

January 7, 2005

John Borton, District Ranger  
Chetco & Gold Beach Ranger Districts  
29279 Ellensburg  
Gold Beach, OR 97444

RE: Special Use Permits for the Lower Rogue and Illinois River, DEIS

FROM: Dan Serres on behalf of Friends of Living Oregon Waters and the Rogue Group Sierra Club

*\*Submitted on January 7, 2005 by e-mail and postal mail.*

## **Introduction**

Friends of Living Oregon Waters (FLOW) mission is to protect *Oregon Waters* from pollution and development using legal oversight, monitoring and education. Our office is based in Grants Pass, Oregon. The Rogue Group Sierra Club (RGSC) is based in Ashland, OR and is the local body of the national environmental organization, the Sierra Club. The purpose of the Sierra Club and its local body, the Rogue Group Sierra Club, is to restore the quality of the natural environment and to maintain the integrity of ecosystems, to education the public to the need to support and understand the objectives of the Sierra Club, and to study, explore and enjoy the wildlands. The RGSC has many members who actively use and enjoy the area impacted by this analysis.

FLOW and the RGSC are engaged in this process because many of our members have expressed interest and concern in the Lower Rogue and Illinois Rivers, particularly in how commercial powerboat use is affecting wildlife, fisheries, and the recreational experience of other users. The current level of powerboat use on the Rogue is unacceptable, not to mention the possible increases in actual use proposed in the DEIS.

The current DEIS reflects an unsatisfactory level of analysis for undertaking the proposed re-issuance of permits and the associated channel maintenance. We are very concerned that the current document fails to adequately protect the outstandingly remarkable values of the Rogue and Illinois Rivers, which are federally designated as Wild and Scenic. While we recognize that this may, in part, be due to the lack of a revised river management plan, the DEIS fails to

develop an adequate compromise between the special use permits and other uses of the river. Given the current DEIS' range of alternatives, we are forced to support the No Action Alternative.

## **Comments on the Special Use Permits DEIS**

### *Inadequate Range of Alternatives*

1. The Judge Aiken decision of 2004 did not give the SNF the authority to unreasonably limit the range of Alternatives in this DEIS. The original process by which the current permits were issued was deemed inadequate under NEPA, forcing the current EIS process. In the current DEIS, SNF offers no alternative that will absolutely limit the level of jetboat use. Indeed, all of the alternatives represent an increase over "actual use," as listed in Table 3 on page 31 of the DEIS. Essentially, the SNF has developed an "all or nothing" EIS wherein there is no meaningful compromise option between very high levels of powerboat use and none whatsoever. The DEIS does a severe disservice to the public by not only failing to consider a reduction in powerboat usage on the Wild Section, but also by failing to consider an alternative that holds usage to its current actual level.
2. FLOW has suggested that the SNF consider returning the Wild Section of the history of management actions made since 1968. Instead, the SNF states that it has no need to consider a return to 1968 use levels because Judge Aiken gave the SNF leave not to return immediately to 1968 use levels. The public has expressed substantial interest in a reduction in powerboat use levels, particularly the motorized tour boats. 1968 use levels may have provided this DEIS with an intermediate alternative regarding jetboat use, instead of leaving the public no option between heavy use (including in the Wild Section) and no use whatsoever. As a part of the NEPA process, the SNF is required to present the public with a meaningful range of alternatives. While in this case the SNF is not immediately required to return to 1968 use levels, its failure to consider any reduction in powerboat use represents a serious shortcoming in the development of this DEIS.

*Failure to Adequately Analyze Appropriate Use Levels*

3. The SNF has failed to develop an accurate picture of the total use on the Rogue and Illinois Rivers. This is a failing of the river management plan, but in light of the absence of an established, reviewed, user capacity, the SNF should not be favoring increases in actual use in the Action Alternatives. The SNF has failed to demonstrate how the current use is impacting the environment, particularly regarding fisheries and other established ORVs of the Illinois and Rogue Rivers. Additionally, the Preferred Alternative does not specifically address how proposed increases in actual use over the averages the past few years might increase the impact on the environment.

The SNF should note that there is legal precedent for the need to address the actual capacity of these rivers. Without analyzing the amount of impact caused by different types of users, including motorized tourboats, and without establishing what level of impact the system can withstand without diminishing ORVs, the SNF is failing to uphold its NEPA obligation to fully analyze the environmental impacts of its action. Essentially, without establishing whether the jetboat use levels are within the bounds of not diminishing the ORVs of the Illinois and Rogue Rivers, the SNF's Preferred Alternative uses "arbitrary and capricious" standards of measurement for environmental 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.

4. The SNF has failed to justify why a 25% increase over past actual use is necessary. It may be less important to leave room for economic growth if the river itself is being negatively impacted even by current usage. Without an established user capacity, it is impossible for the public to judge whether these increases will negatively impact the ORVs of the river. Moreover, the "economic growth" factor of 25 % is unsupported in the DEIS. Why did the SNF arrive at this particular figure? It seems extremely arbitrary, particularly considering the SNF has failed to establish what level of

commercial powerboat use the river can handle without degrading the ORVs of the river. The SNF fails to adequately analyze how or if this increase may diminish natural and scenic values, fisheries health, and how it may exacerbate existing user conflicts by increasing actual jetboat usage on the Rogue and Illinois Rivers, particularly in the Wild section of the Rogue.

5. Outside of the No Action Alternative, none of the options reduce actual use. The DEIS is written as if the only imperative was to satisfy the motorized users. Indeed, the economics section includes many “indicators” whose veracity might be questioned. How did the SNF determine the indirect economic benefits of motorized recreation users on the Rogue? The DEIS references set models and assumptions without verifying their applicability to this particular situation (effects to Economics, Chapter 3 of the DEIS). The DEIS does not include specific information about the assumptions made or the data used in this analysis. Moreover, the presumed measurability of economic and recreational impacts of the various Alternatives should not necessarily give them priority over possible environmental impacts. Although it is difficult to determine the specific impact of motorized users on the values of the Rogue and Illinois that caused them to be included in the Wild and Scenic Rivers System, this should not allow the SNF to give undo weight to one type of commercial use just because the economic impact of reducing that use are easily tabulated.

This DEIS does not reflect an attempt to balance the environmental damage caused by commercial jetboat use with the economic benefit to certain sectors of the economy (particularly the outfitters themselves). Moreover, it does not attempt to represent the public benefit by attempting to quantify the externalities caused by powerboat use in the form of diminished recreational experience for non-motorized users and in harm to fisheries (as the Preferred Alternative is Likely to Adversely Impact the threatened coho salmon, as well as May Impact other sensitive species).

6. The SNF has failed to provide a credible plan by which use will be monitored and controlled in the future. Without a comprehensive monitoring plan, the public receives no assurance that the permit holders will abide by the terms set forth, even the very lax

terms in the Preferred Alternative. The “honors system” may be suitable, but the SNF has not demonstrated how it will reinforce this system with monitoring and what recourse is available to the public in the event that a permit holder does not abide by the terms of its agreement.

Most importantly, the SNF has presented a plan with undo discretion given to the District Ranger, who may grant temporary permits on an as-needed basis. Not having presented the public with a user capacity, it is difficult for the public to judge how these added permits may affect the environment. Indeed, the Preferred Alternative already fails to reduce jetboat usage below current actual levels. Because the analysis is so incomplete and already skewed in favor of commercial jetboat operators, granting the District Ranger unlimited discretion in issuing additional temporary permits seems excessive.

#### *Inadequate Analysis of Channel Maintenance*

7. The SNF has failed to develop a DEIS that presents the public with a thorough, well-reasoned analysis of channel maintenance activities and its possible impacts to the environment. The current DEIS is deeply inadequate for the purpose of developing a Section 7 determination on whether the current use will negatively impact the ORVs of the Rogue and Illinois Wild and Scenic Rivers. For instance, the SNF has failed to analyze the visual impact caused by dredging and the resultant release of streambottom sediment into the Rogue and Illinois Rivers. The effects to the natural scenic ORV, as well as other ORVs of the Rogue and Illinois Rivers, are difficult to ascertain from this DEIS, which lacks site-specific information about how dredging has occurred, how it might occur in the future, and what the specific effects might be.
  
8. The SNF asserts that dredging generally “repositions materials, but does not affect the hydrology or free-flowing nature of the river” (DEIS p. 117). Yet, the public is offered little specific information on where these activities have occurred in the past, and the impacts of these past dredging operations. The DEIS offers only an extremely cursory analysis of the dredging operations, not even offering detailed information regarding the extent, frequency, and possible impacts of the dredging operations.

Without specific information, the public has little basis to judge the veracity of the SNF assertion that these are only “minor channel modifications,” and that these modifications will not seriously affect aquatic wildlife, fisheries, and other outstandingly remarkable values of these Wild and Scenic Rivers. Additionally, while the SNF says the maintenance occurs in low-water years, this does not offer the public adequate information about the possible impacts of disrupting the streambottom environment, particularly in dry years.

9. The SNF justifies the need for channel maintenance on the grounds that, “without channel maintenance occurring in the river corridor, there would be a potential for thousands of visitors to be affected by reducing the available opportunities.” Indeed, while this may be true, the SNF is also in charge of protecting other, less easily measured ORVs such as the health of fisheries, the water quality, and the wildlife of the Rogue and Illinois Rivers. Because the DEIS lacks detailed, reliable information regarding the impacts to other ORVs, this analysis is inadequate for developing a Section 7 determination. Furthermore, this DEIS is inconsistent with the NEPA standard of taking a “hard look” at the environmental consequences of an action. Dredging may have many other impacts rather than alleviating possible barriers to a subset of recreational users on the Rogue and Illinois Rivers, and this DEIS gives no detailed analysis of these possible effects.
  
10. The SNF has failed to analyze the possible impacts of releasing, not only gravels, but also sediment, into the rivers. The disturbance of the gravels and sediment that build up may, in fact, be more important than the SNF suggests in its DEIS. Particularly with regards to the fisheries, MIS, and wildlife impacts in Chapter 4 of the DEIS, the SNF has failed to present site-level information that describes the actions to be taken, and the anticipated impacts of these actions. Without knowing where or how intensely the dredging will occur, the public cannot verify the SNF’s assertion that “essential fish habitat will not be affected by minor channel modifications from dredging” (DEIS p. 121). Chapter 4 is fraught with assertions regarding the nature of dredging impacts to different resources—wildlife, fisheries, recreation, etc. Yet, the analysis is extremely

cursory and does not offer a scientific rationale that links specific actions to specific impacts, or lack of impacts. For instance, the DEIS states on p. 131 that MIS and the Western Pond Turtle may face “temporary displacement”, from channel maintenance activities. Without a detailed description of these activities and how they affect specific MIS, it is impossible for the public to judge the veracity of this statement. Here, the SNF offers a statement about impacts without specifying where and how certain species will be affected. Without more detailed information regarding dredging and its impacts, the DEIS is inadequate in giving direction to the Regional Forester for a Section 7 determination.

#### *Failure to Adequately Analyze Fisheries Impacts*

11. Fisheries are listed as an outstandingly remarkable value for the Wild and Scenic Rogue and Illinois Rivers. The SNF has described, in Chapter 1 of the DEIS, the need to uphold these outstandingly remarkable values by maintaining or improving them in every project it undertakes. The SNF has failed to adequately analyze the negative impacts of powerboat use, particularly motorized tourboats, on the fisheries resources of the Illinois and Rogue Rivers. Crucially, without a determination of user capacity, it is difficult to judge in this DEIS alone whether jetboats, along with all other uses, are negatively affecting the fisheries values of these rivers. Without analyzing effects in the light of a set user capacity or use level, the SNF is failing to adequately describe the impacts of its Preferred Alternative to fisheries resources.
12. The DEIS lacks specific, detailed information to support its conclusion that channel maintenance activities will not affect fisheries. Disturbance of gravels may impact sensitive and threatened fish species, as well as various fish MIS. The DEIS fails to adequately describe the proposed dredging operations, and it offers only an extremely cursory analysis without satisfactory scientific rationale that the disturbance caused will result in no effect on fish species. Hence, the SNF has failed to demonstrate that, under the Preferred Alternative, it will protect the ORVs of the Illinois and Rogue Rivers.

13. The Likely to Adversely Affect determination for threatened coho salmon would appear to be inconsistent with the “maintain or improve” standard for Wild and Scenic River ORVs. The Rogue River is home to a number of anadromous fish species, including coho salmon that are federally designated as threatened under the Endangered Species Act. Other sensitive species include chinook, steelhead, sturgeon, and cutthroat trout. Although the SNF claims to be maintaining the outstandingly remarkable values of the Wild Rogue and Illinois Rivers, the DEIS states that “the proposed project is likely to adversely effect Southern Oregon/Northern California coho” and coho habitat (DEIS p. 118).

Fisheries were determined to be an outstandingly remarkable value (ORV) for the Rogue and Illinois Rivers at the time of their designation. Because motorboats are present when juvenile and adult coho are using the lower Rogue, the possibility exists that channel disruption, harassment, and disturbance may diminish the health of the threatened Coho. The fish are forced to move in the stream channel, some areas of the stream channel are modified, and fish are often prompted to vacate their thermal refugia. Also, similar factors may negatively impact other sensitive species in the project area. As a result, the SNF accurately determined that there was the possibility of “take” in the Preferred Alternative.

Outside of the No Action Alternative, the SNF has failed to present the public with an alternative that adequately protects the fisheries ORV for the Wild and Scenic sections of the Rogue and Illinois. The Preferred Alternative will undermine one ORV, ostensibly for the benefit of one subset of recreational users. It is highly arguable whether or not motorboat use is at all appropriate for the Wild Rogue and Illinois Rivers, much less at levels that will adversely effect a federally threatened species. The DEIS fails to resolve its internal contradictions by, on the one hand, claiming to protect the ORVs of the project area, and on the other hand permitting use levels that will undermine the health of coho salmon.

14. The programmatic NOAA take permit for the threatened coho salmon that the SNF cites as covering this action may be entirely inappropriate for the jetboat issue. The DEIS deals with actions ranging from powerboat use and motorized tourboat use to

dredging the gravels of the Rogue and Illinois Rivers to maintain a navigable channel for large vessels. The wide array of actions permitted under the Preferred Alternative represents an increase over current actual use, and the associated take of threatened coho salmon may seriously hinder the health and recovery of this species in the Rogue and Illinois Rivers. The lack of a complete consultation in the DEIS limits the ability of the public to judge the impacts of this action. Additionally, it is difficult to believe that NOAA's programmatic take permit for fishing applies in this case, with such a wide variety of possible impacts. The SNF needs to clarify the status of this LAA determination and how, exactly, it is consistent with the SNF's obligation to uphold the ORVs of the Rogue and Illinois Rivers, in particular the fisheries ORV. The current take permit is inappropriate, and not reflective of the true impact that will be caused in the Preferred Alternative. The SNF appears to be violating its requirement to "improve or maintain" the ORVs of the Illinois and Rogue rivers. The illogical leap from an LAA determination to a claim of maintaining the fisheries ORV remains unresolved, and could be considered "arbitrary and capricious" under NEPA.

#### *Failure to Adequately Analyze Recreational Impacts*

15. While the SNF is not legally required (at this point) to return use levels to 1968 levels, it should consider whether the recreation levels and types now employed are appropriate to a federally designated Wild river. That is, the user conflicts that exist between motorized and non-motorized users should be investigated in light of the direction given by the Wild and Scenic Rivers Act, which calls for Wild Rivers to be managed as if they were in a "primitive" state. It is difficult to imagine that motorized tourboating matches the original intent of the Congress when it designated the Rogue as a charter piece of its Wild and Scenic Rivers system, regardless of the administrative history that has allowed motorized tourboats on the river. Particularly when the public has expressed strong concerns about the impact of motorized use on non-motorized users, the SNF should have considered at least some reduction in the Wild Section of the river. Although the SNF asserts that complaints are minimal, this may be indicative of a situation in which it has failed to detect the real concerns of river users. Additionally,

river users may have already changed their patterns of use—which portions of the river and when—because of the nuisance of large, disruptive jetboats.

Moreover, significant user conflicts do occur. Although the SNF asserts that the user conflicts are minimal, there are a significant number of users whose experience is diminished by excessive tourboat use to warrant a reconsideration of motorized tourboat levels, particularly in the Wild section of the Illinois and Rogue Rivers. The SNF has chosen, in its Preferred Alternative, to favor one type of recreational user at the expense of other users, and at the expense of the natural, scenic, and biological values that make the Rogue and Illinois so remarkable. In diminishing the wildlife and fisheries values, excessive powerboat use also indirectly diminishes the experience of other users who visit the project area to fish, view wildlife, and enjoy relative peace in a natural setting. In allowing increased jetboat use and channel maintenance to occur, the SNF has pushed aside the concerns of non-motorized users and the elements of the river they may value most—the wildlife, fish, and undisturbed scenery.

#### *Failure to Adequately Analyze Impacts on Wildlife*

16. The SNF inadequately enumerates impacts to MIS. No population-level data is offered to help the public verify the environmental impacts of the proposed action. The SNF is required to provide quantitative population data to corroborate their claims about effects to sensitive species. The SNF is required to present the public with population data for MIS in a given project area. There is no suitable habitat proxy offered in the DEIS to replace this specific type of data, so the DEIS is incomplete and fails to offer the public the necessary scientific evidence to corroborate its assertions about the status of MIS.

Particularly for sensitive fish MIS, we would expect the SNF to include data consistent with NEPA's requirement to take a "hard look" at the environmental effects of the action. It is very difficult to determine the nature of effects on sensitive fish species, as well as terrestrial species. MIS are intended to give the SNF a solid grounding in actual population trend data to inform its determinations about the possible environmental effects of its actions. Particularly in this case, where SNF has already

determined that the Preferred Alternative is “likely to adversely effect” coho salmon, the DEIS should contain population-level data from MIS species so the public can understand the severity of the proposed impacts.

17. The DEIS states that there are many species for which the Preferred Alternative may adversely individuals, such as the Del Norte salamander, the Common Kingsnake, and the Northwestern pond turtle. Other species, such as bald eagles, marbled murrelet, and the northern spotted owl, may also be affected by the Preferred Alternative’s designated level of motorboat use. For some wildlife, the DEIS states that “the potential for impacts is proportional to the amount of boat activity,” and yet the DEIS recommends maintaining a high level of motorized tourboating without thoroughly analyzing any intermediate level of use. Indeed, none of the alternatives except the No Action Alternative propose any reduction in powerboat use, which is particularly disturbing considering the public interest in reductions in powerboat use in the Wild Section of the Rogue. The public would benefit from a broader, more thorough analysis of a range of alternatives.

Furthermore, the effects on bald eagles and northern spotted owls may be more serious than suggested by the DEIS. We would look for more population-level data to corroborate the SNF’s assertion that boat activity does not affect some sensitive of these and other sensitive vertebrates. The noise and disturbance of the powerful motorboats may harass sensitive species, disrupting their foraging and breeding patterns. The determination that there will be “no effect” on critical habitat seems inaccurate in the case of motorized tourboat operation, where the noise and disturbance of permittee operations routinely reduces the undisturbed quality of the habitat.

#### *Failure to Adequately Analyze Cumulative Impacts*

18. The SNF has failed to analyze the cumulative impacts of all recreational and management activities in the current DEIS. It is not adequate to simply list other activities without presenting a thorough rationale for how specific impacts may or may not occur. Particularly with regard to threatened wildlife and fish species, the current

permits may not appear to have significant effects, but when considered alongside other disturbances in the habitat of sensitive and threatened wildlife and fish, the effects may be important. For instance, the SNF has failed to accurately assess the overall impact of the proposed permits to the western pond turtle and coho salmon, species that may be impacted by non-motorized as well as motorized activity. The cumulative effects analysis presented in the DEIS is cursory, particularly regarding fisheries effects. Because the immediate activity is likely to adversely affect the Coho, and may affect other fisheries species, it will contribute to other activities that have diminished the health of sensitive and threatened fish. The SNF needs to thoroughly explore how the motorboat activity contribute to a larger suite of factors that have caused the coho to be listed as threatened and that might ultimately cause the listing of other sensitive species.

19. The dredging analysis is extremely inadequate; without a more thorough explanation of where and how dredging will occur, where it has occurred in the past, and what the possible effects might be to specific wildlife and fish species, the SNF cannot accurately paint a picture of how the Preferred Alternative, as a whole, will affect these species. After all—the DEIS gives direction to more actions than simply re-issuing the current special use permits; it also may provide a basis for determining how Wild and Scenic River outstandingly remarkable values will be affected by channel maintenance. Because analysis of channel maintenance effects is weak, it hampers the SNF's ability to accurately assess the cumulative impacts of the permits and the channel maintenance as a whole.

Respectfully submitted,

*/s/ Dan Serres*

Dan Serres, M.S.

Program Assistant, FLOW

*/s/ Joe Serres*

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

President, FLOW Board of Directors

Also on behalf of Rogue Group Sierra Club