Forest Service

Bitterroot National Forest

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Subject: 1570 (215) A&L - ARO Letter - Pilgrim Creek Timber Sale Project - Kootenai National Forest - Artley - #13-01-00-0038

To: Appeal Deciding Official

This is my recommendation on disposition of the appeal filed by Dick Artley of the Pilgrim Creek Timber Sale Record of Decision (ROD) signed by the Forest Supervisor Paul Bradford of the Kootenai National Forest.

The Forest Supervisor selected Alternative 3, which includes timber harvest and fuel treatments on approximately 1,434 acres, tree planting on 357 to 725 acres depending on site-specific conditions, and road construction of 4.7 mile of new permanent road, 47 miles of reconstruction, and 1.1 miles of new temporary road construction.

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 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 Migratory Bird Treaty Act (MBTA), the Administrative Procedures Act (APA), 42 U.S.C. § 7641, and Executive Orders 13186 and 13274. The appellant asks the Appeal Deciding Official (ADO) to direct the Responsible Official to withdraw the Decision and rewrite the DEIS with a new alternative analyzed in detail that does everything described in the selected alternative except for the logging and road construction. He asks the Forest to then reinitiate the 45-day comment period on the revised DEIS. An informal meeting was offered but the appellant declined to meet. Therefore, no resolution of the issues was reached.

ISSUE REVIEW

Issue 1. The appellant alleges Supervisor Bradford has violated 40 CFR § 1502.9(b) because he did not respond to the responsible opposing viewpoints contained in the attachments submitted by the appellant during the formal 45-day comment period on the DEIS.

Response: Forty-seven pages of the Response to Comments (FEIS, pp. 45 to 92) are dedicated to consideration of all of Mr. Artley's comments on the DEIS, including specific opposing viewpoints presented by him. The Response to Comments (p. 45) begins, by stating "Note: Mr.

Artely submitted numerous documents and attachments as part of his comments. We consider all comments here and begin with this introductory (email) comment, followed by response to his attachments." Clearly the Forest is in compliance with 40 CFR 1502.9(b).

Issue 2. The appellant alleges Supervisor Bradford has violated 40 CFR 1502.16 because he does not discuss "any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented" in Chapter 3 of this EIS. A word search of the EIS indicates that the word "irretrievable" does not exist.

Response: The discussion of irreversible or irretrievable commitments of resources can be found in the Pilgrim Creek DEIS (pp. 3-346 to 3-347). It discusses soil productivity, forest vegetation, air quality, scenic resources, wildlife, inventoried roadless areas, unroaded area, and heritage resources. Clearly the Forest is in compliance with 40 CFR 1502.16.

Issue 3. The appellant alleges Supervisor Bradford has violated 40 CFR 1508.3 and 40 CFR 1502.16 because he plans to apply herbicides as part of this project that might cause Honeybee Colony Collapse Disorder (CCD).

Response: As stated in the DEIS (p. 2-46), the Responsible official does not make a decision to apply herbicides as part of the Pilgrim Creek Timber Sale project. The application of herbicides is being done under the decision authority of the Kootenai National Forest Invasive Plant Management Record of Decision (May, 2007). Since the Forest Supervisor is not making a decision about the use of herbicides the comment is not relevant to this project. The Forest points out that glyphosate is a legal herbicide (FEIS, p. 47). The analysis and project are in compliance with 40 CFR 1502.16, discussion of environmental consequences, and 40 CFR 1508.3, definition of the word *affect*.

Issue 4. The appellant alleges Supervisor Bradford has violated 42 U.S.C. § 4332, Title I, Section 102 (C) because the EIS does not contain a "detailed statement by the responsible official on any adverse environmental effects which cannot be avoided should the proposal be implemented." Here, the appellant places special emphasis on the word "detailed."

Response: The DEIS (p. 3-346) contains a detailed discussion of unavoidable adverse effects. The discussion includes heritage resources, scenic resources, wildlife, and air quality. The analysis is in compliance with NEPA.

Issue 5. The appellant alleges Supervisor Bradford has violated 40 CFR 1505.2 because the EIS for the Pilgrim timber sale does not "state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted." A word search of the EIS indicates that the word "practicable" does not exist.

Response: In fact, the DEIS uses the word "practicable" five times (pp. 3-130, 3-222, 3-282, 3-345, and 3-349) and the ROD uses the word twice (pp. 32 and 34). But more to the point of 40 CFR 1505.2, rather than if the documentation used a particular word: the question is whether the forest attempted to avoid or minimize environmental harm. The DEIS (pp. 2-44 to 2-49) included numerous design features in each action alternative "to lessen the potential impacts and

to avoid potential resource damage." These design features were included in the final decision (ROD, p. 2). Clearly the decision is in compliance with 40 CFR 1505.2.

Issue 6. The appellant alleges Supervisor Bradford has violated 40 CFR 1507.2 because the EIS for the Pilgrim timber sale does not "identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration." A word search of the EIS indicates that the word "unquantified" does not exist.

Response: The appellant is correct, the DEIS, FEIS, and ROD do not include the word "unquantified". Title 40 CFR 1507.2 addresses agency capability to comply with the regulations for implementing NEPA "in terms of personnel and other resources." The Project Initiation Letter (PF, Vol. 2, Doc. 001) documents the personnel assigned to the project, which cover all of the resource areas potentially affected by the project. The IDT meeting notes document numerous interdisciplinary meetings and field reviews (PF, Vol. 2, Doc. 005). Section 102(2)(B) of the National Environmental Policy Act is directed at Federal agencies. It states "all agencies of the Federal Government shall—(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality…" Those methods and procedures have been developed, and they include (for example) the development of EIS, RODs, EAs, Decision Notices, and FONSIs; consultation with other agencies; methods to document of impacts; procedures to inform and involve the public. This has been done by the Forest Service in consultation with CEQ in development of the Forest Service's NEPA procedures.

I find the EIS is in compliance with 40 CFR 1507.2 because an interdisciplinary approach was used to insure the integration of resources potentially affected by the project was analyzed. In addition, the Project Initiation Letter assigned roles and responsibilities for the project. The project has followed Forest Service methods and procedures to insure that presently unquantified environmental amenities and values maybe given appropriate consideration in decision making.

Issue 7. The appellant alleges Supervisor Bradford has violated the Administrative Procedures Act (APA). The Decision disclosed in the ROD is arbitrary and capricious because the documents listed in the literature cited section of the EIS do not discuss the adverse effects of logging and road construction, thus, the Responsible Official "failed to consider an important aspect of the problem and offered an explanation that ran counter to the evidence before the agency."

Response: In fact, some of the literature in the References section (DEIS, Appendix G) discuss the effect of logging and road construction on the soils, fisheries, hydrology, vegetation, and wildlife resources. The public, too, has had opportunity to add to the literature section, and some, including the appellant have taken the opportunity to advise the Responsible Official on the impacts of logging and road construction by submitting additional literature.

As I stated above (in Issue 1), forty-seven pages of the Response to Comments (FEIS, pp. 45 to 92) are dedicated to consideration of all of Mr. Artley's comments on the DEIS. Many of these comments and responses consider and discuss the effects of logging and road construction. Virtually all of the water resources discussion (DEIS, pp. 3-159 to 3-200) is addressing the impact that logging and road construction have on that resource. The fisheries resource (DEIS,

pp. 3-219 to 3-224) likewise discusses the impact timber harvest and road has on fisheries. The soils resource (DEIS, pp. 3-243 to 3-244 and 3-250 to 3-256) also discusses the impact timber harvest and roads have on soils. Each resource in turn analyzes the impact of timber harvest and roads on that resource. These analyses are based on the existing condition, monitoring, and the best available science. The analysis is in compliance with APA.

Issue 8. The appellant alleges Supervisor Bradford does not comply with President Clinton's E.O. 13186 discussed in the Federal Register: February 13, 2009 (Volume 74, Number 29) that requires "each agency to develop and implement a Memorandum of Understanding with the Fish and Wildlife Service that shall promote the conservation of migratory bird populations."

Response: In December 2008, the USFS entered into a MOU with USFWS on migratory birds, in compliance with E.O. 13186. The ROD (p. 37) discloses that neotropical birds were considered in accordance with the MOU, citing the DEIS, p. 3-94 and the FEIS, Appendix 4. The project is in compliance with MBTA and E.O. 13186.

Issue 9. The appellant alleges Supervisor Bradford has violated 40 CFR 1506.6, and Executive Order 13274 because the EIS contains an overly narrow Purpose & Need statement that renders ALL alternatives that do not include commercial logging nonresponsive to the P&N and ineligible to be analyzed in detail.

The EIS Purpose & Need at page 1-5 tells the public the timber sale is needed because:

> **"3. There is a need to provide local employment related to forest management and restoration activities and to supply forest products to contribute to the support of that segment of the local and regional economy dependent on timber products."**

The courts have repeatedly ruled in favor of citizen appellants against a USFS defendant when this issue is decided in court.

Response: After review of 40 CFR 1506, Other Requirements of NEPA, Section 1506.6, I have determined this regulation applies to Public Involvement; it does not apply to the Purpose & Need. The Purpose & Need for action and desired conditions for the project are based on Forest Plan goals, objectives, and standards, in addition to being responsive to the issues identified through public involvement. The Purpose & Need are described in the ROD (pp. 5 to 6) and in more detail in the DEIS (pp. 1-4 to 1-6).

The public involvement process included an informational meeting, listing the proposed action of the quarterly schedule of proposed action, mailing of a detailed project scoping letter, additional public comments were requested regarding the creation of large openings and when the project was changed from an EA to an EIS (DEIS, p. 2-2). Based on public input, the interdisciplinary team developed three action alternatives in addition to the required no action alternative and the proposed action. I find the project and analysis are in compliance with 40 CFR 1506.6, which requires public involvement in the NEPA process.

Executive Order 13274, Environmental Stewardship and Transportation Infrastructure Project Reviews, is primarily directed at the Department of Transportation, not the Department of Agriculture. The purpose of this executive order is to enhance environmental stewardship and streamline the environmental review and development of *high priority* transportation infrastructure projects, not deal with a few small roads and trails in the back country of the Kootenai National Forest.

The Purpose & Need is not overly narrow because it allows for a variety of alternatives that could be developed and chosen that would fulfill the Purpose & Need. The analysis and project are in compliance with 40 CFR 1506.6 and E.O. 13274.

Issue 10. The appellant alleges Supervisor Bradford has violated 42 U.S.C. § 7641, because the noise and dust created by logging was not mentioned in Chapter 3 (the environmental effects analysis) of the EIS. Chapter 3 does not: "identify and classify causes and sources of noise", or "determine the effect on wildlife."

Response: This specific contention was not raised by the appellant in comments previously submitted on the project. Title 42 U.S.C. § 7641 directs that within the Environmental Protection Agency an Office of Noise Abatement and Control shall be established which will "investigate and study noise and its effect on public health." The involvement of the Office of Noise Abatement and Control is not required in the analysis of this project. That being said, the effects of implementing the project on wildlife are thoroughly discussed in the Wildlife Specialist's Report and EIS, including effects such as displacement caused by factors such as noise associated with human activity (e.g., project implementation).

The analysis of potential impacts to wildlife includes disclosures related to disturbance and security (DEIS, pp. 3-47 to 3-134). The impact of logging on various species was analyzed in the DEIS: Canada lynx, p. 3-129; fisher, p. 3-97; northern goshawk, pp. 3-80, 3-89; Coeur d'Alene salamander, pp. 3-93 to 3-94; pileated woodpecker, p. 3-77; and elk, p. 3-71 to 3-73; among others. The analysis is in compliance with NEPA and 42 U.S.C. § 7641.

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.

Julie K. King

JULIE K. KING
Forest Supervisor
cc: Paul Bradford, Janis L Bouma, Ray G Smith, Allen Byrd