

ASHLEY NATIONAL FOREST  
TRAVEL MANAGEMENT PLAN AND  
DRAFT ENVIRONMENTAL IMPACT  
STATEMENT COMMENTS

SUBMITTED BY THE COALITION OF LOCAL GOVERNMENTS ON BEHALF  
OF SWEETWATER COUNTY, THE SWEETWATER COUNTY  
CONSERVATION DISTRICT, LINCOLN COUNTY, UINTA COUNTY, AND  
THE UINTA COUNTY CONSERVATION DISTRICT

JULY 16, 2009



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Sweetwater County, the Sweetwater County Conservation District, Lincoln County, Uinta County, and the Uinta County Conservation District (hereafter Coalition of Local Governments or the Coalition) provide the following comments on the Draft Environmental Impact Statement (DEIS) for the Ashley National Forest Travel Management Plan (ANF TMP), Roosevelt/Duchesne, Flaming Gorge and Vernal Ranger Districts.

## **I. SUMMARY OF MAJOR CONCLUSIONS**

As set out in detail, the Coalition concludes that the ANF DEIS suffers from fatal flaws, because (1) the proposed TMP does not conform to the Forest Service rules and policy for travel planning; (2) the DEIS violates the National Environmental Policy Act (NEPA); and (3) the proposed TMP violates the National Forest Management Act (NFMA) by not meeting consistency requirements.

The DEIS fails to address jurisdiction over all roads and trails to be designated or closed;

The DEIS is not based on a roads / travel analysis that was developed in coordination with local governments and the public;

The DEIS fails to document how the limited number of roads and trails will meet current and future recreation needs, especially given other data showing increased demand for motorized recreation;

The DEIS fails to display and analyze the 'unauthorized roads and trails' despite NEPA's requirement that a federal agency fully disclose and analyze the effects of its decision;

The scope of the DEIS is unlawfully narrowed to the universe of Forest Service chosen roads, thus failing to analyze the similar, connected and cumulative impacts and ignoring the material issues raised at scoping;

The DEIS fails to consider an alternative that would increase recreation access and motorized opportunities, in direct contradiction of the land management direction for the Flaming Gorge National Recreation Area (FGNRA) and the ANF;

The no action alternative omits at least 25% of the roads and trails, thus failing to disclose and analyze the cumulative effects of the change in management being proposed in the preferred alternative;

The DEIS violates the injunction issued by the Wyoming federal district court in *State of Wyoming v. U.S. Dept. of Agriculture*, 570 F. Supp.2d 1309 (D. Wyo. 2008) by implementing the Roadless Conservation Rule with respect to inventoried roadless areas on the ANF, especially road closures; and

The ANF DEIS violates NFMA by affecting roads and trails notwithstanding the land management direction in the ANF Land and Resource Management Plan (LRMP), as supplemented, that classifies the FGNRA for roaded natural recreation, and provides that motorized recreation and dispersed camping are to be emphasized.

## **II. SUMMARY OF RECOMMENDATIONS**

Develop procedures including coordination with local governments and the public to resolve issues of jurisdiction;

Prepare a travel analysis that meets the criteria in the Forest Service Manual and Handbook;

Inventory and map the allegedly unauthorized roads and trails, and prepare maps that depict these roads and trails with a landownership layer;

Develop data regarding levels of service for forest roads and the number of vehicles using the roads during high recreation use seasons, e.g. summer and hunting;

Develop data regarding snowmobile use during the winter;

Develop or refine recreation user data, focusing on motorized versus non-motorized; and mixed uses;

Delete the unlawful roadless areas management and related closures; and

Write a supplemental or new DEIS and submit for public comment.

### **III. SUMMARY OF ALTERNATIVES**

#### **A. No Action Alternative**

According to the DEIS, the No Action alternative would retain approximately 1,587 miles of open National Forest System roads and motorized trails, including approximately 988 miles of road allowing mixed traffic. Off road dispersed camping access and game retrieval would continue to be allowed up to 300 feet from designated routes. The 111,805 acre “hatched travel area” on the Vernal Ranger District would remain open to motorized vehicles on designated routes and existing, but undesignated routes as long as resource damage was not occurring. DEIS at 2-12.

The No Action Alternative, however, does not address the current public use of roads and trails that the ANF claims are classified as ‘unauthorized’ and, therefore, closed. The ANF LRMP did not address these routes and roads. See Ashley National Forest (ANF) LRMP and FEIS (1986). The Forest Service has neither signed nor officially closed many of these routes, pursuant to road closure procedures, 36 C.F.R. §261.50; or in a public NEPA process. The FGNRA travel plan in 1995 did not effect these road and trail closures. The Forest Service did not enforce the alleged closures for the last 23 years. Flaming Gorge Travel Management Environmental Assessment.

As a consequence, the public and public officials cannot be expected to understand that the use of these roads and trails will be unlawful or that they have always been closed, as recently claimed by the ANF Supervisor.<sup>1</sup>

## **B. Preferred Alternative**

Under the identified preferred alternative, the designated road and motorized trail system would total 1,705 miles (357 miles of new or changed routes including 'administratively closed routes' and 1,348 miles of existing routes, which include administratively closed roads). This alternative would eliminate approximately 328 miles of existing, but "undesigned" routes in the "hatched travel areas" on the Vernal Ranger District. DEIS at 1-10.

Outside of these routes, the ANF TMP also eliminates what the Forest Service considers "unauthorized routes," which are not forest roads and occur outside the Vernal Ranger District hatched travel area or which are found in the FGNRA and Roosevelt/Duchesne Ranger District.<sup>2</sup> These include roads, which are unclassified, user created, unplanned, non-system, and undetermined roads that are currently being used by the public. DEIS at 2-3.

According to the Forest Service, wheeled motorized vehicle travel by the public is not permitted on these "unauthorized" routes, with the exception of the hatched travel

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<sup>1</sup> The ANF Supervisor told Utah local governments on June 30, 2009 that these roads have been administratively closed since the previous LRMP in 1986. The administrative closures are limited to the FGNRA. Of the roads and trails now at issue, Appendix A of the DEIS notes administrative closures for only a few of the 672 allegedly unauthorized routes that were not put on the maps, nor analyzed in the DEIS. See Ex. E. At least 110 roads and trails in the FGNRA are not on the maps.

<sup>2</sup> A road is generally defined as "Forest road or trail. A road or trail wholly or partly within or adjacent to and serving the National Forest System that the Forest Service determines is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources." 36 C.F.R. §212.1 (2005). The DEIS classifies all undesigned roads or trails as unauthorized.

areas on the Vernal Ranger District. [Minutes of Utah Local Government Meeting June 30, 2009.] The exact mileage of unauthorized and undesignated routes existing on the Forest is unknown. The ANF decided that it was unreasonable to complete the inventory of all unauthorized and undesignated routes due to the extensive number of routes over the entire forest and the exorbitant cost and amount of time that would be associated with such an inventory. DEIS at 1-4.

The miles of unauthorized routes “indicated” by the data used in the DEIS are estimated to be 373 miles in the Roosevelt/Duchesne District, 480 miles in the Flaming Gorge District, and 583 miles in the Vernal Ranger District, of which 368 miles are considered “undesignated” within the hatched travel area. DEIS at 2-12. The public cannot document the miles of roads and trails not considered, because the DEIS states that it did not inventory or quantify all of the ‘unauthorized’ roads and trails. Appendix A uses Forest Service numbers but since they are not on the maps and no other identification, such as a name or location, is provided, the reader cannot determine which road or trail is to be closed or the reasons given. The local governments conclude that the DEIS greatly underestimates the miles of roads and trails that are excluded from the DEIS but will nevertheless be closed to the public after completion of the EIS.

Thus, when the ANF claims that the preferred alternative increases access, this is materially incorrect and misleading. Any expansion claimed in the DEIS is limited to the narrow class of roads recognized by the Forest Service. The DEIS and the ANF deliberately omit the fact that the TMP will close at least 480 miles of travel routes in the FGNRA.

While the DEIS purports to list some of the “unauthorized routes” in Appendix A, the numbers assigned to the routes do not correspond to numbers used in 1971 or 1991 road maps produced by the Forest Service. As a result, it is literally impossible to divine where these routes are and determine whether they are important for particular recreation uses.

The failure to disclose the roads and trails to be closed in the DEIS is compounded by repeated assurances over the last three years from the Flaming Gorge District Ranger that the Forest Service would not close **any** roads without first consulting with the county commission. At no time until the public hearings on May 14, 2009 did the Forest Service acknowledge that this assurance applied only the roads that met the Forest Service technical definition of a road, rather than the Webster's Dictionary definition of a road or trail.<sup>3</sup>

Because allowing public access to these unauthorized (also known as user-created, unclassified, or non-system) roads, trails, and/or areas would allegedly not meet the purpose and need for the project, the estimated 1,436 miles of unauthorized routes are restricted to non-motorized use in all action alternatives, unless they are proposed for motorized use designation. DEIS at 1-16, 2-3. These "non-system routes" will be closed and stabilized, reclaimed, or obliterated as funds allow. DEIS at 2-5.

Finally, under management common to all alternatives, no areas would be open to cross-country motor vehicle use, but limited motorized access for dispersed camping would be permissible within 150 feet of designated roads and designated motorized trails where getting to the site would not involve: crossing alpine or meadow areas; crossing a live stream, camping within 100 feet of a water body such as a lake or live stream (excluding reservoirs), or camping within ¼ mile of a developed campground. DEIS at 2-2.

#### **IV. DEIS FAILS TO MEET LEGAL MANDATES IN FOREST SERVICE RULES AND POLICY**

##### **A. Forest Service Must Document Jurisdiction and Identify Public, Outstanding and Reserved Rights-of-Way As Part of Its Travel Management Planning for the Ashley National Forest**

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<sup>3</sup> A road is an open way (generally public) for travel or transportation.  
[www.websters-online-dictionary.org](http://www.websters-online-dictionary.org).

The Coalition of Local Governments have repeatedly emphasized in scoping comments and at the two cooperator meetings held that under the 2005 Travel Management Rule (TMR), the Forest Service must first consult and coordinate with them as to all of the roads and trails in the ANF located within Sweetwater County in order to determine jurisdiction. See CLG Scoping Comments Jan. 7, 2008. The Forest Service rejected this comment on the basis that resolution of jurisdiction in coordination with local governments was outside the scope of the EIS. See e.g. Forest Service Response to Scoping Comments Feb. 2008. The DEIS also dismisses the issues of jurisdiction and coordination and wrongfully refuses to analyze the jurisdictional issues in depth. DEIS at 1-17. Forest Service policy requires that the travel management plan process first resolve the issues of jurisdiction through coordination with local governments and the public, and thus the ANF failed to follow binding Forest Service policy from the very outset and admits as much in the DEIS. DEIS1-18; 2-5.

The Forest Service has materially misrepresented the proposed action and alternatives by limiting the universe to roads that the Forest Service recognizes. The DEIS entirely omits an estimated 1,436 miles of roads, of which at least one-third are in the FGNRA, that the Forest Service considers unauthorized or unclassified. The DEIS incorrectly assumes ownership and control over these rights-of-way and effects their closure, without first delineating or identifying the public, outstanding or reserved rights-of-way over which the Forest Service has no authority. FSM 2718.5, 2719 (limited control over reserved or outstanding rights), 2718.31 (R.S. 2477 rights-of-way are subject to and controlled by state law). The FGNRA was not established until 1968 and much of the land within the NRA was privately owned and acquired by the United States. Thus, an unknown number of roads and trails that were used by the public are reserved or outstanding rights over which the Forest Service has no or limited jurisdiction. 36 C.F.R. §251.110(b) ( R.S. 2477); FSM 2718.7 (R.S. 2477); 2734.2 (outstanding or reserved rights-of-way); 5430.5, ¶¶6, 7 (defining outstanding and reserved rights); see also *United States v. Srnsky*, 271 F.3d 595, 601 (4<sup>th</sup> Cir. 2001) (common law implied easement is a reserved right).

The DEIS also fails to disclose and consider access rights and continued access with respect to public and private rights-of-way, including the roads and trails necessary

to reach private land and grazing allotments. The RSGA, which sold significant acreage to the United States, reserved its rights-of-way. Other land owners and grazing permittees have access rights-of-way which were not extinguished when the NRA was established. There is no evidence in the DEIS that the ANF considered these rights and other public and private rights-of-way. A Mr. Peters testified that the DEIS closes the road that he uses to reach his land near Haystack. See Ex. I, Proposed Travel Route Changes on Private Land. The DEIS does not include a private land layer on the maps, thereby failing to disclose the denial of access to private lands within the FGNRA. The assumption in the DEIS that all unclassified or unknown roads are unlawful, without documentation of the research done (if any), and without coordination with local governments and the public, does not meet the legal steps set out in the Forest Service Handbook for Travel Planning, FSH 7709.55, Ch. 11, 12 (2008).

## **B. Outstanding and Reserved Rights Undocumented<sup>4</sup>**

The proposed the DEIS will directly affect public access over the numerous public roads that are outstanding or reserved rights, including R.S. 2477 rights-of-way, located in the FGNRA and will affect access right to private land and grazing allotments. The County has a recognized ownership interest on behalf of the public in the public roads. *Kinscherff v. United States*, 586 F.2d 159, 160 (10<sup>th</sup> Cir. 1978); Wyo. Stat. §24-3-101. The earlier county maps document the existence of many roads in the FGNRA prior to its reservation by Congress in 1968. Ex. A, National Park Service Map, Roads and Trails, Flaming Gorge Recreation Area Project (1962); Ex. B, Forest Service 1971 Travel Map. Thus, there is a presumption that there are public and private roads within the FGNRA, which are valid existing rights, 16 U.S.C. §§460v-2, §460v-5,<sup>5</sup> and that these roads should remain available for public use. Sweetwater County adopted all of

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<sup>4</sup> The Forest Service manual defines an outstanding right as “A property right or interest owned by someone other than the present landowner.” FSM 5430.5 ¶6. A reserved right is “A right created by the grantor in a clause in an instrument or conveyance by which the grantor reserves some right, interest, or profit in the estate granted.” Id. at 5430.5 ¶7.

<sup>5</sup> See also SWCCD goals, objectives and policies for the county transportation system and public rights of access, including those under R.S. 2477, in the *Sweetwater County Conservation District Land & Resource Use Plan & Policy*, pp. 21-24.

these routes by resolution when the Department of the Interior attempted to eradicate the public rights-of-way under R.S. 2477.

Despite the foregoing, the DEIS merely provides: “The Forest Service recognizes documented rights-of-way held by State, county, or other local public authorities. This includes rights-of-way under Revised Statute (R.S.) 2477 that have been evaluated by the authorized Forest Service official in order to make an administrative determination of validity; or that have been adjudicated through the federal court system.” DEIS at 1-17. As a result, the Forest Service explains that roads and trails under the jurisdiction of other entities (such as state and counties) are not analyzed in the DEIS, but are shown on maps of the alternatives. DEIS at 1-9.

Because the Forest Service officials told the Sweetwater County Commission on numerous occasions that it would not close any roads in this travel plan, the county reasonably assumed that the public rights of access were not at risk. Not only has the Forest Service misrepresented that the DEIS maps identify all of the public rights-of-way, the Forest Service must inventory, document and analyze the Forest Service jurisdiction in the TMP process. As shown below, in making TMP designations, the 2005 TMR and implementing policy directives, effective January 7, 2009, 73 Fed. Reg. 74689 (2008),<sup>6</sup> clearly require the Forest Service to first make collaborative, non-binding administrative determinations as to its jurisdiction over roads and trails within the ANF. Collaboration means the full participation of the Coalition of Local Governments. The Forest Service has yet to fully engage in its mandate to determine jurisdiction. The scheduling of the meeting for June 30, 2009 or the offer of July 6, 2009 to meet with specific counties comes entirely too late to be meaningful, especially when the offer

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<sup>6</sup> The Forest Service Manual (“FSM”) and Forest Service Handbooks (“FSH”) codify Forest Service policy, practice, and procedure. They serve as the primary basis for the internal management and control of all programs and the primary source of administrative direction to employees of the Forest Service. The FSM contains legal authorities, objectives, policies, responsibilities, instructions, and guidance needed on a continuing basis by Forest Service line officers and primary staff in more than one unit to plan and execute assigned programs and activities. The FSH is the principal source of specialized guidance and instruction for carrying out the direction issued in the FSM. *Cleveland v. U.S.*, 546 F. Supp.2d 732 n.4 (N.D. Cal. 2008).

appears to expire July 16, 2009. See email of K. Rutledge July 6, 2009 inviting Sweetwater County to schedule a meeting.

These issues were raised more than 18 months ago but at that time the Forest Service flatly refused to address the issue of jurisdiction on the basis that it was outside the scope of the EIS. The failure to comply with the 2005 TMR and implementing directives is arbitrary and capricious and grounds for setting aside the proposed road designations. *Cotton Petroleum Corp. v. U.S. Dept. of Interior, Bureau of Indian Affairs*, 870 F.2d 1515, 1527 (10<sup>th</sup> Cir. 1989).

The ANF now claims that it requested information on road jurisdiction more than two years ago. This is untrue, just as was the case for the ANF Supervisor's contention in May of this year that the ANF had provided the local governments with road maps more than 5 years ago. The Coalition of Local Governments requested road maps at the March 2008 cooperating agency meeting. The maps were provided in November 2008. This was the first set of maps ever provided for travel planning and, as shown in these comments, they are entirely deficient.

The fact that the TMR protects valid existing rights of access does not insulate the Forest Service from considering jurisdiction in its travel management analysis. Valid existing rights of way are to be recognized “[i]n making designations.” 36 C.F.R. §212.55(d) (2005) (emphasis added). Furthermore, “questions of valid existing rights are best examined at the local level, where they can be individually evaluated.” 70 Fed. Reg. 68264, 68282 (2005).<sup>7</sup> Coordination, therefore, with appropriate Federal, State, county, local, and tribal governments in designating roads, trails, and areas for motor vehicle use is required. 36 C.F.R. §212.53.

The Forest Service may not “consider a road or trail on NFS lands for designation unless there is legal public access to that road or trail,” nor may the Forest Service regulate uses within the scope of outstanding or reserved rights-of-way if the

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<sup>7</sup> The TMR preamble is a significant indication of intent in the drafting of regulations and entitled to deference. *U.S. Dept. Of Labor v. Wolf Run Mining Company*, 446 F. Supp.2d 651, 654 (N.D. W. Va. 2006).

agency has not acquired the right to do so. 70 Fed. Reg. at 68276, 68282.<sup>8</sup> Thus, the Forest Service must first consider jurisdiction on a collaborative basis for administrative purposes: “Most NFS roads are intertwined with networks of State and county roads (often crossing NFS lands), and cooperative planning among affected agencies is essential.” 70 Fed. Reg. at 68269.

The ANF appears to claim jurisdiction over all roads located within the NRA, as shown on the maps and listed in the DEIS appendices. The maps, however, do not account for reserved rights-of-way and easements, particularly those held by the RSGA. Moreover, as noted by at least one witness at the May 14, 2009 public hearing, the Forest Service claims jurisdiction over a road leading to private land, when that right-of-way exists pursuant to R.S. 2477 and once vested is a valid existing right assuring the landowner access. Other routes, which existed before the NRA, also provide access to grazing allotments and land and are also presumptively reserved or outstanding rights-of-way. The maps included in these comments provide a small sample of the roads over which the Forest Service erroneously claims jurisdiction. Ex. C, Haystack Buttes; Ex. D, Roadless FG Base Map. Even where the TMP does not propose to close the affected roads, it ignores the fact that these roads may be reserved or outstanding roads or rights-of-way that are not under Forest Service jurisdiction due to their status as outstanding rights or reserved rights. 36 C.F.R. §251.110(b); FSM 2718.5; 2718.31; 5430.5, ¶¶6, 7. Because the DEIS assumes jurisdiction without documentation (despite requests for it), it fails to address the outstanding and reserved rights within the FGNRA. The Forest Service lacks the authority to classify or to put these roads into the travel

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<sup>8</sup> Examples of an outstanding or reserved right-of-way include a road or trail in existence at the time title to the underlying land was acquired by the United States. A right-of-way for a road or trail acquired by the United States where the owner of the underlying land retained control of the right-of-way and reserved the right to allow others to use it would also be a reserved right. 70 Fed. Reg. at 68275. The Forest Service does not exercise jurisdiction or control, including closing such routes. See FSM 2734.2: “The holder of outstanding rights perfected on acquired land prior to Forest Service acquisition, reservation in deeds, easements, or agreements made at the time of acquisition of the land. . . may exercise those rights without obtaining a special use authorization.”

plan, which is limited to roads over which the Forest Service has documented jurisdiction.

The 2009 travel management directives also clearly require the Forest Service to “[d]etermine jurisdiction over all forest service transportation facilities.” FSM 7703.3 (emphasis added). A forest transportation facility includes a forest road or trail, including bridges, culverts, parking lots, marine access facilities, safety devices, and other improvements appurtenant to the forest transportation system. 36 C.F.R. §212.1. The Forest Service Manual, in fact, provides an administrative framework for meeting this requirement by providing guidance in documenting jurisdiction, transferring jurisdiction, and exercising jurisdiction over forest roads, based on such factors as the right of individuals and local public road authorities to own, operate, maintain and use these roads. 73 Fed. Reg. at 74694.

When jurisdiction over a forest transportation facility is uncertain [the Forest Service must] coordinate with Federal, State, county and local public road authorities and consult with the Office of General Counsel. Legal research and title searches may sometimes be necessary to establish jurisdiction over a forest transportation facility.

FSH 7709.55, Ch.11.4.

In determining jurisdiction:

Units and districts should consider rights acquired through appropriation, prescriptive rights, and other rights which may not be documented when determining jurisdiction over a forest transportation facility under applicable law. Evidence of acquired but undocumented rights might include a history of maintenance, depiction of a route on a visitor or travel map, signing, and other indicators of assertion of ownership. . . [The Forest Service may] not manage, maintain, or designate roads and trails over which the Forest Service lacks jurisdiction.

FSM 7715.72.

To date, the Forest Service has failed entirely in meeting the jurisdiction and coordination mandate. Consequently, the ANF TMP cannot be consistent with governing rules and policies until the Forest Service initiates collaborative, non-binding administrative determinations as to its jurisdiction over roads and trails within the ANF. See *SUWA v. BLM*, 425 F.3d 735, 757 (10<sup>th</sup> 2005) (encouraging agency non-binding, administrative R.S. 2477 determinations for its own purposes, such as land use planning).

### **C. 2005 Roads Analysis Must Be Integrated with the TMP Process While Providing for Public Participation**

#### **1. Travel Analysis Not Done Correctly**

In their scoping comments, the Coalition of Local Governments requested that the Forest Service reopen the roads analysis process to provide for close coordination with local governments and public involvement in determining the minimum road system necessary.<sup>9</sup> The Forest Service responded that the 2005 roads analysis process was only internal and was unrelated to the TMP. DEIS 1-18. In both cases, the ANF is incorrect.

The roads analysis completed in 2005 proceeded without addressing the request for coordination or the access needs or the rights of the county residents and permit holders. There was no consultation with local governments or the public and no copies of the completed roads analysis provided to the local governments, except upon request. The Coalition of Local Governments are entitled to understand the basis upon

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<sup>9</sup> The Forest Service's 2001 Roads Policy, 66 Fed. Reg. 3206 (2001), requires the Forest Service to identify the minimum road system needed for safe and efficient travel and for the administration, utilization and protection of National Forest System (NFS) lands. Roads no longer needed to meet forest resource management objectives should be either decommissioned or considered for other uses, such as for trails. 36 C.F.R. §212.5. "Roads analysis" was renamed "travel analysis" to reflect its broader application in informing travel management decisions regarding motor vehicle use on NFS roads and trails. 72 Fed. Reg. 10632 (2007).

which the Forest Service relies for its assumption that these roads and trails should be closed. See e.g. DEIS, Appendix A. The 2005 roads analysis omits most of the roads and trails now addressed in the DEIS. This means that the DEIS proposes to close roads and trails without any travel analysis, even though the Forest Service Handbook requires a travel analysis as the first step for a TMP. FSH 7709.55, ch. 11.3. The gaps in the 2005 roads analysis are especially evident for the FGNRA, where fewer than 28 road segments were assessed. See Table E.1 All Risks by Route (3/2005).

The TMP is to be integrated with the roads analysis (now called travel analysis) into the travel plan decisions. FSH 7709.55 ch.2; FSM 7703.11, ¶1 (“Use travel analysis (FSM 7712; FSH 7709.55, ch. 20) to consider the criteria in 36 CFR 212.55. Travel management decisions involving the designation of NFS roads, NFS trails, and areas on NFS lands must be informed by travel analysis conducted at an appropriate scale, as well as appropriate site-specific environmental analysis and public involvement.”); FSM 7703.12, ¶2 (“To identify the minimum road system, all administrative units must complete a travel analysis that addresses appropriate broad-scale concerns, as identified by the unit manager. A roads analysis that was completed in accordance with Publication FS-643, ‘Informing Decisions About Managing the National Forest Transportation System,’ satisfies the requirement to use travel analysis to identify the minimum road system.”).

The policy revision replaced the term ‘roads analysis’ with ‘travel analysis’ but retained the objectives and content. The roads analysis is not an internal process, despite statements in the DEIS that it is. The rules pursuant to which the ANF did the analysis required the Forest Service to coordinate with local governments and to disclose the analysis to the public. 36 C.F.R. §212.5 (2001); FSM 7730, Publication 643. The ANF roads analysis, which was completed in March of 2005, actually assigns different road numbers, partial or no location information, and names that lack any cross-reference with the DEIS. The ANF apparently conferred with some people who were not state or local government officials, but not with the Utah Counties, Sweetwater County or the Coalition members.

Without a map or a cross-reference index, which the ANF recently told the local governments will not be available, it is impossible to match the 2005 roads analysis findings with the decisions proposed in the DEIS. Not only did the ANF not follow Forest Service rules and policy for a travel analysis, but it has made it impossible for the public to fully understand the decisions being proposed.

With respect to the forest roads, the Forest Service policy emphasizes that the Coalition of Local Governments and the public are entitled to fully understand the basis for any road and trail closures and the effects that such closures will have on land uses, such as maintenance of water facilities and projects, maintenance of watershed health and productivity, forest biological resources, livestock grazing permits, and recreation access. These decisions are to be made on the basis of resource issues and access needs, neither of which is properly displayed or discussed in the materials available pertaining to the travel management plan. 36 C.F.R. §§212.5(b) (2001), 212.53 (2005). Thus, the assumptions shown in the proposed action regarding roads needed for access are fundamentally flawed.

## **2. Roads / Travel Analysis Required by Rule and Policy**

The Forest Service now responds:

The Forest 2005 roads analysis was an internal document. . .There is no requirement to seek external comments during the development of internal documents. The Travel Management process does not require utilization of, or even close coordination to the 2005 Roads Analysis in its completion. The baseline for the Travel Management process is the existing travel regulations which were made independent and prior to the completion of the 2005 Roads Analysis.

DEIS at 1-18.

The ANF response completely disregards the Forest Service rules and policies and is factually incorrect. As provided for by the 2001 Roads Policy, the roads analysis must, to the degree practicable, involve a broad spectrum of interested and affected

citizens, other state and federal agencies, and tribal governments. 36 C.F.R. §212.5(b) (2001). Specifically, “Both local agency and public involvement are key features of the roads analysis methodology.” 66 Fed. Reg. 3206, 3208 (2001) (through “the roads analysis process, responsible officials can use local public involvement to identify roads that are needed for access and those roads that are no longer needed”). The March 2005 roads analysis files were apparently completed before the roads rule was revised in May 2005. Thus, the Forest Service had to involve the public and local government in its roads analysis and, as seen above, it was not supposed to be an ‘internal process.’ During the roadless area review in 2006 and 2007, the Coalition of Local Governments requested the roads analysis on several occasions and was told there was none. By speaking to the ANF engineering division in 2008, it was discovered that indeed the ANF had done a roads analysis in 2005 and the files were promptly provided.

The new travel management directives were adopted in order to consolidate the 2005 TMR with the 2001 roads analysis policy. 72 Fed. Reg. 10632 (2007). The key objective is to integrate roads analysis with travel management planning. *Id.* at 10634. Contrary to the Forest Service’s statement that the TMP process does not utilize the roads analysis, the Forest Service Manual specifically requires the Forest Service to “make travel management decisions that are informed by travel analysis.” FSH 7709.55, Ch. 21(3). The DEIS statement that it did not integrate or “inform” the TMP with the previous roads analysis is an admission that the ANF chose to ignore Forest Service policy and direction, which is otherwise binding on the ANF. *Everett v. United States*, 158 F.3d 1364, 1369 (9<sup>th</sup> Cir. 1998) (holding that while the manual does not have the force and effect of law it provides interpretation of the rules and guidance in its application). The Forest Service adopted the travel manual with notice and public comment and intended that it be followed by individual forests.

Thus, although the identification of the minimum road system pursuant to 36 C.F.R. 212.5(b)(1) and the designation of routes and areas pursuant to 36 C.F.R. 212.51 are independent regulatory requirements, the Forest Service stated that the travel analysis “can and should be used for both.” 73 Fed. Reg. at 74692.

As further required by agency directive, the Forest Service must utilize “appropriate public involvement to identify key roads analysis issues.” FSH 7709.55, Ch.21.3. See *also* FSH 7709.55, Ch.21.11 (“obtain input from external groups, other members of the public, and other governmental agencies”). In the DEIS, the ANF admits that it did not coordinate with government agencies or the public in the roads analysis issues. When the issues were raised in scoping and at cooperator meetings, they were dismissed as being outside the scope of the EIS. See Ashley Issue and Comment Tracking (Feb. 2008).

When an agency adopts an action that is based on a study that is not designed for purpose to be made of it, the administrative action is arbitrary and capricious and a clear error in judgment. *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir.), *cert. denied*, 474 U.S. 863 (1985). Consequently, the proposed action is arbitrary and capricious unless and until the ANF incorporates a valid roads analysis phase into the travel management plan. The Forest Service must also meaningfully collaborate with the Coalition of Local Governments who have special expertise over resource and access issues and with the public.

Because the Forest Service assigned different road numbers and reportedly cannot provide a cross-index, the Coalition of Local Governments could not evaluate the factual, scientific, and biological basis for the roads to be closed (Appendix A) against the previous work done in 2005. The Forest Service assumption that it has the discretion to prepare a travel plan while ignoring its underlying roads / travel analysis or by not fully disclosing it, is wrong. Because this was to be one of the most important first steps in travel planning, the ANF must start the travel planning process again with additional information, including a comprehensive inventory and roads analysis and a determination of jurisdiction.

## **V. NEPA PROCEDURES VIOLATED**

### **A. The DEIS Fails to Disclose and Analyze the Roads to be Closed to Public Use**

#### **1. Meaningful Public Comment Stymied**

The DEIS fails to fully disclose the effects of the proposed action and fails to fully inform the public, so it can make meaningful and informed comments. The DEIS entirely omits an estimated 1,436 miles of roads that the Forest Service considers unauthorized or unclassified, without first delineating or identifying the public, outstanding or reserved rights-of-way over which the Forest Service has no authority DEIS at 2-12.

The ANF DEIS failure to make the effort to inventory the affected roads and trails, to display them on the maps for the 'no action' alternative, and to analyze the respective environmental, social and economic impacts of their closure violates NEPA. The Coalition of Local Governments and the public cannot fully understand the scope or impacts of the proposed action, because so many roads and trails are omitted and not displayed. In addition, most of the 4000 series roads analyzed in Appendix A are not on the maps and are not described either by nickname or location. The format used in the DEIS makes it impossible to determine their locations or what impacts the proposed action will have. See Exhibit E, Analysis of DEIS Appendix A, Roads Omitted from DEIS Maps displaying omitted roads and previous history.

The DEIS violates NEPA as a matter of law. NEPA's twin aims are informed decisionmaking and meaningful public involvement. *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). In Wyoming, when the subject matter of a proposed action concerns access, the failure to "provide sufficient information to identify existing roads" in the project area is a *per se* violation of NEPA. *Wyoming v. USDA*, 570 F. Supp.2d 1309, 1326 (D. Wy. 2008) (setting aside roadless rule prohibiting road construction or reconstruction and timber harvesting in inventoried roadless areas); see also *California v. Block*, 690 F.2d 753, 764-765 (9<sup>th</sup> Cir. 1982) (setting aside the national roadless area evaluation EIS in part due to the failure

of the EIS to include individual analyses of the proposed roadless area units so the public could not provide specific comments). Like the doomed 2000 Roadless Rule FEIS, the DEIS proposes to make significant changes in forest management without providing the site specific information to the public.

By the ANF's own admission, the DEIS does not reflect all of the roads and trails to be closed to public use and reclaimed. DEIS at 1-4 ("The exact mileage of unauthorized and undesignated routes existing on the Forest is unknown and obtaining a complete inventory of all unauthorized and undesignated routes is not considered reasonable due to the extensive number of routes over the entire forest and the exorbitant cost and amount of time that would be associated with such an inventory"). This is an admission that the DEIS does not contain the best available data or even the data necessary to inform the public or decision makers of the scope and impacts of the proposed action.

Under NEPA, the Forest Service may not refuse to conduct an inventory when the impacts of the proposed action on the over 1,400 miles of unauthorized roads and trails would clearly be significant. DEIS at 2-5 (non-system routes would be closed and stabilized, reclaimed, or obliterated as funds allow). The Forest Service cannot make an informed decision when it fails to consider "every significant aspect of the environmental impact of a proposed action." *Baltimore*, 462 U.S. at 97. The public cannot make meaningful comments when they have no way of knowing which routes will be closed and how crowded the remaining recreation access will be. The difficulty of commenting is demonstrated with the ANF public comment sheet that asks the public to identify routes that are omitted and to specify how they are used. The structure and omitted information in the DEIS prevents the public from identifying the omitted roads and trails, since the DEIS does not show all of the routes omitted and many of the applicable maps cannot be read without a large computer screen.

The ANF, therefore, must restart the DEIS and complete an inventory of all roads and trails within the ANF in consultation with the Coalition of Local Governments and other agencies with jurisdiction over rights-of-way. *Wyoming*, 570 F. Supp.2d at 1323 (EIS set aside for NEPA violations where "the Forest Service also acknowledged that these maps did not contain the best data available, even though it had access to better

data for the maps"). The cooperating agencies and the public cannot "meaningfully 'participate' in determining the scope and significant issues to be analyzed in the EIS." *Id.* at 1333. The ANF cannot claim that it did not have the data on one hand and then tell the public that they just did not get around to putting the other roads listed in Appendix A on the maps.

## **2. Significant Impacts on Recreation Use Omitted from DEIS**

The FGNRA attracts weekend and vacation visitors year-round for hunting, fishing, hiking, camping, and boating. At least 75% of the ANF visitors live within a few hours' drive and are residents of the nearby counties in Wyoming and Utah. As the ANF Supervisor has often stated, motorized recreation use on the ANF has increased about 616% since 1986. These recreation users cannot even determine if their routes are to be reclaimed and closed, because they are not on the maps and are not analyzed in the DEIS. Appendix A is entirely inadequate because it is impossible to link the identified routes to maps in the DEIS or even previous Forest Service maps. The routes are not identified by township, range and section and the DEIS uses road numbers not previously used on earlier ANF travel maps.

The Supervisor's statements that these roads were closed previously is not true for all. These roads were not posted and the closures were not enforced. Thus, the Supervisor's alleged 'secret closures' cannot provide the basis to omit these roads and trails from the maps, the DEIS analysis or the No Action Alternative. Their omission greatly misrepresents the extent of recreation closures and skews the entire EIS in violation of NEPA's full disclosure and meaningful public input mandates. The omission taints every aspect of the DEIS from conformance with the LRMP to the analysis of the environmental and recreation impacts.

Until the Forest Service adequately inventories and identifies the unauthorized routes in the ANF, the Coalition of Local Governments "cannot meaningfully provide input on the scope of the proposed EIS by commenting on the direct, indirect, and cumulative impacts" of the ANF TMP. *Wyoming*, 570 F. Supp.2d at 1333. The same is

true with respect to the significant differences between the DEIS Appendix A and the maps which must be reconciled.

Consequently, the DEIS is fatally flawed and the Forest Service must start over beginning with adequate scoping: "With NEPA's purpose in mind-adequate and full disclosure-maps accurately depicting the areas covered by the Roadless Rule are the most basic and fundamental information needed to begin the scoping process.". *Id.*

## **B. Narrowed Scope of Proposed Action Excludes Connected and Cumulative Effects in Violation of NEPA**

### **1. Cross-Country Motorized Use Distinguished**

The Utah and Wyoming counties learned only a week ago that the ANF Supervisor has redefined the proposed decision from a travel management plan to summer off-highway vehicle (OHV) designation. The efforts by the ANF to redefine the nature of the travel decisions also violates NEPA. It also violates the Forest Service travel planning rules and policies by not meeting the criteria for a TMP set out in the manual and handbook. FSH 7709.55. While OHV use can be part of a TMP or it can be separately addressed, the ANF cannot tell the public it is preparing a TMP, then call it an OHV decision, but still effect road closures. By attempting to obscure the decisions to be made, the DEIS also fails to fairly and accurately disclose the proposed actions in the preferred alternative and its direct, indirect, and cumulative effects. Alternatively, the ANF Supervisor is misrepresenting his proposed decision to placate objections, even though he has ample authority to close the ANF to cross-country motorized vehicle travel without an EIS. Strangely, the 2007 scoping map shows that the ANF is already closed to cross-country motorized vehicle travel.

Supervisor Elliott told the cooperators on June 30, 2009 that the decisions in the DEIS would be limited to summer motorized OHV use and any closed designations in the EIS would not lead to a physical closure and reclamation of a road or trail without additional NEPA analysis and public comment. The Supervisor did acknowledge that the roads designated as closed could be gated. According to the Supervisor, the DEIS

is only being done to regulate summer OHV motorized vehicle use on the ANF. The Supervisor's statements do not match the record to date.

There were two public hearings held in Sweetwater County where the Coalition received more than 91 written comments in addition to the public testimony. In virtually all cases, the public urged the Forest Service to not close any road or trail. Because the DEIS does not disclose all of the affected routes to be closed, the public was hard pressed to identify by forest road number or to identify which of the routes listed in Appendix A were most important to them. Nevertheless, the consistent comment was to not limit public access by closing any road or trail.

Significantly, these comments did not promote unlimited cross-country motorized access. The Forest Service, in its efforts to sell the TMP, have pointed to OHV abuses as requiring the closure of roads and trails. These are two very different land uses and the ANF improperly equates cross-country OHV use with motorized vehicle use on existing roads and trails. The Forest Service has ample authority to prohibit cross-country motorized use without preparing a travel plan and has done so. 36 C.F.R. §261.51. The TMP proposes to close a significant percent of the roads and trails in the FGNRA and that requires substantially more evidence of need. Instead, the site-specific and limited erosion areas are simply a smoke screen to effect much greater limits on motorized recreation use without fully informing the public.

## **2. Record Shows DEIS Proposed Action Is a TMP, Not Merely Summer OHV Use or Motorized Cross-Country Travel**

The Supervisor's statements are at odds with the notice of intent to prepare an environmental impact statement (EIS) originally published in November 9, 2007, as well as numerous statements and text in the DEIS itself.

NEPA requires that a federal agency announce the proposed action and the alternatives from the outset. 40 C.F.R. §§1501.3; 1508.22. The 2007 notice of intent stated: "Roosevelt/Duchesne and Flaming Gorge Ranger Districts Travel Management Plan, Ashley National Forest; Duchesne, Daggett, and Summit Counties, UT, and Sweetwater County, WY.

72 Fed. Reg. 63548 (2007); 72 Fed. Reg. 67595 (2007) (extending scoping comment deadline).

The Forest Service has never published a revised notice of intent to change the proposed action from a travel management plan to only OHV designation.

In addition to the notice of intent informing the public that a travel plan would be written, the DEIS itself uses the term “travel management plan” throughout. The pagination states: “Ashley National Forest Travel Management Plan DEIS.” Moreover, the proposed action is described as a travel plan governing motorized use on forest roads and trails. In direct contradiction to the Supervisor, the DEIS also states that the undesignated and unauthorized roads will be closed and decommissioned. DEIS, §1.8, 1-10 (“This alternative [proposed action] would also eliminate approximately 328 miles of existing, undesignated routes.”); §2.2.1, 2-5 (“Non-system routes that are not displayed on the Motor Vehicle Use Map would be closed and stabilized, reclaimed, or obliterated as funds allow. Further site-specific environmental analysis is not needed to close the route but may be conducted to determine the appropriate method of closure.”). There is no provision for future comment or NEPA procedure to close roads and trails omitted from the DEIS or not mapped.

When the Forest Service addresses only OHV use, it is typically done in an EA, not an EIS. Travel management plans, which cover designation of forest roads based on the previous Part 212 roads analysis, decommissioning of roads, and regulation of all motorized uses, are almost always accompanied by an EIS. See *e.g.* 73 Fed. Reg. 41028 (2008) (Santa Fe National Forest Motorized Travel Management Plan); 73 Fed. Reg. 31054 (2008) (Salmon-Challis National Forest Travel Management Plan and Off-highway Vehicle Designation); 72 Fed. Reg. 61607 (2007) (Apache-Sitgreaves National Forest Travel Management Plan).

By comparison, an OHV designation is adopted in an EA, notice of which appears on the Forest Service web site for each forest. See *e.g.* Plumas National Forest OHV designation. As noted earlier, the Forest Service can issue an order

closing the FGNRA to cross-country motorized use pursuant to 36 C.F.R. §261.50. Thus, the real objective is to address cross-country motorized use or OHV problems outside of the roads and trails, as often stated by the Supervisor. But this was done in FGNRA in 1995 and the entire ANF was also closed to cross-country motorized use. Thus, the Supervisor's statements are confusing. Instead, it is quite clear, that the ANF recent efforts to redefine the decision and the proposed action recognize that the DEIS omits material elements for a TMP.

The Supervisor's re-characterization of the decisions to be made based on the DEIS also contradicts the communications with the cooperating agencies in the planning revision process. The ANF planning staff has told the local governments that the TMP is being done to integrate the travel management into the plan revision.

Significantly, the DEIS fails to address the objective in either the ANF LRMP or the recreation objectives that guide the FG NRA and the plan revision. Thus, there is no analysis how the proposed travel changes will meet these recreation and travel objectives. The plan revision assessment shows that at least 75% of the recreation use on the ANF consists of day or overnight visits by persons living within a three-hour's drive. Recreation Assessment (2008) at 4. About one-third of the ANF visitors camp overnight at developed campgrounds or dispersed sites near the roads. *Id.* at 9. Thus, the overwhelming majority of the recreation visitors to the ANF must use motorized vehicles, due to the fact that they are making day or weekend trips and they use the areas, which can be readily reached by vehicles. The Recreation Assessment assumes a decline in outdoor recreation, based on reduced use of national parks and fewer hunting and fish licenses. Recreation Assessment at 11, citing in *Evidence for a fundamental and pervasive shift away from nature-based recreation*, Oliver Pergams & Patricia Zaradic, University of Illinois, 2008. Motorized recreation use, as opposed to primitive non-motorized recreation, is also consistent with these trends.

Recreation use on the ANF shows steady or increase levels of outdoor recreation use, depending on hunting decisions made by the Wyoming Fish and Game Department. The ANF Recreation Assessment relied on Utah data without any Wyoming data. The conclusion to be drawn is that recreation use will remain at or

increase and that the use will continue to favor motorized vehicle travel due to the fact that 75% of the users are local and must return to work or school.

## **C. DEIS Alternatives Fail to Meet NEPA Criteria**

### **1. Omission of Material Scoping Issues Violates NEPA**

Because the notice of intent and related materials described the proposed action as a travel management plan, the local governments submitted scoping and cooperator comments identifying areas where the Forest Service needed more information regarding the roads and trails affected and needed to resolve issues of jurisdiction. These comments mirrored the important elements of any travel plan, as defined by the Forest Service road rules, 36 C.F.R. §212.55, and Forest Service travel policy, FSM 7700; FSH 7709.55.

The ANF responded that those issues were outside the scope of the EIS and would not be addressed. [Issue Tracking and Comment (Feb. 2008) provided at Cooperator Meeting]. The counties and local government cooperators told the Forest Service on many occasions during the cooperator meetings that the Coalition of Local Governments believed several of the alleged 'forest roads' were in fact private and public rights-of-way. On each occasion, the ANF responded that the issue of jurisdiction was irrelevant. The local governments also asked that the Forest Service identify the basis for its assumption of jurisdiction. More recently, the Coalition asked that the Forest Service map the roads that it assumes are unauthorized and are therefore to be decommissioned. 36 C.F.R. §212.5(b)(2) (identification of unneeded roads to be decommissioned). The ANF said that they had no time to do so and that it was not necessary.

The DEIS omitted several material scoping issues, thus violating NEPA. An agency can decide an issue is insignificant if it is covered in another environmental review or it has no significant impact. 40 C.F.R. §1501.7(a)(3). Other roads on the National Forest or NRA do have environmental effects and, thus, these related roads and the hidden decision to close all such roads must be disclosed and the effects

analyzed. The existing roads and trails are also relevant to meeting the current ANF LRMP objectives, those specifically for the FGNRA, and the plan revision.

The scoping issues are to define the scope of the EIS. 40 C.F.R. §1502.9. The scope of an EIS must include connected, similar and cumulative actions. 40 C.F.R. §§1502.14 and 1508.25. The ANF rejection of the connected and related actions, such as the omitted roads and trails, identified in the scoping process on the basis that they did not meet the Purpose and Need violated NEPA. The purpose and need does not define the scope, it is defined by the connected, similar, and cumulative actions. 40 C.F.R. § 1502.9. An EIS does not comply with NEPA when it excludes similar, connected or cumulative actions. Here the ANF Supervisor aggressively narrowed the scope of the EIS to exclude all but the roads pre-selected by the Forest Service. By excluding these roads and trails, the Forest Service artificially limited the analysis and disclosure of the impacts for the preferred alternative as well as all of the other alternatives. NEPA does not allow an agency to so narrowly define the scope of the action and exclude other related actions and their impacts.

The ANF also erred because those were precisely the issues to be addressed in travel planning. FSH 7709.55, §11.4 ¶2. (When jurisdiction over a forest transportation facility is uncertain, coordinate with federal, state, county, and local public road authorities and consult with the local Office of the General Counsel. Legal research and title searches may sometimes be necessary to establish jurisdiction over a forest transportation facility.”). See also Forest Service Manual 7703.3. Moreover, the same policy requires the Forest Service to begin with a complete inventory of all roads, FSH 7709.55, and to evaluate the necessity of the roads based on the roads/travel analysis. The ANF admits that it did neither thereby omitting the significant cumulative effects and failing to disclose those effects.

## **2. DEIS Should Have Considered an Alternative That Meets Projected Recreation Demand**

Both the TMP and the plan revision records repeatedly state that motorized recreation use of the ANF has increased exponentially and that motorized recreation

use is expected to increase 15-30%. DEIS 3-139. The recreation assessment for the plan revision even predicts that nonmotorized recreation will decline as compared with motorized recreation. Recreation Assessment p. 12. Thus, the DEIS needs to consider an alternative that provides for more motorized recreation, with upgrading roads and trails to address resource issues. Certainly the public comments that the ANF has received in both scoping and at public meetings shows a high demand for continuing the existing access. The ANF rejects the alternative of keeping all roads open on the basis that there is resource damage and it would not meet the purpose and need. But an alternative the calls for upgrading and maintaining roads and trails would. Such an alternative is also necessary to meet the Desired Future Condition (DFC) and current land use plan objectives.

#### **4. No Action Alternative Violates NEPA**

Alternative A in The DEIS ('no action alternative) misleads the public by not displaying or showing the 'unauthorized roads' on maps. The no action alternative is intended to inform the public of the extent of the change in terms, of environmental, social and economic impacts. By excluding a significant percent of the affected roads and trails from disclosure and analysis, the Forest Service minimizes the impacts, thereby violating NEPA's mandate of full disclosure.

## **VI. SPECIFIC ROAD COMMENTS**

These comments address two classes of roads and routes: those which are outstanding or reserved rights not acquired by the Forest Service and those roads and routes that are important to meeting the recreation demand in the FGNRA and elsewhere on the ANF.

### **A. ANF DEIS Incorrectly Assumes Jurisdiction Over Rights-of-way Predating NRA**

The ANF DEIS treats all 'unclassified roads' as unauthorized when unclassified roads are not necessarily unauthorized roads and trails since the ANF did not inventory

or determine the jurisdiction for all of the roads and trails. The term 'unauthorized' means that the Forest Service has researched jurisdiction and determined that there is no legal basis for the road. When the roads rule was first revised in 2001, the Forest Service distinguished between classified roads, which included forest roads, state, county, private, and other authorizations. 36 C.F.R. §212.1 (2001). Unclassified roads included "Roads on National Forest System lands that are not managed as part of the forest transportation system, such as unplanned roads, abandoned travelways, and off-road vehicle tracks that have not been designated and managed as a trail; and those roads that were once under permit or other authorization and were not decommissioned upon the termination of the authorization." 36 C.F.R. §212.1 Road (3) (2001). The 2005 TMR deleted the terms and definitions of "classified roads" and "unclassified roads" and retained only the definition of a forest road, as a road "wholly or partly within or adjacent to and serving the NFS that the Forest Service determines is necessary for the protection, administration, and utilization of the NFS and the use and development of its resources." 36 C.F.R. §212.1 (2005).

The ANF thus appears to reason that if it does not have to identify classified roads, which would have included private rights-of-way and outstanding public rights-of-way, then a travel management plan can be limited to only forest roads with all other roads being unauthorized. Unfortunately, this conclusion is incorrect. The Forest Service is also required to document Forest Service jurisdiction over roads within the National Forest System unit and to resolve disputes as to jurisdiction. FSM 7703.3.

Forest Service travel maps for the ANF dated 1991 and 1971 respectively display numerous roads as primitive roads and trails, which are not shown on the DEIS maps or which are to be closed. Exs. B, J, K. With respect to the 1971 map, these roads are reserved or outstanding rights that predate the NRA and are presumptively not forest roads. They cannot be closed without violating valid existing rights. These primitive roads provide access to inholdings and grazing allotments and many remain available for use by the recreating public.

The Coalition has analyzed Appendix A in Exhibit E identifies roads that require additional research. In many cases, the roads provide access to private, state lands or

land administered by BLM. The roads very likely existed before the NRA was established and thus meet the definition of an outstanding or reserved right. The roads also illustrate the importance of the jurisdiction step, so landowners and grazing permittees are not denied access or are required to pay fees to use roads that were previously considered valid rights.

An uncounted number of these roads and trails were expressly excluded from the land rights acquired from RSGA and the rights-of-way are outstanding rights. Other lands, including grazing allotments established under the Taylor Grazing Act (TGA), 43 U.S.C. §315, include rights-of-way for the ranchers using the grazing permit or lease. These rights-of-way were established on unreserved public lands before 1976 and are preserved under the TGA and R.S. 2477. These are also excluded from the definition of a forest road and cannot be closed. The DEIS does not make any of these important distinctions and assumes erroneously that all are 'unauthorized' and can therefore be closed and reclaimed.

The ANF admits that it never examined all of the roads and trails and thus failed to determine if they were reserved or outstanding rights. The excuse that it was too time-consuming expensive, or unreasonable does not justify violation of legal rights or Forest Service policy.

## **B. Roads and Trails Popular for Recreation Use**

The Coalition of Local Governments sponsored two hearings so members of the public could speak to the ANF TMP. The people in attendance and their written comments urged the Forest Service to not close a single road or trail. This position is certainly consistent with the documented popularity of the FGNRA (and the ANF) with residents throughout southwestern Wyoming and northeastern Utah. This also reflects the position of the Wyoming Game and Fish Department (WGFD) when it wrote to the ANF in 2007. The WGFD recommended not closing any roads and trails on the basis that dispersed rather than concentrated access provided better quality recreation and avoided crowding. See Ex. G, Letter of WGFD to ANF, April 17, 2007. The WGFD

further concluded that recreation access does not appear to have adversely affected wildlife numbers.

These comments include a tabulation of the 362 written comments, several of which list specific roads and trails by number and ask that they remain open. The summary and individual comments are provided as Ex. F. More specific information would have been provided had the DEIS provided adequate mapping and location of roads to be closed or restricted.

The Coalition also identified (by laborious map comparison) more than 110 roads in FGNRA and an approximate total of 672 roads and trails that are listed in Appendix A but which are not displayed on the maps. Because the DEIS failed to identify them by map or location, it is not possible to provide additional data about each. The DEIS relies on Appendix A but about 672 roads discussed are not mapped, but Appendix A does not inform the public that the roads or trails being discussed are not on the maps.

Several roads [1008, 1009, 1016] are closed for wildlife habitat, even though WGF D recommended that roads and trails remain open. Other roads [1006, 1102, 1112] provide access to private and state land. Other roads [1077, 1123] are closed for roadless area management or 'remote recreation' [1026, 1027], even though the FGNRA is classified as roaded natural. Several roads to be left open are also not mapped [1061, 1062, 1072]. It goes without saying that most of the unmapped roads will limit dispersed camping, *e.g.* 1199, 1196, 1157.

To add to the public frustration, the ANF has told some officials to rely on the text in Appendix A and a day later, other ANF staff told the local governments to only rely on the maps rather than the text in Appendix A.

The format and terms in Appendix A is very confusing, thus creating a likelihood that the public will comment incorrectly. First the road numbers are called "proposals" while elsewhere in the DEIS they are called forest road numbers. Second, the table uses the phrase "do not adopt" to indicate disagreement with the text below. The term

'Do not adopt' makes no sense and many people have assumed it meant the road would stay open rather than a rejection of the 'proposal' to open the road.

Many of the roads and trails to be closed are found in the inventoried roadless conservation areas (IRAs) that were identified under the Roadless Rule in 1998. The ANF roadless areas in the FGNRA were adopted by Forest Service employees outside of the land use planning and public processes. The land within the FGNRA had never been considered to be roadless and were never studied under the first or second Roadless Area Review and Evaluation (RARE). These areas are still roaded as that term is defined in agency handbook as most are accessible by motor vehicles.

### **C. Roadless Area Management Contradicts Injunction Order**

Enforcement of the roadless rule in Wyoming was enjoined a year ago, *Wyoming*, 570 F. Supp.2d at 1326, and the ANF lacks the legal authority to manage these areas under the roadless rule or to close rules. The IRAs are not part of the ANF LRMP or any plan revision. Any effort to manage these areas puts the ANF at risk for a contempt of court action where the Forest Service would have to explain the reasons that it is violating a federal court order. Previous Coalition comments objected to the classification of these areas as roadless and the ANF plan revision is not sufficiently final as to allow the ANF to implement its classification. Several roadless areas are immediately adjacent to the Wyoming Checkerboard, where the FGNRA lands are subject to private rights-of-way and significant development. Road closures in these IRAs need to be canceled as well. DEIS, App. A.

The Coalition recommends dropping the inventoried roadless areas. The Wyoming federal court held the 2000 inventoried roadless rule was unlawful not only due to the procedural violations of NEPA but also due to the fact that the Forest Service lacked the legal authority to adopt a de facto wilderness management rule. Consideration and proposed adoption of the Wyoming inventoried roadless areas is especially objectionable because the units were never part of the original RARE I or RARE II studies, in large part because these areas are not roadless. The classification of these areas occurred in Forest Service offices without any public comment or

process during the rush to adopt the inventoried roadless area conservation rule. During the exhaustive study as part of the planning process, all of these units were classified as lacking wilderness character. For all of these reasons, the units should be dropped and any disposition should be addressed in the land use plan revision.

## **VII. PREFERRED ALTERNATIVE DOES NOT CONFORM TO FOREST PLAN RECREATIONAL DIRECTION**

As required by the National Forest Management Act (NFMA), the proposed ANF TMP must be consistent with the 1986 ANF Forest Plan. 16 U.S.C. ¶1604(l). See also *Neighbors of Cuddy Mtn. v. U.S. Forest Service*, 137 F.3d 1372, 1376 (9<sup>th</sup> Cir. 1998).

If the proposed ANF TMP does not conform to the plan direction, it may not go forward unless it is modified for consistency or if the Forest Plan itself is contemporaneously amended. 36 C.F.R. §219.8(e). As demonstrated below, the ANF TMP's preferred alternative is inconsistent with the recreational components set forth in the ANF Forest Plan, and the Forest Service must either modify the proposed action to make it consistent with the plan, amend the plan to allow for the proposed action, or reject the proposed action altogether. *Id.*

### **A. Proposed Road Closures and Dispersed Recreation Restrictions Conflict with the Over-arching Recreation Goal for the Ashley National Forest**

The Forest Service agrees that the primary recreation goal for the ANF is to provide a "broad range of recreation opportunities within land capabilities and according to recognized public need" and that the "desire for motorized trail access has increased." DEIS at 3-1, 3-7 (quoting ANF Plan at IV-14). In the Uintah basin, for example, "growth in OHV use has increased 616% over eleven years." *Id.* at iii. Furthermore, "With more use has come a stronger desire for motorized trails both during the summer for recreational riding and during the fall to facilitate access to camps and hunting areas." *Id.*

Despite the recognized need to meet recreation demand for motorized access and motorized recreation, however, the preferred alternative would eliminate approximately 328 miles of existing routes in the hatched travel areas and an estimated 1,436 miles of travel routes are restricted to non-motorized use. DEIS at 1-16, 2-3. These routes would be closed and stabilized, reclaimed, or obliterated as funds allow. DEIS at 1-10, 2-5.<sup>10</sup> In addition, limited motorized access for dispersed camping would be reduced to within 150 feet of designated roads and motorized trails (current management allows for 300 feet) and camping would not be allowed within 100 feet of a water body such as a lake or live stream (excluding reservoir). *Id.* at 2-2.

The blanket road closures and dispersed camping restrictions may not be proposed without first determining whether the significant reduction in recreational opportunities is consistent with the recognized public need as required by the ANF Forest Plan. The Forest Service even acknowledges the potential adverse effects:

The action to limit motorized travel up to 150 ft. off of designated routes to access dispersed camping sites would result in excluding access to numerous historic dispersed camping locations . . . The 100 ft. camping restriction from water would affect several historically used dispersed camping sites throughout the Forest that are located less than 100 ft. from water. There would likely be some resistance resulting from this new restriction because people are naturally drawn to camping adjacent to water. Camping close to water is appealing because of fishing access; convenience in obtaining water for cooking, drinking, and washing; soothing sounds of flowing water; and often cooler temperatures.

DEIS at 3-19, 3-21.

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<sup>10</sup> As previously explained, the Forest Service incorrectly assumes ownership and control over these rights-of-way and effects their closure, without first delineating or identifying the public, outstanding or reserved rights-of-way over which the Forest Service has no authority or control. The Forest Service unlawfully classifies these “non-system” routes as “unauthorized” or “undesigned.” DEIS at iii.

As to these effects, the Forest Service merely concludes: “This does not pose any conflict with the Forest Plan as the majority of dispersed camping occurs within the F and N Management Area Prescriptions on the Forest.” *Id.* at 3-19. The prescription for dispersed recreation for Management Area F, however, provides: “Dispersed recreation is favored over other resources.” ANF Plan at IV-10. *See also id.* (management prescription for the Flaming Gorge National Recreation Area (FGNRA) provides that “[d]ispersed recreation use is high and will be managed at standard service level”).

The DEIS completely fails to identify the actual proposed travel route closures or to reconcile the inconsistency of the proposed road closures with existing management direction emphasizing recreational opportunities, especially the classification of the FGNRA for roaded recreation. Ex. H, Recreation Opportunity Spectrum Map. The consistency analysis, in fact, only addresses potential Forest Plan conflicts of **opening** administratively closed roads. *See e.g.*, DEIS at 3-22 (nine proposals to adopt motorized trails open to all vehicles to access the reservoir for dispersed camping and fishing opportunities do not conflict with current management), 3-23 (Proposal 1007 on the Flaming Gorge RD intends to open up currently administratively closed Sols Canyon road to public access and allow motorized mixed traffic does not conflict with current management), 3-26 (Proposals 3074.5 and 3074.6 located on the Roosevelt-Duchesne RD near Rock Lake aim connecting the Rock Creek and Farm Creek drainages for OHV travel do not conflict with current management), 3-27 (Proposal 1011, to adopt a motorized trail through riparian habitat, would conflict with current trail management practices and management actions the Forest has taken to reroute motorized trails off of wet meadows), 3-29 (proposals to access current dispersed camping—located over 150 ft. from designated routes having suitable historic use, with limited ground disturbance do not appear to conflict with the Forest Plan). As noted on page 25, the WGFD also supported keeping all roads and trails open to ensure high quality dispersed recreation. *See Ex. G.*

The Forest Service then summarily concludes that all “action alternatives are consistent with Forest Plan management direction.” DEIS at 3-7.<sup>11</sup> To the contrary, the preferred alternative’s **de-emphasis** on recreation access conflicts with the ANF Forest Plan’s primary recreation objective, and the DEIS must be revised to provide for a meaningful consistency review.

While the ANF Plan Revision is not even out in draft, the desired future condition written in August 2006 and the core assessments published last year confirm the major role of motorized recreation on the entire ANF and, especially, the FGNRA. Similarly, the draft Ecosystem Diversity Evaluation did not identify motorized recreation or OHV use as a widespread problem, except in the sand dunes. It generally noted risks to water quality from soil salts and increased invasive species. Ecosystem Diversity Evaluate (July 9, 2008) pp. 164-171. There was no discussion of the need to close at least 25% of the travel routes or to limit dispersed camping.

This is true regardless of whether the Forest Service considers the public’s use of these travel routes as unauthorized. The fact remains that the Forest Service has allowed the public to use the roads and trails which are the product of recognized public need and sharp increases in the demand for motorized recreation. The DEIS must address whether the recreational opportunities they provide fit within ANF “land capabilities.” ANF Plan at IV-14. The DEIS should consider how to meet current and future motorized recreation demand rather than how to restrict it.

## **B. DEIS Misstates and Completely Omits Binding Management Guidelines**

The Forest Service misstated or omitted applicable management direction for recreational use and thus failed to disclose Forest Plan inconsistencies that need adequate resolution. While the Forest Service is quick to point out that the Forest Plan allows for the obliteration of roads or trails, DEIS at 3-8, it can only do so if they are

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<sup>11</sup> The conformance or consistency review, 16 U.S.C. §1604(l), is basically non-existent with minimal resource analysis scattered throughout the document. See *e.g.*, DEIS at 3-74 (only dedicated consistency analysis and limited to soils).

unnecessary to meet Forest Service management objectives or if the road or trail is causing resource damage. ANF Plan at IV-14; Ex. G, WGFD Scoping Letter (repeating its original support for all roads in the ANF LRMP DEIS and then stating “We recommend no roads be closed unless supported by sound biological or resource data.”) Because the Forest Service did not link the roads analysis to the DEIS, we cannot evaluate that important conclusion.

Furthermore, the DEIS egregiously omits key management objectives and direction, namely, to “**retain**” travel routes. ANF Plan at IV-14. This omission is particularly arbitrary because it is recognized as of paramount importance in the current travel management plans. Flaming Gorge Travel Management Environmental Assessment, p. 3 (1995) (“Retain needed access”). The DEIS does not attempt to quantify demand or needed access by the number of vehicles or visitors. It also omits access to inholdings and permittees.

Another glaring omission is the DEIS’ failure to consider the Desired Future Condition (DFC). The Forest Service is obligated to implement the preferred alternative adopted in the 1986 Forest Plan to achieve DFC. ANF Plan at IV-1. The DFC provides for “special emphasis” on recreation because of the ANF’s “unique characteristics, public demand, and management direction.” Thus, “Recreation facilities, including the trail system as dispersed areas and developed sites will be upgraded and maintained at acceptable standards and new improvements added to provide meeting public resource needs. The present mix of various recreation activities and opportunities that exist today are expected to continue into the future. Developed and dispersed area recreation demand will be met. . . “ *Id.* at IV-3. The DEIS omits any discussion of DFC.

The draft plan revision does not change the recreation objectives and would increase motorized recreation.

Opportunities to enhance tourism and serve a growing local population are sought out, such as promoting the existing Scenic Byways and Backways, highlighting day use activities, providing opportunities for aging and

physically challenged Forest users, and providing additional interpretation and education for historic and natural resources in the area.

August 2006 draft DFC p. 6.

The transportation system provides the access needed to maintain facilities and infrastructure such as buildings, recreation facilities, municipal water systems, dams, reservoirs, range improvements, vegetation treatments, mine sites, oil and gas wells, electronic and communication sites, utility corridors, transmission lines, and gas and water lines.

August 2006 draft DFC p. 7.

Each of the above recreation uses requires motorized vehicles for access and recreation. In fact, the dispersed recreation opportunities currently provided can only be restricted when visible indicators are triggered, such as when the overstory shows signs of damage due to competition and root exposure. Otherwise, the Forest Service must “[m]aintain current use level and management practices.” ANF Plan at D-1, Limits of Acceptable Change (Dispersed Recreation) D-1.

The DEIS proposes to close roads to stock water ponds on the grounds that they are in an IRA or conflict with meadows (within the grazing allotment). See *e.g.* DEIS, Appendix A, §§2021, 2270. This, too, is inconsistent with the ANF LRMP and plan revision’s draft DFC.

The ANF also unlawfully ignores supplemental plan direction for the FGNRA, which takes precedence. ANF Plan at IV-57. The supplemental direction was provided because of the FGNRA’s unique statutory purpose: 1) public outdoor recreation benefits; (2) conservation of scenic, scientific, historic, and other values contributing to public enjoyment; and (3) such management, utilization, and disposal of natural resources as in his judgment will promote or are compatible with, and do not

significantly impair the purposes for which the recreation area is established. 16 U.S.C. 460v-1,. Pub. L. 90-540, Sec. 2, Oct. 1, 1968, 82 Stat. 904.

In implementing this statutory mandate, the FGNRA supplemental direction adopted several pertinent management decisions pursuant to which the proposed ANF TMP must conform: (1) continue to provide a high quality, varied recreation experience to the full capacity of the area; (2) give special consideration in planning to providing for the increased use of vehicle campers, trailers, and motor homes; (3) provide for public access to shoreline areas; both trails and roads are needed; and (4) coordinate with other federal, state, and county agencies in transportation system planning. ANF Plan at A-1, A-7, A-8, A-21.

The Forest Service's failure to address and resolve the DEIS' clear inconsistencies with the foregoing Forest Plan direction, especially as the preferred alternative, renders the DEIS fatally flawed. Both the current 300 foot dispersed camping allowance and the public's current use levels are presumptively consistent with the Forest Plan, unless the Forest Service can show resource damage on a site-specific basis.

The ANF Forest Plan classifies the entire FGNRA as roaded natural recreation opportunity spectrum. Ex. H, Recreation Opportunity Spectrum Map for FGNRA. The proposed decisions also contradict the recreation management direction without explanation or acknowledgment of the inconsistency with current land use management.

### **C. Proposed 150 Foot Dispersed Camping Requirement Unfounded and Contrary to Regulation**

One of the identified goals for the ANF TMP is to: “[I]ncorporate consistency in travel management practices with other Utah Forests. This includes limiting dispersed camping to within 150 feet of designated routes, and where appropriate, within specified time periods.” DEIS at 1-2. There is, however, no Utah Forest Service directive requiring or encouraging the use of the 150 foot dispersed camping rule. Indeed, in

Wyoming, the Forest Service continues to use the 300 foot dispersed camping rule. See Travel Plan Decision Notice, Wasatch-Cache National Forest, p. 4 (2003) (allowing travel up to 300 feet off designated open roads for dispersed camping).

In fact, the ANF Supervisor misled the Wyoming public when he represented that the ANF TMP would not change dispersed camping limits in Wyoming. *Casper Star Tribune On-Line* (May 20, 2009) (“Elliott told residents the dispersed camping limits would remain at 300 feet in Wyoming”), <http://www.trib.com/articles/2009/05/21/news/wyoming/d436841bc9b311d6872575bc0081a2a0.txt>: To the contrary, all action alternatives propose reducing the distance to 150 feet throughout the ANF. DEIS at 3-15. Recently, the ANF Supervisor has also stated that the Forest Service would not necessarily enforce the 150 foot rule. This simply opens the door to arbitrary enforcement and suggests that the standard itself is arbitrary and not founded on sound site specific data.

The across the board proposed 150 foot dispersed camping requirement is also contrary to the 2005 Travel Management Rule, which provides for dispersed camping: “In designating routes, the responsible official may include in the designation the limited use of motor vehicles within a specific distance of certain designated routes . . . solely for the purposes of dispersed camping. . .” 36 C.F.R. §212.51(b). USDA promulgated this rule to address specific local needs and provided that “designation decisions should be made at the local level, based on site-specific evaluation of local conditions and public involvement.” 70 Fed. Reg. 68264, 68274 (2005).

The ANF, therefore, may not apply a blanket dispersed camping limit on all roads and trails without conducting a site-specific evaluation consistent with Forest Plan management direction and with full public consultation. The DEIS instead adopts the blanket standard based on an alleged Utah guideline that was not officially adopted by Region 4 in accordance with public notice and comment procedures. 36 C.F.R. Part 216.

The ANF defends the 150 feet dispersed camping as necessary to be consistent with Utah policy. While the Forest Service can adopt regional guidelines, this has not

occurred in conformance with the planning rules, 36 C.F.R. §219.12(b)(2) (requiring procedures adopting regional guidelines to include notice and comment in accordance with 36 C.F.R. Part 216).

The Forest Service precedent for dispersed camping provided for 300 feet from existing roads and trails in the 2000 BLM and Forest Service Off-Highway Vehicle Plan and FEIS for Montana, North and South Dakota. The Forest Service Record of Decision explained the decision not to adopt the 150 feet or the 50 feet limits considered in the FEIS.

Alternative 5 allows for dispersed camping within 300 feet of a road or trail provided recreationists use the most direct route and select their site by nonmotorized means. This greater distance than in alternative 1 (50') was important particularly in areas without any developed campgrounds. This allows people to move away from the dust and noise generated on the road or trail. Agency recreation specialists expect relatively little use of this exception, as most popular dispersed campsites already have a road accessing them.

Off-highway Vehicle Record of Decision and Plan Amendment for Montana, North Dakota and Portions of South Dakota (January 2001) p. 6.

The DEIS fails entirely to analyze the issues of dust and noise by limiting camping to within 150 feet of the designated roads. It also fails to address the public safety issues of families camping that close to a road with traffic, when the traffic that will be heavier due to the other road closures.

## **VIII. CONCLUSIONS**

The DEIS suffers from significant omissions in data and information that prevents the public and local government cooperating agencies from effectively providing public comments. The omissions relate in large part to the ANF's failure to follow Forest Service rules, manual and handbook for travel planning.

Notwithstanding the time and effort, the DEIS is so fatally flawed by lack of data, poor data and information that it must be revised entirely. This should occur because the TMP in its present form will reduce recreation use of the FGNRA or crowd people into smaller areas and fewer roads and trails, thus failing to meet the management objectives for which the FGNRA was established and the current land use plan objectives.

As stated at page one of these comments, the ANF needs to take a number of discrete steps to meet the legal and factual requirements for a TMP. Failure to follow these steps will force the local governments to carefully consider other legal avenues to ensure that the public access to this recreation resource is protected and that high quality recreation use is preserved throughout the NRA.