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Reply To: 1570-1 (FOR)

Date: September 2, 1997

Mr. Brian Segee
Southwest Center for Biological Diversity
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Tucson, AZ 85702-0710

CERTIFIED MAIL--
RETURN RECEIPT REQUESTED
P 293 931 333

RE: Little Multi-Product Sale Appeal #97-03-00-0040-A215
Apache-Sitgreaves National Forests

Dear Mr. Segee:

I have completed a review of your July 14, 1997, appeal of the Little Multi-Product Sale. The review was conducted in accordance with 36 CFR 215.

BACKGROUND: On May 21, 1997, Forest Supervisor John Bedell made the decision to implement alternative #2 of the Little Multi-Product Sale on the Alpine Ranger District, Apache-Sitgreaves National Forests. The legal notice of Mr. Bedell's decision was published in the White Mountain Independent on May 30, 1997. I received your appeal on July 17, 1997. I received the appeal record (AR) from the Forest Supervisor on July 29, 1997.

On July 24, 1997, I received a letter from Forest Supervisor John Bedell. In the letter, Mr. Bedell summarized the results of a July 23, 1997, conference call between you and representatives of the Forest. 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 Little Multi-Product Sale complied with applicable laws, regulations, policies, and the Forest Plan.

APPEAL ISSUES: In the statement of reasons, appellant alleges that the Forest Supervisor violated the National Forest Management Act, the National Environmental Policy Act, the Endangered Species Act, and the Administrative Procedures Act. These four issues are addressed as follows:

ISSUE 1: PROJECT VIOLATES NATIONAL FOREST MANAGEMENT ACT (NFMA)

ISSUE 1A: Appellant alleges that the Little Sale violates NFMA because the Forest Service (FS) failed to survey the sale area for all potential Mexican spotted owl areas.

The analysis area was evaluated for potential Mexican spotted owl areas (AR 359). Based on that evaluation, surveys were designed to cover these areas (AR

521 survey maps). Surveys were conducted in 1991, 1992, and 1994, with annual monitoring in the Bob Thomas Creek, Lower Stone Creek, and Swapp-Booth #4 protected activity centers (PAC's) (AR 545, 348). Members of the Little Sale interdisciplinary team discussed and visited the Little Sale with US Fish and Wildlife Service biologists on November 4, 1996 (AR 523). The BA/E was reviewed at this meeting also. The US Fish and Wildlife Service (USFWS) concurred with the findings in the BA/E (AR 521), including the "may effect, not likely to adversely effect the Mexican spotted owl" (AR 547).

The Mexican spotted owl surveys were adequately conducted on potential Mexican spotted owl areas and the Forest Supervisor is affirmed on this issue.

ISSUE 1B: Appellant alleges that the Little Sale violates NFMA because the FS failed to survey the sale area for all potential Northern goshawk areas.

The Northern goshawk surveys for the project were completed in 1992 and 1993 according to interim policy (AR 554). Some of the areas identified by the District Wildlife Biologist as unsuitable nesting habitat for Northern goshawk were not surveyed. These unsurveyed areas are being managed at the foraging area standard since the adjacent nesting goshawk habitat includes these unsurveyed areas for foraging. I conclude that the surveys completed were adequate and the Forest Supervisor is affirmed on this issue.

ISSUE 1C: Appellant alleges that the Little Sale violates NFMA because the Forest Service failed to manage for goshawk vegetation management guidelines.

The primary contention of this appeal point is that the Forest Service is proposing to cut large trees (greater than 18 inches diameter at breast height, dbh) and that this would be in violation of the Forest Plan Amendment effective June 16, 1996.

The Forest Plan Amendment follows the recommendations in GTR RM-217, "Management Recommendations for the Northern Goshawk in the Southwestern United States." (MRNG). The area analyzed for the Little Sale currently has 12% VSS 5 and 4% VSS 6. The appellant contends that because of the deficiency of VSS 5 and VSS 6 it would be a violation of this management direction to cut any "VSS 5 and VSS 6 size trees" (emphasis added).

A vegetation structural stage is a property of a stand, not a tree (MRNG). Therefore, it is inappropriate to refer to VSS 5 and VSS 6 size trees. The intent of the standards and guidelines is to develop and maintain across a landscape plant communities that have the properties described by the VSS classes listed. Removal of large trees is permitted, even when the relevant VSS classes are deficient in the landscape so long as it does not change the classification of the stand. The goshawk standards and guidelines are met so long as the community will remain VSS 6 where it is deficit, and density is maintained to provide at least 40% canopy cover.

On page 9 of the Little Sale EA, the description for alternative #2, the alternative selected for implementation, states that,

"VSS 5 (18-24" dbh) and VSS 6 (24"+) groups would not be targeted for regeneration, but commercial thinning in accordance with the NGMR would occur in these groups in order to improve the longevity of the groups. thinning would be from below, favoring to leave the larger

dominant/codominant trees, and those with the least mistletoe infection, while maintaining a group minimum of 40% canopy cover following harvest, and also maintaining at least a minimum of 2 snags or potential snags per acre.

It is clearly stated here that treatments in structural stages 3, 4, 5 and 6 will be thinning from below, which means that the smaller trees would be removed first, then progressively larger trees would be removed until the desired stocking level has been reached. This is exactly what the appellant suggests with the following statement "Common sense, in addition to sound biology, would dictate that to reduce tree densities, the Forest Service should thin small trees and preserve the large, rare trees." (Appeal p. 6).

The description of alternative #2 goes on to say,

"Scattered overstory trees (occurring singly or in groups of up to 3 in number) which are free of dwarf mistletoe or with low dwarf mistletoe ratings (tree DMR \leq 3) with low potential of spread to healthy understory would be retained by this alternative.

Scattered overstory/midstory trees (occurring singly or in groups of up to 3 in number), with dwarf mistletoe (tree DMR 1+) with a high potential for spread of the disease to a manageable understory would be removed."

Since VSS is a condition of a stand, groups of 3 trees or less (no matter what size) cannot be said to comprise a VSS class. Such small groups of trees would simply be inclusions in the surrounding VSS class. The surrounding VSS class should be managed under the guidelines appropriate to it. In the case of younger VSS classes, the primary goal of the goshawk guidelines is to keep the trees healthy and growing rapidly so they will eventually reach the larger sizes. In this case, it would be appropriate and within the intent and letter of the goshawk guidelines to protect them by removal of a potential disease source.

The appellant challenges the assertion that cutting trees over 18" dbh is best suited to successful implementation of the guidelines over a longer time frame.

Page 6 of the silviculture specialist's report states that computer modeling shows that alternative #2 will result in more area in combined VSS 5 and 6 and more area in VSS 6 in the year 2100, a time frame of about 100 years, than would alternative #4, even though alternative #4 would not allow cutting any trees over 18 inches dbh (AR 525). Only alternative #3 would produce more VSS 6 area and it was rejected because it failed to maintain the required forest density in the larger tree sizes.

The appellant asserts that the statement that management maintaining groups of VSS 5 and 6 as groups of VSS 5 and 6 is "misleading and irrelevant..." (Appeal p. 6). The intent of the goshawk guidelines, when deficit in VSS 5 and VSS 6 stands, is to maintain the stands across the landscape. The guidelines refer to the management of VSS classes which by definition must be large enough to be considered a stand. The guidelines do not refer to the management of individual trees.

The appellant challenges cutting large instead of small trees as not accomplishing the stated goal of hastening the progression towards old growth. The clear language of the environmental assessment (EA) says that when dealing

with VSS 5 and 6, thinning will be from below, which means that small trees will be cut before the large ones. Appellant also questions whether VSS 5 and 6 groups are overly dense. Again, the language of the assessment states that groups will not be thinned below 40% crown cover. Therefore, unless the group exceeds minimum required density it would not be thinned. It must be recognized that one of the stated objectives of treatments of these groups is to extend the longevity of the remaining large, old trees. A letter dated August 27, 1996, from Michelle Frank, Forest Entomologist states that structural stages 3C, 4C, 5C, 6B and 6C can be considered to have high susceptibility to attack by bark beetles (AR 438.6). While the goshawk guidelines require retention of 6B stages, 5C and 6C could be thinned to reduce susceptibility and prolong the life of the remaining trees.

The appellant comments that Forest Service inventories showing that only 3% of all trees in the Southwestern Region are over 17 inches dbh gives more support for not cutting large trees. However, actual numbers of trees greater than 17 inches dbh have not changed substantially. Furthermore, region-wide averages must be tempered with site specific data for a site specific analysis. The data and proposed actions presented in the appeal record, as discussed above, support the decision.

The appellant further states that the "guiding intent behind the goshawk guidelines is to maintain as much old growth as possible." The actual standard presented on page 91 of the ROD for the Forest Plan Amendment is "Manage for old age trees such that as much old forest structure as possible is sustained over time across the landscape" (emphasis added). The goshawk scientific committee determined that about 20% was the maximum amount of VSS 6 that could be sustained over time. This is the overall goal stated in the environmental analysis.

Appellant objects to cutting large trees for mistletoe control. The environmental assessment clearly states, as described above, that large trees will be cut only as allowed by the goshawk guidelines. As long as the guidelines are met, removal of infected trees can reduce spread not only to understory trees but also to nearby large trees. Thinning around large trees can improve the health and vigor of the remaining large trees.

Appellant states that mistletoe contributes to wildlife habitat. Page 24 of the EA states that no insect or disease would be eradicated from the sale area. Furthermore, alternative #3 would have allowed more aggressive treatment of mistletoe, but this alternative was not selected for implementation. This would indicate that the Forest has developed a moderate approach to the disease. It is true that mistletoe can provide certain components of habitat for some wildlife species. However, it is also true that mistletoe can prevent normal growth and development of trees, and reduce the number of trees that reach their full potential in terms of size and age. It is necessary to find a balance that is within the historic range of variability for the ecosystem. Alternative #2 is designed to do that.

Appellant points out that large snags are an important wildlife habitat component. Alternative #2 requires that all areas of VSS 5 and 6 be maintained and kept at stocking levels prescribed in the goshawk guidelines. This provides more than the number of potential snags required by the guidelines. Past attempts at creating snags by killing trees and leaving them standing have not been very successful because the trees did not stand long after death. It

appears that the most effective way to create snags is to simply allow trees to die over time. The selected alternative leaves standing 95.7% of all existing trees over 18 inches dbh across the analysis area (AR 525, p. 11). This provides for future snags.

Appellant states that "large trees, both living and dead, are what the goshawk and Mexican spotted owl depend on for survival." In fact, the goshawk scientific committee found that the goshawk depends on a diverse forest composed of groups of trees of all sizes to support a diversity of prey species.

Appellant claims that the Apache-Sitgreaves National Forests is "cutting down the few remaining large trees." In fact only 4.3% of all trees larger than 18 inches dbh will be removed from the analysis area and this will be done in a manner that is consistent with the goshawk guidelines. The analysis also shows that the selected alternative will result in more VSS 5 and 6 in 100 years than any other alternative except alternative #3, which fails to fully implement the goshawk guidelines. The selected alternative does this while complying with the standards and guidelines for goshawk management. The proposed action provides large trees within the landscape. The 100 year time frame is appropriate for management of a resource like large, old trees.

The project complied with the "Management Recommendations for the Northern Goshawk in the Southwestern United States." The Forest Supervisor is affirmed on this issue.

ISSUE 2: PROJECT VIOLATED NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

ISSUE 2A: Appellant alleges the Little Sale violates NEPA because the FS failed to consider a reasonable range of alternatives.

Appellant contends, "The A-S's consideration of alternatives is inadequate because all of the alternatives, with the exception of the mandated 'no action' alternative, entail heavy timber cutting..."

"[A]n agency must look at every reasonable alternative, within the range dictated by the 'nature and scope of the proposed action' and 'sufficient to permit a reasoned choice.'" Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 (9th Cir. 1992).

The proposed action is to apply a mix of silvicultural treatments to move the analysis area closer to the desired condition identified in the Forest Plan, thus providing focus for the analysis of effects of this action and its alternatives. The purpose and need statement briefly specifies the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action [40CFR §1502.13], further defining the scope of the analysis. Without the requirement for "reasonable" alternatives, the range of alternatives would be boundless. Reasonable alternatives to the proposed action need to address one or more issues raised in the analysis, and need to address the purpose and need for action.

The Little Multi-Product Sale record documents one issue and eight alternatives, the no-action alternative and seven action alternatives, four of which were studied in detail. The action alternatives considered in detail address the purpose and need and the issue raised. Alternatives to timber harvest, and lower levels of harvest were considered but were dropped from detailed analysis

because they did not meet the stated purpose and need. Reasons for dropping these alternatives are stated in the environmental assessment (AR 585 pp. 4-5).

The Forest Supervisor adequately examined a reasonable range of alternatives and is affirmed on this issue.

ISSUE 2B: Appellant alleges that the Little Sale violates NEPA because the FS failed to consider the cumulative effects of this action.

Specifically, appellant claims: no analysis supports the soil, air, and water effects conclusions; there is no analysis of effects of past sales in the area; and no consideration was given to the cumulative effects of grazing.

An environmental assessment is a concise public document that serves to provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. It shall include brief discussions of: the need for the proposal, alternatives as required by sec. 102(2)(E), the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. The detailed supporting analysis more appropriately belongs in the appeal record.

Cumulative effects analysis supporting conclusions concerning soil, air and water are located in the appeal record. The Little Cumulative Effects Analysis Specialist Report (AR 482) references a similar report for the nearby Swapp-Booth Timber Sale (AR 41, 483) which analyzes effects for the same watershed. These documents considered past, present, and future timber sale activities and grazing.

Other supporting documents include: Little watershed boundary/analysis maps (AR 44, 237); LOTUS watershed analysis spreadsheets (AR 465); and a stream condition field summary (AR 334).

The Forest Supervisor appropriately disclosed cumulative effects and is affirmed on this issue.

ISSUE 2C: Appellant alleges the Little Sale violates NEPA because the FS failed to insure the scientific integrity of the EA.

Appellant alleges the EA fails to identify any of the methodologies used as required by 40 CFR 1502.24. The citation is clearly directed toward environmental impact statements, not environmental assessments. The two documents are separate and distinct. Each is defined in the regulations at 40 CFR 1508.9 and 1508.11. EA's shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted (40 CFR 1508.9(a)(3)(b)). As this analysis was documented in an environmental assessment and not an environmental impact statement, methodologies used are appropriately documented in the appeal record.

The environmental assessment complies with 40 CFR 1508.9 and Forest Service Handbook 1909.15, Sections 41.1 and 41.2. The Forest Supervisor is affirmed with respect to the issue of requirements for an EA.

ISSUE 2D: Appellant alleges the Little Sale violates NEPA because the FS attempted to stifle information.

Specifically, the appellant contends the Forest attempted to withhold information requested by the appellant.

As stated in the "Decision Notice and Finding of No Significant Impact, Little Multi-Product Sale" (AR 586), potentially affected and interested individuals, agencies and organizations have been involved in: eleven public mailings, four public scoping meetings, six interdisciplinary team meetings, and one public field trip (AR 133, 134, 141, 204, 233, 234, 281, 552, 553, 556, 585).

While it appears there was a breakdown in communication between district staff members in handling appellant's last information request, the record indicates it was eventually answered (AR 590A, 592, 593).

The Forest met the requirements of notice and public involvement pursuant to 40 CFR 1506.6 and FSH 1909.15 §11.52. The Forest Supervisor is affirmed with respect to this issue.

ISSUE 3: PROJECT VIOLATES ENDANGERED SPECIES ACT (ESA)

ISSUE 3A: Appellant alleges that the FS failed to ensure the viability and recovery of the Mexican spotted owl and loach minnow.

The District Wildlife Biologist evaluated the effects of the project on the Mexican spotted owl and the loach minnow and made the determination that the sale may affect, but is not likely to adversely affect the two species or their habitat (AR 521). The USFWS concurred with the Forest Service's finding of may effect but not likely to adversely affect the two species (AR 578).

Loach minnow are found 30 miles downstream from the analysis area. It is not within the scope of the project to effect recovery of the loach minnow.

The Forest Supervisor is affirmed with respect to this issue.

ISSUE 4: PROJECT VIOLATES ADMINISTRATIVE PROCEDURES ACT (APA)

(Includes response to appellant's issue 2D: The Little Multi-Product Sale violates NEPA because the Little EA demonstrates biased decision-making.)

Appellant alleges that the Little Sale Decision Notice is arbitrary and capricious.

Appellant argues the EA and decision notice violate NEPA, APA and ESA. Appellant references all of the other issues raised in the appeal as grounds for this conclusion.

Reference is, therefore, made to all of the other responses and findings in this administrative review. For reasons stated individually to each of appellant's contentions, the environmental analysis, documentation, and decision are not biased nor arbitrary and capricious. The analysis and documentation complies with NEPA, APA, and ESA, and, therefore, the Forest Supervisor had adequate

information to base his decision. The Forest Supervisor is affirmed on this issue.

APPEAL DECISION: After a detailed review of your appeal, 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 Little Multi-Product Sale. The request for 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, Resources

Enclosure

cc:

A-S NFs
P.Jackson
C.Gonzalez
EAP
WL
FOR