

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

UNITED FOUR WHEEL DRIVE)
ASSOCIATIONS, INC.,) 06_****
TWO TRACKERS FOUR WHEEL DRIVE CLUB)
Appellants,)
v.) Notice of Appeal of the Huron-Manistee
UNITED STATES FOREST SERVICE,) National Forests, Final Land and Resource
HURON-MANISTEE NATIONAL FORESTS) Management Plan, Final Environmental
Impact Statement, and Record of Decision

Appellee.

NOTICE OF APPEAL AND STATEMENT OF REASONS

August 23, 2006

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I. INTRODUCTION

Pursuant to 36 C.F.R. 217, on behalf of its members, United Four Wheel Drive Associations, Inc. (UFWDA) and the Two Trackers Four Wheel Drive Club (hereinafter referred to as “Two Trackers”), by and through undersigned counsel, files this appeal of the Forest Service’s Huron-Manistee National Forests Revised Land and Resource Management Plan (Forest Plan), Final Environmental Impact Statement (FEIS), and Record of Decision (ROD). The March 20, 2006 decision, issued by Randy Moore, Regional Forester, Responsible Official, implements with modifications, Alternative B of the Final Environmental Impact Statement (FEIS). The decision notice was published in the Milwaukee Journal Sentinel on May 30, 2006.

II. REQUEST FOR RELIEF

To eliminate the need to pursue further administrative and legal remedies, UFWDA and the Two Trackers request the Forest Service supplement or amend the Huron-Manistee National Forests ROD, EIS, and Forest Plan to satisfy the legal, analytical and procedural inadequacies established below.

As grounds for the requested relief UFWDA and the Two Trackers shows how the Forest Plan chose road density guidelines that are arbitrary and capricious, unreasonable, and are not feasible or practicable to attain in whole or in part through site-specific implementation; how the Forest Plan failed to consider amending the current trail restriction to vehicles fifty inches (50”) or less in width; how the Forest Plan chose specific Recreation Opportunity Spectrum classifications for certain areas that are arbitrary and capricious; how the Forest Plan instituted transportation guidelines for closing roads to motorized vehicles in MA 6.2, SPM, in contradiction to the purpose of the MA, contradiction to desired future condition, and in contradiction to goals and objectives; and how the Forest Plan exceeded what is required under the Endangered Species Act (ESA) in establishing Recreation, Wilderness, and Related Resource Management guidelines for trails, therefore rendering the guideline legally unsupportable.

III. ARGUMENT AND STATEMENT OF REASONS

A. THE DECISION MAKER ERRED IN ESTABLISHING ROAD DENSITY GUIDELINES THAT ARE ARBITRARY AND CAPRICIOUS, UNREASONABLE, AND NOT FEASIBLE OR PRACTICABLE TO ATTAIN.

1. There is an estimated 10,400 miles of roads existing within the Forests' boundaries, resulting in an average road density of 3.2 miles per square mile. Of the total miles, approximately 6,670 miles are state and county roads and 3,730 miles are National Forest System (NFS) roads. FEIS at III-319. Maximum average miles of road per square mile guidelines provide 0-3 miles of road per square mile dependent upon the type of road and the Management Area within which the road lies. Table II-13, Forest Plan at II-40. These road density guidelines are expressed in a range of the minimum density to the maximum density used as a guideline to reach the desired future condition for the forest.

The US Forest Service jurisdiction over the 10,400 miles of roads existing within the Forests' boundaries is limited to the 3,730 miles of National Forest System roads. The agency does not have jurisdiction to close any of the 6,670 miles of state and county roads existing within the Forests' boundaries. The maximum density goal for local, collector, and arterial roads is 2 miles per square mile. *Id.*

Road density calculations are based on the number of all road miles (NFS, state, and county) occurring within the proclamation boundaries which encompass approximately 2,021,900 total acres. FEIS at III-1. If the agency closed each of the 3,730 miles of NFS roads within its jurisdiction, the average road density of 3.2 miles per square mile would only be reduced to 2.11 miles per square mile. A road density of 2.11 miles per square mile fails to meet even the maximum road density guideline, let alone approach the minimum road density guideline of 0 miles per square mile. Since the Forest Service is

limited by jurisdiction to closure of only NFS roads, the road density guidelines are unattainable even if every single mile of the 3,730 miles of NFS roads were closed. For these reasons the 0-2 miles per square mile road density guidelines are impracticable, unreasonable, and arbitrary and capricious.

2. In response to UFWDA and the Two Trackers' comments regarding the public's inability to offer meaningful analysis and comments regarding semiprimitive motorized/nonmotorized allocations and road and trail density issues as a result of the unavailability of maps and the location of roads and trails as part of the proposed plan and Draft EIS the agency stated the Council on Environmental Quality regulations does not require that detailed supporting information be included in the documents only that it be a part of the planning record and available for public review. The agency further responded the planning record contains this information. FEIS at J-89.

However, when asked by UFWDA to provide the mileage of roads per management area the agency indicated such information was unavailable. Telephone conversation with Lee Evison, Forest Analyst. If the agency, experts of its own planning record, is unable to gather such information the public surely can not be expected to gather the information by comparing lines on a map from the two forest maps for the Huron and the Manistee National Forest prepared at a different scale than the planning record. Even if the public possessed the skills and knowledge base to make such a comparison between data in the planning record and the forest maps, a mere approximation is all that could be developed based on the scale and legend of the forest maps and the size of linear representations of the roads and trails on said map.

Furthermore, in contrast to the agency's characterization of the CEQ regulations, the agency is required to prepare a draft statement that is adequate to allow meaningful analysis and make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives. 40 C.F.R. 1502.9(a). In addition, the agency's characterization that detailed supporting information need not be included in the documents and merely be available for public review is not accurate. The CEQ regulations require either that the material be circulated with the environmental impact statement or *be readily available upon request* (emphasis mine). 40 C.F.R. 1502.18(d). Of interest is the fact that the agency did provide maps indicating the locations of highways and local roads, presumably not even within agency jurisdiction, but was unable or unwilling to provide the locations of Forest Service System roads on these same maps. The unavailability of road mileage and trail mileage per management area rendered it extremely difficult for the public to comment on the validity of road and trail density guidelines and management area prescriptions.

B. THE DECISION MAKER ERRED IN FAILING TO CONSIDER FOR STUDY AMENDING CURRENT RESTRICTIONS ON TRAILS TO VEHICLES FIFTY INCHES (50") OR LESS IN WIDTH.

UFWDA and the Two Trackers provided comment regarding the Draft EIS pointing out the distinction made in the Draft EIS between Off-Highway Vehicles and Off-Road Vehicles and the concern that 4x4 motor vehicles would be excluded from the use of trails in the final forest plan. FEIS at J-68, PC#158.

The concerns raised by UFWDA and the Two Trackers have materialized in the final plan. On the Huron-Manistee National Forests, Off-Highway Vehicle trails are designed to accommodate vehicles 50 inches wide or less (revised Forest Plan, page II-13, VIII, D, 8). Trails for larger vehicles may be

developed after a site-specific analysis consistent with management area direction. This is unlikely as current road densities discourage new trails from being developed. Street legal vehicles, larger than 50 inches, may use the forest road system. FEIS at J-68.

This response is unsatisfactory on several levels.

1. The Response to PC#158 confuses the issue of road density guidelines and trail density guidelines when stating that it is unlikely that **trails** for larger vehicles may be developed after a site-specific analysis consistent with management area direction [because] current **road** densities discourage new trails from being developed (emphasis mine). *Id.*
2. As pointed out in Section III(A) of this appeal, the road density guidelines are arbitrary and capricious because they are unattainable and impracticable even if every single mile of road were closed by the agency, including Maintenance Level 3-5 roads, in an attempt to achieve the desired future condition.
3. The forest currently has an average trail density level of .22 miles per square mile, well below the average trail density guideline indicated in the final plan at 1.4 miles per square mile. Table III-37, FEIS III-304, averaged irrespective of Management Area.
4. The trail density guideline would not limit future trail expansion [for the chosen Alternative], except in Management Area 7.1 where existing trail density exceeds the guideline. FEIS at III-303.

Perhaps the agency response to PC#158 is an error in semantics between road densities and trail densities, which only serves as a clear example of the bias and tendency permeating the agency that trails are, by definition, limited to off-highway vehicles fifty inches (50”) or less in width. The Forest

Plan is in error of its own agency regulations and policy which in 2002 removed from the USFS trail definition the fifty inch (50”) vehicle width limitation for trails.

http://www.fs.fed.us/r3/measures/Inventory/trails%20files/Trail_Definition.doc. This error emphasizes the legitimacy of UFWDA and the Two Trackers’ comments in response to the DEIS and further serves to validate the argument in this appeal that the decisionmaker erred in failing to consider for study amending the 1986 forest plan restrictions on trails to vehicles fifty inches (50”) or less in width.

C. THE DECISION MAKER ERRED IN CHOOSING SPECIFIC RECREATION OPPORTUNITY SPECTRUM (ROS) CLASSIFICATIONS FOR CERTAIN AREAS.

On the Manistee National Forest the White River, Whalen Lake, and Condon Lakes West areas are allocated to Management Area (MA) 6.1, Semi-Primitive Non-Motorized (SPNM). Forest Plan at III-6.1-3, Table III-8. The desired future condition, in relevant part, is to emphasize nonmotorized use. Forest Plan at III-6.1-4. The desired future condition for the three areas listed above is not practicable as each area is currently utilized heavily by motorized recreation. The Forest Service estimates that nearly 1.5 million residents participate in OHV recreation in Michigan. *Off-Highway Vehicle Recreation in the United States, Regions and States: A National Report from the National Survey on Recreation and the Environment (NSRE)*, June, 2005. H. Ken Cordell at page 15. Table 6. It is arbitrary and capricious for the agency to attempt to mold these areas into a nonmotorized desired future condition when failing to consider the current OHV demand, future demand, and the current situation of these areas utilized heavily by motorized recreation.

D. THE DECISION MAKER ERRED IN INSTITUTING CERTAIN TRANSPORTATION GUIDELINES FOR CLOSING ROADS IN MANAGEMENT AREA (MA) 6.2, SEMIPRIMITIVE MOTORIZED AREAS (SPM).

The Purpose of SPM Areas is to provide for, among other things, motorized recreational experiences. Forest Plan at III-6.2-1. The Goals and Objectives include, among other things, [providing] roads and trails for a semiprimitive, motorized experience. Forest Plan at III-6.2-2. In contrast, the desired future condition indicates that low use roads are closed but evident. In contrast the desired future condition also indicates that some roads are converted to Off-Highway Vehicle trails. Forest Plan at III-6.2-3. Finally, a transportation guideline indicates Forest Service roads may be closed to motorized vehicles. Forest Plan at III-6.2-7. Closing low use roads but allowing, encouraging, and setting goals and objectives for motorized recreation on trails is arbitrary and capricious. Motorized vehicle use on roads does not create a desired future condition at odds with or different from the desired future condition which includes motorized recreation on trails.

The purpose of SPM areas is also to provide high visual diversity and enhance and increase wildlife habitats. Forest Plan at III-6.2-1. Vegetative diversity is not affected differently or in greater quantity when comparing motorized recreation use of roads and trails. Further, the decibel level of freeway traffic is at or below 70 dBA. The average decibel level of a single OHV under fifty inches (50”), such as a snowmobile, ATV, or motorcycle is 102 dBA. Noise Center of the League of Hard of Hearing, *Noise Levels in our Environment Fact Sheet*. Based on the purpose for the areas it is arbitrary and capricious to allow motorized trail use but close roads to motorized use in SPM Areas.

E. THE DECISION MAKER ERRED IN ESTABLISHING RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT GUIDELINES FOR TRAILS THAT ARE LEGALLY UNSUPPORTABLE BY EXCEEDING WHAT IS REQUIRED UNDER THE ENDANGERED SPECIES ACT (ESA).

Recreation, Wilderness, and Related Resource Management Guidelines for trails do not permit motorized vehicles in essential habitats for endangered, threatened, and sensitive species. Forest Plan at II-13.

Section 9 of the ESA makes it unlawful for anyone to "take" an endangered species. 16U.S.C. § 1538(a)(1). "Take" is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1532(19). The United States Department of Interior has further defined the statutory term of "harm" to be an act which actually kills or injures wildlife. See 50 C.F.R. § 17.3. In upholding this definition, the Supreme Court has stated that "the government cannot enforce the Section 9 prohibition [against a take] until an animal has actually been killed or injured." *Babbitt v. Sweet Home Chapter of Comm. For a Greater Oregon*, 515 U.S. 687, 703 (1995). Harm must be "actual" not potential or merely speculative. *Arizona Cattle Growers' Association v. United States Fish and Wildlife Service*, 273 F.3d 1229, 1239 (9th Cir. 2001); *National Federation v. Burlington Northern Railroad, Inc.*, 23 F.3d 1508, 1512 (9th Cir. 1994); *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993). Even where there is compelling science, without evidence of causation of actual injury or death of a take, enforcement of section 9 of the ESA is unlawful. See *Defender of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000) (Despite some solid factual premises and wellfounded expert opinion plaintiff's theory, that construction of a school complex was in an areas known to be a habitat of an endangered species, was only speculative and not sufficient to support an injunction.). "Mere anecdotal plover/vehicle interactions of record do not present a principled basis from which to discern a reasonable likelihood that the vehicle traffic at issue will result in actual death or injury to the plovers allegedly present" *Atlantic Green Sea Turtle, et al. v. County Council of Volusia et al*, 2005WL 1227305 at *6 (M.D. Fl. 2005). As in the Country Council of Volusia case, no evidence is present in the Forest Plan, FEIS, or ROD to support a guideline prohibiting motor vehicles in essential habitats for endangered, threatened, and sensitive species. Forest Plan at II-13.

Section 7(a)(2) of the ESA imposes a duty upon federal agencies to avoid destruction or adverse modification of habitat of endangered species where such habitat is determined to be critical.¹ Section 7 provides for the issuance of an Incidental Take Statement ("ITS") where there is specific evidence that the proposed activity will lead to a "take."² A take is limited to "significant habitat modification or degradation" that "actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering." See 50 C.F.R. § 17.3. **Speculative or potential impacts to habitat are not sufficient to impose restrictions or conditions on land use.** Evidence of a "take" must exist.

Potential impacts of recreational uses of the forests are not enough to constitute a "take" under the ESA. Therefore, the guideline 2200 VIII(D)(4) is overreaching and exceeds the requirements of the ESA. As discussed above, and confirmed by the Supreme Court, an agency may not proscribe activities, such as motor vehicle use, in order to protect habitat that is merely considered essential. Sweet Home, 515 at 708-14 (O'Connor, J., concurring); see also Arizona Cattle Growers, 273 F.3d at 1244 ("[T]here is no evidence that Congress intended to allow the Fish and Wildlife Service [though the ESA] to regulate any parcel of land that is merely capable of supporting a protected species.").

The forest plan provides no concrete evidence that a "take" has occurred due to recreation use, nor has the forest plan provided any reasonable certainty of a "take." Guidelines prohibiting motor vehicle use in essential habitat would be arbitrary and capricious and exceed the requirements of the ESA.

¹ "Critical habitat" is defined as habitat that is "essential to the conservation of the species". 16 U.S.C. § 1532(5)(A)(i).

² The prohibition of a take pursuant to section 9 of the ESA has the same functional definition when applied to Section 7 issuance of Incidental Take Statement ("ITS"). Arizona Cattle Growers Ass'n, 273 F.3d at 1239.

IV. **CONCLUSION**

For the foregoing reasons UFWDA and the Two Trackers urge the Forest Service to supplement or amend the Forest Plan so that the ROD, Forest Plan, and FEIS satisfy the legal, analytical, and procedural inadequacies identified in this appeal.

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Respectfully submitted,

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