Comments of the Kalispel Tribe of Indians
on the
LeClerc Creek Grazing Allotment Management Planning
Draft Environmental Impact Statement

Whiteman Creek

Kalispel
natural resources

The LeClerc Creek Grazing Allotment Draft Environmental Impact Statement ("DEIS") does a disservice to our community by failing to present an alternative that would satisfy the interests of both the Kalispel Tribe of Indians ("Tribe") and the permittee. Without such an alternative, the DEIS pits neighbor against neighbor and beckons the rest of the community to choose sides. That is an unfortunate outcome in a small community such as ours, particularly when a more nuanced solution could have been developed with a modicum of federal will.

As things stand, the U.S. Forest Service (the "Forest Service") has summarily dismissed the Tribe's request to develop a real alternative for the good of the community and the public resources involved. Instead we are asked to comment on four alternatives that amount to a choice between grazing and no grazing. Although neither of these options is good for our community, only the no grazing alternative is lawful.

These comments explain why grazing must be discontinued within the LeClerc Creek watershed. The Tribe has no objection to finding a more appropriate site for the permittee's cattle operation elsewhere in the Colville National Forest ("CNF"). Indeed, that is the alternative we have been championing all along.

I. Background

A. The Kalispel Tribe's Cultural Interest in the LeClerc Watershed

The LeClerc watershed is the Kalispel Tribe's most cherished cultural landscape within the CNF. What this means is that no other landscape on the CNF provides a stronger connection between past and future generations. Current tribal members provide this cultural bridge by following ancestrally prescribed behaviors within the LeClerc ecosystem. Traditional religious and medical practitioners serve as stewards of the ecosystem for a larger network of users, including four resident sweat lodge circles on the Kalispel Indian Reservation and numerous family groups who use the watershed's natural resources for subsistence, curative, and educational purposes.

It is important to understand that this site-specific cultural connection requires more than physical access. The cultural lynchpin is the ability of tribal membership to interact with the ecosystem in the same way and places as their ancestors. If the ecosystem ceases to provide its traditional services, the cultural connection to past and future generations begins to die.

This is the point where the Tribe now finds itself due to the Forest Service's management of the LeClerc Grazing Allotment (the "Allotment"). The Forest Service has done so little to avert cattle drift over the past thirty years of the allotment and exhibited such disregard for the local ecosystem that most of the watershed has sustained some form of grazing-related damage. Cow excrement has so fouled these sacred lands that some tribal members have stopped coming to the watershed altogether. Others endure the stench and insult but struggle to maintain their cultural lifeways due to the degradation of the ecosystem.

The Tribe's overriding interest in this allotment is to revive this cultural landscape. This will require a comprehensive ecosystem restoration effort.

B. The Federal Interest in Restoration of the LeClerc Watershed

The DEIS acknowledges the strong federal interest in the LeClerc watershed under the Endangered Species Act ("ESA") due to its importance to listed species such as mountain caribou, grizzly bear, Canada lynx, and bull trout. However, the DEIS entirely fails to mention the broader federal interest in the watershed under the Federal Power Act ("FPA"). Section 4(e) of the FPA[1] authorizes the Department of the Interior ("Interior") to protect the utilization and purposes of federal land reservations from the effects of hydropower projects by including mandatory conditions in licenses issued by the Federal Energy Regulatory Commission ("FERC"). The Box Canyon Hydroelectric Project FERC license (the "License") includes a number of these conditions due to the project's inundation of nearly 500 acres of the Kalispel Indian Reservation.

One such 4(e) condition is the Trout Habitat Restoration Program ("THRP"). The THRP was incorporated into the License in 2010 pursuant to a Settlement Agreement among a number of parties, including Interior, the Tribe, and the Forest Service. The THRP requires the licensee to restore 164 miles of native fish habitat in tributaries to the Pend Oreille River. The Forest Service is a member of the Technical Committee charged with directing and approving the licensee's restoration efforts. In this capacity, the Forest Service co-manages a $9.25 million implementation fund, reviews and approves project proposals, oversees the licensee's monitoring and maintenance obligations, and determines project success.

The THRP specifies that restoration efforts must be focused in seven priority watersheds. LeClerc is not only the largest of these but also has the most potential to provide the largest amount of quality native habitat when restored. $3 million in federal, state, tribal, and THRP funding has already been invested to protect and restore the watershed over the past 20 years.

C. The Forest Service's Unlawful Management of the Allotment

The Forest Service has been unlawfully managing the Allotment since at least 1982. The Forest Service has violated multiple federal laws during this time, including the National Forest Management Act ("NFMA"), the National Environmental Policy Act ("NEPA"), and the ESA. Due to these violations, which are explained below, the impacts of the existing grazing operation have never been effectively assessed, understood, or controlled.

i. Noncompliance with the Allotment Management Plan

The 1982 Allotment Management Plan ("AMP") provides management objectives to ensure that the grazing operation meets the multiple-use and other needs of the lands involved.[2] These objectives are implemented by an Annual Grazing Plan ("AGP"), also called Annual Operating Instructions ("AOI"), which specifies what is required of the permittee. The 1983 AGP sets forth specific monitoring criteria to determine compliance with the AMP's forage composition and riparian objectives.[3] The Forest Service has no record that such monitoring efforts were

[1] 16 U.S.C. § 797(e).
[2] *See* 36 C.F.R. § 222.1.
[3] AGP, pp.2-3.

completed at any point from 1983 -1993 even though AGPs from each of these years contained similar monitoring requirements. This failure to implement or require monitoring amounts to agency action unlawfully withheld or unreasonably delayed and would have been actionable under the Administrative Procedures Act.[4]

ii. Noncompliance with the National Forest Management Act

The National Forest Management Act ("NFMA") requires the Forest Service to ensure that all permitted uses of National Forest System lands are consistent with current land management plans.[5] This requirement applies to allotment management plans.[6] If a permitted use predates such a plan, the Forest Service must revise the authorizing instrument "as soon as practicable" to ensure consistency with the applicable plan. *Id.* The Forest Service has never fulfilled this obligation. The only plan the AMP references is the Sullivan Lake District Multiple Use Plan, which became obsolete over 25 years ago when the 1988 Colville National Forest Plan ("Forest Plan") was finalized.

By failing to revise the AMP, the Forest Service also violated its NFMA obligation to ensure that AMP implementing documents are consistent with the Forest Plan.[7] The Forest Service made no effort to incorporate Forest Plan requirements into its AOIs prior to 2000. AOIs from 2000-2004 include compliance criteria from a single section of the Forest Plan,[8] but that Forest Plan reference disappeared from AOIs thereafter.

iii. Noncompliance with the National Environmental Policy Act

The Forest Service violated the National Environmental Policy Act ("NEPA") in 1991 by renewing the grazing permit without any environmental analysis.[9] The permit attempts to justify this action by tiering the permit approval to the Environmental Impact Statement for the 1988 Forest Plan, stating that the 1982 AMP is scheduled for an update, and conditioning permit approval on incorporation of the revised AMP. Even if this method of tiering is assumed to be lawful, the AMP update never occurred.

iv. Noncompliance with the Endangered Species Act

Following the 1998 listing of bull trout as a threatened species under the ESA, the U.S. Fish and Wildlife Service ("FWS") issued a Biological Opinion ("1999 BiOp") regarding future grazing activities on the Allotment. The 1999 BiOp concludes that grazing on the Allotment is likely to adversely affect bull trout and supports that determination with an Incidental Take Statement ("ITS"). The ITS specifies that in order for its take exemption to apply under section 9 of the ESA, "the Forest Service, to the full extent of its legal authority, and the applicant shall comply"

[4] 5 U.S.C. § 706(1).
[5] 16 U.S.C. § 1604(i).
[6] *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 980 (9th Cir. 2006) ("The AMP must be consistent with the applicable forest plan.").
[7] *Oregon Nat. Desert Ass'n v. Sabo*, 854 F. Supp. 2d 889, 915 (D. Or. 2012) (AOIs must be consistent with the applicable forest plan).
[8] *E.g.*, 2000 AOI, p.5 (section III.D.2).
[9] *See, e.g. W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1040 (9th Cir. 2013) (grazing permit renewals must comply with NEPA).

with its terms and conditions. These include specific requirements for monitoring and infrastructure improvements in 1999 and 2000, as well as a number of more general monitoring requirements with unspecified timelines.

Although Forest Service records indicate that the time-sensitive terms and conditions were followed, more general terms and conditions were not. The Forest Service's extensive monitoring effort in 1999 was rapidly phased out by 2004.[10] There is no record of the Forest Service ever having adopted a "Grazing Monitoring Plan . . . in accordance with the terms and conditions of the Biological Opinion" into an annual plan as promised by the 2000 AOI. There is also no record that the Forest Service has complied with the 1999 BiOp's riparian forage monitoring requirements, including the obligation to report those monitoring results to the FWS. The Forest Service did not provide the Tribe with a legible copy of the final 1999 BiOp, so we are unable to include the numbers of these terms and conditions.

The Forest Service has also violated the ESA by failing to timely reinitiate section 7 consultation following the 2010 critical habitat designation for bull trout. The ESA requires formal consultation to be reinitiated "at the earliest possible time" where newly designated critical habitat may be affected by agency action.[11] Renewal of the allotment grazing permit in 2012 without engaging in section 7 consultation was unlawful, as was the issuance of every AOP issued since the 2010.[12]

II. The Proposed Action (Alternative C)

Instead of providing a management directive to redress the effects of the Forest Service's longstanding neglect of its environmental stewardship obligations, the Proposed Action ("PA") provides a template for continuing to avoid them. The PA does this by funneling known management challenges to an unfunded and intentionally vague adaptive management program, and it justifies this action on the basis of data gaps that the Forest Service created by failing to fulfill monitoring requirements required by the Forest Plan. Whatever conservation benefits the PA does provide are inflated by side-by-side comparisons with the current, unlawful management plan. When these illusory benefits are stripped away, the PA clearly does not meet Forest Plan standards.

The intent of the comments below is not to fix the PA but to fix the flawed framework from which it is derived. Our suggestions below draw from the DEIS, as well as voluminous Forest Service records provided to the Tribe through a Freedom of Information Act ("FOIA") request.[13]

[10] *Compare* 1999-2003 AOIs (requiring at least weekly field observations by the Forest Service) *with* 2004 AOI (no such requirement).
[11] 50 C.F.R. § 402.14, .16.
[12] *Oregon Nat. Desert Ass'n*, 465 F.3d at 983 ("issuance of an AOI is an agency action under § 551(13) of the APA").
[13] The Forest Service did not give the Tribe adequate time to review all of these records prior to the public comment deadline; therefore, we incorporate the entire FOIA response into the record and reserve the right to submit additional comments.

A. Neutralize Range Bias

Although it is reasonable to expect a range management specialist to have an interest in making grazing opportunities available to qualified applicants, it is improper for an environmental analysis to conform to that interest as neatly as this DEIS. Reduce the range bias in the DEIS to appropriate levels by:

i. Refining the purpose and need statement.

The DEIS is doomed from the outset by establishing a range-over-resource hierarchy in the purpose and need statement. The primary need presented is that a qualified applicant would like to continue grazing. The secondary need is everything else. The Forest Plan does not support that absolute hierarchy, so it makes no sense to develop alternatives from that foundation. Also broaden the applicant's need so the grazing operation can be relocated if countervailing interests don't support it in the LeClerc watershed.

ii. Counterbalance the range specialist's economic analysis.

If the Forest Service does not have access to a professional economist, it should at least round out the generic commentary of the range management specialist with that of another resource specialist. The existing analysis's failure to even mention the $3 million dollar investment of federal, state, tribal, and county stakeholders in the restoration of the watershed is a glaring omission. So too is the failure to consider the economic consequences that renewing the allotment may have on millions of dollars available for future conservation investments.

iii. Eliminate "rangewashing" of specialist reports.

Interdisciplinary team meeting notes indicate that resource specialists were cautioned on multiple occasions to avoid using terminology that may lead a reader to believe overgrazing had occurred.[14] Although range management specialists have every right to disagree with another resource specialist's determination of what constitutes overgrazing, it is not appropriate to preempt that conversation altogether.

iv. Avoid visual observations and professional judgments.

The rangeland management section makes repeated use of visual observations and professional judgments to discount grazing impacts.[15] This calls into question the validity of the science in

[14] IDT Notes 1/16/13 ("Chase – please don't use the terms 'over-utilization' or 'over-grazing' in your reports because his data reports do not reveal that. . . . Brian – concerned of the apparent disconnect between the PIBO monitoring data, which is specific to range, and according to Chase, indicates that conditions aren't degraded, because have heard outside partners say the lower Middle Branch is 'hammered.'").

[15] DEIS, p.55 ("As determined by [ocular assessment] the Rangeland Management Specialist, rangeland vegetation appears to be in fair to good condition, with no apparent trend."); p.61 ("Alternative C would result in a loss of 887 acres of suitable grazing land. While the effects of this reduction in suitable grazing land remain to be determined, monitoring and adaptive management will help to determine if the current permitted stocking rate of 101 cow/calf pair (535 AUM's) will be sustainable. Based on professional judgment, the Rangeland Management Specialist does not feel that the reduction in suitable grazing acres will necessitate an immediate change . . .."); p. 68 ("Impacts to tree regeneration have been observed to be insignificant in dry, upland areas and therefore, the impact is likely minimal.").

that section, particularly when the professional judgments are contradictory[16] and the ocular assessments are hypocritical.[17]

B. Do Not Exploit Data Gaps

Another form of range bias that merits special attention is the use of data gaps as a sword for grazing and a shield against environmental mitigation. This is a particularly egregious form of range bias because it capitalizes on data gaps that would not exist but for the Forest Service's chronic failure to update the AMP as required by the Forest Plan. If the AMP had been updated, the Forest Service would have implemented a monitoring plan to track compliance with desired riparian conditions. Forest Plan, § 4-53. The absence of this data creates poor description, which leads to poor management decisions.[18]

C. Avoid Comparisons to a False Baseline

The DEIS concludes that the current management alternative does not comply with Forest Plan standards.[19] However, it never clearly acknowledges the effect of this determination. This determination amounts to an admission that the Forest Service has been unlawfully managing the Allotment since 1988. A corollary to this admission is that the PA's relative conservation benefits over current management are meaningless. The question is not whether the PA is better than unlawful management but whether the PA meets Forest Plan standards. The DEIS repeatedly masks the significance of large environmental impacts by framing them as improvements in comparison to the unlawful, current condition.[20]

D. Don't Use the Adaptive Management Strategy to Avoid the Hard Work

Forest Service records indicate that the PA's adaptive management strategy ("AMS") is a clearinghouse for known problems,[21] plagued by funding[22] and monitoring[23] challenges, and

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[16] *Compare* DEIS, p.55 (impossible to determine trend by professional judgment) *with* DEIS, p.57 (determining trend by professional judgment).

[17] *Compare* DEIS, p.55 (using ocular assessment to assess vegetation condition) *with* 11/18/13 Bolyard email (rejecting hydrologist's ocular assessment of riparian cattle damage).

[18] *E.g.* IDT Notes 1/16/13 ("Amy – the purple line is also to protect water quality. If we put fence where cattle are moving now, does anyone have data to prove that there would be water quality issues. At this point no new proposal, just keep as adaptive mgmt. Gayne – agree with Amy – if we don't have any data, then we are taking the best action we can right now and will monitor future activities."); 11/18/13 Bolyard email ("I am not aware of any scenario anywhere in Region 6 where we require specific management actions to be taken based on an ocular analysis of something. Without some sort of quantifiable data (soil compaction, % increase in bare ground, increased sedimentation into the stream, loss of biodiversity, etc) we have nothing to base our actions on.").

[19] DEIS, pp. 107 (Hydrology and Water Quality), 140 (Fish and Aquatic Habitat).

[20] *E.g.* DEIS, p.111 (increase in stream accessibility in one portion of allotment counterbalanced by decrease in total stream accessibility under current management); p.135 (11 miles of bull trout critical habitat accessible to livestock presented as a significant reduction relative to current condition rather than significant habitat impact).

[21] *E.g.* IDT Notes 7/22/13.
("Chase – proposal to place a CG at Coyote Pass since there is a cattle trail there. The difficulty will be the wing fencing required because it is so rocky. Mike – Maybe some additional fencing would be necessary. Has seen the permittee put cows in Lower Bunchgrass (LB) pasture then when they move to the northern pastures, invariably some cows go right back to LB, which means some areas are grazed season-long.).
Travis – that is part of grazing mgmt and compliance, so if cows end up back there then the range specialist should follow up on to get compliance. It's about complying with direction given.

Jean – to make as part of adaptive mgmt, describe how there have been a lot of changes on the allotment and if problem areas are found then they would address with adaptive mgmt.").

[22] DEIS, p.85. ("It is anticipated that adequate funding would be available in the future for range improvement project construction, allotment administration and monitoring identified in the proposed action, though it is *impossible* to predict future funding levels."). IDT Notes 1/16/13 ("Know that fencing is expensive, but currently have a timber sale opening up ground, have flat open ground and pvt land is being cutover, so there may not be other options.
Travis – don't want to cripple the project because we can't afford $150,000 worth of fencing.
Brian – to put into context there has been over a million dollars spent recently on stream restoration work in the Middle and East Branches of LeClerc Creek.
Amy – Given the inability to utilize any natural barriers on this piece of ground this is what the team came up with. Cattle drift on this piece of the allotment has been an issue for a long time. Maybe we'll come up with another option in the future but this is the proposal for now.)
Mike – could get RMEF or other volunteers to help dismantle some of the older fence. Wildlife could assist with new fence construction.").

[23]IDT Notes 6/16/14 ("Michelle – need to determine if our AM strategy is truly adaptive management, or just monitoring. If we can't commit to the monitoring part, how can we call this AM? Spoke with Jason Jimenez and he said to remove the soil component from the plan because he can't commit to that. Also spoke with Travis about what we are committing to in the plan. If we say we are committed to something in the AM plan and range will have to fund the monitoring, we can only include in the plan what we can realistically do.
. . .
Travis – . . . For the timing parameter, suggest we continue to stay in alignment with PIBO, which is every 5 years. Would be at the end of the grazing season or growing season, whichever is later. This eliminates year-to-year variability.
Brian likes the structure set up by the Kalispel tribe.
Travis – agree, but don't think we have the capacity to do more.").

IDT Notes 12/16/14 ("MP/TWF12 comment – change back to MIM protocol – is this range only?
Jason – would have crew next year and could take on if have budget code. Think every 5 years is laughable, what meaningful data would we get from that?
Chase – past conversation, how often and who should do – tried to make the point at the time that his time is limited, but range spec would have to do, no one else has capacity to do. what he remembers for how we got here.
Michelle – other nepa docs have time periods so think it is appropriate.
Rob – what about how many sites monitored?
Chase – had a list of 10 sites we could monitor, but would establish a multiple indicator plot and have other sites monitored as necessary.
Rob – what about walk thru observation, didn't go anywhere, what about that?
Michelle – point is range can't do it all, who will do?
Chase – don't want to over-commit with monitoring, need to wordsmith.
Jason – change to forest staff or resource specs.
Rob – think robust monitoring is necessary due to sensitivity of project.
Chase – not arguing that, just don't make it too intensive, don't set up for failure by over-committing.
Jason – say annually, is that one day a year?
Rob – propose one day a year.
Jason – not a 20 day thing, is something seasonals can do. One day a year for adapt mgmt does not seem unreasonable, doesn't seem like that much.
Michelle – heartburn is mostly over expecting range staff to do it all.
Chase – would have at least one monitor site per pasture, for entire allotment, monitoring would be done end of grazing or growing season, a PIBO-like MIM monitoring effort. He is lucky to get 2 sites a day now, if talking all pastures then talking 2-3 days, in grand scheme can be hard to accomplish that.
Jason – say annually and have monitoring plan determine how much.
Michelle – agree, get rid of 5 years and change responsibility to FS resource specialists.
Mike – wildlife could help but to take over all monitoring we don't have capacity.").

intentionally designed to include ambiguous thresholds.[24] The AMS also excludes stream temperature monitoring in the hopes that the Department of Ecology won't care.[25] In addition, the AMS only calls for adaptive management to occur on the basis of 3-year trends with no provision for reacting to immediate threats and only decadal opportunities to reinitiate NEPA. Monitoring criteria are also deficient for the reasons provided below. The Tribe's only suggestion regarding the AMS is to scrap it and start over.

E. Use PIBO Data Appropriately

The DEIS relies heavily on PIBO data because the Forest Service never developed appropriate monitoring requirements. That PIBO data is often the best data available to the Service due to its prior transgressions does not mean that it is the right data to be using for habitat evaluations and future monitoring efforts. We suggest that the Forest Service revisit all uses of PIBO data within the DEIS consistent with the following suggestions:

i. Do not rely on PIBO data at all until completing section 7 consultation with the U.S. Fish and Wildlife Service to ensure that PIBO is still valid following the 2010 bull trout critical habitat designation.

ii. Ensure that resource specialists understand each other's PIBO-based analyses.

The DEIS inaccurately states that Alternative C meets the Grazing Management Objectives of PIBO.[26] "Monitoring has shown that standards for livestock use as described in PIBO have not been exceeded."[27] The data presented in Table 2 of the Biological Evaluation, however, shows that 2 out of 3 variables measured in 2013 at both PIBO DMAs failed to meet INFISH RMO standards.[28]

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[24] IDT Notes 6/16/14 ("Gayne – in the Boulder document you did some AM but never came up with thresholds, right?
Travis –well, we didn't have the objectives nailed down as well as we could have.
Gayne – think this project is complex enough without us killing ourselves over the AM plan. . . .
Chase – good point and ties in with our lack of detailed description of the grazing season. We are leaving some things opened-ended and not locking ourselves into it. It's good to leave it a little bit vague to allow for some flexibility.
Gayne – it doesn't mean we won't do monitoring, just don't spend too much time detailing the thresholds.
Rob – that is not my understanding of how AM works.").

[25] IDT Notes 3/17/15
("Michelle – also **using stream temp in adapt mgmt** – no comment from RO.
Travis – think we should not use it, is not appropriate indicator. No other forest has monitored stream temp. Tom's comment was the shape of the stream has a greater effect than the temp. If wide and shallow absorbs more heat, if narrow then cooler.
*Gayne – leave it out for now and see what ecology says.
*Michelle – ok no shade or temp will be monitored in adapt mgmt.").
Also *compare* DEIS, pp.26-27 (AMS has no water quality monitoring component) *with* IDT Notes 1/16/14 (AMS with water quality component).

[26] DEIS, p.73.

[27] *Id.*

[28] Rief, A. 2015. LeClerc Creek Cattle Grazing Allotment EIS Biological Evaluation/Management Indicator Species Report.

The DEIS also seems to ignore its specialist's report regarding existing habitat conditions in the Biological Evaluation. It is unreasonable to conclude that standards for livestock use are being met when nearly every fish and habitat metric analyzed suggests the watershed is not properly functioning or functioning at risk.[29]

iii. Cross check PIBO data with other available data.

Evaluate, for instance, how PIBO data compares to Pend Oreille PUD ("PUD") stream survey data from Middle Branch LeClerc Creek, an existing high-use area,[30] and Upper Middle Branch LeClerc Creek,[31] a future high use area.

iv. Use the right PIBO data for the right purpose.

The attributes proposed to be monitored during PIBO IM (greenline stubble height, streambank alteration, and woody species browse) fail to address the impacts of grazing on stream and riparian habitats and are only meant to determine whether the current year's livestock grazing is meeting planned stocking levels, grazing intensity and duration, and criteria for livestock use of riparian areas: in other words allotment compliance monitoring. The effects of cattle grazing are well documented to include increased W/D ratios, higher levels of fine sediment resulting from collapsed banks, fewer undercut banks, increased bank angles reductions in pool habitat, and degradation of the riparian zone (Al-Chokhachy et al 2010). Of the indicators available in the MIM protocol, the DEIS proposes the three least likely to describe current conditions, detect trends, and inform adaptive management of the allotment with regard to stream and riparian condition.

Even if the appropriate MIM indicators were selected, we believe the level of effort would need to be increased substantially in order to adaptively manage at the allotment scale. Three DMAs measuring ~110 m each divided among 4 pastures is inadequate to describe impacts to over 100 miles of stream and riparian habitat (<0.2% of linear riparian corridors). Further, with less than 1 DMA per pasture, variability cannot be accounted for in trend monitoring to inform adaptive management (e.g. drift between pastures). Heitke et al. (2008) suggested observer variability associated with the protocol be incorporated into management decisions especially when high economic or ecological costs may result from decisions. The authors also note that significant error can arise from within and among individual observers and caution that managers should be careful when taking action based on a single evaluation—especially when the result is near a management standard or threshold (Heitke et al. 2008).

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[29] *Id.*

[30] EESC 2010. Middle Branch LeClerc Creek general and target surveys habitat surveys. Prepared for Box Canyon Hydroelectric Project Fish Sub-Committee. Submitted by the Public Utility District No. 1 of Pend Oreille County as part of the Trout Habitat Restoration Program. (showing that 10 out of 15 reaches surveyed fall below criteria for stable banks, 11 out of 15 fall below criteria for pools/1000 feet, and 13 out of 15 reaches surveyed fall below criteria for surface fines; also showing that bank stability average s 65.26% for the 15 reaches within the allotment, and 99.89% for the reach just outside it).

[31] EESC 2012. Upper Middle Branch LeClerc Creek general and target surveys habitat surveys. Prepared for Box Canyon Hydroelectric Project Fish Sub-Committee. Submitted by the Public Utility District No. 1 of Pend Oreille County as part of the Trout Habitat Restoration Program. (showing that 10 out of 14 reaches surveyed fall below criteria for stable banks, 10 out of 14 fall below criteria for pools/1000 feet, and 12 out of 14 reaches surveyed fall below criteria for surface fines).

Many of the PIBO IM shortcomings with regard to which attributes are monitored are periodically addressed with PIBO Effectiveness Monitoring (PIBO EM). However, PIBO EM is a large scale monitoring program (i.e. Federal grazing lands of the West) and cannot detect change at the allotment or even the scale of an individual District. At even the individual Forest level PIBO EM should only be able to detect 20% change of about 50% of the habitat attributes measured in 35-90 sites (Henderson et al 2005). Therefore, PIBO EM is completely useless in assessing how well modifications proposed in Alternatives C and D improve instream and riparian habitats and cannot inform adaptive management of the allotment.

III. Conclusion

Due to the numerous defects identified above, the PA will result in an allotment with:

- an uncommonly difficult cattle drift problem;[32]
- a pasture rotation prescription that is not operationally practical;[33]
- 43 miles of unfenced boundaries;[34]
- 25 miles of livestock-accessible habitat along fish-bearing streams, including a 12% increase in West Branch LeClerc;[35]
- 11 miles of livestock-accessible bull trout critical habitat;[36]
- an additional mile of TMDL temperature impaired stream;[37] and
- a fatally defective adaptive management strategy.

That Allotment clearly violates the Forest Plan for all of the reasons previously explained in the Tribe's May 28, 2013 EA comments to the Forest Service, which are hereby incorporated by reference. The Tribe need only offer a few clarifications at this point:

[32] IDT Notes 8/22/13 (The Forest Service's Rangeland Management Specialist is "*not aware of other allotments that have such a chronic problem with drift*. Usually can find the spot and plug the hole, but this is a constant problem."); IDT Notes 1/16/13 ("Between our veg mgmt and veg mgmt on private land, it makes it tough to rely on natural barriers to prevent cattle movement."); IDT Meeting Notes 7/22/13 ("Big problem with this allotment is the boundaries are very porous and cattle are adventurous, so it is difficult to nail down the mgmt.").
[33] DEIS, p.14; *see also* 8/26/13 Meeting Notes ("[The permittee] said he felt that a pasture rotation just isn't effective in this allotment, and explained that how the *allotment has been managed for many years now isn't as the management is described in the AOI's*. He explained that cattle are pushed to the higher elevations (Mineral Creek and Upper Bunchgrass) in mid-summer, and that they slowly work their way back toward the Hanlon holding pen and Lower Bunchgrass pasture in small groups.").
[34] DEIS, p.43.
[35] DEIS, pp.43, 112.
[36] DEIS, p.43.
[37] DEIS, p.121.

- Although the Tribe appreciates the exclusion of one of its important traditional cultural properties from the allotment, that does nothing to resolve larger cultural concerns.

- The DEIS continues to use the wrong temperature standard for the LeClerc watershed. The correct temperature criterion is 12°C under Washington State water quality standards and less than 9°C under InFish.[38] Compliance with these standards requires retention of all available shade.

- At a THRP fish subcommittee meeting earlier this week, the Pend Oreille PUD announced that it will not be performing any more conservation work in active grazing areas. The Tribe supports this position, at least with respect to discretionary grazing activities on public lands. The DEIS's economic and cumulative effects analyses should be updated to account for this information.

- The Tribe will support using THRP dollars to fund the swift removal of Allotment infrastructure if the Allotment is cancelled.

- Forest Service records indicate that the northwestern portion of the allotment is being expanded in response to a legal decision concerning trailing outside of allotment boundaries.[39] The DEIS should identify this legal decision and explain its relevance to past and future allotment management.

Thank you for considering these comments. We hope they inspire the Forest Service to take a new and honest look at this management decision, and to find a much better solution for the good of our community. If the Forest Service conducts a credible environmental analysis, it will find that one necessary component of this solution will be to cancel the allotment. The cost of the fencing required to protect the ecological values embodied in the Forest Plan defies reason.

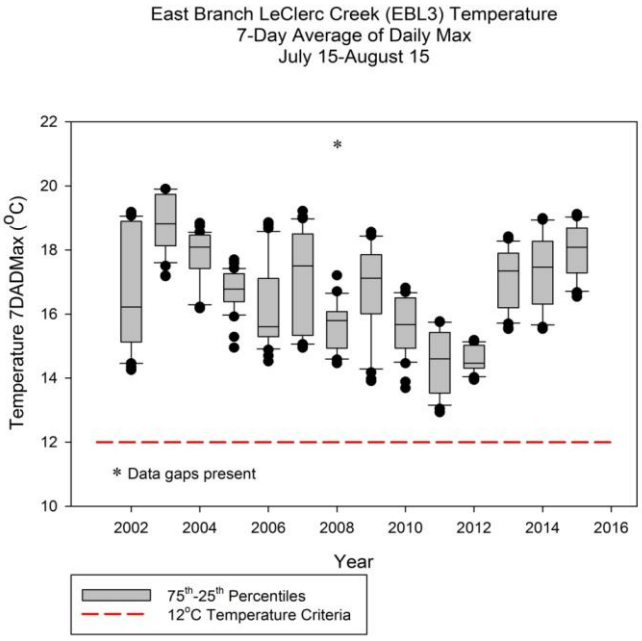
Bear in mind that the Forest Service need not redo the DEIS to make this decision. Grazing permits may be cancelled to devote grazing lands to another public purpose.[40] Other public purposes are compelling here given the LeClerc watershed's importance as a cultural landscape for tribal members, a priority tributary under the THRP, and habitat for multiple ESA-listed species. This importance is underscored by the $3 million conservation investment already made in the watershed, and the availability of millions more for future conservation investments. If the allotment is cancelled, the Tribe will not object to phasing out the allotment over a reasonable period of time to ease the transition of the permittee's grazing operation to a more appropriate site.

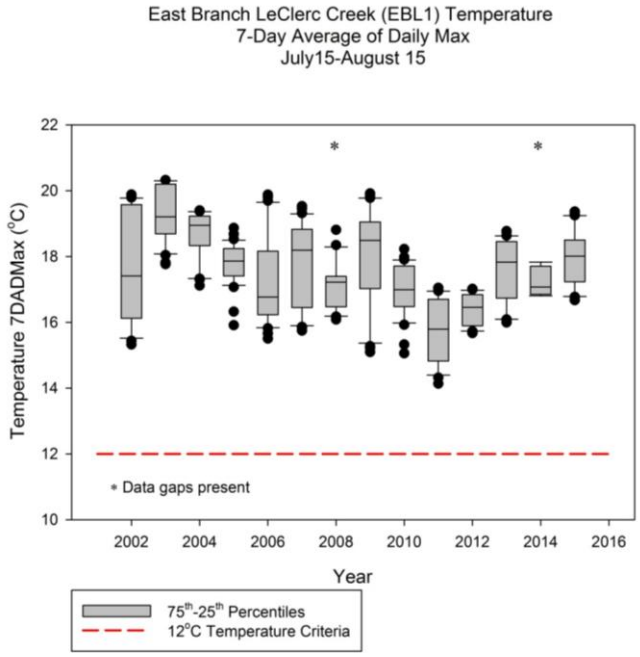
[38] *See* Appendix A to these comments (water temperature information); *see also* 11/27/13 Hickenbottom email ("With regards to grazing, it is hard to "improve" the temperature condition without just fencing it out.").
[39] IDT Notes 1/16/13, 3/12/14.
[40] 36 C.F.R. § 222.4(a)(1) (The Chief, Forest Service, is authorized to cancel . . . permits where lands grazed under the permit are to be devoted to another public purpose . . . .").

Appendix A

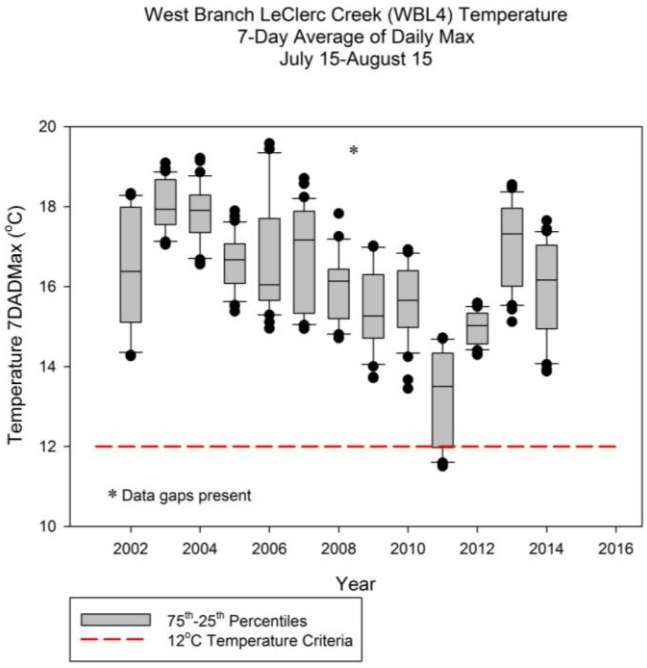
1. Kalispel Natural Resources Department ("KNRD") monitoring of LeClerc Creek Basin tributaries shows consistent summer exceedance of the WA Char spawning and rearing numeric criterion of 12°C (see below). This results in the default narrative criterion of no significant human-caused change from natural conditions being in effect.

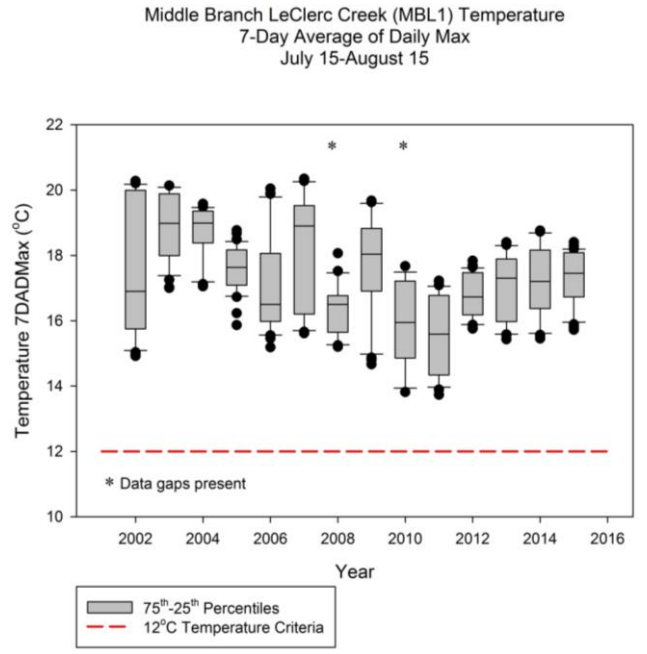
7-day average of the daily maximum temperatures recorded during July 15th – August 15th within the upper (EBL3) and lower (EBL1) East Branch LeClerc Creek





7-day average of the daily maximum temperatures recorded during July 15th – August 15th within Middle Branch and West Branch LeClerc Creek



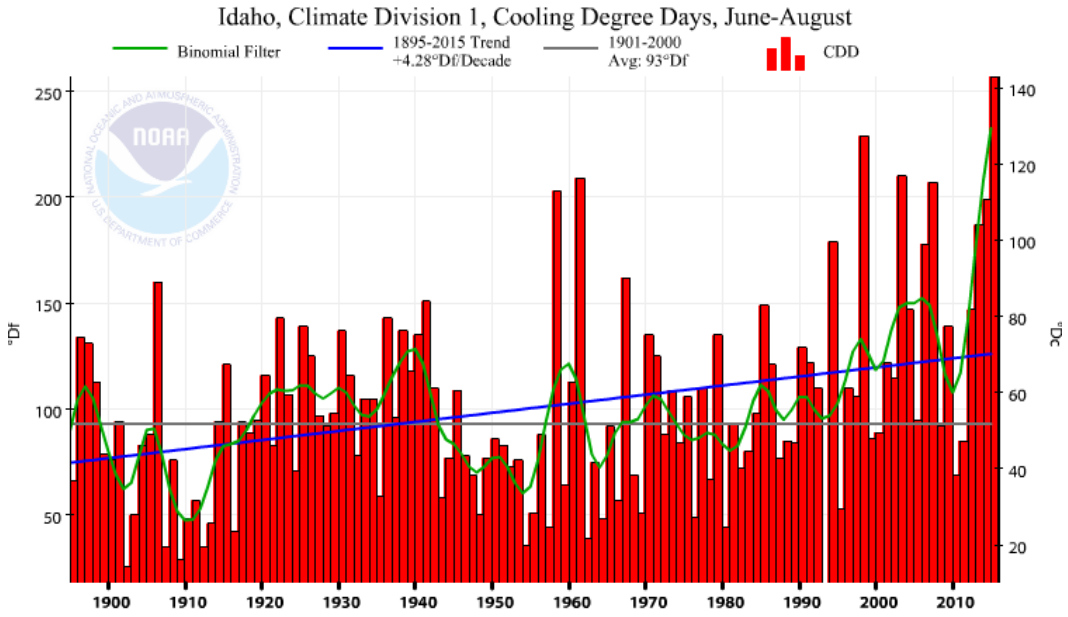


2. The Colville National Forest ("CNF") and WA Ecology assumption that implementation of INFISH with continued riparian grazing in the LeClerc Basin will achieve compliance with the Char temp criteria over the next 30-40 years is wrong. It will be necessary to achieve the maximum riparian shade potential throughout the Basin to restore the water temperature to natural conditions under existing climatic conditions. Continued climate warming will also require implementation of other actions to further cool streams such as restoring and enhancing cold hyporheic flow.

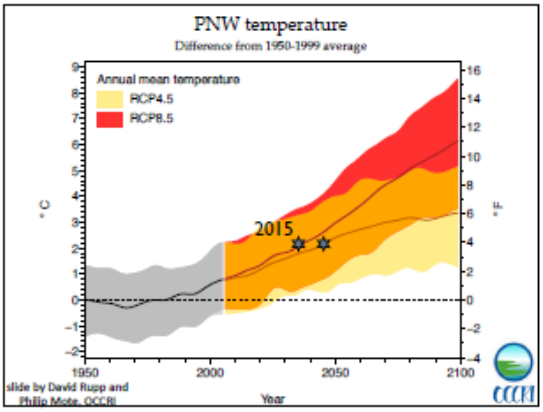
All riparian corridor management actions available to maximize riparian shade recovery will need to be implemented considering the well-understood impacts on the riparian zone by cattle grazing which contribute to changes in hydrology, destabilizing of stream banks, sedimentation, and changing or eliminating of riparian vegetation (Kauffman and Krueger, 1984). The loss of riparian shade and changes in stream morphology commonly contribute to increased water temperature along with other ecological effects (Platts, 1979) and is also well-explained in the DEIS.

3. CNF is required to address climatic change and management adaptations (not just monitoring) during the development of plans by Executive Order 13514 (Federal Leadership in Environmental, Energy, and Economic Performance), Executive Order 13653 (Preparing the United States for the Impacts of Climate Change), and "The President's Climate Action Plan." Adaptation plans are required to evaluate climate change vulnerabilities and to minimize the short- and long-term effects of climate change on agency mission and operations.

    a. The importance of addressing climate warming in the LeClerc watershed is illustrated by the significant increasing trend in summer cooling-degree days for N Idaho (see below).



    b. Predictions for atmospheric warming in the PNW suggest that average temperature experienced in 2015 will be the normal condition around the years 2035-40 with the anticipated rate of continued increase in global CO_2 emissions (see below). Atmoshperic warming has reportedly contributed to waterbodies warming in North America at an average rate of around 0.2°C/decade over the last 30-40 years (Rice and Jastram, 2014; Isaak *et al.*, 2011).



The background plot shows simulated Northwest temperature (see Mote et al. 2013) from 20 global climate models for two different scenarios of future emissions, which have been smoothed to emphasize slow variations. Darker lines show the multi-model mean for each RCP

According to NOAA's Climate at a Glance utility, the Water Year 2015 (i.e., Oct 2014 through Sept 2015) temperature in the Northwest was +3.9°F above the 1950-2000 average. This is indicated by the stars, where they intersect the future curves for RCP8.5 (in about 2033) and RCP4.5 (in about 2045).

2015 anomaly and GCM anomalies are relative to 1950-1999.

Source: Mote, P., J. Abatzoglou, and K. Kunkel, 2013: Climate change in the Northwest. Chapter 2 in Dalton, M., P.W. Mote, and A.K. Snover, eds., 2013: Climate Change in the Northwest: Implications for Our Landscapes, Waters, and Communities. 224 pp. Island Press.

c. Grazing exclusions must be implemented beginning now throughout all of the riparian corridors of the LeClerc Basin along with shade tree restoration to the assure full recovery of the maximum shade potential necessary to eliminate existing and future contribution of man-caused stream warming. This is especially critical in the face of projected climate change discussed above.

4. The Colville Forest Temperature TMDL uses the incorrect temperature criterion (16°C) for LeClerc Creek tributaries to assess shade targets (Table 15, Pg 62, Ecology TMDL Submittal report, https://fortress.wa.gov/ecy/publications/documents/0510047.pdf). Based on this erroneous criterion, the TMDL justifies shade targets less stringent than the maximum natural shade potential needed to meet the correct criterion of 12°C (Ecology's originally proposed Char criterion of 13°C was disapproved by EPA).

a. The correct Temp criterion for the designated use of Char spawning and rearing is 12°C as described from WA WQ stds below.

(c) **Aquatic life temperature criteria.** Except where noted, water temperature is measured by the 7-day average of the daily maximum temperatures (7-DADMax). Table 200 (1)(c) lists the temperature criteria for each of the aquatic life use categories.

Table 200 (1)(c)
Aquatic Life Temperature Criteria in Fresh Water

Category	Highest 7-DADMax
Char Spawning and Rearing*	12°C (53.6°F)
Core Summer Salmonid Habitat*	16°C (60.8°F)
Salmonid Spawning, Rearing, and Migration*	17.5°C (63.5°F)
Salmonid Rearing and Migration **Only**	17.5°C (63.5°F)
Non-anadromous Interior Redband Trout	18°C (64.4°F)
Indigenous Warm Water Species	20°C (68°F)

*Note: Some streams have a more stringent temperature criterion that is applied seasonally to further protect salmonid spawning and egg incubation. See (c)(B)(iv) of this subsection.

https://fortress.wa.gov/ecy/publications/documents/0610091.pdf

b. The EPA 2005 findings map reiterates the designated use for LeClerc Creek tributaries (Fig 2, http://yosemite.epa.gov/R10/water.nsf/34090d07b77d50bd88256b79006529e8/5a8440cd8b259abd882571390071ef4d/$FILE/UsesWRIA62.pdf)
c. If the correct criterion of 12°C had been used then, the maximum natural shade potential would be the correct shade target and activities that prevent attainment, such as grazing within the riparian corridor should not be allowed.
d. Ecology's TMDL submittal report did recommend that the LeClerc Creek tributaries be given a higher priority for **"active implementation of best management practices such as riparian exclusion from grazing and the re-establishment of riparian vegetation"** (pg 62, Ecology TMDL submittal report).
e. The Colville Forest TMDL is invalid for Char designated water as it exists and should not be used as a justification to allow any man-caused activities contributing to non-attainment of the temperature criteria. The TMDL and implementation plan need to be amended using the appropriate temperature criterion and the implementation strategies for all tributaries with Char spawning and rearing use designations.
f. Ecology has set a precedent in 2013 for amending the TMDL implementation plan for Bacteria to allow additional time to implement necessary actions to "help meet the CNF's ongoing commitment to meet or exceed the state's water quality laws, as described in the Memorandum of Agreement (MOA) between Ecology and Region 6 of the U.S. Forest Service (November 2000)." https://fortress.wa.gov/ecy/publications/documents/1310040.pdf

Additional Literature Cited

Kauffman, J.B. and W.C. Krueger. 1984. Livestock Impacts on Riparian Ecosystems and Streamside Management Implications…A Review. Journal of Range Management 37(5).

Platts, W.S. 1979. Livestock grazing and riparian / stream ecosystems – an overview. In: Proc., Forum-Grazing and Riparian/Stream Ecosystems. Trout Unlimited, Inc (pp. 39-45).

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