



June 20, 2011

Delivered via email to appeals-rocky-mountain-regional-office@fs.fed.us.

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

RE: Appeal from Record of Decision for White River National Forest Travel Management Plan dated March 17, 2011

Dear Appeal Deciding Officer:

Please accept this Notice of Appeal under 36 C.F.R. Part 215 from the Record of Decision 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 the BlueRibbon Coalition, Inc. Individual and/or organizational members of BlueRibbon Coalition (BRC) may submit their own appeal(s) from the Decision. This appeal and any such appeals must be independently evaluated and the agency must comply with applicable review procedures for all such appeals. Any communications regarding this appeal should be directed to Brian Hawthorne 208-237-1008 ext 102 and at brbrian@sharetrails.org.

LEGAL STANDARDS

As a preliminary matter, we wish to outline the applicable standard of judicial review as well as the standard which agency decision makers must consider during the administrative review process. We understand that executive-branch agency decisions are ultimately reviewable by the judiciary, which is empowered to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or found to be "without observance of procedure required by law."¹

The arbitrary and capricious review is the mechanism through which the courts can require basic fairness and reasonableness of agency decision making. The arbitrary and capricious standard is deferential and does not allow a reviewing court to substitute its judgment for that of the agency.²

¹5 U.S.C. § 706(2)(A) & (D), see also, *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2004)

²*Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added).

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, 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. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Even where an agency can arguably point to substantial evidence supporting its decision, the presence of contradictory evidence might render the decision arbitrary and capricious. Thus, "even though an agency decision may have been supported by substantial evidence, where other evidence in the record detracts from that relied upon by the agency we may properly find that the agency rule was arbitrary and capricious." ³

Even substantial evidence cannot properly support a decision if the information was not considered by the decision-maker at the proper stage of the process. Information cannot be presented as a post-hoc rationalization to justify a decision previously made.⁴ For the reasons identified below, The decision supported by this EIS, will violate these basic principles.

APPEAL ISSUES

1. The Decision Lacks Necessary Analysis to Justify Site-Specific Actions

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. Rather than provide this analysis, there is an incomplete and confusing table of outcomes posted (section A-2, Attachment 2) that attempts no more than a catalogue of results on individual routes. This strategy is legally deficient.

2. The decision strays from the existing Forest Plan

Nothing in the Forest Plan contemplates the kinds of decisions made in the Decision. The Decision imposes vast non motorized recreation classifications where the Forest Plan indicates motorized uses would be allowed. In reality, one or more forest plan amendments were required by were not even attempted here. See, generally, *Lands Council v. Martin*, 529 F.3d 1219, 1227-1228 (9th Cir. 2008) (outlining procedural requirements for plan amendment).

3. The EIS presents a legally flawed range of Alternatives

³. *American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016 (9th Cir. 1984) (citing *Bowman Transport, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974) (agency decision supported by substantial evidence may still be arbitrary and capricious)); see *Atchinson v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (where agency modifies or overrides precedents or policies, it has the "duty to explain its departure from prior norms").

⁴*Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996).

The range of alternatives was truncated and compressed into an irrationally small range in violation of NEPA.

NEPA imposes a mandatory procedural duty on federal agencies to consider a reasonable range of alternatives to the preferred alternative. 40 C.F.R. § 1502.14 (“agencies shall rigorously explore and objectively evaluate all reasonable alternatives.”) The alternatives section is considered the “heart” of the EIS and a NEPA analysis must “explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14. A NEPA analysis is invalidated by “[t]he existence of a viable but unexamined alternative.” *Resources, Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993). An agency must perform a reasonably thorough analysis of the alternatives before it. “The ‘rule of reason’ guides both the choice of alternatives as well as the extent to which an agency must discuss each alternative.” *Surfrider Foundation v. Dalton*, 989 F. Supp. 1309, 1326 (S.D. Cal. 1998) (citing *City of Carmel-by-the-Sea v. United States Dep’t of Transportation*, 123 F.3d 1142, 1154-55 (9th Cir. 1997)). The “rule of reason” is essentially a reasonableness test which is comparable to the arbitrary and capricious standard. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 n. 23 (1989)). “The discussion of alternatives ‘must go beyond mere assertions’ if it is to fulfill its vital role of ‘exposing the reasoning and data of the agency proposing the action to scrutiny by the public and by other branches of the government.’” *State of Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978), vacated in part on other grounds, *Western Oil & Gas Ass’n*, 439 U.S. 922 (1978) (quoting *NRDC v. Callaway*, 524 F.2d 79, 93-94 (2nd Cir. 1975)).

There are very few alternatives considered in detail, and minimal discussion explaining the selection of those few. Given the diverse history of use on the White River we were surprised and dismayed to see such a narrow range of alternatives presented in the EISs. Many viable alternatives were excluded from detailed analysis and meaningful public review.

4. The Purpose and Need Statement is Legally Insufficient. The Purpose and Need improperly narrows the range of Alternatives and the “decision space”:

The Plan was presented in a confusing context, and, given the Forest Supervisor’s accompanying letter, the Purpose and Need and the Decision Framework, must be viewed as a “closure” decision. This background inappropriately taints analysis through the omission of any “positive” aspects of providing for motorized recreational access.

The agency indefensibly pursued a unilateral emphasis on preservation here. In the purpose and need statement, the Forest articulated Need number 3: “To Designate a Travel System That Is Aligned With the Forest Service Mission, Including the Need to Manage the Land By Providing a System That Attempts to Balance Social and Resource Demands” (FEIS Chapter 1, Page 9)

BRC understands that most recreation management decisions are a balance between providing and protecting. It is obvious that the WRNF has focused nearly exclusively on protecting. Our members are concerned about the WRNF’s lack of consideration for the equally mandated direction to provide. In other words, this need has been formulated to diminish the part of the Forest Service’s Mission regarding providing and enhancing.

It seems important to note that the Travel Management Rule mandates each unit designate roads and trails that will “enhance opportunities for motorized recreation

experiences on National Forest System lands” (70 Fed.Reg. 68264, bold emphasis added).

Mandated direction to provide for products and services, the agency's strategic goals, the documented popularity of motorized recreation and numerous comments submitted in the early stages of the process seems to have been “refracted” in such a way as to drive the decision toward elimination of motorized uses in all of the Alternatives.

For example, when discussing the Decision Framework regarding recreation management the Decision presents a truly “unique” take on considering providing recreational opportunities:

In addition to safety and access, the rule also requires the responsible official to consider the provision of recreation opportunities. For example, it would not make sense to allow ATVs on a road that is part of or connected to a road that does not allow ATV use, especially if the portion that would allow ATVs is only ¼ mile long (for example), or does not lead to a destination.

(FEIS, Chapter 1, page 15) The point that seems to be lost is that closing a ¼ section of road to unlicensed vehicles (ATVs) may eliminate a loop riding experience or eliminate a connection from one trail to another. The approach you have taken is all oriented toward eliminating opportunity, even when discussing direction to provide opportunity. After reviewing the Decision, it appears that this is what has happened.

5. The decision to decommission all closed roads is improperly made in this EIS

We strongly object to the inclusion of mandatory direction to decommission closed roads in this Decision. The decision to decommission closed routes was not thoroughly discussed in the scoping or the DEIS. Moreover, site specific ground disturbing impacts associated with decommissioning were not evaluated in the FEIS.

Individual decommissioning methods require site specific NEPA analysis, particularly where they include ground disturbing methods. The agency cannot announce a categorical decision to decommission encompassing thousands of miles of routes along with a “suite of methods” to be applied in some future, indefinite array of projects to accomplish that outcome.

This project was scoped primarily as a recreational travel management plan that will mostly impact recreational users of the Forest. Other users were assured their access and activities could still continue under stipulations of their permit, lease or other. Separate analysis of decommissioning efforts is necessary to bring the concerns and needs of non-recreational users to the attention of the public, and Forest managers.

It is also important to note that few, if any, USFS travel planning projects got it right the first time. Indeed, many travel planning projects we are aware of have been amended within one or two years after completion, and many have been amended even before the plan has been completely implemented on the ground. It is quite likely that routes you are proposing for decommissioning will be necessary additions in future travel planning. This is especially true considering you are planning to revise your Forest Plan in the near future.

6. Flawed response to comments

The FEIS does not comply with NEPA's requirement to evaluate and respond to comments. The effort here violates not only the spirit of the law but the specific requirements of 40 CFR § 1503.4.

The response to comments section of the FEIS separates comments from the context in which they were originally submitted which led to inadequate response to the comment as a whole. These inadequate responses then accompanied the proposal through the agency's review process. This practice has unduly and unfairly limited the appropriate agency response and their ability to use the comments and their subsequent responses in making decisions. Many travel planning documents faithfully repeat individual comments, and specifically respond to them. This was not attempted here. The uniquely flawed approach responding to comments here prevented commenters from even identifying whether their comments were considered. Additionally, the agency essentially transformed comments en masse into themes which fit the predetermined answers or themes chosen by the agency.

7. Mixed use analysis is arbitrary and capricious

Numerous route closures or changes in management status are driven by the irrational conclusions of a "mixed use analysis" whereby the Forest allegedly determined that safety risks necessitated the change in status. This analysis failed to comply with numerous requirements of NEPA and the APA, including citation to reference material, identification and justification of the methodologies used, and related technical requirements. On a more intuitive level, the inadequacy of the analysis is apparent from its basic premise: that a cadre of Forest engineers or other "experts" can reasonably conclude that uses which have historically occurred for decades in a recreational "crown jewel" of the Forest System are so unsafe as to require closure to one or more forms of use.

Where restrictions target nonlicensed OHVs (ie limit access to street legal vehicles) the changes are thinly disguised, but unjustified, efforts to reduce or eliminate use. There are many reasons why mixed use by street legal and unlicensed OHVs may be appropriate, including to provide for desirable or necessary loop riding opportunities, to facilitate use by certain vehicle types on the most appropriate routes (ie to prevent displacement of unlicensed OHVs to routes that truly do present safety risks), and to allow appropriate riding by families or other users and user groups who may not be able to fully participate using street legal OHVs.

The mixed use restrictions of the Decision are arbitrary and capricious and should be set aside and further studied through a valid analysis.

CONCLUSION

We request the following action regarding the Decision:

- (1) Withdraw the Decision;
- (2) Remand the Decision or specific elements of the Decision for further analysis;
- (3) Additional and/or ongoing action to
- (4) The right to fully participate in all appeals or additional procedures including informal disposition, oral presentation, any public meetings or other aspects of the appeal or ongoing travel planning process.



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