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Forest
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File Code: 1570-1/2200

Date: January 12, 2004

Laurele Fulkerson
Forest Guardians
312 Montezuma, Suite A
Santa Fe, NM 87501

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED
NUMBER:7000 2870 0000 1135 3847**

Re: Appeal #04-03-00-0007-A215, Diamond Butte Allotment Decision, Pleasant Valley
Ranger District, Tonto National Forest

Dear Ms. Fulkerson:

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 Sensibaugh issued a decision on October 15, 2003, for the Diamond Butte Allotment. The decision resulted in the selection of the following alternative and authorization:

Diamond Butte Allotment, Proposed Action, which authorizes 120 head of cattle (cow/calf), to graze yearlong and 30 head of yearlings to graze 5 months annually.

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: 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.



APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision concerning the Diamond Butte Allotment, which authorizes 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/ Abel M. Camarena
ABEL M. CAMARENA
Appeal Deciding Officer, Deputy Regional Forester

cc: David M Stewart, Christina Gonzalez, Mailroom R3 Tonto, Mark Sensibaugh

REVIEW AND FINDINGS

of

Forest Guardians'**Appeal #04-03-00-0007-A215**

ISSUE 1: The Forest Service violated 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: The 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: 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 (Tonto 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 2: The decision violates the Tonto National Forest Plan and the Regional Guide, by failing to manage riparian areas to achieve recovery.

Contention: The appellant asserts that the decision fails 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 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.

Finding: Continued riparian improvement is ensured under this decision and there is no violation of the Tonto National Forest Plan or the Regional Guide.

ISSUE 3: The decision violates the NFMA requirement to maintain viable numbers of all species.

Contention: 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 numbers. The appellant believes there is a lack of management for riparian habitat, 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# Vol. 1, tab 24), Wildlife Resource Report (PR# Vol. 1, tab 17), and BA/E (PR# Vol. 2, tab 3) analyzed the effects to federally (ESA) listed species, Management Indicator Species, and Regional Forester Sensitive Species known or expected to occur on the allotment. Discussions of the effect of the proposed action on the riparian areas are included in the wildlife, and riparian analysis reports (PR# Vol. 1, tabs 14 & 17). In fact 90 percent of the riparian vegetation is inaccessible to livestock grazing (PR# Vol. 2, tab 2 Response to Comments).

The proposed action was determined to “May Affect – Not Likely To Adversely Affect” the Arizona agave, bald eagle, loach minnow, spike dace, and Gila topminnow. The US Fish & Wildlife Service concurred with these determinations on June 20, 2003 (PR # Vol. 2, tab 4).

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

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 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: Data from which MIS trends were determined are found within the Forest level MIS analysis (incorporated by reference PR# Vol. 2, tab 5, Response to Comments). In keeping with the recent Corner Mountain decision (*Center for Biological Diversity v. 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 decision violates NFMA consistency and viability provisions by failing to adequately protect the Northern goshawk.

Contention: The allotment provides nesting or potential habitat for the Northern goshawk, yet fails to establish key foraging areas that limit utilization to an average of 20%.

Response: Neither Northern goshawks nor their habitat are found within or adjacent to the Diamond Butte allotment (PR# Vol. 1, tab 9).

Finding: The decision is consistent with NFMA consistency and viability provisions for the Northern goshawk.

ISSUE 6: The Diamond Butte Term Permit issuance must be suspended until the Tonto 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 Diamond Butte term grazing permit 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). 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 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 7: The Forest Service violated NEPA.

Contention A: The EIS for the proposed project is outdated and requires a supplemental EIS.

Response: NEPA for this project was initiated in 1995 but was not completed at that time. A new scoping letter began the current NEPA process in July of 2001, and the EA was sent out for public comment in March 2002. (See EA page 1 which is PR# 24, Volume 1 and Decision Notice which is PR# 5, Volume 2.)

Finding: There never was a prior EIS done on the project. The EA is up-to-date and considers all the most recent information and current public involvement and is adequate for the decision being made.

Contention B: 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). Significant issues for this project were economic effects and effects to wildlife species. The issue of carrying capacity of the grazing resource was used in development of the proposed action (EA pages 7-8 PR# 24, Volume 1). Alternatives were the current grazing management, less grazing (proposed action), and the no grazing alternative. The three alternatives considered led to a range of differing results.

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

ISSUE 8: The Forest Service violated NEPA because the EA fails to consider and disclose adequately 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 allotment.

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 woody species will be 50 percent use on the total number of dominate leaders each year and 30 percent use on sedges and deergrass in riparian areas. Upland utilization standards will be 45 percent on key species with exception of the Home, Jones Spring, and Marsh Creek Pastures where utilization of key species will be 40 percent.

Finding: Utilization standards for the Diamond Butte Allotment 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 9: The Forest Service violated NEPA by failing to consider and disclose the cumulative impacts of the proposed action.

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, “the EA contains virtually no analysis of cumulative effects...”

Response: Past projects in the area include road use and fire suppression (EA page 31 PR# 24, Volume 1). Effects to soils and vegetation from past activities and historic grazing were described in resource reports (Soils and vegetation PR# 15, Volume 1, wildlife reports referenced below, Heritage Resources report PR# 18, Volume 1), and the EA. There are no future projects known in the area (EA page 32). Other ongoing activities such as hiker access and hunting use were described in the Biological Assessment/Evaluation (page 2 PR# 3, Volume 2). The proposed action is consistent with Forest Plan management area direction for special areas such as Hells Gate Wilderness (pages 2-3, Affected Environment Wildlife Resource report PR# 17, Volume 1), and there are no changes to the adjacent areas evaluated for Wild and Scenic River qualities (Decision Notice PR# 5, Volume 2).

Finding: 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 10: The EA violates the Clean Water Act.

Contention: The appellant contends that the Forest Service failed to require the grazing permit applicant to obtain water quality certification from the State of Arizona.

Response: The State of Arizona 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 were made during the planning process. The project record also shows the Arizona Department of Environmental Quality (PR# 19 & 24, Volume 1) was consulted during the project scoping and planning phases. Improvements of watershed and riparian conditions, along with reduced erosion were identified as project objectives (PR# 24, Volume 1). In addition, the alternative selected responds to the water quality issue through management changes that will have a positive effect on improving ground cover, reducing erosion, and protecting riparian areas (PR#5, Volume 2).

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

ISSUE 11: 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 Tonto National Forest Plan. 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.

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

ISSUE 12: The EA violates the Administrative Procedures Act.

Contention: The appellant asserts, "There exists as yet no information which would indicate that the proposed alternative will remedy the admitted problems on this allotment".

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

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