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File Code: 1570-1/2200

Date: September 6, 2001

Martin Taylor
Center for Biological Diversity
P.O. Box 710
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**CERTIFIED MAIL -
RETURN RECEIPT REQUESTED**
7099 3220 0000 8708 2285

Re: Appeal #01-03-00-0042-A215, Greenback Allotment Decision, Tonto Basin Ranger District,
Tonto National Forest

Dear Mr. Taylor:

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

Acting District Ranger Sensibaugh issued a decision on June 4, 2001, for the Greenback Allotment. The decision resulted in the selection of the following alternative and authorization:

Greenback Allotment, Alternative F, which authorizes 41-80 head of cattle, (cow/calf) to graze yearlong.

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 recommendation of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer concluded that the effects analysis disclosed in the environmental assessment did not consider the potential impacts to cultural resources within the allotment. Therefore, the Reviewing Officer recommended that the decision be reversed.



APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I am reversing the Responsible Official's decision. I am instructing the Responsible Official to disclose the effects of the proposed action on cultural resources in an environmental assessment and make a new decision. The Responsible Official is also instructed to provide for notice and comment of the environmental assessment in accordance with 36 CFR 215.5 and 215.6.

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, Tonto NF
District Ranger, Tonto Basin RD
Director of Rangeland Management, R3
Appeals and Litigation Staff, R3

REVIEW AND FINDINGS
of the
Center for Biological Diversity Appeal
#01-03-00-0042-A215, Greenback Allotment Decision

ISSUE 1: Proposed construction of new fencing in the Salome Wilderness and construction of new pipelines and watering troughs in Dinner “pasture” at the edge of the Salome Wilderness would violate the Wilderness Act.

Contention: The appellant contends the placement of new water sources on the western boundary of the Salome Wilderness Area will increase the level of cattle in the wilderness. The appellant alleges that while the Wilderness Act permitted continuance of existing grazing permits, it prohibited new or expanded grazing operations. Therefore, by placing new water sources at the wilderness boundary more cattle will be concentrated in the wilderness in violation of the Wilderness Act.

Response: Section 4(d)(4)(2) of the Wilderness Act states that grazing in wilderness areas, if established prior to designation of the area as wilderness, “shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.” The Secretary’s regulations, 36 CFR 293.7(a), state, “The grazing of livestock, where such use was established before the date of legislation ... shall be permitted to continue under the general regulations covering grazing of livestock on the National Forests...” Paragraph (b) further states “Additional improvements or structures may be built when necessary to protect wilderness value.”

In the legislative history of the Wilderness Act, it is clear that Congress intended livestock grazing and necessary facilities be permitted to continue in National Forest wilderness areas where such grazing was established prior to classification of an area as wilderness. Specifically, during the 95th Congress, Congress expressed concern that Forest Service regulations and policies were discouraging grazing in wilderness, or unduly restricting proper grazing management. Congressional concern was articulated in two House reports (95-620 and 95-1821) that specifically provided guidance on how Section 4(d)(4)(2) of the Wilderness Act, should be interpreted. The conferees recognized that land management agencies needed flexibility when managing wilderness grazing. Specifically, they made it clear that wilderness designation should not prevent the construction and maintenance of new fences or improvements that are consistent with allotment plans and/or are necessary for protection of the rangelands.

Forest Service policy at 2323.26(a) (2) prohibits the construction of new improvements in wilderness solely to accommodate increased grazing. The record for the Greenback Allotment demonstrates the construction of new fences and water improvements will not accommodate increased numbers of livestock. Rather, the selected alternative reduces permitted grazing from 285 adult cattle yearlong and 157 yearlings 1/1 to 5/31 annually to 41- 80 adult cattle yearlong (Volume IV, Doc. 3). Furthermore after 3 years of implementing Alternative F, production/utilization studies will be conducted to validate current estimates of forage capacity (Volume IV, Doc. 8).

The record also reflects the selected alternative will improve resource conditions. Portions of Salome Creek, currently accessible to livestock, will be excluded from grazing by constructing two short gap fences within the Salome Wilderness. These fences are necessary to provide the most rapid recovery of the stream channel and riparian vegetation (Volume IV, Doc. 2). Furthermore, proper distribution of livestock within grazed pastures has long been recognized as a necessary component of any management system in order to achieve desired soil, water, and vegetative conditions. There is nothing in the record to indicate it is unreasonable to provide additional water sources to improve livestock distribution and enhance overall watershed condition in the Dinner Pasture.

Finding: The Responsible Official interpreted the Wilderness Act, Secretary's Regulations, Congressional Grazing Guidelines, and Forest Service policy correctly.

ISSUE 2: No consideration was given to impacts to archeological resources.

Contention: The appellant contends that the EA fails to consider the potential impacts to archaeological resources, including the impacts of grazing and planned fencing and water developments.

Response: Neither the EA nor the administrative record documents that potential impacts to cultural resources within the allotment were considered in the analysis. The record does not include a cultural resources report or evidence that the SHPO was consulted regarding the effects of the proposed undertaking on historic properties, in accordance with the Region 3 Programmatic Agreement. The decision is not in conformance with current regulation (36 CFR 800.1[c]; 36 CFR 800.16[c]) and policy (2360/1950 letter, 2/11/98). The statement in the EA and DN that NHPA will be complied with for ground-disturbing activities is not sufficient to document that effects on cultural resources were taken into account and disclosed in the decision-making process.

Finding: The EA and the project record do not demonstrate compliance with the requirements of NHPA and NEPA with regard to cultural resources.

ISSUE 3: The Not Likely To Adversely Modify-designated critical habitat for the loach and spikedace minnows is inconsistent with Regional Guidance Criteria.

Contention: "The Guidance Criteria established Nov. 8, 2000 for determination of grazing effects on critical habitat for these two fish list 5 conditions, which must **all** be met for a finding of Not Likely To Adversely Modify to be applicable, thus avoiding a Likely to Adversely Modify finding and requiring formal consultation. One of these conditions is that the watershed must be in satisfactory condition. The "Biological Assessment...notes that the watershed of the Greenback allotment is in 'unsatisfactory condition.'"

Response: Critical habitat for the loach and spikedace minnows was not proposed for any streams within the Greenback Allotment. The closest critical habitat for these species is located on Greenback Creek, several miles downstream from the analysis area (AR III-3). The Forest's desert fish biologist inspected the proposed critical habitat and determined the small size of the stream would not provide the habitat necessary for spikedace minnow. He also concluded the proposed critical habitat appears to be potential habitat for loach minnow, but present conditions for occupation are limited due to high embeddedness in the riffles (AR III-3).

The Forest based the Not Likely To Adversely Modify Critical Habitat determination on the following:

1. The proposed action is designed to restore degraded watershed conditions;
2. The perennial portions of Greenback Creek will be fenced;
3. The distance between the allotment and critical habitat suggests that any impacts would be insignificant and discountable in the reach of critical habitat; and
4. Land uses on the private land between the allotment and critical habitat would probably overwhelm and mask any impacts that could be expected from cattle use on the allotment.

The Forest used the August 25, 1998, Guidance Criteria for their analysis to determine whether the proposed action might affect downstream critical habitat. The consultation team concurred with their findings that the project should not adversely modify critical habitat in August 2000, prior to the critical habitat criteria being developed. Since no critical habitat was proposed within the allotment and their analysis had determined the proposed action would not adversely modify critical habitat, the November critical habitat criteria were not applied.

Finding: The proposed action is consistent with the Guidance Criteria for Determining the Effects of Issuing Term Grazing Permits.

ISSUE 4: Failure to analyze inter-related and interdependent impacts.

Contention: The appellant contends that grazing on the permittee's private land is a connected action and that the effects of that action are not considered in the analysis. The appellant bases this assertion on a statement in the environmental assessment, which states that the no-grazing alternative would result in discontinuing the operation within two years.

Response: The cited statement in the environmental assessment refers to cancellation of the term grazing permit within two years and does not predict what would happen on private lands. The action alternatives all involve year-round livestock grazing authorizations. Management decisions concerning livestock on the Greenback Allotment do not have any bearing on activities on the permittee's private land.

Finding: Grazing on the permittee's private land is not connected to the authorization of livestock on the Greenback Allotment. There is no failure to analyze inter-related or interdependent impacts.

ISSUE 5: Failure to consider full socioeconomic impacts.

Contention: The appellant asserts that there is no estimate of possible economic benefits from no grazing, no disclosure of costs to the public for grazing alternatives, and no consideration of lifestyle and culture of the general public.

Response: An environmental assessment is a concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact (40 CFR 1508.9).

The Responsible Official considered comments on the environmental assessment from the appellant concerning these effects and responded to them in Appendix H to the environmental assessment. The Responsible Official defined the scope of the analysis to include social and economic effects that were identified as significant issues. The Responsible Official's response to comments indicates that appellant's comments did not expand that scope to include costs to the public for grazing alternatives, and consideration of lifestyle and culture of the general public.

Finding: The effects analysis is adequate for an informed decision and finding of no significant impact, given the scope of the analysis conducted.

ISSUE 6: Failure to rigorously and objectively explore alternatives.

Contention: The appellant cites numerous comments made on the environmental assessment, which the interdisciplinary team evaluated and determined not to be significant issues. The appellant suggests that by dismissing these issues, the range of alternatives is inadequate.

Response: Consideration was given to appellant's comments on the environmental assessment, pursuant to 36 CFR 215.6 (Doc. IV-8 Appendix G). The appellant's comments did not suggest additional alternatives.

“[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).

The interdisciplinary team reviewed public comments during scoping and found five issues significant to the proposed action. The environmental assessment documents initial consideration of 14 alternatives. During the analysis, 11 alternatives were dropped from detailed study; and one additional alternative was developed. Three action alternatives and the no-action alternative were carried through the analysis. The alternatives considered in detail are responsive to the identified issues. As there were no unresolved significant issues to drive formulation of additional alternatives, the alternatives considered constitute an appropriate range.

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

ISSUE 7: Expired Forest Plan makes the Decision Notice illegal under the National Forest Management Act (NFMA).

Contention: The appellant contends NFMA requires each National Forest to revise land and resource management plans (LRMP) at least every 15 years. The appellant alleges that until the Forest Service develops a new LRMP, implementation of individual actions must be suspended.

Response: There are no statutes or regulations that describe an expiration date for Land and Resource Management Plans. The Tonto 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 8: The finding of no significant impact is arbitrary and capricious.

Contention: The appellant cites the foregoing issues in contending that the Responsible Official's finding of no significant impact is arbitrary and capricious, and a violation of the Administrative Procedures Act.

Response: Reference is made to the foregoing responses.

Finding: The Responsible Official's finding of no significant impact is not arbitrary and capricious. There is no violation of the Administrative Procedures Act.