



United States
Department of
Agriculture

Forest
Service

Cibola National Forest
and National Grasslands

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File Code: 1570-1/2210

Date: June 14, 2004

Billy Stern
Forest Guardians
312 Montezuma Avenue
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Santa Fe, NM 87501

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED**

RE: Appeal #04-03-03-0002-A215, Muleshoe and Gap Allotments Decision, Magdalena
Ranger District, Cibola National Forest

Dear Mr. Stern:

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 allotments.

BACKGROUND

District Ranger Aldridge issued a decision on March 9, 2004, for the Muleshoe and Gap Allotments. The decision resulted in the selection of the following alternative and authorization:

Muleshoe and Gap Allotments, Alternative C, which authorizes 111–253 head of cattle (cow/calf) to graze yearlong on the Muleshoe Allotment, and 72–150 head of cattle (cow/calf) to graze from 11/16–05/15 annually on the Gap Allotment.

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 215.17, 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 215.18. 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 concluded that: a) decision logic and rationale were generally clearly disclosed; b) the benefits of the proposal were identified; c) the proposals 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 Muleshoe and Gap Allotments, 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/ Liz Agpaoa
LIZ AGPAOA
Appeal Deciding Officer
Forest Supervisor

Enclosure

cc: David M Stewart, Constance J Smith, Dennis Aldridge, Nancy Walls, George C Garcia, Berwyn Brown, Lou E Woltering

REVIEW AND FINDINGS

Forest Guardians'

Appeal #04-03-03-0002-A215

ISSUE 1: The Forest Service violated NFMA by continuing to allow cattle grazing on the allotments without first evaluating the allotments' 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 allotments' 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 (Cibola 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 Cibola 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: Riparian areas are limited in the project area and consist of a few ephemeral drainages and some small springs (PR #64, p. 3). The analysis was appropriately driven by the issues and priorities relevant to this project area (PR #64, p. 4). The scattered riparian areas are amply protected through the use of various wildlife, range and watershed mitigation measures (PR #64, p. 8)

The *Regional Guide for the Southwestern Region* (1983) was removed as guidance and either incorporated into Forest Plans or dropped as guidance (see Federal Register Notice, 66 FR 65463, December 19, 2001).

Finding: There is no violation of the Forest Plan regarding riparian recovery.

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 believes there is a lack of management for riparian habitat and that the Forest Service must provide protection for riparian obligate species. The appellant contends that the Forest Service has failed in its efforts to protect riparian obligate species and their riparian habitats, due primarily to continued livestock grazing.

Response: Viable numbers for all species will be maintained under the proposed action, Alternative C. For species listed under the Endangered Species Act of 1973, the viability for the Mexican spotted owl is supported in the record by the U.S. Fish and Wildlife Service's letter of concurrence dated November 25, 2003 (Cons. # 2-22-03-I-0109) (PR #74). Regional Forester Sensitive Species viability will be maintained through the use of mitigation measures detailed in the Decision Notice/Finding of No Significant Impact (DN/FONSI) (PR #77). For example, mitigation number 6 supports Northern Goshawk Management Guidelines by implementing grazing strategies that maintain cover for the goshawk's prey species. Management Indicator Species, comprised mainly of big game species and cavity nesting birds, are expected to maintain viable numbers under the proposed action (PR #64) that will implement low numbers initially until resource conditions are met and improvements are implemented. In addition, wildlife mitigation measures 1-6 listed in the DN/FONSI (PR #77) will promote resource conditions favorable for viable populations of all species.

Finding: Based on the review of the project record, the Forest did not violate the NFMA requirement to maintain viable numbers of all species.

ISSUE 4: Population survey data of Management Indicator Species is needed to ensure the maintenance of minimum viable populations of wildlife.

Contention: The appellant asserts that since the Forest Service lacks quantitative inventory data on many, if not all, MIS in the planning area and the forest as a whole and the scant data that it does have indicates some species are declining, the agency's decision is arbitrary and capricious.

Response: The project record provides documentation that supports the position that there is sufficient MIS survey data for maintenance of minimum viable populations. The MIS Cibola National Forest Report (PR #50) documents surveys conducted by the Forest Service and partner agencies such as the New Mexico Department of Game and Fish (NMG&F). For example, big game surveys for Elk and Deer were conducted by NMG&F between 1988 and 1998. MIS bird species have been surveyed along 24 established BBS routes and 20 independently designated routes by the Cibola. Data taken from the 20 Cibola National Forest routes indicate that all MIS bird species are present and breeding on the Forest (PR #50). Although some BBS routes show a decline for some bird species statewide, the proposed action, Alternative C, is not expected to contribute to the statewide trends.

Finding: The Forest completed an analysis of MIS that was sufficient to ensure that minimum viable populations would be maintained.

ISSUE 5: The Muleshoe and Gap Allotment term permit issuance must be suspended until the Cibola 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 Muleshoe and Gap 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. A recent court decision in Wyoming upheld the use of the current Plan until revised (Biodiversity Assoc. v. USFS, decision September 30, 2002). Regulations (36 CFR 219.35g) spell out that a revision schedule for each Forest Plan will be published. The current Chief's schedule is posted at the national web site at <http://www.fs.fed.us/emc/nfma>. The Cibola 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: The range of alternatives should meet the stated purpose and need and address one or more issues. The formulation of alternatives is driven by significant issues identified in scoping of the proposed action (40 CFR 1501.2(c)).

Issues brought up by the public mention removing cattle from South Baldy, Langmuir Lab effects, and keeping out of riparian areas (PR #28-30, 33-34). The EA (PR #64) identified economic impacts to permittee and concerns about wildlife habitat, rangeland condition, watershed, and soil stability (page 5). There are no designated riparian areas (EA, p. 3). Three alternatives were considered in detail (no action, current grazing, and proposed action). One alternative to manage the two allotments as one, with one herd, was considered but dropped because of other entities involved such as BLM (EA, p. 8). The request for a reduced numbers alternative was brought up in Burgess' letters (PR #46, 63, and 69).

The proposed action would halve the current numbers of livestock as needed (EA, p. 9). Stocking numbers will initially be set at the low end until resource conditions improve on both allotments (EA, pp. 6, 7). The response to scoping comments in EA Appendix A #1 says that other alternatives to reduce forage use are not needed, because the proposed action would reduce numbers as needed.

Finding: The Responsible Official appropriately defined the scope of analysis, identified issues, and analyzed a range of reasonable alternatives.

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 allotments.

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: 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 Guidelines. These guidelines specifically describe 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 record demonstrates that utilization standards for herbaceous forage will be 30-40 percent in key areas (PR #64; 77). Utilization levels in goshawk habitat will be limited to 20 percent . Initially, stocking levels will be set at the lower end of the range of numbers, as needed, until resource conditions improve and proposed range improvements have been completed. Utilization levels and resource conditions will dictate stocking levels, season of use, and pasture move dates (PR #77). Key areas are identified in the project record (PR #54).

Finding: Utilization standards for the Muleshoe and Gap Allotments were developed in accordance with Forest Service policy. 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. The appellant states the EA contains virtually no analysis of cumulative effects.

Response: The EA (PR #64) identifies past activities as livestock grazing, fire suppression, pinion /juniper control (pages 12-13), pinion juniper invasion (page 19), and historic grazing impacts (pages 3, 5). There are no other future activities in the area, according to the current Schedule of Proposed Actions (January- March 2004) as posted on the Forest web site. None of the past, present, or foreseeable future actions when combined with the alternatives would have a cumulative effect on watershed and soils (EA, p. 20). The Existing Condition Report for

Magdalena Mountains Geographic Area Assessment (PR #37) was used as background information (see response to comments attached to Decision Notice, PR #77), and includes historical background and fire occurrence mapping.

Finding: The EA and supporting project record include consideration of past, present, and reasonably foreseeable actions and their cumulative effects on components of the human environment. 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 fails to consider the full economic implications of this action.

Contention: The appellant contends that the EA does not clearly weigh the economic costs and benefits of the projects. The appellant argues the economic analysis is too narrowly focused on the economic impact to the permittee.

Response: Projects such as the Muleshoe and Gap grazing allotments are developed to be consistent with the direction described in the Forest Plan. Project level requirements for social and economic analyses are described in Forest Service Manual (FSM 1970) and Forest Service Economic and Social Analysis Handbook (FSH 1909.17). The responsible line officer determines the scope, appropriate level, and complexity of economic and social analysis needed (FSM 1970.6).

Costs of improvements such as tanks and pipelines are included in Cost/Benefit Analysis calculations (PR #59) and in the EA (PR #64, pp. 9 and 10). Average costs of ranching in New Mexico are included in the record report “Range Livestock Cost and Return Estimates for New Mexico, 1996” (PR #65). Economic impact to the permittee was an issue identified in the EA for analysis (page 5). The economic effects analysis looked at net ranch income to permittee and used average costs (EA, pp. 21-22). Costs and funding improvements can come from various sources and are shared (EA Appendix A scoping comments and responses #2-4).

Finding: The economic analysis is consistent with regulation and manual and handbook direction for project-level analysis and is not in violation of applicable laws, regulation, or policy.

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 Cibola National Forest Plan. The forest plan provides direction for management emphasis within the project area. Net public benefits were analyzed appropriately during the forest plan’s preparation and are outside the scope of project-level analysis.

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 that no information exists that would indicate that the proposed alternative will remedy the admitted problems on these allotments.

Response: The EA and documents in the record disclose the analysis done to evaluate resource conditions on the allotments and the effects of alternatives considered. In the DN/FONSI, the Responsible Official properly assessed the issues, public input, and impacts to resources in the decision rationale.

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



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Cibola National Forest
and National Grasslands

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File Code: 1570-1/2200

Date: June 14, 2004

Route To:

Subject: ARO, Appeal #04-03-03-0002-A215, Muleshoe and Gap Allotments Decision, Magdalena Ranger District, Cibola National Forest

To: Forest Supervisor, Appeal Deciding Officer

This is my recommendation on the disposition of the appeal filed in protest of the Muleshoe and Gap Allotments Decision Notice and Finding of No Significant Impact concerning the Magdalena Ranger District, Cibola National Forest.

District Ranger Aldridge signed the decision on March 9, 2004. The District Ranger is herein termed as the Responsible Official. Billy Stern of Forest Guardians filed an appeal of this decision under the 36 CFR 215 appeal regulations.

Informal Disposition

Pursuant to 36 CFR 215.17, an attempt was made to seek informal resolution of this appeal. The record reflects that informal resolution was not reached.

Review and Findings

My review was conducted in accordance with 36 CFR 215.19 to ensure that the analysis and decision are in compliance with applicable laws, regulations, policies, and orders. The appeal records, including the appellant's issues and requests for relief have been thoroughly reviewed. Having reviewed the Environmental Assessment (EA), decision, and the project record file, as required by 36 CFR 215.19(b), I conclude the following:

- 1) The decision clearly describes the actions to be taken in sufficient detail that the reader can easily understand what will occur as a result of the decision.
- 2) The selected alternative should accomplish the purpose and need established. The purpose and need stated in the EA reflect consistency with direction in the Forest Plan for the Cibola National Forest.
- 3) The decision is consistent with policy, direction, and supporting evidence. The record contains documentation regarding resource conditions and the Responsible Official's decision documents are based on the record and reflect a reasonable conclusion.



- 4) The record reflects that the Responsible Official provided ample opportunity for public participation during the analysis and decision making process. The Responsible Official's efforts enabled interested publics the opportunity to comment and be involved in the site-specific proposal.

After considering the claims made by the appellant and reviewing the record, I found that the Responsible Official conducted a proper and public NEPA process that resulted in a decision that is consistent with the Cibola National Forest Plan. I found no violations of law, regulations, or Forest Service policy.

Recommendation

I recommend that the Responsible Official's decisions relating to this appeal be affirmed with respect to all of the appellant's contentions.

/s/ Nancy L. Walls
NANCY L. WALLS
District Ranger
Appeal Reviewing Officer

cc: David M Stewart, Berwyn Brown, Constance J Smith, Mailroom R3, Mailroom R3 Cibola, Dennis Aldridge, Deborah L Walker, Arleen D Martinez

[Hard copy of this letter to be attached to ADO letter sent to appellants.]