



United States  
Department of  
Agriculture

Forest  
Service

R3 Regional Office

333 Broadway SE  
Albuquerque, NM 87102  
FAX (505) 842-3800  
V/TTY (505) 842-3292

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File Code: 1570-1/2710

Date: April 21, 2003

Cayce Boone  
President  
To All Our Relations, Inc.  
17200 S. Villita Rd. W.  
Box 730  
Sahuarita, AZ 85629

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED  
NUMBER: 70002870000011356145**

Re: Appeal #03-03-00-0013-A215, Very Energetic Radiation Imaging Telescope Array System (VERITAS), Nogales Ranger District, Coronado National Forest

Dear Mr. Boone:

This is my review decision on the appeal you filed regarding the Decision Notice and Finding of No Significant Impact (DN/FONSI), which allows construction of VERITAS in Montosa Canyon on the Coronado National Forest.

### **BACKGROUND**

On January 9, 2003, Forest Supervisor John McGee signed a DN/FONSI on the VERITAS project. The Forest Supervisor is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeals regulations.

Pursuant to 36 CFR 215.6, an attempt was made to seek informal resolution of the appeal. The record reflects that informal resolution was not reached.

The proposed action involves the construction and operation of seven telescopes in Montosa Canyon, as described in Alternative #4.

My review of this appeal has been conducted in accordance with 36 CFR 215.7. I have thoroughly reviewed the appeal record, the recommendations of the Appeal Reviewing Officer, and interested party comments from the Smithsonian Astrophysical Observatory. My review decision incorporates the project record.

### **APPEAL REVIEWING OFFICER'S FINDINGS**

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; 4) the proposed action is not consistent with the Forest Plan; and 5) NEPA has not been satisfied with respect to effects on visual resources.



**APPEAL DECISION**

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I am reversing the VERITAS project decision with the following instructions:

- 1) Complete a visual resource effects analysis including cumulative effects.
- 2) As part of this analysis, prepare a Forest Plan Amendment for VERITAS.

Any new decision regarding issuance of a permit and/or amending the Forest Plan for VERITAS must fully comply with the public comment and appeal provisions of 36 CFR 215. This decision constitutes the final administrative determination of the Department of Agriculture 36 CFR 215.18(c).

Sincerely,

LUCIA M. TURNER  
Appeal Deciding Officer, Deputy Regional Forester

cc: Mailroom R3 Coronado, Wayne Thornton, Christina Gonzalez, Keith L Graves

**REVIEW AND FINDINGS**

of the

**Center for Biological Diversity (CBD) and Sky Island Alliance (SIA)  
Appeal # 03-03-00-0012-A215**

and

**To All Our Relations (TAOR)  
Appeal # 03-03-00-0013-A215**

and

**Tohono O'odham Nation (Nation)  
Appeal # 03-03-00-0022-A215**

**Very Energetic Radiation Imaging  
Telescope Array System (VERITAS) Project**

**ISSUE 1 ( CBD/SIA, TAOR, Nation )**: The decision violates visual quality objectives (VQOs) and adversely affects scenic quality.

**Contention**: The construction of VERITAS would violate the VQO for Management Area 4 and adversely affect the scenic quality of the area.

**Response**: The Forest Land Management Plan (FLMP) for the Coronado National Forest, completed in 1987, established VQOs to provide direction for managing the visual (scenery) resource and establish the degree of acceptable alteration of the natural landscape based upon the importance of esthetics. The VQOs are based upon the inherent scenic attractiveness of the landscape, the public's concern for esthetics, the visibility of the landscape, and FLMP Forest-wide and Management Area standards and guidelines. They establish the minimum acceptable threshold that activities must meet to be in compliance with the FLMP direction.

The VQO for the proposed action with modified access site is **Retention** (Project Record Document Number [PR] 160, 165, 186, 192, Decision Notice [DN] pg 10) which means activities must not be visually evident. The proposed action with modified access activities will meet a VQO of **Modification** (PR 193 & DN pg 10), which means they will be visually dominant. Therefore, the proposed action with modified access activities will not meet the FLMP VQO of **Retention** (PR 141, 160, 165, 193 & DN pg 10).

All of the alternatives, except the No Action Alternative, will have effects on the visual resource (PR 76, 97, 141, 160, 165, 186, 193, & DN pgs 3, 10 & 17). Forest Service Manual (FSM) 2300, Washington Office FSM Amendment 2300-90-1 effective 6/1/90 and letters from the Chief (2380 August 22, 1994, 2380 March 10, 1997, and 1920/2380 June 11, 2001) contain the policy

for managing the visual resource and do not preclude activities that have visual effects on the natural landscape.

**Finding:** The proposed action with modified access activities will not meet the FLMP VQO of *Retention*.

**ISSUE 2:** The VERITAS decision violates the National Environmental Policy Act (NEPA).

**Contention 2A (CBD/SIA):** The VERITAS decision is related to other projects and events with cumulatively significant effects, thus an environmental impact statement must be prepared. Specifically, the Forest Service has not adequately addressed the cumulative effects of the VERITAS decision on visual quality objectives within the Santa Rita Mountains and the Coronado National Forest.

**Response:** An analysis of VQOs is included in the project record (PR 186). The analysis concludes that the proposed project would not meet VQOs and would contrast sharply with the characteristic landscape. It does not discuss cumulative impacts to the visual resources.

The project record includes a document titled “Cumulative Effects to Visual Quality” (PR 193). This report provides a discussion of impacts to visual resources from past management activities, the proposed project, and foreseeable actions. The report states, “Although the individual effect of the VERITAS project is not substantial, the cumulative effect of past, present, and future actions may be.” The report continues by delineating recommended actions to conclusively determine cumulative effects to the visual resources.

The VERITAS Environmental Analysis (EA) (PR 165) acknowledges additional impacts to the visual resources that would potentially compromise Forest Service scenery management goals in the view shed (Section 1.9, p. 7; Section 3.2.4.4, p.36). The EA’s cumulative effects discussion (Section 1.9, p. 7) provides a conclusive statement that additional impacts would occur to visual resources.

The DN (PR 197, p. 10) states that Montosa Canyon is a relatively undisturbed natural landscape and the changes proposed under the selected alternative would constitute less than 1 percent for the total acres of retention in the management area. No additional analysis is provided.

The Finding of No Significant Impact then states that the cumulative impacts of implementing the VERITAS project are not significant, basing this conclusion on the cumulative effects discussion in the EA (Section 1.9, p. 7).

**Finding:** The project record and EA for the VERITAS project do not document a cumulative effects analysis on visual resources that would lead to a conclusion that significant cumulative effects will or will not result.

**Contention 2B (CBD/SIA):** The VERITAS decision is highly controversial, and will adversely affect the use of an existing cultural resource, thus an environmental impact statement must be prepared.

**Response:** One of the ten factors used by the Forest Service to determine significant impact on the human environment and therefore, if an environmental impact statement is needed, is #4 - *the degree to which the effects on the human environment are likely to be highly controversial* (40 CFR 1508.27). This intensity factor relates to a **controversy over the effects**, not controversy over the proposal. [Friends of Endangered Species vs Jantzen, 1985]. Simple opposition of a project does not create controversy as defined by 40 CFR 1508.27.

The Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act at 40 CEQ [Council of Environmental Quality] 1508.14 state that social or economic effects are not intended by themselves to require preparation of an environmental impact statement. The project record, environmental assessment, response to public comments, and decision notice all clearly document the social and economic effects of implementation of the VERITAS project on the TAOR's special use permit and its operations.

The DN (PR 197, p. 14) includes mitigation measures to reduce environmental impacts to the special use permit and operations of TAOR.

**Finding:** The project record clearly documents disagreement over the value of implementing the VERITAS project. The record also clearly documents the direct and indirect impacts to the existing special use permit held by TAOR. The DN details mitigation measures designed to reduce the magnitude of impacts on the special use permit and operations of TAOR. These social and economic impacts do not warrant the development of an environmental impact statement.

**Contention 2C (CBD/SIA):** The VERITAS decision threatens a violation of law, thus an environmental impact statement must be prepared.

**Response:** Compliance with the implementing regulations for the NEPA, NFMA, and American Indian Religious Freedom Act is discussed in issues 2, 3, and 6. The review of the project record in support of the VERITAS decision, as documented in the findings for issue elements 1 and 2A, notes that the decision is not in compliance with NEPA and the standards and guidelines in the Coronado Forest Plan.

**Findings:** The decision does violate agency implementation requirements for the NEPA and NFMA issues identified as Issues 1 and 2A (See Issue #7). However the documentation in the project record regarding compliance with NEPA and NFMA is not adequate for a significance determination. Therefore, with regard to the question about strict legal compliance with NEPA and NFMA can't be answered with the available information.

**Contention 2D (CBD/SIA, TAOR):** The Forest Service has failed to analyze a reasonable range of alternatives as it has limited itself not only to Forest Service sites, but to sites within Montosa Canyon. A realistic viable alternative site was never presented by the Smithsonian Institute, in which the ultimate criterion for the site's functionality would be that the level of light pollution that was acceptable to astronomical observers. There are other sites in the Santa

Rita Mountains that are equal to or better than Montosa Canyon in the degree of light pollution. These sites should be listed even if they are 30 miles east of Mt. Hopkins.

**Response:** “[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)]. For an alternative to be reasonable, it must meet the stated purpose and need and address one or more issues. Significant issues identified in scoping drive the formulation of alternatives (40 CFR 1501.2(c)).

The project record includes a site comparison study for the VERITAS facility (PR 7). Onsite investigations of three site locations for the VERITAS facility were conducted in this site comparison. All sites were within the vicinity of the Fred Lawrence Whipple Observatory (FLWO) Base Camp and were known as the South Site, North Site and Montosa Site. All three sites are located on lands administered by the Forest Service.

The special use application for VERITAS, submitted by the Smithsonian Astrophysical Observatory, dated 13 December 1999, includes a discussion of two site locations for construction of the VERITAS facility (PR 97). The special use application discussed its proposed location (Montosa Site) and an alternative site (North Site), both of which are on lands administered by the Forest Service.

The special use application continues by stating, “Application for a Special-Use Permit was only made after determining that there were no suitable sites available outside the Forest Boundary that could use efficiently and economically this valuable infrastructure” (PR 97, p. 2).

Briefly, the purpose and need for the VERITAS project, as described in the EA, states “there is a lack of telescopes, or an array of telescopes, that are more sensitive than the existing telescopes used for detecting gamma-ray emissions at FLWO” (PR 165, p. 2).

The EA describes an alternative development process that included several stages (PR 165, Section 2.2, p. 10-11). This discussion is taken from the comparison study for the VERITAS facility (PR 7). As described in the EA, the Smithsonian looked at several broad geographic areas, including off forest locales, for siting the facility. The Smithsonian then identified actual sites that met construction and operational criteria (site selection criteria). One of the selection criteria was that the site must be less than four miles to the existing FLWO facilities. The final step was to include alternative sites and modify the original proposed site to address scoping issues.

Table 2-1 of the EA (PR 165, p. 11) details five alternative sites considered for VERITAS but eliminated from detailed study. All sites are within lands administered by the Forest Service.

**Finding:** The EA does include a description of a process used to narrow the range of alternatives. This alternative development process supported a review of off forest locations and documented why such sites were eliminated from detailed study in the EA. The range of alternatives detailed in the EA is consistent with Forest Plan direction to give high priority to the

consolidation existing and new facilities (LRMP p. 41 (8)). Therefore, an adequate range of alternatives was considered for the VERITAS project analysis in accordance with 40 CFR 1501.2.

**ISSUE 3 (CBD/SIA):** The VERITAS decision violates the National Forest Management Act (NFMA).

**Contention 3A:** The VERITAS decision violates Coronado Forest Plan requirements within Management Area 4. The plan does not provide a land allocation for the VERITAS array, and in fact strongly discourages development of new facilities.

**Response:** A forest-wide goal for the Coronado National Forest is to allow the use of available National Forest Lands for appropriate public and private interests consistent with National Forest policies (LRMP, replacement page 11).

A forest-wide standard and guideline for special use management encourages consolidation of existing and new facilities and uses shall be given a high priority over opening new sites (LRMP, replacement page 41). The project record clearly indicates attempts to co-locate the VERITAS facility with the FLWO sites were not technologically feasible (PR 97, p. 6 of 14). The EA describes and analyzes suitable locations within a close proximity to the FLWO (PR 165, Section 2.2, p. 10-11).

The Coronado Forest Plan established a management emphasis and intensity for Management Area 4, which is “Manage for a sustained harvest of livestock forage and fuelwood while maintaining and improving game animal habitat” (LRMP, replacement page 62). Management Area 4 standards and guidelines do not limit or preclude the development of astrophysical facilities.

**Finding:** The Coronado Forest plan does not need to specifically allocate land for this use in order to permit the VERITAS project.

**Contention 3B:** The VERITAS decision violates Coronado Forest Plan visual quality objective requirements. The Forest Plan must be amended to make such changes.

**Response:** The Montosa Canyon is a relatively undisturbed natural landscape with a VQO of *Retention*. The project record clearly indicates in numerous records that the visual quality objectives identified in the Coronado Forest Plan will not be met under the selected alternative (PR 76; PR 141, p. 3; PR 186, p. 2; PR 160, 165, pgs. 16, 36; PR 186, p. 5; PR 197, pgs. 10-11, 31)

The Environmental Impact Statement for the Coronado Forest Plan allows for “some small and localized exceptions to the retention VQOs where the changes to the visual condition of the landscape will be harmonious and VQOs will be met (PR 188, p. 101).

The DN and FONSI state that less than 1% of the total acres of retention in the management area will be altered (PR 197, p. 10).

**Finding:** The decision to implement Alternative 4 for the VERITAS project was in violation of the VQOs of the Coronado Forest Plan and proper notice and comment procedures to amend the forest plan as described in agency policy were not followed.

**ISSUE 4 (TAOR/Nation):** There is a flaw in the documentation in the Decision Notice. Some tribal testimony and comments were not included in the Summary of Responses appearing on the pages of the Decision Notice.

**Contention:** The Forest Service has neglected oral and verbal testimony submitted in the defense of TAOR in opposition to the construction of the VERITAS project. None of the tribal responses received from Arizona Tribes and out of state tribes was listed in the “Summary of Responses to Comments” appearing on page 23 of the DN.

**Response:** Public comment letters to the EA are found in the project record (PR 177). Responses to public comment on the EA are attached to the DN and FONSI (PR 197).

**Finding:** The Forest correctly followed the notice and comment requirements of 35 CFR 215.

**ISSUE 5 (TAOR/Nation):** The Forest Service did not communicate adequately with Native American communities affected by the Forest Service decision.

**Contention:** The Forest Service has failed to translate NEPA documents so that all members of the public can understand the proposed VERITAS construction. In order to encourage full public scrutiny and participation, information contained in EISs and other NEPA documents must be plain and accessible to general members of the public. In this case, the class of “interested non-professional laypersons likely to be affected by actions taken under the EIS” clearly includes members of Southwestern tribes for whom the area has central religious and cultural significance.

No public hearings were held on this project. The Forest Service has a duty under NEPA to hold public hearings with translators in affected Native American Communities on the proposed VERITAS project. The need to conduct aggressive outreach to Native American communities concerning the proposed VERITAS construction is strongly reinforced under directives such as Executive Order 12898.

The Forest Service’s failure to conduct public meetings within the many Native American communities that will be profoundly and irreversibly affected by the proposed VERITAS project clearly excludes, denies, and subjects Native American populations to discrimination, as the Forest Service is ignoring the very communities that will be most affected by the construction of VERITAS.

The Forest Service has attempted no “adaptive or innovative” measures to inform and educate tribal members, or to solicit their input on the proposed expansion. Instead, the Forest Service has steadfastly refused to address environmental justice or religious considerations, lending the impression that its approval of the proposed action is a predetermined and inevitable outcome.

**Response:** Forest Service Handbook (FSH) 1909.15 requires that the agency conduct scoping actions commensurate with the nature and complexity of the proposed action and no single technique is required or prescribed (FSH 1909.15, 11). Under this direction a Responsible Official has the authority to determine whether translation of analysis documents into languages other than English is practical and appropriate.

Public involvement efforts that agencies shall consider in their project's NEPA analysis is detailed in 36 CFR 1506.6. This guidance also discusses public involvement activities that may be included in NEPA analysis.

The agency is required to conduct scoping actions commensurate with the nature and complexity of the proposed action and no single technique is required or prescribed (FSH 1909.15, 11).

The Forest, in its public involvement strategies, utilized a variety of methods to reach the public, including the Native American Communities. The project record contains numerous records that document dialogue with Native American Communities (PR 11, 21, 28-30, 32, 33, 35, 36, 44, 48-50, 59, 67, 95, 106, 108, 111, 116, 117, 119, 121, 122, 129, 135, 137, 140, 144, 148, 150, 151, 154, 155, 164, 177). Communication takes the form of written correspondence, telephone conversations, face-to-face meetings, interviews, field trips, and other forms of public involvement consistent with the NEPA and agency direction found in FSH 1909.15.

Environmental Justice direction requires fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Executive Order 12898 requires that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Early and meaningful public participation is a paramount goal of NEPA and central to following the direction identified in Executive Order 12898. The EA and its supporting record clearly document extensive and meaningful public involvement on the VERITAS Project. The potential for disproportionately high environmental effects on those communities affected by the proposed action is also clearly documented in the EA and project record. All practical means to avoid and minimize environmental impacts to the existing permittee have been adopted into the decision.

**Finding:** The Forest met the requirements of the CEQ guidance (40 CFR 1500-1508) and the FSH 1909.15 when designing and implementing its public involvement activities. The public involvement actions were consistent, commensurate with the scope of the action, and the public was kept informed and involved in the environmental analysis and decision-making. In addition, the record clearly documents a review of disproportionate impacts to communities in the realm of environmental justice and all practical means to avoid and minimize environmental impacts to the existing permittee have been adopted into the decision.

**ISSUE 6 (Nation):** The provisions of the American Indian Religious Freedom Act and Presidential Executive Order 13007 (Protection of Sacred Sites) that require federal agencies to preserve access and protect sacred sites have not been fulfilled.

**Contention:** Permitting the construction of the VERITAS site in Montosa Canyon will have both direct and indirect impacts on the religious site used by TAOR.

**Response:** TAOR, a non-profit organization founded by a member of the Navajo Nation, holds a non-exclusive special use permit (PR 1) for use of approximately one acre of land in Montosa Canyon near the Smithsonian Base Camp and Visitor Center. The permit was originally issued in 1991 for construction and use of a sweat lodge for religious ceremonial purposes. According to TAOR, the permit area's sweat lodge and talking circle are used to bring young people into the canyon to facilitate a connection to their past, to work with diverse peoples in protecting nature, telling traditional stories, conducting retreats with the local indigenous population and preserving the forest, and building a community of inter-faith, inter-tribal varied use of the Forest (PR 110). TAOR's permit area is located approximately 1000 ft. west of the proposed Montosa Canyon VERITAS site.

The potential impact of VERITAS on the existing TAOR special use permit area was identified as an issue in the EA (PR 141, EA page 4). The record contains evidence of numerous communications and meetings with TAOR concerning this issue (PR 19, 20, 22, 30, 37, 75, 83, 87, 88, 92, 94, 106, 108, 110, 111, 115, 118, 120, 125, 137, 150). A number of comments from the public (PR 28, 29, 33, 39, 42, 44, 59, 67, 72, 98, 103, 143, 146) and from Tribal governments and individuals (PR 32, 36, 40, 44, 48, 49, 50, 67, 119, 140, 144, 150, 154) voiced support for TAOR's work and opposition to construction of VERITAS in Montosa Canyon because of the permit area's religious significance to TAOR's members and participants, many of whom are American Indians. This includes a resolution passed by the Legislative Council of the Tohono O'odham Nation (AR 144). The EA documented and addressed TAOR's concerns about physical impacts such as noise, traffic, and loss of privacy as well as spiritual impacts such as interference with the "light path" (EA, page 16, 18).

The EA concluded that after construction, the operation of the VERITAS telescopes would not be seen or heard from the TAOR permit area (EA, page 29). To address potential disturbance of TAOR's activities due to construction and use of the access road, a new alternative (Alternative 4) was developed (EA, page 12). This alternative moved the location of the access road, which in the proposed action (Alternative 2) would have come within approximately 200 ft. of the TAOR permit area, to a location farther up the Mt. Hopkins Road. At its closest point, the Alternative 4 access road is approximately 1,600 feet from the TAOR permit site. The EA documented that after construction, fewer than 5 vehicles per day will likely access VERITAS (EA, page 29). The EA also clarified how VERITAS will measure and record light (EA, page 29). Comments received in response to the EA, document that the EA did not alter the concerns of TAOR, the Nation, and a number of other respondents (PR 177).

In the DN, after considering the EA, the record, and the comments, the Responsible Official selected Alternative 4 (DN, page 3). He identified additional measures that would be taken to further minimize potential impacts on TAOR's permit area and activities (DN, page 7); he also

acknowledged TAOR's continuing concerns about spiritual impacts (DN, page 7-8) and noted TAOR's support from several American Indian tribes and individuals (DN, page 8). The Responsible Official considered and addressed the principles and requirements of the American Indian Religious Freedom Act and Executive Order 13007 in making his decision (DN, page 8).

**Finding:** The record documents that concerns related to potential impacts on TAOR's permit area and religious activities were solicited, analyzed, and considered in the EA and decision. Although the decision provides for an additional use in Montosa Canyon, it ensures and accommodates TAOR's continued access to and use of their permit area for religious ceremonies and activities. The decision does not affect the physical integrity of the TAOR permit area. It includes modifications and measures to avoid unnecessary interference with TAOR's religious practices. The decision does not violate the American Indian Religious Freedom Act and Executive Order 13007.