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June 15, 2009

VIA CERTIFIED U.S. MAIL AND E-MAIL

Appeal Deciding Officer/Regional Forester, Corbin L. Newman Jr.
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Re: Administrative Appeal of the Tusayan Ranger District Travel Management Project on the Kaibab National Forest

Dear Mr. Newman:

The Center for Biological Diversity, the Grand Canyon Wildlands Council, the Sierra Club, Public Employees for Environmental Responsibility, WildEarth Guardians and Liz Boussard (collectively "Appellants") hereby submit this administrative appeal of the U.S. Forest Service's Decision Notice ("DN") and Finding of No Significant Impact ("FONSI") for the Tusayan Ranger District Travel Management Project, located on the Kaibab National Forest (hereinafter "the Project").

This Notice of Appeal is filed pursuant to, and in compliance with, 36 C.F.R. Part 215. Appellants provided timely substantive comments on the draft Environmental Assessment ("EA"). The Forest Service's final decision either failed to adequately respond to the comments or disagreed with the recommendations made in the comments.

As required by 36 C.F.R. § 215.14(b), Appellants provide the following information:

1. The names and addresses (with a telephone number, if available) of the Appellants are listed below. All correspondence or contacts about this appeal should be directed to counsel representing the above appellants: Cyndi Tuell, Center for Biological Diversity, P.O. Box 710, Tucson, Arizona 85702, (520) 444-6603, (520) 623-9797 (fax), ctuell@biologicaldiversity.org.

2. The Appellants object to the decision to adopt modified Alternative 3 (as described in the EA) by Responsible Official Michael R. Williams, Forest Supervisor, Kaibab National Forest on April 18, 2009.

3. In the following Statement of Reasons, Appellants provide the specific reasons why the decision is being appealed and the specific changes in the decision that we seek, along with the related evidence and rationale on why the decision violates applicable laws and regulations.

NOTICE OF APPEAL

Pursuant to 36 C.F.R. § 215.11, the Center for Biological Diversity, Grand Canyon Wildlands Council, and the Sierra Club ("Appellants") are filing an appeal regarding the Decision Notice ("DN") and Finding of No Significant Impact ("FONSI") signed on April 18, 2009 by Kaibab National Forest Supervisor Michael R. Williams ("Supervisor"). The DN and FONSI were signed on the basis of a December 2008 Environmental Assessment ("EA"). Supervisor Williams selected Alternative 3.

STATEMENT OF REASONS

In 2003, the Chief of the Forest Service identified "unmanaged recreation," especially the impacts from off-road vehicle ("ORV") use, as a key threat facing national forests. DN at 4. In 2006, the Forest Service began scoping Travel Management Planning for the Tusayan Ranger District on the Kaibab National Forest, covering approximately 331,427 acres of forest located just south of the Grand Canyon National Park South Rim.

The FEA identifies the following purposes for the Project: 1) improving management of motorized vehicle use in accordance with the Travel Management Rule; 2) complying with the Travel Management Rule and 36 C.F.R. 261.13 which requires Forests prohibit motor vehicle use off designated roads, trails and areas; and 3) identifying the minimum road system needed for safe and efficient travel for administration, utilization, and protection. FEA at 10.

The Forest Service developed three alternatives. Alternative 1 is the No Action alternative and continues the current situation and management. Alternative 2 is the Proposed Action, which would reduce the number of system routes by 163 miles and incorporate approximately 6 miles of user-created routes into the system. Alternative 3 was developed to respond to concerns that the proposed action would negatively impact motorized recreation and forest access opportunities. This alternative would remove 143 miles of existing system routes and add approximately 6 miles of unauthorized routes to the current system. An alternative endorsed by the Center for Biological Diversity, the Grand Canyon Wildlands Council and over 300 individuals would have designated the Forest Service Wet Weather road system as the open road system. This alternative was dropped after preliminary analysis because the Forest Service determined that it would not provide access to private land parcels and did not comply with the Travel Management Rule. FEA at 27. We note that Alternative 1 is also clearly not in compliance with the Travel Management Rule, yet was analyzed by the Forest Service.

The Forest Supervisor decided to implement Alternative 3 as described in the Environmental Assessment. The decision will remove approximately 143 miles of roads from the existing system, designate 566 miles of open forest roads, allow annual maintenance on one-fifth of the system roads, and open approximately 650 acres of dispersed camping corridors and routes. DN at 3. Over 450 miles of high clearance roads are open to any motorized user. FEA Table 4. This alternative is nearly identical to Alternative 2, as repeatedly emphasized in the EA and FEA. *See* specifically FEA Table 6. To implement the decision, the Forest Service will publish a motor vehicle use map that will be available to the public. DN at 4. Decommissioning of roads will "follow the required NEPA process." DN at 7.

For the reasons explained below, the Project violates the Travel Management Rule (TMR), Executive Order 11644 as amended (EO), the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the National Forest Management Act ("NFMA"), and the Administrative Procedure Act ("APA"), along with various regulations implementing these statutes.

I. The Open Road System is not supportable and does not reflect the "Minimum System," in violation of the Travel Management Rule and Executive Order 11644 as amended

- A. The Open Road System (Designated System) does not reflect the "Minimum System"
- B. The Motorized Big Game Retrieval Provision Violates the TMR
- C. The Decision To Designate Temporary Roads is a violation of the Travel Management Rule

II. The Project Violates the National Environmental Policy Act

- A. The Project May Have Significant Impacts That Must Be Analyzed In An Environmental Impact Statement
    1. Analysis of the CEQ Regulations Demonstrates that an Environmental Impact Statement is Required
    2. The Environmental Assessment Contains Inadequate Analysis To Support The FONSI Determination
    3. Forest Service fails to rely upon its own data
- B. The Forest Service Failed to Properly Identify the Scope of the Project
- C. The Forest Service Failed To Consider and Analyze A Reasonable Range Of Alternatives
    1. The Appellants' Alternative was Improperly Excluded from Analysis
    2. The Alternatives Considered are Nearly Identical
- D. The inclusion of user-created routes is arbitrary and capricious

III. The Travel Management Project Violates The National Forest Management Act Because It Is Inconsistent With The Forest Plan

I. The Open Road System is not supportable and does not reflect the "Minimum System," in violation of the Travel Management Rule and Executive Order 11644 as amended

As stated in the Travel Analysis Process report (TAP), "[a]ny reduction in the number of miles of road by maintenance level would make the existing road system more affordable[,]" making a single mile of route reduction "a positive benefit" for the Forest Service. However, such a reduction would not, in reality, afford any true benefit to the forest. Appellants disagree with the Forest Service that "[m]otorized cross-country travel would be prohibited on the Tusayan Ranger District[]" under alternative 2 and 3 because motorized game retrieval would continue to be allowed throughout almost the entire district and the choice of any alternative, including the no action alternative, would result in unlimited cross-country travel for this purpose. FEA at 17.

None of the alternatives analyzed in the EA comply with the TMR 36 CFR part 212.55(a), which requires the Forest Service to consider the effects on natural and cultural resources, the need for maintenance and administration of roads, trails, and areas, the availability of resources for that maintenance and administration, nor part 212.55(b) which requires the responsible official to consider the effects of motorized use with the objective of minimizing damage to soils, watersheds, vegetation, wildlife and habitat.

A. The Open Road System (Designated System) does not reflect the "Minimum System"

The Forest Service defines a minimum transportation system as "the road system needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands" (36 CFR 212.5b). The agency goes on to further explain the desired minimum road system attempts to "balance" resource and other management objectives, laws and regulations, long-term funding expectations, and minimizes adverse environmental impacts. FEA at 34-35. Our understanding is that the preliminary RAP (Road Analysis Report; Forest Service 2003) and subsequent TAP risk and value processes provide the primary rational basis for this evaluation.

Conspicuously absent from the PA, EA and DN is adequate rationale for the proposed OPEN route network. The DN retains within the proposed open system 138 miles of "High Risk/Low Value" roads, presenting high risks to cultural and natural resources including soil, watershed, and wildlife while providing low access values regarding range management, scenery and private property. *See* TAP pp. 36-48. The DN does not comply with motorized recreation designation criteria set forth in Executive Order 11644, § 3, as amended, and the TMR, 36 C.F.R. § 212.55.

The proposed system consists of the District's "main transportation system" including the 160-mile Wet Weather system. TAP at 48. The proposed action's remaining 280 miles of roads, discussed below, are classified as "Low Value."

As the Forest Service points out, high risk and high value ratings "indicate these are the ***highest*** priority for investment of time and funds to mitigate or eliminate risk and accommodate uses." TAP at 48. The Forest Service also emphasizes that "[f]irst priority will be given to passenger car roads in the Wet Weather system" and that these roads will be the first to receive maintenance and resurfacing. "Second priority will be given to the remaining passenger car roads." TAP at 48.

The Forest Service states the existing Tusayan Ranger District road system represents about 20 percent of the total roads on the forest and can expect to receive about 20 percent of the Kaibab National Forest's total roads budget, or $184,000. EA at 30. While, as stated in the TAP, current priorities are placed on maintaining passenger car roads (TAP at 19), $184,000 would provide about half of the maintenance cost of $353,805 required for the district's 100-mile Management Level 3 roads (TAP at 54). The passenger road mileage (approximately 100 miles)[1] comprises about 14 percent of the Tusayan Ranger District's proposed transportation system. FEA Table 2.

While, as pointed out in the TAP at page 34, a "completely affordable road system may not meet all objectives of a minimum road system including access for administration, utilization, and protect of National Forest System lands," the "availability of resources should be a consideration in designating routes for motor vehicle use." FEA at 16. If, as the agency states, "scarcity of resources should not lead to blanket closures of National Forest lands to recreation users" (FEA at 16), complementary processes like the RAP and TAP provide an adequate, if not exhaustive, basis to determine which routes, based on resource risks, access and other values, should comprise the road system. That was, after all, the purpose of both efforts. It follows that affordability and a risk/value analysis should objectively determine the minimum transportation system.

In this decision, the Forest Service retains in the open road system, low value/high risk routes and a clearly unaffordable road system that will certainly result in continued resource damage. There is no justification as to why these routes are retained, and the failure to adopt a minimum road system as described in the TAP, which is contrary to the Travel Management Rule.

Therefore the EA is unreasonable, arbitrary, capricious, and inconsistent with the Forest Service's duties pursuant to Executive Order 11644 §§ 3(a)(1)-(4), as amended, to minimize resource impacts and minimize conflicts, 36 C.F.R. § 212.55, NEPA, and the CEQ regulations.

In addition, the prevalence of over 100 miles of user-created routes on the Forest indicates that the Forest Service lacks the resources to effectively manage and enforce its current road system. Until these failures are addressed, it is unreasonable to make additions to the road system. The Travel Management Rule requires that the Forest Service consider "the need for maintenance and administration of roads, trails, and areas that would arise if the uses under consideration are designated; and the availability of resources for that maintenance and administration." 36 C.F.R. § 212.55(a). The responsible official must also "monitor the effects of motor vehicle use on designated roads and trails and in designated areas." 36 C.F.R. § 212.57.

Relief Requested: Withdraw the Decision Notice and FONSI, analyze alternatives that are in compliance with the Travel Management Rule and develop an EIS.

B. The Motorized Big Game Retrieval Provision Violates the TMR

[1] The TAP, page 54, refers to a 103-mile Maintenance Level (ML) 3 road system not including the two miles of ML 4 roads. It shows the ML 5 mileage as zero. The EA, page 12, gives a 97-mile figure combining ML 3, 4, and 5.

This decision would allow cross-country motorized big game retrieval (MBGR) for all hunters up to one mile from a designated route for elk. FEA at 13. Appellants are extremely concerned that the exception to the ban on cross-country travel for motorized game retrieval does not address the need to prohibit motorized off-road travel into areas currently closed to off-road travel and all alternatives appear to authorize such travel for MBGR.

The expansive provision for MBGR does not meet the requirement that the Forest must "[a]pply the provision for big game retrieval and dispersed camping *sparingly* . . .." FSM 7703.11(4) (emphasis added). As explained in the Federal Register notice announcing the dispersed camping rule: "Responsible officials may include in the designation the limited use of motor vehicles within a specified distance of *certain designated routes*, and if appropriate within specified time periods, solely for the purposes of dispersed camping or retrieval of a downed big game animal . . .." 73 Fed. Reg. 74,612, 74,612-13 (Dec. 9, 2003) (emphasis added). The Forest may not simply designate a large motor vehicle exception for all, or a large number, of routes.

In fact, the Forest Service has agreed, in deciding an appeal on this exact issue:

> [A] broad designation allowing dispersed camping along all or most designated routes is not consistent with long-term objectives for travel management. Direction from the Chief of the Forest Service indicates that the allowance of dispersed camping by general designation along roads and trails should be used sparingly.

Reviewing Officer Recommendation, Sawtooth National Forest, Travel Plan Revision, Appeals #08-04-14-0035-A215, #08-04-14-0038-A215, and #08-04-14-0039-A215 at 17; *see also* accompanying Appeal Decision at 1, adopting recommendation and directing Sawtooth National Forest to modify decision ("Include designations for motor vehicle use for dispersed camping on the initial motor vehicle use map only to the extent that they reflect conditions where motor vehicle use for dispersed camping is practicable without causing unacceptable resource damage."). This rationale applies to MBGR as well as dispersed camping.

Even if the proposed expansive MBGR vehicle use provisions could be adopted as a substantive matter, the procedures required to do so would be onerous and far beyond what has either been completed or contemplated. First, complementary to the requirement that MBGR be designated sparingly, the rules mandate that the Forest "[a]pply the provision for big game retrieval and dispersed camping sparingly *after conducting travel analysis and appropriate site-specific environmental analysis* and public involvement." FSM 7703.11(4) (emphasis added). As the Forest Service's own map shows, practically the entire forest is within one mile of a road. FEA, Figure 6. Accordingly, the Forest would have to do site-specific analysis under NEPA for all these areas, not just for designated roads and motorized trails. This would require the standard "hard look" under NEPA analyzing direct, indirect, and cumulative impacts to all these areas. Substantive protections under NFMA for streams, including sedimentation, impacts to fish habitat, etc., would need to be analyzed.

Further, consultations with the State Historic Preservation Office (SHPO) and the U.S. Fish and Wildlife Service (USFWS) under the National Historic Preservation Act (NHPA) and the Endangered Species Act (ESA) change drastically once nearly the entire forest is subject to

motorized use. For instance, regarding SHPO consultation, the "USDA Forest Service Policy for Section 106 of the NHPA Compliance in Travel Management: Designated Routes for Motor Vehicle Use" proceeds from the presumption that "[u]nder the proposed regulations, motorized travel will be restricted to designated routes, and unmanaged cross-country travel will be prohibited[, and] the closure of unmanaged cross-country travel will serve to protect historic properties across a broad landscape. It is in the interest of resource protection and historic properties to conclude the designation process as rapidly as possible. Requirements to comply with Section 106 and Section 110 of NHPA for inventory and evaluation of historic properties should be established with this in mind." Further, the Standard Consultation Protocol for Travel Management Route Designation states that "Situations Requiring Consultation" include "fixed-distance corridors along certain roads, including exempt roads, that will be designated for dispersed camping." Thus, the Forest cannot rely on the pre-existing programmatic SHPO consultation if it proceeds with its broad dispersed vehicle use plan for MBGR. The Forest may choose to adopt more limited provisions on a site-specific basis, after site-specific analysis.

Appellants urged the Forest Service to consider the New Mexico Game and Fish Department's (NMGFD) strong and appropriate position of ***not*** advocating for an exception for motorized game retrieval. Appellants also asked the Forest Service to consider NMGFD's recognition "that any OHV use off designated roads and trails establishes tracks that stimulate additional unintended use and subsequent habitat degradation, thereby compromising effective control." NMGF 2006. The Forest Service does in fact recognize that allowing off-road travel for game retrieval will result in the creation of additional, unauthorized routes: "Any newly discovered populations of rare plants found along roads or unauthorized routes (including new routes created by big game retrieval) will be monitored periodically for adverse effects." DN at 8.

In addition, the New Mexico agency "encourages USFS to consider hunting-related OHV activities similar to any other OHV recreational activity that occurs on USFS lands and apply appropriate restrictions equally." NMGFD 2006. In contrast, the Arizona Game and Fish Department (AGFD) is the only state wildlife agency, to our knowledge, requesting an exemption to the general prohibition of motorized game retrieval. The AGFD, in a recent letter to the Coconino National Forest (AGFD 2007), insisted that the Forest Service provide "sufficient sites for the maximum number of hunter camps that could be permitted in a single hunt," ignoring the USFS resource and experiential responsibilities to the American public and other visitors discussed elsewhere in this document. This stance is perplexing to us, not only because of well-known wildlife habitat impacts outlined by NMGFD, but also because of the concern expressed by Arizona hunters regarding ORV impacts discussed below. The Kaibab NF should have recognized and considered that average monthly temperatures for Arizona and New Mexico differ by an average of less than 7 degrees Fahrenheit,[2] making the AGFD argument that game spoilage is the reason to allow such excessive motorized travel incredulous.

The AGFD has presented no study or evidence that game spoilage will occur where motorized game retrieval is not permitted and in fact, the Forest Service provides ideas for alternatives to

[2] NOAA, United States Climate, Average Mean Temperature Index by Month, Climatology by state based on climate division data: 1971-2000. Available at: http://www.cdc.noaa.gov/USclimate/tmp.state.19712000.climo, accessed January 6, 2008.

motorized game retrieval that can be utilized for elk, including asking friends and family for help, non-motorized game carts, pack the game out on horses or mules, or hiring an outfitter. DN at 7. The Forest Service and AGFD have provided no evidence that these same alternatives would not work for elk retrieval.

To the contrary, appellants believe an exception to the ban on cross country travel for big game retrieval will create enforcement problems and will likely create more conflict and resource damage because many dispersed camp sites and user-created routes receive use only during hunting season. Appellants provided the Forest Service with evidence that Arizona hunters are negatively impacted by off-road vehicle use. An AGFD 2006 statewide survey of active hunters that indicated that disruption caused by ORVs was among the top four "barriers to participating in hunting" in Arizona. In fact, 54 percent of the respondents indicated that disruption caused by ORV use was a significant barrier to their participation in hunting (Arizona Department of Game and Fish Hunter Recruitment and Retention Report).

Experiences on forests beyond Region 3 are also illustrative and Appellants provided this information to the Forest Service. In the Grand Mesa National Forest (GMNF) in Colorado, a provision allowing cross-country travel for motorized big game retrieval (MBGR) was discontinued after a determination that the privilege of MBGR had been "systematically abused." (Notification to Discontinue Downed Game Retrieval off-route on the Grand Mesa National Forest, February 2005.) The GMNF discovered that under the guise of game retrieval: travel into areas outside game retrieval areas was common; law enforcement challenges and disruption of the hunting experience of others was extensive; travel occurred outside the designated time; additional illegal routes were created, and new routes "continue to be pioneered into areas;" and unacceptable environmental effects resulted with the creation of additional illegal routes in the forest. The GMNF also found that the privilege imposed "an unreasonable burden on law enforcement personnel to demonstrate proof that a rider is actually traveling to a downed animal."

Regional guidance states that forest supervisors should consider "providing for cross-country travel for the purpose of big game retrieval where it would play an important role in meeting State big game harvest or management objectives." AGFD complains that its effort to reduce elk populations has proven difficult largely to "bad weather, wet roads and other problems…[resulting in] reduction in harvest levels combined with road damage." AGFD 2007. Since the agency provides no further explanation or justification, Appellants are mystified as to how opening up the area to cross-country travel would mitigate the effects of wet weather and associated resource damage. In fact, the contrary is likely to occur. If hunters are allowed to use cross-country travel for MBGR during bad weather or utilize wet roads, damage to the habitat of elk and roads will in fact increase, likely reducing the success of future elk harvests and making it more difficult for hunters to use previously damaged roads.

AGFD also reports "during [agency] aerial patrols we often see elk concentrated in the areas between roads. Knowing that the elk have already learned to avoid hunters by moving away from roads, we are very concerned that any disincentive for hunters to get further from roads will have an effect of lowering hunt success and reduce our ability to meet the Department's harvest objectives and control elk populations." AFGD 2007. The fact that many wildlife species,

including mule deer and elk, avoid roads (Thiessen 1976; Rowland et al. 2005; Rost and Bailey 1979; Berry and Overly 1976; Lyon 1979, 1983; Yarmaloy 1988) and prefer roadless areas is well documented in the literature (Stritthold and Dellasalla 2001). If the Forest Service allows MBGR into areas where elk have concentrated because of a lack of roads, the intrusion into these areas by motorized vehicles is likely to push elk further away, making hunter success less likely, rather than increasing it. MBGR in prime big game habitat will increase motorized access to comparatively secure areas, to the detriment of the big game species as well as other wildlife, negatively impacting species diversity contrary to NFMA and where endangered species habitat is located, requiring analysis of each area where MBGR is permitted under Section 7 of the Endangered Species Act by the Forest Service. Because the Forest Service is proposing to open the entire forest to motorized use for game retrieval, the entire forest must is subject to consultation.

AGFD's concern is curious in that it seems logical that quality wildlife habitat would be a positive incentive for hunters to go hunting. The excess numbers of elk and the inability or unwillingness of hunters to reduce those numbers only reinforces the urgency to restore ecological integrity through recovery of ecologically effective populations of large carnivore populations, including wolves (Beschta 2003, 2005; Beschta and Ripple 2006,2007, Ripple and Beschta 2003,2004, 2007, 2008; Smith et al. 2003; Ripple and Larsen 2002; Romme et at. 1995; Binkley et al. 2005).

Although AGFD maintains "further restrictions on motorized game retrieval will predictably lower hunt success" (AGFD 2007), this position is in fact contraindicated by earlier research findings demonstrating that road closures actually increase hunting opportunities and hunter satisfaction. Rowland et al. 2005. In addition, Gratson et al. (2000) found hunter success almost doubled when open road density is reduced from 4.25 mi/mi^2 to about 1.0 mi/mi^2 (2.54 km/km^2 to 0.56 km/km^2). Arizona apparently is the only state requesting an exemption to the general prohibition on motorized game retrieval and AGFD offers no explanation for this disparity.

The Forest Service's application of the exception for motorized big game retrieval will undermine the purpose of the TMR, and is not consistent with the TMR. The chosen alternative will create a good deal of confusion among the public, confound ranger attempts at consistent enforcement, and lead to an ever expanding network of motorized routes across public forest lands. The TMR clearly states that for motor vehicle use for big game retrieval, the responsible official "*may* include…the *limited* use of motor vehicles within a specified distance of *certain* designated routes solely for the purpose of retrieval of downed big game…" 36 CFR 212.51(b), *emphasis added*. The alternatives analyzed in the EA demonstrate that the allowance for cross-country travel for motorized big game retrieval is neither limited nor applied to certain routes. The Forest Service's own map provided in the FEA at Figure 6 shows the extent to which the exception for motorized game retrieval is clearly not sparingly applied as it graphically shows nearly the entire forest is open to motorized cross-country travel.

Prohibitions on cross-country travel do not limit big game hunting, but simply imply that successful hunters will have to use traditional methods of game retrieval. At present, the Forest Service has failed to provide a reasoned and informed justification for the MBGR which satisfied NEPA, NFMA, and the ESA.

The Grand Canyon National Park also expressed concerns about the impacts of the proposed MBGR strategy and asked the Forest Service to "[i]nstitute a one-mile boundary from the Park for motorized uses and game retrieval." FEA at 147. The Forests Service response that instituting a one-mile buffer "for any purpose is not reasonable" makes clear that prior to the determination in the DN and the FONSI, the Forest Service had predetermined that motorized big game retrieval would be allowed throughout the forest despite the impacts found in the EA, yet the impacts from dispersed camping were enough to cause the Forest Service to avoid locating designated camping sites and corridors along the Park boundary. FEA at 147.

Remedy Requested: The provision for game retrieval should be removed from this decision. In the alternative, this deficiency of the Environmental Assessment warrants the withdrawal of the current document and the release of an Environmental Impact Statement that addresses these concerns, specifically, the analysis of an alternative that does not make allowances for cross-country travel to retrieve downed game and inclusion of site specific analysis of the effects of the alternatives.

C. The Decision To Designate Temporary Roads is a violation of the Travel Management Rule

The Travel Management Rule states, "Temporary roads are not NFS roads and may not be designated. Temporary roads are used for emergency purposes or under a written authorization for a particular time frame and then decommissioned." 70 Fed. Reg. 68281 (Nov. 9, 2005). Moreover, because previous environmental review under NEPA assumed that these temporary roads would be closed and obliterated, new NEPA analysis is needed to address impacts of permanent designation.

Relief Requested: Temporary roads must be immediately closed, revegetated, and excluded from the Forest Service's transportation network. The Forest Service cannot and should not legitimize such routes or reward OHV users for their illegal and destructive behavior by now designating such routes as part of the new transportation system. The Forest Service must effectively close them to motorized traffic consistent with the Travel Management Rule and the Forest Plan.

II. The Project Violates the National Environmental Policy Act

The Forest Service's environmental review of the Project fails to comply with NEPA, 42 U.S.C. § 4331, *et seq*. First, the Forest Service failed to properly identify the scope of this project. Second, the Forest Service failed to consider an adequate range of alternatives in the EA.

NEPA is a procedural statute that does not mandate particular results, but provides the necessary process to ensure that federal agencies take a "hard look" at the environmental consequences of its actions. *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 536 (8th Cir. 2003). The completion of environmental review under NEPA

> [E]nsures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). The "larger audience" also includes the public, and NEPA documentation gives the public the assurance that the agency has "indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983).

A. The Project May Have Significant Impacts That Must Be Analyzed In An Environmental Impact Statement

1. Analysis of the CEQ Regulations Demonstrates that an Environmental Impact Statement is Required

The Forest Service violated NEPA and the CEQ regulations by issuing the DN and FONSI and thereby relying on the EA rather than preparing an EIS. Given the complexity of the route designation process and the long-term consequences of designating a huge network of routes across the District to forest users and the environment, an EIS should have been prepared. Under NEPA, federal agencies must prepare an environmental impact statement ("EIS") for "all major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The potential for significant impacts triggers the need for an EIS, and the Eighth Circuit holds that an EIS is required if a significant environmental impact is "likely." *Sierra Club v. United States Army Corps of Eng'rs*, 446 F.3d 808, 815 (8th Cir. 2006).

NEPA requires an EIS for all "major Federal actions significantly affecting the . . . human environment." 42 U.S.C. §4332(2)(C). Where an EIS is not categorically required, the agency may prepare an EA to determine whether the proposed action *may* have a significant environmental effect. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (*citing* 40 C.F.R. § 1501.4). "If the EA establishes that the agency's action *may* have a significant effect upon the . . . environment, an EIS must be prepared." *Id*., emphasis in original. Furthermore, an EIS must be prepared if "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (quotation omitted). "To trigger this requirement a plaintiff need not show that significant effects will in fact occur, raising substantial questions whether a project may have a significant effect is sufficient." *Id*. at 1150. A decision not to prepare an EIS must be supported by a "convincing statement of reasons" demonstrating why the project's impacts are insignificant. *Blue Mtns Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

The term "significant" has two components: context and intensity. 40 C.F.R. § 1508.27. These components are considered by the Ninth Circuit in determining whether an EIS should have been prepared. *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004). Context refers to the setting in which the proposed action takes place, in this case a National Forest in Idaho and, in the case of

user-created routes that the Forest Service wants to incorporate into the designated route system, the immediate environs, such as watershed, that the route is located within. *Id*. § 1508.27(a). Intensity means "the severity of the impact." *Id*. § 1508.27(b). The Ninth Circuit has held that if an agency's "action is environmentally 'significant' according to *any* of these criteria," then the agency violated NEPA if it failed to prepare an EIS. *Public Citizen v. Dept. of Transportation*, 316 F.3d 1002, 1023 (9th Cir. 2003) (emphasis original), *rev'd on other grounds*, 540 U.S. 1088, 124 S.Ct. 2204 (2004), *citing National Parks Conservation Assn. v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001).

An agency may prepare an EA to determine whether an EIS is necessary. 40 C.F.R. §§ 1501.4, 1508.9(a). In evaluating whether the impact is significant, the agency must take into account a number of considerations, including: the context of the action; any unique characteristics of the project area; its controversial nature; possible harm to scientific, cultural, or social resources; harm to endangered or threatened species; and whether the project may violate environmental laws. 40 C.F.R. § 1508.27. "When the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared." *Izaak Walton League of America, Inc. v. Kimbell*, 516 F. Supp. 2d 982 (D. Minn. 2007).

An agency may not avoid the environmental analysis and public participation requirements simply by preparing a lengthy EA; NEPA and CEQ regulations do not allow it. As the Ninth Circuit has held:

> No matter how thorough, an EA can *never* substitute for preparation of an EIS, if the proposed action could significantly affect the environment. We stress in this regard that an EIS serves different purposes from an EA. An EA simply assesses whether there will be a significant impact on the environment. An EIS weighs any significant negative impacts of the proposed action against the positive objects of the proposal. Preparation of an EIS thus ensures that the decision-makers know there is a significant risk of environmental impact, and take that impact into consideration.[3]

The Forest Service concluded that the effects of the Project are not significant based on a 169 page EA and therefore issued a FONSI. DN at 19. But the justification for the FONSI is flawed in several respects.

The Project affects over 330,000 acres and makes decisions about OHV use on approximately 900 miles of existing roads, including user-created roads. TAP at 12 and 24. The Project area is adjacent to the Grand Canyon National Park to the south, making the district unique as "a gateway to one of the most famous national parks in the country." TAP at 23. The Project area is bordered on the east by the Navajo Nation, on the west by the Havasupai reservation and is also contiguous to State land. TAP at 10. While the district the Project is located in is not adjacent to the other districts of the Kaibab National Forest, these districts are concurrently undergoing Travel Management along with all other forests in Arizona. The decisions made by one forest or district will have far reaching impacts on not only the other districts within that forest, but also

[3] *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004) (emphasis added).

upon other forests in the State and region. For example, the Prescott National Forest has made it clear that they will follow the motorized game retrieval provisions of other forests that are adjacent to their borders where they share game management units.

Specifically, 566 miles of Forest Roads will be designated with this decision, including 6 miles of unauthorized routes added to the system. FEA Table 6. While the environmental impact from the addition of a single route might be adequately examined in an EA, the designation of a forest-wide system of roads and trails must be examined in an EIS.

This project has statewide importance given its geographic location and proximity to sensitive public lands. This is underscored by the involvement in the Project by the impressive level of federal, state, and local government or agency comment, as well as public comment on the Project.

There are also numerous flaws in the Forest Service's evaluation of the intensity of the Project's impacts. To begin, the Forest Service concludes, without any analysis, that the Project's impacts are not uncertain. DN at 19; *see* 40 C.F.R. § 1508.27(b)(4). Similarly, animal mortality due to vehicle collisions on roads is "unlikely" to occur frequently, yet there are no studies cited to support this assertion, no statistics available to bear this assertion out, nor any reports cited that support this position. FEA at 63. In this case, such uncertainty is a byproduct of the Forest Service's failure to conduct <u>any</u> site-specific mortality studies.

Though the EA states that cross-country travel for motorized game retrieval will result in "isolated occurrences of resource damage," there is no evidence or study cited to support this claim. FEA at 38. There is no analysis of which hunters are causing this damage, which hunting season is resulting in this damage, or how many hunters will utilize this broad exception to the ban on cross-country travel for game retrieval. The Forest Service acknowledges that unauthorized routes will continue to be created via big game retrieval. DN at 8. Additionally, the Forest Service states that "[m]onitoring of game retrieval routes is included in this decision[,]" making clear the Forest Service is aware that allowing motorized big game retrieval will in fact result in resource damage and the continued creation of unauthorized routes. DN at 14.

The Forest Service offers no support for its conclusion that the Project's impacts will not be cumulatively significant. DN at 20; *see* 40 C.F.R. § 1508.27(b)(7). Rather, it simply asserts that the cumulative impacts have been discussed in the EA. But the Forest Service failed to analyze the cumulative impacts of the Project in light of past, present, and future illegal motorized recreational use. Simply because the Forest Service has closed many user-created routes to motorized use (with vague plans to decommission these routes at some undisclosed time in the future) does not mean that impacts from these routes have ceased. The user-created "ghost" network of routes will continue to have impacts until the routes are obliterated. These impacts relate to noise, water quality, wildlife, and spread of invasive species, as discussed below, and must be considered. Undoubtedly, the Project has significant impacts when the cumulative impacts of the Project are fully considered.

Next, the Forest Service concludes that the Project will not establish precedent for future actions. DN at 19; *see* 40 C.F.R. § 1508.27(b)(6). But the Project designates 566 miles of national forest system road that will facilitate extraction of timber and other natural resources. The designation of this road system also facilitates further future expansion of motorized recreation opportunities, such as creating additional loop routes and the continued damage to resources via motorized big game retrieval. EA at 38. As stated above, other forests and districts are likely to follow the lead of the Tusayan Ranger District in developing their own travel management plans as the region strives for consistency across district and forest boundaries, and game management units.

The Forest Service concluded, again without any justification, that impacts to endangered or threatened species or their habitat are not likely to be significant. DN at 20; *see* 40 C.F.R. § 1508.27(b)(9).

The Forest Service also concluded that the Project will not significantly impact areas with "[u]nique characteristics," 40 C.F.R. § 1508.27(b)(3), including the Inventoried Roadless Area (Coconino Rim). DN at 19. To arrive at this conclusion, the Forest Service has improperly dismissed the significant impacts to roadless areas from illegal use or continued cross-country use for motorized game retrieval, as discussed below. In addition to the Coconino Rim, the Forest is adjacent to other unique areas that will be impacted by the Project, including tribal lands and the Grand Canyon National Park.

More generally, the Forest Service's reasoning in support of the FONSI is fundamentally flawed. The only alternative provided by the public that would have provided beneficial effects for wildlife, watershed, soils, rare plants and help prevent the spread of invasive species, was discarded early on in the process. DN at 13. The Forest Supervisor stated that he selected Alternative 3 because "this alternative provides reasonable access for motorized recreation on the Tusayan Ranger District…provides access for recreation and management needs and reduces the miles of roads open to motorized use." DN at 12. Nowhere does the Forest Supervisor indicate that the chosen alternative will provide benefits to the environment or be an improvement over the current management situation other than to ban cross-country travel. Given the near forest-wide exception for driving cross-country from game retrieval, there is not a benefit to the environment as a result of this plan.

It is difficult to understand how the provision allowing driving across the entire Forest for game retrieval would not cause significant negative impacts to the environment. But rather than prepare an EIS, the Forest Service prepared a cursory EA and fails to properly analyze significant environmental issues. Because an EA and an EIS serve different purposes, an EA can never substitute for preparation of an EIS when the action could significantly affect the environment. *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004). The Forest Service must prepare an EIS to analyze the Project's significant impacts.

The EA did not provide adequate legal boundaries or consistent science-based methodologies. In other words, the Forest Service provided no indication how the proposed open routes were screened and selected, or how these routes comport with legal protections afforded to watersheds, water quality, wildlife populations and habitat, and quiet use recreation interests.

Unfortunately, it appears the Forest Service determined prior to the preparation of this EA that the environmental impacts of travel planning would not be significant and therefore the preparation of an EIS was discarded before the EA was even begun.[4] Appellants strongly recommended that the Forest Service reconsider this position. Appellants believe the significant impacts associated with this planning effort, coupled with the extreme level of controversy surrounding this issue in the Kaibab National Forest and the Tusayan Ranger District warrants the preparation of an EIS.

Relief Requested: The Forest Service must prepare an EIS for this Travel Management Project.

2. The Environmental Assessment Contains Inadequate Analysis To Support The FONSI Determination

If the EA provides "sufficient evidence and analysis" that the proposed action will not significantly affect the quality of the human environment, then the agency issues a FONSI, 40 C.F.R. §§ 1501.4(e), 1508.9. But in reaching a conclusion to forego an EIS, the agency must take a "hard look" at the project's potential impacts, identify the "relevant areas of environmental concern," make a "convincing case that the impact was insignificant," and, if the impact is determined to be significant, convincingly establish that changes in the project will sufficiently reduce that impact. *Heartwood, Inc. v. United States Forest Serv.*, 380 F.3d 428, 431 (8th Cir. 2004).

The EA contains inadequate analysis of impacts to support a FONSI determination. As explained below, this analysis is particularly deficient with respect to cumulative impacts, air, soils, watersheds, climate change, wildlife, invasive plants, and heritage resources.

Throughout the EA, the Forest Service states that ORVs can have negative impacts on resources such as wildlife, soils, water, quiet recreation, air quality, and vegetation. The Forest Service notes that motorized cross-country travel has substantially increased in late winter and early spring, specifically to collect deer and elk antlers as well as the development of a user-created "short motorized trail system." FEA at 35. The Forest Service cites studies that conclude "OHV traffic can adversely affect natural resources regardless of the type and equipment on the individual vehicle." FEA at 35. However, there is a noticeable lack of any analysis on the specific impacts being caused by the current level of motorized use on the forest or the expected impacts from the proposed designated routes. Throughout the FEA, the Forest Service simply states that Alternatives 2 and 3 would prohibit use on unauthorized routes and that the impacts of Alternatives 2 and 3 would be similar. For example, on page 40 of the FEA:

> Implementation of Alternative 2 (Proposed Action) will have a positive effect for transportation. It would close some existing roads that have drainage issues and would prohibit motorized cross-country use. More miles of road would be maintained. Resource damage would be reduced compared to the existing condition. There would be an adequate system of roads to provide for forest

[4] *See* email from Charlotte Minor, attached as Appendix D in our comments to the EA. "During the preliminary scoping and analysis, no significant effects were identified, and therefore, an Environmental Assessment (EA) was determined to be the tool to use (versus an Environmental Impact Statement).

> management activities. The net cumulative effect of implementing TMR and other natural events will result in a positive trend.
>
> Implementation of Alternative 3 would be similar to Alternative 2. There would be a slightly reduced positive trend with this alternative.

Throughout the FEA, the Forest Service indicates that the impacts of the two action alternatives will "cause less damage," damage will be reduced, and there will be "some improvement" in reducing various negative impacts from off-road vehicles when compared to the no action alternative. FEA, throughout. These assumptions are not backed up by quantified evidence, and just because an action may improve the current condition, that does not exempt the Forest Service from analyzing the impacts that will occur from the chosen action.

The travel management rule requires that the agency "shall consider effects on the following, with the objective of minimizing: (1) Damage to soil, watershed, vegetation, and other forest resources; (2) Harassment of wildlife and significant disruption of wildlife habitats; (3) Conflicts between motor vehicle use and existing or proposed recreational uses of National Forest System lands or neighboring Federal lands . . .." 36 C.F.R. § 212.55(b). Each route designation requires a detailed analysis of the effect of that designation on the above factors and for other issues raised by staff and the public during comment periods. The analysis should include an explanation of how that particular route minimizes damage, harassment, and conflicts.

"General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mt. v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). Analysis of site-specific impacts must "contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). NEPA mandates a "hard look at a decision's environmental consequences." *Id.* An agency may not "rely upon forecasting difficulties or the task's magnitude to excuse the absence of a reasonably thorough site-specific analysis of the decision's environmental consequences." *Id.* at 765; *see also Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357 (9th Cir. 1994) (site-specific analyses for approval of multiple sites required when the agency makes a "critical decision . . . to act on site development.") (citations omitted). Unfortunately, all that the public has been provided are generalized statements that apply to the routes en-mass.

Further, merely because the Forest Service proposes to replace a cross-country management regime with one that prohibits cross country travel does not mean that impacts of the designation can be swept aside and only compared with the no-action alternative. As one court put it in the context of modestly improved fuel economy standards where the plaintiffs had urged more stringent standards:

> The only reason NHTSA provided for why the environmental impact of the Final Rule would be insignificant is that it results in a decreased rate of growth of [greenhouse gas] emissions compared to the light truck CAFE standard for MY 2007. But simply because

> the Final Rule may be an improvement over the MY 2007 CAFE standard does not necessarily mean that it will not have a 'significant effect' on the environment.

Center for Biological Diversity v. HTSA, 538 F.3d 1172, 1224 (9th Cir. 2008); *see also* 40 C.F.R. § 1508.27(b)(1) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.").

The Forest Service has therefore failed to properly disclose the magnitude of the impacts of the proposed project and cannot proceed with the project until an EIS is completed. Without quantified evidence, Appellants are unable to determine if there will be significant impacts and these conclusory statements do not comply with NEPA: "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1). When assessing significance, the question is whether the Project would have any significant impacts, not whether the Project would benefit the environment overall. *See Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996) ("Furthermore, that the Secretary believes the effects of a particular designation to be beneficial is equally immaterial to his responsibility to comply with NEPA."); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981) ("And even if the Corps was correct in deciding that the new land use will be beneficial in impact, a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant."). In other words, a significant impact cannot be dismissed just because it is paired with an action that has an environmental benefit. The Forest Service erred by allowing the potential positive aspects of implementing the Travel Management Rule to influence its conclusions about the actual impacts from the roads and trail opened to OHV use.

Specific concerns on the lack of analysis include:

a. Cumulative Impacts – the EA places existing routes outside of its impacts analysis. Few existing routes have ever been subject to NEPA analysis for impacts to the natural and cultural resources or climate change and their cumulative effects have never been considered. Even routes that were subjected to NEPA analysis when they were built, must now be analyzed again for their cumulative effects on the landscape. The transportation system was created in a piecemeal fashion over many years and now is the time for the Forest Service to take a close look at the cumulative effects of its road system. Existing motorized routes, both system and unauthorized, have negative impacts to natural resources and will continue to cause resource damage that, when taken with other Forest Service actions and existing routes that remain on the ground even if they are not designated as open to motorized use, are cumulatively significant. The impacts of all routes must be analyzed:

> "[w]ithin the NEPA scheme, any proposal adding to this ORV system . . . must be examined in light of the entire existing system." *North Cascades Conservation Council*, 98 F. Supp. 2d 1193, 1198 (W.D. Wash 1999). It also still holds true that "the impact of the existing system, and whether it can bear an increase in use, has never been carefully considered," and that "[w]ithout examining the ORV trail system, the Forest Service cannot meaningfully measure cumulative environmental impacts in the fashion that NEPA requires." *Id.* at 1199.

The Mountaineers v. USFS, 445 F. Supp. 2d 1235, 1248 (W.D. Wash 2006). CEQ regulations explain that the "intensity" of an impact, and thus its significance, is determined, *inter alia*, by asking:

> Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

40 C.F.R. § 1508.27(b)(7). As defined by the CEQ regulations:

> "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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R § 1508.7.

The cumulative impacts analysis is particularly deficient with respect to the impacts from illegal motorized recreational use. Even though the Forest Service has decided not to designate many miles of user-created roads, these routes and their associated impacts have not disappeared. Routes that were not incorporated into the system and have not been obliterated will undoubtedly continue to experience illegal use. The Forest Service must consider the cumulative impacts of the illegal use of these routes in addition to the use of the additional system routes designated in this Project. *See Sierra Club v. Bosworth*, 352 F. Supp. 2d 909 (D. Minn. 2005). In *Sierra Club v. Bosworth*, the district court held that the Forest Service failed to adequately analyze impacts from illegal use from closed roads. The court explained:

> [T]he Forest Service's EA contains little to no analysis of any illegal use of "closed" roads in the Project. . . . As such, the Forest Service has not provided sufficient analysis to support its conclusory statement that "new road building or re-opening closed ones" are "not expected to result in any cumulative adverse effects." The analysis of this factor favors the necessity of preparing an EIS.

Id. at 924-25. For all of the resources impacted by the Project, the cumulative impacts of the Forest Service's actions must be viewed as a product of: (1) the baseline impact caused by the pre-existing designated route system; (2) the added impact caused by illegal user-created routes, over time; (3) the short and long-term impacts caused by the persistence of all of these routes on the landscape now; (4) the impacts caused by lawful use of the designated route system coupled with potential unlawful use of the undesignated route system; and (5) the impact caused by past, present, and reasonably foreseeable future actions. Only by combining the past, present, and

future impacts of illegal use with the impacts of authorized road use (on federal and non-federal lands) can the true impacts of this Project be evaluated and understood.

For previous resource management projects, the Forest Service has refused to analyze impacts from unauthorized use of temporary roads and user-created routes by simply expressing the agency's intention to close or decommission these routes sometime in the future. The inadequacy of that approach is made apparent with this Project -- approximately 125 miles of mostly user-created routes remain on the ground with no plans for decommissioning. When, if not now, will the impacts from these routes be analyzed or the plans to decommission these routes be finalized? The cumulative impact of motorized recreation to the landscape must now be addressed through an EIS. *See* 40 C.F.R. § 1508.27(b)(7); *Sierra Club v. Bosworth*, 352 F. Supp. 2d at 927.

In addition, the cumulative impacts analysis is deficient because there is no consideration that there are likely to be new, more powerful, and louder types of motorized recreational use in the future. For example, more powerful ATVs would have a greater capacity to cause soil erosion, which has impacts to water quality. Louder ATVs would have a greater capacity to have noise impacts in the Coconino Rim IRA.

The cumulative impacts analysis is also deficient regarding MBGR. The agency cannot simply allow an exception for MBGR, but rather, must provide justification for that decision. In this justification, the Forest Service must address the "cumulative impacts" of the exception. 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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR § 1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Impacts can be either direct (caused by the action and occurring at the same time and place), or indirect (caused by the action but occurring later in time or at some distance, though still reasonably foreseeable.) 40 CFR § 1508.8(a) and (b). There is no justification or analysis of the cumulative impacts, nor any site specific analysis of the MBGR provision in the EA, the FEA, or the DN.

Because the Forest Service failed to consider the environmental impacts of the entire transportation system and other ongoing and expected Travel Management projects in Arizona (Coconino, Tonto, Apache-Sitgreaves, Coronado), the EA is deficient under NEPA.

b. Air, Soils and Watershed – there are approximately 39 miles of frequently used roads located on soils with a severe erosion hazard and approximately one-quarter of the Tusayan Ranger District is covered by soils with low bearing strength when wet. TAP 26. While it is agreed that Alternative 1 would have a "highly negative effect," the impacts of implementation of Alternatives 2 and 3 are not a marked improvement. While the reduction of motorized routes by 20 percent is an improvement over the current situation, the statement that it "will be possible to keep the open roads in better condition" is not borne out by the Forest Service's analysis of the funding situation (just 8 percent of the current forest-wide road system can be maintained annually and just 100 miles of roads on the Tusayan Ranger District are maintained annually, TAP at 14 and 19). Nor is the statement that "[i]t might even be possible to make road

improvements to some roads (i.e. hard surfaces and/or drainage enhancements)" adequate analysis for NEPA purposes. FEA at 57. For those system roads that received infrequent use but not physically removed from the designated system under the final decision, there will be no mitigation of the impact these routes have on soils and watershed conditions. For infrequently used routes, failure to decommission these routes will result in continuation of nearly the same impacts with no improvement in the environmental situation. If the motorized routes not designated under this project are not decommissioned, their physical presence will continue to impact air quality, soils, and watershed health. These continuing impacts must be properly analyzed and disclosed to the public. Simply designating a route as closed does not negate the impact of that route.

There is no way to adequately address the impacts from motorized big game retrieval. The Forest Service does not indicate how many hunters use motorized vehicles for retrieval of game other than big game under the current conditions and therefore cannot make an educated comparison of effects from the current condition to the proposed action. The estimates for the number of motorized trips off road for elk, deer and pronghorn are estimated based solely on a personal communication with Larry Phoenix. The agency must disclose "any responsible opposing view," 40 C.F.R. § 1502.9(b), and must use high quality information and accurate scientific analysis. *Id.* § 1500.1(b). The Ninth Circuit held in *Idaho Sporting Congress v. Thomas*,

> allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.

137 F.3d 1146, 1150 (9th Cir. 1998).Therefore, Appellants cannot make a scientifically based comparison between the current situation and the proposed alternatives and question how the Forest Service managed to believe they could. Given the ability of hunters to drive off-road vehicles to nearly every part of the forest and the uncertainty of the number of hunters who have and who will participate in this activity, there are substantial questions concerning the scope and magnitude of the impacts caused by this activity indicating that impacts from motorized game retrieval may in fact be significant.

The Forest Service acknowledges that "it is difficult to distinguish the effects of motorized big game retrieval from those of general motorized cross-country use. The implementation of TMR would prohibit the general motorized cross-country use, thus enabling the District to better determine the effects of big-game retrieval." FEA at 153. This statement is clearly contrary to the assertion by the Forest Service that the impacts of this Project are *not* uncertain. DN at 19. The Forest Service cannot at once claim that the impacts of a management strategy are uncertain and *not* uncertain, depending on how such a claim will suit the agency's needs. This decision document is clearly contradictory to the response to public comments in the FEA and this contradiction must be remedied.

40 C.F.R. § 1502.22 imposes three mandatory obligations on land managers in the face of scientific uncertainty: (1) a duty to disclose the scientific uncertainty; (2) a duty to complete independent research and gather information if no adequate information exists (unless the costs are exorbitant or the means of obtaining the information are not known); and (3) a duty to evaluate the potential, reasonably foreseeable impacts in the absence of relevant information, using a four-step process.

> In the absence of information, the agency must at a minimum include in the EIS:
> (1) a statement that such information is incomplete or unavailable;
> (2) a statement of the relevance of the missing information to evaluating reasonably foreseeable impacts;
> (3) a summary of relevant, existing credible scientific evidence; and
> (4) the agency's evaluation of all reasonably foreseeable impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

40 C.F.R. § 1502.22(b) (paraphrased).

The impacts of motorized dispersed camping is not an improvement over the current condition as alleged by the Forest Service. EA at 47. In fact, because the Forest Service acknowledges that most of the current motorized dispersed camping on the district occurs in existing sites and areas that have been identified for use in both Alternative 2 and 3, there would be no improvement. Many of the roads proposed for motorized dispersed camping corridors have soil and watershed concerns which are not addressed on a site specific basis in the EA. EA at 47.

Fugitive dust from off-road vehicle (ORV) routes impacts watersheds. The treatment of the environmental effects of fugitive dust in the EA was completely absent and only give cursory treatment in the FEA ("The Kaibab National Forest must submit prescribed burn plans to the Arizona DEQ in order to minimize smoke, but it is not required to reduce fugitive dust or vehicle emissions." FEA at 54. The FEA simply states that under alternatives 2 and 3 fugitive dust will be reduced compared to Alternative 1, which is true with the closure of a single mile of route. The expected increase in traffic on existing roads will likely lead to a significant increase in fugitive dust. This increase was not investigated nor disclosed in the EA and there is no alternative which discusses the potential beneficial impact on air and watershed quality that would result from a decrease in motorized road and trail mileage. In addition, the use of ORVs on designated routes will generate emissions from the vehicle engines *and* from fugitive dust. The Forest Service failed to even attempt to quantify these emissions and therefore cannot possibly fully understand their likely impact on air quality, public health, wildlife, snowpack, or plants in the planning area. If every unpaved route identified in the Tusayan Ranger District EA were closed, and the soil subsequently stabilized, there would be much less fugitive dust compared to the amount likely to result from implementation of any of the alternatives. The Forest Service must include a comprehensive inventory of fugitive dust generated by designated routes (both when being traveled by vehicles and as a result of wind erosion) and the engine emissions generated by the vehicles traveling these routes.

It is eminently foreseeable that there will be increased air pollution from increased use on the extensive, existing road system. ORV use has increased in the past several years and will likely

continue to increase. The environmental effects of these increases and measures to mitigate them must be discussed as compliance with NEPA necessitates.

c. Climate Change – The information on fugitive dust is also necessary for understanding the likely contributions to regional climate change caused by this plan. Beyond fugitive dust, other impacts of this project should have been analyzed in the context of climate change. Unfortunately, climate change was initially not addressed at all in the EA. The Decision Notice indicates that "[i]nformation regarding climate change has been added to the EA[,]" then goes on to state that "[i]t is difficult to predict the effects of climate change in a local scale." DN at 15. Without any evidence, studies, or statistics to bear out this claim, the Forest Supervisor states that, because most motorized cross-country use will be prohibited through his decision, "[r]esource damage such as damage to plants, creation of bare dirt and resulting erosion potential would be decreased as a result of this decision." DN at 15. The comparison of the two action alternatives to Alternative 1, the no action alternative, provide the Forest Service with their only rationale for stating that under either alternative impacts associated with climate change will be improved. However, as stated above, and in the Final EA and Draft EA, the impacts from Alternative 3 "would be similar to Alternative 2. There would be a slightly reduced positive trend with this alternative[,]" and no alternative is analyzed that would provide the Forest Service or the public with a reasonable range of choices or information about the impacts of the two very similar action alternatives compared to doing nothing at all. FEA at 40 and throughout.

Observed and anticipated impacts caused by climate change may require more aggressive actions to protect, restore, and enhance ecological resiliency. Such actions could entail protecting migratory wildlife corridors by reducing route densities, physically decommissioning and eliminating routes in bottlenecks and other important habitats, and administratively designating protected areas, free from motorized use, to protect wildlife. Similar actions may be warranted to protect other forest resources, such as water quality. But without acknowledging the threat of climate change and building this threat into the agency's analysis of impacts and consideration of alternatives, the Forest Service cannot make a reasoned and informed decision pertaining to motorized recreation. In particular, the Forest Service may be grossly underestimating the cumulative impacts of permitting an extensive motorized route system and, regardless, is failing to adequately consider an increasingly dominant consideration for public lands management.

d. Wildlife – There are numerous species Appellants are concerned about in the Tusayan Ranger District, including the California condor, Forest Sensitive Species (bald eagle, northern goshawk, spotted bat, Allen's lappet-brown bat, Townsend's big-eared bat, Mogollon vole), Management Indicator Species (northern goshawk, wild turkey, hairy woodpecker, pygmy nuthatch, juniper titmouse, Abert's squirrel, elk, mule deer, pronghorn antelope), and Migratory Bird Species (northern goshawk, olive-sided flycatcher, Cordilleran flycatcher, purple martin, gray flycatcher, pinyon jay, gray vireo, black-throated gray warbler, juniper titmouse, sage thrasher, sage sparrow, Brewer's sparrow, Swainson's hawk, ferruginous hawk, burrowing owl, grasshopper sparrow). FEA at 59-61.

The Forest Service lists the potential impacts to species and acknowledges the existence of many studies on the impacts of motor vehicles to these species and notes that "[m]otorized cross-country travel would be allowed to continue and would likely increase during the next 10

years[]" under Alternative 1. FEA at 62. However, under all alternatives motorized big game retrieval would continue to occur and would likely increase for elk, continuing the negative impacts of cross-country travel throughout the forest. Despite this continuation of negative impacts, the Forest Service does not analyze any of the negative impacts from cross-country travel other than to address the needs of, and impacts to hunters and the need of Arizona Department of Game and Fish to manage elk populations. There is no consideration given to the impacts that nearly unlimited motorized access to the forest during elk hunting season will have on elk or any other species in the Tusayan Ranger District.

Mule deer fawning and elk calving habitat occurs throughout Management Area 8, 9 and 10. Game Areas 8 and 9 provide important winter and transitional range for these species, yet the Forest Service did not present nor analyze any alternatives that would prevent motorized use, specifically motorized big game retrieval, in these areas. Nor does the FEA offer the public any analysis of the impacts of the nearly unlimited (spatially) proposal for motorized big game retrieval to the habitat of these species, nor for pronghorn or wild turkey despite the fact that the eastern portion of Management Area 8 provides most of the winter habitat for elk. Forest Plan 103.

Apparently, because no new roads will be constructed and no additional areas would be authorized for cross-country motorized use, the Forest Service did not believe it should analyze the *current and ongoing* impacts of motorized use on wildlife. Appellants disagree that implementation of Alternative 1, the no action alternative (or the two very similar action alternatives), "would not result in population declines or threats to population viability for any of the species evaluated." FEA at 67.

The total cumulative effects analysis done for the impacts of wildlife for Alternatives 2 and 3 is contained in a single paragraph (with a single change of 143 miles for Alternative 3):

> The primary direct and indirect effects on wildlife of closing 163 fewer miles of roads open to motorized public travel and reducing motorized cross-country travel under Alternative 2 would be decreased motor vehicle-related human disturbance and increased habitat quality for a wide variety of wildlife species. Because the primary effects of past, present, and reasonably foreseeable future actions would not result in population declines or threats to population viability for any of the species evaluated.

FEA at 70 and 71. There are several, fatal problems with this analysis. First, cumulative impacts are addressed through a basic two-step process: (1) the Forest Service catalogues the past, present, and reasonably foreseeable projects in the project area – keeping in mind the importance of landscape connectivity and, therefore, motorized travel planning on other National Forests; and, then, (2) analyzes these projects in light of the proposed action and relative to the existing baseline condition of the environment. This hasn't been done. Nothing identifies either the specific projects relevant to cumulative impacts analysis or the magnitude of those project's impacts. There is therefore no analysis of these projects in light of the proposed action.

Second, the restrictive 10-year time frame established for the cumulative impacts analysis is arbitrary and capricious and not supported with a scientifically defensible justification. As the Forest Service should be aware, natural systems function on multiple time scales and impacts may persist for decades and, in some instances, centuries. By arbitrarily setting a restrictive 10-year time frame, the Forest Service hides the true long-term impacts that would be suffered by wildlife. Moreover, NEPA and any of the core laws that the Forest Service is subject to, such as NFMA, do not impose such timelines. Rather, NEPA requires disclosure of foreseeable impacts, however short or long they may occur, and the Forest Service's EA – and disclosure of impacts – should be modified accordingly to account for the true longevity of impacts.

Third, simply because roads will be closed and motorized cross-country travel limited does not necessarily mean that impacts would be "positive." Rather, it simply means that impacts could be less than under the existing management regime whereby cross-country travel is permitted. By spinning the effects as "positive" the EA obscures the fact that impacts from existing motorized use already likely exceeded NEPA's significance threshold, thus requiring the completion of an EIS, rather than an EA. The closure of some roads and the elimination of cross-country travel, while welcomed, may not reduce impacts to insignificance. A proper analysis would compare the existing baseline condition of the environment to the magnitude of the effects – "positive" and "negative" – caused by a given alternative to properly inform and substantiate a defensible conclusion regarding significance and the acceptability of impacts. The analysis is simply too conclusory and too unsubstantiated to provide a reasoned basis to conclude that impacts will, in fact, be insignificant.

Third, as emphasized previously, closed routes will remain on the landscape and continue to fragment and thereby impact habitat. This is particularly the case if motorized use, even though unauthorized, continues, or if the motorized big game retrieval exception is applied excessively, as is the case here, or abused by motorized recreationists as has happened in other forests such as the Grand Mesa Uncompaghre in Colorado. The Forest Service states: "Vehicles could travel almost anywhere on the District at random [during elk hunting season]." FEA at 74. The significance of these closed, and not decommissioned, routes must be evaluated and accounted for in the NEPA analysis.

e. Invasive Weeds – in both action alternatives, the introduction of new invasive weeds will continue. FEA at 74-75. Invasive weeds have been described by the Forest Service's former Chief Dale Robertson as one of the "four threats" to our National Forests. The replacement of native browse species by non-natives is cited as one of the factors affecting mule deer on both summer and winter ranges. Vehicles are known to spread invasive weeds and many of the routes being proposed for designation harbor invasive weeds. Dispersed camp sites are frequently used by hunters during the elk hunting season. These same hunters, under both action alternatives, will be permitted to drive cross-country from these dispersed camp sites to retrieve downed game through nearly the entire district. Invasive plant species can, and are likely to therefore continue to be spread throughout the entire district. The impact of the spread of invasive weeds will be significant under the proposed action, was not adequately addressed in the EA, and must be addressed in an EIS.

f. Heritage Resources – In stark contrast to the above issues of concern, where little to no analysis was performed, the Heritage analysis indicates that GIS information was used to address very specific concerns in the Tusayan Ranger District, including the identification of specific areas and routes that would need mitigation measures to mitigate impacts of motorized use. A table of the sites that would be impacted is included in this section which indicates most (74 percent) of the heritage resources in the Tusayan Ranger District are located within one-quarter mile of open routes and 99 percent are located within one mile. Though Appellants believe this level of analysis is inadequate, even this level of analysis was not completed for any other resource in the Tusayan Ranger District. This analysis clearly indicates that allowing motorized big game retrieval for up to 1 mile from any road in the forest will place nearly every heritage resource in the Tusayan Ranger District in jeopardy, and yet the Forest Service does not address this issue, despite the fact that Management Area 10 contains a high density of cultural resource sites and the cultural resources in Management Areas 8 and 9 are largely unknown but thought to be quite high. Forest Plan at 103, 109, and 115. This bolsters our argument below that the motorized big game retrieval strategy proposed in both action alternatives is excessive and is contrary to the purpose of the Travel Management Rule which seeks to protect exactly these resources and will result in significant impacts.

g. For all resource issues, the impacts of motorized big game retrieval are purely speculative and not based on any scientific research as to the nature of the habits of off-road motorized vehicle users. Appellants provided the Forest Service with scientific research on the habits of such motorized vehicle users in. Appellants asked the Forest Service to rely upon these studies rather than upon Forest Service estimates based upon Arizona Game and Fish Department estimates. The Forest Service fails to adequately address the significant impacts to cultural resources from the anticipated more than 500 motorized big game retrieval trips. FEA at 68. Rather, these impacts are dismissed as impacting just one percent of the district, failing to take into account the impacts of ORV use beyond the direct tire-print of the vehicle such as noise, pollution, to other hunters and to wildlife. There is absolutely no analysis of the impacts MBGR will have on the semi-primitive, non-motorized Recreation Opportunity Spectrum acres in the Tusayan district.

The Forest Service must address the need to mitigate the damage to resources from off-road vehicle use for motorized big game retrieval and the proposed motorized route system for all forest resources, including implementation of a monitoring plan. "An agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment." *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S. Ct. 2718, 2730 n.21 (1976)).

Relief Requested: The Forest Service must prepare an EIS that addresses these deficiencies.

3. Forest Service fails to rely upon its own data

Appellants are extremely concerned that the Forest Service is failing to properly consider its own data. According to the National Visitor Use Monitoring Results (Forest Service 2006c:15) 3.4% of forest visitors participate in ORV travel, with 0.8% stating this activity is the primary reason for their visit. In contrast, substantially more visitors prefer non-motorized activities such as hiking and walking (47.2%) and viewing wildlife (44.8%). Non-motorized recreationists represent a large majority of forest users on the Tusayan Ranger District. These forest users object to the noise, dust, pollution and littering that ORV recreationists impose on their forest experience according to a visitor use survey conducted by Dr. Martha Lee of Northern Arizona University under contract with the Kaibab (Boussard *et. al* 2002).

Unfortunately, the Forest Service believes that the National Visitor Use Monitoring Report and the Northern Arizona University Recreation Use Study (commissioned by the Forest Service) do not reflect the growth of OHV use in Arizona in the past 5 years. FEA at 153 and 154. However, the Forest Service did not provide the public with any other studies to refute the information in these reports. If the Forest Service has relied on information that was not provided to the public during the scoping phase of this project, they have failed to comply with NEPA regulations, are in violation of the law, and the analysis of those studies is utterly lacking in the EA, the Final EA and the TAP. We note that the1987 Forest Plan for the Kaibab National Forest directs the Forest to "Use traffic counts, trail counts, and visitor registration systems to determine stay data to determine dispersed recreation use (RIM reliability class 4)," and to [m]onitor off-road vehicle (ORV) use during scheduled patrols and revise the ORV plan to prevent resource damage and user conflicts." Forest Plan at 39.

Although the general "arbitrary and capricious" standard is deferential, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" and courts will "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866-67 (1983) (citations omitted). If this is the case, the Forest Service must return to the scoping phase of this project, inform the public of which studies it relied upon to determine the number of ORV users in the Kaibab National Forest, and explain to the public why the Forest Service's own studies do not provide sufficient data for this project. Ironically, the Forest Service relies on the National Visitor Use Monitoring (NVUM) report to justify the dispersed camping strategy. FEA at 42.

The Forest Service cannot have it both ways: either the NVUM is a valid document upon which the Forest Service and the public may rely to develop projects for the forest, or it is not. The Forest Service cannot claim at once that the NVUM is valid for dispersed camping decisions, but invalid for other off-road vehicle decisions.

B. The Forest Service Failed to Properly Identify the Scope of the Project

Appellants are concerned that the purpose and need statement was neither sufficiently broad nor sufficiently precise to set up a proper and complete analysis. Travel planning must evaluate and address the environmental, social, and cultural impacts associated with unauthorized routes *and* currently designated roads, trails, and areas, as identified through Travel Analysis. Travel

Analysis should "form the basis for the proposed actions and purpose and need statements" in the subsequent NEPA process. Forest Service Manual 7712.3(2). In addition, analyzing impacts to ecological and cultural resources across the entire transportation system is a critical factor in determining the "minimum road system" as envisioned by 36 CFR 212.5 (b)(1) and the recent draft directives for implementing the Travel Management Rule. The purpose and need statement should be clearer on these points.

A glaring example of how the failure to develop a proper purpose and need statement results in a process that does not accurately reflect the actual purpose of the proposed project is found in the EA, where the public is informed that the responsible official will decide "[w]hether to prohibit motorized cross-country travel on the Tusayan Ranger District, except as specified for permitted uses." FEA at 15. The fact and intent of the Travel Management Rule is that cross-country travel *will* be prohibited except as specified, therefore the responsible official does not have the option of deciding that cross-country travel will be permitted district wide, rather the responsible official must decide which exceptions will apply in this district. Unfortunately, the deficient purpose and need statement has resulted in the lack of an adequate no action alternative and the lack of a reasonable range of alternatives (discussed further below).

Appellants recommend the withdrawal of the EA and the preparation of an EIS with the following needs identified:

- the need to eliminate cross-country travel and move to a system of designated roads, trails, and areas consistent with the Travel Management Rule and the Executive Orders on use of off-road vehicles on public lands;
- the need to address degradation of environmental, social, and cultural resources associated both with user-created routes and currently designated roads, trails, and areas, as identified through Travel Analysis;
- the need to — by way of a science-based analysis — "identify the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands" and identify roads that are "no longer needed to meet forest resource management objectives and that, therefore, should be decommissioned or considered for other uses, such as for trails";
- the need to provide opportunities for motorized *and* non-motorized recreation within the carrying capacity of the land (minimizing damage to soil, watershed, vegetation, cultural sites, and other resources of the public lands; and minimizing harassment of wildlife or significant disruption of wildlife habitats).
- the need to adjust both the core transportation system and recreation travel network in light of funding limitations for maintenance, monitoring, and enforcement[10]; and the need to address public safety concerns, user conflicts, private property rights, lost non-motorized recreational opportunities, and impact to natural soundscapes and air quality that have arisen or might be expected to arise given recent trends in motorized use.

As a result of the failure to properly identify the purpose and need for this Project, the Forest Service failed to set appropriate sideboards and identify methodologies used in developing alternatives

40 C.F.R. § 1502.24 requires the Forest Service to "ensure the professional integrity, including scientific integrity, of the discussions and analysis in [environmental analysis]," and provides that the Forest Service "shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon …" Additionally, the Data Quality Act directs federal agencies in "ensuring and maximizing the quality, objectivity, utility, and integrity of information, including statistical information, disseminated by Federal agencies" P.L. 106-554 § 515. Decisions made in minimizing damage to soil, watersheds, vegetation, wildlife, and habitats should incorporate and reference findings of relevant university, government, and other studies regarding the negative or positive impact of ORV use, automobiles, and roads. The Forest Service must describe what methodology and scientific information they used to determine how motorized routes could potentially impact natural resources on the Forest and how this information drove the project design criteria with respect to soils, watersheds, vegetation, threatened and endangered species, sensitive species, and management indicator species. The agency should cite all science-based decisions and provide a list of references from peer-reviewed publications from universities, government agencies, and other researchers. The Forest Service must describe how they used the best available science (or if lacking, whether they employed the precautionary principle) to make their decisions. Specific methodology for determinations should be given.

Appellants provided the Kaibab with possible boundaries, which we termed "sideboards," for selecting routes for inclusion in a final travel plan in our comments in response to the EA.

Understanding the rationale behind the decision making process is essential to the public's analysis as required by NEPA. As you are aware, NEPA prescribes a process, not a result, and it is therefore essential to provide this rationale to: (1) ensure that the NEPA process is meaningful and "foster[s] excellent action" (40 C.F.R. § 1500.1); (2) ensure that the Forest Service's ultimate decision is not "arbitrary or capricious" (5 U.S.C. § 706(2)(A)) and thereby comports with the Forest Service's legal obligations to conserve and protect the Tusayan RD (e.g., NFMA, ESA, CWA, NHPA, and Executive Order 11644, as amended); and (3) assist the public's involvement in the travel planning process.

The failure to provide this rationale undermines the intent and purpose behind the NEPA process, not to mention adherence to the Forest Service's related legal responsibilities, and compromises the Forest Service's and broader public's ability to reach reasoned and informed conclusions concerning the validity and acceptability of route designation decisions.

Relief Requested: The deficiency of the Purpose and Need statement in the Environmental Assessment warrants the withdrawal of the current document and a new NEPA process including the preparation of an Environmental Impact Statement, or in the alternative, a new Environmental Assessment.

C. The Forest Service Failed To Consider and Analyze A Reasonable Range Of Alternatives

Under NEPA, federal agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). The discussion of reasonable alternatives section is the "heart" of any environmental analysis under NEPA. 40 C.F.R. § 1502.14.

This NEPA provision is critical even where impacts are insignificant, underscoring the point that NEPA is not merely intended to disclose impacts, but to resolve conflicts and thereby "create and maintain conditions under which man and nature can exist in productive harmony" (42 U.S.C. § 4331(a)), and "foster excellent action":

> Ultimately, of course, it is not better documents but better decisions that count. *NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action*. The NEPA process is intended to help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

40 C.F.R. § 1500.1(c) (emphasis added); *see also* 40 C.F.R. § 1500.2(e).

As the CEQ regulations explain, the range of alternatives is essential to "sharply defining the issues and providing a clear basis for choice among options by the decision maker *and the public*." 40 C.F.R. § 1502.14 (emphasis added).

The "purpose and need" of the action helps define the reasonable range of alternatives that needs to be considered. Here, the very limited purpose and need of the Project is to improve management of motorized vehicle use in accordance with the Travel Management Rule, prohibit motor vehicle use off the system of designated roads, trails and areas, identify the minimum system and designate a system of roads, trails and areas for vehicle use by vehicle class, and time of year. Under NEPA, a reasonable range of alternatives that meets this purpose and need must therefore be evaluated and included.

The Forest Service failed to consider reasonable alternatives designed to meaningfully protect the Tusayan Ranger District's natural resources, in particular wildlife, habitat, and air and water quality, and therefore violated NEPA and the CEQ regulations that implement NEPA.

1. The Appellants' Alternative was Improperly Excluded from Analysis

The Forest Service inappropriately rejected Appellant's alternative that represents the inclusion of the best available science and that would have offered natural resource protection while still allowing for public access and administrative needs. Alternative 4 was presented in the 2006 Proposed Route Designation System for the Tusayan Ranger District. This alternative, which Appellants endorsed, proposed designating the 160-mile Wet Weather Road, or "Backbone" system as the open road system. Unfortunately, the Wet Weather alternative was rejected after preliminary analysis. FEA at 15. The EA summarily dismissed this "conservationist" alternative as "not [providing] required access to private land parcels" and not complying "with the Travel Management Rule…which requires the Forests identify the minimum road system…." EA at 24.

The FEA rejected the alternative because "recreation sites would not have road access, the spectrum of recreation opportunities would no longer follow the Forest Plan guidance, response time for fire suppression would be reduced, and future vegetation management activities would require more miles of road reconstruction and temporary road construction." FEA at 27. This rationale is faulty and disingenuous. Access to private lands (which concern was dropped from the final EA), adequate response for fire suppression, and "future vegetation management activities" could be accomplished through special use permits or on roads open to administrative use only. As the TAP points out, "[h]aving good passenger roads within six miles of most areas of the District may be adequate for fire management. This is roughly the current situation." TAP at 32. In addition, the TAP notes that "[r]oad access increases the risk of human-caused fires." *Id*. Additionally, the Travel Management Rule does not preclude emergency fire response personnel from using any road, open or closed, designated or not, throughout the forest.

The 160-mile Wet Weather system consists of about 30 percent of the proposed road system and, extrapolating from the EA (page 54), consists of the 100-mile Maintenance Level (ML) 3 system and approximately 60 miles of ML 2 (High Clearance) roads. While the total projected annual cost of maintaining ML-3 ($353,805) and ML-2 ($12,180) routes is $365,985, or $85,000 less than necessary to maintain the proposed system, this is nearly twice the current $184,000.00 budget. The Wet Weather alternative appears to be the most fiscally responsible alternative offered and, as such, should not have been dropped from further analysis.

The Travel Analysis Process Report (TAP) recommends that "where exclusive need is access to private land, issue a special use permit for the road." TAP at 49. Appellants believe this approach should have been utilized in the analysis of the Wet Weather alternative rather than discard whole cloth the proposed alternative for a perceived problem that was easily remedied and had a solution available and recommended by the Forest Service itself. The failure to analyze the Wet Weather alternative is especially curious given that 9 of 12 months of the year the Tusayan Ranger District can expect snow or rain which makes the roads susceptible to damage. FEA at 53.

2. The Alternatives Considered are Nearly Identical

There are numerous examples of how the Forest Service alternatives are essentially the same, and therefore they failed to consider a reasonable range of alternatives. First, under all alternatives motorized big game retrieval (MBGR) is allowed through nearly 100 percent of the forest. Second, no unauthorized routes are rehabilitated and will therefore remain on the ground and continue to cause resource damage in all alternatives (and which is not analyzed in the EA.) Third, dispersed camping is essentially the same with 17 miles of dispersed camping corridors under both alternatives 2 and 3. Finally, the number of miles of motorized routes is not sufficiently different under the alternatives. In fact, the Forest Service acknowledges that "the direct and indirect effects of roads, dispersed camping and game retrieval are similar" in both action alternatives. FEA at 48. The only true difference between the alternatives is that in Alternative 3 the Forest Service has made accommodations for the motorized community to allow for "longer distance routes they enjoy taking on the district[,]" which is not part of the purpose and need statement for this Project. FEA at 48. During the public meeting for this

Project held in Flagstaff on Tuesday, January 13, 2009, the Forest Service was heard repeatedly emphasizing the lack of a difference between the alternatives in an apparent effort to appease the motorized community.

The difference between alternatives 2 and 3 is not a meaningful difference. Alternative 2 reduces motorized recreation by approximately 24% (EA at 40), while under alternative 3, motorized recreation is reduced by 22% (EA at 59). The number of miles of motorized routes in Alternative 2 is 546, while in alternative 3 it is 566, with just a 3% difference in the number of miles of designated roads between the alternatives. EA at 24. In the EA, the explanation of the direct and indirect effects of the alternatives for various resource concerns (soils, recreation and scenic resources, watershed, motorized use, dispersed camping, motorized game retrieval, vegetation, fire, range, and OHV recreation) states time and again that the "[i]mplementation of Alternative 3 would produce approximately the same effects to [resources] as Alternative 2." In fact, for the analysis of impacts to various resources, both alternatives 2 and 3 are often addressed in a single paragraph, sometimes a single sentence.

The table below, copied from the final EA for the Travel Management Plan, makes clear that very little difference exists between the two action alternatives.

Table 6. Comparison of alternatives.

Status	Alt 1 (No Action)	Alt 2 (Proposed Action)	Alt 3 (Increased Roads)
Miles of Roads Open to Motorized Travel	709	546	566
Percent of Existing Roads	100%	77%	80%
Miles of Roads for Administrative Use Only	0	163%	143%
Percent of Existing Roads	0%	23%	20%
Miles of Routes Added to Open Road System	N/A	6	6
Percent Increase from Routes Added to Open Road System	N/A	1%	1%
Information by Vehicle Type			
Miles of Passenger Car Roads by Alternative	105	105	105
Miles of High Clearance Roads by Alternative	604	441	461

(Mileages are approximate)

The District proposed designating existing campsites as a means of accommodating most recreational demand for camping, yet did not develop an alternative that would have allowed analysis or public comment on this option. EA at 15 and 16. As stated in the FEA, most camping occurs within a few hundred feet of open roads. FEA at 42. As a result of repeated use, dispersed campsites often have less vegetation and/or bare ground and one or more fire rings constructed by campers. Existing sites are readily apparent to the casual Forest visitor and are likely to continue to be "found" and used by future campers. FEA at 42. As stated in the EA, a recent survey showed only a few unauthorized routes to campsite were longer than 300 feet. EA at 16. Confining camping to previously disturbed, existing campsites as part of a designated campsite

system would greatly reduce the threat of campsite proliferation and the consequent likely serous impacts to natural and cultural resources. However, the alternatives developed and analyzed by the Forest Service only analyzed alternatives that included the camping corridor method despite Appellants recommendation that the Forest Service analyze the designated camp site method.

Despite Appellants' request, the Forest Service failed to provide any alternative that would allow analysis of the impacts of a reduced motorized route network on wildlife, soils, watersheds, or other resources within the Tusayan Ranger District. Simply stating that both alternatives will "result in a positive trend" in regards to environmental effects is not analysis and makes clear that the public has been provided with no real range of alternative which they, or the forest service, can analyze. FEA at 40, 49, 50. No alternative was presented or analyzed which would have provided the Forest Service or the public with a road system based on the minimum system needed for administration and use, nor a road system based on the best available science (for example a system that would reduce route density to 1 mi/square mi or less).

Appellants informed the Tusayan Ranger District that, to ensure compliance with NEPA and the CEQ regulations, the Forest Service must:

1. Consider alternatives that would aggressively reduce overall route densities within acceptable science-based ecological limits across the entire Tusayan Ranger District;

2. Consider alternatives that would determine how best to physically close, decommission, and obliterate unnecessary or unacceptable routes, in particular unauthorized, user-created routes;

3. Consider alternatives that would not only reduce route densities, but entirely eliminate routes within key areas to protect environmentally sensitive watersheds and wildlife habitats and minimize user conflicts by establishing additional quiet-use recreation areas (e.g., Coconino Rim IRA and Red Butte motorized travel exclusion areas);

4. Consider alternatives that would not have provided an exemption from the ban on cross-country travel for purposes of dispersed camping and motorized game retrieval.

5. Consider alternatives that consider the specific route closure recommendations as discussed in comments previously submitted by the Center for Biological Diversity and other conservation organizations.

Appellants asked the Forest Service to develop and analyze an alternative that incorporated the above recommendations to balance the needs of wildlife with the desire to improve quality motorized trail opportunities. Overall, our recommendations and comments were intended to ensure a range of reasonable alternatives to reduce the potential for conflicts between user groups, provide security habitat for big game during hunting seasons, reduce disturbance that displaces wildlife from preferred habitats, and expand source habitats currently fragmented by roads and trails.

Due to an ill-perceived defect, that had it existed would be easily remedied, the only alternative that would have provided for resource protection was improperly eliminated from consideration and analysis. A "viable but unexamined alternative renders [the] environmental impact statement inadequate." *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985). As the Seventh Circuit put it, "[i]f NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 670 (7th Cir. 1997). Additionally, "an agency must *on its own initiative* study all alternatives that appear reasonable and appropriate for study at the time, and must also look into other significant alternatives that are called to its attention by other agencies, or by the public during the comment period afforded for that purpose.'" *Dubois v. Dep't of Agriculture*, 102 F.3d 1273, 1291 (1st Cir. 1996), *quoting Seacoast Anti-Pollution League, v. Nuclear Reg. Comm'n*, 598 F.2d 1221, 1231 (1st Cir. 1979) (emphasis from *Dubois* court).

None of the alternatives analyzed prevents the deleterious impacts of cross-country motorized travel, the Appellants' recommended alternative was improperly excluded, and therefore the alternatives analyzed, collectively, fail to "sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decision maker and the public." 40 C.F.R. § 1502.14.

Relief Requested: The Forest Service must withdraw the Decision Notice and FONSI and prepare an EIS, or alternatively an EA, that includes a reasonable range of alternatives, including the Wet Weather Alternative (*"Alternative 4").*

D. The inclusion of user-created routes is arbitrary and capricious

The Travel Management Rule explains that "[u]ser created routes were developed without agency authorization, environmental analysis, or public involvement and do not have the same status as National Forest System roads and trails included in the forest transportation system." 70 Fed. Reg. 68268. The environmental impacts of these routes have never been assessed. The need for environmental review for user-created roads is particularly important because these routes have a high potential for environmental damage given that they have not been designed or maintained to avoid such impacts.

The Forest Service cannot make user-created routes permanent without conducting site-specific environmental review. It is insufficient for the Forest Service to simply attest that a site-specific analysis is in the "project file." Such an approach subverts the purposes of NEPA. Such analysis must be included in a NEPA document and be open to public comment under NEPA. "The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement." *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), aff'd sub nom *Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984). Moreover, without full analysis of the past, present, and future impacts of each new system route, it is impossible to understand the full environmental consequences of the Project.

For example, the designation of a user-created route in proximity to a stream may cause significant direct, indirect, and cumulative impacts to water quality. But the EA, by not taking a site-specific hard look at each newly designated route within its proper environmental "context," blurs and effectively understates the "intensity" of these impacts. 40 C.F.R. §§ 1508.27(a), (b).

Before user-created routes can be added to the designated system, the Forest Service must ensure they are constructed according to engineering standards to ensure these routes are in compliance with road Best Management Practices and prevent resource degradation.

Relief Requested: Remove all user-created routes from the designated system. Alternatively, withdraw the Decision Notice and FONSI and issue an EIS that includes site-specific analysis of user-created routes and develop a monitoring and enforcement protocol.

E. There is no Specific Analysis on Monitoring and Enforcement

The Project provides for monitoring, but it does not make monitoring a priority. No budgetary analysis for monitoring and enforcement of the proposed designated system are included. By making route designations without considering "the availability of resources" for monitoring and enforcement, the Forest Service violates the NEPA. 36 C.F.R. § 212.55(a); *see Sierra Club v. USDA*, 116 F.3d 1482 (7th Cir. 1997) (holding that enforcement mechanisms must be included in NEPA analysis). The Forest Service should provide a specific cost estimate for monitoring and enforcement under each alternative and compare it to it current and projected budget and include provisions for an enforcement plan in the Record of Decision.

III. The Travel Management Project Violates The National Forest Management Act Because It Is Inconsistent With The Forest Plan

Pursuant to NFMA, all aspects of the Travel Management Project must be consistent with the Forest Plan. 16 U.S.C. § 1604 (i). If the Project is not consistent, then the Responsible Official must either change the Project to bring into compliance with the Forest Plan or propose an amendment to the Forest Plan. *See* 70 Fed. Reg. 68279. The Project is inconsistent with several standards provided in the Forest Plan. These violations of law are discussed below.

There is little evidence in the PA or FEA the Forest Service followed the Forest Plan Standards and Guidelines when proposing to open these designated camping areas and corridors to motorized use. Appellants remind the agency that the Outdoor Recreation goals for the Kaibab National Forest require that they must establish off-road vehicle closures as needed to maintain other resource objectives and manage off-road vehicle use to provide off-road vehicle opportunities *while protecting resources and minimizing conflicts with other users*. 1987 Forest Plan page 15, emphasis added. The 1987 Forest Plan Standards and Guidelines also state that the forest should monitor ORV use and revise the ORV plan to prevent resource damage and conflicts. *Id*. at 39. The Kaibab National Forest must also "[p]rovide off-road vehicle area closures and manage ORV use that occurs on other areas to maintain recreation, visual, heritage, soil, water, wildlife, and other resource values." (1987 FP) Additionally, the Kaibab National Forest must "[f]ormulate and execute land treatment measures to (1) close, revegetate, and

thereby obliterate, system roads not needed for resource actions… Forest Plan at pp. 7, 104, 110, and 116, covering Management Areas 8, 9 and 10.

Despite the statement in the FEA that:

> "OHV use can damage forest resources, disturb wildlife, and can impact forest visitors seeking a quiet and secluded recreation experience in the forest due to the noise and increase in dust that they create. A recent study has concluded that OHV traffic can adversely affect natural resources regardless of the type and equipment on the individual vehicle (USDA Forest Service, 2008). The study looked at the effects of cross-country travel and user-created trails. It found vegetation was reduced by a minimum of 40 percent and was often completely eliminated as a result of OHV traffic at the seven test sites (located in different vegetation types across the country). Soils were compacted, displaced or loosened, making them available for erosion by water. The ability of soil to absorb rainfall was reduced by half, while soil erosion was increased by more than a half. It was also found that OHV can cause significant amounts of dust. Low volumes of riders could generate dust loads greater than 150 micrograms per cubic meter. As the volume of riders increases, the dust concentrations could move into the unhealthful range in forested locations where air circulation is inhibited. Two other results from the study indicated that sport-model OHV (lighter weight vehicles) cause as much disturbance as utility model vehicles (heavier weight vehicles)."

FEA at 35; many of the proposed 17 miles of dispersed camping corridors "have soils and watershed concerns." EA at 47. The Recreation and Scenic Resources report states that dispersed camping "can cause resource damage" and that when repeated camping activity takes place in the same location "vegetation is often damaged or may be gone," and goes on to cite a study indicating that after a certain number of uses and amount of damage, no additional damage will occur. Recreation and Scenic Resources Specialist Report at 4. However, there is no information about where these concerns are, what type of damage is occurring, or how damage or impacts will be mitigated or avoided. The Forest Service has not ensured that these dispersed camping corridors are in compliance with forest plan standards and guidelines.

For those seeking a more primitive, non-motorized camping experience, the Forest Service states in the Recreation and Scenic Resources report for the EA that these opportunities will continue to be provided at Red Butte and Coconino Rim. Recreation and Scenic Resources Specialist Report at 8. However, in the Recreation, Scenery Management, Access to Private Land and Special Uses report for the TAP, the Forest Service notes that there has been an increase in motorized use in both of the Red Butte and Coconino Rim areas for cross-country driving and motorized camping resulting in conflicts and reduced opportunities for primitive, non-motorized experiences. Recreation, Scenery Management, Access to Private Land and Special Uses at 2. Given that just two areas of the Tusayan district were off-limits to motorized use and off-road users were violating closure orders, the district should have analyzed the impacts of

closing the forest to cross-country travel for all purposes except limited dispersed camping and game retrieval on users seeking a quiet, primitive experience, including the very likely increase in violations of restrictions on motorized use in the Red Butte and Coconino Rim areas. Rather, the specialist report for the EA states that those "recreationists desiring semi-primitive non-motorized opportunities will continue to be able to engage in these at Red Butte and the Coconino Rim[,]" seemingly oblivious to the problems reported in the specialist report for the TAP.

The generalized statements of the EA and the specialist reports referred to in the EA are never applied to any specific areas in the Tusayan district and specific, known user conflicts are ignored.

There are no provisions in the Proposed Action or the FEA for decommissioning or obliterating unnecessary system routes as required by the Forest Plan. While we understand that the Kaibab National Forest plans to address obliteration of unnecessary and undesignated routes at a future time, it is unclear and incomprehensible why the Forest Service is not utilizing the Travel Management Planning process for this purpose.

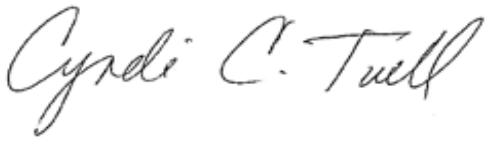
There is no reference in the EA or FEA about the impact the nearly district-wide MBGR provision will have on the more than 8,000 acres of land classified as semi-primitive non-motorized in the Recreation Opportunity Spectrum (nor how this will impact the additional proposed 13,000 acres of semi-primitive non-motorized acres. *See* Proposed Forest Plan Amendment for South Zone Recreation Opportunity Spectrum and Scenery Management version 1.0 pp. 4, 6 and 8.

Additionally, in NFMA, at 16 USC 1531, Congress declared that our nation's wildlife resources make a material contribution to the health, recreation, employment and well-being of the nation's citizens; that citizens, particularly those in urban areas, have insufficient opportunity to participate in recreational opportunities designed to foster human interaction with wildlife, such as hunting. Each state is encouraged under NFMA to develop a plan for the conservation of fish and wildlife. The AGFD position on MBGR does not facilitate the conservation of fish and wildlife, but rather could seriously negatively impact wildlife as well the opportunities for citizens residing in urban areas to participate in wildlife-human interactions.

Relief Requested: Withdraw the Decsion Notice and issue a decision that is consistent with the Forest Plan and NFMA. In the alternative, prepare an Environmental Impact Statement that addresses site specific concerns for this district.

In closing, thank you for your consideration of this administrative appeal. Appellants appreciate the amount of time and effort the Forest Service has put into the travel planning process. If you have any questions, or wish to discuss the issues raised in this appeal letter in greater detail, please do not hesitate to contact me.

Sincerely,



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