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File Code: 1570-1/2200
Date: October 16, 2001

Martin Taylor
Center for Biological Diversity
P.O. Box 710
Tucson, AZ 88062

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Re: Appeals #01-03-00-0050/0051/0052-A215, Gila River, Little Rough, and Mangas Valley/Silverdale Allotment Decisions, Silver City Ranger District, Gila 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, which authorize grazing and implement the grazing management strategy on the above named allotments. Due the commonality of the issues and the structure of your appeal this decision letter and review of the findings will address all the allotments.

BACKGROUND

District Ranger Engel issued decisions on July 17, 2001, for the Gila River, Little Rough, and Mangas Valley/Silverdale Allotments. The decisions resulted in the selection of the following alternatives and authorizations:

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

Little Rough Allotment, Alternative D, which authorizes up to 200 head of cattle, (Cow/Calf) to graze during the dormant season, but not to exceed 525 animal months of use in any one season and 1050 animal months of use in any three-year period.

Mangas Valley/Silverdale Allotment, Alternative D, which authorizes up to 261 head of cattle, (Cow/Calf) to graze yearlong.

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 record indicates that informal resolution was not reached.

My review of these appeals has been conducted in accordance with 36 CFR 215.17. I have 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) found that: (a) decision logic and rationale were generally clearly disclosed; (b) the benefits of the proposals were identified; (c) public participation and response to comments were adequate. However, the ARO 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, 2000), the decision and project record do not demonstrate consideration of MIS information as required by the regulations at 36 CFR 219.

APPEAL DECISION

After a detailed review of the records and the Appeal Reviewing Officer's recommendation, I reverse the Responsible Official's decisions concerning the above named allotments 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, I believe 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 an Environmental Assessment or Supplemental Environmental Assessment for public comment and issue a new decision under 36 CFR 215.

In addition to my instructions, I recognize there is a degree of ambiguity articulated in the record and accompanying decisions. Therefore, I am recommending the Responsible Official consider the following items in his new analyses and decision(s):

(1) clarify that the maximum stocking rate in the term grazing permit for the Little Rough Allotment will be limited to 525 animal months of use in any one season and 1050 animal months of use in any three-year period;

(2) add appropriate protocols to the monitoring plan for the Gila River, Little Rough, and Mangas Valley/Silverdale Allotments designed to measure vegetative ground cover, surface physical properties, and stability indicators as outlined in document 123 of the project record;

(3) ensure that the term grazing permits for the Gila River, Little Rough, and Mangas Valley/Silverdale Allotments will state that the numbers of livestock identified in the decisions constitute the upper limits of livestock to be permitted under favorable conditions and that these numbers may be adjusted as necessary annually through the annual operating instructions to respond to fluctuations in climatic patterns or other phenomenon such as wildfires or insect infestations.

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

REVIEW AND FINDINGS

of the

Center for Biological Diversity Appeals

#01-03-00-0050-A215, Gila River Allotment Decision

#01-03-00-0051-A215, Little Rough Allotment Decision

#01-03-00-0052-A215, Mangas Valley/Silverdale Allotment Decision

ISSUE 1: The Forest Service violated the Endangered Species Act (ESA) because the decisions differ from the actions that were analyzed.

Contention A: The appellant contends the action consulted on differs from the Responsible Official's decision on the Gila River Allotment and therefore violates ESA. The appellant argues the ESA consultation considered 12,818 acres of full capacity range but the proposed action reduces full capacity range and thus increases stocking density.

Response A: The record reflects the action consulted on is grazing of up to 216 head of cattle, during the dormant season (approximately October through March), using a 2-pasture split herd, grazing management system (Docs. 127; 135). The action consulted on is consistent with the Responsible Official's decision (Doc. 149). The 12,818 acres listed in the description of the action (Doc. 135) is based on a 1977 allotment analysis map (Doc. 139; Gila River Grazing Capability Analysis). The appellant's reference to a reduction of full capacity range is based on Terrestrial Ecosystem Survey data used in 1998 to estimate the total acres of capacity range on the allotment (Docs. 139; Gila River Grazing Capability Analysis). However, the record documents it was recommended "that the 1997 "Full Capacity" areas remain as the area of this allotment considered as capable to be grazed in the future." (Gila River Grazing Capability Analysis). This recommendation was carried forward in the subsequent analysis, consultation, and decision.

Finding: The action consulted on is consistent with the selected alternative. There has been no violation of the ESA. The selected alternative does not increase the stocking density over current management.

Contention B: The appellant contends the action consulted on differs from the Responsible Official's decision on the Little Rough Allotment and therefore violates ESA. The appellant argues the ESA consultation was based on a level of grazing of 525 animal months of use in any one season and 1050 animal months of use in any three-year period. The appellant claims the decision allows for 525 animal months for three years in a row.

Response B: The record reflects the action consulted on is grazing of up to 200 head of cattle during the dormant season, not to exceed 525 animal months of use in any one season and 1050 animal months of use in any three-year period (Doc. 129). Although the Responsible Official's decision as written is confusing, he does reference his decision back to page 29 of the environmental assessment (EA) (Doc. 139). The description of the stocking rates for the Little

Rough Allotment in the EA state '…not to exceed 1050 animal months of use in any two out of three years. This is consistent with the action consulted on. Furthermore, the record documents the Little Rough Allotment will not be stocked on a regular basis (Docs. 129; 139).

Finding: The action consulted on is consistent with the selected alternative. There has been no violation of the ESA. However, based on the ambiguity of the Responsible Official's decision the appeal decision needs to clearly limit the stocking rate to 525 animal months of use in any one season and 1050 animal months of use in any three-year period.

ISSUE 2: The range capability analysis is contrary to the USFS handbook.

Contention: The appellant contends Section 2209.21 of the Forest Service Handbook requires that soils classified as unstable, with natural soil loss rates that exceed tolerable soil loss rates to maintain soil productivity be classified as no capability range. The appellant argues the requirements of the handbook were not met when analyzing any of the allotments because the capable acres analyzed exceed the acres of soils that are not classified unstable.

Response: The record demonstrates various sources were considered for each allotment when determining full capacity and potential capacity acres. For the Gila River Allotment this included a 1982 Terrestrial Ecosystem Survey (TES), a 1998 TES, and a 1977 allotment analysis. A grazing capability analysis compared the three sets of data and recommended full capacity acres from the 1977 allotment analysis be used as the basis for the current NEPA analysis. Factors considered in the 1977 analysis included forage production, amount of vegetative cover, slope, and active soil movement. The recommendation was based on documentation that vegetative ground cover is increasing and bare soil is decreasing on key areas on this allotment under current management (Gila River Grazing Capability Analysis). The record acknowledges there is steep terrain on the allotment with shallow soils and low site productivity. It is further acknowledged that most of these sites were overgrazed in the past leading to varying levels of soil loss. However, allotment inspections indicate that the current level of use is not causing further decline of these sites because use by permitted livestock is incidental.

For the Little Rough Allotment the sources included a 1982 TES, a 1998 TES, a 1969 allotment analysis. A grazing capability analysis compared the three sets of data and recommended full capacity acres from the 1969 allotment analysis be used as the basis for the current NEPA analysis. Factors considered in the 1969 analysis included forage production, amount of vegetative cover, slope, and active soil movement. The recommendation was based on current information that indicates vegetative communities on this allotment are near natural condition and the fact that the allotment has been grazed very little over the past 30 years (Little Rough Grazing Capability Analysis).

For the Mangas Valley/Silverdale Allotment the sources included a 1982 TES, a 1998 TES, and a 1981 allotment analysis. A grazing capability analysis compared the three sets of data and recommended full capacity acres from the 1981 allotment analysis be used as the basis for the current NEPA analysis. Factors considered in the 1981 analysis included forage production, amount of vegetative cover, slope, and active soil movement. The recommendation was based on documentation that indicates vegetative communities on this allotment are recovering at near natural rates under current management (Mangas Valley/Silverdale Grazing Capability

Analysis).

For all of the allotments discussed above it was concluded that setting and monitoring proper utilization levels would ensure the continued productivity of capacity rangeland. All of the above recommendations were carried forward in the subsequent analysis and decision.

Finding: The rationale for using monitoring data and previous allotment analyses as the basis for determining acres of capacity range is documented in the project record. However, the existing monitoring plan should be amended to include soil condition (nutrient cycling, hydrologic function, stability) monitoring.

ISSUE 3: The range capacity analysis lacks scientific integrity and is arbitrary and capricious.

Contention A: The appellant contends that estimates of capability and capacity in the project record ignore available data on unstable soils. The appellant concludes the Responsible Official failed to make the required rational connection between the facts found, namely the dominance of unstable soils on these allotments, and the choice made, namely to assign capability to unstable soils.

Response A: Rangeland management is an ongoing adaptive process where monitoring provides continued validation of decisions and provides additional information upon which future decisions will be based. The record demonstrates various sources were considered for each allotment when estimating grazing capacity. For the Gila River Allotment this included the use of Geographical Information System (GIS) technology that adjusts the estimated pounds of available forage based on percent allowable use, steepness of slopes and distance from water; a 1979 production-utilization study; and the comparison of actual use to trend data for soil and vegetative conditions. Comparison of average actual use over the past 20 years with transect data demonstrated that vegetative conditions have improved substantially from the 1960's when stocking rates were 30 percent higher. The report concludes that the capacity of the Gila River Allotment varies between 1200 and 1800 animal months depending upon climatic conditions. The recommended stocking rate in the report is 1500 animal months with the flexibility to be adjusted up or down depending on climatic conditions. This is consistent with the average stocking rate of the past 20 years (1556 animal months) (Gila River Grazing Capability Analysis).

In the recent past, the Little Rough Allotment was part of the Bullard Peak Allotment. Consequently, data such as production-utilization studies and actual use data are limited. The capacity estimate was developed using average stocking rates for similar vegetative communities on the Gila National Forest. This resulted in an estimated stocking rate of 529 animal months. The report concludes that the capacity of the Little Rough Allotment varies between 450 and 550 animal months depending upon climatic conditions (Little Rough Grazing Capability Analysis).

GIS technology, production-utilization studies conducted between 1978 and 1979, and the comparison of actual use to trend data for soil and vegetative conditions were the sources used on the Mangas Valley/Silverdale Allotment. Comparison of average actual use over the past 40 years with transect data demonstrated that both vegetative and soil conditions have improved substantially from the 1960's when stocking rates were 20 percent higher. The report concludes

that the capacity of the Mangas Valley/Silverdale Allotment varies between 3000 and 3400 animal months depending upon climatic conditions. The recommended stocking rate in the report is 3000 animal months with the flexibility to be adjusted up or down depending on climatic conditions. This is consistent with the average stocking rate of the past 10 years (3025 animal months) (Mangas Valley/Silverdale Grazing Capability Analysis).

Estimating available forage capacity for large ungulates is not an exact science. To account for this the Forest Service establishes conservative forage utilization standards to insure that not only are plant vigor and health sustained (herbaceous and woody species) but, sufficient residual plant material is left to meet other resource needs such as soil protection, cover and food requirements for wildlife, and watershed health. These standards also account for all large ungulate use (wild and domestic). Recurring monitoring provides information for managers to move livestock before unacceptable damage to soil and water resources occurs and to adjust utilization standards if necessary on a case by case basis. The record reflects that utilization standards have been established for the three allotments and a monitoring plan has been developed as part of the analysis (Doc. 139).

As noted under Issue 2 above, the record demonstrates various sources were considered for each allotment when determining full capacity and potential capacity acres. While the appellant implies the Responsible Official should have used TES data as the sole basis for determining forage capacity, the Responsible Official chose to rely on monitoring and trends in soil and vegetative conditions realizing there were differences of opinions on the Interdisciplinary Team in terms of which source of information was the most reliable.

Finding: The Responsible Official considered many sources of science based capacity prediction methodologies and tempered them with on the ground knowledge from monitoring and field inspections to determine capacity acres. The decisions related to estimating grazing capacity are not arbitrary and capricious.

Contention B: The appellant contends the findings of no effect on the Little Rough and Mangas Valley/Silverdale Allotments and no adverse effect on the Gila River Allotment on critical habitat for loach and spikedace minnows are based on misrepresentations, contrary to the evidence before the agency, and therefore arbitrary and capricious in violation of the Administrative Procedures Act. The appellant argues that blaming poor soils on past rather than recent or present grazing on the Gila River Allotment and concluding that sediment that may come from upland areas of the Little Rough and Mangas Valley/Silverdale Allotments will be held in ephemeral drainages of these allotments, is not supported by empirical evidence. The appellant concludes that sediment deposition in stream beds is known to be a principal factor in limiting reproductive success of loach and spikedace minnows and that despite exclosure of riparian areas along the Gila River loach and spikedace minnow numbers have not recovered in recent years.

Response B: Spikedace and loach minnow numbers have increased significantly since 1996. Forest Service monitoring data indicates the average number of spikedace in 1999 and 2000 is up nearly 300% over 1996 and 1997 numbers. For the loach minnow the average number for 1999 and 2000 is approximately 2000% greater than 1996 and 1997 numbers.

Finding: A journey-level fisheries biologist concluded the proposed actions may affect, but would not likely adversely affect either the loach or spikedace minnows or their critical habitat. The U.S. Fish and Wildlife Service concurred with the findings. The findings are not arbitrary and capricious.

ISSUE 4: Allowable use is contrary to the Gila Forest Plan and the National Forest Management Act (NFMA).

Contention: The appellant contends the allowable use levels on all three allotments violate the 1996 amendment to the Gila Forest Plan.

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 was done (Gila River Allotment Doc. 96; Little Rough Allotment Doc. 129; Mangas Valley/Silverdale Allotment Doc.97).

The records demonstrate that utilization levels on the Gila and Mangas Valley/Silverdale Allotments 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 (Docs. 96; 97; 139). Utilization levels on the Little Rough Allotment will be a three-inch average stubble height on Blue or Hairy Gramma, or a five-inch stubble height on Sideoats Gramma (Doc. 129).

A review of the records disclosed that there is a provision for monitoring of key areas (Doc. 139).

Regardless of the numbers authorized to graze in any given year, cattle will be removed from pastures or an allotment as utilization levels are reached.

Finding: The site-specific utilization standards developed by the Interdisciplinary Team are consistent with the 1996 Record of Decision for the Amended Forest Plans. Monitoring of key areas will ensure adherence to the established utilization standards and progression toward overall healthy watershed conditions.

ISSUE 5: The suitability analysis is no longer valid.

Contention: The appellant contends that since the Gila Forest Plan will expire on November 12, 2001, it is no longer relevant. The appellant further contends that there is no legally adequate Renewable Resource Program (RPA) to which the allotment decisions can be tiered.

Response: There are no statutes or regulations that describe an expiration date for the Forest

Service RPA Program or land and resource management plans. The Gila Land and Resource Management Plan will remain in effect until it revised, consistent with the requirements of NFMA 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 environmental assessment fails to take a hard look at impacts.

Contention: The appellant asserts the effects disclosure on vegetation, riparian areas, wildlife, global warming, interdependent actions, and the socio-economic structure does not constitute a hard look as required by NEPA.

Response: The record provides evidence that the Responsible Official took a hard look at the environmental impacts associated with this project. The environmental assessment (EA, Doc. 139) describes in a clear and thorough narrative the effects to vegetation, considering changes in species composition, frequency of species occurrence, total plant density, seral stage compared to the potential natural community, and individual plant health and vigor (EA pages 38-43). The analysis uses commonly accepted methods that are consistent with agency direction, as referenced in the EA. Similarly, pages 43 and 44 of the EA adequately disclose effects to riparian areas. The EA devotes nearly 17 pages of narrative (pages 44-61) in describing effects to wildlife, including consideration of federally listed species and management indicator species, as well as other grazing and non-grazing wildlife species. Pages 68 to 82 of the EA disclose effects to relevant social and economic factors, using commonly accepted methods for estimating effects to permittee and agency costs and benefits, local jobs, payments to counties, social and cultural conditions in the local communities, and other social effects. Effects on global warming are not within the defined scope of this site-specific grazing management project or the issues associated with this project, as identified in chapter I of the EA. The discussion of environmental consequences is consistent with the issues identified (EA pages 23-24), in accordance with applicable Council on Environmental Quality regulations.

The interdependent actions cited by the appellant relate to actions on private lands. The EA states that private lands managed separately from the National Forest System Lands are not analyzed. Grazing of non-federal lands is not dependent on the federal action. Actions on these private lands are not interdependent parts of a larger action. Private lands used in conjunction with the Mangas Valley/Silverdale allotment are included in the effects analysis (EA Appendix X, p. 13).

Finding: The EA takes a "hard look" and adequately discloses the environmental effects in accordance with NEPA regulations.

ISSUE 7: The findings of no significant impacts for the three decisions are contrary to NEPA.

Contention: The appellant contends that there is sufficient controversy to trigger the requirement to prepare an environmental impact statement for each of the three allotments.

Response: The Responsible Official determined that "the effects on the quality of the human environmental are not likely to be highly controversial" (Decision Notice and Finding of No Significant Impact documents, Docs. 149, 150, 151). The Decision Notice and Finding of No Significant Impact documents state that this determination is based on a review of the EA. In addition, based on the EA and the 10 points evaluated in the Finding of No Significant Impact, the Responsible Official determined that the project is not a major federal action and will not significantly affect the quality of the human environment therefore no environmental impact statement is necessary. There is no evidence in the record that indicates there would be significant effects from the selected alternative(s) on any of these grazing allotments that would trigger an EIS.

Finding: The Responsible Official appropriately found that there was not likely to be any significant effects or sufficient controversy regarding the effects to necessitate the preparation of an EIS.