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File Code: 1570-1

Date: November 24, 2004

Bill Stern  
Grazing Program Coordinator  
Forest Guardians  
312 Montezuma Ave. Suite A  
Santa Fe, NM 87501

RE: Appeal #05-03-06-0001-A215, Canyon del Buey Allotment

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 grazing for approximately 4,665 AUMs (Animal Unit Months) and up to 5,234 AUMs, for 12 months.

### **BACKGROUND**

District Ranger Janice Stevenson made a decision on September 14, 2004 for the Gila National Forest on this project. 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 Canyon del Buey Allotment Project.



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

Sincerely,

/s/ Marcia R. Andre  
MARCIA R. ANDRE  
Forest Supervisor

Enclosures (2)

cc: Constance J Smith, David M Stewart, Berwyn Brown, Richard Stahn, Janice S Stevenson, Debby J Hyde-Sato, Cecilia McNicoll, Stephen G Libby, Mailroom R3 Gila

**REVIEW AND FINDINGS**

of

**Billy Stern's Forest Guardians****Appeal #05-03-06-0001-A215****Canyon del Buey Allotment, Gila NF.****ISSUE 1: The Decision violates the NFMA and Gila National 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. Even though a "no-grazing" alternative is included in the EA, the benefits of that alternative to wildlife, watersheds, and non-game species are not fully analyzed. 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 Forest Plan complies with the requirements outlined in 36 CFR §219.20 (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 Gila LRMP. The 36 CFR §219 regulations on planning alternatives 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. By failing to conduct a cost/benefit analysis for all uses of the land rather than just for elk hunting and watching, the FS failed to consider whether permitting grazing on this allotment makes economic sense despite the requirement of 36 CFR 219.3.

**Response:** A determination of agency policy of grazing on National Forest System lands is outside the scope of this decision. The Gila LRMP allocated lands in Management Area 9B, which contains the Canyon del Buey allotment (PR #56 p.5), with the long term forage objective to manage for a livestock/wildlife utilization ratio of 75/25 (PR #1 p. 257). Lands are classified as full capacity range in this Management Area 9B as described on page 261 of the Gila Plan.

The Canyon del Buey Allotment EA proposed action is to authorize livestock grazing and maintain and improve range/watershed conditions through the allotment management plan (PR #56 p.7).

With respect to costs and benefits of elk forage and elk hunting, the appropriate level for determining resource output tradeoffs is at the Forest level. The number of hunting permits and wildlife population numbers vary from year to year based on habitat conditions and management goals. The economic effects where there is a trade-off with other multiple uses must be made at the Forest Plan level.

**Finding:** The alternatives meet the purpose and need statement for economic analysis and are consistent with Forest Plan objectives. Meeting NFMA's mandate for maximizing public benefit has been met in the Forest Plan decision.

**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. The EA fails to make it clear that other alternatives will lead to improvement of soil conditions.

**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).

Under the selected alternative 100 percent of the spring/seep habitat will be excluded from livestock use and 5 acres of wet meadow will be protected (PR #56 p.7). Seven exclosures to protect seeps and springs are outlined on page 20 of the EA. Soil and watershed conditions and effects of all alternatives including the No Grazing alternative are described on pages 30-36 in the EA (PR#56).

**Finding:** The EA proposed action and the selection of the proposed action in the DN indicate that riparian management is a priority. Continued riparian improvement is ensured under this decision, and there is no violation of the Gila National Forest Plan.

**ISSUE 2: The FS has violated NFMA and NEPA because the EA fails to consider the effects of consistent past violations of the grazing term permit.**

**Contention A:** The proposed action fails to address how the allotment will be managed if developments are not built on schedule. If the range developments are not done, the proposed action will parallel that of the No Action alternative which has led to overgrazing in key areas and riparian areas. The NEPA process offers no documentation suggesting that cattle will consistently use new upland water developments in such a way that will prevent violations.

**Response:** Water developments planned will be monitored with relocated or new key monitoring areas (EA PR#56 p. 32). An 11-pasture deferred grazing system with new fencing is included in the proposed action, and it is foreseen that this will result in a more effective distribution of livestock use in the uplands. Some soil compaction is expected to continue with

permitted grazing near watering sites; however monitoring, adherence to utilization standards, and pasture rotation are expected to mitigate any negative impacts to watershed conditions (PR#56 p. 33).

The NEPA document is not required to guarantee that no violations will occur in the future. The Substantive Comment Consideration document (PR#54 p.4) shows that current key area monitoring indicated utilization and high use areas to protect, which helped design the proposed action.

**Finding:** The NEPA document analyzed the effects of the proposed alternative including livestock use and improvements based on the best information available at this time. Speculation on how the alternative will be implemented in the future and possible violations are beyond the scope of the NEPA document.

**Contention B:** The Forest Service violated NEPA because the EA fails to consider the effects of consistent past violations of the term grazing permit in relation to the preferred action. Over the last 5 years the agency has allowed the permittee to violate legally set standards 30 percent of the time. The District has failed to adjust numbers in the past despite consistent violations, so we reject in advance the argument that line officers can adjust numbers on an annual basis. A request was made for scientifically-based criteria to reduce numbers however there was no acknowledgment of this request in the EA or Decision Notice which is violation of NEPA, APA and NFMA.

**Response:** NEPA procedures ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. When terms and conditions of grazing permits are violated, the Forest Service has separate administrative procedures in place to correct violations and to ensure they do not continue to occur. Past permit violations and subsequent administrative actions are beyond the scope of the analysis.

This request for criteria to decrease numbers was noted and considered by the Responsible Official in her review of comments in the record (PR#54 p. 5). Appendix 3 of the EA (PR #56) spells out the criteria for increase for additional livestock stocking.

**Finding:** The Forest Service is not required to disclose past permit violations in the decision making process. The Responsible Official considered all substantive comments in reaching her decision.

**ISSUE 3: 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:** Effects to Forest Sensitive Species are assessed in the Wildlife Assessment of the Canyon Del Buey Allotment (PR #41) and Environmental Assessment (EA, PR #56 pp. 51-71)

by alternative. A list of nine species was derived from the Region 3 sensitive species list as well as the Quemado District species of concern list based on whether the species or their habitat was present. The list is located in the Wildlife Assessment for the Canyon del Buey allotment (PR #41 pp. 20 and 21) and the EA (PR #56 p. 63) with the detailed analysis in the pages immediately following the list. Some species may benefit while individuals of some species would be impacted, however, there would be no trend toward federal listing. Species viability would also not be adversely affected (EA, PR #56, pp. 63-66, with summary on p. 66).

Riparian obligate MIS and TE&S species were assessed in the Consultation and Biological Evaluation, Wildlife Assessment for the Canyon Del Buey Allotment, and the EA (PR #'s 33, 41, and 56, respectively). A T&E concurrence letter along with a MSO Critical Habitat Conference Report is included in the project record (PR #'s 37 and 55). There have been 20 acres of spring/seep habitat and 4 acres of woody riparian habitat identified on the Canyon del Buey allotment (EA, PR #56, p. 3). All alternatives except the No Change (current management) alternative protect 100 percent of spring/seep areas and would have a 5-acre riparian habitat enclosure (EA, PR #56, pp. 10-29, Decision Notice PR #58 pp. 2, 3). In effect, 100 percent of riparian areas would be excluded from livestock grazing. Since the selected alternative would protect 100 percent of riparian areas located within the Canyon del Buey allotment, then the Forest Service will have adequately protected riparian habitat and riparian obligate species.

Note: Dr. Stoleson's 1998 review of district Southwestern Willow Flycatcher habitat is cited as a reason that there is no suitable or potentially suitable habitat within the allotment, but the document was not found within the project record. Please add this review to the project record.

**Finding:** The Forest determination that sensitive species viability will be maintained and that there is no trend towards federal listing is supported by documents in the project record and the EA analysis. Based on review of the project record, the Forest did not violate the NFMA requirement to maintain viable numbers of all species. Further, the Forest is committed to the protection of riparian/spring/seep habitat by excluding 100 percent of this habitat from livestock grazing, thus protecting riparian obligate species and their riparian habitat.

**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. The EA and DN violate NFMA and NEPA by failing to give significant data on MIS. The 10<sup>th</sup> Circuit has said that the status of MIS has to be monitored with actual numbers rather than just assuming that available habitat ensures their health.

**Response:** The population and habitat trends for all Gila National Forest Management Indicator Species (MIS) are evaluated and disclosed in the 2004 Gila National Forest Management Indicator Species Report (Gila NF MIS in PR #41), the Quemado Management Indicator Species Evaluation (Quemado MIS also in PR #41), and the EA (PR #56, pp. 66-70). These documents address population trends and viability at a broad-scale (Nation-wide to District-wide). Selection of affected MIS species is outlined on page 66 of the EA (PR #56) and page 24 of the Wildlife Assessment of the Canyon del Buey Allotment (PR #41). The latter two documents (PR #'s 41 and 56) describe project-level effects to 19 MIS species including elk, mule deer, pronghorn antelope, Abert's squirrel, red squirrel, blue grouse, blacktail jackrabbit, Mearn's (Montezuma) quail, horned lark, longtail vole, meadow (Mogollon) vole, beaver, turkey, plain (juniper)

titmouse, hairy woodpecker, Mexican spotted owl, killdeer, mallard, and common (northern) flicker. A summary table is included in the EA (PR #56 p. 67) for the predicted trends for habitat and populations separated by each alternative. In the pages following the table there are descriptions of habitat requirements and population trends.

A summary of effects on the 19 MIS species that were analyzed for this allotment follows:

**Elk** – The allotment is within Game Management Unit (GMU) 15 (Grazing Consultation Forms, Allotment Status, PR #33). NMDGF have set a goal to manage elk herd numbers at about 4,500 animals within GMU 15 with current numbers at approximately 3,500 animals (PR #41 Wildlife Assessment p. 10). NMDGF data indicates that the forest-wide trend varies from stable (southern Gila) to down (northwest, northeast, and central Gila) (Gila NF MIS PR #41 p.6). The Proposed Action would improve range and riparian condition (Quemado MIS PR#41 p. 6). Habitat would change with changes in range and riparian condition, but the population would stay stable per NMDGF Operational Plan (EA, PR #56 p. 67 and Quemado MIS PR #41 p. 10).

**Mule deer** – NMDGF data indicates that mule deer on the Gila National Forest have been in a general downward trend (PR #41 Gila NF MIS p. 6). Mule deer is not a grass-dependent species so changes in range condition would have little effect on habitat capability. Change in habitat would not be sufficient to trigger a change in population. The Proposed Action would improve range and riparian condition (PR #41 Quemado MIS p. 7). NMDGF is expected to continue current hunt strategies and management, maintaining the slight downward trend (EA, PR #56 pg. 68).

**Pronghorn antelope** – Since 1986, pronghorn antelope numbers on the Forest have remained stable on the District to stable to slightly declining across the Forest (PR #41 Gila NF MIS p.8). Habitat would change consistent with range condition. No change in population is predicted for any alternative except the No Grazing alternative. All the alternatives are expected to improve habitat, and livestock grazing alternatives would maintain the current hiding cover but not improve it (PR #41 Quemado MIS p. 8). Populations present on the allotment are unlikely to change under any alternative except No Grazing alternative (EA, PR #41 pg. 68).

**Abert's and red squirrel** – Both of these species are ranked as G5 in the NatureServe database throughout their range; that is it is globally secure and common, widespread, and abundant. There is no apparent trend for Abert's or red squirrels across the forest, however, they are noted as being sufficiently abundant to withstand hunting pressures as they are managed as a small game species by the NMDGF (PR #41 Gila NF MIS report pp.8-10). Population data on the district fluctuates considerably. Abert's squirrel populations are generally down across the district, while red squirrel populations appear to be relatively stable (PR #41 Quemado MIS pp.8-9). Since the squirrels are pine and mixed conifer dependent, livestock grazing would have no discernable effect on the habitat under any alternative. Consequently, no change in population is predicted (EA, PR #56 pg. 68).

**Blue grouse** – NatureServe database ranks the blue grouse as a G5 species throughout its range; that is, it is secure and common, widespread, and abundant. NMDGF manages blue grouse through annual hunting permits and indicate that statewide populations appear to be stable at this time. Populations on the Forest are too isolated and uncommon to obtain an accurate forest trend at this time (PR #41 Gila NF MIS pp.20-21). There are currently no known populations of blue grouse on the Quemado Ranger District (PR #41, Quemado MIS p.16 and EA, PR #56 pg. 68);

however there is potential, marginal habitat on Mangas, Fox, and Aspen Mountains. Surveys to date have all been negative for blue grouse. Since blue grouse are a mixed conifer dependent species, none of the alternatives would have a discernable effect on the mixed conifer habitat. Habitat trend is stable, no population trend is predicted (EA, PR #56 pg. 68).

Note: Need to include District blue grouse surveys into project record.

**Blacktail jackrabbit** – NatureServe database ranks the blacktail jackrabbit as a G5 species throughout its range; that is, it is secure and common, widespread, and abundant. Blacktail jackrabbits are well distributed across the forest. Populations have been documented to vary annually and locally but no long term forest trend has been discerned (PR #41, Gila NF MIS pp.12-13). This is an early seral stage dependent species, which livestock grazing maintains. A meaningful change in population trend is unlikely (EA, PR #56 pg. 68 and PR #41 Quemado MIS p.9).

**Mearn's (Montezuma) quail** – Throughout its range the Mearn's quail is listed as G4 or G5 meaning apparently secure, uncommon but not rare, and usually widespread, not vulnerable in most of its range, or globally secure and common, widespread, and abundant, respectively. The trend for the species on the Forest is thought to be stable (PR #41 Gila MIS pp.21-23). The species has not been found on the allotment, so population trend is not predicted. Recent district observations indicate an increase in population occurrence and abundance across potential habitats across the district (EA, PR #56 pg. 68). All alternatives except the No Change alternative are predicted to improve habitat conditions for the species (PR #41 Quemado MIS p.11).

**Horned lark and killdeer** – North American Breeding Bird Surveys (BBS) indicate a downward trend in New Mexico. It appears that Forest populations are slightly down (PR #41 Gila NF MIS pp.24-25). These are early seral grassland and margin of water dependent species preferring short grass. Habitat capability would benefit from livestock grazing but decline under little or no grazing use. The allotment has some habitat available for killdeer. Action alternatives predict a decline in habitat conditions for horned lark since grass height would be lowered. The general downward trend for horned lark population on the District is expected to apply to the allotment. Similarly all alternatives would adversely affect habitat for killdeer since grass height would increase (PR #41 Quemado MIS pp.11-12). Predicted changes in habitat are not likely to be sufficient to predict meaningful change in trend in population on the allotment (EA, PR #56 pg. 68).

**Longtail vole** – NatureServe database lists the long-tailed vole as G5 species throughout its range; that is, it is secure and common, widespread, and abundant. The species is sufficiently uncommon and populations so scattered that no Forest trend can be confirmed (PR #41 Gila NF MIS pp.13-14). The species occurs on adjacent districts and is believed to occur on the Quemado district although surveys have been negative to date. Habitat capability would improve under little or no livestock use. All alternatives would increase habitat and populations since all result in substantial improvement in meadow and spring/seep-related habitats on the allotment (PR #41 Quemado MIS pp.9-10). Population change is predicted based on reduced use of forage by livestock under all but the No Change alternative (PR #41, and EA, PR #56 pg. 68).

**Beaver** – Throughout its range the beaver is listed as a G5 species by NatureServe meaning secure, common, widespread, and abundant. Currently, beaver populations in the state and in the

Gila National Forest are unknown (PR #41 Gila NF MIS pp.15-17). There appears to be fewer occupied sites currently than in 1986 on the Quemado district based on observations by district personnel. There are no beaver present in the allotment and the ephemeral nature of Patterson Canyon precludes occupancy by beaver. Since the riparian conditions are severely limited by encroachment of the roadbed, no alternative is predicted to improve habitat conditions. No population trend is predicted since the species does not occur on the allotment (PR #41 Quemado MIS p.10, and EA, PR #56 pp.68-69).

**Merriam's Wild Turkey** – State-wide trends appear to be down due to drought conditions. Forest-wide turkey population in 1986 was estimated at 10,730 animals with relatively stable population numbers (PR #41 Gila NF MIS pp.18-20). Four BBS routes adjacent to the District show an upward trend. Generally, turkey benefit from retention of tall cover and the presence of abundant large seed heads. Alternatives that maintain current levels of vegetation utilization would benefit turkey habitat the least. No meaningful population trend is likely considering annual population fluctuations due to climatic and weather factors and annual hunting strategies (PR #41 Quemado MIS pp.15-16 and EA, PR #56 p. 69).

**Plain (juniper) titmouse** – According to the BBS, long-term population trends appear to be stable to slightly decreasing at the Forest level (PR #41 Gila NF MIS p.32). Livestock grazing alternatives would not affect the primary constituent elements of titmouse habitat, so no alternative would noticeably change habitat capability for this species. No change in population trend (EA, PR #56 p. 69) or habitat (PR #41 Quemado MIS p.11) is predicted.

**Hairy woodpecker** – According to the BBS, long-term population trends appear to be stable to slightly decreasing at the Forest level (PR #41 Gila NF MIS p.30). Recent drought related die off of larger trees has increased snag availability (PR #41 Quemado MIS pp.16-17). No alternative would noticeably change habitat capability for this species, so no change in population trend is predicted for the allotment (EA, PR #56 p.69).

**Mexican spotted owl** – Forest-wide there have been 570 individuals located, however, not all suitable habitat has been surveyed. Since there is inconclusive evidence regarding whether the MSO population is declining or is significantly less than historical levels, the long-term population trend for MSO on the Gila National Forest appear to be low, cyclic, but stable (PR #41 Gila NF MIS p.18). District-wide there are 39 Protected Activity Centers (PACs) on the Quemado Ranger District.

There is generally little livestock use in protected or restricted conifer habitat; however, there are portions of two PACs within the allotment. Monitoring indicates little livestock use in one PAC and moderate to heavy use of the meadow in the other PAC. All alternatives except the No Change alternative would improve habitat capability for this species. It is predicted that meadow improvement and consequent prey species habitat improvement would occur if any alternative except the No Change alternative were selected. No change in population trend is predicted for the allotment since woodrat populations appear to be the mainstay prey item for both existing MSO pairs. Protective measures are in place to minimize potential direct and indirect effects of livestock use (EA, PR #56 p. 69 and PR#41 Quemado MIS pp.12-15).

**Mallard** – State-wide population trends appear to be declining while long-term population trends for the Gila National Forest appear to be stable (PR #41 Gila NF MIS pp.33-34). Based on expectation of improved herbaceous cover around currently heavily used stock tanks due to

redistribution of use by livestock and reduction in allowable use levels all alternatives except the No Change are predicted to improve habitat. This slight improvement in habitat conditions is not expected to manifest in any change in population since the allotment receives only sporadic, occasional, and erratic use. Due to the marginal potential of existing habitat any increase in population on the allotment is unlikely, and periodic use of the allotment by resting migratory birds is not sufficient to predict a trend (EA, PR #56 p. 69 and PR#41 Quemado MIS p.12).

**Common (northern) flicker** – According to the BBS, there has been a slight increase in state population trends, and long-term population trends for the Gila National Forest appear to be stable (PR #41 Gila NF MIS pp.27-28). No alternative would change primary constituent elements for the flicker or noticeably change habitat capability for this species (EA, PR #56 p. 70). Recent drought related die off of larger trees has increased snag availability (PR #41 Quemado MIS p.16). No change in population trend is predicted for the allotment (EA, PR #56 p. 70).

**Meadow (Mogollon) vole** – Throughout its range the vole is listed as G4 or G5 meaning apparently secure, uncommon but not rare, and usually widespread, not vulnerable in most of its range, or globally secure and common, widespread, and abundant, respectively (PR #41 Gila NF MIS pp.14-15). This is the most common vole on the Gila National Forest; however, there is insufficient population data at this time to suggest a forest or district trend. Higher range and watershed conditions would result in higher habitat capability. Reductions in livestock grazing, protection of meadows and riparian areas have improved habitat conditions since 1995 (PR #41 Quemado MIS p.10). Populations in these small mammals fluctuate with weather conditions. Changes in habitat capability are predicted to change populations because the species limiting factor is closely tied to range and watershed condition (EA, PR #56 p. 70).

The Forest MIS assessment contains records of Breeding Bird Surveys, Forest surveys, and surveys from partner agencies such as the New Mexico Department of Game and Fish (NMDGF). NMDGF elk management information and deer surveys conducted by game management unit are included in the project record as part of PR #41.

**Finding:** The project record contains sufficient information to determine population trends of MIS at a broad-scale, as well as habitat trends. The Forest completed an analysis of MIS that was sufficient to ensure that minimum viable populations of wildlife would be maintained. Population viability, trends, and habitat trends are sufficiently analyzed and documented at both broad-scale and at the project level.

**ISSUE 4: The Canyon del Buey 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 there is no legally adequate RPA program or land and resource management plan to which the Canyon del Buey term grazing permit issuance project can be tiered. Term permit must be suspended until the Forest publishes a new FEIS supporting a revised Gila LMP.

**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 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 5: The project does not meet the requirements of NEPA.**

**Contention A:** The EA does not include a purpose and need section as required by NEPA. The purpose and need in the request for comments noted under-utilization but failed to recognize over-utilization on much of the allotment. The stated need is biased and thus leads to a statement of purpose and need that is arbitrary and capricious.

**Response:** Chapter 1 of the EA is titled Purpose and Need for Action (PR #56 p.3). Over-utilization of key areas has been addressed within annual operating instructions and resolved recurring problems with the exception of one key area near a water source (PR #56 p. 6). Current utilization monitoring shows a pattern of heavy use in the soft areas within the Slaughter and Canyon del Buey pastures (PR #56 p. 36). One of the project objectives is to reduce the risk and occurrence of forage and browse utilization exceeding set allowable use levels (PR #56 p.6). The purpose and need emphasizes improvement of range condition, improvement of watershed condition, improvement of forage quality, quantity, and the high meadow; and protection for springs and seeps (PR #56 p.6). The purpose and need is developed based on current conditions and monitoring.

**Finding:** The required purpose and need section is found in the EA. The need does not show bias towards more utilization and is not arbitrary and capricious.

**Contention B:** 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 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)).

Four different alternatives were reviewed. The four alternatives include a Resource Economic alternative, the No Change alternative, the Proposed Action and a No Grazing alternative (PR #56 pp. 10, 16, 20, 21). No significant issues besides cost were raised in the public scoping. The issue of cost of improvements was addressed in the Resource Economic Alternative that was developed (PR #56 pp.8-9, 16-17). As shown in the comparison of alternative table (PR #56 p. 24), the livestock stocking varies in the three grazing alternatives, with the Resource Economic alternative having less livestock and AUMs than either the Proposed Action or No Change alternative.

**Finding:** The Responsible Official appropriately defined the scope of the analysis and analyzed a range of reasonable alternatives that addressed significant issues 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. The FS is obligated to designate key forage monitoring areas under the Endangered Species Act as a result of the Biological Opinions on the 1996 Forest Plan amendments.

**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.

Levels of allowable use were included in the consultation process under Section 7 of the Endangered Species Act (PR #33). Allowable use levels by key area and pasture are documented in the EA (PR #56 p.13). The use levels established represent conservative stocking levels based on objectives to maintain plant physiology, and residual herbaceous cover.

**Finding:** The Responsible Official did not violate NEPA by not disclosing the key area names and locations. 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. Utilization standards and monitoring protocol for the Canyon del Buey 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. The only information concerning cumulative effects in the record is contained in the EA. The information provided is insufficient. The EA does not even attempt to catalog other activities occurring with the allotment's boundaries.

**Response:** Cumulative effects were addressed in the EA and project record. Cumulative effects include watershed (EA PR#56 p.39), economics (EA PR#56 pp.29, 82-84) other activities in area (EA PR#56 p.30), past activities in area (EA PR#56 p.31), connected actions (EA PR#56 pp.38, 43, 47), air effects (EA PR#56 p.41), riparian effects (EA PR#56 p. 47), noxious weeds (EA PR#56 p. 51), social (EA PR#56 pp.87-89) and a section in the EA on vegetation, roads structure, wildlife and wild fire cumulative effects (EA PR#56 pp.72-77). These sections more than adequately disclose cumulative effects. There is also a separate report in the record on 5<sup>th</sup> code watershed cumulative effects (PR #52).

**Finding:** Cumulative effects of alternatives were extensively disclosed and addressed in the EA and project record.

**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. There is no information about the economic benefits of other uses of this allotment such as recreation although the EA states that the community is pursuing diversification of the economy. Although this EA gives the expected improvements and their costs, there is no summation nor is it connected with information about fees coming in.

**Response :** Projects such as the Canyon del Buey 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 Gila LRMP. The responsible line officer determines the scope, appropriate level and complexity of economic and social analysis needed (FSM 1970.6).

The cost of range developments of the proposed action was identified as a significant issue for the analysis (PR #56 p.9). The EA addressed economics and reviewed income and costs to the permittee and receipts to the county (PR #56 pp. 28-29, 77-85). Costs of developments were specifically addressed on page 84 of the EA. The project record also includes the economic report as background (PR #43).

**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.

**Contention E:** The EA fails to discuss the impacts of the new water developments such as the changes to soil and vegetation.

**Response:** The effects of livestock trampling and compaction around water developments are described in the EA (PR #56 pp. 33, 36). The proposed action will have fewer areas of

concentrated use by livestock (PR #56 pp. 32, 36). The use and effects of trampling of vegetation around water sources is described for all alternatives on page 56 of the EA (PR #56).

**Finding:** The effects of new water developments in alternatives have been properly disclosed and analyzed in this analysis for the Responsible Official to make an informed decision.

**Contention F:** The stocking numbers in the preferred alternative are based on undisclosed and arbitrary assumptions about the levels of forage that will be available. There is no basis for the predictions in the tables in the Canyon del Buey EA (pp. 54-55).

**Response:** Capacity estimates take into account slope, distance from reliable water, forage production, allowable use, and estimated wildlife use yearlong on the allotment (PR #35). Capacity estimates reflect management objectives by alternative (PR #13 pp.35, 56). The proposed action moves existing conditions associated with high elevation meadows, range, watershed, riparian, spring/seep and wet meadow areas significantly closer to desired conditions within a 10-year period. Under this alternative the stocking level could be increased beyond the lower level identified in the alternative based on meeting specific criteria identified in the environmental assessment (PR #56, Appendix 3). The economic alternative establishes a lower stocking level based on fewer investments in range improvements and a lower intensity of management (PR #56). Capacity estimates for the proposed action were reduced by five percent to provide more flexibility to respond to changing precipitation patterns.

**Finding:** There is nothing in the record to suggest that the method for estimating capacity for the alternatives considered in detail is arbitrary.

**Contention G:** The FS has violated NEPA, APA, and the Appeals Reform Act because they have failed to provide an EA for comment. 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. There was no detailed information on the expected effects of the proposed action, and the public did not have the information available to provide the substantive comments being demanded by the new regulations. The comment period was like an additional scoping notice.

**Response :** In the *Citizens for Better Forestry v. USDA* case, 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), NOAA had done an EA that went out for comment, then the proposed management plan was later 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 Canyon del Buey project, a 30-day notice and comment period was used for the EA. The proposed action sent out for public comment was a preliminary EA which included four alternatives and a detailed effects analysis for each of those alternatives (PR #44). This preliminary EA included more than enough information for the public to respond with substantive comments specific to the proposed action alternative, comments relating to the proposed action, and reasons for the Responsible Official to consider in making the decision (36 CFR§215.2).

**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 6: The decision violates the Multiple Use and Sustained Yield Act.**

**Contention A:** The appellant alleges that the decision violates the Multiple Use and Sustained Yield Act by failing to manage for the highest public benefit. The Forest Service continues to subsidize the cattle industry, especially on an allotment where improvements will be costly but a minimal amount will be generated from annual grazing fees. 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 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 analyzes the effects of the selected alternative on the various resources. The effects of the proposed action alternative are described as improving watershed conditions and soil conditions on the allotment overall (PR#56 p.32).

The Decision Notice (PR # 58) states that the proposed action, which was selected, moves toward all of the desired objectives described in the EA, including improvements in watershed and range condition.

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

**ISSUE 7: The EA 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 :** The EA, DN and the 75 documents in the record disclose the analysis done to evaluate resource conditions on the allotment and the effects of alternatives considered. Along with specialist reports for each resource, the record also includes field data records. The record includes Terrestrial Ecosystem System information on soil mapping and plant communities (PR #2).

**Finding:** In the Decision Notice for the Canyon del Buey Allotment, the Responsible Official properly assessed the issues, public input, and impacts to resources in her 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:** Use levels of available forage are connected with years of above-average precipitation. The EA mentions that drought conditions are expected to continue but fails to take this expectation into consideration when discussing effects of the alternatives.

**Response:** The lower range of stocking in the proposed action reflects a 20 percent reduction over the no change alternative (current management) (PR #13, 35, 56). Allowable forage utilization levels are determined from “proper use” and are the level of grazing utilization that can be permitted on an area when all influencing factors are considered (FSH 2209.21\_R-3). It is impossible to accurately predict the effects of continued drought on the forage resource. The actual stocking on the allotment in any given year will be determined by site-specific criteria such as availability of water and forage. Decisions documented in the Annual Operating Instructions reflect current and anticipated on the ground conditions.

**Finding:** Decisions documented in the Annual Operating Instructions will reflect current and anticipated on the ground conditions and provide flexibility in responding to natural variability in resource conditions. The EA adequately addresses the drought conditions in the alternative development and analysis in the record.



**File Code:** 1570  
**Route To:**

**Date:** November 23, 2004

**Subject:** ARO, Appeal # 05-03-06-0001-A215, Canyon del Buey Allotment, Quemado Ranger District, Gila National Forest

**To:** Marcia Andre, 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 (DN/FONSI) on the Canyon del Buey Allotment, Quemado Ranger District, Gila National Forest.

District Ranger Janice Stevenson signed the decision on 9/14/04. 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), DN/FONSI, 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 Gila 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 Gila National Forest Plan. I found no violations of law, regulations, or Forest Service policy. However, two documents were mentioned in the EA that could not be found in the project record and should be included. Please add:

Dr. Stoleson's 1998 review of Southwestern Willow Flycatcher habitat.  
District blue grouse surveys.

**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/ Rick Stahn  
RICHARD STAHN  
District Ranger  
Appeals Reviewing Officer

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