



United States
Department of
Agriculture

Forest
Service

Pacific
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Region

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File Code: 1570
Appeal No.: 11-05-00-0013-A215
Date: January 14, 2011

Gerald Hobbs
President
Public Lands for the People
7194 Conejo Drive
San Bernardino, CA 92404

CERTIFIED - RETURN
RECEIPT REQUESTED

Dear Mr. Hobbs:

On December 2, 2010, you filed a Notice of Appeal (NOA) on behalf of Public Lands for the People pursuant to 36 CFR 215 appealing the decision on the Tahoe Motorized Travel Management Final Environmental Impact Statement (FEIS). Tahoe National Forest Supervisor Tom Quinn signed the Record of Decision (ROD) approving Modified Alternative 6 of the Tahoe Motorized Travel Management FEIS on September 21, 2010. The legal notice of the decision was published in the newspaper of record (Grass Valley's The Union newspaper) on October 19, 2010.

I have reviewed the entire appeal record, including your written Notice of Appeal (NOA), the ROD, FEIS, DEIS, and supporting documentation. I have weighed the recommendation from the Appeal Reviewing Officer and incorporated it into this decision. A copy of the Appeal Reviewing Officer's recommendation is enclosed. This letter constitutes my decision on the appeal and on the specific relief requested.

FOREST ACTION BEING APPEALED

Over the past few decades, the availability and capability of motor vehicles, particularly off-highway vehicles (OHVs) and sport utility vehicles (SUVs) has increased tremendously. Nationally, the number of OHV users has climbed seven-fold in the past 30 years, from approximately 5 million in 1972 to 36 million in 2000. California is experiencing the highest level of OHV use of any state in the nation. There were 786,914 ATVs and off-road motorcycles registered in 2004, up 330% since 1980. Annual sales of ATVs and off-road motorcycles in California were the highest in the U.S. for the last five years. Four-wheel-drive vehicle sales in California increased to 3,046,866 (1500%) from 1989 to 2002.

Across the nation, unmanaged motor vehicle use—particularly OHV use—has resulted in unplanned roads and trails, erosion, watershed and habitat degradation, and impacts to cultural resource sites. Compaction and erosion are the primary effects of motor vehicle use on soils. Riparian areas and aquatic-dependent species are particularly vulnerable to damage from motor vehicle use.



The purpose of this action is to implement Subpart B of the 2005 Travel Management Rule while providing for a diversity of motor vehicle recreation opportunities and providing motorized access to dispersed recreation opportunities. Identified needs are to regulate cross-country motor vehicle travel by the public and to make limited changes and additions to the Tahoe National Forest Transportation System (NFTS).

The decision will:

- Add specific routes, as identified on the ROD map, to the NFTS as follows:
 - 13.1 miles (346 individual segments) of roads and
 - 48.9 miles (107 individual segments) of motorized trails.
- Establish approximately 244 acres of “Open Areas” at Boca, Prosser, and Stampede Reservoirs as open to highway legal vehicles only.
- Make the following changes to the NFTS:
 - allow mixed use on a total of approximately 130.8 miles of passenger car roads (with concurrence received from the California Highway Patrol on March 17, 2010), of which approximately 117.5 miles will be open to mixed use only during deer rifle hunting season;
 - allow non-highway legal vehicles to use 122.0 miles of roads as an added benefit of reducing maintenance levels on specific roads where natural resource management objectives can be achieved with a lower road maintenance level;
 - place seasonal restrictions on 1,369.5 miles of roads and motorized trails as follows: (1) on the westside of the Tahoe National Forest, implement wet weather seasonal closures on native surface roads and motorized trails from January 1 through March 31; (2) on the remainder of the Tahoe National Forest, implement wet weather seasonal closures on native surface roads and motorized trails from January 1 through April 23; and (3) allow over-the-snow travel on 3.6 miles of the Fordyce jeep trail when 15 inches of snow is present on the ground; and
 - re-open 11.4 miles (13 individual segments) of existing closed roads (Maintenance Level 1 roads) for motorized use.
- Amend the 1990 *Tahoe National Forest Land and Resource Management Plan* (Forest Plan) to remove the seasonal restriction for the Humbug Sailor Management Area (#84).

APPEAL REVIEWING OFFICER'S FINDINGS and RECOMMENDATION

Documentation demonstrated compliance with applicable laws, regulations, and policies in light of the appeal issues raised by appellant.

Appeal Reviewing Officer (ARO) Tyrone Kelley, Forest Supervisor for the Six Rivers National Forest, found that the project is an appropriate and reasonable response to direction in the Tahoe National Forest Land and Resource Management Plan and is in compliance with the plan.

The purpose and need for the project were clear. The Forest Supervisor's decision logic and rationale were clear and well documented. The Forest Supervisor was responsive to public concerns.

ARO Tyrone Kelley recommended affirmation of the Forest Supervisor's decision on all issues and denial of all requested relief.

DECISION

I agree with the ARO's analysis as presented in the recommendation letter. All appeal issues raised have been considered. I affirm the Forest Supervisor's decision to implement Modified Alternative 6. I deny all requested relief.

The project may be implemented on, but not before, the 15th business day following the date of this letter (36 CFR 215.9(b)). My decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 215.18(c)].

Sincerely,

/s/ Ronald G. Ketter
RONALD G. KETTER
Deputy Regional Forester
Appeal Deciding Officer

Enclosure



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File Code: 1570-1

Date: January 13, 2011

Subject: Tahoe National Forest Motorized Travel Management Project
Appeal No. 11-05-00-0013-A215.

To: Appeal Deciding Officer

I am the designated Appeal Reviewing Officer for the appeals filed on the Tahoe National Forest Motorized Travel Management Plan. This is my recommendation on disposition of the appeal filed by Gerald Hobbs on behalf of Public Lands for the People appealing the Tahoe National Forest Supervisor, Tom Quinn's Record of Decision (ROD) for the Tahoe National Forest Motorized Travel Management Project Environmental Impact Statement (EIS). The decision was signed on September 21, 2010 and the legal notice of the decision was published on October 19, 2010.

DECISION BEING APPEALED

Over the past few decades, the availability and capability of motor vehicles, particularly off-highway vehicles (OHVs) and sport utility vehicles (SUVs) has increased tremendously. Nationally, the number of OHV users has climbed seven-fold in the past 30 years, from approximately 5 million in 1972 to 36 million in 2000. California is experiencing the highest level of OHV use of any state in the nation. There were 786,914 ATVs and off-road motorcycles registered in 2004, up 330% since 1980. Annual sales of ATVs and off-road motorcycles in California were the highest in the U.S. for the last five years. Four-wheel-drive vehicle sales in California increased to 3,046,866 (1500%) from 1989 to 2002.

Across the nation, unmanaged motor vehicle use—particularly OHV use—has resulted in unplanned roads and trails, erosion, watershed and habitat degradation, and impacts to cultural resource sites. Compaction and erosion are the primary effects of motor vehicle use on soils. Riparian areas and aquatic-dependent species are particularly vulnerable to damage from motor vehicle use. The Tahoe National Forest (TNF or Forest) lacks a clearly defined, designated system of roads and trails designed to best meet the recreational needs of the public and protect sensitive natural resources.

The 2005 Travel Management Rule (36 CFR 212), was developed in response to people's increased use of the National Forests by motorized vehicles and the effects of that use on ecological, physical, cultural, and social resources.

Subpart B of the final Travel Management Rule requires designation of roads, trails, and areas for motor vehicle use. The Travel Management Rule does not require the Forest Supervisor to reconsider decisions authorizing motor vehicle use on the existing National Forest Transportation System (NFTS). Part 261 – Prohibitions, Subpart A (36 CFR 261.13) of the final rule prohibits the use of motor vehicles off of designated roads, trails and areas, as well as use of motor vehicles on roads and trails that is not consistent with the designations.

The Forest Supervisor selected a modified Alternative 6. The decision will:



Add specific routes, as identified on the ROD map, to the NFTS as follows:

- 13.1 miles (346 individual segments) of roads and
 - 48.9 miles (107 individual segments) of motorized trails.
- Establish approximately 244 acres of “Open Areas” at Boca, Prosser, and Stampede Reservoirs as open to highway legal vehicles only.
- Make the following changes to the NFTS:
 - allow mixed use on a total of approximately 130.8 miles of passenger car roads (with concurrence received from the California Highway Patrol on March 17, 2010), of which approximately 117.5 miles will be open to mixed use only during deer rifle hunting season;
 - allow non-highway legal vehicles to use 122.0 miles of roads as an added benefit of reducing maintenance levels on specific roads where natural resource management objectives can be achieved with a lower road maintenance level;
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 - re-open 11.4 miles (13 individual segments) of existing closed roads (Maintenance Level 1 roads) for motorized use.
 - Amend the 1990 *Tahoe National Forest Land and Resource Management Plan* (Forest Plan) to remove the seasonal restriction for the Humbug Sailor Management Area (#84).

PUBLIC INVOLVEMENT/PROJECT OVERVIEW

The following characterizes the types of public involvement efforts used throughout the Tahoe National Forest’s travel management planning process:

- Numerous public meetings and workshops were held over the past five years to engage the public in helping the Forest Service manage motorized routes on the Forest. These workshops gave the public opportunities for providing comments and feedback on the Forest’s inventory of unauthorized routes, bringing forward ideas for developing the proposed action, discussing the proposed action, and understanding how we developed and analyzed the alternatives presented in the DEIS.
- Over the past five years, numerous informal meetings and briefings were held and regular newsletters were published to share the Forest’s progress on this project with the public. Field visits, face-to-face meetings, and phone calls were regular forms of communication the Forest Service used to actively engage with the public to answer questions and respond to their issues and concerns.

- During the summer of 2006, a variety of interested individuals with a range of perspectives provided suggestions for designing a public participation process that would allow affected individuals, communities, and the visiting public to help the Forest Service begin building the Proposed Action. Approximately 20 individuals provided suggestions for this part of the public involvement process.
- The Forest Service developed a Proposed Action and alternatives based on broad-based and route-specific comments provided by the public during a series of public workshops held during the fall of 2006 as well as through meetings, letters, and phone calls. In addition, several groups submitted alternatives to the proposed action, and these alternatives formed the basis for several of the alternatives analyzed in detail in the DEIS, Supplemental DEIS, and FEIS.

After release of the DEIS in September 2008, comments were received from both the environmental and off-highway vehicle communities, questioning whether the DEIS had either erroneously included or excluded certain routes from the NFTS. To respond to these concerns, the Forest conducted an extensive forest-wide, route-by-route review to ensure the accuracy of the NFTS. The details of this review are presented in Chapter 1 of the Supplemental DEIS, released in February 2010, and carried forward into the FEIS. The overall outcome is that the FEIS displays a NFTS that has approximately 405 fewer miles than that displayed in the DEIS (from approximately 2,800 miles in the DEIS to approximately 2,395 miles in the FEIS). The Forest disclosed these changes in the Supplemental DEIS and provided a 45-day comment period for the public to comment on the environmental analysis. During March 2010, a series of public meetings were held in Sierraville, Nevada City, and Auburn to discuss the analyses presented in the Supplemental DEIS and respond to questions and concerns from the public. In addition, presentations were made regarding the Supplemental DEIS at Board of Supervisor meetings for Sierra, Placer, and Nevada Counties. Finally, the Forest Supervisor personally met with members of the environmental and off-highway vehicle communities to explain the process for defining the existing NFTS and the findings from the review and to get their input on the changes to the NFTS between the DEIS and Supplemental DEIS.

APPEAL SUMMARY

The appeal period for this project ended on December 3, 2010. The current appeal was filed on December 2, 2010 and is timely. For requested relief the appellants requested that an extension of time for further comments be granted because some maps are not readily available and that the Regional Forester reverse the Forest Supervisor's decision to implement the project and remand it back to the Forest Supervisor with instructions to make an informed decision based on the data and to see that the project does not violate the laws of the United States, nor the rights of its citizens.

The Forest Supervisor offered an appeal resolution meeting with the appellant on December 7, 2010, but the appellant declined so no issues were resolved.

ISSUES AND RESPONSES

Issue 1: The Tahoe National Forest has failed to include in their analysis many of the items in my comments, therefore the decision to implement Alternative 6 was based on data insufficient to make an informed decision. (Appeal, pg. 1)

Response: The concerns identified in the appellant's comment letter dated December 22, 2008 were considered on pages N-22, N-24, N-25, N-50, N-145, and N-151 of the FEIS.

I find that the Forest Supervisor adequately considered the comments that were submitted by the appellant.

Issue 2: The decision is in violation of 16 USC 478 because Alternative 6 will be implemented without a review of active unpatented mining claims (obtainable through BLM's data base). (Appeal, pp. 2-4)

Response: The FEIS appropriately does not review permitted uses because they are exempted from the decision under 36 CFR 212.51(a)(8) and CFR 261.13(h). The Forest Supervisor's decision does not make any determination as to the validity of any mining claims or as to any person's right to prospect or explore for locatable minerals or to conduct locatable mineral operations. Rather, the decision merely analyzes and proposes those National Forest System (NFS) roads, trails, and areas on NFS lands that should be open to motor vehicle use by the public. The FEIS discusses mining and mineral operations at numerous places, including FEIS page 3-664 ("Routes used by miners to access their mining claims will remain available for their use regardless of the alternative selected."), page N-50 ("The decision being made is not applicable to permitted activities, including grazing permits, special use permits, road use permits, and mining plans of operation."), and page N-145 ("If a mining claim has an approved Plan of Operation, access is approved and granted through that Plan, including the use of roads or trails closed for other uses, if needed...").

The Organic Act of 1897, which has been codified at 16 USC § 478, provides that "nothing shall be construed as . . . prohibit[ing] any person from entering upon . . . national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." It also provides that persons accessing the national forests for mining purposes "must comply with the rules and regulations covering . . . national forests."

The statute cited by the appellant allows a person engaging in mining activities to access NFS lands, but does not specify particular roads or means of transportation to achieve that access. The statute does not give miners an unqualified right to use particular roads or means of transportation. Rather, the Organic Act requires miners to comply with reasonable Forest Service rules and regulations; these include reasonable regulation of motor vehicle use on NFS lands pursuant to 36 CFR 212, 36 CFR 261.13, and the Forest Supervisor's decision. The decision and the Travel Management Rule allow persons engaging in mining operations who wish to have motor vehicle access to NFS lands to 1) use the roads, trails, and areas that were designated for motor vehicle use, 2) use roads and trails that are exempt from the designations (such as state and county roads), and/or 3) use roads, trails, and areas that are specifically permitted through a written authorization, such as a mining plan of operations. Finally, there is nothing in the decision that precludes a person from using non-motorized means of access to engage in mining operations.

The Forest Supervisor's decision implements reasonable regulations to protect resources on NFS lands within the Tahoe National Forest. Therefore, I find that the decision does not violate 16 USC § 478.

Issue 3: The EIS is not a substitute for the Code of Federal Regulations, a miner does not need to get a Plan of Operation under actions specifically exempt under CFR 36 228.4(a) (1) (i). (Appeal, pg. 2-3)

Response: 36 CFR 228.4(a)(1)(i) states that a notice of intent to operate is not required for “operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes.” The EIS and Forest Supervisor’s decision do not conflict with this regulation. Rather, the EIS and decision merely analyzes and proposes those National Forest System (NFS) roads, trails, and areas on NFS lands that should open to motor vehicle use by the public. As prior to the decision, a notice of intent to operate is not required on the Tahoe National Forest when the operation will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes.

I find that the Forest Supervisor’s decision is consistent with 36 CFR 228.4(a)(1)(i).

Issue 4: The Forest Service may not use its authority to prohibit, obstruct, or otherwise materially interfere with the routine maintenance of R.S 2477 rights-of-ways used by miners and other private inholders (the maps provided by the appellant are not subject to closure). (Appeal, pp. 3-7)

Response: R.S. 2477 was originally a provision of the Mining Law of 1866 that became codified as Revised Statute (R.S.) 2477 and later 43 USC 932, and repealed in 1976 by the Federal Land Policy and Management Act (FLPMA). The FLPMA contains a savings provision for rights, like R.S. 2477 rights-of-way, that were established prior to the enactment of FLPMA. R.S. 2477 rights-of-way are for public highways under the jurisdiction of state, county, or local public road authorities. Only a public entity, such as a state, county or municipal agency, may assert a right under R.S. 2477.

The status of R.S. 2477 roads or permitted activities, such as mining, are outside of the scope of the Forest Supervisor’s current decision (FEIS, Appendix N 1.00-2, pg. 22; FEIS, Appendix N, Comment # 2.00-30, pg. 50). Additionally, “to date, no county or other entity has asserted RS2477 rights for any specific route” (FEIS, Appendix N, Comment # 1.00-2, pg. 22). The Forest noted in Appendix N, page 145, that there are existing processes for providing access for miners or others interested in obtaining permits.

I find that the Forest appropriately addressed concerns about R.S. 2477 rights-of-ways used by miners and other private inholders.

Issue 5: The project and proposed temporary and permanent Forest Orders are in violation of 30 USCA 22 (Mining Act), Minerals Policy Act (30 USCA 21 (a)), 30 USCA 612 (b) (Multiple Surface Use Act), and 16 USCA 472 (Transfer Act). (Appeal, pp. 7-9)

Response: The Forest Service has statutory authority to regulate mining claim access on NFS lands. Pursuant to the Organic Administration Act of 1897, which established the NFS, the Secretary of Agriculture has the authority to make rules and regulations to protect national forest lands from destruction and depredation. 16 USC § 551. Persons entering the national forests for mining and prospecting activities “must comply with the rules and regulations covering such national forests.” 16 USC § 478. In addition, the Ninth Circuit has established that the authority of the Secretary includes the right to restrict motorized access to specified areas of the national forests, including mining

claims. Clouser v. Espy, 42 F.3d 1522, 1530 (9th Cir. 1994; McMichael v. United States, 355 F.2d 283 (9th Cir. 1965)). Mining operations are not exempt from the Secretary’s rulemaking authority. United States v. Shumway, 199 F.3d 1093, 1107 (9th Cir. 1999); United States v. Weiss, 642 F.2d 296, 298 (9th Cir. 1981).

The Mining Laws of 1866 and 1872, which have been codified at 30 USC § 22-54, clearly state that the “free and open” exploration, occupation, and purchase of lands in which valuable mineral deposits are found is subject to “regulations prescribed by law.” 30 USC § 22. The Travel Management Rule (36 CFR 21) is one such regulation. I find that the Forest Supervisor’s decision does not conflict with the Mining Laws of 1866 and 1872.

The Mining and Minerals Policy Act of 1970, which has been codified at 30 USC § 21(a), makes no mention of ingress and egress to mining claims. Furthermore, it contains no statutory command that would prohibit the Forest Service from exercising its regulatory authority over mining claim access. I find that the Forest Supervisor’s decision does not conflict with the Mining and Minerals Policy Act of 1970.

The Multiple Surface Use Act, which has been codified at 30 USC § 612, prohibit the “restriction of any existing rights of any mining claimant holding a valid mining claim.” 30 USC § 612. However, by its terms, 30 USC § 612 address only “use of the surface of any . . . mining claim by the United States.” In addition, this section provides that “any mining claim hereafter located under the mining laws of the United State shall be subject . . . to the right of the United State to manage . . . surface resources thereof . . .” 30 USC § 612(b). In Clouser v. Espy, the Ninth Circuit stated that it saw “no basis for construing the statute as limiting Forest Service regulation of activities on national forest lands outside of the boundaries of a mining claim, particularly in view of the fact that Congress subsequently enacted a statute specifically addressing that issue—16 USC § 1134(b).” 42 F.3d 1522, 1538 (9th Cir. 1994). I find that this subsection does not apply to actions taken by the Forest Service to regulate mining-related activities that occur on NFS lands outside of the boundary of the mining claim.

The Transfer Act of 1905, which has been codified at 16 USC § 472, transferred the forest reserves from the Department of Interior to the Department of Agriculture. As stated above, pursuant to the Organic Administration Act of 1897, which established the NFS, the Secretary of Agriculture has the authority to make rules and regulations to protect national forest lands from destruction and depredation. 16 USC § 551. I find that the Forest Supervisor’s decision does not conflict with the Transfer Act of 1905.

Issue 6: The Forest Service, by picking and choosing the existing routes to remain open or to close (permanent or seasonal) are not only unlawfully terminating the 1866 Mining Grant, but are acting as unlawful substitutes to Congress, in direct violation of the Wilderness Act. (Appeal, pp. 9-10)

Response: The Wilderness Act, which has been codified at 16 USC § 1134(b), does not provide an unlimited right of vehicle access to mining claims. The terms of the statute unambiguously state that the Secretary of Agriculture is authorized to permit access to mining claims by *reasonable regulations*, which once again affirms the Forest Service’s authority to regulate access to mining claims.

The appellant states that the Forest Supervisor violated his authority by designating wilderness or creating “de facto” wilderness areas. The Forest Supervisor neither proposed, analyzed, nor made a decision on designating or proposing wilderness as part of the Travel Management EIS/ROD. As the appellant states, the authority to designate wilderness is reserved for Congress.

The presence or absence of roads is not the defining characteristic of wilderness. While exclusion of motorized vehicles is one component of wilderness, there is a substantial difference between areas without motorized routes and wilderness. All other activities that would be non-conforming in designated wilderness will still be allowed in areas on the forest where routes have not been designated for motorized use. The Selected Alternative results in approximately 2,470 miles of legal motorized public roads and trails in about 836,000 acres of non-wilderness land.

I find that the Forest Supervisor’s decision does not conflict with the Wilderness Act.

Issue 7: The Forest Service violated NEPA by failing to take a hard look at the cumulative environmental and social-economical impacts of the project on inholders and mineral estate holders. (Appeal, pg. 10)

Response: Consistent with 36 CFR 212.51 (a) (8) of the Travel Management Rule, the Selected Alternative allows for motor vehicle use off the designated transportation system where specifically authorized by a written authorization issued by the Forest Service (FEIS, pg. 30). Holders of written authorizations, including mining claimants with approved Plans of Operation or private land owners with road use permits or easements, will be able to use routes identified in their authorizations even if those routes are closed to general public use (Appendix N, pg. 155). As such, the Selected Alternative is not applicable to and would not directly, indirectly, or cumulatively affect permitted activities, including special use permits, road use permits, and mining plans of operation (ROD, pg.29; Appendix N, pg. N-50).

In Chapter 3.11, the forest considered the effects of the alternatives on minority populations and low income populations (FEIS, pp. 827-835), and on groups protected by common race, color, national origin, age, disability, sex, marital status, familial status, parental status, religion, sexual orientation, genetics, political beliefs, or receipt of income from any public assistance program (FEIS, pg. 838). Mining claimants are not identified as a minority or protected group. Restrictions on motor vehicle use that are applied consistently to everyone are not discriminatory (FEIS, pg. 838).

I find the Responsible Official did not violate NEPA in his consideration of the impacts of the project on mining claimants and owners of private inholdings.

FINDINGS

Clarity of the Decision and Rationale

The Forest Supervisor’s decision for Motorized Travel Management and supporting rationale are clearly presented in the Record of Decision (ROD) signed on September 21, 2010. His reasons for selecting Modified Alternative 6 are logical, responsive, and consistent with the direction contained in the Tahoe National Forest Land and Resource Management Plan.

Public participation was adequate and well documented

Public participation was adequate and well documented. A Notice of Intent and Notice of Availability of the DEIS were published in the Federal Register. The project was added to the quarterly Schedule of Proposed Actions. The Forest mailed scoping letters, hosted public meetings, and distributed draft and final EISs to interested groups and individuals. The Tahoe National Forest has maintained current information on planning and activities on its web page. Responses to the comments received are detailed and included as part of the FEIS. The decision of the Forest Supervisor indicates he considered and responded to public input.

Responses to the comments received were detailed and included as part of the FEIS. The ROD indicated the Forest Supervisor considered and responded to public input.

RECOMMENDATION

My review was conducted pursuant to and in accordance with 36 CFR 215.19 to ensure the analysis and decision is in compliance with applicable laws, regulations, policy, and orders. I reviewed the appeal record, including the comments received during the comment period and how the Tahoe Forest Supervisor used this information, the appellant's objections and recommended changes.

Based on my review, I recommend the Forest Supervisor's decision be affirmed. I recommend the Appellants' requested relief be denied on all issues.

/s/ Tyrone Kelley

TYRONE KELLEY

Appeal Reviewing Officer

Forest Supervisor, Six Rivers National Forest