

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action Nos.: 18-cv-02354-MSK
18-cv-02903-MSK

TRAILS PRESERVATION ALLIANCE,
SAN JUAN TRAIL RIDERS, PUBLIC
ACCESS PRESERVATION ASSOCIATION,

Petitioners and Intervenor-Respondents,

v.

U.S. FOREST SERVICE;
SAN JUAN NATIONAL FOREST;
KARA CHADWICK, Forest Supervisor;
DEREK PADILLA, Dolores District Ranger;

Federal Respondents,

and

WILDEARTH GUARDIANS;
SAN JUAN CITIZENS ALLIANCE;
DUNTON HOT SPRINGS, INC.;
SHEEP MOUNTAIN ALLIANCE,

Intervenor-Respondents and Petitioners.

**OPENING BRIEF ON THE MERITS BY PETITIONERS
TRAILS PRESERVATION ALLIANCE, SAN JUAN TRAIL RIDERS
and PUBLIC ACCESS PRESERVATION ASSOCIATION**

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I. INTRODUCTION

These consolidated matters address U.S. Forest Service planning and management of recreational access. The final agency action under review is the Rico West Dolores Roads and Trails (Travel Management) Project Final Record of Decision, Environmental Impact Statement and associated actions issued by the Dolores Ranger District, San Juan National Forest on July 30, 2018 (collectively, the “Decision”). Petitioners in the lead case (No. 18-cv-02354) Trails Preservation Alliance, San Juan Trail Riders, and Public Access Preservation Association (collectively “Trail Riders”) are nonprofit organizations consisting primarily of members who enjoy and advocate for motorcycle trail access. Petitioners in the companion case (No. 18-cv-02903) are nonprofit preservation organizations and a privately owned ecotourism resort.

The Rico West Dolores roads and trails have received motorized vehicle travel for decades. The location and nature of that motorized access have become regularly and increasingly scrutinized. Through this scrutiny, improved equipment and better management practices, motorcycle travel on designated trails has long been environmentally sustainable and recognized as one of a spectrum of appropriate multiple uses of the area. The Forest Service previously restricted motorized access in 2009, and that effort and the validity of ongoing motorized travel was challenged and upheld in this Court, and eventually the Tenth Circuit, in *Backcountry Hunters and Anglers, Colorado Chapter v. U.S. Forest Service*, Case No. 11-cv-3139-MSK (D. Colo.), 612 Fed. Appx. 934 (10th Cir. 2015).

Following its successful defense of the foregoing litigation, the Forest Service undertook further planning culminating in the Decision. The Decision imposed significant new restrictions

on motorized travel. The Decision eliminated motorcycle trail access to the Town of Rico. The Decision reduced available motorcycle trail mileage by over 30 percent, reduced the season of use, eliminated key routes, and disrupted long-established loops and trail connectivity. These substantial but ill-chosen reductions unnecessarily eliminate access, will threaten adverse environmental impacts, create crowding and increase public safety risks by redirecting and concentrating motorized travel. Unfortunately, these actions ignore logic, disserve sound policy and violate the law.

The Trail Riders faced little option but to challenge the Decision’s restrictions through this action. The Court should declare unlawful and vacate the Decision, and remand this matter to the Forest Service for further analysis.

II. LEGAL FRAMEWORK

The Trail Riders challenge the Decision under various authorities including the National Environmental Policy Act, 42 U.S.C. § 4331, et seq. (“NEPA”); the National Forest Management Act, 16 U.S.C. § 1600 et seq. (“NFMA”) and associated Forest Service Travel Management Rule, 36 C.F.R. part 212; and the Administrative Procedure Act, 5 U.S.C. § 551, et seq. (the “APA”).

A. Administrative Procedure Act.

The APA provides the applicable waiver of the United States’ sovereign immunity here for those aggrieved by “final agency action.” 5 U.S.C. §§ 702, 704; *Lujan v. National Wildlife Fedn.*, 497 U.S. 871, 882 (1990). APA section 706(2) provides the standard of review: a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law; [or] (C) short of statutory right; [or] (E) unsupported by substantial evidence....” This standard of review is “narrow” but 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.

Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted). This review focuses on adherence to procedure and the rationality of the agency process, not the wisdom of the agency’s decision. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). Still, the Court may affirm the agency’s decision solely “on the ground articulated by the agency itself” and post hoc “rationalization by counsel in briefs or argument will not cure noncompliance....” *Id.* at 1565, 1575. The Court will not weigh evidence or question the agency’s choice of methodology, but any deference to the agency is reduced if the record demonstrates that the agency has “prejudged” the issues. *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002).

B. National Environmental Policy Act.

NEPA represents “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. NEPA does not impose substantive requirements, but creates a series of procedures designed to disclose and analyze potential environmental effects of proposed federal actions. See, generally, *Citizens’ Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1177-1178 (10th Cir. 2008). Central among these is the requirement that major federal actions which

have the potential of a significant effect be preceded by an environmental impact statement (“EIS”) for public review and comment. 42 U.S.C. § 4332. NEPA’s protections of the “environment” refer to the “human environment” which “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14. Thus, the agency’s duty to analyze impacts does not end with impacts to the physical environment, because “[w]hen an [EIS] is prepared 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.*

NEPA procedures are designed to advance “twin aims” of “consider[ing] every significant aspect of the environmental impact of a proposed action” and “ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Forest Guardians v. U.S. Fish and Wildlife Service*, 611 F.3d 692, 711 (10th Cir. 2010) (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983)); *New Mexico ex. rel. Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009) (NEPA focus[es] both agency and public attention” and “facilitates informed decisionmaking by agencies and allows the political process to check those decisions”).

C. Travel Management Rule.

On November 9, 2005, the Forest Service published a Final Rule entitled “Travel Management; Designated Routes and Areas for Motor Vehicle Use.” 70 Fed.Reg. 68264-68291 (Nov. 9, 2005) (the “Travel Management Rule”). The Travel Management Rule was promulgated in accordance with notice-and-comment rulemaking procedures of the APA and therefore carries force and effect of law. The 2005 Rule is codified at 36 C.F.R. part 212,

subparts B and C.¹ The Travel Management Rule generally “requires designation of those roads, trails and areas that are open to motor vehicle use...and will prohibit the use of motor vehicles off the designated system, as well as use of motor vehicles on routes and in areas that is not consistent with the designations.” 70 Fed.Reg. 68264 (Nov. 9, 2005).

The Travel Management Rule requires the agency to apply “general criteria” when designating roads, trails and areas for vehicle use, which include effects on natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses of National Forest System lands, the need for maintenance and administration of roads, trails and areas, and the availability of resources for maintenance and administration. 36 C.F.R. § 212.55(a). The Rule further includes “specific criteria” which must be considered “with the objective of minimizing” effects on specified resources including soils, watersheds, wildlife and associated habitats and conflicts between vehicle and other uses and within vehicle use types. *Id.* at (b). The eventual designations are disclosed and analyzed in a public planning process, with the final product being published in a decision document and displayed on a Motor Vehicle Use Map to govern future travel in the project area. See, generally, *Biodiversity Conservation Alliance v. U.S. Forest Service*, 765 F.3d 1264 (10th Cir. 2014); *Pryors Coalition v. Weldon*, 803 F.Supp.2d 1184 (D. Mont. 2011), *aff’d*, 551 Fed. Appx. 426 (9th Cir. 2014); *Ctr. for Sierra Nevada Conservation v. U.S. Forest Service*, 832 F.Supp.2d 1138 (E.D. Cal. 2011). Travel management can present unique challenges “where the agency must comply with a multitude of obligations, many of which pull the agency in competing directions....” *Ctr. for Sierra Nevada Conservation*, 832 F.Supp.2d at 1149.

¹ Subpart C addresses “over-snow vehicle” use which was not considered in the Decision.

III. STATEMENT OF FACTS

The pertinent facts are either admitted or contained within the administrative record.

A. The Project Area and Background.

The San Juan Forest includes about 1.8 million acres located in southwestern Colorado. The Rico West Dolores analysis area is located with the Forest's Dolores Ranger District, and contains approximately 244,554 acres of National Forest system lands and 11,702 non-Forest Service lands (the "Area"). Trail Riders' Petition (ECF 1) and Answer (ECF 18) at ¶¶ 25 (admitted). The Area includes mesas, aspen stands, steep slopes of dense conifers, and snow-covered peaks and is bisected by Highway 145, which follows the Dolores River. *Id.* at ¶¶ 26. The west side of the Area is bordered by private land and the Boggy-Glade travel management area, the north side includes a portion of the Lizard Head Wilderness, and the east side of the Area is the spine of the La Plata Mountains, and the Colorado Trail (a statewide non-motorized trail). *Id.* Communities within and nearby the Area include Cortez, Dolores, Dove Creek, the Town of Rico, and Telluride. *Id.* A general view of the Forest including the Area is found in the Forest Plan. AR 0775.² A narrower view of the Dolores Ranger District is found in the Travel Analysis Process. AR 2602. The Decision documents contain various maps focusing on the roads and trails within the Area. AR 5761-5767.

The roads and trails in the Area often developed along historic pathways originally created for mining or domestic livestock grazing. Trail Riders' Petition (ECF 1) and Answer (ECF 18) at ¶¶ 27 (admitted). This network was expanded to include roads constructed to access

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

timber sales in spruce, fir and aspen forest types. *Id.* Modern use of the Area still includes uses like mining, livestock grazing, and timber, as well as increasing and diverse forms of recreation. *Id.* at ¶¶ 28 (admitted). Like nearly all of western Colorado, the area includes popular big game hunting areas, with an assortment of seasons for different species and weapon types. *Id.* Also popular is vehicle-based recreation using motorcycles, all-terrain vehicles, utility vehicles and jeeps, which in Forest Service parlance are collectively referred to as “off-highway vehicles.” 36 C.F.R. § 212.1 (defining “off-highway vehicle” as “[a]ny motor vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or other natural terrain”).

Motor vehicle travel on the National Forest System was long conducted on an “open unless designated closed” policy, which allowed for at least a theoretical and legal possibility of cross-country travel. Despite this possibility, topography, vegetation and other factors caused vehicle riders to travel along the network of established roads and trails in the Area. These routes are depicted on various maps going back decades. AR 5546 (describing maps as early 1971 showing “use by motorcycles on ‘single-track’ trails”). More recently, and certainly after passage of NFMA in 1976, management of the San Juan National Forest became increasingly formalized. The 1983 Forest Plan included travel management elements, including adoption of a 1994 Travel Management Map. AR 2564. In 1999, a Closure Order restricted on-trail travel to those motorized uses permitted on the 1994 Map. These actions tended to formalize the historical use patterns and motorcycle travel limited to existing trails in the Area.

The trend toward more intensive travel management solidified with adoption of the agency-wide Forest Service Travel Management Rule on November 9, 2005. 70 Fed.Reg.

68264-68291 (Nov. 9, 2005). The Rule signified a shift to designation of roads, trails and areas for motorized vehicle travel. Outside the prescribed travel on these roads, trails, and areas, motor vehicle travel would be prohibited. AR 5549-5550 (discussing Rule within the project Purpose and Need statement). The Forest undertook efforts to implement the Rule and adopt new travel management decisions. The Dolores Ranger District decided to complete three separate decisions to address each of its identified “travel management landscapes” – the Area, the Mancos Cortez area, and the Boggy Glade area. AR 2599-2600; AR 4808 (depicting “landscape motorcycle routes”).

The planning process for the Area culminated in a 2009 Decision Notice, which prohibited cross-country motorized travel and designated specific routes for motorized and non-motorized travel. Various parties filed administrative appeals, and the reviewing officer recommended reversal, including on the grounds that a more rigorous Environmental Impact Statement should have been prepared. AR 2565-2569; AR 2570-2571 (Decision adopting recommendation). The Forest Supervisor in 2010 followed this recommendation, reversed the Decision and vacated the new trail designations, but issued an interim order closing the Area to cross-country motorized travel. AR 2572-2573. One of the appellants, Backcountry Hunters and Anglers, Colorado Chapter, filed a lawsuit in 2011 asking the Court to declare the 2010 “decision” unlawful and/or issue an injunction prohibiting motorized use of 14 trails in the Area. That case wound its way through this Court and the Tenth Circuit, with the Forest Service (and Intervenor including the Trail Riders) prevailing throughout. See, *Backcountry Hunters & Anglers v. U.S. Forest Service*, 612 Fed. Appx. 934 (10th Cir. 2015). However, part of the management scheme outlined by the 2010 “temporary” order included the Forest Service’s

intention to devise “a more permanent replacement policy” to govern motorized vehicle travel in the Area.

B. Chronology of the Travel Management Project.

The Rico West Dolores Travel Management Project represents the “more permanent replacement policy” to designate roads, trails and areas for motorized use in the Area. Trail Riders’ Petition (ECF 1) and Answer (ECF 18) at ¶¶ 37 (admitted). The Project was formally initiated in December 2014 with publication of a proposed action. *Id.* A Draft Environmental Impact Statement (“DEIS”) was released for public comment on May 6, 2016. *Id.* at ¶¶ 38; AR 5530-5531 (cover letter). A Supplemental Draft Environmental Impact Statement (“SDEIS”) was published on July 7, 2017. AR 7866-7873 (cover letter and summary). Approximately 1,100 letters, emails or phone logs were received in response to the DEIS and SDEIS. The Trail Riders submitted written comments. Trail Riders’ Petition (ECF 1) and Answer (ECF 18) at ¶¶ 43 (admitted).

The DEIS and SDEIS each outlined five (5) alternatives to be considered in detail. AR 5535-5536; AR 5557 (DEIS); AR 7866 (explaining that “procedural clarification” addressed in SDEIS “does not require any changes to the five alternatives presented in the original Draft EIS”). In general terms, Alternative A was the legally-required “no action” alternative intended to outline the pre-decisional existing condition. AR 5557. Alternative B was the “proposed action” which was described as the December 2014 proposed action “with refinements.” *Id.* Alternative C would “reestablish motorcycle use on some, but not all, of the trails that would be closed to motorcycle use under Alternative B.” *Id.* Alternative D would provide a motorcycle trail system similar to Alternative C but would reduce motorcycle riding and focus on a

“semiprimitive nonmotorized recreation setting” in the Bear Creek drainage. *Id.* Alternative E would be similar to Alternative D, but extend the “semiprimitive nonmotorized recreation setting” to North Calico Trail and connecting trails. *Id.* In terms of trail mileage for motorcycle use, the DEIS/SDEIS alternatives covered the following range:

Alternative	A	B	C	D	E
Miles Designated Open to Motorcycles	114	86	100	88	65

AR 5559 (Table 2-1).

Another important plan component was seasonal timing restrictions, defining times during which trails would be open/closed to motorcycle travel. Under the “no action” Alternative A, there would be no timing restrictions. AR 5562 (Table 2-3). Under Alternative B, trails would be open for motorcycle travel from July 1 to September 8, and closed from September 9 to June 30. *Id.* Under Alternatives C, D and E trails would be open for motorcycle travel from June 1 to October 30, and closed from November 1 to May 30. *Id.*

A Draft Record of Decision (“Draft ROD”) and Final Environmental Impact Statement (“FEIS”) were issued on November 14, 2017. AR 10658-10763. The Draft ROD proposed adoption of Alternative B Modified. AR 10669. The Draft ROD identified a minimum road system, created a new designation on 19 miles of trails in the Black Mesa area for motorized vehicles up to 62 inches in width, designated 83 miles of trail for motorcycle use, and adopted seasonal restrictions allowing motorcycles on designated trails from June 1 to October 30, with motorcycle use prohibited from November 1 to May 31. AR 10668-10671.

Under applicable regulations at 36 C.F.R. part 218, the Draft ROD was subject to a

“predecisional administrative review” through “objection” within 45 days. Twenty (20) objections letters from 14 unique objectors were presented to the Draft ROD. Trail Riders’ Petition (ECF 1) and Answer (ECF 18) at ¶¶ 46 (admitted). These objections were considered by an Objection Reviewing Officer within the Forest Service Rocky Mountain Region office. *Id.* Extensive efforts were made to explore “resolution” of the objections, which included telephonic meetings on February 22, March 7 and March 16 of 2018, as well as the exchange of written proposals between some of the objectors and the Forest Service. *Id.* at ¶¶ 47; AR 10309-10547. A resolution was not reached. *Id.* Upon concluding that a resolution would not be reached, the Reviewing Officer issued a formal written response to the objections dated April 4, 2018 (“Objection Response”). AR 10548-10586 (individually addressed letters to objectors); AR 10587-10657. The Objection Response constitutes the final administrative determination of the Department of Agriculture. AR 10585-10586 (citing 36 C.F.R. § 218.11(b)(2)).

The Dolores Ranger District issued a Final Record of Decision dated July 30, 2018 (“Final ROD”). AR 10765-10889. The Final ROD tracked the Draft ROD, with two additional modifications. AR 10777. First, motorcycle use was prohibited on the entire East Fall Creek Trail, extending this closure to include a one-half mile section that had been proposed for continuing motorcycle use in the Draft ROD. *Id.* Additionally, a dual designation for Forest Service Road 692A was added to allow for motorcycle use, contingent upon approval in a separate analysis of a new motorcycle trail named Spring Creek Extension that would connect to the end of Road 692A. AR 10778.

C. Trails at Issue and Nature of Recreational Travel in the Area.

It is important in analyzing the Decision to appreciate the nature of recreational access to

the Area, its network of trails and the connectivity between these trails and the adjacent landscapes outside the Area. Many Forest Service travel plan cases involve an entire Forest and a daunting array of road/trail configurations. See, e.g., *Idaho Conservation League v. Guzman*, 766 F.Supp.2d 1056, 1069 (D. Idaho 2011) (describing Salmon-Challis Forest Travel Plan, where action alternatives ranged from 2,905 miles to 4,351 miles of motorized routes). The Area has a much more modest route network which is far easier to understand, particularly given the primary focus here on motorcycle travel. The agency has in several instances summarized these motorcycle trails in a table. AR 5559-5561 (DEIS summarizing trail prescriptions by alternative); AR 10823-10824 (Final ROD, Attachment 2 summarizing trail designations). The location and interrelation of these trails is enhanced by viewing them on a map. AR 5715 (DEIS showing “no action” Alternative A or predecisional status); AR 10846 (Final ROD with final designations).

The Trail Riders have emphasized certain key elements of this network. This input fits within the subarea discussions used by the Service to organize the analysis. See, e.g., AR 5566-5580 (DEIS discussion of alternatives for nine (9) subareas).³ Starting at the northern end of the Area, Subarea 2 contains the Calico North, Winter, West Fall Creek and East Fall Creek Trails. The Calico Trail is central feature running north-south through the Area, and the Winter and Fall Creeks trails have historically provided important loop riding opportunities in this area. AR

³ The Trail Riders’ concerns focus on a handful of key trails. The Trail Riders are certainly concerned about the overall health and effective management of the entire Forest. The Trail Riders also appreciate and on some occasions address management issues involving other types of vehicles or nonmotorized access, but their focus in this litigation is on single-track motorcycle trail designations. As a result, the Trail Riders’ focus in the Area designations is on subareas 2, 3, 4, 6, 8 and 9.

4062.⁴ This is also a focal area for nonmotorized recreationists, given its proximity to the Lizard Head Wilderness and the Dunton Hot Springs Resort, a privately owned “ecotourism resort” operated under various special use permits with the Service. *Id.*; AR 2764-2766 (Proposed Action (“PA”)). The Trail Riders recommended that the previously authorized routes remain available for motorized travel, but that a new Winter Trail route be designated solely for nonmotorized access, to create “a win for both motorized and non-motorized users.” AR 4062.

Subarea 3 is in the southwestern part of the Area, where the focus for the Trail Riders was to designate the Loading Pen Trail for motorcycle use and to retain and extend the motorcycle route on Spring Creek, to provide for loop riding on desirable trails and connectivity to trails outside the southern boundary of the Area. AR 4063 (SJTR); AR 2767-2769 (PA). Subarea 4 lies to the east of Subarea 3, and includes the South Calico Trail and key connections eastward, most notably via the Wildcat and/or Tenderfoot Trails. AR 4064 (SJTR); AR 2770-2772 (PA). Access along Wildcat Trail would work in concert with the Subarea 8 Ryman Creek Trail, such that Wildcat extends to the west of Highway 145 and provides ingress/egress to Calico Trail along the ridgeline, while “Ryman Trail is needed as a cross-over route from the East that connects to the Hermosa drainage.” AR 4064 (SJTR); AR 2785-2787 (PA).

Subarea 6 focuses on the Town of Rico, and portions of the Burnett Creek and Horse Creek trails that provide connection between the Town and the motorcycle trail network. Aside from these trails, motorized vehicle access to Rico is provided solely by Highway 145. The Trail

⁴ The Trail Riders’ input is largely summarized through the San Juan Trail Riders’ comments, but similar comments were also presented by Public Access Preservation Association. See, AR 4017-4021.

Riders objected from the outset to the proposed closures of Burnett Creek and Horse Creek Trails “to completely isolate single-track motorized recreation from the town of Rico.” AR 4020 (PAPA); see also, AR 4066 (SJTR); AR 2777-2780 (PA) (“emphasize non-motorized recreation modes in order to emphasize the community’s quiet-use character”).

Finally, Subarea 9 involves the Bear Creek drainage, which offers prized opportunities for diverse activities. Aside from the unique setting, routes in the Bear Creek drainage provide key connections for motorcycle riders between the Area and the Mancos/Cortez landscape to the south. Even in scoping, the Trail Riders recognized that some reductions in historical motorcycle access were likely in Bear Creek, but expressed a willingness to support such changes through designation of comparable trail miles elsewhere. AR 4066 (SJTR); AR 2788-2791 (PA) (outlining key considerations including “balancing desired recreation experiences” and “providing connections for motorcycles”).

D. General Overview of Travel Plan Restrictions.

The Final ROD imposes a series of significant restrictions on motorcycle travel:

(a) motorcycle travel was prohibited on Winter, West Fall and East Fall Creek Trails (AR 10784), in the vicinity of the private Dunton Hot Springs Resort, which perhaps not coincidentally facilitates a non-motorized loop trail experience directly from the Resort property, in addition to the abundance of similar opportunity accessible by a short drive (or hike) to the Lizard Head Wilderness;

(b) Motorcycle travel was reduced by roughly 85 percent in the Bear Creek drainage as requested by special use interests and a few seasonal residents, leaving only a “pass through” connection between Grindstone and Gold Run Trails and along 1.72 miles near the middle of the

Bear Creek Trail (AR 10792-10793);

(c) Motorcycle trail connection to the Town of Rico was eliminated, through closure of the Burnett Creek and Horse Creek Trails (AR 10789-10780);

(d) Motorcycle travel was prohibited on Ryman Creek Trail (AR 10792), which was a desirable 5 mile trail segment providing important connectivity for riders in the Telluride area and to adjacent trail systems in the Hermosa area;

(e) Motorcycle travel was eliminated from the Spring Creek (AR 10785) and Wildcat Trails (AR 10787);

(f) Motorcycle travel on designated trails can only occur from June 1 to October 30, and is prohibited from November 1 to May 31 (AR 10780-10781).

The Final ROD designates a total of 84 miles of trail for motorcycle use, down from 114 miles authorized for travel prior to the Decision. AR 10778 (Table 1). Aside from the arithmetic reduction of mileage, the changes greatly impact the connectivity, ability to ride loops, aesthetic experience, and safety for motorcycle riders in the Area. The Trail Riders therefore filed this action on September 14, 2018.

IV. ARGUMENT

The Decision makes dramatic, unnecessary and unjustified changes to a long existing and sustainable trails network. The Court should declare the Decision unlawful, vacate the Decision, and remand this matter to the agency for further proceedings.

A. The Trail Riders Meet Standing Requirements.

The Trail Riders initiated this action for judicial review and it is therefore “incumbent on [them] to demonstrate the elements of standing.” *New Mexico Off-Highway Vehicle Alliance v.*

U.S. Forest Service, 645 Fed.Appx. 795, 801 (10th Cir. 2016). To demonstrate standing “a plaintiff must show:

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

SUWA v. Palma, 707 F.3d 1143, 1153 (10th Cir. 2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000)). In the National Forest management setting, an “injury” is sufficient which “in fact affects the recreational or even the mere esthetic interests of the plaintiff....” *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). An organization can assert the standing of its members. *Id.* The Trail Groups have submitted declarations of Don Riggle and Allen Christy, which amply satisfy all of these requirements, for the declarants and members of the organizations. See, e.g., *High Country Conservation Advocates v. U.S. Forest Service*, 333 F.Supp. 3d 1107, 1117-1118 (D. Colo. 2018). The Decision prevents the present and planned future motorcycle access by Petitioners’ members to specific trails in the Area, causing concrete but redressable harm to their recreational and aesthetic interests. There should be little dispute that Petitioners have demonstrated standing.

B. The Decision Fails to Consider Important Aspects of the Project and Fails to Articulate a Rational Connection between Facts Found and Choices Made.

The Travel Management Rule provides for broad discretion in the designation process, the agency must still carry out that role in a manner that explains and justifies its route-by-route conclusions to the public and a reviewing court.

1. There is Insufficient Site-Specific Analysis to Support Closures.

The Decision advances a suite of management choices to address a range of purported management needs. However rational this analysis might be on some site or with further documentation, the critical linkage is missing here between any facts found, analysis performed and management choices made.

The Decision employs a narrative style that fails to meet applicable requirements for presentation of technical conclusions. Under even “arbitrary and capricious” review the agency must articulate a “rational connection between the facts found and the choice made....” *Motor Vehicle Mfrs. Ass’n.*, 463 U.S. at 43. NEPA imposes various technical protocols including disclosure of methods, presentation of hard data, and disclosure of any “sources relied upon for conclusions” in an EIS. 40 C.F.R. § 1502.24. NEPA does not envision undocumented narrative exposition, but requires that “[a]gencies shall insure the professional integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements.” *Id.*; *Sierra Nevada Forest Protection Campaign v. Tippin*, 2006 U.S. Dist. LEXIS 99458 at *29 (E.D. Cal. 2006) (“NEPA does not permit an agency to rely on the conclusions [of agency experts] without providing both supporting analysis and data”). A “bare assertion of opinion from an [agency] expert, without any supporting reasoning, would not pass muster in an EIS.” *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1103 (9th Cir. 2016). The agency certainly has latitude in choosing and implementing the methodology it will employ, but if a chosen “test is used to evaluate a proposed project, NEPA requires the agency to include that test in its [EIS]” and any such test “is therefore subject to the NEPA regulations regarding accuracy and scientific integrity.” *Env’tl. Defense v. U.S. Army Corps of Eng’rs*, 515 F.Supp.2d 69, 87 (D. D.C. 2007).

The Decision does not attempt the necessary connection between specific closure (or designation) decisions and the relevant analysis on the affected site(s). The rationales consist of narrative discussion, devoid of anything resembling data or scientific analysis. See, e.g., AR 10785 (rationale for closing Spring Creek Trail to motorcycle travel because “the ID team was unable, at this time, to find a route that did not result in unacceptable impacts to the ‘outstanding waters’ designation of Spring Creek including fish habitat”); AR 10792 (discussing, but containing no documentation or analysis of, soil “downcutting” and “positioning of soil layers”); AR 10793 (apparently justifying Bear Creek actions “in response to many commenters who identified Bear Creek as a unique river”).

The Decision is deficient for failing to provide data and analysis, but is further flawed in reaching conclusions that simply contradict recent analysis of the same issues on the same trails. Pleadings from the *Backcountry Hunters & Anglers* litigation are included in the record. AR 10142-10290. The agency emphatically rejected claims that existing motorcycle travel on Area trails was causing undue conflict or resource impacts. AR 10174-10185 (Service’s preliminary injunction brief). The agency properly noted the testimony of its wildlife biologist that deer and elk are habitat generalists which have security areas “in which there is no OHV use” within the Area ranging in size from 450 to 5,000 acres which “provide ‘ample habitat for deer and elk.’” AR 10178-10179 (citing Ivan Messinger Declaration). The Trail Riders reminded the Service of these positions in the planning process. AR 7691-7694; AR 7697-7699 (summarizing declarations of Service leadership and specialists on issues including wildlife, fisheries, vegetation, maintenance, and crowding/conflict). The Decision attempts to justify its change in position, claiming these declarations “did not address all concerns associated with this analysis”

and “were confined to a subset of the total motorized road and trail system.” AR 10772. The agency further contends “while there was not an immediate need to prohibit motorized use on the 14 trails involved in the lawsuit, this did not mean there were not issues that needed to be addressed for their long-term effects on a particular resource.” *Id.* These explanations and qualifications do not hold up to the specific statements in the agency’s prior sworn testimony.

The narrative, informal style of the presentation and absence of meaningful hard data/analysis are a fatal combination for the Decision. There is no way to determine what information was relied upon or at what point the scientific analysis pointed the District Ranger to any particular decision element. The Court should declare this approach deficient and remand the Decision for further analysis.

2. Closures Cannot be Rationally Based Upon Generalized User Conflict.

The Decision’s analytical weaknesses are particularly acute for social “conflict.” A primary rationale for motorcycle use restrictions is a ubiquitous finding of “user conflict.” The Decision and underlying record do not approach the threshold to justify individual management actions on this rationale.

Reduction of alleged conflict and enhancing a “nonmotorized experience” is the rationale for the majority of motorized route restrictions. See, e.g., AR 10784 (Winter, East Fall and West Fall Trail closures will provide “an emphasis on nonmotorized experiences” and “should reduce conflicts”); AR 10789 (Burnett Creek and Horse Creek Trail closures will meet “the desires of the Town of Rico” and “[c]onflicts will be reduced”); AR 10792 (Ryman Creek Trail closure “will provide an additional opportunity for semiprimitive nonmotorized experiences”); AR 10793 (Bear Creek and Little Bear Creek Trail closures to enhance nonmotorized uses). The

Trail Riders objected to reduction of undocumented conflict as the rationale for these closures. AR 10011-10013. The Objection Response refers to “recreation conflict” literature in the abstract, claims “[t]here is no requirement for a finding of direct conflict” but asserts that conflict was analyzed at pages 200-207 in the FEIS. AR 10605; 10619-10620.

The referenced analysis falls short of NEPA’s standards for presentation of technical analysis. The initial portion of the cited discussion consists of a generalized narrative or bare assertion of opinion. AR 9383-9385. The discussion then shifts to the Area in announcing that “[s]coping comments reveal conflicts between recreation uses under the current road and trail system.” AR 9385. This discussion does not get beyond generalized discussion or anecdotal observation, emphasizing comments (or conclusions) like the fact that use levels are low to moderate, that some users move to other trails when encounter rates increase, and that motorized trail opportunities would be enhanced by more trails/connections. AR 9386. A table is provided that summarizes “conflicts noted by comments” for individual trails. AR 9387-9390. There is no meaningful catalogue or analysis of the actual comments. The record includes a document entitled “social values mentioned.” AR 4160-4164. This document only confirms the arbitrariness of the agency’s “method.” There are no citations, no indication of source/site, or frequency. Many of the “values” deny conflict or are supportive of shared use. AR 4160 (“PA overstates conflict...”; “The trail system is under-utilized and conflict is low”; “Conflict between people is overstated”); AR 4162 (“Person that rides mtn bikes, hikes and “I believe in multi-use trails”). Relying in this way upon some nebulous presence of subjective “conflict” can hardly be a rational connection between facts found and closure choices made.

It is debatable whether subjective comment from some unspecified commenter(s) can

even form the basis for trail closures. The Travel Management Rule requires the agency to “consider effects...with the objective of minimizing....(3) Conflicts between motor vehicle use and existing or proposed recreational uses” of the Forest.” 36 C.F.R. § 212.55(b). The regulation refers to conflicts of “use” not conflict between “users.” In the analogous consideration of “controversy” as a NEPA intensity factor the proper focus “refers to disputes over the size or effect of the action itself, not whether or how passionately people oppose it.” *Wild Wilderness v. Allen*, 871 F.3d 719, 728 (9th Cir. 2017). The *Wild Wilderness* panel declined to engage the now predictable pile of comments asserting “conflicts” and affirmed a Forest Service decision to build a snowmobile staging area, finding that the agency sufficiently considered comments and “we need not address the question of whether on-snow user conflicts are outside the scope of the agency’s required NEPA analysis entirely because they are ‘citizens’ subjective experiences...not the ‘physical environment.’” *Id.* at 729 n.2 (citing *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1466 (9th Cir. 1996) and *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983)).

Even if subjective assertion of conflict can be a basis for travel management designations, common sense dictates there be an articulable basis for the agency’s conclusions. This topic may not be susceptible to “hard” scientific analysis such as erosion, water quality or reproductive success, but even social scientific subject matter is routinely analyzed through the scientific method. *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1182 (9th Cir. 2000) (upholding decision based on recreation use study); *Riverhawks v. Zepeda*, 228 F.Supp.2d 1173, 1184 (D. Or. 2002) (discussing “user study” conducted on site noting motorized use was “cited as a source of concern” but finding “the majority of non-motorized users nevertheless indicated a

high degree of satisfaction”). The agency did not attempt any such analysis and does not purport to offer site-specific analysis of conflict here. If anything, the Service here admitted futility in attempting scientific analysis in saying “those who comment during a public comment, and those who were interviewed for the San Juan interviews, do not constitute a random or representative public sample. No statistical sample data exists related to the potential for conflicts between recreation uses.” AR 9386. In justifying the decision to leave certain trails open to motorcycle use against those proclaiming conflict, the District Ranger observed “[t]here are examples of conflict described in public comments for all the trails with single track motorized use and these two trails were no exception.” AR 10787 (discussing Priest Gulch and South Calico Trails). This epitomizes arbitrary and capricious behavior – an unspecified quantum of “conflict” was apparently presented for all the trails, with no explanation provided how the decisionmaker chose between “open” or “closed” designations.

Conflict of use must be considered under the Travel Management Rule. Like any topic, the agency must still engage a transparent and rational analysis, disclosing methods, data and analysis. Even if the bar for technical analysis of social science is low, the Decision comes nowhere close to being sufficient. The Court should advise the agency on remand to adopt and disclose some defensible method for any treatment of conflict.

3. The Decision Improperly Restricts Access to Rico.

The Town of Rico is the only, albeit primitive, municipality within and is therefore an important feature of the Area. The Decision eliminates motorcycle trail access to the Town of Rico. This is flawed for two independent reasons. The purported rationale that the Town “desires” such a closure is simply incorrect and not supported by the record. Additionally, the

closure of trail access to Rico creates potentially significant public safety risks which the Service has failed to disclose or analyze in violation of NEPA and the Travel Management Rule.

a. The Town of Rico did not Desire to Eliminate Motorcycle Access.

The Service claims that closure of all motorcycle trails to Rico was justified by the “desires” of the Town of Rico. AR 10789 (“Meeting the desires of the Town of Rico and its residents were factors in my decision to remove single track motorized use designations from the Burnett and Horse Creek Trails.”). Like many of the “choices made” in the ROD(s), there is no identified inflection point in the decisionmaking process or reasoned explanation of where the switch flipped from “keep open” to “close” the affected trails to motorcycle use. Far worse in this instance, the purported reason for closing the trails to Rico is flatly contradicted by the record.

The Service generally discusses the situation for the Town of Rico, framing a need to “strike[] a balance between concerns about motorcycle traffic on streets in the town of Rico with the need for motorcyclists to have access to town businesses for fuel, food, or lodging.” AR 5556. The DEIS discussion is based on 2004 Rico Regional Master Plan which the Service says “reveal[s] that residents favor quiet forms of recreation.” AR 5694. However, the same discussion concludes that every action alternative, including those which would allow for continuing motorcycle trail access to Rico, is “not in conflict with the Rico Regional Master Plan.” *Id.*

The actual comments received reflect a changing position from “the Town of Rico.” Initially, the Town Manager provided input on Town letterhead dated January 26, 2015 indicating that “[w]e, in the town of Rico, are generally pleased with the proposed action...” AR

10036.⁵ This input specifically stated the “decision to close upper Burnett Creek and Upper Horse Creek Trails to motorized use is very much appreciated” and expressed support for closing Calico Trail between the intersections with the above-named routes, to create a nonmotorized trail loop from Rico. *Id.* The Town’s comments on the DEIS, dated June 9, 2016, continue to reflect this view. AR 7824-7825 (restating support for “the Burnett Creek/Horse Creek Loop as a non-motorized trail” and strong opposition to any of the alternatives that would allow motorized use of upper Burnett Creek Trail). However, in a comment to the SDEIS about six weeks later, a new Town Manager provided input on Town letterhead dated July 25, 2017 advising the Town Board of Trustees “is withdrawing” the January 26, 2015 comment letter. AR 9143. The letter further expresses a “strong preference” to prohibit motorized use of Burnett Creek Trail but allow motorized use of Horse Creek Trail as “the most appropriate point for motorized ingress and egress between the Calico Trail and Highway 145.” *Id.* Private groups purporting to represent “outdoor enthusiasts” focused on nonmotorized use also supported this approach. AR 8433-8435 (Rico Trails Alliance comments, advocating for Horse Creek or Wildcat as “the most appropriate point and the quickest means for motorized ingress and egress between the Calico Trail and Highway 145”); AR 8444-8445 (Telluride Mountain Club expressing support of same approach). Through some combination of the passage of time, ventilation of the issues in the administrative process, or political change, the “Town of Rico” modified its position on whether and where there should be motorcycle access to the Town.

⁵ The cited comments were all provided as exhibits to the Trail Riders objections. See, AR 10028-10044. The citations here are to the pages where the original comment is included, where applicable, in the administrative record.

While the Town’s position apparently changed, the Service’s did not. In the Proposed Action, the Service emphasized “the community’s quiet-use character” through “discouraging motorcycle use from Forest trails into the Town” with closure of Burnett and Horse Creek Trails to motorcycle use. AR 2777-2778. In the Draft ROD, the District Ranger first penned the conclusion that “[m]eeting the desires of the Town of Rico and its residents were factors in my decision to remove single track motorized use designations from the Burnett Creek and Horse Creek Trails.” AR 10680. Again, the Draft ROD was released in November of 2017, roughly four months after the Town Manager and Board of Trustees expressed support for continuing motorized access via Horse Creek or Wildcat Trails. Those “desires” were ignored and the above-quoted sentence is included verbatim in the Final ROD. AR 10789. Indeed, the Court has ample basis to find “that the EIS sets forth statements that are materially false or inaccurate” and on that basis “may properly find that the EIS does not satisfy the requirements of NEPA.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983)

There is not a rational connection between the undisputed documents in the record and the District Ranger’s assertion that the Town of Rico “desired” to eliminate motorcycle trail access to Rico. Whatever significance the Town’s desire might have in the ultimate management decision, it cannot provide a defensible basis for eliminating motorcycle travel on Burnett Creek, Horse Creek and Wildcat Trails.

b. The Decision Fails to Address Public Safety Risks.

The Service not only misrepresented the Town’s desire, but also failed to properly disclose or consider the safety risks associated with eliminating motorcycle trail access to Rico and displacing any possible access to a paved highway. The Decision acknowledges that Rico

has “value” for emergency services, fuel, lodging, and other visitor services. AR 5556 (acknowledging “the need for motorcyclists to have access to town businesses for fuel, food, or lodging”); AR 10789 (recognizing the Town is “valued as a gas stop and this access remains in place via Hwy 145”). The Decision is seriously flawed in this respect. Eliminating motorcycle trail access to Rico creates unjustified risk and complicates access from the Calico crest for riders who need the support or resources available in the Town. Additionally, the Decision fails to analyze or justify the risks caused by displacing all motorcycle access to the Town onto Highway 145.

The Decision itself contains virtually no discussion of these concerns. Regarding travel on Highway 145, the Decision blithely concludes that that access remains “via Hwy 145” without even considering the nature or volume of this traffic or the extent to which trail motorcycles should be sharing a highway with full sized vehicles. AR 10789. Regarding the function of the Town as a resource/refuge for riders along the Calico “ridgeline” the Decision admits that options “to exit the ridge to the east would not exist but there are multiple options to exit the ridge on the west side....” *Id.* However, this choice is unresponsive to the presented need to address riders facing “bad weather or mechanical trouble.” *Id.* The point is that riders in these situations, or even more so those in medical need, require access to Rico, not simply to “exit the ridge.” The Decision contains nothing resembling analysis to which the Court can defer.

The Objection Response contains additional discussion. It begins by recognizing that public safety is a consideration in designation of motorized vehicle routes. AR 10593. The discussion simply repeats the above-quoted, conclusory language from the ROD(s). *Id.* The

Objection Response additionally asserts the “FEIS discusses safety in the context of mixed use on roads and trails” citing to specific pages (pp. 214-225 and 262-263) in the FEIS. *Id.* It concludes that the “the roads under review could be designated for motorized mixed use without increasing the safety risk to the public.” *Id.*

The Objection Response does not adequately address any safety concerns. The referenced portions of the FEIS don’t pertain to risks associated with highway travel. The discussion starting at page 214 of the FEIS is entitled “trail safety” and primarily addresses travel on the trails themselves. To the extent there is mention of Highway 145, it is identified as a destination, e.g. the discussion is about how trail closures affect access to Highway 145, within the network of “motorcycle connections to adjacent landscapes.” AR 9403-9405 (FEIS 220-222). The discussion at pages 262-263 of the FEIS is not about highway use, but rather the “Mixed Use Analysis” of National Forest System roads. AR 9445-9446. This Mixed Use Analysis is not included in the FEIS, but is “located in the project file.” AR 9445. A document with that title is contained in the administrative record, but it addresses only maintenance level 2 roads, and contains no mention of Highway 145. AR 4446-4472.⁶ The Objection Response is thus unresponsive to the question posed, as the conclusion that “[n]o roads were identified where a mix of licensed and unlicensed use should be prohibited” is only accurate in describing a small subset of National Forest System roads of a certain maintenance level.

The Service failed to meet its obligation to consider public safety in making motorized

⁶ “Maintenance level terminology” classifies roads from Maintenance Level (“ML”) 1 (roads in storage for more than a year) to ML 5 (roads paved or chip sealed). AR 2605.

vehicle designations. The agency seemingly acknowledges that public safety is a factor it must consider in making designations. AR 10593. The Travel Management Rule “specific criteria” for designating trails include “[c]onflicts among different classes of motor vehicle uses” and “[c]ompatibility of motor vehicle use with existing conditions in populated areas, taking into account sound, emissions, and other factors” *Id.* at (b)(4) and (5). Specific criteria for designating roads require consideration of “[s]peed, volume, composition, and distribution of traffic on roads” and “[c]ompatibility of vehicle class with road geometry and road surfacing.” *Id.* at (c). The Service will presumably say that Highway 145 is outside its jurisdiction and it therefore did not “designate” Highway 145 for motorcycle access. AR 5551 (“This project will not apply to Hwy. 145 itself, which is managed by the State of Colorado.”). However, the agency made designations with not only the knowledge but the intent that closure of historical motorcycle access would displace motorcycle travel to Highway 145. See, e.g., AR 9405 (describing extent of “connections” necessitated along Highway 145 under different alternatives). While the Decision recognizes the need for this travel, it does not disclose or analyze the effects on the human environment. Instead, “[m]ixed use of different types of motor vehicles on roads was not identified as an issue for this project.” AR 10593.

The Service failed to meaningfully consider effects to public safety associated with increased motorcycle traffic on Highway 145. This is a classic instance of the agency “fail[ing] to consider an important aspect of the problem....” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43. On remand, the Court should instruct the Service to disclose and analyze public safety issues caused by anticipated changes in travel patterns necessitated by the Decision.

4. Excluding Public Access is Not a Rational Livestock Management Tool.

The Decision closes Wildcat Trail solely because the closure “is critical to minimize conflicts with livestock herding efforts in the Wildcat Creek drainage.” AR 10787. The Objection Response goes even further, explaining that the pasture traversed by Wildcat must undergo “intensive management requirements” for the “specialized breed of cow” involved. AR 10633. These conclusions and the decision to eliminate long occurring public access along Wildcat Trail are not supported by the record.

Again, the record is thin to document the agency’s drastic conclusion that closure is the necessary option for managing Wildcat Trail. What is apparent is that the livestock grazing permittee does not like motorcycles because “motorcycle noise is disturbing and oftentimes motorcycles are arrogant.” AR 4110. The permittee has expressed a wide range of opinions to the Service, including that on Burnet[t] [Creek Trail] “bikes can’t hurt this, already impacted” and that on the Calico Trail “I don’t think noisy bikes should be in this area at all....” AR 4551. The Decision takes the opposite action to the permittee’s suggestion on each of these routes. Nor does the agency consider the suggested possibility of leaving “the trails as they are and limit[ing] the number of bik[e]s [and] make them put mufflers on them.” AR 4552. Again, the agency is arbitrarily picking which elements of this singularly-expressed view will translate to action and which will be ignored.

The Trail Riders consulted with representatives in the ranching industry, and offered testimony on this situation in the objection process. Brenda Richards has spent her life in the livestock industry, operating under public land grazing permits and serving in leadership with grazing advocacy organizations like the Public Lands Council. AR 10052. Public lands ranchers

understand (or should understand) that “we operate within a system of ‘multiple use’ management” that necessitates they “coexist with these uses.” AR 10053. In review of the Decision, Ms. Richards, who is familiar with “dozens, if not hundreds” of grazing decisions, observes “I cannot recall a similar decision or application of similar logic in which a federal land manager is closing a route/area to a particular form of public access for the ostensible benefit of the single permittee grazing cattle in the area.” AR 10054. She concludes, “it is certainly unusual to see ‘a specific type of livestock grazing system’ used by a federal land manager as an excuse to close an area to motorized vehicles.” AR 10055.

Even if this apparent contradiction is resolved in favor of this particular permittee on the Tenderfoot allotment, there is no explanation why the Service failed to consider a system which would allow continuing motorcycle travel when cattle are not authorized to be grazing in the affected pasture. The Decision provides limited and cryptic information on this topic, disclosing only that the Tenderfoot allotment employs a four-pasture rotation grazing system with a season of use from June 20 to October 15. AR 9346. However, the administrative record offers additional information, suggesting that actual use of the affected pasture(s) is for a far shorter time period. See, AR 4538 (2001 grazing season, Wildcat permitted use was June 10 through July 25); AR 4542 (2005 grazing season, Wildcat permitted use was July 10 to August 26). Even if the agency has rationally chosen to prohibit motorcycle access during cattle grazing, it has failed to consider the possibility that access could occur when grazing is not authorized.

There is no rational basis for completely eliminating motorcycle travel along the Wildcat Trail. The Court should declare unlawful and set aside the stated rationale and require the Service to reevaluate use of Wildcat Trail on remand.

C. The Service Failed to Adequately Present and Respond to Comments.

NEPA includes an explicit procedural requirement to present and respond to each comment submitted on the DEIS/SDEIS. The Service failed to properly address these duties.

The CEQ regulations prescribe the agency's duties in responding to comments. The Service, in "preparing a final [EIS] shall assess and consider comments...and shall respond by one or more of the means listed below, stating its response in the final statement." 40 CFR § 1503.4(a). There are five "possible responses" described, all of which necessitate identification of both the particular comment, as well as the specified response. *Id.* at (1)-(5). The regulations further provide "[a]ll substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement." *Id.* at (b).

Judicial decisions confirm and illuminate these requirements. These regulations "impose upon an agency preparing an FEIS the duty to assess, consider, and respond to all comments." *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 537 (8th Cir. 2003) (emphasis added). The agency must "consider each comment it receives and respond." *Utah Envtl. Congress v. Bosworth*, 2003 U.S. Dist. LEXIS 25577 at *22, *rev'd on other grounds*, 372 F.3d 1219 (10th Cir. 2004). This includes the requirement that "[t]he comments must be included with the final EIS." *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986). A related aspect of compliance can be publication of a list identifying each commenter. *Wildwest Institute v. Bull*, 547 F.3d 1162, 1170 (9th Cir. 2008). Responding to comments is not a mere formality or a task in which "substantial compliance" might suffice, for "Congress requires

federal agencies to comply with the policies of NEPA to the fullest extent possible.” *Hodel*, 806 F.2d at 1383. A core policy “is to encourage and facilitate public involvement in decisions concerning environmental issues.” *Id.*

The Service’s effort here does not meet these requirements. The Trail Riders raised this issue in their objections. AR 10018-10019. The Objection Response acknowledges the cited regulations and concludes that the “FEIS Appendix K...contains comments received and agency responses in compliance with 40 CFR 1503.4.” AR 10648-10649. Appendix K is located at AR 9564-9652. On initial review, it is apparent that Appendix K includes neither a list of all commenters, nor copies of “all substantive comments.” Rather, Appendix K starts by characterizing its contents as “[t]his comment analysis process” which provides “a map to the responses.” AR 9564. The discussion summarizes the manner in which “all comments were filed in the Forest Service’s Content Analysis and Response Database” and in which individual comments “were identified within the body of comment letters” and coded. *Id.* In general terms, comments were sorted into “form letters” (AR 9565-9566), recurrent topics that are summarized and responded to (AR 9566-9605), and a table identifying the “ltr #” and text of comment with a short response (AR 9605-9644). This approach does not allow one to know whether all the comments were addressed, or whether one’s own comment was received and addressed. Within this hierarchy, the middle section appears to reflect the greatest consideration by the agency, but here the comments are apparently not published verbatim, but are summarized or paraphrased by the agency (or a contractor) and then addressed collectively. See, e.g., AR 9575-9576 (presenting and responding to “comments” described as “Elk-1” through “Elk-4”).

The Trail Riders understand that the Service undertook significant effort in evaluating

comments. However well-intended that effort may have been, it did not comply with the plain requirements of the regulation. Strict compliance is required. The Court should instruct the Service on remand to comply with NEPA's requirements for publishing and responding to comments.

D. The Decision Fails to Properly Address Route Decommissioning.

The Travel Management Rule provides a regulatory foundation to designate routes for motorized travel on Forest Service lands. Additional steps, such as constructing new routes, building bridges, or obliterating old routes, are not specifically contemplated by the Rule. Any such additional actions that might be attempted in a travel management project would require substantial disclosure and analysis that is not included in the Decision. The absence of this analysis renders deficient the purported decision to decommission certain routes in the Area.

The Service has regular occasion to consider both the practices and procedures associated with route decommissioning, and has recognized that a decision to decommission a route is distinct from the decision not to designate the route for continuing motorized access. The agency “may proceed to implement the Travel Management Plan, but may only effect road closures by publishing closure orders and/or travel maps, and installing signs and gates” and “[s]ite-specific analysis of the environmental impacts of closure methods that require surface disturbance is required before any further action is taken.” AR 10049 (Forest Service Intermountain Region appeal decision dated January 27, 2000). That decision makes clear the distinction between a “travel plan” that designates specified routes for motorized travel and the separate decision(s) “that implements the [designation] decision through initiating further ground disturbing actions, such as earthen berms and barriers, ripping the roadbed, or other actions which will have

potential effects on soil and water resources, other beneficial uses, and public safety....” *Id.* There exist various “alternative closure actions” that might be selected on any given site” and a proper decision must include “the necessary documentation of the site-specific effects of various closure methods and their potential effects on soil, water, and human safety....” AR 10049-10050.

The Service appears to consider the Decision sufficient to meet these requirements and authorize decommissioning of numerous routes in the Area. See, AR 10670-10671 (Draft ROD Table 1); AR 10778-10779 (Final ROD Table 1).⁷ These actions for the selected “Alternative Modified B” include 7 miles of “road currently designated for motor vehicle use to be decommissioned” and 40 miles of “currently ML1 stored roads to be decommissioned.” *Id.*

The ROD(s) present additional information on a route-specific basis, starting with Attachment 2, which starts by summarizing the actions to be taken for each trail. AR 10717-10718. Of these trails, only Lower Ryman includes the implementation action “decommission.” AR 10718. This is supposedly further described in the subsequent table, but it only states “[c]onsult hydrologist and restore natural water flow patterns through decommissioning efforts.” AR 10721. The next portion of Attachment 2 has a map and description of “Calico Trail Reconstruction” actions. AR 10724. These entries have detailed descriptions, such as at location 9 to “[r]epair trail by rutted out seep on 10% grade by installing a culvert and hardening 20ft of trail above and below the culvert with sod block.” *Id.* Following that is a series of tables identifying various actions involving roads, some of which include the action of

⁷ The information in Attachment 2 to the Draft ROD and the Final ROD are nearly identical. Unless noted otherwise, this discussion cites to the Draft ROD.

decommissioning a certain mileage of a road, but without any further information about the location of that segment or the techniques to be utilized. AR 10725-10726 (see, e.g., Road #208 (Rio Lado) where the action is to “maintain 0.7 miles” and “decommission the remaining 0.86 miles”). Then follow tables of what appear to be ML1 “roads to be decommissioned” which show only a road number, name and length (in miles) (AR 10728-10729) and ML2 roads to be decommissioned. AR 10729-10730. Attachment 3 follows and consists of several pages of text entitled “general implementation” guidance (AR 10731-10736) and a “decommissioning implementation tree.” AR 10736-10737.

The Trail Riders argued in their objections that these efforts are deficient. AR 10021. The Objection Response does not deny that site-specific analysis of route decommissioning is required, but asserts that “[m]ethods and application of route decommissioning are provided in Appendix I of the FEIS” and that “[s]ite-specific analysis for proposed decommissioning locations was included in the travel analysis in the FEIS (Chapter 3).” AR 10618.

Appendix I offers little comfort that the Service has disclosed or analyzed the site-specific effects of its proposed action(s). It consists solely of the “implementation tree.” AR 9559-9560. This is not disclosure and analysis sufficient to comply with NEPA – it is a checklist to be followed in seat-of-the-pants “field checks” by agency staff to “[d]etermine whether ground-disturbing techniques are necessary” through “the following If-Then scenarios.” AR 9559. Some of the “Thens” purportedly within the ambit of such field analysis include “scarifying or ripping” 12 inches or more, “ripping parallel to the contour” and “re-contouring at drainage crossing with a dozer.” *Id.* The Service cannot rationally assert an “if-then” strategy at NEPA compliance and certainly not one allowing on-site decisions by agency staff involving a

“dozer.”

Nor does the purported analysis of decommissioning “in the travel analysis in the FEIS” provide the necessary information to satisfy NEPA. The Objection Response does not inspire confidence by referring in passing to an entire chapter of the FEIS rather than citing to specific pages of the analysis. The discussion of “travel analysis” appears at FEIS pages 252-263. AR 9435-9446. The word “decommission” does occasionally appear in this discussion, but not in any manner that can plausibly connect a particular action or decommissioning technique to individual sites. See, e.g., AR 9442-9443 (narrative referring to a list of ML1 roads to be decommissioned and summarizing “Decom 1” and “Decom 2” strategies, the latter including “aggressive re-contouring action to rip and seed” which “may” include consultation with “the hydrologist, archaeologist and ecologist”). The FEIS does not indicate which roads will be subject to Decom 2 – that information “is located in the project file.” AR 9442.

The differing treatments of sites illuminates the distinction between what constitutes acceptable analysis and what does not. For example, the presentation of “Calico Trail Reconstruction” provides detailed information that allows the public to understand the specific locations and implementation actions that are being proposed. At the other end of the spectrum is a table simply identifying a road to be decommissioned, with no further information about where, when or how decommissioning will occur and the attendant impacts.

Once “ripped” these routes will be unavailable for future designation for motorized travel, or even future nonmotorized uses. That is the whole point of decommissioning, which can be well justified for various ecological, aesthetic or management purposes. However, when these actions will involve heavy equipment, ground disturbance and removal/replacement of

trees/boulders they must be disclosed to the public and their effects analyzed. The Service is either unaware of this requirement, tried to include decommissioning as an afterthought, or has made an intentional choice to push the planning envelope. The Court should clarify the need for site-specific analysis of heavy decommissioning actions, declare unlawful the strategy attempted by the Decision and remand decommissioning actions for further analysis.

V. CONCLUSION

The Court should declare the Decision unlawful, vacate the Decision, and remand the matter to the Forest Service for further analysis and subsequent agency action.

Dated: August 2, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Opening Brief contains 10,369 words and therefore complies with the 11,000 word limit for Petitioners' opening briefs agreed upon by the parties and established by the Court's Joint Case Management Plan (ECF 24).

/s/ Paul A. Turcke
Paul A. Turcke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the District of Colorado through the Court's CM/ECF system on August 2, 2019. I certify that all participants in the cases are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ Paul A. Turcke
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