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Forest
Service

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File Code: 1570-1/2350-4

Date: March 18, 2003

Mark Herrington, President
Coalition of Arizona/ New Mexico Counties for
Stable Economic Growth
P.O. Box 125
Glenwood, NM 88039

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED
NUMBER: 70002870000011359603**

Re: Appeal #03-03-00-0015-A217, Forest Plan Amendment 9, Gila National Forest

Dear Mr. Herrington:

On October 26, 2002, the Gila National Forest Supervisor, Marcia Andre, signed a Decision Notice amending the Gila National Forest Land and Resource Management Plan (Forest Plan) to protect identified eligible rivers. This Forest Plan Amendment 9 applies to rivers on the Gila National Forest, inventoried and found eligible for inclusion in the National Wild and Scenic River System. Amendment 9 placed current Forest Service policy, for protection of eligible rivers, into the Forest Plan.

A wild and scenic river is defined in Section 1(b) of the Wild and Scenic Rivers Act (WSRA) as a free-flowing river with outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. The first step in evaluating whether a river should be recommended to Congress for designation into the National System is to determine its eligibility. Section 2(b) of the WSRA describes eligibility. It states that “*A wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream and the related adjacent land area that possesses one or more of the values referred to in Section 1, subsection (b) of this Act.*”

Guidance for judging the significance of river-related values is discussed in the Interagency Guidelines¹. Once a river is determined eligible, its existing level of in-river and shoreline development is considered as a basis for assigning river segments a classification—wild, scenic or recreational. Eligibility and classification represent an inventory of existing conditions and not an agency decision under the National Environmental Policy Act (NEPA). The Forest Service Handbook (FSH 1909.12, Chapter 8) establishes agency policy for the study process, providing additional guidance for inventory (eligibility and classification) and protection.

The wild and scenic river study process does, however, include an agency decision making step subject to NEPA—suitability. This final step in the process is framed in Section 4(a) of the WSRA and discussed in the Interagency Guidelines.

¹ Departments of Interior and Agriculture Interagency Guidelines for Eligibility, Classification and Management of River Areas, which are in the Federal Register—Vol. 47, No. 173: September 7, 1982



On January 30, 2003, your representatives met with Gila National Forest officials to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. At that meeting you agreed to continue with the appeal process.

Your appeal challenges the protection of eligible rivers through measures included in the Gila Forest Plan Amendment. You suggest that Ms. Andre's decision was predetermined, failed to appropriately involve Counties, and didn't appropriately analyze the effects on County and private activities.

I am affirming the Forest Supervisor's November 21, 2002, decision amending the Gila Forest Plan. My decision is based on the following information relative to your statement of reasons:

1. The decision fails to consider the issues and comments made by the appellants.

The written comments received from Catron County, Sierra County and the Coalition of Counties were addressed on pages 16 and 17 in "Responses to the 30 Day Comments to the Environmental Assessment" (EA). The Forest Supervisor also provided written responses to county requests in 2002, specifically on July 3rd, July 16th, August 28th, and September 26th. Forest personnel met with County representatives on several occasions. The record supports detailed consideration of issues and comments made by the County within the scope of this decision.

2. The Responsible Official failed to give timely notice and invite Counties to participate as cooperating agencies pursuant to Council on Environmental Quality (CEQ) directives.

The Regulations for Implementing the Procedural Provisions of the NEPA (40 CFR Parts 1500-1508) allow a lead federal agency to request another federal agency or tribal, state or local government to become a cooperating agency in an environmental analysis process. Cooperating status is conferred to agencies with jurisdiction by law or with special expertise to inform the environmental analysis process. Catron County was granted cooperating agency status on September 26, 2002. Sierra County requested cooperating agency status too late in the analysis process to be effective and as a result they were not granted cooperating agency status. The record does support a strong effort on the forest's part to contact and address the issues identified by Sierra County.

3. The Responsible Official failed to adhere to the Southwest Forest Integrated Management Desk Guide, Appendix A, "Local Government Coordinating Requirements for NFMA", procedurally denying Catron and Sierra proper input into the Forest Plan Amendment Process.

The Integrated Resource Management Desk Guide (desk guide) issued by the Southwestern Region simply provides guidance throughout the Region on planning issues and does not replace Agency regulation or policy. The desk guide, in Appendix A, merely summarizes requirements for Forest Service coordination and as such, does not replace Agency requirements under NEPA or the NFMA.

As stated above, the record clearly supports detailed consideration of issues and comments made by Catron and Sierra Counties within the scope of this decision. In addition, Catron County, which requested cooperating agency status in a timely manner, was granted such status.

4. The Responsible Official predetermined the outcome of the EA.

The responsible official did not predetermine the outcome of the EA. The following is a description of the process that she followed:

A 1999 litigation settlement agreement required four New Mexico National Forests (Carson, Cibola, Gila and Lincoln) to conduct an inventory (eligibility and classification) of rivers within their respective national forests. This agreement also stipulated that any rivers determined eligible would be provided interim protection in conformance with agency policy (FSH 1909.12, Chapter 8.12).

The Gila National Forest Supervisor developed resource criteria from which to evaluate the significance of river related values of free-flowing rivers on the Forest. She assembled an interdisciplinary team of Forest Service subject matter experts to conduct this evaluation and conducted extensive public involvement to better inform staff about river-related values.

Upon conclusion of the inventory process, she followed agency direction (and the settlement agreement) to protect eligible rivers until such time as suitability is completed. The purpose and need, as described in the Gila National Forest scoping document and the EA, was to provide this interim direction.

5. There was no coordination or consistency review of the Counties' water plans, policies, regulations or ordinances.

The Forest Supervisor's decision was to follow current agency policy, which was placed in the Forest Plan. A review of County plans, policies, regulations or ordinances was not within the scope of this analysis and decision. The decision merely pulls agency policy into a common place and gives better assurance that eligible rivers are protected. The forest plan amendment does not make irreversible or irretrievable decisions regarding those segments, or lands adjacent to those river segments, determined to meet eligibility during the forest's inventory process.

6. The requirement for effects analysis of the proposed action was not met.

The effects of the proposed action were analyzed and it was determined that there were no environmental effects, significant or otherwise. The EA (page 3) and Decision Notice describe why there are no effects.

7. There has been no analysis of the effects on the ability to conduct wildfire suppression.

As stated in 6 above, the environmental analysis placed current Forest Service policy, for protection of eligible rivers, into the Forest Plan (proposed action). It determined that there were no environmental impacts to the human environment, including effects to conducting wildfire suppression, resulting from implementation of the proposed action.

8. Forest Service Handbook Guidelines that were moved by the Gila National Forest's action to the Forest Plan never underwent any NEPA analysis prior to their implementation.

Agency directives are issued through the Forest Service Directive System, which is comprised of the Forest Service Manual and related Forest Service Handbooks. The Directive System codifies the agency's policy, practice, and procedures affecting more than one unit and the delegations of continuing authority and assignment of continuing responsibilities. It serves as the primary administrative basis for the internal management and control of all programs and is the primary source of administrative direction to Forest Service employees.

Forest Service Handbook guidance, in this case Forest Service Handbook 1909.12 (Land and Resource Management Planning Handbook), did go through public notice and comment. Which is to say, this Forest Service policy was published in the Federal Register for public comment before it became final. The agency reviewed and incorporated, as appropriate, public comments in the final policy. NEPA compliance is not required for Forest Service Handbook guidance.

9. There was no analysis of the effects on private property rights.

See the response to issue 11 below.

10. There was no analysis of the effects on the Counties' tax base.

See the response to issue 11 below.

11. There was no analysis of the effects on the Counties' ability to deal with County or private functions.

The Forest Plan amendment only applies to National Forest system lands and is merely a continuation of current policy. Therefore, it was determined that there are no effects to private property, the Counties' tax base, or private or County functions. An analysis of effects to these issues is not required at this stage and would be appropriately conducted during suitability analysis or project level analysis of site-specific projects.

12. No Taking Implication Assessment, per Executive Order 12680, was conducted for the proposed action.

Executive Order 12680 relates to the administration of foreign assistance and related functions and arms export controls. The Executive Order to which we believe you refer is Executive Order 12630 (March 15, 1988).

A taking implication assessment described in Executive Order 12630 is not necessary. The action of placing current Forest Service policy into the Forest Plan is merely adding policy language currently being implemented. Hence this action would not have any effect on property rights and could not affect a taking.

13. There was no analysis of the effects on the Counties' ability to provide for county services.

The Forest Plan amendment only applies to National Forest System lands and the decision is a continuation of current policy. As such, there are no effects on the Counties' functions or services.

This decision is subject to discretionary review by the Chief of the Forest Service. The Chief will have 15 days from receipt of this decision to choose whether or not to exercise discretionary review (36 CFR 217.17(d)).

Sincerely,

LUCIA M. TURNER
Appeal Reviewing Officer, Deputy Regional Forester

cc: Marcia Andre, Christina Gonzalez, Denise McCaig