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File Code: 1570 **Date:** August 27, 2013
Route To: (1570)

Subject: 1570 (215) A&L - ARO Letter - Middle Bugs - IPNF - Artley - #13-01-00-0042

To: Appeal Deciding Official

This is my recommendation on disposition of the appeal filed by Dick Artley of the Middle Bugs Project Decision Notice (DN) and Finding of No Significant Impact (FONSI) signed by Forest Supervisor Rick Brazell of the Nez Perce and Clearwater National Forests.

The Forest Supervisor selected Alternative C, which includes regeneration harvesting on 642 acres, commercial thinning on 63 acres, pre-commercial thinning on up to 114 acres, and post-harvest burning on 642 acres. The project also includes 5.2 miles of temporary road construction, one mile of road reconstruction, 23 miles of road reconditioning, 3 miles of road decommissioning, long-term storage of 11.3 miles of road , replacement of 42 undersized culverts, and decompaction of 31 acres of skid trails.

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 law, regulation, policy, and orders. The appeal record, including the appellant's comments 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 Appeals Reform Act (ARA), the Administrative Procedures Act (APA), and Executive Order 13274. The appellant asks the Appeal Deciding Official (ADO) to direct the Responsible Official to withdraw the Decision and rewrite the pre-decisional EA with a new alternative analyzed in detail that excludes logging and road construction from the selected alternative. He also asks the Responsible Official to rewrite the Purpose & Need to describe project goals to truly restore forested ecosystems, to move the project's actions to the Alternatives section, and to reinitiate the 30-day comment period on the revised pre-decisional EA. An informal meeting was offered to the appellant but he declined. Therefore, no resolution of the issues was reached.

ISSUE REVIEW

Issue 1. The appellant alleges Supervisor Brazell has violated 40 CFR 1502.9(b) because he did not respond to the responsible opposing viewpoints contained in the four attachments submitted by the appellant during the formal 30-day comment period on the EA.

Response: Even though 40 CFR 1502 applies to Environmental Impact Statements, not EAs, the DN and FONSI (Appendix D, pp. 122 to 143) list and respond to each of the responsible opposing viewpoints the appellant submitted in four attachments to his comments on the EA. The DN and FONSI (Appendix B-Response to Comments, pp. 81 to 113) also respond to the opposing viewpoints brought up by the public, including the appellant, on the EA. The analysis is in compliance with NEPA and the regulations at 40 CFR 1502.9(b).

Issue 2. The appellant alleges Supervisor Brazell has violated 36 CFR 215.6(d) and 40 CFR 1503.4 because he did not respond to each of the 19 comments submitted by the appellant during the formal 30-day comment period on the pre-decisional EA.

Response: Title 36 CFR 215.6(d) cited by the appellants does not exist. I assume this was a typographical error and the appellant was referring to 36 CFR 215.6 (b). The appellant's comments were responded to in the Response to Comments section of the DN and/or already analyzed and discussed in the EA:

Appellant Comment #1, See Hydrology analysis (EA, pp. 68, 74, and 77) concerning impacts of long-term road storage;
Appellant Comment #2, See DN Appendix B (p. 100), #47;
Appellant Comment #3, See DN Appendix B, (p. 90), #25;
Appellant Comment #4, See Forest Plan Management Area direction and overstocked stand information (DN, pp. 8, 43 and EA, pp. 3, 9 to 10, 32);
Appellant Comments #4, #5, #8, See DN, Appendix B, (p. 99) #41, #42;
Appellant Comment #6, See DN, Appendix B (pp. 95 to 98), #35 thru #38;
Appellant Comment #7, See DN, Appendix B (p. 84), #9;
Appellant Comment #9, See DN, Appendix B (p. 99), #43;
Appellant Comment #10, #11, See DN, Appendix B (pp. 99 and 100), #45;
Appellant Comment #12, See DN, Appendix B (p. 100), #46;
Appellant Comment #13, #15, See DN, Appendix D (pp. 122 to 143);
Appellant Comment #14, See DN, Appendix B (pp. 89 to 90), #23;
Appellant Comment #16, See DN, Appendix B (pp. 103 and 104), #54, predicted effects of road construction and science used;
Appellant Comment #17, See DN, Appendix B (pp. 89 and 122), #23;
Appellant Comment #18, See Purpose and Need, DN, (pp. 1 and 2);
Appellant Comment #19, See affected environment and environmental consequences (EA, Chapter 3).

The analysis is in compliance with 36 CFR 215.6(b) and 40 CFR 1503.4.

Issue 3. The appellant alleges Supervisor Brazell has violated 40 CFR 1500.1(b) because the EA does not analyze how the project will affect Climate Change. This requirement is discussed at http://www.fs.fed.us/climatechange/

Response: The appellant's comment letters on the Middle Bugs project did not raise a concern about the project affecting the climate. He did not put the agency on notice of his concerns on this issue. The notice and comment period is intended to solicit information, concerns, and any issues specific to the proposed action and to provide such comments to the Responsible Official

before the decision is made. The intent in requiring comments is to obtain meaningful and useful information from individuals about their concerns and issues, and use it to enhance project analysis and project planning. Waiting until the appeal period to raise an issue or concern does not give the Responsible Official an opportunity to consider the impacts of the project in light of public concerns.

Furthermore, the appeal itself provides no substantive or specific evidence to support the claim. The included regulation citation adds no clarity to the claim, and the internet link simply leads to a cover page for the agency-wide Forest Service program and approach to understand and address climate change. Due to the fact the appellant did not bring his concern to the attention of the Responsible Official at the appropriate time; I will not consider this appeal contention further.

Issue 4. The appellant alleges Supervisor Brazell has violated 40 CFR 1505.2 (c) because the EA for the Middle Bugs timber sale does not "state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted."

Response: Title 40 CFR 1505.2 applies to Records of Decision, not a DN and FONSI, as in the case of the Middle Bugs Project. However, the EA (pp. 21 to 24) included numerous design features "developed to eliminate or reduce to acceptable levels the effects of the proposed activities." The DN (p. 3) states these design features "will be implemented as part of my decision" and then lists them, and discusses their effectiveness where necessary (DN, pp. 3 to 7). The decision is in compliance with 40 CFR 1505.2.

Issue 5. ***The appellant alleges Supervisor Brazell has violated 40 CFR 1507.2 because the EA for the Middle Bugs 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."***

Response: The EA, DN, and FONSI do not use 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 EA (pp. 112) 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 (PF, Vol. 2).

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 EISs, RODs, EAs, Decision Notices, and FONSIs; consultation with other agencies; methods to document impacts; procedures to inform and involve the public. The Forest Service developed these and other NEPA procedures in consultation with CEQ .

I find the EA is in compliance with 40 CFR 1507.2 because Supervisor Brazell used an interdisciplinary approach to analyze the resources potentially affected by the project. The team followed Forest Service methods and procedures to insure that presently unquantified environmental amenities and values could be given appropriate consideration in decision

making.

Issue 6. The appellant alleges Supervisor Brazell's Reference and Literature Cited section does not contain or cite science literature that describes the ecological damage that is caused by several logging and road construction activities that will occur as part of this timber sale. By withholding this important information about the possible impacts of the project Supervisor Brazell has violated 40 CFR 1500.1(b) because environmental information is not available to public officials and citizens, the information provided to the public is not "high quality," and an "accurate scientific analysis" would not be possible without information describing the adverse impacts of logging and road construction.

Response: There are literature citations in the References section (EA, Appendix E) that discuss the effects of logging and road construction on the soils, fisheries, water quality, 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 (DN, Appendix D).

As stated above (in Issue 2), the Response to Comments (DN, Appendix B, pp. 81 to 113) are dedicated to consideration of all of the public's comments on the EA, including Mr. Artley's. Many of these comments and responses consider and discuss the effects of logging and road construction. Virtually all of the water quality discussion (EA, pp. 68 to 78) speaks to the impact that logging and road construction have on that resource. The fisheries resource (EA, pp. 78 to 84) likewise discusses the impact timber harvest and roads have on fisheries. The soils resource (EA, pp. 87 to 93) 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 environmental information is available to public officials and citizens, is of high quality, and is accurate. The analysis is in compliance with 40 CFR 1500.1(b).

Issue 7. The appellant alleges Supervisor Brazell has violated 40 CFR 1506.6, and Executive Order 13274 because the EA contains an overly narrow Purpose & Need statement that renders <u>ALL</u> alternatives that do not include commercial logging nonresponsive to the P&N and ineligible to be analyzed in detail. The appellant states the courts agree that providing timber volume from public land for any reason is not the "underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action" (40 CFR 1502.13).

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 DN (pp. 1 to 2) and in more detail in the EA (pp. 3 to 5).

The public involvement process included listing the project on the Schedule of Proposed Actions, mailing out scoping letters, a presentation and discussion with the Nez Perce Tribe and the Clearwater Basin Collaborative, a legal notice requesting public comments, and responding to those comments in the DN (Appendix B) (EA, p. 17). The interdisciplinary team used the formulated issues and developed alternatives (Alternatives A through H found in the EA, pp. 16 to 28) to address those issues. 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 Nez Perce 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.

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.

CHRISTINE DAWE
Deputy Forest Supervisor

cc: Rick Brazell, Norma Staaf, Kathy Rodriguez, Tammy Harding, Ray G Smith, Allen Byrd