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Forest
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Date: January 28, 1998

Mr. Jack D. Mattox
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CERTIFIED MAIL --
RETURN RECEIPT REQUESTED

RE: Cat Dwarf Mistletoe Control Project Appeal 98-03-00-0011-A215
Apache-Sitgreaves National Forests

Dear Mr. Mattox:

I have completed a review of your December 12, 1997, appeal of the Cat Dwarf Mistletoe Control Project Decision Memo. The review was conducted in accordance with 36 CFR 215.

BACKGROUND: On October 22, 1997, the Forest Supervisor issued a Decision Memo approving implementation of the proposed Cat Dwarf Mistletoe Control Project. The project is located on the Alpine Ranger District of the Apache-Sitgreaves National Forests. The legal notice of this decision was published in the White Mountain Independent on October 28, 1997. I received your appeal on December 17, 1997. I received the appeal record (AR) from the Forest on December 29, 1997.

On January 15, 1998, I received a letter from the Forest Supervisor which summarized the outcome of informal negotiations, conducted via teleconference, between yourself, Mr. Bedell, and other Forest personnel. The purpose of these negotiations was to attempt to resolve this appeal in an informal manner. Subsequent correspondence indicates that resolution of your appeal issues was not possible through these negotiations.

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 Forest Supervisor's decision was supported by the appeal record and recommended that the decision of the Forest Supervisor be affirmed.

APPEAL ISSUES: Appellant alleges that the project violates legal requirements of the National Environmental Policy Act (NEPA) and its implementing regulations, the National Forest Management Act (NFMA) and its implementing regulations, the Endangered Species Act (ESA), the Administrative Procedures Act (APA), the Apache-Sitgreaves National Forest Plan (LRMP) as amended, and the Forest Service Handbook (FSH). These issues are addressed as follows:



ISSUE 1: THE CAT DWARF MISTLETOE CONTROL PROJECT WOULD VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

ISSUE 1A: Scoping and project analysis are incomplete, inaccurate or misleading

CONTENTION: Appellant contends, "The Cat DMC Project would violate NEPA [National Environmental Policy Act] because the scoping and project analysis are factually incomplete, inaccurate or misleading." Specifically, appellant asserts that the project map erroneously identifies the township and range in which the project is located. Additionally, appellant argues that the biological assessment and evaluation for the project relies on the biologist's feelings and requires a date.

RESPONSE: Appellant is correct in noting that the project area map is incorrectly annotated. The correct location is T 4-1/2 N, R31E. The project is however, correctly located on the topographic map in relation to major landmarks (record at 17). The annotation error has no effect on the proposed action nor the effects of the action.

The biological assessment and evaluation indicates an Apache-Sitgreaves National Forest master species list was reviewed. District records for occurrence of these species were reviewed in conjunction with on-the-ground reconnaissance of stand conditions and habitat type (record at 15). The district wildlife staff officer appropriately concluded that no suitable or critical habitat, occupied or not, existed on the project area. While the biological assessment and evaluation does not show a date, the project record index indicates it was completed in February of 1994.

The Forest Supervisor is affirmed on this issue.

ISSUE 1B: Categorical Exclusion is suspect

CONTENTION: Appellant contends that the decision to categorically exclude the project is suspect because of the reasons above and the presence of extraordinary circumstances not referenced.

RESPONSE: As stated above, the district wildlife staff officer found that no suitable or critical habitat, occupied or not, existed on the project area, thus eliminating that particular extraordinary circumstance (record at 15). Appellant does not suggest any other specific extraordinary circumstances were overlooked.

The Forest Supervisor appropriately found that the analysis revealed no other extraordinary circumstances present, and is affirmed on this issue.

ISSUE 1C: Reasonable range of alternatives

CONTENTION: Appellant contends that the analysis does not contain a reasonable range of alternatives, and that no alternatives described in the scoping report.

RESPONSE: The scoping report describes the proposed action, purpose and need for the action, the nature of the decision to be made (record at 17). The document also describes preliminary issues

that have already been addressed by the proposed action. The scoping document is for disclosure of the proposal, not to document the subsequent analysis.

Analysis of comments made in response to the scoping report indicates an alternative was considered (and subsequently chosen) which maintains the diversity of tree species, by not treating tree species other than ponderosa pine (record at 24). The scoping report also contemplates a no-action alternative in its description of the decision to be made (record at 17). The analysis therefore, considered two action alternatives and the no-action alternative.

The Forest Supervisor is affirmed on the issue of a reasonable range of alternatives.

ISSUE 1D: Inadequate purpose and need

CONTENTION: Appellant contends that the purpose and need for action is inadequate, citing the scoping report's description of the understory as relatively healthy at present. Appellant also suggests the marking guides are in conflict with the proposed action, and forest plan direction to achieve diverse stands protected from losses due to insects and diseases exceeding endemic levels. Appellant also argues there is no explanation, data, analysis, or recommended action related to the purpose and need to enhance watershed conditions.

RESPONSE: The purpose and need statement describes a problem with top-down spread of dwarf mistletoe, from the overstory to the seedling and sapling understory. The intent is to remove the overstory infection before it spreads to the relatively healthy understory. The silvicultural objectives in the record indicate an urgency in protecting the seedling and sapling understory (record at 12, 13).

The proposed action consists of pre-commercial and commercial sanitation and free thinning of seedling, sapling, pole, and sawtimber size trees to reduce the spread of mistletoe, and to regulate stocking of the seedling and saplings. The marking guides are consistent with the proposed action and purpose and need as they focus on overstory trees with visible mistletoe only. Healthy ponderosa pine trees and other tree species are to be left (record at 12.13). Thinning guides address the mistletoe infection in the seedling and sapling component as well as providing room for growth. The guide also specifically directs that species other than ponderosa pine should be left (record at 14).

As discussed above, the proposed action and the specific marking guides and thinning guides will implement forest plan direction by managing for diverse stands and avoiding losses due to disease exceeding an endemic level.

The watershed analysis in the record indicates some areas of unsatisfactory watershed condition exist, due to a lack of ground cover (record at 5.3). The purpose and need includes increasing sunlight to the forest floor to promote growth of the herbaceous understory. The increased ground cover is expected to improve watershed condition where cover is lacking.

ISSUE 1E: Cumulative Effects

CONTENTION: Appellant contends that the Forest Service fails to consider the cumulative effects of the action, and that the scoping report lacks an effects analysis.

RESPONSE: The Council on Environmental Quality (CEQ) promulgated regulations which require agencies to identify classes of actions which normally do not require either an environmental impact statement or an environmental assessment (40 CFR 1507.3(b)(2)(ii)). In consultation with the Council, the Chief of the Forest Service identified actions for which a project file and decision memo are required but do not require an environmental impact statement or environmental assessment. The Cat Dwarf Mistletoe Control Project fits within these classes of actions (FSH 1909.15 Section 31.2, Category 4).

The scoping report indicates a review of past and proposed future projects was conducted. Both the scoping report and the decision memo indicate that the physical and biological effects are limited to the area of planned activity (record at 17, 25). The scoping report is not an analysis disclosure document and should not include an effects analysis.

The Forest Supervisor appropriately reviewed other projects for cumulatively and indicated none were significant. The Forest Supervisor is affirmed on this issue.

ISSUE 2: THE CAT DWARF MISTLETOE CONTROL PROJECT WOULD VIOLATE THE NATIONAL FOREST MANAGEMENT ACT (NFMA).

ISSUE 2A: National Forest Management Act

CONTENTION: No Mexican spotted owl (MSO) survey has been done for the analysis area, and the last one done for adjacent areas was 1990. New guidelines in 1996, however, require the FS to "Survey all potential spotted owl areas including protected, restricted, and other forest and woodland types within an analysis area plus the area 1/2 mile beyond the perimeter of the proposed treatment area." ROD, p.87.

RESPONSE: In the District response letter to the Southwest Center for Biodiversity (SWCBD) it states: "There were no MSO surveys conducted specifically for this project (record at 31). **Potential habitat** to the north (Colman Creek drainage) and to the south (Campbell Blue drainage) were last surveyed in 1990. " It goes on to state "MSO were located and PAC's have been established. The closest PAC to the project area is over **one mile** to the north." On Pg.87 of the Forest Plan Amendment, the MSO Standard reads: "Survey all **potential** spotted owl areas including protected, restricted, and other forest and woodland types within an analysis area plus the area 1/2 mile beyond the perimeter of the proposed treatment area." The key word is **potential**, therefore the District had previously surveyed the "potential MSO habitat" to the north and south that is located well beyond 1/2 mile from the planning area boundary. Thus the intent of the Standard to survey in suitable as well as "potential" MSO habitat has been previously met in adjacent areas where potential habitat exists.

In addition, the BA&E (record at 15) clearly states that there is no occupied habitat or suitable/critical unoccupied habitat present for MSO. It goes on to document that District records for the occurrence of these species were reviewed in conjunction with on-the-ground reconnaissance of stand conditions and habitat type. This is consistent with the response letter to

SWCBD (record at 31). "The project area was reviewed by the district biologist, including on the ground reconnaissance, and it was determined that the project area did not contain the necessary constituent elements for nesting, roosting, or primary foraging."

The Forest Supervisor is affirmed on this issue.

ISSUE 2B: Goshawk guidelines

CONTENTION: Appellant contends that the project is not consistent with the forest plan guidelines for management of northern goshawk. Specifically, appellant argues that the project does not manage for old age trees such that as much old forest structure as possible is sustained over time across the landscape.

RESPONSE: Project objectives are to protect the healthy understory from dwarf mistletoe infection and create healthy stands to be able to grow into suitable habitat for goshawk foraging habitat (record at 12, 13 & 31). Existing data indicate that no trees > 20" dbh will be harvested from either stand and only one stand will have 0.8 trees per acre harvested over 18" dbh (but less than 20" dbh). Both stands have open canopies with scattered large trees in the overstory and pockets of heavy regeneration in the understory (record at 12, 13 & 21). Thus only large trees heavily infected with dwarf mistletoe will be removed. Therefore not all of the large ponderosa pine will be removed, and the 73 acres proposed for treatment represent a very small fraction of the 5,400 acre foraging area, not to mention at the landscape level.

The forest plan references The Management Recommendations for the Northern Goshawk in the Southwestern United States (MRNG) for information which provides the basis for the forest plan management guidelines. Page 79 of the MRNG addresses forest health and states: "Management recommendations for developing the desired forest conditions could include application of sanitation cuts and thinnings to reduce the detrimental effects of mistletoe in the post-fledging family areas and **foraging areas**." It goes on to state that "Because mistletoe in large trees infects nearby understory trees, the understory might not reach the larger tree sizes." Therefore the importance of protecting the understory for developing future large trees is recognized.

The Forest Supervisor is affirmed on this issue.

ISSUE 2C: Prescription for treating dwarf mistletoe infection is extreme, scientifically controversial, and in violation of Forest Service guidelines.

CONTENTION: "By cutting all trees with signs of infection starting at level 1, the FS violates the ROD Amended Plan of 1996 at p.21, "manage to decrease dwarf mistletoe", and at p.22, "manage... to achieve diverse stands protected from losses due to... diseases exceeding endemic levels." (Appeal p. 6)

RESPONSE: As you point out, the Amended Apache-Sitgreaves Forest Plan does state that the Forest is to "manage to decrease dwarf mistletoe". The proposed prescription for the Cat timber sale will do this. It will not eliminate mistletoe from the stands to be treated, as there is almost always some mistletoe missed and infections exist within the stand which have not yet developed to the externally

visible stage. However, the treatment will significantly reduce the severity of the overall infection in the area and slow the spread of mistletoe through the residual stand, which is the main objective of this project.

You indicate that the cutting of all trees with a dwarf mistletoe infection rating of 1 violates direction found in the Record of Decision for Amendment of Forest Plans (1996), page 22. You present a partial quote of that direction as evidence. However, I find that when that direction is looked at in full context;

"Manage for timber production using integrated resource management to achieve diverse stands protected from losses due to insects or diseases exceeding endemic levels."

the Forest's proposal is in line with the intent of this Forest Plan direction. It is managing for the production of timber products using the integrated resource management process. It is managing the stands to provide for "... tree densities, sizes, and ages as prescribed by the Goshawk recommendations." It seeks to provide protection from losses due to dwarf mistletoe infection in both short and long term time frames. And, it is treating areas that are infected with dwarf mistletoe above levels considered endemic to the area. The "PRESALE CUTTING UNIT SUMMARY" information cards indicate, from on the ground examination, that dwarf mistletoe infection is "... heavy in many of the clumps of poles and scattered overstory. Other clumps are free of mistletoe."

The Forest Supervisor is affirmed on these issues.

ISSUE 2D: The proposed project fails to apply the amended Forest Plan standards and guidelines for old growth management.

CONTENTION: "Ranger Dyson states that "Twenty percent of the district has not been allocated to old growth. However, the stands proposed for treatment do not have structural attributes necessary to meet old growth conditions." But the ROD for the '96 Amendment states "allocate no less than 20 percent of each forested ecosystem management area to old growth as depicted in the table on page 96." Said table noted trees in a PP forest of 14" to 18" and trees in a mixed-species of 18" to 20" as part of the structural attributes used to determine old growth. These trees appear to be present in the project area, and are planned to be cut in apparent violation of the ROD."

RESPONSE: Allocation of areas to meet Forest Plan standards and guidelines for old growth is a Forest decision. As stated in the ROD you refer to, "Allocations will consist of landscape percentages meeting old growth conditions and not specific acres." Likewise, individual trees or clumps of trees do not in and of themselves constitute old growth, even though they may fall within the size range identified in the table on page 96. As the District Ranger pointed out in his December 10th response to your questions, "... the stands proposed for treatment do not have the structural attributes necessary to meet old growth conditions." The project proposal and the individual stand treatment objectives, as outlined in the detailed marking guides for each stand, identify that these actions are being taken to "... provide the needed age classes associated with the Northern Goshawk foraging area."

It is clear the Forest has identified these stands to be managed in the short term for a specific component of the overall vegetation structural stage distribution recommended under the northern goshawk standards and guidelines. The stands do not have the characteristics needed to make them a

viable candidate for old growth allocation. The proposed project does not fail to apply amended Forest Plan standards and guidelines for old growth, as old growth allocation is a landscape issue and therefore is not an issue in this proposal.

The Forest Supervisor is affirmed on this issue.

ISSUE 3: THE PROPOSED PROJECT WOULD VIOLATE THE ENDANGERED SPECIES ACT (ESA).

CONTENTION: Appellant contends that the Forest Service failed to use the best available data. Reference is made to the currency of the BA&E and MSO surveys.

RESPONSE: See discussion under Issue I.A. and Issue II.A.

The Forest Supervisor is affirmed on this issue.

ISSUE 4 a: The Cat Dwarf Mistletoe Project Would Violate the Administrative Procedures Act (APA)

CONTENTION: Appellant contends, "The Cat Dwarf Mistletoe Control Project Decision Notice is Arbitrary and Capricious." Appellant cites the foregoing appeal issues as reasons for the contention.

RESPONSE: Based upon the project record and responses to all of the above issues, the Forest Supervisor followed the procedural requirements of NEPA, CEQ regulations, and Forest Service policy in arriving at an informed decision on the Cat Dwarf Mistletoe Control Project. The Forest Supervisor is affirmed on this issue.

APPEAL DECISION: After reviewing the appeal record and considering the recommendations from the Appeal Reviewing Officer, I find that the Forest Supervisor complied with the National Environmental Policy Act, the National Forest Management Act, the Endangered Species Act, the Administrative Procedure Act, the Apache-Sitgreaves National Forest Plan as amended, and direction found in the Forest Service Handbook. I affirm the Forest Supervisor's decision to implement the Cat Dwarf Mistletoe Control Project as proposed. Appellant's request for relief is denied.

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

GILBERT VIGIL
Appeals Deciding Officer
Acting Deputy Regional Forester, Resources

Mr. Jack Mattox

Enclosure

cc:

Apache-Sitgreaves NF

P.Jackson

D.Birmingham

EAP

FOR