NO. 23-1074

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID A. LESH,
Defendant-Appellant.

ANSWER BRIEF OF THE UNITED STATES

On Appeal from the United States District Court
for the District of Colorado
The Honorable Daniel D. Domenico
No. 22-cr-00033-DDD-GPG
The Honorable Gordon P. Gallagher
No. 22-po-07016-GPG

COLE FINEGAN
United States Attorney

KYLE BRENTON
Assistant U.S. Attorney
1801 California Street
Suite 1600
Denver, Colorado 80202
(303) 454-0100

Attorneys for Plaintiff-Appellee
United States of America

ORAL ARGUMENT NOT REQUESTED

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None.

JURISDICTIONAL STATEMENT

David Lesh was charged with misdemeanor offenses against the United States over which the magistrate judge had jurisdiction under 18 U.S.C. § 3401. Judgment against him entered on January 12, 2022, I:66,[1] and he timely appealed to the district court on January 25. I:65. The district court had jurisdiction over the appeal under 18 U.S.C. § 3402 and entered final judgment affirming the convictions on March 10, 2023. I:173. Lesh timely appealed that order on March 14. I:189. This court has jurisdiction over Lesh's appeal of the final judgment under 28 U.S.C. § 1291.

[1] Appellant's Appendix will be cited by volume (in Roman numerals) and page number. Appellee's Supplemental Appendix will be cited as "Supp.I."

STATEMENT OF THE ISSUE

David Lesh—a seller of ski gear and social media provocateur—went snowmobiling in the terrain park at Keystone Ski Resort while it was closed during COVID. He took photographs and posted them to Instagram—a practice he later told a magazine had led to increases in his sales. He was charged with two petty offenses: operating a snowmobile outside a designated area and conducting work activity on National Forest System lands without authorization. He was convicted by the magistrate judge after a bench trial, and the district court affirmed.

1. Was the evidence sufficient to convict Lesh of operating a snowmobile outside designated areas even though the map the magistrate judge took judicial notice of was undated?

2. Did the evidence regarding Lesh's social-media-based business model suffice to support the magistrate judge's conclusion that Lesh's Keystone photo shoot was performed with a commercial motive, and thus "work activity?"

3. Did Congress provide a sufficiently intelligible principle to allow the Forest Service to promulgate the regulatory offense of

conducting unauthorized work activity on National Forest System lands without violating the nondelegation principle?

4. Did the magistrate judge and district court properly apply decades of settled Supreme Court precedent in holding that Lesh was not entitled to a jury trial on his petty offenses?

STATEMENT OF THE CASE

1. Lesh posts photographs to Instagram of snowmobiling through the Keystone Resort terrain park while the resort is closed for COVID.

Lesh is the owner of an outdoor apparel company that sells ski clothes. II:257. He uses social media to market his company and increase public awareness of his brand. II:357, 402-03; I:59, 198, 206. Those social media posts often include photographs of individuals engaged in winter sports or other outdoor activities. II:402-03.

In April 2020, while Keystone Ski Resort was closed due to the COVID-19 pandemic, Lesh posted two photographs to his Instagram account of an individual driving a snowmobile off a jump in the Keystone terrain park. II:249, 258-59, 261-62, 264-65; I:191-92. Alongside the photos, he included the caption, "Solid park sesh, no lift

ticket needed." II:262; I:191-92. Keystone Resort is on National Forest System lands. II:275, 293.

At the time, the closure of Keystone Resort was marked by signs at the base of the mountain, as well as signage and rope lines marking the boundaries of the ski area. II:249-53. In addition, large barriers of snow had been placed in front of all of the terrain park features to make them inaccessible. II:256. The Keystone terrain park was not designed to be used by snowmobiles. II:249.

On the day of Lesh's Instagram posts, a Keystone employee went to the terrain park and saw fresh snowmobile tracks leading off of and looping around the jump where the photo had been taken. II:265, 267, 297-98. Someone had taken a snow shovel from a nearby utility shed and dug a channel through the barrier blocking the jump so that a snowmobile could drive through it. II:267-68. The tracks showed that someone had gone over the jump multiple times and had also been snowmobiling around the resort property. II:268. The employee took photos of the tracks. II:269-74; I:193-97. No Keystone employees were using snowmobiles at the resort during that time. II:266.

Over the next several months, Lesh made two other relevant Instagram posts. First, in June 2020, Lesh posted a photo of him standing on a log in the middle of Hanging Lake. II:304, 307-08; I:214. Second, in October 2020, Lesh posted a photo of him appearing to defecate in Maroon Lake. II:311-12; I:217. Both Hanging Lake and Maroon Lake are on National Forest System lands. I:53. Lesh claims that the Hanging Lake and Maroon Lake photos are both photoshopped, and the government does not claim otherwise. II:344-46; I:53.

In January 2021, *The New Yorker* magazine published an article about Lesh that referenced the Keystone, Hanging Lake, and Maroon Lake photographs and Instagram posts. I:198. The article states that Lesh "posted a couple of photos of him snowmobiling off a jump in a closed terrain park at the Keystone ski area." I:204. It also cited Lesh's claim that his company's sales had increased thirty percent since he posted the photo at Hanging Lake. I:207. In a subsequent YouTube podcast interview, Lesh said regarding the *New Yorker* article that "nothing that [the author] said was untrue or unfair, but it only captures one aspect of me, one part of my life, one part of our marketing, one part of my company." I:218 at :32-:45.

2. Lesh is convicted of operating a snowmobile off a designated route and conducting unauthorized work activity on National Forest System lands.

The government charged Lesh with two petty offenses: (1) operating a snowmobile off a designated route on National Forest System lands, in violation of 36 C.F.R. § 261.14 (count 1); and (2) conducting work activity on Forest System lands without authorization, in violation of 36 C.F.R. § 261.10(c) (count 2). I:21.[2] Count 1 was tied in date and location to the incident at Keystone Resort. *Id.* Count 2 was broader in both date and location—specifying a date range of April 24, 2020 (the date of the Keystone post) through October 21, 2020 (the date of the Maroon Lake post), and including all Forest System lands in Colorado. *Id.*

The case went to a bench trial before the magistrate judge. The government presented the evidence discussed above through the testimony of two witnesses: the Director of Mountain Operations for Keystone Resort, who took photos of the snowmobile tracks in the

[2] Lesh was initially charged with five additional counts of entering a closed protected area and a prohibited body of water based on the Hanging Lake and Maroon Lake photos. I:18-20. The government later dropped those counts. I:21.

Keystone terrain park after seeing Lesh's Instagram post; and the U.S. Forest Service Special Agent who conducted the investigation. *See generally* II:247-428. The government also presented the snowmobiling Instagram posts (I:190-92), the photos of the snowmobile tracks (I:193-96), the *New Yorker* magazine article (I:198), the Hanging Lake and Maroon Lake Instagram posts (I:214-15), and an excerpt of the podcast interview (I:218).

At the close of the government's evidence, Lesh moved for judgment of acquittal on both counts. II:429-33. As to count 1, Lesh argued that the government had failed to show that the route designations were reflected on an over-snow vehicle use map or that Lesh was physically present at Keystone Resort on the charged date. II:429-32. As to count 2, he argued that there was no evidence that Lesh conducted work activity on Forest System lands. II:432-33.

The court denied the motion. II:435-39. It cited the testimony that the closure of the ski area was clearly marked with signage. II:436-37. It then found that, viewed in the light most favorable to the prosecution, "the combination of the pictures, the article, and the video" were sufficient to support the finding that Lesh was the individual

operating the snowmobile in the Instagram photo. II:438. On count 2, the court found that there was sufficient evidence that the posts were part of Lesh's business model, and thus, had a commercial motive. II:438-39.

After trial, the magistrate judge issued a written decision finding Lesh guilty on both counts. I:49. The court first found beyond a reasonable doubt that Lesh possessed or operated a snowmobile off a designated route at Keystone Resort. I:57. The court was particularly persuaded by the photos showing snowmobile tracks in the Keystone terrain park on the day of Lesh's Keystone Instagram posts. I:55-56. In addition, although the statements in the magazine article did not alone prove identity, Lesh's adoption of those statements in the podcast interview provided further evidence of guilt. I:56-57. The court concluded that an over-snow vehicle use map was not required given the obvious closure of the area, but it nevertheless took judicial notice of the map that was publicly available on the internet. I:57-58 n.5.

The map is attached hereto as Attachment 1 and is available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd491314.pdf. Keystone Ski Area is visible in the right-central area of the map, and is

shaded to indicate, per the map's key, an "[a]rea where no motorized over-snow use is permitted." Attach. 1. The map states that it is effective during the winter from November 23 through May 2, but it does not specify a particular year. *Id.*

On count 2, the court found that Lesh's conduct at Keystone Resort—"on lands encompassed by the regulation"—was "work activity" because it was part of an "advertisement and marketing campaign . . . that relied upon social media trolling as a way to stir up controversy and free press while using [Forest System] lands as the location or backdrop." I:59-60. The court did not deem the Hanging Lake and Maroon Lake posts to be independent violations, but found them relevant to proving motive, opportunity, and intent. I:59. That motive was further bolstered by Lesh's adopted admission that his company's sales increased by thirty percent after he posted the Hanging Lake photo. *Id.*

Nearly two months later, Lesh moved for leave to file an out-of-time motion for judgment of acquittal raising a constitutional challenge to 36 C.F.R. § 261.10(c)—the regulation at issue in count 2. Supp.I:18. The motion did not address or discuss the court's decision to take

judicial notice of the over-snow vehicle use map or allude to any sufficiency argument as to count 1. *See generally* Supp.I:18-26. The magistrate judge denied Lesh's request for leave to file his motion out of time. Supp.I:40.

3. Lesh appeals and the district court affirms his conviction.

Lesh appealed his conviction to the district court, which affirmed. I:173. The court held that Lesh had no right to a jury trial where only petty offenses were charged. I:176-78. It concluded that the evidence at trial had been sufficient for a rational factfinder to convict Lesh on both counts. I:178-85. It held that the magistrate judge did not violate the hearsay rule by admitting the *New Yorker* article, based on Lesh's adoption of the article's content in the podcast. I:185-87. And it concluded that the magistrate judge correctly admitted the Maroon Lake and Hanging Lake photos as *res gestae* evidence. I:187-88.

SUMMARY OF ARGUMENT

Lesh raises a flurry of challenges to his convictions, all of which fail.

First, he claims that the evidence was insufficient as to count 1, for operating an over-snow vehicle outside designated areas on National

Forest System lands. His only argument is that the over-snow vehicle map that the magistrate judge took judicial notice of was not sufficient because there was no evidence this map was available on April 25, 2020. But Lesh failed to raise this argument before either the magistrate judge or the district court. The claim is thus subject to plain-error review at best, and because Lesh did not argue plain error in his opening brief, it is waived. Regardless, Lesh cannot satisfy the plain error standard.

Second, as to count 2, he asserts that the evidence was insufficient to conclude that his Keystone photo shoot was "work activity" within the meaning of the regulation. But the magistrate judge was persuaded by the ample evidence that the photo shoot was part of a concerted social media campaign to stir up controversy and drive attention and sales to Lesh's outdoor apparel brand. Lesh quibbles with the weight of this evidence but cannot rebut its sufficiency. The magistrate judge's reliance on Lesh's statements in the Instagram post and to the *New Yorker* as evidence of his commercial motivation did not violate the First Amendment. And interpreting the regulation to reach Lesh's

conduct does not render it void for vagueness (another unpreserved argument).

Third, Lesh argues that Congress's delegation of authority to the Secretary of Agriculture to promulgate the work activity regulation is so broad and standardless that it lacks an intelligible principle and thus violates the nondelegation doctrine. This argument, too, is unpreserved in its current form and directly contradicts the argument Lesh made below. And given that the Supreme Court has found only two unconstitutional delegations in its entire history and has upheld broad delegations such as regulating "in the public interest" as sufficiently intelligible, the ample guidance given by Congress in 7 U.S.C. § 1011(f) and its accompanying statutory subsection more than meets the intelligible principle test.

Finally, Lesh continues his quixotic quest to establish a new right to a jury trial for petty misdemeanor offenses. This argument remains barred by decades of clear Supreme Court precedent and must be rejected once again.

The convictions should be affirmed.

ARGUMENT

I. Lesh failed to preserve his claim that the undated map was not sufficient and he cannot show plain error.

Lesh's first argument is that the government failed to present sufficient evidence on an element of the offense underlying his conviction on count 1. Lesh did not preserve this claim and waived it by failing to present it below. And he cannot show plain error.

A. Lesh failed to preserve his map-date argument and the court should thus decline to consider it.

Section 261.14 of Title 36 of the Code of Federal Regulations instructs the Forest Service to designate certain areas for over-snow vehicle use and to identify these designated areas on an over-snow vehicle use map. These maps must be made available to the public. The regulation also prohibits the operation of over-snow vehicles such as snowmobiles outside those designated areas.

According to Lesh, this means that an element of a § 261.14 violation is that the Forest Service did indeed create such a map and it was publicly available at the time of the offense. Because it is an element, Lesh says, the government was required to introduce the map at trial. The magistrate judge rejected this claim. But in an abundance

of caution, he took judicial notice of the relevant map, which he found on the Forest Service's website. *See* Attach. 1.

In his opening brief in this court, however, Lesh makes a different argument. Now he claims that even the judicially-noticed map was insufficient because it does not state on its face that it had been issued before Lesh drove his snowmobile into Keystone terrain park on April 25, 2020. Op.Br. at 19-22. But Lesh has never made this argument before this appeal.

After the magistrate judge issued the conviction order, Lesh sought leave to file a renewed motion for acquittal. Supp.I:18. But he did not identify the undated map—or indeed any issue regarding count 1 at all—as something he planned to argue in such a motion. *See* Supp.I:26.

In his appeal to the district court, Lesh argued in a single paragraph that the government failed to introduce the supposedly-required map. I:91-92. But he did not discuss the judicially-noticed map or argue that it was insufficient because it was not dated. *See id.* And, although the government pointed out that the magistrate judge

taking judicial notice of the map mooted the map issue entirely, I:136, Lesh's reply ignored count 1 altogether. *See* I:162-70.

Lesh may argue that these are the same claim, but they are not. This court's preservation requirements apply with equal strength to "a new theory on appeal that falls under the same general category as an argument presented at trial." *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002). While Lesh did argue below that the government was required to admit *a* map, he never argued that the *particular* map the magistrate judge took notice of was insufficient because it did not include a specific year. That is thus a new argument that Lesh did not preserve for appeal.

Because Lesh forfeited this argument below, it is subject only to plain-error review. However, Lesh's opening brief fails to argue plain error. As a result, the court has the discretion not to consider this claim even under the plain error standard.

This court's decision in *United States v. Leffler* strongly counsels in favor of that approach. 942 F.3d 1192, 1196-98 (10th Cir. 2019). The defendant in *Leffler* attempted to raise a challenge to the sufficiency of the evidence that he failed to present to the district court. *Id.* at 1197.

As the court emphasized, "[w]hen an appellant fails to preserve an issue *and also* fails to make a plain-error argument on appeal, we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise." *Id.* at 1196 (emphasis added). Like Leffler, Lesh asks this Court to consider an argument that he never presented to the magistrate judge or the district court, and he has not explained why this alleged error satisfies the plain-error test. Consequently, the court should consider this claim waived.[3]

B. Lesh cannot establish plain error.

Even if the court were inclined to review this issue for plain error, reversal would not be appropriate. To show plain error, Lesh must demonstrate "(1) an error, (2) that is plain, which means clear or obvious under current law, [] (3) that affects substantial rights, [and

[3] The court could also hold this argument waived pursuant to the firm waiver rule. Where a party fails to object to a particular aspect of a magistrate judge's recommendation to the district court, he "waives review of both factual and legal questions." *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119 (10th Cir. 2005). This rule should also apply here, where a magistrate judge's decision has already been reviewed by the district court. Put differently: Failing to make a contemporaneous objection is forfeiture; failing to raise an issue until the second level of appeal is waiver.

that] (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (quoting *United States v. McGehee*, 672 F.3d 860, 866 (10th Cir. 2012)). "[T]he defendant has the burden of establishing each of the four requirements for plain-error relief." *Greer v. United States*, 141 S.Ct. 2090, 2097 (2021).

Lesh cannot satisfy the first, second, or fourth prongs of the plain error test. As to the first, even if the map were an element of the offense as Lesh claims, the lack of a year on its face does not render it plainly insufficient. Under the sufficiency of the evidence standard, a conviction may be reversed "only when no reasonable [factfinder] could find the defendant guilty beyond a reasonable doubt." *Id.* The court may not second-guess the factfinder as long as, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact" could have found the defendant guilty. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (emphasis in original).

It is not plainly irrational for a factfinder to conclude—as the magistrate judge did—that a government map available on the internet in October of 2021 was also available in April of 2020. That is

particularly the case where the relevant regulation was amended to require the map to be prepared in 2015. *See* Use by Over-Snow Vehicles (Travel Management Rule), 80 Fed. Reg. 4500-01 (2015); Op.Br. 25 ("[I]t was only in 2015 that all Ranger Districts were first directed to issue over-snow vehicle use maps."). Under the "highly deferential" sufficiency standard, *United States v. Burtrum*, 21 F.4th 680, 685 (10th Cir. 2021), this inference drawn by the magistrate judge was not even error, let alone plain error.

With respect to the second element, any error was not clear or obvious under well-settled law. Lesh claims that admission of a properly-dated map was a "condition precedent" to the offense. Op.Br. 17. Although his argument is that admission of the map is an *element* of the offense, he does not cite or address any case law regarding what is or is not an element—as opposed to, say, a procedural instruction to the agency or an affirmative defense that must be raised by the defendant. By simply assuming—rather than showing through case law and analysis—that the map is an element, Lesh fails to show that the magistrate judge's conclusion to the contrary was clear and obvious error.

Nor can Lesh make out the fourth prong of plain error. Although a conviction in the absence of sufficient evidence on an element may typically satisfy the first three elements of plain error, a defendant still must establish that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Goode*, 483 F.3d 676, 681 (10th Cir. 2007); *see also Leffler*, 942 F.3d at 1199 n.1 (noting that the fourth prong still must be satisfied even for sufficiency arguments).

Lesh offers nothing but speculation to support the theory that the map wasn't available in April 2020—and it is easy to see why. The same map was available at the same link then. *See* Wayback Machine, https://web.archive.org/web/20170501000000*/https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd491314.pdf.[4] In fact, the map on the

[4] The court may take judicial notice of this website. *See, e.g.*, *Erickson v. Nebraska Machinery Co.*, No. 15-cv-01147-JD, 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015) ("Courts have taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *Sabatini v. Price*, No. 17-CV-01597, 2018 WL 1638258, at *5 (S.D. Cal. Apr. 5, 2018), *aff'd sub nom. Sabatini v. Azar*, 749 F. App'x 588 (9th Cir. 2019). *See also United States v. Burch*, 169 F.3d 666, 672 (10th Cir. 1999) ("Judicial notice may be taken at any time, including on appeal.").

Forest Service website has been unchanged since at least February 2017.

Moreover, the obvious purpose of the designation provision of § 261.14 is to ensure that a defendant has notice that the area at issue is closed to over-snow vehicles. And there was ample evidence Lesh knew of the closure, including the fact that signs had been posted and the area blocked off with snow berms that Lesh had to dig through (with a stolen shovel) to access the park. I:51. Moreover, Lesh's own words in his Instagram post that there was "no lift ticket needed" establish that he knew the area was closed. I:191.

Given this, any insufficiency could easily have been cured if this argument had actually been presented to the magistrate judge. *See, e.g., Goode*, 483 F.3d at 682; *Johnson v. United States*, 520 U.S. 461, 470 (1997) (declining to find plain error where evidence of element not found by jury was "overwhelming and essentially uncontroverted"); *cf. Greer v. United States*, 141 S. Ct. 2090 (2021) (holding that defendant cannot establish plain error on claim about missing element of crime without some suggestion that he could have presented evidence to negate that element). Affirming his conviction would thus not create the type of

"miscarriage of justice" required to establish the fourth prong of plain error.

II. The evidence at trial connecting Lesh's social-media activity and his business sufficed to support the verdict that he engaged in "work activity" on National Forest System lands.

As to count 2, Lesh argues (1) that the evidence was insufficient for a rational factfinder to conclude that he engaged in "work activity" on National Forest System lands, (2) that prosecuting him for posting the photograph to Instagram violates the First Amendment, and (3) that 36 C.F.R. § 261.10(c) as applied to his conduct is void for vagueness. The first two arguments fail on their merits; the third is not preserved for appeal.

A. The evidence linking Lesh's Instagram posts with his ski apparel business was sufficient for a rational factfinder to conclude that Lesh engaged in work activity.

The regulation prohibits "conducting any kind of work activity" on National Forest System lands "unless authorized by Federal law, regulation, or special-use authorization." 36 C.F.R. § 261.10(c). Lesh does not contend that his Keystone photo shoot was authorized, so the only question for the purposes of his sufficiency argument is whether

there was enough evidence for a rational factfinder to conclude that Lesh engaged in "work activity" within the meaning of the regulation. Lesh preserved this argument. I:92-97; II:471. The court reviews the sufficiency of the evidence de novo, but its inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318 (emphasis in original); *see also Burtrum*, 21 F.4th at 685 (noting that the sufficiency standard is "highly deferential" to the factfinder's conclusions).

The answer is yes. The magistrate judge relied on Lesh's own words to conclude that the Keystone photo shoot was part of a coordinated plan to capture attention online and drive traffic to Lesh's ski apparel company. Lesh told the *New Yorker* that as a "little guy" in the industry, it's not "interesting and unique" to be "super 'eco this' and 'eco that.'" I:201. But provoking the federal government turned out to be a more lucrative strategy: as soon as he had "one misdemeanor, in a terrain park, [] everyone goes nuts." I:205. "The more hate I got," he said, "the more people got behind me." I:206. He characterized the

prosecution as "an opportunity to reach a whole new group of people—while really solidifying the customer base we already had." I:206. And the strategy succeeded, as he told the interviewer that after he posted the Hanging Lake photograph, his sales went up thirty percent. I:207. These statements were sufficient to support the magistrate judge's conclusion that "the advertisement and marketing campaign with which Defendant embarked, beginning with the Keystone Resort photographs, was one that relied upon social media trolling as a way to stir up controversy and free press while using NFS lands as the location or backdrop." I:59.

This court has held that "the key" to whether conduct constitutes "work activity" under § 261.10(c) is whether "the work activity or service is a commercial activity." *United States v. Brown*, 200 F.3d 710, 714 (10th Cir. 1999). Where a defendant's conduct is "motivated by the prospect of commercial gain," he is engaged in commercial activity and thus "work activity" within the meaning of the regulation. *Id.* at 715. Conducting a photo shoot on National Forest System lands to generate content for a coordinated social media campaign to drive attention to one's company is certainly "motivated by the prospect of commercial

gain," and a rational factfinder could (and did) conclude that Lesh's conduct was thus "work activity."

Lesh's arguments to the contrary fail:

First, he contends that his conduct did not meet the definition of commercial activity in 36 C.F.R. § 261.2. Op.Br. 27. Under that provision, "commercial use or activity" means, among other things, "any use or activity … where the primary purpose is the sale of a good or service … regardless of whether the use or activity is intended to produce a profit." 36 C.F.R. § 261.2.

Lesh complains that the magistrate judge "*never made a primary purpose finding*." Op.Br. 27 (emphasis in original). But while the magistrate judge did not find Lesh's "primary purpose" in so many words, the entire thrust of his analysis of Lesh's words and conduct is that Lesh was there to create content for his social media campaign to drive attention and sales to his business. *See* I:59. It is impossible to read the conviction order and escape the conclusion that the magistrate judge found Lesh's primary purpose was to drive up sales of his products. Lesh's attempts to dissociate his conduct from his business—arguments that he did not tag the name of the company in the

Instagram post, that he did not wear branded merchandise in the photo, etc., Op.Br. 28, 32-33—are simply quibbles with the weight of the evidence, not its sufficiency, and should not trouble this court as such issues are "exclusively the province of the [factfinder]." *United States v. Tennison*, 13 F.4th 1049, 1059 (10th Cir. 2021).

Second, Lesh claims that his photo shoot could not have been work activity because he "received neither cash nor anything else of value" for it. Op.Br. 28. In making this argument he relies on cases from the Ninth Circuit and District of Colorado that predate this court's articulation of the proper standard in *Brown*. *See id.* (citing *United States v. Strong*, 79 F.3d 925 (9th Cir. 1996) & *United States v. Bartels*, 1998 WL 289231 at *4 (D. Colo. 1998) (unpublished)). In light of *Brown*, however, the standard this court applies is whether the evidence sufficed for a rational factfinder to conclude that Lesh had a commercial motivation. To the extent those earlier cases required a direct payment (which they did not), they are superseded by this court's holding that the conduct need be motivated only by "*the prospect of* commercial gain." 200 F.3d at 715 (emphasis added). Lesh's was, and so he engaged in "work activity."

Third, Lesh takes issue with the magistrate judge's discussion of the "still photography" provisions of the applicable regulations. Op.Br. 29-30. The court need not consider this, though, because the magistrate judge's discussion of still photography was an alternative holding. The magistrate judge held that "*even without considering these admissions by Defendant*, the Court *could* still find that Defendant's actions were commercial in nature" under the still photography regulation. I:60 (emphasis added). This discussion was thus an alternative holding in which the magistrate judge set aside Lesh's statements and concluded that he could be convicted anyway. This was prudent given Lesh's then-active objections to admission of his statements from the *New Yorker* article. Now, however, Lesh has dropped those challenges, and there is thus no need to consider the alternative still photography holding. *See United States v. Porter*, 66 F.4th 1223, 1227 (10th Cir. 2023) (declining to consider alternative holding where primary holding has been affirmed).

The evidence was sufficient for the magistrate judge to convict Lesh on count 2.[5]

B. Lesh's Instagram post was not the basis of his conviction, but rather evidence of his commercial motivation for the photo shoot, and so convicting him did not violate the First Amendment.

Next, Lesh argues that prosecuting him for posting the photograph to Instagram violated his First Amendment rights. Op.Br. 34-38. While the government argued to the district court that Lesh failed to preserve this argument, the district court considered and rejected it on its merits. I:183-84. This court reviews First Amendment issues de novo. *United States v. Wenger*, 427 F.3d 840, 845 (10th Cir. 2005).

Lesh's argument rests on the false premise that he was prosecuted for his speech—for posting the photograph to Instagram. To the contrary, Lesh was prosecuted for engaging in work activity on National

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[5] Lesh makes a drive-by reference to the rule of lenity, claiming that "[i]f the Court determines that the regulation is ambiguous" as to him, the rule should be applied. Op.Br. 31. It is Lesh's responsibility—not the court's—to discern and argue a "grievous ambiguity or uncertainty" in the language of the regulation requiring resort to the rule of lenity. *Muscarello v. United States*, 524 U.S. 125, 138 (1998). No such ambiguity exists here.

Forest System lands without authorization. The acts underlying this conviction were his driving his snowmobile past "area closed" signs, stealing a snow shovel from a utility shed and digging his way through a snow berm, and jumping off a ski jump in an otherwise-closed terrain park for photographs. Lesh's speech—in his Instagram post, the *New Yorker* article, and the podcast—was relevant only to show that the actions he performed on April 25 were "motivated by the prospect of commercial gain," and thus work activity. *See Brown*, 200 F.3d at 715.

It is commonplace for a defendant's motivation to be proven by their words, even when those words are spoken at a time removed from the *actus reus* of the crime. The use of speech as evidence of intent does not transform every such criminal prosecution into a First Amendment case. "The First Amendment … does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

Lesh claims that his speech was not simply evidence of intent, but that it was "[t]he *only* aspect of Lesh's actions that rendered his conduct potentially 'commercial'" and thus subject to § 261.10(c). Op.Br. 35 (emphasis in original). But the magistrate judge relied on several facts

to demonstrate the commercial nature of Lesh's motive: the Keystone post, to be sure, but also the Hanging Lake and Maroon Lake photos, the *New Yorker* article, and the podcast. *See* I:59-60. The Instagram post did not "render" Lesh's activity commercial—it was simply one piece of evidence of the "advertisement and marketing campaign," I:59, that the court found was Lesh's underlying motive for breaking into Keystone on April 25.

Lesh's legal argument rests entirely on a Second Circuit case, *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). *See* Op.Br. 36-37. In *Caronia*, the government prosecuted a pharmaceutical sales representative for promoting an off-label use in selling a drug to doctors. 703 F.3d at 160-62. Based on the trial record, it was clear to the court that the sole basis of the prosecution was the representative's actual words spoken to the doctors, rather than any other underlying misconduct. *See id.* at 161 ("[T]he government's summation and the district court's instruction left the jury to understand that Caronia's speech was itself the proscribed conduct."). The court held that this prosecution violated the First Amendment where the defendant's words were admitted not as evidence of intent, but rather "that the

government prosecuted Caronia *for* his promotion and marketing efforts." *Id.* at 161 (emphasis in original).

Even the *Caronia* court, though, assumed that the government could present the defendant's speech as evidence of some other underlying crime. *See id.* at 161. And multiple courts since have observed that, even under *Caronia*, use of speech to prove motive or intent does not run afoul of the First Amendment. *See, e.g.*, *United States ex rel. Polansky v. Pfizer, Inc.*, 822 F.3d 613, 615 n.2 (2d Cir. 2016) ("*Caronia* left open the government's ability to prove misbranding on a theory that promotional speech provides evidence that a drug is intended for a use that is not included on the drug's FDA-approved label."); *United States v. Amarin*, 119 F. Supp. 3d 196, 228 (S.D.N.Y. 2015) ("*Caronia* does not limit the Government's ability to use promotional speech to establish intent in a misbranding action with a proper *actus reus*."); *United States v. Facteau*, No. 15-CR-10076-ADB, 2020 WL 5517573, at *14 (D. Mass. Sept. 14, 2020) (unpublished) ("Here, the use of speech to actively market and promote the device for off-label use, as Defendants did, was evidence of their intent that the device be used for a purpose that the FDA had not approved and was

not itself the crime. The Court therefore finds that Defendants' First Amendment rights were not violated by the conviction.").

Here, as in those cases, Lesh's speech was introduced as evidence that his activities at Keystone on April 25 had a commercial motive and were thus work activity. His speech was not itself the charged crime. Thus even if *Caronia* were binding on this court—which it is not—it would not establish that Lesh's prosecution violated the First Amendment.

But even if Lesh were correct and his violation did encompass the posting of this photograph to Instagram, it still would not follow that his actions were constitutionally protected activity. Rather, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Such regulations are justified if they further an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on

alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See id.*

Those requirements are met here. The regulation is designed to prevent people from conducting commercial activity on National Forest System land without *at least* notifying the government and obtaining permission in the form of a special-use permit. The notice and permit requirement furthers the government's important interest in protecting these natural areas. The regulation is entirely unrelated to the suppression of speech, and any incidental restriction is no greater than necessary.

Although Lesh argues that this regulation is a content-based restriction, he misunderstands that term. A restriction is not content-based simply because it requires reading (or viewing) the speech or expression at issue. *See, e.g.*, *City of Austin, Texas v. Reagan Nat'l Advert. of Austin*, 142 S. Ct. 1464, 1471 (2022). The Supreme Court has repeatedly rejected "the view that any examination of speech or expression inherently triggers heightened First Amendment concern." *Id.* Only "regulations that discriminate based on the topic discussed or the idea or message expressed [] are content based." *Id.* The regulation

in this case does not discriminate against any messages or topics because the vast majority of conduct it prohibits is not expressive in any way.

And the regulation is not a restraint on speech based on content—to the extent it reaches speech at all, its effect is limited to commercial speech. But commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). And Lesh has not made a commercial speech argument at all.

Lesh's conviction did not violate the First Amendment.

C. Lesh did not preserve a void-for-vagueness challenge, and the regulation is not so vague as to be constitutionally invalid.

Lesh argues that § 261.10(c) as applied to his conduct is void for vagueness. Op.Br. 38-42. Lesh did not preserve this argument for appeal. Neither the phrase "void for vagueness" nor any of its constituent parts appear anywhere in the record on appeal. Lesh's brief does not identify any location in the record where he made this

argument. *See* 10th Cir. R. 28.1(A). The court should decline to consider it. *See McDonald* 287 F.3d at 999.

Lesh did argue that his Fifth Amendment right to due process was violated by the prosecution because he did not have notice that his conduct fell within the scope of the regulation as ultimately interpreted by the magistrate judge. II:472; *see also* I:184 (district court holding that this generic due process notice argument was preserved). Even if the court finds this sufficient to preserve the specific void for vagueness argument, Lesh still cannot prevail on it.

The void for vagueness principle applies only to "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). The regulation prohibits "any work activity" on National Forest System lands without authorization, and this court has held that "work activity" is any conduct "motivated by the prospect of commercial gain." *Brown*, 200 F.3d at 715. So the line between work activity and non-work activity is not drawn based on, to take examples from Lesh's parade of horribles, the size of a defendant's Instagram following or the logos on their

clothes in vacation pictures. Op.Br. 41. Rather, the issue turns on the defendant's motivation, and whether it was commercial in nature. This distinction is clear and easily understood, and such motivation determinations are made by factfinders in countless courts every day. Lesh's conduct fell on the wrong side of it here.

Lesh complains that his prosecution was unprecedented and unforeseeable because the government has never before prosecuted someone for violation of the regulation where they were not "paid directly [for] the work activity or services." Op.Br. 40. (Lesh does not explain where he acquired this encyclopedic knowledge of all past prosecutions under the regulation.) But, again, a violation of § 261.10(c) does not turn on where, when, how, or even whether the defendant was directly paid for their work activity. Rather, as this court held in *Brown*, a violation hinges on the defendant's motivation in engaging in the conduct. The motivation of defendants in other cases involving direct payment was the prospect of commercial gain, just as Lesh's was here. There was thus nothing unprecedented about this prosecution.

III. Congress did not violate the nondelegation principle in giving the Secretary of Agriculture authority to promulgate 36 C.F.R. § 261.10.

Lesh next argues that the statute under which § 261.10 was promulgated—7 U.S.C. § 1011(f)—represents an unconstitutional delegation of legislative power to the executive branch. Op.Br. 43-48. This argument is not preserved for appeal, and even if it were, it has no merit.

A. Lesh has made three different, conflicting nondelegation arguments, and the current version is not preserved for appeal.

Lesh has made three different nondelegation arguments over the three phases of this case. Before the magistrate judge, he filed a motion to dismiss the indictment in which he argued that the court should apply a novel nondelegation analysis proposed by then-Judge Gorsuch in his dissent from denial of rehearing en banc in *United States v. Nichols*, 784 F.3d 666, 667-77 (10th Cir. 2015). Lesh urged the court to conclude—based entirely on the novel analysis proposed in the *Nichols* dissent—that the delegation in § 1011(f) is unconstitutional. I:27. The magistrate judge properly noted that a dissent is not the law, that no court had ever adopted the *Nichols* dissent's analytical framework, and

that Lesh had not argued a nondelegation violation under the actual law. I:47 ("Defendant does not rely upon controlling precedent or make a cogent argument.").

On appeal to the district court, Lesh presented a second, inconsistent nondelegation argument. He argued that the delegation to the Secretary of Agriculture in § 1011(f) was limited to the regulation of activity occurring on National Forest System land and did not extend so far as to permit the Secretary to promulgate regulations that punished off-land activities, such as Lesh's Instagram post. I:94-95. He conceded that § 1011(f) was "a narrow delegation … to regulate activities occurring *on* the land." I:94 (emphasis in original). This argument was thus founded on the proposition that the delegation in § 1011(f) was *valid* as to activities occurring on National Forest System land, and merely that the application of the regulation to Lesh's "off-land" activities exceeded the scope of the valid delegation from Congress. This conflicts directly with the argument Lesh made in his motion to dismiss. The district court rejected this argument because Lesh was prosecuted for his on-land activities, not for posting the photograph to Instagram. I:182.

Lesh now makes a third nondelegation argument. He once again asserts that the delegation in § 1011(f) is overbroad and invalid on its face, but this time because it lacks an intelligible principle—the actual governing legal standard. Op.Br. 43-47. This is a new argument he did not present to the magistrate judge or the district court, and it is thus not preserved for appeal. *See McDonald* 287 F.3d at 999. This rule should apply with particular force here, because Lesh seeks to press an argument that directly contradicts his position below—that applying § 261.10(c) to his off-land conduct exceeded the scope of an otherwise-valid delegation. *See Saulsbury Oil Co. v. Phillips Petroleum Co.*, 1142 F.2d 27, 34 (10th Cir. 1944) (a party "may not on appeal change its theory and take a position inconsistent therewith").

B. Congress provided an intelligible principle in the statute to guide the agency's rulemaking, and so did not violate the nondelegation doctrine.

Even if the court were to overlook the preservation issue, Lesh's third attempt to argue nondelegation is not the charm. Congress does not violate the nondelegation rule "so long as [it] formulates an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *United States v.*

Barrett, 496 F.3d 1079, 1108 (10th Cir. 2007) (citing *United States v. Mistretta*, 488 U.S. 361, 371 (1989)) (cleaned up).[6]

Finding an intelligible principle is not an arduous task—in its history, the Supreme Court has found such a principle lacking only twice. *See Whitman v. Amer. Trucking Ass'ns*, 531 U.S. 457, 474 (2001); *see also Gundy v. United States*, 139 S.Ct. 2116, 2129 (2019) ("Only twice in this country's history (and that in a single year) have we found a delegation excessive."). Indeed, as airy a congressional charge as regulating "in the public interest" has been found sufficient to provide an intelligible principle. *See Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 U.S. at 474-75.

Section 1011(f) charges the Secretary of Agriculture with "mak[ing] such rules and regulations as he deems necessary to prevent

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[6] Even the *Nichols* dissent recognized that the Supreme Court "has applied the intelligible principle test to regulations that may be enforceable through criminal penalties." *Nichols*, 784 F.3d at 672 (Gorsuch, J., dissenting from denial of rehearing en banc).

trespasses and otherwise regulate the use and occupancy of" National Forest System land "in order to conserve and utilize it or advance the purposes of this subchapter." 7 U.S.C. § 1011(f). Relying primarily on an out-of-circuit, unpublished district court opinion interpreting a different statute,[7] Lesh argues that this amounts to "a total absence of guidance" by Congress to the executive and lacks an intelligible principle. Op.Br. 48 (quoting *Jarkesy v. S.E.C.*, 34 F.4th 446, 462 (5th Cir. 2022), *cert granted* 143 S.Ct. 2688 (2023)).

Congress did not end § 1011(f) with the words "as he deems necessary," and leave the rest up to the Secretary's discretion, however. Instead, Congress told the Secretary to make rules necessary "to prevent trespass and otherwise regulate the use and occupancy" of the land "in order to conserve and utilize it or advance the purposes of this subchapter." Even looking only at this provision, Congress at the outset gave the Secretary three intelligible principles: preventing trespass, conserving the land, and utilizing the land. Those alone would suffice to pass the intelligible principle test. *See Whitman*, 531 U.S. at 474

[7] *See United States v. Pheasant*, No. 21-CR-00024-RCJ-CLB, 2023 WL 3095959 (D. Nev. Apr. 26, 2023) (unpublished).

(recounting several highly generic congressional directions held to be sufficient).

Zooming out, Congress gave the Secretary even more guidance in directing her to promulgate regulations to "advance the purposes of this subchapter." Section 1011 appears in the Bankhead-Jones Farm Tenant Act, *see* 7 U.S.C. § 1000, as part of subchapter III, addressing "Land Conservation and Land Utilization." Subchapter III includes 7 U.S.C. § 1010, which requires the Secretary to "develop a program of land conservation and land utilization" aimed at, among other goals, "preserving natural resources, protecting fish and wildlife, developing and protecting recreational facilities, … and protecting the public lands, health, safety, and welfare, but not to build industrial parks or establish private industrial or commercial enterprises."

This litany of intelligible purposes guides the Secretary's rulemaking discretion and meets the nondelegation test. And by directing the Secretary to "preserv[e] natural resources" and "protect[] recreational facilities… but not to build … commercial enterprises," Congress all but invited the Secretary to ban "work activity" on the regulated lands. *See* 36 C.F.R. § 261.10(c).

Section 1011(f) is not an unconstitutional delegation of legislative power to the executive branch.

IV. Binding Supreme Court precedent establishes that Lesh had no right to a jury trial.

Lesh's final claim is that he was improperly denied a jury trial. He raised this issue below, and the magistrate judge explained that Lesh was not entitled to a jury trial because the charges were for petty offenses. II:226, 228. This Court reviews a defendant's claim that he was entitled to a jury trial de novo. *United States v. Penk*, 319 F. App'x 733, 734 (10th Cir. 2009) (unpublished); *United States v. Stenzel*, 49 F.3d 658, 660 (10th Cir. 1995).

There is no right to a jury trial for petty offenses. *Lewis v. United States*, 518 U.S. 322, 325 (1996); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). An offense with a maximum prison term of six months or less is presumptively a petty offense. *Lewis*, 518 U.S. at 326. This rule applies even when a defendant is charged with multiple petty offenses that could result in an aggregate sentence exceeding six months. *Id.* at 330; *see also United States v. Luppi*, 188 F.3d 520 (Table), 1999 WL 535295, at *6 (10th Cir. 1999) (unpublished).

Lesh does not dispute that he was charged only with petty offenses. The maximum sentence for each violation was six months' imprisonment. 36 C.F.R. § 261.1b. That made them Class B misdemeanors and, by statute, petty offenses. 18 U.S.C. § 3559(a)(7) (providing that offense with a maximum term of imprisonment of six months or less is a Class B misdemeanor), § 19 (providing that Class B misdemeanor is a petty offense). Thus, Lesh had no constitutional right to a jury trial for those offenses. *Lewis*, 518 U.S. at 325; *Penk*, 319 F. App'x at 734.

As the district court recognized, neither it nor the magistrate judge had authority to depart from decades of settled Supreme Court precedent. I:176-78. Lesh's arguments to the contrary—based on commentators who have questioned this long-standing rule and tea-leaf-reading about what some Justices of the Supreme Court might do in the future—do not empower this court to do so either.

CONCLUSION

Lesh's convictions should be affirmed.

DATED: September 8, 2023

Respectfully submitted,

COLE FINEGAN
United States Attorney

/s/ KYLE BRENTON
KYLE BRENTON
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 32(a)(7)(B)(i), I certify that the **ANSWER BRIEF OF THE UNITED STATES** is proportionally spaced and contains 8,428 words, according to the Microsoft Word software used in preparing the brief.

/S/ KAYLA KEITER
KAYLA KEITER
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

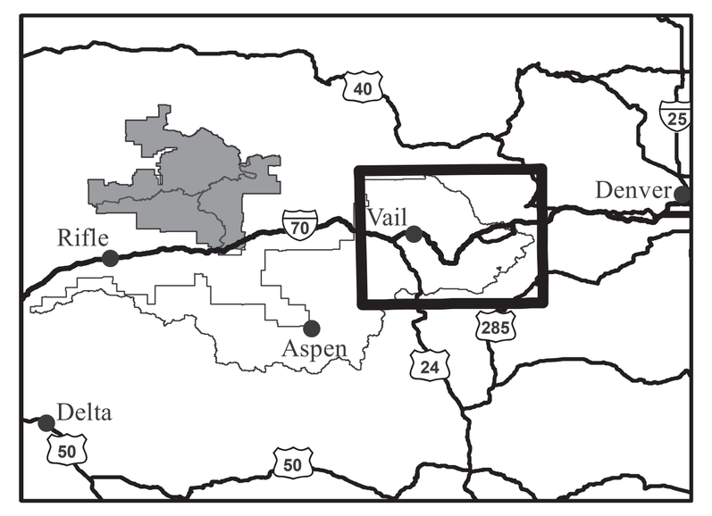
/S/ KAYLA KEITER
KAYLA KEITER
U.S. Attorney's Office

Winter
Motor Vehicle Use Map
White River National Forest

Dillon Ranger District
Effective Dates: Nov 23 - May 20

Colorado · Forest Service
United States Department of Agriculture

VICINITY MAP



INFORMATION SOURCES

White River National Forest
Supervisor's Office
900 Grand Avenue
Glenwood Springs, CO 81601
Phone: (970) 945-2521

Dillon Ranger District
680 Blue River Parkway
Silverthorn, CO 80498
Phone: (970) 468-5400

White River National Forest
Website:
www.fs.usda.gov/whiteriver

In case of emergency, Dial 911

Legend

- Plowed Route Within WRNF Boundary: Route maintained for winter wheeled motor vehicle access
- Route shown in Open Motorized area for informational purposes only
- Designated Routes in Restricted Areas: Routes open to over-snow motorized vehicles where over-snow travel is restricted to designated routes (100 feet either side)
- Fluctuating Snowline Route: Route with fluctuating closure points depending on snowline
- Motorized Prohibited Areas: Area where no motorized over-snow use is permitted
- Restricted Areas: Areas currently closed to motorized over-snow travel except on designated routes shown on map.
- Open Motorized Areas: Areas where motorized over-snow use is permitted without restriction.
- Interstate
- Highways, US, State
- Other Public Roads
- Hut
- Information
- Winter Trailhead
- Forest or Unit Boundary
- National Forest System Lands
- Non-National Forest System Lands within the National Forest
- Wilderness Boundary
- District Boundary
- Township and Range Lines
- Lakes and Rivers
- 200 ft contour line

0 1 2 4 Miles

PURPOSE AND CONTENTS OF THIS MAP

This winter Motor Vehicle Use Map (MVUM) identifies those routes and areas designated for winter over–snow motor vehicle use pursuant to 36 CFR 212 Subpart C for the purpose of enforcing the prohibition at 36 CFR 261.13 and 36 CFR 261.14.

The winter season is considered the snow season. Winter Season over-snow motorized travel restrictions begin Nov. 23 and ends May 20 (Vail Pass Recreation Area Nov. 15th – May 20th). Over-snow vehicles are defined as: "a motor vehicle that is designed for use over the snow and runs on tracks and/or ski or skis while in use over snow." (36 CFR 212.1).

Plowed access routes to winter trailheads are plowed by multiple partners and/or counties. This MVUM shows plowed routes only within forest boundaries. Other than over-snow vehicles, only highway legal vehicles (licensed full size vehicles) may travel on plowed routes. Due to fluctuating snow conditions some routes (as identified in legend), have closure points that move with the snow. Follow travel restrictions posted on the ground on these routes.
A route may also be open to summer modes of travel during the winter season per special order. Contact local ranger district for more information.

Designation of a route or area for winter over-snow motor vehicle use shown on this map should not be interpreted as encouraging or inviting use or implying that the route or area is marked and/or passable, actively groomed, or safe for travel.

Seasonal weather conditions and natural events may render designated routes or areas impassable for extended periods. Users are responsible for their own safety, which includes avalanche awareness. Designated open areas may contain dangerous or impassable terrain. These designations apply only to National Forest System routes and lands.

RIDE RESPONSIBLY

Responsible use is key to the success of travel management and a sustainable recreation system.

- It's your responsibilty to know where Prohibited Areas are, including Wilderness.
- Travel only in open areas or on routes as identified on the motor vehicle use map.
- Be respectful of other forest users and private property owners.
- Avoid routes with inadequate snow cover
- Respect wildlife's wintering habitat
- Plan your visit and be safe
- Help maintain the integrity and investment of groomed routes.

WINTER SAFETY

Planning your visit in advance will help ensure you have a great time.

- Let someone know before you go. Tell a friend or family member where you are going and when you expect to return. Cell phones rarely work within the forest.
- Check the forecast before arriving and bring equipment for changing conditions (e.g., waterproof gear, extra layers).
- Check avalanche conditions before arriving and avoid riding in potential avalanche areas. For current conditions, visit http://avalanche.state.co.us/index.php.
- Carry avalanche protection (e.g., emergency beacon, shovel).
- Be safe. Don't ride alone.

FS-873-0215

PROHIBITIONS

Possession or operation of an over-snow vehicle on National Forest System lands in violation of restriction or prohibition established pursuant to 36 CFR 212, subpart C (36 CFR 261.14) is prohibited.

Violations of 36 CFR 261.14 are subject to a fine of up to $5,000 or imprisonment of up to 6 months or both (U.S.C. 3571(e)). This prohibition applies regardless of the absence or presence of signs.

Routes and areas may also be subject to temporary, emergency closures and visitors must comply with signs notifying them of such restrictions. A National Forest may issue an order to close a route or area on a temporary basis to protect the life, health, or safety of forest visitors or the natural or cultural resources in these areas. Such temporary, emergency closures are consistent with the Travel Management Rule (36 CFR 212.52(b); 36 CFR 261, subpart B).

OPERATOR RESPONSIBILITIES

Operating a motor vehicle on National Forest System lands carries a great responsibility. Not only must you know and follow all applicable traffic laws, you need to show concern for the environment as well as other forest users. As a motor vehicle operator, you are also subject to state traffic law, including state requirements for licensing, registration, and operation of the vehicle in question.

Over-snow vehicle use involves inherent risks that may result in property damage, serious injury, and possibly death to participants. Drive cautiously and anticipate rough surfaces and features, such as snow, mud, vegetation, and water crossings common to remote travel conditions. By your participation, you voluntarily assume full responsibility for damages incurred, and risks and dangers experienced. Take care at all times to protect yourself and those under your responsibility. Much of the White River National Forest is remote. Medical assistance may not be readily available. Cellular telephones do not work in many areas of the White River National Forest. Take adequate food, water, first-aid supplies, and other supplies and equipment appropriate for seasonal conditions.

ALWAYS REMEMBER TO RESPECT PRIVATE LAND! PROTECT YOUR PRIVILEGE. STAY ON DESIGNATED ROUTES AND IN DESIGNATED OPEN AREAS.

Please read and understand this map in its entirety. If you have questions, please contact the White River National Forest for clarification.

tread lightly!® LEAVING A GOOD IMPRESSION