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File Code: 1570-1/2200

Date: September 23, 2003

Martin Taylor  
Center For Biological Diversity  
P.O. Box 710  
Tucson, AZ 85702-0710

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED  
NUMBER: 7000 2870 0000 1135 3595**

RE: Appeal #03-03-00-0034-A215, Osborne Allotment Decision, Mountainair Ranger District,  
Cibola National Forest

Dear Mr. Taylor:

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

### **BACKGROUND**

District Ranger Estrada issued a decision on May 23, 2003, for the Osborne Allotment. The decision resulted in the selection of the following alternative and authorization:

Osborne Allotment, Alternative C, which authorizes 50 head of cattle (cow/calf) to graze from November 1 through April 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 your 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 Osborne 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/ Abel M. Camarena  
ABEL M. CAMARENA  
Appeal Deciding Officer,  
Deputy Regional Forester

Enclosure

cc: Vicky Estrada, Mailroom R3 Cibola, David M Stewart, Christina Gonzalez, Rita Skinner

**REVIEW AND FINDINGS**  
**of the**  
**Center for Biological Diversity's**  
**Appeal #03-03-00-00034-A215**  
**Osborne Grazing Allotment**

**ISSUE 1:** The decision violates Section 7(a)(1) of the Endangered Species Act.

**Contention:** The appellant contends the decision will not enhance the recovery of listed species.

**Response:** “Section 7(a)(1) of the ESA authorizes federal agencies to incorporate species conservation into their planning process but does not mandate agencies to accord endangered species conservation the highest priority in planning efforts” (Federal Solicitor’s Opinion, p. 95, Endangered Species Handbook, D.J. Rohlf, Stanford Environmental Law Society).

**Finding:** Section 7(a)(1) was not violated.

**ISSUE 2:** The Decision Notice is not tiered to a valid Forest Plan.

**Contention:** The appellant contends that 15 years have passed without the mandatory revision of the Forest Plan required under the NFMA; therefore, the Forest Plan is outdated with respect to grazing and no longer in compliance with NFMA.

**Response:** The Consolidated Appropriations Resolution from Congress for 2003 (Section 320) states that the Secretary of Agriculture is not in violation of the Resources Planning Act of 1974 solely because more than 15 years have passed without revision of a plan. A recent court decision in Wyoming upheld the use of the current plan until revised (*Biodiversity Assoc. v. USFS* decision, September 30, 2002). Regulations (36 CFR 219.35g) spell out that a revision schedule for each Forest Plan will be published.

**Finding:** The Forest Plan is the current NFMA Plan direction for the Cibola National Forest and assigns management direction until it is revised or amended.

**ISSUE 3:** There is no valid suitability analysis.

**Contention:** The appellant contends a suitability analysis must be done as part of this NEPA analysis.

**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 Cibola Forest Plan. The 36 CFR 219 regulations are not applicable in this case.

**ISSUE 4:** Watershed conditions are unsatisfactory.

**Contention:** The appellant contends the Regional Guide requires that watersheds be analyzed and scored as being optimum, satisfactory, or unsatisfactory condition.

**Response:** The Regional Guide facilitated Forest Plan development. Requirements in the Regional Guide are reflected in the Forest Plan.

**Finding:** There is no requirement for project-level compliance with Regional Guides.

**ISSUE 5:** Insufficient local trend data is available for Management Indicator Species (MIS), specifically mule deer and pronghorn.

**Contention:** The appellant contends the decision does not factor in the decline of mule deer and pronghorn statewide.

**Response:** Mule deer, pronghorn, and other relevant MIS are discussed in the EA (PR #43), Wildlife Specialist Report, and project and forest-level MIS analyses (PR #44). Population trend data is compiled from NM Game & Fish reports in compliance with 36 CFR 219.19 and the recent Corner Mountain decision in the 10<sup>th</sup> Circuit Court.

Local mule deer habitat conditions, mitigation and habitat improvement projects are discussed in the EA (PR #43, p. 25). Discussion of mule deer and pronghorn population trends at the Forest and District levels are discussed in the forest-level MIS analysis (PR #44), which is the appropriate level for population discussion.

**Finding:** Data used in the analysis is consistent with recent court rulings and appropriate to the decision level.

**ISSUE 6:** The range of alternatives is not reasonable.

**Contention:** The appellant contends, “No reasonable alternative which connects juniper treatment to no or reduced grazing is considered.” The appellant says that the discussion of impacts is biased against no grazing by disassociating no grazing from juniper treatments.

**Response:** For an alternative to be reasonable, it must meet the stated purpose and need, and address one or more issues. Significant issues identified in the scoping of the proposed action drive the formulation of alternatives (40 CFR 1501.2(c)).

The purpose and need for this project is to “...authorize term grazing permits on the Osborne Allotment...consistent with ecologically sustainable principles, in accordance with direction and objectives in the Cibola National Forest Land and Resource Management Plan...” (PR #44, pp. 7-8). Three alternatives were analyzed and considered: A - No Grazing; B - Current Management; and C - Proposed Action, which included juniper treatment (PR #44 and 57). Alternative C responds to an issue raised by permittees related to the loss of vegetative diversity due to juniper encroachment (PR #5, 8, 10, 29, 44, and 57). Prior to developing this alternative, several juniper treatment options were discussed with the permittees and among the interdisciplinary team (PR #5, 8, 10, and 29).

**Finding:** The Responsible Official appropriately identified and addressed issues and analyzed a range of reasonable alternatives that addressed key issues and met the scope of the analysis.

**ISSUE 7:** Failure to take a hard look at the grazing actions, as NEPA requires.

**Contention 1:** The appellant contends the analyses failed to do an adequate economic analysis. Costs to the public of maintaining ranching operations on these allotments are not estimated in the EA. No analysis was done of the socio-economic benefits of the no-grazing alternative to the general public in terms of enhanced recreational, wildlife, and hunting resources. The income of the permittee is implicitly weighted much more heavily in the analysis than all the other resources values combined.

**Response:** Project-level requirements for social and economic analysis are found in the Forest Service Manual (FSM 1970) and the Economic and Social Analysis Handbook (FSH 1909.17). The Responsible Official determines the scope, appropriate level, and complexity of economic and social analysis needed (FSM 1970.6).

Social and economic impacts to permittees were identified as an issue (PR #27, 29, 29, 44, 57) as stated in the EA (PR #44, p. 12) and Decision Notice (PR #57, p. 5). Torrance County is described as economically depressed, and the dominant industry in the county is noted as being agriculture and livestock production (PR #44, p. 32). As such, the effects of the three alternatives related to this social and economic issue are described in the EA (PR #44, pp. 32, and 34-35).

In terms of enhanced recreational, wildlife and hunting resources, the EA (PR #44, p. 32) and project records (#13, 19, 29, and 30) describe the isolation of the allotment and the limited past and ongoing recreational and hunting opportunities, as well as the future likelihood for recreational and hunting opportunities to remain limited on the Osborne Allotment. An effects discussion is also provided in the wildlife analysis section of the EA (PR #44, pp. 24-29).

**Finding:** The economic analysis for this project is sufficient, follows agency guidance, and adequately discloses effects under NEPA for the Responsible Official to make a reasoned decision.

**Contention 2:** The EA fails to consider the impacts of global warming, and the likely increased risk of erosion on these allotments due to global warming.

**Response:** The impacts of global warming on grazing in the southwest are outside the scope of this project EA. However, the means to adjust cattle management in the event of drought are discussed in the proposed action (PR #44, p. 10). Furthermore, the EA (PR #44, pp. 8 and 22) provides a discussion of existing conditions and effects related to soil stability and erosion.

**Finding:** The EA meets the standards for analysis and disclosure for direct, indirect, and cumulative impacts of the alternatives.

**Contention 3:** The effects of the proposed actions on private lands and other federal allotments that are part of these livestock operations are not analyzed for their environmental impacts.

**Response:** The effects of the proposed actions on private lands were considered. Links between use of the allotment and adjacent private land are described, along with a discussion on how private land fits into the overall operation of the grazing system, such as season of use for private

vs. forest pastures and the use of private land to water cattle on the forest allotment (PR #8; 10; and 44, p. 30).

Records #27 and #28, as well as the Economic Analysis section of the EA (PR #44, p. 27) describe how integral the allotment is to the private land operations. Should grazing be eliminated on the allotment, the permittees predict they will need to sell their property to development and their family will have to relocate elsewhere.

**Finding:** The EA meets the standards for analysis of alternatives and addresses the connected action of grazing on adjacent private lands.

**ISSUE 8:** The Forest Service failed to choose the optimal alternative.

**Contention:** The appellant contends, “The decision does not meet the high standards of the Multiple Use Sustained Yield Act that the agency allow only that combination of uses that ‘will best meet the needs of the American people...without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.’” The appellant says the Forest Service has not chosen the optimal alternative, which is to end grazing based on special economic interests of the permittee.

**Response:** The EA states the purpose of the proposed action is to authorize Term Grazing Permits on the Osborne Allotment consistent with ecologically sustainable principles, in accordance with direction and objectives in the Cibola National Forest Land and Resource Management Plan and in compliance with applicable laws, regulations, and policies (PR #44, p. 7). A determination of the agency’s policy of grazing on National Forest System lands is outside the scope of this decision. The Cibola National Forest Plan allocated lands for grazing activity in Management Area (MA) 15. The management emphasis for MA 15 is on “range and wildlife management activities which will increase both grazing capacity and wildlife habitat capacity” (PR #4, p. 174).

**Finding:** The selected alternative meets the purpose and need statement and is consistent with Forest Plan objectives.

**ISSUE 9:** The FONSI is contrary to NEPA.

**Contention:** The appellant contends an environmental impact statement must be prepared for the allotment, because a significant impact may occur. Three points were listed: 1) controversy; 2) precedent; and 3) cumulative impacts.

**Response:**

- 1) Appellant claims controversy because of opposition to public lands grazing. This opposition is part of a national policy discussion about grazing on national forests and is not a scientific dispute about the methodology or results of the analysis. Grazing has been ongoing on this allotment for over 50 years with the same number of head and season of use (PR #8; 10; and 44, p. 32). This type of activity (grazing) is a historic activity, and its effects have been measured and analyzed for many years.
- 2) The appellant contends that significance is triggered by precedence, because this action may bias the decision for future land use actions. Because the Rescission Act in 1994 established

a nationwide schedule for NEPA analysis of grazing allotments, this EA is in line with national direction; and it is not setting any new precedent or standard for other projects. Furthermore, grazing has been an ongoing activity on this allotment for the past 50 years, as described in the EA (PR #44, p. 32) and project records (#8, 10, 27, 28, and 29). The selected alternative would not change the historic season of use or number of head and therefore does not set a precedent (PR #44 and 57).

- 3) Regarding cumulative effects and significance: The EA (PR #44, p. 20) describes the Osborne Allotment as a small parcel of federal land mostly bordered by private land, where little activity other than cattle grazing has occurred over the past 50 years. Because of the remote location and poor accessibility, there are no saleable timber resources or known economically viable mineral resources, and recreation opportunities are limited to foot-travel from adjacent National Forest System land. The limited past and current activities (including those activities on private land) are discussed in project records (# 8 and 10) and the existing condition sections of the EA (PR #44). Additionally, there are no future projects or actions, other than those outlined in this document, which could be reasonably foreseen to contribute to cumulative effects.

**Finding:** The FONSI properly referenced the EA and document records. The conclusion that an Environmental Impact Statement is not necessary is consistent with the information in the record.