

JOHN C. ADAMS & STEPHEN F. MCCOOL\*

# Finite Recreation Opportunities: The Forest Service, the Bureau of Land Management, and Off-Road Vehicle Management

## ABSTRACT

*The Forest Service and the Bureau of Land Management are revising their local travel management plans. These plans govern much of the allocation of recreation experience opportunities, including the balance between off-road vehicle and non-motorized opportunities. This article explores current and historic management of off-road vehicles by the Forest Service and the Bureau of Land Management, as well as laws and regulations governing off-road vehicle management, in order to (1) explain how Forest Service and Bureau of Land Management travel management works; (2) evaluate current off-road vehicle and non-motorized allocations for multiple-use lands; and (3) provide suggestions for improved agency management of off-road vehicles. Ultimately, concerns regarding appropriate allocations, the escalating conflicts between recreationists, increasing demand for outdoor recreation, the rising stakes associated with allocation decisions, and the plainly political nature of allocation decisions all point to a better, long-term solution: a new statutory recreation policy for multiple-use lands.*

## I. INTRODUCTION

The U.S. Department of Agriculture Forest Service (FS) and U.S. Department of the Interior Bureau of Land Management (BLM) are currently revising the site-specific travel management plans that allocate multiple-use lands to motorized and non-motorized recreation. The revisions will likely result in semi-permanent allocations to these incompatible types of recreation. This article identifies the manner in which these allocations will be made; discusses issues and concerns regarding allocations; and argues that existing allocations will, to a great extent, influence the results of the ongoing revision. In light of escalating conflict, increasing demand, and the plainly political nature of allocation decisions, current recreation policy is inadequate to wisely and fairly guide allocation

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\* John C. Adams, Ph.D., and Stephen F. McCool, Professor Emeritus of Wildland Recreation Management, are both at the College of Forestry and Conservation, University of Montana. Thanks to Laurie Yung, Martin Nie, Hank Harrington (in memoriam), Albert Borgmann, and Dan Flores for their critiques and assistance.

on multiple-use public lands, and a statutory national recreation policy for multiple-use lands is therefore necessary.

The FS and BLM manage most of the lands they administer under a multiple-use mandate, established for the FS by the Multiple-Use Sustained-Yield Act (MUSYA)<sup>1</sup> and National Forest Management Act (NFMA)<sup>2</sup> and for the BLM by the Federal Land Policy Management Act (FLPMA).<sup>3</sup> Both agencies have largely unfettered discretion to manage recreation as they see fit on multiple-use lands.

The ongoing revisions to site-specific travel management for wheeled vehicles were catalyzed by what the FS has named as one of the four principal threats to national forest health: unmanaged off-road vehicle (ORV) use in areas where these vehicles currently drive without restriction.<sup>4</sup> The FS estimates that the use of wheeled ORVs (generally all-terrain vehicles, or ATVs, off-road motorcycles, four-wheel drive vehicles, and sand vehicles)<sup>5</sup> is permitted either everywhere or on all “existing” trails (including uninventoried, unofficial, and user-made trails) on 57 percent of national forest acreage.<sup>6</sup> BLM permits such ORV use on 66 percent of its lands.<sup>7</sup> ORVs are additionally permitted on designated

1. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2006).

2. National Forest Management Act of 1976, 16 U.S.C. §§ 160–187 (2006).

3. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2006).

4. USDA Forest Serv., *Four Threats to the Health of the Nation’s Forests and Grasslands* (2006), <http://www.fs.fed.us/projects/four-threats> (last visited Feb. 21, 2009). The FS named “unmanaged recreation” as one of the four threats. *Id.* Unmanaged recreation includes other issues, such as cross-country equestrian use in the southeast, but ORVs were the largest component of unmanaged recreation, and the initial focus of the agency. Interview with Dale Bosworth, former Forest Serv. Chief, in Missoula, Mont. (Nov. 7, 2007).

5. According to an Executive Order, “‘off-road vehicle’ means any motorized vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or other natural terrain,” excluding motorboats and government vehicles. Exec. Order No. 11,644 § 2(3), 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended* by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended* by Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987). Some agencies prefer to designate these vehicles “OHVs,” or off-highway vehicles; this article retains the more accurate and limiting denomination used in Executive Order 11,644. Snowmobiles are ORVs, governed by the same rules and regulations as wheeled ORVs, but they are often treated separately in terms of route allocation and impact evaluation.

6. USDA Forest Serv., *Summary*, [http://www.fs.fed.us/recreation/programs/ohv/travel\\_mgmt\\_summary.pdf](http://www.fs.fed.us/recreation/programs/ohv/travel_mgmt_summary.pdf) (last visited Feb. 20, 2007). For more information, *see infra* Part IV.F.

7. U.S. DEP’T OF THE INTERIOR, BLM, *TRAVEL MANAGEMENT PROGRAM*, [http://www.blm.gov/wo/st/en/prog/Recreation/recreation\\_national/travel\\_management.print.html](http://www.blm.gov/wo/st/en/prog/Recreation/recreation_national/travel_management.print.html) (last visited Mar. 11, 2007) [hereinafter *TRAVEL MANAGEMENT PROGRAM*]. U.S. DEP’T OF THE INTERIOR, BLM, *RECREATION MANAGEMENT INFORMATION SYSTEM REPORT #11, OFF HIGHWAY VEHICLE DESIGNATIONS 95* (2008) [hereinafter *OFF HIGHWAY VEHICLE DESIGNATIONS*]; *see also infra* Part IV.F.

routes in other areas. Snowmobiles, also ORVs, are similarly managed. While some FS and BLM units have completed travel planning conscientiously,<sup>8</sup> in many instances both unmanaged recreation specifically, and recreation allocations generally, are the result not of an explicitly considered and planned policy, but of a default policy allowing ORV use to continue everywhere it developed.

The consequence of this management approach is that ORVs are used in many areas where they have significant negative impacts on water, soil, wildlife, and vegetative resources. Because motorized use generally displaces non-motorized uses, current ORV management privileges motorized recreation at the expense of non-motorized recreation. Finally, this largely-unplanned allocation is likely to be used as a baseline in current and future planning processes, prejudicing recreation allocation in favor of motorized recreation.

To address problems with the existing allocations, in 2005 the FS published a new federal rule (Travel Management; Designated Routes, and Areas for Motor Vehicle Use) governing travel management on the national forests,<sup>9</sup> and required individual national forests and ranger districts to “decide which roads, trails, and areas to designate for motor vehicle use.”<sup>10</sup> BLM, though with less alacrity, is also moving to make ORV allocations on a site-by-site, route-by-route basis.<sup>11</sup> It is not clear when the agencies will wish to revisit travel planning again in the future because of the cost and polarized politics of travel management revision, and the increasing entrenchment of “existing” uses. Accordingly, these processes will determine how Americans will be able to recreate on “multiple-use” lands for the coming decades.

This article explores current and historic FS and BLM management of ORVs, as well as laws and regulations governing ORV management, in order to (1) explain how FS and BLM travel management works,

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8. Because recreation administration is not monolithic within either agency there are many variations in the direction and quality of ORV management, and the general conclusions drawn in this article will not accurately reflect management of every administrative unit.

9. TRAVEL MANAGEMENT PROGRAM, *supra* note 7; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005) (codified at 36 C.F.R. pts. 212, 251, 261 & 295).

10. USDA FOREST SERV., ON THE RIGHT TRAIL! A FOREST SERVICE PROGRAM FOR OHV ACCESS 2 (2005), available at [http://www.fs.fed.us/recreation/programs/ohv/ohv\\_use.pdf](http://www.fs.fed.us/recreation/programs/ohv/ohv_use.pdf). See also Memorandum from Dale Bosworth, Forest Serv. Chief, to Regional Foresters, et. al., (June 8, 2006), available at [http://www.fs.fed.us/recreation/programs/ohv/letter\\_plus\\_attachment.pdf](http://www.fs.fed.us/recreation/programs/ohv/letter_plus_attachment.pdf).

11. U.S. DEP'T OF THE INTERIOR, BLM, NATIONAL MANAGEMENT STRATEGY FOR MOTORIZED OFF-HIGHWAY VEHICLE USE ON PUBLIC LANDS (2001), available at [http://www.blm.gov/ohv/OHV\\_FNL.pdf](http://www.blm.gov/ohv/OHV_FNL.pdf) [hereinafter NATIONAL MANAGEMENT STRATEGY].

concluding that the agencies' discretion over allocations is virtually unfettered by statutes or the courts; (2) evaluate current recreation allocations for multiple-use lands in light of recreation impacts, fairness to different user groups, and the purpose of public lands; (3) provide suggestions for improved agency management of ORVs; and (4) finally, argue that, while necessary in the absence of statutory direction, the ongoing agency processes are unlikely to yield, in the aggregate, rational and socially desirable allocations. Recreation allocations are fundamentally political decisions about the purpose of public lands and about what uses of public lands are appropriate and desirable. Those larger political determinations are best made by Congress, and not by agency line officers on a case-by-case basis, indicating the need for a statutory recreation policy for multiple-use lands.

The article consists of six parts. This Part (Part I) introduced the two main agency actors in ORV management, the FS and BLM. Part II reviews some of the environmental, social, and political impacts of motorized recreation, thereby explaining why ORV allocations need to be made in a deliberative manner. Part III provides an overview of the FS and BLM authority and obligations in managing ORVs, and describes how courts have responded to lawsuits contesting agency decisions. Part IV discusses agency implementation of management obligations, explaining how the FS and BLM arrived at current allocations. Part V evaluates the current allocation of recreation on public lands in relation to demand and appropriate use. Part VI suggests ways to improve agency management of ORVs, then argues that improvement will not obviate the need for a statutory recreation policy for multiple-use lands.

## II. ORV IMPACTS

Like most uses of public land, including other types of recreation, ORVs deliver desirable social benefits at the cost of other environmental and social values.<sup>12</sup> ORV impacts must be understood in order to soundly evaluate those tradeoffs. In this part, the environmental and social impacts of ORVs and the relationship between ORV management and wilderness designation is addressed.

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12. For a review of research on the benefits of recreation, see ROBERT E. MANNING, *STUDIES IN OUTDOOR RECREATION: SEARCH AND RESEARCH FOR SATISFACTION* 156-74 (2d ed. 1999). There has been a significant amount of research into the benefits of wildlands recreation, but relatively little that differentiates between benefits delivered by different types of experiences and modes of transportation.

## A. Environmental Impacts of ORVs

The environmental impacts of recreation are not fully understood, in part because the impacts of recreational activities vary by location, activity type, affected resource, time of use, recreationist behavior, and a host of other factors.<sup>13</sup> Further, few wildlife studies have translated recreation impacts “into practical metrics (e.g., population size and trend, species distribution and richness) that serve as big-picture benchmarks for on-going (long-term) change.”<sup>14</sup> It is known that many kinds of public land recreation have impacts on soil, vegetation, water quality, and wildlife, and frequently spread invasive plant species.<sup>15</sup> Further, for many resources, in many places, the impacts of initial recreation use are often disproportionately great; that is, the impact of only a few recreationists is often nearly as great as that of many recreationists, leading to the management maxim that use should generally be concentrated, rather than dispersed.<sup>16</sup>

As with other types of recreation, ORV impacts on physical resources vary greatly by vehicle type, amount of use, season, recreationist behavior, and the sensitivity of the environment. Havlick summarizes potential wheeled ORV impacts in this way:

The ecological consequences of ORVs range from soil compaction and erosion to noise, air, and water pollution. In many ways approximating the impacts of roads . . . ORVs directly and indirectly damage vegetation and wildlife, fragment habitat, displace sensitive species, introduce and distribute invasive species, and provide extensive access to legal hunting and illegal poaching of wildlife.<sup>17</sup>

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13. David N. Cole, *Environmental Impacts of Outdoor Recreation in Wildlands*, in *SOCIETY AND NATURAL RESOURCES: A SUMMARY OF KNOWLEDGE* (Michael J. Manfredo et al., eds., 2004).

14. Interview with Tamara L. Mildenstein, in Missoula, Mont. (Sept. 2008) (discussing ongoing research by Tamara L. Mildenstein, L. Scott Mills, Peter Landres, Regina M. Rochefort, James P. Schaberl). Mildenstein et al., in a literature review, found very few wildlife studies that “specifically targeted recreation effects on wildlife population and/or community levels,” and almost none that considered effects on larger populations or ecological communities. *Id.* They concluded that “the larger question of whether these changes translate into meaningful effects on the units of conservation focus—wildlife populations, species, or communities—is still a relatively unexplored research area in the wildlife-recreation field.” *Id.*

15. Cole, *supra* note 13, at 111.

16. *Id.*

17. DAVE HAVLICK, *NO PLACE DISTANT: ROADS AND MOTORIZED RECREATION ON AMERICA’S PUBLIC LANDS* 91 (2002).

Snowmobiles may have impacts associated with noise, exhaust, snow compaction, wildlife stress or displacement, and damage to exposed vegetation.<sup>18</sup> ORV impacts are generally, though not inevitably, greater than those of non-motorized recreationists, due in part to the nature of the machines (e.g., their wide stance and substantial weight) and the fact that each motorized recreationist typically impacts a substantially greater area of landscape than does a non-motorized recreationist.<sup>19</sup> Further, even minimal ORV use can have significant impacts.<sup>20</sup> In general, ORV impacts are significant enough to warrant monitoring and evaluation,<sup>21</sup> because they may be very great in particular places or have very significant impacts on specific resources.<sup>22</sup> While knowledge of ORV im-

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18. See generally BIODIVERSITY LEGAL FOUNDATION, REPORT AND FORMAL COMMENTS ON THE CURRENT AND POTENTIAL ADVERSE IMPACTS OF WINTER RECREATIONAL USE IN YELLOWSTONE NATIONAL PARK AND THE WINTER VISITOR USE MANAGEMENT PROCESS BY THE U.S. PARK SERVICE (1996).

19. USDA FOREST SERV., POSITION PAPER: UNMANAGED MOTORIZED RECREATION 3, available at <http://www.fs.fed.us/publications/policy-analysis/unmanaged-recreation-position-paper.pdf> (“[A] disproportionate effect from irresponsible OHV use is likely because motorized vehicles are powerful, can travel many miles quickly, and can easily damage sensitive resources.”). Length of a visit varies by terrain and trail condition, but ATV drivers typically drive more than 20 miles a day, compared to something on the order of six miles for recreationists on foot. See JOHN GENEREUX & MICHELE GENEREUX, AN OHV RECREATION PLANNING TOOL BASED ON A SURVEY OF RESOURCE MANAGERS AND A SURVEY OF OFF-HIGHWAY VEHICLE RIDERS IN MINNESOTA 87 (2001) (describing a survey of Minnesota ATV drivers, with mean trip distance of 33 miles and median of 20 miles); TOM CRIMMINS, COLORADO OFF-HIGHWAY VEHICLE USER SURVEY: SUMMARY OF RESULTS 2 (1999) (describing a survey of Colorado OHV drivers, with a mean ride distance of 29 miles); STEPHEN F. MCCOOL & JUSTIN HARRIS, THE MONTANA TRAIL USERS STUDY 8, 10, 18, 20 (1994), available at <http://www.itrr.umt.edu/research/TRAILS.pdf> (finding in a survey of Montana trail users an average trail walk distance of 2.5 miles, median backpack distance of 8 miles, median off-road motorcycle distance of 25 miles, and median ATV trip of 15 miles). For impacts like that of spreading noxious weeds, the greater distance traveled exacerbates problems. See Jonathan L. Gelbard, *Invasaders on the Move: Roads and Off-Road Vehicle Use as Major Causes of Weed Invasions*, in THRILLCRAFT: THE ENVIRONMENTAL CONSEQUENCES OF MOTORIZED RECREATION 125 (George Wuerthner ed., 2007). The sound of ORVs also carries farther than does the sound of other activities, thus for wildlife, ORVs have an impact corridor that is not just longer than that of other recreationists, but also wider.

20. See, e.g., Lance Frazler, *Taking Another Look at Wolverines*, HERALD J. (Logan, Utah), May 31, 1996, at 11 (discussing the findings of researcher Jeff Copeland that wolverines, who den in the type of cirques favored for snowmobile “highmarking,” sometimes abandon natal dens after minimal snowmobile encounters).

21. A 1998 study found that ORVs were “implicated” in the decline of approximately 13 percent of imperiled species in the United States. David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 610 (1998). The extent of recreation impacts, i.e., the degree of culpability in species decline, is not identified in the article.

22. Increasingly the courts, FS, and BLM have imposed limitations on ORV use to protect specific species in specific places. See, e.g., Associated Press, *Judge Bans Snowmobiles*

pacts is imperfect, ORV routes and play areas can be designated so as to reduce known or suspected impacts. Thus, ORV allocations that were made inadvertently or without adequate consideration are particularly likely to have undesirable or unacceptable impacts on flora and fauna.

Despite the environmental impacts caused by ORVs, it should be remembered that all human activities on, and many beyond, multiple-use lands have impacts on public land resources, whether those activities be hiking, grazing, logging, or anything that results in on- or off-site pollution. The critical question is not whether impacts occur, but rather what type and level of impacts occur, and whether we are willing to accept them. Site-specific ORV impacts should be carefully monitored and may require elimination of ORVs in particular places. However, assuming that, in contrast with past performance, the agencies designate ORV areas with care, monitor impacts, and enforce closures, the environmental impacts caused by ORVs point to the need for careful management of ORVs and not broad-scale elimination.

## B. Social Impacts of ORVs

As early as the 1960s, recreation managers began to argue that some recreation activities impact the experience available to others,<sup>23</sup> leading to today's recognition that some recreation, such as ORV driving, precludes the experience other recreationists seek. The recreation management field has long pushed agencies to manage for experience or "recreation opportunities,"<sup>24</sup> rather than activities, recognizing that a walk in deep wilderness is not the same as a walk in populous front country.<sup>25</sup> This approach was realized with the creation of the Recreation Opportunity Spectrum (ROS). Developed in the 1970s, by Driver and

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to *Protect Endangered Caribou in Northern Idaho*, SEATTLE TIMES, Sept. 26, 2006, available at [http://seattletimes.nwsourc.com/html/localnews/2003276333\\_webcaribou26.html](http://seattletimes.nwsourc.com/html/localnews/2003276333_webcaribou26.html) (regarding suspension of snowmobile use to protect caribou in the Idaho Panhandle National Forest); Editorial, *Fencing Off More Public Land*, LAS VEGAS REVIEW-JOURNAL, Aug. 9, 2006 (regarding the closure of a BLM area to protect threatened and endangered cacti); Janet Wilson, *Actions Renew Tensions Over Use of Desert Land*, L.A. TIMES, Mar. 15, 2006, at B-3 (regarding suspension of wheeled ORV use to protect rare plants in BLM areas).

23. J. Alan Wager, *The Carrying Capacity of Wild Lands for Recreation*, 7 FOREST SCI. MONOGRAPHS 1 (1964).

24. ROGER N. CLARK & GEORGE H. STANKEY, *THE RECREATION OPPORTUNITY SPECTRUM: A FRAMEWORK FOR PLANNING, MANAGEMENT, AND RESEARCH* 1-7 (1979).

25. The nomenclature "opportunity" indicates that "there is structure in the environment that sets boundaries on what can be perceived or experienced, but that within those boundaries recreationists are free to experience the world in highly individual and variable ways." MICHAEL E. PATTERSON & DANIEL R. WILLIAMS, *COLLECTING AND ANALYZING QUALITATIVE DATA: HERMENEUTIC PRINCIPLES, METHODS, & CASE EXAMPLES* 61 (2002) (describing this as "situated freedom").

Brown and Clark and Stankey, with input from the FS and BLM, ROS attempted to shift agency attention away from activity type, such as hiking or fishing, by focusing on setting.<sup>26</sup> ROS asserted that setting (physical, social, and managerial) matters to recreationists, and assumed that, without an effort to protect a variety of settings, the more primitive settings would gradually be lost.<sup>27</sup> ROS was intended to prevent the overlap of incompatible activities and to ensure the availability of a variety of experience opportunities through zoning.

In ROS, social setting includes the number, behavior, and other characteristics of fellow recreationists, including mode of transportation. The presence of ORVs may facilitate or hinder visitors' achievement of particular experiences. In some instances, the effect of one recreationist on another's experience manifests as "recreation conflict,"<sup>28</sup> essentially a degradation of the recreation experience.<sup>29</sup> Many non-motorized recreationists experience conflict with motorized recreationists. For example, a 1994 Montana survey found that only 11.4 percent of hikers/walkers believed motorcycling to be compatible with their activity; 15.8 percent of horseback riders believed the same.<sup>30</sup> Depending on the intensity of the activity, conflict can result in displacement, i.e., the abandonment of the use of a particular trail or area or a change in time of use.<sup>31</sup> The result, as the Department of the Interior concluded in 1978, is that:

It appears that most nonmotorized forms of outdoor recreation are disrupted or diminished in value by the operation of ORVs nearby. This is especially true for those visitors whose

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26. CLARK & STANKEY, *supra* note 24; B.L. DRIVER & PERRY J. BROWN, USDA FOREST SERV., GEN. TECH. REP. RM-55, THE OPPORTUNITY SPECTRUM CONCEPT AND BEHAVIORAL INFORMATION IN OUTDOOR RECREATION RESOURCE SUPPLY INVENTORIES: A RATIONALE 24 (1978).

27. See CLARK & STANKEY, *supra* note 24, at preface; Roger N. Clark et al., *Values, Behavior, and Conflict in Modern Camping Culture*, 3 J. LEISURE RES. 143, 145 (1971) (describing a process of recreation invasion and succession leading toward progressively more modern settings).

28. Alan E. Watson, *An Analysis of Recent Progress in Recreation Conflict Research and Perceptions of Future Challenges and Opportunities*, 17 LEISURE SCI. 235, 235 (1995).

29. In recreation literature, conflict is usually defined as "goal interference attributed to another's behavior." Gerald R. Jacob & Richard Schreyer, *Conflict in Outdoor Recreation: A Theoretical Perspective*, 12 J. LEISURE RES. 368, 369 (1980). For a review of the conflict literature, see MANNING, *supra* note 12, at 194–205. One study has found that an encounter with even a single ORV can degrade the experience of non-motorized recreationists. Joar Vitterso et al., *Recreational Conflict Is Affective: The Case of Cross-Country Skiers and Snowmobiles*, 26 LEISURE SCI. 227 (2004). This suggests that, for some non-motorized recreationists, ORV social impacts occur on an asymptotic curve similar to the generalized recreationist-environmental impact curve. See *supra* text accompanying note 16.

30. MCCOOL & HARRIS, *supra* note 19, at 9, 13.

31. See generally MANNING, *supra* note 12, at 95–97.



recreation goals include solitude, tranquility, relaxation, observation of wildlife, and appreciation of wildland environments. Where a significant level of ORV use is present, tranquility-seeking recreationists are often displaced altogether.<sup>32</sup>

In plain language, for most non-motorized recreationists, allocation is a zero-sum game: permitting motorized use precludes the experience most non-motorized recreationists seek.

Conflict between motorized and non-motorized recreationists is asymmetric, meaning the conflict is generally felt more keenly by non-motorized recreationists than ORV drivers.<sup>33</sup> The result is that many motorized recreationists, largely unaffected by sharing trails, argue that non-motorized recreationists are simply selfish, and that “all recreationists must learn to share trails and facilities.”<sup>34</sup> While this may be an effective rhetorical strategy, it ignores the clear evidence that, for most non-motorized recreationists, motorized trail use is incompatible with the experience they seek on public lands.

### C. Impacts on Wilderness Designation

One of the most contentious public land issues over the last 40 years has been whether or not to designate FS and BLM roadless areas as wilderness.<sup>35</sup> In general, Congress and the agencies consider areas that include no roads for 5,000 or more contiguous acres to be “roadless” and eligible for wilderness designation.<sup>36</sup> Wilderness designation, accomplished by statute, removes areas of federal public land from multiple-

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32. U.S. DEP'T OF THE INTERIOR, HERITAGE CONSERVATION AND RECREATION SERVICE, FINAL ENVIRONMENTAL STATEMENT: DEPARTMENTAL IMPLEMENTATION OF EXECUTIVE ORDER 11,644, 30–31 (1978).

33. Asymmetric conflict has been recognized for decades. See Timothy B. Knopp & John D. Tyger, *A Study of Conflict in Recreational Land Use: Snowmobiling vs. Ski-Touring*, 5 J. LEISURE RES. 6 (1973); Jacob & Schreyer, *supra* note 29. Jan Laitos and Rachel Reiss also explain the concept. See Jan G. Laitos & Rachel B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENVTL. L. 1091, 1101–03 (2004). In the Montana trail users' survey cited earlier, while only 11.4 percent of hikers believed motorcycling compatible with their activity, 55.5 percent of motorcyclists thought the two activities compatible. McCool & Harris, *supra* note 19, at 9, 19.

34. BlueRibbon Coalition, *Preserving Our Natural Resources FOR the Public Instead of FROM the Public*, <http://www.sharetrails.org> (last visited Jan. 23, 2009).

35. This means that areas would be designated, by statute, as part of the National Wilderness Preservation System. See Wilderness Act, 16 U.S.C. §§ 1131–1136 (2006); Douglas W. Scott, *A Wilderness-Forever Future: A Short History of the National Wilderness Preservation System* (2001); Craig W. Allin, *The Politics of Wilderness Preservation* (1982).

36. Wilderness Act § 1131(c)(3).

use management, requiring them to be managed under the provisions of the Wilderness Act.<sup>37</sup>

Since its conceptualization, wilderness has been as much a recreational allocation as an ecological one. For example, early wilderness advocate Bob Marshall differentiated between pristine areas and wilderness. The chief function of wilderness, he suggested, “is not to make possible contact with the virgin forest but rather to make it possible to retire completely from the modes of transportation and the living conditions of the twentieth century.”<sup>38</sup> With that history, it is no surprise that the most straightforward provision of the Wilderness Act is prohibition of the use of “motor vehicles, motorized equipment or motorboats” and other forms of “mechanical transport” within the National Wilderness Preservation System.<sup>39</sup>

To preserve multiple-use management and agency discretion to permit ORV use, off-road vehicle organizations typically oppose wilderness designation. For example, Clark Collins, of the influential ORV group “BlueRibbon [sic] Coalition,” has stated that “[i]t is time for ‘wise use’ legislation to remove roadless areas from consideration for wilderness without designating more.”<sup>40</sup> ORV organizations now generally present the most potent opposition to wilderness designation.<sup>41</sup>

37. *Id.* §§ 1131–1136.

38. ROBERT MARSHALL, *THE PEOPLE’S FOREST* 178–79 (1933). Aldo Leopold, likewise, argued that the absence of motor vehicles was more essential to wilderness than the absence of careful logging. PAUL S. SUTTER, *DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT* 72 (2002).

39. Wilderness Act § 1133(c).

40. Stephen Stuebner, *AFL-CIO Backs Anti-Wilderness Group*, *IDAHO STATESMAN*, July 14, 1989. Some ORV organizations state that their opposition is only to designation of areas where they ride, e.g., “We do, however, actively oppose Wilderness designation of areas presently used by mechanized recreationists because that designation disallows our continued use of those areas.” *Forest Service Reform: Hearing Before the Subcomm. on Nat. Parks, Forests and Public Lands of the H. Comm. on Nat. Res.*, 103d Cong. 303 (1994) (statement of Clark Collins, Exec. Dir., BlueRibbon Coalition). Some ORV organizations state that their opposition is to designation of areas they may desire in the future, e.g., “Many of [the areas in U.S. Rep. LaRocco’s proposal] are used now and will be used in the future by mechanized recreationists. Our numbers are growing and they’ll continue to grow, and we need those wild lands.” *Idaho Wilderness Proposals: Hearing Before the Subcomm. on Nat. Parks, Forests, and Pub. Lands of the H. Comm. on Natural Resources*, 103d Cong. 57–58 (1995) (statement of Sandra Mitchell, Idaho State Snowmobile Association and Idaho Trail Machine Association) [hereinafter *Idaho Wilderness Proposals*].

41. ORV groups first waxed in political power with the Wise Use Movement in the 1980s. By 1988, the BlueRibbon Coalition claimed a measure of responsibility for President Reagan’s pocket veto of the RARE II wilderness bill for Montana. Clark Collins, *A Chronology of the BlueRibbon Coalition*, *BLUERIBBON MAGAZINE* (2005), available at <http://www.sharetrails.org/magazine/article.php?id=1473>. See also John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 *J. LAND RESOURCES & ENVTL. L.* 1, 6 (2005) (describing barriers to

Because wilderness is a type of recreation allocation, the arguments surrounding wilderness designation and agency allocation are often very similar. This connection and similarity is strengthened by the relationship between agency allocation and congressional action. Historically, Congress has been extremely reluctant to designate areas as wilderness if there is established ORV use. For example, U.S. Representative John Seiberling described a bill to designate wilderness in Montana in this way: “Just for the record we would note that the way this resolved the question of snowmobiling was to drop the snowmobile areas out of wilderness. So there are no snowmobile areas in the wilderness areas in this bill.”<sup>42</sup> Even the FS and BLM, in making their statutorily required recommendations for or against wilderness designation of roadless areas, are heavily influenced by whether they, themselves, have permitted or prohibited ORV use in particular areas.<sup>43</sup>

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wilderness designation for BLM areas, and noting the decline in influence over wilderness designation of timber and mining, and the increased importance of “off-road vehicle (ORV) users, and local governments that cater to them”).

42. *To Establish the Lee Metcalf Wilderness and Management Area in the State of Montana, and for Other Purposes: Hearing Before the S. Subcomm. on Pub. Lands and Nat. Parks of the H. Comm. on Interior and Insular Affairs*, 98th Cong. 67 (1983) (statement of Rep. Seiberling, Chairman of the Subcomm.); reprinted in *Additions to the National Wilderness Preservation System, Part IV* (describing designation of the Lee Metcalf Wilderness). Because of this sort of history, many constituencies, including the agencies, believe that creating the perception that a particular management regime is “historic” creates a potent rhetorical case for its continuance. Steve Schwarze, *Rhetorical Traction: Definitions and Institutional Arguments in Judicial Opinions About Wilderness Access*, 38 ARGUMENTATION & ADVOCACY 131, 140 (2002) (describing efforts by snowmobile organizations and the National Park Service to bolster legal and rhetorical support for specific recreation policies by demonstrating that those policies constituted continuation of existing policy rather than change).

43. The Secretary of the Interior, “from time to time,” is required to recommend to the President whether roadless areas are suitable for wilderness designation. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(a) (2006). The FS is required during land management planning to recommend whether roadless areas are suitable for wilderness designation. 36 C.F.R. § 219.7(a)(6)(ii) (2006). Agency recommendations have no legal implications, but are important politically. The agencies factor motorized use into their recommendations. For example, the Beaverhead-Deerlodge National Forest, in its recent evaluation of roadless areas for wilderness recommendations, based suitability judgments, in part, on whether ORVs were used in the area and whether “low standard roads” (probably ORV routes) were present. USDA FOREST SERV., BEAVERHEAD-DEERLODGE NATIONAL FOREST REVISED DRAFT FOREST PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT, at C-11 (2008). In some senses this is completely sensible: the agency should disclose and consider impacts on motorized recreationists in its wilderness recommendations. In another sense this simply dresses up previous agency allocations as a judgment about wilderness suitability: the agency permits ORVs to drive in place X, therefore X’s suitability for designation is low, therefore the agency recommends against designating X as wilderness. The FS sometimes permits motorized use even within areas that it has itself recommended for wilderness. In 2001, for example, the agency approved the continued use of ORVs on ex-

The result is that agency allocations for roadless areas frequently determine future wilderness designation. The allocation to *non-motorized* use eliminates a primary factor in motivating and justifying opposition to wilderness designation and creates a constituency with a vested and rhetorically-potent interest in advocating for wilderness designation. The allocation to *ORV* use creates a prejudicial history of use and a constituency with a vested and rhetorically-potent interest in opposing wilderness designation.<sup>44</sup>

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isting trails for 169,000 acres of recommended wilderness in Montana and the Dakotas. USDA FOREST SERV. & U.S. DEP'T OF THE INTERIOR, BLM, OFF-HIGHWAY VEHICLE FINAL ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED PLAN AMENDMENT FOR MONTANA, NORTH DAKOTA, AND PORTIONS OF SOUTH DAKOTA 12, 35 (2001) (identifying recommended wilderness areas affected by the relevant decision and defining "cross-country use" so as to exclude motorized use on non-system routes where it contemporaneously occurred) [hereinafter OFF-HIGHWAY VEHICLE FINAL ENVIRONMENTAL IMPACT STATEMENT]; USDA FOREST SERV., OFF-HIGHWAY VEHICLE RECORD OF DECISION AND PLAN AMENDMENT FOR MONTANA, NORTH DAKOTA, AND PORTIONS OF SOUTH DAKOTA 2 (2001) (applying the decision to cross-country use as defined, thus permitting continued ORV use on existing system and non-system routes). *See also* Natural Resources Defense Council v. U.S. Forest Serv., Slip Copy, 2007 WL 2580700 (D. Cal. Sept. 5, 2007) (affirming a FS travel plan revision permitting snowmobile use in a recommended wilderness). Region One of the FS suggests that motorized and mechanized use in its forests be prohibited in recommended wilderness. E-mail from Chris Ryan, USDA Forest Serv. Program Leader for Wilderness, Wild & Scenic Rivers, Outfitters, Northern Region, Regional Consistency for Management of Recommended Wilderness and Wilderness Study Areas, to John C. Adams (Dec. 20, 2007) (on file with author). However, in general, the agency manages recommended wilderness under a "nonimpairment standard," USDA FOREST SERV., FOREST SERVICE MANUAL § 1923.03(1) (2006), similar to the standard that the BLM applies to Wilderness Study Areas. BLM WSAs are managed under a "nonimpairment standard," i.e., they are managed "so as not to impair the suitability of such areas for preservation as wilderness." Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (2006). *See also* Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 66 (2004) (holding that Section 1782(c) "assuredly does not mandate, with the clarity necessary to support judicial action under Section 706(1), the total exclusion of ORV use").

44. In general, the use of ORVs creates a potent political argument against wilderness designation, but it does not actually preclude congressional action. However, in some instances ORV use permitted by past allocations has been used to press Revised Statute 2477 (Mining Act of 1866, 43 U.S.C. § 932 (repealed 1976)) claims in roadless areas, thus creating new "roads" that would literally preclude wilderness designation. *See* Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 524 (2005) (providing background, arguing for agency adjudication of claims and stating that "[s]ome of these groups are seeking to establish R.S. 2477 highway claims in order to preclude the potential future designation of public lands for protection under the Wilderness Act of 1964"). *See also* Southwest Four Wheel Drive Association v. Bureau of Land Management, 271 F. Supp. 2d 1308 (D.N.M. 2003) (where an ORV-driver organization argued that ORV use created a public right-of-way under RS 2477 in a BLM roadless area and claim was barred by statute of limitations).

If Congress continues to eschew designation of areas where the agencies permit motorized use, the consequences are significant for advocates for an expanded National Wilderness Preservation System. The BLM, according to 1993 data, permitted motorized or mechanized use in 78 percent of its Wilderness Study Areas (WSAs); that is, the BLM has taken administrative steps that hinder wilderness designation in approximately three out of four of its eligible roadless areas.<sup>45</sup> There does not seem to be summary data for motorized use in FS roadless areas, but it may also be a significant proportion of areas eligible for wilderness designation. In Montana, for example, between three and four million of the six million national forest roadless acres within the state permit some type of motorized use.<sup>46</sup> FS and BLM ORV allocations preclude or hinder wilderness designation efforts for many currently roadless areas.

The relationship between wilderness and recreation allocation needs to be acknowledged because (a) it helps explain why many agency allocations are so fiercely contested; (b) it helps explain why environmental organizations often champion non-motorized allocations; and (c) it indicates that agency decisions are fundamentally political decisions that affect future land management designations and congressional policymaking.

To summarize, the environmental impacts of ORVs are important site-specifically, but little research has related the impacts of ORVs, or recreation more generally, to population dynamics or to species of concern. ORVs displace most non-motorized recreationists, making allocation to motorized or non-motorized recreation a zero-sum game. Allocations to motorized or non-motorized recreation are closely related

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45. U.S. GEN. ACCOUNTING OFFICE, FEDERAL LAND MANAGEMENT: STATUS AND USES OF WILDERNESS STUDY AREAS 8, 17 (1993). For the BLM, most roadless areas are WSAs, designated under either section 603(a) or 202(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1711(a), 1712, 1782 (2006), or, in one instance, created by Congress through the Alaska National Interest Lands Conservation Act (ANILCA)). See 16 U.S.C. § 3144 (2006); THE WILDERNESS SOCIETY, THE BUREAU OF LAND MANAGEMENT'S CONTINUING OBLIGATION TO INVENTORY AND PROTECT WILDERNESS VALUES 5-8 (2003). In addition to BLM WSAs, in 1993 there were 40 congressionally-designated WSAs in national forests, some of which permitted motorized or mechanized use. U.S. GEN. ACCOUNTING OFFICE, *supra* note 45, at 62-71.

46. See OFF-HIGHWAY VEHICLE FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 43, at 35 (identifying 430,000 FS WSAs acres which permitted cross-country ORV use and an additional 3.4 million acres of roadless area which permitted cross-country ORV use). This data did not include roadless areas where use is permitted on designated routes. *Id.*; see also E-mail from Adam Rissien, Montana ORV Coordinator, Wildlands CPR to John C. Adams (Feb. 22, 2008) (on file with author) (finding that, excluding the Gallatin National Forest, based on ROS data provided by the FS, 3.3 million roadless acres in Montana (58 percent of inventoried roadless area acreage, including Wilderness Study Areas) permit motorized use).

to, and influence, the politics of wilderness designation. The lack of certitude about environmental impacts indicates a need for assiduous impact monitoring, and impacts will give cause to prohibit ORV use in site-specific areas. In general, the environmental, social, and political consequences of permitting ORV use do not indicate that such allocations are inherently inappropriate. Yet, they do indicate that agency determinations of where ORV use is appropriate will only be partially due to environmental impacts. For the most part, allocation to motorized or non-motorized recreation is a political decision determining “who should get the goods.”<sup>47</sup>

### III. LEGAL FRAMEWORK OF ORV MANAGEMENT

The legal foundation of agency management of recreation in general, and ORVs specifically, is discussed in five sub-parts. Part III.A addresses the statutory authority for the FS and BLM to provide and regulate outdoor recreation. Part III.B addresses ORV management on multiple-use lands, focusing particularly on Executive Order 11,644 and its amendment, Executive Order 11,989.<sup>48</sup> Part III.C discusses ORV management in the context of land management planning and the National Environmental Policy Act (NEPA).<sup>49</sup> Part III.D discusses agency authority to suspend damaging ORV use irrespective of management plan allocations. Part III.E addresses the agency obligation to monitor ORV impacts. Based on the findings in the following sub-parts, the FS and BLM have virtually unfettered discretion to permit or prohibit ORV use.

#### A. Statutory Context of Public Lands Recreation Management

There are five main forms of statutes that provide recreation management direction for the FS and BLM: (1) statutes governing specific

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47. Richard Schreyer, *Sociological and Political Factors in Carrying Capacity Decision Making*, in PROCEEDINGS OF 3RD RESOURCES MANAGEMENT CONFERENCE SOUTHWEST REGION SUPERINTENDENT'S CONFERENCE 229, 242 (Ronald H. Wauer ed., 1976) (arguing that determining which experience opportunities will be provided in national parks is a necessity and a political act).

48. Executive Order 11,644 was issued in 1972 by President Nixon establishing the basic duty to explicitly permit or prohibit ORV use on multiple-use lands. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended by* Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987). In 1977, President Carter amended the Order with Executive Order 11,989, establishing the additional agency duty of suspending ORV use wherever it has considerable adverse effects on natural, cultural, or historic resources. Exec. Order No. 11,989 § 9, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

49. National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2006).

recreation situations, such as ski resorts; (2) statutes that are not directed at recreation management, but affect it, such as the Endangered Species Act (ESA);<sup>50</sup> (3) statutes establishing special management direction for designated areas; (4) the agencies' organic acts that provide general direction from Congress; and (5) statutes governing agency land management planning.

Statutes that govern specific recreation situations include, for example, laws governing the use of national forests,<sup>51</sup> the permitting of ski areas on national forests,<sup>52</sup> and the regulation of other commercial uses and concessions on national forests.<sup>53</sup> These laws typically address special uses of national forests, rather than ORV allocation and management.

Certain statutes are not directed primarily at recreation, but can nonetheless affect allocation. Some of the most important of these statutes are the ESA,<sup>54</sup> the Federal Advisory Committee Act,<sup>55</sup> and NEPA.<sup>56</sup> The effect of these statutes is site- or circumstance-specific.<sup>57</sup>

Special statutory designations that establish site-specific direction for management of particular public lands typically include general direction or specific stipulations affecting recreation management. Special management areas include, but are not limited to, scenic and historic trails designated under the National Trails System Act of 1968,<sup>58</sup> lands designated as part of the National Wilderness Preservation System,<sup>59</sup> and other areas with special enabling legislation,<sup>60</sup> such as Montana WSAs<sup>61</sup> and the Sawtooth National Recreation Area.<sup>62</sup> Once Congress provides

50. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1536, 1538–1540 (2006).

51. See GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 1045 (4th ed. 2001).

52. *Id.*

53. See TOM QUINN, USDA FS Gen. Tech. Rep. PNW-566, *PUBLIC LANDS AND PRIVATE RECREATION ENTERPRISE: POLICY ISSUES FROM A HISTORICAL PERSPECTIVE* 31 (2002), available at <http://www.fs.fed.us/pnw/pubs/gtr556.pdf>.

54. Endangered Species Act § 1538–1540.

55. Federal Advisory Committee Act, 5 U.S.C. App. 2, § 1 (2006).

56. National Environmental Policy Act, 42 U.S.C. §§ 4314–4347 (2006).

57. For example, the Federal Advisory Committee Act is relevant only if the agencies are assembling an advisory committee. 5 U.S.C. App. 2, §§ 2, 7–9.

58. National Trails System Act of 1968, 16 U.S.C. §§ 1241–1249 (2006).

59. Wilderness Act §§ 1131–1136.

60. See generally Faye B. McKnight, *The Use of "Special Management Areas" as Alternatives to Wilderness Designation or Multiple Use Management of Federal Public Lands*, 8 *PUB. LAND L. REV.* 61 (1987) (discussing congressional establishment of special management areas).

61. Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243 (1977).

62. Sawtooth National Recreation Area Establishment Act, Pub. L. 92-400, 86 Stat. 612 (1972).

special statutory direction for an area, it is, in all likelihood, no longer a “multiple-use” area, but is managed according to language included in the designating statute that may provide for or preclude particular types of recreation. In accordance with the FS and BLM organic acts, national forest and BLM lands absent site-specific statutory direction are “multiple-use lands,” dedicated to a variety of different uses, including outdoor recreation, as described in detail in Part III.B.

The fifth type of law affecting recreation management, addressed in Part III.C, is land management planning. The legal frameworks for recreation management of both national forest and BLM multiple-use lands are similar and almost entirely procedural. The balance of this section collectively focuses on the broad discretion to manage recreation afforded to the FS and BLM in their organic acts and related statutes; the procedural requirements associated with land management and travel planning; and the Executive Order that is the most explicit existing federal statement of ORV policy.<sup>63</sup>

### B. Agency Authority to Permit and Regulate Recreation

Since at least 1899, recreation has been a use of national forests recognized by the FS, and the national forests were described as “great national playgrounds for the people” as early as 1909.<sup>64</sup> The National Forest System is now the largest single supplier of public outdoor recreation in the nation,<sup>65</sup> while the BLM also provides increasingly popular settings for outdoor activities.<sup>66</sup>

Despite a long history of recreation on national forests, providing opportunities for “outdoor recreation” was first explicitly recognized by Congress as one of the purposes of national forests with the 1960 passage of MUSYA.<sup>67</sup> MUSYA states that “the National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. . . . In the administration of the National Forests due consideration shall be given to the relative values of

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63. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended by* Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

64. *National Forests as Public Playgrounds*, HARPER'S WEEKLY, Sept. 10, 1910, at 26.

65. CHARLES I. ZINSER, *OUTDOOR RECREATION: UNITED STATES NATIONAL PARKS, FORESTS, AND PUBLIC LANDS* 231 (1995).

66. The BLM estimates that its lands receive about 55 million visitors annually. *TRAVEL MANAGEMENT PROGRAM*, *supra* note 7.

67. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2006). The FS Organic Act is silent on recreation. Organic Administrative Act of 1897, 16 U.S.C. §§ 473–475, 477–482, 551 (2006).



the various resources in particular areas.”<sup>68</sup> MUSYA does not identify a hierarchy of the five named multiple uses, define outdoor recreation, distinguish between the many possible types of outdoor recreation, nor articulate where and when particular recreation uses would be appropriate.

The Forest and Rangeland Renewable Resources Planning Act of 1974,<sup>69</sup> amended by NFMA in 1976 (typically referred to, together, as NFMA),<sup>70</sup> expanded upon MUSYA. Principally, it directs the FS to develop plans to govern management of each administrative unit.<sup>71</sup> These acts provide no additional guidance with regard to recreation management, except that recreation should be considered in forest planning.<sup>72</sup>

Congress first recognized recreation as an essential purpose of BLM lands with the passage of the BLM’s organic act, FLPMA, in 1976.<sup>73</sup> FLPMA authorizes use of BLM lands for outdoor recreation but, like MUSYA, neither places that use within a hierarchy of uses nor identifies what sort of outdoor recreation is permitted and under what circumstances.<sup>74</sup> Like NFMA, FLPMA requires the BLM to prepare land management plans for all administrative units, and therein requires consideration of recreation.<sup>75</sup>

68. Multiple-Use Sustained Yield Act §§ 528–529.

69. Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (2006).

70. National Forest Management Act of 1976, 16 U.S.C. §§ 1601–1687 (2006).

71. *Id.* § 1604(a).

72. *Id.* § 1604(e). Regarding recreation, the National Forest Management Act provides: “The Secretary shall assure that such plans—(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960, and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” *Id.* § 1604(e)(1). The regulations guiding forest plan development shall specify guidelines for plans which “(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish.” *Id.* § 1604(6)(3)(A).

73. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1784, 1701(a) (2006).

74. *Id.* §§ 1701(a), 1702(c). “It is the policy of the United States that . . . (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.” *Id.* at § 1701(a).

75. *Id.* at §§ 1712(c)(1), 1702(c). Management plans must also “coordinate” with the Statewide Outdoor Recreation Plans required by the Land and Water Conservation Fund Act of 1964, 16 U.S.C. §§ 4601–4604, 43 U.S.C. §1712(c)(9) (2006). Interestingly, Title VI of

In sum, Congress has not provided either the FS or the BLM with guidance regarding what types of recreation should be permitted or provided for, or under what circumstances recreation should be permitted. Under the existing statutes, ORV allocations and management are subject merely to procedural requirements that the agencies must comply with in making any land management decision.

However, specific direction for ORV management was given to the agencies in 1972 with the issuance of Executive Order 11,644<sup>76</sup> by President Nixon. Executive Order 11,644 has the effect of a statute<sup>77</sup> and is applicable to national parks, national forests, national wildlife refuges, and BLM-administered lands. Executive Order 11,644 requires each affected agency to designate “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.”<sup>78</sup> Thus, the principal effect of Executive Order 11,644 is to require the agencies to allocate public lands to motorized or non-motorized use. However, this Order also establishes a “minimization” standard, requiring ORV use to be permitted only where impacts on soil, water, vegetation, wildlife, and other resources, and conflicts with other recreationists, are minimized.<sup>79</sup> This

FLPMA, in establishing the California Desert Conservation Area, explicitly provided that outdoor recreation would include “where appropriate, [use] of offroad [sic] recreational vehicles.” *Id.* § 1781(a)(4). Congress apparently mentioned off-road vehicle use in this area because use was established and controversial.

76. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended by* Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

77. 91 C.J.S. *Proclamations & Exec. Orders* § 48 (2004) (explaining that an Executive Order issued “pursuant to authority delegated to [the President] by Congress, has the effect of a statute and is a part of the law of the land”).

78. Exec. Order No. 11,644 §3, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended by* Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

79. *Id.* The areas where use is permitted “shall be located to minimize damage to soil, watershed, vegetation, or other resources of the public lands . . . to minimize harassment of wildlife . . . [and] to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands. . . .” *Id.* Codification of Executive Order 11,644 in federal regulations mirrored this language almost exactly. See 36 C.F.R. § 295.2 (revised July 1, 2003), reiterating the “shall minimize” language found in Executive Order 11,644. However, in 2005, the Bush administration significantly weakened the “shall be located to minimize” standard for the FS to “shall consider effects on . . . with the objective of minimizing.” 36 C.F.R. § 212.55(b) (2005). The courts rejected a similar formulation by the BLM in 1975. *National Wildlife Federation v. Morton*, 393 F. Supp. 1286 (D.C. Cir. 1975). The FS previously defined minimization of ORV impacts in this way: “To reduce off-road vehicle effects to the smallest degree feasible short of elimination, consistent with the specific management direction and practices established for the area as determined by economic, legal, environmental, and technological factors.” USDA FOREST SERV.,

Order also states that ORVs shall be permitted in national parks and national wildlife refuges and game ranges “only if the respective agency head determines that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values.”<sup>80</sup> This small clause probably limits National Park Service (NPS) discretion only minimally, but creates a default prohibition on ORV use in national parks and helps explain the vast difference between the NPS and the FS and BLM in orientation toward ORVs.

The legal import of the minimization standard is unclear. One court suggested that the minimization standard is more stringent than one of preventing considerable adverse effects to resources,<sup>81</sup> but in practice, since any level of ORV use has some impacts on resources and other recreationists, to literally minimize impacts, or “reduce [them] to the smallest possible amount or degree,”<sup>82</sup> would require the elimination of ORV use. Since the agencies have the authority to permit ORV use, the courts have concluded that minimization must mean something like *minimize ORV impacts given the location and amount of ORV use the agency chooses to permit*.<sup>83</sup> This interpretation, while reasonable in its way, transforms the “shall minimize” language from a plain standard which must be met in order to permit ORV use to a vague admonition that the agen-

FOREST SERVICE MANUAL § 2355.05(6) (2006). In 2008, the agency revised the Manual to eliminate this definition. USDA FOREST SERV., FOREST SERVICE MANUAL §§ 2350, 7700, 7710 (2008); USDA FOREST SERV., FOREST SERVICE HANDBOOK § 7709.55; 73 Fed. Reg. 74,689 (Dec. 9, 2008); TRAVEL MANAGEMENT DIRECTIVES—EFFECTIVE JANUARY 8, 2009, available at <http://www.fs.fed.us/recreation/programs/ohv/2350.pdf>.

80. Exec. Order No. 11,644 § 4, 37 Fed. Reg. 2877 (Feb. 9, 1972), reprinted as amended by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), reprinted as amended by Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

81. *American Motorcyclist Association v. Watt*, 543 F. Supp. 789 (D. Cal. 1982) (holding that land management plan language locating ORV trails where they would not cause “considerable adverse effects” failed to meet the more stringent “shall minimize” standard of Executive Order 11,644).

82. RANDOM HOUSE UNABRIDGED DICTIONARY 1225 (2d ed. 1993).

83. See Ronni Flannery, *EIS Required for National Forest Motorcycle Project*, ROAD-RIP-ORDER (Winter 2005), available at <http://www.wildlandscpr.org/legal-notes/eldorado-orv-routes-closed-court> (discussing *Center for Sierra Nevada Conservation v. John Berry*, No. Civ. S-02-325 LKK/JFM (D. Cal. Feb. 15, 2005)). “Plaintiffs had argued that the government’s own analysis contained alternatives that admittedly minimized impacts to a greater degree than the alternative chosen, while still providing motorized recreational opportunities, and that its failure to select such alternatives was a failure to comply with the minimization criteria. But the Court concluded that while minimizing environmental damage from off-road vehicles was a mandatory duty, the government had a great deal of discretion to decide how to accomplish this.” *Id.* Similarly, in *Sierra Club v. Clark II*, the Ninth Circuit approved the BLM’s plan to direct the famous Barstow to Las Vegas motorcycle race through a Wilderness Study Area, though the race would plainly have deleterious impacts on natural resources. *Sierra Club v. Clark*, 774 F.2d 1406, 1410 (9th Cir. 1985).

cies ought to mitigate impacts in the wake of a decision to permit ORV use.

While Executive Order 11,644 apparently fails to provide an enforceable standard limiting where ORV use areas may be designated, it does give the agencies discretion to prohibit ORV use as they choose. For example, the FS justified a prohibition on ORV use in one area by invoking its duty under Executive Order 11,644 to minimize user conflict; the courts affirmed the decision.<sup>84</sup>

All told, Executive Order 11,644 directs the FS and BLM to make recreation allocations permitting and precluding ORV use, and grants the authority to limit ORV use on a number of grounds. However, beyond the plain requirement that the agencies make allocations, this Order functions solely as a grant of, rather than as a brake on, discretion. That discretion is constrained only by the more general planning and decision-making requirements binding on the FS and BLM.

### C. Land Management Planning and Project Decisions

The FS and BLM enjoy virtually unlimited discretion to permit or to prohibit ORV use and must only comply with prescribed planning procedures in order to establish or change site-specific management. The route and/or area designation required by Executive Order 11,644 has been accomplished through the agencies' respective land management planning processes, as laid out in NFMA<sup>85</sup> and FLPMA.<sup>86</sup> The first generation of land management plans, i.e., FS forest plans and BLM resource management plans, were generally completed in the late 1980s and established forest- or BLM unit-wide recreation policies of a very general nature.<sup>87</sup> They typically zoned public lands; the standards and guidelines for specific zones or management areas within the management plans sometimes explicitly permitted or prohibited ORV use.<sup>88</sup> In theory, unit-wide and management area-specific standards and guidelines together comprised route and area designation for ORVs.

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84. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468 (9th Cir. 1994).

85. *National Forest Management Act of 1976*, 16 U.S.C. § 1604 (2006).

86. *Federal Land Policy and Management Act* §§ 1712(c)(1), 1702(c).

87. As an example, the strongest forest-wide standard provided by the Gallatin National Forest's first forest plan states: "Dispersed recreation use will be managed to provide users with a wide range of opportunities to meet increasing demand while protecting forest resources." *USDA FOREST SERV., GALLATIN NATIONAL FOREST PLAN*, at II-15 (1988) [hereinafter *GALLATIN NATIONAL FOREST PLAN*].

88. For example, Management Areas 11 and 12 in the Lolo National Forest Plan (located in Montana) prohibit the use of motor vehicles. *USDA FOREST SERV., LOLO NATIONAL FOREST PLAN*, III-32, III-37 (1986) [hereinafter *LOLO NATIONAL FOREST PLAN*].

Land management planning and the ORV designations included in such planning must comply with NEPA.<sup>89</sup> NEPA is interpreted by the courts as a procedural statute, establishing certain requirements to ensure that, prior to action, a government agency has considered likely environmental impacts, provided an opportunity for public input, and explored alternatives.<sup>90</sup> NEPA requires that federal agencies complete an Environmental Impact Statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.”<sup>91</sup> If an agency is unsure whether an EIS is required, the agency may prepare a far less comprehensive evaluation known as an Environmental Assessment (EA).<sup>92</sup> The EA is used to determine whether the proposed agency action would trigger an EIS, or whether the agency can issue a Finding of No Significant Impact (FONSI)<sup>93</sup> and simply proceed with the action. Some types of agency action, such as routine trail maintenance, have been found, by class, to have no significant impacts; these actions are “categorically excluded” from further NEPA analysis.<sup>94</sup>

Prior to the 1990s, the creation of a land management plan was believed to be a major federal action with significant environmental impacts, triggering the need for an accompanying EIS.<sup>95</sup> The George W. Bush administration attempted, with results that have not yet been determined, to divorce land management planning from full-scale NEPA analysis by arguing that plans do not authorize any final agency actions and therefore do not result in significant environmental impact, and therefore do not trigger an EIS.<sup>96</sup> Because travel planning manifestly con-

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89. National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2006).

90. JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 256 (2004).

91. National Environmental Policy Act § 4332(2)(C).

92. 40 C.F.R. §§ 1501.3–4, 1508.9 (2008).

93. *Id.* § 1508.13.

94. *Id.* § 1508.4. See also U.S. Government Accountability Office, Forest Service: Use of Categorical Exclusions for Vegetation Management Projects, Calendar Years 2003 through 2005 28–30 (2006) available at <http://www.gao.gov/new.items/d0799.pdf>.

95. RASBAND ET AL., *supra* note 90, at 285; National Environmental Policy Act § 4332(c).

96. National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1030–33 (Jan. 5, 2005). The Bush administration enacted regulations stripping forest plans of any actual decisions, and therein “specifying that plans, plan amendments, and plan revisions may be categorically excluded from NEPA documentation as provided in agency NEPA procedures.” *Id.* at 1032. These regulations were rejected by a U.S. District Court on other grounds. *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007). In 2008, the Bush administration enacted new NFMA regulations that pursue the same strategy relating to NEPA. National Forest System Land Management Planning, 73 Fed. Reg. 21,468, 21,473, 21,506 (Apr. 21, 2008). The Bush administration effort followed, in part, from *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726 (1998). In *Ohio Forestry*, the Supreme Court found that a Forest Plan decision that an area is suitable for logging does not constitute a decision to log that area, and hence cannot be considered

stitutes a decision, i.e., final agency action, the Bush administration separated national forest travel planning from more general forest planning.<sup>97</sup> Regardless of whether travel planning is accomplished under the auspices of more general land management planning or as a separate travel management process, setting the regulations for motorized access on roads and trails in any reasonably-sized administrative unit should have “significant environmental impacts,” triggering an EIS. Any subsequent proposed changes to travel management must be evaluated for the significance of their environmental impacts, in accordance with NEPA, and a categorical exclusion, EA, or EIS prepared. Project decisions, such as changes to trail infrastructure, are also federal actions, and therefore subject to the same NEPA requirements.<sup>98</sup>

Most legal challenges to FS and BLM ORV route designations are procedural. Plaintiffs do not challenge the authority of the agency to permit or prohibit ORV use through land management planning or travel planning, rather, they typically assert that the NEPA analysis accompanying a land management plan, travel plan, or amendment was inadequate in scope (e.g., an EA was prepared where an EIS was required) or so deficient in some regard as to invalidate the decision based on the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard under the Administrative Procedure Act (APA).<sup>99</sup> The courts have found some ORV route designations procedurally flawed, and therefore unlawful,<sup>100</sup> but, in general, the courts defer to

litigable final agency action under the Administrative Procedure Act. Administrative Procedure Act of 1946, 5 U.S.C. §§ 500–84, 701–06, 1215, 1305, 3105, 3344, 3502, 4301, 5335, 5372, 7521, 7532 (2006). However, the Court explicitly stated that its decision did not extend to other sorts of plan decisions, and noted that the government, in *Ohio Forestry*, argued that if the Sierra Club’s claim was “‘that [the] plan was allowing motorcycles into a bird-watching area or something like that, that would be immediately justiciable.’” 523 U.S. at 738–39. Thus, the proposed regulations remove justiciable decisions from forest planning. See also *Mont. Snowmobile Ass’n v. Wildes*, 103 F.Supp. 2d 1239 (D. Mont. 2000) (holding that, notwithstanding *Ohio Forestry*, snowmobile use was prohibited in specific management areas by the Lolo National Forest’s 1986 Forest Plan), *aff’d*, 26 Fed. Appx. 762 (9th Cir. 2002).

97. Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005).

98. 40 C.F.R. § 1508.18(b)(4) (2006).

99. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

100. See, e.g., *Sierra Club v. U.S. Dep’t of Agric.*, 116 F.3d 1482 (7th Cir. 1997) (finding the EIS supporting a decision to designate new ORV routes inadequate for being founded on the assumption that ORV riders would obey regulations); *Center for Sierra Nevada Conservation v. Berry*, No. Civ. S-02-325 LKK/JFM (D. Cal. Feb. 15, 2005) (holding that an EIS justifying ORV use inadequately considered the cumulative impacts of activities within and beyond the plan area).

the expertise of the agencies. Plaintiffs, whether arguing for or against ORV use, typically lose.<sup>101</sup>

In some cases, plaintiffs have litigated agency projects that make physical changes to infrastructure that facilitate or impede ORV use. Here again, plaintiffs must show that the NEPA analysis accompanying a decision is so inadequate as to render the decision arbitrary or capricious. While plaintiffs have won some such cases,<sup>102</sup> the bar is high and judicial deference to the agency great.<sup>103</sup>

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101. In several instances, the courts have rejected plaintiffs' claims that EAs were inadequate and could not justify the accompanying FONSI. *See, e.g.,* Colo. Off-Highway Vehicle Coal. v. U.S. Forest Serv., 357 F.3d 1130, 1130–31 (10th Cir. 2004) (finding an EA and FONSI sufficient to limit motorized use to designated routes on about 217,000 acres); Am. Sand Ass'n v. U.S. Dep't of the Interior, 268 F. Supp. 2d 1250 (D. Cal. 2003) (finding an EA and FONSI sufficient to close portions of the BLM Algodones Dunes to ORV use); Natural Res. Def. Council v. U.S. Forest Serv., No. S-05-0290WBS/GGH, 2007 WL 2580700 (D. Cal. Sept. 5, 2007) (finding that an EA adequately considered the impacts of opening an agency-recommended wilderness to snowmobiling). The courts have also rejected a number of claims that particular EISs are deficient enough to render the accompanying decisions arbitrary and capricious under the APA. *See, e.g.,* Colo. Off-Highway Vehicle Coalition v. U.S. Forest Serv., 505 F. Supp. 2d 808 (D. Colo. 2007) (finding an EIS sufficient to prohibit motorized use on certain routes); Northwest Motorcycle Assoc. v. U.S. Dep't of Agric., 18 F.3d 1468 (9th Cir. 1994) (finding an EIS sufficient to close routes to ORVs).

102. *See, e.g.,* Mountaineers v. U.S. Forest Serv., 445 F. Supp. 2d 1235 (D. Wash. 2006) (finding an EA inadequate to justify a FONSI for a bridge-building project that would have promoted ORV use). In *Mountaineers*, the court focused on the fact that the FS had not planned most of the ORV route system in the area, the system had simply developed through use. As a result, the FS had never evaluated the effects of the system, and the court was unsympathetic to agency claims that impacts that only slightly exceeded those of an unknown baseline would not be significant. *Id.* at 1245. *See also* Wash. Trails Assoc. v. U.S. Forest Serv., 935 F. Supp. 1117 (D. Wash. 1996) (finding that the impacts on wildlife and other users stemming from improving and connecting regional motorized trails precluded the use of a categorical exclusion). *Washington Trails Association* highlights a charge made by environmental organizations in the 1990s, to wit, that the agencies avoided environmental analysis of changes in use by transforming motorized trails through "maintenance" of existing trails permitting motorized access; maintenance, such as grading a previously-ungraded trail, relocating a trail, or widening a trail, can result in easier passage, making a trail more accessible to a greater number of motorized users or vehicle types. *Id.* at 1120–21. *See also* Hells Canyon Preservation Council v. U.S. Forest Serv., No. 02-291-HU, slip op. (D. Or. Nov. 21, 2003) (holding that a categorical exclusion for recreational site maintenance did not extend to reconstruction of a road, used by ATVs, providing access to the site).

103. *See, e.g.,* Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205 (10th Cir. 2002) (finding that an EA adequately considered the impact on ORV drivers of obliteration of 89 miles of road); Methow Forest Watch v. U.S. Forest Serv., 383 F. Supp. 2d 1263 (D. Or. 2005) (finding that separate EAs adequately considered the cumulative effects of granting special use permits for snowmobiling and helicopter-skiing in the Okanogan National Forest). *See also* Izaak Walton League of Am., Inc. v. Kimbell, 516 F. Supp. 2d 982 (D. Minn. 2007) (finding an EA adequate to justify a FONSI on two counts (spread of invasive plant

In sum, legal sufficiency for permitting or prohibiting ORV use is not a substantive question. Instead, it is a matter of whether the FS or BLM, in prohibiting or permitting ORV use through their land management plans, properly followed planning procedures, conducted the appropriate level of NEPA analysis, and competently executed the NEPA analysis.

#### D. Emergency Closures

When President Carter signed Executive Order 11,989 in 1977, he amended Executive Order 11,644 to require the four affected agencies to suspend ORV use if such use “will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat or cultural or historic resources of particular areas or trails of the public lands.”<sup>104</sup> This authority buttresses the agencies’ general authority to protect public lands granted through the agencies’ organic acts, and gives the FS and BLM the authority and duty to close areas to damaging ORV use without regard for existing designations or the land management planning process.<sup>105</sup>

Executive Order 11,989 effectively prohibits ORV use in any area where it will cause considerable adverse effects, and some early observers believed it would greatly constrain agency discretion to permit motorized use.<sup>106</sup> However, to date the courts have refused to compel

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species and cumulative impacts), but inadequate on a third count (noise impacts to the nearby Boundary Waters Canoe Area Wilderness)).

104. Exec. Order No. 11,989 § 9(a), 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987). The Forest Service Manual previously defined an adverse ORV effect as:

Any effect as a result of ORV use that does not meet the standards for the:  
 a. Maintenance of the long-term productive capacity of the land. b. Maintenance of air and water quality. c. Maintenance of wildlife habitat and stable and balanced populations of wildlife. d. Maintenance of other existing and proposed uses of the Forest. e. Preservation of cultural and historical resource values.

USDA FOREST SERV., FOREST SERVICE MANUAL § 2355.05 (2006). In 2008, the agency revised the Manual to eliminate this definition. USDA FOREST SERV., FOREST SERVICE MANUAL §§ 2350, 7700, 7710 (2008); FOREST SERVICE HANDBOOK § 7709.55, 73 Fed. Reg. 74,689 (Dec. 9, 2008); TRAVEL MANAGEMENT DIRECTIVES, *supra* note 79.

105. *Sierra Club v. Clark*, 756 F.2d 686, 690 (9th Cir. 1985) (“This provision creates a separate duty to close without regard to the designation process; it does not automatically become inoperative once the Secretary exercises his discretion to designate the land.”).

106. The American Motorcyclist Association argued that “the unwritten intent of this policy is to eliminate ORV use whenever conflict occurs. . . . This section not only does away with ORV use when there is a conflict with an established use, it goes so far as to do away with ORV use if there ‘might’ someday be a conflict.” U.S. DEP’T OF THE INTERIOR, HERITAGE CONSERVATION AND RECREATION SERV., *supra* note 32, at 252.



agency closures on the basis of Executive Order 11,989. For example, in *Sierra Club v. Clark*, plaintiffs sued the BLM for permitting ORV use in a 3,000-acre play area where damage was incontrovertibly occurring.<sup>107</sup> The Ninth Circuit Court of Appeals (Ninth Circuit) concluded that, “Sierra Club’s interpretation of the regulation would inevitably result in the total prohibition of ORV use because it is doubtful that any discrete area could withstand unrestricted ORV use without considerable adverse effects.”<sup>108</sup> This case involved the California Desert Conservation Area, where, by statute, the BLM may permit ORV use “where appropriate,”<sup>109</sup> and this played some role in the court’s reading that Congress did not desire minimization of impacts through prohibition of ORV use. Still, the outcome of this case demonstrates that using the courts to compel agency action on the basis of “considerable adverse effects” is difficult.<sup>110</sup>

While Executive Order 11,989 has not yet been successfully used to compel agency action, the courts have supported the agencies’ invocation of Executive Order 11,989 authority to suspend ORV use at their discretion and without NEPA analysis.<sup>111</sup> For example, in *Utah Shared Access Alliance v. Carpenter*, where ORV organizations sued to prevent an emergency ORV closure by the BLM, the court held that the BLM has broad authority to anticipate (as opposed to demonstrate) adverse effects and to suspend ORV use without recourse to the procedures of land management planning.<sup>112</sup> Thus, consistent with the courts’ interpretation

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107. *Sierra Club v. Clark*, 756 F.2d at 691.

108. *Id.*

109. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 601(a)(4) (2006).

110. See also *Sierra Club v. Clark*, 774 F.2d 1406, 1410 (9th Cir. 1985) (rejecting a claim that ORVs cause “undue harm” requiring suspension under Executive Order 11,989 and FLPMA); *Conservation Law Foundation v. Sec’y of the Interior*, 864 F.2d 954 (1st Cir. 1989) (rejecting a claim based on Executive Order 11,989, concluding based on the administrative record that ecological impacts were minimal, and that a rational decision requiring judicial deference had been reached).

111. See *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1135 (10th Cir. 2006) (“[C]ourts have consistently emphasized the distinction between the initial ORV-route-designation process reflected in an RMP—which is subject to public comment and requires the promulgation of an EA—and closures of those designated routes authorized under regulations promulgated pursuant to FLPMA, NEPA, and other statutes.”). Executive Order 11,644, as amended by Executive Order 11,989, requires that a suspended use not be resumed until the resource issue is resolved. Exec. Order No. 11,644 § 9, 37 Fed. Reg. 2877 (Feb. 9, 1972), reprinted as amended by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), reprinted as amended by Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

112. *Utah Shared Access Alliance v. Carpenter*, 348 F. Supp. 2d 1265 (D. Utah 2006), *aff’d*, 463 F.3d 1125 (10th Cir. 2006). See also *Am. Sand Association v. U.S. Dep’t of the Interior*, 268 F. Supp. 2d 1250 (D. Cal. 2003) (holding that the BLM has broad discretion to implement ORV closures on the basis of environmental harm); *Douglas County v. Babbitt*, 48 F.3d 1495, 1506 (9th Cir. 1995) (holding that “when a federal agency takes an action that

of the original Executive Order 11,644, Executive Order 11,989 gives the FS and BLM broad discretion to suspend ORV use, but does not create a standard that can be effectively used by outside parties to compel suspension of ORV use.

### E. Monitoring

In order to protect resources and identify impacts that are not minimized, or are considerably adverse, and which would require an emergency suspension or prohibition on ORV use, Executive Order 11,644 commands that “[t]he respective agency head shall monitor the effects of the use of off-road vehicles on lands under their jurisdictions.”<sup>113</sup> Historically, agency monitoring of ORV effects has been abysmal. For example, approximately 46 percent of all national forests have no records of ORV monitoring between 1987 and 1998.<sup>114</sup> This is problematic because, as the General Accounting Office concluded regarding jet ski and snowmobile use on federal public lands, “it is difficult to properly manage the use of these vehicles if units have no or inadequate information on their impact. Furthermore, without such information,

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prevents human interference with the environment, it need not prepare an EIS”); *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997) (holding that the National Park Service, under similar authority, could continue an emergency closure for an unstated but apparently extended period of time given an annual review of the closure and some justification in the record for the action taken); *Humboldt County v. United States*, 684 F.2d 1276 (9th Cir. 1982) (holding that Executive Order 11,644 authorized even the closure of passenger vehicle roads where ORV damage is occurring, but asserting that emergency closures may not last indefinitely).

113. Exec. Order No. 11,644 § 8(a), 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended* by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended* by Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987). For the FS, this duty was codified at 36 C.F.R. §§ 295.5 and 295.6 (revised as of July 21, 2003), which required monitoring of effects, as well as annual review of each forest’s ORV management plan. Under the FS’s 2005 travel regulations revision, §212.57 replaced the previous requirement of annual review with a simple gesture toward the concept of monitoring: “[T]he responsible official shall monitor the effects of motor vehicle use consistent with the applicable land management plan, as appropriate and feasible.” 36 C.F.R. § 212.57 (2006). The BLM is simply required to “monitor effects of the use of off-road vehicles.” 43 C.F.R. § 8342.3 (2006).

114. See DAVE HAVLICK, ROARING FROM THE PAST: OFF-ROAD VEHICLES ON AMERICA’S NATIONAL FORESTS 5 (1999), *available at* <http://www.wildlandscpr.org/files/RoaringFromPast.pdf>. The U.S. General Accounting Office has found that that 70 percent of BLM administrative units with snowmobile use reported no monitoring of snowmobile impacts; 42 percent of affected FS units report no monitoring of snowmobile impacts. U.S. GEN. ACCOUNTING OFFICE, AGENCIES NEED TO ASSESS THE IMPACT OF PERSONAL WATERCRAFT AND SNOWMOBILE USE 22 (2000). Sixty-one percent of affected BLM units and 93 percent of affected FS units reported that information on the impact of snowmobiles was “less than adequate” for “determining how snowmobile use should be managed on [their] unit.” *Id.* at 57.

these agencies are not in compliance with the monitoring requirements of existing executive orders concerning snowmobiles.”<sup>115</sup> Without effective monitoring, the FS and BLM are (perhaps blissfully) unaware of whether ORV impacts are negligible, minimized, or considerably adverse.

Legally, nonetheless, this monitoring requirement is virtually unenforceable for two reasons. First, the courts have found that annual review and monitoring requirements in land management plans and the federal regulations can be fulfilled by even the most *pro forma* efforts.<sup>116</sup> For example, in *Friends of the Kalmiopsis v. Forest Service*, the Ninth Circuit found that the agency’s evidence of monitoring—a one-sentence statement in some but not all annual monitoring reports indicating that no ORV impacts were “detected”—was adequate to preclude triggering judicial review for an agency action unlawfully withheld under the APA.<sup>117</sup> Relatedly, the U.S. Supreme Court has found that general monitoring commitments in land management plans are nonbinding under the APA, and therefore cannot be “unlawfully withheld.”<sup>118</sup> Second, some courts have held that monitoring is not a final agency action under the APA, and, thus, neither the failure to act nor the adequacy of monitoring are ripe for judicial review.<sup>119</sup>

Taken together, it appears that (1) specific monitoring commitments in land management plans are nonbinding; and (2) either any indication of monitoring, no matter how minimal, is legally sufficient to preclude an APA claim for action unlawfully withheld, or the sufficiency

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115. *Id.* at 26–27.

116. See *Friends of the Earth v. U.S. Dep’t of the Interior*, 478 F. Supp. 2d 11 (D.D.C. 2007) (holding that under Executive Order 11,644 the National Park Service is required to monitor, but not to implement a formal monitoring program). See also *Mont. Snowmobile Assoc. v. Wildes*, 26 Fed. Appx. 762 (9th Cir. 2002) (implying that monitoring need not be initiated in the absence of knowledge of a problem, and that monitoring reports need not be formal or lengthy).

117. See *Friends of the Kalmiopsis v. U.S. Forest Serv.*, No. CV-96-3041-CO, 1999 WL 893631, at \*3–4 (9th Cir. Oct. 15, 1999) (stating that “although we find the Forest Service’s lax monitoring unlikely to expose potential problems caused by ORVs, we do not find a complete failure to perform a legally required duty that would trigger review under § 706(1)”).

118. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67–72 (2004) (holding that implementation of specific dimensions of monitoring promised in a BLM land management could not be compelled under the APA).

119. See *Ohio Valley Trail Riders v. Worthington*, 111 F. Supp. 2d 878, 888–89 (D. Ky. 2000) (holding that because monitoring is not a final agency action, it cannot be compelled under the APA). But see *Friends of the Kalmiopsis*, 1999 WL 893631, at \*4 (suggesting that failure to monitor might be ripe for review in the face of an “imminent agency action hinging on the result of the allegedly deficient monitoring reports and annual plan reviews,” such as designation of ORV areas).

of monitoring may not be challenged under the APA at all because monitoring is not a final agency action. As a consequence, there is no legal penalty for poor monitoring; however, assiduous monitoring could create a paper trail demonstrating considerable adverse impacts to resources, leaving an agency vulnerable to litigation arguing the demonstrated need for a suspension of ORV use. Thus, the agencies may have a perverse incentive to limit monitoring. At any rate, current judicial interpretation makes the monitoring clause of Executive Order 11,644 largely meaningless.

#### IV. ORV ALLOCATIONS: HIGH-CENTERED SINCE THE 1970S

Both the FS and BLM have recently initiated efforts to reconsider the allocation of ORV routes and areas, i.e., to conduct travel planning.<sup>120</sup> The current “baseline” allocations will play a crucial role in influencing the outcome of the planning processes, because some of the joy of public land recreation derives from affection for specific places where use already occurs, the agencies will find it easier to deviate moderately from the current situation than to radically rethink allocation, and changing an allocation is more politically difficult than maintaining the status quo.<sup>121</sup> These factors make a radical departure from the existing allocations unlikely, and it is therefore important to understand current allocations.

To understand current allocations, it is necessary to briefly review the history of ORV management on public lands and some of the technological and demographic changes that have affected that management. This Part reviews that history, identifies the extent to which the FS and BLM have completed allocations, and argues that many of the current allocations were arrived at shoddily and by default. These conclusions are supported by Part IV.F, which summarizes agency “designations.” Designation refers to the broad agency characterization of the way that

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120. In some cases, the FS is not actually reconsidering allocations. It is simply collating and reissuing existing allocations.

121. *Nat'l Wildlife Federation v. Morton*, 393 F. Supp. 1286, 1292 (D.C. Cir. 1975). The point here was made with regard to areas that are “open” to unregulated ORV use, but it is probably the case that any allocation, motorized or non-motorized, creates a bias toward the status quo:

Designation as ‘open’ does not truly maintain the status quo. As plaintiff notes, this designation, being an official government act, changes the character of the land use policy, tilting it in favor of ORV use. Future designations will not be made in the context of applying the required criteria . . . in determining whether a specific area or trail’s existing ‘open’ status should be changed to ‘closed’ or ‘restricted.’ This distinction creates a subtle, but nevertheless real, inertial presumption in favor of ORV use.

*Id.*

ORVs are managed in an area, e.g., whether they are permitted on no trails, designated trails, all trails, or everywhere. Designations are a measure of the extent to which the agencies have accomplished the fundamental duty established by Executive Order 11,644: to identify the routes on which (and areas in which) ORVs are permitted and prohibited.

Part IV.G addresses not just these broad designations, but actual allocations, i.e., the number of acres where ORV use is prohibited or permitted. Thus, where designation measures whether allocations have been made, allocation measures the aggregate distribution of recreational opportunities. Part IV.G summarizes current allocations to motorized and non-motorized recreation and concludes that many of those allocations were the result of accident or misfeasance, not deliberate decision making, and that current allocations are heavily skewed toward permitting ORV use.

### A. The Open-Access Era (1900–1970)

Vehicle use off-road has been part of public land recreation since the inception of the automobile and motorcycle. However, much of the public domain was too rugged for motorized vehicle use off-road until at least the 1940s. The popularization of the Jeep following World War II significantly increased off-road 4x4 use,<sup>122</sup> while the popularity of dual purpose (street-legal but off-road capable) motorcycles also increased.

In the early 1960s, Honda enabled more motorcyclists to drive off-road by building inexpensive machines that were light, durable, and powerful enough to ride over rough terrain.<sup>123</sup> The total number of ORVs sold in the United States grew from about 155,000 units in 1960 to 1,800,000 in 1970.<sup>124</sup> Exemplifying the boom, snowmobiles were first

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122. PATRICK R. FOSTER, *THE STORY OF JEEP* 24 (1st ed. 1998). Prior to World War II, there were off-road capable, four-wheel drive trucks, but there were no light passenger vehicles reliably capable of driving off-road. Bespeaking the challenge of building such a vehicle, the U.S. military invited 135 manufacturers to design such a vehicle in 1940, yet only one (American Bantam) responded with a real plan. *Id.* at 23–24.

123. DAVID SHERIDAN, *OFF-ROAD VEHICLES ON PUBLIC LAND* 1 (1979).

124. Arthur Stupay, *Growth of Powered Recreation Vehicles in the 1970's*, in *PROCEEDINGS: THE 1971 SNOWMOBILE AND OFF THE ROAD VEHICLE RESEARCH SYMPOSIUM* 14 (Michael Chubb ed., 1971) (not clarifying whether full-size, off-road capable vehicles are included in estimates). The type and amount of ORV use that was occurring helps illuminate contemporaneous ORV impacts and management decisions. There are at least five measures of use, each with its own strengths and deficiencies: (1) FS/BLM user days; (2) ORVs in use; (3) ORVs sold annually; (4) U.S. adult participants in off-road driving; and (5) registrations. While the quantity of ORV user days on FS/BLM multiple-use lands is a straightforward method of determining ORV use, there is no reliable historic data of this type. Each of the other measures suffers from one or more deficiencies, particularly that they fail to identify frequency or type of ORV use on public lands, as opposed to use on private lands, use for

mass-marketed in 1959 by Bombardier,<sup>125</sup> and sold fewer than 10,000 units per year in the early 1960s,<sup>126</sup> but 342,000 were sold in 1971 in the United States.<sup>127</sup> Despite a long history of use, it was not until the late 1960s that ORVs became popular enough and sufficiently technologically capable to warrant significant FS and BLM management.

During this open-access era, motorists were permitted to go pretty much anywhere they could reach on national forest and BLM lands. To the extent that there was concern about ORVs, it was subsumed by the national discussion over wilderness, which, in one interpretation, has been principally about preserving opportunities for non-motorized recreation.<sup>128</sup> But excluding the role of ORVs in the wilderness debate, until the 1970s, ORVs were usually not thought of as something that needed management.<sup>129</sup> National forests and BLM lands were nearly a true public good for recreationists: there was open access for any who could walk

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farming, use to take the kids to soccer practice, etc. Because reliable data is unavailable, national adult participation and vehicle sales serve as the best indicators of ORV trends on public land use. For participation data, see H. KEN CORDELL ET AL., OFF-HIGHWAY VEHICLE RECREATION IN THE UNITED STATES, REGIONS AND STATES (USDA FS Southern Res. Station 2005), available at <http://www.treesearch.fs.fed.us/pubs/21307> [hereinafter CORDELL, OHV RECREATION]; H. Ken Cordell, *Outdoor Recreation Participation Trends*, in *OUTDOOR RECREATION IN AMERICAN LIFE: A NATIONAL ASSESSMENT OF DEMAND AND SUPPLY TRENDS* (H. Ken Cordell ed., 1999). The FS is attempting to improve its recreation data, and beginning in 1998, the National Visitor Use Monitoring Project (NVUM) was initiated to estimate visitor use based on nation-wide sampling. See USDA Forest Serv., Recreation, Heritage & Wilderness Programs; National Visitor Use Monitoring Program, <http://www.fs.fed.us/recreation/programs/nvum/> (last visited May 30, 2007). BLM has begun using the same program. U.S. Dept' of the Interior, BLM, *Visitor Use Surveys & Research*, [http://www.blm.gov/wo/st/en/prog/Recreation/national\\_recreation/visitor\\_use\\_surveys.html](http://www.blm.gov/wo/st/en/prog/Recreation/national_recreation/visitor_use_surveys.html) (last visited June 27, 2007). NVUM data is useful at the national level, but the meager sampling means that reporting by forest is not very precise. See DONALD B.K. ENGLISH ET AL., USDA FS Gen. Tech. Rep. SRS-57, FOREST SERVICE NATIONAL VISITOR USE MONITORING PROJECT: RESEARCH METHOD DOCUMENTATION 2 (2002) (stating that reporting by forest will be "within 15 percent of actual visitation, at the 80 percent confidence level"; that is, for one in five estimates, actual visitation will not be within a 30 percent range surrounding the estimate).

125. MORTEN LUND & BEA WILLIAMS, *THE SNOWMOBILER'S BIBLE* 14–19 (1974).

126. Stupay, *supra* note 124, at 17.

127. E-mail from Susan Andrews, International Snowmobile Industry Association, to John C. Adams (Dec. 6, 2007) (on file with author).

128. SUTTER, *supra* note 38. While the wilderness debate has often focused on the presence or absence of roads, already by 1953, a Montana outfitter had investigated statutory protection from off-road jeeps for the Hilgard Hold Area on the Gallatin National Forest. Christopher M. Roholt, *The Montana Wilderness Study Bill—A Case History* 71 (Aug. 1977) (unpublished Master's thesis, University of Montana) (on file with Mansfield Library, University of Montana).

129. See SHERIDAN, *supra* note 123, at 3.

or drive, and there were few enough recreationists that the impact on the experience of others was generally minimal.<sup>130</sup>

### B. Early Strife (1970s)

Controversies over wilderness and clear-cutting on national forest lands became prominent in the 1960s and escalated in the 1970s.<sup>131</sup> Environmental organizations began proposing new areas for wilderness designation, and ORV use played a role in those debates.<sup>132</sup> Likewise, the hotly contested FS wilderness recommendations in the Roadless Area Review and Evaluations (RARE I and RARE II) were based, in part, on consideration of impacts from ORV use.<sup>133</sup>

While the FS struggled with wilderness, ORV use on public lands was probably increasing significantly. For several years in the 1970s, more than 300,000 snowmobiles were sold annually in the United

130. True public goods are those from which new users cannot be excluded, and which are not diminished by additional users. WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY* 10 (1994). Public lands were long perceived as functionally inexhaustible in extent and in availability of recreational resources, but are now better conceptualized as a common-pool resource: one which is collectively owned, from which users can be excluded, and which is diminished by additional uses. See generally Elinor Ostrom, *The Rudiments of a Theory of the Origins, Survival, and Performance of Common-Property Institutions*, in *MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY* 293 (Daniel W. Bromley ed., 1992).

131. For a good history of the wilderness debate, see ALLIN, *supra* note 35. For a brief review of the controversy over clear-cutting and the genesis of NFMA, see Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead* 68 U. COL. L. REV. 659, 659–63 (1997).

132. For example, some argued that designation of the Scapegoat Wilderness would negatively impact snowmobilers and motor scooter drivers. *Lincoln Back Country Wilderness Area, Montana: Hearing on S. 1121 Before the Sen. Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs*, 90th Cong. 16 (1968) (statement of Cecil Garland, Pres., Lincoln Back Country Protective Ass'n). Similarly, designation of the Middle Fork Judith Wilderness Study Area in Montana was challenged on the grounds of impacts to ORV drivers. Thomas Kotynski, *Middle Fork of Judith Object of Intense Feelings*, GREAT FALLS TRIBUNE, June 19, 1977, at Sec. 5.

133. For example, the FS measured lost and gained hypothetical user days of motorized and non-motorized recreation as part of its RARE II evaluation of alternatives, USDA FOREST SERV., ROADLESS AREA REVIEW AND EVALUATION, FINAL ENVIRONMENTAL STATEMENT 46–49 (1979), and degraded wilderness character ratings based on “impacts on soil and vegetation from ORV use” and the presence of user-created routes. USDA FOREST SERV., RARE II WILDERNESS ATTRIBUTE RATING SYSTEM: A USER’S MANUAL 15–17 (1977). The BLM also considered motor vehicle use in its wilderness recommendations in the 1980s, including consideration of “vehicle ways,” in evaluating “naturalness” of roadless areas. See, e.g., U.S. DEP’T OF THE INTERIOR, BLM, MONTANA STATEWIDE WILDERNESS STUDY REPORT VOLUME II: WILDERNESS STUDY AREA SPECIFIC RECOMMENDATIONS 12 (1991).

States.<sup>134</sup> In 1973, 292,000 off-road motorcycles and ATVs were sold, in addition to 573,000 dual-purpose motorcycles.<sup>135</sup> ATVs barely existed at the outset of the decade, but annual sales grew to the hundreds of thousands by the end of the 1970s.<sup>136</sup> Also, 4x4s were increasingly used for off-road recreation as Jeeps, 4x4 pick-ups, and sport-utility vehicles (SUVs) became more common.<sup>137</sup>

In the early 1970s, a consensus emerged that ORV use on public lands was having impacts on flora and fauna<sup>138</sup> and non-motorized recreationists,<sup>139</sup> and therefore more diligent management was needed.<sup>140</sup> While there were some earlier agency responses to growing ORV use,<sup>141</sup> President Richard Nixon effectively launched ORV management on federal lands in 1972 with Executive Order 11,644.

The launch fizzled and the careful system-wide route designation prescribed by the Order did not occur. The BLM's first effort to implement Executive Order 11,644 was to simply endorse existing manage-

134. Andrews, *supra* note 127.

135. 1994 MOTORCYCLE INDUS. COUNCIL, MOTORCYCLE STATISTICAL ANNUAL 10 (1994) [hereinafter MOTORCYCLE INDUS. COUNCIL]. It is unknown how many dual-purpose motorcycles were driven off-road, or how often or where. *Id.*

136. ATVs have been manufactured since at least 1961, though they were novelty vehicles typically resembling "claw-footed bathtubs" with wheels, ATVs: *Invincible Vehicles That Go Anywhere*, CHANGING TIMES, May 1970, at 13, until the 1970 advent of three-wheelers, with only 9,000 ATVs sold nationally in 1970. Stupay, *supra* note 124, at 17. As late as 1980, a FS-convened conference on ORVs included motorcycle and 4x4 representatives, but ATVs were barely mentioned. OFF-ROAD VEHICLE USE: A MANAGEMENT CHALLENGE (Richard N. Andrews & Paul F. Nowak eds., 1980). In 1982, 250,000 ATVs were sold in the United States; until 1982 the industry did not differentiate between motorcycle and ATV sales. MOTORCYCLE INDUS. COUNCIL, *supra* note 135, at 10.

137. For example, aggregated sales of all Jeep models increased almost every year in the 1970s, from 33,984 vehicles in 1970 to 163,548 in 1978. FOSTER, *supra* note 122, at 250. Although the definition of an SUV is open to interpretation, SUVs were generally first manufactured in the 1960s. For example, that decade saw the introduction of the International Harvester Scout (1961), Willys (Jeep) Wagoneer (1962), Ford Bronco (1966), and Chevy Blazer (1969). DAVID H. JACOBS, SPORT UTILITY VEHICLES: THE OFF-ROAD REVOLUTION 18–19 (1998). SUVs increasing popularity sparked the issue of four new or fully redesigned models in 1982. Josh Lauer, *Driven to Extremes: Fear of Crime and the Rise of the Sport Utility Vehicle in the United States*, 1 CRIME MEDIA CULTURE 149, 153 (2005).

138. See, e.g., ROBERT H. WEBB, AN ANNOTATED BIBLIOGRAPHY OF THE EFFECTS OF OFF-ROAD VEHICLES ON THE ENVIRONMENT 5–8 (1978).

139. Managers and academics explicitly recognized that ORVs could impact the experience of other recreationists, leading (in part) to the development of ROS. See CLARK & STANKEY, *supra* note 24, at 5–7; DRIVER & BROWN, *supra* note 26, at 24–29.

140. Stupay, *supra* note 124, at 8 (a June 1971 meeting in East Lansing of industry, environmental, academic, and agency representatives to discuss the growing issue).

141. J.R. Penny, *Off-Road Vehicles on the Public Lands in California*, in THE 1971 SNOWMOBILE AND OFF THE ROAD VEHICLE RESEARCH SYMPOSIUM, *supra* note 124, at 96 (stating that the California office of the BLM began trying to address ORV use in 1968).



ment by leaving all BLM areas open to motorized use unless otherwise specified, a policy rejected by the courts.<sup>142</sup> Subsequently, the BLM prepared unit-by-unit management plans that made little attempt to identify or minimize ORV impacts, and that appear to have limited ORV use minimally.<sup>143</sup> The FS also prepared “ORV plans” for each forest, but,

it appears that in drawing up its ORV Plans, the Forest Service may frequently have simply legitimized the status quo. That is, already existing ORV routes and areas were designated open, already prohibited areas were declared closed, and seldom used areas restricted—without a systematic analysis of present and future ORV impacts on the resources.<sup>144</sup>

As a result, as of 1979, 115.9 million national forest acres were left completely open to ORV use; 31.3 million acres restricted ORV use to specific sites, vehicles, or seasons of use; and 40.7 million national forest acres were designated “closed.”<sup>145</sup> The Carter administration was so concerned by agency foot-dragging on route allocation that President Carter issued Executive Order 11,989, providing for emergency closure of ORV-impacted areas and “closed-unless-open” policies,<sup>146</sup> and the Council on Environmental Quality (CEQ) considered more draconian measures.<sup>147</sup> However, as discussed, these measures provided agency discretion without effectively compelling action.

142. *Nat'l Wildlife Fed'n v. Morton*, 393 F. Supp. 1286 (D.C. Cir. 1975). The Department of the Interior acknowledged that “the open use designation continued the general status of ORV use on public lands as it was prior to the issuance of Executive Order 11644.” George Rehm, *BLM's ORV Plan Taken to Court*, *THE ORV MONITOR*, Dec. 1974, at 1–2 (on file in the Environmental Defense Fund Collection, Frank Melville, Jr. Memorial Library, Stony Brook University).

143. See generally Gary A. Rosenberg, *Regulation of Off-Road Vehicles*, 5 *ENVTL. AFF.* 175 (1976); SHERIDAN, *supra* note 123, at 16.

144. SHERIDAN, *supra* note 123, at 43. Sheridan reports that “[i]n its instructions to Regional Forests concerning the ORV planning process, the Washington office of the Forest Service stressed that ‘restrictions and closures are to be used only as a last resort.’” *Id.* at 40–41. See also Rosenberg, *supra* note 143 (a review critical of implementation of Executive Order 11,644 by all four affected agencies (BLM, FS, NPS, and the U.S. Fish & Wildlife Service)).

145. SHERIDAN, *supra* note 123, at 43. (data did not include four national forests that had yet to complete ORV plans).

146. Exec. Order No. 11,989 § 9, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended* by Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

147. Richard L. Bury & Larry D. Gustke, *Interest Groups and Policy Formulation: The Case of Regulating Off-Road Vehicles*, 34 *J. SOIL & WATER CONSERVATION* 281 (1979). The International Snowmobile Industry Association learned of CEQ's considerations, and ORV enthusiasts snowed the administration with a then-massive 74,000 letter protest. *Id.*

### C. The Planning and Wilderness Era (1980s)

During the 1980s, two important changes in ORV use occurred. First, three-wheeled ATVs became immensely popular, outselling off-road motorcycles as early as 1982.<sup>148</sup> Second, in 1988, the major ATV manufacturers entered a consent decree with the Consumer Products Safety Commission that prohibited the sale of new three-wheelers, due to the number of injuries the unstable trikes had caused.<sup>149</sup> Thus, over the course of the decade, the primary wheeled ORV used on multiple-use lands shifted from motorcycles, to three-wheelers, and then to four-wheelers. While the switch to four-wheelers probably contributed to a temporary dip in ATV sales, the end result was the popularization of a vehicle which, because it is wide and relatively stable, requires neither experience nor strength to operate, in contrast with motorcycles.<sup>150</sup>

In the mid-1980s, the FS and BLM initiated the land management planning required by NFMA and FLPMA. In theory, the new plans overhauled the ORV allocations made in the earlier ORV plans completed in response to Executive Order 11,644. However, logging, grazing, and wilderness recommendations were the primary agency concerns in the 1980s, and in many places ORVs received scant attention.<sup>151</sup> Indeed, some FS forest plans simply incorporated existing ORV plans by reference, and some simply classified forest areas as open, closed, or restricted areas.<sup>152</sup> Further, the agencies' shared a de facto policy of permitting ORV use where it was not problematic.<sup>153</sup> Rugged terrain and

148. 1994 MOTORCYCLE INDUS. COUNCIL, *supra* note 135, at 10.

149. *Outlawing a Three-Wheeler*, TIME, January 11, 1988, at 59; ATV.Info.com, *Facts About ATV*, <http://www.atv.info/page.cfm?name=ATV%20Facts> (last visited Apr. 1, 2009).

150. Four-wheelers were first sold in the United States by Suzuki in 1982. ATV.Info.com, *supra* note 149.

151. "OHV use was not commonly evaluated as part of travel access management. Most LMPs that did address OHV use and did not fully recognize or anticipated the demand and resulting conflicts." [sic] USDA FOREST SERV., FINAL REPORT: NATIONAL OFF-HIGHWAY VEHICLE (OHV) ACTIVITY REVIEW 4 (1995). See also Beryl Johnston, Region One Issue Manager, USDA Forest Serv., *Region One's Strategy, Access and Travel Management* (Feb. 21, 1995) ("Travel Management planning should be an integral part of most Forest activities, but only minor attention was given to it in [Region One] Forest Plans."); Flannery, *supra* note 83 (describing how the Eldorado National Forest's 1990 travel plan "simply incorporated existing routes, roads, and tracks that had been used by off-road vehicles" without NEPA analysis).

152. USDA FOREST SERV., OFF-ROAD VEHICLE AND TRAVEL MANAGEMENT ACTIVITY REVIEW OCT. 15-18 AND NOV. 2-7, 1 (1987).

153. Travel Management, Designated Routes and Areas for Motor Vehicle Use, 69 Fed. Reg. 42,381-82 (July 15, 2004) (to be codified at 7 C.F.R. pts. 212, 251, 261 & 295) (acknowledging that ORV use is unregulated when perceived as unproblematic). See also Dale Bosworth, Forest Serv. Chief, Address at ATV EXPO Industry Breakfast, ORV Use: Rising to

existing technology greatly limited where ORVs could drive, and relatively low user numbers limited their impacts on resources and other recreationists. As a result, areas where ORVs could not go, or went only infrequently, typically remained open to ORV use, even in the wake of an earnest consideration of ORV impacts. As machine technology and recreation demographics changed, but land management plans remained static, this default “open” policy would have enormous consequences.

Some land management plans genuinely considered ORV management and limited ORV use,<sup>154</sup> and many management plans imposed certain seasonal restrictions on motorized use. Yet given other planning priorities and the default “open” policy, many administrative units appear to have permitted ORVs virtually everywhere.<sup>155</sup> Thus, without regard for the “minimization” criteria established in Executive Order 11,644, the agencies allocated a huge portion of the multiple-use domain to ORVs.<sup>156</sup> For example, forest plans permitted seasonal or year-round

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the Management Challenge (October 14, 2004), *available at* <http://www.fs.fed.us/news/2004/speeches/10/ohv-use.shtml> (arguing that “[y]ou don’t need to manage a use if it has no impact”) [hereinafter Bosworth, *Rising to the Management Challenge*]; Jay Wilkinson, *The New Competing Uses: Balancing Recreation with Preservation in Utah’s Wasatch Mountains*, 24 J. LAND RESOURCES & ENVTL. L. 561, 579 (2004) (stating in the context of the Wasatch-Cache and Uinta National Forests that “[t]he Forest Service has traditionally viewed the separation of recreational users as a last resort”). The Lolo National Forest illustrates this dynamic. “When the [Lolo National Forest] travel plan map was first published in 1977, backcountry snowmobiling was virtually non-existent and the forest didn’t implemented [sic] any restrictions. In 1986, when the forest plan was completed there were still so few people snowmobiling in the backcountry it was not identified as an issue by the public or the forest.” USDA FOREST SERV., STATELINE SNOWMOBILE ENVIRONMENTAL ASSESSMENT 2-3 (1996). As a result, the Lolo left the entire forest open to snowmobiles “unless closed for other reasons.” LOLO NATIONAL FOREST PLAN, *supra* note 88, at II-19.

154. For example, the Hoosier National Forest wrestled with the issue, even attempting to form a stakeholder collaborative before finally choosing to prohibit ORV use on and off trails. USDA FOREST SERV., HOOSIER NATIONAL FOREST, OFF-ROAD VEHICLE USE AREAS RECORD OF DECISION 1-4 (1987).

155. For example, the Gallatin National Forest in south-central Montana generally did not place limits on ORV use, stating: “The Forest Plan does not propose to geographically separate recreation uses, except on a localized basis where individual trails may be restricted. . . . Separation of motorized, foot, and stock users into exclusive areas would make the Gallatin National Forest effectively smaller for each group and would require intensive administration.” USDA FOREST SERV., GALLATIN NATIONAL FOREST PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT, at VI-57 (1988).

156. There is also the possibility that some units believed, due to low contemporaneous user numbers and comparatively primitive technology, that ORV impacts were minimal even with huge allocations. However, this raises the question of why those original allocations were not revisited as technology and user numbers changed. Thus, it is possible to argue that the original allocations were more carefully made than is asserted here, but doing so merely shifts focus to questions regarding the agencies’ failure to suspend and/or reallocate as problems with ORV use became evident.

cross-country ORV travel on 10.2 of the 14.8 million non-wilderness national forest acres in Montana and the Dakotas.<sup>157</sup> (Areas permitting cross-country travel simply allowed ORVs to drive anywhere.) Similarly, in the FS Southwestern Region, roughly 55 percent of all national forest areas were left open to cross-country travel.<sup>158</sup> Representative of BLM planning is the Box Elder Resource Area (located in Utah) land management plan, in which “999,634 acres were designated as open to off-highway vehicle travel [anywhere]; 11,180 acres were limited to existing routes; and 980 acres were limited to designated routes.”<sup>159</sup> Given a second opportunity to comply with Executive Order 11,644 and to carefully consider ORV allocations on a route-by-route basis, many units of the FS and BLM declined.

#### D. Escalating Capabilities, Escalating Conflict (1990s)

The 1990s saw the development of ever more capable ORVs, going ever more places on multiple-use lands. ATV sales, stagnant in the early 1990s, began to increase significantly in the middle of the decade (*see* Figure 1, below), and the stability of the four-wheelers enabled more riders to safely drive more places. Snowmobile sales also climbed, but even more significantly, the power-to-weight ratio of snowmobiles improved dramatically. Where stock machines had previously been largely confined to iced-over lakes and groomed trails, they were now able to float on powder and climb steep slopes; they began to traverse the most

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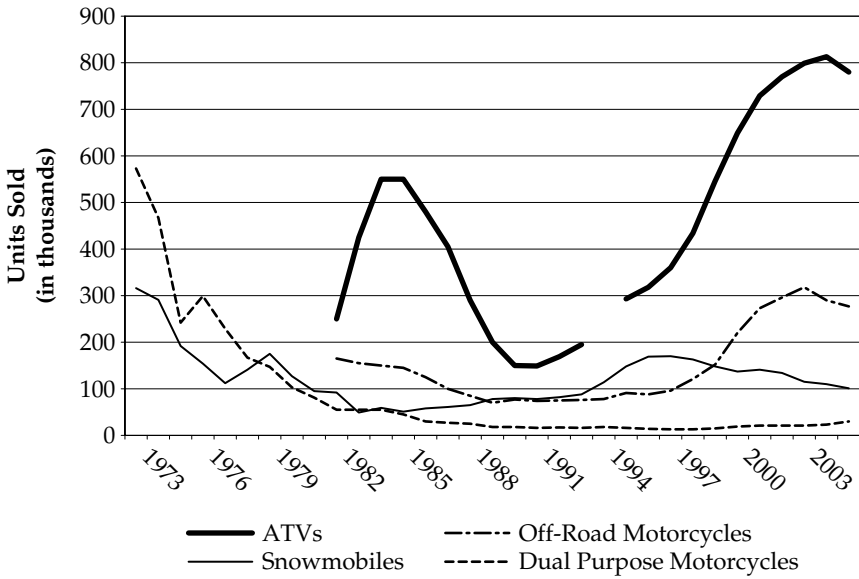
157. There are 18,210,000 acres of national forest in Montana and the Dakotas, of which 10,190,000 permitted cross-country use in 2000. OFF-HIGHWAY VEHICLE FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 43, at 3, 5. There are 4,490,845 acres of designated wilderness in Montana national forests and 13,426 in South Dakota. Wilderness.net, Advanced Wilderness Search Results, <http://www.wilderness.net/index.cfm?fuse=NWPS> (last visited May 22, 2008). Accordingly, the FS permitted cross-country use on 74 percent of non-wilderness acres in Montana and the Dakotas. While it is true that wilderness should be considered a non-motorized allocation, in this context, the significance is that FS Region One permitted cross-country ORV use in three-quarters of those places where Congress had not expressly prohibited such an allocation.

158. USDA Forest Serv., Motor Vehicle Use Map (MVUM) Development in Support of the Travel Management Rule, 36 C.F.R. § 212 (2006), *available at* [http://www.fs.fed.us/recreation/programs/ohv/travel\\_mgmt\\_schedule.pdf](http://www.fs.fed.us/recreation/programs/ohv/travel_mgmt_schedule.pdf) [hereinafter MVUM].

159. Utah Shared Access Alliance v. Carpenter, 348 F. Supp. 2d 1265, 1268 (D. Utah 2004), *aff'd*, 463 F.3d 1125 (10th Cir. 2006). Or, for example, the Dillon Resource Area's land management plan left 71 percent of the area completely open to wheeled ORVs, 86 percent of the area completely open to snowmobiles, and may have permitted ORVs on other trails in the balance. U.S. DEP'T OF THE INTERIOR, BLM, DILLON RESOURCE AREA, BUTTE DISTRICT OFF ROAD VEHICLE DESIGNATIONS, at ii (1981).

remote mountain backcountry.<sup>160</sup> SUVs also became increasingly popular,<sup>161</sup> though it is difficult to guess how many were used off-road.

**FIGURE 1.<sup>162</sup>**  
**SNOWMOBILE, ATV, AND OFF-ROAD MOTORCYCLE U.S.**  
**ANNUAL UNIT SALES, 1973–2005**



160. Lane Lindstrom, *Happy Trails: Try 500, 600s on for Size*, SNOWWEST, Oct. 1997, at 28. “It wasn’t so long ago that even the 500s [500cc engines] were underpowered for western riding. They did okay on the trail, but that was about it. With new advances in technology, however, that have juiced up the 500s and 600s, you wouldn’t hesitate to blast off trail, regardless of snow conditions.” *Id.* Indicative of the growing problem, in 1996, the Lolo National Forest (in western Montana) began reconsidering snowmobile regulation in its Forest Plan because “slopes previously inaccessible except to the most powerfully modified machines are now routinely climbed.” USDA FOREST SERV., STATELINE SNOWMOBILE ENVIRONMENTAL ASSESSMENT 2 (1996).

161. U.S. DEP’T OF ENERGY, OAK RIDGE NAT’L LAB., *AN ANALYSIS OF THE IMPACT OF SPORT UTILITY VEHICLES IN THE UNITED STATES* 2, 6 (2000) (stating that the SUV share of the U.S. auto market rose from 7 percent in 1990 to 19 percent in 1999, when more than 3 million units sold, compared to 243,000 in 1980).

162. MOTORCYCLE INDUS. COUNCIL, *supra* note 135, at 10; *Market Data Book 2006 Unit Sales*, POWERSPORTS BUSINESS 44–52 (2006); *Market Data Book 2005 Unit Sales*, POWERSPORTS BUSINESS 40 (2005); Andrews, *supra* note 127; Motorcycle Indus. Council, Student Kit, 2006, at 8.

While machine numbers and capabilities were increasing in the early 1990s, the FS was working to expand driving opportunities.<sup>163</sup> Funding from many states and the federal government gave line officers from the FS and BLM a budgetary incentive to work with ORV groups to maintain and build ORV routes.<sup>164</sup> And, in 1990, the FS made a critical change when it abandoned the “40-inch rule” that prohibited most four-wheel ATV use on national forest trails.<sup>165</sup> Prior to 1990, the use of motor vehicles wider than 40 inches was prohibited on national forest trails because 40 inches was wide enough to accommodate a typical motorcycle’s handlebars, and the assumption was that anything wider than a motorcycle would be a 4x4 that belonged on roads, not trails.<sup>166</sup> However, most modern ATVs (and snowmobiles) are wider than 40 inches, and would be illegal on trails under the old rule.<sup>167</sup> To accommodate these vehicles, the FS very quietly eliminated the rule,<sup>168</sup> allowing each national forest to

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163. Memorandum from Jack Ward Thomas, Forest Serv. Chief, to Regional Foresters, Motorized Recreation on National Forests, File Code 2350 (Dec. 28, 1994) (urging line officers to work closely with ORV organizations and to provide motorized opportunities “wherever we can”).

164. State and federal funding for ORV routes was sometimes used to prevent damage or repair heavily-impacted trails, but environmental organizations also alleged that it was sometimes used to “rebuild” ORV routes that had previously been impassable for most riders. Permitting such a change costs a decisionmaker nothing while pleasing a vocal constituency. Some states use sticker funds or gasoline taxes to fund ORV projects. *See, e.g.*, Minn. Dep’t of Nat. Resources, Natural Resources Fund (2008), <http://www.dnr.state.mn.us/aboutdnr/budget/budgetplan/04-05/natresfund.html> (last visited April 21, 2009) (detailing deposits into various ORV and watercraft funds for 2004–05, including \$30.5 million in gas taxes). Extra-agency federal funding is authorized under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA), Pub. L. 109-59, §1109, 119 Stat. 1144, 1168 (2005). The program provides funding for non-motorized, motorized, and “shared” trails; funding decisions are controlled by the states, typically through committees made up of user-group representatives. *See generally* COALITION FOR RECREATIONAL TRAILS, RECREATIONAL TRAILS PROGRAM: REPORT ON STATE PROJECTS (2005), available at [http://www.funoutdoors.info/2005-Report\\_revised.pdf](http://www.funoutdoors.info/2005-Report_revised.pdf). This program was originally proposed by ORV organizations as part of the Wise Use movement. THE WISE USE AGENDA 16, 36–40 (Alan M. Gottlieb ed., 1989).

165. Prohibitions; Forest Development Trails; Final Rule, 55 Fed. Reg. 25,830 (June 25, 1990) (to be codified at 36 C.F.R. pt. 261). *See also* HAVLICK, *supra* note 114.

166. Prohibitions; Forest Development Trails; Final Rule, 55 Fed. Reg. at 25,831.

167. For example, the “Sportsman 2008 ATV models range in width from 42 to 48 inches, with 48 inches being the norm.” POLARIS, THE WORLD’S TOUGHEST ATVs 30 (2008), available at <http://pi54.com/brochures/2008/2008ATV.pdf>. The only ATVs Polaris manufactures that are less than 40 inches wide are those for youths, such as the Outlaw 50, designed for six year olds. POLARIS INDUSTRIES INC., 2009, at 12, 32 (ATV sales pamphlet) (2008). Polaris also makes snowmobiles for mountain sledding that range in width from 45.5 to 48 inches. POLARIS INDUSTRIES INC., 2009, SNOWMOBILES DEEP SNOW 16–17 (2008).

168. The agency did not broadcast the proposed change, received only five comments from the general public on the rule change, and published an EA of the change that was

define which vehicles were appropriate for trail use.<sup>169</sup> This seemingly-modest change opened national forest trails to a new class of vehicles. For example, the Polaris Ranger Crew, a “utility” ATV now legal on many FS trails, is 50 inches wide, carries six people, tows 2,000 pounds, and carries 1,750 pounds in the cargo box.<sup>170</sup> Permitting such vehicles on trails may be appropriate and desirable, but it is a radical change from only permitting trail motorcycles.

As ORVs pushed into ever-more territory, environmental and non-motorized recreation organizations protested, and controversy over

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only three pages long. Prohibitions; Forest Development Trails; Final Rule, 55 Fed. Reg. 25,830, 25,831 (June 25, 1990) (to be codified at 36 C.F.R. pt. 216); USDA FOREST SERV., ENVIRONMENTAL ASSESSMENT, DECISION NOTICE, FINDING OF NO SIGNIFICANT IMPACT: 40 INCH RULE AMENDMENT (1989).

169. Elimination of the 40-inch rule enabled any national forest to permit vehicles wider than 40 inches on trails; however, in most instances such a decision would require an amendment to the existing forest plan, and would therefore need to be made in compliance with NFMA and NEPA. While many forests retained the old restriction, 52 national forests reported in 1999 that they permitted vehicles wider than 40 inches on trails; only five provided evidence that they had processed the change through NEPA. HAVLICK, *supra* note 114, at 4. The actions of the Gallatin National Forest are telling: “The Gallatin simply changed the travel maps to open its lands to wider vehicles. There is no evidence of any NEPA or Forest Plan documentation to accompany the notation changes on the maps.” *Id.* But see *Mont. Wilderness Ass’n. v. U.S. Forest Serv.*, CV 00-199-M-DWM (D. Mont. Mar. 27, 2003) (finding that the forest plans for the Clearwater and Bitterroot national forests lacked a judicially enforceable 40-inch rule independent of the national rule, and, thus, that NEPA-consistent forest plan amendments were unnecessary to permit trail use by ATVs).

170. POLARIS INDUSTRIES INC., 2009 POLARIS PRODUCTS CALENDAR (Sept. 2009). As one internal agency comment on the proposed change noted, “[t]his regulation has served us well and we believe the industry will just keep building bigger and bigger toys and at some point there must be a break between a trail and a road.” Memorandum from William Kickbusch, Recreation Staff Officer, Mark Twain Nat’l Forest, to Gaylord Yost, USDA Forest Serv. Region 9 (undated) (on file with the Natural Resources Journal). Indeed, the FS is now seeing requests to permit “UTVs,” utility ATVs with side-by-side seating that “look like a golf cart with a pickup bed.” Rob Chaney, *Wider Four-Wheelers Present Problem for Rangers*, MISSOULIAN, July 5, 2007. Many of these vehicles are around 60 inches wide. PolarisIndustries.com, Polaris Ranger, <http://www.polarisindustries.com/en-us/Ranger/2009/500/4x4/Pages/Specs.aspx> (last visited Oct. 21, 2009). A Ford Focus is 70 inches wide. Fordvehicles.com, Focus sedan, <http://www.fordvehicles.com/cars/focussedan/features/specs/> (last visited Oct. 29, 2008). This means that many UTVs are closer in width to standard passenger automobiles than standard ATVs, let alone the old standard of 40 inches. As “trail” vehicles have grown, it has become more and more difficult to articulate a clear difference between a road and a motorized trail, in terms of impacts on either the environment or non-motorized recreationists, and the difference between highway and off-road vehicles “has blurred.” Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264, 68,265 (Nov. 9, 2005) (to be codified at 36 pts. 212, 251, 261 & 295).

their use grew.<sup>171</sup> At the same time, both ORV advocates and competing user groups increased their scrutiny of ORV decisions. Prior to the mid-1990s, changes in recreation designations often flew below the public's radar. By the late 1990s, both motorized and non-motorized recreationists had begun to demand that the agencies use the appropriate planning processes to alter ORV management and both had begun to litigate resulting adverse decisions.<sup>172</sup> The profile of ORV organizations increased in prominence, as the Wise Use movement, of which many were a part, waxed in power.<sup>173</sup> By the end of the decade, the conflict over ORV use on public lands rivaled that over logging and the Clinton administration's roadless initiative. In the face of increasing contentiousness and impacts, the agencies began to question the impacts of ORVs, particularly in areas open to cross-country use.<sup>174</sup>

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171. See, e.g., George Ochenski, *No Quiet on the Western Front*, MONT. MAG. 44 (May/June 1999); Carol Bradley, *Can Little Belts Absorb Influx of Off-Road Vehicles?* GREAT FALLS TRIBUNE, Nov. 8, 1997, at M1; Elizabeth Manning, *Motorheads: The New, Noisy, Organized Force in the West*, HIGH COUNTRY NEWS, Dec. 9, 1998, at 1; Todd Wilkinson, *Crush of Off-Road Vehicles Plies West's Public Lands*, CHRISTIAN SCI. MONITOR, Oct. 5, 1999, at 3.

172. See, e.g., Wash. Trails Ass'n v. U.S. Forest Serv. 935 F. Supp. 1117 (D. Wash. 1996) (finding an agency attempt to categorically exclude extensive reconstruction of a motorized trail unlawful); Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205 (10th Cir. 2002) (finding an EA constituted adequate consideration of the impacts resulting from the closure 89 miles of FS road used by ORVs).

173. DAVID HELVARG, *THE WAR AGAINST THE GREENS* 45–99 (1994). The Wise Use Movement was the ideological heir of the Sagebrush Rebellion. It “defined itself mainly in opposition to the environmental movement, environmental regulations, and federal agencies governing land uses, all of which it portrayed as arrogant, ignorant outsiders intruding on local communities and denying them their livelihoods and right to self-determination.” James McCarthy, *First World Political Ecology: Lessons from the Wise Use Movement*, 34 ENV'T AND PLANNING 1281, 1282–83 (2002). The founding document of the Wise Use Movement, the Wise Use Agenda, included testimonials and policy proposals from the BlueRibbon Coalition, the United Four Wheel Drive Association, and the International Association of Snowmobile Administrators, as well as calls for some ORV access to wilderness. *THE WISE USE AGENDA*, *supra* note 164, at 15, 36–43, 118–21, 124–29.

174. For example, when Dale Bosworth became the Regional Forester of Region One, he met with the Region's district rangers, and “the one thing that they were most worried about was off-highway vehicle use.” Interview with Dale Bosworth, *supra* note 4. As a result, Bosworth, along with the BLM director for Montana and the Dakotas, determined that the FS and BLM could not permit unmanaged cross-country travel in so-called open areas in Montana and the Dakotas. OFF-HIGHWAY VEHICLE FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 43. The tri-state decision was emblematic of a new resolve to address unmanaged ORV use, but also permitted continued use on all “existing” trails (including user-made, non-system trails), with the trails to be inventoried in the future. *Id.* at 12–13, 18.



### E. Return to Planning (2000–Present)

In the first decade of the twenty-first century, the FS and BLM returned to ORV planning, apparently as a result of ever-more-obvious impacts and conflicts, pressure from environmentalists,<sup>175</sup> and the commitment of the FS chief, Dale Bosworth. While planning was sometimes initiated at the local or regional level,<sup>176</sup> the most significant developments were the FS travel-planning regulations revision<sup>177</sup> and plan to review all national forest travel plans for wheeled vehicles by 2010.<sup>178</sup> The FS actions are historically significant, representing, for many administrative units, their first real compliance with Executive Order 11,644. The BLM also promulgated a new ORV management strategy in 2001,<sup>179</sup> and some units have begun either land management plan revision (incorporating travel management) or separate travel plan revisions.<sup>180</sup> Both agencies have explicitly disavowed the existing policy of permitting cross-country ORV use in vast areas.<sup>181</sup> These belated efforts come as motor-

175. See, e.g., WILDLANDS CENTER FOR PREVENTING ROADS AND THE WILDERNESS SOCIETY, PETITION TO ENHANCE AND EXPAND REGULATIONS GOVERNING THE ADMINISTRATION OF RECREATIONAL OFF-ROAD VEHICLE USE ON NATIONAL FORESTS (1999), available at [http://www.wildlandspr.org/files/uploads/PDFs/Final\\_ORV\\_Petition\\_revised.pdf](http://www.wildlandspr.org/files/uploads/PDFs/Final_ORV_Petition_revised.pdf).

176. See, e.g., OFF-HIGHWAY VEHICLE FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 43.

177. National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005) (to be codified at 36 C.F.R. pt. 219).

178. Memorandum from Dale Bosworth, *supra* note 10. While some forests have taken this opportunity to appraise travel needs and impacts through a full EIS, others are simply repackaging existing allocations in the new “motor vehicle use map” format. USDA Forest Serv., Travel Management & Off-Highway Vehicle (OHV) Program, <http://www.fs.fed.us/recreation/programs/ohv/> (last visited May 27, 2008).

179. NATIONAL MANAGEMENT STRATEGY, *supra* note 11.

180. A list of the BLM revisions in process are available electronically. Bureau of Land Management, U.S. Department of the Interior, *Travel Management Planning & Inventory*, [http://www.blm.gov/wo/st/en/prog/Recreation/recreation\\_national/travel\\_management/travel\\_mgt\\_planning.html](http://www.blm.gov/wo/st/en/prog/Recreation/recreation_national/travel_management/travel_mgt_planning.html) (last visited Dec. 6, 2007).

181. For example:

As of January 2008, about 64 million acres of National Forest System lands were completely open to cross-country motor vehicle use. When OHVs were less popular, this scenario may not have been a problem. However, as the sales and technology of ATVs increased, opportunities for Americans to enjoy Federal lands grew. The magnitude and intensity of motor vehicle use have increased to the point that the intent of E.O. 11644, and the subsequent E.O. 11989, cannot be met while still allowing unrestricted cross-country motor vehicle use.

*The Impacts of Unmanaged Off-Road Vehicles on Federal Land: Hearing Before the H. Subcomm. on National Parks, Forests and Public Lands of the H. Comm. on Natural Resources, 110th Cong. 3 (2008) (statement of Joel Holtrop, Deputy Chief, Nat'l Forest System, USDA Forest Serv.) available at*

ized vehicles continue to increase in capability and as recreation allocations are increasingly difficult to change because they are liable to be politically contested and face legal challenge on procedural grounds.<sup>182</sup>

## F. Summary of Designations

This part summarizes aggregate agency designations. To reiterate, ORV “designations” measure the extent to which the agencies have completed route allocation, theoretically in accord with the criteria established in Executive Order 11,644. In many places, the FS and BLM have never completed this basic task.

ORV technology has changed dramatically since President Nixon first addressed agency management of ORVs. In 1972, a typical off-road motorist might have driven a Tote Goat, a moped with a five-horsepower lawnmower engine.<sup>183</sup> Today’s typical ATV is nearly 50 inches wide, has a four-stroke engine with an automatic transmission and four-wheel drive, and 40 horsepower.<sup>184</sup> For snowmobiles, “slopes previously inaccessible except to the most powerfully modified machines are now routinely climbed.”<sup>185</sup> Since the open-access era, there have been radical changes in where off-road machines can go, complemented by dramatic increases in the number of off-road recreationists.

While some FS and BLM management units have completed careful ORV planning, many plans are little farther along than they were in 1970. For many units, the allocations inherited from the open-access era were reaffirmed in the ORV plans of the 1970s; the same allocations were subsequently reaffirmed in the land management plans of the 1980s. In other words, these units technically completed the route designation

58&extmode=view&extid=151 (last visited Apr. 2, 2008) [hereinafter *The Impacts of Unmanaged Off-Road Vehicles on Federal Land*]; *Id.* (statement of Henri Bisson, Deputy Dir., BLM, asserting that the BLM believes “that continued designation of large areas that remain open to unregulated ‘cross-country travel’ is not a practical management strategy”).

182. For example, one ORV organization sued the FS for failing to allocate new ORV routes, *Shawnee Trail Conservancy v. Nicholas*, 343 F. Supp. 2d 687 (D. Ill. 2004), and another for closing a national forest to cross-country travel. *Colorado Off-Highway Vehicle Coal. v. U.S. Forest Serv.*, 357 F.3d 1130 (10th Cir. 2004). Environmental organizations, likewise, have sued the agency for permitting ORV use. *See, e.g., Utah Envtl. Congress v. U.S. Forest Serv.*, 2001 WL 34036256 (D. Utah June 19, 2001).

183. Wikipedia.com, Tote Gote, [http://en.wikipedia.org/wiki/Tote\\_gote](http://en.wikipedia.org/wiki/Tote_gote) (last visited Dec. 28, 2007).

184. Posting of 07trx400ex to <http://www.exriders.com/vbb/showthread.php?threadid=346607> (Apr. 14, 2008) (regarding horsepower of stock ATVs, asserting that the results are derived from Calif. Air Resources Board data).

185. Indeed, a plurality (40 percent) of Utah snowmobilers list sledding off-trail as their preferred riding activity. USDA FOREST SERV., STATELINE SNOWMOBILE ENVIRONMENTAL ASSESSMENT, *supra* note 160.

mandated by Executive Order 11,644, but they have never seriously evaluated ORV impacts, let alone addressed the “minimization” criteria established by the Executive Order.<sup>186</sup> This is typified by the acknowledgment Gallatin National Forest officials made in 2006 that “[t]here has never been a comprehensive analysis or management plan for travel on the Gallatin National Forest.”<sup>187</sup>

The result is that, in 2006, on 57 percent of national forest acres wheeled ORVs were permitted to either (a) travel cross-country, i.e., drive anywhere, without restriction, or (b) travel on “existing trails.”<sup>188</sup> In “existing trails” areas, route-by-route allocations have not yet been made, and ORVs may drive on any unplanned, non-system, user-made tracks. Typically the agencies have not inventoried where ORV use occurs in these areas, let alone evaluated where it is appropriate; had the agencies done so, these areas would be categorized as restricting ORV use to designated areas. Instead, this is a stop-gap measure which prohibits user creation of new trails and driving over unmarked ground. While an improvement over permission to drive everywhere, this still leaves ORV use effectively “unmanaged.” Areas where ORV use is “unmanaged” have made a broad, legally defensible “decision,” but, with some minor exceptions, have not substantively fulfilled their duty to allocate ORV use on a route-by-route or area-by-area basis. The FS data is reported by

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186. Or, as noted previously, they believed impacts were minimal contemporaneously, but failed to monitor and address changing use and impacts.

187. USDA FOREST SERV., RECORD OF DECISION, GALLATIN NATIONAL FOREST TRAVEL MANAGEMENT PLAN 6-7 (2006). Similarly, in 2007, a court found that the BLM had never completed travel planning for the Steens Mountain Cooperative Management and Protection Area. *Or. Nat. Desert Ass'n v. Shuford*, Slip Copy, 2007 WL 1695162, 20 (D. Or. June 8, 2007).

188. Forest Service summary data from 2006 shows 46 million acres where use on “existing trails” is permitted, 66 million acres permitting “cross-country” use, and 44 million acres where ORVs are restricted to allocated routes; in this analysis we assume that the 39 million acre difference between areas that are “open” (105 million) and the subset of those permitting cross-country use (66 million acres) is generally closed to ORV use. USDA Forest Serv., Summary, *supra* note 6. The FS defines areas that permit use on “existing” trails this way: “The unit or district restricts motor vehicles to ‘existing’ routes, including user-created routes which may or may not be inventoried and have not yet been evaluated for designation. Site-specific planning will still be necessary to determine which routes should be designated for motor vehicle use.” USDA Forest Serv., Explanatory Notes—Travel Management Schedule, available at [http://www.fs.fed.us/recreation/programs/ohv/explanatory\\_notes.pdf](http://www.fs.fed.us/recreation/programs/ohv/explanatory_notes.pdf). Cross-country areas are those “currently open to cross-country motor vehicle use.” *Id.* Certainly some management units deliberately planned cross-country play areas for ORVs, but these areas should measure at most in the tens of thousands of acres. For the most part, if any area is open to cross-country use or use on existing routes, the agency has never really considered where and whether ORV use is appropriate in those areas.

administrative unit, rather than acre, and may therefore understate the number of acres where ORV use is prohibited, to the extent that “closed” areas are within larger areas where ORVs are restricted to allocated routes.<sup>189</sup> But in general, for wheeled vehicles, the FS has never completed allocations for this 57 percent of national forest acres. In 2006, no FS region had less than one-third of its territory in this undesignated category; Region One had yet to limit ORV use on 85 percent of its territory.<sup>190</sup> The designation status for snowmobiles is unclear, but probably as incomplete.

To put this in historical context, Table 1 (below) shows that, in 1979, the original ORV plans left 115.9 million national forest acres open to unrestricted motorized use, while on 31.3 million acres ORV use was permitted only in designated areas.<sup>191</sup> FS data from 2006 is not reported in identical categories, but generally shows 112 million acres open to cross-country or existing uses, 39 million acres closed to ORVs, and 44 million acres permitting use only in designated areas.<sup>192</sup> Plainly, there are nearly as many acres today for which the agency has not completed designation as there were in 1979.

**TABLE 1.<sup>193</sup> TOTAL FS ACRES BY ORV MANAGEMENT CATEGORY (IN MILLIONS) 1979 and 2006**

	1979	2006
ORV Use Prohibited	40.7	39
Restricted to Allocated Routes	31.3	44
Unmanaged (permits ORVs to drive cross-country or on “existing” routes)	115.9	112

189. *Id.*

190. USDA Forest Serv., Summary, *supra* note 6. Approximately 20 to 30 forests require ORVs to stay on designated routes, 40 to 50 “restrict use to existing roads and trails, and between 50 and 60 national forests allow unrestricted cross-country motorized use.” Brenda M. Yankoviak, Off-Road Vehicle Policy on USDA National Forests: Evaluating User Conflicts and Travel Management (Dec. 2005) (unpublished master’s thesis, Univ. of Mont.) (on file with Mansfield Library, University of Montana) (citing personal communication with J. Ingersoll, FS National OHV Program Leader (Oct. 3, 2005)).

191. SHERIDAN, *supra* note 123, at 41 (stating that four forests had yet to report on their ORV plans).

192. USDA Forest Serv., Summary, *supra* note 6.

193. SHERIDAN, *supra* note 123, at 41; USDA Forest Serv., Summary, *supra* note 6. In Table 1, “Restricted to Allocated Routes” corresponds to the FS category “system.” The “ORV Use Prohibited” total for 2006 is the difference between the FS category “open” (105 million acres) and those open areas that permit cross-country use (66 million acres). *Id.* The

The BLM is no better. The BLM has never addressed ORV use on 13 percent of its territory, and therefore permits it everywhere in those undesignated areas.<sup>194</sup> BLM permits unregulated cross-country use on 31 percent of its territory; permits use on existing trails on 22 percent of its territory; and permits ORV use only on designated routes on 30 percent of its territory (see Table 2, below).<sup>195</sup> Only 5 percent of BLM's territory is categorically closed to ORV use.<sup>196</sup> The sum of BLM acres for which no travel plan has been completed, those that are open to all use, and those that permit use on all "existing" trails is, very roughly, 66 percent of what the BLM administers.<sup>197</sup> This appears to address only wheeled ORVs; for snowmobiles, "the units typically allow visitors to use snowmobiles unless very high levels of use are found to impair resources or cause user conflicts."<sup>198</sup> While superficially complying with legal forms, the BLM has fundamentally failed to complete ORV management planning on approximately two-thirds of its territory.

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number of closed acres may actually be greater, as some closed areas may be subsumed under the "Restricted to Allocated Routes" (system) category. The FS manages approximately 35.5 million acres of the National Wilderness Preservation System, where ORV use is prohibited by statute. Wilderness.net, Wilderness Management, <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=manage> (last visited Nov. 24, 2008). The difference in total acreage for 1979 and 2006 highlights the approximate nature of this data, but is partly explained by the fact that four forests are not included in the 1979 data. SHERIDAN, *supra* note 123, at 41.

194. OFF HIGHWAY VEHICLE DESIGNATIONS, *supra* note 7, at 95. "BLM management plans do not currently address motorized access in 'undesignated' areas. Thus, these 'undesignated' lands have no restrictions on motorized access." TRAVEL MANAGEMENT PROGRAM, *supra* note 7.

195. OFF HIGHWAY VEHICLE DESIGNATIONS, *supra* note 7, at 95. BLM publications typically report areas confining ORVs to existing trails as a subset of areas where ORV use is restricted, thus showing "designated" areas comprising 48 percent of BLM territory. TRAVEL MANAGEMENT PROGRAM, *supra* note 7.

196. *Id.*

197. OFF HIGHWAY VEHICLE DESIGNATIONS, *supra* note 7, at 95. For a variety of reasons, the BLM's data is only very approximate. E-mail from Tina McDonald, RMIS User Representative, BLM, to John C. Adams (June 2, 2008) (on file with author). Similar to wheeled ORV allocations, in plain violation of Executive Order 11,644, the U.S. General Accounting Office reports that "[a]ccording to the Group Manager of Recreation at the Bureau of Land Management, individual units have rarely designated areas specifically for snowmobile use." U.S. GEN. ACCOUNTING OFFICE, *supra* note 114, at 14.

198. *Id.*

**TABLE 2.<sup>199</sup> PERCENT OF BLM ACRES BY ORV MANAGEMENT CATEGORY (2006)**

ORV Use Prohibited		5%	
Restricted to Allocated Routes/Other Limitations		30%	
Unmanaged	{ { {	ORV Use Permitted on “Existing” Routes	22%
		Unregulated ORV Use (by decision)	31%
		Unregulated ORV Use (never planned)	13%

The scope of agency failure is immense. Executive Order 11,644 leaves no doubt that designation of ORV-appropriate areas is mandated on a site-by-site, route-by-route basis. The agencies periodically recognized that lack of ORV management was a problem.<sup>200</sup> There were no outstanding technical or political issues that precluded route designation, and the directive long predates the complications in management that create the “process predicament.”<sup>201</sup> Yet the FS and BLM did not

199. OFF HIGHWAY VEHICLE DESIGNATIONS, *supra* note 7, at 95. However, in another place BLM identifies percentage by management category in this way: ORV use prohibited, 4 percent; ORV use limited (to allocated routes, existing routes, or in some other way), 48 percent; unregulated ORV use (by decision), 32 percent; unregulated ORV use (never planned), 16 percent. TRAVEL MANAGEMENT PROGRAM, *supra* note 7.

200. See G. Douglas Hofe, Jr., Dir., Bureau of Outdoor Recreation, Keynote Address, in PROCEEDINGS OF THE 1971 SNOWMOBILE AND OFF THE ROAD VEHICLE RESEARCH SYMPOSIUM, *supra* note 124, at 4, 7 (urging the adoption of “meaningful” land management plans, complete with ORV management, noting that “development and production of these vehicles have moved faster than our regulatory and legislative machinery); JON DRIESSEN, USDA FOREST SERV., PROBLEMS IN MANAGING FOREST RECREATION FACILITIES: A SURVEY OF FIELD PERSONNEL 13 (1978) (quantifying “control” of ORVs as the third highest priority recreation problem identified by FS line officers, and ORV monitoring as the fourth); USDA FOREST SERV., OFF-ROAD VEHICLE AND TRAVEL MANAGEMENT ACTIVITY REVIEW, *supra* note 152, at 3 (noting in an internal review that “[w]ith few exceptions, the team noted that uncontrolled cross country or area wide use leads to unacceptable resource damage, and is inappropriate on the National Forests). See also U.S. GEN. ACCOUNTING OFFICE, FEDERAL LANDS: INFORMATION ON THE USE AND IMPACT OF OFF-HIGHWAY VEHICLES 15 (1995), available at <http://www.gao.gov/archive/1995/rc95209.pdf> (report to U.S. Rep. Bruce Vento identifying widespread failures in FS and BLM ORV management, and noting that the FS intended no change in management).

201. The Forest Service argues that many of its land management failures stem from what it calls “the process predicament” or “analysis paralysis.” Then-Chief Dale Bosworth distilled this complaint in 2001:

I have spoken many times about the ‘analysis paralysis’ that grips the Forest Service. When I use that expression, I mean the difficult, costly, confusing and seemingly endless processes that have been put in place in

comprehensively designate appropriate ORV routes and play areas. In some cases, the agencies acted to aggrandize ORV allocations without regard for the Executive Order.<sup>202</sup> In other cases, the agencies made decisions that were rendered obsolete by changing technology, demographics, and use patterns. There are a number of factors that mitigate agency responsibility for this failure, such as lack of funding, the vagueness of MUSYA and FLPMA, and the lack of congressional interest and guidance, but the bottom line is that the FS and BLM had the duty and legal authority to regulate ORV use and to designate ORV use areas. While some units did this, those administering a majority of the agencies' lands followed the procedures just enough to satisfy a deferential judiciary. Substantively, they never completed the task.

The consequences of agency failure include inefficient use of public resources, significant impacts to the environment, the inadvertent loss of a range of experience opportunities, and the creation of a major problem which will take significant time and resources to resolve. The failure to resolve the allocation issue has created two competing user groups, each of which believes, with good reason, that they are losing *existing* recreation areas. Non-motorized recreationists correctly believe that they are being displaced by ORVs on routes that historically saw few or no motors, while ORV drivers correctly believe that travel planning is diminishing the territory where they can drive. The agencies now face not just a zero-sum game, but one in which both contesting parties believe they are getting progressively less of the pie. Now that the agencies are finally addressing this problem, they will do so in a context in which such allocations are increasingly contentious,<sup>203</sup> increasingly consequential to local economies and communities, and increasingly subject to polit-

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order for agency line officers to comply with the laws enacted by Congress and the implementing regulations put in place by the Forest Service and other agencies.

*Gridlock on the National Forests: Oversight Hearing Before the H. Subcomm. on Forests & Forest Health, Comm. on Resources*, 107th Cong. 7 (Dec. 4, 2001) (statement of Dale Bosworth, USDA Forest Serv. Chief). This appears to be a mix of good assessment and convenient scapegoating. Regardless, Executive Order 11,644 dates back to the days of broad and largely unchallenged agency discretion, leaving analysis paralysis an unconvincing explanation for long-term failure. Further, the agency has completed travel planning in a manner that is legally sufficient—it is substantively that the agency has failed.

202. For example, the BLM tried to declare all national resource lands open to ORV use unless otherwise closed, see Rehm, *supra* note 142, at 1, and as when the FS eliminated the 40-inch rule. See *supra* text accompanying notes 165–170.

203. For example, at a recent FS hearing in Montana regarding ORV management, one apparent-ORV-advocate loudly suggested that somebody “[p]ut a bullet in her head,” referring to a fellow citizen who advocated non-motorized management. Editorial, *Etc.*, MISSOULA INDEP., Jan. 17, 2008, at 7.

ical intervention and litigation. They will do so as recreational demand on public lands is increasing<sup>204</sup> while agency funding for recreation is declining,<sup>205</sup> and while the ESA and other environmental legislation increasingly limit recreation use by diminishing the area available to satisfy particular user groups and the experiences they seek.<sup>206</sup>

### G. Summary of Allocations

The designations discussed in the previous section measure the extent to which the agencies have completed allocations for wheeled ORVs; this section addresses what those allocations are. One clear conclusion that can be drawn from the designation data is that at least half of all BLM and national forest lands are allocated to wheeled motorized recreation. Areas that permit cross-country ORV travel, ORV travel on existing trails, or simply have no travel plan, are all effectively allocated to motorized recreation: for the FS, as discussed in the previous section, that was approximately 57 percent of its territory in 2006,<sup>207</sup> and for the BLM 66 percent.<sup>208</sup> As noted, the FS data may be overstated through its failure to account for some portions of the National Wilderness Preservation System within units that are managed under an “open” or “existing trails” regime.<sup>209</sup> However, because ORVs are also permitted on many routes in areas within which they are confined to designated routes, the true proportion of national forest and BLM land area allocated to motorized recreation is greater than the proportion permitting “unmanaged” ORV use.

204. H. KEN CORDELL, USDA FOREST SERV., RECREATION AND TOURISM TRENDS RESEARCH 15 (2005), available at <http://www.srs.fs.usda.gov/trends/NatORC.html> [hereinafter CORDELL, RECREATION AND TOURISM TRENDS RESEARCH].

205. See LEE K. CERVENY & CLARE M. RYAN, USDA FOREST SERV., AGENCY CAPACITY FOR RECREATION SCIENCE AND MANAGEMENT: THE CASE OF THE US FOREST SERVICE 16–17 (2008), available at [http://www.fs.fed.us/pnw/pubs/pnw\\_gtr757.pdf](http://www.fs.fed.us/pnw/pubs/pnw_gtr757.pdf) (describing a gradual decline in FS recreation funding from 1993 to 2007 and a net loss of 655 full-time recreation personnel between 2002 and 2007).

206. See, e.g., Janet Wilson, *Actions Renew Tensions over Use of Desert Land*, L.A. TIMES, Mar. 15, 2006, at B3 (describing a U.S. District Court decision to set aside a U.S. Fish and Wildlife Service opinion and associated BLM recreation management decisions regarding ORV impacts to plants and tortoises); Bobby Magill, *Land Closing Angers Off-Roaders*, THE DAILY SENTINEL (Grand Junction, Colo.), July 13, 2007, (describing BLM closures due to ORV impacts on endangered cacti); Associated Press, *Judge Bans Snowmobiles to Protect Endangered Caribou in Northern Idaho*, SEATTLE TIMES, Sept. 26, 2006 (describing a U.S. District Court injunction on snowmobiling in portions of the Idaho Panhandle National Forests to protect caribou).

207. See *supra* text accompanying note 188.

208. See *supra* text accompanying note 197.

209. See *supra* text accompanying note 189.



Unfortunately, quantifying allocations is challenging. First, there is little data, and much of what exists is not very useful. For example, the data regarding areas permitting ORV use cross-country and on existing trails presented here does not translate simply and directly into allocations, because trail miles are generally a better measure of recreation opportunity than acreage.<sup>210</sup> However, available data on allocated trail miles is of questionable value. For example, the FS states that 28 percent of its trail system is open to wheeled ORVs,<sup>211</sup> but this fails to account for the uninventoried and user-created trails in areas that permit ORVs on “existing” trails or that permit cross-country travel.<sup>212</sup> The agencies do not know how many such trail miles exist. The BLM does not even have a breakdown of system trails by permitted use.<sup>213</sup> We are unaware of any national summary data on snowmobile and cross-country skiing allocations for either the FS or BLM, though one skier organization estimates that snowmobiles are permitted on 70 percent of national forest acres in western snow states.<sup>214</sup>

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210. Acres convey allocation poorly because recreationists are often confined to trails either by regulation or by terrain. A given 10,000 acres may contain trail opportunities ranging from zero to hundreds of miles.

211. Bosworth, *Rising to the Management Challenge*, *supra* note 153. *But see* USDA Forest Serv., Summary, *supra* note 6, at 1 (showing 26 percent of the national forest trail system was open to wheeled ORV use in 2006).

212. *See* Bosworth, *Rising to the Management Challenge*, *supra* note 153 (estimating that there are 14,000 miles of user-created trails on national forests, and “more than 780,000 acres of user-created OHV use areas”). Further, there is some question of the accuracy of the data irrespective of non-system trails. For example, 1996 data for Region One indicated that 58 percent of all trail miles in the region permitted ORV use (including snowmobile use). USDA FOREST SERV., STATE SUMMARY OF TOTAL RECREATION USE ON NATIONAL FOREST SYSTEM LANDS BY ACTIVITY, REGION NO. 1 (1996). 2006 data indicates that only 34 percent of trail miles in the region permit wheeled ORV use. MVUM, *supra* note 158. It is unlikely that snowmobile use accounts for this vast discrepancy, and it is unlikely that motorized use has been eliminated on a quarter of the trail miles in the region in the last decade. Thus, the discrepancy raises significant doubts about the accuracy of agency data. One regional examination of trail allocations, based on FS data for designated trails, suggests that in national forests and grasslands in Idaho, Montana, Nebraska, North Dakota, Oregon, South Dakota, Washington, and Wyoming, motorized use is permitted on 42 percent of trail miles (26,000 miles). MARK LAWLER, SHATTERED SOLITUDE/ERODED HABITAT: THE MOTORIZATION OF THE LANDS OF LEWIS AND CLARK 12 (2000) *available at* [http://www.sierraclub.org/wildlands/ORV/ORV\\_report.pdf](http://www.sierraclub.org/wildlands/ORV/ORV_report.pdf).

213. E-mail from Mark Goldbach, BLM Nat’l Trails & Travel Mgmt. Coordinator, to John C. Adams (Dec. 31, 2007) (on file with author).

214. KATHLEEN E. RIVERS & MARK MENLOVE, WINTER RECREATION ON WESTERN NATIONAL FOREST LANDS 9 (Winter Wildlands Alliance 2006), *available at* [http://www.winterwildlands.org/resources/reports/WWA\\_WinterRecreation.pdf](http://www.winterwildlands.org/resources/reports/WWA_WinterRecreation.pdf). Winter Wildlands Alliance based its estimates on Freedom of Information requests to western national forests (Cal., Colo., Idaho, Mont., Nev., Or., Utah, Wash., Wyo., and the western portions of Neb. and S.D.). *Id.* at 1. The organization reported that snowmobile use is permitted on 70 per-

Second, identifying trail allocations in isolation from road miles presents an incomplete picture of recreation opportunities. There are approximately 440,000 miles of public and national forest system roads on national forest lands, and another (estimated) 60,000 miles of “unclassified” roads,<sup>215</sup> compared to 133,087 miles of trail.<sup>216</sup> The BLM has 82,000 miles of road, compared to 16,000 miles of trail,<sup>217</sup> and suffers from the same “unclassified” road problem as does the FS. Many of these roads do not provide desired ORV experience opportunities and some prohibit use by ORVs that are not street-legal,<sup>218</sup> however, many of these roads are popular with ORV drivers.<sup>219</sup> Some of these roads facilitate non-motorized recreation by providing access to trailheads; many, however, preclude meaningful opportunities for non-motorized recreation, rather than providing access to additional such opportunities. Accordingly, roads cannot simply be summed with trails to evaluate allocation to motorized and non-motorized recreation, yet they provide and preclude certain opportunities, and therefore cannot simply be ignored in favor of trail miles when analyzing allocation.<sup>220</sup> In some respects, evaluation of the role of roads in allocation hinges on how ORV driving is regarded: if driving on trails is a distinct form of recreation, ORVs may merit significant trail allocations, and road miles may be less relevant to aggregate allocation; if driving on trails is merely another way to drive on public

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cent of 115,940,419 acres of affected land, and noted that two-thirds of the acreage where snowmobile use is prohibited is designated wilderness, i.e., snowmobile use is twice as likely to be prohibited by statute than by agency decision. *Id.* at 9.

215. USDA FOREST SERV., FOREST SERVICE ROADLESS AREA CONSERVATION FINAL ENVIRONMENTAL IMPACT STATEMENT 3–25 (2000).

216. USDA Forest Serv., Recreation Quick Facts, [http://www.fs.fed.us/recreation/programs/facts/facts\\_sheet.shtml](http://www.fs.fed.us/recreation/programs/facts/facts_sheet.shtml) (last visited Feb. 21, 2009).

217. U.S. DEP’T OF THE INTERIOR, BLM, ROADS AND TRAILS TERMINOLOGY 18 (2006), available at <http://www.blm.gov/nstc/library/pdf/TN422.pdf>.

218. The FS estimates that ORVs are permitted on 275,000 miles of the 374,000 miles of national forest system roads. USDA Forest Serv., Summary, *supra* note 6.

219. Indeed, at least once ORV drivers have sued to prevent road closures based on the associated diminishment of ORV-driving opportunities. *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205 (10th Cir. 2002).

220. In fact, ORVs have largely erased the distinction between roads and trails. For example, the FS currently defines a road as “[a] motor vehicle route over 50 inches wide, unless identified and managed as a trail.” 36 C.F.R. § 212.1 (2007). A trail is defined as “[a] route 50 inches or less in width or a route over 50 inches wide that is identified and managed as a trail.” *Id.* In other words, if the FS calls it a road, it is a road; if the FS calls it a trail, it is a trail. See generally Bethanie Walder, *Closed Roads: Open for Business?*, ROAD RIPORTER, Winter Solstice 2007, at 8–9, available at [http://www.wildlandscpr.org/files/uploads/RIPorter/RIPorter\\_12-4?screen.pdf](http://www.wildlandscpr.org/files/uploads/RIPorter/RIPorter_12-4?screen.pdf) (arguing that FS reclassification of roads as trails lexiconically diminishes “road” impacts and maintenance backlogs, while changing nothing on the ground).

lands, road miles are extremely relevant to aggregate allocation, and it is hard to argue, given the existing imbalance in road and trail miles, that more opportunities to drive should be provided at the expense of horse and foot trails.

Given the deficiencies in trail allocation data, currently, acreage is a better indicator of total allocations than trail miles. We know that roughly 57 percent of FS acreage and 66 percent of BLM acreage permits unregulated ORV use.<sup>221</sup> Also, we know that ORVs are permitted on designated routes on a substantial portion of the remaining national forest and BLM lands. Thus, we can estimate that ORVs are allocated somewhere between 55 and 75 percent of national forest and BLM off-road recreation opportunities—roughly two-thirds of such opportunities. Since ORV use is prohibited by statute on designated wilderness, the proportion of allocations to ORVs on multiple-use lands, where the agencies were solely responsible for making recreation allocations, is even higher.<sup>222</sup>

The FS and BLM never substantively completed route-by-route or area-by-area allocations as they were required to by law. Many administrative units of the agencies complied with this duty only technically, and, as a default, permitted unmanaged ORV use on more than half of the agencies' land. Their failure and default policy contributed to the allocations we see today, where approximately two-thirds of national forest and BLM lands are allocated to motorized use, and, therefore, often preclude quiet, non-motorized experiences. This allocation—apparently unintended, largely unrecognized, and certainly unexamined—raises questions regarding the resource impacts resulting from widespread ORV use, the fair distribution of public land recreation opportunities, and the purpose of public lands.

## V. EVALUATION OF CURRENT ORV ALLOCATIONS

This Part considers the application of several evaluative criteria to current ORV allocations. Current allocations are relevant despite ongoing revisions, because the existing baseline, and the expectations it creates, will have a great influence on revisions. For example, any proposed

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221. See *supra* text accompanying notes 188–197. It is astonishing that, ignoring the 30 percent of BLM land with an unspecified balance between motorized and non-motorized use, for every acre of BLM land on which ORV use is categorically prohibited, there are roughly 12 acres that permit virtually unregulated ORV use. See *supra* Table 2 and accompanying text.

222. Approximately 18 percent of the national forest system is designated wilderness; approximately 3 percent of BLM lands are designated wilderness. Wilderness.net, *supra* note 193.

change will be defined by comparison with a “no action” alternative; in instances where motorized allocations diminish, it will thus appear that ORV drivers are “losing” areas that non-motorized recreationists gain, though in reality non-motorized recreationists may also be “losing” traditionally used areas. In general, the FS and BLM will find plans easier to defend politically the less they deviate from the existing situation. Accordingly, existing allocations will likely cast a long shadow over revised allocations. Further, the evaluative criteria addressed here highlight fundamental questions that need to be asked about future, as well as current, allocations.

In evaluating current ORV allocations on public lands, policymakers need to consider impacts on natural resources and the fairness and desirability of allocations both generally and in relation to the purpose of public lands. ORVs undoubtedly have adverse impacts on natural resources, such as promoting erosion, spreading invasive weeds, and displacing wildlife. ORVs may have significant adverse impacts in some places, and negligible impacts in others. Because earnest environmental and social assessments were never completed on many lands, it must be assumed that current allocations lead to potential impacts, such as weed seed dispersal, flora and fauna impacts, erosion, and other impacts, to a far greater extent than would occur under a more carefully planned system.<sup>223</sup> Further, in many instances allocations in roadless areas may be unwise: there are strong arguments for the preservation of roadless areas,<sup>224</sup> and in many cases where the exclusion of roads and passenger vehicles is warranted, the exclusion of smaller vehicles and their routes will be equally meritorious. All this argues for more assiduous management, including careful designation of ORV routes, monitoring of impacts, and suspension of use where damage is occurring. ORVs can have extremely deleterious site-specific impacts, and land managers need to prevent “considerable adverse effects.”<sup>225</sup>

At the macro level, however, it is not clear that natural resource impacts mean anything for appropriate aggregate distribution of recrea-

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223. Current ORV allocations are inefficient, because they may cause greater-than-necessary impact to physical resources and other recreationists in order to deliver a given level of benefits to ORV drivers. In this context, efficiency denotes the cost of delivering a specific level of benefits; a policy which achieves that level of benefits at minimal cost is very efficient. DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 61 (1997).

224. Special Areas, Roadless Area Conservation, Final Rule, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001).

225. Exec. Order No. 11,644 § 9, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended* by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), *reprinted as amended* by Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

tion opportunities. In other words, if designations are carefully made, and if site-specific impacts are appropriately prevented or mitigated, ORV impacts to resources should not be great enough to reproach the current allocation to motorized use. Instead, while site-specific natural resource harms may necessitate site-specific ORV restrictions, the primary reason to question current allocations is the impact on other recreationists.

Because some believe demand is an essential component in evaluating the equitability of recreation allocations, recreational supply and demand is discussed in Part V.A. Although existing measures of supply and demand are imperfect, it is clear that ORV drivers enjoy an allocation disproportionate to their visitor numbers on FS and BLM lands. Part V.B argues that, regardless of demand, the adequacy of allocations is better evaluated in light of foundational decisions regarding the purpose of multiple-use lands and the role of recreation thereon. It is not clear, *prima facie*, that ORV use on trails is consistent with common conceptualizations of the purpose of multiple-use land. In part because of these issues, a statutory policy is proposed in Part VI.

### A. Recreation Demand

Many recreationists and policymakers believe that recreation demand should play a role in determining experience opportunity allocations, suggesting that it is equitable to provide opportunity proportional to demand for that opportunity.<sup>226</sup> User numbers are typically used as a measure of demand, but there are problems with using this proxy, because measuring existing use does not measure potential use, in part because existing allocations will influence demand.<sup>227</sup> For example, if motorized use displaced non-motorized use in a given area, user num-

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226. In this article, the term “demand” loosely indicates the amount of people who currently pursue particular experience opportunities. One important question about demand is whether it should be proportional to user numbers or whether the disproportionate amount of terrain required for pursuits such as ORV driving should be taken into account. Analogously, one would not look only to number of participants in order to allocate park space to the chess club and the soccer club; one would also consider the user groups’ respective space needs. However, the choice of analogy is important; few would assert that the most gluttonous person deserves the biggest slice of a small cake. In its ongoing travel management revision, the White River National Forest has incorporated consideration of average distance traveled into its identification of recreational supply. USDA FOREST SERV., SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT: WHITE RIVER NATIONAL FOREST TRAVEL MANAGEMENT PLAN 89–90 (2008) *available at* [http://www.fs.fed.us/r2/whiteriver/projects/travel\\_management/sdeis/WRNF\\_TMP\\_SDEIS\\_2008.pdf](http://www.fs.fed.us/r2/whiteriver/projects/travel_management/sdeis/WRNF_TMP_SDEIS_2008.pdf).

227. BRIAN E. GARBER-YONTS, CONCEPTUALIZING AND MEASURING DEMAND FOR RECREATION ON NATIONAL FORESTS: A REVIEW AND SYNTHESIS 9 (2005), *available at* [http://www.fs.fed.us/pnw/pubs/pnw\\_gtr645.pdf](http://www.fs.fed.us/pnw/pubs/pnw_gtr645.pdf). For this and other reasons, Garber-Yonts compellingly

bers would indicate low non-motorized demand for that area; if motorized use were prohibited in that same area, user numbers would indicate zero motorized demand for the area. Accordingly, basing allocation on demand—either site-specifically or in aggregate—may privilege current users, with no clear rationale for doing so.

Disregarding this conceptual problem, the FS estimates that of visits to national forests from 2000 to 2003, 39.6 percent involved hiking, 6.6 percent incorporated ORV use, 5.0 percent incorporated bicycling, 3.9 percent incorporated cross-country skiing, and 2.6 percent incorporated snowmobiling.<sup>228</sup> In other words, six times more visitors to the national forests hiked than drove off-road; 50 percent more visitors cross-country skied than snowmobiled.

The BLM estimates that it receives about 55 million visitors annually, of whom 12 million drive wheeled ORVs, .05 million snowmobile, and 0.5 million participate “in other specialized motorized sports, events, and activities.”<sup>229</sup> Presumably many of the balance (42 million recreationists), pursue non-motorized activities, but the difficulty of categorizing recreation visits makes this unclear. The BLM estimates that about 10 percent of visitor days are for ORV driving, and 10 percent for “non-motorized travel,” but most of the other activities, such as the largest, “camping and picnicking,” tell little about recreationists’ disposition toward ORV use.<sup>230</sup>

Considering recreation demand more generally, a national estimate of outdoor recreation, irrespective of where it takes place, suggests that, to consider just a few of the activities addressed by the survey, 38 percent of Americans participate in day hiking, 22.5 percent drive off-road, 19.8 percent participate in mountain biking, 7.1 percent ride horses

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argues for a more complicated definition of demand, integrating a relationship to supply. *Id.* at 26.

228. USDA FOREST SERV., NATIONAL FOREST VISITOR USE MONITORING PROGRAM NATIONAL PROJECT RESULTS, JANUARY 2000 THROUGH SEPTEMBER 2003, at 6 (2004), available at [http://www.fs.fed.us/recreation/programs/nvum/national\\_report\\_final\\_draft.pdf](http://www.fs.fed.us/recreation/programs/nvum/national_report_final_draft.pdf). Using approximately 1996 FS data from an older recreation accounting system for national forests in states crossed by Lewis and Clark (Idaho, Mont., Neb., N.D., Or., S.D., Wash., Wyo.), the Sierra Club found that there were 5.6 million hiking and walking visitor days, 1.6 million horseback days, 0.9 million motorcycle days, 0.6 million ATV days, 0.9 million cross-country skiing days, and 1.9 million snowmobile days. LAWLER, *supra* note 212, at 12.

229. TRAVEL MANAGEMENT PROGRAM, *supra* note 7.

230. U.S. DEP’T OF THE INTERIOR, BLM, PUBLIC LAND STATISTICS 191 (2006), available at [http://www.blm.gov/wo/st/en/res/Direct\\_Links\\_to\\_Publications/ann\\_rpt\\_and\\_pls/2006\\_pls\\_index.html](http://www.blm.gov/wo/st/en/res/Direct_Links_to_Publications/ann_rpt_and_pls/2006_pls_index.html). BLM estimates that it receives 192,000 snowmobile visitor days, and 445,000 “other winter activities” days. *Id.* at 192.

on trails, 6.3 percent snowmobile, and 2.7 percent cross-country ski.<sup>231</sup> ORV driving has experienced a surge of popularity in the last two decades, with an increase of 110 percent in the number of people, from 20 million drivers to 42 million, who say they participated in this activity during the years between 1983 and 2001.<sup>232</sup> However, in general, non-motorized outdoor recreation participation increased even more quickly. In the same period, annual birdwatching participants increased by 231 percent, to 73 million participants, and the number of day hikers increased 194 percent, to 76 million participants.<sup>233</sup>

It is hard to draw concrete statistical conclusions from this data, but it is almost certain that substantially more people pursue non-motorized activities on public lands than pursue ORV driving. Given that ORVs are currently allocated 60 to 75 percent of FS and BLM-administered lands,<sup>234</sup> if the goal for recreation allocations is proportionality to demand, the FS and BLM are not achieving it.<sup>235</sup> While demand is a prob-

231. H. KEN CORDELL ET AL., RECREATION STATISTICS UPDATE: UPDATE REPORT NO. 2 (2004), available at <http://www.srs.fs.usda.gov/trends/RECUPDATES/recupdate0907.pdf>. There is a plethora of other categories. To give a sense of demand in public land states, a mid-1990s study in Montana found that 37 percent of Montanans participated in day hiking, 15 percent in horseback riding, 10 percent in off-road/ATV driving, 7 percent in snowmobiling, and 5 percent in cross-country skiing. J. ALLEN ELLARD ET AL., RECREATION PARTICIPATION PATTERNS BY MONTANA RESIDENTS 9 (1999), available at <http://www.itrr.umt.edu/research/resrecr.pdf>.

232. CORDELL, RECREATION AND TOURISM TRENDS RESEARCH, *supra* note 204, at 18. This participation data is based on asking survey respondents, for the past year, "Did you drive off-road for recreation using a 4-wheel drive, ATV, or motorcycle?" CORDELL, OHV RECREATION *supra* note 124, at 4. The range of possible respondent interpretations of "off-road" and "for recreation" highlights the difficulty of utilizing this data to do more than illustrate broad trends. *Id.*

233. CORDELL, RECREATION AND TOURISM TRENDS RESEARCH, *supra* note 204, at 259.

234. *See supra* Part IV.G.

235. At least one judge has pointed toward a judicial standard that would find allocation disproportionate to demand arbitrary:

The Conservation Law Foundation, in its brief, notes that recreational 'vehicles are used by less than 2.5 percent of the summertime visitors to the Seashore.' The government, in its brief, says it has set aside 8 miles, of 48 Cape Cod National Seashore beachfront miles, or 16 percent of the beach, for ORV use. Although it seems fairly obvious that those who use ORVs need a length of coastline in which to use them, it is also fairly obvious that their use is often incompatible with the quiet enjoyment of the seashore that the Cape Cod National Seashore Act contemplated the vast majority of visitors would seek. At some geographical point, reserving miles of coastline for ORVs would amount to taking too much from too many for the enjoyment of too few. We here hold only that, giving full and appropriate weight to the judgment of the administrators, we cannot say, on the basis of the record before us, that 16 percent actually crosses the line marked by statutory word 'arbitrary.'

lematic proxy for fairness, this nonetheless raises questions about whether multiple-use recreation allocations are equitable.

## B. Recreation and the Purpose of Multiple-Use Lands

Recreation managers and stakeholders are preoccupied with supply and demand because permitting people to pursue their activities in proportion to their numbers has a veneer of distributional equity and fairness. However, identifying fair methods of distributing public resources depends upon identifying the underlying goal of the program. Different public resources are distributed according to different principles, in furtherance of different goals, as illustrated by the difference between how we distribute food stamps, social security benefits, and access to public libraries. Just as we would not permit demand for all leisure activities (skateboarding, band practice, model railroading) to dictate the distribution of space at a library, distribution by demand should not be a substitute for conscious public land recreation policy decisions. To wisely allocate recreation opportunities on public lands, policymakers need to first address the question of what type of recreation is most appropriate—and deserving of public support—on public lands.

Unfortunately, the exact goals of multiple-use land recreation are unclear. Coggins has argued that in the MUSYA and FLPMA, “[o]utdoor recreation’ has a generally accepted meaning. Congress intended to include hiking, camping, and birdwatching. Hunting and fishing are also included by inference from the subsequent reference to state fish and game laws. The outer boundaries of the definition, however, are in the eye of the beholder.”<sup>236</sup> The lack of a clear national policy on what constitutes outdoor recreation meriting support and allocations is a real problem, given intensifying recreation pressure on a finite land base. To treat stakeholders fairly and achieve whatever goals we have for public

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Conservation Law Found. v. Sec’y of the Interior, 864 F.2d 954, 961 (1st Cir. 1989) (Breyer, J. concurring).

236. George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 38–39 (1983). Coggins also noted Ralph W. Johnson’s articulation of the problem with demand as a substitute for a determination of appropriateness:

[I]t is said, many people like to ride motorbikes on mountain trails. This led me to invite a number of friends to fill in the blank in the following sentence: Because people like to ride motorbikes on mountain trails they should be allowed to do so, is like saying that because they like to \_\_\_\_\_ on mountain trails they should be allowed to do so. Unfortunately, none of the entries were printable.

*Id.* at 39 n.357 (quoting Ralph W. Johnson, *Recreation, Fish, Wildlife and the Public Land Law Review Commission*, 6 LAND & WATER L. REV. 283, 289 n.18 (1970)).



lands recreation, we need a clear federal policy identifying which types of recreation opportunities will be provided and how they will be prioritized in planning processes.

In fact, the FS and BLM already do place some boundaries on what should be provided on public lands. For example, the FS generally does not build golf courses, motocross tracks, and other “urban-type” facilities.<sup>237</sup> The agencies manage for a limited subset of all outdoor recreation activities, rather than for *all* types of outdoor recreation for which there is a demand, and this is consistent with the public conceptualization of public lands.<sup>238</sup>

The importance of establishing an explicit national policy is illustrated by the questions about ORVs raised by two FS attempts to identify what is recreationally appropriate on national forests. First, with regard to facilities, the FS states, “[p]ublic use facilities provided by the Forest Service must contrast with urbanization and harmonize and complement the natural environment. Do not provide facilities for urban-type sports, such as swimming pools, tennis courts, playground equipment, and golf courses on National Forest System lands with public funds.”<sup>239</sup> Essentially, this policy distinguishes between things that are *natural* and those that are *urban*, and it states that the FS will seek to provide recreation consonant with the former.

In a second attempt to articulate what is appropriate, the FS states that it will provide recreation opportunities that “a. Encourage the study and enjoyment of nature; b. Highlight the importance of conservation; c. Provide scenic and visual enjoyment; and d. Instill appreciation of the nation’s history, cultural resources, and traditional values.”<sup>240</sup> With its focus on the study and enjoyment of nature, this section of the Forest Service Manual suggests a standard that distinguishes between *outside fun* and *engagement with the natural world*. Outside fun is simply fun stuff that takes place outside, like volleyball, fireworks displays, miniature golf, antique shows, and portable video gaming. Engagement with the natural world suggests an experience that focuses on a web of life and processes that are substantially natural—places that are largely un-

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237. USDA FOREST SERV., FOREST SERVICE MANUAL § 2303(1)–(2) (1998).

238. For example, a national survey completed for the FS in 2000 found that “[t]he public supports multiple uses, but not all uses equally. Motorized recreation is not a high priority objective, while preserving the ability to have a ‘wilderness experience’ is important.” DEBORAH J. SHIELDS ET AL., SURVEY RESULTS OF THE AMERICAN PUBLIC’S VALUES, OBJECTIVES, BELIEFS, AND ATTITUDES REGARDING FORESTS AND GRASSLANDS: A TECHNICAL DOCUMENT SUPPORTING THE 2000 USDA FOREST SERVICE RPA ASSESSMENT, Abstract (2002), available at [http://www.fs.fed.us/rm/pubs/rmrs\\_gtr095.pdf](http://www.fs.fed.us/rm/pubs/rmrs_gtr095.pdf).

239. USDA FOREST SERV., FOREST SERVICE MANUAL, *supra* note 237.

240. *Id.* § 2302(5).

tended, unconstructed, and uncontrolled (though not necessarily untouched or pristine). Opportunities for engagement arise when pursuits encourage interaction with and understanding of natural landscapes, e.g., allowing the possibility that the landscape will act on the person—it is this possibility that makes seeing a mountain lion on a trail substantially more engaging than seeing an African lion at the zoo.<sup>241</sup> Though he tended to emphasize physical risk over other factors, this is essentially the argument that Joseph Sax made regarding public lands; that many of the important benefits of outdoor recreation stem from moving out of the comfort zone of one's car.<sup>242</sup>

It is not clear that ORV driving meets the standards of either FS approach to defining appropriate recreation for public lands.<sup>243</sup> With regard to the effort to provide experiences that contrast with urban life and that complement the natural environment, in many respects, internal combustion vehicles are the quintessential symbol of modern, urban life.<sup>244</sup> In fact, research indicates that motorized vehicles are more disruptive to perceptions of a natural landscape than some human-built structures.<sup>245</sup> For many, then, ORVs produce discord and not the harmony

241. See JOHN BERGER, *ABOUT LOOKING* 21–26 (1980).

242. See JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 79–90 (1980) [hereinafter SAX, *MOUNTAINS WITHOUT HANDRAILS*]; Professor Joseph L. Sax, Horace M. Albright Lectureship in Conservation at the University of California, Berkeley: Recreation Policy on the Federal Lands (May 10, 1978), available at <http://calforestry.cnr.berkeley.edu/lectures/albright/1978sax.html> [hereinafter Sax, *Recreational Policy on the Federal Lands*].

243. The Forest Service asserts that ORVs are a “legitimate” or “acceptable” use of national forests, but does not provide any clear rationale for that determination. See Bosworth, *Rising to the Management Challenge*, *supra* note 153; Memorandum from Jack Ward Thomas, *supra* note 163.

244. See, e.g., Wendell Berry, *An Entrance to the Woods*, in *THE ART OF THE PERSONAL ESSAY: AN ANTHOLOGY FROM THE CLASSICAL ERA TO THE PRESENT* 670, 676 (Phillip Lopate ed., 1995) (arguing that the distant roar of a highway “is the voice of the American economy; it is sounding also wherever strip mines are being cut in the steep slopes of Appalachia, and wherever crop land is being destroyed to make roads and suburbs, and wherever rivers and marshes and bays and forests are being destroyed for the sake of industry or commerce”).

245. See William Hammitt, *The Psychology and Functions of Wilderness Solitude*, in *INTERNATIONAL WILDERNESS ALLOCATION, MANAGEMENT, AND RESEARCH* 227 (John C. Hendee & Vance G. Martin eds., 1994) (finding that the lack of man-made noises seemed more important to respondents than the lack of man-made intrusions). See also Roger S. Ulrich, *Biophilia, Biophobia, and Natural Landscapes*, in *THE BIOPHILIA HYPOTHESIS* 73, 95 (Stephen R. Kellert & Edward O. Wilson eds., 1993) (providing a summary of environmental psychology research pertinent to the biophilia hypothesis, and concluding: “In very general terms, European, North American, and Japanese adult groups tend to respond to scenes as natural if the landscape is predominantly vegetation, water, and mountains, if artificial features such as buildings, automobiles, and advertising signs are absent or inconspicuous. . . .” (em-

with a natural environment that the FS encourages. This discord is highlighted by the apparent inconsistency of discouraging children's swing sets on multiple-use lands, on the grounds that they are intrusively urban, while providing obstacle courses for Hummers.

It is also unclear that ORVs promote engagement with the natural world. ORV drivers often argue that they seek outdoor experiences functionally identical to those sought by foot-travelers.<sup>246</sup> From the outside, however, ORV driving appears to be focused more on the sport and demands of driving than on the environment; engagement with natural sounds, smells, and tastes is less likely astride a noisy machine or within a vehicle,<sup>247</sup> while the possibility of the environment imposing unwanted conditions on the recreationist is diminished.<sup>248</sup> Some ORVs are automobiles, and all are similar to them, differentiated only by their number of wheels and whether they fully enclose the passenger(s). While driving ORVs may facilitate access to engaging experiences, it is not clear that the driving itself promotes engagement with a natural landscape. As Sax suggests, the person who drives up to the Grand Canyon and drives away "has stopped short of the very intensity of experience, of engagement, that is of the essence of the process of self-discovery. He is like one who tries to experience Shakespeare by holding one of the plays in his hand."<sup>249</sup> To the extent that ORVs offer an experience fundamentally different from driving passenger vehicles on dirt roads, the difference ap-

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phasis added)); Britton L. Mace, et al., *Visibility and Natural Quiet in National Parks and Wilderness Areas: Psychological Considerations*, 36 ENV'T & BEHAV. 5, 22 (2004) (summarizing the psychological and physiological effects of exposure to loud noise in natural environments).

246. For example, motorists "go to wild and undeveloped lands to find their recreation for many of the same reasons others visit wilderness. They want the challenge of wild lands, scenic beauty, remoteness and quality destinations, such as alpine lakes with fishing." *Idaho Wilderness Proposals*, *supra* note 40, at 57.

247. As Warren Bacon wrote: "Even superficial visual experiences are unlikely while the [motorized] equipment is moving because so much attention must be given to keeping the vehicle on the trail or primitive road." Warren Bacon, *Multisensory Landscape Aesthetics*, in *NATURE AND THE HUMAN SPIRIT: TOWARD AN EXPANDED LAND MANAGEMENT ETHIC* 311, 315 (B.L. Driver et al. eds., 1996).

248. The risks associated with wildlife encounters, weather, and other environmental factors are substantially less for ORV drivers than for muscle-powered recreationists; the machines alert and deter aggressive wildlife, some inherently provide heat and shelter, and in most instances the drivers are temporally closer to assistance.

249. Sax, *Recreation Policy on the Federal Lands*, *supra* note 242. See also SAX, *MOUNTAINS WITHOUT HANDRAILS*, *supra* note 242, at 79 ("The purpose of reserving natural areas, however, is not to keep people in their cars, but to lure them out; to encourage a close look at the infinite detail and variety that the natural scene provides; to expose, rather than insulate. . . ."); Coggins, *supra* note 236, at 39 (arguing that it is unclear whether ORV driving constitutes "outdoor recreation" within the meaning of FLPMA).

pears principally to be the challenge of driving—a challenge that can be exhilarating, but which may not be dependent on a natural setting.<sup>250</sup> It is, at best, unclear whether driving ORVs “encourage[s] the study and enjoyment of nature” or is simply outside fun.

It is very clear, though, that ORVs change the quality of interaction that is available to other recreationists.<sup>251</sup> For non-motorized recreationists, the sound of motors makes birdsong inaudible and encounters with bears less likely. Because the presence of ORVs effectively shrinks the distance any recreationist is from safety, ORVs diminish the sense of risk or wildness that many recreationists seek on public lands. ORVs preclude or diminish opportunities for others to pursue “the study and enjoyment of nature.”

Whether or not the FS efforts to define appropriate recreation succeed perfectly, they reflect the general sense that not all recreation is equally appropriate on public lands and indicate that a policy to distinguish between recreational pursuits is critical in determining how public lands should be used. As technology and human ingenuity produce ever more recreational activities, it will become even more important to be able to articulate which activities are and are not deserving of public subsidy and support. Given the cultural, historic, and psychological importance of natural experiences, and the inaccessibility and ecological fragmentation of America’s privately-owned landscapes, the FS is probably right to emphasize natural, non-urban experience opportunities. In the lower 48 states, 83 percent of the United States is less than 0.7 miles from a road,<sup>252</sup> and public lands could offer a distinctively different experience, if so managed. Such management, though, will only follow from promulgation of a clear policy regarding recreation on public lands, including careful consideration of how ORV driving fits into that policy. In

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250. ORV drivers also sometimes argue that use of the machines permits the young, the aged, and the infirm to camp, fish, or picnic in remote spots, i.e., that ORVs promote the opportunity to engage in activities that more obviously create opportunities for engagement with the natural world. But access by young, aged, and infirm individuals and the general public will plainly be enhanced more by permitting passenger car access than by permitting only ORV access, since driving ORVs demands greater physical skill than driving a car, since ATVs and motorcycles cannot be driven by many of the young, aged, and infirm, and since ORVs (generally) carry fewer passengers than do passenger vehicles. Further, while car ownership is not universal, it is far more prevalent than ORV ownership. If the United States wishes to provide motorized access for scenic drives and easier access to specific destinations, as opposed to ORV driving experiences, roads for passenger vehicles are the answer. However, few observers suggest that multiple-use lands have inadequate road access.

251. See *supra* Part I.

252. Kurt H. Riitters & James D. Wickham, *How Far to the Nearest Road?* 1 FRONTIERS IN ECOLOGY & ENV'T 125, 125 (2003).

the absence of such a policy, it is difficult to evaluate whether ORV allocations advance or hinder the national interest in recreation on public lands, but at a minimum, FS attempts to define appropriate recreation raise questions about the wisdom of current ORV allocations.

## VI. POLICY IMPLICATIONS AND RECOMMENDATIONS

To date, FS and BLM management of ORVs on multiple-use lands has been deficient. The agencies have failed to carefully examine and limit the impacts of motorized recreation on the physical environment of public lands and on other users of public lands. As the agencies finally move on this issue, there are actions that can be taken to increase the efficiency and fairness of ORV allocation and management. Part VI.A outlines some actions that the FS and BLM can take to improve ORV management.

As the previous section suggested, better consideration of site-specific impacts will not address more fundamental issues relating to allocation of public resources. Part VI.B argues that while improvement within the existing policy framework for ORV management is necessary, it is not sufficient. For the FS and BLM to make transparent, rational, wise, and fair decisions regarding ORV use, the United States needs to develop a statutory recreation policy for multiple-use lands. Part VI.C concludes with consideration of some forms a statutory recreation policy for multiple-use lands could take.

### A. Improving Agency Management of ORVs

There are 10 steps that the agencies can and should take to improve ORV management:

(1) In the near-term, the agencies need to focus significant resources on revising travel allocations. Laudably, the FS hopes to complete revisions by 2010, and the BLM needs a similarly aggressive timeline.<sup>253</sup> The longer the current allocations remain in effect, the greater the impacts to natural resources and other recreationists will be, the more entrenched the opposition to change will become, and the more user-created routes will be developed in unmanaged areas.

(2) As the agencies move to revise allocations, they need to clearly define how they intend to locate routes so as to minimize impacts to natural resources and other recreationists in accordance with Executive Order

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253. USDA Forest Serv., Summary, *supra* note 6.

11,644. Given judicial deference, if the agencies fail to do so, the minimization standard of Executive Order 11,644 will remain meaningless.

(3) As they proceed with designation, the FS and BLM need to acknowledge that current allocations are the product of agency failure to act, not design. Ideally, ORV routes would be allocated as if the map were currently empty of ORV routes.<sup>254</sup> Reliance on the current baseline will encourage inefficient allocations that likely disproportionately impact natural resources and non-motorized recreationists. While acknowledging existing use, the agencies need to do their best to imagine the best possible arrangement of ORV routes, rather than simply tinkering around the edges of the current allocations.

Relatedly, both the agencies and motorists need to recognize that, in many cases, travel plan revision should result in a substantially reduced ORV allocation. ORV drivers will feel frustrated by this, legitimately, but the current, disproportionately-motorized allocations were founded not on government promises to ORV drivers, but on previous agency actions that were ill-considered vis-à-vis impacts on natural resources, unfair to other recreationists, and only technically in compliance with the law. Accordingly, ORV drivers are deserving of sympathy, but their allocations should not be privileged. If the FS and BLM wish to argue that their role in public land management is to cater disproportionately to ORV use, they should do so openly. Barring that assertion, aggregate ORV allocations should diminish. Allocations will be contentious regardless of how the agencies justify them, but it is possible that

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254. At least theoretically, the BLM understands this, having recently instructed its units:

Choose individual roads and trails with the transportation network goals in mind rather than just using all the inherited roads and trails. Most existing roads and trails on public land were created by use over time, rather than planned or constructed for specific activities or needs. Instead of simply using this process as a way of deciding which individual roads and trails should be closed or left open, consider a broader range of possibilities for management of individual roads and trails, including re-routes, reconstruction or new construction, and closures.

Memorandum No. 2008-014 from Todd Christensen, Acting Deputy Ass't Dir. Renewable Resources and Planning, BLM, to State Dirs., at Attachment 3-1 (2007), available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/im\\_attachments/2008.Par.92038.File.dat/IM2008-014\\_att3.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2008.Par.92038.File.dat/IM2008-014_att3.pdf). In contrast, the FS advises its units to use the status quo if they can "[u]se this baseline system in considering whether to propose changes to motor vehicle use during the designation process. Identifying the baseline system avoids unnecessary reconsideration of travel management decisions." USDA FOREST SERV. NAT'L OHV IMPLEMENTATION TEAM, MOTOR VEHICLE ROUTE AND AREA DESIGNATION GUIDE v. 111705, at 5, [http://www.fs.fed.us/r3/sfe/Travel%20Mgt/route\\_designation\\_guide.pdf](http://www.fs.fed.us/r3/sfe/Travel%20Mgt/route_designation_guide.pdf) (last visited Mar. 1, 2008).

being clear about the origin of current, disproportionate allocations and the resulting displacement of non-motorized users may change expectations and ameliorate some of the rancor of the debate.

(4) As they proceed with route designation, the agencies need to be very explicit about the types of recreation experience opportunities that they are providing and precluding. In order to clearly depict the choices they are making, the FS and BLM should utilize ROS for both inventory and comparison of alternatives.<sup>255</sup> Decision makers need to tell the public plainly what experience opportunities will be available on multiple-use lands in the coming decades. ROS is a potentially powerful communicative and evaluative tool.

(5) As they proceed with route designation, the agencies need to develop a framework for evaluating competing claims by recreationists. Any allocation to a particular experience opportunity functions as an implicit endorsement of the claims that the advocates for that opportunity make regarding the appropriateness, benefits, and impacts of their preferred activity. The agencies need to better understand the logical and philosophical foundations of recreationist arguments so that line officers can (a) evaluate competing claims fairly, and (b) articulate what claims they are accepting and why, thus facilitating decision transparency.

(6) Monitoring needs to be an integral part of land management. Monitoring is required by Executive Order 11,644, necessary for adaptive management, and demanded by common sense. The agencies need to understand the experience opportunities available and what the impacts of recreation are. Without assiduous monitoring, it is difficult to see how the agencies will comply with the legal requirement that they suspend ORV use when it “will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat or cultural or historic resources of particular areas or trails.”<sup>256</sup>

(7) Enforcement of closures and other regulations is critical. As the BLM noted in its 2001 Strategy, “substantially more law enforcement rangers and support resources are needed to ensure compliance with motorized OHV [off-highway vehicles] regulations. Currently, each ranger patrols an average of 1.76 million acres of often very remote public land.”<sup>257</sup> Without enforcement, paper allocations are meaningless.

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255. See *supra* text accompanying notes 24–27.

256. Exec. Order No. 11,644 §9, 37 Fed. Reg. 2877 (Feb. 9, 1972), reprinted as amended by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 25, 1977), reprinted as amended by Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987).

257. NATIONAL MANAGEMENT STRATEGY, *supra* note 11, at 16. Even though the vast BLM territories in Alaska distort this average, it is clear that enforcement is currently inadequate.

(8) The agencies need to learn from their failed attempts to manage ORVs so as to avoid repeating the mistakes with other types of recreation. For example, mountain bikes were “barely more than a novelty in 1984,”<sup>258</sup> but increases in use, conflicts with other recreationists, and transforming technology are propelling them on an arc near-identical to that of ORVs 15 years ago. Other activities, such as heli-skiing and mountain climbing show similar trends.<sup>259</sup> It may be appropriate to allocate large areas to these activities, but the lesson of ORV management is that such decisions should not be made inadvertently through inaction, but consciously and explicitly through frameworks that are inclusive and require direct consideration of impacts on the distribution of recreation opportunities. It is clear that mountain bike use, in particular, is careening toward a train wreck like the agencies have with ORVs, and now is the time to think about where this recreation is appropriate and desirable.<sup>260</sup>

(9) ORV management could also be enhanced by a research program that is directed towards understanding not only the biophysical impacts of ORV use and their mitigation, but also the interactions that occur among competing, and sometimes overlapping, recreation opportunities. A strong research organization and knowledge base is needed to support FS and BLM efforts to optimize allocation efficiencies and limit environmental impacts.

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See also U.S. GEN. ACCOUNTING OFFICE, *supra* note 114, at 57 (stating that 57 percent of BLM administrative units with snowmobile use report that law enforcement staffing is “less than” or “much less than” adequate; 74 percent of affected FS units report the same). Also, see retired FS law enforcement officer Jack Gregory arguing that there is a pervasive culture of illegal and abusive ORV driving and inadequate law enforcement resources to address such abuse and resultant impacts, and concluding that “[o]ur public lands are in serious trouble. Irresponsible off-roading has become such a menace that it is now the single greatest threat to American landscapes.” *The Impacts of Unmanaged Off-Road Vehicles on Federal Land*, *supra* note 181, at 1–3 (statement of Jack Gregory, Rangers for Responsible Recreation & Pub. Employees for Env'tl. Responsibility).

258. USDA FOREST SERV., DRAFT ENVIRONMENTAL IMPACT STATEMENT; WHITE RIVER NATIONAL FOREST TRAVEL MANAGEMENT PLAN 66 (2006).

259. For a description of the nascent conflict between heli-skiers and backcountry skiers, see Wilkinson, *supra* note 153.

260. The agencies have seemingly failed to learn this lesson. For example, the Gallatin National Forest, in its 2006 travel plan revision, declined to limit the use of mountain bikes to designated routes (i.e., allowed cross-country mountain bike use), stating that “[s]ome parts of the country are incurring problems with off-route bike travel but that is currently not the case on the Gallatin Forest. . . . There are no known areas of the Forest where off-route mountain bike impacts would compel me to manage biking on designated routes only at this time and therefore I dismissed this alternative as not ripe for decision.” USDA FOREST SERV., RECORD OF DECISION, *supra* note 187, at 128.



(10) The agencies should consider establishing a policy generally prohibiting ORV use in roadless areas. Roadless areas are exceptional for their wild and quiet recreation opportunities, their habitat for threatened and endangered species, and other values.<sup>261</sup> Their character and values derive from their lack of accessibility by motor vehicle. While ORVs may be less impactful than road vehicles in some instances, thus more acceptable in roadless areas, in general, where roadless areas are protected from vehicles that depend upon roads, they should be equally protected from use by off-road motor vehicles.

The FS and BLM have the authority to implement each of these suggestions. To the extent that these suggestions are dependent upon congressional appropriations, the agencies need to be more compelling in arguing for prioritization of these issues. If the agencies believe or find that they are unable to, at a minimum, revise travel plans expeditiously and (in accord with the minimization standards of Executive Order 11,644) monitor impacts and enforce closures, then they need to acknowledge their inability to comply with federal law and adequately manage ORVs, and they need to consider more drastic action, such as a blanket prohibition on ORV use.

### **B. A Policy Vacuum**

While the FS and BLM can and should take steps to improve ORV management, their history of failure and the lack of political will necessary to make significant changes to the existing baseline suggest that, while cross-country ORV use will be largely phased out, it is unlikely that the agencies will otherwise depart radically from existing allocations. The need to escape from the shadow of allocations of questionable fairness and efficiency, the need to fundamentally reconsider what sorts of recreation should be prioritized on public lands, the escalating conflicts between recreationists, the increasing diversity of recreation demands, the rising stakes associated with allocation decisions, and the plainly political nature of allocation decisions all point to a better, long-term solution: a new statutory recreation policy for multiple-use lands.

Clearly, there is a problem with current statutory direction for the FS and BLM. The multiple-use mandates of the agencies have been heavily criticized for their failure to actually prescribe priorities and manage-

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261. Special Areas, Roadless Area Conservation, Final Rule, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

ment direction.<sup>262</sup> As the General Accounting Office stated in addressing the FS:

We believe that statutory changes to improve the efficiency and effectiveness of the Forest Service's decision-making process cannot be identified until after agreement is reached on which uses the agency is to emphasize under its broad multiple-use and sustained-yield mandate and how it is to resolve conflicts or make choices among competing uses on its land.<sup>263</sup>

This general failure is reproduced with regard to recreation; it is unclear how recreation should be prioritized relative to other multiple uses on public lands, and it is unclear how different types of recreation should be prioritized relative to one another on public lands.<sup>264</sup> Congress has eschewed the difficult political decision of determining which recreationists will get the goods on multiple-use lands.

This congressional failure has a number of negative consequences associated with the perception and reality of arbitrariness in agency allocations. First, to some extent, Congress has given the FS and BLM responsibility without power. Breazeale argues that between lawsuits, executive interference, congressional interference, and the effect of other statutes, agency planning only sometimes determines management direction.<sup>265</sup> Bressman argues that "Congress . . . grants power without meaningful administrative limits so that its members will have space to push agencies toward preferential outcomes. Congress thus facilitates ar-

262. See, e.g., Coggins, *supra* note 236; Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223 (2004); Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625 (1997).

263. U.S. GEN. ACCOUNTING OFFICE, *FOREST SERVICE DECISION-MAKING: GREATER CLARITY NEEDED ON MISSION PRIORITIES* 8 (1997) available at <http://www.gao.gov/archive/1997/rc97081t.pdf>.

264. Jan Laitos and Thomas Carr argue that, in fact, the fulcrum of the failure of multiple use is recreation. They argue that recreation and preservation are becoming the dominant uses of public lands, and that future conflict over public land management will often be between camps exemplified by environmental organizations on one hand, and ORV advocates on the other. Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140 (1999); Jan G. Laitos, *The Multiple to Dominant Use Paradigm Shift in Natural Resources Management*, 24 LAND RESOURCES & ENVTL. L. 221 (2004). Even very recent congressional attempts to consider problems associated with ORV use on public lands have explicitly eschewed addressing allocation. *The Impacts of Unmanaged Off-Road Vehicles on Federal Land*, *supra* note 181, at 4–5 (opening statement of Rep. Raúl Grijalva, Chairman, Subcomm. on National Parks, Forests and Public Lands).

265. Robert Breazeale, *Is Something Wrong with the National Forest Management Act?* 21 J. LAND RESOURCES & ENVTL. L. 317 (2001).

bitrary administrative decisionmaking.”<sup>266</sup> While the agencies have, on the whole, had the latitude to make allocation decisions, the appearance of agency discretion is sometimes a mask for arbitrary decisions by other agents, depriving citizens of the benefits of either delegated discretion or clear congressional accountability.

Second, contention and rancor are fostered as diverse interests see their own policy goals reflected in the vague language of multiple use, but not in individual decisions. The ambiguity of organic acts “allows those of us who are interested in public land management to project our vision and values onto the language Congress used to instruct those agencies. This almost insures that some significant part of the interested public will believe that the agencies [sic] conduct is not only wrong but illegal.”<sup>267</sup> These beliefs are evident in interest group rhetoric surrounding the increasing number of lawsuits filed over FS and BLM recreation allocations.<sup>268</sup>

Third, the absence of clear statutory goals and standards means that agency recreation decisions will be inconsistent, meaning they will not be made based on consistent criteria or in furtherance of any national goal. Accordingly, many decisions will result from the simple preferences of individual decision makers. As political scientist Douglas Yates writes, “To the extent that public bureaucracies have difficulty defining precise goals and measures of performance, policy-makers in bureaucratic units are left relatively free to make valuative decisions. In the absence of clear goals, there is at least a partial vacuum that must be filled by somebody’s valuative decision.”<sup>269</sup> As a consequence, even the best-

266. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1688 (2004). Nie similarly argues that through riders and appropriations Congress exercises control without accountability. Martin Nie, *Governing the Tongass: National Forest Conflict & Political Decision Making*, 36 ENVTL. L. 385, 447 (2006). Regarding Congressional micromanagement of the FS, see also Jack Ward Thomas, *What Now? From a Former Chief of the Forest Service*, in *A VISION OF THE U.S. FOREST SERVICE: GOALS FOR ITS NEXT CENTURY* 15–16 (Roger A. Sedjo ed., 2000); Elise S. Jones & Will Callaway, *Neutral Bystander, Intrusive Micromanager, or Useful Catalyst? The Role of Congress in Effecting Change Within the Forest Service*, 23 POL’Y STUD. J. 337 (1995).

267. Cheever, *supra* note 262, at 629. Cheever was addressing the FS and NPS, but the point applies equally to the BLM.

268. For example, ORV drivers often argue that they have a “right to ride.” See, e.g., Ed Klim, International Snowmobile Manufacturer’s Association, *Vote Smart to Protect Your Right to Ride*, [http://www.ilsnowmobile.com/isma\\_aug\\_26\\_2004.htm](http://www.ilsnowmobile.com/isma_aug_26_2004.htm) (last visited Apr. 20, 2009). The invocation of rights implies a legal and moral obligation on behalf of the state, STONE, *supra* note 223, at 323–24, and indicates increased likelihood of litigation. Barbara Gray, *Framing of Environmental Disputes*, in *MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS: CONCEPTS AND CASES* 11, 16–17 (Roy J. Lewicki et al. eds., 2003).

269. DOUGLAS YATES, *BUREAUCRATIC DEMOCRACY* 84 (1982).

reasoned ORV management decision may be perceived by aggrieved parties as the arbitrary preference of the decision maker.

Fourth, and finally, decisions may be or appear arbitrary because they are political, not technical. The absence of clear direction has the effect of forcing individual decision makers to resolve value and interest conflicts.<sup>270</sup> As Nie writes, “[a] good clear law will eliminate the politics at certain points. Vague, meaningless law, in contrast, politicizes the entire policymaking process from Congress to the low-level agency representatives who endlessly negotiate with agency ‘clients.’”<sup>271</sup> It is not fair, wise, or democratic to ask the silviculturalists, engineers, range specialists, wildlife biologists, or recreation managers of the agencies to resolve local political disputes between chambers of commerce, sporting goods stores, bike shops, ORV dealers, tourism-dependent businesses, county commissions, environmental groups, and a spate of recreation groups.

Traditionally, FS and BLM managers have been regarded as professionals who apply technical expertise to solve technical problems; for example, how to log for maximum return or how many head of cattle the range can sustain. This Progressive Era ideal promotes delegation of broad discretion to the agencies, but recreation allocation decisions are more than merely technical issues. In fact, given that they are fundamentally distributive decisions, deeply implicated in the wholly political debate over wilderness, they are significantly more political than technical in nature. It is, thus, no surprise that under the existing framework, “[s]uccessful programs [have] active line officer involvement, a ‘champion’ and an active OHV club or organization.”<sup>272</sup>

Exemplifying the non-technical nature of recreation allocations is the recent travel plan decision by the Gallatin National Forest, in south central Montana. The Gallatin revised its travel plan in 2006, and concluded that, given the elimination of unregulated cross-country use,<sup>273</sup> there were very few resource constraints that would dictate either site-specific ORV decisions or a general direction.<sup>274</sup> The Record of Decision

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270. Nie, *supra* note 266, at 432.

271. Nie, *supra* note 262, at 263.

272. USDA FOREST SERV., FINAL REPORT: NATIONAL OFF-HIGHWAY VEHICLE (OHV) ACTIVITY REVIEW, *supra* note 151, at 4.

273. The alternatives ranged from permitting unregulated cross-country travel by wheeled ORVs (and use of existing designated routes) to an alternative that prohibited cross-country wheeled use and most ATV and motorcycle use on trails. USDA FOREST SERV., GALLATIN NATIONAL FOREST PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 155, at 19–23.

274. For instance, with regard to general wildlife concerns, Forest Supervisor Rebecca Heath concluded that the less ORV use “the better it would be for wildlife. However, I could not identify a specific threshold, or breakpoint, among the range of alternatives in which the prescribed level of recreation opportunity would become acceptable or unaccept-

(ROD) made clear that virtually any travel decision on the Gallatin would have been defensible. In the end, the Gallatin increased its allocation to non-motorized uses and moderately decreased ORV allocations, and justified the final allocation by referencing demand; demand “is largely based on several studies that consistently show that participation in non-motorized activity exceeds that of motorized activity.”<sup>275</sup> The Gallatin was silent on why demand should drive allocation decisions.

It is difficult to see what technical expertise the FS is applying in the Gallatin case. It is not stewardship of the resource that is dictating the decision, but politics. Without national guidance, there is no way to judge the quality, efficacy, or fairness of plans like the Gallatin’s. It is not clear what goals are furthered, whether the winners or losers were fairly chosen, or whether the plans create and maintain an appropriate distribution of recreation opportunities.

The United States needs a federal statutory policy to provide guidelines for where and under what circumstances ORV use is appropriate on public lands.<sup>276</sup> The FS and BLM need this guidance in order to resolve basic allocation issues such as: “What are appropriate and inappropriate uses? What will be provided? How much? Under what conditions? Where?”<sup>277</sup> In the absence of such direction, the agencies will continue to answer these questions on an ad hoc and often arbitrary basis, based on local politics or superficially attractive criteria such as demand, with results that are probably unjust and unwise. A national policy is needed to establish the goals and standards against which management efficacy can be measured and to resolve the essential question of what kind of public lands recreation the United States wants to promote.

Further, ORV management is only one part of the recreation management puzzle. Reducing recreation management to motorized and non-motorized use ignores that recreation user groups are far from mon-

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able to me.” *Id.* at 82 (2006). With regard to economics, the Supervisor “concluded that none of the Travel Management Plan alternatives would result in any notable effects to the local economy and therefore this was not a factor in my decision.” *Id.* at 73. Despite the relationship between motorized use and invasive weeds, the Supervisor similarly concluded, “I cannot claim that this issue was significant in my choice among the seven alternatives.” *Id.* at 83.

275. *Id.* at 19.

276. The lack of a recreation policy for multiple-use lands reflects a more general problem for multiple-use lands, and, ideally, recreation would be resolved within a broader revision of policy for FS and BLM lands.

277. Schreyer, *supra* note 47, at 242. See also Roger N. Clark, *Research Roles and Priorities for Effective Management of Off-Road Recreation Vehicles*, in OFF-ROAD VEHICLE USE: A MANAGEMENT CHALLENGE, *supra* note 136, at 245, 251 (stating that the land management agencies needed to resolve basic allocation issues).

olithic in their views and desires, and that there are many other recreation activities (hunting, angling, horsepacking, biking, etc.) that demand and deserve attention through allocations. While ORVs exemplify the consequences of the lack of a recreation policy for national forests and BLM lands, it would be a gross mistake to think that ORVs are unique in their ability to affect recreational use patterns, experiences, and the environment. The public lands host a finite supply of recreation experience opportunities in the face of increasing and increasingly diverse demands. Congress is failing the agencies and failing the public if it fails to provide clear guidance for making decisions about how to allocate resources in these disputes.

### C. A Statutory Recreation Policy for Multiple-Use Lands

A new new statutory recreation policy for multiple-use lands could take many forms. Below are seven, non-exclusive, approaches that lawmakers should consider:

(1) The Fish and Wildlife Refuge System Approach: Individual management units could use a compatibility standard to consider whether a proposed use conflicts with any use higher in priority. A hierarchy would be established by statute. This could apply solely to recreation or could be part of a more general reconstruction of the agencies' organic acts.<sup>278</sup>

(2) The Organic Act Approach: The agencies' difficulty with prioritization of recreation is symptomatic of a larger challenge in resolving competing demands between the multiple uses. Determination of what are appropriate or high priority recreation opportunities could be accomplished as part of a larger effort to redefine the purpose and management direction of national forests and BLM lands.

(3) The National Recreation Area Approach: Within an "organic act" for each administrative unit, Congress could provide clear direction for recreation management.

(4) The System Approach: Instead of specific direction for each administrative unit, lawmakers could provide specific direction for a limited number of specific systems. This might be similar in structure to the National Landscape Conservation System of the BLM, but with more explicit direction.<sup>279</sup>

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278. See Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 526 (2002) (describing and evaluating the 1997 National Wildlife Refuge System Improvement Act).

279. See National Landscape Conservation Act, H.R. 2016, 110th Cong. (2008).

- (5) The Definitional Approach: “Outdoor recreation” could be defined so as to include and exclude certain uses.
- (6) The Standards Approach: Define and delimit the circumstances under which specific types of recreation are appropriate, precluded, or prioritized.
- (7) The Benchmark Approach: Lawmakers could establish numeric benchmarks for allocations to mode of travel or ROS category at different scales of administrative units, e.g., nation, region, forest, and district.

Each of these strategies has weaknesses, and all face the challenge of finessing the tension between contradictory needs for national direction and local flexibility. But each has the virtue of determining, in the appropriate forum, with democratic accountability, the appropriate uses of our national public lands. Since the current system offers ad hoc, inequitable, and unaccountable resolution of the same issue, the status quo is untenable.

## VII. CONCLUSION

The FS has highlighted “unmanaged” recreation as one of the four greatest threats to ecosystem health on national forests.<sup>280</sup> The agencies face the problem of “unmanaged” ORV recreation on multiple-use lands because they have failed to meet their legal obligation to allocate ORV opportunities on a route-by-route basis so as to minimize impacts on natural resources and conflicts with other recreationists. The result of that failure, and default policies letting ORV use occur where allocations were not completed, is not just ecological harm; it also contributed to an allocation of roughly two-thirds of national forest and BLM lands to ORV recreation. This allocation is not commensurate with recreation demand on public lands, raising questions about fairness to other recreationists. Further, this allocation ignores fundamental questions about the purpose of recreation on public lands.

The agencies are attempting to revisit public lands allocation at this time, but the hangover from their previous failures is likely to prove determinative. It is unlikely that the agencies will fundamentally reconsider the location or aggregate distribution of recreation allocations on multiple-use lands. Because of the failure of Congress to provide definitive policy, the agencies may finally complete allocation and improve ORV management at the margins. However, their decisions will lack transparency and appear arbitrary, they will fail to advance any known

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280. USDA Forest Serv., *Four Threats to the Health of the Nation’s Forests and Grasslands*, *supra* note 4.

and agreed-upon goal for public land management, and they may continue a policy of disproportionate allocation to ORV driving without any clear rationale for doing so. The multiple-use lands of the United States are too symbolically and recreationally vital to allow their future and purpose to be determined by ad hoc local decisions, congressional inattention, and previous agency failures. Accordingly, Congress needs to provide the FS and BLM clear direction regarding the purpose of public lands and appropriate recreation thereon by enacting a statutory policy governing recreation management on multiple-use lands.