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Forest
Service

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File Code: 1570-1/2200

Date: October 10, 2002

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

**CERTIFIED MAIL – RETURN
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7000 2870 0000 1135 2772**

RE: Appeal #02-03-00-0028-A215, Devil's Park Allotment Decision, Glenwood Ranger District, Gila 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 Raley issued a decision on July 13, 2002, for the Devil's Park Allotment. The decision resulted in the selection of the following alternative and authorization:

- Devil's Park Allotment, Alternative 6, which authorizes 95 head of cattle to graze 8.5 months 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 concluded that: (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 Devil's Park 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/ Abel M. Camarena

ABEL M. CAMARENA

Appeal Deciding Officer,

Deputy Regional Forester

cc: David M Stewart, Stephen G Libby, Russell D Ward, Christina Gonzalez, Larry Raley

REVIEW AND FINDINGS

of the

Forest Guardians' Appeal

#02-03-00-0028-A215, Devil's Park 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, stating that "...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 that, 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 (Gila 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 Gila 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.

In addition, the effects analysis in the EA demonstrates the selected alternative will improve riparian, range, and soil conditions and have no negative impacts with respect to long-term soil productivity.

Finding: Continued riparian improvement is ensured under this decision, and there is no violation of the Gila 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 believes there is a 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, and the Chiricahua leopard frog. The appellant contends that only a cessation of grazing in these watersheds combined with active restoration work will adequately provide for the minimum habitat needs for these species.

Response: The BA (Doc. 62) and Region 3 Consultation forms (Doc. 46) analyzed the effects to federal threatened and endangered species, proposed species, and Region 3 Sensitive Species. Management Indicator Species (MIS) are discussed both in the Wildlife Specialist's report (Doc. 62) and the Forest-wide MIS analysis (Doc. 65). The Mexican garter snake does not occur on this allotment.

Although designated critical habitat for the Southwestern willow flycatcher is found on the allotment, only now is some of the area approaching suitable habitat conditions. No Southwestern willow flycatchers have been reported in this area. The United States Fish and Wildlife Service (USFWS) concurred with a "May Affect - Not Likely to Adversely Affect" determination for the Southwestern willow flycatcher (Doc. 63, p.2).

An analysis of the alternatives for the black hawk found that potential roosting/nesting habitat might not recover as quickly as desired. Due to the limited amount of habitat affected, the project would not reduce the viability or result in a trend towards federal listing (Doc. 62, p. 9).

The Wildlife Specialist's report concluded that although some individuals of narrow-headed garter snake may be harmed, none of the alternatives results in a trend toward federal listing or loss of population viability for this species (Doc. 62, p. 8).

Suitable habitat for the Chiricahua leopard frog is found on the allotment; however, there is no evidence that the frog currently occupies any habitat on the allotment. The USFWS concurred with a "Not Likely to Jeopardize" and the Forest agreed to survey stock tanks prior to maintenance activities (Doc. 46, pp. 32-33; Doc. 63, p. 3). Subsequently, the Chiricahua leopard frog was listed as "Threatened" (June 13, 2002) and the Forest concluded a determination of "No Effect" (Doc. 46, inserted in front of consultation forms for Chiricahua leopard frog).

Potential Mexican spotted owl habitat occurs on the allotment; and although no surveys have been completed, grazing is proposed at levels and with appropriate mitigation that the USFWS concurred with a “May Affect – Not Likely To Adversely Affect” determination (Doc. 63, p. 3).

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 since the scant data that it does have indicates some species are declining, the agency’s decision is arbitrary and capricious.

Response: A review of the project record indicates the Forest’s analysis of the effects the project would have on MIS was sufficient to meet the standards of the National Forest Management Act (Doc. 45, pp. 29-34; Doc. 62; Doc. 65).

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

ISSUE 5: 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 guidelines referred to by the appellant are management recommendations and were not part of the forest plan amendment. Site-specific grazing utilization guidelines for the Devil’s Park Allotment are found in the final EA (Doc. 41, p. 21) and are in compliance with the Forest Plan as amended.

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

ISSUE 6: The Devil’s Park term permit issuance must be suspended until the Gila National Forest revises its land and resource management plan and until the Forest Service develops a renewable resources program.

Contention: The appellant contends, “...(T)here is no legally adequate RPA program or land and resource management plan to which the Devil’s Park 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 Gila 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 7: 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).

Seven alternatives analyzed in detail and one alternative not analyzed in detail were evaluated in this EA. A range of grazing periods and different levels of grazing use were analyzed to meet the purpose and need statement.

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

ISSUE 8: 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: 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, is not overgrazed.

The record demonstrates that utilization standards for key species on key areas will be 20 percent on poor condition range and 30 percent on fair condition range during the growing season. Utilization standards for key species during the dormant season will be 30 percent. Additionally, before pastures are grazed, the previous year or current year growth must be greater than 2.5 inches on key species.

Finding: Utilization standards for the Devil's Park Allotment 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 9: 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 summarizes cumulative effects analysis for watershed, soils, and air on p. 10. (The document referred to in the EA should be Document 39, not 36.) Effects on wildlife from other activities such as fire are noted in the EA on pages 23 through 34 and documented in the record (Doc. 62 - cumulative effects section).

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 and for the purpose of determining significance and whether an EIS is needed.

ISSUE 10: The EA violates the Clean Water Act.

Contention: The appellant contends that the Forest Service failed to require the grazing permit applicant to obtain water quality certification from the State of Arizona.

Response: There is no requirement to obtain certification from the State of Arizona for activities occurring in New Mexico. The appropriate non-point source pollution considerations, which include Best Management Practices, were made during the planning process (Doc. 62).

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 11: 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 Gila 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.

The effects analysis in the EA demonstrates the selected alternative will improve riparian, range, and soil conditions and will have no negative impacts with respect to long-term soil productivity.

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

ISSUE 12: 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 documents in the record disclose the analysis done to evaluate resource conditions on the allotment and effects of alternatives considered. In the DN/FONSI, the Responsible Official properly assessed the issues, public input, and impacts to resources in his decision rationale.

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