



United States  
Department of  
Agriculture

Forest  
Service

Santa Fe National Forest

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File Code: 1570-1/2200

Date: February 4, 2004

Laurele Fulkerson  
Forest Guardians  
312 Montezuma, Suite A  
Santa Fe, NM 85701

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RE: Appeals #04-03-10-0001/0002/0003/0004-A215, Peñas Negras, Ojito Frio, Palomas, and Vacas Allotments, Cuba Ranger District, Santa Fe National Forest.

Dear: Ms. Fulkerson:

This is my review decision concerning the appeals you filed regarding the Decision Notices and Findings of No Significant Impact, which authorize grazing and implement the grazing management strategy on the above-referenced allotments.

### **BACKGROUND**

District Ranger Romero issued decisions on November 4, 2003, for the Peñas Negras, Ojito Frio, Palomas, and Vacas Allotments. The decisions resulted in the selection of the following alternatives and authorizations:

Peñas Negras Allotment, Alternative 2, which authorizes 303 head of cattle to graze June through October annually.

Ojito Frio Allotment, Alternative 2, which authorizes 181 head of cattle to graze June through October annually.

Palomas Allotment, Alternative 2, which authorizes 109 head of cattle to graze June through October annually.

Vacas Allotment, Alternative 3, which authorizes 216 head of cattle to graze June through October annually.

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

My review of these appeals has been conducted in accordance with 36 CFR 215.18. I have reviewed the project record and the recommendation of the Appeal Reviewing Officer. My review decision incorporates the project 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 proposals were identified; c) the proposals and decisions are consistent with agency policy, direction and supporting information; and d) public participation and response to comments were adequate.

**APPEAL DECISION**

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decisions concerning the above-named allotments, which authorize grazing and implementation of management actions.

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

Sincerely,

/s/ Gilbert Zepeda  
GILBERT ZEPEDA  
Appeal Deciding Officer  
Forest Supervisor

Enclosure

cc: Christina Gonzalez, Patrick L Jackson, Berwyn Brown, David M Stewart, Steve F Romero,  
Mailroom R3 Santa Fe

**REVIEW AND FINDINGS**

of

Forest Guardians'

Appeals #04-03-10-0001/0002/0003/0004-A215

Peñas Negras, Ojito Frio, Palomas, and Vacas Grazing Allotments

**ISSUE 1:** The Forest Service violated NFMA by continuing to allow cattle grazing on the allotments without first evaluating the allotments' suitability for grazing; therefore, the choices of any of these alternatives are premature.

**Contention:** The appellant contends that NFMA was violated because the Responsible Official failed to evaluate the allotments' suitability for grazing, stating, "...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 suitability analyses, 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 decisions are 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 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 decisions are not premature.

**ISSUE 2:** The decisions violate the Santa Fe National Forest Plan and the Regional Guide by failing to manage riparian areas to achieve recovery.

**Contention:** The appellant asserts that the decisions fail to make the health of riparian areas a priority and, in so doing, violate both the forest plan and Regional Guide.

**Response:** The Regional Guide facilitated forest plan development. Requirements in the Regional Guide are reflected in the forest plan. There is no requirement for project-level compliance with Regional Guides.

In addition, riparian health was considered during the planning of these projects. Impacts to riparian conditions were identified as project issues (PR #37), and the alternatives selected respond to the riparian health issue through management changes that will have a positive effect on improving ground cover, reducing erosion and protecting riparian areas (PR #44).

**Finding:** Continued riparian improvement is ensured under these decisions, and there is no violation of the Santa Fe National Forest Plan or the Regional Guide.

**ISSUE 3:** The decisions violate the NFMA requirement to maintain viable numbers of all species.

**Contention:** The appellant contends that 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 numbers. The appellant believes there is a lack of management for riparian habitats and that the Forest Service must provide protection for riparian obligate species. The appellant contends that only a cessation of grazing in these watersheds combined with active restoration work will adequately provide for the minimum habitat needs for these species.

**Response:** The EA (PR #37), Wildlife and Fish Reports (PR #26 and #31), Rio Grande Cutthroat Trout Report (PR #22), Management Indicator Species (MIS) Report (PR #32), and Migratory Bird Analysis (PR #33) analyzed the effects to federally listed (ESA) species, MIS, and Region 3 Regional Forester Sensitive Species known or expected to occur in the proposed action areas.

The proposed actions were determined to be “May Affect-Not Likely to Adversely Affect” with respect to the Mexican spotted owl (BA/E, PR #40). The US Fish and Wildlife Service (PR #40) concurred with this determination on October 6, 2003.

Discussions of the effects of the proposed actions on the riparian areas are included in the Rio Grande Cutthroat Trout Report (PR #22), the watershed and soils analysis within the EA (PR #37), pp. 18-23, and a supplemental stream analysis (PR #42), which incorporates data from NMED (PR #29 and #35).

A thorough analysis of the effects of the proposed actions on indigenous wildlife was completed. No threat to the viability of any species was determined as a probable result of implementing the proposed actions.

**Finding:** Based on the review of the project record, the Forest did not violate the NFMA requirement to maintain viable numbers of all species.

**ISSUE 4:** Population survey data of Management Indicator Species is needed to ensure the maintenance of minimum viable populations of wildlife.

**Contention:** The appellant asserts that since the Forest Service lacks quantitative inventory data on many, if not all, MIS in the planning areas and the forest as a whole, and the scant data that it does have indicates some species are declining, the agency’s decisions are arbitrary and capricious.

**Response:** Data from which MIS trends were determined is found within the forest-level MIS analysis, which is included by reference in the project-level MIS analysis (PR #32). In keeping with the recent Corner Mountain decision (*Center for Biological Diversity v. US Forest Service*, No. CV 01-1106 WJ/RLP ACE), “The Forest has the discretion regarding the identification of the geographic area within which the effects of the environmental impacts are measured.”

**Finding:** The Forest completed an analysis of MIS that was sufficient to ensure that minimum viable populations would be maintained.

**ISSUE 5:** The issuance of the allotments' term permits must be suspended until the Santa Fe 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 term grazing permits' issuance project can be tiered."

**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). Regulations (36 CFR 219.35g) spell out that a revision schedule for each Forest Plan will be published. The Santa Fe 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.

**ISSUE 6:** 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:** "[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)).

Comments in response to the scoping letters identified local concerns on density of trees, riparian impacts from cattle, cattle damage, fence disrepair, economics, and recreation conflicts (PR #11 and #20). These issues were captured in the EA (PR #37, p. 7). One of the Alternatives Eliminated from Detailed Study (EA, p. 8) addressed the issue of no riparian grazing, and the Proposed Action addressed issues of fence disrepair, and grazing impact to areas including riparian areas.

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

**ISSUE 7:** The Forest Service violated NEPA because the EA fails to adequately consider and disclose the location and protocol for monitoring key forage utilization areas within the allotment.

**Contention:** The appellant contends the EA 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. Southwestern Region Rangeland Management Specialists, Ecologists, and other scientists have developed these guidelines over a period of 50 years.

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.

The record demonstrates that utilization standards for herbaceous forage will be 40 percent (conservative use). Livestock will be moved to another pasture or off the allotments, as applicable, when utilization standards are reached. Additionally, cattle will not enter the allotments until range readiness inspections indicate forage is ready to be grazed (PR #37 and #43).

**Finding:** Utilization standards for the allotments were developed in accordance with Forest Service Policy. 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 EA. As the selected alternative is implemented, all monitoring information will be available to the public.

**ISSUE 8:** 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:** A list of past, present, and future activities that are in the areas is shown in the EA (PR #37, pp. 15-16). This includes recreation, past logging, restoration projects, fishery management projects, fire history, and road management. Effects to resources are described as follows: soils, p. 18; water, pp. 21-22; vegetation, p. 25; wildlife, p. 31; heritage, p. 33; and recreation, p. 38.

**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 and for the purpose of determining significance and whether or not an EIS is needed.

**ISSUE 9:** The EA violates the Clean Water Act.

**Contention:** The appellant contends that the Forest Service failed to require the grazing permit applicants to obtain water quality certification from the State of New Mexico.

**Response:** The State of New Mexico does not require water quality certification for dispersed non-point activities such as livestock grazing. However, the record shows that the appropriate non-point source pollution considerations, which include Best Management Practices, were made during the planning process (PR #37). The project record also shows the New Mexico Department of Environmental Quality was consulted (PR #10 and #19). Improvement of riparian conditions was identified as a project objective (PR #37); and the alternatives selected respond to water quality concerns through management changes that will have a positive effect on improving ground cover, reducing erosion, and protecting riparian areas, while also providing for grazing use monitoring (PR #44).

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

**ISSUE 10:** The decisions violate the Multiple Use and Sustained Yield Act.

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

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

**Finding:** These decisions will improve land productivity and are, therefore, consistent with the Multiple Use and Sustained Yield Act.

**ISSUE 11:** 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 these allotments."

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

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