

File Code: 1570-1

Date: November 2, 1999

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

Certified Mail-Return Receipt Requested
Z 095 964 318

Re: Appeal #99-03-00-0112-A215, Whitehouse and Datil Allotments, Magdalena Ranger District, Cibola National Forest.

Dear Mr. Horning:

This is my review decision concerning the appeal you filed on behalf of Forest Guardians, regarding the Decision Notice and Finding Of No Significant Impact which authorize grazing and implement the grazing management strategy on the Whitehouse and Datil allotments.

BACKGROUND

District Ranger Chavez issued a decision on August 3, 1999, for the Whitehouse and Datil allotments. The decision resulted in the selection of the following alternative and authorization: Whitehouse and Datil allotments, Proposed Action, which authorizes between 200 and 750 head of cattle (cow calf) to graze yearlong.

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 215.7. I have thoroughly 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) the decision logic was generally disclosed, however, some of the constraints identified in the selected alternative were not brought forward in the decision; (b) the benefits of the proposal were identified; (c) the decision is consistent with agency policy, direction and supporting information

provided that the Responsible Official conducts the necessary studies to make a more definitive estimate of grazing capacity to support future NEPA analysis and decision making; (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 records and the Appeal Reviewing Officer's recommendations, I affirm the Responsible Official's decision concerning the Whitehouse and Datil allotments with the following clarification and direction.

I am clarifying that the Responsible Official's decision provides for including the following provisions of the selected alternative in the term grazing permit:

1. On an annual basis adjust the livestock numbers to be grazed, based on availability of forage and key area utilization monitoring from the previous grazing season, as identified in the environmental assessment.
2. Maintain forage utilization within the 30 percent utilization guidelines identified for key areas in the environmental assessment.
3. Limit Forest Service participation in construction of new improvements based on the availability of funds.

An adaptive management decision of this nature requires that the Responsible Official follow up appropriately to ensure proper resource management of these allotments. Therefore, I am directing the Responsible Official to take the following actions:

1. Within the next three year period conduct the necessary studies to make a more definitive estimation of grazing capacity and numbers of livestock to be permitted.
2. By no later than fiscal year 2003, make a new NEPA decision based on the revised grazing capacity estimates.

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, Cibola NF
District Ranger, Magdalena RD
Director of Rangeland Management, R3
Appeals and Litigation Staff, R3

REVIEW AND FINDINGS**of the****Forest Guardians' Appeal #99-03-00-0112-A215****regarding the****Whitehouse and Datil Allotments Decision**

ISSUE 1: The Forest Service violated the National Forest Management Act (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: 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: Contrary to the appellant's assertions, 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, 1999 U.S. App. LEXIS 20026 (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 (Cibola Forest Plan EIS Appendix B, Description of Analysis Process).

Finding: There is no requirement to conduct a suitability analysis when conducting a National Environmental Policy Act (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 violated the NFMA by failing to maintain viable numbers of all species, by failing to ensure that riparian areas will recover to satisfactory conditions, and by not balancing livestock numbers on the allotments.

Contention: Appellant contends that the Forest Service must provide protection and habitat for riparian obligate species. Appellant cites 36 CFR 219.19 planning regulations in supporting the assertion. The appellant further contends that despite this direction (i.e. Forest Plans), the Forest Service has failed to protect riparian habitats and riparian obligate species, due to livestock grazing. The appellant also contends that the decision fails to ensure that riparian areas on the allotments will recover to satisfactory condition by the year 2015 as required by the Forest Plan and the Regional Guide, and that the decision fails to comply with the Forest Plan standard to balance livestock permitted use with capacity.

Response: Regulations at 36 CFR 219 Subpart A, which appellant cites, set forth a process for developing, adopting, and revising land and resource management plans for the National Forest System as required by the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended [36 CFR 219.1(a)]. Forest Plans include goals, objectives, standards, and guidelines for the protection of threatened, endangered, Forest Service sensitive, and other species and their habitat. Site-specific projects are designed under the direction provided in Forest Plans. The Responsible Official found the selected alternatives to be consistent with the Forest Plan (Doc. 38).

The record indicates that several years of production-utilization studies would need to be conducted before actual stocking levels could be determined (Doc. 38). Resource protection and compliance with Forest Plan standards will be achieved through annual adjustment of livestock numbers depending on forage production, and availability of water. In addition to annual adjustment of livestock numbers, protection of riparian areas and uplands will be ensured through implementation and monitoring of forage utilization standards and Best Management Practices (BMPs) (Doc. 38; 45). Maximum forage use will be limited as described in the EA for the proposed action (Doc. 38).

Threatened and endangered species and Forest Service sensitive species are not likely to be adversely affected (Doc. 28).

The appellant inaccurately cites Forest Plan requirements. The Cibola Forest Plan does not contain a requirement that "allotments will recover to satisfactory condition by the year 2015", or by any other year (Cibola Forest Plan, pp. 10, 24). The Regional Guide suggests that Forests, in developing their Forest Plans, "improve all terrestrial ecosystems and watersheds to satisfactory or better condition by 2020" (pg. 3-2, item #8). There is nothing in the record to indicate a failure to adhere to the Regional Guide or the Cibola Forest Plan.

Finding: The Responsible Official reached a reasonable conclusion, based on the effects of the selected alternative, that the decision provides for adequate protection of riparian and upland habitats consistent with the Cibola National Forest Plan and Regional Guide.

ISSUE 3: The Forest Service violated NEPA by failing to analyze a reasonable range of alternatives.

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

Response: The formulation of alternatives is driven by significant issues identified in scoping 40 CFR §1501.2(c). For an alternative to be reasonable, it must meet the stated purpose and need, and address one or more issues. The analysis considered four alternatives: Proposed Action (adaptive management); Alternative A, (maximum livestock grazing); Alternative B, No Action (no grazing); Alternative C, No Change (current management) (Doc. 38).

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

ISSUE 4: The decision notice violates NFMA

Contention: The appellant argues that the use of "Proper Functioning Condition" (PFC) as the standard for riparian ecosystem health violates the Cibola National Forest Plan. Appellant asserts that the adoption of PFC sets a lower standard for riparian health than what is currently in the Forest Plan.

Response: PFC is a qualitative method for assessing the condition of riparian-wetland areas considering hydrology, vegetation and erosion/depositional attributes and processes. The three PFC condition categories were used by the Forest to describe the environmental impacts of the alternatives on riparian condition and to evaluate resolution of the vegetation/riparian issue. The Cibola Forest Plan contains no specific standards for riparian ground cover, overstory cover, tree age classes or stream bed composition. Instead, it calls for the general improvement of areas in unsatisfactory condition and maintenance of areas in satisfactory condition (Doc. 5). The PFC condition classes (Functioning, Functioning at Risk, and Non-functioning) were used as surrogates to evaluate if the alternatives were meeting the maintenance/improvement requirements of the Forest Plan (Doc. 38).

Finding: The Forest Plan standards for riparian condition were not violated in the environmental analysis of this allotment.

ISSUE 5: The Forest Service violated NEPA in failing to consider and disclose adequately the cumulative impacts of the proposed action.

Contention: The appellant contends that the cumulative effects of the alternatives were not adequately addressed, considering all past, present, and reasonably foreseeable activities as required by NEPA.

Response: The north half of the analysis area is located in the Gallinas-Rio Salado fifth code watershed and the south half of the analysis area is located in the Plains of San Agustin fifth code watershed (Doc. 5) Cumulative effects considered in the analysis included; logging, firewood gathering, other recreational activities, grazing, and the impact of fire suppression policies on ecosystem processes. The record indicates there will not be significant cumulative effects, singularly or in combination, associated with the proposed action (Doc.38).

Finding: Past, present, and reasonably foreseeable actions were considered in the analysis. The environmental assessment reflects an adequate analysis and disclosure of cumulative effects on the affected environment.

ISSUE 6: The EA violates the Clean Water Act.

The EA violates the Clean Water Act (CWA).

Contention: The appellant argues that the Forest Service failed to require the grazing permit applicants to obtain water quality certification from the state of Arizona for the Whitehouse and Datil 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 activities occurring in New Mexico. However, the record contains evidence of the incorporation of water quality mitigating measures (Best Management Practices or BMP's) throughout the

planning and decision process (Doc 5; Doc 38). The project BMP's are appropriate for the primarily ephemeral and intermittent streams in this allotment.

Finding: Appropriate procedures were followed and adequate mitigation is planned for this allotment management plan decision and there will be no violation of the Clean Water Act.

ISSUE 7: 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 to authorize livestock grazing will permanently impair land productivity.

Response: Management of forest lands for 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 at the Forest Plan level, and are outside the scope of a project level analysis.

The EA discloses that site productivity will be maintained through application of BMPs. Monitoring will be employed to ensure BMPs are effective in maintaining site productivity and to identify any necessary changes in management practices (Doc. 38).

Finding: A decision concerning the highest public benefit is outside the scope of the analysis under review. The Responsible Official's decision will not impair land productivity.

ISSUE 8: 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 record indicates that annual adjustments in livestock numbers and implementation and monitoring of forage utilization standards and BMPs will improve watershed conditions (Doc. 38).

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