BEFORE THE HUMBOLDT-TOIYABE FOREST SUPERVISOR,
U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, INTERMOUNTAIN REGION

CENTER FOR BIOLOGICAL DIVERSITY

Appellant

v.

Gar Abbas and Wendy Fuell
District Rangers and Deciding Officials
Humboldt-Toiyabe National Forest

Respondent

In Re: Appeal of April 13, 2012
Record of Decision for the Humboldt-Toiyabe National Forest Mountain City, Ruby Mountains, and Jarbridge Ranger Districts Combined Travel Management Project Final Environmental Impact Statement and Record of Decision
APPELLANTS’ CONTACT INFORMATION

- CENTER FOR BIOLOGICAL DIVERSITY: Rob Mrowka, Ecologist and Conservation Advocate, 4261 Lily Glen Ct, North Las Vegas, NV 89032
  PHONE: (702) 249-5821

CERTIFICATION OF FILING

This appeal was filed by electronic transmission to:
appeals-intermtn-regional-office@fs.fed.us

ATTN: Supervisor Jeanne Higgins, Appeals Deciding Officer, 1200 Franklin Way
Sparks, NV 89431.

Dated this 31 day of May, 2012.

_______________________________
Rob Mrowka
Dedication

This Appeal is prepared and submitted in the memory of
Dan Heinz.

Dan was a former Forest Service employee and district ranger who
performed his stewardship and public service duties in an exemplary manner.

Upon his retirement, Dan became a fierce and relentless crusader and advocate
for wild lands and the skills needed to survive in them.

Among Dan’s primary concerns was the illicit spread
of motorized thrill craft across National Forest System lands
and the havoc they had on native ecosystems
and the ability to enjoy solitude and quiet recreation on these lands.

If Dan were still among us he would surely have co-submitted this appeal.

Thank you, and rest in peace Dan – we will carry on.
APPELLANTS’
NOTICE OF APPEAL AND STATEMENT
OF REASONS

I. NOTICE OF APPEAL


This appeal is consistent with 36 C.F.R. § 215.11 and is based upon written comments submitted by Appellant during the scoping period, comments on the Draft Environmental Impact Statement (DEIS), and face-to-face contacts and oral communications with Humboldt-Toiyabe National Forest staff. This appeal is consistent with 36 C.F.R. § 215.14 (Appeal Content) in that we are submitting substantial evidence of violations of law, regulation, and policy contained in the ROD and FEIS, requiring remand or reversal of said decision.

II. STATEMENT OF POSITION

With this appeal, Appellants seek to ensure that motorized travel on the Mountain City, Ruby Mountains, and Jarbridge Ranger Districts (“districts”) is managed sustainably to ensure the long-term health of the affected environment and to minimize conflicts with other important uses of the Forest. Management practices approved by the ROD will fail to halt resource damage, fail to reduce conflicts with other recreational users, fail to protect and conserve wildlife, fail to ensure that water quality goals are met, and fail to meet other important resource objectives.

This appeal of the Travel Management Project ROD will show that important and timely comments and reasonable, feasible management alternatives provided by interested members of the public during the National Environmental Policy Act (NEPA) process were inadequately addressed by Forest officials. The FEIS omits critical information, fails to respond to public comments, and provides and relies upon incorrect claims and statements. Furthermore, the Forest selected an action alternative that fails to comply with multiple legal requirements to minimize impacts to resources and to non-motorized recreation.
III. STATEMENT OF REASONS

A. THE ROD AND FEIS VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT

1. FAILURE TO ANALYZE A FULL RANGE OF REASONABLE ALTERNATIVES

The Council on Environmental Quality’s NEPA regulations describe the alternatives section as the “heart” of the EIS, and require that an EIS’s alternatives section “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14. NEPA regulations provide that an EIS must include “the alternative of no action,” as well as a “hard look” at “all reasonable alternatives.”1 In examining the reasonableness of an EIS’s alternatives and elimination of alternatives from analysis, a court first looks to whether the “Purpose and Need” was reasonable, and then whether the alternatives considered were reasonable in light of that goal. Surfrider Found. v. Dalton, 989 F.Supp. 1309, 1327 (S.D. Cal. 1998), aff’d per curium, 196 F.3d 1057 (9th Cir. 1999). Regarding alternatives rejected for full evaluation, a court asks “whether the summary rejection of these sites was unreasonable, such that the [EIS] failed to consider a reasonable range of alternatives.” Id. at 1327–28 (“An unreasonable failure to consider a viable alternative renders an alternatives analysis inadequate.”).

The Forest Service Handbook guides managers to “develop . . . alternatives fully and impartially . . . [and to] ensure that the range of alternatives does not prematurely foreclose options that might protect, restore, and enhance the environment.”2 Much legal precedent guards against an insufficient range of alternatives.3 NEPA also requires that agencies “present complete and accurate information to decision-makers and to the public to allow an informed comparison of the alternatives considered in the EIS.” Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 813 (9th Cir. 2005). The Forest Service failed in this mandate by not considering in detail the citizen’s proposed alternative suggested by appellants or other alternatives that would have reduced the mileage on the districts’ designated transportation system (not just closed the forest to cross country travel and locked in or expanded the existing transportation system). This failure has caused the Forest to foreclose options that would protect, restore, or enhance the

---

1 42 U.S.C. § 4332(c); 40 C.F.R. § 1502.14(a), (d).
2 Forest Service Handbook 1909.15 § 14
3 “An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action.” Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1538 (9th Cir. 1997). An agency violates NEPA by failing to “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990) (quoting 40 C.F.R. § 1502.14). This evaluation extends to considering more environmentally protective alternatives and mitigation measures. See, e.g., Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1122–23 (9th Cir. 2002) (and cases cited therein). NEPA requires that an actual “range” of alternatives is considered, such that the Act will “preclude agencies from defining the objectives of their actions in terms so unreasonably narrow that they can be accomplished by only one alternative (i.e. the applicant’s proposed project).” Col. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999) (citing Simmons v. U.S. Corps of Eng’rs, 120 F.3d 664, 669 (7th Cir. 1997)). This requirement prevents the EIS from becoming “a foreordained formality.” City of New York v. Dep’t of Transp., 715 F.2d 732, 743 (2d Cir. 1983). See also Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002).
environment. Moreover, the Forest Service failed to provide a rational explanation as to why this alternative was not considered in detail.

“The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985). In fact, "'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).

This is even more true where, as here, the appellants identified specific routes to be closed or excluded from the motorized system, as well as provided the rationale for doing so. Time and time again, courts have rejected NEPA decisions where the agency unreasonably chooses to consider only alternatives that involve substantial development of public lands. *See, e.g.*, *California v. Block*, 690 F.2d 753, 766-69 (9th Cir. 1982) (agency did not consider a reasonable range of alternatives where none of them would have protected more than 33 percent of potential wilderness); *Friends of the Bitterroot v. U.S. Forest Serv.*, 900 F. Supp. 1368, 1373-74 (D. Mont. 1994) (agency violated NEPA by only considering alternatives that included logging in a roadless area); *The Wilderness Society v. Wisely*, 524 F. Supp. 2d 1285, 1311-12 (D. Colo. 2007) (agency violated NEPA by failing to consider “no surface occupancy” alternative); *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 814 (9th Cir. 2005) (EIS for forest plan inadequate because it failed to consider any alternative protecting most of the currently roadless areas). Unfortunately, the districts have similarly failed to consider a reasonable range of alternatives.

### a. Appellant’s Suggested Alternatives Not Considered

Scoping comments from the Center included a table of specific routes and route segments that we identified for consideration of closure, along with our rationale for the need to do so. These were provided to the agency with the specific request that they be considered as a “citizen’s alternative”.4 We also offered to meet with the agency and participate in the formulation of this alternative; we never received a response from the agency to this offer. This request was not honored in the DEIS, and in our comments to that DEIS we once again raised our belief that our alternative provided an approach that was feasible and addressed concerns not adequately reflected in any of the three alternatives analyzed by the agency. We once again requested that our citizen’s alternative be analyzed in the FEIS, which it wasn’t.5

The range of alternatives analyzed in the FEIS was narrow and needlessly confined. While the no-action alternative is required by NEPA and provides a basis for comparison of effects, in this instance it violates the Travel Management Rule (TMR) by failing to go to a designated route system and so could not be chosen. It cannot be considered in terms of providing a reasonable range of alternatives. All other action alternatives actually increased the miles of motorized routes above what is

---

4 Letter dated 02/17/09 to Project Manager James Winfrey from The Center for Biological Diversity, pages 12-18.

5 Letter dated 12/17/10 to District Rangers Montoya and Abbas from the Center for Biological Diversity, Appendix 4.
considered as the current system.\(^6\) (See our next point, III A 1. b.). While Alternative 3, Current system designated all current system routes and closed cross country travel, without adding additional routes, all other alternatives added motorized mileage while increasing the adverse impacts on natural resources and increasing user conflicts. No alternative considered closing routes that are documented to be damaging forest resources. This constitutes a failure to explore a full range of alternatives that would actually reduce the footprint of the transportation system and would have better satisfied the stated purpose and need for this project.

Meanwhile, the ROD recklessly adds 969 miles of new motorized routes to the already over-large system at the expense of wildlife, native plants, watershed and soils, IRA values and services, and non-motorized recreational experiences. The citizen’s alternative we submitted used the current system, eliminated cross country travel and most user-created roads, and identified current system roads that were redundant, not needed, or at significant odds with wildlife, plant, watershed, and cultural resource values, and thus presented a credible alternative in addressing the purposes and needs. Our proposed alternative was significantly different from any of the analyzed alternatives in that it identified a true minimum required road system as required by the Travel Management Rule, subpart A. It proposed closing 424 miles of existing system roads, and eliminating 149 miles of proposed unauthorized user-created motorized trails that are designated in the ROD.\(^7\) Even if for some reason the Forest Service did not want to close all routes suggested in our alternative, it was arbitrary and capricious to refuse to consider closure of even a small number of the identified routes.

The districts have arbitrarily constrained the range of alternatives in the FEIS by not considering an alternative that incorporates various public comments regarding the removal of motor vehicle routes from the system, some of which are documented to be causing resource damage or have been identified by the Forest Service as unneeded. A fully fleshed out range of alternatives would have better explored and expanded upon the suggestions contained in our citizens’ alternative, and the decision by the agency to reject those proposals without further analysis was arbitrary and capricious and in violation of the National Environmental Policy Act (NEPA).

The Center requests:

- That the decision be withdrawn and a supplemental EIS prepared that analyzes the Center’s submitted citizen’s alternative.

\(b.\) The Forest Service Failed To Analyze An Alternative That Would Result In A Net Reduction In The Designated System’s Mileage (Road Closures).

The Forest Service failed to consider a reasonable range of alternatives because no alternative proposes closures of existing, designated routes, which would result in a net reduction of the mileage of the designated travel system. Given that OHVs are associated with negative effects to water quality and wildlife habitat and the spread of exotic weeds, the Forest Service should have included an alternative based primarily on road closures and restoration of areas previously damaged by OHVs.

---

\(^6\) FEIS, Table S-3.  
\(^7\) Letter dated 12/17/10 to District Rangers Montoya and Abbas from the Center for Biological Diversity, Appendix 4.
When considering designations for OHV use, courts have held that a land management agency may not privilege one type of use over another, thereby precluding from its analysis alternatives that would close routes to OHV use. *Or. Natural Desert Ass’n v. Bureau of Land Mgmt. (ONDA v. BLM)*, 531 F.3d 1114, 1145 (9th Cir. 2008); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, No. C 06-4884 SI, at *40-41 (N.D. Cal. Sept. 28, 2009).

It is precisely this sort of “uncritical []” privileging of one form of use over another that we have held violates NEPA. *See Block*, 690 F.2d at 767. Closures, not just “limited” designations, must be considered to comply with NEPA.

*ONDA v. BLM*, 531 F.3d at 1145. Here, the Forest Service considered only alternatives that would leave in place or add to the Forest’s massive existing, designated system. Table S-3 in the FEIS clearly illustrates this point. When comparing the “current system” alternative, which is the existing transportation system, closed to cross country travel, to the one other action alternative (the proposed action), every effects indicator shows a retention of the status quo or an increase in mileage. For instance, routes of mileage within pygmy rabbit habitat increased from the 306.7 to 373.7. Routes within sage grouse habitat or potential habitat also increased. Similarly, the mileage of routes within other sensitive areas, such as near streams and inventoried roadless areas also increased. In refusing to evaluate an alternative which reduced system mileage, the agency failed to consider a reasonable range of alternatives.

The FEIS gives no convincing rationale for this decision to ignore public comments concerning the documented resource impacts of specific roads and to refuse to consider removal of routes from the designated system. Thus, the FEIS’s unreasonably narrow range of alternatives made the decision to increase the size of the NFTS a foreordained formality and the decision is arbitrary and capricious. This is a clear violation of NEPA.

The Center requests:

- That the decision be withdrawn and a supplemental EIS be prepared that includes and alternative that results in a net reduction of the designated transportation system through specific closures.

2. **FAILURE TO TAKE A HARD AND ACCURATE LOOK AT THE DIRECT, INDIRECT, AND CUMULATIVE EFFECTS**

NEPA requires federal agencies to assess the direct, indirect, and cumulative environmental impacts of proposed actions, taking a “hard look” at environmental consequences, and performing an analysis commensurate with the scale of the action at issue. 8 “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).

---

8 40 C.F.R. §§ 1502.2 (b) and 1508.8
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).

a. Inventoried Roadless Area Characteristics

With respect to Inventoried Roadless Areas (IRAs), the Forest Service must evaluate two distinct types of effects resulting from the motorized travel plan. First, the FEIS must “disclose that significant roadless areas will be affected [under the motorized travel plan] and take the requisite ‘hard look’ at the environmental consequences of that fact,” including analyses of the plan’s effects on “water resources, soils, wildlife habitat, and recreation opportunities.” Lands Council v. Martin, 529 F.3d 1219, 1230, 1232 n. 7 (9th Cir. 2008); Smith v. U.S. Forest Serv., 33 F.3d 1072, 1078 (9th Cir. 1994); Or. Natural Desert Ass’n v. Bureau of Land Mgmt., 531 F.3d 1114, 1137-38 (9th Cir. 2008). “Roadless Area Characteristics” are “[r]esources or features that are often present in and characterize inventoried roadless areas, including:

(1) High quality or undisturbed soil, water, and air;
(2) Sources of public drinking water;
(3) Diversity of plant and animal communities;
(4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land;
(5) Primitive, semi-primitive non-motorized and semi-primitive motorized classes of dispersed recreation;
(6) Reference landscapes;
(7) Natural appearing landscapes with high scenic quality;
(8) Traditional cultural properties and sacred sites; and
(9) Other locally identified unique characteristics.

36 C.F.R. § 294.11. The Forest Service must disclose impacts to each of these characteristics from its decisions. Second, the Forest Service must disclose the effect of designating roads in roadless areas on potential wilderness designation. Lands Council, 529 F.3d at 1230. The “possibility of future wilderness classification triggers, at the very least, an obligation . . . to disclose the fact that development will affect a 5,000 acre roadless area” or a roadless area of “sufficient size as to make practicable its preservation and use in an unimpaired condition.” Smith, 33 F.3d at 1078.

The preferred alternative proposes to add about 210 miles of additional, previously unauthorized user-created open motorized routes in IRAs.9 The ROD arbitrarily states that routes less than .5 miles long are “short” and infers that they will have minimal adverse impacts10. The ROD

---

9 ROD, page 11.
10 Ibid.
The ROD conveniently changes the standard for “short” from .2 miles in the FEIS to .5 miles. The ROD does not disclose the fact that many of the new additions are several miles in length, although this can be determined from a close look at the FEIS and cross-checking Appendix A of the ROD with available maps of IRAs. The FEIS and ROD also fail to disclose the cumulative effects of these “short” routes on overall roadless character, instead stating that “wilderness attributes are normally located more than 1 mile from a road.” This statement is nonsensical in nature, and fails to address the potential harm done to wilderness and roadless attributes by addition of numerous motorized spur routes. The decision will seriously impact many of the IRAs and severely impact the attributes they exhibit, potentially impinging on the prerogative of Congress to designate Wilderness. For instance, the FEIS discloses that 85.6 miles of motorized trails will be authorized in areas having Wilderness capability in the selected alternative, including areas having “high capability” such as Pete Basin, Copper Mountain and Pearl Peak. In its selected alternative, the agency knowingly impairs the IRA and Wilderness quality of IRAs, despite the agency’s own 2006 Wilderness Assessment finding the areas to be capable of providing Wilderness qualities and attributes, some highly capable of doing so.

In the ROD and in the FEIS, the forest asserts that the additions “may” impact roadless characteristics or Wilderness attributes. This is an understatement, and the districts were required to disclose the impacts to roadless characteristics from designation of these routes. One of these impacts is to non-motorized recreation. To most forest users, trails are travel-ways that are traversed in a non-motorized fashion (feet and hooves), while roads are meant for motorized use. While technically designation of motorized “trails” is allowed in IRAs, such designations damage the integrity of the roadless area.

Roadless areas are often one of the last bastions of relative ecological health. They provide important havens for wildlife and sensitive species by limiting the human impacts that come with motor vehicle access. Watersheds, which are especially crucial elements of the mountain ranges of the districts, function infinitely better when rain and snowfall run through healthy, non-compacted soils, vegetated slopes and stream banks, and healthy and diverse ecosystems. The Forest Service is required to analyze and protect these roadless area characteristics and has failed to do so by this decision.

Further, inviting agile motorized vehicles far into remote areas that will see little or no law enforcement presence is inherently problematic. The FEIS provided no information on how enforcement will be accomplished to ensure only legal use of these routes. Many of the proposed additions dead end in the IRAs, inviting further expansion of the route and further erosion of roadless area quality. Given the large number of user-created routes in the inventory, this is a demonstrated existing problem that must be addressed route-specifically.

The FEIS’ claim that proposed motorized routes in IRAs are existing, and therefore will not damage the character of the IRAs, is unsubstantiated. First, there is no baseline study or

---

11 Compare FEIS page 56 to ROD page 11. The FEIS further confuses the analysis by later using the .5 mile criteria on page 60.
12 FEIS p. 56.
13 See FEIS, page 56 and Tables 20 and 22.
14 FEIS, pages 55-63, and particularly Tables 20 and 22.
information provided to show that the existing user-created routes have not already damaged roadless area characteristics. The presence of any motorized route likely damages the character of an IRA. Many of these routes have been constructed or improved by ORV users, and are thus already illegally damaging the character of the IRA. Second, permanent designation of motorized routes in IRAs will undoubtedly result in increasing impacts on surrounding ecosystems as well as foreseeable changes to the routes. Permanent designation and advertisement on a motor vehicle use map (MVUM) will likely lead to an increase in use of the trail by motorized users which, in turn, would likely lead to a host of impacts: the creation of additional user-created routes, an increase in the introduction and spread of invasive species via the vehicle tires, additional noise disturbance from the engines to wildlife and non-motorized visitors, an increase in litter from an increase in visitation, and user-conflicts with non-motorized users to name a few.

Once a route is designated—or even illegally constructed—it is highly unlikely that it will be effectively closed. Once a route exists in some manner, people seem to come out of the woodwork to claim that road as their birthright if anyone suggests closing it.15 We are afraid that when it comes time for another roadless area inventory, nearly every “motorized trail” out there will look enough like a dirt road that it will disqualify a large swath of the surrounding country from future protection. The designation of motorized trails thus, as a practical matter, has the potential to flout the Roadless Rule, which is meant to conserve what little remains of our roadless lands. The Forest Service has failed to evaluate this reality and the impacts on the roadless area characteristics of IRAs.

The districts further undermine the spirit of the Roadless Area Conservation Rule by attempting in the FEIS to change the route designation terminology from roads to motorized trails. In so doing, the agency ignores express direction from Region 4 that forests must not allow backdoor designation of roads in IRAs by renaming them trails. Quoting from the guidance:

[Motorized] trails are lower speed routes with more limited lines of sight and a more intimate connection to nature. Trails are narrow and are not suitable for sedan or other two wheel drive passenger vehicles. While vehicles larger than an ATV may be appropriate on a trail, such as “jeep” trails, in general trails are intended for smaller vehicles…In general, the use of the designation of “trails open to all motor vehicles” is not limited enough for roadless areas. Such a designation would easily allow full sized vehicles including large 4x4 trucks, SUV and other vehicles associated with roads. Where a trail exists that is intended for use by 4x4 trucks and other high clearance vehicles, use the designation of Special Vehicle Designation and specify “Off Highway Vehicles only” following the definition in 36 C.F.R. § 212.1. It is imperative that the designation of “trail open to all motor vehicles” not be used to allow back door designation of roads in roadless areas.16

Under this approach, the routes in IRAs that are not currently classified as “motorized trails” cannot be switched to that status simply to perform an end run around the prohibition against

---

15 Witness the response of the motorized recreation community at scoping meetings for TMP being conducted on the Jarbridge, Mountain City and Ruby Mountain RDs. See: http://m.rgj.com/news.jsp?key=167549
road construction in the RACR.

Further, we challenge how such designations can be construed to minimize impacts, as directed by Executive Orders 11644 and 11189, when the management guidelines and monitoring requirements for motorized trails are more lax than those for roads. Since most, if not all, non-system routes were not constructed to any standard, their environmental impacts could be, and likely are, greater than system routes. Therefore, the designation of any non-system route as a motorized trail should also include an assessment of current compliance with trail construction standards and how any areas of non-compliance will be addressed. There has not been the requisite disclosure of how the Forest Service has minimized impacts, as required by the Executive Orders and the Travel Management Rule, by designating these motorized trails in sensitive areas such as IRAs.

As previously discussed in this appeal, the FEIS failed to analyze the citizen’s alternative submitted by the Center, which eliminated most new and some existing routes in IRAs to preserve and protect the roadless area values. The responsible National Forest officials are required to “minimize conflicts between motor vehicle use and existing or proposed recreational uses of National Forest System lands.” By definition, roadless areas afford a type of quiet and primitive recreation that cannot be found near roads. Designating dozens of miles of motorized trails in these areas would cause disproportionate conflict between quiet recreationists and OHV users and will risk precluding roadless areas from further consideration for Wilderness designation.

We realize that some of these unauthorized, user-created trails may provide valued recreational opportunities to visitors. We therefore recommended in our DEIS comments that the forest consider designating, where appropriate, these user-created routes for non-motorized use. This reasonable alternative was not analyzed. Doing so would ensure that forest visitors could continue to enjoy these trails but the use would change to non-motorized activities. This would alleviate some of the environmental impacts and much of the user-conflict as described throughout this letter.

The FEIS and ROD should have considered the potential impacts of the propagation of engine noise around roads and recreational trails in either its route-specific assessment or its analysis of cumulative impacts of the motorized system, especially its impacts on natural soundscapes and any sensitive species or areas. The Forest Service must locate ORV routes to “ensure the compatibility of such uses with existing other uses and must consider “compatibility of motor vehicle use with existing conditions in populated areas, taking into account sound, emissions, and other factors.”

ORV use comprises only 1.9 percent of recreational visits to all U.S. national forests when such use is the primary activity and 4.6 percent of all visits where ORVs are used in concert with

---

17 36 C.F.R. § 212.55
18 36 C.F.R. 212.55(b)(5).
other activities such as hunting and fishing. With few exceptions, quiet users comprise the vast majority of recreational visitation on public lands.

Scientific evidence supports the importance of natural sounds for wildlife, ecosystems and people. National Park Service’s Natural Sounds Program Center developed two annotated bibliographies regarding the impact that sound has on wildlife and another on the impact sound has on other park visitors. Many spatial models and software packages are available for analyzing potential noise propagation from transportation systems, which the Forest Service could employ. Noise generated by the average ATV engines can reach sound levels of 81 - 111db. This noise level is equivalent to a rock concert or a busy street. Because of the way they are driven, with frequent engine revving, the sound level is not constant. Noise from an ATV can be loud enough to interfere with a conversation 800 feet away depending on vegetation and landscape. When this level of noise is generated by more than one vehicle, the resulting noise can be audible more than two miles away. Those seeking quiet and solitude will have a difficult time escaping the sounds of ORVs, which reduces the ability of these users to access the forest in a manner which they enjoy.

Quiet recreation refers mainly to those visitors who partake in summer activities such as, hiking, bicycling, fishing, hunting, horseback riding, bird watching and other wildlife observing activities, as well as winter activities such as cross-country skiing, backcountry skiing, and snowshoeing. However, the full scope of these activities would also include camping, picnicking, naturalist and spiritualist endeavors, hang gliding, photography, caving/spelunking, climbing, historical sightseeing, canoeing/kayaking, rafting, trail running, or any other summer or winter activity that relies on human power and motorized vehicles are not central to the recreational experience sought. Quiet recreationists seek experiences of natural sounds, natural smells, and natural settings.

Conflict can be defined as an emotional state of annoyance with another group or person that can result in dissatisfaction with a specific experience. For example, a hiker seeking quiet in nature could experience conflict after encountering an ORV user on the same trail because the ORV use could be perceived as preventing the hiker from attaining his or her goal of a quiet,
natural experience. Feelings of conflict often occur among quiet users when they hear motor vehicle noise, witness acts of great speed and/or reckless behavior, smell exhaust, and see visible environmental damage. This all can lead to the displacement of non-motorized recreationists from places they would normally frequent.26 27 28

Use conflict often can be “asymmetrical” in that one user group is generally more impacted by conflict than another. For instance, hikers may be bothered by ORV riders but ORV riders are not generally bothered by hikers. This “asymmetrical conflict” is most likely to occur between motorized and non-motorized recreation activities, where ORV riding in particular is considered incompatible with every other land-based activity but snowmobiling.29 Consequently, non-motorized users often are disproportionately affected by the presence of motor vehicles (especially loud ones), which can cover a lot of ground quickly (Badarraco 1976, Webber 1995).30 31

The Center requests:

- That the decision be withdrawn and a supplemental EIS be prepared that takes a hard look at the direct, indirect, and cumulative impacts to roadless and wilderness values and to develop an alternative that addresses the appellant’s concerns over the need to preserve potential Wilderness and Roadless Area values, including the need for recreation free from the conflicts generated by the sounds and smells of motorized use. The revised decision should fully reflect the requirements outlined in the ORV Executive Orders, as more fully discussed below, as well as disclose the specific effects of the decision on roadless area characteristics.

b. Wildlife Concerns

A. Lahontan cutthroat trout

Lahontan cutthroat trout (“LCT”) were listed by the U.S. Fish and Wildlife Service as “endangered” in 1970 (Federal Register Vol. 35, p. 13520) and then reclassified as “threatened” in 1975 to facilitate management and allow angling (Federal Register Vol. 40, p. 29864). The Travel Management analysis area is located within the range of the LCT Humboldt River Basin

29WDNR (Wisconsin Department of Natural Resources). 2006. Statewide Comprehensive Outdoor Recreation Plan (SCORP), Chapter 4, Compatibility & Conflict in Wisconsin Outdoor Recreation.
Geographic Management Unit (GMU). An interagency team has been developed for the GMU to implement actions and conduct research necessary for LCT recovery.

LCT inhabit both lakes and streams, but are obligatory stream spawners. Within the project area LCT only inhabit streams. Optimum LCT habitat is characterized by well vegetated and stable stream banks, stream bottoms with relatively silt-free gravel/rubble substrate, cool water, and pools in close proximity to cover and velocity breaks.

In the biological assessment (“BA”) for this project, the staff fisheries biologist makes the statement that for Foreman Creek, a significant LCT habitat, there would be 1 unauthorized route (U56563) left open constituting .35 mile of routes within 300 feet of existing LCT habitat and 1 motorized crossing. Further, Table 11 displays the proposed status of routes in the North Fork Humboldt River drainage, and is clear that of the unauthorized inventoried routes, only U56563 would be authorized as a route.

The U.S. Fish and Wildlife Service’s (“FWS”) Biological Opinion (“BO”) accepts the forest’s proposal for protecting LCT, and notes that there will be “two new stream fords on occupied LCT streams (Foreman and Carville Creeks) under the proposed action…” The same section of the BO also notes the mileage of new routes being authorized within 300-feet of occupied LCT habitat, which equals the amount indicated by totaling the additions in the BA.

When comparing the unauthorized routes identified in the decision as being approved as open, it is clear that at least two routes in occupied LCT habitat presumed be closed in the BA and BO are in fact declared to be open in the ROD. These routes are all affect Foreman Creek and are: M7246A and U56849A; they total .25 miles in length.

The inclusion of these routes as open violates the assumptions made in the BA and BO as to the impacts on LCT.

The BA addresses the impacts from motorized big game retrieval (“MBGR”) on LCT and other aquatic species of concern in one short paragraph promising, “Motorized vehicles would not be permitted to cross riparian areas, streams and rivers except at designated road or motorized trail crossings to prevent impacts to riparian and aquatic resources.” This is at best a hollow, conscience salving promise. There is no certainty or even slimmest hope that the districts will be able to implement and enforce these restrictions. The districts all have abundant examples of OHV damage to streams, riparian areas and meadows. District budgets are notoriously lacking

32 Biological Assessment/Evaluation for the NE Travel Management Project, Jim Harvey, September 19, 2011, page 12.
33 Ibid, page 27.
36 ROD, Appendix A: Roads and Trails as Open for Motor Vehicle Use by District.
38 BA, page 4.
39 See Appendices 4 and 5 in the Center’s comments on the DEIS for photo and narrative documentation.
in resources for enforcement and monitoring. No where do the districts analyze the impacts from MBGR, but rather write them off as moot under the guise of this hollow promise.

The Center requests:

- Routes M7246A and U56849A be permanently closed to motorized vehicle use.
- That the decision be withdrawn and a supplemental EIS prepared that analyzes and discloses the impacts from MBGR.
- The districts disclose their budgets for the past 5-years as well as their current and out-year budgets for law enforcement and monitoring to establish, or not, a reasoned basis for accepting that the MBGR restrictions can and will be adequately enforced, and include the results of such analysis in the supplemental EIS.

B. Greater sage grouse

The greater sage grouse was found to be warranted for protections under the Endangered Species Act in March 2010, and a listing action will be undertaken once the US Fish and Wildlife Service has the resources to accomplish it. More recently, the sage grouse was included in a settlement agreement between the FWS and the Center placing it on a trajectory to have listing completed by 2015.

The FEIS and ROD err in analyzing the potential impacts to sage grouse from the project by using out-dated science to set criteria for analysis. Despite the Center’s attempt to call this to the attention of forest service planners in our comments on the DEIS, the agency continued the wrongful analysis, while chiding the Center in its response to comments.

Specifically, the Center is concerned with the proposal to only protect leks and habitats with 31 miles of an open road, and which analyzes only a 200-meter “zone of influence”.  

While the DEIS cites to Connelly, 2000, it either fails to consider or ignores the science contained in that research paper. Connelly et al recommended that for non-migratory grouse occupying habitats that are distributed uniformly and are generally well distributed around the lek, that a 2-mile no disturbance area would be adequate based on the present science. For non-migratory grouse occupying not uniformly distributed sagebrush habitats, a 3.1 mile non-disturbance buffer was in order. They also made note that migratory birds can move further than 11 miles between leks and nesting habitat, and that breeding habitats within 11 miles of a lek should be identified and protected (emphasis added).

41 See: http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/pdfs/proposed_settlement_agreement.pdf
42 FEIS, pages 131-135.
Sage grouse have a strong fidelity to their display, breeding, summering and wintering areas. Male grouse typically travel up to 1.3 miles to their lek sites, while during the breeding season, females typically travel less than 3 miles, but up to 22 miles to nest. Sage grouse exhibit both migratory and non-migratory behaviors, and populations of the grouse can contain both behaviors. Non-migratory grouse usually do not travel more than 6 miles annually, although migratory birds typically travel 21 miles annually, but travels up to 100 miles have been documented.44

The proposed project area lies within known valuable sage grouse habitat that is important to the long term survival of the species.45

Faced with increasing demands on wild public lands to supply sites for renewable energy development, the Nevada Department of Wildlife (“NDOW”) developed conservation standards to help protect and conserve the species and their habitats.46 This document gathered and synthesized the most currently available research and scientific knowledge regarding the topic, and represents the current state-of-the-art and science.

These standards state:

- “In Wyoming, male sage-grouse showed decreased lek attendance rates in response to increased road traffic (Holloran 2005). Lyon (2000) found that roads with light traffic (1-12 vehicles/day) were correlated with less successful nesting by sage-grouse. Light traffic near leks may also reduce nest-initiation rates and increase distances female grouse move from leks during nest-site selection (Lyon and Anderson 2003). Additionally, roads are likely important vectors for exotic vegetation to invade and replace essential sage-grouse habitat. This is a long-term change that is exacerbated by other developments on the landscape.”47

- “Additionally, linear rights of way are thought to influence grouse distribution, movement, and vital rates indirectly through changes in vegetation communities. For example, disturbance of roadsides and water runoff provide favorable habitat conditions for exotic annual grasses. In the Great Basin, cheatgrass (Bromus tectorum), which is an aggressive invasive annual grass, reproduction and growth are closely linked to roads and powerlines (Bradley and Mustard 2006). Cheatgrass invasion changes landscape composition by frequently replacing sagebrush and perennial grasses following wildfire or other disturbances. For example, areas dominated by cheatgrass often experience relatively larger, more frequent wildfires (D’Antonio and Vitousek 1992), which is not beneficial to sage-grouse populations (Beck et al. 2009). Invasion of cheatgrass in areas of the Great Basin are associated with decreased fire return intervals from 60–110 years to 3–5 years, and some cheatgrass dominated sites are 500 times more likely to burn than those with sagebrush cover (Stewart and Hull 1949). Because mountain big sagebrush


46 Nevada Governor’s Sage-Grouse Conservation Team. 2010. Nevada energy and infrastructure development standards to conserve greater sage-grouse populations and their habitats. 58 pages plus appendices.

(Artemisia tridentate vaseyana) and Wyoming big sagebrush (A. T. wyomingensis) need 35–120 years to recover following a burn (Baker 2006), once cheatgrass dominates an area the effects are usually irreversible.48

- “Also, drilling within 3.1 miles of a lek, road traffic, and well density were associated with a reduction in breeding males (Holloran 2005). Additional research from western Wyoming suggests that yearling males tend to avoid leks highly immersed in developing gas fields and, as distance from drilling rigs decreased, there was less recruitment (Kaiser 2006).”49

- “Third, buffer zones encompass nesting habitat associated with these leks and the same explanatory factors for lek attendance negatively affect nest initiation rates and site selection, leading to lower population vital rates. Distances that female grouse will nest away from a lek vary between migratory and non-migratory populations. Braun et al. (1977) indicated that most females nest within 3.2 km of a lek; however, more recent research suggests that females nest further from leks than previously thought. Connelly et al. (In Press) found that the average distance between a female’s nest and the nearest lek was 1.3–1.5 km in Idaho (Wakkinen et al. 1992, Fischer 1994), 2.7 km in North Dakota (Herman-Brunson 2007), 2.8 km in Colorado (Petersen 1980), 4.9 km in Alberta (Aldridge 2005), and 5.1 km in Washington (Schroeder et al. 1999). An analysis conducted by the Oregon Department of Fish and Wildlife showed that, of 493 nest locations, 80% were within 3 miles of the nearest lek based on radio-telemetry data (ODFW 2009). Similarly, Holloran and Anderson (2005) found that sage-grouse nests are spatially associated with lek location within 3.1 miles in Wyoming. Research also shows that female sage-grouse show fidelity to specific nesting areas. For example, Berry and Eng (1985) found that the mean distance between successive nests for three female grouse was 552 m in Wyoming, while in the Big Desert of Idaho, Fischer et al. (1993) found a median distance between consecutive year nests of all females (n=22) was 740 m. These factors are important to consider when accounting for the effects that development and disturbance can have on nesting grouse as indicated above (Chapter 1, Section B).

These points demonstrate the need to extend lek buffer zones beyond 2 miles; a figure previously used in many guidance documents.50

- “Based on the cumulative scientific findings to date, NGSCT (“Nevada Governor’s Sage-Grouse Conservation Team”) encourages a “no surface occupancy” buffer of 3 miles be adopted for resident population of sage-grouse. For migratory populations, a 3-mile protection zone plus additional protections for known nesting habitat associated with those populations should be adopted. Consideration should also be given to the protection of movement corridors that sage-grouse utilize to move between seasonal habitats.”51

- “Human Activity (Daily Operations/Maintenance)
a. Vehicle trips should be limited to those times that would least impact nesting or wintering grouse:

51 Ibid, page 11.
i. Vehicle trips should not occur on a regular basis within 3 miles of an active lek or in identified nesting habitats from 01 March through 15 May.
   1) If vehicle trips are required during the lekking period, vehicles should only be operated from 10:00 a.m. to 5:00 p.m. daily.
   ii. Public access to construction areas should be limited if construction activities are occurring from 01 March through 15 May.”52

In another study on impacts to sage grouse from coal-bed natural gas development in Montana and Wyoming concluded that any development within .25 miles of a lek posed a severe threat to the lek’s persistence, and may result in impacts over much larger areas. It further found that timing restrictions on construction and drilling during the breeding season do not prevent the impacts of associated infrastructure, such as avoidance, collisions, and predation during other times of the year that may be crucial for population persistence. Based on modeling conducted in this study, the authors estimated that development within 2 miles of a lek would reduce the average probability of lek persistence from 87% to 5%.53 54

The protections found in the FEIS and ROD, which limit protections to within .31 miles of leks, are grossly inadequate.

The Center requests:

- Seasonal closures (February 20 – May 15) be put in effect on user-created routes being added to the transportation system that are within 2-miles (if not 3-miles) of an active lek.
- That seasonal closures be put in place for user-created routes being added to the transportation system that are within .6 miles of seeps, springs and wet meadows that are found within identified brood-rearing habitats, for a duration to be determined through consultation with NDOW biologists.
- The districts re-analyze the environmental consequences based on leks and habitat found within 2-miles of a lek rather than the .31 as in the current FEIS and expand the “zone of influence” as supported by the science provided in this Appeal, and share the results the FWS, NDOW and the Center.

**c. Road Density and Watershed Condition and Aquatic Species Concerns**

The analysis of watershed condition disclosed in the FEIS can only be described as confusing.

---

54 The districts in their response to our cite of this study, arrogantly stated to the effect that the study was moot since the project was not a coal-bed methane project. They should have known better that the reference was general one to roads and disturbance to leks, and that specific studies related to effects on grouse from recreational motorized use are non-existent.
On one-hand, the districts clearly use metrics such as distance of roads from streams, number of crossings and miles of road on slopes greater than 30% in areas with erosive soils to disclose impacts to water quality and erosion. However, the very important metric of road density is only briefly mentioned in the watershed section 3.7.\(^{55}\)

The density of roads within a watershed is a critical determinant of how vital and properly functioning the watershed is.\(^{56}\) The metric of road density is primarily discussed and used in the FEIS in the section on impacts to elk.\(^{57}\)

While the watershed section does provide a one sentence description of the range of road densities purported to be the result of each alternative, it does not draw any logical conclusions as to the health of the impacted watersheds, individually or as a whole. Further, it appears there are data discrepancies and contradictions between sections of the FEIS. As a point of concern, the following table shows the range of road densities reported in the elk versus watershed sections:

<table>
<thead>
<tr>
<th>Road densities expressed as miles per square mile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alternative</td>
</tr>
<tr>
<td>Elk section(^{58})</td>
</tr>
<tr>
<td>Watershed section(^{59})</td>
</tr>
</tbody>
</table>

\(^{*}\) - Alternative 3 has 6 acres with densities above 5mi/mi\(^2\) and Alternative 4 has 20 which were dropped in rounding the densities reported in the table.

So it seems that road densities have been under reported in the watershed section, which has the effect of falsely minimizing the road impacts.

Why this is important is not clearly demonstrated by the above table. In reviewing Table 60, it becomes clear that there is significant acreage in watersheds that have road densities above the maximum densities reported in the watershed section.\(^{60}\) The agency’s Watershed Condition Classification Technical Guide states that on the average, watersheds having < 1 mi/mi\(^2\) are in a properly functioning condition; those having densities of 1 – 2.4 mi/mi\(^2\) are functioning at risk; and, those having densities above 2.4mi/mi\(^2\) are impaired.\(^{61}\) Using the only road densities provided – those in Table 60, it appears that there are significant portions of watersheds in an at risk or impaired condition. Consider these figures derived from Table 60:

---

\(^{55}\) FEIS section 3.7.


\(^{57}\) FEIS section 3.10.3.7.

\(^{58}\) FEIS, Table 60.

\(^{59}\) FEIS, Section 3.7.3 narrative.

\(^{60}\) Since Table 60 has ranges that do not conform to the ranges used in the watershed section, it is impossible to state a finite amount.

## Acres of each class of open road density

<table>
<thead>
<tr>
<th>Alternative</th>
<th>Properly Functioning *</th>
<th>Functioning at Risk *</th>
<th>Impaired Function *</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(&lt; 1.5 mi/mi²)</td>
<td>(1.5 – 2.5 mi/mi²)</td>
<td>(2.5 mi/mi² +)</td>
</tr>
<tr>
<td>1</td>
<td>244,541</td>
<td>321,629</td>
<td>215,993</td>
</tr>
<tr>
<td>2</td>
<td>289,061</td>
<td>286,171</td>
<td>154,088</td>
</tr>
<tr>
<td>3</td>
<td>425,667</td>
<td>159,044</td>
<td>36,352</td>
</tr>
<tr>
<td>4</td>
<td>350,660</td>
<td>255,998</td>
<td>73,027</td>
</tr>
<tr>
<td>5</td>
<td>355,091</td>
<td>232,826</td>
<td>82,445</td>
</tr>
</tbody>
</table>

* - because the Center lacked other data, we had to use what was provided in the FEIS, which errs on the permissive side of the ranges provided in the Watershed Condition Guide, < 1.5 as opposed to < 1, and 1.5 to 2.5 rather than 1 – 2.4, for example.

The districts have not done an adequate job of analyzing and disclosing the magnitude of the impacts of their decision on watershed quality and function. It is also critical to point out that the selected alternative 2 results in poorer watershed conditions than every other action alternative, seemingly to the detriment of not only water quality and watershed health, but also Lahontan cutthroat, redband and bull trout, Columbia spotted frog. The Center asserts that the FEIS fails to analyze, describe and disclose the true impacts from its alternatives, and in particular from its decision. In doing so, the districts ignore and violate the protections afforded these and other management indicator species under the Humboldt NF Plan.

The Center requests the following:

- The decision be withdrawn and a supplemental EIS be prepared that adequately and accurately discloses the impacts of the alternatives on watershed health as well as impacted aquatic species;
- That the Forest Service re-initiate consultation with the FWS under the Endangered Species Act based on the findings of the supplemental EIS.
- That the agency select alternative 3, or formulate another alternative that better provides resource protections required by executive orders, the National Forest Management Act, the Endangered Species Act and other applicable laws and regulations.

---

62 Derived from FEIS, Table 60.
d. Noxious and Invasive Plants

ORVs are a major vector for non-native (exotic) invasive plant species. When non-native plants invade areas, they tend to crowd out and outcompete native vegetation, and as a result, multiple aspects of that ecosystem can be impacted. With knobby tires and large undercarriages, ORVs can unintentionally take invasive non-native species deep into forestlands. For example, one study found that in just one trip on a 10 mi. course, an ORV dispersed 2,000 spotted knapweed seeds. Another study found that the presence of invasive plants decreases with distance from a roadway, and warns that roadless areas, valued as refuges for native species are at risk from motorized use. It concludes stating:

“…to protect these habitats from the continued threat of invasion, land managers should consider means of preventing construction of new roads, limiting off-highway vehicle access into grasslands with low road densities, identifying a regime of livestock grazing that favors the persistence of natives over the spread of exotics, and monitoring recreational trails and grazing allotments within roadless areas to detect and eradicate new infestations.”

The Roads Analysis Process Report for the Humboldt-Toiyabe NF acknowledges that, “Roads are the primary vectors in the spread of invasive species…Typically invasive plants will follow a road system and then once established start expanding into the surrounding area.” Dirt bikes, ATVs and other off-road vehicles can spread noxious weeds and invasive plants over a wide area in only a few hours. These weeds displace native plants and can alter entire ecosystems.

Federal and state laws direct the Forest to minimize the potential (emphasis added) for spreading noxious weeds when planning projects (Federal Noxious Weed Act 1974, National Strategy and Implementation Plan of Invasive Species System 2004, Executive Order on Invasive Species 1999, Forest Service Manual 2080, Nevada Revised Statutes Section 555, Nevada Administrative Code Section 555)”.

The district’s decision adds 160 miles of user-created routes to the forest transportation system in areas identified by the district as having high risk of infestation from noxious weeds, and 1835 miles in moderate risk areas.

---

67 FEIS, Table S-3.
A comparison of all the alternatives is provided in the following table:

**Miles of Open Motorized Routes in High and Moderate Invasive Risk Areas**

<table>
<thead>
<tr>
<th>Alternative</th>
<th>High Risk</th>
<th>Mod Risk</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>165</td>
<td>1734</td>
<td>1899</td>
</tr>
<tr>
<td>2 (Selected)</td>
<td>160</td>
<td>1835</td>
<td>1995</td>
</tr>
<tr>
<td>3 (Current)</td>
<td>138</td>
<td>850</td>
<td>989</td>
</tr>
<tr>
<td>4</td>
<td>143</td>
<td>1380</td>
<td>1523</td>
</tr>
<tr>
<td>5</td>
<td>148</td>
<td>1294</td>
<td>1442</td>
</tr>
</tbody>
</table>

The Center believes that this decision violates the law, agency directives, common sense and environmental ethics. One hundred more acres are put at risk from noxious weeds in the decision that in the “No Action” alternative of the FEIS, and over 1000 more acres are at risk than in the “Current System” alternative.

The ROD attempts to hide the impacts of the decision by merely addressing the miles of motorized routes in “high risk areas”, stating that the decision would reduce such risk by 3.8 miles. It then offers the baseless explanation that through monitoring and the treatment of infested areas the weeds will be kept in check, and if not they reserve the right to reassess the decision. This argument is baseless in that the agency knows full well it is routinely underfunded to do the promised monitoring and treatment. Further, by this deceit shows that it lacks the political well and sense of stewardship to do the right thing and address the problem in a new decision. This is particularly of concern in light of the magnitude of the increase to the approved motorized system.

Executive Order 11312, directs Federal agencies to prevent introduction of invasive species, detect and respond rapidly to and control such species, not authorize, fund or carry out actions likely to cause or promote introduction or spread of invasive species unless the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measure to minimize risk of harm will be taken in conjunction with the actions. The agency has not made public a determination that the benefits of designating ORV trails outweigh the potential harm caused by invasive species. Indeed, such a determination would be indefensible. Further, the agency has not proposed feasible measures to minimize the risk. Therefore, it would be arbitrary and capricious to designate these miles of unauthorized ORV routes in or adjacent to noxious weed infestations.

Forest Service Manual (FSM) 2081.03 requires a weed risk assessment for any ground disturbing activity and noxious weed control measures for any project having moderate to high risk of introducing or spreading noxious weeds. While the districts may make the assertion that the designation of user-created routes as open is only an administrative action and not a ground disturbing one, it seems to us that the impacts of continued motorized use on these routes will

---

68 ROD, page 15.
have similar on-going impacts as newly constructed routes and should be more carefully analyzed and disclosed, rather than being written off as “meeting the letter of the law”. Further, lacking is any scientific justification or support for the district’s analysis methodology used to describe areas as being of moderate or high risk.

While the ban on cross-country travel has the potential for a positive improvement over the current situation, it is tempered by the allowance of cross-country travel for game retrieval during the fall – the very time that many of the noxious weeds are setting and dispersing their seeds. The ROD discloses that there would be motorized access to over 15,000 acres of invasive plant infestations through the allowance for motorized game retrieval, adding 385 acres of road or trail passing through high risk weed populations.\(^6^9\)

The FEIS is largely mute on the impacts of the likely spread on noxious and invasive weeds on ecosystem health, including unplanned fire, and on the management indicators species in its forest plan as well as other species of concerns such as protected under the Endangered Species Act and Nevada Revised Statutes.

The Center requests:

- The districts withdraw their decision and prepare a supplemental EIS that does a thorough job of evaluating the impacts from the more than doubling of the miles of motorized routes in moderate and high risk noxious and invasive weed areas.
- The districts disclose their budgets for the past 5-years for noxious weed monitoring and treatment and the acres of accomplishment for each, as well as their current and out-year budgets for the same to establish, or not, a reasoned expectation that the promises made in the FEIS and ROD can actually be accomplished, and reports such analysis in the supplemental EIS.

\[e. \quad \text{Cumulative Effects Of The Entire Transportation System}\]

The FEIS fails to adequately address the cumulative impacts of the existing transportation system and is therefore deficient under NEPA. 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. In the context of travel management planning, courts have held that proposals to designate additional routes for motorized recreation must be viewed in light of the entire transportation system. In other words, the impacts of all routes must be analyzed:

\(^{6^9}\) ROD, pages 14-15.
Within 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 Forest Service failed to meet this basic requirement of NEPA. The transportation system was created in a piecemeal fashion over many years and in this process the Forest Service should have taken a hard look at both the direct and 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. When examined along with other Forest Service actions and routes not designated as open to motorized use that are not physically removed from the ground, the transportation system’s impacts are cumulatively significant. Even routes that were subjected to NEPA analysis when they were built must now be reanalyzed for their cumulative effects on the landscape. There is no evidence within the FEIS that this cumulative effects analysis was done, only cursory assertions that the impacts were considered.

The cumulative impacts analysis is also deficient with respect to the impacts from illegal motorized recreational use. Even though the Forest Service has decided not to designate a number of 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 continue to have negative consequences for the environment and will also likely continue to experience illegal use. The Forest Service must consider the cumulative impacts of the presence of these routes on the ground, as well as illegal use of these routes. See Sierra Club v. Bosworth, 352 F. Supp. 2d 909 (D. Minn. 2005). The districts must consider the cumulative effects of reasonably foreseeable illegal activity. The Mountaineers, 445 F. Supp. 2d at 1248 (internal citations omitted).

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 IRAs.

Because the Forest Service failed to consider the environmental impacts and cumulative effects of the entire transportation system the FEIS and ROD are deficient under NEPA. The Forest Service must correct this deficiency in the analysis. 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. The absence of this detailed analysis in the FEIS has produced a decision that is arbitrary and capricious and in violation of NEPA.

The Center requests:

- The districts withdraw their decision and prepare a supplemental EIS that includes a cumulative impacts analysis that addresses the above concerns.

**B. Executive Orders 11989 and 11644 and the Travel Management Rule Must be Applied to All Motorized Trails**

The Off Road Vehicle Executive Orders must be applied to the designation of all motorized trails and areas, including those areas designated for motorized dispersed camping and motorized big game retrieval.

Two recent U.S. District Court decisions regarding the “minimization” criteria for travel management planning: *Idaho Conservation League (ICL) v. Guzman*, 2011 WL 447456 (D. Idaho Feb. 4, 2011), and *Center for Sierra Nevada Conservation et al., v. United States Forest Service* (Eldorado National Forest), case # S-09-2523 (E.D. CA. May 26, 2011). In *ICL v. Guzman*, the court held that the Forest Service must not only consider the minimizing criteria found in Executive Order 11644, as amended, but must also demonstrate how the agency applied those minimization criteria. The *Eldorado* decision affirmed this requirement.

If a travel management plan record of decision does not adequately reflect how the Forest Service applied the minimization criteria in the Travel Management Plan designations, the agency’s decision is in violation of the Travel Management Rule and the ORV Executive Orders. It is not enough to simply consider the minimization criteria with respect to particular trails utilizing a matrix of criteria that places putative routes in risk categories; the agency must also demonstrate how the minimization criteria were then implemented or applied in the route designation decision process, consistent with the objective of minimizing impacts.

These cases are consistent with the 2009 decision from the Northern District of California in which the court held that the Bureau of Land Management must comply with the same Executive Orders by placing “routes specifically to minimize ‘damage’ to public resources, ‘harassment’ and ‘disruption’ of wildlife and its habitat and minimize ‘conflicts’ of uses.” *Ctr. for Biological Diversity v. U.S. Dept. of Interior, ---F.Supp.2d---*, 2009 WL 7036134 (Sept. 28, 2009) (”CBD”). In *ICL v. Guzman*, the court held that the agency’s attempt to distinguish the holding in *CBD*
based on the fact that the two agencies operate under different regulations (36 C.F.R § 212.55(b) for the Forest Service and 43 C.F.R. § 8342.1 for the Bureau of Land Management) was an unreasonable interpretation because both agencies are bound by Executive Order 11644. According to the court, to construe a distinction between the requirements of the two agencies is to draw a distinction without real, practical difference and such an interpretation is unreasonable. *ICL v. Guzman*, 2011 WL 447456, at 17. The court stated that “[n]ot only are both agencies bound by the plain language of the ORV Executive Orders, but both contemplate the same result: the land management agencies will consider the impacts of ORV use and, in selecting appropriate routes, will attempt to minimize these impacts.” *Id.* Similarly, the *Eldorado* decision makes clear that “Subpart B is equivalent to the Bureau of Land Management’s corresponding regulation interpreting Executive Order 11544.” *Eldorado* at 13.

During the public comment period for this project Appellants asked that the Executive Orders and the minimization criteria be applied to all motorized trails and areas. We note that the EIS for this project completely fails to disclose how both the ORV Executive Orders and the Travel Management Rule minimization criteria were applied to trails and area designations. The Forest Service focuses on the fact that impacts from motorized uses are going to be “reduced” due to the elimination of much cross-country motorized travel and the closure of certain motorized routes. However, a reduction in impacts does not equate with a minimization of impacts. As the courts in both *Idaho Conservation League* and *Center for Biological Diversity* explained, “‘minimize’ as used in the regulation does not refer to the number of routes, nor their overall mileage. It refers to the effects of route designations, i.e. the [Forest Service] is required to place routes specifically to minimize ‘damage’ to public resources, ‘harassment’ and ‘disruption’ of wildlife and its habitat, and minimize ‘conflicts' of uses.” *ICL v. Guzman* at *16 (quoting *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, --- F.Supp.2d ----, 2009 WL 7036134, at *20 (Sept. 28, 2009)).

In this project ROD and Final EIS, we are unable to determine how the Forest Service actually applied the minimization criteria to all routes and areas designated for motorized uses. As examples of a motorized trail where impacts have not been minimized through this planning process, we refer the agency to Appendix 5 of our comments on the DEIS, and specifically routes U58305A, M2496B, M6999, R8214, and U57106 – all of which were requested by the Center to be closed but were left open in the decision.

It is clear that the minimization criteria have not been applied to these sample routes, or for the motorized big game retrieval areas. We would be happy to provide the Forest Service with a list of additional specific routes for which we have concerns, and have done so in our prior administrative comments.

The Center requests:

- That the Forest Service withdraw its decision and prepare a supplemental EIS that clearly and specifically demonstrates how the minimization criteria found in the Executive Orders, and identified as part of the purpose and need for this project, have been not only considered, but actually applied.
C. Motorized Big Game Retrieval

The districts’ decision authorizes the retrieval of elk with an ATV or UTV type vehicle up to 0.5 miles from a designated trail or road, subject to voluntary restrictions set in the ROD.\(^{70}\) This is done in spite of the significant and damaging impacts that will occur, some of which are documented in the ROD – damage to cultural resource sites, adverse impacts to 12 species of sensitive plants, increased soil erosion and sedimentation of streams, including those with listed and species of concern, motorized access to over 15,000 acres of invasive weed infestations, and increased user conflicts, including with those hunters who prefer traditional, fair-chase hunting without the use of motorized off-road vehicles.\(^{71}\)

The FEIS and ROD do not adequately analyze and disclose the impacts from this cross-country motorized use. Instead the districts rely on unsubstantiated assumptions. One of these assumptions is that there would only be approximately 140 trips annually for retrieval of elk. This figure purportedly comes from NDOW data, but no citation is provided. Further, NDOW has recently recommended to the state’s Wildlife Commission that there be 21% increase statewide in bull elk tags and 22% statewide in cow elk tags compared to 2011.\(^{72}\) This, and future quota changes, cast doubt on the districts’ assumptions and analysis and highlight the problem of relying for mitigation or minimization, on criteria not under the agency’s control.

Further, in truth, the districts failed to analyze the impacts from MBGR and instead deferred to the unreasoned assumptions of the number of trips made being minimal and that hunters would voluntarily comply with the restrictions (which many would not likely even know about), and monitoring and enforcement efforts.

This is at best a hollow, conscience salving approach. There is no certainty or even slimmest hope that the districts will be able to implement and enforce these restrictions. The districts all have abundant examples of OHV damage to streams, riparian areas and meadows.\(^{73}\) District budgets are notoriously lacking in resources for enforcement and monitoring.

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 travel management 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 maps show, outside of Wilderness, practically the entire forest is within one mile of a road. 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

\(^{70}\) ROD, page 5.
\(^{71}\) ROD, page 14-15.
\(^{72}\) See NDOW recommendation at: http://ndow.org/about/news/pr/2012/April/2012_quota.shtml
\(^{73}\) See Appendices 4 and 5 in the Center’s comments on the DEIS for photo and narrative documentation.
impacts to all these areas. Substantive protections under NFMA for streams, including sedimentation, impacts to fish habitat, spread of noxious weeds for example, would need to be analyzed. Finally, the requirement of the TMR and Executive Orders to minimize impacts to forest resources must also be evaluated and disclosed.

Given the controversy and uncertainties associated with MBGR – namely, the level and amount of use by hunters, illegitimate use by non-hunters, fragmentation of habitat, increased likelihood that unauthorized ‘ghost’ routes will proliferate from repeated use, reduced viability and quality of the hunting experience (in particular for backcountry hunters who do not rely on ORVs), and additional water quality impacts – this “hard look” could only be satisfied through a supplemental EIS since the current FEIS fails to meet these tests. Then, in order to comply with the TMR and Executive Order requirements to “minimize” impacts from the designation of open areas, the forest would have to demonstrate how the impacts from these designations had been minimized.

The Center requests:

- That the decision be withdrawn and the provision for MRBG be denied across the districts.
- That MBGR be re-contemplated, a supplemental EIS be prepared that fully and adequately analyzes and discloses the true environmental impacts from the proposed authorization of cross-country travel.
- That any allowance for MBGR be subject to annual review to account for changes in the number of tags issued and hunters expected to take advantage of the exception to cross-country travel.
- The districts disclose their budgets for the past 5-years as well as their current and out-year budgets for law enforcement and monitoring to establish, or not, a reasoned basis for accepting that the MBGR restrictions can and will be adequately enforced, and include the results of such analysis in the supplemental EIS.

IV. REQUEST FOR RELIEF

Based on the information provided in this appeal, it is clear that the Responsible Official’s decision failed to comply with law, regulation, and policy as outlined in detail above. Appellant respectfully request that the Record of Decision for the Humboldt-Toiyabe Mountain City, Ruby Mountains, and Jarbridge Ranger Districts Combined Motorized Travel Management Final Environmental Impact Statement be withdrawn, a supplemental EIS be prepared, and a new decision issued that is in compliance with the law. Furthermore, the route designations should be limited to those motorized routes which can be justified through appropriate documentation showing that they were designed to be used by the public for long-term motorized recreation or that have been subjected to rigorous analysis during this process. For the Interim, the Center requests that cross-country be banned, including for MBGR, and motorized travel restricted to the roads and trails contained in Alternative 3 (Current) of the FEIS.
Our detailed specific requests are highlighted below:

- That the decision be withdrawn and a supplemental EIS prepared that analyzes the Center’s submitted citizen’s alternative.
- That the decision be withdrawn and a supplemental EIS be prepared that includes and alternative that results in a net reduction of the designated transportation system through specific closures.
- That the decision be withdrawn and a supplemental EIS be prepared that takes a hard look at the direct, indirect, and cumulative impacts to roadless and wilderness values and to develop an alternative that addresses the appellant’s concerns over the need to preserve potential Wilderness and Roadless Area values, including the need for recreation free from the conflicts generated by the sounds and smells of motorized use. The revised decision should fully reflect the requirements outlined in the ORV Executive Orders, as more fully discussed below, as well as disclose the specific effects of the decision on roadless area characteristics.
- Routes M7246A and U56849A be permanently closed to motorized vehicle use.
- That the decision be withdrawn and a supplemental EIS prepared that analyzes and discloses the impacts from MBGR.
- The districts disclose their budgets for the past 5-years as well as their current and out-year budgets for law enforcement and monitoring to establish, or not, a reasoned basis for accepting that the MBGR restrictions can and will be adequately enforced, and include the results of such analysis in the supplemental EIS.
- Seasonal closures (February 20 – May 15) be put in effect on user-created routes being added to the transportation system that are within 2-miles (if not 3-miles) of an active lek.
- That seasonal closures be put in place for user-created routes being added to the transportation system that are within .6 miles of seeps, springs and wet meadows that are found within identified brood-rearing habitats, for a duration to be determined through consultation with NDOW biologists.
- The districts re-analyze the environmental consequences based on leks and habitat found within 2-miles of a lek rather than the .31 as in the current FEIS and expand the “zone of influence” as supported by the science provided in this Appeal, and share the results the FWS, NDOW and the Center.
- The decision be withdrawn and a supplemental EIS be prepared that adequately and accurately discloses the impacts of the alternatives on watershed health as well as impacted aquatic species;
- That the Forest Service re-initiate consultation with the FWS under the Endangered Species Act based on the findings of the supplemental EIS.
- That the agency select alternative 3, or formulate another alternative that better provides resource protections required by executive orders, the National Forest Management Act, the Endangered Species Act and other applicable laws and regulations.
- The districts withdraw their decision and prepare a supplemental EIS that does a thorough job of evaluating the impacts from the more than doubling of the miles of motorized routes in moderate and high risk noxious and invasive weed areas.
- The districts disclose their budgets for the past 5-years for noxious weed monitoring and treatment and the acres of accomplishment for each, as well as their current and out-year
budgets for the same to establish, or not, a reasoned expectation that the promises made in the FEIS and ROD can actually be accomplished, and reports such analysis in the supplemental EIS.

- The districts withdraw their decision and prepare a supplemental EIS that includes a cumulative impacts analysis that addresses the concerns we raised.
- That the Forest Service withdraw its decision and prepare a supplemental EIS that clearly and specifically demonstrates how the minimization criteria found in the Executive Orders, and identified as part of the purpose and need for this project, have been not only considered, but actually applied.
- That the decision be withdrawn and the provision for MRBG be denied across the districts.
- That is MBGR be re-contemplated, a supplemental EIS be prepared that fully and adequately analyzes and discloses the true environmental impacts from the proposed authorization of cross-country travel.
- That any allowance for MBGR se subject to annual review to account for changes in the number of tags issued and hunters expected to take advantage of the exception to cross-country travel.
- The districts disclose their budgets for the past 5-years as well as their current and out-year budgets for law enforcement and monitoring to establish, or not, a reasoned basis for accepting that the MBGR restrictions can and will be adequately enforced, and include the results of such analysis in the supplemental EIS.
- As an interim provision, the Center requests that cross-county be banned, including for MBGR, and motorized travel restricted to the roads and trails contained in Alternative 3 (Current) of the FEIS.