

(703) 535-5565
(703) 997-1330 *fax*
kevin@gardenlawfirm.com

April 29, 2004

VIA HAND DELIVERY

USDA Forest Service
Attn: NFS-EMC Staff (Barbara Timberlake)
Stop Code 1104
1400 Independence Avenue, SW
Washington, D.C. 20250-1104

Re: Notice of Appeal of ROD for the FEIS of the LRMP Revision for the
Cherokee National Forest

Dear Chief Bosworth:

We are filing this Notice of Appeal pursuant to 36 C.F.R. § 217 on behalf of the Back Country Horsemen of East Tennessee and the Back Country Horsemen of America (“Back Country Horsemen”). The Back Country Horsemen of East Tennessee are located at 1217 Silver Grove Road, Bluff City, Tennessee 37618 (423-538-7863) and the Back Country Horsemen of America are located at P.O. Box 1367, Graham, Washington 98338-1367 (360-832-2461). Pursuant to this Notice, the Back Country Horsemen are appealing the Record of Decision for the Final Environmental Impact Statement of the Land and Resource Management Plan Revision for the Cherokee National Forest (hereinafter referred to as the “ROD”). The ROD was issued by Robert T. Jacobs, Regional Forester, Southern Region and is dated January 2004. Legal notice of the ROD was published on January 30, 2004. Therefore, this appeal is timely pursuant to 36 C.F.R. § 217.8(a)(3).

The Back Country Horsemen consist of recreational horseback riders as well as owners of pack stock who use and enjoy lands within the National Forest System, including the Cherokee National Forest. As you probably are aware, the horse industry is

highly diverse and has a total direct and indirect impact of over \$100 billion on the U.S. economy. Nonetheless, the median income of horse-owning families is around \$60,000, making recreational horseback riding a largely middle class activity.¹ One of the goals of the Back Country Horsemen is to work with government agencies such as the U.S. Forest Service to ensure that all steps are taken which are necessary to keep public lands such as the Cherokee National Forest open for recreational horse use. Consistent with this goal, the Back Country Horsemen work hard to instill a “Leave No Trace” ethic in all of their members, as well as the public in general. In fact, just recently the Back Country Horsemen of East Tennessee removed 18 weighed tons of trash on the Cherokee National Forest. The Back Country Horsemen strongly believe in the effectiveness, as well as fiscal efficiency, of promoting education rather than regulation.

As set forth below in more detail, the Back Country Horsemen are appealing the Regional Forester’s decision to implement FW-108 as set forth in the Land and Resource Management Plan Revision.² Given the overbroad restriction on horse and pack stock activity imposed under FW-108, the lack of sufficient environmental analysis related to the alternatives considered by the Regional Forester and the other reasons set forth

¹*The Economic Impact of the Horse Industry in the United States*, Volume 1: National Summary (1996), prepared by Barents Group, LLC for The American Horse Council Foundation (used with permission) (copy attached as Exhibit A).

²FW-108 is set forth at page 58 of the Revised Land and Resource Management Plan, Cherokee National Forest (hereinafter “LMP at ___”). FW-108 states:

ALLOW HORSES AND PACK STOCK ONLY ON OPEN AND CLOSED CLASSIFIED ROADS (UNLESS OTHERWISE POSTED) AND DESIGNATED TRAILS. HORSES AND PACK STOCK ARE ALLOWED IMMEDIATELY ADJACENT TO THESE TRAILS AND ROADS FOR THE PURPOSE OF CAMPING, RESTING, PICNICKING, WATERING, ETC. (WITHIN A CORRIDOR OF 300 FEET ON EITHER SIDE OF THE DESIGNATED TRAILS OR ROADS UNLESS OTHERWISE POSTED TO PROTECT MAINTAINED WILDLIFE OPENINGS, SOIL & WATER IMPROVEMENTS, ETC.) SEE RIPARIAN SECTION FOR ADDITIONAL GUIDANCE.

herein, the Regional Forester's decision was arbitrary, capricious and not in accordance with applicable law.

1. The Regional Forester's decision to impose a blanket rule prohibiting horse and pack stock users from recreating in 99% of the Cherokee National Forest lacks a reasonable basis.

As described in more detail below, the Regional Forester has decided to restrict all recreationists who enjoy the Cherokee National Forest through the use of horses and pack stock to 1% of the Forest area based on alleged current or future impacts of an admittedly unknown quantity, duration and degree. Moreover, the Regional Forester's decision to impose a forest-wide prohibition is directly contrary to the general conclusion in the Final Environmental Impact Statement for the Revised Land and Resource Management Plan, Cherokee National Forest (hereinafter "FEIS at __") that the impact of horse and pack stock use could be adequately addressed on a site-specific or time-specific basis. This decision to restrict a substantial sector of Forest recreationists to a minute area of the Forest on a year-round basis is arbitrary, capricious and not in accordance with law.

Under FW-108, the Regional Forester has imposed a forest-wide restriction on horse and pack stock activity. LMP at 58. Under that restriction, horses and pack stock are only allowed on trails designated for horse and pack stock use. While horses and pack stock are also allowed on both open and closed roads, open roads do not provide a substantive recreational experience and increasing the use of open roads increases risks to the safety of these recreationists. In addition, closed roads generally provide no substantive recreational opportunity due to their short length. Declaration of Michael McClelland at ¶ 4 (attached hereto as Exhibit B). Moreover, while roads are of important use for accessing parts of the Forests, these roadways are no more enjoyable to horseback riders as a place to recreate than they are to hikers. For that reason, considering these

roads as part of the area where equestrians can truly recreate is no more appropriate than including them in the total mileage of hiking trails available on the Forest.³

While FW-108 does provide that horses and pack stock are also allowed within 300 feet of the designated trails for certain limited activities, it prohibits general travel within this corridor. Nonetheless, even if all of this 300 foot corridor on each side of the designated trails is considered, the 129 miles of trails designated for horse and pack stock use (FEIS at 312) equals 9,381 acres of area where equestrians can recreate on the Forest. In contrast, the Cherokee National Forest covers 639,450 acres. LMP at 4. Thus, the area on which horse and pack stock users can recreate in the Cherokee National Forest is 1% of the land area of the Forest.⁴ Previously, horse and stock users were given the opportunity to travel on appropriate portions of nearly 100% of the Forest area.

The basis for this drastic change in Forest use is nothing more than the vague assertion that non-designated trails made by horse and pack stock users have caused detrimental impacts on the Forest. However, *at no place in the record* did the Regional Forester quantify this impact. Similarly, *at no place in the record* did the Regional Forester assess the extent or nature of this perceived detrimental impact. There is no discussion of the frequency of these areas of purported detrimental impact, the duration of the impact, or the severity of the impact. In addition, the cursory comments on horse and pack stock impacts off of designated trails are limited to impacts from non-

³The FEIS identifies 20.6 miles of trails for hike and horse only and 108.7 miles for hike, bike and horse only. FEIS at 312. The LMP identifies 1,143 miles of local roads and 407 miles of collector roads. LMP at 11. For the reasons set forth above, it is no more appropriate to consider these local and collector roads as part of the available recreational horse trails than it is to consider them as part of the hiking trails.

⁴The applicable regulations implementing NFMA state that “a broad spectrum of forest and rangeland related outdoor recreation opportunities *shall be provided for in each alternative.*” 36 C.F.R. § 219.21 (2000) (emphasis added). The Regional Forester’s restriction of equestrian activities to a minute portion of the Forest, especially without demonstrating that such restriction is required for environmental reasons, is inconsistent with this regulation.

designated trails. Nowhere in the FEIS is there any assessment of the impacts from cross-country travel not on any established trail.

Rather than including specific information on the nature of these alleged impacts, the Regional Forester admits a lack of such information. LMP at 226 (“Recreation impacts on water quality and riparian areas, specifically OHV’s and equestrian use, *are topics for which more information is needed*”) (emphasis added). The absence of a quantified and properly analyzed basis for the decision to ban a specific group of recreationists from as much as 99% of the Forest makes that decision arbitrary and capricious.

In fact, the FEIS actually contradicts the Regional Forester’s decision that an absolute forest-wide prohibition on horse and pack stock off of designated trails is needed to protect the Forest environment. The FEIS explicitly states that even if there were any detrimental impact from horse and pack stock use, this impact “would be localized and would be reduced by using strategies to avoid riparian areas whenever possible, using appropriate mitigation measures and educating forest visitors about ways to protect soil and water resources.” FEIS at 67-68, 79. However, rather than establish strategies on a local level to mitigate any potential harm by horse and pack stock users off of designated trails, the Regional Forester simply issued a forest-wide ban.

In addition, the FEIS shows that the Regional Forester’s vague representations as to existing forest-wide detrimental impacts are inconsistent with the scientific review which is contained in the FEIS. As stated in the FEIS, “[a] proper functioning condition assessment has not been completed on forest riparian areas. Most of the areas are believed to be functioning at or near their proper capability and potential.” FEIS at 77.

The FEIS also shows that the drastic action of removing horse and pack stock from any opportunity to enjoy substantial portions of the Forest produces no significant environmental benefit. While such a prohibition was only included in one alternative, the

FEIS concluded that “[e]ffects to the riparian resource are not expected to vary significantly by any alternative.” FEIS at 79; *see also* FEIS at 68 (“Effects to the soil and water resources would not be expected to vary significantly by any alternative, except Alternative A and E”).⁵ The Regional Forester himself also concluded that “*all alternatives* would implement forest-wide and riparian management standards to protect and improve water quality, aquatic habitat and riparian area condition.” ROD at 8 (emphasis added). Therefore, continuing the current activities of horse and pack stock users would not have a significant impact on riparian resources and would implement forest-wide and riparian management standards to protect and improve water quality. Furthermore, as to the issue of soil compaction, the FEIS shows that large areas of the Forest, including those within the horse and pack stock ban, have soil characteristics which reduce their susceptibility to compaction. FEIS at 48. Thus, the dramatic restriction on horse and pack stock use does not produce any significant benefit in the quality of riparian areas or eliminate compaction concerns on a large part of the Forest, which are the two prominent concerns set forth in FW-108.

a. The Regional Forester’s decision that 278,849 acres of the Cherokee National Forest are suitable for logging operations but only 9,381 acres are suitable for horse and pack stock use is illogical.

The Regional Forester has determined that 278,849 acres of the Forest are suitable for timber companies to enter upon and engage in logging activities. ROD at 4; LMP at 391.⁶ These activities include felling trees and skidding and decking logs, as well as slash removal by either burning or machine methods. In addition, clear cutting (referred to as “even aged management”) will be allowed in these areas as well. *See* LMP at 45.

⁵ Because Alternative F is the ‘no-action’ alternative pursuant to which current activities are continued, this conclusion applies to the continuation of current horse and pack stock activities.

⁶ Whether Forest land is suitable for logging operations is determined based on the criteria set forth in 36 C.F.R. § 219.14(a), and includes an assessment of whether appropriate mitigation efforts can be implemented to avoid “irreversible resource damage to soils productivity, or watershed conditions.”

While these logging activities were found suitable for 278,849 acres of the Cherokee National Forest, horse and pack stock activities were found suitable for only 9,381 acres excluding roads. This determination is illogical.

At a minimum, if appropriate site-specific mitigation measures can be put in place to allow such heavy-impact activities as timber operations on over 40% of the Forest, at a minimum appropriate site-specific mitigation measures can be put in place for far less intrusive horse and pack stock activities. For the Regional Forester to determine that logging can occur on 278,849 acres of the Forest, but horse and pack stock users can only use 9,381 acres simply makes no sense and further supports the arbitrary and capricious nature of the Regional Forester's decision.

b. The bases given for the Regional Forester's decision to ban horses and stock from most of the Forest area are self-contradictory.

The Regional Forester's reasons for banning horse and pack stock from a substantial portion of the Forest are not only vague and insufficient, they are also contradicted by the findings in the FEIS and LMP. For example, while the decision regarding horses and pack stock is apparently based in part on perceived detrimental impacts to riparian areas, the FEIS found that the riparian areas on the Forest were "functioning at or near their proper capability and potential." FEIS at 77. Also, while the Regional Forester's decision is based on the conclusion that recreational horse and pack stock activities have detrimental impacts to the environment, the LMP specifically protects commercial grazing on the Forest because of the beneficial impact of the livestock on the Forest. LMP at 65. In this regard, the LMP states at FW-108 that horses and pack stock should be restricted to trails in order to protect "wildlife openings," but then states elsewhere that commercial grazing should be used to maintain and expand "important forest openings and aesthetically pleasing pastoral settings." LMP at 65; *see* LMP at 132 ("Wildlife viewing opportunities are maintained and expanded through livestock grazing, cultivation, mowing, and burning of openings and pastoral areas"). The Regional Forester does not explain why, on the one hand, the Forest Service believes

untended commercial livestock can be managed to benefit the forest and wildlife, but, on the other hand, it believes horse and pack stock users cannot be similarly managed to benefit the forest, and instead are viewed as causing unavoidable harm that justifies excluding them from most areas of the Forest.

In addition, the Regional Forester has determined (without a scientific basis) that the current horse and pack stock activity across the Forest is creating unacceptable degrees of impact which merits restricting it to within 300 feet of designated trails. LMP at 58 (FW-108). However, the Regional Forester notes that most of the current use in large parts of the Forest is within this 300 foot area. LMP at 59 (“Typically, use occurs most often within a 300-foot corridor of developed trails”). If most of the use is already in the 300 foot corridor, the Regional Forester has to acknowledge that there is little activity outside this 300 foot corridor - thus making it implausible that such use is causing detrimental forest-wide impacts. Similarly, given that most of the current use is within this 300 foot corridor and this current use includes activity on non-designated trails in this area, and such use on those trails will be allowed to continue subject to appropriate forest regulations that mitigate the impact, there is no basis for concluding that those same forest regulations would not mitigate any forest-wide impact outside this corridor.

Finally, the Regional Forester has decided that the detrimental impacts of horse and pack stock activity on the Forest require immediate and severe restrictions on their use, but then in the FEIS the Forest Service admits that it needs to obtain more information on what these impacts are. LMP at 226. While the process of revising the Forest Plan has been ongoing for over 10 years (*see* ROD at 2), *the Forest has never bothered to make this assessment*. There is absolutely no reason given as to why the severe restriction of corralling all horse and pack stock use onto a small area of the Forest has to be done immediately, before the actual impact of the current use can be measured and appropriately tailored mitigation measures can be devised and considered.

- c. **The Regional Forester's decision to restrict horse and pack stock use to designated trails in order to prevent harm, but not to restrict hikers' use to designated trails, is arbitrary in light of the FEIS's conclusion that hikers' activity on non-designated trails degrades the environment.**

As with its unsupported assertion in the FEIS that horse and pack stock use off of designated trails can harm the environment, the Forest Service similarly makes the assertion that hiker activity off designated trails can also harm the environment. FEIS at 313, 318. However, the Regional Forester imposes no forest-wide ban on hiker activity off of designated trails. This decision to restrict only certain Forest users whom the Forest Service believes are creating environmental harm and allow others to continue their activities is arbitrary.

While the FEIS refers to both hiking and horseback riding as contributing to environmental degradation when conducted off of designated trails, it fails to individually or collectively quantify the alleged detrimental impact of these activities. Therefore, there is no rational basis for the Forest Service to establish restrictions on one particular user group under the assertion that the group's activities are harming the environment, and then allow another user group to engage in exactly the same activity (*i.e.*, travel off of designated trails). The lack of a rational basis for the Forest Service's decision in this regard renders it arbitrary.

2. **By failing to disclose in sufficient detail the facts upon which it based its decision to prohibit horses and pack stock from a substantial part of the Forest, the Regional Forester failed to substantively engage the public in his decision process in violation of NFMA.**

The Cherokee LMP imposes a very dramatic change in the recreational use which horseback riders can engage in on the Cherokee National Forest. This change is apparently based on the perceived (but not assessed or quantified) detrimental impacts of horseback riding off of designated trails. However, other than the inclusion of a few vague statements as to the existence of such use, neither the Cherokee LMP nor the Cherokee FEIS contain any detail whatsoever as to the location and extent of this

purportedly detrimental impact. For example, there is no assessment in the FEIS of the degree of the impact of horse activity on non-designated trails, no assessment of the estimated mileage of such trails and no assessment of the duration of any impact from such trails. There is a similar lack of analysis related to cross-country impacts of horse and pack stock activity. This complete absence of any assessment and evaluation of the asserted harm which justifies the decision to restrict horseback riding from most of the Forest areas eviscerates the possibility of having any real public involvement in the Regional Forester's decision.

The National Forest Management Act ("NFMA") mandates that the Forest Service "shall provide for public participation in the development, review, and revision of land management plans." 16 U.S.C. § 1604(d). However, by failing to identify with any level of detail the basis for his decision, the Regional Forester has completely prevented the public from effectively addressing or rebutting the facts he is relying upon for his action. This conduct completely precludes any effective or substantive public involvement in the decision-making process.

3. The Forest Service failed to assess in Alternative F (the required no-action alternative) the environmental impacts of current recreational horse and pack stock activity off of designated trails within the Forest in violation of NEPA.

As discussed above, the Regional Forester failed to set forth in the FEIS or in any other document an assessment or quantification of the purported detrimental impact which he perceived was being caused by horse and pack stock use off of designated trails. At a minimum, the FEIS was required to assess the environmental impacts of the "no-action" alternative, which in the current FEIS was identified as Alternative F, in order to determine the benchmark against which alternatives can be compared. *See* FEIS at 25. However, this assessment was not done with respect to horse and pack stock activity on other than designated trails. As a result, the Forest Service has violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* This violation renders the FEIS invalid, as well as any decision based on that FEIS.

The substantive reason for invalidating a decision based on faulty NEPA analysis is that the decision-maker is precluded from making an informed judgment as to which alternative is the best overall with respect to its environmental impacts as compared to its other benefits. This reason is even more significant in a situation such as the present one where the decision-maker for a Forest Plan was not the Forest Supervisor, but instead the Regional Forester who is located off the Forest. The thoroughness of the FEIS becomes even more critical for ensuring that the decision-maker is fully and properly informed. In the present case, the decision-maker simply was unable to assess the actual impact of continued horse and pack stock activities off of designated trails, and thus his decision was not properly informed.

4. The Forest Service violated NEPA and NFMA by failing to assess reasonable alternatives which included site-specific efforts and increased public education to reduce the perceived impact of horse and pack stock use on the Forest.

NEPA requires the Forest Service to include all reasonable alternatives which implement its project, which in this case was management of the Cherokee National Forest. 43 U.S.C. § 4332(C)(iii).⁷ With respect to the issue of regulating in some manner the activities of horse and pack stock users on the Forest, the Forest Service was required to consider all reasonable alternatives which would allow for this use while establishing sufficient measures to prevent unacceptable environmental harm.

⁷NFMA requires as part of its provisions that the Forest Service adhere to the requirements set forth in NEPA. 16 U.S.C. § 1604(g)(1); 36 C.F.R. §§ 219.5(a)(5), 219.12(f)(2000). The NFMA regulations further state that:

The primary goal in formulating alternatives, besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements of §§ 219.13 through 219.27

36 C.F.R. § 219.12(f). The Regional Forester's failure to consider a more focused alternative with regard to horse and pack stock activity resulted in the failure to maximize *net* public benefits.

Notwithstanding that the Forest Service failed to identify with any sufficient detail the basis for its conclusion that such use causes unacceptable harm, even if such harm were present, the Forest Service failed to consider reasonable alternatives which would address this harm. In fact, the FEIS itself acknowledges that such reasonable alternatives existed - yet none were even considered by the Forest Service.

While the FEIS fails to identify, evaluate or assess any particular detrimental impacts from horse and pack stock activity off of designated trails within the Forest, it does generally state that any impacts from dispersed recreation, such as horse and pack stock activity and hikers on non-designated trails, “would be localized and would be reduced by using strategies to avoid riparian areas whenever possible, using appropriate mitigation measures and educating forest visitors about ways to protect soil and water resources.” FEIS at 67-68, 79. However, contrary to implementing an alternative which imposed appropriate strategies to restrict horseback riders from riparian areas whenever possible and other mitigation measures on a site-specific or resource-specific basis, as well as educating forest users, the alternative the Regional Forester implemented was the blanket forest-wide ban implemented under FW-108.⁸

If in fact impacts are in a particular area which is more susceptible to cross-country travel, or are being caused by certain users in particular areas, such as by adjacent landowners creating trails onto the Forest from their property, this impact can be

⁸Our review of the individuals who were involved in the preparation of the FEIS shows no educational background or experience of any of the individuals in the area of horse or pack stock activities and impacts. This apparent failure to include an individual with appropriate training and experience in equestrian activities and recreation in the preparation of the LMP and FEIS was a deficiency in the process and may have contributed to the failure to consider reasonable alternatives other than a forest-wide ban on horse and pack stock use off of designated trails. It may also have resulted in the incredulous assertion in the LMP that limiting horseback riders to a corridor of 300 feet along either side of designated trails will not remove the feeling of being able to freely travel throughout the Forest. *See* FEIS at 318; *see* Declaration of Michael McClelland at ¶ 5 (demonstrating that limitation of horse and pack stock activity to 300 foot corridor along designated trails will destroy his sense of freedom to enjoy the Forest) (attached as Exhibit B).

mitigated by efforts focused on these areas or particular Forest users. Mitigating this impact does not require a forest-wide ban on all horse and pack stock activity on non-designated trails. In addition, in many areas of the Cherokee National Forest, the topography of the land naturally limits travel off of designated trails. In such areas, there is no need for additional Forest Service regulations. Also, where the perceived problems are caused by an insufficient amount of designated trails in a certain area, the Forest Service should have considered an alternative that clearly designated additional trails in that area. While the creation of additional trails would require funds, the imposition of an additional and highly restrictive regulation will also require agency funds based on the increased demands it will place on law enforcement. *The increased financial requirements of enforcing a new, forest-wide rule could very likely exceed the funding needed to construct new trails in certain areas.*⁹

While the FEIS specifically refers to increasing public education as a method for mitigating the environmental impacts of horse and pack stock activity (as well as the activities of all users), the Regional Forester very specifically and deliberately ignored public education as an alternative. The FEIS admits that the comments the Forest Service received in response to the draft EIS included the assertion that “[t]he Forest Service should conduct natural resource education programs for the public.” FEIS at Appendix H (Concern 1-70). In response to this concern, the FEIS states:

This is a good suggestion and one which is carried out in every national forest to some degree. **Environmental education is a very valuable tool for national forest management** and can be done to the extent that budgets allow. Land and resource management planning does not normally address environmental education and, in the case of this and the other southern Appalachian forests, **it is not included**. Other programs on the forests do address environmental education.

⁹The regulations which implement NFMA also require the Forest Service to develop a broad range of alternatives, albeit for the purpose of identifying the benefits and costs of land and resource management according to the Forest planning process. 36 C.F.R. § 219.5(a)(4)(2000). The Regional Forester’s failure to consider adequate alternatives also violated this provision as well given that the benefits and costs of these alternatives were not fully addressed.

FEIS at Appendix H (response to Public Concern 1-70) (emphasis added). As demonstrated by this admission, the Forest Service recognizes that public education “is a very valuable tool for national forest management.” The Cherokee Revised Land and Resource Management Plans is being established *precisely* for this purpose.¹⁰ However, the Regional Forester has “not included” public education as part of his management consideration because it is “normally” not considered. Moreover, given that the implementation of a forest-wide restriction will undeniably increase demands on the Forest’s financial budget for personnel costs necessary to enforce that rule, the Regional Forester’s decision to apply federal funds to increase his agency’s staffing needs rather than put those funds towards public education makes no sense. The Regional Forester’s failure to consider public education as part of a reasonable alternative is without a legitimate basis and violates 36 C.F.R. § 219.12(f)(4), which states:

Alternatives shall provide different ways to address and respond to the major public issues, management concerns, and resource opportunities identified during the planning process.

For the reasons set forth above, the Regional Forester’s failure to consider and evaluate reasonable alternatives that addressed current horse and pack stock use on areas other than designated trails constitutes a violation of NEPA as well as NFMA.

¹⁰As stated in 36 C.F.R. § 219.1(b)(2000), which describes the purpose of national forest planning:

Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management.

5. The Forest Service failed to assess the environmental impact of concentrating all horse and pack stock use on designated trails pursuant to the selected alternative, thereby violating NEPA.

Because the Regional Forester's restriction under FW-108 restricts horse and pack stock from most of the Forest, it correspondingly concentrates all such use onto a small portion of the Forest. Regardless of what the specific recreational activity is, concentrating it into a confined small area will obviously have environmental impacts due to that concentration, even where dispersal of the activity would have no detrimental impact. However, nowhere in the FEIS does the Forest Service assess the obvious ramifications of FW-108. This failure to apprise the decision-maker of the environmental impacts of concentrating all horse and pack stock use to a very small portion of the Forest violates NEPA.

As demonstrated above, the Forest Service has failed to quantify and assess the impact of horse and pack stock use on areas other than designated trails in the Forest. The Forest Service has also failed to assess the impact of concentrating all such use onto a small section of the Forest. As a result, the Regional Forester had no information as to the effect of concentrating all of this use on designated trails, nor any information that would have allowed him to compare this impact caused by the concentration to the impact produced from dispersed activities. The area which horse and pack stock users had an opportunity to travel in was reduced from nearly 100% of the Forest to a very small portion of the Forest under the alternative selected by the Regional Forester. If in fact this use which had been dispersed throughout the Forest was substantial enough to require such a severe regulation, concentrating all this use to a highly defined and small area of the Forest would obviously have environmental impacts.¹¹ *The act of concentrating this activity could even result in more environmental impacts than the*

¹¹The detrimental impacts of concentrating recreational use into certain areas of the Forest, as opposed to dispersing it throughout, are discussed in the FEIS as part of the analysis of developed and popular recreation sites. See, e.g., FEIS at 67-68.

current dispersed use. Because this analysis was not completed the Forest Service violated applicable regulations, which state:

Alternatives shall be formulated to facilitate analysis of opportunity costs and of resource use and environmental trade-offs among alternatives and between benchmarks and alternatives.

36 C.F.R. § 219.12(f)(2). However, the FEIS does not acknowledge much less analyze this impact resulting from selected Alternative I. Choosing an alternative without being aware of the environmental impacts of that alternative is a direct violation of NEPA.

6. The Forest Service is increasing risks to horse and pack stock users by encouraging their increased recreational use of roads which are also used by motorized vehicles.

In restricting horse and pack stock users from use of non-designated trails, the Forest Service appears to be encouraging riders to make more use of Forest System roads for their recreational purposes. Because these roads are also used by automobiles and other motorized vehicles, they are used sparingly by horseback riders for purposes of access. Use of these roads creates risks for horseback riders as well as other road users given the dangers of traveling on roads also used by motorized vehicles. To the extent the Forest is encouraging increased recreational use of these roads as an alternative to current recreational activity off of designated trails, this use not only provides no true recreational value, it also creates a corresponding increase in safety risks to forest users. Moreover, this decision is directly contrary to the Forest Service's stated goal of "[p]roviding a transportation system that supplies safe and efficient access for forest users while protecting forest resources." LMP at 67 (GOAL 48).

7. The Forest Service failed to assess the increased demand on its already limited budgetary resources to enforce the new regulation prohibiting horse and pack stock activities in most of the Forest Area.

The regulations implementing NFMA explicitly state that the responsible deciding official, in making determinations related to Forest Plans, should consider the "available budgets, including current and likely Forest Service budgets." 36 C.F.R. §

219.4(b)(iii). In this regard, the Regional Forester admitted in the LMP that it is unknown whether the Forest Service will have a sufficient budget in the future to support enforcement of Forest regulations (LMP at 365). Certainly, the current budgetary status of the federal government makes additional funding very difficult to obtain. The Regional Forester nonetheless chose to enact a forest regulation (FW-108) that clearly will increase the Forest Service's need to augment its law enforcement resources and increase its staff.¹² However, as the FEIS shows, the Regional Forester could have considered public education as a viable method for addressing the concerns over horse and pack stock activities (as well as all other activities) on areas off of designated trails.¹³ The failure of the Regional Forester to provide any reasonable rationale for choosing an alternative that will likely increase funding demands related to the Forest's staff when other alternatives that avoid this need were available violates this direction to consider these budgetary issues.

Furthermore, even considering the statements in the FEIS, the need to prohibit horse and pack stock use on non-designated trails is not even necessary in many areas of the Forest where riparian issues do not exist or can be mitigated and soil compaction is not an issue. By imposing a restriction on public use that has no apparent justification,

¹²The Chattahoochee-Oconee National Forests, which recently implemented a similar ban on horse and pack stock activity on areas other than designated trails, acknowledged that implementation of that new ban would require increased efforts, which will include necessary funding, to educate the public as to the existence of the ban itself. *See* US Forest Service News Release (February 23, 2004) (copy attached as Exhibit C).

¹³The Forest has previously asserted that individuals deliberately cutting vegetation to create non-designated trails was a basis for implementing FW-108. Declaration of Michael McClelland at ¶ 7 (attached as Exhibit B). However, the Forest already has a regulation prohibiting this activity. Rather than enforcing existing regulations, the Regional Forester has chosen to implement additional regulations in an effort to resolve his perceived problem. Additional regulations only hinder the activities of the law abiding users, and have no impact on those acting illegally. The Forest should have considered enforcing the regulations it has, not implementing even more regulations.

the Forest Service increases the public's frustration and lack of respect for Forest rules. This reaction in turn will lead to increased disregard for such rules. In turn, this will then lead to both additional demands for law enforcement efforts as well as detrimental impacts on the Forest. Because of the difficulty to monitor Forest users, the Forest Service places critical reliance on those users having respect for the laws applicable to the Forest. Voluntary adherence to those rules, as opposed to law enforcement, in large part protects the Forest's resources. Without respect for those laws, their ability to protect the Forest will be reduced. For this reason, the Back Country Horsemen advocate education, not regulation. Apparently, the Regional Forester has chosen exactly the opposite tact in this case.¹⁴

8. The Forest Service has prohibited historic use of the Wilderness Areas within the Cherokee NF in violation of the Wilderness Act.

Horse and pack stock use has historically occurred throughout the Wilderness areas which are subject to the regulations in the LMP, including FW-108. The Wilderness Act provides that such historic use is to be allowed to continue in areas designated as wilderness. However, FW-108 eliminates this historic use of these areas thus constituting a violation of the Wilderness Act.

9. By prohibiting horses from a substantial portion of the Forest, the Forest Service has denied disabled people the ability to see this area of the Forest.

Travel by horse is one of the few ways for disabled individuals and those without sufficient physical capacity to see the Cherokee National Forest. However, pursuant to FW-108, these individuals are now limited to only 1% of the Forest's overall area. While access to all parts of the Forest by disabled visitors is not guaranteed, this limitation on access via horseback was not necessary and could have been avoided by use of site-specific measures. Therefore, FW-108 constitutes a violation of the Americans with Disabilities Act.

¹⁴The LMP notes that illegal trail activities are increasing on the Forest. LMP at 16. The Regional Forester apparently believes that the appropriate way to reduce this illegal activity is by imposing more regulations. However, individuals who do not follow existing rules are not going to follow additional rules.

Travel by horse or other means is the only way for disabled individuals and those without sufficient physical capacity to see the Cherokee National Forest. However, pursuant to FW-108, these individuals are now limited to only a small portion of the Forest. This limitation was not necessary and could have been avoided by use of reasonable site-specific measures. Therefore, FW-108 is inconsistent with the Americans with Disabilities Act.

Conclusion

For the reasons set forth above, Back Country Horsemen respectfully request that you vacate the Regional Forester's decision to implement FW-108. As the above-discussion demonstrates, the Back Country Horsemen are not seeking *carte blanche* to travel wherever and whenever they wish across the Cherokee National Forest. Much to the contrary, what they are seeking are focused, properly tailored regulations which allow for their recreational enjoyment while at the same time ensuring adequate protections to the Forest's natural environment. While the Back Country Horsemen are not seeking indiscriminate access to the Cherokee National Forest, they disagree with the indiscriminate prohibition set forth under FW-108.

Very truly yours,

THE GARDEN LAW FIRM P.C.

Kevin R. Garden

KRG/ecf
Enclosures

USDA Forest Service

April 29, 2004

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cc (via U.S. Mail)(w/ encl.)

Robert T. Jacobs

Regional Forester