FSEEE Forest Service Employees for Environmental Ethics

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TRANSMITTED ELECTRONICALLY AND BY U.S. POSTAL SERVICE (CERTIFIED)

January 11, 2017

Reta Laford, Reviewing Officer
USDA-Forest Service
Olympic National Forest
1835 Black Lake Blvd. SW
Olympia, WA 98512

RE: OBJECTION Pacific Northwest Electronic Warfare Range

Dear Ms. Laford:

By this letter, FSEEE objects to Pacific district ranger Dean Millett's decision to issue a special-use permit to the U.S. Navy to conduct electronic warfare training on the Olympic National Forest. In this letter, we identify specific comments FSEEE made during scoping, the Forest Service's response (if any), and the basis for our objection.

**A. Electronic warfare training is not a permissible use consistent with the public purposes for which national forests are reserved and administered** (Comment submitted by FSEEE on 10/31/14).

The reservation of federal land, pursuant to statutory authority granted by Congress, "not only withdraws the land from the operation of the public land laws, but also **dedicates the land to a particular public use**." S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 784-785 (10th Cir. Utah 2005) (emphasis added). A reservation's permissible public uses are defined by the statutory authority under which the reservation was made, and by any subsequent authorizing legislation. Examples of public land reservations include Indian reservations, military reservations, and national parks and monuments. United States v. New Mexico, 438 U.S. 696, 699 (U.S. 1978).

The particular public uses for which Congress has reserved the national forests are set forth in authorizing statutes. The two original purposes, authorized in the 1897 Organic Act, are to secure "favorable conditions of water flows," and "to furnish a continuous supply of timber." 16 U.S.C. § 475; United States v. New Mexico, 438 U.S. 696, 707 (U.S. 1978) ("The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress

intended national forests to be reserved for only two purposes – '[to] conserve the water flows, and to furnish a continuous supply of timber for the people.") In 1960, Congress added outdoor recreation, range, and wildlife and fish to the public purposes for which national forests are to "be administered." 16 USC § 528.

In addition to these natural resource public purposes, Congress has authorized the Forest Service to permit use of national forests for, among other things, telecommunications facilities (43 USC § 1761), archaeological site exploration (16 USC § 432), and oil and gas pipelines (30 USC § 185). So, too, Congress has authorized the Forest Service to permit state or local governments (but not federal agencies) to construct or maintain "public buildings or other public works" on national forests (43 USC § 931).

At no time, however, has Congress passed any statute authorizing generally the use of national forests for military use. Nor does any statute authorize specifically the use of the Olympic National Forest for such purpose.

Forest Service Response #1: The permitted military use "does not restrict or affect the Forest Service in implementing its mission of stewardship of the nation's national forests."

*FSEEE Objection*: The issue is whether Congress authorized the Forest Service to permit military use, not whether military use precludes the Forest Service from accommodating the uses Congress has authorized, e.g., recreation, wildlife, conserving water flows, and furnishing timber. The Forest Service's response does not dispute that the Organic Act, which the response quotes, does not authorize the Forest Service to permit military use of national forests.

Forest Service Response #2: The permit complies with the Master Agreement Concerning The Use of National Forest System Lands for Military Activity, signed by the Secretary of Defense (22 September 1988) and the Secretary of Agriculture (30 September 1988).

*FSEEE Objection*: Neither the Secretaries of Agriculture nor Defense, alone or in combination, have the authority to define the appropriate uses of national forests. Only Congress has that authority. See U.S. Constitution, Article 4, Section 3, Clause 2 ("The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."). The Master Agreement relies entirely on the Organic Act to justify military uses of national forests ("The use of these lands for military training activities is within the statutory authority of the Act of June 4, 1897"). However, as discussed above, the Organic Act provides no such authority.

**B. The Forest Service has not demonstrated that the mobile emitters "cannot reasonably be accommodated on private land," in violation of the National Forest Management Act** (Comment submitted by FSEEE on 10/9/2014).

Even if the Organic Act authorized the Forest Service to permit military use of national forests, which it does not, the National Forest Management Act ("NFMA") requires that "permits . . . for the use and occupancy of National Forest System lands shall be consistent with the land management plan[s]." See 16 USC § 1604(i). The Olympic National Forest's Land and Resource Management Plan ("1990 LRMP") requires that special-use permits "may be authorized when such use cannot reasonably be accommodated on private land." See LRMP at IV-55.

The environmental assessment fails to consider private land for the deployment of the mobile emitters.[1] Thus, the Forest Service has not demonstrated that the mobile emitters "cannot reasonably be accommodated on private land," in violation of the NFMA.[2]

It is apparent from EA's map of proposed emitter locations (EA at 1-3) that private land is in the same neck of the woods as the proposed national forest emitter sites. In fact, the emitters appear to be located predominately near the national forest boundary (e.g., sites 1, 2, 3, 4, 5, 7, 9, 10, 11, and 15) close to adjacent private land.

Forest Service Response: The Forest Service did not acknowledge nor respond to this comment.

*FSEEE Objection*: FSEEE objects to the permitting decision because the Forest Service has not demonstrated that the mobile emitters "cannot reasonably be accommodated on private land," as required by the 1990 LRMP and NFMA. Nor has the Forest Service explained its failure to consider this 1990 LRMP special-use permitting standard by acknowledging and responding to FSEEE's comment.

**C. The Forest Service fails to give priority to "the interests and needs of the general public . . . over those of the [special-use permit] applicant, in violation of the 1990 LRMP and NFMA** (Comment submitted by FSEEE on 10/9/2014).

The 1990 LRMP requires that "the interests and needs of the general public shall be **given priority** over those of the [special-use permit] applicant." See LRMP at IV-55 (emphasis added). The EA does not acknowledge this mandatory duty nor explain how the proposed deployment of mobile emitters complies with it. The failure to address this mandatory standard violates the NFMA.

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[1] The EA only considered private land for locating "stationary sites," not the mobile emitters proposed for deployment on the national forest. EA at 2-9.

[2] The Navy-prepared environmental assessment never references the 1990 LRMP, although it does mention a 1994 amendment to the LRMP regarding northern spotted owl habitat. Perhaps the Navy and its consultants didn't know about the 1990 LRMP. Regardless, it is the Forest Service's responsibility, not the Navy's, to be cognizant of and follow its own LRMP.

The use of the emitters will require "warning tape and removable 'Electromagnetic Radiation Hazard' signage, which would warn people to not linger inside the taped area." See EA at 2-4. Thus, the permit excludes the general public from national forest land, elevating the Navy's interests above the public's use of these lands. The EA also acknowledges that the Navy emitters pose a "Radiation Hazard" to the general public. It would be difficult to imagine a more egregious subordination of the public's needs and interests to the applicant's.

Forest Service Response: The Forest Service did not acknowledge that the EA fails to mention this 1990 LRMP standard. Nor did the Forest Service explain in its response to public comments how shutting the public out of these training sites and exposing the public to radiation hazard gives "priority" to the general public over the Navy.

*FSEEE Objection*: FSEEE objects to the permitting decision because the Forest Service failed to address this mandatory 1990 LRMP standard and failed to comply with its terms.

**D. The Forest Service fails to determine that the Navy's use is "compatible, and in harmony with, the surrounding landscape," in violation of NFMA** (Comment submitted by FSEEE on 10/9/2014).

The 1990 LRMP requires that permitted uses "should be compatible, and in harmony with, the surrounding landscape." See LRMP at IV-55. Once again, the EA does not mention this standard, in violation of NFMA. Had the EA assessed the compatibility of locating mobile emitters at the proposed sites, the analysis may have shown that the emitters are inconsistent with the LRMP's management prescriptions for visual quality and recreation opportunities.[3]

In regard to visual quality, the EA assesses only the effect of the fixed non-national forest emitters on the visual environment. It never mentions the visual quality effects of the mobile emitters. Yet the mobile emitters will affect at least an order of magnitude more land area as they travel along miles of road and park at over a dozen sites on the national forests for up to 70% of each year. The transient nature of the emitters is no justification for ignoring their effect on visual quality; if anything, their proposed ubiquitous presence throughout the western flank of the Olympic National Forest argues for more, not less, visual quality consideration.

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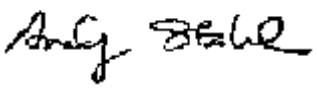
[3] The LRMP prescribes visual quality objectives (e.g., retention, modification) and recreation opportunities (e.g. Roaded Natural, Modified, Rural) for each land allocation. These prescriptions generally reiterate that uses be harmonious in appearance with the natural setting. The EA fails to assess the effects the mobile emitters will have on meeting visual quality objectives or recreation opportunity spectrum ("ROS") prescriptions.

Forest Service Response: The Forest Service did not acknowledge that the EA fails to mention this 1990 LRMP standard. Nor did the Forest Service assess the mobile emitters' consistency with 1990 LRMP visual quality objectives and recreation opportunity spectrum prescriptions.

*FSEEE Objection*: FSEEE objects to the permitting decision because the Forest Service failed to address this mandatory 1990 LRMP standard and failed to comply with its terms.

In conclusion, the Forest Service should deny the Navy's permit application because Congress has not authorized military training as a permissible use of national forests. Even if military training were a permissible use, the Forest Service has failed to acknowledge or comply with relevant mandatory standards established in the 1990 LRMP.

Sincerely,



Executive Director