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Date: November 7, 2003

John Horning
Forest Guardians
318 Montezuma Street
Santa Fe, NM 87501

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED**

RE: Appeal #03-03-00-0040-A215, Lakes and BMG Wildfire Salvage Project, Jemez and Cuba Ranger Districts, Santa Fe National Forest

Dear Mr. Horning:

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 provides for salvaging dead trees on approximately 890 acres that burned in the Lakes and BMG wildfires. No road construction is included in the decision.

BACKGROUND

District Ranger John F. Peterson made a decision on August 6, 2003, for the Lakes and BMG Wildfire Timber Salvage Project. The District Ranger 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 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 on the Lakes and BMG Wildfire Timber Salvage Project.

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 Santa Fe, Christina Gonzalez, Leonard Lucero, Rita Skinner, John F Peterson, Steve F Romero, John F. Peterson, Rita Skinner

REVIEW AND FINDINGS

of

John Horning's, Gregory Pollak's, and Sam Hitt's**Appeal #03-03-00-0040-A215****Lakes and BMG Wildfire Salvage Project****ISSUE 1: The Lakes and BMG Wildfire Salvage violates the National Environmental Policy Act (NEPA).**

Contention A: The Responsible Official failed to prepare an Environmental Impact Statement (EIS) as required by 40 CFR§1508.27(3) (4) (7) (9). The threshold of significance is reached in the following points; therefore, an EIS is required. The project calls for salvage logging in units 6, 7, and 8 on Sandoval Ridge. These units are within the “Essential Zone” of the narrowly endemic Jemez Mountain salamander (JMS). This is significant because it is a unique area that is ecologically critical. The JMS Cooperative Management Plan, which Forest Biologists helped write, says that actions that adversely impact the Jemez Mountain salamander will not generally be conducted within the Essential Zone. Also, the effects on the quality of the human environment are likely to be highly controversial.

Response: The JMS and potential effects from the proposed action were an integral part of the planning and analysis processes (Project Record [PR] #14, #25, #26, #29, #36, #40, #45, #46, #47, #52, and #53). Mitigations of potential impacts were developed in coordination with the salamander team (PR #25, #36, #40, and #47). The conclusion of the effects analysis is that salvage may impact individuals but will not decrease population viability or cause a trend towards federal listing (PR #45, EA, pp. 29-30). The Decision Notice (PR #53) added mitigation to the selected Alternative (#2) to protect JMS even further (lessen compaction with winter logging) and to enhance habitat (putting more logs on the ground). (See Response to Comments on this point in PR #53.) Researchers were consulted about effects to their study (PR #45, p. 3).

Finding: The JMS Cooperative Management Plan was incorporated into the proposed action by meeting with the JMS Team, and including their concerns into mitigation measures for protecting the JMS. The record does not reflect a controversy among researchers; therefore, an EIS is not required to address controversy.

Contention B: The New Mexico Department of Game and Fish said that it is “concerned with the cumulative effects of planned and unplanned disturbances to habitat of the narrowly endemic, state-threatened Jemez Mountain Salamander ... from unplanned stand replacing fires ... road construction ... and timber salvage projects.” The project's cumulative effects should have been evaluated in an EIS. The degree to which the project may adversely affect an endangered or threatened species, in this case an occupied Mexican spotted owl Protected Activity Center (MSO PAC), is significant.

Response: The area in question did contain an active MSO PAC up until the fire. Visits and surveys (PR #66) to the area of the PAC since the fire have not recorded any occupancy by an

MSO. A field trip with the United States Fish and Wildlife Service (FWS) (PR #13) resulted in a letter (PR #23), discounting the PAC from further consideration as an MSO PAC. The Biological Assessment (PR #46), and Environmental Assessment (PR #45) discuss the MSO and potential affects of the proposed action. The FWS concurred (PR #49) with a determination of “may affect — not likely to adversely affect” on May 1, 2003.

Finding: Consultation was completed per Endangered Species Act (ESA) requirements. No adverse effects from the proposed action on ESA listed species were found.

ISSUE 2: The Lakes and BMG Wildfire Salvage violates the National Forest Management Act (NFMA).

Contention A: The Lakes and BMG Wildfire Salvage Project fails to provide for the diversity of plant and animal communities in the planning area or insure the maintenance of viable wildlife populations.

Response: The 36 CFR 219 regulations for NFMA refer to forest planning and measures of diversity in the evaluation of plan alternatives. The regulations do not include project-level analysis or mandate any monitoring requirements for Management Indicator Species (MIS). Trends for MIS are discussed in the draft Forest MIS Assessment, a project-specific MIS analysis (PR #27), and the EA (PR #45).

Although the McGaffey Lawsuit (*Forest Guardians v. Forest Service, CIV 00-714 JP/KPM-ACE*) set the stage for MIS evaluations in the Southwest, the more recent Corner Mountain Lawsuit (*Center for Biological Diversity v. US Forest Service, CIV 01-1106 WJ/RLP ACE*) decision has defined MIS requirements in New Mexico. “The Forest Service has the discretion regarding the identification of the geographic area within which the effects of the environmental impacts are measured.”

Finding: The proposed project as defined in the Decision Notice provides for a diversity of plant and animal communities and the maintenance of viable wildlife populations.

Contention B: The Lakes and BMG Wildfire Salvage Project fails to address the requirements of Management Area (MA) C. Management Area C requires that a viewshed corridor plan be developed as part of project-level planning for all vegetative management projects.

Response: Forest Service Manual direction (FSM 2371.21[1]) requires that each special area designated by law be assigned a separate MA designation in the Forest Plan. The Jemez National Recreation Area (JNRA) was designated as MA X and replaces portions of those management areas that the JNRA overlaps. A portion of MA C that involves the project area and portions of the Forest Road 376 travel corridor was replaced by MA X (PR #59, p. 3). Treatment units 1-5 and a portion of units 6 and 9 are within MA X. Units 6-8 are within MA E, where management direction identifies salvage as a timber management priority. Units 10 and 11 fall within MA R, where cultural resources are emphasized. Within MA R, timber harvesting activities can occur where compatible (PR #45, pp. 4-5). Within the JNRA (MA X), “trees damaged or down due to fires, diseases, or insect infestations may be utilized, salvaged, or removed from the recreation area as appropriate” (P.L. 103-104, Sec.2[g] and PR #59, p. 5).

One unit (Unit 9) associated with the salvage project is within the view of a travel corridor of Forest Road (FR) 376 within the JNRA. That unit was proposed for salvage to improve the

scenic conditions along the travel corridor by removing dead trees adjacent to the roadside and promoting the re-establishment of aspen (PR #53, p. 4; and PR #45, pp. 12-13).

Mitigation measures have been identified to maintain or enhance the scenic integrity along the FR 376 corridor. Mitigation measures designed to maintain scenic quality include: requirements for irregular unit boundaries, the retention of snags and down logs, stump heights not to exceed 6 inches, landings to be restored to pretreatment conditions, and slash is not to exceed 18" in height and must be disposed of within 1 year of salvage harvest (PR #45, pp. 12-13).

Finding: The NEPA analysis for the Lakes and BMG Wildfire Timber Salvage Project includes documentation supporting the fact that portions of MA C within the project area are now in MA X due to the JNRA designation. MA X, as well as portions of MAs E and R, does not preclude the salvaging of dead trees. Mitigation measures have also been developed to reduce the visual impact along FR 376 and from NM State Highway 126.

Contention C: Cutting trees larger than 9 inches diameter at breast height in the MSO PAC is contrary to the MSO Recovery Plan.

Response: The Mexican Spotted Owl Recovery Plan, p. 88, Guideline #8, states that if a stand-replacement fire occurs within a PAC, timber salvage plans must be evaluated on a case-specific basis. A letter from the FWS (PR #23) validates that the Fenton Lake PAC located in the JNRA was completely destroyed in the 2002 Lake Fire. The FWS states that the Fenton Lake PAC can be decommissioned pending survey results.

The Biological Assessment (PR #46, pp. 5-7) states that the Fenton Lake PAC experienced a high-intensity burn during the Lakes Fire, most likely destroying its suitability for future MSO breeding until a mixed-conifer canopy is re-established. Based on comments made by Santiago Gonzales, FWS Endangered Species Biologist, on April 13, 2003, it was decided that the salvage sale could proceed in the PAC provided that no cutting occurred in the PAC during the MSO breeding season (PR #43 and #46). Mr. Gonzales felt that, with the restriction on logging during the MSO breeding season and mitigation measures aimed at protecting Jemez Mountain salamanders, the salvage operation would not likely have an adverse effect on the MSO.

Finding: The MSO Recovery Plan allows for salvage harvesting within destroyed PACs, based on a case-by-case basis. Consultation with the FWS on the Fenton Lake PAC was completed. It was determined that the PAC was most likely no longer suitable for MSO breeding and that salvage activity could occur, provided specific mitigation measures were followed. The Environmental Assessment (PR #45, p. 12) states that salvage logging within the PAC will not occur during the March 1 - August 31 breeding season (as specified in USDI-USFWS, 1995; USDA-FS, 1987, Appendix D, p. 2).

Contention D: Seeding requirements are not mentioned in EA.

Response: Standard Forest Service clauses for avoiding invasive non-native plants will be implemented. The clauses state that the contractor will insure all equipment moved onto the National Forest is clean and free of soil, seeds, and vegetative matter debris that could contain or hold seed. The Forest Service is to be notified before any equipment is moved onto the forest so that it can be inspected (PR #45, p. 13). The EA (PR #45, p. 20) states that landings and skid trails will be seeded to re-establish vegetative cover following salvage activities.

Finding: Based on a review of the EA and supporting documents, no specific seed mix is identified to rehabilitate landings and skid trails. Specific seed mixes will be identified in the C-clauses of the logging contract. It is most likely that a similar seed mix, as identified in the Burn Area Emergency Report (BAER) for the burn area, will be used for post-harvest soil rehabilitation of landings and skid trails (PR #45, p. 13). The EA does specifically cover mitigation measures designed to curtail the introduction of non-native seed into the project area.

Contention E: The Lakes and BMG Wildfire Salvage Project fails to disclose compliance with Forest Plan conservation strategies for sensitive species.

Response: FSM 2621.2 states, “To preclude trends toward endangerment that would result in the need for Federal listing, units must develop conservation strategies for those sensitive species whose continued existence may be negatively affected by the forest plan or a proposed project. To devise conservation strategies, first conduct biological assessments of identified species.”

A biological assessment (PR #46) was prepared and all Regional Forester Sensitive Species for the Santa Fe National Forest were considered. No trend towards federal listing was determined for any of the Sensitive Species as a result of the proposed action. Therefore, no conservation strategies need to be developed.

Finding: The requirements of FSM 2621.2 have been met.

Contention F: The Lakes and BMG Wildfire Salvage Project fails to collect information needed to protect soils in the BMG.

Response: Evidence of project soil information on the BMG fire is contained in the project record (#16, #31, #37, #41, and #45). These documents describe both pre-fire and post-fire conditions. Soil protection measures are described in the EA (PR #45, pp. 10-11). These measures include the addition of organic material to the soil during the salvage operation which will improve the unsatisfactory soil conditions that existed prior to the fire.

Finding: The project record contains evidence that adequate soil information was collected and analyzed for the BMG project. The mitigation planned will assure that erosion is minimized and soil productivity is maintained.

ISSUE 3: The Lakes and BMG Wildfire Salvage Project violates the Migratory Bird Treaty Act (MBTA) and an Executive Order (E.O.) requiring agency action to protect migratory birds.

Contention: The project admits that it will kill songbirds. Thousands of snags will be cut that are utilized by dozens of cavity-nesting bird species. The Forest Service cannot bring about the unintended but foreseeable death of protected songbirds. In addition, E.O. 13186 directs federal agencies to take specific actions to further implement the MBTA.

Response: The MBTA was designed to forestall hunting of migratory birds and the sale of their parts (*Mahler v. US Forest Service*, 927 F. Supp.15598, S.D. Ind. 1996). It was not, however, designed to regulate timber harvesting to prevent the killing of migratory birds (*Id.*; *Newton County Wildlife Association v. US Forest Service*, 113 F. 3d 110,115, 8th Cir. 1997). Therefore, the Forest is not violating MBTA when migratory birds are killed as a result of timber harvesting. Effects to migratory birds are discussed on pp. 33-34 of the EA (PR #45), as well as

in the Migratory Bird Effects Analysis (PR #28), Biological Assessment (PR #46), and response to comments, p. 5 (PR #53).

E.O. 13186 requires federal agencies to develop Memorandums of Understanding (MOU) with the FWS to promote the conservation of migratory bird populations. At this date, the MOU has not been finalized. Should the proposed action not be completed before the MOU is signed, actions specified in the MOU will be applied as determined by the Department of Agriculture.

Finding: The intent of the Migratory Bird Treaty Act and Executive Order 13186, as currently defined has been met.

ISSUE 4: The Lakes and BMG Wildfire Salvage Project fails to meet the mandate of the Clean Water Act and New Mexico's water quality standard.

Contention: Rio Cebolla and Rio de las Vacas do not at this time have Total Maximum Daily Load (TMDL) thresholds. Until this TMDL is established, activities impacting these streams cannot proceed.

Response: The named tributaries to the Jemez River are included in the Jemez River/Rio Guadalupe TMDL (PR #60). The activities planned and the Best Management Practices established for this project (PR #45, PR #53) are consistent with the TMDL implementation plan.

Finding: Appropriate procedures were followed and adequate mitigation is planned for this project. There will be no violation of the Clean Water Act.

ISSUE 5: The Lakes and BMG Wildfire Salvage Project fails to demonstrate consistency with the Forest Transportation System Management Policy.

Contention: The Lakes and BMG Wildfire Salvage Project has not met the requirement to identify unneeded roads, create a minimum road system, establish road management objectives, and create an accurate road inventory.

Response: All roads proposed for use in the Lakes and BMG Wildfire Salvage Project are maintenance level 2. The project does not propose to construct or reconstruct any additional roads. There is no change in maintenance levels or road construction proposed by the project; therefore, a Roads Analysis Process is not required. The road maintenance descriptions, level 1 versus level 2, were discussed; any discrepancies were clarified, and the road inventory was updated in the Lakes and BMG Wildfire Salvage Project documentation (PR #51).

The project record is replete with statements that the project proposes no new road construction or reconstruction. Two examples are: PR #14 states, "These areas are highly roaded; salvage logging should not result in the construction of new roads or improvement of existing roads." The EA states, "Only existing roads would be used; no new roads would be constructed or reconstructed." (PR #45, p. 6, Alternative 2, Proposed Action)

The identification of unneeded roads, creation of a minimum road system, establishment of road management objectives, and creation of an accurate road inventory are tasks that should be completed at a watershed level. These tasks are intended to be developed in the context of a road system that services, at a minimum, a watershed area, not just a small project area.

Finding: The Environmental Assessment and project record are in compliance and consistent with the Forest Service Road Policy.

ISSUE 6: The Lakes and BMG Wildfire Salvage Project violates the Endangered Species Act.

Contention: The Santa Fe National Forest has failed to monitor the Mexican spotted owl populations, as required by the 1996 Biological Opinion. Specifically, monitoring requires baseline imagery to monitor macro-habitat; annual microhabitat monitoring reports; and design and implementation of an owl population monitoring program.

Response: Determinations of compliance with the ESA are met through consultation with the FWS (the regulatory agency responsible for the ESA). A Biological Assessment/Evaluation (PR #46) including the MSO was prepared. Discussions with the FWS were conducted (PR #26) and concurrence on the determination of effects and compliance with ESA was rendered by the FWS (PR #49).

Finding: No evidence of a violation of the ESA was found.