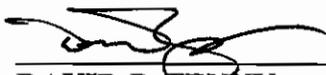


Discretionary Review Decision
on the
Chief's Appeal Decision
Regarding the
Medicine Bow National Forest
Revised Land and Resource Management Plan



DAVID P. FENNY

4/17/06
Date

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

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Procedural Background

This is my review decision, under 36 CFR 217, of the February 16, 2006 Consolidated Decision for Appeals of the Medicine Bow National Forest (NF) Revised Land and Resource Management Plan by the Chief of the Forest Service (Chief). The Chief ruled on 6 appeals of Regional Forester Rick Cables' December 29, 2003 Record of Decision approving the Medicine Bow NF Revised Land and Resource Management Plan (LRMP, or Forest Plan).

Gloria Manning, Reviewing Officer for the Chief, signed the appeal decision on February 16, 2006. I requested the appeal record from the Chief on March 3, 2006 and received it on March 13, 2006. On March 20, 2006, I decided to conduct a discretionary review to specifically address the management of bighorn sheep and domestic sheep issue in the Chief's appeal decision. My decision is based on a review of the appeal record and the Chief's appeal decision.

A list of the appellants are identified in the February 16, 2006, Consolidated Decision for Appeals of the Medicine Bow National Forest Revised Land and Resource Management Plan in Appendix A. The requested relief is summarized in the Chief's appeal decision. Each appellant will be notified of this discretionary review and my 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 (16 USC 528-531) and the National Forest Management Act (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 is also 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 may be performed by the Deputy Under Secretary.

The appeal regulations allow discretionary review of the Chief's decision by the Under Secretary. The regulation identifies factors that should be considered in making a determination of whether to undertake a discretionary review. These factors include, but

are not limited to, 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 on the management of bighorn sheep and domestic sheep involves all of these factors. Accordingly, I conclude that a discretionary review of the Chief’s appeal decision on this issue is warranted.

The Revised LRMP was prepared under NFMA and its implementing regulations promulgated in 1982 at 36 CFR 219 (47 FR 43073, Sept. 30, 1982; see also 36 CFR 219.35 (2004)). Accordingly, I based my review on the 1982 regulations. All references to 36 CFR 219 in this decision refer to the 1982 version of those regulations.

Summary of Deputy Under Secretary Decision

Based on my review of the appeal record, I affirm the Chief’s February 16, 2006 appeal decision on the Medicine Bow National Forest Revised LRMP, with the exception of the Chief’s decision with instructions on the management of bighorn sheep and domestic sheep. On this issue, I affirm the Regional Forester’s decision. The details of my decision on this issue are provided below.

This is the final administrative determination for the Department of Agriculture on these appeals. By copy of this document, I am notifying all participants of my decision.

Medicine Bow Revised Land and Resource Management Plan

The Medicine Bow NF Revised LRMP and Final Environmental Statement (FEIS) were prepared under the Multiple-Use Sustained-Yield Act, the Forest and Rangeland Renewable Resources Planning Act of 1974 as amended by the National Forest Management Act (NFMA) (16 U.S.C. 1600 *et seq.*), the implementing regulations of the NFMA (36 CFR 219), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1500-1508). The 2003 Medicine Bow NF LRMP revised the 1985 Medicine Bow NF LRMP, as amended. The revised LRMP is a framework for management of the Medicine Bow NF.

Management for Bighorn Sheep and Domestic Sheep

Summary of the Issue

Appellants contend that the Medicine Bow NF “Plan Fails to Maintain Bighorn Sheep Populations Well-Distributed Throughout the Planning Area”, and that the “FS has an obligation to maintain the viability of bighorn sheep in each of the three units of the Medicine Bow NF where they occur.”

Regulations concerning species viability and national forest planning are found in the 1982 NFMA implementing regulations at 36 CFR 219.19: “Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.” The regulation at the same location defines

“viable population” as “one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.”

There are potential adverse effects to bighorn sheep from contact with domestic sheep on the Medicine Bow NF and the potential transmission of *Pasteurella haemolytica*. This is a bacterial disease organism that is common in domestic sheep, but rarely causes symptoms and frequently goes unnoticed. In contrast, studies have revealed that *P. haemolytica* has been fatal to 75 to 100 percent of bighorn sheep that contract it.

The three bighorn sheep herds on the Medicine Bow NF were established through re-introduction efforts in 1964, 1970 and 1977. At the time the FEIS was prepared, the Laramie Peak herd had more than 300 sheep and the Douglas Creek herd had 100 sheep. The Encampment herd had remained steady at or above 50 sheep for the last 25 years, even though there are several Forest Service domestic sheep allotments and private-land sheep operations within and adjacent to the range of this herd. The persistence of this small herd is due, in part, to the ongoing cooperative working relationship with the State of Wyoming regarding bighorn sheep management.

The FEIS analysis identifies disease transmission from domestic sheep as the primary threat to bighorn sheep viability on the Medicine Bow NF. The viability determination for the Selected Alternative (D-FEIS) identifies “the likely loss of Encampment herd,” due to less protective management direction than provided for the Laramie Peak and Douglas Creek herds that are likely to persist over the long-term. The FEIS concludes that there is a moderate to high likelihood of bighorn sheep persistence over the long-term on the Medicine Bow NF under the selected LRMP alternative.

Following approval of the LRMP, the Final Report and Recommendations from the Wyoming State-wide Bighorn/Domestic Sheep Interaction Working Group was issued.

Discussion

This decision properly hinges on the specific facts of this case. The three current bighorn populations on the Medicine Bow NF are introduced, and the populations are naturally disjunct. According to the administrative record (Appendix D), only one of the three populations is currently above the minimum size of 125 that theory suggests is necessary to avoid loss of long-term genetic viability. The other two populations are considered low priorities for management under state management plans. The two larger populations are in areas where there is relatively little chance of contact with domestic sheep, either because there are vacant domestic sheep grazing allotments on the national forest or relatively little interspersed or adjacent private land with domestic sheep grazing. The smallest population, on the other hand, is in an area with poor forage and subject to potentially fatal interaction with existing domestic sheep grazing.

In these circumstances, the viability provisions of the planning regulation do not require the Regional Forester to attempt to maintain habitat for all three populations. To interpret

the regulation in that fashion would create a powerful disincentive to experiment with further reintroductions of extirpated species whose viability prospects are uncertain. Because of the inherent flexibility in the National Forest Management Act to provide for the diversity of plant and animal communities to meet overall multiple-use objectives, application of the viability regulation provides for line officer discretion to balance multiple use objectives and uncertainty. Furthermore, the Forest Service or the courts have not established a concrete standard for diversity. In this case, the Regional Forester appropriately exercised his discretion and has concluded that the provisions of the plan are sufficient to maintain two of the three introduced populations with a moderate to high likelihood of long term persistence on the forest. This is more than sufficient to comply with the viability provision of the regulation.

The administrative record demonstrates the difficulty of dealing with unique cases such as this one. Some of the material in the record reflects the belief on the part of some staff biologists and planners that the viability regulation requires maintenance of all three populations. In that respect, the staff specialists have based their technical comments on a mistaken interpretation of the policy in the planning regulation. There does not appear to be any serious dispute in the record regarding the persistence of the Laramie Peak and Douglas Creek herds. The prevalent concern is whether the Encampment herd will be maintained and whether maintenance of that herd is required as well.

The Chief's decision errs in two important respects. First, it concludes that maintenance of all three herds is required by the regulation. For the reasons described above, that is incorrect. Secondly, the Chief's appeal decision states that the Regional Forester has failed to explain why he did not adopt additional protective measures to attempt to provide for the persistence of the third herd. This statement flows from the Chief's conclusion that additional protective measures were required, and in that respect is based on a faulty premise. Moreover, I find that the Appendix D of the EIS has a clear description of the tradeoffs that the Regional Forester considered in deciding to emphasize maintenance of two herds of bighorn sheep rather than all three. In essence, the threat of disease means that bighorn and domestic sheep are unlikely to coexist; management must emphasize one or the other. The Regional Forester clearly lays out his reasons for choosing to emphasize the bighorn in two instances and domestic sheep in the other. I find this explanation, along with the other supporting material in the record, sufficient.

Decision

I find the Medicine Bow National Forest Revised LRMP is in compliance with the NFMA regulations with respect to the viability requirement for bighorn sheep. I find the Chief's appeal decision misstates the viability requirement for bighorn sheep. Therefore, I am setting aside the Chief's decision and instructions on the issue of bighorn sheep. Secondly, with respect to bighorn sheep, I affirm the Regional Forester's original decision to approve the Medicine Bow National Forest Revised LRMP. Finally, I instruct the Regional Forester to continue the good working relationship with the State of Wyoming on the management of bighorn sheep and domestic sheep. Accordingly, the Medicine

Bow National Forest should refer to the Final Report and Recommendations from the Wyoming State-wide Bighorn/Domestic Sheep Interaction Working Group, consider the report, and take appropriate actions.