WILDERNESS WATCH
Keeping Wilderness Wild

May 6, 2020

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To: Objection Reviewing Officer
USDA Forest Service
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Emailed to: appeals-northern-regional-office@usda.gov

RE: Canyon Lake Dam Access for Repair Project

Responsible Official: Matthew Anderson, Bitterroot National Forest Supervisor[1]

Pursuant to 36 CFR 218 regulations, this is an objection to the **second** draft Decision Notice (DN), finding of no significant impact (FONSI), and Environmental Assessment (EA) **Canyon Lake Dam Access for Repair Project** submitted on behalf of Wilderness Watch. Wilderness Watch is a national wilderness conservation organization dedicated to the protection and proper stewardship of the National Wilderness Preservation System.

The attachments are being sent via separate emails.

Sincerely,

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[1] There is no responsible official listed on the EA, DN, or DN cover letter. Since Supervisor Anderson signed the cover letter, we assume he is the responsible official.

Introduction

The Canyon Dam proposal—authorizing 32 helicopter flights and heavy, motorized equipment use in the Selway Bitterroot Wilderness, is one where the agency utterly fails in its responsibility to protect Wilderness by falsely claiming that the Forest Service cannot influence the type, method or kind of construction for dam repairs. This flies in the face of the Wilderness Act, the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and promises made by the Forest Service and the Department of Agriculture over the years.

The total deference to the proponent's proposal so narrowly constrains the purpose and need, as well as consideration of reasonable alternatives, that the outcome is foreordained. There are no alternatives analyzed. The 28-page EA does not fully reflect the negative impacts to Wilderness from this proposal.

This objection largely follows our earlier objection, which is attached. Frankly, it is unclear as to what constitutes the supposedly new information, which the agency claims limits the scope of this objection process. The cover letter states, "Please note that the **consideration of objections is strictly limited to new information regarding repair work on the dam and the effects of that work on affected resources**; no other issues will be considered during this objection period." Emphasis in original. The EA is similar in many ways to the previous EA. There is no indication of the changes or nature of the changes in the document.

Furthermore, we have no idea whether our past objection is current or what has become of it. This is highly irregular and dismissive of the public and public involvement processes.

Violation of the Wilderness Act

Congress enacted the Wilderness Act, 16 U.S.C. §§ 1131-1136, "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition…." 16 U.S.C. § 1131(a). Accordingly, the Wilderness Act establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their "natural," "untrammeled" condition. *Id.* § 1131(a). "A wilderness, in contrast with those areas where man and his own works dominate the landscape," is statutorily defined as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain" and an area "retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions…." *Id.* § 1131(c). Thus, wilderness "shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment *as wilderness*, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness…." *Id.* § 1131(a) (emphasis added). The Act's opening section "sets forth the Act's broad mandate to protect the forests, waters, and creatures of the wilderness in their natural, untrammeled state" and "show[s] a mandate of preservation for wilderness and the essential need to keep [nonconforming uses] out of it." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061-62 (9th Cir. 2003) (en banc).

In keeping with the Act's overarching purpose, Congress expressly prohibited a variety of uses

in wilderness. "Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter…." 16 U.S.C. § 1133(c). And,

> [E]xcept as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Id. Thus "[o]nce federal land has been designated as wilderness, the Wilderness Act places severe restrictions on commercial activities, roads, motorized vehicles, motorized transport, and structures within the area, subject to very narrow exceptions and existing private rights." *Wilderness Watch v. Mainella*, 375 F.3d at 1089; *see also Wilderness Watch v. U.S. Fish & Wildlife Serv.,* 629 F.3d at 1039.

Here, the Forest Service notes that it is required to authorize "reasonable access to valid occupancies," which it maintains, in this case, is an easement held by CCID.[2] In any event, even if the CCID were a valid easement holder, the Forest Service admits, "the Wilderness Act also requires the Forest Service to *'prescribe the routes of travel to and from the surrounded occupancies, the mode of travel, and other conditions reasonably necessary to preserve the National Forest Wilderness'*." However, there is only one alternative analyzed in the EA, the proponent's proposal. As such, this statement is misleading. In reality, the Forest Service believes there is "a narrow scope to the Agency's discretion" and that it has virtually no say in what activities take place regarding the dams.

Wilderness Watch's comments stated:[3]

> The Forest Service must administer legally permitted, non-conforming structures in a way that doesn't further degrade the area's wilderness character. Utilizing traditional skills and foregoing the use of motorized equipment is a sign of respect for and commitment to upholding the spirit of the Wilderness Act, and other Forests have successfully completed major dam repair projects using traditional means.[4] Invading Wilderness with helicopters and other tools of modern technology strikes at the heart of Wilderness as a place set apart.
>
> The EA and MRDG need to forthrightly acknowledge that the existing dam was built and has been maintained without motorized equipment for nearly a century. It is how dams in the Selway-Bitterroot and other Wildernesses around the country have traditionally been maintained.

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[2] It should be noted these easements were granted, post wilderness designation, based upon the "Ditch Bill" which was legislation that passed post-wilderness designation. This raises questions about the nature of any valid occupancy.

[3] Footnotes included from our comments, but they are numbered differently than in the comments.

[4] See attached examples, including a different Forest declining a helicopter use request as incompatible with the Wilderness Act and instead requiring a dam company to haul 500 tons of sand and cement for dam repair by pack mules. Over 100 mule loads were unloaded at the dam site each day for a total of "over 4,000 mule loads of sand and cement [] hauled over steep, precipitous trails."

In the discussion leading up to passage of the Wilderness Act in 1964, the Secretary of Agriculture described how the Forest Service would interpret and implement the law:

> Water developments for the storage and diversion of water for irrigation, domestic, and other uses have been allowed in this wilderness-type areas. The works generally have been constructed and maintained by means which did not involve motorized transportation. There are 144 such projects. We would construe the provisions of [the Wilderness Act] as permitting the continued maintenance of these existing projects by means which would not involve motorized transportation as in the past.

S. Rep. No. 109 p.29, 88th Cong. 1st session (1963).

The proposed action reflects a starkly different interpretation and implementation of the law. Should the Forest Service adopt such an action, the EA should explain how the agency has arrived at such a remarkably different interpretation of the Wilderness Act than the Secretary of Agriculture and Congress arrived at in 1964. To expound a bit further, the EA refers to section 5(b) of the Wilderness Act and uses it to justify use of heavy equipment and helicopters without understanding what the law states:

> In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations **consistent with the preservation of the area as wilderness**, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

Emphasis added. When the Selway-Bitterroot Wilderness was designated, the customary access was non-motorized as the Secretary of Agriculture testified. The Wilderness Act's central mandate requires the Forest Service to protect the area's wilderness character and that ingress and egress needs to be consistent with the preservation of the area as Wilderness. Agency policy espouses a non-degradation policy for achieving this end. The Forest Service has adopted a management framework for monitoring conditions related to wilderness character in order to determine whether it is meeting its legal mandate. It is quite clear from the MRDG[5] that the proposed action will degrade the area's wilderness character, but that a non-motorized alternative won't to the same degree (see page 28).

In the response to comments there is the allegation that the dam liner cannot be cut up and hauled without use of a helicopter. This begs the question as to how the dam was lined before helicopters or whether a less intrusive alternative—one that only hauled in the dam liner via helicopter—should have been considered. This demonstrates the complete lack of agency initiative in dam decisions that harm Wilderness. It also demonstrates the agency's failure to meet promises to the Congress and the public to maintain the dams by non-motorized means.

Why is heavy equipment needed when the dams were built without their use? The EA merely suggests that modern engineering requires it to be done this way without explanation as to why.

[5] While the MRDG considers a non-motorized option, it is not an EA and such an alternative should have been analyzed in the EA or EIS.

Why weren't "the structural and design" deficiencies corrected in that recent repair, which used helicopters and heavy equipment? ROD (attached) at 5. If the pattern holds, the Forest Service will be back again in a few years with another proposal for this dam, recycling the same argument about the technology. In essence, the Forest Service dissembled the public about Canyon Lake Dam in 2003 and continues to do so.

The EA states this about cumulative impacts:

> Because of the ephemeral and geographically limited nature of this proposal's effects on the wilderness setting (4 to 6 weeks) there doesn't appear to be cumulative effects (overlapping in both time and space) with other past, present or reasonably foreseeable actions (PF-Effects**)**. There may be both concurrent, similar activities (ongoing trail and dam maintenance, etc.) and reasonably foreseeable activities (trail and dam maintenance) in the broader wilderness area.
>
> The Selway Bitterroot Wilderness includes approximately 1,340,360 acres. The Canyon Creek drainage is approximately 3,146 acres. Thus, the analysis area for the Canyon Lake Dam Access for Repair, 2018 project is approximately 0.24% of the entire Selway Bitterroot Wilderness. Estimated length of project is approximately 4 to 6 weeks with mechanized transport estimated only 8 to 10 days of that total time. While the project is ongoing, users' choices of destinations in the Canyon Creek drainage may be limited for short periods but wilderness visitors would continue to have the opportunity to visit another portion of the remaining 1,337,214 acres within the SB15W (sic) to obtain the wilderness experience they have come to expect.

This turns the Wilderness Act on its head. There are two inappropriate messages the EA is conveying. *First, violations of Wilderness are not serious if they are only 4 to 6 weeks long.* Under that premise, people who illegally go into the Wilderness by motorcycles and spend a week riding around have almost no impact because it is a short time. The Selway-Bitterroot Wilderness is wilderness for 365 days a year. *Second, the size of the Canyon Lake drainage is small and therefore unimportant to the Wilderness as a whole.* That misses the point that Canyon Lake is part of the Wilderness. In any case, a hypothetical road, 50 miles long and 25 feet wide, is over 20 times smaller than the Canyon Creek drainage yet such a road bisecting the Wilderness would be very harmful.

The documents (EA, DDN, MRDG) send mixed messages about the emergency or safety issues. The MRDG states, "Due to the safety issue of this being a high hazard dam and this is the third sink hole issue since 2003 there is urgency to complete the work after the irrigators have used the water and before the winter conditions set in at this high elevation site in 2020." Yet, the DN notes, " The EA was updated to remove any reference to emergency status of the repairs. The proposed action is not an emergency and we apologize for any confusion information the EA may have caused."

Without any alternatives, or an adequate NEPA analysis (either the level or in terms of detail), a decision-maker can't tell if the only option analyzed is indeed the best or it if is consistent with

the Wilderness Act.[6] The EA needs to be rejected.

Remedies:

Withdraw the EA and DN
If this project continues, prepare an EIS that looks at a real range of alternatives.

NEPA Violations

The EA failed to adequately analyze the direct, indirect, and cumulative impacts of the proposal on Wilderness, including impacts from heavy equipment use and 32 helicopter flights, and failed to rigorously explore reasonable alternatives that would lessen or eliminate those impacts. The EA does not adequately address the impacts of motorized and mechanized intrusions in conjunction with other past and reasonably foreseeable motorized instructions in the Wilderness.

Our comments stated:[7]

> One of the biggest problems is there is no analysis of a non-motorized or even a less motorized access option. The Forest Service has abdicated its responsibility by concluding, with absolutely no analysis, that the 32 requested helicopter flights are needed without analyzing whether it could be anything from zero to 31. All the EA states is this:
>
> > In the course of evaluating CCID's request, the Forest Service explored additional non- mechanized means of access the minimum requirements analysis (PF-REC-006). The responsible parties, or those liable for the project implementation, which includes CCID and their engineering representatives, plan to incorporate non-motorized methods wherever feasible. However, a totally non-motorized, non-mechanized alternative would not meet state of practice engineering techniques for this project.
> >
> > It should be noted, that the Forest Service cannot decide for CCID which methods shall be used to ensure a safely rehabilitated dam. The responsibility for dam safety lies solely with CCID. This alternative was dismissed from further analysis.
>
> There is simply a conclusory statement a no motorized access option is infeasible, with no explanation of the work to be done. And, as noted before, there is no analysis of why 32 flights are needed, why it couldn't be fewer. There is no analysis at all of the amount of heavy equipment use so there is no way for the pubic or decision-maker to determine whether all the motorized and heavy equipment is indeed necessary. There is no detailed description of the design, the work to be done, or an enumeration of the type and kinds of motorized equipment other than a helicopter and heavy equipment in the EA. The Forest Service simply takes the proponent's request at face value without inquiry into alternative designs or methods that, while perhaps are not the most preferred, would be adequate.

[6] Our comments noted the MRDG couldn't supplant the NEPA document, which is the case here as there is no detail or real analysis in the EA.

[7] Footnotes in the original are reproduced here, though the numbers assigned to the footnotes are not the same as in our comments.

NEPA requires USFS to "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action. 40 C.F.R. § 1502.14(a). USFS "may not define the objectives of its action in terms so unreasonably narrow that only one alterative . . . would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The EA violates these requirements by deferring entirely to the dam project proponent's proposal and design standards as well as to the proponent's desire for motorized access to facilitate that design. The Forest Service should work with the project proponent on a maintenance plan that could be completed without motorized access.

In addition to NEPA's rigorous exploration of alternatives requirement, the Forest Plan restricts the authorization of motorized equipment for dam maintenance in wilderness when, among other criteria, "it is the only feasible means of accomplishing the necessary maintenance." Regarding the feasibility of the non-motorized proposal, the MRDG does not state it is infeasible on page 29 but rather (and illogically) concludes and non-motorized option would have more impacts than a motorized one on the Wilderness.[8] This rationale undermines the purpose of the strict feasibility limitation, it is short-sighted given that future motorized access requests for dam maintenance are likely without adequate trail access, and this balancing act is not one that is found within the Wilderness Act. The Wilderness Act prohibits motorized equipment and helicopter intrusion—it does not prohibit pack strings and traditional skills. Most things can be accomplished more quickly utilizing motorized tools, access, and equipment, but this type of mechanized haste and noise is not condoned by the Wilderness Act.[9] Further, while the MRDG is not a NEPA document, and can't substitute for one, the fact that it and the EA are somewhat contradictory, with each other and internally, as well as lacking in substantive information reflects a hasty process rather than one grounded in sound analysis.

The analysis of the current condition and impacts lacks NEPA sufficiency and transparency. Here is no detail in the amount of motorized equipment use other than the number of helicopter flights. There is no detail how much the surface impact from the construction would increase and affect the sites that already exceed standards near

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[8] The EA at 16 states it would take multiple seasons to fix the trail, though strangely this is not in the environmental consequences section. The EA also states at 16 that the current trail location "was established by the dam workers in places that "worked" in this very difficult terrain" proving that it is indeed feasible.

[9] The agency toolbox on wilderness.net/tools contains multiple examples highlighting the importance of traditional tools over motorized and mechanized efficiency—even if it means extended presence of crews in the wilderness. For example, the Forest Service constructed over 13 miles of trail in the Charles C. Deam Wilderness and moved over 650 tons of gravel using only a mule string and hand tools. It took the work crew an entire summer (sometimes working 12-hour days, six days a week) to complete the work. While motorized tools would have been more efficient and cut down on crew presence in the wilderness, the Forest Service realized it needed find "unique and innovative" traditional means "to meet the requirements for trail work in a congressionally-designated wilderness." See attached. **There is even an example of an innovative crew overcoming the prevailing attitude that certain work at the Canyon Lake Dam could not be done with non-motorized means and traditional skills.** Also attached. **The Forest Service should do the same on this latest proposal, or if it appears that the problems with Canyon Lake Dam will continue, seriously reconsider breaching the dam. At a minimum, the prior maintenance projects at this dam, the current proposal, and the likelihood of future requests of a similar nature, strongly supports the need for a feasible non-motorized access plan.**

Canyon Lake. The EA refers to various surveys and files which are not available on the website. The government shutdown and holidays prevented the public from obtaining that information. In any case, the EA should have had some analysis what the project files detail rather than to simply refer to various files in the project record.

We are told in the EA that six sites exceed the Selway-Bitterroot Wilderness General Management Direction, including the dam site (EA page 15), yet the EA does not analyze how and whether those sites would be further affected or increase in size due to the heavy machinery and the work on the dam. The EA simply states:

> Effects on the campsites associated would be comparable to past work projects. These campsite and trail impacts are considered traditional and are able to be mitigated. While use would be somewhat increased it would be similar to what recreationists would normally encounter along the trail.

While offering no detail, this also presents an internal consistency problem. Why can impacts from an unknown number of workers over a 6-week period operating heavy machinery on sites (including the dam itself) that already exceed standards be mitigated yet impacts from a trail used to haul material to the site can't be mitigated (MRDG page 29)?

It should also be noted the EA fails to fully consider a no-action alterative or to provide a description of the existing condition in terms of any resource (except appendix B which addresses the "current condition" of only the dam itself). This violates NEPA.

A. The FONSI is Unsupported and the Action is Likely to Have a Significant Impact: an Environmental Impact Statement Must Be Prepared.

As we stated in our previous comments, we have grave concerns about the lack of adequate environmental review for this project which would include 32 helicopter flights in Wilderness and an undetermined amount of heavy equipment use.

NEPA requires federal agencies to prepare a detailed EIS for all major Federal actions significantly affecting the quality of the human environment. (42 U.S.C. § 4332[2][C]). If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why the project's impacts will be insignificant (Blue Mts. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)). "The statement of reasons is critical to determining whether the agency took a 'hard look' at the potential environmental impact of a project" (Id.). As we stated above, the FONSI does not provide a convincing statement of reasons for why an EIS is not necessary.

In considering whether an EIS is required for a proposed action, the Council on Environmental Quality regulations directs agencies to consider ten "significance factors" (40 C.F.R. § 1508.27[b]; Sierra Club v. Bosworth, 510 F.3d 1016,1033 (9th Cir. 2007).

"[Any] of these factors may be sufficient to require preparation of an EIS in appropriate circumstances" (National Parks and Conservation Assoc. v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001)). Criteria for determining when a full EIS is required include:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
(2) The degree to which the proposed action affects public health or safety.
(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Many of these criteria are implicated and we discuss several in detail below:

Unique Characteristics:

The unique characteristics of the immediate geographic area for this project include the Selway-Bitterroot Wilderness. By definition, designated Wilderness meets the unique characteristics. This alone requires the preparation of an EIS.

Highly Controversial and Highly Uncertain and/or Unique / Unknown Risks:

An EIS is also required where impacts are "highly controversial," i.e., implicate "a substantial dispute [about] the size, nature, or effect of" the agency's actions – or otherwise implicate "highly uncertain" or "unknown risks."[10] Moreover, agencies must consider "context" and, thus, whether impacts are significant relative to the affected region, interests, or locality, and in light of both short- and long-term effects. Thus, an action could raise concerns about purely local resources, or purely short-term effects, but nonetheless require preparation of an EIS. That is precisely what occurred with the preparation of an EIS on the last Canyon Lake dam project, which appears not to have been as extensive as this proposal.

[10] 40 C.F.R. 1508.27(b)(4), (5); Blue Mts. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)

Related to Other Actions with Individually Insignificant but Cumulatively Significant Impacts:

NEPA emphasizes "coherent and comprehensive up-front environmental analysis" to ensure an agency "will not act on incomplete information, only to regret its decision after it is too late to correct" (*Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998)). NEPA thus requires federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed action (42 U.S.C. § 4332(C); 40 C.F.R. §§ 1508.7, 1508.8, 1508.25 (the scope of a proposed action must include connected, cumulative, and similar actions); *Sierra Club v. Bosworth*, 2007 U.S. App. LEXIS 28013 (9th Cir. 2007)). Cumulative impacts include the impact on the environment that 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). A cumulative effects analysis must also provide detailed and quantifiable information and cannot rely on general statements and conclusions (*Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998)).

This action is related to projects on other dams in the Wilderness, as we noted in our comments. This project requires the use of mechanized and motorized equipment within designated Wilderness, which is a violation of the Wilderness Act unless it is *necessary to meet the minimum requirement for preservation of the area as wilderness* or meets the exception in 5(b) of the Act. Neither has been shown to apply here, as there is no alternative to consider fewer helicopter flights or no helicopter flights.

The EA does not look at the cumulative impacts of this and other projects, including the past repair project. It may even be a connected action, or ongoing and repetitive need to repair dams via an ever-increasing amount of helicopter use and heavy equipment. Further, there is the consistent use of helicopters to replace pack stock in almost every dam project--including a catwalk on Fred Burr High Lake that could have easily been replaced by non-motorized means—and other actions. The 18 tools document that authorizes prohibited means for dam maintenance, which that has not undergone any NEPA review, is one such document.

While we again assert that this action alone requires an EIS, this action is appears to be related to other dam actions. It also appears it will be repeated and the impacts increased indefinitely, as the experience with the 2003 EIS and ROD for Canyon Lake Dam demonstrates. The cumulative impacts of helicopter use and heavy equipment use on dams, and helicopter use for other projects—for example bridges, fire fighting or structure maintenance—were not analyzed in the EA.

The Action Threatens a Violation of Federal Law or Requirements Imposed for the Protection of the Environment

This action will violate the Wilderness Act because there is no valuation of whether it can be accomplished through less destructive means. The FONSI EA and DN, as they are now presented, would result in a violation of the Wilderness Act, the National Forest Management Act, and the Endangered Species Act because the Forest Service has failed to evaluate the impacts of this project on endangered species as consultation is not complete (EA page 18). This is inside the recovery area

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Any one of the above criteria (unique characteristics, related actions/cumulative impacts, adverse effects to endangered species, violation of Federal law or requirements imposed for the protection of the environment, controversy) should have led the Forest Service to prepare an EIS and foreclose a FONSI because, for this project, substantial questions have been raised about the significant degradation of some human environmental factors.[11] It is, of course, the agency's burden to provide a convincing statement of reasons justifying a decision to rely on a lesser EA and not an EIS; we need not show that significant effects will in fact occur.[12] The Forest Service has not provided any such "convincing statement" in the FONSI.

B. The FONSI/EA Fail to Analyze an Adequate Range of Alternatives, in Violation of NEPA.

In our prior comments we specifically asked the Forest Service to consider and analyze alternatives to the use of helicopters or and alternative that used fewer helicopters and motorized equipment. This did not happen—the Forest Service failed to include even a no action alternative as required by NEPA.

NEPA requires USFS to "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action. 40 C.F.R. § 1502.14(a). The Forest Service "may not define the objectives of its action in terms so unreasonably narrow that only one alterative . . . would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The Forest Service is in gross violation of these requirements. Here, the Forest Service defers entirely to the project proponent's design and construction proposal without requesting a project design that could be completed without the use of motorized equipment and helicopters, or with lesser reliance on these normally prohibited uses.

We again note that Federal Agencies are required by NEPA to "rigorously explore and objectively evaluate All reasonable alternatives and to briefly discuss the reasons for eliminating any alternatives that were not developed in detail" (40 CFR 1502.14, emphasis added.) Unfortunately, the FONSI and EA fail in analyzing an inadequate range of alternatives, in violation of NEPA.

C. The Public Has Been Prejudiced by the New Information Without a Formal Comment Period

As we noted in the introduction, the agency claims there is new information. Indeed, the date on the DN, MRDG, and EA show them to be 2020. Even if the content is similar in many respects to the earlier iterations, a new public comment process should have been initiated. Members of the public have not been afforded the opportunity to comment on the new EA.

Further, the CEQ regulations only allow incorporation by reference when the underlying material

[11] PCA v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th cir. 1988).
[12] Idaho Sporting Congress, 137 F.3d at 1150

is actually available: "No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment." 40 C.F.R. § 1502.21. Forest Service regulations state the same. See 36 C.F.R. §220.4(h). throughout the document, the Project File is referenced but it is not available on the website. See for example, EA at 14, 16, 17, 18, and 20.

Lastly, Forest Service guidance during the pandemic is to give the public more time to respond to comment periods. We suggest that an EIS be prepared and this EA and DN be withdrawn.

Remedies:

Withdraw the EA and DN
If this project continues, prepare an EIS that looks at a real range of alternatives.

NFMA Violations

The Bitterroot National Forest Plan ("Forest Plan") is enforceable under NFMA. The Selway-Bitterroot Wilderness Plan, which is tiered to the Forest Plan, forbids motorized equipment and other non-conforming activities in the Wilderness area unless it can be demonstrated that it is the only feasible means of accomplishing the necessary maintenance. For the reasons stated above, the Forest Service has not met this heavy burden.

Other

In our comments, we referenced a field trip to a dam that resolved an appeal. We request that once conditions permit, we accompany the Forest Service on a filed trip. No response was received. We again make that request prior to a decision being made.

Remedy:
Conduct a field trip with Wilderness Watch before a decision is made.