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First name: Rocky

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Organization:

Title:

Comments: Dear Forest Service,

Attached is an objection to the Black Diamond Landscape Resiliency and Risk Reduction Project from Rocky Smith et al. Please acknowledge receipt of this objection with an e-mail to me at the address listed in the form.

Thanks,

Rocky Smith

Letter Text:

ARGUMENTS IN SUPPORT OF OBJECTIONI. THE PROPOSED ACTION WOULD PERMANENTLY DEGRADE ROADLESS AREA CHARACTERISTICS, IN CONTRADICTION TO THE COLORADO ROADLESS RULE (CRR)Roadless areas are very important for a variety of functions. Areas with no roads, or at least none open to public motorized use, provide high quality wildlife habitat and promote the diversity of plant and animal communities.Objectors addressed the issue of impacts to roadless areas on pp. 11-15 of our comments on the Preliminary Environmental Assessment (PEA) dated April 3, 2023. We also addressed this issue in our scoping comments of September 23, 2022 at pp. 12-15.Four Colorado roadless areas (CRAs) would be entered as part of the Black Diamond Project. Prescribed fire would be implemented on 13,901 acres, and 7726 acres could be manually thinned. Roadless Report at 1. These proposed treatments would overlap; the total footprint in roadless areas would be approximately 15,801 acres. Id. at 2.Three of the CRAs, Green Ridge East, Green Ridge West, and Cherokee Park, are mostly in the subalpine zone (i. e., above elevation 9200 feet - FEA at 8), where fire is infrequent, and conditions are less departed from historical conditions than in lower elevations.Evidence of fire suppression effects on much of the upper montane and sub-alpine have not commonly been found to deviate from conditions under the prior fire history period.Final Environmental Assessment (FEA) at 6.The FEA correctly states that "[c]ommunities and infrastructure are limited in this zone." Id. at 8. None of these three CRAs are covered by a community wildfire protection plan. See FEA Apx C, map 8.Treatment in these CRAs is simply not needed. But it is proposed anyway.Treatment in all four CRAs would include: "Thinning of small diameter trees generally 2ft tall 10" dbh (lodgepole) and 12" dbh (other species) (sic)".Roadless Report at 3. Additionally, in the Cherokee Park CRA, the following would occur: "Fireline construction necessary to facilitate adequate control features for prescribed burning." Ibid.The Biological Evaluation and Wildlife Report (BE-W Report) further describes treatment proposed in CRAs:Many or most features will still require some improvements such as hand line (1-2 feet wide), surface fuel rearrangement with chainsaws (i.e., saw line) (50-100 feet wide), limbing, or small tree removal to be effective in moderating fire behavior along control lines. Where natural features don't exist to contain a prescribed fire, the preparation treatments may require more intensive and/or extensive fuel mitigation. This may include treating a wider area to the maximum extent allowed and require hand piling and burning of fuels to manage fire behavior during a broadcast prescribed fire.BE-W Report at 38, with emphasis added; see also Roadless Report at 2.The BE-W Report also states the outcome of the proposed roadless area treatments:Proposed hand thinning and broadcast burning treatments would remove or kill smaller diameter trees and some overstory trees, while leaving a residual stand of larger dominant trees.Id. at 111.PODs (potential operational delineations) are designated in CRAs as described below. They "will generally range between 300

and 1000 feet" in width. FEA at 20. As discussed below, there would be adverse impacts to at least two roadless area characteristics: diversity of plant and animal communities and habitat for threatened, endangered, and sensitive species and species dependent on large undisturbed areas of land. See CRR at 36 CFR 294.41. Much of the Cherokee Park CRA is covered by treatment opportunity areas, with much area proposed for manual thinning. See FEA Apx C, Maps 11 and 15. This Roadless Area (RA) ranges in elevation from about 8,400 to 9,700 feet and is in the upper montane and subalpine zones. Dominant cover types are lodgepole pine, with Engelmann spruce and subalpine fir mixed in at higher elevations. [hellip] The area above about 9,000 feet is dominated by subalpine forest of lodgepole pine and mixed spruce-fir-lodgepole and provides suitable lynx habitat in about half of the RA. Roadless Report at 9. This report continues to note the possible undesired effects of the proposed treatments: As described, proposed broadcast prescribed burning, and associated small tree cutting where allowable to facilitate burning, may be consistent with maintaining or improving habitat structure in the minor portion of this RA at the lowest elevations that may have mixed Douglas-fir, ponderosa, and lodgepole pine. In most of the RA where lodgepole pine and mixed spruce-fir-lodgepole is dominant, burning could cause undesired tree mortality and reduce habitat quality for mature forest species, such as goshawk, marten, and boreal owl. It may also impact suitable lynx habitat through undesired canopy and understory tree mortality. Variable levels of beetle-caused tree mortality in lodgepole pine and Engelmann spruce are present and additional canopy mortality from broadcast burning could further reduce habitat quality for these species and would likely reduce dense horizontal cover in lynx habitat. Id. at 9-10; emphasis added. The Green Ridge East CRA "ranges in elevation from about 9,600 to 10,300 feet and is in the subalpine zone". Id. at 10. Treatment would consist of small tree thinning, followed by piling and burning of slash and surface fuels. Ibid. The proposed treatment would have the following effects: This could reduce habitat quality for mature forest species, such as goshawk, marten, and boreal owl, primarily by reducing prey cover and understory and overstory canopy cover. It would also impact suitable lynx habitat through undesired canopy and understory tree mortality and reduction in dense horizontal cover. Variable levels of beetle-caused tree mortality in lodgepole pine and spruce are present and additional canopy mortality from pile burning and removal of small trees and surface cover would further reduce habitat quality for these species and would likely reduce dense horizontal cover in lynx habitat. Id. at 10-11; emphasis added. The Green Ridge West CRA "ranges in elevation from about 8,400 to 10,400 feet and is predominantly in the subalpine zone." Id. at 11. Much of this CRA is in treatment opportunity areas, with much area proposed for manual thinning. See FEA Apx C, maps 13 and 15. As described above, the proposed small tree cutting, surface fuels piling, and pile burning would reduce understory conifer cover and down wood prevalence. Additionally, some overstory tree mortality likely would occur from pile burning. This could reduce habitat quality for mature forest species, such as goshawk, marten, and boreal owl, primarily by reducing prey cover and understory and overstory canopy cover. It would also impact suitable lynx habitat through undesired canopy and understory tree mortality and reduction in dense horizontal cover. Variable levels of beetle-caused tree mortality in lodgepole pine and spruce are present and additional canopy mortality from pile burning and removal of small trees and surface cover would further reduce habitat quality for these species and would likely reduce dense horizontal cover in lynx habitat. Id. at 11-12. Treatments in the CRAs would be maintained so they would continue to serve as PODs, fuel breaks, or more "resilient" forests. For example, in lodgepole pine, Shaded fuel breaks are directed at POD boundaries and strategic defense locations in lodgepole pine stands with a predominantly live overstory where thinning can reduce canopy bulk densities but maintain light conditions which preclude understory regeneration. FEA at 38, emphasis added. In lodgepole pine and spruce-fir forests, treatment near POD boundaries in areas with high tree mortality would be implemented so as to "not significantly impact the efficacy of the feature as a POD boundary through sustain (sic) increases in fuel loading." Ibid. The discussion on p. 11 of the FEA indicates the desire to establish and maintain PODs to "[p]rovid[e] for safe, informed, and strategic response to wildland fires". There are four PODs in the Green Ridge West CRA and one POD encompasses the Cherokee Park CRA. FEA Apx C, Map 9. Clearly, the intent is to maintain treated areas in a state that keeps fuels low, prevents or minimizes tree regeneration, and provides the desired condition of reducing the fire threat. In other words, habitat for species needing forested habitat in the subalpine zone, which would be degraded by the proposed treatments, would not be allowed to recover or improve. This means that the impacts to CRAs would not just be temporary, they would be permanent. That is, the reduction in tree density, elimination of understory needed for lynx foraging, and the removal or burning of down dead material would be

permanently maintained in three CRAs in the project area that extend into the subalpine zone. There is thus no doubt that the proposed treatments in at least the three CRAs that are all or mostly in the subalpine zone would permanently degrade habitat for threatened and sensitive wildlife species needing forested habitat. These species include, but are not limited to: lynx (threatened); marten (sensitive); goshawk (sensitive); boreal owl (sensitive); olive-sided flycatcher (sensitive); and pygmy shrew (sensitive). These species and others are present in some or all of the subalpine CRAs in the project area. Roadless Report at 9-16. The lasting harm to habitat for these species violates the Colorado Roadless Rule at 294.42(c), which requires that for any treatment, "roadless area characteristics will be maintained or improved over the long term". Specifically, the following roadless area characteristics would not be maintained with implementation of the Black Diamond Project.

diversity of plant and animal communities; habitat for threatened, endangered, proposed, candidate, and sensitive species, and for those species dependent on large, undisturbed areas of land. See CRR at 294.41.II. LODGEPOLE PINE IN LYNX HABITAT WOULD BE THINNED BEFORE IT PROVIDED HARE HABITAT, CONTRADICTING DIRECTION IN THE SOUTHERN ROCKIES LYNX AMENDMENT

Objectors addressed this issue on pp. 6-7 of our PEA comments. Retaining existing and future lynx habitat is important, since some habitat was lost in the Cameron Peak Fire. This included land in the Redfeather South Lynx Analysis Unit (LAU), part of which is in the project area. BE-W Report at 82. We reiterate that any treatment in lynx habitat, almost all of which is in the subalpine zone, is not needed to meet the purpose and need of the project and would likely be harmful to wildlife habitat. Under the proposed project, lodgepole pine stands cut early in implementation may be thinned

later: Towards the end of the scope of the project timeline, some stands where regeneration harvest occurred under this decision earlier in project implementation may also require thinning and may be done so in some instances prior to those stands providing suitable winter snowshoe hare habitat. BE-W Report at 33. Not counting any thinning in stands soon to be treated, up to 1540 acres of land in the Redfeather North LAU could be non-commercially thinned, and 6426 acres may be thinned and/or burned. BE-W Report at 84. In the Redfeather South LAU, over 6300 acres could be thinned. Ibid. The Standard Veg S5 in the Southern Rockies Lynx Amendment (SRLA) largely prohibits pre-commercial thinning outside the wildland-urban interface "until the stands no longer provide winter snowshoe hare habitat". SRLA ROD at Attachment 1-3. Most of the lynx habitat that might be treated in the Black Diamond Project is likely outside the WUI, as it is in the higher elevations, away from communities and most infrastructure. There are several exceptions to this prohibition, but there are limitations on applying them, including: pre-commercial thinning must be no more than one percent of lynx habitat in each LAU, and projects must be "designed to maintain lynx habitat connectivity and provide snowshoe hare habitat over the long term". Id. at Attachment 1-4. It is not clear if the project would comply with these limitations on pre-commercial thinning. The numbers cited for acres that might be thinned, if they were all in lynx habitat, would be well over one percent of the lynx habitat in each LAU. Though it is unlikely that all of the proposed thinning would occur in lynx habitat, additional areas treated early in project implementation could later be thinned before they were allowed to become hare habitat. Since the number of acres of lynx habitat to be treated, including those via thinning, and their locations are not known, it is impossible to ascertain that the requirements of SRLA for pre-commercial thinning would be met. Another requirement for pre-commercial thinning in lynx habitat is that "[m]onitoring is used to determine snowshoe hare response". Monitoring and field surveys are mentioned as part of the implementation strategy (FEA at 39 et seq.), but there is no specific direction for what would be monitored or surveyed. Thus there is no assurance that snowshoe hare response to proposed actions would be determined.

III. THE PROJECT WOULD ALLOW CUTTING IN OLD GROWTH WITHIN MA 3.5 AREAS, IN CONTRADICTION TO THE FOREST PLAN

Objectors addressed this issue at pp. 16-17 of our 2022 scoping comments and pp. 9-11 of our comments on the PEA. Approximately 352 acres of lodgepole pine forests and 251 acres of Spruce-fir forests occur as inventoried old-growth forests and almost exclusively along potential POD boundaries. Proposed management activities along POD boundaries will likely be unable to substantially improve old growth conditions in Spruce-fir or lodgepole pine forests. Vegetation management activities are thereby largely limited to improving wildfire suppression response by removing or modifying surface and ladder fuels that are in close proximity to the proposed wildfire control feature (e.g., road or ridgeline). These actions will likely not substantially alter the function of designated old growth forests. BE-W Report at 75. Surface and ladder fuels (the latter are live understory trees) are an integral part of lodgepole pine and spruce-fir old growth forests. Multiple canopy layers are considered a "must" criteria for spruce-fir old growth and a quality attribute for lodgepole pine

old growth. See Mehl, 1992 at 108. Thus removal of understory trees would alter the quality and functions of old growth lodgepole pine and spruce-fir. A design Feature even notes that treatment would diminish old growth quality in these ecological types: Treatments in old-growth lodgepole pine or spruce-fir are not needed to maintain old-growth structure and would generally degrade old-growth habitat quality. Wildlife Design Feature 15a, FEA Apx B at 18. Treating lodgepole pine and spruce-fir old growth would violate the Forest Plan for areas assigned to Management Area (MA) 3.5, which has the following standard: "Exclude vegetation treatment of inventoried spruce-fir or lodgepole pine old growth." Plan at 357. According to FEA map 4 (at FEA Apx. p. 4), about half of the project area is assigned to this MA. A design feature even says that lodgepole pine and spruce for in the Black Diamond project area would be avoided: In Management Area 3.5, exclude vegetation treatment from inventoried or discovered spruce-fir and lodgepole pine old growth per Forest Plan standard 1. Exceptions may be made if the lodgepole old growth is considered non-functional at time of implementation. This determination of functionality is to be made for the stand as a whole within the treatment unit. Wildlife Design Feature 15b, FEA Apx B at 18. But in spite of this prohibition, treatment is proposed for old growth stands. **SUGGESTED REMEDIES** Proposed treatments in roadless areas must be modified. They must not permanently reduce habitat for species requiring forested habitat or permanently affect the diversity of plant and animal communities. Impacts of treatment adversely affecting habitat for species such as lynx, goshawk, marten, and others must be mitigated as much as possible. This should include revegetation of any fire control lines. Pre-commercial thinning in lodgepole pine or other species in lynx habitat, in both existing stands and ones that result from proposed treatment, must not occur until after the stands no longer provide snowshoe hare habitat, i. e., the lowest branches are out of reach of hare standing on average winter snow depth. If such thinning will be approved, the Forest Service must first show that any such actions, individually and cumulatively, will comply with SRLA. Treatments must not be approved in areas with lodgepole pine or spruce-fir old growth, at least in areas assigned to MA 3.5. **IV. THE FEA FAILED TO TAKE A HARD LOOK AT THE IMPACTS OF THE PROPOSED ACTION, IN VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT.** The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. [sect][sect] 4321 et seq., requires federal agencies to identify and evaluate impacts of "major Federal actions significantly affecting the quality of the human environment." NEPA requires agencies to "take a hard look at environmental consequences" of their proposed actions, consider alternatives, and publicly disseminate such information before taking final action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Where the exercise of site-specific discretion is material to a project's environmental consequences, NEPA requires consideration of site-specific proposals and alternatives, regardless of whether the effects are "significant." 42 U.S.C. [sect] 4332(2)(C), (E). Objectors addressed this issue on pp. 18-23 and pp. 27-28 of our PEA comments. The proposed action relies on a condition-based management approach, under which the physical and temporal scales of the action will not be fully defined when the decision is made, but will instead be done later, just prior to implementation. See FEA at 82. This approach may well streamline vegetation management on the Canyon Lakes Ranger District, but it does not comply with NEPA's procedural requirements. Those requirements demand coherent and comprehensive up-front environmental analysis to ensure the agency does not act on incomplete information, only to regret its decision after it is too late to correct. Here, the Forest Service has identified the overall project area [mdash] approximately 190,056 acres of national forest lands [mdash] and treatment opportunity areas (120,455 acres - see FEA at 16) that identify the general locations within the project area that will be subject to various treatments such as salvage or thinning, broadcast burning, manual thinning, etc., alone or in combination. The agency has not, however specified the exact locations where those treatments will take place or stated when those treatments would be implemented over the twenty-year project lifespan. Rather "the proposed action is a collection of forest management actions that could be implemented in the project area, but exact selection of specific management actions, and/or combinations of actions when appropriate, will be dependent on the site-specific needs and forest plan directives for the areas identified for treatment." FEA at 15. By only identifying broad areas within which treatments may occur, the agency fails to fully explain to the public how or where actual activities will affect localized habitats. The agency states the following in its internal guidance on compliance with the NEPA: "If the Agency does not know where or when an activity will occur or if it will occur at all[,] then the effects of that action cannot be meaningfully evaluated." U.S. Forest Service, Forest Service Handbook, FSH 1909.15.01(1). See *Kettle Range Conservation Grp. v. U.S. Forest Serv.*, No. 2:21-CV-00161-SAB, 2023 WL 4112930, at *9 (E.D.

Wash. June 21, 2023). That is the case here. By failing to consider the site-specific effects of the proposed action, the agency violates NEPA. Under the terms of the proposed action in the FEA, the Forest Service would be able to exercise significant discretion over timeframe, locations, and specific treatments in carrying out the proposed action. This discretion is presumably material to the proposed action's environmental consequences, as the ability to tailor actions to improve conditions is a stated need for the proposed action. See, e. g., FEA at 15. The proposed action therefore requires the Forest Service to take a hard look at site-specific proposals and alternatives. By considering only the proposed action and the no action alternative in the FEA, the Forest Service failed to consider reasonable alternatives, in violation of NEPA. Objectors suggested a reasonable alternative that would proscribe treatments within the four Colorado Roadless Areas (CRAs) within the overall project area. Such an alternative would largely meet the purpose and need described in the FEA, while better meeting the intent of the Colorado Roadless Rule. On pp. 11-15 of our PEA comments, objectors describe adverse impacts to the CRAs under the proposed action. Analysis of an alternative in which no treatments would be completed within the CRAs would provide an opportunity for the decisionmaker and the public to weigh the costs and benefits of the proposed action relative to the costs and benefits of the suggested alternative. Given the considerable negative impacts to roadless characteristics and habitat for ESA-listed species, the public and the decisionmaker would benefit from evaluation of an alternative in which the primary benefits of the proposed action would be attained but without the costs of disrupting CRAs. By not evaluating the suggested alternative in comparison to the proposed action the Forest Service failed to take a hard look at the environmental effects of the Black Diamond project.

SUGGESTED REMEDIES After implementing the other remedies suggested here, the Forest Service should publish a supplemental programmatic EA for the proposed condition-based management approach. This programmatic EA should include an evaluation of an alternative that is similar to the proposed action but excludes all treatments within CRAs, or excludes all such treatments except or the lower elevations of the North Lone Pine CRA. (See our PEA comments at 15.) The Forest Service would then utilize a series of separate EAs that tier to the supplemental programmatic EA, one for each specific proposal to implement the types of treatments described in the Black Diamond FEA.

V. THE FEA FAILED TO EVALUATE THE IMPACTS OF MITIGATION MEASURES, IN VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT. Objectors addressed this issue on pp. 26-27 of our PEA comments. NEPA requires that an agency, as part of its analysis of the environmental impacts of a proposed action consider mitigation measures that would:

- [bull] avoid the impact altogether by not taking the proposed action or parts of the action;
- [bull] minimize impacts of the proposed action by limiting the degree or magnitude of the action and its implementation;
- [bull] rectify the impact by repairing, rehabilitating, or restoring the affected environment;
- [bull] reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action;
- and [bull] compensate for the impact by replacing or providing substitute resources or environments.

40 C.F.R. [sect] 1508.1(s). NEPA is a procedural statute and does not mandate the form or adoption of any mitigation. *Id.* It does, however, require that the agency discuss mitigation measures, in order to fulfill its obligation to inform the decisionmaker and the public so that they can properly evaluate the severity of the adverse effects of a proposed action. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989). NEPA requires that the agency discuss mitigation measures, with "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id.* at 352. An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. Compare *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998) (disapproving an EIS that lacked such an assessment) with *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir. 2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. *Methow Valley*, 490 U.S. at 351-52, 109 S. Ct. 1835 (citing 42 U.S.C. [sect] 4332(C)(ii)). A mitigation discussion without at least some determination of effectiveness is useless in making that evaluation. *South Fork Band Council v. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (rejecting EIS for mining project for failure to conduct adequate review of mitigation and mitigation effectiveness in EIS). See *Dine Citizens v. Klein*, 747 F. Supp. 2d 1234, 1258-59 (D. Colo. 2010) (finding "lack of detail as to the nature of the mitigation measures" precluded "meaningful judicial review"). The FEA, similar to the PEA, includes discussions of mitigation in the contexts of "fuels mitigation" and "hazard mitigation" and "Wildland Urban Interface Mitigation Zones." These

things are not the same as mitigation in the NEPA context, which is concerned with measures that are meant to avoid or counter the environmental effects of the proposed action. With a charitable reading, Appendix B[mdash]Design Features could be said to provide a brief discussion of mitigation measures, but, even then, mitigation in the NEPA context is frequently conflated with fuels mitigation, and no assessment of whether proposed mitigation measures (in the NEPA context) would be effective at avoiding or lessening environmental impacts is offered. Absent some evaluation of whether the proposed design features will mitigate environmental harms of the proposed action, the Forest Service cannot reasonably find that the proposed action will have no significant impact on the environment.**SUGGESTED REMEDIES**The Forest Service should withdraw the draft decision and issue a supplemental EA that has a discussion of mitigation measures that includes an assessment of their likely effectiveness in countering or offsetting the negative impacts of the proposed action. Note that mitigation includes actions that "minimize impacts of the proposed action by limiting the degree or magnitude of the action and its implementation." 40 C.F.R. [sect] 1508.1(s)(2). The alternative discussed above in Section IV fits this category of mitigation[mdash]withholding treatments within CRAs would minimize adverse impacts to CRAs by limiting the magnitude of the treatments. A thorough evaluation of the suggested alternative may remedy the agency's failure to analyze the impacts of mitigation measures as well.**REFERENCE**Mehl, Mel S., 1992. Old-Growth Descriptions For the Major Cover Types in the Rocky Mountain Region. IN: Old-Growth Forests in the Southwest and Rocky Mountain Regions: Proceedings of A Workshop. Rocky Mountain Forest and Range Experiment Station (now Rocky Mountain Research Station), General Technical Report RM-213, June 1992.