No. 17-15665

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMY GRANAT; CORKY LAZZARINO; SIERRA ACCESS COALITION; CALIFORNIA OFF-ROAD VEHICLE ASSOCIATION; THE COUNTY OF PLUMAS; and THE COUNTY OF BUTTE,
Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, a federal agency; SONNY PERDUE, in his official capacity as Secretary of the UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE, a federal agency; THOMAS L. TIDWELL, in his official capacity as Chief of the UNITED STATES FOREST SERVICE; RANDY MOORE, in his official capacity as PACIFIC SOUTHWEST REGIONAL FORESTER; ALICE CARLTON, in her official capacity as the former PLUMAS NATIONAL FOREST SUPERVISOR; and EARL FORD, in his official capacity as PLUMAS NATIONAL FOREST SUPERVISOR,
Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Honorable Morrison C. England, Jr., District Judge

# APPELLANTS' REPLY BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants Sierra Access Coalition and California Off-Road Vehicle Association hereby state that they have no parent corporations, and no publicly held corporation owns 10 percent or more of the stock of either of them.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

In this action, Appellants Amy Granat, *et al.* (collectively "Forest Users"), contend that the travel management decision issued by Appellees United States Forest Service, *et al.* (collectively "Service"), for the Plumas National Forest violates the Travel Management Rule and the National Environmental Policy Act (NEPA). In response, the Service asks this Court to treat the agency's discretionary decision-making authority as a trump card by which it may evade its legal obligations. For the following reasons, the request should be denied.

First, NEPA and its implementing regulations require federal agencies to "rigorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14(a), to any proposed action that may have a significant effect on the environment. *See* 42 U.S.C. § 4332(C)(iii). Here, the Service precluded itself from being able to consider a reasonable range of alternatives because the agency summarily excluded 63% of the inventoried user-created routes in the Plumas National Forest from any alternatives analysis. Instead, the agency adopted a truncated approach which analyzes four alternatives. These alternatives consist of closely similar combinations of no more than one-third of the total

inventoried miles of trails considered for inclusion in the National Forest Transportation System. ER 189-202. The Service spends the bulk of its brief attempting to explain away this material deficiency in its alternatives analysis, but the agency's efforts are unavailing. The Service's cramped array of alternatives—covering just a small portion of the Plumas National Forest—effectively rendered the studied alternatives "virtually indistinguishable from each other," thereby making "the range of action alternatives . . . unreasonably narrow." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

Second, the Travel Management Rule requires the Service to "coordinate with appropriate . . . county, and other local governmental entities." 36 C.F.R. § 212.53. Similarly, a NEPA-implementing regulation directs the Service to "cooperate with . . . local agencies" in, among other things, "[j]oint planning processes." 40 C.F.R. § 1506.2(b)(1). Rather than demonstrate that it actually coordinated and cooperated with Plumas and Butte Counties, the Service in its appellate brief relies almost entirely on its discretion to interpret and implement these legal duties. But the Service's discretion-based argument founders on a first principle

of legal interpretation—text should be interpreted if possible to have independent meaning. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 364 (2000) ("[It is a] cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute."). In conflict with that basic canon, the Service's interpretation of its obligation to coordinate and to cooperate would render these mandates meaningless. Neither the Service's nor any other agency's discretion extends that far. *See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1071 (9th Cir. 2005) (an agency interpretation that would render text superfluous is not entitled to deference).

## I. THE SERVICE'S WINNOWING PROCESS HAMSTRUNG THE AGENCY'S ABILITY TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES

Contrary to the Service's characterization, the issue is not whether more—or fewer—of the 1,107 miles of lawfully[1] created trails should have been selected for designation as open to motorized vehicle use. NEPA

[1] The Service objects to the description of the 1,107 miles of inventoried routes as "lawful." Ans. Br. 17. But as the agency itself notes, "pre-2005 regulations . . . allow[ed] motorists to travel across most of the forest—including along unauthorized, user-created routes." *Id.* Conduct that is not prohibited by law is necessarily lawful behavior.

requires agencies to take a "hard look" at environmental consequences by preparing an environmental impact statement that adequately considers a reasonable range of alternatives, so as to "foster[] informed decision-making and informed public participation." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 872 (9th Cir. 2004) (quoting *Cal. v. Block*, 690 F.2d 753, 769 (9th Cir. 1982)). To accomplish this goal, a series of alternatives should "cover the full spectrum of alternatives." 46 Fed. Reg. 18,026, 18,026 (Mar. 23, 1981).

Here, the Service impermissibly limited its available alternatives through a winnowing process using spreadsheets of all inventoried trails containing only limited information. *Cf.* ER 292-303 (Beckwourth spreadsheet), ER 304-19 (Mount Hough spreadsheet), ER 320-25 (Feather River spreadsheet) (collectively "The First and Second Cut Spreadsheets"). The agency did so using many criteria unrelated to environmental or recreational concerns. *See, e.g.*, ER 202 (removing all routes designated as "dead end spur," routes of less than 1/2 mile in length, and any dead-end routes intersecting county roads). Moreover, other valuable criteria requested by the Forest Users were not

considered, such as the benefit of fuels reduction through firewood collection.

In the Final Environmental Impact Statement, the Service considered alternatives representing the addition of between 0% and 33% of the inventoried miles. The agency also used a "no action" alternative as a representation of full use of the inventoried miles. Ans. Br. 15. It did so despite the fact that the "no action" alternative could not comply with the Travel Management Rule, and thus actually stood for the addition of zero inventoried miles to the Travel Management System. Thus, the Service failed to analyze feasible alternatives that could serve the project's twin purposes of additions to the forest transportation network and minimization of environmental impacts (ER 237)—namely, combinations of routes drawn from *outside* the agency's favored subset. The Service's alternatives analysis precluded, rather than fostered, informed decision-making and public participation, thereby rendering it legally deficient. *Cf. Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1181 (9th Cir. 1990) (range of alternatives reviewed according to a rule of reason to determine whether it is broad enough to permit a reasoned choice).

### A. The Service's Winnowing Process Prevented the Agency From Considering Environmental or Recreational Impacts

The Service winnowed roughly 700 of 1,107 miles of inventoried trails in the First and Second Cut Spreadsheets, often using criteria that were unrelated to environmental or recreational impacts. *See, e.g.*, ER 202 (noting that the Service removed all routes designated "dead end spur" routes of less than 1/2 mile in length, and any dead-end routes intersecting county roads). Many of these routes provided significant recreational opportunities, such as access to backcountry areas of the forest otherwise inaccessible to disabled, handicapped, and elderly people. *See* ER 180. Many of these routes were specifically requested for inclusion by the Forest Users, yet received no further consideration for reasons unrelated to environmental impacts *or* recreational opportunities. *See* ER 283 (the Service aimed to "reduc[e] dead-end" routes); *and see, e.g.*, ER 325 *and* Further Excerpts of Record 4-6 (route 6205 rejected as a dead-end spur despite specific request by Forest Users). Any on-site analysis was limited to the remaining 410 miles.

The Service suggests that its alternatives were "based on public concerns about specific trails,"[2] except where there would be "substantial adverse effects on natural resources." Ans. Br. 20. But as noted above, the winnowing process removed many trails that the Forest Users specifically requested, for reasons unrelated to environmental or recreational impacts. *See* ER 202. Nor is it clear that the Service could adequately determine what adverse effects on natural resources might be "substantial," given that the spreadsheets used a system of "**H**igh, **M**edium, and **L**ow" ratings for "Benefits and Access" and "Concerns and Risks" in the First and Second Cut Spreadsheets. In fact, many routes that the Forest Users requested for inclusion were removed from any consideration by the spreadsheets. *See* ER 292-325 (Professor "SAC").

[2] Hampering the public's participation was the Service's decision (i) to use alphanumerical designations for trails, rather than the common names known to most of the public, including the Forest Users, and (ii) to change the already confusing alphanumeric designations during the winnowing process, without providing any map overlays. *See* ER 208-09. Many members of the public were familiar only with the historical, user-created names of these trails. Thus, the Service's use of new and unfamiliar markers made it difficult for the public to understand which miles were being eliminated, or to express interest in particular routes. *Id.* Further, no maps were provided to users showing trails that would be closed, only maps showing which trails would remain open. *Id.*

The Service contends that expanding the range of alternatives to include the winnowed routes "would be costly and time consuming without compelling benefits to recreation." Ans. Br. 20. But given that all winnowing occurred without any on-site analysis, and in part for reasons other than environmental or recreational concerns, the Service rendered itself unable to determine whether designation of the excluded trails would provide "compelling benefits to recreation" without "substantial adverse effects on natural resources." Ans. Br. 20. That a more tailored process might increase time and costs is irrelevant to whether the winnowing process adequately met the purpose and need of the project. For, regardless of time or cost, an alternatives analysis must be sufficiently broad to permit a reasoned choice. *See N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) ("Consideration of reasonable alternatives is necessary to ensure that the agency has before it and takes into account all possible approaches to, and potential environmental impacts of, a particular project."). The removal of the vast majority of inventoried routes from consideration—many specifically requested by the public—for reasons other than environmental or recreational impacts made the winnowing process unreasonable under

NEPA. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) ("[A]n agency must look at every reasonable alternative.").

### B. The Winnowing Process Prevented the Service from Considering an Adequate Range of Alternatives to Foster Informed Decision-Making

An Environmental Impact Statement must provide both decision-makers and the public with a "full and fair discussion" of significant environmental impacts and inform them of reasonable alternatives. 40 C.F.R. § 1502.1. To be sure, an environmental impact statement need not analyze alternatives that are "inconsistent with the [agency's] basic policy objectives," that are "not significantly distinguishable from alternatives actually considered," or that have "substantially similar consequences." *Headwaters, Inc.*, 914 F.2d at 1180-81 (citations omitted). But a failure to consider a viable or reasonable alternative renders the statement invalid. *Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011).

The Service created its alternatives from various iterations of only a small number of the total inventoried routes. *See* First and Second Cut Spreadsheets; ER 248-50 (alternatives considered). Although the considered alternatives contained differing total mileage, the Service's

misguided winnowing process guaranteed that they would not comprise appreciably different combinations of routes. Because the Service eliminated 63% of the available miles using a winnowing process that did not adequately consider environmental impacts or recreational uses, the agency likely omitted consideration of feasible alternatives that plausibly would have been *more* consistent with the basic policy objectives of the Travel Management Rule. *Cf. Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999) (an environmental impact statement is defective if the agency has failed to consider an alternative that was "more consistent with its basic policy objectives"). Because the defective winnowing process materially hampered the ability of the Service, as well as the public, to adequately consider the environmental impacts of the project, it rendered the environmental impact statement inadequate. *Cf. Friends of Yosemite Valley*, 520 F.3d at 1038 (a range of alternatives is unreasonably narrow if the alternatives "are virtually indistinguishable from each other").

Contrary to the Service's suggestion, Ans. Br. 21, the additional feasible alternatives that the agency should have considered need not have contained "arbitrarily greater mileages." To be clear, the Forest

Users do *not* ask for the consideration of high-mileage alternatives, or even for more mid-range alternatives.[3] Instead, they seek only the consideration of a *broader* range of alternatives, which would serve the project's environmental and recreational goals but which the Service's arbitrary paper-review gauntlet made impossible. Some winnowing processes, to be sure, are permissible, but the Service's spreadsheet elimination is not among them. As noted above, the winnowing criteria—which included factors relating principally to route design and length, *see, e.g.*, ER 202—were not reasonably related to the project's purpose and need of environmental protection and recreational access, ER 237. *See Idaho Conservation League*, 956 F.2d at 1520 (range of alternatives is dictated by the nature and scope of the proposed action). Hence, the Service could not properly craft sufficiently different alternatives to be

[3] The Service is correct that an environmental impact statement is not invalid simply because it does not consider many "mid-range alternatives." Ans. Br. 17 (quoting *Westlands Water Dist.*, 376 F.3d at 871). But the analysis still must "achieve[] the goals intended by NEPA: open, thorough public discussion promoting informed decision-making." *Westlands Water Dist.*, 376 F.3d at 872. The Service's analysis here does not satisfy that basic command.

useful to its—and the public's—consideration and analysis of the proposed action.[4]

The Service overplays the significance of its analysis of the "no action" alternative, Ans. Br. 15-16, which would have continued to allow motorized travel on all 1,107 miles of inventoried routes. The "no action" alternative was not a feasible alternative meriting serious consideration because it could not satisfy the Travel Management Rule. Although NEPA requires analysis of a "no action" scenario, it is used only "to establish a baseline" against which the other, feasible options can be compared. ER 235. Analysis of a "no action" alternative does not relieve the Service of its obligation to review other feasible alternatives that may achieve the goals of the project. *See Muckleshoot Indian Tribe*, 177 F.3d at 810 (two "virtually identical" alternatives and a no-action alternative were not adequate where other feasible alternatives existed and were not

[4] The Service acknowledges that future designation of routes that did not survive the agency's spreadsheet gauntlet may be appropriate. *See* Ans. Br. 27 ("[T]he Service committed to refining its transportation system, including (where appropriate) by designating more routes in the future to provide recreation opportunities."); ER 242. If, however, the designation of such routes would be feasible and appropriate in the future, there is no good reason why such routes would not have been appropriate for consideration in the alternatives analysis of the Final Environmental Impact Statement.

considered). That conclusion especially follows here, where the Service's review of the infeasible "no action" alternative consisted merely of a cursory handful of paragraphs. ER 240, 301-02, and 308-09.[5] Such a feeble analysis cannot provide the "substantial treatment" that NEPA requires. *See Se. Alaska Conservation Council*, 649 F.3d at 1058 (citing 40 C.F.R. § 1502.14(b)).

Lastly, the Service can find no help in the admonition that the "NEPA alternatives requirement must be interpreted less stringently" when the agency seeks to "conserve and protect the natural environment." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002). That rule does not relieve the Service of its obligation to examine a full range of all reasonable alternatives, presented in comparative form. 40 C.F.R. § 1502.14. Here, the Service presented a limited selection of alternatives improperly winnowed by criteria often

[5] The decision in *Friends of Tahoe Forest Access v. U.S. Dep't of Agric.*, 641 Fed. Appx. 741 (9th Cir. 2016), is not to the contrary. To be sure, in that case the Service crafted its alternatives from a smaller subset (80 of 869 miles) than that developed here, but in upholding the Service's alternatives analysis this Court did not address the propriety of the agency's winnowing process, other than to note that it was preceded by "a robust public process." *See id.* at 743-44. The winnowing process's defects—apparently unaddressed by *Friends of Tahoe Forest Access*—readily distinguish that unpublished decision.

unrelated to environmental impacts or recreational opportunities. Necessarily, then, the alternatives analysis—which is, after all, the "heart" of an environmental impact statement, *Idaho Conservation League*, 956 F.2d at 1519 (quoting 40 C.F.R. § 1502.14)—is inadequate.

## II. THE SERVICE'S MERE "PUBLIC OUTREACH" FAILED TO SATISFY ITS LEGAL OBLIGATIONS TO "COORDINATE" WITH THE COUNTIES

The Service acknowledges, Ans. Br. 28, that it was required to "coordinate with appropriate . . . local governmental entities . . . when designating National Forest System roads, National Forest System trails, and areas on National Forest System lands." 36 C.F.R. § 212.53. But rather than coordinating with the Counties—that is, identifying the Counties' needs, plans, and goals; attempting to harmonize their policies with the Service's own plans; and, where such harmonization is not accomplished, at least explaining why federal policy should trump countervailing local policy—the Service merely had various meetings and other communications with County officials. These interactions are qualitatively no different from those the Service had with the public-at-large, to whom the Service owes no duty of "coordination."

The Service's insistence that the Counties took part in "public-involvement opportunities" provided to "all interested parties"

demonstrates that the Service *failed* to "coordinate" with the Counties. Ans. Br. at 28. That is, as far as the Service was concerned, it coordinated with the Counties by treating the Counties as it did every other "interested" party. But the Service did not have an obligation to coordinate with all interested parties—only with the Counties. The Service's obligation to the Counties, therefore, extended beyond merely noting that the Counties participated—along with everyone else—in "public-involvement opportunities."

To substantiate its alleged coordination with the Counties, the Service points to a few references in the record pertaining to the Counties' concern that certain forest routes remain open for mixed-use, *i.e.*, off-highway vehicle and standard-passenger vehicle use on the same road. Ans. Br. 28-29 (citing ER 239, SER 127-44). According to the Service, these references demonstrate that: (1) the Counties participated in some "public-involvement opportunities"; (2) the Service met with the Counties; (3) information was exchanged between the Service and the

Counties; all of which resulted in (4) the Service designating a single 4.1-mile segment of one road for mixed use.[6]

But again, the Service's purported "coordination" was nothing more than meetings, input, and (alleged) consideration of County information.[7] The descriptions of its conduct (*e.g.*, "met with") *confirm* the Forest Users' arguments. Indeed, the Service acknowledges that these interactions were merely part of the Service's general outreach to the public-at-large. *See* Ans. Br. 28 ("public-involvement opportunities"). That the Service can point to one arguable instance of a County-induced change demonstrates only that the Service's idea of "coordination" is not so deficient as to fail to satisfy NEPA's minimal comment-consideration obligations. *Cf.* 40 C.F.R. § 1503.4(a)(1) (permissible responses to public comment include the modification of alternatives or the proposed action).

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[6] The Service points to a few other documents (SER 42, 47-53, 148-53) to argue that it "continued to address the counties' concerns"—but as the Service itself acknowledges, these "continued" efforts took place after it had issued the Record of Decision and after the Counties had appealed. Ans. Br. 29. By that point, the Service's window for coordination had closed.

[7] When asked by a Forest User member whether the Service coordinated with the Counties before the route-winnowing process commenced, a Service official flatly responded: "No. We could have coordinated but we didn't." ER 177 (Sierra Access Coalition appeal) (emphasis removed).

Whatever the significance of the Service's mixed-use decisions, the agency's failure to take account of the Counties' existing transportation networks represents a substantial coordination failure. The Counties and their residents rely heavily on forest routes to supplement the Counties' own transportation network, including for fire-fighting and other public-safety purposes. ER 176-77, 181-84, 199-200, SER 84-85. But the Service's mass route closure was bizarrely deaf to this oft-repeated concern. Indeed, as Plumas County advised in comments to the Service, the Draft Environmental Impact Statement did "not adequately coordinate uses between National Forest routes and the County road system or consider the opportunities for County roads to serve as connectors between National Forest routes for OHV use." SER 128. Similarly, Butte County provided a list of the relevant roads and a map demonstrating the relationship between the County roads and the Forest routes. SER 131-36. Although the Service promised that it would use County roads as connectors, SER 085, the Final Environmental Impact Statement shows that the agency did not follow through on its

assurance.[8] *See* Record of Decision (ER 232-61) and Motor Vehicle Use Map.[9]

Notably, had the Service actually coordinated, it would have advanced its own goals as well as those of the Counties. For example, allowing mixed-use on County-requested roads would have produced "substantially more loop opportunities, more recreation opportunities, . . . easier access for the disabled and elderly, and connect[ors between] the public [and] many of their historic OHV dispersed campsites," ER 184. All of these recreational benefits would have ably served the project purposes of providing "motor vehicle access to dispersed recreation opportunities," as well as "a diversity of motorized recreation opportunities." ER 237.

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[8] On appeal, the Service states only that it "committed to identifying" county-road connectors—it does not say that it actually did identify connectors. Ans. Br. 33.

[9] Before the final decisions were made, the Service advised that "[a]s we develop user maps that make recommendation for OHV travel, we will utilize county roads as connectors. County roads will be shown as other public roads on our Motor Vehicle Use Map." SER 85. But the "other public roads" on the Vehicle Use Maps (which can be found here: https://www.fs.usda.gov/detail/plumas/home/?cid=stelprdb5322854) do not show that they are OHV-legal.

Ultimately, all of the Service's points are just variations on its central defense—the Forest Users impermissibly seek a local veto power. *See* Ans. Br. 30. The characterization is off-base. The Forest Users acknowledge that coordination requires a partnership in which the Service is undoubtedly the senior member. After all, it is the Service's prerogative—not the Counties'—to decide how travel should be managed on the national forests, including the Plumas National Forest. *See* 36 C.F.R. §§ 212.50-212.57. But although not a veto power, coordination *is* an obligation on the Service to make best efforts to avoid needless conflicts with local policies and, where conflicts occur, at least to explain why they occur. If coordination is not even that, then it becomes improperly redundant of run-of-the-mill notice-and-comment. *Cf. Earth Island Inst. v. Carlton*, 626 F.3d 462, 472-73 (9th Cir. 2010) (although an environmental impact statement "must respond explicitly and directly to conflicting views," it "need not respond to every single scientific study or comment") (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1172 (9th Cir. 2006), and *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009)).

Finally, the Service relies on the principle of judicial deference to agency interpretation of ambiguous regulatory language to claim that it coordinated with the Counties by "allowing" them to be "meaningfully engaged in the administrative process." Ans. Br. 30. The argument is unavailing.[10] The meaning of coordination is not ambiguous, Opening Br. 41-44, and the Service makes no attempt to suggest otherwise, *see* Ans. Br. 30-31 (tracking the Forest Users' explanation that "coordination" requires "harmonization"). Without ambiguity, the Service's interpretation is not afforded deference, as the Service's cited authority

[10] Over the last few Terms, several Supreme Court Justices have suggested that the principle of deference set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), and its progenitor *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be reconsidered. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment) ("I await a case in which the validity of Seminole Rock may be explored through full briefing and argument."); *id.* at 1213 (Scalia, J., concurring in the judgment) ("I would . . . abandon[] Auer."); *id.* at 1225 (Thomas, J., concurring in the judgment) ("[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) ("The opinion concurring in part and dissenting in part raises serious questions about the principle set forth in . . . *Seminole Rock* . . . and *Auer*. . . . It may be appropriate to reconsider that principle in an appropriate case."). Although this Court is bound by *Auer* and *Seminole Rock*, the Forest Users preserve the issue of these cases' validity for Supreme Court review.

shows. *See Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192, 1199 (9th Cir. 2012) ("[W]here an agency interprets its own regulation, even if through an informal process, its interpretation of an *ambiguous* regulation is controlling under *Auer* unless plainly erroneous or inconsistent with the regulation.") (emphasis added) (internal quotation marks and citations omitted). *See also Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). Moreover, deference is not owed to the Service's minimalist interpretation of its coordination obligation because, as noted above, it makes the obligation redundant of the agency's comment-consideration responsibilities under NEPA.[11] *See Metrophones Telecomms.*, 423 F.3d at 1071 (no deference for agency interpretation that creates surplusage).

## III. THE SERVICE DID NOT "COOPERATE" WITH THE COUNTIES, DESPITE THE FOREST USERS' IDENTIFICATION OF NUMEROUS LOCAL POLICIES THAT THE SERVICE'S MASS ROUTE CLOSURE WOULD FRUSTRATE

The Service acknowledges that NEPA requires it to "cooperat[e]" with government agencies, an obligation that includes the responsibility

[11] The Service cannot avoid its obligation to coordinate by relying on the fact that it alone has final travel management authority, *see* Ans. Br. 31, because that authority is itself predicated upon the satisfaction of the coordination obligation, *see* 36 C.F.R. § 212.53.

to explain inconsistencies between local plans and the Service's proposed action. Ans. Br. 32. But the agency claims that the Counties failed to satisfy their half of the duty to cooperate by not identifying any local plan requirements inconsistent with the Service's final decision. *See id.* The Service is mistaken: the Forest Users identified a number of such inconsistencies.

For example, the Forest Users brought to the Service's attention Plumas County Resolution 08-7514, which establishes a Plumas County Coordinating Counsel "to represent the County in coordinating the management plans and actions of federal and state agencies." ER 176-77. Pursuant to the resolution, members of the Plumas County Board of Supervisors advised the Service that the agency's proposed motor vehicle restrictions would frustrate the County's policy to have integrated road-management strategies, including allowance for motorized mixed-use on interconnecting County and Forest roads. ER 176. Despite these informative efforts, the Service failed to discuss the inconsistencies with Plumas's plans (or with other state, regional, or local plans). ER 177 (citing FEIS § 1.7 at 8-9 & *id.*, Ch. 4 at 438-39 (no description of any coordination with other agencies or elected officials or consistency with

local plans)). *See also* ER 174-78 (SAC & CORVA Appeal); ER 217-19 (Plumas County Appeal); ER 222-26 (Butte County Appeal) (all noting that the FEIS did not include any discussion of Plumas County or Butte County plans or policies concerning motorized vehicle use on County roads, and the relation of these plans and policies to the Service's proposed restrictions on motorized vehicle use).

The Service nevertheless protests that it adequately cooperated by "addressing the objectives [that] underlie the counties' plans and policies." Ans. Br. 33. As an example, the Service notes that it analyzed the impact of route closures on the local economy. *See id.* (citing SER 67-79, SER 86, SER 87). Perhaps this kind of "cut to the chase" analysis may work in some contexts, but the trouble for the Service here is that the agency did not consistently follow that approach. For instance, when Plumas County brought to the Service's attention the existence of the former's Fire Plan—which relies on forest routes to provide evacuation options for County residents—the agency's robotic response was: "Please identify any route that is needed for communities at risk." SER 85. The proper reply should have been an effort by the Service, consistent with the Fire Plan, to incorporate into its decision-making "the need for

evacuation routes or whether existing roads that are proposed for decommissioning could provide evacuation routes themselves or serve as parts of new routes." SER 85. Such an effort was critical to true cooperation because, contrary to the Service's assertion, Ans. Br. 33, route closures *do* affect emergency and law-enforcement access. Although such access is not forbidden on closed routes, 36 C.F.R. § 212.51, maintenance is, so these routes soon will become practically if not legally inaccessible, ER 200. The Service's failure to explain how its mass route closures would not compromise the Counties' emergency services programs is just one example of the Service's systemic cooperation failure, a deficiency which vitiates the agency's NEPA analysis. *See Openlands v. U.S. Dep't of Transp.*, 124 F. Supp. 3d 796, 808-09 (N.D. Ill. 2015) (NEPA requires an agency to explain how it will reconcile its proposed transportation project with local transportation plans that are based on different planning assumptions).

Contrary to the Service's view, none of the agency's NEPA errors was harmless. When considering whether such a failure is harmless, the Court looks to whether the error "materially impeded NEPA's goals" of "informed decisionmaking and public participation," or otherwise

significantly affected the agency's decision. *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016). As the foregoing demonstrates, the Service's inability adequately to take into account the Counties' transportation policies—especially concerning public safety—constitutes a radical failure to cooperate which necessarily precluded informed decision-making. Indeed, the Service could not have acted in an informed manner if it did not know, for example, that its route closures would have a material impact on the Counties' ability to provide emergency services to their residents. *See, e.g.,* FER 001-003 (Plumas County Comment) (alerting the Service to "fire-safe requirements [that] dictate that development in Limited Opportunity Areas shall have a minimum of two access routes for roadways over one mile," and therefore requesting analysis of whether "any private properties will be affected by the project closures"); ER 199 (noting that in recent years "there have been many large wildfires on the PNF that have affected public safety, impacted the counties' economy, threatened and burned numerous acres of private land, and devastated many forest resources including water quality," but the Service nevertheless "failed to analyze the transportation system that is needed for fire suppression and support").

The Service's NEPA analysis was deficient and harmful. It should be set aside.

## CONCLUSION

The Service failed to analyze a reasonable range of alternatives, and failed to coordinate and cooperate with local governments before implementing its mass-route closure on the Plumas National Forest. The judgment of the district court should be reversed.

DATED: September 27, 2017.

Respectfully submitted,

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PACIFIC LEGAL FOUNDATION

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## STATEMENT OF RELATED CASES

Plaintiffs-Appellants are aware of no related cases within the meaning of Circuit Rule 28-2.6.

## CERTIFICATE OF COMPLIANCE

### Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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DATED: September 27, 2017.

s/ Oliver J. Dunford
OLIVER J. DUNFORD

## CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ Oliver J. Dunford
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