

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

AUG 31 2009

IN THE UNITED STATES DISTRICT COURT Stephan Harris, Clerk
Cheyenne
FOR THE DISTRICT OF WYOMING

WESTERN WATERSHEDS PROJECT,)	
)	
Petitioner,)	
)	
vs.)	Case No. 07-CV-323-B
)	
)	
UNITED STATES FOREST)	
SERVICE, et al.,)	
)	
Respondents.)	

ORDER AFFIRMING ADMINISTRATIVE ACTION AND DENYING PETITIONER'S
MOTION FOR RECONSIDERATION OF MAGISTRATE JUDGE'S RULINGS

This matter came before the Court on the Petitioner's Petition for Review of Agency Action [doc. #1]. A hearing was held concerning this matter on July 28, 2009. Natalie Havlina and Gay George appeared on behalf of the Petitioner; Carol Statkus appeared on behalf of the Respondent; Daniel Frank appeared on behalf of the Respondent-Intervenors; and James Kaste appeared on behalf of the State of Wyoming as amicus curiae. After considering the Petition, reviewing the materials on file, and hearing oral arguments, and being fully advised in the premises, this Court FINDS that the administrative action should be AFFIRMED. The Court further FINDS

and ORDERS as follows:

I. FACTUAL BACKGROUND

The Bighorn National Forest is located in north central Wyoming's Bighorn mountain range. The forest contains 1,115,161 acres within its boundaries, including 7,491 acres of State and private land. (R. at B04802.) Bighorn National Forest embraces mountain meadows and grasslands that have provided grazing pastures for livestock since settlers first moved into the area. (R. at B4803.) Sheep, cattle, and horses continue to graze on forest lands to this day, and the ability of community members to use forest land as sustenance for livestock has preserved the lifestyle, custom, and culture of the local communities surrounding the Bighorn National Forest.¹ (Id.)

A. 1985 Bighorn National Forest Plan

In 1985, pursuant to the National Forest Management Act of 1976, the United States Forest Service ("Forest Service") initiated and adopted a forest plan for the Bighorn National Forest ("1985 Plan"). The Forest Service prepared an environmental impact statement ("1985 EIS") to accompany the initial forest plan

¹ More than 28,000 cattle and 21,000 sheep graze on forest land under special use permits. (R. at B04802.)

pursuant to NEPA. (R. at B00219-1657.) The 1985 EIS evaluated eight different alternatives, and the potential environmental impacts of each alternative analyzed. (R. at B00125-28, B00305-06.) Within these alternatives, the 1985 EIS examined varying levels of livestock grazing, and the effects the different levels would have on the environment. (R. at B00269-85.) The forest plan for the Bighorn National Forest was finalized, and remained in place until 2005 when the Forest Service published its Record of Decision implementing a revised forest plan for the Bighorn National Forest.

B. 2005 Revised Bighorn National Forest Plan

In November 1999, the Forest Service published a Notice of Intent to revise the 1985 Bighorn National Forest Plan (R. at B02188-2196.) Over the next five years, the Forest Service looked to, and analyzed the environmental effects of a variety of alternatives. The Forest Service collaborated with the public, other agencies, and State and local governments to develop the revised plan. (R. at B03409-10, B03435-36.) Throughout the plan revision process, the Forest Service focused on five major "Revision Topics." (R. at B03481-87.) These five topics were developed based on a review of monitoring for a thirteen year

period, results of an Allowable Sale Quantity Analysis, inventories, assessments, Forest Service conservation leadership initiatives, laws and regulations, and comments received during the scoping period. (R. at B03481.) The five major revision topics included: (1) Biological and Habitat Diversity; (2) Timber Suitability and Management of Forested Lands; (3) Roadless/Wilderness; (4) Special Areas; and (5) Recreation and Travel Management. (R. at B03481.) Although a number of additional topics were proposed by the public and other agencies, the Forest Service determined that those topics "represented need for change, but they were not urgent enough to be categorized as amendment topics or would not drive the development of alternatives." (R. at B04153.) Those additional topics, however, "were used when developing standards and guidelines and when conducting the effects analysis for the [Final Environmental Impact Statement] FEIS." (Id.) Livestock grazing was identified as one of these additional topics. (Id.)

Using the five major revision topics, the Forest Service developed a range of alternatives. (R. at B03492.) Based on discussions with various groups, agencies, and public comment, the Forest Service added alternatives and incorporated ideas into

existing alternatives. (R. at B03492-93.) Following further analysis, the Regional Forester approved a range of six alternatives for detailed review, including a "no action" alternative. (R. at B03493.) These six alternatives, A, B, C, D, E, and the no action alternative, were published in the draft environmental impact statement (DEIS). (Id.) After receiving public comment on the DEIS, the Forest Service added a modified version of alternative D in the final environmental impact statement (FEIS).² (R. at B03492.) The six original alternatives as well as D-FEIS were analyzed in detail in the FEIS. (R. at B03493.) The alternatives selected for detailed analysis did not differ concerning forest-wide livestock grazing numbers. (R. at B03461.) The alternatives did, however, contain significantly different allocations of "management areas." (R. at B03550-52.)

Although the seven alternatives identified above were the only alternatives discussed in detail in the FEIS, the Forest Service did consider a number of other alternatives, but determined that detailed analysis of these alternatives was not warranted. (R. at B03517-27.) In making this determination, the Forest Service briefly discussed each of the additional alternatives, and

² This alternative is identified as D-FEIS while the original alternative is referred to as D-DEIS. (R. at B03492.)

explained the rationale for leaving them out of the detailed analysis process. (Id.)

Ultimately, the Regional Forest adopted Alternative D-FEIS for the Revised Bighorn National Forest Plan. (R. at B03401.) This alternative emphasized "active vegetation management, primarily through timber harvest and prescribed fire; providing sawtimber, firewood, and other wood products; livestock grazing; and diversifying wildlife habitat." (R. at B03508.) The Revised Bighorn National Forest Plan also explained that it represented a programmatic document, and that many decisions would be made at the project-level following detailed site-specific analyses. (R. at B04800.) It then went on to identify "Grazing Allotment Management Plans" as an example of "project decisions that require more detailed environmental analysis" at the site-specific level. (Id.)

After the Forest Service published the ROD pertaining to the Revised Bighorn National Forest Plan, Western Watersheds Project appealed the decision to the Forest Service. (R. at B04731.) On August 15, 2006, the Forest Service affirmed the ROD. (R. at B04773-87.)

C. Piney Creek Allotment Management Plans

In early 2005, the scoping process for the Piney Creek

Allotment Management Plans began. (R. at B08296.) The Piney Creek Allotment Management Plans (AMPs) includes the Piney Creek, Little Piney, and Willow Park cattle and horse livestock grazing allotments. (R. at B08309.) The Forest Service authorizes livestock grazing on these allotments under term grazing permits. An environmental assessment (EA), produced by the Forest Service regarding the Piney Creek AMPs, was made available for public comment in September 2006. (See R. at B08297.) The EA considered three alternatives in detail. (See R. at B08296.) These included: Alternative 1, no livestock grazing, Alternative 2, livestock grazing under current management, and Alternative 3, livestock grazing using adaptive management. (R. at B08295-96.)

On May 7, 2007, the Forest Service issued the Decision Notice (DN) and Finding of No Significant Impact (FONSI) for the Piney Creek AMPs. (R. at B08291-8303.) A Final EA accompanied the decision, in which the District Ranger opted to implement Alternative 3 - "Livestock Grazing Using Adaptive Management." (R. at B08304-51.)

D. Petition for Review of Agency Action

Western Watersheds Project filed a Petition for Review of Agency Action in this Court on December 20, 2007. (Pet. for Review

of Agency Action.) The Petition seeks review of the adoption of the Revised Land and Resource Management Plan (also known as the Revised Bighorn National Forest Plan) and the supporting FEIS. (Id.) Western Watersheds Project also seeks federal court review of the Forest Service's DN and FONSI for the Piney Creek AMPs and the supporting Final EA. (Id.)

II. STATEMENT OF PARTIES, JURISDICTION, AND VENUE

A. Statement of the Parties

Petitioner, Western Watersheds Project (WWP), is a non-profit conservation group. WWP has an office and staff located in Wyoming, and many of its members frequently visit the Bighorn National Forest for recreational, scientific, educational, and aesthetic purposes.

Respondent, United States Forest Service, is an agency of the United States Department of Agriculture (USDA). The USDA is a department of the executive branch of the United States government, and is responsible for overseeing the activities of the Forest Service. The Forest Service is charged with the administration of the National Forests, including the Bighorn National Forest which is the subject of the current Petition.

The Intervenors in this case consist of Bighorn, Johnson, and

Washakie Counties, as well as the Wyoming Stock Growers Association (WSGA), the Wyoming Farm Bureau Federation (WFBF), the Muddy Creek Grazing Association, and Joe Foss individually. The Intervenor counties, in this case, worked with the Forest Service as "cooperating agencies" in developing the 2005 Revised Bighorn Forest Land Resource Management Plan. Intervenor WSGA is a Wyoming non-profit corporation. WSGA represents approximately 1,200 cattle owners, producers, and ranchers within the State of Wyoming. Intervenor WFBF is another Wyoming non-profit corporation founded to represent agricultural producers throughout Wyoming. Intervenor Muddy Creek Grazing Association is an unincorporated association of livestock grazing permittees who hold livestock grazing permits on the Muddy Creek Allotment of the Bighorn National Forest. Finally, Joe Foss is a rancher who holds a livestock grazing permit for the Willow Park Allotment lying within the Bighorn National Forest.

Amicus curiae, the State of Wyoming, is a sovereign state of the United States. The State of Wyoming has an interest in this suit in its own right and on behalf of its own citizens.

B. Jurisdiction

Petitioner seeks judicial review of the final agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*,

the National Environmental Policy Act, and the National Forest Management Act. This Court exercises jurisdiction pursuant to 28 U.S.C. § 1331, 5 U.S.C. §§ 704 and 706(2), and 42 U.S.C. §§ 4321 *et seq.*

C. Venue

Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) as all or a substantial portion of the events or omissions giving rise to the claims herein occurred within the State of Wyoming.

III. STATUTORY FRAMEWORK

A. National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires federal agencies to examine the environmental impacts that a proposed action may have prior to its implementation. Utah Env'tl. Congress v. Bosworth, 443 F.3d 732, 736 (10th Cir. 2006). Congress promulgated NEPA with the twin goals of fostering informed decision-making by the agency and encouraging informed public participation in the agency process. See Forest Guardians v. United States Forest Serv., 495 F.3d 1162, 1172 (10th Cir. 2007) (stating that a Court reviews an EIS to determine whether the presentation of the topics fostered informed decision-making and informed public participation). By focusing the agency's and the

public's attention on the possible environmental effects, "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

In requiring that an agency analyze the environmental impacts of a proposed action, NEPA demands that the agency prepare either an environmental impact statement (EIS), an environmental assessment (EA), or a categorical exclusion. Utah Envtl. Congress v. Bosworth, 443 F.3d at 736. An environmental impact statement, the most rigorous analysis of the three, is required when a proposed action will "significantly affect[] the quality of the human environment." Id.; 42 U.S.C. § 4332 (2)(C); see also 40 C.F.R. § 1502.4 (requiring an EIS for a major federal action). The EIS assesses "the predicted impacts of the proposed action on all aspects of the environment, including indirect and cumulative impacts." New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 703 (10th Cir. 2009).

Although NEPA mandates that all agencies perform procedural requirements in compliance with the Act, it does not command any specific, substantive environmental results. Marsh v. Or. Natural

Res. Council, 490 U.S. 360, 371 (1989). If the record, submitted to the court, demonstrates that the agency took a "hard look" at the environmental consequences of the proposed action, "the court will not second-guess the wisdom of the ultimate decision." Utahns for Better Transp. v. United States Dept. of Transp., 305 F.3d 1152, 1163 (10th Cir. 2002). "In other words, [NEPA] prohibits uninformed - rather than unwise - agency action." Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1178 (10th Cir. 2008).

B. National Forest Management Act

The National Forest Management Act of 1976 (NFMA) requires the Forest Service to develop a land and resource management plan, also known as a forest plan, for each forest unit in the National Forest System. 16 U.S.C. § 1604(a), (e). The requisite forest plan provides day-to-day management standards for each forest unit, and must be revised at least every fifteen years. 16 U.S.C. § (f)(5); Colo. Off-Highway Vehicle Coal. v. United States Forest Serv., 357 F.3d 1130, 1132 (10th Cir. 2004); see also 16 U.S.C. § 1604(f)(5). The creation or revision of a forest plan constitutes a major federal action that "significantly affects the quality of the human environment." Id. at 1132; 42 U.S.C. § 4332(2)(C); 40 C.F.R. §

1502.4. As such, the Forest Service must support the forest plan by an EIS that details the environmental impacts of the forest plan on the forest and surrounding areas. Colo. Off-Highway, 357 F.3d at 1132.

NFMA envisions forest management by the Forest Service on two distinct levels: (1) programmatic and (2) project or site-specific. Colo. Env'tl. Coal. v. Dombeck, 185 F.3d 1162, 1167-68 (10th Cir. 1999). At the programmatic level, the Forest Service develops "general, forest-wide planning goals memorialized in a forest plan." Utah Env'tl. Congress v. Bosworth, 443 F.3d at 737. When creating a forest plan at the programmatic level, the Forest Service must account for an array of interests and uses including "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." Id. (citing 16 U.S.C. § 1604(e)(1)). Alternately, at the site-specific or project level, the Forest Service implements the forest plan by approving or disapproving specified projects. Id. The Forest Service does this through additional environmental analyses including an additional environmental impact statement, environmental assessment or categorical exclusion. Id. Although the Forest Service looks to each particular project individually, every project, at the site-

specific level, must comply with the overall, applicable forest plan. Silverton Snowmobile Club v. United States Forest Serv., 433 F.3d 772, 785 (10th Cir. 2006); 16 U.S.C. § 1604(i)).

IV. STANDARD OF REVIEW

Neither NEPA nor NFMA provides for a private right of action. Utah Env'tl. Congress v. Bosworth, 443 F.3d at 739. As a result, the Court must review the Forest Service's actions under the Administrative Procedure Act ("APA"), which empowers a district court to review an agency's final action. 5 U.S.C. § 704; Utahns for Better Transp., 305 F.3d at 1164. Pursuant to the APA, a reviewing court may hold an agency action unlawful and set it aside only if it finds the agency action to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A); Utahns for Better Transp., 305 F.3d at 1164. Under this standard, the court must determine whether "the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Utah Env'tl. Congress v. Richmond, 483 F.3d 1127, 1134 (10th Cir. 2007) (citation omitted).

Although an agency's actions are generally entitled to a presumption of regularity, an agency action is arbitrary and

capricious if it: (1) failed to consider an important aspect of the problem; (2) offered an explanation for its decision that runs counter to the evidence before the agency; or (3) produced a decision that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Utah Envtl. Congress v. Richmond, 483 F.3d at 1134. Nevertheless, the standard of review is a narrow one, and a court must be mindful not to substitute its own judgment for that of the agency. Id. at 1134. As the United States Supreme Court has stated, "Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . . , not simply because the court [or the petitioner] is unhappy with the result reached." Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983) (quoting Vt. Yankee Nuclear Power Co. v. Natural Res. Def. Council, Inc. 435 U.S. 519, 558 (1978)).

V. DISCUSSION

A. Consideration of Alternatives

WWP's primary contention in this case rests with the Forest Service's failure to consider, in detail, livestock grazing alternatives when it promulgated the revised Bighorn National

Forest Plan ("Revised Plan"). WWP argues that this failure was arbitrary and capricious, and that as a result, the Revised Plan must be reversed and remanded to the Forest Service for further rulemaking. Although the Court recognizes that the Forest Service did, indeed, neglect to consider grazing alternatives in detail at the programmatic level when promulgating the Revised Plan, the Court finds that the agency's decision in preserving grazing determinations for site-specific evaluation was neither arbitrary nor capricious.

1. *National Environmental Policy Act*

The "heart" of a NEPA analysis lies in an agency's consideration of a range of alternatives. New Mexico, 565 F.3d at 708. Pursuant to NEPA, every environmental impact statement must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). Without a thorough environmental analysis of alternatives, the ability of an agency to make an informed decision would be substantially hampered. New Mexico, 565 F.3d at 708. While NEPA requires agencies to evaluate a range of alternatives in generating environmental impact statements, that range need not be infinite. Utahns for Better Transp., 305 F.3d at 1166. Instead, courts apply the "rule of

reason standard (essentially an abuse of discretion standard) in deciding whether claimed deficiencies in a[n] FEIS are merely flyspecks, or are significant enough to defeat the goals of informed decisionmaking and informed public comment." Id. at 1163.

Turning to the current action, WWP contends that the Revised Plan violates NEPA requirements because it failed to consider a reasonable range of alternatives regarding grazing at the programmatic level. First, WWP argues that the Forest Service's decision not to include grazing alternatives for detailed analysis in the EIS was arbitrary and capricious because it has considered grazing alternatives in other forest plans around the country. WWP also argues that the failure to consider alternatives for grazing was arbitrary and capricious as the Forest Service did consider alternatives for grazing in the 1985 Bighorn National Forest Plan. The Court will take each of these arguments in turn.

WWP first asserts that the Forest Service's failure to consider a range of grazing alternatives at the programmatic level was arbitrary and capricious because it has considered grazing alternatives at the programmatic level when creating environmental impact statements (EISs) for other forest plans across the country. In supporting this contention WWP has requested that the Court

supplement the administrative record with EISs from different forest plans. Initially, Magistrate Judge Beaman denied this request determining that the additional EISs were "irrelevant to the issues present in the case." (Order Denying Pet'r's Mot. to Consider Extra-Record Evidence or Supplement the Administrative R. at 4.) This Court agrees.

As Magistrate Judge Beaman stated in his Order, "The lawsuit revolves around whether respondent followed the requirements set forth by NEPA in its revision process for the Bighorn National Forest; EISs concerning other national forests are unrelated to this inquiry and provide no useful background information." (Id.) This Court finds that reasoning persuasive. Actions the Forest Service may have taken regarding other forests in this country have no bearing on whether the Forest Service complied with NEPA here. What may work well for one forest, may not for another. Additionally, to understand the rationale behind the Forest Service's decision to include grazing alternatives in these other forest plans, the Court must review the entire EIS for those plans. To use an EIS piecemeal in the fashion requested by WWP is disingenuous, and the Court refuses to utilize portions of those EISs absent the context in which the alternatives were considered.

As a result, the Court finds WWP's line of reasoning unpersuasive on this point. Furthermore, because the additional EISs are irrelevant to the case at hand³, the Court FINDS that Petitioner's Motion for Reconsideration of Magistrate Judge's Rulings is DENIED.

WWP also argues that the Forest Service's failure to consider grazing alternatives at the programmatic level was arbitrary and capricious because it had done so in the 1985 Bighorn National Forest Plan. The Court recognizes that the Forest Service did consider grazing alternatives in the 1985 Forest Plan, through varying the number of permitted animal unit months (AUMs) by alternative.⁴ (R. at B00136-37.) Nevertheless, similar to the above discussion, what the Forest Service did twenty years prior to implementing the Revised Plan is irrelevant to the question of whether the Forest Service complied with NEPA in 2005.

Indeed, the Forest Service clearly realized that setting

³ The Court also agrees with Magistrate Judge Beaman regarding the newsletter that Petitioner's wish to add to the administrative record. As stated by Magistrate Beaman, "[T]he pertinent information contained in the newsletter is already present in the administrative record; therefore, the Court finds no need to add the newsletter to the record." (Order Denying Pet'r's Mot. to Consider Extra-Record Evidence or Supplement the Administrative R. at 4.)

⁴ An AUM is the amount of forage required to sustain a 1,000-pound animal for one month, or 780 pounds of forage.

specific output AUMs at the programmatic level is neither feasible nor practical. (See R. at B06566-67.) The 1985 Forest Plan called for an output of 143,000 AUMs each year with a projected annual output of 144,000 AUMs for the years 2000 to 2030. (R. at B06565.) Nevertheless, in 2002, only 118,396 AUMs were actually permitted on the Bighorn National Forest. (R. at B06566.) Clearly, setting goals based on a specific output of AUMs, created an exercise in futility. The Forest Service recognized the impracticability of doing so in its Analysis of the Management Situation stating, "Monitoring has shown that the 1985 Forest Plan objective of 144,000 AUMs cannot be consistently supported while meeting the other Forest Plan goals and objectives Livestock grazing on the Forest has evolved to be based upon a desired condition, rather than an output of AUMs." (R. at B06567.)

By focusing on the desired condition of the Bighorn National Forest, instead of a specific output of AUMs, the Forest Service is better able to determine which areas need additional conservation and which areas can sustain higher levels of grazing. To adequately determine this, the Forest Service must be given the opportunity and discretion to analyze each area permitted for grazing, in detail, and decide how that area should be managed. It

would be infeasible to do this on a forest-wide basis, and the Court cannot say that the Forest Service's decision to preserve this decision for site-specific analysis was either arbitrary or capricious.

WWP makes a third argument regarding NEPA and the failure of the Forest Service to consider grazing alternatives at the programmatic level. Essentially, WWP disputes the Forest Service's statement that it could not consider livestock grazing rates at a programmatic level because it was infeasible. WWP asserts that the Forest Service did, in fact, set a "binding target" rate of 113,800 or more AUMs in the Revised Plan. (Pet'r WWP's Proposed Findings of Fact and Conclusions of Law ¶ 98.) When the Court looks to the actual language used, however, it becomes clear that this number is not a "binding target," but something else altogether.

The Forest Service set forth four goals in implementing the Revised Plan at the site-specific level. The second goal focuses on the multiple benefits the Bighorn National Forest can provide to people. (R. at B04812.) It states, "Provide a variety of uses, values, products, and services for present and future generations by managing within the capability of sustainable ecosystems. Recognize the interdependence between the Bighorn National Forest

and local communities. Consider natural and social systems across landownership boundaries, including land use patterns and open space." (Id.) Within that goal, the Revised Plan discusses livestock grazing:

Provide forage for livestock while managing to meet desired conditions. Provide forage for livestock at a level that strives to maintain or exceed the year 2004 permitted stocking level of 113,800 Animal Unit Months (AUMs), while recognizing that stocking levels may be adjusted through the implementation of allotment management plans (AMPs) and administration of grazing permits.

(R. at B04815 (emphasis added).) In spite of the Forest Service's inclusion of the number 113,800 AUMs, the emphasis remains with managing the forest to meet desired conditions rather than a specific output of AUMs. Additionally, the Forest Service makes clear that discretion still rests at the site-specific level. Although the Forest Service may strive to maintain a specific output of AUMs, it does not make that number mandatory, and it emphasizes that grazing levels can, and likely will, be adjusted through AMPs. This is plainly in keeping with the Forest Service's decision that grazing determinations should be made at the site-specific level "based upon a desired condition, rather than an output of AUMs." (R. at B06567.)

2. *National Forest Management Act*

In promulgating a forest plan, NFMA requires the Forest Service to consider "a broad range of reasonable alternatives according to NEPA procedures." 36 C.F.R. § 219.12(f) (1982). The goal, under NFMA, for considering a range of alternatives is to "identify[] the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements" *Id.* Pursuant to this goal, NFMA states, "Alternatives shall be distributed between the minimum resource potential and the maximum resource potential to reflect to the extent practicable the full range of major commodity and environmental resource uses and values that could be produced from the forest." *Id.* § 219.12(f)(1). Additionally, NFMA requires the Forest Service to consider alternatives that "address and respond to the major public issues, management concerns, and resource opportunities identified during the planning process." *Id.* § 219.12(f)(4).

WWP argues that the Forest Service failed to comply with these mandates by neglecting to consider grazing alternatives at the programmatic level. Initially, WWP contends that livestock grazing is a "major commodity" of the Bighorn National Forest, and as such,

alternatives regarding grazing were required by NFMA in promulgating the Revised Plan. Additionally, WWP argues that livestock grazing on forest land presented a "major public issue" during the planning process as evidenced by the numerous comments received by the Forest Service regarding grazing. As a result, pursuant to NFMA, the Forest Service should have considered grazing alternatives at the programmatic level.

Notwithstanding WWP's implications to the contrary, nothing in NFMA requires the Forest Service to consider alternatives regarding major commodities or public issues in detail. The Forest Service absolutely complied with NFMA by considering grazing alternatives despite its rejection of these alternatives for detailed examination. (R. at B03517-27.) Indeed, the Forest Service considered a Non-Commodity Based Alternative (discontinuing livestock grazing and sawtimber harvesting), a No Sheep Grazing Alternative, a Reduced Livestock Grazing Alternative, and an Alternative with Predetermined Livestock Grazing Outputs. (R. at B03517-18.)) As required by NFMA, the Forest Service complied with NEPA by considering these alternatives briefly, and giving sufficient rationales as to why they were not utilized for detailed consideration. See 36 C.F.R. 219.12(f) (stating that alternative

shall be formulated according to NEPA procedures); see also All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992) (stating that NEPA "does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective") (citations omitted). That is all that NFMA and NEPA require, and the Court is not persuaded that the Forest Service's decisions, actions, or rationales were arbitrary and capricious in this respect.

3. *Site-Specific Consideration of Alternatives*

WWP essentially argues that the Forest Service failed to comply with NEPA and NFMA by neglecting to discuss grazing alternatives, in detail, at the programmatic level. The Court notes, however, that the Forest Service performed every task that WWP is requesting at the site-specific level in promulgating the EA for the Piney Creek Allotment Management Plans. See Forest Guardians v. Forsgren, 478 F.3d 1149, 1154 (10th Cir. 2007) (recognizing that implementation of forest plans occurs when site-specific projects are "proposed and assessed" and that only when this occurs is there an "irreversible commitment of resources"). In fact, the Forest Service exclusively considered grazing

alternatives at the site-specific level. (See R. at B08295-96.) It also performed an in-depth and lengthy environmental analysis of the allotment areas in determining which alternative should be selected, and how grazing should be managed for each allotment. (R. at B08555-10025.)

Neither NEPA nor NFMA requires the Forest Service to consider every possible alternative at the programmatic level. Indeed, an agency may restrict its detailed analysis of alternatives to correspond to the agency's "basic policy objectives" of a planning action. New Mexico, 565 F.3d at 709 n. 30; see also Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976) (recognizing that feasibility considerations may necessitate the restricting the scope of comprehensive statements). The agency is given discretion in defining the purpose, goals, and objectives in creating a forest plan, and that discretion is constrained only in that the Forest Service must refrain from unreasonably defining the purpose too narrowly. New Mexico, 565 F.3d at 709 n. 30.

Despite WWP's contentions, the purpose of the Revised Plan was anything but narrow. The Forest Service recognized five broad categories needing revision. (R. at B03481-87.) The five major revision topics included: (1) Biological and Habitat Diversity; (2)

Timber Suitability and Management of Forested Lands; (3) Roadless/Wilderness; (4) Special Areas; and (5) Recreation and Travel Management. (R. at B03481.) These are extremely broad topics that cover a wide range of issues. Simply because the Forest Service opted not to include livestock grazing in these revision topics does not mean that the Forest Service unreasonably narrowed its purpose, objectives, and goals in implementing the Revised Plan. After considering the arguments set forth by WWP, the Court ultimately finds that the Forest Service's decision to determine livestock grazing levels at the site-specific level rather than the programmatic level was not arbitrary and capricious.

B. "Hard Look" Requirement

NEPA requires agencies to take a "hard look" at the environmental consequences of a proposed action. Robertson, 490 U.S. at 350. Nevertheless, as the Court has already recognized, NEPA does not demand that agencies elevate environmental concerns over other valid concerns. Balt. Gas, 462 U.S. at 97. Indeed, so long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the

environmental costs." Robertson, 490 U.S. at 350.

In taking a "hard look" at the environmental consequences of a proposed action, the agency must analyze the direct impacts of that action, as well as the indirect and cumulative impacts of "past, present, and reasonably foreseeable future actions" 40 C.F.R. § 1508.7; Dombeck, 185 F.3d at 1176. WWP contends that the Forest Service failed in this command by neglecting to analyze the direct and current environmental impacts of grazing on the forest prior to adoption of the Revised Plan.⁵

In promulgating the Revised Plan, the Forest Service continually emphasized that grazing determinations would not be made at the programmatic level as this had proven to be impractical through the 1985 Forest Plan. (See, e.g., R. at B06567.) Instead, grazing decisions would be made at the site-specific level where local foresters could provide a more accurate and specific evaluation of the area, and the amount of grazing that each area could sustain while maintaining the integrity of the surrounding environment. The Forest Service did just this when it implemented

⁵ The Court notes that the Forest Service has submitted a total of twenty-two volumes of administrative records to the Court for consideration. After reviewing these documents, the Court has no doubt that the Forest Service took the requisite "hard look" at the environmental consequences of its decision.

the Piney Creek AMPs. Foresters provided an extensive and intensive analysis of the area prior to implementing the livestock grazing plan in those areas. (R. at B08555-10025.)

The Forest Service not only performed a detailed examination of the environment at the site-specific level, it also analyzed, although in less detail than at the site-specific level, the effects of livestock grazing at the programmatic level. WWP asserts that the Forest Service made only general statements about the potential and historic grazing impacts, but failed to provide any information regarding "the *current* condition of the Bighorn National Forest or the extent to which grazing *actually* caused or is causing those conditions." (Pet'r WWP's Proposed Findings of Fact and Conclusions of Law ¶ 140 (emphasis in original).) This contention is inaccurate. The Forest Service continually acknowledged the adverse and advantageous environmental effects that livestock grazing poses to the environment.

For example, the Forest Service provided a detailed study of nine different geographic areas within the Bighorn National Forest, and the current condition of those areas. (R. at B06581-7026.) Although the reported conditions within each geographic area do not exclusively discuss the effects of grazing, each area contains a

section on grazing and its impacts. (R. at B06639-40 (grazing on Clear Creek, Crazy Woman Creek, North Fork of Powder River geographic area), B06688-89 (grazing on the Devil's Canyon geographic area), B06731-32 (grazing on the Goose Creek geographic area), B06779-80 (grazing on the Little Bighorn geographic area), B06825-26 (grazing on the Paintrock Creek geographic area), B06866-67 (grazing on the Piney/Rock Creek geographic area), B06920-22 (grazing on the Shell Creek geographic area), B06961-62 (grazing on the Tensleep Creek geographic area), B07013-14 (grazing on the Tongue River geographic area).) In addition, each of these geographic analyses documents the detrimental effects that livestock grazing has had and will likely continue to have on riparian areas, soil, water quality, vegetation, etc. (See, e.g., B06596 (grazing as a disturbance factor in riparian areas in Clear Creek geographic area) B06605 (grazing as a disturbance on soil in Clear Creek geographic area) B06615 (grazing impacts on hydrologic conditions in Clear Creek geographic area).)

Furthermore, in addition to the geographic analyses, the Forest Service also relied on a study performed by David S. Winters, an aquatic ecologist ("Winters Study") in looking at the environmental effects of livestock grazing. (R. at B05652-6016.)

Again, the Winters Study does not exclusively consider the effects of livestock grazing on aquatic areas. It does, however, recognize the detrimental impact that livestock grazing has and may continue to have on aquatic areas of the forest. (R. at B05924-27.)

These are but a few of the references and analyses that the Forest Service examined, regarding livestock grazing, in creating the Forest Plan.⁶ Again, the Court is only charged with the responsibility of determining whether the Forest Service produced enough information to enable it to take a "hard look" at the environmental consequences and make an informed decision. The Court is convinced that sufficient information existed in the administrative record regarding the detrimental and advantageous effects of livestock grazing for the Forest Service to make an informed decision. Simply because WWP may not like the ultimate outcome does not mean that the Forest Service was in violation of the law.

C. Allotment Management Plans

WWP argues that the Piney Creek Allotment Management Plans must be reversed and remanded as they are tiered to the Revised

⁶ The Court emphasizes that this is far from an exhaustive listing of the environmental analyses regarding the effects of livestock grazing performed by the Forest Service in promulgating the Revised Plan.

Plan, and that Plan is in violation of NEPA and NFMA. The Court, however, has found that the Revised Bighorn National Forest Plan is not in violation of established law. As a result, the Piney Creek AMPs are likewise valid.

VI. CONCLUSION

The Court finds that the Forest Service's actions in this case were neither arbitrary nor capricious, and that the Forest Service took the requisite "hard look" at the environmental consequences in implementing the Revised Bighorn National Forest Plan and the subsequent Piney Creek AMPs.

NOW THEREFORE, IT IS HEREBY ORDERED that the administrative action is AFFIRMED.

IT IS FURTHER ORDERED that Petitioner's Motion for Reconsideration of Magistrate Judge's Rulings is DENIED.

Dated this 31st day of August, 2009.


UNITED STATES DISTRICT JUDGE