

United States
Department of
Agriculture

Forest
Service

Pacific
Northwest
Region

333 S.W. First Street
P.O. Box 3623
Portland, OR 97208-3623

Reply To: 1570-1
(97-06-0021-15)
Date: December 12, 1996

Western Whitewater Association
ATTN: Mr. Jim Percy, President
P.O. Box 8922
Boise, ID 83707

CERTIFIED MAIL - RETURN
RECEIPT REQUESTED

Dear Mr. Percy:

This is my decision on your appeal of Wallowa-Whitman National Forest Supervisor R. M. Richmond's September 9, 1996, decision to select Alternative C, with modifications, of the Wild and Scenic Snake River Outfitter Environmental Assessment (EA).

Your appeal raises concerns that the decision violates the National Environmental Policy Act (NEPA), the Wild and Scenic Rivers Act, the Hells Canyon National Recreation Area Act, the Administrative Procedures Act, and the Federal Advisory Committee Act. You request the decision be reversed and changed so access to the entire Wild and Scenic River is made available to the general public for both private users and outfitter and guide businesses.

In the following section, I have identified your issues along with a response. I am providing my response in an effort to help you understand how I arrived at my decision.

Issue: The outfitter EA is improperly tiered to the Final Environmental Impact Statement (FEIS) for the Wild and Scenic Snake River Recreation Management Plan (RMP). The EA did not go from a broader to more site-specific analysis but continues to resolve issues at a general level that are properly addressed in an environmental impact statement (EIS). If issues were decided in the Record of Decision (ROD) for the FEIS, why does the no-action alternative in the EA admit that no regulations and none of the changes suggested by the ROD will be implemented. The agency improperly narrowed the range of alternatives. The agency should have performed a supplemental EIS.

Response: The operational concepts were affirmed by the appeal decision for the Wild and Scenic Snake River RMP, with instructions for addressing certain operational issues. The Forest Supervisor has completed a site-specific analysis addressing the operational issues identified by private and commercial publics and within the context of the Regional Forester's instructions. Therefore, the EA is properly tiered and provides an adequate range of alternatives addressing the purpose and need. The no-action alternative required by NEPA is properly described in the EA as the alternative that would

not implement the proposed action. The Finding of No Significant Impact is supported by the analysis. The Public Comments and Forest Service Responses Appendix D documents the results of public involvement efforts.

Issue: The agency failed to follow proper procedure and impermissibly foreclosed alternatives in this case. Comments were accepted and considered after the deadline. These comments made reference to a personal, private meeting between the Deciding Officer and individual members of one vocal interest group. These errors are sufficient to invalidate this decision. More importantly than the mere form of this clandestine procedure, is the fact that many users, especially private powerboaters, have been severely prejudiced by the improprieties of the agency.

Response: There is no NEPA requirement for the agency to reject or not consider late comments. The NEPA does not provide a provision that allows the agency to ignore any meaningful comment regardless of the time the comment is received. Considering comments after the comment period has closed is not a procedural irregularity, it is a common agency practice. The planning record for the EA contains the comment letters referenced in your appeal. In addition, the Deciding Officer has the discretion to discuss any issues relevant to the NEPA analysis at any time with any members of the public.

Issue: The agency has apparently viewed the continued presence of the HCPC v. Williams case, pending before the Honorable Judge Redden, as forcing the agency to implement a plan as soon as possible. Thus, the EA was conducted, but the agency never had any intention of even considering any decision that would require generation of an EIS, for fear such a decision would invoke an unfavorable reaction in court. The opinion of the court did nothing to lead the agency to believe it no longer had the duty to follow the law and its own regulations. That duty was ignored in this decision.

Response: The purpose and need of the EA was focused to facilitate addressing the commercial outfitter-guide issues relevant to implementation of the Wild and Scenic Snake River RMP. However, the ruling of the court did nothing to limit the Deciding Officer's discretion to address any of the issues relevant to implementation of the Wild and Scenic Snake River RMP.

Issue: The agency's EA and resulting Decision violate the Deputy Regional Forester's reversal because the agency has not even attempted an economic viability analysis.

Response: The EA discloses the economic consequences and recognizes there is a risk that some commercial outfitters could go out of business. However, the EA also discloses that implementation of the decision will not result in the loss of a diversity of services now available to the public. In addition, I find an adequate economic analysis is provided by the EA and supporting analysis.

Issue: The decision fails to address the Americans With Disabilities Act.

Response: The EA discloses that implementation of the decision will not result in the loss of a diversity of services now available to the public. The access to services for individuals covered by the Americans With Disabilities Act is no different from the access provided by individuals not covered under that Act. I find no violation of the Americans With Disabilities Act.

Issue: The agency ignored statutory intent and skirted interpretation of the HCRNA Act. The non-motorized window is a ban, not merely regulation.

Response: The issue that motorized use should be managed in the wild segment of the river is addressed in the analysis of public comment on the Final Rule for the HCRNA-Federal Lands (Rule). The Rule to implement Sections 10(b-e) of the HCRNA Act establishes the ability of the Forest Supervisor to restrict motorized use through the forest planning process.

The level of powerboat use was established in October 1994, when the Record of Decision for the Wild and Scenic Snake River RMP was signed. The RMP was written to establish fair and equitable recreation use levels. The outfitter EA provides additional analysis related to the economic effects of allocation and operational limitations on individual commercial river permits. The outfitter EA establishes a higher level of commercial powerboat use than the level established in the RMP. The level for private powerboat use remains unchanged.

Issue: The agency is improperly attempting to limit access to private property.

Response: In order to assure reasonable and adequate access to private land, I directed the Forest Supervisor to conduct further analysis of access needs. Pending this additional analysis and a new decision, access to private lands by commercial and private users will not be changed.

In conclusion, I have reviewed the record documentation provided by the Forest Supervisor and the written recommendation of the Appeal Reviewing Officer. The Appeal Reviewing Officer focused her review on the documentation developed by the Forest Supervisor and the issues raised in your appeal. A copy of her recommendation is enclosed. The Forest Supervisor's determination of the context and intensity of the proposed action is supported by the EA and analysis file. The appeal record addresses the issues raised in your appeal. The record also demonstrates that the decision is consistent with applicable laws, regulations, policies, and existing direction. Therefore, I affirm the Forest Supervisor's decision, with one exception.

I am granting your request for relief in part and reversing the Forest Supervisor's decision to implement the non-motorized window when it coincides with the Fourth of July. The Forest Supervisor's decision relevant to the Fourth of July is not supported by adequate analysis in the EA or Decision Notice. The Forest Supervisor may implement the Timing and Duration of the Non-Motorized Period as described in the EA on page II-18. Page II-18 discloses that when the Fourth of July coincides with a Monday, Tuesday, or Wednesday of a scheduled non-motorized period, that period will be skipped. I am denying the remainder of your requested relief.

Mr. Jim Percy

4

This decision constitutes the final administrative determination by the U.S. Department of Agriculture and is not subject to further administrative review.

Sincerely,

/s/ Richard A. Ferraro

RICHARD A. FERRARO
Appeal Deciding Officer
Deputy Regional Forester

Enclosure