

Friends of Living Oregon Waters (FLOW)
P.O. Box 2478
Grants Pass, OR 97528
541-251-3569

January 28, 2005

USDA Forest Service
Appeals Deciding Officer: Regional Forester
ATTN: 1570 Appeals
P.O. Box 3623
Portland, OR 97208-3623

Forest Supervisor
Siskiyou/Rogue River NF
333 W. 8th Street
P.O. Box 520
Medford, OR 97501-0209

**Re: Notice of Appeal of the Decision Notice and FONSI for the Illinois River
Recreational Development EA,**

Dear Reviewing Officer:

Friends of Living Oregon Waters (FLOW) hereby files this Appeal of the Decision Notice and FONSI for the Illinois River Recreational Plan, pursuant to 36 C.F.R. § 215.

Pursuant to 36 C.F.R. §215.14(b), the Appellant provides the following information:

(1) This is a Notice of Appeal filed pursuant to 36 C.F.R. 215.

(2) The name, address and telephone number of the Appellant is:

Friends of Living Oregon Waters (FLOW)

Attn: Dan Serres & Joe Serres

P.O. Box 2478

Grants Pass, OR 97528

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(3) The Appellant objects to the decision to adopt a mixture of Alternatives from the Environmental Assessment prepared for the decision of the Illinois River Recreation. The Decision Notice was published to the Medford Mail Tribune on December 15, 2004, thereby establishing a 45-day appeal period. The deadline for appeal is Monday, January 31st, 2005 and

this appeal was sent via postal mail and e-mailed (appeals-pacificnorthwest-rogueriver-siskiyou@fs.fed.us) to the Forest Service and the Appeals Deciding Officer on Friday, January 28, 2005.

(4) The Appellants' objections and issues:

- The Appellants object to the lack of determination by the Forest Service under the Wild and Scenic Rivers act regarding a user capacity for the Illinois River Wild and Scenic Corridor thereby rendering illegal management actions proposed for the Wild and Scenic Illinois River.
- The Appellants object to the Forest Service's failure to adequately analyze impacts to Illinois River outstandingly remarkable values under the National Environmental Policy Act and the Wild and Scenic Rivers Act.
- The Appellant subject to the tiering of the IRRD EA, Decision, and FONSI to a Wild and Scenic River Management Plan which is incomplete, failing to address user capacity, and which has never been properly reviewed by the public under NEPA.
- The Appellants object to the Forest Service's failure to adequately analyze the cumulative effects of developing increased recreational access without clearly developing a cumulative impacts analysis or a user capacity.

Appellants request a remand of the Decision Notice, and a stay of all actions pertaining to the IRRD EA and the Decision Notice.

(5) The Forest Service has clearly failed to comply with the National Environmental Policy Act (NEPA), the Wild and Scenic Rivers Act, and the Administrative Procedures Act (APA).

Appellants Interest

Friends of Living Oregon Waters (FLOW), P.O. Box 2478, Grants Pass, Oregon, 97528, is an IRS-determined 501(c)3 organization comprised of hundreds of individuals dedicated to

advocating for the protection and restoration of Oregon's waters. FLOW uses legal oversight and public education to help protect *Oregon Waters* from the impacts of pollution and development. Illinois River recreational developments adversely affect FLOW members use and enjoyment of the area in which FLOW members hike, swim, photograph, view wildlife and birds, study, and find solitude.

FLOW has an organizational interest in providing its members and the public with the information that NEPA requires the Forest Service to compile and to disclose in environmental documents. Members of FLOW have a right to know the environmental costs and tradeoffs involved in resource management decisions. Appellants have a right under NEPA to review and comment upon proposals for major federal actions that may significantly effect the environment, such as the approval of this project.

FLOW is a "party to the case" as comments were provided for the Environmental Assessment and representatives of FLOW have met with agency personnel regarding this project on multiple occasions. The interests of the Appellants and their members have been adversely affected by the Siskiyou National Forest's failure to prepare an adequate NEPA document for this decision. FLOW therefore appeals, pursuant to 36 C.F.R. 215, the decision to proceed with this project, the Environmental Assessment and the Finding of No Significant Impact (FONSI).

Request for Stay

A full stay is necessary to prevent irreversible environmental damage, damaging the interests of FLOW members and to prevent unnecessary expenditure of taxpayer money on this project.

When environmental injury is "sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Production Co. v. Village of Gambell, U.S. 545 (1987). There is evidence of the project's immediate adverse impact on the recreational interests of Appellant members and the adverse impacts that the project will have on soils, plant species, wildlife species, recreational quality and the physical and chemical integrity of project area riparian areas. On the other side of the balance there are not any countervailing equities that would suggest a stay is inappropriate, or even counterproductive. Furthermore, we

are not aware of any irreparable injury to third parties that would be caused by the entry of a stay against development of this project.

Statement of Reasons

1. FAILURE TO IMPLEMENT A DETERMINED USER CAPACITY UNDER THE WILD AND SCENIC RIVERS ACT

Public comments on the Draft EA for the Illinois River Recreation Development Project have identified serious shortcomings in the analysis of environmental impacts, given the lack of proper planning for the entire Wild and Scenic Section of the Illinois River. The current decision and EA reflect a failure to fully consider the capacity of the River for all types of use. The EA offers the public an incomplete analysis of the possible impacts of the proposed developments along the Illinois River because it fails to establish a threshold of use beyond which the resources of the Illinois Valley will begin to be diminished. Clearly, this is an issue for the Illinois Wild and Scenic River Management Plan (IWSRMP), but because this EA and Decision tier to an incomplete current IWSRMP, the issue is valid and needs to be resolved before these recreational projects can move forward.

Indeed, the EA offers no comprehensive analysis of the possible effects of the proposed recreational developments. Although the SNF claims that the action will, in fact, limit the amount of parking at recreational sites (thus limiting the number of users), it does so without offering the public reasoning that suggests that the amount of use allowed by the developments will “maintain or improve” the outstandingly remarkable values of the Wild and Scenic River corridor. Essentially, there is no baseline analysis for recreational capacity in the Illinois Wild and Scenic River corridor, particularly in the Scenic section of the Illinois that sees the heaviest recreational use. Although the SNF claims to be following proper management direction as described in Chapter 1 of the EA, the SNF fails to meet the NEPA standard of presenting the public with a “hard look” at the possible environmental consequences of the action, and it fails to

establish the necessary protections under the Wild and Scenic Rivers Act. Recreation is an important value of the Illinois River corridor, but the SNF must clearly establish the degree to which recreation can occur without diminishing returns to recreational users and damage to other ORVs. Moreover, recreational use must be considered and limited while fully considering the impacts of other, non-recreational impacts.

In April 2004, the U.S. Court of Appeals for the Ninth Circuit directed the National Park Service (NPS) to prepare a "new or revised" comprehensive management plan that addresses two deficiencies identified in the Court's October 27, 2003 opinion (*Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 803 9th Cir. 2003). The Court ruled that the revised plan must implement a user capacity program that presents "specific, measurable" limits on use. Without a "concrete measure of use", a Wild and Scenic River management plan fails to sufficiently address user capacities as required by the Wild and Scenic Rivers Act. The current effective management plan for the Illinois Wild and Scenic River (which is incomplete and out-of-date) lacks any in-depth consideration of user capacities.

While an agency managing a Wild and Scenic River may not be required to implement any specific cap on use, the Merced River ruling demonstrates that the agency is required to develop and implement a user capacity plan with "quantitative measures sufficient to ensure its effectiveness as a current measure of user capacity" (Opinion p. 12). Essentially, the SNF has failed to begin the development of a user capacity assessment, offering no rationale linking the levels and types of river use with possible environmental effects. Under the standard set by NEPA wherein the SNF is required to "articulate a rational connection between the facts and the choice made," the current Decision Notice and FONSI should be considered "arbitrary and capricious," having relied on a management plan which is inadequate by not addressing user capacity in thorough detail, with sufficient logical rationale.

Without a specific, measurable plan to address and limit user capacity, the SNF cannot credibly develop actions within the Wild and Scenic River Corridor that satisfy either the Wild and Scenic Rivers Act or the National Environmental Policy Act in terms of protecting and enhancing the ORVs of the river. The ORVs of the river, as described in the EA, are scenery,

recreation, fisheries, water quality, and botanical resources. In light of the recent Merced River case, the current management plan, written in 1985 and reviewed in 1998, fails to adequately address the user capacity of the Illinois River. Indeed, excessive use could directly threaten all ORVs of the river. Hence, the SNF must re-write and develop its alternatives in accordance with a fully developed concept of user capacity in the Illinois Wild and Scenic River corridor.

The decidedly cursory and incomplete 1985 management plan for the Illinois Wild and Scenic River fails to meet the legal standard of addressing user capacity, according to the ruling in the Merced River case. Crucially, the current management plan fails to address user capacity whatsoever in the Scenic and Recreational portions of the river, and its user capacity program for the Wild Section should be reviewed and revised. The plan was not intended to be a final plan, and page 32 states that “because accurate use figures have not been gathered to date, the Forest Service will monitor use. Upon review of this information, changes may be necessary in forthcoming years.” Actions that depend on a concept of user capacity—such as the proposed recreational development—should not rest on a management plan that lacks adequate data and NEPA review for this parameter.

Furthermore, the SNF’s current plan does not rise to the standard of actually “addressing” the user capacity issue, although it does mention user capacity in its 1985 management plan. To “address” the issue is not to simply mention it without developing well-reasoned conclusions. Indeed, to simply mention user capacity without developing a river-wide, rational program for setting the capacity fails in terms of the NEPA standard of “articulating a rational connection between the facts found and the choice made.” In the Merced River case, the NPS actually addressed user capacity in greater detail than in the management plan for the Wild and Scenic Illinois River. The SNF is relying on an analysis that it admits is incomplete, without even attempting to develop user limits on the Scenic and Recreational portions of the river. As described in the Merced case, this level of planning would have fallen short of the requirements of NEPA and the Wild and Scenic Rivers Act—both by failing to “yield any actual measure of user capacities, whither by setting limits on the specific number of visitors, by monitoring and maintaining environmental and experiential criteria...or through some other method”, and by

failing to present any rationale whatsoever in the Recreational and Scenic sections of the river (Merced River case, Opinion, page 10).

Only for the portion of the Illinois downstream from Briggs Creek does the USFS even attempt to set a user capacity in its current management plan, and this permitting process probably warrants review as well. Clearly, this does not meet the standard set by NEPA and the Wild and Scenic Rivers Act. The Merced River case demonstrates that the plan's current concept of user capacity is woefully inadequate. Hence, the public cannot be sure the proposed actions are within a user capacity that ensures the maintenance and improvement of the Illinois River's ORVs. Lastly, the APA provides that the courts may set aside final agency action (the Decision notice and the failure to comply with adequately with the WSRA) that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) & (D).

2. PROPOSED ACTION TIERS TO A MANAGEMENT PLAN THAT IS INCOMPLETE AND LACKS NEPA REVIEW

The SNF cannot base its decision on a plan that has not been properly reviewed under NEPA. Indeed, the Illinois Wild and Scenic River Management Plan, completed in 1985, states that the Plan "is intended to be used as a guide for future planning efforts. It should not be construed as being the final plan. The Forest Service should continue to refine the concepts, and tailor them to meet the needs of the people and the River." (IWSRMP, page 1). Under the Wild and Scenic Rivers Act, the SNF is required to complete and implement a management plan that is comprehensive and publicly reviewed according to NEPA. Without an up-to-date and NEPA-reviewed plan, the public lacks the necessary input into planning for decisions that may influence how the SNF maintains and improves the ORVs of the Illinois River. The Wild and Scenic Rivers Act specifically included a provision requiring the management plan to address user capacities, and as described above the current plan fails to meet this requirement, among others. It is badly in need of update, revision, and full public review under NEPA.

Without a valid and comprehensive management plan, the SNF lacks the planning framework to implement actions such as those described in the IRRDEA. The lack of a

comprehensive planning approach undermines the SNF's ability to ensure the protection of the outstandingly remarkable values of the Wild and Scenic Illinois River. The absence of a proper management plan is evidenced by the wide variety of developments proposed along the Illinois River Wild and Scenic Corridor that could affect the natural setting, as well as the recreational experience of users. For instance, the IRRDEA and the Decision Notice propose many paved parking areas, improvements to campgrounds, and other changes that may modify the pattern of use in the Illinois Wild and Scenic River Corridor, impacting recreational users and the natural environment. Paved access and recreational development may be inconsistent with the ORVs of the river, and the SNF has failed to demonstrate that they will maintain and enhance these ORVs by basing their actions on an outdated, incomplete river management plan.

The SNF may claim that the IRWSRMP was NEPA-reviewed in 1998, and adopted along with the Forest's new Resource Management Plan. Regardless of the nature of the SNF's 1998 LRMP, the Wild and Scenic Rivers Act demands the development and review of a plan to manage the carrying capacity of the river, which the current IWSRMP lacks. Moreover, the Plan should have been reviewed independently under the National Environmental Policy Act, and its unamended adoption along with the RMP does not excuse the lack of public process for the current plan. The NEPA process for reviewing the RMP is inadequate for developing a full, complete Wild and Scenic River Management Plan. The development of such a plan requires its own public process, particularly when the document in question is inadequate and admits, on the first page, that it was not intended at the time of its writing to be a final plan.

The inadequacy of the current river management plan is directly applicable in this case—not “out of scope”, as asserted by the SNF in its response to EA comments. The EA itself rests on the reasoning and direction provided by the IWSRMP, particularly regarding the amount and type of different activity that is appropriate in the Wild and Scenic River Corridor. The river must be managed for the enhancement and maintenance of ORVs, not for recreational access wherever the impact would be “minimal,” as described in the IRRDEA.

3. CUMULATIVE IMPACTS

A cumulative impact is defined under NEPA as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. Agencies must provide "quantified or detailed information" about cumulative impacts. *LOWD v. Forest Service*, (U.S. Dist. Ct. Or.)(Civil No. 04-488-HA at 17-18). *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). "General statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Id.* at 1380. Agencies must go beyond merely cataloguing projects and must include a helpful analysis of the cumulative impacts of past, present, and future projects. *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 809-10 (9th Cir. 1999).

The SNF's determination that its proposed recreational developments constitute no significant impact on the natural values and recreational quality of the Illinois Wild and Scenic River lacks merit, particularly considering the weakness of the river management plan on which it relies and the sparseness of information regarding the variety of recreational and other uses in the Illinois River. The incorporation of the Illinois River Watershed Assessment was helpful, but does not constitute an adequate analysis of how the proposed actions may contribute to other trends in the project area that may threaten the ORVs of the Wild and Scenic Illinois. Indeed, if the recreational developments have the effect of increasing use in sensitive areas, botanical, aquatic, and recreational resources could be impacted. While these impacts may be relatively small for any given action—for instance, the development of improved parking at McCaleb's Riverside—the EA should lend more analysis to how changing patterns of use might act in concert with other trends in the Forest (such as increased ORV use, invasive species, logging, etc.) could specifically impact the environment of the Wild and Scenic Illinois. Moreover, the SNF must not continue ongoing actions or propose new actions that diminish the ORVs of the Wild and Scenic River Corridor; in this case, the SNF has not demonstrably met this standard.

The EA's treatment of cumulative effects does not constitute a hard look at the possible impact of the proposed recreational development, considering the long history of overuse, lawlessness, and damage to some parts of the Illinois River corridor. Under NEPA, the SNF is required to thoroughly assess the impacts of its proposed action in the light of other cumulative impacts, and the EA does not include a detailed discussion of this kind.

In determining whether a project will have a significant impact on the environment, an agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." *Id.* The CEQ regulations define "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. *See also ONRC Fund vs. BLM* (U.S. Dist. Ct. OR.)(Civil No. 04-693-AA at 31-32)

The Ninth Circuit addressed this issue in *Blackwood*:

A cumulative impact on the environment "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions[.] 40 C.F.R. § 1508.7 Cumulative impacts may result from 'individually minor but collectively significant actions taking place over a period of time.' *Id.* In determining whether a project will have a 'significant' impact on the environment, an agency must consider '[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.' 40 C.F.R. ¶ 1508.27(b)(7). If several actions have a cumulative environmental effect, 'this consequence must be considered in an EIS.' *Blackwood*, 161 F.3d at 1214 (some citations omitted).

More recently, the Ninth Circuit has held, "a proper consideration of the cumulative impacts of a project requires "some quantified or detailed information; . . . [g]eneral statements about possible effects and some risks do not constitute a hard look absent a justification regarding why more definite information could not be provided.'" *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, F.3d , 2004 WL 2406557, *2 (9th Cir. Oct. 28, 2004)(quoting *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998)).

The current EA is based on general assertions, and it lacks a crucial element of cumulative analysis that would clarify the SNF's compliance or non-compliance with the "maintain and improve" standard of the Wild and Scenic Rivers Act; it fails to address user capacities. Without an up-to-date and complete management plan for the Wild and Scenic River, the SNF fails to coherently plan for the full suite of activities and impacts on the Illinois River. The SNF should fully comply with the Wild and Scenic Rivers Act, address the issue of user capacity directly, and in so doing develop a thorough analysis of how its recreational development plan meets the standard of maintaining or improving ORVs while considering all impacts to the river corridor.

The current EA is lacking a specific rationale that links data to the no effect conclusion. The information is too general, and the impacts too ill-defined to constitute a "hard look" under NEPA. While the SNF has mentioned some important possible cumulative effect factors, it has failed to provide the public with specific, credible reasoning that corroborates the FONSI. For instance, analysis of the type presented on page 71 of the EA demonstrates that the USFS has given only a cursory analysis to possible cumulative impacts, such as possible impacts to botanical resources—an outstandingly remarkable value of the Illinois River.

The EA asserts that "cumulative effects are expected from continued inappropriate off road vehicle use within the project area. At specific sites, soil disturbance and compaction has jeopardized the future viability of plant survival. If continued, this activity would result in the reduction of suitable habitat for species of concern. This cumulative effect is partially mitigated by the actions proposed in the Illinois River Recreation Development Project. Resource interpretation, increased signing, and physical barriers are expected to result in more compliance with existing regulations." Yet, there are many cases where developments may increase access and use, possibly exacerbating negative impacts on botanical resources. The USFS has failed to offer quantified, reasoned analysis that supports its conclusion that the net effect of its actions, in combination with other actions affecting the project area, will "maintain or improve" the ORVs of the Illinois Wild and Scenic River corridor. Currently, the analysis in the EA is inadequate to support a "no effect" determination for recreational development actions that could have a negative affect on the ORVs of the Wild and Scenic River.

REQUEST FOR RELIEF

Due to aforementioned violations of applicable laws and regulations, FLOW requests:

1. A withdrawal of the Decision Notice and Finding of No Significant Impact.
2. That no decision be made until a proper Wild and Scenic River Management Plan for the Illinois River has been prepared that compares alternatives using a transparent, objective and rational decisionmaking procedure using the best available scientific evidence and practice, and that fully analyzes impacts of possible actions in light of an established user capacity.
3. That no decision be made until a proper EA has been prepared that compares alternatives in light of a fully completed River Management Plan, and with a NEPA-reviewed, scientifically-based user capacity.
4. Suspension of activities resulting from this EA and Decision Notice until an adequate NEPA analysis is completed or agreement is reached with Appellants through resolution that allows specific portions of the project to move forward if parties agree as such.

Respectfully submitted,

/s/ Joe Serres

Joe Serres, J.D., M.B.A.

Conservation Coordinator, FLOW

/s/ Dan Serres

Dan Serres, M.S.

Program Coordinator, FLOW