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.

REPLY BRIEF BY PETITIONERS TRAILS PRESERVATION ALLIANCE, SAN JUAN TRAIL RIDERS and PUBLIC ACCESS PRESERVATION ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. INTRODUCTION

These matters are before the Court on presentation of the merits challenging the U.S Forest Service Rico West Dolores Roads and Trails (Travel Management) Project (the "Decision"). In accordance with the stipulated scheduling order (ECF 24), as modified (ECF 38), the Trail Riders hereby submit this reply brief.

II. ARGUMENT

The Trail Users' independent claims demonstrate multiple violations under applicable law, including the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and the Forest Service Travel Management Rule ("TMR"). The Court should declare the Decision unlawful, vacate the Decision, and remand this matter to the agency for further proceedings.

A. The Path to the Decision is Indiscernible and Legally Insufficient.

The Decision fails to meet the APA's basic requirement to articulate a "rational connection between the facts found and the choice made…." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Trail Riders demonstrate: (a) the Decision relies on bare assertions unsupported by site-specific analysis (Trail Riders' Opening Br. (ECF 43) at 21-23); (b) "user conflict" analysis is pivotal but uniquely deficient (*id*. at 23-26); (c) Town of Rico closures rely on insufficient conclusions and procedural omissions (*id*. at 26-32); and (d) livestock management concerns cannot justify closure of the Wildcat Trail (*id*. at 33-34). Any or all of these claims justify a ruling in Trail Riders' favor.

These arguments hinge on detailed application of the APA standard of review. A particularly useful summary occurs in *Colorado Wild v. U.S. Forest Service*, 435 F.3d 1204,

1213 (10th Cir. 2006). The applicable "arbitrary and capricious" standard is narrow and the Circuit advises "[w]e confine our review to ascertaining whether the agency examined the relevant data and articulated a satisfactory explanation for its decision." *Id*. The focus is "on the rationality of an agency's decision making process rather than on the rationality of the actual decision" and the "'agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Id*. "Thus, the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record." *Id*. (emphasis added). Even this deferential review "requires an agency's action to be supported by facts in the record." *Id*. Such facts must rise to at least the level of "substantial evidence" which is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'" (quoting *Pennaco Energy v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004)) and is "'something more than a mere scintilla but something less that the weight of the evidence.'" *Id*. (quoting *Foust v. Lujan*, 942 F.2d 712, 714 (10th Cir. 1991)). The Forest Service's Decision here is uniquely adrift from this critical connection between evidence presented in the record and identified as a rational basis for the chosen conclusion(s).

1. The Decision Rests on Mere Conclusions without Supporting Data.

The agency is afforded wide latitude interpreting data and reaching conclusions, but Respondents here only repeat the agency's conclusions while obscuring the absence of supporting data or presence of contradictory data.

Respondents emphasize that no particular type of analysis is required and that a "narrative style" of EIS can be sufficient. Federal Respondents' Br. (ECF 48) ("USFS Br.") at 12-13. They cast the question as one of formatting or choosing between scientific

methodologies. *Id*. Trail Riders do not dispute these general observations. It is true the Court's "'deference to the agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology.'" *Colorado Wild*, 435 F.3d at 1216 (quoting *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988)). However, the agency cannot use "technical expertise" as some talisman by which to fend off all judicial inquiry. *Heartwood v. U.S. Forest Service*, 73 F.Supp.2d 962, 976 (S.D. Ill. 1999) ("the Court may not rely merely on the agency's expertise"). This Decision is deficient because "the Court must be convinced that the record contains adequate evidence supporting the agency's expert opinions and decisions, as well as the evidence upon which the agency states it relied in making those decisions." *Id*. (emphasis added).

The heart of the matter then should be the evidence which supports specialist conclusions as well as the rationales advanced by the Forest Service in closing particular trails. The Forest Service offers various examples of "site-specific analyses of the effects of the Project." USFS Br. (ECF 48) at 13. Several of the cited examples are only summaries, not actual data. See, e.g., RW5030 (soils map); RW4910 ("Trail Crosswalk" table). The "Trail Crosswalk" might point to a location in the record of where to look for data, but the table itself does nothing more than repeat conclusions. Even looking to those documents does not reveal data or otherwise support the Decision. The Hydrology Report is the proffered basis for several closures, including Spring Creek Trail. USFS Br. (ECF 48) at 13. This document does not contain data, only summaries or interpretations of data, e.g., whether water quality standards are being met.[1] Even so, aside from

[1] The statement "water quality is being met" is a conclusion, not "data" or "technical analysis." Data might include the applicable standard(s) alongside a presentation of samples for attributes such as water temperature, turbidity, pollutant levels, or macroinvertebrate sampling.

the identified waters at McPhee Reservoir and River Segment 9 of Silver Creek impacted by heavy metals "[a]ll other stream segments within the Rico-West Dolores Landscape are currently meeting water quality standards for their designated beneficial uses." *Id*. The "water quality" conclusions further state that all waters "meet water quality standards for sediment", that every alternative "would reduce the risk of sediment delivery" and that every alternative would meet applicable standards. RW5070-5071. The "outstanding waters" designation was similarly considered, and again even "[u]nder [Alternative A "no action"] Spring Creek would probably continue to meet the outstanding waters designation since conditions along the stream would not change." RW5071. Yet the Record of Decision says "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, so my decision does not include single track motorized use of the Spring Creek Trail." RW10785. There is no citation to the record to support this conclusion. Rather, the above-cited portions of the record flatly contradict any suggestion that long-existing motorized use is causing "unacceptable impacts" to Spring Creek water quality.

The Forest Service next turns to Winter Trail, claiming the record justifies closure through findings of "user group pressure" and a need to "curtail the 'destructive cycle of degradation.'" USFS Br. (ECF 48) at 13 (citing RW9284). But these snippets of text do not accurately reflect the record. On the same page, the discussion of Alternative A (no action) states that "trail realignment and developments could be expected to occur" through routine trail maintenance and through such efforts applicable Forest Plan Standards and Water Conservation Practices would be met and "wetland ecosystem health could be maintained and wetlands would

not be adversely impacted." RW9284. The document explains that "rutting and trail braiding" are the consequence of "untreated sections of trail." *Id*.; see also RW8203-8205 (photos depicting trail braiding in a wetland meadow and treatment through "turnpike trail" treatment). Forest Service specialists have previously observed that "a paralleling trail (also known as trail braiding),…could be from any user type" and that applicable trail sections "need to be reconstructed and the paralleling trail needs to be rehabilitated." RW3247 (Declaration of Penelope K. Wu in 1:11-cv-3139-MSK).[2] Like Spring Creek, the alleged protection of unavoidable impacts through eliminating motorcycle use is a solution in search of a problem.

Similar deficiencies are apparent for the closures along Bear Creek, which reflect a "compromise decision…designed to reduce the potential for conflict and noise disturbance…." USFS Br. (ECF 48) at 15 (emphasis added). Against Trail Users' allegation that site-specific data is lacking the Forest Service cites RW9201, 9204, 9209, 9211, 9409, and 10793-10794. *Id*. Those pages offer only conclusory statements from the FEIS discussion of "issues" (RW9201), "alternatives" (RW9204-9211), a summary of "effects of the alternatives" (RW9409), or the ROD itself (RW10793-10794).[3] There is not a single reference to any data nor is there any attempt at "technical analysis" in any of these materials. Rather, this decision is premised upon

---

[2] Ms. Wu's observations are further supported by the record. See, e.g., Trampling Effects of Hikers, Motorcycles and Horses in Meadows and Forests (RW5031-5038). Contrary to the generalized narrative relied on by the Forest Service, this is actually scientific research which concluded that "[d]amage generally increased from hiker to motorcycle to horse in our study…." In other words, horses generally have greater impacts to trails than motorcycles. RW5037.

[3] The agency curiously portrays the Decision as removing motorcycle use "from the lower third of the Bear Creek drainage, while continuing to allow motorized use on the majority of the drainage…." USFS Br. (ECF 48) at 14. Alternative B (modified) designates 1.72 miles for single track motorized use and 11.29 miles non-motorized along Bear Creek Trail. RW9209.

"meeting the desires of many users of this area." RW10793.[4]

The Forest Service's unexplained reversal on these key issues further illustrates the Decision's flaws. The agency brushes aside this argument as based on "allegedly contradict[ory] statements" and seeks to distinguish the prior declarations as only addressing interim designations for the limited duration of a preliminary injunction. USFS Br. (ECF 48) at 15-16. However, the substance of the testimony presented applies beyond that procedural context and applies with equal force to the Decision. For example, the District Wildlife Biologist concluded that 157,568 acres of big game "security areas" exist "between the current designated road and trail system" and big game "seasonal migration and the use and production of foraging areas is not restrained" by motorcycle travel. RW3221 (Declaration of Ivan Messinger in 1:11-cv-3139-MSK). Regarding conflict, the Supervisory Outdoor Recreation Planner acknowledged that "people hold different values and expectations" and that on "shared use" trails "[w]hen trail users fully understand what to expect on a trail, it can help to alleviate potential issues, such as noise and/or safety conflicts." RW3241 (Declaration of Penelope K. Wu in 1:11-cv-3139-MSK). The Fishery Biologist rebutted allegations of siltation or other harmful effects of motorized vehicle impacts, noting that habitat exceeds requirements "to fully support healthy trout populations" and that closing trails to motorcycles would have little effect because "the trails at issue here would exist with or without [off-road vehicle] use and would continue to act as sediment conduits, regardless of the type of uses applied." Declaration of David Gerhardt (ECF 34-8) in

[4] The rationale that the decision meets "desires of many users" is vacuous and renders the APA a dead letter. The Court (and the public) are at least entitled to an explanation of how the "desires" were sampled, how many are many, and what the tipping point was between decision options in analyzing these desires. This Decision's perfunctory effort neither reveals a discernible path nor allows the Court to connect "facts" to "choices made."

1:11-cv-3139-MSK at ¶ 5. These declarants make broadly-applicable statements about the same (if not greater) road/trail network in the same area for the same issues as the Decision. The Decision contradicts the agency's prior conclusions on key issues and then relies on these unexplained reversals as the rationale for closing trails to motorcycle use.

The rationales for motorcycle trail closures are not adequately explained or connected to sufficient evidence in the record. The Court should declare unlawful and vacate the Decision.

2. The User Conflict Analysis is Arbitrary and Capricious.

The above-detailed absence of physical resource justifications for the Decision reveals its true focus – to allocate motorized and non-motorized recreation preferences based upon "desires" and "requests" of unidentified individuals. The fact that conflict might provide some part of the rationale for the Decision does not exempt the agency from the APA's requirements to show the connection between evidence in the record, conclusions of agency specialists, and the ultimate decision.

The Forest Service first responds by claiming that motorcycle restrictions were selected "on certain trails for a variety of other reasons, including environmental impacts, conflicts between motor vehicle use and populated areas, private landowner concerns or other concerns raised through public comments." USFS Br. (ECF 48) at 17. The law requires that the agency take a procedural "hard look" and articulate a rational basis for finding facts and making a decision. Euphemistic packaging of "conflict" as "landowner concerns" or populated area planning or "other concerns" does not somehow justify the lack of any systematic treatment. One would have to suspend common sense or any knowledge of human behavior to question

whether a "private landowner" in proximity to the National Forest System would ever desire anything but to exclude the public to the maximum extent possible. Supposed environmental impacts to soils, water quality and wetlands have been revealed as illusory. The "other reasons" defense is undercut by the preceding sentence saying wildlife concerns are a "red herring" and "the primary rationale for removing motorcycles from certain trails explained above, was to provide a range of qualitatively different recreation opportunities." *Id*.[5]

Nothing in the Decision or the Forest Service briefing identifies the evidence of conflict, the methodology used to collect it, or explains the basis for factual findings or the ultimate decision. The Forest Service asserts its "methodology was sound" and that it analyzed user conflict using the best available information in public comments, National Visitor Use Monitoring [NVUM] data, and user interview summaries." USFS Br. (ECF 48) at 20. The NVUM data provides no evidence of conflict – it only reflects the recreation preferences of visitors. RW9417; RW9360.[6] These figures are not tied in any way to "conflict" unless one were to presume that all non-motorized participants felt conflict with all motorized vehicle encounters. In fact, any suggestion in the NVUM data is to the contrary, for the agency acknowledges the "[s]atisfaction results…show high levels of satisfaction…." RW9361.

The most specific information purporting to address conflict is Table 3-43, which only

---

[5] Trail Users recognize that some recreationists prefer a non-motorized setting, which is best found in formally designated Wilderness, of which the San Juan Forest has 420,521 acres, including the 41,496 acre Lizard Head Wilderness at the northern end of the project area. See, https://www.fs.usda.gov/recarea/sanjuan/recarea/?recid=81055; RW0570.

[6] The participation categories are not mutually exclusive; it is apparent from the tabular results that respondents can report participating in more than one activity, as the percentage participation column totals more than one hundred percent participation (361.8 % participation, to be exact). RW 9360. In other words, one survey respondent could report participating in OHV Use, Developed Camping, Relaxing, Fishing, and Hiking/Walking.

contains a brief characterization of scoping comments for particular trails. RW9387-9390 (see, USFS Br. (ECF 48) at 20). This is not "evidence." It is at least one layer of abstraction distant from evidence, i.e. the actual comment. Nor is there any effort to distinguish factual comments based on actual encounters (see, e.g., RW9387 "Bear Creek" addressing "noise disturbance from motorcycles"), versus comments expressing a preference (*id*., Eagle Peak, East Twin Springs), a desire (RW9388, Horse Creek), or a concern (*id*., Johnny Bull; RW9389, Winter). That a "private landowner" (i.e. resort operator) or a livestock permittee would prefer non-motorized recreation (or fewer humans, period) is self-evident and should carry little weight in a NEPA analysis allocating public recreation opportunities.

The pleadings clarify the "private landowner concern[s] about noise impacts to cabins on nearby private land that detracts from guest services." RW9389. Christoph Henkel is the President of Intervenor-Respondent–Petitioner Dunton Hot Springs, Inc. and associated properties, as well as Vice Chairman of the $22 billion in global sales Henkel AG & Co KGaA. Declaration of Christoph Henkel (ECF 45-2) at ¶ 3. Dunton includes 183 acres of private property adjacent to the Forest, "a luxury, high end tourist accommodation" which "offers its Resort guests five-star dining coupled with a rustic 'Old West' experience and 'quiet use' recreational opportunities including fishing, horse-back riding, hiking, cross-country skiing, mushroom foraging, photography, wildlife watching, and other activities." *Id*. at ¶ 6. These operations "occur in the Resort, on affiliated properties, and on surrounding [San Juan Forest] lands" and Dunton "has an outfitter permit from the Forest Service for tourist-related hiking, horseback riding, cross-country-skiing and mountain biking in the Forest." *Id*. and at ¶ 9. Dunton is apparently highly successful in these enterprises and is considered by Bon Appetit the

Fourth Best Hotel for Food Lovers in America, made the 2014 Conde Nast Gold List, and was named a Top 10 Remote Hotel worldwide by Gayot. *Id*. at ¶ 1, n.1, 2. Dunton has thirteen "lovingly restored" rustic cabins which can be rented for between $975 and $2,165 per night, double occupancy. See, https://www.duntondestinations.com/hot-springs/lodging-rates/ (last visited October 31, 2019). As impressive as this all sounds "Dunton is actively trying to increase its resort business" which "depends in large part on the quality of the guest experience" including the "relatively pristine quality of the surrounding forest and wildlife." Declaration of Christoph Henkel (ECF 45-2) at ¶ 8. Closing motorized trails in a multiple-use National Forest seems plainly at the core of Dunton's business plan, advanced here through the Decision.

The APA requires the Forest Service to specify what constitutes "conflict" and explain why personal desires or reports of noise are now a basis for prohibiting motorcycles, when the agency previously determined that motorcycle noise:

> [I]s in the 'ear of the listener' in terms of tolerance or acceptance of vehicle noise. Noise can be short term as a vehicle passes through a particular area. Noise is acceptable in an area managed for multiple uses including motorcycles and is typical of other motorized trails on the San Juan National Forest.

RW3242 (Declaration of Penelope K. Wu in 1:11-cv-3139-MSK); see also, RW9366 (noting "Shared Use Emphasis" for the Dolores Geographic Area). The Forest Service recognizes "that the consideration of public comment is not a vote-counting process in which the outcome is determined by the majority opinion." RW9564. Yet the agency relies on Table 3-43, which doesn't even attempt to portray a majority of comments, but in several key instances presents conclusions based on the desires or preferences of a handful of (or one) self-interested comment(s). Even if conflict is asymmetrical (RW9384), the Forest Service's treatment of it should not be. The agency ignores the "social values" reported at RW4160-4164 expressing a

predictable wide range of views, including many supporting motorized use or describing how satisfying the trails are. The Decision's treatment of conflict fails to document found or justify choices made.

The Forest Service admits its "chosen method [was] to rely primarily on public comments to analyze user conflict" and attempts to compare the Decision to *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1179-1180 (10th Cir. 2008) and *Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture*, 18 F.3d 1468, 1475 (9th Cir. 1994). USFS Br. (ECF 48) at 20-21. It is debatable whether this constitutes "methodology" for analyzing conflict, which is why Petitioners cited cases like *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1182 (9th Cir. 2000) and *Riverhawks v. Zepeda*, 228 F.Supp.2d 1173, 1184 (D. Or. 2002) to demonstrate that scientific analysis is possible and routinely conducted in similar Forest Service projects. The Court owes little deference to "agency expertise" which consists of a colloquial interpretation of unquantified comment in a tabular comment summary. See, *Mitzelfelt v. Dep't of Air Force*, 903 F.2d 1293, 1296 (10th Cir. 1990) ("courts should defer to the judgment of an administrative agency only with reference to topics within the agency's area of expertise").

The cited cases are distinguishable. Respondents invoke *Krueger* primarily for the phrase that "anecdotal information" can be sufficient in analyzing recreational use. See, USFS Br. (ECF 48) at 20-21. The context of *Krueger* is important – it involved renewal of a special use permit for heli-skiing, not trail designation across a broad project area for the general public. That anecdotal information relied upon was tangible, identified by the agency, and in the record. *Krueger*, 513 F.3d at 1180, 1180 n.2 ("the EIS adopted the 1999 EIS's analysis of backcountry

usage patterns" which referred to three reports based on trailhead interviews, permittee observations, and "an independent survey"). This is comparable to similar analyses in *Hells Canyon* and *Riverhawks*, and only further reveals the inadequacy of Table 3-43 as the basis for analyzing user conflict. *Northwest Motorcycle* is similarly distinguishable, because the agency's decision was connected to the actual content and volume of comments submitted, rather than some generalized summary like Table 3-43. *Northwest Motorcycle*, 18 F.3d at 1478 (finding record support for the conclusion that "extensive comments" expressed "high levels of concern about conflicts"). This contrasts with the court's rejection of "personal experiences of Forest Service personnel" as a rational basis for the decision, because "Defendants were unable to point to any place in the Administrative Record" providing evidence in support. *Id*. at 1475. The short phrases within the cells of Table 3-43 are similarly deficient. They could be based on a high volume of contents, or they could be based on a single comment, as seems the case for several cells. See, e.g., RW9387 (East Fork – "one outfitter identified conflicts"); RW9388 (Johnny Bull – "private landowner concerned about noise"); RW9389 (Wildcat – "range permittee"). The Court cannot verify that substantial evidence supports the agency's conclusions.

The TMR requires the Forest Service to consider conflict of use, but the eventual decision must still comply with the APA to survive even arbitrary and capricious review. A table summarizing comment themes does not suffice. The Court should declare the Decision unlawful and remand the designations to the agency for further analysis.

3. Rico Closures are Not Properly Analyzed or Documented.

Motorized route closures around the Town of Rico are flawed for two, independent reasons: (a) acceding to the "desires" of a "town" or a handful of property owners is not

adequately supported by the record and an insufficient basis for prohibiting motorcycle access; and (b) the Forest Service failed to consider public safety impacts of diverting motorcycle traffic to Highway 145. See, Trail Riders' Opening Br. (ECF 43) at 26-32.

The improper reliance on unspecified "desires" is epitomized by the proposed amicus brief of the Town of Rico and Rico Trails Alliance (ECF 49-1). That brief correctly notes (*id*. at 4) that Trail Riders do not object to its filing – indeed, the heartfelt passion yet misapprehension of applicable law only amplifies Trail Riders' claims. The brief seems motivated by a perceived need to forestall "further delay" or "uncertainty caused by Petitioners' lawsuit." *Id*. at 7, 11, 12, 13. The Decision has been implemented. Final agency action like the Decision faces no legal barrier to implementation absent a successful motion for preliminary injunction which no party seeks here. The Town of Rico should channel any frustration at the timing or degree of the Decision's implementation toward the agency, not Trail Riders.

Forest Service management decisions through a NEPA process properly focus on multiple use, sustained yield principles informed by science, not local politics or public relations. The record speaks for itself in establishing the Town/proposed Amici position – they requested the agency "[c]lose Burnett Creek to motorized use and allow motorized use of Horse Creek or Wildcat instead." RW8433. More concerning is the conspicuous effort to insert questionable and entirely new testimony through the brief:

> The Burnett Creek trail is marked by deep ruts, exposed rocks, channelization and large potholes caused by motorized use. The same is true for Horse Creek. Both are so severely degraded that it is difficult to traverse on foot or by mountain bike.

(Proposed) Amicus Br. (ECF 49-1) at 11 (citing RW8434). Nothing resembling that language appears on the cited page. The following page has similar language to the brief, but it refers to

Lower Ryman and East Fork Trails. RW8435. The Court (and the agency) should exercise caution in deferring to a course charted by the Town of Rico.

The public safety arguments focus on the fact that motorcycle access from the Area's trail network is now diverted to Highway 145. Either Trail Riders were unclear or Respondents are deflecting, as Trail Riders are not focusing on the irrelevant analysis of "mixed use" of Forest roads or trail system safety issues, but rather the practical concerns created by establishing a non-motorcycle bubble around Rico, necessitating that motorcycle access to the Town occur solely through Highway 145. See, USFS Br. (ECF 48) at 24-26. The Forest Service eventually addresses the real concern, "that the Forest Service should have analyzed risks associated with the 'mixed use' of Highway 145 by trail motorcycles and other vehicles" but deflects this argument by saying only "licensed" vehicles will be on the Highway. *Id*. at 26 (citing RW10593). These words, and the cited page of the Objection Response, are unresponsive to the intuitive question raised.

Capitulating to a vague and undocumented desire of certain individuals does not represent a rational basis to prohibit trail motorcycle access to Rico. Whatever impacts or conflicts may be associated with such use are not documented or differentiated between motorcycle use and other motorized travel that will continue on the routes at issue. The Town apparently wants to have its cake and eat it too by welcoming motorcycle riders/customers who must now enter by riding many miles on Highway 145, but the Forest Service did not analyze the potential effects of this change as required by NEPA. The Court should declare unlawful the prohibition of motorcycle access on Burnett Creek, Horse Creek and/or Wildcat Trails.

4. Livestock Permittee Opinions are Not Rationally Connected to Trail Closure.

The Wildcat Trail closure to ostensibly address "critical…conflicts with livestock herding" necessitated by a "specialized breed of cow" are also insufficiently documented. RW10787; RW10633.

The Forest Service maintains the view that "[r]educing impacts related to allotment management are in the combined interest of the Forest Service and the grazing permittee." USFS Br. (ECF 48) at 27. Again, the proffered record cites offer questionable support. The first cite is from the FEIS's introductory "considerations for the analysis" section. RW9193. The next cite is from the "alternatives considered but not carried forward" section. RW9241 (cited three times on page 27 of the Brief). The final cite is to the Final ROD. RW10787. None of these present evidence. There are no data or facts, or support for any of the conclusions advanced, e.g. what the "intensive management requirements" are, what the "specialized breed of cow" is, or why "dedication to herding" is so critical to improved range conditions and how such dedication will be frustrated by motorcycle travel. Conspicuously absent from the agency's defense is any citation to the rangeland specialist's report. Yet again, the agency asks the Court to accept its conclusion through presumption if not faith alone, absent any supporting evidence, analysis or discussion.

Undocumented conclusions and self-serving permittee comments do not constitute agency expertise to which the Court can defer. The Court should declare unlawful and set aside the Decision and direct the Service to reevaluate potential motorcycle access along the Wildcat Trail.

B. Comment Responses Violated Clear Procedural Direction.

The regulations impose specific procedural requirements for responding to comments which the Forest Service failed to satisfy. The parties disagree over precise formulation of the procedural duties, with the Forest Service denying that it must reproduce comments verbatim or respond to each and every comment individually. USFS Br. (ECF 48) at 30. Instead, the agency contends that it satisfied its duty "to 'respond to substantive issues raised in comments.'" *Id*. (quoting *Utahns for Better Transp. v. U.S. Dep't of Trans*., 305 F.3d 1152, 1165 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003)). Trail Riders do not concede that this is the standard, as it contradicts the plain language of the governing regulation. 40 C.F.R. § 1503.4(a) (agency "shall assess and consider comments, both individually and collectively, and shall respond" by one of five specified methods). Regardless, the record shows that the agency did not even meet its own version of the standard.

Respondents' argument places great weight on the "publicly accessible 'reading room' feature" of the "Content Analysis and Response Database." USFS Br. (ECF 48) at 31-32 (citing RW9564). Whatever compliance this feature might establish is of little value to the Forest Service, for the record does not contain the content of any such reading room. Assuming it is some interactive online tool, the record is similarly devoid of any URL, IP address or other way to access or view the reading room. Rather, the cited page of the record only refers to the feature as well as "responses in their original form." Whatever support may exist for the agency's position must be found in the record itself, and the only document in the record is the "comment analysis" in Appendix K. RW9564-9645.

Even if the Court accepts Respondents' suggested low bar for responding to comments

the agency has fallen short here. There are numerous instances where the comment response summaries fail to address specific issues in the Trail Riders' comments. For example, the Trail Riders' comments raised the inconsistency between the previously-submitted *Backcountry* declarations specifically raising (and providing) the declarations on elk habitat, watershed/fisheries, and user conflict. RW 3211; 3218-3249 (scoping comments); RW7691 (DEIS comments). However, the Appendix K response only identified and responded to this issue in the "Wildlife-Fish" section, without acknowledging or addressing the other declarations on elk habitat or user conflict. See, RW9579 (fish); RW9575-9579 (elk); RW9588-9590 (conflict).

There exist other failures to address Trail Riders' comments. Compare, e.g., RW7690 (elk habitat/population factors and especially hunting) and RW9575-9579 (Elk responses ignoring comment); RW7692-7693 (siltation effects occur from trail existence "regardless of the type of uses applied") and RW9579 (Fish-1 and Fish-2 ignoring comment); RW7694 (trail maintenance) and RW9593-9596 and RW9599-9601 (neither mentioning comment); RW7695 (abundance of nonmotorized recreation opportunities, not mentioned anywhere). Conversely, counsel was able to find a handful of instances where a phrase from Trail Riders' comments was noted verbatim. See, e.g., RW7692 (comment) and RW9579 (response); RW7696 (livestock comment); RW9602 (response). [7]

The Court must "set aside an agency action if the agency has failed to follow required

[7] It is a daunting task to scan the entirety of Appendix K seeking to prove a negative, i.e. that a particular comment was not addressed. Counsel only attempted this for the Trail Riders' DEIS comments, but suspects other comments were ignored. The examples show the Trail Riders have standing and demonstrate how "the Forest Service failed to respond to [Trail Users'] comments completely." Nonmotorized Users' Br. (ECF 51) at 21.

procedures." *Krueger*, 513 F.3d at 1176. The agency certainly expended some effort in addressing comments, but the design or presentation of that effort is fundamentally flawed and doesn't comport with binding regulations. The Court should declare unlawful and vacate the Decision.

C. The Decision Fails to Properly Disclose Ground-Disturbing Actions.

The Trail Riders' final argument addresses the Decision's failure to disclose the methods by which potentially significant ground-disturbing action might occur. Trail Riders' Opening Br. (ECF 43) at 37-41.

Respondents defend by advancing two themes. The first is that decommissioning "will benefit and protect – not harm – vegetation, wetlands, wildlife, and other forest resources with minimal short-term effects." USFS Br. (ECF 48) at 33. Relatedly, the Forest Service contends that Trail Riders "grossly exaggerate the potential adverse effects from decommissioning." *Id*. at 36. The second theme asserts the agency "provided detailed maps and narrative information describing where decommissioning will occur" (*id*. at 34) and "also provided sufficient site-specific information regarding the methods to be used for decommissioning certain routes." *Id*. at 35.

The first theme quickly devolves into asking the Court to "trust us, we are the agency and know what is best." This is antithetical to NEPA's most basic purposes. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009) ("the facilitation of informed agency decisionmaking and public involvement [are] the 'twin aims' of NEPA"); 40 C.F.R. § 1500.1(b) ("NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken"); 40 C.F.R. § 1508.8

(definition of "effects" which "may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial"). Maybe Trail Riders' concerns do grossly exaggerate impacts, but there is no way to determine if the Forest Service has rationally made that judgment without knowing what is being proposed, at a specific location, in an identified timeframe, and through a specific on-the-ground action(s). Again, there is a disconnect between the agency's position and the necessary factual support in the record.

Regarding the second theme and adequacy of site-specific disclosure/analysis, Trail Riders attempt a simple argument – actions with a bulldozer probably requires site-specific analysis. The agency emphasizes its identification of particular roads slated for decommissioning and the "Implementation Tree" by which on-site treatments will be selected. USFS Br. (ECF 48) at 35-36. These arguments apparently hope the Court will allow the details that are presented (e.g. location) to excuse omission of other details (e.g. method of decommissioning). Trail Riders' argument really boils down to the Implementation Tree, because that is the only document which identifies decommissioning methods. RW8231-8232. As intriguing as its title sounds, this Tree is rather scraggly in providing comfort as to the manner in which a bulldozer operator with his/her engine at idle might be singularly making judgment calls at the site. Again, the Tree presents "If-Then scenarios" in order to determine whether ground-disturbing techniques are necessary, and if so, what they will be. RW8231. One layer involves deciding if "a ground disturbance technique" is required and outlines some examples, apparently in order from least to greatest disturbance. *Id*. at (1)(b). Where less aggressive measures prove unsuccessful, section (1)(c) instructs to "install larger barriers" which can be a

"berm" or to "[b]uild it high enough to block traffic." *Id*. Contrary to Respondents' efforts to distinguish it, this is precisely what the Forest Service's Intermountain Region appeal decision found deficient. RW10046-10050. The "larger barriers" there blocked wheeled vehicle traffic, but the areas remained open to snowmobile travel and the "barriers" presented unforeseen and undisclosed safety hazards. RW10049 (reversing "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, until further site specific analysis is completed").

The Forest Service finally asserts that Attachments 2 and 3 to the Final ROD provide "trail-specific prescriptions" for decommissioning. USFS Br. (ECF 48) at 36. These documents are in the Final ROD and thus not subject to public comment. This flies in the face of the command "that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). Even if provided in the DEIS (or supplemental DEIS) they would still not address Trail Users' concerns, because Attachment 2 only identifies roads and locations, but not methods. RW10831-10836.[8] To the extent Attachment 3 addresses decommissioning methods, it only instructs to "[u]se the Implementation Tree" and then repeats the Tree verbatim. RW10843-10844.

The Decision potentially authorizes heavy equipment use and ground disturbance on roughly 50 miles of routes in the Area. NEPA requires those actions be properly described and made available for public comment, including not just the location but the method of treatment.

---

[8] The Calico Trail Reconstruction provides an example of the type of disclosure the agency is capable of, mapping and describing specific treatments and specific locations on the Trail. RW10830.

The Decision fails to provide this information and should in this regard be declared unlawful by the Court and vacated.

III. CONCLUSION

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

Dated: November 1, 2019.

Respectfully submitted,

/s/ Paul A. Turcke
Paul A. Turcke
MSBT Law, Chtd.
7699 West Riverside Drive
Boise, ID 83714
Telephone: (208) 331-1800
pat@msbtlaw.com
Attorneys for Trails Pres. Alliance et al.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply Brief contains 5,999 words and therefore complies with the 6,000 word limit for Petitioners' reply 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 November 1, 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
Paul A. Turcke