

September 16, 2022

Curtis Keetch
Objection Reviewing Officer
White River National Forest
900 Grand Ave.
P.O. Box 948
Glenwood Springs, CO 81601

Submitted Electronically To: <https://cara.fs2c.usda.gov/Public/CommentInput?Project=57654>

Re: OBJECTION Pursuant to 36 C.F.R. § 218.8 for the Yellowjacket Project # 57654, Blanco Ranger District, White River National Forest.

Dear Reviewing Officer:

Wilderness Workshop (“WW”) and the Center for Biological Diversity (“the Center”), collectively “Objectors,” hereby submit this objection to the White River National Forest’s Draft Decision Notice (DDN), Finding of No Significant Impact (FONSI), and Final Environmental Assessment (Final EA) for the Yellowjacket Project.

Yellowjacket Project

Objectors object to the following project under 36 C.F.R. § 218.8(d)(4):

Project: Yellowjacket Project, Blanco Ranger District, Rio Blanco County, Colorado.

Responsible Official and Forest/Ranger District: Curtis Keetch, District Ranger, Blanco Ranger District, White River National Forest.

Timeliness

This objection is timely filed. Notice of the DDN and FONSI was published in the Rio Blanco Herald Times (the newspaper of record) on August 4, 2022.¹

Lead Objector

As required by 36 C.F.R. § 218.8(d)(3), the Objectors designate the “Lead Objector” as follows:

¹ See Public Notice, Rio Blanco Herald Times (August 4, 2022), available at: <https://rbheraldtimes.column.us/search> (last viewed September 16, 2022). The 45th day after the August 4, 2022 notice is Sunday, September 18, 2022. See 36 C.F.R. § 218.6(a) (“when the time period expires on a Saturday, Sunday, or Federal holiday, the time is extended to the end of the next Federal working day.”); *id.* § 218.6(b) (“Starting date. The day *after* publication of the legal notice ... is the first day of the objection-filing period”) (emphasis added). Therefore, the last day to object to the Yellowjacket Project is September 19, 2022.

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Interests and Participation of the Objectors

Wilderness Workshop is a community-oriented 501(c)(3) nonprofit organization based in Carbondale, Colorado. WW is dedicated to the protection and conservation of public lands on the White River National Forest. WW uses legal, policy, and educational tools to achieve its mission. Our members and staff enjoy hiking, camping, wildlife watching, study, contemplation, solitude, photography, and other activities on the lands throughout the Blanco Ranger District, including within the units encompassed by the Yellowjacket Project.

The Center for Biological Diversity is a 501(c)(3) nonprofit organization based in Tucson, Arizona, with offices across the country including in Crested Butte and Denver, Colorado, and has 1.7 million members and online activists. The Center is dedicated to protecting and restoring imperiled species and natural ecosystems. The Center uses science, policy, and law to advocate for the conservation and recovery of species on the brink of extinction and the habitats they need to survive. The Center has advocated and continues to actively advocate for increased protections for species and their habitats across Colorado. Center members and supporters use and enjoy the White River National Forest, and the lands of the Yellowjacket Project area for recreation, photography, nature study, and spiritual renewal.

The Center for Biological Diversity believes that the welfare of human beings is deeply linked to nature — to the existence in our world of a vast diversity of wild animals and plants. Because diversity has intrinsic value, and because its loss impoverishes society, we work to secure a future for all species, great and small, hovering on the brink of extinction. We do so through science, law and creative media, with a focus on protecting the lands, forests, waters and climate that species need to survive. The Center has and continues to actively advocate for increased protections for species and their habitats in southwest Colorado and across the American Southwest.

Request for An Objection Resolution Meeting

Objectors hereby request a meeting with the Objection Reviewing Officer to discuss a resolution of this objection pursuant to 36 C.F.R. § 218.11(a).

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III. PROPOSED RESOLUTION

I. Introduction

A. The Proposed Action

The Yellowjacket Project (“Project” or “Proposed Action”) is a 2,300-acre logging project on the Blanco Ranger District of the White River National Forest. Situated in the mid-montane ecosystem, the project area has an impressive array of biodiversity, with forests ranging from new-growth aspen and lodgepole pine, to old growth ponderosa. Wildlife thrive in these dense, mature forests. The project area sees most of its public use during hunting season. According to the Final EA, the Forest Service would primarily clearcut the forest for the ‘purpose’ of:

- Improv[ing] forest resilience to potential future disturbances by maintaining and/or increasing age and size class diversity at the stand and landscape scale.
- Provid[ing] forest products and/or biomass to local industries.
- Improv[ing] current and future material sources to support road maintenance and road reconstruction activities.

Final EA at 5. In support of the ‘need’ for the Yellowjacket Project, the Forest Service states that:

- Natural disturbance processes have been suppressed in a landscape that was previously adapted to wildfire.
- Forest resiliency is lacking across the landscape due, in part, to the absence of age and size class diversity in both aspen and mixed conifer stands.
- Local and regional timber markets exist that can utilize forest products.
- Development of local material sources would better support present and continued road maintenance and road reconstruction activities.

Id. To achieve the ‘purpose and need’ of the project, the Forest Service proposes to cut timber and burn units approximately sixteen miles east of Meeker, CO in Rio Blanco County. *Id.* at 6-7. This project would include clearcuts with leave tree, coppice (aspen clearcuts), group selection,

sanitation/salvage, and pre-commercial thinning. Broadcast burning with hand treatment preparation has also been proposed. *Id.* The Forest Service proposes to conduct this scope of work through:

Commercial timber sales, stewardship contracts and/or agreements may be used to implement vegetation management activities. Conventional ground-based logging systems are planned for tree removal over the majority of this project, including rubber-tired skidders, track skidders and rubber-tired or track-mechanized harvesters. Logging activities (cutting, felling, yarding, temporary road construction and obliteration, road maintenance and road reconstruction) may occur year-round as weather, design features and ground conditions allow. Individual projects may take three to five years to implement once placed under contract.

Id. at 9-10. In addition to the logging activities, the Forest Service would construct 12.2 miles of temporary roads in areas with extensive roadless character. Final EA at 14. Almost 1,300 acres would be clearcut.

B. Objectors' Concerns with the Yellowjacket Project

The Objectors file this objection because we have remaining concerns about the ecological impacts of the Yellowjacket Project and the Forest Service's underlying environmental analysis. Specifically, the Final EA for the Yellowjacket Project violates the National Environmental Policy Act (NEPA), 42 U.S.C. § 4231 *et seq.*, by failing to consider a reasonable range of alternatives, including an alternative that would comply with the letter and spirit of the National Forest Management Act (NFMA), 16 U.S.C § 1604 *et seq.*, and an alternative that would ensure protection of roadless character in the project area. In addition to deficient alternatives analysis, the Final EA fails to take a hard look at the impacts on roadless resources and impacts from native ungulate and livestock grazing and the mitigation required to ensure the purpose and need of the project are achieved. Finally, the Forest Service failed to acknowledge and analyze cumulative impacts of this project together with other reasonably foreseeable actions.

II. This Project Violates the National Environmental Policy Act.

A. The Forest Service erred when it failed to consider a reasonable range of alternatives.

In taking the “hard look” at impacts that NEPA requires, an EA must “study, develop, and describe” reasonable alternatives to the proposed action.² The Tenth Circuit explains that this mandate extends to EAs as well as EISs: “A properly-drafted EA must include a discussion of

² 42 U.S.C. § 4332(2)(C) & (E); 40 C.F.R. § 1508.9(b) (an EA “[s]hall include brief discussions ... of alternatives”). Although the Council on Environmental Quality amended its NEPA regulations in 2020, those regulations “apply to any NEPA process begun after September 14, 2020. An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before September 14, 2020.” 40 C.F.R. § 1506.13 (2020). Because the Yellowjacket NEPA process began in February 2020 with scoping, and because the Forest Service throughout the NEPA process relied on CEQ’s 1978 NEPA regulations, those regulations apply to the Yellowjacket decision.

appropriate alternatives to the proposed project.”³ This alternatives analysis “is at the heart of the NEPA process, and is ‘operative even if the agency finds no significant environmental impact.’”⁴ Reasonable alternatives must be analyzed for an EA even where a FONSI is issued because “nonsignificant impact does not equal no impact. Thus, if an even less harmful alternative is feasible, it ought to be considered.”⁵ When an agency considers reasonable alternatives, it “ensures that it has considered all possible approaches to, and potential environmental impacts of, a particular project; as a result, NEPA ensures that the most intelligent, optimally beneficial decision will ultimately be made.”⁶

In determining whether an alternative is “reasonable,” and thus requires detailed analysis, courts look to two guideposts: “First, when considering agency actions taken pursuant to a statute, an alternative is reasonable only if it falls within the agency’s statutory mandate. Second, reasonableness is judged with reference to an agency’s objectives for a particular project.”⁷ Any alternative that is unreasonably excluded will invalidate the NEPA analysis. “The existence of a viable but unexamined alternative renders an alternatives analysis, and the EA which relies upon it, inadequate.”⁸ The agency’s obligation to consider reasonable alternatives applies to citizen proposed alternatives.⁹ Finally, courts require that an agency adequately and explicitly explain in the EA any decision to eliminate an alternative from further study.¹⁰

1. The Forest Service failed to consider a reasonable alternative that would limit clearcuts to 40 acres.

The Forest Service failed to consider the viable alternative of limiting the Project’s clearcuts to 40 acres. The Objectors raised this issue in comments, requesting that:

[T]he USFS analyze a reasonable alternative that limits clearcuts within the project area to 40 acres or less. As NFMA acknowledges by its very provisions, clearcuts larger than that should be rare and are likely to have significant impacts to watersheds, scenic values, and wildlife. Such a proposal would reduce such impacts

³ *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) (granting injunction where EA failed to consider reasonable alternatives).

⁴ *Diné Citizens Against Ruining Our Env’t v. Klein*, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010) (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004)). See also *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (in preparing EA, “an agency must still give full and meaningful consideration to all reasonable alternatives” (emphasis added) (internal quotation and citation omitted)); 40 C.F.R. § 1502.14 (describing alternatives analysis as the “heart of the environmental impact statement”).

⁵ *Ayers v. Espy*, 873 F. Supp. 455, 473 (D. Colo. 1994) (internal citation omitted).

⁶ *Wilderness Soc’y v. Wisely*, 524 F. Supp. 2d 1285, 1309 (D. Colo. 2007) (quotations & citation omitted).

⁷ *Diné Citizens Against Ruining Our Env’t*, 747 F. Supp. 2d at 1255 (quoting *New Mexico ex rel. Richardson*, 565 F.3d at 709).

⁸ *Id.* at 1256.

⁹ See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217-19 (9th Cir. 2008) (finding EA deficient, in part, for failing to evaluate a specific proposal submitted by petitioner); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999) (agency’s “[h]ard look” analysis should utilize “public comment and the best available scientific information”) (emphasis added).

¹⁰ See *Wilderness Soc’y*, 524 F. Supp. 2d at 1309 (holding EA for agency decision to offer oil and gas leases violated NEPA because it failed to discuss the reasons for eliminating a “no surface occupancy” alternative suggested by conservation groups); *Ayers*, 873 F. Supp. at 468, 473.

while still enabling the Forest Service to achieve much of the purpose and need for the proposed action.

Objectors' Scoping Comments at 8. In the DDN, the Forest Service rationalized its failure to consider this proposed alternative, insisting that "developing a third alternative limiting clearings was unnecessary because the Deciding Official may select a subset of proposed treatment units in their Decision Notice." DDN at 2.

This rationale subverts the goals of NEPA. The alternatives section of an EA should present the environmental impacts of a proposed action and reasonable alternatives at a comparable level of detail and in comparative form to give the public a clear picture of impacts and to give the decisionmaker a clear basis for choice among options.¹¹ "The existence of a viable but unexamined alternative renders an alternatives analysis, and the EA which relies upon it, inadequate."¹² While the Deciding Officer could choose a less damaging subset of the Proposed Action, the agency has not analyzed or disclosed the potential benefits of doing so in a comparative analysis as required by law.¹³

Limiting clearcuts to 40 acres or less would comport with NFMA and likely reduce impacts on sensitive resources. That makes it reasonable. But it would also be reasonable because smaller clearcuts would closely mimic natural conditions in the area. The Final EA highlights that the natural patches in forest types encompassed by this project area are mostly less than 50 acres:

The Forest Plan Final Environmental Impact Statement found that natural patch size in lodgepole pine and aspen was highly variable, and that while the greatest frequency of patches occurred in the 6-50 acre category, the majority of acres occurred in patch sizes ranging from 51-200 acres in size. Patch sizes greater than 200 acres were documented but occurred less frequently. By varying the treatment size from 8 to 53 acres within aspen coppice units, and 6 to 268 acres in the clearcut with leave tree units, resulting patches emulate natural patch size variations and are within the Historic Range of Variability for these forest types.

Final EA at 24; *see also* Forest Plan FEIS at D-26, Table A-62, which shows 3630 patches in the 6-50 acre size range for lodgepole pine, versus 1294 patches 51-200 acres in size. For aspen, 3655 patches were in 6-50 acres and 1767 patches were 51-200 acres. In other words, limiting treatment to 40 acres or less would not be outside the historic range of variability. Nonetheless, the Forest Service failed to consider this reasonable alternative.

Further, the While River National Forest Land and Resource Management Plan (Forest Plan) requires openings to be less than 40 acres. For example, Silviculture Standard 5 in the Forest Plan indicates that the maximum size of openings created by even-aged management will, with

¹¹ *See e.g.*, 40 C.F.R. § 1502.14 (1978). *See also* N.4 *supra* (EAs must give full consideration to reasonable alternatives). This and all subsequent cites to the CEQ Regulations implementing NEPA are to the 1978 Regulations, as that is being used for this project. *See* EA at 7.

¹² *Diné Citizens Against Ruining Our Env't*, 747 F. Supp. 2d at 1256.

¹³ *All. for the Wild Rockies v. Marten*, 2021 U.S. Dist. LEXIS 238034, at *48 (D. Mont. 2021) (stating "[t]he ultimate decision to exempt an action from the Forest Plan standards is an 'either/or' proposition, there could be other reasonable alternatives apart from 'no action' that do not require a Forest Plan exemption.").

limited exceptions, be 40 acres regardless of forest type.¹⁴ This standard is critical because even-aged management can result in major impacts to structural and stage ratios and landscape patterns and it can have significant impacts on wildlife and wildlife habitat (e.g., by perforating habitats).¹⁵ Large openings created by even-aged management can also have the effect of reducing species and age class diversity—which runs counter to the goals of this proposal. Analyzing an alternative that limited openings to 40 acres would also allow the public and decisionmaker to understand the tradeoffs (if any) between following national and forest plan direction on limiting clearcuts and carving larger clearcuts. Put another way, it would answer the question: would following current law and limiting the size of clearcuts to 40 acres better achieve the project’s goals?

An alternative limiting the size of clearcuts was clearly within the purpose contemplated by the project, to “improve forest resilience to potential future disturbances by maintaining and/or increasing age and size class diversity at the stand and landscape scale[,]” because the openings under 40 acres would still maintain or increase age and size class diversity at the stand and landscape scale. Final EA at 5. The Forest Service failed to explain in the Final EA or DDN why such an alternative would not meet the purpose and need for the project, including improving forest resilience, nor did it include any scientific support for why greater than 40-acre openings are necessary. This omission in the Final EA also undermines the comparative value of the agency’s analysis—which is a critical goal of NEPA.

Here, the Forest Service violated NEPA by failing to consider a reasonable alternative that would comply with its own plan and achieve the purpose and need of the project. The agency failed to provide any reasonable explanation for this omission, or any evidence that the purpose and need could not be achieved with smaller clearcuts. The agency’s analysis of only one alternative subverts the intent of NEPA by robbing the public and the decisionmaker of a comparative basis on which to choose the best course of action.

Proposed Remedy: Prior to issuing a final decision approving this project, the Forest Service must revise the Final EA to consider in detail an alternative limiting clearcuts to 40 acres or less. The revised EA must be issued for public review and comment.

2. The Forest Service failed to consider an alternative that would ensure protection of roadless characteristics in the project area.

In addition to failing to consider a reasonable alternative that would follow the contours of the law set forth in NFMA and the Forest Plan, the Final EA fails to analyze an alternative that would preserve roadless characteristics in roadless areas, including citizen inventoried roadless areas. Objectors requested the Forest Service consider this alternative in its environmental

¹⁴ U.S. Dept. of Agric. (USDA), Forest Service, WRNF Land and Resource Management Plan (LRMP) (2002), at 2-12, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_000999.pdf. The LRMP defines a “standard” as a “course of action that must be followed, or a level of attainment that must be reached, to achieve forest goals. Adherence to standards is mandatory. Standards are used to assure that individual projects are in compliance with the forest plan. They should limit project-related activities, not compel or require them. Deviations from standards must be analyzed and documented in a forest plan amendment.” Id. at 2-1.

¹⁵ USDA, Forest Service, Final EIS for the WRNF LRMP, at 3-83, 3-93. available at https://www.fs.usda.gov/detail/whiteriver/landmanagement/?cid=fsbdev3_001228.

analysis. *See* Objectors' Scoping Comments at 8 (stating: "The Forest Service should consider at least one alternative that eliminates road construction (including temporary road-building) and logging within areas inventoried by conservation groups and found to be roadless."). In responding to this proposed alternative, the DDN states that: "[A] commenter suggested an alternative to eliminate and/or minimize road construction and logging in roadless areas. This alternative was eliminated from detailed study, as no treatments are proposed within 2012 Colorado Roadless Areas." DDN at 2.

Since the early 2000s, environmental groups across Colorado, including WW, have undertaken and completed on-the-ground inventories in search of National Forest lands that should properly be inventoried and protected as roadless areas. These areas include the Milk Creek, Fawn Creek, and Big Beaver Basin citizen proposed roadless areas, which overlap with the Yellowjacket Project area. While the Forest Service declined to include these areas in the agency's 2012 Colorado Roadless inventory, that does not eliminate the fact on the ground that each of these areas lacks roads and contains roadless characteristic identified by the Colorado Roadless Rule. We provided the Forest Service with details on these citizen proposed roadless areas in scoping comments, including maps and detailed area descriptions but the agency ignored the information. *See* Objectors' Scoping Comments at Appendices 2-6.

Milk Creek, Fawn Creek, and Big Beaver Basin contain outstanding roadless character. Each area is 5,000 acres or greater, either independently or when combined with adjacent and contiguous Colorado Roadless Areas protected by the Colorado Roadless Rule. The Milk Creek Citizen Inventoried Roadless Area is immediately adjacent to Morapos A Colorado Roadless Area, with only an infrequently used non-motorized trail separating the two units. In other words, these roadless areas are contiguous. By including Milk Creek as a roadless area alongside Morapos A, this creates one of the largest roadless area complexes in Colorado at approximately 110,000 acres. Milk Creek Citizen Inventoried Roadless Area is known for its exceptional elk habitat, including the Elk Winter Concentration and Severe Winter Range areas that are lacking in the currently inventoried Morapos A Colorado Roadless Area. *See* Objectors' Scoping Comments at Appendices 2-6. The forested slopes on the west side of the Milk Creek unit are elk calving grounds. Milk Creek also has a critical population of Colorado River cutthroat trout, and the area has been identified as an area of high priority habitat by the Colorado Division of Parks and Wildlife.

The Fawn Creek Citizen Inventoried Roadless Area is 5,491 acres in size. It is separated from the 104,000 acre Morapos/Pagoda Peak Colorado Roadless Area by a seldom traveled, low maintenance, high clearance 4WD road. The Fawn Creek area has been identified by the Colorado Division of Parks and Wildlife as high priority habitat with valuable summer range for big game, and critical elk calving areas. The area is in a natural state and offers high opportunity for primitive recreation and solitude, except during hunting season, when use increases.



Picture of the Fawn Creek Citizen Inventoried Roadless Area, looking into Unit 217—which shows a diversity species and age classes.

The Big Beaver Basin Citizen Inventoried Roadless Area is 8,673 acres in size. It retains high habitat value for a broad range of species of concern to the White River National Forest and the State of Colorado, including: boreal toad, boreal owl, flammulated owl, goshawk, northern leopard frog, and American three-toed woodpecker. Big Beaver Basin has been identified by the Colorado Division of Parks and Wildlife as extremely high priority habitat. The entire area maintains quality summer range for big game. The lower elevation areas along Big Beaver and East Beaver Creeks contain big game winter range as well. The area contains important mid-elevation ecosystems, and it provides outstanding hunting, wildlife viewing, and motorized recreation opportunities. Located in the far northwest portion of the Flat Tops Plateau region, it is an important transition area between the montane and grassland ecosystems.



Picture of the Big Beaver Basin Citizen Inventoried Roadless Area .

Federal courts have invalidated agency analyses that fail to consider impacts of logging large uninventoried roadless areas because such areas are rare and retain unique characteristics that may be impacted by logging.¹⁶ Courts cite unique roadless characteristics including water resources and production, undisturbed soils, unfragmented wildlife habitat, and unconfined recreation opportunities as roadless characteristics with independent environmental significance that must be considered in agency decisionmaking—even in roadless areas that are outside of an agency’s own inventory.¹⁷ Impacts to uninventoried roadless lands also must be considered “because of their potential for designation as wilderness areas under the Wilderness Act of 1964.”¹⁸ The Milk Creek, Fawn Creek, and Big Beaver Basin Citizen Inventoried Roadless Areas retain many of these unique roadless characteristics. Committing not to build new temporary or system roads and cut timber in these areas may be the best and most reasonable

¹⁶ See e.g., *Lands Council v. Martin*, 529 F.3d 1219, 1230-32 (9th Cir. 2008) (citing additional authorities).

¹⁷ *Id.*, at 1230 (citing *Smith v. United States Forest Service*, 33 F.3d 1078-79 (9th Cir. 1994); *Lands Council v. Martin*, 479 F.3d 636, 640 (9th Cir. 2007)).

¹⁸ *Id.*

way to protect their roadless character.¹⁹ However, the Forest Service refused to consider such an alternative.

We note that the Forest Service in Region 1 routinely analyzes in NEPA documents the impacts of logging project to roadless characteristics, including Inventoried Roadless Area and contiguous blocks of unroaded lands.²⁰ It is arbitrary for the Forest Service to provide such analysis in Montana, but not to provide it in this case.

Here, an alternative limiting roadbuilding and tree cutting in areas with roadless character would allow the Forest Service to carry out all three purposes set forth in the Final EA, while also protecting important roadless values from undue degradation. This alternative would not include authorization of any new temporary roads with the Milk Creek, Fawn Creek, and Big Beaver Basin Citizen Inventoried Roadless Areas, and it would protect approximately a thousand acres of these roadless lands from tree cutting. Instead of complying with federal caselaw and considering how best to protect valuable roadless characteristics in the project area, the Forest Service categorically dismissed this alternative without providing adequate and explicit explanation.

Suggested Remedy: Prior to issuing a final decision approving this project, the Forest Service must revise the EA to consider in detail an alternative that would exclude the road building, including temporary roads, and tree cutting from the citizen roadless areas.

B. The Forest Service erred when it failed to take a hard look at potential impacts to forest resources.

NEPA imposes “action-forcing procedures ... requir[ing] that agencies take a hard look at environmental consequences.”²¹ The purpose of the “hard look” requirement is to ensure that the “agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.”²² These “environmental consequences” may be direct, indirect, or cumulative.²³

Direct effects “are caused by the action and occur at the same time and place.”²⁴ Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”²⁵ “Indirect effects may include ... effects on air and water and other

¹⁹ See Final EA at 14, authorizing “12.2 miles of temporary road would be needed to complete harvesting activities[.]” see also DN at 2, stating: (“Vegetation management treatments on approximately 2,300 acres of National Forest System lands using traditional logging methods and broadcast burning.”).

²⁰ See, e.g., Kootenai National Forest, Black Ram Final EA (June 2022) at 148-161 (analyzing project impacts to Inventoried Roadless Areas and contiguous unroaded lands), excerpts attached as Exhibit 1, and available at <https://www.fs.usda.gov/project/?project=52784>. While we do not endorse this section of the Black Ram EA as legally sufficient, it is far more than the analysis performed for the Yellowjacket Final EA.

²¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

²² *Baltimore Gas & Elec. v. NRDC*, 462 U.S. 87, 97 (1983).

²³ 40 C.F.R. §§ 1502.16, 1508.7, 1508.8; see also *Hillsdale Env'tl. Loss Prevention v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1166 (10th Cir. 2012).

²⁴ 40 C.F.R. § 1508.8(a).

²⁵ *Id.* § 1508.8(b).

natural systems, including ecosystems.”²⁶ A cumulative impact is the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”²⁷ Cumulative impacts have the potential to indicate a significant effect and mandate the preparation of an environmental impact statement to consider those impacts. An analysis under NEPA requires the consideration of cumulative impacts in an environmental assessment.²⁸ Agencies determine whether direct, indirect, or cumulative impacts are significant by accounting for both the “context” and “intensity” of those impacts.²⁹

An environmental effect is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”³⁰ An agency’s hard look examination “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.”³¹ “Looking to the standards set out by regulation and by statute, assessment of all ‘reasonably foreseeable’ impacts must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made.”³²

NEPA’s hard look at environmental consequences must be based on “accurate scientific information” of “high quality.”³³ The law “ensures that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts.”³⁴

The hard look mandate requires agencies to consider sensitive values and potential impacts to those values when contemplating new projects. Courts have remanded agency decisions that failed to adequately consider logging impacts to roadless lands, saying: “the decision to harvest timber on a previously undeveloped tract of land is ‘an irreversible and irretrievable decision’ which could have ‘serious environmental consequences.’”³⁵ Federal courts have also held that “an area’s roadless character has . . . environmental significance,” and requires NEPA analysis.³⁶

²⁶ *Id.*

²⁷ *Id.* § 1508.7; *see also id.* § 1508.25.

²⁸ *Wyo. Outdoor Council v. United States Army Corps of Eng’rs*, 351 F. Supp. 2d 1232, 1237 (D. Wyo. 2005).

²⁹ 40 C.F.R. § 1508.27.

³⁰ *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir.1992).

³¹ *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010).

³² *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009); *see also* 42 U.S.C. § 4332(2)(C)(v); 40 C.F.R. §§ 1501.2, 1502.22; *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (holding agencies are to perform hard look NEPA analysis “before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values.”).

³³ 40 C.F.R. § 1500.1(b).

³⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349.

³⁵ *Nat’l Audubon Soc’y v. U.S. Forest Serv.*, 46 F.3d 1437, 1448 (9th Cir. 1993) (*quoting California v. Block*, 690 F.2d 753, 763 (9th Cir. 1982)).

³⁶ *Smith v. United States Forest Serv.*, 33 F.3d 1072, 1079 (9th Cir. 1994); *see also Or. Nat. Desert Ass’n v. BLM*, 531 F.3d 1114, 1138 (9th Cir. 2008) (confirming the BLM, like the Forest Service, must analyze impacts to roadless character in its NEPA analyses).

The hard look mandate also requires agencies to disclose and analyze any management tools or mitigation measures intended to reduce potential impacts in sufficient detail to ensure the environmental consequences have been fairly evaluated.³⁷

Here, as discussed in more detail below, the Forest Service failed to take a hard look at impacts to roadless lands, and at impacts related to grazing and regeneration in the units proposed for logging. The agency also failed to take a hard look at important cumulative impacts from other reasonably foreseeable actions.

1. The Forest Service failed to take a hard look at impacts to citizen proposed roadless lands.

The Forest Service failed to take a hard look at roadless resources when it did not include any analysis of the potential impacts from the Yellowjacket Project on roadless resources. Although the project does not overlap with any roadless areas designated under the 2012 Colorado Roadless Rule, the project does significantly overlap with several large citizen proposed roadless areas. *See* Objectors' Scoping Comments at Appendices 2-6; *see also* section II A 2 *supra*. The Forest Service dismissed the issue when it stated in the Final EA, "No forest vegetation management activities are proposed within designated 2012 Colorado Roadless Areas (CRA)." However, Objectors raised the issue with the Forest Service because at least one of the units – Milk Creek Citizen Inventoried Roadless Area – directly adjoins Colorado Roadless Area Morapos A; there is no road separating the non-inventoried roadless area from the inventoried roadless area. Furthermore, the Big Beaver Basin and Fawn Creek Citizen Inventoried Roadless Areas are greater than 5,000 acres and should receive a heightened level of analysis under *Smith v. United States Forest Service*.

Federal caselaw requires the Forest Service to analyze roadless character as a resource value in its NEPA analysis. Federal courts have consistently held that "an area's roadless character has . . . environmental significance," and requires NEPA analysis.³⁸

Here, the Forest Service failed to take a hard look when it didn't analyze impacts to roadless character on the citizen proposed roadless areas provided to the agency in Objectors' scoping comments. Although the Forest Service assumed there would be no roadless impacts because the project does not cut trees or construct roads in Colorado Roadless Areas, the Forest Service never acknowledged the roadless characteristics of the citizen-proposed Milk Creek, Fawn Creek, and Big Beaver Basin Citizen Inventoried Roadless Areas. As discussed above, agencies have an obligation to take a hard look at the potential impacts of logging large roadless areas—even if they're outside of the agency's own inventory.

³⁷ *Neighbors of Cuddy Mt. v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (citing *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997), *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353(1989) ("A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA."), *Northwest Indian Cemetery Protective Ass'n. v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988).

³⁸ *Smith v. United States Forest Serv.*, 33 F.3d 1072, 1079 (9th Cir. 1994); *see also Or. Nat. Desert Ass'n v. BLM*, 531 F.3d 1114, 1138 (9th Cir. 2008) (confirming the BLM, like the Forest Service, must analyze impacts to roadless character in its NEPA analyses).

Suggested Remedy: The Forest Service should either remove the tree cutting units and temporary roads from the citizen proposed roadless areas or take the “hard look” NEPA requires at the Yellowjacket Project’s impacts to roadless character due to temporary road construction and tree removal.

2. The Forest Service failed to take a hard look at the impacts of grazing.

The Forest Service also failed to take a hard look at the impacts grazing may have on achievement of the project’s goals. There is no question that livestock grazing presents a significant threat to healthy aspen regeneration.³⁹ The Final EA notes “[t]he greatest concern with the harvesting that has occurred in the past is the amount of unsuccessful regeneration within several of the aspen clear cuts, particularly in the Ellison Mountain area.” Final EA at 51. It also says that “the most likely cause” of unsuccessful regeneration “is domestic sheep grazing, however elk can also contribute to excessive browse on newly regenerating aspen stands.” *Id.* The Final EA makes clear that “[k]eeping cattle and sheep out of these aspen coppice units after treatment will be challenging for both sheep herders and cattle managers.” *Id.* at 80.

While grazing is clearly the biggest threat to the efficacy of this project (because regeneration would be required to increase tree age and size class diversity), the Final EA fails to discuss or analyze how much aspen regeneration could be impacted by grazing. The Final EA acknowledges that keeping cattle and sheep away from regeneration will be challenging and that unsuccessful regeneration resulting from grazing is the greatest concern. But, aside from these vague and grave predictions, the Final EA presents no actual discussion or analysis of the extent to which grazing may undermine the goals of this project.

To satisfy its obligations under NEPA, the Forest Service must take a hard look at the extent to which grazing will impede achievement of the tree regeneration this project intends to stimulate. Such analysis should include discussion of the impacts of grazing on prior treatments, including those in the Ellison Mountain area, and it should include high quality and accurate scientific information disclosing the nature and degree of effects that grazing may have on regeneration. As discussed in the following section, the Forest Service’s analysis must also take a hard look at the efficacy of potential mitigation measures to reduce grazing impacts.

Suggested Remedy: Before issuing a final decision, the agency must issue a new environmental assessment that takes a hard look at the impacts of the project together with the impacts of livestock grazing.

³⁹ See S. Kitchen *et al.*, Guidelines for aspen restoration in Utah with applicability to the Intermountain West, Forest Service Gen. Tech. Rep. RMRS-GTR-390 (2019) at 24-25 (excessive browsing by wild or domestic ungulates is one of the few root causes for aspen decline in Utah), 26 (“Heavy browse pressure on regeneration after aspen canopy removal (i.e., fire or clearcut) can result in depletion of root reserves and permanent loss of aspen in a matter of a few years.”), 27 (overuse by livestock was likely to worsen as the climate heats up: “The extent and severity of this driver [that is, excessive browsing] of aspen instability are likely to expand in the future as average snowpack decreases (longer grazing season) and the frequency and severity of drought increase with changing climate.”) attached as Exhibit 2, available at https://www.fs.usda.gov/rm/pubs_series/rmrs/gtr/rmrs_gtr390.pdf (last viewed Sep. 14, 2022); see also J. Ratner, *et al.*, What’s Eating the Pando Clone? (June 2019) (Pando clone of aspen in Utah demonstrate that livestock threaten regeneration far more than wild ungulates.), attached as Exhibit 3.

3. The Forest Service failed to take a hard look at the efficacy of management tools to reduce the impacts of grazing on regeneration.

When an agency relies on management tools, i.e. project design features, or mitigation measures to reduce environmental impacts, it must disclose and fairly evaluate the environmental consequences of using those tools.⁴⁰ Courts will invalidate agency analyses that rely on mitigation measures vaguely.⁴¹ NEPA requires a commitment to implement mitigation measures, as well as analysis and disclosure of their effectiveness.⁴² Courts also often look at an agency's monitoring commitments to ensure compliance with mitigation.

Comments submitted by the Objectors asked the Forest Service to disclose how it intends to ensure regeneration in areas proposed to be clearcut. *See* Objectors' Scoping Comments at 34. The comment was intended to encourage the agency to formulate design features to ensure successful regeneration, because stimulating new growth is a primary purpose of this project.

In response, the Forest Service simply acknowledged the damaging impacts of grazing on regeneration and proposed a few unenforceable and voluntary measures that have little chance of success in reducing damaging impacts *if* they are implemented. *See* range design features #2 and #4, Final EA at 97-98. The agency provided no quantifiable analysis of how effective its proposed measures would be, i.e. how much they would reduce impacts on regeneration. NEPA requires more, especially because securing regeneration is a primary purpose of this project.

As stated above, grazing presents a significant threat to healthy aspen regeneration. To address this issue, however, the Forest Service only considered implementing voluntary and unenforceable measures, such as:

Livestock operators will be asked to avoid grazing/browsing in these harvested units until the regrowth is high enough to withstand pressure from browsing. Estimates of seedling/sapling heights greater than 5' in aspen stands has been generally accepted to avoid damage to regeneration by elk browsing. Although sheep cannot reach this height, the area also supports an abundance of elk so this threshold height would be applicable within the treatment units.

Id. at 80. Asking livestock operators to avoid harvested units could be a worthwhile endeavor, but the operator could refuse. Neither the Final EA nor the DDN provide any enforceable mechanism to ensure harvested units will not be grazed. The Final EA also lacks any analysis of the potential benefits such measures might have.

⁴⁰ *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (*quoting* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989)). "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Northwest Indian Cemetery Protective Ass'n. v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988).

⁴¹ *Neighbors of Cuddy Mt. v. United States Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998).

⁴² *Id.*

The design features proposed in the Final EA suffer the same problems. For example, design features vaguely discuss resting areas from grazing for revegetation, as well as altering grazing rotations and trailing protocols, but those provisions lack any enforcement mechanism. *See* Final EA at 97-98. The design features are completely dependent on a grazing permittee's willingness to abide the Forest Service's request. The strongest commitment found in the Final EA is this:

Management practices that will be utilized will include: 1) No bedding of sheep in coppice units post treatment, 2) No salting of sheep in coppice units post treatment, 3) Fast-trailing through coppice treatment units. These practices will be exercised until aspen regeneration is at least five feet (5') tall.

Final EA at 97. Again, though, these provisions are voluntary and unenforceable. And the Final EA provides no analysis or disclosure to support a conclusion that these design features would effectively reduce the impacts of grazing—even if they were enforceable. And finally, the “fast-trailing” proposal still involves sheep trailing through recently-treated coppice units, resulting in some damage to regenerating aspen. But the Final EA contains no analysis of this impact.

Though it is perhaps less of a concern than sheep, cattle can eat and/or trample aspen and conifer regeneration. Thus, there need to be enforceable measures to limit the impacts from cattle use of treated units in the event that grazing is harming aspen regeneration. This should include fencing recently cut aspen units and strict monitoring for effects on aspen recruitment.⁴³ Mitigation measures could also include resting the allotment for three to five years by removing livestock, or on a more limited basis, could include shifting the timing of grazing, water development, and placement of salt.⁴⁴ Cattle and sheep are not the only culprits attracted to aspen shoots; deer and elk are known to feast on aspen regeneration. Reasonable measures may limit this impact as well, but none were considered.

Suggested Remedy: The Forest Service must revise the EA to include analysis of design features and mitigation measures that reduce the impacts of grazing on regeneration. The revised EA must analyze the possible effectiveness of project design criteria and describe the overall impact of grazing on tree regeneration. It must demonstrate that even with grazing and trampling, regeneration will be sufficient to achieve the project purpose and need. Any final decision must make mitigation measures enforceable.

4. The Forest Service failed to take a hard look at the cumulative impacts from the White River Aspen Management Project.

The purpose of an EA is to determine whether the agency must prepare an environmental impact statement (EIS). 40 C.F.R. § 1501.4(b). In order for the agency to conclude an EIS is unnecessary, it must make a finding that there will be no significant impact on the human environment from the proposed agency action. 40 C.F.R. §§ 1508.9; 1508.13. Agencies do that by taking a hard look at potential impacts, including the cumulative impacts from reasonably foreseeable projects. Regulations define “cumulative impact” as:

⁴³ *See* Exhibit 2 at 29-33.

⁴⁴ *Id.*

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. Agencies cannot avoid a significance finding by splitting bigger projects into smaller projects, and thereby sidestepping analysis and disclosure of broader cumulative effects. 40 C.F.R. § 1508.27(b)(7). Circuit courts agree that “an environmental effect is ‘reasonably foreseeable’ if it is ‘sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.’”⁴⁵ Here, the Final EA fails to analyze or even discuss cumulative impacts of the foreseeable White River Aspen Management Project (Forest-Wide Project) together with the Proposed Action.⁴⁶

Originally released to the public for scoping in February 2021, the Forest-Wide Project proposes to treat 375,000 acres on the White River National Forest, including on the Blanco Ranger District.⁴⁷ The ‘purpose’ of this project is strikingly similar to the Proposed Action at issue in this objection, which is to: “Improve the resiliency of aspen forests to disturbance agents[.]” and “[t]here is a scarcity of young aspen forests on the White River National Forest[.]” White River Aspen Management Project, Notice of Proposed Action, at 16. The ‘need’ for the Forest-Wide Project is to: “Maintain and increase the spatial occurrence of aspen on the White River National Forest[.]” in light of conifer encroachment and heavy browse that “has the potential to further reduce the extent of aspen on the White River National Forest.” *Id.* Because the Forest-Wide Project would authorize treatments on all 375,000 acres of aspen baseline habitat, including within and directly adjacent to the Yellowjacket project area, it is reasonably foreseeable that the two projects will have cumulative impacts. *Id.* at 5.

However, the Forest Service did not take a hard look at the cumulative impacts of the Yellowjacket project together with the reasonably foreseeable future action of the Forest-Wide Project despite these two projects’ overlap in purpose and geography. Even though the Forest-Wide Project was released for scoping in February 2021, over a year prior to the release of the Yellowjacket Final EA, the Final EA does not mention this massive project that encompasses the entire aspen baseline habitat for the National Forest and includes the Yellowjacket Project area. In addition to the project area overlap, both projects will include clearcutting, temporary road building, and are for the purpose of aspen forest resiliency. *See Id.* at 21-22.

The projects will impact the same resources, from watersheds to wildlife to recreation, but the Forest Service made no effort to disclose and analyze the cumulative impacts that the two projects may have together. Together, the two projects may magnify impacts to watersheds,

⁴⁵ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)); *see also La. Crawfish Producers Ass’n-W. v. Rowan*, 463 F.3d 352, 358 (5th Cir. 2006).

⁴⁶ *See* White River Aspen Management Project, Notice of Proposed Action (March 2021), attached as Exhibit 4.

⁴⁷ For the purposes of this objection, the Forest-Wide Project constitutes new information pursuant to 36 C.F.R. § 218.8(d) because the project was not released for scoping until after the scoping period for the Yellowjacket Project was closed.

degrade wildlife habitat, and create a maze of temporary road scars that degrade roadless characteristics, and spread noxious weeds, resulting in significant impacts. Grazing poses similar risks and challenges to the goals of both projects, but the Forest Service did not even acknowledge as much. The agency also neglected to provide any discussion or analysis of whether implementation of the two projects together may undermine the goals of either or both. For example, the Forest-Wide Project could lead to the logging of aspen stands that the Yellowjacket Project left standing or could increase the size of clearcut openings made by the Yellowjacket Project. With so much potential for cutting in and around the Yellowjacket Project area, these two projects could tip the balance away from diverse age classes and toward single aged stands.

The absence of any analysis or discussion of the reasonably foreseeable Forest-Wide Project that may have cumulative impacts of significance renders the Yellowjacket Final EA, DDN, and FONSI inadequate under NEPA.

Suggested Remedy: The Forest Service must revise the Final EA to include analysis of the cumulative impacts from the Yellowjacket Project alongside the reasonably foreseeable impacts from the Forest-Wide Project.

IV. PROPOSED RESOLUTION AND CONCLUSION

As discussed extensively in this objection, the Final EA falls short of a legally sound NEPA analysis. Specifically, Objectors have serious concerns about the viability of this project based on its lack of meaningful analysis and design features related to grazing in aspen clearcuts, and the Final EA's outright ignoring of citizen proposed roadless areas. As such, to resolve this issue the Objectors propose the following solution: remove all vegetation management and temporary road building from the Milk Creek, Fawn Creek, and Big Beaver Basin Citizen Inventoried Roadless Areas. Also, grazing must be adequately analyzed and limited via mandatory measures as needed to ensure sufficient aspen regeneration, as discussed above. Finally, the agency should revise its analysis to take a hard look at cumulative impacts of the proposed action together with other foreseeable projects.

We would welcome the opportunity to further discuss this option in a future objection resolution meeting.

Sincerely,



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TABLE OF EXHIBITS

- Exhibit 1. Kootenai National Forest, Black Ram Final EA (June 2022).
- Exhibit 2: S. Kitchen *et al.*, Guidelines for aspen restoration in Utah with applicability to the Intermountain West, Forest Service Gen. Tech. Rep. RMRS-GTR-390 (2019).
- Exhibit 3: J. Ratner, *et al.*, What's Eating the Pando Clone? (June 2019).
- Exhibit 4: White River Aspen Management Project, Notice of Proposed Action (February 2021).