APPENDIX

BEFORE THE DEPARTMENT OF AGRICULTURE
FOREST SERVICE

NEW MEXICO OFF HIGHWAY VEHICLE ALLIANCE Petitioners SECRETARY OF THE DEPARTMENT Of AGRICULTURE and the CHIEF, FOREST SERVICE Responsible Officials	)	**PETITION FOR RULEMAKING TO AMEND THE FOREST SERVICE PLANNING RULE DIRECTIVES**

DATED this 10th day of March, 2015

Respectfully submitted by

Mark R. Werkmeister
Board of Directors
New Mexico Off Highway Vehicle Alliance
15 Camino de Verdad
Santa Fe, NM 87508
(505) 321-3155
trailwerks@comcast.net

TABLE OF CONTENTS

INTRODUCTION

The New Mexico Off Highway Vehicle Alliance (NMOHVA) hereby petitions the United States Secretary of the Department of Agriculture to initiate rulemaking to amend the 2012 Planning Rule Final Directives pursuant to the Administrative Procedure Act[1] and 7 CFR 1.28[2].

The United States Department of Agriculture (USDA) Forest Service published the 2012 Planning Rule Final Directives on February 6, 2015[3] with an effective date of January 31, 2015. The final directives are characterized by the agency as "a key set of agency guidance documents" to direct the implementation of the 2012 Planning Rule. Specifically, Chapter 70 of these directives provides the definition and the description of inventorying, evaluating, analyzing and potentially recommending lands for inclusion in the National Wilderness Preservation System (Wilderness) or as Wilderness Study Areas:

> *"The intent of this section is to make the process by which lands are recommended during land management planning for inclusion in the National Wilderness Preservation System or as a Wilderness Study Area transparent and consistent across the National Forest System."*[4]

Chapter 70 provides direction to the agency in direct conflict with both the letter and spirit of the Wilderness Act of 1964[5] (Wilderness Act).

Petitioners request that the Secretary of Agriculture amend Forest Service Handbook (FSH) 1909.12 Chapter 70 to properly adhere to the Wilderness Act as duly referenced as the Authority for the Chapter:

> *"70.1 – Authority*
>
> *The purpose of wilderness and the broad direction for managing wilderness are in the Wilderness Act of 1964 (16 U.S.C. 1131–1136, 78 Stat 890) and the Eastern Wilderness Act of 1975 (16 U.S.C. 1132 (Note))."*[6]

---

[1] 5 USC 553(e) (2014) requires federal agencies to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

[2] 7 CFR 1.28 (2014) states: "Petitions by interested persons in accordance with 5 USC 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule. All such petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions."

[3] Federal Register, Volume 80, No. 25, p. 6687

[4] Forest Service Handbook 1909.12, Section 70.6, p. 3 of 15

[5] 16 USC 1131-1136, 78 Stat 890

[6] Forest Service Handbook 1909.12, Section 70.1, p. 2 of 15

PETITION FOR RULEMAKING

BEFORE THE DEPARTMENT OF AGRICULTURE
FOREST SERVICE

NEW MEXICO OFF HIGHWAY VEHICLE ALLIANCE Petitioners	)	**PETITION FOR RULEMAKING TO AMEND THE FOREST SERVICE 2012 PLANNING RULE DIRECTIVES**
SECRETARY OF THE DEPARTMENT Of AGRICULTURE and the CHIEF, FOREST SERVICE Responsible Officials	)	

Pursuant to the Administrative Procedure Act, 16 USC 553(e), the New Mexico Off Highway Vehicle Alliance (NMOHVA) hereby petitions the Forest Service to amend the 2012 Planning Rule Final Directives Chapter 70 to adhere to the Wilderness Act of 1964.

Standing to File. NMOHVA is a 501(c)(3) non-profit organization incorporated under the laws of the State of New Mexico. The NMOHVA was formed in 2004 to represent motorized recreationists in New Mexico including 4WD enthusiasts, dirt bike riders and ATV users. We are a statewide nonprofit alliance of motorized off-highway vehicle enthusiasts and organizations. Our mission is promoting, protecting and preserving responsible OHV recreation through education, safety training and responsible land use ethics. We cooperate with public and private interests to protect and preserve public land access and work to ensure a positive future for OHV recreation in New Mexico. NMOHVA represents approximately 600 members.

NMOHVA has represented its members by fully participating in the land management planning public process, volunteering our members' services for route maintenance, public patrols, mapping and filing comments on numerous Forest Service land use plans and travel management plans. As such, NMOHVA is "an interested person" under the Administrative Procedures Act.

ARGUMENT IN SUPPORT OF PETITION

Background and History

The National Wilderness Preservation System (NWPS) was established by the Wilderness Act of 1960 (Public Law 88-577). In it, Congress clearly and very carefully defined what was meant by "wilderness" in Section 2(c) of the Act:

> *"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."*

Since its very inception, wilderness proponents have tried to stretch this purposeful Congressional definition of wilderness. The phrase most often used in these efforts is Section 2(c)(1):

> *"generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable;"*

All such efforts are based on taking Section 2(c)(1) out of context. The numerical list of wilderness features in Section 2(c) is preceded, not accidently, with the word "*and*". The definition of wilderness, correctly read includes both the first part of the definition and the numerical list of features (emphasis added):

> *"**An area of wilderness is** further defined to mean in this Act **an area of undeveloped Federal land retaining its primeval character and influence**, **without permanent improvements or human habitation**, which is protected and managed so as to preserve its natural conditions **and** which (1) **generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable**;*

The Congressional intent in the Wilderness Act is clearly stated. The clear and specific use of the conjunction "and" leaves no doubt of Congress's intent: Both of the specified conditions are to be met for lands to qualify as suitable for potential wilderness. Areas of land that meet only one or the other of the conditions are not suitable for inclusion in the NWPS. The clear and specific Congressional definition of wilderness in the Wilderness Act has never been changed.

> *While wilderness designations were originally granted by an Act of Congress for Federal land that retained a "primeval character", meaning that it had not suffered from human habitation or development, the Eastern Wilderness Act of 1975 extended the protection of the NWPS to areas in the eastern States that were not initially considered for inclusion in the Wilderness Act. This act allowed lands that did not meet the constraints of size, roadlessness, or human impact to be designated as wilderness areas under the belief that they could be returned to a "primeval" state through preservation.*
>
> *In 1964, both the Forest Service and Congress agreed that eastern areas would have qualified as wilderness. However, six years later, the Forest Service opposed congressional designation of new wilderness areas in West Virginia with land use histories of logging. In 1971, they adopted a "purity" interpretation for wilderness designation, meaning that no lands with a history of human disturbance, East or West, could qualify as wilderness."*[7]

The Forest Service's view on wilderness has definitely changed in the intervening forty-four years even if the Wilderness Act's definition has not. Even the so-called Eastern Wilderness Act of 1975 (16 U.S.C. 1132) that the Forest Service uses to justify "looser" definitions for lands east of the 100th Meridian did not, in fact, change the definition of wilderness established by Congress with the original Act. It merely designated a list of areas in the eastern US as Wilderness. It did nothing to change the definitions of what constitutes wilderness.

Previous Planning Rule Directives

The 2012 Planning Rule and its Directives continue the Forest Service's long slide away from both the letter and the spirit of the Wilderness Act. The previous set of planning directives (in support of the 1982 Planning Rule Directives) had already degenerated to throw a "much wider net" over lands to identify additional "potential wilderness". The agency's planning handbook initially established the proper framework for inventory selection in Section 71:

> *"The first step in the evaluation of potential wilderness is to identify and inventory all areas within National Forest System (NFS) lands that satisfy the definition of wilderness found in section 2(c) of the 1964 Wilderness Act."*[8]

Unfortunately, the rest of Chapter 70 (circa 2014) did not support the definitions of wilderness as defined above. Some of the more blatant examples:

> *"Areas may qualify for the inventory of potential wilderness even though they include the following types of areas or features:*

---

[7] Scott, Douglas W. (2005). "Our Nationwide National Wilderness Preservation System". *People, Places, and Parks: Proceedings of the 2005 George Wright Society Conference on Parks, Protected Areas, and Cultural Sites*. Hancock, Michigan: The George Wright Society.

[8] FSH1909.12, Chapter 70, Amendment 1909.12-2007-1

1. Airstrips and heliports."

We strongly assert under no reasonable interpretation of "*an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation***"** can lands include something so permanent, so indicative of man's imprint, as an airstrip. More violations of Congressional law abound:

> *"3. Electronic installations, such as cell towers, television, radio, and telephone repeaters, and the like, provided their impact is minimal.*
> *4. Evidence of historic mining (50+ years ago)."*

We note, with wry (maybe gallows) humor, that this provision in the Directives would allow structures as "historic" even though they were built after the Wilderness Act was passed in 1964. We cannot conceive that was the intent of Congress when they passed the Act.

The blatant examples continue:

> *"5b. Areas with less than one mile of interior fence per section.*
> *6. Federal ownership of less than 70 percent if it is realistic to manage the Federal lands as wilderness, independent of the private land.*
> *7. Minor structural range improvements (FSM 2240.5), such as fences or water troughs."*

The Forest Service offers even more flagrant violations of Congressional definition for lands east of the 100th Meridian evidently based on misinterpretation of the 1975 Eastern Wilderness Act (emphasis added):

> *"Criteria for inventorying those lands that may have potential for wilderness recommendation* ***recognize that much, if not all of the land, shows some signs of human activity and modification*** *even though they have shown high recuperative capabilities."*

These lands have an even broader range of "exceptions" that make them "eligible" to be considered as wilderness (emphasis added):

> *"1. The* ***land is regaining*** *a natural, untrammeled appearance.*
> *2.* ***Improvements existing in the area*** *are being affected by the forces of nature rather than humans and* ***are disappearing*** *or muted.*
> *3. The area has existing or attainable NFS ownership patterns, both surface and subsurface, that could ensure perpetuation of identified wilderness characteristics.*
> *4. The location of the area is conducive to the perpetuation of wilderness values. Consider the relationship of the area to sources of noise, air, and water pollution, as well as unsightly conditions that would have an effect on the wilderness experience. The amount and pattern of Federal ownership is also an influencing factor.*

*5. Each **area contains no more than a half mile of forest roads** (36 CFR 212.1) under Forest Service jurisdiction for each 1,000 acres.*
*6. No more than 15 percent of the **area is in non-native, planted vegetation**.*
*7. Twenty percent or less of the **area has been harvested** within the past 10 years.*
*8. The **area contains only a few dwellings** on private lands and the location of these dwellings and their access needs insulate their effects on wilderness characteristics on NFS lands."*

We again note that every single one of the above "exceptions" in the former planning Directives that the Forest Service granted itself clearly violated the definition for wilderness established by Congress.

Current Planning Rule Directives

The current Planning Rule Directives (implemented Jan 31, 2015) offer even more egregiously erroneous direction on the criteria for lands with potential wilderness characteristics. The largest change is that the agency is now directed to ignore many roads that exist on the landscape when they inventory land for wilderness characteristics. The agency is directed to include level 1 roads, many "historic" roads, and even some level 2 roads:

"1. Include in the inventory areas that contain the following road improvement attributes if the areas also meet the other inventory criteria (secs. 71.21 and 71.22b of this Handbook):

a. Areas that contain forest roads maintained to level 1;

f. Areas with historical wagon routes, historical mining routes, or other settlement era transportation features considered part of the historical and cultural landscape of the area.

g. Areas with maintenance level 2 roads that do not meet the criteria for exclusion in subsection 2(c) below."[9]

This criterion is absolutely certain to run afoul of the Congressional definition of wilderness. We strongly assert that a road is clearly a "permanent improvement" and, as such, is automatically disqualified for inclusion as potential wilderness. The current planning Directives add other and additional "exceptions" that even the previous Directives did not contain:

"10. Lands adjacent to development or activities that impact opportunities for solitude. The fact that nonwilderness activities or uses can be seen or heard from within any portion of the area, must not, of itself, preclude inclusion in the inventory. It is appropriate to extend boundaries to the edges of development for purposes of inclusion in the inventory.

[9] FSH1909.12, Section 71.22a

> *11. Structures, dwellings, and other relics of past occupation when they are considered part of the historical and cultural landscape of the area.*
>
> *12. Areas with improvements that have been proposed by the Forest Service for consideration as recommended wilderness as a result of a previous Forest planning process or that the Responsible Official merits for inclusion in the inventory that were proposed for consideration through public or intergovernmental participation opportunities (sec. 70.61 of this Handbook)."*[10]

Any "Structures, dwellings, and other relics of past occupation" can now be ignored and included as potential wilderness areas as long as they are "considered part of the historical and cultural landscape of the area." "Considered" by whom? Again we stress that Congress as not delegated the definition of wilderness to the Forest Service!

Read item #12 above again carefully. It allows the Responsible Official to include any improvements, without restriction, if they find "merit" for inclusion. The single paragraph "allows", by the Forest Service's own rulemaking, them to include any improvement in any area as potential wilderness.

The Forest Service Cannot Promulgate Rules that Violate a Congressional Statute

The Secretary of Agriculture, by the National Forest Management Act of 1976, is required to (emphasis added):

> *"As soon as practicable, but not later than two years after enactment of this subsection, the Secretary shall in accordance with the procedures set forth in section 553 of title 5, United States Code, promulgate regulations, under the principles of the Multiple-Use, Sustained-Yield Act of 1960, that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to-*
>
> *(2)* ***specifying guidelines which-***
>
> *(A)* ***require the identification of the suitability of lands for resource management"***[11]

Indeed, the Final 2012 Planning Rules acknowledge this same specific requirement:

> *"The NFMA requires regulations consistent with the principles of the Multiple-Use Sustained-Yield Act of 1960, that set out the process for the development and revision of the land management plans and the guidelines and standards the Act prescribes (16*

[10] FSH1909.12, Section 71.22b
[11] 16 USC 1604(g)(2)(A)

U.S.C. 1604(g)).”[12]

The agency is required by statute to review for suitability of lands for resource management. One of these resources is wilderness (emphasis added):

> *“(3) specifying guidelines for land management plans developed to achieve the goals of the Program which—*
>
> *(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for* ***outdoor recreation (including wilderness****), range, timber, watershed, wildlife, and fish;”*[13]

The Agency activities prescribed by Chapter 70 by the 2012 Planning Directives do not meet this statutory requirement because the agency is employing the wrong criteria in its review for suitability. The Forest Service is required to review the lands for suitability for resource management. One of the resources required to review the lands for is wilderness. The agency has not met the requirement to review for wilderness suitability because the current Planning Directives prescribe using the wrong criteria. The criterion for potential wilderness doesn't support the legal, Congressionally-defined, definition of wilderness!

The Wilderness Act is Clear: The Forest Service Can't Manufacture "Wilderness"

The 2012 Planning Rule Directives violate the Wilderness Act:

> *“…and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act.”*[14]

Yet the Planning Directives allow the Forest Service a wide range of management options for recommended wilderness, up to, and including managing the area as if it were already designated wilderness (emphasis added):

> *“When developing plan components for recommended wilderness areas,* ***the Responsible Official has discretion to implement a range of management options****. All plan components applicable to a recommended area* ***must protect and maintain the social and ecological characteristics that provide the basis for wilderness recommendation****. In addition, the plan may include one or more plan components for a recommended wilderness area that:*
> *1.* ***Enhance the ecological and social characteristics that provide the basis for wilderness designations****;*

[12] Federal Register Vol. 77, No. 68, April 9, 2012, p. 21165
[13] 16 USC 1604(g)(3)(A)
[14] 16 USC 1131(a)

> *2. Continue existing uses, only if such uses do not prevent the protection and maintenance of the social and ecological characteristics that provide the basis for wilderness designation;*
> *3. **Alter existing uses**, subject to valid existing rights; or*
> *4. **Eliminate existing uses**, except those uses subject to valid existing rights."*[15]

In fact, the Planning Directives instruct the Responsible Official to:

> *"The Responsible Official should strive to maintain consistency with the provisions of 16 USC 1133(d) and the content of FSM 1923.03(3) when developing plan components for the management of recommended wilderness areas."*[16]

And what is contained in 16 USC 1133(d)? All of the special provisions for managing designated Wilderness. And FSM 1923.03(3) states:

> *"Any area recommended for wilderness or wilderness study designation is not available for any use or activity that may reduce the wilderness potential of an area."*

The current 2012 Planning Rule Directives instruct the Forest Service to manage areas recommended for wilderness as if Congress has already designated those areas as Wilderness.

Congress has not delegated Wilderness decision making to Forest Service. In fact, it has specifically retained that right only for itself:

> *"…and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act."*

The Forest Service Must Take Action to Ensure Alignment of its Planning Practices to the Statutory Requirements.

As a matter of law, the Forest Service must take action to align its 2012 Planning Rule Directives to the National Forest Planning Act (16 USC 1604) and to the Wilderness Act (16 USC 1131-1136). The current Planning Rule Directives put the agency out of compliance with statutory requirements for reviewing the suitability of lands for resource management. The Current Planning Rule Directives put the agency out of compliance with Congress specifically retaining the power to create Wilderness to itself.

Specifically, NMOHVA petitions the Secretary to withdraw Chapter 70 of the 2012 Planning Rule Directives (FSH1909.12) and promulgate rules that meet the statutory requirements of the National Forest Planning Act (16 USC 1604) and to the Wilderness Act (16 USC 1131-1136).

[15] FSH1909.12, Section 74.1
[16] FSH1909.12, Section 74.1

CONCLUSION

As a matter of law and sound administrative policy, the Secretary should withdraw the offending portion of the 2012 Planning Rule Directives (FSH 1909.12 Chapter 70) and promulgate new directives that meet the requirements of the National Forest Management Act and the Wilderness Act. The current Land Management Planning Handbook, Chapter 70, contains crucial direction that will result in violations of federal statute. The Forest Service, by following the currently stated directives will achieve certain and specific results that will violate several federal statutes.

NMOHVA therefore petitions the Secretary to immediately address the problem by promptly withdrawing the specified directives and revising them to comply with existing law.