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**February 13, 2023**

**Jennifer Eberlein, Regional Forester (Objection Reviewing Officer)**  
1600 Tollhouse Road,  
Clovis, CA 93611

**RE: Objections to Creek Fire Restoration Project (60422)**

Dear Objection Reviewing Officer:

Please accept these objections to the Draft Decision Notice (“Draft DN”) for the Creek Fire Restoration Project, as well as the associated Final Environmental Assessment (“FEA”). The Responsible Official is Dean Gould, Forest Supervisor. These objections are submitted on behalf of BlueRibbon Coalition (BRC), including BRC’s individual and organizational members who have enjoyed, and plan in the future to enjoy, access to the Sierra National Forest.

These objections are submitted in accordance with 36 C.F.R. part 218. BRC filed comments on the Creek Fire Restoration Project Detailed Purpose and Need and Proposed Action for Scoping raising the stated issues or otherwise providing a basis for these objections. The point of contact for this objection is Ben Burr, please direct all communication regarding these objections to Ben Burr at PO Box 5449 Pocatello, ID 83202. 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**

BRC has a unique perspective and longstanding interest in motorized vehicle use and the Creek Fire Restoration Project. BRC is a nonprofit corporation that champions responsible recreation and encourages individual environmental stewardship. BRC members use various motorized and nonmotorized means to access public lands and waters, specifically including use of the Sierra National Forest. BRC 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.

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## 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 DN.

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 analyzing 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 Creek Fire Restoration 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.

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

We appreciate that the Draft DN includes approval of near-term project implementations. However, some of the long-term projects and full scope of the proposal should be reconsidered. The Draft DN 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 (9<sup>th</sup> Cir. 2016).

BRC reiterates the following concerns raised in previous Comments to the Creek Fire Restoration Project:

#### **Long term project approval**

Pg. 23 Purpose and Need and Proposed Action “Over the long term (10 or more years), not implementing treatments would result in even further increased surface fuels, in turn resulting in increased flame lengths and higher fire line intensities, leading to increased firefighter and public risk and higher suppression and recovery costs.”

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Pg. 25 Purpose and Need and Proposed Action “Long-term access is particularly important for follow-up treatments such as burning of piles, maintenance thinning, or release of planted trees and future fire suppression.”

USFS needs to see through the proposed hazardous fuels reduction of 235 miles and 11,200 acres. We recommend using commercial treatment in the maximum amount of land possible. Best available science should be used in making these decisions. Past forest fires that have burned rampant because of the lack of forest projects should be looked at when making decisions.

### **Public Safety**

Pg. 38 of DN “Wildfire behavior in heavy fuel load areas would be very high and present safety threats to people in the developed sites, hiking on trails and using roads as escape routes.”

BRC supports the broad project objectives to keep forests healthy and reduce the risk of wildland fires. The Forest Service recognizes the safety threats of wildfire and should actively pursue all management strategies near-term and long-term in order to prevent wildfire. The approval of the full scope of the project is vital for forest health but also public safety. It is reiterated time and time again within the EA and DN that long term fire treatments will greatly improve forest resiliency to wildfire and the need for long term forest projects. Best available science must be used in the decisions of these long term projects. The full proposal for reforestation on 68,000 acres, 925 miles hazard tree felling removal and fuel break maintenance needs to be approved and implemented as soon as possible..

### **Water**

Pg. 51 of DN “In the long term, project road maintenance and repair would reduce road-based contributions to sediment load throughout project watersheds, compared to current estimates”

As water issues and drought continue to arise in the Western United States, specifically California and surrounding the Sierra National Forest, projects to improve watershed quality need to move forward. Wildfire is the greatest harm to watersheds and treatments to prevent wildfire that are proven beneficial needs to be made priority. nearly 95% of incoming water has flowed into the Pacific Ocean, according to data from the U.S. Bureau of Reclamation.

Furthermore, sediments from runoff after wildfires and from impaired tributaries and poorly maintained roads can fill lakes and streambeds This leads to obstructed natural stream flows which adversely affect navigation, recreational use, and valuable aquatic habitat.

### **Roads**

Pg. 15 Purpose and Need and Proposed Action “Some of these activities would only be successful or feasible if implemented within years immediately post-fire – therefore, the next 5 to 7 years is a critical timeframe. Due to the overarching need for urgency and increase in scale, post-fire management needs to be creative, address bigger areas, and occur more quickly than in the past.”

USFS needs to protect the current 1,500 miles of forest system roads. BRC would like to see road maintenance and improvements be implemented in the maximum amount of area and mileage as well as temporary roads be analyzed into the forest road system permanently. Resiliency and forest health goals for 53,000 acres and 150 miles of forest roads should also be fully approved.

Recent studies show dust has a “cooling effect” on the planet especially when the dust is on dark surfaces such as forests.<sup>1</sup> “We show desert dust has increased, and most likely slightly counteracted greenhouse warming, which is missing from current climate models,”

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[https://www.nature.com/articles/s43017-022-00379-5.epdf?sharing\\_token=B3d9LsAt-ABoiaa4qBwuJtRgN0jAjWel9jnR3ZoTv0Mmj4DEWLGEcE3jE8ziMCHTXannQCeO30A6am4fvbGoeYUnHfdUZN-AyPIJvS0ndjlUtMIsN9bcU4zEOPtroRu8NU4TteUUhZXHCmLwv1GkVK2o vIMkv4sRo204TdlTqN809W6YAZZFPLWovB5lj1CMz3f62kRMsUR9vg8yydWhhAZ7PWEO4LdrNR8Qpw\\_EYQ%3D&tracking\\_referrer=www.cbsnews.com](https://www.nature.com/articles/s43017-022-00379-5.epdf?sharing_token=B3d9LsAt-ABoiaa4qBwuJtRgN0jAjWel9jnR3ZoTv0Mmj4DEWLGEcE3jE8ziMCHTXannQCeO30A6am4fvbGoeYUnHfdUZN-AyPIJvS0ndjlUtMIsN9bcU4zEOPtroRu8NU4TteUUhZXHCmLwv1GkVK2o vIMkv4sRo204TdlTqN809W6YAZZFPLWovB5lj1CMz3f62kRMsUR9vg8yydWhhAZ7PWEO4LdrNR8Qpw_EYQ%3D&tracking_referrer=www.cbsnews.com)

## Habitat

Habitat loss is the largest threat to wildlife and wildfire is the largest threat to habitat loss. One wildfire could cause an entire species to go extinct. We support the Forest Service in properly managing the forests to prevent wildfires that could cause harm to wildlife. However, many conservation groups actively litigate forest projects that help mitigate fires. One of the best things that can be done to protect wildlife and habitat is to actively manage forests to prevent wildfires.

Pg 23 Purpose and Need and Proposed Action “In the short term, (less than 10 years) and especially without post-fire treatments, young trees in a recovering burned area may be vulnerable to a high-intensity fire, delaying or precluding the return of historical mature-forest composition and structure. If no action is taken, snags would continue to fall and increase the surface fuel loading in all size classes.”

### **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 “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 (9<sup>th</sup> 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 2021. Outdoor recreation now accounts for \$821 billion 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. Non-motorized forms of recreation account for \$33 billion in economic value. Gear that is used in all forms of recreation accounts for \$52 billion. Motorized forms of recreation account for a shocking \$78 billion in economic value.

Any sales from forest treatments will also help stimulate the local economy. We believe the USFS should move forward with timber harvest on the full 5,800 acres. The proposed project provides local jobs and brings in local revenue. BRC supports these efforts and supports any comments made by locals and members who approve these projects for local economic benefit.

Pg. 31 Purpose and Need and Proposed Action “It is anticipated that removal of salvaged materials would need to occur with 3 years. Commercial value would reduce the costs of fuels reduction and site preparation work and may provide funds to support the associated restoration activities.”

BRC would like to note that the Florence and Edison lake areas, sand flats by Red and Coyote Lakes which lend access to fishing, hunting, hiking, dispersed camping and other recreational values need more intensive planting and treatment and the economic effects and recreational value of these areas need to be strongly considered.

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BRC is also concerned with the Jose Basin closures. The economic effects of having closures of uses, areas, roads trails and overall access should not be taken lightly. These economic benefits are important to users and locals and should be thoroughly addressed by the USFS.

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.