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Department of
Agriculture

Forest
Service

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File Code: 1570-1/2200

Date: November 14, 2001

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

**CERTIFIED MAIL -
RETURN RECEIPT REQUESTED**
7000 2870 0000 1135 8842

Re: Appeal #01-03-00-0056-A215, Miranda Allotment Decision, Camino Real Ranger District, Carson National Forest

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 Seesholtz issued a decision on August 16, 2001, for the Miranda Allotment. The

ent, Alternative C, which authorizes 52 head of cattle, (cow/calf) to graze from June 1 through September 30, annually.

The District Ranger is identified as the Responsible Official, whose decision is subject to al regulations. Pursuant to 36 CFR 215.16, an attempt was made to seek informal resolution of your appeal. The record indicates that informal

ve
reviewed the appeal record and the recommendation of the Appeal Reviewing Officer. My

ecision be
affirmed and that your request for relief be denied. The evaluation concluded: (a) decision logic
(c) the proposal and decision are consistent with agency policy, direction and supporting



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 Miranda 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/ Dale Fabian
JAMES T. GLADEN
Appeal Deciding Officer,
Deputy Regional Forester,
Resources

Enclosure

cc:
Forest Supervisor, Carson NF
District Ranger, Camino Real RD
Director of Rangeland Management, R3
Appeals and Litigation Staff, R3

REVIEW AND FINDINGS
of the

Forest Guardians Appeal

#01-03-00-0056-A215, Miranda 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 (Carson 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 Carson 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 and Decision Notice indicate that the riparian areas in the allotment are in satisfactory condition consistent with the Forest Plan, and will remain that way under the selected alternative (Doc. 32- EA, Doc. 36- DN, and Docs. 17, 21, 24).

Finding: Continued riparian improvement is ensured under this decision and there is no violation of the Carson 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 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 would have on federally listed species, regional sensitive species and Forest designated management indicator species (MIS). They detailed their findings in AR-23, 24, 32 and 36. Habitat trends for all species were indicated to be stable or improving under the preferred alternative for all species, (AR-24). Review of the appeal record finds no evidence that the proposed action will reduce the viability of any MIS, game species, Regional Forester designated sensitive species or federally listed or candidate species analyzed in the EA. The only important riparian area in the allotment is excluded from grazing (AR-32 and 36). Thus none of the riparian associated species' viability, identified by the appellant, will be affected by the proposed action. A Biological Assessment prepared by the Forest resulted in a *no effect* or *not likely to adversely affect* determination for all of the federally listed species on the allotment. By definition the viability of federally listed species is not expected to be affected given these determinations. The Forest addressed population and habitat trends for all federally listed species, Regional Forester designated sensitive species, and MIS in the planning area (AR-24).

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 species or federally listed species under the ESA, as analyzed in the EA and supporting documentation. 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 contains one designated Northern goshawk post fledgling Area (PFA), (AR-23 and 24). In this regard the Forest has followed the Northern goshawk conservation recommendations. Utilization outlined in the document under appeal is set at 20 to 35%, to be determined by *key area*, (AR-32 and 36). The Northern goshawk PFA occurs on steep slopes

where there typically has been no livestock grazing (AR-24). Forage utilization will likely average 20% or less in the PFA. The Forest has followed the conservation recommendations for the Northern goshawk and proposed utilization will likely average less than 20% in the PFA.

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

ISSUE 5: The Miranda term permit issuance must be suspended until the Carson National Forest revises its 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 Miranda 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 Carson 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).

Chapter 1 of the EA clearly defines the "project scope" including purpose and need. Only one issue was identified during the scoping process, regarding effects to potential Southwest willow flycatcher habitat (Doc. 32, pages 1-8). The range of alternatives is consistent with that defined scope, and permits a reasoned choice. In addition, the appeal does not identify another specific alternative for the District's consideration (Doc. 37).

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: The record documents the utilization standard is 40 percent. This is consistent with the 1996 Forest Plan Amendment (Doc. 33). 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 (FSH 2209.21). 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 50 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, are not overgrazed.

The purpose of an environmental assessment is to disclose the environmental effects of a Federal action and make a determination if 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 record provides ample evidence that past, present, and reasonably foreseeable actions were considered as possible contributors to cumulative effects (Doc 32, EA, pages 17, 20, 21, 27, 33, 65, 68, 70, 72, Doc. 36 DN/FONSI, and specialist’s reports in the record).

Finding: The cumulative effects analysis is adequate for an informed decision and for the purpose of determining significance and whether or not 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: There is no requirement to obtain certification from the State of Arizona for activities occurring in New Mexico. However, the appropriate non-point source pollution considerations, which include Best Management Practices, were made during the planning process (Doc. 21, Doc. 33, pages 12-14) for this project. The project record shows New Mexico Environment Department (Doc. 12) was consulted and provided input (Doc. 13) during the project scoping and planning phases. In addition, the alternative selected responds to water quality issues through management changes that will have a positive effect on protecting riparian areas (Doc. 36).

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. 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 and supporting documents in the record describe how current grazing is not adversely impacting long-term soil productivity, and the selected alternative “C” would not impair soil productivity (Doc. 32, EA pages 15-17, Doc. 36 DN/FONSI, and Docs. 17 and 18).

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 and Decision Notice describe how the selected alternative “C” will improve the water, soil and riparian conditions, primarily by restricting grazing in potential willow flycatcher habitat and applying specific mitigation measures, in order to remedy the problems identified (Docs. 32 and 36).

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