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Subject: ARO Letter - Lolo Post Burn ROD - Lolo NF - Appeal #02-01-00-0076 -
Montanans for Property Rights

To: Appeal Deciding Officer

This is my recommendation on disposition of the appeal filed by Ron Olfert, on behalf of Montanans for Property Rights, protesting the Lolo Post Burn Record of Decision (ROD) on the Lolo National Forest (Plains/Thompson Falls District).

The Forest Supervisor's decision adopts Alternative 5-modified, which includes timber thinning and salvage on 4,600 acres, regeneration monitoring and planting on up to 12,916 acres, riparian planting on 38 acres, prescribed burning on 114 acres, weed treatments along 509 miles of road, soil stabilization on 762 acres, 1.7 miles of temporary road construction, 287 miles of road reconstruction, 224 miles of road decommissioning, travel restriction on 3 miles of road, removal of 108 culverts, rehabilitation of one dam site, reclamation of three mines, development of one gravel source, trail stabilization, and heritage interpretation.

My review was conducted pursuant to, and in accordance with, 36 CFR 215.19 to ensure the analysis and decision is in compliance with applicable laws, regulations, policy, and orders. The appeal record, including the appellant's objections and recommended changes, has been thoroughly reviewed. Although I may not have listed each specific issue, I have considered all the issues raised in the appeal and believe they are adequately addressed below.

The appellant alleges violations of the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Revised Statue 2477 of the Mining Act of 1866, the Multiple Use Sustained Yield Act (MUSYA), and the Lolo National Forest Plan. In the appeal, the appellant requests the ROD be withdrawn or be remanded to the Forest. The appellant further requested if the Forest wishes to carry out more road closures and access restrictions they be directed to prepare an Environmental Impact Statement (EIS) that remedies the alleged violation of law, regulation, policy, and the Forest Plan the appellant identified in the appeal. An informal meeting was held. At the meeting the appellant modified the requested relief to state that the Lolo National Forest may proceed immediately with all of the harvest proposed in the EIS and ROD, and the entire ROD not be withdrawn. At the meeting, Issues 3, 4, and 6 were resolved and Issue 2 was modified. The appeal will proceed on Issues 1, 2-modified, 5, and 7.

ISSUE REVIEW

Issue 1. Based on a tour of the project area and further study, the appellant found the following items are problems with the project:

Issue 1, Contentions 1 and 2: There is no need for road decommissioning on most of the roads being considered, as they are stable or becoming so, and not generating significant



sediment. Decommissioning or obliterating roads would not improve the sedimentation situation.

Response: The EIS and project file document that roads, even those that are considered stable, are a source for sediment. In a letter to Fire Recovery Hydrologists, dated February 6, 1995, Forest Hydrologist Steven R. Johnson states, “Road have been identified as the major impact on the forest environment” (emphasis in the original). Further on he states, “For the roads we no longer actively use, our dwindling road maintenance budget will make it difficult to maintain the culvert crossings... **It is important to note that culverts can fail if not maintained even on roads that have become so brushed in that travel is difficult.** Even on roads that appear to be so thick with alder that a sediment production concern seems ludicrous, we often find that the road tracks are still actively functioning as erosion sources. True, it is not the magnitude it was when the road was constructed, but it is still an erosion source that comes into play during events when we also have plenty of flow to take the erosion on into a channel” (emphasis in original) (PF, Vol. 8, F-139, reference number 46). The EIS points out (p. 1-4), “The 2000 fires and fire suppression activities have left portions of the watershed with unstable soils, reduced water quality, and less capability to withstand disturbances for both natural and human activities... Prior to 2000 previous timber harvest, road building and mining activities inside and outside the fire perimeters had affected water quality in some areas to the point where water quality may have not met State water quality standards (Montana Department of Environmental Quality, 2000).” The EIS goes on to list three streams in the project area where road building is included in the list of activities that has degraded the water quality, and one road where unpaved road runoff is the problem. The EIS (p. 2-28) also discusses that one road will have to be fully recontoured to reduce sediment delivery near critical fish spawning habitat.

“The intension behind [road decommissioning] is to improve water flow and water quality conditions by eliminating road prism interception and unvegetated soils associated with open roads” (EIS, p. 4-90). As research has found (Hickenbottom, 2000), after 1 year’s revegetation on a recontoured road, volume of runoff and erosion greatly decreased to near natural slope conditions (EIS, pp. 4-89 to 90). The EIS and project file have demonstrated there is a need for road decommissioning in the project area.

Issue 1, Contention 3. The EIS does not promote “best practices” in forest management, but instead engages in catering to the narrow agenda of groups promoting protection of selected plant and animal species, the selection of which is considered error-prone at best, and fraudulent at worst. Re-planting should be given higher priority, given that the U.S. Forest Service performs only about 15 percent of the forest re-planting being done in the U.S., the remaining 85 percent by private industry.

Response: Protection of the Forest’s plant and animal species is not a narrow agenda catering to certain groups. It is the law of the land. The Endangered Species Act (ESA) (16 U.S.C. 1531, et seq.) requires the Forest Service to conserve endangered and threatened species and to use our authority to further the purposes of ESA. The Forest and Rangeland Renewable Resources Planning Act (RPA) (16 U.S.C. 1600, et seq.) requires the Forest Service to insure the protection of forest resources, including wildlife and fish, and to provide for the diversity of plant and animal communities.

As discussed in the EIS (pp. 3-162 and 163), lodgepole pine successfully regenerates naturally. The cone production of larch, ponderosa pine, and Douglas-fir were above average in 2000, and the cones were mature when the fire occurred. It is likely natural regeneration will be successful over much of the burned area. The project analysis was based on the gross amount of 12,000 acres of tree planting; however, the Forest expects that monitoring will indicate natural regeneration will be successful over a large portion of the burn and that substantially less than the 12,000 acres will need to be planted. There is no reason to expend funds on planting trees if the area is successfully regenerating desirable species naturally. The EIS is promoting good forest management.

Issue 1, Contention 4. Consistent with NEPA regulations, courts have held that an EIS must include sufficient information to determine the full impacts of an action prior to implementation. Courts have also held that sufficient monitoring and inventorying of forest resources is vital to making sound forest management decisions and ultimately utilizing and protecting forest resources. Underlying this appeal is the premise that these requirements are neglected in the Lolo Post Burn EIS. The best available science, including data and methods, was not employed in the Lolo Post Burn EIS. The failure of the EIS in this regard meant that the Responsible Official lacked the data necessary to make an informed, sound decision.

Response: The 529-page Final EIS and the 45 volume project record clearly displays that an extraordinary amount of information was compiled to describe the existing conditions of the project area and determine the effects of the alternatives. The analyses are based on surveys and data (see the 150 maps in Appendix A and another 109 maps in the project file) and an extensive library of literature (PF, Vols. 28 through 44). In order to digest all this information, Chapter 2 of the EIS summarizes the findings of the analysis. The project used an extensive amount of good quality, accurate data, and the best science available. The Forest Supervisor had adequate information for making an informed, sound decision.

Issue 2, Contention 1. The EIS and project are in violation of the MUSYA, NFMA, and NEPA. The Forest improperly used the Purpose and Need to limit the alternatives. The inclusion of the statement that the “reasons for proposing management activities...are based on a combination of factors including (1) resource condition, (2) Forest Plan direction, and (3) National Fire Plan direction” unreasonably limits alternative considerations. It is the belief of the appellant that neither the Forest Plan direction nor the National Fire Plan direction is adequate upon which to base all alternatives. These directions may have been influenced by pressure to protect certain species of wildlife rather than abide by the multiple-use and forest management laws and regulations.

Response: The Agency’s Deciding Official has the discretion to determine the Purpose and Need for a project proposal. The NEPA implementing regulations state the NEPA document shall “briefly specify the underlying purpose and need to which the agency is responding...” (40 CFR 1502.13). The Forest has provided information on the project to support the stated Purpose and Need (EIS, pp. 1-1 to 1-13). Basing the Purpose and Need on the resource condition, Forest Plan Direction, and National Fire Plan direction is logical and absolutely proper.

The ROD (pp. 10 and 11) states the ID team developed alternatives to the proposed action based on the issues raised in discussion with the public, other agencies, and Forest Service resource professionals. “In order to avoid developing alternatives that were not environmentally, technically or economically feasible, ‘Design Criteria’ were developed to limit the scope of the alternatives within known resource constraints, Forest Plan Standards, and laws and regulations.” While 40 CFR 1502.14(c) states, the Forest shall “include reasonable alternatives not within the jurisdiction of the lead agency,” it is not reasonable to develop alternatives that are not feasible because of physical or legal constraints.

MUSYA directs the Secretary of Agriculture to “develop and administer the renewable surface resources of the National Forests for multiple use and sustained yield of the several products and services obtained therefrom...due consideration shall be given to the relative values of the various resources in particular areas” (16 U.S.C. 529). “ ‘Multiple use’ means the management of all the various renewable surface resources of the National Forest so that they are utilized in the combination that will best meet the needs of the American people...” and “ ‘Sustained yield of the several products and services’ means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the National Forest without impairment of the productivity of the land” (16 U.S.C. 531). With this project the Forest will be able to administer the renewable resources that were impacted by the wildfires of 2000, renew them, maintain them in perpetuity, and continue to produce a regular output of the various renewable resources of the National Forest without impairment of the productivity of the land (EIS, pp. 1-1 to 1-4).

The Purpose and Need is within the discretion of the Responsible Official and there is an appropriate range of alternatives. The project is in compliance with NFMA, NEPA, and MUSYA.

Issue 2, Contention 2. An alternative should have included the following: (1) salvage of all 35,000 acres of dead and dying trees due to the wildfires, as well as cleaning out of all tamarack trees infested with mistletoe, (2) brush removal, (3) increased re-planting, (4) mining reclamation limited to remediation of contamination only, and (5) no system road obliteration.

Response: The “Purpose of and Need for Action” describes three distinct purposes and objectives for the proposed activities: Restoration and Recovery of the Watershed; Restoration and Recovery of the Land; and Working with People and Communities (EIS, pp. 1-2 and 1-4 to 13). The ID Team conducted various types of public scoping in order to ascertain the range of issues the public voiced in respect to the project (ROD, pp. 6 to 10). The ID Team developed alternatives that “were designed to reflect the range of issues and resource conditions and the purpose and need of the project” (EIS, p. 2-20). Each alternative reflected various aspects and combinations of resource management. Due to the conditions of the resources following the wildfires, some combinations of activities were not suitable for achieving the purpose and need.

Alternative 6, the proposed action, is similar to the alternative the appellant desired. The ROD (p. 13) and EIS (p. 2-46) discuss why that alternative was dropped from detailed study. The

ROD states, “although most of the activities identified within this alternative were feasible, additional field evaluations and analysis completed in the summer of 2001 determined some areas impractical to treat due to economic, social, and environmental constraints...” (ROD, p. 13). The project has an appropriate range of alternatives and is in compliance with NEPA.

Issues 3 and 4. The EIS lacks scientific integrity in the discussions of project effects on wildfire and effects on stream contaminates from mine reclamation.

These issues have been resolved between the appellant and the Lolo National Forest, and therefore will not be discussed here. (See appeal resolution letter from Deborah L. Austin to the Regional Forester, dated October 9, 2002.)

Issue 5. Roads that meet R.S. 2477 definitions must not be closed. Each road must be determined conclusively NOT to be an R.S. 2477 road, or it must be left as is, or improved. The EIS fails to provide an analysis of roads with respect to R.S. 2477 classification.

Response: At this time, there is no established process for local governmental entities to file a request for a validity determination, or the Forest Service or other Federal Government agencies to process a determination on a R.S. 2477 assertion. An attempt to establish these procedures was initiated by the Department of Interior; however, pending action by Congress this effort was put on hold. (See memorandum from Secretary of the Interior Bruce Babbitt to the Assistant Secretaries for Fish and Wildlife and Parks, Land and Minerals Management, Indian Affairs, and Water and Science, dated January 22, 1997.) Therefore, the Forest Service cannot promulgate any final rule or regulation regarding the recognition, validity, or management of an R.S. 2477 assertion without the expressed approval of an Act of Congress, except in situations where there is a compelling need demonstrated by a responsible government entity or public road agency. (See letter from Chief of the Forest Service to the Regional Foresters, dated March 14, 1994; letter from the Deputy Chief, NFS to Regional Foresters and OGC Regional Attorneys, dated September 25, 1997; letter from the Associate Deputy Chief, NFS to Regional Foresters, dated December 15, 1997; and Forest Service Manual 2734.5.) As documented in the comments received on the project, the State of Montana, and Missoula, Sanders, and Mineral Counties have not identified any concerns about R.S. 2477 roads in the project area (PF, Vol. 5, Docs. C-1 to C-68, D-1 to D-50, and Vols. 6 to 9, Docs. F-1 to F-187). Without local government concerns there is no reason to make a determination pursuant to R.S. 2477 on each road the Lolo National Forest has decided to close.

Issue 6: The Discussion of Wilderness and roadless areas is inadequate.

This issue has been resolved between the appellant and the Lolo National Forest, and therefore will not be discussed here. (See appeal resolution letter from Deborah L. Austin to the Regional Forester, dated October 9, 2002.)

Issue 7, Contention 1. The analysis of cumulative effects is inadequate in violation of NEPA. The cumulative effects must include a prediction over time of leaving wood in the forest, of leaving infested trees, and of disturbing ground when unnecessary.

Response: The ROD, EIS, and project file discuss and disclose the direct, indirect, and cumulative effects associated with woody debris on fire behavior and soil effects, and the data supporting the analysis (ROD, pp. 27, 31, and 44; EIS, pp. 2-36, 2-41, 3-24 to 26, 3-29 to 30, 3-34, 3-199, 4-4, 4-77 to 81, 4-84; PF, Vol. 15, Docs. M-63, M-64, M-65, M-66, M75, and Vol. 32, Doc. N-180). The Forest also responded to public comments and concerns about leaving down woody material in the forest (EIS, Appendix I, pp. I-42 and I-44). Fuels management was discussed throughout the document as part of the purpose and need for fuels reduction, soil protection, and future woody debris recruitment. The cumulative effects analysis is in compliance with NEPA.

Issue 7, Contention 2. The EIS is too heavily weighted in favor of unproven, unscientific statements of supposed damage to flora and fauna resulting from human access. A more balanced alternative, which stresses multiple-use, including motorized recreation, extractive industries, as well as protected species, must be presented.

Response: The appellant does not identify what statements about impact to flora and fauna resulting from access to the project are unproven or unscientific. The Forest Supervisor and the ID team went to great lengths to balance the competing interests, laws, and resource needs in developing this Post Burn EIS (ROD, pp. 19 to 23; Project Summary, pp. 1 to 34). Discussion of alternatives can be found in Issue 2, Contention 2 (above). This project is in compliance with NEPA.

RECOMMENDATION

I have reviewed the record for each of the contentions addressed above and have found that the analysis and decision adequately address the issues raised by the appellant. I recommend the Forest Supervisor's decision be affirmed and the appellant's requested relief be denied.

/s/ Maureen McBrien

MAUREEN MCBRIEN

Appeal Reviewing Officer

Deputy Director of Recreation, Minerals, Lands, Heritage and Wilderness