



United States  
Department of  
Agriculture

Forest  
Service

Region 1

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File 1570 (215) Date: February 26, 1999  
Code:  
Route  
To:  
Subject: North Fork Rye Creek Fire Timber Sale DM, Appeal #99-01-00-0084  
Bitterroot National Forest  
To: Appeal Deciding Officer

This is my recommendation on disposition of the appeal filed by Than Hitt on behalf of The Ecology Center, Alliance for the Wild Rockies, Friends of the Bitterroot, American Wildlands, Sierra Club Bitterroot-Mission Group, and Ron Stephens protesting the North Fork Rye Creek Fire Timber Sale Decision Memo signed by the Acting Darby District Ranger (Bitterroot National Forest).

The District Ranger's decision adopts the proposal to harvest fire-damaged and fire-killed trees on 722 acres, construct 1,200 feet of temporary road, and commercially thin 37 acres in the burn area.

My review was conducted pursuant to, and in accordance with, 36 CFR 215.19 to ensure the analysis and decision are in compliance with applicable laws, regulations, policy, and orders. The appeal record, including the Appellants' objections and recommended changes, has been thoroughly reviewed.

## FINDINGS

### Appeal Review Findings

The Appellant alleges violations of the National Environmental Policy Act (NEPA), the National Forest Management Act, and the Clean Water Act. The Appellant requests the decision be remanded. No informal meeting was held, and no interested party comments were received.

## FINDINGS

### Appeal Review Findings

Objection 1: The proposed project violates the Bitterroot National Forest Land and Resource Management Plan.

Response: The Appellants contend that the project violates the Forest Plan goals and standards regarding soil quality, old growth, road densities, and wildlife habitat. After careful review of the Decision Memo and Project File, I find that the project does not violate Forest Plan goals and standards.

Soils: Although there is a potential for there to be a minor effect to the soil resource from the cable corridors, I find that this effect is offset and reduced by the mitigation applied and the felling of trees on 360 acres of steep, intensely burned slopes where no harvest will occur (DM, p. 11).

Water Quality/Fisheries Habitat: As noted in the DM, p. 13, "The analysis shows that all alternatives are consistent with Forest Plan Standards for water and fisheries." This reference is supported by the documentation in the project record.

Road Densities: The actual road density for North Fork Rye Creek is 5.46 miles per square mile (WAT 16A), which is within the preferred density level of 6.6 miles per square mile (FP III-13); therefore the project is consistent with the Forest Plan.

Old Growth: As noted in DM, p. 15, no old growth will be harvested; therefore, the project does not violate the Forest Plan.

Elk Habitat Effectiveness: The Bitterroot Forest Plan, p. II-21, states "Manage roads through the Travel Plan process (emphasis added) to attain or maintain 50 percent or higher elk habitat effectiveness." I find that the District Ranger appropriately determined that road management was outside the scope of this decision.

Objection 2: The use of a categorical exclusion is inappropriate.

Response: The Appellants contend that the presence of extraordinary circumstances, including steep slopes, highly erosive soils, the federally listed bull trout, and potential habitat for gray wolves and grizzly bears, require documentation in an EA or EIS. The Forest Service has interpreted the regulations at FSH 1909.15, Chapter 30.3(2), a proposed action may be categorically excluded from documentation if it does not significantly impact, individually or cumulatively, the listed "extraordinary circumstances" or the environment. This position has been supported by a recent Ninth Circuit Court of Appeals decision which "...held that an agency may issue a categorical exclusion even where threatened or endangered species are present if the agency determines that the project will not impact negatively on the species" (Southwest Center for Biological Diversity v. U.S. Forest Service et al., #96-15756).

In addition, this issue has been argued in the District of Montana, Missoula Division, Paulson v. Schrenk; CV 95-52-M-CCL. In that decision, the Plaintiff argued that extraordinary circumstances existed by the presence of threatened and endangered species and critical habitat. The court found "Defendants fulfilled their obligation to consider potential extraordinary circumstances, which are generally features of the Forest that would militate against the categorical exclusion. Defendants examined the impacts of commercial mushroom harvesting on steep slopes and erosive soils, threatened and endangered species...." The court found that "because the agency interpretation of its own regulations does not appear plainly erroneous or any way inconsistent with the regulations....Defendants have not acted in an arbitrary and capricious manner or otherwise not in accordance with law."

Based on my review of the Decision Memo, pages 10-18, and supporting documentation in the project file, I find that the District Ranger did consider the effects of the proposed action on extraordinary circumstances. I find that he appropriately determined that the proposed action would not significantly impact, individually or cumulatively, the listed "extraordinary circumstances" or the environment.

Objection 3: The proposed project violates the Clean Water Act (CWA) and the National Forest Management Act (NFMA).

Response: Contention A. Appellants contend that the decision violates Montana state water quality standards because the project will result in sediment being added to the North Fork of Rye Creek which

is listed as a "water quality limited segment" under section 303(d) of the CWA. The Appellants contend that the Forest Service failed to disclose the impacts of sediment- delivery from increased use of the Rye Creek and North Rye Creek roads. They also contend that the conclusion that BMPs and mitigation measures will minimize sediment-delivery is not supported by scientific data.

My review of the record indicates the State found that the appropriate level of best management practices are proposed for the project (Project File, WAT-2). The Biological Assessment states "Minor (undetectable and immeasurable) sediment input to streams is possible but the probability is low. Any sediment would have to get there by overland flow through RHCAs. This salvage sale would not disturb the large areas of soil on steep slopes near RHCAs that would be needed to generate overland sediment pulses on streams." In addition, the District appropriately responded to the Appellants comments regarding use of the roads in Rye Creek and North Creek roads (Response to Comments, Issues #4 & #5, Appendix A-15).

I find that the project does not violate Montana state water quality standards. My finding is based on the consultation with the State Department of Environmental Quality (Project File WAT-1 and WAT-2), the analysis and findings in the Biological Assessments, the Water and Fish analysis, and the Response to Comments.

Response: Contention B. Appellants contend that the decision is in violation of the CWA because the "total maximum daily load" (TMDL), required for water quality limited segments, has not been developed for the North Fork of Rye Creek.

The State has the overall responsibility for developing TMDLs. In their letter dated November 13, 1998, the state says "we will work with project sponsors (e.g. USFS Districts), on a case-by-case basis, to determine if a TMDL is needed or whether actions of lesser size or scope can take place under more conventional water quality protection practices." I find that based on the scope of this project development of TMDLs was not required.

Response: Contention C. Appellants contend that the CE and DM violate the NFMA because the project does not comply with State and federal water quality requirements. The District Ranger summarized his findings related to the Clean Water Act in the Decision Memo, p.12, and in Response to Comments. His findings are based on the project design, implementation of BMPs and consultation with the State Department of Environmental Quality.

Objection 4: The proposed action violates the Endangered Species Act (ESA).

Response: Appellants contend that the proposed action offers no benefit to local bull trout populations and may degrade habitat conditions in Rye Creek. Appellants also contend that the importance of the Rye Creek population to the status and risk of bull trout in the Bitterroot range cannot be determined without a landscape-level analysis.

A Biological Assessment for bull trout was prepared (PF Fish-1) and determined that the project was "not likely to affect bull trout." The BA determined that "No losses or take of bull trout individuals are expected to occur due to sediment input." The US Fish and Wildlife Service concurred with this finding on December 15, 1998. I have determined that the project does not violate the Endangered Species Act.

Objection 5: Insufficient information was available to the decision maker at the time of project design and evaluation.

Response: Appellants contend that the Responsible Official lacked information regarding hydrophobic soils, cable-yarding impacts, actual road densities and elk habitat effectiveness, and critical landscape-level analysis needed to make an informed decision.

Based on my review of the project record, Response to Comments, field notes, and documentation in the Decision Memo, I find there was sufficient information for the decision maker to base his decision.

#### RECOMMENDATION

I recommend the District Ranger's decision be affirmed and the Appellant's requested relief be denied.

/s/ Martin L. Prather

MARTIN L. PRATHER  
Reviewing Officer  
Staff Assistant, Regional Forester