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December 18, 2020

United States Forest Service
Rocky Mountain Regional Office
Attn: Reviewing Officer
P.O. Box 18980
Golden, CO 80402
r02admin-review@usda.gov

*Via email, certified mail, and online at
<https://cara.ecosystem-management.org/Public/CommentInput?project=48214>.*

Re: Objection to Draft Record of Decision - Pike and San Isabel National Forests Motorized Travel Management (MVUM)

Dear Objection Reviewing Officer,

Sportsmen's Paradise ("Sportsmen's") submits this Objection in accordance with 36 CFR § 218 to the Draft Record of Decision ("DROD") for the Pike and San Isabel National Forest Motorized Travel Management (MVUM) Analysis ("Proposed Project"). Sportsmen's is a 501(c)(7) community association located in Park County a few miles outside of Lake George, Colorado and bordering the South Park Ranger District of the Pike & San Isabel National Forest. Sportsmen's address is P.O. Box 383, Lake George, CO 80827.

For purposes of this Objection, Sportsmen's is represented by legal counsel, Trout Raley through Bennett Raley and Mirko Kruse. Please direct all correspondence and responses to counsel. Their contact information is provided below:

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This Objection was filed on December 18, 2020. The 45 day objection period began on November 6, 2020 and ends on December 21, 2020. This Objection is therefore timely. The Responsible Official for the Proposed Project is Diana Trujillo, Forest Supervisor. Through this

Objection, Sportsmen’s raises novel issues that have arisen since the conclusion of the comment period and are therefore properly reviewable pursuant to 36 CFR § 218.8. The reviewability of this Objection is discussed further below. Sportsmen’s requests that the DROD’s MVUM attached as part of Selected-Alternative C be corrected in accordance with the error identified below and for an Objection Resolution meeting to address this concern. 36 CFR § 219.57(a).

BACKGROUND AND ERROR IN THE UPDATED MVUM

Sportsmen’s Paradise

Sportsmen’s is a community association that has been in existence since the late 1950s. Sportsmen’s consists of 160 tax-paying, privately-owned lots surrounding approximately 160 acres that are common to its membership. Sportsmen’s is situated along approximately two miles of the South Platte River beginning at the end of Park County Road 112 and ending at the top of Wildcat Canyon, just past where Beaver Creek enters the South Platte from the east. It is surrounded on all four sides by the Pike and San Isabel National Forest (“PSINF”). Sportsmen’s has enjoyed amicable relationships with local governments and the Forest Service for many years, particularly during the Hayman Fire of 2002, the in-stream restoration efforts for the South Platte River beginning in 2015, and during a 2017 tornado that downed trees across Forest Service Road 274. Sportsmen’s strong partnerships with local governments and the Forest Service continues today.

Sportsmen’s Use of Forest Service Road 274

For more than 60 years, Sportsmen’s members have enjoyed access to a network of Forest Service Roads to the east of Sportsmen’s via Forest Service Road 274 (“FSR 274”), which—as far as Sportsmen’s can tell—has always connected to a road at Sportsmen’s eastern property boundary. After fishing, access to the PSINF via FSR 274 is probably one of the most unique aspects of Sportsmen’s that enhances its overall use and enjoyment by its members and guests.

FSR 274 has always connected to a road at Sportsmen’s eastern property boundary. All of the following maps, which have been published by PSINF, show FSR 274 connecting to Sportsmen’s eastern property boundary:

1. 1984 Forest Plan
2. 1992 MVUM
3. 2010 MVUM

See Attachment B.

Sportsmen’s Notice of Partial Closure to FSR 274

In early December of 2019, Sportsmen’s reached out to Josh Voorhis, District Ranger for the South Park District of the PSINF, regarding another access road unrelated to FSR 274. Ranger Voorhis’s reply on December 18, 2019 also contained information regarding FSR 274, however, and his assertion that FSR 274 “does not connect to Sportsmen’s Paradise” and

speculation for why the road was now closed. *See* Attachment A. To support his claim, Ranger Voorhis attached a map to his email showing FSR 274 ending short of Sportsmen’s property line. *See* Attachment C. This was the first notice Sportsmen’s or any of its members received regarding this purported partial road closure of FSR 274.

At Sportsmen’s request, Ranger Voorhis asked his colleague Amy Titterington to provide the coordinates for the end of FSR 274. Those coordinates would mark FSR 274 ending approximately 600 feet east of Sportsmen’s property boundary. Neither Ranger Voorhis nor Ranger Titterington could tell Sportsmen’s where the coordinates originated from, why they marked the terminus of FSR 274, or when this change occurred.¹

Ranger Voorhis could not identify the cause or timing of the closure, but did state that the latest MVUM shows the road as being closed prior to reaching Sportsmen’s property and that his “office is simply implementing the existing closure” shown on the map. Voorhis reaffirmed that “[s]ince the MVUM is our legal document regarding motorized travel management, I am obligated to enforce this closure.”² *See* Attachment C.

Partial Closure to FSR 274 is Based on Error

Based on the evidence collected from previous MVUMs, discussions with Forest Service personnel, the Forest Service’s INFRA data available online, and information in the DROD, Sportsmen’s is convinced that the partial road closure represented in the DROD’s MVUM for Selected-Alternative C is not the result of conscientious agency decision making but an error currently memorialized within the updated MVUM produced as part of this Proposed Project.³

The error at issue is that the updated MVUM included in Selected-Alternative C of the DROD depicts FSR 274 terminating short of Sportsmen’s property line. This depiction of FSR 274 is inconsistent with all other Forest Service information provided for this road. First, all of the official maps published and distributed before the DEIS for the Proposed Project show FSR 274 connecting and ending within Sportsmen’s property, including (1) the 1984 Forest Plan Map, (2) 1992 MVUM, (3) the 2010 MVUM printed and distributed for public use, and (4) importantly, the MVUM published as part of the DEIS No-Action Alternative A. *See* Attachments B & I.

Additionally, all of the INFRA road reports and data the Forest Service publishes online in connection with the Proposed Project—including the most recent reports published for 2020—clearly show FSR 274 ending at the “intersection of PVT [private] road,” or entering “private

¹ In separate emails, Ranger Voorhis speculated that the closure occurred as a result of a BLM mining closure order or as part of Wild & Scenic studies along the South Platte River. Sportsmen’s subsequent research and letters to the Forest Service have not found any basis for this speculation. *See* Attachment J.

² Confusingly, Ranger Voorhis referenced the 2010 MVUM as showing this closure. The map he claims as the basis for this reference does not look like any MVUM map published by PSINF in print or online. The physical published version of the 2010 MVUM does not show this closure. Nor does the No Change Alternative A. *See* Attachments B & I.

³ And even if this action was intentional, the lack of notice, omission from the DEIS, and lack of a rational basis for a closure make this action legally invalid.

jurisdiction.” *See* Attachment F. That “private road” is the East Platte Road within Sportsmen’s property and “private jurisdiction” refers to the road entering Sportsmen’s private property.

FSR 274 is also not listed as one of the forest service roads “decommissioned” by the Proposed Project’s selected alternative. Appendix A to the DROD lists every road within the PSINF by Administrative Ranger District and includes important information for each, including its route number, name, length, and status. Many roads are listed as “decommissioned” under the selected alternative; yet, FSR 274 is not. Rather FSR 274 is labeled as a “designated route” that is “open to all vehicles.” *See* Attachment H.

Finally, the Forest Service’s signage on location signals that FSR 274 begins and ends at Sportsmen’s property boundary. The sign marking the beginning and end of FSR 274 is located adjacent to the property line, not 600 feet within the National Forest. *See* Attachment E.

Inconsistent with maps previously published by the Forest Service, the Forest Service’s own INFRA reports, the Forest Service’s listing of FSR 274 in the DROD, and the Forest Service’s signage on the ground, the MVUM included as part of the DROD’s Selected-Alternative C shows FSR 274 ending just short of Sportsmen’s property boundary. On the ground, this new terminus of FSR 274 exists 600 feet from the Sportsmen’s property boundary, wholly within Forest Service property, and without connecting to any “private road” or entering the “private jurisdiction” of Sportsmen’s. Also important, the MVUM for Selected-Alternative C does not label FSR 274 as having been changed by the selected alternative for the Proposed Project. The only indication of this change is the disappeared final 600-foot length of FSR 274 on the updated MVUM. This change was likely not an intentional product of the Forest Service’s decision making, but rather based on error that has manifested itself within the latest MVUM.

The Source of the Error Cannot be Precisely Defined

According to the INFRA reports, there are four segments for FSR 274. The 2020 INFRA reports combine the middle two segments. The four segments consist of:

Segment 1 – This segment runs from the beginning of FSR 274 at Teller County Road 32 through private property. It was originally thought to be .8 miles long but this length was corrected to 1.02 miles by “N. Palider” in September of 2009. *See* Attachment G (2016 INFRA Road ROE report).

Segments 2 and 3 – These segments have been correctly identified as running through the PSINF. There have been several adjustments of the length of these segments over the years and they were combined in the most recent INFRA reports. *See* Attachment G. But they have always been designated as ending at a private property boundary, which can only be the property owned by Sportsmen’s. The end point of the middle two segments has not been accurately identified in terms of the mile point (“MP”) in any of the INFRA reports that serve as the basis for the updated MVUM.

Segment 4 –This segment has been consistently identified as being .15 miles long and being on “private property.” The private property label is correct as this represents the final segment of the road as it enters Sportsmen’s and connects to Sportsmen’s East Platte Road. *See Attachment F.*

Prior to 2009, the length of FSR 274 was recorded in the INFRA database as 3.90 miles. In September of 2009, “N. Palider” corrected the length to 4.15. In August of 2015, “G. Morrison” updated the length to 4.25, this time including the remarks “Road EMP changed from 4.15 to 4.25 to match new AECOM and NAIP spatial data.” In February of 2016, “K. Dougan” changed the data to show FSR 274 beginning at MP 1.02 (accounting for Segment 1 which traverses private property for the first 1.02 miles) and ending at MP 4.10 (accounting for Segment 4 which also traverses the private property of Sportsmen’s). *See Attachment G.*

Based on the INFRA data Sportsmen’s has access to and has reviewed, the most logical conclusion is that one of the data points from “K. Dougan’s” 2016 survey work was incorrectly entered into this INFRA database. Specifically, Segment 4 was incorrectly inputted as being 0.15 miles in length where the correct entry would label this segment as 0.015 miles in length.

When entered into the Forest Service’s Geodata website,⁴ the coordinates for the endpoint of FSR 274 show FSR 274 ending approximately 0.15 miles from East Platte Road inside Sportsmen’s Paradise. The length of East Platte Road to the Forest Service property boundary, however, (the length of the road within “private jurisdiction”), is approximately 0.015 miles. Because the INFRA data now incorrectly shows that there is 0.15 miles of private property between East Platte Road and the Forest Service boundary—when there is actually only 0.015 miles—FSR 274 now is incorrectly shown on the MVUM as ending 600 feet short of the actual point where it transitions to private property.

Whatever the precise cause, it is clear based on the INFRA reports that there have been several recent surveying changes made to FSR 274. Sportsmen’s is convinced that these surveying changes and data entries have resulted in an error now reflected on the DROD’s MVUM for Selected-Alternative C. Sportsmen’s relayed its concerns regarding this error in two letters to Forest Supervisor Diana Trujillo on February 24, 2020 and to Forest Planner John Dow on March 12, 2020. *See Attachment J.*

This Error Carries Legal Consequences if Not Corrected

Though not the apparent product of agency decision making, FSR 274’s depiction on the updated MVUM can carry serious legal consequences. Generally, once a motor vehicle use map is issued that displays designated roads, motor vehicle use that is inconsistent with those designations or revisions is prohibited. 36 C.F.R. § 261.13. Ranger Voorhis, in earlier conversations with Sportsmen’s, had mentioned the potential closure of the last 600 feet of FSR 274 in the year 2020. Although Ranger Voorhis could not pinpoint the cause of the closure, the precise cause was beside the point from an administration standpoint because the MVUM now “show[s] the road as being closed prior to reaching [S]portsman [sic] property.” From Ranger Voorhis’s perspective, his “office is simply implementing the existing closure” shown on the

⁴ <https://data.fs.usda.gov/geodata/rastergateway/states-regions/states.php>

MVUM. *See* Attachment D. FSR 274’s current depiction on the updated MVUM is therefore effectuating a revision to its previous designation: the last 600 feet of the road is effectively being decommissioned without any of the required process of notice, public participation, agency review criteria, and consideration of environmental consequences.

Sportsmen’s urges the Forest Service to correct this error now by correctly identifying the final portion of FSR 274 in the updated MVUM. Failing to do so would result in violations of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (“NEPA”), the Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (“APA”), and the Forest Service Travel Management Rule.

REVIEWABILITY

This Objection is reviewable under 36 CFR § 218.8. Under that provision governing the filing of objections during the Forest Service’s predecisional administrative review process, issues raised in objections may be based on “new information that arose after the opportunities for comment.” *Id.*; *see also* 36 CFR § 218.10 (exempting “issues that arose after the opportunities for comment” from categories of unreviewable objections); 36 CFR § 219.53(a). Consistent with this requirement, the Forest Service Handbook re-affirms that it should consider objections—even though they are not based on previous comments filed during the NEPA process—when the objection concerns novel issues arising after the formal comment opportunities have concluded. *See* FSH 1909.12, Land Management Planning Handbook Ch. 50, § 51.42 (eff. Jan 20, 2015). The precise scope of what constitutes “new information” justifying the reviewability of novel objections has not been elaborated on by other Forest Service guidance or in case law. However, in a similar context, courts have ruled that NEPA and similar claims are not barred by issue exhaustion when a litigant raises an issue for the first time when that issue was not fairly presented during the administrative comment period. *See Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007, 1289 (9th Cir. 2007); *Desert Protective Council v. U.S. Dep’t of the Interior*, 927 F. Supp. 2d 949 (S.D. Cal. 2013). If there is any doubt as to reviewability, the Forest Service accept review consistent with its policy to “do more than meet the minimum legal requirements for public involvement in our decisions and activities.” FSH 1909.15, National Environmental Policy Act Handbook at 65 (eff. May 28, 2014).

Sportsmen’s first learned that the Proposed Project could result in a closure of a portion of FSR 274 on December 18, 2019, more than a month after the comment period ended for the DEIS on November 4, 2019. On December 18, 2019, Sportsmen’s received correspondence from Ranger Voorhis that the Forest Service no longer considered the western terminus of FSR 274 to end within the boundaries of the Sportsmen’s property. *See* Attachment A. Rather, Voorhis indicated that the governing MVUM showed FSR 274 ending short of the boundary line with Sportsmen’s within Forest Service property and that the Forest Service “has plans to close this illegal route in 2020.” *Id.*

This correspondence with Ranger Voorhis was the first notice Sportsmen’s or any of its members had regarding a potential partial closure of FSR 274 or that the governing MVUM listed this portion as closed. This information was not disclosed as part of the DEIS for the Proposed Project. The status quo represented for FSR 274 by the Proposed Project’s DEIS clearly shows FSR 274 ending within Sportsmen’s property boundary: both the 2010 MVUM

included as the map governing the No-Action Alternative A and the physical 2010 MVUM printed and distributed by the Forest Service shows FSR 274 ending within Sportsmen's property boundary. *See* Attachment B. Critically, the MVUM included as part of the DEIS's Selected - Alternative C, labels FSR 274 as "Route Status Unchanged" and color-codes FSR 274 as "Road open to all vehicles." *See* Attachment I.

Because the no action alternative shows FSR 274 ending at Sportsmen's property (as it has historically) and because the selected alternative shows FSR 274 as unchanged by the Proposed Project, any decision to close FSR 274 is not valid and FSR 274 must remain open. Furthermore, the DEIS lists the roads within the PSINF that will be decommissioned or otherwise changed in status by the Proposed Project. Nowhere is FSR 274 listed as an altered route. *See* Attachment H. The only indication that FSR 274 could be altered by the Proposed Project was the MVUM attached with Selected-Alternative C, which shows FSR 274 ending before Sportsmen's property boundary. This deleted portion is not labeled as a decommissioned portion on the map, which is at a very small scale, rather a small segment of the road simply disappears. There is no notice of a closure of FSR 274. Accordingly, the DEIS did not put Sportsmen's on notice that this partial closure could be effectuated by the Proposed Project. Rather, it was Sportsmen's December 18, 2019 conversation with Ranger Voorhis that brought this change to Sportsmen's attention. As such, this change to FSR 274 represents "new information that arose after the opportunities for comment" to the DEIS and Sportsmen's is permitted to file this Objection pursuant to 36 CFR 218.8.

OBJECTIONS

If the MVUM is not corrected, resulting in a partial closure of FSR 274, the Forest Service will violate the APA, NEPA, and the Travel Management Rule's requirements for notice, publication participation, agency review, and consideration of environmental impacts.

Notice and Public Participation

Informed public participation in federal agency decision-making is an essential part of the NEPA process. 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."); 40 C.F.R. § 1500.2 ("Federal agencies shall to the fullest extent possible: . . . (d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment."). Independent of NEPA, the Travel Management Rule also imposes public participation requirements for the Forest Service's road designations within its national forests. Section 212.52 of the Travel Management Rule provides for the public notice and participation in national forest road designations and revisions:

The public shall be allowed to participate in the designation of National Forest System roads . . . and revising those designations pursuant to this subpart. Advance notice shall be given to allow for public comment, consistent with agency procedures under the National Environmental Policy Act, on proposed designations and revisions.

36 CFR § 212.52(a). Although this provision does not enumerate specific requirements for the type and extent of public participation, at least some involvement is necessary. Comments and Responses to Travel Management Rule, 70 FR 68264-012005; *see also Clearwater Cty. v. U.S. Forest Service*, 2017 WL 2623166, at * 7 (D. Idaho 2017) (stating that the travel management rule requires “some level” of participation in national forest road designations from counties).

If the Forest Service allowed a portion of FSR 274 to be decommissioned through adoption of the DROD’s updated MVUM for Selected-Alternative C, this would amount to a closure without proper notice or public participation as required under NEPA and the Travel Management Rule. *See Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv.*, 329 F. Supp. 3d 1191, 1203–05 (D. Mont. 2018) (determining that the Forest Service acted arbitrarily and capriciously when it decided to close national forest trails without opportunity for public comment). Part of the rationale behind the Travel Management Rule was to rid the Forest Service of ad-hoc and arbitrary determinations over road designations that permeated earlier travel management in the national forests. *See* 3 Pub. Nat. Resources L. § 31:8 (2d ed. 2020). The Travel Management Rule created a process to be followed for designations or revisions to Forest Service roads, including public participation requirements. The Forest Service cannot close any part of FSR 274 without complying with these requirements.

Review Criteria under the Travel Management Rule

In addition to its public participation requirements, the Travel Management Rule also imposes specific review criteria when National Forest roads are designated or revised. In designating roads, trails, and areas for motor vehicle use, the responsible official must consider the effects on national forest natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses of NFS lands, maintenance and administration needs resulting from motorized use, and the availability of resources for that maintenance and administration. 36 C.F.R. § 212.55(a). To comply with these criteria, the Forest Service must provide more than a cursory discussion of the criteria and general statements attempting to meet them. *WildEarth Guardians v. Jeffries*, 370 F. Supp. 3d 1208, 1248–51 (D. Or. 2019). Furthermore, these criteria cannot be assessed on a broad, forest-wide basis but must be analyzed at a “granular” level. *Wildearth Guardians v. Montana Snowmobile Ass’n*, 790 F.3d 920, 930-31 (9th Cir. 2015).

Here, if the Forest Service de-commissioned the western terminus of FSR 274 through the adoption of the DROD’s updated MVUM for Selected-Alternative C, this would effectuate a closure without proper consideration of these criteria. *See, e.g., Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1071–74 (D. Idaho 2011) (finding violation of criteria). Consideration of forest resources, public safety, recreational opportunities, and access needs would be particularly important for a determination to close the western terminus of FSR 274. Such a closure would require Sportsmen’s members and guests to use Park County Road 112 to trailer their OHVs to access the trails system historically accessed via FSR 274. Park County Road 112 is a gravel road that runs parallel to the South Platte River for two and a half miles, sometimes approaching as few as ten feet from the bank. Any closure of FSR 274 would cause more harm to this river corridor and this unintended consequence would need to be considered.

As for access and public safety, although County Road 112 provides the primary access for Sportsmen's members, FSR 274 would provide important emergency access and escape in the event of a wildfire or another road-closure event. Only County Road 112 provides primary access to Sportsmen's and there are few other feasible alternatives in the event of an emergency. FSR 750 to the North of FSR 274, for example, is a rugged four-wheel drive jeep trail that could not accommodate two-wheel drive passenger vehicles.

Recreational opportunities would also be severely diminished for Sportsmen's members. For more than 60 years FSR 274 has provided safe and reasonable access to the national forest for recreational purposes, providing Sportsmen's members access to a network of Forest Service Roads to the east. After fishing, access to the PSINF via FSR 274 is one of the most unique aspects of Sportsmen's that enhances its overall use and enjoyment.

Without considering these important aspects and effects of a partial road closure to FSR 274, the Forest Service would violate the review-criteria provision of the Travel Management Rule. This failure to consider the review criteria would result in arbitrary and capricious agency action under the APA.

Consideration of Environmental Impacts under NEPA

Under NEPA, no major agency action significantly affecting the environment can be instituted without the preparation of an impact statement. 16 CFR § 1.82(a). The environmental impacts of a partial closure to FSR 274 were not analyzed as part of the current NEPA process for the Proposed Project. FSR 274 is not listed as one of the forest service roads "decommissioned" by the Proposed Project's Selected-Alternative C. See Attachment H. And the MVUM included as part of the DROD's Selected-Alternative C labels FSR 274 as "Route Status Unchanged." Therefore, if a partial closure of FSR 274 were effectuated, the environmental impacts from this action would need to be reviewed either through a standalone NEPA process, see 40 CFR §§ 1508.9, or as a supplemental EIS to the current Proposed Project, see 23 CFR § 771.130.

FSR 274's current depiction on the updated MVUM would be a revision to its previous designation. This constitutes agency action and the Forest Service has not provided any rationale or basis for this change. Under the APA, any agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law is invalid and must be set aside. 5 U.S.C. § 706(2)(a). A failure to correct this error would be a violation of NEPA, the APA, and the Travel Management Rule. Sportsmen's requests that the DROD's MVUM attached as part of Selected-Alternative C be corrected in accordance with the error identified in this letter, any other necessary changes made thereto, and for an Objection Resolution meeting to address this concern. 36 CFR § 219.57(a).

Sincerely,



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