

SENT VIA E-MAIL AND HAND DELIVERED

July 24, 2008

USDA Forest Service  
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**Re: Administrative Appeal of the U.S. Forest Service's Record of Decision (ROD) for the Custer National Forest's Beartooth Travel Management Plan (June 2, 2008)**

Dear Appeal Deciding Officer:

The Pryors Coalition, Wildlands CPR, Yellowstone Valley Audubon Society, Frontier Heritage Alliance, Eastern Wildlands Chapter of the Montana Wilderness Association, Beartooth Back Country Horsemen, Montana Wilderness Association, Dick Walton, Susan Newell, Margaret Webster, Phil Jaquith, Robert Lubbers, and Clayton McCracken (collectively "the Appellants") hereby submit this timely administrative appeal of the U.S. Forest Service's (USFS's) final environmental impact statement (FEIS) and Record of Decision (ROD) for the Custer National Forest's Beartooth Travel Management Plan (hereinafter "decision" or "Beartooth decision") signed on June 2, 2008 by Steve Williams, Forest Supervisor for the Custer National Forest.

This appeal is filed pursuant to, and in compliance with, 36 C.F.R. § 215. Pursuant to § 215.13. The Appellants provided timely substantive comments on the USFS's draft environmental impact statement (DEIS). The USFS's final decision either failed to adequately respond to these comments and/or disagreed with the recommendations made in the comments.

Pursuant to 36 C.F.R. § 215.15 this appeal is being filed with the Appeal Deciding Officer within the mandatory 45 day time period. This appeal includes all the required contents of an appeal specified by 36 C.F.R. § 215.14.

Outlined below are the specific reasons why the USFS's Beartooth decision is being appealed, along with the related evidence and rationale on why the decision is in violation of the applicable laws and regulations and should be remanded and reversed.

## **I. NEPA VIOLATIONS**

NEPA “promotes its sweeping commitment to ‘prevent or eliminate damage to the environment’ . . . by focusing Government and public attention on the environmental effects of proposed agency action.” Marsh v. ONRC, 490 U.S. 360, 371 (1989). By so doing, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” Id.

Similarly, the “broad dissemination of information mandated by NEPA permits [the] public and other government agencies to react to the effects of a proposed action at a meaningful time.” Id. “Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action.” 40 C.F.R. § 1500.1 (c). As outlined below, the USFS’s Beartooth decision violates NEPA in a number of significant ways.

### **A. Alternative B Modified Does Not Satisfy The Purpose And Need of the Beartooth Decision**

Pursuant to NEPA, the USFS’s FEIS and ROD must “specify the underlying purpose and need” of the proposed action. 40 C.F.R. § 1502.13. Here, the purpose and need of the USFS’s Beartooth decision is to: “(1) identify routes for public motorized use on the District; (2) provide for a variety of motorized and non-motorized opportunities; (3) minimize or mitigate impacts on natural and cultural resources; and (4) have enforceable travel management guidelines.” As currently proposed, however, the preferred alternative – Alternative B Modified – does not satisfy this purpose and need. Indeed, the *only* item that Alternative B Modified satisfies is the identification of routes for public motorized use on the District.

#### **1. Failure to provide for a variety of non-motorized opportunities**

First, Alternative B Modified does not provide for non-motorized opportunities throughout the Beartooth District, particularly when evaluating the Pryor and the Beartooth as individual units within the District.<sup>1</sup>

In the FEIS, the impact of the noise from increased motorized recreation activities on non-motorized recreation was identified as a major concern to be taken into consideration during the selection of the proposed action. The indicator used to evaluate whether that concern was

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<sup>1</sup> The Pryor Unit is geographically, ecologically, recreationally, and culturally separate from the Beartooth Unit.

being appropriately addressed was the amount of acreage included in motorized and non-motorized ROS settings in the Beartooth and Pryor Units.

Availability of non-motorized recreation opportunities in general was also identified as an additional issue. Particular concerns with these opportunities were specifically identified in the Pryor Unit. The indicators used to evaluate whether the availability of non-motorized recreation was being appropriately addressed were: (1) acres in semi-primitive non-motorized and primitive ROS settings within the District by Beartooth and Pryor Unit; and (2) miles of non-motorized system trails within the District by Beartooth and Pryor Unit. Notably, all of the USFS's own indicators support the assertion that the Pryor Unit should be evaluated separately from the Beartooth Unit, particularly for the type of recreational experience it can provide.

The Custer National Forest (CNF) asserts that Alternative B Modified "appears to respond best to the significant issue of recreation preferences by providing a compromise between motorized and non-motorized recreation preferences..." This, however, is not the case. Based on the USFS's own indicators, the USFS's decision has done nothing to address the lack of non-motorized opportunities or the impacts to non-motorized recreational users in the CNF, particularly in the Pryors.

On the contrary, even though travel planning is designed to address both motorized and non-motorized recreational needs, the USFS's decision reflects an overall bias within the CNF towards the designation of motorized routes. This bias towards motorized recreation is particularly evident in the Pryors, where the concentration of vehicle routes leaves virtually nowhere for a non-motorized recreationist to escape from vehicle noise, dust, commotion, and disturbance, unless they choose to go to an entirely different area of the National Forest.

The Pryors are an area unique from other parts of the District in ecology, geology, and atmosphere, and non-motorized recreationists should not be precluded from enjoying this area. Pursuant to the USFS's decision, however, there will be only *one* designated non-motorized route in the Pryors – a two mile trail of a strenuous nature. In contrast, the USFS chose to designate 124 miles of motorized routes in the area. The motorized setting covers 62% of the area, leaving only 38% for non-motorized recreation.<sup>2</sup> As a result, non-motorized recreational users in the Pryors are relegated either to hiking, biking, or riding a horse on a motorized route or to blazing their own path. This option detracts from the quiet experience sought, can often be dangerous due to presence of motor vehicles, might include bushwhacking and scrambling off trail which is not a viable option for many visitors, and given the route density in the Pryors may still frequently be within earshot of a motorized route.

Moreover, the USFS's most recent usage numbers show that the percentage of ORV use on the Custer is 3.16% of the total recreation use. Yet this minority of users has been given well over half of the Pryors in which to recreate, leaving only small, highly fragmented areas that are

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<sup>2</sup> Notably, on p. 3-15 of the EIS there is no bar graph for the Pryor unit depicting ROS by alternative, while there is such a graph for the Beartooth Unit and the District as a whole.

accessible to only the most physically fit and determined of non-motorized recreationists. Even taking into consideration the Beartooth unit of the district, the division between non-motorized and motorized uses is lopsided based on percentage of users that engage in each activity. The ROS for the entire Beartooth District, for instance, is 20% motorized setting – significantly more than the 3.16% of motorized users that visit the CNF.

The Beartooth unit is 63% wilderness (332,490 acres), which is Congressionally unavailable for motorized users. Wilderness is often remote and rugged, difficult to access during a one day trip, and must be maintained in an unaltered state, sometimes leading to restrictions on the number of users. When one removes the wilderness portion of the District from the USFS's calculations (because it is set aside for reasons beyond recreational opportunity) the ROS for the remaining acres is 44% motorized. This cannot be considered a "balanced" allocation between motorized and non-motorized opportunities. Non-motorized recreationists should not be relegated to a back country, multi-day excursion if they want to recreate on the CNF, but should have a variety of opportunities to enjoy in a day the National Forest System.

In fact, rarely in the FEIS does the USFS state that a particular route is to be closed, or to remain closed to motorized use, in order to provide a non-motorized recreational opportunity. Indeed, the Appellants found only one instance – Shriver Peak Road – where non-motorized access was discussed and it appears to be an afterthought discussed only in the summary of changes table in the Executive Summary. By contrast, there are a number of times in the FEIS where the USFS opens routes to motorized use to provide a motorized recreational opportunity. In some cases these motorized routes are user created, non-systems roads that are now being added to the system – resulting in even less non-motorized recreational opportunities. This proclivity for motorized trails is apparent in the about-face between the DEIS preferred alternative and the FEIS to designate Meyers and Lodgepole trails for motorcycle use rather than as trails for non-motorized users

Indeed, the CNF's default position is always to open a route to motorized use unless it must be closed. Only those routes that were deemed unsuitable for motorized use were even considered for non-motorized designation. According to the USFS:

[We] reviewed existing routes not being proposed for motorized use for potential non-motorized trail opportunities. However, the same concerns associated with designating routes for motorized use existed with making the routes system non-motorized trails. Consequently, no routes are proposed for conversion to non-motorized system trails.

FEIS at p. 5-60.

In other words, even though non-motorized uses are less intense and have less impact on the National Forest's resources than motorized uses, the USFS dismissed designation of those routes for non-motorized use on the grounds that "the same concerns associated with designating routes for motorized use existed with making the routes system non-motorized trails." This is

absurd. Moreover, the USFS does not explain what those same concerns are, or why a less intensive use would have the same impacts on the route.

Furthermore, by using the designation process described above, the USFS appears to be implying that all routes suitable for public use should be designated motorized, leaving no suitable routes available for non-motorized designation. This process was applied even to routes such as # 2088 (beyond Shriver Peak) and # 2095A that were previously non-system routes and therefore had no pre-disposition to being either motorized or non-motorized.

Other examples of the USFS's bias towards motorized recreation as the expense of non-motorized users include:

(1) The USFS's decision regarding the Meyers Creek and Lodgepole trails. These trails were originally proposed in the DEIS to be non-motorized, and then at the last minute ended up designated for motorcycle use. If Lodgepole and Meyers Creek had been designated as motorized within the DEIS, the Appellants would have provided information on foreseeable user conflict;

(2) The USFS's failure to take into account the public comments opposing the designation of the 3/4 mile end of Commissary trail as motorized;

(3) The USFS's general failure to recognize non-motorized recreational needs. See e.g., FEIS at p. 5-61 (“...some dead end routes were included [as motorized] in the alternatives, typically because there were no significant resource issues with the route, or ...[a] utilization (including [motorized] recreation), ... need for the route had been identified.”);

(4) The USFS's failure to put wildlife needs/resources on equal footing with motorized recreational opportunities. See e.g., FEIS at p. 5-87, 5-117 (Shriver Peak: “The remainder of the route would be designated ... to provide ... motorized recreation opportunities;” “closure of the designated portion of the route may potentially benefit wildlife. However, other resources, such as [motorized] recreation opportunities ... were also considered ....”);

(5) The USFS's statement that Roberts Bench – a new motorized route being added to the system – will simply be “maintained;”<sup>3</sup> FEIS p. 5-117, C-36

(6) The USFS's failure to consider public comment (and justification) for designating Island Ridge a non-motorized route;

(7) The USFS's apparent criterion that any route “appropriate to consider for public motorized use” should be designated for public motorized use; FEIS 5-58, MISC-39 and MISC-40

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<sup>3</sup> In 2004 the USFS identified Roberts Bench as “*unnneeded*” and proposed it for “*yearlong restriction*” allowing no motorized use.

(8) The USFS’s “specific Rationale” in Appendix C, table C-5 of the FEIS (p. C-35) where many unauthorized routes are added for motorized use, but not a single trail is added for non-motorized use in the Pryors;

(9) The USFS’s treatment of the Graham/Stockman area. In the FEIS and ROD, Graham Trail (#2013) was designated as a trail open to all ORVs because motorized interests indicated this route was “in better condition and preferable to other routes in the vicinity.” As a result, Piney Creek Road (#2012) east of the quarry was not designated for public motorized use. The USFS claimed this was a change made to keep the number of routes the same, and to increase the size of a “consolidated defacto non-motorized area.” While the sentiment is nice, the result is not. There is no access to the bottom end of Piney Creek Road because of the private property at the limestone quarry. As such, this “trade” just adds one more motorized route up the mountain and only “keeps the overall number of routes the same as Alternative B” in an artificial sense. Now there are three parallel motorized routes up the mountain (Graham, Stockman, and Bear Canyon) in just a couple of miles. This was a perfect (but failed) opportunity to provide a “separate but equal” non-motorized route. The Appellants suggested making Bear Canyon as the non-motorized route in its comments and Graham Trail as the motorized route instead of Stockman (or Bear Canyon), and believe this would be a fair solution to the situation. The USFS’s ROD, however, rejected this approach and to date has failed to provide a rational justification to have *all three* motorized access routes in the Graham/Stockman area designated for motorized use; and <sup>4</sup>

(10) The USFS’s statement that “Alternative C provides many of the natural and cultural resource considerations provided in Alternative B Modified, but [does not] . . . respond[] well to the interests expressed by motorized recreationists.” This statement is as disappointing as it is incorrect. Alternative C designates 53% of the Pryor Unit in a motorized setting, and has only a slight decrease from Alternative B Modified in motorized setting for the entire District (17.8% compared to 19.7%).

## **2. Failure to provide for enforceable travel management guidelines**

Second, the USFS’s Beartooth decision also fails to provide for enforceable travel management guidelines – an explicit “purpose and need” of the project. Simply producing an MVUM does not satisfy the stated purpose and need for enforceable travel management guidelines, especially since enforceability of the route system was not used as a factor in

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<sup>4</sup> The USFS promoted this move as “increase[ing] the size of a consolidated de facto non-motorized area.” This is ridiculous. The USFS specifically rejected all requests for non-motorized areas either designated or de facto through this process, as outside the scope of the analysis. Further, no public comments asked for this non-motorized area above the noisy (and dusty) limestone quarry. This trail is also not accessible from the bottom because of the quarry. Finally, a 4WD is necessary to access Piney Creek Road from the top, while someone without a 4WD could access the start of the Bear Canyon hiking trail, which was a trail recommended by the Pryors Coalition for non-motorized access. By contrast, no non-motorized recreation opportunities that were suggested during public comments were incorporated into the decision to implement Alternative B Modified.

designating routes. See FEIS at p. 2-1, p. 5-25 (“Enforcement of regulations is part of everyday operations on National Forests. Suggesting that if the Forest Service is unable to enforce every motorized violation we should manage the entire Forest as non-motorized is not a reasonable alternative to consider.”).<sup>5</sup>

The USFS also appears to have no understanding of how the requirement to allow only licensed vehicles on the designated system would increase enforceability of the system. The decision to not require visible licenses on all vehicles on “mixed use roads” and “motorized trails” will handicap enforcement of regulations. There is reason to believe the sense of anonymity provided will actually increase violations. Simply by calling a road a “road” (not a “motorized trail”) as CNF has done for decades would allow all motor vehicles to be licensed under Montana law.

### **3. Failure to minimize impacts on natural and cultural resources**

Third, the USFS’s fails to satisfy the purpose and need of minimizing impacts the natural and cultural resources of the CNF (see below).

#### **B. The USFS Failed To Consider A Reasonable Range Of Alternatives**

NEPA “mandates that agencies ‘study, develop, and describe appropriate alternatives to recommended course of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.’” Pit River Tribe v. U.S. Forest Service, 469 F. 3d 768, 785 (9<sup>th</sup> Cir. 2006) (quoting 42 U.S.C. § 4332 (E)); see also 42 U.S.C. § 4332 (2)(C)(iii) (must consider “alternatives to the proposed action”). The alternatives analysis is “the heart” of the environmental analysis because it presents “impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options.” 40 C.F.R. § 1502.14. The alternatives analysis guarantees that “agency decisionmakers ‘[have] before [them] and take [ ] into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.’” Bob Marshall Alliance v. Hodel, 852 F. 2d 1223, 1228 (9<sup>th</sup> Cir. 1988) (citations omitted). “Informed and meaningful consideration of alternatives . . . is thus an integral part of the statutory scheme” and “critical to the goals of NEPA even where a proposed action does not trigger the FEIS process.” Id. at 1228-29.

Here, the USFS failed to give meaningful consideration to alternatives in a number of significant respects. First, the USFS failed to consider a reasonable range of alternatives that would have preserved large areas of natural quiet in the Pryors, where only non-motorized opportunities would be allowed. The USFS, for instance, should have taken a hard look at

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<sup>5</sup> No comments on the DEIS requested that the CNF be closed to all uses, only that routes be restricted to what can be patrolled with current and projected funding. Yet, the USFS is attempting to use a strawman argument to dismiss the importance being able to enforce the new travel plan.

designating a number of trails non-motorized to create tracts of quiet areas. Such trails include trail #2088/#2095A on Big Pryor, #2492/#2814 Bear Canyon, #2144 Punchbowl, #2093 Island Ridge, #20972 Roberts Bench, #2092 Commissary Ridge (southern 1 1/2 mile) and #2092C, #2018 Inferno Canyon, and #2011 King Canyon. In addition, routes #2088 and #2095A – as designated in Alternative B Modified – form a single dead end route with many resource concerns and little apparent benefit for motorized users. Not opening Route #2095A and #2088 west of Crater Ice Cave would decrease road density and add about 2300 acres (estimate) of secure habitat.<sup>6</sup>

Notably, taking the recommendations made on roads above and closing the recommended routes would have the following results: Inferno Canyon #2018 would make roughly 1300 acres of non-motorized setting and reduce available miles by 2.78 miles; King Canyon #2011 about 1600 acres and 3.6 miles; Bear Canyon #2492/#2814 about 1300 acres and 5.5 miles; the end 3/4 mile of Commissary #2092 about 500 acres; Island ridge # 2093 about 250 acres and 1.3 miles; Roberts Bench #20972 about 400 acres and 0.6 miles; Punchbowl #2144 about 1500 acres and 3.5 miles. These estimates could be improved with the use of GIS mapping software. This would mean a total of 6700 acres preserved for wildlife and non-motorized recreation and 18 miles gained for non-motorized recreation.

Second, the USFS violated NEPA's alternatives requirement by not considering various alternatives for how to classify and whether to include "user-created" routes, i.e., routes that are not identified on the USFS's 1987 travel plan map as motorized routes and routes that have not been subjected to any public review or NEPA analysis (including an alternatives analysis), in the National Forest roads system.<sup>7</sup> Instead, the USFS's alternatives analysis incorrectly assumes that many such routes are already in the System.

Third, the USFS failed to consider a true "no-action" alternative as required by NEPA. Rather, the USFS mistakenly included user-created, non-system routes that have never been subjected to NEPA in the environmental baseline and no action alternative. Such routes include, but are not limited to: #2088 (west of Shriver Peak), #2095A, #2013 (Graham Trail), 2814 (Bear

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<sup>6</sup> For comparison, the 2.2 mile closure in the middle of #2088 in the EIS increases secure habitat by only about 600 acres (estimate). There is no apparent administrative need for this dead end route. There is also little need for this route for motorized recreation given the abundance of preferred loop routes in the area. However, there is a desperate need for non-motorized routes, especially ones that would provide an easy hiking experience like #2088. The short 2.2 mile closure in the middle of #2088 does little to satisfy this non-motorized recreational need, and as illustrated above does little to increase habitat security. The USFS claims that #2088 is needed for "range improvements." However, if that is the case, an administrative use designation would be more appropriate, allowing lessee's access to make the necessary improvements while still providing for wildlife security and a non-motorized recreation route

<sup>7</sup> Many route descriptions in the 1987 Plan are not distinct routes and the map to accompany the travel plan was never produced. Route #2088, however, is an exception. The 1987 Plan clearly states (see p. 6, 9, and 11) this new road ends at Shriver Peak: "Shriver Peak Road, which follows the ridgeline of Big Pryor Mountain from Road #3091[now numbered #2091] near Red Pryor Mtn north to Shriver Peak, will be placed on the Forest Transportation System."

Canyon Ridge), #2096 (Switchback), #24922, and #24923 (Bear Canyon Cutoff). Unless the USFS can produce documentation and an analysis of the addition of the 5 miles of #2088 west of Shriver Peak (Crater Ice Cave) since 1987 and the other roads mentioned above, such routes should be removed from the baseline system and treated in a new analysis as non-system roads.

Fourth, the USFS failed to conduct an adequate, objective comparison of alternatives. The USFS only focused on positive aspects of Alternative B Modified while ignoring concerns over the preferred alternative and its impacts. The ROD, for instance, states that “[i]n many cases, there were no significant differences between the alternatives based on impact indicators for the above resources [wildlife etc], especially between Alternatives B, C, and B Modified. This is not an accurate statement. Moreover, by taking this route, the USFS created a situation where the alternatives available to them appeared to have no difference on the environment when, in actuality, significant differences do exist between the various alternatives.

For example, in the case of deer and elk habitat (road density and secure area) in the Pryor Unit, both Alternative B and Alternative B Modified fail to meet the threshold, while Alternative C does meet these requirements.<sup>8</sup> In another instance, Alternative C reduces weed susceptibility significantly more than other alternatives, yet the CNF still claims that this difference is minimal.

Further, a comparison of the benefits of Alternative B Modified should be with the no action alternative, not alternative A. A properly defined “no action” alternative most closely resembles the existing legally designated system and should be the “starting point for any proposed changes.” ROD p. 10. The rationale in the Executive Summary, however, compares Alternative B Modified with Alternative A. The USFS states that its “decision will reduce the number of miles of motorized opportunities available compared to the existing condition.... This is especially true for the Pryor Unit. My decision provides an increase in the amount of non-motorized Recreation Opportunity Spectrum (ROS) settings compared to the existing condition in the Pryor Unit....” ROD p.7.

Without question, this invalid comparison produces an invalid conclusion contrary to fact. The “existing condition” is the result of decades of non-enforcement of the 1987 Travel Plan and subsequent decisions and is the equivalent of the maximum motorized Alternative A according to CNF (see Executive Summary at p. 8). Indeed, there are at least twice as many miles of motorized routes on the ground in the Pryor Unit than are authorized in the 1987 Travel Plan and subsequent decisions. As such, using alternative A as a baseline for comparison skews the decision towards motorized activities and is a violation of NEPA.

Notably, in the DEIS, the USFS includes a more appropriate comparison of alternatives. See Table 3-8 on p. 3-17 in the DEIS. It is interesting to note that even though the correct alternative was chosen for comparison, the numbers in this table were incorrectly calculated,

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<sup>8</sup>To bring Alternative B Modified into compliance with the Forest Plan standards requires an amendment to the Forest Plan to alter the standards that were put in place to protect wildlife. This amendment was not properly justified and the effects were not adequately evaluated or disclosed during the NEPA process.

which was pointed out by the Appellants in its comments on the DEIS. The corrected calculations revealed that Alternative B increases motorized opportunity by over 11% and reduces non-motorized opportunity by nearly 15% in the Pryor Unit when compared to the no action alternative.<sup>9</sup> We would also like to point out that the following figures do not remove the roads mentioned above that should not be included in the No Action Alternative. Moving these roads out of the No Action Alternative would affect the calculations.

The following table is (corrected by appellants) from the DEIS (pg. 3-17):

**Corrected** Table 3-8, with Alternative B Modified added. Percent Change in Acreage Available for Motorized and Non-motorized Recreation Opportunities Compared Against No Action.

	Alternative A	Alternative B	Alternative C	Alternative B Modified
<b>Pryor Unit</b>				
% Change in Motorized Recreation Opportunity	25.7% increase	11.5% increase	5.5% decrease	9.7% increase
% Change in Non-motorized Recreation Opportunity	33.4% decrease	14.9% decrease	7.2% increase	12.6% decrease

Though we were unable to locate a table mirroring Table 3-8 from the DEIS in the FEIS, we did find a paragraph that put the same calculations into narrative form. Unfortunately, the same error is made in these calculations as was made in the DEIS. Below is corrected information for the second full paragraph on FEIS p. 3-43:

ROS information indicates that in the Pryor Unit Alternative A would increase areas with the potential for motorized noise disturbance by approximately 25.7% over No Action (**not 15%**). Alternative B and B Modified would increase the area with this potential by 11.5% and 9.7%, respectively (**not 7% and 6%**). Alternative C would reduce the area with potential for motorized noise disturbance in the Pryor Unit by 5.5% (**not 3%**).

The above paragraph provides the % changes (from no action) in motorized setting for the various alternatives. The following parallel paragraph, which was not provided in the FEIS, provides the % changes in non-motorized setting.

ROS information indicates that in the Pryor Unit Alternative A would reduce areas with the potential escape from motorized noise disturbance by approximately 33.4% over No

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<sup>9</sup> In response to the Appellants' comments on this subject, the CNF responded "Thank you for identifying this error. The table has been corrected in the FEIS." EIS p. 5-59. Apparently the table's calculations were corrected by removing it altogether, because the corrected table cannot be found in the EIS

Action. Alternative B and B Modified would reduce the area with this potential by 14.9% and 12.6%, respectively. Alternative C would increase the area with potential for escape from motorized noise disturbance in the Pryor Unit by 7.2%.

The USFS has selected an alternative that provides for a 12.6% decrease in areas free from motorized disturbance, when compared to the no action alternative. To put this in perspective, the no action alternative had a motorized setting of more than 50%, meaning that less than half of the project area was zoned for non-motorized uses, which are the activities a majority of the visitors to the forest are engaging in. By illustration, when Alternative B Modified is compared to the no action alternative, 4,529 acres of the 33,913 acres previously available to non-motorized recreation and preserved as wildlife habitat were lost in the Pryor Unit.

As such, the assertion made in the ROD on page 7 that the decision actually increased non-motorized setting in the Pryor Unit is blatantly incorrect and is designed to mislead the reader in violation of NEPA.

### **C. The USFS Failed To Take A Hard Look At Direct Impacts**

Pursuant to NEPA, the USFS is required to assess the direct impacts of its proposed action – in this case its decision to adopt and implement the Beartooth decision – on the environment. Direct impacts are caused by the action and occur at the same time and place. See 40 C.F.R. §1508.8. Under NEPA, the direct impacts of an action must be analyzed based on the affected interests, the affected region, and the locality in which they will occur. 40 C.F.R. § 1508.27 (a). Here, the USFS still needs to take a hard look at the direct impacts of its proposed action on the region's wildlife, caves, the impacts of non-system routes, and safety concerns, how it calculated seasons of use.

#### **1. Wildlife**

The USFS has failed to take a hard look at the effects of Alternative B Modified on wildlife. First, Season of Use restrictions put in place by the ROD for the Pryor Unit are inadequate to protect wildlife habitat. Such restrictions do nothing to address concerns over elk (and deer) moving away from motorized trails during the late winter/early spring and summer months. In the case of the Pryor Unit, elk have moved entirely off the unit, probably due to a lack of secure habitat for elk to graze and rest without disturbance from motorized vehicles.

As was stated in comments submitted on the DEIS on 12/12/2007, there is a large quantity of research to document the effects of motorized use on elk. The CNF uses elk as surrogate for deer (FEIS 3-127,128). To reiterate the literature that the USFS failed to take into account when designating routes in the Pryor Unit, here are some examples from an Izaak Walton League Report on recent research:

- (1) Elk tend to avoid areas near open roads and ORV routes (Edge and Marcum 1991, Wisdom 2007). Recently, another study reported preliminary results suggesting the ORVs are causing a shift in the spatial distribution of elk in Oregon (Wisdom 2007).
- (2) Elk vulnerability and mortality from hunter harvest, both legal and illegal, increases as open-road density increases (Unsworth 1993; McCorquodale et al. 2003).
- (3) In areas of higher road density, elk exhibit levels of stress and increased movement rates ( Rowland et al. 2005).
- (4) ATVs tend to disturb elk much more than people on foot do. One master's thesis (Vieira 2000) indicated that elk in the White River area of Colorado moved twice as far from ATV disturbance as from people on foot. Another study showed that elk tolerated hikers to within 500 feet, but that elk moved when ATVs came within 2000 yards. Furthermore elk tended to walk away from hikers but ran from ATVs (Wisdom et al. 2004).
- (5) Closing roads can benefit elk.
  - \* Road closures allowed elk to stay in preferred habitat longer, rather than being displaced (Irwin and Peek 1991)
  - \* Closing roads extended the age structure and doubled the bull-to-cow ratio (Leptich and Zager 1991).
  - \* Elk hunter success almost doubled when open-road density was reduced from 2.54km/km<sup>2</sup> to 0.56 km/km<sup>2</sup> (Gratson and Whitman 2000).
  - \* Road closures may improve elk performance, increase the amount of effective habitat, increase hunting opportunities, decrease damage to crops, improve diet quality, increase hunter satisfaction, and decrease vulnerability of elk during the hunting season (Rowland et al. 2005).

At present, the selected alternative includes a road density higher than the threshold needed for elk and deer (1.27 mi/sq mi. compared to <1 mi/sq mi.) and secure habitat is below the threshold (26% compared to 30% minimum). This reinforces the concerns raised during the DEIS commenting process that more secure habitat is needed. The USFS's FEIS failed to adequately address this issue as required by NEPA. The failure to take a hard look at the environmental impacts of the over-burdened road system on wildlife, particularly in the Pryor Unit, is a fatal flaw in this FEIS that can only be remedied by re-analyzing the effects of the proposed action in greater detail and taking into account the best available science

## **2. Caves**

Many caves are located close to designated routes, including those that are user-created. This creates an increased likelihood that these caves will be subjected to vandalism and looting. There is no evaluation, however, in the FEIS of the effect of these designations on the caves on the District.

## **3. Non-System Routes**

The FEIS fails to disclose the impacts of non-system roads. This issue is a particular problem when viewed in light of the lack of funding admitted to in the FEIS. In the USFS's own words, "based on past funding levels, the Forest is unlikely to have sufficient funding to maintain to standard all of the routes necessary for the administration, utilization, and protection of the District for the foreseeable future." FEIS p. 2-18.

The cost of addressing the resource damage frequently caused by non-system routes, when added to the lack of funding to maintain the designated system, is particularly problematic as an additional maintenance burden that cannot be foreseeably met. In light of this fact, it was arbitrary and capricious for the Forest Service to state that maintenance and enforcement "were not significant issues and represented managerial rather than environmental concerns."

Moreover, the inability to adequately maintain trails translates into environmental degradation. Roads and trails need regular maintenance to address impacts from use such as erosion, poor water quality, and the spread of invasive weeds. The FEIS states, "[r]oad and trail maintenance funding can only be applied to system roads and trails. FEIS p. 2-18. These resource constraints reinforce the obvious need to provide a plan and implementation schedule for removing any non-system routes after the release of the MVUM. In such a plan, the Custer should have identified which funds can be used to remove non-system routes, and how much of that funding is available now and into the foreseeable future. Without such a plan, the funding to address the resource damage from non-system routes will never materialize and the mandates in the Executive Orders to minimize damage from motorized use will never be met.

While Appendix E did list non-system routes for decommissioning (an action we fully commend) it is unclear when these routes will actually be removed, what cumulative impacts these routes have, and how enforcement will prevent use from continuing until the routes are removed from the ground. It is also unclear how the on-going impacts from the existence of these trails will be mitigated in the interim, especially since many of the non-system routes were not designated due to environmental concerns. This disregards the potentially cumulative impact that has already been caused by user-created routes, both individually and collectively. The inability to maintain even existing roads and trails brings into question how the USFS will remove non-system routes. Furthermore, the decision not to treat enforcement as an environmental factor will invariably lead to continued use of non-system routes with the accompanying environmental impacts.

A passing reference to incorporating BMPs into the “design, construction and maintenance phases of all routes” does not address the issue of routes that are already on the ground that did not get designated and may need to be reclaimed.

These deficiencies are compounded by the fact that the FEIS calculates route densities for purposes of analyzing the impacts of the various action alternatives on the basis of only the designated (open) system, ignoring the presence of user-created routes and the high likelihood that motorized users will continue to access those routes until a monitoring and enforcement system is in place. See, e.g., FEIS p. 3-40.

Based on the foregoing reasons, the USFS should revisit the FEIS’s analysis of impacts to: (1) ensure that the impacts caused by non-system, user-created routes to water quality, fisheries, aquatic resources, and wildlife, are properly analyzed; and (2) ensure that the USFS has addressed the right alternatives, and chosen an alternative that comports with the agency’s duties pursuant to not only NEPA and the CEQ regulations, but the USFS’s duties pursuant to Executive Order 11644, as amended, and as implemented by the 2005 Travel Management Rule.

#### **4. Safety Concerns**

Nowhere in the FEIS (or DEIS) does the USFS disclose that a consequence of renaming routes as “motorized trails” is that drivers under 12 years old (no limits) will be allowed. This point was raised numerous times in public comments (SA-3 FEIS pg. 5-91-92), but the USFS’s Summary of Comments and Response totally ignore both the underage driver and safety issues which were the main point of the comments.

**Summary of Comments:** Concerned the Forest Service is not following State Laws related to licensing requirements by designating motorized trails.

**Response:** The Forest Service defers to State Law in regard to operation of vehicles on roads and trails.... The ROD documents the Forest Supervisor's conclusions about the various issues and the rationale for making his choice for a Travel Management Plan.

The USFS pretends the comments are ONLY about whether they are consistent with state law, which was not the heart of the comments. The comments pointed out that the effect of the new Travel Plan is to allow ANY driver in ANY vehicle on motorized trails open to all vehicle types. CNF may think they are just allowing 5 year olds to drive kid sized ATVs, but the total absence of rules allows a 5 year old to drive a monster truck. This serious safety issue was not analyzed by the USFS and should be evaluated in a new NEPA process.

#### **5. Season of Use**

The USFS adopted inappropriate season of use (SOU) dates for the Big Pryor. In the FEIS CNF proposes a restricted SOU for approximately 28 miles of motorized routes on Big Pryor Mountain “... to minimize road damage (rutting, braiding, head-cutting) from motor

vehicle use when roads are typically moist due to ground thawing and snow melting.” (FEIS Page C-44)

In the DEIS the proposed SOU dates were June 15 through April 15 (i.e. closed 60 days from April 16 through June 14). In the FEIS this was changed to May 22 through April 15 (i.e. closed 36 days from April 16 through May 21). CNF says: *“The change reflects more accurate information used to develop the dates and due to the fact that these routes area generally located in lands with a southern aspect that result in more rapid snowmelt and soil drying.”* See Executive Summary at p. 12. The USFS is wrong

Photographs taken on March 18, 2007 on Inferno Canyon Road show serious road damage already done four weeks before CNF’s chosen closing dates. See Appendix A. (CNF was aware of these photos before the DEIS or FEIS were written.) Photographs taken on May 13, 2008 show large areas of deep snow cover on Red Pryor Divide Road. *Id.* Photos taken on June 17, 2008 on Red Pryor Mountain show large, melting drifts, muddy roads, and road damage nearly three weeks after CNF’s chosen opening date for the road. *Id.* In fact, CNF then closed these Big Pryor roads from June 27 to July 10 - a full seven weeks after CNF’s own proposed opening date.

This mistake can be easily corrected by revising the FEIS to include more realistic SOU dates to protect Pryor Mountain resources. Perhaps more significant is that the USFS’s error regarding the SOU is a case study of CNF’s overall bias in favor of accommodating the most extreme motorized recreationists demonstrated throughout the FEIS.

In 2004, the CNF proposed a seasonal closure for these same roads on Big Pryor Mountain from December 1 to July 1 (Beartooth Ranger District Travel Management Proposal pg. 55). The above facts on the ground suggest that this was a well considered proposal based on the accumulated experience of CNF staff. But since then there has been a large turnover in CNF staff, and some motorized recreationists protested loudly.

The 2007 DEIS reduced this closure to the 60 days from April 16 through June 14. Again the extreme motor recreationists protested loudly and in the FEIS CNF reduced the closure to 36 days from April 16 through May 21. CNF reported in the FEIS that: “Many respondants (sic) requested Memorial Day weekend be the beginning of the season of use for this and many other areas[in the Pryors], rather than June 16.” FEIS p. 5-102. This includes a comment by Ed Melcher writing for the motorized use group FFOR: “Memorial Day Weekend all areas should be open for use.” FEIS p. 5-96. There were also many public comments stating that the seasonal closure in the DEIS was already too short to achieve its objective. Those didn’t seem to influence CNF. The CNF continues: “Further analysis of climate data, including snow-free periods and historic temperatures, was conducted. Alternative B Modified season of use in the FEIS responds to not only the new climate information, but also accommodates a Memorial Day weekend opening.” FEIS p. 5-102.

While the analysis presented in Appendix F of the FEIS begins with a reasonable approach, on the way to determining the appropriate date to open the SOU on Big Pryor Mountain it makes a chain of three serious errors (see below). Each of these three errors conveniently shifts the SOU opening date significantly earlier. Finally a miracle occurs. *“Therefore, the SOU starting date ... was moved back to May 22. This date also accounts for public comments that requested the SOU to include Memorial Day weekend.”* FEIS p. F-6.

The miracle is that May 22 just happens to be the precise date needed to have the roads open Friday after work on Memorial Day weekend every year as the date of Memorial Day varies with the calendar!<sup>10</sup> It is difficult to make sense of the odd phrase *“accounts for”* in the above sentence unless it is turned around to read: *“Public comments that requested the SOU to include Memorial Day weekend account for this date.”*

A similar chain of errors in this new analysis leads precisely to the previously chosen date (April 15 in the DEIS) for the end of the SOU. But nowhere in the DEIS or FEIS does CNF give any explanation for the need to have roads on the top of Big Pryor Mountain open to wheeled vehicles in January and February. How does this make any more sense than opening the Beartooth Highway in those months? How much public demand is there during those months? Will CNF have any law enforcement on top at that time? There is clear evidence that the roads are vulnerable to severe damage by March.

It appears that some sort of “group think” bias in favor of motorized recreation led CNF to strive for a reason to change the SOU dates to accommodate the loudest motorized users. The same “group think” apparently prevented the decisionmakers from seeing red flags and asking the appropriate questions which should have led them to doubt the results and take a hard look at the analysis. These red flags and questions include:

1. An opening date 40 days (nearly six weeks) earlier than in the 2004 CNF proposal. Could the previous CNF staff who had much more experience in the Pryors really have been that far off?
2. Given Montana weather patterns it is highly unlikely that a short 36 day window could be determined within which spring melt would reliably both begin and end over an elevation range from 6000 ft. to 8700 ft. (The emergency closure during spring 2008 lasted for 48 days after the proposed 36 day window.)
3. A conscientious decisionmaker should have asked, “If I chose this date, what is the probability that roads will be sufficiently dry by then?” This question was not asked.
4. A conscientious decisionmaker would also ask, “This result completely accommodates one extreme of public opinion. Am I absolutely sure this decision is justifiable?”

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<sup>10</sup> Memorial Day Monday ranges from May 25 to May 31

**D. The USFS Needs to Adequately Assess the *Indirect* Impacts of the Beartooth Decision**

Under NEPA, the USFS must consider the “indirect effects” of a proposed action. Indirect effects of a proposed action are effects that are caused by the action but occur later in time or are further removed in distance. 40 C.F.R. § 1508 (b). Indirect effects “may include growth inducing effects or other effects related to induced changes in pattern of land use; population density or growth rate; and related effects on air, water, and other natural resources.” Id.

For example, an indirect effect of continued motorized access to the area is the spread of invasive weeds. Off-road vehicles, including ATVs, dirt bikes, and jeeps strip vegetation and rut the up the soil, creating ideal conditions for invasive weeds and other exotic plants. At present, weed infestation is a problem in the CNF.

According to the Montana Department of Agriculture’s noxious weed program, the negative effect of noxious weeds is a loss of wildlife habitat and reduced wildlife numbers, reduced livestock grazing capacity, increased soil erosion and topsoil loss, diminished water quality and fish habitat, reduced land value, and increased costs associated with controlling established weeds. These impacts need to be addressed. How does the USFS plan to address such affects? How will the USFS deal with invasive weeds and the resulting impact on wildlife? Through this travel planning process, the USFS should take proactive action to prevent the spread of noxious weeds.

The USFS also needs to take a hard look at how its proposed Travel Plan indirectly affects: (1) wildlife (elk security, increased access, poaching); and (2) non-motorized recreational opportunities.

Finally, the CNF must (but has failed) to consider the indirect affects of its decision to designate Lodgepole and Meyers Creek trails as motorcycle trails. The indirect effect of the CNF designating these two trails for motorized use is that the Gallatin National Forest has now begun scoping to open several trails on its lands to motorized use that were previously closed. The Gallatin decided these trails should not be motorized and is reconsidering only because of CNF’s plan to motorize these trails. In making the determination to open these two trails to motorcycle use, the CNF did not analyze the increased use of the area from the foreseeable designation of the Gallatin trails as motorized.

**E. The USFS Failed to Provide the Public With Sufficient information to Allow For Meaningful Public Comment**

NEPA procedures are designed to ensure that “environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1. The very goal of NEPA, and purpose of preparing NEPA documents to “encourage and facilitate public involvement in decisions which affect the quality of the human environment,” to

“provide a full and fair discussion of significant environmental impacts [of a proposed action]” and to “inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. §§ 1500.2; 1502.1; see also Anderson v. Evans, 314 F.3d 1006, 1016 (9<sup>th</sup> Cir. 2002) (interpreting NEPA’s public notice requirement to mean that the public must be given an opportunity to comment on proposed action); Citizens for Better Forestry v. U.S. Dep’t of Agric., 341 F.3d 961 (9<sup>th</sup> Cir. 2003) (failure “to involve or even inform the public” about proposed action violates NEPA).

Here, a DEIS was submitted for public review and comment. However, the DEIS fails to provide adequate mention or discussion of the potential for the CNF to designate Meyers Creek (#27) and Lodgepole (#22) trails as motorized single-track trails. The possibility of these trails remaining open to motorized use is only shown on the map for Alternative A and the No Action Alternative, and included no discussion in the FEIS. A mere mention on a map that is not the preferred alternative is not adequate to give notice. Though the 1987 Travel Plan indicates that these two trails are motorized, subsequent maps indicate the trails as open to non-motorized use only. The 1986 (with 1995 revisions) CNF map also shows both Meyers and Lodgepole as non-motorized trails. Finally, the 2004 Beartooth District Travel Management Proposal, not to mention the 2007 DEIS preferred alternative that preceded this FEIS, again show Meyers and Lodgepole as trails proposed for non-motorized use.

It was therefore beyond the scope of comments requested for individuals to provide information on these trails and their value for non-motorized uses and their inappropriateness for motorized use.

Without question, there are serious user conflict and safety concerns associated with designating motorized use on these two trails that have not been fully analyzed. The ROD’s decision to make Meyers and Lodgepole motorcycle trails is therefore arbitrary and capricious and should be rescinded until a complete NEPA analysis, including public comment, is completed.

## **II. THE USFS’S *START DATE* FOR THE SEASON OF USE RESTRICTION IS ARBITRARY AND CAPRICIOUS**

The USFS’s Season of Use (SOU) start date is arbitrary and capricious and should be set aside and remanded to the Agency for three reasons.

First, the USFS only considered average dates and ignored important variations. The average date at which the Snow Water Equivalent (SWE) drops to zero is computed for each SNOTEL site. See Table F-3, FEIS p. F-5. The variation in this date for each site is ignored, thus discarding an important piece of information the Responsible Official should use in making a decision. If the average date of the end of melt is used as the start date for the SOU it would be reasonable to expect that in half of all years the melt would not be finished by that date and an emergency closure would be required. A prudent decisionmaker would choose to set the start of

the SOU at least one standard deviation after the average date of end of melt. With this choice only about one year out of six would require an emergency extension of the closure.<sup>11</sup> Computing the standard deviation for each SNOTEL site using the data in Table F-3 shows that the typical standard deviation is about 10 days. Thus the start of the SOU should be about 10 days after the average end of melt and perhaps a bit later to allow for drying of the soil after the end of melt.

Second, the USFS incorrectly assumed that all roads would be at the 8,000 ft. elevation. The end of melt and start of SOU should be determined by the highest elevation roads which melt last. Most of roads #2091, #2088, and #2095A are well above 8000 ft. elevation and up to over 8700 ft. elevation. The linear regression line on Chart F-2 (page F-6) shows that the average date of end of melt varies significantly with elevation. At 8500 ft elevation, for example, the date is June 13 – nearly two weeks later than the May 31 date determined by CNF for 8000 ft elevation.

Third, the USFS incorrectly claimed that the top of Big Pryor has a southern aspect. Much of the top of Big Pryor Mountain including the above mentioned routes is on a relative flat plateau. It does not have much southern aspect. Thus the explanation given on page F-6 and elsewhere for moving the start date for the SOU back to May 22 instead of the May 31 date (incorrectly) determined from Chart F-2 is invalid. Furthermore, no explanation is given for the choice of 9 days for this adjustment. The apparent reason is the above mentioned miracle that it gives the pre-selected May 22 date. (Note: The “southern aspect” issue was not considered for the lower elevation routes which do have a southern exposure. Doing so would have moved the end of the SOU earlier and thus lengthened the closure period. This may be the ultimate example of arbitrary and capricious bias.)

In conclusion, therefore, an appropriate use of the data in Appendix F leads to an average end of melt date on top of Big Pryor of about June 13. Adding about 10 days for the standard deviation of the variation from the average gives about June 23. Interestingly this comes

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<sup>11</sup> From the EIS:

“2.5.6.11 Season of Use Flexibility

There is a range of potential season of use designations; those proposed were selected based on protecting resource values at risk, which may vary by locale but include values such as soils, hydrology, and wildlife. **If conditions warrant, there may be flexibility to extend or reduce the season.**” (FEIS 2-19, Emphasis added.)

Any SOU decision that requires frequent special closures of motorized routes will defeat the purpose of the MVUM and making motor vehicle regulations “strict liability” regulations. (See FEIS pg 2-16) It will be the user’s responsibility to know the rules (from the MVUM) which is to be published each year in January. Special closures not on the MVUM will require public notice – which may not be seen. People may plan a weekend trip based in good faith on the regulations on the MVUM then get to the top of the Pryors and find a sign saying they can’t go through as planned but must turn back. This could cause disappointment, hard feelings, and a temptation to sneak on through. If the sign has been “disappeared” are they liable if what they did was legal according to the MVUM? On the other hand a special extension of the SOU when conditions allow will cause none of these problems. A person trusting the MVUM can not get into trouble. They will not violate any special rule.

This should be sufficient reason for the Forest to prefer SOU dates that rarely require special additional closures, but may more frequently allow special extra openings.

reasonably close to the proposal made by the CNF in 2004. Presumably 2008 is an example of the one year out of six which requires an emergency extension to the closure.

### **III. THE USFS'S *END DATE* FOR THE SEASON OF USE RESTRICTION IS ARBITRARY AND CAPRICIOUS**

There are four major errors in the USFS's end date determination. The USFS's Season of Use (SOU) end date is arbitrary and capricious and should be set aside and remanded to the Agency.

First, the USFS used invalid criteria for determining the beginning of snowmelt. According to the FEIS, the "date when routes and adjacent soil **begin** to become susceptible to excessive rutting or displacement was assumed to be the point in time when average daily temperature exceeded 0°C." Yet, significant snow melt, formation of mud, and susceptibility to rutting, will occur when the daytime temperature is above freezing. This happens before the average daily temperature is above freezing. The later arbitrary adjustment of the criterion to +1<sup>0</sup> C (FEIS p. F-2) is also invalid. A dark colored frozen muddy road will heat up above the air temperature on a sunny day just like a black asphalt parking lot. So perhaps the Criterion should be -1<sup>0</sup>C instead. Note that the shift from 0<sup>0</sup>C to +1<sup>0</sup>C shifts the "start of snowmelt" date determined from the regression line on Chart F-1 eight days later from April 6 to April 14. Using -1<sup>0</sup>C would translate to March 28.

Second, only averages were considered and important variation was ignored. In this case both the day to day weather variations (in a single year) and the year to year variations are important. Both are lost in the averaging over the period of record for each SNOTEL site, and in then in determining the linear regression line. The naive interpretation of the regression line used in CNF's analysis presumes that there is one single date on which the daily average temperature reaches the chosen criterion. Example Chart F-1 (FEIS p. F-3) for Cole Creek shows the average daily temperature reached +1<sup>0</sup>C on March 22 and April 9. These are 23 and 5 days before the single April 14 date determined by CNF. Similarly a 0<sup>0</sup>C criterion shows (Chart F-1) the average daily temperature reaching that criteria six times in the 14 days before the April 6 date determined from the regression line. If that is the criterion for melting, then melting will happen each of those days.

Third, all roads were incorrectly assumed to be at 8,000 feet. The start of melt and end of SOU should be determined by the lower elevation roads which melt first. Roads #2011, #2018, and #2850 are well below 8000 ft. elevation and down to under 6000 ft. elevation. The linear regression line on Chart F-2 (FEIS p. F-6) shows that the average date of start of melt varies significantly with elevation. At 6800 ft elevation, for example, the date is April 5 – more than two weeks earlier than the April 21 date determined by CNF for 8000 ft elevation. CNF does move the end of SOU date back to April 15 because of spring black bear hunting season. It is not explained how bear hunting changes the snowmelt date, but this makes the final result match the DEIS date.

Fourth, the southwest slope of the Pryors does have a southern aspect. Roads #2018, #2011 and #2850 do have a significant southern aspect. Therefore it would be reasonable to make an adjustment moving the SOU end date earlier to allow for the earlier melt on the south facing slopes. The CNF doesn't mention this idea.

Wherefore, to estimate an appropriate end of SOU date based on the data in Appendix F and the above discussion one might begin with an April 5 average date determined from the regression line at 6800 ft. elevation. Using the 0<sup>0</sup>C criterion would shift this about a week earlier. Then shift it at least a couple weeks earlier to allow for the variations in weather and at least another week due to the southern aspect. This gives an end of SOU (start of closure) date of no later than March 8. This is five weeks earlier than CNF's result but is consistent with the March 18, 2007 photos of damage at 7000 ft. on Inferno Canyon Road.

#### **IV. NFMA VIOLATIONS**

The Forest Plan contains specific protections and recommendations for wildlife. It states "manage the land to maintain at least viable populations of existing native and desirable non-native vertebrate species." (Chapter II, 4a). The Forest Plan also specifies that: "Forest activities with potential for an impact on key wildlife species on key habitats, will have wildlife consideration made early in the project analysis process." The USFS's own policy also states that where "necessary to protect wildlife values, access and /or traffic will be restricted in key wildlife habitats during critical periods." The critical winter ranges for elk are from November 30 to June 15.

SOU restrictions in the ROD provide for only 36 days that trails in most of the Pryor Unit are closed to motorized use, closing use on 4/16 and re-opening use on 5/22. This is contrary to the direction in the Forest Plan, and an arbitrary and capricious decision. Closures should have been evaluated to protect elk and deer from motorized use. This is particularly applicable for Commissary Ridge and Island Ridge, which could be elk habitat and would provide escape cover.

#### **V. VIOLATION OF THE TRAVEL PLANNING RULE**

Pursuant to the 2005 Travel Planning Rule (see 70 Fed. Reg. 68264), in designating National Forest system roads, the USFS is required to "consider effects on National Forest System natural and cultural resources, public safety, provisions of recreational opportunities, access needs, conflicts among uses of National Forest System lands, the need for maintenance and administration of roads . . . that would arise if the uses under consideration are designated; and the availability of resources for that maintenance and administration." 36 C.F.R. § 212.55 (2005).

##### **A. Dispersed Camping**

Here, the USFS has improperly authorized extensive dispersed motorized camping and failed to justify its exemption allowing cross-country motorized use for dispersed motorized camping on virtually every motorized route in the District.

The 2005 Travel Management Rule does provide for this exemption to the ban on cross country travel, but only for the “the **limited** use of motor vehicles within a specified distance of **certain** designated routes.” 36 C.F.R. § 212.51(b) (emphasis added). Moreover, this exemption cannot be imposed, as it is in this decision, without the proper NEPA analysis and an evidentiary basis provided in the record. We would also like to point out that a limit on dispersed **motorized** camping would not limit individuals from engaging in the activity of dispersed camping on the District. It would only prevent individuals from driving off of a legally designated motorized route to camp.

This limited exemption was addressed in the Q&A which accompanied the Travel Management Rule:

The Department expects the Forest Service to apply this provision sparingly, on a local or State-wide basis, to avoid undermining the purposes of the final rule and to promote consistency in implementation.

In a letter dated June 8, 2006, the Chief of the Forest Service also released follow-up guidance regarding the use of the dispersed camping and game retrieval exceptions allowed by 36 CFR 212.51(b). The letter (emphasis added) states:

Such designations represent site-specific decisions associated with specific roads and trails or road and trail segments, rather than a blanket exception to the rule. Designations under 36 CFR 212.51(b) *will be applied sparingly to avoid undermining the purposes of the rule and to promote consistency in implementation.*

In a June 30, 2006 letter, the Region 1 Regional Forester provided Forest Supervisors with the following guidance: “Supervisors will follow national direction and apply this provision [referring to the dispersed motorized camping exemption] sparingly and on a route by route basis.” (FEIS 5-56).

Unfortunately, the CNF has failed to follow this direction to apply dispersed motorized camping “sparingly” and “on a route by route basis.” The CNF has authorized the use of motor vehicles for dispersed camping on virtually every road in the Beartooth District, without regard to compliance with the 2005 Travel Management Rule and without completing the requisite environmental review on a route by route basis.

Specifically, in its selection of Alternative B Modified the CNF has allowed dispersed motorized camping “within 300 feet of all designated system roads and motorized trails on the District, except along system road #2421 Main Fork of Rock Creek, where dispersed vehicle

camping would be allowed on or within a vehicle's length from the edge of designated spurs off system road #2421." FEIS 2-34; *see also* Appendix D-1. Furthermore, on the Pryor unit of the District, which as explained above is geographically and geologically, ecologically, culturally and recreationally unique from the rest of the Beartooth District, a dispersed motorized camping buffer of 300 feet has been designated universally across the entire unit. This universal application of the dispersed motorized camping exemption not only undermines the purpose and intent of the Travel Management Rule as stated in the Regional Forester's letter, but is also simply a violation of the Travel Management Rule.

In addition, the Custer has violated NEPA by applying this buffer for dispersed motorized camping without site specific analysis, disclosed through the NEPA process, of the effects of continued motorized travel on water quality, wildlife, vegetation (including the spread of noxious weeds), and soils. The only site specific analysis that appears to have been done is on the Main Fork Rock Creek area, where dispersed motorized camping was NOT allowed, but instead specific dispersed motorized camp sites were identified. Without site specific surveys it is impossible to know what the effects of allowing continued motorized cross country travel to this extent will really be on the Beartooth and Pryors.

Finally, granting a blanket exception for dispersed camping would make enforcement of authorized routes difficult, if not impossible, and would lead to wide swaths of impact, as motorized use would be authorized off of designated routes at any point along the route system. Enforcement problems arise when rules become less clear, as was the case for the 1987 Travel Plan, thereby making it more difficult for law enforcement officers to issue tickets to those violating the law. Not only that, but given the limited number of law enforcement personnel and the reality that most areas will not see a patrol officer, the agency has not justified how it will enforce a system that allows this much motorized use in very remote areas, including cross country motorized camping. The travel management rule was in part implemented to remedy this problem, and the Custer has let this opportunity pass it by in this decision.

The USFS cannot adequately maintain its route system, and has been unable to slow the proliferation of user created routes. User created routes will undoubtedly be created by those seeking dispersed camping locations, and will likely be followed by others looking for recreation opportunities. If individuals do not get off of their vehicle in order to locate an appropriate site for dispersed camping, but instead drive off in a direction that looks suitable and is passable by vehicle, it is easy to see how the proliferation of unmanageable user created routes could occur. Even one legal cross-country excursion looking for an appropriate location to camp could lead to the creation of a permanent, unauthorized user-created route, degradation to forest resources and the non-motorized recreation experience, and additional management difficulties. Without constant vigilance and appropriate signing and enforcement by the USFS, route proliferation will continue to occur on the Custer and resource damage will continue to be uncontrollable.

Both Wildlands CPR and the Pryors Coalition commented during the DEIS comment period expressing their concerns over this blanket application of the dispersed motorized camping exemption and the lack of site specific analysis of the effects of a dispersed motorized

camping buffer. This is especially true for soil and water quality concerns. The FEIS states “[d]ispersed recreation (dispersed camping and off-road vehicle use) across the District has steadily increased over the years resulting in localized soil compaction, erosion and accelerated sediment delivery to stream systems.” FEIS p. 3-84. Yet the FEIS did not analyze or illustrate where dispersed motorized camping will intersect with streams and potentially cause increased sedimentation. Furthermore, the FEIS states in regard to Alternative B Modified that “[a]dditionally, this alternative attempts to manage future expansion of dispersed camping that is occurring which will minimize risks for additional impacts to develop in the future.” FEIS p. 3-95. However, the only route where dispersed camping will be managed is along route 2421 (Rock Creek) and in some cases along 2071 (West Fork Rock Creek). Only two routes on the whole system will be actually managed for dispersed motorized camping while the rest of the transportation system is open. Since the Custer has applied the dispersed camping exemption so broadly, to make the claim that the preferred alternative attempts to manage future expansion of dispersed motorized camping and associated effects is arbitrary and capricious.

The Pryors Coalition expressed their concerns as follows:

The Pryors Coalition supports dispersed camping in the Pryors. We do have concerns about where vehicles are driven and parked by campers. The impacts of such driving and parking will increase as the number of users increases over the lifetime of this Travel Plan. Much of the vegetation and soil of the Pryors is fragile – including cryptobiotic soils and cushion plant communities. In some situations recovery from damage caused by the passage of a single 4WD vehicle could take several decades. For this reason we are concerned about the blanket application of the “300-foot rule” to all motorized routes. In principle this means that a 600-foot-wide corridor along every road -- over 72 acres per mile of road -- is vulnerable to vehicle damage. This “300-foot rule” also significantly increases the area susceptible to introduction of noxious weeds.

Generally, most people would not be greatly inconvenienced by parking their vehicle beside the road and carrying their sleeping bag etc. a short 300 feet. Of course they could camp only 100 ft from the road, or alternatively carry their gear 600 feet, without being tempted to drive all the way.

There may be places and routes in the Pryors where driving 300 feet to camp will not cause inordinate damage. We note that the 2005 Travel Management Rule says that “*The Department expects the Forest Service to apply this provision sparingly...*” and “*within a specified distance of certain designated routes...*” (page 68284). The universal application of the 300-foot rule to all routes in the Pryors seems to conflict with this directive.

The Forest should determine criteria for where such vehicle camping is appropriate. Then those “*certain designated*” routes, areas and/or spots where the 300-foot rule is appropriate can be implemented and it can be implemented. Unless and until this

determination is made, based on scientific criteria, vehicles should be required to park beside the road. Dispersed camping can still be allowed at any distance from any road.

Peter Lesica, a commenter and botanist cited at least twice in the References section of the FEIS, expressed his concern about the 300 foot buffer well in his comment letter:

I am a field biologist and familiar with the vegetation and terrain of the study area. I am happy that cross-country travel is prohibited. . . . My main concern is allowing people to drive vehicles 300 feet off the roadway in order to camp. This is the length of a football field and is excessive in my opinion. Most vehicle campsites are within 100 feet of the road. Allowing 300 feet will just give vehicle operators the idea that they can roam all over the place. This huge "buffer" will result in unnecessary damage to vegetation and introduce weeds when it is simply isn't necessary I strongly urge you to allow vehicles to go no more than 100 feet off the roadway to camp.

## **B. The Availability of Funds for Maintenance and Administration**

Contrary to the dictate of the Travel Management Rule, the USFS specifically did not address the affordability of the system it was designating. See FEIS p. 2-18 (“It is important to note that the original proposed action cited reduction of maintenance costs as rationale for not designating some roads. This criterion was not used in the re-evaluation of roads and trails for the proposed action or development of the action alternatives in the DEIS or FEIS. Funding for road and trail maintenance varies from year to year and was determined to not be a suitable filter for determining routes that should or shouldn’t be designated for public motorized use.”).

The USFS even admits that its present and future system is too large to maintain, but defers addressing this problem to a later time when “issues arise.” In the USFS’s own words: “Funding for maintenance of roads and trails is not anticipated to change significantly in the next 10 years. Based on past funding levels, the Forest is unlikely to have sufficient funding to maintain to standard all of the routes necessary for the administration, utilization, and protection of the District for the foreseeable future. As a result, the Forest prioritizes maintenance work and routinely applies for additional/supplemental funding to increase the number of miles of road and trail maintenance completed. If issues arise, road closures will be considered to protect resources and/or user safety.”

## **VI. EXECUTIVE ORDER VIOLATIONS**

The Travel Management Rule (TMR) was promulgated to implement Executive Order 11644, as amended by Executive Order 11989. 70 Fed. Reg. 68264 (Nov. 9, 2005). The Executive Orders require that these regulations direct that “designation of such areas and trails will be based upon the protection of the resources of the public lands, promotion of the safety of all users of those lands, and minimization of conflicts among the various uses of those lands.” EO 11644 Sec. 3(a). The TMR, in implementing the Executive Orders, sets out criteria to

consider when designating National Forest System roads, trails, and areas for motor vehicle use. The TMR dictates the following:

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

36 CFR 212.55(a)

Pursuant to Executive Order 11644 (as amended by Executive Order 11989), the USFS is to designate areas and trails to comply with the following:

- (1) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, or other resources of the public lands.
- (2) Areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats.
- (3) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands...

E.O. 11644 § 3; see also 36 CFR 212.55(b).

In addition, effects of the use of off-road vehicles must be monitored, and on the basis of the information gathered the agency should, as necessary, amend or rescind designations of the areas. E.O. 11644 § 8(a); see also 36 CFR 212.57.

At present, the USFS's Beartooth Travel Plan ROD is inconsistent with Executive Order 11644, and the TMR, for three reasons. First, the USFS is not locating or designating roads and trails to minimize harm to watersheds, wildlife populations and habitat, or other resources. Second, the USFS has not located motorized use to minimize conflicts between that use and other existing or proposed recreational uses, such as the original proposal made by the Pryors Coalition. Third, the USFS has not adequately demonstrated how they will effectively monitor travel plan implementation since they tier this activity to a programmatic Forest Plan monitoring system that does not provide for on-site evaluations.

**A. The USFS Failed to Locate or Designate Roads and Trails to Minimize Harm to Watersheds, Wildlife Populations and Habitat, and Other Resources**

The USFS's Alternative B Modified does not minimize the impacts to the forest's resources. While the minimization criteria outlined in the Executive Orders must be balanced

with the other needs of the Forest, the ROD failed to achieve this balance by adopting a decision that is heavily skewed in favor of motorized recreation.

Furthermore, NEPA regulations require that an FEIS: (1) “include appropriate mitigation measures not already included in the proposed action or alternatives,” 40 CFR §§1502.14(f); and (2) “include discussions of: . . . [m]eans to mitigate adverse environmental impacts (if not already covered under 1502.14(f)).” 40 CFR §§ 1502.16(h). Moreover, the FEIS is required to “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.” 40 CFR 1505.2(c).

According to the CEQ, “[a]ny such measures that are adopted must be explained and committed in the ROD [Record of Decision].” Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18036 (March 23, 1981). That has not been done in this case. Because the FEIS fails to adequately assess environmental effects and fails to identify monitoring and enforcement of mitigation efforts, it is impossible to comply with this provision or the Executive Order.

It is also disingenuous to use the addition of site specific mitigation to justify a particular alternative, when those same additions added to another alternative would have made it even more environmentally sound. For instance, the USFS states that “Alternative B Modified did provide more actions that addressed site specific water quality, fisheries, and soils concerns than any of the other alternatives, which was an influence on my decision-making.” Some of these site specific issues were never a concern in Alternative C because the designation of the routes was avoided to begin with, while others could have been remedied in a similar manner by imposing site specific restrictions. This is particularly true with regards to season of use restrictions implemented in Alternative B Modified.

The following are examples of instances where the USFS chose not to minimize impacts of the designation of areas and trails. First, with regards to archeological cultural resources, the USFS states that “[a]lternative C consists of the lowest site count (1) that is either currently being effected or may be affected . . . Alternative B Modified consists of . . . ten sites that are either currently being effected or may potentially be affected.” FEIS p. 3-61. For traditional cultural properties, the USFS notes that “[t]his alternative, [C] while allowing access of motorized vehicles to most of the more popular routes that are now available, does restrict access of motorized vehicles to more remote and pristine areas for both units. This does help protect, in part, the ethnographic landscape of the Pryor, Arrow Shot Into Rock, Mountain.” FEIS p. 3-75. “Effects from this alternative [B Modified] are basically the same as Alternative B with one important exception – it protects the Big Pryor overlook by dropping a segment of road 2088 where most of the fasting areas and cultural sensitive sites are located. By dropping the segment before it reaches the Shriver Peak and the Crater Ice Cave, motorized access over TCP sites at Shriver Peak would be reduced.” FEIS p. 3-76.

In response to this justification for selection of Alternative B Modified over Alternative C, it should be noted that the Pryors Coalition's original proposal (from which Alternative C was derived) protected road 2088, but the agency chose not to include this in Alternative C. Furthermore, the CNF could have modified Alternative C, which was only affecting this one cultural location, to exclude this road, just as they did when they Alternative B Modified. The CNF was continually biased towards selecting Alternative B, no matter what the cost to the environment or to non-motorized users of the area.

The Forest Service also ignored the clearly beneficial and minimized impacts presented by Alternative C in regards to the indirect impacts to water quality. The FEIS acknowledges that Alternative C reduces impacts to water resources by over 51.9 miles, while Alternative B modified only 43.3 miles. FEIS p. 3-96. To reduce these impacts to fisheries and aquatics, the USFS relies on unclear mitigation measures that apparently have no schedule for implementation and no demonstration that funding actually exists to implement the mitigation. See FEIS p. 3-123 ("Site specific effects that potentially increase risk of adverse impacts to aquatic habitat and species are mitigated in Alternative B Modified."). The USFS also failed to identify specific actions or assess the efficacy of those specific actions to demonstrate that they would in fact reduce impacts within acceptable limits. See Natl. Parks and Conserv. Assn. v. Babbitt, 241 F.3d 722, 734 (9th Cir. 2001) ("'perfunctory description'" or "'mere listing' of mitigation measures, without supporting analytical data,' is insufficient)

The USFS also ignored the writing on the wall with regards to erosive soils and weeds. Route designation on soils with high and very high erosion hazard ratings are greater for Alternative B modified. FEIS p. 3-169-170. The total susceptibility to the spread of weeds is far greater for Alternative B Modified (13,290 acres compared to 2211 acres in Alternative C). FEIS p.3-203.

Impacts to wildlife are also not "minimized" by the selection of Alternative B Modified. In general wildlife would face a lower potential for mortality and have a larger core habitat (35% in the Pryors Unit). FEIS p. 3-153. Bats are listed as a sensitive species in the forest plan, and as such were specifically considered within the FEIS. "Alternative C would have the lowest open motorized route miles (79) and thus would provide the most protection to bat colonies overall because caves would be less easily accessible than under the other alternatives." FEIS on p. 3-140. This choice for overall protection was ignored in favor of a seasonal winter restriction during bat hibernation periods. Unfortunately, this is the same season of use that is discussed in detail above, and that would only provide 36 days of closure during spring melt. This restriction would not provide protection for bats during winter hibernation, and it is flawed to attempt to rely on that restriction rather than an overall reduction in route density that would in actuality prevent disturbance of bats.

The impacts to elk and deer were also not minimized by the decision in the ROD. Elk are a management indicator species within the Forest Plan, and serve as a surrogate for both mule and white-tailed deer. The FEIS states that "Canfield et al. (1999) recommended that open road densities should be less than 1.0 mi/sq mi in big game summer habitat, with scattered key areas

with no roads.” FEIS p. 3-142. Hillis et al. (1991) . . . defined secure areas as >250 acres in size and >0.5 mile from an open road, and recommended that they comprise >30% of the analysis unit.” FEIS p. 3-143. Only Alternative C meets this threshold with 0.69 mi/sq. mile. Alternative B Modified is 1.27 mi/sq. mile. Only Alternative C provides adequate security habitat at 37% vs. 26 % for Alternative B Modified. There is no explanation as to why the science cited within the FEIS is not implemented in the ROD. There is also no explanation as to why Roads #2088 and #2095A (Big Pryor) and #2412 (Punch Bowl) were not closed as suggested by The Pryors Coalition. This would significantly increase secure areas with a loss of only a few miles of motorized opportunity. One might say that this provides “more bang for the buck” in an area where elk are not currently present and deer are in the decline, but could easily re-establish and/or recover if given appropriately unroaded habitat.

Similarly, big horn sheep would fare better under Alternative C than any other alternative. “The availability of escape terrain would be the highest under this alternative in both the Beartooth and Pryors Units. The greatest difference would be in the Pryors, where Alternative C would provide 28.5% more escape terrain than under the No Action Alternative.” FEIS p. 3-147.

Finally, one commenter raised the issue of resource damage he had personally witnessed on Meyers Creek. The commenter said “*Finally, a specific case where allowing ORV use is ill-advised.* This summer I went for a hike out of the Meyers Creek Work Center. Signs said that vehicles were not allowed on Trail 27. This turned out to not be true. Five motorcycles passed us on the trail as we were going up a fairly steep portion of the trail along the South Fork of Meyers Creek. This was early July. There was water running down the trail. The bikes dug up the trail and increased the erosion. There were water and rocks tumbling down the trail. This trail should not have been opened to ORV use until this portion of the trail was improved to handle that kind of use. “*Whoever allowed motorized use of this trail was probably not familiar with it. I think some of the bike riders were even embarrassed about the damage they were causing.*” FEIS p. 5-29. The portion of the quote in italics was not quoted in the FEIS, but is in the original letter #385. The known resource damage being caused to Meyers Creek trail by motorized use was ignored in the designation of this trail for motorized use in the ROD.

**B. The USFS Failed to Locate Motorized Use to Minimize Conflicts Between that Use and Other Existing or Proposed Recreational Uses**

Executive Order 11644 mandates that “[a]reas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands.” E.O. 11644 Sec. 3(3). The USFS must minimize conflicts by presenting a well-balanced decision for recreation on the forest, which has not even been attempted to be achieved. This is particularly true for the Pryor Unit, where only two miles of non-motorized trails were designated, as discussed in detail above.

The USFS acknowledged in the FEIS, when evaluating the no action alternative, that “[c]onflicts between motorized users and other types of recreationists would continue and,

perhaps, increase in the future as the number of recreationists on public lands increases.” FEIS p. 3-38. The FS further acknowledged that public comments revealed a concern over conflicts between non-motorized and motorized users, and that the “concerns included visuals, noise, wildlife displacement and harassment, and resource damage.” FEIS p. 3-36. Though this definition conflates actual user-conflicts, such as visual and noise effects on one user by another, with other factors that must be considered separately, such as wildlife and other resource protection, it is still one valid criteria that should have been used in evaluating the alternatives. The other criteria is displacement of one use because of the presence of another use. Instead, user conflicts in the traditional sense of adverse effects on one user and their response to that adverse effect have been marginalized by the USFS.

Later in its response to comments, the USFS seems to forget that use conflicts had been raised as a valid issue, and elected not to analyze use conflict as one of the criteria for route evaluation. *See* FEIS p. 5-19. Instead, the USFS equates use conflicts to a “personal preference related to the amount and types of motorized recreation opportunities that should be provided.” *Id.* Use conflict represented the “personal values” of forest users and those “personal values shape preferences for which activities are appropriate and desirable on public lands.” FEIS p. 3-37.

It is unclear what the USFS means when it says “[c]omments received after the DEIS pointed out that some conflict may be perceived conflict rather than actual conflict.” FEIS p. 3-38. The USFS appears to be relying on this category of comment to artificially narrow the definition of conflict and discount the effects of designating motorized use on all but two miles of trail within the Pryor Unit. The USFS does not explain how perceived conflict is different from an actual conflict, especially in terms of avoidance by non-motorized users on designated motorized routes.

Furthermore, the FEIS fails to respond to comments from non-motorized recreationists who noted conflict with motorized use on particular routes. For example, Ron Nusbaum points out the following in his comments on the DEIS:

The beginning terrain on most approaches to the Big Pryor Mountain top is limited to narrow corridors, but once on top the terrain opens and allows lateral movement off trail/road by foot and stock users. Motorized users cannot leave the trail/road for passing purposes; therefore they will be impeded when overtaking the slower (hikers, horsemen, etc.) user, until terrain and the slower user permits passage. Even worse is the case of head-on encounter. In the case of stock – which gets very nervous, sometimes dangerously reactionary, if followed or approached by noisy machines, presents an unpleasant if not unsafe experience. Imagine the stress to the adults escorting minors and the disabled? This is an unacceptable conflict, especially, considering the proposed near 100% motorized designation of the Pryor Mountain area!

The Beartooth Back Country Horsemen expressed the same concern in their comment letter. The Pryors Coalition also expressed similar concerns in its comment letter.

Mixing these different motorized and non-motorized uses on the same trail can lead to conflicts, safety concerns, and significant degradation of the experience of non-motorized users. These people may feel “shut out” and avoid these parts of the public land. According to Rebecca Heath, “I’ve learned that non-motorized recreationists feel that their recreation experience is negatively affected by motorized recreation, and in general, motorized recreationists do not perceive any user conflict. Separating these often conflicting types of pursuits (motorized and non-motorized uses) was an objective I had in building the Travel Plan.” (Gallatin NF, ROD, 10/30/06. p. 91).

Safety concerns arise when mixing, for example, horse riders and ATVs on the same trail. The ATVs frequently travel much faster, and are likely to come up behind the horses “pushing” them from behind. This can make the horses anxious and possibly lead to serious incidents. Motorized users are not allowed to leave the road to pass therefore are impeded (further intensifying the horses anxiety) until the slower user chooses or locates a safe place to depart the road. Terrain may limit the options, and there are no passing lanes on a two track road.

The clear solution to the above problems is to designate at least half of the trails up the south and west slopes of Big Pryor Mountain as non-motorized. We recommend that these non-motorized routes include the Inferno Canyon route #2018, King Trail #2011, and Bear Canyon route #2492, including Bear Canyon Ridge route #2814.

... Coupled with Stockman Trail #2850, a non-motorized #2492 would also provide separate trails for motorized and non-motorized users up through the rough lower-elevation country. It would also provide completely separate loading and unloading areas for horses and ATVs.

In the FEIS, the USFS failed to respond to these comments in their entirety. In response to other comments that expressed concern over conflicts between non-motorized and motorized uses, the USFS glibly responded that “The Forest seeks to provide a wide range of uses that include motorized and non-motorized opportunities for the recreating public. Alternative B Modified provides a variety of motorized and non-motorized opportunities that address the perceived conflicts. It is unlikely that any alternative could resolve the conflicts between individual values. There is no documentation of user conflicts on specific routes. Conflict was not used as criteria for route evaluation.” FEIS p. 5-19 (emphasis added). It is difficult to see how Alternative B Modified provides for non-motorized uses within the Pryor Unit on any level, much less on a level that could be called “variety.”

Wildlands CPR also raised concerns about the manner in which the Forest Service was addressing use conflicts analysis.

The DEIS states, “It is difficult to say to what degree the conflict may be increased or decreased by alternative, because individuals will respond differently to each alternative.

However, none of the alternatives wholly eliminate either motorized or non-motorized use, so the alternatives are not expected to increase the conflict to the degree that some users feel they have been entirely precluded from having opportunities compatible with their personal values.” (DEIS p. 3-16). (FEIS p. 3-37).

The threshold established with this reasoning is flawed in that the determination of an unacceptable degree of conflict would only occur in the event that one user was entirely precluded from opportunities in line with their values across the whole planning area. This all or nothing delineation is artificial as there are many ways to minimize user-conflicts route-by-route and in discrete areas. Unfortunately, the DEIS failed to show a route-by-route analysis of the potential for user conflicts, and instead gave a listing in Appendix C of each route with a column for specific rationales. Providing a rationale does not substitute for a hard look analysis that is required under NEPA.

During public meetings attendees were asked to identify routes that everyone could agree to designate for motorized use; these are included in each action alternative. Yet there is no corresponding list of routes where people identified the potential for user conflicts or where exclusive non-motorized use could be agreed upon. It would be reasonable to assume that those routes not agreed to for designated motorized use would have the potential for user-conflicts. However, there is no alternative analyzed that measures or even describes the potential for user conflict on these routes. Nowhere in the DEIS does the Forest Service demonstrate that each proposed route change was analyzed in order to minimize user conflicts as required by EO 11644 as amended by EO 11989. In response, the USFS notes that: “The Forest Service adhered to NEPA and the EO’s.

In response the Custer NF replied, “Comments reviewed from scoping, collaboration, and DEIS public review period indicated a general philosophical conflict between motorized and non-motorized uses rather than from route specific use conflicts. A route-by-route review was completed but no routes were closed due to conflict.” FEIS, p. 5-20. The USFS is wrong. The conflicts are much more than a “philosophical” disagreement over how public lands should be enjoyed, but are in themselves the display of future user conflict.

Alternative C still leaves open over ½ of the planning area to motorized use and best minimizes the potential for user conflicts; especially in relation to noise (see table 3-11). This would meet the E.O. requirements to minimize conflicts among forest uses in the Pryor Unit while still balancing resource protection with motorized access.

Public safety is also a significant concern when discussing conflicts between different recreational uses. In several instances above we have cited safety concerns between recreational stock users and motorized users. This will be an especially large problem on Lodgepole and Meyers Creek Trails. See Appendix A to this appeal for photographs that illustrate obvious safety and conflict concerns. Unfortunately, the USFS failed to analyze the potential conflicts in terms of public safety between motorized and non-motorized user. The FEIS states “The primary

focus of public safety associated with route designation is related to mixing licensed and unlicensed vehicle use on District roads and trails.” FEIS p. 2-13.

Additionally, the USFS states in the FEIS that “[r]outes designated as trails do not require a motorized mixed use analysis.” FEIS p. 2-13. This means that for the preferred alternative, 49 miles of trails would be open to all sizes of vehicles, and all ages of drivers, without ever analyzing whether or not the trail was appropriate for this mixed use. The FEIS asserts that, “[t]rail characteristics, such as slower speeds than roads, generally mean that crash severity and crash frequency are lower than for roads.” FEIS p. 2-13. However, the agency provides no information to support this claim. We note that the USFS currently has no trail design parameters for vehicles larger than ATVs, which begs the question of how these motorized mixed use trails differ in function from roads, or what characteristic they may have that exempts them from mixed use analysis. Conflicts on these trails will be exacerbated with the addition of non-motorized users who may have nowhere else to go and motorized vehicles greater than 50 inches. The Forest Service failed to analyze these potential conflicts.

Conflicts between users are a very real problem on the CNF and should have been fully evaluated and used as a factor in determining the allocation of motorized and non-motorized trails.

Finally, there was no evaluation of the impacts to hunting opportunities from motorized route designations. The FEIS states that “The public identified concerns with travel management planning impacts on other recreation uses, including: ...non-commercial...hunting opportunities. Specific use rates are not available for these activities, with the exception of commercial hunting which can only be conducted under an outfitter/guide permit.” FEIS p. 3-8. However, Montana Fish, Wildlife and Parks has significant information on harvest levels by hunting district, and several studies mentioned above describe motorized impacts on big game, in addition to those impacts mentioned in the FEIS. Motorized use negatively impacts big game and other wildlife, oftentimes displacing them onto private property or other areas where hunting opportunities are the lost to the general public. This reduces the ability to properly manage wildlife through the Montana hunting permit system. The decision not to analyze the loss of hunting opportunities was arbitrary and capricious and in violation of NEPA, the Executive Orders listed above and Executive Order 13443 - Facilitation of Hunting Heritage and Wildlife Conservation.

**C. The USFS failed to provide for monitoring the effects of motorized vehicle use on the National Forests’ resources**

There is no detailed monitoring plan in the FEIS and the mention of monitoring efforts in the ROD is inadequate to ensure that the new travel management plan and MVUM will be appropriately implemented. The reference to monitoring in the ROD does not inspire confidence in the process, stating that monitoring “**could** be used to determine” effects from ORV use and “**may** be conducted” as provided in the Forest Plan. ROD p. 20. If monitoring is not used to determine the effects, then it is not clear what will be used. If the one solid guideline contained in the Forest Plan is not used as a starting point, then what will be used? It is unclear how the USFS

will know how much an area is being affected or how much an area changes due to ORV use if they have no monitoring or baseline information.

The Environmental Protection Agency expressed similar concerns in its comments on the DEIS:

We are concerned that these statements include ambiguous or uncertain language stating that monitoring “could be used” and “may be conducted” and “if Beartooth Travel Management is selected.” This language does not provide assurance that there will be an effective program for monitoring, evaluation and adaptive management for travel management. Unless effects of travel are identified through monitoring they will not be known, and likely not mitigated. The DEIS, does not clearly state a commitment or assurance that adequate monitoring will be conducted to identify effects from travel or a commitment that effects of travel management will be mitigated with the monitoring and adaptive management program.

We realize that monitoring budgets are limited, but we believe the Travel Plan should include a monitoring plan to assess effects of road and travel management. The initial decisions on opening or closing roads to motorized travel may need to be modified based on impacts resulting from travel that can only be identified by monitoring.

The EPA goes on to express concern about the future impacts from the designated system without appropriate monitoring in place:

We are particularly concerned about effects of roads and motorized uses on water quality, aquatic habitat and fisheries, as well as other resources such as wildlife habitat, sensitive plants. Given the acknowledged impact of roads/trails and ATV/OHV use on water quality and fisheries and other resources such as wildlife, sensitive plants, etc., it would appear appropriate to develop monitoring components to assess travel management impacts on these resources.

It is unfortunate that the USFS did not take this advice to heart and implement a strong monitoring program with an adaptive management approach. The lack of specificity as to how monitoring will be implemented and how effectiveness of the new travel plan will be ensured fails to comply with the mandate in the TMR and Executive Orders to monitor impacts. In order to comply with these mandates, the Forest should have a detailed monitoring plan in place, as mentioned in the FEIS on p. 2-23, BEFORE a decision is made on the travel plan, providing firm guidelines to ensure consistency in implementation of the travel plan. Any monitoring plan should be made available for public comment, to aid in informing public comments and for public review of a crucial element to the travel plan.

It is interesting to note that the extent of the monitoring plan is contingent upon the budget available to the forest, while the designation of the routes themselves was unrestrained by budget limitations. *See* FEIS p. 2-23 and 2-18.

## **VII. THE USFS NEEDS TO PROVIDE LARGE BLOCKS OF NATURAL QUIET**

As outlined In the Appellants' comments on the DEIS, pursuant to the Multiple Use-Sustained Yield Act ("MUSY") and the National Forest Management Act ("NFMA"), the USFS is to provide for "multiple use" of the CNF which includes coordinating "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness" management on National Forest lands. 16 U.S.C. § 1604 (e). The USFS is to manage all of the various . . . resources of the National Forests so that they are utilized in the combination that will best meet the needs of the American people." 16 U.S.C. § 531. In so doing, it is understood that some of the National Forest land "will be used for less than all of the resources." Id.

In accordance with this broad multiple use objective, it is the policy (and statutory duty) of the USFS to provide and maintain opportunities for a variety of motorized and non-motorized activities and to find a balance between these interests to maintain a mix of opportunities to enjoy the National Forest.

As stated in the preamble to the Travel Management Rule (70 Fed. Reg. 68266), the National Forests should "provide access *for both* motorized and non-motorized users in a manner that is environmentally sustainable over the long term. The National Forest System is not reserved for the exclusive use of any one group, nor must every use be accommodated on every acre. It is entirely appropriate for different areas of the National Forest to provide different opportunities for recreation." 70 Fed. Reg. at 68266 (emphasis added).

Indeed, as described above, pursuant to Executive Order ("E.O.") 11644, the USFS is to "provide for administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, *and areas in which the use of off-road vehicles may not be permitted.*" E.O. 11644 at § 3 (emphasis added).

Towards this end, and to provide for a balanced mix of motorized and non-motorized use, the Appellants urge the USFS to separate the two types of recreational use by setting aside large blocks of natural quiet areas for non-motorized use, particularly in the Pryors.

Importantly, trying to provide for balanced use by providing for equal, shared access to the same roads and trails does not suffice. This is because, as the USFS concedes, motorized and non-motorized uses are not compatible. Without question, non-motorized recreational use (i.e, hiking, horseback riding, fair chase hunting, snowshoeing, skiing, bird-watching, and wildlife viewing) is wholly incompatible with, and displaced by, motorized access. Individuals seeking natural quiet and solitude and a more primitive, wilderness or hunting experience in the CNF cannot share the trails with the sights, smells, and noises of motorcycles and ATVs.

## **VIII. THE USFS NEEDS TO ADOPT NEW, LESS CONFUSING, DEFINITIONS FOR ROADS AND TRAILS**

The Appellants urge the USFS, once again, to adopt new definitions for “roads” and “trails” because the USFS’s current definitions are too broad, extremely confusing, and illegal. Under the current definition, a road is a “motor vehicle route over 50 inches wide, unless designated and managed as a trail.” A trail on the other hand is a “route 50 inches or less in width or a route over 50 inches wide that is identified and managed as a trail.” 36 C.F.R. § 212.1.

In other words, a route over 50 inches wide can be designated as either a road or a trail. The label assigned to a route over 50 inches wide is entirely within the discretion of the responsible USFS official. As such, it is impossible to make any on-the-ground distinctions between a road and a trail. A route over 50 inches wide could be labeled either a road or a trail on a USFS map. A route that looks like a road and is used as a road by 4x4s, Jeeps, SUVs, etc. may be deemed a “trail” by local USFS personnel. This is extremely confusing and misleading, and creates a situation where the impacts of a forest’s motorized system are impossible to quantify and therefore impossible to control.

At a minimum, the USFS needs to adopt a definition and criteria that clearly distinguishes roads from trails. Of particular concern is that by blurring (or removing) the line between roads and trails and retaining the flexibility and discretion to label a road a trail, the USFS has, in effect, circumvented the requirements of its own regulations, policies, and Forest Plans. For instance, there are a number of standards and guidelines in the Forest Plan applicable only to “roads” (i.e., road-density standards, elk security standards etc . . .) but not motorized trails. Further, pursuant to the 2001 Roadless Rule<sup>12</sup> a “road may not be constructed or reconstructed in inventoried roadless areas.” 36 C.F.R. § 294.12 (a). This prohibition in the Roadless Rule applies only to roads, not to trails.

Using the current definition, therefore, the USFS can circumvent any prohibitions or limitations on the use or creation of new “roads” in roadless areas, wilderness study areas, wildlife areas, or other primitive areas simply by calling a new route a trail or renaming an existing road a trail. Conversely, the USFS could attempt to bypass the legal requirements of Executive Order 11644 by calling a trail a road. See E.O. 11644 (referring only to “areas and trails”). In short, the USFS’s semantics game severely undermines all statutory, regulatory, and Forest Plan prohibitions respecting roads. What good comes of prohibiting new roads when a 60 inch route used by motor vehicles can simply be deemed a trail?

Moreover, conspicuously missing from the definition of a road or trail is any reference to, or requirement that, in order to be included in the transportation system, the route be constructed and/or maintained by the USFS. Absent such language, user created routes can now satisfy the definition of road or trail. User created routes that tear up the vegetation and create depressions in the soil can now be deemed official roads and trails by the simple process of designating the route on a map. This broad definition is illogical and illegal.

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<sup>12</sup> While purportedly replaced by the Governor’s petition process, the Rule was recently reinstated in People of the State of California v. U.S. Dept. of Agriculture, 2006 WL 2711469 (N.D. Cal. September 20, 2006)

In the instance of the decision on the Beartooth, the Forest Service classified 49 miles of trails as “open to all vehicle types.” FEIS p. 2-35. It is unclear how these “trails” open to all vehicles are different from “roads,” which are frequently also open to all vehicle types. There is no analysis as to the impacts that will result from the different maintenance requirements for trails v. roads, and no discussion of how these 49 miles of trails affect motorized route density on the forest. At a minimum, this is a violation of NEPA for failure to properly disclose impacts, and likely also rises to the level of violating the NFMA, CWA, and the ORV EOs.

## **IX. COMPLIANCE WITH THE CLEAN WATER ACT**

Pursuant to section 313 of the Clean Water Act (“CWA”), 33 U.S.C. § 1323, the USFS is required to comply with “all Federal, State, interstate, and local requirements” when engaging in any activity resulting, or which may result, in the discharge or runoff of pollutants. Such requirements include the State of Montana’s water quality standards (including the anti-degradation policy).

As such, in this case, the USFS must ensure that the Beartooth decision complies with all applicable state water quality standards. Towards this end, the USFS must also obtain 401 certification from the State of Montana. See 33 U.S.C. § 1341. Indeed, the USFS concedes that its proposed Travel Plan will result in the discharge or runoff of pollutants into the various rivers and streams in the analysis area thereby triggering its 401 and section 313 obligations. In fact, many of these rivers and streams in the CNF are already water quality impaired and on the State of Montana’s 303 (d) list. For example, Lodgepole Creek has a Water Quality Category rating 5, meaning one or more uses are impaired and a TMDL is required. It is unclear how increased motorcycle use from this proposed action will impact the creek. To the extent that any roads or trails in the analysis area contribute to or cause water quality violations, they should be closed and restored immediately.

## **X. IMPLEMENTATION AND ENFORCEMENT**

Overall, creating blocks of motor-free land will make enforcement of unauthorized ORV use easier because there will be less confusion about where and when vehicle use will be allowed and overtime most ORV users to become accustomed to the restriction.

As written above, the FEIS does not adequately address implementation and enforcement or even provide a proper plan for monitoring to ensure compliance with the new Travel Plan. Implementation, enforcement, and monitoring are not separate/unrelated issues that can be ignored in the FEIS. Rather, they are integral parts of any proposed Travel Plan. In the ROD, the USFS only discusses enforcement and implementation in very general, vague terms and without any guarantees or assurances that it will be implemented. This is in violation of the requirements in the Executive Order 11644 and the requirement of NEPA to take a “hard look” at impacts of a proposed action.

## **RELIEF REQUESTED.**

Appellants seek the following relief:

1. Based on Section I.B of this appeal, the Forest Service should rescind the ROD to consider several alternatives within the FEIS. These alternatives consist of:
  - a. Alternatives that would aggressively reduce overall route densities within acceptable science-based ecological limits across the entire Beartooth District and especially in the Pryor Unit;
  - b. Alternatives that would determine how best to physically close, decommission, and obliterate unnecessary or unacceptable routes, in particular unauthorized, user-created routes, especially in the Pryor Unit; and:
  - c. Alternatives that would not only reduce route densities, but entirely eliminate routes within key areas to protect environmentally sensitive watersheds and wildlife habitats and minimize user conflicts by establishing quiet-use recreation areas and trails, especially in the Pryor Unit.
2. Based on Section I, revisit the FEIS's analysis of impacts through a new EIS to: (1) ensure that the impacts caused by non-system, user-created routes to the spread of invasive species, water quality, fisheries, aquatic resources, and wildlife, are properly analyzed; (2) conduct site-specific analysis for all user-created routes that the Forest Service wants to designate into the motorized route system; (3) analyze the effects of allowing users of all ages on motorized routes; (4) address enforcement issues; and (5) ensure that the Forest Service has addressed the right alternatives, and chosen an alternative that comports with the agency's duties pursuant to not only NEPA and the CEQ regulations, but the Forest Services duties pursuant to Executive Order 11644, as amended, and the 2005 Travel Management Rule.
3. Based on Sections I.C.5, II, and III, above, the Forest Service should revise its Season of Use analysis in a new NEPA analysis.
4. In order to remedy the defect of lack of non-motorized opportunities in the Pryors, the Forest Service should designate routes as non-motorized, including the following:
  - #2088/#2095A on Big Pryor;
  - #2492/#2814 Bear Canyon;
  - #2144 Punch Bowl;
  - #2093 Island Ridge;
  - #20972 Roberts Bench;
  - #2092 Commissary Ridge (southern 1 1/2 miles) and #2092C;
  - #2018 Inferno Canyon; and
  - #2011 King Canyon.

5. Based on obvious use conflicts and inappropriateness of the trail for motorized use on both Meyers Creek and Lodgepole Creek, these routes should also be designated as non-motorized in order to minimize impacts and conflicts in accordance with the ORV Executive Orders.
6. Based on Section 5.A, above, the Forest Service should reconsider its application of the dispersed camping exemption and thereby consider the following potential guidance:
  - a. If certain high value dispersed campsites are located away from system routes and cannot be practically accessed any other way, the Forest should designate a single non-redundant route to these dispersed campsites rather than granting a blanket exemption.

In closing, thank you in advance for taking the time to carefully consider and evaluate this administrative appeal. The Appellants appreciate the amount of time and effort the USFS has put into the travel planning process.

If you have any questions or comments, or wish to discuss the issues raised in this appeal letter in greater detail, please do not hesitate to contact the Appellants listed below. We look forward to discussing these issues further during the informal appeal resolution meeting process. Thank you for your attention to this matter.

Sincerely,



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