

May 19, 2006

Appeal Deciding Officer  
U.S. Forest Service Intermountain Region  
324 25<sup>th</sup> Street  
Ogden, Utah 84401  
**VIA Hand Delivery**

**APPEAL OF THE RECORD OF DECISION AND FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE OGDEN RANGER DISTRICT – TRAVEL PLAN REVISION**

Dear Appeal Deciding Officer:

Pursuant to 36 C.F.R. § 215, the Sierra Club, Wild Utah Project, Western Wildlife Conservancy, and Citizens' Committee to Save Our Canyons (hereafter collectively referred to as "Sierra Club") hereby appeals the Record of Decision associated with the Ogden Ranger District Travel Plan Revision by Chip Sibbernsen, Ogden District Ranger, Wasatch-Cache National Forest. As set forth below, certain aspects of the decision of the Ogden District Ranger's revision of the Ogden Ranger District Travel Plan are in violation of the National Environmental Policy Act, National Forest Management Act, Executive Orders 11644 and 11989, and the Clean Water Act. Hereafter, reference to "the decision" refers to the Record of Decision signed by Chip Sibbernsen, Ogden District Ranger on March 20, 2006 authorizing revision of the Ogden Ranger District Travel Plan.

**I. INTRODUCTION**

Like most national forests, the Ogden Ranger District of the Wasatch Cache National Forest (WCNF) is faced with the challenge of managing the recent explosion of motorized recreation. In rising to this challenge, the Forest Service is required to ensure full consideration of the environmental consequences of allowing motorized use of the forest. The Ogden Ranger District includes the critical watersheds for the Ogden Valley and Ogden Utah. In addition to being the main water source for the adjacent urban area, the recreation opportunities found throughout the District are regionally important to both motorized and quiet recreationists. The important configuration of upland plateau, rugged mountains, and canyons form a unique habitat conditions that makes these mountains one of the most important wildlife areas in the state.

The Ogden Ranger District has been managed with 244 miles of motor vehicle routes. However, the Forest Service's management of these motorized routes has been unsuccessful. Unplanned, user created trails have proliferated across the forest. In turn, roads and motorized trails have led to declines in the habitat qualities and population numbers for some important species of wildlife. In addition, water quality has been degraded, lands have been scarred by unethical motorized use, and quiet recreationists have been pushed out of popular areas as motorized recreation has become the dominant use of the WCNF.

In taking this appealed action, the Forest Service has revised its existing travel system to add dozens of new motorized roads/trails. The Forest Service has taken this action without ever evaluating comprehensively the consequences of the existing travel system. Moreover, a disproportionate number of these new routes are in the areas prized for their non-motorized recreational qualities and important wildlife habitat. For example, vehicle routes within goshawk post fledgling areas are increasing 15%. This same story is repeated for sharp tailed grouse, elk, and mule deer habitat. The total density of roads measured in terms of miles of road per square mile continues to climb in too many important places.

Box Elder Creek just south of Mantua offers an excellent example of the relationship between wildlife and off-road vehicles. On the 13<sup>th</sup> of May a number of volunteers undergoing ORV monitoring training met a couple on horseback riders. The horseback riders, who rode this same canyon each week, reported that since the Forest Service physically implemented the closure of this stretch of canyon to motor vehicles in late 2003, elk have returned to browse. They were concerned that the new decision would return ATVs to this canyon thus once again displacing elk. In addition, areas previously closed to motorized use have often become the areas sought out by those who wish to use the forest for quiet recreation free from the loud noise of motors, dust, and dangerous road/trail confrontations.

Sierra Club is filing this appeal in order to promote the watershed stewardship needed to protect our town water sources, our wild heritage, and a balanced diversity of recreation and land use. Sierra Club provided the Forest Service with detailed analysis based on best available information on the consequences of its travel plan revision. Unfortunately, most of these comments were ignored in the final decision.

As a result, the Forest Service, in reaching its decision to revise the Ogden Travel Plan, has violated mandatory obligations to minimize the impacts of motorized roads/trails and to prevent use conflicts on each route. The Forest Service also failed to make its decision based on an informed, comprehensive analysis of the action. As discussed below, Sierra Club requests that the decision to revise the Travel Plan be vacated and the environmental analysis returned to the agency for compliance with applicable laws and regulations.

## **II. THE HISTORY OF TRAVEL MANAGEMENT ON THE OGDEN RANGER DISTRICT**

The Forest Service has actively managed motorized travel on the Wasatch-Cache National Forest for decades. In 1980, the Forest Service published a “District Travel Map” restricting motorized travel to certain areas of the forest. Thereafter, in 1988 and 1991, the Forest Service revised these travel maps by adding and removing certain roads/trails from the motorized travel system.

Poignantly, the Forest Service never undertook any environmental review during the adoption of the 1980 travel map or the 1988 or 1991 travel map revisions. Essentially, the Forest Service has failed to ever take a comprehensive evaluation of the Wasatch-Cache National Forest travel system. Instead, the Forest Service has expanded the motorized travel system on the forest route-by-route without ever evaluating the consequences of the greater system.

Also of note, the Forest Service, through its forest plan, has restricted motorized travel on the WCNF to designated routes since, at least, 1988. The revised WCNF forest plan continues to manage motorized travel on an “open on designated routes” basis. WCNF Revised Forest Plan, Standard S17. As such, motorized travel has been **managed** and restricted to designated routes.

Despite this managed travel system, the WCNF has experienced a proliferation of user-created trails. Rather than develop more effective management techniques to ensure travel is limited to designated roads/trails, the Forest Service through its Ogden Travel Plan revision is acquiescing to those that illegally use and create unplanned roads/trails by formally designating such roads/trails into the travel system.

However, the Forest Service has taken far too few actions to prevent or mitigate the existing problem – users are not staying on designated roads/trails. Essentially, the Forest Service is attempting to escape the issue by designating more trails. History reveals that despite motorized travel designations on the forest, the proliferation of user created roads/trails continues. Moreover, by designating more routes open for motorized recreation, the Forest Service is causing more use conflicts in areas prized by non-motorized recreationists.

Accordingly, the Forest Service’s attempt to create a distinction between managed and unmanaged motorized recreation lacks substance. See ROD at 3-4. For example, the Forest Service emphasizes that “[u]nmanaged motorized recreation has resulted in a proliferation of user created trails, eroded hillsides, contributed to the spread of noxious weeds, caused trail use conflicts and disturbance to wildlife.” ROD at 3. Yet, the WCNF has been a managed (designated) travel system for decades and management techniques have proven ineffective. The decision to add dozens of additional designated routes will do nothing to lessen the ongoing travel management challenges of the Forest Service. In addition, as discussed below, the decision violates numerous environmental law and Forest Service obligations and therefore, must be vacated.

### **III. THE FOREST SERVICE FAILED TO ANALYZE THE IMPACTS ASSOCIATED WITH DESIGNATION OF THE SHOSHONE TRAIL AS REQUIRED BY NEPA.**

NEPA requires consideration of the environmental impact of all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). However, in violation of NEPA, the Forest Service has never analyzed the environmental consequences of the actions taken to designate the Shoshone ATV Trail. This violation of NEPA is exacerbated by the Forest Service’s failure to ever analyze comprehensively the existing travel system on the WCNF.

In April 2002, Rep. Hansen proposed the Shoshone Trail system with the introduction of H.R. 3936 in an effort to provide motorized users with a large, interconnected motorized trail system in Northern Utah. Although this federal legislation was defeated, the Forest Service has continued to implement the Shoshone Trail system despite any consideration of the adverse environmental impacts associated with the ORV trail network. As discussed in Sierra Club’s comments and below, the implementation of the Shoshone Trail is in violation of NEPA and other federal environmental and cultural statutes, such as the Endangered Species Act (failure to consult) and the National Historic Preservation Act (failure to identify and consult).

First, the Forest Service claims that “the USFS and BLM gave permission to the UDP&R to begin marking routes that were historically designated as open based on past environmental review beginning in 1988 and associated travel plans as the Shoshone ATV Trail.” FEIS at 3-4. However, the Forest Service fails to acknowledge that neither the 1988 Travel Plan, nor the 1991 revision of the Travel Plan included any environmental analysis under NEPA. The Forest Service’s suggestion that the agency had no obligation to conduct NEPA analysis on past road creation has been rejected by federal courts. In Center for Sierra Nevada Conservation, the court

recognized that in enacting NEPA, Congress provided “a mandatory chronological arrangement, instructing that a NEPA analysis must be completed before committing resources.” Ctr. for Sierra Nevada Conservation v. Berry, No. S-02-325, slip op. at 51 (E.D. Calif. 2005). Accordingly, plaintiffs prevailed in a challenge to the Forest Service’s lack of NEPA analysis prior to completing a 1990 ORV Plan. In response to the Forest Service contention that it could prioritize its analysis of the travel system, the court responded that

[w]hile this court appreciates the Forest Service’s daunting task of conducting a forest-wide environmental assessment and respects its stated goals of conducting evaluations by priority areas, **these practicalities do not mitigate its failure to comply with NEPA.**

*Id.* The Court concluded that by creating “a forest-wide ORV Plan” without a comprehensive forest-wide analysis of the travel system with “specific analysis” rendered the ORV Plan in operation in violation of NEPA. On the WCNF, the Forest Service has created the existing motorized travel system without adequate consideration of the environmental impacts, as required by NEPA, or application of the minimization criteria contained in Executive Order 11644. As such, past environmental reviews do not support designation of the Shoshone Trail system.

Second, the Forest Service and other agencies participating in the development of the Shoshone Trail system are well aware that actions associated with designation, such as publication and distribution of maps, will result in increased use of the trails encompassed by the system. In fact, the Forest Service acknowledged in the DEIS that “[t]he identification of the Shoshone ATV trail in the Curtis Creek area and northward on the Logan Ranger District and adjacent BLM lands has had the effect of attracting motorized recreation visitors to this area.” DEIS at 4-60. However, in violation of NEPA and other federal statutes, the Forest Service has never undertaken an analysis of the detrimental impacts of “attracting motorized recreation visitors to this area.”

Instead, in the FEIS, the Forest Service changed its position by suggesting that “[t]he naming of the Shoshone ATV trail in the Curtis Creek area and northward on the Logan Ranger District and adjacent BLM lands is not expected to change the use patterns, create new users, or commit to any construction or exceptional amount of annual trail maintenance.” FEIS at 4-68. The Forest Service provides no rationale for this changed position. The inconsistent position taken by the agency on this issue casts serious doubt on the validity of its analysis. *See, e.g., Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9<sup>th</sup> Cir. 1992) (holding that the court would not give deference to the agency’s “expertise” when the agency has fluctuated in its position.)

Third, the Forest Service’s suggestion that “[t]he Shoshone Trail is an administrative decision only,” FEIS at 8-38, lacks merit because the Forest Service has committed to do much more than simply a ceremonial naming. In February 2004, the Forest Service entered into a Memorandum of Understanding with the Bureau of Land Management, Utah State Parks, Utah Division of Wildlife Resources, and Cache and Rich counties to jointly cooperate in the “development, operation and maintenance of the trail system.” MOU at 1 (attached as Exhibit A). In fact, recognizing the likely increase in trail use associated with the designation, the parties to the MOU acknowledged that the “trail may also boost economic development in the surrounding communities.” MOU at 1. In signing the MOU, the Forest Service agreed to provide a Forest Service representative to the Shoshone Trail “Steering Group” as well as two

representatives to the “Work Group overseeing trail operations.” MOU at 2. In addition, the Forest Service agreed to “[c]ommit to carry out trail management and work to the best of its capabilities as recommended by the Steering Group” and to “[o]rganize and supervise all Forest Service employee and volunteer participation in relation to work done on the Shoshone Trail.” MOU at 2.

In addition, in August of 2003, the Forest Service entered into a Challenge Cost-Share Agreement with the State of Utah Parks and Recreation in order to provide “for joint cooperation in the development, operation, and maintenance of a trail system known as the Shoshone Trail OHV Trail System.” Shoshone Cost-Share Agreement at 1 (attached as Exhibit B). As part of the cost-share agreement, the Forest Service committed to “[c]arry out trail management work” including “sign installation and maintenance, patrol work, trail maintenance and decommissioning of trespass trails.” Shoshone Cost-Share Agreement at 2. Again, the Forest Service agreed to “[o]rganize and supervise all Forest Service employees and volunteer participants in relation to work done on the Shoshone Trail.” Shoshone Cost-Share Agreement at 2. As well, the Forest Service committed to developing an Annual Operating and Financial Plan including such items as work priorities and schedules, funding, law enforcement coordination, volunteer involvement, map preparation and distribution, and monitoring. Shoshone Cost-Share Agreement at 2. In fiscal year 2003, as part of this cost-share agreement the Forest Service committed to expended employee time and equipment use in support of the Shoshone Trail.

Accordingly, the Forest Service has agreed to do much more than simply name a networked ORV trail system. Designation of the Shoshone Trail commits the Forest Service to provide personnel and equipment to trail maintenance, employee and volunteer supervision, signing, law enforcement, map preparation and distribution, and monitoring. Such activities constitute a “major federal action” under NEPA and, as such, the environmental consequences of the trail designation must be considered in a proper NEPA document.

Fourth, Sierra Club’s concerns of increased environmental impacts due to designation of the Shoshone Trail have already been recognized as valid by the Forest Service. In the DEIS, the Forest Service suggested that “[a] decision for the Shoshone Trail was provided in the Forest Plan revision decision.” DEIS at 1-13. However, the WCNF Revised Forest Plan Appeal Decision directly contradicts the Forest Service’s assertion by stating that “it is clear that the Regional Forester did not make a site-specific decision that establishes a new Shoshone Trail System, but uses it as an example of projects that could meet the goals and objectives identified in the Forest Plan.” The decision goes on to say that “the Wasatch-Cache only proposed the Shoshone Trail System in the Forest Plan, and did not approve the project... The Regional Forester did not decide to establish the Shoshone Trail System.” Most poignantly, the Reviewing Officer for the Chief concluded that “**[t]he appellant raises valid concerns to be raised and considered when site-specific project action is undertaken.**” At this time, site-specific project action has been taken, including the signing of the MOU and cost-share agreement, signing of the trail network, and publication and distribution of maps. As such, the Forest Service is in violation of the NEPA requirement to solicit and analyze public comments on major federal actions, consider alternatives, and take a hard look at the environmental consequences of major federal actions.

Although the currently designated “Shoshone Trail” consists of 220 miles of interconnected routes in Cache and Rich counties that were already open to motorized use before

the Shoshone Trail name was applied to them, it is important to realize that this 220-mile system constitutes less than half of the entire planned Shoshone Trail system, as defined, for instance, in Rep. Hansen's bill and as shown on various draft maps dating from 2002-03. An example of such a map, dating from 14 February 2003, is attached as Exhibit C. (Due to the small scale of reproduction, the trails have been highlighted for clarity.) This particular map was produced by the Utah Division of Parks and Recreation with input from the Forest Service, and was displayed at a Forest Service open house presenting the WCNF Revised Forest Plan to the public on 23 April 2003. The map depicts what is now designated as the Shoshone Trail system as "Phase 1", while also including approximately 300 miles of additional routes termed "potential trails."

It is notable that the "potential trails" include several routes within the Ogden Ranger District that are being affected by the current decision; examples include the Pete's Hollow Trail (26022), Public Grove 4x4 (20220), Dock Flat Complex (26010), Davenport Hollow (20196), and Tilda Spring (26102). Other "potential trails" occur in the Logan Ranger District which will soon undertake a separate NEPA process to revise its travel plan. Still others occur on BLM, state, and private lands. Furthermore, the current decision goes beyond the 2003 draft map by opening or constructing additional motorized routes that connect to the phase-1 or potential trails; examples include Baxter Sawmill 2 (26994), Curtis Ridge Trail (3309), Red Spur Mtn (20218), Tilda Spring 3 extension (xxx4), Arbs Private (26724), Sink Hole Loop (26012), Box Elder Creek (xx34), and Devils Hole Canyon (xx30). The Forest Service has clearly indicated its position that "[n]aming a series of existing, open travel routes the Shoshone Trail does not require an environmental review under NEPA." FEIS at 8-48. Thus, the Forest Service believes that no further NEPA analysis would be required before formally incorporating any of these currently affected routes into an expanded Shoshone Trail system. Even if this is not done, however, the fact remains that the current decision constitutes a major step toward the long-planned creation of an extended, connected, looping system of ATV trails stretching from Brigham City to Bear Lake. Yet the present NEPA analysis ignores the impacts of this larger system, both on resources outside the Ogden Ranger District and on resources within the Ogden Ranger District that would be impacted by the increased use that would result from promotion of this vast trail system as a regional attraction. By analyzing the current designations in isolation from the rest of the larger trail system, and failing to disclose or analyze the impacts of the project as a whole,<sup>1</sup> the Forest Service has violated NEPA.

As discussed in Sierra Club's comments, federal courts have recognized the significance of increased motorized trail use as a necessary component for environmental analyses relating to trail designations. According to *Wash. Trails Ass'n v. U.S. Forest Service*, "the environmental significance of [the trail project] cannot be accurately assessed unless the potential for increased use resulting from the cumulative impact of the projected network of ORV trails planned for the [Ranger District] is carefully considered." *Wash. Trails Ass'n v. U.S. Forest Service*, 935 F.Supp. 1117, 1123 (W.D. Wash. 1996); see also North Cascade Conservation Council, 98

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<sup>1</sup> CEQ's NEPA implementing regulations prohibit "segmentation" of environmental analysis by mandating that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). Thus, an agency may not segment a project into smaller projects to avoid preparing an environmental impact statement. In cases, "[w]here several foreseeable similar projects in geographical region have cumulative environmental impact, under NEPA, projects should be evaluated in a single environmental impact statement." *Center for Biological Diversity v. Federal Highway Admin.*, 2003 WL 22700917 (S.D. Calif. 2003).

F.Supp.2d 1193, 1198 (W.D. Wash 1999)(“Within the NEPA scheme, however, any proposal adding to this ORV system that may adversely affect the environment must be examined in light of the entire existing system”). The Forest Service has never analyzed the environmental consequences of designation of the Shoshone Trail system, including those associated with increased use. Moreover, the Shoshone Trail designation has never been analyzed in the context of the entire existing travel system. Further exacerbating the illegality of the designation of the Shoshone Trail is the fact that routes encompassed by the Shoshone Trail were never subject to past NEPA reviews or application of the minimization criteria embodied in Executive Order 11644. Accordingly, Sierra Club request vacation of the decision to revise the Ogden Travel Plan, a remand of the FEIS to the agency, and instructions that the Forest Service must analyze comprehensively the consequences of designating the Shoshone Trail, as required by NEPA and other environmental and cultural laws and regulations.

#### **IV. THE DECISION VIOLATES EXECUTIVE ORDERS 11644**

In revising the Ogden Travel Plan, the Forest Service essentially ignores the criteria set forth by Executive Order, and codified in the Forest Service’s regulations at 36 C.F.R. § 212,<sup>2</sup> mandating that the Forest Service’s designation of areas and trails open to motorized use “shall be in accordance with the following

- (1) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, or other resources of public lands.
- (2) Areas and trails shall be located to minimize harassment to wildlife or significant disruption of wildlife habitats.
- (3) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring lands, and to ensure compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.

Executive Order No. 11644. Despite this clear mandate the Forest Service repeatedly misconstrues its obligations to apply the minimization criteria at a site-specific level during the route designation process.

As stated by the Ninth Circuit:

We have recognized, however, that under certain circumstances, Executive Orders, with specific statutory foundation, are treated as agency action under the Administrative Procedure Act.

City of Carmel v. U.S. Dept. of Transportation, 123 F.3d 1144, 1166 (9<sup>th</sup> Cir. 1995).

In other words, an Executive Order is to be “accorded the force and effect of a statute” when it has a “distinct statutory foundation.” Ass’n for Women in Science v. Califano, 566 F.2d 339,

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<sup>2</sup> The Forest Service finalized regulations implementing Executive Order 11644 and 11989, which are codified at 36 C.F.R. § 212. As such, the Forest Service’s failure to implement the minimization criteria of the Executive Orders also violates 36 C.F.R. § 212.

344 (D.C. Cir. 1977). Because Executive Order 11644 has a statutory basis in the National Environmental Policy Act (NEPA), the organic statutes governing the Forest Service and the authority of the federal government to administer federal lands, the Executive Order is the proper basis, with the effect of a statute, to determine the appropriateness of designating routes for motorized use. In fact, the Ninth Circuit has recognized that “[u]nder the codification of the applicable Executive Order [11644], the court concludes that the Defendants were charged to minimize likely future conflicts between forest users.” Northwest Motorcycle Ass’n v. U.S. Dept. of Agriculture, 18 F.3d 1468, 1477 (9<sup>th</sup> Cir. 1994).

In addition, a federal court has recently acknowledged that “**Executive Order 11644 created a policy striking a balance in favor of resource protection.**” *Cent. for Sierra Nevada Conservation v. Berry*, No. S-02-325, slip op. at 53 (E.D. Calif. Feb. 15, 2005). The mandate of Executive Order 11644 applies both to the existing travel system and any new designation. However, in reaching its decision the Forest Service has designated dozens of new motorized trails without ever applying the minimization criteria.

Instead, the Forest Service responded to Sierra Club’s comments indicating that the minimization criteria must be applied on a route-by-route basis by suggesting that “Best Management Practices (BMPs), standards and guidelines, and soil and water conservation measure will be implemented to avoid or reduce adverse effects....” FEIS at 8-37. However, application of BMPs and other measures after designation does not accord with the Executive Order’s mandate that the minimization criteria must be applied before designation.

The Forest Service appears to incorrectly believe that it need only consider the minimization criteria rather than adhere to the unambiguous language requiring that motorized trails “shall be located” to minimize damage to soil, watershed, vegetation, or other resources, harassment to wildlife or significant disruption of wildlife habitats, and conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring lands. *See, e.g.* FEIS 8-49 “The overall transportation plan did consider minimizing conflicts between ORV and other recreation uses. The Box Elder Creek ATV trail proposal does not eliminate other recreational uses in this area.”) The Executive Order does not end simply at consideration. Instead, the Executive Order is clear that the Forest Service is required to “locate to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring lands.” Had the minimization requirements of the Executive Order been properly applied, the decision would be significantly different.

For example, much of the area that includes Public Grove, Devil’s Gate Valley, Sink Hole, and Clay Valley is inappropriate for ORV use because such use inevitably causes damage to soils, watershed, and vegetation. Specifically, the clay soils in this area retain water for long periods and are then easily damaged by the passage of vehicles. The results are badly widened and braided routes, deep rutting and mud holes, loss of topsoil, and invasion of noxious weeds along disturbed areas. Spring seasonal closures are not adequate to minimize this damage because wet conditions can also occur during the summer and frequently occur during the fall. The problem is exacerbated by the generally open terrain which offers few natural barriers to off-route travel. Because the Ogden Ranger District includes numerous other areas that are more suitable for ORV use, there is no need to open additional routes in this specific area. Application of the minimization criterion would therefore result in a decision to leave the Public Grove 4x4, Mantua Church Camp, and Sink Hole Loop routes closed to motorized use.

Minimization of wildlife harassment and wildlife habitat disruption would similarly dictate that no new routes in the Public Grove/Devil’s Gate Valley/Sink Hole area be opened to

motorized use. Wildlife species that would be particularly affected by these routes include elk, sage grouse, and sharptail grouse. The Public Grove 4x4 route would fragment a large patch of elk habitat into two much smaller patches. This route would also pass very close to a historic sage grouse lek site; in fact, an existing spur off the route, which motorists would undoubtedly continue to use unless the main route is physically closed, goes directly through the lek site. Although no sage grouse observations at this lek have been recorded in some time, this could simply be due to inadequate attempts to observe them. There have been several recent reports of sage grouse sightings in this general area (Bret Selman, personal communication). Furthermore, it is likely that any decline in sage grouse has been caused, in part, by illegal motorized use of the very routes that the Forest Service is now proposing to open. We simply do not know what would happen to the sage grouse population in this area if the existing travel plan were to be implemented and enforced. Similarly, the Sink Hole Loop route passes through known sharptail grouse habitat. Seasonal closures of these routes during the spring are not sufficient to minimize harassment of sage grouse or sharptail grouse, because harassment during the brooding season would continue, as would harassment during the fall when the young birds must learn the locations of the leks.

Another unneeded route that should remain closed to motorized use in order to minimize disturbance to elk habitat is Baxter Sawmill 2.

In the Box Elder Creek area, west of Dock Flat, a significant amount of nonmotorized use (hikers and equestrians) has developed since a fence was constructed to keep out illegal ORV use in late fall, 2003. The nonmotorized trails in this area were even highlighted in an article in the Standard-Examiner, May 25, 2005. The decision, however, preserves no nonmotorized trails in this area; all trails would either become motorized or would be obliterated. Furthermore, the newly motorized trails fill the area so densely that it would not be practical to construct new nonmotorized trails of any significant length in this area in the future. Thus, the Forest Service has effectively decided to force nonmotorized trail users in this area to share trails with motor vehicles, inevitably leading to use conflicts (noise, dust, fumes, safety hazards) that are likely to drive out nonmotorized users. Yet a more reasonable decision, consistent with the minimization criterion, would have been simply to permit ORV use on the Willard Road and on the trails east of the road, while setting aside the trails to the west for nonmotorized use.

Similarly, in the hundred-square-mile Curtis Creek area we are unaware of the existence of any maintained nonmotorized trails. The Forest Service has, in fact, attempted to obliterate a number of closed roads and nonmotorized trails in this area, in order to discourage unauthorized motorized use. Yet a demand for nonmotorized trail opportunities clearly exists. In recent years, nonmotorized users have discovered and used the closed portion of the Davenport Hollow road (20196/xxx8) as a nonmotorized trail. This trail too has been highlighted in an article in the Standard-Examiner (30 June 2004). In light of the very extensive system of looping ORV routes in the rest of the Curtis Creek area, which are more than adequate to meet the demand for motorized recreation opportunities, a reasonable decision would have been to set aside the trails in the southwestern corner (the closed portion of the Davenport Hollow road as well as the Tilda Spring and Boundary Spring trails) for nonmotorized use. Instead, the Forest Service has again chosen to force nonmotorized users to share trails with motor vehicles. The only nonmotorized trail in the area would be the northernmost 1.12 mile of the Davenport Hollow road, and even this trail would be accessible only by first traveling more than a mile along a motorized trail—one that is likely to receive greatly increased use if the looping Tilda Spring 3 extension is constructed.

The Box Elder Creek and Tilda Spring areas are also important habitat for elk and potential habitat for Canada lynx. In addition, the Tilda Spring trail passes through known sage grouse habitat where motorized activity would be likely to harass nesting and brooding sage grouse. Therefore, disturbance of these species (and, undoubtedly, others) would be further minimized by excluding these unneeded areas from the system of designated motorized routes.

Sierra Club has attached photos to this appeal in order to demonstrate the Forest Service's failure to apply the minimization criteria necessary to ensure that roads/trails are located in a manner that minimizes damage to soil, watershed, vegetation, or other resources, harassment to wildlife or significant disruption of wildlife habitats, and conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring lands. For example, Photo 1 depicts the Pete's Hollow trail (26022), which is steep and already severely eroded. Photo 2 of the Dock Flat Complex (26010) provides a reference to point for use conflicts whereby motorized designation would displace quiet users. Photo 3 of the Public Hollow Loop (20092) exhibits deep mud holes and severe widening and braiding, yet nonetheless has been designated as motorized under the decision. Photo 4 and 5 of the Public Grove 4x4 route (20220) demonstrates the impacts and likelihood of user-created roads/trails, and adverse impacts to soils. Photo 6 of the Davenport Hollow route also demonstrates the negative impact to quiet uses resulting from the decision.

Executive Order 11644 sets clear unambiguous criteria that must be considered before designating any road/trail open to motorized travel. These criteria are necessary to ensure that motorized designations are informed by thorough consideration of the impacts to natural resources and other uses of National Forests. However, aside from a few mentions of the minimization criteria, the Forest Service failed to apply the minimization criteria in a legally adequate manner. Accordingly, the decision to revise the Ogden Travel Plan violates Executive Order 11644, as codified at 36 C.F.R. § 212. Therefore, Sierra Club respectfully requests that the decision be vacated and the FEIS remanded to the Forest Service with instruction to apply the minimization criteria on a route-by-route basis.

## **V. THE RECORD OF DECISION VIOLATES NEPA<sup>3</sup>**

### **A. The Forest Service Failed to Take a Hard Look at Significant Impacts Associated with the Revision of the Travel Plan<sup>4</sup>**

NEPA's "sweeping" commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of the proposed agency action." Marsh v. ONRC, 490 U.S. 360, 371 (1989). NEPA thus commands that federal agencies take a "hard look" at the environmental consequences of their proposed actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1171 (10<sup>th</sup> Cir. 1999). By forcing

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<sup>3</sup> Pursuant to 40 C.F.R. § 1502.21, "no material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within **the time allowed for comment.**" 40 C.F.R. ¶ 1502.21. According to the Forest Service in its "Incorporation by Reference" Section, "the entirety of the supporting record is hereby incorporated without further reference." FEIS at 1-10. As this regulation makes clear, only materials available to the public during the comment period may be incorporated by reference.

<sup>4</sup> The discussion above this section concerning the impacts of the Shoshone Trail designation and the agency's failure to apply the minimization criteria also are relevant to the discussion of the NEPA inadequacies of the decision. Accordingly, Sierra Club hereby incorporates by reference Sections III and IV into all NEPA claims.

agencies to take a “hard look” at the environmental consequences of a proposed action, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” Marsh v. ONRC, 490 U.S. at 371; *see* Robertson, 490 U.S., at 349, 109 S.Ct., at 1845. In addition, “the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.” *Id.*

In order to comply with NEPA’s “hard look” mandate, an “EIS’s form, content, and preparation [must] foster both decision making and informed public participation.” Calif. v. Block, 690 F.2d 753, 761 (9<sup>th</sup> Cir. 1982). Informed decision making also requires an evaluation of the “indirect effects” of an action. 40 C.F.R. § 1508.8. Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8. In other words, in order to comply with NEPA, an agency must analyze the environmental effect and the alleged cause where “a reasonably close causal relationship” exists. *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). A close causal relationship exists where the action agency holds the legal authority to prevent a certain effect. *Id.* at 770.

### **1. The Forest Service Failed to Analyze Adequately Use Conflicts**

Pursuant to its Forest Plan, the WCNF is required “[t]o provide a variety of recreation access opportunities for both motorized and non-motorized users that meet user needs and desires.” FEIS at 1-8. As such, and in accordance with the Executive Orders, the Forest Service must “reduce conflicts between recreation users.” FEIS at 1-8. However, the Forest Service failed to consider adequately the interests of non-motorized recreationists on the forest.

Instead, the Forest Service suggests that “[t]he types of non-motorized trails are outside the scope of the Ogden Travel Plan EIS.” FEIS at 8-55. If the Forest Service is required to reduce conflicts between recreation users, then informed decision making on motorized recreation, as required by NEPA, must include a thorough and comprehensive evaluation of non-motorized recreational opportunities on the forest.

As Sierra Club discussed in its comments on the DEIS, numerous areas of the Ogden Ranger District where new route designations are planned are currently experiencing or will experience use conflicts as a result of the decision. For example, the “Mollen’s Hollow Overlook Trail,” i.e., the northern portion of Forest Road 20196 starting at the junction with road 20197, is currently closed to motorized use and offers outstanding and unique opportunities for hiking and other quiet recreation. Because nearly every other ridge top in the Monte Cristo range is traversed by an open road, this nonmotorized route is truly unique. The view from the cliff tops at the end of the route is an additional attraction. The wildflower viewing along this route in early summer is outstanding, and was featured in a news article in the Ogden Standard-Examiner, 30 June 2004.

Keeping only the northern half of this trail closed to motorized use would not preserve this unique opportunity for quiet recreation, because users would have to share the southern half of the trail with motorists in order to access the northern half. Again, this would create an unnecessary use conflict, in violation of the minimization requirement of 36 CFR 295.2. While such mixed use might be acceptable if motorized use remains at a very low level, the proposed loop connecting to the Tilda Spring trail can be expected to attract much larger numbers of ATV riders to this area, driving nonmotorized users away.

In response, the Forest Service simply indicated that "[a] range of alternatives was analyzed for these routes." FEIS at 8-49. However, the Forest Service's consideration of alternatives did not include a thorough analysis of use conflicts, including evaluation of non-motorized recreation opportunities at the site specific level or even district wide. The Forest Service claims that analysis of non-motorized trails "is outside the scope of this analysis and would not contribute to the decision-making for this project." FEIS at 8-38. This conclusion is preposterous given that the Forest Service is required to reduce use conflicts and take a hard look at the consequences of its actions. Essentially, the Forest Service doesn't even know the location, condition, or frequency of use of non-motorized trails on the forest. The availability of non-motorized trail data is essential to understanding the consequences of designating dozens of miles of new motorized trails and the compliance with the Forest Service's obligation to reduce use conflicts. As such, the Forest Service has violated NEPA by failing to base its decision on a complete understanding of the issues following the necessary "hard look" at use conflicts, which are an indirect result of road/trail designations.

Similarly, the Sierra Club commented that the Box Elder Creek area provides outstanding opportunities for quiet recreation in all seasons and that designation of a motorized route in this area would unnecessarily result in use conflicts. In response, the Forest Service indicates that "[t]he overall transportation plan did consider minimizing conflicts between ORV and other recreation uses. The Box Elder Creek ATV trail proposal does not eliminate other recreation uses in the area." FEIS at 8-48. The Forest Service's response completely runs afoul of NEPA's mandate and the Executive Orders minimization criteria.

First, the "overall transportation plan" has never comprehensively considered use conflicts as required by NEPA. As previously discussed, the Forest Service did not undertake a NEPA review of the 1988 travel plan, as revised in 1991. Had the Forest Service analyzed use conflicts, as part of this EIS or past environmental reviews, the agency would have substantial data relating to non-motorized recreation on the forest, data on areas where conflicts are known to occur, and perhaps, a record of administrative action to reduce use conflicts. Instead, in violation of NEPA and the minimization criteria, none of this information appears in this EIS (or any other environmental review).

Second, designating an ATV trail while not eliminating other recreational uses in the Box Elder Creek area does nothing to respond to the identified use conflicts that will occur in this area. In other words, designating a motorized route in an area known to provide outstanding recreational opportunities for non-motorized users creates or exacerbates identified conflicts, rather than provide for proper analysis and minimization.

Third, as discussed above, application of the minimization criteria as well as NEPA's hard look mandate require that use conflicts be resolved on a route-by-route basis prior to the designation of any road/trail for motorized use. As such, any unspecified analysis of the "overall transportation plan" would nonetheless violate NEPA and the minimization criteria because it does not provide for the required hard look at the site-specific level.

The Forest Service recognizes that diverse "uses need to be managed and distributed proportionately on the landscape in accordance with factors such as: 1) minimizing the environmental damage to soils, water, wildlife, and vegetation, and 2) providing a range of opportunities for various types of recreation experiences across the spectrum from primitive,

non-motorized use through motorized/developed recreation use." ROD at 4. Yet, the Forest Service completely failed to analyze the adequacy of and impact to non-motorized recreational opportunities while designating dozens of new motorized roads/trails on the forest. The Forest Service cannot provide for "a range of opportunities for various types of recreation experiences" if it lacks information and understanding of the impacts of its actions on quiet forest uses.

NEPA requires a full understanding of the impacts of each route designation prior to decision making. Without consideration of the conflicts of route designations with non-motorized recreational opportunities, the Forest Service has failed to comply with NEPA. Accordingly, Sierra Club requests vacation of the decision and a remand of the FEIS to the Forest Service with instructions that thorough and thoughtful analysis of use conflicts must to be included in the travel plan revision. This analysis must include evaluation of use conflicts at the site-specific level, essentially each designated road/trail, rather than on a forest-wide or District-wide basis.

## **2. The Forest Service Failed To Analyze Adequately Impacts of User-Created Trails and the Ability to Enforce Designations**

The Forest Service acknowledges that "over the past decade there has been a significant increase the development of illegal, user created trails." Draft Environmental Impact Statement for the Ogden Travel Plan Revision (hereafter "DEIS") at 1-2. According to the Forest Service, the proliferation of user-created trails has resulted in "eroded hillsides, introduction of noxious weeds, trail use conflicts and disturbance to wildlife." FEIS at 1-2. In fact, "dealing with non-system/user developed trails and roads" is one of the "primary objectives" of the travel plan revision. FEIS at 4-11; *see also* ROD at 4 ("New routes are being pioneered in places where none have ever existed before. This proliferation of unauthorized routes is changing the face of the National Forest.").

Of note, the increase of user created trails "over the past decade" occurred while the Forest Service limited motorized travel to designated routes only. As such, the Forest Service cannot rely on revision of the Ogden Travel Plan, which includes the designation of additional trails/routes, to eliminate or reduce the user-created trail problem on the Ogden Ranger District. Rather, under NEPA, the Forest Service must take a hard look at the continued impacts of user-created trails/roads and the ability of the agency to effectively respond through enforcement actions.

The Environmental Protection Agency (EPA) highlighted the user-created trail issue to the Forest Service in its comments, yet the Forest Service failed to provide any response. *See* FEIS at 8-69. According to the EPA, the Forest Service's failure to consider the potential for continued proliferation of user-created trails in the DEIS was unwarranted given that "unclassified routes often have a disproportionate effect to environmental resources." Comment Letter from Larry Svoboda, Director, NEPA Program (EPA), to Chip Sibbernsen, Ogden District Ranger, Re: Ogden Ranger District Travel Plan (March 30, 2005). Recognizing that "[f]orest transportation systems have inherent indirect effect," the EPA concluded that impacts from "unauthorized user created trail spurs . . . deserve consideration in this EIS." *Id.* Nonetheless, the Forest Service ignored EPA's recommendation despite the fact that the EPA's "responsibility and role is to provide scoping comments, review EISs and provide information and appropriate technical advice during and following the environmental analysis process." FEIS at 1-15.

Instead of undertaking the requisite “hard look” at the foreseeable continued consequences of user-created trails, the Forest Service simply acknowledges the problem of unauthorized roads/trail and assumes that “all unauthorized roads or trails will continue to be closed and rehabilitated.” FEIS at 8-38 and 8-55; *see also* FEIS at 1-5 (“Motorized vehicles will stay on clearly marked, designated open, roads and trails.”). However, the Forest Service completely ignores the implications of the fact that the agency has not been successful in restricting use to designated routes in the past. In addition, the Forest Service failed to analyze the success of previous attempts at rehabilitation.

According to the Forest Service, the agency need not analyze the impacts associated with user created roads/trails because “[a]ccurate speculation on the location and amount of new user created routes is not possible.” FEIS at 8-38. Contrary to the Forest Service’s misguided assertion, a good starting place for a user created road/trail analysis would be an assessment of factors that have led to the proliferation of the existing problem. In addition, it is not difficult to assess, based on an evaluation of the on-the-ground conditions, whether additional user created roads/trails are likely. For example, the Forest Service could evaluate whether natural barriers prevent road/trail creations, whether a given route is likely to develop mud holes that motorists will go around, or whether the route passes close to attractive off-route destinations such as summits and overlooks, etc. It is important to note that in taking this unsubstantiated position that user created trails cannot be predicted, the Forest Service ignored the EPA recommendation “that particularly for the proposed new routes that adjoin relatively undisturbed or sensitive resources, it is important to disclose whether the surrounding landscape and other considerations make it more or less likely that user-developed routes would be cut or that sensitive resources could be adversely affected or lost.” Comment Letter from Larry Svoboda, Director, NEPA Program (EPA), to Chip Sibbersen, Ogden District Ranger, Re: Ogden Ranger District Travel Plan (March 30, 2005).

The Forest Service lack of analysis of the user created trail problem is exacerbated by its failure to analyze its enforcement capabilities. According to the EPA, “[g]iven the historic lack of success with managing the [user created road/trail] issue through education and enforcement, and given the growing significant effects from unauthorized use described in the DEIS, we believe this issue should be included among the significant issues driving the analysis.” Comment Letter from Larry Svoboda, Director, NEPA Program (EPA), to Chip Sibbersen, Ogden District Ranger, Re: Ogden Ranger District Travel Plan (March 30, 2005).

Echoing the EPA’s concern, Federal courts have previously recognized the significance of the issue of enforcement. For example, in *Sierra Club v. U.S. Dept. of Agric.*, the Seventh Circuit Court of Appeals invalidated an the Record of Decision for a Resource Management Plan based on the fact that

[w]hile the plan notes that ATV/OHM travel outside the designated trails is ‘of great concern,’ there is no attempt to identify specific enforcement efforts to address this problem or to explain why the Forest Service expects to be successful in restricting travel to the designated trails when its past efforts have been unsuccessful.

*Sierra Club v. U.S. Dept. of Agric.*, 1997 WL 295308 at 29 (7<sup>th</sup> Cir. 1997). The court also noted that “the failure to . . . provide a meaningful analysis of the Forest Service’s plans to enforce its trail regulations is of great significance in this case” because the environmental analysis assumes

that motorized users will abide by the regulations. *Id.* Accordingly, the Forest Service’s analysis failed to comply with NEPA because it failed to discuss “what the increased environmental effects will be due to an inability to keep such users on the trails.” *Id.*

The Forest Service admits that “users far outnumber enforcement abilities.” FEIS at 1-8. Nonetheless, the Forest Service concludes that enforcement considerations are “outside the scope of this action.” FEIS at 1-14. As an initial matter, it is important to note, the Forest Service in promulgating its recent motorized recreation regulations reiterated that “availability of resources for maintenance and administration must be considered in designating routes for motor vehicle uses....” 70 Fed. Reg. 68269. However, in violation of 36 C.F.R. § 212.55, the Forest Service failed to adequately assess its capabilities to administer the designated route/trail system encompassed by the Ogden Ranger District.

Moreover, successful enforcement is a key unsupported assumption that permeates much of the Forest Service’s analysis of its decision. For example, in analyzing the effect of the decision on watersheds and aquatic resources, the Forest Service assumes that “[a]ny unauthorized road or motorized trail not identified within a specific Alternative or within the Travel Plan will continue to be closed and rehabbed. Unauthorized routes will be considered closed for the effects analysis.” FEIS at 4-4; *see also* FEIS at 4-11 (utilizing the same misguided assumption for the soils analysis); FEIS at 4-14 (same for vegetation analysis); 4-42 (same for recreation analysis). In fact, the Forest Service claims that “[c]ompliance with the current Travel Plan will be excellent.” FEIS at 1-6. However, history proves that the Forest Service lacks the enforcement capabilities to ensure no motorized use of closed roads or to provide “excellent” compliance with its designated road/trail system. Moreover, the assumption of road/trail rehabilitation is completely unsupported.

According to the Forest Service, the Ogden Ranger District “is allocated approximately three weeks of the Forest’s road crew’s time and equipment to accomplish its annual road maintenance work.” FEIS at 2-7. This work includes decommissioning of unauthorized roads/trails as well as blading and shaping of roads, cleaning of culverts, and spot graveling. FEIS at 2-7. Three weeks of various road related duties each year is certainly not sufficient to ensure adequate enforcement of closures and successful rehabilitation.<sup>5</sup> Accordingly, in violation of NEPA, the Forest Service has failed to take the requisite hard look at its ability to administer the designated motorized travel system.

In fact, the Forest Service appears to understand its limited capabilities to restrict motorized use to designated trails/roads. According to the Forest Service, “unauthorized routes will be closed **as funding becomes available.**” FEIS at 8-42; *see also* FEIS at 4-64 (“Many unauthorized roads and trails have been closed on the Ogden Ranger District and more will be [sic] closed and rehabilitated as funding becomes available.”). The ability to enforce closures and prevent the continued proliferation of user-created trails is directly tied to speculative funding. Proper NEPA analysis requires a more thorough analysis of the likelihood of funding for prevention of user-created trails and enforcement.

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<sup>5</sup> Of note, the Forest Service indicates that “[a]ny unauthorized road or motorized trail not identified within the selected alternative within the travel plan will be closed in a timely manner to reduce impacts to wildlife.” FEIS at 4-67. The Forest Service’s assertion lacks substance given that any unauthorized road/trail is already closed. The important issue is the ability of the Forest Service to enforce closures and prevent the proliferation of more user-created trails. Based on past management of motorized recreation on the Ogden Ranger District, the Forest Service has been unable to prevent user-created roads/trails despite having a designated system for nearly two decades.

For example, the Forest Service acknowledges that “[n]ew unauthorized routes will be created and previously closed routes will be illegally used” and that “[i]llegal use could have a substantial effect on wildlife if not held in check.” FEIS at 4-67. Yet, the Forest Service has failed to consider adequately its ability to hold these “substantial effect[s]” in check. As such, continued proliferation of user-created trails and enforcement capabilities is a fundamental issue that must be thoroughly analyzed as part of the travel plan revision.

Accordingly, Sierra Club request that the decision be vacated and the EIS remanded to the agency for further analysis of the impacts of user-created trails/roads as well as the ability of the Forest Service to enforce road/trail designations.

### **3. The Forest Service Failed to Analyze Adequately Impacts Associated with Dispersed Camping**

According to the Forest Service, “[d]ispersed camping is outside the scope of this document.” FEIS at 8-41. Yet, in direct contradiction of this statement, the Forest Service designated routes in order to provide access to dispersed campsites. *See* FEIS at 8-41 (“Minor routes that are significantly longer than 150 feet and access existing dispersed campsites have been added to Table 2.7.2. Examples are the three Harriet Spring roads, xx35, xx37 and xx38.”); FEIS at 2-7 (“The travel plan analysis has identified minor system side roads that access dispersed recreation sites.”). Moreover, the Forest Service set forth a plan for particular “dispersed” camping areas. *See* FEIS at 4-69 (“Two heavily used concentrated use areas exist on the Ogden RD. These are described in Appendix C as the Dock Flat and Dry Bread concentrated use areas.”).

The Forest Service is well aware of the adverse impacts of dispersed camping. For example, the Forest Service acknowledges that use of dispersed campsites result in “high amounts of compaction, damage to trees, sanitation impacts, and excessive trash and campfire residue.” FES at 4-69. In addition, impacts associated with dispersed camping include “creation of unauthorized user created routes.” FEIS at 4-69. Increases in motorized recreational opportunities inevitably results in increased dispersed camping.

Pursuant to NEPA, the Forest Service cannot refuse to analyze the impacts of dispersed camping while designating routes to dispersed campsites, taking management action on certain dispersed campsites, and acknowledging the adverse impacts of dispersed campsites. According to the EPA, “effects from anticipated unauthorized user created trail spurs as well as from dispersed camping, deserve consideration in this EIS.” Comment Letter from Larry Svoboda, Director, NEPA Program (EPA), to Chip Sibbernsen, Ogden District Ranger, Re: Ogden Ranger District Travel Plan (March 30, 2005). Sierra Club raised similar concerns in its comment letter. *See* FEIS at 8-41.

Nonetheless, in violation of NEPA’s mandate that agencies take a hard look at the consequences of its actions, the Forest Service contends that:

[w]hile these activities may occur in association with roads and trails, it is not a reasonably foreseeable consequence of motorized use, nor is it likely to occur to any great extent. Accordingly, there is no practical [sic] way to estimate or quantify where and how much dispersed camping use will be occurring.

FEIS at 4-64. The Forest Service’s contention lacks basis and is arbitrary and capricious. Dispersed camping is a foreseeable consequence of motorized use. After all, the Forest Service

acknowledges that “[t]he issue of how dispersed camping will be managed is a component of our motorized recreation use.” FEIS at 2-2. If, by the Forest Service’s own admission, dispersed camping management is a component of motorized recreational use and by its decision the Forest Service has added dozens of additional roads/trails for motorized use, then the Forest Service must analyze this consequence of its decision making.

By failing to take a hard look at the environmental consequences of dispersed camping, the Forest Service violated NEPA’s hard look mandate. Accordingly, Sierra Club respectfully requests that the decision be vacated and the FEIS remanded to the Forest Service for further analysis of the foreseeable impacts of dispersed camping resulting from its action.

#### **4. The Forest Service Failed to Analyze Adequately Impacts to Watersheds, Soils, Vegetation, Wildlife, Recreation, Scenery, Private Lands, and Roadless Areas.**

As previously discussed, the Forest Service’s assessment of impacts to natural resources on the Ogden Ranger District is entirely premised on the assumption that users will remain on designated roads/trails, that the Forest Service has the enforcement capabilities to enforce road/trail designations, and that roads/trails not designated for motorized use can be rehabilitated. Each of these premises is proven false by the Forest Services past attempts, over nearly two decades, to restrict motorized travel to the pre-revision designated road/trail system. Accordingly, the entire impact analysis is faulty and must be remanded to the agency for further assessment.

#### **B. The Forest Service Failed to Respond Adequately to Comments.<sup>6</sup>**

On March 30, 2005, Sierra Club and other conservation organizations submitted extensive comments on the Forest Service’s DEBE for the revision of the Ogden Travel Plan. In violation of NEPA, the Forest Service failed to respond adequately. The Forest Service is required to follow direction given in 40 CFR 1503.4 when responding to comments submitted on a DEIS. Specifically:

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

- (1) Modify alternatives including the proposed action.
- (2) Develop and evaluate alternatives not previously given serious consideration by the agency.
- (3) Supplement, improve, or modify its analyses.
- (4) Make factual corrections.

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<sup>6</sup> The Forest Service’s failure to respond adequately to public comments also demonstrates the agency’s failure to take the requisite hard look at the environmental consequences of the travel plan revision. Although Sierra Club frames this contention as a failure to respond to comments, it is Sierra Club’s intention that the Appeals Deciding Officer also considers these matters in the context of the Forest Service’s hard look mandate.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement

As discussed further below, Forest Service failed to respond to several important comments made by Sierra Club. The Forest Service's lack of response is so significant that the final decision being offered today is likely to have been changed had the response been made, the analysis requested and the alternatives considered. In addition, the Forest Service violated 40 CFR § 1503.4 by not attaching the Sierra Club comments "to the final statement." Some of the Sierra Club comments are interpreted and listed under the section of the FEIS in Chapter 8, response to comments. Approximately 130 of the comments that the Sierra Club made in its fifty nine pages of comments are responded to. However, a number of comments central to this decision were not noted and no reply from the Forest Service given. For this reason, we ask that a copy of our comments be included with the FEIS as required by regulation. With decisions now published on the web or circulated by CD, this is not an unreasonable request.

As previously noted, Executive Order 11644, as codified in 36 C.F.R. 295.2, requires that the Forest Service shall locate routes for motorized use to:

- 1) minimize damage to soil, watershed, vegetation, or other resources on public lands.
- 2) minimize harassment of wildlife or significant disruption of wildlife habitats.
- 3) minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring lands, and to ensure compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.

The comments that the Sierra Club and others submitted offered specific recommendations that would have better met these requirements. The route proposed for Box Elder Creek offers an excellent example of this.

On the 13<sup>th</sup> of May members of the Sierra Club participated in a joint OHV monitoring training lesson with other groups in Box Elder Creek on the section of route 26010 close to Docks Flat. The Forest Service, in response to a number of problems, had taken significant steps to eliminate vehicle use in the section of Box Elder Creek by closing the upper part of this creek to ORV use. For the past two years, signs and buck & rail fences have kept ATVs and other vehicles out of this water supply for the nearby town of Mantua. Box Elder Creek is also high

value elk habitat and elk frequent this area. On this monitoring training lesson, Sierra Club members met two on horseback who ride in this canyon each week. The horse riders noted that since ORV use had been removed from this part of Box Elder Creek, elk had returned to the canyon down as low as the buck & rail fences near Dock Flat. The horse riders said that when ATVs used this area, the elk had relocated to higher elevations away from frequently used routes. Sierra Club members noted recent elk scat in this part of Box Elder Creek further verifying that elk now frequent this area recently closed to ATV use.

This is clear evidence that ATV use in Box Elder Creek harasses wildlife leading to their avoiding this prime habitat. In order to meet the requirement to reduce harassment of wildlife, Box Elder Creek should remain closed to ORV use.

The Ogden Ranger District Travel plan proposes to add a net gain in miles of routes open to motorized vehicles. Note that this total does not include the net increase in administrative routes that are also being added in this Ranger District.

Type of route	Previous Travel Plan	New 2006 Travel Plan
open roads	198	202
motor trail	46	58
total	244	260
	Percent change	6.56%

The Record of Decision on page 32 states: “ I have made my decision with the objective of minimizing: damage to soil, watershed, vegetation and other forest resources; harassment of wildlife and significant disruption of wildlife habitat; conflicts between motor vehicle use and existing or proposed recreation uses of NFS lands; and conflicts among different classes of motor vehicle uses on NFS lands.”

The decision given fails to follow the intent or measure that this statement claims. For example, many routes are being opened that exceed forest service erosion standards. One example will help understand the nature of this. Route XX30 (segment west of Willard Basin road), a pioneered route, exhibits steep slopes and has already eroded as much as a foot from runoff and vehicle use. We recommend that the Forest Service apply their route design standards to all routes open to vehicles, now open new routes that do not meeting standards to vehicle use, and report in the final document the ability of routes proposed to meet such standards.

Minimizing the impacts of ORV use also includes responding to the increased impacts caused by vehicle route in areas inhabited by rare plants. On page 4-15 of the FEIS, the Forest Service proposes 9.07 miles of new construction or improved trails in rare plant habitat. There is no map showing these routes. We ask that such a map be included in the final EIS and decision. Further, we ask that the Forest Service provide analysis supported by past monitoring that such routes “minimize” the damage done to these plants.

The next sections outline the increased in the number of miles of motorized recreation routes in important wildlife habitat. The decision reported for the Ogden Ranger District would increase the miles of open routes from 146.6 miles to 161.1 miles in high value summer deer habitat, FEIS page 4-18. This decision would increase the miles of routes in critical elk habitat from 11.8 miles to 16.3 miles, page 4-20 FEIS. In high value elk habitat, the miles of routes

would increase from 13.1 to 13.4 miles. Based on the information on page 4-27 of the FEIS, this decision would increase the miles of routes within post fledgling areas for Goshawks from 13.3 to 15.4 miles. This represents a 17% increase in routes in key Goshawk habitat. For the Canada lynx, miles of routes within primary lynx habitat are reduced by a mile from 30.3 to 29.2, a 3% improvement. However, the miles of routes within secondary lynx habitat are increased by 20% from 53.7 to 64.8 miles. For sharp tailed grouse the ORV routes in key habitat increase from 1.7 to 2.5 miles, page 4-37 FEIS. For sage grouse, these routes increase from 14.5 to 19.5 miles, page 4-38 FEIS.

On page 4-66 of the FEIS, the cumulative effects to wildlife for this travel plan decision are described, “The major influences on wildlife and their habitats within and adjacent to the Ogden Ranger District have been livestock grazing (which has had an effect on cover, forage, and vegetation composition and species diversity), fire suppression (which has reduced the presence of early successional vegetation classes) and roads, trails, and recreation use (which has affected wildlife through disturbance).”

Clearly by the admission of the Forest Service, increased roads and resulting ORV use is a major influence on wildlife. There is an overall increase in miles of routes within important wildlife habitat in the 2006 Ogden Ranger District Travel Plan. This plan fails to meet the Forest Service’s requirement to minimize harassment to wildlife and damage to habitat required under law. We request that the Forest Service reduce the number of routes within important habitat, especially those habitats where wildlife populations are in decline or not at their potential.

In next section we will review the reply that the Forest Service gives in Chapter 8 of the FEIS to the comments filed by the Sierra Club. The specific comment listed in Chapter 8 will be cited, the Forest Service’s interpretation of the Club comment stated, and the Forest Service reply to that comment fully quoted, and a remedy recommend for those comments failing to fully meet the requirements under 40 CFR 1503.4. Responses to Sierra Club comments are on pages 8-37 to 55 of the FEIS.

### **FEIS 8-39, comment 101 section 12**

*Forest Service interpretation of the Club comment:* “We (the Sierra Club et al.) are generally satisfied with the number and emphasis of alternatives. However, Forest Service should consider our ‘Conservation Alternative.’”

*Forest Service reply:* “Thank you for your comment. Although not considered as an additional Alternative (see Section 2.3) several elements of the "conservation Alternative" are included within the Alternatives already analyzed in the FEIS. The decision maker has the opportunity to choose from among the many actions included within the range of Alternatives, as long as those actions have been analyzed. We feel we have considered a reasonable range of Alternatives within the scope of the project.”

#### *Appeal Remedy:*

40 CFR 1502.14 (a) states that the agency shall when preparing an EIS “Rigorously 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.”

The Forest Service admits that they did not consider the Sierra Club’s alternative. This response failed to consider this alternative and failed to offer the required justification for this action. 40 CFR 1503.4(a)(5) requires the Forest Service to “Explain why the comments do not warrant

further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.” The response in the FEIS failed to meet this requirement and therefore is in violation of this law.

We request that the Forest Service conduct the same level of analysis conducted for Alternative 4 and Alternative 5 on the Conservation Alternative. This alternative, submitted in our comments is included below:

### **The (Sierra Club et al.) Conservation Alternative**

In this section we describe in detail what we call a “Conservation Alternative” for the Ogden District Travel Plan. We suggest that Alternative 3a be modified to coincide with the Conservation Alternative.

Like Alternative 3a, the Conservation Alternative is intended as a reasonable compromise among conflicting resources and uses of the Forest. It is not a wish list of what our respective organizations would propose in the absence of political considerations. If the Travel Plan decision were entirely up to us, we would close many additional routes to motorized use in order to further protect resources such as wildlife, watersheds, roadless areas, and quiet recreation opportunities. It may be that the Conservation Alternative would still compromise certain resources at unacceptable levels, so further modification to it may be needed as additional information comes to light. It may also be possible to add a few more open routes to the Conservation Alternative without compromising our objectives. However, based on what we know at this time, the Conservation Alternative is our suggested compromise.

In many respects the Conservation Alternative is similar to Alternative 3a; therefore we will take Alternative 3a as a starting point in describing it. The further modifications to Alternative 3a that we suggest are as follows:

1. Eliminate the Box Elder Creek route (26010, xx34, and xx30 west of the Willard road) as a motorized route and manage it instead as a nonmotorized trail. This will provide high-quality quiet recreation opportunities in this area and protect important habitat for big game, Canada lynx, flammulated owl, and other species. It will preserve roadless values in the Willard roadless area.
2. Eliminate the Sink Hole loop route (26012) as an open road, in order to protect habitat for sharptail grouse and other wildlife on the National Forest and nearby private land.
3. Close all of the Public Grove 4x4 (20220) to motorized travel. This will protect water quality in the South Fork Little Bear River, greatly decrease wildlife habitat fragmentation in the remote portions of Public Grove and Devil’s Gate valley, protect soils from further damage, and reduce maintenance, management, and law enforcement costs so that these activities can be directed elsewhere. The Mantua Church Camp segment (xx31) should be an administrative road for use by adjacent

- landowners. The north portion of road 20092 should be temporarily closed until the area can be restored and the road can be maintained to Forest Service standards. The Forest Service may wish to explore options for making a very small loop out of this road, in order to reduce management difficulties associated with dead-end routes. When it is reopened, this road should still be seasonally closed during both the spring and fall.
4. Close all of the Tilda Spring trail complex, including the Boundary Spring and Tin Cup Spring routes, to all motorized use. This will preserve roadless values, improve wildlife habitat, and provide unique high-quality quiet recreation opportunities in the Mollen's Hollow roadless area. The other looping routes in the Curtis Creek area and connected Shoshone Trail routes make this trail complex redundant and unnecessary for motorized use.
  5. Keep the Baxter Sawmill 2 route closed. This route has no unique recreational purpose and needlessly protrudes into valuable wildlife habitat.
  6. Keep the Dry Bread Upper route (20107) closed, except for the portion north of the power line. This will make management of the Dry Bread area easier and reduce vehicular trespass into the Upper South Fork roadless area. There are enough loop trails in the Dry Bread area without adding this one.

By our calculations, these changes would result in a net decrease of approximately 3 miles of open motorized routes from the current travel plan, or an increase of approximately 17 miles from the 1988 travel plan.

In addition, the Conservation Alternative proposes the following:

1. Additional seasonal closures of the Skyline South and Lewis Peak trails, the Willard Basin road, and all unpaved routes in the Dry Bread area during wet spring conditions. These routes could be opened to motorized use after June 15, except for the Willard road which should be gated at several points and opened in stages, with the upper basin opened only after July 15 (to coincide with the opening of the northern Skyline Trail to motorcycles). These seasonal closures would greatly reduce damage from vehicular travel during times of partial snow cover and when the road surfaces are wet. Maintenance costs would be reduced accordingly.
2. Limit dispersed vehicular camping and picnicking to designated sites district-wide. There is simply no need for users to create new sites, and doing so causes considerable damage to forest resources.
3. Strictly prohibit all recreational ORV use in dispersed camping areas, for reasons outlined elsewhere in these comments.
4. In the Dry Bread Pond area, eliminate the proposed ORV play area at the small sink hole. This location is difficult to monitor (not visible from the highway) and the Forest Service should not allow that type of vehicular play because it would set a bad precedent and encourage irresponsible activity in nearby areas. ORV users who desire a play area should go to other locations where this is permitted on a larger scale, not to the Ogden Ranger District where there are enough management difficulties already.

5. Downgrade the Baldy-Wheeler road and the Lamb's Canyon 4x4 road to ATV trails, in order to provide a greater diversity of motorized opportunities.
6. Eliminate all Forest Service activities to actively promote motorized recreation in the Ogden District, including the present program to promote the Shoshone ATV Trail. There is admittedly a fine line between promotion and user education; the later should be continued and even increased. Rather than designating a recommended system of ORV routes, the Forest Service should simply close any routes that are not recommended and then provide users with the relevant travel map and regulations. It is too confusing to have a separate Shoshone Trail map that fails to completely indicate what routes are closed to motorized use and what other regulations are applicable on the National Forest. The separate National Forest and Shoshone Trail numbering systems also create unnecessary confusion.

Besides the site-specific rationales already given, the Conservation Alternative is designed to make management of the Ogden Ranger District transportation system easier rather than more difficult. The number of open motorized routes is substantially reduced from Alternative 3a, so that these routes can be maintained and managed more easily within limited budgets. ATV trails are placed primarily in less remote areas where monitoring and law enforcement can be more frequent. Remote areas are closed off at access points that can be frequently monitored for violations or vandalism.

Page FEIS 8-48, comment 101 section 74

*Forest Service interpretation of the Club comment:* "Proposed road densities exceed established standards for elk, lynx, and sage grouse."

*Forest Service Reply:* The EIS displays the effects to elk habitat by analyzing patch size (buffering roads) and displaying changes by Alternatives. Section 4.6.3.3 displays the effects to Canada Lynx by Alternatives. Additional information has been added to the FEIS with regards to sage grouse and the effects of the Alternatives on the sage grouse and their habitats.

*Appeal Remedy:* This response is inconsistent with the 40 CFR 1503.4. The Forest Service did not implement the recommended actions or provide needed justification for not responding to this request. This Forest Service response to the comments failed to cite the sources, authorities, or reasons which support the agency's position.

We ask that the Forest Service provide the requested road density analysis, use validated density standards for the wildlife listed, determine which routes in the system including new ones would meet or exceed these density standards, report the density analysis for each route in the FEIS. Lastly, in order to meet the requirement to minimize harassment to wildlife, not open new routes where densities exceed standards.

The FEIS on the page numbered "Summary -1" identified route densities as a key issue and admits densities tied to wildlife. The Forest Plan requires that road densities be considered

before opening or creating new roads. The buffering analysis (patch size) is another tool not density analysis and can not be substituted as a density analysis.

Buffering does apply to some of the requirements for limiting human activities near sage grouse leks. Page 4-38 of the FEIS states “For sage grouse, Connelly, et al (2000) recommended that ‘Human activities within view of or less than 0.5 km (0.31 miles) from leks should be minimized during early morning and late evening when birds are near or on leks.’ None of the alternatives have roads or motorized trails which would be managed by the USFS within 0.31 miles of an active lek site.”

The DEIS notes that sage grouse historically were resident in this Ranger District but, because of past land use and management, no longer are. The Forest Service has an obligation to restore sage grouse to their historic range. In order to do this, the guidelines just cited as well as the recommendations in our comments need to be followed when choosing to keep open a route to ORV use or created a new route.

Those sections of the Club’s comments are repeated below:

#### Sage Grouse

Sagebrush communities in the Ranger District have been identified in the revised Wasatch Cache Forest Plan as management indicator communities (DEIS p. 3-9). The current assessment of Properly Functioning Condition on the Ranger District indicates that these communities are not currently functioning properly, and have moderate to high deviation from PFC (Table 3.5.3, DEIS). There is currently 83.5 miles of roads in this habitat. These roads may be reducing the quality of sage grouse habitat by introducing weeds. However, the DEIS claims that these roads and their use have little to do with the deviation from PFC (DEIS p. 3-10). Yet, the DEIS offers no information to back this statement up.

Viability of sage grouse populations require that a variety of habitat needs are met. These include habitat for nesting, brood rearing, and winter habitats (Call and Maser 1985). Connelly et al. (2000) proposed comprehensive guidelines regarding the management of sage grouse. These guidelines focused on the conservation of breeding/nesting habitat, late summer brood-rearing habitat, and wintering habitat. We recommend that the Forest Service apply these management practices in restoring habitat and sage grouse to their historic range.

Sage grouse, exhibit strong fidelity to individual lek sites from year to year (Dunn and Braun 1986). During the spring period, male habitat use is concentrated within 2 km of lek sites (Benson et al. 1991). Young males may establish new leks in order to take part in breeding (Gates 1985). Because leks sites are used traditionally year after year and represent selection for optimal breeding and nesting habitat, it is crucially important to protect the area surrounding lek sites from impacts.

Sage grouse move a limited distance from nesting sites for early and late brood rearing. In western Wyoming, Lyon (2000) found that sage grouse moved an

average of 1.1 km from the nest site for early brood-rearing, and late brood-rearing habitats averaged 4.8 km distant from the early brood-rearing areas. As a rule, breeding and nesting activity are concentrated in the habitats adjacent to the lek site. In a Montana study, Wallestad and Schladweiler (1974) found that no male sage grouse traveled farther than 1.8 km from a lek during the breeding season. But following breeding, males may make long migrations to distant summer ranges (Connelly et al. 1988). Hulet et al. (1986) found that 10 of 13 hens nested within 1.9 miles of the lek site during the first year of their southern Idaho study, with an average distance of 1.7 miles from the lek site; 100% of hens nested within 2 miles of the lek site during the second year of this study, with an average distance from lek of 0.5 mile. In Montana, Wallestad and Pyrah (1974) found that 73% of nests were built within 2 miles of the lek, but only one nest occurred within 0.5 mile of the lek site.

But in Bates Hole, Wyoming, Holloran (1999) found that average nesting distance from lek site was 3.25 km for adults and 5.27 km for yearlings. Wakkinen et al. (1992) cautioned that leks were poor predictors of sage grouse nest sites; although 92% of sage grouse nested within 3.2 km of a lek in this study, sage grouse did not necessarily nest near the same lek where breeding took place.

Lyon (2000) pointed out that quarter-mile lek buffers were insufficient to maintain the viability of grouse populations. Connelly et al. (2000) recommended that sage grouse habitat should be protected within 3.2 km of lek sites under ideal habitat conditions, within 5 km when habitat conditions are not ideal, and within 18 km where sage grouse populations are migratory. Furthermore, these researchers stated that in areas where 40% or more of the original breeding habitat has been lost, all remaining habitat should be protected.

But Beck (1977) cautioned that protection of lek sites only is insufficient to maintain sage grouse winter habitats. And Connelly et al. (1988) later cautioned, "Protection of sagebrush habitats within a 3.2 km radius of leks may not be sufficient to ensure the protection of year-long habitat requirements" (p. 116). And Braun (pers. comm.) recommended even larger buffers of 3 miles from lek sites where surface disturbance and vegetation treatments should be prohibited, based on the uncertainty of protecting sage grouse nesting habitat with smaller buffers. Thus, areas within 3 miles of a sage grouse lek should be put under year-round stipulations preventing habitat alterations.

Sage grouse were historically present in Public Grove vicinity. According to DWR sage grouse data, a previously occupied lek exists on the west side of Public Grove very near a vehicle route that has been designated closed but used by vehicles. Routes in the Devils Hole Canyon, Public Grove and the southwestern side of Mollens Hollow (Tilda Spring area) pass through known sage grouse habitat. Map (ord\_sgrouse\_density.jpg) shows that the identified routes are in habitat that requires a buffered distance from grouse leks and nesting sites. This plan should establish management that ensures the viability or

reestablishment of sage grouse in these areas. Allowing new routes in these areas would be inconsistent with sage grouse recovery management.

The Forest Service did not apply the standards we recommended in this FEIS. There is no justification given for the Forest Service ignoring this request. We provide specific information that was not responded to in this FEIS. For this reason, the Forest Service has not met the requirements found in 40 CFR 1503.4.

Based on route density analysis we supplied in the comments, a number of routes exceeded accepted road density standards. Adding these routes in the important wildlife habitat would be in conflict with the Forest Plan's requirements that route density be used to help meet desired conditions for these species. The following is a list of routes where with other roads reach densities incompatible with wildlife habitat needs:

Baxter Ridge route 26714 new open (critical elk calving)  
Baxter Sawmill 2 route 26994 open seasonal (critical elk calving)  
Tilda Springs 3 Route xxx4 new motorized trail  
Boundary Spring Route 26736 newly open  
Hollow overlook, Davenport route xxx8 new non-motorized trail (admin problems)  
Abs Basin route 20057 to a new dispersed camping area. (Mollens Hollow roadless area)  
Lake Town Spur 1 route 26717  
Lake town spur 2, route 26718  
Nick Reservoir administrative road 26979 (loop road less than one quarter mile from the main road.  
Wasatch Ridge, dispersed route 26733  
Baldy-Wheeler seasonal road 20071(crosses primary lynx habitat entirely in secondary)  
Dairy 2 route 26732 new open road, to gravel source.  
Arbs Private Route 26724 new open road  
Red Spur Mountain 20218 new open road (gravel source quarter mile in)  
Public Grove Route route 20220 seasonal road  
Devils gate new seasonal trail route xx31  
Pete's Hollow Route 26022 into DWR wildlife lands, elk  
Box Elder Creek Route 26101 and xx34, xx30  
new administration roads  
Zion Springs 20221 new admin  
Six Bit Spring Route 20144 new admin  
Curtis Private 20074 new admin  
Longhurst Spring 26980 new admin

It should be noted that the Baxter Ridge route and Baxter Sawmill Routes are in elk calving areas ignored in Forest Service analysis. The FEIS and DEIS failed to provide elk calving habitat locations on any map. The Forest Service should provide information on routes in elk calving grounds. Based on route density analysis for the Baster Ridge and Sawmill Routes, these routes would lead to densities above those accepted for calving areas.

Note that the Final EIS does include Appendix B which includes by sixth order watershed average miles of roads per square mile. As will be explained in more detail later, the information in this table does not apply the practices required for route density analysis and as a result does not constitute an adequate response to this comment.

FEIS page 8-52 Comment 101 section 92

*Forest Service interpretation of the Club comment:* “The Forest Service should consider using 0.6 km of road/square km to delineate effective lynx habitat and use this number to assess effects of proposed roads.”

*Forest Service Reply:* “the lynx conservation strategy specifies ‘at this time, there is no compelling evidence to recommend management of road density to conserve lynx.’ Road density has been assessed within 6th order watersheds (Appendix B).”

*Appeal Remedy:*

We argue that roads and their use is an important factor that has extirpated the lynx from this area. The FEIS downplays the impacts that ORV trails and motorized use can have on this species, stating “Ruediger et al. (2000) notes.....“preliminary information” available regarding lynx suggests they do not avoid roads except for highways with high traffic volumes” (Apps 2000). Yet, this “preliminary” information (based on Apps 2000) which “suggests” that lynx do not avoid roads except for highways is based on a study which ONLY considers paved highways and their impacts on lynx (which was incidentally found to be a significant impact), and is actually silent on the issue of unpaved roads and other routes and ways. Obviously, the significant issue in regards to the Ogden RD Travel Plan is the potential impact of unpaved roads and other routes and ways on lynx, not paved highways. Thus, it is disingenuous of the USFS to use this citation to claim that motorized use on a trail system will not affect lynx. The Forest Service should correct this text since, as written, it misrepresents Apps research.

It’s also very interesting that the EIS cites Singleton et al. (2002) as evidence that lynx are not affected by road density. The threshold of road density over which habitat was considered unsuitable for lynx in their model was 4-mi of road per square mile (Singleton et al. 2002). Most would not consider this to be very high road density.

Additionally, the EIS emphasizes that the prevailing management document for lynx in the region, the comprehensive Lynx Conservation Agreement and Strategy (LCAS) “reports little information is available on effects of roads and trails on lynx or its prey.” This is the take home message that should be given in the DEIS...that we don’t know very much about the impacts of roads and trails on lynx, not that we assume that everything other than highways pose no problem for this species. More research is sorely needed on the impacts of dirt roads and tracks and their use on lynx.

On that topic, it is interesting that the FEIS cites the LCAS as its primary source however ignores key management recommendations. The LCAS recommends: (1) road densities no greater than 2 miles/mi.2, (2) minimizing roads on ridgetops or areas identified as important for lynx habitat connectivity, (3) locating trails and roads away from forested stringers, (4) concentrating recreational activities within existing

developed areas rather than developing new areas in lynx habitat, and (5) management activities that seeks to minimize the loss or modification of lynx habitat as a result of the spread of non-native invasive plant species. We request that in applying the Forest Plan requirements for considering density for new roads that these LCAS criteria be applied in analysis for this decision.

In summary, the EIS should have taken a more conservative approach in regards to the suspected or potential impacts of roads and trails on this federally listed species. Among other things, it should be kept in mind that carnivores in general have large habitat area requirements, specialized habitat needs, low reproductive success, and low dispersal/colonizing abilities that result in these animals being especially sensitive to human disturbance, and habitat fragmentation and isolation. Above all, it should be noted that the U.S. Fish & Wildlife Service has concluded that the “single factor threatening the contiguous U.S. Distinct Population Segment of lynx is the inadequacy of existing regulatory mechanisms, specifically the guidance for conservation of lynx in National Forest Land and Resource Plans” (Federal Register, March 24 2000 at 16082). Thus it is clear that, even if the Ogden Ranger District is not considered a LAU, the agency still has specific duties related to lynx conservation. The Travel Plan should cite lynx recovery objectives and strategies to effect recovery of lynx, and how the preferred alternative might interact with these goals and objectives.

As mentioned above, the EIS downplays the impacts of roads, trails and ORV use on lynx. Yet increased roads and trails lead to increased access and thus increased trapping of lynx (Bailey et al. 1986, Parker et al. 1983, Snowden 2003), as well as incidental or illegal shooting and vehicular mortality (Snowden 2003). Roads and trails in lynx habitat have been tied to reduced amount of downed logs - which are important for denning habitat (Gaines et al. 2003), and may lead to disturbance of dens and even abandonment as well (Snowden 2003).

The Forest Service should consider new scientific information that updates the older citations relied on in the EIS. Note that most of this research has been published since the Lynx Conservation Strategy and Agreement (Ruediger et al. 2000) as well as Ruggiero et al. 1999 (the source of most of the citations pulled out of Ruediger et al. in the FEIS), which are the two leading documents that the EIS uses to make the case that road densities do not affect lynx. All the complete literature citations noted here can either be found on our original comments on the DEIS, or in the travel Plan FEIS.

In the final EIS, the Forest Service added an Appendix B part of which includes Table 1. “changes by alternative for miles of open road and motorized trail per square mile within sixth order watersheds (USFS managed lands only.)” By choosing as the spacial measure the unit of sixth order watersheds, the Forest Service has eliminated meaningful site specific analysis.

When conducting scientific analysis, the Forest Service needs to follow 40 CFR§ 1502.24, methodology and scientific accuracy, which states:

“Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.”

Road density using sixth order watersheds is in conflict with accepted scientific practices such as those described in Singleton (2002). The full citation is for this Forest Service publication is: Singleton, P.H., W.L. Gaines, and J.F. Lehmkuhl. 2002. Landscape permeability for large carnivores in Washington: a geographic information system weighted-distance and least cost corridor assessment. Res. Pap. PNW-RP-549. Portland, OR. USDA, Forest Service, Pacific Northwest Research Station.

Singleton uses a 90 meter grid for this Forest Service analysis. In order to identify the road density associated within a specific wildlife species habitat, a grid of 100 meters or smaller is needed to identify site specific road densities.

In the FEIS, the Forest Service failed to cite scientific or other references that support the analysis described in Appendix B. For this reason, this analysis fails to meet the requires found in 40 CFR 1502.24 concerning professional and scientific integrity. Method use and the supporting scientific literature are absent from this FEIS. Road density standards mentioned in the literature both the Forest Service and we cite would use methods similar to those used by Singleton. Request that the Forest Service conduct route density on no larger than a 100 meter grid size and publish these finding with the final result. We further request that the Forest Service identify those new routes that would create densities above those listed for each species in our comments. Such routes where densities exceed standards that lead to harassment of wildlife should not be added to the Ogden Travel Plan system of open routes.

FEIS page 8-53 Comment 101 Section 107

*Forest Service interpretation of the Club comment:* “The FEIS should explain how the Forest Service defined PFA and provide a map that shows routes that cross the PFAs.”

*Forest Service Reply:* Additional information regarding the analysis for goshawks has been added to the EIS and within the project record. Maps have been produced and are located within the project record.

*Appeal Remedy:* The FEIS does explain how the Forest Service defines PFAs. Page 4-28 explains that a 600 acre area surrounding a nest site is used in this assessment. This is helpful and we appreciate this addition. However, no map is provided that identifies those routes that cross PFAs. Without this location specific information, cumulative environmental analysis is not possible. Clearly, the Forest Service did not provide a map in the FEIS with those routes that cross identified PFAs. This reply fails to justify the Forest Service’s decision not to provide this information by citing the sources, authorities, or reasons which support the agency's position. For

this reason, this reply violates the requirements found in 40 CFR 1503.4. We request that the Forest Service comply with these requirements for this comment.

FEIS page 8-53 Comment 101 section 108

*Forest Service interpretation of the Cub comment:* Goshawk analysis should follow the guidelines established by the FWS.

*Forest Service Reply:* Additional information regarding the analysis for goshawks has been added to the EIS and within the project record.

Page 4-29 of the FEIS includes the following impact analysis concerning goshawks: “This alternative (Alt. 5, the decision) would create a motorized trail within the SPB goshawk nest territory. For nest SPB-A, an additional 1.28 miles of motorized trail would be created within the PFA for a total of 2.14 miles of road and motorized trail. The distance from the nest to the closest open road or motorized trail would change slightly to 0.35 miles. For nest SPB-WC, an additional 0.7 miles of motorized trail would be created within the PFA for a total of 2.58 miles of road and motorized trail. The disturbance related within this alternative could reduce productivity or cause the abandonment of the SPB territory. This alternative opens the Curtis Ridge trail to ATV use which may increase motorized use within the RW goshawk territory in the future. Due to the closeness of existing nests to the existing road, increased use could cause disturbance of these nests and affect productivity. This alternative would add 0.59 miles of unauthorized existing road within the OCB goshawk PFA (on the outer edge of the PFA). All USFS managed roads within the SNB territory are seasonally closed (between March 1 and September 30) for the protection of the goshawk. No changes would occur from the existing travel plan in the location or miles of roads or motorized trails within the other goshawk PFA’s. This alternative would have approximately 54 miles of road and motorized trail within conifer habitat. This alternative would have moderate effects on the goshawk and their habitat compared to the other alternatives.

During interdisciplinary team meetings, a potential seasonal road closure was discussed to provide additional protection to the RW territory nests (A and B) during the early portion of the goshawk nesting period due to the closeness of these nest sites to the existing road. This seasonal closure was considered but not adopted in any of the alternatives for the following reasons: 1) the existing road has been open as a motorized route since at least 1988 and management of the existing route meets existing goshawk guidelines; 2) the nests were established in the immediate vicinity of the open road along with the associated activity and still have produced young and fledglings; and 3) the area is in a remote location and consistent gate management and patrol would be challenging. As discussed above the alternatives may affect the occupancy of specific territories and/or affect productivity at specific nest sites, but the effects on these few sites will not likely influence the forest-wide trend. Additional information regarding Forest Plan monitoring and trend is available in the project record (Management Indicator Species of the Wasatch-Cache National Forest, USDA 2006).”

Appeal Remedy: The reply does not address the comment. The comment asked that the Forest Service apply the guidelines established by the FWS. The Forest Service has failed to respond to this comment as required by 40 CFR 1503.4.

FEIS 8-55, comment 101 section 56-C

*Forest Service interpretation of the Cub comment:* “A third indicator should be the number of dispersed campsites in each Alternative.”

Forest Service Reply: “Dispersed camping is outside the scope of this document. See section 2.3 Alternatives Considered and Eliminated from Details Analysis item 6.

Page 2-2 of the FEIS has relevant information described in Section 2.3: “7. Ranger District-wide plans for dispersed camping. The issue of how dispersed camping will be managed is a component of our motorized recreation use. However, this issue did not justify creating a separate alternative for this management. Management activities to reduce the problems associated with dispersed camping will be included in mitigation. Two areas of concentrated dispersed camping are included in the proposed action and described in Appendix C.”

However, the Record of Decision for this FEIS does make a decision concerning dispersed camping. Page 19 of the Record of Decision states, “8. Dispersed Camping: It is my decision to allow limited use of motor vehicles within 150 feet of designated roads for direct access to dispersed camping sites. Dispersed camping will not be permitted at any time along motorized trails. Dispersed camping along open roads in the General Forest Area or within the Concentrated Use Areas will be closely monitored to reduce the impacts of motor vehicle use within 150 feet of open roads. The District will evaluate dispersed camping sites to reduce resource damage caused by motor vehicle use. Those campsites that do not have an acceptable access route will be closed and restored as appropriate based on resource concerns. The District will prioritize the removal of dispersed campsites to eliminate crossing live streams and where motor vehicle use will result in damage to vegetation, wet meadows, riparian areas or other sensitive resource concerns.”

*Appeal Remedy:*

Clearly the Forest Service made a decision and dispersed camping is within the scope of this EIS. The decision made has several components. First, dispersed vehicle supported camping (at any user chosen site) would be allowed within 150 feet of system roads. No vehicle supported camping would be allowed along motorized trails. Three, as a result of upcoming monitoring, the Forest Service may remove some dispersed campsites in order to protect streams, vegetation, wet meadows, riparian area or other “sensitive resource concerns.” There was no other alternative recommended in the DEIS or FEIS and no analysis of the impacts for dispersed camping provided.

We request that the Forest Service consider and analyze the impacts for an alternative that would require that all vehicle related dispersed camping be limited to designated

camp sites and that the designation of these sites include a process that ensures that wildlife and other resource values are not impaired by the location of these sites. Both the proliferation and size of each camp site over time is a significant issue. Managing disperse camping is one of the priority tasks under the draft Environmental Management System.

These next comments submitted by the Sierra Club et al. were not included in the reply to comments.

For the northern goshawk, we recommended that analysis concerning goshawks include not only occupied nests but also other nests occupied within the past seven years. Detailed scientific justification for this was provided in our comments. This analysis was not conducted in fact, this comment was not addressed in this FEIS. The Forest Service failed to meet the requirement found in 40 CFR 1503.4 which requires one of five ways to respond to a comment. The Forest Service failed to apply any of these required ways to respond.

Our DEIS comments outlined the importance of this request, “Protection of both occupied and unoccupied nests is important since not all raptor pairs breed each year or use the same nests within their nesting territory (Scott 1985). Non-use may occur over one prey fluctuation period that may be as much as seven years for some raptor species (USFWS, 1999). We recommend that the Forest Service use all nests that have been occupied within the past seven years in their goshawk habitat analysis.”

Such analysis, needed to ensure the viability of this indicator species, would lead to additional nest sites being included in the now short list of PFAs. This would further identify more routes where additional management change needed to minimize the harassment of wildlife would be required. Response to this comment could significantly alter the final decision based on the requirements that need to be followed.

### **C. The Forest Service Relied on Incorrect Assumptions in Reaching its Decision**

“Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). Accordingly, “[t]o take the required ‘hard look’ at a proposed project's effects, an agency may not rely on incorrect assumptions or data in an EIS.” Native Ecosystems Council v. Forest Service, 418 F.3d 953, 965 (9<sup>th</sup> Cir. 2005). According to a federal court, “[a]gency action will be set aside as arbitrary and capricious if the agency lacked support in the administrative record for its factual assumptions or other otherwise abused its discretion...” Cactus Corner LLC v. U.S. Dept. of Agric., 346 F.Supp.2d 1075, 1095 (E.D. Calif. 2004).

As discussed above, in its analysis of the environmental consequences of the revision of the Ogden Travel Plan, the Forest Service assumes that “[m]otorized vehicles will stay on clearly marked, designated open, roads and trails.” FEIS at 1-5; *see also* FEIS at 8-55 (“all unauthorized roads or trails will continue to be closed and rehabilitated.”); FEIS at 4-4 (“Unauthorized routes will be considered closed for the effects analysis.”); FEIS at 4-11 (utilizing the same misguided

assumption for the soils analysis); FEIS at 4-14 (same for vegetation analysis); 4-42 (same for recreation analysis) In fact, the Forest Service claims that “[c]ompliance with the current Travel Plan will be excellent.” FEIS at 1-6.

The WCNF has permitted travel only on designated motorized routes for decades; yet user-created trails and ill conceived dispersed camping areas have proliferated. Moreover, the Forest Service has not established that the agency can reliably rehabilitate closed roads. According to the EPA, the Forest Service has exhibited a “historic lack of success with managing” unauthorized motorized recreation and the “positive effects of planned education and enforcement may be misplaced.” Comment Letter from Larry Svoboda, Director, NEPA Program (EPA), to Chip Sibbersen, Ogden District Ranger, Re: Ogden Ranger District Travel Plan (March 30, 2005).

Ignoring the comments of the EPA and the public, the Forest Service utilized incorrect assumptions regarding its ability to prevent the proliferation of user created roads/trails and reduce impacts of dispersed camping in determining the environmental consequences of the revision to the Travel Plan. By relying on these incorrect assumptions, the Forest Service violated NEPA and rendered an arbitrary and capricious decision that lacks historical or administrative record support. Accordingly, Sierra Club requests that the decision be vacated and the EIS remanded to the agency for proper assessment of the consequences of the revision that disregards the Forest Service’s incorrect assumptions regarding user created roads/trails, enforcement, and rehabilitation.

#### **D. The Forest Service Impermissibly Limited the Area of Analysis of Impacts**

As discussed above, the Forest Service failed to analyze impacts associated with the inevitable consequence of additional user-created trails. In addition, the Forest Service is well aware that motorized recreation has impacts, such as noise, that extend beyond any given route. Nonetheless, in many cases, the Forest Service limited its analysis of impacts to the Ogden Ranger District.

For example, according to the Forest Service, “[t]he area of influence for direct and indirect effects to wildlife is the area within the Ogden Ranger District.” FEIS at 3-11. However, motorized recreation does not just affect the Ogden Ranger District, but rather impacts are extended beyond the District’s boundaries to adjacent private land. Of particular concern, sharp tailed grouse are known to inhabit private land in close proximity to the Ogden Ranger District. FEIS at 4-37. This limited area of analysis is a problem that occurs throughout the FEIS with regard to other wildlife, soils, watersheds, roadless areas, and recreation. The Forest Service does not operate in isolation.

However, in limiting its analysis of impacts to the Ogden Ranger District, the Forest Service has failed to take a hard look at the indirect consequences of road/trail designations. *See* 40 C.F.R. § 1508.8. Accordingly, the Forest Service has run afoul of NEPA’s requirements and Sierra Club requests vacation of the decision and a remand of the FEIS to the agency for further evaluation of impacts beyond the boundaries of the Ogden Ranger District.

#### **E. The Forest Service Failed to Analyze Adequately Cumulative Impacts of its Decision**

Cumulative impacts are “the impact[s] on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable

future actions.” 40 C.F.R. § 1508.7. The Forest Service’s cumulative impacts analysis must provide “some quantified or detailed information,” because “[w]ithout such information, neither courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide.” Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998). An agency’s cumulative impact analysis “must be more than perfunctory.” Ocean Advocates v. U.S. Army Corps of Eng’rs, 361 F.3d 1108, 1128 (9th Cir. 2004) (citations omitted).

According to Wash. Trails Ass’n v. U.S. Forest Service, “the environmental significance of [the trail project] cannot be accurately assessed unless the potential for increased use resulting from the cumulative impact of the projected network of ORV trails planned for the [Ranger District] is carefully considered.” Wash. Trails Ass’n v. U.S. Forest Service, 935 F.Supp. 1117, 1123 (W.D. Wash. 1996); *see also* North Cascade Conservation Council, 98 F.Supp.2d 1193, 1198 (W.D. Wash. 1999) (“Within the NEPA scheme, however, any proposal adding to this ORV system that may adversely affect the environment must be examined in light of the entire existing system”). The Forest Service has never analyzed the environmental consequences of existing route system or the designation of networked trails on the forest. This analysis must be conducted in conjunction with the designation of dozens of miles of new motorized routes.

Accordingly, the Forest Service’s decision to utilize the existing designated travel system (or no action alternative) as the baseline for its analysis is arbitrary and capricious and in violation of NEPA. FEIS at 8-48. Under NEPA, a cumulative impacts analysis must assess the impacts of past management actions. As such, the existing (pre-revision) motorized travel system must be analyzed prior to any assessment of additional impacts associated with the revision and/or foreseeable future actions.

More specifically, the Forest Service has not even attempted to analyze that cumulative impacts of revisions to the Ogden Ranger District travel plan implemented since 1988. These revisions added approximately 20 miles of motorized routes in the district. About half of these were added after scoping and a categorical exclusion; the other half were added without any public notice at all. Significantly, among those added without public notice, consideration of alternatives, or an evaluation of the consequences were the presently open portion of the Public Grove 4x4 route (20220) and the entire complex of routes in the southwest corner of the Mollen’s Hollow roadless area including Davenport Hollow, Tin Cup Spring, Tilda Spring, and Boundary Spring.

The opening of these additional routes to motorized travel had significant impacts on wildlife habitat (for instance, a 9.5% decrease in total elk patch acreage in the district; two routes that pass directly through known sage grouse habitat) and on opportunities for quiet, nonmotorized recreation. The present FEIS does not attempt to analyze the cumulative impacts of these past additions, nor does it analyze an alternative that would reverse these additions.

Moreover, as previously discussed, the Forest Service has never undertaken an analysis of the foreseeable impacts of designating the Shoshone Trail. This networked trail system will result in increased use on motorized routes, which inevitably leads to additional consequences such as user-created roads/trails and dispersed camping. In addition, the Forest Service has extensive plans for additions to the Shoshone Trail system. The cumulative consequences of these foreseeable additions must be analyzed at this time in order to for the Ogden Travel plan revision to be properly informed.

In addition, the consequences of user-created roads/trails and dispersed camping must be analyzed outside the context of the Shoshone Trail designation. Motorized recreation on

National Forests has increased substantially over the last decade. The consequences of increased use are known and foreseeable to the Forest Service. Yet, the Forest Service has essentially ignored its history of insufficient management. This action does not change any of the management challenges on the forest for the better. Rather, failures of past management will be exacerbated by adding dozens of motorized routes. In other words, motorized travel on the WCNF continues to be managed as a designated system. As a result, user-created trails will continue to proliferate and dispersed campsites will continue to adversely impact natural resources. In fact, with the additions, these problems will be exacerbated. Again, these foreseeable consequences must be analyzed at this time in order to foster informed decision making as required by NEPA.

Accordingly, Sierra Club requests that the decision to revise the Ogden Travel Plan be vacated and the FEIS remanded to the Forest Service for further analysis of the cumulative impacts associated with the action.

#### **F. The Forest Service Failed to Analyze Adequately the Efficacy of Mitigation Measures**

The Forest Service relies on the implementation of mitigation measures throughout the FEIS to justify its decision. For example, the Forest Service indicates that “Best Management Practices (BMPs), standards and guidelines, and soil and water conservation measures will be implemented to avoid or reduce adverse impacts.” FEIS at 8-37. Moreover, as previously discussed, the Forest Service relies on the assumption that that “all unauthorized roads or trails will continue to be closed and rehabilitated.” FEIS at 8-55.

However, the Forest Service conclusion the BMPs, standards and guidelines will avoid or reduce adverse impacts is entirely unsupported. The Forest Service is required to implement these measures regardless of any decision made relating to the revision of the Ogden Travel Plan. Past implementation of BMPs and other measures has not prevented resource damage, halted the proliferation of user created trails, or reduced use conflicts.

In addition, the Forest Service assumes that closed roads/trails will be rehabilitated. However, user-created trails have proliferated on the forest despite Forest Service obligations to implement rehabilitation measure and to prevent their use in the past. Simply stated, the Forest Service lacks support for its assumption that rehabilitation of closed trails can be reliably accomplished.

The U.S. Supreme Court has recognized the importance of a thorough discussion and analysis of the efficacy of mitigation measures in order to ensure that agencies have taken the requisite hard look at the environmental consequences of federal actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Moreover, an agency may not defer important agency decisions in the guise of mitigation measures. Jones v. Gordon, 792 F.2d 821, 829 (9th Cir. 1986); *see also* Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1173 (10<sup>th</sup> Cir. 1999) (in an EIS, “[i]t is not enough to merely list possible mitigation measures”) (*citing* Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380 (9<sup>th</sup> Cir. 1998) (perfunctory description of mitigating measures falls short of “hard look”). Where the effectiveness of the mitigation measures depends upon how they are applied and enforced, and the latter is uncertain, the measures are suspect. Jones v. Gordon, 792 F.2d at 829; Greenpeace U.S.A. v. Evans, 688 F.Supp. 579, 585 (W.D.Wash 1987).

The Forest Service’s conclusion that mitigation measures, including successful closure and rehabilitation of non-designated roads/trails, will prevent resource damage, reduce use

conflicts, and halt the proliferation of user-created trails lacks merit and analysis. In order to comply with NEPA's hard look mandate, the Forest Service must provide a thorough analysis the effectiveness of, and ability to implement and enforce, the mitigation measures.

Of particular concern, the decision discusses compliance with EO 13112 regarding invasive species, ROD at 31, but in fact the Forest Service is entirely unprepared to mitigate the spread of invasive species. In fact, the project record contains documentation by Sierra Club that several newly added routes (Dock Flat complex – Box Elder Creek, Public Grove 4x4, Mantua Church Camp, Sink Hole Loop) are already serving as vectors for invasive plants. *See* Sierra Club Comments on the DEIS at 25-26 (referring to a map that was attached with specific locations, etc.).

Having failed to adequately evaluate the effectiveness of and ability to implement mitigation measures, the decision violates NEPA. Accordingly, Sierra Club requests that the decision be vacated and the EIS remanded to the agency for further analysis of the Forest Service's ability to implement effectively mitigation measures that have been assumed successful, such as the prevention of user created routes or spread of noxious weeds.

#### **G. The Forest Service Arbitrarily Narrowed the Purpose and Need for the Action.**

Pursuant to NEPA, EISs must “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13. Federal courts have been clear that the range of reasonable alternatives to be considered in an environmental impact statement depends on the purpose of the project. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815-16 (9th Cir. 1987) (impact statements must consider all reasonable alternatives that accomplish project purpose, but need not consider alternatives not reasonably related to purpose). However, an agency's discretion to determine the purpose and need of a project is not unfettered. Courts will scrutinize and reject an agency's characterization of a project's purpose and need if it results in an overly narrow formulation of alternatives. In *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 n.7 (9th Cir. 1999), the court explained that the agency's proposed interpretation of its purpose and need was too narrow to satisfy NEPA, because it restricted the scope of reasonable alternatives too tightly, down to one or two choices. *See also* *Davis v. Mineta*, 302 F.3d 1104, 1119 (10<sup>th</sup> Cir. 2002) (federal agencies cannot “define the project so narrowly that it foreclose[s] a reasonable consideration of alternatives.”).

Here, the Forest Service claims that “[a] travel plan revision is needed to address th[e] dramatic increase in demand for motorized recreational experiences since the last Ogden RD travel plan revision in 1991.” FEIS at 1-2. However, as noted by the EPA, “[t]he desire for more ‘opportunities’ is a broad statement that one could expect from any forest user-group.” Comment Letter from Larry Svoboda, Director, NEPA Program (EPA), to Chip Sibbernsen, Ogden District Ranger, Re: Ogden Ranger District Travel Plan (March 30, 2005). By formulating the purpose and need for the revision as a response to desired use by motorized recreationists, in violation of NEPA, the Forest Service has narrowed the responsive alternatives to alternatives that result in increased motorized recreation.

A proper formulation of the purpose and need would recognize that all forest users, including non-motorized users, demand more opportunities to pursue their interests on the forest. As such, all uses of the forest, not just motorized use, would have factored into the process of formulating alternatives.

Accordingly, by defining the purpose and need of the travel plan revision as a response to increased demand for motorized recreation, in violation of NEPA, the Forest Service has narrowed the formulation of possible alternatives to alternative that respond solely to this narrow issue and not the demands of diverse forest users. As a result, Sierra Club requests that the decision be vacated and the FEIS remanded to the agency for revision of the narrowly defined purpose and need of the travel plan revision. In its reformulation of the purpose and need of the travel plan revision, the Forest Service must account for demands by all forest users for increased opportunities to pursue their interest on the forest.

## **H. The Forest Service Failed to Consider a Reasonable Range of Alternatives**

NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternate uses of available resources.” 42 U.S.C. § 4332(E). “The alternative analysis is characterized as ‘the heart’ of the environmental impact statement.” Colorado Env'tl Coalition v. Dombeck, 185 F.3d 1162, 1175 (10<sup>th</sup> Cir. 1999)(citing 42 C.F.R. § 1502.14). Courts apply a “rule of reason” analysis to determine whether the range of alternatives an agency considered, “and the extent to which it discuss[ed] them,” was adequate. Utahns for Better Transportation v. U.S. Dept. of Transportation, 305 F.3d at 1152, 1166-67 (citing City of Grapevine v. Department of Transp., 17 F.3d 1502, 1506 (D.C. Cir. 1994)). A reasonable alternative is one that is “non-speculative . . . and bounded by some notion of feasibility.” Id. at 1172 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978)) (additional citations omitted).

In particular, agencies must consider alternatives that are more consistent with the agency’s mandate. In Muckleshoot Indian Tribe v. U.S. Forest Service, the Ninth Circuit remanded an EIS to the agency based on its failure to consider alternatives to a land exchange that imposed restrictions on the traded land. 177 F.3d 800, 813 (9<sup>th</sup> Cir. 1999). The Ninth Circuit was “troubled” that “the Forest Service failed to consider an alternative that was more consistent with its basic policy objectives than the alternatives that were the subject of final consideration.” Id. (citing Seattle Audubon Society v. Mosely, 80 F.3d 1401, 1404 (9<sup>th</sup> Cir. 1996)).

According to the Seventh Circuit, if “NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives.” Simmons v. U.S. Army Corps of Engineers, 12 F.3d 664, 670 (7<sup>th</sup> Cir. 1997). Moreover, “in examining alternatives to the proposed action, an agency’s consideration of environmental concerns must be more than a pro formal ritual. Considering environmental costs means seriously considering alternative actions to avoid them.” SUWA v. Norton, 237 F.Supp.2d 48, 51 (D.D.C. 2002) (citing Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm., 449 F.2d 1109, 1128 (D.C.Cir. 1971)).

The detailed analysis of alternatives is essential to NEPA’s statutory scheme and its underlying purpose to “provid[e] a clear basis for choice among options by the decision-maker and the public.” 40 C.F.R. 1502.14; *see also* 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1507.2(d) & 1508.9(b); CEC v. Dombeck at 1174 (“What is required is information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned”) (quotation marks and citation omitted). Ultimately, NEPA’s alternatives mandate means that “no major federal

project should be undertaken without intense consideration of other **more ecologically sound** courses of action . . . .” Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974)(emphasis added); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (the alternatives requirement guarantees that agency decision-makers “[have] before [them] and take[] into proper account all possible approaches to a particular project . . . **which would alter the environmental impact and the cost-benefit balance**) (emphasis added); Alaska Wilderness Recreation & Tourism Ass’n v. Morrison, 67 F.3d 723, 729 (9<sup>th</sup> Cir. 1995).

So important is the alternatives requirement that “the existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” Alaska Wilderness v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995); *see also*, Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1288 (1st Cir. 1996) (EIS invalid because agency did not consider alternative of using artificial water storage units instead of a natural pond as a source of snowmaking for a ski resort); Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1128 (8<sup>th</sup> Cir. 1999) (*quoting Dubois*, 102 F.3d at 1287).

Of particular importance to the Ogden Travel Plan Revision is the obligation that “[a]s one aspect of evaluating a proposed course of action under NEPA, the agency has a duty to study all alternatives that appear reasonable and appropriate for study, as well as **significant alternatives suggested by other agencies or the public during the comment period.**” Dubois, 102 F.3d at 1286 (citing numerous others). As discussed above, Sierra Club submitted Conservation Alternative “intended as a reasonable compromise among conflicting resources and uses of the Forest.” Despite the Conservation Alternative’s reasonableness and the Forest Service’s ability to easily incorporate this alternative into its analysis, the Forest Service declined to consider the Conservation Alternative.

Of particular concern, in declining to analyze the Conservation Alternative, the Forest Service contends that “several elements of the ‘Conservation Alternative’ are included within the Alternative already analyzed in the FEIS.” FEIS at 8-39. One element not considered in any alternative was the recommended closure of the highly controversial, currently open portion of the Public Grove 4 x 4 route. This route was opened in 1991 without any NEPA analysis, including public notice, consideration of alternative, and thorough analysis of the impacts, or application of the minimization criteria and as such, the Forest Service has been operating in violation of NEPA for 15 years. Previously in this appeal, we have highlighted the numerous issues surrounding the Public Grove 4 x 4 route. In order to comply with NEPA, the Forest Service should have considered closing this route as recommended by Sierra Club.<sup>7</sup>

Moreover, the Forest Service never considered any alternative that would limit camping to designated campgrounds. Instead, as discussed above, the Forest Service completely failed to analyze the impacts of dispersed camping despite the clear connection with motorized recreation. Similarly, the Forest Service failed to analyze any

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<sup>7</sup> With regard to the Public Grove 4 x 4 route, the Forest Service also draws the arbitrary conclusion that the FEIS “describes some level of motorized access and use in the Public Grove area for every Alternative analyzed. This indicates that at least some of these roads are a necessary part of the transportation network on the District.” FEIS at 8-49. The Forest Service completely failed to indicate what this route is necessary for. A proper alternatives analysis would determine the necessity of this route; not some unspecified and unrecorded conclusion of the Forest Service.

alternative that would leave closed the Dry Bread Sink Hole play area. Moreover, all of the Forest Service alternatives include the same plans for two heavily used Dock Flat and Dry Bread concentrated use areas. As such, not comparative evaluation was undertaken for these important aspects of the decision.

NEPA is intended to foster informed decision making through public participation. In submitting the Conservation Alternative, Sierra Club has presented a reasonable and appropriate response to the diverse demands of forest users. By failing to consider the Conservation Alternative, the Forest Service has violated NEPA. In addition, the Forest Service failed to consider alternatives for important elements of this action, such as dispersed camping and/or the Dry Break Sink Hole play area. Without an alternative analysis, the Forest Service lacks the information necessary for informed and reasoned decision making. Therefore, Sierra Club requests that the decision be vacated and the FEIS remanded to the agency for analysis of the Conservation Alternative.

#### **IV. The Forest Service Arbitrarily and Capriciously Concluded the Certain Routes Crossing Private Land Are Public Roads.**

The Forest Service's rationale for inclusion of routes encompassed by the Mantua Loop Trail runs afoul of Utah law. Specifically, the Forest Service concluded that designation of the Public Grove 4x4 "is consistent with the recommendations made by the Box Elder County Access Committee and a decision made by the Box Elder County Commission." ROD at 14. Similarly, the Forest Service concluded that the Sink Hollow Loop Road "is consistent with the recommendations made by the Box Elder County Access Committee and a decision made by the Box Elder County Commission" as well as the opinions of Cache County. ROD at 14. The Forest Service notes that if the Box Elder County Commission or Cache County were to vacate their decisions suggesting that these routes connect to county public roads, the Forest Service would rescind the decision relative to these routes, as required by the Forest Plan.

However, counties cannot create public roads by resolution or recommendation. In *Campbell v. Box Elder County*, 962 P.2d 806 (Utah App. 1998), the Utah Court of Appeals reiterated the long-standing requirement that "the county bears the burden of proving dedication [of roads] to the public by clear and convincing evidence." *Campbell v. Box Elder County*, 962 P.2d 806, 808 (Utah App. 1998) quoting *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995). The court also recognized that "[t]he law does not lightly allow the transfer of property from private to public use." *Id.* Although the law does not lightly allow the transfer of private land for public use as a road, the Forest Service has arbitrarily and capriciously treated Box Elder and Cache Counties' public road assertions as validly recognized under Utah law.

The Forest Service's actions regarding roads/trails adjacent to private property, furthermore, violates the National Forest Management Act's requirement that site-specific actions shall be consistent with the land management plans. 16 U.S.C. § 1604(i). According to the Revised Forest Plan, "[i]f the only access to National Forest requires crossing private land where public access is restricted, the adjacent National Forest land will be closed to motorized and mechanized use without a permit authorizing motorized use." Revised WCNF Forest Plan at 4-46 (Standard 19). Despite Box Elder and Cache counties' contention, the disputed roads are currently closed until properly adjudicated before a Utah court. As such, the Revised Forest Plan requires closure of the adjacent Forest Service roads/trails.

If Utah courts validate Box Elder County and Cache County public road assertions, then the Forest Service can respond accordingly. However, at this time, Box Elder and Cache Counties have nothing more than unsubstantiated public road claims. The Forest Service cannot sanction these claims as public roads in a manner that is inconsistent with the proper procedures set forth by Utah law and/or the Revised Forest Plan. Accordingly, the rationale for including these motorized trails is arbitrary and capricious thereby, requiring vacation of this portion of the decision.

## **V. The Forest Service Failed to Properly Apply Agency Adopted Rules Regarding Road Construction**

Pursuant to Forest Service Manual (FSM) Section 7705, new road construction includes any “activity that results in the addition of forest classified or temporary road miles.” *See also* 36 CFR 212.1. The Forest Service acknowledged that “[i]f a route is identified in an alternative [to] be added, it is analyzed as if it was a new construction.” FEIS at 8-67. However, in adding new roads to the motorized travel system, the Forest Service failed to apply the obligations the agency has adopted.

According to FSM Section 7703, “[i]n managing the forest transportation system for access, the Responsible Officials must coordinate with other public and private transportation system agencies to integrate transportation information and **to balance transportation facility investments and maintenance costs against the need to maintain land health and water quality.**” Furthermore, in adding roads to the motorized travel system, the responsible officials must “[a]dd new roads only where resource management objectives and benefits are clearly demonstrated and where **long-term funding obligations have been carefully considered.**” However, in violation of its own manual, the Forest Service failed to analyze the maintenance costs or long-term funding obligations of the Ogden Travel Plan revision. Moreover, the Forest Service failed to undertake a balancing of the costs associated with road designations in relation to land health and water quality.

For example, the Sink Hole Loop (26012) initially leads motorist across private property and then proceeds onto forest land that is a narrow traverse across a rather steep slope (see attached Photo 7). Along with costly safety issues, there is a high potential for erosion. The road also goes through some mud holes and then down a very steep, eroded slope where it would be difficult to drive even a high-clearance pickup. This route also passes through sharptail grouse habitat, a Forest Service sensitive species.

Similarly, the Public Hollow Loop (20092) (photo 3) is part of an area previously closed by emergency order. This area is a mess of one deep mud hole after another. This road lacks any legitimate purpose. In addition, Baxter Sawmill 2 is a mile-long dead-end road that's simply unnecessary in an area that's important habitat for elk and other wildlife.

Had the Forest Service properly balanced the costs of designating these roads with the environmental consequences, surely the Forest Service would have concluded that the access benefits are substantial outweighed by the consequences to land health. Moreover, the costs of maintaining these roads are substantial while the motorized recreational benefits are few. Accordingly, Sierra Club request that the decision be vacated and the FEIS remanded to the agency with order to apply the Forest Service Manual for any new road additions.

## **VI. The Forest Service Violated the National Forest Management Act**

Pursuant to the National Forest Management Act, “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). As raised in comments, Management Prescription 3.1W, Watershed Emphasis, places priority on “maintaining quality of watershed conditions and aquatic habitats.” Revised WCNF Forest Plan at 4-69. Moreover, Management Prescription 3.2U, Undeveloped Terrestrial Habitats, “consists of terrestrial habitat areas protected from development because of potential impacts to key habitat elements.” Forest Plan at 4-70. These management prescriptions set forth priorities for management of key areas that were ignored in reaching the decision to revise the travel plan.

According to the Forest Service, “[n]o actions in this document would conflict with MPCs 3.1 and 3.2u.” FEIS at 8-43. However, NFMA requires consistency. Although actions may not be in direct conflict, it is certainly inconsistent with the Forest Plan to allow motorized recreation in areas emphasized for watershed values and undeveloped terrestrial habitat. The burden is on the agency to demonstrate consistency and the failure to properly apply and analyze these management prescriptions renders the decision arbitrary and capricious.<sup>8</sup>

Moreover, the Forest Service, in some instances, justifies its decision based on the Forest Plan ROS map showing the area as motorized. *See* ROD-16, ROD-24. This is problematic for several reasons. First, it would be more appropriate to base decisions on the management prescription maps, not the ROS maps, because the ROS maps mostly just describe where it’s currently likely that you’ll hear noise from vehicles—they don’t prescribe how further management decisions should be made. Furthermore, the ROS maps were drawn in anticipation of several specific new motorized route designations, as discussed in our appeal of the Forest Plan. Also, the Forest planning process explicitly excluded changes to summer travel plans from consideration and public comment, so any such results of that process cannot stand as valid NEPA decisions.

In addition, the Forest Service decided that Pete’s Hollow Trail would be opened as a motorcycle only trail. Pete’s Hollow Trail is extremely steep over a long distance and already badly eroded (several feet below banks). The Forest Service failed to articulate the standard upon which it relied to conclude that the Pete’s Hollow Trail is appropriate for motorcycle travel. However, based on the steepness of this trail, any reasonable standard, including standards contained in the Forest Plan, must have been violated with the designation of the trail.

Accordingly, the Forest Service’s decision to revise the Ogden Travel Plan is not consistent with the WCNF Revised Forest Plan. Accordingly, Sierra Club requests vacation of the decision and a remand to the agency with further instruction to comply with the obligations contained in the Forest Plan.

## **VII. The Forest Service Decision Violates the Clean Water Act**

The goal of the Clean Water Act (CWA) is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” To this end, the CWA requires federal agencies to comply with state water quality standards. 33 USC §§ 1323, 1313. In 1987, Section 319 was added to the CWA to provide additional emphasis on preventing and correcting non-

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<sup>8</sup> Sierra Club incorporates by reference the previously discussed failure of the Forest Service to apply route density standards as required by the Forest Plan as additional violations of NFMA.

point source pollution problems. In response, the State of Utah has incorporated narrative biological criteria into its state water quality standards which state that:

[I]t shall be unlawful . . . to discharge or place any waste or other substance in such a way as will be or may become offensive such as unnatural deposits . . . or cause conditions which produce undesirable aquatic life . . . or result in concentrations or combinations of substances which produce undesirable physiological responses in desirable resident fish, or other desirable aquatic life . . .

Utah Admin. Code R317-2-7.2 (narrative standards). The Environmental Protection Agency (EPA) has confirmed that excessive sediments impair a water's beneficial uses:

[e]xcessive sediments deposited on stream and lake bottoms can choke spawning gravels (reducing survival and growth rates), impair fish food sources, fill in rearing pools (reducing cover from prey and thermal refugia), and reduce habitat complexity in stream channels. Excessive suspended sediments can make it more difficult for fish to find prey and at high levels can cause direct physical harm, such as clogged gills. . . . Thus, whether pursuant to narrative or numerical standards, [an agency] must evaluate all waters to determine whether aquatic life is being impaired by sediments.

Protocol for Developing Sediment TMDLs, EPA 1999 (EPA 841-B-99-004).

As discussed in our comments, the North Fork Ogden River is not meeting its beneficial uses because the river is impaired with respect to dissolved oxygen. The Forest Service generally does not monitor water quality on the forest. However, based on the condition of the North Fork Ogden River, the Forest Service must take action to determine the cause of the impairment, thoroughly consider the proposed action's consequences on water quality, and describe the measures the agency will take to ensure the watercourse meets all beneficial uses in the future.

Importantly, all watercourses within the WCNF are designated Category 1 – High Quality Waters, which “shall be maintained at existing high quality.” Utah Admin. Code R317-2-3.2. Therefore, all nonpoint sources “shall be controlled to the extent feasible through implementation of best management practices or regulatory programs.” Utah Admin. Code R317-2-3.2.

Instead of responding to these requirements, the Forest Service indicates that it need not take action, including ensuring compliance with a TMDL that must be designated, because “the recent drought is not representative of conditions since water has been removed from the stream for irrigation.” The Forest Service's reasoning is completely arbitrary. Certainly, droughts are foreseeable in this region. Moreover, continued removal of water from the stream for irrigation is foreseeable. As such, these conditions do not justify the agency's lack of action to comply with the Clean Water Act. Based on this violation, Sierra Club requests a vacation of the decision and a remand to the agency to ensure compliance with the Clean Water Act.

## VIII. Sierra Club's Requested Relief

Pursuant to 36 C.F.R. § 215.14, Sierra Club has thoroughly discussed the illegalities of the decision to revise the Ogden Travel Plan. Sierra Club has also indicated its requested relief at the close of each of these discussions. In order to reiterate, Sierra Club requests the following from the Appeal Deciding Officer:

- 1) A declaration that the Forest Service failed to consider the consequences of designating the Shoshone Trail, a remand of the FEIS to the agency, and instructions that the Forest Service must analyze, as required by NEPA, the consequences of this federal action;
- 2) A declaration that the Forest Service failed to apply the minimization criteria of Executive Order 11644, as codified at 36 C.F.R. § 212, a remand of the FEIS to the agency, and instructions that the Forest Service must apply the minimization criteria on a route-by-route basis;
- 3) A declaration that the Forest Service failed to comply with NEPA by: a) failing to analyze adequately significant environmental consequences of the action (including, but not limited to, use conflicts, user created trails, enforcement capabilities, and dispersed camping); b) failing to adequately respond to comments; c) relying on incorrect assumptions in reaching its decision; d) arbitrarily limiting the area of analysis of impacts; e) failing to analyze adequately cumulative impacts; f) failing to take the requisite hard look at the effectiveness and ability to implement mitigation measures; g) arbitrarily narrowing the purpose and need of the action; and f) failing to consider a reasonable range of alternatives. Sierra Club request a remand of the FEIS to the agency with instructions that the Forest Service must fully comply with NEPA prior to reaching its decision to revise the Travel Plan.
- 4) A declaration that the Forest Service arbitrarily and capriciously, and in violation of the Forest Plan, relied on unsubstantiated county road claims in reaching its decision. Sierra Club requests that any roads/trails opened to motorized use as a result from the rationale that forest service road/trail designations must be consistent with adjacent road/trail designations be immediately closed to motorized use.
- 5) A declaration that the Forest Service failed to apply its own policies contained in the Forest Service Manual in adding roads to the motorized travel system. Sierra Club request a remand of the FEIS to the agency with instructions that the Forest Service must consider and apply the direction of the Forest Manual prior to adding new roads to the travel system
- 6) A declaration that the Forest Service failed to reach a decision consistent with its Forest Plan, as required by NFMA. Sierra Club requests a remand to the agency with instructions that the agency must conform to the Forest Plan in reaching its decision.

7) A declaration that the Forest Service failed to comply with the Clean Water Act in reaching its decision to revise the Travel Plan. Sierra Club requests a remand of the FIES to the agency with instructions requiring full compliance with the Clean Water Act.

8) As noted above, the appropriate course of action is to remand the FEIS to the Forest Service in order to fully comply with applicable law and regulation. To the extent it may assist the Appeal Deciding Officer in crafting his/her decision, Sierra Club specifically requests instructions that the Forest Service designate the following routes as either closed routes, administrative roads, or non-motorized trails:

Pete's Hollow (26022), Box Elder Creek (xx34), Dock Flat Complex (26010) (portion west of Willard Basin road), Devils Hole Canyon ATV (xx30) (portion west of Willard Basin road), Mantua Church Camp (xx31) (east portion), Sink Hole Loop (26012), Public Grove 4x4 (20220) (entire route including the portion already open to motorized use), Dry Bread Upper (20107), Tin Cup Spring (20210), Tilda Spring Overlook (26102), Boundary Spring (26736), Davenport Hollow (20196) (north of junction with Buck Springs, 20197), Tilda Spring 3 extension (xxx4), Baxter Sawmill 2 (26994).

Respectfully submitted and hand delivered this 19<sup>th</sup> day of May 2006 by:

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