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File Code: 1570-1/2200

Date: October 31, 2001

Kristen Stade  
Forest Guardians  
312 Montezuma, Suite A  
Santa Fe, NM 87501

**CERTIFIED MAIL -  
RETURN RECEIPT REQUESTED**

Re: Appeal #01-03-00-0047-A215, Black River Allotment Decision, Alpine Ranger District,  
Apache-Sitgreaves National Forests

Dear Ms. Stade:

This is my review decision concerning the appeal you filed regarding the Decision Notice and Finding Of No Significant Impact, which authorize grazing and implement the grazing management strategy on the above-named allotment.

**BACKGROUND**

District Ranger Settles issued a decision on July 27, 2001, for the Black River Allotment. The decision resulted in the selection of the following alternative and authorization:

Black River Allotment, Alternative 4, which authorizes 200 head of cattle, (cow/calf) to graze for 1.5 months annually. Use will be on a 2-year cycle: July 15 to August 31 for year one; September 1 to October 15 for year two. (*currently 388 head of cattle (cow/calf) are permitted from May 16 to October 31 annually*)

The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations. Pursuant to 36 CFR 215.16, an attempt was made to seek informal resolution of your appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR 215.17. I have reviewed the appeal record and the recommendation of the Appeal Reviewing Officer. My review decision incorporates the appeal record.



**APPEAL REVIEWING OFFICER'S RECOMMENDATION**

The Appeal Reviewing Officer recommended that the Responsible Official's decision be affirmed and that your request for relief be denied. The evaluation concluded: (a) decision logic and rationale were generally clearly disclosed; (b) the benefits of the proposal were identified; (c) the proposal and decision are consistent with agency policy, direction and supporting information; (d) public participation and response to comments were adequate.

**APPEAL DECISION**

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision concerning the above-named allotment, which authorizes grazing and implementation of management actions.

My decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 215.18(c)].

Sincerely,

/s/ Alan J. Koschmann  
JAMES T. GLADEN  
Appeal Deciding Officer,  
Deputy Regional Forester,  
Resources

Enclosure

cc:  
Forest Supervisor, Apache-Sitgreaves NFs  
District Ranger, Alpine RD  
Director of Rangeland Management, R3  
Appeals and Litigation Staff, R3

**REVIEW AND FINDINGS**

of the

**Forest Guardians' Appeal****#01-03-00-0047-A215, Black River Allotment Decision**

**ISSUE 1:** The Forest Service violated NFMA by continuing to allow cattle grazing on the allotment without first evaluating the allotment's suitability for grazing. Therefore, the choice of any alternative is premature.

**Contention:** The appellant contends that NFMA was violated because the Responsible Official failed to evaluate the allotment's suitability for grazing: "...the Forest Service must determine in forest planning the suitability and potential capability of the National Forest System lands...36 CFR, Sec. [3]19.20." Absent a suitability analysis, the appellant contends that the Forest Service failed to discharge its obligation under NFMA to take a hard look at each alternative and, therefore, the decision is premature.

**Response:** NFMA does not require that a suitability analysis be conducted at the project level. On August 24, 1999, the United States Court of Appeals for the Ninth Circuit, in Wilderness Society v. Thomas, 188 F.3d 1130 (9th Cir. 1999), concluded the Forest Service complied with NFMA in adopting the Prescott Forest Plan, including the plan's allocation of acreage suitable for grazing. The forest plan complies with the requirements outlined in 36 CFR 219.20 through the analysis process applied in preparation of the forest plan (Apache-Sitgreaves National Forest Plan EIS Appendix B, Description of Analysis Process).

**Finding:** There is no requirement to conduct a suitability analysis when conducting a NEPA analysis at the project level concerning the management and permitting of livestock grazing. All requirements for suitability under the provisions of 36 CFR 219.20 were met upon completion of the forest plan. The 36 CFR 219 regulations are not applicable in this case; therefore, the decision is not premature.

**ISSUE 2:** The decision violates the Apache-Sitgreaves National Forest Plan and the Regional Guide by failing to manage riparian areas to achieve recovery.

**Contention:** The appellant asserts that the decision fails to make the health of riparian areas a priority and in so doing violates both the forest plan and regional guide.

**Response:** The regional guide facilitated forest plan development. Requirements in the regional guide are reflected in the forest plan. There is no requirement for project-level compliance with regional guides.

The Environmental Assessment identifies riparian improvement as a key issue and desired condition (EA, Doc. 110, pp. 2, 6, 9). The EA (pp. 16-21) and Decision Notice (DN, Doc. 111, pp. 2, 3, 5) describe how the selected alternative will improve riparian conditions to achieve recovery consistent with the Forest Plan, primarily by adjusting the grazing strategy, allowable forage utilization, and season of use. Those documents further state that livestock use of riparian areas will be monitored to ensure that the desired conditions are achieved in the specified timeframe (EA pp. 6, 28; DN pp. 2, 3). Document #102 also shows the District's evaluation of consistency with riparian standards contained in the Forest Plan.

**Finding:** Continued riparian improvement is ensured under this decision, and there is no violation of the Apache-Sitgreaves National Forest Plan or the regional guide.

**ISSUE 3:** The decision violates the NFMA requirement to maintain viable numbers of all species.

**Contention:** The appellant contends the Forest Service must manage sensitive species to sustain viability and prevent the need for listing. In addition, the Forest Service must manage (fish and wildlife habitat) to maintain viable numbers. The appellant points to the perceived lack of management for riparian habitat, and contends that the Forest Service must provide protection for riparian obligate species. In particular, the appellant believes that domestic livestock production threatens the viability of the Southwestern willow flycatcher, the Black hawk, the Mexican spotted owl, the Mexican garter snake, the Narrow-headed garter snake, the Chiricahua leopard frog, and the Arizona southwestern toad.

**Response:** The Forest completed an in-depth review of the effects of each of the proposed alternatives on federally listed species, regional sensitive species and Forest-designated management indicator species (MIS). They detailed their findings in AR-30, 104, 108, 109, 110, and 111. Habitat trends for all species were indicated to be stable or improving under the preferred alternative compared with the current management strategy (AR-108). Review of the appeal record finds no evidence that the proposed action will reduce the viability of any MIS, game species, and Regional Forester-designated sensitive species or federally listed or candidate species analyzed in the EA. All of the important riparian areas in the allotment are eliminated from grazing, with the exception of Boneyard Creek (AR-30). Thus, the viability of none of the riparian associated species identified by the appellant would be negatively affected by the proposed action. The Biological Assessment of 6/10/1999 concluded that the proposed action was not likely to affect the Mexican Spotted owl and the Southwestern willow flycatcher adversely. By definition, viability is judged to be maintained for these two species. A Biological Opinion issued by the U.S. Fish and Wildlife Service on 2/26/2001 further supports the maintenance of viability of federally listed species on the allotment with a conclusive determination that the proposed action *would not jeopardize the continued existence* (i.e., viability is maintained) of the loach minnow and would not result in adverse modification or destruction of designated critical habitat for the loach minnow (AR-104).

**Finding:** Review of the appeal record finds no evidence that the proposed action will reduce the viability of any of the species identified by the appellant, or any other MIS, game, or federally

listed species under the ESA, as analyzed in the EA and supporting documentation (AR-110, p. 23). The proposed action maintains or improves habitat quality for the species analyzed.

**ISSUE 4:** The decision violates NFMA consistency and viability provisions by failing to adequately protect the Northern goshawk.

**Contention:** The allotment provides nesting or potential habitat for the Northern goshawk, yet fails to establish key foraging areas that limit utilization to an average of 20% and a maximum of 40%.

**Response:** The allotment does not contain any known active or historic nest sites for the Northern goshawk (AR-108). Proposed utilization outlined in the document under appeal is a maximum of 20% to be determined by *key areas* (AR-111). If utilization exceeds 20%, livestock are to be removed from the national forest (AR-111); therefore, there can be no concern for this species at this time from livestock grazing on this allotment.

**Finding:** The decision is consistent with NFMA consistency and viability provisions for the Northern goshawk.

**ISSUE 5:** The Black River term permit issuance must be suspended until the Apache-Sitgreaves National Forests revise the land and resource management plan and until the Forest Service develops a renewable resources program.

**Contention:** The appellant contends, "...there is no legally adequate RPA program or land and resource management plan to which the Black River term grazing permit issuance project can be tiered."

**Response:** There are no statutes or regulations that describe an expiration date for the Forest Service Renewable Resource Program or Land and Resource Management Plans. The Apache-Sitgreaves Land and Resource Management Plan will remain in effect until it is revised, consistent with the requirements of the National Forest Management Act and implementing regulations.

**Finding:** The current plan is in effect until the revision process is completed. There are no requirements to suspend activities until the process is completed.

**ISSUE 6:** The Forest Service violated NEPA by failing to analyze a reasonable range of alternatives.

**Contention:** The appellant contends that a range of reasonable alternatives, as required by NEPA implementing regulations, was not analyzed.

**Response:** "[A]n agency must look at every reasonable alternative, within the range dictated by the 'nature and scope of the proposed action' and 'sufficient to permit a reasoned choice.'" Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 (9th Cir. 1992). For an alternative

to be reasonable, it must meet the stated purpose and need and address one or more issues. The formulation of alternatives is driven by significant issues identified in scoping 40 CFR 1501.2(c).

The EA defines the purpose and need, including objectives, desired conditions, and key issues (Doc. 110, pp. 1-9). The EA describes a range of alternatives consistent with that scope (pp. 12-13). The appellant's comments on the EA (Doc 93) and appeal (Doc. 127) do not identify another alternative to be considered.

**Finding:** The Responsible Official appropriately defined the scope of the analysis and analyzed a range of reasonable alternatives within that scope.

**ISSUE 7:** The Forest Service violated NEPA, because the EA fails to consider and disclose adequately the location and protocol for monitoring key forage utilization areas within the allotment.

**Contention:** The appellant contends the EA must disclose the names, locations, forage utilization limits, and monitoring protocol for each and every key area within the allotment.

**Response:** Both the decision notice and the environmental assessment document that the utilization standard for the allotment will be 20 percent. If utilization reaches 20 percent in any one key area, livestock will be removed from the allotment (Docs. 110; 111). The terms and conditions of the Biological Opinion include specific monitoring requirements to ensure protection and recovery of loach minnows (Doc. 104).

Proper forage utilization standards are employed to sustain such things as plant health and vigor, long-term soil productivity, and protection for threatened, endangered, and sensitive species and their habitats. Forage utilization levels are determined based on guidelines set out in the R-3 Allotment Analysis Handbook (FSH2209.21). This handbook specifically describes appropriate forage utilization levels recommended for the purpose of improving rangeland condition. Southwestern Region Rangeland Management Specialists, Ecologists, and other scientists have developed these guidelines over a period of fifty years.

Forage utilization is measured by key area on key forage species within various pastures encompassing a grazing allotment. Key areas are locations readily accessible to water and forage and are located on level to intermediate slopes. Key species are herbaceous and woody vegetation that domestic livestock prefer at any given time of the year. By monitoring key areas, the Forest Service can ensure that an allotment, or pastures within an allotment, is not overgrazed.

The purpose of an environmental assessment is to disclose the environmental effects of a Federal action and make a determination whether the effects rise to the threshold that trigger the requirement to do an environmental impact statement. Establishing and monitoring forage utilization standards ensures that grazing will not have a significant effect on the environment. The effects of grazing on other resources have been disclosed in the environmental assessment.

**Finding:** The Responsible Official has met the requirement of NEPA, which is to disclose the effects of the proposed action on the human environment. There is nothing in federal statutes, regulations, or Forest Service policy that requires the Responsible Official to disclose the names and locations of each and every key area within an allotment in an EA. As the selected alternative is implemented all monitoring information will be available to the public.

**ISSUE 8:** The Forest Service violated NEPA by failing to consider and disclose the cumulative impacts of the proposed action.

**Contention:** The appellant contends that the cumulative effects of the alternatives were not adequately addressed, considering past, present, and reasonably foreseeable activities as required by NEPA. Appellant states, “the EA contains virtually no analysis of cumulative effects...”

**Response:** The EA adequately addresses cumulative effects for each relevant resource throughout the environmental consequences section, on pp. 16-28 (Doc. 110). That analysis considers past, present, and reasonably foreseeable actions including timber sale activity, grazing by wild ungulates, past livestock grazing, roads, recreational activities, fires and prescribed burns (most of those activities are identified on page 21). In addition, the cumulative effects analysis was completed at the 5<sup>th</sup> code watershed and airshed scale, beyond the allotment boundary (Doc. 110, pp. 20, 21, and Doc. 48).

**Finding:** The cumulative effects analysis is adequate for an informed decision and for the purpose of determining significance and whether an EIS is needed.

**ISSUE 9:** The EA violates the Clean Water Act.

**Contention:** The appellant argues that the Forest Service failed to obtain water quality certification from the state of Arizona, as required under Section 401 of the Clean Water Act.

**Response:** The State of Arizona does not require water quality certification for dispersed non-point activities such as livestock grazing. However, the record shows that the appropriate non-point source pollution considerations, which include Best Management Practices, were made during the planning process (Doc. 3 and Doc 110, page 11). The project record also shows the Arizona Department of Environmental Quality (Doc 5) was consulted during the project scoping and planning phases. In addition, the alternative selected responds to soil and water quality issues through management changes that will have a positive effect on improving ground cover, reducing erosion, and protecting riparian areas (Doc. 111).

**Finding:** Appropriate procedures were followed and adequate mitigation is planned for the project area. There will be no violation of the Clean Water Act.

**ISSUE 10:** The decision violates the Multiple Use and Sustained Yield Act.

**Contention:** The appellant alleges that the decision violates the Multiple Use and Sustained Yield Act by failing to manage for the highest public benefit. The appellant further alleges that the decision will continue to impair land productivity.

**Response:** Management of National Forest Lands for the highest net public benefits was analyzed and decided upon in the preparation of the forest plan. The forest plan provides direction for management emphasis within the project area. Net public benefits were analyzed appropriately during forest plan preparation, and are outside the scope of project-level analysis. The EA describes how the selected alternative will improve riparian, range and soil conditions including long-term soil productivity (Doc. 110, pp. 19-21).

**Finding:** This decision will improve land productivity and is, therefore, consistent with the Multiple Use and Sustained Yield Act.

**ISSUE 11:** The EA violates the Administrative Procedures Act.

**Contention:** The appellant asserts, “There exists as yet no information which would indicate that the proposed alternative will remedy the admitted problems on this allotment.”

**Response:** The EA describes the problems on the allotment and the desired conditions to be achieved, such as improving range, soil and riparian conditions (Doc. 110, pp. 2-6). The effects analysis describes how the proposed alternative will improve those conditions in order to remedy the identified problems (Doc. 110, pp. 14-22).

**Finding:** The Responsible Official made a reasoned and informed decision based on the analysis and has not violated the Administrative Procedures Act.