



File Code: 1570-1/2200

Date: July 19, 2001

Kirsten Stade
Forest Guardians
1411 Second Street
Santa Fe, NM 87505

**CERTIFIED MAIL -
RETURN RECEIPT REQUESTED**
7099 3220 0000 8709 9986

Re: Appeal #01-03-00-0031-A215, Tenney Allotment Decision, Alpine Ranger District,
Apache-Sitgreaves National Forests

Dear Ms. Stade:

This is my review decision concerning the appeal you filed regarding the Decision Notice and Finding Of No Significant Impact, which authorize grazing and implement the grazing management strategy on the Tenney Allotment.

BACKGROUND

District Ranger Settles issued a decision on March 30, 2001, for the above-named allotment. The decision resulted in the selection of the following alternative and authorization:

Tenney Allotment, Alternative 6, which authorizes 14 head of cattle, (Cow/Calf), to graze from July 15 through October 31 annually.

The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations. Pursuant to 36 CFR 215.16, an attempt was made to seek informal resolution of your appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR 215.17. I have reviewed the appeal record and the recommendation of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer recommended that the Responsible Official's decision be affirmed and that your request for relief be denied. The evaluation concluded: (a) decision logic and rationale were generally clearly disclosed; (b) the benefits of the proposal were identified; (c) the proposal and decision are consistent with agency policy, direction and supporting information; (d) public participation and response to comments were adequate; and (e) all of the major issues raised by the appellant were adequately addressed in the project record.



APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision concerning the Tenney Allotment, which authorizes grazing and implementation of management actions.

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

Sincerely,

/s/James T. Gladen
JAMES T. GLADEN
Appeal Deciding Officer
Deputy Regional Forester, Resources

Enclosure

cc:
Forest Supervisor, Apache-Sitgreaves NFs
District Ranger, Alpine RD
Director of Rangeland Management, R3
Appeals and Litigation Staff, R3

**REVIEW AND FINDINGS
of the**

Forest Guardians' Appeal

#01-03-00-0031-A215, Tenney Allotment Decision

ISSUE 1: The Forest Service violated NFMA by continuing to allow cattle grazing on the allotment without first evaluating the allotment's suitability for grazing. Therefore, the choice of any alternative is premature.

Contention: The appellant contends that NFMA was violated because the Responsible Official failed to evaluate the allotment's suitability for grazing, "...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 therefore, the decision is premature.

Response: NFMA does not require that a suitability analysis be conducted at the project level. On August 24, 1999, the United States Court of Appeals for the Ninth Circuit, in Wilderness Society v. Thomas, 188 F.3d 1130 (9th Cir. 1999), concluded the Forest Service complied with NFMA in adopting the Prescott Forest Plan, including the plan's allocation of acreage suitable for grazing. The forest plan complies with the requirements outlined in 36 CFR 219.20 through the analysis process applied in preparation of the forest plan (Apache-Sitgreaves Forest Plan EIS, Appendix B, Description of Analysis Process).

Finding: There is no requirement to conduct a suitability analysis when conducting a NEPA analysis at the project level concerning the management and permitting of livestock grazing. All requirements for suitability under the provisions of 36 CFR 219.20 were met upon completion of the forest plan. The 36 CFR 219 regulations are not applicable in this case therefore the decision is not premature.

ISSUE 2: The decision violates the Apache-Sitgreaves National Forest Plan and the Regional Guide by failing to manage riparian areas to achieve recovery.

Contention: The Forest Service's decision fails to ensure that riparian areas on the allotment will recover to satisfactory condition by the year 2015, as required by the forest plan.

Response: The Apache-Sitgreaves National Forest Plan does not contain a standard and guideline for riparian areas that require their condition to be in satisfactory condition by the year 2015.

Finding: Continued riparian improvement is ensured under this decision, and there is no violation of the Apache-Sitgreaves National Forest Plan.

ISSUE 3: The decision violates the NFMA requirement to maintain viable numbers of all species.

Contention: The appellant contends the Forest Service must manage sensitive species to sustain viability and prevent the need for listing and that, in addition, the Forest Service must manage (fish and wildlife habitat) to maintain viable numbers. The appellant points to the perceived lack of management for riparian habitat, and that the Forest Service must provide protection for riparian obligate species. In particular, the appellant believes that domestic livestock production threatens the viability of the Southwestern willow flycatcher, the Bell's vireo, the yellow-billed cuckoo, the black hawk, the Mexican spotted owl, the Mexican garter snake, the narrow-headed garter snake, the Chiricahua leopard frog, the Yavapai leopard frog, the Arizona southwestern toad, and the lowland leopard frog.

Response: The Biological Assessment and Evaluation (BAE) (Doc. 23) and Wildlife Specialist Report (Doc. 84) analyzed the effects to Federally listed species, Management indicator species, and Region 3 Sensitive Species on the allotment, including most of the species listed by the appellant. The yellow-billed cuckoo, Bell's vireo, Yavapai leopard frog, Mexican garter snake, black hawk, lowland leopard frog, and Arizona southwestern toad are not found on this area of the Apache-Sitgreaves National Forests (Doc. 32).

The Southwestern willow flycatcher has not been found in this area. Habitat for the Southwestern willow flycatcher is not present, nor is it likely to develop in the foreseeable future. It was determined that the proposed "May Affect - Not Likely to Adversely Affect" in accordance with the Guidance Criteria, was due to some adjacent occupied habitat. Based on the Guidance Criteria, the proposed action will have "No Effect" on the Mexican spotted owl.

The proposed action (Doc. 84, p. 11) "may impact" individuals of the narrow-headed garter snake and other sensitive species, but will not result in a trend towards federal listing.

Because the proposed action maintains habitat quantity or quality for the species analyzed, this action should not reduce the viability of these species.

Finding: Review of the appeal record finds no evidence that the proposed action will reduce the viability of any of the species identified by the appellant or any other MIS, game or ESA listed species analyzed in the environmental assessment (EA). The proposed action maintains habitat quantity and/or quality for the species analyzed.

ISSUE 4: The decision violates NFMA consistency and viability provisions by failing to adequately protect the northern goshawk.

Contention: The allotment provides nesting or potential habitat for the northern goshawk, yet fails to establish key foraging areas that limit utilization to an average of 20% and a maximum of 40%.

Response: The Tenney Allotment has no known Northern goshawks within its boundary (Doc. 35) although some potential foraging habitat does occur. Potential effects of the proposed action on the Northern goshawk are analyzed in the Wildlife Specialist Report (Doc. 84). It was determined that the proposed action “May impact individuals, but will not result in a trend towards federal listing,” which is in accordance with NFMA and Forest Service policy and regulation. There is no requirement to establish key foraging areas and limit utilization on potential goshawk foraging areas.

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

ISSUE 5: The Tenney term permit issuance must be suspended until the Apache-Sitgreaves National Forests 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 Tenney term grazing permit reissuance project can be tiered.”

Response: There are no statutes or regulations that describe an expiration date for the Forest Service Renewable Resource Program or Land and Resource Management Plans. The Apache-Sitgreaves 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 6: The Forest Service violated NEPA by failing to analyze a reasonable range of alternatives.

Contention: The appellant contends that a range of reasonable alternatives, as required by NEPA implementing regulations, was not analyzed.

Response: “[A]n agency must look at every reasonable alternative, within the range dictated by the ‘nature and scope of the proposed action’ and ‘sufficient to permit a reasoned choice.’” Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 (9th Cir. 1992). For an alternative to be reasonable, it must meet the stated purpose and need and address one or more issues. The formulation of alternatives is driven by significant issues identified in scoping [40 CFR 1501.2(c)].

The EA indicates that five action alternatives plus the required no-action alternative were considered. Three action alternatives were subsequently dropped from detailed study for reasons stated in the EA (EA, p. 11). One significant issue was identified during scoping (EA, p. 9). Alternative 6 was developed to address this issue. There are no unresolved issues requiring further alternative development.

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

ISSUE 7: The Forest Service violated NEPA by failing to consider and disclose the cumulative impacts of the proposed action.

Contention: The appellant contends that the cumulative effects of the alternatives were not adequately addressed, considering past, present, and reasonably foreseeable future activities, as required by NEPA. Appellant states, “... the EA contains virtually no analysis of cumulative effects...”

Response: The EA contains discussions of cumulative effects on vegetation, soil and water, air, wildlife, recreation, economics, and heritage resources (EA, pp. 15-23).

Finding: The record includes consideration of past, present, and reasonably foreseeable future actions and their cumulative effects on the components of the human environment. The cumulative effects analysis is adequate for an informed decision and for the purpose of determining significance and whether an EIS is needed.

ISSUE 8: The EA violates the Clean Water Act.

Contention: The appellant contends that Forest Service failed to require the permittee to provide certification from the State of Arizona, as required under Section 401 of the Clean Water Act (CWA).

Response: The State of Arizona does not require water quality certification for dispersed non-point activities such as livestock grazing.

Finding: Appropriate procedures were followed and adequate mitigation is planned for the project area. There will be no violation of the Clean Water Act.

ISSUE 9: 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 forest plan. The forest plan provides direction for management emphasis within the project area. Net public benefits were analyzed appropriately during forest plan preparation and are outside the scope of project-level analysis.

The EA's effects disclosure indicates that the selected alternative will provide sufficient vegetative ground cover to protect land productivity (EA, pp. 14-16).

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

ISSUE 10: The EA violates the Administrative Procedures Act.

Contention: The appellant asserts, "There exists as yet no information which would indicate that the proposed alternative will remedy the admitted problems on this allotment."

Response: The identified problem on the allotment is range condition not meeting forest plan standards in the two identified key areas (EA, p. 5). The selected alternative is predicted to remedy this problem by improving range condition in these key areas. These areas are expected to meet forest plan standards by 2015 (EA, p. 15).

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