

DISCRETIONARY REVIEW DECISION

ON THE

CHIEF'S APPEAL DECISION

REGARDING THE

RIO GRANDE NATIONAL FOREST

REVISED LAND AND RESOURCE MANAGEMENT PLAN

COLORADO ENVIRONMENTAL COALITION, ET AL. (# 97-13-00-0057)

/s/ David P. Tenny
DAVID P. TENNY

March 29, 2001
Date

**Acting Deputy Under Secretary for
Natural Resources and Environment
United States Department of Agriculture**

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**Discretionary Review Decision
On The
Chief's Appeal Decision
Regarding the
Rio Grande National Forest Revised Land and Resource Management Plan
Colorado Environmental Coalition, et al (Appeal #97-13-00-0057)**

Procedural Background

This is my discretionary review decision under 36 CFR 217 on the January 19, 2001 appeal decision of the Reviewing Officer for the Chief of the Forest Service regarding the appeal by the Colorado Environmental Coalition and others of the Rio Grande National Forest (RGNF) Revised Land and Resource Management Plan (Revised Forest Plan) and its accompanying Final Environmental Impact Statement (FEIS). Regional Forester Elizabeth Estill signed the Record of Decision (ROD) approving the Revised Forest Plan on November 7, 1996.

The appellants are Colorado Environmental Coalition, Southern Rockies Ecosystem Project, San Luis Valley Ecosystem Council, Biodiversity Associates/Friends of the Bow, Sierra Club, Biodiversity Legal Foundation, Sinapu, Forest Guardians, The Wilderness Society, Colorado Trout Unlimited, High Country Citizens Alliance, Colorado Grizzly Project, National Wildlife Foundation, and Steven M. Hannon. Several parties were granted intervenor status on the appeal.

Sally Collins, Reviewing Officer for the Chief, signed the appeal decision (Chief's appeal decision) on January 19, 2001. I requested the appeal record from the Chief on February 5, 2001. The appeal record was received on February 12, 2001. I announced my decision to review the Chief's appeal decision on February 27, 2001. My decision is based on a review of the appeal record and the Chief's appeal decision.

The relief requested and the procedural background are summarized in the Chief's appeal decision.

Statutory and Regulatory Authorities

Regulations governing forest plan appeals were promulgated in 1989 at 36 CFR 217 (47 FR 3357, January 23, 1989). These regulations are not based on any statutory requirement for an appeal process, but instead aid the Department of Agriculture in meeting its responsibilities under the Organic Administration Act (16 USC 472, 551), the Multiple-Use Sustained-Yield Act (MUSYA) (16 USC 528-531) and the National Forest Management Act (NFMA) (16 USC 1600, et seq.). The Under Secretary of Agriculture is responsible for protecting, managing, and administering the National Forests (7 CFR 2.20 (a)(2)(ii)). The Under Secretary also is charged under 7 CFR 2.20 (a)(2)(viii) to "exercise the administrative appeal functions of the Secretary of Agriculture in review of

decisions of the Chief of the Forest Service pursuant to 36 CFR parts 215 and 217 and 36 CFR 251, Subpart C.” Under 7 CFR 2.59, all duties and powers delegated to the Under Secretary are performed by the Deputy Under Secretary during the absence or unavailability of the Under Secretary.

The Regional Forester’s decision to approve the Revised Forest Plan was subject to appeal in accordance with Forest Service appeal regulations, which provide for discretionary review by the Secretary of appeal decisions made by the Chief (36 CFR 217.7). As explained above, that authority has been delegated to me. Discretionary review is based on the appeal record presented to the Chief (36 CFR 217.17 (e)). The appeal regulations grant broad latitude in deciding when to conduct discretionary review, based on a number of factors identified in the regulation (36 CFR 217.17 (a)). These include, but are not limited to, such factors as the “controversy surrounding the decision, the potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy.” The Chief’s appeal decision involves all of these factors. Accordingly, I concluded that a discretionary review of the Chief’s appeal decision was warranted.

The Revised Forest Plan was prepared under NFMA and its implementing regulations promulgated in 1982 at 36 CFR 219 (47 FR 43073, Sept. 30, 1982). Under the terms of the newly issued NFMA planning regulations at 36 CFR 219 (65 FR 67514, November 9, 2000), the Rio Grande Revised Forest Plan is governed by the 1982 version of these regulations. Accordingly, I based my review on the 1982 regulations. Likewise, any additional planning necessary under my decision will be conducted under the 1982 regulations. All references to 36 CFR 219 in this decision refer to the 1982 version of those regulations.

Deputy Under Secretary Decision Summary

The Chief’s appeal decision identifies eleven issues raised in the NOA. The appeal decision also contains an analysis of the appeal points for each issue, and the Chief’s decision. All this information was analyzed and considered during my discretionary review. Based upon an extensive review of the appeal record, I have decided to affirm in part and reverse in part the Chief’s January 19, 2001 appeal decision. My decision on each issue discussed in the Chief’s appeal decision is as follows:

1. Viability and Diversity.....Chief is affirmed, instructions are vacated, different instructions are provided
2. Livestock Grazing Capability and Suitability Determination.....Chief is affirmed
3. WildernessChief is affirmed
4. Wilderness Fish Stocking.....Chief is affirmed
5. Travel Management.....Chief is affirmed
6. Winter Recreation Impacts on ResourcesChief is affirmed

- 7. Conditioning at Re-issuance and Issuance of FLPMA Authorizations.....Chief is affirmed with instructions
- 8. Clean Water ActChief is affirmed
- 9. Continuous Monitoring.....Chief is affirmed, instructions are vacated
- 10. Supplemental DEIS.....Chief is affirmed
- 11. Maximum Size of Created Openings.....Chief is affirmed

This decision is the final administrative determination of the Department of Agriculture under 36 CFR 217. By copy of this decision, I am notifying all participants of my decision.

Summary of the Issues

The Chief affirmed the Regional Forester on seven appeal issues. These include wilderness, wilderness fish stocking, travel management, winter recreation impacts on resources, section 401 of the Clean Water Act, supplemental draft environmental impact statement, and maximum size of created openings. I agree with the Chief’s analysis of these issues as presented in the appeal decision, and concur with the Chief’s conclusions that these portions of the Regional Forester’s November 7, 1996 decision comply with applicable federal law, regulations, and Forest Service Manual direction. I incorporate all of the Chief’s analysis and conclusions regarding these seven issues into this decision by reference. Based on that information and for the same reasons, I affirm the Chief’s decision on these issues. This decision includes no further discussion of these issues.

The Chief affirmed the Regional Forester regarding livestock grazing capability, and reversed the Regional Forester’s decision regarding the suitability of lands for livestock grazing. I incorporate all of the Chief’s analysis and findings regarding livestock grazing capability and suitability into this decision by reference. Based on that information and for the same reasons, I affirm the Chief’s decision on this issue. This decision includes no further discussion of this issue.

I affirm the Chief’s reversal of the Regional Forester’s decision with respect to viability and diversity. I disagree with some of the Chief’s analysis and findings relating to viability, however. I also disagree with the Chief’s instructions on how to remedy this deficiency. Accordingly, I am vacating the Chief’s instructions and issuing different instructions. This issue is explained in detail below.

I affirm the Chief’s decision to reverse the Regional Forester with respect to monitoring of management indicator species (MIS). I also affirm the Chief’s decision to affirm the monitoring portions of the Regional Forester’s decision that do not relate to MIS monitoring. I do not agree, however, with the Chief’s instructions regarding the non-MIS monitoring issues and I vacate those instructions. This issue is explained in detail below.

I affirm, with instructions, the Chief's decision to reverse the Regional Forester regarding the conditioning at issuance and re-issuance of authorizations under the Federal Land Policy Management Act (FLPMA). This issue is explained in detail below.

The Rio Grande Revised Forest Plan

Land and Resource Management Plans (forest plans) are prepared under MUSYA, the Forest and Rangeland Renewable Resources Planning Act of 1974 as amended by NFMA, the implementing regulations of NFMA, and the National Environmental Policy Act (42 USC 4321 et seq.) and its implementing regulations (40 CFR 1500-1508). The original forest plan for the RGNF was approved in January, 1985. NFMA requires forest plans to be revised every 10 to 15 years; revision of the 1985 RGNF Forest Plan satisfies this requirement.

Forest plans set forth goals and objectives, including desired future conditions, and establish standards and guidelines to follow in pursuit of those goals and objectives. The Revised Forest Plan “provides the framework to guide the day-to-day resource management operations of the Rio Grande National Forest, and subsequent land and resource management decisions made during project planning” (Revised Forest Plan, p. P-4).

Forest plans are permissive in that they allow, but do not mandate, certain activities to take place; they do not make any irretrievable commitment of resources, and they do not contain site-specific decisions (*Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726 (1998)). Therefore, a forest plan's EIS is limited in its ability to predict what will occur over the next 10 to 15 years. Likewise, a forest plan EIS does not display effects of site-specific activities. Due to its programmatic nature, a forest plan EIS is a cumulative impact analysis document, but it is also necessarily somewhat speculative in its display of those impacts.

Forest plans guide the project planning process, through which site-specific activities are proposed, analyzed under NEPA, and approved. NFMA requires projects to be consistent with the standards and guidelines contained in the forest plan (16 USC 1604 (i); see *Swan View Coalition v. Turner*, 824 F. Supp. 923, 933 (D. Mont. 1992)).

Forest plans also establish monitoring requirements to determine the effectiveness of the standards and guidelines and other management direction in meeting the plan's goals and objectives. As stated in the Revised Forest Plan, “Monitoring is the key to adaptive management (the ability to change as new information or technology is developed) and is the necessary feedback mechanism for improved resource management. Monitoring and evaluation are used to determine if an amendment or revision of the Forest Plan is needed” (Revised Forest Plan, p. V-1).

The continuing cycle of approval, amendment, site-specific projects, monitoring, and revision means that planning is never-ending. A forest plan, approved at one point in time, is never the “last word” on the management of a national forest.

Detailed Discussion of the Issues

Viability and Diversity

Since its enactment in 1976, NFMA's requirement to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives and within the multiple-use objectives of a land management plan," (16 USC 1604 (g)(3)(B)) has been the subject of intense debate within and among the Forest Service, the scientific and environmental communities, the federal judiciary, and others. The implementing regulations requiring the Forest Service to manage fish and wildlife habitat "to maintain viable populations of existing native and desired non-native vertebrate species in the planning area" (36 CFR 219.19) expanded the statutory requirement considerably, but did little to explain how to meet it.

Out of this debate, a few areas of general consensus have emerged. One is that, due to the complex and dynamic nature of ecosystems, there is no way to prove that a forest plan will "ensure" diversity and viability. Certainty is not possible; nor is the avoidance of all risk, even if all human-caused changes to habitat could be stopped. We cannot hold forest plans to a level of certainty that, ultimately, is illusory.

There is also wide agreement that there is no single and precise standard or technique for how to provide for diversity and viability. As the Ninth Circuit has acknowledged, there is considerable latitude to interpret the regulations:

[T]he record demonstrates that the federal defendants considered the viability of plant and animal populations based on the current state of scientific knowledge. Because of the inherent flexibility of the NFMA, and because there is no showing that the federal defendants overlooked any relevant factors or made any clear errors of judgment, we conclude that their interpretation and application of the NFMA's viability regulations was reasonable.

Seattle Audubon Society v. Mosely, 80 F. 3d 1401, 1401 (9th Cir. 1996).

Because there is no precise standard, this decision presents an opportunity to offer general guidance to the Forest Service regarding the basic principles on viability that have emerged over the years and should be incorporated in future revision efforts. I intend this discretionary review decision, together with those regarding revised forest plans for the Routt and Arapaho and Roosevelt National Forests, to supply such guidance.

Forest Service decisionmakers have considerable discretion regarding how to provide for viability, so long as relevant factors are not overlooked, no clear errors of judgment are made, a rationale is provided for using the approach taken, and the plain language requirements of the regulations are met.

Among the relevant factors to be considered are the overall multiple use objectives for the planning area, mitigation measures that can reasonably be expected to be developed at the project level, and the available scientific information on:

- Trends in the quantity, quality, and distribution of habitat for fish and wildlife species for which the Forest Service has determined that viability concerns exist;
- Trends in abundance and distribution of such species, to the extent such data are available;
- The habitat needs of such species and how they are affected by management activities; and
- Habitat and population trends of management indicator species, to the extent such data are available.

In considering these factors, Forest Service decisionmakers must determine how much additional scientific data should be gathered, and how rigorously the data should be analyzed to develop information useful for making management decisions. In keeping with the statutory requirement to provide for diversity “within the multiple-use objectives of a land management plan,” (16 USC 1604 (g)(3)(B)) the amount and quality of scientific information should be commensurate with the land management activities projected in the forest plan and the viability risks associated with those activities. In cases where population and habitat trends are believed to be in significant decline throughout the planning area, and substantial habitat disruption is allowed by the forest plan, a more rigorous approach to maintaining viability is indicated. In cases where habitat and population trends are believed to be within the range of historic variation, and the forest plan allows little additional habitat disturbance, a much less rigorous analysis is warranted. In such cases, a more qualitative approach to factors such as trend analysis may suffice, as long as the approach considers the relevant factors and demonstrates sound judgment, including a rational explanation for the level of analysis conducted.

There are thousands of species of wildlife on the national forests; trying to provide for diversity and viability on a species-by-species basis is virtually impossible. Instead, the scientific community has widely accepted the use of a coarse-filter/fine-filter process to address biodiversity issues, as described in *Wildlife, Forests, and Forestry: Principles of Managing Forests for Biological Diversity* (Hunter, M. L. Jr. 1990. Prentice-Hall, Inc. Englewood Cliffs, New Jersey)).

The “coarse-filter” approach to maintaining biological diversity was developed by The Nature Conservancy (The Nature Conservancy. 1982. *Natural heritage program operations manual*. The Nature Conservancy, Arlington, Virginia). Frequently, in Forest Service coarse-filter analyses, the first step involves identifying the types of ecosystems that are present on a forest through the use of remote-sensing technology such as aerial photography and an ecosystem classification system such as ECOMAP. Then the changes in these ecosystems over time are evaluated, to estimate what is known as the Range of Historic Variation (RHV), sometimes referred to as Range of Natural Variation (RNV). This approach assumes that maintaining a representative array of ecosystems (or habitat types) will maintain the vast majority of species in a region.

The course-filter approach involves developing models to predict how key elements of current ecosystems, such as the structure and composition of forest stands, will change in the future in response to natural factors and management activities. Comparing the results of this analysis to the RHV allows reasonable conclusions to be drawn regarding the level of risk to viability associated with any particular level of management activities allowed by a forest plan.

The coarse-filter approach is not sufficient to address all species, however; additional “fine-filter” analysis is warranted for species that are rare or have unique habitat requirements (Noss, R.F. 1987. *From plant communities to landscapes in conservation inventories: a look at the Nature Conservancy (USA)*. Biol. Conserv. 41:11-37).

Fine-filter analysis examines trends in the abundance and distribution of particular species and their habitat. Because such analysis is very difficult and requires substantial information that may not be readily available, only a few species can reasonably be analyzed using this approach:

The limitation of the fine-filter approach is expense and lack of information. In most parts of the world the status (population size, distribution, and security) of most species is unknown, and even if a comprehensive list of endangered species could be assembled, there would be insufficient money to deal with them all.

(Wildlife, Forests, and Forestry, p. 238.)

In addition, the depth and level of detail of the fine-filter analysis must be commensurate with the viability risks associated with the land management decisions being considered. Species with similar habitat needs may be analyzed as a group, for example, where the forest plan projects that the amount of disturbance from management will be low.

The coarse filter/fine filter analysis is not done simply for the sake of estimating effects of forest plan alternatives. Rather, the analysis is used in the forest planning process as one of the many multiple-use factors that guide the development of land allocations, management prescriptions, and standards and guidelines (S&Gs). These elements of the forest plan alternatives are developed, analyzed, refined, and analyzed again in an iterative fashion until the decisionmaker is satisfied that the diversity and viability requirements have been met. In this fashion, the analysis and the proposed management direction each influence the other.

As noted above, however, planning does not end with approval of a forest plan. Much more work is done as projects are proposed, analyzed under NEPA, decided upon, and carried out, including:

- Additional attention is paid to new information pertaining to viability issues that arise;
- More detailed site-specific habitat maps and inventory information are developed;

- Site-specific Biological Evaluations and Biological Assessments are prepared to evaluate the effects of the project on threatened, endangered, and sensitive species; and
- Appropriate site-specific mitigation measures (e.g., S&Gs) are developed and implemented.

It is only during implementation of site-specific projects and activities on the ground that effects of forest management on viability--and the effectiveness of the measures designed to maintain it--can be observed. As projects are carried out, the Forest Service builds upon its knowledge through monitoring and evaluation of those projects and makes necessary adjustments, either by amending the forest plan or adjusting on the ground actions.

The Approach Taken by the RGNF

The RGNF, in part, followed the coarse filter/fine filter approach described above, which is summarized in the Chief's decision and in the FEIS. As the Chief stated in the appeal decision, the RGNF started with an analysis of habitat based on available information:

The approach used to evaluate the potential effects of plan alternatives on these [24 sensitive] species entailed the use of six Landtype Associations (LTA's) and four parameters to assess habitat suitability: 1. structural-class composition, 2. percentage in an undeveloped condition, 3. Density of open roads, and 4. Spatial patterns. (FEIS, p. 3-113)

The Revised Plan, FEIS, and record identify habitat requirements for the 24 sensitive species in very broad terms

(Chief's appeal decision, p. 5.)

The Forest also displayed the limited population data available from three large scale assessments (FEIS, pp. F 18-19), and analyzed information such as existing fragmentation and the projected level of road construction and timber harvest under each alternative. Based on this information, the RGNF determined that the Revised Forest Plan would have little effect on habitat on the Forest:

Only 2% of the forested cover type (26,540 acres of 1,167,420) has had ... timber harvests in the last 30-50 years.

(FEIS, p. 3-101.)

Of the RGNF's forested acres, 62% can be classified as late-successional forests.... Of the late-successional forests, 61% is currently in an undeveloped state.

(FEIS, p. 3-102.)

[R]egardless of budget level, the amount of undeveloped areas (areas without roads) entered would be small. Consequently, almost two-thirds of the Forest would remain in an undeveloped condition and at a low risk of alteration by human disturbances.

... [A]lmost two-thirds of the RGNF's forested acres would remain in a late successional condition [after a decade of managing the Forest under the Revised Forest Plan at full budget level].

(FEIS, p. 3-109.)

As a result of not appreciably changing the acreage of either the undeveloped land or the late-successional forest, the RGNF will maintain its characteristic patches of human disturbances surrounded by a landscape of late-successional forests.

(FEIS, p. 3-112.)

With little effect on condition and pattern of habitat, road density, and percent of land in an undeveloped condition, the Forest also concluded that there would be little risk to wildlife viability:

None of the Alternatives will appreciably change the four parameter values [structural-class composition, percentage in an undeveloped condition, density of open roads, and spatial patterns] from what they are currently. As a result, there will be limited impacts on the [Threatened and Endangered] and Sensitive species, and the risk to species viability is considered small.

(FEIS, p. 3-113 (emphasis added).)

The RGNF specifically addressed the issue of whether additional scientific documentation was necessary in its response to public comments on the Draft EIS: "We feel that we made a good faith effort to incorporate the latest research into the [viability] analysis" (FEIS Appendix N, p. N-133); "the data used [for the effects analysis] are the best available" (FEIS Appendix N, p. N-268).

The Chief's Views

The Chief's appeal decision asserts that the viability analysis is unacceptable on several counts:

[T]he FEIS and other parts of the planning record contain information describing whether each sensitive species was known to be present on the RGNF, but did not provide or consider adequate information regarding historic and current population status, trends, or distribution in relation to the planning area.

(Chief's appeal decision, p. 5.)

In addition to general allegations regarding viability, your appeal includes more specific allegations with respect to viability of certain species including species that rely on old-growth (NOA p. 10, p. 56), and species associated with aquatic ecosystems, grasslands, shrubs, and meadows (NOA, p. 56), and bighorn sheep (NOA, p. 66). I have concluded, for the same reasons described above [that the RGNF did not provide adequate information], that the Revised Forest Plan, FEIS, and other material in the planning record do not provide an adequate basis for concluding that habitat will be managed under the Revised Forest Plan to maintain viable populations

(Chief's appeal decision, p. 6.)

The Wildlife standards and guidelines that are provided, and most of the other[s],... are stated in very general terms.... The reliance on standards and guidelines that are largely site-specific mitigation measures and the analysis of likely outcomes of the use of these measures, has not been done in a manner that supports a determination that the Revised Forest Plan would result in management of habitat that maintains viable populations

(Chief's appeal decision, p. 6.)

The RGNF did not select MIS as required by 36 CFR 219.19

(Chief's appeal decision, p. 7.)

With respect to the general nature of the standards and guidelines, there is no reason to assume that they will not be implemented as written, or that they will not be effective in achieving their objectives, particularly in light of the small risk to species viability discussed above. This issue was raised by the public during the comment period on the Draft EIS. The RGNF responded by clarifying some of the standards and guidelines, and by explaining their reasoning for not making them more specific:

The intent of the [standards and guidelines] as written was to leave enough flexibility to handle the myriad of local situations. Hiding cover is a good example. The intent is to reduce vehicular harassment. Instead of trying to dictate a specific distance or vegetative density, it is left open so that it can be adjusted to the vegetation and topography of the area [during site-specific project planning].

(FEIS Appendix N, p. N-134.)

The Revised Forest Plan contains general standards and guidelines, which require appropriate site-specific mitigation measures to be identified during project planning.

Implementation of the standards and guidelines will be monitored, and necessary changes identified and made. I find that approach to be reasonable.

There are other weaknesses, however, that require attention. These include:

- Management indicator species were not identified, which does not meet the plain language requirements of 36 CFR 219.19.
- Inadequate analysis was conducted relating to species referred to in the FEIS (pages F 20-23) as the “Riparian Group” and the “Nonforested Group.”
- No map of rangeland for which livestock grazing permits has been issued.
- Habitat effects were displayed for only 10 years following adoption of the Revised Forest Plan.
- cursory references were made to the scientific literature regarding habitat needs, distribution, and population trends of sensitive species.

Regarding MIS, the RGNF is somewhat confusing in its treatment of this issue. The FEIS includes a reasoned discussion of why the scientific community has moved away from focusing on particular species and more towards tracking plant communities as management indicators. Consequently, the RGNF used LTAs as management indicators rather than identifying particular MIS. In the same discussion, however, the RGNF essentially identified and selected MIS without using that phrase:

For this analysis, LTAs will be considered the management indicators and used in comparing the Alternatives. As Wilcove (1991) pointed out, while there are good reasons to monitor habitats, there is still a need to monitor species. We realize that the indicators chosen are best for coarse-filter elements. To fill that gap, a number of species have been included in the monitoring plan with the intent of tracking their occurrence and population. We felt these species were the ones most likely needing a fine-filter approach.

(FEIS, pp. 3-122 and 3-123.)

While this analysis approaches *de facto* compliance with the MIS requirements of NFMA regulations, more needs to be done to formally select species as MIS, according to the procedure identified in 36 CFR 219.19. It is possible that the species identified in the monitoring plan will suffice as MIS, in which case very little additional work will be needed, but it is impossible to know for certain until the MIS selection process has been completed. Once MIS are selected, the Forest must also ensure that the effects of FEIS alternatives on MIS are estimated, and that MIS monitoring requirements are met, which will be discussed further under that issue.

Accordingly, after reviewing the record, I affirm the Chief’s decision to reverse the Regional Forester with respect to viability and diversity. I do not accept the Chief’s remedy, however, which was that “Future viability analyses should be based on efforts currently underway in the Region and at the national level of the Forest Service on this topic, and related program reviews.” (Chief’s appeal decision, p. 7). These instructions

essentially direct the Regional Forester to begin a new viability analysis. That overstates the remedy necessary to meet the applicable viability requirements. Therefore, I vacate the Chief's instructions, and instruct the Regional Forester to modify the existing viability analysis to correct the four deficiencies identified above.

Conditioning at Re-Issuance and Issuance of FLPMA Authorizations

The Chief found that Standard 5 of the Revised Forest Plan and Guidelines 1-3 that follow the Standard are not consistent with the provisions of Section 505 of FLPMA or 36 CFR 251.56. The Standard and Guidelines do not accurately reflect the requirements to include, in all authorizations for water storage and diversion facilities, "terms and conditions which will ... minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment...." (FLPMA, sec. 505, 43 USC 1765 (a)(ii); 36 CFR 251.56 (a)(1)(ii).) Accordingly, the Chief reversed the Regional Forester's decision on this issue.

After reviewing the appeal record, I concur with the Chief's conclusion that the language in Standard 5 and Guidelines 1-3 does not meet the requirements of the applicable statute and regulation. I also agree with his instruction that issuance and re-issuance of authorizations for water storage and diversion facilities must comply with Section 505 of FLPMA and 36 CFR 251.56 at the project level. I add the instruction that the Forest issue an errata sheet that changes page III-7 of the Revised Forest Plan to require compliance with Section 505 of FLPMA and 36 CFR 251.56 when issuing and re-issuing authorizations for water storage and diversion facilities.

Continuous Monitoring

The Chief found that the Revised Forest Plan partially meets the requirements of the NFMA and 36 CFR 219. The Chief affirmed the monitoring provisions, except those relating to MIS, with instructions to develop them further based on current Regional efforts and related program reviews. Because the Revised Forest Plan contains no provisions for monitoring MIS, the Chief found that the Revised Forest Plan does not comply with the section of the 1982 NFMA regulations that requires such monitoring. Consequently, the Chief reversed the Regional Forester's decision with respect to MIS monitoring.

After reviewing the record, I concur with the Chief's analysis and finding that the Revised Forest Plan does not meet the requirement relating to MIS monitoring. I affirm the Chief's decision to reverse the Regional Forester on this subject. As discussed above regarding the viability and diversity issue, if the species already identified in the monitoring plan are selected as MIS, substantive changes to the monitoring plan should be minimal. If additional species are identified as MIS to meet regulatory requirements, then the monitoring plan must be modified to identify how MIS monitoring requirements will be met for such species.

I find that the Revised Forest Plan meets all other monitoring requirements of 36 CFR 219. I do not concur in the Chief's assessment, however, that "monitoring effectiveness is questionable because substance is deferred to yet-to-be-determined Annual Monitoring Operational Plans." (Chief's appeal decision, p. 21). The Chief stated in the appeal decision:

Table V-1 (Revised Forest Plan, pp. V-18 through V-30) rigorously outlines the Forestwide Desired Conditions, Monitoring Objectives, specific monitoring methods, and specified monitoring frequencies.

I have compared the requirements of 36 CFR 219.12, 36 CFR 219.19, 36 CFR 219.21, 36 CFR 219.7, and 36 CFR 219.11 with the Revised Forest Plan's Table V-1 cited above, and find that each of the requirements is recognized as legally required by the Forest. This includes requirements for the expected frequency of measurements, expected precision and reliability, and the time when the evaluation will be reported (36 CFR 219.12(k)(4)) as shown in Table V-1.

(Chief's appeal decision, pp. 20-21.)

I conclude from these statements, and a review of the record, that all of the required substance pertaining to monitoring and evaluation--except for MIS monitoring as described above--is included in the Revised Forest Plan. The fact that additional substance will be developed and provided in Annual Monitoring Operational Plans does not undermine the credibility of the substance contained in the Revised Forest Plan, as the Chief's appeal decision asserts. In support of this assertion, the Chief's appeal decision cites the failure to comply with the MIS monitoring requirements as "illustrative," (Chief's appeal decision, p. 21) when in fact this is the only requirement not met by the Revised Forest Plan.

There is no logical basis for concluding that the substance to be provided in the future—substance beyond that required by 36 CFR 219—gives rise to legitimate questions of credibility regarding the Revised Forest Plan. In this regard, the Chief's appeal decision states that "It is clear from the Revised Forest Plan, the FEIS, and the Record that the Forest was very much aware of the law, regulation, and policy concerning the issue of monitoring and evaluation. Furthermore, it is apparent the Forest adhered to that law, regulation, and policy in articulating a reasoned approach to establish realistic monitoring priorities and scales." (Chief's appeal decision, p. 21). Therefore, I conclude that, with the exception of MIS monitoring, the monitoring provisions of the Revised Forest Plan meet the requirements of law, regulation, and Forest Service policy.

The Chief was concerned, however, that:

The Forest's two-tiered approach to monitoring and evaluation does not assure [sic] that monitoring will be accomplished on the ground. Likewise, it does not assure that likely results will be sufficient to measure the desired conditions and

objectives cited in Table V-1. Furthermore, the monitoring plan does not assure that forest wide questions which require persistence over time will be addressed.

(Chief's appeal decision, p. 21.)

The Chief does not assert that such "assurances" are required by statute, regulation, or Forest Service policy. Indeed, the Chief states that the Forest adhered to applicable law, regulation, and policy. In addition, the Chief states that "The ROD provides the same assurance that monitoring will be carried out as it does for other requirements of the Revised Forest Plan." (Chief's appeal decision, p. 21). Therefore, the Chief's instructions to "further develop the substance of the Rio Grande's monitoring plan" (Chief's appeal decision, p. 22) can only be seen as requiring the Forest to exceed, not merely meet, applicable law, regulation, and Forest Service policy. However useful such further development may be, it is inappropriate to require it as part of an appeal decision. Accordingly, while I affirm the Chief's decision to affirm the monitoring provisions, except for those regarding MIS, I vacate the Chief's instructions.

Implementing the Decision of the Deputy Under Secretary

As a result of my decision, the Rio Grande National Forest is directed to meet the following requirements:

- Select appropriate MIS per 36 CFR 219.19 and display the environmental effects of forest plan alternatives on such species.
- Expand the display of environmental effects of forest plan alternatives on Riparian Group and Nonforested Group species to be commensurate with the display in the FEIS of effects on other Groups.
- Display habitat effects for a longer time period, to be determined by the Forest based on consideration of rotation age and rate of change in plant communities due to succession or management activities. As part of the coarse-filter and fine-filter analyses contained in the FEIS, habitat/vegetation types should be forecast into the future to ensure the persistence of these ecosystems. In addition, the disclosure of effects should include a better display of where management activities are permitted by habitat/vegetation type and management prescription.
- Add direction to the monitoring plan if MIS are selected that the Revised Forest Plan does not already require to be monitored.
- Issue an errata sheet regarding compliance with Section 505 of FLPMA.
- Develop a new livestock grazing suitability determination as required by the Chief's decision, including a map of rangelands that shows where grazing permits have been issued.
- Add to the record the scientific literature cites used to determine habitat needs, distribution, and trends of sensitive species and MIS.

While the deficiencies identified in the Revised Forest Plan are being addressed, the Forest should review on-going project activities authorized since the effective date of the Plan. The review should take into account whether the viability considerations in those

activities are sufficiently protective or whether they need adjustment. The Forest Service is instructed to provide appellants and the Chief's office with a list of on-going projects that need adjustment within sixty days of the date of this decision.

Any new project activities proposed during the period the deficiencies identified above are being addressed, that may affect the viability of identified sensitive species, should also be evaluated for an adequate approach to viability. The framework for both reviews noted above is the approach described in pages five through eight of my decision.

I agree with the Chief that a work plan "that describes amendments and/or other actions (and a schedule for their completion)" is needed (Chief's appeal decision, p. 2). However, because my decision calls for different analyses and disclosures than did the Chief's appeal decision, I vacate the Chief's instructions to the Regional Forester. Instead, I instruct the Forest Service to provide the appellants, the public, and the Chief with a work plan within 120 days of the date of my decision that describes amendments and/or other actions (and a schedule for their completion) needed to bring the Revised Forest Plan into conformance with applicable law and regulation and the specific requirements listed above.