



Appeal Deciding Officer  
1101 New York Ave.  
Alamogordo, NM 88310

September 7, 2004

**Via E-mail: [appeals-southwestern-lincoln@fs.fed.us](mailto:appeals-southwestern-lincoln@fs.fed.us)**  
**RE: Sacramento Allotment FEIS and DN**

On July 28, 2004, Frank Martinez, District Ranger for the Sacramento Ranger District in the Lincoln National Forest, issued a Decision Notice for the Sacramento Allotment Management Plan.

### **NOTICE OF APPEAL**

Notice is hereby given pursuant to 36 CFR 215.7 that Forest Guardians appeal to the Regional Forester, Southwestern Region, USDA Forest Service to overturn District Ranger Martinez's Decision Notice for the above-mentioned FEIS and allotment management plan.

### **REQUEST FOR RELIEF**

Forest Guardians requests administrative review of the decision to implement the selected alternative for this grazing allotment. We request that the decision notice be rescinded and withdrawn. Further, because of the degraded condition throughout the allotment and the importance of the area's watershed, we request that the allotment be held in total non-use until the allotment is brought into compliance with the Forest Plan.

The appellants further request that the Forest Plan be amended and should determine the entire Forest's suitability by weighing "the appropriateness of applying certain resource management practices to the project area in question" (36 CFR 219.3). This analysis has not been adequately conducted for this EIS, or for the Lincoln National Forest Plan.

Appellants contend that the decision to choose any alternative that calls for continued grazing on this allotment is without sufficient scientific basis.

Continued commercial livestock production in this area significantly affects Forest Guardians and its more than 1,400 members who value the area for its spiritual and recreational values, as well as its importance to the health of this watershed and to game and non-game fish and wildlife populations.

### **INTRODUCTION**

The approval of the EIS for this allotment violates numerous federal rules and regulations including the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., and the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 et seq., the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq., and the Administrative Procedures Act (APA), 5 U.S.C. §§ 706 et seq. This analysis has not adequately considered the impacts of this project on sensitive species, soil erosion, riparian areas, watersheds and water quality, recreation use, TES species and wildlife habitat. Compelling reasons for granting this appeal are presented below.

In general, we feel that the chosen alternative is based is arbitrary and capricious and allows for continued grazing in an area where it has clearly been shown to have detrimental effects and be inconsistent with other uses. This is a violation of the forest plan, NFMA and the APA. This decision calls for a reduction is

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elk in the areas without giving clear reasons as to why that is necessary. While it claims to be the Environmentally Preferred Alternative (DN-14), a close reading of the DN and FEIS show that, while the DN claims that the chosen alternative (B) will resolve 2 of the 5 major issues discussed in the FEIS, it actually fails to resolve any, and instead puts the environment and species in this allotment at continued risk. It also claims that there is a “need” to graze in this area, but the laws only require the agency to open up areas to grazing that do not conflict with other uses and only to the extent that it is consistent with the Forest Plan, which is not the case here.

Alternative B also continues to put riparian areas, water quality and Threatened and Endangered Species at risk, in violation of the CWA and ESA. Further, it fails to fully analyze current capacity, the effects of the decision on Dry Canyon, the economics of the alternatives, water use or cumulative impacts.

Both the history of this allotment, which was not or barely grazed from 1983-1989, and the FEIS show that the Environmentally Preferred Alternative is Alternative C, the no-grazing option. This alternative completely and clearly resolves four of the five issues considered in the FEIS. While the fifth issue should be considered, there is no legal requirement to provide for the economic viability of a single rancher.

### ***STATEMENT OF REASONS***

#### **A. THE DECISION NOTICE FOR THIS ALLOTMENT MUST BE WITHDRAWN BECAUSE IT VIOLATES THE NATIONAL FOREST MANAGEMENT ACT AND THE LINCOLN FOREST PLAN**

##### **1. The Forest Service violated NFMA by continuing to allow cattle grazing on the allotment without first evaluating the allotment’s suitability for grazing.**

The National Forest Management Act (NFMA), 16 U.S.C. § 1601 et seq., contains specific requirements that the Forest Service must follow in addressing actions on National Forests. One such requirement is that the Forest Service identifies “the suitability of lands for resource management” (16 U.S.C. §1604 (g)(2)(A)). Among other things, this means that the Forest Service must determine in forest planning the suitability and potential capability of the National Forest system lands for producing forage for grazing animals and for providing habitat for management indicator species. Even though a “no-grazing” alternative is included in the EIS, the benefits of that alternative to wildlife, watersheds, and non-game species are not fully analyzed. Without answering the absolutely crucial question of this land’s particular suitability for continued grazing, the agency fails to determine the appropriateness of its actions as required by law.

Although the Forest Service will likely claim that it has adequately considered the “suitability” for this allotment, it has not. It has never performed the suitability analysis that NFMA requires. “Suitability” has been taken to mean, “the appropriateness of applying certain resource management practices to a particular area of land, as determined by an analysis of the economic and environmental consequences and the alternative uses foregone” (36 C.F.R. § 219.3).

Because the EIS failed to address the economic and environmental consequences and the alternative uses foregone of each different alternative, as the regulations require, this analysis is inadequate. It simply has neither examined the costs of continued grazing on the allotment, nor the costs that might be incurred or the income that might be generated by devoting the allotment to alternative uses. The failure to conduct just this type of analysis not only undermines the scope of this EIS, but also violates the NFMA mandate to identify the alternative that comes closest to maximizing public benefit.

Our review of the literature shows that in many areas public lands livestock grazing—from strictly an economic efficiency standpoint—does not serve the broader public interest. This is particularly true when livestock grazing occurs in the habitat of economically valuable big-game species such as deer and elk, as is the case on this allotment. According to Loomis et al. (1991), “the incremental benefits of deer hunting gained under the 2 years-off, 1-year-on grazing system is greater than the lost economic value of the forage to the rancher as computed by USDA economic research.” Souder (1997) also addresses the relative

values of and benefits of uses other than commercial livestock production, concluding that deer and turkey hunting and dispersed recreation are for more economically valuable than livestock grazing. The point is not that the results of an economic analysis would be similar, but that they would help determine other economically valuable uses of the land.

Another report published by the Forest Service itself makes different, but highly relevant conclusions. That report, entitled "An Economic Evaluation of the Oak Creek Range Management Area, Utah" (GTR-INT-224), concludes that even though a project may have some benefits for livestock production or even possibly for watershed enhancement, it does not make sense economically. The report speaks for itself:

The project was not economically feasible. Given the high costs of implementing and managing the project and the relatively low value of the increased forage production, the costs of the project for exceeded its benefits to livestock production. Attempts to account for non-market benefits and refine cost and benefit estimates have limited impact on the overall lack of cost-effectiveness. GTR-INT-224.

It is quite clear that the intent of the NFMA regulations is to combine environmental and economic analyses that then enable the agency to maximize the net public benefit. By failing to conduct this type of analysis for all uses of the land, rather than just for elk hunting and watching, the Forest Service failed to consider whether permitting grazing on this allotment makes economic sense, despite the clear requirement of 36 C.F.R. § 219.3 that it do so.

Similarly, nothing in the planning record for this allotment contains a discussion of the "environmental consequences and the alternative uses foregone," as the regulations also require. There is no evidence that the Forest Service has ever considered the relative environmental gains that could be achieved by closing portions of the allotment, or the entire allotment to livestock use. Likewise, although this allotment have valuable recreation and fishery values, nothing in the plan shows that the Forest Service considered that the areas might be better suited to recreation than to grazing. In addition, the analysis fails to consider what changes in the levels and types of recreation would result from a discontinuation of grazing in portions of the allotment, or the entire allotment.

By failing to perform these required analyses, the Forest Service has attempted to defeat the purposes of the planning regulations that require adequate consideration of wildlife and other uses of the range resource. See 36 C.F.R. § 219.20. See also "Final Report of the Committee of Scientists on the NFMA Regulations," 44 Fed. Reg. 26 627-28 (1979), Wilkinson and Anderson, Land and Resource Planning in the National Forests, 64 Or. Law Rev. 29, 111 (1985) (citing Minutes of the Committee of Scientists, November 1-2, 1978). The Forest Service must not be permitted to conclude the planning process for this allotment without complying with these requirements.

The failure to conduct just this type of cost/benefit analysis not only undermines the scope of this Environmental Assessment, but also violates the mandate of NFMA to identify the alternative that comes nearest to maximizing the public benefit (Bartlett 1983).

In addition to the direct economic comparison of forage values for livestock and native game, other research demonstrates that fee-hunting enterprises can generate significant revenue to the operator, as well as local communities (Fitzhugh and Loomis 1986, Loomis and Fitzhugh 1989, and Roach and Loomis 1993). Analyzing the economic benefits of allocating all forage to native ungulates would enable the local communities and the Forest Service to identify the alternative which best maximizes the net public benefit.

While commodity values increase as livestock grazing decreases in many areas, non-commodity values such as wildlife watching also increase as livestock pressure decreases. This is true especially in riparian areas (Crandall et al 1992; Crandall and Colby 1992). Utilizing this type of information is critical in analyzing how to maximize the net public benefit as required by NFMA.

As explained above, it is quite clear that the intent of the NFMA regulations is to combine environmental and economic analyses that enable the agency to maximize the public benefit. In the case of this allotment,

the Forest Service deliberately chose not to conduct a thorough economic analysis, which would have enabled them to compare the economic benefit of allocating forage to domestic livestock versus big game and non-game wildlife.

## **2. The Decisions Violate the Lincoln National Forest Plan and the Regional Guide by Failing to Manage Riparian Areas to Achieve Recovery.**

The Decision Notice fails to make the health of riparian areas and watersheds a priority and, in doing so, violate both the Lincoln National Forest Plan and the Southwestern Regional Guide. The EIS make it clear that the no grazing alternative will lead to more extensive and more rapid improvement of watershed conditions than any of the other alternatives. It also clearly identifies possible risks of Alternative B, which at best would bring only a “slight improvement”(3-13) in the surface waters of the allotment and a “gradual improvement of riparian communities” (3-14). The FEIS fails to state whether these improvements would actually be significant. Further, it is clear that there is still risk: “The maximum allowable forage use levels and limited grazing durations set for the winter and summer pastures *may* decrease the trampling of riparian areas and the use of woody riparian species by livestock” (emphasis added.) Note that the FEIS states that impacts *may* be reduced, not that they *will be* reduced. Clearly this alternative continues to put riparian areas at risk. The same arguments apply to soils (3-7) and vegetation.

In addition, it must be asked, “Where is this slight improvement coming from?” Although the proposed action appears to be a reduction in use from the current permitted 553 cattle, actual use on the allotment has been 250-330 cattle, and degradation continues. How will the proposed “reduction” to a range from 200-412 cattle provide for even slight improvements to the riparian areas, soil or vegetation? There is no basis for this arbitrary and capricious contention.

The FEIS also fails to identify possibly risks if overgrazing or trespasses occur. These risks are significant, particularly in drought years. Since the agency has failed to take a “hard look” at the effects of Alternative B on these areas, it has also failed to satisfy the Forest Plan requirement that the restoration of such degraded riparian areas be a management priority. Specifically, it requires the agency to:

Manage riparian areas to provide optimum vegetation and ecological diversity (p. 13);

Emphasize restoration of lowland habitats (ROD, p. 90); and

Implement management strategies that will restore good conditions to degraded riparian communities as soon as possible. (MSO Forest Plan Amendments.)

Restoration of riparian areas should be effected in as little time as possible. The FEIS admits that the preferred alternative – if successful – will take decades to improve riparian areas. The preferred alternative neither emphasizes restoration nor provides for optimum vegetation and ecological diversity. It provides only the potential for minor improvements in these key riparian zones. As these hydraulic systems (most likely with riparian past and potential) are currently degraded, then an alternative that allows grazing in the riparian areas, with all its associated trampling, water soiling, and destruction of vegetation, cannot be considered acceptable. The decision that selected this alternative for implementation is in violation of the Forest Plan’s mandate to prioritize riparian health, and must be withdrawn.

Further, both the Forest Service and Fish and Wildlife Service appear to misread the third requirement noted above. It does NOT read, “Implement management strategies *as soon as possible* that will restore good conditions to degraded riparian communities.” However, both agencies seem to argue that quick implementation of weak management strategies that will take decades to improve conditions satisfy the requirement. This is a misreading of the requirement and a violation of the Forest Plan Amendments. The requirement is clearly to provide management that will ensure the restoration, *as soon as possible*, of good conditions to degraded riparian communities. Both the FEIS and USFWS BO note that less than 10% of riparian zones associated with perennial waters in this allotment are in satisfactory condition. Thus there is no dispute about the extent of degradation. The only alternative that provides for clear improvement to riparian areas is Alternative C, the No grazing alternative.

The Forest Service must manage riparian areas to protect productivity and diversity by taking actions to protect and improve dependent resources and give preferential consideration to resources dependent on riparian areas. Riparian areas are areas of special concern in the Forest Plan because of their vital importance to the health of fish and wildlife and the overall well being of the watersheds. Accordingly, the Forest Service must not allow activities or resource uses that adversely affect riparian dependent resources.

### 3. The Decision Violates the National Forest Management Act's Requirement to Maintain Viable Numbers of All Species.

In addition to the consistency requirement, the Forest Service's regulations impose specific forest management standards related to sensitive species, requiring the Forest Service to "manage [fish and wildlife habitat] to maintain viable populations of [native species]." See 36 C.F.R. § 219.19. The Forest Plan further provides that the Forest Service must manage sensitive species to sustain viability and prevent the need for listing as threatened or endangered.

NFMA directs the Secretary of Agriculture to issue plans that will provide for diversity of plant and animal communities . . . in order to meet overall multiple-use objectives . . . See 16 U.S.C. § 1604(g)(3)(B). Toward that end, the Forest Service has adopted regulations requiring that fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrates species in the planning area. See 36 C.F.R. § 219.19. A viable population is defined as one that has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. Id. To insure viability, habitat must be provided to support at least a minimum number of reproductive individuals. This duty requires planning for the entire biological community—not for one species alone. See Seattle Audubon Society V. Moseley, 798 F. Supp. 1484, 1489 (W.D. 1992).

In issuing grazing permits on national forest lands, the Forest Service must manage sensitive species to sustain viability and prevent the need for listing as threatened or endangered. Additionally, the Forest Service has a duty under its own NFMA regulations to "manage [fish and wildlife habitat] to maintain viable populations of [native species]" in approving grazing permits and developing AMPs. See 36 C.F.R. § 219.19. Site-specific decisions must be consistent with the plain terms of the Forest Plan. Cuddy Mountain, 137 F.3d at 1377. In addition, the Forest Service's site-specific projects must comply with the Service's viability regulations embodied in section 219.19. Inland Empire Public Lands v. U.S. Forest Service, 88 F.3d 754, 760 n.6 (9<sup>th</sup> Cir. 1996). "Regulation 219.19 ultimately requires the Forest Service to maintain viable populations" (Inland Empire, 88 F.3d at 761 (9<sup>th</sup> Cir. 1996).) The Forest Service has violated both of these provisions in its management of this allotment.

Despite this direction, the Forest Service has failed dramatically in its efforts to protect riparian obligate species and their riparian habitats, due primarily to continued livestock grazing. Livestock grazing alters riparian habitat and watershed health, thereby affecting the habitat of riparian obligate species, in a variety of ways. The scientific literature is voluminous on these effects. In fact, a 1991 Southwestern Region report concluded:

There are still millions of acres of land and thousands of miles of stream courses that remain in an unsatisfactory condition. Riparian areas, instead of being lush, green oases in the hot, dry climate, are void of vegetation, eroding and, frequently, as dry as the uplands.

This assessment is particularly important in light of the fact that habitats on private lands, especially in Arizona and New Mexico are, by and large, in severely degraded condition.

ONE OF THE CONCLUSIONS IN THE FEIS MAKES IT CLEAR THAT THE VIABILITY STANDARD IS NOT BEING UPHELD: "Forage use is at a level that assures continued existence of *most* threatened and endangered species" (3-76 – emphasis in the original). THE REQUIREMENT IS NOT THAT *MOST* SPECIES REMAIN VIABLE, BUT THAT *ALL* SPECIES REMAIN VIABLE. IT IS BOTH INCREDIBLE AND IRRECONCILABLE THAT THIS STANDARD IS BEING IGNORED FOR

SPECIES THAT ARE ALREADY THREATENED AND ENDANGERED. (More details in the ESA section below.)

The issuance of these permits, in violation of both the Forest Plan and NFMA's implementing regulation, is arbitrary and capricious and must be reversed.

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

The Forest Service is required to collect population trend data for Management Indicator Species (MIS) and for all affected species (as required by section 219.26) to fulfill its duty to maintain population viability. The courts have determined that this duty cannot be carried out by simply monitoring habitat, but requires population surveys. See Sierra Club v. Martin, 168 F.3d 1 (11th Cir. 1999). Adequate population monitoring has not been done for any MIS or other species that may be affected by continued grazing on this allotment. While habitat models may have a role in determining population viability, those models must first be verified through population sampling (Lint et al., 1999). However, at the present time, the Forest Service is violating the monitoring provisions of the National Forest Management Act.

Section 219.26 creates a general obligation that the Forest Service gathers and keeps quantitative data to ensure species diversity in the planning area. It states in relevant part:

Forest Planning shall provide for the diversity of plant and animal communities and tree species consistent with the overall multiple use objectives of the planning areas. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition. [Emphasis added]

Section 219.19 specifically requires that the Forest Service monitor populations of Management Indicator Species, stating:

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area . . . (1) In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species . . . (6) Population trends of the management indicator species will be monitored and relationships to habitat changes determined. [Emphasis added] (1)

As these regulations make abundantly clear, the Forest Service has an affirmative obligation to gather and maintain quantitative wildlife population data. Since the Forest Service lacks quantitative inventory data on many, if not all, MIS in the planning area, as well as the forest as a whole, and the scant data that it does have indicates some species are inexplicably declining, the agency's decision is arbitrary and capricious as a matter of law. See Sierra Club v. Glickman, 974 F.Supp. 905, 936 (E.D. Tex. 1997) ("The unambiguous language of the MIS regulations requires collection of population data.")

In this case, the EIS and DN violate NFMA and NEPA by failing to give significant data on MIS, and avoiding the key question: What decision would actually be of most benefit to wildlife?

Also, please note that the 10<sup>th</sup> Circuit has decided that the status of MIS have to be monitored with actual numbers, rather than just making the assumption that available habitat ensures their health

**5. Choice of Any Alternative is Premature**

The Forest Service's contention that a suitability analysis of this allotment will support commercial livestock production in this area is premature and purely speculative. It is obvious that the Forest did not

use the entire NEPA process to conduct a suitability analysis, but instead dismissed serious consideration of a suitability review early on in the NEPA process. Further, the argument (based on Wilderness Society v. Thomas) that a suitability analysis occurred in the previous Forest plan analysis fails to hold water. While Forest Plans could be the proper place for a suitability analysis, the information and process outlined in the Lincoln Plan EIS simply fails to either specifically show that the Sacramento allotment areas are suitable for grazing, or to give guidance specific enough to conclude that are suitable.

In choosing any alternative that calls for a predetermined management action prior to performing a suitability analysis specific to these areas, the agency has made a foregone conclusion without all available information. Specifically, there is no scientific data upon which the agency can rely that supports the choice of an alternative allowing any cattle grazing on this already heavily impacted allotment.

This appellant requests that the agency comply with existing regulations and approve total non-use for this allotment until such a time as an in-depth suitability analysis has been completed and its results fully analyzed. Only after the analysis has been completed will the agency have the requisite scientific information in hand to make a rational and reasoned decision, using the best available data. To do otherwise would presuppose an outcome of a scientific study not yet completed, and would clearly fail to account for the present condition of these areas in an informed manner.

**6. The term permit issuance must be suspended until the Forest revises its land and resource management plan and until the Forest Service develops a Renewable Resources Program.**

The Forest and Rangeland Renewable Resources Planning Act (“RPA”) and the National Forest Management Act Amendments (“NFMA”) provide unambiguous direction to the Forest Service regarding forest-planning duties at the national and local levels. The purpose of these planning requirements is to ensure that all site specific decisions made by the Forest Service are consistent with goals, objectives, standards, and guidelines established for the National Forest system as a whole, as well as for individual National Forests. Plans completed at the national, regional, forest, and project levels are integrated to provide a consistent framework for achieving these goals and objectives. See 36 C.F.R. § 219.4. Project level decisions are tiered to forest level decisions, which are in turn tiered to regional and national level decisions. Id.

In addition, the RPA Program’s supporting analyses contained in the RPA Assessments are critical for determining whether or not individual projects authorized by the Forest Service are consistent with resource demands placed on individual National Forests by the American people as a whole, taking into consideration the demands placed on forests in all ownerships. See 16 U.S.C. § 1601(a).

The RPA requires the Forest Service to develop a Renewable Resources Program at least every five years, and an Assessment at least every ten years. See 16 U.S.C. § 1602, 1601(a). The Forest Service developed the last Renewable Resource Program in 1992.

The NFMA requires each National Forest to revise land and resource management plans *at least* every 15 years. See 16 U.S.C. 1604 (f)(5). These requirements are reiterated and amplified in forest planning regulations at 36 C.F.R. § 19.10(g) and the Forest Service Handbook at FSH 1922.6.

The Lincoln National Forest land and resource plan recently expired, before the term permit for this allotment expires. Thus, there is no legally adequate RPA Program or land and resource management plan to which the term permit reissuance project can be tiered. There have been no rulings by any federal courts and no directives issued by the National Headquarters of the U.S. Forest Service authorizing the Forest to continue implementing its outdated LRMP. Until the Forest Service develops a new RPA Program and new LRMP, implementation of individual actions, including this environmental analysis must be suspended.

The suspension of the term permit reissuance is necessary because the goals, objectives, standards, and guidelines contained in the new National Forest LRMP are no longer relevant or defensible in light of

significantly changed resource demands by the public, significantly changed environmental and economic conditions, and significant changes in Forest Service management direction. These include:

1. Significant new information about the status, distribution, and effects of management activities on threatened, endangered, sensitive, and management indicator species.
2. Significant new scientific information about the beneficial role of natural disturbance and the detrimental effects of suppressing fires, insect outbreaks, or floods and salvaging timber from areas affected by these disturbances.
3. Significant changes in the social and economic setting in which the Forest operates, including far less demand for commodities produced by the Forest and far greater demands for preservation of old growth forests, wildlife habitat, clean water, recreation sites, and other goods and services produced by natural forest ecosystems.
4. Significant changes in management direction, including the adoption of integrated resource management, ecosystem management, and principles of ecological and economic sustainability set forth in the Forest Service's new forest planning regulations. FR Vol. 65 No. 218, Thursday, November 9, 2000.
5. Vast changes in the composition and structure of forests managed by non-Forest Service landowners caused by increases in road building, development, oil and gas leasing, industrial tree farming, developed recreation, and other uses that have caused detrimental cumulative impacts to terrestrial and aquatic ecosystems managed by the Forest.
6. New information about the inadequacy of the LRMP's standards and guidelines in protecting environmental, economic, social, and cultural resources.

These significant changes have been well documented by the Forest Service in the context of its annual monitoring and evaluation reports, as well as the five and ten year reviews of the LRMP required by 36 C.F.R. § 219.10 (g). These significant changes in public demands, conditions, and management direction render the goals, objectives, standards and guidelines in the LRMP obsolete and inadequate for protecting and restoring ecological and economic sustainability.

**7. The term permit reissuance must be suspended until the Forest publishes a new Final Environmental Impact Statement supporting a revised LRMP.**

Continued implementation of the current LRMP not only violates the RPA and the NFMA, but also violates the National Environmental Policy Act ("NEPA"). This is because the Forest has failed to correct, update, revise, amend, or supplement the Final Environmental Impact Statement ("FEIS") prepared for the LRMP, and continues to tier project decisions to this FEIS despite the fact that it is woefully outdated, inaccurate, and obsolete.

For instance, the project relies on the analyses contained in the original LRMP FEIS to disclose and mitigate effects on resources as a result of continued livestock grazing on grazing allotments in the National Forest. The FEIS's analyses of direct, indirect, and cumulative impacts to these resources, however, is now so outdated and so inaccurate that it is meaningless for all practical purposes.

The Forest Service's regulations implementing NEPA clearly recognize that EISs that cover program and project activities over an extended time need regular updating. For instance, the Environmental Policy and Procedures Handbook requires a review of EISs every three to five years, and requires that EISs be corrected, amended, or revised when "the agency makes substantial changes in the proposed action that are relevant to environmental concerns" or when "there are significant new circumstances or information relevant to environmental concerns" that have "bearing on the proposed action or its impacts" (FSH 1909.15, 18.03, 18.1, 18.2).



As discussed above, there have been both substantial changes in how the Forest's LRMP has been implemented, as well as significant changes in environmental, economic, social and cultural conditions since the record of decision for the LRMP was signed. Despite these changes, the Forest has not corrected, amended, revised, or supplemented the LRMP's FEIS and, many years later, continues to tier project level decisions to this irrelevant document.

The Forest Service is also in violation of NEPA because it is authorizing site-specific actions that have adverse environmental consequences and preclude the choice of reasonable alternatives that will be considered in the revised LRMP and accompanying EIS. Taking actions that result in adverse environmental impact or which preclude alternatives while an EIS is being prepared is prohibited by 40 C.F.R. § 1506.1(a), (b). In the area, there are many resources of concern that may offer additional levels of protection by the revised LRMP. For instance, the project area contains roadless areas, old growth, and potential wilderness--resources that are specifically identified by the Forest Service's new planning regulations as necessary for promoting ecological and economic sustainability.

**8. The permittees for this allotment do not fulfill USFS base property requirements.**

The USFWS BO for this allotment notes, "The permittees on the Sacramento Allotment do not have any adjacent private lands" (p. 9). This is a significant requirement for holding a term permit as noted in the Forest Service manual:

Private land used in conjunction with the permitted use will be known as "base property." The permittee must own, in fee, base property with livestock handling facilities upon it such as fences, corrals, waters, forage, etc. There is no acreage requirement. Forests may designate an acreage requirement through Forest Supplements. (FSM 2231.22a – Term Permits.)

The BO also notes that these private lands are "an integral part of the allotment" (p. 30). Because the current permittee does not have adequate base property with livestock handling facilities the USFS preferred alternative calls for the establishment of numerous holding traps. In these holding traps, the preferred alternative would allow 70% utilization, in violation of the guidelines for MSO recovery. The lack of adjacent lands also led to the need for the livestock to over-winter on the allotment, increasing the utilization violations. It is clear that the lack of adequate base property and associated handling facilities is causing significant increased impacts to this allotment. Issuing a permit to a permittee without adequate base property is a violation of Forest Service policy and legal requirements.

**9. Parts of the Sacramento and Dry Canyon Allotments appear to be supplying Alamogordo's water. These areas should be closed to grazing.**

The Forest Plan calls for the agency to maintain Level A management in the Alamogordo watershed (p. 87 and 211), which prohibits livestock grazing. The USFWS BO clearly notes: "City of Alamogordo water developments impact poppy habitat by reducing water availability during germination of seedlings and throughout the year" (p. 61). While the FEIS is sparse in terms of maps that identify the location of allotment and watershed boundaries, it is clear that the parts of the Sacramento and possibly the Dry Canyon allotments are in the Alamogordo watershed as they are supplying water to the city. These areas MUST be closed to grazing to satisfy the Forest Plan requirements.

**B. THE DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT FOR THIS ALLOTMENT MUST BE WITHDRAWN BECAUSE THEY VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT.**

**1. Issuance of the Term Grazing permit violates the most basic requirements of the National Environmental Policy Act.**

The USFS has failed to discharge its obligations under NEPA to perform a proper EIS for the issuance of a term grazing permit on this allotment. First, the EIS fails to consider reasonable alternatives to the

proposed action. Second, the EIS fails to take a "hard look" at potential effects of the proposed action and the no grazing alternative. Third, the EIS fails to adequately disclose the exact names, location, and utilization limits of all upland and riparian key areas within the allotment. Fourth, the EIS fails to consider adequately the cumulative impacts of the proposed action together with those of reasonably foreseeable actions.

**a. The Forest Service Has Violated NEPA Because the EIS Fails to Analyze a Range of Reasonable Alternatives.**

NEPA and regulations implementing it require agencies to consider a range of reasonable alternatives to an agency action in preparing environmental review documents. NEPA requires agencies to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources. See 42 U.S.C. §4332(2)(E).

The courts and Council on Environmental Quality ("CEQ") regulations implementing NEPA make clear that the discussion of alternatives is "the heart" of the NEPA process. See 40 C.F.R. § 1502.14. In order to "sharply define the issues and provide a clear basis for choice among options by the decision maker and the public," environmental documents must explore and evaluate "all reasonable alternatives." *Id.*; see also Forest Service Handbook 1909.15; Environmental Policy and Procedures Handbook 1909.15-92-1, Sec. 14; 57 Federal Register, 43180,43198 cow.2 (Sep. 18, 1992).

This duty to consider reasonable alternatives is independent and of a wider scope than the duty to complete an environmental impact statement ("EIS"). 40 C.F.R. § 1508.9(b); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989) ("Consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process"); Natural Resources Defense Council v. U.S. Dept. of the Navy, 857 F.Supp. 734, 739-40 (C.D. Cal.1994) (duty to consider reasonable alternatives is independent and of wider scope than the duty to complete an EIS); Sierra Club v. Watkins, 808 F.Supp. 852, 870 (D.D.C. 1991) (same); Sierra Club v. Alexander, 484 F.Supp. 455 (N.D.N.Y. 1980). Although an agency need not consider every possible alternative, it must consider reasonable alternatives "necessary to permit a reasoned choice." Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1180-81 (9th Cir. 1990). Put differently, an agency must consider those alternatives that "would alter the environmental impact and the cost-benefit balance" (Bob Marshall Alliance, 852 F.2d at 1228, quoting Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F. 2d 1109, 1114 (D.C. Cir. 1971)).

**b. Case law interpreting NEPA also makes clear that the Forest Service must take a hard look at alternatives which not only emphasize different factors but which lead to differing results.**

The Forest Service "must take a 'hard look' at alternatives which not only emphasize different factors but which lead to differing results" (Citizens for Environmental Quality v. U.S., 731 F.Supp. 970, 989, citing California v. Block, 690 F.2d 753 (9th Cir. 1982)). In this EIS, it appears that the Forest Service did precisely what the court condemned in the Citizens for Environmental Quality case, where Califo production (here, livestock or AUMs) was the goal, and they devised two or three action alternatives to achieve that predetermined goal. The action alternatives would permit similar levels of livestock grazing over similar periods of time. This is the epitome of a result-biased decision making process. It constitutes an illegitimately narrow range of alternatives, notwithstanding the statutory mandate of NEPA.

The National Forest Management Act and implementing regulations require that allotment level and permit decisions must conform to 36 C.F.R. § 219.10(e). By examining only one action alternative and refusing to analyze others that result in a lower stocking rates for the allotment, the Forest Service has directly violated NEPA's requirement that the agency address a "range of reasonable alternatives" which not only emphasizes different factors, but also leads to differing results.

**c. The Forest Service Has Violated NEPA Because the EIS Fails to Consider and Disclose Adequately the Location and Protocol for Monitoring of Key Forage Utilization Areas within the allotment.**

Given NEPA's requirements that agencies take a "hard look" at proposed actions and fully disclose all components of the proposal to allow for public participation, the EIS falls short in that it fails to disclose to the public crucial aspects of the monitoring program included in the proposal. The National Forest Management Act requires that the Forest Service designate key forage grazing areas, or key areas, in riparian and upland areas on all allotments for the purposes of monitoring forage utilization. Furthermore, as a result of the Biological Opinions on the 1996 Forest Plan amendments, the Forest Service is also obligated to designate key forage monitoring areas under the Endangered Species Act. The intended purpose of the key forage area requirement is to limit forage utilization in key upland and riparian areas to ensure protection of threatened and endangered species habitat.

Since forage utilization monitoring is such a critical aspect of federal land grazing permit administration, and so critical to compliance with both the ESA and the NFMA, details of this monitoring must be made known to the public, the Forest Service decision maker and the FWS for purposes of consultation pursuant to the ESA. In particular, the EIS must disclose the names, locations, forage utilization limits, and monitoring protocol for each and every key area within the allotment. In failing to disclose and map key areas and specific forage utilization requirements for those areas within the allotment, the Forest has failed both to take a "hard look" at the proposed action and to disclose adequately all of its components and potential consequences.

Further, the utilization standards on this allotment are unacceptable, especially considering the fact that this allotment contain habitat for the Mexican spotted, a species that requires healthy canopy including all age classes of woody vegetation for its survival. In addition, as mentioned in our comments, the utilization standard in riparian areas containing Mexican spotted owl habitat should never be more than 20 % in order to ensure the recovery of the species according to a document on "Mitigation for the Mexican Spotted Owl and Peregrine Falcon on Grazing Allotments for Annual Operating Plans" issued by the Coconino National Forest.

**d. The Forest Service Has Violated NEPA Because the EIS Fails to Consider and Disclose Adequately the Cumulative Impacts of the Proposed Action.**

Environmental assessments must take a hard look at the "environmental impacts" of proposed actions, but also the cumulative impacts. See 40 C.F.R. § 1508.9. CEQ regulations succinctly define cumulative impact as: the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. See 40 C.F.R. § 1508.7. See also 40 C.F.R. § 1508.8 (effects include ecological, aesthetic, historical, cultural, economic, social or health impacts, whether direct, indirect or cumulative); 40 C.F.R. § 1508.25(c) (EIS shall consider three types of impacts, including cumulative effects); 40 C.F.R. § 1508.25(a)(2) (EISs must analyze the effects of actions "which when viewed with other proposed actions have cumulatively significant impacts"). If the combination of these cumulative effects would result in significant impacts to the human environment, the Forest Service must prepare a full environmental impact statement. See Inland Empire Public Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1993).

Forest Service policy on NEPA closely follows the CEQ regulations in regard to the necessity of analyzing cumulative effects. That policy, adopted after public comment and publication in the Federal Register, states:

Individual actions when considered alone may not have a significant impact on the human environment. Groups of actions, when added together, may have collective or cumulative impacts, which are significant. Cumulative effects that occur must be considered and analyzed without regard to land ownership\boundaries. Consideration must be given to the incremental effects of the past, present, and reasonably foreseeable related actions of the Forest Service as well

as those of other agencies and individuals. Forest Service Handbook 1909.15; Environmental Policy and Procedures Handbook 1909.15-92-1, Sec. 15.1; 57 Fed. Reg. 43180, 43199 cow.1 (Sep. 18,1992).

The Forest Service cannot assess the impact of issuance of a term grazing permit on this allotment in isolation. Instead, it must examine the effects of past and reasonably foreseeable recreation, logging, roading, species introduction and other activities throughout the watershed. Most importantly, it must analyze the cumulative effects of 100 or more years of livestock grazing on this allotment. See Inland Empire, 992 F.2d at 981 (Forest Service may not analyze timber sales in isolation).

Because the EIS contains virtually no analysis of cumulative effects, it fails utterly to take the required "hard look" required by NEPA. The EIS provides no further explanation of why this is the case and fails to explain why this difficulty excuses compliance with the mandatory language of the regulations and the Forest Service's own guidance. In fact, the EIS does not even attempt to catalog other activities occurring within the allotment's boundaries that may also have impacts on water quality, wildlife, recreation, aquatic and riparian habitats, vegetation, or threatened, endangered and sensitive species. (Please refer back to the argument noting the failure of the EIS to include the cumulative impacts of grazing on the allotment's hydrology and vegetation that may have virtually destroyed its riparian areas.)

The only information concerning cumulative effects in the record is contained in the EIS. The information provided is insufficient. The analysis fails to analyze or disclose the potential for cumulative significant impacts on any other value or resource (e.g., water quantity, water quality, vegetation, recreation, etc.) on the allotment. One federal court has held explicitly that such a limited cumulative effects analysis is blatantly illegal. The court stated, "The failure to consider whether there is a potential for cumulative impacts on any aspect of the environment except wildlife species as a result of these projects cannot be characterized as a 'truly informed exercise of discretion,' nor can it be said to amount to the requisite 'hard look' at the environmental consequences of granting the permit in question" (Alpine Lakes Protection Society v. U.S. Forest Service, 838 F.Supp. 478, 484 (W.D.Wash. 1993)).

Given these gross inadequacies, the agency cannot be said to have taken a "hard look" at the potential effects of the issuance of a livestock term grazing permit, when taken together with those of other past, present, or reasonably foreseeable actions that affect the allotment. Indeed, the agency took no look at all. This thwarts the underlying purpose of NEPA, which is to "insure that environmental information is available to public officials and citizens before decisions are made" (40 C.F.R. § 1500.1(b)); see also Sierra Club v. Watkins, 808 F.Supp. at 858. Because this failure clearly violates NEPA, its implementing regulations, and Forest Service policy, the Decision must be set aside.

**e. The Forest Service Has Violated NEPA Because the EIS Fails to Consider the full economic implications of this action.**

The EIS failed in its obligation to clearly weigh the economic costs and benefits of this project. With elk forage use and elk hunting a key issue related to the grazing of this allotment, the FEIS dismisses the notion that Wildlife and Fish User Days should be considered in the analysis (Appendix D-10), due to a lack in accepted methodology. Although the methodology may not be clear, hunting and other recreation use on the allotment clearly do have an impact on the local economy that the FEIS must consider. This failure is a violation of NEPA.

In addition, the economic analysis done on the impacts to the permittee is flawed. In examining Alternatives A and D, the analysis assumes that the maximum capacity would consistently be used. The recent and long-term history of the allotment clearly shows that that is not the case. This over-estimates the PNV for the permittee and thus overestimates the impacts of all the other alternatives.

**f. The EIS fails to address grazing and its effects of Invasive/non-native species.**

Livestock grazing, which is an extensive land use throughout the Southwest, can lead to the proliferation of noxious weeds (Jones 2001). Grazing by livestock can aid the spread and establishment of alien species in

three ways: 1) dispersing seeds in hair/wool and dung; 2) opening up habitat for weedy species; and 3) reducing competition from native species by eating them (Fleischner 1994). A multitude of studies have found increased densities, cover or biomass of exotic plant species in grazed versus ungrazed sites (Green and Kaufman 1995; Drut 1994; Harper et al. 1996). Kitchen and Hall (1996) found that spring grazing by sheep resulted in higher percent cover of exotic annuals, and favored halogeton and cheatgrass (Bromus tectorum) expansion. Grazing can reduce leaf area to the point where native plants cannot complete photosynthesis, or can prevent native plants from reaching reproductive maturity (Knapp 1996). Annual noxious weeds, such as cheatgrass, have a competitive advantage over native plants in overgrazed environments. Livestock also can transport noxious weed seeds on their hides or hooves (Knapp 1996).

In a recent extensive literature review, Jones (2001) illustrated how cattle disseminate weed seeds in their hair/wool and hooves; increase the “invasibility” of sites; and maintain weedy communities by preferentially grazing on natives. The ability of cattle to increase a site’s susceptibility to invasion has received the most attention from the scientific community. Sites become invisable due to increased bare soils as a result of grazing, which offer greater opportunity for weed establishment, with less competition.<sup>1</sup> Evans and Young (1972) found that increased soil erosion [shown to be caused by grazing] also loosens surface soils and helps bury seeds. Exotic seeds adapted to more erosion-prone environments will benefit from this alteration while native species likely will not. Deposition of nitrogen-rich livestock dung also increases invasion of nitrophilous weeds such as cheatgrass by stimulating germination and enhancing growth over that of native plants (Evans and Young 1975; Smith and Nowak 1990; Trent et al. 1994; Young and Allen 1997). Finally, cattle grazing can compound the above impacts by creating warmer and drier soil microclimates, through soil compaction, and loss of plant, microbiotic crust and litter cover. The resulting warmer, drier microclimate reduces the competitive vigor of many native grasses (Piemeissal 1951; Archer and Smeins 1991), thus further increasing viability of aggressive exotics.

Once they are established, weeds negatively impact western arid ecosystems in numerous ways. Weed infestations reduce biodiversity (Randall 1996), increase fire frequency (Esque 1999; Brooks et al. 1999), disrupt nutrient cycling (Vitousek 1990), alter soil microclimate (Evans and Young 1984), reduce effectiveness of wildlife habitat (Davidson et al. 1996; Knick and Rotenberry 1997), and can expedite loss of topsoil in xeric environments (Lacy et al. 1989).

The evidence for cattle’s implication in spread and establishment of exotic weeds is greater than any evidence to the contrary. Examples of studies documented cattle harms to native plant communities include:

- Rawlings et al. (1997) found that the part of Canyonlands National Park that had been grazed most intensively prior to 1967 has since been extensively invaded by cheatgrass.
- In a study of 530 different rangeland sites in southern Utah, Gelbard (1999) found that cheatgrass cover was five times greater on sites without cryptobiotic soils (disturbed by either cattle or motorized use) than on sites with undisturbed crusts (and 64% of all sites that were disturbed and lacking crusts were attributed to cattle grazing).
- Bich et al. (1995) found that both density and basal area of Indian ricegrass (Orzopsis hymenoides), a native bunchgrass, increased with decreasing grazing intensity, while density and foliar cover of snakeweed (Gutierrezia spp.) increased with increasing grazing intensity.

The productivity of cheatgrass is extremely variable – in consecutive years, tenfold differences in cheatgrass production have been observed (Young and Allen 1997). Cheatgrass production is extremely low under drought conditions, and may provide no forage in some years (Young and Allen 1997). Stewart and Young (1939, as cited in Knapp 1996) determined that perennial grasses produced twice as much vegetative biomass as cheatgrass in wet years, and 12 times as much herbage as cheatgrass in drought conditions. In areas where cheatgrass forms dense monocultures, forage options are extremely limited, and small variations in weather may lead to large-scale population swings among native grazers.

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Many areas in the West that were once dominated by perennial plant species are now dominated by introduced annuals such as those mentioned above. Overgrazing is a major cause of this conversion. Rather than addressing the threat of exotic weed proliferation, the BLM claims, "grazing can help prevent the spread of undesirable plant species" and can minimize, or at least have no effect on, the spread of invasive weeds such as cheatgrass (See Jones 2001). In supporting this claim, the agency cites Sheley (1995), an article that appears in a magazine, not a peer-referred journal. This paper is a two-page set of grazing recommendations, based on no experimental evidence of its own (or any other studies for that matter) that goes into no detail on the "proper grazing management practices" that can supposedly control weeds (Jones 2001).

Despite this widespread scientific understanding that grazing contributes to noxious weed proliferation, the FEIS fails to consider this issue. Further, the USFSW BO notes that, "the Forest Service indicated that they included noxious weeds within their herbaceous ground cover height measurements," and "The Lincoln National Forest has previously indicated that species such as elk, voles, and some birds that depend significantly on meadows for foraging or reproducing may be negatively affected by the spread of these noxious weeds (p. 43). The inclusion of noxious weeds in measurements of available forage lead to over estimates of palatable forage and thus over-estimates of stocking capacity.

**Given these general considerations that show a failure in the NEPA analysis and the legal considerations that follow, we urge you to reverse the DN and implement the no-grazing alternative, to best serve the public lands and the public at large. This is the only alternative that will clearly improve allotment conditions and the only alternative that will fully comply with existing laws, regulations and management criteria.**

**C. THE DECISION TO APPROVE THIS PERMIT VIOLATES THE MULTIPLE USE AND SUSTAINED YIELD ACT BY FAILING TO MANAGE THE LAND FOR THE HIGHEST PUBLIC BENEFIT AND BY PERMITTING ACTIVITIES WHICH RESULT IN PERMANENT IMPAIRMENT OF THE PRODUCTIVITY OF THE LAND.**

The Multiple Use and Sustained Yield Act of 1960 requires the Forest Service to maintain conditions of its lands such that the resources are utilized in a:

[C]ombination that will best meet the needs of the American people, making the most judicious use of the land for some or all of the these renewable resources . . . without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output. (See PL 86-517 § 4(a)).

In the state of New Mexico, the cattle industry has virtually "privatized" National Forest lands for its own benefit, excluding those values, including clean water, native wildlife and plant species, and pristine recreational settings, which are far more valuable to the state and the nation than the trivial amount of beef produced from public lands. Annual employment and income generated by recreation, tourism, fisheries, and water related industries in Arizona is far greater than that generated by the cattle industry, yet the Forest Service continues to subsidize this industry through below market permit rates and publicly financed planning and resource protection programs. Livestock grazing on these lands not only results in direct financial loss to the American people through these subsidies, but creates significant "external" costs by damaging recreation sites, clean water, fish, and wildlife, as well as forcing expenditures on costly recovery efforts for these resources. The Forest Service, by approving this permit, which almost exclusively benefits one small corporation, is continuing to support a handful of commercial interests at the expense of the American people as a whole. This is especially relevant on an allotment where the Forest Service intends to spend a considerable sum on "improvements," yet generates a minimal amount annually from grazing fees.

The Multiple Use and Sustained Yield Act prohibits activities that permanently impair the productivity of the land. See PL 86-517 § 4(b). There is no question that livestock grazing, in the past, has permanently

degraded the productivity of our riparian zones, native fisheries, grasslands, and forests. Forest Service literature is replete with studies documenting these effects. The decision to approve the permit in question fails to recognize this prohibition, and will continue to impair the long-term productivity of lands on the National Forest.

#### **D. THE DECISION TO APPROVE THIS PERMIT VIOLATES THE ENDANGERED SPECIES ACT**

The Endangered Species Act requires that habitat for listed species be maintained or improved to a condition that allows for the survival and eventual delisting of such species. The EIS for this allotment reveals that habitat conditions are far from satisfactory. These conditions describe an area whose habitat quality is severely compromised. These severely deteriorated range conditions, combined with the degraded condition of riparian areas on these allotments, call into question whether the Forest Service has given any consideration to its mandate to protect habitat for endangered species. To continue to allow grazing in areas that are already so severely degraded is a clear violation of the Endangered Species Act, and for this reason the decision for the allotments must be withdrawn.

The FEIS makes it clear that both the Sacramento prickly poppy and the Sacramento mountain thistle may be adversely affected by this project. Both of these species have extremely limited ranges, but the majority of their ranges lie within the project area. Both species continue to be harmed by numerous factors, including livestock trampling and herbivory. While the proposed mitigation measures would reduce impacts from livestock, it is clear that some impacts would continue. In addition, it is noted that water withdrawals create drought-like impacts with negatively affect these species, and “drought conditions reducing the availability of moisture during the critical seedling establishment period adversely affect the long-term population size and potential for survival” (FEIS 3-51), but the relationship between water withdrawal for livestock grazing and its affects on these species are not full explored. This is a violation of both NEPA and the ESA.

Simply stated, the viability of both the Sacramento prickly poppy and the Sacramento mountain thistle remain in jeopardy under the chosen alternative, and may be adversely affecting their habitat. Choosing continued grazing over endangered species in areas where clear conflicts with these species have been identified is simply not acceptable and in violation of various laws and regulations.

For the Mexican Spotted Owl (MSO), the USFWS BO indicates that they expect two MSO protected activities centers (PACs) to be taken as a result of this project (p.1). While the 196 MSO recovery plan anticipated 151 PACs would be affected by activities that would result in incidental take, with 26 in the allotment’s Basin and Range area, to date there have already been 262 PACs adversely affected, with 41 in the allotment’s vicinity. The allotment BO provides no rational as to why they are allowing more take than expected, and still concluding that additional take will not result in jeopardy to the species. In addition, the BO notes: “Because of its size and location, the Basin and Range East RU likely plays a very important role in the metapopulation dynamics of the MSO in the Southwest (Stacy 2000)” (p. 28).

In assessing whether the proposed grazing on the Sacramento will affect MSOs, the USFWS uses a Catch-22 logic that puts the MSO at risk of further jeopardy. On one hand, the BO clearly documents that existing standards for forage utilization have been consistently violated and that riparian areas have continued to degrade (p. 31-32) However in approving a no-jeopardy biological opinion on this proposal, the USFWS makes explicit its assumption that the only way that the MSO’s viability will be protected is if the standards are consistently met. They state: “We do not consult on permit enforcement issues.... However, the above activities have occurred within the action area and affect the current status of the species” (p. 32). The FWS admission of significant impacts due to routine violations of the permit terms and condition is noteworthy primarily because the agency then refuses to take these violations into account in informing the BO’s conclusions.

For instance, the BO documents that Mexican and long-tailed voles – key prey species important to the survival of MSO, “were found in low numbers or were non-existent within many of the key areas monitored.... For the majority of key areas... did not maintain herbaceous ground cover height during the

summer grazing season” (p.32). Putting aside the question of whether utilization standards will be upheld, even if they are, both agencies presume that the recovery of these prey species will be instantaneous. They also acknowledge that the allotment area is often affected by drought. It is impossible to uphold the 4” herbaceous cover standard during drought when grasses do not reach 4” during the growing season. The FEIS, and specifically, the preferred alternative fail to make contingencies for it, and simply acknowledge in their BA and DEIS that 35% standards could be exceeded during dry periods and thus affect the MSO prey cover.

Yet, in another moment of contradictory and sometimes confusing logic, the USFWS BO notes, “we expect that the Forest Service will administer the Sacramento Allotment permit consistent with the Lincoln National Forest Plan, which includes maintaining the proposed herbaceous ground cover height and forage utilization, even during drought conditions” (p. 50). Where are the provisions in the Preferred Alternative that ensure consistency with the Forest Plan? The BO also notes that the “United States District Court for the District of New Mexico found that the Forest Plan Amendments mandates the Forest Service to maintain forage use that assures the recovery and continues existence of listed species, and requires that they ensure consumption of forage by livestock and wild ungulates (e.g. elk) does not exceed set utilization standards (p. 52). Given the Forest Service’s history in being unable to control over-utilization, and numerous statements made during this NEPA analysis, no such assurances can be provided that utilization will not be exceeded. Thus this proposal is inconsistent with the Forest Plan. Though the FWS’ BO fails to state it so clearly, the net effect of all of this confusing logic is that as soon as the standards of the Lincoln national forest plan are not complied with, which everyone knows is a routine occurrence, the current no-jeopardy opinion will be invalid. Given this information we believe livestock grazing is not feasible and should be ended the Sacramento Allotment.

Further, the 8/31/04 designation of critical habitat for the MSO brings with it new, more protective requirement that the Forest Service and USFWS ensure the recovery of the MSO by preventing the adverse modification of critical habitat. The Forest Service can no longer carry out activities with the goal of preventing or altering projects that prevent the MSO from being jeopardized. At various points, both the FEIS and USFWS BO indicate that MSO habitat will be adversely modified if the preferred alternative is implemented.

The BO states, “These conservation measures represent actions proposed by the Forest Service that were evaluated below as part of our jeopardy analyses” (p. 11). This and other statements in the BO clearly indicate that the USFWS assessed the impacts of the project in terms of jeopardy, and did not consider the question of adverse modification and its associated higher recovery standard. If it had done so, the only possibly conclusion is that grazing and its related impacts do adversely modify (now) critical habitat in much if not all of the allotment. Consultation must be reinitiated to consider adverse modification, or since the BO and FEIS clearly document adverse modifications to critical habitat, the DN must be reconsidered.

#### **E. THE FEIS AND DN VIOLATE THE ADMINISTRATIVE PROCEDURES ACT**

The Administrative Procedures Act (APA) provides that agency actions must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (5 U.S.C. § 706(2)(A)). If an agency action is determined to be any of the above, it will be held unlawful and “set aside” by a reviewing court.

The courts have consistently found that an agency action is arbitrary and capricious when it completely disregards the scientific data and recommendations of experts. See American Tunaboat Association v. Baldrige (738 F 2d 1013-1017 (9th Cir. 1984)). This is especially true when the scientific information is gathered and the recommendations are made by the agency’s own experts (Id. at 1017).

It has been demonstrated over at least 70 years that cattle grazing is highly detrimental to this land. As of yet, no information exists that would indicate that the proposed alternative will remedy the admitted problems on this allotment. Also, given the currently degraded condition of the land due to historical and ongoing livestock grazing, the decision to continue to graze the land is inexplicable. The preferred



alternative simply does not represent a reasoned and rational decision reflecting the highest and best use of the land. The appellants submit that, based on data cited in the EIS, there is little known about the effects this alternative would have on the ecosystem. What is known suggests that those effects would be detrimental. Given the poor conditions on this allotment, the decision to choose any alternative to continue livestock grazing cannot be considered a rational one and would likely be considered an arbitrary and capricious decision under the APA.

By failing to implement the decision that will result in the most expeditious recovery of riparian habitats and watershed conditions, the U.S. Forest Service is violating its duty to conserve species under the Endangered Species Act. Based on the analysis in the EIS, the Forest Service admits that the no-grazing alternative would result in the quickest recovery of degraded watersheds and riparian habitats. As such, the no-grazing alternative is the decision that must be implemented to avoid violating both the ESA and APA.

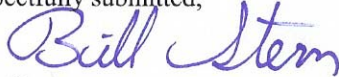
### CONCLUSION

As aptly demonstrated above, this FEIS is seriously flawed in numerous respects. After extensive ongoing livestock grazing throughout the allotment, along with numerous permit violations, the allotment is in severely degraded condition.

The appellants reassert their claim that the decision results in clear negative affects to recreation, soils, vegetation, wildlife, water quality, threatened, endangered and sensitive species, the decision to implement any action alternative is without proper legal, scientific and economic foundation and merit.

Therefore, the appellants request that the Forest Service require total non-use of the allotment until such a time as site-specific studies inform the Forest Supervisor that this area has fully recovered from past grazing impacts and that recreation conflicts can be resolved. Upon completion of these studies and a Forest-wide suitability analysis, we request a new Forest-wide EIS for this allotment incorporating these findings before any grazing is resumed.

Respectfully submitted,



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