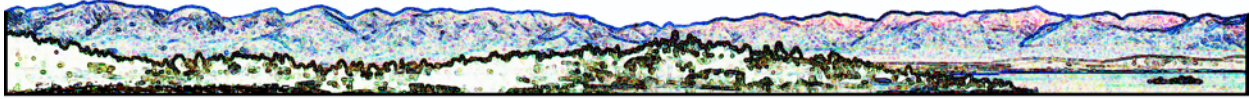


Swan View Coalition

Nature and Human Nature on the Same Path



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December 18, 2024

Chris Dowling
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Submission via <https://cara.fs2c.usda.gov/Public//CommentInput?Project=64924> and via email to Christopher.Dowling@usda.gov and jeffrey.durkin@usda.gov

Re: Comments on Rumbling Owl Fuels Reduction Project EA

Dear Ranger Dowling and Silviculturist Durkin;

Please accept these comments in the above matter into the public record. We incorporate by reference the comments being submitted by Friends of the Wild Swan. As described in this letter, we will be filing some supportive documents not included in this PDF via direct email to the two of you.

We find nothing substantial in the EA that addresses the concerns we expressed in our 12/12/23 comments on the Proposed Action. We therefore incorporate our earlier comments by reference and reallege each of the claims and issues raised therein. The EA you have published is insufficient for public review and violates the spirit of Orders from the U.S. District Court in Missoula and the promises made by Flathead Forest Supervisor Anthony Botello in his efforts to avoid a Court order of vacatur against the Forest Plan and its BiOp.

We find this EA to have no scientific or legal foundation for its treatment of roads, let alone its assessment of the impacts of roads to grizzly bears, bull trout and other resources. The Flathead Forest Plan currently has no adequate Biological Opinion (BiOp) because it was found legally deficient by Judge Christensen of the U.S. District Court in Missoula, MT, on 6/28/24, along with his determination that the Forest Service also violated the law by relying on that inadequate BiOp. Nor does the EA attempt to correct the same Court's (Judge Molloy, 6/24/23) ruling against the prior BiOp and the Forest Service's reliance upon it, as discussed in our prior comments.

These Court opinions can be found at https://earthjustice.org/wp-content/uploads/2024/06/flathead-2024-06-28_order.pdf and [https://earthjustice.org/wp-content/uploads/2021-06-24 doc. 116 opinion and order.pdf](https://earthjustice.org/wp-content/uploads/2021-06-24_doc_116_opinion_and_order.pdf), respectively. We will email you those opinions

separately. We find the names of those Judges and the word “court” nowhere in the EA, along with no mention whatsoever of these two lawsuits. It is premature for the Forest Service to issue the Rumbling Owl EA until it has remedied the shortcomings detailed by these two court rulings, let alone ask for public comment on a premature EA that makes no mention of those shortcomings or how they will or have been remedied.

In his 4/9/24 Declaration to the Court, Supervisor Botello states:

I am writing this declaration to respond to Plaintiffs’ request for partial and prospective vacatur. Plaintiffs’ requested relief . . . would impact three planned projects under the challenged Forest Plan provisions – Dry Riverside, Rumbling Owl, and Mid Swan . . . If the Court approves the (Magistrate Judge’s) merits recommendations and remedy recommendation (remand without vacatur), none of the three planned projects will be approved until the U.S. Fish and Wildlife Service has revised its Biological Opinion for the Forest Plan.” (Parenthesis added, we will email you the Botello Declaration separately).

This promise then resulted in Judge Christensen denying vacatur on the basis that “Regarding the three projects . . . it appears that the Forest Service has already elected not to move forward in anticipation of remand” The premature issuance of an EA for public review, under emergency exemptions from the public right to file Objections, is anything but electing “not to move forward.” This is instead a fast track to issuing a decision on Rumbling Owl that views the BiOp revision as nothing more than a speed bump with no need to alter course in any way.

While the Rumbling Owl EA is not a formal approval/decision, it nonetheless demonstrates Forest Service approval of the proposed action and its rejection of all suggested alternatives to the proposed action (EA at 6-20). No revised BiOp has been issued by FWS, the remand is not yet complete, and the estimated decision date for the project is estimated to be “09/2025” (<https://www.fs.usda.gov/project/flathead/?project=64924>).

It is unethical to ask the public to review a premature EA without the essential benefit of a revised BiOp and without honoring the spirit of the Court’s Order and the Botello Declaration. The Forest Service intends to use emergency provisions that do not allow for a formal public Objection to the project, so this review of the EA is the only junction short of District Court for the public to be heard on this project.

The EA relies on the same flawed Forest Plan and BiOp road analyses that fails to account for total road density by excluding “impassable” roads from calculations of Total Motorized Route Density (TMRD). This approach was faulted by the Court. Judge Christensen ruled:

The issue is not a change in TMRD levels, but a change in how TMRD is calculated. Under the Revised Forest Plan, a road will be excluded from TMRD if it meets the definition of impassable. However, under Amendment 19, a road had to meet the more demanding reclaimed road standard before it would be excluded from TMRD calculations . . . As such, relying on 2011 baseline TMRD levels does not address the concern raised by Plaintiffs. . . Turning to Plaintiff’s

final objection, the Court agrees that the scientific evidence cited by FWS does not support the agency's decision to exclude impassable roads from TMRD calculations. (p 30)

FWS fails to explain how the exclusion of "impassable" roads from TMRD calculations - which could result in a net increase in total road density without any corresponding change in TMRD - does not negatively impact bears. The fact that Mace and Waller (1997) showed a "spectrum" of avoidance behavior does not sufficiently support the agency's position. Moreover, the "spectrum" argument is undermined by various other scientific studies referenced by FWS that conclude "grizzly bears *consistently* were displaced from roads and habitat surrounding roads, *often despite relatively low levels of use*. USFWS_037333 (emphasis added). (p 32)

(Re Mace and Manley 1993) Importantly, the researchers also noted that "[u]nless a road has *completely* revegetated, managers should assume that some level of human use is occurring along closed roads, and grizzly bears will respond to that use." . . . This finding again undermines FWS's decision to exclude impassable roads from TMRD. (p 33)

Yet the EA continues to exclude "impassable" roads from TMRD and continues to reason that, because the NCDE grizzly bear population was increasing in 2011, maintaining TMRD at 2011 levels will safeguard grizzly bear recovery. This, of course, ignores the fact that the actual "total road density" will increase above 2011 levels as new roads are built and old roads are rebuilt under the Forest Plan and projects like Rumbling Owl – so the actual total road density will not remain at the 2011 levels thought to support grizzly bear recovery. Judge Christensen indeed ruled:

Finally, an increase in the NCDE bear population prior to implementation of the Revised Forest Plan does not provide sufficient support for the agency's position because the new "impassable" road standard could result in increased unauthorized motorized use due to an increased reliance on road closure methods that are not entirely effective. (p 26)

Nonetheless, the Forest Service continues with this big lie that all will be fine as impacts to bears are kept at 2011 baseline levels, while ignoring the fact that entrance-only road closures like those used on "impassable" roads are often ineffective, that such roads have continuing impacts to grizzly bears, and that such roads will increase with time as more roads are built and simply rendered "impassable" – all the while not being accounted for in TMRD. We find this false and unlawful assurance, among other places, in the EA at 48 and Project File Exhibit Q-09 at 15.

To the extent the EA pecks around the edges to address road issues raised in our prior letter, it instead introduces conflicting information. While the Forest Plan glossary states that only "Federal, State and tribal roads" are included in TMRD, the EA at 11 claims that the old Plum Creek roads in Section 33 were already included in TMRD so adding some of them to the National Forest Road System does not constitute an increase in calculated road densities. These facts do not square with one another, given that previous landowners Plum Creek and Rocky Mountain Elk Foundation are/were

neither a federal, state or tribal agency. Is the Forest Plan Glossary wrong on this or is the EA wrong?

Similarly, the EA uses the term “obliterated” road when that term appears nowhere in the Forest Plan, not even its Glossary (see EA at 7, 10, 11, 44, 99, 122, and 128). The EA, at 128, adds more confusion by stating that “obliterated” roads “would meet the forest plan’s impassable definition.” The EA goes on to say that obliteration would include “Removing all stream-aligned and cross-drain culverts,” but the definition for “impassable” road has no such requirement. So, which is it? The circular references between “decommissioned” and “impassable” roads did not pass muster with the District Court, so what makes the Forest Service think that a new circular reference to “obliterated” roads will? Indeed, Judge Christensen ruled:

Reviewing de novo, the Court finds that FWS was arbitrary and capricious for failing to address its decision to abandon the culvert removal requirement with respect to “impassable” roads. (p 35)

Defendants read the holding in *Flathead I* too narrowly by limiting its discussion to culvert removal on decommissioned roads and ignoring impassable roads. (p 37)

Thus, the error identified in *Flathead I* persists in the Revised BiOp because FWS has again failed to address the effects of abandoning the culvert removal requirement on impassable roads. (p 38)

Thus, it would appear that both agencies agree that culvert removal is an important component of managing sediment impacts on both decommissioned and closed/barriered roads, which includes impassable roads . . . This reading of *Flathead I* is also consistent with the opinion of the Forest Service’s own biologist who noted in an email that the agency is not “decommissioning many roads anymore and instead [is] making new roads meet the new impassable definition” and, therefore, would “not necessarily remove culverts.” (p 39)

The Court was similarly unimpressed with the Revised BiOp’s ITS requirement that all stream-aligned culverts be removed from “decommissioned” roads. Judge Christensen ruled:

The court is unpersuaded that the Culvert Monitoring Plan, ITS, and other components of the Revised Forest Plan act as sufficient safeguards for bull trout and bull trout habitat . . . the existence of the Culvert Monitoring Plan did not excuse FWS’s failure to adequately consider abandonment of the culvert removal requirement . . . because ITS only applies to decommissioned roads, the Court fails to see how this distinction makes any difference with respect to culvert removal on impassable roads and the potential impacts to bull trout. Moreover, the addition of the ITS on remand further underscores the potential adverse impacts of allowing culverts to remain on closed roads, including impassable roads, and the importance of addressing this issue. (p 40)

We are similarly unimpressed that the EA, at 10, appears to confine culvert removal from closed roads to apply only to the 2.8 miles of road to be “obliterated” among the approximately 8 miles of “newly acquired” roads in Section 33. What of the remaining barriered roads and temporary roads in the project area? Simply meeting the definition of “impassable” does not require the removal of culverts nor does it adequately protect threatened bull trout and other aquatic life. Indeed, PDF-TRANS-01 (EA at 123) allows stream-aligned culverts to remain in place on barriered roads. Pardon our skepticism, but having been through District Court twice now on this issue, we find it very curious that the Forest Service now introduces a new culvert-removal requirement for “obliterated” roads that is contradicted by the very definition of “impassable” that it is tied to.

One thing the EA appears to get right, on page 52, is that the “replacement of the berm on Road 9582 with a gate would increase potential motorized access on the southern portion of this road” accessing Section 33, although it is not clear if the EA is referencing administrative use or unauthorized motorized use. As noted on page 7 of our Road Hunt report, gates are far less effective than berms, at 31% compared to 69% effective, respectively. Making the prospect of a gate even worse is the fact that Forest Service road closure surveys show that the existing berm closure on Road 9582 was being driven around by motor vehicles in 2022 and 2023. (See the road closure survey spreadsheets [Flathead_National_Forest_Closure_Monitoring_2022.xlsx](#) and [R01_Flathead_National_Forest_Closure_Monitoring_2023_Inspections_Export_Raw.xls](#), which we will email you separately). If the Forest Service can’t prevent unauthorized motorized use of Road 9582 with an earth berm, what makes it think it can do so with a gate?

Project File Exhibit Q-09 references a review of closure device monitoring in the analysis area for 2022-2024, concluding in Table 1 that the percent found ineffective was 4% for 2022, 8% for 2023, and 2% for 2024. What Exhibit Q-09 does not disclose is that, since 2021, the Flathead NF has surveyed its road closures to determine whether they are “found functional” or “found not functional,” not whether they are found “effective” or “ineffective.” Nonetheless, the Flathead reports results as percent ineffective even though it has repeatedly failed to provide an explanation of how it gets from monitoring for “functional/not functional” to reporting percent “effective/ineffective,” especially in the face of having listed scores of road closures displaying a breach by motor vehicles as “found functional.” We discuss these matters thoroughly in our May 2023 Road Hunt report provided with our prior comments and now with our December 2024 report “Roads Revisited: A revisit of ten ineffective road closures in the Flathead National Forest’s Swan Valley Geographic Area,” which can be found at <https://www.swanview.org/public/assets/uploads/reports/Roads-Revisited-2024-Hammer.pdf>. We will also email you a copy separately.

At least the Flathead’s “Cyclone Bill Project File Exhibit Q-22” (emailed separately) admits that its Forest-wide road closure device inspections remain “draft” for 2021-2024. Perhaps this is because the Flathead has no documented method for determining “effectiveness” from “found functional” data? We are given no clues in the Rumbling Owl EA, let alone any Forest-wide data like that found in Cyclone Bill Exhibit Q-22.

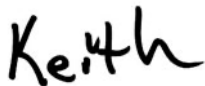
In our 2024 Roads Revisited report, at 10-11, we show that Cyclone Bill Exhibit Q-22 itself shows a Forest-wide increase in ineffective road closure ineffectiveness from 4-7% from 2021-2023. Moreover, we find that increase to likely be from 17-31% ineffective when we estimate adjustments using common-sense assumptions that “not functional” road closures are likely “ineffective” and that closures “breached” by motor vehicles are likely “not functional!”

Until the Flathead provides a clear description of how its road closures found “not functional” somehow are apparently often counted as “effective,” and how its road closures found “breached” by motor vehicles often get counted as “functional,” its summaries of road closure effectiveness simply can’t be trusted. And until the Flathead and FWS correct the scientific and legal problems pointed out in the above-mentioned Court Orders, its project-level analyses of the effects of roads on grizzly bears, bull trout and other resources can’t be trusted either.

So, these comments on the Rumbling Owl EA are submitted to you under protest because we and the general public have not yet been provided the revised Forest Plan BiOp and any other results of the Court’s Remand that would be the basis for the analyses in the EA, as described above. It seems abundantly clear from the Court’s Order that, due to the gravity of the factors contributing to the Remand of the BiOp, changes to the Forest Plan are also necessary – such as the need to include “impassable” roads in TMRD.

Please keep us informed about this project.

Sincerely,



Keith J. Hammer
Chair

Referenced items to be emailed separately:

- Judge Christensen’s 6/28/24 Order on the Flathead Forest Plan BiOp
- Judge Molloy’s 6/24/21 Order on the Flathead Forest Plan BiOp
- 4/9/24 Declaration of Anthony Botello
- Road closure survey spreadsheets
- Flathead_National_Forest_Closure_Monitoring_2022.xlsx and R01_Flathead_National_Forest_Closure_Monitoring_2023_Inspections_Export_Raw.xls
- Hammer, December 2024. “Roads Revisited: A revisit of ten ineffective road closures in the Flathead National Forest’s Swan Valley Geographic Area.”
- Cyclone Bill Project File Exhibit Q-22