

UPPER SNAKE RIVER TRIBES FOUNDATION, INC.

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(208) 331-7880

September 22, 2021

Idaho Department of Lands
Attn: Gary Hess – Rulemaking
3284 W. Industrial Loop
Coeur d’Alene, ID 83815

RE: 20.02.01 Rules Pertaining to the Idaho Forest Practices Act – Proposed Rulemaking

The Upper Snake River Tribes (USRT) Foundation submits this letter, in addition to our previously submitted letter dated May 7, 2021, regarding 20.02.01 Rules Pertaining to the Idaho Forest Practices Act. Despite numerous tribes, tribal organizations, non-governmental organizations, the Environmental Protection Agency (EPA) and other stakeholders submitting detailed comment letters requesting changes to the proposed rule, Idaho Department of Lands (IDL) chose not to take those changes seriously and incorporate them into its proposed rule. USRT is deeply frustrated and disappointed with IDL’s decision and asks IDL to strongly reconsider.

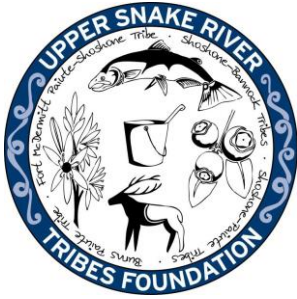
If comments or questions arise, please contact Scott Hauser, USRT Executive Director, by phone ((208) 331-7880) or email (scott.hauser@usrtf.org) at your convenience.

Sincerely,

s:/ *Scott Hauser*

Scott Hauser

USRT Executive Director



UPPER SNAKE RIVER TRIBES FOUNDATION, INC.

3380 W. Americana Terrace, Suite 360

Boise, ID 83706

(208) 331-7880

May 7, 2021

Idaho Department of Lands
Attn: Gary Hess – Rulemaking
3284 W. Industrial Loop
Coeur d'Alene, ID 83815

RE: 20.02.01 Rules Pertaining to the Idaho Forest Practices Act – Negotiated Rulemaking

The Upper Snake River Tribes (USRT) Foundation is composed of four Indian tribes of the Upper Snake River region in Idaho, Nevada, and Oregon: the Burns Paiute Tribe, Fort McDermitt Paiute-Shoshone Tribe, Shoshone-Bannock Tribes of the Fort Hall Reservation, and Shoshone-Paiute Tribes of the Duck Valley Reservation. The four tribes have common vested interests to protect rights reserved through the United States Constitution, federal treaties, federal unratified treaties (e.g. Fort Boise Treaty of 1864, Bruneau Treaty of 1866, and Malheur Treaty of 1864), executive orders, inherent rights, and aboriginal title to the land, which has never been extinguished by USRT member tribes. USRT works to ensure the protection, enhancement, and preservation of the tribes' rights, resources, cultural properties, and practices and that they remain secured. These include but are not limited to hunting, fishing, gathering, subsistence uses, and religious and ceremonial activities.

Keeping Idaho's streams clean, clear, and cold is essential to the livelihood and survival of fish, wildlife, and the whole forest ecosystem. Streams with deep pools, vegetative cover, and sufficient amounts of large woody debris (LWD) are essential for rearing and overwintering juvenile fish, adult migration, and spawning, in addition to collecting and storing sediment moving downstream that fish then use for spawning gravels.¹ Additionally, LWD traps fish carcasses, leaf litter, and sediment that is beneficial for nutrient cycling and microbial colonization that is essential for the health of a stream's ecosystem.² Further, streams with more stabilized banks (logs, rootwads, undercut banks) provide more territories and habitat for fish, providing more shade, food, and cover, while also reducing sediment erosion and excessive precipitation runoff.³ If the riparian zones along these streams and surrounding areas become overharvested, not only are streams subject to higher temperatures and loss of valuable habitat, cover, and food sources, the water is also subject to overloads of fine sediment, which can suffocate eggs and abrade fish gills, making it difficult for fish to breath.⁴

¹ *Forest Practices Habitat Conservation Plan*, Washington State Department of Natural Resources, 113 (December 2005), available at <https://www.dnr.wa.gov/programs-and-services/forest-practices/forest-practices-habitat-conservation-plan>.

² *Id.*

³ *Id.*

⁴ *Id.*, at 112-13.

In order to protect these streams and all that depend on them, USRT recommends the following changes, discussed in further detail below, to Idaho Department of Lands (IDL)'s proposed rule changes to 20.02.01 Rules Pertaining to the Idaho Forest Practices Act:

1. The new definition for cable yarding should require logs to be fully suspended to prevent trenching and increased sediment transportation.
2. For Class II streams, the 30' zone described in 20.02.01.010.60(d) is misleading – it only prevents the use of equipment within that 30' zone. Timber is still allowed to be harvested to the streambank.
3. Class II streams need to have a legitimate protection zone that prohibits timber harvest for at least 25', if not more (see discussion on Washington State Department of Natural Resources 2018 study below).
4. IDL should consider adopting the riparian habitat protection zones set forth in the Finding of No Significant Impact/Environmental Assessment for the Interim Strategies for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California (commonly known as "PACFISH"). At the very least, IDL should not allow timber harvest within the 25' inner zone of fish bearing streams, and limit removal and equipment usage within the 75' inner zone.
5. There is currently no definition for forest floor filtration. The new language added to 20.02.01.040.03(g) identifies when supplemental filtration is needed (when forest floor filtration isn't available) but doesn't define what adequate forest floor filtration actually is.

1. Cable Yarding

The current draft definition of cable yarding in 20.02.01.010.07 states, "Techniques that use winch systems, secured to stationary base machines, to transport fully or partially suspended logs or trees to landings." Pursuant to the Occupational Safety & Health Administration (OSHA)'s Logging eTool page, there are several different models of cable yarding systems⁵; however, some of the systems may cause trenching by the ends of the logs dragging (see diagram below), leading to downhill sediment erosion. In a negotiated rulemaking meeting on May 4, 2021⁶, USRT staff asked IDL to clarify if there were regulations in place to avoid trenching due to cable yarding. Regulatory and Stewardship Program Manager Gary Hess and Chief Forestry Assistance Bureau Archie Gray stated that there were regulations concerning trenching in the road maintenance section. USRT does not think that this is adequate protection and asks that specific language be added so that cable yarding systems fully suspend logs during transportation to prevent excessive trenching and movement of sediment.

⁵ "Examples of Cable Yarding Systems (From the Washington State Safety Standards for Logging Operations)," Occupational Safety & Health Administration, United States Department of Labor, *available at* https://www.osha.gov/SLTC/etools/logging/manual/yarding/example_systems.html.

⁶ Note: Meeting notes and documents soon to be available at: <https://www.idl.idaho.gov/rulemaking/docket-20-0201-2101/>.

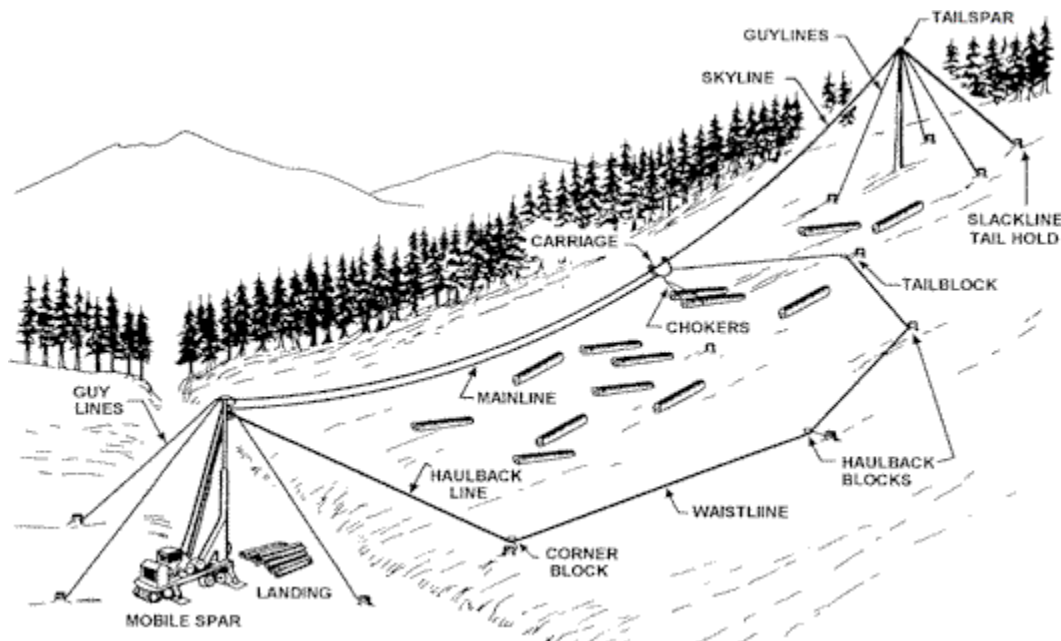


Figure 1: Illustration of a slack line cable yarding system, showing logs partially suspended and the potential for excessive trenching, leading to downhill sediment transportation.⁷

2. Class II Stream Definition and Protection

The current definition of a Class II Stream Protection Zone is as follows:

Class II Stream Protection Zone means the area encompassed by a minimum slope distance of thirty (30) feet on each side of the ordinary high water marks. (Figure 2.) For Class II streams that do not contribute surface flow into Class I streams a variance to this requirement may be requested. In no case ~~shall~~will this width be less than five (5) feet slope distance on each side of the ordinary high water marks. Operators must provide for soil stabilization and water filtering effects by leaving undisturbed soils in widths sufficient to prevent washing of sediment. ~~(7-1-96)(C)~~⁸.

In a negotiated rulemaking meeting on May 4, 2021⁹, USRT staff asked IDL to clarify what activity was allowed in the defined “thirty (30) feet on each side of the ordinary high water marks.” Regulatory and Stewardship Program Manager Gary Hess and Chief Forestry Assistance Bureau Archie Gray stated that the 30’ zone did not permit the use of any heavy equipment or building landing pads within the zone but confirmed that trees can be harvested to the stream’s edge. Additionally, when asked where the numbers of 30’ and 5’ came from, Hess and Gray

⁷ Image taken from OSHA’s Logging eTool page, “Examples of Cable Yarding Systems (From the Washington State Safety Standards for Logging Operations),” available at https://www.osha.gov/SLTC/etools/logging/manual/yarding/example_systems.html.

⁸ IDAPA 20.02.01.010.60(d) (Note: the red underlined material is proposed new language, while the blue strikethrough material is language proposed to be removed).

⁹ *Supra*, note 6.

responded that the numbers came from forestry practices in Oregon from the 1970s and were unsure of when the 5' rule was implemented.

USRT urges IDL to adopt and implement actual protections for Class II streams. In a 2018 study from Washington State Department of Natural Resources, technical coordinators and staff collected data at 17 sites along non-fish bearing headwater basins (classified as Class II streams in Idaho) using the following criteria:

Riparian management zones (RMZs) are 50-ft (15.2-m) wide bands adjacent to both sides of Type Np streams. Perennial initiation points (PIPs) are sensitive sites located at the uppermost point of perennial flow, surrounded by a 56-ft (17.1-m) radius management zone. Management of the RMZs and PIPs varied using four different experimental treatments:

1) 0% treatment: the entire length of the Type Np stream network and all PIPs were clearcut to the edge of the stream. The uplands were also clearcut.

2) Forest Practice (FP) treatment: Approximately 50% of the length of the Type Np stream network received a 50-ft (15.2-m) wide buffer; the remainder of the RMZ was clearcut. The buffered portion is referred to as the FPB treatment and the clearcut portion as FPU treatment. All PIPs in the FP treatment received a 56-ft (17.1-m) radius buffer (no trees removed). Adjacent uplands were clearcut.

3) 100% treatment: A 50-ft (15.2-m) wide buffer was retained along the entire length of the Type Np stream network and a 56-ft (17.1-m) radius buffer was retained around all PIPs. No trees were removed from these buffers. Adjacent uplands were clearcut.

4) Reference sites: No trees were cut in or adjacent to the RMZ or PIPs.¹⁰

Data was collected on all standing live and dead trees with diameters ≥ 4 in (≥ 10.2 cm) at breast height (4.5 ft [1.37 m] above ground), with pre-harvest data collected in 2007 and 2008, and post-harvest data collected in the first two summers post-harvest (2009 and 2010).¹¹ The post-harvest data showed an increase in mortality rates in the FPB treatment RMZs and lower mortality rates in the 100% treatment RMZs, an unexpected result:

We expected substantial mortality in newly exposed FPB buffers based on previous studies. However, the significant difference between higher mortality rates in the FPB treatment RMZs and the lower rates in the 100% treatment RMZs was unexpected, because both had 50-ft (15.2-m) wide buffers and differed only in the percentage of stream length buffered. . . . One possible explanation for lower mortality in the 100% treatment PIPs compared to the FPB treatment PIPs is that the former were connected to RMZ buffers, whereas the latter were separated from the downstream buffer and surrounded by clearcut areas.¹²

¹⁰ Aimee P. McIntyre et al., *Effectiveness of Experimental Riparian Buffers on Perennial Non-fish-bearing Streams on Competent Lithologies in Western Washington*, Washington State Department of Natural Resources 5-6 (September 2018).

¹¹ *Id.*

¹² *Id.*, at 5-27.

This new data suggests that even with a 50' buffer, the mortality rate is still substantial. Because of this new data, in addition to what is already known about soil/bank erosion due to lack of a sufficient riparian area (see above), USRT urges IDL to create protections for Class II streams. PACFISH (discussed in more detail below) implemented 150' slope distance (300' including both sides of the channel) for permanently flowing non-fish bearing streams in 1995 for streams on federal lands.¹³ USRT asks IDL to consider the long lasting benefits of protecting water quality, fish habitat, and the whole forest ecosystem by implementing a substantial harvest-free buffer (recognizing that based on new research discussed above, even 50' isn't necessarily sufficient, and considering PACFISH's regulations) over Class II streams.

3. PACFISH Riparian Habitat Protection Zones

In 1995, the U.S. Forest Service ("USFS") and Bureau of Land Management ("BLM") released the Decision of Record for Finding of No Significant Impact/Environmental Assessment for the Interim Strategies for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California (commonly known as "PACFISH"). This decision established management practices to prevent the extinction or further endangerment of anadromous fish stocks and to help restore habitat of Pacific salmon, steelhead, and sea-run cutthroat trout.¹⁴ PACFISH established the following regulations for riparian habitat conservation areas (RHCAs):

Category 1 - Fish-bearing streams: Interim RHCAs consist of the stream and the area on either side of the stream extending from the edges of the active stream channel to the top of the inner gorge, or to the outer edges of the 100-year floodplain, or to the outer edges of riparian vegetation, or to a distance equal to the height of two site-potential trees, or 300 feet slope distance (600 feet, including both sides of the stream channel), whichever is greatest.

Category 2 - Permanently flowing non-fish-bearing streams: Interim RHCAs consist of the stream and the area on either side of the stream extending from the edges of the active stream channel to the top of the inner gorge, or to the outer edges of the 100-year flood plain, or to the outer edges of riparian vegetation, or to a distance equal to the height of one site-potential tree, or 150 feet slope distance (300 feet, including both sides of the stream channel), whichever is greatest.

Category 3 - Ponds, lakes, reservoirs, and wetlands greater than 1 acre: Interim RHCAs consist of the body of water or wetland and the area to the outer edges of the riparian vegetation, or to the extent of the seasonally saturated soil, or to the extent of moderately and highly unstable areas, or to a distance equal to the height of one site-potential tree, or 150 feet slope distance from the edge of the maximum pool elevation of constructed ponds and reservoirs or from the edge of the wetland, pond or lake, whichever is greatest.

¹³ *Finding of No Significant Impact/Environmental Assessment for the Interim Strategies for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California*, U.S. Forest Service, Department of Agriculture, and Bureau of Land Management, Department of the Interior C-8 (February 24, 1995) [hereinafter *PACFISH*].

¹⁴ *Id.*, at 1.

Category 4 - Seasonally flowing or intermittent streams, wetlands less than 1 acre, landslides, and landslide-prone areas: This category includes features with high variability in size and site-specific characteristics.

At a minimum, the interim RHCAs must include:

- a. the extent of landslides and landslide-prone areas;
- b. the intermittent stream channel and the area to the top of the inner gorge;
- c. the intermittent stream channel or wetland and the area to the outer edges of the riparian vegetation;
- d. for Priority Watersheds, the area from the edges of the stream channel, wetland, landslide, or landslide-prone area to a distance equal to the height of one site-potential tree, or 100 feet slope distance, whichever is greatest;
- e. for watersheds not identified as Priority Watersheds, the area from the edges of the stream channel, wetland, landslide, or landslide-prone area to a distance equal to the height of one-half site potential tree, or 50 feet slope distance, whichever is greatest.¹⁵

The agencies established these principles based on multiple scientific studies that researched the best ways to protect streams from non-channelized sediment inputs, ensure sufficient delivery of organic matter and woody debris, stream shading, bank stability, and protect water quality for aquatic ecosystems.¹⁶ Based on these conclusions and implementations backed by numerous scientific studies, USRT asks IDL to strongly consider the benefits to riparian habitat and aquatic ecosystems by adopting PACFISH's riparian habitat conservation area regulations. If IDL is unwilling to do so, USRT requests at

¹⁵ *Id.*, at C-8 – C-9; see also *Biological Opinion for the Effects to Bull Trout from Continued Implementation of Land and Resource Management Plans and Resource Management Plans as Amended by the Interim Strategy for Managing Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, Western Montana, and Portions of Nevada (INFISH), and the Interim Strategy for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California (PACFISH)*, U.S. Forest Service (Regions 1, 4, and 6) and Bureau of Land Management (OR, WA, ID, MT), with consultation conducted by U.S. Fish and Wildlife Service (Regions 1 and 6), 9-10 (date illegible), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5427694.pdf.

¹⁶ “RHCAs include 8- 7 traditional riparian corridors, wetlands, intermittent streams, and other areas that help maintain the integrity of aquatic ecosystems by (1) influencing the delivery of coarse sediment, organic matter, and woody debris to streams; (2) providing root strength for channel stability; (3) shading the stream; and (4) protecting water quality (Naiman et al. 1992). . . . Widths of interim RHCAs that are adequate to protect streams from non-channelized sediment inputs should be sufficient to provide other riparian functions, including delivery of organic matter and woody debris, stream shading, and bank stability (Brazier and Brown 1973, Gregory et al. 1984, Steinblums et al. 1984, Beschta et al. 1987, McDade et al. 1990, Sedell and Beschta 1991, Belt et al. 1992). The effectiveness of riparian conservation areas in influencing sediment delivery from non-channelized flow is highly variable. A review by Belt et al. (1992) of studies in Idaho (Haupt 1959a, 1959b; Ketcheson and Megehan 1996; Burroughs and King 1985, 1989[]); and elsewhere (Trimble and Sartz 1957, Packer 1967, Swift 1986) concluded that non-channelized sediment flow rarely travels more than 300 feet and that 200-300 foot riparian [‘]filter strips[’] are generally effective at protecting streams from sediment from non-channelized flow.” *PACFISH*, *supra* note 11, at C-6 – C-7.

minimum to prohibit timber harvest within the 25' inner zone of fish bearing streams, and limit removal and equipment usage within the 75' inner zone.

4. Forest Floor Filtration

Currently, Idaho Department of Lands has no definition of what is meant by “forest floor filtration.” In a negotiated rulemaking meeting on May 4, 2021¹⁷, while discussing the addition of language to 20.02.01.040.03(g) describing when supplemental filtration is needed, USRT staff asked IDL staff whether there was an established definition for forest floor filtration and when it is deemed adequate for sediment and erosion control. Regulatory and Stewardship Program Manager Gary Hess and Chief Forestry Assistance Bureau Archie Gray confirmed that there is no written definition for forest floor filtration but is instead determined visually by private forest specialists based on their experience and knowledge in the field. In order to prevent inadequate filtration that results in increased sediment and erosion control from occurring, USRT requests that IDL defines “forest floor filtration,” including appropriate materials (such as logging debris) and appropriate amounts of those materials.

If comments or questions arise in reviewing this letter, please contact Scott Hauser, USRT Executive Director, by phone ((208) 331-7880) or email (scott.hauser@usrf.org) at your convenience.

Sincerely,

s:/ *Scott Hauser*

Scott Hauser
USRT Executive Director

¹⁷ *Supra*, note 6.