



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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

March 29, 2019

Sent via email only to: appeals-northern-regional-office@fs.fed.us

Attn: Objection Review Officer
USDA Forest Service, Northern Region
26 Fort Missoula Road
Missoula, MT 59804

Re: Nez Perce Tribe's Objection to the Little Boulder Project

Dear Objection Review Officer:

Please find the attached objection (Objection) submitted on behalf of the Nez Perce Tribe regarding the Little Boulder Project (Project) Final Environmental Impact Statement (FEIS) and Draft Record of decision (DROD). The Project is located on the Palouse Ranger District and the Responsible Official is Cheryl Probert, Forest Supervisor. The Project area includes the Potlatch River watershed including Little Boulder Creek, Hog Meadow Creek and the East Fork Potlatch River, located outside of the town of Helmer in Latah County, Idaho. A legal notice opening the Project Objection period appeared in the Lewiston Morning Tribune on February 15, 2019. This Objection is timely filed pursuant to 36 C.F.R. § 218, and all of the issues described in this Objection are based on the Tribe's previously submitted comments on February 28, 2018, which are located in the Project record and are incorporated here by reference.

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 Project is also located within the Tribe's area of exclusive use and occupancy, as adjudicated by the Indian Claims Commission,² 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 Forest.

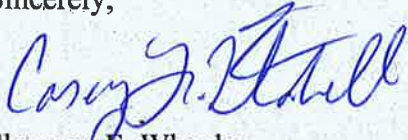
¹ Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

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

Attn: Objection Review Officer
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Page 2

The Tribe's contact for this Objection is Mike Lopez, Staff Attorney, Nez Perce Tribe Office of Legal Counsel. Mr. Lopez can be contacted at (208) 843-7355 or mlopez@nezperce.org.

Sincerely,



Shannon F. Wheeler
Chairman

For -

**OBJECTION
LITTLE BOULDER VEGETATION PROJECT
FINAL ENVIRONMENTAL IMPACT STATEMENT AND DRAFT RECORD OF
DECISION**

**Submitted by the Nez Perce Tribe
April 2019**

I. GENERAL COMMENTS

a. Project Description

The Nez Perce-Clearwater National Forests (Forest) has selected Alternative 2, proposing 1,501 acres of regeneration timber harvest and 1,183 acres of fuels reduction treatments to improve forest stand resiliency, watershed conditions, and re-establish necessary road access for future management of the land within the Little Boulder Project (Project) area. Watershed improvements include: replacing undersized or deteriorated culverts, replacing the existing Ruby Creek ford with a bridge or other aquatic organism passage structure, improving soil conditions by decompacting existing skid trails and landings, and range improvements designed to keep livestock within allotment boundaries. The road work includes: 5.2 miles of new road construction, 1.8 miles of non-system road added to system, 9.0 miles of road reconstruction, 14.9 miles of road reconditioning, 10.2 miles of temporary road construction (to be decommissioned after harvest activity), 0.3 miles of road placed into intermittent storage, and further development of two existing quarries to provide materials for road maintenance.

b. Nez Perce Tribe's Interest in the Little Boulder Vegetation Project

Treaty tribes, such as the Nez Perce Tribe (Tribe), have been recognized as managers of their Treaty-reserved resources.³ As manager, the Tribe has devoted substantial time, effort, and resources to the recovery and co-management of Treaty-reserved resources.

As a 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 one 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

³ *United States v. Washington*, 384 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.

Tribe presumes the continued existence of the biological conditions necessary to support the Treaty-reserved rights.⁷

Forest Service Manual (FSM) 1563.8b specifically states that the Forest Service “must 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.”

c. The Tribe’s Participation in the Little Boulder Project

The proposed Project has evolved since the Forest and the Tribe’s pre-consultations in October and November of 2015. There have been numerous quarterly meeting staff discussions about Little Boulder Creek and a field trip with staff in 2015. The Tribe recognizes the management need to address insect and disease activity, wildfire risk, and forest resiliency, but the Tribe is concerned about undue impacts to watershed conditions and wildlife species and their habitat during and after implementation. Comments were submitted on the draft Environmental Impact Statement on 2/28/2018 to this effect.

II. SPECIFIC OBJECTIONS

a. Impacts to Elk Habitat

Security areas that provide refuge from motorized and other anthropogenic disturbance are scarce within the Project area and yet the area provides some of the only remaining security habitat in the greater area due to extensive road networks and timber harvest on adjacent lands. Unfortunately, new road construction, vegetation treatments, and associated activities in Alternative 2 are expected to worsen this condition. The large amount of regeneration harvest acres and construction of the new ridgeline road in Alternative 2 are outstanding concerns of the Tribe.

At a minimum, the Forest used Servheen et al. 1997 (Servheen) to evaluate both Elk Habitat Effectiveness and Elk Vulnerability for each alternative and Elk Analysis Unit. However, the Tribe also recommended that the Forest supplement Servheen with best available scientific literature and recommendations contained therein. The supplemental analyses should account for the impacts of anthropogenic disturbance including motorized travel, silvicultural prescriptions, livestock grazing, and other management activities on elk and elk habitat (see distance-band or analogous methods as well as recent research and recommendations described in Unsworth 1998; Rowland et al. 2000, 2005; Rumble et al. 2005; Wisdom et al. 2005; Dohmen 2006; Long et al. 2008, 2009; Frair et al. 2008; Naylor et al. 2009; Ciuti et al. 2012; McCorquodale 2013; and Ranglack et al. 2017).

Proposed Remedies: The Tribe recommends use of more recent research about elk habitat and security as a basis for a more scientifically defensible and complete analysis of impacts to elk

⁷ 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).

generated by the Project. The analysis should evaluate habitat quality and quantity in addition to disturbance from the road network, timber harvest activities, and livestock grazing activities and operations (including the construction of new fence), all of which are factors that can impact the exercise of the Tribe's treaty rights. The Tribe recommends Alternative 3, and adopting design criteria to limit impacts elk security along roads and trails by taking advantage of natural topography and harvest methods (feathering, skips, etc.) when marking units.

b. Impact of Large Openings

Alternative 2 has the largest treatment footprint of all the alternatives and, thus, may exacerbate many degraded resource conditions within the Project area, including impacts from high road densities, high levels of motorized use and disturbance, livestock grazing, low elk habitat security, and previous soil disturbance. Large openings are also of concern from an elk vulnerability standpoint as extended sight lines may allow for extreme-range shooting by hunters from elevated vantage points. Large openings may impede dispersal, reduce foraging opportunities, increase vulnerability to predators and human harvest, and degrade soil condition.

Proposed Remedy: The Tribe recommends Alternative 3, and that the Forest use a combination of dispersed and aggregated retention strategies to limit the size of openings to less than 40 acres in regeneration units. The Tribe requests that the Forest evaluate and determine the condition of all openings adjacent to harvest units.

c. Livestock Grazing Impacts

The Tribe acknowledges that a range allotment analysis is outside the scope of this Project, however, Alternative 2 will change vegetation dynamics and construct new obstacles (fence lines and new system road), thereby influencing the season-long grazing that has occurred, and will continue to occur, in the Project area. All action alternatives will impact the behavior, distribution, and forage utilization of cattle in the Project, which are factors that can impact the quality of the Tribe's treaty resources, including big game, traditional foods, and fisheries.

Because livestock grazing is a reasonably foreseeable future action in the Project area, the Tribe would like to know how it helps the Forest achieve desired future conditions?

Proposed Remedy: The Tribe recommends that the Forest evaluate the direct, indirect, and cumulative impacts of livestock grazing on resource conditions and the Tribe's treaty resources, including desired future conditions, before and after implementation. The Tribe also asks that the chosen alternative incorporate design features to limit possible proposed or concurrent activities that may damage planted seedlings, degrade resource conditions (e.g. plant composition, soil stability, and sensitive species viability), and treaty resources.

d. No New Permanent Road

The proposed new ridgetop system road, although closed to the public, would increase the road density in an area with existing high road densities and poor watershed condition. Watershed condition ratings based on road densities indicate that, in terms of road densities, all subwatersheds

associated with the Project are in a poor condition⁸ and will remain so.⁹ There are approximately 652 total miles of roads in the three subwatersheds affected by the Project. Road densities in the subwatersheds range from 3.4 to 5.1 mi/mi². Within the Project area boundaries, there are 60.3 miles of roads. The overall road density in the Project area is 3.1 mi/mi².¹⁰ The proposed new road would have 4 new stream crossing and require new culverts. Therefore, the Tribe objects to Alternative 2 which proposes 5.2 miles of new road construction in the Project area.

The Tribe agrees with the Project's purpose and need, but questions the long-term need for a permanent system road to access land previously accessible before the Cherry Dinner road decommissioning projects (Road 3306). We now understand that a Travel Analysis was performed by the ID Team and it was determined there is a long-term access need for managing the management Area E1 (timber producing lands) ground within the Project area.¹¹ However, a temporary road would provide long-term access for wildland urban interface reasons. Prescribed burning could also be done in this area to reduce built-up fuels without the need for a permanent system road.

The FEIS recognizes that, "[e]ven though the direct and indirect effects of the project actions would not measurably influence or degrade overall subwatershed conditions, the cumulative effects in the subwatersheds analyzed will have a significant effect." Currently, there is active road building and heavy logging being conducted in the East Fork Potlatch subwatershed, which is mostly privately owned.¹²

Proposed Remedy: Instead of building the 5.2 miles of new permanent road, build a temporary non-system road.

e. Impacts to Cultural Resources

The Tribe is deeply concerned about the deliberate routing of proposed new road segments (mostly on or near ridgetops). As the Forest knows, many Nez Perce traditional spiritual sites are located on ridge tops and peaks. Although the FEIS states that no known Native American or cultural sites are known to be located within the Area of Potential Effects,¹³ the Forest does not seem to have made any meaningful effort to identify these sites. Archaeological surveys are inadequate to identify and evaluate these resources, and the Tribe does not believe that asking Tribal staff in meetings or letters for site information constitutes a good faith effort.

The Tribe is concerned that the Forest may not be adequately alert to Tribal resources in the Project area due to the following description of expected cultural resources: "Past and present uses within the project area associated with private and public land use include, but are not limited to: timber harvest, grazing, recreational and/or subsistence activities. The recent arrival of Euro-American

⁸ Little Boulder Vegetation FEIS p. 153.

⁹ Little Boulder Vegetation FEIS p. 162.

¹⁰ Little Boulder Vegetation FEIS p. 153

¹¹ Little Boulder Vegetation FEIS p. 343.

¹² Little Boulder Vegetation FEIS p. 163.

¹³ Little Boulder Vegetation FEIS, p. 89, Table 3.3.0

populations and their associated land use, settlement patterns, road building, and resource related practices changed the vegetative landscape.”¹⁴

The Tribe urges the Forest to engage the Tribe in ethnographic or traditional use studies to identify sacred sites, traditional cultural properties, and historic properties of religious and cultural significance to Indian tribes for this and future projects, as permitted in the FSM, Section 2367.3:

The agency official shall use Federal procurement and contracting authority to acquire necessary skills, technical expertise, work capacity, and/or products to complete compliance and stewardship work. Contracting is most appropriate for:

1. Preparation of Forest cultural resource overviews and ethnographies.

In addition, the Tribe reminds the Forest that protection of spiritual sites requires more than simple avoidance: the agency must consider and promote the conditions of solitude and isolation that are integral to the continued use of these places.

Proposed Remedy: The Tribe recommends that the Forest preserve any intact remnants of non-motorized trails and engage the Tribe in ethnographic or traditional use studies to identify sacred sites, traditional cultural properties, and historic properties of religious and cultural significance to Indian tribes for this and future projects.

CONCLUDING OBJECTION

Concluding Remedy: Choose Alternative 3. Alternative 3 is very similar to alternatives 2 and 4, however, this alternative does not propose any new road construction and proposes 2.1 miles of non-system roads be decommissioned after the timber sale.¹⁵ How can Alt 3 not be chosen as the environmental alternative?

¹⁴ Little Boulder Vegetation FEIS, p. 87.

¹⁵ Little Boulder Vegetation FEIS p. 187.

III. REFERENCES

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