



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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

November 18, 2021

Submitted via web portal only to: <https://cara.ecosystem-management.org/Public/CommentInput?Project=60889>

Krassel Ranger District
% Joshua Simpson
Payette National Forest
500 North Mission Street, Building 1
McCall, ID 83638

Re: Nez Perce Tribe's Scoping Comments on the East Fork South Fork Restoration and Access Management Plan

Dear Mr. Simpson:

On behalf of the Nez Perce Tribe ("Tribe"), thank you for the opportunity to comment on the Payette National Forest's ("Forest") proposed East Fork South Fork Restoration and Access Management Plan ("Project"). The Tribe understands that the Project proposes to implement a range of actions relating to motorized travel management and watershed rehabilitation within the East Fork South Fork Salmon River watershed and the non-wilderness portion of the upper Monumental Creek watershed—approximately 22 miles east of McCall, Idaho, on the Forest's Krassel Ranger District. The Tribe, through its Department of Fisheries Resource Management Watershed Division, has participated extensively in the Big Creek/Yellow Pine/South Fork Salmon River Collaborative ("Collaborative") and expressed support for the consensus recommendations that the Collaborative provided to the Forest on December 18, 2018.¹

The Tribe's paramount priority is to protect and advance its treaty-reserved rights and cultural interests within its aboriginal territory. As the Forest is aware, this Project 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 1855.² The Forest Service, therefore, has a treaty and trust responsibility to ensure that its actions, including approval and implementation of this Project, are


¹ Big Creek/Yellow Pine/South Fork Salmon River Collaborative, *East Fork South Fork Salmon River Restoration and Access Management Proposed Action* (December 18, 2018), <https://dfmwatershed.maps.arcgis.com/sharing/rest/content/items/3f2ad411622441088ad8cebea7098bcb/data>.

² Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

fully consistent with the 1855 Treaty, executive orders, departmental regulations and policies, and other federal laws implicating the United States' unique relationship with the Tribe. The Project is also located within the Tribe's area of exclusive use and occupancy, as adjudicated by the Indian Claims Commission.³

Please find attached the Tribe's scoping comments on the Project. Thank you again for the opportunity to comment. Please contact Michael Lopez, Senior Staff Attorney, at mlopez@nezperce.org or 208.843.7355, with any questions or concerns.

Sincerely,



Samuel N. Penney
Chairman

³ *Nez Perce Tribe v. United States*, Docket #175, 18 Ind. Cl. Comm. 1.

**East Fork South Fork Restoration and Access Management Plan
Nez Perce Tribe's Scoping Comments
November 18, 2021**

I. GENERAL COMMENTS

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 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 States entered into a treaty with the Tribe through which the Tribe ceded a vast territory.⁴ In this treaty, the Tribe explicitly reserved, however, within its ceded territory "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 land."⁵ The Tribe's treaty also presumed and reserved the continued existence of those biological conditions necessary to support the resources upon which its treaty-reserved rights depend within its ceded territory.⁶ The land and water that comprises the Payette National Forest ("Forest") is part of the vast territory ceded by the Tribe to the United States and, therefore, is subject to the Tribe's treaty-reserved rights.

The proposed East Fork South Fork Restoration and Access Management Plan ("Project") is located in the East Fork South Fork Salmon River ("EFSFSR") watershed and the non-wilderness portion of upper Monumental Creek watershed ("Thunder Mountain area"). The Project is entirely within the Tribe's ceded territory, as well as within the area determined by the Indians Claims Commission to have been exclusively used and occupied by the Tribe.⁷ This area provides irreplaceable habitat for Tribal resources, including Chinook salmon, steelhead, and bull trout, which are subject to the exercise of the Tribe's treaty-reserved rights.

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 in 1992, Snake River Basin Steelhead were listed as threatened in 1997, and bull trout were listed as threatened in 1999. The decimation of these runs has seriously impacted the Tribe's economy and wellbeing. The Tribe has, therefore, as a co-manager, devoted substantial time, effort, and resources to the recovery of treaty-reserved resources, including on the Forest.⁸

⁴ Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

⁵ *Id.* at art III.

⁶ 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) *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979); *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd*, *Washington v. United States*, 138 S. Ct. 1832 (2018).

⁷ *Nez Perce Tribe v. United States*, Docket #175, 18 Ind. Cl. Comm. 1.

⁸ *United States v. Washington*, 384 F.Supp. 312, 339-40, 403 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

II. SPECIFIC COMMENTS

A. Motorized Recreation

The Tribe does not support the Forest's proposed motorized actions below because they are not consistent with the Tribe's and the Big Creek/Yellow Pine/South Fork Salmon River Collaborative's ("Collaborative") goals for the Project, and none of these actions were included in the final consensus recommendations the Collaborative provided the Forest:

- Designate the Quartz Creek Road/Motorized Trail (# 067) as a system road to the Quartz Creek Bridge, then designate it as a new motorized trail open to all vehicles that incorporates three miles of mining roads up to the Red Mountain mining area
- Designate approximately four and one half miles of new motorized trail open to all vehicles in the Horse Heaven area connecting with the existing Boise National Forest trail access
- Designate approximately one mile of system road in the Thunder Mountain area to provide access to Marble Creek and Lookout Mountain trailheads
- Designate approximately two miles of new motorized trail open to all vehicles in the Thunder Mountain area

The Tribe does support the Collaborative proposal to designate approximately one mile of new motorized trail in the Wilson Mine area near Profile Summit. The Tribe notes, however, that the Forest's scoping document does not specify whether the proposed new trail would be open to all vehicles or limited to vehicles smaller than 50" tread. The Tribe only supports opening the trail to vehicles smaller than 50" tread (an ATV trail) as proposed by the Collaborative.

The Tribe also supports the designation of the Quartz Creek Road/Motorized Trail (# 067) as a trail open to all vehicles to the Quartz Creek Bridge and then as a motorized trail open to ATVs (incorporating the three miles of mining road up to the Red Mountain mining area).

Finally, the Tribe supports a proposal not included in the Forest's scoping document for the Project—redesigning the switchbacks on the Sheep Creek Trail #071 for pack saddle/motorcycle use.

B. Natural Resources

The Tribe recommends the following projects to benefit natural resources, none of which were specifically mentioned in the Project proposal. These recommendations are supported by the Collaborative.

- Address sediment delivery issues on the Yellow Pine Bar Road (facilitating camping access) through graveling/resurfacing
- Reroute the McCall-Yellow Pine Road around the Eiguren Ranch and recontour the "Bowling Alley" slide area
- Maintain Missouri Creek Trail (# 031) non-motorized trail status and conduct trail improvements for sediment reduction
- Conduct Storm Damage Risk Reduction ("SDRR") work around sediment-delivery points and fix trail issues on Quartz Creek Road/Trail (# 067)

- Fix culvert issues on EFSFSR Road hanging culvert (mile marker 3.15) and Spring Creek culvert (on Profile Summit Road); fix erosion caused by a log dam on Profile Creek Road
- Decommission Mule Hill Road for resource benefits
- Decommission Sugar Creek road spurs for resource benefits

The Tribe and Collaborative put significant time into drafting consensus recommendations for the EFSFSR. The Tribe was, therefore, surprised by the vagueness of the Forest's scoping document with regard to watershed improvement actions. The Tribe was also surprised that the Forest's proposed locations for restoration work differs from the Collaborative's recommendations.

Motorized recreation impacts to natural resources occurring in the EFSFSR should not be offset by restoration actions in the Thunder Mountain area. Restoration work in the Thunder Mountain area benefits the Middle Fork of the Salmon River, which has a Chinook salmon population distinct from the South Fork Salmon River Chinook salmon population. Instead, the Forest should evaluate which listed fish species and specific fish populations are being affected by motorized recreation and plan appropriate protective measures in the associated watershed.

The Tribe asks that the Collaborative's natural resource recommendations for the EFSFSR be included in the Project to effectively offset the proposed motorized recreation in the EFSFSR watershed.

C. East Fork Yellow Pine Area

In the East Fork Yellow Pine area, the Tribe supports rerouting a section of the McCall - Yellow Pine Road around the Eiguren Ranch and recontouring the "Bowling Alley" slide area. This action would improve conditions for fish habitat as well as human safety. The Tribe also recommends trail improvements to the Sheep Creek Trail (# 071). This two-wheel motorcycle trail has two switchback sections that are consistently too steep and tight for stock and motorcycles to navigate. The trail should be rerouted to have fewer and wider switchbacks that will accommodate a broader variety of users. The old trail should be fully decommissioned.

D. Yellow Pine/Profile Creek Area

In the Yellow Pine/Profile Creek area, the Tribe recommends Storm Damage Risk Reduction treatments on the Quartz Creek Road/Trail # 067. Extensive road surveys and Geomorphic Road Analysis and Inventory Package modeling show the Quartz Creek Road delivers the highest amount of sediment to streams of any road surveyed in the EFSFSR.

The Tribe also recommends the following culvert replacements:

Stream	GPS Datum	Easting	Northing	General Impression
Profile Creek	UTM 11 T	625327	4988203	Complete fish passage barrier, high velocity flows, suitable habitat upstream
Profile Creek	UTM 11 T	625439	4989646	Possible fish barrier, suitable habitat upstream
Ryan Creek	UTM 11 T	626402	4986402	Possible fish barrier, suitable habitat upstream

E. Greater Stibnite Area

The Tribe does not support the Project proposal of designating four and one half miles of new routes open to all vehicles within the Greater Stibnite area. The Greater Stibnite area is largely located in the Sugar Mountain and Horse Heaven Inventoried Roadless Areas and is entirely located in Management Prescription Categories 3.1 and 3.2.⁹ The Tribe also requests that the Forest evaluate restoration offsets, such as SDRR on the Quartz Creek Road/Trail (# 067) and the Missouri Creek Trail (# 031), and complete a full recontour decommissioning of the Mule Hill Road.

F. Thunder Mountain Area

The Tribe offers the following comments regarding the Thunder Mountain area in Management Prescription Category 3.2.¹⁰ The proposed actions in this area include the creation of two miles of new motorized trail and the addition of approximately one new mile of system road. The Tribe supports restoration in the Thunder Mountain area, including the decommissioning of abandoned mining roads and the replacement of damaged or undersized culverts. The Tribe recommends decommissioning roads and replacing culverts with the greatest benefit to resources, such as Endangered Species Act-listed fish species. The Tribe also requests the Forest complete further analysis of the potential benefits from replacing the following culverts:

⁹ Payette National Forest Land and Resource Management Plan at III-256.

¹⁰ *Id.*

Stream	GPS Datum	Easting	Northing	General Impression
Botha Creek	UTM 11 T	642385	4977704	Complete fish passage barrier blocking good upstream habitat
Tributary to Monumental Creek	UTM 11 T	639528	4975052	Culvert is a fish passage barrier; upstream habitat marginal, steep with boulder cascades
Boulder Creek	UTM 11 T	641534	4976673	Culvert appears undersized and might become a fish passage barrier at high and low flows; suitable upstream habitat.
Neff Creek	UTM 11 T	641870	4977231	Potential sediment issue, major erosion; not fish bearing
Monumental Creek	UTM 11 T	638816	4974495	Culvert not currently a fish passage barrier; very suitable upstream habitat
Rainbow Creek	UTM 11 T	643421	4978930	Culvert not currently a fish passage barrier; suitable upstream habitat

G. Impacts to Wildlife and Plants

The Tribe requests that the Forest explicitly evaluate, in its environmental analysis, the trade-offs between the following resource interests: proposed motorized opportunities, wildlife habitat security and disturbance (e.g., noise, human presence), spread of noxious weeds, and quality and quantity of wildlife and plant habitats within the Project area. The Tribe also requests that the Forest evaluate the potential need for seasonal restrictions on motorized roads and trails that would benefit habitats vulnerable to motorized disturbances, such as big game habitat.

H. Cultural Resources

The Tribe expects the Forest to adequately address cultural resources significant to the Tribe. The Tribe believes the Forest can best protect the Tribe's cultural resources by engaging the Tribe's cultural resource staff early in Project development, consulting on the Areas of Potential Effects, identifying historic properties, and consulting on the significance of those resources with "any Indian tribe . . . that might attach religious and cultural significance to properties within the area of potential effects."¹¹ Although this may be challenging for the Forest, the Tribe believes that these steps are critical for identifying Nez Perce traditional cultural properties in the Project area,

¹¹ 36 C.F.R. § 800.4(b).

as well as for evaluating identified archaeological sites through the lens of significance to the Tribe.

Finally, the Tribe hopes that as part of early engagement, the Forest will provide cultural resource compliance reports and documentation to Tribal staff at the same time, if not before, it provides them to the Idaho State Historic Preservation Office. The Tribe hopes that by providing full information early in the process, the Forest will enable the opportunity for technical issues to be identified and, hopefully, resolved before the legal deadlines for Project comment or objection begin.

III. CONCLUSION

Thank you for the opportunity to comment. As noted above, the Tribe and the Collaborative have committed substantial time and effort over the last two years to developing recommendations that carefully balance motorized recreational and restoration opportunities. As a result of this careful consideration, the Tribe cannot support several of the Forest's proposals for motorized recreation. The Tribe also cannot support the Forest's proposals to offset motorized impacts to natural resources in the EFSFSR with restoration actions in the Thunder Mountain area, a distinct watershed.

The Tribe requests that going forward the Forest include all of the Tribe's and Collaborative's carefully-considered recommendations as an alternative in this Project's NEPA analysis, including the Tribe's culvert-replacement recommendations contained in these comments. The Tribe also requests that the Forest provide additional details regarding its proposed watershed improvement actions. Without these additional details, Tribal staff, the Collaborative, and the public will not be able to fully evaluate the Project's motorized impacts to natural resources and consider resource tradeoffs.

The Tribe looks forward to further discussions with the Forest regarding its restoration and access management plans in the EFSFSR watershed and Thunder Mountain area.