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MISSOULA, MT

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PATRICK E. DUFFY

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

SIERRA CLUB, INC., and ALLIANCE)	CV 03-22-M-DWM
FOR THE WILD ROCKIES, INC.,)	
)	
Plaintiffs,)	
)	
vs.)	ORDER
)	
DEBORAH L.R. AUSTIN, in her)	
official capacity as Forest)	
Supervisor for the Lolo National)	
Forest; and the UNITED STATES)	
FOREST SERVICE, an agency of the)	
U.S. Department of Agriculture,)	
)	
Defendants,)	
and)	
)	
MINERAL COUNTY, CITY OF SUPERIOR,)	
ST. REGIS SCHOOL DISTRICT, SUPERIOR)	
SCHOOL DISTRICT, MONTANA COALITION)	
OF FOREST COUNTIES, AND TRICON)	
TIMBER, LLC,)	
)	
Defendant-Intervenors.)	
_____)	

Plaintiffs Sierra Club ("Sierra") and Alliance for the Wild Rockies ("Alliance") filed a motion on February 10, 2003, for a preliminary injunction to halt timber harvesting in conjunction

with the Lolo National Forest Post-Burn Project. Arguments on the preliminary injunction were consolidated with arguments for summary judgment and were held in Missoula on March 21, 2003. A temporary restraining order was issued on April 9, to prevent timber harvest activities in Units 806 and 708. Those harvests were scheduled to begin on April 11 and April 15, 2003, respectively. The TRO was renewed on April 18, pending my Order on the merits of the summary judgment arguments. This Order explains my reasons for issuing a preliminary injunction on April 25, 2003. That Order granted and denied summary judgment, as explained here.

A. Background on the Lolo Post-Burn Project

The Lolo Post-Burn Project includes a number of management activities on the Lolo National Forest. It involves road decommissioning, restoration projects, and the proposed logging of approximately 35.2 million board feet of lumber. The Project Area covers nearly 127,000 acres. It includes lands that were burned in four of the largest fires on the Lolo National Forest in 2000. The logging includes commercial thinning and salvage logging in both burnt and insect-killed stands. Approximately 2,200 acres of the Project Area is currently unroaded, some of which is contiguous with Inventoried Roadless Areas (IRAs).

B. Plaintiffs' Arguments

Plaintiffs make two major arguments. First, they contend

that the Forest Service failed to analyze the effects of the Lolo Post-Burn Project on uninventoried roadless areas. Second, they assert that the Project violates water quality standards. Because the Forest Service insufficiently analyzed these effects, the Plaintiffs argue that the Project must be stopped until the appropriate factors are considered by the agency.

1. Unroaded Areas

1.5 of the 1.7 miles of new road in the Lolo Project are in areas characterized as possessing roadless characteristics. Some of these areas are adjacent to Inventoried Roadless Areas. ROD 28. The Forest Service decided not to consider the impacts of these sales on the roadless areas. It also did not decide whether those areas would be considered for future roadless inventories or as wilderness in this round of decision-making. The Forest Service chose instead to defer this consideration until the preparation of the next Forest Plan revision. FEIS 3-61, ROD, 29. Plaintiffs take exception to this inaction. Deferring this decision, Plaintiffs argue, is unlawful for three reasons.

First, it is argued that NEPA requires a detailed analysis of any "irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C)(v). Sierra and Alliance assert that the deciding officer avoided this mandate by

concluding that no irretrievable or irreversible commitment of the resource would occur in this project. ROD, 29. They claim such a conclusion conflicts with the law of the Ninth Circuit, which holds that logging projects on such areas is in fact irreversible and irretrievable. Smith v. U.S. Forest Service, 33 F.3d 1072, 1078 (9th Cir. Wash. 1994); California v. Block, 690 F.2d 753, 763 (9th Cir. 1982). If this is so, then the decision contravenes the law and as such is arbitrary and capricious, in violation of the Administrative Procedures Act, 5 U.S.C. §706(2)(A). The final prong of this attack claims that the finding of no commitment of the resource depended on a conclusion that the roads are temporary. ROD, 29. This conclusion is, according to Plaintiffs, contradicted by conclusions drawn elsewhere in the record. ROD, 28; FEIS 2-35.

The second aspect of the deferral argument claims the Forest Service violated NEPA by putting off considering the effects of its action until after the action has occurred. 40 C.F.R. § 1500.1(b)(2003) and § 1502.22; Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998.) The Forest Plan is not scheduled for revision until 2006, years after this project has been implemented. Consequently, avoiding such critical aspects now is a dereliction of responsibility. This premise stems from Ninth Circuit law which holds that large tracts of uninventoried land cannot be developed until wilderness

classification has been considered. Smith, 33 F.3d at 1073; Native Ecosystems Council v. Dombeck, 304 F.3d 886, 896-7 (9th Cir. 2002).

The third claim challenging the inaction is that the Forest Service relied on a suspended Forest Service regulation as the basis for its decision to delay consideration of the impact on roadless areas. The Forest Service relied on 36 C.F.R. § 219.9(b)(8) (FEIS 1-21, 3-60), which was withdrawn by the Bush administration in 2001. Plaintiffs' Preliminary Injunction Brief, 8. To rely on a suspended provision in decision-making is alleged to be arbitrary. Furthermore, the argument suggests the regulation requires consideration of the roadless areas in Forest Plan revision but does not permit failure to consider them under NEPA. Even if the regulation were valid, Plaintiffs claim, it would not excuse the Forest Service's decision here.

Plaintiffs conclude that the Forest Service violated NEPA by failing to analyze adequately the effect of the project on these unroaded areas. Prelim. Inj. Brief, 9. This argument is based on the notion that the Forest Service has concluded previously that uninventoried unroaded areas possess similar values to inventoried roadless areas. In this project, the Forest Service considered some impacts on inventoried areas but not on the contiguous non-inventoried areas. While the Forest Service may have analyzed the Project's impacts on different elements, i.e.

soils, recreation, etc., it did not analyze its impact on the areas' value as roadless or wilderness itself. Prelim. Inj. Brief, 12. (Relying on Smith, 33 F.3d at 1079, and California v. Block, 690 F.2d at 764.)

2. Water Quality

Plaintiffs' second major argument is that the Forest Service failed to consider adequately water quality issues when it was designing the Lolo Post-Burn Project.

In essence, this issue is addressed by a two prong argument. First, Sierra and Alliance claim, the Forest Service is bound by the Clean Water Act § 313 (33 U.S.C. § 1323) to follow Montana's water quality standards. The project at issue here takes place in a number of areas with rivers and streams that the State of Montana has designated as failing to meet water quality standards. These below standard waters include Trout Creek, Ninemile Creek, the Clark Fork River, Flat Creek, and Big Blue Creek. Prelim. Inj. Brief, 13; FEIS 3-93, 94; Prelim. Inj. Br. Attachment F. The argument is that Montana law prohibits increases in naturally occurring sediments in streams classified, as these streams and rivers are, as B-1. Admin. R. Mont. 17.30.623(f)(199).¹ The FEIS finds that the project will increase sediment above naturally occurring amounts. FEIS 4-47

¹In its Brief, Plaintiffs inadvertently cite Mont. Code Ann. § 17-30-623 for this regulation.

(Fig. 4.6.19); 4-38 (Fig. 4.6-7); 4-38, 4-56 (Fig. 4.6.11); 4-56; ROD, 29; FEIS 3-71 (Fig. 3.11.1) Brief, 14-15. The underlying pressure of Plaintiffs' position is that sediment in streams has a detrimental effect on fish, including the westslope cutthroat and bull trout that live in this area. The bull trout is a federally listed threatened species under the Endangered Species Act and is particularly sensitive to sediment. Prelim. Inj. Br., 15. It is argued that the Forest Service itself has said that these fish are "functioning at unacceptable risk" and "at risk" in this area. FEIS 3-235, Prelim. Inj. Br., 16. While Sierra and Alliance acknowledge the Forest Service's claims that following this project's road decommissioning, there will be less sediment overall going into the streams than there is now, nonetheless, they claim a potential future positive result cannot justify a current violation of the law. Prelim. Inj. Br., 16. Consequently they argue the Forest Service's choice of Alternative 5 is arbitrary and capricious.

Plaintiffs also argue that the Forest Service does not have sufficient evidence of the total sediment that will be produced by these activities or of the streams' capacity to handle the sediment that will be produced. At oral argument, Plaintiffs' counsel emphasized the lack of Total Maximum Daily Load figures for the Clean Water Act §303(d) in the listed stream segments involved in this project. Neither do the segments have a

specific Forest Service determination of how much sediment will run into the streams as a result of its acts, in violation of CWA § 303(d). Prelim. Inj. Br., 17. The Plaintiffs' claim the Forest Service relies unduly on Best Management Practices (BMPs). Prelim. Inj. Brief, 17. The core of this assertion is that the Forest Service has not established that BMPs, some of which are outlined without scientific basis, would protect the streams from sedimentation. Brief, 18-19.

C. Forest Service's Motion for Summary Judgment

The Forest Service makes three main arguments in its motion for summary judgment, in response to Plaintiffs' arguments about unroaded areas and water quality.

1. Unroaded Areas

First, the Forest Service claims it complied with NEPA in its analysis of the impacts of the Lolo Project on unroaded areas. The Forest Service argues that determination of whether an area will become inventoried roadless or wilderness is made at the Forest Plan revision stage, not at the time of project implementation. Defendant's Summary Judm. Br., 4. The argument continues by claiming the current 1986 Forest Plan identifies which areas have wilderness or roadless potential. Sum. Judg. Brief, 4. It argues that projects are designed to implement the Forest Plan. From the Forest Service's perspective, Plaintiffs are trying to force a plan revision to occur during project

design, which is not required by law. Sum. Judg. Brief, 5. The Forest Service argues that the irretrievable, irreversible analysis already occurred during the forest planning process and consequently it need not be repeated at the project stage. This is based on the notion that, "[a] holding to the contrary would eviscerate the very intent of a Forest Plan, and burden the Forest Service with the 'sisyphean feat of forever starting over in [its] environmental evaluations, regardless of the usefulness of such efforts.'" Price Road Neighborhood Ass'n v. United States Dept. of Transport., 113 F.3d 1505, 1510 (9th Cir. 1997).

The Forest Service suggests Plaintiffs' reliance on Smith and California v. Block is misplaced. They distinguish the cases by arguing that neither case says the Forest Service must reconsider the potential of the lands for future designation every time a site specific project occurs, so long as it did so at the planning stage. Summary Judm. Br., 5.

On the issue of the improperly cited Rule, the Forest Service argues that even if they were wrong, the essential mandate is the same in the 1982 Rules, i.e., that the determination of roadless and wilderness areas is made in the Forest Plan and not in the project plans. Summary Judm. Br., 6.

The Forest Service's second main argument on the issue of roadless areas is that it adequately evaluated the impacts of the project on unroaded areas. The Post-Burn FEIS identified all

roadless areas in the project area, inventoried or not. Summary Judm. Br., 7. The Forest Service asserts that the FEIS then analyzed the impacts of the Project on the unique characteristics of these unroaded areas. FEIS 4-19; Summary Judm. Br., 8. According to the Forest Service, the Project will actually increase the amount of unroaded area over time, after the Lolo National Forest decommissions approximately 224 miles of roads. ROD, 15; Summary Judm. Br., 8. The Project also considers the effects of logging on unroaded areas. FEIS 4-27; Summary Judm. Br., 9. Much of the logging will be done by helicopter, which does not preclude these areas from being considered in the future for roadless or wilderness designation. Summary Judm. Br., 9. In the short term, these areas would not be eligible for such designation, but that alone does not make the current logging project a violation of NEPA. Summary Judm. Br., 10.

2. Water Quality

The Forest Service rebuts Plaintiffs' water quality arguments first by claiming that the sediments produced are predominantly due to the road decommissioning and restoration activity and not road-building activities. The future benefits outweigh short-term harms because sedimentation is predicted to decrease in the long term due the Project. Summary Judm. Br., 10; FEIS 4-64, 65.

The Forest Service argues that the Post-Burn Project

complies with the Clean Water Act and Montana's Water Quality Standards. Summary Judm. Br., 10. Defendants interpret the R. Admin. Mont. differently from Plaintiffs. "Naturally occurring" sediment is defined in Mont. Admin. R. 17.30.623(2)(f) (2002) as "conditions or material present from runoff or percolation over which man has no control or from developed land where all reasonable land, soil and water conservation practices have been applied." Brief, 11, emphasis added. The Forest Service claims that practices outlined in the Lolo Plan easily meet this latter requirement. This claim is bolstered by the warrant that the Montana Department of Environmental Quality and the U.S. EPA reviewed the Post-Burn Project and concluded that it complies with Montana Water Quality Standards. Summary Judm. Br., 12.

In fact, sediment levels are already far above natural levels due to the 2000 fires, and they will be reduced following complete implementation of the Lolo Post-Burn Project. Brief, 12. The Forest Services argues that the figures cited by Plaintiffs identifying how much sediment will increase after the plan are misleading: the no-action option would result in even greater sedimentation. Summary Judm. Br., 13.

In response to Plaintiffs' argument that the Forest Service failed to develop total maximum daily loads for sediment release, Defendants argue that Montana law does not require them to do so, and therefore, the Forest Service is not in violation of CWA §

303(d). Summary Judm. Br., 13. According to Defendants, Mont. Code § 75-5-703(10)(b)(2001) allows activities to proceed in the absence of a TMDL as long as they comply with reasonable practices. Summary Judm. Br., 14. The Service argues that its use of BMPs on these projects amounts to such reasonable practices.

In defense of BMPs, the Forest Service claims that it carefully monitors these practices, and they are sufficiently based on Forest Service experience and expertise. They are not simply voluntary but are part of the enforceable contract terms. Brief, 14. The FEIS must provide evidence of the effectiveness of mitigation measures that satisfies the legal standard of the "rule of reason", not "substantial support," as Plaintiffs argued. Summary Judm. Br., 15.

Finally, the Forest Service argues that it considered and disclosed all potential impacts on fish. FEIS 4-129-159. The Forest Service contends this project will benefit fish in the long term. Over time, closing roads will reduce the negative impacts of roads on streams. Arguably, the potential short-term increases in sedimentation due to the Project will be less than short-term sediment from roads and due to the fires. The Project supposedly includes all possible means to lessen these short-term impacts, according to the Forest Service. Brief, 17. The Forest Service argues that it consulted with the U.S. Fish and Wildlife

Service about the impacts on the bull trout and the Fish and Wildlife Service concluded that the Project is "not likely to jeopardize the continued existence" of bull trout. AR Vol. 24, M-439 at 46; Summary Judm. Br., 18. If accurate, it is contended that this determination satisfies the law's requirements.

D. Intervenor's Motion for Summary Judgment

Intervenors take the same position as Defendants, for the most part. Intervenors claim that Plaintiffs' request that the Lolo National Forest should consider impacts on roadless areas is in contravention of NEPA and NFMA, because these issues are dealt with in the Forest Plan. It is unnecessary to reconsider the issue in the project plans. The Lolo Forest Plan allocates many of the roadless lands in this project to Management Areas (MA) that are deemed suitable for timber production. Brief, 6. Therefore, according to Intervenors, the Post-Burn Project cannot overrule those designations.

Intervenors also argue, in their Motion for Summary Judgment, that Plaintiffs' Clean Water Act claims are barred by the Act's 60 day notice requirement in 33 U.S.C. § 1365(b)(1).

Finally, Intervenors argue, relying on Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1496 (9th Cir. 1995), that even if the Court finds a violation of law, it must not issue an injunction without further weighing the equities, including further briefing and argument. Intervenors' Summary

E. Analysis

1. Standard for Summary Judgment

A party moving for summary judgment is entitled to such if the party can demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986).

The party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the moving party has met his initial burden with a properly supported motion, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine

² Forest Conservation Council is clearly distinguishable. The issue there was whether the Appellants had a right to intervene. In this case, Intervenorors have been fully involved in briefing and arguing all along; the analysis underlying Forest Conservation Council is inapplicable here.

issue for trial." Anderson, at 248. The nonmoving party may do this by use of affidavits (including his own), depositions, answers to interrogatories, and admissions. Id.

2. Standard of Review of the Forest Service under the APA

Judicial review of agency decisions is governed by the Administrative Procedures Act, which directs a court to overturn agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Native Ecosystems Council v. Dombeck, 304 F.3d 886, 891 (9th Cir. 2002). Failure of the agency to comply with a clear mandate is an abuse of discretion. ONRC Action v. Bureau of Land Management, 150 F.3d 1132, 1137 (9th Cir. 1998).

3. Roadless Areas

The first issue that must be considered is how the dispute is characterized. The Forest Service misconstrues, in part, Plaintiffs' arguments about unroaded areas. The Forest Service emphasizes, correctly, that the determination of whether areas are to become designated roadless is a matter for the Forest Plan revision process, and not site specific determinations. Summary Judm. Br., 4-6. However, Plaintiffs are not arguing that the Forest Service must have considered these unroaded areas at this time for wilderness designation. Rather, the argument is that the Forest Service must consider the Project's impacts on

potential future designation--on the characteristics that may or may not allow the areas to be so designated in the next revision--whether or not it intends to revise the areas designation. If the Forest Service had no duty to consider to the impacts of projects on non-designated wilderness and unroaded areas, there would be no check on the use of those areas, and there would be no back-up measure to assure at least the potential of future wilderness designations. The Lolo National Forest's Plan mostly allows for logging in the disputed areas involved in this Project. However, before it takes any action that may preclude these areas from future roadless or wilderness designation, it has a legal duty to consider those impacts.

The parties dispute the meaning of Smith v. U.S. Forest Service, 33 F.3d 1072 (9th Cir. 1994), and California v. Block, 690 F.2d 753 (9th Cir. 1982), based on these two views of the controversy. The Forest Service is right that the cases are distinguishable on the basis that they deal with an initial consideration of the effects of a project on the potential for inclusion as wilderness. However, Plaintiffs are correct that the underlying theme in both cases, if not the substantive holding, is that logging is an irretrievable commitment of resources to the extent that logging precludes a later less onerous alternative. To that extent, Plaintiffs are asking the Forest Service not to consider wilderness or inventoried roadless designation at this point, but simply to consider that certain management activities by their nature erase future options from

the board.

The Forest Service hangs its hat on the contention that asking it to reconsider wilderness designation every time there is a timber sale would eviscerate the purpose of the Forest Plan. This view overstates Plaintiffs' request. Some of these unroaded areas are plainly never going to be eligible for any kind of wilderness or roadless designation, especially those that are squeezed between clear cut units. Thorough consideration of the impact of the project on such an area would be quick and simple and would not involve reinventing the wheel each time.

This being the case, the next question is whether the Lolo National Forest sufficiently consider these impacts. I conclude that it did. The record shows that the Forest Service considered the impacts of the Post-Burn Project on unroaded areas to the extent required by law. 66 Fed. Reg. 65797; FEIS 3-58-9; 3-60-70; 4-19; 4-26,27,29; ROD 28; So long as the Forest Service gave the issue a hard look, which it did, then it is beyond my prerogative to compel a different course of action. That is a matter particularly within agency expertise. Plaintiffs' motion for summary judgment on this issue is denied and the Defendants' motion for summary judgment is granted.

4. Water Quality

The Forest Service's handling of water quality in the Post-Burn Project is a simpler issue. In short, the law was not followed. The Project occurs in several drainages with designated water quality limited stream segments. The Project

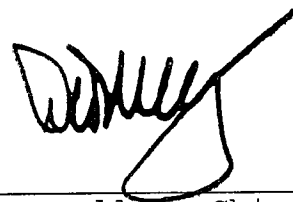
will result in sedimentation to streams. The Forest Service argues that the initial increase caused by the Project will be followed by a greater decrease over current levels after the Project is completed. That may or may not be true. However, the Forest Service is working by speculation here because neither it nor the State of Montana has established Total Maximum Daily Loads. By the Forest Service's own estimates, fish are likely to be threatened. Before the Forest Service decides to do anything that will increase sedimentation, even if the proposed action should ultimately decrease long-term sedimentation, the Forest Service must know how much the stream can carry away. Without a baseline, there is no way but speculation to determine how the sediment impacts water quality, adversely or beneficially. The Best Management Practices employed in the Project are not sufficiently reasonable under Mont. Code Ann. 75-5-703(10)(b), because it is possible that even perfect compliance with the best practices would not be enough. The Forest Service simply does not know. By deciding to carry out this project in watersheds with already compromised streams, without knowing the exact condition and capacity to cope of those streams, the approval of the Lolo Post-Burn Project is arbitrary and capricious within the terms of the APA. The impacted streams include Trout Creek, Ninemile Creek, the Clark Fork River, Flat Creek, and Big Blue Creek. FEIS 3-93, 94; Plaintiffs' Prelim. Inj. Br., 13. Consequently, sales impacting these stream segments cannot

proceed until TMDL's are established.³

F. Conclusion

Therefore, it is HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED as to the consideration of unroaded areas and GRANTED on the issue of water quality. Defendant's Motion for Summary Judgment is GRANTED on the issue of consideration of unroaded areas and DENIED on the issue of the water quality. The United States Forest Service is enjoined from proceeding on Lolo National Forest Post-Burn Project activities affecting § 303(d)-listed segments of Trout Creek, Ninemile Creek, the Clark Fork River, Flat Creek, and Big Blue Creek, until Total Maximum Daily Load figures for these stream segments have been established by the State of Montana and considered by the Forest Service.

DATED this 30th day of April, 2003.



Donald W. Molloy, Chief Judge
United States District Court

³ In the past, the State has on a cooperative basis expedited the TMDL process. At oral argument, the Forest Service conceded that it had not asked the State to move quickly to establish TMDLs for these affected waters. The EPA's May 8, 2002 letter to Chris Partyka, Project Leader on the Plains/Thompson Falls Ranger District (attached as Attachment H to Plaintiffs' Brief in Support of Preliminary Injunction) recommended that the Lolo contact the Montana Department of Environmental Quality regarding TMDLs.