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Submitted via email

Re: Scoping Comments on Shoshone National Forest Travel Management

Thank you for the opportunity to comment on the Shoshone National Forest's Proposed Action for the Travel Management Project. With over 500,000 members and supporters, The Wilderness Society (TWS) is a national non-profit dedicated to protecting wilderness and inspiring Americans to care for our wild places. Since our founding in 1935, we have worked closely with diverse interests who care about the future of our national forests. We provide scientific, legal, and policy guidance to land managers, communities, local conservation groups, and state and federal decision-makers aimed at ensuring the best management of our public lands, including responsible and balanced management of motorized recreation. TWS has numerous members both locally and nationally that recreate on the Shoshone Forest and we continue to participate in Forest planning processes.

These comments are intended to highlight the laws and policies that must be meaningfully applied in the Shoshone's travel management planning process. The comments submitted by Wyoming Wilderness Association, Wyoming Outdoor Council, Sierra Club, and Winter Wildlands Alliance address these issues in more detail and provide relevant site-specific information and recommendations. TWS supports the information and recommendations made in those comment letters.

I. The Forest Service must apply the executive order minimization criteria to actually *minimize* impacts when designating *each* area and trail open to motorized use.

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 11644 and 11989 in 1972 and 1977, respectively, requiring federal land management agencies to plan for ORV use based on protecting

resources and other uses.[1] 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.[2]

The Forest Service codified these "minimization criteria" in subparts B and C of its travel management regulations.[3] 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.[4] Collectively, these cases confirm the Forest Service's substantive legal obligation 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. 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]."[5] 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:

[1] 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).
[2] Exec. Order No. 11,644, § 3(a).
[3] 36 C.F.R. §§ 212.55, 212.81(d).
[4] *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).
[5] *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 11644, § 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.").

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.[6]

Second, effective application of the minimization criteria must include meaningful opportunities for public participation and input *early* in the planning process.[7] 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.[8] In 2012, the Journal of Conservation Planning published a literature review and best management practices (BMPs) for ORVs on national forest lands.[9] The BMPs provide guidelines, based on peer-reviewed science, for ORV designation decisions, implementation actions, and monitoring activities that are intended to minimize impacts to soils, water quality, vegetation, and wildlife, and conflicts with other recreational uses. Winter Wildlands Alliance recently published a similar literature review and BMPs for winter travel planning on national forest system lands, which will soon be published in a peer-reviewed journal.[10] 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 winter trailheads, parking, and staging areas; and using suitable measures to trap and treat pollutants from over-snow vehicle emissions in snowmelt runoff or locating staging areas at a sufficient distance from waterbodies to provide adequate pollutant filtering.[11] The Forest Service should incorporate the Journal of Conservation Planning, Winter Wildlands Alliance, and National Core BMPs into its 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 ORV use, the Forest Service should conduct soundscape modeling and incorporate the results of that modeling into its decision-making.[12] Other site- or resource-specific

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[6] *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).
[7] *See* 36 C.F.R. § 212.52(a).
[8] *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).
[9] T. Adam Switalski & Allison Jones, Off-road Vehicle Best Management Practices for Forestlands: A Review of Scientific Literature and Guidance for Managers, *Journal of Conservation Planning* 8:12-24 (2012), *available at* http://www.journalconsplanning.org/2012/JCP_v8_2_Switalski.pdf.
[10] 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.
[11] 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.
[12] *See, e.g.*, *Snowmobile Best Management Practices*, pp. 6-7 (describing noise simulation modeling used in Yellowstone National Park).

information might include, for example, air quality modeling or monitoring; wildlife populations, habitat, or monitoring data; or visitor use data.

Fourth, proper application of the minimization criteria must address both site-specific and larger-scale impacts.[13] 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 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.[14] 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 ORV use.[15]

Sixth, application of the minimization criteria must take into account available resources for monitoring and enforcement of the designated system.[16] To ease enforcement obligations and ensure user compliance in the first place, ORV 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."[17] This language in the Travel Management Rule encourages forests to tailor their designation decisions to account for snowfall patterns and different and evolving ORV technologies, and to minimize corresponding social and environmental impacts.

II. The Forest Service must satisfy the requirements of Subpart C of the Travel Management Rule.

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

[13] *See, e.g.*, *Idaho Conservation League*, 766 F. Supp. 2d at 1066-68, 1074-77 (invaliding 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).

[14] *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.").

[15] *See Snowmobile Best Management Practices*, pp. 4-5, 10, 13.

[16] *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).

[17] 36 C.F.R. §§ 212.56, 212.81(a).

where OSV use is permitted based on resource protection needs and other recreational uses.[18] Implemented correctly, the rule presents an important opportunity to enhance quality recreation opportunities for both motorized and non-motorized users, protect wildlife during the vulnerable winter season, prevent avoidable damage to key conservation lands and forest resources, and restore balance to the winter backcountry.

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.[19] 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.

The Shoshone 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 and avoid the specter of litigation that has plagued summer-time travel management planning, it is critical that the Shoshone'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 winter visitors enjoying non-motorized, quiet forms of recreation.

A. 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."[20] 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."[21] The agency is "under an affirmative obligation to actually show that it aimed to minimize environmental damage when designating . . . areas."[22]

B. 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.

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[18] 36 C.F.R. part 212, subpart C, 80 Fed. Reg. 4500 (Jan. 28, 2015).
[19] *See* 36 C.F.R. §§ 212.80(a), 212.81(a), 261.14.
[20] *WildEarth Guardians*, 790 F.3d at 930-31.
[21] *WildEarth Guardians*, 790 F.3d at 932.
[22] *WildEarth Guardians*, 790 F.3d at 932 (quotations and citations omitted).

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.

C. Adequate Snowpack

Subpart C requires designation of areas and routes for OSV use "where snowfall is adequate for that use to occur."[23] 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.[24] 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). 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 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 identify 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.[25]

III. The Forest Service must comply with Subpart A of the Travel Management Rule.

To address its unsustainable and deteriorating road system, the Forest Service promulgated the Roads Rule (referred to as "subpart A") in 2001.[26] The Roads Rule created two important obligations for the

[23] 36 C.F.R. § 212.81(a).
[24] *See Snowmobile Best Management Practices*, p. 14.
[25] 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).
[26] 66 Fed. Reg. 3206 (Jan. 12, 2001); 36 C.F.R. part 212, subpart A.

agency. One obligation is to identify unneeded roads to prioritize for decommissioning or to be considered for other uses.[27] Another obligation is to identify the Minimum Road System (MRS) needed for safe and efficient travel and for the protection, management, and use of National Forest system lands.[28] The MRS is the road system, determined by the Forest Service, as needed to:

- Meet resource and other management objectives adopted in the relevant land and resource management plan;
- Meet applicable statutory and regulatory requirements;
- Reflect long-term funding expectations; and
- Ensure that the identified system minimizes adverse environmental impacts associated with road construction, reconstruction, decommissioning, and maintenance.[29]

A 2012 memorandum from Deputy Chief Weldon to Regional Foresters echoes this direction.[30] The goal of subpart A is "to maintain an appropriately sized and environmentally sustainable road system that is responsive to ecological, economic, and social concerns."[31]

The Forest Service's Washington Office has issued a series of directive memoranda that outline how the agency expects forests to comply with subpart A.[32] First, each forest was required to submit its Travel Analysis Report (TAR) by September 30, 2015.[33] Next, pursuant to its own regulations and directive memoranda, the Forest Service must determine the MRS in its analysis under NEPA.[34] By analyzing

[27] 36 C.F.R. § 212.5(b)(2).

[28] 36 C.F.R. § 212.5(b)(1). In promulgating its rules, the Forest Service indicated that "[t]he requirement to identify roads for decommissioning is '[e]equally important' as the overall identification of the minimum road system." *Center for Sierra Nevada v. U.S. Forest Service*, 832 F. Supp. 2d 1138 (E.D. Cal. 2011) (quoting 66 Fed. Reg. at 3207).

[29] 36 C.F.R. § 212.5(b)(2) (hereafter, MRS factors).

[30] Memorandum from Leslie Weldon to Regional Foresters et al. on Travel Management, Implementation of 36 CFR, Part 212, Subpart A (Mar. 29, 2012) (hereafter, 2012 Weldon Memo).

[31] *See* 2012 Weldon Memo at 1 ("The national forest road system of the future must continue to provide needed access for recreation and resource management, as well as support watershed restoration and resource protection to sustain healthy ecosystems."). *See also* Memorandum from Joel Holtrop, U.S. Forest Service Washington Office, to Regional Foresters *et al.* (Nov. 10, 2010) (hereafter, 2010 Holtrop Memo) ("Though this process points to a smaller road system than our current one, the national forest road system of the future must provide needed access for recreation and resource management and support watershed restoration and resource protection to sustain healthy ecosystems and ecological connectivity.").

[32] 2010 Holtrop Memo; 2012 Weldon Memo; Memorandum from Leslie Weldon, U.S. Forest Service Washington Office, to Regional Foresters *et al.* (Dec. 17, 2013) (hereafter, 2013 Weldon Memo) (supplementing and reaffirming the 2012 Weldon Memo).

[33] *See* 2013 Weldon Memo.

[34] *See* 2012 Weldon Memo at 2 (directing forests to "analyze the proposed action and alternatives in terms of whether, per 36 CFR § 212.5(b)(1), the resulting [road] system is needed").

whether a proposed project is consistent with the TAR and considering the MRS factors under 36 C.F.R. § 212.5(b)(1), the Forest Service expects each forest to identify the MRS.[35]

Given that the Shoshone National Forest has completed its TAR, it is time for the Forest Service to take the next step under subpart A: identify the MRS through this project subject to NEPA.[36] This project, a forest-wide transportation plan, provides the appropriate geographic scale for the Forest Service to identify the MRS. The Forest Service's Washington Office directed forests to use the TAR to identify the MRS for proposed actions at the scale of a 6th code sub watershed or larger.[37] Plus, consideration of the MRS factors at 36 C.F.R. § 212.5(b)(1) only makes sense on a large enough geographic scale. Pursuant to the plain language of the agency's own regulations and directive memoranda interpreting those regulations, the Forest Service must consider the TARs and identify the MRS when analyzing this project under NEPA.[38]

The Forest Service should also consider unneeded roads for closure or decommissioning. Subpart A directs the agency to "identify the roads on lands under Forest Service jurisdiction that are no longer needed."[39] The Forest Service must ensure that the actions proposed under the travel plan are consistent with subpart A. The forest must assess each alternative in relation to the TAR as well as the factors for an MRS. The decision to close, decommission, convert to another use such as trails, or maintain certain roads should reflect the results from the risks and benefits analysis in the TAR. The Shoshone should not designate unneeded roads as open for public motorized use on the MVUM. To the extent that the final decision in this project differs from what is recommended in the TAR, the Forest Service must provide an explanation for that inconsistency.

The Forest Service should utilize road closures and decommissioning in this project to enhance landscape connectivity and ecological integrity based on:

- Effectiveness in reducing fragmentation, connecting un-roaded and lightly-roaded areas, and improving stream segments, important watersheds, and other sensitive ecological and conservation areas and corridors;
- Benefit to species and habitats, including restoring aquatic and terrestrial habitats and habitat connections;

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[35] *Id.* ("The resulting decision [in a site-specific project] identifies the MRS and unneeded roads for each sub watershed or larger scale").

[36] *See* 2012 Weldon Memo ("The next step in identification of the MRS is to use the travel analysis report to develop proposed actions to identify the MRS . . . at the scale of a 6th code sub watershed or larger. Proposed actions and alternatives are subject to environmental analysis under NEPA. Travel analysis should be used to inform the environmental analysis.").

[37] 2012 Weldon Memo at 2. *See also* 2012 FAQs (noting that "travel analysis and identification of the MRS could be done at the same scale, if that scale is at the ranger district or unit level.").

[38] *See, e.g.*, 2012 Weldon Memo at 2 ("Travel analysis should be used to inform the environmental analysis.")

[39] 36 C.F.R. § 212.5(b)(2). *See also Center for Sierra Nevada*, 832 F. Supp. 2d at 1155 ("The court agrees that during the Subpart A analysis the Forest Service will need to evaluate all roads, including any roads previously designated as open under subpart B, for decommissioning.").

- Addressing impaired or at-risk watersheds;
- Achieving motorized route density standards; and
- Enhancement of quiet recreation experiences.

The agency may feel the level of NEPA in this forest-wide travel planning process is not appropriate for analyzing site-specific impacts of active decommissioning. We remind the agency that it has a useful tool for advancing road decommissioning: Categorical Exclusion (CE) #20.[40] CE #20 is reserved for decommissioning and obliteration of non-system roads and trails. To utilize CE #20, the agency could simply remove any unneeded roads from the transportation system, thereby making them non-system roads in this process. Removing roads from the system would not result in any ground-disturbing activity. Once these unneeded roads are converted to non-system roads, the Shoshone can utilize CE #20 to implement the on-the-ground decommissioning activity. Utilizing this CE will help expedite the pace and scale at which road-related restoration work occurs.

Thank you for your consideration.

Sincerely,

Dan Smitherman
Wyoming Representative
The Wilderness Society
[redacted]

[40] 36 C.F.R. § 220.6(e)(20).