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Date: January 7, 2011

Subject: Recommendation Memorandum for the Palmer Gulch Allotment, Mystic Range
Project Environmental Assessment 11-02.03-0012

To: Dennis Jaeger, Appeal Deciding Officer

I have reviewed the appeal record (2011-02-03-0012) regarding the December 31, 2010 appeal of the decision of District Ranger, Robert J. Thompson, concerning the Mystic Range Project: Palmer Gulch Allotment on the Black Hills National Forest by Friends of the Norbeck. My review of the appeal, as submitted by the eligible appellant, focused on the decision documentation developed by the District Ranger. Pursuant to 36 CFR §215.13(f)(2), this will constitute my written recommendation concerning the disposition of the appeal, and I am forwarding the appeal record to you.

BACKGROUND

The Mystic Range Project: Palmer Gulch Allotment Record of Decision (ROD) was signed by the Mystic District Ranger on October 12, 2010. The purpose of this decision was to determine whether or not livestock grazing should continue and, if so, whether any changes may be needed to meet Forest Plan direction on the Palmer Gulch Allotment. The Palmer Gulch Allotment includes a portion of the Norbeck Wildlife Preserve (NWP), which has additional legal and management direction from other allotments included in a separate ROD as part of the Mystic Range Project.

RELIEF REQUESTED

The appellant requests the following relief:

1. Remand of those parts of Ranger Thompson's 10/12/10 decision that authorize continued livestock grazing for three to five years on the Palmer Gulch Allotment within the Norbeck Wildlife Preserve on the Mystic Ranger District of the Black Hills National Forest;
2. Immediate designation of the Sunday, Palmer, Ford and south half of the Rabbit Pastures, and the ungrazed portions of the Lower and Upper Bear Pastures, as unsuitable for livestock grazing; and immediate permanent closure of FS 356;
3. Remand of those parts of Ranger Thompson's 10/12/10 decision that authorize trailing of livestock through the Norbeck Preserve;
4. Remand of those parts of Ranger Thompson's 10/12/10 decision that authorize construction by permittee(s) of boundary fencing along the north and west borders of the Norbeck Preserve;
5. Remand of the non-Norbeck parts of Ranger Thompson's 10/12/10 decision, with instructions to bring the Mystic Range Project into compliance with NFMA, the 1982 regulations, the 1999 Forest Plan Appeal Decision, and the 2000 Settlement Agreement in order to avoid being inextricably tied to the illegal flaws of the Phase II Amendment; and

6. Mandate that no further actions be undertaken on the Norbeck Wildlife Preserve until a new programmatic Environmental Impact Statement has been prepared that manages the Preserve consistent with the specific "protection" of game animals and birds, and their "breeding place" mandates of the Norbeck Organic Act, conducts the required review of expansion of Black Elk Wilderness, and all Norbeck/Black Elk Wilderness Forest Plan Standards and Guidelines have been brought into line with the NOA direction as interpreted in the 2001 Tenth Circuit Ruling.

APPEAL POINT AND DISCUSSION

- I. By Failing to Prioritize the Protection of Game Animals and Birds within the Norbeck Portions of the Palmer Gulch Allotment, the FEIS/ROD Violate the Norbeck Organic Act (NOA) and the Tenth Circuit Mandate (p. 9).

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

A copy of the Norbeck Organic Act (NOA) is included in the appeal record at Vol. C of the appeal record (AR), pps. 2399 - 2404. In order to meet the intent of the NOA and, therefore, prioritize the protection of game animals and birds within the Norbeck portions of the Palmer Gulch Allotment, the decision made in the ROD is that grazing, as it currently exists, will be phased out within the Norbeck Wildlife Preserve (NWP) as a part of two existing grazing permits on the Palmer Gulch Allotment (p. 2 of the ROD). The decision to phase-out livestock grazing within the NWP portion of the Palmer Gulch Allotment "relies heavily on the Wildlife evaluation," specifically in reference to the effects of livestock grazing on "12 key game animals and bird species (AR Vol. B, p. 463).

In the 1927 Master Plan for the Protection and Administration of the Preserve (excerpts at pp. 2412 - 2414 in Vol. C of AR), grazing was acknowledged as an activity that had historically occurred within the boundaries of the NWP and would continue, although there were some limitations set.

As stated on pages 26 and 27 of the FEIS, subsequent agency plans for the NWP have followed the lead of the 1927 Master Plan in realizing that the primary use of the NWP was for "game animals and birds," and that all actions in the NWP were to benefit these species. Management plans drawn up in 1973, 1979, and 1989, and two generations of Forest Plans (1983 and 1997) have included grazing as suitable use. The current Forest Plan, as amended, provides direction for MA 5.4A. Permits may be reissued, but permitted livestock numbers are not to be increased. The Forest Service should take advantage of opportunities to transfer forage use from livestock to wildlife.

The Black Hills Land and Resource Management Plan (Forest Plan) is the programmatic planning document and is consistent with the NOA. A revision of the Forest Plan was completed in June 1997. The first major amendment (Phase I) to this Forest Plan was completed in May 2001, and the second major amendment (phase II) was completed in October 2005. The Phase II decision was upheld on appeal and become effective in March 2006. The plan, as amended, includes management direction specific to the NWP, including livestock grazing, which is

allowed. This direction does take into account the NOA requirement that the Forest Service protect game animals and birds and recognizes the NWP as a breeding place for these animals.

The Tenth Circuit Court of Appeals (Tenth Circuit) decision is included in the record at Vol. C of the AR, pp. 2373 - 2391. The appellant and Forest Service have differing interpretations of the referenced "mandate" from the Tenth Circuit. The Forest Service only reads the Tenth Circuit decision as holding that the specific requirements of the NOA supersede the general requirements of NFMA if there is a conflict between the two. The Tenth Circuit specifically recognized that the Forest Service could continue to manage Norbeck under both the NOA and NFMA so long as there were no conflicts between the two.

The 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States (p.L. 107-206) (pp. 2392 - 2398 of Vol. C of AR) states, in part, "The Secretary is authorized to use the full spectrum of management tools including prescribed fire and silvicultural treatments in meeting the purposes of the Norbeck Organic Act." Livestock grazing falls within that "full spectrum of management tools."

In order to meet the mandate of P.L. 107-206 concerning management and monitoring of the NWP, the Forest Service entered into a memorandum of understanding (MOD) with the South Dakota Department of Game, Fish and Parks (SDGFP). The most recent version of the SOGFP MOD (2009) is located in Vol. C of the AR at pages 2415 - 2418. As allowed by the Tenth Circuit decision, the 2009 SOGFP MOD provides a definition of "protection" to clarify management of the "NWP in accordance with the original spirit and intent" (AR Vol. C, p. 2418). Protection is defined as "the controlled use, skill and systematic conservation and management of game animals and birds and their habitats; to protect game animals and birds and their habitats from depletion or the need to preserve individuals." Thus, the Forest Service did not interpret the NOA as requiring that all adverse impacts to individuals be eliminated as long as management conserves populations within the Preserve. This view of "protection" also controls how the Forest Service meets the "breeding place" element of the NOA. The Forest Service does not interpret the NOA to require that it eliminate all adverse impacts to: 1) individuals during breeding season, or 2) breeding habitat and conditions. Rather, the "breeding place" element of the NOA can be met by managing the Preserve to provide habitat and conditions that support breeding by game animals and birds.

Appendix E of the FEIS contains "Management Direction and Opportunities" for the Mystic Range Project Area. This included Forest Plan goals, in order of emphasis priority; and Goals 1, 2 and 3 were considered to be the primary project drivers in terms of providing Forest Plan direction and guidance to support the purpose and need and the development of a responsive proposed action (FEIS Appendix E, p. E-I). Other standards and guidelines from the Forest Plan were also considered and addressed in the FEIS. Of the list of standards and guidelines listed in the appeal as prioritizing non-wildlife objectives "over and above the specific Norbeck mandates for the protection of game animals and birds, and their breeding places, in violation of NOA and the Tenth Circuit Ruling," only three were applied in the Palmer Gulch Ailotment analysis and decision; and those are specific to the NWP. The rest were not addressed and, therefore, are not applicable to this project. The pertinent standards and guidelines are:

- 5.4A-2501: Existing livestock grazing may continue; permits may be reissued to existing or new permittees. Do not permit any increase in livestock numbers (animal months). Under the decision for the Palmer Gulch Allotment, livestock numbers will be reduced through the phasing out of grazing, as it currently exists, in the NWP. This standard is addressed in the FEIS at pp. 148 - 154 and pp. 180 - 182. It is also discussed on pp. 7 - 9 of the ROD.
- 5.4A-2502: Take advantage of opportunities to transfer forage use from livestock. The decision to phase-out grazing, as it currently exists, in the NWP portion of the Palmer Gulch Allotment does just that. This guideline is discussed in the FEIS at pp. 101 and 110 -114.
- 5.4A-2505: Livestock grazing may be used intermittently as a management tool (even in areas designated unsuitable for livestock grazing) to improve habitat conditions; e.g., to control noxious weeds. The ROD for the Palmer Gulch Allotment of the Mystic Range Project would allow for intermittent use of livestock grazing in the NWP, even after grazing use, as it presently exists has been phased out. This guideline is discussed in the FEIS at pp. 148 -154 and 180 - 182. It is also discussed on pp. 7 - 9 of the ROD.

The ROD (p. 5) states that the decision meets requirements under all applicable laws, regulations and policies, including the Norbeck Organic Act. It also states that the decision is consistent with the standards and guidelines in the Forest Plan (as described above).

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

- II. By Relying on Economic Factors to Determine that Livestock Grazing Should be Permitted for the Next 3-5 Years within the Norbeck Portions of the Palmer Gulch Allotment, the FEIS/ROD Violate the Norbeck Organic Act and the Tenth Circuit Mandate (p. 12).

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(1) and (b)(9).

Social/Economics and the effects the decision could have on livestock grazing permittees were a key issue analyzed in the FEIS (see page 33). Having to construct new fences to prevent livestock from accessing the Norbeck Wildlife Preserve will result in additional costs to those permittees. The 3- to 5-year phase out timeline was arrived at because of the legal requirement for notification to the term grazing permittees and the "practical consideration" about time necessary to construct fencing in order to prevent livestock from accessing the Norbeck Wildlife Preserve (ROD, pages 7 and 8).

Effects of implementation of the alternatives on ground nesting birds and other wildlife species are described in detail in Chapter 3.

The Mystic Range Project is in compliance with the NOA, the Forest Plan and the Tenth Circuit decision. See also discussion Wilder Appeal Issue 1.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

IIA. The ROD Improperly Prioritizes Concerns for Permittee Operations over the Specific Wildlife Mandate of the NOA.

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

The two grazing permittees that would be affected by the elimination of grazing within the Norbeck Wildlife Preserve hold term grazing permits (FEIS, Chapter 3, pages 80 - 84). As documented in the ROD (pages 9 and 10), direction contained in both 36 CFR 222.4(aXI) and FSH 2209.13, 16.24, states that, "when lands grazed under a term permit are to be devoted to another public purpose, no permit shall be cancelled without two years' prior notification, except in an emergency."

The Mystic FEIS notes that grazing has occurred on the Palmer Gulch Allotment since the inception of the national forest (FEIS p. 81). Grazing thus predates establishment of the Preserve in 1920. The present grazing level in the Palmer Gulch Allotment is only about one-third the amount authorized during World War II (FEIS p. 81). The Mystic FEIS shows that grazing impacts on game animals and birds are not so drastic as to require immediate termination of grazing that has occurred within the Preserve for well over ninety years.

The Mystic Range Project is in compliance with the NOA, the Forest Plan and the Tenth Circuit decision. See also discussion under Appeal Issue 1.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

IIB. Direct and Indirect Impacts to Game Animals During the Phase-Out Period Were Not Assessed.

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

The direct and indirect impacts of livestock grazing on game animals were disclosed and discussed in several locations of the FEIS and Specialist Reports. Direct and indirect impacts of livestock grazing on elk can be found in the project FEIS (AR Vol. B pp. 190-193) and Wildlife Specialist Report (AR Vol. C pp. 591~594). Direct and indirect impacts of livestock grazing on white-tailed deer can be found in the project FEIS (AR Vol. B pp. 159:-165) and Wildlife Specialist Report (AR Vol. C pp. 558-564). Direct and indirect impacts of livestock grazing on bighorn sheep can be found in the project FEIS (AR Vol. B p. 422) and Biological Assessment/Biological Evaluation (AR Vol. C pp. 662-666). Direct and indirect impacts of livestock grazing on mountain goats can be found in the project FEIS (AR Vol. B pp. 186-191) and Wildlife Specialist Report (AR Vol. C pp. 585-589).

Direct and indirect impacts to game animals of the three to five year phase-out period of livestock grazing on Palmer Gulch pastures within the NWP are the same as those disclosed for continued livestock grazing under Alternative C.

The decision to phase-out livestock grazing within the NWP portion of the Palmer Gulch ROD "relies heavily on the Wildlife evaluation", specifically in reference to the effects of livestock grazing on "12 key game animals and bird species"(AR Vol. B p. 463). During the three year phase-out period on the south half of the Palmer Gulch Allotment, the decision also includes stipulations precluding permitted livestock use within the Palmer and Sunday Pastures before June 15, and after "around August 1" to mitigate adverse impacts to game animals and birds (AR Vol. B p. 460)

Recommendation: Recommend that the District Ranger decision be affirmed on this point.

NE. Direct and Indirect Impacts to Birds During the Phase-Out Period Were Not Assessed.

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215. 14(b)(7) and (b)(9).

The direct and indirect impacts of livestock grazing on birds were disclosed and discussed in several locations of the FEIS and Specialist Reports. Direct and indirect impacts of livestock grazing on song sparrows can be found in the project FEIS (AR Vol. B pp. 145-151) and Wildlife Specialist Report (AR Vol. C pp. 545-550). Direct and indirect impacts of livestock grazing on ruffed grouse can be found in the project FEIS (AR Vol. B pp. 154-159) and Wildlife Specialist Report (AR Vol. C pp. 554-558). Direct and indirect impacts of livestock grazing on mountain bluebirds can be found in the project FEIS (AR Vol. B p. 196-199) and Wildlife Specialist Report (AR Vol. C pp. 597-599). Direct and indirect impacts of livestock grazing on Merriam's turkey can be found in the project FEIS (AR Vol. B pp. 193-196) and Wildlife Specialist Report (AR Vol. C pp. 594-597).

Direct and indirect impacts to birds of the three to five year phase-out period of livestock grazing on Palmer Gulch pastures within the NWP are the same as those disclosed for continued livestock grazing under Alternative C.

The decision to phase-out livestock grazing within the NWP portion of the Palmer Gulch ROD "relies heavily on the Wildlife evaluation", specifically in reference to the effects of livestock grazing on "12 key game animals and bird species"(AR Vol. B p. 463). During the three year phase-out period on the south half of the Palmer Gulch Allotment, the decision also includes stipulations precluding permitted livestock use within the Palmer and Sunday Pastures before June 15, and after "around August 1" to mitigate adverse impacts to game animals and birds (AR Vol. B p. 460)

Recommendation: Recommend that the District Ranger decision be affirmed on this point.

IID. Direct and Indirect Impacts to Aquatic Habitat and Water Quality Were Not Assessed.

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215. 14(b)(7) and (b)(9).

The direct and indirect impacts of livestock grazing on aquatic habitat and water quality were disclosed and discussed in several locations of the FEIS and Specialist Reports. Direct and indirect impacts of livestock grazing on aquatic habitats can be found in the project FEIS (AR Vol. B pp. 200-202), the Biological Assessment/Biological Evaluation (AR Vol. C pp. 629-652) and throughout the Fishery Specialist Report (AR Vol. C pp. 1272-1289) and Hydrology Specialist Report (AR Vol. C pp. 1407-1792). Direct and indirect impacts of livestock grazing on water quality can be found throughout the Hydrology Specialist Report (AR Vol. C pp. 1407-1792).

Direct and indirect impacts of livestock grazing on mountain sucker (as a sensitive species) are disclosed in the Biological Assessment/Biological Evaluation (AR Vol. C pp. 683-687); and as a MIS in the Fisheries Specialist Report (AR Vol. C pp. 1277-1278). Summaries of both appear in the FEIS (AR Vol. B pp. 200-202 and Appendix D p. 428). The determination as a sensitive species is "may adversely impact individuals, but not likely to result in a loss of viability in the Planning Area nor cause a trend toward federal listing" (AR Vol. C p. 650). The determination as a MIS is "All alternatives will have a neutral effect on the Forest-wide population trend for the mountain sucker because of this species' limited occurrence in the analysis area" (AR Vol. C p. 1278).

Direct and indirect impacts to aquatic habitat and water quality of the three to five year phase-out period of livestock grazing on Palmer Gulch pastures within the NWP are the same as those disclosed for continued livestock grazing under Alternative C.

Recommendation: Recommend that the District Ranger decision be affirmed on this point.

III. Misrepresentation of the Timeline of the No-Grazing Alternative Biases the Perceived "Reasonableness" of the Duration of the Grazing Phase-Out Period.

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

36 CFR 222.4(a)(7) deals with modifying the terms and conditions of a grazing permit, and that is not what is being done under this decision. Under the Palmer Gulch Allotment decision, the District Ranger is cancelling, in part, the permits for the pastures currently being grazed within the Norbeck Wildlife Preserve.

The two grazing permittees that would be affected by the elimination of grazing within the Norbeck Wildlife Preserve hold term grazing permits (FEIS, Chapter 3, pages 80 - 84). As documented in the ROD (pages 9 and 10), direction contained in both 36 CFR 222.4(a)(7) and FSH 2209.13, 16.24, states that, "when lands grazed under a term permit are to be devoted to another public purpose, no permit shall be cancelled without two years' prior notification, except in an emergency." The "public purpose" for which grazing is being phased out is the improvement of wildlife habitat within in the Norbeck Wildlife Preserve. Because livestock grazing has been a historic use of the preserve, deciding to now devote that land to wildlife habitat instead cannot be considered to be an "emergency" that would justify immediate termination of a term grazing permit. As stated in the ROD (page 8), the two affected permittees

will need time to make adjustments, especially for construction of fencing to prevent cattle from moving on to the Norbeck Wildlife Preserve. According to the ROD (pages 8 and 9) fencing of the northern portion of the Palmer Gulch Allotment by the permittee in that area will be necessary primarily because of actions anticipated to be taken by the Forest Service that will remove a natural barrier.

The decision in the ROD is in compliance with the Forest Plan, the NOA, and the Tenth Circuit ruling. See also the discussion under Appeal Issue I.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

- III. By Authorizing Trailing of Livestock within the Norbeck Wildlife Preserve, the FEIS/ROD violate NOA by Prioritizing Non-Wildlife Concerns Over the Specific "Protection" and "Breeding Place" Mandates for Norbeck (p. 20).

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

Trailing of livestock is a grazing management activity authorized under the annual operating instructions (AOI) attached to a grazing permit (see FSH 2209.13,31.23, at page 2318 of Vol. C). Under the ROD for the Palmer Gulch Allotment, trailing of livestock will be allowed for a variety of reasons and at various times (page 2 of the ROD and page 39 of the FEIS). The steep slopes to be avoided by allowing trailing through the Norbeck Wildlife Preserve might be in allotments adjacent to the Preserve. Grazing activities have been valid uses of the Norbeck Wildlife Preserve since the 1927 management plan and are specifically authorized by the 1997 Forest Plan, as amended in 2005. The FEIS did not identify any significant impacts from trailing livestock through the Preserve and appellants have identified none. The minor, short-term impacts of livestock trailing must be considered in context of the overall management of the Preserve that adequately "protects" game animal and bird populations and provides habitat and conditions favorable to their breeding.

The list of adaptive management practices listed on page 46 of the FEIS are not site-specific, but the "construct fence to exclude livestock" under "Common to Alternative C" could be used to justify fencing along the Palmer Creek Road, if deemed necessary.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

- IV. By Failing to Adequately Address the Cumulative Impacts of Livestock Grazing Coupled with the Logging that has been Proposed by the Norbeck Wildlife Project and Other Recent Projects, the FEIS/ROD Violate both the NOA and the NEPA (p. 21).

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

The cumulative impacts of livestock grazing and "various vegetative treatments" on focus species are discussed and disclosed at multiple locations within the Appeal Record. The

appellant is correct in their contention that these cumulative impacts are discussed at the scale of the entire Mystic Range Project and not at the scale of the specific Norbeck Wildlife Preserve. 40 CFR §1508.7 (Cumulative Impact) does not define the appropriate scale for the discussion of cumulative impacts, other than to refer to the "action." In this case, the "action" is the entire Mystic Range Project including eight grazing allotments; one of which includes portions of the Norbeck Wildlife Preserve.

Cumulative impacts to golden-crowned kinglet, brown creeper and black-backed woodpecker are discussed and disclosed together as "Tree Nesting MIS" in the FEIS (AR Vol. B pp. 140-145) and in the Wildlife Specialist Report (AR Vol. C pp. 538-544). Additional discussion of cumulative effects to black-backed woodpecker as a sensitive species can be found in the Biological Assessment/Biological Evaluation (AR Vol. C pp. 674-679).

Cumulative water quality and aquatic habitat impacts, are discussed and disclosed at multiple locations within the Appeal Record and include implementation of "various vegetative treatments." Cumulative impacts to watershed resources including water quality can be found in the FEIS (AR Vol. B pp. 267-268) and Hydrology Specialist Report (AR Vol. C pp. 1516-1561 (specific to Palmer Gulch Allotment) and pp. 1790-1793). Cumulative impacts to mountain sucker are specifically disclosed in the Biological Assessment/Biological Evaluation (AR Vol. C pp. 682-688).

USFS Region 2 developed Watershed Conservation Practices (WCPs) to meet state non-point source water quality requirements per Section 319 of the Clean Water Act (AR Vol. C pp. 1411-1412). Applicable WCPs to the Mystic Range Project are listed in the Hydrology Specialist Report (AR Vol. C pp. 1408-1410), are carried forward to the FEIS, Appendix B (AR Vol. B pp. 397-399) and are incorporated into the Palmer Gulch ROD by reference (AR Vol. B p. 470).

Disclosure of past, present and reasonable foreseeable future actions are listed, by allotment, in Appendix C of the FEIS (AR Vol. B pp. 410-419). The use of current environmental conditions as a proxy for the impacts of past actions is discussed in the FEIS (AR Vol. B pp. 74-75). As such, existing condition discussions (often discussed at the scale of the allotment) in all specialist reports also contribute to the assessment of impacts of past actions (e.g. Wildlife Specialist Report AR Vol. C pp. 532-536). Many specialists list these existing conditions allotment by allotment.

Recommendation: Recommend that the District Ranger decision be affirmed on this point.

- V. By Failing to Consider the Direct and Indirect Impacts on Game Animals and Birds of the Proposed Fencing that would be Used to Exclude Livestock from the Norbeck Portions of the Palmer Gulch Allotment, the FEIS/ROD "iolate NEPA (p. 23).

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

The direct and indirect effects on game animals and birds of the proposed fencing is included in the EIS and in the Wildlife Specialists Report contained in the Project Record. The alternative

description on page 41 of the EIS includes a description of the new structural improvements including fences, cattleguards and water developments. The analysis of effects is focused on Management Indicator Species (MIS), Species of Local Concern (SOLC), and Region 2 Sensitive Species as it relates to the associated rangeland improvements, including fencing (EIS p. 128-189). This same discussion and analysis is included in the Wildlife Specialist Report beginning on page 17 (AR Vol. C, pp. 538-600). Also, beginning on page 179 of the EIS, the analysis of effects includes a discussion of potential impacts to "Norbeck Focus Species" because of the portion of the Palmer Gulch Allotment that is included in the project area (AR Vol. C p. 590).

While the NOA authorizes the State of South Dakota to construct fencing on federal lands, it does not limit the authority to construct fences to just the State (see NOA in Vol. C, pages 2399 to 2404). The Norbeck Wildlife Preserve lies within the Black Hills National Forest and is still managed by the Forest Service, as acknowledged in the NOA, the 1927 Norbeck Wildlife Preserve Management Plan (appeal record Vol. C, pages 2412 to 2414), the MOD between the Forest Service and South Dakota Game and Fish Department (see pages 2415 to 2427 of Vol. C of the appeal record), and the Forest Plan. ~ part of that management responsibility, the Forest Service will prepare allotment management plans (AMPs) and issue new grazing permits to implement the decisions made in the ROD for the Palmer Gulch Allotment portion of the Mystic Range Project. The terms and conditions of those permits can include requirements for installation and/or maintenance of range improvements, which include fences (see FSM 2200, R2 Supplement 2200-2003-1, Chapter 2240 - Range Improvements (Vol. C of the appeal record, pages 2173 to 2189).

Guideline 3202 on page E-7 in Appendix E directs that, Structures, such as fences and roads will be designed and built so they do not create unnecessary or unreasonable barriers or hazards for wildlife and people.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

- "I. Failure to Provide a Norbeck-Specific Big Game Hunting Unit "iolates NOA; Absent a Norbeck-specific Big Game Hunting Unit, Forest Plan Standard 5.4A-25OS Violates the Specific "Protection" and "Breeding Place" Mandates for Norbeck by Prioritizing Livestock Grazing over Big Game (p. 25).

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

This issue is outside the scope of the proposed action, which is to reauthorize livestock grazing on the Palmer Gulch Allotment. The 2005 Forest Plan, as amended by Phase II, is not appealable under this decision. The Forest Plan does not require any action inconsistent with the NOA, and the Mystic Range Project complies with the Forest Plan.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

- VII. The Required Wilderness Review Has Never Been Completed for Expanding the Black Elk Wilderness within the Norbeck Wildlife Preserve; the 1997 Reason for Denying this Review Has Been Overturned by the Tenth Circuit Mandate (p. 27).

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

This issue is outside the scope of the proposed action, which is to reauthorize livestock grazing on the Palmer Gulch Allotment. The FEIS for the Phase II Forest Plan Amendment (CAR Vol. C p. 1845A) addresses this point: "Wilderness analysis and recommendations were made as a part of the 1997 Revised LRMP and are outside the scope of the Phase II decision. A roadless analysis and possible wilderness recommendations may be conducted when the Black Hills LRMP is next revised." This issue was not brought up during public scoping or comment for the Mystic Range Project.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

- VIII. By Tiering to the Fatally Flawed Phase II Amendment, the non-Norbeck parts of the FEIS/ROD Violate the NFMA, the 1982 Planning Regulations, the 1999 LRMP Appeal Decision, and the 2000 Settlement Agreement between BCA *et al* and USFS (p. 29).

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

The Phase II ROD for the Forest Plan was signed in October 2005, and the decision was upheld on appeal. The Forest Plan, as amended by Phase II, became effective in March 2006. The Mystic Range Project is consistent with the Forest Plan direction and also complies with NOA.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

- IX. By Failing to Ensure Viable Populations of Wildlife on the non-Norbeck Portions of the Black Hills National Forest, the FEIS/ROD Violate NFMA (p. 30).

- IXA. The 1982 regulations regarding wildlife viability and Management Indicator Species apply to the Mystic Range Project.

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

The ROD and the response to comments provide detailed responses on this appeal point including the key points that the 1982 regulations are no longer in effect, were not adopted by the Phase II Amendment, and that the 2000 transition rule provides the current standard which only requires compliance with the Forest Plan and consideration of Best Available Science when authorizing projects. The response to comments also addresses appellants' claim that the Departmental regulation requires maintenance of viability. This is expressly raised in the appeal point, but the RART team failed to address it even though the response to comments does. See, A-42.

Recommendation: Recommend that the District Ranger's decision be affirmed on both points.

IXB. The FEIS fails to provide thorough consideration and protection for MIS.

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

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 IXC 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 section of the Wildlife (Wildlife Report, AR, Vol C, pp. 538-564) and Fisheries (Fisheries Specialist Report, AR, Vol C, pp. 1272-1288), and Monitoring and Evaluation (AR, Vol C, pp. 1120-1130) 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.

Appellants claim that the FEIS refers back to the Phase II Amendment FEIS "to avoid providing up-to-date data regarding the status of MIS in the planning area." The record shows this is not true. The AR contains the "2009 Monitoring and Implementation Guide Black Hills National Forest Land and Resource Management Plan" (Volume C, pp. 989-1074) and the "Black Hills National Forest FY 2008 Monitoring and Evaluation Report" (Volume C, pp.1075-1136). The status of MIS is covered in the 2009 Monitoring and Implementation Guide (AR, Vol C, pp. 1057-1073) and in the FY2008 Monitoring and Evaluation Report (AR, Vol C, pp. 1120-1130).

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

IXC. The FEIS fails to provide thorough consideration for R2 Sensitive Species.

Discussion: The appellant fails to demonstrate how the project decision itself violates law, regulation or policy as required by 36 CFR 215.14(b)(7) and (b)(9).

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).

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.

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 "Beneficial Impact", "No Impact", "May adversely impact individuals, but is not likely to result in a loss of viability in the planning area, nor cause a trend toward Federal listing" (Wildlife/Fisheries) or "May adversely impact individuals, but is not likely to result in a loss of viability in the planning area, nor cause a trend toward Federal listing or loss of species viability rangewide" (Botany) for each sensitive species under the proposed action. These determinations are part of the AR (Volume C, botany: pp. 1328; wildlife & fisheries: pp. 644-652),

The US Forest Service refutes the Appellants claim that no Biological Evaluation was conducted for the Mystic Range Project. The Wildlife BE for the Mystic Range Project is contained in the AR (Volume C, pp. 628-709), and the AR also contains the Fisheries (Volume C, pp.1272-1289) and Botany (Volume C, pp.1290-1392) Specialist Reports specific to the Mystic Range Project.

Recommendation: Recommend that the District Ranger's decision be affirmed on this point.

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ROBERTSPRENTALL

Appeal Reviewing Officer