United States Department of Agriculture

Forest Service

Southwestern Region

517 Gold Avenue, SW
Albuquerque, NM 87102-0084
FAX (505) 842-3800
V/TTY (505) 842-3292

File Code: 1570-1

Date: February 3, 1999

Forest Guardians
c/o John Horning
1413 Second St., Suite One
Santa Fe, New Mexico 87505

Certified Mail - Return Receipt Requested
P 293 931 360

RE: Appeal #99-03-00-0009-A215, Black Copper/Red River Allotments, Carson National Forest; Appeal #99-03-00-0012-A215, Perk/Sowell Allotments, Lincoln National Forest.

Dear Mr. Horning:

This is my review decision on the appeals you filed regarding Acting Forest Supervisor Gary Schiff's (Carson NF) and District Ranger Max Goodwin's (Sacramento District) decisions to implement grazing management strategies and authorize grazing on the Black Copper/Red River Allotments (Carson NF) and Perk/Sowell Allotments (Lincoln NF).

DECISION AND RESPONSIBLE OFFICIAL

The following decisions were issued by the Responsible Officials and are subject to administrative review under 36 CFR 215 appeal regulations:

1. On August 26, 1998, Acting Forest Supervisor Gary Schiff issued a Decision Notice concerning the implementation of "Alternative C" that authorizes livestock grazing and rangeland management actions on the Black Copper/Red River (Carson NF) Allotments.

2. On November 12, 1998, District Ranger Max Goodwin issued a Decision Notice concerning the implementation of "Alternative C" that authorizes livestock grazing and rangeland management actions on the Perk/Sowell Allotments (Sacramento RD, Lincoln NF).

Due to the identical nature of these appeals, I have chosen to consolidate my response into one decision document. My review of these appeals has been conducted pursuant to, and in accordance with 36 CFR 215.17. I have thoroughly reviewed the appeal records, including the recommendations of the Appeal Reviewing Officer regarding the disposition of these appeals. My review decision hereby incorporates by reference these appeal records.

As directed in 36 CFR 215.16, the District Rangers or their staff, contacted you (as the appellant) to discuss informal disposition of the appeals . The record reflects that you declined to meet with either District Ranger for the purpose of seeking informal resolution of the appeal issues.

APPEAL ISSUES AND FINDINGS

Appellant contends that: 1) The Forest Service violated the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA) by continuing to graze cattle without evaluating grazing suitability and a decision is therefore premature; 2) the analyses do not meet the requirements of Forest Service Handbook 2209.11 "Range Project Effectiveness Handbook" for economic analysis; 3) The EA's violate the Clean Water Act by failing to require permittee certification from the State Department of Environmental Quality ; 4) The decisions violate the Multiple Use and Sustained Yield Act by failing to manage for the highest and best use, and without impairing land productivity; and 5) The EA's violate the Administrative Procedures Act.

The appellant's issues are addressed as follows:

ISSUE 1: The Forest Service violated NFMA and NEPA.

Contention: Appellant contends that NFMA and NEPA were violated because the Responsible Officials (RO) failed to evaluate the allotments' suitability for grazing. As the appellant stated on page 2 of each appeal, "...the Forest Service must determine in forest planning the suitability and potential capability of the National Forest System lands..., 36 CFR, Sec. 319.20". Appellant further contends that regulations at 36 CFR 219.3 require the project environmental assessments (EA's) to address the economic and environmental consequences and the alternative uses foregone. Absent this suitability analysis, appellant argues that the Forest Service failed to discharge its obligation under NEPA to take a hard look at each alternative, and therefore the decisions are premature.

Response: Although appellant claims NFMA requires that suitability analyses be conducted at the project level, he is mistaken. The Forest Service operates within a two tiered planning and decision making process. The first level is the programmatic forest plan level and the second is the site specific project level, such as a grazing allotment. The appellant has failed to make the distinction between forest planning and project planning. The appellant argues that there are regulatory requirements that the agency must fulfill in regards to completing a suitability analysis, in which appellants cited 36 CFR 319.20 as the regulation. There is no regulatory requirement that compels the Forest Service to conduct a suitability analysis and determination at an allotment or project planning level.

The purpose of the NFMA regulations (36 CFR 219) is to "... set forth a process for developing, adopting, and revising land and resource management plans for the National Forest System..." Appellant references the NFMA regulations' suitability requirement which applies to forest plan level decisions, not project level decisions. The forest plan is the proper and only level at which suitability per the requirements of 36 CFR 219.20 is made.

The forest planning process inherently undertook a quantitative analysis fully incorporating economics into the process. The forest plans fully comply with the requirements outlined in 36 CFR 219.20 through the analysis process applied in preparation of the Forest Plan (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. As previously described, all requirements for suitability under the provisions of 36 CFR 219.20 were met in completion of the forest plans. The 36 CFR 219 regulations are not applicable in this case, therefore, the decisions are not premature. The RO's are affirmed with respect to the issues related to an alleged failure to conduct a suitability analysis.

ISSUE 2: Inadequate range project effectiveness analysis.

Contention: Appellant asserts that the analyses do not meet the requirements of Forest Service Handbook 2209.11 "Range Project Effectiveness Handbook" for economic analysis.

Response: Forest Service Handbook 2209.11 "Range Project Effectiveness Handbook" was removed from the Forest Service directives system April 1, 1998.

Finding: With the removal of FSH 2209.11 from Forest Service directives, appellant's issue is moot. The RO's are affirmed on this issue.

ISSUE 3: The EA's violate the Clean Water Act (CWA).

Contention: The appellant argues that the Forest Service failed to obtain water quality certification from the state of Arizona (Black Copper- Red River Allotments) and the state of New Mexico (Perk and Sowell Allotments) as required under Section 401 of the Clean Water Act.

Response: There is no requirement to obtain certification from the State of Arizona for the Black Copper- Red River allotments which are located in New Mexico. In regards to the Perk and Sowell Allotments, the State of New Mexico does not require water quality certification for non point source activities such as dispersed livestock grazing. The appropriate non point source considerations, which include Best Management Practices (BMP'S) relevant to the non perennial stream conditions in these allotments, are discussed in the EA (Doc. 34). The project record also shows that the New Mexico Environmental Department (Doc. 26) provided input during the project scoping and planning phases.

Finding: The RO's did not violate the Clean Water Act and are affirmed on this issue.

ISSUE 4: The Decisions violate the Multiple Use and Sustained Yield Act.

Contention: The appellant alleges that the decisions violate the Multiple Use and Sustained Yield Act by failing to manage for highest and best use. Appellant further alleges that the decisions to authorize livestock grazing will permanently impair land productivity.

Response: The decisions concerning highest and best use were made during development of the Forest Plans for the Carson and Lincoln NF, respectively. The EAs reflect that range and vegetation conditions will generally improve under the selected management systems (Perk and Sowell EA pp 7-9; Black Copper/Red River EA pp 11, and 15-16).

Finding: The records indicate that land productivity is not being impaired. The ROs are affirmed regarding this issue.

ISSUE 5: The EA's violate the Administrative Procedures Act.

Contention: Appellant asserts that the EA's contain no information which would indicate that the selected alternatives would remedy problems on the respective allotments. Appellant suggests there is little known about the effects of the selected actions and for those effects that are known, they are detrimental to the environment.

Response: The records contain adequate documentation addressing the effects of the selected alternatives identified in the EA, under Chapter 3, "Environmental Consequences". The EA's evaluated the effects, of those alternatives considered, on the physical, biological, and socio-economic attributes of the environment within the project area. The records reflect that Forest Service specialists, provided input into the analysis processes. The RO's considered the specialists reports, along with the entire project record, to arrive at a reasonable decision. Each effects analysis provides a clear basis for choice among the alternatives considered by the decision maker (Black Copper/Red River analysis: Doc. 43,45,47-56,59; Perk/Sowell analysis: Doc. 13-22,28-32,34,39).

Finding: The RO's did not violate the Administrative Procedures Act, and are affirmed on this issue.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer (ARO) has 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 proposals were identified; (c) the proposals and decisions 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 records.

APPEAL DECISION

After a detailed review of the records and the ARO recommendations, I affirm the Responsible Official's decisions concerning the Black Copper/Red River Allotments, (Carson NF) and the Perk/Sowell Allotments (Lincoln NF) grazing management actions.

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

Sincerely,

/s/ John R. Kirkpatrick

JOHN R. KIRKPATRICK
Appeal Deciding Officer
Deputy Regional Forester, Resources

Enclosure

cc:
Forest Supervisor, Carson NF
District Ranger, Questa RD, Carson NF
Forest Supervisor, Lincoln NF
District Ranger, Sacramento RD, Lincoln NF
Director, Rangeland Mgt., R3
Director, EAP, R3
Appeals and Litigation Staff, R3