United States Department of Agriculture | **Forest Service** | **Region One** | **200 East Broadway P.O. Box 7669 Missoula, MT 59807**

File Code: 1570-1 **Date:** August 21, 2003
Route To: (1570 - 215)

Subject: ARO Letter - White/White TS DN - Clearwater NF - Appeal #03-01-00-0061 - Nez Perce Tribal Executive Committee

To: Appeal Deciding Officer

This is my recommendation on disposition of the appeal filed by Rick Eichstaedt on behalf of the Nez Perce Tribal Executive Committee (NPTEC) protesting the White/White Timber Sale Decision Notice (DN) on the Clearwater National Forest.

The District Ranger's decision adopts Alternative 4, which includes decommissioning 20.4 miles of road; placing 14.9 miles of road in long term storage; and regeneration harvest, commercial thinning, pre-commercial thinning, and prescribed burning on 2,954 acres.

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 Endangered Species Act (ESA), the Clean Water Act (CWA), and the Clearwater Forest Plan. The appellant requests the Regional Forester rescind the DN, remand it to the Forest with instructions to prepare an Environmental Impact Statement (EIS), and insure compliance with the Forest Plan, Federal laws, and Federal trust responsibilities. An informal meeting was held but no resolution of the issues was reached.

ISSUE REVIEW

Issue 1. In violation of NEPA, the Forest should have prepared an EIS rather than an EA because the White/White Project is a major federal action significantly affecting the human environment.

Response: The regulations at 40 CFR 1501.4(c) provide for the preparation of an Environmental Assessment (EA) to determine whether or not to prepare an EIS. As discussed in the Response to Comments (DN, Appendix D, pp. 25 to 26), there are four classes of actions where the Forest Service Handbook requires an EIS: 1) where an EIS is required by law; 2) aerial applications of chemical pesticides; 3) substantial alteration of inventoried roadless areas larger than 5,000 acres in size; and 4) large scale actions that may significantly affect the quality of the human environment. The first three classes do not apply to this project. As documented in the DN and FONSI, the District Ranger determined this project is not a major federal action with significant effects on the quality of the human environment (DN, pp. 18 to 20). The analysis is in compliance with NEPA.

Issue 2. In violation of NEPA, the DN/FONSI incorrectly states that suction dredge mining will have "no effect." This is in conflict with the June 27, 2003, NOAA Fisheries biological opinion, which determined that suction dredging may adversely affect essential fish habitat for Chinook and coho salmon.

Response: The Forest is aware of the impact that suction dredge mining has on fisheries. It was the Clearwater National Forest's Biological Assessment (BA) on recreational suction dredging that determined those activities were likely to adversely affect steelhead, and habitat for Chinook and coho salmon [Project File (PF), Vol. 2, Doc. 44D, pp. 13 to 14, 17 to 21; and Appendices A, B, C, and D]. The June 27, 2003, National Marine Fisheries Service's Biological Opinion (PF, Vol. 2, Doc. 44C, p. 14) is based on the Forest's BA. The sentence from the DN (p. 4) referenced in the appeal is convoluted and poorly constructed. I believe the "no effect" phrase actually refers to the impact the White/White project itself will have, not the impact the suction dredge mining will have. The statements made in the fisheries section of the EA (p. 103) support this interpretation. The analysis is in compliance with NEPA.

Issue 3. In violation of NEPA, the EA fails to adequately assess cumulative effects to Lolo Creek. Other activities associated with state, private, or BLM ownerships have not been analyzed.

Response: The EA contains an analysis of the impacts to each resource (Chapter 3, pp. 35 to 140). Included in the analysis are the direct, indirect, and cumulative effects. Under cumulative effects, each specialist describes the geographic boundary of the cumulative effects area and the present and reasonably foreseeable activities within the boundary that may impact the resource being considered. Where the geographic boundary includes the entire Lolo Creek watershed, the Brick Trout Timber Sale is included. For example, wide cumulative effects analysis areas are needed for threatened and endangered species, fisheries, watershed, cultural heritage, and recreation. These resources consider the Brick Trout project (EA, pp. 101, 123 and 130; DN, Appendix B, pp. 6 to 9).

The cumulative effects to Aquatics and Fisheries are discussed in the EA, (pp. 99 to 105). Cumulative watershed effects were analyzed for each year from 1987 through 2010, covering the past, present, and reasonably foreseeable future activities (DN, Appendix D, pp. 11, 30, and 31). These activities are displayed in the EA (Appendix F). Other activities on other ownerships were considered in the cumulative effects analysis (EA, Appendix P, pp. 3 to 4; PF, Vol. 1, Doc. 33, pp. 4 and 5). The analysis is in compliance with NEPA.

Issue 4. In violation of NEPA, the EA fails to take a hard look at the environmental effects of the project on fisheries, watershed conditions, sedimentation, sensitive plants, wildlife, and noxious weeds.

Response: The EA takes the required hard look at the environmental effects of the project on fisheries and watershed (EA, pp. 85 to 105, Appendix C; PF, Vol. 2, Docs. 44, 44A, 61, 65, and 65A), sedimentation (EA, pp. 105 to 110, Appendix G; PF, Vol. 6, Doc. 234), sensitive plants (EA, pp. 55 to 60), wildlife (EA, pp. 66 to 85; PF, Vol. 2, Docs. 44A and 44B, Vol. 5, Docs. 181

to 185), and noxious weeds (EA, pp. 60 to 65; PF, Vol. 1, Doc. 39). The analysis is in compliance with NEPA.

Issue 5. Stream survey and fish habitat monitoring data for Lolo Creek are outdated. The Forest failed to document existing conditions for fish habitat in Lolo Creek and its tributaries in the project area.

Response: The EA described the existing condition of Lolo Creek (EA, pp. 90 to 91) and the existing condition of Chinook salmon, steelhead, bull, westslope cutthroat, and brook trout in Lolo Creek (pp. 91 to 93). The EA also states the habitat conditions for the drainage can be found in the Section 7 Biological Assessment for Lolo Creek Drainage Mainstem Clearwater Subbasin, dated June 30, 1999, available from the Forest (cover and signature page can be found in the PF, Vol. 2, Doc. 50). The data is the most up to date information available on Lolo Creek. The analysis is in compliance with NEPA.

Issue 6. In violation of NEPA, the foundation of the "no measurable increase" contention is constructed on a series of inaccurate assumptions, unsupported data, old data, under-funded monitoring, flawed watershed modeling and analysis (WATBAL & WEPP), the generic application of management strategies (such as BMPs), default reliance on PACFISH, and the limited analysis of cumulative effects and connected actions.

Response: In compliance with NEPA (see implementing regulations at 40 CFR 1502.16 and 1502.24), the watershed analysis used the best available information to discuss and analyze the environmental impact of the alternatives, including direct, indirect, and cumulative effects, adverse effects, short term uses, and long term productivity (EA, pp. 85 to 105). The analysis is in compliance with NEPA.

Issue 7. In violation of NEPA, the EA does not adequately identify the current conditions of noxious weeds in the project area, or the effectiveness of the proposed management techniques. The EA does not adequately identify how the techniques may impact wildlife and culturally significant plants, or the potential adverse effects to aquatic resources such as riparian areas, water quality, and fish populations from the application of herbicides.

Response: The EA discusses the current condition of noxious weeds in the project area (EA, pp. 60 to 62; PF, Vol. 1, Doc. 39). The project's weed control only includes manual and biological methods agreed to by the Clearwater Basin Weed Coordinating Committee (p. 63), of which the Nez Perce Tribe is a member (p. 61). No herbicides are involved. The design criteria and mitigation for noxious weed only involves equipment washing, revegetation of exposed soils, and use of weed-free straw as mulch (EA, Appendix O, p. 1). The EA states, "due to the reforestation rate on fertile soils [Alternatives 3 through 5] present a low risk of increasing weed infestations beyond the road shoulders and log landings" (p. 65). Due to low risk of weed spread and the low impact methods used to manage the weeds there were no impacts to analyze.

Issue 8. In violation of NEPA, the Forest has failed to disclose available wildlife habitat quantity and quality, and the protocol used on wildlife surveys. The Forest has failed to

conduct adequate population monitoring to determine the existing conditions of these species.

Response: The wildlife section discusses the impacts the project would have on wildlife habitat quantity and quality, and discusses the analysis process the wildlife biologist used (EA, pp. 66 to 85; PF, Vol. 5, Docs. 181 to 187). This analysis of effects is based on surveys and monitoring (DN, p. 9, and Appendices C and D; EA, pp. 29 to 33, and Appendices P and O; PF, Vol. 2, Docs. 80 and 80A, and Vol. 6, Doc. 236A). The analysis is in compliance with NEPA.

Issue 9. In violation of NEPA, the DN and EA fail to adequately respond to the Tribe's issues and concerns raised to the Forest. Despite the Forest Supervisor's commitment to hold a pre-decisional meeting with the Tribe, no such meeting was held and the Tribe did not even receive a substantive response to its issues of concern until receiving a copy of the DN and FONSI.

Response: The Forest adequately responded to the Tribe's concerns and attempted to hold a pre-decisional meeting with the Tribe (PF, Vol. 1, Doc. 27). This document indicates the Forest held a meeting with Barbara Inyan on August 13, 2001, to review the North Mud Timber Sale and the Proposed White/White project. On May 20, 2002, the Forest met with Rick Eichstaedt, Heidi McRoberts, and Barbara Inyan on the Brick Trout and White/White projects. On March 3, 2003, a pre-decisional meeting on Brick Trout was held with numerous tribal members. In this meeting White/White was also discussed. This document also demonstrates the Forest attempted to arrange a pre-decisional meeting with the Tribe specifically on the White/White project. The document contains a copy of the letter from the Tribe declining the pre-decisional meeting, stating the meeting and field trip to the project area are unnecessary. The project file also documents the District Ranger sent letters to the various Tribal members on April 24, 2003, responding to their concerns, in preparation for the pre-decisional meeting. These letters were sent to the Tribe over a month before the DN and FONSI were signed. The Forest's handling of public comments is in compliance with NEPA.

Issue 10. The Yoosa Creek Acclimation Facility and the treaty fish rights are at the center of this project and should have been reflected in the Purpose and Need of the project. The Forest should have considered an aggressive watershed restoration alternative rather than only alternatives that focus on the harvest of timber and burning in degraded watersheds. This is in violation of NEPA. The Forest's "no measurable increase" threshold is unresponsive to the Tribes legal interests, specifically as related to the Yoosa Creek Acclimation Facility.

Response: The project's Purpose and Need is three fold (EA, pp. 7 to 10). One part of the Purpose and Need for the project is to restore the aquatic ecosystem through road decommissioning and replacement of culverts. Another part of the Purpose and Need is to make the forest vegetation more resilient to insects, disease, and fire. These parts of the Purpose and Need are responsive to the Tribe's concerns and interests. The White/White project considered the impacts to the fish hatchery, and is designed to have no measurable increase in sediment and no effects on the rearing facility at Yoosa Creek, the watershed, or the fisheries resources (DN, p. 14; EA, pp. 100 to 103; and PF, Vol. 2, Doc. 44). The analysis is in compliance with NEPA.

Issue 11. In violation of NEPA, the EA fails to analyze a reasonable range of alternatives that meets the stated Purpose and Need for the project.

Response: Chapter II of the EA describes how comments received during public scoping were used to identify issues and develop alternatives (pp. 12 to 20). It gives detailed information about four alternatives considered in detail (Alternatives 1, 3, 4, and 5) (pp. 21 to 29). The EA also discusses the two alternatives (the Restoration-only Alternative and Alternative 2) not considered in detail (p. 21). The No Action Alternative (Alternative 1) and the Restoration-only Alternative would not meet the Purpose and Need. Alternatives 2, 3, 4, and 5 would meet the Purpose and Need. The alternatives are within the management direction, respond to the issues raised during public scoping, and are reasonable for this project. I find this to be an adequate range of alternatives, and in compliance with NEPA.

Issue 12. In violation of NFMA, the White/White project proposes activities in watersheds that currently are in a state of non-compliance with the Clearwater Forest Plan standards for fish and water quality.

Response: The project is located within the Lolo Creek watershed. There are no 303(d) listed streams within the project analysis area. However, outside the project area, Lolo Creek from Eldorado to the Clearwater River is water quality limited (EA, Appendix P). Direct and indirect effects of the project to the watershed are discussed in the EA (pp. 93 to 103). There are no direct or indirect effects of harvesting timber on water quality, so there can be no downstream cumulative effects in Lolo Creek below Eldorado (DN, Appendix D, p. 9).

The current existing condition modeled sediment production within Lolo and Chamook Creek watersheds does exceed the Forest Plan standard. However, the White/White Timber Sale will be a “no effect” or produce “no measurable increase in sediment” in Chamook, Yoosa, and Lolo Creeks (EA, p. 103) with the WATBAL model showing a 0 percent increase in sediment over natural sediment levels for the proposed action (EA, pp. 98-99). As such, the project meets the Forest Plan standards (EA, pp. 97-99) and meets the Forest Plan settlement agreement (PF, Vol. 2, Doc. 44, pp. 23 to 40 and 45).

Issue 13. The project violates the NFMA biodiversity requirement by failing to conduct requisite population monitoring of management indicator species.

Response: Monitoring of management indicator species (MIS) is a Forest-level issue and outside the scope of this project. The Forest issues annual Monitoring and Evaluation Reports as required by the Forest Plan (PF, Vol. 6, Doc. 236A). This report addresses the monitoring done for threatened and endangered, management indicator, and sensitive species. NFMA imposes duties on the Forest Service that include providing for a diversity of plant and animal communities (36 CFR 219.26). Specifically the Forest Service is obligated to maintain sufficient habitat (36 CFR 219.19) and to monitor the population trends of MIS [36 CFR 219.19(a)(b)]. In *Inland Empire Public Lands v. United States Forest Service*, the U.S. Court of Appeals for the 9th Circuit deferred to the Forest Service interpretation of these regulations to find that the Forest Service can fulfill its population monitoring requirements by maintaining sufficient habitat. The project is in compliance with NFMA.

Issue 14. The White/White Project violates the Endangered Species Act (ESA). The biological assessment is arbitrary and capricious because it fails to base its conclusions on the best available science. The selected alternative is inconsistent with the Federal government's salmon recovery strategies. Unproven mitigation measures cannot be logically construed as assisting the conservation and recovery of salmon.

Response: The Biological Assessment (BA) (DN, Appendix B) is based on the best available science, including 12 fisheries surveys conducted by two independent private survey firms (DN, Appendix B, pp. 29 to 31). Additional information was used in the aquatics analysis section of the EA (Appendix Q, pp. 4 to 6; PF, Vol. 2, Doc. 44, pp. 46 to 48, and Vol. 2, Docs. 45 to 80A).

Both U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) reviewed the BA (DN, Appendix B, pp. 1 to 6). The USFWS concurred with the BA's determination of "may affect but not likely to adversely affect" bull trout (DN, Appendix B, p. 1). The NMFS determined the project would have no more than a negligible potential to adversely affect ESA-listed salmon and steelhead, the designated critical habitat, or essential fish habitat (EFH). Since the project would not effect EFH, NMFS stated, "additional conservation measures to avoid, minimize, or mitigate potential adverse effects of the proposed actions on EFH are not necessary." NMFS also found the project is consistent with PACFISH. The project is in compliance with ESA.

Issue 15. The Forest has failed to ensure compliance with the Clean Water Act (CWA). The Forest has not established any relevant fish habitat baseline for either Eldorado or Lolo Creeks. Their information on fish habitat-sediment conditions for those streams is obsolete.

Response: Environmental baseline information for Lolo Creek can be found in the Decision Notice (Appendix C, pp. 37 to 45). The Lolo Creek habitat data is from two surveys done in 1998 and 1999. Fish population data is from surveys conducted over the last 15 years. Other information was collected from 1990 to 2002, depending on the source. Environmental baseline information for Eldorado Creek can be found in the DN (Appendix C, pp. 46 to 53). The Eldorado Creek habitat data is from two surveys done in 1998 and 1999. Other information was collected from 1993 to 2002, depending on the source. The data is not obsolete, and the project is in compliance with CWA.

Issue 16. The Forest has failed to comply with the federal trust fund responsibilities owed to the Nez Perce Tribe by failing to protect treaty rights and trust resources. The Forest commitment to implement fish recovery and habitat improvement projects in this drainage are commitments that should not be compromised by other land management activities, even if the other activities are identified in the Forest Plan.

Response: The EA analyzed the impact the project would have on treaty rights and trust resources (EA, pp. 130 to 133). The District Ranger determined the project would not adversely affect Tribal treaty rights (DN, p. 17). As discussed in Issue 14 (above) the project would have no more than a negligible

potential to adversely affect fisheries. The Forest commitment to implement fish recovery and habitat improvement would not be compromised by this project.

The Forest Service was an active participant in the development of the EIS for the Nez Perce Tribal Hatchery Program. During the EIS development, the Forest Service repeatedly expressed concerns that the balance of multiple uses and activities anticipated in the Clearwater Forest Plan for the Lolo Creek area could not be modified without going through the proper procedures and amending the Forest Plan. The Bonneville Power Administration determined no changes were necessary in the anticipated uses in the area, and therefore, an amendment to the Forest Plan was not necessary (Hatchery, EIS, p. 5-4). In other words, if a project could have gone forward before the acclimation facility was approved, it could also go forward afterwards (PF, Vol. 2, Doc. 44E, pp. 2, 4 and 5). The Forest has complied with the federal trust fund responsibilities owed to the Nez Perce Tribe, and is protecting treaty rights and trust resources.

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 District Ranger's decision be affirmed and the appellant's requested relief be denied.

/s/ Ed Nesselroad
ED NESSELROAD
Appeal Reviewing Officer
Director of Public and Governmental Relations