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43 C.F.R §4.410

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**TIOGA BRIDGE & SUSAN CREEK DAY-USE AREA IMPROVEMENTS PROJECT
APPEAL**

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I. Notice of Appeal

Pursuant to 43 CFR 4.410 et seq., the above named groups are appealing the decision to authorize “some, but not all, components of the Proposed Action Alternative as described in the *Tioga Bridge and Susan Creek Day-Use Area Improvements Environmental Assessment*” (ROD 1). We are also appealing the BLM’s finding of non-significance for the entire Project EA, including connected actions described in the decision and EA.

II. Appellants’ Interests

Appellants have standing to appeal this project.

Appellants have standing to appeal this project and request a stay, and would be harmed by the project’s implementation. Members of our organizations have visited the Susan Creek Recreation Area, including the new acres recently acquired from Douglas County. We use and enjoy these beautiful public lands.

We fully supported BLM in purchasing the lands this decision will be implemented on, from Douglas County. We submitted testimony to Douglas County on June 25, 2008, pointing out that these lands include some of the most significant and oldest archeological finds in the Umpqua watershed, deserving of federal protection. We also pointed out that the Douglas County property would significantly enhance the BLM’s Susan Creek Recreation Area because they contained pristine old-growth forests (rare forest type adjacent to highway 138 in the Wild and Scenic river corridor). The property also included 50 acres of riparian reserves that protect the endangered Coho salmon. In the end, the many local citizens who testified at the Douglas County commissioners meeting were successful in convincing two out of three county commissioners to sell the property to BLM. Now that BLM owns this property, it is important for the BLM to fully protect this valuable and remarkable public asset with all applicable environmental regulations.

We attended BLM’s Susan Creek Recreation Area open house on January 1, 2009, submitted scoping comments on the proposed action on February 17, 2009, and submitted comments on the EA on August 26, 2009.

Our use and enjoyment of these forests will be harmed if the BLM brings tracked equipment through the old growth forest to the Susan Creek proposed bridge site, cutting down old growth understory trees¹ and disturbing forest soils and important down woody debris. Our use and enjoyment of the North Umpqua River will be harmed if the BLM brings heavy equipment into the river for the Tioga Bridge geotechnical drilling, disturbing bank vegetation and increasing water turbidity. Our enjoyment will be drastically degraded if any of the Bentonite Clay or other toxic substances spill into the creek or river, especially since there is no toxic spill cleanup plan.

We have standing to appeal this project. “...an appellant must have a legally cognizable interest in the land at issue . . . however, that interest need not be an economic or a property interest. Use of the land will suffice. An organization may establish that it is adversely affected within the

¹ For instance, Pacific Dogwood and Yew trees would have to be cut down.

meaning of 43 C.F.R. 4.410 by showing that one or more of its members uses the public land in question.”² We use the land in question.³

Recreational and aesthetic values, as well as non-monetary watershed values, would be directly harmed by the proposed activities. The harm to appellants’ interests is therefore an “injury in fact,” and satisfies IBLA standards for review. Appellants have a long-standing interest in the management of public forestlands in all the BLM districts and the right to make BLM comply with resource management plans and federal policies.

III. Request for Stay

Pursuant to 43 CFR 4.21, appellants request a stay of further implementation of this project while the board is reviewing this appeal. This request for a stay is justified based on the following standards:

1. The relative harm to appellants if the stay is denied far outweighs any potential harm from granting the stay.

If the stay is denied, the BLM will implement their decision to proceed with the construction of bridges, trails and more recreational facilities, resulting a loss of fish, wildlife and aesthetic resources.

Denying the stay will have negative environmental impacts because the project will be implemented, whereas the government would incur no harm if a stay were granted. The government can simply implement the project at a later time. The courts have found that, “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.”⁴ When environmental injury is “sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.”⁵ In contrast, any harm to the government would be economic and “the Government’s economic loss cannot be considered compelling if it is to be gained in contravention of federal law.”⁶ The only injury to BLM is monetary -- an injury which is not “irreparable” in the equitable sense.⁷

A stay is necessary so that the Board will have the ability to redress our injury after considering the merits of this appeal. The Statement of Reasons below will show how this project will cause immediate and long-lasting harm to the public as well as to old-growth forests, dependent species, the North Umpqua Wild and Scenic Corridor, and important fish resources. Staying the decision will preserve the status quo, allowing the BLM to make the necessary corrections to this project.

² Wyoming Outdoor Council, 153 IBLA 379 at 383 (2000).

³ An example of our use can be seen the pictures we submitted with our 8-26-09 comments, showing our members enjoying the project area.

⁴ *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S. Ct. 1396, 1404 (1987).

⁵ *Id.*

⁶ *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1491 (E.D. Cal. 1988), rev’d on other grounds, 918 F.2d 813 (9th Cir. 1990) (citing *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988)).

⁷ *Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937 (1974).

2. This appeal has a high likelihood of success on the merits.

The likelihood of success on the merits of this appeal is demonstrated in the comments and information we have previously submitted to the BLM, and as presented in this appeal. The Statement of Reasons is included with this request for a stay and fully explains the merits of this appeal, including:

- * implementing this project prematurely,
- * using wrong and missing information,
- * not considering all reasonable alternatives,
- * not providing a spill management plan for the use of fish-killing bentonite clay;
- * creating a situation that requires old growth “hazard” trees to be cut down, without disclosing or considering impacts; and
- * failing to comply with the ESA, NEPA, FLPMA and the Northwest Forest Plan.

We demonstrate in reason 11, below why an EIS is necessary, not only for the geotechnical drilling portion of this project, but also for all the connected actions documented in the EA.

This appeal has a high likelihood of success on the merits, as fully explained in our Statement of Reasons below.

3. There is a high likelihood of immediate and irreparable harm if the stay is not granted.

If a stay is not granted, this project will be implemented, and will result in long-lasting harm to the public and environmental resources, as described in the Statement of Reasons.

4. The public interest favors granting the stay.

Public interest clearly favors granting the stay. The project area is next to a popular recreation area, in an expansion of that recreation area. Refusal of administrative agencies to comply with environmental laws “invokes a public interest of the highest order: the interest in having government officials act in accordance with the law.”⁸

Citizens oppose this project and deserve to have the issues reviewed by the IBLA. We have written to BLM, asking the BLM to consider reasonable alternatives that do not harm recreation activities, degrade old growth forests or harm the habitat of at-risk salmon species. The public interests in healthy fisheries and wildlife populations, as well as sustainable recreation and other ecosystem services, favor granting the stay. A stay will be in the public interest because it will protect the status quo of the environment in, near, and downstream of the project area, and will protect the interests of appellants and local citizens until the IBLA can make a decision on the merits.

⁸ Seattle Audubon Society v. Evans, 771F. Supp.1081, 1096 (W.D Wash.1991), 952F.2d 297 (9th Cir.1991).

Requested Relief

Because of the violations of the Roseburg BLM RMP, NEPA, FLPMA, the ESA and the Northwest Forest Plan, the appellants request a full remand of the project decisions and reconsideration of the project under NEPA that includes more appropriate alternatives to the proposed action.

STATEMENT OF REASONS

1. The ROD violates legal requirements for consultation under Section 7 of the Endangered Species Act.

Oregon Coast Coho are a listed threatened species with critical habitat present throughout the project area.

The proposed Tioga Bridge and Susan Creek Day-Use Area Improvements Project will afflict the North Umpqua River and a number of its tributaries, which support valuable native fish populations that have already been experiencing drastic population decreases (EA 33). The fish populations rely upon important aquatic and riparian resources that stretch throughout all areas of the proposed project. Among the fish populations present in the project area is the threatened Oregon Coast Coho. Critical habitat for coho is also found throughout the project area, not just the Tioga Bridge area (EA 33-34).

The ROD wrongly relies on conclusions in the EA that the only component of the Project that “will have a mechanism for an effect on Oregon Coast coho salmon is construction of the Tioga Bridge” (ROD 6). Critical coho habitat extends beyond the Tioga Bridge area into the areas and locations of other activities proposed in the EA. The BLM inadequately relies on the programmatic consultation through the Army Corps of Engineers and the Oregon Department of Transportation. This programmatic consultation is inappropriate for the Tioga Bridge component and, for the reasons described below, other components of the Project require Section 7 consultation as well.

The BLM has not sufficiently consulted with regard to the proposed project’s impact to coho salmon. Critical coho habitat is found not only in the North Umpqua River but also in the Susan Creek tributary. A significant portion of the project’s proposed actions would take place on Susan Creek, yet the ROD and the EA downplay the value of Susan Creek for coho and side-step the consultation requirements.

Approximately 600 feet of the lower Susan Creek would be subjected to the proposed project (EA 34). According to the EA this 600 feet is relatively steep and more ideal for the spawning and rearing of anadromous fish species other than coho (EA 34). Still, this stretch of Susan Creek does provide habitat for coho salmon (EA 34). Moreover, the EA fails to discuss and consider the upper stretches of Susan Creek for habitat values, specifically those for coho. Considering that the project is limited to the lowest reaches of the stream, it is foreseeable that proposed activities could deter, isolate, or shutout coho salmon using habitat above the lower 600 feet of Susan Creek as well. These are serious impacts and effects that the EA does not address and the ROD ignores.

The EA does recognize the important role of an alcove pool found at the confluence of Susan Creek and the North Umpqua River (EA 34). Fisheries biologists consider this pool an “important rearing habitat for juvenile Chinook and *coho salmon*.” (EA 34, emphasis added). But the ROD nonetheless approves detrimental Project activities that will directly impact the alcove. This approval is given in light of the proposed mitigation steps described in the EA, but these mitigation measures are not enough to allow a project to go forward in a critical habitat area with a listed, federally threatened species present. The ROD must base its decision of a legally required and appropriate consultation with the NMFS. Without the appropriate consultation, the potential for jeopardy cannot be understood. The BLM’s consideration and commitment to mitigation measures such as project design features (PDFs) are appreciated, but

are not enough to fulfill the agency's legal duties to protect and promote the Oregon Coast coho. The BP oil leak in the Gulf Coast is a telling reminder that an agency cannot fully control the environmental consequences of development and resource use. No amount of project design features, prevention, or mitigation can ensure that the coho do not suffer as a result of the proposed project. Thus, it is of utmost importance that consultation be done properly and without shortcuts.

Programmatic Consultation is Inappropriate for the Type and Breadth of the Project

Reliance on the SLOPES IV programmatic biological opinion and incidental take statement is inappropriate. According to the SLOPES IV Handbook, the programmatic biological opinion and incidental take statement is "an agreement between the U.S. Army Corps of Engineers and NMFS that, *if used appropriately*, allows projects to be permitted without going through individual Endangered Species Act Section 7 consultation" (SLOPES IV Handbook 5-156, emphasis added). This programmatic consultation is inappropriate for the Tioga Bridge and Susan Creek Day-Use Area Improvements Project because 1) the Project involves the installation of new bridges and new culverts, not replacement bridges or culverts, 2) road construction within the riparian zone, and finally 3) the Project does not appear to have a clear nexus with the U.S. Army Corps of Engineers. "SLOPES IV is not intended to permit every type of project. Some projects are unique, are outside the scope of what is considered . . . and have effects not analyzed as part of SLOPES IV. The intent is to permit actions and their effects effects [*sic*] that are repeatable and predictable." (SLOPES IV Handbook 28-256). Building a brand new bridge over an unused, dilapidated stream crossing is not repeatable or predictable, and because the Susan Creek Day-Use Improvements involve new culverts and a new bridge, these project components are also outside of the scope of the programmatic consultation.

New Bridges and Culverts

The Tioga Bridge component of the Project is essentially the installation of a new bridge even though the Project will utilize the piers left standing from the old Young's Bay Bridge. For nearly half a century, 46 years, no bridge has been in existence at the proposed site of the Tioga Bridge. Because the area of the proposed Tioga Bridge has not been used as a crossing for such a long time, the natural environment (both aquatic and terrestrial) has likely readapted and returned to the conditions that may have been present before the construction of the old Young's Bay Bridge. In other words, this area is no longer accustomed to and deteriorated by the consequences frequent human use. Thus, the impact of the Tioga Bridge construction on top the old piers would be no less significant than if the Young's Bay Bridge had never existed.

Activities in the construction of the Tioga Bridge include a 270-foot prefabricated laminate wood bridge, pouring concrete to extend the height of the piers, staging two large cranes (on either side of the river), as well as clearing vegetation and compacting soil in order to gain access to the river. Approaches supported by two new concrete foundations, 60 feet long and 10 feet wide would be installed between the existing piers, as well as new footings on both sides of the river. Finally, concrete blocks left from the Young's Bay Bridge will be removed by crane and disposed. A notable side point is that the EA does not consider effects such as increased erosion or turbidity that could result from removal of the old concrete blocks.

The remaining components of the Project (Susan Creek Bridge, intermittent stream crossings, Emerald Trail construction, gazebo expansion, etc.) have significant potential to adversely harm the environment and jeopardize coho salmon, so these components cannot be

appropriately covered by the SLOPES IV programmatic consultation. “The design intent of SLOPES IV for bridges is to remove an old bridge or culvert and replace it with a better structure that improves current baseline conditions. A new bridge would be potentially considered as degradation to baseline conditions.” SLOPES IV Handbook 29-156. This Project will construct new crossings on Susan Creek, specifically a 6-foot by 90-foot pedestrian bridge with concrete or laminate wood abutment and a new culvert for an adjacent low spot. Other pedestrian bridges are also intended at smaller, intermittent stream crossings, requiring excavation for the placement of wood footings. These activities will occur in pristine forest and riparian zones. The Project is not about improving baseline conditions, as required for the SLOPES IV programmatic consultation, because the baseline conditions are currently undeveloped.

Due to the new construction within designated critical coho salmon habitat, the BLM must initiate an individual consultation with NMFS. The conclusion in the EA that project components outside of the Tioga Bridge construction will not have an impact on coho or critical habitat is incorrect. The EA makes this conclusion yet describes multiple ways in which the project will affect the Susan Creek confluence with the North Umpqua, namely the increased sediment flow and turbidity. And consideration is not given in the EA to the impact that more humans and recreation within the critical habitat area might have on coho. These considerations must be taken in a separate Section 7 consultation.

Road Construction Within the Riparian Zone

The SLOPES IV Handbook points out that the programmatic consultation is inappropriate for road construction within riparian zones. The exceptions described are for temporary access roads and for the construction of replacement bridges. Indeed the EA describes a temporary access that will be needed in both the construction of the Tioga Bridge and the Susan Creek Day-Use Improvements, but the Project also intends to create a permanent trail within multiple riparian zones that is the primary impetus for the Project. Thus, it is further questionable whether or not the SLOPES IV programmatic consultation is appropriate.

No Clear Nexus with the U.S. Army Corps of Engineers

The BLM is the acting agency so the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service should be consulted, not the Army Corps of Engineers and Oregon Department of Transportation. The EA relies on the Section 404 permit requirement for this nexus. The breadth of the Project encompasses activities, however, that go beyond those that fall under the Section 404 requirement. The nexus to the Corps is not clear enough to ensure that the Project in its entirety receives proper consultation.

Project Design Features Cannot Replace Aquatic Conservation Strategies Requirements

The Project occurs entirely within an established riparian reserve under the 1994 Northwest Forest Plan standards and guidelines. These standards and guidelines prohibit and regulate activities in riparian reserves that “retard or prevent attainment of the Aquatic Conservation Strategy objectives.” (Northwest Forest Plan Standards and Guidelines 33). “Recognizing the importance of these areas as refugia, any new human disturbance will be greatly restricted.” (NFP ROD 72.) Recreation, such as that proposed here, is a prohibited and regulated activity under the ACS.

Appendix A of the EA provides a cursory discussion of the Aquatic Conservation Strategies. ACS objectives are not sufficiently considered in the EA and the proposed action would not meet

these objectives at the site scale nor the watershed scale. Building a new bridge across the North Umpqua River, a new trail and numerous other riparian crossings such as the Susan Creek Bridge is not in accordance with ACS. In fact the proposed project could result in disruption of spatial and temporal connectivity, for example through the installation of new culverts, which could be improperly laid or inadequately maintained. The EA relies on project design features to prevent or mitigate activities that contradict with other ACS objective, namely objectives to maintain and restore the distribution, diversity, and complexity of watershed and landscape-scale features, the physical integrity of aquatic system (shorelines, banks, and bottom configurations), water quality, the sediment regime, species composition and structural diversity, and well distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species (EA Appendix D 61-63).

The Project Design Features cannot ensure that the proposed project will maintain and restore the ACS objectives; PDFs can only attempt to reduce the adverse impacts that proposed project would inflict. Described in the PDFs, it is clear that the proposed project would likely violate the ACS, for example by compacting soils (scarifying the top 10-12 inches will only “ameliorate” soil compaction, not prevent soil compaction) (EA 14-17). Moreover the PDFs cannot be comprehensive enough to prevent adverse impacts of the Project and to further promote ACS objectives. The PDFs to prevent the introduction and spread of noxious weeds, as another example, focus only on invasive-species introduction during the construction phase of the project, and does not focus on the long-term risk that increased recreationalists could pose (EA 16). Other PDFs fall short of ensuring ACS objective would be attained as well.

Because the Project is proposed within the critical habitat of the Oregon Coast coho and within a designated Riparian Reserve, the ACS must be more thoroughly considered. This consideration cannot be done through the reliance of PDFs, or the reliance on an overly generalized programmatic consultation that does not fit the project in the first place.

2. The EA fails to consider indirect and cumulative impacts as required by NEPA.

Impacts Analysis

Direct and indirect cumulative impacts of a proposed action are defined as the impacts of past, present and reasonably foreseeable future actions (CFR § 1508). Agencies must do cumulative impacts analysis as part of the NEPA process. Based on relevant case law, a cumulative impacts analysis must be “more than perfunctory” (*Brong*, 492 F.3d at 1133), and requires “some quantified or detailed information.” (*Klamath-Siskiyou* 387 F.3d at 993, quoting *Ocean Advocates* (361 F.3d at 1128) and *Neighbors of Cuddy Mountain v. USFS* (137 F.3d 1372, 1379-80). In *ONRC v. BLM*, a cumulative effects analysis was not upheld because it “[d]id not sufficiently identify or discuss the incremental impact that can be expected . . . or how those individual impacts might combine or synergistically interact with each other to affect the watershed environment.” (823, quoting *KSWILD v. BLM*, 387 F.3d at 997).

Here the BLM has not addressed any cumulative impacts. The area of the proposed project is extremely valuable as critical habitat to listed species as well as a riparian reserve. It is also an area with a history of heavy human use. Thus, a cumulative impacts analysis is not only required by procedure for the Project, but would be highly informative for determining the environmental impacts of Project on the particular area.

3. The EA is not in conformance with the 1995 Roseburg District Record of Decision and Resource Management Plan directing the BLM to manage and protect the North Umpqua River as a congressionally designated Wild and Scenic River.

As mentioned in previous comments, the proposed project violates general resource management requirement of the Wild and Scenic Rivers Act by adversely impacting the Outstandingly Remarkable Values (ORVs) of the North Umpqua River and failing to maintain and enhance the natural integrity of river related values. The scenic quality of the river will be degraded by the cutting of riparian forest, build-up of more human structures, and by installing the Tioga Bridge, which will be visible from the highway and detract from the surrounding natural beauty.

Fisheries is an ORV that will be greatly impacted by increased accessibility to the riverbank. “Fisherman in the area may be impacted by other recreationalists crossing the bridge and accessing the North Umpqua Trail. Their presence may spook fishing holes” (EA 22). The EA also inexplicably assumes that the newly developed access and the increased number of visitors to the river will not result in more anglers to the area (EA 22). The EA later states in contradiction that “[n]ewly provided access to the south side of the river may result in increased fishing pressure . . . as anglers take advantage of formerly inaccessible fishing areas” (EA 36). Without any empirical evidence or explanation otherwise, the EA subsequently concludes that the increased pressure caused by fishing dispersed into new reaches of the river, and not due to an increase of anglers (EA 37). This is false conclusion considering the overall increasing human population and attractiveness of the North Umpqua fisheries.

Water quality is another threatened ORV. The EA does not consider how an increased human presence could affect the water quality. Concerns are refuse and waste that although likely inadvertent, will inevitably be left behind by day-users. Additionally, with the increased use of the North Umpqua trail and the new use of the proposed Emerald Trail, more automobile parking will result. Even though the ROD does not approve the expansion of the Susan Creek parking lot, the vehicles transporting the recreationalists of the new facilities will need to go somewhere. Thus, there is still a very valid concern with regard to the petroleum-based contaminants that could enter the waterways. The risk of spilling bentonite clay into the waterways is also a very real concern. As is soil erosion and compaction resulting from use of large equipment during the construction process.

Recreation is also an OHV, but “protecting and enhancing the recreational value does not equal major recreational facilities developments as proposed.” (Umpqua Watersheds, Klamath Siskiyou Wildlands Center and Cascadia Wildlands EA Comments 17). “New facilities built in response to visitor demands, will be limited in the corridor. The basic natural character of the river corridor will not be compromised by any new developments” (Desired Future Conditions from the Wild and Scenic River Plan 1992).

This appeal has been submitted by:

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