

**United States
Department of
Agriculture**

**Forest
Service**

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Date: September 17, 1999

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CERTIFIED MAIL - RRR

RE: Appeal Kingston Allotment, R. Brent Bason (1999-03-06-0002-251).

Dear Ms. Budd-Falen:

This is my review decision on the appeal you filed on behalf of the Brent Bason pertaining to District Ranger Jim Paxon's Decision Notice and Finding of No Significant Impact and Environmental Assessment for the Kingston grazing allotment, Black Range District. My review of this appeal has been conducted pursuant to and in accordance with 36 CFR 251.80.

BACKGROUND

On February 23, 1999, James E. Paxon, Jr., District Ranger of the Black Range Ranger District on the Gila National Forest, signed a Decision Notice and Finding of No Significant Impact for the Kingston Grazing Analysis.

On April 15, 1999, Forest Supervisor Camarena received a Notice of Appeal and Request for Stay of the Decision Notice, Finding of No Significant Impact, and Environmental Assessment for the Kingston Grazing Allotment from Karen Budd-Falen representing Mr. Bason.

On April 21, 1999, Forest Supervisor Camarena notified Karen-Budd Falen of receipt of Notice of Appeal and Request for Stay. The Request for stay was granted.

On May 14, 1999, a request for extension for submission of the District Ranger's Responsive Statement was granted, extending the Responsive Statement for 30 days.

On May 25, 1999, Forest Supervisor Camarena responded to Mr. Tom Manning's request for intervention into Mr. Bason's 36 CFR 251 appeal of the Kingston Grazing Allotment decision. He informed Mr. Manning that only holders of a written instrument issued for occupancy and use of National Forest System land have standing in a 36 CFR 251 appeal.

On June 18, 1999, a request for a 15 day extension on the Responsive Statement was given to the District due to fire emergency activities.

On July 12, 1999, District Ranger Paxon provided the Forest Supervisor a Responsive Statement to points of appeal regarding Mr. Bason's appeal.

On July 22, 1999, John M. McCall of Budd-Falen Law Office was notified that a copy of the Black Range District Ranger's Responsive Statement was given to them and postmarked on July 13, 1999. Pursuant to 36 CFR 251.94(c), within 20 days of the postmarked date, he must file a written reply with the Reviewing Officer.

On July 29, 1999, Forest Supervisor Camarena received a response from Karen Budd-Falen's office responding to the District Ranger's Responsive Statement.

On August 5, 1999, Reviewing Officer Abel M. Camarena closed the record.

FINDINGS

The following is my evaluation and response to each of the subparts within each of the 4 major issues.

I Facts.

This section restates past history of the allotment, discusses the status of Mr. Bason's loan, and identifies alternatives stated in the Environmental Assessment. No comment is warranted.

II Standard of Review.

No comment, this sections calls for conclusion of law. In addition, contrary to the appellants' complaint, the decision was issued by District Ranger Jim Paxon and not the Forest Supervisor.

III Grounds for Appeal.

A. NEPA Analysis is Not Required For Reissuance of Term Grazing Permits .

Contention: Appellant contends the EA for the Kingston Allotment grazing permit is another example of the Forest Service unnecessarily subjecting the reissuance of expiring term grazing permits to NEPA analysis. Reissuance of grazing permits which merely continue a previously authorized activity or action does not require additional NEPA analysis. To subject grazing, that is already authorized by the Forest Plan, to NEPA analysis simply because a grazing permit is up for renewal not only is inconsistent with prevailing law, but wastes the agency's time and taxpayer's money. There is no legal precedent or mandate requiring the Forest Service to apply the NEPA process to the reissuance of grazing authorization.

Response: Contrary to the appellant's assertions, the National Environmental Policy Act (NEPA) applies to Federal Agency planning and decision making for actions which may affect the environment on a site specific project (NEPA Section 102). Actions include new and continuing activities including projects and programs approved by federal agencies (40 CFR 1508.18(a) [Responsive Statement Exhibit 2]). 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) [Responsive Statement

Exhibit 2]). The 1995 Recession Act (P.L. 104-19) Section 504 required all Forests to establish a schedule to conduct NEPA. Section 504(a) of this statute required each National Forest System unit to identify all grazing allotments for which NEPA analysis was needed and establish a schedule for their completion. The Chief of the Forest Service memorandum of March 7, 1996 further established schedules for the National Forest Systems to develop within Regions and within Forest. In regards to this schedule, the Kingston allotment was identified as requiring NEPA to be conducted in 1998.

Expiring term grazing permits have no legal right of "renewal" (36 CFR 222.3(b), and FSM 2230.3(2), [Responsive Statement Exhibits 3 and 4])." Thus, the Forest Service is presented with a clean slate and need not reauthorize the same type/level/intensity of grazing or any grazing at all. The new decision whether to authorize grazing is a discretionary one to which NEPA attaches and a site-specific analysis is required [National Wildlife Federation v. Bureau of Land Management, No. UT-06-91-01 (U.S. De't of Interior, Office of Hearing and Appeals, Hearings Division) Judge Rampton, 12-20-93 (the Comb Wash Allotment case)] and others.

This action was consistent with present laws, regulations, and directives.

The District Ranger is affirmed on this issue.

B. Assuming *Arguendo* That NEPA is Necessary, The Decision And The EA Violate NEPA and Forest Service Procedure.

1. The "No action" alternative is not a "reasonable alternative" under NEPA when misconstrued to mean "no grazing".

Contention: The appellant asserts that only "real" environmental "issues" and "reasonable alternatives" to proposed actions must be considered as per CEQ regulations when implementing NEPA. Alternatives that cannot be feasibly considered or implemented are not "real issues" or "reasonable alternatives" and therefore violate NEPA. The appellant refers to the 1986 Forest Plan as identifying the "no action" alternative as continuing current resource management. The agency's "no action/no grazing" alternative is inappropriate for consideration because livestock grazing cannot legally be eliminated from this allotment. Such elimination would violate congressional intent of multiple use as manifested by the Multiple Use Sustained Yield Act (MUSYA), National Forest Management Act (NFMA) and Forest Land Policy and Management Act (FLPMA). By considering "no grazing" to be "no action," the Forest Service perverted the requirements of NEPA.

Response:

The NEPA implementing regulations require that a no action alternative be considered along with the proposed action and alternatives to the proposed action (40 CFR 1502.14(d)) [Responsive Statement Exhibit 2]. The implementing regulations have been clarified by the Council on Environmental Quality (CEQ). CEQ has advised that there may be two interpretations of no action. In the first case, where a management plan exists and legal authorizations will continue in force until a new plan (proposed action) is completed, then no action is continuation of the existing plan. In the second case, which applies to project decisions

where new authorization is required, no action is not taking the action, i.e., authorizing grazing (CEQ 40 Question 3). A no action alternative must be analyzed even if the agency is under legal obligation to act (CEQ 40 Question 3) [Responsive Statement Exhibit 5].

The correct application of the no action alternative is related to the findings in Appeal Item A above. Since the agency action is issuing a new permit authorizing grazing and is purely discretionary with the Agency, taking no action would result in no permit being issued which in turn would result in no grazing. Even assuming *arguendo* that the Forest Service is somehow legally bound to act (issue a new permit), the no action (not issuing a permit) must still be evaluated (CEQ 40 Question 3). This interpretation is reflected in Forest Service policy which states "For the purpose of making livestock grazing decisions, the "no action" alternative is the "no grazing" alternative (FSH 2209.13 ID 2209.13 91.24) (Responsive Statement Exhibit 6).

Appellant argues that no grazing cannot be considered because it is not reasonable and therefore violates NEPA. NEPA requirements have positive obligations to consider all reasonable alternatives plus a no action alternative [40 CFR 1502.14(a)(d)] (Responsive Statement Exhibit 2.) There is no requirement that the no action alternative necessarily be a reasonable alternative nor that what some may consider to be unreasonable alternatives, not be considered. The legal obligation is to make sure all reasonable alternatives to the proposed action are considered along with a no action alternative. Emphasis is on what is reasonable rather than whether the alternative is desirable from the appellant's standpoint. Reasonable alternatives are those that are practical or feasible from a technical and economic standpoint rather than simply desirable (CEQ 40 Question 2a) [Responsive Statement Exhibit 5].

Alternatives evaluated do not all have to be consistent with agency plans, legal authorizations, or budgets (40 CFR 1502.14) [Responsive Statement Exhibit 2]. These factors along with the desirability of the action may all be criteria for selecting among the alternatives evaluated. However, they are not valid criteria for eliminating alternatives from evaluation.

Appellant argues that a no grazing alternative is invalid because the allotment contains lands identified as suitable for grazing in the forest plan and implies that the forest plan mandates grazing of all suitable land. The Appellant is incorrect with this assumption. Suitability is only conducted at the Forest planning level and not at the project planning level. The Forest Service operated within a two-tiered planning and decision making process. The first level is the programmatic forest plan level and the second is the site-specific project level, such as a grazing allotment.

There is a distinction between forest planning and project planning level. The forest plan is the proper and only level at which suitability per the requirements of 36 CFR 219.20 is made and not at the project level such as issuance of a term grazing permit. Capability of an area to be grazed is made at the project level.

The District Ranger is affirmed on this issue.

2. The Forest Service violated the Intergovernmental Cooperation Act, NEPA and NFMA by denying Sierra County its lawful right of participation.

Contention: The appellant asserts that the Forest Service is mandated by law, regulations, and Executive Order if a local government, in this case Sierra County, has environmental ordinances that require NEPA-like environmental analyses for a particular action. The federal agency preparing an EA must cooperate and coordinate many of the studies, hearing, and planning processes with the local government. This includes the joint preparation of an EA and in addition, if the local government's requirements do no conflict with the NEPA, the federal agency "shall cooperate in fulfilling these [county] requirements." The appellant further states that "nowhere does the Kingston EA discuss any consideration of the Sierra County Land Use Plan or how the Forest Service complied with the March, 1994 Memorandum of Understanding. The appellant contends that the EA simply concludes a local land use plan exist and ignores its contents which is a violation of NEPA. The Forest Service is to cooperate with counties in their environmental planning efforts and under the ICA, if the federal agency believes that there are inconsistencies between local ordinances and federal law, the federal agency must note the inconsistencies in the EA. In this case, the Forest Service failed to demonstrate adequate compliance with the ICA and other statutes and regulations by failing to specifically consider individual provisions of the Sierra County Land Use Plan. Specifically, the Kingston EA lacked any discussion supporting a Forest Service decision to act in disharmony with any land use provisions.

Response: A response to this issue must be preceded by a discussion of the applicable constitutional and regulatory framework. Constitutional issues relating to county ordinances are focused on the roles of the United States, States, and Counties. State and local government have authority, within certain limitations, to regulate the activities of persons using National Forest System lands. It is important to understand the legal structure that defines the relationships between the three levels of government and the criteria that determine which level of government has jurisdiction over particular matters.

The Forest Service administers laws which have been enacted by Congress under the authority of the Property Clause of the United States Constitution.

The Property Clause of the United States Constitution is found in Article IV, Section 3. It reads: "The Congress shall have Power to dispose of and make all needful rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

The Organic Administration Act, the Multiple Use-Sustained Yield Act, and the National Forest Management Act are all "Property Clause" statutes. They do no apply to state or private land. Generally speaking, these statutes and their implementing regulations govern the permissible occupancy and use of National Forest System lands.

State and local governments derive their authority to govern from the Tenth Amendment to the U.S. Constitution, commonly referred to as the "reserved powers" clause. Thus, they look to the Tenth Amendment to define their relationship to the Federal government.

The Tenth Amendment to the constitution reads "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." On the basis of the Tenth Amendment, the Organic Administration Act provides, in part: "the jurisdiction, both civil and criminal, over persons within national forest shall not be affected or changed by reason of their existence, except so far as the punishment or offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reasons of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the state."

Unless special procedures have been followed to establish the exclusive jurisdiction of the United States over specific lands, the states share jurisdiction over activities on National Forest System lands. Thus, the United States controls land uses on National Forest System lands, while the states and local governments generally have some jurisdiction under their "police power" to regulate the health, safety and welfare of persons on National Forest System lands. State environmental laws could also apply to activities on these same lands. However, state laws and local ordinance do not apply to actions of the United States, unless Congress has legislatively consented. Examples of situations where such consent has been provided are found in the "federal facilities" section of the federal statutes relating to water pollution (33 USC Sec. 1323) and air pollution (42 USC Sec. 7418). An example of a situation where consent to state and local jurisdiction is not authorized is provided by the situation where a federal employee is asking to consent to county zoning or annexation on behalf of the United States. There is no delegation of authority for such consent.

All three levels of government look to the Supremacy Clause in the United States Constitution to determine which level will prevail in the event a conflict arises between two or more levels as to which jurisdictional level is controlling in a specific situation, or, alternately, whether jurisdiction must be shared.

Jurisdictional issues have and continue to be the subject of litigations around the country. The United States Supreme court has dealt with the issue numerous times, and in general, resolves such questions within each specific factual context by following a "preemption analysis" that is based on the Supremacy Clause of the United States Constitution.

The Supremacy Clause, Article VI, C1. provides, "this Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby..."

Under the Supremacy Clause preemption analysis utilized by the U.S. Supreme Court, a state or local law or ordinance is preempted by Federal law if Congress evidences an intent, either express or implied, to occupy a given subject matter area. If Congress has not entirely displaced state regulation over a subject matter, state law is still preempted to the extent that it (a) actually conflicts with Federal law or (b) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress or (c) it interferes with the methods by which the deferral statutes was designed to reach a particular goal. That is, when it is impossible to comply with both State and Federal law, or where the State law stands as an obstacle to the

accomplishment or the full purposes and objectives of Congress, the intent of Congress controls in Supremacy Clause cases.

Federal government attorneys have consistently advised that land use enactments by counties are illegal and violate the Supremacy and Property Clauses of the United States Constitution.

The "Property Clause" gives Congress unlimited discretion over the occupancy, use and disposition of lands owned by the United States. State laws apply to persons on National Forest lands under the State's police power to regulate health, safety, and welfare. Counties are political subdivisions of the States and have only those powers conferred under the State constitution and statutes. Therefore, the Forest Service has no obligation to comply with county use ordinances which impeded or interfere with the agency's congressionally mandated land management responsibilities.

The Forest Service, however, is obligated to comply with federal laws and regulations. County land use ordinances liberally cite the National Environmental Policy Act and National Forest Management Act implementing regulations as the basis for federal compliance with local ordinances. In this connection, it is important to distinguish between procedural requirements in federal laws and substantive requirements in such laws. One illustration of this distinction is the difference between (1) requirements to conduct public involvement, to study and to disclose the results of the public comment and the analysis and (2) provisions which confer rights on nonfederal parties or support imposing mitigation requirements. NEPA is a procedural statute. NFMA confers no right on private persons; however, it provides a standard against which land and resource management plans can be measured by a court. This discussion address Forest Service responsibilities in those implementing regulations.

National Environmental Policy Act (40 CFR 1500-1508)

Two of the purposes of the National Environmental Policy Act implementing regulations are to reduce paperwork and reduce delay by eliminating duplication with comparable State and local procedures, i.e., 1500.4(n) and 1500.5(h)(Responsive Statement Exhibit 2)- eliminating duplication with State and local procedures by providing for joint preparation (1506.2)...etc.

Joint Planning and Cooperation

Section 1506.2 as referenced in 1500.4(n) and 1500.5(h) above is frequently cited in county land use ordinances as the regulation requiring Forest Service compliance with county ordinances.

1506.2(b)(Responsive Statement Exhibit 2) states: "Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements...; such cooperation shall, to the fullest extent possible, include:

- (1) Joint planning processes
- (2) Joint environmental research and studies
- (3) Joint public hearings (except where otherwise provided by statute)
- (4) Joint environmental assessments

Most county citations to Section 1506.2(b) imply that joint planning, etc. are mandatory. However, the section only applies when certain conditions are met. First, there must be a duplication between NEPA and the State and local requirements. County land use ordinances often attempt to prescribe substantive restrictions on federal agency action and typically do not duplicate NEPA procedural requirements. Second, the required cooperation is "to the fullest extent possible." The judgement whether or not cooperation is possible to reduce duplication is left with the Federal agency. However, the fact that federal and county personnel may conduct joint process activities does not mean that the county has any authority to make land management decisions on Federal land.

The Council on Environmental Quality's interpretation of 1506.2 is that Federal agencies and local agencies are "strongly urged" to cooperate fully with each other.

From the preceding analysis it is clear that county ordinances are not equivalent to NEPA and 40 CFR 1506.2 is not applicable to this case.

The record indicates that on April 4, 1994, the planning relationship between the Gila National Forest and Sierra County was formalized in a Memorandum of Understanding. (EA Project record 20-01[Responsive Statement Exhibit 7]).

This issue then revolves around how well the Forest and County followed the planning procedures in the 1994 MOU.

The Forest was obligated to provide a scoping request that contained the proposed action, purpose and need, preliminary issues, decision to be made, and possible alternatives (MOU IV C.1.). The record indicates this obligation was fulfilled (EA Project Record 14-01, 18A-08, [Responsive Statement Exhibits 8 and 9]).

The County was obligated to respond with issues specific to the proposed action (MOU IV C 3). This analysis was provided (EA Project Record 18B-02 [Responsive Statement Exhibit 10]).

The Forest was obligated to go back to the County with an analysis of issues (MOU IV C 5). This obligation was provided (EA Project Record 18A-08, 04-04, & 04-08 [Responsive Statement Exhibit 9, 11, & 12])

The Forest was obligated to provide alternatives that would be considered in detail after the analysis of issues was completed (MOU IV D). This was provided as part of the issue analysis (EA Project Record 18A-08, 04-04, & 04-08 [Responsive Statement Exhibits 11 and 12]).

The Forest was obligated to provide copies of the EA for comment (36 CFR 215, MOU IV E). The EA was provided for comment (EA Project Record 04-04 [Responsive Statement Exhibit 11]). The County responded (EA Project Record 18B-02 [Responsive Statement Exhibit 10]).

In view of the previous discussion of the applicable constitutional and regulatory framework and the review of the record the District Ranger is affirmed on this issue.

3. The Forest Service failed to adequately consider economic, environmental, social or cumulative impacts in the EA.

(i) Failure to adequately consider economic impacts.

Contention: The appellant asserts that the EA fails to adequately consider either the cumulative economic impacts that the proposed action will have on the Permittee, Sierra County and the surrounding region. The Forest Service failed to compare (1) the economic impact to Sierra County as systematic livestock reduction occur on the 28 allotment undergoing environmental analysis at this time; (2) the probability that the Permittee will face bank foreclosure; (3) the real possibility that many or all federal lands grazing permittees in the region may be incrementally driven out of business; and (4) the cumulative effects on local economies, etc. The Forest Service failed to compare the estimated impacts of the five EA alternatives to the existing management situation. The EA fails to discuss the overall reduction of AUMs on areas suitable for grazing within the Gila National Forest as a whole. The EA failed to calculate the social and economic impacts over the ten year term of the grazing permit period. The Forest Service failed to take into account the removal of 19,916 acres from the Cave Creek Allotment to the Kingston Allotment.

Response: The purpose of an EA is not a rigorous analysis of every facet of the environment related to the proposal but simply to conclude whether there will, or may be, a "significant" environmental impact. CEQ regulations clearly state that the EA is to be a concise document including a "brief discussion of (1) the need for the proposal; (2) alternatives as required by section 102(2)(E) of NEPA; (3) the environmental impacts, including cumulative effects of the proposed action and the identified alternatives; and (4) a listing of those consulted (40 CFR 1508.9) [Responsive Statement Exhibit 2]. In addition, CEQ's 40 Questions 35, 36 [Responsive Statement Exhibit 5] emphasizes that "it should not contain long description or detailed data" and indicates that EA's should be no more than 10-15 pages in length. The Government is required to address the environmental effects (direct, indirect, and cumulative) of the proposed action and alternatives in the EA (40 CFR 1502.16 [Responsive Statement Exhibit 2]). The economic and social cumulative impacts were summarized in the EA project record 04-08 [Responsive Statement Exhibit 12] and were found to be consistent with approved and recognized Forest Service methods. A detailed economic and social analysis was included in the project record 24-9, 24-10, 24-12, 24-13, 24-14, 24-15, [Responsive Statement Exhibits 13, 14, 15, 16, 17, and 18] which contained specialist reports addressing impacts to the permittee, Sierra County and surrounding regions which addressed effects on the local economies, government and schools. These specialist reports address impacts to the permittee, Sierra County, local economics, government, and schools. The economic and social impacts were analyzed using an investment analysis for a ten year period. [Responsive Statement Exhibit 17]. In addition, impacts of implementing several grazing decisions analyzed in 1998 are documented in the EA project record (24-10 and 24-14) [Responsive Statement Exhibits 14 and 17].

Appellant is incorrect by stating "the Forest Service failed to take in account the removal of 19,916 acres from the Cave Creek Allotment to the Kingston Allotment". The record indicates both Alternative D and the selected Alternative E included the addition of the 19,916 acres to the Kingston Allotment. Each of the specialist reports (Project Record 21-06, 21-07, 22-07, 23-02, 24-09, 24-10, 24-14, 24-15, 26-02, & 27-01 [Responsive Statement Exhibits 19, 20, 21, 22, 23, and 24]) took into account the direct, indirect and cumulative impacts associated with

alternatives D and E, thus meeting the requirements of NEPA as described in 40 CFR 1502.16, 1508.8, and 1508.9 (Exhibit 2).

As part of the permit issuance process, the District Ranger is required to assure that the permit is consistent with the Forest Plan (36 CFR 219.10e [Responsive Statement Exhibit 25]). Forest Service procedures require that new permits incorporate Forest Plan requirements as terms and conditions of the permit. Specific terms and conditions attached to the grazing permit, such as forage utilization values, special wildlife management needs and monitoring, are required to implement Forest Plan standards and guidelines. The environmental, economic, and social effects of these terms have been evaluated within the EA (Project Record 04-08 [Responsive Statement Exhibit 11]).

The purpose of an EA is to determine if the proposal is a major federal action significantly affecting the environment. The purpose of a FONSI is to document that the proposal does not have significant effects and therefore does not constitute a major federal action. This proposed action is clearly not a major federal action and does not require an EIS. Additionally, 40 CFR 1508.14 (Responsive Statement Exhibit 2) states: Economic or social effects are not intended by themselves to require preparation of an EIS. Also, economic injury does not qualify plaintiffs for standing (Responsive Statement Exhibit 26).

In review of the record, the District Ranger is affirmed on this issue.

(ii) Failure to adequately consider environmental impacts

Contention: The appellant asserts that the EA fails to consider the cumulative and connected environmental and physical impacts of the decision by failing to consider the possibility that reduction of livestock numbers will cause fuel loading which could lead to catastrophic fires with severe impacts on wildlife, fish, and forest ecosystems. In addition, the EA fails to adequately analyze the impacts of the loss of the range and water improvement currently maintained by the Permittee.

Response: The effects upon fuels and fire management (direct, indirect, and cumulative) have been displayed in the fuels and fire management section of the EA (Responsive Statement Exhibits 11 and 12), and in the wildlife effects analysis (Project Record 23-03, and 23-04 [Responsive Statement Exhibits 22 and 27]).

Maintenance of range improvements is determined by Part 2 (i) of the Term Grazing Permit. This provision of the Term permit states "this permit is issued and accepted with the provision that the permittee will maintain all range improvements, whether private or government owned, that are assigned for maintenance to standards of repair, orderliness, and safety acceptable to the Forest Service." Improvements to be maintained and acceptable standards for maintenance are specified in Part 3 of the permit. The Appellant speculates there will be no one to pay for and maintain the water improvements and wildlife will suffer. No changes in maintenance responsibilities or assignments have been made as a result of this decision. Therefore, this issue is conjecture. The wildlife effects section in the EA does look at the possibility of losing waters, under the no action/no grazing alternative, and the impacts that this will have on wildlife (EA page III-35 [Responsive Statement Exhibit 12]).

District Ranger is affirmed on this issue.

(iii) Failure to adequately consider social impacts.

Contention: The Appellant asserts that "the Forest Service projects an increase in the permittee's income and makes the erroneous assumption that the permittee's economic well-being will be furthered ". In addition, the appellant claims "the cumulative effects on surrounding communities are equally erroneous."

Response: The selected alternative for the Kingston allotment is Alternative E. Alternative E analyzes the impacts of implementing the decision upon a permittee, not a specific firm. The economic analysis specifically states that economic conditions of the individual permittee is a very personal issue, and that specific operating costs and revenues were not available. Costs and revenues were generated using the New Mexico State University Agricultural Experiment Station, Range Livestock Cost and Return Estimates for New Mexico reports 1986-96 (Project Record 24-12 [Responsive Statement Exhibit 15]). These projected costs and revenues were used to approximate net ranch income (EA pages III-50 to III-51 [Responsive Statement Exhibit 12]). The analysis shows that under Alternative E, this allotment would still be considered a viable operation.

See discussion regarding cumulative effects on surrounding communities in Item 3 (i).

The District Ranger is affirmed on this issue.

(iv) Failure to adequately consider direct and indirect effects of the proposed action.

Contention: The appellant asserts that the Forest Service failed to adequately consider the direct and indirect effects of the selected alternative in the Kingston EA by failing to discuss (1) whether possible future permittees would want to operate under the selected alternative; (2) the effects the selected alternative will have on private right, including private property and water rights; and (3) the effects upon the local custom and culture as livestock grazing is removed for other uses.

Response: The Appellant speculates whether possible future permittees would want to operate under the selected alternative or whether any livestock producer could operate under Alternative E. This issue is conjecture and not amenable to scientific analysis.

The Appellant claims effects on private rights, including private property and water rights. Executive Order 12630-Governmental Actions and Interference with Constitutionally Protected Property Rights (53 Federal register 8859, 1988) and the associated Attorney General Guidelines direct government agencies to prepare a "taking implications Assessment" when their actions impact constitutionally protected property rights. Benefits and privileges bestowed by the government are specifically excluded from the definition of private property rights. The Appellant may own surface water rights located on private property. However, we are not aware of any surface water rights owned by the appellant on National Forest System lands within the allotment. Further the grazing of livestock on National Forest lands is a privilege granted by the Chief, USDA Forest Service, to individuals who have met the established requirements on

ownership of base property and livestock. Grazing use is a privilege that has been established in Acts of Congress; Granger Thye Act of April 24, 1950, and the Federal Land Policy and Management Act of October 21, 1976. Both of these Acts state that issuance of grazing permits in no way grants any right, title or interest held by the United States in any lands or resources. In *Swim vs. Bergland*, 696 F. 2d. 712 (9th Cir. 1983) it is stated: "It is safe to say that it has always been the intention and policy of the government to regard the use of its public lands for stock grazing, either under the original tacit consent or, as to National Forests, under regulation through the permit system, as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation."

The Appellant claims the effects on local custom and culture were not analyzed. Effects upon local custom and culture have been summarized in the EA (Project Record 04-08 [Responsive Statement Exhibit 12]). A detailed social analysis, from which these summaries were derived, is included in the project record (Project Record 24-07, 24-9, 24-10, 24-12, 24-14 [Responsive Statement Exhibits 28, 13, 14, 15, and 17]). These specialist reports address impacts to the permittee, Sierra County and surrounding regions. In addition, these specialist reports address effects on local economies, government and schools. The economic and social impacts were analyzed using an investment analysis for a Ten Year period (Project Record 24-14 [Responsive Statement Exhibit 17]).

The District Ranger is affirmed on this issue.

(v) Failure to adequately consider cumulative effects of the proposed action.

Contention: The Kingston EA and Decision fails to discuss impacts from decisions on other allotments within the Gila National Forest. Twenty-eight other allotment are subject to Forest Service review. Accordingly, the economic, social and environmental impact discussion should analyze overall impacts from the 28 allotment review. For the reasons discussed in (i) through (v) *supra* the Forest Service failed to adequately consider economic, environmental, social, indirect or cumulative impacts in the EA.

Response: The Government is required to address the environmental effects (direct, indirect, and cumulative) of the proposed action and alternatives in the EA (40 CFR 1502.16 [Responsive Statement Exhibit 2]). Cumulative effects have been analyzed in the various specialist reports (Project Record 21-06, 21-07, 22-07, 23-02, 23-03, 23-04, 24-9, 24-10, 24-14 [Responsive Statement Exhibits 19,20, 21, 22, 27, 13, 14, and 17]), and a synopsis was presented in the EA, page III-67 to III-68 (Project Record 04-08 [Responsive Statement Exhibit 12]). These specialist reports address impacts to the permittee, Sierra County, surrounding regions, and the environment.

Project Record documents 24-09, 24-10, and 24-12 (Responsive Statement Exhibits 13, 14, and 15) evaluate the impacts associated with the remaining decisions under review on the Gila National Forest.

The District Ranger is affirmed on this issue.

4. The EA fails to adequately consider opportunities for mitigation.

Contention: The appellant asserts the EA fails to discuss mitigation of the severe impacts on the Permittee, his family as well as local citizens. Further, the appellant states "the Forest Service could have offered additional grazing to the permittee elsewhere and or increase livestock numbers while accomplishing better distribution through the use of various livestock management techniques. "Another type of mitigation is federal assistance in helping Mr. Bason renegotiate the terms of his GFOL loan to prevent foreclosure."

Response: Mitigation measures are required for significant effects which have not already been included in the proposed action or alternative (40 CFR 1502.149(f), 1502.16(h) [Responsive Statement Exhibit 2]). The proposed action caused no significant effects and no significant environmental issues were identified (Project Record 02-01 and 04-08 [Responsive Statement Exhibits 29 and 12]). Mitigation measures were included in the proposed action as supplemented through public comment (Project Record 02-01 and 04-08 [Responsive Statement Exhibits 29 and 12]).

In regards to offering additional grazing to the permittee, the District Ranger established the project scope by sharply defining the proposed action. The offer of additional grazing elsewhere in the Gila National Forest is outside the scope of this analysis.

Helping Mr. Bason renegotiate the terms of his GFOL loan is outside the scope of this analysis.

In regards to accomplishing better livestock distribution by various techniques, salting and herding were identified in the EA as mitigation measures.

The District Ranger is affirmed on this issue.

5. Alternative "C" in the EA does not reflect current management

Contention: The Appellant asserts the averaging of actual use records over the last five year period of time to help determine current management is flawed. The appellant contends that 300 head represents the carrying capacity of the Kingston allotment and maximum amount currently permitted. Therefore, the use of 171 cattle as representing current management is erroneous.

Response: Forest Service Handbook 2209.13 Chapter 90 (Procedures for Authorizing Grazing) section 91.24 describes alternative requirements for taking grazing projects through the NEPA process. Section 91.24 (Responsive Statement Exhibit 6) states: A range of reasonable alternative for grazing authorization should include at a minimum (1) the no action (no grazing) alternative, (2) the proposed action, and (3) the no change (continuation of current management) alternative, where grazing is currently an ongoing activity. If continuation of current management practices are not listed as the proposed action, it should be included as an alternatives for comparison against the proposed action and other alternatives. Five alternatives were evaluated on the Kingston allotment: the no action/no grazing, current grazing permit, present management situation, alternative proposed by the permittee, and the preferred alternative. The current grazing permit and the current management situation were broken into

two different alternatives because the permit did not reflect the management situation that had been occurring on the ground over the last five years, thus it did not provide a good comparison of how current management was contributing to existing on the ground conditions. This EA satisfies the requirements of NEPA as defined in 40 CFR 1502.14 and 40 CFR 1505.1(e) (Responsive Statement Exhibit 2).

The District Ranger is affirmed on this issue.

6. The EA violates NEPA because it failed to analyze a required alternative.

Contention: The Forest Service is required to consider a "No Action" alternative that would implement the existing management regime. The appellant further claims "the EA failed to consider the current management regime as an alternative".

Response: For a discussion regarding the "No Action" alternative, see response under Item B-1. Alternative C depicts the existing management situation on the Kingston Allotment and is displayed in the EA (refer to previous answer in B-5 for explanation of current management). What the appellant identifies the current management alternative is analyzed in the EA as the current permit alternative, Alternative B.

The District Ranger is affirmed on this issue.

7. The EA failed to contain a required civil rights impact analysis.

Contention:

The Appellant contends that the Forest Service Handbook mandates the agency complete a Civil Rights Impact Analysis ("CRIA") or Civil Right Impact Statement ("CRIS") describing the range of actions having potential civil rights impact on local citizens and federal employees. The Appellant further states "that responsible Forest Service officers shall examine proposed "major" policy actions for civil rights implications. A major policy action is one that affects 10 or more people.

Further, the Appellant asserts "if the Forest Service insists that the reissuance of a term grazing permit on this allotment is an action requiring a NEPA analysis, it must confess that the EA, Decision Notice, and FONSI constitute a "major" policy action for which a civil rights analysis must be completed.

Response: The need for NEPA analysis is discussed in Item A. The purpose of an EA is to determine if this proposal is a major federal action significantly affecting the environment. The purpose of a FONSI is to document that the proposal does not have significant effects and, therefore, does not constitute a major federal 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 environmental impact statement is required. Forest Service Handbook (FSH) 1709.11 Chapter 31.11 states, "...civil right impact

statements are not separate reports, but instead are integral with the procedures and variables for the social impact analysis". FSH 1909.17 Chapter 30 outlines the process for including civil rights in the social impact analysis.

The Deciding Officer conducted an assessment of the social and economic effects to local communities (Responsive Statement Exhibits 13, 14, 15, 16, & 17).

The Appellant is correct concerning the need for CRIA'S/CRIS's when "major **policy** actions are undertaken by the Forest Service. However, the Appellant is incorrect in calling a site-specific NEPA planning process and decision for this allotment a "major" policy undertaking. FSM 1731 identifies requirements of a civil rights impact statement being required of actions such as: (1) Legislative proposals, policies, programs, and projects for which an environmental impact statement is required. In this case, an environmental impact statement was not required.

The Appellant asserts that the action is a "major" policy action in that it affects 10 or more people. The Appellant is incorrect in relating this to the action/actions identified in the "Proposed locations or relocations of field installations involving 10 or more permanent employees (FSM 1240)."

The District Ranger is affirmed on this issue.

8. The NEPA process followed in the EA set up a pre-determined outcome.

Contention: The Appellant alleges "the NEPA scoping process focused on improving range and riparian conditions on this allotment; and by focusing on this primary goal, the Forest Service put forth a preferred alternative with one goal in mind. Appellant claims "the Forest Service dismissed as non-issues important public concerns such as the cumulative impacts of the NEPA evaluations as applied to other grazing permits throughout the Gila National Forest". The Appellant claims "the Forest Service failed to consider mitigation for social and economic impacts, the management history of neighboring allotments and circumstances faced by Mr. Bason individually". Appellant further claims "the Forest Service abused its discretion by implementing a biased process and the Decision reflects the Forest Service general goals of reducing and/or eliminating livestock grazing throughout the desert southwest.

Response: A proposal (proposed action) is defined as "when an agency...has a goal and is actively preparing to make a decision..." (CEQ Sec. 1508.23 [Responsive Statement Exhibit 2]). Stating such a goal, in this case to authorize grazing on the Kingston allotment for a 10 year period, consistent with the direction and objectives of the Gila National Forest Plan, is an explicit fulfillment of existing regulation.

The District Ranger established the project scope by sharply defining the proposed action. On February 24, 1998, Sierra County was mailed a preliminary scoping letter regarding the Kingston grazing allotment. (Project Record 14-01 [Responsive Statement Exhibit 8]).

On March 2, 1998, Brent and Stephanie Bason were mailed a preliminary scoping letter regarding the Kingston grazing allotment. The proposed action was to authorize grazing for currently permitted season of use and number and class of livestock. (Project Record 18A-01, 11-02 [Responsive Statement Exhibit 32]). On June 5, 1998, Brent and Stephanie Bason were

mailed a second scoping letter for the Kingston allotment identifying issues and alternatives. (Project Record 18A-08 [Responsive Statement Exhibit 9]). On August 21, 1998, Brent and Stephanie Bason were mailed a copy of the Kingston allotment Environmental Assessment. (Project Record 04-04, 04-06 [Responsive Statement Exhibits 11 and 33]). On February 23, 1999, Jim Paxon, District Ranger, signed the Decision Notice and Finding of No Significant Impact for the Kingston Allotment. District Ranger Paxon selected alternative E, which allows for 300 cattle (cow/calf) to be permitted, with 100 head of cattle in non-use for the first 3 years, new production-utilization (PU) surveys and allotment monitoring will be completed to determine the actual carrying capacity. Permitted numbers would then be adjusted, up or down, based on the results of PU surveys, monitoring, adherence to required utilization standards and success of required mitigation measures. (Project Record 02-01 [Responsive Statement Exhibit 29]). The District Ranger addressed the environmental effects (direct, indirect, and cumulative) of the proposed action and alternatives in the NEPA document (40 CFR 1502.16 [Responsive Statement Exhibit 2]). The District submitted the EA for public review, analyzed the comments, and published the DN and FONSI.

See response under Items 3 (i), (ii), (iii), (iv), (v) and Item 4 regarding Appellant's claims regarding cumulative impacts and mitigation for social and environmental impacts.

Based on the record, the District Ranger is affirmed on this issue.

C. The EA, FONSI and Decision Notice Are Not In Accordance With The Gila National Forest Plan.

1. The EA imposes terms and conditions on the allotment that are not authorized by the Forest Plan.

Contention: The EA and Decision Notice subject the permittee to "new production-utilization surveys and allotment monitoring." The new production utilization survey method or plan is not defined in the EA, Decision, or Gila Forest Plan thus subjecting the Permittee to a vague and arbitrary monitoring plan.

The Appellant further claims "there is no definition of what constitutes upland habitat from lowland habitat; under the utilization standards proposed in Alternative E, the permittee is faced with a vague and arbitrary limit; the arbitrary percentages established as utilization levels for various habitats are not supported by any scientific data; the EA does not state the biological or scientific basis for the utilization standards, nor are the utilization standards supported by adequate range trend/condition or production utilization studies; accordingly, the utilization levels conflict with and/or exceed the scope of the Forest Plan".

Response: The Gila National Forest Plan provides guidelines for how often production-utilization surveys need to be completed. In review of the Forest Plan, the Kingston allotment is identified as under Management Intensity Level C. The guidelines recommend PU surveys average 15 year cycles (Responsive Statement Exhibit 34). Forest Service Handbook 2209.21(03) Policy states: Range analysis should be considered, as needed, on all National Forest Rangeland (Responsive Statement Exhibit 35). The degree of range analysis to be accomplished will vary depending on the need for information for preparation, update, and monitoring of forest land management plans and allotment management plans." Chapter 50, of

FSH 2209.21, gives the following reasons for conducting PU surveys: 1) There is a need to establish, verify, or update an estimated grazing capacity; 2) An existing or new management system needs evaluation; 3) Needed as a tool for developing and refining management plans, and/or 4) Needed to establish wildlife forage allocations as identified in Forest Plans (Responsive Statement Exhibit 35). On the Kingston Allotment, the last PU survey that covered all the pastures was done in 1973. In 1990, a PU survey was completed on the Trujillo pasture of the Kingston allotment. The decision to do PU surveys is within the guidelines provided in the Forest Plan and Forest Service Handbook 2209.21. PU surveys will be conducted following the procedures identified in FSH 2209.21 Chapter 50.

The Forest Plan, as amended on June 5, 1996, by Regional Forester Cartwright, established Standards and Guidelines for all National Forest System lands within Region 3 pending site specific analysis. The NEPA analysis conducted on the Kingston Allotment established Standards and Guidelines for grazing on the allotment. These were developed in consideration of guidance in the R-3 Allotment Analysis Handbook (FSH 2209.21) Section 53.2, and the interdisciplinary team recommendations (Responsive Statement Exhibit 37).

As part of the permit issuance process, the District Ranger is required to assure that the permit is consistent with the Forest Plan (36 CFR 219.10e [Responsive Statement Exhibit 25]). Forest Service procedures require that new permits incorporate Forest Plan requirements as terms and conditions of the permit. Specific terms and conditions attached to the grazing permit, such as forage utilization values, are required to implement Forest Plan standards and guidelines. The environmental, economic, and social effects of these terms have been evaluated within the EA.

The District Ranger is affirmed on this issue.

2. Conflict with the Multiple-Use Mission.

Contention: The 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 interest ahead of livestock grazing also violates the principle of multiple use as set forth in the Multiple Use Sustained Yield Act.

Response: The requirement for conducting NEPA analysis for the issuance of a Term Grazing Permit is discussed in response to A.

In reviewing the project record, I could not find any evidence that indicated the grazing analysis conducted on the Gila National Forest is aimed at reducing or eliminating livestock grazing in the desert southwest nor was there a goal established to place recreational and environmental interest ahead of livestock grazing. In the purpose and need section, grazing is recognized as a legitimate use of the National Forest as stated on pages I-3 and I-4 of the Kingston Environmental Assessment (Responsive Statement Exhibit 11). Contrary to the Appellant's belief, stocking levels are being set at a carrying capacity within the capability of the resources which will sustain or improve these conditions. (Responsive Statement Exhibits 21 and 39).

All management practices and activities of the selected Alternative E are consistent with the management direction, including standards, guidelines, and management area 2G which contains

the Kingston Allotment in the final Land and Resource Management Plan for the Gila National Forest (September, 1986), as amended, and its provisions, which were developed in accordance with the National Forest Management Act of 1976 (16 USC 1604(i) and 36 CFR 219.10(e)). Additionally, the management practices and activities of Alternative E are consistent with the MUSYA.

The District Ranger is affirmed on this issue.

D. Practical And Scientific Reasons Why The EA And Decision Are Inadequate.

1. Range capacity calculation using GIS and ARC/Info (Livestock Allocation Model) is incorrect.

Contention: The Appellant claims "the Livestock Allocation Model used by the Forest Service to determine the carrying capacity of the Kingston Allotment is totally inadequate". Appellant alleges several problems with the model. Appellant states "the model should only be used only as a starting point and not the final determination. Model results should be combined with current management, on the ground survey and range experience". Appellant claims "use of the Model as an "end all" method to determine allotment carrying capacity is arbitrary and capricious; use of the model devoid of any on-the-ground studies is scientifically unsound".

Response: Best available data was used to estimate the current carrying capacity. Included in this information is actual use records, permittee input, 1973 and 1990 PU studies, field inspections by Forest Service personnel, historical records, and Range/Geographical Information System (GIS) range analysis calculator. (The calculator incorporated water locations, slope, and estimated forage production derived from Kingston allotment records, aerial photographs, and allotment inspections) (Project Record 22-08 [Responsive Statement Exhibit 39]). The Range/GIS analysis calculator follows a procedure developed by Professor Jerry Holechek, Department of Animal and Range Sciences, New Mexico State University described in the textbook, "Range Management Principles and Practices, second edit, 1995." Historic carrying capacity estimates (unadjusted for the additional pastures) have ranged from 150 to 200 since 1956 (Project Record 22-08 [Responsive Statement Exhibit 39]). The estimated carrying capacity will be ground truthed using production utilization studies that will be conducted over the next three years.

The District Ranger is affirmed on this issue.

2. The EA provides no scientific support for its utilization and carrying capacity findings

Contention: The Forest Service determined the allowable use based on vegetative response, wildlife needs, and other factors including threatened and endangered species. The Forest Service claims to have considered other factors, grazing intensity, season of uses, etc. There is no consideration of livestock management practices or the impacts of grazing wildlife. There is no explanation of how different factors, studies, and guidelines were applied, weighted or considered in assigning a final utilization value. There is no explanation concerning the terms, conditions, assumptions or parameters used in reaching final utilization rates. The Forest Service failed to include production and capacity calculation in the EA. The calculation of allotment carrying capacity and predicted utilization values is the key factor in this decision. The

Appellant claims the chart at page III-32, entitled, "Predicted Percent Utilization" is presented without reference to any scientific data or study. The Appellant claims, "presenting wholesale conclusions without scientific backing is arbitrary and capricious."

Response: The Forest Plan and subsequent amendment provide general standards and guidelines with specific utilization standards identified (See response to Item C-1 and D-1 regarding establishment of allowable utilization levels.

In reference to the chart entitled "Predicted Percent Utilization" on page III-32 of the EA, predictions were made by a journeyman level range conservationist that used professional experience, personal knowledge of the allotment, utilization levels under existing management (vegetative write-up for Alternative C (Project record 22-07 [Responsive Statement Exhibit 21]), and allotment records (Project record 22-08 [Responsive Statement Exhibit 39]) to help make these determinations.

A proper evaluation of grazing capacity was made and allowable utilization levels comply with Forest Plan standards and guidelines which are supported by recent scientific findings and documented in the project record. Further, the decision provides for future on-the-ground analysis to validate actual allotment carrying capacity.

The District Ranger is affirmed on this issue.

3. The EA inadequately discussed the impacts of grazing by elk and other grazing wildlife.

Contention: The Appellant claims "the permittee will be placed in an impossible position, if elk and other grazing wildlife over utilize riparian areas; the permittee's livestock must have access to riparian areas to drink water, hence the permittee cannot exclude his cattle from water; yet because of elk and wildlife use, after the three year monitoring, if the Forest Service decides riparian use must be limited, the Forest will only reduce livestock; such reductions may occur despite ideal livestock management and through absolutely no falt of the permittee".

The Appellant claims "the agency acted arbitrarily and capriciously by failing to consider the possibility that allotment conditions are attributable to elk".

The Appellant claims the Forest Service should conduct studies to determine the current size of the elk herd, the population of other types of grazing wildlife, the current trend and forecast of future populations, types of plants used by wildlife, the areas within the Kingston allotment where grazing wildlife is most abundant, and a projection overall wildlife utilization".

Response: Internal and external scoping is used during the NEPA process to identify issues. Notes from the first interdisciplinary team meeting (Responsive Statement Exhibit 37) [Project Record 9A-01]) document that elk on the allotment are not a problem. In all the communications (meetings or letters) with Mr. Brent Bason, not once did he identify elk as a problem or issue on the allotment.

Elk and other grazing wildlife use on the allotment was analyzed in the EA, on pages III-32 to III-38, and III-47 to III-48 (Responsive Statement Exhibit 12). On page III-38 (Responsive Statement Exhibit 12) it is stated, "Elk numbers on the allotment are low and should not contribute to utilization levels that would exceed stated standards." In the soil and watershed write-up, the forest hydrologist uses 50 elk to make his determinations. The 50 elk are an estimated number. For the selected Alternative (E), the hydrologist states, "Use in the riparian areas is expected to be at or below an acceptable level". This anticipated use would lead to an improvement in riparian vegetation and have a beneficial effect on water quality. In the next 10 years, conditions would gradually improve, but not to a level of significance. This determination is made with a degree of uncertainty and the watershed condition should be monitored. The 50 elk that are estimated by the Gila National Forest to graze the allotment yearlong would impact riparian areas in those years below normal precipitation."

On dry years, the annual operating plan would potentially require reduced livestock numbers to assure utilization levels remain within stated standards. During prolonged periods of dry weather, the Forest would potentially ask the New Mexico Department of Game and Fish (NMG&F) to reduce elk numbers. Elk population numbers are managed by the NMG&F. The Forest Service does provide recommendations, and the recommendations are based on Forest Plan direction, but the Forest Service has no authority to lower numbers.

The District Ranger is affirmed on this issue.

4. The EA's "economic" analysis is inadequate because it relies on regional averages instead of actual, readily available data.

Contention: The Appellant asserts that the Forest Service decided to analyze economic impacts to Sierra County as part of its NEPA analysis, the EA should utilize actual, verifiable data instead of regional averages. The Forest Service should have obtained allotment specific data from the permittee. The agency's failure to gather input from the permittee resulted in a violation to 40 CFR 1508.9(a)(2) by failing to determine and analyze the economic impacts on Mr. Bason, the person most affected by the Decision.

Response: The purpose of an EA is not a rigorous analysis of every facet of the environment related to the proposal but simply to conclude whether there will, or may be, a "significant" environmental impact. The CEQ regulations clearly state that the EA is to be a concise document including a "brief discussion of: (1) the need for the proposal; (2) alternatives as required by Section 102(2)(E) of NEPA (Responsive Statement Exhibit 1); (3) the environmental impacts, including cumulative effects of the proposed action and the identified alternatives; and (4) a listing of those consulted (40 CFR 1508.9) (Responsive Statement Exhibit 2). Moreover, CEQ's 40 Questions emphasize that "it should not contain long descriptions or detailed data" and indicates that the EA's should be no more than 10-15 pages in length and take no more than 3 months to prepare (46 Fed. Reg. 18037-3-23-81) (Responsive Statement Exhibit 5).

In review of the record, the Forest Service held a meeting on July 1, 1998 with Mr. Bason and Sierra County. During this meeting, the District asked the permittee if they would like the economic effects displayed as regional averages or should the Forest give specifics for the Kingston allotment (EA Project Record 17-04 [Responsive Statement Exhibit 40]. The Bason's response was that they would give the Forest an answer soon on how they wanted the effects

displayed in a public document. There is no record that Mr. Bason provided any specific information or response to this question.

The economic analysis relied on the best information available. Sierra County and Mr. Bason were provided an opportunity to participate.

The District Ranger is affirmed on this issue.

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

Contention: The EA cites no scientific study, data or survey to support the findings that under alternatives B, C, and D adverse watershed effects are expected to occur. Similarly, the EA concludes, without any citation to any study, that impacts from past livestock grazing include soil compaction, reduction in vegetative ground cover, increased on-site soil loss and a reduction in water quality to the tributaries of Percha Creek. Additionally, the agency fails to explain the basic methodology and principles explaining how it derived its soil related conclusions. Without this there is no meaningful opportunity for public comment or review.

Response: The Soils and Watershed write-up in the EA is a summary of the soil and watershed specialist report (Project record 21-07 [Responsive Statement Exhibit 20]). The specialist report refers to Forest Plan Standards and Guidelines, the six Riparian Area Survey and Evaluation System (RASES) transects located on the allotment, and cluster data for the North Trujillo and South Percha pastures. At the back of the document a reference section lists all the scientific literature that was used in the formulation of this analyses.

The best available data pertaining to vegetative and soil condition and trend information was used in the analysis. This information is adequate for determining soil condition and trend.

The District Ranger is affirmed on this issue.

6. The agency failed to consult and cooperate with the permittee and Sierra County

Contention: The Forest Service failed to follow the federal law (FLPMA, NFMA, and NEPA), and agency regulations that require federal agencies to consult and cooperate with the Permittee and Sierra County officials.

Response: Refer to question B-2.; it documents that the Forest Service followed all requirements related to cooperation with Sierra County.

In reference to the Forest Service not consulting or cooperating with the permittee, this has not been the case. The permittee submitted an alternative (Responsive Statement Exhibits 11 and 12), which was carried forward in the Kingston Analysis as Alternative D. The preferred/selected alternative, Alternative E, was developed with the permittee's needs in mind. Livestock numbers were modified to meet the permittees needs (Responsive Statement Exhibit 40). The permittee stated that 200 head of cattle were needed to maintain a viable operation, and since the request was within the accuracy of the original capacity estimate, 200 head of cattle yearlong was the number evaluated in the preferred alternative. In addition, there are several

documents in the project record (1B-05, 1B-10, 17-01 to 17-04, and 18B-02 [Responsive Statement Exhibits 41, 42, 43, 40, 44, and 45]) that confirm Mr. Bason was consulted with and had the opportunity to provide input.

The Forest has complied with all NEPA requirements to involve Federal and State agencies, Sierra County, Mr. Bason and the public in conducting this analysis.

The District Ranger is affirmed on this issue.

7. The agency EA improperly relies on several wildlife management documents.

Contention: The Forest Service relied on several documents (Mexico Spotted Owl Recovery Plan, Guidance Criteria for Determining Effects of Issuing Term Grazing Permits, Management Recommendations for the Northern Goshawk in the Southwestern United States, and Programmatic Biological Assessment for the Mexican Spotted Owl) that are scientifically unsound, are rules and/or amendments to the Forest Plan that must be subject to public comment, and were developed without consultation, cooperation, and coordination of the permittee and/or Sierra County.

Response: The legality of the Forest Plan amendments used in the development and analyses of the Kingston grazing allotment is outside the scope of this process.

Section 2 of the Endangered Species Act of 1973, as amended 1978, 1979, 1982, and 1988 declares that all federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act (FSM 2670.11 [Responsive Statement Exhibit 46]). Section 7 directs federal departments and agencies to ensure that actions authorized, funded, or carried out by them (authorizing a grazing permit) are not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat.

Forest Service Manual 2670.46 (2) identifies a District Rangers responsibility: Identify, manage, and protect essential and critical habitats to meet legal requirements and recovery objectives for Federally listed species (Responsive Statement Exhibit 46). To meet recovery objectives, and to carry a project through consultation with the U.S. Fish and Wildlife Service (Secretary of the Interior representative), the District Ranger must use the best available information in the development of a project.

The appellant is incorrect in stating the documents relied on are scientifically unsound and arbitrary and capricious. The documents listed contain the most up-to-date, scientifically based information on the management of the Mexican spotted owl, goshawk, and other listed species in the region. Academia, Forest scientist, Fish and Wildlife Service scientist, and Arizona and New Mexico State biologists developed these documents.

The appellant is incorrect in eluding to amendments of the Gila National Land and Resource Management Plan were not subject to public comment and review. The 1996 Forest Plan amendment was subjected to this review.

The District Ranger is affirmed in this issue.

8. The Forest Service used improper vegetative survey techniques.

Contention: The Forest Service used aerial photos, computer databases and old planning guides, without on the ground studies, to estimate forage production. Without the necessary on-the-ground studies, any vegetation studies and their findings are totally inadequate.

Response: See response to D-1. The record indicates the District Ranger utilized the best information available and that information gathered on the ground was utilized.

The District Ranger is affirmed on this issue.

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

Contention: The Gila Forest Plan mandates the development and preparation of AMPs in careful and considered consultation, cooperation and coordination with parties involved, including Permittee. In developing an AMP the permittee traditionally proposes and/or request the construction of range improvements to increase allotment capacity and enhance range quality. The AMP process was ignored in favor of a broad cut. The EA ignored range improvement techniques and AMP revision in favor of direct herd reductions.

Response: An AMP is a strategy to implement a NEPA decision developed in concert with the permittee. A range improvement on National Forest land is an action authorized by the federal government that needs to be analyzed under NEPA. This can be accomplished by including an improvement in an alternative or in several of the alternatives, just as a mineral supplement to promote the use of browse, salting, and herding have been displayed in the Kingston Range Analysis. Alternatives were developed to address these issues with input from the permittee, public, other agencies, and Forest Service specialists. The Forest Service developed a wide range of alternatives for the Kingston allotment, including relevant range improvements.

The District Ranger is affirmed on this issue. Due to the appeal enacted by the permittee, completion of the AMP will be delayed until final disposition of the appeal.

10. Reissuance of a grazing permit is not discretionary.

Contention: Appellant claims "the agency suggestion that reissuance of a grazing permit is a matter subject to the agency's discretion is unfounded; a grazing permit and a grazing preference are property interest protected by the United States Constitution".

Response: Forest Service Policy (FSM 2230.3(2)) states: "Grazing permits authorize livestock on National Forest System lands. The holding of such permits is a privilege, not a property right. Permit holders may not assign or transfer grazing privileges in whole or in part (Responsive Statement Exhibit 3)." This is supported in 36 CFR part 222.3 a and b where it is stated: "a) Unless otherwise specified by the Chief, Forest Service, all grazing and livestock use on National Forest System lands and on other lands under Forest Service control must be authorized by a

grazing or livestock use permit; and b) Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources (Responsive Statement Exhibit 25). The Forest Service need not reauthorize the same type/level/intensity of grazing or any grazing at all."

The District Ranger is affirmed on this issue.

11. A regulatory impact analysis should have been completed prior to decision.

Contention: Appellant asserts "the Decision for the Kingston Allotment is a significant regulatory action. Additionally, the Decision has a significant impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA [5 U.S.C. 605 et seq.]). Therefore, a regulatory impact analysis should have been prepared pursuant to Executive Order 12,866 and RFA."

Response: The Appellant is incorrect in this assertion. The Regulatory Flexibility Act, Executive Order 12,866 does not apply to NEPA decisions. The Act refers to new policy and direction affecting small businesses. This decision makes no new policy or sets no new direction. It is for the issuance and administration of a term grazing permit authorizing livestock grazing on National Forest from existing laws, policy and direction.

The District Ranger is affirmed on this issue.

E. The Agency EA, Decision, and FONSI are Fundamentally Flawed in Their Entirety.

Contention: The Appellant asserts "As noted in numerous arguments supra, the EA, Decision and FONSI for the Kingston Allotment are procedurally, legally, scientifically and biologically flawed in almost every respect. Additionally, the EA fails to provide sufficient information and data supporting many of the Forest Service's wholesale conclusions concerning carrying capacity, forage utilization projections, wildlife impacts, vegetation findings and threatened and endangered species."

Response: Based on the intensive review of the record, I find the District Ranger has followed all the proper procedures in the development and analysis of this project. Response to the Appellant's specific allegations are enclosed throughout this document.

The District Ranger is affirmed on this issue.

RESPONSES TO APPELLANT'S REPLY TO DISTRICT RANGER PAXON'S RESPONSIVE STATEMENT

A. The Decision Notice was Arbitrary and Capricious Abuse of Discretion.

Contention: " The Forest Service's Response abandoned any discussion to support its decision to require the exact same 100 head cut prior to and after adding an additional 19,913 acres to the Kingston Allotment".

Response: The logic behind the 100 head reduction is displayed in Responsive Statement Exhibit 39 and summarized as follows. On the Kingston Allotment most of the production numbers were taken from a 1973 P/U study. On the North and South Trujillo pastures of this allotment production numbers were taken from a 1990 P/U study. These production figures were extrapolated to a timber vegetation coverage and input into the Range/GIS range analysis calculator. The end result after running the program estimated the carrying capacity of the allotment to be 100 AUYS without the consumption of browse. The addition of Cave Creek and Mineral Creek pastures, from the Cave Creek Allotment, increases the capacity by 26 AUYS. The 19,913 acres referred to in the appellants contention represents 26 AUYS. The addition of the 19,913 acres (26 AUYS) to the Kingston Allotment (100 AUYS) totals 126 AUYS. With the abundance of browse on the allotment, the agency has estimated that browse contributes to 39 % of the livestock's diet. With the consumption of browse, the estimated carrying capacity is an additional 38 AUYS for a total estimated carrying capacity of 164 AUYS. Due to the lack of current data, the decision is to submit the permit at 300 AUYS but with 100 of those AUYS non use, pending production utilization studies to establish actual allotment carrying capacity.

Additionally, in April 1998 meeting at the Black Range Ranger District permittee Brent Bason admitted that he is running 150 head of cattle on the Kingston allotment and is short on feed (Responsive Statement Exhibit 39). On July 8, 1998, during a meeting at NMSU with the New Mexico Range Improvement Task Force, New Mexico Cattle Growers Association, and New Mexico Farm Bureau, the previous Kingston allotment permittee, Jimmy Bason, stated that he had been running 150 head on the Kingston allotment for the last seven years. (Responsive Statement Exhibit 39) Mr. Jimmy Bason claimed that he was running these numbers due to the drought conditions. The history of estimated carrying capacities, and experience of present and past Kingston allotment permittees, illustrates that the allotment is not presently capable of sustaining 300 head of cattle yearlong.

B. The Agency Failed to Consult and Cooperate with the Permittee and Sierra County.

Response: Refer to response to D-6 to Grounds of Appeal.

C. The Forest Service's Appeal Requirements Offend Mr. Bason's Due Process Rights.

Contention: Even after Mr. Bason seriously tried to accommodate the Forest Service's demands through adding acreage, it still required the exact same livestock cuts as before. The procedure offered by the Forest Service offends Mr. Bason's procedural due process rights guaranteed by the Fifth Amendment. The appeal process the Forest Service affords Mr. Bason when his livelihood is at stake does not sufficiently protect his interests. Mr. Bason should be afforded an oral evidentiary hearing prior to the Forest Service decision.

The Forest Service's failure to toll the time frame to issue a notice of appeal, stay request or reply from the date of decision instead of the date of receipt is arbitrary and capricious and does not comport with procedural due process guarantees. The appellant should not be required to exhaust the Forest Service's administrative remedies as these procedures represent the definition of "futile".

Response: Mr. Brent Bason's administrative procedural rights, related to the Kingston grazing permit, are outlined in 36 CFR 251.88 and, have been respected throughout the course of this analysis as evidenced by the present "stay" on the Kingston decision. "Oral evidentiary hearings" are not identified by the body of regulation outlining the permittee appeal process (36 CFR 251.84, 36 CFR 251.85, 36 CFR 251.86, 36 CFR 251.87, 36 CFR 251.88, 36 CFR 251.89, 36 CFR 251.90, 36 CFR 251.91, 36 CFR 251.92, 36 CFR 251.93, 36 CFR 251.94, 36 CFR 251.95, 36 CFR 251.96, 36 CFR 251.97, 36 CFR 251.98, 36 CFR 251.99, 36 CFR 251.100, 36 CFR 251.101, and 36 CFR 251.102).

Mr. Brent Bason was provided with an opportunity for an oral presentation to the Reviewing Officer under 36 CFR 251.97 (b). Under this subsection, only an appellant may request and be granted an oral presentation. An appellant may request an oral presentation at any time prior to closing of the appeal record (§ 251.98). A Reviewing Officer shall automatically grant an oral presentation if the appellant requested the presentation as part of the notice of appeal. Additionally, 36 CFR 251.97 (d) directs that oral presentations shall be held only at the first level of appeal (§ 251.87 (a)). Mr. Brent Bason's appeal record officially closed August 5, 1999. No request to conduct an oral presentation was received from Mr. Brent Bason by the Reviewing Officer prior to the closure of the Kingston appeal record (August 5).

Regarding the futility of the appeal process, 36 CFR 251.101 states that, " it is the position of the Department of Agriculture that any filing for Federal judicial review of and relief from a decision appealable under this subpart is premature and inappropriate, unless the appellant has first sought to resolve the dispute by invoking and exhausting the procedures of this subpart. This position may be waived only upon a written finding by the Chief.

The filing procedures to appeal the Kingston analysis are defined in 36 CFR 251.88 (1)(c)(1) which states that, " The time period for filing a notice of appeal of a decision, under this subpart, begins on the first day after the Deciding Officer's written notice of the decision. All other time periods applicable to this subpart also will be computed to begin on the first day following an event or action related to the appeal." The Kingston Decision Notice / FONSI was published on 2/24/99. The appeal period closed on 4/12/99. The appeal period time frame "tolls" at 45 days + one weekend. Therefore the Forest Service has followed the filing procedures correctly.

D. The Permittee requests his attorney fees be reimbursed

Response: It is inappropriate for the Forest Service to consider this request while the appellant's appeal is in process and prior to any final disposition in a adversary adjudication related to the appeal. Should the appellant choose to seek judicial proceedings at the close of the 36 CFR 251 appeal process, then his request for fee reimbursement will be considered at the final disposition in the adversary adjudication. As defined in the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 (a) (2), " A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in

connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal. "

IV. REQUEST FOR STAY PENDING FINAL DECISION ON THE MERITS

Contention: The Appellant request that the Decision Notice be stayed pending a final resolution of this appeal. The EA, FONSI and Decision Notice demonstrates no critical need (social, environmental or economic) for the Decision to be immediately implemented pending appeal.

Response: Your request for stay is granted. The decision to implement Alternative E will be stayed pending final agency decision on the merits of your appeal. As previously specified in my letter to you dated April 21, 1999, pending resolution of this appeal, specific livestock management on the Kingston Allotment will be governed by the permittee's annual operating plan.

DECISION

After a detailed review of the records, I find the District Ranger conducted a proper process that resulted in decisions that are consistent with Forest Service policy, regulations and laws.

The District Ranger is affirmed with respect to all appellant contentions.

Pursuant to 36 CFR 251.87(c), my decision is appealable to the Regional Forester. A notice of appeal for a second level review must be submitted to Regional Forester, Federal Building, 517 Gold Avenue S.W., Albuquerque, New Mexico, 87102 within 15 days of this decision.

Sincerely,

/s/Abel M. Camarena

ABEL M. CAMARENA
Reviewing Officer

cc:
Black Range District Ranger
Brent Bason
R.O.