

United States
Department of
Agriculture

Forest
Service

Southwestern
Region

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Reply To: 1570-1 (FOR)

Date: April 24, 1997

Ms. Sharon Galbreath
Plateau Group and Grand Canyon Chapter
Sierra Club
P.O. Box 38
Flagstaff, AZ 86002-0038

CERTIFIED MAIL--
RETURN RECEIPT REQUESTED
P 293 931 314

Mr. Peter Galvin
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CERTIFIED MAIL--
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P 293 931 369

RE: Gentry Analysis Area Appeal #97-03-00-0029-A215
Apache-Sitgreaves National Forests

Dear Ms. Galbreath and Mr. Galvin:

I have completed a review of your March 10, 1997, appeal of the Gentry Analysis Area project. The review was conducted in accordance with 36 CFR 215.

BACKGROUND: On January 17, 1997, Forest Supervisor John Bedell made the decision to implement alternative #2 of the Gentry Analysis Area on the Chevelon Ranger District, Apache-Sitgreaves National Forests. The legal notice of Mr. Bedell's decision was published in the White Mountain Independent on January 24, 1997. I received your appeal on March 13, 1997. I received the appeal record (AR) from the Forest Supervisor on March 18, 1997.

Between March 13 and 25, 1997, I received Interested Party comments from three parties. Comments from the following Interested Parties were given consideration in my review decision:

Liz Wise, White Mountain Conservation League
Duane Shroufe, Arizona Game and Fish Department
Suzanne Jones, The Wilderness Society.

On April 2, 1997, I received a letter from Forest Supervisor John Bedell. In the letter, Mr. Bedell summarized the results of his March 24, 1997, tele-conference call with Sharon Galbreath and other involved parties. I understand that resolution of the appeal issues was not possible during the informal disposition meeting.

RECOMMENDATION OF APPEAL REVIEWING OFFICER (ARO): The Appeal Reviewing Officer has reviewed the appeal record and forwarded his recommendations to me. I have attached a copy of the ARO's letter. The ARO found that the Gentry Analysis

Area project complied with applicable laws, regulations, policies, and the Forest Plan Amendment.

APPEAL ISSUES: In the statement of reasons, appellants allege that the Gentry Analysis Area project violated: 1) National Environmental Policy Act, and Apache-Sitgreaves National Forests Land Management Plan Appeal Settlement Document, 2) Regional goshawk policy, 3) Forest Plan Amendment, 4) Endangered Species Act, Mexican spotted owl Recovery Plan, and Forest Service threatened, endangered and sensitive species policy, 5) the Migratory Bird Treaty Act, and 6) Administrative Procedures Act. These six issues are addressed as follows:

ISSUE 1: PROJECT VIOLATED NATIONAL ENVIRONMENTAL POLICY ACT (Appeal pp. 2, 3, 12, 13), & **APACHE-SITGREAVES NATIONAL FORESTS LAND MANAGEMENT PLAN APPEAL SETTLEMENT DOCUMENT** (Appeal pp. 2-6, 8, 12)

Appellants allege a host of National Environmental Policy Act (NEPA) violations, most of which center around "significance" in the NEPA context, and dictate the requirement for preparation of an environmental impact statement (EIS). The following allegations are addressed in this issue:

- o project does not conform to the 1990 Forest Plan Settlement Agreement
- o cutting large old trees is irreversible and irretrievable
- o harvesting large trees and understory thinning has significant effects on scenic and recreation values
- o cutting large mistletoe infected trees is controversial
- o cutting old growth trees to enhance old growth characteristics is controversial
- o public was denied a new 30-day comment period
- o cumulative effects analysis is inadequate

The 1990 Forest Plan Settlement states, "During the interim period and until the future amendment or revision is completed, a process for allocating and managing old growth will be developed. Decisions to be made will include the definition of old growth, its arrangement on the landscape and how it will be designated in the Forest Plan. An agreed upon process, similar to that used on the Kaibab National Forest, will be used to map the old growth component. These mapped old-growth units will not be harvested for any purpose until the future amendment or revision is complete."

The Apache-Sitgreaves Forest Plan was amended on June 5, 1996 along with the other ten forests in the Southwestern Region. The Forest Plan Amendment, which includes direction for old growth management, was made with full public involvement. The settlement agreement clearly states that the agreed upon process was to last only until the plan was amended. Although the Forest Plan Amendment decision is currently under appeal, the decision was not stayed. The Amendment is "complete" as called for in the agreement.

Any further discussion about the Amendment as it relates to the 1990 Settlement Agreement is outside the scope of the Gentry analysis and is in fact being addressed in the Forest Plan Amendment appeal.

The appeal record indicates one stand (Compartment 4113, stand 17) presently meeting the Regional criteria for old growth will be treated (AR 138). The prescribed treatment consists of thinning 26 acres of this stand, from below, in the 5" to 18" diameter classes. The Environmental Assessment (EA) indicates the

treatment is oriented toward managing for old growth characteristics and moving the stand toward threshold habitat conditions for nest/roost sites used by the Mexican spotted owl (AR 145 pp. 9, 42-44). The appeal record also shows that the post-treatment stand characteristics are intended to meet the Forest Plan Amendment old growth criteria (AR 131). As this practice is consistent with the Apache Sitgreaves Forest Plan, it is appropriate. This activity is allowed under the original Apache-Sitgreaves Forest Plan decision in 1987 and the 1996 Amendment.

"Irreversible" describes the loss of future options. It applies primarily to the effects of use of nonrenewable resources, such as minerals or cultural resources, or to those factors, such as soil productivity that are renewable only over long periods of time. "Irretrievable" applies to the loss of production, harvest, or use of natural resources. For example, some or all of the timber production from an area is lost irretrievably while an area is serving as a winter sports site. The production lost is irretrievable, but the action is not irreversible. If the use changes, it is possible to resume timber production (FSH 1909.15 §.05). Cutting large old overstory trees is irretrievable but not irreversible. The EA describes the short-term and long-term effects of this action (AR 145 pp. 42-44). Irreversible and/or irretrievable commitments of resources do not in and of themselves trigger "significance" in the NEPA context.

Appellants also contend this project constitutes a "significant federal action." The Forest Supervisor prepared an EA and Finding of No Significant Impact (FONSI) per 36 CFR 1501.3-4. The Forest Supervisor "...determined that the implementation of Alternative #2 is not a major Federal action that would significantly affect the quality of the human environment." The EA and appeal record support the conclusions in the Decision Notice/FONSI.

The scope of the environmental analysis is determined by the significant issues related to the proposed action (40 CFR 1501.7). The documentation will be prepared in accordance with the project scope (40 CFR 1502.9). The Forest Supervisor is required to address the environmental effects (direct, indirect, and cumulative) of the proposed action and alternatives in the document (40 CFR 1502.16). Therefore, the environmental impacts to be considered are determined by the significant issues related to the proposed action. The Forest Supervisor established the project scope by sharply defining the proposed action, soliciting issues from the public, and by identifying significant issues through analysis of comments. The Forest Supervisor did not consider effects on scenic and recreation values to be a problem with the proposed action. Neither the appellants nor anyone else offering comment raised this concern. As these issues were never raised, there was no reason to consider them in the analysis.

Cumulative effects analyses, considering the effects of past and proposed projects with the effects of this project were conducted (AR 89-91, 145 pp. 89-91). Effects of past, present, and proposed projects were considered on wildlife habitat capability and the watershed. The Cumulative Watershed Effects Analysis also considers cumulative effects of livestock grazing on the watershed (AR 92).

Appellants claim that the cumulative effects analysis is incomplete and inadequate because it was only analyzed at the ecosystem management area level. The area management scale analyzed is not in violation of the Forest Plan Amendment. The FEIS on pages 10-11 states that, to determine site specific

mitigation for most TES species, "An accepted ecological approach is to do analyses at multiple scales, one above and one below that needed to analyze the site specific action." The project was analyzed at the stand level (one below), and the ecosystem management area level (one above). This is consistent with the Forest Plan Amendment.

Appellants claim that cutting large old trees (mistletoe infected or not) is highly controversial in the scientific community. This controversy is not evident in the public comments. Appellants do not offer any evidence of this controversy either. This allegation is dismissed as having no merit. Based on the intermediate treatments proposed, there is no possibility that mistletoe will be eliminated from the stands (AR 131).

Appellants contend that the public was denied the required 30-day comment period prior to issuing the decision. The EA was mailed to interested parties on July 14, 1995 for 30-day notice and comment (AR 123). The Gentry Decision Notice was originally issued in July of 1996, in violation of a court injunction (AR 130). The decision was subsequently withdrawn for that reason (AR 133). After the injunction was lifted, a new Decision Notice was issued on January 17, 1997 (AR 141). There is no requirement for additional notice and comment periods when an EA is not changed or supplemented (36 CFR 215.3-6).

Appellants are correct in pointing out that the Southwest Center For Biological Diversity and the Sierra Club were not notified of the new decision. Neither signatory to this appeal ever expressed interest in the proposed action. The sum total of the appellants' involvement was to appeal the first decision. This does not constitute a comment or expression of interest under 36 CFR 215.

The Forest Supervisor complied with the procedural requirements of NEPA using appropriate discretion in determining the scope of analysis. Although the appellants obviously disagree with the results of the analysis, appellants have failed to substantiate any significant procedural flaws. The Forest Supervisor is affirmed on this issue.

ISSUE 2: PROJECT VIOLATED REGIONAL GOSHAWK POLICY (Appeal pp. 2, 3)

Appellants claim that the project violates Regional goshawk policy because "Large VSS 5 and 6 trees are proposed for harvest..." and that proper goshawk surveys are lacking.

Some VSS 5 clumps of trees will be thinned. Only a few selected large trees, heavily infested with dwarf mistletoe, shall be removed. The selected alternative maintains the current percentage of VSS 6 (AR 137, 145).

The Habitat Capability Index (HCI) for goshawk immediately post harvest will not change significantly from current conditions (0.657), but in 20 years the HCI is predicted to improve to 0.748. Short-term, insignificant impacts will help move the area towards desired condition while still meeting Forest Plan Standards and Guidelines as amended. The Forest has complied with Regional goshawk policy and the Forest Plan as amended. The latest goshawk survey for this project took place in 1996. Northern goshawk will not be adversely impacted and population viability will be maintained (AR 98, 145).

ISSUE 3: PROJECT VIOLATED FOREST PLAN AMENDMENT BY HARVESTING TREES IN VSS 5 & 6 (Appeal p. 11)

Forest Plan Guidelines for protection of the northern goshawk outside of post-fledging family areas include direction to maintain 20% in VSS 5 and 6. This direction also includes an acceptable range of +/- 3% (Forest Plan Amendment ROD p. 92). Therefore, the one percent reduction that appellants pointed out in VSS 5 is within the range directed in the Forest Plan Amendment. Based on the prescriptions for the Gentry project, and the post-harvest summary table in the EA on page 38, the percentage of VSS 6 will remain at 3% at the Ecosystem Management Area scale, and at 7% at the Gentry Analysis Area scale (AR 131, 145).

ISSUE 4: PROJECT VIOLATED ENDANGERED SPECIES ACT, MEXICAN SPOTTED OWL RECOVERY PLAN, & FOREST SERVICE THREATENED, ENDANGERED AND SENSITIVE SPECIES POLICY (Appeal p. 3)

Appellants claim that the project violates the MSO recovery plan, that proper surveys for the MSO were not completed and that harvesting will take place in a designated MSO territory that was improperly "de-designated." Therefore, appellants contend that ESA and APA have been violated.

MSO surveys took place in 1995 and 1996 in compliance with the MSO Recovery Plan. MSO surveys in the analysis area are also planned for 1997.

With the release of the draft recovery plan, the Forest worked very closely with U.S. Fish and Wildlife Service (USFWS) to establish MSO habitat boundaries. The USFWS, the agency that regulates all activities for compliance with ESA, concurred with the new MSO habitat boundary modification (AR 118, 122, 126). The USFWS concurred with the Forest's determination that this project is not likely to adversely affect the MSO (AR 118).

Appellants claim that the BE incorrectly concludes that there will be no negative effects to threatened, endangered, and sensitive (TE&S) species, and it does not analyze effects to all Management Indicator Species (MIS) and TE&S species.

Field inventories were conducted by Forest Service and the Arizona Department of Game and Fish personnel. Data was collected on current habitat conditions including vegetative structural stages, canopy cover, snags, stand composition, water developments, road densities and habitat diversity. Analyzing these parameters, effects to TE&S and MIS species were estimated using stand data projections, and techniques such as the HCI model, as well as professional judgment (AR 145).

The Biological Evaluation and supporting documentation analyzes and discloses effects to all TE&S species that occur or might occur in the area (AR 98). The resulting determinations, based on the analyses, are proper. MIS were chosen to reflect the different habitat type uses by wildlife in the analyzed area. Effects to MIS were properly analyzed and disclosed (AR 145).

This project decision complies with ESA, MSO recovery plan, and Forest Service policy for wildlife species. MSO habitat boundary modifications, completed with USFWS participation, were appropriate. The conclusions in the Biological Evaluation and supporting documents were valid.

ISSUE 5: PROJECT VIOLATED MIGRATORY BIRD TREATY ACT (Appeal p. 3)

Contention: Appellants claim that the project violates the MBTA because possible nest trees might be harvested.

Response: The Migratory Bird Treaty Act does not address the taking of habitat as does the Endangered Species Act. The MBTA refers specifically to direct taking, or killing of birds on its list (16 U.S.C. 703). This type of taking is not proposed with this sale. Nests of goshawk, flammulated owl, or other such sensitive species, if found in timber harvest units, will be protected following Forest Plan Standards and Guidelines for nesting raptors (AR 145). This project will not result in "takings" of migratory birds under the MBTA. This project does not violate MBTA.

ISSUE 6: PROJECT VIOLATED ADMINISTRATIVE PROCEDURES ACT (Appeal pp. 2 and 3)

The Forest Supervisor conducted a NEPA analysis in a public arena disclosing the environmental effects of the action. Appellants and other publics participated in the process or had ample opportunity to do so. Based on my review of this record, I conclude that the Forest Supervisor considered the essential information/facts and public input related to the project, and reached an appropriate decision. I find that the Gentry Analysis Area decision was not arbitrary, capricious or an abuse of discretion.

APPEAL DECISION: After a detailed review of the appeal record and the Appeal Reviewing Officer's recommendations, it is my decision to affirm the Forest Supervisor's decision to implement alternative #2 of the Gentry Analysis Area. The requested relief in your appeal is denied.

This decision constitutes the final administrative determination of the Department of Agriculture (36 CFR 215.18(c)).

Sincerely,

/s/ John R. Kirkpatrick

JOHN R. KIRKPATRICK
Appeals Deciding Officer
Deputy Regional Forester

Enclosure

cc:
Interested Parties (3)
A-S NFs
P. Jackson
C. Gonzalez
EAP
WL
FOR