



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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Submitted via webform through project website

http://www.fs.fed.us/nepa/nepa_project_exp.php?project=54260

District Ranger Anthony Botello
Payette National Forest, Krassel Ranger District
500 North Mission, Building 2
McCall, Idaho 83638

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

Dear Ranger Botello:

Thank you for the opportunity to provide comments on the Big Creek Hazardous Fuels Reduction Project Environmental Assessment.

The U.S. Forest Service, Payette National Forest, Krassel Ranger District ("Forest"), prepared an Environmental Assessment ("EA") 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 9,818 acres and would construct less than 1 mile of temporary road to facilitate equipment access and product removal. The proposed Project 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 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 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 1855¹. 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 Tribe². 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.

Thank you again for the opportunity to provide comments on the Project. The Tribe's technical comments follow this letter; they reflect the policy views and technical concerns of the Tribe. You are welcome to contact Mike Lopez, Nez Perce Tribe Staff Attorney, at (208) 843-7355 or mlopez@nezperce.org with any questions or concerns.

Sincerely,



Shannon Wheeler
Chairman

¹ Treaty with the Nez Perces, 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

I. GENERAL COMMENTS

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[shy]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 COMMENTS

The Tribe 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 *U.S. 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.

⁷ *See, Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 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

Creating a new, 0.8-mile road located in an intact forest east of Edwardsburg should be reconsidered and a new action alternative identified. If this proposed road is developed to haul commercial timber, it will need to be wide enough to pass large equipment, require turnarounds, and impact soils and wildlife found in an intact portion of forest. The Forest justifies construction of this road using road standard 1309 for Management Prescription Category ("MPC") 3.2. This road standard states "[r]oad construction or reconstruction may only occur where needed... [t]o address immediate response situations where, if action is not taken, unacceptable impacts to hydrologic, aquatic, riparian or terrestrial resources, or health and safety, would result."⁸ However, no immediate response situation was explicitly stated, so we must assume that the Forest is implying the threat of wildfire. While the threat of wildfire always exists in forests, the immediate need to build a road is not justified under MPC 3.2. The Tribe understands the need to protect the east side of Edwardsburg from the threat of fire; accordingly, we suggest the Forest to examine an alternative where a precommercial thin ("PCT")/pile-burn treatment and prescribed burn ("Rx") could achieve the same fire resilience without building a road.

Further, this temporary road is partially located in the riparian conservation area ("RCA") and the Big Creek Fringe Inventoried Roadless Area. Although the EA states that the temporary road would be located outside of riparian conservation areas⁹, the EA does not explain (through text or map) where the temporary road will be specifically located. The temporary road cannot possibly avoid the Lick Creek RCA without crossing through private property. Moreover, the temporary road would pass through a roadless area managed under the Backcountry Restoration theme, which is "managed to retain undeveloped character, while providing a variety of recreation opportunities and allowing for limited forest health activities including preserving strongholds for a variety of species and maintaining or restoring the characteristics of ecosystem composition and structure."¹⁰ The Regional Forester may approve temporary road construction to reduce hazardous fuel conditions when the activity cannot be reasonably accomplished without a temporary road¹¹. The Tribe recommends that the current private spur roads that connect to the Rose Marie Neal Road be utilized to allow precommercial thin and prescribed burn activities. Using private roads would prevent a temporary road from being built in a roadless area but still allow access to create a fire break around homes. The Tribe recommends the Forest contact these landowners to determine if these private roads could be utilized. The use of private spur roads would also allow access without passing through the Lick Creek RCA.

The Tribe offers the following suggestions to reduce environmental impacts associated with the temporary road:

⁸ Payette National Forest Land & Resource Management Plan at III-264.

⁹ Big Creek Hazardous Fuels Reduction Project Environmental Assessment at 18.

¹⁰ 73 FR 1139.

¹¹ 36 CFR 294.23 (b)(3)(ii)

- Ask private landowners to use the existing road network in Edwardsburg to create a fire break on the east side, rather than building a 0.8-mile temporary road.
- Develop an alternative where a precommercial thin/pile-burn treatment and prescribed burn could achieve desired fire resilience without building a temporary road.

Fords and Stream Crossings

Vehicular fords have the potential to negatively impact fish species by creating stream bed and bank disturbance, adding fine sediment to streams, reducing riparian plant cover, and potentially crushing fish located on fords. Stream channel morphology is routinely altered by vehicular fording, becoming wider and shallower at the point of crossing.

The Forest identifies 20 temporary stream crossings in Table 6 of the EA¹². In the ‘Direct and Indirect Effects’ section of the EA, the Forest identifies 18 fords in the Smith Creek drainage and 2 temporary crossings in the Headwaters Big Creek watershed at Lick Creek¹³. Environmental DNA samples taken by the Forest show that Endangered Species Act (“ESA”)-listed bull trout and steelhead are present in Smith Creek. Vehicular fords on the Smith Creek Road are often on smaller tributary crossings potentially inhabited by ESA-listed fishes, due to their close proximity to the mainstem Smith Creek. The Forest should consider additional measures, such as temporary crossing structures and graveling ford approaches, due to the prospective mastication equipment and 94 loads of timber crossing fords on Smith Creek Road. Please note that the EA does not contain Figure 7 that purportedly shows the location of these stream crossing/fords.

The EA does not analyze all fords in the Project area. The Hydrology Specialist report that shows the location of these 20 fords/stream crossings¹⁴, but Tribal staff located an additional five fords through Geomorphic Road Analysis and Inventory Package (“GRAIP”) surveys (Figure 1). Three of these fords are located on the Pueblo Summit Road, and two are located on the northern section of Smith Creek Road that is identified as Road Segment 1 in Figure 5 of the EA. The Forest should include these additional fords in the Project analysis.

One of the temporary crossings at Lick Creek is not located on the 0.8-mile temporary road but instead is located on the south side of the Rose Marie Road, on private property. The Tribe questions how this area will be accessed without building a temporary road and, further does not understand why thinning with removal needs to occur along the edge of a meadow.

The EA does not address impacts to former road improvement work in the Project area. In 2014 and 2015, the Forest partnered with the Tribe to harden 15 stream crossings and add 67 waterbars to the Smith Creek Loop (Figure 2). Because the Smith Creek Loop trail is a narrow trail prism (Figure 2); the Tribe is concerned that the trail prism will be widened to accommodate mastication and supply equipment, and requires that the previous sediment reduction projects are restored so they continue to function as designed.

The Tribe offers the following suggestions to reduce environmental impacts associated with

¹² Big Creek Hazardous Fuels Reduction Project Environmental Assessment at 21.

¹³ *Id.* at 48.

¹⁴ Big Creek Hazardous Fuel Reduction Project, Hydrology Report, Figure 7 at 30.

vehicular fording and stream crossings:

- Analyze all fords in the project area for resource impacts.
- Construct temporary crossings and harden fords along the Smith Creek Road and Loop. On smaller stream crossings, this treatment could be as simple as placing logs in the channel to mitigate stream damage from mastication equipment.
- Communicate in the Final EA how previous road improvement projects on the Smith Creek Loop will be improved or returned to their original state.
- The Smith Creek Loop is the most environmentally sensitive road in this Project due to the high density of fords (13), 47% percent of the road in RCAs and small road prism. Rather than using tracked mastication equipment on this road section, the Tribe recommends examining a thin/pile-burn treatment and prescribed burn for this section of road.

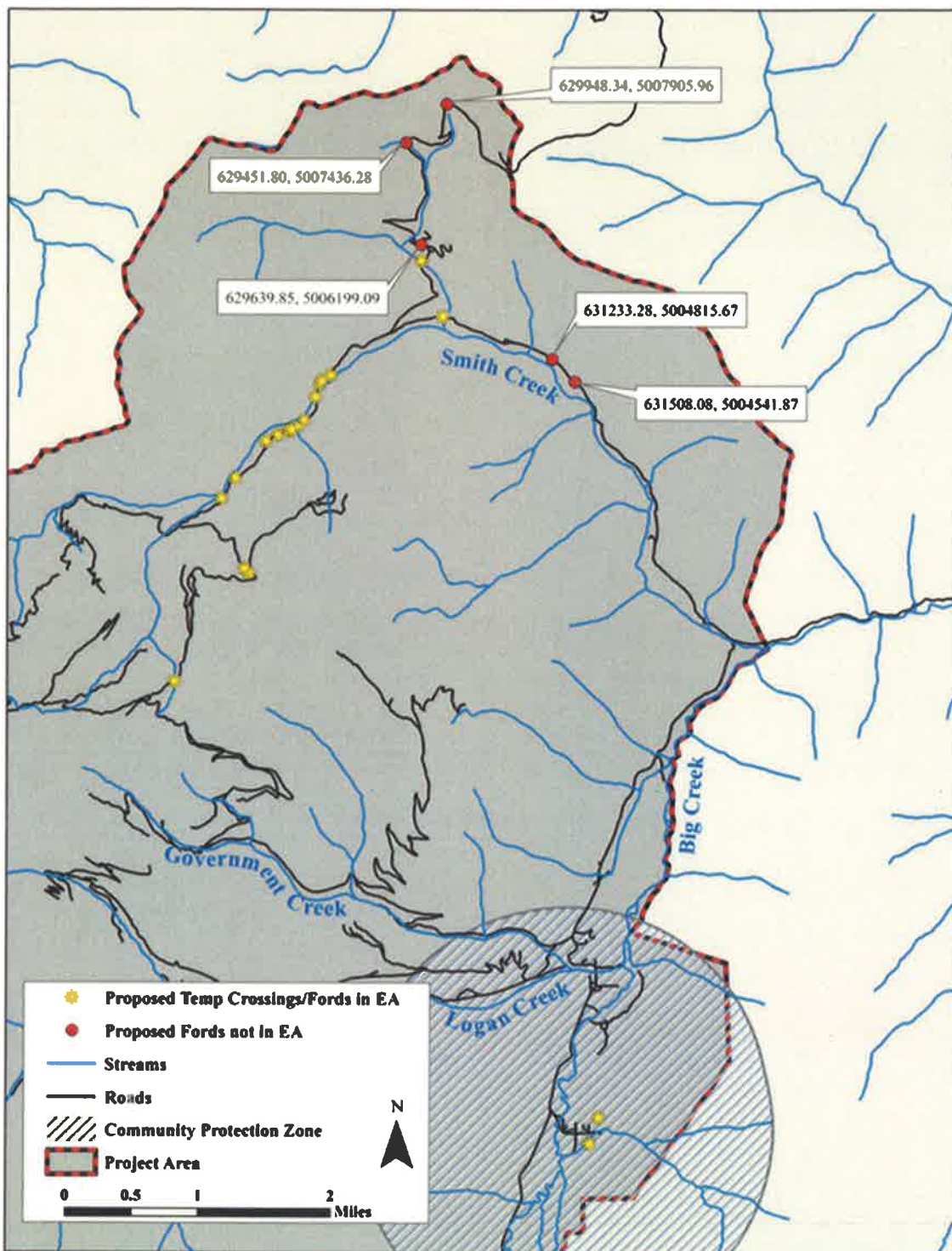


Figure 1. The proposed temporary crossings, fords, and Community Protection Zone boundary in the Big Creek Hazardous Fuel Reduction Project.



Figure 2. An example of stream crossing hardening that was performed as a restoration partnership project between the Forest and Tribe in 2014-15.

Vehicle Trips within Project Area

The EA contains inconsistencies regarding timber-hauling loads and project duration. The EA states there will be approximately 600 log trucks coming out of the project area¹⁵ but road segment load estimates in Table 5 of the EA total 708.8 loads. Further, the number of estimated loads passing through the ‘Warren-Profile Gap, Southern’ road segment is estimated at 604.8 loads in Table 5¹⁶, but loads generated from all other road segments total 613.6. With respect to project duration, the Forest estimates that the duration of the project to be 2 to 5 years¹⁷, yet the EA also states that Project implementation will last approximately 10 years¹⁸.

In order to mitigate for sediment caused by log hauling, the Tribe recommends the Forest gravel and improve the Profile Creek Road at locations that were not completed by the Forest’s graveling efforts that took place in 2016. Similarly, the Tribe recommends that the Big Creek Road, which is currently native surface, be graveled prior to Project activity.

The EA does not consider all options for minimizing Project impacts, while still achieving reduced fuel loads. For instance, hauling logs out of Big Creek has the potential to spread insects and disease. Instead, the Forest could haul logs to degraded sites in need of organic material, such as the Moscow or McCrae mines, for mastication and coverage of disturbed ground. This solution would reduce fuel densities, while mitigating impacts from increased truck traffic and the potential for spreading insects and disease.

The Tribe offers the following suggestions to reduce environmental impacts associated with

¹⁵ Big Creek Hazardous Fuels Reduction Project Environmental Assessment at 57.

¹⁶ *Id.* at 19.

¹⁷ *Id.* at 57.

¹⁸ *Id.* at 29.

vehicle trips in the project area:

- Establish a clear Project timeline and ensure the number of timber-hauling loads is accurate so effects can be better analyzed.
- Consider graveling sections of road that will receive the bulk of vehicular traffic associated with the Project.
- Examine the risk of spreading insects and disease from logs being removed from the Project area.

Sediment Modeling

The Tribe appreciates that sediment modeling was performed for this Project, however the Tribe questions the conclusion that “increasing the traffic on the haul routes does not measurably increase sediment to project area streams. Increases are so small that measurable detection in the field would not be possible.”¹⁹

Sediment modeling efforts are critical in the Big Creek watershed, due to the current condition of roads and potential impacts to aquatic resources. Road-based sediment yield to streams generally increases in the following situations: when roads cross or are adjacent to streams²⁰, when motorized traffic increases^{21 22 23}, and when road surfaces are composed of more erodible material²⁴. Unfortunately, all of these conditions are present on Big Creek roads. Indeed, the roads identified for carrying out the proposed action treatments will receive increased motorized traffic, are largely in the RCA, have stream crossings, and are composed of native surface. The existing Watershed Condition Indicators for the Headwaters of Big Creek, Logan Creek, and Smith Creek are already categorized as Functioning at Risk for sediment/turbidity²⁵. Due to the elevated baseline for sediment/turbidity in these watersheds, the Tribe considers it critical to be conservative in the Project sediment predictions and offer sediment reducing offsets.

The Forest used the Water Erosion Prediction Project (“WEPP”) and GRAIP models to quantify sediment-based impacts to area streams²⁶. The Forest’s sediment WEPP model is limited in its ability to accurately and reliably predict sediment generated by vehicular fording and Project activities occurring in the RCA - which is a principal concern of the Tribe. As such, the Forest will likely underestimate the amount of sediment delivered to an already sediment--impaired stream²⁷. The WEPP model provides options for road configurations, soil, climate, traffic use,

¹⁹ *Id.* at 35.

²⁰ Belt, GH., J.O’Laughlin, and T.Merrill. 1992, Design of forest riparian buffer strips for the protection of water quality: Analysis of Scientific Literature. Report No. 8, Idaho Forest, Wildlife, and Range Policy Analysis Group.

²¹ Foltz, R.B. 1996, Traffic and no-traffic on an aggregate surfaced road: sediment production differences. Presented at the FAO Seminar on Environmentally Sound Forest Roads, June 1996, Sinaia, Romania. 13 p.

²² Bilby R.E., K. Sullivan, and S.H. Duncan. 1989, The generation of fate of road-surface sediment in forested watersheds in southwestern Washington. *Forest Science*. 35 (2): 453-468.

²³ Reid, L.M. and T Dunne. 1984, Sediment production from forest road surfaces. *Water Resources Research*. 20(11) 1753-1761.

²⁴ Gucinski, H, M.J., Furniss, R.R. Ziemer, and M.H. Brookes. 2001, Forest roads; a synthesis of scientific information. Gen. Tech. Rep. PNW GTR-509. Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station. 103 p.

²⁵ Big Creek Hazardous Fuel Reduction Project, Hydrology Report, Table 10 at 21.

²⁶ Big Creek Hazardous Fuels Reduction Project Environmental Assessment at 33-35.

²⁷ <https://www.fisheries.noaa.gov/resource/document/recovery-plan-snake-river-spring-summer-chinook-salmon-and-snake-river-basin>

gradient, length and width as well as fillslope buffer; however, assuming that BMP's will offset all Project sedimentation is based on judgement and not modeled results.

The Tribe offers the following suggestions in relation to the sediment modeling completed for the project area:

- Be conservative in modeling regarding sediment production and delivery related to Project activities.
- Consider graveling sections of road that will receive the bulk of vehicular traffic, as a means to offset Project-generated sediment.
- Construct temporary crossings and harden fords along the Smith Creek Road and Loop. On smaller stream crossings, this treatment could be as simple as placing logs in the channel to reduce turbidity pulses associated with fording.

b. Commercial Harvest

Commercial harvest in this Project area will negatively impact aquatic and terrestrial resources through requisite changes to the road system. The roads identified in the Project area for commercial thinning are historic mining roads and are narrow in width, often rocky, and would prove difficult to pass larger vehicles and vehicles with trailers. Notably, the Smith Creek road is 51% in the RCA, has 8 stream crossings, and limited vehicle turn around or passing opportunities. In order to pass larger thinning equipment, these roads will need to be widened, will require turnarounds, and will impact intact forest and riparian habitat. The Tribe recommends that the Forest evaluate whether the PCT/pile-burn treatment and Rx burning may achieve the same fire resilience with a smaller environmental footprint

The EA states that commercial timber harvest is prohibited outside of the Community Protection Zone ("CPZ"); based on this reasoning, the Moscow and Independence mines were dropped from consideration²⁸. However, all of Smith Creek and most of Government, Logan, and Big Creeks fall outside of the CPZ boundary (Figure 1), but these areas are still identified as commercial thinning with removal on the Proposed Action Map in the EA (no page number available for reference). In Table 6 of the EA, the proposed action treatment types are identified but never described within the document²⁹. The Tribe would like the Forest to consider dropping the commercial harvest proposed in this Project outside of the CPZ boundary. If the thinning near the road could be accomplished with a lesser footprint, that method would be the Tribe's recommended and desired treatment.

Aside from CPZs, the Forest is proposing commercial harvest in inappropriate management areas. The Forest is ostensibly proposing commercial logging at all locations designated as 'thinning with removal' on the Proposed Action Map. This commercial harvest includes 116 acres within the Big Creek Fringe Inventoried Roadless Area ("IRA") that are proposed for thinning with removal³⁰. The roadless rule "prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics"³¹.

²⁸ Big Creek Hazardous Fuels Reduction Project Environmental Assessment at 21.

²⁹ *Id.* at 21.

³⁰ *Id.* Table 23 at 77.

³¹ 66 FR 3244.

Additionally, the entire project area is located in MPC 3.2 and 4.1c, which “have been identified as not suited for timber production.”³²

The Tribe offers the following suggestions to reduce environmental impacts associated with Commercial Harvesting Equipment:

- Examine an alternative where a pre-commercial thin/pile-burn treatment and prescribed burn could achieve desired fire resilience instead of commercial thinning with removal.
- Remove commercial thinning outside of the CPZ boundary.
- Include a description of proposed action treatment types so environmental impacts can be better evaluated.

c. Prescribed Burning

The Tribe recommends that the Forest break burn blocks into smaller units for better analysis and provide a burn plan with associated details and timelines.

d. Sediment and Fishery Concerns

The Tribe is always concerned with sediment delivery to streams, especially streams supporting ESA-threatened, anadromous fish in the Big Creek watershed. Indeed, excess fine sediment is a primary factor limiting recovery of these ESA-listed species in the Big Creek watershed³³. The Forest proposes fording and crossing streams listed as critical habitat for Chinook salmon, steelhead, and bull trout, to facilitate large equipment access and timber removal.

The Tribe offers the following suggestions to reduce the sediment footprint of this Project:

- Remove commercial thinning treatments from this Project so that the need of equipment trips is reduced and road prisms do not need to be widened.
- Where possible, use Rx burning and PCT/pile burns to accomplish fire resilience.

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 with stream crossings and where over 50% of the road is in the RCA (see Table 1, RCA roads identified in bold font). Will commercial harvest/hauling equipment need to travel through RCAs to access commercial harvest zones (e.g., areas on the Smith Creek Road where RCA thinning treatment occurs between the road and farther commercial treatment)?

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

³² Payette National Forest Land & Resource Management Plan at III-261.

³³ <http://www.fisheries.noaa.gov/resource/document/recovery-plan-snake-river-spring-summer-chinook-salmon-and-snake-basin>

as "Functioning at Risk." To assist the Forest, 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 roads, especially those located in RCAs. The Tribe recommends not clearing roads of vegetation or widening roads in RCAs.

Table 1. Summary of log hauling routes in the Big Creek Hazardous Fuel Reduction Project. For reference, these routes and the associated ID numbers are the same as Table 5 and Figure 5 of the EA³⁴.

Road Segment #	Road Segment Name	% in RCA	Stream Crossings	# Loads Generated + # Loads Passing Through
1	Big Creek- Smith Creek- Northern	55.77%	5*	93.6
2	Big Creek Smith Creek- Southern	43.12%	3	163.2
3	Big Creek Spur 20	0.00%	0	8.8
4	Logan Creek	66.67%	0	153.6
5	Rose Marie Neal	63.46%	1	96
6	Warren-Profile Gap, Northern	42.59%	8	131.2
7	Warren-Profile Gap, Southern	35.94%	7	708.8
8	Warren-Profile Gap, Central	58.67%	7	604.8

*Stream Crossings include two fords that were not analyzed in the EA.

³⁴ Big Creek Hazardous Fuels Reduction Project Environmental Assessment at 19-20.

f. Impacts to Inventoried Roadless Areas

The Tribe finds it hard to comment on the Project's impacts to IRAs for the following reasons. First, the justification for minimally impacting IRAs in the Proposed Action are mostly qualitative, rather than quantitative. Further, the justification for mitigated impacts to 'high quality or undisturbed soil, water, and air' is the use of National Best Management Practices ("BMPs") for roads³⁵. However, the EA never defines the road BMPs, other than their vague objectives. Road BMPs are referenced in the EA³⁶ and Table 12 notes that BMPs are included in Appendix B³⁷ but these are Project Design Features. However, road BMPs are not defined in Appendix B but are included in the Big Creek Fuel Reduction Hydrology Report.³⁸

The Tribe offers the following suggestions to reduce impacts to Inventoried Roadless Areas:

- Use quantitative analyses to evaluate all Project impacts to resources.
- Include road BMPs in the Final EA for evaluation.

³⁵ *Id.* at 77.

³⁶ *Id.* at 36.

³⁷ Big Creek Hazardous Fuels Reduction Project Environmental Assessment Table 12 at 31-32.

³⁸ Big Creek Hazardous Fuel Reduction Project, Hydrology Report, Table 16 at 36.