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File Code: 1570-1/2200

Date: December 16, 2002

Hamilton Smith  
Forest Guardians  
312 Montezuma, Suite A  
Santa Fe, NM 87501

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED**

RE: Appeal #03-03-00-0008-A215, Underwood Lake Allotment Decision, Quemado Ranger District, Gila National Forest

Dear Mr. Smith:

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 Stevenson issued a decision on September 16, 2002, for the Underwood Lake Allotment. The decision resulted in the selection of the following alternative and authorization:

Underwood Lake Allotment, Alternative C, which authorizes 185 head of cattle (cow/calf) to graze May 1 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 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 Underwood Lake 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: Janice S Stevenson, Stephen G Libby, David M Stewart, Christina Gonzalez

## **REVIEW AND FINDINGS**

**of the**

**Forest Guardians' Appeal**

**#03-03-00-0008-A215, Underwood Lake Allotment Decision**

**ISSUE 1:** 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.

Riparian health was identified as an objective for this project, and continued riparian recovery was deemed a significant issue that guided alternative development and selection (Doc. 67, pp. 9, 11). The alternative selected provides for a reduction of animal use and a grazing strategy, including protective fencing, that meet the riparian improvement objectives identified in the forest plan (Doc. 68).

**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 2:** 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, saying, "...[T]he 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 (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 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 EA (Doc. 51) and Wildlife Assessment (Doc. 50) analyze the effects to Management Indicator Species (MIS), Region 3 Sensitive Species, and seven federally listed species on the Underwood Lake Allotment. The Mexican garter snake and black hawk do not occur on this allotment.

Riparian habitat is specifically addressed in the EA (Doc. 51, pp. 32-33) and effects of the proposed alternative disclosed. Although the slight downward trend would continue, it is not expected to affect the viability of any species (Doc. 51, pp. 42-48).

No suitable or potential habitat for the Southwestern willow flycatcher occurs on the allotment. The nearest occupied habitat (six air miles southwest) occurs on the Forest Service administrative site in Alpine, Arizona.

Mexican spotted owls are found on the allotment. Monitoring indicates grazing use (Doc. 50, p. 16) is well within recommended levels, and appropriate mitigation is in place to support the determination of “May affect – not likely to adversely affect.”

Habitat for the Chiricahua leopard frog occurs on the allotment. However, surveys since 1998 have not documented occupancy of any potential sites. A determination of “May affect – not likely to adversely affect” was concluded.

Consultation with the USF&WS was initiated (Doc. 50.6, 50.7, and 50.8) and concurrence granted (Doc. 50.9).

**Finding:** Based on a 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 MIS 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:** Data from which the MIS analysis was conducted are included in the Process Record (Doc. 50.327 through 50.344). The regulations (36 CFR 219.19) do not require population data at the planning (project) area. Data at the Forest level is adequate to determine general population trends and ensure that viable populations will be maintained on the Forest.

**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 Underwood Lake Allotment contains goshawk habitat; however, all known nest sites are outside of, but adjacent to the allotment (Doc. 50, p. 21). The guidelines referred to by the appellant are management recommendations and were not part of the Forest plan amendment. Site-specific grazing guidelines are found in the final EA (Doc. 51, p. 13) 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 Underwood Lake 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 Underwood Lake 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). Four alternatives including the no-action alternative were developed to meet issues and the purpose and need statement. These were analyzed in detail for effects.

**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 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 40% on bluegrass sites and 35% on other upland sites. Utilization standards for woody species within the Creek and Big Bend Pastures will be limited to no more than 10% of the riparian sprouts/seedlings and 25% on riparian sprouts/seedlings in other riparian areas (Doc. 68).

**Finding:** Utilization standards for the Underwood Lake 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, “[T]he EA contains virtually no analysis of cumulative effects...”

**Response:** Cumulative effects were disclosed and analyzed in the EA. Beginning on page 22, the Introduction under Chapter III- Environmental Consequences, there is a list of possible actions with cumulative effects in the area. Cumulative effects for soil, water, and air are described on pages 26-27. Cumulative effects for biological resources are described on pages 31-32. Riparian resource cumulative effects are described on pages 34-35. Other effects are addressed on page 37 of the EA. Wildlife resource cumulative effects are outlined on pages 47-48. Economic cumulative foreseeable effects are identified on page 53.

**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 or not 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.

**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.

**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 the effects of alternatives considered. In the DN/FONSI, the Responsible Official properly assessed the issues, public input, and impacts to resources in her decision rationale.

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