



File Code: 1570

Date: August 4, 2011

Paul Turcke  
Moore, Smith, Buxton & Turcke, CHTD  
950 W. Bannock Street, Suite 520  
Boise, ID 83702

Dear Mr. Turcke,

On June 20, 2011, you filed a Notice of Appeal (NOA) on behalf of **NOVA Guides** pursuant to 36 CFR 215. White River Forest Supervisor Scott Fitzwilliams signed the Record of Decision (ROD) approving Alternative G Modified of the White River Travel Management Final Environmental Impact Statement (FEIS) on March 17, 2011. Pursuant to 36 CFR 215.17 an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR 215.18 - Formal review and disposition procedures. I have reviewed the appeal record, including your written NOA, the ROD, FEIS, SDEIS, DEIS and supporting documentation. I have weighed the recommendation from the Appeal Reviewing Officer and incorporated it into this decision. A copy of the Appeal Reviewing Officer's recommendation is enclosed. This letter constitutes my decision on the appeal and on the specific relief requested.

### **FOREST ACTION BEING APPEALED**

The White River National Forest travel planning effort is an extension of earlier planning processes to both update the WRNF travel management direction and to align the travel strategy on the Forest within the scope of the White River Forest Plan. Due to public input and the complexity of the subject matter, the decision was made to separate the two plans and develop the Travel Management Plan after the completion of the Forest Plan in 2002.

In November 2005 the National Travel Management Rule (36 CFR 212) was published revising regulations in response to the growing popularity and capability of off-highway vehicle use of the national forests and the effects of that use on the environment. Subpart B of the final Travel Management Rule requires designation of roads, trails, and areas for motor vehicle use.

The purpose of the Forest Supervisor's action is to implement the 2005 Travel Management Rule through selection of a designated road and trails system, allowable uses on those routes, and winter motorized travel uses by area or designated routes. Identified needs are to update the official designated transportation system, identify what is not part of the official travel system, and designate a travel system aligned with the need to balance social and resource demands.



The decision will:

- Designate the official White River National Forest system road and trail network.
- Designate 1,420 miles of road to be open to licensed vehicles of which 872 miles will be open to licensed and unlicensed vehicles.
- Designate 1,613 miles of road and trail to be open to licensed motorcycles of which 1,066 miles will be open to unlicensed motorcycles.
- Designate 1,023 miles of road and trail to be open to motorized vehicles less than 50" in width (ATVs).
- Allow mechanized (bicycle) travel on 2,172 miles of road and trail.
- Designate 3,373 miles of road and trail for horseback riding and 3,592 miles for hiking. The Forest is an open forest for horse and hike travel.
- Incorporate 225 miles of previously unauthorized routes into the travel system.
- Decommission 519 miles of system routes.
- Authorize those areas where motorized use over snow can occur in accordance with 36 CFR 212, Part C. There will be 695,723 acres of open areas for motorized use; 517,693 acres of restricted areas where motorized use over snow can occur on designated routes; and within restricted acres, 198 miles of over snow routes will be authorized.
- Exempt in the final travel order and motor vehicle use maps, use and occupancy of National Forest System lands and resources pursuant to a written authorization issued under federal law or regulation.
- Not allow off road travel for game retrieval.
- Allow off road parking for special uses such as forest product gathering when specified and issued by permit.
- Allow parking a motor vehicle on the side of the road up to 30 feet from the edge of the road surface for all uses other than dispersed camping or as specified by a permit.
- Allow off road camping and parking; it must not damage the land, vegetation or streams and no live trees may be cut.
- Allow access for permitted activities on National Forest System lands independent of general public access. Individuals or groups with special permits will be allowed to conduct their business according to the conditions outlined in their permits.

## **APPEAL REVIEWING OFFICER'S FINDINGS AND RECOMMENDATION**

The Appeal Reviewing Officer, Richard Cooksey, Deputy Forest Supervisor Medicine-Bow/Routt National Forest, found that:

- Documentation in the record demonstrated compliance with applicable laws, regulations and policies in light of the appeal issues raised by the appellant: A) the decision improperly restricts permitted operations; B) the plan lacks legally required route specific analysis; C) the decision contains numerous flaws regarding decommissioning; D) the socioeconomic effect analysis is legally deficient; E) analysis of technical issues is deficient; F) the cumulative effects analysis is legally deficient; and G) specific decision components will adversely impact NOVA Guides.

- With regard to Appeal Issue A) the decision and analysis demonstrate that the effects of travel management o permitted outfitters was considered, however there is an opportunity to clarify how the decision may be implemented regarding routes with outfitter permitted use, Appeal issue C) the decision to designate a travel management strategy for roads and trails was supported by the record, but the Forest Supervisor erred in concluding that no further NEPA on the decommissioning and rehabilitation methods would be needed, and Appeal Issues D) the decision to decommission closed roads and trails was supported by the record, but the Forest Supervisor erred in omitting from the FEIS the socio-economic analysis section.

ARO Cooksey recommended affirmation of the Forest Supervisor's decision on all issues, with instruction to work with the outfitters and guides who hold Special Use Authorizations to determine which routes are available for their use and/or what mitigation measures may be applied to continue the permitted use and to consider additional site-specific NEPA analysis as appropriate, prior to decommissioning roads or trails as identified in Appeal Issue C, and instruction to post and make available the socio-economic analysis section of the FEIS as identified in Appeal Issue D. Requested relief to 1) withdraw the decision; 2) remand the decision for further analysis; and 3) utilize the appeal process to facilitate additional analysis, should be denied.

## **APPEAL DECISION**

I agree with the ARO's analysis as presented in the enclosed letter. All appeal issues raised have been considered. I affirm the Forest Supervisor's decision to implement Alternative G Modified, along with the instruction pursuant to the ARO's recommendations on Appeal Issues C and D. I deny requested relief to withdraw or remand the decision for further analysis.

The project may be implemented on, but not before, the 15<sup>th</sup> business day following the date of this letter (36 CFR 215.9(b)). My decision constitutes the final administrative determination of the Department of Agriculture (36 CFR 215.18(c)).

Sincerely,

*/s/ Randall Karstaedt*

**RANDALL KARSTAEDT**

Appeal Deciding Officer

Acting Deputy Regional Forester, Resources

Enclosure

cc: Wendy Haskins

Scott Fitzwilliams

Cindy Dean



File Code: 1570-1

Date: August 3, 2011

Route To:

Subject: White River National Forest Travel Management Plan,  
Appeal No. WR 11-02-00-0043 (215)

To: Appeal Deciding Officer

As the designated Appeal Reviewing Officer, this is my recommendation on disposition of the appeal filed by the **NOVA Guides** under the regulations at 36 CFR 215. Forest Supervisor Scott Fitzwilliams signed the Record of Decision (ROD) for the White River National Forest on March 17, 2011, and a legal notice of the decision was published in the newspaper of record on May 4, 2011. My recommendation is based on the appeal and the decision documentation (36 CFR 215.18(a)).

## BACKGROUND

The White River National Forest (WRNF) travel planning effort is an extension of earlier planning processes to both update the WRNF travel management direction and to align the travel strategy on the Forest within the scope of the White River Forest Plan (Forest Plan). Due to public input and the complexity of the subject matter, the decision was made to separate the two plans and develop the Travel Management Plan (TMP) after the completion of the Forest Plan. Information gathered during the initial effort was used in this decision. This TMP adheres to the 2002 Forest Plan and does not amend the Forest Plan (FEIS, Summary p. 2).

On August 27, 2002, the Forest Supervisor of the WRNF published a Notice of Intent in the Federal Register for a forest-wide TMP and invited public comment until October 31, 2002. The agency held six public meetings in September 2002 and open houses were held where many members of the public provided input.

In November 2005, the National Travel Management Rule (36 CFR 212) was published revising regulations in response to the growing popularity and capability of off-highway vehicle use of the national forests and the effects of that use on the environment. Subpart B of the final Travel Management Rule requires designation of roads, trails, and areas for motor vehicle use. Before December 9, 2008, the travel management regulations for Subpart B did not require the completion of Subpart A (identification of the minimum road system) prior to implementation of Subpart B's designations. The Travel Management Rule does not require the Forest Supervisor to reconsider prior decisions authorizing motor vehicle use on the existing National Forest Transportation System (NFTS).

On July 28, 2006, the WRNF prepared and released for a 90-day public comment period the White River National Forest Travel Management Plan Draft Environmental Impact Statement (DEIS). The DEIS examined three action alternatives along with the no-action alternative based on key issues identified during scoping.





The DEIS incorporated direction from 36 CFR 212 Subpart B of the 2005 Final Rule for Travel Management: Designation of Roads, Trails, and Areas for Motor Vehicle Use (travel rule). The WRNF staff members held meetings with individuals, interest groups, and government representatives during this time.

On November 7, 2008, the WRNF released the White River National Forest Travel Management Plan Supplemental Draft Environmental Impact Statement (SDEIS) for public review and comment. Based on the original alternatives in the DEIS, the ability to better incorporate travel rule direction, and response to public comments received, the deciding official identified the preferred alternative in the SDEIS. Staff members again met with individuals, interest groups, and government representatives. Comments on this plan were accepted until January 6, 2009.

On March 17, 2011, the Forest Supervisor signed a Record of Decision (ROD) for travel management pursuant to the travel rule on the WRNF.

Pursuant to 36 CFR 215.17, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

## **RELIEF REQUESTED**

Appellants respectfully request the Appeal Deciding Officer expeditiously grant any and all of the following relief from the Decision:

- (1) Withdraw the Decision;
- (2) Remand the Decision for further analysis; and
- (3) Utilize the Part 215 and 251 appeal processes to facilitate additional analysis of at least portions of the decision (such as specific routes, trail systems, or decision components), with implementation staged or delayed as appropriate.

We specifically request the opportunity for informal disposition, oral presentation, and or any procedural opportunities provided for or consistent with the applicable regulations.

## **ISSUES AND DISCUSSION**

### **APPEAL ISSUE A: The Decision Improperly Restricts Permitted Operations**

Appellant states: "The Decision fails to disclose the effect of route closures on our operations. These effects are distinct and require separate analysis for permitted use as well as general public use...A travel plan must at least acknowledge and rationally discuss the balance between access considerations and viability of ongoing commercial operations. It is obvious that the Decision addresses a perceived need to address resource and other concerns to restrict or eliminate certain uses at certain locations. However, the Forest is similarly obligated to at least consider, and arguably maintain, the commercial viability of specially permitted operations. *See*, 36 CFR § 251.54 (e)(5)(iv). The Decision fails to do this."

#### **Rule:**

36 CFR 212.51(a) - Motor vehicle use on National Forest System roads, on National Forest System trails, and in areas on National Forest System lands shall be designated by vehicle class and, if appropriate, by time of year by the responsible official on administrative units or Ranger

Districts of the National Forest System, provided that the following vehicles and uses are exempted from these designations:

(8) Motor vehicle use that is specifically authorized under a written authorization issued under Federal law or regulations.

36 CFR 212.55 - In designating National Forest System roads, National Forest System trails, and areas on National Forest System lands for motor vehicle use, the responsible official shall consider effects on National Forest System natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses of National Forest System lands, the need for maintenance and administration of roads, trails, and areas that would arise if the uses under consideration are designated; and the availability of resources for that maintenance and administration.

36 CFR 212.55 (d) *Rights of access*. In making designations pursuant to this subpart, the responsible official shall recognize: (1) Valid existing rights; and (2) The rights of use of National Forest System roads and National Forest System trails under §212.6(b).

#### 36 CFR 215.14 Appeal Content

- (a) It is the appellant's responsibility to provide sufficient project or activity-specific evidence and rationale, focusing on the decision, to show why the Responsible Official's decision should be reversed (paragraph (b)(6–9)).
- (b) The appeal must be filed with the Appeal Deciding Officer §215.8 in writing. At a minimum, an appeal must include the following:
  - (6) Any specific change(s) in the decision that the appellant seeks and rationale for those changes;
  - (7) Any portion(s) of the decision with which the appellant disagrees, and explanation for the disagreement;
  - (8) Why the appellant believes the Responsible Official's decision failed to consider the substantive comments; and
  - (9) How the appellant believes the decision specifically violates law, regulation, or policy.

#### **Discussion:**

The 'Forest Road and Trail Designation' section of the ROD states: "*Of these roads and trails, most are open to the public. Some are under special-use permit and restricted to use by the permit holder. These permits have been granted under previous decisions (ROD, p. 17).*"

The ROD further states, under the 'Camp Hale' section: "*Based on the opportunity for partnerships with interest groups and outfitters and guides to help institute and maintain an OHV Ranger program, I am reserving the option to authorize the following in the Camp Hale and Vail Pass areas: motorized access for all vehicles on 702 Resolution, 703 Homestake, 709/16 Shrine Pass, 714 East Fork Eagle, 715 Pearl Creek, 728 Lime Creek, 747 Wearyman, and 751 Ptarmigan roads. In addition, the section of 702 Resolution road from Pando trailhead to the intersection of 716 Camp Hale and N702W would be open as ATV trails. Authorizing the designations would be based on my assessment of proposals and adequate long-term funding and other support needed for a viable OHV Ranger Program, including but not limited to all resources such Forest Service OHV rangers, program administration, supplies, and equipment necessary to run the program*" (ROD, p. 21).

The Final Environmental Impact Statement (FEIS) states: “Any modifications to ski areas, Nordic centers, or any other special use area will be conducted under the respective permit, including initiating the NEPA process when appropriate and updating operating plans for implementation (FEIS, p. 30).”

The FEIS further states: “In addition to the downhill ski areas, many other special-use permittees, such as resorts, outfitters and guides, huts, and owners of in-holdings, may be permitted to construct and maintain roads and trails specific to their operations (permitted routes). Many of these permitted routes may not be open to the general public. Permitted routes are generally analyzed through processes associated with individual permits (FEIS, pp. 94-95).”

Page 119 of the FEIS states: “Other special use permits for road use and access can be issued for outfitter and guide operations. Approximately 197 additional miles of road and 14 miles of trail are currently managed under the special use permit system on the forest.”

Tables 3.17 and 3.18 of the FEIS demonstrate that the miles of road managed under special use permit would increase from 197 miles in Alternative G to 201 miles in Alternative GM. These tables further demonstrate that the miles of trail managed under special use permit would increase from 14 in Alternative G to 46 in Alternative GM (FEIS, p. 125).

The ‘Special Areas and Permits’ sections of both the ROD and the FEIS state: “Access for permitted activities (such as outfitter and guide operations) on National Forest System lands is independent of general public access. Individuals or groups with special permits are allowed to conduct their business according to conditions outlined in their permits. If a permit does not stipulate exemptions to the forest’s general travel regulations, the general travel regulations will apply (ROD, p. 21; FEIS, pp. 29-30).” That same section of the ROD goes on to state: “Special use permits may be issued for specific uses and access needs across the forest” (p. 21).

In addition to the above information, the record demonstrates that White River National Forest personnel met with members of Nova Guides, Inc. on May 27, 2009 to discuss their concerns. They also responded to the appellants comments regarding routes within their permitted area stating: “The final alternative has not been modified to allow unlicensed vehicles in these areas. This is based on the small network of roads, lack of a quality riding experience, and the fact access is allowed for licensed vehicles. However, holders of special use permits may be allowed limited use for guided tours” (Response to Site-Specific Comments: Eagle-Holy Cross Ranger District, Eagle/Holy Cross-16 – Eagle/Holy Cross-17).

The aforementioned information demonstrates the White River National Forest’s consideration of the effect of the travel management decision on Nova Guides, Inc.’s permitted activities.

Further discussion of this issue is difficult since Nova Guides, Inc. did not provide sufficient site-specific information for the reviewer to understand this particular issue. For instance, they list several activities they are permitted for and several roads they are concerned with in the decision; however, Nova Guides, Inc. provides no indication of what type of use they are permitted for on the specific routes, so understanding the specific concern is not possible and would be speculative.

Further, access to travel routes not designated in the travel management plan, but desired for use by Nova Guides, Inc. would require analysis under 36 CFR 251 Subpart B – Special Uses and are independent of the travel management plan.

**Recommendation:** I recommend the Forest Supervisor's decision be affirmed on this issue.

### **APPEAL ISSUE B: The Plan Lacks Legally Required Route Specific Analysis**

Appellant states: "The Decision is fatally flawed through the total omission of this detailed analysis for any route. Instead, the approach is to discuss impacts or issues at the broadest level, if at all. Individual route options (FEIS Attachment 1) and eventual conclusions (FEIS Attachment 2) are displayed in tabular form. However, these tables present merely conclusions, without attempting to even summarize analysis. For some routes, it appears that different prescriptions are created for different route segments, which are extremely difficult (if not impossible) to ascertain from the information presented.

This approach violates NEPA procedures as well as the substantive requirements of NFMA and the 2005 Travel Management Rule ("TMR"). [T]he agency must inform the public of the options being considered, identify relevant issues and information, rationally discuss them, and present a reasonably discernible path to the agency's final choice. These steps are simply not attempted in the Plan."

#### **Rule:**

40 CFR 1502.15 - The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration.

40 CFR 1502.16 - This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives, direct and indirect effects, including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.

National Forest Management Act, 16 U.S.C. 1608(a) - The Congress declares that the installation of a proper system of transportation to service the National Forest System, as is provided for in sections 532 to 538 of this title, shall be carried forward in time to meet anticipated needs on an economical and environmentally sound basis, and the method chosen for financing the construction and maintenance of the transportation system should be such as to enhance local, regional, and national benefits ....

36 CFR Part 212, Subpart B - Subpart B describes the requirements for designating roads, trails, and areas for motor vehicle use and for identifying designated roads, trails, and areas on a motor vehicle use map (MVUM).

FSM 7700 and FSH 7709.55 – Travel Management - Travel analysis (FSM 7712; FSH 7709.55, ch. 20) is used to ensure that road management decisions are based on consideration of environmental, social, and economic impacts.

FSM 1920 – The responsible official shall provide a forest transportation system that best achieves the desired conditions identified in the applicable land management plan.



**Discussion:**

Neither NEPA, its regulations, NFMA nor the 2005 Travel Management Rule require a detailed discussion of each route included and excluded in a travel management plan. Such detail would generate an unmanageably large rather than succinct EIS and would essentially exponentially multiply the number of alternatives considered in detail to consideration of every combination. *“The Forest Service has inventoried and mapped all existing roads and trails for consideration under White River National Forest jurisdiction. These include forest system roads and trails as well as unauthorized roads and trails. Sources included previous inventories, Forest Service field managers, and information submitted by the public. Inventory of winter use was aided by public input as well (FEIS, p. 46).”* The WRNF staff reviewed each route on a site-specific basis, and the rationale behind each decision on a route is stated in the last 4 columns of the table in FEIS Attachment 2. (FEIS Attachment 2, pp. A2-1 to A2-102). The rationales are coded, and keys to these codes are in the introduction to FEIS Attachment 2. (FEIS Attachment 2, pp. A2-ii to A2-iv).

In the FEIS, the Affected Environment and Environmental Consequences section in Chapter 3 discusses the overriding scientific and analytical basis for the decisions to include or not include a route in the authorized forest transportation system, categorized by individual environment or resource, including direct, indirect, and cumulative effects of implementing the alternatives and applicable mitigation measures. (FEIS, p. 46). The decision on which routes to include in the TMP was *“partially determined by the following criteria: need for the route, the route’s importance in the overall network, the route’s fit with the overall recreation management goals for an area, the route’s fit with other management goals for an area, and the route’s current condition,”* along with public comments (FEIS, p. 33). The administrative record contains more detailed analysis of the designated routes by alternative and resource area (/06\_GIS/FEIS). The FEIS Alternatives Chapter also presents the alternatives in comparative form, defining the differences amongst the alternatives and providing a clear basis for choice among options for the decision maker. (FEIS, pp. 25-45)

WRNF did discuss the rationale behind the decision on certain routes with Nova Guides, Inc. by addressing Nova Guides, Inc.’s routes of concern noted in its comment. (FEIS Attachment 3, Response to Site-Specific Comments, pp. Eagle/Holy Cross-1, 16, 17)

**Recommendation:**

I recommend the Forest Supervisor’s decision be affirmed on this issue.

**APPEAL ISSUE C: The Decision Contains Numerous Flaws Regarding Decommissioning**

Appellant states: “The Decision outlines an unprecedented decommissioning campaign. It is flawed on several levels. From a policy perspective, the agency has sadly chosen to reject a legacy of trail mileage which has provided many benefits to diverse users and could continue to do so long into the future. Procedurally, decommissioning actions are not validly disclosed or described. Substantively, there is insufficient justification for any decommissioning project.



Distinct from the failure to disclose decommissioning actions is the lack of meaningful discussion about whether decommissioning should occur for individual routes. The failure to analyze decommissioning issues/alternatives implicates many issues. Certainly physical resource impacts enter the analysis. These include direct impacts such as those associated with removing culverts, "recontouring" roadbeds/stream crossings, or similar actions. They also involve indirect impacts, such as wildlife effects based on reductions, displacements or other changes to access associated with decommissioning. Additionally, impacts to the "human environment" are involved. It is obvious and perhaps primarily intended to reduce motorized vehicle access through decommissioning. But also impacted, intentionally or unintentionally, is nonmotorized access in trails/areas of decommissioning. The agency simply cannot comply with its numerous substantive requirements without some discussion that meaningfully involves the public, to analyze available options.

Aside from immediate impacts associated with decommissioning, the Forests "designate or decommission" approach is fundamentally inconsistent with the Travel Management Rule. The TMR is intended to be a dynamic and evolving process, not a "one time only" edict creating an inflexible transportation system."

**Rule:**

FSM 7715.78 states, if unauthorized routes are not designated, motor vehicle use on these routes is prohibited (36 CFR 261.13). Consider addressing restoration and decommissioning of unauthorized routes when making travel management decisions.

40 CFR 1502.16 - The environmental consequences section of an EIS will include the environmental impacts, including direct and indirect effects, of the alternatives, including the proposed action.

**Discussion:**

One of the objectives of travel management planning is to identify a transportation system (roads and trails) that is truly necessary and to decommission the remaining system roads and trails that are no longer needed. (FEIS, p. 132) It is also important to consider decommissioning unauthorized roads that are not incorporated through the travel management planning process especially when use of the route causes resource damage, harasses wildlife, or endangers public safety (FEIS, p. 132). One of the decisions to be made with TMP is determining which routes will be decommissioned and rehabilitated (FEIS, p. 30). One of the objective strategies in the Forest Plan is to decommission 22 miles of unneeded road per year. The Travel Plan will identify specific system roads that meet the criteria for decommissioning (WRNF TMP NOI, 8/27/02, p. 54997).

The decision to decommission some existing routes on the forest was disclosed and discussed throughout this EIS process and every action alternative involved decommissioning existing roads on the forest. (DEIS pp. 2, 28-31, Chapter 3) Decommissioning roads was a decision to be made in the Notice of Intent for the TMP (WRNF TMP NOI, 8/27/02, p. 54997). The impact on the "human environment" was discussed and was considered in the balancing of interests along with public safety, resource damage, and availability of resources to maintain the travel system, see discussion in D and E below. The need to decommission routes is justified through the discussions of the reasoning behind decommissioning and by FSM 7715.78.

All users of the WRNF will undoubtedly not agree with every decision on every route on the WRNF; however, the fact that Nova Guides, Inc. would have made different decisions does not make this decision flawed. As previously stated at B, no law, regulation or policy requires a detailed analysis of each route as part of the process of formulating a forest's travel management plan. As also stated above at B, the public and Nova Guides, Inc. had opportunity to comment on the travel management plan and the decommissioning proposed during public comment periods, and the forest's staff specifically considered and responded to those that Nova Guides, Inc. mentioned in its comment letter.

The assumptions on page 46 and 47 of the FEIS address several of the appellant's concerns. Assumption 2, "Unauthorized or user-created roads, trails, and areas are not National Forest Transportation System facilities;" however, us these user created routes were considered for inclusion in the National Forest Transportation System along with the authorized routes during this planning process. (FEIS, p. 8-9, 46) Assumption 3: "The Forest Service will continue to make changes to the National Forest Transportation System as needed. Changes can be initiated through public or government proposals. These changes will require consideration through the NEPA process." (FEIS, p. 47) Thus, the travel management planning for the WRNF is a dynamic and on-going process.

Assumption 5, that decommissioning will allow routes to return to a natural state similar to surrounding areas was applied in the effects analysis in each resource section in the FEIS Chapter 3 (FEIS p. 46). Road and trail decommissioning was discussed in the relevant resource sections throughout Chapter 3 of the FEIS (FEIS pp. 50-215) and in the analysis (/06\_GIS/SDEIS/analyses\_SDEIS). Many resource sections in the FEIS Chapter 3 used the miles of roads or trails decommissioned as a metric to measure the effects of the alternatives on key indicators. Chapter 2 of the FEIS (pp. 42-43, table 2-6) includes a comparison of effects of land and resource protection, including decommissioning, by alternative. The effects of decommissioning each route are not discussed individually, but are included in the effects analysis of the total miles to be decommissioned in each alternative (/06\_GIS/SDEIS/analyses\_SDEIS). Some decommissioning activities listed could include ground disturbing activities (e.g., pulling culverts, recontouring slopes). Although decommissioning has initial costs; once a route is decommissioned any resource impacts or administrative costs should essentially be eliminated. (DEIS p. 16; FEIS, p. 16) Thus, this direct effect of implementing the travel management plan was considered.

**Recommendation:**

I find that the decision to decommission unneeded roads and trails is supported by the record, but that the Forest Supervisor erred in concluding that no further NEPA on the decommissioning and rehabilitation methods would be needed. I recommend the Forest Supervisor's decision be affirmed on this issue, with instruction to consider additional site-specific NEPA analysis, as appropriate, prior to decommissioning roads or trails.

**APPEAL ISSUE D: The Socioeconomic Effect Analysis is Legally Deficient**

Appellant states: "The Decision fails to adequately consider socioeconomic effects of the various alternatives...The FEIS does not even contain a section on socioeconomic effects. *See, generally*, FEIS Chapter 3; FEIS Table of Contents at i. Such a section is common, perhaps universal, in typical agency practice, and was present in the DEIS and SDEIS here.

The Plan seemingly uses high and purportedly increasing demand as an excuse for restrictions, but ignores the necessary discussion of how the ensuing restrictions, assuming they are effective, will impact socioeconomic factors. The Decision irrationally focuses on selective components of a zero sum analysis.

Whatever analysis may be appropriate for the broader context, there is virtually no discussion in the narrow context of impacts to Nova Guides. The ROD apparently avoids this issue entirely, suggesting that specially permitted access is distinct from and not addressed by this project. *See*, ROD at 23. This approach cannot be rationally defended.”

**Rule:**

40 CFR 1502.16, Environmental Consequences - directs the analysis and discussion of impacts effects of the proposed action and the alternatives.

40 CFR 1508.8, Effects - details the range of effects that must be considered, including social and economic.

40 CFR 1508.14, Human Environment - states that when “economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.”

40 CFR 1508.25, Scope - directs that the analysis include direct, indirect and cumulative impacts.

**Discussion:**

The socio-economic section was inadvertently omitted from the FEIS. However, the socio-economic discussion was included in the DEIS beginning on page 89 and in the SDEIS beginning on page 102. Consequently, the public was allowed opportunity to comment on these materials during the public review periods for the DEIS and the SDEIS (40 CFR 1503, Commenting). The comment periods for the DEIS and SDEIS were initiated via publications of Notices of Availability (NOA) in the Federal Register on July 28, 2006 and November 7, 2008, respectively.

Although the socio-economic section is missing from the documentation of the FEIS, a socio-economic ‘report’ is included in the project record for the FEIS (09\_FEIS/04\_FEIS/working/WRNF\_TMP\_FEIS\_ch3\_social\_drafr\_061510.docx). This report contains similar information to that documented in the DEIS and SDEIS. The major content difference between the unpublished report and the previous versions included in the DEIS and SDEIS is that the unpublished report includes a brief discussion of Alternative GM. This unpublished socio-economic report for the FEIS states, “Changes were made to address issues raised during comment. These comments did not drive a large change from the direction the preferred alternative presented (p. 6).” In a response to comments, the Forest referred to the socio-economic section in Chapter 3, demonstrating their reliance on the unpublished socio-economic report the Forest expected to include in the FEIS. These statements demonstrate that the socio-economic analysis conducted earlier in the EIS process and the conclusions from that analysis did not change appreciably from the proposed FEIS language; there were no comments received during the review of the SDEIS that directly raised socio-economic concerns.

**Recommendation:** I recommend the Forest Supervisor's decision be affirmed on this issue with instruction. Given that disclosure of the socio-economic effects was included in the two previous draft EIS's, it appears to me that its omission from the FEIS may have been inadvertent. I instruct the Forest Supervisor to post the socio-economic section to their Forest website and provide to the appellant as an errata to the FEIS. I recommend that a letter be sent to everyone who commented on the FEIS notifying them of posting of the document on the website and offering to send the document upon request.

### **APPEAL ISSUE E: Analysis of Technical Issues is Deficient**

Appellant states: "The Decision lacks meaningful analysis of technical issues including physical resource and other "human environmental" factors. Agencies cannot ask the public to accept their conclusions on faith alone, but must identify specific references, identify methodologies used and provide, where applicable, hard data to allow the public to meaningfully discern the agency's analytical path to a decision.

The technical analysis is largely presented in FEIS Chapter 3 and runs afoul of these principles. Most sections provide few, if any, citations to any reference material. Where references are cited, they are often for very broad or general issues, and lacking for subsequent and more critical steps in the agency analysis. *See, e.g.*, FEIS at pages 70-71 (recreation visitation); page 82 (undocumented narrative discussion about "changing to a visitor focus"). Finally, virtually none of the discussions provide hard data or other comparable material to facilitate meaningful public review.

For many routes affecting Nova Guides' operation, code 62 is provided, which is the extremely broad "provide for user safety and/or recreation management." In the absence of identification of specific issues, let alone analysis, this explanation is essentially meaningless. This approach violates basic procedural requirements by which agency conclusions must be presented and documented. These procedural defects condemn the Decision's technical analysis."

#### **Rule:**

40 CFR 1502.14 Alternatives including the proposed action.

40 CFR 1502.21 Incorporation by Reference - Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described

40 CFR 1502.24 Methodology and Scientific Accuracy - Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.

#### **Discussion:**

Appellant contends that the FEIS does not provide valid sources, methodology, hard data, or citations to support the analysis. Every resource section of Chapter 3 of the FEIS pg. 46 identifies Key Indicators/Measures and direct/indirect effects. Chapter 3 of the FEIS also reveals numerous citations for scientific research and studies related to that section. These citations meet the intent of 40 CFR 1502.24. Several examples of incorporation by reference were found in Chapter 3 which complies with 40 CFR 1502.21.



FEIS Chapter 2 pg. 25-45 outlines the methodology used in developing alternatives, features common to all alternatives, the alternative development process, alternatives considered but eliminated from detailed study, and alternatives considered in detail. This is a very clear and concise method of analysis that is well recognized and accepted as the norm under 40 CFR 1502.14.

Literature cited and other references are also listed in Appendix C which also meets the intent of 40 CFR 1502 "An agency may place discussion of methodology in an appendix." I find the FEIS and ROD fully complied with CEQ's NEPA regulations as they pertain to reference citation, methodology, and technical analysis.

**Recommendation:**

I recommend the Forest Supervisor's decision be affirmed on this issue.

**APPEAL ISSUE F: The Cumulative Effects Analysis is Legally Deficient**

Appellant states: "The Decision reflects an unusual and flawed procedure as well as unsupportable conclusions regarding analysis of cumulative impacts. The duty to evaluate cumulative impacts in an EIS is "mandatory." 40 CFR § 1508.7

Cumulative effects for recreation management are discussed at FEIS 96-97. However, the discussion focuses on nature and anticipated trends in recreation demand. There is a fundamental disconnect between the above-cited regulatory mandate and the perfunctory yet off-target discussion in the FEIS. To the extent any discussion is presented, it addresses general or public lands use of the Forest, and completely avoids discussion of impacts to permitted uses or to Appellant's specific operations.

While it appears almost certain that the Decision will have impacts to public use and our operations, it is uncertain what those effects will be and the manner in which they will develop. The complex interrelationships creating and influencing such effects are among the reasons why a meaningful cumulative effect discussion is required by NEPA. Unfortunately, the FEIS instead reflects a "check the box" mindset that relegates the cumulative effects section to a formality justifying a decision already made."

**Rule:**

40 CFR 1508.7- 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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR 1508.25(c)(3) – *Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. [A]gencies shall consider ...

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) *cumulative*.



**Discussion:**

Appellant contends the cumulative effects analysis is deficient. Every resource section in Chapter 3 of the FEIS pg. 46-265 contains a Cumulative Effects section. These sections address past, present, and future potential effects of the alternatives. In the FEIS, the Affected Environment and Environmental Consequences section in Chapter 3 describes each resource section for Key Indicators/Measures and direct and indirect effects of the transportation system (FEIS, p. 46).

The designation of the WRNF roads and trails system began with taking stock in the current road network in the forest; an effort that was significantly aided with public comments. The WRNF undertook an extensive effort to spatially locate all of the NFTS (roads and trails), and the unauthorized routes which showed current or past motor vehicle use and which could be interpreted as travel ways for motor vehicles (/06\_GIS and /14\_District Files).

The WRNF then developed alternatives which designated roads and trails. Designation of routes was partially determined by the following criteria: need for the route, the route's importance in the overall network, the route's fit with the overall recreation management goals for an area, the route's fit with other management goals for an area, and the route's current condition.(FEIS, Chapter 2, Alternatives, pg 33)

The purpose of the TMP was to identify an official designated travel system with the goal of balancing the physical, biological, and social values associated with the WRNF (FEIS, p. 8). Each alternative analyzed in the FEIS represents a potential transportation system with a different combination of routes for the various uses. Attachment 2 of the FEIS includes a table documenting the rationale for designating each route. The FEIS discusses the effects of each alternative for the various resources; including soil, water, wildlife, vegetation and other physical resource impacts in the FEIS Chapter 3(pp. 46-225). The effects analysis includes direct, indirect and cumulative effects. The effects of each route are not discussed individually, but are included in the effects analysis of the total transportation system for each alternative. The administrative record contains more detailed analysis of the designated routes by alternative and resource area (/06\_GIS/FEIS). This approach meets the purpose of the project, FEIS page 8. The FEIS Chapter 2 (p. 41, Table 2-6) includes a comparison of effects on key issues by alternative. The FEIS Chapter 2 also presents the alternatives in comparative form, defining the differences amongst the alternatives and providing a clear basis for choice among options for the decision maker.

I find the Forest made a reasonable effort to gather site specific information and use this information consistent with agency directives in designating roads, trails and areas for motor vehicle use.

**Recommendation:** I recommend the Forest Supervisor's decision be affirmed on this issue.

**APPEAL ISSUE G: Specific Decision Components Will Adversely Impact Nova Guides**

Appellant states: "The Decision states that snow cats will be prohibited from operating on groomed routes unless they are equipped with a grooming implement. ROD at page 17.

This is a change from past practice. We conduct snow cat tours and have not faced this restriction previously. The change has not been properly disclosed or analyzed.

Our operations will also be impacted by changing to camping on the Forest. Under the Decision, it appears that some existing designated campground use will be prohibited. In addition, dispersed camping will be eliminated at some undisclosed number of sites along the thousands of miles of existing routes closed by the Decision. Again, these closures will have varied and rippling effects on many layers. The Decision does not identify or reach meaningful conclusions on any of these topics.

We do appreciate the Forest's effort to create some flexibility in the Camp Hale area. As this is base of operations, we could obviously benefit from, or at least better survive, some of the contemplated changes implementing the Decision such as continuation of use under an OHV Ranger Program. ROD at pg 21. However, there are several problems with this proposal...It has been suggested that Nova Guides would be required to contribute regular and specified funds to the Program. We question whether such a requirement is appropriate or legally defensible. Regardless, it seems likely that successful implementation of such a Program is questionable and will at best be delayed."

**Rule:**

36 CFR 212, Subpart C – *Use by over-snow vehicles*. If the responsible official proposes restrictions or prohibitions on use by over-snow vehicles under this subpart, the requirements governing designation of NFS roads, NFS trails, and areas on NFS lands in §§ 212.52, 212.53, 212.54, 212.55, 212.56, and 212.57 shall apply to establishment of those restrictions or prohibitions.

36 CFR 212.51(b) – Motor vehicle use for dispersed camping or big game retrieval. In designating routes, the responsible official may include I the designation the limited use of motor vehicles within a specified distance of certain forest roads or trails where motor vehicle use is allowed, and if appropriate within specified time periods, solely for the purposes of dispersed camping or retrieval of a downed big game animal by an individual who has legally taken that animal.

**Discussion:**

- ***Snowcat tours***

The Draft EIS, Final EIS, and ROD all stated that: "all grooming operations on winter trails require a permit or other authorization. On National Forest System lands where groomed motorized winter trails are provided by the Forest Service, or through other approved providers, travel is restricted to snowmobiles and non-motorized/non-mechanized uses only. Machines such as snowcats or other tracked vehicles designed specifically for over-snow winter travel are prohibited from these groomed trails unless equipped with and operating a grooming implement that is designed to groom the trail behind the machine. On groomed non-motorized winter trails, travel is restricted to non-motorized/non-mechanized uses only, unless granted through permit or other authorization. The intent of this provision is to maintain the integrity of the groomed snow surface and to protect the investment made in maintaining these winter routes for their intended purpose." (ROD p. 17; FEIS p. 29; DEIS p. 27) The above- quoted language represents

disclosure of the proposed management of over-snow vehicles under this travel management plan and decision.

This travel management plan addresses modes of transportation, such as snowcat use, that were not widely used at the time that the 1984 travel management plan and thus were not significantly regulated in 1984, in addition to the mitigation of the effects of the use of these modes of transportation and the additional requirements in the 2002 revised forest plan and the 2005 National Motorized Travel Regulations. (FEIS p. 67-72, 77) 36 CFR 212.55(a), requires consideration of the resources needed to administer and maintain available recreational opportunities, ensure public safety, and avoid conflicts among uses of the National Forest, among other considerations in designating the authorized travel system, and 36 CFR 212.55 (b) seeks to designate an authorized travel system that will mitigate effects of road and trail use on soil, watersheds, wildlife, and other recreational uses of the forest. One of the chief objectives of this travel management plan and decision was to balance the needs of the variety of users of the White River National Forest. (FEIS p. 66) There are some specific user conflicts that occur in on trails in the winter, among them is the tendency of some vehicles to “tear up the smoothly packed snow surface desired by snowmobilers and cross-country skiers” and the potential damage to vegetation when groomed winter trails are torn up by certain uses. (FEIS p. 72-73) Thus, the rationale for these restrictions on winter use of the forest was analyzed.

It does not appear, upon review of the administrative record and the comments for the DEIS and SDEIS specifically, that the issue as it relates to the requirement for groomed trails for a special use permittee was raised.

- *Designated campground use and dispersed camping*

The ROD discusses dispersed camping and includes the following: “*For most of the forest, dispersed camping with a motor vehicle can occur 300 feet from a designated road. Camping is prohibited within 100 feet of lakes and streams and system trails, unless exceptions are justified by terrain or specific design that protects the riparian and aquatic ecosystems. There are some places on the forest where dispersed camping can only occur in designated sites. This direction is part of the forest plan and compliant with the travel rule. (Forest Plan - General Recreation Standard 1 page 2-34; Travel System Infrastructure Standard 5 page 2-39).*” (ROD, p. 22) The ROD is the document that communicated the decision. This decision does not regulate camping in the White River National Forest but rather the limited use of motor vehicles outside of the authorized route system of the forest when the vehicle is being used to access dispersed campsites. The analysis of public safety of and resource damage caused by use of motor vehicles in association with dispersed camping in the White River National Forest, per the requirements in 36 CFR 212.51(b), and the impact of the decision on demand for dispersed camping is in the Environmental Impact Statements (FEIS, p. 16, 44, 93). Under 36 CFR 212.51(b), the forest has discretion to decide whether and where to allow motor vehicles use in association with dispersed camping.

The FEIS indicates that the areas that vary from the 300 foot radius pattern for motor vehicle use associated with dispersed camping are those areas under “special orders restricting any off-road travel,” in order to comply “with the forest plan and the travel rule (FEIS, pp. 16-17, 44).” The FEIS also points out that “special uses under permit ... may allow off-road travel includ[ing] outfitter-guide activities (FEIS, p. 17).” The forest can allow motor vehicle use for dispersed camping only in areas where that use does not violate law, regulation, and the forest plan, and the forest personnel will continue to monitor dispersed camping sites to ensure public safety and minimize resource damage (FEIS, p. 44,



93).” The forest considered any impacts that the implementation of the TMP would have on dispersed camping and found that the impact would be minimal (FEIS, p. 93).”

There is no indication that an outfitter-guide operating under a special use authorization would be impacted by routes closed to the public.

- *Implementation of the TMP decision in the Camp Hale area*

At the conclusion of this travel management planning process, the WRNF will engage in completing a Travel Management Implementation Action Plan (TMIAP) (ROD, pp. 12-13). The TMIAP will describe steps to be taken to effectively implement the TMP Record of Decision. The emphasis will be on the “4Es:” Education, Engineering, Enforcement, and Evaluation (monitoring).

If the OHV Ranger Program in the Camp Hale area is not effective, safety issues arise, or non-compliance occurs in spite of these efforts, the Forest Supervisor is reserving the right in the TMP decision to return the designations in part or in whole to licensed full-sized vehicles only. Until that time, these roads will be open only to licensed full-sized vehicles and guided operations for ATVs under a special use permit (ROD, pp. 21-22).

Discussion of this issue is difficult since Nova Guides, Inc. did not provide sufficient site-specific information for the reviewer to understand Nova Guides’ particular violation of law, regulation or policy with the OHV Ranger Program in the Camp Hale area. For instance, the appeal lists several activities Nova Guides, Inc. is permitted for and several roads it is concerned with in the decision; however, Nova Guides, Inc. provides no indication of what type of use they are permitted for on the specific routes, so understanding the specific concern is impossible or at least speculative.

**Recommendation:** I recommend the Forest Supervisor’s decision be affirmed on this issue.

## RECOMMENDATION

I recommend that the Forest Supervisor’s March 17, 2011 decision be affirmed with the instructions outlined under Appeal Issues B, C and D, and that the Appellant’s request for relief be denied.



RICHARD A. COOKSEY  
Appeal Reviewing Officer

Deputy Forest Supervisor  
Medicine Bow-Routt National Forests  
Thunder Basin National Grassland





# MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW  
950 W. BANNOCK STREET, SUITE 520; BOISE, ID 83702  
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202 [www.msbtlaw.com](http://www.msbtlaw.com)

LOREN W. ANDERSON  
STEPHANIE J. BONNEY<sup>≈</sup>  
SUSAN E. BUXTON\*  
PAUL J. FITZER  
JILL S. HOLINKA  
BRUCE M. SMITH  
PAUL A. TURCKE<sup>‡</sup>  
CARL J. WITHROE<sup>»\*</sup>

JOHN J. MCFADDEN *of Counsel*  
MICHAEL C. MOORE<sup>‡</sup> *of Counsel*

» Also admitted in California  
\* Also admitted in Oregon  
<sup>‡</sup> Also admitted in South Dakota  
≈ Also admitted in Utah  
<sup>‡</sup> Also admitted in Washington

June 20, 2011

*Delivered via U.S. Mail and email to [appeals-rocky-mountain-regional-office@fs.fed.us](mailto:appeals-rocky-mountain-regional-office@fs.fed.us)*

Appeal Deciding Officer  
USDA Forest Service  
Rocky Mountain Region  
740 Simms St.  
Golden, CO 80401

## **RE: Notice of Appeal- White River NF Travel Management ROD/FEIS**

Dear Appeal Deciding Officer:

Please accept this Notice of Appeal from the Record of Decision Notice ("ROD") and Final Environmental Impact Statement ("FEIS") for the White River National Forest Travel Management Plan (collectively, the "Decision"), dated March 17, 2011. This appeal is presented on behalf of Nova Guides, Inc. Any communications regarding this appeal should be directed to Paul A. Turcke at the above contact information and [pat@msbtlaw.com](mailto:pat@msbtlaw.com).

This appeal is submitted pursuant to 36 CFR part 215. This appeal is independently submitted pursuant to 36 CFR part 251. We recognize the ROD does not indicate it is appealable decision under part 251, but we disagree and desire to fully preserve Appellant's procedural rights. In particular, an appealable decision includes "written decisions of Forest Service line officers related to issuance, denial, or administration of...(8) Special use authorizations..." 36 CFR § 251.82(a). The Decision contains numerous and significant impacts to the permitted operations of Nova Guides.

## **I. INTRODUCTION**

The Decision unnecessarily restricts access and severely threatens the continuing viability of Appellant's continuing operations. Nova Guides has worked hard to evaluate and respond to

unique opportunities and diverse interests that exist within and nearby the White River National Forest. The Decision contains both summer and winter use restrictions which impact the ability to conduct activities specifically identified in our permit documents, as well as related operations (e.g. unguided rentals) which are an important component of our business. None of these impacts are disclosed or discussed in the Decision in violation of various laws and regulations.

In addition to the impacts to Nova Guides' operations and permitted activities, the Decision unjustifiably restricts public access to the Forest, which we value on a personal and aesthetic level with other members of the community and other Forest visitors.

Nova Guides hopes through the administrative appeal process to improve the Decision and contribute to an evolving process of effective recreation management on the Forest. In order to do this we respectfully request that you withdraw the Decision and order the Forest to address specified concerns on remand.

## **II. NATURE OF APPELLANT'S INTERESTS**

Nova Guides operates a commercial business providing diverse, full season tourism and recreation services. These include lodging and meeting facility rentals as well as numerous motorized and nonmotorized recreational activities in both summer and winter. These activities in summer include guided hiking, whitewater rafting, guided fishing, guided mountain bike or jeep tours, and guided ATV tours or unguided ATV rentals. In winter our activities include guided snowmobile and snow cat tours as well as unguided snowmobile rentals. More information is available at [www.novaguides.com](http://www.novaguides.com).

Maintaining a viable operation depends on Nova Guides' ability to serve available demand for all activities throughout the year. Like any business, we face a variety of operating expenses, including fixed and variable overhead expenses. We cannot maintain debt service, payroll, and other continuing expenses if revenues are too closely tied to a single season or type of activity. Such a business model would create periods of "feast" and "famine" threatening effective operations.

Nova Guides does several things to maintain a relatively steady stream of revenue. We offer a wide range of products and services to appeal to the wide range of visitors to the area. We offer this range of options across all seasons. We also serve a wide variety of recreational preferences. The Decision implies, incorrectly in our view, that many forms of recreation are fundamentally incompatible with one another. We have learned that Forest visitors have as much in common as they do differences, and our success depends on learning how to understand and address these varying but overlapping interests.

In 26 years of experience Nova Guides has developed some ability to predict and adapt to trends and patterns, but fluctuations and one-time events are common and we must be positioned to take advantage of opportunities as they develop. Many of our clients return on a regular basis or otherwise book far in advance, but many also inquire on short notice. It is important that we have an array of options, including some available on a nearly daily basis, so that we may serve

customers who spontaneously consider our services or only learn of us when they arrive in the area. Occasionally, a satisfied “walk up” visitor becomes a repeat client who falls in love with the area and some aspect of our operation and chooses to spend increasing amounts of their recreation or corporate budget utilizing our services. Such visitors provide additional benefits to others in the community. These activities, along with the obvious use of alpine skiing resorts and other destination activities, has created a web of economic activity in the area.

The Decision does not meaningfully identify or discuss any of these issues. We agree with some of the information in the Decision portraying the Forest as a “crown jewel” of the Forest System receiving relatively heavy visitation. But heavy visitation does not mean excessive visitation, nor should it be interpreted to mean that large areas of the Forest are being over utilized, or even moderately utilized. In fact, in over 26 years Nova Guides has been located near Camp Hale, we have seen relatively stable use of the area, with many periods of little use around identifiable “peak use” seasons. There remain abundant opportunities for many forms of high quality recreation on the White River Forest. The Decision sends a variety of wrong messages about recreation opportunity and agency management strategy.

The Decision should be withdrawn and revisited in order to better serve the agency’s varied goals protecting resources and serving the public.

### **III. APPEAL ISSUES**

The Decision is legally deficient in its treatment of several important issues.

#### **A. The Decision Improperly Restricts Permitted Operations.**

Our operations depend on a viable network of routes for both permitted and general public access. The Decision fails to disclose the effect of route closures on our operations. These effects are distinct and require separate analysis for permitted use as well as general public use.

The Decision apparently seeks to avoid implicating permitted operations. *See*, ROD at 23. However, this intention rings hollow in the face of the massive decommissioning campaign purportedly authorized in the Decision. For instance, we appreciate the somewhat unique treatment of Camp Hale, which the Decision identifies for a possible “OHV Ranger Program” and “reserve[s]” for reopening specified routes. We are skeptical that the agency will implement or meaningfully pursue such a program. Our skepticism is amplified by the fact that some of the identified routes appear (FEIS section A-2, Attachment 2) to be slated for decommissioning.

To be clear, the activities and routes of concern are those specifically named in our permit documents, as well as those typically accessible by our rental customers. Regarding the former, they include the routes/areas identified for our jeep, ATV, mountain bike tours and snowmobile and snow cat tours. By way of illustration, but not an exhaustive list, these include Camp Hale 716, Old Hwy 24 726, East Fork Eagle River 714, Homestake 703, Hornsilver Road 746, June Creek 717, Lost Lake 786, McAllister Gulch 708, Metcalf Creek 779, Mill Creek 710, Moniger Pass 433, No Name 705, Pearl Creek 715, Piney Road 701, Ranch Creek 755, Red &

White Mountain 734, Red Sandstone/Muddy Pass 700, Resolution 702, Shrine Pass 709, Tigiwon 707, Wearyman Creek 747 and existing and historically accessed routes connecting to or used in conjunction with these routes.

The impacts to our permitted operations are further apparent by reviewing our permit documents. Our permits and annual operating plans identify specific routes and service days of our use. These figures establish not only our priority use, but also factor into the fees we must provide to the Forest Service. Travel on many of the identified routes is restricted under the Decision.

A travel plan must at least acknowledge and rationally discuss the balance between access considerations and viability of ongoing commercial operations. It is obvious that the Decision addresses a perceived need to address resource and other concerns to restrict or eliminate certain uses at certain locations. However, the Forest is similarly obligated to at least consider, and arguably maintain, the commercial viability of specially permitted operations. *See*, 36 CFR § 251.54(e)(5)(iv) (proponent must demonstrate technical and economic feasibility/capability). The Decision fails to do this.

It is a fundamental requirement of NEPA and applicable permitting regulations that even possible impacts to our permit be disclosed and meaningfully analyzed in a formal planning process such as this one. The White River Travel Plan has brushed aside this issue, to our significant risk. Steps must be taken on appeal to set aside all aspects of the Decision that could adversely impact our permitted operations.

#### B. The Plan Lacks Legally Required Route Specific Analysis.

A travel planning process like this one necessitates detailed analysis of myriad factors for virtually every route. By way of illustration these factors might include soil, water, wildlife, vegetation and other physical resource impacts, as well as facilitation of human activities including vehicle-focused recreation, vehicle access to facilitate other forms of recreation such as camping, hiking, hunting, fishing, backcountry skiing, and others, and nonmotorized recreation.

The Decision is fatally flawed through the total omission of this detailed analysis for any route. Instead, the approach is to discuss impacts or issues at the broadest level, if at all. Individual route options (FEIS Attachment 1) and eventual conclusions (FEIS Attachment 2) are displayed in tabular form. However, these tables present merely conclusions, without attempting to even summarize analysis. For some routes, it appears that different prescriptions are created for different route segments, which are extremely difficult (if not impossible) to ascertain from the information presented.

This approach violates NEPA procedures as well as the substantive requirements of NFMA and the 2005 Travel Management Rule ("TMR"). The agency is afforded latitude in making the difficult choices inherent in this process. But the agency must inform the public of the options being considered, identify relevant issues and information, rationally discuss them, and present a reasonably discernible path to the agency's final choice. These steps are simply not attempted in the Plan.

The basic analytical structure of the Plan is deeply flawed. The tabular summaries offer no more than the most simplistic catalogue of the hundreds of route-specific choices made by the Forest. This method precludes compliance with the law since there is not even an attempt to demonstrate the agency's analytical path to the ultimate decision on any route.

C. The Decision Contains Numerous Flaws Regarding Decommissioning.

The Decision outlines an unprecedented decommissioning campaign. It is flawed on several levels. From a policy perspective, the agency has sadly chosen to reject a legacy of trail mileage which has provided many benefits to diverse users and could continue to do so long into the future. Procedurally, decommissioning actions are not validly disclosed or described. Substantively, there is insufficient justification for any decommissioning project.

Decommissioning is a site-specific action which requires site-specific analysis. The ROD/FEIS fail to reasonably consider or respond to this requirement. The Forest blithely suggests any site-specific decisions either have been made but are not disclosed, or will be made as part of "implementation" in some indefinite manner in the future. ROD at 12, 19. The specific methods of decommissioning must be disclosed and analyzed on a route by route basis, at least where they include ground disturbing activity.

Distinct from the failure to disclose decommissioning actions is the lack of meaningful discussion about whether decommissioning should occur for individual routes. The failure to analyze decommissioning issues/alternatives implicates many issues. Certainly physical resource impacts enter the analysis. These include direct impacts such as those associated with removing culverts, "recontouring" roadbeds/stream crossings, or similar actions. They also involve indirect impacts, such as wildlife effects based on reductions, displacements or other changes to access associated with decommissioning. Additionally, impacts to the "human environment" are involved. It is obvious and perhaps primarily intended to reduce motorized vehicle access through decommissioning. But also impacted, intentionally or unintentionally, is nonmotorized access in trails/areas of decommissioning. The agency simply cannot comply with its numerous substantive requirements without some discussion, that meaningfully involves the public, to analyze available options.

Aside from immediate impacts associated with decommissioning, the Forests "designate or decommission" approach is fundamentally inconsistent with the Travel Management Rule, not to mention common sense. The TMR is intended to be a dynamic and evolving process, not a "one time only" edict creating an inflexible transportation system. Even routes that are determined unsuitable for continuing or present use may be suitable candidates for future designation following maintenance, reconstruction, further analysis, changes in use or resource conditions, or other factors. Removing all routes not designated improperly forecloses future management options. These issues are amplified by the over 1,500 miles of routes which the Decision purports to authorize for decommissioning.

The appeal decision should reverse and set aside the decommissioning elements of the Decision and instruct the Forest to complete a separate process to disclose specific



decommissioning methods in any and every instance where ground disturbing activity may occur in conjunction with decommissioning.

D. The Socioeconomic Effect Analysis is Legally Deficient.

The Decision fails to adequately consider socioeconomic effects of the various alternatives. NEPA requires analysis of impacts to the “human environment.” 42 USC § 4332(2)(C). The “human environment” expressly includes “the natural and physical environment and the relationship of people with that environment.” 40 CFR § 1508.14. When an agency prepares an EIS “and economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment.” *Id.* A robust analysis is contemplated, for MUSYA states that “sustained yield” “means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.” 16 USC § 531(b). In discharging these duties, the Secretary shall give “due consideration...to the relative values of the various resources in particular areas.” 16 USC § 529.

The FEIS does not even contain a section on socioeconomic effects. *See, generally*, FEIS Chapter 3; FEIS Table of Contents at i. Such a section is common, perhaps universal, in typical agency practice, and was present in the DEIS and SDEIS here. The need for such discussion seems obvious in light of the frequent observation about the popularity and volume of visitation to the White River Forest, and the associated development of gateway communities and recreation-related facilities and effects in the locale.

There will likely be significant effects on the nature of use and the provision of goods and services, not only for those directly tied to recreational activities like Nova Guides, but for surrounding communities who derive significant, multilayered economic benefits from recreation related tourism. The Plan seemingly uses high and purportedly increasing demand as an excuse for restrictions, but ignores the necessary discussion of how the ensuing restrictions, assuming they are effective, will impact socioeconomic factors. The Decision irrationally focuses on selective components of a zero sum analysis.

Whatever analysis may be appropriate for the broader context, there is virtually no discussion in the narrow context of impacts to Nova Guides. The ROD apparently avoids this issue entirely, suggesting that specially permitted access is distinct from and not addressed by this project. *See*, ROD at 23. This approach cannot be rationally defended.

Neither the public nor the agency could be properly informed of the possible consequences of the decision options under review. On remand, the Forest should be directed to properly analyze socioeconomic impacts.

E. Analysis of Technical Issues is Deficient.

The Decision lacks meaningful analysis of technical issues including physical resource and other “human environmental” factors. Agencies cannot ask the public to accept their

conclusions on faith alone, but must identify specific references, identify methodologies used and provide, where applicable, hard data to allow the public to meaningfully discern the agency's analytical path to a decision. *See*, 40 CFR §§ 1502.6, 1502.24; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9<sup>th</sup> Cir. 1998).

The technical analysis is largely presented in FEIS Chapter 3 and runs afoul of these principles. Most sections provide few, if any, citations to any reference material. Where references are cited, they are often for very broad or general issues, and lacking for subsequent and more critical steps in the agency analysis. *See, e.g.*, FEIS at 70-71 (recreation visitation); 82 (undocumented narrative discussion about "changing to a visitor focus"). Finally, virtually none of the discussions provide hard data or other comparable material to facilitate meaningful public review.

For many routes affecting Nova Guides' operations, code 62 is provided, which is the extremely broad "provide for user safety and/or recreation management." In the absence of identification of specific issues, let alone analysis, this explanation is essentially meaningless. This approach violates basic procedural requirements by which agency conclusions must be presented and documented.

These procedural defects condemn the Decision's technical analysis. Further review should occur on remand or in subsequent analyses, and any technical materials, including underlying data, should be made fully available for public review and comment.

#### F. The Cumulative Effects Analysis is Legally Deficient.

The Decision reflects an unusual and flawed procedure as well as unsupportable conclusions regarding analysis of cumulative impacts. The duty to evaluate cumulative impacts in an EIS is "mandatory." *City of Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142, 1160 (9<sup>th</sup> Cir. 1997). "Cumulative impact" is defined by the relevant CEQ regulation as:

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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. The cumulative impacts analysis is deficient for many resources, but is particularly lacking in assessing recreation impacts.

Cumulative effects for recreation management are discussed at FEIS 96-97. However, the discussion focuses on nature and anticipated trends in recreation demand. There is a fundamental disconnect between the above-cited regulatory mandate and the perfunctory yet off-target discussion in the FEIS. To the extent any discussion is presented, it addresses general or public lands use of the Forest, and completely avoids discussion of impacts to permitted uses or to Appellant's specific operations.

While it appears almost certain that the Decision will have impacts to public use and our operations, it is uncertain what those effects will be and the manner in which they will develop.

The complex interrelationships creating and influencing such effects are among the reasons why a meaningful cumulative effect discussion is required by NEPA. The need to intelligently consider and conduct such a discussion is among NEPA's "action forcing procedures" that hopefully creates both "better documents [and] better decisions...." 40 CFR § 1500.1(c). Unfortunately, the FEIS instead reflects a "check the box" mindset that relegates the cumulative effects section to a formality justifying a decision already made.

On remand the Forest should be directed to prepare a valid and meaningful cumulative effects analysis for appropriate human environmental factors, including socioeconomic factors and impacts to specially permitted uses.

G. Specific Decision Components Will Adversely Impact Nova Guides.

We wish to specifically identify certain elements of the Decision that are not properly disclosed or analyzed which will uniquely impact Nova Guides. These include restrictions on snow cat travel, designated/dispersed camping and the OHV Ranger Program.

The Decision, at least under one possible reading, will severely limit our snow cat tours. The Decision states that snow cats will be prohibited from operating on groomed routes unless they are equipped with a grooming implement. ROD at 17. This is a change from past practice. We conduct snow cat tours and have not faced this restriction previously. The change has not been properly disclosed or analyzed.

Our operations will also be impacted by changing to camping on the Forest. Under the Decision, it appears that some existing designated campground use will be prohibited. In addition, dispersed camping will be eliminated at some undisclosed number of sites along the thousands of miles of existing routes closed by the Decision. Again, these closures will have varied and rippling effects on many layers. The Decision does not identify or reach meaningful conclusions on any of these topics.

We do appreciate the Forest's effort to create some flexibility in the Camp Hale area. As this is base of operations we could obviously benefit from, or at least better survive, some of the contemplated changes implementing the Decision such as continuation of use under an OHV Ranger Program. ROD at 21. However, there are several problems with this proposal. The identified flexibility should actually be a part of the entire management program. In other words, periodic revision to better address resource and user needs is assumed to occur throughout the Forest, not just in narrowly identified areas for specific routes. *See*, 36 CFR §§ 212.54, 212.57. We generally support any creative and proactive effort to better manage recreational use, including OHV use. However, there are many unanswered questions and apparent budgetary challenges associated with the OHV Ranger Program, at least as it has been explained to us. It has been suggested that Nova Guides would be required to contribute regular and specified funds to the Program. We question whether such a requirement is appropriate or legally defensible. Regardless, it seems likely that successful implementation of such a Program is questionable and will at best be delayed. To the extent the OHV Ranger Program is intended to mitigate adverse consequences of the Decision it offers little comfort.

These elements, in addition to specific routes and other issues previously identified, should be clarified and modified through the appeal process.

#### **IV. RELIEF REQUESTED**

In light of the foregoing, Appellants respectfully request the Appeal Deciding Officer expeditiously grant any and all of the following relief from the Decision:

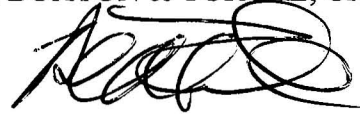
- (1) Withdraw the Decision;
- (2) Remand the Decision for further analysis;
- (3) Utilize the Part 215 and 251 appeal processes to facilitate additional analysis of at least portions of the decision (such as specific routes, trail systems, or decision components), with implementation staged or delayed as appropriate.

We specifically request the opportunity for informal disposition, oral presentation, and or any procedural opportunities provided for or consistent with the applicable regulations.

Sincerely,

MOORE, SMITH, BUXTON & TURCKE, CHTD

/s/ Paul A. Turcke  
Paul A. Turcke

A handwritten signature in black ink, appearing to read 'Paul A. Turcke', written over a horizontal line.

/PAT: cam  
cc: Steve Pittel