



## Specific Legal Requirements

### 1- Feasibility of Nonmotorized Means as per NFMA and the Wilderness Act

The decision to approve helicopter and motorized equipment a violation of NFMA and the Wilderness Act. The Bitterroot Forest Plan, Selway-Bitterroot Wilderness General Management Direction, 1992 Update contains the following non-discretionary standard:

"Motorized equipment or other nonconforming activities will be authorized when it can be demonstrated that: 1) it is the only feasible means of accomplishing the necessary maintenance...." (p. M - 2) (emphasis added).

"Feasible" has been defined by the Courts as "possible as an engineering matter" and as "physically possible." (see Citizens to Preserve Overton Park v. Volpe. Also, Friends of the Boundary Waters Wilderness v. Robertson (8th Cir., 1992). Appendix C of the EA concludes other options are possible. Indeed, alternative 3 was a non-motorized option. Rather than honestly choose the best option, the agency abdicated its responsibility to wilderness character brought forth by the proponent. It is not insignificant to this issue that the dam was successfully constructed without motorized equipment. Furthermore, this is the placement of a a catwalk and a beam. The total weight is about 600 pounds and can easily be done.

Appendix C is basically a cookie cutter analysis. It conflates non-dam functions (the catwalk) with dam safety. A catwalk can easily be built onsite from materials packed to the site.

The Wilderness Act is explicit in section 4(c):

. . . except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, . .

As is shown below, in this case the agency has failed to show that the use of motorized equipment is the minimum tool necessary for management of the wilderness. Indeed, the viability of alternative 3 proves that the wrong decision was made.

The DN and EA absurdly conclude says the use of helicopters will have less impact on wilderness than stock and trail use. The difference is between four and possibly eight working days!.

The purpose of Wilderness is to provide for wild, "untrammelled" areas where motorized equipment is precluded. The duration of impact, though a factor, is not the main point. In Wilderness, if something is to be done, it has to be by primitive means. The difference between four and eight days is minimal.

The EA agrees that under either action alternative, trail work will need to be done. The only difference is the last mile and a half whereby we have noted, and the Forest Service admits it failed to analyze () that all materials could be readily hauled on foot to the dam site. WW and FOC even offered to assist in this regard, but that offer too was completely ignored.

The Forest Service Manual (FSM) explains how the requirements of the Wilderness Act are to be met. The overriding management philosophy is as follows (FSM 2320)

The goal of wilderness management is to identify these influences, define their causes, remedy them, and close the gap ("A") between the attainable level of purity and the level that exists on each wilderness ("X").

Thus, it is clear that the goal of wilderness management is to keep and improve the pristine conditions of wilderness. Resorting to the use of a helicopter even for valid occupancies, is contrary to the Act if other options are available. Again, alternative 3 proves that non-motorized means are feasible and doable.

The same section of the Manual further notes:

Where a choice must be made between wilderness values and visitor or any other activity, preserving the wilderness resource is the overriding value. Economy, convenience, commercial value, and comfort are not standards of management or use of wilderness.

Preserving Wilderness character is paramount. The DN and EA engage in a disingenuous and wrong-headed exercise by arguing that helicopter use is less impacting to wilderness than stock use! Amazingly, the

This policy clearly shows how the decision to use a helicopter and motorized equipment are in error. The decision to use specific materials did not go through a complete analysis in the EA that weighed wilderness values in context of the extent of the existing legal occupancy.

The Forest Service failed to follow regional direction on dams which note that four conditions must be met before motorized/mechanized use is allowed. The first, is an emergency. The EA admits this is not an emergency. Nowhere in the Project Files is the current situation declared an emergency.

Finally, it must be noted that the Secretary of Agriculture testified that the Selway-Bitterroot dams could be maintained with non-motorized means. The Senate Report that accompanied the Wilderness bill included the following statement from the Secretary:

**“Water developments.-**Water developments for the storage and diversion of water for irrigation, domestic, and other uses have been allowed in these

wilderness-type areas. The works generally have been constructed and maintained by means which did not involve motorized transportation. There are 144 such projects. We would construe the provisions of S.4 as permitting the continued maintenance of these existing projects by means which would not involve motorized transportation as in the past.”

In the EA, the Bitterroot Forest attempted to refute the Secretary's statement by casting doubt the Secretary even said anything during the Wilderness Act hearings, further suggesting that the analysis performed by Bitterroot Forest officials was seeking to justify a predetermined course of action, rather than dealing in a fair and forthright manner with issues raised by the public, and that ought to have received thorough consideration.

The conclusion that the project can not be safely completed without motorized equipment lacks any rational validity.

- a. To our knowledge there is not a single dam in the SBW where the Forest Service has authorized the use of a helicopter to haul the cable for a log boom or the materials for a catwalk, unless perhaps those materials were used as part of a larger dam reconstruction project. Neither the EA or MRDG gives any explanation why a helicopter is necessary for this particular catwalk and log boom except that the proponent would have to modify the proposed catwalk’s design. This hardly suggests the helicopter is the minimum required.
- b. Throughout the SBW there are numerous bridges that, unlike the catwalk, which only needs to support one person at a time, have to support several fully-loaded pack strings at a time and are much longer than the catwalk and have been built without the use of helicopters or motorized equipment. Highway bridges and railroad trestles are built in sections held together by bolts and plates. Clearly this technology is good enough for the catwalk on the Fred Burr dam, and materials are available that can be carried on foot or packstock to the dam site.
- c. Throughout the National Wilderness Preservation System projects requiring vastly more difficult and challenging work are routinely completed without motorized equipment. A few examples:

On the Bridger-Teton National Forest in the Teton Wilderness, the Forest Service packed 35,000 lbs. of timbers 21 miles up an extremely rugged trail, over a pass (where packstock are lost each year), clearing more than 500 downfall trees in the process, for a trail reconstruction project. Compare that to the 700 lbs of materials up a 7.5-mile, relatively gentle trail for the Fred Burr project.

On the San Juan-Rio Grande National Forest in the Weminuche Wilderness, a private irrigation ditch project required excavating more than 2,600 cubic yards of rock and earth with mule-drawn slips; hauling 40,500 lbs of Quickrete and mixing the concrete by hand to repair the ditch. The project’s location was seven miles from the trailhead at an elevation of 10,400 feet. Compare that to hauling 700 lbs of materials to the Fred Burr dam.

On the Bitterroot National Forest in the Selway-Bitterroot Wilderness, the Canyon Creek Irrigation District, after the Bitterroot Forest Supervisor determined it wasn't possible, packed in all of the supplies and breached the Canyon Lake Dam (removing approx. 700 cubic yards of material) without motorized equipment or helicopters. Most of the dam reconstruction projection was completed without motorized equipment. Compare that to the simple task of hauling 700 lbs. of materials and building a catwalk for the Fred Burr dam.

On the Payette National Forest in the Frank Church-River of No Return Wilderness, a private contractor excavated and moved 4 million pounds of material to repair the Cabin Creek airstrip. Compare that to moving 700 lbs. of materials to the Fred Burr site.

On the Cherokee National Forest in the Pond Mountain Wilderness the Forest Service used a team of six mules to pull two 50-ft stringers weighing 5,500 lbs. each nearly a mile to a bridge location with the Wilderness. Each log had to be pulled across rain-swollen Laurel Creek three times. Compare that to hauling 700 lbs up the Fred Burr trail.

On the White Mountain National Forest in the Pemigewasset Wilderness, the Forest Service recently dismantled and removed a 180-foot suspension bridge in its entirety, including decking, railing, and cables. The entire project was done using non-motorized equipment and stock animals. A steel I-beam bridge over Black Brook, was also removed. The suspension bridge was approximately 3 miles from the Wilderness boundary and 5.5 miles from the road. Compare the difficulty of completing this project with that of the Fred Burr catwalk.

A Sept 22, 2002 article in the Albuquerque Journal described how two men are building a 40-ft. dam on the Santa Fe National Forest in the San Pedro Parks Wilderness without using helicopters or other motorized equipment. With three packhorses they have hauled 20,000 lbs. of sand, 90,000 lbs. of rock and 100 bags of cement to the site. Compare that to hauling 700 lbs of materials and building a catwalk (not the dam, just a catwalk) at Fred Burr.

There are dozens of other examples where significantly more difficult and challenging projects have been completed in national forest Wildernesses without helicopters or other motorized equipment. And there undoubtedly many projects equal to or more challenging than the Fred Burr catwalk done without helicopters or motorized equipment in the Northern Region each year. The Fred Burr decision makes a mockery of the Forest Service's commitment to the "minimum tool" concept.

Finally, the fact that alternative 3 is a viable option means it must be chosen as it meets the minimum necessary requirement. The agency in this EA has turned the Wilderness Act on its head by suggesting that a helicopter is needed to carry a cable and a metal catwalk that can easily be packed in pieces into the dam.

### 3- NEPA/Need for an EIS/Decisionmaking Space

In the DN and EA the agency argues that it has no jurisdiction over the dam and is therefore, limited in its ability to choose Alternative 3.. We show below how that interpretation is contrary to case law. This point is particularly important as the area is designated Wilderness and has substantial value that the agency refuses to properly recognize.

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999) [land exchange] speaks directly to the issue of scope.

"The Forest Service also contends that because the purpose of the transaction was to carry out an "exchange" and not a purchase, it was not required to consider this alternative. Seattle Audubon Society, 80 F.3d at 1404 (holding that an agency is not required to examine alternatives inconsistent with its basic policy objectives). To the extent that Weyerhaeuser would have been exchanging its lands for federal monies rather than federal lands, we do not recognize such an inconsistency. [FN7] Were we to construe the statement of purpose as limiting the transaction to land-for-land exchanges, it would certainly be too narrow to meet the standards for an appropriate statement of purpose as articulated in City of Carmel, 123 F.3d at 1155." [end footnote]

This narrow approach by the Bitterroot National Forest officials violates other case law as well. "[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 112 S. Ct. 616 (1991). See also Ayers v. Espy, 873 F. Supp. 455, 467-68 (D. Colo. 1994) (rejecting timber sale EA because USFS considered only even-age management).

In this case the Forest Service has allowed the proponent to so narrowly define the scope of the project, specifically in designing a catwalk that could easily be hauled by stock and built on-site. The agency has allowed the proponent to essentially eliminate the selection of the non-motorized alternative. Furthermore, Alternative 3 failed to recognize that the trail need not be upgraded for the last mile plus, rather offers were made to haul the different pieces by foot.

While the EA looked at a non-motorized option, the agency never seriously considered it.

An EIS is needed. Allowing the use of a helicopter landings is, in and of itself, a significant impact on the wilderness resource and wilderness character of the Selway-Bitterroot Wilderness.

### 3- Occupancy

There is an implication in the EA that the special use permit is somehow exempt from the Wilderness Act's prohibition on motorized use. The agency's own regulations and the law show that is not the case. Even valid occupancies must conform with the agency policies and congressional land use designations, like Wilderness.

#### 5- Informal Disposition Meeting

Appellants request an on-site meeting. Since the dispute revolves around the ability to haul materials to the site, we believe there is no better place to discuss the possibility than at the site itself. In the Holloway Dam appeal, the decision-maker saw that the EA's description of the trail was inaccurate and that stock could be used to do minor dam repair. This project is of a similar small scope in terms of the weight of the materials and distance to be hauled.

#### Relief Requested

We request that the Regional Forester:

- 1- Rescind the Decision Notice / FONSI and instruct the Bitterroot National Forest Supervisor to adopt either Alternative 1 or 3.

Sincerely,

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