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Date: November 10, 2003

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RE: Appeal #03-03-00-0041-A215, Sipapu Ski Area Improvements, Camino Real Ranger District, Carson National Forest

Dear Ms. Brown:

This is my review decision on the appeal you filed regarding the Decision Notice (DN), Environmental Analysis (EA), and Finding of No Significant Impact (FONSI) on the above-referenced project, which provided for the implementation of work as identified within the 2000 Summer Work Plan.

BACKGROUND

District Ranger Cecilia Seesholtz approved the implementation of work identified within the 2000 Summer Work Plan on July 12, 2000. Essentially, this work consisted of moving one surface (Poma) lift (1,212 linear feet in length) to a new location up the mountain from where it was currently situated, installing one aerial (triple chair) lift (796 linear feet in length), clear approximately 13 acres for trails - including lift lines and other ski-able terrain, thin approximately 10 acres for gladed trails providing skiable terrain, and modify the previous boundary by approximately 30 acres to incorporate the new improvements.

During the late spring of 2001, District Ranger Seesholtz discovered that the magnitude of the work was actually outside her authority and moved to halt further activity.

On July 6, 2001, Forest Supervisor Chavez informed the permit holder, in writing, that the approval of the 2000 Summer Work Plan by Ranger Seesholtz were invalid and that future actions were not approved.

In August, 2001, the permittee sued the Forest Service in United States District Court seeking a preliminary injunction to allow for the implementation of the 2000 Summer Work Plan. The Federal District Judge granted the preliminary injunction in September of 2001. He also ordered the Forest Service to complete an environmental analysis. The work on the expansion was completed in time for the 2001/2002 ski season. The District Court also ordered the Forest Service to analyze, through NEPA, the effects of the work as identified in the 2000 Summer Work Plan.

Forest Supervisor Martin Chavez signed the environmental decision concerning the implementation of work for the Sipapu Ski area improvements on August 5, 2003.



The Forest Supervisor is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations.

Pursuant to 36 CFR 215.16, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR 215.17. I have reviewed the appeal record and the recommendation of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer found that: a) the decision logic and rationale were generally clearly disclosed; b) the benefits of the proposal were identified; c) the proposal and decision are consistent with agency policy, direction and supporting information; and d) public participation and response to comments were adequate.

APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision for the Sipapu Ski Area.

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

Sincerely,

/s/ Abel M. Camarena
ABEL M. CAMARENA
Appeal Deciding Officer,
Deputy Regional Forester

Enclosure

cc: Mailroom R3 Carson National Forest, Christina Gonzalez, John Beckley, Cecilia Seesholtz, June Trujillo, Leonard Atencio

REVIEW AND FINDINGS

of

Western Environmental Law Center's

Appeal #03-03-00-0041-A215

Sipapu Ski Area Improvements

ISSUE 1: The appellants state that NEPA is inadequate because the Forest Service failed to produce an adequate environmental document that discloses the environmental effects and provides adequate mitigation measures.

Contention A: The environmental assessment (EA) has no legitimate purpose and need. The purpose and need is to attract more visitors to the ski area however, the Forest Service presumes there will be no increase in visits and that there is no need to analyze the impacts to the environment by increased use.

Response: On page 3 of the EA (PR #24), the Purpose and Need includes more varied ski terrain and longer stays. The Proposed Action (EA page 4) is to continue current operations plus improvements and to modify the Special Use Permit boundary.

The socio-economic analysis responds to the issue of increased capacity (EA pages 54 and 61). Ski lifts have never approached capacity in terms of actual visits. The new ski lift will increase capacity at Sipapu but ski visits are still a function of annual snow conditions and regional economic conditions. The numbers of skier visits by year were disclosed (EA page 58) and a comparison was made to Taos Ski Valley (Response to Comments (PR #26, item 8.13)). In this comparison it was found that other factors such as weather and demographics have a greater impact on the number of visits than ski area capacity and terrain.

The analysis for soil and water (EA page 26) says there is no increase in wastewater treatment since there is no appreciable increase in skier visits projected. The recreation effects of adding new terrain are very small, and cumulative effects are negligible (EA pages 53-54).

Finding: The EA disclosed the effect of increased terrain and additional improvements but the actual number of skier visits is not expected to increase. Purpose and Need and Effects are adequate for this project analysis.

Contention B: The EA reflects inadequate alternatives analysis. The range of alternatives considered in the EA is unreasonably limited.

Response: There were two alternatives eliminated from detailed analysis and four alternatives analyzed in detail (EA pages 9-11). These six alternatives include modification of the permit as a separate alternative to issuing a new special use permit authorization to the new owner. The removal of the improvements was included as an alternative which was analyzed in detail.

Issues and unresolved conflicts about the proposed action centered on the issuance of the special use permit, removal of improvements, impacts to an inventoried roadless area, mitigation and monitoring (EA pages 7-8).

Finding: The range of alternatives is adequate for the issues presented. Alternatives are developed to address unresolved conflicts in a proposal (Council of Environmental Quality (CEQ) regulations on NEPA at 40 CFR 1501.2(c.)).

Contention C: The EA contains an inadequate analysis of environmental consequences. In violation of NEPA regulations, the EA does not differentiate between indirect and direct effects and doesn't mention either specifically. There is virtually no discussion of growth-inducing effects. There is no separate cumulative effects analysis, which is a violation of NEPA.

Response: The CEQ regulations for implementing NEPA do not require separate sections for direct, indirect and cumulative effects analysis disclosure. An EA is to briefly discuss the environmental impacts (40 CFR 1508.9(b) on EA contents; Definitions of Effects at 1508.7, 8 and under 1508.16). Similar language is in the Forest Service Handbook 1909.15, Sections 14 and 15.

This project analysis discloses direct, indirect, and cumulative effects to soil, water, vegetation, wildlife, cultural and other resources. (EA pages 13-27 for Soil and Water; pages 31-34 for Vegetation; pages 35-45 for Wildlife; pages 49-53 for Cultural Resource Impacts; Socio-Economic Effects on pages 57-62)

Growth inducing effects were an issue addressed in the socio-economic review. The amount of increased use of the facility is variable, dependent on weather and regional economics more than on facility improvements. See Response to Contention B.

Finding: Direct, indirect and cumulative effects including growth-induced effects are adequately addressed in the EA.

Contention D: The EA contains inadequate analysis of erosion. The EA fails to adequately address water runoff and erosion control. Details to prevent damage to the Rio Pueblo from runoff, spring melt, and trail construction are lacking. The EA fails to address whether trails were graded. There is no discussion of impacts caused by ski runs that are deforested. There is no discussion of alternatives for ski trails in different locations that may cause fewer impacts to the Rio Pueblo, soil erosion, or the inventoried roadless area.

Response: The soil and water condition and effects assessment conducted for this analysis (PR #12, PR #24) addresses runoff and erosion for all disturbed areas including ski trails and lifts. A list of required mitigation measures includes; re-vegetation, log and earthen water bars, mulching, and buffer strips specifically designed to reduce erosion and runoff. In the ski run areas with tree removal, adequate erosion control protection will be provided by the expanded growth of under story vegetation and continued existence of undisturbed buffer areas (PR #24, page 22).

Alternatives are developed in response to significant issues and unresolved conflicts. The project record does not indicate that the specific location of the proposed action relative to the Rio Pueblo was raised as a significant planning issue. An alternative to look at relocating the chair lifts and ski runs to a different location is therefore not within the defined scope of the analysis.

Finding: Erosion impacts were adequately analyzed and appropriate mitigation measures are required.

Contention E: The EA contains an inadequate analysis of water quantity. Impacts to water quantity within the Rio Pueblo Watershed and to downstream users are inadequately analyzed in the EA. An increase of one-third of the skiable terrain will result in increased snowmaking which diverts waters from the Rio Pueblo, which is not addressed in the EA. The Forest Service should monitor winter stream flows and implement measures to ensure that ski area diversions do not impair a threshold stream discharge level. The EA fails to disclose or analyze summertime water use at the resort and impacts of that.

Response: The project does not propose any increase in snowmaking (PR #24, page 23) nor does it propose summertime water use. The ski area's use of water for snowmaking is permitted and regulated by the New Mexico Office of the State Engineer. Monitoring for water use is a stipulation of the State Water Right Permit and is accomplished by the ski area and reported quarterly to the State Engineer's Office (PR #12).

Finding: The analysis and disclosure of effects on water quantity is adequate.

Contention F: The EA contains inadequate analysis of water quality. The EA fails to analyze the effects of removing riparian vegetation and tourism on the Rio Pueblo Coldwater Fishery. Increased erosion from clearing for trails and chairlifts should be analyzed. The impacts of snowmaking on water quality and use of chemicals should be analyzed.

Response: The effects of the proposed action on water quality was examined thoroughly (PR #12, PR #24). Best management practices to protect water quality are required (PR #24, PR #31). Increased erosion is addressed in the response to Contention D, above. The impacts of snowmaking are addressed in the response to Contention E, above.

Finding: The analysis and disclosure of the effects on water quality is adequate.

Contention G: The scope of analysis of the project's significance is inappropriate. Significant impacts may affect the Rio Pueblo Watershed.

Response: A description of the project size relative to the entire watershed was just one part of the analysis done to evaluate soil and water effects (PR #24, pages 21-27). The Finding of No Significant Impact was based on many factors (PR #31).

Finding: The Forest Service conducted analysis of the direct, indirect and cumulative effects of the project on soil and water at various scales appropriate to the resource affected and the resource issues. Therefore the Finding of No Significant Impact is valid.

Contention H: The EA fails to analyze the expansion's incursion into an inventoried roadless area. An EIS should be prepared to analyze the effects on the unique characteristics of the area which are significant. Temporary work roads used for access are a violation of the Roadless Rule and the EA does not address use of these, instead analyzing heavy equipment use.

Response: The expansion into a portion of the inventoried roadless area (Comales Canyon) is disclosed and analyzed (EA pages 55-56) and in the record (PR #17).

There is no road construction in the project. A road is defined in the Roadless Area Conservation Rule (36 CFR 294) as a motor vehicle travel way over 50 inches wide. Heavy equipment was used during clearing of ski runs (EA page 22 and PR #12), but ski runs would not normally be a drivable roadway. The cleared areas, which became ski trails, are traveled by vehicles infrequently and were never built or designed as roads (PR #26, item 2.08). It is reasonable to assume that ski trail clearings are not being built to the same standard as a drivable roadway and therefore are not temporary roads, although some vehicles may be able to travel these trails to haul equipment.

Timber cutting is allowed in 36 CFR 294.13(b)(2) if it is "incidental to implementation of a management activity no otherwise prohibited by this subpart."

Roadless characteristics (from 36 CFR 294.11) are evaluated in the EA as follows:

- *high quality or undisturbed soil, water, and air*- EA pages 13-27 and PR #12.
- *diversity of plant and animal communities*- EA pages 38-41, PR #14, and MIS Reports PR #28 and 29.
- *habitat for threatened, endangered, proposed, candidate, sensitive species and for those species dependent on large, undisturbed areas of land*- EA pages 35-38, 41-45 and Biological Assessment and Evaluation Report PR #19.
- *primitive, semi-primitive non-motorized and semi-primitive motorized classes of dispersed recreation* – skier recreation use was analyzed in the recreation and socio-economic effects in the EA pages 53-54 and pages 57-62 and in PR #16, 18. PR #10 describes the Management Area direction for the impacted area.
- *traditional cultural properties and sacred sites*- EA pages 46-53 and Cultural Resource Report PR#15, and
- *other locally identified unique characteristics*- EA pages 54-55 on Wild and Scenic River Effects.

Finding: The EA analyzes the effects of 30 acres of ski area development on the boundary of the Comales Inventoried Roadless Area. Activities are not prohibited by the Roadless Area Conservation Rule (36 CFR 294) which is currently enjoined. Roadless values affected are disclosed in different resource analyses. The 30 acres of impact and the effects of clearing for ski trails and lift development in the inventoried roadless area are not significant.

Contention I: The EA fails to adequately address the impacts on the traditional cultural property of the Pueblo of Picuris.

Response: The Cultural Effects Report (PR #15) and the EA (pages 50-51) address the traditional property concerns identified by the Pueblo of Picuris in the ethnographic study completed pursuant to the previous EIS. Both the EA (page 50) and the Decision Notice (page 6) disclose that the Pueblo considers the entire Rio Pueblo Watershed, including the canyon sides, stream, and surrounding mountain peaks, as a traditional cultural property. The EA (page 50) also notes that no specific properties or areas of concern were identified within the project area. The potential impact of the proposed action on the larger Rio Pueblo Watershed is discussed (pages 51-53). The project record documents that the specific concerns raised by the Pueblo in meetings, phone calls, and correspondence regarding the proposed action (PR #27) focused on water use and water quality issues, rather than impacts to traditional cultural properties.

Finding: The EA adequately addressed impacts on traditional cultural properties based on input received from the Pueblo of Picuris during the environmental analysis.

Contention J: The EA fails to analyze the cumulative impacts of year-round use of the resort.

Response: The current and existing permit that is still in effect is the permit as amended and dated March 21, 1980. The record shows that the current and existing permit, as amended, authorizes only winter type activities to occur within the permitted ski area boundary plus miscellaneous summer activities approved within the summer operating plan. There is no authorization for “all sorts of year-round activities to occur within the permitted area”. In fact, the record reflects there has been no request from the permit holder to expand the range of activities within the permitted area to include full season resort-type activities. If and when this request would occur, further analysis would be needed to determine if full season resort-type activities would be appropriate and permitted.

Finding: The analysis of the effects on the recreation resources is adequate because there is no authorized year-round use of the permitted area.

Contention K: The controversial expansion must be analyzed in an EIS. This project has caused controversy in communities and the Pueblo. Local conservation groups have protested this project.

Response: The controversy surrounded doing an EA after the project implemented as shown in the letters received and summarized on page 6 of the EA (PR #24). Issues generated (EA pages 7-8) included the Special Use Permit, improvements, and impacts on inventoried roadless area, effects, mitigation and monitoring. There is no scientific controversy about this project and the amount of political and local controversy is limited. It is the Responsible Official’s decision as to whether the controversy rises to the amount that an EIS is needed to address significance (FSH 1909.15 sections 10.4 and 17), unless the action falls into a class that requires preparation of an EIS (FSH 1909.15 section 20). The Decision Notice/Finding of No Significant Impact (PR #31) spells out that the effects of this project are not highly controversial in a scientific sense, while disagreement about the decision remains.

Finding: An EIS is not required for this project.

ISSUE 1 SUMMARY:

In summary, the appellant claims that the Responsible Official did not take the requisite hard look at the environmental effects of the Ski Area Expansion as required by the National Environmental Policy Act. The environmental assessment adequately disclosed the environmental effects on soil, water, wildlife, vegetation and air, and appropriately concluded that there will no significant environmental effects. In addition, the mitigation measures identified (EA pages 11-12) will provide appropriate protection of the resources.

ISSUE 2: The DN should not authorize Sipapu's trespass and a new Special Use Permit (SUP) is needed.

Contention A: The Forest Service proposes through this DN to amend the Sipapu SUP boundary to officially recognize and memorialize the trespass, without recourse or penalty to the SUP violators. The EA will allow the permit holder to engage in all sorts of activities within the new permit boundary that previously were not authorized outside of the SUP area. The EA fails to analyze the impacts of such expanded uses and activities to this area. Modification of the SUP boundary should be excluded from this DN. The transfer of the ownership and trespass issue must be addressed by obtaining a new special use authorization, outside of NEPA. If not, the DN should impose terms and conditions, which will prevent further expansion of the ski area.

Response: The area of expansion where the 2000 Summer Work Plan activities have been completed must be amended to be included within the permit area boundary. There was no "trespass" on the part of the permit holder. Those activities that were initiated by the permit holder were based upon the District Ranger's approval of the 2000 Summer Work Plan. When this approval was found to be outside the authority of the District Ranger, the forest responded with actions intended to halt any further activities until the correct authority was given. The United States District Court directed the Forest Service to allow those activities to be completed in time for the 2001/2002 ski season.

The record shows that the current and existing permit, as amended, authorizes only winter type activities and miscellaneous summer activities to occur within the permitted ski area boundary and that permit is still in effect. There is no authorization for "all sorts of year-round activities" to occur within the permitted area. The Decision Notice is specific as to authorizing only five specific actions to occur (DN/FONSI page 4). A Decision Notice is not the appropriate process "to prevent further expansion of the ski area". Any further proposed expansion of the ski area would have to go through the NEPA process.

Finding: There was no "trespass" on the part of the permit holder. If and when the assets of the Sipapu Ski Area are proposed to reflect a change in ownership, a new special use permit will be required. A new permit would be issued only after the technical and financial ability of the proponent is determined. The issuance of a new permit or an amendment to an existing permit is a management action that is administrative in function and is not subject to appeal.