



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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

August 20, 2018

Submitted at: <http://www.fs.usda.gov/project/?project=54260>

Mr. Anthony Botello
Krassel District Ranger
Payette National Forest
500 N Mission St, Building 2
McCall, ID 83638

Re: Nez Perce Tribe's Scoping Comments on the Big Creek Hazardous Fuels Reduction Project

Dear Ranger Botello:

Thank you for the opportunity to provide comments on the Big Creek Hazardous Fuels Reduction Project. These comments reflect the policy views and technical concerns of the Nez Perce Tribe ("Tribe").

The U.S. Forest Service, Payette National Forest, Krassel Ranger District ("Forest"), is preparing an Environmental Assessment for the Big Creek Hazardous Fuels Reduction Project ("Project"). The Project's primary objective is to decrease the potential intensity and severity of a wildfire by reducing stand densities, fuel loadings and continuity, and ladder fuels on National Forest System lands. This Project would treat approximately 10,600 acres and would construct less than 1 mile of temporary road to facilitate equipment access and product removal. The proposed fuels treatments are in direct proximity to the Edwardsburg-Big Creek communities, private land, U.S. Forest Service administrative sites and along Forest Service Road 50340 (Warren-Profile Gap Road), Forest Service Road 50343 (Logan Creek Road), Government Creek Forest Service Road 50344, Forest Service Road 50371 (Big Creek-Smith Creek Road), and associated spur roads. These treatments would reduce wildland fire risk to private homes, structures, other private property, and National Forest resources and would increase the effectiveness of fire suppression efforts, as well as improve ingress/egress of public and emergency responders.

Since time immemorial, the 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

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territory, and these activities still play a major role in the subsistence, culture, religion, and economy of the Tribe.

As the Forest is aware, this Project is located entirely within the Tribe's aboriginal territory subject to the rights the Tribe reserved, and the United States secured, in the Treaty of 1855.¹ The Tribe's Department of Fisheries Resource Management has been deeply involved and invested in the Big Creek watershed with fishery research and watershed restoration projects. The Project 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.² 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 Project. The Forest Service 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.

Attached are the Tribe's comments on the Big Creek Hazardous Fuels Reduction Project. In addition to reviewing our comments, the Tribe asks that the Forest add this Project to the September 5, 2018 coordination meeting agenda so that the Forest and Tribe can discuss the technical details of the Tribe's comments.

Thank you again for the opportunity to comment on the Big Creek Hazardous Fuels Reduction Project. 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,



Shannon F. Wheeler
Chairman

¹ Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

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

**NEZ PERCE TRIBE'S COMMENTS ON THE
BIG CREEK HAZARDOUS FUELS REDUCTION PROJECT
AUGUST 20, 2018**

I. GENERAL COMMENTS

a. The Nez Perce Tribe's Interest in the Big Creek Hazardous Fuels Reduction Project

Treaty tribes, such as the Nez Perce, have been recognized as managers of their treaty-reserved resources.³ 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.⁴ This trust relationship has been described as "one of the primary cornerstones of Indian law,"⁵ 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.⁶

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.⁷

Forest Service Manual 1563.8b ("FSM") specifically states that the Forest Service "shall administer lands subject to off-reservation treaty rights in a manner that protects Indian tribes' rights and interests in the resources reserved under treaty." FSM 1563.03 further directs the Forest Service, among other responsibilities, to "[i]mplement Forest Service programs and activities consistent with and respecting Indian treaty and other reserved rights and fulfilling the Federal Government's legally mandated trust responsibilities with Indian Tribes."

II. WATERSHED

The Tribe's Watershed Division supports the overall goal of making the Big Creek watershed more resilient to fire but has the following concerns and questions regarding the Project's overall method and scope.

³ *United States v. Washington*, 684 F. Supp. 312, 339-40, 403 (W.D. Wash. 1974).

⁴ 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).

⁵ Felix Cohen, Handbook of Federal Indian Law 221 (1982).

⁶ See, e.g., *Mitchell*, 463 U.S. at 225.

⁷ See *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), cert. denied, *Sunnyside Valley Irrigation District v. United States*, 474 U.S. 1032 (1985).

a. Roads

- Temporary Roads: What is the purpose and need for the 1 mile of new temporary road construction north east of Lick Creek? This temporary road is partially located in the riparian conservation area (“RCA”) and Cottontail Point / Pilot Peak Idaho Roadless area. If this new road is developed for the haul of commercial timber, it will have to be wide enough to pass large equipment, will require turnarounds, and will impact an intact portion of forest. Looking at Google Earth maps, the proposed road line passes through patches of meadow habitat. Could a precommercial thin (“PCT”)/pile-burn treatment and prescribed (“Rx”) achieve get the same fire resiliency results without building a road?
- Commercial Thinning Route Roads: The roads identified in the Project area for commercial thinning are historic mining roads that are narrow and unmaintained. Reiterating the comment above, in order to pass larger thinning equipment, these roads will have to be widened, will require turnarounds, and will impact intact forest and riparian habitat. Could the PCT/pile-burn treatment and Rx burning achieve the same fire resiliency results with a smaller environmental footprint?
- Access: Is the Forest proposing to haul timber out of Big Creek? How many trips with large-scale thinning equipment will occur along the Profile Creek and Big Creek roads, which run adjacent to streams with Endangered Species Act (“ESA”)-listed fish? Will a sediment analysis be conducted on the projected increase traffic due to the Project? Are there plans to gravel and improve the Profile Creek road at locations that were not completed in 2016 and the Big Creek road, which is currently native surface, prior to project activity?

b. Commercial Harvest

With this Project the Forest proposes approximately 2,250 acres of mechanical treatments consisting of commercial and non-commercial thinning, using tractor, jammer, or skyline systems, or mastication. All of the commercial thinning is around private property and along system roads. Numerous standing, dead lodgepole pine and sub-alpine fir need to be removed around residence housing on the private property near Edwardsburg through PCT/pile-burning. Why is commercial thinning needed around the Moscow Mine private property given that there are no structures located on the property? Could fire resiliency there be accomplished with PCT/pile-burn treatment and Rx burning? Similarly, the Independence Mine property only has one collapsed structure and one historic cabin that could be protected by PCT/pile-burn and Rx burning. Please consider this option. Large commercial thinning equipment driving on the Smith Creek loop will encounter numerous stream crossings and pass through riparian habitat with ESA-listed fish species. If the thinning near the road could be accomplished with a lesser footprint, that method would be the Tribe’s recommended and desired treatment.

Please provide an explanation of the purpose and need regarding the use of tractor, jammer, and skyline systems with details concerning where these would occur and their footprint on the landscape.

c. Burning

The Tribe recommends that the Forest break burn blocks into smaller units for better analysis.

d. Sediment and Fishery Concerns

The Tribe is always concerned with sediment delivery to streams, especially streams supporting ESA-listed, anadromous fish in the Big Creek watershed, as increased sediment quantity is the primary factor limiting recovery of these ESA-listed species in this watershed. The roads proposed to facilitate large equipment access and timber removal are adjacent to, and potentially involve the fording or crossing of, streams listed as Chinook salmon, steelhead and bull trout critical habitat.

In an effort to assist the Forest in its obligation to minimize adverse environmental impacts on National Forest surface resources, the Tribe offers the following suggestions to reduce the sediment footprint of this Project.

- Remove the commercial thinning treatments from this Project so that road prisms can be left as small as possible and so the number of trips needed with large equipment is reduced.
- Where possible, use Rx burning and PCT/pile burns to accomplish fire resiliency.

e. Impacts to Riparian Conservation Areas

Roads located in the RCA have the potential to impact sediment delivery to streams, large woody debris recruitment, stream shade, and nutrient inputs. Some of the proposed commercial thin/harvest actions are located on roads where over 50% of the road is in the RCA (see Table 1, RCA roads identified in **bold** font) and the road contains stream crossings.

The proposed action routes largely fall under Management Prescription Category 3.2, which focuses on active restoration and maintenance of aquatic terrestrial and hydrologic resources. Active fuel reduction restoration should involve reducing impacts to RCAs that are already listed as “Functioning at Risk.” In an effort to assist the Forest in its obligation to minimize adverse environmental impacts on National Forest surface resources, the Tribe offers the following suggestions to reduce impacts to RCAs within the Project area:

- Keep a light footprint on the roads, especially those located in RCAs. The Tribe recommends not using large equipment to clear roads of vegetation or widen roads in RCAs.
- Provide the number of heavy equipment trips to help the Forest, Tribe, and public better understand the degree to which the trips will impact resources on specific roads.

Table 1. Routes identified in the Big Creek WUI Project Boundary. These routes and the associated ID numbers are the same as those listed in the BCRAMP project for reference.

	Route	ID#	EA Miles	Calc. Miles	% in RCA	# Stream Crossings	Type of equipment and trips proposed under this project
NAMED	Big Creek Loop	503408500	1.26	1.41	25	4	?
		503408500	0.1				
	Big Creek-Smith Creek	50371	2.52	2.52	31	5	?
	Big Creek Spur 20	503408650	0.19	0.24	0	0	?
		503408650	0.04			0	
	Cleveland Mine	503408540	1.29	1.49	20	1	?
		BC3	0.2			0	
	Elk Summit Wagon	503406200	0.37	0.48	79	1	?
	Golden Cup Mine	503406600	4.13	4.37	4	1	?
	Government Creek	503406300	0.01	1.37	67	0	?
		503406300	1.36			1	
	Logan Creek Spur	50343	1.14	1.14	95	2	?
		503437000	0.07	0.07 ¹	0	0	?
	Ludwig Mine	503435000	2.16	2.4	29	3	?
		503435000	0.36				
		503435000 ²	0.03				
	McCrae Mine	503717000	1.85	1.84	59	2	?
	Moscow Mine	503438000	1.35	1.49 ¹	57	3	?
	Rocket Mine	503718000	0.31	1.03	22	2	?
		503718000	0.72				
		503718400	0.1	0.47 ¹	26	3	?
			503718400				
	Sunday Mine	503433000	0.12	1.02	6	2	?
		503433000	0.34				
		503433000	0.58				
		503433500	0.37	0.37	0	0	
		503433600	0.14	0.14	0	0	
UN-NAMED	Golden Cup to Lakeside Prospect	503406650	0.76	0.9	0	0	?
	Antimony Rainbow Claims	503435400	0.11	0.11	9	0	?
		503435500	0.44	0.74	8	2	
		503435500	0.3				?
		503435580	0.47	0.47	0	0	?
	Logan Creek Spur	503437000	0.34	0.34 ¹	29	0	?
	Upper McCrae Mine from Elk Summit	503442000	1.65	1.65	16	3	?
McCrae Mine Temp	503717000	0.41	0.41 ¹	12	0	?	