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Date: December 24, 2003

Martin Taylor
Center for Biological Diversity
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**CERTIFIED MAIL -
RETURN RECEIPT REQUESTED**

RE: Appeal #04-03-06-0002-A215, Hot/Cold Springs Allotment Decision, Silver City Ranger District, Gila National Forest

Dear Mr. Taylor:

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

BACKGROUND

District Rangers Chavez and Engle issued a decision on September 29, 2003, for the Hot/Cold Springs Allotment. The decision resulted in the selection of the following alternative and authorization:

Hot/Cold Springs Allotment, Alternative 1, which authorizes 25 head of horses to graze the Hot/Cold Springs Allotment, not to exceed 300 animal months annually. A permit to graze will be issued on an annual basis and the allotment will be rested every third year.

The District Rangers are identified as the Responsible Officials, whose decision is subject to administrative review under 36 CFR 215 appeal regulations. Pursuant to 36 CFR 215.17, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

My review of your appeal has been conducted in accordance with 36 CFR 215.18. I have reviewed the appeal record and the recommendation of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer concluded that: a) decision logic and rationale were generally clearly disclosed; b) the benefits of the proposal were identified; c) the proposal and decision are consistent with agency policy, direction and supporting information; and d) public participation and response to comments were adequate.



DECISION

Based on a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision concerning the Hot/Cold Springs Allotment, which authorizes grazing and implementation of management actions.

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

Sincerely,

/s/ Marcia R. Andre
MARCIA R. ANDRE
Forest Supervisor
Appeal Deciding Officer

cc: David M Stewart, Berwyn Brown, Annette H Chavez, Gerry Engel, Christina Gonzalez,
Stephanie Sanchez

REVIEW AND FINDINGS
of
Center for Biological Diversity's
Appeal #04-03-06-0002-A215

ISSUE 1: Purpose and Need

Contention: The appellant contends that the Purpose and Need is entirely driven by economic interest of the livestock operator and other resources are not mentioned thus, NEPA has been violated.

Response: The EA Purpose and Need (PR #64, p. 2) explicitly states that the proposed action is needed to resolve long-standing resource and public safety concerns in the Brushy Mountain and Big Bear Horse pastures, located in the Gila Wilderness. The purpose and need statement goes on to spell out the objectives, which are to meet Forest Plan goals and to move the project area towards desired conditions.

Finding: The Purpose and Need Statement addresses restoration of resource conditions in a wilderness area and overall condition of the project area. The Purpose and Need Statement reflects the agency's objectives to manage the resources, and follows NEPA.

ISSUE 2: No Valid Suitability Analysis

Contention: The appellant contends the Forest Plan and the suitability analysis contained therein are outdated due to new information and changes in “relative values” of “alternative uses foregone” and thus is no longer in compliance with NFMA. The appellant states that the fact that the allotment has been closed for a considerable time is testament to the fact that relative values have changed significantly and that the plan must be revised before any project-level decisions go forward.

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).

Additionally, there are no statutes or regulations that describe an expiration date for Land and Resource Management Plans. The Gila National Forest 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. A recent court decision in Wyoming upheld the use of the current Plan until revised (Biodiversity Assoc. v. USFS, September 30, 2002). Regulations (36 CFR 219.35g) spell out that a revision schedule for each Forest Plan will be published.

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 Coronado Forest Plan. Additionally, the current plan is in effect until the revision process is completed.

ISSUE 3: Mitigation Measures

Contention: The appellant contends a mere listing of mitigation measures is insufficient to qualify as a reasoned discussion as required by NEPA.

Response: The Response to Comments (PR #79, item 4.5) addresses this point. Mitigation was designed into the project; this included fencing of the spring in Fogarty Canyon, avoiding use of areas that would affect Mexican spotted owls, using utilization rates and stubble heights to regulate use, and pasture rotation. This is in the Proposed Action discussion in the EA (PR #64, p. 4) that specifies that as utilization levels are met, livestock will be moved from a key area to other key areas or off the allotment. Analysis of the mitigation measures is a substantial part of the environmental analysis.

Finding: The EA adequately describes measures which were designed as part of the project to mitigate adverse environmental impacts.

ISSUE 4: Soils

Contention: The appellant contends the Forest Service failed to consider or disclose the extent of cryptobiotic crusts on soils on the allotments and failed to consider or disclose the impacts of the proposed action to cryptobiotic crusts.

Response: The project record contains documents describing the limited extent of cryptobiotic crusts in the project area, which were discussed in proportion to their significance in the affected area (PR #81, p. 20). The environmental effects on soil were also discussed (PR #61, PR #81, and PR #64).

Finding: The impacts of the proposed action on relevant soil properties were fully considered and disclosed.

ISSUE 5: Riparian

Contention: The appellant contends riparian areas will be quickly devastated by horses.

Response: The project record fully evaluates existing riparian condition and estimates the effect of the proposed action on riparian resources (PR #44, PR #49, PR #58, PR #61, and PR #64). The conclusion that the proposed action will have no long-term negative effects to riparian condition is well supported. In addition, woody vegetation utilization levels have been specifically set to minimize impacts to riparian vegetation (PR #64, PR #82).

Finding: The impacts of the proposed action on riparian areas were fully considered and disclosed.

ISSUE 6: Economics

Contention: The appellant contends the Forest Service failed to identify the full economic cost

of range improvements, monitoring, and all other ancillary costs to the public, such as animal damage control. The amount of revenue from the permittee and a comparison with cost or net loss is not shown.

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

Revenues are displayed in the EA (PR #64, p. 30), and documents in the record (PR #60) show fees paid for the special use permit. There are no tax revenues. Range improvements such as water developments are a positive amenity to wildlife and vegetation, as described on page 16 of the EA. A listing of range developments is displayed on page 17 of the EA, and the effects of fencing on wildlife and raptors are discussed. This is a small project, entailing the grazing of 25 horses.

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

ISSUE 7: Failure to Consider Current Science

Contention: The appellant contends while some studies are mentioned and discussed briefly, the most recent scientific studies (Galt, et al., 2000; and Jones, 2000) are not. The appellant states that by failing to ensure the scientific accuracy of the information contained in the EA, the Forest Service is in violation of NEPA.

Response: The utilization standards used for key areas in the project are defined based on site-specific conditions on the allotment (PR #59 range report), which the Responsible Official and interdisciplinary team chose to use rather than a published paper by Holochek and Galt. Site-specific knowledge of the allotment by the range specialist has been used in the analysis rather than a literature review by Jones, who summarized effects of moderate grazing across the larger arid west. Furthermore, the development of specific utilization standards based on site-specific resource conditions is consistent with the Gila Forest Plan direction.

Finding: This NEPA document used the best information available for a small site-specific environmental analysis and follows the guidance in the CEQ regulations and policy.

ISSUE 8: Failure to Consider Climate Change

Contention: The appellant contends the Forest Service failed to consider impacts of the proposed action and how they might be exacerbated in the context of global warming and the present low rainfall cycle in the southwest.

Response: The Council on Environmental Quality regulations implementing NEPA require an EA to include “brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), or the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted” (40 CFR 1508.9). The EA must “briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact” (40CFR 1508.9). “Impacts shall be discussed in

proportion to their significance” (40 CFR 1502.2).

The effects upon global warming are outside the scope of this project-level action and associated analysis. In addition, the Forest Service does not believe better decisions will result from including a discussion of global climate change at the project-level analysis.

Finding: The EA adequately discloses the environmental impacts of the proposed action and alternatives, consistent with policy, regulation, and law. There was no violation of NEPA by failing to consider the effects of global warming on this site-specific project action.

ISSUE 9: Cumulative Effects Analysis

Contention: The appellant contends that the Forest Service has not analyzed the impact of interrelated grazing of other lands by the same permittee. The appellant also contends that the cumulative impacts of fence construction and roads used primarily for ranching have not been considered.

Response: An assessment of impacts of grazing across the larger watershed is included in the record (PR #51 Cumulative Effects Analysis for Upper Mimbres River and Hot-Cold Springs 5th Code Watersheds). Road density is addressed in the same cumulative effects report.

The EA (PR #64, pp. 25-28) addresses cumulative effects. Road maintenance is addressed and no new roads are proposed for construction. Use of roads is dependent on the condition and maintenance of the road. The effects of fencing upon wildlife and raptors are discussed on page 17 of the EA.

Finding: Cumulative effects have been addressed by the interdisciplinary team in the record and in the environmental analysis document. The effects analysis is more than sufficient for the Responsible Official to make a decision on the effects of the alternatives considered in detail.

ISSUE 10: Proposal Does Not Meet Multiple-use Standard (36 CFR 219.3)

Contention: The appellant contends the Forest Service is required to maximize “net public benefit” in accordance with 36 CFR 219.3.

Response: The appellant references the definition section (36 CFR 219.3) of the Secretary’s planning regulations. Net public benefit is defined as, “An expression used to signify the overall long-term value to the nation of all outputs and positive effects (benefits) less all associated inputs and negative effects (costs) whether they can be quantitatively valued or not. Net public benefits are measured by both quantitative and qualitative criteria rather than a single measure or index....” Present net value, social and economic impacts, outputs of goods and services, and overall protection and enhancement of environmental resources were included in a comparative analysis of the aggregate effects of management alternatives during the development of the Gila Forest Plan.

Finding: There is no requirement to consider net public benefits in the context of the NFMA regulations at the project level concerning the management and permitting of livestock grazing. All requirements for displaying net public benefits were met upon completion of the Gila Forest Plan. The 36 CFR 219 regulations are not applicable in this case.

ISSUE 11: Potential natural community

Contention: The appellant contends Forest Service Handbook 2209.14 requires a determination of ecological status by comparing the present community to the potential natural community.

Response: Forest Service Handbook 2209.14 was removed in its entirety from the Forest Service Directives System on April 1, 1998.

Finding: There is no requirement to compare the present community to the potential natural community.

ISSUE 12: ESA and Sensitive Species

Contention: The appellant contends the proposed action will increase the level of negative impacts on federally listed and sensitive species.

Response: Possible effects of the proposed action on federally listed and Regional Forester Sensitive Species are analyzed and disclosed in the Biological Assessment (PR #50) and Wildlife Specialist report (PR #57), summarized in the EA (PR #64) and the Decision Notice (PR #82).

Concurrence was granted on the determinations of effect for threatened and endangered species by the US Fish & Wildlife Service July 25, 2003 (PR #58). The biologist of record did not determine a trend towards federal listing for any of the sensitive species found on the allotment as a result of the proposed action.

Finding: Legal requirements of the Endangered Species Act and Forest Service Manual (FSM) 2621.2 (Sensitive species) have been met.

ISSUE 13: Clean Water Act.

Contention: The appellant contends redevelopment of a stock tank constitutes a point source of pollution and should be regulated under section 402 of the Clean Water Act. The appellant also contends that the Clean Water Act will be violated, since continued grazing causes non-point source pollution.

Response: Regulation of point-source pollution falls under the purview of the EPA and the New Mexico Environment Department.

The appropriate non-point source pollution considerations, which include Best Management Practices (BMPs), were made during the planning process (PR #64). The project record shows New Mexico Environment Department (PR #8, PR #67) was consulted and provided input (PR #28) during the project scoping and planning phases. Riparian conditions along with reduced erosion were identified as significant issues (PR #64, pp. 3-4), and the selected alternative responds to these issues (PR #82).

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

ISSUE 14: National Historic Preservation Act (NHPA)

Contention: The appellant contends the proposed action violates NHPA because moderate impacts will occur.

Response: In accordance with an agreement between the Forest Service and the State Historic

Preservation Officer (SHPO), issuing an annual grazing permit on the Hot/Cold Springs Allotment will have no adverse effect on cultural resources. The only ground disturbing activity would be the construction of a 660-foot fence.

A cultural resources survey report for the entire allotment, which includes the results of the 100% survey of the fence, was submitted to SHPO. The Forest Archaeologist concluded that a determination of “no adverse effect” is appropriate for the selected alternative. The SHPO concurred on September 16, 2003 (PR #62, #63, #71).

Finding: There are no violations of NHPA.

ISSUE 15: Administrative Procedures Act (APA)

Contention: The appellant contends the proposed action violates the APA.

Response: The EA and documents in the record disclose the analysis done to evaluate resource conditions on the allotment and the effects of alternatives considered. In the DN/FONSI, the Responsible Official properly assessed the issues, public input, and impacts to resources in the decision rationale.

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