

May 28, 2009

Charles T. Oliver
Darby District Ranger
712 N. Main St.
Darby, MT 59829

RE: Fish Lake Dam Maintenance

Dear Mr. Oliver:

Wilderness Watch (WW) is providing these comments in response to your scoping letter for proposed maintenance work on the Fish Lake Dam in the Selway-Bitterroot Wilderness. These comments are also provided on behalf of Friends of the Clearwater. WW believes the Fish Lake Dam presents an extraordinary opportunity to restore a piece of the Selway-Bitterroot Wilderness to a condition that existed prior to its degradation by humans. Wilderness Watch believes the proposed project is incompatible with Wilderness. The Forest Service should re-evaluate its plans for the area and consider breaching or removing the dam to restore the area's wilderness character.

Before delving into the specifics of our comments, I would first like to suggest that Wilderness Watch and the Forest Service join in a field trip early this summer to discuss the project on-site. I think it would be an invaluable opportunity for WW to learn what the Forest Service has in mind, and to discuss potential alternatives and opportunities for managing this area. Please let me know of your interest and availability for the trip.

Purpose and Need

From reading the scoping letter, it appears the Forest Service is approaching this project from a too-narrow and inappropriate perspective. The stated purpose and need is focused on how to maintain and perpetuate a non-conforming administrative structure (dam and reservoir) in Wilderness. It should be looking at the situation from the perspective of protecting, preserving, and restoring this part of the Selway-Bitterroot Wilderness. Maintaining a dam as an administrative structure in Wilderness makes no more sense than maintaining an ATV trail as an administrative structure in Wilderness. The underlying focus of the action—whether an incompatible structure or vehicle—is anathema to Wilderness.

Forest Service regulations and policy direct and guide management of the area. The regulations state in part, "National Forest Wilderness shall be managed to promote, perpetuate, and where necessary, restore the wilderness character of the land..." (36 CFR 293. 2). Forest Service policy calls for "Manage[ing] wilderness toward attaining the

highest level of purity in wilderness within legal constraints.” Where human influences have degraded wilderness, “The goal of wilderness management is to identify these influences, define their causes, remedy them, and close the gap between the attainable level of purity and the level that exists on each Wilderness.” (FSM 2320.6). Viewed in the appropriate context, the project takes on a very different light. Rather than trying to perpetuate a dam in the SBW, the project should be designed to lessen its presence and impact on the Wilderness.

Fish Lake dam represents a remarkable opportunity to preserve and restore the SBW’s wilderness character. The public enthusiasm surrounding the removal of the Milltown Dam near Missoula, and the public support for removing the Mike Horse Dam near Lincoln, are good indications of the public’s desire to see natural conditions restored on the landscape. The Forest Service should capitalize on this to garner public attention and support for restoring a piece of the SBW. Unfortunately, the proposed project sends the message that the Forest Service is more focused on trying to maintain a dam where it doesn’t belong, rather than promote the natural qualities of Wilderness. Something is wrong with this picture.

Scope of the work

The scoping letter states that the project will take an estimated 10 weeks to complete. The Canyon Lake Dam was completely breached and reconstructed, almost entirely by hand, in a similar amount of time. Canyon Lake’s water storage is more than twice Fish Lake’s storage, and the Canyon Lake Dam is roughly equal in height (21 ft. v. 20 ft.). Yet, the project at Fish Lake is described as being much smaller in scale; i.e. removing log debris, drilling and blasting a rock, and clearing some small trees and other vegetation from the spillway channel. Is the project actually much greater in scope than it appears? Could not the dam be completely breached by hand and the slopes stabilized in a similar amount of time as proposed for the maintenance project?

Maintaining and perpetuating the dam runs counter to the Wilderness Act

“...except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter... there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and **no structure or installation** within any such area.” emphasis added. Wilderness Act Section 4(c)

The Fish Lake Dam is an administrative structure and, like all administrative structures, should be periodically reviewed to determine whether it is “necessary to meet minimum requirements” for administering the Wilderness to protect the area’s wilderness character. Wilderness Watch is confident that any reasonable review will clearly show that it is not necessary and thus does not belong. While this determination doesn’t necessarily require removing the dam, it does prohibit the agency from maintaining a prohibited structure.

In a similar case where the Forest Service proposed maintaining several dams in the Emigrant Wilderness, the court concluded that maintaining prohibited structures is illegal.

...regardless of how carefully and thoroughly Forest Service considered the various action plans, the plans considered and the plan finally chosen are predicated on the legal contention that maintenance, repair and operation of the dams is “necessary to meet minimum requirements for the administration of the area for purposes of this chapter” – a contention that is without legal or logical support. High Sierra Hikers v. Blackwell. 2006.

Here, as there, maintaining an unnecessary administrative structure runs counter to both the spirit and letter of the Wilderness Act.

The Wilderness Act also mandates that the Forest Service preserve the Selway-Bitterroot’s wilderness character:

... each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Wilderness Act Section 4(b).

The Forest Service has developed monitoring protocols that can help in determining if a project or activity would degrade an area’s wilderness character (see Monitoring Selected Conditions Related to Wilderness Character: A National Framework. US Department of Agriculture, Forest Service, General Technical Report RMRS-GTR-151. April 2005. Also see Keeping It Wild: An Interagency Strategy to Monitor Trends in Wilderness Character Across the National Wilderness Preservation System Gen. Tech. Rep. RMRS-GTR-212. Fort Collins, CO: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station. 2008. 85 p.). The protocols identify four qualities of wilderness character that can be measured and described. Each of the four qualities—untrammelled, natural, undeveloped, and opportunities for solitude—will be degraded by the perpetuation of the dam and the use of motorized equipment to maintain it. For this reason alone, the project is inappropriate and should be reconsidered.

Dam safety requirements

The scoping letter bluntly states that the project is based on the Forest Service’s responsibility to comply with federal dam safety laws and regulations and to protect national forest lands. It is unclear, however, what is required to meet dam safety laws and regulations for the Fish Lake Dam. Indeed, nothing in the referenced dam safety laws, policies, or guidelines suggests the Forest Service approach is necessary or appropriate, or that wilderness-compatible options wouldn’t better meet dam safety concerns. Forest Service Manual 7500, referenced in the scoping letter, is particularly informative.

FSM 7502 – Objectives:

Two objectives are relevant to Fish Lake Dam:

Manage water storage or transmission structures administered or permitted by the Forest Service to:

1. Prevent sudden failure resulting in loss of life or extensive damage to property or the environment.
4. Minimize the potential liability of the Forest Service from failures of Forest Service owned and permitted dams.

In both cases, breaching the dam meets the objectives better than any other option. This is especially true over the long term.

FSM 7503 – Policy:

Here again, there are two provisions particularly relevant to Fish Lake Dam

1. Ensure that the design, construction, operation, and maintenance of Forest Service owned dams and dams authorized by special use permits or other instruments meet acceptable standards or withdraw them from service to the degree necessary to safeguard life and property.
8. Comply with the policies on the following aspects of water storage and transmission facilities management identified in the cross-referenced sections of the Forest Service Manual:

a. Facilities located in wilderness areas (FSM 2320.3, 2323.42, 2326).

The referenced wilderness policies clearly argue for breaching the dam. For example, FSM 2320.3 includes:

2320.3 - Policy

1. Where there are alternatives among management decisions, wilderness values shall dominate over all other considerations except where limited by the Wilderness Act, subsequent legislation, or regulations.
4. Cease uses and activities and remove existing structures not essential to the administration, protection, or management of wilderness for wilderness purposes or not provided for in the establishing legislation.

In both instances, breaching the dam is the only option consistent with Forest Service policy.

2323.42 - Policy

The policy for soil and water management is generally the same as for all National Forest watersheds (FSM 2502). However, in wilderness natural processes shall dominate; measures that modify plant cover and treat soil mantles or other activities designed to supplement natural water yield are inappropriate.

Here again, the policy states that Wilderness is different, measures that modify natural conditions are inappropriate.

2326.1 - Conditions Under Which [Motorized] Use May Be Approved

Allow the use of motorized equipment or mechanical transport only for:

1. Emergencies where the situation involves an inescapable urgency and temporary need for speed beyond that available by primitive means. Categories include fire suppression, health and safety, law enforcement involving serious crime or fugitive pursuit, removal of deceased persons, and aircraft accident investigations.
2. Aircraft or motorboat use established before the area was designated as wilderness by the Act of 1964 or subsequent wilderness legislation.
3. Exploration and development of valid existing mineral rights (FSM 2323.7).
4. Access to surrounded State and private lands and valid occupancies (FSM 2326.13).
5. To meet minimum needs for protection and administration of the area as wilderness, only as follows:
 - a. A delivery or application problem necessary to meet wilderness objectives cannot be resolved within reason through the use of nonmotorized methods.
 - b. An essential activity is impossible to accomplish by nonmotorized means because of such factors as time or season limitations, safety, or other material restrictions.
 - c. A necessary and continuing program was established around the use of motorized equipment before the unit became a part of the National Wilderness Preservation System, and the continued use of motorized equipment is essential to continuation of the program.
 - d. Removal of aircraft wreckage when nonmotorized methods are unsuitable.

It does not appear that the use of motorized equipment to maintain the Fish Lake Dam meets any of the exceptions listed in FSM 2326. All work needs to be accomplished by non-motorized and non-mechanized means. The proposal to use a motorized drill is inconsistent with the agency's wilderness policy and contrary to law.

In short, there doesn't appear to be anything in the agency's dam safety responsibilities that support the proposed action. Breaching the dam better meets the agency dam policy than does maintaining the dam as proposed in the scoping letter.

National Environmental Policy Act

The scoping letter states the proposal meets the categorical exclusion criteria in FSH 31.12.4 for repair and maintenance of roads, trails and landline boundaries. We disagree with this conclusion. It fails to recognize that even if the type of tasks being performed is similar, the context of this project is entirely different. The proposal involves a non-conforming structure and the use of motorized equipment in a designated Wilderness. As mentioned above, the proposal is also likely to be found unlawful.

We strongly suggest the Forest Service prepare an EA that looks at alternatives to the proposed action. The obvious alternative is one that breaches the dam in a way that allows the natural lake and natural hydrological function to be restored.

Conclusion

Rather than spend money and effort to maintain and perpetuate a dam in the Selway-Bitterroot Wilderness, the Forest Service should use this opportunity to remove this non-conforming structure from the area. The Fish Lake Dam is an example where dam safety needs and wilderness stewardship requirements need not come into conflict. We believe that by utilizing the services of volunteers, agencies like the Montana Conservation Corps, and Forest Service personnel the project can be completed in a timely manner, while also building public awareness and support for wilderness stewardship.

As mentioned at the outset, we would like to schedule a field trip to the site this summer where the proposed project and various options can be discussed.

Sincerely,

George Nickas
Executive Director

Also submitted on behalf of Friends of the Clearwater, P.O. Box 9241, Moscow, Idaho 83843.