



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

August 17, 2016

Anthony Botello
Krassel District Ranger
500 North Mission, Building 1
McCall, ID 83638

Comments submitted via website portal: <http://www.fs.usda.gov/project/?project=49889>

Re: Nez Perce Tribe's comments on the Morgan Ridge Exploratory Drilling Plan of Operation

Dear Mr. Botello:

Thank you for the opportunity to provide scoping comments on the Morgan Ridge Exploratory Drilling Plan of Operation. These comments reflect the policy views and technical concerns of the Tribe.

The proposed action (Action) would accept a Plan of Operations to conduct exploratory drilling for locatable minerals from four drill pads by the American Independence Mines and Minerals Company. A total of six core holes would be drilled to depths of up to 1,500 feet. Water for drilling would be sourced from Government Creek under an existing temporary water right, and water withdrawals would not exceed ten percent of the water base flow. The Action would authorize the use, repair, and maintenance of temporary access roads to the drill sites. Approximately 3.1 miles of road would be authorized for mechanized vehicle access to drill pads in the North Fork of Logan Creek drainage and approximately 1.4 miles of temporary road would be authorized to access a drill pad in the Government Creek drainage.

Since time immemorial, the Nez Perce Tribe (Tribe) has occupied and used over 13 million acres of land now comprising north-central Idaho, southeast Washington, northeast Oregon, and parts of Montana. Tribal members engaged in fishing, hunting, gathering, and pasturing across their vast aboriginal territory, and these activities still play a major role in the subsistence, culture, religion, and economy of the Tribe.

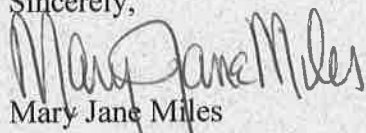
As the Payette National Forest is aware, this Action is located entirely within the Tribe's aboriginal territory and is subject to the rights the Tribe reserved, and the United States secured, in the Treaty of 1855. The Action is also located within the Tribe's area of exclusive use and occupancy, as adjudicated by the Indian Claims Commission and encompasses areas of cultural and spiritual

significance to the Tribe. As a result, the Tribe considers the protection of its treaty-reserved rights and other rights and interests to be a paramount obligation of the Payette National Forest when implementing this Action. The Forest Service has a trust responsibility to ensure that its actions, including implementation of this Action, are fully consistent with the 1855 Treaty, executive orders, departmental regulations, and other federal laws implicating the United States' unique relationship with the Tribe.

Attached are the Tribe's scoping comments on the Morgan Ridge Exploratory Drilling Plan of Operation. In addition to reviewing our comments, we ask for more discussion during the upcoming quarterly meeting on September 7, 2016 regarding the technical details of our suggestions.

Thank you again for the opportunity to provide scoping comments on the Morgan Ridge Exploratory Drilling Plan of Operation. You are welcome to contact Amanda Rogerson, Nez Perce Tribe Staff Attorney, at (208) 843-7355 or amandar@nezperce.org, with any questions or concerns.

Sincerely,


Mary Jane Miles
Chairman

NEZ PERCE TRIBE'S COMMENTS ON THE MORGAN RIDGE EXPLORATORY DRILLING PLAN OF OPERATION

AUGUST 2016

I. GENERAL COMMENTS

a. The Nez Perce Tribe's Interest in the Morgan Ridge Exploratory Drilling Plan of Operation

Treaty tribes, such as the Nez Perce, have been recognized as managers of their treaty-reserved resources. *U.S. v. Washington*, 684 F. Supp. 312, 339-40, 403 (W.D. Wash. 1974). As manager, the Nez Perce Tribe (Tribe) has devoted substantial time, effort, and resources to the recovery and co-management of treaty-reserved resources within its treaty territory.

As fiduciary, the United States and all its agencies owe a trust duty to federally recognized tribes to protect their resources. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463, U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). This trust relationship has been described as "one of the primary cornerstones of Indian law," Felix Cohen, *Handbook of Federal Indian Law* 221 (1982), and has been compared to the relationship existing under the common law of trusts, with the United States as trustee, the tribes as beneficiaries, and the property and natural resources managed by the United States as the trust corpus. *See, e.g., Mitchell*, 463 U.S. at 225.

All executive agencies of the United States are subject to the federal trust responsibility to recognize and uphold treaty-reserved rights. Executive agencies must also protect the habitats and resources on which those rights rest, as the right to take fish and other resources reserved by the Tribe presumes the continued existence of the biological conditions necessary to support the treaty-reserved resources. *See Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1394 (9th Cir. 1985), *cert. denied*, *Sunnyside Valley Irrigation District v. United States*, 474 U.S. 1032 (1985).

Forest Service Manual 1563.01d (FSM) specifically states that the Forest Service "must administer lands subject to off-reservation treaty rights in a manner that protects Tribes' rights and interests in the resources reserved under treaty." FSM 1563 further directs the Forest Service, among other responsibilities, to "[i]mplement programs and activities honoring treaty rights and fulfill legally mandated trust responsibilities to the extent they are determined applicable to National Forest System lands."

II. WATERSHED

a. Plan of Operation

The purpose of the proposed action (Action) is to conduct exploratory drilling for locatable minerals from four drill pads by the American Independence Mines and Minerals Company (AIMMCO). The Action would also authorize the use, repair, and maintenance of temporary

access roads to the drill sites. Approximately 3.1 miles of road would be authorized for mechanized vehicle access in the North Fork of Logan Creek and 1.4 miles of temporary road to access the drill pad in Government Creek drainage.

The maps included in the scoping package show four drill pads on existing road beds, which minimizes ground disturbance. It would be helpful to have additional details on the locations and level of road maintenance proposed for the roads.

The Tribe is always concerned with sediment delivery to streams, especially streams supporting anadromous fish in the Big Creek watershed, as increased sediment quantity is the primary factor limiting recovery of these listed species in this watershed. The 3.1 miles of road and 1.4 miles of temporary road proposed for authorization for mineral exploration in this Plan of Operation are adjacent to and involve the fording of streams listed as Chinook salmon, steelhead, and bull trout critical habitat. The higher the percentage of the existing road bed that's covered with vegetation, the lower the percentage of sediment delivered to area streams. Road width also factors into the sediment delivery to streams; wider roads have more surface area to contribute to sediment delivery. If AIMCCO is able to use large equipment such as bulldozers, backhoes, and graders to accommodate full-size traffic, the roads will be widened and more vegetation will be removed. Using a grader on a road helps maintain a smooth driving surface but also pushes sediment into ditches and frees surface fines from the road prism making them more likely to enter streams. Widening roads and clearing them of vegetation for a two-year period will cause an increase in sediment delivery to area streams. Road work and access should be the minimum necessary to complete the proposed Action.

In an effort to assist the Forest Service in its obligation of minimizing adverse environmental impacts on National Forest surface resources, the Tribe offers the following suggestions to reduce sediment delivery to streams:

- Leave the road prism as narrow as possible.
 - Use small, mini-excavators, similar to those used on the Smith Creek Loop Trail in 2014-15, so that the road prism is not unduly widened and vegetation isn't unnecessarily removed.
- Install a gate or barrier at the road entrance to reduce unauthorized traffic.
- Install water bars and gravel sediment delivery points.
- Construct temporary crossing structures on the Government Creek stream crossing to protect ESA-listed and sensitive fish species.
- Following mining, give the roads ML 1 status or decommission them in short order. Also, remove culverts on roads that will not be used in the near future.

b. Water Withdrawal

The Tribe is concerned about water withdrawals from streams that support anadromous fish. Withdrawing even 10% of the stream flow can be significant during low flows, which is when threatened Chinook salmon spawn in Logan and Big Creek.

In addition to the Action-related diversion, there are four other unregulated diversions on Government Creek and several on Logan Creek, downstream of the confluence with Government Creek. Because these diversions are unmonitored, the actual reduction in these creeks' flow is unknown, which imposes unnecessary risk to threatened Chinook salmon and steelhead, along with various resident species that depend on ample, cool water. The Tribe has had many conversations with the Krassel Ranger District and Forest Service fisheries staff about water diversions in Big Creek and hopes to see measuring devices on water diversions this year. An additional diversion in this system could potentially worsen conditions.

Big Creek supports an important Chinook salmon population and spawning area downstream of where Logan Creek enters Big Creek. Direct effects from water diversions include a reduction in habitat due to water removal, entrainment, and the potential for sediment deposition. These are concerns because of the listed steelhead, bull trout, sensitive redband, and cutthroat trout present in the watershed.

c. Impacts to Riparian Conservation Areas

Roads located in Riparian Conservation Areas (RCAs) have the potential to impact sediment delivery to streams, large woody debris recruitment, stream shade, and nutrient inputs. Some of the proposed access routes for the Action are located in RCAs and include stream crossings.

The proposed Action's routes largely fall under Management Prescription Category 3.2 which is the Active Restoration and Maintenance of Aquatic, Terrestrial, and Hydrologic Resources category. Thus, active restoration should involve reducing impacts to RCAs such as in the headwaters of Government Creek and the North Fork of Logan Creek, that are listed as Functioning at Risk.

d. Conclusion

The Tribe agrees with the Forest Service that an Environmental Assessment should be completed for this Action. The Tribe will continue to be involved in this planning process to help ensure that the proposed Action is sufficiently protective of natural resources in the area.