

## ***Record of Decision***

# **Allegheny Wood Products Easement**

**USDA Forest Service  
Monongahela National Forest  
Tucker County, West Virginia**

## **Introduction**

This Record of Decision (ROD) documents the selection of an alternative for the Allegheny Wood Products Easement Final Environmental Impact Statement (FEIS). I have made this decision after careful review of the FEIS and its supporting Project File (PF). I have also considered the comments made by the public from the scoping period efforts in 2002 (PF Section C), during the scoping period efforts for the EIS in 2005 (PF Section D), from the 45-day comment period for the Draft Environmental Impact Statement (PF Section R), and from the reopened comment period (PF Section U).

This document includes my decision, the rationale for my decision, additional alternatives considered, and the reasons I did not select those alternatives considered in detail, findings required by other laws and regulations, appeal opportunities, and implementation information.

References are used throughout this decision document. References from the Project File begin with PF (e.g., PF A-1 refers to Project File, document A-1). References from the Forest Plan begin with FP (e.g., FP, page II-7 refers to page II-7 of the Forest Plan). References to the Final Environmental Impact Statement begin with FEIS (e.g., FEIS page 1-3 refers to page 1-3 of the Allegheny Wood Products Easement Final Environmental Impact Statement).

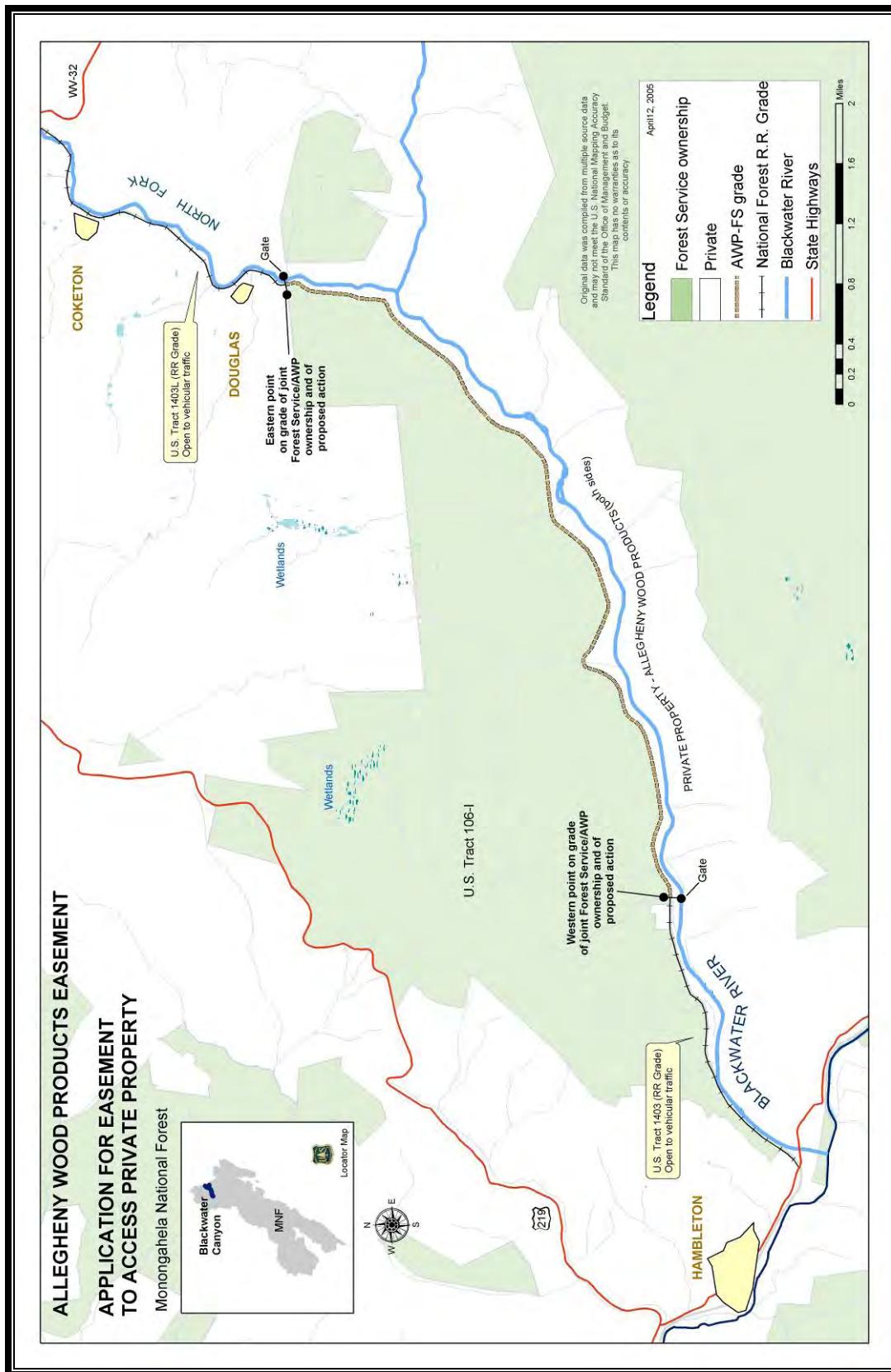
## **Decision and Reasons for Decision**

### ***Background***

When the historic railroad grade in Blackwater Canyon was abandoned by the railroad in 1986, ownership between the gates on the east and west portion of the grade reverted to the adjacent landowners, resulting in a linear division of ownership along 5.5 miles of the grade. Currently, approximately 6 feet of tread on the north (uphill) side of the grade is in National Forest System management (PF A-27). The south (downhill) side of the grade is owned by Allegheny Wood Products Inc. (AWP) (see Vicinity Map and Figure 1).

The railroad grade was used as a road during the late 1980's and early 1990's, but was eventually closed to public motorized use and made a Forest System Trail (#115) around 1995. Due to growing erosion problems and the difficulty of maintaining a trail on dual ownership land, the trail was removed from the Forest Trail System in 2003. However, the full width of the grade is still used as a popular hiking, biking, and skiing trail by members of the public, and this use is promoted by a number of local businesses and groups. AWP has not authorized public use of their portion of the grade, nor have they authorized the Forest to maintain the grade as a trail.

## Vicinity Map for Blackwater Railroad Grade





**Figure 1. Blackwater Canyon Railroad Grade. The southern portion (left side of the photo) is owned by AWP; the northern portion (right side of the photo) is on National Forest System land. A small rockslide onto the grade can just be seen in the distance.**

In July 2001, AWP applied for motorized access on the National Forest System (NFS) portion of the railroad grade to the roughly 300 acres of their property that are located between the railroad grade and the Blackwater River (PF A-1). The access was requested across NFS lands to allow AWP to respond to insect and disease infestation and wildfire, to provide an economically feasible avenue to conduct timber stand improvement work and commercial thinning on a 10- to 15-year basis, and to improve the drainage structures along the grade to correct erosion damage to the AWP property located downhill (Figure 2).

#### *Purpose and Need*

The purpose of this action is to respond to AWP's request for the Forest Service to authorize the use of the NFS portion of the railroad grade in Blackwater Canyon by AWP for the reasonable use and enjoyment of their property. The need for AWP to access and use the railroad grade was given in three reasons in AWP's 2001 special use application request. They refer to the railroad grade as the "Road":



**Figure 2. Example of erosion damage along the Blackwater Grade. AWP property is on the left, NFS land on the right. Conditions have already created a safety hazard and will continue to worsen without treatment.**

- a. “The current condition of the Road is poor. There are numerous drainage structures that are not functioning properly. This poses a great risk to AWP property on the North side of the Blackwater River and downslope from the Road. The area is prone to slips and landslides. AWP needs access to repair and maintain drainage structures to prevent further degradation.
- b. Access is needed to make it economically feasible for AWP to conduct timber stand improvement (TSI) work and/or light commercial thinning on AWP property on the North side of the Blackwater River.
- c. Access is needed to protect forest health (including prevention of fire, disease, and pest infestation) on the North side of the Blackwater River that pose a threat to AWP’s property, public resources, and public safety. Only full and regular access along the Road will be adequate to allow AWP to prevent and/or respond to such threats.” (PF A\_2)

Federal action is needed because AWP has submitted the required application in accordance with applicable federal regulations and USFS policies. The Forest therefore has an obligation to consider the requested access and use.

During the protracted length of this project, events and changes have occurred related to the project's purpose and need. First, in a letter dated 12/13/2007 and signed by John Crites, AWP expressed that they do not want the Forest or the general public using their side of the railroad grade: "In response to a telephone conversation on December 12, 2007 between Jeff Hammes of your agency and Donna Reckart, I want to reiterate that under no circumstances will Allegheny Wood Products, Inc. (AWP) give permission for the Forest Service or any other individuals to enter on our side of the abandoned railroad grade through the Blackwater Canyon until the Easement to utilize your half of the grade is granted to our company" (PF A\_28). I interpreted this letter to mean that AWP considers any public or Forest Service use of their portion of the railroad grade as trespass on their property. Although the Forest cannot physically prevent the public from using AWP's portion of the grade, use that is occurring is likely illegal.

Second, the railroad grade conditions have deteriorated to the point where they are not only degrading AWP property, but also creating hazardous conditions for users of the grade (see Figure 2). These hazardous conditions are starting to expand onto the NFS portion of the rail grade as well. In response to these conditions and AWP's letter cited above, the Forest in 2008 posted signs at both property gates, informing the public: "WARNING—Hazards in this Area. For the next 5.5 miles, this railroad grade crosses both public and private ownership. The boundary is roughly down the centerline of the grade but is not marked. To respect the rights of the private landowner, please stay on the uphill side of the grade. The public portion is no longer part of the Monongahela National Forest trail system and no maintenance is performed. The grade ahead contains washouts, rough surfaces, and large sinkholes. Use caution if you choose to proceed" (Figure 3).



Figure 3. Sign posted at gated entrance to Blackwater Canyon railroad grade.

Third, invoking 16 USC 3210(a) of the Alaska National Interest Lands Conservation Act (ANILCA), AWP stated in its 2001 application for access (PF A\_1, p. 4), “A portion of AWP’s property lies on the North side of the Blackwater River. Adequate access to that property from the South is extremely difficult and often infeasible due to the barrier formed by the Blackwater River. Only full road access from the North along the Road is sufficient to reach and manage AWP’s property on the North side of the Blackwater River”. However, AWP has shown that timber management can be conducted on their property on the North side of the Blackwater River without the use of the railroad grade “Road”. In fact, AWP lands were harvested using helicopter in 1999 and by using conventional logging with skidders, loaders, and trucks that accessed the property via a temporary bridge placed over the Blackwater River in 2009.

Fourth, AWP also invoked 36 CFR Part 251 related to the Federal Land Policy and Management Act of 1976 (FLPMA), which contains authorization for the Forest Service to grant rights-of-way. Given that AWP has already shown the ability to access their lands for timber management without using the rail grade, we are addressing the need for their request under FLPMA rather than ANILCA. Because access and use would be authorized under the special use permit regulations for FLPMA, the Forest must consider the need for this proposal in the context of what public benefit or interest would be served from such an authorization, as well as what impacts it may have to the environment and public safety (43 USC 1765 and 36 CFR 251.54).

AWP stated in its 2001 application for access, “AWP’s intended uses of the Road will benefit the public safety and the protection of public resources. Such uses will also benefit the public by protecting AWP’s private resources and its continued ability to provide valuable public resources to the public” (PF A\_1, p. 4). However, extensive public involvement for this project has indicated that the vast majority of public respondents felt that granting AWP access for the purpose of logging their lands would not be a benefit to the public but would rather compromise the safety of trail users and/or destroy the natural character of the rail grade trail in the process (FEIS, Appendix B). Therefore, I have considered not only the public benefits that AWP has asserted but also the benefits to the recreating public who use or have an interest in the rail grade.

### *Forest Plan Consistency*

In accepting the permit application submitted by AWP, the Forest determined that providing access as requested is consistent with the Forest Plan and associated standards and guidelines, as per the National Forest Management Act and 36 CFR 251.54(e)(ii). The Monongahela National Forest Plan Goal LS06 for Rights-of-Way is to “Acquire, grant, and/or exchange for legal access to meet the needs of the planned resource management activities and public and administrative access” (FP page II-51). One of the Forest Plan goals for special uses (LS18) states “Special use authorizations are issued for uses that: a) Serve the public, b) Promote public health and safety, c) Protect the environment, and/or d) Are legally mandated (FP page II-52). The purpose under which AWP originally requested access is generally consistent with the intent of these goals.

### *Decision Authority*

As the Forest Supervisor, Forest Service Manual 5460, Supplement No. R9RO 5460-2007-2 authorizes me to “Complete and/or obtain all necessary documentation...Such documentation includes...Environmental Site Assessment Report” (In this case, the AWP EIS and Project File). Therefore, I am authorized to sign this Record of Decision.

### *Consultation with Other Agencies*

This decision is being made after extensive consultation with numerous state and federal agencies (FEIS, Chapter 5). The United States Fish and Wildlife Agency, the Advisory Council on Historic Preservation, and the State Historic Preservation Officer have been involved in this project since the original proposal. Scoping resulted in expressions of interest from other interest groups, including the National Trust for Historic Preservation, The Friends of Blackwater, The Wilderness Society, and the Governor's Office, who I kept informed throughout the process.

### *Decision*

Based upon my review of the FEIS analysis and all alternatives, I select Alternative 4 as the alternative that best addresses issues related to unmanaged recreation and protection of existing recreation opportunities and heritage resources. By selecting Alternative 4, I am approving AWP's application for access to the Blackwater Canyon railroad grade with the conditions described in this alternative. My approval authorizes the activities and conditions of this alternative, which would be carried forward into a legal instrument for implementation should AWP agree to those activities and conditions.

The need for motorized access to the Forest Service portion of the railroad grade was described in AWP's 2001 application in terms of repair and maintenance of the railroad grade drainage structures and long-term timber management and resource protection (PF A-1, PF A-20, and PF A-22). This decision meets the purpose and need for this proposal by analyzing and approving the AWP's request for motorized access for the purpose of repairing and maintaining drainage structures to prevent further resource degradation. This decision authorizes AWP motorized use of the Forest Service portion of the railroad grade for the limited purpose of repairing damage to the grade and maintaining drainage structures to reduce impacts to AWP's land immediately downslope from the railroad grade. This decision also authorizes motorized access for emergency vehicles.

This access authorization involves the railroad grade between the existing gates located on the grade, a distance of an estimated 5.5 miles. In this decision, the Forest Service authorizes AWP motorized access of 10 feet of the agency's portion of the railroad grade, with additional width as required for the limited purpose of repairing drainage and protecting and stabilizing cut slopes. Although the NFS portion of the tread of the railroad grade is generally 6 feet in width, additional width is specifically authorized here to allow AWP to maintain or repair existing ditches, culvert heads, and cut slopes that are associated with the grade.

Even though the authorization involves 10 feet plus temporary use of additional width on the NFS side of the grade's center line for the purpose of maintenance and stabilization, the railroad grade itself will not be any wider than it was when originally constructed. My intent is to limit the amount (width) and type of repair and maintenance on the grade to only that needed for the purposes of this authorization. Under no circumstance shall the existing grade be altered or modified to such a degree that current recreational opportunities and experiences or existing heritage resources would be lost or substantially impacted. Indeed, the agency's paramount purpose in entering into this reciprocal access project is conservation of heritage resources and recreational opportunities by gaining a legal right to access the AWP portion of the grade for

hikers, mountain bikers, and skiers and maintaining the railroad grade as a trail for safe, continued public use over the long term.

AWP is authorized motorized access to the Forest Service portion of the railroad grade to accomplish the following two objectives:

- 1) Maintenance and repair of drainage structures that are causing damage to AWP property (e.g. pick-up trucks on a yearly basis and construction equipment as needed) and to implement necessary repairs to the grade to ensure safe emergency vehicle passage.
- 2) Safe passage of emergency vehicles (e.g. pick-up or fire trucks for fire suppression).

AWP will be responsible to perform routine maintenance or repair along the grade such as cleaning culverts and ditches and fixing any existing or future slumps or slides impeding emergency vehicle access. All repair and maintenance plans will be approved by a Forest engineer prior to implementation. Use of motorized vehicles (e.g., construction equipment) by AWP employees on approved business is authorized to maintain and repair the grade to ensure the safe passage for emergency traffic on a yearly or as-needed basis.

During repair and maintenance activities, AWP must adequately protect soil and water resources on Forest Service lands, including but not limited to replacing culverts, increasing the number and size of culverts, and stabilizing existing slumps. Removal of encroaching vegetation may be needed, as well as limited placement of approved surfacing materials.

AWP's work on the grade is limited to maintenance and repair and does not extend to development, improvement, or enhancement of the grade. Thus, AWP shall not change the width, surfacing, drainage structures (other than culvert size or number of culverts), or make any other alteration of the railroad grade beyond its original design and appearance. No re-alignment or widening of the original railroad grade is authorized by this decision.

In summary, AWP's maintenance work is to be *restorative* in nature and directed toward conservation of public resources for future generations. Given this context, this authorization of motorized access to AWP for maintenance and repair work encompasses only the work necessary to bring the grade and drain structures back to a condition so that it is safely usable for emergency vehicle access and the current non-motorized recreation purposes (hiking, biking, skiing). Any further road maintenance needed to manage the recreation and heritage resources along the railroad grade will be the responsibility of the Forest Service.

Motorized access to the Forest Service portion of the grade for uses other than maintenance of drainage structures and access by emergency vehicles is not authorized. The conditions and limitations included in this authorization are expressly tailored to site-specific conditions in the project area. The purpose of the limited use and conditions imposed upon use is to reduce environmental effects by limiting the nature and type of vehicles that use the railroad grade, the frequency of motorized use, and the season of that use. Thus, this decision does not authorize AWP motorized access to the Forest Service's portion of the railroad grade for log hauling or timber management over the long term. AWP has demonstrated that this need can be met through the use of helicopters and access through their land on the south side of the Blackwater River. This decision also includes specific mitigation measures described below.

This grant of access to AWP is conditioned on the requirement that AWP grant reciprocal access to the Forest Service and the public on its portion of the railroad grade. The Forest Service would obtain a legal right to reciprocal access across the AWP-owned portion of the railroad grade in order to effectively manage the recreation and heritage resources, including the railroad grade itself and especially the large stone culverts that span Tub Run and Big Run. This is the Forest Service portion of the reciprocal access authorization described in FEIS Alternatives 3 and 4. AWP will authorize access to the Forest Service to approximately 10 feet of its railroad grade, and additional width as required for protection and stabilization of the fill slopes and heritage resources. The Forest Service will perform routine maintenance along the grade related to managing heritage resources and the railroad grade as a recreation trail.

The Draft Environmental Impact Statement (DEIS) and FEIS refer to the grant of access to the Forest Service portion of the railroad grade to AWP in various ways, *e.g.* an authorization, an easement, or a permit. Regardless of which instrument is chosen to implement this decision, the legal instrument will include the objectives, mitigation, and limits upon access set forth in this Record of Decision. The choice of legal instrument to implement this decision is ministerial, *i.e.*, activities authorized and their environmental effects are unaffected by the choice of instrument.

Authorization of motorized use of the Forest Service portion of the railroad grade for purposes other than those explicitly set forth in this decision would require additional NEPA analysis and public involvement. For example, if AWP chose to further develop Blackwater Canyon and desired motorized access to Forest Service land beyond that authorized here, the landowner would have to submit a new request for access. A new request for further motorized access would require additional analysis. Moreover, in response to concerns raised in public comments, this decision to grant limited authorization to AWP for motorized access to Forest Service land to maintain and repair drain structures and allow emergency vehicle access is not transferable.

### **Specific Mitigation**

The following mitigation is in addition to the standards and guidelines identified in the Forest Plan related to road and trail maintenance.

Silt fencing shall be used around culvert work on NFS lands if stream banks have to be cut into to insert or replace culverts. Silt fences will need to be cleaned periodically and after large storm events. The material cleaned from the silt fences would be deposited in an area outside of the riparian buffer, filter strip, or any other area where the material could be readily delivered to a stream channel. This fill would be seeded and mulched. This mitigation is expected to reduce sediment delivery to the Blackwater River (FEIS, Chapter 3, Water and Aquatic Resources).

Soil stabilization procedures will take place as soon as practical after earth-disturbing activities are completed or prior to extensive periods of inactivity. Mulching will occur if seeding is not effective, if disturbance is temporary and seeding can be done at a later time, or if the disturbance occurs during the winter.

The gates located at either end of the grade will remain in place, closed, and locked except when opened for NFS or AWP access.

Details for repair and maintenance work performed on the grade will be stipulated by the Forest Service to provide for improvements within the right-of-way that can support the intended uses while adequately protecting resources and users.

Construction equipment may be used where needed to repair and maintain the rail grade surface for vehicle use, but following repairs, no logging or log-hauling activities will be allowed on the Forest's portion of the rail grade. Outside of repair and maintenance activities, AWP vehicle use will be restricted to pick-up trucks or fire trucks needed for access to AWP property to respond to emergency situations such as fire or personal injury.

No access for repair or maintenance activities will be allowed from 6:00 PM on Friday evenings through 6:00 AM on Monday mornings. In addition, no access for repair or maintenance activities will take place on national holidays. Weekend and holiday access exceptions may be made for emergency wildfire suppression or rescue activities. Signs notifying the public of AWP activities will be posted by AWP at each gate two weeks prior to and during periods of repair or maintenance or AWP timber cutting near the rail grade. Notification of these activities will also be posted on the Monongahela National Forest web site when they occur. The Forest will be notified at least two weeks prior to AWP work to allow for public notices to be published in local newspapers. The railroad grade may be closed to public access during periods of repair and maintenance, or when AWP is cutting timber near the grade, to provide for public safety.

The trail along the railroad grade will be managed by the Forest Service as Forest Trail 115.

The Forest Service completed the consultation process required by 36 CFR 800, Protection of Historic Properties, the implementing regulations of the National Historic Preservation Act of 1966. Consultation with the Advisory Council on Historic Preservation, the West Virginia Division of Culture and History, and other parties resulted in the development of a Programmatic Agreement (see Appendix A). The Forest Service and AWP are bound by the agreement stipulations for managing heritage resources within the project area.

No snow-plowing will be allowed within the authorization boundary in order to allow for winter recreation such as cross-country skiing or snow-shoeing.

Gravel surfacing will be to the minimum level and size necessary to provide for vehicle access in an attempt to maintain a relatively smooth and stable base for mountain bikers.

The clearing of cavity trees or trees greater than 6 inches diameter at breast height will be limited to September 15 to March 31 in West Virginia northern flying squirrel suitable habitat to reduce potential impacts to squirrel young.

Any state, federal or local permits needed for repairing or maintaining the rail grade will be the responsibility of AWP.

There will be no monetary compensation to AWP or from AWP. I am waiving this requirement pursuant to the Federal Land Policy and Management Act [Sec. 504 (g)] (see PF B-36). The property line essentially passes through the center line of the grade. This decision authorizes access to both parties at approximately the same acreage (PF A-27). Therefore, there would be no measurable value difference.

### *Changes from DEIS to FEIS*

Approximately 5,200 people replied to our DEIS during the first comment period (see public involvement discussion in this document). The second comment period received approximately 2,000 letters. Many of these comments resulted in changes from the DEIS to the FEIS. Some changes made in the FEIS were editorial or points of clarification. Other changes were more substantive. These include:

- Clarification of expected motorized use and frequency of use by AWP;
- Forest Plan direction throughout the document is now from the 2006 Revised Forest Plan;
- An expanded discussion of the scope and the purpose and need of the project;
- Clarification of the Alternative 1 description to indicate probability of grade closure;
- Development of a fourth alternative analyzed in detail to address public concerns;
- Additional mitigation to reduce resource impacts, based on public recommendations;
- Consideration of additional alternatives that were suggested by the public;
- Update of wildlife analysis to reflect Revised Forest Plan consultation with U.S. Fish and Wildlife Service and an updated Regional Forester Sensitive Species list.

### *Rationale for the Decision*

Public involvement played a key role in my decision. The scientific information gained during the public comment process was incorporated into the analysis. The views of the public helped shape my understanding of the public interest in balancing environmental and multiple use tradeoffs. We listened to the public in formulating the range of alternatives, environmental effects, and suggested mitigation. The alternative selected is in large part the result of public involvement. The Forest interdisciplinary team and I want to thank all the people who took time to give us input on this project. Public input has greatly assisted the agency and we appreciate your participation.

Effects on AWP's private property have also been carefully considered in this analysis. Recent developments concerning their ability to access their land using other routes have influenced my decision. I am sensitive to AWP's private property rights and have kept this consideration in mind during project analysis and decision-making.

We did our best to involve the public and seek consensus on one of the most contentious resource issues facing the Forest at this time. Despite the agency's effort in collaboration, complete consensus could not be reached. It is not possible to make a decision on access in this situation and give everyone all that they would like to have. Compromise is necessary. With this in mind, I have reviewed the science, public comments, and field work. I saw the erosion, and the hazards on the trail concern me. In selecting Alternative 4, I have weighed and carefully balanced social, economic, and environmental factors. I am fully aware that not everyone will agree with my decision, but believe that, considering all the information before me, this is the right thing to do at this time for both the land and to serve the greater public interest. The safety and resource degradation issues cannot be ignored any longer. The time has come to take action either to maintain and repair the railroad grade, or initiate further limits on public access.

The public involvement efforts for this project resulted in extensive and polarized comments from the public both for and against authorization for motorized access. I want to assure the

public that both sides of this debate were given equal consideration. The easement application came from a member of the public who had a legitimate request for use of public lands. However, I also heard from thousands of people who had differing opinions as to the public benefits, or lack thereof, that the proposed action would generate.

Many of the comments I received during scoping and during the DEIS comment period spoke to the importance of this area to the commenter. I fully understand the importance of this canyon for the solitude, beauty, and recreational opportunities it provides to many viewers and visitors. I have walked this grade several times and I appreciate the beauty and historic value of this grade, including the scenic views, waterfalls, and historic creek crossings with the stone arch culverts.

I had several conversations with individuals that felt that purchasing the property from AWP would be in the public interest. While I agree that purchasing the property from a willing seller at a market price would be a good solution on the north side of the river, that Alternative is not within my control. However, granting an easement or other authorization for access would not preclude a purchase if a serious opportunity for purchase arises in the future. The Forest would work with any future landowner to obtain reciprocal access in order to address the resource management issues that are analyzed in the FEIS.

While many comments from the public were related to potential impacts from motorized use and alterations in the grade as a treasured recreational resource, key concerns appeared to focus on the impact of timber harvest adjacent to the grade. I understand these concerns, but I also know that AWP has logged the area on the north side of the Blackwater in the past from across the river. AWP has indicated they plan to continue to manage their lands as a timber resource, and the Forest Service does not regulate AWP's land use activities.

I also heard from many people who were concerned that logging and log hauling along the rail grade would create safety concerns for users and would destroy the natural character of the grade, and therefore the recreational experience gained from using the grade. Although the railroad grade was originally built to haul timber and coal, was only converted from a railroad in the 1980s, and still retains many signs of past use and development, I can still appreciate the safety and recreation experience concerns that I heard. I have responded to those concerns by: 1) restricting timber-related activities along the Forest's portion of the rail grade, 2) applying many mitigation measures to reduce the potential recreational, visual, and safety impacts to grade users, and 3) pursuing reciprocal access to the entire grade so that the grade trail may remain open to safe and legal recreational use.

My decision is based on the analysis in the AWP FEIS and the Project File. This analysis is based on the most current science (PF I-6, K-4, M-23, N-13, O-5) and applicable references. These references are contained in the Project file and listed at the end of the FEIS. The Forest has compiled a significant inventory of scientific information as well as field data. Hundreds of thousands of dollars and many hours have been spent by local resource experts on-the-ground collecting biological, physical, and other field data. This decision includes the scientific information provided by the public and other natural resource experts. This body of scientific work informed the agency regarding the trade-offs or differences in environmental effects between alternatives. No scientific data presented to the agency has been overlooked or ignored. My decision is based upon the best available science.

The Selected Alternative strives to minimize impacts to recreation and heritage resources while still responding to a request from a member of the public who is also an adjacent landowner. This alternative would not authorize motorized access along the grade for AWP to conduct log hauling and long-term timber management on their property between the Blackwater River and the railroad grade. Motorized access for timber management and log hauling is not being authorized because AWP has shown the ability to manage timber on their land without using the railroad grade, and the FEIS concluded that using the grade for these purposes would adversely affect the natural character of the grade, as well as recreational opportunities and experiences along the grade (Chapter 3, Recreation section). These potential impacts were also a major concern expressed by the public who commented on the DEIS (FEIS, Appendix B).

This alternative gives the Forest Service an opportunity to maintain the trail to a standard that provides safe recreational experiences (Issue 2) and to correct ongoing and deteriorating erosion problems with the grade that are becoming safety hazards for bikers and hikers, and resource concerns for the adjacent landowner (AWP). This alternative will also address the current situation related to hiker trespass onto private property that currently exists due to the mixed ownership of the railroad grade (FEIS, Chapter 3, Recreation section).

This alternative provides a higher level of protection to the railroad grade and its associated heritage resource sites, as well as a higher level of protection for recreationists, than Alternatives 2 or 3 (Issue 1). While both Alternatives 2 and 3 would impact recreation to some degree, the Selected Alternative: 1) limits the amount and placement of gravel thus reducing (but not eliminating) impacts to the quality of mountain biking, 2) maintains winter activities through the restriction of snow plowing, and 3) increases safety (compared to the Proposed Action) through restrictions on using the grade for logging or log hauling, and notification and restrictions during logging and repair/maintenance operations (Issues 2 and 3). Because harvest activities that may occur near this grade are expected to be commercial thinnings every 10-15 years, impacts from these activities are expected to be short and infrequent (FEIS, Chapter 3, Recreation section).

The Selected Alternative provides a high degree of protection to heritage resources, but balances that objective with additional access to AWP. Published science, field work, and expert observation as documented in the FEIS support the conclusion that limited motorized access to allow maintenance and repair of the trail and emergency vehicle access is compatible with protection of the heritage resources. The mitigation included in this decision has been specifically designed and tailored with both resource protection and access objectives in mind.

I did receive comments on the validity of the Programmatic Agreement without the signature of the State Historic Preservation Officer. A programmatic agreement was developed during consultation for compliance with the National Historic Preservation Act (NHPA). Although the SHPO office was involved in discussions during the development of the agreement, the SHPO declined to sign the agreement without prejudice (Project File, Heritage Resources section). My review of the pertinent regulations leads me to conclude that this decision is in compliance with the Section 106 of the NHPA regarding consultation with State and Federal agencies.

I also heard comments on the effects of this proposal on the Wild and Scenic River eligibility of the Blackwater River. While logging on private property would be expected to have a temporary detrimental impact on the visual qualities in the canyon, there would be no effect on the eligibility of the river from the granting of the authorization for mutual access.

The Selected Alternative will also provide an opportunity to repair or reduce existing resource damage occurring from poorly placed or old culverts that are causing erosion. This alternative reasonably balances the desires of recreationists on a popular trail with the rights of a private property owner to access and protect his lands while still caring for Forest resources and providing safe recreational opportunities (FEIS, pp. 3-5 to 3-10).

In addition to the research used in the individual resource analysis (PF I-6, K-4, M-23, N-13, O-5), I have reviewed state monitoring reports of the implementation and effectiveness of the West Virginia Best Management Practices (PF I-4, O-9, and O-10). The effectiveness studies showed that the BMPs were between 80 and 85% effective, with higher effectiveness on industry-owned lands (PF O-10). Any logging done on private lands would need to comply with these BMPs.

In considering the environmental trade-offs between alternatives, I weighed both short-term and longer-term environment effects. Although (as disclosed in the FEIS) repair and maintenance will have some adverse short-term effects, I feel the long-term benefits to the environment outweigh the shorter-term effects. In a relatively brief period, the short-term adverse effects should become unnoticeable and unmeasureable. Mitigation was developed specifically to address the adverse short-term effects of repair, maintenance, and motorized access to the railroad grade. Project monitoring is incorporated into this action to ensure that effects are not beyond what was anticipated in the FEIS. Taking no action at this time would continue the ongoing adverse effects on soil, water, recreation and other resources. As the situation continues to deteriorate, the Forest's management options dwindle, and the longer-term consequences mount. The Selected Alternative is the logical course of action, taking into account both short- and long-term environmental consequences.

The Selected Alternative is a reasonable, incremental step toward resolving a longer-term land use issue with an adjacent private landowner. Alternative 4 preserves options for future management. It allows limited motorized access to arrest the degradation of soil, water, and heritage resources, and provides a means for quick response to human or resource emergencies. It continues current recreation opportunities. It stabilizes the current situation with a view toward repair of the railroad grade. It harmonizes well with the broader themes of conservation set forth in our revised Forest Plan. The Selected Alternative, like all other alternatives considered, does not resolve all conflicts associated with the railroad grade. It does, however, reasonably balance conflicting factors and sets the agency on a course that conserves management options as well as multiple use resources for future generations. Under the Selected Alternative, future land managers will have the opportunity to work with the private landowner and the public to take further steps toward conserving this unique resource.

#### *Other Alternatives Considered*

In addition to the Selected Alternative, I considered 11 other alternatives that were eliminated from detailed study and three other alternatives that were analyzed in detail, which are discussed below. A more detailed comparison of the alternatives considered in detail can be found in the FEIS at the end of Chapter 2 (Comparison of Alternatives) and throughout Chapter 3.

The following is a summary of alternatives considered but eliminated from detailed study, along with the rationale for dismissal.

**Purchasing of AWP Property:** We considered an alternative where the federal government would purchase the AWP property located between the railroad grade and the Blackwater River. AWP and the Forest Service went through a series of negotiations from March 1997 through December 1998 to allow the Forest Service to acquire the property, including an attempt at a land exchange. Because of appraisal values and other concerns related to the proposed land exchange, AWP was not interested in exchanging or selling all or parts of their property in Blackwater Canyon to the federal government. Since AWP was not a willing seller, this alternative was eliminated from detailed study because it is infeasible. Should AWP decide to sell their property to the Forest Service at some point, their authorization for access would no longer apply, and the Forest Service would no longer need reciprocal access. Should AWP sell their property to another agency, organization, or individual, AWP's authorization would no longer apply, but the Forest Service would work with the new landowner to address the resource management issues that are analyzed in the FEIS.

**Condemnation of AWP Property:** We considered an alternative where the Forest Service would condemn (through eminent domain) the AWP property and transfer it into federal ownership. Section 205(a) of the Federal Land Management Act of 1976 authorizes this practice only if necessary to secure access to public lands. The public already has access to public lands on the north side of the grade. Therefore, this alternative was eliminated from detailed study because it is in conflict with Section 205(a) of the Federal Land Management Act of 1976.

**Mitigation on Private Lands:** We considered an alternative where standard mitigation applied on NFS lands would be applied to the AWP portion of the railroad grade and its other private lands. This alternative was not given detailed study because: 1) for the AWP portion of the grade, the mitigation duplicates that provided for Alternatives 3 and 4, and 2) the Forest Service does not have the authority to regulate activities on private lands.

**Alternative Route across NFS Lands:** We considered an alternative that would provide access across NFS Lands other than on the railroad grade. However, the only way this access could be accomplished would be to construct a road above the existing railroad grade. This road would be constructed on steep ground and would need to cross the railroad grade in order to actually access AWP properties. Not only could construction de-stabilize the railroad grade, but AWP would not be able to correct drainage problems that are causing damage to AWP property. An alternative route would also not address the issues related to the need for Forest Service access to AWP's half of the grade for adequate recreation and heritage resource management. Therefore this alternative was not given detailed study because it is impractical and it would not meet the purpose and need for this project.

**Expanded Easement:** Some members of the public suggested an alternative where the Forest Service would arrange a reciprocal easement extending to the north bank of the Blackwater River. The purpose of this easement would be to provide a protective area along AWP lands and provide a lower level of impact to river recreationists. This alternative was not given detailed study because it does not meet the purpose and need for this proposal, and it is beyond the scope of this project. Granting such an easement or similar authorization would not change land ownership and thus would not preclude AWP from logging their property if they chose.

**Amended Management Prescription:** Several members of the public suggested an alternative that re-allocated the area above and on the grade to Management Prescription 6.2 for additional protection. Changing the management prescription of the area along the grade to 6.2, which has a non-motorized backcountry recreation management emphasis, would be in direct conflict with the purpose and need of this proposal for motorized access. The area above the grade has roads that provide popular motorized recreation opportunities for the public and they would conflict with a 6.2 allocation as well. Finally, changing the Management Prescription in this document is not related to the purpose and need for the proposal and beyond the scope of this analysis. Therefore, this alternative was not considered in detail.

**Longer Logging Use Restriction:** Some comments suggested we restrict AWP from using the grade for logging activity from Memorial Day through Labor Day to reduce potential impacts to recreation. The Memorial Day through Labor restriction would limit use for over three months during a period of time when the least amount of damage from maintenance and use would be expected on the trail. If a “no snow plowing” restriction is included, the operating window would be further reduced. Thus, this alternative could, in effect, extend the amount of time to complete an operation to several years, which would extend the time of impacts to recreationists. Therefore, this alternative was not considered in detail.

**Limited Operation Restriction:** Members of the public suggested an alternative that would restrict AWP to using the grade as a haul route every 10-15 years but limit them to only a two-year window for this purpose. Exceptions would be made for needs outside of this window for special circumstances (e.g., storm or fire damage, etc.) and AWP would still retain access with pickup trucks and smaller vehicles when needed. This alternative was rendered moot by the selection of Alternative 4. However, it was not considered in detail for several other reasons as well. First, limiting a facet of AWP’s operations is not so much an alternative as it is mitigation that could be applied to any action alternative. Second, as mitigation it may put an unneeded restriction on the private landowner, whose harvest schedule is going to be dictated by factors such as stand conditions, weather conditions, and economics. Third, it is generally considered uneconomical and unnecessary to thin managed stands more often than every 10-15 years. Finally, we anticipate that harvest operations on an area this size would normally be completed in one year or less, thereby eliminating the need for a two-year window.

**Bridge Construction:** An alternative was suggested that would not grant the easement but would instead construct a bridge crossing the Blackwater River for AWP to access the north side of their property from the south side of the River. AWP did build a bridge in the fall of 2009, and they are currently harvesting approximately 160 acres of their property on the north side of the river. However, at this writing, AWP has not withdrawn their application for an easement along the railroad grade. Therefore, the Forest must assume that AWP still wants us to complete the NEPA process on their existing application. No action (not granting an easement) is still one of the alternatives considered and analyzed in detail in this EIS. Whether AWP decides to harvest the remainder of their land on the north side of the river using bridges and conventional skidding remains to be seen. Helicopter logging is also an option they have used in the past. The harvest methods used by AWP to manage their property are private business decisions over which the Forest Service has no authority.

**Maintenance Agreement:** An alternative was suggested by members of the public that, rather than providing AWP with an easement or permit to manage their land, a maintenance agreement

be developed between the Forest Service and AWP to improve conditions along the grade. This alternative would also include the requirement for a permit/cost share process each time AWP desired access for timbering activities. This agreement would result in improvement of the deteriorating conditions along the grade, and is similar to Alternative 4, which was developed to address similar concerns.

**Limited Length of Easement:** An alternative was suggested by members of the public that the easement be limited to the length of one logging operation, requiring AWP to reapply in 15 years for another permit. The exact time frame for the easement or other reciprocal authorization has yet to be determined, and it could end up being 15 years or more. However, this alternative also suggests that only the logging operations be addressed by the permit, which would not provide for AWP motorized access to do needed surveys or continued maintenance of the grade or fire suppression, and that would not meet the purpose and need of the original permit request. Therefore, this alternative was eliminated from detailed study.

### **Alternatives Considered in Detail but not Selected**

The following is a summary of alternatives considered in detail but not selected for implementation, along with the rationale for not selecting them. A more detailed description of these alternatives can be found in Chapter 2 of the FEIS.

#### **Alternative 1 - No Action**

Under the No Action Alternative, current management plans would continue to guide management of the project area. Alternative 1 is essentially the “status quo” strategy that allows current activities and policies to move forward over time. Access for inventory, survey, and other land management activities would be available to AWP through non-motorized means. Commercial thinning could still be done by AWP through means such as helicopter logging or bridging the river. There would be no effects to recreation or heritage resources from activities associated with a proposed easement.

The No Action Alternative, however, would not allow AWP to have motorized access to effectively manage timber, address insect and disease infestation or fire suppression, or repair drainage structures and erosion damage along the rail grade—all of which were part of their original easement application proposal. The No Action Alternative would also not allow the Forest Service legal access to address heritage resource and watershed concerns along the grade, nor would it allow the Forest Service to maintain the entire grade for safe and legal recreation use over the long term. As a reasonably foreseeable action, I would have to consider closure of the railroad grade to public use, either for the length of time it would take to see if we could repair and reconfigure the trail to allow for safe and legal recreational access, or permanently if we could not.

Therefore, I did not select this alternative because it did not meet any of the purpose and need for the proposal, it did not meet Forest needs for resource management, and it may preclude public use of the trail for recreational purposes.

#### **Alternative 2 - Proposed Action**

The Proposed Action would allow the Forest Service to authorize right-of-way access to AWP across NFS lands along the railroad grade for the reasonable use and enjoyment of their private

property. The reasonable use and enjoyment was described in the application for the easement submitted by Allegheny Wood Products Inc. (AWP) as long-term timber management. Access for timber management would allow repair and maintenance of the grade to improve drainage, timber stand improvement, and light commercial thinning on a 10-15 year interval, which is described in the AWP easement application. The access is also intended to allow AWP to respond to insect and disease infestation, and to wildfire prevention and suppression needs. Motorized access to AWP for uses other than timber management as described above would not be approved under this authorization. Motorized access by the Forest Service along the railroad grade would not be allowed.

I did not select this alternative for several reasons. While this alternative met the purpose and need for the proposal, it did not provide access for the government to actively manage the trail for recreation users. In addition, this alternative provided minimal protection for the trail users, the trail's character, and for heritage sites. I feel that the Selected Alternative will do more to make the entire grade available to the public while still providing access to AWP. Finally, FSM 2730 (Road and Trail Rights-of-Way Grants) identifies specific objectives for granting rights-of-way (FSM 2730.2). Specifically, these objectives are:

1. Provide rights-of-way for the public road system, including the Federal-aid system, when such roads cross National Forest System lands or interests in lands.
2. Accommodate the access needs for the protection, development, and utilization of lands and resources owned by private interests or administered by public agencies when the planned forest development road system and public road system do not meet those needs adequately.
3. Protect and enhance the quality of air, water, soil, and natural beauty of Forest Service administered lands in the granting of any right-of-way.
4. Cooperate with intermingled and adjacent landowners in developing roads that serve the needs of both parties through the exchange of rights-of-way.
5. Provide access across National Forest System land to private land that is adequate to secure the owners thereof of reasonable use and enjoyment of their land without unnecessarily reducing the management options of the Forest Service or damaging National Forest System lands or resources.

Alternative 2 would not meet objective number 4 described above, and it would not meet objective number 5 as well as Alternative 3 would. Therefore, I did not select this alternative.

### **Alternative 3**

Alternative 3 was identified as the preferred alternative in the DEIS. However, since the release of the DEIS in 2005 a number of changes occurred related to grade conditions, AWP's ability to manage timber on their land without the use of the railroad grade, AWP's reluctance to allow maintenance or public use of their portion of the grade, and a broader perspective of public benefits and impacts presented through our public involvement efforts (see Purpose and Need section). I did not feel that Alternative 3, as described and analyzed in the FEIS, adequately addressed these changes or concerns expressed by the public in their comments on the DEIS. However, I still believe that the reciprocal access provided in Alternative 3 offers the most

promising solution for resolving the issues associated with this project. Therefore, I modified Alternative 3, with its reciprocal access, by restricting timber management activities along the grade and adding more mitigation measures to increase recreationist safety and enjoyment. This modified alternative became Alternative 4.

#### *Environmentally Preferred Alternative*

Alternative 4 is my environmentally preferable alternative, as I believe that it best meets the intent of Section 101 of the National Environmental Policy Act to "...create and maintain conditions under which man and nature can exist in productive harmony." While this alternative has the potential to disturb heritage sites and recreational users, it provides for a higher level of protection to recreationists and heritage sites in the long run. Alternative 1 (No Action) would have no immediate disturbance to historical properties and would have no immediate impact to the recreation users of the trail, but deterioration of the grade and user trespass would continue. This would eventually result in safety and legal concerns, permanent loss of many of the heritage sites, and perhaps loss of the grade for recreation. Alternative 1 would also result in continuing erosion from inadequate culverts and other drainage structures. Alternatives 2 and 3 would replace these inadequate structures, but Alternative 4 also provides the best opportunity for the Forest Service to maintain the trail for recreation purposes while protecting Forest resources.

#### *Public Involvement*

As described in the background, the need for this action arose in July, 2001 with an application for an easement from AWP (PF A-1). In November, 2002 we notified 1,072 people of this proposal (PF C-122). Approximately 4,500 responses were received during the initial scoping period. This proposal was originally going to be analyzed and disclosed under an environmental assessment (EA).

The Forest later determined that an EA may not meet the intent of NEPA because of the potential impacts to historic sites and recreation use along the railroad grade. We decided to issue a Notice of Intent (NOI) to complete an Environmental Impact Statement to analyze the effects of granting an easement to AWP along the grade. This NOI was published in the Federal Register on April 13, 2005, initiating a 45-day scoping period (PF D-9). Because the Federal Register posted an erroneous e-mail address, a second NOI was mailed to Environmental Protection Agency on April 14 (PF D-10) and subsequently posted. We sent a letter announcing the scoping period to an estimated 4,300 individuals, organizations, and other agencies, and we received an estimated 840 responses to the letter.

Comments received during these efforts were used to define issues, develop alternatives and mitigation measures, and define the scope of the environmental consequences.

Using the comments from the public and other agencies, (see *Issues* section of the FEIS), I affirmed several issues regarding the effects of the proposed action. The main issues of concern included impacts to heritage sites and impacts to recreation (see FEIS Chapter 2). To address these concerns, the Forest Service created the alternatives described above.

Attempts were made by the Forest to arrange field trips with the SHPO and AWP but neither party was able to attend (PF B-9, B-10, and B-11).

Prior to completion of a Draft Environmental Impact Statement, approximately 4,800 letters were mailed to those people who responded during the original scoping effort and the scoping for the EIS (PF Q-43). The purpose of this letter was to inform them of the upcoming DEIS and to ask people if and how they would like to receive it (i.e., CD, hard copy, or off the Forest web page) (PF Q-11).

On 23 December, 2005 a Notice of Availability was placed in the Federal Register (PF Q-18). Those who responded with the format they wanted were mailed copies of the DEIS (PF Q-21 and Q-22) or told how to find the DEIS on the Forest web page (PF Q-17). An additional letter was mailed to those who did not respond to the 13 December 2005 (PF Q-11) letter (PF Q-11) advising them of the availability of the DEIS.

Approximately 5,200 letters were received during the 45-day comment period. These letters were reviewed and the comments were responded to.

An additional comment period was initiated on June 22, 2006 to provide the public with an opportunity to comment again on the DEIS in light of two new letters of clarification from AWP on their intended use of the grade. This second effort resulted in an approximately 2,000 additional letters.

Responses to substantive comments are featured in Appendix A (Response to Comments) to the FEIS. Many of these comments resulted in changes in the DEIS including additional alternatives, clarification, and additional mitigation and analysis.

#### *Findings Required by Other Laws and Regulations*

This alternative meets requirements under:

#### **The National Environmental Policy Act (NEPA);**

As described in the FEIS, the NEPA requires analysis of projects to ensure the anticipated effects are considered prior to project implementation (40 CFR 1502.16). The analysis for the Allegheny Wood Products Easement project followed the guidelines of NEPA as provided by the Council on Environmental Quality (CEQ).

The AWP FEIS tiers to the 2006 Forest Plan and its Final Environmental Impact Statement. Alternatives were developed based on existing conditions, Forest Plans goals and objectives, and public concerns and recommendations. I considered a total of four alternatives in detail, including a No Action alternative as required by the NEPA (FEIS Chapter 2); eleven alternatives were considered but eliminated from detailed study. I find that the range of alternatives is appropriate given the scope of the proposal and the purpose and need for action.

The Allegheny Wood Products Easement FEIS, the Project File, and this Record of Decision fulfill the requirements of the NEPA.

The NEPA also requires that the analysis include unavailable or incomplete information (40 CFR 1502.22). In the cumulative effects discussions throughout the FEIS, there are references to the

potential effects of logging on private lands. While it is unknown precisely where or at what level logging will occur in these properties, the FEIS makes an attempt to estimate these effects given reasonable assumptions.

In addition, the specialist reports in the Project File reflect the use of the most current science and methodologies for analysis of the effects as required in 40 CFR 1502.24.

This decision uses all practical means to minimize the potential for environmental harm from this proposal and its associated activities.

### **The National Forest Management Act (NFMA);**

The NFMA requires that any projects on NFS lands be consistent with the National Forest Management Act through consistency with the Forest Plan.

The Monongahela National Forest Land and Resource Management Plan (Forest Plan) provides overall management direction for the Monongahela National Forest including:

- Multiple use goals and objectives, and management standards and guidelines to achieve them.
- Monitoring and evaluation requirements to determine whether goals, objectives, and standards and guidelines are being met.
- Direction for specific management areas.

As noted in the “Purpose and Need” section of this ROD, I have determined that the AWP proposal is consistent with Forest Plan goals and associated management direction related to special uses. Additional requirements in the NFMA related to vegetation management or manipulation are not applicable to this project.

### **Best Available Science**

The NFMA implementing regulations require that projects implementing land management plans and plan amendments...must be developed considering the best available science in accordance with 219.35(a)...and must be consistent with the provisions with the governing plan.

My use of the best available science is described in “Rationale for My Decision. The need to employ the best science is not new, as Agency decisions have always required a sound technical basis. What constitutes best available science can vary over time and across scientific disciplines. My conclusion is based on a review of the record that shows a thorough review of relevant scientific information, a consideration of responsible views, and the acknowledgement of incomplete or unavailable information, scientific uncertainty, and risk. My decision meets this requirement.

### **Irreversible or Irretrievable Commitment of Resources**

Because the work authorized in this decision is only on the existing disturbed railroad grade and its drainage ditches, there would be no irreversible or irretrievable impacts to the soils, slope, or site productivity.

It is possible that activities that disturb the railroad grade may result in damage or loss of historical properties or other parts of the rail grade. However, we know that impacts to historical

resources and the grade have already occurred, and that they will continue to occur under a No Action alternative. My decision selects an alternative that would allow the Forest Service the opportunity to effectively address these impacts over time through restoration and maintenance.

### **The Endangered Species Act (ESA);**

The Selected Alternative meets the requirements of the Endangered Species Act. Forest Biologists considered the potential effects to all federally listed or proposed species within the project area, or with suitable habitat within the project area (FEIS pp. 3-23 to 3-24 and 3-37 to 3-47). A Biological Evaluation (BE) was submitted to U.S. Fish and Wildlife Service (PF M-12). The BE determined there would be **No Effect** to the bald eagle, shale barren rockcrest, and Virginia spirea. The BE determined this alternative **May Affect, but Not Likely to Adversely Affect** the Virginia big-eared bat, West Virginia Northern Flying Squirrel, Cheat Mountain salamander, small whorled pogonia, and running buffalo clover. The BE determined this alternative **May Affect, and is Likely to Adversely Affect** the Indiana bat, due primarily to potential cumulative impacts associated with reasonably foreseeable timber harvest on AWP lands. However, the analysis found that direct and indirect effects associated with repair and maintenance of the rail grade “...could improve roosting habitat along the grade by exposing more potential roost trees to sunlight. The canopy opening and associated edge habitat also may improve foraging habitat by mimicking the canopy gaps associated with preferred habitat” (FEIS p. 3-49).

On February 2, 2007, the U.S. Fish and Wildlife submitted a Biological Opinion for this project (PF M-24) that concurred with these findings.

### **The National Historic Preservation Act (NHPA);**

The NHPA sets forth a framework for identifying and evaluating historic properties, and assessing effects to these properties (36 CFR 800 Subpart B). Section 101(b)(4) of the National Environmental Policy Act (NEPA) states “In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may...preserve important historic, cultural, and natural aspects of our national heritage, and maintain, whenever possible, an environment which supports diversity, and variety of individual choice...” To accomplish this, federal agencies use the Section 106 process associated with the NHPA (codified in 36 CFR 800.3b and 800.8). To do this, the Monongahela National Forest routinely consults with the West Virginia State Historic Preservation Office (SHPO) and the Advisory Council on Historic Preservation (AChP).

Due to potential adverse effects to heritage resources from all alternatives analyzed in the EIS, including no action, consultation on this proposal occurred with the SHPO, the AChP, and AWP. Representatives from the Wilderness Society, the National Trust for Historic Preservation and the Friends of Blackwater requested and were granted consulting party status in this process.

Consultation pursuant to the terms of Section 106 of the NHPA has been completed for this project, thus fulfilling the requirements of 36 CFR 800. A programmatic agreement was developed as a result of consultation (Appendix D of the FEIS and Appendix B of this ROD).

The SHPO chose not to be a signatory for this agreement. The ACHP, AWP, and the Forest Service are signatories to this agreement. The Forest has already completed mitigation documentation in the agreement. Based upon the efforts discussed above and in the Project File, I have determined that this decision is consistent with the National Historic Preservation Act.

**The Federal Land Policy and Management Act of 1976 (FLPMA);**

Title II of the FLPMA provides direction for the Land Use Planning, Land Acquisition, and Disposition of public lands. Title V of the FLPMA states in part "...[T]he Secretary of Agriculture...[is] authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for... (6) roads trails, highways..." (Sec. 501 (a)(6)). As this authority has been delegated to me, I am authorized to grant this access right-of-way.

This Act states "The Secretary...shall require...that the applicant submit and disclose those plans...or intended use, of the right-of-way which he deems necessary to a determination, in accordance of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way" (Sec 501 (b)(1)). FLPMA requires that the applicant (if a partnership, corporation association, or other business entity), submit specific information related to the business (Sec. 501 (b)(2)). It also requires information related to use of this grade by the applicant (Sec. 501 (b)(1)).

This information was provided as a part of the application for an easement (PF A-1). The application included specific information related to corporate interests. Overall usages of the grade by the applicant as described in the application are sufficient for me to grant this access.

Based on the efforts discussed above and the Project File, I have determined that this decision is consistent with the Federal Land Policy and Management Act of 1976 (as amended).

**The Alaska National Interest Lands Conservation Act (ANILCA);**

The Alaska National Interest Lands Conservation Act provides in part for the access of non-federal lands when access is not possible or feasible without crossing federal lands. The applicant (AWP) requested access in accordance with language from the ANILCA as well as the FLMWA. A requirement of mine is to determine if the applicant has reasonable access to his property for the intended use. In the past, the applicant has thinned his property by helicopter to the south side of the Blackwater River, and a large portion of the property is currently being logged via a bridge across the Blackwater River. Access to do surveys and other resource management activities has occurred by walking, bicycling, or OHV use on the applicant's segment of the trail. Therefore, my decision is not based on my authority under the ANILCA. My decision is based on the authorities granted to me using the FLMWA. Based on this rationale, I find this decision is consistent with, but not dependent on the ANILCA.

**The Wild and Scenic Rivers Act;**

The Wild and Scenic River Study completed by the Monongahela National Forest in 1995 identified two segments of the Blackwater River that are eligible for inclusion in the National Wild and Scenic River System (PF N-12). The outstanding and remarkable values that were

identified for these river segments in the 1995 study include “scenic” and “recreational”. These values are discussed on pages 3-12 to 3-13 of the FEIS.

The USDA Forest Service does not have the authority to regulate management activities on private lands within a Wild and Scenic River Corridor. Direction and restrictions to management activities within these corridors are limited to federal lands. No proposed activities on NFS lands under the Selected Alternative would impact those attributes (i.e., the scenic and recreational values) that were identified when determining the eligibility of the Blackwater River for inclusion under the Wild and Scenic Rivers System (FEIS p. 3-13). Therefore, I find this decision is consistent with the Wild and Scenic Rivers Act.

### **Clean Water Act;**

The Clean Water Act (as amended, 33 U.S.C. 1323) directs the Forest Service to meet state, interstate, and local substantive as well as procedural requirements with respect to control and abatement of pollution in the same manner and to the same extent as any non-government entity. The Forest Service has the statutory authority to regulate, permit and enforce land-use activities on the NFS lands that affect water quality.

Mitigation measures on NFS lands are included in this decision to reduce sediment flow to the Blackwater River. In addition, any logging done on private lands will be guided by West Virginia Best Management Practices that are designed to reduce sediment. Therefore, I find this decision is consistent with the Clean Water Act.

### **Executive Order 12898 (Environmental Justice);**

In February 1994, President Clinton signed Executive Order 12898, requiring federal agencies to conduct activities related to human health and the environment in a manner that does not discriminate or have the effect of discriminating against minority and low income families (PF B-46). Based on the analysis in the FEIS (p. 3-67), I find there is no discrimination against low income or minority families.

## **Implementation**

### *Implementation Date*

If no appeals are filed within the 45-day time period under 36 CFR 215, implementation of the decision may occur on, but not before, 5 business days from the close of the appeal filing period. When appeals are filed, implementation may occur on, but not before, the 15th business day following the date of the last appeal disposition.

### *Administrative Review or Appeal Opportunities*

This decision is subject to administrative appeal pursuant to Forest Service Regulations at 36 CFR 215 by individuals and organizations who submitted written or oral comments and/or expressed interest during the first 45-day comment period or the reopened thirty-day comment period (36 CFR 215.13). A legal notice of this decision will be published in *The Inter-Mountain* in Elkins, WV, which is the “Paper of Record” for this decision.

The permit applicant can also choose to appeal under 36 CFR 251 Subpart C and must meet the requirements of 36 CFR 251.90. The applicant must stipulate under which regulation (36 CFR 215 or 36 CFR 251) they are appealing. They cannot appeal under both (36 CFR 215.11(d)).

In accordance with 36 CFR 215.15 or 36 CFR 251.88, a written Notice of Appeal must be postmarked and submitted to the following Appeal Deciding Officer within 45 calendar days after the date the notice of this decision is published in *The Inter-Mountain*: Regional Forester, Appeal Deciding Officer, Attn: Appeals and Litigation, USDA Forest Service, Eastern Region 626 E. Wisconsin Avenue, Milwaukee, WI 53202-4616. The publication date in *The Inter-Mountain* is the exclusive means for calculating the time to file an appeal. Those wishing to appeal this decision should not rely upon dates or timeframe information provided by any other source. An appeal, including attachments received after the 45-day appeal period will not be considered. Appeals must follow the direction in 36 CFR 215.14 (for 36 CFR 215 appeals) or 36 CFR 251.90 (for 36 CFR 251 appeals). A Notice of Appeal may also be faxed to Attn: Regional Forester, Appeals Deciding Officer, (414) 944-3963 or hand-delivered to the above address during the normal business hours of 7:30 A.M. to 4:00 P.M., Monday through Friday. If submitted electronically, appeals should be directed to [appeals-eastern-regional-office@fs.fed.us](mailto:appeals-eastern-regional-office@fs.fed.us). They should be in .txt, .rtf, .doc, .pdf or other Microsoft Office-compatible formats. In cases where no identifiable name is attached to an electronic message, a verification of identify will be required.

#### *Contact Person*

For additional information concerning this decision or the Forest Service appeal process, contact David Ede, Forest Planner and Environmental Coordinator, Monongahela National Forest, 200 Sycamore Street, Elkins, WV, 26241 or phone (304) 636-1800.

/s/ Clyde N. Thompson  
**CLYDE N. THOMPSON**  
Forest Supervisor  
Monongahela National Forest

07/26/2010  
**[DATE]**

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