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August 2, 2007

Transmitted via U.S. Mail and Facsimile to 530-621-5297

Jason Nedlo, Team Leader
Ramiro Villalvazo, Forest Supervisor
Eldorado National Forest
100 Forni Road
Placerville, CA 95667

RE: Request for Supplemental Analysis on Eldorado Travel Management EIS

Dear Messrs Nedlo and Villalvazo:

We are writing on behalf of our client, the BlueRibbon Coalition ("BlueRibbon") and its many individual and organizational members who are keenly interested in the Public Wheeled Motorized Travel Management planning process underway on the Eldorado National Forest (the "Travel Planning Process"). BlueRibbon is an Idaho non-profit corporation, with over 10,000 individual, business and organizational members representing approximately 600,000 individuals nationwide. BlueRibbon members use motorized and non-motorized means, including off-highway vehicles, snowmobiles, horses, mountain bikes, and hiking, to access state and federally-managed lands throughout the United States, including those in the Eldorado National Forest. BlueRibbon, along with its member organizations California Enduro Riders Association, American Motorcyclist Association District 36, California Association of 4 Wheel Drive Clubs, Friends of the Rubicon, Eldorado Equestrian Trails Foundation and We the People intervened and successfully cross-claimed in *Sierra Nevada Conservation v. Berry*, Case No. CV-02-325-LKK (E.D.Cal). The purpose of this letter is to request that you withdraw the current DEIS and associated public comment period and conduct supplemental analysis and issue a supplemental EIS, to include and seek input on additional alternatives to those presented in the DEIS.

At the outset, we note that the DEIS and its accompanying appendices, maps and attachments are simply too complex and voluminous to be meaningfully reviewed and commented upon within the limited time provided by the Forest. The current 45 day comment period is inadequate.

More fundamental problems plague the DEIS and make it unwise to proceed to a final decision on the current procedural foundation. At least some of these flaws are outside the control of the Eldorado, and the Forest should wait until several broader issues are resolved before continuing further in the Travel Planning Process.

The DEIS does not, and cannot, adequately address the issue of which version of the Forest Service Planning Regulations governs the Travel Planning Process. This is a time of unique uncertainty and confusion on this topic. On March 30, 2007 a district judge in the U.S. Northern District of California declared illegal and enjoined nationwide application of the 2005 Forest Service Planning Regulations. Order dated March 30, 2007 in *Citizens for Better Forestry v. U.S. Dept. of Agric.* Case No. CV-05-1144-PJH (N.D.Cal.). In response, on April 27, 2007 the Forest Service issued direction from its Washington DC office to all Regional Foresters stating that the 2000 Forest Service Planning Regulations, as clarified by a 2004 Interpretive Rule, are in effect. However, this direction is now being challenged in a new action filed on July 26, 2007, which contends that this decision to reinstate the 2000 Regulations is also illegal. See, *Citizens for Better Forestry v. U.S. Dept. of Agric.*, Case No. CV-07-3831-SC (N.D.Cal.). Plaintiffs in the new case contend that the 1982 Planning Regulations are those which should be in effect. The DEIS fails to address this issue. The selection of the proper planning framework is critical, because the planning regulations address fundamental issues such as the focus and scope of the analysis, as well as the procedural requirements for steps like Forest Plan amendments that are obviously implicated within the Travel Planning effort. This maelstrom of uncertainty, which is beyond the Eldorado's responsibility and control, makes it unwise to proceed to the next critical stages of planning. To inexorably push toward issuance of a FEIS and Record of Decision in the coming months invites review and possible reversal through presentation of the same arguments successfully used by the *Citizens for Better Forestry* plaintiffs.

The DEIS presents a similarly unacceptable risk of deficient analysis of "Roadless Area" issues. The DEIS proceeds under the assumption that the 2001 Roadless Rule applies. However, the substance of Roadless Area management guidance has changed frequently, and may soon do so again. The State of Wyoming successfully argued in the U.S. District of Wyoming that the 2001 Rule was illegal. *Wyoming v. U.S. Dept. of Agric.*, 277 F.Supp.2d 1197 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005). The Tenth Circuit Court of Appeals never considered the legality of the 2001 Rule, since the Bush Administration promulgated its 2005 Roadless Rule while the appeal before the Tenth Circuit was pending. Proponents of the 2001 Rule then successfully challenged the 2005 Rule and obtained a nationwide injunction against its application. *California ex rel Lockyer v. U.S. Dept of Agric.*, 459 F.Supp.2d 874 (N.D.Cal. 2006), *appeals docketed and consolidated*, 9th Circuit Appeal Nos. 07-15613, 07-15614 and 07-15695. As a result, the focus has returned to the District of Wyoming, where the State of Wyoming has re-filed its challenge to the 2001 Rule, and the Court is scheduled to hear argument on the merits on October 19, 2007 in *State of Wyoming v. U.S. Dept. of Agric.*, Case No. CV 07-17. This scenario presents an unjustified risk that the legal underpinnings of the Eldorado's approach to Roadless Area management will shift at a critical stage of the planning process.

Even if the 2001 Roadless Rule remains in effect throughout the Travel Planning Process, the Eldorado has incorrently interpreted and applied that Rule in the DEIS. The 2001 Rule allows for the inclusion and maintenance of trails in Roadless Areas designated for vehicle use. See, 36 C.F.R. §§ 294.11 (definitions of "road", "classified road" and "unclassified road") and 294.12(c) (clarifying that maintenance of "classified roads"); 66 Fed.Reg. 3272-3273 (Jan. 12, 2001). However, the Eldorado apparently interprets this direction to require that the formal designation have been completed, to current and ever-evolving NEPA standards, prior to adoption of the 2001 Rule. As a result, the Eldorado has apparently failed to meaningfully consider inclusion of numerous routes in Roadless Areas for designation in the Travel Planning Process. For example, attached hereto is a map with accompanying photos compiled by BlueRibbon member and Western Representative Don Amador, showing routes within the Caples Creek Inventoried Roadless Area identified to the public as "open" to vehicle travel on the 1997 Forest Visitor Map. No alternative in the DEIS considers allowing continued vehicle travel along these routes. Similar analysis in other areas renders the DEIS treatment of Roadless issues insufficient.

The Forest's apparent rush to complete the comment period evidences a further flaw of the DEIS – the Forest's misinterpretation of the Court's role and Order in *Sierra Nevada Conservation*. Comments made to the public suggest that the Forest has "fast-tracked" the DEIS and limited the comment period based on logistical constraints imposed by meeting the December 31, 2007 deadline. The Forest has apparently refused to consider any alternatives or additional motorized route designations that would necessitate analysis threatening compliance with the deadline. Even Alternative A, which provides the most vehicle access and is erroneously characterized as the "no action" alternative, is virtually identical to the "interim" route network approved by the Court. In hindsight, the Forest is committing precisely the evil about which we expressed concern in *Sierra Nevada Conservation*:

> The Court should exercise caution, however, for any conditions on remand should not have the actual or perceived effect of directing or limiting the agency's exercise of discretion. The Court is challenged with inspiring the agency to timely and legally-sufficient action, without telling the agency how it must act. However, the agency must obviously comply with the law. Consistent with these principles, the Recreational Groups feel it important to note that any decisions on remand must allow for robust public input and must consider a full range of management options and information within the context of the decision at issue. Where the new Forest-wide access plan is concerned, it is harder to imagine a broader context. Thus, it should be clear that the Forest must essentially work from a "clean slate" without presuming that any openings, or restrictions, of specific forms of access will be eliminated from proper analysis.

Intervenors' Memorandum Addressing Remedy at 8-9 (Dkt 140) in *Sierra Nevada Conservation* (February 28, 2005)(footnote omitted). As we feared, the Forest has failed to conduct the robust analysis required by law and has failed to work from a "clean slate" of available opportunity, but

has instead worked within a "box" allegedly established by the Order. The interim remedy approved by the Court was presented by the Forest, in opposition to the possibility of more aggressive restriction, if not elimination, of vehicle access to the Forest. The Order does not reflect a substantive analysis by the Court of the level, location or any other aspect of proper management of vehicle access.

In conjunction with misinterpretation of the Order, the Forest has illegally narrowed the Travel Planning analysis through generation of an inadequate route inventory and improper "filtering" of possible alternatives. These sequential limitations operate cumulatively to leave the Forest with an unduly narrow range of options in the DEIS. In generating its route inventory, the Forest ignored past mapping and input from the public. The Forest, both in generating its proposed remedy in *Sierra Nevada Conservation* and in the current Travel Planning Process has improperly defined its "system" routes so as to eliminate well-established and long-traveled routes from its inventory. Through selective and creative interpretation of the Forest Plan Standards and Guidelines, the Travel Planning Team has further eliminated possible routes and areas from the universe of potential decision options. Even where routes or areas do not meet Forest Plan direction, the agency should at least consider whether a plan amendment is justified to modify the Forest Plan direction. In fact, through the current project-level planning the agency may appropriately and logically determine that new routes would be superior to some of those on the ground.

These flaws are only a few of those necessitating supplementation of the DEIS. While other flaws exist, the severity and nature of those outlined above should evoke particular caution. We in no way disparage the Forest in reaching this conclusion, but instead observe that the Forest will, should it forge ahead to meet the December 31 deadline, be forced to predict the outcome of numerous and fundamental legal issues that are uniquely in flux between now and the fall of 2007. This unique scenario presents the likelihood of fundamental change after the close of public comment and during the Forest's final decision-making process. To move forward with the current document on the current schedule will only subject the Forest to more litigation from multiple parties, with an unacceptable risk of remand. It makes far more sense to seek additional time, broaden the analysis, provide a greater range of options that will cover the topics of potential change, and create a more defensible final product.

We realize that supplemental analysis will require additional time and will require the Forest Service to seek modification of the Order. Our clients will support such a request in any way possible, including moving independently for such relief. We do not believe that the Court intended or expected the selection of the December 31, 2007 deadline to have the apparent substantive effect of restricting alternatives or to present the procedural risk existing in the current legal and regulatory storm.

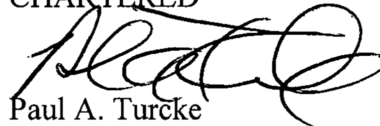
Ultimately, the agency, our clients and the public should be striving for an actively-managed route network on the Eldorado that provides legally-sufficient protection for resources while providing sufficient opportunities to meet diverse and growing recreational demand. The

approach reflected in the DEIS fails to meet this objective and in fact may result in undisclosed and excessive environmental impact as a result of limiting the opportunities available for mechanized recreation. Should the agency agree with us that supplemental analysis is appropriate here, we would strongly encourage consultation with additional experts within the agency or in the private sector who are knowledgeable regarding the necessary and desired opportunities for the varied types of mechanized recreation anticipated on the Forest.

Thank you for considering this input. Please contact our office if you have questions or require additional information.

Sincerely,

MOORE SMITH BUXTON & TURCKE,
CHARTERED



Paul A. Turcke

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enclosure