

**UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF LAND APPEALS**

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GREG WARREN	)	<b>IBLA Case: 2017-0225</b>
Appellant,	)	Appeal of Bureau of Land Management
	)	Decision Record Approving the
	)	Proposed Action (with additional criteria)
v.	)	Described in the
	)	Environmental Assessment for the
BUREAU OF LAND MANAGEMENT,	)	Silverton Guides Helicopter Ski
Respondent,	)	Terrain Exchange
	)	(DOI-BLM-CO-S060-2016-0022-EA)
	)	
	)	Gunnison County, Colorado

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**APPELLANT’S REPLY TO BLM’S ANSWER ON APPEAL**

This is reply to the BLM’s Answer on appeal following the guidance in 43 C.F.R. § 4.412(d). This reply brief is limited to the issues raised in the Answer.

**BLM’s Answer Section I:** “Appellants' allegations of deficiencies in land management planning processes and plan documents relied upon for the terrain exchange decision are outside the scope of the Board's review and cannot be considered as part of an appeal on this project level implementation decision” (Answer at 10).

**Reply to Answer:** An amendment to the Tres Rios RMP would be beneficial for such purposes as defining the extent of the Continental Divide National Scenic Trail (CDNST) management corridor.

However, the current RMP provides appropriate CDNST direction that is relevant to the Helicopter Skiing decision and this appeal.

**BLM’s Answer:** “The Appellant provides his synopsis of what he perceives to be the definitions, background, and requirements of the NTSA, BLM Manual 6280 (MS-6280), and related legislative history, regulatory structure, and policy. SOR at 4-11. The Appellant claims that “[m]anagement actions allowed by this [BLM] decision are inconsistent with the requirements of the National Trails System Act (NTSA) as implemented through the BLM National Trails Direction MS-6280, the Continental Divide National Scenic Trail (**CDNST or Trail**) [emphasis added] Comprehensive Plan, and related regulations.” SOR at 2....” (Answer at 10)

**Reply to Answer:** Perceptions of the EA and Answer analyses and content is based on a professional knowledge of the FLPMA, National Trails System Act (NTSA), NEPA, and related regulations and policies that was acquired, in part, through various U.S. Forest Service work assignments.<sup>1</sup>

**General Observation – CDNST or Trail:** Due to the use of “CDNST<sup>2</sup>” and “Trail<sup>3</sup>” acronyms, the respondent’s arguments are occasionally unclear where the term Trail is used. The term Trail in the Answer does not always refer to a National Scenic Trail route and associated setting<sup>4</sup> in some of the arguments, but instead to only a linear transportation route.

**BLM’s Answer:** “BLM land managers are authorized to make project level decisions even if there are additional matters that may be taken up in further planning decisions on scenic trails, so long as the project level decisions do not substantially impact or interfere with trail purposes. BLM Manual 6280, Sec. 5.3.A... Third, the Administrative Record reflects that the Proposed Action was carefully analyzed and formulated to avoid impacts that would potentially alter or degrade the Trail or its values” (Answer at 12).

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<sup>1</sup> I was the National Program Administrator for the CDNST. Duties included developing and implementing national CDNST policy, which included preparing a Federal Register Notice of final amendments to comprehensive plan and final directives (74 FR 51116). Another example of relevant experience includes an assignment as the Southern Rockies Canada Lynx Forest Plan Amendment/EIS Interdisciplinary Team Leader for the Forest Service (65 FR 40601). I am retired, but continue to be involved in natural resource planning as an unaffiliated public. I contribute to conserving National Scenic Trail recreational, scenic, natural, and historical values through the NSTrail.org website. National Scenic Trail Planning Handbooks posted on this website offer foundational rationale for understanding and providing for the nature and purposes of National Scenic Trails and supplements the direction in agencies directives. I have a B.S. degree in Wildlife Biology and a M.S. degree in Wildland Recreation Management.

<sup>2</sup> “National Scenic Trail. A continuous, long-distance trail located on the ground by the land-managing agency along the congressionally designated route, in coordination with the trail administering agency. A National Scenic Trail provides maximum compatible outdoor recreation opportunity and conservation and enjoyment of the nationally significant scenic, historic, natural, and cultural resources, qualities, values, and associated settings and the primary use or uses of the areas through which such trails may pass... National Scenic Trails include the tread, or the trail path, and the trail setting which is included within the National Trail Management Corridor...” (MS-6280 at G-5)

<sup>3</sup> “Trail. A linear route managed for human-powered, stock, or off-highway vehicle forms of transportation or for historical or heritage values. Trails are not generally managed for use by four-wheel drive or high-clearance vehicles” (BLM, 2006, Roads and Trails Terminology. Technical Note 422).

<sup>4</sup> Associated Settings. The geographic extent of the resources, qualities, and values or landscape elements within the surrounding environment that influence the trail experience and contribute to resource protection. Settings associated with a National Scenic or Historic Trail include scenic, historic, cultural, recreation, natural (including biological, geological, and scientific), and other landscape elements (see resources, qualities, and values). (MS-6280 at G-1)

**Reply to Answer:** The RMP establishes that the Continental Divide National Scenic Trail and the Colorado Trail are nonmotorized trails and have high scenic integrity. This direction is further defined in the Tres Rios RMP FEIS, which states that, “[r]egardless of the alternatives, the 1968 NTSA prevents land management agencies from taking actions that would directly and/or significantly alter the immediate surroundings of the trail **corridors** (emphasis added) or that would degrade the specific resources for which the trail was designated” (RMP FEIS, 2.5.24 National Recreation, Scenic, and Historic Trails, page 58; and 3.25.3 Environmental Consequences, page 569). A recreation related helicopter landing in the CDNST corridor is a motorized use that is inconsistent with the RMP direction. Avoiding helicopter skiing related impacts to the CDNST potential National Trail Management Corridor<sup>5</sup> (NTMC) would be consistent with the RMP direction, the CDNST Comprehensive Plan, and MS-6280. The BLM may take actions within the potential NTMC so long as the project level decisions do not substantially impact or interfere with the nature and purposes of the CDNST. As discussed in the comments on the preliminary EA, the SOR and in this Reply, the planning record does not reflect that the selected alternative was carefully analyzed and formulated to avoid substantial impacts to the CDNST resources, qualities, values, and associated settings. A careful analysis would have identified significant natural, historical, and cultural resources to be preserved in the potential CDNST NTMC (16 U.S.C 1244(5)(f)), which would have include the recognition of high value wolverine habitat. BLM MS-6280, Section 5.3.A states:

“A. Upon Receipt of a Proposed Action

1. Where a proposed action is found to be inconsistent with the purpose for which the National Trail was designated, the BLM shall consider rejecting applications for proposed projects or denying approval of the action pursuant to FLPMA, the NTSA, and other applicable law and policy.

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<sup>5</sup> “National Trail Management Corridor. Allocation established through the land use planning process, pursuant to Section 202 of Federal Land Policy and Management Act and Section 7(a)(2) of the National Trails System Act (“rights-of-way”) for a public land area of sufficient width within which to encompass National Trail resources, qualities, values, and associated settings and the primary use or uses that are present or to be restored” (MS-6280 at G-6).

2. The BLM may not permit proposed uses along National Trails which will substantially interfere with the nature and purposes of the trail, and the BLM shall make efforts, to the extent practicable, to avoid authorizing activities that are incompatible with the purposes for which such trails were established (see Chapter 1.6 Statement of Programmatic Policy).

3. If the BLM chooses not to defer analysis of a proposed action, the BLM shall follow the applicable procedures and protocols outlined in this manual.”

The BLM should have rejected the application, since helicopter landings in the CDNST corridor is not a purpose for which the CDNST was designated. The BLM has not demonstrated that efforts were made to avoid authorizing activities that are incompatible with the purposes for which the CDNST was established. The BLM has not demonstrated that it has followed the procedures and protocols in MS-6280. For example, the requirement of BLM MS-6280, Section 5.3.B.2, have not been addressed: “If a National Trail Management Corridor has not been established in a land use plan, the BLM should undertake the following: ... iii. The BLM will identify, within the area of potential adverse impact, any adverse impacts to the nature and purposes; resources, qualities, values, and associated settings; and the primary use or uses for the affected environment, alternative formulation and analysis, and environmental consequences (see chapter 3 of this manual).”

The Field Manager is responsible for, “[e]stablishing National Trail Management Corridors through the land use planning process, and incorporating management actions for National Trails in accordance with applicable laws and policy” (MS-6280 Section 1.4.C.5). To fulfill that responsibility, the Field Manager could initiate RMP amendment processes as described in 43 C.F.R. § 1610.6-6/BLM Handbook H-1601-1, Section VII.

**BLM's Answer Section II. "The BLM employee who signed the Decision Record on the terrain exchange had the authority to do so" (Answer at 12).**

**Reply to Answer:** BLM Directive MS-1203 in Appendix I at 90 describes that the approval or denial of actions affecting trail corridor area (NTSA, Sec. (7c), NHPA, and FLPMA) is the responsibility of the State Director. The Answer does not address the concern that most National Trail authorities are retained with the State Director. This BLM action does affect the CDNST potential NTMC, and therefore, the State Director may be the responsible official.

**BLM's Answer Section III. The BLM Answer states that, "The Administrative Record on the terrain exchange demonstrates that BLM took a "hard look" at the Proposed Action in accordance with NEPA, and that BLM acted consistently with other federal laws and regulations, including the NTSA." (Answer at 14)**

**Reply to Answer:** Federal actions are to be addressed through NEPA processes, which includes disclosing environmental effects. A summary of NEPA process requirements as related to National Trail planning were included with comments submitted on the preliminary EA in an attached CDNST Planning Handbook. The key NEPA concerns related to this analysis was not recognizing the CDNST potential NTMC extent in the affected environment and environmental effects sections. The respondent asserts that the EA took a hard look at the environmental effects, but this is not true for the CDNST. The analysis failed to consider substantial National Scenic Trail environmental questions of material significance to the action of allowing helicopter landings within a National Trail Management Corridor, and as such, the action is clearly not in compliance with the analysis requirements of MS-6280 Section 5.3.B.2 and 40 C.F.R. § 1502.24. To demonstrate this point, the following is the complete (and inadequate) National Scenic Trail related Affected Environment and Environmental Effects discussion that is found in the EA:

"3.1 RECREATION - AFFECTED ENVIRONMENT - The Minnie/Maggie and Southeast pods of the SRP overlap and are adjacent to the Continental Divide National Scenic Trail (CDNST) for a distance of approximately 3 miles on BLM-managed land. The Alpine Triangle RAMP states: "This trail [CDNST] would be maintained to provide seasonal foot, horse, and mountain bike access" (pg. 41). A management plan for the scenic trail was completed in 2009 and provides guidance "...to provide for

high-quality scenic, primitive hiking and horseback riding opportunities and to conserve natural, historic, and cultural resources along the CDNST corridor” (CDNST 2009). The management plan aims to protect the visual quality along the trail, and stipulates that the trail should be at least 0.5 mile from motorized uses. The plan also states that “motor vehicle use by the general public is prohibited on the CDNST, unless that use is consistent with the applicable land use management plan” (pg. 19); in the case of over-snow vehicles, [motorized use] is allowed ... on public lands and the use will not substantially interfere with the nature and purposes of the CDNST” (pg. 20). Though helicopter use is not specifically mentioned in the CDNST management plan, it is consistent with over-the-snow motorized travel. Within the SRP area, the CDNST is primarily used during the snow-free season. There is no documented winter use of the trail due to the terrain, snowpack, distance from a parking area, and exposure during winter months (EA at 20).”

#### ENVIRONMENTAL EFFECTS - Direct and Indirect Environmental Effects

“Alternative 1 – No Action, Under Alternative 1, recreation in the area would not change from existing conditions. No new terrain would be authorized for heli-skiing. Silverton Guides would continue to offer heli-skiing for 600 annual user days in the existing SRP. Minimal user conflicts would continue throughout the SRP. No new Impacts to users of the CDNST (emphasis added) would occur. Weather conditions would likely continue to limit the variety of terrain available for use as described in the Affected Environment section. Avalanche safety concerns would persist in the existing pods and the snow quality and recreational experience could continue to limit the amount of heli-ski use in the pods that are proposed to be removed from the SRP” (EA at 22).

Alternative 2 – Proposed Action, “No impacts are expected on users of the CDNST, due to the temporal separation of through-hiking and heli-skiing. The trail is not identifiable in winter since it is covered by deep snow. If winter nonmotorized or mechanized use on the trail were to occur, additional analysis would be conducted to assess consistency with protection of recreational opportunities on the trail (CDNST 2009)<sup>6</sup>” (EA at 23).

The CDNST is not addressed in cumulative effects (EA at 24).

As discussed in comments on the preliminary EA, the SOR and in this Reply, the record does not reflect that the selected alternative was carefully analyzed and formulated to avoid substantial impacts that would degrade CDNST corridor resources, qualities, values,<sup>7</sup> and associated settings<sup>4</sup>. A careful analysis would identify significant natural, historical, and cultural resources to be preserved in the potential CDNST NTMC, including the recognition of high value wolverine habitat. Alternatives recommended in comments on the preliminary EA are reasonable and should have been developed. By doing so, the analysis would have disclosed the effects on CDNST values of providing for a NTMC with an

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<sup>6</sup> The CDNST Comprehensive Plan does not contain such direction.

<sup>7</sup> Resources, Qualities, and Values. The significant scenic, historic, cultural, recreation, natural (including biological, geological, and scientific), and other landscape areas through which such trails may pass as identified in the National Trails System Act” (MS-6280 at G-7)

extent of one mile covering approximately 2,100 acres or 8 percent of the project area—see the vicinity map in the SOR at Appendix B - CDNST NTMC (SOR at 30). Similarly, the EA should have disclosed the effects of excluding heli-skiing from the Maggie Gulch and Minnie Gulch pods. The EA did not take a hard look at the proposed and reasonable alternatives.

**BLM's Answer, Part A:** The BLM Answer describes that the "...the "EA adopts a narrow description" of the CDNST (SOR at 15)... (Answer at 16). In response to public comments (see, e.g., comments documented in Appendix C to the EA, at C-22), BLM conducted an analysis in the Final EA to determine whether the heli-skiing areas under the Proposed Action which would intersect with the Trail would conform with the 2009 CDNST Plan. This trail plan and previous versions were developed, as required, in accordance with the NTSA. See 2009 CDNST Plan at 1 (stating that "[t]he National Trails System Act requires the Secretary of Agriculture,... in consultation with other affected Federal agencies, the governors of affected states, and the relevant advisory council established pursuant to the Act, to prepare a comprehensive plan for the management and use of the CDNST (16 U.S.C. § 1244(f)"). Federal agency action taken in conformance of a comprehensive trail plan formulated under the NTSA necessarily entails compliance with the NTSA." (Answer at 17)

**Reply to Answer:** The Answer is confusing since it comingles a discussion that addresses the CDNST and a Trail route. A Comprehensive Plan is defined by the NTSA, while a trail plan is a resource plan, such as establishing Travel Management Objectives. National Scenic Trail<sup>2</sup> comprehensive plans provide for the protection of the nature and purposes of National Scenic and Historic Trails and be consistent with the National Trails System Act, while Trail<sup>3</sup> plans are directed to be consistent with a Resource Management Plan. Comprehensive Plans developed in response to the requirements of the NTSA are not resource plans that are subordinate to land use plans.

Comprehensive plan direction should be applied to a defined corridor and be associated with measurable outcome-focused objectives that are related to maintaining or achieving nature and purposes desired conditions. These objectives need to describe specific recreation opportunities (e.g., activities and experiences); management, land protection, acquisition and development needs; and conservation measures.

On National Forest System lands and BLM public lands, the Comprehensive Plan direction is normally implemented through NFMA and FLPMA integrated planning processes, including establishing

practices to be observed. BLM practices are described in Resource Management Plans and Special Area Plans as management actions, allowable use decisions, and implementation actions that are applied to a NTMC.

Comprehensive plan requirements (16 U.S.C. § 1244(f)) for the CDNST are addressed through staged or stepped-down decision processes: (1) the 2009 Comprehensive Plan established broad policy and procedures including identifying the nature and purposes, (2) land management and use plans guide all natural resource management activities and establish management standards (aka thresholds) and guidelines, provide integrated resource management direction for designated areas, and address programmatic planning requirements as described in the Comprehensive Plan (Chapter IV), and (3) mid-level and site-specific plans complete the comprehensive planning process through field-level actions to protect the corridor and then maintain or construct the travel route. Staged and stepped down decision processes is an administrative approach to incrementally step through the comprehensive planning process that is required by the NTSA, while being consistent with FLPMA and NEPA staged decisionmaking processes. (Preliminary EA Comments, CDNST Planning Handbook at 19).

**BLM's Answer, Part A:** "The NTSA states that, in addition to campsites, shelters, and related public use facilities, "other uses along the trail, which will not substantially interfere with the nature and purposes of the trail, may be permitted by the Secretary charged with the administration of the trail. Reasonable efforts shall be made to provide sufficient access opportunities to such trails and, to the extent practicable, efforts shall be made to avoid activities incompatible with the purposes for which such trails were established." 16 U.S.C. § 1246(c). This same section provides that "other uses along the historic trails and the Continental Divide National Scenic Trail, which will not substantially interfere with the nature and purposes of the trail, and which, at the time of designation, are allowed by administrative regulations, including the use of motorized vehicles, shall be permitted by the Secretary charged with the administration of the trail. This statute clearly excludes the CDNST from the general Congressional direction that national scenic trails "normally" be closed to motorized uses" (Answer at 18).

**Reply to Answer:** The Answer correctly describes the responsibility of the Secretary of Agriculture in permitting other uses along the CDNST. The Decision Record does not described that the action will not substantially interfere with the CDNST nature and purposes. The Affected Environment section of the EA at 20 makes statements about effects of the proposed action, including stating that, "Within the SRP

area, the CDNST is primarily used during the snow-free season. There is no documented winter use of the trail due to the terrain, snowpack, distance from a parking area, and exposure during winter months.” The EA does not, however, identify and disclose helicopter use impacts on the National Scenic Trail resources, qualities, values, and associated settings. The record does not indicate that the administrating agency (i.e. USDA Forest Service) concurs with the BLM’s assumed determination that the proposed action would not substantially interfere with the nature and purposes of the CDNST.

The NTSA is clear about protecting the nature and purposes of National Scenic Trails, which includes providing for a non-motorized setting. Nature and purposes is thoroughly discussed in the CDNST Planning Handbook, Chapter II, submitted as comments on the preliminary EA. The following is an excerpt from this handbook that refers to a Federal Register Notice:

The formulation of the nature and purposes direction for the CDNST was developed through a public process (36 C.F.R. § 216) and approved by Forest Service Associate Chief Hank Kashdan as documented in Federal Register: October 5, 2009 (Volume 74, Number 191), ACTION: Notice of final amendments to comprehensive plan and final directives ([74 FR 51116](#)).

The following are excerpts from the response to nature and purposes comments –

“The amendments to the 1985 CDNST Comprehensive Plan and corresponding directives are to ensure that the nature and purposes of the CDNST track those in the 1976 CDNST Study Report and 1977 CDNST Final Environmental Impact Statement, which were prepared pursuant to the NTSA (16 U.S.C. § 1244(b))...

Consistent with the NTSA, the 1976 CDNST Study Report, and the 1977 CDNST Final Environmental Impact Statement, the amended CDNST Comprehensive Plan states that the nature and purposes of the CDNST are to provide for high-quality scenic, primitive hiking and horseback riding opportunities and to conserve natural, historic, and cultural resources along the CDNST corridor... The amendments to the CDNST Comprehensive Plan and directives ensure consistency with the nature and purposes of the CDNST in the context of right-of-way acquisition, land management planning, scenery management, recreation resource management, motor vehicle use, trail and facility standards, and carrying capacity.’

The 1983 amendment to the NTSA, which added 16 U.S.C. § 1246(j), does not modify the nature and purposes of the CDNST. The added subsection simply lists uses and vehicles that may be permitted on National Trails generally...

The Forest Service has removed the words ‘non-motorized’ and ‘recreational’ from the nature and

purposes statement for the CDNST, as these words were redundant. 'High-quality scenic, primitive hiking and horseback riding' are non-motorized recreation opportunities. The Agency has not removed the word 'primitive' from the nature and purposes statement, as it is not redundant and is not ambiguous. It means 'of or relating to an earliest or original stage or state....' Preferred recreation settings, including primitive or semi-primitive non-motorized categories, are delineated in the Forest Service's Recreation Opportunity Spectrum system (FSM 2311.1) and described in the CDNST Comprehensive Plan, Chapter IV(B)(5)...."

The NTSA and legislative history does not indicate that the CDNST is excluded from the general Congressional direction that the use of motorized vehicles by the general public along any National Scenic Trail shall be prohibited. Instead, any motor vehicle use along the CDNST is only allowed through narrow exemptions.

**BLM's Answer, Part A:** The 2009 CDNST Plan declares that the "nature and purposes of the CDNST are to provide for high quality scenic, primitive hiking and horseback riding opportunities and to conserve natural, historic, and cultural resources along the CDNST corridor. Id. at 8. The Plan also states that motorized use of the CDNST, "[i]n the case of over-snow vehicles ... is allowed on public lands and the use will not substantially interfere with the nature and purposes of the CDNST." Under BLM Manual 6280, at G-8, a finding of "substantial interference" is defined as a "determination that an activity or use affects (hinders or obstructs) the nature and purposes of a designated National Trail" (Answer at 19).

**Reply to Answer:** "Motor vehicle use by the general public is prohibited on the CDNST, unless that use is consistent with the applicable land management plan and: ... (6) In the case of over-snow vehicles, is allowed... on public lands and the use will not substantially interfere with the nature and purposes of the CDNST." The Tres Rios RMP prescribes desired conditions that do not support approving helicopter (motorized) use in the potential CDNST National Trail Management Corridor:

"3.5.1 Consistent with their designation, the significant scenic, historic, recreation and natural resources for each trail are identified, interpreted, and protected. The values for which these trails were established are retained.

3.5.2 The Continental Divide National Scenic Trail and the Colorado Trail provide opportunities for remote backcountry recreation, challenge, and solitude, except where they come near area communities (where more people and development may be encountered).

3.5.3 The Continental Divide National Scenic Trail and the Colorado Trail are non-motorized trails and have high scenic integrity” (RMP at II-139).

**BLM’s Answer:** “Neither the NTSA or the 2009 CDNST Plan prohibits, per se, helicopters from flying over or landing on designated national trails... The NTSA states that the Secretary of Interior may allow other uses along the CDNST "which will not substantially interfere with the nature and purposes of the trail, and which, at the time of designation, are allowed by administrative regulations, including the use of motorized vehicles. 16 U.S.C. § 1246(c)..." (Answer at 19).

**Reply to Answer:** The Secretary of Agriculture, and not the Secretary of Interior, is charged with the administration of the CDNST (16 U.S.C § 1244(a)(5)).

**BLM’s Answer, Part A:** Executive Order 11644, Sec. 1. Further, "off-road vehicle" was defined to mean "any motorized vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow ... or other natural terrain." Id. at Sec. 2(3). Notably, the term off-road was also defined to exclude "any vehicle whose use is expressly authorized by the respective agency under a permit, lease, license, or contract. Id. at Sec 2(3)(C)" (Answer at 20).

**Reply to Answer:** BLM cites Executive Order 11644, as amended by Executive Order 11989, as grounds for the authorization of helicopter use as outlined in the Proposed Action. However, the scope of these orders are more limited. The preamble to E.O. 11644 recites a need for a unified Federal policy toward the of certain types of vehicles on the public lands, namely “motorcycles, minibikes, trail bikes, snowmobiles, dune-buggies, all-terrain vehicles, and others” that are in use in the United States, with rapidly increasing popularity. While such use is often for legitimate purposes, it frequently conflicts with wise land and resource management practices, environmental values, and other types of recreational activity. Helicopters and other airborne vehicles are not mentioned. In the past, helicopter landings have not been recognized as being subject to E.O. 11644 and E.O. 11989. If this was an omission, the BLM should issue regulations that clearly address helicopter landings (and aircraft landings) on Federal lands.

The BLM cites regulations established by the Secretary of the Interior to “provide procedures for the management of lands administered under provisions ... of the [NTSA],” 43 C.F.R. § 8351.0-6(a).

However, these regulations make no reference to the requirement that an allowed use of motorized vehicles must not substantially interfere with the nature and purposes of the trail and must have been

allowed by administrative regulations at the time of designation. I do not regard a helicopter as being an over-snow vehicle, and in any event, the use as defined in the Proposed Action would substantially interfere with the nature and purposes of the CDNST because of the associated introduction of noise and other disturbances that would impact important wildlife habitat in the CDNST corridor.

There has been inconsistencies in how NEPA is applied to special use permits by land management agencies. In short, a NEPA decision “approves” an action/activity to take place on the landscape. A recreation special use authorization “authorizes” a specific entity to conduct the stated action/activity in a specific location on the landscape in conformance with a NEPA decision. Authorizing a special recreation permit, without an associated NEPA decision, would not be in compliance with the Administrative Procedures Act.

**BLM’s Answer, Part A:** “In 1978, the Secretary of the Interior established regulations to “provide procedures for the management of lands administered under provisions ... of the [NTSA],” 43 C.F.R. § 8351.0-1, to “assure that all public lands administered under provisions ... of the [NTSA] are managed in a manner consistent with the purposes” of the act, 43 C.F.R. § 8351.0-2” (Answer at 21).

**Reply to Answer:** In general, “[t]he purpose of this Act is to provide the means for attaining these objectives by instituting a national system of recreation and scenic trails” (16 U.S.C. § 1241(b)).

“National Recreation Trail ... will provide a variety of outdoor recreation uses, [including motor vehicle use]... National Historic Trails shall have their purpose the identification and protection of the historic route and its historic remnants and artifacts for public use and enjoyment [1978 NTSA amendment].

National Scenic Trails are so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass... The Continental Divide Trail 1976 Study Report and 1977 Final Environmental Statement provided additional guidance as to the purpose of the Continental Divide Trail. In 2009, the Forest Service amended the CDNST Comprehensive Plan to establish planning and management direction consistent with the Study Report, FES, and NTSA (74 FR 51116). The Comprehensive Plan describes that, “[t]he primary policy is to administer the CDNST consistent with the

nature and purposes for which this National Scenic Trail was established. The nature and purposes of the CDNST are to provide for high quality scenic, primitive hiking and horseback riding opportunities and to conserve natural, historic, and cultural resources along the CDNST corridor” (Comprehensive Plan, Chapter IV(A) at 8).

**BLM’s Answer, Part A:** “... Congress in 1983 enacted an amendment to the NTSA, specifically articulating that the managing federal agency has discretion to allow a variety of activities on designated portions of national trails... This same section states that “[v]ehicles which may be permitted on certain trails may include, but need not be limited to, motorcycles, bicycles, four-wheel drive or all-terrain off-road vehicles.” Id. (emphasis added). [T]he legislative history behind this new subsection stated: ... It is intended, for example, that motorized vehicles will not normally be allowed on national scenic or historical trails and will be allowed on recreational trails only at times and places where such use will not create significant on-trail or off-trail environmental damage and will not jeopardize the safety of hikers, equestrians, or other uses or conflict with the primary purposes for which the trail, or the portion of the trail, were created. H.R. REP. No. 98-28, at 6 (1983), reprinted in 1983 U.S.C.C.A.N. 112” (Answer at 22).

**Reply to Answer:** This congressional report underscores the importance of understanding the primary purposes for which a National Trail was established. The 1983 amendment to the NTSA, which added 16 U.S.C. § 1246(j), does not modify the nature and purposes of the CDNST. The added subsection simply lists uses and vehicles that may be permitted on National Trails generally (74 FR 51118). National Trails include National Recreation Trails, National Scenic Trails, National Historic Trails, and Side and Connecting Trails. Moreover, the provisions of the new subsection declare that they “shall not supersede any other provisions of this Act” [NTSA].

I was Head of Dispersed Recreation and the Regional Trails Program Manager in the Pacific Northwest Region of the Forest Service when this legislation was enacted. As a result of the legislation, the Region designated several National Recreation Trails that allowed motor vehicle use. The intent of this NTSA amendment was not deemed by the USDA Office of General Council as allowing motor vehicles along the Pacific Crest National Scenic Trail, except as provided for in 16 U.S.C. 1246(c).

**BLM’s Answer, Part A:** “As with over-snow vehicles such as snowmobiles, no road system of any sort is necessary to facilitate potential helicopter landings on authorized portions of the CDNST that are associated with Silverton Guides' heli-skiing operations. The snow will support the activity, and only a very small area would be needed for helicopter landings and take-offs, should they occur. Likewise, any

associated helicopter-supported skiing that may occur along the CDNST is also consistent with the nature and purposes of the trail” (Answer at 23).

**Reply to Answer:** The BLM should provide for the protection of CDNST resources, qualities, and values within the potential NTMC and not just protect the CDNST trail tread/path. The effects discussion does not demonstrate that the nature and purposes of the CDNST are protected.

**BLM’s Answer, Part B:** The BLM Answer states that, “The Appellant asserts that the EA is deficient because it only considers impacts to existing recreational uses. [The description needs to be expanded to describe the Recreation Opportunity Spectrum (ROS) setting and the natural qualities of the corridor area”] SOR at 12. The Appellant asserts that the monitoring provisions imposed through the decision will not effectively protect potential future non-motorized winter uses of the Trail SOR at 16”. Footnote 18 states that, “[t]he Appellant also asserts in his summary, SOR at 24, that one NEPA concern is BLM “not providing for a range of alternatives that fail to address the protection of a CDNST corridor,” but the Appellant does not elaborate any further on this assertion. In any event the “Board has held that when the EA discusses in detail the environmental impacts of the project, BLM need not address a plethora of possible alternatives; setting forth the implications of both its proposed action and the no action alternative, which form the ends of the spectrum, suffice...” (Answer at 24).

**Reply to Answer:** Reasonable alternatives were presented to the BLM in comments on the preliminary Helicopter Skiing EA and identified in the SOR, “The following are recommendations for addressing the planning and management of the CDNST within the project area as related to the Helicopter skiing proposal:

1. Avoid impacts to the CDNST corridor by excluding from the Helicopter skiing permit the National Trail Management Corridor (NTMC) area as depicted on the attached map [SOR at 30]. This would include any helicopter assisted skiing that originates on private land within the CDNST NTMC; and

2. Consider through NEPA processes expanding the extent of the CDNST corridor to better protect high-quality wolverine habitat to further fulfill the conservation purposes of this National Scenic Trail. For this purpose, I recommend expanding the CDNST NTMC to include the Maggie Gulch and Minnie Gulch pods” (SOR at 28).

The final Helicopter Skiing EA states that “[a]mending the RMP is outside the scope of this analysis” (Helicopter Skiing EA, C-19). However, the Field Manager is responsible for, “[e]stablishing National Trail Management Corridors through the land use planning process, and incorporating

management actions for National Trails in accordance with applicable laws and policy” (MS-6280 Section 1.4.C.5). To fulfill that responsibility, the Field Manager could initiate RMP amendment processes as described in BLM Handbook H-1601-1, Section VII.

The Helicopter Skiing EA decision does not avoid impacts to the CDNST (MS-6280, Section 5.3). As such, the effects of the action brings the potential CDNST NTMC into the scope of the NEPA analyses and decisions (40 C.F.R. § 1508.25(c)). The BLM response to the above comment did not follow the guidance in 40 C.F.R. § 1503.4(a) parts 1 - 4. An appropriate response would have been for the Interdisciplinary Team to have developed and analyzed alternatives to address the substantive concerns. The corrective action at this time is to avoid harm to the potential CDNST National Trail Management Corridor (SOR at 17).

The Decision Record and Appendix B of the EA at B-2 fail to address National Scenic Trail inventorying and monitoring requirements: “District and Field Managers are responsible for: ... 4. Inventorying and monitoring National Trail resources, qualities, values, and associated settings and the primary use or uses of the trail” (MS-6280 Section 1.4.C.4). “Monitoring. The BLM shall monitor the conditions of National Trail resources, qualities, values, and associated settings and the primary use or uses of the trail on public lands or interests in lands; the effects of decision implementation; and in order to identify new and emerging issues” (MS-6280 Section 1.6.3.e).

**BLM’s Answer, Part B:** “It should also be noted that the .5 (half) mile guidance that Appellant references, SOR at 12, and which is discussed in the EA at 20, is guidance directing federal agencies to attempt to *locate* the Trail itself .5 miles from roads, railroads, or trails with motorized uses within Semi-primitive Non-motorized Recreation Opportunity Spectrum (ROS) settings; it is not direction to federal agencies to keep motorized uses .5 miles from the Trail. See 2009 CDNST Plan, at 16.” (Answer at 25)

**Reply to Answer:** The existing Affected Environment section of the EA at 20 accurately describes the existing ROS setting along the CDNST route in Maggie Gulch and Minnie Gulch. The CDNST Comprehensive Plan management direction guidance is to, “Use the ROS system in delineating and integrating recreation opportunities in managing the CDNST. Where possible, locate the CDNST in

primitive or semi-primitive non-motorized ROS classes” (Comprehensive Plan, Chapter IV.B.5 at 16). Management direction for Semi-Primitive Motorized, Roaded Natural, Rural, and Urban ROS classes allow uses that would likely substantially interfere with the nature and purposes of the CDNST if the allocation desired conditions are realized. While, the establishment of Primitive and Semi-Primitive Non-Motorized (SPNM) ROS classes and high and very high scenic integrity allocations would normally protect the nature and purposes (values) of the CDNST. SPNM settings would normally be managed to keep motorized uses 0.5 miles from the CDNST travel path. This assessment is based on a professional understanding of the Recreation Opportunity Spectrum framework and purposes as supported with scientific studies. I demonstrated this knowledge in coauthoring a Forest Service ROS handbook: Recreation Opportunity Setting as a Management Tool.<sup>8</sup>

**BLM’s Answer, Part C:** The BLM Answer describes, “The Appellant also cites BLM Manual 6280 and asserts that the selected Proposed Action does not conform to the Manual. Among other things, Appellant asserts that the corridor for the CDNST must first be established before BLM may approve motorized use of any portion of the Trail in a project level decision. See SOR at 11, 13, 14, 17. The Appellant also claims that BLM uses too narrow a description of the CDNST. SOR at 15. However, the record and the law does not support the Appellant’s claims” (Answer at 25).

**Reply to Answer:** I reviewed the SOR at 11, 13, 14, 17 and see that I addressed RMP desired conditions, MS-6280 Section 4.3 direction, establishing a NTMC, the CDNST Comprehensive Plan, over-snow vehicles, regulations, NEPA scope and alternatives; however, I did not find where, “Appellant asserts that the corridor for the CDNST must first be established before BLM may approve motorized use of any portion of the Trail in a project level decision.” The BLM description of the CDNST is narrow being limited to only the CDNST travel path and does not address the resources, values, and settings to be protected. BLM policy directs that, “[a]s part of the NEPA analysis for the proposed action, the BLM will evaluate whether the proposed action would substantially interfere with or be incompatible with the

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<sup>8</sup> Recreation Opportunity Setting as a Management Tool - Stankey, Warren, and Bacon – 1986; [http://www.nstrail.org/carrying\\_capacity/ros\\_tool\\_1986.pdf](http://www.nstrail.org/carrying_capacity/ros_tool_1986.pdf)

nature and purposes of a National Trail (hinders or obstructs), and will consider the following: ... “The extent to which the proposed action would affect the conservation or enjoyment of resources, qualities, values, and associated settings of the areas through which such trails may pass, including noteworthy characteristics or landforms of the region” (MS-6280 Section 1.6.3.A)). Such an analysis is not in the EA.

The 1984 Sharon Long IBLA decision was specific to a National Historic Trail with purposes that are not equivalent to the purposes for which the CDNST was established. This decision also predates BLM directive MS-6280, which dictates processes for BLM as a managing agency for a National Trail.

**BLM’s Answer, Part D:** “The failure to identify during scoping that a portion of the CDNST falls within the terrain exchange does not render the NEPA review on the Proposed Action deficient” (Answer at 26).

**Reply to Answer:** The BLM recognized the informal Colorado Trail in the preliminary EA, but not the congressionally designated CDNST. Failing to recognize the CDNST in the preliminary EA is inconsistent with ensuring adequate public involvement through EA processes. Policy requires that, “[a]s part of the NEPA analysis for a land use plan that includes a National Trail(s) within the planning area, and for any implementation-level activities proposed along a National Trail or within a National Trail Management Corridor, the BLM shall: ... Ensure adequate public involvement in the BLM’s management activities through the NEPA, land use planning, and/or other applicable processes” (MS-6280 Section 1.6.3). “Proposed management actions must undergo a NEPA analysis, and must include public involvement, in accordance with this manual” (MS-6280 Section 5.5.A).

**BLM’s Answer, Part E:** “In Sections 3.1 and 3.4 of the EA, at 19-24 and at 30-33, BLM analyzed impacts to the CDNST and compliance with the Tres Rios RMP and Alpine Triangle RAMP, including the ROS setting. As designated in the Tres Rios RMP, for most off the Silverton SRMA, the Winter ROS is Semi-Primitive Motorized... See Tres Rios RMP, Figure 2.15.3 at II-92... Thus, the Proposed Action is consistent with the prescribed ROS settings. EA at 24. Recreation Opportunity Spectrum (ROS) is Semi-Primitive Motorized for the Silverton SRMA” (Answer at 27).

**Reply to Answer:** The Answer refers to Tres Rios RMP Figure 2.115.3 at II-92 for ROS guidance.

However, Tres Rios RMP Chapter II provides further direction deferring to Chapter III of the RMP for

CDNST guidance stating, “[s]ee relevant sections in Chapter 3 for specific management direction for the following areas within the TRFO geographic area... Chapter 3 states, “3.5.3 The Continental Divide National Scenic Trail ... [is a] non-motorized trail...” (Chapter II-139).

**BLM’s Answer, Part E:** “Further, impacts to wildlife were analyzed in Section 3.6 of the EA, at 37-46. In its analyses, BLM documented its determinations that impacts of the Proposed Action would be insignificant to recreational uses, the Trail, and wildlife. Appellant fails to point to anything in these findings that contravene the Tres Rios RMP, Alpine Triangle RAMP, or the 2009 CDNST. The Appellant merely asserts a difference of opinion about potential impacts, which is an insufficient basis to find BLM's decision unreasonable or invalid...” (Answer at 27).

**Reply to Answer:** CDNST specific resources, qualities, and values analyses are not found in Section 3.6 of the EA, at 37-46. Specific to wolverines, my concern is directed at providing for the purposes for which the CDNST was established. The NTSA (16 U.S.C. § 1244(f)) requires that, “specific objectives and practices to be observed in the management of the trail, including the identification of all significant natural, historical, and cultural resources to be preserved...” The habitat along this section of the CDNST should be identified as a significant natural resource to be preserved. The following discussions from the Preliminary EA and final EA displays the relationship between winter use activities and the protection wolverine habitat. The preliminary EA, but not the final EA<sup>9</sup>, describes that:

“There are numerous historical records of North American wolverines from the Colorado Rocky Mountains; however, it is believed the species was extirpated from the Southern Rocky Mountains by the early 1900s. Potential effects of the Proposed Action focus on impacts to historic but currently unoccupied habitat. The Proposed Action could result in a high risk of disturbance to individual wolverine, if any were present. The remote and inaccessible terrain targeted for heli-skiing is the same terrain favored by wolverines for denning, movement and foraging. Colorado Parks and Wildlife believes that the project area constitutes some of the highest quality potential wolverine habitat remaining in the State of Colorado. Under the Proposed Action, 5,566 acres of suitable habitat in the existing SRP would be removed from the SRP and potential impacts eliminated. However, 16,252 acres of previously undisturbed habitat would be included the SRP, a net increase of 10,686 acres of potential disturbance to wolverine habitat. Compared to the existing SRP, the Proposed Action could result in an increased impact to wolverine habitat and pose greater direct risks of disturbance to larger amounts of formerly relatively undisturbed potential wolverine denning, foraging, and movement areas” (Preliminary EA at 36).

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<sup>9</sup> Omission of this information in the Final EA is inconsistent with the requirements of 40 CFR 1502.15, 40 CFR 1502.16, and 40 CFR 1508.7.

The final EA describes that, “The Proposed Action would not increase cumulative impacts to North American wolverine, as there is no change to the number of annual user days. However, effects would be relocated from the area north of Silverton Mountain Ski Area to pods further south and distributed across a greater area. This wider distribution of human presence, combined with nearby heli-skiing operations (Telluride Helitrax) in potential wolverine habitat would contribute to cumulative impacts to wolverine if they were present. In addition, heli-skiing and helicopter-based snow stability testing and control activities are authorized at the Silverton Mountain Ski Area under a separate permit. Together, the combined area of previously approved permits for heli-skiing and helicopter-based avalanche testing operations permits, along with the Proposed Action, are large in comparison to the amount of potential wolverine habitat on BLM lands and immediately adjacent National Forest System lands” (EA at 45).

**BLM’s Answer, Part F:** “The Appellant contends that BLM failed to adequately consider the Proposed Action’s impacts to wolverine habitat. SOR at 18. The Appellant also asserts that “[n]ot protecting wolverine habitat in the potential National Trail Management [~~Trail~~] (sic) Corridor substantially interferes with the nature and purposes of the CDNST.” Id. at 19. The Appellant cherry picks certain statements from the BA to allege error, SOR at 17-18, without noting other findings and conclusions reached in the BA” (Answer at 28).

**Reply to Answer:** I reviewed the BA to see if there was justification to identify wolverine habitat along the CDNST corridor as a significant resource to be preserved (16 U.S.C. § 1244(f)). The BA supported the significance of this habitat. In addition, the Preliminary EA discussion confirmed the value of the habitat along the potential CDNST NTMC (Preliminary EA at 36).

**BLM’s Answer - Statement:** The BLM Answer describes that, “Subjective determinations regarding how best to manage public lands for a variety of activities is committed to the professional opinion of BLM’s technical experts, and that judgment should not be overturned based solely on contrary opinions such as those raised in this appeal... A “difference of opinion does not demonstrate that BLM’s analysis is unreasonable or invalid...” BLM’s subjective decisions are entitled to considerable deference, even though a reasonable person might differ in making those decisions....” (Answer at 30).

**Reply to Answer:** I recognize and respect that the responsible official is charged with making a reasoned decision on the project after an interdisciplinary team takes a hard look at the environmental consequences of reasonable alternatives including disclosing and analyzing the direct, indirect, and cumulative environmental impacts of the proposed action. I also recognize the critical role of a planning team to inform decisions. However, in my professional judgement,<sup>1</sup> I do not believe that the EA supports the Decision Record and FONSI.

The EA decision was not based on a reasonably thorough discussion of ... significant aspects of the probable environmental consequences on the CDNST setting. The “settings associated with a National Scenic or Historic Trail include scenic, historic, cultural, recreation, natural (including biological, geological, and scientific), and other landscape elements (see resources, qualities, and values)” (MS-6280 at G-1). The decision is inconsistent with the Tres Rios RMP that establishes the CDNST as a non-motorized trail (RMP at II-139, RMP FEIS 2.5.24 at 58, and RMP FEIS 3.25.3 at 569). The Final EA and Decision Record does not indicate that the BLM (or U.S. Forest Service) made a determination that the proposed action would not substantially interfere with the nature and purposes of the CDNST (16 U.S.C. § 1246(c)). The FONSI (at 3) fails to certify that the action is in compliance with the National Trails System Act, including being consistent with direction in BLM Directive MS-6280. The Final EA procedures do not adhere to the direction in Directive MS-6280: (1) Section 5.3 that identifies specific protocols, “for Proposed Actions which May Adversely Impact Designated National Trails” and (2) Section 5.5 describes, “National Trail Site-Specific Management Considerations.” The FONSI mistakenly describes that the decision is in compliance with the CDNST Comprehensive Plan. The project may have a significant effect on the CDNST setting (human environment), and therefore, it would be reasonable for the Decision Record to be withdrawn and an Environmental Impact Statement prepared.

### **Conclusion**

For the reasons stated in the SOR and Reply, this appeal should be upheld and the application by Silverton Guides for approval of a terrain exchange be denied, unless the decision is amended to add an additional “project design criteria” to address the relief sought (SOR at 24) and described here as: “4. No-Landing-Zones/No-Fly-Zone and skier drop-offs are allowed for (1) the area that is within one-half mile of the established CDNST route (trail path), and (2) the area that is within the Maggie Gulch/Minnie Gulch pod.”

Respectfully submitted this 10 day of October 2017.