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Date: January 7, 2011

Route To:

Subject: Recommendation Memorandum for the Mystic EIS and RODs, 11-02-03-0011

To: Dennis Jaeger, Appeal Deciding Officer

I have reviewed the notice of appeal dated December 5, 2010 (11-02-03-11), of Robert J. Thompson, District Ranger, Black Hills National Forest, Mystic Ranger District, decision concerning the Mystic Range Analysis Area. My review focused on the decision documentation developed by the District Ranger in reaching his decision, issues raised during the appeal, and comments submitted by interested parties. The appeal was submitted by Jonathan B. Ratner on behalf of Western Watersheds Project, hereinafter referred to as Appellant. Pursuant to 36 CFR 215.13(f)(2), this will constitute my written recommendation concerning the disposition of the appeal. I am forwarding the appeal record to you.

BACKGROUND

On October 12th 2010 District Ranger Robert Thompson signed the decision for the Rangeland Allotment Management Planning on the Mystic Range Analysis Area, Palmer Gulch Allotment. The decision selected Alternative C, with modifications as it relates to Norbeck Wildlife Preserve (NWP) (EIS pp 41-45 & Palmer Gulch ROD pp 2-5). Alternative C continues to permit grazing on non-NWP acres in the Palmer Gulch allotment under an adaptive management strategy. The NWP acres in the allotment will be phased out of grazing within 3-5 years.

On October 12th 2010 District Ranger Robert Thompson signed the decision for the Rangeland Allotment Management Planning on the Mystic Range Analysis Area, Bald Horse, Deerfield, Porcupine, Redfern, Rimmer, Slate Prairie, and Tigerville Allotments. The decision selected Alternative C, with minor modifications (EIS pp 41-45 & Seven Allotments ROD pp 2-8). Alternative C continues to permit grazing on the allotments under an adaptive management strategy.

RELIEF REQUESTED

The Appellant requests that the decision be withdrawn. Appellant also requests: 1) That the Forest makes good faith efforts to work with Appellant to redesign the project to reduce environmental impact, create a defensible monitoring plan and take measures to adequately protect Sensitive Species and the habitats on which they depend, 2) Develop a defensible monitoring plan for the project area that is fully funded, and 3) Experts from the Rocky Mountain Research Station (RMRS), the Regional Office and other institutions be utilized in the design criteria needed to fully protect Sensitive Species and their habitats.

APPEAL ISSUES

Appeal Issue 01: The EIS and ROD's Violate NFMA, NEPA. The ROD's failed to adequately implement design criteria and mitigation to protect sensitive species and insure viability.



The Appellant claims that conservation strategies for sensitive species were not incorporated into the project, that MIS determinations were not done in accordance with regulation, and that a productivity or capability determination for livestock grazing was not completed (pp 3-5).

Discussion: The foundation of the appellant's argument is that we are under the 1982 Rule; we, in fact, are not under the 1982 Planning Rule. All effects analyses are in accordance with the current planning rule designation. The transition provisions of the 2000 rule, as amended, are the only applicable provisions at this time. The 1982 rule is not in effect (36 CFR 219.35 Appendix B (2) (2009)). Under the transition language of the rule, the authorized officer must ensure that the project is consistent with the forest plan and find that the best available science has been considered (36 CFR 219.35 Appendix B (2) (2009)). Therefore, based on the transition language, adopted by the Forest Service on December 18, 2009, the Forest did not violate NFMA, the Planning Rule, or the Judge's order in Civ 08-1927.

The development of management objectives for sensitive species and MIS occurs at the Forest scale rather than at the scale of an individual project. [See response to Appeal Issue 8 for further discussion of viability analyses for sensitive species.] Detailed analyses of habitat conditions and population data for each MIS species are provided in the MIS sections of the Wildlife (EIS pp 127-188) and Fisheries (EIS pp 189-191) reports. The analyses describe potentially suitable habitat in the project area, and analyze direct, indirect and cumulative effects comparing existing habitat conditions with conditions expected under each alternative. Design criteria include applicable Forest Plan Standards, and Guidelines, the design criteria/best management practices from the Watershed Conservation Practices Handbook, project design criteria, and adaptive management actions. All of these were accounted for in determining effects from the project and the relationship to Forest-level viability requirements for MIS species.

As stated on Table-6 (Range Specialist Report, pp 21-25) the Mystic Range Analysis Area contains lands identified as suitable for domestic livestock grazing in the Forest Plan, and continued domestic livestock grazing is consistent with the goals, objectives, standards, and guidelines of the Forest Plan. A capability determination was conducted for each allotment; from that determination the IDT was able to determine the allotments grazing capacity (Table-7 Range Specialist Report, p 26).

Conclusion: I find no violation of law, regulation, or policy, and recommend the District Ranger be affirmed on this issue.

**Appeal Issue 02: The EIS and ROD's Violate NFMA, NEPA. The EIS and ROD's failed to comply with Forest Plan requirements
The Appellant claims that EIS and ROD's failed to provide discussion, analysis or evidence that all the applicable Forest Plan Standards, Guidelines, MA direction and other requirements have be complied with (p 5).**

Discussion: The ROD's (Seven Allotment ROD, pp 8-10 & Palmer Gulch ROD, pp 5-8) discuss why the decisions are consistent with the Black Hills National Forest Land and Resource Management Plan: its contribution towards Forest Plan goals and objectives and the Norbeck

Organic Act. Appendix E of the EIS provides a list of specific Forest Plan goals, standards, guidelines, MA direction and WCPs applicable to the proposed action and/or design criteria. Specific design criteria and mitigation measures (EIS, Appendix B) have been developed to include Forest Plan Standards and Guidelines, USFS Region 2 Watershed Conservation Practices, Best Management Practices and other similar works as they apply to the Mystic Range Project. By making these specific requirements part and parcel of the proposed action, the forest has demonstrated compliance with Forest Plan standards, guidelines, MA direction and other requirements.

Conclusion: I find no violation of law, regulation, or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 03: The EIS and ROD's Violate NFMA, NEPA. The EIS and ROD's fail to comply with the sensitive species policy. The Appellant contends that the EIS does not discuss viability for sensitive species (pp 5-7).

Discussion: Guidance for sensitive species is found in Forest Service Manual (FSM) 2600-2670. The objectives of this chapter are to: develop and implement conservation strategies for sensitive species and their habitats, in coordination with other Forest Service units, managing agencies, and landowners and; coordinate management objectives to conserve sensitive species with state and federal agencies, tribes and other cooperators as appropriate (FSM 2670.22). A Biological Evaluation (BE) is used to analyze the effects of Forest Service actions on sensitive species. The purpose of this analysis for sensitive species is to determine whether the action will contribute toward federal listing or loss of viability in the planning area (FSM 2672.41). [See response to Appeal Item 8 for a discussion of sensitive species viability determinations.] The project record demonstrates thorough compliance with sensitive species policy through the biological evaluations that were completed for plants, wildlife and fisheries. Each of these BEs analyzed the direct, indirect and cumulative effects of the alternatives on sensitive species, and made determinations of either "No Impact" or "May Impact individuals, but is not likely to cause a trend towards Federal listing or loss of viability in the planning area" for each sensitive species under the proposed action. These determinations are summarized in Appendix D of the EIS.

Language in this section of Appellant's appeal references to sheep grazing which is not among the issues affecting the Mystic Range Project (p 6).

Conclusion: I find no violation of law, regulation, or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 04a: The EIS violates NEPA. The EIS failed to analyze an appropriate range of alternatives (p 8). The Appellant also claims that both NEPA and NFMA have been violated because the EIS and ROD's failed to analyze or provide any rationale related to why certain areas should not be grazed (p 9). The Appellant further claims that the EIS failed to accurately and quantitatively determine how much forage is currently available (p 12).

Discussion: 40 CFR 1505.1(e), requires, in part, that the alternatives considered by the decision maker are encompassed by the range of alternatives discussed in the relevant environmental documents. No specific number of alternatives is required or prescribed. The EIS includes

analysis of three alternatives: one that does not authorize grazing (No Action); one alternative that authorizes grazing under a variety of adaptive management actions but does not allow construction of new range improvements, and one that authorizes grazing under a variety of adaptive management actions but does allow for construction of new range improvements. Therefore, not grazing any given area is analyzed as part of Alternative A, and is also available as an option under adaptive management.

The rationale for permitting livestock grazing is articulated in the purpose and need for the project (Palmer Gulch ROD, p 1-2, Seven Allotments ROD, p 1 and EIS p 27), which supports Forest Plan goals and objectives for sustained commodity uses (Palmer Gulch ROD, pp 5-9, Seven Allotments ROD, pp 9-11 and EIS pp 24-26).

A capability determination was conducted for each allotment; from that determination the IDT was able to determine the allotments grazing capacity (Table-7 Range Specialist Report, p 26).

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 04b: The EIS violates NEPA. The EIS failed to analyze an appropriate range of alternatives.

The Appellant alleges that ““relevant information” was purposely withheld from the “decision-making process”” (p 10).

Discussion: After review of the administrative record, I find no evidence that the ID Team “purposely withheld” information from the “decision-making” process. Also see appeal issue 7.

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 05: The EIS violated NEPA. The EIS failed to analyze past actions.

The Appellant contends that the EIS violates NEPA by failing to analyze past actions. Specifically, the Appellant claims there was no review of how well past AMP’s were implemented, how effective the actions proposed in them were, or whether permittees were in compliance with these plans (p 13).

Discussion: The EIS contains a summary of past practices and current conditions expressed in the Range section located in Chapter 3 (pp 74-99). Historic management is summarized as well in this section. The current rangeland conditions are a reflection of monitoring work, implementation of AMP’s, and permit administration by the Forest Service range personnel in cooperation with respective permittees. In addition, statements regarding condition of range improvements, permittee compliance with assigned maintenance of improvements, and comments on permittee actions to manage their livestock are also discussed.

The EIS also contains past, present and foreseeable activities in the Mystic Range Analysis area (Appendix C).

Conclusion: I find no violation on law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 06: The EIS violates NEPA. The EIS failed to analyze impacts of actions.

The Appellant claims that “the EIS failed to provide any analysis of the impacts of the proposed water developments.” Specifically, the Appellant claims that “the EIS failed to provide information as to their exact locations, other than a general map” and that “it failed to provide information regarding distance to water, soil properties, slope, vegetation, relations to crucial winter range or other wildlife habitats or cultural resources in the areas proposed or distance to water” and finally, “there is no site-specific analysis for any of the water developments”. They further claim that the FS failed to take a “hard look” at riparian conditions, and the EIS provides no rationale that would support the implementation of 4” stubble height for recovery (pp 13-14).

Discussion: The ROD’s lists all of the proposed improvements in Table 1 (Palmer Gulch ROD pp 18-19 & Seven Allotments ROD pp 20-25). The locations of each proposed improvement are provided spatially on a map (EIS, Appendix F). The legal locations were not expressed in the EIS or ROD’s; however the maps provided the reader with the ability to interpret the legal locations of the improvements. In order to keep the EIS succinct, very detailed site specific maps are not included in the EIS. The maps provided are certainly adequate to provide the reader enough information to understand and provide comments to the Forest Service. If a reader required a more exact location of the proposed improvements a request could have been made to the Forest Service for this information.

The Range Specialist Report indicates (p 80) that ground disturbing activities such as installation of water developments, pipelines, fences or exclosures require both heritage resource and sensitive species surveys and approval by a Forest Service archeologist, botanist, and wildlife biologist prior to construction.

[See response to Appeal Issue 11g for further discussion on the effects analyses on water improvements.]

The EIS thoroughly covers riparian conditions in chapter 3; Watershed, Geology and Soils (pp 226-259). Additional information can also be found in the Soil and Watershed Specialist Report. The EIS also has site-specific riparian monitoring (Table 2-2) in 7 of the 8 allotments (p 50).

The EIS states that stubble height requirements are initially set at 4 inches (Table 2-2, p 50) which is based on the WCP handbook, Forest Plan and recommendations from the University of Idaho’s 2004 Stubble Height Study Report. However, if monitoring shows that the riparian/stream are not improving and trends toward desired conditions are not being met, adaptive management options may be implemented, one of which could be increasing stubble height.

Conclusion: I find no violation on law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 07: The EIS violates NEPA. The EIS grossly misrepresents science, fails to implement BAS.

The Appellant alleges that EIS violates NEPA by failing to implement best available science. The Appellant also alleges the FS did not use or cite the numerous sources provided by the Appellant (p 14).

Discussion: Projects implementing land management plans must be developed considering the best available science in accordance with 36 CFR 219.36 (a) and must be consistent with the provisions of the governing plan (Appendix B to CFR 219.35). In other words, projects proposed and carried out must be consistent with the forest plan and show consideration of "best available science".

A review of the ROD's and EIS found ample evidence that Best Available Science was used during project development and analysis. For example, both ROD's (Palmer Gulch ROD, p 15 & Seven Allotments ROD, p 17) state that the decisions made were based on the best science and information available.

The Record does contain a document by document response for the material supplied by the Appellant. However, besides those documents described below in Appeal Point 12, the Appellant has not stated, with anything near specificity, how each provided document might suggest that the Deciding Officer's decision was arbitrary and capricious, or otherwise flawed. The Deciding Officer is under no legal obligation to guess which or which part, of the many documents provided by Appellant may be relevant or otherwise pertain to his appeal. Accordingly, Appellant has not met his burden under 36 CFR 215.14(a) with respect to all provided documentation.

However, references to literature used during the effects analysis were given in the EIS. The bibliography section of the EIS provides a list of literature, papers, reports and other information used and cited during the analysis, including sources provided by the appellant. The project record contains each of the documents provided by the appellant with relevant Forest Service comments providing evidence that this information was considered.

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 08: The EIS violates NEPA. The EIS and BA/BE's determination are insupportable (pp 14-15).

Discussion: Forest Service Manual 2670.32 provides guidance for conducting appropriate inventories and monitoring of sensitive species to improve knowledge of distribution, status, and response to management activities, coordinating efforts within the Region and with other agencies and partners where feasible. Forest Service Manual 2672.43 provides procedures for conducting biological evaluations. There is no specific requirement for use of quantitative population data when completing viability determinations for sensitive species. Furthermore, there is not one methodology for determination of population viability that would be appropriate for all species or populations. The Biological Evaluations for plants, wildlife, and fisheries each incorporate a variety of information on species distribution and habitat suitability within the project area, including the results of range-wide conservation assessments where available. This information, combined with descriptions of existing conditions, habitat conditions expected with implementation of the project, incorporation of Forest Plan Standards and Guidelines, the Watershed Conservation Practices Handbook design criteria, and adaptive management measures, provide a rational basis for sensitive species viability determinations.

Conclusion: I find no violation of law, regulation or policy, and recommend the District Ranger be affirmed on this issue.

Appeal Issue 09: The EIS violates NEPA. The EIS failed to analyze actual forage use.

Cattle weights have increased markedly over the past decades and this additional forage consumption is not being accounted for by the FS in its permits and billings. The NRCS Range and Pasture Handbook value of 30 pounds air-dry weight would be 3% of body weight for a 1,000 cow. Applying this to the current weight of 1,680 pounds for a cow/calf pair, the daily forage consumption would be 50.4 lbs of air-dry forage per day, or for a month (30.4 days), 1532 pounds of forage per AUM. The EIS failed to discuss the above issue, nor did it update its forage consumption rate on this allotment to provide the forage needed for wildlife as required by the Forest Plan and to ensure the public trust is not violated by undercharging for the actual weights of cattle and calves grazed. This lack of disclosure of this important issue violates NEPA. Further, the FS is allowing far more AUM's to be removed by livestock than what is being permitted. So even though cattle numbers may have stayed constant, forage removal has increased by ~40%. This was not analyzed in the EIS which violates NEPA (pp 16-17).

Discussion: The Forest Service agrees that, nationally, average cattle weights have increased over the years and thus a corresponding increase in forage consumption has occurred. Use is based on Forest Plan utilization guidelines which identify allowable use criteria. Any increase in consumption rates due to larger cattle is addressed at this point—so theoretically the allowable use guideline will be met sooner during the season of use with larger animals than with the same number of lighter animals. Over time, stocking rates can be adjusted, when needed, from the original stocking rates based on these guidelines, resource objectives, the need to meet other environmental and social concerns, as well as implementing changes in grazing management systems. The EIS states (pp 45-46) if monitoring shows that desired conditions, as described by LRMP Direction, are not being met, then an alternative set of management actions, the effects of which are analyzed in this EIS, may be implemented to achieve the desired results. Management practices that are possible options are shown in Table 2-1, Adaptive Options (EIS, p 46)(USDA, Forest Service, Quimby, 2006, 2007)(Valentine, 1989)(Savory, 1999).

The Appellant erroneously states that the EIS did not provide forage needed for wildlife, when, in fact the Range Specialist report states that watershed protection and wildlife use allocations were considered when developing initial models of capability (Range Specialist Report, pp 25-26).

The Forest Service does not charge a grazing fee based on the weight of cattle; rather, grazing fees are based on head months (the number of head multiplied by the number of months during the grazing period). The Forest Service defines a head month as one month's use and occupancy of the rangeland by one weaned or adult cow over six months of age (with or without calf), bull, steer, heifer, burro, mule, bison, ewe (with or without lambs), ram, or goat (Forest Service Handbook 2209.13). Therefore, no additional grazing fees would be collected if it is determined that permitted livestock are significantly larger than 1,000 pounds.

Conclusion: I find no violation of law, regulation or policy, and recommend the District Ranger be affirmed on this issue.

Appeal Issue 10: The EIS violates NEPA. The EIS failed to justify "Range Improvements."

The Appellant claims that "the ROD's authorize the construction of many new water developments and other "range improvements". The rationale provided is to "help increase cattle distribution" and to "to help draw animals away from areas in need of less grazing use". Unfortunately, the EIS fails to mention that all of the proposed water developments are within a few hundred yards of natural watercourses and will do little if anything to improve conditions. In addition, the EIS failed to provide any scientific basis or other information that would indicate these actions will be effective. Further, there was no site-specific analysis of the impacts of these water developments which violates NEPA. (pp 17-18)

Discussion: The EIS affirms that the analysis area has available live water for livestock use. However, due to topography and historical uses, water improvements are needed that allow livestock to water off streams and springs to ensure a continued upward trend in these areas (p 41).

Maps of the proposed water and fence improvements are included in the EIS, Appendix F. The proposed water and fence improvements are intended to provide better resource protection, get better livestock distribution, and reduce the potential for livestock-vehicle collisions along higher speed roads. In addition, the proposed fences are also intended to address cattle drift between allotments or pastures.

The selected alternative adaptive management provides that additional water developments or fencing may be constructed to provide livestock an alternative water source away from riparian areas (EIS, Table 2-4, p 60).

Additionally, specific design criteria are included in the selected alternative that would remove or relocate watering structures from identified sensitive areas whenever possible (EIS, Appendix B).

[See response to Appeal Issue 11g for further discussion on the effects analyses on range improvements.]

Conclusion: I find no violation of law, regulation or policy, and recommend the District Ranger be affirmed on this issue.

Appeal Issue 11: The EIS violates NEPA. The EIS and ROD's failed to implement adaptive management.

There are several separate parts to this issue that will be addressed individually below:

Issue 11a: The Appellant states that the "need is "for greater management flexibility" but little justification for this need is provided." "A so-called need is to open currently vacant allotments "to facilitate the management flexibility just mentioned" but the Forest Service provides no rational basis for this so-called need" (p 18).

Discussion: The need for greater management flexibility is driven by the need to cope with fluctuations in environmental and social conditions including, but not limited to, annual changes in weather; to be responsive to visitor use pattern changes; to be responsive to permittee request for reasonable operational adjustments; and to respond to unforeseen issues (EIS p 27). The need to open currently vacant allotments is not part of this projects need statement; therefore, no

explanation for this need is given.

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Issue 11b: The Appellant points out that the EIS states: "not permitting livestock grazing would result in inflexibility, as if domestic livestock (an invasive alien species) grazing is required to avoid ecosystem collapse. This is of course absurd and indicates the biased attitude of this NEPA process" (p 18).

Discussion: The Appellant erroneously claims that the EIS states "not permitting livestock grazing would result in inflexibility", however nowhere where in the document does this statement appear. If Alternative A was selected, the use of livestock as a management tool would have been eliminated. The environmental consequences of the No Grazing Alternative and both action alternatives were fully analyzed in the EIS (pp 63-272) as required by the NEPA.

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Issue 11c: The Appellant claims that no information is provided as to how the implementation of Alternative C would be more flexible than the current management practices. He goes on to claim that "the falsity of the Forest Service's purported need for "flexibility" is clearly exposed in FSH 2209.13-92" (p 18-20).

Discussion: Alternative C is an adaptive management alternative that provides a toolbox of management practices that will now be available for the land managers to implement if the existing condition of the allotments or pastures analyzed is not meeting the desired condition for those areas. In addition to the toolbox, multiple range improvements were also analyzed through the EIS including water and fence structures. These range improvements would not be available to the land managers without the appropriate NEPA analysis. The EIS (p. 57) explains why "Current Management" was not an "Alternative Considered in Detail.

Table 2-4 (pp 60-61) of the EIS displays a comparison of how the issue of management flexibility differs between alternatives B and C. There is ample evidence in both the ROD's and EIS that disclose the differences in management flexibility between the adaptive management alternative and current livestock grazing management.

Under Alternative C, management adjustments could be selected from the list of adaptive management actions which are described in the EIS (pp 46). Initially, a concern would be identified based on monitoring. Secondly, a management action would be selected that could potentially solve the concern. The success or failure of a given management action would be determined based on monitoring. If a particular management action failed to address the concern, a different management action would be selected and assessed based on monitoring which could include an adjustment in AUM's.

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Issue 11d: The Appellant claims that the EIS does not meet the requirements of FSH 2209.13 93.3a which requires: "The team, using an interdisciplinary approach, should

identify the desired rangeland conditions' within the analysis area. Desired conditions should be specific, quantifiable, and focused on rangeland resources." Additionally, the Appellant asserts that the desired condition's laid out for benchmark areas do not meet the requirement of the Forest Service Handbook (p 18-19).

Discussion: The EIS and Range Specialist Report contain proper and adequate descriptions of the existing and desired conditions, conditions of resources, including rangeland resources (EIS pp 27-29, pp 50-56 and Range Specialist Report pp 98-161).

The desired conditions (EIS pp 50-56) for the benchmark and key areas by allotment are certainly site specific. For example, the Bald Horse Allotment/Lower Victoria # 2 site states "maintain existing condition. Manage by providing for diversity of desirable plant species, less than 5% bare ground, less than 2% noxious weeds". The desired conditions for the benchmark and key areas meet all Forest Service Handbook requirements.

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Issue 11e: The Appellant alleges that the EIS failed to meet the requirements outlined in FSH 2209.13 93.3c which requires: "Identification of resource management needs is simply the comparison of desired conditions with existing conditions to determine the extent and rate at which current management is meeting or moving toward those desired conditions" (pp 18-19).

The EIS outlines desired conditions based on Forest Plan management area direction in Table 1-2 (pp 28-29) and Table 3-2 (p 71) as well as site-specific conditions developed for vegetation types represented on each allotment in Table 2-2 (p 50) for benchmark sites and key monitoring areas. The comparison of desired and existing conditions and the extent to which management is meeting or moving toward desired conditions is summarized in Table 2-3 (pp. 50-56) by benchmark or key areas. Furthermore, existing conditions are noted on an allotment by allotment basis starting on page 74 of EIS.

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Issue 11f: The Appellant alleges that the Quimby document is not fully implemented in this EIS. The Appellant also alleges the EIS's "monitoring plan" could hardly be called "carefully focused" (p 19).

Discussion: There is no specific law or regulation or policy requiring that adaptive management principles be utilized in livestock grazing NEPA. Quimby's work, Quimby 2007, while it is intended to assist land managers in the practical application of adaptive management principles during project development and analysis procedures, has not been adopted by Region 2 as official direction. The Responsible Official decided to follow an adaptive management strategy in the RODs. Both RODs selected Alternative C, the adaptive management alternative.

The EIS identifies design criteria to be met in general terms (p 47 & Appendix B). Additional design criteria to be met are listed in the Range Specialist Report (pp 77-81). Monitoring will occur, and the results will be used to make determinations of rangeland conditions and whether or not conditions are moving toward the desired future condition in a reasonable timeframe for

the allotment. If not, then an alternative set of management actions would be implemented to achieve the desired results. These adaptive management actions or tools are listed in the EIS (p 46) and are further explained in the Range Specialist Report (pp 163-171). The list of actions is not intended to be all-inclusive, but provides a range of actions available to the Forest Service to maintain or improve resource conditions to meet project-level desired conditions and management objectives.

Benchmarks and key areas are relatively small parts of the allotments and represent much larger areas. Benchmarks can change as needed depending on such factors as weather fluctuations, past permittee compliance history, and changes in current resource and/or social issues. Key areas are those areas which are monitored annually to determine when a threshold (such as stubble height, utilization, or bank trampling) has been reached. A monitoring plan was developed and included in the EIS (pp 47-56). Thus, the RODs and EIS address the applicable concerns and implement the guidance found in Quimby's work.

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Issue 11g: The Appellant claims that the EIS did not follow Forest Service Handbook 2209.13 94.2 as required. FSH 2209.13 94.2 states: "The evaluation of a proposed action's environmental effects must include the potential effects of all adaptive management options that may be implemented at some future point in time. For example if one potential option is to fence off a riparian area, the effects of that fence must be evaluated even if that management option may never actually be implemented (p 20)."

Discussion: All adaptive management actions are listed in the EIS, Table 2-1 (p 46). Additional adaptive management actions specific to each allotment are listed in the EIS (pp 107-123) and Range Specialist Report (pp 98-163).

Effects analyses on these adaptive management actions are included in the following sections:

- Watershed and Aquatic Resources, (pp 226-259),
- Range, (pp 105-127),
- Botany, (pp 191-225)
- Threatened, Endangered, and Sensitive Wildlife Species, (Appendix D),
- Wildlife, (pp 127-188),
- Fisheries, (pp 190-191),
- Heritage, (pp 259-264), and
- Social and Economic, Cost Efficiency, (Table 3-23 on p 268 and pp 269-271).

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Issue 11h: The Appellant claims that there is no commitment, locations, triggers, or measurable objectives identified for short or long-term monitoring (p. 20).

Discussion: The EIS contains the monitoring plan which identifies the desired condition (*i.e.* measurable objective), methods, frequency, trigger points, and change needed (*i.e.* management response) for various site locations within the eight allotments (pp 47-57).

Conclusion: I find no violation of law, regulation or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 12: The EIS and RODs fail to insure compliance with CWA.

The Appellant claims that “the EIS [*sic*] failed to provide any data supporting its claims that streams not listed on the 303d are compliant with the CWA.” Furthermore, the Appellant contends that the agency has “failed to show that BMPs will effectively protect water quality and state water quality standards will be met” especially when “this is not supported by research or the FS’s own experience.” One example from the Bighorn National Forest is cited along with four other scientific papers which Appellant claims are “opposing views.” The EIS fails to acknowledge and address these “responsible opposing views regarding the effectiveness of BMPs” (pp. 20-23).

Discussion: There is no statement or wording found in the EIS or RODs which makes any claim that ‘streams not listed on the 303d are compliant with the CWA.’ As stated in the EIS (p. 232), it is the responsibility of the SD DENR to determine which streams to list as 303(d) impaired and which are not meeting beneficial uses.

Under the nonpoint source pollution provisions of the CWA (Section 319), states develop a management program for non-point pollution control, which is voluntary and not regulated by permits. This is done with state-developed BMPs. Region 2 has developed Water Conservation Practices (WCPs) to meet state non-point source water quality requirements (Soils and Watershed Specialist Report, p. 20).

The Appellant’s views regarding the effectiveness of BMPs were not brought forward during either the scoping or EIS comment periods and therefore are not addressed in the EIS or RODs. As noted in the ROD (Palmer Gulch ROD, p 14 & Seven Allotments ROD, p 16), this project is designed to improve upon current livestock grazing practices; no further water quality degradation is expected from the proposed project.

As a final matter, that the Appellant subjectively feels the cited appeal documents are “opposing views,” is legally irrelevant. To be considered an “opposing view” the study must directly challenge a Forest Service scientific conclusion in this matter. The Appellant has provided no information that his cited appeal material directly challenges a scientific conclusion in this matter. See, *Lands Council v. McNair*, 20675, 20687, No. 09-36026, (9th Circuit, December 28, 2010-Not Yet Published)

Conclusion: I find no violation of law, regulation, or policy and recommend the District Ranger be affirmed on this issue.

Appeal Issue 13: Appellant attempts to incorporate all previous comments as appeal points in this matter.

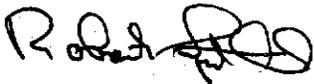
Discussion: 36 CFR 215.14(a) places the burden on the Appellant to provide specific project or activity specific evidence and rationale focusing on the decision, to show why the decision should be reversed. The Appellant attempts to, without specificity, switch this mandatory burden to the Responsible Official by attempting to globally incorporate pre-decisional comments as post decisional appeal points. 36 CFR 215.14(b)(6) through (9) contain essential substantive elements of a post-decisional appeal which must be met by the Appellant, none of which are satisfied by merely asking the Appeal Deciding Officer ("ADO") to incorporate pre-decisional comments as post decision appeal points. Specifically 36 CFR 215.14(b)(8) requires the Appellant to provide information on why the Responsible Official's decision failed to consider substantive comments. Merely requesting the ADO to respond to these very same comments as appeal points does not meet this required element. The Appellant has, therefore, not met his burden under 36 CFR 215.14(a). Therefore, we decline to address your comments to the EA as appeal points because, as presented, they do not provide sufficient information for the ADO to render a decision and are not in compliance with the appeal content requirements of the regulations.

Recommendation:

I recommend that you do not consider the original comments on the EA as appeal points.

RECOMMENDATION

I have reviewed and considered the appeal record, EIS, RODs and notice of appeal pursuant to and in accordance with 36 CFR 215.19. I find no violation of law, regulation, or policy and I recommend the decision of the District Ranger be affirmed in this case.



ROBERT SPRENTALL
Appeal Reviewing Officer