United States Department of Agriculture | **Forest Service** | **Lincoln National Forest** | **1101 New York Avenue Alamogordo, NM 88310-6992 (505) 434-7200**

File Code: 1570-1/2200
Date: October 25, 2004October 25, 2004

Bill Stern
Forest Guardians
312 Montezuma Ave, Suite A
Santa Fe, NM 87501

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
NUMBER: 7002-0860-0000-3017-3805

RE: Appeal #04-03-08-0001-A215, Sacramento Allotment Decision, Sacramento Ranger District, Lincoln National Forest

Dear Mr. Stern:

This is my review decision concerning the appeal you filed regarding the Record of Decision which authorizes grazing and implements the grazing management strategy on the Sacramento, Dry Canyon, and Davis Grazing Allotments.

BACKGROUND

District Ranger Martinez issued a decision on July 28, 2004, for the Sacramento Allotment. The decision resulted in the selection of the following alternative and authorization:

> Sacramento Allotment, Alternative B, which authorizes variable stocking from 200 to 412 head of cattle (cow/calf) and 5 head of horses from May 15 to October 31 on summer range and 200 to 335 cattle and 5 horses from November 1 to May 14 on the winter range. Issue a Term Grazing Permit for up to 75 cattle from November 1 to May 14 on the Dry Canyon Allotment.

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

My review of this appeal has been conducted in accordance with 36 CFR 215.18. 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 was adequate.

APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm with instructions the Responsible Official's decision concerning the Sacramento Allotment, which authorizes grazing and implementation of management actions.

I am hereby instructing the Responsible Official to add to the project record all the files referenced in the MIS report and FEIS used as source data for the MIS population and habitat analysis. I am also instructing the Responsible Official to add to the record documentation on the City of Alamogordo watershed from Forest files. Documents to be added are outlined in the review and findings document attached.

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

Sincerely,

/S/ JOSE M. MARTINEZ

JOSE MARTINEZ
Appeal Deciding Officer, Forest Supervisor

Enclosure

Cc: David M. Stewart-R3, Constance J. Smith-R3, Ed Armenta-R3, Frank R. Martinez-R3, George O. Wilson-R3, Larry Cosper-R3, Don DeLorenzo-R3, Doug Moore, Michael Nivison-Otero Count Commission, Michael Van Zandt-Attorney for Appellant, Jimmy Goss-Appellant

REVIEW AND FINDINGS

Of

Billy Stern's

Appeal #04-03-08-0001-A215 of Sacramento Allotment/Lincoln NF

ISSUE 1: The Decision violates the NFMA and Lincoln Forest Plan (Lincoln LMP)

Contention A: The Forest Service violated NFMA by continuing to allow cattle grazing on the allotment without first evaluating the allotment's suitability for grazing. The Forest Service must determine in Forest planning the suitability and potential capability of the National Forest System lands 36 CFR §219.3. Absent a suitability analysis, the appellant contends that the Forest Service failed to discharge its obligation under NFMA to take a hard look at each alternative; and, therefore, the choice of any alternative is premature.

Response: NFMA does not require that a suitability analysis be conducted at the project level. On August 24, 1999, the United States Court of Appeals for the Ninth Circuit, in *Wilderness Society v. Thomas,* 188 F.3d 1130 (9th Cir. 1999), concluded the Forest Service complied with NFMA in adopting the Prescott Land and Resource Management Plan (LRMP), 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. The EIS for Lincoln LRMP in the Affected Environment section, p. 112, describes acres considered suitable for rangeland. Suitable acres are again discussed in Chapter 4 Environmental Consequences, page 164, where both suitable and unsuitable lands are described.

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 Lincoln LRMP. The 36 CFR 219 regulations are not applicable in this case; therefore, the decision is not premature.

Contention B: The Forest Service violated NFMA's mandate to identify the alternative that maximizes public benefit. Livestock grazing from strictly an economic efficiency standpoint does not serve the broader public interest as shown in literature such as Loomis 1991, Souder 1997, and the FS publication GTR-INT-224. By failing to conduct a cost/benefit analysis for all uses of the land rather than just for elk hunting and watching, the FS failed to consider whether permitting grazing on this allotment makes economic sense despite the requirement of 36 CFR 219.3.

Response: A determination of agency policy of grazing on National Forest System lands is outside the scope of this decision. The Lincoln LRMP allocated lands for grazing activity in Management Areas 1A -1G, 1I-1J, 2A – 2F, 2G – 2H, 3A, 3B-3F,and 4I-4O, 4Q and 4U, balancing permitted livestock with grazing capacity. Grazing has been prohibited in Management Areas 1H, 1H – RNA, 2F – RNA and 3A – RNA (see Forest Plan Goals page 12,

Lincoln LRMP, 1986). The Sacramento Allotment FEIS purpose and need statement is to authorize livestock grazing and provide long-term management direction through Allotment Management Plans (PR #138 FEIS p. 1-5, PR #139 ROD p.3).

Finding: There is no requirement to evaluate an alternative at a project level that maximizes public benefit. That is a Forest Plan requirement. The alternatives evaluated in the project meet the purpose and need statement for economic analysis and are consistent with Forest Plan objectives.

Contention C: The appellant asserts that the decision fails to manage riparian areas to achieve recovery, and to make the health of riparian areas a priority, and in so doing violates both the Forest Plan and Regional Guide.

Response: The Regional Guide for the Southwestern Region (1983) was removed as guidance and either incorporated into Forest Plans or dropped as guidance (see *Federal Register* Notice, 66 FR 65463, December 19, 2001).

Under the selected Alternative B, there are 20 acres of new riparian exclosures and the proposed management system is designed to enhance riparian areas without exclusion of livestock from all riparian areas (PR #138 FEIS pp. 3-14 to 3-15, and Response to Comments pp. 7-8 for R6-c, R14-a, R18-d, R18-h). The Sacramento Allotment FEIS (pp.3-10 to 3-16) and Proper Functioning Condition Assessment of June 1999 (PR # 85) describe the condition of perennial streams and riparian areas.

Finding: The FEIS proposed action and the selection of Alternative B in the ROD indicate that riparian management is a priority. Continued riparian improvement is ensured under this decision, and there is no violation of the Lincoln National Forest Plan.

<u>ISSUE 2</u>: The decision violates the NFMA requirement to maintain viable numbers of all species.

Contention A: The appellant contends the Forest Service must manage sensitive species to sustain viability and prevent the need for listing. In addition, the Forest Service must manage fish and wildlife habitat to maintain viable populations of native species. The appellant believes the Forest Service has failed dramatically in its efforts to protect riparian obligate species and their riparian habitats as a result of continued livestock grazing. By stating that existence of *most* threatened and endangered species remain viable but not all; the viability standard is not being met.

Response: Direct, indirect and cumulative effects to Forest Sensitive Species are assessed in the Wildlife Specialist Report, Amended Report, and Biological Evaluation (PR #'s 96, 109, and 115). Effects are disclosed by alternative in the FEIS for the sensitive species of peregrine falcon, northern goshawk, riparian complex species, Sacramento mountain salamander, desert shrew, and New Mexico meadow jumping mouse (PR # 138 FEIS on pp. 3-24 – 3-26 and 3-38 – 3-44). Sensitive plant species are addressed on FEIS pages 3-52 - 55. A summary of adverse effects is in the FEIS page 3-75. Alternative B may adversely affect peregrine falcon habitat, but impacts would not threaten viability. Other sensitive species would have individuals that may be

impacted by Alternative B but there is no trend towards federal listing, and for a few sensitive species there will be an increase in suitable habitat. Viability will not be adversely affected.

Riparian conditions were identified as an issue in the analysis (PR #138 FEIS p. 1-10) and the proposed action was developed in part to improve riparian conditions (FEIS p. 3-10). Mitigation measures are identified that will protect riparian resources from grazing (FEIS p.2-11).

Issues related to threatened and endangered species are discussed under ISSUE 9 elsewhere in this review. The issue of MIS population viability is addressed below under Contention 2B.

Finding: The Forest determination that sensitive species viability will be maintained and there is no trend towards federal listing is supported by documents in the project record and the FEIS analysis. Based on the review of the project record, the Forest did not violate the NFMA requirement to maintain viable numbers of all species.

Contention B: Population survey data of Management Indicator Species are needed to ensure the maintenance of minimum viable populations of wildlife. The appellant asserts that since the Forest Service lacks quantitative monitoring data on many, if not all, MIS in the planning area and the Forest as a whole, and the scant data that it does have indicates some species are declining, the agency's decision is arbitrary and capricious.

Response: Population trends and habitat status for all Lincoln National Forest Management Indicator Species (MIS) are evaluated and disclosed in the 2002 Forest MIS Species Assessment (PR # 94) and the Amended Wildlife and Fish 2003 Report (PR #115) which address population trends and population viability at the broad scale (Statewide) and Forest-wide levels. Selection of affected MIS species is outlined on page 3-18 of the Sacramento Allotment FEIS (PR #138). The Wildlife Specialist's Reports (PR #96, 115) describe project-level effects to 5 MIS species as well as neotropical migratory birds, turkey, black bear, riparian complex species and cold-water fish.

A summary of effects on the five MIS species that were analyzed on this allotment follows.

- For western meadowlark, the overall forest-wide population trend in downward (FEIS p. 3-19) and under selected Alternative B, the forest-wide population trend effect is expected to be upward (FEIS p. 3-27).
- For rufous-crowned sparrow, the forest-wide population trend is estimated to be downward (FEIS p. 3-19), and the selected Alternative B would maintain enough suitable habitat for current numbers of this species (FEIS p. 3-28).
- For Mexican vole, the population trend fluctuates, but is considered to be upward on the Forest (FEIS p. 3-20), and the selected Alternative B would maintain enough suitable habitat for current numbers of this species (FEIS p. 3-30).
- For deer, the population trend on the Forest appears to be downward (FEIS p. 3-22), and Alternative B would be expected to maintain and may improve habitat conditions and would allow for numbers to remain at current levels (PR #96 p. 39, PR #115 pp. 18-19).
- For elk, the population trend on the Forest is estimated to be downward (FEIS p. 3-20), and the selected Alternative B is expected to maintain and may improve the habitat

> conditions for this species if the use guideline is met, and would allow for maintenance of the 1,000 elk [head herd] objective (PR #96 p. 33, PR #115 p.16).

The Forest MIS assessment contains records of surveys completed by the Forest or its partner agencies such as New Mexico Department of Game and Fish (NMDGF). Population trends and population viability are described at the broad scale (Statewide) and regional (Forest-wide) levels. New Mexico Department of Game and Fish (NMDGF) elk management information, including population estimates by management unit are included in the record as PR #103 and 107. A master's thesis describing project-level ungulate (deer and elk) distribution and densities on the Sacramento Grazing Allotment (Wright 2000) is included in the Record as PR #104. Note: Survey data for the five MIS assessed in PR #94 are displayed in the report, but source documents are missing from the project record. Specifically, West 2001 (Bird population studies) and Ward 1999 (Status of Mexican vole) should be added to the record.

For MIS species, the Amended Wildlife Specialist's Report (PR #115) and FEIS (pp. 3-27 - 3-30) conclude that the proposed action will maintain or improve suitable habitats for MIS and that Forest trend (numbers) would most likely improve, or allow for numbers to remain at current levels.

Finding: The record contains sufficient information to determine population trends of MIS. The Forest completed an analysis of MIS that was sufficient to ensure that minimum viable populations would be maintained. Both population viability and project level effects are analyzed and displayed. Data sources that are referenced need to be added to the project record.

ISSUE 3: The Sacramento Term Permit issuance must be suspended until the Lincoln National Forest revises its Land and Resource Management Plan and until the Forest Service develops a renewable resources program.

Contention: The appellant contends there is no legally adequate RPA program or land and resource management plan to which the Sacramento term grazing permit issuance project can be tiered. Term permit must be suspended until the Forest publishes a new FEIS supporting a revised Lincoln LMP.

Response: There are no statutes or regulations that describe an expiration date for the Forest Service Renewable Resource Program or Land and Resource Management Plans. A recent court decision in Wyoming upheld the use of the current Plan until revised *(Biodiversity Assoc. v. USFS*, decision September 30, 2002). Also, language in the 2004 appropriations bill for the Forest Service allows that (section 320). "Prior to October 1, 2004, the Secretary of Agriculture shall not be considered to be in violation of subparagraph 6(f)(5)(A) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)(A)) solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System." The Lincoln Land and Resource Management Plan will remain in effect until it is revised, consistent with the requirements of the National Forest Management Act and implementing regulations.

Finding: The current plan is in effect until the revision process is completed. There are no requirements to suspend activities until the process is completed.

<u>ISSUE 4</u>: The permittees for this allotment do not fulfill USFS base property requirements.

Contention A: The USFWS BO notes that permittees do not have any adjacent private lands. Since current permittee does not have adequate base property with livestock, the preferred alternative would allow 70 percent utilization in hold traps, and also the need for livestock to over-winter on the allotment, increasing the utilization violations. Issuing a permit to a permittee without adequate base property is a violation of FS policy and legal requirements.

Response: Base property is land owned and used by the permittee for a farm or ranch. Such property shall include the basic facilities necessary to conduct a ranching operation and the capability to produce a part of the annual forage crop needed to support the permitted livestock over a yearlong period as determined by the Regional Forester.

Forest Supervisors shall, within limits established by Regional Forester, establish minimum base property requirements for National Forests (FSH 2209.13, sec. 12.21)

This has been established for the Lincoln National Forest in a FSH Supplement (FSH 2209.13-96-1), which has a minimum base property requirement of no less than 80 acres. There is no direction regarding whether base property should be adjacent to an Allotment and or NFS land.

The portion of the contention regarding 70 percent utilization is addressed under Issue 6, Contention B.

Finding: Reissuing or issuing a permit under the FEIS selected alternative would not violate any FS policy and or legal requirements. Base property requirements and inspection of base property shall be conducted before issuing of a term grazing permit as per Form FS-2200-10a of the permit.

<u>ISSUE 5:</u> Grazing in the Alamogordo watershed is prohibited by the Lincoln Forest Plan.

Contention: Parts of the Sacramento and Dry Canyon Allotments appear to be supplying Alamogordo's water. The Forest Plan calls for Level A management in the Alamogordo watershed which prohibits livestock grazing. The USFWS BO mentions water developments in the area.

Response: The City of Alamogordo Watershed was identified in a March 21, 1966 Hydrologic Analysis and Water Resource Management Plan report, Alamogordo Municipal Watershed; which recommended continued non-use of upper watershed by domestic stock, and specifically mentions Alamo Canyon as supplying the water for the pipeline system to the reservoir (pp. 5-7 and 9, on file at Forest, not in project record).

The 1986 Lincoln LRMP, "Management Area 2B Alamo" Range Objective for Activity of Range Resource Management (D02) is to "Maintain level A management on the Alamogordo Watershed" (LRMP p. 87). Level A management (Lincoln LRMP p. 211) excludes livestock grazing to protect other values or eliminate conflicts with other uses.

The Lincoln NF Allotment map of January 28, 1988 shows the area of the Alamogordo Watershed around Alamo Canyon that was excluded from grazing (on file at Forest, not in project record). The 1995 EA (PR #76) shows alternative maps that have the Alamogordo

watershed/Alamo Canyon area eliminated from grazing. The 1999 map of key areas for monitoring site shows the Alamogordo watershed area (Alamo Canyon) is now mapped outside of the allotment area boundary (PR #79). The FEIS (PR #138 p.1-2) shows the Alamo Canyon/Alamogordo watershed as being removed from the allotment and pastures.

Finding: The Alamogordo watershed has been excluded from the allotment boundary and excluded from grazing. The Sacramento, Dry Canyon and Davis Allotment decision is consistent with Lincoln Forest Plan direction. The Alamogordo watershed document and maps from 1966 and 1988 should be added to the project record.

ISSUE 6: The project does not meet the requirements of NEPA.

Contention A: The appellant contends that a range of reasonable alternatives, as required by NEPA implementing regulations, was not analyzed. The EIS fails to take a hard look at potential effects of the proposed action and the no grazing alternative. By examining only one action alternative and refusing to analyze others that result in a lower stocking rates, the FS has violated NEPA requirements to address a range of reasonable alternatives that not only emphasize different factors but also lead to differing results.

Response: FEIS page 2-1 summarizes alternative development (PR #138) and PR # 67 is a detailed discussion and description of alternative development. Nine alternatives were developed in the original 1995 EA, and three of those were dropped from detailed study. In the 1996 supplemental EA, the Sacramento Grazing Association provided an alternative that was considered in the FEIS under Alternative A. With additions of Dry Canyon and Davis Allotment to Sacramento Allotment for consideration, more alternatives were developed in 2002. The FEIS ended up using 5 alternatives analyzed in detail (PR #138 p. 2.5), and five were dropped from further analysis, (pp. 2.9-10). The proposed action and no action alternatives were analyzed in detail in the FEIS.

Alternative C is the no grazing alternative. A long-term rest alternative was considered and dropped from detailed consideration. Current management was analyzed in Alternative D and the permittee alternative was considered in Alternative A.

Issues identified in the FEIS (p.1-10) included effects of livestock grazing on wildlife and plant habitat, use by elk, viability of livestock operation, recreational use, and impacts to perennial streams. The 5 alternatives analyzed in detail address these issues differently with different results (pp.2-12 to 2-15). "[A]n agency must look at every reasonable alternative, within the range dictated by the ‘nature and scope of the proposed action’ and ‘sufficient to permit a reasoned choice.’" *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992). For an alternative to be reasonable, it must meet the stated purpose and need and address one or more issues. The formulation of alternatives is driven by significant issues identified in scoping (40 CFR 1501.2(c)).

Finding: The Responsible Official appropriately defined the scope of the analysis and analyzed a range of reasonable alternatives within that scope.

Contention B: The FS has violated NEPA because the EIS fails to consider and disclose adequately the location and protocol for monitoring key forage utilization areas within the

allotment. The appellant contends the EIS must disclose the names, locations, forage utilization limits, and monitoring protocol for each and every key area within the allotments.

Response: Proper forage utilization standards are employed to sustain such things as plant health and vigor, long-term soil productivity, and protection for threatened, endangered, and sensitive species and their habitats. Forage utilization levels are determined based on guidelines set out in the R-3 Allotment Analysis Guidelines. These guidelines specifically describe appropriate forage utilization levels recommended for the purpose of improving rangeland condition.

Forage utilization is measured by key area on key forage species within various pastures encompassing a grazing allotment. Key areas are locations readily accessible to water and forage and are located on level to intermediate slopes. Key species are herbaceous and woody vegetation that domestic livestock prefer at any given time of the year. By monitoring key areas, the Forest Service can ensure that an allotment or pastures within an allotment are not overgrazed.

There are grazing utilization standards in Lincoln LRMP pages 35 and 35a (Plan Amendment 9, 1996). The guidelines are to develop site-specific forage use levels in consultation with US Fish and Wildlife Service. In the event that site-specific information is not available, average key species forage utilization in key areas by livestock and wildlife should not exceed levels set forth in the allowable use guide table on page 35a.

The Biological Opinion issued by USFWS (PR #131 p. 10) analyzes 70 percent utilization in livestock traps, 35 percent on the summer and 40 percent in the winter units. This action has been developed by consultation with USFWS, meeting the standards set forth in the Lincoln LRMP. There is no NEPA requirement to disclose the names and locations of key areas.

Finding: The Responsible Official did not violate NEPA by not disclosing the key area names and locations. There is nothing in federal statutes, regulations, or Forest Service policy that requires the Responsible Official to disclose the names and locations of each and every key area within an allotment in an EIS. Utilization standards and monitoring protocol for the Sacramento Grazing Allotment were developed in accordance with Forest Service policy and through USFWS consultation.

Contention C: The Forest Service violated NEPA by failing to consider and disclose the cumulative impacts of the proposed action. The appellant contends that the cumulative effects of the alternatives were not adequately addressed, considering past, present, and reasonably foreseeable activities, as required by NEPA. Appellant states, “The EIS contains virtually no analysis of cumulative effects…” The EIS does not even attempt to catalog other activities occurring with the allotment’s boundaries.

Response: Cumulative affects analysis is in the FEIS (PR#138 pp.3 -71 – 3-75) and includes an extensive list of past, present, and foreseeable projects in Table 14.

Reports in the record that address cumulative effects include:

- Wildlife Specialist Reports and Biological Evaluation (PR #96, 109, and 115),

- Initial EA 1995, (PR #76 pp. 77-81),
- Watershed Cumulative Effects Analysis Report (PR #78)
- Range Analysis has extensive photo and plot measurement data of past range conditions (PR #81)
- Dry Canyon Grazing Allotment EA (1999) has a cumulative effects analysis (PR #86 pp 19 –20 in document 29 in tab),
- PR # 102, Rio Penasco Project, is an extensive list of timber projects over the next 5 years.

Finding: The record includes consideration of past, present, and reasonably foreseeable actions and their cumulative effects on the components of the human environment. The cumulative effects analysis is adequate for an informed decision.

Contention D: The FS has violated NEPA because the EIS fails to consider the full economic implications of this action. The EIS failed to weight the economic costs and benefits of the project. Costs and benefits of elk forage use and elk hunting should have been considered. Although the methodology for considering user days is not clear, hunting and other recreation use has an impact on the local economy that should have been considered in the FEIS.

Response: Projects such as the Sacramento grazing allotment are developed to be consistent with the direction described in the Forest Plan. Project level requirements for social and economic analysis are described in Forest Service Manual (FSM 1970) and Forest Service Social and Economic Analysis Handbook (FSH 1909.17). The proposed action is the implementation of previously approved practices that are included in the current Lincoln LRMP. The responsible line officer determines the scope, appropriate level and complexity of economic and social analysis needed (FSM 1970.6).

The economic effects of the project were identified by numerous responses during scoping (PR #17) and identified as a significant issue for the analysis (PR #67 and FEIS PR #138 p. 1-10). The economic efficiency and cost-benefit were assessed in the Socio- Economic Technical Report (PR #90) and summarized and disclosed in the FEIS on pages 3-62 to 3-66.

With respect to costs and benefits of elk forage and elk hunting, the appropriate level for determining resource output tradeoffs is at the Forest level (see FEIS Appendix D, p. 9). The number of hunting permits and wildlife population numbers vary from year to year based on habitat conditions and management goals. The economic effects of wildlife use where there is a trade-off with other multiple uses must be made at the Forest Plan level.

Finding: The economic analysis is consistent with regulation and manual and handbook direction for project-level decision making and is not in violation of applicable laws, regulations or policy.

Contention E: The analysis done on the impacts to the permittee is flawed. Analysis assumes that maximum capacity would consistently be used, but history shows this is not true. The PNV for the permittee has been overestimated and thus the impacts of all the other alternatives have also been overestimated.

Response: The capacity estimates used in the economic analysis (PR #90) were selected in order to compare and contrast the economic effects of the various alternatives and are not for assessing an absolute or total economic value. Capacity and stocking levels are set based on annual fluctuations in forage availability and management objectives.

Finding: The economic analysis is consistent with regulation and manual and handbook direction for project-level decision making and is not in violation of applicable laws, regulations of policy.

ISSUE 7: The EIS fails to address grazing and relationship to invasive species.

Contention: The EIS fails to consider how grazing contributes to noxious weed spread. Noxious weeds were included in measurements of available forage according to the USFWS BO, leading to overestimates of palatable forage and overestimates of stocking capacity.

Response: Scoping for the EIS in 1999 did not result in this issue being raised (PR #106). An assessment is required to be completed prior to ground disturbing activities to determine the risk of spread of noxious weeds (ROD PR #139 p. 5). Eradication of noxious weeds in all livestock traps to minimize disturbance to the Mexican spotted owl is described as a Term and Condition prescribed in the Biological Opinion from USFWS (ROD p. 12, BO p. 69). The BO (PR #131 p.36) describes ongoing experimental efforts on the part of the Forest to treat noxious weeds at Sacramento Mountain thistle sites and proposes conservation measures to reduce the impacts of weeds on thistles (BO p.71).

The appellant's reference to noxious weeds being included in forage measurements is inaccurate. Invasive species are included in measurements of *herbaceous ground cover* (PR #131, p.43, emphasis added), but are not used to calculate the available forage base. Forage capacity estimates are based on production and utilization studies contained in the record (PR #30, 37, 38) and are consistent with Region 3 Manual guidance.

Finding: Effects of invasive species on listed plant species were assessed during consultation with USFWS, and mitigation features intended to control the spread of noxious weeds are included in the proposed action. Invasive species are not included in estimates of forage capacity.

ISSUE 8: The decision violates the Multiple Use and Sustained Yield Act.

Contention: The appellant alleges that the decision violates the Multiple Use and Sustained Yield Act by failing to manage for the highest public benefit. The appellant further alleges that the decision will continue to impair land productivity.

Response: Management of National Forest Lands for the highest net public benefits was analyzed and decided upon in the preparation of the Lincoln LRMP. The Forest Plan provides direction for management emphasis within the project area. Net public benefits were analyzed appropriately during the forest plan's preparation and are outside the scope of project-level analysis.

Also see Issue 1 Contention B response to similar contention concerning economic analysis.

In reference to the contention that the decision will continue to impair land productivity, FEIS (PR #138 pp.3-13 – 3-76) analyzes the effects of the selected alternative on the various resources. The effects of Alternative B are described as improving or having slight or gradual improvements, or no change on the various land and water resources. The effects analysis clearly demonstrates improvement in land productivity.

The ROD (PR #139 p. 5), states that Alternative B best moves toward all of the desired future conditions described in the FEIS, and goes on to specifically describe either/or improving, balancing, and maintaining the various land, water, plant and animal resources.

Finding: This decision will improve land productivity and is, therefore, consistent with the Multiple Use and Sustained Yield Act.

ISSUE 9: The Decision violates the Endangered Species Act

Contention A: Both the Sacramento prickly poppy and the Sacramento Mountain thistle may be adversely affected by this project. The relationship between water withdrawal for livestock grazing and its affects on these two species are not fully covered. Appellant contends that the summary statement on pages 2-15 and 3-76 of the FEIS, that the preferred alternative "protects *most* threatened, endangered and sensitive wildlife and plant species and heritage resources while best resolving other identified issues" does not meet the viability standard.

Response: Section 7(a)(2) of the Endangered Species Act requires Federal agencies to "insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence" of threatened or endangered species. Effects to threatened and endangered species are assessed in numerous documents found in the project record, including Wildlife Specialist's Reports (PR #'s 71, 96, 115) and Biological Assessments, reports and Section 7d determinations (PR #'s 97, 105A, 110, 111, 117A, 118, 123 and 124). Consultation with the US Fish and Wildlife Service was completed in 2003 and a Biological Opinion (PR #131) was issued on February 4, 2004.

The Biological Assessment (PR # 118) describes historic impacts to Sacramento prickly poppy and Sacramento mountain thistle as a result of past management on the allotment, and determined that the proposed action would adversely affect the two species. The USFWS concurred, but determined that the proposed action is not likely to jeopardize the species because of the implementation of features of the proposed action that are predicted to reduce impacts and improve range conditions over the term of the project (PR #131 BO pp.12-13 and 66-67).

Mitigation features designed to reduce effects to listed plants are included in the proposed action (PR #138 FEIS p. 2-11 and PR #139 ROD pp. 5-13). These measures, especially the removal of livestock from the Alamo Pasture by February 1, will allow for germination and growth and avoid trampling and herbivory. Adverse environmental effects that cannot be avoided are disclosed on page 3-75 of the FEIS, including that the proposed action may affect Sacramento Mountain thistle and Sacramento prickly poppy because some random grazing and trampling of these plants in unprotected areas cannot be avoided. This was restated on FEIS page 3-76 as regards to NFMA findings.

The proposed action does not include any proposal for water withdrawal for livestock (FEIS pp. 2-4 to 2-6). Therefore, this issue was not analyzed.

Finding: Consultation occurred as required under the Endangered Species Act for the Sacramento prickly poppy and the Sacramento Mountain thistle. A Biological Opinion made a determination of "no jeopardy". All legal requirements of the Endangered Species Act have been met.

Contention B: Two Mexican spotted owl (MSO) protected activity centers (PACS) will be taken as a result of this project. There have already been 262 PACS adversely affected, with 41 in the allotment vicinity. The BO provides no rationale as to why more take is being allowed. MSO prey cover will be affected by the drought and no allowance is made for the impact on prey species.

Response: According to records available in the project record (PR #s 83, 96, 109, 118 and 131) there are 109 protected activity centers (PACs) on the Sacramento Ranger District and 46 PACs that have some portion within the Sacramento Allotment. The source of the 262 PAC estimate is unclear in the appellant's letter.

Effects to threatened and endangered species are assessed in numerous documents found in the project record, including: Wildlife Specialist's Reports (PR #s 71, 96, 115) and Biological Assessments (BA), reports and Section 7-D determinations (PR #s 97, 105A, 110, 111, 117A, 118, 123 and 124).

The MSO effects analysis was conducted using the Forest Service Guidance Criteria and included an assessment of the need for 4-inch stubble height for prey cover habitat. The BA determined that the 4-inch criteria may not be met in times of drought or in livestock traps (approximately 3 percent of the suitable range), which led to the determination of adverse effects to prey cover.

Consultation with the US Fish and Wildlife Service was completed in 2003 and a Biological Opinion was issued on February 4, 2004 with a determination of "no jeopardy" for MSO by the US Fish and Wildlife Service. An incidental take statement was included with the final opinion and reasonable and prudent measures and their associated terms and conditions were issued (PR #131 BO pp. 69-70). These will be implemented as part of the project (PR #139 ROD pp.12 and 13). The FWS rationale for their incidental take statement is found on page 68 of the Biological Opinion.

The Forest has identified several mitigation measures to be implemented as part of the proposed action that are expected to minimize or avoid impacts to MSO and to promote management, restoration and maintenance of riparian habitat (PR #138 FEIS pp. 2-5, 2-6 and 2-11) and to avoid jeopardy to the species (PR #139 ROD pp 12-13).

Finding: Consultation occurred as required under the Endangered Species Act. The Biological Opinion of "no jeopardy" was issued and an incidental take statement was included in the Final opinion. The Forest will implement the terms and conditions as part of the proposed action (ROD pp. 12-13).

Contention C: The 8/31/04 designation of critical habitat for the MSO has a more protective requirement to prevent the adverse modification of critical habitat. The USFWS did not consider the question of adverse modification and its higher recovery standard. Consultation must be reinitiated to consider adverse modification.

Response: The Forest requested reinitiation of consultation for MSO critical habitat on September 14, 2004 (PR #137) with a determination that the proposed action is "likely to adversely affect" designated critical habitat. A biological opinion was issued on October 15, 2004, stating that the project is not likely to destroy or adversely modify designated critical habitat.

Finding: The Forest is compliance with the ESA.

ISSUE 10: The EIS violates the Administrative Procedures Act.

Contention: The agency action completely disregards the scientific data and recommendations of experts. Given the current degraded condition of the land due to historical and ongoing livestock grazing, the decision to continue to graze the land is inexplicable. Based on data in the EIS, there is little known about the effects this alternative would have on the ecosystem.

Response: The FEIS/ROD and documents in the record disclose the analysis done to evaluate resource conditions on the allotment and the effects of alternatives considered.

The ROD gives extensive reference to the FEIS for rationale used to select Alternative B which best meets Purpose and Need, moves toward desired conditions, and balances the 5 issues (PR #139).

In the FEIS, Appendix D, Response to Comments (PR #138 p.12), the contention that scientific data and recommendations of experts are disregarded is responded to by recognizing extensive studies, books, and articles are available and that the FS has the job of sorting out those applicable. This response gives specific reference to Dr. Galt's work done specifically on the allotment area. FEIS, Appendix B, page 1-3 is an extensive list of references used that include various scientific studies, books, and technical papers and reports. FEIS, Chapter 5, Consultation with Others, gives a list of other experts, publics, and agencies consulted during the analysis, (PR #138 pp. 5-1 – 5-2). Appellant does not identify what specific data and/or studies or science were not considered, so it is not possible to determine if some key study of applicability to this analysis was missed.

Finding: In the ROD for the Sacramento, Dry Canyon, and Davis Allotments, the Responsible Official properly assessed the issues, public input, and impacts to resources in his decision rationale. The Responsible Official made a reasoned and informed decision based on the analysis and has not violated the Administrative Procedures Act.

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File Code: 1570 **Date:** September 30, 2004
Route To:

Subject: ARO, Appeal #04-03-08-0001-A215, Sacramento Allotment Decision, Sacramento Ranger District, Lincoln National Forest

To: Jose Martinez, Appeal Deciding Officer

This is my recommendation on the disposition of the appeal filed in protest of the Record of Decision on the above referenced project. District Ranger Frank Martinez made a decision on July 28,2004 for the Sacramento, Dry Canyon and Davis Grazing Allotment FEIS. The decision resulted in selection of Alternative B, which would:

Issue a Term Grazing Permit on the Sacramento Allotment with variable stocking from 200 to 412 cattle and 5 horses from May 15 to October 31 on summer range and 200 to 335 cattle and 5 horses from November 1 to May 14 on the winter range. Issue a Term Grazing Permit for up to 75 cattle from November 1 to May 14 on the Dry Canyon Allotment.

The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations. Forest Guardians filed the appeal of this decision under the 36 CFR 215 regulations.

Informal Disposition

Pursuant to 36 CFR215.17 an attempt was made to seek informal resolution of this appeal. The record reflects that informal resolution was not reached.

Review and Findings

My review was conducted in accordance with 36 CFR 215.19 to ensure that the analysis and decision are in compliance with applicable laws, regulations, policies, and orders. The appeal record, including the appellants issues and request for relief has been thoroughly reviewed. Having reviewed the Final Environmental Impact Statement (FEIS), Record of Decision (ROD), and the project record file, as required by 36 CFR 215.19 (h), I conclude the following:

1) The decision clearly describes the actions to be taken in sufficient detail that the reader can easily understand what will occur as a result of the decision.

2) The selected alternative should accomplish the purpose and need established. The purpose and need stated in the FEIS reflect consistency with direction in the Forest Plan for the Lincoln National Forest.

3) The decision is consistent with policy, direction, and supporting evidence. The record contains documentation regarding resource conditions and the Responsible Officials decision documents are based on the record and reflect a reasonable conclusion.

4) The record reflects that the Responsible Official provided ample opportunity for public participation during the analysis and decision making process. The Responsible Official's efforts enabled interested publics the opportunity to comment and be involved in the site-specific proposal.

After considering the claims made by the appellant and reviewing the record, I found that the Responsible Official conducted a proper and public NEPA process that resulted in a decision that is consistent with the Lincoln National Forest Plan, with the following clarifications:

> The project record is incomplete. The following documents used in the project analysis need to be added: Lincoln National Forest Land Management Plan with maps, source documents for MIS surveys, map defining boundaries of the "Alamogordo Watershed", and maps with locations of proposed range and watershed improvements.

Recommendation

I recommend that the Responsible Official's decision relating to this appeal be affirmed with respect to all of the appellant's contentions.

/s/ Edward E. Armenta
EDWARD E. ARMENTA
Appeal Reviewing Officer
District Ranger