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File Code: 1570-1/2200

Date: November 20, 2001

Kirsten Stade  
Forest Guardians  
312 Montezuma, Suite A  
Santa Fe, NM 87501

**CERTIFIED MAIL -  
RETURN RECEIPT REQUESTED  
7000 2870 0000 1135 8859**

RE: Appeal #01-03-00-0055-A215, Berger Pasture Allotment Decision, Mount Taylor Ranger District, Cibola National Forest

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 above-named allotment.

### **BACKGROUND**

District Ranger Hagerdon issued a decision on August 13, 2001, for the Berger Pasture Allotment. The decision resulted in the selection of the following alternative and authorization:

- Berger Pasture Allotment, Alternative B, which authorizes 8 head of cattle to graze May 1 through June 30 and August 1 through September 30 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.



**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 above-named 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/ Bob Leaverton  
JAMES T. GLADEN  
Appeal Deciding Officer,  
Deputy Regional Forester,  
Resources

Enclosures

cc:  
Forest Supervisor, Cibola NF  
District Ranger, Mount Taylor RD  
Director of Rangeland Management, R3  
Appeals and Litigation Staff, R3

## **REVIEW AND FINDINGS**

of the

### **Forest Guardians Appeal**

#### **#01-03-00-0055-A215, Berger Pasture 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, stating, "...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 (Cibola 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 Cibola National Forest 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 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 regional guides.

The only riparian area within this allotment is a naturally occurring pond, and the selected alternative would not affect it (EA, Doc. 28; DN, Doc. 29).

**Finding:** Continued protection of the limited riparian on this allotment is ensured under this decision, and there is no violation of the Cibola National Forest Plan or the regional guide.

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

**Contention:** The appellant believes that continued livestock grazing along riparian habitats threatens the viability of numerous riparian obligate species, which include federally listed, Regional Forester sensitive, and Forest Plan management indicator species. In particular, the appellant believes that domestic livestock production in the watershed 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. Only the cessation of grazing in these watersheds, combined with active restoration work will adequately provide for the minimum habitat needs of these species.

**Response:** The Forest analyzed the effects continued livestock grazing would have on riparian species and their habitats and found livestock grazing was not impacting riparian habitat condition and trend (AR 11, 18, 28). The only riparian habitat in this allotment is a small amount on portions of a naturally occurring pond. The condition and extent of this riparian area is not of sufficient quantity or quality to provide for most riparian dependent species, and none of the ones identified by the appellant.

The Berger Pasture Allotment is outside the range of the black hawk, Mexican garter snake, narrow-headed garter snake, Chiricahua leopard frog, and Southwestern toad. No existing or potential habitat for the Southwestern willow flycatcher or Mexican spotted owl exists within the allotment. The light to moderate grazing currently occurring in the allotment, which would continue under the proposed action, is well within the guidelines for MSO foraging (AR 11, 18).

A biological assessment and evaluation prepared by the Forest made *no effect* or *not likely to adversely affect* determinations for all federally listed species analyzed for this project. These determinations, by definition, indicate the Forest does not expect the viability of listed species to be affected by the proposed action (AR 18, 27).

**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, Regional Forester sensitive, or federally listed species analyzed in the EA. The proposed action maintains or improves 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:** This allotment is not found within any goshawk nesting or post fledging family areas. However, a small portion of the foraging area for a goshawk territory is located within the allotment. No potential nesting habitat is found within the allotment.

Allotment inspections reveal that grazing levels on the allotment are within levels prescribed for the conditions within the allotment. Cover that is needed for prey base production is being left and the physical condition of the entire allotment is improving (AR 11, 28).

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

**ISSUE 5:** The Berger Pasture term permit issuance must be suspended until the Cibola National Forest 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 Berger Pasture 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 Cibola 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 nature and scope of the proposed action is limited to re-authorizing on-going livestock management, and evidence indicates that changes in livestock management are not warranted (EA, Doc. 28, pages 4-6). No allotment-specific concerns or significant issues were identified during scoping, in association with the proposed action (Doc. 28, pages 4-6). Therefore, the limited range of alternatives is appropriate and consistent with the scope of the EA.

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

**ISSUE 7:** The Forest Service violated NEPA because the EA fails to consider and disclose adequately 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:** The record documents the utilization standard is 25 percent (Doc. 28). 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 Handbook (FSH 2209.21). This handbook specifically describes 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 purpose of an environmental assessment is to disclose the environmental effects of a Federal action and make a determination if the effects rise to the threshold that trigger the requirement to do an environmental impact statement. Establishing and monitoring forage utilization standards ensures that grazing will not have a significant effect on the environment. The effects of grazing on other resources have been disclosed in the environmental assessment.

**Finding:** The Responsible Official has met the requirement of NEPA, which is to disclose the effects of the proposed action on the human environment. 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 8:** 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 activities as required by NEPA. Appellant states, “the EA contains virtually no analysis of cumulative effects...”

**Response:** Throughout the EA are descriptions of past, present, and reasonably foreseeable actions within and surrounding the allotment that could be possible contributors to cumulative effects (Doc. 28, with cumulative effects summarized on page 30). The EA discloses that the alternatives would not result in any detrimental impacts; therefore, the alternatives could not add to any detrimental *cumulative* impacts.

**Finding:** The cumulative effects analysis is adequate for an informed decision and for the purpose of determining significance and whether an EIS is needed.

**ISSUE 9:** The EA violates the Clean Water Act.

**Contention:** The appellant argues that the Forest Service failed to obtain water quality certification from the state of Arizona, 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. The appropriate non-point source pollution considerations, which include Best Management Practices, were made during the planning process (Doc. 28).

**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 10:** 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 describes how the selected alternative provides for a continued upward trend, with no negative impacts to soil conditions or long-term soil productivity (Doc. 28, page 10).

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

**ISSUE 11:** 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:** According to the EA and record, the allotment is in good condition, and there are no grazing-related problems that need to be addressed by the proposed action (Doc. 28 pages 4-6; Doc. 1; Doc. 13).

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