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[2023-11-02 Cheryl Probert, Nez Perce-Clearwater - Nez Perce Tribe Request Additional Time Resolve Key Outstanding Issues Draft Forest Plan.pdf](#)

Please see the attached letter regarding the Nez Perce Tribe Request Additional Time Resolve Key Outstanding Issues Draft Forest Plan.

Leslie Bursch
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Nez Perce

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November 2, 2023

Sent Via Email Only To: cheryl.probert@usda.gov

Ms. Cheryl Probert, Forest Supervisor
Nez Perce-Clearwater National Forests
1008 Highway 64
Kamiah, ID 83536

Re: Nez Perce Tribe's Request for Additional Time to Resolve Key Outstanding Issues Related to the Protection of Treaty Rights and Resources in the Nez Perce-Clearwater National Forests' Draft Forest Plan

Dear Supervisor Probert:

Thank you for meeting with the Nez Perce Tribal Executive Committee ("NPTEC") on September 26 and October 24, 2023, to discuss the status of the Nez Perce-Clearwater National Forests' ("Forest") Draft Forest Plan ("Forest Plan"). The NPTEC has reviewed your October 13, 2023, letter detailing the changes you have made to the Forest Plan in partial response to the Tribe's requests, providing an explanation of the increased timber harvest management targets in the Forest Plan, and suggesting next steps for engagement. The Tribe looks forward to its in-person meeting with you and Chief Moore in Washington D.C. on November 6.

While the Tribe and Forest have different perspectives on the Forest's treaty obligations as well as what the National Forest Management Act ("NFMA") and 2012 Planning Rule require, the Tribe appreciates the Forest's commitment to work with the Tribe to find common solutions to the Tribe's key outstanding concerns with the Forest Plan. The Tribe urges the Forest to allow the time necessary, before it publishes a Draft Record of Decision, for the Forest to review all of the Tribe's prior comments, collaborate with Tribal staff to address the Tribe's concerns, and revise the working draft. The Tribe will reiterate this request to Chief Moore during our meeting next week.

As the Tribe has consistently emphasized throughout the Forest Planning process, the Tribe believes the United States has two obligations pursuant to its treaty with the Tribe: the United States has an obligation to protect the Tribe's ability access to the Forest to exercise its treaty rights as well as an obligation to protect and ensure the viability and availability of the underlying natural

resources on the Forest that make the exercise of the Tribe's treaty-reserved rights possible. These federal legal obligations to the Tribe are primary; they are in addition to the United States' trust responsibilities to the Tribe and superior to the Forest's statutory and regulatory obligations under NFMA and the 2012 Planning Rule. The Forest also has independent statutory and regulatory obligations, however, under NFMA and the 2012 Planning Rule to ensure that its actions and its implementing regulations do not weaken, degrade, or abrogate tribal treaty-reserved rights and resources.¹

The Tribe believes that Forest Plan standards are necessary to protect the Tribe's treaty-reserved resources and, therefore, to uphold the Tribe's treaty. Standards are the only Forest Plan component that can provide the management safeguards necessary to ensure Forest consistency, certainty, and accountability for upholding the Tribe's treaty.² The Tribe's perspective is based on decades of experience engaging with the Forest on hundreds of projects on National Forest System lands across the Tribe's homeland. If not carefully planned, implemented, and monitored, Forest projects can and do harm and degrade treaty-reserved resources in the short and long term. Harming or degrading treaty-reserved resources can interfere with Tribal members' ability to exercise the Tribe's treaty-reserved rights, connect with those resources, and transmit a connection to those resources to younger generations. In extreme contexts, the degradation of treaty-reserved resources can interfere with the intergenerational connection to places and resources and the intergenerational transmission of how and where treaty rights are exercised. This is not what the Tribe bargained for in 1855.

Nothing in the 2012 Planning Rule alters the definition of a standard under NFMA or prevents the Forest from selecting standards, as opposed to guidelines, to support desired future conditions and the health and availability of treaty-reserved resources. While guidelines may provide the Forest with more management flexibility, guidelines also reduce accountability and oversight and, therefore, increase the risk that Forest management will violate the Tribe's treaty.

During the Tribe's in-person meetings in 2022 and 2023 with Secretary Vilsack, Undersecretary Wilkes, Deputy Undersecretary Harrell, Director Thompson, and Forest Service leadership in Washington D.C. regarding the Forest Plan, the Tribe expressed concerns with the Forest's persistent unwillingness throughout the planning process to make necessary changes in the Forest Plan to fulfill the United States' legal obligations to the Tribe under the Tribe's treaty. The Tribe pointed out that the Forest has repeatedly declined to adopt effective fisheries, wildlife, air, and plant standards that incorporate co-management, best available science, project-level and Forest-

¹ The Forest's four million acres are located entirely within the homeland of the Nez Perce people, the *Nimíipuu*. On June 11, 1855, the Tribe reserved by treaty, and the United States secured to the Tribe, rights that the *Nimíipuu* have exercised since time immemorial, including the right to take fish at all usual and accustomed places, the right to travel, and the rights to hunt, gather, and pasture on open and unclaimed land. Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957. For the Nez Perce, these reserved rights were and are a guarantee of our ability to preserve our culture, identity, and way of life.

² See *All. For the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1113 (9th Cir. 2018) (“[A] guideline does not impose a mandatory constraint on project planning and activity in the way a standard does.”).

wide monitoring, and traditional ecological knowledge³—standards necessary to protect the Tribe’s treaty-reserved rights and resources.

The Tribe left the 2022 and 2023 Washington D.C. meetings with renewed confidence in the Biden Administration’s commitment to protecting and honoring treaty rights and tribal sovereignty in keeping with several of the administration’s executive actions.⁴ The Tribe also left those meetings confident that the U.S. Department of Agriculture and the Forest would not adopt a Forest Plan that allows the degradation of the Tribe’s treaty-reserved resources in violation of its 1855 Treaty.

The Tribe is pleased that its confidence does not appear to have been misplaced. Your recent meeting with the NPTEC and October 13, 2023, letter reflect that you now better appreciate the Tribe’s position that some Forest Plan standards are necessary to protect the Tribe’s treaty-reserved resources and that you are focused on developing collaborative solutions with the Tribe. To further this collaboration, the Tribe outlines below the areas in which it would like to work with the Forest to develop standards for inclusion in the Forest Plan that protect the Tribe’s treaty-reserved rights and natural resources.

Needed Standards

Treaty Obligations

As you are aware, the Tribe and Forest have been unable to reach agreement regarding adoption of Forest-wide treaty standards for the “Tribal Trust Responsibilities” section in the Forest Plan. The Tribe has requested, through written comments, staff-to-staff meetings, and government-to-government consultation, that the Forest retain the Forest-wide treaty standards that have been in place for over 35 years in Forest’s current Clearwater National Forest Plan. The current Clearwater Forest Plan treaty standards require the Forest to:

³ The Tribe has submitted numerous written comments to the Forest regarding the development of the Forest Plan and engaged in staff-to-staff meetings and formal government-to-government consultation. The Tribe also participated as a Cooperating Agency in review of the Forest Plan and Draft Environmental Impact Statement prior to its public release on December 20, 2019.

⁴ See Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7,491 (Jan. 26, 2021); White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities, 86 Fed. Reg. 57,313 (Oct. 11, 2021); Strengthening the Nation’s Forests, Communities, and Local Economies, 87 Fed. Reg. 24,851 (Apr. 22, 2022); Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7,619 (Jan. 27, 2021); Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights, 2021, <https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf>; Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403, Nov. 15, 2021, <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf>.

Ensure that Forest actions are not detrimental to the protection and preservation of Indian Tribes' religious and cultural sites and practices and treaty rights.⁵

[E]nsure proposed practices and management activities are coordinated with other governmental agencies and Indian tribes to [e]nsure requirements of all laws and regulations are met and terms of Indian Treaties are upheld.⁶

In an April 17, 2017, letter to the Tribe regarding the Forest Plan, you explained that the Forest was in the process of developing language to ensure trust responsibilities are met and that there would be "specific plan language that requires project level consultation, similarly to the language in the 1987 Clearwater Forest Plan." In the Tribe's April 20, 2020, comments on the Forest Plan and Draft Environmental Impact Statement, the Tribe requested that the Forest retain the Clearwater Forest Plan language quoted above. Upon review of the Forest Plan and Draft Final Environmental Impact Statement in June 2021, however, the Tribe was disappointed to see that the Forest unilaterally elected not to retain these standards and substituted instead a Forest-wide standard that would allow agency actions to harm treaty-reserved resources in the short-time if the Forest determines, in its sole discretion, that those actions will result in long-term benefits to the Tribe's treaty rights and resources. You explained in your October 13, 2023, letter that the Forest views the Forest-wide treaty standards in the Clearwater National Forest Plan as appropriate for a Forest-wide "goal" but not a "standard" in the new Forest Plan.

In response to the Forest's decision not to include a Forest-wide treaty standard in the Forest Plan, the Tribe requested that the Forest arrange a meeting between the Tribe's legal counsel and the Forest Service's legal counsel to directly discuss the Tribe's concerns and request. You committed in an October 26, 2021, letter to arrange such a meeting. An initial meeting between the Tribe's and Forest's attorneys occurred on October 26, 2023. The Tribe appreciates you following up on its pending request.

The October 26, 2023, attorney call was an introductory conversation between the Tribe's legal counsel and the Forest's Regional Office of General Counsel and Washington D.C. Office of General Counsel. During that meeting, the Tribe's counsel was able to clarify the Tribe's view that the Forest has a treaty-based duty not only to ensure access to National Forest System lands for the exercise treaty rights but also to protect and ensure the viability and availability of the natural resources necessary to effectuate the Tribe's treaty-reserved rights. The Tribe looks forward to additional meetings between its and the Forest Service's respective counsel. The Tribe is hopeful that with adequate time the attorneys can identify Forest-wide treaty standards for inclusion in the Forest Plan.

⁵ 1987 Clearwater National Forest Plan, pg. II-23.

⁶ 1987 Clearwater National Forest Plan, pg. II-21.

Wildlife

The Tribe has raised several concerns with the Forest in comments and staff-to-staff meetings regarding the need for strong wildlife protections, including standards, to protect the viability and availability of these treaty-reserved resources. The Forest Plan, however, continues to rely too heavily on aspirational goals and desired future conditions, some of which are not aligned with the natural range of variation or future natural resource conditions under a changing climate. The wildlife language reflects numerous resource protection gaps, caveats, conditionalities, and analytical shortcomings. The result is a Forest Plan that does not appear to provide the proper “safety net” or “fine filter” to ensure the continued health and availability of some treaty-reserved resources on the Forest. For instance, protections for elk are more aspirational and less protective in the Forest Plan than under the current 1987 Forest Plans, particularly within MA3 (the roaded front) where Tribal members most commonly exercise their treaty-reserved hunting rights. This is despite decades of effort by the Tribe to develop strong, defensible elk protection standards and numerous meetings on this topic with the Forest in the last seven years. For example, in the Tribe’s April 20, 2020, comments, the Tribe requested that the Forest include a new Forest-wide standard to ensure treaty-reserved hunting opportunities are sustained across the Forest:

Management activities shall result in no net increase in the extent of human disturbance to elk at the HUC 12 scale.

The Forest elected not to incorporate this standard into the Forest Plan.

In its September 29, 2022, letter to Undersecretary Wilkes, the Tribe specifically requested that the Forest revisit the Forest Plan to incorporate standards to account for the agency’s failure to consistently use an elk vulnerability model to assess potential project-related impacts to elk. The Tribe has also raised concerns about negative impacts to fisher, white-headed woodpecker, and other Species of Conservation Concern (“SCC”), due in part to the lack of specific Forest Plan components for those species. Tribal staff met most recently with Forest staff on September 20, 2023, to review these and other outstanding wildlife concerns. Given these outstanding wildlife issues within the Forest Plan, the Tribe requests that the Forest review and incorporate the Tribe’s previous recommendations specific to wildlife, including but not limited to the development of robust standards to protect the Tribe’s treaty-reserved wildlife resources.

Aquatic Habitat

The Tribe is pleased that the Forest has committed to converting to standards the seven aquatic-related draft resource guidelines identified in Appendix A of your October 13 letter. The Tribe fully supports converting these guidelines to standards. The Tribe would like to also discuss, however, converting to standards those guidelines the Tribe previously identified in written comments and staff-to-staff meetings. To date the Forest has either declined to adopt or has not addressed these requests. Two of the guidelines previously identified by the Tribe as candidates for conversion to standards are the following proposed aquatic resource guidelines:

FW-GDL-WTR-02: To maintain channel forming processes and aquatic habitat, large woody debris should not be cut or removed from stream channels or floodplains unless it threatens public safety or critical infrastructure, such as mid-channel bridge piers.

FW-GDL-RMZ-02: To reduce the likelihood of sediment input to streams, avoid new road, trail, and landing construction, including temporary roads, in riparian management zones except where: (a) necessary for stream crossings, or (b) a road or trail relocation contributes to attainment of aquatic and riparian desired conditions, or (c) Forest Service authorities are limited by law or regulation.

According to your October 13 letter, the Forest reanalyzed these two guidelines and determined that if these guidelines were converted to standards, “it is likely that critical restoration projects proposed by the Tribe and others would not be able to move forward, and if these plan components would have been standards in the past, at least two projects proposed and implemented by the Tribe would have been able to proceed without a plan amendment.” When asked during the October 24 meeting with NPTEC why this issue could not be fixed by including an exception in the standard language to ensure that critical restoration projects could move forward in the future (e.g., exceptions for protecting people or infrastructure), the Forest responded that such exceptions cannot be included in standards because such exceptions would depart from desired future conditions and are not consistent with the 2012 Planning Rule. When reviewing the latest Forest Plan draft provided to the Tribe in February 2023, however, the Tribe identified several resource standards containing similar exceptions for human safety, property, or infrastructure.⁷ Given the existence of these other proposed standards in the Forest Plan, the Tribe does not understand why its request to convert the aquatic resource guidelines identified above to standards, with additional language providing for needed restoration-related exceptions, is not possible.

Additional Coordination and Clarification Needed

President Biden’s September 27, 2023, Memorandum

On September 27, 2023, President Biden issued a Memorandum on Restoring Healthy and Abundant Salmon, Steelhead, and Other Native Fish Populations in the Columbia River Basin.⁸ In that Memorandum, President Biden directs all federal agencies, including the Forest Service, to use existing authorities and available resources to restore salmon and other wild fish populations to help ensure that the United States upholds its treaty and trust responsibilities to tribes. In

⁷ Examples of standards containing exceptions include: “FW-STD-CAVE-01 Cave and karst features environments shall not be altered, except where necessary to protect associated natural resources or to protect health and safety”; and “FW-STD-TBR-06. The maximum opening size created by clearcutting, seed tree cutting, shelterwood seed cutting, or other cuts designed to regenerate an even-aged stand of timber in a single harvest operation shall be 40 acres....Exceptions to the 40-acre maximum opening size standard may occur when determined necessary to help achieve desired ecological conditions for the plan areas (Table 22).” (emphasis added).

⁸ Restoring Healthy and Abundant Salmon, Steelhead, and Other Native Fish Populations in the Columbia River Basin, 88 Fed. Reg. 67,617 (Sep. 27, 2023).

response to this Memorandum, the Tribe issued a statement commending the Biden Administration for taking this critically important step in light of the salmon extinction crisis in the Columbia River Basin and noting that “[b]y publicly acknowledging that healthy and abundant salmon runs are essential, we know the Biden Administration is prioritizing the needs of the Northwest and working to uphold our Treaty.”⁹

Recent returns of Endangered Species Act-listed adult fish across the entire Snake River basin are a fraction of historical abundance and established healthy and harvestable goals. Additionally, recent abundance trends are negative with associated productivity below replacement for most populations within the Snake River basin. Given the species’ low abundance and productivity, and assuming the negative trends continue, a recent analysis by the Tribe showed 77% of spring/summer Chinook salmon and 44% of steelhead populations will drop below a quasi-extinction threshold by 2025. These ongoing abundance declines and threats to population persistence led to a National Oceanographic and Atmospheric Administration report, which concluded that abundance levels are concerning and warrant urgent restoration actions.

At the October 24 meeting, NPTEC asked whether the Forest had re-examined the Forest Plan in light of President Biden’s September 27, 2023, Memorandum. You responded that the Forest is meeting this directive through development of the Aquatic and Riparian Conservation Strategy (“ARCS”) document, which is intended to guide the Forest Plan in developing networks of properly functioning watersheds that support populations of fish and other aquatic and riparian-dependent organisms. The ARCS has been in development for years and is not a response to the President's September 27 Memorandum.

The Tribe expects the Forest to fully meet the purpose and intent of the President’s Memorandum by identifying for the Tribe which specific, prioritized, additional measures the Forest will take and implement in the new Forest Plan to comply with the President’s Memorandum. These additional measures should fully leverage the Forest’s authorities to protect the Tribe’s treaty and ensure that all plan components in the Forest Plan are providing “equitable treatment for fish and wildlife” to “adequately protect, mitigate, and enhance fish and wildlife affected by the Federal dams in the [Columbia River] Basin.”¹⁰

Species of Conservation Concern

Another topic that the Tribe raised during the October 24 meeting is the status of the SCC list in relation to the Forest Plan. Recently, Tribal staff met with Forest staff to discuss the SCC; they were informed that spring/summer chinook salmon are being evaluated for potential removal from the SCC. Our understanding is the Forest is considering this action because those species were extirpated and reintroduced and, therefore, are not native to the area. The Forest informed NPTEC

⁹ “Federal funds boost tribal-led revival efforts for salmon in upper Columbia River Basin,” The Spokesman-Review, Oct. 29, 2023,

<https://www.spokesman.com/stories/2023/oct/29/federal-funds-boost-tribal-led-revival-efforts-for/>.

¹⁰ Restoring Healthy and Abundant Salmon, Steelhead, and Other Native Fish Populations in the Columbia River Basin, 88 Fed. Reg. 67,617, 67,617 (Sep. 27, 2023).

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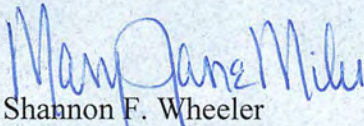
at the October 24 meeting that the list of SCC is a Regional matter and decisions are made at that level. The Tribe appreciates this clarification but requests that the Forest provide more detailed information to the Tribe regarding the rationale for and status of the potential removal of this culturally-significant, treaty-reserved resource from the SCC list.

Next Steps

In summary, the Tribe appreciates the Forest's efforts to work with the Tribe on the Forest Plan and its commitment to continue our dialogue regarding the Forest Plan. To facilitate this dialogue and collaborative work, the Tribe requests that the Forest Service not proceed with publishing a Draft Record of Decision until the Tribe and Forest have had an opportunity to comprehensively address the Tribe's outstanding concerns, including the Tribe's need for additional standards in the Forest Plan. Only through further collaboration will the Tribe's and Biden Administration's shared vision of a Forest Plan that protects the Tribe's treaty-reserved rights and resources for generations to come be achieved.

The Tribe looks forward to our meeting with Chief Moore next week.

Sincerely,


FDC Shannon F. Wheeler
Chairman

cc (via email only):

Mr. Randy Moore, Region 8 Forestry Technician (randy.b.moore@usda.gov)
Ms. Leanne Marten, Region 1 Regional Forester (leanne.marten@usda.gov)
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