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May 13, 2019

Delivered via email to objections-pacificsouthwest-regional-office@fs.fed.us

Mr. Randy Moore, Regional Forester
USDA Forest Service, Pacific Southwest Region
Attn: Stanislaus NF Over-Snow Vehicle Use Designation Project
1323 Club Drive
Vallejo, CA 94592

RE: Objections to Stanislaus NF OSV Designation Draft ROD

Dear Objection Reviewing Officer:

Please accept these objections to the Draft Record of Decision (“Draft ROD”) for the Stanislaus National Forest Over Snow Vehicle Use Designation, as well as the associated Final Environmental Impact Statement (“FEIS”). The Responsible Official is Forest Supervisor Jason Kuiken. The applicable legal notice was published on March 29, 2019 in the Union Democrat, the newspaper of record for the Forest. These objections are submitted on behalf of the BlueRibbon Coalition/Sharetrails.org (“BRC”), including BRC’s individual and organizational members who have enjoyed, and plan in the future to enjoy, over snow vehicle (“OSV”) access to the Stanislaus National Forest. We particularly note and incorporate by reference herein the objections submitted by the Sierra Snowmobile Foundation (“SSF”).

These objections are submitted in accordance with 36 C.F.R. part 218. BRC, and numerous BRC members, filed comments raising the stated issues or otherwise providing a basis for these objections. The point of contact for this objector is the undersigned, and please direct all communication regarding these objections to Paul Turcke at 7699 West Riverside Drive; Boise, Idaho 83714; 208-331-1800; pat@msbtlaw.com. We formally request a resolution meeting in accordance with 36 C.F.R. § 218.11. We hereby authorize, indeed encourage, the Reviewing Officer to extend the time for a written response to objections, particularly if it will facilitate a thorough effort to explore opportunities to resolve objections. See, 36 C.F.R. § 218.26(b).

I. Interest of the Objector

BRC has a unique perspective and longstanding interest in motorized vehicle use and

management of the National Forest System, including for OSV. BRC was a defendant-intervenor in *Snowlands Network et al. v. U.S. Forest Service*, Case No. 11-CV-2921-MCE (E.D. Cal.). BRC remains committed to this presence in ongoing management of the Stanislaus National Forest and other California Forests in whatever role may now become necessary.

BRC is a nonprofit corporation that champions responsible recreation and encourages individual environmental stewardship. BRC has members in all 50 states, including California. BRC members use various motorized and nonmotorized means to access public lands, specifically including winter use of the Stanislaus National Forest. BlueRibbon has a long-standing interest in the protection of the values and natural resources addressed in this process, and regularly works with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors.

II. Objection Issues

We recognize the agency has conducted a lengthy process, and meaningfully addressed some of our concerns. We want to express our appreciation for the agency's thoughtful effort, support of stakeholder involvement and collaboration, and patience in this lengthy process. Still, we have concerns about some aspects of the Draft ROD, wish to protect against reversal or dilution of what we consider favorable positions during the objection process, and have other objections to other aspects of the Draft ROD.

The objection process necessarily anticipates the possibility and potential likelihood of success in subsequent litigation brought by an objector. In such a challenge the Administrative Procedure Act (APA) waives the United States' sovereign immunity for those aggrieved by "final agency action." 5 U.S.C. §§ 702, 704; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990). APA section 706(2) provides the relevant standard of review: a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (C) short of statutory right; [or] (E) unsupported by substantial evidence...." This standard of review is "narrow" but the agency:

must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made....Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted). This is considered a deferential standard of review. Still, there always exists some level of litigation risk, and we believe the Draft ROD can be improved as outline below.

A. Snow Depth Prescriptions Go Too Far.

Our primary objection throughout the California OSV designation processes has been the imposition of inflexible snow depth prescriptions. We understand there is a push for imposition of Forest-wide snow depth requirements, and that there is an informal or historical impression that snow depth has been required, such as in administration of snow grooming programs at the state/local level. However, as BRC has consistently noted, there is no legal requirement to impose snow depth prescriptions. Snow depth language was considered by the agency and intentionally left out of the Travel Management Rule revised Subpart C. See, 80 Fed.Reg. 4507 (Jan. 28, 2015). Instead, the Final Rule carefully settled on addressing this subject by stating that roads, trails and areas for OSV use “shall be designated...where snowfall is adequate for that use to occur, and, if appropriate, shall be designated by class of vehicle and time of year...” *Id.* at 4511; 36 C.F.R. § 212.81(a).

We recognize that snow depth language has evolved and we appreciate the progress being made on this issue by engaged interests and the agency. As we have indicated, we believe the Tahoe Draft ROD settles on a balance that BRC considers acceptable. The regulatory trigger for formal action should be damage to resources, which requires adaptability and flexibility for individual sites/conditions and user behavior. It comports with best available science to refer to factors, even measurable factors including snow depth and snow water equivalency, as “guideline[s] to avoid damaging resources.” Tahoe Draft ROD at 2. There are elements of this recognition in the Stanislaus documents. See, Stanislaus Draft ROD at 11 (“monitoring and enforcement will be focused on resource damage rather than strict adherence to snow depth measurement”). Still, BRC feels that the Stanislaus prescription lacks the breadth and qualifying language of the Tahoe, and errs too far on the side of relying on snow depth alone as a management approach. *Id.* (apparently acting on unspecified yet unanimous “forest resource specialists” recommendations to select snow depth prescriptions).

In our prior objections, we have noted the deficient “science” used thus far to justify snow depth prescriptions. See, e.g., Lassen FEIS at 85 (“[i]n multiple reviews of best available scientific data, specialists determined that there is little or no science to support a universal snow depth for protecting multiple resources.”). We particularly incorporate here by reference the joint comments on snow depth submitted by the International Snowmobile Manufacturers Ass’n, American Council of Snowmobile Associations and BRC to the Plumas National Forest Draft EIS. The science of snow depth actually suggests that snow depth alone constitutes a simplistic measure which should not be relied upon as a singular means of characterizing adequate snow cover for resource protection.

Snow depth is not an effective or necessary means to protect against “resource damage.” Existing practices and common sense address many of the factors that purportedly motivate these prescriptions. For example, groomers are able to raise the grooming apparatus and/or pull in snow from adjacent areas as needed to avoid or enhance grooming over areas with thin snow coverage. Existing regulations provide authority for enforcement officers to take appropriate action should they encounter improper conduct. See, e.g., 36 § 261.15 (prohibiting certain activities in the use of “any vehicle off National Forest System, State or County roads” including in violation of noise

standards, creating excessive smoke, carelessly or in a manner that endangers any person/property, or “in a manner which damages or unreasonably disturbs the land, wildlife, or vegetative resources”). Resource damage is amply addressed through officer discretion in the field applying existing regulations, rather than an inflexible snow depth requirement.

There is no basis or compelling practical need to create snow depth requirements beyond the “adequate” snowfall cover language of the regulation. The Forest, in cooperation with partners and engaged users, can properly address management challenges that may arise in flexible and site-specific manner. We recognize the Stanislaus seems intent on quantifying some depth value in the consideration of snow depth, and we ask that you make clear that any such numeric figure for depth, or any other snowfall attribute, is merely a guideline that must be evaluated by recreationists, agency specialists and/or law enforcement personnel on a site-by-site or case-by-case basis.

B. Routes, Pacific Crest Trail, Near Natural and Recommended Wilderness.

BRC believes that the Stanislaus has generally taken a reasonable position on several key issues noted above. The OSV route designations generally recognize and allow continuation of OSV travel on historical and existing routes. We particularly note our support for designations in response to public comments, such as the Herring Creek Road, late season use of Bear Valley permit area and similar modifications. Draft ROD at 6-7.

The Pacific Crest Trail has been a topic of controversy on many Forests, but less so here. We acknowledge the strong views of certain advocates for “quieter” use, but largely concur in candid and intuitively correct view first announced in the Lassen that PCT buffers are a “solution in search of a problem.” The Stanislaus ROD appropriately describes a similar situation, noting the relatively slight mileage of non-Wilderness PCT, the bulk of which is a significant distance from access. Draft ROD at 9-10. The Stanislaus should generally retain its stated management course and refrain from buffers or other PCT-motivated closures to winter recreation.

Similarly, we applaud the Stanislaus for recognizing and rejecting any requests to impose inflexible prohibitions against snowmobiling in recommended wilderness. Draft ROD at 8-9. The fact that areas exist which are recommended wilderness yet have received historical snowmobile access only proves that these attributes are not mutually exclusive. Recommended wilderness is not Wilderness, and the Forest’s role is to evaluate and determine suitability, and protect against diminishment of wilderness values. A prohibition on motorized access would go too far and intrude on the exclusively Congressional role of designating Wilderness. Relatedly, zoning such as for “near natural” areas in the Forest Plan should have a dynamic relationship with project-level planning, and we appreciate the Forest getting it right through a willingness to consider boundary revisions or accommodations to historical use, with suitable Forest Plan amendments as may be appropriate. Draft ROD at 11-12.

For each of these issues, BRC hereby notes its general support of the Draft ROD balance. BRC will object to modification of these decisions in a manner that will remove the designated routes/areas from the MVUM or impose additional constraints or restrictions on OSV access.

C. Certain OSV Restrictions are Unjustified and Unacceptable.

The Draft ROD contains various designations/restrictions that have not properly considered input from the OSV community or which are otherwise not supportable. We particularly note and incorporate by reference our earlier comments on the DEIS, and similar comments and objections by SSF. Specifically, we concur in and incorporate by reference the SSF objections addressing elevation-based closures and in particular: (a) closure of the Eagle Meadows area; (b) lower reaches of Jelmini Basin; (c) seasonal closure of Sonora Pass; (d) Woodchuck Basin. These designations are variously flawed, largely focused on unsupported claims of wildlife/resource impacts or unsubstantiated perceptions of “conflict,” or as raised in BRC’s and SSF’s earlier comments.

D. The Agency Has Failed to Sufficiently Document Site-Specific Conclusions.

To amplify and extend on the above-stated objections at various sites, BRC objects that some of the restrictions on OSV go too far and the applicable designations should be reconsidered.

The Draft ROD and FEIS fail to sufficiently describe or document the basis for some of the site-specific designation choices presented. Under even “arbitrary and capricious” review the agency must articulate a “rational connection between the facts found and the choice made...” *Motor Vehicle Mfrs. Ass’n.*, 463 U.S. at 43. NEPA imposes various technical protocols including disclosure of methods, presentation of hard data, and disclosure of any “sources relied upon for conclusions” in an EIS. 40 C.F.R. § 1502.24. NEPA does not envision undocumented narrative exposition, but requires that “[a]gencies shall insure the professional integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements.” *Id.*; *Sierra Nevada Forest Protection Campaign v. Tippin*, 2006 U.S. Dist. LEXIS 99458, *29 (E.D. Cal. 2006) (“NEPA does not permit an agency to rely on the conclusions [of agency experts] without providing both supporting analysis and data”). A “bare assertion of opinion from an [agency] expert, without any supporting reasoning, would not pass muster in an EIS.” *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1103 (9th Cir. 2016).

It is unclear what bases have been relied upon to justify reductions from historical OSV access, particularly including those noted in the preceding Objection C. These rationales must not only be justified, but even more fundamentally identified, so as to allow meaningful review and response by the public. We ask that the specified area designations be revisited to better comport with logic, available science, and stakeholder input.

E. BRC Objects to Reliance upon User Conflict to Justify Closure.

The Draft ROD and FEIS rely, at least in part, upon purported “user conflict” as the rationale for closing certain routes/areas to continuing motorized travel. See, e.g. at FEIS 86-87. We are particularly concerned at the suggestion that any “area of overlap between non-motorized and motorized uses” is synonymous with “creating conflicts.” See, *Id.* at 75. This rationale is flawed on multiple levels.

1. Subjective User Conflict Cannot Support Closure.

Subjective preferences of users, individually or collectively, cannot justify elimination of access to the less popular or less conflicted users. At most, the Travel Management Rule requires the agency to “consider effects...with the objective of minimizing....(3) Conflicts between motor vehicle use and existing or proposed recreational uses” of the Forest.” 36 C.F.R. § 212.55(b). The regulation refers to conflicts of “use” not conflict between “users.”

This language is derived from the Executive Orders, issued by Presidents Nixon and Carter. See, E.O. 11644, 11989; 42 Fed.Reg. 26959. While there has been debate about whether the EO’s create an enforceable right of action, the Forest Service effectively rendered this a non-issue when it chose to paste the EO language into regulations adopted via notice and comment rule-making. The present-day interpretation by some special interests and land managers does not rationally interpret this language. The actual wording refers to conflicts between “uses” not “users.” The historical context is relevant, as in the early 1970’s off-highway vehicles were relatively new and largely unregulated. The EO’s reflect a crude first step at the anticipated need to balance a new and developing use with the conservation efforts of the era reflected in contemporaneously adopted statutes like NEPA and NFMA. In any event, it was not intended then, nor does it make sense now, to allow some quantum of subjective complaining by some class of “user” to exclude other users from public lands.

Nor is subjective “user conflict” an “environmental” impact under NEPA. A recent Ninth Circuit decision correctly notes that “controversy” as a NEPA intensity factor “refers to disputes over the size or effect of the action itself, not whether or how passionately people oppose it.” *Wild Wilderness v. Allen*, 871 F.3d 719, 728 (9th Cir. 2017). The panel further noted it “need not address the question of whether on-snow user conflicts are outside the scope of the agency’s required NEPA analysis entirely because they are ‘citizens’ subjective experiences,’ not the ‘physical environment.’” *Id.* at 729 n.2 (citations omitted). The U.S. Supreme Court has emphasized that NEPA does not focus on generalized or personalized psychological impacts. “It would be extraordinarily difficult for agencies to differentiate between ‘genuine’ claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy. Until Congress provides a more explicit statutory instruction than NEPA now contains, we do not think agencies are obliged to undertake the inquiry.” *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983).

The governing law only authorizes the Forest Service to analyze and minimize conflicts between uses, not the subjective preferences of users. The Draft ROD reflects an improper emphasis on the latter, which should be addressed through instructions/remand.

2. The Agency Lacks Meaningful Analysis of Conflict.

Even if the Forest can properly rely on “user conflict” as a basis for selectively closing trails to a specified form(s) of use, the Draft ROD and FEIS advance that conclusion without meaningful, site-specific data or fact. Again, the agency must utilize “high quality” data and

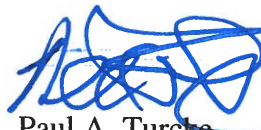
cannot rely on undocumented narrative summary. Objectors understand that the “science” behind recreation planning may be social science, but even so the Forest Service is capable of conducting real analysis of real visitors on actual sites in the project area. See, *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1182 (9th Cir. 2000) (upholding decision based on recreation use study); *Riverhawks v. Zepeda*, 228 F.Supp.2d 1173, 1184 (discussing “user study” conducted on site noting motorized use was “cited as a source of concern” but finding “the majority of non-motorized users nevertheless indicated a high degree of satisfaction”). The agency did not attempt any such analysis and does not purport to offer site-specific analysis of “conflict” here. Rather, the discussion is framed in a narrative and generalized fashion. Data is absent, leaving only generalized and undocumented presentation of abstract conclusions apparently reported by agency staff. FEIS at 86-87 (stating conflicts may arise “if OSVs interrupt the serenity of a non-motorized recreationist’s experience” – stating nothing more than an abstract concept unquantified or applied to any site/evidence). This does not meet the standards identified in the above-cited cases.

User conflict cannot form a legitimate basis for closures presented by the Draft ROD. The complete absence of data or any rational, site-specific analysis taints the conflict based route closures. These conclusions must be vacated and addressed in any further planning.

III. Conclusion

The Draft ROD outlines several unjustified restrictions on historical and legitimate OSV access. We appreciate the opportunity to address these concerns in the objection process and urge you to utilize the objection process to restore a functional and sustainable network of designated routes and areas for OSV use on the Stanislaus National Forest.

Sincerely,



Paul A. Turcke

/PAT