



United States  
Department of  
Agriculture

Forest  
Service

Cibola National Forest  
and National Grasslands

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File Code: 1570

Date: December 29, 2004

Billy Stern  
Forest Guardians  
312 Montezuma Ave. Suite A  
Santa Fe, NM 87501

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED  
NUMBER:**

RE: Appeal #05-03-03-0001-A215, Branson-La Jara Grazing Allotments

Dear Mr. Stern:

This is my review decision on the appeal filed regarding the Decision Notice (DN), Environmental Analysis (EA), and Finding of No Significant Impact (FONSI) on the above-referenced project, which authorizes up to 15 head months of use annually on the Branson Allotment and up to 120 head months of use annually on the La Jara Allotment.

### **BACKGROUND**

District Ranger Hagerdon made a decision on September 30, 2004, for the Mount Taylor Ranger District, Cibola National Forest on the Branson-La Jara allotments. 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 the 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, including the recommendations of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

### **APPEAL REVIEWING OFFICER'S RECOMMENDATION**

The Appeal Reviewing Officer found that: a) the 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; and 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 on the Branson and La Jara Allotments.

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

Sincerely,

/S/ Robert Knauer for  
ROBIN K. NIMURA  
Acting Forest Supervisor, Appeal Deciding Officer

cc: Constance J Smith, David M Stewart, Berwyn Brown, George C Garcia, Cindy Correll, Chuck Hagerdon, Mailroom R3 Cibola, Dennis Aldridge

Enclosures (2)

**REVIEW AND FINDINGS**

of

**Billy Stern's Forest Guardians****Appeal #05-03-03-0001-A215****Branson and La Jara Allotments, Cibola NF****ISSUE 1: The Decision violates the NFMA and Cibola Forest Plan**

**Contention A:** The Forest Service violated NFMA by continuing to allow cattle grazing on the allotment without first evaluating 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 §219.3. In particular, the La Jara north central unit has generally been in poor condition and the appellant asks whether it is suitable for grazing. 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 choice of any alternative 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 Land and Resource Management Plan (LRMP), including the Plan's allocation of acreage suitable for grazing. The Cibola Forest Plan complies with the requirements outlined in 36 CFR 219.20 through the analysis process applied in preparation of the Forest Plan.

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 Cibola LRMP. The 36 CFR 219 regulations are not applicable in this case; therefore, the decision is not premature.

**Contention B:** The Forest Service violated NFMA's mandate to identify the alternative that maximizes public benefit. Livestock grazing from strictly an economic efficiency standpoint does not serve the broader public interest as shown in literature such as Loomis 1991, Souder 1997, and the FS publication GTR-INT-224. FS has attempted to defeat the purposes of the planning regulations that require adequate consideration of wildlife and other uses of the range resource (36 CFR 219.20).

**Response:** A determination of agency policy of grazing on National Forest System lands is outside the scope of this decision. The Cibola LRMP allocated lands for grazing activity in all

management areas except Management Areas 1, and 2, and has separate direction for the designated grasslands (LRMP pp. 56-58). Permitted use will be adjusted to range capacity by the end of Period or decade 3 (p.57 LRMP).

The Branson and La Jara Allotment EA purpose and need statement is to authorize livestock grazing and provide implement long-term grazing management direction to improve forage production and plant community diversity on these allotments (EA PR #27 p.3).

**Finding:** The alternative meets the purpose and need statement for economic analysis and is consistent with Forest Plan objectives.

**Contention C:** The appellant asserts that the decision fails to manage riparian areas to achieve recovery, and 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 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).

There are no riparian areas on the Branson and La Jara Allotments. All streams on the two allotments are ephemeral, flowing only in response to extreme precipitation events. Furthermore, surveys confirm there are no riparian areas on either allotment (PR# 27 p.15).

**Finding:** There is no violation of the Cibola National Forest Plan.

**ISSUE 2: The decision violates the NFMA requirement to maintain viable numbers of all species.**

**Contention A:** 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 populations of native species. The appellant believes the Forest Service has failed dramatically in its efforts to protect riparian obligate species and their riparian habitats as a result of continued livestock grazing.

**Response: Sensitive Species.** The Biological Evaluation (PR #25) documents “no effect” findings for three sensitive species (Cebolleta pocket gopher, gray vireo and Texas horned lizard), and for two species (gopher, vireo) determines that the proposed action is “beneficial”.

**Native Species:** The Wildlife Specialist report (PR #22), Neo-tropical Migratory Bird Analysis (PR #24) and New Mexico Game & Fish Survey data (PR #36) all support the maintenance of viable populations of native species. Native species such as elk, mule deer, pinon jay, and Virginia’s warbler will be managed to maintain viability through improved habitat quality within analysis area. Habitat quantity is expected to remain the same since no habitat type will be changed (i.e. type converted) by the selected action.

**Riparian Obligate Species:** The project record documents (PR #27) that there are no riparian areas within either allotment. Riparian obligates were considered and discussed in the Wildlife Specialist report (PR #22) and the Neo-tropical Migratory Bird Analysis (PR #24), but due to the

fact that no suitable habitat was present within either allotment, a no effect determination was reached due to lack of habitat

**Finding:** Sensitive Species. All procedural requirements for the analysis of effects to sensitive species have been met.

Native Species: Native species viability will be managed and maintained under the selected action. Habitat types within the allotments, such as pinyon-juniper and mountain grassland will be maintained or enhanced. In addition, population survey data (PR #36) for species such as elk and deer indicate maintenance of existing populations within the analysis areas.

Riparian Obligate Species: The Forest Service did not fail to protect Riparian habitat and/or riparian obligate species, since neither occurs on the allotments. Continued livestock grazing on the allotments will not affect riparian habitat or species due to their lack of presence on the allotments.

**Contention B:** Population survey data of Management Indicator Species are needed to ensure the maintenance of minimum viable populations of wildlife. The appellant asserts that since the Forest Service lacks quantitative monitoring 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. The 10<sup>th</sup> Circuit has decided that MIS status must be monitored with actual numbers.

**Response:** Population survey data is provided in the project record (#35 and #36) for the three MIS species found within the allotments. Population data for mule deer and elk are provided at both the Forest and Game Management Unit scale. The allotments fall within Game Management Unit 9 for which the survey data is provided. Juniper titmouse survey data is provided at both the Forest and BBS route level.

Mule deer numbers in the Forest MIS report (PR #34) indicates a downward population trend, while more site specific data from Game Management Unit 9 (PR #36) indicates an upward trend for mule deer.

Elk numbers in the Forest MIS report (PR#34) indicates an upward population trend, while more site specific data from Game Management Unit 9 (PR #36) indicates a stable trend for elk.

Juniper titmouse numbers in the Forest MIS report (PR #34) were updated with new data taken from BBS routes that determined the population trend on the Cibola is stable (PR #35).

**Finding:** The project record does contain population survey data for the three MIS species found within the allotments. In addition, the project record also documents that habitat quality and quantity for the three MIS species will be either enhanced or maintained (PR #22).

**ISSUE 3: The Branson and La Jara 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 Branson and La Jara term grazing permit issuance project can be tiered. Term permit must be suspended until the Forest publishes a new FEIS supporting a revised Cibola LRMP.

**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). Also, language in the 2004 appropriations bill for the Forest Service allows that (section 320). “Prior to October 1, 2004, the Secretary of Agriculture shall not be considered to be in violation of subparagraph 6(f)(5)(A) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)(A)) solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System.” 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 5: The project does not meet the requirements of NEPA.**

**Contention A:** The appellant contends that a range of reasonable alternatives, as required by NEPA implementing regulations, was not analyzed. The EA fails to take a hard look at potential effects of the proposed action and the no grazing alternative. By examining only one action alternative and refusing to analyze others that result in a lower stocking rates, the FS has violated NEPA requirements to address a range of reasonable alternatives that not only emphasize different factors but also lead to differing results.

**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)).

There were no significant issues brought forward during scoping or after the EA was released for comment that would drive the creation of an additional alternative (DN PR#37 p.1-2, PR#27 p.4). An alternative considered by eliminated from detailed study included a full forage use (40-45 percent utilization) alternative (PR#37 p.5). The public meeting held to answer questions and talk about the planning for this proposal attracted no members from the public (PR#12).

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

**Contention B:** The FS has violated NEPA because the EA fails to consider and disclose adequately the location and protocol for monitoring key forage utilization areas within the allotment. The appellant contends the EA must disclose the names, locations, forage utilization limits, and monitoring protocol for each and every key area within the allotments.

**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.

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.

There are grazing utilization standards in Cibola LRMP as part of the Plan Amendment 7, 1996 (LRMP p.63-7). The guidelines are to develop site-specific forage use levels in consultation with US Fish and Wildlife Service. In the event that site-specific information is not available, average key species forage utilization in key areas by livestock and wildlife should not exceed levels set forth in the allowable use guide table on page 63-7. There is a map in this EA of the key area locations (Map 2 p.3 EA PR#27).

The proposed action has been concurred upon through informal consultation with USFWS, meeting the standards set forth in the Cibola LRMP (Biological Assessment and Evaluation PR# 25).

**Finding:** Utilization standards and monitoring protocol for the Branson and La Jara Grazing Allotment were developed in accordance with Forest Service policy and through USFWS consultation.

**Contention C:** The Forest Service violated NEPA by failing to consider and disclose the cumulative impacts of the proposed action. 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 that the EA contains virtually no analysis of cumulative effects and that the EA does not even attempt to catalog other activities occurring with the allotment's boundaries.

**Response:** Cumulative effects are addressed in the EA and project record. The EA discloses mining and reclamation effects (PR#27 pp. 10, 14, 16, 17), a future thinning proposal (p.14), another grazing planning effort, and past wildfires (pp.16-17). Firewood cutting activity (PR#5) and a cumulative effects watershed report (PR#20) are in the project record.

**Finding:** The record includes consideration of past, present, and reasonably foreseeable actions and their cumulative effects on the components of the human environment. The cumulative effects analysis is adequate for an informed decision.

**Contention D:** The FS has violated NEPA because the EA fails to consider the full economic implications of this action. The EA failed to weight the economic costs and benefits of the project. Forest Service must consider the economic implications of this project not just to the permittee, but to the taxpayer.

**Response:** Projects such as the Branson and La Jara grazing allotment are developed to be consistent with the direction described in the Forest Plan. Project level requirements for social and economic analysis are described in Forest Service Manual (FSM 1970) and Forest Service

Social and Economic Analysis Handbook (FSH 1909.17). The proposed action is the implementation of previously approved practices that are included in the current Cibola LRMP. No specific economic analysis was done for this project. In answer to this question brought up in scoping and in the comment EA by the appellants, the response is that a simple “dollars out-dollars in test” is not the appropriate basis for resource decisions (PR#27 response #6 and PR#37 response #18). The responsible line officer determines the scope, appropriate level and complexity of economic and social analysis needed (FSM 1970.6).

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

#### **ISSUE 6: The FS failed to provide an EA for comment in violation of existing law.**

**Contention:** The 9th Circuit has ruled in two cases (*Anderson v. Evans* and *Citizens for Better Forestry v. USDA*) that the agencies must provide a full EA for comment. The document provided for public comment gave little detailed information on current conditions or the expected effects of the proposed action. The public did not have the information available to provide the substantive comments being demanded by the new regulations. The appellant believes this was a repeat of scoping and a burden to the public rather than an opportunity for increased participation. The EA failed to address this comment.

**Response:** In the *Citizens for Better Forestry v. USDA* case (August 2003), the court said that the 2000 Planning Rule EA/FONSI was issued 5 months after the comment period in the Federal Register had closed. In the *Anderson v. Evans* (Makah tribe whaling case, November 2003), NOAA had done an EA that went out for comment, then the proposed management plan was incorporated into the final EA and DN, but no public comment opportunity was given on the changed proposal. There is no language in either court decision saying that a full EA must be sent out for public comment.

In the Branson and La Jara project, a 30-day notice and comment period was used and the proposed action sent out for public comment was a complete EA with proposed action, alternatives, and effects discussions (cover letter and EA PR#27).

**Finding:** The proposed action sent out under the 30-day notice and comment period met the new appeal regulations at 36 CFR 215.3. Enough information was given in the proposed action package to generate substantive comments from the public.

#### **ISSUE 8: 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 LRMP. 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.

In reference to the contention that the decision will continue to impair land productivity, EA (PR#27 pp.6-21) analyzes the effects of the selected alternative on the various resources. The effects of Alternative 1 are described as increasing range site productivity and condition, with increases in plant community diversity, decreased runoff, and no effect on threatened, endangered and sensitive species. The effects analysis clearly demonstrates improvement in land productivity.

The DN (PR#37) states that Alternative 1 best moves toward all of the desired future conditions described in the EA, and goes on to specifically describe how it will improve and maintain the various land, water, plant and animal resources.

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

#### **ISSUE 10: The EIS violates the Administrative Procedures Act.**

**Contention A:** The agency action completely disregards the scientific data and recommendations of experts. Given the current degraded condition of the land due to historical and ongoing livestock grazing, the decision to continue to graze the land is inexplicable. Based on data in the EA, there is little known about the effects this alternative would have on the ecosystem.

**Response:** Publications were reviewed and used in the interdisciplinary analysis of this project (Volume 2 of record). The EA/DN and documents in the record disclose the analysis done to evaluate resource conditions on the allotment and the effects of alternatives considered.

**Finding:** In the Decision Notice (PR#37) for the Branson and La Jara Allotment, the Responsible Official properly assessed the issues, public input, and impacts to resources in his decision rationale. The Responsible Official made a reasoned and informed decision based on the analysis and has not violated the Administrative Procedures Act.

**Contention B:** The EA and FONSI fail to connect the allowable annual use level with available forage measurements, when higher use levels are tied to years of above average precipitation. The appellant made comments asking how the Branson allotment will be managed on an annual basis if forage drops below 100 lb/acre under drought or other conditions. Appellant believes this comment was disregarded in violation of APA.

**Response:** Comments made during scoping were responded to as an appendix to the EA (PR#27) and comments made on the EA were responded to in an appendix to the Decision Notice (PR#37). Drought conditions were specifically mentioned as part of the existing condition in the EA and non-use was taken on La Jara allotment for the last two years due to drought (pp. 3, 7 PR#27). Flexibility in herd size was designed into the proposed action on La Jara allotment (p.1 PR #27). The open travel between private land and the allotment, and the low numbers, 5 head of cattle, on Branson allotment allow flexibility in dry seasons (PR#1). The

EA/DN and documents in the record disclose the analysis done to evaluate resource conditions on the allotment and the effects of alternatives considered.

**Finding:** In the DN for the Branson and La Jara Allotment, the Responsible Official properly assessed the issues, public input, and impacts to resources in his decision rationale. 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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**File Code:** 1570-1/2200  
**Route To:**

**Date:** December 16, 2004

**Subject:** ARO Appeal #05-03-03-0001-A215, Branson LaJara Allotment

**To:** Acting Forest Supervisor, Appeal Deciding Officer

This is my recommendation on the disposition of the appeal filed in protest of the Decision Notice and Finding of No Significant Impact concerning the Branson-La Jara Grazing Allotments, Mt. Taylor Ranger District, Cibola National Forest.

District Ranger Chuck Hagerdon signed the decision on September 30, 2004. The District Ranger is herein termed as the Responsible Official. 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 Notice and Finding of No Significant Impact, 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 as amended.
- 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 decision relating to this appeal be affirmed with respect to all of the appellant's contentions.

Sincerely,

*/s/ Dennis Aldridge*  
DENNIS R. ALDRIDGE  
District Ranger, Appeal  
Reviewing Officer

Cc: Chuck Hagerdon, Dave Stewart, Ber Brown, Mailroom R3 Cibola, Constance Smith, Cindy Correll

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