

File Code: 1570-1

Date: January 31, 2000

Budd-Falen Law Offices
Attention: Karen Budd-Falen
P.O. Box 346
Cheyenne, WY 82003-0346

Certified Mail - Return Receipt Requested
P 556 954 710

Re: Appeal #99-03-06-0002-251, Kingston Allotment, Black Range Ranger District, Gila National Forest

Dear Ms. Budd-Falen:

This is my second level review decision on the appeal you filed on behalf of your client, R. Brent Bason. The appeal is in regard to the Black Range District Ranger's decision concerning the continued authorization of livestock grazing for the Kingston allotment. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

Background

On February 23, 1999, District Ranger James E. Paxon, Jr. issued a decision notice (DN) concerning the future authorization of livestock grazing for the Kingston allotment, located within the Black Range Ranger District. The District Ranger's decision would implement Alternative E, which would allow 300 cattle (cow/calf) to graze yearlong with 100 head in non-use for the first three years.

Your first level appeal and request for stay of this decision was received by Forest Supervisor Camarena on April 15, 1999. On April 21, 1999, Supervisor Camarena granted your stay request pending a final agency decision on the merits of the appeal. Under the provisions of 36 CFR 251.94 the District Ranger prepared and mailed to you a copy, on July 12, 1999, of his written responsive statement to your appeal. Your reply to the responsive statement was received by Supervisor Camarena on July 29, 1999. Supervisor Camarena subsequently closed the record on August 5, 1999. Based on his review of the record, Supervisor Camarena affirmed the District Ranger's decision on September 17, 1999.

Your second level appeal of the District Ranger's decision was received in this office on October 6, 1999. By letter dated October 21, 1999, I indicated my review decision would be made within 30 days from the date the appeal record was received from the first level Reviewing Officer. Because of demands placed on this office having to do with litigation and other appeals, I subsequently extended the time period to issue a second level decision on this appeal to no later than January 31, 2000.

A total of two other appeals were filed regarding this decision under the appeal regulations at 36 CFR 215. A review of these appeals was conducted pursuant to and in accordance with 36 CFR

215.17 with decisions rendered in May, 1999. One request to intervene in this appeal was received on May 17, 1999, and subsequently denied by Supervisor Camarena on May 25, 1999.

Points of Appeal

My review of this appeal was confined to the substantive points raised in the appeal, the District Ranger's responsive statement of July 12, 1999, appellant's July 29, 1999, reply to the responsive statement, the first level appeal decision dated September 17, 1999, the District Ranger's decision and associated environmental assessment (EA) and project record, federal statutes, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.

Issue 1 NEPA analysis is not required for reissuance of term grazing permits

Contention: Appellant claims that there is no legal precedent or mandate requiring the Forest Service to apply the NEPA process to the reissuance of grazing authorizations.

Response: The National Environmental Policy Act (NEPA) applies to Federal Agency planning and decision making for actions which may affect the environment (NEPA Section 102). Actions include new and continuing activities including projects and programs approved by federal agencies [40 CFR 1508.18(a)]. Federal actions include approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit [40 CFR 1508.18(b)(4)].

The Forest Service has the discretion and the duty to determine appropriate uses of the National Forests and may authorize certain appropriate uses by issuing permits. Any decision by a Forest Service line officer to issue, modify, or reissue an authorized use is clearly a federal action subject to NEPA procedures.

Finding: All of the actions taken by the District Ranger relative to his decision to modify the term grazing permit are required by NEPA procedures and were properly implemented by the District Ranger.

Issue 2 No action alternative

Contention: Appellant claims the no action alternative is not a reasonable alternative under NEPA when misconstrued to mean no grazing.

Response: The Council on Environmental Quality (CEQ) publication Forty Most Asked Questions defines the no action alternative. CEQ provides two distinct interpretations of no action that must be considered, depending on the nature of the proposal being evaluated. The first interpretation involves actions such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases no action is no change from current management direction or level of management intensity. The second interpretation of no action is illustrated in instances involving federal decisions on proposals for projects. No action in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity. The EA states that the decision to be made is whether or not to authorize livestock grazing on the Kingston allotment, and if so, under what conditions. Therefore, no action means no authorization.

The EA includes a no grazing alternative, a current permit alternative, and current management alternative, plus three other action alternatives. The EA includes analysis of the alternative suggested by the appellant.

Finding: The District Ranger appropriately considered a no action alternative.

Issue 3 Cooperation and consultation

Contention: Appellant asserts, "The Forest Service violated the Intergovernmental Cooperation Act, NEPA, and NFMA by denying Sierra County its lawful right of participation." The appellant also argues the agency failed to consult with the permittee.

Response: In the interest of cooperation, the Forest and Sierra County entered into a Memorandum of Understanding (MOU) in 1994 (Doc. G-7). The MOU establishes an intergovernmental planning relationship between the Gila National Forest and Sierra County (MOU Section I). Section IV of the MOU defines each entity's role in project planning under the NEPA. The project record indicates that Sierra County's participation in the planning process is consistent with the MOU (Docs. G-8, G-9, G-10, G-32, G-40).

The record indicates that the District Ranger met with the permittee (Doc. 40) and analyzed an alternative submitted by the permittee (Docs. 43, 44, 45, EA pp 17-18).

Finding: The District Ranger appropriately consulted with Sierra County and the permittee.

Issue 4 Social and economic impacts

Contention: Appellant claims that the Forest Service failed to adequately consider economic impacts in the EA. Appellant suggests that the Forest Service failed to consider: 1) economic effects to Sierra County from systematic livestock reductions on 28 allotments; 2) all permittees in the region being driven out of business; 3) overall reduction of animal unit months (AUM's) on the Gila as a whole; 4) local economic loss from neighboring allotments; 5) cumulative economic and social effects ; 6) comparison of the alternatives to current management; 7) economic impacts over the 10-year permit term; 8) the probability of the permittee facing foreclosure. The appellant also contends the Forest Service should have used actual verifiable data, including allotment specific data from the permittee, instead of regional averages.

Response: 1-5) The agency is not required to speculate on the future, only to consider what is reasonably foreseeable (CEQ "Forty Most Asked Questions" and 40 CFR 1508.7). There was no proposal to drive permittees in the region out of business, to systematically reduce livestock on 28 allotments, nor to reduce AUM's on the Gila as a whole. Such an analysis would be speculative. Cumulative economic and social effects from all of the allotment decisions scheduled in fiscal year 1998 were analyzed in the report "Social Analysis for Fiscal Year 98 Allotment Management Plans on the Gila National Forest, Southwestern Region, USDA Forest Service" (Doc. G-13).

6) The EA displays the economic effects of each alternative such that any alternative may be compared to any other (EA pp 51-56). In addition, the EA displays changes in ranch income compared to present management (EA p 51).

7) The EA displays economic effects in terms of annual ranch income, jobs and annual income, and annual payments to counties (EA pp 51-56). The EA also includes an investment analysis

which discounts costs and values over the permit's 10-year term. These are not one time occurrences as appellant suggests.

8) The EA notes, average actual use over the past five years has been 171 head yearlong (EA p 17). The EA discloses estimates of annual ranch income and the methodology used in the estimates (EA pp 50-51). The EA notes that the actual amount of revenue required to maintain a viable operation is not known (EA p 51). The purpose of an EA is to provide evidence for determining whether or not to prepare an environmental impact statement (EIS) (40 CFR 1508.9). Economic and social effects are not intended by themselves to require preparation of an environmental impact statement (40 CFR 1508.14). Foreclosure and loss of a permittee's ranching operation does not bear on the District Ranger's decision not to prepare an EIS. Therefore, comparative approximations are sufficient for a reasoned choice among the alternatives.

The rationale for using average economic data developed by the Agricultural Experiment Station at New Mexico State University is documented in the project record (Doc. G-15).

Finding: The EA adequately discloses the economic and social effects of the alternatives, sufficient to make a reasoned and informed decision.

Issue 5 Environmental impacts

Contention: Appellant claims that the Forest Service failed to consider the loss of wildlife water and increased fuel loading as a result of livestock reductions.

Response: The EA discusses watering areas dependent on maintenance on page 35. It states that without permittee maintenance under the no grazing alternative, wildlife water in the North Trujillo Pasture could be limited during dry periods. The EA goes on to state that the remainder of the allotment contains sufficient spring and stream water for wildlife without the need for maintenance. Permittee maintenance would be required by the Term Grazing Permit, Part 2 (i), in all action alternatives. The EA addresses the effects of each alternative on fuels and the occurrence of fire and its effect on encroachment of woody species (EA pp 66-67).

Finding: The EA adequately analyzes and discloses the environmental effects on wildlife water and fuels.

Issue 6 Direct and indirect effects

Contention: Appellant contends that the Forest Service should have discussed; whether possible future permittees would want to operate under the selected alternative, the effect the selected alternative will have on private property and water rights, and the effect upon the local custom and culture as livestock grazing is removed for other uses.

Response: Whether any future permittee would want to operate under the selected alternative is for the market to decide and is irrelevant to the decision. The decision is described in the EA as being whether or not to authorize livestock grazing on the Kingston allotment, and if so, under what conditions.

The selected alternative authorizes grazing on the Kingston allotment. A grazing authorization conveys no private property rights to National Forest System Lands (43 U.S.C. 1752).

The terms applied to the authorization in the selected alternative address the stated purpose and need to improve riparian and watershed condition, consistent with Gila Forest Plan standards and guidelines. The selected alternative does not remove livestock for other uses.

Finding: The EA's effects analysis is adequate relative to appellant's contention.

Issue 7 Mitigation

Contention: Appellant asserts, "The EA fails to discuss mitigation of the severe impacts on the permittee, his family and local citizens." Appellant suggests that the EA should discuss measures for livestock distribution, offering additional grazing elsewhere on the Gila National Forest or providing federal assistance in renegotiating the permittee's loan.

Response: Changes in the permittee's financial status is not an environmental impact. "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." See *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d713, 716 (9th Cir. 1993). The EA and supporting record disclose effects on local communities in terms of jobs and income, as discussed before. The economic effects in terms of jobs and income and payments to counties do not support the appellant's assertion of "severe impacts" (EA pp 52-55 and Doc. G-13).

The EA includes measures for livestock distribution in the selected alternative (EA pp 18-20) and in the mitigative measures discussion (EA pp 20-21). While outside the scope of this analysis, the Forest Service has a process for allocating unused livestock grazing capacity, which includes allocations to permittees who have taken reductions in permitted numbers. The decision does not preclude that opportunity should excess capacity become available. Providing federal assistance in renegotiating the permittee's loan is outside the scope of this analysis and decision.

Finding: The District Ranger adequately employed mitigation measures to address environmental impacts.

Issue 8 Current management alternative

Contention: Appellant contends, "Alternative C in the EA does not reflect current management."

Response: Alternative C reflects average actual use for the past five years (EA p. 17). This alternative provides a reference for the level of stocking and management that contributed to current conditions. The appellant contends that the permittee's intent is to build the livestock herd up to 300 head as authorized under the current permit, and that the herd is at 264 and growing. This makes a case for considering the maximum currently permitted as "current management". Alternative B represents the current permit.

Finding: Regardless of which alternative is labelled "current management", both the recent level and the currently permitted level of stocking were considered. The District Ranger considered an adequate range of alternatives.

Issue 9 Required alternative

Contention: Appellant claims, "The EA violates NEPA because it failed to analyze a required alternative." Appellant states that the Forest Service is required to consider a no action alternative that would implement the existing management regime, citing 40 CFR 1502.14(d) as requiring an alternative that mirrors the status quo.

Response: Regulation at 40 CFR 1502.14(d) requires that a no action alternative be considered. It does not, however, require that such an alternative mirror the status quo. As discussed before, CEQ has advised that there are two definitions for no action: either a current plan remains in effect or a proposed project does not go forward. Both the current grazing authorization and a no grazing alternative were considered. Regardless of which definition applies, both constructs of no action were considered in detail.

Finding: Regardless of which definition applies, both constructs of no action were considered in detail. The District Ranger considered an adequate range of alternatives.

Issue 10 Civil rights impact analysis

Contention: Appellant asserts, "The EA failed to contain a required civil rights impact analysis."

Response: The appellant is correct concerning the need for civil rights impact analysis (CRIA) and civil rights impact statements (CRIS) when "major" policy actions are undertaken by the Forest Service. However, a site-specific NEPA planning process and decision for an allotment is not a "major" policy action.

Forest Service Manual (FSM) direction at 1731 states that a civil rights impact statement is required for major policy actions. FSM 1731 describes a number of situations which would constitute a major policy action including projects for which an EIS is required. Forest Service Handbook (FSH) 1709.11 Chapter 31.11 states, "A civil rights impact analysis for environmental or natural resource actions is part of the social impact analysis package..." FSH 1909.17 outlines the process for including civil rights in the social analysis.

The District Ranger conducted an assessment of the social and economic effects to local communities and the permittee as part of the analysis process. Based on the EA and FONSI, this is not a "major" federal action and does not require a CRIA or CRIS.

Finding: The social and economic effects to local communities and permittee were properly assessed and disclosed, and satisfy the needs for civil rights assessment.

Issue 11 Pre-determined outcome

Contention: Appellant contends, "The NEPA process followed in the EA set up a pre-determined outcome." Appellant further contends that the analysis was skewed by focusing on improving range and riparian condition.

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).

The EA defines the scope of the analysis in specifying the purpose and need to which the agency is responding in proposing the alternatives including the proposed action (40 CFR 1508.9(b) and 1502.14).

The purpose and need statement includes, "Forest Service policy is to make forage available to qualified operators from lands suitable for grazing consistent with land management plans (FSM 2203.1)" (EA p 8). The EA's purpose and need discussion also points out a need to restore unsatisfactory riparian conditions and improve watershed condition pursuant to forest plan direction. Without the requirement for "reasonable" alternatives, the range of alternatives would be boundless. Reasonable alternatives to the proposed action need to address one or more issues raised in the analysis, and need to address the purpose and need for action. The alternatives appropriately focus on meeting the stated purpose and need.

Finding: The District Ranger appropriately focused the analysis on achieving the stated purpose and need for action.

Issue 12 The EA imposes terms and conditions on the allotments that are not authorized by the Forest Plan

Contention: The appellant contends that the EA imposes terms and conditions on the allotments that are not authorized by the Forest Plan. The appellant claims the production-utilization (PU) surveys will subject the permittee to a vague and arbitrary monitoring plan and that the utilization standards are not supported by scientific data.

Response: Proper forage utilization levels are employed to ensure such things as plant health and vigor, long term soil productivity, and protection for threatened, endangered, and sensitive species and their habitats. Key areas where utilization levels will be monitored are identified in the project record (Doc. 36). Forage utilization levels are determined based on guidelines set out in the R-3 Allotment Analysis Handbook (FSH 2209.21) (Doc. 35). This handbook specifically describes appropriate forage utilization levels recommended for the purpose of improving rangeland condition. These guidelines have been developed over a period of 50 years by Southwestern Region Rangeland Management Specialists, Ecologists, and other scientists.

Rangeland management is an ongoing adaptive process where monitoring provides continued validation of decisions and provides a higher level of information upon which future decisions will be based. PU surveys are not a vague and arbitrary monitoring plan as the appellant suggests. Rather, they are a standard Forest Service method for verifying estimated grazing capacity. Guidance for conducting these surveys is found in Chapter 50 of the R-3 Allotment Analysis Handbook (Doc. 35). The handbook specifically identifies the need for Forest Officers to provide the opportunity for the permittee to be involved in PU surveys.

Finding: The District Ranger acted within his discretion to set utilization levels, determine appropriate levels of livestock use, and determine what level of monitoring is necessary as part of the site specific NEPA.

Issue 13 Multiple-use mission

Contention: Appellant claims, "The Forest Service proposal to review twenty-eight allotments in an overall effort to reduce or eliminate livestock grazing in the desert southwest is contrary to the very mission set forth in the Gila Forest Plan. The goal of putting recreational and

environmental interests ahead of grazing also violates principles of multiple use as set forth in the MUSYA [Multiple-Use Sustained-Yield Act]."

Response: There is no proposal to reduce or eliminate grazing in the desert Southwest, nor does the EA purport to put any particular interest ahead of another. The EA is tiered to the Gila Forest Plan EIS. The Kingston allotment is located in Management Area 2G. The forest plan reflects decisions concerning the mix of land uses in Management Area 2G (Gila Forest Plan p 84). The forest plan prescribes a management emphasis for wildlife habitat, natural conditions in the wilderness, fuelwood, and livestock grazing. There is no particular order of priority within these four emphasis areas.

Finding: The EA does not conflict with the Gila mission statement nor the Multiple-Use Sustained-Yield Act.

Issue 14 Range capacity calculations using GIS and ARC/Info is incorrect and the EA provides no scientific support for its utilization and carrying capacity findings

Contention: The appellant contends that the "Livestock Allocation Model" is overly restrictive when making long term carrying capacity determinations, lacking the benefit of on-the-ground knowledge, experience, or site by site verification (Appeal D-1). The appellant further contends that there is no explanation in the EA as to how final utilization values were determined and that the findings of the Forest Service are scientifically unsound since "on-the-ground vegetative" studies were not conducted (Appeal D-2; D-8).

Response: It must be pointed out that no amount of data is ever totally scientifically conclusive when applying the analysis and decision making process to biologically complex expanses of national forest system lands consisting of thousands of acres. Rangeland management is an ongoing adaptive process where monitoring provides continued validation of the decision and provides a higher level of information upon which future decisions will be based.

A review of the record reveals that sixty percent of the Kingston Allotment is in poor or very poor condition. Furthermore, past inspections and field analysis have shown that use in riparian areas and key sites has been excessive, with vegetation conditions declining slowly over the last few years (Doc. G12.) The selection of Alternative D (permittee's alternative) would cause a decline in the condition of the riparian areas on the allotment (Doc. A). The Forest Plan directs resource managers to maintain or improve watershed conditions to satisfactory condition on 70-90 percent of the unsatisfactory watersheds by the end of the fifth decade (Doc.G-12). Therefore, this decision is about authorizing an amount of livestock grazing that is consistent with achieving satisfactory watershed conditions. It would not be appropriate for the District Ranger to decide on a level of grazing that may cause further environmental degradation.

The appellant infers that the Forest Service determined carrying capacity solely on the basis of a computer model and that Forest Service findings are scientifically unsound. A review of the record shows that professional judgement coupled with personal knowledge of the area, existing resource data on vegetation and other basic resource components such as soils located in the Forest's Geographical Information System, precipitation records, plant physiology, range condition, actual use records, past PU surveys, field inspections and other historical records, permittee input, utilization guidelines (1996 amended Forest Plans), and other resource requirements were considered in determining carrying capacity and forage utilization levels (Docs. A; G; K; G-12; G-19; G-21-24; G-37; G-39). Additionally, the District Ranger's decision

immediately commits the Forest Service to three years of PU surveys, and monitoring of utilization standards in key areas. This information will be used to adjust permitted livestock numbers, as necessary, at the end of three years (Doc. A).

Finding: The Region 3 Allotment Analysis Handbook (FSH 2209.21, R-3), provides broad guidelines for the collection and analysis of resource information to be used within the NEPA process (Doc. G-35). Methodologies used by Gila National Forest personnel as a basis for the Ranger's decision are within the scope of the direction contained within the Allotment Analysis Handbook.

Issue 15 The EA inadequately discussed the impacts of grazing by elk and other grazing wildlife

Contention: The appellant contends that elk herds in the area have increased dramatically in the last decade, with elk utilizing a significant portion of the available forage. Additionally, the appellant asserts that the Forest Service cannot support Alternative E based on its suggestion that the riparian and other vegetative conditions are poor, without considering the possibility that such conditions might be attributable to wildlife.

Response: Forage utilization standards apply to use by all grazing ungulates including big game species. Contrary to the appellant's contention that elk herds have increased dramatically, the record indicates that elk numbers are low and that utilization levels by all grazing ungulates are not expected to exceed utilization standards identified in Alternative E (Doc. G-12). Furthermore, the Forest Service has no direct control over big game numbers. Although the Forest Service provides recommendations related to management of big game numbers, only the New Mexico Department of Game and Fish has ultimate jurisdiction in regulating the hunting of big game.

Finding: The Interdisciplinary Team properly considered the effects of big game in the analysis.

Issue 16 The EA's analysis on soils and watershed is without scientific data.

Contention: The appellant contends that Forest Service conclusions on current soil and water conditions and the Forest Service description of anticipated environmental effects in Alternatives B, C, and D are not supported by any scientific study, data or survey.

Response: A review of the record reveals that an inspection of the allotment was conducted by watershed scientists prior to their analysis of environmental effects (Doc. G-20, p11). The soil and water specialists also relied on a recent riparian survey for six sites in the allotment (Doc. G-20, p11) and water quality information collected by the State of New Mexico on an allotment stream (Doc. G-20, p18) in order to describe current soil and water conditions. The soils field inspection, which documented the existence of erosive soils on slopes over 40 percent, was combined with other allotment information such as vegetative condition (Doc. G-21) collected in 1990 and GIS generated slope classes (Doc G-20, p10) and professionally interpreted to describe expected effects on soil and water for each alternative. Planned monitoring will provide validation of the conditions and expectations which formed the basis for the decision.

Finding: Methodologies used by Gila National Forest personnel to analyze effects on soil and water are scientifically supportable.

Issue 17 The agency EA improperly relies on several wildlife management documents

Contention: The appellant objects to the Agency's reliance on the following documents:

- (i) The Mexican Spotted Owl Recovery Plan and Guidance Criteria for Determining the Effects of Issuing Term Grazing Permits.
- (ii) Management Recommendations for the Northern Goshawk in the Southwestern United States; and
- (iii) Programmatic Biological Assessment for Mexican Spotted Owl and other interim directives and standards and guidelines for protection of the Mexican Spotted Owl.

"The above documents individually and collectively result in severe grazing reductions on grazing allotments that: (i) are scientifically unsound and are thus arbitrary and capricious, (ii) are rules and/or amendments of the Gila National Land and Resource Management Plan ("Forest Plan") that must be subject to public comment and review under NFMA, NEPA, or the APA, and (iii) were developed without consultation, cooperation, and coordination of the Permittee and/or Sierra County..."

Response: A review of the record disclosed that the Interdisciplinary Team (IDT) improperly cited the Guidance Criteria as the direction used to analyze the effects of the Alternatives. The Guidance Criteria only provides thresholds for consultation purposes with the US Fish and Wildlife Service (FWS). The direction stated actually comes from the Forest Plan, as amended by the Record of Decision for Amendments of Forest Plans, Arizona and New Mexico, 1996. This Amendment incorporates Mexican Spotted Owl Recovery Plan findings and recommendations into Standards and Guides through the Environmental Impact Statement (EIS) process into Forest Plan direction. It also includes Standards and Guidelines for the Northern Goshawk based on the Management Recommendations for the Northern Goshawk in the Southwestern United States. The EIS included public involvement, review and comment and satisfies all NEPA, NFMA and APA requirements. Both the Recovery Plan and Management Recommendations were developed by teams of scientists using the most recent knowledge on the owl and goshawk.

Finding: Although the IDT should have cited the Forest Plan Standards and Guidelines rather than the Guidance Criteria on page III-42, the IDT properly used the MSO Recovery Plan, Guidance Criteria, Management Recommendations for the Northern Goshawk, and Standards and Guidelines for the Mexican spotted owl and Northern Goshawk.

Issue 18 The EA failed to analyze and consider range improvement techniques to expand or fully realize actual allotment capacity

Contention: The appellant contends that range improvements such as mineral supplement placement, water development, herding, and fencing can dramatically improve utilization of an allotment and eliminate distributional problems. The appellant asserts the Forest Service ignored range improvement techniques in favor of direct herd reductions.

Response: The District Ranger's decision incorporates a 6-pasture, winter deferred-rotation system and a summer rest/deferred-rotation system. Additionally, there are 31 developed water sources (springs and stock tanks) and each pasture is divided with fully functional fences (Docs. G 12; G 27). Fences and water developments will be maintained and herding will be used to

help prevent overgrazing of key areas (Doc. A). To promote use of browse a mineral supplement is included in Alternative E. The use of browse by cattle constitutes an estimated 38 percent of the available forage under Alternative E (Docs. G 12; G 39).

Finding: The District Ranger's decision employs the full scope of management techniques available. In this situation proposing additional capital investments cannot be viewed as a reasonable solution to restoring degraded watershed condition.

Issue 19 Permit reissuance

Contention: Appellant claims, "Reissuance of a grazing permit is not discretionary."

Response: Appellant suggests that a grazing permit and a grazing preference or priority are property interests protected by the United States Constitution. As early as 1911, in upholding the Secretary of Agriculture's authority to issue the grazing permit regulation, the United States Supreme Court held that an "implied license" to graze on public lands existed "so long as the government did not cancel its tacit consent." Light v. United States, 220 U.S. 523, 535(1911). The "implied license" theory discussed in Light was articulated by the Supreme Court as early as 1890, Buford v. Houtz, 133 U.S. 320, 326 (1890), and has since been cited recently in cases reaffirming that, use of public lands for grazing is not a right but a privilege. See, e.g. Diamond Bar Cattle Company v. United States, 168 F.3d 1209 (10th Cir. 1999).

Furthermore, although appellant may have a priority for renewal, the 10th Circuit Court of Appeals has repeatedly held that the decision whether to issue or deny a permit is a discretionary one. "[T]he very determinations of whether to renew grazing permits and whether public lands should even be designated for grazing purposes [see 36 C.F.R. 219.20] are matters completely within the Secretary of Interior's discretion." Baca v King, 92 F.3d 1031, 1037 (10th Cir. 1996). See also, United States v. Morrell, 331 F.2d 498 (10th Cir. 1964) and Chorunos v. United States, 193 F.2d 321 (10th Cir. 1952). The most recent case is Federal Lands Legal Consortium v. United States, No. 988-2211 (10th Cir., October 28, 1999).

Finding: Reissuance of a grazing permit is discretionary.

Issue 20 Regulatory impact analysis

Contention: Appellant claims, "A regulatory impact analysis should have been completed prior to this decision."

Response: This is a site specific project decision designed within the existing regulatory framework. There is no regulatory proposal that would require a regulatory impact analysis.

Finding: A regulatory impact analysis is not required for this decision.

Decision

My second level review of this appeal was conducted in accordance with 36 CFR 251 Subpart C.

After review of the appeal record, I find that the District Ranger's decision with respect to continued authorization of livestock grazing for the Kingston allotment is based on a reasonable assessment of the resource conditions on the allotment.

The District Ranger's decision is in conformance with applicable laws, regulations, policies and procedures. I find no evidence which would support the allegations that the District Ranger

acted in an arbitrary and capricious manner. Therefore, I affirm the District Ranger's decision to implement Alternative E.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 251.87(e)(3)].

Sincerely,

/s/ James T. Gladen
JAMES T. GLADEN
Appeal Reviewing Officer
Deputy Regional Forester, Resources

cc:
Forest Supervisor, Gila NF
District Ranger, Black Range RD
Director, Range Management, R3
Appeals and Litigation Staff, R3