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Date: March 31, 2005

Bryan Bird
Forest Guardians
312 Montezuma , Suite A
Santa Fe, NM 87501

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

RE: Appeal #05-03-00-0003-A217, Managing Special Species Habitat Forest Plan Amendment,
Santa Fe National Forest

Dear Mr. Bird:

This is my review decision on the appeal filed regarding the Decision Notice (DN), Environmental Analysis (EA), and Finding of No Significant Impact (FONSI) on the above-referenced project, which provides for a non-significant amendment to the Santa Fe National Forest Land and Resource Management Plan. The decision updates and clarifies selected standards and guidelines for managing threatened, endangered and sensitive species habitats to reflect changes in management policies, practices, terminology and species lists since the Forest Plan was approved in 1987. No on-the-ground activities were authorized in this decision.

BACKGROUND

Forest Supervisor Gilbert Zepeda made a decision that was published on December 15, 2004 for the Santa Fe National Forest amending the Land and Resource Management Plan. The Forest Supervisor is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR § 217 appeal regulations.

Pursuant to 36 CFR § 217.12, the Deciding Officer attempted to seek resolution of the appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR § 217.15 (c.). I have reviewed the appeal record. My review decision incorporates the appeal record.

APPEAL DECISION

After a detailed review of the record, I affirm the Responsible Official's decision with the following instruction on the Managing Special Species Habitat Forest Plan Amendment for the Santa Fe National Forest.

Instruction is to add the referenced Black-footed ferret Recovery Plan (1988) to the record for the decision.



Unless a higher level officer exercises the discretion to review this decision, it constitutes the final administrative determination of the Department of Agriculture [36 CFR § 217.16(e)]. The Chief of the Forest Service has 15 days from receipt of this decision to decide whether or not to exercise discretionary review (36 CFR 217.17(d)).

Sincerely,

/s/ Abel M. Camarena
ABEL M. CAMARENA
Appeal Deciding Officer, Deputy Regional Forester

cc: Bob Davis, Allen Fowler, Constance J Smith, Gilbert Zepeda, Mailroom R3 Santa Fe,
Mailroom R3, Matt Turner, Ernie W Taylor, Geri Rivers, Robert C Griffith

REVIEW AND FINDINGS

of

Forest Guardians and Wild Watershed's

Appeal #05-03-00-0003-A217

Managing Special Species Habitat, Forest Plan Amendment, Santa Fe NF

ISSUE 1: The project does not meet the requirements of NEPA.

Contention A: The EA dismisses black-footed ferret reintroduction based on the lack of prairie and grasslands, but Hubbard and Schmidt (appellant's attachment) state that the Sangre de Cristo Mountains and Valle Grande possess viable habitat for Gunnison's prairie dog. This information directly contradicts the EA's assertion that adequate habitat does not exist for prairie dogs and thus for black-footed ferret populations on the Santa Fe.

Response: The Environmental Assessment (PR#52, p. 16) does not assert that prairie dogs are absent on the forest. Rather, the EA asserts that the distribution and abundance of prairie dogs is insufficient to support viable black-tailed ferret populations through re-introduction (EA, PR#16, p. 16; also PR#40). This assertion is supported by documentation provided by the appellants, especially the information in Pierce (1973; document provided by appellants) which shows that the extent of prairie dog towns at that time did not meet standards for recommended black-tailed ferret surveys found in the species' Recovery Plan (Black-tailed Ferret Recovery Plan, US Fish and Wildlife Service, 1988; Appendix I, which is not included in record). Specifically, the Recovery Plan (p. 108) recommends surveys on prairie dog towns of 250 acres or more, or a combined area of 250 acres or more for all prairie dog towns within a 4.5 mile radius. The data from Pierce (1973) showed that no single Ranger District on the Santa Fe National Forest contained 250 acres of prairie dog towns, and no towns occurred on 3 Ranger Districts. Nothing in the amendment precludes re-evaluation of the status of prairie dogs and black-tailed ferret re-introduction.

Finding: The EA is consistent with recent scientific information, the Recovery Plan, and adequately discloses the analysis.

Contention B: The Forest Service failed to respond to substantive comments as required under NEPA at 40 CFR 1503.4(a). Agency must explain why comments do not warrant further response and discuss any responsible opposing view. In particular the EA fails to respond to comments made by the NM Department of Game and Fish regarding a 1980 MOU on state-listed species (EA at 29), that state-listed species must be treated the same as federally listed species.

Response: Comments were summarized and responded to in Appendix B of the EA (PR#52). Comments submitted by NM Department of Game and Fish in their May 27, 2004 letter (PR# 46) were considered and addressed in Appendix B. Furthermore, the Forest Service met with the Department to discuss their comments (PR# 49) and followed up with a letter (PR# 50) providing a summary of edits made to the EA in response to their concerns.

Finding: The Responsible Official appropriately identified and responded to comments.

Contention C: The agency failed to respond substantively to the comment that black-footed ferret reintroduction not be dropped from consideration. The agency should have provided a substantive response to this comment raised by more than one party.

Response: Comments referencing the black-footed ferret were submitted by Forest Guardians and the U.S. Fish and Wildlife Service. The Responsible Official considered these comments and appropriately responded by adding clarification to the EA as suggested by U.S. Fish and Wildlife Service and by providing additional information in Appendix B of the EA (PR#52); explaining that while the U.S. Fish and Wildlife Service has not identified any black-footed ferret reintroduction sites on the Santa Fe National Forest, the amendment would not eliminate the possibility for reintroduction. The standards for black-footed ferret were misleading because they implied active management of prairie dogs for their contribution to black-footed ferret recovery, when in fact; there is insufficient prairie or grassland habitat on the Forest to support a viable ferret recovery project. Furthermore, the black-footed ferret is believed to be extirpated in New Mexico as none have been found since 1934 (PR# 52, pp.4, 16, 31, 32).

Finding: The Responsible Official appropriately identified and responded to comments related to black-footed ferret reintroduction.

Contention D: Forest Service failed to disclose and analyze impacts from oil and gas leasing and drilling on bald eagle and peregrine falcon. EA fails to consider the Santa Fe National Forest cooperation with Wildlife Services on prairie dog eradication in 1991 with Sandoval County, which was a considerable impact.

Response: The Decision Memo (PR# 51) clearly describes this amendment as programmatic and specifies no site-specific or ground-disturbing activities are being approved in the decision. The purpose of the amendment is to update and clarify standards and guides which are strategic, rather than prescriptive in nature. In approving this plan amendment, the Forest Service does not have detailed information about what projects and activities will be proposed over the life of the plan, how many will be approved, where they will be located, or how they will be designed. As such, environmental effects cannot be meaningfully evaluated without knowledge of the specific timing and location of future projects and activities.

The Biological Assessment/Biological Evaluation (PR# 41) states, “The proposed amendment will have no effect on any threatened and endangered species or proposed critical habitat for the Mexican spotted owl, and no impacts on any species.”

The amendment does not exempt the Forest Service from evaluating the potential environmental effects of future site-specific actions on special status species and their habitats in the context of other past, present, and reasonably foreseeable projects.

Finding: The proposed amendment is clearly identified as being programmatic in nature and no direct, indirect, or cumulative effects are anticipated.

Contention E: The appellant contends that a range of reasonable alternatives, as required by NEPA implementing regulations, was not analyzed. An alternative should have been considered that keeps current protections for special status species while updating and clarifying the Forest

Plan. By examining only the planned changes and the no action alternative, the FS has violated NEPA.

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. The formulation of alternatives is driven by significant issues identified in scoping (40 CFR 1501.2(c)).

The Responsible Official defined the scope of the analysis to consist of updating a set of wildlife standards and guidelines that have become outdated over the past 15+ years, and eliminating redundancies. The purpose and need is outlined in Chapter 1 of the EA (PR# 52, p.2). In summary, the purpose and need is to clarify and update standards and guidelines for managing special status species.

The Forest determined that issues raised during the scoping period were not significant in terms of NEPA regulations and agency definitions – thus they were not used in developing alternatives to the proposed action. However; a number of the public issues, although not considered significant in the context of NEPA, were addressed by refining and clarifying the proposed action.

The alternative suggested in the above contention was considered, but eliminated from detailed study because it would not meet the purpose and need for amending the Forest Plan, as described in Chapter 2 of the EA (PR# 52, p. 5).

Finding: The Responsible Official appropriately defined the scope of the analysis and analyzed a range of reasonable alternatives within that scope.

ISSUE 2: The Plan Amendment Violates NEPA and ESA

Contention: The Forest Service must prepare an EIS because there are a host of significant impacts. Specifically, the mention of the endangered black-footed ferret has been dropped from the proposed amendment. Also there are several documented bald eagle nest sites. An EIS must be prepared when an action may adversely affect an endangered species. The ESA is violated because the proposed amendment only reacts to needs of rare wildlife when threatened by development instead of proactively engaging in site-specific recovery efforts.

Response: (See Response to Issue 1, Contention A). The amendment does not preclude evaluation of suitability for black-tailed ferret re-introduction, since the amendment wording requires adherence to species recovery plans and such re-evaluations and recommendations would come from these plans (PR#52). This complies with Section 7(a) (1) of the Endangered Species Act of 1973, as amended. Similarly, the amendment does not alter the Section 7(a)(2) obligation of the Forest Service under the same act, since consultation would still occur on projects conducted under the Forest Plan.

The Responsible Official made a Finding of No Significant Impact (PR# 51) with respect to the Forest Plan Amendment for Managing Special Status Species Habitat. This finding is supported by EA (PR# 52) and the BA/BE (PR# 41). As stated previously, this amendment is

programmatic in nature and specifies no site-specific or ground-disturbing activities as part of the decision.

Finding: A Finding of No Significant Impact is supported by the EA and the project record. The proposed amendment is consistent with Sections 7(a)(1) and 7(a)(2) of the Endangered Species Act of 1973, as amended.

ISSUE 3: The Decision violates the NFMA.

Contention A: The proposed amendment changes from the inventory and evaluation of habitats for development of action plans maximizing contribution to Jemez Mountains salamander recovery efforts, to acting only when proposed activities may affect these habitats.

Response: The original Forest Plan language clearly indicates that inventory and monitoring would be conducted to develop an action plan for the development of a Master Interagency Agreement between the US Forest Service and the US Fish and Wildlife Service and the New Mexico Department of Game and Fish for the conservation of the Jemez Mountain Salamander (PR#52, p. 11). The action plan has been completed and the Interagency Conservation Agreement for the conservation of the Jemez Mountain Salamander has been entered into, which is included in the amendment's Project Record (PR#10). The amendment would require adherence to this Conservation Agreement, and an analysis of impacts as a Sensitive Species according to FSM 2670.

Finding: The amendment is consistent with Forest Service policy regarding sensitive species. There is no violation of NFMA.

Contention B: Although the meadow jumping mouse is a Forest Service sensitive species, all mention of it is dropped from the proposed amendment. Instead the FS will only evaluate the effects of proposed action on sensitive species in general.

Response: The amendment does not call for an evaluation of effects of a proposed action on sensitive species in general, rather it states that for all sensitive species found in a project area there must be an evaluation of "...impacts of proposed actions on sensitive species or their habitats according to procedures described in FSM 2672.4" (PR#52, p.10). This broadens the plan requirements from specifically named sensitive species to covering all sensitive species found in the project area. The amendment would still require analysis for any sensitive species affected by projects, according to Forest Service Direction found in FSM 2670. This includes preparation of a Biological Evaluation determining the impacts to all sensitive species individually, not in general.

Finding: The amendment is consistent with Forest Service Sensitive Species policy. There is no violation of NFMA.

Contention C: All mention of the requirement to manage grazed lands to provide suitable habitat for reintroduction of grama grass cactus and develop a grama grass cactus recovery action plan is dropped, instead FS will emphasize conservation of the grama grass cactus and other rare species, such vague language is unenforceable and meaningless.

Response: The grama grass cactus is not federally listed or proposed for listing under the Endangered Species Act of 1973 (PR#37), nor is it a Forest Service Region 3 Sensitive Species

(PR#39). The plan amendment provides for conservation of this species, as well as other rare plant and animal species that do not have specific legal or policy protections (PR#52, p.10). The EA addresses these rare species by emphasizing "... conservation of plant and animal species having limited distribution and abundance on the Forest..." (PR#52, p.19) and because these species are no longer listed as sensitive, the amendment language gives them better protection than the original plan wording.

Finding: The amendment is consistent with law, regulation and policy regarding management of non-listed, non-sensitive plant and animal species. There is no violation of NFMA.

Contention D: The current plan restricts new roads within essential bald eagle and peregrine falcon habitat and public use to protect these habitats; this is replaced by procedures under the ESA and NMFA.

Response: The amendment would not remove the obligation of the Forest to consult with the U.S. Fish and Wildlife Service on any activities which would affect the Bald eagle. This would include new road construction in Bald eagle habitat. Similarly, the development of site plans for Peregrine falcon eyries and adherence to the requirements of these site plans (PR#52, p. 8) would not remove the obligation of the Forest to conduct Biological Evaluations as set forth in FSM 2670. As stated in the EA (PR#52, p.18), "...activities that may disturb or threaten nesting peregrine falcons..." must "...be evaluated and avoided or mitigated, and restrictions on activities that may disturb falcons must be developed and followed in accordance with the eyrie site plan." Also, as stated in the EA (PR#52, p. 2), the amendment would not change "the level of protection that has typically been provided when site-specific and species-specific mitigations are developed and implemented at the project level..."

Finding: The amendment is consistent with existing law, regulation and policy regarding protection of Bald eagle and Peregrine falcon habitats. There is no violation of NFMA or ESA; the amendment is in compliance with both laws.

Contention E: The current plan evaluates activities within 4 miles of potential or existing peregrine falcon nesting habitat, while the amendment focuses only on individual eyrie and surrounding habitat zones. The recovery of peregrine falcon requires expansion into unoccupied habitats and the proposed amendment ignores this requirement. Appellants cite a paper by Johnson, 2001, that peregrine is not necessarily recovering in the Southwest.

Response: The development of site plans for Peregrine falcon eyries and adherence to the requirements of these site plans (PR#52, p. 8) would not remove the obligation of the Forest to conduct Biological Evaluations as set forth in FSM 2670. As stated in the EA (PR#52, p. 2), the amendment would not change "the level of protection that has typically been provided when site-specific and species-specific mitigations are developed and implemented at the project level..."

The Forest Plan as amended would not preclude expansion into unoccupied habitats, and newly occupied habitat would be afforded the same protections as currently occupied habitat. As stated in the EA (PR#52, p. 17), the amendment would require the Forest Service to "...develop and follow site specific eyrie management plans that will specify what activities are to be restricted or prohibited, including when and where to avoid potential adverse impacts to falcon habitat." These protections go beyond what was afforded in the original Forest Plan.

The report by Johnson, (2001), submitted by the appellants, states that the Peregrine falcon population in New Mexico increased dramatically (200 percent), since 1985, and that current productivity is at levels that maintain the population, although productivity is showing a downward trend which could lead to a future state-wide decline (Johnson, p. 15). Johnson concludes that this decline is most likely due to national and international use of pesticides (over which there is no local control), and advocates that protection and enhancement of habitat as the only viable local contribution to peregrine conservation. The Forest Plan amendment clearly is intended to promote protection and enhancement of habitat in line with Johnson's recommendations.

Finding: The amendment is consistent with existing law, regulation and policy regarding protection of Peregrine falcon habitats. There is no violation of NFMA.

Contention F: The requirement for monitoring of management practices and analysis of impacts to occupied and threatened and endangered habitat disappears in the proposed plan amendment with the excuse that monitoring is done by the existing monitoring plan.

Response: There is no change in intent or effect of monitoring by the amendment language; it merely combines two standards into one more compact standard that has the same effect. The amendment, like the original forest plan, still requires that the Forest Service "...monitor management practices within occupied and potential habitat for threatened, endangered, and sensitive species, and evaluate impacts" (PR#52, p.8). The requirement to monitor the impacts of management practices on threatened and endangered species is still clearly in the amendment language, it has not "disappeared" simply because it was combined with similar language on monitoring impacts on sensitive species.

Finding: The amendment is consistent with existing law, regulation and policy regarding monitoring of special species habitats. There is no violation of NFMA.