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Forest
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Date: June 4, 2003

Mark Sifuentes
Ignacio Chaves Ranch
1734 Dietz Pl. NW
Albuquerque, NM 87107-3215

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED
NUMBER: 70002870000011356176**

RE: Appeal #03-03-00-0025-A215, Abbe Springs Road Easement Exchange, Magdalena
Ranger District, Cibola National Forest.

Dear Mr. Sifuentes:

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 project noted above, which provides for an exchange of easements for access to inholdings and to National Forest System lands. Approximately 1.8 miles of easement are to be granted to Abbe Springs Ranches Homeowners Association, and the Forest Service would receive about 1.76 mile of easements from Southwest Properties of New Mexico. A connected action is further development of lots on private land and many of the appeal points focused on these private land effects.

BACKGROUND

Acting Forest Supervisor Clifford J. Dils issued a decision on March 3, 2003, for the Abbe Springs Road Easement Exchange. The Acting 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 your 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, including the recommendations of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer concluded that: 1) decision logic and rationale were clearly disclosed; 2) the benefits of the proposal were identified; 3) public participation and response to comments were adequate; and 4) the project is in compliance with NEPA and other applicable federal laws and regulations.



The Appeal Reviewing Officer recommended that the Responsible Official's decision on the Abbe Springs Road Easement Exchange be affirmed.

APPEAL DECISION

After a detailed review of the records and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision on the Abbe Springs Road Easement Exchange.

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

Sincerely,

/s/ Lucia M. Turner
LUCIA M. TURNER
Appeal Deciding Officer, Deputy Regional Forester

Enclosure

cc: Deborah L Walker, Paul H Wachter, Constance J Smith, Mailroom R3 Cibola, Christina Gonzalez

REVIEW AND FINDINGS

of the

Mark Sifuentes, Ignacio Chaves Ranch's**Appeal #03-03-00-0025-A215****Abbe Springs Road Easement Exchange**

ISSUE 1: The Environmental Assessment (EA) is inadequate and incomplete in its analysis of significant environmental issues, and indirect and cumulative effects.

Contention 1a: The EA is inadequate in its analysis of increased storm runoff, related soil erosion and sediment transport, and increased flood potential. It is also inadequate in its analysis of the impacts on appellant's property and health and safety by the subdivision.

There is no discussion of water quality. Runoff could become contaminated with waste from the subdivision's septic systems. The effects analysis in the EA is inconsistent with the July 6, 2001, watershed report prepared by the Forest Service.

Depletion of ground and surface water supplies is one of most significant issues associated with the subdivision. The EA does not give it a hard look. The cumulative effects to the ground water supply discussion, fails to reflect negative opinions from the Office of State Engineer, and the Balleau report (Appeal Attachment 2).

Map 3, Table 6 and the discussion in Section 3.2 of the EA is unclear. The analysis addresses the entire watershed and not the impacts on the locally affected areas, which can be substantial (Appeal Attachment 3, Comment 13).

The EA is inadequate in its analysis of the effects on riparian vegetation. The removal of vegetation will probably affect 25 square miles, not just 214 acres. The potential lowering of the water table would likely result in loss of many cottonwood trees, in turn affecting the ecology, (Appeal Attachment 3, Comment 45).

Response: Storm runoff, erosion, flooding, and ground water supply were all identified as major issues as a result of public involvement during the planning of this project. The project record (PR) contains evidence of adequate direct, indirect and cumulative effects analysis for each of these issues, as well as other relevant environmental consequences. Surface water issues were addressed in PR #44 and PR #90 and appropriately sized sub-watersheds were utilized to evaluate the downstream effects. The sub-watershed, of concern to the appellant was specifically analyzed for runoff and flooding potential. Water quality was not identified as a planning issue and therefore, the analysis appropriately concentrated on the water issues relevant to the project.

The project record indicates that information regarding ground water supply was utilized from a multitude of sources, including the State Engineer and Balleau reports (PR #64, 69, 73, 80, 82). The project's effects on vegetation were appropriately analyzed and displayed in the EA (PR #90).

Finding: The EA for this project is complete and adequate for direct, indirect and cumulative effects on surface water, ground water and riparian vegetation.

Contention 1b: The selection of three species (Merriam's turkey, black bear, and elk) as indicator species is not sound biology and these species should not have been used in an effects analysis (Appeal Attachment 3, Comment/Response No. 26).

The blue-black silverspot butterfly inhabits moist areas. The cumulative effect of the proposed action, to dry up springs could adversely affect this sensitive species (Appeal Attachment 2, pg. 9).

Response: Management Indicator Species (MIS) were selected during development of the Cibola National Forest Land Management Plan (FLMP). A species is selected to represent the effects of an activity and/or action on other similar species for different habitat types (Code of Federal Regulations (CFR) 36 §219.19).

In the Cibola FLMP Environmental Impact Statement (EIS, pg. 91) Merriam's turkey was selected for pinyon-juniper and ponderosa pine, and elk was chosen for mountain grasslands. Although not an official MIS, the Cibola has used black bear as an indicator species for mixed-conifer and spruce-fir habitat types (PR #33 & #75).

Forest Service policy requires that effects to MIS be analyzed for all projects based on the habitat present, and the professional judgment of the project biologist (PR #33 & #75). Most species are wide-ranging and may not use all available habitat for a variety of reasons.

Potential effects on the blue-black silverspot butterfly are disclosed in the Biological Evaluation (PR #34), which was reviewed by the US Fish and Wildlife Service (PR #117). A determination of "May affect individuals, but is not likely to result in a trend towards federal listing" was concluded. This determination is appropriate for species considered "Sensitive".

Finding: The Responsible Official appropriately selected Merriam's turkey, black bear and elk as MIS and disclosed environmental effects on these species. The decision documentation and record meet the intent of CFR 36 §219.19 and Forest Service policy for analysis of MIS. The Biological Evaluation included the blue-black silver spot butterfly, and concluded the project "May affect individuals, but is not likely to result in a trend towards federal listing". The Forest has met its obligations under the National Forest Management Act and the Endangered Species Act.

Contention 1c: The loss of public recreational opportunities could be major due to reciprocal easements. This includes exclusion of hunting, passage across private lands that previously

permitted it, conflicts between subdivision lot owners and hunters, and closure of arroyo access to the Barranco Blanco Canyon system.

The change in the decision notice that proposed easement #10 is no longer needed because it belongs to another owner, has potential for different effects than those presented in the EA. Thus the recreational benefits attributed to the proposed action in the EA would not be realized. There also would be no reason for reciprocal easements.

Response: The primary recreation use in the area is hunting (PR #90, pg. 25 & PR #131, pg. 4) with some other limited uses such as, picnicking, nature viewing, and hiking (PR #90, pg. 14 & PR #131, pg. 5). The legal access and the granting of reciprocal easements will not preclude hunting in the future (PR #90, pg. 14) and in fact it could increase (PR #90, pg. 14 & PR #90, pg. 26). Exploratory uses on public lands by new residents will be the principle effect of the proposed action (PR #90, pg. 26). Many parcels of land both public and private have no legal access and have been accessed by driving through arroyo bottoms, which involves trespass across private land (PR #90, pg. 3). There is non-motorized access across National Forest land to the Barranco Blanco Canyon system in T. 1 N., R. 5 W., Section 22 along Mesa Cencerro.

The EA analyzed the effects of all of the easements including easement #10 (PR #131, pg. 11). It is not part of this decision because it is on private land that does not belong to Southwest Properties and a separate decision on it will be made with the appropriate landowner (PR #131, pg. 11). Therefore there will not be any additional effects when the decision on it is made.

Finding: Reciprocal easements will increase recreational use in the area. The effects of granting easement #10 were analyzed and granting of that easement at a later date should not affect recreational benefits. Reciprocal easements are desirable for public access to the area for recreational purposes.

Contention 1d: The EA statement that the proposed action will have no effect on heritage resources located on public lands is in error (reference EA section 3.9.2.1). There is potential for removing heritage resources on both public and private lands. There are remains or original homesteads and graves in the immediate area that may be affected through disturbance and removal.

Another error is that the EA says that archaeological resources located on private property are outside of the jurisdiction of the Forest Service and outside the scope of this EA per consultations with the State Historic Preservation Officer (SHPO, EA reference section 3.9.2.1). NEPA must acknowledge indirect and cumulative effects on a proposed action on cultural resources located on both adjacent private and public lands.

Regarding the Finding of No Significant Impact (FONSI) the appellant's homes are over 50 years old. One is nearly 100 years old and they may have potential to be eligible for inclusion in National Register of Historic Places and may be affected by the proposed action. (Appeal Attachment 2)

Response: A survey was conducted of the proposed roads and rights-of-way on National Forest lands, and no heritage resources were identified (PR #5). A survey was also conducted on private lands, including research on historic records designed specifically to locate historic homesteads and a survey of high probability areas designed to locate prehistoric sites that might contain graves (PR #81). Several prehistoric habitation sites were identified on private land, and protection measures were agreed upon with the SHPO (PR #111). The potential for a general increase in trespass and vandalism was identified as an issue in the analysis and is addressed in the EA (pg. 13). To discourage vandalism of heritage sites, protection measures include providing information on preservation incentives and statutes to new landowners (EA pg. 19).

The EA acknowledges that there may be as yet, undiscovered archaeological sites on private lands in the area that may be at risk (EA pg. 19); however, reasonable steps were taken, in consultation with the SHPO, to survey proposed road locations and high probability areas within the private lands. Eight prehistoric sites were located, and site protection measures were agreed upon, including road realignment, protection from disturbance by construction activities, subdivision protective covenants, and making information on state preservation incentives and information available to the new landowners (PR #111, EA pg. 18-19).

The appellant's contention that the proposed action may adversely affect his homes through accelerated channel migration is not supported by the analysis of storm runoff and erosion (EA pg. 12) and was not identified as a heritage issue in the planning process.

Finding: Appropriate steps were taken to identify and disclose potential effects of the proposed action on heritage resources on public and private lands.

Contention 1e: The EA is deficient in the analysis of the effects of the degradation of Forest Road 123. The EA reflects a lack of knowledge of road characteristics and limited traffic-carrying capabilities. The Roads Analysis baseline is not described sufficiently in the EA. The effects discussion needs to be carried further to recognize the effects of more frequent traffic and more severe degradation of the road.

The appellant requested that the EA address potential impacts to the road that crosses his property from FR 123 to Alamo.

Response: The Interdisciplinary team (IDT) made "extensive efforts to determine the major issues," including the aforementioned road issue. The project level Road Analysis (PR #91) for the Abbe Springs Road Easement Exchange states, "Based on the Forest-wide Road Analysis, NFSR 123 and all roads providing access to NFS lands should be a maintenance level 2 (high clearance) road. If there is a need to provide a passenger car road (level 3 maintenance) for private uses or to meet any local or state requirements, the responsibility of providing any improvements should lie with the landowners, a homeowners' association or Socorro County." The current road standard allows high clearance vehicles. This type of road should not require an increased maintenance frequency with the proposed subdivision and use. If additional maintenance is required, the Forest Service will provide and maintain a safe and efficient road.

Finding: The EA and the project level Road Analysis for the Abbe Springs Road is not deficient in the analysis of the effects of the degradation of Forest Road 123.

Contention 1f: The EA presents an unrealistic analysis of increased trespass and property damage.

Response: The EA (PR #90) states that the potential net change in trespass and vandalism in the area cannot be determined but could decrease because of the increased presence of landowners with increased fencing and the posting of private land.

Finding: There is nothing in the record nor has the appellant provided any information that validates either an increase or a decrease in trespass and property damage (vandalism).

Contention 1g: The discussion of air quality in the EA is not consistent with Forest Service Watershed Report that accompanied the March 6, 2002, pre-decisional EA.

Response: The Watershed Report (PR #44) says that air quality will be affected with dust and fireplace smoke from the subdivision as roads and houses are developed. This is transient but will increase over time. The EA (pg. 25) discloses this minimal impact. The cumulative impacts will be diluted by the geographic spread of the impacts and the impacts are short-term. The activities will be spread over a number of years as homeowners develop their lots.

Finding: The discussion in the EA is consistent with the Watershed Report and discloses effects that are short-term and limited in nature to air quality.

Contention 1h: The effects analysis for sound (noise) is deficient. The “dilution effect” that is discussed would be far less in this remote area where sounds carry, than in a more developed area.

Response: The EA (pg. 26) discloses effects, with very localized short-term increases in noise from construction in the proposed development, but minimal because the scale of effects is small. The cumulative effects are discussed. The nearest local resident is about one mile from the nearest Southwest Properties parcel.

Finding: The EA has an adequate disclosure of noise effects from construction for this proposed action and connected actions.

ISSUE 2: Discussion of the No Action Alternative is deficient.

Contention: The EA should objectively address effects of all alternatives including the No Action Alternative and not promote or justify land subdivision. The EA does not disclose that the No Action Alternative would entail the continued development of 77 lots on 2500 acres. The No Action Alternative should be a baseline for comparison, but the No Action Alternative here does have impacts (Appeal Attachment 3).

Response: The EA states that Southwest Properties has already developed other acres of land in the area, (EA, pg. 1, Background, and pg. 3, Affected Environment). The Forest Service

reviewed other alternatives (EA, pg. 7 & 8). The subdivision development was not sponsored by the Forest Service in the various alternatives, rather the changes in alternatives focused on various easement and land exchange possibilities.

The effects of the No Action Alternative are included in the EA, either in separate discussions (EA, Increased Trespass pg. 13) or in the Affected Environment current condition explanations (EA, pg. 14 Traditional Lifestyle) or as a baseline comparison in the Proposed Action effects discussion (EA, pg. 11-26, Sections on soils and water, environmental justice, socioeconomics, etc.) Many of the No Action Effects are outside the scope of the Forest Service analysis, such as effects on the private land from existing roads, subdivision lot development, and water use.

Finding: The discussions of the No Action Alternative are adequate for the decision being made. The effects on private land are the responsibility of local and State agencies and their standards. An analysis of the current condition on private land has been made, which assesses the No Action Alternative and provides a baseline to compare with the Proposed Action.

ISSUE 3: The inadequacy of the EA does not provide an accurate and objective basis for a FONSI (Appeal Attachment 2).

Contention 3a: Contrary to the FONSI, the project's effects are highly controversial. There is technical controversy with subdivision effects on ground water depletion, ground water sufficiency, effects on adjacent surface and ground water, water quality issues, water rights and property impairment as seen in reports and testimony. See Office of State Engineers opinions, expert hydrologist Dr. Frank Titus, and expert hydrogeologist from New Mexico Tech. Resource Technology Inc. provided a report that was delivered to the Cibola National Forest.

Response: The proposed action is for the transfer of road easements and not the development of private land. However, since increased development is recognized as a connected action, it was analyzed as such in the environmental analysis. Although there are differences of scientific opinion as to the effects that possible future wells might have on groundwater, the effects of the exchange of road easements on ground water, are negligible and have not been challenged. The EA discusses the uncertainty surrounding whether private property owners would be at risk of not having an adequate water supply and explains how the regulation of that activity is outside the jurisdiction of the Forest Service (PR #90, pg. 17). The EA also includes a discussion on the potential of the proposed action to cause increased flood flows onto private land and concluded that there would not be any substantial increase in surface runoff (PR #90, pg. 10-12). The project record did not contain any evidence showing contrary opinions regarding the technical validity of the surface runoff calculations.

Finding: The Finding of No Significant Impact is correct. The effects of the easements proposed in this project are not highly controversial.

Contention 3b: Contrary to the FONSI, this action may establish a precedent for future actions with significant effects. NEPA was established to address the significant environmental effects of growth promoting actions. The establishment of one subdivision would lead to additional

nearby developments. This could deplete area springs and force ranchers to sell land to developers.

Response: A thorough explanation of this part of the Finding is on page 7 of the Decision Notice. This decision is not a new precedent-setting decision. Road easements and subsequent development effects are familiar to the public. The precedence or a linking of this decision to unknown future developments in the area is speculative and is not established in the record.

Finding: The Finding of No Significant Impact is correct. Implementation of the action would not establish a precedent for any future action with significant effects.

Contention 3c: Contrary to the FONSI, this action is related to other actions with individually significant effects.

It is not accurate to say that there is no reasonably foreseeable future action expected to occur on other private land in the area. The appellant says that there have been numerous inquiries into the purchase of land with the intent for more subdivision development, and land is for sale.

Response: No specific future actions of subdivision development or other private development was noted in the project record. The trend towards more residential use was described in the effects section for Traditional Uses and Socioeconomics in the EA.

Other than lands records or interests in lands conveyed into or out of Federal ownership within the proclaimed National Forest System boundaries, the Forest Service does not maintain records regarding title transfers between non-Federal parties and private landownership.

Finding: All reasonably foreseeable future actions on private land have been analyzed for this decision, and no other actions are expected to occur. The FONSI is correct.

ISSUE 4: Compliance with Laws and Regulations

Contention 4a: The EA does not demonstrate compliance with Executive Order 11990 - Protection of Wetlands. The indirect and cumulative effects of the proposed action may adversely affect many springs.

Response: Executive Order 11990 is aimed at the protection of wetlands on federal property. The project record (PR #131) discloses that there are no wetlands or riparian areas within the proposed easement locations.

Finding: There is full compliance with Executive Order 11990 on Protection of Wetlands.

Contention 4b: The EA does not demonstrate compliance with Executive Order 12898 - Environmental Justice. The adverse effects of the proposed action may result in a disproportionately high and adverse human health and environmental effect, on low-income or minority populations.

Response: Environmental Justice was identified as an issue (EA pg. 5). This issue was evaluated on pages 14 and 15 of the EA. All persons would be affected equally in the area. No disproportionately high effects to minority or low-income populations were found in this section or in other parts of the project record.

Finding: The EA discloses effects and there are no disproportionately high effects to minority or low-income populations as a result of any alternative. The EA is in compliance with the Executive Order 12898 on Environmental Justice.

Contention 4c: The EA does not address 36 CFR Part 251.111 that covers access. Access does not include rights-of-way for power lines and other utilities. The Forest Service is not addressing this requirement in its proposed action. (Appeal Attachment 3)

Response: 36 CFR §251, Subpart D, addresses access to non-Federal lands. 36 CFR §251.111 *Definitions*, defines access to mean “the ability of landowners to have ingress and egress to their lands. It does not include rights-of-way for power lines or other utilities.”

The EA’s proposed action is the granting of road easements from the Forest Service to Southwest Properties of New Mexico and the granting of reciprocal easements from Southwest Properties to the Forest Service (PR #90, #114, #132, #133, #134).

Finding: The purpose of the project is to grant road easements to Southwest Properties and in turn Southwest Properties granting reciprocal road easements to the Forest Service (PR #90, #114, #132, # 133, #134). The project does not include the routing of utility lines. There is an ongoing analysis of a request for power lines across the National Forest in the Abbe Springs area from Socorro Electric Coop. That project is not part of the EA for the Abbe Springs Road Easement Exchange.

Contention 4d: The EA does not address 36 CFR Part 251.114(e) that addresses degradation of public roads due to extensive subdivision use. There is no discussion of how compliance with 36 CFR Part 251.114(e) will be accomplished.

Response: 36 CFR §251.114(e)

“When access is tributary to or dependent on forest development roads, and traffic over these roads arising from the use of landowner's lands exceeds their safe capacity or will cause damage to the roadway, the landowner(s) may be required to obtain a road-use permit and to perform such reconstruction as necessary to bring the road to a safe and adequate standard to accommodate such traffic in addition to the Government's traffic. In such case, the landowner(s) also shall enter into a cooperative maintenance arrangement with the Forest Service to ensure that the landowner's commensurate maintenance responsibilities are met or shall make arrangements to have the jurisdiction and maintenance responsibility for the road assumed by the appropriate public road authority.”

36 CFR §251.114(e) is addressed in the Project Road Analysis (PR #91) “If there is a need to provide a passenger car road (level 3 maintenance) for private uses or to meet any local or state

requirements, the responsibility of providing any improvements should lie with the landowners, a homeowners' association or Socorro County" and the road is suitable for Forest Service uses.

Finding: The EA (PR #90, pg. 16 & 17) specifically addresses and discusses compliance with 36 CFR §251.114(e).

Contention 4e: This use does not reflect the intent of the Alaska National Interest Lands Conservation Act (ANILCA).

Response: Disposing the public domain through sales, homesteading, mining patents, and grants resulted in private holdings being intermingled with National Forest System (NFS) lands. Congress recognized private landowner's basic access needs by providing, in the ANILCA access rights across NFS lands subject to terms and conditions of the Secretary of Agriculture. Granting a "rights-of-way" usually authorizes such access.

ANILCA, Section 1323(a). "Notwithstanding any other provisions of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to non-federally owned lands within the boundaries of the National Forest System as the Secretary deems adequate (emphasis added) to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with the rules and regulations applicable to ingress and egress to or from the National Forest System."

36 CFR §251.110 (c). "Subject to the terms and conditions contained in this part and in parts 212 and 293 of this chapter, as appropriate, landowners shall be authorized such access as the authorized official deems to be adequate (emphasis added) to secure them the reasonable use and enjoyment of their land."

36 CFR §212 applies to administering the forest transportation system.

36 CFR §293 applies to wilderness and primitive areas that are not part of this appeal.

What constitutes reasonable use and enjoyment of private land is case-specific, and includes consideration of State and local laws and zoning restrictions, along with typical uses of similarly situated private land in proximity to the land for which access is requested. Land managers must make judgments on a case-by-case basis regarding what is the access type that is adequate and commensurate with the reasonable use and enjoyment of non-federal land. Land managers must take into consideration the conventional, traditional access to similarly situated non-federal land for similar uses and enjoyment in proximity to the land for which access is requested (36 CFR §251.114(a)).

Finding: In compliance with ANILCA, the Responsible Official deemed that granting road access to Southwest Properties of New Mexico (the Applicant) was adequate and commensurate with the type of access the Applicant currently has in their County approved subdivision (PR #90, Map 1). The decision is consistent with ANILCA by providing safe and legal access, adequate and commensurate with the reasonable use and enjoyment of the Applicant's property.

ISSUE 5: The EA is deficient in its discussion of Impacts on Traditional Lifestyle, and Socioeconomics.

Contention: The proposed action would appreciably reduce recreation use including hunting for non-subdivision owners. The appellant believes the stated improvement of hunting opportunities from legal access is overstated; that the spur to Carrizozo Springs would be limited opportunities. The subdivision use could have an adverse effect on neighboring ranches, resulting in change in land use and generation-old lifestyles.

Any depletion or loss of springflow, drought-related, would result in impairment of use, economic return and economic value of property.

Response: The EA discloses uses such as hunting (EA, pg. 14 Traditional Uses, pg. 25-26 Recreation) and says that newly opened lands will not provide significantly new recreational opportunities. Traditional Lifestyle and Socioeconomics were addressed in the EA (pg. 14, 15, 16). The economic effects were disclosed based on county information and census. Traditional uses on private land were characterized as shifting from agricultural towards more residential patterns.

Finding: The EA is adequate in its disclosure of effects on Traditional Lifestyle and Socioeconomics.