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Forest
Service

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Date: October 27, 1997

Mr. Brian Segee
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CERTIFIED MAIL--
RETURN RECEIPT REQUESTED
P 293 931 344

RE: Webber Analysis Area Appeal #97-03-00-0057-A215
Tonto National Forest

Dear Mr. Segee:

I have completed a review of your September 8, 1997, appeal of the Webber Analysis Area decision notice (DN) and finding of no significant impact (FONSI). The review was conducted in accordance with 36 CFR 215.

BACKGROUND: On July 18, 1997, the Forest Supervisor made a decision to implement modified Alternative 3 for the Webber Analysis Area Environmental Assessment (EA). The project is located on the Payson Ranger District of the Tonto National Forest. The legal notice of the decision was published in the Mesa Tribune on July 25, 1997. I received your appeal on September 10, 1997. I received the appeal record (AR) from the Forest on September 24, 1997.

Between September 20 and 23, 1997, I received interested party comments from the following people:

Rick Erman of Phoenix, Arizona
Duane Shroufe on behalf of Arizona Game & Fish Department
Eric Hiser on behalf of Grand Canyon Council, Boy Scouts of America

On September 26, 1997, I sent letters to these three people acknowledging that I had received their interested party comments. Their comments were given consideration in my review decision.

On September 25, 1997, I received a letter from the Forest Supervisor. In the letter Mr. Bazan summarized the outcome of informal disposition meetings between Peter Galvin from Southwest Center for Biological Diversity and several people from the Forest. I understand that resolution of the appeal issues was not possible during the teleconference meetings.

RECOMMENDATION OF APPEAL REVIEWING OFFICER (ARO): The Appeal Reviewing Officer has reviewed the appeal record and forwarded his recommendations to me. I have attached a copy of the ARO's letter. The ARO found that the Forest Supervisor's decision was supported by the appeal record, and recommended I affirm the decision.



APPEAL ISSUES: Appellant alleges that the project violates: National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Migratory Bird Treaty Act (MBTA) and Administrative Procedures Act (APA). These issues are addressed as follows:

ISSUE 1: PROJECT VIOLATES NATIONAL ENVIRONMENTAL POLICY ACT

ISSUE 1A: Project fails to conform to stated purpose and need

CONTENTION: "The Forest Service focuses on two conditions in its purpose and need statement: lack of structural diversity and the need to reduce fuel loads. Neither of these conditions can be remedied by cutting trees over 16" dbh...The Forest Service needs to do one of two things: 1) Truly manage for forest health by leaving the yellow bellies alone and trying to remedy the extremely over dense thickets of young trees caused by 100 years of Forest Service logging, grazing, and fire suppression, or 2) Admit that these sales are based on economics and not ecology." (Appeal p. 3)

RESPONSE: The "Purpose and Need" statement from the Environmental Assessment (AR #88 p. 1) includes the Management Area 4D emphasis from the Tonto Plan. This emphasis clearly states the area will be managed for a variety of renewable resource outputs with primary emphasis on intensive, sustained yield timber management, timber resource protection, creation of wildlife habitat diversity, increased populations of emphasis harvest species, and recreation opportunity.

The desired condition statement in the EA also includes the desire to have the Webber Area provide a range of products which is compatible in reaching and/or maintaining a healthy and diverse ecosystem. This includes providing for diversity of vegetative structural stages and reducing fuel loads.

It is clear from the appeal record that the project objectives include economic as well as ecological objectives. I find the project conforms to stated purpose and need. The Forest Supervisor is affirmed on this point.

ISSUE 1B: EA fails to consider a reasonable range of alternatives

CONTENTION: "The Tonto NF's consideration of alternatives is inadequate because only two alternatives, with the exception of the mandated 'no action' alternative, are analyzed...these two alternatives are only slightly different in scale, and both focus on logging as a means to achieve the stated purpose and need of the project." (Appeal p. 8)

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).

The proposed action is to apply a mix of silvicultural treatments to move the analysis area closer to the desired condition identified in the EA, thus providing focus for the analysis of effects of this action and alternatives thereto. The purpose and need statement briefly states why this project is proposed. Alternatives including the proposed action (40 CFR

1502.13) are different ways to meet the purpose and need and further define the scope of the analysis. Without the requirement for "reasonable" alternatives, the range of alternatives would be boundless. Reasonable alternatives to the proposed action need to address one or more issues raised in the analysis and address the purpose and need for action.

The range of alternatives as defined in 40 CFR 1505.1(e) includes all the alternatives discussed in the environmental documents. It includes the reasonable alternatives which are explored and evaluated as well as those alternatives eliminated from detailed study. The Webber Interdisciplinary Team (IDT) actually considered and documented nine alternatives. They considered two drafts of Alternatives 1 and 3, and a combined Alternative 1 and 3. There were two alternatives considered but dropped from detailed study. Also, Alternative 2 and a No Action Alternative were considered in detail.

The alternatives considered were based on the issues and the desired conditions. The Forest Supervisor adequately examined a reasonable range of alternatives and is affirmed on this point.

ISSUE 1C: Inadequate cumulative effects analysis by the Forest Service

CONTENTION: "Although it acknowledges that the adjacent Bull Owl Timber Sale contributes to the cumulative impacts on the area, the EA does not analyze that impact. Similarly, the EA fails to consider the cumulative effects on the area from the yearlong 300 head o[f] cattle that graze on the Payson Allotment." (Appeal p. 9)

RESPONSE: The Webber ID Team listed on EA page 8 the past, present, and foreseeable future actions that they considered as possible contributors to cumulative effects. Based on their consideration, they determined that cumulative effects estimates were appropriate for watershed effects, visual quality effects, fuels and wildlife habitat capacity effects.

The results of their estimates are documented in AR #92 in which they focus their attention on the combined effects of the Bull Owl Analysis Area treatments, but they also incorporate the considerations of other activities from the Bull Owl EA.

The ID Team, through the analysis process, considered the cumulative effects. The documentation of their consideration is adequate to give a reasonable disclosure of these cumulative effects. The Forest Supervisor is affirmed on this point.

ISSUE 2: PROJECT VIOLATES NATIONAL FOREST MANAGEMENT ACT & MIGRATORY BIRD TREATY ACT**ISSUE 2A:** Proposed timber sale is not included in the Forest Plan

CONTENTION: "Page 31 of the Tonto LRMP contains 'management direction' in the form of a timber offering schedule. The Webber Analysis Area is not contained on this list...The Tonto NF may not go forward with any timber sales until it amends its Forest Plan to provide an updated offering schedule." (Appeal p. 4)

RESPONSE: Prior to the implementation of the Region wide Forest Plan amendment of June 5, 1996, plans contained informational tables that estimated quantity and timing of site specific activities. The tables were the best estimate of possible activities when the plans were approved. However, since plans were approved, it has been established through appeals and litigation that the plan is a programmatic document. Site-specific activities listed in these tables were not covered in the programmatic environmental analysis and do not constitute one of the key decisions made in the forest plans. Actual forest plan implementation has been different than portrayed in the informational tables. Modifications to the tables are handled as corrections (FSH 1909.15, 10-18) rather than amendments. Direction has been given to the field units to publish a schedule of proposed actions four times a year to provide the public with the needed information on project scheduling (Forest Service Handbook 1909.15).

The Timber Offering Schedule was moved to Appendix K in the amended Tonto Forest Plan. The Webber Timber Sale is included on this schedule as Small ST Sale 1995 (AR #4). Treatments such as those proposed in the Webber Analysis Area decision are clearly within the scope of the management emphasis for Management Area 4D.

The Forest Supervisor is affirmed on this point.

ISSUE 2B: Proposed logging violates Forest Plan

CONTENTION: "The Forest Service admits in the Webber EA that the proposed logging above the Highline Trail violates the Tonto LRMP[.]" (Appeal p. 4)

RESPONSE: We cannot find the admission concerning the Highline Trail you quote from the EA on page 5. Further, the standards and guidelines for Management Area 4D, Analysis Areas 5506 and 5542 include the following: "The Highline, Derrick, and Horton Creek Trails, are closed to off road vehicle use. Assure that no human-related activities impact the Highline Trail and its ancillary trails." (Refer to the Tonto Forest Plan p. 129). Mitigation measures discussed in the EA and AR #101 will limit human activity impacts to temporary impacts.

Review of the Forest Plan documented in AR #97, 98, 99, 100 and 101 led the ID Team to the conclusion that the project was consistent with the Forest Plan because there is no permanent impact to the Highline Trail. The Forest Supervisor is affirmed on this point.

ISSUE 2C: Proposed sale fails to follow Forest Plan MSO standards and guidelines

CONTENTION: "The Webber EA makes no mention of whether PAC's have been established, how many of them exist, or what their relation to this timber sale is." (Appeal p. 5)

RESPONSE: The EA makes reference to protected activity centers (PAC's) regarding burning and the need for in-depth monitoring prior to and after burning (AR #88 pp. 50 and 108). In the amended BA&E, pp. 9 and 12, PAC's are numerated and discussed (AR #121). In the U.S. Fish and Wildlife Service's (USFWS) letter of conditional concurrence and letter of clarification (AR #123), PAC's are also described and discussed.

CONTENTION: "The FS may not, as it attempts to do on Webber, prescribe burns unless it determines the location of nest sites. This lack of knowledge is also indicative of[f]...the failure to conduct proper and current surveys." (Appeal p. 5)

RESPONSE: Mexican spotted owl (MSO) surveys were completed to protocol in 1994 and 1995 (AR #6). The Forest completed MSO monitoring surveys between 1995 and 1997 (AR #9).

CONTENTION: "...the Forest Service is required to do pre-and post-treatment monitoring...if the FS cannot come up with the funds for monitoring then it cannot implement the burns." (Appeal p. 6)

RESPONSE: In a letter to USFWS, the Forest Supervisor stated that "...the Forest made a commitment in the BA&E to protect the 100 acre core of each PAC. It is our responsibility to do this while ensuring the safety of our burning crews." (AR #115). The USFWS stated in a letter, "Broadcast burning is proposed within spotted owl PAC's. The Forest Service has indicated that they will not conduct any burning within any PAC prior to locating nest/roost sites and establishing buffers of at least 100 acres around each nest/roost site, and that they will develop a monitoring plan to comply with recommendations of the Recovery Plan prior to and after burning within any PAC. The Forest Service has indicated that they will ensure that such funds for monitoring are available." (AR #123).

The Forest Supervisor is committed to complete monitoring prior to implementation of the Webber project, and is affirmed on this point.

ISSUE 2D: Project fails to follow Forest Plan old growth requirements

CONTENTION: "Another component of the 1996 Regional Amendments is the requirement that the FS 'allocate no less than 20 percent of each forested ecosystem management area to old growth.'...The Webber EA fails to discuss this required 20 percent allocation or how it relates to this sale." (Appeal p. 6)

RESPONSE: The Forest allocated 23% of the 14,661 acres of Webber Analysis Area to old growth habitat (AR #91). Most of the allocated old growth is comprised of potential

old growth. A map is included in the appeal record that shows the areas in the Webber Analysis Area to be managed for old growth (AR #91). The Forest Plan standard is that 20% of an ecosystem management area will be allocated to old growth (Tonto Forest Plan p. 40). The Webber NEPA analysis included an allocation of old growth. Therefore, the Forest Supervisor complied with this standard, and is affirmed on this point.

ISSUE 2E: Project fails to follow Forest Plan Northern goshawk standards and guidelines

CONTENTION: "The Webber EA violates the amended Tonto LRMP by failing to apply Northern Goshawk standards and guidelines outside of Mexican Spotted Owl protected and restricted areas. It also reveals that the FS has failed to perform required surveying with respect to the Goshawk." (Appeal p. 6)

RESPONSE: The southern part of the Webber Analysis Area does not contain conifer nesting habitat and does not require survey for the Northern goshawk. The northern half of the analysis area contains nesting habitat and was completely surveyed. The intent is to locate nesting goshawks to 1) establish nest areas, 2) establish post fledging family areas, and 3) ensure that timber harvest treatment does not affect goshawks. (AR #7, 8, 121; Tonto Forest Plan p. 40-8).

The Forest Supervisor completed sufficient surveys, complied with the Forest Plan Northern goshawk standards and guidelines and is affirmed on this point.

ISSUE 2F: Project fails to follow Forest Plan snag density guideline

CONTENTION: "In order to meet mandated snag densities, the FS is implicitly required by the LRMP to retain all large trees which will constitute the future snag component." (Appeal p. 7)

RESPONSE: After reviewing the Tonto Forest Plan and the appeal record, I find two snag standards (AR #88 pp. 33 and 39, Tonto Forest Plan pp. 133 and 40-10). One snag standard for Management Area 4D, Decision Unit 32 is to provide 1.8 snags per acre in the ponderosa pine/mixed conifer type, with a preferred snag being at least 15 inches dbh and 35 feet in height (Tonto Forest Plan p. 133). Elsewhere in the Forest Plan there is a requirement to leave 3 snags per acre in the mixed conifer and 2 snags per acre in the ponderosa pine habitat at 18 inches or larger dbh and 30 feet in height (Tonto Forest Plan p. 40-10) in Northern goshawk foraging areas. The Forest Supervisor is directed to follow the snag standard on page 40-10 for the Webber project, which is consistent with the Regional Forest Plan Amendment ROD dated June 5, 1996. I recommend that the Forest remove the older snag standard on page 133 of the Forest Plan. The Forest Supervisor is not required "...to retain all large trees which will constitute the future snag component." (Appeal p. 7). The Forest Supervisor is required to meet the snag standard on p. 40-10 of the Tonto Forest Plan, and therefore, will comply with the Forest Plan.

CONTENTION: "How will cutting trees up to 26" dbh help remedy this lack of structural diversity?" (Appeal p. 7)

RESPONSE: Vegetation structural stage (VSS) is a stand attribute and not an attribute of individual trees. The Tonto Forest Plan defines structural diversity in terms of VSS, and this is the standard for the Forest. Structural diversity is the desired condition of a distribution of vegetation structural stages as shown as 10% grass/forb/shrub (VSS 1), 10% seedling-sapling (VSS 2), 20% young forest (VSS 3), 20% mid-aged forest (VSS 4), 20% mature forest (VSS 5), and 20% old forest (VSS 6), (Tonto Forest Plan p. 40-10). The proposed Webber project does begin to move the stands toward the desired VSS distribution as shown on pp. 35 and 107 of the EA (AR #88). Therefore, the Webber project does not reduce structural diversity as found in the Tonto Forest Plan (p. 40-10).

The Forest Supervisor is affirmed on this point.

ISSUE 2G: Project violates NFMA and MBTA by failure to provide for viable populations of sensitive species and possible taking of flammulated owls

CONTENTION: "The Webber BE fails to meet this mandate" of maintaining viable populations of sensitive species. "It fails to cover all sensitive species and management indicator species (MIS). Specifically, it fails to assure t[hat] flammulated owls will not be taken as a result of logging activities on the Webber analysis are[a]. This failure to survey and possible take of Flammulated Owls is a violation of the Migratory Bird Treaty Act." (Appeal p. 7)

RESPONSE: The BA&E states, "With the change in habitat condition expected, a change in wildlife populations may also occur. However, due to the limited scope of the proposed treatments, changes are expected to be minor and would not affect the population viability for TES species." (AR #121 p. 7).

All of the sensitive species are addressed in the BA&E on pages 7 through 12 and in Appendix B, p. 19 (AR #121). Management indicator species are required to be evaluated at the forest planning level and not at the project level (36 CFR 219.19).

"Habitat requirements for the flammulated owl overlap those of the spotted owl. It is expected that compliance with recommendations in the Mexican Spotted Owl Recovery Plan within the Webber analysis area will also be providing for the needs of flammulated owls that may be in the area...Due to the limited amount of the analysis area being treated the population viability for flammulated owls is not expected to be affected by the proposed actions." (AR #121 p. 9).

The Migratory Bird Treaty Act does not address the taking of habitat as does the Endangered Species Act. The MBTA refers specifically to direct taking or killing of birds on its list (16 U.S.C. 703). This type of taking is not proposed with this sale. Nests of TES species, if found in timber harvest units, will be protected using timber sale contract provisions which allow modifications needed, after a contract is awarded, to protect TES species. This project will not result in the "takings" of migratory birds under MBTA.

The Forest Supervisor is affirmed on this point.

ISSUE 3: PROJECT VIOLATES ADMINISTRATIVE PROCEDURES ACT

CONTENTION: "The EA and Decision Notice Are Arbitrary and Capricious." (Appeal p. 9)... "The FS has violated the Tonto LRMP, NFMA, and NEPA in implementing this decision." (Appeal p. 10).

RESPONSE: I have reviewed Forest Supervisor's alleged violations of the Tonto Forest Plan, NFMA and NEPA in the first two issues. Based on my review, I find that the Forest Supervisor had adequate information to base his decision, and that his decision was not arbitrary and capricious. The Forest Supervisor is affirmed on this point.

APPEAL DECISION: After reviewing the appeal record and considering the recommendations from the Appeal Reviewing Officer, I find that the Forest Supervisor complied with the National Environmental Policy Act, the National Forest Management Act, the Migratory Bird Treaty Act, and the Administrative Procedures Act. I affirm the Forest Supervisor's decision to implement Alternative 3 as modified for the Webber Analysis Area. I direct the Forest Supervisor to use the Tonto Forest Plan snag standards on page 40-10 in the Webber project. Appellant's request for relief is denied.

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

Sincerely,

/s/ Gilbert Vigil
GILBERT VIGIL
Appeals Deciding Officer
Acting Deputy Regional Forester, Resources

Enclosure

cc:
Interested Parties (3)
Tonto NF
P.Jackson
C.Gonzalez
EAP
FOR