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June 17, 2011

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

Appeal Deciding Officer
USDA Forest Service
Rocky Mountain Region
740 Simms St.
Golden, CO 80401

**RE: Part 215 Notice of Appeal- White River 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 White River National Forest Travel Management Plan (collectively, the "Decision"), dated March 17, 2011. This appeal is presented on behalf of the Trails Preservation Alliance (TPA), Colorado Off Highway Vehicle Coalition (COHVCO) and Rocky Mountain Enduro Circuit (RMEC). Individual and/or organizational members of the listed appellants may submit their own appeal(s) from the Decision. Appellants are also aware of and support the input and any appeals from other recreational access organizations including the Summit County Off Road Riders, Colorado Snowmobile Association and the BlueRibbon Coalition. This appeal and any such additional 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 Don Riggle, (719) 338-4106; driggle10@msn.com; Dennis Larratt, (720) 530-9974, larratt@mho.com; and Paul Turcke at the above-listed contact information and pat@msbtlaw.com.

## I. INTRODUCTION

The Decision caps the end of a lengthy but badly misdirected planning effort. It is not an appropriate starting point toward a new era of "managed recreation" on the White River Forest. We implore current leadership to break from the unwise, in some cases illegal, choices of their predecessors to make meaningful and necessary improvements in the Decision through this appeal process.

We would be remiss to ignore the positive aspects of the planning process and Decision. We appreciate the Forest's willingness to consider at least some unauthorized routes for designation, we appreciate the general availability of Forest staff to consider input from the general public and Forest stakeholders, we appreciate the Forest's recognition of past and necessary future cooperation involving nonfederal entities, volunteers and diverse user groups in implementing, maintaining and monitoring any effective recreation management program.

Our appeal mixes broad concepts and technical details. It is hopefully apparent that we are frustrated by an apparent attitude, at least among agency personnel in the formative stages of the planning process, to manage through elimination. Rather than evaluating diverse user preferences and attempting a proactive effort to meet demand, this Travel Plan process largely seems a defensive effort in which the Forest looks to safety, budget, the ever present handful of "conflict" users, and similar excuses to not only close/restrict use, but to physically eliminate routes. The extent of decommissioning discussed in the Plan is unprecedented. That the Forest would consider, let alone be so obviously committed to, eliminating this legacy of access is troubling. That the Forest would attempt to execute such a vast decommissioning campaign through the deficient procedural framework here adds to our concern. Appellants' members primarily seek motorized recreation opportunities, and especially single and quality two-track motorcycle and ATV riding, along with historical full-size 4WD experience, but the implications of the decommissioning campaign extend far beyond the motorized access community. Decommissioning a route takes its use away from every Forest visitor and effectively seals the fate of all future visitors and agency managers/decisionmakers. None of this is consistent with the repeated references to the White River as a "crown jewel" of the Forest System. A crown jewel should be actively managed for diverse, quality recreation experiences. The Decision sends the message that "if we close it, they might go away."

Some form of remand will be necessary to rectify the varied flaws in the Decision. We understand the travel management process is an ongoing and dynamic exercise. We also recognize the value in accomplishing some endpoint in the first TMR designation effort. We are deeply concerned that erring on the side of caution and closing routes in the interest of simply making a decision will effectively preclude meaningful consideration of reopening those or similar routes in the future. We are interested in working within and beyond the appeal process to balance these concepts and improve the White River travel plan. We identify various specific routes which we think should be the first priority toward such progress.

We are committed to working with, and as necessary, against, the Forest Service in order to fulfill the incredible opportunity we all possess on the White River. There are many reasons why it is and should be a "crown jewel" and recreation management success story. We ask that you create through this appeal decision a step forward in pursuit of that goal in order to address the steps sideways and backwards thus far in the process. We can all grow in our collective journey so long as we reach our destination.

## II. GENERAL LEGAL STANDARD

The applicable standard of judicial review 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 Forest process reflects numerous procedural and conceptual flaws which combine to illegally taint the final outcome. There are basic misconceptions about the importance and necessity of providing for recreation demand, including motorized recreation demand. Hindsight reveals a history on the White River Forest of prioritizing nonmotorized recreation and downhill skiing, to the detriment of other forms of recreation. As a result, there is an inappropriate reduction in summer recreation opportunities through the Decision.

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).

"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,

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 "[l]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 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. Sadly, the Decision apparently proceeded from the basic attitude that different types of recreation are not compatible in the same locations. Rather than consider effectively managed shared use, the Forest pursued a dichotomous choice, stating "[u]se of mountain bikes, ATV's, four-wheel drive vehicles, snowmobiles, and trails for hiking, horseback riding and backcountry skiing all are competing

over the same land base." FEIS at 9. This is an exaggerated, gross overstatement of the facts on how the Forest's current transportation system works. It is a false characterization of the recreation activities on the Forest and sets up a bias during the consideration of impacts and decisions on the need for conflict resolution. The error is compounded for Appellants by the omission of any reference to motorcycle trail riders among the "competitors" for recreation opportunity.

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/nonmotorized recreation opportunities. The Forest should revisit these issues on remand and/or ongoing analysis.

B. The Plan Flows from an Irrational and Contradictory Perspective on Travel Management.

The Travel Plan reflects a misdirected and internally contradictory focus from within the Forest. The FEIS states the purpose of the Plan is to, "identify the transportation system with the goal of balancing the physical, biological and social values associated with the White River National Forest. FEIS at 3. However, the identification and "balancing" of these "values" is confused and misapplied in the Plan.

The TMR requires the agency to balance user interests against the other criteria in designating routes and areas under the final code. 70 Fed.Reg. 68271 (Nov. 9, 2005). The TMR does not define a "value-based" road and trail management system. Designation criteria at 36 CFR §212.55 list the consideration of "provision of recreational opportunities", a demand-based approach.

At the same time, the Forest Service in numerous places, including public involvement associated with the development of Forest Service Handbook FSH 7710, draft travel rules, pending National Forest Planning rules, A Forest Service Washington Office publication on " *A Framework for* "*Sustainable Recreation*", June 25, 2010, the draft White River National Forest travel management planning documents, promotes the balancing of ecological, social, and economic sustainability, a value-based system. This sets up an arbitrary set of terms and processes and requires the decision maker and the responding publics to "wade through" a confusing set of inconsistent guidelines and definitions, resulting in different expectations.

The Deciding Official selects Alternative GM because "it best meets the purpose and need, and represents the best balance of social, economic, and environmental interests and effects". ROD at 22 (emphasis added). This is a different set of terms and decision variables when compared to the Plan's stated purpose of balancing physical, biological, and social values. "Interests and effects" have replaced "values", and economic concerns have somehow re-entered the decision mix of terminology.

There is no clarifying discussion or explanation about the concepts of balance, values, interests, and effects, nor the shift between the "statement of purpose" in the FEIS and the deciding officer's choice of "purpose" language in his selection of the final plan alternative. .

Further, the ROD and FEIS eliminated the standard and expected Chapter 3 Affected Environment section on socioeconomics and any attempt to clarify changed plan terminology or their application to the process. Such discussion is virtually universal, and was presented in Chapter 3 of the DEIS and SEIS. The interdisciplinary team did not include a social/economist, so, the decision maker and the public have been excluded from the complete understanding of the social and economic affects between final alternatives or any significant application of the social and economic sciences requested.

In the list of objectives to help illustrate the "needs analysis", the focus is on meeting the requirements of law, the forest plan, and establishment of routes and modes of transportation, decommissioning, solutions to resource impacts. *See*, FEIS at 5. There was apparently no "need" to provide sustainable values of outdoor recreation. During the process of identifying key issues only volume of recreation, conflict resolution and resource protection were identified to create alternatives. Maintaining sustainable, quality social and economic values of users and communities was neglected or grossly combined in the "volume" of recreation issue.

The Decision grew from a confusing, contradictory and legally incorrect foundation. There may exist a planning product that improved with age, but this one did not. The Forest set out to accomplish too much and combine too many disparate threads in the Forest Plan, related guidance, and TMR. This flawed approach resulted in a flawed Decision, which should be simplified on remand to more faithfully and defensibly respond to and comply with the TMR.

C. The Purpose and Need Statement is Legally Insufficient.

The Plan was presented in a confusing context, and, given the Forest Supervisor's accompanying letter and purpose/need statement, must be viewed as a "closure" decision. This background inappropriately taints analysis through the omission of any "positive" aspects of providing for motorized recreational access.

A proper range of alternatives cannot flow from an illegally narrow purpose and need. The reasonableness of the agency's choices in defining its range of alternatives is determined by the "underlying purpose and need" for the agency's action. *City of Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815-816 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 332 (1989). The entire range of alternatives presented to the public must "encompass those to be considered by the ultimate agency decisionmaker." 40 C.F.R. § 1502.2(e). The agency is entitled to "identify *some* parameters and criteria—related to Plan standards—for generating alternatives…." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1522 (9th Cir. 1992) (italics in original). However, in defining the project limits the agency must evaluate "alternative means to accomplish the general goal of an action" and cannot "rig" the purpose and need section of a NEPA process to limit the range of alternatives. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997) (emphasis added).

The purpose and need section is flawed on several levels. First, it inadequately reconciles the above-stated concerns and presents various contradictory statements about the Forest Service

mission, the Forest Plan, the TMR, the "natural state" of the lands and some balance of "social and resource demands." FEIS at 8-10. Second, there is the significant but understated intent to "designate or eliminate" which implicates all forms of recreation and many issues beyond recreation, including administrative access, public health and safety through activities such as firefighting, search and rescue, law enforcement and wildlife management. Neither the purpose and need statement or the Plan in general adequately disclose, describe or analyze such elimination of access.

The purpose and need statement inadequately defined the parameters of the decision options before the agency. The underlying confusion and resulting language should be addressed on remand.

D. Flawed Assumptions About Recreation Experience Taint the Decision.

A meaningful site-specific discussion of recreation opportunities and choices is lacking from the Decision. Instead, very broad generalizations are attempted. This approach is questionable but rendered totally inadequate by the deeply flawed assumptions undergirding the analysis.

The Recreation Management section of Chapter 3 discusses the concepts of a diversity of recreation activities, social equity, quality recreation, personal expectations, quality of experiences, and user conflicts. FEIS at 66. This Recreation Management section of the FEIS attempts to establish an evolutionary flow of recreation use patterns from a hierarchical system of mixed recreation that over the years of increased growth has generated many areas of unacceptable conflict.

The recreation section team, evidently in order to guide a decision towards segregating uses and minimizing conflict, assumes that "a quality experience" is a single-track trail for hikers. And that mountain bikers will have some acceptance to share single-tracks with hikers. The recreation analysis goes on to state that ATV's and motorcycle "groups" tend to be more tolerant of full-size vehicles on primitive roadways while still looking for backcountry experiences that avoid a developed roadway FEIS at 85. The implication is that motorized/nonmotorized users tolerate (perhaps even seek) one another, but do tolerate those from across the motorized/nonmotorized divide. This simplistic bias is further carried over to page 87 (FEIS) in the description of the Figure 3.8 graphs. Specifically, "quality recreation" for ATV's and motorcycles is assumed to include level 2-3 roads and trails open to ATV's and unlicensed motorcycles. Quality experiences for mountain bikers is assumed to include level 2 roads and trails open to that use. Quality experiences for hiking and horse riding is assumed to include only trails.

Evidently, the forest has not heard or has chosen to ignore or set aside the input from actual recreationists, and particularly motorized users. A quality experience for a motorcyclist includes an opportunity for solitude, getting away from groups, riding on a single-track trail in a diversity of settings (including the primitive) on inter-connected loops. Dealing with capricious assumptions, and then establishing an inventory or level 1, 2 and 3 roads converted to trails to match up with demand, is contrary to the ROS system defined in the same Recreation

Management Section. Quality on the White River National Forest seems to be based on engineering road standards 1-5 and not ROS settings. No summary of miles of road or trail by activity and/or ROS setting has been displayed or disclosed leading to continued confusion as to recreation opportunity comparisons.

There is an additional inconvenient truth painfully omitted from the discussion. "Conflict" is a byproduct of human-human interaction in its myriad variations, and is not always correlated with motorized use. "Conflict" exists between mountain bikers and hikers, even between hikers. Or between one motorcycle rider and another. A simplistic conception of "conflict" or "recreation preference" impedes progress toward effective recreation management.

There is in this discussion and it presumptions an apparent desire by the Forest Service to have the hikers and horse users in the highest quality primitive and pristine settings while motorized users, because they have more tolerance, accept the more developed and less primitive settings. Regardless of the ultimate answer, the Forest failed to even consider the obvious question -- why should public lands be continually designated and managed for the intolerant, creating less and less total accessible acres for the general population of users? There are time-honored and intuitive but undeveloped techniques to manage recreation that are employed daily in other settings such as specially designated areas or destination rivers. The Forest Service, including the White River Forest, irrationally refuses to even consider a new state-of-the-art for analyzing and managing recreation.

The recreation experience analysis is deeply flawed. The discussion is largely characterized by overgeneralization, lack of documentation or data to support any conclusion, and conclusions that are simply wrong.

D. The Plan Lacks Legally Required Route Specific Analysis.

A travel planning process like this one necessitates detailed analysis of myriad factors for virtually every route. By way of illustration these factors might include soil, water, wildlife, vegetation and other physical resource impacts, as well as facilitation of human activities including vehicle-focused recreation, vehicle access to facilitate other forms of recreation such as camping, hiking, hunting, fishing, backcountry skiing, and others, and nonmotorized recreation.

The Decision is fatally flawed through the total omission of this detailed analysis for any route. Instead, the approach is to discuss impacts or issues at the broadest level, if at all. Individual route options (FEIS Attachment 1) and eventual conclusions (FEIS Attachment 2) are displayed in tabular form. However, these tables present merely conclusions, without attempting to even summarize analysis.

This approach violates NEPA procedures as well as the substantive requirements of NFMA and the TMR. The agency is afforded latitude in making the difficult choices inherent in this process. But the agency must inform the public of the options being considered, identify relevant issues and information, rationally discuss them, and present a reasonably discernible path to the agency's final choice. These steps are simply not attempted in the Plan.

The basic analytical structure of the Plan is deeply flawed. The tabular summaries offer no more than the most simplistic catalogue of the hundreds of route-specific choices made by the Forest. This method precludes compliance with the APA since there is not even an attempt to demonstrate the agency's analytical path to the ultimate decision on any route.

E. The Plan Fails to Adequately Disclose Decommissioning Actions.

Decommissioning is a site-specific action which requires site-specific analysis. We stressed this point in our comments, including submission of the January 27, 2000 appeal decision from the Intermountain Regional Office clarifying the need for site-specific analysis where ground disturbing actions are contemplated. Again, we attach this document as Exhibit "A" hereto.

The ROD/FEIS fail to reasonably consider or respond to this requirement. The Forest blithely suggests any site-specific decisions either have been made but are not disclosed, or will be made as part of "implementation" in some indefinite manner in the future. ROD at 12, 19.

The scope of decommissioning stated in the Decision is staggering and unprecedented. The Decision states that 692 miles of "non-system" routes will be slated for decommissioning. ROD at 19, Table 1.2. In conjunction with 519 miles of "system" routes. *Id.* These routes are apparently in addition to roughly 240 miles of routes "already decommissioned but require[ing] additional treatment." *Id.* (178 system, 162 non-system). For perspective, this totals 1,551 miles, or nearly one-third of all existing routes in the Forest.[1] Whether the Forest should "walk away" from these existing and historically utilized routes is a separate question (addressed below) from the procedural deficiency to disclose the method of decommissioning. The attempt at compliance through mere reference to a "suite of methods" is utterly deficient. *Id.*

The appeal decision should reverse and set aside the decommissioning elements of the Decision and instruct the Forest to complete a separate process to disclose specific decommissioning methods in any and every instance where ground disturbing activity may occur in conjunction with decommissioning.

F. The Plan Lacks Meaningful Site Specific Analysis of Decommissioning.

Distinct from the failure to disclose decommissioning actions is the lack of meaningful discussion about whether decommissioning should occur for "non-designated" routes. The agency simply cannot comply with its numerous substantive requirements without some discussion, that meaningfully involves the public, to analyze available options.

The failure to analyze decommissioning issues/alternatives implicates many issues. Certainly physical resource impacts enter the analysis. These include direct impacts such as those associated with removing culverts, "recontouring" roadbeds/stream crossings, or similar actions. They also involve indirect impacts, such as wildlife effects based on reductions,

[1] Determined by adding the figures in ROD Table 1.2, and converting to a fraction that total divided by the same figure plus "foot" routes from ROD Table 1.1 (i.e. 1551/5143).

displacements or other changes to access associated with decommissioning. Additionally, impacts to the "human environment" are involved. It is obvious and perhaps primarily intended to reduce motorized vehicle access through decommissioning. But also impacted, intentionally or unintentionally, is nonmotorized access in trails/areas of decommissioning.

The Plan acknowledges the complex, multi-faceted nature of recreation planning, as well as the unique challenges presented by the White River with its location, volume and unique visitor population. Assuming the Forest has fully complied with all legal requirements in designating routes for motorized access (which it has not), the Forest has not even attempted to comply with the legal requirements that attend decommissioning routes not designated for motorized access. Put differently, there is a complex and difficult analysis that must precede the Forest's apparent desire to remove roads/trails *en masse* from the landscape for all users.

Aside from immediate impacts associated with decommissioning, the Forests "designate or decommission" approach is fundamentally inconsistent with the Travel Management Rule, not to mention common sense. The TMR is intended to be a dynamic and evolving process, not a "one time only" edict creating an inflexible transportation system. There may exist many routes that are determined unsuitable for continuing or present use which may be suitable candidates for future designation following maintenance, reconstruction, further analysis, changes in use or resource conditions, or other factors. Removing all routes not designated improperly forecloses future management options.

Independent from the failure to disclose noted above, the appeal decision should reverse and set aside the Decision's decommissioning actions and require the Forest to conduct analysis, including opportunities for public involvement under NEPA and other applicable law, before rendering decisions about decommissioning any individual route(s) that are not designated.

G. The Socioeconomic Effect Analysis is Legally Deficient.

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.

Shockingly, the FEIS lacks a section on socioeconomic effects. *See*, *generally*, FEIS Chapter 3; FEIS Table of Contents at i. Such a section is common, perhaps universal, in typical agency practice, and was present in the DEIS and SDEIS here. The need for such discussion seems obvious in light of the frequent observation about the popularity and volume of visitation

to the White River Forest, and the associated development of gateway communities and recreation-related facilities and effects in the locale.

Recreation is an increasingly dominant use of public lands, especially on the White River Forest. We are concerned that the Decision reflects a step backward in meaningful study and planning for the role of recreation from a socioeconomic perspective. Our culture, including the Service, increasingly prioritizes "public-private partnerships" and integrated management to the benefit of social, economic, and environmental goals. Documentation of the economic value of specific recreational activities should be a priority for the Forest Service. We recognize there are challenges in this undertaking, but they can be reasonably surmounted. For example, the economic value of specially permitted trail use for ski areas and other permittees would not only provide a manageable context for such study, but would presumably bring additional revenue to the agency for recreation management.

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.

H. 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 technical analysis is largely presented in FEIS Chapter 3 and runs afoul of these principles. Most sections provide few, if any, citations to any reference material. Where references are cited, they are often for very broad or general issues, and lacking for subsequent and more critical steps in the agency analysis. *See*, *e.g.*, FEIS at 70-71 (recreation visitation); 82 (undocumented narrative discussion about "changing to a visitor focus"). Finally, virtually none of the discussions 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 meaningful discussion of the rationale for individual route decisions.

A separate concern exists over mixed use, which apparently drives many closures under generalized "safety" concerns. "Transportation and Infrastructure" indicates a 2006 and 2007 forest engineering study was completed on management level 3-5 roads in response to the 2005 Road Rule requirements. FEIS at 121. A couple of areas in the FEIS, including page 119, paragraph 5, say that: "The forest will work with the various state, county and local road management agencies to determine where non-highway legal vehicles may be legally used on

roads under the jurisdictions of these entities. Decisions in the final travel management plan will reflect the legality and practicality of non-forest legal motor vehicles being able to access areas of the forest." This sounds like a future tense reference to a job that has not yet been completed.

Our understanding is that this FEIS/ROD was to be the a final travel management plan, based on the 2002 FLMP, and that it had a complete inventory of possible coordinated mixed use roads from which to optimize motorized recreation opportunities.

Appellants request, on remand or in ongoing analysis, that closures motivated by wildlife, watershed, safety 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. The Cumulative Effects Analysis is Legally 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.

Cumulative effects for recreation management are discussed at FEIS 96-97. However, the discussion focuses on nature and anticipated trends in recreation demand. There is a fundamental disconnect between the above-cited regulatory mandate and the perfunctory yet off-target discussion in the FEIS. The Decision fails to pose, let alone answer, the obvious question-what is the effect of the Decision on the "human environment", more specifically recreation opportunity/demand, in conjunction with past, present and reasonably foreseeable future actions? Phrased differently, what does the Forest predict will occur when the Decision dramatically reduces opportunity in the face of what it portrays as steadily growing demand? It is an independent and fatal flaw that the Decision fails to even consider these questions.

To the extent the Decision suggests a perfect storm of declining opportunity in the face of rising demand, it is a storm the Forest has not only long observed, but arguably created.
Ski area expansions with service roads, trails, lift towers, and mountain bike routes have all taken place outside of an integrated transportation master planning process. These decisions reflect increased opportunities for mountain biking and are outside of the consideration of a balance of needs for motorized recreation activities surrounding resort communities displayed in the FEIS.

This development, which also addresses the inappropriate assumptions noted in our earlier comments, was made conspicuous to our organizations on June 21, 2006. On that date, following a Colorado Roadless Area task force meeting, a Forest Service employee informed several of our organization representatives that the "recreational niche" developed on the White River Forest was "wilderness and skiing." The same individual indicated that "his" Forest should not be a "destination for motorized recreation." It is inappropriate for this attitude to permeate the formal planning process. It is doubly so for the agency to overlook the cumulative steps toward implementing this vision.

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.

J. The Attempt to Comply with Subpart A is Inadequate.

The Decision only provides minimal attention to "subpart A" of the TMR. The effort is deficient and should be withdrawn.

Subpart A requires identification of a "minimum road system." *See*, 36 CFR § 212.5(b). The language in question was added to the regulation in 2001 and has received relatively little attention until recently. Within the last year subpart A claims have been raised in numerous preservationist lawsuits contending (erroneously) that subunits have illegally attempted to designate something more than the "minimum" road system, or that subpart A designation of the "minimum" road system must precede more detailed subpart B analysis of roads, trails and areas for use.

These cases are winding through the court system. Recent guidance was offered in the Eastern District of California in *Center for Sierra Nevada Conservation v. U.S. Forest Service*, Case No. CV 09-2523-LKK (E.D.Cal.), attached hereto as Exhibit "B." That decision offers meaningful insight on various aspects of the TMR and upholds the Forest Service interpretation that the regulations allow the agency to complete Subpart B designations prior to an independent Subpart A analysis.

The Decision unfortunately falls below whatever standard is ultimately established in these decisions. In particular, the Forest fails to even identify the proper regulatory language and purports to establish a "minimal road system" instead of the "minimum road system" required by the regulation. FEIS at 18. A "minimal" road system seems likely to be closer to the preservationist vision of subpart A, i.e. that the road system be as close to zero as possible. This interpretation is inconsistent with the interpretation of other forests which have survived judicial scrutiny. There is no defensible reason why the agency should diminish its discretionary authority as arguably attempted in the Decision. The White River Forest's interpretation is deficient from both legal and policy perspectives.

K. 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 expectation of this FEIS and ROD was that it would finally establish an integrated and updated Transportation Plan for the Forest based on the 2002 Forest Plan. *See*, FEIS at 3. One of the stated purposes was to "align the travel strategy on the forest with the forest plan" It has been a nine year wait for a travel plan implementation process under the new forest plan, and much longer (26 years ago) when the existing travel plan was put in place. *See*, FEIS at 10 ("[n]o new road or trail construction or reconstruction is part of the proposed action or decision"). A complete inventory of roads and trails, including unauthorized routes, for updated and responsive decision making under FSM 7700, FSH 7710, and 36 CFR 212 would logically that consideration of some segments of new road and trail or reconstruction would have created more opportunity to address forest plan implementation issues and provide for a more complete set of alternatives for the decision maker and public to consider.

It appears that the Forest was only really trying to implement the 2005 Travel Rule and not making a complete effort to update the 1985 Transportation plan by limiting alternatives only consideration of the existing system. The final product is not fully responsive to the Purpose and Need Statement.

The Decision rationale states "Alternative GM meets the spirit of the Travel Rule and will allow the White River National Forest to implement an official system for the entire forest." ROD at 22. Again, the FEIS states "[n]o new construction of roads or trails is proposed in this document, but construction may be initiated through some future project-specific analyses.

Some project proposals may also include changes in recreation, such as new routes to create loop opportunities…." FEIS at 20. By not including all loop route opportunities and excluding reconstruction possibilities in this ROD/FEIS, the number and range the alternatives were artificially constrained to the point of not allowing a full response to the key issues: volume and type of recreation and resolution of recreation conflict. ROD at 7.

This approach also puts off the decisions on location and construction of trail heads and other transportation facilities that could go along way to resolving conflicts particularly at points of concentrated recreation use and shared access. The Travel Management process is supposed to be a totally integrated decision process responsive to a forest plan, especially when it is to replace old and outdated plans. The "no construction" strategy leaves critical system decisions on recreation and travel management pending and begging some other planning process, or some stand alone, future set of project level decisions. It does not allow for the achievement of the Purpose statement. The mapping of the preferred alternative clearly shows most motorized recreation has been concentrated into the Rio Blanco Ranger District, and otherwise avoided Forest Plan approved motorized areas around ski resorts and high value mountain communities. Another example of this segmentation is in the Ruedi Reservoir area. The area south of the reservoir and north of Lenado has been shifted essentially to a non-motorized area preventing any continued use of a north-south motorized trail system. This changes historical use on established trails and roads, and eliminates opportunities to link established routes.

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.

L. Certain Routes Were Improperly Excluded from the System.

Specified routes were improperly considered unauthorized routes when they have long been recognized and managed by the Service. We refer to and incorporate by reference the comments signed by Dennis Larratt dated January 6, 2009. Those comments cite the 1981 Travel Map which includes numerous routes that the current planning documents fail to identify as system routes. As a result, the ability for these routes has been improperly diminished.

It is hard to know the true effect of withholding "system" status for these routes. Again, a detailed discussion of the decisionmaking analysis for any route is lacking from the planning documents. However, we reasonably believe that many of these routes were simply not realistically considered for designation because of the mistaken belief that they were unauthorized routes and therefore a lesser priority than system routes.

## 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:

**(A) Basalt Mtn/Red Table Trail System**

(1) 3-1913.1 Old Road - has been used to access all the trails on Basalt Mtn/ Red Table. For safety reasons this trail needs to remain open to keep OHV's off of main Cattle Creek Road.

(2) 3-1913W.1G Lower Bower Creek Trail - allows for a bigger loop in this trail system to meet user demand and prevent unauthorized use

(3) 3-N1913W.1G NW of Bower Cr Trail – same as above.

(4) 4-N6046.1 Green Gate Trail - key to completing this system to provide a complete day riding experience.

**(B) Triangle/Lenado Trail System**

(1) 1-N121.1 North Kobey Park Trail.

(2) 1-508.2R, 1-1508W.1H South Kobey Park Trails

These are single-track trails that run through Kobey Park from FS road 503 to Lookout above Lenado. These trails complete a single track system from Triangle Peak to Lenado and create a day long riding experience. These trails were part of an Adopt a Trail agreement between MTRA (Motorcycle Trail Riders Association) and Aspen Ranger District in 1984.

(3) 3-1930.1 Rocky Fork to Miller Cr trail

(4) 3-522.1 Miller Cr tr to County Road.

These two trails create a link from Aspen/Roaring Fork Valley to Frying Pan River Valley. They have provided access since the turn of the century for mining and logging and there is no demonstrated need for closure.

**(C) Thompson Creek Area**

(1) 3-1951.1 South Branch Thompson Cr

(2) 3-1951W.2 Connector trail to Middle Thompson Cr.

These two trails overlap winter snowmobile trails and allow a loop from Thompson Creek side to Four Mile Park and FS road 300.

**(D) Red Table Mountain Area**

(1) 4-464W.3 East Old Mans, 4-N204.1 Timber Basin

These trails are necessary to complete a Gypsum/Carbondale loop.

(2) 3-1913.2 North Fork Cattle Creek

A challenging trail which completes another section of the loop.

**(E) Red and White Mountain Area**

(1) 7-779.1 Wildridge to Red and White - Provides access to trails on Red/White Mtn.

**(F) Holy Cross Ranger District**

(1) Numerous routes that have provided historic access and complete loops, including:

7-774.1
7-774.2C
7-783.1
7-783.1A
7-783.1B
7-1881.1A
7-N226.1
7-225.1
7-994W.1
7-993W.1
7-992W.1
7-788.1
7-N230.1
7-N278.1
7-N231.1
7-2106.1A
7-996W.1
7-734.1A
7-2110.1
7-781.1
7-N289.1
7-N285.1
7-N239.1
7-N247.1

(2) Additional routes that have similarly provided historic access, complete loops, and serve important additional needs including safety, challenge, visitor experience, including:

7-N234.1
7-1881.1
7-2107.1
7-2106.1
7-N238.1

7-N248.1
7-1896.1
7-1896.2
7-781.1A
7-N236.1
7-N237.1
7-737.1
7-N286.1
7-1880.1

**(G) Varied routes primarily providing 4WD/OHV access:**

4-415.1 (Yeoman Park Rd)
4-416.1 (Hat Creek)
4-436.1 (W. Hat Creek)
4-400.2 (Sylvan to Crooked Creek Pass)
4-414.1 (Sylvan to Leeds--Hardscrabble to Leeds)
3-400.2 (Crooked Creek to Burnt Mt/Woods Lake)
7-700.1*

4-415.1 (Yeoman Park Rd)
4-416.1 (Hat Creek)
4-436.1 (W. Hat Creek)
4-400.2 (Sylvan to Crooked Creek Pass)

These roads are commonly shared by licensed and unlicensed vehicles during hunting and non-hunting seasons. The roads serve as a loop for OHV users from the old Fulford Road back to the Yeoman Park campgrounds and to other camping locations, including Sylvan Lake. These routes have long facilitated a variety of quality user experiences with minimal issues and minimal maintenance or administration issues.

4-414.1 (Sylvan to Leeds--Hardscrabble to Leeds)
3-400.2 (Crooked Creek to Burnt Mt/Woods Lake)

Similar to the above areas. These routes are arguably safer traveled by multiple OHV's than full size vehicles, especially with trailers hauling OHV's.

7-700.1* (Red and White--Wolcott to Piney)

Removal of OHV's to this entire area will have a horrible effect on hunting and recreational use in this area. This is a great area for OHV usage and has not been abused in the past. The trails from Wolcott to Piney have been shared by OHV's and licensed vehicles for many years with minimal issues.

4-419.1 (Old Fulford Road) - open to OHV's less than 50in. Where should people park to use this access point and drop off machines? Why close to Jeeps? Road has great history to it and is not abused by users for the last 20+ yrs. No cost to maintain.

4-646.1 (Craig Peak Road) - status on map is unclear. This is a very popular hunting area for older hunters where they can access high country walk old logging roads. Resource, maintenance and administration issues have been virtually nonexistent for decades.

4-426-1 (above Fulford) - this road is used by OHV's for hunting access to New York Mtn and it also used to help haul hikers in/out of Polar Star and Hidden Treasure areas. Resource, maintenance and administration issues have been virtually nonexistent for decades.

4-435.1 (Metheny Park-eastern section) – similar to above, provides historical hunting opportunity with minimal issues.

4-435.1C/B (Metheny Park Loop) – important hunting access and particularly access to existing and historically used campsites.

**(H) Golden Horseshoe Area Trails**

5-gh-92 American gulch ditch/Trans-Continental ditch

5-gh-71/44

5-gh-44/22/27 short connecting

5-gh-45/27/33/17

5-gh-73

5-gh-31

5-611w.2a

5-n6013.1 Connects Boreas Pass to Indiana Gulch

The foregoing list is not intended to be detailed or exhaustive, but to provide some input on specific areas of concern in the interest of initiating or continuing dialogue.

## 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