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Department of  
Agriculture

Forest  
Service

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File Code: 1570-1/2200

Date: June 25, 2002

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**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**  
7000 2870 0000 1135 5124

Re: Appeal #02-01-01-251, Pleasant Valley Allotment, Clifton Ranger District,  
Apache-Sitgreaves National Forests

Dear Mr. Shapiro:

This letter documents my second-level review decision of the appeal you filed on behalf of your clients, Abe and Lydia Martinez (permittees). The appeal is in regard to District Ranger Hayes' decision to implement Alternative D that is described in the Decision Notice signed by Ranger Hayes on December 6, 2001. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

### **BACKGROUND**

On December 6, 2001, Ranger Hayes (Deciding Officer) signed a Decision Notice implementing Alternative D for management of the Pleasant Valley Allotment. On January 28, 2002, you filed your first-level appeal, including a request for stay. On January 31, 2002, Forest Supervisor Bedell (first-level Reviewing Officer) denied your request for stay. On February 6, 2002, I informed you that, in accordance with the discretionary review authority at 36 CFR 251.100, I would not review the first-level Reviewing Officer's denial of your stay request. Under the provisions of 36 CFR 251.94, the District Ranger completed his written responsive statement to your appeal on February 20, 2002. On March 19, 2002, you submitted your response to the District Ranger's Responsive Statement. On April 1, 2002, Supervisor Bedell closed the record. Based on his review of the record, Supervisor Bedell affirmed the District Ranger's decision on April 24, 2002.

Your second-level appeal was received in this office on May 9, 2002. By letter dated May 21, 2002, I indicated my review would be made within 30 days from the date the appeal record was received.

### **POINTS OF APPEAL**

My review of this appeal was confined to the substantive points raised in the appeal, the appeal record, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.



**ISSUE 1:** The Environmental Assessment of December 6, 2001, relies on generalizations rather than site-specific factual data.

**Discussion:** A review of the record discloses that the following site-specific data was used in the analysis. Record 3, Heritage Data Management System maps and information; Record 31, protocol for complying with the Clean Water Act in Arizona; Record 32, documentation of clusters, paces, and Daubenmire transects to be read for a 1998 range analysis; Record 35, guidance criteria for effects determinations on listed species; Record 37, watershed condition assessment methodology; Record 38, results of production-utilization survey dated January 28, 1999; Record 40, utilization monitoring dated May 24, 1999; Record 43, request for federally listed and sensitive species list from the Arizona Game and Fish Department; Record 44, special status species list; Record 46, range inspection report dated October 7, 1999; Record 47, documentation of planning meeting with permittee; Record 63, permittee proposed stocking rates; Record 72, geographical information system acres by slope and terrestrial ecosystem survey mapping units; Record 98, wild ungulate forage needs; Record 99, evaluation of fish resources on Pleasant Valley Allotment; Record 100, listing of Federally listed species, sensitive species, and management indicator species; Record 101, existing condition for fish, wildlife, and rare plants; Record 101A, summary of PFC surveys; Record 102, revised wild ungulate forage needs; Record 109, final allotment analysis; Record 111, cultural resource report; Record 119, list of Federally listed and sensitive species; Record 120, basin characteristics and stream flow statistics for Arizona; Record 123, biological assessment; Record 132, cumulative effects analysis; Record 136, allowable forage use by livestock; Record 138, corrected information for Razorback sucker for biological assessment; Record 139, permittee income and improvement cost spreadsheet; Record 149, wildlife report; Record 161, actual use history; and Record 241, biological opinion. Additionally, 41 supporting tables and appendixes are included in the environmental assessment. These include information such as the summary of PFC surveys on Dix Creek, livestock capacity calculations, and wildlife forage demands.

As the first-level Reviewing Officer pointed out “The Environmental Assessment has a very detailed discussion and maps of the current resource conditions...This data is specific as to acres and mapping units on the allotment...Approximately 18 specialists are identified in the E.A. as providing data as well as input into the assessment. Site-specific range condition data by map unit and production of forage by unit are displayed...and are derived from production utilization surveys...A Range Analysis was conducted on the allotment in 2000...Riparian surveys were conducted on the allotment in 1998 and 1999...”

Significant issues considered in the analysis included watershed and soil condition, riparian condition, economic impacts to families and local communities, and social concerns related to rural lifestyles. Five alternatives responding to the issues were analyzed in detail and documented in the environmental assessment (Doc. 244). Furthermore, the Deciding Officer’s rationale for selecting Alternative D is documented in the Decision Notice and Finding of No Significant Effect.

**Finding:** The record indicates the Deciding Officer used the best data available to analyze alternatives to the proposed action and to make his decision regarding the management of the Pleasant Valley Allotment. The best available data used in the analysis was site specific to the Pleasant Valley Allotment.

**ISSUE 2:** Exclusion of cattle from the San Francisco River and Dix Creek unnecessarily and unconstitutionally takes the permittee's water rights.

**Discussion:** The Appellant did not submit Statement of Claims No. 36-68576 and 36-68575 as part of the record that he referenced in his appeal. Therefore, the appellant's claim cannot be evaluated based on the referenced statements of claim.

**Finding:** In the first-level review decision, the Reviewing Officer acknowledges the deferment of grazing in riparian areas is a necessary action to ensure proper stewardship of rangeland resources. Additionally, the Reviewing Officer goes on to say "Nowhere in the decision does it state that the Permittee cannot irrigate his private land, maintain and use the ditch to transport the water, or pump water to adjacent areas to facilitate livestock use." There is nothing in the record that would indicate the permittee's water rights have been compromised.

**ISSUE 3:** The incidental take statement for loach minnow is illegal, and the Forest Service's implementation of the same is arbitrary, capricious, and in excess of its authority.

**Discussion:** In Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service, 273 F.3d 1229 (9<sup>th</sup> Cir. 2001), the court found the Incidental Take Statement for the Cow Flat Allotment was not arbitrary and capricious because of the presence of loach minnow in the allotment and the fact they would be vulnerable to direct harm resulting from cattle grazing. The court did find the U.S. Fish and Wildlife Service was arbitrary and capricious in "...its failure to properly specify the amount of anticipated take and to provide a clear standard for determining when the authorized level of take has been exceeded..." The Biological Opinion for the Pleasant Valley Allotment (PR 241 pp 69-70) appropriately issued an Incidental Take Statement because of the presence of loach minnow in the San Francisco River that would be vulnerable to direct and indirect harm resulting from cattle grazing. Unlike the Cow Flat determination, the Reasonable and Prudent Measures and Term and Conditions for the loach minnow (PR 241 pp 70-73) provided the specificity necessary to properly specify the amount of anticipated take and to provide a clear standard for determining when the authorized level of take has been exceeded.

**Finding:** The project record indicates the Biological Opinion issued by the U.S. Fish and Wildlife Service was not arbitrary and capricious and therefore the implementation of the same by the Forest is not arbitrary, capricious, and in excess of its authority as the appellant contended.

## **DECISION**

After review of the appeal record, I find that the Responsible Official's decision to implement Alternative D in the environmental assessment was based on a reasonable assessment of the resource conditions on the allotment and there is no taking of the permittee's water rights. In addition, the Biological Opinion issued by Fish and Wildlife Service includes an incidental take statement, which documents the presence of a listed species and identifies the amount of anticipated take along with a standard for determining when the authorized take level has been exceeded.

I affirm the Responsible Official's decision, which I find to be in conformance with applicable laws, regulations, policies, and procedures.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 251.87(e)(3)].

Sincerely,

/s/ Leonard Atencio for  
JAMES T. GLADEN  
Reviewing Officer, Deputy Regional Forester, Resources

cc:  
Apache Sitgreaves NFs  
Clifton RD  
C.Gonzalez  
D.Stewart