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File Code: 1570/2200

Date: October 22, 2004

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

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

RE: Appeal #04-03-06-0003-A215, Tennessee Allotment, Glenwood Ranger District Gila National Forest

Dear Mr. Stern:

This is my review decision on the Forest Guardian's appeal filed regarding the Decision Notice (DN), Environmental Analysis (EA), and Finding of No Significant Impact (FONSI) on the above-referenced project, which provides for grazing up to 80 cow/calf pairs, not to exceed 600 AMs in a grazing year.

### **BACKGROUND**

District Ranger Jacque Buchanan made a decision on the Tennessee Allotment 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; and c) public participation and response to comments were adequate. However, the decision is not consistent with agency policy, direction and supporting information as described below.



**APPEAL DECISION**

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I reverse the Responsible Official's decision on the Tennessee Allotment Project. The decision does not match the Proposed Action sent out to the public and analyzed for environmental effects. It does not agree with the proposed action sent to USFWS for Endangered Species consultation.

In order to proceed with the project, a new decision notice must be issued that is consistent with the proposed action and the action consulted upon for ESA. If the new decision is consistent with the proposed action in the NEPA document and the proposed action consulted on, it is subject to appeal under 36 CFR §215. A new 30-day comment period will not be necessary since the NEPA proposed action and the analysis has not changed.

If a decision is chosen that is different from the proposed action or range of alternatives analyzed and described in the NEPA analysis, a new 30-day public comment period and re-consultation must be completed before issuing a new decision subject to appeal under 36 CFR §215.

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

The review and findings of the points raised in your appeal is enclosed.

Sincerely,

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

cc: Constance J Smith, David M Stewart, Jacque A Buchanan, Larry Sears, Debby J Hyde-Sato, Cecilia McNicoll, Mailroom R3 Gila

**REVIEW AND FINDINGS****of****Billy Stern's Forest Guardian****Appeal #04-03-06-0003-A215**

**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, "...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 conduct an economic analysis that includes uses foregone; 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 (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 National Forest Plan.

**Issue 2: The Decisions violate 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 doing so violates both the Forest Plan and Regional Guide. Appellants cite current unsatisfactory riparian conditions, risk of overgrazing, especially in drought years and inadequate description of the "no grazing" alternative.

**Response:** Appellants cite extensively from the *Regional Guide for the Southwestern Region* (1983). This guide was removed as guidance and either incorporated into Forest Plans or dropped as guidance (see Federal Register Notice, 66 FR 65463, December 19, 2001).

Current riparian conditions are rated as properly functioning, with measurable improvement occurring between 1998 and 2003 (PR# 67, p. 7). The protection of riparian areas was identified as a project priority and the decision prescribes management changes that will have a positive effect on improving riparian vegetation. The decision also minimizes any risk of overgrazing by dictating seasonal use and utilization rates for riparian areas, and provides for monitoring in key

areas (PR# 91). The effects analysis of the “no grazing” alternative appropriately describes an upward trend in riparian condition and growth of riparian vegetation in Tennessee creek (PR# 77, p 24).

**Finding:** Continued riparian improvement is ensured under this decision and there is no violation of the Gila National Forest Plan.

**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:** The EA (PR #77), Biological Evaluation package (PR #10), Migratory Bird Effects Analysis (PR #59), Threatened and Endangered Species Report (PR #69), Sensitive Species Report (PR #70), MIS Evaluation (PR #71), and Cumulative Wildlife Effects Report (PR#72) analyzed the effects to Federally listed species, Management Indicator Species, Region 3 Regional Forester Sensitive Species, and migratory birds occurring on the allotment. These are the only species required to be analyzed according to Federal law and policy. The analysis did not determine any threats to species viability.

The proposed action “may affect, is not likely to adversely affect” the threatened spikedace, loach minnow and their critical habitats. The US Fish and Wildlife Service (FWS) concurred with these determinations on July 25, 2003 (PR #51). The proposed action also “may affect is not likely to adversely affect” the endangered southwestern willow flycatcher and the proposed Chiricahua leopard frog. The FWS concurred with these determinations on February 27, 2004 (PR # 66). In order to protect the riparian resources in Tennessee Creek, grazing will be restricted in the riparian area to dormant season use and utilization rate of 20 percent applied to the woody obligate species. Additionally, a pipeline approximately 1 mile long will be extended from an existing spring, in order to create a new water source that will enable better livestock distribution and help maintain and improve allotment conditions (PR #51, 61, and 91).

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

**Contention B:** Population survey data of Management Indicator Species is needed to ensure the maintenance of minimum viable populations of wildlife. The appellant asserts that since the Forest Service lacks quantitative inventory data on many, if not all, MIS in the planning area and the forest as a whole, and the scant data that it does have indicates some species are declining, the agency’s decision is arbitrary and capricious.

**Response:** The Tennessee Allotment MIS Report (PR #71), incorporates by reference the Gila National Forest Plan and EIS and includes appropriate sections of the 2002 Gila National Forest Management Indicator Species Report. Selected Management Indicator Species (MIS) are tied to successional (seral) stages of each vegetation type and serve as an indicator for detecting major habitat changes (LRMP EIS p. 71). Nine MIS were analyzed associated with three vegetation types found on the Tennessee Allotment which are piñon/juniper woodlands,

ponderosa pine, and mid-elevation riparian. Anticipated changes to successional stages within each vegetation type are used to determine potential impacts to MIS at the project level and impacts to MIS population trends at the Forest level as a result of project implementation.

The MIS report (PR #71) indicates that population trend data is often gathered at a larger scale, by cooperating agencies. The MIS report also states that qualitative data is available through field observations by the district biologist and range staff personnel however there is no documentation in the project record of these observations. MIS population trend is analyzed in the MIS report (PR #71) and that report fails to show any consistent declining trends.

**Finding:** The Gila National Forest Plan identified MIS that were associated with successional stages of each vegetation type to serve as an indicator for detecting major habitat changes. The decision is based on the data and analysis presented in the project record and is not arbitrary and capricious. Observation data should be added to the project record.

**ISSUE 4: The Tennessee 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 Tennessee term grazing permit issuance project can be tiered.

**Response:** There are no statutes or regulations that describe expiration date for the Forest Service Renewable Resource Program or Gila National Forest Land and Resource Management Plan (1986) as amended. A recent court decision in Wyoming upheld the use of the current Plan until revised (*Biodiversity Assoc. v. USFS*, 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. The District addressed this issue in their response to scoping comments (PR #56) where they stated the requirement to update the LRMP is made at a higher level.

**Finding:** The current plan is in effect until the revision process is completed. There are no requirements to suspend activities on the Gila National Forest until a new plan 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.

**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 also driven by significant issues identified in scoping (40 CFR 1501.2(c)).

The ID Team evaluated the responses received during scoping to determine which responses were significant (PR #56). No issues were raised that required development of additional alternatives.

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

**Contention B:** 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. 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:** There is no NEPA requirement to disclose the names and locations of key areas.

The record demonstrates utilization standards have been considered, consulted on and established for the Tennessee allotment for both herbaceous species and woody riparian species (PR #10, #64, #77 and #91). The selected alternative, Alternative 2 (PR #77, p. 3), specifies residual stubble heights on key herbaceous forage species, and 20 percent utilization cap on woody riparian obligate species. The project record shows that utilization monitoring protocol has been developed for the Tennessee allotment (PR #64, p. 9 and #77, pp. 3-4).

**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 Tennessee Allotment were developed in accordance with Forest Service policy.

**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, “The EA contains virtually no analysis of cumulative effects...”

**Response:** The EA disclosed the cumulative effects of the proposed action and past, present, and reasonably foreseeable future actions (PR #77, pp. 44-52). The EA disclosed that the cumulative effects analysis considered potential changes to on-site conditions such as soil characteristics and downstream effects such as changes to overland flows (PR #77 p. 49). The watershed analysis (PR #67, p. 15), the Cumulative Wildlife Effects Report (PR # 72), and Heritage Resource Specialist Report (PR# 61), address cumulative effects to the resources.

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

**Contention D:** The Forest Service violated NEPA because the full economic implications of the action were not considered. The EA failed to weigh the economic costs and benefits of the project and disclose the full cost of continuing grazing on the allotment for ten years to the taxpayer.

**Response:** The Forest Service Manual (FSM 1970.6) states that the Responsible Line Officer determines the scope, appropriate level, and complexity of the social and economic analysis. Based on the direction in FSH 1909.15\_13.03, the type and amount of data collected in an environmental analysis depends on the nature of the action, the issues, and the scope, context, and intensity of anticipated effects.

The Social-Economic Report (PR #63) for the Tennessee allotment considered economic criteria such as present net value, benefit/cost ratio, annual equivalent value, and internal rate of return. Each of these criteria was calculated using the Quick Silver economic modeling program to determine potential economic returns for each alternative. Based on that analysis, the selected alternative (Alternative 2) was found to provide the highest present net value and benefit/cost ratio compared to the other two alternatives (PR #63, p. 8).

**Finding:** The economic analysis is consistent with regulation provided in the Forest Service handbook and manual for project-level analysis and is not in violation of applicable laws, regulation, and policy.

**Contention E:** 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. The appellant contends that failing to disclose permit violations in the decision making process is a violation of NEPA, NFMA, and MUSYA.

**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.

**Finding:** The Forest Service is not required to disclose past permit violations in the decision making process.

**Contention F:** 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:** Precipitation records were displayed and considered in the EA for recent years which takes into account the drought (PR #77). 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. Consequently, conservative forage utilization standards that include a cap (PR #64, #77, and #91) are being implemented.

The actual stocking on the allotment in any given year is determined by site specific range-readiness checks and other criteria such as availability of water (PR #91, p. 1). Decisions documented in the Annual Operating Instructions reflect current and anticipated on the ground conditions.

**Finding:** Setting of a conservative allowable forage utilization standard is one of the considerations on which to base pasture moves and annual grazing management. These standards provide flexibility in responding to natural variability consistent with existing Forest Service policies and research.

**ISSUE 6: 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 (PR #1). The Forest Plan provides direction for management emphasis within the project area. In the case of range management, the goal is to provide forage to the extent benefits are commensurate with costs without impairing land productivity and within the constraints of social needs (PR #1, p.11). No significant effects were found during the analysis that would result in impaired productivity to the environment (DN/FONSI PR #91 pp. 3-12).

**Finding:** This decision is consistent with the Gila National Forest Plan, which determined that domestic livestock grazing is an appropriate use of this area. Highest public benefit was determined in the Forest Plan Record of Decision and is outside the scope of project-level analysis.

**ISSUE 7: The EA violates the Administrative Procedures Act.**

**Contention A:** The appellant contends that due to poor conditions on the allotment the selected alternative does not represent a reasoned and rational decision and would likely be considered arbitrary and capricious under APA.

**Response:** The EA states that 66 percent of the allotment is in poor range condition (PR #77 p.12), and defines this range condition rating as related to the lands' ability or value for grazing livestock (Region 3 Rangeland Analysis and Management Training Guide, p. 2-1). It is not an ecological rating. Range condition rating is based on plant species composition, abundance, and vigor in relation to the forage preference of the type of livestock to be grazed (i.e., cattle). That portion of the allotment with a poor range condition rating is generally in an upward trend, while that portion in fair condition is generally in a stable trend (PR #77, p.12).

In the DN/FONSI for the Tennessee Allotment, the Responsible Official assessed the issues, public input, and impacts to resources in the decision rationale. The Decision Notice stated that Alternative 2 (selected alternative) provides for the best combination of protection and restoration of the resources and the economic needs of the permit holder (PR #91, p. 2).

**Finding:** 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 fails to connect the allowable use level with measurements of available forage, which leaves the allowable annual use an arbitrary decision.

**Response:** Forage utilization levels are determined based on guidelines set out in the Allotment Analysis Handbook (FSH 2209.21\_R-3). These guidelines specifically describe appropriate forage utilization levels recommended for the purpose of improving rangeland conditions. Current research was also used (Holechek 1988, Holechek and Galt 2000 as cited in PR #64, p. 12).

**Finding:** Information found in the project record does not support the contention that this decision was arbitrary. The District adequately connected allowable use levels with available forage calculations in the Range Specialist Report and displayed the results in the EA.



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**File Code:** 1570-1  
**Route To:**

**Date:** October 21, 2004

**Subject:** ADO, Appeal #04-03-06-0003-A215, Tennessee Allotment, Glenwood RD, Forest Guardians appeal

**To:**

This is my recommendation on the disposition of the two appeals filed in protest of the Decision Notice and Finding of No Significant Impact concerning the Tennessee Allotment on the Glenwood Ranger District of the Gila National Forest.

District Ranger Buchanan made a decision on July 28, 2004, for the Tennessee Allotment. The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations. Billy Stern of the Forest Guardians filed appeal #04-03-06-0003-A215 and Morgan Gust of the Three-Up Outfit filed appeal #04-03-06-0004-A215 under the 36 CFR 215 regulations.

### **Informal Disposition**

Pursuant to 35 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 record including the appellant's issues and request for relief has 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 does not clearly describe the action in sufficient detail for the reader to easily understand what will occur as a result of the decision. Specifically, the decision incorporated a 35% utilization cap in addition to a stubble height standard for utilization that was put before the public in the EA. Furthermore, the stubble height standard described in the decision does not match the stubble heights by species as described in the EA and consulted on with the US Fish and Wildlife Service. It is very difficult for the reader to determine what the actual utilization standard is and, furthermore, what are the actual effects of that standard.
- 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 except as described above in Item 1.
- 4) The record reflects that the Responsible Official provided 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. However, the public did not get an opportunity to comment on the utilization standards that were adopted in the decision.

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 except as described above in Items 1 and 4. Specifically, the decision does not match the alternatives described in the EA well enough for the reader to be able to clearly understand the decision regarding grazing utilization standards and what the effects of that standard will be; and the public did not get an opportunity to comment on the selected utilization standards.

It appears that a new decision could be made based on the existing environmental analysis that would be consistent with the analysis or a new analysis should be made that considers the effects of the chosen utilization standard.

### **Recommendation**

I recommend that the Responsible Official's decision relating to these appeals be remanded or reversed.

/s/ Larry G. Sears  
LARRY G. SEARS  
Appeal Reviewing Officer

Cc: Jacque Buchanan  
Connie Smith