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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

SIERRA TRAIL DOGS MOTORCYCLE AND RECREATION CLUB; PINE NUT MOUNTAINS TRAILS ASSOCIATION; AMERICAN MOTORCYCLIST ASSOCIATION, DISTRICT 36; CALIFORNIA 4 WHEEL DRIVE ASSOCIATION and THE BLUE RIBBON COALITION, Plaintiffs, vs. UNITED STATES FOREST SERVICE; HUMBOLDT TOIYABE NATIONAL FOREST; WILLIAM ("BILL") DUNKELBERGER, Forest Supervisor, Humboldt-Toiyabe National Forest; Defendants.	Case No.: 3:18-cv-00594-MMD-CBC **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Sierra Trail Dogs Motorcycle and Recreation Club, Pine Nut Mountains Trails Association, American Motorcyclist Association, District 36, California 4 Wheel Drive Association, and the BlueRibbon Coalition hereby submit this motion for summary judgment. This motion is made pursuant to Fed.R.Civ.P. 56, the applicable Local Rules, the Joint Briefing Schedule as approved by the Court (ECF 27), the attached Memorandum of Points and Authorities, the pleadings, administrative record and papers on file herein, and any oral argument the Court may allow.[1]

Respectfully submitted this 20th day of September, 2019.

ERICKSON, THORPE, & SWAINSTON, LTD.

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Attorneys for Plaintiffs

[1] Plaintiffs have reviewed Local Rule 78-1 and believe this motion raises questions of procedural compliance that can be resolved without argument. If the Court has questions or otherwise determines that oral argument may assist the Court in resolving the motion(s), Counsel would be pleased to present argument.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case questions the extent to which a federal agency can conduct a years-running public planning process, only to dramatically change its final decision through a backroom "resolution" of objections to placate a narrow set of special interests. The final agency action that Plaintiffs challenge is the final Record of Decision for the Greater Sage-grouse Bi-state Distinct Population Segment Forest Plan Amendment issued by the Humboldt-Toiyabe National Forest dated May 16, 2016 (the "Decision"). The Decision was generated through a complex and typically arduous environmental impact statement analysis under the National Environmental Policy Act ("NEPA"), well familiar to all the parties. In that process only two action alternatives were presented, which marked conceptual endpoints on a wide variety of management components and variations between them. The Forest Service presented a draft decision, which was acceptable to Plaintiffs but which drew objections from other parties. In order to resolve some of the objections, the Forest Service made detailed changes, and issued a final Decision imposing restrictions on recreation events that were never suggested in the prior analysis and therefore never analyzed by the agency and never available for public input. Those changes to dozens of circular buffers where organized event operations were prohibited increased the size of each buffer from less than one to over fifty square miles and increased the length of the prohibited season by sixty percent. Such unpredictable and undisclosed shifting in the Decision violated the law. The Court should declare unlawful and vacate the Decision.

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II. SUMMARY OF RELEVANT FACTS

Review here proceeds under the Administrative Procedure Act, and the Court's resulting "record review." As the administrative record generally establishes and defines the limits of any material facts at issue, summary judgment "is a particularly appropriate means of resolving claims against a forest management decision by the U.S. Forest Service." *Wilderness Soc'y v. Bosworth*, 118 F.Supp.2d 1082, 1089 (D. Mont. 2000). The facts relevant to Plaintiffs' narrow claims are either admitted or contained within the administrative record.

A. Bi-State Sage-Grouse and the Project Area.

The Greater sage-grouse (*Centrocercus urophasianus*) is an iconic bird that lives in sagebrush-steppe habitats in the Great Basin and high desert areas stretching from Oregon eastward to the Dakotas, and Alberta southward to Nevada. Sage-grouse biology, populations and habitat trends have been extensively studied by federal agencies, tribes, state wildlife managers, local governments and engaged private interests. See, generally, 80 Fed.Reg. 59859-59860 (Oct. 2, 2015). Within this broader effort, this case involves the much smaller and more localized population of the Bi-State sage grouse, which is a sub-species located in the area that straddles the boundary between northeastern California and western Nevada, generally known as the Mono Basin.

In 2002 the Fish and Wildlife Service first received a petition requesting the Bi-State sage-grouse be "emergency listed" as a "distinct population segment" under the Endangered Species Act. AR 1089.[2] Various actions by the Service, subsequent petitions, lawsuits and settlements followed, eventually reflected in a "12 month finding" by the Service in March 23, 2010. AR 1090 (characterizing the publication at 75 Fed.Reg. 13909 (Mar. 23, 2010)). The Service at that time found the Bi-State sage-grouse met regulatory criteria as a distinct

[2] The administrative record is Bates stamped, so citations to the record are as follows: AR-[Bates stamped page number] ([description of document, if applicable]).

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population segment, the listing of which was "warranted but precluded" by "higher priority listing actions." *Id.* A proposed rule was published to list the Bi-State sage-grouse as "threatened" (78 Fed.Reg. 64358 (Oct. 28, 2013) (AR 1086-1113)) along with a proposed rule to designate "critical habitat" (78 Fed.Reg. 64328 (Oct. 28, 2013) (AR 1057-1085)).

During the same time as the foregoing Fish and Wildlife Service efforts to address the Bi-State listing question, the Forest Service began efforts "to address the recent 'warranted, but precluded' ESA decision from FWS by addressing needed changes in the management and conservation of [Bi-State grouse] habitats within the Humboldt-Toiyabe National Forest" and adjacent BLM districts. 77 Fed.Reg. 71397 (Nov. 30, 2012); AR 2037. Specifically, the Forest proposed to amend its Forest Plan to "add[ ] or chang[e] some of the regulatory mechanisms that would reduce, eliminate or minimize threats" to Bi-State grouse habitat by addressing identified resource areas and resource uses on agency-administered lands. *Id.*

The Forest Plan Amendment process spanned several years and occurred against a larger backdrop of interest and activity involving range-wide sage-grouse issues.[3] Within this broader flurry of activity, the Fish and Wildlife Service withdrew the previously-proposed listing of the Bi-State grouse, finding "that the threats…no longer are as significant as believed…." 80 Fed.Reg. 22828 (Apr. 23, 2015). The Service additionally found that existing regulatory mechanisms as defined by "ongoing and future conservation efforts" would be adequate to conserve the species and militate against listing. *Id.* at 22845. The Service concluded, "[t]herefore, we are withdrawing our proposal to list the bi-State DPS of greater sage-grouse as threatened with critical habitat." *Id.* at 22828; AR 36023-36026 (Secretary of

[3] In 2015 the Forest Service and BLM issued Greater sage-grouse amendments to 98 land use plans in 10 States, resulting in twelve lawsuits. The Court has familiarity with this background and the general subject matter, as reflected in *Western Exploration, LLC v. U.S. Dept. of Interior*, 250 F.Supp.3d 718 (D. Nev. 2017).

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Interior news release recognizing withdrawal of proposed rule).[4] Similar logic was applied in the Finding that listing was "not warranted" for Greater sage-grouse rangewide. 80 Fed.Reg. 59858, 59941 (Oct. 2, 2015) ("our best judgment today indicates that successful sage-grouse conservation will be achieved by continued implementation of the regulatory mechanisms and conservation efforts…").

The sinuous background and complex science on sage-grouse are interesting but Plaintiffs need not engage the science or flyspeck technical discussions in the NEPA documents. Rather, Plaintiffs bring a narrowly focused procedural challenge to the manner in which Defendants made significant changes in the Decision without public review. This challenge arises from the Bi-State grouse saga but has broader implications in any Forest Service planning process. Specific aspects of the Forest Plan Amendment process inform this analysis.

B. The Humboldt-Toiyabe Plan Amendment Process.

As mentioned above, the Forest on November 30, 2012, published notice declaring the Forest's intent to prepare an environmental impact statement ("EIS") and elicit public comment on a project to amend the Forest Plan to address Bi-State grouse management issues. AR 2036-2038. The project area for the Decisions involves roughly 967,878 acres managed by the Forest, and 1.7 million acres managed by the U.S. Bureau of Land Management ("BLM"). The Forest Service acted as the "lead agency" and primarily

[4] The Service's above-referenced "not warranted" conclusion was successfully challenged in *Desert Survivors v. U.S. Dept. of Interior*, Case No. 16-cv-1165-JCS (N.D. Cal.). The resulting August 24, 2018, remedy order vacated the Service's "withdrawal decision" at 80 Fed.Reg. 22828 (Apr. 23, 2015), reinstated the proposal to list the Bi-State grouse as "threatened" at 78 Fed.Reg. 64328, ordered the Service to provide a new opportunity for public comment and issue a "new and final listing determination" by October 1, 2019, and vacated and set aside the Service's "significant portion of range" policy affecting the above-cited decisions.

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1 conducted the NEPA process for the Decisions. The Forest conducted public meetings and
2 received voluminous comment. Complaint (ECF 1) and Answer (ECF 21) at ¶¶ 25, 27
3 (admitted).

4 On August 23, 2013, the Forest released a draft EIS ("DEIS"), which started a 90 day
5 public comment period. AR 22659. The DEIS presented two alternatives to be analyzed in
6 detail. AR 22684-22685. Alternative A was the legally-required "no action" alternative.
7 Alternative B was described as the "proposed action." There are a wide variety of activities
8 and land uses which have been identified as threats to sage-grouse and thus addressed in the
9 Proposed Action, but Plaintiffs' narrow interest here lies in the "access/recreation"
10 prescriptions.[5] "Individual recreation activities" enjoyed by Plaintiffs "such as casual driving
11 and use of designated trails" were "considered a diffuse disturbance with no long-term
12 effects." AR 22703 (DEIS discussion of effects of Alternative 2 – Proposed Action). The
13 Proposed Action in the DEIS could affect recreation special use permits, where "mitigation or
14 restrictive measures could be placed on types, locations, and timing of activities…." AR
15 22704. Any such changes would fall within Standard 2b of the Proposed Action, which states
16 that "[b]uffers, timing limitations, or offsite habitat restoration shall be applied to all new or
17 renewed discretionary actions in Bi-state-sage grouse habitat…." AR 22689; see also, AR
18 22693 (comparing Alternatives 1 and 2 and stating that for recreation special uses "site-
19 specific NEPA could determine some seasonal or timing restrictions").

20 In early July of 2014 the Forest published a Revised DEIS ("RDEIS"). AR 30253
21 (Federal Register notice of availability published July 11, 2014). An accompanying letter
22 addressed to "interested parties" explained the RDEIS "was developed in response to public

23 [5] Plaintiffs focus on organized events conducted through special use permits, which are noted in the DEIS. AR 22699-22700 (referring to off-highway vehicle events, specifically the
24 "Sierra Trail Dogs motorcycle event lasting for 2 days in June"); see also, Declaration of Tony Vigil (filed contemporaneously herewith).

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comment seeking clarity regarding the Proposed Action's goals, objectives, standards, and guidelines." AR 30254. Relevant changes reflect modifications "to provide more specificity…." *Id.* [6] The RDEIS presented three alternatives: Alternative A (No Action); Alternative B (Proposed Action); and Alternative C (Conservation Alternative). AR 30285-30286. This resulted in new prescriptions addressing "off-highway vehicle events" in Standards B-AR-S-03 which provided "[b]etween March 1 and May 15, off-highway vehicle events that pass within a 0.25 mile of an active lek shall only take place during daylight hours after 10 am." AR 30292. The new Alternative C counterpart provided "[d]o not authorize off-highway vehicle events." *Id.* Again, the public was provided the opportunity to submit comments to the RDEIS.

The agency's next formal step was the simultaneous release of the Draft Record of Decision ("Draft ROD") and Final EIS ("FEIS") which was announced on February 5, 2015. AR 35607. The Draft ROD includes a table in which the Forest Supervisor "listed the standards and guidelines I am selecting, along with my rationale for selecting each." AR 35541. For off-highway vehicle events, this choice was to select Standard B-AR-S-03. AR 355545. However, the FEIS specifications for this standard were changed, so the new standard provides "[b]etween March 1 and May 15, off-highway vehicle events that pass within 3 miles of an active lek shall only take place during daylight hours after 10 a.m." *Id.*;

[6] Such clarity and specificity was seemingly requested in comments like those submitted by the Center for Biological Diversity. AR 28379-28394. These describe the DEIS as "fundamentally flawed and categorically inadequate" (AR 28380), in large part because the DEIS "'requirements' are highly discretionary and up for broad interpretation, as opposed to being prescriptive and mandatory." AR 28383. The comments recommend numerous specific prescriptions, including for motorized recreation events "strong affirmative actions to curtail organized events that impact leks and early brood-rearing habitats during the critical period of March 1 to June 30.

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see also AR 34220 (FEIS presentation of identical language).[7] This choice is based upon "rationale 1" (AR 35545) which from the menu of rationale options is: "I have decided to include standards that prohibit projects or activities that, by their nature, would not be able to avoid adverse effects to habitat, because conserving habitat is a purpose of the amendment." AR 35544. The FEIS was not subject to public comment.

On February 6, 2015, the Forest published legal notice in the Reno Gazette-Journal announcing release of the FEIS and Draft ROD and initiating the 60 day period for objections to the Draft ROD. Complaint (ECF 1) and Answer (ECF 21) at ¶¶ 36 (admitted); AR 34182-34183. A total of seven (7) objections were submitted that met applicable criteria and were processed by the reviewing officer. *Id.* at ¶¶ 37 (admitted). Plaintiffs did not submit objections. *Id.* at ¶¶ 38 (admitted). Various efforts occurred to seek "resolution" of the objections. See, 36 C.F.R. § 219.57. These included meetings on May 8, May 19, May 20, and July 30, 2015. The objectors and interested persons participated in these meetings, either attending in person or via telephone. Complaint (ECF 1) and Answer (ECF 21) at ¶¶ 40 (admitted). Other contacts outside of the aforementioned meetings occurred between individual objectors, their counsel/representatives, and Forest Service personnel to discuss resolution, including circulation of written "proposed remedies" to the various objection points. These were discussed and provided the focus of the July 30 meeting. *Id.* at ¶¶ 41, 42 (admitted). At the July 30 meeting the Forest Service circulated a proposed "final remedy" which would change Standard B-AR-S-03 to read "[b]etween March 1 and June 30, off-

[7] This expansion of the buffer size was apparently in direct response to preservationist group comments. AR 33899, 33922 (describing lek buffers as "absurdly permissive" and advocating for prohibition of all vehicle events, or alternatively, for prohibition of events "within 1.9 miles of any breeding, nesting, or brood-rearing habitat during its season of use by the birds."); AR 34050, 34056 (internal Forest Service memo outlining responses to these comments, stating "[t]his buffer has been enlarged to 3 miles between March 1 and May 15th").

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1 highway vehicle events that pass within 4 miles of an active or pending lek shall not be
2 authorized." AR 35934, 35960, 35986.

3 Representatives for Plaintiff BlueRibbon Coalition participated in the July 30, 2015,
4 meeting via telephone and learned of the resolution proposals. Complaint (ECF 1) and
5 Answer (ECF 21) at ¶¶ 44 (admitted). Counsel sent a letter dated August 5, 2015, to
6 Supervisor Dunkelberger expressing concern and attempting to "object" to the proposed
7 modification to B-AR-S-03. AR 36020-36022.

8 On May 16, 2016, the Forest Supervisor signed the Final Record of Decision ("Final
9 ROD"). AR 36029-36091. A Federal Register notice of the plan amendment approval was
10 published on May 20, 2016, referring to signing of the final ROD and stating the plan
11 amendment would take effect 30 days after publication of the notice. 81 Fed.Reg. 31909
12 (May 20, 2016) (AR 36092). In the Final ROD the Forest Supervisor again "listed the
13 standards and guidelines I am selecting, along with my rationale for selecting each." AR
14 36032. The relevant standard is now AR-S-02, which provides "[b]etween March 1 and June
15 30, off-highway vehicle events that pass within 4 miles of an active or pending lek shall not
16 be authorized. Critical disturbance periods may shift 2 weeks back or forward in atypically
17 dry or wet years based on observations of breeding/nesting." AR 36044.

18 These changes have been implemented. As the Forest Service noted as early as the
19 DEIS, the historical June dates have been selected "to avoid later summer heat." AR 22700.
20 Since implementation of the Decision, the Sierra Trail Dogs' Mystery 250 was held on July
21 14-15, 2018 and July 13-14, 2019. Declaration of Tony Vigil at ¶ 9. To address the
22 associated adverse impacts to Plaintiffs' recreational and aesthetic, procedural, and
23 environmental interests caused by the Decision, Plaintiffs filed this action.

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III. LEGAL FRAMEWORK

Plaintiffs' claims arise under and require the Court to apply several statutes and regulations.

A. Administrative Procedure Act.

The Administrative Procedure Act ("APA") provides that "final agency action" may be declared unlawful and set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is narrow and a reviewing court may not substitute its judgment for that of the agency. *Marsh v. ONRC*, 490 U.S. 360, 378 (1989). However, the agency must articulate a rational connection between the facts found and the conclusions made. *Wildwest Inst. v. Kurth*, 855 F.3d 995, 1002 (9th Cir. 2017). While narrow, the inquiry must be searching and careful. *Marsh*, 490 U.S. at 378. A decision "is arbitrary and capricious[:]"

> if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered 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.

Defs. of Wildlife v. Zinke, 856 F.3d 1248, 1257 (9th Cir. 2017) (quoting *Conservation Cong. v. U.S. Forest Service*, 720 F.3d 1048, 1054 (9th Cir. 2013)).

B. National Environmental Policy Act.

NEPA represents "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1. NEPA embodies a Congressional desire "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of future generations of Americans." 42 U.S.C. § 4331(a). NEPA's operative EIS requirement is triggered by federal action which may "significantly affect[ ] the quality of the human environment…." *Id.* at § 4332(2)(C) (emphasis added). The "human environment" "shall be interpreted

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comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14. NEPA is a purely procedural statute designed to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

An agency's compliance with NEPA is subject to judicial review under APA 706(2). Courts generally look to see if the agency took a sufficiently "hard look" and whether "the EIS process fostered informed decision-making and public participation." *National Parks & Conservation Ass'n v. U.S. Dept. of Transp.*, 222 F.3d 677, 680 (9th Cir. 2000).

C. National Forest Management Act.

The National Forest Management Act ("NFMA") provides the statutory framework for management of the National Forest System. NFMA requires each Forest to prepare and revise a Land and Resource Management Plan ("Forest Plan"). 16 U.S.C. § 1604. A Forest Plan lays out broad guidelines to advance goals and objectives, to "insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish…." *Id.* at (g)(3)(A).

Activities and project-level decisions must be consistent with the Forest Plan. 16 U.S.C. § 1604(i); *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 961 (9th Cir. 2005). Plan direction is presented through components "including the standards, guidelines, and desired conditions…that collectively establish the details of forest management." *Alliance for the Wild Rockies v. U.S. Forest Service*, 907 F.3d 1105, 1111 (9th Cir. 2018). This array is hierarchical and "[t]he Forest Service must strictly comply with a forest plan's

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1 'standards,' which are considered binding limitations…." *Id.*; AR 2801 (agency briefing
2 acknowledging a Forest Plan Standard is a "mandatory constraint on decision-making").

3 D. Forest Planning Regulations.

4 This case raises questions about the interpretation and application of the "objection
5 resolution" procedures codified at 36 C.F.R. part 219. The relevant regulations were
6 promulgated through the Final Rule adopting the 2012 Forest Planning Rule. 77 Fed.Reg.
7 21162-21276 (April 9, 2012) (AR 1748-1862). That Rule establishes a "pre-decisional
8 administrative review process" for Forest "plans, plan amendments, or plan revisions." *Id.* at
9 21273 (AR 1859) (now codified at 36 C.F.R. § 219.50). An objector is required to have
10 "submitted substantive formal comments related to a plan, plan amendment, or plan revision
11 during the opportunities for public comments…." 36 C.F.R. § 219.53(a) (AR 1859). An
12 "objector" must present "a concise statement explaining the objection and suggesting how the
13 proposed plan decision may be improved" and, if applicable, how the decision "is inconsistent
14 with law, regulation, or policy…." 36 C.F.R. § 219.54(b)(6) (AR 1860).

15 Any objections submitted are considered by a "reviewing officer" who is the "line
16 officer at the next higher administrative level above the responsible official" who issued the
17 decision. 36 C.F.R. § 219.56(e) (AR 1861). The Reviewing Officer is tasked with
18 "resolving" objections. 36 C.F.R. § 219.57. This may occur through "alternative dispute
19 resolution methods" including meetings open to "interested persons" and "observation by the
20 public." *Id.* at (a). In any event, the Reviewing Officer "must render a written response to the
21 objection(s)" which "must set forth the reasons for the response" and "may contain
22 instructions to the responsible official." *Id.* at (b)(1). This response "is limited to only those
23 issues and concerns submitted in the objection(s)." *Id.* at (b)(2). The Reviewing Officer's
24 response "will be the final decision of the U.S. Department of Agriculture on the objection."

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1 *Id.* at (b)(3). Sometimes a final rule discussion of individual sections provides insight to the
2 rationale or possible application of certain provisions, but little insight into the objection
3 process is provided by the applicable discussion here. 77 Fed.Reg. at 21250 (AR 1836).

4 **IV. ARGUMENT**

5 The Decision makes significant changes that were never disclosed nor made available
6 for public input. Nor is there any meaningful agency analysis of the decision elements at
7 issue. The Court should declare certain provisions of the Decision unlawful, vacate them, and
8 remand this matter to the agency for further proceedings.

9 A. Plaintiffs Meet Standing Requirements.

10 It is required in some courts and asserted by some practitioners that a plaintiff invoking
11 federal jurisdiction shoulders a mandatory duty to affirmatively establish standing in moving
12 for summary judgment. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992); *High*
13 *Country Conservation Advocates v. U.S. Forest Service*, 333 F.Supp. 3d 1107, 1117-1118 (D.
14 Colo. 2018). To demonstrate standing:

15 a plaintiff must show: (1) it has suffered an "injury in fact" that is (a) concrete
16 and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it
17 is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

18 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000)
19 (numbering in original) (quoting *Lujan*, 504 U.S. at 560-561). In the National Forest
20 management setting, an "injury" is sufficient which "in fact affects the recreational or even
21 the mere esthetic interests of the plaintiff…." *Summers v. Earth Island Inst.*, 555 U.S. 488,
22 494 (2009). An organization can assert the standing of its members. *Id.*

23 Plaintiffs satisfy each of these requirements. Plaintiffs have submitted the declarations
24 of Tony Vigil, Mathew Giltner and Don Amador, which address these specific elements for
the declarants, their respective organizations and/or the organizations' members. The

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practical consequence of expanding the size of lek buffers, extending the season in which they apply to June 30, and eliminating any daily operating period within those buffers, is to force vehicle events to July 1 or later. Vigil Declaration at ¶ 8. This has resulted in concrete, adverse effects to Plaintiffs' legally protected interests. *Id.* at ¶¶ 9-11. However justified the modified lek buffer prescriptions might be, those particular changes involve analysis and an exercise of discretion that should be explained in, and informed by, public dialogue. The Decision's prescriptions for lek buffers, and the manner in which they were chosen, have broader implications in other sage grouse habitats or planning processes on other issues. *Id.* at ¶11; Amador Declaration at ¶ 9.

The Decision has adversely affected, and will in the future adversely affect, permitted event administration and motorcycle access by Plaintiffs' members at specific times and along any network of routes they might plausibly seek to have approved for event use, causing concrete but redressable harm to their recreational and aesthetic interests. Plaintiffs also assert actual, concrete and redressable environmental injury and procedural injury caused by the Decision. Plaintiffs have standing.

B. The Decision Violates NEPA.

The Forest Service ended up at the Decision through significant changes that occurred after and outside of the required public review process. This outcome was illegal under either technical or intuitive interpretation of NEPA.

1. The Decision Violates Range of Alternatives Requirements.

The Decision and any subsequent special event permits complying with the Decision violate NEPA. Complaint (ECF 1) at ¶¶ 61-78 (Counts Two and Three). Plaintiffs allege that the "unique terms of the agreement/Final ROD governing special event permits were not

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disclosed during the NEPA process and were not a reasonably foreseeable combination or refinement of the alternatives presented in any EIS." *Id*. at ¶ 68.

Critical to NEPA's procedural scheme is the mandatory duty to consider in an EIS a sufficient range of alternatives to the proposed action. 42 U.S.C. § 4332(C). This discussion of alternatives "is the heart" of an EIS. 40 C.F.R. § 1502.14. A reviewing court applies a "rule of reason" to determine if the range of alternatives considered was sufficient. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008). The "existence of a viable but unexamined alternative renders the [EIS] inadequate. An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice." *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

The Forest Service failed to present one or more viable alternative(s) for public review and comment. Plaintiffs need not speculate in making this statement – the agency chose an apparently viable but omitted alternative as its final Decision. For specially permitted vehicle events, the RDEIS alternative presented to the public stated "[b]etween March 1 and May 15, off-highway vehicle events that pass within a 0.25 mile of an active lek shall only take place during daylight hours after 10 am." AR 30292. The final version adopted in the Decision stated "[b]etween March 1 and June 30, off-highway vehicle events that pass within 4 miles of an active or pending lek shall not be authorized. Critical disturbance periods may shift 2 weeks back or forward in atypically dry or wet years based on observations of breeding/nesting." AR 36044. The allegedly omitted alternative here is not some hypothetical figment of Plaintiffs' imagination – it was adopted as the Decision.[8]

[8] Plaintiffs only compare the last alternatives available for public comment in the RDEIS to those identified in the Final ROD. Defendants actually shuffled the alternatives twice after public comment, starting with the Draft ROD/FEIS where they increased the buffer size from 0.25 miles to 3 miles. This only strengthens Plaintiffs' argument.

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These are different in multiple, significant ways. The seasonal restrictions were expanded, to include the period from May 15 to June 30. This expansion is not coincidental. The previously selected seasonal restriction encompassed the breeding season, while the expanded one includes the nesting season. AR 30289 (RDEIS table summarizing "seasonal dates" and identifying March 1-May 15 as the breeding season, and April 1-June 30 as the nesting and early brood-rearing season). The preservationist objectors consistently made this demand from the early stages of the process. AR 28387 (Center for Biological Diversity comments in January, 2014, seeking "strong affirmative actions to curtail organized events that impact leks and early brood-rearing habitats during the critical period of March 1 to June 30"); AR 33899, 33922 (joint comments from three groups in October, 2014, urging vehicle events "under no circumstances be allowed" in breeding, nesting, or brood-rearing habitat during its season of use); AR 35663 (WildEarth Guardians objection). The size of the lek buffers is also quite different. The area of a 0.25 mile buffer would be 0.20 miles, the area of a 3 mile buffer would be 28.27 miles, the area of a 4 mile buffer would be 50.27 miles.[9] The Fish and Wildlife Service apparently concluded that "all known leks are within 3 km (1.8 mi.) or less of an existing road…." AR 35663-35664. The RDEIS states that 503.6 miles of the routes designated for motor vehicle travel pass within 5 miles of "active Bi-state DPS leks." AR 30320. These changes have significant and synergistic adverse impacts on the human environment. Plaintiffs do not contend that the agency was required to present some infinite array of permutations on (a) buffer size; (b) seasonal restrictions; (c) time of day restrictions. However, the agency was required to at least raise the possibility of variations in one or more

[9] The formula for the area of a circle is (radius)(squared) times pi; the stated figures are based on a value of 3.14159 for pi and rounded to two decimal places. The buffers would actually be slightly larger than presented, as those calculations assume the radius extends from a point, while the lek itself is actually a circular or oblong area. See, AR 1064 (explaining lek sites consist of "areas" of bare soil, wind-swept ridges, meadows, and other relatively open sites).

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of these elements, and provide a meaningful opportunity for informed public input and agency analysis of reasonable alternative combinations.

The Forest Service will presumably defend by claiming that it had discretion to select the Decision from within the endpoints established by the RDEIS alternatives. The agency has already expressed this interpretation of the range of alternatives requirement:

> By having alternatives that analyze the "ceiling" as well as the "floor" of a range of options, we can disclose the effects of these "bookends" and make any needed modifications in management language in the decision knowing that the potential effects of those modifications were considered (as long as those effects fall within the range analyzed).

AR 34465. According to such logic, for off-highway vehicle events, Alternative A was "no action" where events "are permitted using existing direction" and "granted on a case-by-case basis after environmental analysis" and Alternative C was "[d]o not authorize" any events." AR 30292. Under the Forest Service's interpretation if it discloses the effects of these "bookends" it can adopt anything between them. This interpretation is incorrect. For starters, there is no case that supports this interpretation, at least not in any setting resembling this project. The absence of any such authority should come as no surprise, for if this were correct it would make little sense for an agency to ever offer midpoint alternatives between the bookends. The Council on Environmental Quality ("CEQ") has not specifically addressed the "bookend" strategy, but it has offered guidance for proposals that might suggest "a very large or even an infinite number of possible reasonable alternatives" and advises in such instances that "a reasonable number of examples, covering the *full spectrum* of alternatives, must be analyzed and compared in the EIS." 46 Fed.Reg. 18026, 18027 (Mar. 23, 1981) ("Forty Most Asked Questions Concerning CEQ's NEPA Regulations") (Question 1b) (italics in original).[10]

[10] CEQ has long been considered an authority on NEPA, upon which its interpretation "is entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

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1 To the extent decisions exist addressing "bookends" or any requirement for "mid-range"
2 alternatives, they support Plaintiffs' position. In *Westlands Water Dist. v. U.S. Dept. of*
3 *Interior*, 376 F.3d 853 (9th Cir. 2004), the district court declared the range of alternatives
4 deficient, finding it "included only 'two extreme endpoints and one mid-range alternative,
5 which pre-ordained the selection.'" *Id.* at 871 (quoting district court order at 275 F.Supp.
6 1157, 1219 (E.D. Cal. 2002)). The Circuit panel reversed, recognizing the "touchstone"
7 principle is "'whether an EIS's selection and discussion of alternatives fosters informed
8 decision-making and informed public participation.'" *Westlands*, 376 F.3d at 872 (quoting
9 *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)). In doing so, the panel noted the EIS
10 in question fully analyzed six different alternatives and "there was a thorough public debate
11 about many different flow and non-flow combinations" in which the multiple various were
12 "posited" in that debate to which "the EIS team responded." *Id.* Nothing resembling a
13 "public debate" on differing lek buffer sizes/seasons/daily periods appears in this record, nor
14 did the ultimate decision come from "the EIS team" but instead the Objection Reviewing
15 Officer. This Court considered similar principles in *Western Exploration*, citing the
16 *Westlands* analysis and finding that changes outside the comment period "could not have
17 [been] 'reasonably anticipated'" and "did not allow for intelligent public participation in the
18 EIS process." *Western Exploration*, 250 F.Supp.3d at 749.

19 The Forest Service's standard on recreation events in the final Decision was never
20 presented for public comment. The elements of this standard were not reasonably discernible
21 in any alternative available for public review. In fact, the eventual restrictions were so
22 different and expansive as to be an unforeseeable reversal of management strategy. This was
23 the purpose of the change – to resolve objections and address demands of certain interests
24 voiced throughout the planning process. This adoption of a never articulated standard violates

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1 NEPA's range of alternatives requirements. The Court should declare unlawful and vacate
2 the Decision's Standard AR-S-02 and remand the matter to the Forest Service.

3 2. *A Supplemental NEPA Analysis Was Required.*

4 The Forest Service's attempt to make significant changes without providing an
5 opportunity for public review and comment constitutes an independent violation of NEPA's
6 supplementation requirement.

7 An agency must prepare a supplemental EIS if "[t]he agency makes substantial changes
8 in the proposed action that are relevant to environmental concerns." 40 C.F.R. §
9 1502.9(c)(1)(i). This affords the agency "some flexibility to modify alternatives canvassed in
10 the draft EIS to reflect public input." *Block*, 690 F.2d at 771. However, a supplemental EIS
11 is required if "the final agency action departs substantially from the alternatives described in
12 the draft EIS." *Russell Country Sportsmen v. U.S. Forest Service*, 668 F.3d 1037, 1045 (9th
13 Cir. 2011). Supplementation is not required if "(1) the new alternative is a 'minor variation of
14 one of the alternatives discussed in the draft EIS' and (2) the new alternative is 'qualitatively
15 within the spectrum of alternatives that were discussed in the draft [EIS].'" *Id.* (quoting 46
16 Fed.Reg. at 18035) (CEQ "Forty Most Asked Questions").

17 The Decision departs substantially from the RDEIS alternatives, as detailed above. This
18 violates both the letter and the spirit of the supplementation standards. NEPA's central aims
19 are to allow for informed public comment and to disclose agency analysis of the presented
20 alternatives in the daylight of public review. Neither occurred here for anything resembling
21 the prohibition on vehicle events passing within 4 miles of an active or pending lek between
22 March 1 and June 30.

23 The "bookend" defense is of even less validity in the supplementation analysis. This is
24 because the two-pronged standard is framed in the conjunctive – the action must be "a minor

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variation" and "qualitatively within the spectrum" of presented alternatives. Assuming *arguendo* that "qualitatively within" could be deemed synonymous with "anywhere between the bookends" it could not be rationally asserted that adding 46 days to the seasonal restriction, eliminating any daytime operating option, and increasing the buffer size more than a hundred-fold constituted a "minor variation" on the RDEIS formulation of Alternative B.[11]

Nor should the Court be particularly sympathetic to any suggestion that the agency was simply adapting to some unforeseen development or shift in public input. The preservationist objectors raised the same issues throughout the planning process. The agency was well aware of their key demand to impose lek buffers through both the breeding and nesting seasons. AR 28387; AR 33922. The agency chose to ignore this position stated in comments to the publicly-reviewed DEIS and RDEIS, but then capitulate to it in the Decision.

Finally, the Forest Service will likely contend that a supplemental EIS was not needed because certain individuals here, including at least one of the Plaintiffs, had an opportunity to participate during the objection process. As with the "bookend" argument, Plaintiffs are not speculating about this defense, as it has already been raised in responses to EIS comments by the Forest Service.[12] Congressman Mark Amodei requested a briefing with the Forest Service and BLM following resolution of the objections but prior to issuance of the Final ROD. AR 36018. The first "concern" attributed to Representative Amodei was:

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[11] Perhaps Defendants (or Intervenors) will suggest that the "minor variation" comparison should be to the FEIS version of Alternative B. This would be improper as the FEIS was not available for public comment. Regardless, the Decision is not a "minor variation" from that alternative either, for the FEIS Alternative B had the same seasonal and time of day prescriptions as the RDEIS, and the 3 mile to 4 mile increase in buffer size translates to nearly double the impacted surface area.

[12] The Court is not expected to provide an explanation for the agency, nor can the agency's counsel present litigatory post hoc rationalizations – the agency's choices can only be upheld "on the basis articulated by the agency itself…." *ONDA v. BLM*, 531 F.3d 1114, 1141 (9th Cir. 2008).

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> **Issue:** Forest Service objection process results in changes negotiated between the agency and objectors that are then implemented without further public comment. Congressman Amodei noted that many stakeholders support the plan as originally published and would not support changes made by the Forest Service in the objection resolution process. **Response:** Bill clarified that stakeholders have the opportunity to participate as interested parties during the objection process. He also clarified that some changes resulted from the input of the wildlife agencies (USFWS, Nevada Department of Wildlife and California Department of Fish and Wildlife) on the draft ROD. Ralph clarified BLM's procedures, which require the agency to seek public comment on changes negotiated during its protest process. Neither agency has the ability to make changes not previously analyzed.

AR 36018-36019 (bold in original). These responses are inadequate, if not disingenuous. Addressing them in reverse order, the final sentence makes precisely the point motivating this lawsuit. Plaintiffs encourage the Forest Service in its cross-motion to identify the text in any EIS which "previously analyzed" a 4 mile lek buffer prohibiting vehicle events between March 1 and June 30. The point in the penultimate sentence is not relevant here, as Plaintiffs are not suing the BLM. The assertion that seeks to legitimize any changes by attributing them to wildlife management agencies is false, at least as concerns vehicle event permitting. See, AR 36408-36409 (NDOW "follow-up" comments on Draft ROD).

The first sentence of the Forest Service Response is the most relevant, and still far wide of proper NEPA compliance. The NEPA requirements address public involvement, not the extremely limited universe of "stakeholders" or narrower subset of "interested parties." The agency's euphemistic description of the interested parties as having an "opportunity to participate" should provide little comfort, as well as being unresponsive to NEPA's mandate. The outcome here was premised on resolution of objections. To the extent they had an opportunity to participate, the interested parties protested in classic vociferous but futile fashion to a "done deal" involving negotiated changes in the ROD. AR 36020-36022. The most fundamental of NEPA purposes is to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40

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1 C.F.R. § 1500.1(b). Requiring someone to be a "stakeholder" and affirmatively seek
2 "interested party" status that at most allows them to voice an objection that will be ignored
3 can hardly be reconciled with this command. Nor should the Forest Service be encouraged in
4 a "some input is good enough" defense here.

5 Congress requires federal agencies to comply with the policies of NEPA to the fullest extent possible. One of the policies of NEPA is to encourage and
6 facilitate public involvement in decisions concerning environmental issues. In fact, the CEQ regulations interpret NEPA to require public comment generally.

7

8 *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1383 (9th Cir. 1986) (citations omitted).
9 Counsel has omitted the internal citations, but notes that the aforementioned section 1500.1(b)
10 in the CEQ guidance is among the sections referred to in the last sentence of the *Trustees*
11 quote. If "the Proposed Action ultimately differs so dramatically from the alternatives
12 canvassed in the draft EIS as to preclude 'meaningful consideration' by the public" then some
13 opportunity for public comment is required and "the circulation of a supplemental draft EIS
14 describing the Proposed Action is the only means of satisfying this requirement." *Block*, 690
15 F.2d at 770 (emphasis added). The Forest Service made a calculated choice here to treat
16 Plaintiffs as the path of least resistance, leaving them little choice but to seek recourse before
17 the Court.

18 The Forest Service's standard on recreation events in the final Decision was not a minor
19 variation on any alternative ever publicly analyzed or presented for public comment. It was a
20 negotiated resolution, if not a capitulation, to the specific demands of certain members of the
21 public. However valid those concerns might have been, the agency was required to disclose,
22 analyze, and consider public input upon them prior to their adoption as the final Decision.
23 The Court should declare unlawful and vacate the Decision's Standard AR-S-02 and remand
24 the matter to the Forest Service.

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C. The Objection Resolution Process Illegally Circumvented NEPA.

Plaintiffs independently question the application of the regulations creating the "predecisional review process" that facilitated the Decision. Complaint (ECF 1) at ¶¶ 52-60 (Count One).

The Forest Service's approach here seems antithetical to decades of NEPA policy, where the interrelated twin aims require information be available to the public and that the agency "carefully consider" information, including public feedback, before committing to a decision. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011); *Block*, 690 F.2d at 767 (the "touchstone" for a court's NEPA inquiry "is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation"). Allowing an "objection resolution" to make substantive changes amounting to the reversal of the agency's position on a decision forged through the arduous public process turns this policy on its head. *NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (discussing the proper sequence of presentation and decision lest "the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it."). None of these principles should be diluted when the changes arise in a *quid pro quo* with a particular objector(s), no matter how intelligent, threatening, or compelling he or she might be. The Court should clarify that disclosure and analysis of effects regarding a new alternative or other substantial changes must be made in the public view and prior to a final agency decision.

Plaintiffs are not bringing a facial challenge to the regulation at 36 C.F.R. part 219, but are asking the Court to address the tension between the objection resolution process, as outlined in the regulation or as it was applied here, and other statutory requirements such as those under NEPA. The Forest Service might suggest that it has broad latitude in "objection

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1 resolution" under the regulation, sufficient to override Plaintiffs' NEPA concerns. An agency
2 is exempt from NEPA requirements in extremely narrow circumstances. One such instance is
3 where Congress creates an express statutory exemption. *Jamul Action Comm. v. Chauduri*,
4 837 F.3d 958, 963 (9th Cir. 2016). Additionally, NEPA requirements might yield to a
5 substantive statute which creates "an irreconcilable and fundamental conflict" with NEPA.
6 *Id.*; *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976). Neither
7 avenue is plausible here. The Circuit acknowledges it "has been reticent" to find any such
8 conflict. *Chauduri*, 837 F.3d at 964 (citing *Forelaws on Board v. Johnson*, 743 F.2d 677, 683
9 (9th Cir. 1985)). Where the conflict might exist, it must involve a statute (as opposed to an
10 agency's regulation) and any conflicting deadline must be one imposed by Congress, not the
11 agency itself. *Id.* None of these circumstances remotely apply to the Forest Service's choices
12 here in conducting the NEPA process or in resolving objections.

13 All but the most perfunctory decisions by land management agencies like the Forest
14 Service will in today's world draw objections. The part 219 objection process at issue here
15 addresses Forest Plan adoption or amendment, but a very similar process is outlined in the
16 adjacent part 218 regulations which apply to project-level decisions. Plaintiffs are not trying
17 to dismantle the 2012 Planning Rule or hamstring the agency with impossible duties.
18 Plaintiffs might be tempted by the prospect of a favorable outcome when the roles are
19 reversed, but the broader interest is served by clarifying the proper boundaries. Agencies
20 should not have latitude to adopt an objection resolution that is outside the alternatives
21 available for public review. The Court should seize this moment to clarify the proper relation
22 between NEPA and objection resolution under the Forest Service pre-decisional
23 administrative review process.

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1 D. The Court Can Fashion an Appropriate Remedy.

2 The Decision grapples with a broad and complicated series of challenges, but
3 conspicuously crosses the APA's line on the specific grounds Plaintiffs raise. The Court must
4 therefore determine an appropriate remedy.

5 The APA's starting point in the remedy analysis provides that a reviewing court shall
6 "hold unlawful and set aside agency action, findings, and conclusions found to be" in
7 violation of any of the components of section 706(2)'s "arbitrary and capricious" standard. 5
8 U.S.C. § 706(2). The relevant agency action(s) will be remanded for further agency
9 consideration. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468-469 (1984). The
10 manner, substance and timing of remand should be left to the agency's discretion. *Alaska Ctr.*
11 *for the Environment v. Browner*, 20 F.3d 981, 986–87 (9th Cir. 1994) (district court on
12 remand properly left "substance and manner" of achieving compliance with statutory directive
13 up to agency).

14 Some cases further consider "remand with vacatur." Courts have generally held that
15 when an agency decision is vacated, the agency action previously in force is reinstated.
16 *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("the effect of invalidating an agency
17 rule is to reinstate the rule previously in force."); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d
18 750, 757 (D.C. Cir. 1987).

19 A different option exists under "remand without vacatur." A reviewing court might
20 remand the relevant decision to the agency, while leaving the decision in place. *Idaho Farm*
21 *Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("when equity demands, the
22 regulation can be left in place while the agency follows the necessary procedures."); *National*
23 *Ski Areas Assoc. v. U.S. Forest Service*, 910 F. Supp. 2d 1269, 1286-87 (D. Colo. 2012)
24 (recognizing courts have authority to determine whether or not to vacate an agency action).

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1 The Court can craft a suitable remedy. Courts sometimes conduct a distinct "remedy
2 phase" to specifically consider options and arguments from the parties. That approach should
3 not be necessary here given the narrow focus of Plaintiffs' claims. The offending element(s)
4 of the Decision can be excised and addressed on remand.

5 **V. CONCLUSION**

6 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their
7 motion for summary judgment, declare unlawful and vacate the Decision and remand this
8 matter to the Forest Service for further proceedings.

9 Respectfully submitted this 20th day of September, 2019.

10
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16 BY: /s/ Paul A. Turcke
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18
19 **CERTIFICATE OF SERVICE**

20 I, Paul A. Turcke, hereby certify that on September 20, 2019, I caused the foregoing to
21 be filed through the Court's CM/ECF system which shall serve counsel of record as indicated
22 on the certificate of filing.

23 /s/ Paul A. Turcke
Paul A. Turcke
24

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