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August 19, 2005

Jack Blackwell
Regional Forester
USDA Forest Service - R5
1323 Club Drive
Vallejo, CA 94592

RE: USFS Region 5 Route Designation Guidebook

Dear Regional Forester Blackwell:

Our office represents the BlueRibbon Coalition, Inc. ("BlueRibbon"), as well as numerous other organizations dedicated to preservation of responsible recreational access to public lands. BlueRibbon is an Idaho nonprofit corporation representing over 1,100 businesses and organizations with approximately 600,000 members nationwide, whose members use motorized and nonmotorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access U.S. Forest Service-managed lands throughout the country, including such lands in the Service's Pacific Southwest Region. BlueRibbon has a long-standing interest in the protection of the values and natural resources found on these lands, and regularly works with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors. These efforts have included participation in both the administrative process and the courtroom, including as Defendant-Intervenor-Cross-Claimants in *Center for Sierra Nevada Conservation v. Berry*, Case No. CV 02-325-LKK, involving travel management issues on the Eldorado National Forest.

We are writing to express our concerns about aspects of the "Route Designation Guidebook" being circulated by your office. Portions of the Guidebook arguably violate existing law and Forest Service policy guidance. Specifically, "Step 2" of the Guidebook asserts that

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California Forests can properly issue Forest-wide “interim orders” under 36 C.F.R. § 261.50 to prohibit all vehicle travel “off mapped roads, trails, and off-route use areas.” Guidebook at 21 (derived from 2/27/05 amended version available at <http://www.fs.fed.us/r5/rwhr/ohv/route-designation/index.html>). BlueRibbon believes that Step 2 as written presents unacceptable risks that vehicle road, trail and area designations will be undertaken in violation of required procedures.

There are numerous flaws in Step 2. While suggesting the “public be involved in this process” and hoping for public support for its “interim actions” Step 2 does not require compliance with the National Environmental Policy Act (“NEPA”). To the contrary, the assertion that Forest-wide “interim” management can be accomplished via part 261 orders effectively implies NEPA compliance is not necessary for road, trail or area closures. Even the Service’s own analyses reject this conclusion. For example, Appendix J to the Guidebook is an opinion from Region 5 OGC which concludes “any decision designating ORV routes and areas must be supported by an environmental analysis and decision under NEPA.” *Id.* at 85 (Appx. J).

We comprehend that the Guidebook attempts to characterize the Step 2 “interim actions” as something other than route designation. See, Guidebook at 21 (“Step 2 does **not** designate roads, trails, or areas for OHV use, **nor does it close** existing trails, roads, and off-route use areas that are currently managed as open unless vehicle use is causing or will cause considerable adverse effects.”) (emphasis in original). This position is flawed on multiple levels. First, we fail to understand how a decision restricting travel solely to “mapped” roads, trails and areas does not “close” all unmapped roads, trails and areas. Additionally, there are numerous Forests that are either in an “open” travel status or which have meaningful opportunities on motorized routes that were legally created while the Forest was in an “open” status. These routes can be closed only through a decision document and supporting site-specific analysis. Further, and understanding that “interim” closure can be performed in compliance with existing regulations at parts 295 and 261, the quoted language in the Guidebook misstates the applicable standard for such “interim” closure. The Guidebook standard purports to “not close” trails, roads and areas “that are currently managed as open unless vehicle use is causing or will cause considerable adverse effects.” *Id.* This standard improperly creates a two-pronged standard, framed in the conjunctive, requiring a Forest Supervisor to determine that a route (or area) is both “currently managed as open” and that the route (or area) is not receiving use causing “considerable adverse effects.” In addition to misstating the standard set forth at the presently-applicable 36 C.F.R. § 295.5, the Guidebook language implies that the Forest can correctly institute closures via interim order for routes not recognized as being “open.” In other words, the onus is on those defending

continued access along existing routes to establish their “open” status, as opposed to the proper interpretation which would recognize that existing routes not formally closed are open to travel.

We also question the specified two-year (or longer) term for interim prescriptions stated in Step 2. Existing regulations require annual review of the “off-road vehicle management plan[.]” 36 C.F.R. § 295.6. If changes to the plan are attempted, “the public will be given the opportunity to participate in the review as stated in § 295.3.” *Id.* Section 295.3 describes the nature of public participation, including at least “[s]ixty days advance notice...for public review....” Section 295.3 additionally clarifies that any action taken without such public process can only occur “[i]n emergency situations” and for a period of “up to one year....” *Id.* Properly understood, the “interim orders” outlined in Step 2 can be instituted only where an “emergency” exists and even then can only last for up to one year. Such orders must be reviewed at least annually by the applicable Forest Supervisor who shall provide for appropriate public involvement in the review process.

Central to our analysis, but apparently overlooked in the Guidebook, is the November 6, 1995, “consolidated decision” issued by the Washington, D.C. Office of the Forest Service on the appeals from the 1989 Eldorado Forest Plan. In relevant part, the 1989 Decision attempted to change the Forest’s travel management status from an “open” to a “restricted to designated trails” designation. In addition, the Forest issued a 1990 “ORV Plan” which sought to effect vehicle use designations for specific routes and areas. The Chief’s Consolidated Decision rejected this approach, finding:

We conclude that the decision in the Forest Plan to permit ORV restrictions in the General Forest management areas complied with appropriate procedures (NEPA and 36 CFR 295.3) for a programmatic decision. However, we find no site-specific analysis to implement the 1990 ORV Plan. Therefore, the Regional Forester (through the Forest Supervisor) is directed to disclose the environmental consequences of the decision in the ORV Plan to restrict use to designated routes in General Forest areas. In particular, the environmental effects of increased concentration of use on open trails and the effect on visitor experiences should be addressed. Reasonable alternatives for managing ORV use in General Forest areas should be explored, including the No Action alternative.

CSNC v. Berry, Administrative Record at 981. The Consolidated Decision further held:

The new ORV Plan incorporated the environmental analysis of the Forest Plan, but no further NEPA documentation was conducted. Because the designation of

open travel routes or closed areas is a site-specific decision, the effects and rationale for the decision must be disclosed at the time there is an irretrievable commitment of resources and cannot be deferred (Sierra Club v. Hathaway, 579 F.2d 1162, 1168 (9th Cir. 1978)).

Id. (emphasis added). This reasoning was adopted and expanded upon by Judge Karlton in declaring the 1990 ORV Plan to be in violation of NEPA:

It is well-known that “the nature and scope of [a] proposed action will determine the extent of detail, analysis, and information an adequate statement must contain.” California v. Bergland, 483 F.Supp. at 473 (citing Atlanta Coalition v. Atlanta Regional Comm., 599 F.2d 1333, 1344 (5th Cir. 1979)). Here, the forest-wide scope of the ORV plan dictated that the environmental analysis required likewise be forest-wide. Further, it is essential to a meaningful environmental analysis that such analysis be conducted before the plan’s adoption, because, as noted, NEPA does not permit an irretrievable commitment of resources to be implemented beforehand. Here, closures of ORV use areas and trail designations were allowed forest-wide, thereby triggering the duty to conduct specific analysis. Accordingly, the 1990 ORV Plan was adopted and is operating in violation of NEPA.

Order at 53-54, *CSNC v. Berry* (E.D. Cal., Feb. 16, 2005). We believe the same analysis would apply with even greater force to Forest-wide designations (or closures) attempted through an “interim” order.

As you are aware, the Forest Service is in the process of evaluating comments upon a proposed rule which will establish new procedures for designation of roads, trails and areas for vehicle use. Without attempting an exhaustive analysis here, we believe the Guidebook’s approach is inconsistent with the provisions of the proposed rule. At a minimum, it would be logical for the Pacific Southwest Region and California Forests to wait for, and comply with, the provisions of the final rule that will likely be released later this year by the Washington Office.

At most, we believe that the part 261 interim order authority can be used to close specific areas to vehicular travel for periods of not more than one year, provided the Forest analyzes and documents the resource damage and/or user safety protection rationale justifying the specific restrictions. Part 261 is not designed, and should not be used, to effect Forest-wide closures to public access. Our clients appreciate, and generally join in, the Service’s desire to mitigate or reverse isolated adverse impacts associated with “cross-country” travel. However, blanket

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closures via “interim order” are not a reasonable way to address these concerns. Rather, each Forest should assess site-specific needs and take appropriate action justified by its site-specific analysis. Where possible, the public should be fully involved in all aspects of this process, including the opportunity for notice and comment under the NEPA.

We appreciate the complexity of the task and related procedural history before the agency. Our clients wish to facilitate and participate in a meaningful and legal route designation process. However, the Guidebook appears to advance the position that an “interim” order can close all but “mapped” and “open” roads, trails and areas without any formal NEPA process, let alone an environmental impact statement. This position is untenable. Our clients have instructed me to advise you, should the Forest Service continue progress toward implementation, that they will direct us to formally challenge such a position.

We look forward to your response to these concerns. We request that you provide some response within thirty (30) days of the date of this letter in order to facilitate appropriate resolution of this issue.

Sincerely,

MOORE SMITH BUXTON & TURCKE,
CHARTERED

A handwritten signature in black ink, appearing to read 'Paul A. Turcke', with a stylized, cursive flourish at the end.

Paul A. Turcke

/PAT

cc: BlueRibbon Coalition