



OFFICE OF THE GUNNISON COUNTY ATTORNEY

David Baumgarten – County Attorney
Matthew R. Hoyt – Deputy County Attorney

July 29, 2019

Grand Mesa, Uncompahgre
and Gunnison National Forests
Attn: Plan Revision Team
2250 South Main Street
Delta, CO 81416

***VIA FIRST CLASS MAIL
AND ELECTRONIC SUBMISSION***

Re: Gunnison County's Preliminary and Informal Comments Regarding Working Draft
of Revised Land Management Plan

Dear Plan Revision Team,

On behalf of the Board of County Commissioners of Gunnison County ("Gunnison County" or "County"), thank you for the opportunity to comment on the United States Forest Service's ("USFS's" or "Forest Service's") Grand Mesa, Uncompahgre and Gunnison National Forests ("GMUG") Working Draft of the Revised Land Management Plan ("Forest Plan" or "Plan"). Please do not consider the comments contained in this letter to be the only, or final, comments that the County may submit regarding the Forest Plan during the planning process. Gunnison County reserves the right to submit additional or different comments as the planning process progresses.

INTEREST OF GUNNISON COUNTY

Gunnison County is the fifth-largest county by land area in Colorado, with a total area of 3,260 square miles, which in turn is approximately the size of Rhode Island. Land under the jurisdiction of the USFS consists of almost 2,000 square miles of this area, including the Gunnison National Forest, which is a substantial part of the GMUG, as well as the White River National Forest.

Recognizing that public lands are an important part of the economy, health and well-being of its citizens, Gunnison County has, throughout its history, promoted responsible use and enjoyment of USFS lands within its borders by the public, most often in cooperation with the USFS and other stakeholders. In addition, pursuant to Colorado law, the County retains, and exercises, authority to regulate land use planning, environmental quality and protection of lands within its borders. *See, e.g.,* Colo. Rev. Stat. §§ 18-9-117, 29-20-101, 30-28-101 *et seq.*, 30-11-107 *et seq.*, 38-1-202, 42-1-102, 42-4-106, 43-1-217, 43-2-112, 43-2-201, 43-2-201.1; *Bd. of Cty. Comm'rs v. BDS Int'l, LLC*, 159 P.3d 773, 785 (Colo. App. 2006); *Ashpalt Paving Co. v. Bd. of Cty. Comm'rs*, 425 P.2d 289, 293 (Colo. 1967). For any or all of these reasons, there can be no doubt

that Gunnison County is an important, if not critical, stakeholder and interested party in the appropriate development of a Forest Plan for the GMUG.

COMMENTS ON THE WORKING DRAFT

Gunnison County provides the following informal comments on the working draft of the Forest Plan:

I. THE FOREST PLAN SHOULD INCORPORATE THE RECOMMENDATIONS OF THE GUNNISON PUBLIC LANDS INITIATIVE.

As the USFS is undoubtedly aware, the Gunnison Public Lands Initiative (“GPLI”) is a local coalition of public land use organizations, users and stakeholders formed to protect public lands, enhance and sustain the local economy that relies upon public lands, and to support historic and sustainable public land use. In January 2019, GPLI published a proposal for land use and management for public lands in Gunnison County (“GPLI Proposal”). Gunnison County supports this proposal, and asks USFS to incorporate its provisions into the draft Forest Plan, and, to the extent the draft Forest Plan is inconsistent with the GPLI Proposal, to revise the draft Forest Plan to render it consistent. In this way, the County believes that the Forest Plan will avoid a “one size fits all” approach to the GMUG, particularly when it comes to the unique challenges, opportunities and needs of public lands within Gunnison County, and as analyzed by GPLI in its Proposal.

II. THE FOREST PLAN SHOULD MORE FULLY INCORPORATE THE GUNNISON SAGE-GROUSE CCA AND SHOULD OTHERWISE MORE FULLY ACCOUNT FOR THIS ALLEGEDLY THREATENED SPECIES.

Attached as Exhibit A to this letter is a series of comments prepared by Gunnison County’s wildlife expert James Cochran regarding issues and concerns regarding the Forest Plan’s handling of the Gunnison Sage-grouse. Gunnison County encourages USFS to address these comments and concerns in the Forest Plan.

III. THE DRAFT FOREST PLAN’S TIME FRAME FOR ESTABLISHING RESEARCH NATURAL AREAS IS TOO LONG, UNLESS THIS OTHERWISE MEETS THE REQUIREMENTS OF THE ROCKY MOUNTAIN BIOLOGICAL LABORATORY.

In its discussion of Research Natural Areas (“RNA”), the draft Plan provides as an objective that “[w]ithin 3 years of plan approval, complete establishment reports for recommended Research Natural Areas.” *See* Forest Plan at 60. Unless this objective otherwise expressly meets the requirements of the Rocky Mountain Biological Laboratory (“RMBL”), Gunnison County is concerned about this time frame at least as to the Gothic RNA because, in short, that research natural area should already be recommended and established. As USFS is likely aware, RMBL has been conducting research in the Gothic RNA since 1928; it makes little sense to us, then, that USFS would need an additional three years to make a determination as to the Gothic RNA. Indeed, as Gunnison County acknowledges and appreciates, the draft Plan already proposes prohibition of camping and off-route travel within the Gothic RNA, thereby recognizing

the longstanding and unique nature of this area within the GMUG. This stated, Gunnison County defers to RMBL, as the organization most affected by these provisions of the Forest Plan, as to whether the current draft as written satisfies its needs and concerns.

IV. THE FOREST PLAN SHOULD ADDRESS COAL MINE METHANE CAPTURE AND LEASE RESTRICTIONS RECOGNIZING THE COUNTY'S AUTHORITY TO REGULATE OIL AND GAS DEVELOPMENT WITHIN ITS BORDERS.

As the USFS is likely aware, Gunnison County considers it essential to address the potential pollution and greenhouse gas emission effects from both operating and non-operating coal mines within the GMUG. Indeed, Gunnison County has been an active participant in the North Fork Coal Mine Methane Working Group and its mission to support sustainable mining activities on public lands in the County while at the same time address coal mine methane emissions from mines in the North Fork Valley. Although this group has focused its efforts on lands managed by the Bureau of Land Management ("BLM"), its work is equally applicable to coal mining that has occurred, or that could occur, on lands within the GMUG. Although the Forest Plan refers to, for example, air quality requirements under the federal Clean Air Act, it does not provide for specific work or steps to address air pollution from coal mine methane, and, more specifically, exploration of coal mine methane capture methods to address such pollution.

Gunnison County therefore encourages USFS to explore, consider and address coal mine methane capture in the Forest Plan. By way of example, Gunnison County suggests adding a guideline to the air quality provisions of the Plan ("AQ") to the effect that the USFS will endeavor to explore with producers, technology and options to reduce methane emissions from existing active and inactive mining operations that includes methane capture

In addition, the Forest Plan should recognize Gunnison County's authority to regulate mineral development and operations on GMUG lands within the County, particularly with regard to oil and gas development and operations. Both the federal courts, and courts here in Colorado, have made clear that "neither the federal statutory scheme nor the case law relied upon by [oil and gas producers] supports the conclusion that Congress intended to preempt all local regulation in the area of oil and gas operations." *See Bd. of Cty. Comm'rs v. BDS Int'l, LLC*, 159 P.3d 773, 785 (Colo. App. 2006), *citing Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 406 F.2d 1303 (10th Cir. 1969); *see also, e.g., Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1205 n.6 (10th Cir. 2012) (explaining that federal law regarding mineral leasing does not "provide a pervasive regulatory scheme intended to occupy the entire field of federal mineral lands regulation.") (internal citations and quotation marks omitted); *Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122, 1124 (10th Cir. 1982) ("Congress has prescribed limited, but not exclusive, controls over the leasing of federal lands for oil and gas production.")

Accordingly, Gunnison County believes the Forest Plan should expressly recognize this authority, even if oil, gas and mineral development operations within the GMUG are minimal. By way of example, Gunnison County suggests that the Plan's draft standards for saleable and leasable minerals ("ENMI") include a standard stating that all oil and gas lease operation comport with County regulatory requirements in addition to federal and state standards.

V. THE FOREST PLAN SHOULD EXPRESSLY ACKNOWLEDGE AS AN OBJECTIVE COORDINATION AND COOPERATION WITH OTHER FEDERAL LAND MANAGEMENT AGENCIES.

As the USFS well knows, natural boundaries, waterways, wildlife, and, for that matter, county boundaries, do not honor, and are normally inconsistent with, the boundaries of the lands managed by the various federal agencies within the areas surrounding the GMUG. Although the Forest Plan notes as an objective to work cooperatively with other Federal agencies, primarily the BLM and the National Park Service (“NPS”), with regard to land acquisition and conveyances, *see* Forest Plan at 150-51, Gunnison County encourages the USFS to state as an objective its intent to seek cooperation on all aspects of land management, including water and air quality, wildlife, extractive industries, and recreation. The County sees such cooperation and collaboration as the best way to manage federal lands within the County’s borders.

This is not to say that Gunnison County fully supports or endorses the land management policies, procedures or practices of other federal agencies, or that the Forest Plan should mimic them. Indeed, the County is in the process of protesting the Resource Management Plan adopted by the Uncompaghre Field office of the BLM. Regardless, the County nonetheless suggests USFS state as an overall objective or guidance the coordination of land management in the GMUG with surrounding federal land management agencies.

VI. THE FOREST PLAN SHOULD DIFFERENTIATE BETWEEN MOTORIZED USES, PARTICULARLY UTVS, E-BIKES AND TRACKED SNOW VEHICLES (OTHER THAN SNOWMOBILES).

Again recognizing that at least some of the County’s suggestions fall within more specific travel management issues, Gunnison County nonetheless suggests that the Forest Plan categorizes with too broad a brush motorized versus non-motorized vehicle use. In particular, the Forest Plan should account for recent technological innovations that have indisputably changed the face of backcountry vehicle use and impacts (though, as we will explain, in dramatically different ways): Pedal assist electric bikes (“PA e-bikes”), sport utility terrain side-by-side vehicles (“UTVs”), and tracked over-the-snow vehicles. At a minimum, the County suggests, employment of the overly simplistic motorized vs. non-motorized paradigm no longer makes sense in light of at least these technological changes.¹

In reviewing the Forest Plan, Gunnison County understands USFS to lump all vehicles into two categories for planning purposes: Motorized and non-motorized. Included in the definition of “motorized” are two-wheel motorcycles, short wheel base four-wheel all-terrain vehicles (“ATVs”), four-wheel drive passenger vehicles, all types of electric bikes, whether throttled or pedal-assisted motors, UTVs, and non-snowmobile

¹ Gunnison County recognizes and appreciates that the Forest Plan may be limited, to some extent, by Federal regulations defining motorized uses. *See, e.g.*, 36 C.F.R. § 212.1 (2019) (defining “motor vehicle generally as “[a]ny vehicle which is self propelled” and “off-highway vehicle” as “[a]ny motor vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or other natural terrain.”). However, it is the view of Gunnison County that such regulatory definitions should not stand in the way of appropriate and flexible forest management designed to address the challenges of twenty-first century technology, not captive to a regulation first promulgated, for example, in the 1960s. *See id.*

vehicles traveling on snow employing tracks instead of wheels (e.g., passenger trucks or UTVs with tracks). The County contends this is far too simplistic for appropriate National Forest management, especially where PA e-bikes, UTVs, and tracked snow vehicles are concerned.

In both the Forest Plan and in practice, USFS appears to treat all e-bikes the same: A motorized vehicle restricted in the same fashion as any vehicle with a gasoline-powered motor, and regardless of the type of e-bike. However, and as the USFS is undoubtedly aware, not all e-bikes are the same. While some e-bikes provide power on demand through a throttle, thus making them little different from other motorized two-wheeled vehicles, PA e-bikes provide motorized assistance only when the rider is pedaling, thus operating in a way more akin to bicycles. *See* https://en.wikipedia.org/wiki/Electric_bicycle_-_S-Pedelecs (explaining differences between types of e-bikes). It makes little sense to manage PA e-bikes in the GMUG in exactly the same way the USFS manages other motorized uses, particularly when the classic impacts associated with motorized uses, such as noise, are not present with PA e-bikes.

As for UTVs, USFS has already acknowledged in its planning documents that “[t]here are safety concerns, traffic jams and environmental damage occurring due to the high amount of use [by UTVs] on these routes and the relatively recent use of these roads by other than high-clearance vehicles. The increased numbers of vehicles using these routes is affecting the experience for all users.” *See* GMUG Draft Forest Plan Assessment: Recreation (March 2018) at xxviii. As USFS has observed:

In the past, 4WD and high-clearance vehicles were the most popular method of travel on the forest in backcountry settings. In recent years, ATV use increased and remains a popular use, but UTVs or side-by-sides are gaining in popularity and appear to be replacing some ATV and 4WD use. Motorcycle use appears to be increasing, but the Forest Service has not seen as dramatic an increase as with ATV’s and UTV’s. UTV’s currently require roads for travel, as they are too wide for standard trails, including standard ATV trails. There is interest in widening trails to accommodate UTVs. ATV riding is frequently a more action-oriented pursuit, while UTVs are a more comfortable means of accessing areas of the forest. Mixing of UTV and ATV use could result in experiences that are not satisfying for either user group; furthermore, the public has commented that UTVs and Jeeps may not be fully compatible either.

See id. Although the County agrees with USFS that “UTV-based recreation is an accepted activity[,]” *see id.*, USFS already recognizes that UTVs pose management challenges that do not fit neatly into a “motorized vs. non-motorized” category.

“Finally, as to tracked over-the-snow vehicles, the USFS already acknowledges that [winter m]otorized activities include snowmobiling and recently has begun to include conversions and designed vehicles such as snow-motorcycles, trucks and vans with track conversion kits and other snow machines designed similar to race-cars with tracked propulsion . . . [and] will need to be addressed in the plan” *See* GMUG Draft Forest Plan Assessment: Recreation at xxvii. Yet, the County does not see where the draft Forest Plan does so.

In sum, the County recognizes the challenges of predicting and addressing changing technology, along with the potential of becoming so granular at the planning level so as not to afford District Rangers the necessary flexibility to address such changes over time.² Thus, the County does not suggest USFS necessarily provide for every potential management tool in the Forest Plan, only a recognition that technological advances no longer support the “motorized vs. non-motorized” rubric of forest management, particularly as it relates to the above-described new types of uses.³ By way of example, therefore, Gunnison County suggests that the High Use Management Areas (“HIREC”) portion of the draft Plan include as objective(s) the development of travel management requirements and oversight specific to PA e-bikes, UTVs and non-snowmobile tracked vehicles, including but not limited to evaluation of non-motorized trails within HIREC that should be made accessible to PA e-bikes while at the same time continuing to prohibit throttled e-bikes as motorized vehicles.

VII. THE FOREST PLAN SHOULD RECOGNIZE THE THREATS TO PUBLIC ROADS.

It is the opinion of Gunnison County that a current civil litigation naming both the County and USFS as Defendants, *Biro v. Smith et al.*, Fed. Dist. Ct. Cause No. 1:19-cv-01056-CMA-GPG, sheds light on a potentially significant threat to access to public lands in the GMUG: Landowners who illegally and inappropriately take it upon themselves to block or otherwise impede access to forest lands, adversely affecting such lands use and enjoyment. While the County will continue to vigorously defend its interests in that litigation, it also urges the USFS to do so, and, in context of the Forest Plan itself, to spell out in the Forest Plan its express commitment to maintaining appropriate and legal access to public lands. Although the current draft of the Forest Plan makes mention of access issues, *see* Forest Plan at 43, it does not express a firm commitment by USFS to take all appropriate steps, up to and including collaboration with law enforcement and litigation, to ensure that private landowners honor historical public access routes and work with the USFS regarding use and access concerns rather than taking matters into their own hands by taking illegal or otherwise inappropriate actions that lead only to conflict, user confusion, and, for all intents and purposes, *de facto* theft of public property.

The County views the Forest Plan as an appropriate place for USFS to take this express stance, and therefore urges the agency to do so. By way of example, the County suggests that the draft Plan’s provisions regarding access include a guideline that USFS will take appropriate legal steps to prohibit and eliminate the illicit blockade by private parties of USFS and other public roads that access USFS lands within the GMUG.

CONCLUSION

Gunnison County appreciates the opportunity to provide the foregoing comments.

² Other technological and use changes that the Forest Plan could, and perhaps should, acknowledge and address in the Plan are: 1) The potential that backcountry vehicles may, within the life of the Plan, become fully or at least partially, automated, leading to additional safety and impact issues; 2) all current types of gasoline-powered motorized backcountry vehicles may well all become battery-powered, changing, for example, potential wildlife impacts; 3) even current technology is experiencing different uses, such as the prevalence of mountain bikers shuttling to trails by motor vehicle rather than riding to trailheads, leading to increased impacts on roads, on clean air and water, and use conflicts. Any or all of these, Gunnison County suggests, are matters USFS should contemplate expressly considering in the Forest Plan.

³ To the extent Gunnison County’s suggestion would require amendment to the current Travel Management Plan(s) for the GMUG, we would recommend that as well.

Best regards,

A handwritten signature in black ink, appearing to read "Matthew R. Hoyt", with a long horizontal flourish extending to the right.

Matthew R. Hoyt
Deputy County Attorney

**GMUG Forest Plan Revision Working Draft
Gunnison sage-grouse Comments**

by

James O. Cochran

Cochran Fish and Wildlife Consulting LLC

for

Gunnison County

Submitted 6/25/19

Gunnison County provides specific comments related to the Gunnison sage-grouse components of the GMUG Forest Plan Revision Draft (June 2019) below. In general note, Gunnison County was surprised that the Gunnison Basin Gunnison Sage-grouse Candidate Conservation Agreement (CCA) (September 2013) was minimally used as guidance throughout this draft. According to the 2017 USFS Forest Plan Assessments, there are 15 known leks in the planning area, with 14 of those in the Gunnison Ranger District (Gunnison Basin). Those same draft documents noted that over 30% of the total Gunnison Basin Gunnison sage-grouse population, based upon lek counts, was located on USFS managed lands, even though less than 20% of the occupied habitat in the Gunnison Basin is managed by the USFS. These figures indicate that USFS managed lands in the Gunnison Basin, which has the largest population of Gunnison sage-grouse, are inordinately important to the species. Therefore Gunnison County recommends that the USFS review the Gunnison sage-grouse CCA and incorporate it more fully into this Forest Plan revision.

Specific comments follow:

P. 21 Objective FW-OBJ-IVSP-02:

Treatment of cheatgrass in Gunnison sage-grouse designated critical habitat is listed as a priority. Gunnison County suggests that prioritization of cheatgrass treatment across ownership/land manager boundaries (private, BLM, State of Colorado, etc.) be noted as the highest priority in order to achieve order of magnitude effectiveness and minimize/avoid reinfestation.

P. 29 Desired Conditions FW-DC-SPEC-29

Gunnison County cautions the USFS that using the GuSG structural habitat guidelines in the GuSG Rangewide Conservation Plan also requires using the sampling protocol used to establish those guidelines. Using a different sampling protocol then trying to "cross-walk" the data will result in erroneous conclusions regarding meeting/not meeting the habitat guidelines.

P. 30 Objectives FW-OBJ-SPEC-31

Because of the known impacts that off-leash pets have on Gunnison sage-grouse, Gunnison County recommends a stronger approach to this issue. We recommend that it be a requirement, not a request that all pets within Gunnison sage-grouse habitat be leashed or under immediate command of the owner/public.



P. 30 Objectives FW-OBJ-SPEC-32

Fence marking near leks needs to be approached with caution. Some kinds of markings make noise in the wind, which could impact leks. Other markings “flash”, which could impact lek attendance, breeding success, etc.

P. 30 Objectives FW-OBJ-SPEC-33

Winter travel is changing in the Gunnison Basin. Mechanical means, such as tracked ATV's makes areas normally not accessible to snowmobiles accessible for both individual users and outfitters. Gunnison County requests, at minimum, a provision for future regulation of over-the-snow travel within Gunnison sage-grouse critical habitat.

P. 30 Objectives FW-GDL-SPEC-34

Gunnison County recommends that this guideline be amended to read “...surface disturbing activities should not be permitted within Tier 1 habitat as defined by the Gunnison Basin Gunnison Sage-grouse Habitat Prioritization Tool (HPT) unless no feasible alternative is available AND that NO surface disturbing activities should be permitted within 0.6 mile of a lek.”

P. 80 Monitoring Question/Indicators

Gunnison County is unsure what the USFS considers Gunnison sage-grouse “core habitat”. Using this term is likely to cause confusion and mis-interpretation as the Plan is implemented.

FW-DC-SPEC-29

Forb and grass production and ground cover provide not only “residual” vegetation suitable for nesting cover, but provide hiding cover for all life stages. New vegetation provides food (directly and as a substrate of insects. FW-DC-SPEC-29 focuses only on residual cover. Gunnison County recommends that the SPEC focus not only on residual cover, but on new vegetative cover to address the life stage needs of the Gunnison sage-grouse.