



Sierra Forest Legacy
Protecting Sierra Nevada Forests and Communities



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Submitted via email

Re: Pre-Scoping Comments on Inyo National Forest Over-Snow Vehicle Use Designation

We are pleased that the Inyo National Forest is reaching out to the public to gather information and ideas about the winter travel planning process, and look forward to working with you on this important plan.

Planning Approach

It is very important to us that the Inyo National Forest creates a public process in which all ideas can be fairly heard and vetted. To that end, we would ask that you conduct scoping more generally by explaining the sideboards and direction set forth in subpart C of the Forest Service's travel management regulations, 36 C.F.R. part 212, and asking for public input including specific proposals for snowmobile and quiet use areas. We ask that you do not offer a detailed proposed action that proposes open areas for over-snow vehicle (OSV) use. The detailed proposed action approach has been used by other forests in Region 5 and is not yielding acceptable results. It undercuts the public scoping process by proposing areas for OSV use prior to application of the executive order minimization criteria or public understanding of the governing sideboards on the agency's decision-space. In our experience, the result is that forests generally identify a proposed action that is not legally compliant and skews the planning process in favor of motorized uses.

To ensure a successful travel planning effort, we recommend that the INF communicate to stakeholders early on the requirements of the laws and policies that will govern the process and define the agency's decision-space. It is important for the public to understand the requirements of the new subpart C regulation and what changes it will require to the management status quo. We have not seen this done on other forests in Region 5 and believe it has compromised – perhaps fatally – the planning process.

2015 Travel Management Rule Amendment – Use by Over-Snow Vehicles

The Forest Service's new rule governing over-snow vehicle (OSV) use requires national forests with adequate snowfall to designate and display on an "over-snow vehicle use map" specific areas and routes where OSV use is permitted based on resource protection needs and other recreational uses.¹

Implemented correctly, the rule presents an important opportunity to restore balance to the winter backcountry.²

The rule requires a paradigm shift from a default "open unless designated closed" to a default "closed unless designated open" approach. To implement that approach, each forest must specifically delineate areas and trails where OSV use is permitted and prohibit OSV use outside of the designated system.³ In other words, the final rule requires forests to make OSV designations under a consistent "closed unless designated open" approach and not to designate areas as open essentially by default.⁴

The Inyo is one of the first national forests to undergo winter travel management planning under the new OSV rule. To ensure rule implementation is off to the right start, it is critical that the Inyo's OSV plan satisfies the Forest Service's substantive legal duty to locate areas and trails designated as open to OSV use to *minimize* resource damage and conflicts with the majority of winter visitors enjoying non-motorized, quiet forms of recreation.⁵ Included below are important actions that are required to comply with the plain language of the final OSV rule.

¹ 36 C.F.R. part 212, subpart C, 80 Fed. Reg. 4500 (Jan. 28, 2015).

² Currently, approximately 94 million acres within national forests that receive regular snowfall are open to OSV use, while only about 30 million acres outside of designated wilderness (where motorized uses are prohibited by statute) are closed to that use. Winter Wildlands Alliance, *Winter Recreation on National Forest Lands*, p. 4 & Fig. 3 (2015), available at <http://winterwildlands.org/wp-content/uploads/2015/06/2015-Winter-Rec-Report.pdf> and attached. The status quo on the Inyo National Forest is similar, with approximately 49% of the forest currently open to cross-country OSV use. *Id.* p. 35.

³ See 36 C.F.R. §§ 212.80(a), 212.81(a), 261.14.

⁴ Recognizing that the draft rule would have permitted inconsistent management approaches, with corresponding confusion among users and enforcement difficulties, the Forest Service in the final rule determined that "it would be clearer for the public and would enhance consistency in travel management planning and decision-making if the Responsible Official were required to designate a system of routes and areas where OSV use is prohibited unless allowed" (i.e., marked open on a map). 80 Fed. Reg. at 4507.

⁵ According to recent Forest Service National Visitor Use Monitoring data, 6.7% of the visitors interviewed on the Inyo participated in cross-country skiing, while only 1.1% participated in snowmobiling.

I. The Forest Service must conduct travel analysis to inform its proposed action.

Current Forest Service directives governing travel management planning require the agency to conduct travel analysis to inform its decision-making.⁶ Travel analysis must be completed *prior to* formulation of a proposed action and should “form the basis for proposed actions related to designation of roads, trails, and areas for motor vehicle use.”⁷ More specifically, travel analysis is designed to “[i]dentify management opportunities and priorities[,] formulate proposals for changes[,] . . . [c]ompare motor vehicle use . . . with desired conditions established in the applicable land management plan, and describe options for modifying the forest transportation system that would achieve desired conditions.”⁸

II. The Forest Service must apply the minimization criteria to actually *minimize* impacts when designating *each* area and trail open to OSV use.

A. Background

In response to the growing use of dirt bikes, snowmobiles, all-terrain vehicles, and other off-road vehicles (ORVs) and the corresponding environmental damage, social conflicts, and public safety concerns, Presidents Nixon and Carter issued Executive Orders 11,644 and 11,989 in 1972 and 1977, respectively, requiring federal land management agencies to plan for ORV use based on protecting resources and other uses.⁹ When designating areas or trails available for ORV use, agencies must locate them to:

- (1) minimize damage to soil, watershed, vegetation, or other resources of the public lands;
- (2) minimize harassment of wildlife or significant disruption of wildlife habitats; and
- (3) minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands.¹⁰

The Forest Service codified these “minimization criteria” in subparts B and now C of its travel management regulations.¹¹ The agency has struggled, however, to properly apply the criteria in its travel management decisions, leading to a suite of federal court cases invalidating Forest Service travel management plans.¹² Collectively, these cases confirm the Forest Service’s substantive legal obligation

⁶ See generally Forest Service Handbook (FSH) 7709.55, chs. 10 & 20; Forest Service Manual (FSM) 7712 & 7715.

⁷ See FSH 7709.55, §§ 13(3) & 21.6; FSM 7715.03(2).

⁸ FSH 7709.55, § 21.5.

⁹ Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972), *as amended by* Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977).

¹⁰ Exec. Order No. 11,644, § 3(a).

¹¹ 36 C.F.R. §§ 212.55, 212.81(d).

¹² See *WildEarth Guardians v. U.S. Forest Serv.*, 790 F.3d 920, 929-32 (9th Cir. 2015); *Friends of the Clearwater v. U.S. Forest Serv.*, No. 3:13-CV-00515-EJL, 2015 U.S. Dist. LEXIS 30671, at *37-52 (D. Idaho Mar. 11, 2015); *The Wilderness Soc’y v. U.S. Forest Serv.*, No. CV08-363-E-EJL, 2013 U.S. Dist. LEXIS 153036, at *22-32 (D. Idaho Oct. 22, 2013); *Cent. Sierra Envtl. Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1094-98 (E.D. Cal. 2013); *Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1071-74 (D. Idaho 2011).

to meaningfully apply and implement – not just identify or consider – the minimization criteria when designating *each* area and trail, and to show in the administrative record how it did so.

It has been over four decades since President Nixon first obligated the Forest Service to minimize impacts associated with ORV use, including snowmobiles. Yet the agency has systematically failed to do so. In the meantime, irresponsible and mismanaged ORV use continues to degrade soil, air, and water quality, threaten imperiled wildlife species, and diminish the experience of the majority of public lands visitors who enjoy the natural landscape through quiet, non-motorized forms of recreation.

As one of the first forests to implement the new OSV rule, it is important that the Inyo properly apply the minimization criteria and ensure that the agency's repeated failures in the summer-time travel planning context are not a harbinger for winter travel planning. The following discussion describes in more detail how the Forest Service must apply the minimization criteria to designate areas and trails for OSV use that minimize impacts to vulnerable wildlife and the majority of national forest visitors seeking to enjoy nature free from noise and pollution.

B. Proper application of the minimization criteria

The executive orders require the Forest Service to *minimize* impacts – not just identify or consider them – when designating areas or trails for OSV use, and to demonstrate in the administrative record how it did so. As the Ninth Circuit recently held, “[w]hat is required is that the Forest Service document how it evaluated and applied [relevant] data on an area-by-area [or route-by-route] basis with the objective of minimizing impacts as specified in the [Travel Management Rule].”¹³ To satisfy its substantive duty to minimize impacts, the Forest Service must apply a transparent and common-sense methodology for meaningful application of *each* minimization criterion to *each* area and trail being considered for designation. That methodology must include several key elements.

First, proper application of the minimization criteria is not solely an office exercise. Rather, the Forest Service must get out on the ground, gather site-specific information, and actually apply the criteria to minimize resource damage and user conflicts associated with each designated area and route.¹⁴

¹³ *WildEarth Guardians*, 790 F.3d at 931; see also *id.* at 932 (“consideration” of the minimization criteria is insufficient; rather, the agency “must apply the data it has compiled to show how it designed the areas open to snowmobile use “with the objective of minimizing” impacts). Importantly, efforts to *mitigate* impacts associated with a designated OSV system are insufficient to fully satisfy the duty to *minimize* impacts, as specified in the executive orders. See Exec. Order 11,644, § 3(a) (“Areas and trails shall be *located* to minimize” impacts and conflicts.). Thus, application of the minimization criteria should be approached in two steps: first, the agency locates areas and routes to minimize impacts, and second, the agency establishes site-specific management actions to further reduce impacts. Similarly, the Forest Service may not rely on compliance with the relevant forest plan as a proxy for application of the minimization criteria because doing so conflates separate and distinct legal obligations. See *Friends of the Clearwater*, 2015 U.S. Dist. LEXIS 30671, at *46 (“Merely concluding that the proposed action is consistent with the Forest Plan does not . . . satisfy the requirement that the Forest Service provide some explanation or analysis showing that it considered the minimizing criteria and took some action to minimize environmental damage when designating routes.”).

¹⁴ See, e.g., *Idaho Conservation League*, 766 F. Supp. 2d at 1074-77 (invalidating travel management plan that failed to utilize monitoring and other site-specific data showing resource damage).

Second, effective application of the minimization criteria must include meaningful opportunities for public participation and input *early* in the planning process.¹⁵ In many cases, public lands users and other stakeholders are the best source of information for identifying resource and user conflicts.

Third, application of the minimization criteria should be informed by the best available scientific information and associated strategies and methodologies for minimizing impacts to particular resources.¹⁶ Winter Wildlands Alliance recently published a comprehensive literature review and best management practices (BMPs) for OSV use on national forests.¹⁷ The BMPs provide guidelines, based on peer-reviewed science, for OSV designation decisions that are intended to minimize conflicts with other winter recreational uses and impacts to wildlife, water quality, soils, and vegetation. The Forest Service's National Core BMP Technical Guide also includes relevant BMPs, such as imposing minimum snow depth and season of use restrictions; using applicable best practices when constructing OSV trailheads, parking, and staging areas; and using suitable measures to trap and treat pollutants from OSV emissions in snowmelt runoff or locating staging areas at a sufficient distance from waterbodies to provide adequate pollutant filtering.¹⁸ The Forest Service should incorporate the Winter Wildlands Alliance and National Core BMPs into its winter travel planning decisions.

In addition to generalized BMPs, application of the minimization criteria should incorporate any site- or resource-specific scientific information or analysis. For example, to effectively minimize the significant noise impacts associated with OSV use, the Forest Service should conduct soundscape modeling and incorporate the results of that modeling into its decision-making.¹⁹ Other site- or resource-specific information might include, for example, air quality modeling or monitoring; wildlife population, habitat, or monitoring data; or visitor use data.

Fourth, proper application of the minimization criteria must address both site-specific and larger-scale impacts.²⁰ For example, the Forest Service must assess and minimize landscape-scale impacts such as habitat fragmentation; cumulative noise, and air and water quality impacts; and degradation of wilderness-quality lands and associated opportunities for primitive forms of recreation. The agency also

¹⁵ See 36 C.F.R. § 212.52(a).

¹⁶ See *Friends of the Clearwater*, 2015 U.S. Dist. LEXIS 30671, at *24-30, 40-52 (invalidating route designations that failed to consider best available science on impacts of motorized routes on elk habitat effectiveness or to select routes with the objective of minimizing impacts to that habitat and other forest resources).

¹⁷ Winter Wildlands Alliance, *Snowmobile Best Management Practices for Forest Service Travel Planning: A Comprehensive Literature Review and Recommendations for Management* (Dec. 2014), available at <http://winterwildlands.org/wp-content/uploads/2015/02/BMP-Report.pdf> and attached.

¹⁸ U.S. Department of Agriculture, Forest Service, *National Best Management Practices for Water Quality Management on National Forest System Lands, Volume 1: National Core BMP Technical Guide* (April 2012), available at http://www.fs.fed.us/biology/resources/pubs/watershed/FS_National_Core_BMPs_April2012.pdf.

¹⁹ See, e.g., *Snowmobile Best Management Practices*, pp. 6-7 (describing noise simulation modeling used in Yellowstone National Park).

²⁰ See, e.g., *Idaho Conservation League*, 766 F. Supp. 2d at 1066-68, 1074-77 (invalidating travel plan that failed to consider aggregate impacts of short motorized routes on wilderness values or site-specific erosion and other impacts of particular routes).

must assess and minimize site-specific impacts to soils, vegetation, water, and other public lands resources, sensitive wildlife habitat, and important areas for non-motorized recreation.

Fifth, the Forest Service should account for predicted climate change impacts in its application of the minimization criteria and designation decisions.²¹ Already climate change is leading to reduced and less reliable snowpack and increasing the vulnerability of wildlife, soils, and water resources to disturbance, compaction, and pollution impacts associated with OSV use.²²

Sixth, application of the minimization criteria must take into account available resources for monitoring and enforcement of the designated system.²³ To ease enforcement obligations and ensure user compliance in the first place, OSV designation decisions should establish clear boundaries and simple, consistent restrictions designed to minimize resource damage and user conflicts.

Finally, the Forest Service should consider whether to designate areas or trails by “class of vehicle” and/or “time of year,” as provided for in the OSV rule.²⁴ That provision allows forests to tailor their designation decisions to account for snowfall patterns and different and evolving OSV technologies, and to minimize corresponding social and environmental impacts.

C. Area designations

The Forest Service’s substantive duty to minimize impacts associated with OSV use applies to both area and route designations. Minimization of impacts associated with OSV area allocations is particularly important because the OSV rule permits the Forest Service to designate larger areas open to cross-country travel than in the summer-time travel planning context. As the Ninth Circuit recently held, the Forest Service must “apply the minimization criteria to *each area* it designate[s] for snowmobile use” and “provide a . . . granular minimization analysis to fulfill the objectives of Executive Order 11644.”²⁵ Importantly, the agency “cannot rely upon a forest-wide reduction in the total area open to snowmobiles as a basis for demonstrating compliance with the minimization criteria,” which are “concerned with the effects of each particularized area.”²⁶ The agency is “under an affirmative

²¹ See, e.g., 77 Fed. Reg. 77,801, 77,828-29 (Dec. 24, 2014) (Council on Environmental Quality’s revised draft guidance on consideration of climate change in NEPA states: “Climate change can increase the vulnerability of a resource, ecosystem, human community, or structure, which would then be more susceptible to climate change and other effects and result in a proposed action’s effects being more environmentally damaging. . . . Such considerations are squarely within the realm of NEPA, informing decisions on whether to proceed with and how to design the proposed action so as to minimize impacts on the environment, as well as informing possible adaptation measures to address these impacts, ultimately enabling the selection of smarter, more resilient actions.”).

²² See *Snowmobile Best Management Practices*, pp. 4-5, 10, 13.

²³ See *Sierra Club v. U.S. Forest Serv.*, 857 F. Supp. 2d 1167, 1176-78 (D. Utah 2012) (NEPA requires agency to take a hard look at the impacts of illegal motorized use on forest resources and the likelihood of illegal use continuing under each alternative).

²⁴ 36 C.F.R. § 212.81(a).

²⁵ *WildEarth Guardians*, 790 F.3d at 930-31.

²⁶ *WildEarth Guardians*, 790 F.3d at 932.

obligation to actually show that it aimed to minimize environmental damage when designating . . . areas.”²⁷

D. Trail designations

Under the plain terms of the executive orders, the Forest Service must apply the minimization criteria to *all* trails designated for OSV use – even if those trails are located in areas of the forest that would be designated as open to cross-country OSV use. When designated and placed on a map, trails focus the impacts of OSV use to those locations and generally increase the number of OSV users visiting the area. This is particularly true of groomed trails within areas otherwise open to cross-country travel. Groomed trails are desirable for traveling faster and further into remote areas. In addition, grooming often results in widening the footprint of the trail. The widened trail is then used in summer by wheeled motorized vehicles resulting in other impacts and conflicts. Moreover, the impacts associated with OSV use on designated trails extend beyond the trail corridor itself. As part of applying and implementing the minimization criteria, the Forest Service must address noise, air quality, habitat fragmentation, and other landscape-scale impacts associated with trail use.

E. Adequate Snowpack

Subpart C requires designation of areas and routes for OSV use “where snowfall is adequate for that use to occur.”²⁸ Particularly with climate change leading to reduced and less reliable snowpack, low-elevation and other areas that lack regular and consistent snowfall should not be designated for OSV use. Closing those areas is necessary to comply with the plain language of the subpart C regulations and with the executive order minimization criteria.

To account for variable snowpack and ensure that OSV use occurs only where and when snowfall is adequate, minimum snow depth restrictions are an important tool to further minimize impacts associated with OSV area and trail designations. The best available science shows that minimum snow depths should be at least 18 inches for cross-country travel and 12 inches for travel on groomed trails.²⁹ These depths are generally sufficient to minimize impacts to water quality, soils, and vegetation and to buffer for variable snow conditions (e.g., while a shaded trailhead may have 12 inches of snow, south-facing slopes further up the trail may have little or no snow). Consistent with the best available scientific information, the Inyo has proposed a forest plan standard of 18 inches for cross-country OSV use, which we support.³⁰ The Forest Service should also address its plans to enforce minimum snow depth restrictions, including protocols for monitoring snow depths, communicating conditions with the public, and implementing emergency closures when snowpack falls below the relevant thresholds. Minimum snow depths measurements should be taken at established locations that are representative of varying

²⁷ *WildEarth Guardians*, 790 F.3d at 932 (quotations and citations omitted).

²⁸ 36 C.F.R. § 212.81(a).

²⁹ See *Snowmobile Best Management Practices*, p. 14.

³⁰ See Sierra, Sequoia, and Inyo National Forests, *Detailed Proposed Action*, p. 56 (Aug. 2014), available at http://a123.g.akamai.net/7/123/11558/abc123/forestservice.download.akamai.com/11558/www/nepa/3403_FSPL_T3_2325964.pdf.

snow depths based on factors such as wind, orientation, slope, tree cover, etc. and depths should be reported regularly on the forest website and posted at popular access points.

In addition, forests should clearly identified season of use restrictions based on wildlife needs, water quality considerations, average snow depth figures, and other relevant information, with those restrictions serving as bookends, and minimum snow depth requirements providing an additional limitation on use.³¹

F. Integrating the minimization criteria with the NEPA process

Application of the minimization criteria under the executive orders and analysis of the direct, indirect, and cumulative impacts of a range of reasonable alternatives under NEPA should complement and reinforce one another. As discussed above, the executive orders require application of the minimization criteria to *each* designated area and route, and the corresponding NEPA analysis should analyze impacts associated with the *entire* system proposed for designation under each alternative – regardless of the extent to which that system is already reflected in current OSV management.

In most cases, cross-country OSV travel has been allowed by default across vast portions of the national forests, with that use and its associated impacts never being subjected to a thorough NEPA analysis or application of the minimization criteria. The NEPA analysis for the travel plan must analyze – and *minimize* – the impacts of designations that allow continued OSV travel in those areas. Similarly, the Forest Service must analyze and minimize impacts associated with designating existing OSV routes that have not previously been subject to NEPA or the minimization criteria. This is, of course, in addition to analyzing and minimizing impacts associated with designating any new or previously illegal, user-created areas or trails.

To facilitate this required analysis and comply with NEPA, the EIS must include an alternative under which no areas or routes would be designated as open to recreational OSV use.³² This alternative is necessary to provide an accurate comparison for analysis of the impacts associated with all the area and route designations made in the winter travel plan – including those that allow continued OSV travel in existing areas or on existing routes. Unlike in a typical NEPA analysis where the no action alternative provides that baseline for comparison, the no action alternative for most winter travel planning efforts reflects the current management status quo allowing cross-country OSV travel by default across vast portions of the forest. This is similar to the situation in *Western Watersheds Project v. Abbey*, where the Ninth Circuit overturned a BLM NEPA analysis that failed to analyze an alternative that would eliminate grazing in the Missouri Breaks National Monument.³³ Absent such an alternative, and where both the no action and action alternatives permitted continued grazing, the court found that the agency was

³¹ 36 C.F.R. § 212.81(a) (OSV rule permits agency to designate areas or trails by “time of year” to tailor designation decisions to account for snowfall patterns).

³² Specially authorized or permitted OSV uses to, for example, access valid existing rights would still be allowed. See 36 C.F.R. § 212.81(a) (describing exempted uses).

³³ 719 F.3d 1035, 1050-53 (9th Cir. 2013).

“operating with limited information on grazing impacts,” in violation of NEPA.³⁴ The same is true here, where an alternative that designates no areas or trails open to OSV use is necessary to facilitate a fully informed decision about the impacts of the action alternatives.

III. OSV use designation could prejudice the forest plan revision process

We are concerned that the Inyo National Forest is putting the cart before the horse by proposing winter travel planning before it completes its land management plan revision. We want to ensure that decisions to designate particular areas for OSV use do not foreclose or prejudice important forest-plan-level decisions, including the requirement to determine whether to recommend additional areas for wilderness designation.³⁵ The planning process is the appropriate place to make any decisions about the management of important conservation areas like Horse Meadows, Lundy Canyon, and Mono Craters. Mono Craters is just one example of the dry-forb meadow habitats east of 395 that should be protected from OSV use.

As a general matter, permitting OSV use in areas that are being considered for wilderness recommendation could prejudice the ongoing plan revision process. OSV use in those areas would degrade their naturalness, diminish opportunities for solitude and primitive recreation, and vastly reduce the likelihood that Congress would eventually designate them as Wilderness. The Forest Service must manage any areas that are recommended for wilderness designation “to protect and maintain the ecological and social characteristics that provide the basis for their suitability for wilderness designation.”³⁶ The Forest Service is required to analyze these impacts under NEPA and to minimize degradation to wilderness values and recreational uses under the minimization criteria when making OSV designation decisions.³⁷

To avoid prejudicing the ongoing wilderness recommendation, the Inyo should ensure that its winter travel management process is appropriately sequenced with the forest plan revision process.

IV. Endangered Species Act compliance

Under the Endangered Species Act, the Forest Service must ensure that its actions will not jeopardize

³⁴ See also, e.g., *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 708-11 (10th Cir. 2009) (invalidating NEPA analysis that failed to analyze an alternative that would close the entire area to oil and gas development because, “[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded”).

³⁵ 36 C.F.R. § 219.7(c)(2)(v); Forest Service Handbook 1909.12, ch. 70.

³⁶ 36 C.F.R. § 219.10(b)(1); see also Forest Service Manual 1923.03 (“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.”).

³⁷ See *Montana Wilderness Association v. McAllister*, 666 F.3d 549, 558 (9th Cir. 2011) (Forest Service failed to maintain wilderness character by ignoring impacts of increased motorized uses on opportunities for solitude); *Idaho Conservation League*, 766 F. Supp. 3d at 1066-68, 1071-77 (agency must analyze and minimize impacts of motorized uses on wilderness values and roadless characteristics).

the continued existence of listed species or result in the destruction or adverse modification of their critical habitat.³⁸ Three relevant amphibian species were recently listed as threatened or endangered (Sierra Nevada yellow-legged frog, Mountain yellow-legged frog, and Yosemite toad), with proposed critical habitat for the Sierra Nevada yellow-legged frog and Yosemite toad located on the Inyo.³⁹ Due to the presence of the listed amphibian species and proposed critical habitat and the potential adverse effects of OSV travel the forest must formally consult with the U.S. Fish and Wildlife Service as part of its winter travel planning process.⁴⁰

V. Forest Service Sensitive Species

As described above, the Forest Service is obligated to designate only those areas and trails for OSV use that minimize harassment of wildlife and significant disruption of wildlife habitat and to comply with other sensitive species management laws and policies. The Inyo should compile best available scientific information and management constraints for all species on the forest that may be impacted by OSV use prior to identifying proposed OSV areas and trails. This includes the following two sensitive species:

A. Sierra Nevada Red Fox

The U.S. Forest Service is currently coordinating with the U.S. Fish and Wildlife Service, university research scientists, scientists with the State Department of Fish and Wildlife, and the National Park Service to increase scientific understanding of exactly where the Sierra Nevada red fox (SNRF) still persists, what the status of its small population is, and what risks continue to threaten the SNRF. Recent scientific studies suggest that snowmobiles are a likely disturbance and source of mortality for SNRF.⁴¹

B. Bi-State Sage Grouse

In April, 2015, U.S. Fish and Wildlife Service determined that the Bi-State population of greater sage-grouse does not require the protection of the ESA. A key factor in the decision not to list the bird was the development of The Bi-State Action Plan, a conservation plan developed by partners in the Bi-State Local Area Working Group over the past 15 years. The Bi-State Action Plan established standards for the management of snowmobiles that contribute to positive on-the-ground habitat conservation including the requirement that snowmobile use be limited to designated areas and routes, as well as the application of a seasonal use restriction on snowmobile use in sage grouse wintering areas from 11/15 to 5/1.⁴²

³⁸ 16 U.S.C. § 1536(a)(2).

³⁹ 79 Fed. Reg. 24,256 (Apr. 29, 2014) (final listing rule); 78 Fed. Reg. 24,516 (Apr. 25, 2013) (proposed critical habitat).

⁴⁰ See 16 U.S.C. § 1536(a); C.F.R. § 402.14(a).

⁴¹ USFWS. 2015. 12-Month finding on a petition to list Sierra Nevada red fox as an endangered or threatened species. Federal Register Volume 80(195): 60989-61028. Thursday, October 8, 2015.

⁴² B-State Action Plan For Conservation of the Greater Sage-Grouse Bi-State Distinct Population Segment. March 15, 2012.

VI. Planning for non-motorized winter recreation

With increasing numbers of participants in both motorized and human-powered winter back-country recreation, conflicts between skiers, snowshoers, and snowmobilers has grown and will continue to escalate in many areas. Part of this conflict is due to the disparity in non-motorized opportunities available to skiers and snowshoers on national forests, as compared to snowmobilers. Those disparities are documented in detail in Winter Wildlands Alliance's recent report, *Winter Recreation on National Forest Lands*.⁴³ As described above, the Forest Service is obligated under the ORV executive orders to locate designated areas and trails for OSV use to *minimize* those conflicts, and is required under the 2012 planning rule to plan for sustainable recreation. Yet travel planning efforts are often focused only on the motorized system and generally ignore non-motorized recreation. The result is to perpetuate the disparity in non-motorized recreation opportunities by ignoring one side of the equation.

The solution is to plan for OSV use in the larger winter recreation context. As the Forest Supervisor on the Bitterroot National Forest recently recognized in the Draft Record of Decision for that forest's travel management planning process for both winter and summer ORV uses,

I concluded early in the analysis that motorized recreation opportunities on the Bitterroot National Forest could not be assessed without also considering opportunities for non-motorized recreation. Motorized and non-motorized recreation experiences are linked in the sense that one affects the other. This is particularly true for the effects of motorized use on non-motorized user experiences. Providing quality recreation opportunities for both types of users requires the consideration of motorized use within the context of the full spectrum of uses.⁴⁴

Another forest that has effectively planned for ORV use in the larger recreation context is the White River. That forest's 2011 travel plan, which covered both summer and winter, established clear boundaries and expectations for motorized and non-motorized uses based on factors such as the quality of recreational experiences, average travel distances and terrain needs for motorized versus non-motorized users, crowding, user trends and demands, and locations and availability of access points and staging areas.⁴⁵

The BLM has also recognized the importance of looking holistically at a travel network that includes both motorized and non-motorized recreational routes to ensure opportunities and access for all user groups, including those seeking quiet use opportunities. That agency's travel and transportation management manual provides:

[T]he recreation program has a specific need to recognize and manage motorized recreational use of off-highway vehicles (OHVs) and non-motorized travel, such as

⁴³ See generally *Winter Recreation on National Forest Lands*, pp. 3-7.

⁴⁴ USDA Forest Service, Draft Record of Decision, Bitterroot National Forest Travel Management Planning Project, p. 1 (April 2015).

⁴⁵ See USDA Forest Service, Final Environmental Impact Statement, White River National Forest Travel Management Plan, pp. 66-97 (Mar. 2011).

foot, equestrian, and non-motorized mechanical travel. The planning process should consider and address the full range of various modes of travel on public lands, not only motorized access needs. An understanding of the regional supply and demand of recreational opportunities and access needs is important in designating a system of roads, primitive roads, trails, and areas for specific recreation and other uses.⁴⁶

We encourage the Inyo National Forest to plan for OSV use in the larger recreation context. This includes proactively planning for both motorized and non-motorized winter uses, considering the array of recreational uses and trends, required settings, desired outcomes, and the recreation niche of the forest. Areas and trails for motorized and non-motorized winter uses should be designated based on that information and in accordance with the executive order minimization criteria (which requires locating motorized elements of the system to minimize adverse impacts to non-motorized winter recreation opportunities). This will necessarily require close coordination with and consideration of the ongoing forest plan revision process.

VII. Current and anticipated future over-snow uses

The Forest Service's travel management regulations define OSV as "a motor vehicle that is designed for use over snow and that runs on a track or tracks and/or a ski or skis, while in use over snow."⁴⁷ While the requirements of the new rule apply only to OSVs, effective winter travel management planning and compliance with the minimization criteria require the Forest Service to account for existing and potential future over-snow recreational uses that may not satisfy the definition of OSV.⁴⁸ For example, fat-tire bike riding is an increasing wintertime mechanized use throughout the Sierra Nevada and nationally. Other new types of motorized or mechanized over-snow uses may also exist or be developed over the life of the winter travel plan. The OSV plan and corresponding NEPA analysis should address the non-OSV over-snow uses that are already occurring on the forest, and should anticipate and provide a process for addressing future over-snow uses through updates to the plan.⁴⁹ Failure to address these ongoing and foreseeable uses of the forest that may be impacted by OSV designations would result in both an inadequate NEPA analysis and inadequate minimization of conflicts with other uses.

VIII. The Forest Service may not rely on previous OSV decisions that are outdated or failed to apply the minimization criteria.

Given the Inyo National Forest's stated intent to conduct winter travel planning under the new OSV rule, it may not rely on the rule's grandfathering provision to adopt existing OSV management decisions

⁴⁶ BLM Manual 1606.06(A)(1).

⁴⁷ 36 C.F.R. § 212.1 (defining over-snow vehicle as "[a] motor vehicle that is designed for use over snow and that runs on a track or tracks and/or a ski or skis, while in use over snow").

⁴⁸ See Exec. Order No. 11,644, § 3(a)(3) ("Areas and trails shall be located to minimize conflicts between off-road vehicle use and other *existing or proposed* recreational uses of the same or neighboring public lands" (emphasis added)).

without further public involvement.⁵⁰ Instead, as described above, the Forest Service must apply the minimization criteria to each area and route being considered for designation – even those areas and routes currently open to OSV use.

If the forest were to rely on the grandfathering provision, however, it would have to ensure that the previous OSV designation decisions satisfy the requirements of the new rule and any other regulatory requirements. Most critically, those previous decisions must have been subject to the minimization criteria, and the administrative records for the decisions must demonstrate that the agency applied the criteria when making any OSV area or route designations. If the previous decisions were not subject to the minimization criteria, the Forest Service may not adopt them on its OSV use map.⁵¹

Similarly, the Forest Service may not adopt previous decisions that rely on an “open unless designated closed” policy. As described above, the final OSV rule rejects this approach and requires the agency to designate discrete, specifically delineated open areas and routes that are located to minimize environmental damage and user conflicts. The agency may not adopt as its area designations previous decisions that permitted cross-country OSV travel by default and except where such travel was specifically prohibited.

Finally, the Forest Service must ensure that previous decisions are not outdated. Older decisions likely did not account for the increased speed, power, and other capabilities of current OSV technology, which allow OSVs to travel further and faster into the backcountry and to access remote areas that were previously inaccessible. Older decisions also may not account for new scientific information on sensitive wildlife and other forest resources and how they are affected by OSV use. They may not account for current recreational use trends and increasing conflict between motorized and non-motorized winter backcountry users. And they may not account for the current and predicted impacts of climate change, which is, among other things, reducing and altering snowpack and increasing the vulnerability of wildlife and other resources to OSV-related impacts. Without this information, the Forest Service cannot demonstrate how those previous decisions minimize impacts based on current circumstances and science.

IX. The Forest Service should prepare an environmental impact statement.

⁵⁰ See 36 C.F.R. § 212.81(b) (“Public notice with no further public involvement is sufficient if an administrative unit or a Ranger District has made previous administrative decisions, under other authorities and including public involvement, which restrict [OSV] use to designated routes and areas . . . and no change is proposed to these previous decisions.”).

⁵¹ The language of the grandfathering provision does not explicitly require that previous OSV decisions have been subject to the minimization criteria. See 36 C.F.R. § 212.81(b). To the extent the agency interprets the provision to permit adoption of OSV designation decisions that do not satisfy the minimization criteria, the rule itself violates Executive Orders 11644 and 11989. See *Winter Wildlands Alliance v. U.S. Forest Serv.*, No. 1:11-CV-586-REB, 2013 U.S. Dist. LEXIS 47728, at *32 (D. Idaho Mar. 29, 2013) (requiring the agency to promulgate new OSV travel management rule that complies with the executive orders and making clear that the orders “require[] the Forest Service to ensure that *all* forest lands are designated for *all* off-road vehicles”).

NEPA requires preparation of an environmental impact statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.”⁵² In determining whether an EIS is required, agencies must consider both the context and intensity of the proposed action.⁵³ The Council on Environmental Quality has defined a number of factors to consider when determining whether an EIS is required.⁵⁴ As applied to winter travel management on the Inyo National Forest, we believe these factors will likely require preparation of an EIS, rather than an environmental assessment. For instance, travel management decisions are generally highly controversial; depending on sequencing with the ongoing land management plan revision and wilderness recommendation process, the action may establish a precedent for future actions with significant effects; and, given the agency’s difficulty in properly applying the executive order minimization criteria in past and ongoing travel planning efforts, the action threatens a violation of federal law imposed for the protection of the environment. Given the significance of the winter travel management decisions contemplated, the Inyo National Forest should prepare an EIS.

X. Conclusion

We ask that you do not offer a detailed proposed action that proposes open areas for OSV use, but rather that you conduct scoping more generally by explaining the sideboards and direction set forth in the OSV rule and by asking for public input including specific proposals for snowmobile and quiet use areas. Once you have conducted a public process in which all ideas can be fairly heard and vetted, we ask that you comply with the plain language of the OSV rule and the ORV executive orders by properly applying the minimization criteria to designate areas and trails available for OSV use that minimize impacts to resources and user conflicts and bring balance to the backcountry.

Thank you for your consideration.

Sincerely,



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⁵² 42 U.S.C. § 4332(2)(C).

⁵³ 40 C.F.R. § 1508.27.

⁵⁴ 40 C.F.R. § 1508.27(b).

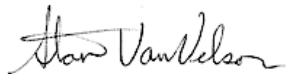


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