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**APPEAL TO THE REGIONAL FORESTER  
 OF THE UNITED STATES FOREST SERVICE  
 REGION 6**

<b>Bark</b>	)	
	)	
Appellant	)	
	)	
v.	)	<u>36 CFR §215 Appeal</u>
	)	<b>In Re:</b> Appeal of August 27,
	)	2010 Record of Decision and
<b>Mary Wagner, Regional Forester</b>	)	Final Environmental Impact
	)	Statement for the Mt. Hood
	)	Off-Highway Vehicle (OHV)
Respondent	)	Management Plan, including
	)	Forest Plan Amendment #17
	)	
	)	

## **APPELLANT'S CONTACT INFORMATION**

- **Bark** (Lead Appellant): Lori Ann Burd, Restore Mt. Hood Campaign Manager and Staff Attorney, PO Box 12065, Portland, OR 97212. (503) 331-0374. loriann@bark-out.org.
- **Friends of Mt. Hood** (Appellant): Barbara Wilson, Board Chair, Friends of Mt. Hood, 12820 SW 20th Court, Beaverton, OR 97008. 503-644-0762. wilsonbn@frontier.com.

## **CERTIFICATION OF FILING**

This appeal was filed by electronic transmission to:  
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Mary Wagner, Regional Forester  
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Lori Ann Burd  
Dated this 12<sup>th</sup> day of October, 2010

**APPELLANT'S NOTICE OF APPEAL,  
REQUESTED RELIEF,  
AND STATEMENT OF REASONS**

**I. NOTICE OF APPEAL**

In accordance with 36 C.F.R. § 215, Bark and the undersigned appellants respectfully appeal to Regional Forester Mary Wagner for relief from Mt. Hood National Forest Supervisor Gary Larsen's Record of Decision (ROD), signed on August 27, 2010, for the Off-highway Vehicle (OHV) Management Plan, including Forest Plan Amendment #17 Final Environmental Impact Statement (FEIS) (hereinafter Plan).

Decision Document: Record of Decision, Off-Highway Vehicle (OHV) Management Plan, including Forest Plan Amendment #17

Decision Date: August 27, 2010

Responsible Official: Gary Larsen, Forest Supervisor, Mount Hood National Forest (MHNF)

Appeal Period End Date: October 12, 2010

Description of the Project: This Plan determines where OHV use is and is not permitted in MHNF.

Location: MHNF

Appellant's Interests:

Bark has a specific interest in this Plan and project area, and that interest will be adversely affected by this project. We have previously expressed our interest in this specific Plan, and have standing to appeal this decision according to 36 CFR § 215.13. Bark is a non-profit organization based in Portland, Oregon and has worked to protect the MHNF since 1999. Staff, members, volunteers, supporters, and board members of Bark live in the communities surrounding the MHNF and use and enjoy the Forest extensively for recreation, drinking water, hunting, fishing, general aesthetic enjoyment, family gatherings, viewing flora and fauna, gathering forest projects, and other purposes. Specifically, Bark's members and supporters have used the project area for hiking, camping, bird watching, mushroom gathering, photography, and family gatherings. The value of the activities engaged in by Bark members and staff will be irreparably damaged by this decision. We have a long-standing interest in the sound management of this

area and the right to request agency compliance with applicable environmental laws.

Friends of Mount Hood (FOMH) has a specific interest in this Plan and project area, and that interest will be adversely affected by this project. FOMH members have a long standing interest in the management of Mt. Hood National Forest and frequently visit the forest to hike and take photographs. FOMH has previously expressed interest in this specific plan. FOMH's Board Chair Barbara Wilson wrote and submitted comments during the Portland OHV Plan DEIS Open House. Board members Lou Daily and John Wood also submitted comments on this Plan. FOMH is a nonprofit organization dedicated to monitoring development and management of national forest lands on Mount Hood. FOMH is especially interested in protecting the alpine meadows, wetlands, streams, wildlife, and forested slopes on the mountain.

Bark and Friends of Mt. Hood (hereinafter collectively referred to as Bark) appeal the August 27, 2010 ROD on Mt. Hood's OHV Plan. We wish to acknowledge the Forest Service's considerable efforts to develop a comprehensive OHV Plan for MHNH that balances the diverse interests of the public with environmental concerns. However, we have found within the FEIS and ROD several legal inadequacies that preclude us from lending our full support to the decision.

All appellants hereby reference and incorporate in this appeal their comments on the Scoping Notice and Draft Environmental Impact Statement for Mt. Hood's OHV Plan.

## II. **Requested Relief**

Appellants wish to reiterate our support for many aspects of MHNH's OHV Plan, as we have described in communications with agency staff and in local media outlets. Given the complexity of the issues and time and resources committed to this document, we believe that its overall quality should be highlighted. However, for the reasons stated below, certain aspects of the ROD and FEIS fail to comply with law, regulation, and policy. Therefore, Bark respectfully requests the Regional Forester to set aside the Decision and direct Forest Supervisor Gary Larsen to immediately make the limited changes sought in this appeal. In the interim, while changes are being incorporated, the forest should move forward with implementation of the remainder of the decision, including the ban on cross country travel.

### **III. Statement of Reasons**

#### **a. This FEIS and ROD Fails to Provide an Adequate Plan for Law Enforcement and Compliance, Paving the Way for Illegal Use and Resource Damage**

In our DEIS comments, Bark provided extensive comments questioning the Forest Service's ability to enforce the OHV Plan without providing for additional Project Design Criteria and enforcement plans. The purpose and need for this OHV Plan simply cannot be achieved without an adequate monitoring and law enforcement plan, but this decision fails to incorporate an adequate plan. We recognize that the implementation of this Plan will undoubtedly make certain aspects of enforcing OHV laws and rules less complex for law enforcement officers. However, this Plan is deficient because it relies too heavily on the motor vehicle use map (MVUM) as an enforcement tool, does not call for adequate signage, fails to provide for an ongoing enforcement monitoring plan, and does not spell out mechanisms for ensuring the enforcement of OHV related regulations. It also fails to deal with ongoing and known problem areas in a proactive manner.

OHV use in National Forests is a highly regulated activity, and the agency is required to:

- Effectively monitor ORV use (36 C.F.R. § 212.57);
- Practice adaptive management by periodically reviewing the monitoring results and altering the management of OHVs to ensure that serious user conflicts and natural resource impacts are not occurring (36 C.F.R. § 295.5);
- Ensure that OHV use does not result in significant adverse impacts to natural resources or loss of viability to native and desired non-native species (36 C.F.R. § 295.2) and;
- Close a trail or area if OHV use "is directly causing or will directly cause considerable adverse effects on public safety or soil, vegetation, wildlife, wildlife habitat, or cultural resources associated with that road, trail, or area" (36 C.F.R. § 212.52(b)(2)).

In our DEIS comments we specifically called for improved Project Design Criteria (PDCs) for enforcement and monitoring. Unfortunately, the PDCs for Recreation Management, Roads, Law Enforcement, and Public Awareness and Education remain woefully inadequate in the FEIS. See FEIS 2-35-36.

#### **i. The MVUM is an Inadequate Enforcement Tool**

The FEIS makes the claim that the MVUM will ensure public awareness as to what portions of the Forest are open or closed to OHV use. FEIS 3-223.

However, it is widely known that many visitors to Mt. Hood National Forest never stop at a Ranger Station and do not carry maps. Individuals who are accustomed to using their OHVs in areas excluded from this Plan who do not belong to any kind of organized club may not have any idea that the Forest's policy will be changing to "closed unless posted open." The FEIS notes that the "fact that only open roads, trails, and areas would be posted could make Forest visitors less inclined to tear down signs." FEIS at 3-223. While we appreciate that signage will be provided along designated OHV routes, signage indicating the new closed unless posted open policy is also necessary, even if it is regularly torn. Without signs OHV users may not even know that their use outside of designated areas will be illegal. The Forest Service needs to provide for signage throughout the Forest, especially in areas where OHV users are known to visit. While it is frustrating that certain individuals will seize upon opportunities to take down signs, this Plan's reliance on the MVUM and subsequent failure to call for basic signage outside of OHV areas is a critical flaw.

In addition, the MVUM is a complicated map and OHV users may decide to simply ride along their accustomed routes instead of spending their time attempting to discern where they can go on the map. The MVUM cannot substitute for the Forest proactively working to ensure compliance with applicable regulations.

#### ii. Monitoring

36 C.F.R. § 212.57 requires the Responsible Officer to monitor OHV use. A plan for monitoring compliance with the Plan should have been included in the decision in order to implement this regulatory requirement. This plan should be designed to identify early warning signs of resource impacts and conflicts before irreversible damage occurs, as required by Section 8 of Executive Order 11644 and the Travel Management Rule. Monitoring should occur both around the designated areas and areas of known OHV use which were not included in this plan. If the Forest Service cannot commit to an adequate level of monitoring, it should reduce the number of areas included in the plan.

#### iii. The Effects Analysis Failed to Include Illegal OHV Use

NEPA requires agencies to prepare NEPA documents that addresses a project's direct impacts, indirect impacts, and cumulative effects. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Thomas v. Peterson*, 753 F.2d 754, 758-59 (9th Cir. 1985); *Save the Yaak v. Block*, 840 F.2d 714, 720 (9th Cir. 1988); *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1378-79 (9th Cir. 1998). This analysis needs to include: (1) the

effects of past connected and cumulative actions; (2) the effects of present connected and cumulative actions; and (3) the effects of reasonably foreseeable future connected and cumulative actions. 40 C.F.R. § 1508.7.

In our DEIS comments, we provide ample evidence to demonstrate that mere signage, physical barriers and rider education are not effective for mitigating the adverse and often significant impacts of ongoing violation of OHV use restrictions. Because illegal use has proven nearly impossible to curtail, its impacts are reasonably foreseeable and thus NEPA mandates their consideration. Here, the FEIS details the reasons why unlawful OHV use will not be considered. FEIS at 2-4,5. While we appreciate the considerable challenges associated with analyzing these impacts, they still must be analyzed under NEPA. At a bare minimum the analysis should have incorporated the reasonably foreseeable impacts of ongoing OHV use on routes which are currently used but are not included in the plan. A special emphasis should be placed on monitoring and determining how law enforcement can prevent adverse impacts on existing OHV routes which were excluded from this plan but are adjacent to routes in systems that are included in this plan.

#### iv. Specific Areas of Concern

We remain concerned about the impacts of OHV use in a number of areas. This section is not a comprehensive listing of these areas but rather a short list of some of the areas we are especially concerned about.

##### Staging Areas

The FEIS' notes that staging areas have the potential to create party spots because they contain amenities, leading to problems such as litter and vandalism. 3-224. However, the analysis fails to note that staging areas can also be extremely intimidating areas for other users to pass through, especially those visiting the Forest for purposes other than OHV recreation because these areas are often right off the road and frequently used for target shooting and alcohol consumption. Because staging areas provide a centralized area for law enforcement to communicate with OHV users, as noted in FEIS at 3-224, the Plan should include a specific plan for how enforcement and monitoring will be conducted at these areas.

Law enforcement issues and increased traffic at staging areas are reasonably foreseeable cumulative impacts which should have been analyzed.

## Enforcement Plan for Seasonal Closures at Mt. Defiance, McCubbins Gulch and Rock Creek

This Plan rightfully provides for seasonal closures to protect wildlife. FEIS at 2-45, 46. However, it does not provide details on how seasonal closures for wildlife protection will be enforced. Seasonal closures will be a special challenge to enforce. Law enforcement may not visit those areas as frequently as they would when the closures are not in effect because they may place their priorities elsewhere. OHV users will be accustomed to using those areas and may be reluctant to simply go home or drive to LaDee Flats once they realize that the area they have come to ride is closed in order to protect wildlife. The Plan should have provided details on how closures will be enforced, including a list of consequences for violations of seasonal closures.

## Illegal OHV Use at LaDee Flats is an Ongoing Concern

LaDee Flats has a long history as a lawless area. An order banning OHV use at LaDee Flats went into effect in 1992. However, OHV use at LaDee has continued, as we discussed in our DEIS comments. OHV users at LaDee Flats have an 18 year history of openly disregarding the law and causing significant resource damage. This is despite or perhaps in spite of the consistent efforts of law enforcement officers and groups like the Clackamas Stewardship Partners, who helped to provide funding for additional closure devices. The Forest Service has put in a large variety of closure devices in this area, but OHV users have consistently disregarded them.

While we appreciate that the Forest Service is hopeful that OHV users will comply with the law, the unlawful use at LaDee Flats provides evidence that closure devices and signs are not enough. Without the constant presence of law enforcement in this area, OHV riders are almost guaranteed to ride outside of designated routes. We hope the MHNH will take its obligation to practice adaptive management especially seriously in LaDee Flats. See 36 C.F.R. § 295.5. The Forest Service is required to ensure that OHV use does not result in significant adverse impacts to natural resources or loss of viability to native and desired non-native species. 36 C.F.R. § 295.2. Illegal OHV use at LaDee Flats will almost certainly result in adverse impacts to natural resources. The Forest Service is required to close a trail or area if OHV use "is directly causing or will directly cause considerable adverse effects on public safety or soil, vegetation, wildlife, wildlife habitat, or cultural resources associated with that road, trail, or area." 36 C.F.R. § 212.52(b)(2). The Plan fails to describe the actions MHNH will take if unlawful OHV use is observed at LaDee Flats. We trust the Forest Service



will close this area. But the better course of action may be to not open it at all.

### The 4610 Road is a Major Safety Hazard

The 4610 road is a hazardous road. Turning off Highway 224, drivers find themselves on an extremely narrow curving road. Drivers find they have barely enough space for two regular sized passenger vehicles to pass each other, and the many blind curves on this road make passing a hazardous experience. In addition, logging activity is ongoing in the area. MHNH just proposed a new timber sale, No Gin, in this area, so it is reasonable to expect logging trucks to be barreling down this road for years to come. Passing a logging truck on this road is treacherous. Due to concerns about the risk of serious accidents, we asked for a moratorium on logging activity while OHV use is occurring. Unfortunately this decision does not incorporate this reasonable safeguard or any other mechanism for preventing accidents on this road. We remain extremely concerned about the safety risks encountered by drivers along this first stretch of the 4610.

Once drivers get into the OHV system they will continue to be confronted with narrow roads and the hazards of driving on a forest road where children may be operating OHVs. As we mentioned in our DEIS comments, anecdotes of close calls in this area are easy to come by. Action needs to be taken to prevent accidents along the entire length of the 4610 road.

### Abbott Road Should be Decommissioned East of the North Fork Quarry to Prevent Illegal OHV Use

We greatly appreciate that this Plan excludes the portion of 4610 that goes east of the North Fork Quarry out of the LaDee system. This road presents "unique challenges for law enforcement because of its remoteness and narrow road prism." ROD at 10. It also bisects the Roaring River and Salmon Huckleberry Wilderness areas and is a known source of OHV access into wilderness. However, the fact that this road remains open practically invites illegal OHV use. OHV users know that their chances of being apprehended by law enforcement on this road are very slim, and they are likely to take advantage of the opportunity to ride further along the Abbott road. The Abbott road is well known for other kinds of illegal activities, including dumping of stolen cars and trash and the harassment of campers. In short, it is a well known problem road. Many non-OHV riders report avoiding using this area despite the access it provides because they fear collisions with OHV users, are intimidated by the target shooting that occurs right off the road, and the road is in very rough shape. Because this road serves very few legitimate purposes and creates significant law enforcement and monitoring

challenges, the Forest Service should have included a plan to decommission the Abbott road from the North Fork Quarry and beyond in its OHV Plan.

### Managing Illegal OHV Use at Rock Creek

Heavy OHV use at Rock Creek has been the source of many problems over the years and has had a significant impact on both natural resources and humans, especially those who reside at Sportsman's Park. Vandalism, litter, noise, and the scaring off of wildlife are major problems. We appreciate the work MHNH has done to attempt to balance the interests at this area. However, certain OHV users, and Class II users, may have grown accustomed to being able to utilize certain routes in this area. This decision excludes some of these routes. The FEIS recognizes the challenge of keeping people off the routes they have been using for years. "Unless there is a legitimate reason for excluding Class II OHVs from this alternative, management through enforcement and compliance would be difficult to implement." FEIS 3-224. The ID Team obviously has legitimate reasons for keeping Class II OHVs out of this area. However the FEIS reveals an utter lack of confidence in these reasons and acknowledges the difficulty of enforcement without confidence. This Plan is lacking because it fails to provide for a management scheme which effectively communicates, monitors, and enforces the new OHV rules.

### Wilderness Incursions at Mt. Defiance

We appreciate that you removed some roads which provided opportunities for OHV incursions into wilderness from your decision, especially the 4860 and 48960-140 routes out of Rock Creek.

However, we remain concerned about the 2821630 route out of Mt. Defiance, which is adjacent to the Mark O. Hatfield Wilderness. Keeping this route creates the possibility of OHVs riding to nearby Warren Lake or along Warren Creek. We are concerned that because the Mt. Defiance area is the smallest of the OHV areas, law enforcement officers may not be able to put adequate resources into ensuring that OHV users stick to designated routes and stay out of the Wilderness. Without adequate law enforcement, OHV users are may be tempted to stray from designated routes and continuing along the non-designated 2820 road. Black, Rainy, North, and Bear Lakes are all destinations that OHV users will be tempted to visit in this area. Mt. Defiance is in a fairly remote portion of MHNH and users are unlikely to take the time to visit a ranger station to pick up an MVUM before visiting this OHV area. This area is also particularly out of the way and may present unique challenges for law enforcement patrols. The FEIS does not provide for an adequate plan to manage illegal OHV use at Mt. Defiance.

### **b. The Plan Fails to Adequately Consider the Impacts of Dust from OHVs on Human Health**

NEPA's mandate is that all federal agencies must include in all "major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on ... the environmental impact of the proposed project ...." 42 U.S.C. § 4432(C)(i). It demands that agencies to take a "hard look" at the environmental impacts of agency actions. See *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972). In addition, NEPA requires an agency preparing a FEIS to assess, consider, and respond to public comments. 40 C.F.R. § 1503.4. Finally, NEPA's mandate to consider the direct and indirect effects on an agency action includes a mandate to consider impacts to health, whether direct, indirect, or cumulative. 40 C.F.R. § 1508.8.

Throughout the development of this OHV Plan the Forest Service has heard from individuals who are concerned about the impacts from dust caused by OHV use. Most significantly, the Forest Service has received comments from several residents of Sportsman's Park, a residential area adjacent to the Rock Creek OHV area. The health impacts of excessive dust was an issue these individuals identified early on in their scoping comments. While we all live with some dust, these individuals pointed out that they reside in Sportsman's Park in part to escape the pollution associated with living in more urban areas. Because OHV use is so heavy in the areas adjacent to their homes, these individuals have commented both formally and informally to agency staff throughout the process of developing this Plan that OHV use at Rock Creek has impacts to their health. These impacts include respiratory difficulties due to high levels of dust in the air during peak OHV use periods.

Despite first hand accounts of health impacts submitted to the Forest Service in informal and formal comments, the FEIS does not directly respond to these comments or in any way consider the impacts of inhaling large amounts of dust. The only place where the Plan considers dust is in the air quality analysis general air quality analysis that fails to consider the actual impacts dust has on human health. FEIS 2-242. The Plan also mentions that dust raises quality of life issues for some people who moved to this community in order to get away from pollution. FEIS at 3-31. This Plan fails to take the requisite hard look at these serious impacts to human health. This constitutes a serious failure in the analysis which must be remedied.

### **c. The Plan Fails to Adequately Consider the Fire Suppression Resources Available in the Rock Creek OHV Area**

While this Plan does carefully consider the various causes of fire in MHNH, it fails to consider the resources available to fight those fires. During scoping the Pine Hollow Fire Department, a volunteer EMS team, wrote comments opposing OHV use at Rock Creek. They noted that they are already dealing with more fire than they can manage and that some weekends they have had up to five calls from the Rock Creek OHV area. Any delay in the amount of time it takes to respond to a fire will increase the cost of the fire, as noted in the FEIS. While OHV use cannot usually be pointed to as the direct cause of a fire, fires do occur more frequently in areas known for OHV use than other areas. An expeditious response to fire is important in the Rock Creek area because of its proximity to homes and other structures. This Plan fails to take a hard look at the resources available to respond to fires in Rock Creek or respond to the request of the Pine Hollow Fire Department to ban OHV use at Rock Creek.

**d. This Plan Fails to Adequately Consider the Need for and Availability of Resources for Maintenance and Administration of the OHV System**

The Travel Management Rule requires the Responsible Officer to consider “the need for maintenance and administration of roads, trails, and areas that would arise if the uses under consideration are designated; and the availability of resources for that maintenance and administration.” 36 CFR 212.55(a). The FEIS very broadly mentions potential sources of funding and potential difficulties the Forest may face in attempting to pay for the OHV system. FEIS at 1-9, 1-20. However, the FEIS does not provide any specific information about funding considerations or how these considerations factored into this decision.

The public should be informed of this analysis in order to aid in our understanding of the travel planning process. We know that funding for roads and trails is often quite limited, as is evidenced by the maintenance backlog for forest roads not just in MHNH but in forests nation wide. While Legacy Roads and Trails funding has provided much needed funding for certain types of work, those funds cannot be used for implementing an OHV system. Providing the public with some specific information regarding funding mechanisms for implementing a project, such as how much funding is available statewide each year and how soon the Forest will be seeking appropriations, is crucial in aiding the public’s understanding of not just how decisions are made but also how they are implemented. This type of disclosure is consistent with NEPA’s policy to “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. 1500.2(d).

### **e. The FEIS Fails to Consider Effects of OHV Use at Mt. Defiance**

This FEIS properly considers the effects of OHV routes on adjacent designated wilderness areas with one notable exception. It does not consider the portions of the Mark O. Hatfield Wilderness administered by the Columbia River Gorge National Scenic Area, despite the fact that the entire area is "within the proclaimed boundary of the Forest." FEIS at 3-248. No rationale is given for this omission. The Mark O. Hatfield Wilderness is adjacent to the proposed routes at Mt. Defiance and warrants the same level of analysis that was provided for all the other designated wilderness areas within the Forest.

The FEIS also fails to provide any actual information about the Hood River County motorized system. It only mentions that Mt. Defiance is adjacent to this system, Mt. Defiance is being included to provide access to this system, and that maps of this system are in the project file. There is no detailed, quantified information provided. There is also no real analysis of cumulative environmental effects on wildlife, air and water quality, plants, soils, etc. This does not constitute taking a hard look at or providing an actual analysis of direct, indirect, or cumulative environmental impacts.

MHNF also failed to provide justification for lifting its seasonal closure on May 15. The Oregon Department of Fish and Wildlife (ODFW) recommended that MHNF refrain from developing an OHV system at Mt. Defiance because due radio telemetry verified deer and elk winter range as well as deer fawning and elk calving areas at Mt. Defiance. ODFW also noted that if MHNF chose to include Mt. Defiance in its Plan, it "recommends the proposed seasonal closure be extended until June 15." FEIS at Appendix I-114. MHNF not only ignored this recommendation, it did not even respond to the comment in the FEIS, saying only "[s]ee responses to Form Letter D." FEIS at Appendix I-54. No responses to Form Letter D were found in this FEIS. MHNF elected to lift its seasonal closure on Mt. Defiance on May 15, despite noting research indicating that it is only by June 16 that 90% of elk give birth. FEIS at 2-46, 3-184. MHNF's decision to open an area known for fawning and calving in the middle of the season without any analysis is a major problem.

MHNF decided to include the Mt. Defiance area in its OHV Plan without adequately considering impacts to the adjacent wilderness, the direct, indirect, and cumulative impacts of this area and the adjacent private land, and the impacts to calving elk and fawning deer. The APA provides that "agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" will be held unlawful and set aside. 5 U.S.C. § 706(2)(A). MHNF's failure to

adequately consider wilderness impacts, cumulative impacts resulting from the designation of OHV routes, or impacts of lifting seasonal restrictions during calving and fawning season at Mt. Defiance is arbitrary and capricious.

**f. MHNH Violated NFMA by Designating a System at McCubbins Gulch that Dramatically Exceeds the Forest Plans Road Density Standards**

NFMA requires that each National Forest develop a forest plan, which is implemented through site-specific actions. 16 U.S.C. § 1604 (d); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1376 (9th Cir. 1998). The “Forest Service's failure to comply with the provisions of a Forest Plan is a violation of NFMA.” *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 961 (9th Cir. 2005) (citing 16 U.S.C. §1604(i) and cases).

“High road densities lead to harassment of elk herds.” FEIS at 3-183. Mt. Hood’s Forest Plan’s standard is that by the year 2000, “roads open to motorized vehicle traffic should be reduced to 2.0 miles per square mile within the inventoried deer and elk winter range and 2.5 miles per square mile within inventoried deer and elk summer range...” FEIS at 3-183. This Plan includes a system of OHV routes at McCubbins Gulch that contains 28 miles of OHV routes in winter range and 56 miles in summer range. Shockingly, this Plan calls for a road density of 3.82 mi/road/mi<sup>2</sup>, almost double the permissible density for winter range. Instead of utilizing this opportunity to come into compliance with the its own Forest Plan, MHNH has attempts to finalize a plan that will keep the McCubbins Gulch area out of compliance for the indefinite future. This Plan is unlawful because it violated NFMA’s mandate by failing to comply with the Forest Plan’s standard for road density.

**g. The Forest Service Violated NEPA by Relying on an Improper Baseline**

Recent case law in the Northern District of California instructs agencies their baselines should clearly disclose those routes that have been previously subjected to NEPA and those routes that have been illegally created. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 2009 U.S. Dist. LEXIS 90016, at 43 (Sept, 29, 2009) (To fulfill NEPA’s goal of providing the public with information to assess the impact of a proposed action, the “no action” alternative should be based on the status quo – with a full description of what the status quo is and how it was reached – and should be consistently used as the benchmark by which the various alternatives are compared.)

In essence, the Forest Service must provide an accurate picture of the on the ground route situation, so that decision makers and the public understand what is contained in the baseline. The threshold for determining whether a route is currently in the transportation system and open to motor vehicle travel by the public should be consistent and rigorous.

In our DEIS comments we noted that MHNH had relied on an improper baseline, hoping this deficiency would be corrected in the FEIS. Unfortunately the FEIS did not remedy the problem and instead attempted to justify the use of an improper baseline. "While recognizing that illegal OHV use occurs on the Forest, the analysis in Chapter 3 does not include for the following reasons. First, no inventory of user-created roads and trails exists for the forest to provide a baseline for potential future illegal use. An inventory would require a considerable amount of time and funding..." FEIS at 2-4. As mentioned above, we recognize that this is a considerable burden. However, the mere fact that this would be a burden does not remove from the agency the obligation to use an accurate baseline. "The environmental baseline is an integral part of an EIS, because it is against this information that environmental impacts are measured and evaluated; therefore, it is critical that the baseline be accurate and complete." *Or. Natural Desert Ass'n v. Shuford*, No. 06-242-AA, 2007 WL 1695162, at \*4 (D. Or. 2007) (citing *American Rivers v. Fed. Energy Regulatory Comm'n*, 201 F.3d 1186, 1195 & n. 15 (9th Cir. 2000)). Because this decision relies on an improper baseline, the entire analysis is critically flawed and thus arbitrary and capricious.

**h. This Plan Fails to Minimize the Effects of OHVs to National Forest System Lands as required by 36 CFR § 212.55 and ORV Executive Order 11644, as amended by EO 11989.**

Former Chief of the Forest Service, Dale Bosworth described "unmanaged recreation" including the use of off-road vehicles as one of the top four threats to America's forests, deserts and grasslands. See <http://www.fs.fed.us/projects/four-threats/>. Accordingly, the Forest Service promulgated the 2005 travel management rule because "[t]he growing popularity and capabilities of [off-highway vehicles (OHVs)] demand new regulations, so that the Forest Service can continue to provide these opportunities while sustaining the health of [National Forest System] lands and resources." 70 Fed. Reg. 68264-68265.

The 2005 travel management rule requires the responsible official to designate a system of roads, trails and areas "by vehicle class and, if appropriate, by time of year." 36 CFR § 212.51(a). In designating roads,

trails and areas (or closing them), the responsible official is required to consider generally the:

effects on National Forest System **natural and cultural resources**, public safety, provision of recreational opportunities, access needs, **conflicts among uses of National Forest System lands**, the need for maintenance and administration of roads, trails, and areas that would arise if the uses under consideration are designated; and the **availability of resources for that maintenance and administration**. (Emphasis added).

36 C.F.R. 212.55(a); Executive Order 11644, as amended. In addition to the general criteria described above, Executive Order 11644 and 36 C.F.R. 215.55(b) mandate that the responsible official shall locate areas and trails to minimize:

- Damage to soil, watershed, vegetation, and other forest resources;
- Harassment of wildlife and significant disruption of wildlife habitats; and
- Conflicts between motor vehicle use and existing or proposed recreational uses of National Forest System lands or neighboring Federal lands

The duty to comply with the criteria from the OHV Executive Orders and the 2005 Travel Management Rule was recently re-affirmed and elaborated upon by a U.S. District Court in the northern district of California, when evaluating BLM land management plans for the California Desert Conservation Area. *Center for Biological Diversity v. BLM*, 2009 U.S. Dist. LEXIS 90016 (N.D. CA 2009). In this case, the court addressed the requirements for the BLM to implement its own OHV management regulations which were promulgated to comply with the OHV Executive Orders, and whose language exactly mirrors that of the OHV Executive Orders. While the language of these regulations differs slightly from those promulgated by the Forest Service to implement the OHV Executive Orders, the intent of the regulations is identical – to control the impacts caused by off road vehicles and to locate areas and trails in such a manner as to minimize the impacts from that use.

Consequently, the recent decision on how the BLM should implement its regulations managing off road vehicles applies directly to the case at hand – how the Forest Service should implement its own OHV regulations and how it should implement the OHV Executive Orders. The court found that the BLM had failed to properly apply its regulations when it failed to demonstrate how



the “minimization criteria were in fact applied when OHV routes were designated.” *Id.* at 28. The court went on to explain that “minimize” “refers to the *effects* of route designations, i.e. the BLM 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.” *Id.* at 30.

This same interpretation of minimize, and the requirement that the agency demonstrate how that criteria has been implemented, including through individualized determinations for specific routes and trails where vehicle use will be allowed, applies to the Forest Service. In this Plan, MHNH obviously put forth a great deal of effort to minimize impacts in many situations. However, in several instances it failed.

i. MHNH Failed to Minimize Impacts to Northern Spotted Owls (NSO) at LaDee Flats, Rock Creek, and McCubbins Gulch

No where in the FEIS does MHNH attempt to describe how it attempted to minimize the impacts on NSO. Implementation of this Plan will cause disturbance to nine known NSO sites and disruption to two sites. FEIS at 3-140. Consultation with U.S. Fish and Wildlife has revealed that the effect of this disturbance is “may affect and likely to adversely to affect” due to proximity of roads and trails to known nest sites. FEIS 3-141. MHNH does not offer even the most cursory explanation of how it attempted to minimize the disturbance and disruption of these known NSO sites. Without any explanation it is impossible to understand why MHNH did not simply plan its routes a little bit further away from the known NSO nest sites. This omission leads to the conclusion that MHNH failed to minimize impacts to NSO.

ii. MHNH Failed to Minimize Impacts to Deer and Elk at McCubbins Gulch and Mt. Defiance

As mentioned above, MHNH is out of compliance with its own Forest Plan’s road density requirements for McCubbins Gulch and disregarded ODFW’s advice to keep Mt. Defiance’s seasonal closure in place until June 15. Adhering to the Forest Plan’s road density standards and ODFW’s advice would have provided some indication that MHNH was seeking to minimize OHV impacts to wildlife. But by failing to follow its Forest Plan and ODFW’s recommendation MHNH has shown an unwillingness to minimize impacts to deer and elk in McCubbins Gulch and Mt. Defiance.

iii. MHNH Failed to Minimize Impacts to Soils at Rock Creek, McCubbins Gulch, and LaDee Flats

For MHNH's OHV Plan to reduce harm to soils, "least impactful scenario would be to choose the least amount of OHV systems that occur on the most resistant/resilient land..." FEIS at 3-47. Rock Creek, McCubbins Gulch, and LaDee Flats are areas of higher concern for impacts to soils. *Id.* Yet all three areas were selected despite the mandate to the impacts of OHV use on soils. MHNH fails to demonstrate how selecting these areas complies with its minimization obligations.

iv. MHNH Failed to Minimize Impacts to Late Successional Reserves (LSR)

This Plan includes considerable mileage within LSR in McCubbins Gulch and some additional mileage of LSR at LaDee Flats and Rock Creek. Late Successional Reserves are a highly valued natural resources and should not have been included in this Plan. The inclusion of LSR in this plan indicates a failure to minimize impacts on an important natural resource.

**IV. Conclusion**

Thank you for your careful consideration of the points raised in this appeal. We look forward to discussing these issues with you.

Sincerely,



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