



Nez Perce

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

January 23, 2019

Submitted via email: jjdurkin@fs.fed.us

Forest Environmental Coordinator
Umatilla National Forest
72510 Coyote Rd
Pendleton, OR 97801

Re: Nez Perce Tribe's Objection regarding the Glass Restoration Project

Dear Reviewing Officer:

Please find the attached objection ("Objection") submitted on behalf of the Nez Perce Tribe ("Tribe") for the Glass Restoration Project ("Project") Final Environmental Assessment ("FEA") and Draft Decision Notice and Finding of No Significant Impact ("DN/FONSI"). The Project is located on the Umatilla National Forest ("Forest"), Walla Walla Ranger District. The Responsible Official is Michael Rassbach, District Ranger, Walla Walla Ranger District. A legal notice opening the Project Objection period appeared in the East Oregonian on December 11, 2018. 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 September 11, 2018, which are located in the Project record and incorporated here by reference.

As the Forest Service is aware, portions of the present-day Forest are located within the Tribe's aboriginal territory and are subject to the rights the Tribe reserved, and the United States secured, in its Treaty of 1855.¹ Part of the Forest 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.

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.

Forest Environmental Coordinator
January 23, 2019
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.

Sincerely,



Shannon F. Wheeler
Chairman

**OBJECTION
GLASS RESTORATION PROJECT
FINAL ENVIRONMENTAL ASSESSMENT**

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

I. THE NEZ PERCE TRIBE'S INTEREST IN THE GLASS RESTORATION PROJECT

a. Project Description

The Umatilla National Forest ("Forest") is proposing commercial harvest, non-commercial thinning, fuel treatments, soil restoration, and replanting of desired tree species to improve ecosystem resiliency and benefit economic and social interests in the Upper Lookingglass, Little Lookingglass, and Jarboe Cleek watersheds. The proposed Glass Restoration Project ("Project") actions include 1,638 acres of commercial harvest, 2,713 acres of non-commercial thinning, 1.2 miles of new temporary road construction, and 7.3 miles of temporary road construction on existing templates. The Project also includes 16 acres of commercial harvest and 120 acres of non-commercial harvest within Riparian Habitat Conservation Areas ("RHCAs"). These actions are to decrease offsite ponderosa pine in favor of a species composition close to the range of historical values for moist forest. The Project also aims to improve landscape resiliency, restore RHCAs, and provide forest products.

b. Nez Perce Interest and Participation in the Glass Restoration Project

The Nez Perce Tribe ("Tribe") is a federally recognized Indian tribe with headquarters in Lapwai, Idaho, on the Nez Perce Reservation. Since time immemorial, the 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, and gathering across their vast aboriginal territory, and these activities still do play a major role in the culture, religion, subsistence, and commerce of the Tribe.

In 1855, the United States entered into a Treaty with the Tribe.³ In this Treaty, the Tribe explicitly reserved, and the United States secured, among other guarantees, a permanent homeland as the well as "the right of taking 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 Forest are part of the vast territory ceded by the Tribe, over which the Tribe has Treaty-reserved rights. These Forest lands and waters provide irreplaceable critical habitat for Tribal resources, including big game species, traditional foods, and imperiled stocks of Snake River steelhead, Spring/Summer Chinook salmon, bull trout, Pacific lamprey, and other

³ Treaty of June 11, 1855 with the Nez Percés, 12 Stat. 957.

⁴ *Id.*

resident aquatic species. These and other natural resources are subject to the exercise of the Tribe's Treaty-reserved rights.⁵

The Treaty-reserved right to take fish and other resources reserved by the Tribe presumed the continued existence of those resources.⁶ Thus, the treaty secures to the Tribe the continued existence of those biological conditions necessary for the resources that are the subject matter of the treaties.⁷ Unfortunately, many of the Treaty resources important to the Tribe are at risk. These declines have resulted in significant negative impacts to the Tribe's livelihood, culture and economy.

Treaty tribes, such as the Nez Perce have been recognized as managers of their Treaty-reserved resources.⁸ As a co-manager, the Tribe has devoted substantial time, effort, and resources to the recovery and co-management of Treaty-reserved resources within its Treaty territory.

As a fiduciary, the United States and all its agencies owe a trust duty to the Tribe and other federally-recognized tribes.⁹ This trust relationship has been described as "one of the primary cornerstones of Indian law,"¹⁰ 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.¹¹

All executive agencies of the United States are subject to the federal trust responsibility to recognize and uphold Treaty-reserved rights. Forest Service Manual ("FSM") 1563.8b 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."

The Tribe has raised concerns to the Forest, through written comments on the draft Environmental Assessment on September 11, 2018, emails (dated October 15 and 29, 2018 and attached and incorporated herein), and other staff-to-staff communications. Tribal staff visited the Project area with the District Ranger Mike Rassbach and Forest Silviculturist Jack Comish on October 2, 2018. Tribal staff discussed the Tribe's wildlife concerns with the Forest Biologist Holly Harris on October 12, 2018. Tribal staff appreciates that the FEA includes corrected road density estimates and more information about impacts to amphibians and elk security.

⁵ See e.g., *Sohappy 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'n*, 443 U.S. 658 (1979) (Fishing Vessel).

⁶ See Fishing Vessel at 678-79.

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).

⁸ *United States v. Washington*, 384 F. Supp. 312, 339-40, 403 (W.D. Wash. 1974).

⁹ 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).

¹⁰ Felix Cohen, *Handbook of Federal Indian Law* 221 (1982).

¹¹ See, e.g., *Mitchell*, 463 U.S. at 225.

However, none of the riparian treatment input that the Tribe provided is reflected in the FEA and DN/FONSI.

Tribal staff also supports efforts to monitor for amphibians prior to and during layout of all potential RHCA treatments. In addition, Tribal staff encourages the Forest to take advantage of natural topography and harvest methods (feathering, skips, etc.) when marking units prior to implementation, to maintain elk security along motorized roads and trails. The Tribe remains concerned, however, about the treatments in the RHCAs. An email was sent to Ranger Rassbach on October 15, 2018 raising concerns about the commercial harvest in the RHCAs with a response to be in touch received on October 29, 2018.

The Tribe does not support the preferred Alternative A, which uses a combination of treatments including commercial timber harvest in RHCAs and non-commercial thinning vegetation management intended to restore both upland and riparian areas. The Tribe opposes commercial treatments in RHCAs. The Tribe is filing this Objection because it wants to protect and preserve natural resources within the Project area.

II. SPECIFIC OBJECTION

The Tribe does not agree with the proposed treatment (mechanical methods with commercial-sized trees removed by ground and skyline logging systems) for the 16 acres of commercial harvest in category 4 Class IV (intermittent) RHCA. The Tribe objects to commercial treatments in RHCAs.

Remedy: Non-commercial thinning could be used to improve stand resiliency to natural disturbance and to remove non-native species. Non-commercial thinning (including girdling), in place of commercial thinning, would remedy to the Tribe's objection. Non-commercial thinning would favor retention of early seral species (western larch, western red cedar, and quaking aspen) while retaining a mix of species and spatial heterogeneity, which the Tribe supports.

The Tribe requests that the Forest not issue any final Decision Notice that would authorize commercial treatments in RHCAs.