



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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July 12, 2017

Keith Lannom
Forest Supervisor
Payette National Forest
800 W Lakeside Avenue
McCall, Idaho 83638

Comments submitted online through webform <http://www.fs.fed.usda.gov/project/?project=51257>

RE: Nez Perce Tribe's Scoping Comments on the South Fork Restoration and Access Management Project

Dear Mr. Lannom,

On behalf of the Nez Perce Tribe ("Tribe"), thank you for the opportunity to comment on the Payette National Forest's South Fork Restoration and Access Management Project ("SFRAMP" or "Project"). As you are aware, the Watershed Division of the Tribe's Department of Fisheries Resource Management has been deeply involved and invested in the Big Creek/Yellow Pine/South Fork Salmon River Collaborative ("Collaborative"). The Watershed Division participated in the Collaborative throughout its life. It also supported the Collaborative, on behalf of the Tribe, by collecting road inventories in the South Fork Salmon River, writing reports, analyzing field data, creating maps, and giving presentations. Because the Tribe was such an integral part of the Collaborative and its decision-making process, the Tribe fully supports the portions of this Project that were fully agreed upon by the Collaborative as a whole. The Tribe has serious concerns, however, with two parts of this Project that were not discussed or agreed upon by the Collaborative. They are:

- 1) The issuance of a Forest Roads and Trails Act easement to Valley County for the South Fork Salmon Road #474.
- 2) Converting the Martin Ridge Trail, located in the Needles Recommended Wilderness Area, from a non-motorized trail to a 2-wheel motorized trail.

The Tribe's paramount goal is to protect and advance its treaty-reserved and cultural interests in its aboriginal territory. As the Payette National Forest is aware, the SFRAMP is located entirely within the Tribe's aboriginal territory and is subject to the rights that the Tribe reserved, and the

United States secured, in the Treaty of 1855.¹ The Project is also located within the Tribe's area of exclusive use and occupancy, as adjudicated by the Indian Claims Commission.² The Forest Service thus has a trust responsibility to ensure that its actions, including implementation of this Project, are fully consistent with the 1855 Treaty, executive orders, departmental regulations, and other federal laws implicating the United States' unique relationship with the Tribe.

Thank you again for the opportunity to comment on this Project. Please send the Forest's written response to Amanda Rogerson, Staff Attorney, at 208.843.7355 or amandar@nezperce.org. Please also contact Ms. Rogerson with any questions or concerns.

Sincerely,



Mary Jane Miles
Chairman

¹ Treaty of June 11, 1855, with the Nez Percés, 12 Stat. 957 (1859).

² *Nez Perce Tribe v. United States*, Docket #175, 18 Ind. Cl. Comm. 1.

South Fork Restoration and Access Management Project

I. GENERAL COMMENTS

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

In 1855, the United State entered into a treaty with the Tribe.³ In this treaty, the Tribe explicitly reserved, "the right to fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed lands."⁴

The lands and waters of the Payette National Forest are part of the vast territory ceded by the Tribe, over which the Tribe has treaty-reserved rights. The Project is located in the South Fork Salmon River ("SFSR") watershed and entirely within the Tribes ceded territory, as well as within the area determined by the Indians Claims Commission to be the exclusive use and occupancy of the Tribe.⁵

These National Forest System lands and waters provide irreplaceable habitat for tribal resources, including Chinook salmon, steelhead, and bull trout. These and other aquatic resources are subject to the exercise of the Tribe's treaty-reserved rights. *See e.g., Sohapp v. Smith*, 302 F. Supp. 899 (D.Or.1969), *aff'd*, *United States v. Oregon*, 529 F. 2d 570 (9th Cir. 1976); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'*, 443 U.S. 658 (1979).

The treaty-reserved right to take fish and other resources reserved by the Tribe presumed the continued existence of those biological conditions necessary to support the resources that are the subject of the treaty. *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). Harm to these resources and their habitat will harm the Tribe and its members.

Unfortunately, many of the resources sacred to the Tribe are at risk of disappearing. Snake River Spring/Summer Chinook salmon were listed as threatened under the Endangered Species Act ("ESA") in 1992, steelhead were listed as threatened in 1997, and bull trout were listed as threatened in 1999. The decimation of salmon runs has seriously impacted the tribal economy.

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 Tribe has devoted substantial time, effort, and resources to the recovery and co-management of treaty-reserved resources within its treaty territory.

³ Treaty of June 11, 1855 with the Nez Perces, 12 Stat. 957 (1859).

⁴ *Id.*

⁵ *Nez Perce Tribe v. United States*, Docket #175, 18 Ind. Cl. Comm. 1.

SPECIFIC COMMENTS

- a. The SFSR road was not proposed for a Federal Roads and Trails Act easement during the Big Creek/Yellow Pine/South Fork Salmon River Collaborative Process; Placing a FRTA easement on the SFSR may impact treaty-reserved resources.**

The designation of the SFSR road for FRTA easement was not proposed during the Collaborative. Consequently, it was not considered by the Collaborative and the Tribe has a paucity of information about the FRTA easement and its potential impacts to resources, such as ESA-listed fish species.

The Tribe has taken an active role in restoring Chinook salmon runs in the SFSR watershed for over 20 years, with financial support from the Bonneville Power Administration. The Tribe's Department of Fisheries Resources Management ("DFRM") spends at least \$2.5 million annually restoring Chinook salmon runs in the SFSR watershed. The Tribe's DFRM restoration activities include: hatchery supplementation, fishery research, and watershed restoration. The SFSR is also a vital tribal fishery for Chinook salmon harvest.

The Tribe is wary of the proposed FRTA easement because the Forest Service has a trust responsibility to the Tribe to protect the Tribe's treaty resources while Valley County, which would acquire the easement, does not have this responsibility. In addition, the Forest Service has a professional fisheries biologists and hydrologists who make road-related decisions. Valley County does not have access to similar professional advice and expertise.

Also, as the Forest Service is aware, the SFSR road is an expensive and complex road to maintain. Thus, the Environmental Assessment ("EA") for the SFRAMP should show past and future annual maintenance costs for the SFSR road, culverts, and bridges. The Forest Service should also require that the County prove that it can afford road's annual maintenance costs. If the County cannot afford the level of maintenance that the Forest Service has been doing on the road, the Forest Service should not grant the County a FRTA easement. It is imperative that the Forest Service, in keeping with its trust responsibility, ensure this road is maintained without any impacts to ESA-listed fish species or other treaty-reserved resources.

The Tribe is aware that only the Chief of the Forest Service can terminate a FRTA easement if the easement holder does not consent to its termination. Thus, the Tribe takes the proposed FRTA easement seriously and wants the Forest Service to do the due diligence described herein prior to granting a FRTA easement. The SFSR Watershed and its ESA-listed fish species are too important to overlook.

Below are specific questions about the FRTA easement; the Tribe believes these questions require additional analysis and response by the Forest.

- If significant road, culvert, or bridge damage occurs on the SFSR road due a heavy snow year leading to a wet spring, similar to those that occurred in 2016 and 2017, and Valley County does not have the funds or capacity to deal with the damage, how will the Forest Service protect treaty-reserved resources?

- If the FRTA easement for the SFSR road is given to Valley County, will the current fuel haul ban on the SFSR road remain in place?
 - How frequently and by whom will the roads be monitored if a FRTA easement is given to Valley County?
 - What would prompt the Forest Service to step in and address resource degradation caused by a FRTA easement road? What would prompt the Forest Service to terminate a FRTA easement?
 - If Valley County receives the FRTA easement and makes management decisions that affect treaty-reserved resources, what recourse does the Tribe have? How would the Forest Service fulfill its trust responsibility to protect the Tribe's treaty-reserved resources in that situation?
- b. Converting the Martin Ridge Trail, located in the Needles Recommended Wilderness, from a non-motorized trail to a 2-wheel motorized trail violates Forest Land and Resource Management Plan standards was not supported by the Collaborative as a whole.**

Forest Land and Resource Management Plan Standards

Because the Martin Ridge Trail is in Management Prescription Category 1.2, Recommended Wilderness, Forest Land and Resource Management Plan recreation standards apply to it.

Recreational Standard 1203: “No new motorized or mechanical uses will be allowed, except where these uses must be allowed in response to reserved or outstanding rights, statue or treaty.”

No such reserved or outstanding rights requiring motorized or mechanical uses exist for the Martin Ridge Trail. Allowing motorized use of the Martin Ridge Trail is a clear violation of Standard 1203. Please explain the Forest's rationale for this violation.

Recreational Standard 1204: “Existing motorized or mechanical uses are allowed only if they do not lead to long-term adverse changes in wilderness values.”

The Martin Ridge Trail is not a current existing motorized trail, rather it is currently designated as a non-motorized trail; converting it to a motorized trail will lead to long-term, adverse changes in wilderness values. Motorizing the Martin Ridge Trail should not be included in the EA's preferred alternative.

The Collaborative

The Collaborative's goals for the SFSR corridor were clearly defined as:

- 1) Look for 50” motorized recreational opportunities;
- 2) Look for restoration opportunities; and

- 3) Provide for outstanding legal rights such as Tribal, mineral, and private property access.

The Martin Ridge Trail conversion to a 2-wheel motorized trail does not support any of these goals and, for that reason, two of the three Collaborative voting groups could not support this proposal. There are currently 151.1 miles of 2-wheeled motorized trail on the Payette and there is no need for an additional 8-mile 2-wheel trail. During the Collaborative process, the Idaho Department of Fish and Game (IDFG) voiced concerns that were captured in the matrix about the potential negative impacts on security habitat for big game during the hunting season and nesting habitat for flammulated owls if the Martin Ridge Trail is converted to a 2-wheel motorized trail. The Tribe echoes these concerns. Converting trails from non-motorized to motorized can have significant and long-lasting negative impacts on wildlife habitats and populations. The Forest Service needs to analyze and consider these impacts in the EA.

c. Conclusion.

Thank you for the opportunity to comment. The Tribe looks forward to the Forest's response to these important issues.