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Delivered via email to [objections-pacificsouthwest-regional-office@fs.fed.us](mailto:objections-pacificsouthwest-regional-office@fs.fed.us)

Objection Reviewing Officer  
USDA Forest Service, Pacific Southwest Region  
1323 Club Drive  
Vallejo, CA 94592

**RE: Objections to Lassen NF OSV Designation Draft ROD**

Dear Objection Reviewing Officer:

Please accept these objections to the Draft Record of Decision (“Draft ROD”) for the Lassen National Forest Over Snow Vehicle Use Designation, as well as the associated Revised Final Environmental Impact Statement (“RFEIS”). The Responsible Official is Acting Forest Supervisor Ted O. McArthur. The applicable legal notice was published on April 3, 2018 in the Lassen County Times, the newspaper of record for the Forest. These objections are submitted on behalf of the BlueRibbon Coalition/Sharetrails.org (“BRC”), including BRC’s individual and organizational members who have enjoyed, and plan in the future to enjoy, over snow vehicle (“OSV”) access to the Lassen National Forest.

These objections are submitted in accordance with 36 C.F.R. part 218. BRC, and numerous BRC members, filed comments raising the stated issues or otherwise providing a basis for these objections. The point of contact for this objector is the undersigned, and please direct all communication regarding these objections to Paul Turcke at 950 West Bannock Street, Suite 520; Boise, Idaho 83702; 208-331-1800; [pat@msbtlaw.com](mailto:pat@msbtlaw.com). We formally request a resolution meeting in accordance with 36 C.F.R. § 218.11. We hereby authorize, indeed encourage, the Reviewing Officer to extend the time for a written response to objections, particularly if it will facilitate a thorough effort to explore opportunities to resolve objections. See, 36 C.F.R. § 218.26(b).

**I. Interest of the Objector**

BRC has a unique perspective and longstanding interest in motorized vehicle use and

management of the National Forest System, including for OSV. BRC was a defendant-intervenor in *Snowlands Network et al. v. U.S. Forest Service*, Case No. 11-CV-2921-MCE (E.D. Cal.). We remain committed to this presence in ongoing management of the Lassen National Forest in whatever role may now become necessary.

BRC is a nonprofit corporation that champions responsible recreation and encourages individual environmental stewardship. BRC has members in all 50 states, including California. BRC members use various motorized and nonmotorized means to access public lands, specifically including winter use of the Lassen National Forest. BlueRibbon has a long-standing interest in the protection of the values and natural resources addressed in this process, and regularly works with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors.

## **II. Objection Issues**

We note at the outset that the agency has conducted a lengthy process, and addressed many of our concerns. We want to express our appreciation for the agency's thoughtful effort, support of stakeholder involvement and collaboration, and patience in this lengthy process. We support the bulk of the route/area designation and the decision to forego Pacific Crest Trail buffers. Still, there remain concerns with the current approach, and we raise the following objections, which provide a legal basis for our requested changes to the Draft ROD.

The objection process necessarily anticipates the possibility and potential likelihood of success in subsequent litigation brought by an objector. In such a challenge the Administrative Procedure Act (APA) waives the United States' sovereign immunity for those aggrieved by "final agency action." 5 U.S.C. §§ 702, 704; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990). APA section 706(2) provides the relevant standard of review: a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (C) short of statutory right; [or] (E) unsupported by substantial evidence...." This standard of review is "narrow" but the agency:

must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made....Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). This is considered a deferential standard of review. Still, there always exists some level of litigation risk, and we believe the decision can be improved as outline below.

**A. The Agency Should Decline to Impose Snow Depth Prescriptions.**

Our primary objection concerns the imposition of any inflexible snow depth prescriptions. The legal basis for snow depth requirements is shaky. Such requirements pose an unjustified risk of creating practical confusion and difficulties for both the agency and interested publics.

There is no defensible legal requirement or basis for snow depth prescriptions. The *Snowlands* settlement does not address the question of snow depth, but only a process by which the agency will evaluate designation of routes for grooming. Similarly, the now revised “Subpart C” of the regulations at 36 CFR part 212 provide for OSV designations addressing class of vehicle, seasons of use, and specified designation criteria from Subpart B. Nowhere is snow depth included in this regulatory checklist. In fact, snow depth language was considered by the agency and intentionally left out of Subpart C. See, 80 Fed.Reg. 4507 (Jan. 28, 2015). Instead, the Final Rule carefully settled on addressing this subject by stating that roads, trails and areas for OSV use “shall be designated...where snowfall is adequate for that use to occur, and, if appropriate, shall be designated by class of vehicle and time of year....” *Id.* at 4511; 36 C.F.R. § 212.81(a).

The RFEIS itself does not make a supportable case for imposing snow depth requirements. The discussion starts with the observation that “[i]n multiple reviews of best available scientific data, specialists determined that there is little or no science to support a universal snow depth for protecting multiple resources.” RFEIS at 85 (emphasis added). In fact, “skiers actually may have a greater effect than OSV’s because skis have a greater footload (weight per surface area) in comparison to an OSV track.” *Id.* The discussion suggests that the primary basis for the 12 inch depth figure is the SHPO programmatic agreement (“PA”) and the California Parks/Recreation grooming guidance. *Id.* Neither of these would form a defensible rationale. The grooming restrictions have no applicability to cross-country designations. The PA “was developed for heavy equipment, such as loggers and skidders, conducting logging operations.” RFEIS at 404. The same discussion theorizes that snowmobiles “exert only 0.5 pound of pressure per square inch, versus four-wheel drive vehicles, which exert 30 pounds per square inch.” *Id.* Yet the Forest openly admits “our monitoring does not differentiate between OHV and OSV impacts.” *Id.* at 856. This approach, characterized as one that “best protects natural and cultural resources,” is euphemistic overkill, not remotely connected to any conceivable impact that snowmobiles might actually have on any site/resource.

There are many practical reasons to avoid inflexible prescriptions. Snow depth is highly variable, depending on numerous weather and site factors. Even under uniform or constant snowfall, varying sites will display varying snow depth. It is obvious, but important to note, that owners/operators of today’s sophisticated and expensive snowmobiles know they are designed to travel over snow, not dirt and rocks. A snow depth requirement is a solution in search of a problem.

Snow depth is not an effective or necessary means to protect against “resource damage.” Existing practices and common sense address many of the factors that purportedly motivate these prescriptions. For example, groomers are able to raise the grooming apparatus and/or pull in snow from adjacent areas as needed to avoid or enhance grooming over areas with thin snow coverage. Existing regulations provide authority for enforcement officers to take appropriate action should

they encounter improper conduct. See, e.g., 36 § 261.15 (prohibiting certain activities in the use of “any vehicle off National Forest System, State or County roads” including in violation of noise standards, creating excessive smoke, carelessly or in a manner that endangers any person/property, or “in a manner which damages or unreasonably disturbs the land, wildlife, or vegetative resources”). Resource damage is amply addressed through officer discretion in the field applying existing regulations, rather than an inflexible snow depth requirement.

The creation of “minimum snow depths” might encourage a “watchdog” culture intent on finding an excuse for closure. The Forest needs to better anticipate and protect against abuse of the possibility that individual or organizational activists will be capturing, even staging, photographic “evidence” of inadequate snow depth or otherwise trying to force the agency into implementing and enforcing snow depth requirements. Relatedly, we are concerned that the Draft ROD suggests the possibility that snow depth “violations,” however they might be interpreted, will imply some nondiscretionary duty to cite operators in violation of criminal provisions at 36 CFR part 261. We do not believe that the agency intends such illogical results, or intends to create any constraint on the informed discretion of field personnel conducting law enforcement or monitoring activity.

Rather than what might be perceived as an inflexible, Forest-wide snow depth prescription, the agency should employ a flexible, adaptive management approach to snow depth and snow coverage/quality attributes. The parties most attuned to these issues are state and local grooming administrators, local governments, and affected users. We appreciate that the Forest Service has recognized this to some extent, by including these parties’ input. Still we are concerned that the Forest Service has taken the bait toward becoming unnecessarily involved in this topic. Snow depth should be avoided, and discussed in a final decision in a manner that properly characterizes snow depth considerations, broad agency discretion, and ample ability within that discretion utilizing existing tools/practices to protect against resource damage and fulfill all management responsibilities.

Considering the broad array of potential issues, the best approach would be to avoid any Forest-wide snow depth prescriptions. There is not regulatory basis or compelling practical need to create such requirements. The Forest, in cooperation with partners and engaged users, can properly address management challenges that may arise in flexible and site-specific manner.

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

We appreciate that the Draft ROD includes designation of meaningful routes and areas for continuing OSV access. However, some of the restrictions on such use go too far and some of the designations should be reconsidered.

The Draft ROD and RFEIS fail to sufficiently describe or document the basis for some of the site-specific designation choices presented. Under even “arbitrary and capricious” review the agency must articulate a “rational connection between the facts found and the choice made....” *Motor Vehicle Mfrs. Ass’n.*, 463 U.S. at 43. NEPA imposes various technical protocols including disclosure of methods, presentation of hard data, and disclosure of any “sources relied upon for

conclusions” in an EIS. 40 C.F.R. § 1502.24. NEPA does not envision undocumented narrative exposition, but requires that “[a]gencies shall insure the professional integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements.” *Id.*; *Sierra Nevada Forest Protection Campaign v. Tippin*, 2006 U.S. Dist. LEXIS 99458, \*29 (E.D. Cal. 2006) (“NEPA does not permit an agency to rely on the conclusions [of agency experts] without providing both supporting analysis and data”). A “bare assertion of opinion from an [agency] expert, without any supporting reasoning, would not pass muster in an EIS.” *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1103 (9<sup>th</sup> Cir. 2016).

We note that the Draft ROD includes closures that go beyond even those requested in the *Snowlands* alternative. In terms of total designations of area acres, Alternative 3 allows for OSV use on 833,280 acres, while the Draft ROD provides for such use on 762,920 acres. Compare, RFEIS at 57 and Draft ROD at 1-2. While we appreciate the opportunity for stakeholder involvement, these discrepancies at least partly reflect that the Forest did not give proper weight to stakeholder agreement that certain areas could continue to appropriately receive OSV use.

There are several area designations we would like to emphasize. The Draft ROD would not designate any OSV use areas in the Fall River and Shasta sub-units. Draft ROD at 1. Even the *Snowlands* alternative would have provided for designations of 17,570 and 48,620 acres in these areas, respectively. It is true these areas have light snowfall, and that people are highly unlikely to ride snowmobiles across vast expanses of lava. The Forest Service doesn’t need to create rules to address these issues. The fact is there are times, if only occasional instances, where sufficient snow falls for OSV use in these areas. This use, primarily on roads, is uniquely prized by local enthusiasts. There is no harm in allowing for the possibility of this occasional use to continue. In the Jonesville area, even the stakeholder group did not think it was necessary to close the area north of the Colby Meadows ski trail. Similarly the ubiquitous rationale for deer wintering and yellow-legged frog habitat closures is questionable, such as in the Bogard and Morgan Summit areas. Frogs are not likely active and habitat is not impacted when overlaid by “adequate” snow cover. There exists ample habitat for wintering deer, who are likely to find elevations/locations that lack sufficient snow for OSV recreation.

We ask that the specified area designations be revisited to better comport with logic, available science, and stakeholder input and collaborative agreement.

### **C. The Forest Illegally Relies upon User Conflict to Justify Closure.**

The Draft ROD relies, at least in part, upon purported “user conflict” as the rationale for closing trails to continuing motorized travel. See, e.g., Draft ROD at 2; RFEIS at 107-108. This rationale is flawed on multiple levels.

#### **1. Subjective User Conflict Cannot Support Closure.**

Subjective preferences of users, individually or collectively, cannot justify elimination of access to the less popular or less conflicted users. At most, the Travel Management Rule requires the agency to “consider effects...with the objective of minimizing...(3) Conflicts between motor

vehicle use and existing or proposed recreational uses” of the Forest.” 36 C.F.R. § 212.55(b). The regulation refers to conflicts of “use” not conflict between “users.”

This language is derived from the Executive Orders, issued by Presidents Nixon and Carter. See, E.O. 11644, 11989; 42 Fed.Reg. 26959. While there has been debate about whether the EO’s create an enforceable right of action, the Forest Service effectively rendered this a non-issue when it chose to paste the EO language into regulations adopted via notice and comment rule-making. The present-day interpretation by some special interests and land managers does not rationally interpret this language. The actual wording refers to conflicts between “uses” not “users.” The historical context is relevant, as in the early 1970’s off-highway vehicles were relatively new and largely unregulated. The EO’s reflect a crude first step at the anticipated need to balance a new and developing use with the conservation efforts of the era reflected in contemporaneously adopted statutes like NEPA and FLPMA. In any event, it was not intended then, nor does it make sense now, to allow some quantum of subjective complaining by some class of “user” to exclude other users from public lands.

Nor is subjective “user conflict” an “environmental” impact under NEPA. A recent Ninth Circuit decision correctly notes that “controversy” as a NEPA intensity factor “refers to disputes over the size or effect of the action itself, not whether or how passionately people oppose it.” *Wild Wilderness v. Allen*, 871 F.3d 719, 728 (9<sup>th</sup> Cir. 2017). The panel further indicated it “need not address the question of whether on-snow user conflicts are outside the scope of the agency’s required NEPA analysis entirely because they are ‘citizens’ subjective experiences,’ not the ‘physical environment.’” *Id.* at 729 n.2 (citations omitted). In a largely forgotten effort, the U.S. Supreme Court emphasized that NEPA focuses on impacts to the physical environment. “It would be extraordinarily difficult for agencies to differentiate between ‘genuine’ claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy. Until Congress provides a more explicit statutory instruction than NEPA now contains, we do not think agencies are obliged to undertake the inquiry.” *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983).

The governing law only authorizes the Forest Service to analyze and minimize conflicts between uses, not the subjective preferences of users. The Draft ROD reflects an improper emphasis on the latter, which should be addressed through instructions/remand.

## 2. The Agency Lacks Meaningful Analysis of Conflict.

Even if the Forest can properly rely on “user conflict” as a basis for selectively closing trails to a specified form(s) of use, the Draft ROD is independently flawed by reaching that outcome without meaningful, site-specific data or fact. Again, the agency must utilize “high quality” data and cannot rely on undocumented narrative summary. Objectors understand that the “science” behind recreation planning may be social science, but even so the Forest Service is capable of conducting real analysis of real visitors on actual sites in the project area. See, *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1182 (9<sup>th</sup> Cir. 2000) (upholding decision based on recreation use study); *Riverhawks v. Zepeda*, 228 F.Supp.2d 1173, 1184 (discussing “user study” conducted on site noting motorized use was “cited as a source of concern” but finding “the

majority of non-motorized users nevertheless indicated a high degree of satisfaction”). The agency did not attempt any such analysis and does not purport to offer site-specific analysis of “conflict” here. Rather, the discussion is framed in a narrative and generalized fashion. See, RFEIS at 107-108. Data is largely absent, or at an insufficient general level, such as presentation of NVUM results. This does not meet the standards identified in the above-cited cases.

User conflict cannot form a legitimate basis for closures presented by the Draft ROD. The complete absence of data or any rational, site-specific analysis taints the conflict based route closures. These conclusions must be vacated and addressed in any further planning.

#### **D. The cursory Socioeconomic Analysis is Deficient.**

The analysis fails to properly evaluate the substantial adverse impacts to local communities that might be caused by the proposed reductions in OSV recreation opportunity. A valid NEPA analysis must include this consideration and disclosure of socioeconomic effects. NEPA embodies a Congressional desire “to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of future generations of Americans.” 42 U.S.C. § 4331(a). Thus, NEPA’s operative EIS requirement is triggered by federal action which may “significantly affect[ ] the quality of the human environment...” *Id.* at § 4332(2)(C) (emphasis added). The “human environment” “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14.

The socioeconomic chapter of the RFEIS contains a lot interesting discussion and generalized observations, but lacks meaningful data or analysis. In the end, it concludes that this decision will essentially be a socioeconomic “non-event.” RFEIS at 247 (table comparing effects and finding “no change” across every alternative for “economic activity” and “quality of life” indicators).

The Lassen National Forest falls within a larger integrated transportation and public lands network and is the first OSV designation process among the California Forests. The Forest must properly evaluate these interconnected OSV designation decisions on a broader scale, and the consequences of decisions in the Draft ROD must be properly disclosed. A cumulative impact “is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions...” 40 C.F.R. § 1508.7. Cumulative impacts must be discussed in an EIS in a manner that allows for “meaningful analysis.” *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1160 (9<sup>th</sup> Cir. 1997). It is not enough to describe related projects “with generalities insufficient to permit adequate review of the cumulative impact.” *Id.*; see also, *Humane Soc’y v. Dept. of Commerce*, 432 F.Supp.2d 4, 22 (D.D.C. 2006) (discussion must go beyond “conclusory remarks and statements”).

These discussions are inadequate in the RFEIS. The attempt at cumulative effects for the action alternatives is presented in the discussion of Alternative 2. RFEIS at 239-240 (Alt. 2); *id.* at 242, 244, 246 (Alts. 3-5, stating “cumulative effects would similar to the cumulative effects described under alternative 2”). The cursory discussion in Alternative 2 predicts, without

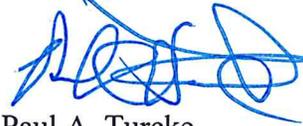
meaningful analysis or support, that “none of the actions are expected to measurably affect annual recreation use, visitor spending, and associated employment, labor income, and tax revenue.” RFEIS at 239. There is no mention of the connection between and/or displacement of Lassen visitors and those to other CA OSV Forests, or the precedential nature of the Lassen decision vis-à-vis these other Forests in California or beyond.

We ask that any instructions/remand require a more robust socioeconomic analysis that properly analyzes the contribution and role of OSV recreation in affected communities, and discloses the potential adverse effects, by alternative, associated with restrictions of OSV recreation opportunity.

**III. Conclusion**

The Draft ROD outlines several unjustified restrictions on historical and legitimate OSV access. We request that the decision elements outlined in our objections be identified for elimination and/or clarification through instructions to the Responsible Official. We appreciate the opportunity to address these concerns in the objection process and urge you to utilize the objection process to restore a functional and sustainable network of designated routes and areas for OSV use on the Lassen National Forest.

Sincerely,



Paul A. Turcke

/PAT