



File Code: 1570
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Diane Marks
728 Caroline Street
Port Angeles, WA 98362

Dear Ms. Marks:

On behalf of the Tonto National Forest, I would like to thank you for your involvement in the Apache Leap Special Management Area (ALSMA) Project. This letter is in response to the objection you filed on the Final Environmental Assessment (EA) and Draft Decision Notice (DN). I have read your objection and reviewed the project record and Final EA, including the environmental effects. My review of your objection was conducted in accordance with the administrative review procedures found at 36 CFR 219, Subpart B.

PROJECT OVERVIEW

The Forest Service is proposing to revise the current management of the ALSMA on the Globe Ranger District of the Tonto National Forest. In December 2014, Congress set forth the establishment of the ALSMA through the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015. Section 3003(g)(5)(a) of the NDAA directed the Forest Service to prepare a special management plan for the ALSMA in consultation with affected Native American tribes, the Town of Superior, Resolution Copper Mining, LLC (Resolution Copper), and interested members of the public.

The Proposed Action is to: (1) prepare and adopt a programmatic management plan for the approximately 839-acre ALSMA; and (2) amend the 1985 Tonto National Forest Land and Resource Management Plan to address the newly designated ALSMA.

ADMINISTRATIVE REVIEW PROCESS

The legal notice for the objection filing period was published on August 25, 2017. Your timely objection, 18-03-00-0005-O219, was received on October 10, 2017. The regulations at 36 CFR 219, Subpart B, provide for a pre-decisional administrative review process in which the objector provides sufficient narrative description of the project, specific issues related to the project, and suggested remedies that would resolve the objections (36 CFR 219.54). The regulations also allow for parties to meet in order to resolve issues. You were invited to participate in an objection resolution meeting the week of December 4, 2017. We were unable to meet. This letter, including an instruction to the Responsible Official, is my written response to your objections.



OBJECTION RESPONSES

ISSUE 1: The draft decision conflicts with the American Indian Religious Freedom Act (AIRFA).

Contention 1a: The Forest does not adequately analyze how granting of permits and processes to disturb the lands of Apache Leap would conflict with the AIRFA. The EA does not report on conflicts or detailed mitigations that could arise if there is any industrial activity on the Mountain. In addition, the Forest misquotes the AIRFA by leaving out the phrase “including but not limited to access to sites” and replaced the legal mandate with “This act also requires federal agencies to accommodate access to and ceremonial use of sacred sites and to avoid adversely affecting the physical integrity of such sacred sites.” The “accommodations” frame the “access to sacred sites” solely in terms of USFS “permissions.” This framework is not recognizing Native American legal rights to sacred sites and sacred prayers and ceremonies within the context of the AIRFA. Applying for permits from the USFS does not adequately address these legal rights of Tribal people under the AIRFA. [Objection, p. 1]

Response: The objector may be confusing the ALSMA management plan with the Resolution Copper project. There are no permits associated with the ALSMA management plan.

The objector raises concern about industrial activities. The ALSMA management plan does not include industrial activities. The ALSMA management plan includes the following standards which preclude the extraction of minerals:

- 1. The Apache Leap SMA is withdrawn from all forms of location, entry, and patent under the mining laws; and disposition under the mineral leasing, mineral materials, and geothermal leasing laws pursuant to Section 3003 of the NDAA.*
- 2. Filing of mineral claims, mineral exploration, mineral development, and removal of mineral material is not authorized within the Apache Leap SMA. The Apache Leap SMA Management Plan does not include any proposed industrial activities that are within the special management area. [PR 0001800, p. 26]*

The objector noted an exclusion of words in the AIRFA presented in the EA. The language in the EA referring to AIRFA is not a direct quote and adds the phrase “including but not limited to,” therefore the language is consistent with AIRFA. The language in the EA includes the following:

...use and possession of sacred objects and the freedom to worship through ceremonial and religious rites. This act also requires federal agencies to accommodate access to and ceremonial use of sacred sites and to avoid adversely affecting the physical integrity of such sacred sites. [PR 0001801, p. 33]

Contention 1b: The objector contends that it is not clear that the Forest understands that the pristine nature of the whole *entire* mountain where Apache Leap is located should be preserved. This means that some parts, however small, cannot be removed, tampered with, destroyed, limited, and especially traded. Trading a piece of sacred land for another piece of land misses the relationship of Native Americans to “their original lands.” These “original lands” are specifically

protected by the AIRFA for the benefit of the religious practices of the Native Americans. If the entire Mountain is sacred land, no changes whatsoever can be made to it for it to remain sacred. [Objection, p. 1]

Response: The Forest acknowledges the significant cultural importance of Apache Leap. Many tribes consider Apache Leap sacred and important to their ceremonies, cultural practices, and traditional use. The majority of the ALSMA lands fall within the boundaries of the *Chi'chil Bildagoteel* Historic District, an Apache Traditional Cultural Property formally listed on the National Register of Historic Places.

The Apache Leap Special Management Area does not preclude the tribes from practicing their religion. AIRFA establishes the policy “to protect and preserve for American Indians their inherent right of freedom, to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including, but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonials and traditional rites.” The Forest responded to the objector’s comments of concern about access for traditional cultural activities and recreation by adding management approaches for access to the ALSMA Plan to encourage the “Forest Service to work with interested parties in the future to facilitate continued access to the Apache Leap SMA.” The Tribal section includes desired conditions, guidelines, standards, and management approaches specific to tribal resources and concerns [PR 0001800, pp. 20-21]. The Guidelines include the utilization of the Cultural and Heritage Cooperation Authority of the 2008 Farm Bill (codified at 25 USC Chapter 32A), which authorizes the Forest to temporarily close the National Forest System lands for the privacy of tribal activities for traditional and cultural purposes [PR 0001800, p. 21, Guideline 2]. Plan components designed to address tribal access concerns are also explained in the draft DN [PR 0001799, p. 4].

The ALSMA Management Plan complies with the requirements in the NDAA to protect the values for which the area was designated, including the area’s natural character. The management plan contains direction that fosters preservation of the area’s natural character [PR 0001800, pp. 18-19]. The management plan standards and guidelines contain direction that would protect the natural character and scenery for the Apache Leap SMA. The standards state that the natural character and associated values, including natural quiet, dark skies, and limited encounters with other visitors, shall take precedence over recreation uses where conflicts occur. The guidelines, when implemented, that would aid in protection of the natural character and scenery include the following:

1. *All proposed developments (including vegetation manipulation and ground-disturbing activities/construction) should be designed to blend with the natural setting by remaining consistent with the form, line, color, texture, and pattern common to the landscape character.*
2. *Construction of new communications sites, utility lines, or transmission lines should not occur within the Apache Leap SMA.*
3. *Regular maintenance activities, such as utility line clearing, should be performed in a manner consistent with protection of the natural character and values of the Apache Leap SMA.*

4. *If seismic monitoring indicates that the natural character or values of the Apache Leap SMA are being negatively impacted, rehabilitation and closures may be used to mitigate impacts.*
5. *The Apache Leap SMA should be managed for the visual quality objective of "Retention" under the Visual Management System and a scenic integrity objective of "High" under the Scenery Management System. [PR 0001800, pp. 18-19]*

Contention 1c: The Management Approaches only "consider" several processes to explore further compliance with the AIRFA. The process verb needs to be changed to "ensure" as all the power for the outcomes of "working with Tribes" lies on the side of the USFS if the verb is "consider." These processes for further actions to ensure the rights of the Tribes need to be much more detailed and definite. [Objection, p. 2]

Response: The ALSMA Management Plan must be compliant with existing law. The EA lists the AIRFA, among other laws, under the regulatory framework section for Tribal resources [PR 1801, p. 33]. Management approaches are not plan direction but are Forest Service intent on how the desired conditions and/or objectives can be met. They can also include partnership opportunities and collaborative suggestions. The word "consider" is used in Management Approaches to frame the intention being made. Changing the word to "ensure" is more appropriate for plan direction (which guides future projects and decision making) than for Management Approaches. The word "consider" is not misused in the Management Approaches that the objector references, however, the Forest acknowledges that it was likely not the best choice in describing working with the tribes [PR 0001801, p. 21].

ISSUE 2: The draft decision does not fully meet the requirements of the National Environmental Policy Act (NEPA).

Contention 2a: The Forest's finding that permits granted under the Management Plan EA will have no significant impacts on the Apache Leap Mountain appear to be related to scientific, environmental, recreational, or other factors. The Cultural/Tribal analysis appears to be ignorant and insufficient with regard to Tribes Cultural/Spiritual Needs and Rights. Since the Forest recognizes that the entire Apache Leap Mountain is a sacred mountain to the many surrounding tribes, it follows that any changes to the entire sacred mountain are significant impacts to the Native Americans' sacred land. The Forest needs to do a more in-depth analysis of "significant impact" including the world-view and values of the Tribes. [Objection, p. 2]

Response: The objector contends that the analysis of effects did not thoroughly consider tribal and cultural resources, that a more in-depth analysis is needed, and that any changes to the entire Apache Leap Mountain would result in significant effects.

The Forest followed the CEQ regulations (40 CFR 1508.27) and Forest Service Handbook (1909.15-05) guidelines for determining the significance of impacts in the environmental analysis and the FONSI, demonstrating consideration of context and intensity in analyzing impacts to tribal, cultural, and natural resources [PR 0001801, pp. 72-76]. The Forest did involve and consider tribes views and rights, did not find "significant" impacts but rather generally

beneficial impacts, and provided rationale for the findings made related to cultural and tribal resources as explained in the EA [PR 0001801, pp. 32-41] and outlined below.

The Forest initiated consultation with 12 different tribes with a letter dated September 26 and has held 13 different meetings to date with various leaders of tribes to obtain input on the ALSMA Plan and project as well as two other meetings for all the consulting and interested tribes [PR 0001801 p. 6; PR Schema 3.c]. The Forest described the importance of the Apache Leap area to the tribes in the EA [PR 0001801, p. 32] and recognizes the mountain as a sacred site [PR 0001801, p. C-11]. The Forest analyzed the consequences of the proposed action on tribal and cultural resources in the EA and found that effects on tribal resources would be generally beneficial as the proposed action would reduce currently occurring surface disturbance of grazing on vegetation and soils, including disturbance to “important wild plant species used by tribal members” [PR 0001801, p. 34]; disturbance from the use of vehicles on 0.35 miles of roads, which would be converted to non-motorized trails [PR 0001801, p. 34]; and limits on construction of new infrastructure and closure of current abandoned mining infrastructure [PR 0001801, p. 34]. The EA also specifies “The mitigation of abandoned mining infrastructure would include tribal input during the planning and design stages” [PR 0001801, p. 35].

Implementation of the project is also expected to benefit cultural resources as the proposed plan would reduce currently occurring impacts to cultural resources and is designed to maintain the natural character and protect and conserve cultural and historic resources within the entire ALSMA [PR 0001801, p. 40]. As explained in the EA, the proposed plan includes “modified desired conditions, standards, guidelines, and management approaches to protect archaeological sites within the *Chi'chil Bildagoteel* Historic District, thereby preserving the significance of the historic and cultural resources of the Apache Leap SMA as recognized in the National Register of Historic Places” [PR 0001801, p. 39]. The management emphasis for the management area under the proposed action includes “the primary purposes stated in the NDAA Section 3003(g)(3): to preserve the natural character of Apache Leap; to allow for traditional uses of the area by Native American people; and to protect and conserve the cultural and archaeological resources of the area” [PR 0001801, p. 12]. The only action identified as having the potential to impact cultural and historic resources negatively—installation of grazing fences to keep livestock out of the allotments—would be mitigated under a separate environmental review process conducted for installation of those fences [PR 0001801, p. 40].

In relation to seismic monitoring and operation of an underground tunnel proposed under the Resolution Copper Project, which is yet to be fully planned, the Forest explained in the response to comments that “while the Forest Service may require terms and conditions regarding implementation of these uses, it does not have the authority to prohibit these uses” but that “any of these authorized activities are subject to review under Section 106 of the NHPA, as well as compliance with the current forest plan” [PR 0001801, p. C-21]. Such uses are also outlined in the management plan as authorized activities per Section 3003(g)(4)(B) of the NDAA [PR 0001800, p. 6], were considered for cumulative effects [PR 0001801, pp. B1-B8], and would be analyzed in detail under the project in which they would occur.

CONCLUSION

My review finds that the project is in compliance with all applicable laws and the Tonto National Forest Plan. However, I am issuing an instruction to the Forest Supervisor to clarify a point in the Management Plan.

Instructions:

Based on feedback and concerns received in your objection letter, I have decided to issue the following instruction:

1. Revise the wording in the Management Plan, Section 3.2.4 Management Approaches, which discusses “consider working with tribes” and “consider developing a strategy.”

The Forest Supervisor, Neil Bosworth, may sign the Decision Notice for this project once these instructions have been addressed. My review constitutes the final administrative determination of the Department of Agriculture; no further review from any other Forest Service or Department of Agriculture official of my written response to your objection is available. [36 CFR 219.57(b)(3)]

Sincerely,



JIM UPCHURCH
Deputy Regional Forester

cc: Neil Bosworth; Tom Torres; Mary Rasmussen; Lee Ann Atkinson; Marianne Thomas; Roxanne Turley; Matt Turner; Cat Luna