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File Code: 1570-1/2200  
Date: July 21, 2003

Laurie Fulkerson  
Forest Guardians  
312 Montezuma, Suite A  
Santa Fe, NM 87501

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED**

RE: Appeal #03-03-00-0032-A215, Town Tank Allotment Decision, Lakeside Ranger District,  
Apache-Sitgreaves National Forests

Dear Ms. Fulkerson:

This is my review decision concerning the appeal you filed regarding the Decision Notice and Finding of No Significant Impact, which authorize grazing and implement the grazing management strategy on the above-referenced allotment.

### **BACKGROUND**

District Ranger Collins issued a decision on April 22, 2003, for the Town Tank Allotment. The decision resulted in the selection of the following alternative and authorization:

Town Tank Allotment, Alternative 3, which authorizes 20 animal months of grazing (6-9 head) between July 1 and October 31, annually.

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

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

### **APPEAL REVIEWING OFFICER'S RECOMMENDATION**

The Appeal Reviewing Officer concluded that: a) decision logic and rationale were generally clearly disclosed; b) the benefits of the proposal were identified; c) the proposal and decision are consistent with agency policy, direction, and supporting information; 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 concerning the Town Tank 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,

ABEL M. CAMARENA  
Appeal Deciding Officer,  
Deputy Regional Forester

Enclosure

cc: David M Stewart, Mailroom R3 Apache Sitgreaves, Edward Collins, Christina Gonzalez

**REVIEW AND FINDINGS****of the****Forest Guardians'****Appeal #03-03-00-0032-A215****Town Tank Allotment**

**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 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 Forests Plan and the Regional Guide by failing to manage riparian areas to achieve recovery.

**Contention:** The appellant asserts that the decision fails to make the health of riparian areas a priority and, in so doing, violates both the forest plan and the Regional Guide.

**Response:** The Regional Guide facilitated forest plan development. Requirements in the Regional Guide are reflected in the forest plan. There is no requirement for project-level compliance with the Regional Guide. This project does not include any measurable acreage of riparian areas (Doc. 41, p. 1-2). The decision provides the opportunity for rapid ecosystem recovery by reducing livestock grazing pressure on watershed condition (Doc. 56).

**Finding:** Continued watershed condition improvement is ensured under this decision, and there is no violation of the Apache- Sitgreaves National Forests Plan or the Regional Guide.

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

**Contention:** The appellant contends the Forest Service must manage sensitive species to sustain viability and prevent the need for listing. In addition, the Forest Service must manage (fish and wildlife habitat) to maintain viable numbers. The appellant believes there is a lack of management for riparian habitat and that the Forest Service must provide protection for riparian obligate species. In particular, the appellant believes that domestic livestock production threatens the viability of the Southwestern willow flycatcher, the black hawk, the Mexican spotted owl, the Mexican garter snake, the narrow-headed garter snake, the Chiricahua leopard frog, and the Arizona southwestern toad. The appellant contends that only a cessation of grazing in these watersheds, combined with active restoration work will adequately provide for the minimum habitat needs for these species.

**Response:** The EA (Doc. 54), Wildlife Specialist Reports (Docs. 24; 43), and BAE (Doc. 51) analyzed the effects to Federally listed species, Management Indicator Species (MIS), and Region 3 Sensitive species occurring on the allotment, including some of the species listed by the appellant BAE, Appendix A (Doc. 51). No threat to viability was determined as a probable result of implementing the proposed action. The Southwestern willow flycatcher, black hawk, Mexican garter snake, and Arizona southwestern toad do not occur on the allotment.

The proposed action “May Affect” but is “Not Likely To Adversely Affect” the Mexican spotted owl and the bald eagle. A determination of “No Jeopardy” was concluded for the Chiricahua leopard frog. The U.S. Fish and Wildlife Service concurred with these determinations (Doc. 52).

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

**ISSUE 4:** Population survey data of MIS is needed to ensure the maintenance of minimum viable populations of wildlife.

**Contention:** The appellant asserts that since the Forest Service lacks quantitative inventory data on many, if not all, MIS in the planning area and the forest as a whole and the scant data that it does have indicates some species are declining, the agency’s decision is arbitrary and capricious.

**Response:** The data from which the MIS analysis was conducted is found in the Apache-Sitgreaves MIS analysis report, available at the District Office. Discussions on effects to MIS are included in the Wildlife Specialists Reports (Docs. 24; 43) and the EA (Doc. 54).

The CFR 36 219.19 regulations do not require population data at the project level, nor do they require that all trends be stable or upward. Data at the Forest level is adequate to determine general population trends and ensure that viable populations will be maintained.

**Finding:** The Forest completed an analysis of MIS that was sufficient to ensure that minimum viable populations would be maintained.

**ISSUE 5:** The decision violates NFMA consistency and viability provisions by failing to adequately protect the Northern goshawk.

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

**Response:** The guidelines referred to by the appellant are management recommendations and were not part of the forest plan amendment. Grazing utilization guidelines are found in the EA (Doc. 54). Analysis of effects on the Northern goshawk from the proposed action are discussed in the Wildlife Specialist Reports (Docs. 24; 43) and summarized in the EA (Doc. 54) and are in compliance with the forest plan as amended.

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

**ISSUE 6:** The Town Tank Allotment 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 Town Tank Allotment term grazing permit issuance project can be tiered."

**Response:** There are no statutes or regulations that describe an expiration date for the Forest Service Renewable Resource Program or Land and Resource Management Plans. The Apache-Sitgreaves National Forests 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. A recent court decision in Wyoming upheld the use of the current Plan until revised (*Biodiversity Assoc. v. USFS*, September 30, 2002). Regulations (36 CFR 219.35g) spell out that a revision schedule for each Forest Plan will be published.

**Finding:** The current plan is in effect until the revision process is completed. There are no requirements to suspend activities until the process is completed.

**ISSUE 7:** The Forest Service violated NEPA by failing to analyze a reasonable range of alternatives.

**Contention:** The appellant contends that a range of reasonable alternatives, with differing effects as well as objectives, 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 range of alternatives in the Town Tank Allotment environmental analysis includes: a no grazing alternative, a current management alternative, and a proposed action that would change current management. The outcomes and effects of all three alternatives are different on the grazing resource.

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

**ISSUE 8:** The Forest Service violated NEPA because the EA fails to consider and adequately disclose the location and protocol for monitoring key forage utilization areas within the allotment.

**Contention:** The appellant contends the EA must disclose the names, locations, forage utilization limits, and monitoring protocol for each and every key area within the allotment.

**Response:** Proper forage utilization standards are employed to sustain such things as plant health and vigor; long-term soil productivity; and protection for threatened, endangered, and sensitive species and their habitats. Forage utilization levels are determined based on guidelines set out in the R-3 Allotment Analysis Guidelines. These guidelines specifically describe appropriate forage utilization levels recommended for the purpose of improving rangeland condition. Southwestern Region Rangeland Management Specialists, Ecologists, and other scientists have developed these guidelines over a period of 50 years.

Forage utilization is measured by key area on key forage species within various pastures encompassing a grazing allotment. Key areas are locations readily accessible to water and forage and are located on level to intermediate slopes. Key species are herbaceous and woody vegetation that domestic livestock prefer at any given time of the year. By monitoring key areas, the Forest Service can ensure that an allotment, or pastures within an allotment, are not overgrazed.

The record demonstrates that utilization standards for herbaceous forage will be limited to 25%. Once utilization standards are reached, livestock will be removed from the pasture and not allowed to re-graze a pasture during the grazing season.

**Finding:** Utilization standards for the Town Tank Allotment were developed in accordance with Forest Service Policy. There is nothing in federal statutes, regulations, or Forest Service Policy that requires the Responsible Official to disclose the names and locations of each and every key area within an allotment in an EA. As the selected alternative is implemented, all monitoring information will be available to the public.

**ISSUE 9:** The Forest Service violated NEPA by failing to consider and disclose the cumulative impacts of the proposed action.

**Contention:** The Forest Service cannot assess the impact of issuance of a term grazing permit on these allotments in isolation, and must analyze the cumulative effects of 100 or more years of livestock grazing on this allotment.

**Response:** Existing allotment condition was appraised during field reviews (Doc. 54, p. 3; Docs. 8; 25; 28) and described throughout the EA. Past activities including prior logging and grazing are described in the EA (Doc. 54, p. 14; and Doc. 28, Range Specialist Report) and in the effects analysis section in the EA (Doc. 54, pp. 15-16; and Doc. 42). Future planned activities were described in the EA (Doc. 54, p. 25).

**Finding:** The record includes consideration of past, present, and reasonably foreseeable actions and their cumulative effects from grazing on the components of the human environment.

**ISSUE 10:** The EA violates the Clean Water Act.

**Contention:** The appellant contends that the Forest Service failed to require the grazing permit applicant to obtain water quality certification from the State of Arizona.

**Response:** The State of Arizona does not require water quality certification for dispersed non-point activities such as livestock grazing. However, the record shows that the appropriate non-point source pollution considerations, which include Best Management Practices (BMPs), were made during the planning process (Doc. 54, pp. 30-32). The project record also shows the Arizona Department of Environmental Quality (Doc. 35; 47) was consulted during the project scoping and planning phases. Improvement of watershed condition, along with improved hydrologic function, were identified as project objectives (Doc. 54, p. 4); and the alternative selected responds to these watershed condition issues through management changes that will have a positive effect on improving ground cover, increasing water infiltration rates, and increasing beneficial woody material (Doc. 56).

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

**ISSUE 11:** The decision violates the Multiple Use and Sustained Yield Act.

**Contention:** The appellant alleges that the decision violates the Multiple Use and Sustained Yield Act by failing to manage for the highest public benefit. The appellant further alleges that the decision will continue to impair land productivity.

**Response:** Management of National Forest System lands for the highest net public benefits was analyzed and decided upon in the preparation of the Apache-Sitgreaves National Forests Plan. The forest plan provides direction for management emphasis within the project area. Net public benefits were analyzed appropriately during the forest plan's preparation, and are outside the scope of project-level analysis. The Decision Notice and record (see letter in Doc. 49) limits use of the allotment until the area has recovered.

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

**ISSUE 12:** The EA violates the Administrative Procedures Act.

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

**Response:** The EA and documents in the record disclose the analysis done to evaluate resource conditions on the allotment and the effects of alternatives considered. In the DN/FONSI, the Responsible Official properly assessed the issues, public input, and impacts to resources in the decision rationale.

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