Re: ATV Outlaw Jamboree and Failure to Require a Special Use Permit

Dear Mr. Newman, and Mr. Zornes,

We write to follow up on the ATV Jamboree that is scheduled to take place on the Apache-Sitgreaves National Forests September 4-9, 2012, without any Special Use Permit issued by the U.S. Forest Service. We hope that by this letter we can avoid any need to pursue additional legal action against the U.S. Forest Service.

As discussed repeatedly in prior meetings and correspondence with the Forest Service, the Center maintains that the Forest Service’s decision not to require the organizers of the 9th Annual ATV Outlaw Jamboree to obtain a special use permit is inappropriate under the agency’s own regulations. We request that the Forest Service promptly notify the Jamboree organizers that the event, as planned, cannot take place on Forest Service lands unless and until such permit is issued. Moreover, prior to issuing a special use permit, the Forest Service must comply with NEPA. *High Sierra Hikers Assoc. v. Blackwell*, 390 F.3d 630 (9th Cir. 2004).

As you are aware, the Center has been in discussions with the Forest Service about this event since 2008, when we expressed our concerns that a 5-year Special Use Permit had been granted using an inappropriate Categorical Exclusion. In 2011, this Special Use Permit was inappropriately extended, again without NEPA analysis, to allow the event to occur for the 8th year in a row. For 2012, the Forest Service has inappropriately determined that no Special Use Permit of any kind is required. *See Appendix A*, email from Jim Zornes to Cyndi Tuell dated March 29, 2012.

The ATV Jamboree original permit authorized in 2006 relied on 36 C.F.R. 220.6(e)(3):
3) Approval, modification, or continuation of minor special uses of NFS lands that require less than five contiguous acres of land. Examples include but are not limited to:
   (i) Approving the construction of a meteorological sampling site;
   (ii) Approving the use of land for a one-time group event;
   (iii) Approving the construction of temporary facilities for filming of staged or natural events or studies of natural or cultural history;
   (iv) Approving the use of land for a 40-foot utility corridor that crosses one mile of a national forest;
   (v) Approving the installation of a driveway, mailbox, or other facilities incidental to use of a residence;
   (vi) Approving an additional telecommunication use at a site already used for such purposes;
   (vii) Approving the removal of mineral materials from an existing community pit or common-use area; and
   (viii) Approving the continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed.

This categorical exclusion was not appropriate for the initial 5-year Special Use Permit, and is certainly not appropriate now, years later, after expiration of the permit.

As discussed at a meeting on May 24, 2011, and in communications between the Center and the Forest Service during the fall of 2011, there are several reasons this permit was inappropriately issued using the Categorical Exclusion: 1) acreage of forest impacted; 2) the impact of the event on particular routes, specifically Little Creek, Paddy Creek, Auger Canyon and the Rogers Reservoir route; 3) unknown impacts from the Wallow fire on the event location; and 4) unknown impacts caused by the event on the area impacted by the Wallow fire.

The added concern regarding impacts to natural resources resulting from the Wallow fire is significant and must be analyzed in a NEPA process. The impacts of the fire are still being assessed in the area where the Jamboree is to take place, and yet the Forest Service has determined that a special use permit is not required for this event. As a result, no environmental analysis has occurred, in violation of NEPA, and no consultation with the U.S. Fish and Wildlife Service has occurred, in violation of the Endangered Species Act.

Our goal in communicating with the Apache-Sitgreaves National Forests for the past 3 years was to ensure that in 2012 the permit would only be considered pursuant to the laws and regulations in place to protect natural resources. Only following a legitimate, public NEPA process that assists the Forest Service in protecting natural resources from inappropriate motorized uses can this ATV Jamboree be properly considered and authorized to proceed.

The Forest Service Handbook makes clear when a permit is and is not required:

C. **When is a Permit Required:**
A permit is required when individuals or organizations (including institutional and semi-public outfitting and guiding) are conducting outfitting and guiding activities on National Forest System (NFS) Lands or related waters. Outfitting and guiding services include but are not limited to packing, hunting and fishing trips; raft, canoe, kayak, and boat trips; all-terrain and horse liveries; hiking; ski, jeep, snowmobile, mountain bike and boat tours and rentals; helicopter and cross-country skiing; rock climbing; etc. (Refer to Definitions in chapter 11 for guiding, outfitting, institutional and semi-public outfitters).

Outfitters based off of NFS lands who rent and deliver equipment or livestock to the public on NFS Lands must obtain a special use permit if they, their employees, or agents occupy or use NFS lands or related water in connection with their rental programs. Delivering the public to NFS lands off the road or trail right of way constitutes use of the land.

D. When a Permit is NOT required:

A permit is not required if an operator's customers transport rented equipment or livestock to and from the NFS lands:

A permit is not required if an operation serves Forest Service employees, Forest Service contractors, or other Federal officials in the course of their official duties.

A permit is not required when activities such as touring buses, taxi service, bicycle touring, shuttle services occur entirely on public roads, i.e., federal, state, or county or Forest highways, or on Forest development roads and trails unless stated by order issued under 36 CFR 261.50 or under 36 CFR 261.70. A permit would be required if the outfitter or guide's customers spend time off the public highway on NFS lands such as visitor centers, picnic lunch stops, sight seeing stops, restroom/refreshment stops, etc. It would be rare that an operation involving Forest development roads and trails would not require a permit, as ancillary use of NFS Lands normally occurs. See 36 CFR 251.50.

Do not require a separate permit when the service is provided for and subordinate to a non-outfitting activity such as mineral exploration companies and film production companies. Authorize the outfitting activity under the principal use permit. However, where clientele of the outfitter are involved in commercial filming of the outfitter's operation for marketing purposes, allow the use via their existing outfitter permit.

See also 36 C.F.R. 251.50. As required by the regulations governing special uses, “[b]efore conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer…” 36 C.F.R. 251.50(a). A special use authorization is not required for non-commercial recreational activities unless the proposed use is a noncommercial group use which is defined as “an activity conducted on National Forest System lands that involves a group of 75 or more people, either as participants or
spectators.” 36 C.F.R. 251.50(c)(1) and 251.51. Travel on any National Forest System road requires special use authorization if “the travel is for the purpose of engaging in a noncommercial group use, outfitting or guiding, a recreation event, commercial filming, or still photography” as defined in 36 C.F.R. 251.51. Guiding is defined as “providing services or assistance (such as supervision, protection, education, training, packing, touring, subsistence, transporting people, or interpretation) for pecuniary remuneration or other gain to individuals or groups on National Forest System lands. 36 C.F.R. 251.51.

This event will involve hundreds of participants and observers, the purpose of the travel on Forest System roads is for engaging in a recreational event, it will involve guiding, and based on images and video found in the Jamboree newsletter and website, still photography and possibly filming will occur.

If the authorized officer determines that the proposed use will have nominal effects on National Forest System lands, resources, or programs a special use authorization may not be required. 36 C.F.R 251(3)(1). However, for this event, the staff of the Apache-Sitgreaves National Forests have repeatedly stated that a permit was not requested. The Forest Service staff are not claiming the use would have nominal effects.

We continue to believe a commercial permit is required for this event. Commercial use or activity is defined as “any use or activity on National Forest System lands (a) where an entry or participation fee is charged, or (b) where the primary purpose is the sale of a good or service and in either case, regardless of whether the use or activity is intended to produce a profit.” 36 C.F.R. 251.51.

We have repeatedly provided the Forest Service with information that the Jamboree organizers are planning to guide Jamboree participants and there is no dispute that this is a recreational event (defined as a recreational activity for which an entry or participation fee is charged 36 C.F.R. 251.51). This information is from the Jamboree organizer’s own website. We have attached this information as Appendix B (folder with evidence of guiding from the ATV Outlaw Jamboree website). In addition, the Jamboree organizer’s website includes a statement that indicates a special use permit has been obtained. We have attached this statement as Appendix C. These appendices clearly indicate that Jamboree organizers will “show guests the White Mountains” and “share their knowledge of the area” during group rides which are “hosted by club volunteers” and participants must sign up for at the start of the Jamboree. Participants must sign a waiver to participate in trail rides. This information was posted on June 15, 2012 and was on the Jamboree website as of 5pm Monday, August 13, 2012.

The 2012 Jamboree will include a geocaching activity which is certain to encourage participants to drive off-route. See Appendix D. Driving off-route is likely to cause adverse impacts to native vegetation that is just getting established in the wake of the Wallow fire. Species displaced in the wake of the Wallow fire, including Mexican spotted owl, are also certain to be impacted by the noise of dozens upon dozens of ORVs traveling through the forest at the same time.
1. The Jamboree website registration page indicates that the registration fee for the full event is $150. (http://azatvoutlawtrail.com/registration/) In previous years the registration fee was $100 for non-riders and $150 for ORV/trail riders. The event planning for 2012 is nearly identical to previous year’s events. However, the Jamboree print edition newsletter indicates that participants who are planning to ride on Forest Service trails must pay $150 while those who are “non-riders” are only charged $100. This would indicate not only a need for a Special Use Permit, but perhaps a Commercial Use Permit. See Appendix H, a copy of the Jamboree newsletter. By failing to require the Jamboree organizers to obtain a permit, the Forest Service is not only putting natural resources at risk, but is failing to properly recover costs borne by taxpayers for what clearly appears to be a commercial event.

2. The Outlaw Jamboree website indicates that the "registration fee includes" (among other things) "2 Nightly Saffel Canyon Poker Runs with prizes for winners". The Saffel Canyon trails are on National Forest System Lands and this event is organized and supervised by the event organizers. Additionally, prizes are being offered for winners of the nightly poker run rides. Since these nightly trail rides are covered under the registration fee that is collected by the organizers and because prizes are being offered to the winners this would constitute a commercial event required to be authorized under either a "commercial outfitter/ guide" or a "recreational event" special use permit.

3. The Outlaw Jamboree websites indicates that some of the trail rides are sponsored by commercial enterprises. For instance, the description of the Robbers' Roost Ride on the Outlaw Jamboree website states: "Ride Sponsored by Molly Butler’s Lodge." (http://azatvoutlawtrail.com/outlaw-trails-rides/4-robbers-roost-trail/)

Over the past calendar year, the Center has repeatedly communicated with the staff of the Apache-Sitgreaves National Forests indicating our concerns that this event was apparently moving forward in the same manner as previous years, but without the proper permits. The Center has also been made aware of several other individuals who have been required to obtain Commercial Use Permits for hiking events, even when the hiking event would include only active participants (no guides) and no fees were being charged. Two examples:

1. Individuals who run a small lodge in the area were required to obtain an outfitter/guide permit so that they can hike with their lodgers. That business does not charge clients for specific hikes. When reviewing their application the Special Use Officer specifically informed them that even though they were not charging for the hikes they would require a permit and that their permit fee would be 3% of the entire annual gross receipts for their lodging business even though all of the gross receipts pertained to services provided on private lands.

2. In 2012, the White Mountain Nature Center sponsored an event that the Forest Service required to be permitted. Participants of the event contributed a fee to take part in a variety of activities at the Nature Center property and to go for a walk within the Woodland Lake Park parcel. The walk occurred entirely on trails within the White Mountain trails system -
trails that are open to the general public. The Nature Center was required to pay an estimated fee and to acquire liability insurance naming the federal government as additionally insured. This example is no different than the Outlaw Jamboree charging a registration fee and including activities such as the Saffel Canyon poker ride or other guided trail rides, and yet a permit is not being required for the Jamboree.

Additionally, the Center has information and belief that the Forest Service has opened trails in the area of the Wallow fire and either widened or authorized larger vehicles on a specific trail specifically for the Jamboree.

This information about the use of a specific trail was obtained from the Jamboree organizer’s Facebook page:

We had a great informative meeting tonight. Met with Jim Zornes and Ryan Domsela from the forest service. They reported that they are opening alot of roads. We went from 7 closer areas in the burn area down to 1 which is on Esculdilla. The biggest hazard out there is falling trees. They stated that if it was not for the jamboree and the club, they would of never put Saffel Canyon trail as a priority to open. They are willing to work with us to get more trails open and get us off of main roads as much as they can. We are excited for the jamboree and registration is set to open on the 15th of this month.

The meeting referenced on the Facebook page apparently took place on January 5, 2012. We have attached a pdf file of this webpage as Appendix E, see page 5 of the pdf file. This paragraph clearly indicates the USFS, specifically Jim Zornes and/or Ryan Domsalla, are making decisions regarding trails open to motorized uses and using the Outlaw Jamboree as a rationale.

This information about the widening of this trail is from the Jamboree organizer’s website:

*Due to efforts of the Apache County ATV Roughriders Club and the forest service, the Saffel Canyon OHV Trail has now been widened to 60”! Because of this change, there will be no limitations for side by sides less than 60” on any of the organized ATV trail rides this year. If your vehicle exceeds the 60” width, please talk with our ride leaders Tuesday afternoon for suggestions for trails allowing wider vehicles.

We have attached a pdf file of this webpage at Appendix F. It is clear that the Forest Service is providing special services for the Jamboree organizers that are not available to other forest users and that is not subject to NEPA compliance. We were particularly concerned that the Forest Supervisor, Jim Zornes, submitted a letter for inclusion in the Jamboree newsletter thanking the Outlaw Jamboree sponsoring organization, the Apache County ATV Roughriders, for their “effort in making the trails safer and more accessible for their club…” See Appendix H, copy of Jamboree newsletter.
It appears there may be an arbitrary and unfair process for getting approval for public uses of public lands in this national forest. Not only are we concerned about the unfairness of this system, we are also concerned about the potential impacts to species such as the Mexican spotted owl and the Mexican gray wolf, both species impacted by the Wallow fire. We have repeatedly communicated all of the above information to the Forest Service.

As we demonstrated in September of 2011, we are willing to work cooperatively with the Forest Service as well as the Jamboree organizers as long as the appropriate laws and regulations are followed. As you will recall, in September of 2011 the Center worked with Jamboree organizers and the Forest Service to ensure that only open routes were used for the event and that public safety was also ensured. The Center did not challenge the Forest Service decision to allow use on a single closed route in order to ensure public safety and with the understanding that a NEPA analysis for future Jamboree events would take place and that the Center would be notified. See Appendix G, email from the Forest Service to Cyndi Tuell indicating a NEPA process would occur in 2012. Unfortunately, the Forest Service has now authorized this event in 2012 with the determination that a permit will not be required.

The Center is considering the use of any and all legal avenues open to us to ensure that this event takes place only after proper NEPA analysis has been completed and that the Endangered Species Act is not violated. Our goal is to ensure that any threatened and endangered species are not harmed, and that impacts to soils and vegetation that are particularly vulnerable in light of the Wallow fire are avoided.

We request a response to this letter by Friday, August 17. This will allow us time to engage in further communications and consider our options prior to the event scheduled for September 4-9.

Thank you for your time and prompt attention to this matter.

Sincerely,

Cyndi C. Tuell
Southwest Conservation Advocate
Center for Biological Diversity
P.O. Box 710
Tucson, Arizona
520-623-5262 ext 308
tuell@biologicaldiversity.org

cc: Ryan Domsalla, Recreation, Lands, Minerals, Trails Program Officer rdomsalla@fs.fed.us

Francisco Valenzuela, Director of Recreation Heritage and Wilderness
fvalenzuela@fs.fed.us

Andrew Smith, United States Department of Justice
andrew.smith@usdoj.gov

Don Cassano, ADOT Ombudsman, Arizona Department of Transportation
DCassano@azdot.gov

Dorlene Maloy, ATV Outlaw Jamboree Organizer
dorlenemaloy@frontiernet.net