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Department of  
Agriculture

Forest  
Service

Southwestern  
Region

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Reply To: 1570-1 (FOR)

Date: June 9, 1997

Mr. Peter Galvin  
Southwest Center For Biological Diversity  
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Tucson, AZ 85731-7839

CERTIFIED MAIL--  
RETURN RECEIPT REQUESTED

RE: Sundown Ecosystem Management Area Appeal #97-03-00-0033-A215  
Apache-Sitgreaves National Forests

Dear Mr. Galvin:

I have completed a review of the April 25, 1997, appeal of the Sundown Ecosystem Management Area Environmental Assessment decision. The review was conducted in accordance with 36 CFR 215.

**BACKGROUND:** On March 3, 1997, Apache-Sitgreaves National Forests Supervisor John Bedell made the decision to implement alternative 3 of the Sundown Ecosystem Management Area Environmental Assessment. The project is located on the Heber Ranger District, Apache-Sitgreaves National Forests. The legal notice of the decision was published in the White Mountain Independent on March 11, 1997. I received the appeal on April 25, 1997. I received the appeal record (AR) from the Forest Supervisor on May 12, 1997.

I received several letters from the Apache-Sitgreaves National Forests Supervisor and the Chevelon/Heber District Ranger. In these letters, both summarized the results of telephone conference calls held between appellant and persons from the Forest. I understand that resolution of the appeal issues was not possible during informal disposition teleconferences.

**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 project met the intent of the Apache-Sitgreaves National Forests Plan. He also found that the decision made sense in order to accomplish the purpose and need as stated in the Environmental Assessment (EA). Lastly, the ARO felt that the Forest Supervisor's decision was consistent with local, Regional and west-wide concerns to improve watershed, future forest health, VSS diversity, and riparian. Also to establish a more natural fire regime, maintain wildlife habitat, and reduce open road density.

**APPEAL ISSUES:** Appellant alleges that the project violates: 1) National Environmental Policy Act (NEPA), Administrative Procedures Act (APA), and Forest Service Policy, 2) Federal Advisory Committee Act (FACA), 3) National Forest

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Management Act (NFMA), 4) Mexican Spotted Owl (MSO) Recovery Plan, 5) Endangered Species Act (ESA), and 6) Migratory Bird Treaty Act (MBTA).

My response to appellant's concerns provides a focused review of contentions involving complex resource management issues. Although every contention made by appellant may not be cited in this decision, all of appellant's concerns have been considered. My review of appellant's concerns focused upon the compliance of the Responsible Official's decision with law, regulation and policy.

In addition to the issues noted below, appellant has made a number of scattered assertions in his appeal. However, no rationale was provided and I am unable to respond to such assertions.

**ISSUE 1: PROJECT VIOLATES NEPA, APA & FOREST SERVICE POLICY**

Appellant argues the effects analysis is inadequate in the following areas:

- cumulative effects from activities on White Mountain Apache Reservation
- inaccurate effects analysis in biological assessment and evaluation (BA&E)
- short-term impacts
- soil loss from roads
- logging 10,000 acres of old growth
- public safety
- effects on management indicator species and threatened, endangered, and Forest Service sensitive species
- clearcutting old growth
- benefits of mistletoe
- cumulative effects of logging and grazing
- financial analysis
- recreation and visual quality.

NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The EA summarizes the effects of implementing the proposed action and alternatives, and states that four major issues define the scope of environmental concern for the project. The analysis discloses effects of the action on soil, air, water, wildlife, and vegetation. Cumulative effects are discussed where they occur. The effects discussion also discloses how well each alternative addresses the four issues identified during scoping. Specialist reports in the project record are referenced in the effects discussions (AR 134 pp. 11-27).

Notable documents supporting the effects disclosure in the EA include:

The Biological Assessment and Evaluation which documented findings of "may affect but not likely to adversely affect" for federally listed species (AR 125, 151). For sensitive species, the BA&E documented findings of "no impact" or "may impact but is not likely to result in a trend toward federal listing". The evaluation is based on a species list developed in association with the U.S. Fish and Wildlife Service (USFWS). All threatened, endangered, or sensitive species that exist or may exist in the area and/or their habitat were evaluated. The Forest properly consulted with USFWS. The USFWS concurred with the findings documented in the BA&E (AR 132).

The Watershed Specialist Report and Watershed Cumulative Effects Analysis examined past, present, and reasonably foreseeable activities in the watershed and discussed short and long-term effects of the actions (AR 131, 102). They support the effects summary in the EA which indicated the selected alternative will result in long-term improvement of watershed conditions.

VSS spreadsheets in the record and EA Appendices B and C support the conclusions in the EA Chapter III which indicate treatments will move the ecosystem management area (EMA) closer to the desired conditions for both the ponderosa pine type and the pinyon-juniper woodland (AR 67, 84, 134).

The Riparian Impact Report supports the EA Chapter III effects discussion. This discussion indicates treatments will favor re-establishment of riparian vegetation (AR 98).

The Wildlife Specialist Report and R03WILD Wildlife Model Results analyzed and disclosed effects to Management Indicator Species (MIS) (AR 99, 76). These support the EA Chapter III effects discussion on MIS and their habitat which indicates improvement in habitat capability for wintering elk, summer and winter mule deer, and year-round antelope under the selected alternative (AR 134).

The record supports the effects discussion in the EA and provided the decision-maker with the best available information, sufficient to support the finding of no significant impact (FONSI) and to make a reasoned, informed decision. The Forest Supervisor is affirmed on all issues concerning effects disclosure.

Appellant contends, "[t]he range of alternatives is unreasonably narrow..."

"[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 includes tree harvest, slash disposal broadcast burning, road closure, and riparian restoration, providing focus for the analysis of effects of this action and alternatives thereto (AR 13). 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 (40 CFR 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 address the purpose and need for action.

Issues identified from comments received on the proposal are either addressed by the proposed action, or alternative 2, or the no-action alternative (AR 134 pp. 11-27). No significant issues were identified which would necessitate generating additional alternatives (AR 90). Therefore, the two action alternatives, plus the no-action alternative, constitute a reasonable range.

The Southwest Center for Biological Diversity's (SWCBD) comment on the EA included a suggestion for an additional alternative which avoided cutting any yellow pines or trees over 16" dbh. The record indicates that harvest of trees

over 16" dbh is predicted to occur on less than 400 acres out of more than 3600 acres (AR 151, 134 pp. 3, 8-9). This alternative would not respond to the purpose and need nor resolve the issues any differently than the proposed action. As such, it would not add to the range of alternatives. Absent any rationale for this alternative from SWCBD, the Forest found this alternative to be arbitrary and without any scientific merit (AR 121, 134 p. F-4). The Forest Supervisor is affirmed with regard to this issue.

Appellant alleges the action is not yet ripe for decision, misquoting the Southwestern Region's Integrated Resource Management desk guide, and pointing out that funding may not be immediately available for portions of the selected action.

The Integrated Resource Management desk guide states, "...it may be unlikely that a decision made today will be adequate 5 years from now." The guide also states, "There is no hard and fast rule on actual time frames..." If any of the selected actions take place more than five years from the date of decision, the Forest Supervisor should review the environmental analysis for adequacy before proceeding. Should the analysis prove lacking at that time, the EA should be supplemented and a new FONSI prepared. Either a new decision should then be issued or the original decision affirmed (FSH 1909.15 Sec. 18.4). The Forest Supervisor is affirmed with regard to this issue.

Appellant alleges public comments were inadequately addressed, including a comment by Arizona Game and Fish Department concerning harvest of mistletoe infected trees larger than 16" dbh.

Substantive comments on the EA were received from the Southwest Center for Biological Diversity and the Arizona Game and Fish Department. They are quoted verbatim in the EA, Appendix F (AR 134). Comments are addressed point by point. The Forest Supervisor has adequately responded to comments.

Appellant was confused by the change in the number of goshawk territories.

A new territory was discovered in 1995. No territories were de-designated or changed. The amendment to the BA&E clears up the confusion (AR 151). The Forest Supervisor is affirmed with regard to this issue.

Appellant contends the purpose and need for the project is not adequately defined.

The EA shall include brief discussions of the need for the proposal (40 CFR 1508.9(3)(b)). The EA briefly describes the purpose and need for action on pages one and two. The purpose and need focus on moving toward the desired condition for the Sundown area. The desired conditions are detailed in the EA Appendix B (AR 134). The Forest Supervisor is affirmed with respect to the issue of purpose and need.

Appellant alleges the EA contains inadequate methodology and scientific accuracy 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)).

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

Appellant alleges that the EA does not make the required NFMA findings.

Proposed woodland treatment of pinyon-juniper is in unsuitable timberlands. Such treatments, if made for other than timber production, are permitted under 36 CFR 219.27. Timber harvest of ponderosa pine is proposed in suitable timberlands. Proposed regeneration harvests in ponderosa pine are irregular group shelterwood, and shelterwood seedcut under group selection. Per 36 CFR 219.27, the five year regeneration requirement is not triggered until a final harvest is completed. Therefore, proposed harvests are consistent with NFMA. The EA contains the NFMA findings on page 26 per 36 CFR 219.27.

Appellant argues the project has changed since it was originally proposed.

The public was informed of the changes in issues being addressed in the analysis, by letter on April 16, 1996, and in a public meeting on May 7, 1996 (AR 94, 96). The record indicates the first draft of the EA was circulated for internal interdisciplinary team review three and a half months later on August 1, 1996. This afforded plenty of time for additional comments and satisfies any argument for re-scoping. The Forest Supervisor is affirmed on this issue.

**ISSUE 2: PROJECT VIOLATES FEDERAL ADVISORY COMMITTEE ACT (Appeal p. 3)**

Appellant alleges that the Forest formed a working group of select publics to develop alternatives.

The record indicates a pinyon-juniper work group was formed at a public meeting on August 14, 1995. The record also shows this group assisted with some analysis of vegetation structural stage distribution in the woodland. There is no indication that this group acted in an advisory capacity for the decision-maker.

Public involvement in the Sundown analysis began with an invitation to a public meeting held April 24, 1995 (AR 7). Two subsequent public meetings were held on August 14, 1995, and May 6, 1996 (AR 27, 96). The environmental assessment was circulated for public review and comment for 30 days beginning August 20, 1996 (AR 108). The Forest Supervisor indicated that all comments received throughout the analysis were considered in the decision (AR 135). No FACA violations are evident in the analysis. The Forest Supervisor is affirmed with regard to this issue.

**ISSUE 3: PROJECT VIOLATES NATIONAL FOREST MANAGEMENT ACT**

Appellant alleges numerous inconsistencies with the Forest Plan, which, therefore, violates the National Forest Management Act. Specifically appellant

argues the project fails to meet standards and/or guidelines in the following areas:

- guidelines related to road closure
- LMP Settlement Agreement
- standards and guidelines for alligator juniper
- snag requirements
- maximum harvest block size of 100 acres
- harvest re-entry
- proposed harvest not in Forest Plan sale schedule
- Ari-Pine Resource Plan contradicts Forest Plan.

The EA states one effect of implementing alternative 3 (the selected alternative) is that open road densities will be reduced to the desired level of 2.0 miles per section (AR 134 p. 19).

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... 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 Forests 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. The Amendment is "complete" as called for in the agreement.

Appellant offers no reason to suggest that the selected alternative is not in compliance with Forest Plan standards and guides concerning alligator juniper. There is no indication in the record that the selected alternative will not follow Forest Plan standards and guidelines for alligator juniper.

Treatments prescribed under the selected alternative emphasize retention of potential snags, and indicate no trees over 24 inches DBH will be harvested (AR 134 p. 10, 146A). Appellant again offers no reason to believe that the Forest Plan standards and guides will not be followed.

There is nothing in the record to indicate the harvest block size standard will not be followed. However, the Forest Supervisor is reminded to comply with the Forest Plan standard concerning harvest block size when laying out harvest units in the woodland. ("Harvest block size will be a minimum of 10 acres and a maximum of 100 acres", Apache-Sitgreaves Forests Plan p. 152.)

Forest plans are broad, programmatic documents which provide the framework for how a national forest will be managed, but generally do not provide final authorization for particular projects making irretrievable or irreversible resource commitments. The federal courts have adopted this characterization of the nature of forest plans: CFEQ v. Lynq 731 F.Supp. 970, 977-978 (D. Colo. 1989) and Idaho Conservation League et al. v. Mumma et al., CV88-197-M-CCL (D. Mont. 1990).

The Apache-Sitgreaves Forests Plan did not make any final site specific project level decisions. The Plan merely displayed a tentative list of projects that were anticipated to be accomplished during the next ten years. The Forest Plan Environmental Impact Statement specifically states subsequent projects will require further NEPA disclosure before a site specific decision can be made (Environmental Impact Statement for the Apache-Sitgreaves Forests Plan, p. 4). A mere variance from implementation schedule projections does not constitute a departure from Forest Plan consistency. The Forest Plan does not need to be amended for the Sundown EMA project to proceed.

The Ari-Pine Resource Area Plan is an expression of desired conditions for a particular landscape within the Forest. It focuses on vegetative and watershed conditions, riparian areas, and wildlife and livestock forage needs at the landscape level (AR 134 p. 1). Such a description of desired conditions is neither action-forcing nor a commitment of resources. Until an action is proposed, there is no requirement for Forest Plan consistency.

The allegation that the re-entry period is inconsistent with the Forest Plan is without merit. There is no such Forest Plan standard or guideline defining the frequency of re-entry for harvest.

The actions proposed within the Sundown Ecosystem Management Area were appropriately found to be consistent with the Apache-Sitgreaves Forests Plan (AR 134 p. 26). The Forest Supervisor is affirmed with regard to this issue.

#### ISSUE 4: PROJECT VIOLATES MEXICAN SPOTTED OWL RECOVERY PLAN

Appellant claims that project violates the MSO Recovery Plan concerning de-listing because the Sundown area was logged within the past several years.

In their Biological Opinion on the Amended Forest Plans, the USFWS recommended that only one commercial timber harvest per stand take place before the MSO is de-listed. The selected alternative will comply with this recommendation.

Appellant believes that the project will harvest large trees in capable habitat, and fails to maintain 20 sq. ft. basal area, thus the project violates the Recovery Plan and Forest Service policy for treating stands in restricted habitat.

There is no MSO restricted or protected habitat involved in the project. There are no Protected Activity Centers near the area (AR 125). The USFWS concurred with the Forest's finding of may affect but likely to adversely affect MSO (AR 132). This project complies with the Recovery Plan and Forest Plan.

The Forest Supervisor is affirmed with regard to compliance with the MSO Recovery Plan.

#### ISSUE 5: PROJECT VIOLATES ENDANGERED SPECIES ACT

Appellant thought that the BA&E was signed before the Decision Notice because the first heading of the BA&E reads "selected" alternative.

In paragraph 2 of the BA&E, the document clearly states that it is an analysis of the preferred alternative. The BA&E complies with NEPA/APA, FS Policy and the ESA.

Appellant alleges that because there is a small number difference between the BA&E and the EA, that incorrect information was given to USFWS for the consultation.

The USFWS was given the BA&E and the EA for their consultation analysis. USFWS had adequate and correct information upon which to base their concurrence.

Appellant contends that the Decision Notice referenced effects determinations for sensitive species which did not appear in the BA&E.

Comparing the species analyzed in the BA&E and those referenced in the Decision Notice, I find no such discrepancy.

Appellant contends that the project violates numerous standards and guidelines for wildlife including deferrals for wildlife.

Appellant does not state which or how standards and guidelines for wildlife were allegedly violated. Deferring activities in key areas can protect wildlife habitat. The Forest has complied with wildlife standards and guidelines.

The Forest Supervisor is affirmed with regard to compliance with the ESA.

#### ISSUE 6: PROJECT VIOLATES MIGRATORY BIRD TREATY ACT

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 threatened, endangered and sensitive species, if found in timber harvest units, will be protected using timber sale contract provisions which allow modifications needed, after a contract is awarded. This project will not result in "takings" of migratory birds under MBTA.

The Forest Supervisor is affirmed with regard to the issue of compliance with the MBTA.

Appellant has made a number of scattered assertions in his appeal. However, no rationale was provided and I am unable to respond to such assertions

**APPEAL DECISION:** After reviewing the appeal record and the Appeal Reviewing Officer's recommendations, I find that the project complies with NEPA, APA, Forest Service Policy, FACA, NFMA, MSO Recovery Plan, ESA, and MBTA. It is my decision to affirm the Forest Supervisor's decision to implement alternative 3 of the Sundown Ecosystem Management Area Environmental Assessment.

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Mr. Peter Galvin

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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  
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