

Notice of Appeal Huron-Manistee National Forests Amendment 1 to the 2006 Land and Resource Management Plan

This is a Notice of Appeal filed pursuant to 36 C.F.R. part 217 (2000)¹. The appellant is Kurt J. Meister, whose address is 22581 Moorgate Street, Novi, Michigan 48374-3769 and whose telephone number is (248) 347-4273. This is an appeal of the decision by Charles L. Myers, Regional Forester, (the “Regional Forester”) on January 27th, 2012 to select Alternative 4 as described in Chapter 2 of the Final Supplemental Environmental Impact Statement (the “FSEIS”) as an amendment to the 2006 Land and Resource Management Plan for the Huron-Manistee National Forests (the “2006 Plan”) which is contained in the Huron-Manistee National Forests Record of Decision Final Supplemental Environmental Impact Statement To accompany Amendment 1 to the 2006 Land and Resource Management Plan (the “Decision”).

The Decision is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law and was made without observance of procedure required by law, including, but not limited to, the Multiple-Use Sustained-Yield Act of 1960, the Wild and Scenic Rivers Act of 1968, the National Environmental Policy Act of 1969, the Endangered Species Act of 1973, the Forest and Rangeland Renewable Resources Planning Act of 1974, the Federal Land Policy and Management Act of 1976, the National Forest Management Act of 1976, the Healthy Forest Restoration Act of 2003, the Data Quality Act of 2005 and the Energy Policy Act of 2005, all as amended, and the rules, regulations, procedures, policies and decisions interpreting such acts, including, but not limited to, the 1982 planning rules, the Forest Service Manual and the Forest Service Handbook (collectively, the “Applicable Laws”). The specific portions of the decision to which the appellant objects, specifically how the decision violates law, regulation or policy, and the specific changes in the decision the appellant seeks are set forth below.

Background

The 2006 Plan was appealed both administratively and in court by me, in part as a result of its failure to provide quiet areas on the Forests. In the court appeal, the United States Court of Appeals for the Sixth Circuit (the “Court of Appeals”) held that the 2006 Plan's approval was arbitrary and without observance of procedures required by law. *Meister v. U.S. Dept. of Agriculture*, 623 F.3d 363, 380 (6th Cir. 2010). The Court of Appeals did not set aside the 2006 Plan, but instead gave the Service time to adopt a plan that complies with the law. As a result, the Service issued a Notice of Intent to prepare a Supplemental Environmental Impact Statement (the “Notice of Intent”) in which:

The Forest Service proposes to remedy the deficiencies identified by the court by supplementing the Environmental Impact Statement for the Forest Land and Resource Management Plan. The supplement will evaluate an alternative that closes Semiprimitive Nonmotorized Management Areas to snowmobile use and firearm

¹ All references to title 36 of the Code of Federal Regulations are to the 2000 compilation, ie. the 1982 planning rules, which were used to make the Decision.

hunting (subject to existing rights) and closes Primitive Area [sic] (Nordhouse Dunes Wilderness) to firearm hunting (subject to existing rights). (75 Fed. Reg. 81561)

However, instead of making any attempt to solve the lack of opportunities for users seeking quiet places, the Service only looked at the potential adverse impacts to hunters and snowmobilers. As the Decision concludes:

After considering all the information provided in these documents, I have concluded that the available supply of areas and trails on National Forest System and State lands where users may enjoy snowmobiling and hunting should meet the current and foreseeable demand for these recreation experiences.

(Decision p. 10) However, the supply of areas on the Forests or anywhere else in the lower peninsula of Michigan where users can enjoy bird watching, hiking, backpacking, cross-country skiing, snow shoeing, kayaking or canoeing in a relatively quiet setting is virtually non-existent. Infuriatingly, the Regional Forester didn't even consider that!

The Semiprimitive Nonmotorized Areas Should Not Have Been Eliminated

The Decision eliminates **every** Semiprimitive Nonmotorized Area on the Huron-Manistee National Forests (the "Forests"). Each of the Semiprimitive Nonmotorized areas designated in the 2006 Plan should continue to be designated as Semiprimitive Nonmotorized Areas.

The Forests consist of 978,918 acres. (Decision p. 3) The original Land and Resource Management Plan Huron-Manistee National Forests (the "1986 Plan") designated 46,284 acres, 4.7% of the Forests, as Semiprimitive Nonmotorized Areas and no acres of Semiprimitive Motorized Areas. The lack of semiprimitive areas was the basis for several appeals of the 1986 Forest Plan. Pursuant to the Final Statement of Agreement for Appeals 1730, 1731, and 1735 dated August 11, 1988 (the "Settlement Agreement"), additional areas were to be analyzed for inclusion as Semiprimitive Nonmotorized Areas and Semiprimitive Motorized Areas. (Settlement Agreement pp. 2-3) At the time the 2006 Plan was adopted, the 1986 Plan had been amended to designate a total of 59,626 acres, 6.1% of the Forests, as Semiprimitive Nonmotorized Areas and 11,375 acres, 1.2% of the Forests, as Semiprimitive Motorized Areas. (FEIS p. II-15)

In addition, the Settlement Agreement required the Service to complete a Forest-level demand assessment. (Settlement Agreement p. 4) The result was, "According to a dispersed recreation demand assessment completed by Charles M. Nelson, professor at Michigan State University, the majority of those sampled favored more land to be allocated as semiprimitive areas, especially non-motorized areas." (2006 Huron-Manistee National Forests Proposed Land and Resource Management Plan Forest Plan p. A-9)

Recognizing Professor Nelson's finding, the Huron-Manistee National Forests Final Environmental Impact Statement To accompany the 2006 Land and Resource Management Plan (the "FEIS") found the **only** demand from the public that had changed significantly since 1986 was, "The demand for semiprimitive recreation, both motorized and nonmotorized, has increased." (FEIS p. I-1)

The United States Department of Interior, Office of the Secretary, Office of Environmental Policy and Compliance stated in its comments on the 2006 Plan, “Areas available for non-motorized activities are at a premium in the Midwest and additional acreage should be preserved or added whenever possible.” (Comment letter dated June 20, 2005 reproduced at FEIS p. J-135) The Huron-Manistee National Forests Recreation Supply and Demand Analysis For the Supplemental Environmental Impact Statement dated January 2012 (the “Supply and Demand Analysis”) comes to a similar conclusion, “In general, the Forest Service concludes that opportunities to experience SPNM and Primitive experiences are limited in Michigan, especially in the Lower Peninsula. Recreationists seeking these experiences may have to travel relatively long distances for SPNM and Primitive recreation opportunities, especially if the users are located in the Lower Peninsula.” (Supply and Demand Analysis p. 65)

Despite the lack of semiprimitive nonmotorized and primitive opportunities and the public's desire for additional Semiprimitive Nonmotorized Areas, the 2006 Plan only proposed to “[c]omplete the designation of the semiprimitive . . . acres proposed in the existing [1986] Forest Plan.” (FEIS p. II-15) “The 2006 review determined that there were no significant plan-level issues with the management of these areas that warranted change during the Forest Plan revision process.” (Decision p. 7)

The failure to designate substantially more areas as Semiprimitive Nonmotorized Areas was one of the issues appealed by me. However, the Court of Appeals deferred to the Service's reasons for not designating any additional areas as Semiprimitive Nonmotorized Areas and rejected this claim. (*Meister* p. 380)

The Notice of Intent states that the Purpose and Needs for Action was to “remedy the deficiencies identified by the court”. (Notice of Intent p. 81561) However, the Decision eliminates **every** Semiprimitive Nonmotorized Area on the Forests, supposedly to comply with the Court of Appeals decision which **upheld** the Services' decision about the amount of Semiprimitive Nonmotorized Areas!

The Decision purports to solve a problem which the Court of Appeals found not to exist. In order to justify this result, the Service concocted a bizarre “interpretation” of the Court of Appeals' decision. “[T]he agency's interpretation of the *Meister* panel finding [is] that to be consistent with the direction in the 2006 Forest Plan, the [Wilderness and Semiprimitive Nonmotorized Areas] should meet all of their classified ROS [Recreational Opportunity Spectrum] characteristics, goals and objectives”. (FSEIS p. 9) As a result, the Service went back and re-characterized all of the Semiprimitive Nonmotorized Areas:

The goal of the inventory was to attain full compliance with all ROS characteristics at the time of this analysis; in 2006 the ROS interpretation by the Forest Service allowed for areas to be classified based upon an aspiration or objective, which the agency referred to as “desired future condition.” The *Meister* panel found that the agency's 2006 interpretation was deficient.

(FSEIS p. 10) This is simply wrong.

Nothing in the Sixth Circuit Opinion found the Service's original interpretation deficient or even mentions the "desired future condition", let alone suggests that the Wilderness and Semiprimitive Nonmotorized Areas had to be in full compliance with all ROS characteristics at the time the 2006 Plan was adopted.

Instead, the Sixth Circuit held exactly the opposite:

But striking a balance typically involves some give on each side. We think that should be especially true for participants in activities that do *not* conform to the area descriptions in the ROS. One might at least expect them not to have the run of the areas. And so, in striking a balance between competing uses of the Forests, one might expect the Service seriously to consider whether, say, birdwatchers in fall should be able to enjoy their pastime, in 6.75% of the Forests, without ducking for the occasional gunshot. Or whether, in some corner of the Forest – especially an ostensibly "nonmotorized" one – a snowshoer should be able to walk a trail without hearing the whine of snowmobile engines. The Service is charged with *balancing* competing uses of the Forests, rather than favoring one or two uses above all others.

(*Meister* p. 379)

As is shown below, the Wilderness and Semiprimitive Nonmotorized Areas do not conform to the ROS descriptions of primitive and semiprimitive nonmotorized largely as a result of the failure of the Service to plan the Forests in accordance with the ROS. The other reason they do not conform is that in the more than 25 years since their designation, the Service has refused to take the necessary actions to bring them into compliance, such as closing or relocating the roads and ORV and snowmobile trails in and around these areas.

40 C.F.R. §1508.22(a) requires that a notice of intent **shall** "Describe the proposed action **and possible alternatives**". The proposed action was to "evaluate an alternative that closes Semiprimitive Nonmotorized Management Areas to snowmobile use and firearm hunting (subject to existing rights) and closes Primitive Area [sic] (Nordhouse Dunes Wilderness) to firearm hunting (subject to existing rights)". (Notice of Intent p. 81561)

The possible alternatives listed in the Notice of Intent were:

No Action Alternative: The Forest Service would continue to implement the 2006 Forest Plan in its current form. Current direction would continue to guide management of the Semiprimitive Nonmotorized Management Areas and Primitive Area (Nordhouse Dunes Wilderness). There would be no changes to the management of these areas.

Modified Closure Alternative: The Forest Service would ban firearm hunting and snowmobile use in some portion of the 13 existing Semiprimitive Nonmotorized Areas and the Primitive Area (Nordhouse Dunes Wilderness).

(Notice of Intent p. 81561)

Eliminating the Semiprimitive Nonmotorized Areas (or changing the ROS categories of the Wilderness and Semiprimitive Nonmotorized Areas) was not mentioned.² Therefore, the Decision does not comply with the Council on Environmental Quality regulations or the National Environmental Policy Act.

The Decision to eliminate **all** Semiprimitive Nonmotorized Areas is in direct opposition to the desires of the public, and is neither required nor **allowed** by the Court of Appeals' decision or the Applicable Laws.

**The Wilderness and Semiprimitive Nonmotorized Areas
Should be Managed under the
Recreational Opportunity Spectrum Classifications of
Primitive and Semiprimitive Nonmotorized
and the
Areas Bordering These Areas
Should be Managed under
Compatible ROS Classifications**

As a result of the Decision, the Wilderness will be managed under the ROS classification of semiprimitive nonmotorized, and the Semiprimitive Nonmotorized Areas will be split between those managed as roaded natural and those managed as semiprimitive motorized. (Decision, p. 17) Instead, the Decision should have managed the Wilderness under the ROS classification of primitive, the Semiprimitive Nonmotorized Areas as semiprimitive nonmotorized and provided standards and guidelines designed to provide, at a minimum, a quieter recreation experience relative to the rest of the Forests. The 2006 Plan also should have been amended to provide that the areas surrounding the Wilderness and Semiprimitive Nonmotorized Areas should be managed in accordance with the ROS in a way that would not degrade the values of the Wilderness and Semiprimitive Nonmotorized Areas.

The FEIS recognized the need to provide quiet recreation opportunities, “[T]he Huron-Manistee National Forests are among the few places in the Lower Peninsula of Michigan where people can visit to enjoy quality primitive or semiprimitive motorized and nonmotorized recreational experiences.” (FEIS p. III-317. Similar statements are found at FEIS pp. III-277, III- 312) “There is also an expectation among some visitors of a forest experience that includes a sense of isolation from the sights and sounds of others.” (FEIS p. III-331)

2 Public Concern No. 219 was, “The Huron-Manistee National Forest should create more quiet/primitive areas.” The Service's Response was:

The creation of more quiet/primitive areas in addition to those currently identified in the Forest Plan does not meet the Purpose and Need for Action (Draft SEIS, page 1). The Meister panel found that the analysis of possible additional SPNM areas (2006 Forest plan M.A. 6.1) in the 2006 Forest Planning process was adequate (Draft SEIS, pages 1-2).

(FSEIS p. 546) The Service can't say that reducing (to zero) the number of Semiprimitive Nonmotorized Areas was within the scope, but expanding the number of Semiprimitive Nonmotorized Areas was not. It is hard to imagine that the Court of Appeals would have upheld (or will uphold) the Decision to eliminate all Semiprimitive Nonmotorized Areas.

The FEIS then discussed activities which prevent the experience of solitude and tranquility. “Noise within the [Forests] is generated by several sources which have varying degrees of intensity and duration. These sources are: . . . 2) recreational vehicles on trails . . . [and] 4) firearm use during hunting seasons” (FEIS p. III-275) However, the 2006 Plan did nothing to reduce these sources of noise, ultimately resulting in the Court of Appeals' decision.

This desire by the public for quiet recreation was echoed in the comments on the proposed amendment to the 2006 Plan. Two of the significant issues developed as a result of the comments submitted in response to the Notice of Intent were:

Issue 1: The management area conditions, including other public and private infrastructure within and adjacent to the [Primitive and Semiprimitive Nonmotorized Areas], are inconsistent with the Recreation Opportunity Spectrum activity, setting and experience characteristics

Issue 2: The Forests should provide opportunities for quiet recreation experiences. This issue addresses the desire of some visitors for the opportunity to recreate in an environment with the high probability of isolation from the sounds of human activity.

(Decision p. 27) Issue 2 is exactly what the ROS classifications of primitive and semiprimitive nonmotorized are designed to achieve. Utilizing the ROS also solves Issue 1.

The ROS requires the Service to “consider the spatial distribution of opportunities. Sharply dissimilar opportunities generally should be kept apart so that conflicts are minimized.” (1986 ROS Book, p. III-26.)

The Forest Service Manual clearly provides that the Service must use the ROS to decide what activities should be allowed (and prohibited) adjacent to wilderness areas:

Because wilderness does not exist in a vacuum, consider activities on both sides of wilderness boundaries during planning and articulate management goals and the blending of diverse resources in forest plans. Do not maintain buffer strips of undeveloped wildland to provide an informal extension of wilderness. Do not maintain internal buffer zones that degrade wilderness values. **Use the Recreation Opportunity Spectrum (FSM 2310) as a tool to plan adjacent land management.** [emphasis supplied]³

(Forest Service Manual §2320.3(5)) Decisions about how to manage areas adjacent to SPNM areas are to be made the same way. (Forest Service Manual §2311.1)

3 The Service did not consider **any** alternative which would manage the Forests in accordance with the ROS. The closest alternative was Alternative 10 (which was eliminated from detailed study) which provided for Quiet Areas plus Buffers. (FSEIS p. 21) The Regional Forester correctly determined that “buffers” are inconsistent with the enabling legislation for the Wilderness. The Service should have properly framed the alternative as managing the Primitive and Semiprimitive Nonmotorized Areas and the adjacent lands in accordance with the ROS. Properly framed, it is hard to imagine how this should not have been the selected alternative.

Compliance with the ROS results in a positive outcome for all users:

The recreation spinoff is or should be a mix of opportunities in which the public recreates free of conflict and incompatible activities and settings. Without distinct differences in opportunities, the public has little or no choice in recreation provided by a National Forest. This may lead to greater dissatisfaction and conflict with other uses and users. Forest Service management intentions should be to maintain recreation diversity and democratic choice for the publics while meeting the requirements of various laws under which the Forest service operates.

(ROS Users Guide, Eastern Region Supplement p. 14) By following the ROS the Service complies with the Multiple-Use Sustained-Yield Act of 1960, which requires the Forests to be managed to provide a wide range of products and recreational opportunities.

The Decision pays lip service to the desire of the public for “[r]etaining the opportunity for a quiet recreation experience”. (Decision p. 19). However, with respect to the major sources of noise, “Hunting and snowmobiling opportunities would be unchanged”. (Decision p. 16). The Decision blatantly ignores the Service's planning rules, adopted pursuant to the National Forest Management Act, and the holding of the Court of Appeals.

Hunting

The Decision should have prohibited gun hunting and other firearm shooting in the Primitive and Semiprimitive Nonmotorized Areas at a minimum. The Decision states:

While the agency has the authority to prohibit gun hunting in specific times and places for reasons that can be articulated, such closures are not specifically required in Semiprimitive Nonmotorized and Primitive areas by the Recreation Opportunity Spectrum.

(Decision p. 21) This is **absolutely wrong**. The Court of Appeals held, “Gun hunting is inconsistent with the 'direction in forest plans' as set forth in the ROS descriptions [primitive and semiprimitive nonmotorized] of the challenged areas, since those areas are supposed to present little chance of encountering noise by humans.”⁴ (*Meister* p. 379])

On its face, the Decision is in direct violation of the holding Court of Appeals. Pursuant to the Decision, the Wilderness will be managed under the ROS of semiprimitive nonmotorized. Therefore, gun hunting must be prohibited in the Wilderness at the very least. The Service has no discretion to do anything else.

4 The Decision appears to be based in part on the incorrect assumption that the “Service does not have the authority to prohibit members of federally recognized tribes from exercising treaty rights established by the 1819 Treaty of Saginaw of the 1836 Treaty of Washington.” (Decision p. 20) I am much less bothered by having tribal members hunt with firearms than having **everyone** hunting with guns in these areas. However, had the Service banned **all** hunting in the Wilderness and Semiprimitive Nonmotorized Areas, tribal members would not have had any right to hunt in these areas either.

Before discussing the reasons why the Decision should have prohibited gun hunting in the Semiprimitive Nonmotorized Areas, it might be useful to put this into perspective. The Forests “lie within a two-hour drive of 7.4 million residents of the State of Michigan.” (*Meister*, p. 368) Of those people, 75%, or 5.55 million people, participate in outdoor recreation activities in public venues. (Supply and Demand Analysis p. 10). Those 5.55 million people represent over 93% of the visitors to the Forests. (Supply and Demand Analysis Table 9 p. 20) Of these 5.55 million people, less than 46,000 hunt on the Forests and, of those that do hunt, less than 3,200 hunt in the Wilderness and Semiprimitive Nonmotorized Areas.⁵ (FSEIS Table A-5 p. 322)

The Forests consist of 978,918 acres. (Decision p. 3) The Wilderness Area consists of 3,370 acres, or 0.35% of the Forests, and Semiprimitive Nonmotorized Areas constitute 62,301 acres, or 6.40% of the Forests. (FEIS Table III-28 p. III-275) Since “hunting is permitted virtually everywhere in the Forests, save perhaps the parking lots” (*Meister*, p. 375), forest-wide, there are more than 20 acres dedicated to **each** hunter. The same is true when looking only at the Wilderness and Semiprimitive Nonmotorized Areas. On the other hand, there is virtually no place on the Forests where the other 5.5 million people who prefer to do something other than hunt on the Forests can enjoy their activities free from the noise and danger of gun hunting.⁶

Perhaps this would be an acceptable result if the other 5.5 million people had somewhere else to go to enjoy their activities. Unfortunately, as is shown below, they don't! 36 C.F.R. §219.21(e) requires the Service to perform exactly this analysis. The Service's planning efforts:

shall be coordinated to the extent feasible with the present and proposed recreation activities of local and State land use or outdoor recreation plans, particularly the State Comprehensive Outdoor Recreation Plan, and recreation opportunities already present and available on other public and private lands, with the aim of reducing duplication in meeting recreation demands.

As the Court of Appeals held, “The acreage already dedicated to a particular activity on state land should be considered in deciding how much federal land to allocate to that activity.” (*Meister* p. 374)

The Service apparently attempted to comply with the regulation by discussing duplication directly with the Michigan Department of Natural Resources (the “MDNR”). That might have been beneficial, had the discussion not been unreasonably limited to reducing “duplication of recreation opportunities provided for those visitors **who enjoy snowmobiling and hunting experiences in the Huron-Manistee National Forests' Primitive and Semiprimitive Nonmotorized Areas.**”⁷

5 The total number of hunters is probably smaller, since it can reasonably be assumed that at least some of the Deer hunters also are “Small Game” hunters.

6 Gun hunting is not limited to a couple of weeks in November. Gun hunters are on the Forests year-round. (FSEIS Table 25 pp. 117-118)

7 First, the Service should have considered all opportunities for hunting on other public and private land, especially since gun hunting is allowed on almost all public land in the lower peninsula of Michigan. Second, since the Decision eliminates all primitive areas and only leaves the Wilderness as a semiprimitive nonmotorized area, most of the hunters who previously hunted in primitive and semiprimitive nonmotorized areas are going to be hunting in areas not managed for these characteristics any more. Therefore, the Service should have been discussing duplication of hunting opportunities generally. Nothing in the Supply and Demand Analysis suggests that gun hunters only hunt in certain

As part of this process, the agencies reviewed Recreation Opportunity Spectrum standards, current and projected demand for outdoor recreation experiences in these areas, the recreation opportunities provided in Michigan, and past history of cooperative planning efforts. This information is provided in detail within the Recreation Supply and Demand Study attached to the Final Supplemental Environmental Impact Statement. (USDA-FS 2011, Page 66)

Upon the conclusion of this process, the Forest Service and the Michigan Department of Natural Resources did not identify any potential opportunities to reduce 'duplication in meeting demands for recreation opportunities' on National Forest System lands or State lands.

(Decision p. 9) Unfortunately, no part of this process was done in accordance with the Applicable Laws.

First, the Supply and Demand Analysis clearly shows that the Service and the MDNR were using incorrect current demand numbers. The 2007 NVUM data, on which demand is based (Supply and Demand Analysis Table 10 p. 21), is grossly different from the 2000-2002 National Survey on Recreation and the Environment data ("NSRE data"). (Supply and Demand Analysis Tables 6 and 7 pp. 16-17). For example, the 2007 NVUM data shows that 25.2% of visitors to the Forests participated in hunting. However, the NSRE data shows that only 14.3% participated in hunting on the Manistee National Forest and 24.1% participated in hunting on the Huron National Forest. On the other hand, the 2007 NVUM data shows only 2.5% of the visitors participated in backpacking, while the NSRE data shows participation rates of 9.4% and 10.7%, respectively.

Given these inconsistencies and the past problems the Service has had with the NVUM data on the Forests, it should not have relied solely on the 2007 NVUM data. Therefore, the projections are not based on the best available scientific data.

The Supply and Demand Analysis clearly shows that the Service and the MDNR also used inexplicably **wrong** projections. (Supply and Demand Analysis Table 11 p. 22)⁸ The projections contained in Table 11 bear no relation to Mr. Cordell's projections. For example, Mr. Cordell projects the participation rate in the North for hunting to rise from 0.98 in 2000 to 0.99 in 2050. (Cordell (1999) Table VI.12 p. 335) This 1% increase is a far cry from the 21% increase shown in Table 11. On the other hand, Mr. Cordell projects an increase in the participation rate in the North for hiking to rise from 0.99 in 2000 to 1.31 in 2050. (Cordell (1999) Table VI.15 p. 338) This is **10 times** the increase shown in Table 11. Using the correct data shows that the projected demand for hiking is increasing **30 times** faster than the projected demand for hunting!

The projected demand relied upon by the Service compounds these problems. It starts with the highly suspect 2007 NVUM "primary purpose" data⁹ and then applies the made up projections from

types of management area.

8 The projections purport to be based on *Outdoor Recreation for 21st Century America* (Cordell et al. 2004). Mr. Cordell made no such projections in this book. Instead, it was in *Outdoor Recreation in American Life: A National Assessment of Demand and Supply Trends* (Cordell et al. 1999) that he made projections of demand in future decades.

9 The Service should have based the projected use levels on the percent of visitors who participated in an activity, which

Table 11 to determine the projected use levels contained in Table 12. (Supply and Demand Analysis p. 23). This is precisely the kind of data manipulation, which the Court of Appeals discussed before concluding:

The Service's estimates of . . . visitors to the Forests are entirely arbitrary. And—under the Service's own interpretation of § 219.2(a)(2)—those estimates are integral to the demand-supply analysis required under that subsection. To that extent, the Service's issuance of the Plan was arbitrary and without observance of procedure required by law.

(*Meister* p. 374)

The Supply and Demand Analysis also shows that the Service and the MDNR considered the wrong supply. “As determined by the District court, the market area for this analysis is the State of Michigan.” (Supply and Demand Analysis p. 7) This statement is absolutely wrong! The District Court never made any such determination.

In the FEIS, the Service determined, “The Lower Peninsula of Michigan is being considered as the Cumulative Effects Area for semiprimitive recreational opportunities.” (FEIS p. III-296, III-312) This was the correct “market area”. Virtually everything in the Supply and Demand Analysis concludes that few visitors to the Forests would consider going to the upper peninsula of Michigan to participate in their activities.¹⁰ Consideration of a change in the Cumulative Effects Area was not within the scope of the Decision.

The Supply and Demand Analysis also ignored the regulation's clear mandate to consider **private** land. (Supply and Demand Analysis p. 38) Having no information about the supply of private land, the Service and the MDNR failed to even consider a potentially large supply of land.

The conclusion that there were no potential opportunities to reduce duplication is not supported by the facts. For all its short-comings, the Supply and Demand Analysis does show that while there are millions of acres of other public lands available and used for gun hunting, the total number of acres of public lands in the lower peninsula of Michigan which can be enjoyed free from the noise of firearm hunting is less than 90,750, consisting of not more than 70,000 acres of state park land¹¹, 20,000 acres of state forest land subject to deed restrictions and 750 acres in the Grass Bay Preserve.

The Service concluded, “the available supply of areas and trails on National Forest System and State lands where users may enjoy snowmobiling and hunting should meet the current and foreseeable demand for these recreation experiences. (Decision p. 10) As described above, this was based on a vastly inflated demand for hunting and consideration of only a portion of the supply for hunting. Therefore, using the correct demand and supply numbers necessarily results in the conclusion that there

reflects use. Projecting use levels based only on the primary purpose of a visit may substantially underestimate demand for activities on the Forests which are not the primary reason for a visit to the Forests. Moreover, the Service has no data upon which to determine projected “primary purpose” demand. Mr. Cordell's projections are based on participation rates, not “primary purpose”.

10 See e.g., Supply and Demand Analysis, pp. 25 (“The Forests had the most wilderness site visits, which is likely due to the Forests proximity to Michigan's major population centers.”) and 61 (“An important consideration for recreationists in Michigan is the distance to their desired recreation opportunity”).

11 This assumes that all of the state park land is located in the lower peninsula.

is duplication in meeting the demand for hunting and that portions of the Forests should be closed to hunting.

ORVs and Snowmobiles

The Decision should have prohibited ORVs and snowmobiles in the Semiprimitive Nonmotorized Areas and, at a minimum, on trails bordering those areas.

Much of the same analysis relating to hunting applies to ORVs and snowmobiles. The Service and the MDNR's limitation of their discussion to “duplication of recreation opportunities provided for those visitors who enjoy snowmobiling and hunting experiences in the Huron-Manistee National Forests' **Primitive and Semiprimitive Nonmotorized Areas**” was even more unreasonable in the case of snowmobiles.¹² By definition, ORVs and snowmobiles aren't supposed to be in primitive and semiprimitive **nonmotorized** areas. Therefore, whether or not some snowmobilers wanted to do this, it shouldn't even have been considered. Again, the only question should have been whether there was a duplication of the opportunity for snowmobiling.

Just as with hunting, the Service and the MDNR used unexplainable projections to determine the projected demand for snowmobiling. Mr. Cordell projects the participation rate in the North for snowmobiling to rise from 0.98 in 2000 to 1.22 in 2050. (Cordell (1999) Table VI.5 p. 328) This is a far cry from the 106% increase shown in Table 11. The 46% increase in cross-country skiing is one of the few numbers which comes close to Mr. Cordell's projections. (Cordell (1999) Table VI.3 p. 326) Had the Service and the MDNR looked at the correct projections, they would have seen that the demand for cross-country skiing was increasing at **twice** the rate as the projected demand for snowmobiling – not the other way around!

The fact that the Service and the MDNR did not find any opportunities for reducing duplication in snowmobiling opportunities can only mean they never looked at a map! For example, Map A-12 attached to the FSEIS shows the Michigan DNR Designated Snowmobile Trails on the Manistee National Forest. It shows dozens of loops of varying sizes. Each and every one of those loops are a source of potential duplication!¹³

Even more shocking is the supply analysis (or lack thereof) contained in the Supply and Demand Analysis relating to snowmobiling. The only analysis consists of one table showing the amount of trails on the three national forests in Michigan (Supply and Demand Analysis Table 24 p. 40) and a paragraph describing the ownership of land on which Michigan's 6,200 miles of snowmobile trails¹⁴ are located. (Supply and Demand Analysis p. 44) That's it!

12 It is ironic that while the Service and the MDNR limited their discussion of duplication to snowmobiling in Primitive and Semiprimitive Nonmotorized Areas, the Michigan Snowmobile Association is appealing the Decision, not on the basis that there aren't enough semiprimitive opportunities, but that many of these areas should have been classified as Routed Natural Areas. (Michigan Snowmobile Association Notice of Appeal p. 3)

13 Near the bottom-left corner of the page, there is a loop which is particularly offensive, since it does nothing more than putting snowmobiles much closer to the White River Semiprimitive Nonmotorized Area. Map A-39 provides a closer look at this area and not only confirms this, but shows that the portion of the loop closest to the White River Semiprimitive Nonmotorized Area is entirely on Service roads and could easily be closed to provide a more quiet experience in the White River Semiprimitive Nonmotorized Area.

14 That means if you rode your snowmobile 100 miles every day, it would take **two months** to cover all the trails in the

Even a cursory look at a map shows that the Forests are not being managed in accordance with the ROS. The Briar Hills Semiprimitive Nonmotorized Area is bordered on two sides by a snowmobile trail. (FSEIS Map A-29) The Nordhouse Dunes Wilderness Area has a forest service road as it's eastern boundary. (FSEIS Map A-34)

Unlike hunting, decisions concerning ORVs and snowmobiles are subject to additional requirements besides simply complying with the ROS. 36 C.F.R. §219.21(g) specifically requires that, "Off-road vehicle use shall be planned and implemented to protect land and other resources, promote public safety, and **minimize conflicts with other uses of the National Forest System lands.**"

The Reid Lake Semiprimitive Nonmotorized Area (which contains a large hiking/cross-country skiing trail network) has separate snowmobile and ORV trails within 1 mile of its southern border. (FSEIS Map A-35) Both of these could easily be rerouted farther from the Semiprimitive Nonmotorized Area to reduce the conflicts caused by the noise from the snowmobiles and ORVs.

Even worse, the Whitewater Semiprimitive Nonmotorized Area has a snowmobile trail and an ORV trail **inside** the Semiprimitive Nonmotorized Area! (FSEIS Map A-26) As the ultimate insult, the motorcycle trail (H58-8) just contains a loop inside the Semiprimitive Nonmotorized Area. (FSEIS Map A-26). It doesn't connect to any other trail or road. All it does is put motorcycles inside the Semiprimitive Nonmotorized Area.¹⁵

As the Court of Appeals held, "The mere fact of a nonconformity is no reason to allow it to continue." (*Meister* p. 377) The Service must perform a Forest-wide review to eliminate these and the many other incompatible uses which prevent the Forests from conforming to the ROS. Certainly, the Standards and Guidelines need to prohibit these trails.

Again, the Service concluded, "the available supply of areas and trails on National Forest System and State lands where users may enjoy snowmobiling and hunting should meet the current and foreseeable demand for these recreation experiences." (Decision p. 10) As described above, this was based on a vastly inflated demand for snowmobiling. Therefore, using the correct demand numbers necessarily results in the conclusion that there is duplication in meeting the demand for snowmobiling and that portions of the existing snowmobile trails could certainly be rerouted if not closed.

36 C.F.R. §219.21(a)(2) requires the Service to identify "the settings needed to provide quality recreation opportunities". As the Sixth Circuit held, "It is not enough, therefore, for the Service merely to identify the supply of lands on which an activity *can* occur. It must instead identify the supply of lands on which participants in that activity are afforded a 'quality recreation opportunit[y]' (emphasis in original)." (*Meister* p. 372) The Supply and Demand Analysis failed to perform this analysis. It admits on p. 57:

The level of recreation uses by type (*i.e.* snowmobiling, cross-country skiing, hunting, hiking, etc.) and the quality of recreation opportunities provided by area are not evaluated. A more specific study would need to be conducted to determine if specific

State of Michigan!

15 Amazingly, none of the alternatives even considered closing these trails. (FSEIS p. 145)

areas of the Forests are receiving recreation use levels above the capacity of an area and potential impacts to the quality of the recreation experience provided.

The Service must do this more specific study to comply with the regulation and the decision of the Court of Appeals.

“The Huron-Manistee National Forests are among the rare places in the Lower Peninsula of Michigan with a land base large enough and contiguous enough to provide opportunities for solitude or for relatively remote and semiprimitive types of recreation.” (FEIS p. III-312) While the Service might not be able to achieve absolute quiet in the Wilderness Area and the Semiprimitive Nonmotorized Areas, it needs to adopt standards and guidelines which will produce quieter areas relative to the rest of the Forests. The Service needs to prohibit firearm hunting and shooting and ORV and snowmobile trails in and on the lands bordering the Wilderness and Semiprimitive Nonmotorized Areas. This will come much closer to meeting the desires of the public, the Applicable Laws and the decision of the Court of Appeals than does eliminating **all** Semiprimitive Nonmotorized Areas.

/s/ Kurt J. Meister