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Delivered via U.S. Mail and email to appeals-rocky-mountain-regional-office@fs.fed.us

Appeals
USDA Forest Service
Rocky Mountain Region
740 Simms St.
Golden, CO 80401

RE: Part 215 Notice of Appeal- Gunnison NF Travel Management ROD/FEIS

Dear Appeal Deciding Officer:

Please accept this Notice of Appeal under 36 C.F.R. Part 215 from the Record of Decision Notice (“ROD”) and Final Environmental Impact Statement (“FEIS”) for the Gunnison National Forest Travel Management Plan (collectively, the “Decision”), dated June 28, 2010. This appeal is presented on behalf of the Trails Preservation Alliance (TPA), Colorado Off Highway Vehicle Coalition (COHVCO), Rocky Mountain Enduro Circuit (RMEC) and the BlueRibbon Coalition. Individual and/or organizational members of the listed appellants may submit their own appeal(s) from the Decision. This appeal and any such appeals must be independently evaluated and the agency must comply with applicable review procedures for all such appeals. Any communications regarding this appeal should be directed to Paul A. Turcke at the contact information listed above and at pat@msbtlaw.com.

I. INTRODUCTION

Appellants are generally appreciative of the underlying process, structure of the Decision, and outcome on the majority of issues considered. Appellants understand there are active and well-moneyed special interests who seek aggressive reduction (if not elimination) of motorized access to the National Forest System. We applaud the Forest for remaining faithful to the underlying mission of balancing sustainable management of physical resources and appropriate human enjoyment of the Forest. Since current regulations provide no mechanism for intervention in the part 215 appeal process, we face little option but to file an appeal in order to fully participate and defend motorized route/area designations against possible challenge.

There are, however, several areas where the analysis did not follow proper procedures or provide a defensible rationale for restrictions of historically-available motorized access. There is a meaningful demand for motorized/mechanized recreation that is not properly understood or addressed by the Decision. Certain route-specific decisions are simply wrong and should be reconsidered and rectified in the administrative appeal process.

II. GENERAL LEGAL STANDARD

As a preliminary matter, we wish to outline the applicable standard of judicial review, as this standard is effectively the one which agency decisionmakers must consider during the administrative review process. Executive-branch agency decisions are ultimately reviewable by the judiciary, which is empowered to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or found to be “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A) & (D), see also, *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2004) (“we review the full agency record to determine whether substantial evidence supports the agency’s decision....”).

The arbitrary and capricious standard is deferential and does not allow a reviewing court to substitute its judgment for that of the agency:

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....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. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass’n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added). Arbitrary and capricious review is the mechanism through which the courts can require basic fairness and reasonableness of agency behavior, for “unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on discretion.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (quotation omitted).

Even where an agency may have substantial evidence supporting its decision, the presence of contradictory evidence might render the decision arbitrary and capricious. Thus, “even though an agency decision may have been supported by substantial evidence, where other evidence in the record detracts from that relied upon by the agency we may properly find that the agency rule was arbitrary and capricious.” *American Tunaboat Ass’n v. Baldrige*, 738 F.2d 1013,

1016 (9th Cir. 1984) (citing *Bowman Transport, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974) (agency decision supported by substantial evidence may still be arbitrary and capricious)); see *Atchinson v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (where agency modifies or overrides precedents or policies, it has the “duty to explain its departure from prior norms”).

Even substantial evidence cannot properly support a decision if the information was not considered by the decision-maker at the proper stage of the process. Information cannot be presented as a post-hoc rationalization to justify a decision previously made. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). For the reasons identified below, the Decision violates these basic principles.

III. APPEAL ISSUES

The Decision is legally deficient in its treatment of several important issues.

A. The Decision Fails to Properly Analyze or Address Motorized Recreation Demand.

The Decision fails to reflect the basic fact that “[m]otorized recreation is a legitimate use” of the National Forests. Travel Management Rule Final Communication Plan, November 2, 2005, p.5. The various factors that must be reflected in a route designation decision include “provision of recreational opportunities” and “access needs.” 36 CFR § 212.55(a). While a broad analysis of all forms of recreation may be a worthy undertaking, the immediate task before the Forest here was to perform the analysis required by the Travel Management Rule (TMR). The TMR is focused on designation of roads, trails and areas for motorized vehicle travel. The Decision flowed from a fundamentally flawed mission to evaluate all forms of recreation demand, including nonmotorized recreation, and allocate areas/routes accordingly.

“The number of OHV users in the United States has climbed tenfold in the past 32 years, from approximately 5 million in 1972 to 51 million in 2004.” *Id.* As OHV use increases, the Forest Service seems intent on closing much of its route network because of fears of resource damage. However, the Forest Service should be looking for ways to effectively manage and accommodate demand by properly maintaining route systems and looking for areas to construct new, environmentally compatible routes. The Decision reflects the apparent philosophy of limiting opportunities and available route mileage, which will force increasing numbers of visitors into increasingly unsatisfying route networks, creating an unjustified risk of greater environmental impact. Effective travel management needs to prioritize designation of sufficient and well-designed road/trail systems that can respond to current and reasonably anticipated future visitor demand. Where restrictions are necessary, the agency should at least consider, if not look first, to techniques and management prescriptions other than route closures and reductions in available system mileage.

The Forest Service is required by law to make decisions based on a multiple-use mandate, as outlined in statutes like the Multiple-Use Sustained Yield Act of 1960 (“MUSYA”) and the National Forest Management Act (“NFMA”). In particular, NFMA requires:

In developing, maintaining, and revising plans of the National Forest System pursuant to this section, the Secretary shall assure that such plans –

- (1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with [MUSYA], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness...

NFMA §6, 16 U.S.C. § 1604(e). MUSYA provides further clarification of the agency's duty to provide for "use" of the National Forest System, including outdoor recreation. MUSYA's policy statement explains:

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title... MUSYA §1; 16 U.S.C. § 528.

The Forest Service must comply with this legally-mandated approach to management, which is subject to review under applicable administrative procedures and the Administrative Procedure Act (the "APA"). It is well recognized that the agency has discretion when balancing between "use" and "non-use" under these statutes, and in allocating "use" between the activities listed above. However, the agency cannot arbitrarily and capriciously establish its chosen balance, and must develop a plan "that will best meet the needs of the American People." 16 U.S.C. § 531(a).

Then-Chief Dale Bosworth stated upon release of the Travel Management Rule that "[I]and Managers will use the new rule to continue to work with motorized sports enthusiasts, conservations, state and local officials and others to provide responsible motorized recreational experiences in national forests and grasslands for the long run." USDA Forest Service, News Releases, "*USDA Releases Final Rule for Motorized Recreation in National Forests & Grasslands*," dated November 2, 2005. "A managed system of roads, trails and area designated for motor vehicle use will better protect natural and cultural resources, address use conflicts, and secure sustainable opportunities for public enjoyment of national forests and grasslands." Travel Management Rule Final Communication Plan, November 2, 2005, p.5. In fact, "it is Forest Service Policy to provide to diversity of road and trail opportunities for experiencing a variety of environments and modes of travel consistent with the National Forest recreation role and land capability." Forest Service Manual 2353.03(2). The Forest Service should be planning for a managed system, and working with all groups, including OHV enthusiasts, in order to comply with not only the agency's own directives and the Travel Management Rule, but the policies behind the Rule.

The Decision's emphasis on nonmotorized recreation opportunity improperly distracted from proper focus on meeting motorized recreation demand. Additionally, the improper

emphasis on allocating (indeed “awarding”) routes to specified uses ultimately meant that motorized recreationists faced disproportionate restrictions. The trail mileage by recreation type by alternative values have previously been submitted with Appellants’ comments, but we present them again here:

		Existing (1)	Preferred (2)	Alt. 3	Alt. 4
	Sum	1429.58	1429.58	1429.58	1429.58
ATV	ATV	164.94	164.94	164.94	164.94
Motorcycle	MO	501.77	341.11	217.18	426.38
Mountain Bike	MB	586.08	472.35	375.82	622.75
Horse **	HO	1863.94	1783.74	1737.42	1861.28
Foot **	F	1872.71	1792.51	1743.6	1870.05

** includes the ‘unmanaged recreation’ routes AND Wilderness routes

Even if it is proper to undertake the task of allocating motorized/nonmotorized recreation opportunity in a TMR process, the Decision’s allocations fail to reflect the basic fact that many recreation forms are not mutually exclusive. While a sad reflection of human nature, all recreation subgroups will seek “exclusive” use opportunities. In reality, many must accept shared opportunities. For example, a two-track ATV route can (and in many instances must) be shared by ATV riders, motorcyclists, mountain bikers, equestrians, and hikers. Yet such a route will be reflected in any summary as being “allocated” to ATV use.

The Decision fails to properly focus on meeting motorized recreation demand or need. Given the lack of proper focus, a proper outcome was unattainable. Additionally, the Decision arbitrarily and capriciously allocates motorized/nomotorized recreation opportunities. The Forest should revisit these issues on remand and/or ongoing analysis.

B. The Decision Treats Unauthorized Routes Arbitrarily.

There are several distinct and independent flaws in the Decision’s treatment of “unauthorized” or “user-created” routes. In general terms, the Forest treated these as illegitimate and failed to meaningfully consider inclusion of such routes in the action alternatives. The inaccurate depiction of unauthorized routes constitutes independent violation of the Travel Management Rule and NEPA.

The Forest misrepresents the status quo and dramatically understates the historical and existing OHV opportunity on the Forest. A failure to consider unauthorized routes violates both the letter and spirit of the Forest Service Travel Management Rule (“the Rule.”). The Rule recognizes that some of these routes may be properly included in a formally-designated system and encourages Forest to work with interested publics to achieve this end. *See*, 70 Fed.Reg. 68269 (middle column) (“...some user-created routes would make excellent additions to the system of designated routes and areas. The Forest Service is committed to working with user groups and others to identify such routes and consider them on a site-specific basis.”); at 68279 (middle and right columns) (“User-created routes on NFS lands that have resulted from [previously legal] cross-country motor vehicle use may be identified through public involvement and considered in the designation process under the final rule....”). The Forest’s analysis falls far short of what is expected under the Travel Management Rule.

The Forest has independently violated NEPA's requirement that the "no action" alternative be properly identified. *See*, 40 CFR § 1502.14(d). Even in the purported "no action" alternative unauthorized routes are apparently not included. This failure to identify existing routes prevents proper comparison any of the action alternatives to the "baseline" or existing condition. Without a fixed point from which to compare impacts neither the agency nor the public can properly evaluate the true impacts of the alternatives. *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). It is important to note that the relevant "environment" for purposes of evaluating impacts is the "human environment" which includes not just the physical environment but "the relationship of people with that environment." 40 CFR § 1508.14. The FEIS pretends that unauthorized routes do not exist, precluding NEPA's required comparison between the action alternatives and the human environmental baseline.

On the other hand, where nonmotorized unauthorized routes are concerned, the Decision in some instances errs on the opposite side of the analytical spectrum and includes such routes with seemingly little or no analysis. It appears that the FS/BLM has largely accepted user-created mountain bike trails without formal NEPA analysis. Examples include the Ferris Creek area and near Crested Butte, where relatively new, user-created mountain bike trails were apparently included in the Preferred Alternative. In fact, there is at least the perception in the user community that unauthorized mountain bike trails are generally accepted by the agency. *See*, Exhibit A, Denver Post article dated June 30, 2009. A number of near the Crested Butte area.

Appellants have no desire to quibble with the mountain bike community over treatment of unauthorized routes or other issues. The point is that the Decision reflects arbitrary treatment of unauthorized routes based largely (if not entirely) on whether the route(s) in question presently receive motorized use. The TMR acknowledges that user-created routes can be appropriately included in a recreation travel network. Just as the Forest has apparently concluded that many user-created mountain bike trails serve a need, so do routes created or now used by motorized recreationists. Appellants' list of specific trails slated for closure in the Decision should be re-evaluated in ongoing analysis.

C. The Socioeconomic Analysis is Illegally Flawed.

The Decision fails to adequately consider socioeconomic effects of the various alternatives. Again, NEPA's most fundamental legal direction requires the agency to evaluate impacts to the "human environment." 42 USC § 4332(2)(C). The "human environment" expressly includes "the natural and physical environment and the relationship of people with that environment." 40 CFR § 1508.14. When an agency prepares an EIS "and economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment." *Id.* A robust analysis is contemplated, for MUSYA states that "sustained yield" "means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." 16 USC § 531(b). In discharging these duties, the Secretary shall give "due consideration...to the relative values of the various resources in particular areas." 16 USC § 529.

The Decision does not even recognize these criteria. Failing to properly define the target effectively precludes the analysis from hitting it. Instead, the Forest resorted to narrative discussion of socioeconomic impacts. The FEIS cites some broad numbers regarding outdoor recreation. FEIS at 241. None of this discussion is ever connected to specific types of use, specific local communities, or anything approaching site-specific analysis. A proper analysis would seemingly include recognition of existing use patterns and levels, tied to specific roads/trails/areas of the Forest, followed by outputs to local communities. Put differently, the agency must put itself in a position to rationally evaluate the cost/benefit of various designation options for specific routes.

The Decision concludes that “the level of recreational use and associated economic activity is not expected to change from existing conditions.” FEIS at 245. As noted above, there is no meaningful analysis to support this conclusion. In fact, the agency appears to want it both ways – where “environmental” effects (i.e. to the “natural and physical” environment) are concerned, the Decision trumpets the beneficial effects of motorized travel restrictions. However, where there are possible negative effects of those restrictions, such as socioeconomic effects in local communities, the Decision predicts no change.

Neither the public nor the agency could be properly informed of the possible consequences of the decision options under review. On remand, the Forest should be directed to properly analyze socioeconomic impacts.

D. The Decision Considered An Illegally Limited Range of Alternatives.

The Forest considered only alternatives that would significantly reduce motorized recreation opportunity. NEPA imposes a mandatory procedural duty on federal agencies to consider a reasonable range of alternatives to the preferred alternative. 40 C.F.R. § 1502.14 (“agencies shall rigorously explore and objectively evaluate all reasonable alternatives.”) The alternatives section is considered the “heart” of the EIS and a NEPA analysis must “explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14. A NEPA analysis is invalidated by “[t]he existence of a viable but unexamined alternative.” *Resources, Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993).

An agency must also perform a reasonably thorough analysis of the alternatives before it. “The ‘rule of reason’ guides both the choice of alternatives as well as the extent to which an agency must discuss each alternative.” *Surfrider Foundation v. Dalton*, 989 F. Supp. 1309, 1326 (S.D. Cal. 1998) (citing *City of Carmel-by-the-Sea v. United States Dep’t of Transportation*, 123 F.3d 1142, 1154-55 (9th Cir. 1997)). The “rule of reason” is comparable to the arbitrary and capricious standard. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 n. 23 (1989)). “The discussion of alternatives ‘must go beyond mere assertions’ if it is to fulfill its vital role of ‘exposing the reasoning and data of the agency proposing the action to scrutiny by the public and by other branches of the government.’” *State of Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978), *vacated in part on other grounds*, *Western Oil & Gas Ass’n*, 439 U.S. 922 (1978) (quoting *NRDC v. Callaway*, 524 F.2d 79, 93-94 (2nd Cir. 1975)).

A proper range of alternatives was not considered here. The range of alternatives starts from the assumption that the Forest will not meaningfully revisit the retrospective interpretation of any of its prior “designations” made in prior processes, including the 2001 “green to yellow” inventory. As a result of this questionable decision, the “high end” of combined motorized route mileage was identified in the “no action” alternative as 3,731 miles. FEIS at 50 (Table 2-7). The next and independent flaw is the illegally truncated range of alternatives that followed. Specifically, comparing the row in that Table entitled “routes within the scope of analysis” the figures for the four action alternatives are 2,392; 1,984; 2399 and 2,334, respectively. Compared to the “no action” benchmark, these represent 64, 53, 65 and 63 percent of the “no action” mileages, respectively. In short, the agency somehow determined that no less than 35 percent of existing motorized routes must be eliminated from detailed analysis, and then analyzed a narrowly-truncated range of variations around that starting point.

The Council on Environmental Quality has spoken to this situation, and counsels an approach quite different from that adopted by the Forest. The CEQ’s “Forty Most Asked Questions” notes “[a] decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents.” *Forty FAQ*, 46 Fed.Reg. 18026 (Mar. 23, 1981). The CEQ document goes on to illustrate precisely the type of analysis appropriate here in discussing a hypothetical “proposal to designate wilderness areas.” *Id.* at 18027. The CEQ notes that such a proposal, presumably like the converse, a proposal to designate trails, could lend itself to “a very large or even an infinite number of possible alternatives.” *Id.* In such a situation:

only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90 or 100 percent of the Forest to wilderness.

Id. (emphasis added). Instead, the Forest here arbitrarily created a range of alternatives narrowly distributed around an apparent “starting point” of a 35 percent reduction in route mileage.

One or more viable alternatives were improperly excluded from consideration. On remand or through further analysis the Forest should be directed to consider “unclosing” some existing routes, as well as creating new routes that would more properly address the criteria of NFMA, MUSYA and the TMR.

E. The Cumulative Effects Analysis is Deficient.

The Decision reflects an unusual and flawed procedure as well as unsupportable conclusions regarding analysis of cumulative impacts. The duty to evaluate cumulative impacts in an EIS is “mandatory.” *City of Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142, 1160 (9th Cir. 1997). “Cumulative impact” is defined by the relevant CEQ regulation as:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future

actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. The cumulative impacts analysis is deficient for many resources, but is particularly lacking in assessing recreation impacts.

The cumulative impacts treatment is curiously structured. For many resource areas, there is a separate section entitled “cumulative effects.” *See, e.g.*, Wetland, Riparian Veg. et al., FEIS at 85. Additionally, there is a section at the end of the FEIS ch. 3 entitled “Evaluation of Cumulative Impacts at the Landscape Level.” FEIS at 269. All of the discussions are fraught with generalization. For many resources, there is no attempt at coverage aside from the “landscape level” section at the end of chapter 3. The selected procedure does not allow for a sufficient treatment of cumulative impacts.

Regardless of whether the structure is adequate, the discussion regarding past, present, and reasonably foreseeable restrictions on motorized recreation is not. At most, the Decision pays lip service to the fact that other subunits are conducting travel planning which is likely to reduce motorized recreation opportunities. FEIS at 273. The Decision must go much further, for these efforts are tangible and well-documented, and include Region 2 National Forests as well as others in adjacent western states/FS regions that are visited by recreationists frequenting the Forest. The lack of specificity in this discussion precludes it from properly assessing cumulative impacts. This discussion must address not only physical resource factors, but other aspects of the “human environment” including recreation opportunities, access needs, local community support, and impacts of possible displaced use.

The possibility of displaced use is particularly notable, and is mentioned in the Decision. FEIS at 274. The FEIS acknowledges that “there are typically fewer miles of road and trail open to [motorized] users” and that “[o]ften the recreational impact of these cumulative effects is displacement of users or substitution.” *Id.* Unfortunately, only identifying the tip of the planning iceberg does not comply with NEPA. The FEIS cogently touches on numerous cumulative impact issues. For example, what are the effects of displacing traditional GMUG users to (a) other Colorado forests; (b) other states; (c) other forms of recreation? These questions implicate a wide range of impacts. The FEIS raises these important questions but makes absolutely no attempt to analyze, let alone answer, them.

The agency seems well-committed to a path of eliminating historical motorized recreation opportunity across the Forest System. Whether by broader design or the coincidental, simultaneous choices of dozens of individual units erring on the side of closure, the ultimate effect might be to displace millions of riders into less justifiable use of our public lands than has historically occurred on the Forest. Regardless of the agency’s ultimate response, the Forest has entirely failed to conduct the required analysis of this issue as it relates to the Decision.

F. Maintenance Programs and Costs are Inadequately Analyzed.

The TMR necessitates a reasoned analysis of maintenance history and future needs, for the designation criteria specifically require the responsible official to “consider effects on ...The

need for maintenance and administration of roads, trails and areas...and the availability of resources for that maintenance and administration.” 36 CFR 212.55(a). The Decision consistently misrepresents the nature of existing maintenance programs, most notably Colorado State OHV Program funds and grants. Since 1994, for example, the Colorado State OHV program has provided over \$1.6 million in grants to the Gunnison Basin area for trail maintenance and trail crews.

The possible, indeed likely, contributions by nonfederal sources for both funding and other aspects of maintenance should be considered in the designation process. The TMR acknowledges that “volunteers and cooperators can supplement agency resources for maintenance and administration, and their contribution should be considered in this [TMP] evaluation....” 70 Fed.Reg. 68, 261.

Instead of properly recognizing past history and the commitment of user groups to continuing involvement, the FEIS grossly understates both, apparently to justify a less-ambitious route network. Thus, the Decision tepidly offers “[o]ccasionally, the opportunity presents itself for grant funding, user-group funding, or volunteered hours for construction or maintenance of particular trail routes.” FEIS at 265. This is a gross misrepresentation of the consistency and impact of the Colorado State OHV program to the Gunnison Basin. The average grant income per year over the last 10 years is \$150,692. This compares favorably to the \$144,700 annual amount shown in Table 3-61, page 267, for maintaining all USFS and BLM trails under the No Action Alternative.

The motorized recreation community is proud of its past history working to the extent it has been allowed with the Forest Service and other land managers to actively support maintenance, signage, public education/outreach, and other important aspects of recreation management. The duty to analyze maintenance should highlight and enhance these cooperative management successes and opportunities, not be used an excuse for limiting access. On remand and in further analysis the Forest must more accurately portray the availability and consistency of nonfederal sources of funding and other resources.

G. Analysis of Technical Issues is Procedurally Deficient.

The Forest is accorded wide latitude in analyzing technical issues. Unfortunately, the Decision reflects independent deficiencies in this analysis. First, the methodology relied upon and the procedure by which the results were communicated with the public violate NEPA. Further, the substantive conclusions advanced by the Decision do not satisfy even arbitrary and capricious review.

When federal agencies evaluate technical issues or apply specialized expertise, NEPA requires them to rely on valid sources and to disclose methodology, present hard data, cite by footnote or other specific method to technical references, and otherwise disclose and document any bases for expert opinion. 40 C.F.R. § 1502.24; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998). When applying NEPA, agencies must:

utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment....

42 U.S.C. § 4332(A); 40 C.F.R. § 1502.6. NEPA does not envision undocumented narrative exposition, instead requiring:

Agencies shall insure the professional integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

40 C.F.R. § 1502.24. Where information is not provided in the NEPA document itself, but is only cross-referenced:

“The propriety of such incorporation is dependent upon meeting three standards: 1) the material is reasonably available; 2) the statement is understandable without undue cross reference; and 3) the incorporation by reference meets a general standard of reasonableness.”

...[T]here is no evidence in the record concerning the public availability of other incorporated materials. In addition, although it appears that the EA is dependent on these documents to support its finding of no significant impact, [] the EA does not appear to specifically cite to which documents or portions of these documents support which conclusions. This requires undue cross-referencing. It appears that the incorporation of these materials fails the general reasonableness test. Defendants have failed to point out where these materials are specifically cited to in the materials to support their conclusions.

Siskiyou Regional Education Project v. Rose, 87 F.Supp.2d 1074, 1098 (D.Or. 1999) (quoting *NRDC v. Duvall*, 777 F.Supp. 1533, 1539 (E.D.Cal. 1991)) (internal citations omitted). Allowing an agency to couch technical analysis in vague citations to other material violates NEPA and the Council on Environmental Quality Regulations.

The basic methodological structure of the wildlife analysis is questionable, for it largely eschews site-specific analysis for the use of generic “indicators” as a proxy for impacts which can be easily compared (arithmetically) across alternatives. *See*, FEIS at 108 (stream crossing #s across alternatives). This approach is questionable, as it utterly fails to connect route existence (or use) to habitat or site conditions (e.g. soil type, slope, mitigation) so as to intelligently portray actual impacts. Many other analyses lack even this level of rigor. For example, the FEIS purports to analyze impacts to Merriam's Turkey by generally stating that turkeys are susceptible to human disturbance at nest and roost sites, by promising that new routes will not be constructed without further analysis, and by generally concluding that “fewer routes is better” for turkeys. FEIS at 130. This conclusion is devoid of any citation to any source(s) for the multiple

“technical” conclusions it advances. There is no attempt to identify nest or roost sites in relation to any route.

Among the more robust analyses attempted is that for elk, perhaps as a result of the iconic and economic importance of the species in Colorado and the availability of HE and HABCAP modeling. Whatever the value of these and similar tools, none have ever adequately considered an intuitively obvious factor – what are the relative impacts on elk occurring from “purely recreational” motorized travel, versus “nonmotorized” use which includes bipeds vigorously pursuing (and occasionally killing) elk from horses, mountain bikes, and on foot? Even the elk analysis is perhaps best understood through the old adage about lies, damn lies, and statistics.

Finally, none of the analyses, even the most rigorous, provide hard data or other comparable material to facilitate meaningful public review.

These procedural defects condemn the Decision’s technical analysis. Further review should occur on remand or in subsequent analyses, and any technical materials, including underlying data, should be made fully available for public review and comment.

H. Specific Technical Conclusions are Arbitrary and Capricious.

Site-specific decisions are apparently behind many, if not all, of the specific designations within the Decision. However, the agency has generally failed to present the rationale for individual routes. The only real insight to this process is afforded by the ROD, which summarizes the agency analysis for a number of the more complex (or controversial) routes. *See* ROD at 20-38. There are several problems with this approach. For many routes, which are not included among those discussed in the ROD’s summary, the public has no insight whatsoever into the agency’s analytical process. Further, even for the routes which are identified in the ROD, the discussion occurs after the close of comment and therefore a post hoc justification of an agency decision.

Appellants cannot and will not attempt to “prove the negative” regarding such routes. Appellants request, on remand or in ongoing analysis, that closures motivated by wildlife, watershed or other “technical” conclusions be specifically identified. This should include direction to the Forest to reconsider the designation status of the route segments identified, as well as any segments which were not designated for use but for which no justification is presented.

I. Any Decommissioning Requires Additional Analysis.

It is unclear whether, when or how the Forest intends to consider decommissioning of any existing routes that are not designated for motorized travel in the Decision. The topic of decommissioning is not addressed in the discussion of alternatives. However, Table 3-61 provides detailed estimates of decommissioning costs for “work [to] be performed over a 3-year period.” FEIS at 267. Appellants therefore must err on the side of procedural caution and

specifically object to any decommissioning effort which tiers solely (or primarily) to the Decision.

The act of decommissioning is a site-specific action which itself requires commensurate site-specific analysis, far beyond that attempted by the Decision. An existing route not formally designated in this process cannot immediately be slated for decommissioning, at least not using methods involving ground disturbance, until a suitable project-level NEPA analysis has specifically analyzed that project and its associated effects on the human environment in the context of that route. To amplify and support this point, we attach as Exhibit B hereto an administrative appeal decision dated January 27, 2000, issued by the Intermountain Regional Office.

Appellants seek reaffirmation from the Forest (or Appeal Deciding Officer) that the Decision does not address decommissioning and that any decommissioning will be preceded by appropriate site-specific analysis.

J. The Decision is Incorrect Regarding Implementation Timing.

The ROD incorrectly states that implementation of the Decision can occur upon publication in the Grand Junction Sentinel, the GMUG paper of record. The regulations plainly state that where an appeal is filed, “implementation may occur on, but not before, the 15th business day following the date of appeal disposition.” 36 CFR § 215.9(b). “Appeal disposition” in this context will be “a written appeal decision.” 36 CFR § 215.2.

The Decision cannot be implemented as stated in the ROD.

IV. ROUTE-SPECIFIC CHANGES REQUESTED

In addition to, or in specification of, the aforementioned appeal issues, Appellants request the following changes to the ROD for specific routes:

(1) Eyre Basin. The Decision fails to recognize the potential value of this route. The primary justifications identified in discussions with Appellants have been ROS settings and private property concerns. The ROS issue can be addressed by a plan amendment, which the agency has failed to even consider. The private property issue is beyond the scope of the present analysis, and rings particularly hollow when the current property owner is a member of Appellant organizations who is willing to work toward a mutually beneficial arrangement which would facilitate ongoing public access.

(2) Doctor’s Park. The closure based on purported impacts to bighorn sheep is not supported by the data or reasoned analysis.

(3) 4WD Road - Northeast Teocalli Ridge. This route is apparently missing from the FEIS inventory, but has long existed and receives use from both motorized and mountain bike riders. This route should remain open for all use, in that it will reduce some of the traffic on trails #554/557.

(4) Antelope Creek/Land End areas. The current FEIS map shows this trail as being decommissioned. This trail (an old 4WD road) is used by both mountain bike and motorized riders as an alternative to the jeep road (818). In fact in the last few years the Forest has recognized this trail as open to motorized use by signage and trail designation.

(5) Beaver Creek, FS trail # 447. The closure of this trail is of significant concern to the motorized community. This trail is the only single track access off the Lands End area. There is extensive historical use of this area, with closure and decommissioning of alternative routes. If stream crossing issues are the purported rationale, the agency has failed to consider reasonable mitigation options. Further, stream crossing impacts are typically attributable to the existence of a route far more so than travel upon it, and it seems arbitrary to restrict motorized travel while leaving the route in place for continuing use by other groups.

(6) Area south of Highway 50. A number of changes were proposed but largely ignored, some of which include BLM lands or the interface between FS/BLM route systems to allow loop riding and avoid dead ends, including:

- Connect BLM route to FS 806
- Connect FS roads 789.2B to FS 775 to FS 854.2A

(7) The 'Burn Trail', which parallels the Taylor River from approximately Dinner Station Campground to Rocky Brook Road. This single track trail allows users to avoid the busy, and often times dangerously dusty, Taylor Park Road. The trail is nearly flat and easy to ride, with a minor climb on the North end at the road, which historically acts as an ATV barrier.

V. RELIEF REQUESTED

In light of the foregoing, Appellants respectfully request the Appeal Deciding Officer expeditiously grant any and all of the following relief from the Decision:

- (1) Withdraw the Decision;
- (2) Remand the Decision for further analysis;
- (3) Utilize the Part 215 appeal process to facilitate additional analysis of at least portions of the decision (such as specific routes or trail systems), with implementation staged or delayed as appropriate.

We specifically request the opportunity for informal disposition, oral presentation, and or any procedural opportunities provided for or consistent with the applicable regulations.

Sincerely,
MOORE, SMITH, BUXTON & TURCKE, CHTD

/s/ Paul A. Turcke
Paul A. Turcke

/PAT: cam