

AMERICAN WHITEWATER



**BACKCOUNTRY
HUNTERS & ANGLERS
CALIFORNIA**



CALIFORNIA TROUT



March 21, 2022

Christopher Carlton, Forest Supervisor
Plumas National Forest
159 Lawrence Street
Quincy, CA 95971-6025

Cc: Dave Brillenz, District Ranger, Feather River Ranger District
Lori Cayo, Public Services Staff Officer, Feather River Ranger District

Sent electronically and by postal mail

Re: Middle Fork Feather River Closure (Forest Order 05-11-00-21-06)

Dear Supervisor Carlton,

We write to you with significant concerns about the Plumas National Forest's two-year closure of the Middle Fork Feather River and its banks via Forest Order 05-11-00-21-06, which you signed on March 10, 2021. The closure order is problematic for reasons which we detail below, and we respectfully request that you immediately rescind the order and restore public access to the river.

This order is unique because the Forest Service has prohibited all public access to a long, narrow area defined as 25 feet each side of the river for a 20.7-mile-long reach, including the river itself, while it has separately re-opened public access to the surrounding 318,000 acres of the North Complex burn footprint. This 20.7-mile-long river closure area is approximately 327 acres in total size—about 1/1000th of the total burn area—yet it has an outsized impact on the public.

The Middle Fork Feather is an exceptional waterway cherished by whitewater boaters, anglers, hikers, and local residents and visitors alike. Designated by Congress as one of the original eight Wild and Scenic rivers in 1968, it is one of the finest whitewater boating rivers in the nation. It has some of the best fishing in California and has the state's Wild Trout Waters designation. Its canyon offers some of the best backcountry recreation opportunities on the Plumas National

Forest. It is also culturally and spiritually significant to the Native American people who have inhabited this area since time immemorial.

The closure negatively impacts all would-be users of the river and its banks. By eliminating use of the river, the closure also contributes to a reduction in the recreation tourism economy in local communities and this exacerbates and extends the negative impacts of the fire.

We are concerned about the closure not only because of these impacts but also because we believe that Forest Service has not adhered to agency directives, regulations, and statutory requirements in development and enactment of the closure order.

American Whitewater raised these concerns previously with Forest leadership and, in an online meeting with you and your staff on June 8, 2021, presented a detailed assessment of these issues. In that meeting, you indicated that the Plumas National Forest would re-evaluate the need for the closure, but that does not appear to have happened. Our multiple calls and emails since then have gone unanswered, and we are led to assume that the Forest has not prioritized this issue. We appreciate that we have had a long-standing collaborative relationship with Plumas National Forest and we wish for that to continue; however, we find this closure to be a significant issue that we believe is not being addressed adequately.

We re-iterate and elaborate on our concerns below.

1. The closure is unnecessary, does not align with management direction, and may be considered arbitrary and capricious under the Administrative Procedures Act.

The closure of the Middle Fork Feather River and its banks is not necessary to provide for public safety, and there are no documented circumstances that support the Forest Service's stated public safety purpose for this closure. In fact, reports, photographs, and videos provided by people who have entered and traversed the river closure area all indicate that there are no public safety issues.

The closure is not in alignment with the management direction provided by the Middle Fork Feather Wild and Scenic River Classification, Boundaries, and Development Plan (35 FR 4219-4222). Approximately 85% of the river closure area is within the Upper Canyon Wild River Zone with management direction "[t]o provide opportunities for river oriented recreation in a primitive setting offering considerable physical challenge and requiring well developed outdoor skills." 35 FR 4220. The 1988 Plumas National Forest Land and Resource Management Plan (Appendix R) describes the Primitive Recreation Opportunity of the Middle Fork Feather River canyon as an area where "[v]isitors have an opportunity to be part of the natural environment, encounter a high degree of challenge and risk, and use a maximum of outdoor skills." These plans do not provide direction for the Forest Service to restrict access based upon the perceived conditions or challenges that exist in the wild river zone.

The Plumas National Forest has re-opened the entirety of surrounding National Forest land affected by the 2020 North Complex yet, perplexingly, it has closed the river area even though it was not as severely affected by the fire as the re-opened areas. According to the Forest Service's RAVG burn severity data, the river closure area burned with significantly lower

severity than rest of the fire footprint, with only 5% high severity burn compared to 54% for the entire fire area. Similarly, 42% of the river closure area burned at low severity compared to 21% for the entire fire area. The nearby Pacific Crest Trail traverses an area with 33% high severity burn and is open even as it crosses the river. (American Whitewater presented this information in greater detail to the Plumas National Forest on June 8, 2021, and it can be accessed at <https://www.americanwhitewater.org/content/Document/view?id=4525>.)

Further, while the 20.7-mile-long reach of the Middle Fork Feather River is closed between Cleghorn Bar and Milsap Bar, the 7.6-mile-long reach from Milsap Bar to Lake Oroville is open even though it flows through a more intensely burned landscape than the closed reach. The arbitrary nature of the river closure defies logic, but it is clearly not connected to the fire's effects.

The Forest Service has not provided a rationale for why it is unsafe to be on land within 25 feet of the river nor how its prohibition of "going into or being upon" the river provides for public safety nor how circumstances are different once 26 feet from the river. The reasoning of the Forest Service cannot be discerned from its decision, especially considering its other decision to re-open the burned area that fully surrounds the river closure area and its more recent decision to re-open the entirety of the 2021 Dixie Fire footprint along the nearby North Fork Feather River.

The rationale for the closure appears to be entirely subjective and standardless. There is no definition of "public safety" in relevant regulations and no defined threshold of what triggers a public safety closure nor a subsequent re-opening. While the Forest Service has closed the river area "to provide for public safety," it has not engaged in any activities to address its perceived threats to public safety. As such, it appears there is the possibility that the Forest Service may never re-open the river area or that it is simply waiting until some arbitrary date to deem it free of these purported hazards and re-open it to public access.

The Forest Supervisor's decision to close an area is an agency action subject to the Administrative Procedures Act (APA; 5 USC § 500 et seq.). The APA requires the Supervisor to use a rational basis for decisions, and there must be a substantial basis in a supporting administrative record that provides a rational connection between the facts found and the action taken.

We are unaware of a supporting administrative record for the river area closure that meets the substantial basis threshold required by the APA. The closure appears to be based upon undefined, subjective determinations that are not supported by facts and therefore the closure decision may be arbitrary, capricious, and an abuse of discretion under the APA.

2. The Forest Service enacted the closure in an opaque process without the required public notice or input.

The North Complex was contained on December 3, 2020, more than three months prior to the enactment of this closure order. Although no fire emergency existed during this time and the

Forest Service had ample opportunity to notify and involve the public in the decision-making process for the closure, it chose not to do so in violation of regulations and agency directives.

Although the Forest Service may apply its categorical exclusion at 36 C.F.R. § 220.6(d)(1) to orders issued pursuant to 36 CFR § 261, the exclusion simply eliminates the requirement to conduct further analysis in an EIS or EA, absent extraordinary circumstances. 36 C.F.R. § 220.6(a). The agency must still comply with NEPA and agency regulations that require public notice and scoping of a proposed closure action. 36 C.F.R. § 220.4(e) and FSH 1909.15 Ch. 31.3 (“Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded.”).

As part of scoping, the Forest Service is required to “invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons (including those who might not be in accord with the action)” and to conduct scoping outreach. 40 CFR § 1501.9(b) and (c).

Yet, the Forest Service did not provide public notice, post the proposed action to the Schedule of Proposed Actions (SOPA), or scope the proposed action as required.

By omitting public notice and scoping, the Forest Service denied the public its opportunity to provide input and participate in the agency’s management of the public’s lands. In addition to violating applicable regulations and agency directives, this omission contributes to a public distrust of the Forest Service while simultaneously limiting the amount of available information for the agency to use in its decision-making process. This is a particularly acute problem in the context of extraordinary circumstances determinations.

3. The Forest Service did not properly determine whether extraordinary circumstances were present and therefore improperly excluded this closure action from further analysis.

As part of NEPA compliance, the responsible official must determine whether extraordinary circumstances are present, even if the action may otherwise be categorically excluded. 40 CFR § 1501.4(b). The Wild and Scenic Middle Fork Feather River is a resource condition that must be considered in determining whether extraordinary circumstances exist. 36 CFR § 220.6(b)(1)(iii).

Because the express purpose of the agency’s closure action is to prohibit public use of the Wild and Scenic river and its banks, there is a cause-effect relationship between the action and a potential effect on this resource condition. Effects that must be considered include direct and indirect effects upon the river’s natural and physical environments and the relationship of people with that environment. 40 CFR §§ 1508.8 and 1508.14. Use of the river and its banks is inseparable to the human relationship with the river, and the closure action has an effect on this relationship. The only question is the degree of significance.

However, there is no indication that the Forest Service considered this effect or determined its significance. The closure action was not scoped to the public, potentially affected river users or to entities with expertise regarding the river and its use, or to Tribes, agencies, and governments even though the Forest Service Handbook clearly identifies scoping as “the means

to identify the presence or absence of any extraordinary circumstances.” FSH 1909.15 Ch. 31.3. It remains unknown what other issues scoping may have revealed that could have affected the extraordinary circumstances determination.

Without scoping input, there is no means for the agency to be aware of or consider the potential effects of its action on those who use the river and its banks for a multitude of purposes, and consequently, the Forest Service’s determination that there are no extraordinary circumstances is flawed. Because the Forest Service did not properly determine whether extraordinary circumstances exist, it improperly excluded this closure action from further analysis under NEPA. 40 CFR § 1501.4(b)(2) and 36 CFR § 220.6(a) and (b).

4. The closure order constitutes a prohibition on fishing, but the Forest Service did not follow required procedures for enacting a fishing closure.

Closure Order 05-11-00-21-06 employs a uniquely specific arrangement that closes an area defined as “[b]eing within 25 feet of Middle Fork, Feather River” from Cleghorn Bar to Milsap Bar and it also prohibits “[g]oing into or being upon” the river within that area.

The order functions perfectly as a fishing closure because it is designed to prohibit the public from getting within a rod and line’s distance of the river or entering or floating upon the river to fish. The closure order need not cite to the agency’s fishing prohibition at 36 CFR § 261.58(v) to constitute a fishing prohibition. The narrow, specific, and intentional arrangement of this closure clearly intends for it to be a fishing and boating prohibition.

When enacting this order, the Forest Service did not comply with statutory requirements for closing an area of National Forest System Lands to fishing. The procedures set forth in section 4103 of the John D. Dingell, Jr., Conservation, Management, and Recreation Act (Public Law 116-9, Title IV; 16 U.S.C. § 7913) and in FSH 5309.11 Ch. 30 that require the Forest Service to consult with state fish and wildlife agencies and provide advance notice of and opportunity for public comment before closing any National Forest lands to fishing. These procedures were not followed.

Conclusion

Closure Order 05-11-00-21-06 is problematic for the many reasons detailed above. There is no substantiated need for the closure, and it unnecessarily deprives the public of use of their lands and waters. It also presents a litigation risk to the Plumas National Forest.

This is now the brief time of year in which the Middle Fork Feather River has boatable flows, and with the low snowpack we are experiencing this year, its season is likely to be unusually short and early. Trout fishing season opens at the end of April. Public demand for boating and fishing access is strong, and the roads to the put-in at Quincy-LaPorte Road and to the take-out at Milsap Bar are open. It is essential that access to the river and its banks be restored promptly.

We respectfully request that you rescind the closure order immediately and restore public access to this treasure of a National Wild and Scenic River.

Sincerely,

A handwritten signature in black ink that reads "Scott Harding". The signature is written in a cursive, flowing style.

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