

Introduction

At the outset, Appellants wish to wage a serious concern about the lack of a fair, reasonable or adequate process. The scoping letter lacked information that was needed for citizens to provide substantive comments on the actual dam reconstruction proposal and its impacts. Some of that information is provided in the EA, though the most important information is still lacking. The public should have been afforded the opportunity to review the EA, provide comments on the information provided, and identify significant lapses in that information. Instead, the public had only the opportunity to respond to a cursory scoping letter.

Moreover, appellants sat through an appeals resolution meeting on the Tin Cup Dam where we were assured the rushed process that marked that proposal would not be repeated. Yet again, here we are with a DN, EA and FONSI and no opportunity for comment on the EA. This is simply inappropriate when dealing with PUBLIC LANDS.

Beyond the procedural issues, we are deeply concerned with the lack of sensitivity or understanding of wilderness values represented by the decision to forego an EIS. Similar projects in the Selway-Bitterroot Wilderness (i.e. Bass Lake Dam reconstruction, Canyon Lake Dam reconstruction) have been analyzed in an EIS. That forest officials now believe such impacts to wilderness warrant so little analysis and no public comment or scrutiny indicates a substantial decline in the Forest's commitment to and understanding of wilderness. This is a serious problem that the regional forester needs to address.

The fundamental problem with the EA and DN is the complete lack of meaningful consideration for maintaining or reconstructing the dam in a manner that doesn't further degrade the area's wilderness character. The Tamarack Dam was built and reconstructed without motorized equipment and it has lasted for more than a century. It is remarkable with the extraordinary advances in both materials and engineering the agency can claim that it is impossible to complete the project by traditional means. It is even more remarkable the agency can conclude that rehabilitating the dam requires massive use of motorized equipment without having even considered a reasonable, meaningful, non-motorized option.

It is one thing to need heavy equipment to maintain a dam that was built the same way, such as the Bass Lake Dam. It is quite another when the dam was built by traditional skills and could certainly be again.

It is understandable, though not acceptable, the dam owners prefer to do this project with heavy equipment, helicopters, and other motorized equipment, just as they might if the dam was on non-wilderness lands or on private property. But the Forest Service's obligation is quite different. The Forest Service has the responsibility to preserve the area's wilderness character. As such, at a minimum it should have required the dam owner to present at least one reasonable alternative that would accomplish the project without use of motorized equipment. Almost certainly this alternative would have been a different design than the proposed action, but it lacks rational validity to suggest there is

only one way to bring the dam into compliance with dam safety standards. Instead, the best the Forest Service could muster is to determine it infeasible to use traditional skills and tools to do a project that was designed for helicopters and backhoes. That is not a reasonable or sensible approach.

The Tamarack Lake decision is such a far cry from the commitment the Secretary of Agriculture made in his statement to Congress on the 1964 wilderness bill when he assured the American people that the dam would be continued to be managed and maintained with traditional skills. That the Forest Service refuses to even consider the option of meeting that promise is unconscionable and profoundly unprofessional.

The Regional Forester must rescind the Supervisor's decision and order that additional alternatives be developed and considered that do not rely on motorized equipment. We understand the agency's reluctance to design the dam repair project or to become liable should its design fail. A reasonable solution, therefore, is for the Forest Service to require the proponent to submit plans that would accomplish the project utilizing non-mechanized equipment. Even if for the sake of argument there are components of the project that cannot be done by nonmotorized means, all other tasks that can be done with traditional skills should be done in that way. As it stands now the Forest Service left the project's design--and more importantly, a critical decision affecting the stewardship of the Selway-Bitterroot Wilderness--entirely in the hands of the proponent. That is contrary to law and a serious breach of the public's trust.

Specific Legal Requirements

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

The decision to approve helicopter and motorized equipment without fully analyzing a non-motorized alternative violates the Forest Plan, and thus is a violation of NFMA. 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 simply concludes other options are not possible without the benefit of an analysis through the EA. Instead, the agency considered only the single option brought forth by the proponent. It is not insignificant to this issue that the dam was successfully constructed without motorized equipment. It is therefore possible to do because it has been done. (see also Wilderness Requirements and NEPA discussion).

Appendix C fails as a serious attempt to determine what is necessary to meet minimum

requirements. For example, 50# bags of Xypex concrete and miscellaneous hand tools could easily be carried by stock (page 7). Some reinforcing steel could as well (page 7). The geotextile and liner could possibly be carried by stock depending on how many parcels there are and how easy the rolls are to manipulate (page 7). Transport of personnel by helicopter is not necessary (page 9). Yet, this is the proposal that has been approved. It violates even the agency's tortured misinterpretation of the Wilderness Act and other applicable laws.

Furthermore, the EA (Appendix C) is inconsistent. It claims helicopters will be use only what is necessary (page 12) but authorizes the proponents proposal. There are no mitigation measures in the DN or EA that spell out what can and can't be transported by helicopter. The EA merely accepts the proponents' plan.

2- Wilderness Requirements

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. First, however, it is instructive to see how Wilderness is completely misunderstood in this analysis.

The DN and EA conclude the use of helicopters and heavy equipment will have less impact on wilderness than other methods. This is counterintuitive and indicates the documents are merely efforts to rationalize a predetermined decision. Any use of motorized equipment degrades the area's wilderness character. This is acknowledged by the agency's own wilderness monitoring protocol. By contrast, one of the values of wilderness is to maintain traditional skills. Unless the Forest Service plans to allow the dam owners to trash the Wilderness in the process of repairing the dam, the use of traditional skills on the project will not degrade wilderness character and may enhance an important wilderness value. Nothing of the sort can be claimed for the motorized alternative selected in the DN.

Furthermore, the claim that the length of time is crucial in reconstruction misses the point about wilderness. The purpose of Wilderness is to provide for wild, "untrammled" 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.

Even if for the sake of argument one was to agree that it was necessary to use a helicopter or other heavy equipment for some tasks, that does not justify authorizing additional

helicopter trips to deliver materials or personnel that can undoubtedly be delivered with packstock or to use motorized equipment to do other tasks that can be done with traditional skills.

Further, the EA attempts to paint a picture suggesting that massive impact would occur from use of nonmotorized means. However, there is scant detail in the document to support this position precisely because a non-motorized option was not fully analyzed in the EA. The alternative analyzed in the EA was one designed for heavy equipment and helicopter use. No effort was made to analyze an alternative that was lighter on the land and completed with traditional skills.

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 and heavy equipment, even for valid occupancies, is contrary to the Act if other options are available. Again, absent a complete analysis, this can't be determined.

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 while still recognizing private, existing rights is paramount. The DN does not recognize this fact. Rather, it bases the decision to maintain the dam using specific materials that require helicopter access and heavy equipment, largely because of a self-imposed timeline. This directly contradicts the requirement that when, "a choice must be made between wilderness values and visitor or any other activity, preserving the wilderness resource is the overriding value."

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 failure to consider alternatives biased the Wilderness analysis portion of the EA. The agency was hell-bent on approving helicopter use and heavy equipment, regardless of the consequences. Indeed, there was no EA put out for public input. Thus, the alternatives were scant and poorly formulated so only one result would be chosen (see

also NEPA discussion).

The Forest Service failed to follow regional direction on dams that 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, thus the conditions aren't met.

Occupancy and Dam Level

The Wilderness Act prohibits construction or enlargement of water storage facilities without express approval by the President. Portions of the dam were removed in 1958 and 1970, prior to wilderness designation and again shortly thereafter. We believe the Forest Supervisor's decision exceeded the agency's authority when it authorized increasing the storage at Tamarack Lake.

Further, a question was raised as to whether the proposed increase in storage is within the dam owners' water right. The EA responds by claiming the answer to this question is beyond the scope of the analysis. That is wrong. The Forest Service cannot authorize a dam project in Wilderness for which there is no right to store water.

The EA notes the existing dam is under a valid occupancy. The issue of the kind and degree of valid occupancy (whether a special use or another type of occupancy) was inappropriately determined to be beyond the scope of the EA, in violation of NEPA. No question is more fundamental than this one. The Ditch Bill cited in the EA postdates the Wilderness Act by more than 20 years and there is controversy surrounding whether this bill applies to wilderness. A larger dam and/or reservoir would not be covered under the Ditch Bill of the 1980s since that existing reservoir at the time was smaller than what is proposed. (see also NEPA section).

The EA also failed to adequately analyze the impacts to the surrounding wetlands and other habitats from increasing water storage. The analysis consists of a single sentence in the response to comments section whereby the decision notice states it is estimated that less than one acre will be impacted and the effects would be minimal. A simple statement is not the same as analyzing the impacts, which is required by NEPA.

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 to agency policies and congressional land use designations, like Wilderness.

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, 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.

3- NEPA--Narrow Purpose and Need, Range of Alternatives, Need for an EIS

In the DN and EA the agency argues that it has no jurisdiction over the structure and is therefore, limited in its ability to analyze alternatives. 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]

In this case, the Forest Service argues the purpose and need is so narrow as to conduct a specific kind of dam maintenance that requires the use of a helicopter and motorized equipment in the Wilderness. The EA does not analyze whether separable parts of the proposed maintenance can be done to meet maintenance objectives or whether those separable parts are more in need of maintenance than the others.

The EA clearly admits this is non-emergency situation (see appendix C). The failure to look at alternative methods of dam maintenance clearly show the agency has failed in its NEPA duties and directed by the case law cited above. The comment record clearly shows that citizens and organizations raised concerns of alternatives. All suggestions were inappropriately rejected by the agency without being analyzed as alternatives in the EA.

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 narrowly define the scope of the project, specifically in requiring such a narrow time frame for completion, by refusing to conduct its [Forest Service] own assessment of alternative ways to complete the project without the use of motorized equipment, the agency has allowed the proponent to essentially eliminate reasonable non-motorized alternatives from the range of alternatives.

The Seventh Circuit recently explained:

No decision is more important than delimiting what these "reasonable alternatives" are. . . . One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). . . . If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.

The situation on the Tamarack dam is even narrower. There were only two alternatives, no-action and the proposed action. No real consideration was given to the no action alternative, as it did not meet the purpose and need of the project.

It is beyond reason that the Bitterroot National Forest officials were so narrow in their purpose and need as to look at only one action alternative. This extremely narrow purpose and need violates NEPA and is of questionable ethics.

Case law speaks to the need for alternatives, even those that do not completely meet the purpose and need. "An alternative may not be disregarded merely because it does not offer a complete solution to the problem." (*Citizens Against Toxic Sprays v. Bergland*, 428 F. Supp. 908, 933 (D. Or. 1977)). As another court explained, "[o]bviously, any genuine alternative to a proposed action will not fully accomplish all of the goals of the original proposal. One of the reasons that Congress has required agencies to set out and evaluate alternative actions is to give perspective on the environmental costs, and the social necessity, of going ahead with the original proposal." *Town of Matthews v. United States Dept of Transp.*, 527 F. Supp. 1055, 1058 (W.D.N.C. 1981).

The agency cannot rely on the applicant's wishes to define a project. Even in the court case that gave the agencies the most deference in defining purpose and need, the court noted " Obviously, an applicant cannot define a project in order to preclude the existence

of any alternative sites and thus make what is practicable appear impracticable." *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989).

Furthermore, in the *Simmons* case, the court rejected the government's argument that only one alternative would satisfy the permit applicant's needs. NEPA "demand[s] exploration of alternatives free of contractual arrangements. The public interest in the environment cannot be limited by private agreements." *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 669-70 (7th Cir. 1997). NEPA requires agencies to evaluate "alternative means to accomplish the general goal of an action," not the "means by which a particular applicant can reach his goals." *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986).

40 CFR 1506.5 "Agency responsibility" notes:

(a) Information. If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

In this instance, the agency has not independently verified the accuracy of the information. Indeed, the EA admits that the agency has no control over the engineering or design of the project, which is why no alternatives were evaluated. The reason this section is in the NEPA regulations is to ensure credibility, objectivity, and to avoid the appearance of impropriety and conflict of interest.

In its rush to finish this EA, the Bitterroot National Forest failed to allow public comment on the EA. As such, the EA is inaccurate and does not meet NEPA's requirements for accuracy in the "discussions and analyses" of NEPA documents (40 CFR 1502.24).

The scant discussion in the EA (appendix C) is not validated. For example, nonmotorized work that occurred on Canyon Creek dam took much less time than that EA projected.

Forest Service EAs normally go through public input. This EA did not, but was issued with a FONSI and DN without alternatives. There were unresolved issues and controversies (see comment record) and this violates 36 CFR 220.7.

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

whether the project can be done with traditional methods--a controversy that was not explored in the EA because of the lack of alternatives. There is controversy over whether this is rehabilitation or dam and reservoir expansion, expansion that would not be allowed under the Wilderness Act or the Ditch Bill (NOTE: The reservoir at the time of the ditch bill and its current size is smaller than what the proponents have proposed). There was no opportunity for the public to weigh in on the alternatives because there was no chance for input on the EA, once completed, and there were no alternatives except no action, that were analyzed.

In summary, the EA fails NEPA requirements on several grounds. There was no opportunity to comment on the EA. The impacts of such a project are environmentally significant and an EIS should have been prepared. There should have been alternatives, including an alternative that only transported necessary items by motorized means and an alternative that maintained the dam and reservoir at current levels.

4- Threatened and Endangered Wildlife. The EA fails to address impacts to lynx, a threatened species whose range falls within the project area. It also fails to consider how increased water storage could affect downstream fish populations, including threatened bull trout. On both accounts the decision violates the Endangered Species Act.

Relief Requested

We request the Regional Forester do the following:

- 1- Rescind the Decision Notice / FONSI.
- 2- Instruct the Bitterroot National Forest Supervisor to prepare an EIS if the project goes forth.
- 3- Require the EIS fully analyze at least one alternative that can be reasonably implemented using only traditional skills and non-motorized equipment. This alternative might include a substantially different design than the proposed action, but would still meet all dam safety and maintenance requirements.
- 4- Require the Bitterroot National Forest Supervisor, before authorizing the dam to be raised, to affirmatively determine that the Forest Service has the legal authority to enlarge an existing water storage development in Wilderness and that the dam owners retain a water right for the additional storage approved by the project.

Sincerely,

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