No. _____

In The

Supreme Court of the United States

THE ARK INITIATIVE, *et al.*,

Petitioners,

v.

THOMAS TIDWELL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's holding in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) that the Administrative Procedure Act requires an agency, as a threshold obligation, to "display awareness that it *is* changing position" before a reviewing court may sustain a deviation from longstanding policy means that an agency must merely acknowledge that it is reaching a different result as to one regulated entity or, rather, that the agency has adopted a fundamental change in underlying policy that allowed it to reach the specific result.

2. Whether the D.C. Circuit's application of *Fox* to the Forest Service's treatment of roadless areas in Colorado's National Forests – which, for the first time and in tension with Ninth Circuit precedent, allowed the Forest Service to remove areas from the protections of the nation's roadless inventory based on political and economic factors, although the Forest Service never acknowledged this fundamental change in policy in managing the inventory – eviscerates *Fox*'s threshold requirement and also places at risk millions of acres of roadless areas in the National Forests that have heretofore been subject to stringent safeguards.

PARTIES TO THE PROCEEDINGS

Petitioners – The Ark Initiative, Rocky Mountain Wild, Donald Duerr, and Scott Schlesinger – were Plaintiffs and Appellants below. Respondents – Chief Thomas Tidwell of the U.S. Forest Service, Scott Fitzwilliams, and Maribeth Gustafson – were Defendants and Appellees below. Respondents Aspen Skiing Company was an Intervenor and Appellee below.

RULE 29.6 DISCLOSURE

Petitioners do not have parent companies, nor does any publicly owned corporation own 10% or more of stock in any Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners – The Ark Initiative, Rocky Mountain Wild, Donald Duerr, and Scott Schlesinger – respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 816 F.3d 119, and reproduced in the appendix hereto ("App") at 1-28. The district court's opinion is reported at 64 F. Supp. 3d 81, and reproduced at App. 31-90.

JURISDICTION

The D.C. Circuit entered its judgment on March 8, 2016. App. 29-30. On May 4, 2016, the court of appeals denied Petitioners' request for panel rehearing and rehearing en banc. App. 95-97. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 706(2)(A) of the Administrative Procedure Act provides: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and

statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

INTRODUCTION

This case warrants the Court's review for three distinct, albeit related, reasons.

First, this appeal concerns an overriding issue of exceptional importance as to what the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), requires a federal agency to acknowledge when it seeks to depart from longstanding policy or practice as applied to a particular problem. Although this Court has opined as to the relevant obligations that an agency must satisfy for its shift in policy to pass muster – including, crucially, the threshold requirement that an agency must at least "display awareness that it *is* changing position," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*") – the Court has not clarified *what* change in position must be acknowledged and analyzed in the record where, as here, there exists both a narrow change in a specific *outcome* as applied to one regulated entity *and* a change in the much broader *policy* that not only allowed the agency to reach the specific result in the matter before it, but that may henceforth apply to *all* regulated entities. In this case,

the D.C. Circuit held that *Fox*'s threshold requirement was satisfied merely by the U.S. Forest Service ("Forest Service") acknowledging that, in managing National Forest roadless areas, it was treating one industry differently than in the past (the Colorado ski industry), although the agency did not display any awareness that, to achieve this result, it had adopted a fundamental change in its longstanding policy vis-à-vis the nation's roadless inventory. This understanding of *Fox* severely weakens, if not eviscerates, the threshold obligation established by the Court, which will have a profound effect on how the D.C. Circuit, as well as other courts, apply the threshold requirement in future cases; indeed, it is already having such an effect. *See, e.g.*, *Mingo Logan Coal Co. v. EPA*, No. 14-5305, ___ F.3d ___, 2016 WL 3902663, at *5 (D.C. Cir. July 19, 2016) (citing ruling in this case for the proposition that "[c]hanging policy does not, on its own, trigger an especially 'demanding burden of justification'") (quoting 816 F.3d at 127).

Second, in sustaining this fundamental change in agency policy and practice, the D.C. Circuit sanctioned the Forest Service's unexplained departure from its longstanding approach to National Forest management that will have serious practical consequences impacting tens of millions of acres of public lands. Specifically, for four decades, the Forest Service has managed the roadless inventory, which consists of nearly 60 million acres of National Forest lands throughout the country, in order to protect those

federal parcels from road construction and timber harvesting. The Forest Service has consistently made determinations as to which parcels are included in the inventory based solely on the objective conditions that a parcel exhibits vis-à-vis the agency's longstanding eligibility criteria. In 2012, however, the Forest Service promulgated the Colorado Roadless Rule, in which the agency for the first time eliminated roadless safeguards for many areas that indisputably exhibit roadless characteristics by basing those inventory determinations entirely on political and economic considerations. Because the Forest Service failed even to acknowledge the sharp deviation from its longstanding approach to classifying roadless areas, the agency has not only set a grave precedent that will undermine the integrity of the nation's roadless inventory, but in so doing it has also left regulated entities and the public in the dark as to which standards the agency will apply in the future.

Third, the ruling below upholding the Forest Service's application of non-objective factors in classifying and managing the nation's roadless inventory creates tension – if not direct conflict – with the Ninth Circuit's recent en banc ruling rejecting the Forest Service's comparable efforts to weaken safeguards for roadless areas in Alaska based on non-objective factors. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956 (9th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1509 ("*Kake*").

Thus, in order to provide important clarifications concerning the application of the APA when an agency

changes course both as to a specific outcome and a broad regulatory approach, as well as to restore uniformity to the lower courts' decisions pertaining to roadless inventory management, this Court's review is warranted.

STATEMENT OF THE CASE

A. The Importance Of An Objective Roadless Inventory

Pursuant to various statutes authorizing the Forest Service to administer the National Forests, the Forest Service created the roadless inventory in the early 1970s and has updated and managed the inventory ever since. *See* App. 4-7. As the Forest Service has explained, inventoried roadless areas confer substantial benefits on the ecosystem; for example, they "provide clean drinking water," "function as biological strongholds for populations of endangered and threatened species," "provide large, relatively undisturbed landscapes that are important to biological diversity and the long-term survival of many at-risk species," "serve as bulwarks against the spread of non-native invasive plant species," and "provide opportunities for dispersed outdoor recreation, opportunities that diminish as open space and natural settings are developed elsewhere." D.C. Circuit Joint Appendix ("JA") at JA-132.

To ensure that all parcels in the roadless inventory share the common goal of supplying these crucial ecosystem services, the Forest Service has long applied

certain criteria, or "roadless area characteristics," in delimiting the scope of the inventory. App. 6. These criteria – which roadless parcels must exhibit for inclusion in the inventory – include "the absence of roads . . . high-quality and undisturbed soil, water, and air; plant and animal diversity and habitat for various sensitive categories of species; and scenic and cultural properties." *Id.*; *see also* JA-276-82; JA-301-07. National Forest parcels that do not exhibit these objective qualities are excluded from the inventory and thus are subject to road construction, timber harvesting, and other types of development with far less, if any, Forest Service or public scrutiny. Hence, the inclusion of a parcel in the inventory has several important concrete consequences, including: (1) important substantive safeguards such as a general prohibition on timber harvesting and road construction, *id.*, (2) preserving these parcels so that Congress may designate them as permanent Wilderness Areas in the future, and (3) mandating more rigorous procedural protocols, subject to meaningful public participation, under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m, before any project may proceed in a roadless area that may alter its roadless status. *See Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1078-79 (9th Cir. 1994) (explaining that the Forest Service must disclose both a project's impacts to a parcel's roadless characteristics and any adverse impacts that a project poses to "the possibility of future wilderness classification" for a parcel).

In short, the nation's roadless inventory – based on certain objective, ascertainable criteria – has consistently served three key purposes: first, to afford enhanced protection to roadless areas because they are worth protecting in their own right as wildlife habitat and largely unspoiled areas for human visitors, *see* JA-132 (describing the environmental, biodiversity, and aesthetic attributes and characteristics unique to roadless areas); second, to confer stringent NEPA safeguards and disclosure requirements before the Forest Service may authorize activities that would alter the characteristics present in a roadless area; and third, to preserve the roadless status of these areas because they may be proposed for permanent protection pursuant to the Wilderness Act so long as they remain roadless-in-fact.[1]

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[1] One purpose of the roadless inventory has been to maintain an objective, system-wide assessment of areas that, due to their roadless status, could be the subject of future proposed Wilderness designations when the Forest Service revises the forest plan that governs management of a particular National Forest. JA-207 (explaining that "[t]he Roadless Inventory is the first step in the evaluation for additional Wilderness during the Forest Plan Revision" process); JA-212 ("If an area continues to have roadless characteristics, the area continues to have wilderness potential and will be considered for [wilderness] recommendation again in the next round of Forest Planning."); 36 C.F.R. § 219.7 (requiring forest plan revision "at least every fifteen years" and stating that the agency must "[i]dentify and evaluate lands that may be suitable for inclusion in the National Wilderness Preservation System and determine whether to recommend any such lands for wilderness designation").

B. The Forest Service's Historical Approach To Roadless Inventory Classification And Management

For forty years – i.e., prior to the rule under review – it is undisputed that the Forest Service has *invariably and consistently* included in the inventory *all* National Forest parcels containing "roadless area characteristics" such as "the absence of roads . . . high-quality and undisturbed soil, water, and air; plant and animal diversity and habitat for various sensitive categories of species; and scenic and cultural properties." App. 6 (citing 66 Fed. Reg. 3245). Following the agency's longstanding policy and practice, in 2001 the Forest Service issued a nationwide roadless rule ("2001 Roadless Rule"), which again confirmed that the inventory at that time included *all* National Forest parcels containing the objective "roadless area characteristics." JA-132; *see also* JA-211 (stating that the roadless inventory is "a purely objective assessment of conditions on the ground"); JA-272 ("The inventory should be based on definitive, measurable criteria, which avoids value bias.").

Consistent with that approach, in the 2001 Roadless Rule the Forest Service refused a request from the ski industry to exclude from the inventory parcels that exhibited "roadless area characteristics" but happened to overlap with land allocated by the Forest Service through special use permits for potential future ski area development. Because such an exclusion would have been inconsistent with the Forest Service's

historical and uniform policy to include *all* parcels exhibiting "roadless area characteristics" in the inventory, JA-132, the agency specifically rejected the ski industry's inventory exclusion request. *See* JA-146-47; JA-179. However, in that rule, the Forest Service accommodated the ski industry in other, less drastic ways by allowing limited ski-related development *in* roadless areas subject to rigorous NEPA analysis, full public disclosure, and other important safeguards.

Subsequently, the State of Idaho requested that the Forest Service issue a State-specific regulation concerning Idaho's roadless areas, resulting in the 2008 Idaho Rule, *see* 73 Fed. Reg. 61456. Although this rule departed in certain aspects from the 2001 Roadless Rule to accommodate issues specific to Idaho, it was consistent with the most important attribute of the Forest Service's prior policy and practice – namely, the commitment to conduct an inventory based on a "purely objective assessment of conditions on the ground." JA-211. Thus, in the 2008 Idaho Rule, the Forest Service did *not* exclude from the inventory any parcels exhibiting objective "roadless area characteristics." 73 Fed. Reg. at 61463.

C. The 2012 Colorado Rule

In 2012, Colorado became only the second State for which the Forest Service developed a State-specific roadless rule. While "[i]n some ways, the 2012 Colorado Rule is more protective than the national rule," App. 9,

in one pivotal aspect the 2012 Colorado Rule is drastically *less* protective than the Forest Service's 2001 Roadless Rule, the 2008 Idaho Rule, and the agency's undisputed historical practice prior to issuance of the 2001 Roadless Rule. For the first time in four decades of managing the roadless inventory, in the 2012 Colorado Rule the Forest Service excluded from the inventory parcels that indisputably satisfy objective roadless area criteria due to requests for their exclusion by ski industry lobbyists and State officials acting on their behalf. App. 9-10 (citing 77 Fed. Reg. at 39578). Hence, for the first time, the Forest Service transformed its roadless inventory classification process from empirical to political, based on factors having nothing to do with the condition of the parcel under review.[2]

The 2012 Colorado Rule's ski-area exclusion was thus a fundamental shift in the Forest Service's decades-long approach to classifying and managing roadless areas throughout the country. Yet, the Forest

[2] Under the ski-area exclusion, the Forest Service can now avoid disclosing in an environmental impact statement the impacts to roadless characteristics and to a parcel's future prospects of becoming a Wilderness Area because these parcels are no longer in the inventory to which these NEPA procedures apply. *See* 36 C.F.R. § 294.41 ("Colorado Roadless Areas . . . shall constitute the exclusive set of . . . lands within the State of Colorado to which the [EIS] provisions of 36 C.F.R. § 220.5(a)(2) shall apply"); 36 C.F.R. § 294.45(a) ("Environmental documentation will be prepared pursuant to Section 102 of [NEPA] for any proposed action within a Colorado Roadless Area. Proposed actions that would significantly alter the undeveloped character of a Colorado Roadless Area require an Environmental Impact Statement.").

Service *never* acknowledged in the record that it was radically shifting its approach to determining the scope of the inventory and the protections that flow from it. Nor did the agency analyze whether there were sufficient justifications for such a drastic departure. Rather, the Forest Service merely announced it was excluding from the inventory all roadless areas overlapping with special use permits for future ski area development in Colorado because such an exclusion would purportedly benefit the State by increasing tourism. 77 Fed. Reg. 39578.[3]

Compounding the Forest Service's failure to display awareness that the ski-area exclusion profoundly diverged from its prior approach to roadless inventory classification is the fact that in the same rulemaking the Forest Service refused a functionally identical inventory exclusion request from the oil and gas industry on the basis that "[w]hether or not an area is identified as having high [development] potential *is not an inventory criterion*." 77 Fed. Reg. at 39588 (emphasis added). Thus, in rejecting *another* industry's request to exclude parcels from the inventory for development purposes,

[3] Indeed, the Forest Service even went so far as to imply – albeit erroneously – that the ski-area exclusion *was* consistent with past agency practice because those parcels exhibited "degraded roadless area characteristics," App. 10 (citing 77 Fed. Reg. at 39578); however, as the D.C. Circuit held, that assertion "lacks a factual basis in the record" because "[t]he agency has made no attempt identify the location, scope, or degree of any such degradation within the ski-area exclusion," App. 19, and, in any event, that assertion is belied by numerous public comments in the record identifying myriad such parcels as exhibiting high-quality roadless characteristics. *See, e.g.*, JA-344-47.

the Forest Service relied on its longstanding policy and practice in which only the inventory criteria – i.e., the objective "roadless area characteristics" – determine inclusion in the inventory. Although the Forest Service applied these contradictory approaches to roadless inventory classification in the *same* rulemaking, the agency never directly compared the two exclusion requests or explained why these requests warranted disparate treatment insofar as the *inventory criteria* are concerned.

D. Proceedings Below

On August 18, 2014, the district court denied Petitioners' motion for summary judgment and granted Respondents' motions for summary judgment. App. 31-90. After rejecting various jurisdictional arguments raised by Respondents, the district court ruled for Respondents on the merits, finding that the Forest Service did not act arbitrarily and capriciously in promulgating the 2012 Colorado Rule's ski-area exclusion.

On March 8, 2016, the D.C. Circuit affirmed. Citing *Fox*, the court noted that "[t]he 2012 Colorado Rule in general, and its ski-area exclusion in particular, reflect a change in agency policy, as the Forest Service acknowledged in promulgating the rule." App. 15. However, in sustaining the Forest Service's decision, the only acknowledged change that the court pointed to was that "for the first time" the Forest Service made a decision that 8,300 acres of Colorado roadless areas

that overlapped with ski area special use permits will no longer be treated as roadless. *Id.* As for the underlying dramatic *policy* shift that allowed that change to occur – i.e., for the first time in decades of managing the roadless inventory, allowing indisputably roadless parcels to lose protection based solely on political and economic justifications – the D.C. Circuit imposed no burden whatsoever on the Forest Service even to acknowledge *that* change and its implications for roadless area protections throughout the country, let alone set forth any sustainable justification for the policy shift.

Although the court of appeals rejected one of the Forest Service's justifications for the ski-area exclusion – i.e., that those parcels exhibited "degraded roadless area characteristics" – because this assertion "lacks a factual basis in the record," App. 19, the court nevertheless upheld the Forest Service's decision on other grounds. For example, although the Forest Service never acknowledged in the 2012 Colorado Rule the conflict between the approach applied to the oil and gas industry (consistent with the Forest Service's historical approach) and the contradictory approach applied to the ski industry, the D.C. Circuit nonetheless sustained the disparate treatment of these industries. *See* App. 24-25.

On May 4, 2016, the D.C. Circuit denied Petitioners' requests for panel rehearing and rehearing en banc. App. 95-97. On June 20, 2016, this Court issued *Encino Motorcars, LLC v. Navarro*, which reinforced the Court's well-established view under the APA that

an "agency must at least display awareness that it is changing position" and "that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quotation marks and citations omitted).

REASONS FOR GRANTING THE PETITION

As resolved by the D.C. Circuit, this case raises an exceptionally important administrative law question concerning the application of the APA where an agency has failed to display any awareness that it has changed its regulatory approach in a manner that is fundamentally at odds with its longstanding policy and practice. The ruling under review allows an agency to satisfy the threshold standard set forth in *Fox* and reaffirmed in *Encino* merely by "display[ing] awareness" that it has changed a *result* in the specific matter before it, but without displaying any awareness whatsoever of the basic *policy* shift underlying, and indispensable to, the result. Such an approach renders the threshold requirement imposed by *Fox* and progeny largely meaningless. At minimum, it highlights the importance of this Court providing crucial guidance to the lower courts as to *what* change must be acknowledged in situations in which an agency is *both* changing a specific outcome as to *one* matter before it and, in the process, changing the overarching policy and approach that henceforth may apply to *all* entities subject to that regulatory regime. Otherwise, agencies are free to

substantially modify their broad policies through case-specific decisionmaking without ever acknowledging – much less analyzing – the shift in regulatory approach and its consequences for future decisionmaking processes.

This Court's review is also warranted to resolve tension in the courts of appeal concerning the Forest Service's framework for classifying and managing the nation's roadless inventory. In recent decisions applying *Fox*, the en banc Ninth Circuit and the D.C. Circuit reached conflicting outcomes concerning the Forest Service's efforts to rely on non-objective factors in delineating the scope of the roadless inventory, despite the fact that both situations involved analogous attempts to roll back specific protections (and the factual findings underlying those protections) that the agency had previously determined to be necessary in the nationwide 2001 Roadless Rule to ensure uniformity in the agency's roadless inventory classification framework.

Finally, the Court's review is warranted because the Forest Service's special treatment of the Colorado ski industry sets a grave precedent that threatens destructive consequences for the nation's 60 million acres of roadless areas by allowing, for the first time, political and economic factors to influence the roadless classification process, thereby potentially imperiling the integrity of the roadless inventory and the ecosystem services that roadless areas provide. Based on the fundamental policy shift sustained in this case, any industry with commercial interests in National Forests

throughout the country – and which wishes to permanently alter the status of these lands by developing roadless areas without the public disclosure and rigorous analysis requirements currently imposed by NEPA – may now lobby for exclusion of roadless-in-fact parcels from the inventory. This has enormous implications for millions of acres of federal land – implications that, under *Fox*, must at least be acknowledged by the agency and addressed.

For these reasons, this Court's review is warranted.[4]

I. In View of the Ruling Below, This Court's Review Is Necessary To Provide Clarification On *Fox*'s Threshold Requirement That An Agency Must Acknowledge Its Change In Policy.

For decades, this Court has made clear that, although an agency may change its policy or approach to a particular problem, the APA requires an agency shifting gears to provide in the administrative record coherent and non-arbitrary reasons for doing so, especially because regulated entities and the general public come to rely on the agency's established course of action as setting forth the standards that apply to a

[4] Although Petitioners respectfully request that the Court grant certiorari and reverse the court of appeals on the merits, in light of this Court's June 20, 2016 ruling in *Encino* that post-dates the D.C. Circuit's rehearing denials, Petitioners alternatively request that the Court grant certiorari, vacate the judgment below, and remand to the D.C. Circuit for further consideration.

particular problem or issue. Inherent in those decisions is the key principle that an agency must actually acknowledge in the record that it *is* changing its longstanding approach and the specific standards that apply under a particular framework, which both alerts the public to the shift and provides the agency with an opportunity to explain its reasons for doing so.

In 1973, for example, the Court explained that "[a] settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least the presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973). Hence, the Court held that "[w]hatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Id.* at 808.

In 1983, in *State Farm*, this Court again addressed an agency change in position, explaining that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). Importantly, the Court directed that "[t]he reviewing court should not attempt itself to make up for such deficiencies [in the record]: We may not supply a reasoned basis for the agency's action that the agency

itself has not given." *Id.* (quotation marks and citation omitted). Noting that the Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner," *id.* at 48, the Court invalidated the regulation at issue because "the agency submitted no reasons at all" for why it rejected a mandatory airbag standard and explained that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action" because "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50.

In 2009, the Court reaffirmed these principles in *Fox*, when it considered the FCC's policy change concerning its regulation of indecent language on television broadcasts. While clarifying that the APA does not require that an agency change in policy "be justified by reasons more substantial than those required to adopt a policy in the first instance," 556 U.S. at 514, the Court explained that "[t]o be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *Id.* at 515. The Court acknowledged, therefore, that "[a]n agency may not, for example, depart from a prior policy *sub silentio*. . . ." *Id.* Accordingly, in *Fox*, the Court made explicit what had been implicit for decades in APA cases – i.e., an agency desiring to change its policy and practice from its established norms must, as a threshold matter, actually display awareness that it *is* shifting tacks and analyze that departure and its implications through

the formal notice-and-comment procedures prescribed by the APA.

This term, the Court yet again reiterated the important threshold requirement that an agency must display awareness in its decisionmaking record of any change in longstanding policy or practice, lest the agency's action be arbitrary and capricious. In *Encino*, the Court considered the Department of Labor's evolving interpretation as to whether the Fair Labor Standards Act excludes service advisors from its "salesmen" definition. *See generally* 136 S. Ct. 2117. The Court pointed out that, in its formal rulemaking record, "[t]he Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt." *Id.* at 2119-20. The Court articulated the APA standard as follows: "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions . . . [b]ut where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Id.* at 2125. Further, although "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change," the Court underscored that "the agency *must at least* 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.' " *Id.* at 2125-26 (quoting *Fox*, 556 U.S. at 515) (emphasis added).

Applying those principles, the Court invalidated the regulation because "the Department offered barely

any explanation" for its change in policy and practice and thus "the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position." *Id.* at 2126. In particular, "the Department did not analyze or explain why the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services (that is, service advisors)." *Id.* at 2127. Accordingly, because "[i]t is not the role of the courts to speculate on reasons that might have supported an agency's decision," the Court held that "[t]his lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law." *Id*.

Despite this Court's repeated statements that an agency must, as a threshold requirement, display awareness that it is changing its policy or practice to withstand APA scrutiny, the D.C. Circuit's approach in this case demonstrates that further guidance is necessary in situations in which an agency is *both* making a narrow change in a specific *outcome* as applied to one regulated entity and, in achieving that result, also shifting the much broader *policy and approach* that may henceforth apply to *all* regulated entities under that regulatory framework. Indeed, in the ruling below, the D.C. Circuit upheld the Forest Service's Colorado Rule by expressly relying on the fact that the Forest Service *did* acknowledge that it was reaching a different *outcome* insofar as the specific removal from the inventory of 8,300 roadless acres in Colorado because

they overlapped with ski area special use permits. App. 15. That narrow inquiry, however, is far different from the recognition of the dramatic change in longstanding agency "*policy*," *Fox*, 556 U.S. at 515, and "*practice*," *Encino*, 136 S. Ct. at 2119-20, that this Court's precedents appear to require when an agency invokes an entirely novel *approach* to achieve its new outcome in a particular situation – such as the Forest Service's departure here from four decades of agency policy and practice applying only objective factors in classifying roadless areas.

Accordingly, the important administrative law question raised by this petition – and which warrants this Court's intervention – is: what kind of acknowledgement of, and justification for, an agency's change in approach is required by *State Farm*, *Fox*, and *Encino* to withstand APA scrutiny when the agency is *both* changing a specific outcome *and*, in doing so, shifting its entire regulatory approach? Insofar as the ruling below holds that merely acknowledging a change in a specific outcome is sufficient, this severely dilutes, if not eliminates as a practical matter, the threshold requirement imposed by this Court, and hence sets a dangerous administrative law precedent in the circuit where myriad agency policy changes are subject to review. If, consistent with the ruling below, agencies like the Forest Service may make a wholesale shift in overall policy and practice without even expressly acknowledging that they are doing so, addressing the implications of the shift, and explaining why it is

justified, a critical judicial safeguard against arbitrary and unprincipled agency decisionmaking evaporates.

Accordingly, review by the Court is necessary to provide clarity to this Court's previous decisions regarding the threshold obligation imposed on agencies to acknowledge a shift in position and, specifically, whether agencies must acknowledge and explain both a change in a specific outcome as well as the broader, and far more consequential, policy shift embodied in that outcome.

II. The Recent Conflicting Rulings In The Ninth and D.C. Circuits Concerning Roadless Inventory Management Also Warrant Review By The Court.

The Court's review is also warranted to address the inconsistency between the ruling below and the Ninth Circuit's recent en banc ruling in *Kake*. Both rulings relied on *Fox* but established very different approaches to the Forest Service's adoption of non-objective factors in its classification and management of the nation's roadless inventory.

As this Court explained in *Fox*, assuming that an agency can satisfy a reviewing court that it sufficiently displayed awareness of a shift in policy, then the court proceeds to determining whether "there are good reasons for the new policy," whether "the new policy is permissible under the statute," and whether the agency has provided "reasoned explanation . . . for disregarding facts and circumstances that underlay or

were engendered by the prior policy." 556 U.S. at 515-16. Concurring in part and in the judgment, Justice Kennedy explained, "an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so." *Id.* at 537 (Kennedy, J., concurring in part). Hence, Justice Kennedy noted that "[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Id.*

Applying these principles in last year's *Kake* decision, the en banc Ninth Circuit rejected the Forest Service's attempt to weaken roadless safeguards in Alaska's Tongass National Forest on the basis of political and economic considerations. *See* 795 F.3d 956. In that case, the Forest Service did not purport to remove roadless-in-fact parcels from the inventory entirely, as it subsequently did in Colorado, but adopted regulations that had a similar effect by removing barriers to development in roadless areas based on "socioeconomic" factors due to the Forest Service's determination that "[t]he Tongass is vitally important to the economy of Southeast Alaska." *Id.* at 959-63, 967-70. In evaluating the agency's change in position on that particular issue, although the court held that the Forest Service "complie[d] with three of the *Fox* requirements" including that it "displayed awareness that it *is* changing position," *id.* at 967, the Ninth Circuit nevertheless deemed the agency's reversal of position vis-à-vis its treatment of roadless areas in the Tongass

National Forest arbitrary and capricious under *Fox* because of "[t]he absence of a reasoned explanation for disregarding factual findings" that the Forest Service had made on the same issue in the 2001 Roadless Rule. *Id.* at 969. Indeed, the court noted that the socioeconomic concerns cited by the Forest Service in support of weakening roadless safeguards in Alaska "were not new" because they had also been analyzed (and rejected) as part of the 2001 Roadless Rule, and in any event the Forest Service had previously addressed those concerns in the 2001 Roadless Rule by "includ[ing] special mitigation measures – not added for any other national forest – allowing certain ongoing timber and road construction projects in the Tongass to move forward" in inventoried roadless areas. *Id.* at 967-68.[5]

In contrast, in the ruling below the D.C. Circuit upheld the Forest Service's application of non-objective factors to categorically remove certain areas from the roadless inventory in Colorado based on political and economic considerations – a far more draconian step than anything attempted in Alaska. In reaching its conclusion, the D.C. Circuit acknowledged *Kake* but said that it was not bound by the Ninth Circuit's reasoning. App. 20. The court also purported to distinguish *Kake* on the grounds that it involved an issue

[5] Importantly, not only did the regulation in *Kake* not seek to entirely remove roadless-in-fact parcels from the inventory, but it also did not have the direct effect of waiving NEPA's EIS preparation or public disclosure requirements for activities authorized by the Forest Service in roadless areas.

that "the prior rulemaking had specifically considered and rejected." App. 21. Moreover, the D.C. Circuit asserted that a different outcome is warranted because the Colorado Rule, unlike the rule at issue in *Kake*, "was based on an entirely new record, including a new EIS, and supported with new, State-specific findings." *Id.* For several reasons, however, these distinctions, are illusory and raise serious questions as to the consistency of the Ninth Circuit's and D.C. Circuit's approach to judicial review of the Forest Service's management of roadless areas.

First, just as in *Kake*, "the prior rulemaking" referred to by the D.C. Circuit – i.e., the 2001 Roadless Rule with national application – "had specifically considered and rejected" a ski-area exclusion similar to what the agency purported to adopt in the 2012 Colorado Rule on the basis of political and economic factors. Indeed, as explained, the ski industry requested inventory exclusion as part of the 2001 Roadless Rule and the Forest Service deliberately rejected that request, consistent with the agency's policy and practice for classifying roadless areas, *see* JA-146-47, JA-179, while accommodating the industry's concerns through other less drastic means that would maintain the agency's uniformity in approach to classifying and managing roadless areas (much like how the Forest Service addressed roadless areas in the Tongass National Forest in the 2001 Roadless Rule). *See* JA-145. Thus, when the Forest Service reached a contradictory conclusion in the 2012 Colorado Rule – using entirely new, politically

based factors to achieve that result without even acknowledging or analyzing this shift and its precedential implications for millions of roadless area acres nationwide – the agency failed to satisfy the APA and undermined roadless area protections in essentially the same way that the Ninth Circuit discerned in *Kake*.

Second, given that the ski industry already requested a functionally identical exemption from roadless inventory procedures in the 2001 Roadless Rule – and the Forest Service rejected that request in lieu of alternative methods of addressing the industry's concerns in Colorado and elsewhere without abandoning the agency's uniform regulatory regime for classifying roadless areas – any concerns raised by the ski industry as part of the 2012 Colorado Rule certainly were not "new." App. 21. In any event, as in *Kake*, any such concerns could have been addressed in a manner that would not fundamentally alter the agency's longstanding regulatory approach, 795 F.3d at 967-68, consistent with how the agency addressed ski-related development in roadless areas in the 2001 Roadless Rule and the 2008 Idaho Rule. Thus, as in *Kake*, the Forest Service's departure from its prior findings with respect to ski areas – i.e., that the agency could address that industry's concerns without completely eviscerating the roadless inventory classification system – ran afoul of the APA because "[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring).

Third, although the D.C. Circuit focused on the fact that the Forest Service prepared a new decisionmaking record and environmental review for the Colorado Rule in contrast to the rule in *Kake*, the relevant State-specific findings in the Colorado Rule pertained only to the purported political and economic benefits of excluding certain parcels from the roadless inventory, but failed to address at all the policy implications of utilizing, for the first time, non-objective factors in the agency's classification of the roadless inventory. *See supra* at 16-22. As a result, not only did the Forest Service entirely fail to consider an important aspect of the problem in reaching its decision, but the Colorado Rule is even *more* egregious than the one that the Ninth Circuit invalidated in *Kake* because, as that court found, the regulation at least acknowledged that it was, in fact, attempting to shift the agency's overall approach to roadless inventory management. *See* 795 F.3d at 957. Hence, in *Kake*, the Court specifically recognized that not only did the Forest Service display awareness that it sought to change the specific *outcome* with respect to its treatment of roadless protections in the Tongass National Forest, but it also explicitly acknowledged that in achieving that outcome the agency exhibited "a change in policy" by basing that decision primarily on "socioeconomic concerns." *Id.* at 967-68. The Colorado Rule, however, contains no such acknowledgement of the change in the relevant regulatory factors that served as the means of achieving the new outcome, nor any assessment of how that change affects nationwide roadless inventory management.

Because the D.C. Circuit and Ninth Circuit have taken conflicting approaches to review of Forest Service efforts to water down longstanding safeguards for roadless areas, and in particular have imposed widely divergent burdens on the agency when it has attempted to rely on political and economic factors as a basis for lessening protections for such areas, review by this Court is necessary to ensure consistency between the two Circuits where such issues are most likely to arise in the future, as well as in the Forest Service's approach to management of the nation's vast roadless inventory.

III. The Forest Service's Approach To Roadless Inventory Classification In Ski Areas In Colorado Sets A Dangerous And Incoherent Precedent For Roadless Inventory Management Throughout The Country.

Review by this Court is additionally warranted due to the consequential and far-reaching implications of the precedent set by the Forest Service in relying, for the first time, on political and economic considerations in its classification of roadless areas, which have heretofore been classified based exclusively on an objective assessment of the physical condition of the parcels. Not only does this precedent threaten to strip important substantive and procedural safeguards from millions of acres of parcels in the roadless inventory throughout the country, but the Forest Service's contradictory approaches have left serious gaps in the regulatory framework without any coherent standards by which

regulated entities and the public can meaningfully participate in future decisionmaking processes concerning roadless inventory classification and management.

As discussed, prior to the 2012 Colorado Rule's ski-area exclusion (including in the 2001 Roadless Rule, the 2008 Idaho Rule, and pre-2001 roadless inventory management through individual forest plans), the Forest Service had *invariably* and *uniformly* included in the nation's roadless inventory *all* parcels exhibiting objective "roadless area characteristics" and made inventory classification decisions based *solely* upon the existence of those characteristics. *See* JA-211 (Forest Service document stating that the roadless inventory is a purely "*objective assessment of conditions on the ground*") (emphasis added); JA-213 (Forest Service roadless guidance stating that "the inventory is merely that, it is an inventory of the current condition on the ground at the time of the inventory . . . based on criteria found in the Forest Service Handbook"); JA-272 (Forest Service roadless guidance explaining that "[t]he inventory should be based on definitive, measurable criteria, *which avoids value bias*") (emphasis added).[6]

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[6] There is confusion in the record as to the source of the objective criteria that the Forest Service has indisputably heretofore applied in making determinations concerning inclusion in (or exclusion from) the nation's roadless inventory. App. 21-24. For purposes of this petition, however, the question of how the Forest Service's own Handbook applies to ongoing management of the inventory is immaterial. Because all parties agree – and the D.C. Circuit expressly held – that the agency engaged in "a change in

That the Forest Service has historically and consistently based all inventory determinations entirely on the objective condition of the parcel under review vis-à-vis established criteria is not coincidence or happenstance; to the contrary, such an approach embodied a coherent framework in which the agency could uniformly apply "definitive, measurable criteria" to each parcel so as to "avoid[] value bias" in determining the scope of the nation's roadless inventory and the protections that flow from inclusion in the inventory. JA-272. This longstanding approach not only provided a rational and ascertainable standard upon which regulated industries and members of the public came to rely when providing input to the Forest Service as to whether specific parcels qualify for roadless inventory inclusion, but this process also served the critically important purpose of delineating the scope and rigor of NEPA review required for a project impacting a National Forest parcel – i.e., courts have held that a development project generally requires more extensive and rigorous NEPA analysis and public participation if it occurs in a roadless area than if it occurs in an area deemed ineligible for the roadless inventory. *See* JA-269 (Forest Service roadless guidance stating that "[i]t

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agency policy" by excluding roadless-in-fact parcels from the nation's roadless inventory, App. 15, it does not matter whether the Handbook or some other agency guidance undergirded the prior policy that governed for the past four decades. In any event, the record does in fact extensively reflect myriad concessions by the Forest Service over several decades clearly indicating that the Handbook governs the Forest Service's ongoing management of the roadless inventory. *See* JA-200, JA-201-205, JA-207, JA-213, JA-269, JA-272-75.

is important to maintain an inventory" of roadless areas "even if they are allocated . . . [for limited] development," because "[o]nce inventoried and evaluated, *roadless areas are also used to determine [the] significance of various actions*" under NEPA) (emphasis added); 36 C.F.R. § 294.41 (limiting NEPA's environmental impact statement requirement only to inventoried "Colorado Roadless Areas"); 36 C.F.R. § 294.45(a) ("Proposed actions that would significantly alter the undeveloped character of a Colorado Roadless Area require an Environmental Impact Statement.").

Against this backdrop, the Forest Service embarked on a wholly divergent approach to roadless inventory classification in the 2012 Colorado Rule, in the context of the Colorado ski industry. Whereas the Forest Service applied its longstanding approach to all other parcels subject to the 2012 Colorado Rule, the Forest Service applied a totally different approach – based on fundamentally different factors – to the ski industry in Colorado without even acknowledging that it was, for the first time ever, allowing roadless-in-fact parcels to be excluded from the inventory, or analyzing the far-reaching implications this new approach may have for roadless inventory classification and the protections flowing from it.

To make matters worse, the agency not only applied a *different* approach to all other roadless parcels in Colorado in the same rulemaking, but it told another similarly situated entity under the regulatory framework – the oil and gas industry – that the Forest Service was *precluded* from granting that industry's

request to exclude roadless-in-fact parcels from the inventory sought for development by that industry *because* of the agency's longstanding uniform approach. Specifically, whereas the Forest Service applied non-objective political and economic factors to exclude the parcels coveted for development by the Colorado ski industry, *see* JA-478, in response to a functionally identical request from the oil and gas industry the agency unequivocally stated that roadless inventory classification decisions must follow the agency's longstanding "roadless inventory procedures" and thus "[w]hether or not an area is identified as having high [development] potential *is not an inventory criterion*." JA-488 (emphasis added).

This disjointed and unexplained inconsistency in the same rulemaking record – which will have myriad untoward effects on roadless areas and the ecosystem services they provide – is problematic for several reasons. First, because the Forest Service did not even purport to reconcile this patent inconsistency in the record – nor did it even directly compare the two analogous inventory exclusion requests and in any comparative analysis provide relevant factual distinctions that might support this disparate treatment of similarly situated entities – this differential treatment does not comport with this Court's precedents. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) ("There are no findings and no analysis here to justify the choice made . . . the Commission made *no findings specifically directed to the choice*

between two vastly different remedies with vastly different consequences to the carriers and the public.") (emphasis added).[7]

Second, because the Forest Service applied a vastly different approach to roadless parcels coveted for development by the ski industry than to all other roadless parcels in Colorado, other than knowing that, for whatever reason, some industries evidently have more favored status in Colorado National Forests than others – and that all industries throughout the country are free for the first time to lobby the agency for exclusion of areas from the roadless inventory based on factors having nothing to do with their roadless condition

[7] Notwithstanding the Forest Service's failure even to compare these two analogous requests by regulated industries and to articulate relevant differences at the conclusion of any such analysis, the D.C. Circuit upheld the ski-area exclusion on the basis of several rationales the agency proffered for the ski-area exclusion in isolation. App. 17-20. However, "Colorado's concern for aligning the boundaries of ski areas and roadless acreage [and] the relatively small amount of land affected by the ski-area exclusion," App. 19, do not provide sufficient grounds to withstand APA scrutiny even for the specific new *outcome* accomplished in the rule. To the contrary, Colorado's "concerns" were overstated because *every* regulated industry operating in National Forests must deal with potential overlaps of special use permit boundaries and roadless acreage since inventoried roadless area boundaries, in contrast to Forest Service permit boundaries, are determined by objective on-the-ground criteria. In addition, that the ski-area exclusion happens to apply only to 8,300 acres in Colorado – i.e., approximately five times the size of Washington, D.C.'s Rock Creek Park – is not a *reason* for the exclusion, but rather a *result* of it, especially because the approach underlying this outcome, if applied more broadly, will have far-reaching consequences for many more roadless acres in Colorado and elsewhere.

– regulated entities and the public have been left in the dark as to the governing standard for roadless inventory classification and management, how that standard will be applied prospectively, and in the event that the standard will not be uniformly applied, what exceptions apply and within what limits. In short, by setting this novel precedent as a means of catering to a preferred industry in Colorado, the Forest Service has raised serious questions concerning its ability to consistently and coherently apply a uniform standard in administering the roadless inventory, in violation of the APA. *See Encino*, 136 S. Ct. at 2126 (invalidating regulation embodying a policy change because "the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position" especially in light "of decades of industry reliance on the Department's prior policy").

Finally, the Forest Service's new precedent of excluding from the nation's roadless inventory parcels that are indisputably roadless-in-fact significantly alters not only the protections that flow directly from roadless area designation – i.e., restrictions on timber harvesting and road construction – but also both substantially undermines the ability of Congress to potentially designate these parcels as Wilderness Areas in the future and erodes the integrity of the NEPA process that applies much more stringent safeguards to roadless areas because of their important ecosystem services. *See* JA-269 ("Forest Service policy and court action suggest that an EIS is usually necessary . . . for projects impacting roadless areas."). Indeed, because

the roadless parcels to which the Forest Service applied this new "exclusion" approach are no longer in the roadless inventory, the agency no longer has any obligation to prepare an EIS, to take a "hard look" at, or even publicly disclose, a project's impacts that may eliminate a parcel's roadless characteristics, or to consider the potential loss of that parcel from future Wilderness designation. 36 C.F.R. § 294.41 (limiting NEPA's environmental impact statement requirement only to inventoried "Colorado Roadless Areas"); *see also* 36 C.F.R. § 294.45(a) ("Proposed actions that would significantly alter the undeveloped character of a Colorado Roadless Area require an Environmental Impact Statement."). In effect, the Forest Service has sidestepped vital NEPA safeguards that courts have consistently found to apply to *all* roadless areas by making arbitrary distinctions based on political and economic factors as to which roadless areas are, or are not, in the nation's roadless inventory, without even disclosing the untoward effects of this new approach and how it will inevitably subvert the explicit purposes of NEPA.

Thus, although these roadless-in-fact parcels share common attributes with every other roadless area throughout the United States, because the Service excluded them from the inventory by applying, for the first time, non-objective political and economic factors, these parcels – unlike those still in the inventory – have lost the crucial safeguards for which the Forest Service created the roadless inventory in the first instance. More important at this stage, the precedent has been set for the same approach to now be applied to

other areas in National Forests throughout the country – again, with no acknowledgement whatsoever by the Service that this abrupt deviation in longstanding policy and practice has even occurred, let alone why it is justified and what its consequences might entail.

Accordingly, because the Forest Service's unexplained shift in policy and practice poses risks to millions of roadless acres in our National Forests, creates a haphazard regulatory regime devoid of any coherent standards, and in the process eviscerates the essential purposes underlying the roadless inventory and the protections stemming from it, this Court's review is warranted for these reasons as well.

CONCLUSION

For these reasons, the writ for certiorari should be granted in order for the Court to hear the merits of the case. At minimum, Petitioners respectfully request that the Court grant certiorari, vacate the judgment below, and remand the case to the D.C. Circuit for further consideration in light of this Court's recent decision in *Encino*.

Respectfully submitted,

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August 2, 2016

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 19, 2016 Decided March 8, 2016

No. 14-5259

ARK INITIATIVE, ET AL.,
APPELLANTS

v.

THOMAS L. TIDWELL, CHIEF,
U.S. FOREST SERVICE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-CV-00633)

William S. Eubanks II argued the cause for appellants. With him on the briefs was Eric R. Glitzenstein.

James Maysonett, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With him on the brief was John C. Cruden, Assistant Attorney General. Katherine J. Barton, Attorney, entered an appearance.

Ezekiel J. Williams and Steven K. Imig were on the brief for intervenor-appellee Aspen Skiing Company.

Cynthia H. Coffman, Attorney General, Office of the Attorney General for the State of Colorado, Federick R.

Yarger, Solicitor General, Casey A. Shpall, Deputy Attorney General, and Scott Steinbrecher, Assistant Solicitor General, were on the brief for *amicus curiae* the State of Colorado in support of appellee.

John M. Bowlin and David S. Neslin were on the brief for *amicus curiae* Colorado Ski Country USA, Inc. in support of defendant-appellees and intervenor-appellee.

Before: BROWN, KAVANAUGH and PILLARD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: The U.S. Forest Service in the Department of Agriculture generally prohibits road building and timber cutting on its inventoried "roadless" national forest lands. Responding to a petition by the State of Colorado, in 2012 the Service promulgated a rule adopting State-specific standards for the designation and management of the inventoried roadless areas within Colorado's borders. *Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado* (2012 Colorado Rule), 77 Fed. Reg. 39,576 (July 3, 2012) (codified at 36 C.F.R. §§ 294.40-294.49). At issue in this case is the 2012 Colorado Rule's exclusion from the 4.2 million acres of inventoried roadless land in Colorado of about 8,300 acres of land that the Service also has designated for recreational skiing. The practical effect of the decision is to exempt that skiing acreage from the Service's ban against road building and timber cutting on roadless

lands, although any such developments remain subject to environmental review under the National Environmental Policy Act.

The plaintiffs – environmental organizations and two individuals – challenge the Service's application of the 2012 Colorado Rule to allow development of a proposed egress ski trail on once-roadless land within the Special Use Permit boundary for the Snowmass Ski Resort in Aspen. The proposed trail is not a paved road, but a trail approximately 3,000 feet long and averaging 35 feet wide that would require some spot grading and tree and brush cutting to make it usable by skiers and emergency-response patrollers and to open part of it to grooming vehicles. Plaintiffs contend that the Service adopted the ski-area exclusion with reference to factors other than the on-the-ground, undeveloped condition of the 8,300 affected acres, thereby deviating from its own established policy without sufficient explanation. The plaintiffs also claim that the Service gave them insufficient notice of the rulemaking. The District Court disagreed, concluding that the Service offered ample reasons for its decision to exclude existing designated ski areas from the Colorado roadless inventory, and that the Service's six-year public rulemaking process satisfied all applicable notice requirements. *See Ark Initiative v. Tidwell*, 64 F. Supp. 3d 81 (D.D.C. 2014). Because we agree that the Service adequately explained the limited ski-area exclusion and did not violate any applicable notice requirements, we affirm.

I.

A.

The Service generally manages its national forest lands for multiple uses, as authorized by a layered set of national forest management laws reaching back more than a century. *See generally Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1221-22 (10th Cir. 2011); *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 226-27 (D.C. Cir. 2009). The Organic Administration Act of 1897, 16 U.S.C. §§ 473 *et seq.*, requires the Service to manage national forests to secure favorable conditions of water flows and to furnish the nation with a continuous supply of timber, *id.* § 475. The 1960 Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528 *et seq.*, adds "outdoor recreation, range, timber, watershed, and wildlife and fish purposes" to the list of the Service's objectives for forest land management, *id.* § 528, and specifies that renewable surface resources must be administered "for multiple use and sustained yield," *id.* § 529. To serve those goals, the National Forest Management Act of 1976, 16 U.S.C. §§ 1600 *et seq.*, requires the Service to develop land and resource management plans, also called forest plans, which, much like zoning restrictions, designate certain areas of national forest lands for specified uses, *id.* § 1604(a), (e)(1). The Service also may issue permits for development within national forests pursuant to various authorities, consistent with governing forest plans. *Id.* § 1604(i). As relevant here, under the National Forest Ski Area Permit Act of 1986, 16 U.S.C. § 497b, the Service issues long-term special-use permits for skiing

and other recreational activities on lands within the National Forest System. Approximately 6,600 acres of land at issue in this case were covered by special-use ski-area permits, with the remaining 1,700 excluded acres designated for skiing under forest plans.

Some national forest lands are subject to especially stringent management constraints. In 1964, Congress passed the Wilderness Act, 16 U.S.C. §§ 1131 *et seq.*, obligating the Service to review "primitive" lands in the National Forest System to determine their suitability for preservation as "wilderness," *id.* § 1132(b)-(c), a designation that carries with it strict development and use prohibitions for permanent protection of an area's "recreational, scenic, scientific, educational, conservation, and historical use," *id.* § 1133(b). In the 1970s, the Forest Service completed its Roadless Area Review and Evaluation project to fulfill the Wilderness Act's mandate that it inventory extensive primitive areas of federal lands potentially suitable for congressional wilderness designation. *See Wyoming*, 661 F.3d at 1221-22. As a result of that effort and the wilderness designations included in the Wilderness Act itself, *see* 16 U.S.C. § 1132(a), Congress has designated approximately 35 million acres as wilderness lands, *see Wyoming*, 661 F.3d at 1222.

The Service by 2001 had inventoried as "roadless" 58.5 million acres of relatively undisturbed land nationwide that did not make the congressional wilderness-designation cut, an area constituting about a third of national forest lands and 2% of the land mass of the continental United States. *See id.* at 1222, 1225;

Special Areas; Roadless Area Conservation (2001 Roadless Rule), 66 Fed. Reg. 3244, 3245-46 (Jan. 12, 2001). Before 2001, the Service regulated those inventoried roadless areas under governing forest plans, dictating their use and development on a local, "site-specific basis," with no nationwide management standards. *Wyoming*, 661 F.3d at 1222; *see* 66 Fed. Reg. at 3246. During that time, roadbuilding degraded approximately 2.8 million acres of inventoried roadless areas. 66 Fed. Reg. at 3246.

Concerned about further degradation, the Service promulgated the 2001 Roadless Rule, a national roadless policy that looked at "the 'whole picture' regarding the management of the National Forest System." *Id.* at 3246. Subject to preexisting permits, the 2001 Roadless Rule generally "prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because [those activities] have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics." *Id.* at 3244. By "roadless area characteristics," the Service refers not only to the absence of roads as such, but also to beneficial environmental features typical of roadless areas or otherwise relatively undisturbed forest lands, such as high-quality and undisturbed soil, water, and air; plant and animal diversity and habitat for various sensitive categories of species; and scenic and cultural properties. *See id.* at 3245.

In 2005, the Service again changed course, shifting to a state-centered regime for managing roadless areas

by inviting states to petition for federal approval of state-specific management approaches to inventoried roadless lands within their borders. *See Special Areas; State Petitions for Inventoried Roadless Area Management* (State Petitions Rule), 70 Fed. Reg. 25,654 (May 13, 2005). The State Petitions Rule was short-lived. In response to challenges by a handful of Western states and many environmental organizations, the Ninth Circuit sustained a district court order enjoining the State Petitions Rule because it had been adopted without the requisite environmental analysis under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, as enforced through the Administrative Procedures Act (APA), 5 U.S.C. §§ 701 *et seq.*, and without consultation about potential effects on endangered species as required by the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq. See Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011-19 (9th Cir. 2009), *aff'ing Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006). The court order reinstated the 2001 Roadless Rule that had previously been in force nationwide. *See id.* at 1019-21.

By that time, however, the State of Colorado already had seized the opportunity to request federal approval of management of its 4.2 million acres of roadless areas in a manner tailored to state needs. The State created a bipartisan task force in 2005 to compile recommendations for a Colorado-specific roadless-area management rule. In 2006, Colorado filed a petition for rulemaking with the Service. By the time Colorado filed its petition, the Ninth Circuit had struck down

the State Petitions Rule and reinstated the 2001 Roadless Rule, *Cal. ex rel. Lockyer*, 575 F.3d at 1020-21, but Colorado submitted its rulemaking petition under both the State Petitions Rule, in the event it was later reinstated, and section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e), in case the State Petitions Rule remained invalid, as it has to date. Colorado's petition requested, as relevant here, a roadless area "boundary adjustment" to eliminate a relatively small area of overlap of designated ski areas and roadless lands by excluding those overlapping portions from roadless inventory. Colorado Roadless Petition (2006) at 7, 17, J.A. 232, 242.

After a lengthy rulemaking process involving numerous layers of environmental review, broad public participation, and consideration of four alternatives, the Service promulgated the 2012 Colorado Rule. *Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado*, 77 Fed. Reg. 39,576 (July 3, 2012). The 2012 Colorado Rule emphasized the need to "provide for the conservation and management of roadless area characteristics," especially from tree cutting or removal and road construction, but also revised the inventory and management of roadless lands in Colorado based on Colorado's representation that "flexibility is needed to accommodate State-specific situations and concerns in Colorado's roadless areas." *Id.* at 39,577. The 2012 Colorado Rule displaces for that

State the nationwide 2001 Roadless Rule.[1] *See* 36 C.F.R. § 294.48(g).

In some ways, the 2012 Colorado Rule is more protective than the national rule. For example, it adds 409,500 new acres to the Colorado roadless inventory, 77 Fed. Reg. at 39,577, and designates more than a million acres of inventoried roadless areas as "upper-tier" roadless lands subject to more stringent restrictions on roadbuilding, tree cutting, and linear construction (such as power and telecommunication lines) than the national rule imposes, *see* 36 C.F.R. §§ 294.42(b), 294.43(b), 294.44(b); 77 Fed. Reg. at 39,577-78. The Service explicitly included those features "to offset the limited exceptions for Colorado-specific concerns so that the final rule is more protective than the 2001 Roadless Rule." 77 Fed. Reg. at 39,578.

The 2012 Colorado Rule has other, less protective features. For example, it makes certain exceptions from its road-building and timber-cutting prohibitions to facilitate wildfire management, *see* 36 C.F.R. §§ 294.42(c)(1)-(2), 294.43(c)(1)(vi)-(vii), and removes from the roadless inventory 459,100 acres the Service "determined to be substantially altered," 77 Fed. Reg. at 39,577-78. As pertinent here, and as requested by the State, the 2012 Colorado Rule also removed from the roadless inventory approximately 8,300 acres of land the Service already had designated "for ski area

[1] Idaho is the only other State subject to a state-specific roadless rule. *See Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho*, 73 Fed. Reg. 61,456 (Oct. 16, 2008); *see also Jayne v. Sherman*, 706 F.3d 994 (9th Cir. 2013).

management" through special-use permits or forest plans. *Id.* at 39,578.

The Service explained in the preamble to the final rule its reasons for adopting the ski-area exclusion – the centerpiece of this case. *Id.* According to the Service, the twenty-two ski areas located in part on public lands managed by the Service "received about 11.7 million skier visits during the 2010-2011 ski season" and "Colorado skiers spend about $2.6 billion annually, about one third of the annual tourist dollars spent in the State." *Id.* The Service noted that the existing roadless inventory encompassed lands within parts of thirteen ski areas that also fall within a permit boundary (about 6,600 acres) or an area that a forest plan allocates for management as a ski area (about 1,700 acres). *Id.* at 39,578, 39,594. Those 8,300 acres amount to less than 0.2% of Colorado's inventoried roadless areas. *Id.* at 39,578. The Service also asserted that the 8,300 acres at issue here "include [] roadless acres with degraded roadless area characteristics due to the proximity to a major recreational development." *Id.* The ski-area exclusion, the Service reasoned, "will ensure future ski area expansions within existing permit boundaries and forest plan allocations are not in conflict with desired conditions provided through the final rule and address one of the State-specific concerns" Colorado identified. *Id.* The Service emphasized, however, that the 2012 Colorado Rule does not constitute approval of any future ski-area expansions; such

expansions remain subject to "site-specific environmental analysis, appropriate public input, and independent approval." *Id.*

B.

In 2003, Intervenor Aspen Skiing Company sought permission from the Service to construct a trail for skier egress from Burnt Mountain, the easternmost portion of the Snowmass Ski Resort. The Company sought to build the egress trail across part of an eighty-acre portion of Burnt Mountain that the Service previously had inventoried as roadless. Plaintiff Ark Initiative challenged the Service's Environmental Assessment for that project under NEPA and prevailed before the agency on the ground that the assessment failed to analyze the project's anticipated impact on the area's roadless characteristics. In August 2013, after promulgating the 2012 Colorado Rule, the Service completed a new Environmental Assessment for the proposed Burnt Mountain trail. The Service explained that the 2012 Colorado Rule had removed the roadless designation from the acreage at issue because it was within the boundaries of an existing ski-permit area, but nonetheless considered whether the trail would affect the area's roadless characteristics and determined that it would not. *See* Snowmass Ski Area Environmental Assessment for the Burnt Mountain Egress Trail (Aug. 2013) at 3-18 to 3-20, J.A. 675-77. In particular, the Service determined that other applicable standards and guidelines adequately would protect the area's soil, water, and air resources, and its plant and

animal diversity, among other features. In September 2013, the Service approved the egress trail project, concluding that the Environmental Assessment sufficed, so no Environmental Impact Statement (EIS) was warranted, and again noting that the area at issue is no longer "located in [a] designated inventoried roadless area." 2 Burnt Mountain Decision Notice and Finding of No Significant Impact (Sept. 2013) at RTC-5, J.A. 759. Ark appealed that decision within the agency, and the Service affirmed.

Ark Initiative and another environmental organization, Rocky Mountain Wild, and two individual plaintiffs who frequent Burnt Mountain to enjoy its aesthetic and recreational qualities (together, Ark or the plaintiffs) challenged the Service's decision in federal district court under the Wilderness Act, NEPA, and the APA. As relevant to this appeal, Ark alleged that the Service's application of the 2012 Colorado Rule to the egress-trail proposal was arbitrary and capricious and in violation of agency policy because the Service had conducted no site-specific inquiry into the area's on-the-ground conditions before excluding it from the roadless inventory. If the Service had acknowledged the relatively undeveloped character of the Burnt Mountain acreage, Ark asserted, the Service would have been required by its own policy to keep the acreage in the roadless inventory. Ark also contended that, by failing to send it individualized notice of the proposed 2012 Colorado Rule, the Service violated NEPA's notice requirements.

On August 18, 2014, the District Court granted summary judgment to the Service and the Company, denying Ark's cross-motion. *Ark Initiative*, 64 F. Supp. 3d at 110. The court concluded that the Service proffered sufficient justifications for the ski-area exclusion: facilitating recreational use of the land; assisting Colorado's ski industry, an important source of revenue for the State; reducing land-management conflicts and confusion for the ski industry; responding to a request by the State; removing degraded areas from the roadless inventory; and making only a minor impact on the State's overall roadless management. *Id.* at 102-04. The Service had not deviated from its roadless policy in the manner Ark contended, the court explained, because even if the agency handbook on which Ark relied governed roadless inventorying as well as wilderness designation (the Service contends it does not), the Handbook explicitly applies only to placement in the inventory of roadless or potential wilderness lands, not to ongoing management of that inventory. *Id.* at 104-05. The court also rejected the contention that Ark was entitled to individualized notice of the 2012 Colorado Rule and related NEPA proceedings, highlighting that the Service went to great lengths to notify and involve the public in its six-year decision-making process for the rule and received approximately 312,000 public comments. *Id.* at 109-10. The plaintiffs timely appealed to this court.

II.

A.

The question before us is of a type ubiquitous to administrative law: Whether the Colorado rule is permissible under federal law, not whether we believe as a matter of environmental policy it is the best rule, or even a good one. We review *de novo* the District Court's grant of summary judgment and may affirm on any ground properly raised and supported by the record. *See Ark Initiative v. Tidwell*, 749 F.3d 1071, 1074 (D.C. Cir. 2014).

Ark challenges the 2012 Colorado Rule under the APA as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of judicial review under the arbitrary-and-capricious standard "is narrow and a court is not to substitute its judgment for that of the agency," but the court must confirm that the agency has fulfilled its duty to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the

agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* A reviewing court may not "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). But a court "will . . . 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

The 2012 Colorado Rule in general, and its ski-area exclusion in particular, reflect a change in agency policy, as the Service acknowledged in promulgating the rule. The Service stated that the new, State-specific rule "adjusted roadless area boundaries from the 2001 inventory" in several ways, such as by "[e]xcluding ski areas under permit or lands allocated in forest plans to ski area development." 77 Fed. Reg. at 39,576. The agency, for the first time, made a "statewide policy decision that roadless areas not overlap with ski areas," and accordingly removed the 8,300 qualifying acres from the roadless inventory. *Ark Initiative*, 749 F.3d at 1077.

Where an agency changes a policy or practice, it "is obligated to supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42. But no specially demanding burden of justification ordinarily applies to a mere policy change. *See FCC v. Fox*, 556 U.S. 502, 514-16 (2009). An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the

new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* at 515. When a "new policy rests upon factual findings that contradict those which underlay its prior policy," however, an agency must offer a "more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* As discussed below, no elevated burden of justification applies to the Service's decision because, in approving the 2012 Colorado Rule, the Service made no new factual findings contradictory to those supporting the nationwide 2001 Roadless Rule. Consistent with the holding of the district court, and contrary to Ark's contention, we conclude that the agency's decision was valid and non-arbitrary.

The Service lawfully exercised its "broad discretion to determine the proper mix of uses permitted within [national forest] lands." *Wyoming*, 661 F.3d at 1268. There is no question that the Service's decision to include in its management of Colorado's forests some limited accommodation of recreational skiing, together with new, offsetting environmental protections, is permissible under the multiple-use mandates reflected in the Organic Act, the Multiple-Use Sustained-Yield Act, and the National Forest Management Act. *See, e.g.*, 16 U.S.C. §§ 528-529 (requiring administration of National Forest System lands for multiple uses, including recreation); *id.* § 1604(e)(1) (requiring forest plans to accommodate multiple uses, including recreation). Those statutes simply do not constrain the

Service's discretion to shift its designation and treatment of once-inventoried roadless lands, as it did in approving the 2012 Colorado Rule. Indeed, "[n]othing in th[e] [National Forest Management Act] or any other federal statute obligates the Forest Service to manage inventoried roadless areas as a distinct unit of administration or resource value." *Lockyer*, 575 F.3d at 1006.

More to the point, the Service's explanation for its policy change passes muster under the APA. The Service based its decision on Colorado's expressed interests in regulating "long-term management of [Colorado's inventoried roadless areas] to ensure roadless area values are passed on to future generations, while providing for Colorado-specific situations and concerns that are important to the citizens and economy of Colorado." 77 Fed. Reg. at 39,577; *see also id.* at 39,590.

The record supports the Service's concern that on-the-ground management conflicts could arise at the boundaries of roadless lands and ski areas, and the Service reasonably relied on the importance of recreational skiing to Colorado's economy. It noted that ski areas sited in part on public lands managed by the Service attract millions of skiers a year, and that Colorado skiers spend about a third of the approximately $8 billion in tourist dollars the State attracts annually. 77 Fed. Reg. at 39,578. A relatively small number of acres subject to overlapping roadless and ski-area designations under the 2001 Roadless Rule affected thirteen ski areas, the Service explained, and the exclusion aims to avoid management conflict and confusion resulting from that dual designation. *Id.*

The marginal and limited character of the boundary adjustment helped to justify the Service's treatment of it. The ski-area exclusion applies to only 0.2% of all previously inventoried roadless areas in the State, thus on the whole only minimally affecting Colorado's roadless acreage. *Id.* Approximately 6,600 of those 8,300 acres had already been grandfathered under special-use permits exempting them from roadless-area development prohibitions, whether in the 2012 Colorado Rule, *see* 36 C.F.R. § 294.48(a), or the 2001 Roadless Rule, *see* 36 C.F.R. § 294.14(a), *invalidated by* 70 Fed. Reg. 25,654 (May 13, 2005), *reinstated by Cal. ex rel. Lockyer*, 575 F.3d at 1020-21. It was thus only the remaining 1,700 overlapping acres, zoned for skiing under forest plans but not covered by special-use permits, which – but for the challenged ski-area exclusion – would have been subject to the full protections against roadbuilding and timber removal associated with roadless designation. *See* 77 Fed. Reg. at 39,594. The Service determined that the limited overlap, which may have been the inadvertent result of imprecise mapping, could hamper ski-area maintenance and expansion.

Importantly, and also contrary to Ark's contention, the Service addressed how the rule taken as a whole would fulfill the Service's conservation mandate. The 2012 Colorado Rule contains increased protections in the form of new acreage added to the State's roadless inventory, and a new and more restrictive upper-tier designation for some roadless lands. Those provisions

were included to "offset the limited exceptions for Colorado-specific concerns so that the final rule is more [environmentally] protective than the 2001 Roadless Rule." *Id.* at 39,578.

The Service's reasoning that the excluded acreage "include[s] roadless acres with degraded roadless area characteristics due to the proximity to a major recreational development," *id.*, does little to aid our review, because it lacks a factual basis in the record, and the Service's invocation of that rationale is ambiguous at best. The agency has made no attempt to identify the location, scope, or degree of any such degradation within the ski-area exclusion. Indeed, elsewhere in its preamble to the 2012 Colorado Rule, the Service asserted that the rule excludes other lands that have been "substantially altered *and* 8,300 acres for ski area management," suggesting that the 8,300 ski-area acres at issue were not among the acres removed on the basis of their degraded condition. *Id.* at 39,577-78 (emphasis added). The lack of any clear showing of degradation is of no moment, however, as the balance of the Service's reasoning adequately supports the challenged exclusion.

Colorado's concern for aligning the boundaries of ski areas and roadless acreage, the relatively small amount of land affected by the ski-area exclusion, and the rule's substantial offsetting measures provide sufficient, non-arbitrary grounds for the rule. We need not accept the bare fact that "the State of Colorado asked for it" as sufficient justification for the ski-area exclusion, Br. of Federal Appellees 20, because Colorado is

well situated to identify factors supporting desirable combinations of forest-land use within its borders and has done so here. The reasons the Service has provided for accepting Colorado's proposal need not be "so precise, detailed, or elaborate as to be a model for agency explanation" in order for us to hold that they are "the sort of reasons an agency may consider and act upon." *Fox*, 556 U.S. at 538 (Kennedy, J., concurring in part and concurring in the judgment).

Invoking the Ninth Circuit's recent *en banc* decision in *Organized Village of Kake v. U.S. Department of Agriculture*, 795 F.3d 956, 959 (9th Cir. 2015), Ark accuses the Service of an unjustified about-face in its factual assessment. Ark argues that the Service opted in the 2001 Roadless Rule not generally to exempt ski areas and therefore was required when it exempted ski-area acreage from the 2012 Colorado Rule to "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox*, 556 U.S. at 515. We disagree. To begin with, *Kake* is not binding on this court, and we take no position here on whether we agree with that decision. In any event, as noted above, *Fox* demands enhanced justification where a policy change rests on factual findings that contradict the facts undergirding the prior policy, circumstances not present here. *Id.* The rule at issue in *Kake* created an exemption from the national 2001 Roadless Rule for the 16.8 million acre Tongass National Forest that the prior rulemaking had specifically considered and rejected, and it did so by making new, contradictory factual findings without any additional environmental

analysis or material change in "the overall decisionmaking picture." 795 F.3d at 962 (internal quotation marks and citation omitted); *see id.* at 959-60. The 2012 Colorado Rule, in contrast, was based on an entirely new record, including a new EIS, and supported with new, State-specific findings. None of the Colorado findings conflicts with the findings underlying the nationwide 2001 Roadless Rule, which looked at "the 'whole picture' regarding the management of the National Forest System," 66 Fed. Reg. at 3246; *see id.* at 3246-48, and which, the Service even then acknowledged, could affect states differently, *id.* at 3264. No enhanced justification was required for the Service's State-specific ski-area exclusion. *Cf. Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037-38 (D.C. Cir. 2012) (more detailed justification is unnecessary where "petitioners cannot point to any new findings, let alone contradictory ones, upon which EPA relied").

Ark further contends that the Service acted arbitrarily because, Ark asserts, it deviated from the inventory criteria embodied in chapter 70 of its Land Management Planning Handbook by adopting the ski-area exclusion without regard to the affected areas' on-the-ground conditions. *See* Chapter 70, FSH 1909.12 Land Management Planning Handbook (2007 Handbook), J.A. 300-31; *see National Forest System Land Management Planning Directive for Wilderness Evaluation*, 72 Fed. Reg. 4478 (Jan. 31, 2007). Ark contends that the Service's decisions regarding management of roadless areas must be determined solely by "objective criteria" specified in the Handbook. Br. of Appellants

40. Those criteria, which appear to derive from the Wilderness Act's inventorying directive to a different agency responsible for national park land, *see* 16 U.S.C. § 1132(c), require the inventorying of any area that contains no forest roads, "contain[s] 5,000 acres or more," or is at least: contiguous to existing wilderness; a self-contained ecosystem; or subject to preservation "due to physical terrain and natural conditions," 2007 Handbook at 16-17, J.A. 302-03. The Service must inventory and manage as roadless any land that fits that objective description, Ark suggests, and it violated the APA by failing to do so here.

Ark's contentions are off-base, however, because – consistent with the Wilderness Act, 16 U.S.C. § 1132(c) – the Handbook by its own terms applies not to management of roadless inventory, but to the Service's initial inventorying of potential wilderness areas. Chapter 70 of the Handbook, entitled "Wilderness Evaluation," begins by stating that it "describes the process for identifying and evaluating potential wilderness," not any standards for conserving and managing roadless areas. 2007 Handbook at 15, J.A. 301. Ark's confusion likely stems from the fact that the Service identified much of today's roadless inventory as part of its effort under the Wilderness Act to compile a list of potential wilderness areas. *See Wyoming*, 661 F.3d at 1221-22. The "inventory of potential wilderness," the Handbook explains, is "completed with the express purpose of identifying all lands that meet the criteria for being evaluated for wilderness suitability." 2007 Handbook at 15-16, J.A. 301-02.

The Handbook itself seeks to clarify the Service's nomenclature: "Areas of potential wilderness identified through this [inventorying] process are called potential wilderness areas." *i.e.*, not roadless inventory. *Id.* at 15, J.A. 301. "This inventory of potential wilderness is not a land designation, nor does it imply any particular level of management direction or protection in association with the evaluation of these potential wilderness areas." *Id.* In adopting the current version of the Handbook in 2007, the Service took further pains to spell out that "the term 'potential wilderness areas' is used to avoid confusion with the term 'inventoried roadless area' used in the Roadless Area Conservation Rule. . . . The Roadless Area Conservation Rule definition is different from the criteria for 'potential wilderness areas.'" 72 Fed. Reg. at 4478.

Ark nevertheless urges that the Handbook, at least as the Service has applied it, does not mean what it says. Ark emphasizes in particular the Service's mention of the Handbook in its response to comments on the proposed 2012 Colorado Rule. Some commenters questioned the Service's denial of the oil-and-gas industry's request for an exclusion of acreage with high oil-and-gas development potential, while others questioned the Service's failure to prohibit oil-and-gas leasing altogether. *See* 77 Fed. Reg. at 39,588. Ark highlights that, in response to such comments, the Service stated: "Roadless inventory procedures follow Forest Service Handbook 1909.12, Land Management Handbook procedures. Whether or not an area is identified as having high mineral potential is not an

inventory criterion." *Id.* Ark contends that the Service thereby applied the Handbook to "preclude[]" an exclusion for oil-and-gas lands, and similarly should have denied the ski-industry exclusion. Br. of Appellants 49.

The Service permissibly reads its own statement differently than does Ark, as a description of the background factors that bore on its initial inventorying of lands as roadless. The presence of lands in the roadless inventory, the 2012 Colorado Rule preamble points out, simply did not depend on facilitating or prohibiting oil-and-gas development, and it was against that backdrop that the Service defended its decision to leave existing oil-and-gas leases largely undisturbed, neither supplementing leasing rights by excluding oil-and-gas-rich lands from roadless inventory, nor invalidating existing leases in the name of strengthening environmental protection of roadless lands. In light of the record and the deference we owe to the Service, we cannot credit Ark's claim of a "longstanding agency policy and practice" reflected in the Handbook that "preclude[s]" or "foreclose[s]" the Service from removing the ski area lands from roadless inventory. Br. of Appellants 49, 51.

Ark further contends that the Service arbitrarily distinguished between similarly situated industries because it granted ski-area boundary adjustment sought by the State while denying the oil-and-gas industry's requested exclusions. The record shows otherwise. The Service recognized that the ski-area boundary adjustment affected only 8,300 acres of land.

77 Fed. Reg. at 39,578. The oil-and-gas industry's requested exclusion, in contrast, would have removed at least 150,000 acres from the roadless inventory. *See* 1 Final EIS 2012 Colorado Rule at 85, J.A. 431 (listing leased oil-and-gas lands within Colorado's inventoried roadless areas); *see also* 77 Fed. Reg. at 39,578 (noting that there are nearly 900,000 acres classified as having high or moderate-to-high oil-and-gas potential within Colorado's inventoried roadless areas). The Service credited the offsetting protections of the 2012 Colorado Rule as a factor in the acceptability of the ski-area exclusion, 77 Fed. Reg. at 39,578, but those added protections would have been dwarfed by the scope of the requested oil-and-gas exclusion. Accordingly, the Service's decision to exclude from the roadless inventory marginal portions of designated ski areas, but not vast swaths of oil-and-gas lands, was not arbitrary and capricious.

B.

Ark and the two individual plaintiffs also contend that, by failing to send them individualized notice of the rulemaking and NEPA proceedings relating to the 2012 Colorado Rule, the Service violated NEPA's scoping regulations, 40 C.F.R. §§ 1501.7(a)(1), 1506.6(b)(1)-(3). As the District Court aptly recounted, both Colorado and the Service made "impressive efforts to reach out to the public as it worked out the contours of the Colorado Rule." *Ark Initiative*, 64 F. Supp. 3d at 110. Those efforts included: five formal

public-involvement processes, generating 312,000 public comments; the creation of a bipartisan task force in Colorado which held more than a dozen meetings and considered more than 40,000 public comments; publication of numerous notices in the Federal Register; and three open meetings of the Roadless Area Conservation National Advisory Committee. *See* 77 Fed. Reg. at 39,581. It is difficult to see how any person or organization with more than a passing interest in the rulemaking could have missed a chance to participate.

Ark's claim that it was entitled to individualized notice falls short because none of the cited regulations demands any such notice to entities in Ark's circumstances. Section 1501.7(a)(1) provides that, in determining the scope and significance of issues to be addressed in a NEPA process, an agency "shall . . . [i]nvite the participation of" various affected governments, agencies, and entities, as well as "other interested persons (including those who might not be in accord with the action on environmental grounds)." 40 C.F.R. § 1501.7(a)(1). Ark argues that its successful administrative challenge to the Environmental Assessment for the Burnt Mountain egress trail in 2006, which turned on the agency's failure to evaluate the area's roadless characteristics, rendered it an "interested" person under § 1501.7(a)(1) with the same rights as the plaintiff in *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588 (9th Cir. 1988). But, as the District Court recognized, *Ark Initiative*, 64 F. Supp. 3d at 109, Ark's partial and local administrative victory concerning development on a

single parcel of roadless land, years before the Service's state-wide rulemaking, is a far cry from the interest of the plaintiff organization in *Lyng* "as a litigant earlier in th[at] action" – the very action that successfully mandated the new EIS of which the organization sought notice. *Lyng*, 844 F.2d at 595. Were we to accept Ark's sweeping claim that NEPA requires the Service "to give personal notice to *any* interested parties of *any* decision that will affect their interests, irrespective of whether such entities have ever previously litigated over the decision in question," Brief of Appellants 63, NEPA proceedings would regularly, and often senselessly, be derailed for lack of notice.

Section 1506.6 provides that agencies "shall mail notice" of NEPA proceedings both "to those who have requested it on an individual action," 40 C.F.R. § 1506.6(b)(1), and to "national organizations reasonably expected to be interested in the matter," *id.* § 1506.6(b)(2), and that notice "may" be given in various ways to specified types of potentially interested groups or individuals for actions "with effects primarily of local concern," *id.* § 1506.6(b)(3). By its terms, section 1506.6(b)(1) only applies to requested notice about "an individual action," and not to open-ended requests for notice of any actions that could in any way affect a given plot of land, such as the general request Ark purports to have made here with respect to Burnt Mountain. Ark has made no showing that it qualifies as a national organization under section 1506.6(b)(2) or that it falls within the few categories of entities listed in section 1506.6(b)(3), which for the most part does

not contemplate individualized notice in any event. The Service's failure individually to invite Ark to participate in NEPA or rulemaking proceedings thus did not run afoul of any NEPA notice requirement.

* * *

For the foregoing reasons, we affirm the judgment of the District Court.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5259 **September Term, 2015**
FILE ON: MARCH 8, 2016

ARK INITIATIVE, ET AL,
APPELLANTS

v.

THOMAS L. TIDWELL, CHIEF,
U.S. FOREST SERVICE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-00633)

Before: BROWN, KAVANAUGH and PILLARD, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: March 8, 2016

Opinion for the court filed by Circuit Judge Pillard.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE ARK INITIATIVE, *et al.*, **Plaintiffs,** **v.** **THOMAS TIDWELL, Chief, United States Forest Service, *et al.*,** **Defendants,** **and** **ASPEN SKIING COMPANY,** **Intervenor-Defendant**	**Civil Action No. 14-633 (JEB)**

MEMORANDUM OPINION

(Filed Aug. 18, 2014)

The modern administrative state reaches just about everywhere. Even, as this case demonstrates, into the wilds of the Colorado Rockies.

Federal rules create two special classes of protection for the national forests: "wilderness areas" and "roadless areas." Designating a parcel "roadless" makes it harder to cut down trees there; "wilderness" makes it harder still. This case involves a decision by the United States Forest Service to remove the "roadless" designation from approximately 8,300 acres of land in Colorado that fall inside the boundaries of permitted ski areas. Having removed that classification,

the Service then authorized Aspen Skiing Company to fell trees on approximately 80 acres of that formerly "roadless" land in order to build a new ski trail.

Plaintiffs – two environmental groups and two individuals – filed suit to challenge both the removal of the "roadless" designation from the 8,300 acres and the approval of the 80-acre construction project. They claim that the Service's actions contravened the Administrative Procedure Act, the Wilderness Act, and the National Environmental Policy Act. Defendants – joined by Aspen as an Intervenor – contend that Plaintiffs lack standing to bring such challenge and that the agency violated no law. The parties have now cross-moved for summary judgment.

The Court concludes that Plaintiffs do have standing to bring this case, but that their claims are fatally flawed on the merits. Although Plaintiffs offer several worthy challenges to the Service's actions, in the end, the agency made its decision in accordance with the law and following a multi-year, comprehensive, public process. Plaintiffs may have good policy arguments against removing environmental protections from the land in question or approving Aspen's ski trail, but this Court cannot overturn the Service's decisions unless they were unlawful. As they were not, the Court will grant Defendants' and Intervenor's Motions and dismiss this case.

I. Background

A. The Law of the Wild

Congress passed the Wilderness Act in 1964, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131-1136), directing the Forest Service within the next ten years to review whether certain areas in the National Forest System were suitable "for preservation as wilderness." 16 U.S.C. § 1132(b). The Service was to report those findings to the President, who, in turn, would advise Congress on his recommendations on which regions should be officially designated "wilderness areas." *See id.*, § 1132(a)-(b). The Act defines "wilderness" as:

> [A]n area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

Id., § 1131(c). Only Congress has the power to designate a wilderness area. *See id.*, § 1131(a); *Wyoming v.*

Dept. of Agric., 661 F.3d 1209, 1221 (10th Cir. 2011). The moniker confers special legal protections on the land in order to ensure that such places remain, as the Act poetically describes, "area[s] where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S.C. §§ 1131(c) & 1133.

On the Service's second attempt to follow through with the Wilderness Act's command, an undertaking known as the "Roadless Area Review and Evaluation project" (RARE II), it finally completed the inventory in 1979, describing the 62 million acres of prospective wilderness regions it had identified as "roadless areas." *Wyoming*, 661 F.3d at 1221-22; CRR-023380.[1] Based on the Service's report and the President's recommendations, Congress ultimately designated a total of 35 million acres of such land as wilderness, *see Wyoming*, 661 F.3d at 1222, including approximately 1.4 million acres in Colorado. *See* Colorado Wilderness Act, Pub. L. No. 96-560, § 102, 94 Stat. 3265, 3265-68 (1980).

Around the same time, in 1976, Congress passed the National Forest Management Act, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.), which instructs the Forest Service to create and continuously update "land and resource management plans" – also known as "Forest

[1] Because there are two agency decisions at issue in this case – the promulgation of the Colorado Rule and the approval of the Egress-Trail Project – there are two administrative records. The record for the Colorado Rule is denoted with the citation "CRR," and the record for the Egress-Trail Project is denoted "BME."

Plans" – for each unit of the National Forest System. 16 U.S.C. § 1604(a). Per the Service's own regulations, part of the Forest Plan development process includes an evaluation of a unit's suitability as a wilderness or roadless area. *See* CRR-008859; 36 C.F.R. § 219.27(b) (2001); 36 C.F.R. § 219.17(a) (1982).

Particularly relevant to this case is the Service's 1997-2002 evaluation of the White River National Forest in Colorado. There, the Service identified "90 roadless areas . . . totaling 640,000 acres." BME-04668. "Of these 90 areas, 37 (totaling approximately 298,000 acres) were found capable and available for recommended wilderness. The remaining 53 areas were identified as roadless but lacking sufficient wilderness characteristics." *Id.* As part of this evaluation, the Service determined that a 1,700-acre parcel of land within White River known as "Burnt Mountain," which included the 80 acres of land inside the Snowmass ski-permit area that is the subject of Plaintiffs' Complaint, was "roadless" but not suitable for designation as "wilderness." *See* BME-01041, 04225-26, 04633.

B. Roadless Rules

After Congress reviewed the Forest Service's RARE II report and designated certain regions as "wilderness areas," the agency was left with a large inventory of "roadless areas" that, while not officially designated "wilderness," were still "worthy of some level of protection." *Wyoming*, 661 F.3d at 1222. For the first several years, then, the Service managed roadless

lands on a site-specific, individual basis, *see* BME-04666, forbidding industrial development in some areas, while allowing it in others. *See Wyoming*, 661 F.3d at 1222; *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1105 (9th Cir. 2002), *abrogated in part on other grounds by, Wilderness Society v. Forest Service*, 630 F.3d 1173, 1180 (9th Cir. 2011).

In 2001, however, the Service decided to take a broader, national approach to the management of its roadless inventory. It thus promulgated a "Roadless Area Conservation Rule," which sought "to provide, within the context of multiple-use management, lasting protection for inventoried roadless areas within the National Forest System." 66 Fed. Reg. 3,244, 3,272 (Jan. 12, 2001). The Rule prohibited, with a few exceptions, road construction and timber removal on approximately 58.5 million acres of roadless areas across the country "identified in a set of inventoried roadless area maps." *Id.* at 3,244; *see also id.* at 3,272-73; BME-04667. "These nationally-applied prohibitions superceded [*sic*] the management prescriptions for roadless areas applied through the development of individual forest plans." CRR-023382.

The maps of the 58.5 million acres subject to the Roadless Rule were based on the Service's 1979 RARE II inventory of prospective wilderness areas – *i.e.*, the leftover land that Congress had not designated as wilderness – along with some regions that the Service had subsequently designated as roadless as part of its Forest Plan development process. *See* 66 Fed. Reg. at 3,246. The Service made clear that although the Rule

was intended to conserve roadless areas, it would not afford the same protection as a "wilderness" designation: "The Roadless Area Conservation rule, unlike the establishment of wilderness areas, will allow a multitude of activities including motorized uses, grazing, and oil and gas development." *Id.* at 3,249. In effect, this created three levels of protection for land in the National Forest System. "Wilderness" receives the most protection, "roadless" the second most, and land with no designation the least. *Cf. Ark Initiative v. Tidwell*, 895 F. Supp. 2d 230, 240 (D.D.C. 2012) ("'Roadless area' . . . is a heightened designation, presumably meaning that cutting trees in a national forest is easier than cutting trees in a roadless area."), *aff'd*, 749 F.3d 1071 (D.C. Cir. 2014).

The Roadless Rule quickly became a target for litigation. *See* BME-04667; *Wyoming*, 661 F.3d at 1226. In 2005, the Forest Service decided to change tacks and adopt a more federalist approach to roadless-area management. It promulgated a "State Petitions Rule," which invited state governors to petition for state-specific regulations that would govern the roadless areas within their jurisdictions. *See* 70 Fed. Reg. 25,654, 25,654 (May 13, 2005); *id.* at 25,661. The Governor of Colorado took the Forest Service up on that invitation, and after a six-year rulemaking process, *see Ark Initiative*, 895 F. Supp. 2d at 234, the agency in 2012 finally promulgated a special roadless-area management rule specifically for the Rocky Mountain

State: the "Colorado Roadless Areas Rule." *See* 77 Fed. Reg. 39,576, 39,577 (July 3, 2012).[2]

Graced with some of this continent's most impressive mountain ranges, Colorado is, not coincidentally, also home to some of the nation's most sought-after ski terrain. In fact, front and center in this dispute is the Colorado Rule's so-called "Ski Area Exclusion." The Forest Service's 2001 Roadless Rule had previously classified as "roadless" approximately 8,300 acres of land in Colorado that had also been allocated to ski-area special uses. *See* 77 Fed. Reg. at 39,578; CRR-008863, 008897, 009654. Acquiescing in the requests of three successive Colorado Governors, *see* CRR-00863, 00897, 009654, the Colorado Rule removed the roadless classification from those 8,300 acres. *See* 77 Fed. Reg. at 39,578. "In other words, if a previous roadless area lay in a permitted ski area, its roadless designation was removed." *Ark Initiative*, 895 F. Supp. 2d at 235. This included the 80 acres of land in Snowmass at issue in this case. *See* BME-04631, 04673.

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[2] Although the Ninth Circuit subsequently struck down the State Petitions Rule and reinstated the 2001 Roadless Rule, *see California ex rel. Lockyer v. Dept. of Agric.*, 575 F.3d 999, 1020-21 (9th Cir. 2009), Colorado submitted its petition pursuant to *both* the State Petitions Rule *and* § 553(e) of the APA. *See* CRR-008884. Accordingly, despite the fact that the State Petitions Rule was struck down, Colorado remains subject to the state-specific rules promulgated in response to its petition under § 553(e). Aside from Idaho, roadless areas in all other states are currently governed by the 2001 Roadless Rule. *See* BME-04667.

The instant lawsuit involves a challenge to the legality of the Ski-Area Exclusion. Plaintiffs are concerned because, by removing the "roadless" designation from forests that fall within ski-area boundaries, the Service made it easier for companies like Aspen Skiing to cut down those trees. *See Ark Initiative*, 895 F. Supp. 2d at 240.

C. The Burnt Mountain Skier-Egress-Trail Project

In 2003, nine years before the issuance of the Colorado Rule, Aspen Skiing asked the Forest Service for permission to construct the "Burnt Mountain Skier Egress Trail" in the Snowmass Mountain Ski Area. *See* BME-00001. Aspen hoped that the Egress Trail would improve safety and convenience for skiers cruising in the "Burnt Mountain Glades," *see* BME-04635, a set of ski trails in Snowmass that was the subject of prior litigation before this Court. *See id.*; *Ark Initiative*, 895 F. Supp. 2d at 235-36. This would require timber removal (cutting down trees) and construction in Burnt Mountain, which, at the time, was a 1,600-acre designated roadless area. The trees stand on 80 acres of Burnt Mountain that lie within the Snowmass boundaries, where the Trail would be located. *See* BME-00001, 04225, 04673; 77 Fed. Reg. at 39,611. The Forest Service authorized Aspen to construct the Egress Trail in February 2006. *See* BME-04818-912.

Two months later, in April 2006, two of the Plaintiffs in this case – The Ark Initiative and Donald Duerr

– along with several other parties, filed an administrative appeal within the Forest Service requesting review of the agency's decision to approve the Trail. *See* BME-03261-458. That appeal was successful; the Service found that, because the Egress Trail fell within the Burnt Mountain roadless area, the decision to approve it required additional analysis of the "impacts" the Trail would have on the region. BME-03535. The 2006 Appeal Decision therefore ordered the Service to prepare a new environmental assessment on the matter, before any work could begin on the project. *See id.*

Seven years later, in August 2013, the Service completed that assessment. *See* BME-04621-732. Although, as the Service emphasized, *see* BME-04825, the 2012 Colorado Rule had in the interim removed the "roadless" designation from the 80-acre area in question – because it fell within the boundaries of the Snowmass ski-permit area – the Service nevertheless analyzed the Trail's potential impacts on the parcel's "roadless characteristics." *See* BME-04665-81. The Service concluded that even if the Egress Trail had fallen within a roadless area, it "would not affect the nine roadless area characteristics to the point of altering the characteristics of the Burnt Mountain [roadless area]." BME-04677. It therefore authorized Aspen to construct the Egress Trail. *See* BME-04818-912. That authorization is another subject of this litigation.

D. The Instant Case

In April 2014, Plaintiffs filed a three-count Complaint (and two months later, an Amended Complaint) challenging both the Ski-Area Exclusion contained in the Colorado Rule and the Service's approval of the Egress-Trail Project. Plaintiffs allege violations of the Administrative Procedure Act, the Wilderness Act, and the National Environmental Policy Act. *See* Am. Compl., ¶¶ 62-74. Plaintiffs, Defendants, and Intervenor have all cross-moved for summary judgment. Defendants and Intervenor have further moved to strike Plaintiffs' Amended Complaint. The briefing was completed on a somewhat expedited schedule as the tree-cutting is slated to begin imminently.

Before turning to the substance of the parties' arguments, the Court notes that Plaintiffs' briefs, and to some extent Defendants', contain a superfluity of footnotes, many of which are quite lengthy and advance substantive arguments distinct from and additional to those contained in the body text. In restricting the length of the parties' briefs, *see* Minute Order of June 4, 2014; Minute Order of June 26, 2014, the Court did not intend for them to simply reformat their pleadings by transferring text to single-spaced footnotes. This practice proves both highly distracting to the reader and a transparent effort to circumvent the Court's page limitations. The Court will therefore focus its analysis on those arguments the parties thought worthy enough to include in the main text of their pleadings.

II. Legal Standard

Challenges under the APA and NEPA proceed under the familiar "arbitrary and capricious" standard of review. *See* 5 U.S.C. § 706(2)(A); *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983). Although all three parties have filed Motions for Summary Judgment, the limited role federal courts play in reviewing such administrative decisions means that the typical Federal Rule 56 summary-judgment standard does not apply. *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006) (citing *Nat'l Wilderness Inst. v. United States Army Corps of Eng'rs*, 2005 WL 691775, at *7 (D.D.C. 2005)). Instead, in APA and NEPA cases, "the function of the district court is to determine whether or not . . . the evidence in the administrative record permitted the agency to make the decision it did." *Id.* (internal citations omitted). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and otherwise consistent with the standard of review. *See Bloch v. Powell*, 227 F. Supp. 2d 25, 31 (D.D.C. 2002) (citing *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977)).

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "narrow" standard of review – which appropriately encourages courts to defer to the agency's expertise, *see Motor Vehicle Mfrs. Ass'n of United States,*

Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) – an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). In other words, courts "have held it an abuse of discretion for [an agency] to act if there is no evidence to support the decision or if the decision was based on an improper understanding of the law." *Kazarian v. Citizenship and Immigration Services*, 596 F.3d 1115, 1118 (9th Cir. 2010).

It is not enough, then, that the court would have come to a different conclusion from the agency. *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003). The reviewing court "is not to substitute its judgment for that of the agency," *id.* nor to "disturb the decision of an agency that has examine[d] the relevant data and articulate[d] . . . a rational connection between the facts found and the choice made." *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013) (internal quotation marks and citation omitted). A decision that is not fully explained, moreover, may be upheld "if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

III. Analysis

The Court will begin its analysis by addressing Defendants and Intervenor's Motion to Strike the

Amended Complaint. It will then move on to their contentions concerning the Court's purported lack of jurisdiction to adjudicate this lawsuit. Finding those arguments wanting, the Court will finally take on the merits of the case.

A. Motion to Strike

The first issue the Court must resolve is the propriety of Plaintiffs' Amended Complaint. That seemingly innocuous point is particularly hard fought here because the pleading, although it does not add any new claims against Defendants, does include a new Plaintiff – the environmental group Rocky Mountain Wild – who is central to the question of Plaintiffs' standing to bring this case, a matter discussed further in the next section.

Rule 15(a)(1)(A) of the Federal Rules of Civil Procedure allows a party to amend its complaint as a matter of course before trial within "21 days after serving it." Plaintiffs filed their original Complaint on April 16, 2014. *See* ECF No. 1. Apparently due to some confusion in the Clerk's Office, however, Defendants and Intervenor were not served with that pleading until June 16 and 17. *See* ECF Nos. 28, 30; Sur-Reply, Exh. A (Emails). Plaintiffs filed their Amended Complaint on June 5, 2014. *See* ECF No. 16.

The Amended Complaint was therefore filed at least eleven days *before* Defendants and Intervenor were ever served with the original. The practice, in such cases, appears to favor allowing amendment. *See,*

e.g., *McIntrye v. United States*, No. 13-2404, 2014 WL 1653146, at *3 (M.D. Pa. Apr. 23, 2014) ("Since Plaintiff filed his Motion for Leave to File a Second Amended Complaint before Defendants were served with his original or Amended Complaint, we find that Plaintiff was not required to file a Motion for Leave to File a Second Amended Complaint."); *see also Little v. E. Dist. Police Station*, No. 13-1514, 2014 WL 271628, at *3 (D. Md. Jan. 22, 2014); *Park v. TD Ameritrade Trust Co.*, No. 10-188, 2010 WL 1410563, at *1 (D. Colo. Apr. 1, 2010); *Brown v. SCDC Kirland R & E*, No. 10-1169, 2010 WL 3940981, at *1 (D.S.C. Oct. 5, 2010). Because there is no indication that Plaintiffs deliberately manipulated the levers of judicial bureaucracy to engineer this result, the Court is inclined to follow that practice and permit their Amended Complaint.

Defendants and Intervenor object, however, that the Amended Complaint contravenes the parties' Joint Stipulation, approved by the Court at the very beginning of this case. *See* ECF No. 11; Minute Order, Apr. 28, 2014. There, they all agreed to set the litigation on a 97-day expedited schedule, specifying deadlines for the filing of the administrative record and cross-motions for summary judgment. *See* Joint Stipulation at 1-3. Plaintiffs filed the Amended Complaint on day 50 of that schedule and moved for summary judgment just two days later, leaving their opponents with only a few weeks to incorporate the new pleading into their cross-motions in order to meet the agreed-upon deadlines.

While this may well violate the spirit of Rule 15(a)(1)(A) and the Joint Stipulation, that agreement nowhere forbids Plaintiffs from filing an Amended Complaint. Rule 15(a)(1)(A), moreover, does not empower the Court to deny leave to amend on grounds of undue delay or prejudice) – it permits amendment "as a matter of course." *Cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) (laying out grounds to deny leave to amend under Rule 15(a)(2)). The letter of the law, which favors Plaintiffs' Amended Complaint, therefore wins the day. This outcome may unfortunately require Defendants and Intervenor to be more specific in joint stipulations that they enter in the future.

B. Jurisdiction

Having denied the Motion to Strike Plaintiffs' Amended Complaint and deemed that document filed, thereby adding Rocky Mountain Wild as a Plaintiff to this case, the Court next moves to the question of jurisdiction. The Amended Complaint lodges three counts against Defendants: Count 1 challenges the Service's application of the Colorado Rule to its Egress-Trail decision, *see* Am. Compl., ¶¶ 62-66, Count 2 claims that the Egress-Trail approval violated NEPA, *see id.*, ¶¶ 67-71, and Count 3 advances a general attack on the legality of the Colorado Rule. *See id.*, ¶¶ 72-74. Defendants move to dismiss Counts 1 and 3 of the Complaint – the so-called "as-applied" and "facial" challenges to the Colorado Rule – because, they say, none of the Plaintiffs has standing to pursue either of

those claims. Defendants appear to concede that Plaintiffs do have standing to bring Count 2. *See* Def. Mot. at 2, 24.

The doctrine of "standing" reflects the Constitution's restriction of the power of federal courts to decide only "cases or controversies." *See Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990); U.S. Const. art. III, § 2, cl. 1. To have standing to bring a lawsuit in federal court, a plaintiff must establish that: (1) he has suffered a concrete and particularized injury that is actual or imminent, not conjectural or hypothetical; (2) there is a causal relationship between his injury and the defendant's conduct; and (3) it is likely that a victory in court will redress his injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An organizational plaintiff, such as the Ark Initiative or RMW, may have standing to sue both on its own behalf, known as "organizational standing," and also on its members' behalf, which is called "representational standing." *See Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006).

Having considered the arguments, the Court concludes that, at the very least, Plaintiff RMW has standing to bring both Count 1 and Count 3. Since "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," the Court need "not determine whether the other plaintiffs have standing." *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

1. Count 1: "As-Applied" Challenge

Defendants first claim that RMW lacks standing to challenge the Service's application of the Colorado Rule in the context of its approval of the Burnt Mountain Egress Trail. They rest this argument on three grounds. First, RMW has not suffered a concrete injury as a result of the Egress Trail. Second, RMW failed either to submit a comment on the Egress-Trail Project or to identify any specific concerns with the Burnt Mountain parcel when it submitted comments on the Colorado Rule. And third, RMW failed to exhaust its administrative remedies. The Court will address each point in turn.

a. Injury-in-Fact

According to Defendants, the injury RMW will allegedly suffer as a result of the Egress Trail is insufficiently concrete to satisfy the requirements of Article III standing. RMW has claimed "representational standing" to challenge the Trail, submitting two declarations from its staff attorney and member, Matthew Sandler, describing the harm he will suffer if the project is completed. *See* Pl. Mot., Exh. C (Declaration of Matthew Sandler); *see also* Pl. Opp., Exh. E (Supplemental Declaration of Matthew Sandler).

In the Declaration, Sandler explains:

> As a RMW member, I personally and professionally value and visit wilderness-quality lands and roadless areas in Colorado. Among other roadless areas adversely affected by the

> CRR's ski area exclusion, I have been to the Snowmass ski resort and the area in the vicinity of Burnt Mountain and used it for recreational and other purposes. I have concrete plans to return to this area in January 2015, at which time the egress trail could be constructed absent judicial relief in this case, therefore impairing my ability to continue enjoying this area in its natural, undeveloped condition that existed prior to CRR promulgation.

Sandler Decl., ¶ 8. In his Supplemental Declaration, he offers more specifics:

> [W]hen I have visited the Snowmass ski resort, I have often hiked up from the main ski resort, traversed over to Burnt Mountain . . . and skied down Burnt Mountain in a backcountry fashion before traversing back over to the main ski resort and then hiking up to the top of Burnt Mountain again. Although, like most skiers, I do not carry a GPS device when I go backcountry skiing, I can attest that based on my review of maps of Burnt Mountain, I am confident that on several occasions I skied through and otherwise used for recreational purposes the 80-acre parcel that the Service removed from the roadless inventory through the CRR. And, as previously stated, I have concrete plans to return in January 2015 to the Snowmass ski resort, and Burnt Mountain in particular (including the 80-acre parcel), and I will likely continue to return approximately once per year thereafter. The loss of roadless qualities as a result of the

> CRR ski area exclusion in conjunction with egress trail construction will therefore affect my recreational and aesthetic interests in using this parcel for backcountry skiing and other purposes.

Sandler Supp. Decl., ¶ 3.

This harm confers standing on RMW. "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). In his declarations, Sandler avers that he uses the portion of the Burnt Mountain parcel in question and that the construction of the Egress Trail will interfere with his aesthetic and recreational enjoyment of the area. Defendants claim that Sandler's "subjective experience" of the land in question "is not sufficiently concrete." Def. Reply at 6. Yet "aesthetic" and "recreational" values are nearly always "subjective," and the Supreme Court has affirmed that such concerns may constitute cognizable harms. Sandler has therefore suffered an injury-in-fact, caused by the Service's approval of the Egress-Trail Project, which would be redressed if the Court reversed that decision. That gives RMW standing to litigate on his behalf.

b. Comments

Defendants next maintain that RMW lacks standing because it never submitted a comment expressing its objections to the Egress-Trail Project. Because other commenters articulated similar concerns, however, this argument is unavailing.

The D.C. Circuit has described as "black-letter administrative law that '[a]bsent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue.'" *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (quoting *Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. 1991)). This waiver rule reflects the principle that "courts should not topple over administrative decisions unless the administrative body . . . has erred against objection made at the time appropriate under its practice." *Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005) (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)).

Yet the Court of Appeals also quite frequently makes exceptions to this rule, permitting plaintiffs who did not participate in rulemaking processes to file challenges if, for example, other commenters raised the same concerns, *see, e.g.*, *Sierra Club v. EPA*, 353 F.3d 976, 982 (D.C. Cir. 2004); *Natural Res. Def. Council v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987), or their objections related to "key assumptions" underlying the agencies' decisions. *Natural Res. Def. Council v. EPA*,

Nos. 98-1379, 98-1429, 98-1431, 755 F.3d 1010, 2014 WL 2895943, at *9 (D.C. Cir. June 27, 2014). The principle animating these exceptions seems to be that, if the agency knew or should have known about the specific concerns, then the plaintiff need not have personally raised them during the comment period. Indeed, in an earlier iteration of this very case, the Court of Appeals recognized that Plaintiff Ark Initiative "did not choose to comment" on the Colorado Rule and yet simultaneously affirmed that the group "ha[d] Article III standing" to challenge it. *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1073, 1079 (D.C. Cir. 2014).

Here, although RMW itself did not comment on the Egress-Trail Project, *see* BME-03811-04046, a number of other commenters raised the same kind of environmental and administrative concerns alleged in Count 1 of the Amended Complaint. *See, e.g.*, BME-03828-39, 3967-78. The Court, consequently, finds that RMW has not waived its right to bring this challenge.

c. Exhaustion

Defendants last assert – in an almost cursory fashion – that RMW lacks standing because it failed to exhaust its administrative remedies with regard to the Egress-Trail Project. While the three other Plaintiffs in this lawsuit filed an administrative appeal of the Decision Notice for the Project, RMW did not. *See* Am. Compl., ¶¶ 58-61; BME-03811-4046, 04838. Federal law requires a litigant to "exhaust all administrative appeal procedures established by the Secretary [of

Agriculture] or required by law" before he may sue the Forest Service – an agency of the Department of Agriculture – or its officers. 7 U.S.C. § 6912(e)(3).

Against this charge, Plaintiffs note that several district courts have permitted plaintiffs to pursue claims against the Forest Service, even when they have not exhausted their administrative remedies, so long as another organization or a co-plaintiff did file an appeal that raised the same concerns. In such cases, these courts have reasoned, "Since the purpose of the exhaustion requirement is to ensure that agency 'be given first shot at resolving a claimant's difficulties,' . . . the underlying rationale supporting the exhaustion requirement" has been satisfied. *Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 937 (N.D. Cal. 2006); *see also Conservation Congress v. Forest Serv.*, 555 F. Supp. 2d 1093, 1106-07 (E.D. Cal. 2008). In this case, accordingly, the appeal filed by the three other Plaintiffs would fulfill the exhaustion requirement for RMW. Defendants counter by citing cases holding that the exhaustion requirement is mandatory and that administrative remedies sought by other parties cannot satisfy it. *See, e.g.*, *Wildland CPR v. Forest Serv.*, 872 F. Supp. 2d 1064, 1073-74 (D. Mont. 2012); *Chattooga River Watershed Coal. v. Forest Serv.*, 93 F. Supp. 2d 1246, 1251 (N.D. Ga. 2000).

The Court need not weigh in on this debate. According to the D.C. Circuit, the exhaustion requirement in § 6912(e) is non jurisdictional, meaning that a court may in certain circumstances excuse a plaintiff's failure to satisfy it, or may bypass the issue if the

plaintiff ultimately loses the case on other grounds. *See Munsell v. Dept. of Agric.*, 509 F.3d 572, 579 (D.C. Cir. 2007); *see also Dawson Farms, LLC v. Farm Service Agency*, 504 F.3d 592, 602-06 (5th Cir. 2007). Because, as explained below, the Court ultimately concludes that Plaintiffs' claims fail on the merits, it need not tarry over the administrative-exhaustion point. Even assuming that the appeals filed by RMW's co-plaintiffs satisfied this non jurisdictional requirement, they still lose the case.

2. Count 3: "Facial" Challenge

Defendants raise three related objections to RMW's standing to bring the "facial" challenge to the validity of the Colorado Rule alleged in Count 3. First, they contend that the APA does not provide for judicial review of the Rule, independent of a challenge to a specific application of it. Second, they argue that RMW cannot use the Egress-Trail Project as a specific application of the Colorado Rule that affects its interests because it failed to comment on the Project and to exhaust its administrative remedies. Finally, they assert that RMW has suffered no injury as a result of the Rule. Because the Court's holding in the prior section resolves the third point in RMW's favor, *see* Part III.B. 1.a, *supra*, and the second is easily dispatched, given that RMW's co-plaintiffs commented on the Project and RMW submitted extensive comments in opposition to the Colorado Rule, *see* CRR-016832-71, 106963-7001, 134141-84, 134663-706, 157993-97, the Court need only address Defendants' first argument.

The APA provides for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. As the Supreme Court has explained:

> Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.)

Lujan, 497 U.S. at 891. According to Defendants, since there is no statute permitting direct judicial review of the Colorado Rule, and since the Rule standing alone does not require RMW to adjust its conduct in any way, the regulation is not independently reviewable. Defendants concede that the Colorado Rule could be reviewed in the context of a challenge to a specific application of it, such as the Egress-Trail Project, but

they claim that "the action that the court [would] ultimately uphold[ ] or set[ ] aside is the site-specific decision [*i.e.*, the Trail] . . . rather than the regulation itself [*i.e.*, the Colorado Rule]." Def. Mot. at 18.

Even if RMW were barred from bringing an "independent" challenge to the Colorado Rule, it may still attack that regulation – and have it invalidated as unlawful – in the context of a challenge to one of the Rule's specific applications. The specific application in this case would be the Egress-Trail Project, which Plaintiffs have alleged was improper *both* on its own terms *and* because the Colorado Rule on which it was based was invalid. Plaintiffs' challenge to the Egress-Trail Project, in other words, provides the avenue through which they may attack the Colorado Rule as well. "As the Supreme Court has made clear, such 'as applied' challenges are the appropriate means by which a party may challenge a broad agency policy document." *Center for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1273 (D. Col. 2010); *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734-35 (1998) ("[O]ne initial site-specific victory (if based on the [underlying regulation's] unlawfulness)" can "through preclusion principles, effectively carry the day" against that rule.).

In sum, the Court concludes that RMW has standing to bring Counts 1 and 3. Because only one plaintiff needs standing for a case to satisfy Article III, the Court need not inquire into the remaining Plaintiffs. *See Forum*, 547 U.S. at 52 n.2; *Bowsher*, 478 U.S. at 721. Defendants, moreover, as mentioned earlier, concede

that Plaintiffs have standing to bring Count 2. Jurisdictional issues thus resolved, the Court may now move to the merits of the case.

C. Merits

In considering the merits, the Court will proceed from the specific to the general, first analyzing the Egress Trail and then the Ski-Area Exclusion as a whole.

1. *The Egress-Trail Project*

The Court begins with Plaintiffs' challenge to the Service's approval of the Egress-Trail Project. According to their Motion, such approval was unlawful for two main reasons: first, because the Service failed to prepare an Environmental Impact Statement for its decision, as required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and second, because the Environmental Assessment that the Service did prepare was insufficient. The Court will address each contention separately.

a. Environmental Impact Statement

"NEPA itself does not mandate particular results." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Instead, it requires federal agencies to follow certain specified procedures before they take actions that may intrude on Mother Nature.

Most relevant to this case, NEPA requires that when an agency is considering an action that will "significantly affect[] the quality of the human environment," it must first prepare a detailed "Environmental Impact Statement" assessing the consequences of that action and any alternatives that may be available. *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004) (quoting 42 U.S.C. § 4332(2)(C)); *see also Sierra Club v. Peterson*, 717 F.2d 1409, 1412 (D.C. Cir. 1983). When an agency is uncertain of whether an EIS is necessary, it may prepare a more concise "Environmental Assessment" to determine the "significan[ce]" of the action it is considering. 40 C.F.R. §§ 1501.4, 1508.27. If the Environmental Assessment concludes that the proposed action will not have a "significant impact" on the environment, no EIS is necessary. *Peterson*, 717 F.2d at 1412-13; *see also* 40 C.F.R. § 1501.4(e). In such a case, the agency must document that conclusion in a "Finding of No Significant Impact" (FONSI). *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 857 (D.C.Cir. 2006). The decision not to prepare an EIS may be overturned "only if it was arbitrary, capricious, or an abuse of discretion." *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 681 (D.C. Cir. 1982).

In this case, the Service prepared an EA for the Egress-Trail Project and found that no EIS was necessary. *See* BME-04621-732. It then issued a FONSI documenting that conclusion. *See* BME-04818-912. Plaintiffs contend that that decision was flawed because, first, the Service's own regulations require an

EIS for all decisions affecting a roadless area, and, second, the Project would in fact "significantly affect" the environment.

On the first point, according to Plaintiffs, Forest Service regulations require the agency to prepare an EIS before making decisions regarding a roadless area that will have a discernable impact on the area's roadless or wilderness qualities. This proposition is not disputed: Service regulations *do* mandate an EIS for proposals that "would substantially alter the undeveloped character" of a designated roadless area. 36 C.F.R. §§ 220.5(a)(2), 294.45(a). The problem for Plaintiffs, as Defendant and Intervenor are quick to point out, is that the Burnt Mountain parcel lost its "roadless" designation and was removed from the inventory as a result of the Ski-Area Exclusion in the Colorado Rule. *See* BME-04673. These regulations therefore no longer apply to the Egress-Trail Project.

Plaintiffs contend, however, that whether a parcel is *officially* designated "roadless" is irrelevant; so long as the land is *empirically* roadless, they say, an EIS is required, regardless of the administrative label. In support of this position, they cite two Ninth Circuit decisions. In each case, that court reviewed the sufficiency of an EIS prepared by the Forest Service to evaluate the effects of a proposed project involving, in one case, two "uninventoried roadless area[s]," *Lands Council v. Martin*, 529 F.3d 1219, 1230 (9th Cir. 2008), and, in the other, a "roadless area that [was] partially inventoried." *Smith v. Forest Serv.*, 33 F.3d 1072, 1077 (9th Cir. 1994). Those decisions do not bind this Court,

however, and they are not particularly compelling anyway. In each case, the court simply reviewed the sufficiency of an EIS that the Service had decided to prepare for projects in undesignated roadless areas; neither decision held that the EIS was *required*, and, in fact, *Smith* specifically stated the opposite. *See id.* at 1079 ("[A]n EIS may not be *per se* required under such circumstances.").

Even if the Court accepted Plaintiffs' theory of the law, moreover, the Service regulations in question only require an EIS for actions that "*substantially* alter the undeveloped character" of a roadless area. 36 C.F.R. §§ 220.5(a)(2), 294.45(a) (emphasis added). The EA the Service prepared for the Egress Trail, however, concluded, after 26 pages of analysis, that the project "would not affect the nine roadless characteristics to the point of altering the characteristics of the Burnt Mountain [roadless area]." BME-04677. Given that the regulations and case law do not support Plaintiffs' claim, and that even if they did, the Service's conclusions about the effects of the Egress-Trail Project would render an EIS unnecessary, this first argument fails.

Plaintiffs' second argument for why an EIS was necessary focuses on the so-called NEPA "significance factors," set out in 40 C.F.R. § 1508.27. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 218 (D.D.C. 2003). As mentioned earlier, under NEPA, an agency must prepare an EIS for actions that will "significantly" affect the environment, which, according to federal regulations, requires consideration of both "context" and

"intensity." 40 C.F.R. § 1508.27(a) & (b). "Context" means "that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action." *Id.*, § 1508.27(a). "Intensity" means "the severity of impact," and is defined in relation to ten factors:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id., § 1508.27(b). "Some courts have found that '[t]he presence of one or more of these factors should result in an agency decision to prepare an EIS.'" *Fund for Animals*, 281 F. Supp. 2d at 218 (quoting *Pub. Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003)); *see also Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 20 (D.D.C. 2007). Plaintiffs contend here that the Service's decision to approve the Egress Trail

triggered several of the significance factors, thus necessitating an EIS.

Plaintiffs train their sights on three significance factors in particular. First, they say the Project will affect the land's "[u]nique characteristics" and "ecologically critical areas" by degrading the parcel's roadless and wilderness qualities and fragmenting habitat used by elk, lynx, and other species. 40 C.F.R. § 1508.27(b)(3). Second, they claim it will set a "precedent for future actions with significant effects" because it is the first-ever site-specific application of the Colorado Rule's Ski-Area Exclusion. *Id.*, § 1508.27(b)(6). Finally, they argue that the Project may "adversely affect an endangered or threatened species" because it will erode the habitat of the Canadian lynx. *Id.*, § 1508.27(b)(9). Plaintiffs raised these three issues in their comments on the Project, *see* BME-04798-801, but, they claim, "[r]ather than seriously grapple with these concerns, the agency brushed them aside." Mot. at 48.

The administrative record, however, tells a different tale. The EA and FONSI for the Egress-Trail Project separately addressed each and every significance factor, including the three noted by Plaintiffs, and concluded that none was triggered. With respect to Plaintiffs' first point, the EA, after significant analysis, found that the Project would not alter the roadless or wilderness characteristics of the Burnt Mountain parcel. *See* BME-04656-81. The FONSI noted, further, that "[t]he area affected by the approved project elements does not . . . contain . . . ecologically critical areas," and

that "[t]he relatively small amount of habitat loss" would not interfere with elk or lynx habitat. BME-04829-30; *see also* BME-04845, 04860. On the second, the FONSI observed that the Egress Trail would be the first-ever application of the Ski-Area Exclusion, but noted that "[t]he precedent was set by the [Colorado Rule], which eliminated the roadless area designation" for the land in question, and that "similar projects have occurred on NFS lands since NEPA was enacted." BME-04846. Finally, the EA examined the impact the Project would have on the Canadian lynx and found that while "there would be a loss of some lynx habitat, . . . the surrounding habitat would be capable of providing lynx movements and year-round foraging." BME-04677; *see also* BME-04675, 04690-92. Though Plaintiffs may disagree with these conclusions on their merits, the Court's job is to decide only whether they are "arbitrary, capricious, or an abuse of discretion." *Cabinet Mountains*, 685 F.2d at 681. They are not, which means no EIS was required.

b. Environmental Assessment

Plaintiffs are uncowed. Even if no EIS was required for the Egress Trail, they say, the EA and FONSI the Service prepared were themselves inadequate. According to Plaintiffs, although the EA may have analyzed the impact of the project on the 80-acre parcel where the Trail would be constructed, it failed to consider the impact of the Project on the land *adjacent* to that parcel – the region known as Burnt Mountain. Plaintiffs are particularly concerned about

increased human recreation on Burnt Mountain and the impact it may have on the area's prospects for future designation as a "wilderness area." Defendants and Intervenor question whether any of this analysis was necessary. Yet even if it was, the administrative record once more belies Plaintiffs' position on this matter.

A look at the EA and the FONSI shows that the Service repeatedly considered the effect of the Egress Trail on the adjacent Burnt Mountain area, and that it concluded that any such impact would be minimal. *See* BME-04649 ("Alternative 3 would not create a significant effect to the Roadless Area Characteristics of the adjacent Burnt Mountain [roadless area]."); 04677 ("The action alternatives would not affect the nine roadless area characteristics to the point of altering the characteristics of the Burnt Mountain [roadless area]."); 04873 ("The EA discloses that the action alternatives would not affect the 9 Roadless area characteristics of the adjacent [Burnt Mountain roadless area]."). The EA notes, further, that "skier visitation is not contemplated to measurably increase overall," BME-04685; *see also* BME-04845, and that the Burnt Mountain area had already been judged "not capable and not available" for wilderness designation. BME-04855-56 (internal quotation marks omitted). Again, Plaintiffs may disagree with these conclusions, but the only question for the Court is whether the analysis the Service used to reach them was "arbitrary, capricious, or an abuse of discretion." *Cabinet Mountains*, 685 F.2d

at 681. It was not. The EA, as prepared, was thus sufficient to satisfy the Service's obligations under the law.

2. *The Colorado Rule's Ski-Area Exclusion*

Having found Plaintiffs' challenge to the specific Egress-Trail Project wanting, the Court next moves to their broader attack on the Colorado Rule's Ski-Area Exclusion. Plaintiffs advance this assault along three tracks. First, they claim that the Service's decision to remove the "roadless" designation from land falling within ski-area boundaries is arbitrary and capricious, in violation of NEPA. Second, they argue that the decision contravenes substantive provisions of the Wilderness Act. Finally, Plaintiffs complain that they were not invited to participate in the decisionmaking process for the Colorado Rule, a supposed violation of NEPA. As before, the Court will take each of these arguments in sequence.

a. Arbitrary and Capricious

Plaintiffs offer several reasons why the Ski-Area Exclusion in the Colorado Rule was arbitrary and capricious. Before the Court can address those points, however, it must first deal with Defendants' surprising suggestion that such a claim is somehow "not justiciable." Def. Mot. at 31.

i. Justiciability

According to Defendants, "A court cannot evaluate" whether an agency action is arbitrary and capricious without "an underlying statutory obligation" against which to measure its rationale. *Id.* They thus deride this part of Plaintiffs' challenge as a "free-floating" or "stand-alone" APA claim, contending that because Plaintiffs have not identified a particular substantive statute that the Service violated, their claim must be dismissed. *Id.*; Def. Reply at 13. Intervenor, it should be noted, has declined to present this defense. That is a wise choice, since Defendants' argument contradicts clear statutory text and repeatedly affirmed Supreme Court and D.C. Circuit precedent.

The Court begins with basic administrative law. Section 706(2)(A) of the APA empowers a reviewing court to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The Supreme Court has interpreted the "arbitrary and capricious" bit of that provision as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found

> and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted). To put it more simply, "arbitrary and capricious" review asks whether the agency provided "a reasoned analysis" for its decision. *Id.* at 42.

Nowhere in that description is any mention of the need for the reviewing court to identify and apply a substantive underlying statute, as Defendants claim. That makes sense, since, as the D.C. Circuit has explained, "Reasoned decisionmaking is not a procedural requirement . . . *It stems directly from § 706 of the APA.*" *Butte County, Cal v. Hogen*, 613 F.3d 190, 195 (D.C. Cir. 2010) (emphasis added). Indeed, since *State Farm*, countless courts have issued opinions analyzing whether challenged agency actions are "arbitrary and capricious in violation of the Administrative Procedure Act" without relying on anything other than the APA,

the administrative record, and the relevant caselaw. *See, e.g.*, *Republican Nat. Committee v. Federal Election Com'n*, 76 F.3d 400, 407 (D.C. Cir. 1996). That includes the Court of Appeals in an earlier iteration of this very case. *See Ark Initiative*, 749 F.3d at 1076-79.

Against all this, Defendants offer only a novel interpretation of the APA, along with a D.C. Circuit case that they have seriously misunderstood.

First, Defendants invoke § 702 of the APA, which creates a right of action for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Defendants focus on the last piece of that phrase – "within the meaning of a relevant statute" – arguing that it "indicates that it is some other statute, not the APA, that provides a basis for the cause of action." Def. Reply at 13. Leave aside for a moment that such a reading flies in the face of established precedent. *See, e.g.*, *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) ("The Supreme Court has clearly indicated that the Administrative Procedure Act *itself* . . . suppl[ies] a *generic* cause of action in favor of persons aggrieved by agency action.") (emphasis added). Defendants' interpretation is plainly mistaken, since the placement of the comma makes clear that the language in question modifies only the second half of the sentence. As the Supreme Court has explained, "[T]he party seeking review under § 702 must show that he has 'suffer[ed] legal wrong' because of the challenged agency action, *or* is 'adversely affected or

aggrieved' by that action 'within the meaning of a relevant statute." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990) (quoting 5 U.S.C. § 702) (emphasis added). The Court has already found that Plaintiffs have suffered a "legal wrong" as a result of the Colorado Rule, *see* Part III.B. 1.a, *supra*, so § 702 poses no bar to their claim. *Cf. Lujan*, 497 U.S. at 883.

Second, Defendants cite *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178 (D.C. Cir. 2006), noting that the panel in that case "looked to whether the challenged agency action was 'contrary to constitutional right' or 'in excess of statutory . . . authority," but that it "did not adopt a '*State Farm* framework' in analyzing the alleged generic APA claim." Def. Reply at 13 (quoting *Trudeau*, 456 F.3d at 188). It might indeed seem curious that the *Trudeau* court applied such a limited analysis; curious, that is, until one reads just a few paragraphs earlier in the opinion and learns that *those were the only claims the plaintiff in that case actually made. See Trudeau*, 456 F.3d at 188 ("Trudeau's complaint asserts two claims against the FTC. First, he contends that the FTC exceeded its statutory authority . . . Second, Trudeau claims that [the agency] violated his First Amendment rights."). Of course the *Trudeau* court did not inquire into whether the challenged agency action was arbitrary and capricious – the challenger never contended that it was. This argument is a loser. Plaintiffs' claim is justiciable.

ii. Merits

Moving on to the merits of Plaintiffs' claim, they offer four main reasons why promulgation of the Ski-Area Exclusion was arbitrary and capricious: (1) Its proffered justification was insufficient; (2) It abandoned established agency practice regarding roadless-inventory management; (3) It treated similarly situated industries differently; and (4) It created a "disjointed, contradictory nationwide roadless management system." Pl. Mot. at 42. None succeeds in demonstrating that the Service's decision was either arbitrary or capricious.

First, Plaintiffs claim that the Service's explanation of its decision was inadequate. Much of this argument stems from Plaintiffs' contentions that "the only reason" for the Exclusion was because the State of Colorado had requested it, *see* Pl. Opp. at 24 – an allegedly insufficient justification for such a major change – and also that the Service's "controlling, if not sole, rationale" for the Exclusion was the economic interests of the ski industry, *see* Pl. Mot. at 25 – also a purportedly inappropriate consideration. Obviously, those two points are in tension: either the Service included the Exclusion in the Colorado Rule solely at the request of the Rocky Mountain State, or it included the Exclusion solely for economic reasons, but not both. Happily for Defendants, the answer is neither. During a prior round of litigation, in fact, Ark Initiative itself recognized an additional justification the Service had offered for the Exclusion: that the 8,300 acres of land at

issue "are in fact degraded and thus are no longer roadless." *Ark Initiative*, 749 F.3d at 1077.

A look at the administrative record confirms that the Service offered several different reasons, some concededly overlapping, for its decision to exclude areas within ski-area boundaries from the roadless inventory:

- Facilitating recreational use of the land, *see* 77 Fed. Reg. at 39,578 (Colorado's "22 ski areas received about 11.7 million skier visits during the 2010-2011 ski season."); CRR-153483 ("Colorado has the highest number of ski areas under permit on national forests . . . and the highest number of annual skier visits on national forests of any state.").
- Assisting Colorado's ski industry, an important source of revenue for the State, *see* 77 Fed. Reg. at 39,578 ("Colorado skiers spend about $2.6 billion annually, about one third of the annual tourist dollars spent in the State.");
- Reducing management conflicts and confusion, *see id.* ("The roadless area inventory for the 2001 Roadless Rule included portions of either the permit boundary and/or forest plan ski area management allocation for 13 ski areas. The final rule inventory excludes approximately 8,300 acre of permitted ski area boundaries or ski area management allocations from CRAs. . . . This will ensure future ski area

expansions within existing permit boundaries and forest plan allocations are not in conflict with desired conditions provided through the final rule."); CRR-153484 ("The settings, experience, and activities associated with developed ski areas are not always compatible with roadless area characteristics."); CRR-153486 ("The authorization of roads in developed ski areas would facilitate the implementation of required ski area vegetation management plans to improve forest health, remove hazard trees, and manage fuel hazards associated with the current mountain pine beetle epidemic affecting lodgepole pine within developed ski areas.");

- Responding to a request by the State of Colorado, *see* 77 Fed. Reg. at 39,578 (The Exclusion addresses "one of the State-specific concerns identified by the State of Colorado."); CRR-106429 ("The State requested that the Forest Service take this action in order to better balance the social and economic importance of ski areas with the need to protect roadless area characteristics.");

- Removing degraded areas from the roadless inventory, *see* 77 Fed. Reg. at 39,578 ("The final rule inventory excludes approximately 8,300 acres of permitted ski area boundaries or ski area management allocations from CRAs, which include roadless acres with degraded roadless

area characteristics and due to the proximity to a major recreational development."); and

- Making only a minor impact, *see id.* (area removed from the roadless inventory "is less than 0.2% of the [total roadless area in Colorado]"); CRR-153148-49 ("Even though these areas are removed from the roadless inventory, site-specific NEPA would be required for potential development . . . both prior to development within permitted acres . . . and before any acres are added to a ski area permit that are not currently within the permit . . . All ski area expansion would require site-specific analysis and have to be consistent with the Forest Plan[,] both processes involve public participation.").

These diverse justifications make clear that the Service's decision was neither arbitrary nor capricious. They also vitiate Plaintiffs' related argument – that the Exclusion was not necessary to serve the agency's "only rationale" of benefiting Colorado's ski industry. Pl. Opp. at 27.

Plaintiffs' second argument is that, by promulgating the Exclusion, the Service both contravened its "Land Management Planning Handbook," *see* CRR-013684-728, and abandoned past agency practice, all without recognizing or explaining this "dramatic shift in roadless management." Pl. Opp. at 28; *see FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (if agency

changes policy, it must recognize the change and explain the reason for it); *Town of Barnstable, Mass. v. FAA*, 659 F.3d 28, 34-36 (D.C. Cir. 2011) (if agency departs from internal guidelines, it must address the departure and explain the reason for it). This argument also fails.

Start with the Handbook. The section in question, Chapter 70, "describes the process for identifying and evaluating potential wilderness in the National Forest System . . . [that is] used by the Forest Service to determine whether areas are to be recommended for wilderness designation by Congress." CRR-013698. Plaintiffs note that, according to the Handbook, the Service should identify and inventory potential wilderness areas based on the four criteria enumerated in the Wilderness Act, 16 U.S.C. § 1131(c). *See* CRR-013698-702. Those criteria do not include the economic factors the Service considered in adopting the Ski-Area Exclusion, and Plaintiffs, accordingly, cry foul.

Even assuming that the Service's "roadless inventory" is the same as its "potential wilderness inventory," however, this argument comes up short. The chapter of the Handbook Plaintiffs cite plainly does not apply to the task at hand: it governs an area's *initial placement* on the potential-wilderness inventory, but does not constrain the Service's *ongoing management* of that inventory. The agency's decision to recategorize a portion of its already-inventoried areas, therefore, did not contradict the Handbook.

Plaintiffs observe that the Service invoked the Handbook in a different section of the Colorado Rule, when it denied a request from the oil and gas industry to exclude from the roadless inventory areas with high potential for extractive development. *See* 77 Fed. Reg. at 39,588. That may well be true, but because, as the Court just explained, the Handbook does not govern the Service's administration of its roadless inventory, the real victim here would be the oil and gas industry, not Plaintiffs. Even if the Handbook did apply, moreover, this Court must "uphold a[n agency] decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp.*, 419 U.S. at 286. The Service's extensive justifications for the Ski-Area Exclusion, outlined above, are enough for the Court to discern its reasons for departing from the Handbook.

Moving next to past practice, Plaintiffs note that the Service's prior roadless inventories used objective criteria to identify qualifying roadless areas, without relying on economic considerations, and that the Service previously declined to categorically remove from its roadless inventory areas that fell within ski-area boundaries. *See* CRR-01131. Once again, however, this argument is flawed. Even if the difference between the Colorado Rule and the Service's previous roadless-area management strategies qualified as a "chang[ed] position" that the agency would be required to recognize and give "good reasons" for, *Fox*, 556 U.S. at 515, the Service did just that, acknowledging that the Exclusion "adjusted roadless area boundaries from the 2001 inventory" by "[e]xcluding ski areas under permit or

lands allocated in forest plans to ski area development," 77 Fed. Reg. at 39,576, and offering multiple reasons for that adjustment, as already explained. There is no reason, then, to invalidate the Ski-Area Exclusion on these grounds.

Third, Plaintiffs contend that the Exclusion is arbitrary and capricious "because it prospectively and needlessly creates a disjointed, contradictory nationwide roadless management system, whereby inventory inclusion or exclusion is based on different eligibility factors in one state – Colorado – as compared to all other states which are managed pursuant to the [2001 Roadless Rule]." Pl. Mot. at 42. Plaintiffs fail to explain, however, precisely *why* the Court should consider it arbitrary or capricious for the Service to manage its roadless inventory through a more federalist, decentralized process, instead of mandating a uniform standard for the entire National Forest System. Indeed, federal law seems to encourage just this kind of state-by-state approach to forest management. *See, e.g.*, 16 U.S.C. §§ 530, 1604(a). This charge against the Ski Area Exclusion, therefore, fails as well.

Finally, Plaintiffs attack the Ski-Area Exclusion as arbitrary and capricious on the ground that the Service declined to also remove the roadless categorization from lands with high potential for oil and gas development. Plaintiffs claim that the oil and gas industry is "similarly situated" to the ski industry, Pl. Opp. at 31, and that it was thus inconsistent for the Service to recategorize roadless areas within ski-area

boundaries while refusing to do the same for roadless areas with extractive promise.

This is a strange argument. The oil and gas industry differs significantly from the ski industry; indeed, the old adage about "comparing apples and oranges" does not quite seem to do the situation justice. The Court need not condescend to the reader by listing the manifold differences between a ski resort and an oil well. The Service adequately explained its decision not to recategorize roadless areas that had potential for oil and gas development, *see* 77 Fed. Reg. at 39,588, and any variance in treatment between the oil and gas industry and the ski industry did not require special recognition or explanation. There is, in short, nothing arbitrary or capricious here.

Wrapping up, none of Plaintiffs' arguments concerning the arbitrary and capricious nature of the Ski-Area Exclusion hits the mark. The Service provided a well-reasoned explanation for its decision to recategorize roadless areas that fell within ski-area boundaries and thereby satisfied the requirements of the APA. *See State Farm*, 463 U.S. at 42-43.

b. The Wilderness Act

Plaintiffs next claim that the Ski-Area Exclusion is invalid because it violates the Wilderness Act. Unfortunately for Plaintiffs, however, that statute simply does not apply to the Service's management of its roadless inventory. Such an attack on the Service's decision, therefore, rings hollow.

To recap briefly, the Wilderness Act, passed in 1964, defines "wilderness" as land that meets four criteria: it appears affected primarily by the forces of nature rather than humanity, it has outstanding opportunities for solitude or unconfined recreation, it is at least five thousand acres, and it has scientific, educational, scenic, or historical value. *See* 16 U.S.C. § 1131(c). The Act instructs that within ten years of its enactment, the Forest Service should conduct a survey of land in the National Forest System that meets those criteria and report its findings to the President, who will then make recommendations to Congress about which areas should be officially designated "wilderness." *See id.*, § 1132(b). The Service satisfied that obligation in 1979. *See Wyoming*, 661 F.3d at 1221-22. According to Plaintiffs, the Ski-Area Exclusion violated the Wilderness Act because the Service took into account economic considerations, which are absent from the Act's four-point definition of "wilderness." By removing land from the roadless inventory that objectively met that definition, Plaintiffs say, the Service failed to follow the procedure the Act set out for the identification of potential wilderness areas.

Merely explaining the Wilderness Act is practically enough to reveal the flaws in Plaintiffs' argument. The Act defines "wilderness areas," not "roadless areas" – the latter, apparently, is simply a label invented by the Service to cover lands that Congress had declined to designate as the former. *See Wyoming*, 661 F.3d at 1222. The Act says nothing about how the Service should manage its inventory of such areas. The

statute's command, moreover, that the Service should survey lands in the National Forest System for their suitability as wilderness imposed only a single-shot, one-time obligation, which the agency fulfilled over thirty years ago. The Wilderness Act, in short, has absolutely nothing to do with how the Forest Service manages its roadless inventory today. The Service, accordingly, *did not identify the Wilderness Act as the basis of its authority* when it promulgated the Colorado Rule, instead citing to the Organic Act and the Multiple-Use Sustained-Yield Act, *see* 77 Fed. Reg. at 39,602 (citing 16 U.S.C. §§ 472, 529, 551, 1608, 1613; 23 U.S.C. §§ 201, 205), two statutes that the Court will discuss in greater detail further on.

Perhaps recognizing the absence of any direct connection between the Wilderness Act and the Service's management of its roadless inventory, Plaintiffs offer a more atmospheric argument to support their cause:

> [T]o be clear, Plaintiffs are not arguing that the [Colorado Rule] constituted a wilderness suitability evaluation concerning any specific parcel . . . Nor, for that matter, are Plaintiffs asserting that management of roadless areas [i]s equivalent to management [of] wilderness or that the Wilderness Act trumps the authorizing statutes. Rather, Plaintiffs have simply made the straightforward argument that the roadless inventory was created in direct response to the Wilderness Act for the explicit purpose of helping to guide the implementation of the Act, and . . . the inventory still

> serves as a critical starting point in each forest plan revision process under NFMA for evaluating every inventoried roadless area for potential future wilderness designation. On that basis, Plaintiffs have demonstrated that it would contravene Congress's intent in passing the Act if the Service could totally disregard the Wilderness Act's criteria in excluding unroaded, unaltered areas from the roadless inventory and in the process foreclose their consideration for wilderness suitability in future NFMA reviews.

Pl. Opp. at 35 (internal quotation marks omitted).

Plaintiffs' theory, boiled down, is that even though the Wilderness Act has no official connection to the roadless inventory, the two have a conceptual relationship that this Court should ratify. That, however, is not how courts decide cases. "The *plain meaning* of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (emphasis added and internal quotation marks omitted). The meager legislative history Plaintiffs have dug up, which reveals some Congressional opposition to excluding from the national-wilderness inventory part of the "San Gorgonio Wild Area" in the San Bernardino National Forest in California, *see* Pl. Mot. at 33-34 (collecting sources), does not even come close to meeting that standard. The plain meaning of the Wilderness Act says nothing

about the Service's management of its roadless inventory, and that meaning is what controls here.

Grasping at straws, Plaintiffs offer two alternative theories for how the Ski-Area Exclusion might contravene the Wilderness Act.

First, they invoke the 1980 Colorado Wilderness Act, in which Congress followed through on the original promise of the 1964 Wilderness Act by officially designating certain land in the State as "wilderness areas." Pub. L. No. 96-560, § 102(a), 94 Stat. 3265, 3265 (Dec. 22, 1980). Plaintiffs claim that this Act "mandated that the Service conduct wilderness suitability determinations of [roadless areas in Colorado] . . . when revising forest plans" in the State. Pl. Opp. at 37. "[B]y preemptively stripping the roadless inventory protections from 8,260 empirically unroaded acres," Plaintiffs contend, the Ski-Area Exclusion "contravenes Congress's intent" in the Colorado Wilderness Act "that parcels satisfying the [wilderness] suitability criteria, as a factual matter, . . . must be considered and analyzed by the Service for wilderness suitability." *Id.* at 37-38 (citing Pub. L. No. 96-560, § 107(b)(2), 94 Stat. at 3270-71).

A look at the provision in question, however, undermines Plaintiffs' argument. The law states only that the Service's 1979 wilderness-suitability review of national forests in Colorado "shall be deemed for the purposes of the initial land management plans required for such lands to be an adequate consideration

of the suitability of such lands for inclusion [as wilderness areas], and the [Service] shall not be required to review the wilderness option *prior to the revision of the initial plans*." Pub. L. No. 96-560, § 107(b)(2), 94 Stat. at 3271 (emphasis added). Plaintiffs, presumably, read that last bit to imply that the Service *will* be required to periodically review the wilderness suitability of roadless areas in Colorado whenever it revises their Forest Plans. But the statute never actually says so. Even if the Colorado Wilderness Act did impose such a mandate on the Service, moreover, it would still have no bearing on the agency's authority to *remove* land from its roadless inventory. Plaintiffs' argument again amounts to legal hocus pocus, summoning unseen restrictions on the Service's management of its roadless inventory that lack any clear basis in the actual text of the law. The Act offers no support for Plaintiffs' case.

Second, Plaintiffs again invoke the Service's "Land Management Planning Handbook." *See* CRR-013684-728. They note that the Handbook incorporates the Wilderness Act's four-point definition of "wilderness" and that Defendants have conceded that those criteria "were utilized as a starting point for the Colorado roadless inventory." Def. Mot. at 29. Plaintiffs therefore assert that Defendants have "conced[ed] the pertinence of the Wilderness Act . . . to the [Colorado Rule]." Pl. Opp. at 39. This argument fails for two reasons, already explained by the Court. First, the Handbook, by its own terms, covers only the initial placement of land on the roadless inventory, not the

Service's ongoing management of land in that inventory. Second, Plaintiffs have still failed to identify any actual connection between the Wilderness Act and the Service's administration of its roadless inventory. Defendants' admission that the Service referred to the Wilderness Act when it crafted the Colorado Rule does not mean that the agency was legally bound by that Act. Once more, Plaintiffs come up snake eyes.

Having determined that the Wilderness Act did not restrict the Service's decision to remove from its roadless inventory lands falling within ski-area boundaries in Colorado, the question remains: Did the agency have the statutory authority to take such action? For an answer, the Court looks to the two statutes the agency cited in promulgating the Colorado Rule: the Organic Act and the Multiple-Use Sustained-Yield Act. *See* 77 Fed. Reg. at 39,602 (citing 16 U.S.C. §§ 472, 529, 551, 1608, 1613; 23 U.S.C. §§ 201, 205).

The Organic Act, 16 U.S.C. §§ 473-82, 551, enacted in 1897, created the predecessor to the Forest Service, authorizing the agency to "make such rules and regulations . . . as will insure the objects of [the National Forest System]" and to "regulate their occupancy and use and to preserve the forests thereon from destruction." *Id.*, § 551. The Act thus "gives the Forest Service broad discretion to regulate the national forests." *Wyoming*, 661 F.3d at 1234. The Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-31, passed in 1960, further empowered the Service to "administer the renewable surface resources of the national forests for multiple use and sustained yield," including for the purposes of

"outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.*, §§ 528, 529. Congress explained that the MUSYA was "to be supplemental to, but not in derogation of," the Organic Act. *Id.*, § 528. Like the Organic Act, the MUSYA gives the Service "broad discretion to determine the proper mix of uses permitted within" the national forests. *Wyoming*, 661 F.3d at 1268; *see also Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975) (MUSYA "breathe[s] discretion at every pore").

These statutes "delegated authority to the agency generally to make rules carrying the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), thus entitling the Service's interpretations of them to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). As the reader is very likely aware, *Chevron* sets out a two-step test for evaluating an agency's interpretation of a statute it administers. "Under *Chevron*'s first step," the Court asks "'whether Congress has directly spoken to the precise question at issue,' for if 'the intent of Congress is clear, that is the end of the matter . . . [T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1269 (D.C. Cir. 2004) (quoting *Chevron*, 467 U.S. at 842-43). If, however, "the statute is 'silent or ambiguous with respect to the specific issue,'" the Court moves "to *Chevron*'s second step, asking whether the agency's interpretation 'is based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

Applying step one of *Chevron*, it is clear that neither the Organic Act nor the MUSYA addresses how the Forest Service should manage its roadless inventory, nor whether it may remove land from that inventory based in part on economic considerations. Both laws give the agency "broad discretion" to decide how best to administer the National Forest System. *Wyoming*, 661 F.3d at 1234, 1268. Moving on to step two of *Chevron*, it is also clear that the agency reasonably interpreted both laws to allow it to remove the roadless designation of lands falling within ski-area boundaries in Colorado. The MUSYA, in particular, instructs that the Service should administer the national forests "for multiple use," including for "outdoor recreation," plainly empowering the agency to take the action that it did. 16 U.S.C. §§ 528, 529. Indeed, Plaintiffs practically concede the point, never once addressing the scope of the agency's authority under the Organic Act or the MUSYA, and instead devoting their energy to chasing the ethereal – and ultimately, irrelevant – connections between the Wilderness Act and the Colorado Rule.

Summing up, Plaintiffs' contention that the Ski-Area Exclusion violated the Wilderness Act does not prevail. The Service, moreover, was empowered to promulgate the Exclusion under both the Organic Act and the MUSYA. Plaintiffs have thus failed to present any reason for the Court to invalidate the Exclusion on these grounds.

c. Notification

For their last assault on the Colorado Rule, Plaintiffs take issue with the Service's failure to notify them about its decisionmaking process. Federal regulations require an agency engaged in a NEPA-related rulemaking to "[i]nvite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds)." 40 C.F.R. § 1501.7(a)(1). Plaintiffs claim that their successful 2006 challenge to the Service's authorization of the Egress Trail made them "interested persons" entitled to a personal invitation to participate in the administrative process for the Colorado Rule. *See* 5 U.S.C. § 706(2)(D) (providing that agency action undertaken "without observance of procedure required by law" may be set aside).

The law requires no such thing. Nothing in the cited regulation demands that an agency individually notify each and every potentially "interested person" about a NEPA-related rulemaking process, and Plaintiffs have failed to identify a single case so holding. They have invoked one decision in support of their argument, *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588 (9th Cir. 1988), but the circumstances there were a far cry from this case. In *Lyng*, an anti-pesticide group had obtained an injunction against an agency's use of pesticides on the ground that the agency had not performed the required environmental analysis under NEPA. *See id.* at 590. The

agency went back and did the necessary inquiry, but in so doing, it did not personally notify the anti-pesticide group that had obtained the injunction. *See id.* The Ninth Circuit held that the group, "as a litigant earlier in this action," was "clearly an interested person" entitled to personal notice under § 1501.7. *Id.* at 595. It therefore concluded that the agency had violated the law, although it upheld the agency action in question because the group had not demonstrated any prejudice as a result of its lack of notice. *See id.* at 595-96.

Here, by contrast, Plaintiffs' participation in the 2006 Egress Trail case involved an entirely different decisionmaking process from the Colorado Rule, and they therefore were not "litigant[s] earlier in this action" entitled to personal notice. *Id.* at 595. It is not enough, as Plaintiffs insist, that the 2006 case may have had some influence on the Service's decision to promulgate the Colorado Rule – if that were so, agencies considering new rules would be obliged to personally notify the numberless parties who could have possibly played some role in influencing federal policymaking. No regulation would be safe from subsequent review and invalidation on such grounds. Even if Plaintiffs were entitled to personal notice, moreover, they have failed to show – or even mention – how the lack of notice in this case prejudiced them. *See id.* at 595. This is particularly true since RMW *did* comment on the Colorado Rule.

As Defendants and Intervenor have documented, the Forest Service went to great lengths to involve the

public – and Plaintiffs – in the decisionmaking process for the Colorado Rule. This included:

- Five formal public-involvement processes, generating a total of 312,000 public comments, 77 Fed. Reg. at 39,581; *Ark*, 895 F. Supp. 2d at 234;
- The creation of a bipartisan task force in Colorado, which held nine public meetings and six deliberative meetings open to the public, and received over 40,000 public comments, 77 Fed. Reg. at 39,581;
- Numerous notices published in the Federal Register, among them a notice of intent to prepare an EIS on roadless-area conservation in national forests in Colorado, a proposed rule to establish State-specific management direction for roadless areas in Colorado, a notice of availability for the draft EIS, a revised proposed rule and notice of availability for the revised draft EIS, and a notice of availability for the final EIS, *see id.*; and
- Three Roadless Area Conservation National Advisory Committee meetings, open to the public, in which both the Forest Service and the State of Colorado participated. *See id.*

The Service's impressive efforts to reach out to the public as it worked out the contours of the Colorado Rule were sufficient to satisfy its notice obligations to

Plaintiffs. Their final attack on the Rule is therefore unconvincing.

IV. Conclusion

The Court does not intend its decision in this case to minimize the natural beauty of Colorado's mountainsides, nor the imperative of conserving them for future generations. Instead, what the Court holds here is that, as a steward of these lands, the Forest Service has ultimately arrived at a well-considered and lawful decision. As a result, the Court will issue a contemporaneous Order that will deny Defendants' and Intervenor's Motion to Strike the Amended Complaint and grant their Motions for Summary Judgment.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: *August 18, 2014*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE ARK INITIATIVE, *et al.*, **Plaintiffs,** **v.** **THOMAS TIDWELL, Chief, United States Forest Service, *et al.*,** **Defendants,** **and** **ASPEN SKIING COMPANY,** **Intervenor-Defendant.**	**Civil Action No. 14-633 (JEB)** (Filed Aug. 18, 2014)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendants' and Intervenor's Motion to Strike the Amended Complaint is DENIED;
2. Plaintiffs' Motion for Summary Judgment is DENIED;
3. Defendants' and Intervenor's Cross-Motions for Summary Judgment are GRANTED; and
4. Judgment is ENTERED in favor of Defendants.

IT IS SO ORDERED.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: August 18, 2014

UNITED STATES DISTRICT COURT
for the
District of Columbia

ARK INITIATIVE, et al., *Plaintiff* v. THOMAS L. TIDWELL, et al., *Defendant*	)))))	Civil Action No. 14cv633 (JEB)

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($_____), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name) _____ recover costs from the plaintiff (name) _____.

☑ other: Defendants' and Intervenor's Motion to Strike the Amended Complaint is DENIED; Plaintiffs' Motion for Summary Judgment is DENIED; Defendants' and Intervenor's Cross-Motions for Summary Judgment are GRANTED; and Judgment is ENTERED in favor of Defendants.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____without a jury and the above decision was reached.

☐ decided by Judge _____ on a motion for

Date: 08/19/2014

ANGELA D. CAESAR,
CLERK OF COURT

Anjanie Desai
Signature of Clerk
or Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5259 **September Term, 2015**

1:14-cv-00633-JEB

Filed On: May 4, 2016

Ark Initiative, et al.,

Appellants

v.

Thomas L. Tidwell, Chief, U.S. Forest Service, et al.,

Appellees

BEFORE: Brown, Kavanaugh, and Pillard, Circuit Judges

ORDER

Upon consideration of appellants' petition for panel rehearing filed on April 22, 2016, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken R. Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5259 **September Term, 2015**

1:14-cv-00633-JEB

Filed On: May 4, 2016

Ark Initiative, et al.,

Appellants

v.

Thomas L. Tidwell, Chief, U.S. Forest Service, et al.,

Appellees

BEFORE: Garland,* Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Chief Judge Garland did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk