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Comments: Rebecca Antle, President September 5, 2022 Arizona State Association of Four Wheel Drive Clubs P.O. Box 23904 Tempe, Arizona 85282 RE: Objections to Tonto NF Management Plan Draft ROD Dear Objection Reviewing Officer: Please accept these objections to the Draft Record of Decision ([ldquo]Draft ROD[rdquo]) for the Tonto National Forest Management Plan, as well as the associated Final Environmental Impact Statement ([ldquo]FEIS[rdquo]). The Responsible Official is Acting Forest Supervisor Neil Bosworth. These objections are submitted on behalf of the Arizona State Association of Fourwheel Drive Clubs ([ldquo]ASA4WD[rdquo]), including ASA4WD[rsquo]s individual and organizational members who have enjoyed, and plan in the future to enjoy, access to the Tonto National Forest. These objections are submitted in accordance with 36 C.F.R. part 218. ASA4WD filed comments on the Tonto National Forest Forest Draft Forest Plan (DFP) and Draft Environmental Impact Statement (DEIS) raising the stated issues or otherwise providing a basis for these objections. ASA4WD was a party to the comment submitted by the Tonto Recreation Alliance, and is attached to this objection as Attachment A. As such ASA4WD is the lead objector. The point of contact for this objection is Rebecca Antle and please direct all communication regarding these objections to Rebecca Antle at PO Box 23904 Tempe AZ 85285. We formally request a resolution meeting in accordance with 36 C.F.R. [sect] 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. [sect] 218.26(b). I. Interest of the Objector ASA4WD has a unique perspective and longstanding interest in motorized vehicle use and Tonto National Forest Plan Revision Objections. ASA4WD is a nonprofit corporation that champions responsible recreation and encourages individual environmental stewardship. ASA4WD members use various motorized and nonmotorized means to access public lands, specifically including use of the Tonto National Forest. ASA4WD 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[rsquo]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[rsquo] sovereign immunity for those aggrieved by [ldquo]final agency action.[rdquo] 5 U.S.C. [sect][sect] 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 [ldquo]hold unlawful and set aside agency action, findings, and conclusions found to be[mdash](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[hellip].[rdquo] This standard of review is [ldquo]narrow[rdquo] 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[rsquo]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. B. The Agency Has Failed to Sufficiently Document Site-Specific Conclusions. We appreciate that the Draft ROD includes designation of meaningful routes and areas for continuing motorized access. However, some of the restrictions on such use go too far and some of the designations should be

reconsidered. 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. [sect] 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). ASA4WD reiterates the following concerns raised in Tonto Recreation Alliance’s Comments to Tonto Forest Draft Forest Plan (DFP) and Draft Environmental Impact Statement (DEIS):

1.1) Page 20: Management Approaches for Partnerships and Volunteers: The Commenter believes that the proposed language does not go far enough in committing Forest Resources to not only enable but to make sure their partners are successful. The Forest makes a strong case that partners and volunteers are a critical part of delivering their mission. Such a critical component of success warrants a stronger commitment of resources, willingness to adjust processes and procedures plus organizational and/or cultural change where needed to capture the value of partners.

2.1) Page 21: (REC) Paragraph 3, line 4: Change four-wheeling to [“]Off-Highway Vehicle Recreation[”]

2.2) Page 22: (Rec-O-05): This objective is to [“]develop or modify 2 to 8 systems of sustainable designated motorized and non-motorized trails (e.g., mountain biking, equestrian, motorcycle, jeep, and all-terrain vehicle trails) to adequately provide for these user groups and reduce user conflicts. We believe that a definition of [“]system[”] should be provided in the plan. We also suggest that the reference to [“]jeep[”] be replaced with [“]full-sized off-highway vehicle[”].

2.2) Page 23: (Rec-G-03): The proposed language prioritizes minimizing resource damage over all other considerations for recreation developments and improvements. While this is a [“]guideline[”] the wording is not consistent with REC- Page 21, paragraph 4 which emphasizes the consideration and balancing of other factors (e.g. economic and social factors). We recommend that this section be changed to [“]Recreation developments and improvements should be planned, designed, and managed for long-term sustainability considering all effects and benefits using the best available sustainable recreation practices[”]

3.1) Page 26: (REC-DIS-G-06), Line 4: Even though this is a [“]guideline[”] the wording [“]Fall-line trails should be avoided[”] is unnecessarily prescriptive and could limit trail builders trail design options. There are cases where fall-line trails are actually more sustainable than non-fall-line trails (e.g. machine-made non-fall-line trail versus a hardened decomposed granite type surface on a fall-line).

4.1) Page 27: (REC-DIS-MO), Paragraph 1: This paragraph appropriately defines [“]motorized recreation[”] however it does not address the fact that other forest users utilize motorized vehicles and the motorized route system to access their particular recreation preference such as hunting, fishing, hiking, rock climbing, etc. The commenters suggest that the definition of motorized recreation be expanded to include this important forest use of the motorized route system for other recreation uses.

4.3) Page 27 Desired Conditions (REC-DIS-MO-DC-02): The wording for this desired condition reflects that staging areas and access points should be [“]dust free and in convenient locations[”]. The commenters believe that [“]dust free[”] is an unobtainable condition and this should be revised to say [“]should be located in convenient locations and use dust management best practices[”]. Additionally, no mention is made about providing facilities and services that are necessary or valuable to users. The commenters request that wording be included to capture this intent.

4.2) Page 28: Motorized Recreation (REC-DIS-MO-S-02): Including the examples provided in this section (e.g. avoiding hilltops, ridges, any route alignments with greater than 10% surface grade, etc.) as a standard is overly prescriptive and in many cases this guidance may not be consistent with the most sustainable trail building practices. Please delete these prescriptive examples leaving the standard as [“]current sustainable construction and design standards for motorized trail building principles[”]

5.0 Recreational Shooting (REC-DIS-RS): Page 31 [“] REC-DIS-RS-G-03: There are several areas in the forest where recreational shooting takes place in close proximity to motorized and non-motorized trails creating very

high safety hazard for trail users. We request this section be modified to reflect a higher standard for protecting trail users. One possible way to do this would be to modify item [a] to read [within a minimum of one quarter mile from developed recreation sites and approved recreation roads and trails] or alternatively [current and future target shooting areas must have an established adequate safety buffer zone].

6.0 Recommended Wilderness Areas (RWMA): Page 133: Recommended Wilderness Areas (RWMA): Page 133: The commenters do not support any recommended wilderness management areas that would impact

motorized recreation on existing routes approved in the travel management decision. Specifically, we do not support any RWMA[s] that create an envelope around routes designated as open in the Travel Management Plan even if the route has a protecting corridor buffer zone. This type of action effectively prioritizes wilderness over the established motorized recreation route system that was 10+ years in the making and creates potential conflicts even when an open motorized route is protected by a corridor. We ask that the specified area designations be revisited to better comport with logic, available science, and stakeholder input and collaborative agreement.

C. The Forest Illegally Relies upon User Conflict to Justify Closure. The Final Forest Plan relies, at least in part, upon purported [user conflict] as the rationale for closing trails to continuing motorized travel. See, e.g., Final Forest Plan at 11, 28, 30-33.. 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. [sect] 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 FLPMA. 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 indicated 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). In a largely forgotten effort, the U.S. Supreme Court emphasized that NEPA focuses on impacts to the physical environment. [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 is independently flawed by reaching that outcome 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 [ldquo]user study[rdquo] conducted on site noting motorized use was [ldquo]cited as a source of concern[rdquo] but finding [ldquo]the majority of non-motorized users nevertheless indicated a high degree of satisfaction[rdquo]). The agency did not attempt any such analysis and does not purport to offer site-specific analysis of [ldquo]conflict[rdquo] here. Data is largely absent, or at an insufficient general level, such as presentation of NVUM results. 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.

D. 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 [ldquo]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.[rdquo] 42 U.S.C. [sect] 4331(a). Thus, NEPA[rsquo]s operative EIS requirement is triggered by federal action which may [ldquo]significantly affect[ ] the quality of the human environment[hellip].[rdquo] *Id.* at [sect] 4332(2)(C) (emphasis added). The [ldquo]human environment[rdquo] [ldquo]shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.[rdquo] 40 C.F.R. [sect] 1508.14. The socioeconomic impacts are only discussed and analyze 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 [ldquo]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[hellip].[rdquo] 40 C.F.R. [sect] 1508.7. Cumulative impacts must be discussed in an EIS in a manner that allows for [ldquo]meaningful analysis.[rdquo] *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 [ldquo]with generalities insufficient to permit adequate review of the cumulative impact.[rdquo] *Id.*; see also, *Humane Soc[rsquo]y v. Dept. of Commerce*, 432 F.Supp.2d 4, 22 (D.D.C. 2006) (discussion must go beyond [ldquo]conclusory remarks and statements[rdquo]). These discussions are inadequate in the Final Forest Plan. Based on 36 CFR [sect] 219.53 which states, [ldquo]the objection concerns an issue that arose after the opportunities for formal comment.[rdquo] We have objections that agencies need to act according to statutory authority and [ldquo]clear congressional authorization[rdquo] 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, [ldquo]the Government must point to [ldquo]clear congressional authorization[rdquo] to regulate in that manner.[rdquo] 597 U. S. (2022) [ldquo]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 [ldquo]clear congressional authorization[rdquo] for the authority it claims. *Utility Air*, 573 U. S., at 324. Pp. 16[ndash]20. The Roadless Area Conservation Rule is not based on [ldquo]clear congressional authorization. As such, we believe the Forest Service needs to develop alternatives that don[rsquo]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.

E. Users with Disabilities President Biden[rsquo]s 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 [sect] 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 develop a true recreation alternative that 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 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 in the Tonto Forest Management Plan 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 travel plan and ensure that people with disabilities who depend on motorized means do not lose access.