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Forest
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File Code: 1570-1/2200

Date: October 16, 2001

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

Certified Mail – Return Receipt Requested
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Re: Appeal #01-03-00-0045-A215, Gila River Allotment Decision, Silver City Ranger District,
Gila 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 Engle issued a decision on July 17, 2001, for the Gila River Allotment. The decision resulted in the selection of the following alternative and authorization:

Gila River Allotment, Alternative D, which authorizes up to 216 head of cattle, to graze during a 6-7 month fall/winter/spring season.

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 concluded that: (a) decision logic and rationale were generally clearly disclosed; (b) the benefits of the proposal were identified; (c) public participation and response to comments were adequate. However, the Appeal Reviewing Officer also found that in accordance with a recent New Mexico Federal District Court Opinion and Order in Forest Guardians, et al. v. USFS CV 00-714 JP/KPM-ACE (October 1, 2001), the Gila River Allotment decision does not demonstrate consideration of MIS information as required by the regulations at 36 CFR 219.

APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I reverse the Responsible Official's decision concerning the above named allotment since the decision does not comply with Judge Parker's interpretation of the planning regulation requirements. Although, Judge Parker's order is not yet final, it is prudent to implement the order pending final resolution of this case. The Responsible Official is instructed as follows:

- 1) Evaluate and disclose the environmental effects on MIS species considering population information collected at the Forest Plan level or at the appropriate geographical scale for a particular species.
- 2) Upon completion of this analysis circulate a new Environmental Assessment or Supplemental Environmental Assessment for public comment and issue a new decision under 36 CFR 215.

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

Sincerely,

/s/ Alan J. Koschmann

JAMES T. GLADEN
Appeal Deciding Officer,
Deputy Regional Forester,
Resources

Enclosure

cc:

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

REVIEW AND FINDINGS

of the

Forest Guardians' Appeal

#01-03-00-0045-A215, Gila River 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, "...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 (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 decision is not premature.

ISSUE 2: The decision violates the Gila 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.

In addition, the EA (page 43-44) analyzes impacts to riparian areas and indicates that the selected alternative will not impair the few isolated riparian areas that could be accessed by livestock. It states that these isolated riparian areas are currently intact and functioning. The EA describes how the selected alternative continues to limit livestock access to riparian areas and reduces concentrations of livestock at the key springs areas. Furthermore, the EA states that springtime management of livestock would be adjusted yearly so that use would not occur at these isolated riparian sites when the vegetation is in an active growth state. Hence, the record indicates that the selected alternative is consistent with the forest plan requirement to give preferential consideration to riparian dependent resources and ensure that activities support or do not adversely affect riparian-dependent communities (Forest Plan p. 30, Doc. 3).

Finding: Continued riparian improvement is ensured under this decision and there is no violation of the Gila 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 contends the Forest Service must manage sensitive species to sustain viability and prevent the need for listing. In addition, the Forest Service must manage (fish and wildlife habitat) to maintain viable numbers. The appellant believes there is a lack of management for riparian habitat, and that the Forest Service must provide protection for riparian obligate species. In particular, the appellant believes that domestic livestock production 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. The appellant contends that only a cessation of grazing in these watersheds, combined with active restoration work will adequately provide for the minimum habitat needs for these species.

Response: The Forest completed an in-depth review of the effects each of the proposed alternatives would have on federally listed, Region 3 Sensitive, and forest level management indicator species (AR 47, 96, 127, 133, 139, 149). Population trends for nearly all species were identified as stable or increasing, with only the black-tailed jackrabbit and mule deer having a downward trend (primarily due to successional changes and/or the lack of fire as a regularly occurring ecological process). Because of the size and distribution of these two species, this trend does not threaten their viability (AR 139, 149). Review of the appeal record finds no evidence that the proposed action will reduce the viability of any MIS, game or ESA listed species analyzed in the EA. Instead, the record shows maintaining or improving the quantity and/or quality of the habitat for many of the species will at least maintain the viability of these species. The only significant riparian area is associated with the Gila River and is excluded from grazing by natural barriers and gap fences. Therefore, the viability of none of the species identified by the appellant would be affected by the proposed action (AR 139). However, the Forest failed to provide or display the population and habitat trend data in the associated MIS analysis.

Finding: The decision and project record did not consider population information collected at the forest plan level for MIS species.

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: There is no occupied or potential habitat for Northern goshawks within the allotment.

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

ISSUE 5: The Gila River term permit issuance must be suspended until the Gila 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 Gila River 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 Gila 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 range of alternatives includes a no grazing alternative, an alternative that continues current grazing management, and two alternatives that modify grazing management to address the issues identified. This range of alternatives is consistent with the scope of the proposed action including desired conditions to be achieved (EA pages 17-18), and the significant issues identified (EA pages 23-24). The record shows that the appellant did not propose any other alternatives that would meet the purpose and need.

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: 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) (Doc. 5). 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 record demonstrates that utilization levels on the Gila River Allotment will be 45% on slopes 0 to 10%, 25% on slopes 10 to 30%, 15% on slopes 30 to 40%, and use on both herbaceous and woody species located within riparian areas will not exceed 30 plants out of 100 plants surveyed on a line transect (Doc. 96).

Finding: Utilization standards for the Gila River Allotment were developed in accordance with Forest Service Policy. 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: Cumulative effects analysis disclosures are woven throughout Chapter III of the EA, and are appropriately focused on the significant issues identified. The EA shows consideration of cumulative effects of the grazing alternatives combined with many other factors and land use activities, including climatic conditions, site potential, past over-grazing, grazing exclusions, wildlife grazing, fuel wood harvest, fire exclusion, and others. It compares historic to current uses and conditions, and describes long-term trends in soil, vegetation and riparian conditions as a reflection of the cumulative effects of past and present influences on the environment. The EA incorporates a comprehensive broad-scale analysis of historic and current land use activities and their effects on allotment conditions (Doc. 102.5). The cumulative effects analysis looks beyond the allotment boundaries to the entire 5th code watershed boundaries. The analysis in the EA also incorporates a more detailed cumulative effects analysis report for this allotment. (Doc. 94).

Finding: The record includes consideration of past, present, and reasonably foreseeable actions and their cumulative effects on the components of the human environment. The cumulative effects analysis is adequate for an informed decision and for the purpose of determining significance and whether or not 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. However, the record shows that the appropriate non-point source pollution considerations were made during the planning process. The project record shows New Mexico Environment Department (Doc 46) was consulted during the project scoping and planning phases. Best Management Practices for water quality protection are prescribed (Doc. 7, Doc. 139, p.30-31). Improvement of soil and watershed condition was identified as a project objective (Doc 139, p.17) and watershed recovery was identified as a significant issue (Doc 139, p. 24). In addition, the alternative selected responds to the watershed recovery issue through management changes that will have a positive effect on improving ground cover, reducing erosion, and protecting riparian areas (Doc 149).

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 Gila National Forest Plan. The forest plan provides direction for management emphasis within the project area. Net public benefits were analyzed appropriately during the forest plan's preparation, and are outside the scope of project-level analysis.

The EA describes how alternative D (the selected alternative) will provide for continued improvement in vegetative growth and vigor, soil stability and long-term soil productivity (pages 41-43, 62-66).

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: The EA describes the problems on these allotments in terms of vegetation, soil and watershed conditions (pages 5-10). Pages 17-18 spell out the desired conditions that could be achieved by the proposed project. Chapter III of the EA, as well as the Decision Notice, disclose how the selected alternative will improve vegetation, soil and watershed conditions in order to address the problems and meet the desired conditions identified for this allotment. These records show that the selected alternative helps remedy the problems primarily by improving livestock distribution, limiting grazing to specific areas during specific times of the year, and limiting grazing to specific forage utilization levels.

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