



**United States  
Department of  
Agriculture**

**Forest  
Service**

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Certified Mail-Return Receipt Requested  
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Forest Guardians  
c/o John Horning  
1411 Second Street  
Santa Fe, NM 87505

Re: Appeals #00-03-00-0052-A215 McCarty, #00-03-0053-A215 Eagle Peak, #00-03-00-0054-A215 Alexander, #00-03-00-0055-A215 Corner Mountain, #00-03-00-0056-A215 Govina, and #00-03-00-0057-A215 Deep Canyon Allotment Decisions, Reserve Ranger District, Gila National Forest

Dear Mr. Horning:

This is my review decision concerning the appeals you filed regarding the Decision Notices and Findings Of No Significant Impact which authorize grazing and implement the grazing management strategies on the above named allotments. Due to the commonality between the appeals, I have chosen to consolidate my response into one decision document.

## **BACKGROUND**

District Ranger Gardner issued decisions on December 13, 1999, for the above named allotments. The decisions resulted in the selection of the following alternatives and authorizations:

McCarty Allotment, Alternative C, which authorizes incidental use (68 animal unit months).

Eagle Peak Allotment, Alternative D, which authorizes 90 head of cattle (cow/calf) to graze yearlong.

Alexander Allotment, Alternative C, which authorizes 220 head of cattle (cow/calf) to graze yearlong.

Corner Mountain Allotment, Alternative B, which authorizes a range of livestock numbers (not to exceed 407 animal unit months) to graze from April 1 through July 31, August 1 through November 30, or complete rest in accordance with a 3-year modified, rest-rotation grazing management system. The Corner Mountain Allotment is a form of grass bank available to permitted cattle from other allotments.

Govina Allotment, Alternative B, which authorizes 105 head of cattle (cow/calf) to graze yearlong.



Deep Canyon Allotment, Alternative E, which authorizes 228 head of cattle (cow/calf) to graze from November 1 through April 15 annually.

The District Ranger is identified as the Responsible Official, whose decisions are 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 appeals. The records indicate that informal resolution was not reached.

My review of these appeals has been conducted in accordance with 36 CFR 215.17. I have thoroughly reviewed the appeal records and the recommendations of the Appeal Reviewing Officer. My review decision incorporates the appeal records.

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

The Appeal Reviewing Officer (ARO) recommended that the Responsible Official's decisions be affirmed and that your requests 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 decisions were 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 appellants were adequately addressed in the project records.

The ARO also recommended; 1) the importance of adhering to utilization standards be emphasized in my decision and, 2) inconsistencies between the allotment decisions for Eagle Peak, and Alexander Allotments and the biological assessments of record be addressed in my decision.

### **APPEAL DECISION**

After a detailed review of the records and the Appeal Reviewing Officer's recommendations, I am affirming the Responsible Official's decisions with instructions concerning the above named allotments, which authorize grazing and implementation of management actions.

By this letter I am instructing the Responsible Official to monitor the allotments sufficiently to document use levels as cattle move through an allotment, and to ensure domestic cattle are removed from pastures before overall utilization levels are exceeded. If monitoring indicates the established stocking rates cannot be sustained over time then NEPA analyses need to be initiated and further adjustments in management instituted.

I am also instructing the the Responsible Official to resolve inconsistencies between the decisions for Eagle Peak and Alexander Allotments and the biological assessments of record as follows: 1) within 30 days obtain concurrence from the Fish and Wildlife Service on the decisions for the Eagle Peak and Alexander Allotments; or 2) within 30 days issue new decisions for the Eagle Peak and Alexander Allotments which are consistent with the biological assessments of record. The Responsible Official must provide documentation of compliance with these instructions to the Appeal Reviewing Officer.

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

Sincerely,

/s/ Dale Fabian (for)  
JAMES T. GLADEN  
Appeal Deciding Officer  
Deputy Regional Forester, Resources

Enclosure

cc:

Forest Supervisor, Gila NF  
District Ranger, Reserve RD  
Director of Rangeland Management, R3  
Appeals and Litigation Staff, R3

**REVIEW AND FINDINGS****of the****Forest Guardians Appeals****#00-03-00-0052-A215, McCarty Allotment Decision****#00-03-00-0053-A215, Eagle Peak Allotment Decision****#00-03-00-0054-A215, Alexander Allotment Decision****#00-03-00-0055-A215, Corner Mountain Allotment Decision****#00-03-00-0056-A215, Govina Allotment Decision****#00-03-00-0057-A215, Deep Canyon Allotment Decision**

**Issue 1:** The Forest Service violated NFMA's consistency requirement by failing to comply with 1996 Forest Plan amendment requirements to limit forage utilization in key areas.

**Contention:** The appellant contends the decisions allow grazing at levels in excess of capacity for each of these allotments and that monitoring of grazing use has not been provided.

**Response:** The grazing guidelines included in the 1996 amendment to the Forest Plans were established to ensure recovery and continued existence of threatened and endangered species. These guidelines are applicable in situations where more specific guidelines have not been established through site specific NEPA analysis for individual allotments. As NEPA analysis is initiated on individual allotments, site specific forage use levels are established in consultation with the U.S. Fish and Wildlife Service. The records reflect that this has been done (McCarty Docs. 225, 163 ; Eagle Peak Docs. 225, 160 ; Alexander Docs. 225, 159 ; Corner Mountain Docs. 225, 144 ; Govina Docs. 225, 162 ; Deep Canyon Docs. 225, 161).

The records also demonstrate that utilization standards include both elk and livestock use and will be adhered to, across all allotments. For McCarty, Eagle Peak, Corner Mountain, Govina, and Deep Canyon Allotments these are; 35 percent in the uplands during the growing season and 40 percent in the uplands during the dormant season. For the Alexander Allotment utilization standards are 40 percent in the uplands during the growing season and 45 percent in the uplands during the dormant season.

On the McCarty, Eagle Peak, Alexander, Govina, and Deep Canyon Allotments, livestock grazing will be excluded from riparian areas in Willow Flycatcher designated critical habitat, Bald Eagle wintering habitat, and loach minnow habitat. On the Corner Mountain Allotment utilization within riparian areas will be limited to 15 percent on woody species.

A review of the record also discloses that monitoring of key areas is planned. Key area monitoring is planned according to the following schedule: prior to cattle entering a pasture to determine actual use by elk; after cattle have occupied a pasture for approximately half the scheduled time; and at the time cattle are moved to the next pasture. Additional monitoring of elk use is planned if funding is available.

Irrespective of the numbers authorized to graze any given year, as factors such as precipitation influence forage production, cattle will be removed from pastures or an allotment depending on conditions, as utilization levels are reached.

**Finding:** The site specific utilization standards developed by the interdisciplinary team (IDT) are consistent with the 1996 Record of Decision for the amended Forest Plans. Monitoring of key areas will ensure adherence to the established utilization rates and progression toward overall healthy watershed conditions.

**Issue 2:** The Forest Service violated NFMA's consistency requirement by failing to comply with standards and guidelines for management of riparian areas listed in the Gila National Forest Plan.

**Contention:** The appellant contends the Forest Service is failing to give preferential consideration to resources dependent on riparian areas by allowing the continuation of an activity which is degrading riparian resources. Therefore, the decisions are in violation of Forest Plan riparian standards and guidelines, applicable to all management areas except wilderness.

**Response:** The EA for the Corner Mountain Allotment (Doc. 188, Chapter I, page 5) discloses, "where existing resource conditions on the allotment do not meet Forest Plan standards and guidelines, site-specific resource objectives have been identified." Riparian area studies along Negrito Creek rated portions as having riparian vegetation in unsatisfactory condition. The Forest Plan direction for riparian areas is to emphasize maintenance and restoration of healthy riparian ecosystems through conformance with Forest Plan riparian standards and guidelines. Management strategies should move degraded riparian vegetation toward good condition as soon as possible. Damage to riparian vegetation, stream banks, and channels should be prevented. Additionally, the Forest Plan directs that grazing in riparian zones will be managed to provide for the maintenance and improvement of riparian areas. Objective number one is to "restore the unsatisfactory riparian condition along south fork Negrito Creek to satisfactory condition as outlined in the Forest Plan riparian guidelines."

This allotment has more perennial water than other allotments on the Reserve District (Doc. 188, Chapter III, page 57), with three perennial streams bisecting the allotment, South Fork Negrito Creek, Rocker Canyon, and Beaverdam Canyon.

A 3-year modified, rest-rotation grazing management system was identified for the selected alternative which provides growing season rest from livestock 2 years in three and complete rest from livestock every third year (Doc. 188, Chapter II, page 11). The guidelines (Doc. 188, Chapter II, page 12) for forage utilization in key areas would be 35 percent allowable use during the growing season and 45 percent allowable use during the dormant season. Utilization of woody riparian species would be 15 percent.

In order to track improvement of existing range conditions, key areas should be evaluated 3 times a year, but “minimally, inspections should be conducted in each grazed pasture near the time the cattle are to be moved off the pasture (Doc. 188, Chapter II, page 14).”

The Watershed Summary of the EA (Doc. 188, Chapter III, page 48) states “any of the alternatives would do a good job of maintaining or improving watershed and riparian conditions over the allotment.”

It is recognized that under the most ideal conditions all key areas will not be utilized uniformly. The Allotment Management Plan (Doc. 65, IV Monitoring and Inspections) states, “if any one key area in a pasture being grazed by livestock exceeds 35 percent allowable use during the growing season, 45 percent allowable use during the dormant season and 15 percent utilization on the woody riparian species, livestock will be moved to another area of the pasture where actual use is less than allowable use. If all the remaining key areas in the scheduled pasture are at maximum use, livestock will be required to be moved early to the next scheduled pasture.”

If utilization rates are not met after use, stocking and management will be adjusted prior to use of the allotment in the future (Doc. 188, Chapter II, page 13).

The EA for the Tularosa Range Analysis, which includes the Govina, Alexander, Deep Canyon, Eagle Peak, and McCarty allotments, (Doc. 225, Chapter I, page 9) discloses, “where existing resource conditions on the allotment do not meet Forest Plan standards and guidelines, site-specific resource objectives have been identified. Riparian area studies along the Tularosa River, San Francisco River, and Negrito Creek rated portions of these waterways as having riparian vegetation in unsatisfactory condition. The Forest Plan direction for riparian areas is to emphasize maintenance and restoration of healthy riparian ecosystems through conformance with Forest Plan riparian standards and guidelines. Management strategies should move degraded riparian vegetation toward good condition as soon as possible. Damage to riparian vegetation, stream banks, and channels should be prevented. Additionally, the Forest Plan directs that grazing in riparian zones will be managed to provide for the maintenance and improvement of riparian areas.” Objective number one is to “restore the unsatisfactory riparian condition along Tularosa River, San Francisco River, and Negrito Creek to satisfactory condition as outlined in the Forest Plan riparian guidelines.”

The Reasons section of the Decision Notice and Finding of No Significant Impact documents for these five allotments (Doc. 270) discloses the primary issues of non-compliance with the Gila National Forest Plan. This is evidenced by the issues of watershed health, riparian health, and threatened and endangered species habitat, that have been addressed by the construction of riparian fencing along the length of the Tularosa and San Francisco Rivers which occur within these allotments, and by the implementation of utilization standards designed to meet resource objectives.

The Riparian section of these same documents notes that the definition of riparian encompasses perennial springs

The guidelines for forage utilization in key areas (Doc. 225, Chapter II) are 35 percent allowable use during the growing season and 45 percent allowable use during the dormant season for all

but the Alexander allotment which has an allowable use of 40 percent during the growing season and 45 percent during the dormant season. In order to meet the overall utilization requirements, at least 75 percent of the monitoring sites must have utilization rates less than or equal to the allowable use guidelines. If utilization is found to exceed 60 percent on any single key area monitoring site during the use period, livestock would be moved to a portion of the pasture where actual grazing use is less than allowable use. If all remaining key areas in the grazed pasture are at allowable use, livestock would be required to be moved to the next scheduled pasture. If utilization exceeds the allowable use guidelines for 2 consecutive years, or any 3 years in a 10 year period, management changes would be instituted to reduce utilization.

**Findings:** The interdisciplinary team integrated utilization guidelines and monitoring protocol to give preferential consideration to riparian communities and manage riparian areas to protect and improve the productivity and diversity of riparian-dependent resources, as required in the Forest Plan Standards and Guidelines.

**Issue 3:** The Forest Service violated the NFMA by continuing to allow cattle grazing on the allotments 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 allotments' 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 decisions are 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 (Gila 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 decisions are not premature.

**Issue 4:** The decisions violate the National Forest Management Act's requirement to maintain viable numbers of all species.

**Contention:** The appellant contends 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 failed to "protect riparian habitats and [the following] riparian obligate species"

due to livestock grazing: “the Southwest willow flycatcher, the Bell’s least vireo, the Yellow-billed cuckoo, the Black hawk, the Mexican spotted owl, the Mexican garter snake, the Narrow-headed garter snake, the Chiricahua leopard frog, the Yavapai Leopard frog, the Arizona southwestern toad, the Lowland Leopard frog.”

**Response:** Regulations at 36 CFR 219 Subpart A, which the 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 Act of 1974, as amended [36 CFR 219.1(a)]. The Forest Plan includes goals, objectives, standards, and guidelines for the protection of threatened, endangered, Forest Service sensitive, and other species and their habitats. These site-specific projects are designed under the direction provided in the Forest Plan.

Of the riparian obligate species listed above by the appellant, the Record shows the Forest determined the Southwestern willow flycatcher, Bell’s vireo, common black hawk, Mexican spotted owl, narrow-headed garter snake, Chiricahua leopard frog, and Southwestern (Arizona) toad or their habitats occur on one or more of the Corner Mountain, Govina, Alexander, Deep Canyon, Eagle Peak, and McCarty Grazing Allotments. The yellow-billed cuckoo, Mexican garter snake, Yavapai leopard frog, and lowland leopard frog or their habitats are not known to occur on the Reserve District, and thus not within any of the allotments. The Forest’s analysis of the species found on the allotments determined that the proposed action may impact individuals of one or more of these species but the impacts are not likely to result in a trend toward Federal listing or loss of viability (Conner Mountain record Docs. 158A, 188; McCarty, Eagle Peak, Alexander, Govina, Deep Canyon Docs. 186,187, 225).

**Finding:** The Forest did not violate the National Forest Management Act's requirement to maintain viable numbers of species.

**Issue 5:** The Forest Service has violated NEPA by failing to analyze a range of reasonable alternatives.

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

**Response:** Pursuant to 40 CFR Part 1501.2(c), formulation of alternatives is driven by significant issues identified during scoping. To be considered reasonable, alternatives should address one or more issues, and should meet the stated purpose and need. All significant issues were addressed and all purpose and need objectives were met under one or more of the alternatives analyzed for each allotment. At a minimum, three alternatives were analyzed for each allotment. These included: 1) No action (no grazing); 2) Current management and; 3) At least one alternative to current management. For the Deep Canyon Allotment, two alternatives to current management were analyzed.

**Finding:** The scope of the analysis was appropriately defined, and a range of reasonable alternatives was analyzed within that scope. The Forest did not violate NEPA.

**Issue 6:** The Forest Service violated NEPA by failing to consider and disclose the cumulative impacts of the proposed actions.

**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 that “the EA contains virtually no analysis of cumulative effects...”.

**Response:** Chapters I and III of the EAs ( McCarty, Eagle Peak, Alexander, Govina, Deep Canyon Doc. 225 ; Corner Mountain Doc. 188) specifically address past activities occurring within and surrounding the analysis area. In Chapter I, a detailed grazing history is given for each allotment, dating from 1945-47 to the present for most allotments, and from 1933-34 for the Alexander and Corner Mountain Allotments. Chapter III (EA) and the water/soils specialist reports describe existing conditions and trends for vegetation, soil, and riparian conditions, and discuss the cumulative effects of past, current, and reasonably foreseeable future activities, including elk and livestock grazing, fire occurrence and suppression, wood harvest activities, tree thinnings, fuel treatments, and mining.

**Finding:** Past, present, and reasonably foreseeable actions were considered in the analysis. The EA and record reflect an adequate analysis and disclosure of cumulative effects.

**Issue 7:** The Decision to Approve this Permit Violates the Endangered Species Act.

**Contention 1:** The appellant contends the decisions violates the Endangered Species Act by continuing to allow livestock grazing in degraded riparian areas that provide habitat for listed species, and thus the Guidance Criteria threshold for a “Not likely to adversely affect” call were exceeded for loachminnow and spikedace. They further contend “[c]ontinued livestock grazing of riparian habitats within these allotments...is a clear violation of the Mexican Spotted Owl Recovery Plan and 1996 Forest Plan Amendment.”

**Response:** No spikedace or spikedace habitat is found on the Reserve Ranger District. The Records show the District did make a May Affect, Not Likely to Adversely Affect call for the loachminnow and Southwestern willow flycatcher (as well as for other species) based on the following: a total of approximately 2.1 miles of occupied loachminnow, over 8 miles of potential loachminnow habitat, and 9.3 miles of flycatcher Critical Habitat are found on five of the allotments (Corner Mountain contains no habitat for these species); all of this occupied, potential, and critical habitat will be fenced out of the allotment pastures with the selected alternatives; utilization standards have been put in place for woody vegetation in riparian habitat that is open to grazing and upland habitats that will result in improved riparian and upland condition and; stocking rates are being reduced (Corner Mountain Docs. 124, 158A, 188; McCarty, Eagle Peak, Alexander, Govina, Deep Canyon Docs. 159, 160, 161, 162, 163, 225, 270). The US Fish and Wildlife service concurred with the calls made on all listed and proposed species for all six allotments (Doc. 270).

Mexican spotted owl protected activity center (PACs) are found in five of the allotments (McCarty has none). The number of PACs ranges from one, partially within the Deep Canyon allotment boundary, to seven totally within, four mostly within, and one partially within the Corner Mountain Allotment. The measures identified above for loachminnow and Southwestern willow flycatcher will also result in improved condition of riparian habitats within Mexican spotted owl PACs. The US Fish and Wildlife Service concurred with the May Affect, Not Likely to Adversely Affect calls the made by the District.

**Contention 2:** The appellant contends “[t]he decision violates the Endangered Species Act by allowing livestock grazing at levels that exceed forage utilization requirements, and thus exceed the threshold for findings of Not likely to adversely affect for affected species” until stocking rates are not in excess of capacity.

**Response:** On all allotments stocking rates will not exceed capacity. Additionally, utilization standards will not be exceeded. See Issue #1 for more details.

**Finding:** The Forest did not violate the Endangered Species Act.

**Issue 8:** The EAs violate the Clean Water Act

**Contention:** The appellant contends that continued grazing will contribute to violations of state water quality standards and implies that there are no Best Management Practices (BMPs) in place. The appellant further declares that the Forest Service has failed to make a determination of the effect of agency actions regarding violations of water quality standards under the anti-degradation clause of the Clean Water Act (CWA).

**Response:** The record shows that the appropriate non-point source considerations, including identification of BMPs, were made during the planning process. Improvement of water quality and riparian condition, along with reduced erosion were identified as project objectives for all allotments (EA, Chapter II). The New Mexico Environment Department was consulted throughout the scoping and document preparation process (McCarty, Eagle Peak, Alexander, Govina, Deep Canyon Docs. 10, 44, 168, 213; Corner Mountain Docs. 10, 44, 192. In all cases, the alternative selected responds to the water quality issue through management changes that will have a positive effect on improving ground cover, reducing erosion and protecting riparian areas (Doc. 270). In addition to the operational BMPs referenced in the EAs, the grazing management changes that are part of each decision are considered administrative BMPs.

The CWA does not contain an “anti-degradation clause”. It does, however, establish an Anti-Degradation Policy that is reflected in EPA regulations. EPA’s anti-degradation policy has been incorporated into New Mexico’s Administrative Code at 20 NMAC 6.1.1000. According to this codified policy, in streams such as those in these project areas, anti-degradation refers to the maintenance of the level of water quality necessary to protect the existing instream uses. Furthermore, implementation of the State’s anti-degradation policy is guided primarily by the voluntary implementation of BMPs. In the case of these six allotments, the selected alternative and the BMPs prescribe improvements in grazing management that will have a beneficial effect on water quality.

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

**Issue 9:** 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 the highest public benefit. The appellant further alleges that the decisions to authorize livestock grazing will permanently impair land productivity.

**Response:** Management of 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 emphases within the project area. Net public benefits were analyzed appropriately during Forest Plan preparation, and are outside the scope of project-level analysis.

Chapter III in the EAs clearly displays that vegetation conditions and trends have been improving or will improve under the selected alternatives for all allotments analyzed. It is estimated that this will lead to improved watershed conditions, improved riparian/aquatic habitat quality, and enhanced productivity of wildlife habitats. Monitoring provisions are identified in the EAs to ensure BMPs are followed, and site productivity is maintained.

**Finding:** The IDT appropriately considered the effect of the proposed action on long-term productivity of the land and concluded that the inherent productivity of the land would be maintained and improved.

**Issue 10:** The EAs violate the Administrative Procedures Act.

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

**Response:** The records indicate that the selected alternatives will improve watershed health and riparian vegetation conditions and also protect threatened and endangered species’ habitats (Doc. 270). The EAs display the effects of implementing the proposed actions and alternatives. The Responsible Official’s decision rationale reflects consideration of the effects as disclosed in the EA (Doc. 270). Furthermore, the record reflects appropriate public involvement in the NEPA process and indicates that public comments were evaluated and considered in the planning process.

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