



ATTORNEYS AND COUNSELORS AT LAW

950 W. BANNOCK STREET, SUITE 520  
BOISE, ID 83702  
TELEPHONE: (208) 331-1800  
FACSIMILE: (208) 331-1202  
[WWW.MSBTLAW.COM](http://WWW.MSBTLAW.COM)

STEPHANIE J. BONNEY≈  
PAUL J. FITZER  
JILL S. HOLINKA  
CHERESE D. MCLAIN

LYNDON P. NGUYEN  
ANTHONY M. PANTERA, IV  
FRANCES R. STERN  
PAUL A. TURCKE

MICHAEL C. MOORE, *of Counsel*  
DENNIS L. RADOCHA, *of Counsel*  
≈ Also admitted in Utah

December 29, 2017

Delivered via email to [r02admin\\_review@fs.fed.us](mailto:r02admin_review@fs.fed.us)

Objection Reviewing Officer  
San Juan National Forest  
15 Burnett Court  
Durango, CO 81301

**RE: Objections to Rico West Dolores Travel Management Draft ROD**

Dear Objection Reviewing Officer:

Please accept these objections to the Draft Record of Decision (“Draft ROD”) for the Rico West Dolores Roads and Trails (Travel Management) Project on the Dolores Ranger District, San Juan National Forest. The Responsible Official is District Ranger Derek Padilla. These objections are submitted on behalf of the San Juan Trail Riders (“SJTR”), Public Access Preservation Association (“PAPA”), Trails Preservation Alliance (“TPA”), Colorado Off Highway Vehicle Coalition (“COHVCO”), and BlueRibbon Coalition/Sharetrails.org (“BRC”), including these organizations’ individual and organizational members who have enjoyed, and plan in the future to enjoy, access to the Rico West Dolores area (collectively, the “Objectors”).

These objections are submitted in accordance with 36 C.F.R. part 218. The Objectors, as well as their members, filed comments raising the issues, otherwise providing a basis for these objections, or the issues arose after the opportunities for comment. These comments include all comments filed by objectors and their members which, by way of illustration and not limitation, include our firm’s scoping comments dated January 30, 2015 and DEIS comments dated July 15, 2016. The “lead objector” is SJTR. The point of contact for the lead objector and all objectors 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 Organizations**

Our clients have a unique perspective and longstanding interest in use of the Rico West Dolores area and management of the project area. Aside from member and stakeholder participation in the full array of planning processes, we have played a central role on behalf of recreation interests in litigation, particularly including as defendant-intervenors in *Backcountry Hunters and Anglers, Colorado Chapter v. U.S. Forest Service*, Case No. 11-CV-3139 (D. Colo.) and Nos. 13-1216 and 14-1137 (10<sup>th</sup> Cir.). We remain committed to this presence in ongoing management of the Rico West Dolores, in whatever role may now become necessary.

SJTR is a Colorado nonprofit corporation with approximately 400 members. SJTR is based in Durango and its members are primarily from Colorado. SJTR goals and purposes include to provide an organized network for trail enthusiasts, to promote active participation in off-highway vehicle management, to maintain a focused dialogue with the San Juan National Forest, to educate land managers about “Tread Lightly” and other trail conservation practices, and to encourage cooperation and coordination between user groups and engaged interests. SJTR members have used and have concrete plans in the future to use motorized and non-motorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access federal lands throughout the United States, including Forest Service-managed lands in the Rico West Dolores area of the San Juan National Forest.

PAPA is a Colorado nonprofit corporation with approximately 300 participants. PAPA is based in Telluride and its members are primarily from Colorado. PAPA protects and promotes public land access, primarily through advocacy and on-the-ground support such as volunteering for trail projects, event support or similar activities as authorized by the Forest Service and other partners. PAPA members regularly use Forest Service lands throughout the United States, including the Rico West Dolores area, for recreational and aesthetic purposes including off-highway vehicle, motorcycle, mountain bike, equestrian, or hiking travel on trails or primitive roads.

TPA is a Colorado nonprofit corporation. TPA is a volunteer organization created to be a viable partner to public lands managers, working with the USFS and BLM to preserve the sport of trail riding and multi-use recreation. TPA acts as an advocate for the sport and takes the necessary action to insure that the USFS and BLM allocate a fair and equitable percentage of public lands access to diverse multi-use recreational opportunities. TPA members have used, and hope in the future to use, motorized and nonmotorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access federal lands throughout the United States, including in the Rico West Dolores area of the San Juan National Forest.

COHVCO is a Colorado nonprofit corporation. COHVCO is a grassroots advocacy organization representing approximately 230,000 registered off-highway vehicle (“OHV”) users in Colorado seeking to represent, assist, educate, and empower all OHV recreationists in the protection and promotion of multi-use and off-highway motorized recreation throughout Colorado. COHVCO is an environmental organization that advocates and promotes the responsible use and conservation of our public lands and natural resources to preserve their aesthetic and recreational

qualities for future generations. Like the other organizations, COHVCO includes members who use motorized and non-motorized means to gain access to and recreate upon lands in the Rico West Dolores area of the San Juan National Forest.

BRC is a nonprofit corporation that champions responsible recreation and encourages individual environmental stewardship. BRC has members in all 50 states, including Colorado. BRC members use various motorized and nonmotorized means to access public lands, specifically including the Rico West Dolores project area. 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.

All of the above-described organizations have participated, including through their members, in the multiple administrative processes and earlier lawsuit involving the Rico West Dolores area. In addition to their unique perspective in these roles and as trail-based recreationists, the organizations' members own property, hold jobs or conduct businesses, and are members of the communities within and near the Rico West Dolores area. Many have lifetime familiarity hunting, fishing, camping, and participating in a wide range of outdoor activities in the locale and in specific sites throughout the Rico West Dolores area. This background and perspective is particularly relevant given the creative and unusual framing of some issues and factual conclusions in the Draft ROD and related documents.

## **II. Background and Adverse Impacts of the Decision**

The Rico West Dolores Draft ROD would impose dramatic and unwarranted changes to a long-established road/trail system. It is important in framing the objections to understand the nature of this area, the balance of uses, nature of potential resource concerns, and history behind the project. We will highlight these restrictions within the same subareas as outlined in the Draft ROD.

### **A. Subarea 1 (Draft ROD at 13-15)**

This area focuses largely on ATV and UTV riding balanced against “walk in” opportunities in Fish Creek and Willow Divide. While the Objectors include many participants in these forms of recreation, these opportunities are limited in the Rico West Dolores area and it is not a significant destination for this type of activity. We generally support the concepts of providing specific opportunities for ATV and UTV recreation including designation of new routes or conversion of roads to trails, but the handful of provisions to this effect in Subarea 1 are of minimal benefit in comparison to the significant restrictions elsewhere under the Draft ROD.

### **B. Subarea 2 (Draft ROD at 15-16)**

The closures on Winter Trail and the associated connections to East and West Fall Creek Trails represent significant losses of historical, high quality single track motorized opportunities. As the Draft ROD notes, Calico North (Trail 208) is a desirable technical motorcycle route. Draft

ROD at 15-16. The Draft ROD changes eliminate loop riding via Winter Trail, relegating motorcycle users to out and back riding and thus greater two-way traffic on Trail 208, or to loop riding on NFSR 471 and “conflict” with higher traffic volume and full-sized vehicles. The stated rationales are questionable. “User conflict” in this area is created by and uniquely benefits the highly successful and opportunistic commercial enterprise at the Dunton Resort. Similarly, the alleged intent to reduce “impacts to wetlands and the fen” ignores the fact that the trails themselves will still remain, and that the agency is actually expanding and hardening the trail prism in this area. The Draft ROD’s changes are significant “wins” for Dunton, offset by an intentional “loss” for motorcycle enthusiasts.

**C. Subarea 3 (Draft ROD at 16-17)**

The closure of Spring Creek is unnecessary, curiously documented, and easily avoided. The decision documents do not adequately explain whether “greenback lineage cutthroat” populations is even a proper term, let alone provide any data or defensible analysis showing their existence in Spring Creek. Assuming there is a legitimate management concern, the Draft ROD fails to address the fact that route-based watershed impacts are primarily a function of route location and attributes, and minimally correlated to recreational traffic on the trail. In other words, it is the fact the trail exists, and attributes such as proximity to the waterway, soil type, sloping, gradient, and precipitation that determine impacts. Any trail-related impacts to Spring Creek watershed quality will be minimally reduced, if at all, by eliminating motorcycle travel. Regardless, SJTR has identified to the Forest Service a re-route of this trail segment, shown on prior Forest Service maps, which would avoid over two miles of the creek bottom and provide a far better long-term solution for any alleged watershed issues.

We recognize the new designation along Loading Pen Trail would authorize motorcycle use. The purpose for this designation was to facilitate loop riding in conjunction with Stoner Mesa Trail, connected along Spring Creek Trail. With the elimination of the Spring Creek connection, the Loading Pen designation is of minimal value. In fact, the Draft ROD seems designed to create maximize adverse impact to motorcycle riding opportunity, and then arithmetically camouflage this harm through inclusion of low quality miles along Loading Pen.

**D. Subarea 4 (Draft ROD at 18)**

The closure of Wildcat to motorcycles has significant implications and seems integral to a thinly-veiled plan to insulate the Town of Rico from motorized trail connections. The purported rationale – to address a “specific type of livestock grazing system” – is ludicrous. In our collective centuries of experience in public lands management, on behalf of recreation and livestock interests, we have never seen a Forest Service employee advocate for one permittee’s herding effort by advancing a public trail closure on this rationale.

**E. Subarea 5 (Draft ROD at 18-20)**

The main problem here is the highly unusual and unnecessary “short term” closure of Johnny Bull Trail and portions of East and West Fall Creek Trails based on alleged inability to

document a “public right of way” for motor vehicle access on a few small segments of trail that cross mining claims. Draft ROD at 19. There is no prerequisite that the Forest Service possess a “documented public right of way” prior to designating trails – agency units routinely address this common challenge through various approaches. In many instances, the Forest Service only addresses route designation on Forest Service-managed lands, and declines to address a route’s status on other jurisdictions, particularly where that status might turn on application of state law or circumstances beyond the Forest Service’s jurisdiction or authority. Regardless, the agency should prioritize its apparently ongoing effort to rectify this situation. If the agency is insisting on having a documented right of way on these particular sites, it should culminate those efforts post haste and should make increasingly clear the conditional approval of access along the affected routes, should appropriate documentation or other authorization/approval of the routes be obtained.

**F. Subarea 6 (Draft ROD at 20-21)**

The elimination of motorized trail access to the Town of Rico is unacceptable and irrational. The closure both Burnett Creek and Horse Creek trails was purportedly to “[m]eet[ ] the desires of the Town of Rico and its residents” and to reduce “conflicts” “between the populated area of the Town of Rico and motor vehicle use.” Draft ROD at 20. These rationales defy common sense – even the Draft ROD acknowledges safety/access concerns created by eliminating connection to the trail system. Suggesting that access is provided by Highway 145 is irresponsible, and strains credulity. More fundamentally, the conclusion that the “Town of Rico” “desires” elimination of motorized trail access is not unsupported, but flatly contradicted, by the record. See, Town of Rico comments dated July 25, 2017 (signed by Town Manager Kari Distefano) (attached hereto as Exhibit A).

**G. Subarea 7 (Draft ROD at 21-23)**

This Subarea is not a significant focus for the Objectors’ members.

**H. Subarea 8 (Draft ROD at 23)**

The closure of Ryman Creek Trail and refusal to consider alternative motorized access along Salt Creek Trail continue a theme of irrational decision elements which strategically eliminate key route connections. Similar to the concerns raised above on Spring Creek, the alleged soil/maintenance issues raised for both these routes are primarily a function of trail attributes and the continued existence/placement of the route, not whether the route is traversed by hikers, horses, bikes or motorcycles. See, CBHA Declaration of Jonina Vanderbilt (Dkt. 34-6) at ¶ 7 (discussing “entrenchment, braiding and water damage” issues on Calico Trail and noting “[t]hese problems occur to improper trail design and the use of the trail by all types of users.” The Draft ROD ostensibly addresses this concern, by proposed to decommission a section of Ryman Trail, which could certainly resolve any legitimate downcutting concerns. However, the Draft ROD would offset these supposed impacts along the ridgeline by designating an alternative nonmotorized route in Ryman Creek itself, and allowing the continuing existence and nonmotorized use along Salt Creek, which was alleged to have “the same trail maintenance concerns identified for Ryman Creek Trail.” Draft ROD at 23. This rationale is internally contradictory. What seems more

obvious is a predilection to eliminate any motorized connection along Ryman/Salt Creeks, combined with motorcycle closures on Wildcat and Burnett Creek, thus creating a motorcycle impenetrable bubble around Rico. This bubble eliminates historical loop connections from Hermosa District trails to the south/east, and provides an enhanced nonmotorized experience for a handful of individuals the agency has selectively chosen to benefit.

### **I. Subarea 9 (Draft ROD at 23-24)**

Unfortunately, the Draft ROD does not accurately describe the effect of the elimination of motorized access along the Bear Creek-Little Bear Creek trails. This closure, and the unwillingness to consider a suitable replacement route, will disconnect the Rico West Dolores and Manco/Cortez landscape. Assuming the “nonmotorized” experience for hiking/fishing along Bear Creek is a legitimate basis for excluding historical motorized travel, the agency irrationally failed to consider “win-win” alternatives. These would have included designation of the Little Bear Pack Trail for motorized use, and continuation of long-occurring access along the Morrison Trail 610 “stock driveway, road and bridge” which has been specifically dedicated for public use to the Forest Service.

### **J. Summary**

The above-detailed closures work in concert to create significant adverse changes to motorized trail-based recreation and access. The bare statistics alone reveal significant reductions in access. In particular, motorized single track went from 114 miles to 83 miles, which is arithmetically nearly a thirty percent reduction from the status quo. Draft ROD at 10. These figures alone tell only part of the story, for as the above subarea descriptions reveal, the miles that were eliminated for motorized travel were of unique importance to the functionality and quality of the route network. Additionally, seasonal restrictions were added on the remaining trails, imposing an inflexible prohibition of motorized use from November 1 to May 31 every year. Draft ROD at 11.

We are experienced participants in the land use management process, and can appreciate that no stakeholder will “win” on every issue in a decision of this nature. However, the Draft ROD reflects an almost surgically precise evisceration of strategic elements of the Rico West Dolores motorized trail network. This is the exact trail network that the Forest Service successfully defended only a few years ago in the *CBHA* litigation, against the same alleged concerns that now form the rationale for many of the Draft ROD changes. The Draft ROD has inexplicably tipped the balance in creating winners and losers. The Objection Reviewing Officer should seize this opportunity to restore balance and integrity by identifying specific areas for further analysis or refinement.

### **III. Objection Issues**

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 of and 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 Fedn.*, 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, but as we will outline below, the agency will hopefully recognize, and avoid, the litigation risk that attends this uniquely flawed decision.

#### **A. The Subpart A Analysis Reflects Error.**

The Forest, perhaps as part of a larger effort in Region 2, has elected to navigate new procedural ground by including a "Subpart A Minimum Road System" analysis within this project. This effort is flawed on multiple levels. For starters, the documents reveal the Dolores District misunderstanding of how Subpart A developed. See, e.g., Draft ROD at 4 (stating that "the TMR instructs National Forest managers to identify the Minimum Road System...."). The TMR is properly understood to be the comprehensive modification to the system of designating roads, trails and areas for motor vehicle use formally released on November 9, 2005. 70 Fed.Reg. 68264-68290 (Nov. 9, 2005). This Final Rule focused on creation of new provisions in Subparts B and C, and contained only technical and minor provisions affecting Subpart A. *Id.* at 68287-68288. In reality, the "minimum road system" ("MRS") aspect of Subpart A was created on the verge of the clock striking midnight on President Clinton's final term in office. 66 Fed.Reg. 3206-3218 (Jan. 12, 2001). This rollout of Subpart A and MRS happened concurrently with the infamous Roadless Rule. 66 Fed.Reg. 3244-3273 (Jan. 12, 2001). It is unfortunate that the agency did not recognize and correct the confusion reflected by its perception/statement.

This misunderstanding is not a matter of semantics. The MRS is arguably another arrow in a quiver built at the urging of preservationist special interests to complicate and reduce historical motorized access to the National Forest System. It is concerning that the Dolores District so conspicuously grafted Subpart A onto this project, while failing to appreciate its historical context. Subpart A's MRS analysis has never been well understood or widely applied, and has rarely

formed a basis for litigation, let alone remand of Forest Service travel decisions. See, e.g., *Ctr. for Sierra Nevada Cons. v. U.S. Forest Service*, No. 2:09-cv-2523 (E.D. Cal.) (Dkt. 76, Order dated May 26, 2011). It is an anachronistic effort to throw up hurdles and reduce roads, which has been rendered unnecessary by Subpart B's designation requirements. The agency is taking unnecessary risk in relying too conspicuously on Subpart A here, or in any travel management project.

1. The "Minimum Road System" Analysis Violates Procedural Requirements.

Subpart A does not contemplate identification of MRS in a project-level decision like this Rico West Dolores Travel Management Project. The regulation states that the MRS must be identified "[f]or each national forest, national grassland, experimental forest, and any other units of the National Forest System." 36 C.F.R. § 212.5(b). This language directs an outcome on a unit-by-unit level, which here is for the San Juan National Forest. The MRS must be tied to various factors, such as "to meet resource and other management objectives adopted in [the Forest Plan]." *Id.* Neither the regulatory language nor logic support an effort to identify MRS in piecemeal fashion within Forest subunits, or every time some project is undertaken. Rather, MRS should occur, if at all, on a Forest-wide level, most logically in conjunction with the Forest Plan.

2. The Forest Has Not Adequately Involved the Public.

The MRS requirement, both on its face and as applied here by the Dolores District, unwisely if not illegally creates an unjustifiable risk that NEPA analysis of travel management will be segmented in violation of basic NEPA principles. The regulations require that in conducting the MRS analysis the responsible official must "to the degree practicable, involve a broad spectrum of interested and affected citizens, other state and federal agencies, and tribal governments." 36 C.F.R. § 212.5(b). Relatedly, the Council on Environmental Quality ("CEQ") regulations direct that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

The MRS requirement was included midway through the analysis. The only opportunity for any comment on its inclusion was "after the fact" upon release of the SDEIS. It has become apparent in the Draft ROD/FEIS that the MRS involves numerous procedural shortcuts, and heavy reliance on the September, 2015 Travel Analysis Process Report. The "public involvement" for this process was woefully deficient, and lacks disclosure to the full public during generation of the Report. See, TAP Report at 20-21. In fact, the first step of "public involvement" and perhaps the instigation of the agency's questionable effort to now combine Subpart A/B planning was "visits" and "suggestions" from Wilderness Society staff. *Id.* at 20. The public has not been adequately involved in Subpart A analysis.

As long as Subpart A exists it will fuel a "chicken or egg" comparison to Subpart B. Agency counsel skillfully deflected these questions in the above-cited litigation, but by inviting it here the Dolores District creates unnecessary risk. The inevitable loser in this discussion will be those who rely on the ever-declining system of roads providing access to the National Forest System. The confusion surrounding Subpart A is one of the issues that should be rectified in the objection process and addressed in any instructions/remand.

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

The Draft ROD and FEIS employ a narrative style that largely fails to meet applicable requirements for presentation of technical conclusions. 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 will identify specific failures to meet these requirements within specific objections below. However, the overall approach to this decision-making process violates these fundamental principles. We specifically note and incorporate by reference again the effective earlier testimony of Forest Service specialists on many of the same issues on the same trails. See, *CBHA* Declarations of Mark Stiles (Dkt. 43-2); Deborah Kill (Dkt. 34-3); Christopher Bouton (Dkt. 34-4); Penelope Wu (Dkt. 34-5); Jonina Vanderbilt (Dkt. 34-6); Ivan Messinger (Dkt. 34-7); David Gerhardt (Dkt. 34-8); Cara MacMillan (Dkt. 34-9). The Draft ROD attempts to sidestep these declarations, claiming they “do not necessarily conflict” with the FEIS, did not address all concerns, and only addressed whether there was an immediate need to close 14 trails named in the lawsuit rather than long-term effects. Draft ROD at 5. Virtually everything in this statement is wrong. Much of the testimony addressed universal facts or general management perspectives on recreation management. In reality, there has been no meaningful change in conditions and recreation use on these trails is “low to moderate on an upward trend.” FEIS at 67. The Draft ROD attempts a complex solution to problems that largely do not exist. A good place to start in exposing these misstatements is the reliance on “user conflict” to close trails.

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

The Draft ROD relies heavily upon purported “user conflict” as the rationale for closing trails to continuing motorized travel. See, e.g., FEIS at 4 (characterizing basis for motorcycle trail restrictions as “to address resource impacts, livestock distribution concerns and balance requests for nonmotorized areas”); Draft ROD at 6 (identifying “specific needs for change” to include “nonmotorized recreation experience”). 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 entirely bereft of 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 purely narrative and generalized fashion. See, e.g., FEIS at 200-203. In fact, the agency candidly admits it lacks data on conflict, or even on types of use that is specific to the project area. FEIS at 67-68. The agency admits reliance on “[g]eneral qualitative descriptions of the impact of motor vehicle use on recreation experience...based on Forest Service information that relates to recreation management agency-wide.” *Id.* (emphasis added).

While the Draft ROD closes some routes to supposedly address conflict, it leaves others open in the face of indistinguishable conflict. For example, the Subarea 4 discussion discussing the rationale for continuing single track motorized travel on Priest Gulch and South Calico Trails states: “No major resource issues were identified for these trails and regular maintenance will minimize impacts. There are examples of conflict described in public comments for all the trails with single track motorized use and these two trails were no exception.” Draft ROD at 18. This seems to epitomize arbitrariness. There is no quantification of “conflict” on any route, yet “examples” of conflict supposedly exist “for all the trails.” How is a reader, reviewing court, or conscientious visitor to the public lands expected to make a meaningful distinction between the choice to leave one route open and to close another?

The Rico West Dolores attempt at analyzing conflict is uniquely deficient. 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.

### 3. There is Not Even a Finding of “Conflict.”

The Draft ROD is further flawed because even the actions purportedly based on “conflict” lack a predicate finding that any conflict exists. Rather, the agency has curiously framed these choices as addressing unspecified “preferences” or “opinions” from individual commenters. See, FEIS at 204-207 (Table 3-43). Throughout this discussion the phrase that “some commenters preferred nonmotorized settings” appears ubiquitous. However, the agency says “[t]hese statements were an overall conflict with preferred recreation experiences and not instances of direct conflict.” *Id.* The agency seems to be declining to provide instances of “direct conflict” and is denying that such conflict exists. The stated “overall conflict” with motorized access cannot form a defensible basis to restrict motorized travel on specific trails.

## **D. The Forest Improperly Eliminated Trail Access to Rico.**

The Draft ROD would eliminate trail-based motorized access to the Town of Rico. The purported rationale for these closures (along both Horse Creek and Burnett Creek Trails) is to maintain a “mountain town” atmosphere and “meet[ ] the desires of the Town of Rico and some of its residents....” Draft ROD at 20. This conclusion is unsupported by the record and defies common sense.

### 1. Elimination of Motorized Access to Rico is Arbitrary and Capricious.

The “Town of Rico” did not “desire” to “remove single track motorized use designations from the Burnett Creek and Horse Creek Trails.” Draft ROD at 20. The Draft ROD’s conclusion not only lacks even rational support but is flatly contradicted by the record. Objectors did not attempt an exhaustive review of comments on this issue. However, the Town of Rico has plainly stated its position, which was most recently to allow continuing motorized access along the Horse Creek Trail and to close the Burnett Creek Trail to motorized use. See, Town of Rico comments dated July 25, 2017 (signed by Town Manager Kari Distefano) (attached hereto as Exhibit A). The Town of Rico has commented on multiple occasions during the planning process. See, comments dated June 9, 2016 (on DEIS) (attached hereto as Exhibit B); comments dated January 26, 2015 (scoping) (attached hereto as Exhibit C). The comments have evolved, with the initial comments embracing non-motorized designations for Burnett, “Upper Horse Creek” and Wildcat Trails, the DEIS comments continuing a preference that Burnett/Horse Creek Trails be non-motorized but indicating support for motorized travel on Wildcat Trail to provide motorized access to Rico. The most recent comments state the intention of the current Board of Trustees to withdraw the January 26, 2015 scoping comments. Of the formal Town of Rico comments submitted, the Draft ROD only complies with those withdrawn scoping comments.

At the risk of stating the obvious, the Town of Rico meets a variety of needs for a diverse spectrum of humans. A few have chosen to live in or near Rico, on a full or part time basis. These “residents” in any backcountry setting will tend to favor less development, less access, and fewer human co-habitants. The Town of Rico is just large enough, particularly in the context of this sparsely populated project area, to provide a certain level of public goods and services. These are desired by a significant portion of the recreating public and provide a means of revenue and support for certain businesses in the community. The Draft ROD makes no effort at a reasoned discussion of these factors, and provides no meaningful insight at its eventual choice to favor the “desires” of “some residents” over the socioeconomic interests of other residents or the recreating public. See, 16 U.S.C. § 1604(e) (directing management of the National Forest System to provide for “multiple use and sustained yield”); 16 U.S.C. § 531(a) (defining “multiple use” to include “management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people...”).

The agency cannot properly invoke the unspecified desire of “some residents” to defend its choice, but to the extent common themes developed in the “Rico” comments they parallel the Town of Rico approach and contradict the Draft ROD. For example, “a group of outdoor enthusiasts and representatives from the Town of Rico” formed the Rico Trails Alliance, and submitted comments dated August 7, 2017 (attached hereto as Exhibit D). This group “focuses on non-motorized use” but “recognize[s] that both motorized and non-motorized uses and users must co-exist.” *Id.* The Alliance comments track the Town of Rico comments and support closure to motorized access along Burnett Creek Trail while allowing “motorized use of Horse Creek or Wildcat instead.” The Alliance comments were specifically noted and the quoted language presented in the Telluride Mountain Club comments. See, comments dated August 15, 2017 (attached hereto as Exhibit E). The Forest Service has seemingly been offered a collaborative solution by a spontaneous collection of often divergent groups. It is questionable and frustrating that the agency is rejecting their suggested approach.

It may be that the agency perceived itself to be in a conundrum based on the emerging consensus in “Rico” that Horse Creek Trail be authorized for continuing motorized access. This solution was not included in any of the action alternatives. See, FEIS at 27 (Table 2-2) (showing Horse Creek Trail as “single track motorized” in Alternative A and “nonmotorized” in every other alternative). However, the Forest Service regularly (and often successfully) defends itself against range of alternatives arguments by pointing to the “no-action” alternative. Particularly here, where a strong and diverse consensus emerged against some unspecified group of residents, the agency would be well justified in modifying the Draft ROD to allow at least one method of motorized trail access to Rico.

2. Elimination of Motorized Routes to Rico Creates Public Safety Risks.

An independent flaw in the Rico aspect of the decision is that elimination of single track motorized trails to Rico will create significant public safety risks. The general criteria that must be considered include public safety, provision of recreational opportunities, and access needs. 36 C.F.R. § 212.55(a). The specific criteria for designating trails further include “[c]onflicts among different classes of motor vehicle uses” and “[c]ompatibility of motor vehicle use with existing conditions in populated areas, taking into account sound, emissions, and other factors” *Id.* at (b)(4) and (5). Specific criteria for designating roads require consideration of “[s]peed, volume, composition, and distribution of traffic on roads” and “[c]ompatibility of vehicle class with road geometry and road surfacing.” *Id.* at (c).

The Draft ROD discusses cutting off motorcycle access to the Town of Rico, characterizing “single track riders’ concerns” as “not hav[ing] a quick way to exit the ridgeline in case of bad weather or mechanical trouble.” Draft ROD at 20. The Draft ROD responds by identifying East and West Fall Creek, Johnny Bull, and Eagle Peak Trails as providing alternate means of exit. For starters, Johnny Bull Trail is not designated for motorized travel by the Draft ROD, so that option is of little comfort. More importantly, this discussion fails to recognize the broader significance of maintaining access to Rico. The “need to exit the ridgeline” is not a need to simply get to lower ground. It is in most instances a need, or even a legitimate desire, to obtain shelter (e.g. from a storm), human assistance (e.g. to address injury or mechanical difficulty), or to obtain services (e.g. buy a meal or fuel). The suggestion to ride down the Eagle Peak Trail makes no sense in meeting most of these needs, and only reveals the contorted logic permeating the Draft ROD.

The Draft ROD does acknowledge the value of Rico as “a town” including “as a gas stop.” Here, the agency’s solution is to access the Town “via Hwy 145.” *Id.* This is not only unsatisfying but troubling. It is one thing for a Forest Service decisionmaker to “look the other way” and resolve an access conundrum by realizing riders might traverse disconnected route segments by hopping onto to short section of paved highway. For the agency here to encourage people to ride on this Highway on dirt bikes intended for technical single track riding is poor policy and flies in the face of the applicable designation criteria.

The failure to allow some form of continuing motorized trail access to Rico is illogical and indefensible. We urge you to restore some form of access, consistent with the above-cited

comments.

**E. Physical Resource Impacts Cannot Justify Motor Vehicle Restrictions.**

Aside from the effervescent “user conflict” rationale, the Forest suggests that certain “resource impacts” justify some Draft ROD closures. See, e.g., Draft ROD at 6; FEIS at 4. Here again the agency’s analysis is fundamentally illogical or contradicts the agency’s own record. Again, the agency must meet technical presentation requirements that derive from NEPA and are specified in the CEQ regulations, and must meet the APA’s general requirements that a decision be supported by substantial evidence or reflect a rational connection to the facts found.

**1. Elk Habitat and Hunter Experience.**

Some closures are at least partly based on a generalized attempt to “enhance habitat conditions” for elk. FEIS at 9. Elk populations in the project area “are currently meeting objectives.” FEIS at 51. The Forest Service metrics for ungulate management and elk habitat are similarly being met. All alternatives (including Alt. A “no action”) meet motorized route density standards. FEIS at 139. Security area size, cover, forage and connectivity “is maintained across all alternatives.” FEIS at 141. Yet the agency proposes to restrict motorcycle travel on certain trails to “further enhance habitat conditions.” FEIS at 9. This rationale is offered despite Forest Plan direction to “maintain” or “continue” activities and conditions relating to elk and ungulate populations and habitat. See, Forest Plan Guidelines 2.3.62 and 2.3.63.

Related to the impermissible goal of “enhancing” elk habitat, the agency proclaims its intent to respond to “requests from hunters” for areas with reduced motorized access. FEIS at 10. Yet at the same time the agency acknowledges other hunters want to maintain or expand vehicle access. *Id.* The agency offers no explanation why any alteration of the status quo is necessary, or even permissible. The area complies with all applicable guidance, and hunting experiences of every conceivable type exist, as primarily regulated by state wildlife managers and the associated complex system of general and controlled hunt seasons. Hunter “experience” or satisfaction is a complex and highly subjective construct, related to numerous factors including number of target species, trophy quality, ease/difficulty of harvest/extrication, number of competing hunters, ease/difficulty/type of access, hunter experience/skill and sheer luck. A hunter who claims his “experience” carefully stalking alongside a road was ruined when the elk was spooked by a passing vehicle is perhaps offset by a luckier or better adapted hunter who killed a nice bull in a timbered draw that was escaping the opening day onslaught of road travel. The Dolores District is poorly equipped to address these concerns and embarks on a fool’s errand in any claimed effort to improve “hunter experience.”

To the extent there is analysis of elk habitat/hunting considerations, the agency utterly fails to explain how closing certain trails to recreational motorcycle riding will “enhance” anything. We do not dispute that “[t]he magnitude of disturbance to elk...increases dramatically during the big-game hunting seasons.” FEIS at 136. This is probably because elk become disturbed by humans trying to kill them. Virtually all hunters utilize some form of vehicular access, and for some “hunting” is unfortunately synonymous with “vehicle access.” Perhaps we should note that

a trail motorcycle is a disfavored means of access in the road hunting community, as a likely consequence of the fact that the need/desire to hunt from a vehicle, ability to ride technical single track, and do so while carrying hundred pound elk quarter(s) are rarely correlated. It is hardly remarkable, then, that “[e]lk avoid areas adjacent to roads with vehicular traffic, especially during the hunting season.” *Id.* (emphasis added). So an effort to “enhance” elk production, survival, or reduce stress levels should focus on hunting disturbance, or prioritize limits on “higher disturbance/conflict” vehicle-based hunting strategies, e.g. driving on roads. In Idaho, the state wildlife management agency imposes “motorized access restrictions” in specified units which prohibit use of OHV’s on trails as an “aid to hunting” but allow “pure” recreational access. But the Draft ROD does none of this. Rather, it only restricts recreational motorcycle use on some trails. The Draft ROD may reflect the least rational management response to any purported effort at improving a perceived plight of elk in the Rico West Dolores area.

Wildlife issues can indeed be primary factors necessitating travel management changes. Such is particularly the case when motor vehicle access uniquely facilitates human presence or causes unique adverse impacts to threatened or endangered species. Elk management is a popular topic and big business in the State of Colorado, but should properly be recognized as a tertiary factor in managing recreational travel in the Rico West Dolores area. A simultaneous desire to “enhance” elk habitat alongside the “experience” of certain humans seeking to kill elk cannot rationally justify the selective closure of motorcycle trails in the Rico West Dolores area.

## 2. Watersheds.

The most notable statement that can be made about watershed issues in this travel management process is that they are not a serious issue. The watershed factor “most likely to be affected by roads and motorized trails is sediment.” FEIS at 88. “Currently, the waters within the Rico-West Dolores Landscape meet water quality standards for sediment.” FEIS at 91. “At the watershed scale, there would not be a measureable difference between action alternatives for sediment delivery to the stream network.” *Id.* In fact, all of the action alternatives would “lead to some decrease in road miles, which would benefit watershed health to some degree.” FEIS at 88.

Watershed considerations cannot form a basis for making choices between the alternatives.

## 3. Fisheries.

The FEIS discussion of fisheries focuses on “greenback lineage cutthroat trout” and the purported benefit of closing motorized use along Spring Creek to the greenbacks’ benefit. Draft ROD at 16; FEIS at 107-111. There are several flaws in this analysis.

For starters, it is debatable what fish constitute the listed *Oncorhynchus clarki stomias* and where they are located. The same special interests that likely have the District’s ear in this process previously characterized the existence of perhaps only four “pure” populations “that collectively inhabit about a dozen kilometers of stream habitat.” Complaint (Dkt. 1) in No. 1:12-cv-2460 (D. Colo.) (filed September 17, 2012) at ¶¶ 2-3. Having relied on the precarious state of handful of fish to close trails in Bear Creek on the Pike and San Isabel Forests, preservationists

appear to be opportunistically broadening their view of how to identify (and locate) this species. The FEIS hints at the ongoing phylogenetic debate, and the possibility that “greenback lineage cutthroat” may not even be a listed species. FEIS at 108 (pending a decision on the “meristic study” projects that may affect “GB lineage fish is advised”). Assuming these “lineage” fish warrant the special treatment they are accorded here, there is unfortunately no information presented in the FEIS to detail or even document their existence in Spring Creek. Again, the District presents technical conclusions on faith alone.

Through a similar analysis as for watersheds, the discussion of fisheries concludes that impacts to GBCT are minimal. See, FEIS at 110 (“effects to GBCT habitat from increased sedimentation would be discountable, non-quantifiable, short-lived, and not to a level that would adversely affect habitat for GBCT, prey base, or reproductive success.”). At most, the rationalization in favor of Alternative B (modified) is that it might have “benefits” to improving habitat conditions that are already meeting or exceeding standards. This is not a defensible rationale for closing trails to motorized use.

#### 4. Wetlands and Fens.

Fens are topic of unique concern in the project area. Again, fens, like other water-influenced features, can be impacted by “the presence of certain roads and trails (regardless of use).” FEIS at 19. The effects of motorized trails that are within 100 feet of mapped fens was analyzed. “These sites were field checked and it was determined that there currently are no impact from trails on fens.” FEIS at 95. Fen protection cannot form any part of a rationale to eliminate motorcycle travel on trails.

#### **F. The Agency has Not Adequately Responded to Comments.**

The Forest has chosen an unusual method of responding to comments here, which does not comply with NEPA and its implementing regulations. In particular, “[a]n agency preparing a final [EIS] shall assess and consider comments...and shall respond by one or more of the means listed below, stating its response in the final statement.” 40 CFR § 1503.4(a). There are five “possible responses” described, all of which necessitate identification of both the particular comment, as well as the specified response. *Id.* at (1)-(5). The regulations further provide “[a]ll substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.” *Id.* at (b).

The response to comments here is contained in Appendix K to the FEIS. The comments are summarized and sorted. There is no way to track the issues raised or the response to an individual comment. In other words, the approach chosen fails to identify individual comments and the response to them. At best, the latter portion of Appendix K presents a tabular summary of comment text and includes a “Ltr #” for each comment, but there is no list or other information indicating the “Ltr #” assigned to a specific comment/commenter. The agency’s method of responding to comments here does not comply with governing regulations or other applicable law.

### **G. The Draft ROD Impermissibly Juxtaposes Decision Elements.**

The Draft ROD contains a complex and unpredictable mixture of route network components from across, and beyond, the range of alternatives. Courts generally look to see if the agency took a sufficiently “hard look” and generally examine whether “the EIS process fostered informed decision-making and public participation.” *National Parks & Conservation Ass’n v. U.S. Dept. of Transp.*, 222 F.3d 677, 680 (9<sup>th</sup> Cir. 2000). If the Court determines the agency took a “hard look” at the environmental consequences of the project in question then “review is at an end.” *Id.* However, mere “*pro forma* compliance with NEPA procedures, nor *post hoc* rationalizations as to why and how the agency complied with NEPA” will not suffice. *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 340 F.Supp.2d 1249, 1263 (D.Wyo. 2004) (italics in original); see also, *Davis v. Mineta*, 302 F.3d 1104, 1112-1113 (10<sup>th</sup> Cir. 2002).

Judicial scrutiny regularly considers the range of alternatives. NEPA imposes a mandatory procedural duty on federal agencies to consider a reasonable range of alternatives. 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 (9<sup>th</sup> Cir. 1993). The fact the Forest trotted out what was effectively a new alternative in the Draft ROD demonstrates the failure to identify and receive public input on a legally-sufficient range of alternatives.

The Draft ROD presents an unpredictable juxtaposition of route network components from multiple alternatives. The Draft ROD purports to adopt a “modified Alternative B.” Draft ROD at 9. In reality, the Draft ROD mixes and matches from across the alternatives. These changes can be evaluated in Table 2.2 of the FEIS, and appear to include: (1) Bear Creek (Trail 607) selection of Alt. C designating only 1.72 miles motorized; (2) Black Mesa OHV Loops adoption of Alt. C designations; (3) Johnny Bull (Trail 639) supposedly includes single track motorized designation but the Draft ROD (at 19) says it is closed for an estimated 2 years; (4) Little Bear (Trail 609) change from motorized in Alt. B to nonmotorized as presented in Alts. C-E; (5) Loading Pen (Trail 738) was nonmotorized in Alts. A and B, but under B (modified) will be motorized as presented in Alts. C-E; (6) Seasonal restrictions changed to those presented in Alt. C (FEIS at 31, Table 2-6). There are probably other changes we have failed to note, which is understandable and further demonstrates the confusing and unpredictable direction of the Draft ROD.

This outcome, and the apparent process creating it, fundamentally violate the “twin aims” of NEPA, to allow reasoned public input and thus informed agency decision-making. These flaws are amplified by the nature of the discussion in the Draft ROD/FEIS and unspecified reliance on “desires” and “preferences” of some commenters on numerous issues. While NEPA is certainly not a voting process, a commenter must generally identify which action alternative best reflects the commenter’s desired outcome. To meet both logic and the law the agency should specify decision components and outline a clear choice between alternatives that will facilitate informed public input. The confusing mixture of decision elements in the Draft ROD Alternative B (modified) violate these important principles.

#### **H. The Decision Fails to Properly Analyze Cumulative Impacts.**

The Rico West Dolores area is only one part of a larger integrated transportation network. The Forest must properly evaluate the interconnected travel management 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”).

The discussion of cumulative impacts is deficient throughout the FEIS. In particular, the Objectors are concerned about the impact of the Rico West Dolores decision in concert with decision-making that is underway or reasonably anticipated in adjacent riding areas. The FEIS reflects a general awareness of the interconnectedness of these areas. FEIS at 221-223. However, these discussions are conclusory narrative, and provide only generalized or, in some instances inaccurate, conclusions about the riding experience. The challenge is particularly acute given the overlap between the Rico West Dolores and Hermosa travel management decisions. It is preferable, if not essential, that the Forest Service analyze these issues in a single process, so that the consequences of route designations in each area can be properly disclosed and analyzed. It is notable that the majority of Subpart B travel planning efforts occur on a forest-wide basis, which reduces the likelihood of problems associated with segmenting the analysis as is occurring on the San Juan National Forest.

#### **I. The Service Failed to Consider Potential Adverse Impacts of the Decision.**

The Draft ROD adopts a mix of options from different alternatives that will disrupt long-existing use patterns in complex and unpredictable ways. As previously described, roughly 30 percent of route miles have been eliminated from the single track motorized route network, with significant practical implications stretching beyond the arithmetic scope of the sheer mileage reductions. The on-the-ground effect of these changes is uncertain, but it is certain that the existing population of motorized riders will be forced into a much smaller and disjointed route network. The decision recognizes the possibility that these changes and concentration of existing use upon a smaller route network could have adverse environmental impacts. Draft ROD at 35.

There are multiple problems with this scenario. The Draft ROD admits that very few, if any, unacceptable physical resource impacts are associated with existing motorized travel. The rationales behind this decision largely involve an effort to “enhance” existing resource conditions, or social engineering concerns focused on conflict. The Draft ROD represents an unjustified risk of creating physical resource impacts and safety risks as tangible offsets to amorphous goals like enhancing hunter experience and placating the preferences of some for nonmotorized recreation

opportunities. Additionally, this situation creates, or may be designed to trigger, the risk of a perpetuating cycle of closure. A sustainable level of motorized travel could be concentrated into an insufficiently small and dysfunctional combination of routes, which will result in greater impacts leading certain special interests to call for further restrictions on motorized use. All of these risks are intensified by the Draft ROD's overblown effort to change too many components of the existing network at once. A far more logical, and less risky, approach would be to proceed with caution and implement changes more cautiously or in a phased approach so that environmental consequences could be monitored and addressed.

There is no reasoned consideration of the potential for environmental impacts that will be caused by the Draft ROD. These risks outweigh the purported benefits that Alternative B (modified) would have on a system that was largely working.

**J. The Forest Ignores Disclosure Requirements for Route Decommissioning.**

The Draft ROD contemplates a meaningful, but unspecified, system of route decommissioning. This approach violates NEPA.

The decision documents appear to be intended to create "an implementation program that is progressive in nature, ranging from signing to recontouring, ripping, seeding, and placing physical barriers." FEIS at 15, 53. There are individual routes that are identified for decommissioning. Draft ROD, Attachment 2; FEIS at 41-46. However, the particular methods or timetable for decommissioning efforts are not provided.

The Forest Service has previously determined that travel planning decisions can be implemented by publishing orders/maps and installing signs/gates, but not by ground disturbing methods until suitable site-specific analysis has occurred. See, Targhee Travel Plan Appeal Decision dated January 27, 2000 (attached hereto as Exhibit F). In that decision from the agency's Intermountain Region, the Appeal Deciding Officer reversed "that part of the decision that implements the decision through initiating further ground disturbing actions, such as earthen berms and barriers, ripping the roadbed, or other actions which have potential effects on soil and water resources, other beneficial uses and public safety, until further site specific analysis is completed. *Id.* at 4. In particular, the decision lacked "the necessary documentation of the site-specific effects of various closure methods and their potential effects on soil, water, and human safety...." *Id.* at 4-5.

The Draft ROD does not provide for the aforementioned analysis of alternative methods of road decommissioning, or the site-specific effects associated with any of those methods. This shortcoming must be addressed prior to conducting any ground-disturbing road decommissioning action(s) in the Rico West Dolores area.

**K. The Decision is Inconsistent with the Forest Plan.**

Forest Service actions must be consistent with a forest plan. *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 961 (9<sup>th</sup> Cir. 2005). The Draft ROD is not consistent with

several provisions of the San Juan Forest Plan.

The Forest Plan contemplates shared use of recreational trails “based on mutual courtesy and on a strong stewardship ethic that is primarily self-enforced and maintained by individuals and user groups.” FEIS at 183 (quoting Forest Plan desired condition). This directive “points toward collaboration between motorized, mechanized and nonmotorized user groups....” *Id.* There is no further discussion of this desired condition, let alone any explanation of how eliminating one group of users in response to a generalized “desire” or “preference” of some users is consistent with this “stewardship ethic.”

The Forest Plan also contains specific direction for elk habitat and management. In general, a desired condition for all terrestrial wildlife states “[e]cosystems and habitat conditions for terrestrial wildlife species sensitive to human disturbance are maintained.” Forest Plan Desired Condition 2.3.9. Similarly, guidelines for ungulates state that “to provide for healthy ungulate populations capable of meeting state populations objectives, anthropomorphic activity and improvements across the planning area should be designed to maintain and continue to provide effective habitat components that support critical life functions.” Forest Plan Guideline 2.3.63 (emphasis added); see also, Guideline 2.3.62 (projects or activities “should be designed and conducted in a manner that preserves and does not reduce habitat effectiveness”). There is a fundamental difference between “maintain,” “continue” or “does not reduce” versus “enhance.”

#### **L. The Decision Unlawfully Benefits Special Uses.**

Whether inadvertently or by design, the Draft ROD provides a boon to certain special uses. These include the “world class” luxury ecotourism commercial enterprise at the Dunton Hot Springs Resort, the livestock grazing permittee on the Tenderfoot allotment, and certain outfitter/guides hoping to uniquely benefit through creation of new, exclusive “nonmotorized” areas.

Again, the Forest Service is tasked with “management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people....” 16 U.S.C. § 531(a). So in a theoretical “conflict” between the needs of hundreds of members of the public versus the preference of a single permittee, it is conceivable that the agency might conclude the needs of the one might need to adapt to the needs of the many. At a minimum, there should be a reasoned discussion of these considerations, and some discernible rationale for the outcome selected. However, this did not occur. Rather, the analysis disclaims any need or ability to consider special uses. FEIS at 73.

Any interaction or overlap between motorized trail designations and special use permit management should occur in an integrated process. Some amorphous yet unanalyzed need to benefit particular special uses reflects poor policy, and may be illegal. The Forest Service should not be restricting public rights to advance the private, economic interests of a handful of permittees.

#### **M. Livestock Operations Cannot Form a Rational Basis to Restrict Access.**

Closure of the Wildcat Trail to motorized access is irrationally based on a “specific type of livestock grazing system” and a “critical” need to “minimize conflicts with livestock herding efforts in the Wildcat Creek drainage.” Draft ROD at 18. As we have noted in previous comments, closure of a public access along Forest Service system trail to benefit one permittee’s herding effort is virtually unprecedented. To support this conclusion and further illuminate the issue we include the Declaration of Brenda Richards (attached hereto as Exhibit G).

There are further problems with using livestock grazing management as the sole justification for closing Wildcat Trail. The entire discussion about livestock/recreation management is again undocumented narrative, lacking any fact, data, or meaningful connection to any site anywhere, let alone in the project area. FEIS at 161-162. Livestock management is raised as a potential concern for other areas/routes within this project, yet there is no effort to explain why “shared use” will occur on other sites but there is a “critical” need to close Wildcat. See, FEIS at 19, 163 (Table 3-30 showing list of allotments). The FEIS indicates that the permitted dates for grazing on the entire Tenderfoot allotment are June 20 to October 15. So there cannot (lawfully) be any need for “critical” herding near Wildcat Trail outside those dates. FEIS at 163. Digging deeper, the allotment is apparently managed through a four pasture rotation system. *Id.* Admittedly not knowing the specific locations/prescriptions, this is presumably (or will be when next scrutinized) some form of rest-rotation system, in which the season of use for the pasture(s) containing Wildcat Trail will be less than the season of use for the entire allotment, and will change in different years of the rotation cycle. The Draft ROD makes no effort to acknowledge or explain these “holes” in the calendar, and thus the agency’s logic in relying on livestock management to close Wildcat to motorcycles.

The closure of Wildcat is further complicated by its role as a possible connector to the Town of Rico. Again, when accurately depicted, the “Town of Rico” supports maintaining a motorized trail connection, and suggests Wildcat Trail as an appropriate option. See, Exhibits A, D and E hereto. Unfortunately, it appears that the unwavering desire to create a nonmotorized bubble around Rico may be what is really driving the Wildcat closure. If so, this is the type of behavior that the Forest Service should not tolerate and can rectify in the objection process.

**N. The Agency Has Improperly Interpreted Easement Issues to Justify Closure.**

Several key closures are predicated on a contrived dilemma about how to traverse private property or the Forest’s irrational failure to exercise its statutory right to defend continuing public access. These include the Subarea 5 closures of Johnny Bull, East/West Fall Creek Trails (Draft ROD at 19) and the failure to consider continuing access along the Morrison Trail. FEIS at 57. The agency’s conclusions here are arbitrary, capricious, and/or short of statutory right.

As noted above, Forest Service subunits regularly navigate similar concerns in ways that do not result in a volitional choice to prohibit existing public access. Contrary to the implication of the Draft ROD, it is not incumbent on the Forest Service to possess a “documented public right of way” for those portions of a trail that cross some form of private property. Draft ROD at 19. These questions can be complex, often turn on unique facts, and many times do not involve Forest Service jurisdiction or even involve the Forest Service as a party. See, e.g., *Gold Hill Dev. Co., LP*

*v. TSG Ski & Golf, LLC*, 378 P.3d 816 (Colo. App. 2015) (addressing public rights of access under R.S. 2477 and state law prescriptive easement theories, and denying claims that Forest Service was a necessary party).

The Morrison easement interpretation is even more troubling. Here, the United States possesses an express, recorded easement(s) initially granted in 1948 including “to construct, repair and maintain a stock driveway, road and bridge” as well as “the rights and privileges thereunto belonging or in anywise appertaining in and to said easements and rights-of-way.” Based on the cryptic statement in the FEIS, the agency apparently reads this as being solely limited to a “stock driveway.” Such an interpretation is questionable at best. Does a “stock driveway” necessitate “maintenance” or “repair” or construction of a “road” and “bridge?” In other words, the language can be reasonably read to contemplate permissible uses of the easement as a stock drive, road and bridge. This language and the resulting scope of the easement is also subject to reasonable evolution and interpretation, particularly in light of the fact that the easement was being granted to the United States. Regardless of the ultimate interpretation of this language in any hypothetical future proceedings, it is troubling that the Forest Service, after allowing public travel along this easement for decades, has now reversed course upon itself and refuses to defend continuing public rights of access.

The Reviewing Officer should provide instructions directing the agency to revisit or modify its closures of trails based on easement issues.

**O. The Draft ROD Illegally Addresses Route Relocation Options.**

The Draft ROD largely brushes aside potential re-routes of motorized routes yet proudly identifies multiple re-routes for nonmotorized recreation. This is another example of arbitrariness in conducting this process.

Objectors (and others) brought numerous examples of re-routes or alternate connections. These were offered in good faith and in an effort to address stated resource concerns and even “desires” of certain nonmotorized recreationists. These included a re-route along previously-mapped Forest Service trails such as at Spring Creek and Little Bear Pack Trail, or along existing routes such as Salt Creek Trail. These proposals were brushed aside and not even considered for meaningful analysis. Draft ROD at 23; FEIS at 57-58. Yet other trails were “designated” for nonmotorized use with similar, if not greater, concerns and an uncertain source or manner of presentation to the agency. See, e.g., Draft ROD at 19 (adding a “hikers only” trail that would “[t]ake advantage of an old trail alignment around Sockrider Peak”); Draft ROD at 23 and Map A (designating nonmotorized access along Salt Creek and Lower Ryman Creek); Draft ROD at 24 (“officially adding” Little Bear Pack Loop and Pack Connector as nonmotorized trails).

We remain hopeful that these connections might present an opportunity to restore functionality to the trail network and resolve our objections. Where they were not properly considered in the process, we realize that future analysis is likely necessary. Given that they are existing routes, we believe that a resolution could focus on a sufficiently detailed and expedited process to prioritize their evaluation for motorized designation. This approach might allow the

Dolores District to sidestep the apparent differential treatment provided to motorized versus nonmotorized re-routes in this process.

**P. Seasonal Closures are Arbitrary and Capricious.**

The Draft ROD imposes a blanket closure on motorcycle use from November 1 to May 31. This is supposedly to facilitate enhanced hunter experience in a handful of “late fall” seasons. Draft ROD at 28. However, the action chosen, a selective closure of motorcycle travel, is not reasonably connected to that goal.

We recognize that this provision in Alternative B (modified) reduces the seasonal limitation on use, as in Alternative B the prohibition would have been from September 9 to June 30. FEIS at 31. We appreciate that this change is less discriminatory against motorcycle riders that was originally proposed, but it does not make things right. Rather, it will likely be perceived as creating a “lose-lose” scenario and could well form the basis for objections from “quiet use” interests.

There is no rational basis to impose seasonal restrictions that solely affect motorcycle travel on a handful of remaining trails. The seasonal restriction issue should be eliminated or refined through instructions/remand.

**Q. The Objection Process is Illegal.**

The part 218 objection process has now sufficiently developed to reveal several flaws. We wish to note our concerns here, should these flaws develop within this application of the process. To call this a “predecisional” review process is misleading, if not oxymoronic. The fact is that by the time an objection can be submitted, the Forest Service is heavily invested in every sense in the outcome presented in a Draft ROD. In our experience, a Draft ROD almost never goes “back to the drawing” board, except in unusual circumstances such as catastrophic wildfire altering the fundamental landscape within the project areas. Instead, the objection review either rubber-stamps the Draft ROD, or presents a series of instructions that seem designed to strike a balance between placating objectors yet allowing the deciding officer to salvage and rationalize the decision already made.

The part 218 procedures reflect or invite error in multiple ways. There is no impartial review. Indeed, a “reviewing officer” and “deciding officer” are directly adjacent to one another in the same organization chart. They presumably have, and are heavily incentivized to maintain, a solid working relationship. There is a reasonable chance they have some level of personal relationship that is at least cordial. In various instances we have seen the deciding officer and staff have direct input into the objection resolution process, to the point of being provided an opportunity to edit the text of the final reviewing officer’s report. This is hardly the nature of review that comports with the jurisdictional significance of the process or underlying notions of due process.

Another key conundrum created by part 218 is the manner in which objections can be

“resolved,” whether by agreement amongst objectors or through the reviewing officer’s report. Can the Draft ROD be altered in some meaningful way? If so, is it permissible to make changes that were reflected within the range of alternatives? We have seen the agency dramatically reverse course in the part 218 process, even to the point of incorporating decision components that were never previously disclosed for public comment in any alternative.

There are finally a number of procedural fine points that experience has shown to be potentially problematic. There are numerous procedural requirements that are apparently intended to “raise the bar” for objectors or create potentially relief for the agency. See, e.g., 36 C.F.R. §§ 218.4 through 218.8. It is unclear to what extent these requirements can be stringently interpreted or enforced. The timelines are detailed and constraining. Indeed, this reflects the genesis of the approach in the Healthy Forests Restoration Act and an underlying intent to make critical or time sensitive project more impervious to pesky “environmental” appeals. There is no provision in part 218 for a stay of project implementation. As a practical matter, we observe the primary goal to implementation is the need to address any “concerns and instructions identified by the reviewing officer....” 36 C.F.R. § 218.12(b). This is an imprecise and unpredictable method, which probably does little beyond frustrating engaged publics and agency officials alike.

Our concerns about the 218 process can hopefully be rendered moot here. But we raise them nonetheless in anticipation of a possible occasion when it makes sense to bring the process under greater scrutiny.

#### **IV. Elements of a Successful Resolution**

The Draft ROD sadly reflects meaningful restriction of historical access, and particularly motorcycle access, in virtually every component of the Rico West Dolores trail network. Objectors are very concerned that the agency and/or key decisionmakers alongside who they have partnered so willingly and effectively would have diverged so dramatically in the Draft ROD. Dogmatic adherence to this dramatic alteration of this long-existing status quo will allow objectors little option but vigorous opposition in every venue and manner available. However, adoption of even a few common sense modifications to the Draft ROD could restore functionality to at least some components of the route system, could create “win-win” solutions for diverse recreationists, and avert the “no holds barred” fight the Draft ROD would force upon objectors.

It is possible that we can resolve our objections and attain at least an acceptable level of functional access through adoption of some combination of the following elements:

- Resolution/restoration of access along “easements” including Subarea 5 trails, Morrison
- Designation of some form of motorized, trail access to Rico
- Designation of some form of motorized access along Wildcat Trail
- Designation of motorized access in the vicinity of Ryman Creek, such as along Salt Creek
- Connection of motorized routes in Subarea 9, such as along Little Bear Pack Trail
- Designation of the identified re-route in the vicinity of Spring Creek

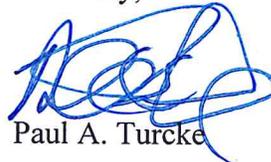
Again, we recognize that some of these were presented as possible decision elements

within one or more alternatives, while others were not because they were not considered in detail. Some of these elements could be resolved without further analysis or a new decision, e.g. restoration of access along Johnny Bull Trail upon acquisition of an easement. We ask that conditional approval of any such routes be clarified and strengthened through instructions. For other routes, we hope to explore in the objection process the manner in which further analysis could be performed that would present the opportunity to restore or improve upon historical opportunity and functionality in Rico West Dolores motorized trail system.

**V. Conclusion**

The Draft ROD outlines unjustified and dramatic elimination of long-existing motorized recreation in the Rico West Dolores area. The analysis is virtually unprecedented in its narrative style and capricious selection of decision elements. One would be hard pressed to create a more surgically precise method of destroying existing quality motorcycle riding opportunities than the Draft ROD. These changes are particularly frustrating to Objectors given the collective time and energy we expended alongside the Forest Service defending against the same issues in the *CBHA* litigation. 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 balance to recreation management in the Rico West Dolores area.

Sincerely,



Paul A. Turcke

/PAT

Enclosure/Exhibit List:

- A- Town of Rico comments dated July 25, 2017
- B- Town of Rico comments dated June 9, 2016
- C- Town of Rico comments dated January 26, 2015
- D- Rico Trails Alliance comments dated August 7, 2017
- E- Telluride Mountain Club comments dated August 15, 2017
- F- Targhee Travel Plan Appeal Decision dated January 27, 2000
- G- Declaration of Brenda Richards