

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

LOREN W. ANDERSON
STEPHANIE J. BONNEY[≈]
SUSAN E. BUXTON*
PAUL J. FITZER
JILL S. HOLINKA
BRUCE M. SMITH
PAUL A. TURCKE[‡]
CARL J. WITHROE^{»*}

JOHN J. MCFADDEN *of Counsel*
MICHAEL C. MOORE[‡] *of Counsel*

» Also admitted in California
* Also admitted in Oregon
[‡] Also admitted in South Dakota
≈ Also admitted in Utah
[‡] Also admitted in Washington

June 20, 2011

Delivered via U.S. Mail and email to 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.

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.

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 (9th 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 (9th 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:

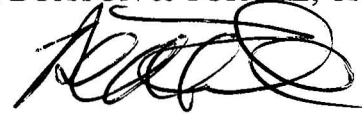
- (1) Withdraw the Decision;
- (2) Remand the Decision for further analysis;
- (3) Utilize the Part 215 and 251 appeal processes to facilitate additional analysis of at least portions of the decision (such as specific routes, trail systems, or decision components), with implementation staged or delayed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