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Forest  
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File Code: 1570-1

Date: June 26, 2000

Forest Guardians  
c/o John Horning  
1411 Second St.  
Santa Fe, NM 87505

Certified Mail-Return Receipt Requested

Re: Appeal #00-03-00-0080-A215, Capulin Allotment Decision, Pecos/Las Vegas Ranger District, Santa Fe National Forest

Dear Mr. Horning:

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

### **BACKGROUND**

District Ranger Crittenden issued a decision on March 15, 2000, for the above named allotment. The decision resulted in the selection of the following alternative and authorizations:

Capulin Allotment, Alternative C, which authorizes 63 head of cattle (cow/calf) to graze July 1 through September 30 annually. The decision also authorizes approximately 5 miles of new fence construction, and development of two springs.

The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations. Pursuant to 36 CFR 215.16, an attempt was made to seek informal resolution of your appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR 215.17. I have reviewed the appeal record and the recommendations of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

### **APPEAL REVIEWING OFFICER'S RECOMMENDATION**

The Appeal Reviewing Officer recommended that the Responsible Official's decision be affirmed and that your request for relief be denied. The evaluation concluded: (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; (d) public participation and response to comments were adequate; and (e) all of the major issues raised by the appellant were adequately addressed in the project records.

### **APPEAL DECISION**

After a detailed review of the record and the Appeal Reviewing Officer's recommendations, I affirm the Responsible Official's decision concerning the above named allotment, which authorize grazing and implementation of management actions. However, the decision is not clear as to: who will fund the proposed range improvements, when the proposed range improvements are scheduled for construction, and if the allotment will remain in nonuse status until all proposed range improvements are in place. Therefore, if the allotment is restocked before the proposed three-pasture deferred rotation grazing system can be fully implemented, I am instructing the Responsible Official to adhere to the utilization level of 25 percent identified in alternative D, as the proper use level under season long grazing with no new range improvements.

Additionally, it is not clear in the decision that the 20-30 percent maximum allowable use in riparian habitat will be implemented in accordance with the biological assessment. I am instructing the Responsible Official to ensure the utilization levels consulted on are immediately adhered to or to reinitiate consultation.

I am also instructing the Responsible Official to include a provision in Part 3 of the term grazing permit requiring complete removal of livestock from the allotment in any given grazing season if utilization standards are reached in all pastures prior to the end of the grazing period authorized in the permit.

Lastly, I am instructing the Responsible Official to add a post-fledging family area (PFA) map for the Goshawk to the project record.

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

Sincerely,

/s/ James T. Gladen  
JAMES T. GLADEN  
Appeal Deciding Officer  
Deputy Regional Forester, Resources

Enclosure

cc:

Forest Supervisor, Santa Fe NF  
District Ranger, Pecos/Las Vegas RD  
Director of Rangeland Management, R3

Appeals and Litigation Staff, R3

## **REVIEW AND FINDINGS**

of the

**Forest Guardians Appeal**

**#00-03-00-0080-A215, Capulin Allotment Decision**

**ISSUE 1:** The Forest Service violated the National Forest Management Act (NFMA) consistency requirement by failing to comply with the 1996 Forest Plan amendment requirements to limit forage utilization in key areas.

**Contention:** The appellant contends the decision allows grazing at a level in excess of capacity for the allotment and that there is no provision for the monitoring of grazing use.

**Response:** The grazing guidelines included in the 1996 amendment to the Forest Plans were established to ensure recovery and continued existence of threatened and endangered species. These guidelines are applicable in situations where more specific guidelines have not been established through site specific National Environmental Policy Act (NEPA) analysis for individual allotments. As NEPA analysis is initiated on individual allotments, site specific forage use levels are established in consultation with the U.S. Fish and Wildlife Service. The record reflects this has been done (Doc. 7). In addition, the record indicates that restricted habitat for the Mexican spotted owl (threatened) occurs in riparian areas on the allotment. Use levels in riparian areas (20-30 percent) will be consistent with the recovery plan for the Mexican spotted owl (Docs. 7, 11).

A review of the record also disclosed that utilization monitoring of key areas is planned and that estimated grazing capacity is based on production utilization surveys adjusted to reflect anticipated capacity through more intensive management.

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

**Finding:** The decision is consistent with the 1996 Record of Decision for the amended Forest Plans. Monitoring of key areas will ensure progression toward overall healthy watershed conditions.

**ISSUE 2:** The Forest Service violated the NFMA by continuing to allow cattle grazing on the allotment without first evaluating the allotment's suitability for grazing. Therefore, the choice of any alternative is premature.

**Contention:** Appellant contends that NFMA was violated because the Responsible Official failed to evaluate the allotment's suitability for grazing, "...the Forest Service must determine in

forest planning the suitability and potential capability of the National Forest System lands... 36 CFR, Sec. [3]19.20". Absent a suitability analysis, the appellant contends that the Forest Service failed to discharge its obligation under NFMA to take a hard look at each alternative and therefore, the decision is premature.

**Response:** Contrary to the appellant's assertions, 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, 1999 U.S. App. LEXIS 20026 (9th Cir. 1999), concluded the Forest Service complied with NFMA in adopting the Prescott Forest Plan, including the Plan's allocation of acreage suitable for grazing. The Forest Plan complies with the requirements outlined in 36 CFR 219.20 through the analysis process applied in preparation of the Forest Plan (Santa Fe Forest Plan EIS Appendix B, Description of Analysis Process).

**Finding:** There is no requirement to conduct a suitability analysis when conducting a NEPA analysis at the project level concerning the management and permitting of livestock grazing. All requirements for suitability under the provisions of 36 CFR 219.20 were met upon completion of the Forest Plan. The 36 CFR 219 regulations are not applicable in this case therefore, the decision is not premature.

**ISSUE 3:** The decision violates the Santa Fe National Forest Plan and the Regional Guide by failing to manage riparian areas to achieve recovery.

**Contention:** The Forest Service's decision fails to ensure that riparian areas on the allotment will recover to satisfactory condition by the year 2015 as required by the Forest Plan.

**Response:** The Santa Fe Forest Plan does not contain a requirement that riparian areas on all allotments will recover to satisfactory condition by the year 2015, or by any other year. The Regional Guide suggests that Forests, in developing their Forest Plans, "improve all terrestrial ecosystems and watersheds to satisfactory or better condition by 2020" (pg. 3-2, item #8). There is nothing in the record to indicate a failure to adhere to the Regional Guide or Forest Plan. The environmental assessment indicates: the majority of full capacity rangelands are already in fair to good condition with stable to upward trend; the selected alternative will only improve watershed protection; and no watershed or riparian problems are foreseen (Docs. 8, 9, 11).

**Finding:** The decision provides for adequate protection of riparian habitat.

**ISSUE 4:** The decision violates NFMA's requirement to maintain viable numbers of all species.

**Contention 4a:** The appellant contends the Forest Service must provide protection and habitat for riparian obligate species. Appellant cites 36 CFR 219.19 planning regulations in supporting the assertion. The appellant further contends, "...despite this direction (i.e. Forest Plans), the Forest Service failed to protect riparian habitats and riparian obligate species, due primarily to continued livestock grazing." "In particular, we believe that domestic livestock production in this watershed threatens the viability of the Southwest willow flycatcher, the Bell's vireo, the Yellow-billed cuckoo, the Black hawk, the Mexican spotted owl, the Mexican garter snake, the Narrow-headed garter snake, the Chiricahua leopard frog, the Yavapai Leopard frog, the Arizona southwestern toad, the Lowland Leopard frog."

**Response:** Regulations at 36 CFR 219 Subpart A, which the appellant cites, set forth a process for developing, adopting, and revising land and resource management plans for the National Forest System, as required by the Forest and Rangeland Renewable Resources Act of 1974, as amended [36 CFR 219.1(a)]. The Forest Plan includes goals, objectives, standards, and guidelines for the protection of threatened, endangered, Forest Service sensitive, and other species and their habitats. This site-specific project is designed under the direction provided in the Forest Plan.

Ute and Capulin Canyons contain the majority of the riparian habitat within the allotment. The remainder of the riparian habitat is associated with five one to two acre wetlands. One of these wetlands was recently fenced to exclude cattle use. The other four receive very light use. Cattle use is not affecting the ability of these wetlands to function as wetlands. (Docs. 8, 14)

The two intermittent streams in Ute and Capulin Canyons are generally in stable condition with no down cutting of the channel and no extensive patches of bare soil. Past livestock use has been heavy, which has reduced plant vigor and composition in the riparian habitat in Capulin Canyon. The past three years of non-use of the allotment has allowed for improved plant vigor and species composition. The Forest is establishing a riparian pasture in Capulin Canyon to reduce cattle use. This pasture will be deferred until August each year, and then grazed for only two weeks. The improvement in cattle distribution, through the proposed deferred rotation system to be implemented in the proposed action, will result in improved vigor in riparian species. (Docs. 8, 14)

The proposed action identifies allowable use at a maximum of 40 percent for the entire allotment. The Biological Assessment/Evaluation (BA/E) identifies allowable use in the riparian at 20 to 30 percent and 30 to 40 percent in the uplands. These allowable use levels were identified in the BA/E and the NEPA process. Therefore, the allowable use levels comply with the Forest Plan Standards and Guidelines for Grazing Management in the 1996 Forest Plan Amendment. (Docs. 7, 14)

Of the species listed by the appellant, only the Southwestern willow flycatcher and Mexican spotted owl are found on the Santa Fe National Forest. The Bell's vireo, yellow billed cuckoo, black hawk, Mexican garter snake, narrow-headed garter snake, Chiricahua leopard frog, Yavapai leopard frog, Arizona southwestern toad, and lowland leopard frog do not occur on or near the Forest (Doc. 7).

The Capulin Allotment contains no occupied or unoccupied suitable and no potential habitat for the Southwestern willow flycatcher, nor does any occupied habitat exist within five miles of the allotment. One Mexican spotted owl protected activity center (PAC) has been established in the allotment, based on surveys conducted in 1989 and 1991. The proposed action has a breeding season closure (March 1- August 30) on all livestock management activities within the PAC, including human disturbance and construction of structural improvements. The proposed action will reduce the forage use to less than 30 percent for the 110 acres of capacity range within the PAC. (Docs. 7, 14).

The Forest conducted an adequate analysis of the effects the proposed action will have on the threatened, endangered, proposed, sensitive, and management indicator species within the Capulin allotment (Docs. 7, 14).

**Contention 4b:** “The decision notice and allotment management plan violate NFMA...by failing to adequately protect the Northern Goshawk.” “These decisions do not require the necessary monitoring of Northern Goshawk areas, nor do they call for a 20% average limit on utilization necessary to protect the Northern Goshawk.”

**Response:** The predominant coniferous vegetation is ponderosa pine, ponderosa pine and Douglas-fir dominated mixed conifer, and spruce-fir. The Forest established a goshawk territory in 1994 based on surveys conducted in 1991 and 1993. The PFA for this territory is located in the northern part of the allotment. None of the structural range improvements are proposed within the PFA. Breeding season restrictions are proposed for all construction activities in suitable but unoccupied nesting habitat and within ¼ mile of the PFA. The proposed action will result in improved conditions for the goshawk’s prey species, as utilization will not exceed 40 percent. Improved conditions for the goshawks’ prey will result in improved foraging conditions for the Northern goshawk (Docs. 7, 14). Forest Plan Standards and Guides for the Northern goshawk do not restrict forage utilization to 20 percent.

**Finding:** The decision notice and allotment management plan do not violate the National Forest Management Act’s requirement to maintain viable numbers of all species and they do adequately protect riparian habitat and the Northern goshawk. However, the utilization standards identified in the Responsible Official’s decision do not include the 20-30 percent standard identified in the BA/E (20-30 percent in riparian and 30-40 percent in the uplands). Additionally, a map of the Goshawk PFA that identifies the six existing and potential nest sites required by the Forest Plan is not included in the project record.

**ISSUE 5:** The Forest Service violated NEPA by failing to analyze a reasonable range of alternatives.

**Contention:** The appellant contends that a range of reasonable alternatives, as required by NEPA implementing regulations, was not analyzed.

**Response:** Alternatives were developed through an interdisciplinary process that included an evaluation of internal and external issues and comments. The EA presents five alternatives. The alternatives considered A) No grazing; B) No Action (No change from current grazing management); C) Three-Pasture, Deferred Rotation Grazing System (Proposed Action); and D) Proper Stocking with No Range Improvements (Doc. 11).

Pursuant to 40 CFR Part 1501.2(c), formulation of alternatives is driven by significant issues identified during scoping. The record indicates that internal and external issues (Docs. 2, 11) were considered when developing alternatives to the proposed action. In addition, the EA includes a discussion of significant issues and how the developed alternatives address these issues (Docs. 11, 14). The EA also provides discussion on how each alternative addresses the

project's purpose and need. The analysis of environmental consequences for each alternative is detailed in Chapter 3 of the EA.

**Finding:** Contrary to the appellant's assertion, and in accordance with 40 CFR Part 1502.14, the interdisciplinary team developed and analyzed a reasonable and appropriate range of alternatives based on the issues identified with the Proposed Action. The record indicates that the range of alternatives complies with NEPA.

**ISSUE 6:** The Forest Service violated NEPA by failing to consider and disclose the cumulative impacts of the proposed actions.

**Contention:** The appellant contends that the cumulative effects of the alternatives were not adequately addressed, considering past, present, and reasonably foreseeable activities as required by NEPA. Appellant states that the EA contains virtually no analysis of cumulative effects.

**Response:** Analysis documents within the project record clearly describe past, present, and reasonably foreseeable future activities relating to specific resources. (Docs 6 – 10). Included in these documents are discussions of cumulative effects.

The EA contains a quantitative and qualitative description of the alternatives in Chapter 1. Chapter 3 of the EA describes the affected environment by resource, including existing conditions and trends for vegetation, soils, economics, water and riparian habitat, wildlife and other resources (Doc. 11). Resource specific discussions of past, current and reasonably foreseeable future activities are also included in Chapter 3. Reasonably foreseeable actions including thinning, prescribed burning, road closures or obliteration, are discussed. Each alternative that was developed has a review of cumulative effects, by resource. This review includes discussions on connected actions, where appropriate.

**Finding:** Past, present, and reasonably foreseeable actions were considered in the analysis and detailed in the supporting process records. The EA discusses in detail the cumulative resource impacts resulting from grazing and cattle distribution.

**ISSUE 7:** The EA violates the Clean Water Act.

**Contention:** The appellant argues that the Forest Service failed to obtain water quality certification from the state of Arizona as required under Section 401 of the Clean Water Act. Appellant also argues that implementation of the decision will degrade water quality.

**Response:** There is no requirement to obtain certification from the State of Arizona for activities occurring in New Mexico. The project record contains evidence of the incorporation of water quality mitigating measures (Best Management Practices).

**Finding:** Adequate mitigation is planned and there will be no violation of the Clean Water Act.

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

The EA, and the process records which support it, clearly state the existing conditions in the watershed, and the past land management practices that have resulted in these conditions. Chapter III of the EA displays the resulting soil and vegetative conditions and trends from implementation of the proposed action and its alternatives. Improvements proposed within the alternatives are designed to, and will begin to restore long-term soil and vegetative conditions within the allotment. Monitoring provisions and mitigation measures are clearly identified in the EA to ensure improved site productivity.

**Finding:** The Responsible Official appropriately considered the effects of the proposed action, and its alternatives on the long-term productivity of the land and concluded that the inherent productivity of the land will be maintained and improved.

**ISSUE 9:** The EA violates the Administrative Procedures Act.

**Contention:** The appellant asserts, “There exists as yet no information which would indicate that the proposed alternatives will remedy the admitted problems on the allotments”.

**Response:** Within Chapter 3 of the EA, and the project record supporting it, the analysis clearly indicates that the selected alternative maintains and ultimately will improve watershed conditions (soils, vegetation, riparian conditions). The EA displays the effects of implementing the proposed action and its alternatives (Doc. 11). The Responsible Official’s decision rationale within the Decision Notice reflects consideration of the effects as disclosed in the EA (Doc. 14). Furthermore, the record reflects appropriate public involvement in the NEPA process and indicates that public comments were evaluated and considered in the planning process.

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