



Aaron Larson, President
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January 28, 2024

Regional Forester (Reviewing Officer)
Northern (R1) Regional Office
Attn: Nez Perce-Clearwater Forest Plan Objection
26 Fort Missoula Road
Missoula, MT 59804

RE: Objections to Nez-Perce Clearwater National Forest Management Plan

Dear Objection Reviewing Officer:

Please accept these objections to the Record of Decision (“ROD”) for the Nez-Perce Clearwater National Forest Land Management Plan (“LMP”), as well as the associated Final Environmental Impact Statement (“FEIS”). The Responsible Official is Cheryl Probert, Forest Supervisor. These objections are submitted on behalf of Magic Valley ATV Riders Inc. (MVATVR), including Magic Valley ATV’s individual and organizational members who have enjoyed, and plan in the future to enjoy, access to the Nez-Perce Clearwater National Forest.

These objections are submitted in accordance with 36 C.F.R. part 218. Magic Valley ATV Riders filed comments on the Nez-Perce Clearwater National Forest DEIS raising the stated issues or otherwise providing a basis for these objections. The point of contact for this objection is Aaron Larson, please direct all communication regarding these objections to Aaron Larson at aaron@atlcomputing.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

Magic Valley ATV Riders has a unique perspective and longstanding interest in motorized vehicle use in the Nez-Perce Clearwater National Forest. MVATVR champions responsible recreation and encourages individual environmental stewardship. MVATVR members use various motorized and nonmotorized means to access public lands and waters, specifically including use of the Nez-Perce Clearwater National Forest. MVATVR 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 note at the outset that the agency has conducted a lengthy process, and addressed many 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, there remain concerns with the current approach, and we raise the following objections, which provide a legal basis for our requested changes to 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 decision can be improved.

A. Users with Disabilities.

President Biden has issued an *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*. Because this information constitutes new information based on *CFR § 218.8 C*, the USFS should update the plan and proposals to be consistent with the President Biden's *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* and the Department of Agriculture's Equity Action Plan. We recommend that the USFS use this planning process to finally begin to reverse its decades-long systematic discrimination against those with mobility impairment-related disabilities. This includes persons with disabilities and limited physical access. The USFS should implement all road maintenance, improvements and analyze adding temporary roads into the system which would be in stronger compliance with the Executive Order.

On his first day in office, President Joe Biden issued an “Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.” This executive order established “an ambitious whole-of-government equity agenda” which focuses on addressing “entrenched disparities in our laws and public policies,” and mandates a “comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”

Under this executive order, “The term ‘equity’ means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as ... persons with disabilities...” Historically, there has been no group more greatly marginalized and excluded by public land management policies, and motorized travel management policies in particular, than people with disabilities. Outdoor enthusiasts with ambulatory disabilities frequently rely on motorized travel as their sole means to enjoy recreating on public lands. Not everyone has the ability to hike into a remote wilderness area, but many such people are still able to drive Jeeps, side-by-sides, and ATVs, which are restricted to the designated motorized route network.

Management policies focused on “minimizing” the environmental impacts of motorized recreation have resulted in a dramatic decrease in motorized recreation opportunities on public lands over the last 20 years which has disproportionately impacted people with disabilities. Wilderness focused environmental groups with extreme ableist biases have pushed for more and more areas to be closed to motorized recreation and reserved exclusively for hikers, mountain bikers, and other “human powered” and “quiet use” forms of recreation in which many people with disabilities are unable to participate.

Every time motorized routes or areas are closed, people with disabilities that require the use of motorized means to access public lands are barred from those areas forever. There has been little recourse for such people in the past because the Americans With Disabilities Act does not require public land management agencies to consider disproportionate effects on the disabled community, but only requires that they be given access to public lands on equal terms with everyone else. As a result, the USFS has historically failed to give any real consideration to the impacts of motorized route closures on the disabled community when developing travel management plans.

The Biden Administration’s focus on equity, however, changes the equation. While the ADA focuses only on equality of opportunity, equity inherently focuses on equality of outcome. Any policy that is facially neutral but disproportionately harms a disadvantaged or marginalized group is considered inequitable. The USFS is therefore required by this executive order and others mandating that federal agencies consider “environmental justice” in NEPA proceedings to consider whether any route closures, decommissioning or lack of roadside treatments in the Nez-Perce Clearwater National Forest would disproportionately harm disabled users’ ability to access public lands.

Any approach to forest management that presumes the superiority of non-motorized forms of recreation like hiking over motorized recreation, or that justifies closing motorized access on the basis that people can still hike on those routes, is inherently discriminatory toward people with disabilities. Any large-scale closures of existing routes would unfairly and inequitably deprive people with disabilities of the ability to recreate in the area using the only means available to them. It is imperative that the USFS consider the access needs of disabled users in drafting the alternatives for this management plan and ensure that people with disabilities who depend on motorized means do not lose access.

Because this Executive Order was issued after a substantial portion of the planning process and public comment periods were completed, it constitutes new information that doesn’t appear to be fully analyzed in the DROD - especially in areas where the DROD restricts access to public lands for those with mobility impairment disabilities.

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

The Draft ROD fails 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).

USFS should not be expanding or implementing designations that restrict motorized use such as recommended wilderness areas, roadless areas and ROS designations. USFS has not provided sufficient evidence that warrants the restrictions or potential restrictions of motorized users in comparison to the benefits that motorized use brings to the area and the Nez-Perce Clearwater National Forest.

We oppose any ROS designations that could set the stage for motorized closures of OHV’s and any motorized use or roads and trails. Restrictive ROS designations for motorized travel are weaponized against the motorized community in which to close routes and favor wilderness focused groups.

Such proposals are in areas that the current forest management plan zones as non-motorized ROS, albeit without language suggesting that the zone is exclusively non-motorized rather than just being non-motorized in focus. USFS needs to be working in conjunction with the county officials to ensure the routes that the counties and local officials are using and wanting to use to benefit the local communities are not in a restrictive ROS zone. Additional language should be removed about any motorized recreation travel conflicting with Semi-Primitive Non-Motorized zones.

To allow for robust travel planning that can fully analyze the county trails master plans, the LMP should add language clarifying that the Semi-Primitive Non-Motorized zone has a non-motorized focus but may include motorized use, including new routes. At the very least, the LMP language should avoid implying an expectation that the Semi-Primitive Non-Motorized zone will be exclusively non-motorized. In addition to refining the language, the plan should refine the ROS boundaries by applying motorized ROS zones to all areas where the counties propose motorized routes, particularly if the language continues to imply that the Semi-Primitive Non-Motorized zone is exclusively non-motorized. At the very least, the ROS map should avoid expanding non-motorized zones into areas where the county trails master plans propose motorized recreation.

Refining both the ROS language and the ROS map is critical for at least a couple reasons. First, it avoids prematurely conflicting with county trails master plans, which were developed through a thorough process that included the USFS. Second, it affords managerial flexibility to provide opportunities for the full range of recreation that has emerged and will continue to adapt with technologies, communities, natural resources, and our understanding thereof. There should not be a semi-primitive non-motorized ROS overlay on roadless areas or roaded areas.

We have serious concerns regarding the Fish Lake area. An outhouse was recently built at the lake as well as having additional infrastructure. This should disqualify the area from being managed as wilderness. This area has a history of logging and the access to the lake is an old logging road. This road has historical value and needs to be protected.

Additionally we object to “Hoodoo, Mallard-Larkins, East Meadow Creek, and West Meadow Creek. The East Meadow Creek Recommended Wilderness Area would be a new recommended area from the No Action Alternative. In total, the Preferred Alternative includes 263,357 acres of recommended wilderness. “

There are major concerns around the recommended wilderness areas as they do not meet the standards for wilderness and as such the USFS should not be managing them as wilderness. For example: “There are several existing roads open to

high clearance vehicles within recommended wilderness areas under this alternative. The East Meadow Creek recommended wilderness area contains two roads – Forest Service Road 285 Elk Mountain, extending 8.9 miles, and Forest Service Road 357 Running Creek, covering 10.4 miles – that would be excluded from the recommended wilderness area and remain open to motorized travel. The Sneakfoot Meadows recommended wilderness area has one road, Forest Service Road 358, which would remain open to motorized vehicles leading into Kooskooskia Meadows for 2.1 miles, after-which the trail is non-motorized. Within the Hoodoo recommended wilderness area, the Fish Lake trail would remain open to motorized travel for approximately 4.5 miles, after-which the trail is non-motorized. This motorized route is excluded from the recommended wilderness areas.“ All of these motorized routes disqualify the areas from any form of wilderness management. The USFS has repeatedly stated they intend to improve recreational access however, “Under this alternative there are no acres in a summer or winter recreation opportunity motorized class.”

There is no recreational objective for over 50 inches. The forest plan dictates the planning and zoning for the Travel Planning. There is no mention in the forest plan addressing the over 50 inch standards for OHV trails. The recreational objectives on pg.76 should be removed as it states that trails will be reduced over time. “Annually maintained to a standard a minimum of 30 percent; reduce deferred maintenance of trails by 5% every 5 years.”

Also, pg.82 Ecosystem Services Guidelines FW-GDL-ES-01 should also include non-motorized verbiage. We recommend adding the following language in the Recreational Values, “If a route is identified as adversely affecting aquatic ecological values, rerouting and route improvements should be considered prior to closure, to preserve motorized/non-motorized access opportunities. If a route or area needs to be closed, alternate motorized access to maintain social and economic sustainability of rural communities should be provided. this guideline should be added to the Recreational Values section on page 76.

The forest service has included a roaded Meadow Creek area as potential wilderness that has motorized trails and vehicles access into East Meadow Creek, Lynx, Running Creek areas. The forest service is claiming a chunk of land outside of Meadow Creek as RWA. Running Creek, Bargamin and Lynx creek drainages do not drain into Meadow Creek. The 285 Elk Mountain Road is the divide ridge line. The outfitter in the area cuts roughly 75 miles of trail in the East Meadow Creek and Running Creek via trail contract.

The Nez Perce-Clearwater NF states “Forest Service’s Draft Revised Land Management Plan Enhances Long-Term Forest Health, Creates Regional Jobs”. However all of these mentioned areas that restrict motorized use in some degree does not comply with this statement. Roads enhance long-term forest health and create regional jobs through recreation, timber harvest and other uses.

C. User Conflict

“User conflict” is an inappropriate and often misapplied concept that has generally been created and emphasized by anti-motorized advocates who are looking for any opportunity to restrict or eliminate motorized use. Despite their aggressive litigation efforts, there are few, if any, court decisions that have forced an agency to restrict any motorized recreation based on alleged “conflict.” Rather, the courts have generally upheld a reasoned agency conclusion designed to address any alleged “conflict.” See, e.g., *Wild Wilderness v. Allen*, 871 F.3d 719, 728-729 (9th Cir. 2017); *Pryors Coalition v. Weldon*, 803 F.Supp.2d 1184 (D. Mont. 2011), *aff’d*, 551 Fed. Appx. 426 (9th Cir. 2013). There are many strategies that can be employed to manage the ever-growing human population that desires to recreate in the National Forest System. We generally support the concept of “shared use.” As long as overall visitation numbers are appropriate for the affected resources, motorized and non-motorized users can be compatible with one another so long as individual users understand designations and plan their activities accordingly. There will always be a handful of pathologically disgruntled

individuals seeking their own private rejuvenation in the National Forests. These outliers should not dictate policy or use designations, and should be handled in a similar way as children testing parental boundaries.

Contrasted to those using “conflict” in a transparent effort to put a thumb on the scales of management balance, there are legitimate concerns that usually reflect the simple fact there are too many people trying to enjoy the same areas at the same time. These “conflicts” can occur within user groups or modalities as often as they occur between them. The agency should consider strategies to publicize and manage these situations. One option might be to designate non-motorized companion trails along motorized routes or designate/groom non-motorized only trails to Wilderness or non-motorized land classification to reduce conflict of uses. Such efforts might be coupled with a targeted information campaign to direct non-motorized uses to non-motorized land classifications. Another element might be to consider enhanced staging/parking for non-motorized users so as to provide better access to non-motorized areas. Finally, we have always been and remain strong advocates of an active and effective enforcement program, so that users who violate or choose to remain criminally ignorant of management prescriptions suffer meaningful adverse consequences. All users need to understand and respect the fact that their use of our National Forests is a privilege to be shared with others under the terms established by applicable law.

D. Wildfire

Active vegetation management can only be implemented through roads and trails. USFS should remove “while embracing the role that wildfire can play” from the following statement: “Fire and fuels management direction that emphasizes active vegetation management within the wildfire crisis strategy landscape, while embracing the role that wildfire can play in moving toward resilient ecological conditions.”

This section gives USFS too much flexibility when a wildfire arises to simply embrace the wildfire rather than use active emergency response. If a wildfire arises at any point, that wildfire should be treated as such and the Forest Service should not allow the wildfire to burn. This involves a lot of risks and wildfires should always be treated with as much urgency to suppress the fire as possible.

E. Alternative Selected

MVATVR requests the following changes to the FEIS:

Closures should not be seen as legitimate almost hardwired responses to issues that can all be managed through other management strategies. NEPA requires analysis of impacts to everything on this list, and managers should have flexibility to find other ways to mitigate impact besides temporary or permanent closure.

USFS should acknowledge that the Categorical Exclusions that apply for construction of new roads and trails should be applicable to these classes. This should be included in the LMP. In many cases these exclusions are for rerouting existing routes because of erosion events, or creating roads to do vegetation treatments that reduce the risk of catastrophic fire. ROS designations should apply only to recreation use and not create unnecessary restrictions on the Forest for adaptive and active management that relates to other uses.

F. The cursory socioeconomic analysis is deficient.

The analysis fails to properly evaluate the substantial adverse impacts to local communities that might be caused by the proposed reductions in motorized recreational opportunity. A valid NEPA analysis must include this consideration and disclosure of socioeconomic effects. NEPA embodies a Congressional desire “to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of future generations of Americans.” 42 U.S.C. § 4331(a). Thus, NEPA’s operative EIS requirement is triggered by federal action which may “significantly affect[] the quality of the human environment....” *Id.* at § 4332(2)(C) (emphasis added). The “human environment” “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14.

The socioeconomic impacts are only discussed and analyzed briefly mainly for timber and livestock, but lacks meaningful data or analysis. The Forest must properly evaluate these interconnected motorized designation decisions on a broader scale, and the consequences of decisions in the Draft ROD must be properly disclosed. A cumulative impact “is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions....” 40 C.F.R. § 1508.7. Cumulative impacts must be discussed in an EIS in a manner that allows for “meaningful analysis.” *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997). It is not enough to describe related projects “with generalities insufficient to permit adequate review of the cumulative impact.” *Id.*; see also, *Humane Soc’y v. Dept. of Commerce*, 432 F.Supp.2d 4, 22 (D.D.C. 2006) (discussion must go beyond “conclusory remarks and statements”). These discussions are inadequate in the Final Forest Plan.

According to the Bureau of Economic Analysis, outdoor recreation had a record breaking year in 2022. Outdoor recreation now accounts for more than \$1 trillion in economic activity. For reference, the oil and gas industry is \$812 billion. Outdoor recreation is popular. It is an economic juggernaut. Yet, public land agencies act as if this nearly \$1 trillion dollar industry is optional or an afterthought. Instead of building new roads, trails, campgrounds, and infrastructure to accommodate the new growth in outdoor recreation, land managers are relentlessly closing public lands for the public to use. It doesn’t make any sense. A deeper dive into the numbers reveals that the engine driving this record-breaking growth is literally the millions of engines that find their way into the various forms of motorized recreation. Hundreds of miles of roads have already been decommissioned between 1999 and 2018. USFS has not adequately analyzed the disparities of fewer roads each year along with the growing number of users each year.

Based on 36 CFR § 219.53 which states, “the **objection** concerns an issue that arose after the opportunities for formal comment.” We have objections that agencies need to act according to statutory authority and “clear congressional authorization” according to *WEST VIRGINIA ET AL. v. ENVIRONMENTAL PROTECTION AGENCY ET AL.* This ruling seriously calls into question the Roadless Area Conservation Rule. Until the Roadless Area Conservation Rule is codified in statute, we believe it would not withstand judicial scrutiny according to new legal precedent set by *WEST VIRGINIA ET AL. v. ENVIRONMENTAL PROTECTION AGENCY ET AL.* According to the ruling, “the Government must point to “clear congressional authorization” to regulate in that manner.” 597 U. S. ____ (2022) “Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to “clear congressional authorization” for the authority it claims. *Utility Air*, 573 U. S., at 324. Pp. 16–20. The Roadless Area Conservation Rule is not based on “clear congressional authorization. As such, we believe the Forest Service needs to develop alternatives that don’t rely on implementation of the Roadless Area Conservation Rule until that rule is codified by Congress or adjudicated. For Example, any Recreation Opportunity Spectrum designations that designate parts of the forest as non-motorized because those areas are designated as roadless by the Roadless Area Conservation Rule, should be re-analyzed. While a direct challenge to the Roadless Area Conservation Rule is time-barred, any new implementation and enforcement of the rule would make it ripe for a legal challenge.

The backcountry airstrips are valuable recreational infrastructure as the USFS points out in the FEIS. These airstrips not only allow access for public health and human safety but they also allow backcountry pilots training that they otherwise could not receive. Backcountry airstrips should not be closed as that would negatively impact local economies.

Sincerely,

Aaron Larson
President
Magic Valley ATV Riders Inc.

cc:

Honorable Senator Mike Crapo
Honorable Senator James Risch
Honorable Representative Russ Fulcher
Idaho County Commissioner Board, Skip Brandt
Idaho State ATV/UTV Association, Karen Crosby
BlueRibbon Coalition, Benjamin Burr