MSBT Law
ATTORNEYS AND COUNSELORS AT LAW

7699 WEST RIVERSIDE DRIVE
BOISE, ID 83714
TELEPHONE: (208) 331-1800
FACSIMILE: (208) 331-1202
WWW.MSBTLAW.COM

SHANNON M. ATWELL
STEPHANIE J. BONNEY≈
PAUL J. FITZER
JILL S. HOLINKA
CHERESE D. MCLAIN
LYNDON P. NGUYEN
ANTHONY M. PANTERA, IV
GEOFFREY A. SCHROEDER
FRANCES R. STERN
PAUL A. TURCKE
MICHAEL C. MOORE, *of Counsel*
DENNIS L. RADOCHA, *of Counsel*

≈ Also admitted in Utah

December 17, 2018

Delivered via email to objections-pacificsouthwest-regional-office@fs.fed.us

Mr. Randy Moore, Regional Forester
USDA Forest Service, Pacific Southwest Region
Attn: Eldorado NF Over-Snow Vehicle Use Designation Project
1323 Club Drive
Vallejo, CA 94592

RE: Objections to Eldorado NF OSV Designation Draft ROD

Dear Objection Reviewing Officer:

Please accept these objections to the Draft Record of Decision ("Draft ROD") for the Eldorado National Forest Over Snow Vehicle Use Designation, as well as the associated Final Environmental Impact Statement ("FEIS"). The Responsible Official is Forest Supervisor Laurence Crabtree. The applicable legal notice was published on November 2, 2018 in the Mountain Democrat, 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 Eldorado 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 7699 West Riverside Drive; Boise, Idaho 83714; 208-331-1800; 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 Eldorado 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 Eldorado 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 recognize the agency has conducted a lengthy process, and addressed some 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 decision to forego Pacific Crest Trail buffers and designate "crossing areas."[1] Still, we have concerns and raise the following objections 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)

[1] We recognize that there is a limited portion of the PCT within the non-Wilderness portion of the Eldorado, and that within that section the Draft ROD would include OSV use areas encompassing 7.5 miles of the PCT, with total "crossing areas" of roughly 5 miles. Draft ROD at 3. We support these choices, and will object to any modifications which would reduce access or reinstate some form of "buffer" preventing OSV access adjacent to the PCT.

(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).

We have steadfastly objected to snow depth prescriptions in the current round of California OSV planning, with little success. We have noted the deficient "science" used thus far to justify snow depth prescriptions. See, e.g., Lassen FEIS at 85 ("[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."). The Eldorado discussion is even more flawed, as it seemingly starts from the presumption that the Forest is locked in by existing Forest Plan language. Specifically, the 1989 Forest Plan contains a standard/guideline stating "[o]ver snow travel will be permitted in designated open areas when there is 12 inches of snow or more and no ground contact is made[.]" Eldorado Forest Plan at 4-83. The Eldorado Draft ROD/FEIS therefore seem to presume that some minimum snow depth is required for any OSV designation. See, FEIS at 84 (describing snow depth requirements for every alternative). We urge the Forest to reconsider its choices on this topic.

Relying on a nearly thirty-year old Forest Plan does not engender confidence in the agency's judgment. Snowmobile technology has changed greatly in that time, not to mention the regulatory landscape and science considering OSV impacts to the human environment. The 1989 Forest Plan included generalized observations about snowmobile travel in stark contrast to the focused proceedings now occurring. A Forest Plan amendment would be amply justified, if not virtually compelled, by the myriad changed circumstances here.

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. The Forest need not impose mandates that are already more

emphatically dictated by pragmatic reality.

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 and could cause much mischief. 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.

We are slightly encouraged by additional language that the Forest has added in this FEIS that snow depth requirements are of largely symbolic importance. See, e.g., FEIS at 56-57. We appreciate what could be interpreted as accommodations to our concerns in the "compliance" and "enforcement" monitoring components to stratify education, warning and citations in addressing these issues. FEIS at 26-27. In the end, we remain of the opinion that snow depth requirements are a solution in search of a problem, and that the Forest Service should generally follow the same approach it did in adopting the amended Subpart C, to require "adequate" snowfall for OSV and preserve the broadest discretion under site-specific conditions to determine what meets that criterion.

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 Reductions in OSV Area Designations are Unjustified and Unacceptable.

The Draft ROD adopts a new "Alternative 5" that would designate 337,100 acres for OSV use, in stark contrast to the DEIS Proposed Action (Alternative 2) that would have designated 435,600 acres for OSV use. See, Draft ROD at 1, 9. It appears that these reductions were arrived at by a combination of (1) capitulating to various demands from special interests; and/or (2) considering only areas for OSV designations lying above 4,000 feet in elevation. See, FEIS at 22. These rationales and the reductions in designated acres are unacceptable and arbitrary. Atmospheric conditions and Subpart C already dictate that there be "adequate" snowfall for OSV travel – the Forest should not be attempting to specify those circumstances in this effort.

There are many instances where the careful and reasoned input of the OSV community has been ignored or contradicted by specific area designations. We particularly note and incorporate by reference our earlier comments on the DEIS, and similar comments and objections by the Sierra Snowmobile Foundation. Specifically, we concur in and incorporate by reference the Foundation's objections addressing (a) alternative access to the Rubicon Trail; (b) areas north and east of the Van Vleck Bunkhouse; (c) Echo Summit/Sayles Canyon; (d) Schneider Cow Camp Road/Sayles Canyon.

The *Snowlands* settlement was a classic instance in which preservationist interests seized a moment of agency oversight/lassitude to hang a litigatory pelt and force "new" action. The Eldorado has unfortunately far overshot the necessary target and made aggressive and unjustified policy and practical choices that will unnecessarily constrain public access. The objection process is the last chance for the Eldorado to revisit this balance and recognize the proper bounds of historic, and generally uncontroversial, snowmobile access.

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

We appreciate that the Draft ROD includes designation of certain 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 FEIS 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 (9th Cir. 2016).

It is unclear what bases have been relied upon in the myriad reductions from historical OSV access. These rationales must not only be justified, but even more fundamentally identified, so as to allow meaningful review and response by the public. We ask that the specified area designations be revisited to better comport with logic, available science, and stakeholder input and collaborative agreement.

D. 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 6-7; FEIS at 64-69. 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 (9th 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 (9th 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, FEIS at 68-69. 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.

III. Conclusion

The Draft ROD outlines several unjustified restrictions on historical and legitimate OSV access. 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 Eldorado National Forest.

Sincerely,

Paul A. Turcke

/PAT