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File Code: 1570/2200  
Date: October 22, 2004

Morgan Gust  
Three-Up Outfit  
PO Box 25  
Mule Creek, NM 88051

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
NO.

RE: Appeal #04-03-06-0004-A215, Tennessee Allotment, Glenwood Ranger District Gila National Forest

Dear Mr. Gust:

This is my review decision on the Three- Up Outfit'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, Larry Sears, Jacque A Buchanan, Mailroom R3 Gila, Debby J Hyde-Sato, Cecilia McNicoll

## **REVIEW AND FINDINGS**

**of**

**Three-Up Outfit's**

**Appeal #04-03-06-0004-A215**

**ISSUE 1: NEPA was violated because public comments, alternatives and economic considerations were not taken into account in the decision.**

**Contention A:** The decision has failed to take into account comments previously provided by the permittee on the Tennessee Allotment EA, its supplement dated August 15, 2000, scoping in June 10, 2003 and its supplement, Mule Creek community comment, and other comments made by permittee in the past. Appellant attached exhibits with copies of some of these comments.

**Response:** Scoping comments were provided by the appellant on at least two separate occasions in regards to the most recent proposed action (PR #5, 6, 8, 44, 46). The ID Team reviewed all scoping comment letters for significant issues as evident in the content analysis (PR #56). Comments provided by both the appellant and the community of Mule Creek were included in the content analysis. Some of these comments were determined to be significant issues, and as such were addressed in the EA (PR #77 p. 5, Issues 3 & 5). Further analysis of these significant issues was provided in the effects discussion for each alternative (PR #77 pp. 26 and 28). In the Decision Notice, the Responsible Official noted that no other alternatives needed to be developed, given that these significant issues had been addressed in the Proposed Action alternative (PR #91). Additional comments were provided by the appellant during the 30-day comment period for the EA. These comments were also reviewed and responses provided in the comment analysis (PR #87). Each point surfaced by the appellant was responded to in that document.

**Finding:** The Forest Service reviewed all comments received either during scoping or during the 30-day comment period, and incorporated those comments appropriately. For those comments that were determined to be significant or substantive, the District used the comment in accordance with NEPA and the Forest Service policy (FSH 1909.15\_11.5).

**Contention B:** The current permit and grazing management since 1986 is not accurately described in the NEPA document. The current permit is best represented by Alternative 4 which was arbitrarily dropped.

**Response:** The ID Team analyzed the current permitted numbers under Alternative 3. The current permitted use pursuant to the AOI (Annual Operating Instructions) is described in Alternative 4. In the EA (PR #77 p.9), the ID Team acknowledged that Alternative 4 would be similar to the Proposed Action (Alternative 2) with the exception of the proposed pipeline development, and so Alternative 4 was considered but eliminated from detailed study. The

selected alternative has a similar grazing management system when compared to the current allotment management under AOI as described in the record.

**Finding:** The District adequately assessed the issues raised during scoping, and no additional alternatives needed to be analyzed in the EA (FSH 1909.15\_14).

**Contention C:** The EA does not adequately consider economic effects and social consequences of the proposed action. The reduction of permitted livestock numbers from 960 to 600 AUMS per year reduces the value of the permit by over one-third and results in similar potential loss of income.

**Response:** The ID Team analyzed the potential economic effects of each alternative (EA PR# 77 p. 28). That analysis evaluated cost and benefits of the allotment operation and the effect of reduced AM (Animal Months) grazed on National Forest lands, to the county tax base and local jobs. A social and economic report was prepared (PR #63) which disclosed potential effects to the local economy using the Quick Silver modeling program. Alternative 2 showed a positive benefit/cost ratio. The economic report did identify a slight reduction in jobs (0.25 jobs) and net annual income under the Proposed Action alternative, but determined that there would be no change in the base herd numbers, thus no measurable loss to the county tax base (PR #77 p. 28). The analysis concluded that the loss of animal months would be negligible in terms of revenue (PR #77 pp. 42 and 56).

It should be remembered that grazing permits and livestock use permits convey no right, title or interest held by the United States in any lands or resources (36 CFR 222.3(b), Federal Land Policy and Management Act of 1976 (Title IV, Sec. 402) and FSM 2230.3). Therefore, the Forest Service does not recognize that the permit has any equity value.

**Finding:** The District used an acceptable method for analyzing economic impacts and determined that there would be no significant economic loss to the county or to the permittee given that the number of animal months is similar to the numbers that have been grazed for the past 10 years. In addition, the Forest Service does not recognize any economic value to the permit even though there are economic benefits to a community as a result of livestock grazing, and those benefits were adequately disclosed.

**Contention D:** The permit should allow up to the current permit authorization of 960 AUM's since conservative utilization standards set forth in the new permit will be monitored and available excess forage should be used.

**Response:** Among the criteria for livestock management on rangelands, grazing intensity (amount) has been considered to be the most critical (Holechek and Galt 2000). According to the Range Specialist Report (PR #64 pp.7-8), and EA (PR #77, p. 13), current data does not support a capacity (amount) of 960 AMs or 80 head yearlong. However, it does support a capacity between 42 and 52 head yearlong. The decision to permit 80 head with a 600 AM cap reflects the option of grazing either 80 head for 7.5 months or grazing 50 head year long. In addition, it is a Gila National Forest Plan requirement that permitted [livestock] numbers will be balanced with grazing capacity (PR #1, p. 32).

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). Stocking rate is one of the influencing factors. 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. Setting of a conservative allowable forage utilization standard on which to base pasture moves and annual grazing management is consistent with existing Forest Service policies, direction, cited research, and is used when 70 percent of the allotment is in poor range condition (PR #67 p. 3, and 77 pp. 12, 27).

**Finding:** The decision to reduce permitted Animal Months (AM) from 960 to 600 is explained by the analysis and is within Gila National Forest Plan requirements. Permitted stocking levels in the Decision Notice (PR #91) reflect capacity.

**Contention E:** The record is devoid of scientific evidence supporting a reduction in permitted numbers to 600 AUM's per year, and evidence supports the 960 AUM's under the current permit.

**Response:** The record contains the Range Specialist Report (PR # 64) and EA (PR # 77, p.13), that detail three different procedures used to arrive at an estimated capacity for the allotment. The methodologies considered a range of site-specific data collected over several years (1975-2004) from the allotment. Capacity estimates were calculated using long-established Forest Service methods (FSH 2209.21 R3) as well as new procedures (Holechek et al. 1988 as cited in PR #64, p. 12). Among the three methodologies, capacity estimates were 42, 48 and 52 Animal Units (AU) yearlong.

**Finding:** Facts in the project record (PR #64 and PR #77, p. 13) do not support the current permitted numbers of 960 Animal Months (AM). However, facts in the project record do provide grazing capacity levels very close to those that occurred on the allotment for the last ten years, average annual stocking of  $41.9 \pm 8.1$  AU yearlong (PR #64, p. 2 and PR # 77, p.11).

## **ISSUE 2: The EA violates the Administrative Procedures Act.**

**Contention:** Utilization limits in the Decision purport to be based on the studies of Holechek and Galt. However, the adopted Alternative 2 does not follow the requirements of these studies. The Decision abandons this sound, peer-reviewed science in favor of its own arbitrary and capricious standards. To limit use to 35 percent year-round is arbitrary, capricious, discriminatory, and contrary to the studies on which it is supposedly based.

**Response:** There are contradictions between the Decision Notice (PR #91) and the EA (PR #77) which need resolution. Most of these conflicts appear to be due to inadequate care in citing or transferring information from one document to others regarding utilization standards.

To be specific, the Decision Notice (PR #91, p. 1) appears to be in error for the following reasons:

- 1) The Decision Notice adds a 35 percent maximum utilization level which was not in the proposed action that was analyzed and disclosed to the public. A 35 percent utilization level on herbaceous vegetation was not mentioned in the scoping report (PR #13) or in the proposed action sent out for public review (PR #77, p. 3),
- 2) A 35 percent utilization level on herbaceous vegetation was not part of the Endangered Species Act consultation package for the proposed action (PR #10, #30 and #51), and
- 4) The Decision Notice does not properly state the stubble height values that were cited in the proposed action. The Decision Notice states that stubble heights will be maintained at 2.5 inches on blue grama and 6-8 inches on black grama. In contrast, the proposed action states that stubble height values of at least 2.5 inches on blue and hairy gramas, at least 4.0 inches on black grama, and 6-8 inches on sideoats grama will be maintained (PR #77, p. 3).

**Finding:** The decision does not match the Proposed Action sent out to the public or alternatives developed and analyzed for effects in the NEPA document and project record. It also does not agree with the action sent to FWS for Endangered Species consultation. Thus the decision should be withdrawn and re-issued. The new decision would follow direction in 40 CFR§1505.1(e) requiring that alternatives considered by the decisionmaker are encompassed by the range of alternatives; and FSH 1909.15\_43.21 that a Decision Notice documents the conclusions drawn and the decision is made based on the analysis in the EA.

### **ISSUE 3: NFMA is violated because the Forest is not managing the land resource affected by the permit.**

**Contention:** Off-road vehicle use is ruining the Forest. These roads are all very steep and show severe erosion. The FS should not be cutting the grazing permit numbers and allowing this road damage to occur.

**Response:** This comment was brought up by the appellant during scoping and the District responded that this issue is beyond the scope of this analysis (PR # 56). Changes to the transportation system were not analyzed as part of the proposed action and are outside the stated purpose and need for this analysis (EA PR #77 p. 3-4). The cumulative effects discussion in the EA (PR #77 pp.48-49, 51) analyzed the impacts from these user-created roads and stated that further analysis of road conditions will occur within the next decade under the watershed assessment for the Lower San Francisco River watershed. The statement in the Decision Notice and FONSI (PR #91, p. 9) that current road densities would be maintained was not a road management decision.

**Finding:** The District was correct in their assessment that reducing the number of user-created roads was beyond the scope of this analysis. Effects of existing roads were appropriately identified under cumulative effects.



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

**Date:** October 21, 2004

**Subject:** ADO Appeal #04-03-06-0004-A215, Tennessee Allotment, Glenwood District, Gust 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