

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

FOREST GUARDIANS; and the NEW MEXICO)
WILDLIFE FEDERATION,)
Plaintiffs,)
v.)
UNITED STATES FOREST SERVICE, an)
administrative agency of the United States)
Department of Agriculture; MIKE JOHANNNS,)
Secretary, United States Department of Agriculture;)
MARK E. REY, Under Secretary for Natural)
Resources and Environment, United States)
Department of Agriculture; and DALE)
BOSWORTH, Chief, United States Forest Service,)
Defendants.)

No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This action for declaratory and injunctive relief challenges the Forest Service’s dismissal of three administrative appeals filed by Plaintiff Forest Guardians. Each of those appeals contested a decision regarding National Forests in New Mexico. Forest Guardians’ appeals were dismissed pursuant to provisions in the Forest Service’s appeals regulations (“appeals regulations”) that limit administrative appeals to those who submit “substantive comments” during a 30 or 45-day comment period designated by the Forest Service. This limitation on administrative appeals violates the Appeals Reform Act, which requires that the Forest Service provide the right of appeal to any “person who was involved in the public comment process . . . through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action.” Appeals Reform Act, Pub. L. 102-

381, § 322(c), 106 Stat. 1374, 1419 (1992) (codified at 16 U.S.C. § 1612 note) (“ARA”).

Because Forest Guardians notified the Forest Service of its interest in, and had submitted written comments about the agency’s decisions before filing the three administrative appeals, the Forest Service’s dismissals of the appeals violated the ARA. Plaintiffs now seek declaratory and injunctive relief to redress the injury caused by those violations of law.

PARTIES

2. Plaintiff Forest Guardians is a non-profit conservation organization whose mission is to preserve and restore native wildlands and wildlife in the American Southwest through reform of public policies and practices. Forest Guardians’ approximately 2,000 members, most of whom reside in New Mexico and Arizona, engage in wildlife viewing, outdoor recreation, and other activities throughout the Southwest, and are particularly concerned with the management of public lands. The health and integrity of ecosystems throughout Western public lands is important to these members’ aesthetic, scientific, and recreational enjoyment of public lands. Because Forest Guardians and its members regularly comment on, appeal, and litigate over actions taken by the Forest Service, having an administrative appeals process that adequately includes public participation is critical to maintaining their involvement and protecting their interests in the management of the National Forests of the Southwest. Forest Guardians filed at least three administrative appeals of Forest Service decisions in New Mexico which the agency dismissed pursuant to its appeals regulations.

3. Plaintiff New Mexico Wildlife Federation (“NMWF”) is a statewide non-profit organization of sportsmen, conservationists, and other concerned citizens dedicated to the protection of our environment and the wise use of our natural resources. The New Mexico

Wildlife Federation has members who hike, camp, hunt, fish, view and study wildlife, and enjoy wilderness experiences within National Forests in New Mexico.

4. Plaintiffs and their members have a strong interest in the notice, comment, and appeal procedures governing National Forest System projects and activities, because the opportunity to participate in the Forest Service's administrative process is integral to their ability to protect their recreational, scientific, aesthetic, and conservation interests in National Forest lands. Plaintiffs and their members have used these procedures to provide information to the Forest Service and advocate their positions about how National Forest lands can be better managed. Plaintiffs and their members also have sought to protect their interests in National Forest lands by appealing Forest Service decisions that violated laws governing the National Forest System.

5. The above-described aesthetic, conservation, recreational, scientific, and procedural interests of Plaintiffs and their members were adversely affected and irreparably harmed by Defendants' violations of the Appeals Reform Act when the Defendants used the appeals regulations to deny Forest Guardians' right to appeal. Plaintiffs have no adequate remedy at law.

6. Defendant United States Forest Service is an agency of the United States Department of Agriculture. The agency and its officers are responsible for the lawful management of the National Forest System.

7. Defendant Mike Johanns is the Secretary of the U.S. Department of Agriculture. Secretary Johanns is sued in his official capacity.

8. Defendant Mark Rey is the Under Secretary for Natural Resources and the

Environment of the U.S. Department of Agriculture. He is sued in his official capacity.

9. Defendant Dale Bosworth is the Chief of the U.S. Forest Service, an agency within the Department of Agriculture. Chief Bosworth is sued in his official capacity.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question) and 1346(a)(2) (civil action against the United States).

11. Venue lies in the district New Mexico pursuant to 28 U.S.C. § 1391(e). Plaintiffs' offices are located in New Mexico, and a substantial portion of Plaintiffs' members reside in New Mexico. The decisions appealed by Forest Guardians involved National Forest lands located in New Mexico, and all of the events giving rise to the claim occurred in New Mexico.

12. All available administrative remedies have been exhausted. The challenged agency actions are final and subject to this Court's review under 5 U.S.C. §§ 702, 704, and 706(2).

THE APPEAL REGULATIONS AND THE APPEALS REFORM ACT

13. On June 4, 2003, new regulations went into effect governing notice, comment, and appeal procedures for National Forest System projects and activities ("appeals regulations"). These regulations limit the right to bring administrative appeals of proposed National Forest System projects and activities to "individuals and organizations who submit substantive written or oral comments" during the 30-day comment period for an environmental assessment, or 45-day comment period for a draft environmental impact statement. 36 C.F.R. § 215.13(a) (2004). Under this rule, people who notified the Forest Service of their interest in the proposed action, including those who submitted substantive comments on the proposed action, but who did not do

so during the specified comment period, may not appeal. By contrast, the Appeals Reform Act guarantees the right to appeal to “a person who was involved in the public comment process . . . through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action.” ARA § 322 (c).

14. Forest Guardians submitted substantive written comments and/or notified the Forest Service of its interest and concern regarding three agency proposals to issue grazing permits for three groups of grazing allotments, each in a different National Forest in New Mexico. After the Forest Service received these comments and expressions of interest and concern, it issued a final decision governing livestock grazing in each group of allotments.

15. Within the time provided by the appeals regulations to administratively appeal those decisions, Forest Guardians filed an administrative appeal of each of the three final decisions. However, the Forest Service dismissed all three appeals due to lack of substantive comments submitted during the 30-day comment period, citing 36 C.F.R. 215.16(a)(6). The Forest Service’s dismissal of Forest Guardians’ appeals violated the ARA, because Forest Guardians “was involved in the public comment process . . . through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action.” ARA § 322(c).

COUNT 1

Defendants violated the ARA when they dismissed Forest Guardians’ appeal of the Horse Mountain, Deep Canyon, San Juan, and Nogal Grazing Allotments decisions

16. Forest Guardians received a July 2, 1997 scoping letter from the Forest Service regarding the issuance of grazing permits on the Horse Mountain, Deep Canyon, San Juan, and Nogal grazing allotments (“Horse Mountain Allotments”) in the Magdalena Ranger District in

Cibola National Forest, New Mexico (“1997 Horse Mountain Scoping Letter”). The purpose of this letter was to “inform the public about the proposed federal action and to solicit comments from interested and affected parties.”

17. Forest Guardians received an August 21, 2001 Environmental Assessment Grazing Analysis for the Horse Mountain Allotments (“2001 Horse Mountain EA”) from the Forest Service. The cover letter accompanying the 2001 Horse Mountain EA requested that interested parties “provide [their] comments by the close of business day on September 21, 2001” to the Magdalena Acting District Ranger.

18. On August 28, 2001, Forest Guardians submitted ten pages of substantive comments in response to the 2001 Horse Mountain EA to the Magdalena Acting District Ranger.

19. In its August 28, 2001 comments, Forest Guardians expressed several concerns about the 2001 Horse Mountain EA, including:

a. The Forest Service’s decision that the continuing problem of Pinyon-Juniper encroachment was outside the scope of this analysis, even though it is the direct result of livestock grazing, “has enormous repercussions for ecosystems throughout the west.”

b. The Forest Service’s “vegetative ‘treatments’ consisting of thinning and prescribed fire to restore the ‘forest health’ of areas that, like the analysis area, have been degraded from the presence of domestic cattle” represent a refusal “to look at the root cause of these problems, which is the continued presence of the private livestock industry on our public lands.”

c. The Forest Service manipulated “its analysis to make the continuation of grazing seem the only defensible alternative.”

d. The Forest Service's argument "that under the No Grazing alternative . . . 'wildlife in some habitats would be displaced and may cause over-utilization in key areas' . . . is an insult to the reader's intelligence, since it is obvious that riparian areas and upland vegetation coexisted and thrived with wildlife for centuries before" widespread grazing on federal western lands.

e. That "[w]hile the EA contains a section on soil condition and erosion and claims that studies showed that most of the allotment was in fair condition with respect to its rangeland and grazable wooded sites," there were no studies or summaries so a reviewer could evaluate the EA for design errors or its credibility.

20. Forest Guardians received a second scoping letter from the Forest Service, dated August 13, 2003 ("2003 Horse Mountain Scoping Letter"). This scoping letter stated that the 2001 Horse Mountain EA was being reviewed and updated, that "a decision [on the 2001 Horse Mountain EA] was not issued because additional information was needed," and that because "changes have been made in the Proposed Actions," another public scoping was being conducted. The Forest Service requested public comments by August 27, 2003.

21. On August 27, 2003, Forest Guardians responded to the 2003 Horse Mountain Scoping Letter, expressing its "interest and concern" in the proposed action, requesting a copy of the draft Environmental Assessment, and asking that it continue to be informed about the allotments.

22. In its August 27, 2003 comments, Forest Guardians raised several concerns with the 2003 Horse Mountain Scoping Letter, including:

a. That it was very concerned about the continuation of grazing on these

allotments, especially because the San Juan allotment was over-grazed in recent years. “For instance, utilization on the San Juan allotment was recorded at 80% in 2000” and that “considering the toll that excessive utilization has taken on these allotments, utilization levels should be set at far lower levels than 35% on uplands and riparian areas.”

b. That “*any* continuation of livestock grazing is inconsistent with the broader public interest mandate of the Forest Service.”

c. That “the so-called ‘improvements’ are enormously costly, to the benefit of a few.”

d. That the Forest Service should give “serious consideration to the No Grazing alternative for these allotments.”

e. That “at a minimum the costs and benefits of continuing grazing on these allotments [should be] seriously analyzed, as well as the impacts of the action.”

23. On December 23, 2003, the Forest Service issued a second Environmental Assessment for the Horse Mountain Allotments (“2003 Horse Mountain EA”).

24. The 2003 Horse Mountain EA discussed the scoping process involved in the environmental analysis. On page four, the agency listed the 1997 Horse Mountain Scoping Letter, the 2001 Horse Mountain EA, and the 2003 Horse Mountain Scoping Letter as a part of the scoping and public involvement process.

25. The 2003 Horse Mountain EA was virtually identical to the 2001 Horse Mountain EA, with only minor differences.

a. Both the 2001 and the 2003 Horse Mountain EAs discussed three alternatives for the Horse Mountain Allotments: the No Livestock Grazing Alternative; the No

Change/No Action Alternative; and the Proposed Action Alternative.

b. The No Grazing Alternative was identical in both the 2001 and 2003 Horse Mountain EAs.

c. In both the 2001 and 2003 Horse Mountain EAs, the No Change Alternative continued the current grazing schedules and numbers/kinds of livestock for all four allotments. If needed, existing fences, wells, and windmills would be maintained, through cost share agreements with the permittees under the 2003 EA, and through range or wildlife funding under the 2001 EA.

d. The proposed grazing system for the Horse Mountain Allotment was almost identical in the 2001 and 2003 EAs. Both proposed a one herd four pasture deferred rotation system for 10 months. The 2001 EA proposed permitted numbers from 150 to 405 head of cattle, while the 2003 EA proposed 153 to 412 head of cattle.

e. In the 2001 Horse Mountain EA, the proposed grazing system for the Deep Canyon Allotment consisted of a four-pasture one herd deferred rotation system with 92 to 243 head of adult cattle with calves for 10 months, while the 2003 Horse Mountain EA proposed a seven-pasture, one herd deferred rotation grazing system with 92 to 250 adult cattle with calves for 10 months.

f. In the 2001 Horse Mountain EA, the proposed grazing system for the San Juan Allotment consisted of a six-pasture one-herd deferred rotation system while the 2003 Horse Mountain EA proposed a four-pasture, one-herd deferred rotation grazing system. Both proposed yearlong grazing, with 149 to 300 head of adult cattle with calves, or 1,788 to 3,600 head months.

g. In the 2001 Horse Mountain EA, the proposed grazing system for the Nogal Allotment consisted of a five-pasture one herd deferred rotation system with 97 to 144 head of adult cattle with calves for the entire year. The 2003 Horse Mountain EA proposed a four-pasture, one-herd deferred rotation grazing system with 91 to 135 head of adult cattle with calves for the entire year.

26. At page 35 and 36 of the 2003 Horse Mountain EA, the Forest Service acknowledged it received a response from Forest Guardians on the 2001 Horse Mountain EA and the 2003 Horse Mountain Scoping Letter. Appendix A to the 2003 Horse Mountain EA cited and addressed six comments submitted by Forest Guardians on the 2003 Horse Mountain Scoping Letter.

27. On December 23, 2003, the Forest Service released a letter saying a “legal notice” was scheduled to appear on December 27, 2003 in the *El Defensor Chieftain*, of a thirty day notice and comment period to solicit comments on the 2003 Horse Mountain, Deep Canyon, San Juan, and Nogal Grazing Allotments’ EA. It stated that “[t]he purpose of this comment period is to allow the public an opportunity to provide early and meaningful participation on a proposed action prior to a decision being made by the Responsible Official.” Further, it provided that comments would “be accepted for 30 calendar days following the publication of legal notice.”

28. On April 15, 2004, the Forest Service issued a Decision Notice and Finding of No Significant Impact for the Horse Mountain and Deep Canyon Allotments (“Horse Mountain DN/FONSI”) and a Decision Notice and Finding of No Significant Impact for the San Juan Grazing Allotment (“San Juan DN/FONSI”).

29. Both the Horse Mountain and the San Juan DN/FONSI selected the Proposed Action, described in the 2003 Horse Mountain EA.

a. The Horse Mountain DN/FONSI permitted maximum allowable forage use levels of 30-40% in key areas. In its August 27, 2003 scoping comments, Forest Guardians had urged that “utilization levels should be set at far lower levels than 35% on uplands and riparian areas.”

b. The Horse Mountain DN/FONSI stated that the Proposed Action “may affect, but [was] not likely to affect” the Northern Aplomado Falcon and the Mexican Spotted Owl; “is not likely to result in a trend toward Federal listing or loss of viability for the Northern Goshawk and the Blue-black Silverspot Butterfly”; and would not adversely affect population numbers or population trends of Forest Service Management Indicator Species. In its August 28, 2001 comments, Forest Guardians cautioned that the Forest Service’s analysis must adequately consider the impacts of the project on sensitive species and wildlife habitat. In its August 27, 2003 comments, Forest Guardians expressed concern that the Forest Service prioritized “the livestock grazing permittee’s economic benefit over all other concerns, including benefits to wildlife.”

c. The Horse Mountain DN/FONSI stated mitigation measures would be implemented to “ensure that all new and renewed grazing permits contain provisions for compliance with water pollution control and abatement regulations and standards under the authority of the Clean Water Act,” that “BMPs [Best Management Practices] would be incorporated to improve water quality during range and watershed improvement projects,” and that there would be monitoring “to ensure application of BMP’s as designed.” In its August 28,

2001 comments, Forest Guardians expressed its concern that “[l]ivestock grazing can and does degrade water quality by increasing the levels of pollutants including fecal coliform, bacteria, suspended solids, dissolved solids, and biological oxygen demand,” and noted that the 2001 Horse Mountain EA “failed to identify the Best Management Practices to ensure compliance with state and federal water quality laws.”

d. Both the Horse Mountain and San Juan DN/FONSI rejected the No Grazing Alternative. In its August 27, 2003 comments, Forest Guardians had urged the Forest Service to give “serious consideration to the No Grazing alternative for these allotments.”

30. The Horse Mountain and the San Juan DN/FONSI acknowledged “one [comment] from a representative of the Forest Guardians” was received in response to the 2001 Horse Mountain EA and “one [comment] from a representative of the Forest Guardians” was received in response to the 2003 Horse Mountain Scoping Letter.

31. Both the Horse Mountain and the San Juan DN/FONSI stated “the decision is subject to administrative review (appeal) pursuant to 36 CFR Part 215,” that appeals “must be filed . . . with the Appeal Deciding Officer within 45 days from the publication date of this notice in the *El Defensor Chieftain*,” and that “[i]ndividuals or organizations who submitted substantive comments during the comment period as specified in 36 CFR § 215.6 may appeal this decision.”

32. On June 1, 2004, Forest Guardians electronically transmitted a Notice of Appeal of the Horse Mountain and Deep Canyon DN/FONSI to Liz Agpaoa, the Forest Supervisor of the Cibola National Forest. This appeal was received within forty-five days of the publication of the legal notice for appealing those DN/FONSI.

33. In its appeal, Forest Guardians objected to the Horse Mountain and Deep Canyon

DN/FONSI on a number of grounds, including:

- a. The Forest Service failed to fully analyze the benefits of the No Grazing Alternative.
- b. The DN/FONSI failed to “make the health of riparian areas and watersheds a priority,” and the Horse Mountain Environmental Assessment failed to make clear that the No Gazing Alternative will lead to more extensive and more rapid improvement of watershed conditions.
- c. The decisions failed to satisfy a Forest Plan requirement that the restoration of degraded riparian areas be a management priority, and the Forest Service failed to protect riparian obligate species and their riparian habitats.
- d. The DN/FONSIs relied on the Forest Plan’s final environmental impact statement to disclose and mitigate the effect of continued grazing on resources, but that impact statement’s analysis of direct, indirect, and cumulative impacts is outdated and inaccurate.
- e. The utilization standards were unacceptable in riparian areas containing Mexican Spotted Owl habitat.
- f. The 2003 Horse Mountain EA failed to consider and disclose the cumulative impacts of the proposed action.

34. Forest Guardians received a June 22, 2004 letter from Liz Agpaoa, the Appeal Deciding Officer, which stated that the Cibola National Forest “received [Forest Guardians’] appeal of [the] decision on the Horse Mountain/Deep Canyon Grazing Allotments . . . in a timely manner.” The letter stated that because Forest Guardians did not “submit[] comments during the 30-day comment period for the Horse Mountain/Deep Canyon environmental assessment,” the

appeal was being dismissed “due to a lack of substantive comments submitted by . . . Forest Guardians during the 30-day comment period in accordance with 36 CFR 215.13(a) and 215.15(a)(6)¹ regulation.”

35. Forest Guardians “was involved in the public comment process” because its submission of written comments on August 28, 2001 and August 27, 2003 shows it had “notif[ied] the Forest Service of [its] interest in the proposed action.” ARA § 322(c).

36. The Forest Service’s dismissal of Forest Guardians’ appeal of the Horse Mountain DN/FONSI violates the ARA, which requires the Forest Service to provide the right of appeal to any “person who was involved in the public comment process . . . through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action.” ARA § 322(c).

COUNT 2

Defendants violated the ARA when they dismissed Forest Guardians’ appeal of the Spring Creek Grazing decision

37. Forest Guardians received an April 15, 2002 scoping letter from the Forest Service proposing to authorize grazing on the Spring Creek Allotment on the Tres Piedras Ranger District in Carson National Forest (“Spring Creek Scoping Letter”). The scoping letter stated:

Your review and comments will help us determine any issues generated by the proposed action and aid us in the development of alternatives. The environmental assessment for this allotment will analyze the effects on watershed, vegetation, wildlife, threatened and endangered plants and animals, riparian [sic], soils, water quality, social and economic conditions, recreation, heritage resources, and other

¹ 36 C.F.R. § 215.15(a)(6) (2004) does not exist. 36 C.F.R. § 215.16(a)(6) (2004) appears to be the relevant regulation.

concerns that may arise from your response to this letter.

The scoping letter requested that comments on the proposed project be submitted to the Tres Piedras Ranger District by May 6, 2002.

38. On April 24, 2002, Forest Guardians responded to the Spring Creek Scoping Letter by sending a facsimile to the Tres Piedras Ranger District, expressing its “interest and concern . . . in the proposed action for the Spring Creek grazing allotment.” Forest Guardians asked to continue to be informed about this allotment, requested a copy of the draft Environmental Assessment, and explained that “[a]t that time, we will provide detailed comments of our opinion on the proposed action.”

39. In its April 24, 2002 comments on the Spring Creek Scoping Letter, Forest Guardians wrote:

a. “While we applaud the Forest’s recognition of the problem of excessive livestock use on this allotment, and proposal to reduce livestock numbers . . . any continuation of livestock grazing is inconsistent with the broader public interest mandate of the Forest Service[] and . . . the so-called ‘improvements’ are enormously costly, to the benefit of a few.”

b. “[T]he Forest Service’s longstanding policy of prioritizing the livestock grazing permittee’s economic benefit over all other concerns, including benefits to wildlife, riparian areas, watershed health, and the United States taxpayer.”

c. That the Forest Service should give “serious consideration to the No Grazing alternative for this allotment.”

d. That “at a minimum the costs and benefits of continuing grazing on this allotment be seriously analyzed, as well as the impacts of the actions.”

40. On July 11, 2003, the Forest Service issued a Notice For Comment on its proposal to authorize grazing on the Spring Creek Allotment. It provided that “[p]ublic [c]omments on the proposed action [would] be accepted for 30 days following the date of publication of [the] notice.” The Notice was scheduled to be published in the *Taos News* on July 18, 2003.

41. The Forest Service issued a September 2003 Environmental Assessment for the Spring Creek Allotment (“Spring Creek EA”). The EA stated that Forest Guardians raised the significant issue of no livestock grazing on National Forest System lands because it was concerned that livestock grazing over the next ten years would cause harsh impacts. The EA went on to explain that the No Grazing Alternative addresses Forest Guardians’ issue of livestock grazing causing harsh impacts. In addition, the Spring Creek EA stated that Alternative E, the No Range Improvement Alternative, addressed “the concerns that . . . Forest Guardians ha[d] with all proposed range improvements on the natural environment and the wildlife.”

42. On March 22, 2004, the Forest Service sent Forest Guardians the Spring Creek EA and its March 17, 2004, Decision Notice and Finding of No Significant Impact for the Spring Creek Environmental Assessment (“Spring Creek DN/FONSI”).

a. The Spring Creek DN/FONSI selected a modified Alternative D authorizing eleven ten-year grazing permits. In its April 24, 2002 comments, Forest Guardians had urged the Forest Service to give “serious consideration to the No Grazing alternative for this allotment.”

b. The Spring Creek DN/FONSI stated that its decision “will not result in any known significant irreversible resource commitments or a significant irreversible loss of . . . wildlife habitats.” In its April 24, 2002 comments, Forest Guardians had expressed concern with

“the Forest Service’s longstanding policy of prioritizing the livestock grazing permittee’s economic benefit over all other concerns, including benefits to wildlife.”

c. The Spring Creek DN/FONSI stated that “[i]t is Forest Service policy to continue contributions to the economic and social well being of people by providing opportunities for economic diversity.” In its April 24, 2004 comments, Forest Guardians had requested that at a minimum the costs and benefits of continuing grazing on this allotment be seriously analyzed.”

43. The Spring Creek DN/FONSI stated “the decision is subject to administrative review (appeal) pursuant to 36 CFR Part 215,” that appeals “must be filed within 45 days from the publication date of this notice in the Taos News, the newspaper of record,” and that “[i]ndividuals or organizations who submitted substantive comments during the comment period specified at 215.6 may appeal this decision.”

44. On April 30, 2004, Forest Guardians electronically transmitted its Notice of Appeal of the Spring Creek DN/FONSI to the Appeal Deciding Officer of the Carson National Forest. This appeal was received within forty-five days of the publication of the legal notice for appealing the Spring Creek DN/FONSI.

45. In its appeal, Forest Guardians objected to the Spring Creek DN/FONSI on several grounds, including:

a. The Forest Service failed to adequately analyze the economic, wildlife, and watershed benefits of the No Grazing alternative.

b. the alternative chosen failed to make the health of riparian areas and watersheds a priority.

c. The Forest Service failed to protect riparian species and riparian habitats from livestock grazing.

d. The Forest Service did not meet its obligation to gather adequate wildlife population data for management indicator species.

e. The riparian utilization standard of 20-40% is unacceptable considering the allotment contains suitable habitat for the Mexican spotted owl and Northern goshawk.

f. The Spring Creek EA failed to consider and disclose the cumulative impacts of the selected alternative.

46. Forest Guardians received a May 17, 2004 letter from Martin Chavez, the Appeal Deciding Officer, which stated that the Carson National Forest “received [Forest Guardians’] appeal of [the] decision on the Spring Creek Allotment . . . in a timely manner.” However, because Forest Guardians did not “submit[] comments during the 30-day comment period for the Spring Creek allotment environmental assessment,” the Forest Service was dismissing Forest Guardian’s appeal “due to a lack of substantive comments submitted by . . . Forest Guardians during the comment period in accordance with 36 CFR 215.13(a) and 215.15(6)² regulation.”

47. Forest Guardians “was involved in the public comment process” because its submission of written comments on April 24, 2002 in response to the Spring Creek Scoping Letter “notif[ied] the Forest Service of [its] interest in the proposed action.” ARA § 322(c).

48. The Forest Service’s dismissal of Forest Guardians’ appeal of the Spring Creek DN/FONSI violates the ARA, which requires the Forest Service to provide the right of appeal to any “person who was involved in the public comment process . . . through submission of written

² 36 C.F.R. § 215.15(6) (2004) does not exist. 36 C.F.R. § 215.16(a)(6) (2004) appears to be the relevant regulation.

or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action.” ARA § 322(c).

COUNT 3

Defendants violated the ARA when they dismissed Forest Guardians’ appeal of the Bull Creek, Cow Creek, Macho, Soldier Creek, and Valle Osha Grazing Allotments decisions

49. Forest Guardians received a March 25, 2004 scoping letter from the Forest Service proposing to re-issue grazing permits on the Bull Creek, Cow Creek, Macho, Soldier Creek, and Valle Osha grazing Allotments (“Bull Creek Allotments”) on the Pecos/Las Vegas Ranger District of the Santa Fe National Forest (“Bull Creek Scoping Letter”). This letter requested comments on the proposed actions be sent to the District Ranger for the Pecos/Las Vegas Ranger District by April 26, 2004.

50. On April 1, 2004, Forest Guardians electronically transmitted its comments in response to the Bull Creek Scoping Letter expressing its “interest and concern, on behalf of [its] staff and our 2,500 members, in the proposed action for the [Bull Creek Allotments].” This letter was misdated “March 16, 2004.” In its comment letter, Forest Guardians requested a copy of the draft Environmental Assessment and asked that it continue to be informed about the allotments.

51. In its April 1, 2004 comments, Forest Guardians expressed several concerns about the Bull Creek Scoping Letter, including:

a. While it applauded the Forest Service for not attempting to increase the livestock numbers on these allotments, it was concerned that continuing “livestock grazing is inconsistent with the broader public interest mandate of the Forest Service; and that the so-called ‘improvements’ are enormously costly, to the benefit of a few.”

- b. That the Forest Service to give “serious consideration to the No Grazing Alternative for this allotment.”
- c. That based on records obtained via the Freedom of Information Act, “Macho and Solder [sic] Creek Allotments are not moving toward riparian and upland objectives,” and queried, “[h]ow do you intend to reconcile this lack of monitoring with the statement in the proposal that these allotments will be monitored once per month.”
- d. That “the proposal does not make key areas or utilization standards clear, nor does it make clear what actions will be necessary if utilization standards are exceeded.”
- e. That “the proposal needs to clearly allot forage to wildlife.”
- f. That it was “VERY concerned about the potential effects returning livestock might have on the Sold[i]er Creek allotment.”
- g. That “at a minimum, the costs and benefits (economic, social and ecological) of continuing grazing on this allotment [should be] seriously analyzed, as well as the full impacts of the proposed actions,” and that the EA “include both the costs of the improvements and monitoring compared to the expected fees.”
- h. That “the EA include all available information regarding monitoring and impacts to wildlife in the allotment, with special attention paid to MIS, regionally sensitive species, and any Threatened or Endangered species.”
- i. That the EA “include both the current status and past and expected impacts to any streams or riparian areas in the allotment, soils, vegetation (including invasive species), as well as impacts to any areas currently under or being considered for[] special management by the Forest Service or any other government agency.”

52. Forest Guardians received an August 2, 2004 letter from the Forest Service's Pecos/Las Vegas Ranger District proposing to re-issue grazing permits on the five Bull Creek allotments ("Bull Creek Proposed Action"). Accompanying this letter were Chapters 1 ("Purpose and Need") and 2 ("Alternatives") of what was to become the Environmental Assessment accompanying the Forest Service's subsequent decision.

53. The August 2, 2004 letter explained that the "opportunity to comment ends 30 days following the date of publication of the legal notice in the Albuquerque Journal" and that only those who submit timely and substantive comments will be accepted as appellants.

54. On August 4, 2004, the Forest Service published a "legal notice" of the thirty day comment period on the Bull Creek Proposed Action in the *Albuquerque Journal*.

55. On September 23, 2004, the Forest Service issued an Environmental Assessment ("Bull Creek EA") and Decision Notice and Finding of No Significant Impact ("DN/FONSI") for the each of the five allotments in the Bull Creek Proposed Action.

56. The DN/FONSI for each of the five allotments selected Alternative 3, the proposed action, which authorized 202 cattle to graze on the five Bull Creek Allotments. This was an increase of 50 cattle above the previous number of cattle authorized to graze on the five Bull Creek Allotments.

a. The DN/FONSI authorized grazing on the Soldier Creek Allotment, which had not been grazed for ten years. In its comments of April 1, 2004, Forest Guardians expressed concern with "the potential effects returning livestock might have on Solder [sic] Creek allotment."

b. The DN/FONSI for each of the five allotments stated that “Alternative 2 (No Grazing) would not be a suitable choice. Continuing to allow grazing will contribute to the socio-economic needs associated with traditional grazing in northern New Mexico . . . [,] Alternative 2 (No Grazing) would not meet those needs,” and “the difference in the environmental consequences between Alternative 2 . . . and the others was not substantial enough to warrant choosing it in the face of this economic and traditional use of the Forest.” In its April 1, 2004 comments, Forest Guardians urged the Forest Service to give “serious consideration to the No Grazing Alternative for this allotment” and to rethink its policy of “prioritizing the livestock grazing permittee’s economic benefit over all other concerns, including benefits to wildlife, riparian areas, watershed health, and the United States taxpayer.”

c. The Bull Creek EA relies extensively on monitoring to determine the effectiveness of mitigation measures, which “are prescribed to avoid, minimize, or compensate for adverse environmental effects.” For example, to meet its objective to prevent soil erosion which would deliver sediment to streams as a result of cattle grazing, the EA proposes “[i]mplementation monitoring [which] will include periodic inspections to ensure compliance with permit terms and conditions” and “[e]ffectiveness monitoring [to] determine if grazing . . . practices are effective in accomplishing the planned objectives.” In its April 1, 2004 comments, Forest Guardians raised the question of “[h]ow do you intend to reconcile this lack of monitoring with the statement in the proposal that these allotments will be monitored once per month[?]”

d. The Bull Creek EA specifies that “cattle would be removed when conservative utilization standards (31-40%) were met[,]” and that since the grazing guideline specifying that “no more than 40% utilization by ungulates would be adhered to, [this] would

provide adequate habitat for small mammals, birds, insects and reptiles and amphibians.” In its April 1, 2004 comments, Forest Guardians raised the concern that “the proposal does not make key areas or utilization standards clear, nor does it make clear what actions will be necessary if utilization standards are exceeded.”

e. In discussing the impacts to the federally listed Mexican Spotted Owl from the chosen alternative on the Bull Creek Allotment, the Bull Creek EA states that “the overall canopy cover and forest structure would not change,” “grazing has not resulted in a lack of ground cover for the [Mexican Spotted Owl’s] prey,” and that the construction of fences would “slow the movement of cattle” which “would incrementally improve ground cover” resulting in more habitat for the Mexican Spotted Owl’s prey. In its April 1, 2004 comments, Forest Guardians asked that “the EA include all available information regarding monitoring and impacts to wildlife in the allotment, with special attention paid to MIS, regionally sensitive species, and any Threatened or Endangered species.”

f. The Bull Creek EA’s consideration of forage available to wildlife is based on the promised limitation on the amount of forage consumed by livestock. For example, as to Rocky Mountain Elk, the EA states “because cattle would be not be allowed to use more than 40% of the forage, grazing would be light to moderate and would not greatly reduce the amount of foraging habitat.” In its April 1, 2004 comments, Forest Guardians raised the concern that “the proposal needs to clearly allot forage to wildlife.”

g. The Bull Creek DN/FONSI stated that under the chosen alternative, “[w]etlands and riparian soils will be protected by mitigation measures . . . and the grazing management strategy and range facilities.” In its April 1, 2004 comments, Forest Guardians had

asked that the analysis “include both the current status and past expected impacts to any streams or riparian areas in the allotment, soils, vegetation (including invasive species).”

57. Each of the DN/FONSI s for the five allotments covered by the Bull Creek EA stated it was subject to administrative review within forty-five days of the publication of legal notice by organizations who submitted “substantive comments” during the comment period pursuant to 36 C.F.R. § 215.6.

58. On October 21, 2004, Forest Guardians electronically transmitted a Notice of Appeal of the Bull Creek, Cow Creek, Macho, Soldier Creek, and Valle Osha Allotment DN/FONSI s to Gilbert Zepeda, Forest Supervisor of the Santa Fe National Forest. This appeal was received within forty-five days of the publication of the legal notice for appealing these DN/FONSI s.

59. In its appeal, Forest Guardians objected to the DN/FONSI s for the five Bull Creek Allotments on several grounds, including:

a. The Forest Service failed to conduct “any economic social analysis” for the allotments.

b. The alternative chosen failed to “make the health of riparian areas and watersheds a priority” especially in the Valle Osha allotment, because “any grazing along riparian areas, even the short grazing periods proposed in riparian areas in the Valle Osha, [could] be detrimental.”

c. The Bull Creek EA incorrectly assumes that none of the alternatives will significantly affect goshawk in the areas, despite the lack of population data for goshawk on

these allotments, and this is especially true because the DN/FONSI renews grazing at unknown levels for the Soldier Creek Allotment.

d. The EA “downplayed or ignored” potential impacts on the Rio Grande cutthroat trout and goshawk.

e. The details of monitoring must be disclosed, including the names, locations, forage utilization limits, and monitoring protocol for each key area within an allotment, and the utilization standard in riparian areas containing Mexican Spotted Owl habitat should never be more than 20 percent.

f. The Bull Creek Allotments EA failed to consider and disclose the cumulative impacts of the alternative.

g. The Forest Service did not consider the relative environmental gains that could be achieved by closing portions of the allotments, or the entire allotment, to livestock use.

h. The analysis of the environmental consequences for the Soldier Creek Allotment is inaccurate because there is no clarity on how often this allotment would be used.

60. Forest Guardians received a November 19, 2004 letter from Gilbert Zepeda, the Forest Supervisor, which stated that the Santa Fe National Forest “received [Forest Guardians’] appeal of [the] decision on the [Bull Creek Allotments] . . . in a timely manner.” The letter stated that Forest Guardians did not “submit[] comments during the 30-day comment period for the subject grazing allotments’ environmental assessment” and that it was dismissing Forest Guardian’s appeal “due to a lack of substantive comments submitted by . . . Forest Guardians

during the 30-day comment period in accordance with 36 CFR 215.13(a) and 215.15(a)(6).”³

61. Forest Guardians “was involved in the public comment process” because its submission of written comments on April 1, 2004 in response to the Bull Creek Scoping Letter “notif[ied] the Forest Service of [its] interest in the proposed action.” ARA § 322(c).

62. The Forest Service’s dismissal of Forest Guardians’ appeal of the Bull Creek DN/FONSI violates the ARA, which requires the Forest Service to provide the right of appeal to any “person who was involved in the public comment process . . . through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action.” ARA § 322(c).

RELIEF REQUESTED

THEREFORE, Plaintiffs respectfully request that this Court:

63. Declare that the Defendants’ dismissals of Forest Guardians’ administrative appeals of the Horse Mountain, Spring Creek, and Bull Creek DN/FONSI violated the ARA, and were therefore arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. §706(2);

64. Vacate Defendants’ decisions dismissing Forest Guardians’ administrative appeals of the Horse Mountain, Spring Creek, and Bull Creek DN/FONSI;

65. Order that Defendants consider Forest Guardians’ administrative appeals pursuant to 36 C.F.R. §§ 215.17 and 215.18, and take appropriate action based on the outcome of those administrative appeals;

³ 36 C.F.R. § 215.15(a)(6) (2004) does not exist. 36 C.F.R. 216.15(a)(6) (2004) appears to be the relevant regulation.

66. Enter a declaratory judgment that Defendants' promulgation and implementation of 36 C.F.R. §§ 215.13(a) and 215.16(a)(6) violates the Appeals Reform Act, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

67. Enjoin Defendants from applying 36 C.F.R. §§ 215.13(a) and 215.16(a)(6) in violation of the Appeals Reform Act;

68. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation; and

69. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Date: April 22, 2005

Respectfully submitted,

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