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CERTIFIED MAIL - RRR

RE: Appeal of Decision Letter Amending 1999-2000 Annual Operating Plan, Wildbunch Allotment (Appeal #99-A/S-251-2), Clifton Ranger District, Apache-Sitgreaves National Forests

Dear Mr. Kennedy:

This letter documents my first level review decision of the appeal you filed on behalf of Carlyle and Martha Cathcart, as the allotment permittee, regarding a decision to amend the 1999-2000 Annual Operating Plan (AOP) for the Wildbunch grazing allotment. My review of your appeal is based on the existing project record. This appeal relates to a decision issued by District Ranger Frank Hayes (Deciding Official), Clifton Ranger District, Apache-Sitgreaves National Forests on June 2, 1999, which would reduce authorized livestock numbers as approved in the revised AOP (February 26, 1999), require livestock management changes, and maintenance of assigned range improvements.

Background

A. A term grazing permit was issued to the appellant on December 6, 1994. The terms of the permit were reviewed with the permittee on that date. The permittee signed and accepted the terms of the permit as prescribed (Doc. 4).

B. A Memorandum Of Understanding (MOU) was signed and agreed to by the permittee to reduce stocking on the allotment for a period of time until specific range improvements were properly maintained or reconstructed according to a schedule. Authorized use would be regulated by the amount of range improvements that had been refurbished/reconstructed to Forest Service (FS) standards and that livestock management had improved to aid in improving the resource conditions (Doc. 5).

C. An AOP was issued to the appellant on February 5, 1999 (Doc. 16).

D. The AOP was revised on February 26, 1999, which identified numbers authorized to graze, areas and time periods to be grazed, set utilization standards to be met, and range improvements required to be maintained (Doc. 20).

E. The appellant was notified of a meeting which would explain monitoring requirements to meet the Biological Opinion requirements to protect threatened or endangered species and their habitat (Doc. 21).

F. The appellant was notified by letter of existing drought conditions and the possibilities of making adjustments in stocking and season of use as needed to protect resources from the adverse effects of drought (Doc. 22).

G. Resource conditions on the allotment were evaluated in late April and early May. It was found that grazing use had been excessive (above Forest Service standards) in various areas of the allotment, livestock management was not being effective in regulating use on forage plants, range improvements were not properly maintained, and little forage had been produced due to drought conditions (Doc. 25).

H. The Deciding Official proposed management actions to correct inadequacies in existing livestock management, adjust permit numbers due to lack of forage resulting from drought, and required specific range improvements to be maintained to FS standards (Doc. 27). The Deciding Official allowed the appellant an opportunity to provide suggestions to remedy the unacceptable management situation (Doc. 28).

I. Deciding Official issued a decision on June 2, 1999, to modify the existing AOP to reduce livestock numbers for the 1999-2000 grazing season down to 100 head (as a core herd), allow up to 65 head in a holding pasture to be supplemented with hay by the permittee, coupled with range seeding to help stimulate revegetation of a severely denuded pasture, remove all livestock from the allotment in excess of the 165 head authorized to remain, move all livestock from the already heavily grazed areas to areas containing forage and water for a specified period of time or until utilization levels are met, and complete assigned range improvement maintenance (Doc. 31).

J. Deciding Official's decision was appealed on July 16, 1999 (Doc. 34).

K. A request for stay was made (Doc. 34) by the appellant. It was denied by the first level Reviewing Officer (Doc. 35), and the second level Reviewing Officer declined to exercise discretionary review, pursuant to 36 CFR 251.92(k) (Doc. 39).

L. Informal resolution of the appeal was not attempted. The appellant requested an "Oral Presentation" but such a presentation was not scheduled (Docs. 34 and 43).

M. The Deciding Official and support staff conducted follow-up inspections on September 3 and 16, 1999, and noted changes in resource conditions and some compliance with the June 2, 1999 decision. On September 21, 1999, after discussions with the appellant, the Deciding Official issued a revised decision related to livestock management on the allotment, authorizing numbers of livestock, defining areas to be grazed and not grazed, and range improvements required to be maintained to FS standards (Doc. 45).

N. The project record, subject to this appeal, was closed on September 28, 1999 (Doc. 46).

Points of Appeal

Your appeal of July 16, 1999, lacks clear, concise declarations to determine the basis of the appeal. There are several statements describing the status and opposition to actions stated in the Deciding Official's letter dated June 2, 1999. The appellant's "Reply" (dated August 26, 1999) to the Deciding Official's "Responsive Statement" is more definitive of the issues raised by the appellant and have been used, for the purposes of this review, to outline the appeal issues.

Issue #1. June 2, 1999, decision is arbitrary and will result in irreversible economic damage to the appellant. The Decision violates the taking clause of the Fifth Amendment to the Constitution and is imposed without due process of law.

Contention: You contend that the appellant has the right to graze the Wildbunch allotment and though their use of the allotment may be subject to agency regulation within their scope of authority, such regulatory action may still result in a takings and therefore compensable. If the actions by the agency are not justified, then it is also arbitrary.

Response: Grazing upon National Forest lands does not assure any permittee of a livelihood or long-term viable business operation. By statute, the Forest Service may allow grazing upon those lands that are capable of supporting such use under a permit system. The statutes do not require maintaining grazing use at an economically feasible level. The economics of grazing on National Forest system lands is an individual choice, influenced by a myriad of external factors not directly related to the grazing permit system itself.

The appellant signed and accepted "**all**" of the provisions of the term grazing permit (Doc. 4) on December 6, 1994, which includes the following statement from Part 1, Item #3: "It is fully understood and agreed that this permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comply with any of the terms and conditions specified in Parts 1, 2, and 3 hereof, or any of the regulations of the Secretary of Agriculture on which this permit is based, or instructions of Forest Officers issued thereunder; ..." and "This permit can also be cancelled, in whole or in part, or otherwise modified, at any time during the term to conform with needed changes brought about by law, regulation, Executive Order, allotment management plans, land management planning, numbers permitted or seasons of use necessary because of resource conditions". Part 1, Item #2 states that only the number, kind, class of livestock for the period of use and allotment specified will be allowed to graze, unless modified by the Forest Service in the "Bill for Collection". The Deciding Official made an adjustment in grazing use on the Wildbunch allotment according to the terms and conditions in the grazing permit due to drought conditions, excessive grazing use, failure to properly manage and distribute livestock use to comply with utilization standards and Biological Opinion, and failure to properly maintain range improvements assigned under the terms of the grazing permit. These actions are well within the authority of the Deciding Official, pursuant to 36 CFR 222, Subpart A, which regulates the administration of grazing permits.

Pursuant to 36 CFR 222.3(b), "Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources". These regulations are

promulgated from the statutes that designate and authorize the Forest Service to manage federal lands contained under the National Forest system.

The appellant's assertion that the acquisition of the base property and subsequently issuance of the term grazing permit establishes a vested interest in federal lands and therefore compensable under the takings clause of the Fifth Amendment is erroneous and a misinterpretation of the law as it relates to grazing permits on National Forest System lands. Federal statutes and case law have defined that the land and the resources are owned by the federal government and a grazing permit does not convey ownership to the land and those resources to any permit holder. The Creative Act (1891) and Organic Administration Act (1897), among other acts, defined the ownership and authority to administer the National Forest lands as being vested with the U.S. Government. Current administration of the National Forest lands is guided by the Multiple Use and Sustained Yield Act (1960), National Environmental Policy Act (1969), Forest and Rangeland Renewable Resources Planning Act (1974), and the National Forest Management Act (1976).

Both the Taylor Grazing Act (1934) and Granger-Thye Act (1950), described the intent of Congress that the issuance of grazing permits do not convey any right, title, interest, or estate in or to the federal lands.

Case law which establishes Forest Service authority and ownership of the National Forest System lands, also refutes any claims of interest or title to the federal lands by permit holders, they are as follows: 1) In Light v. United States (1911), the Supreme Court emphasized that grazing on federal land does not "confer any vested right ... nor deprive the United States of the power of recalling any implied license under which the land had been used for private purpose"; 2) The issue of grazing permit privileges versus property rights has been addressed by the Ninth Circuit Court of appeals in Osborne v. United States (1944) and Swim v. Bergland (1983). In each case, the Court held that grazing permits are privileges, not property rights; 3) In a recent court decision by the Tenth Circuit Court of Appeals in the Diamond Bar Cattle Company, New Mexico Partnership; Laney Cattle Company, New Mexico Partnership case (decision dated February 23, 1999) reaffirmed that the Forest Service is the owner of the lands upon which a permit is issued and the agency's administrative actions do not constitute a takings.

In conclusion, the permittee has no property right as a holder of a grazing permit, therefore the actions of the Deciding Official has not resulted in a taking.

Findings: The Deciding Official acted within the established authority as defined in law and regulations. The actions taken by the Deciding Official are consistent with routine procedures for administration of grazing permits. The Deciding Official is affirmed in regard to this issue.

Issue #2. Appellant has claims to water on the allotment and the U.S. Government is denying appellant the beneficial use of those claimed waters.

Contention: The appellant contends that due to water right claims filed on the water sources within the allotment provided the permit holder ownership of those waters. The actions by the Deciding Official to require removal of livestock from the allotment denies the appellant beneficial use of claimed water rights.

Response: Response to Issue #1 also applies to this issue. The issuance of a term grazing permit does not convey any interest, title, or right to National Forest lands or the resources thereon.

The filing for a water right does not, in and of itself, establish a water right. The appellant alleges that through the predecessor's filing for water rights and assignment of those water right claims establishes them as the owners of such water rights (Docs. 1 and 2). The FS filed for water rights on the waters within the Wildbunch allotment in 1979. The FS also protested the claims filed by the appellant on December 9, 1994. Ownership of water within or adjacent to the Wildbunch allotment is not established until it has been adjudicated by the State of Arizona. The U.S. Government, through the authority of the FS, does not recognize any vested interest in the waters within or adjacent to the Wildbunch allotment. The FS considers the waters to be appurtenant to the land which is owned by the U.S. Government until adjudicated by the State. Therefore, the FS under its explicit authority established by statute and case law can determine the use of waters within the Wildbunch allotment through the administration of the term grazing permit, including non-use of the waters for the purposes of rehabilitating or protecting the vegetation, soils, and other resources as deemed necessary.

Findings: The Deciding Official acted within his authority to regulate livestock use and occupancy within the allotment. The appellant does not have established water rights within the allotment, therefore beneficial use of water has not been denied. The Deciding Official is affirmed in regard to this issue.

Issue #3. The reductions in numbers of livestock is not based on any data. The appellant was not provided the data to review until after the Responsive Statement had been submitted, which deprived the appellant of due process.

Contention: The appellant contends that the decision to reduce livestock numbers was not based on any data, rather it was based on visual observations. If any data was collected, it occurred after the fact only to "shore up" the agency's actions in support of the decision. The appellant did not have the opportunity to evaluate the data collected and refute any information gathered until after the decision was made.

Response: The May 10, 1999, range inspection (Doc. 25) documented 6 days of field evaluations involving both trained and experienced Range Management professionals and a Soils Scientist. These persons are qualified to make assessments as to land productivity potential and determine the extent of livestock use, as well as impacts on other resources. The range inspection described the utilization patterns that had occurred to date based on the obvious

remnants of standing vegetation and livestock signs. The photographic display contained in the inspection is indicative of very high use levels. The inspection also contained information concerning the soil productivity potential and its limitations (susceptibility to grazing). The May 10, 1999, inspection, stated that utilization was measured in one instance.

The FS handbook (FSH 2209.21), Chapter 50, describes the techniques for determining forage production and utilization. Section 52.22 describes the procedures for estimating forage utilization. These methods are intended to be used for determining when the desired forage use level has been reached. There are three methods described, one of which is the Ocular estimate method. This method requires initial clipping and weighing of vegetation to calibrate an examiner's eye for measuring utilization. Once calibration has been established, visual (Ocular) estimations can be made across a pasture or allotment. This is a common and accepted practice for determining utilization, with reasonable reliability when conducted by trained range management professionals.

The June 28, 1999 range inspection (Doc. 33) was a follow-up evaluation of the allotment to identify if any changes have occurred as specified in the Deciding Official's decision (June 2, 1999). The mere fact that more extensive measurements of not only utilization and range conditions were documented in a subsequent inspection, does not negate the validity of prior estimates made by trained professionals, following FS procedures. The photographic record clearly documents the lack of forage on the allotment, and given the prospects of no moisture at the time, the need to take action to protect the resources was reasonable given the prevailing circumstances. The Deciding Official was clearly within his authority to take such action. The decision to reduce and remove livestock from the allotment is well justified, pursuant to Part 2, Section 8(a),(b), and (c) (Doc. 4).

The appellant claims that data was not available prior to the decision being made which deprived them of due process. Both inspections documented that the appellant was invited to participate in the inspections, but declined. The appellant was afforded the opportunity to participate in the field evaluations which would have provided first hand knowledge of the procedures and results of the inspections. Providing information on field data is a courtesy, not a requirement, for the agency to conduct its business. There are means for individuals to access information contained in public record, through the Freedom of Information Act process. The agency is not required to gain a permittee's concurrence to effect needed changes on an allotment through the normal course of administering term grazing permits.

Findings: The decision to reduce livestock numbers is within the authority of the Deciding Official and is supported by the record. The appellant was not deprived of due process. The Deciding Official is affirmed in regard to this issue.

Issue #4. The Decision was based on existing conditions. If conditions have changed, then the agency should consider those changes which would make the original decision no longer valid.

Contention: The appellant contends that if the original decision was based on adverse climatic conditions such as drought, then once favorable moisture conditions occurred, the need to reduce animals is no longer necessary.

Response: The follow-up inspections were conducted after the decision was rendered (Docs 33, 44, and 45). These inspections were not only related to assessing resource conditions, they also entailed evaluating the degree of compliance with Forest Officer's instructions regarding maintenance of assigned range improvements. The Deciding Official recognized that resource conditions had changed and the abundant precipitation was aiding in the growth and recovery of already grazed areas (Doc. 45). The recovery of the resources after heavy grazing remained a concern for the Deciding Official, as well as providing some level of acceptable grazing which would meet FS standards and resource protection. The Deciding Official amended the June 2, 1999, decision by issuing a new decision on September 21, 1999 (Doc. 45).

The decision letter stated the following direction and adjustments to the June 2, 1999, decision: 1) Stocking level of 178 head of cattle is authorized through the remainder of the year and the grazing fee will be adjusted accordingly; 2) Livestock distribution and pasture use was clearly defined and restricted due to past grazing practices and utilization levels; 3) Range improvement maintenance requirements were clearly spelled out as in previous correspondence which were determined to be essential in managing livestock grazing and meeting resource management objectives; 4) The decision also considered a possibility to authorize 225 head, "contingent upon implementation of effective livestock management practices to address resource concerns and maintenance of range improvements...".

It is apparent that the Deciding Official has been open and considerate of the appellant's concerns while fulfilling his "duty" to manage the resources consistent with the land's capability and in compliance with applicable laws and regulations.

Findings: The Deciding Official has considered changing resource conditions and has altered the original decision commensurate with the resource conditions as they exist. The Deciding Official has acted within his authority and has been consistent with law, regulation and policy. The Deciding Official is affirmed in regard to this issue.

Issue #5. The application of the Biological Opinion may or may not have been appropriately used in the issuance of the June 2, 1999, decision and stay denial.

Contention: The appellant contends that the FS has inappropriately applied the Biological Opinion related to grazing on the Wildbunch allotment. The Biological Opinion evaluated grazing effects on Peregrine Falcon, which is no longer valid, because the species has been de-listed. Attaching the standards from the Biological Opinion to the AOP is "contrary to the admonition of Judge Broomfield in the case of Arizona Cattlegrowers vs. Eleanor S. Townsend et. al. CV97-1868PHXRCB".

Response: Arizona Cattlegrowers vs. Eleanor S. Townsend is irrelevant to this case. The Biological Opinion is the end-product of a federal action that may affect threatened or endangered species, or species that are proposed for listing as threatened or endangered (T&E). It had been determined by the FS that ongoing grazing activities may effect listed T&E species, therefore, as required by the Endangered Species Act, Section 7 consultation must be initiated and the Fish and Wildlife Service (FWS) is required to issue an opinion as to the extent of the effects from federal actions, as well as stipulated conditions that an agency must follow to protect T&E species and their habitat from the effects of the agency's actions.

Grazing upon the Wildbunch allotment was analyzed as having potential effect on three T&E species (Loach Minnow, Peregrine Falcon, and Arizona Hedgehog Cactus). The Biological Opinion (Doc. 15A) stated that "ongoing grazing activities on the Wildbunch allotment are not likely to jeopardize the continued existence of the peregrine falcon". The grazing use standards and monitoring requirements, according to the Biological Opinion, has nothing to do with peregrine falcons, but has everything to do with managing grazing as it may indirectly affect Loach Minnow species and its habitat. The primary issue surrounding effects to loach minnow habitat is degraded soil and watershed conditions in the upland areas that drain into the Blue and San Francisco Rivers. Both rivers contain populations of Loach Minnow. FWS issued its opinion with reasonable and prudent measures to minimize incidental take of the species. The terms and conditions implements the reasonable and prudent measures which the FS and the permittee are required to follow to be in compliance with the Biological Opinion.

The terms and conditions are intended to minimize the adverse impacts of grazing on uplands and tributaries to the Blue and San Francisco Rivers. The intent of the Biological Opinion is to restore degraded watersheds by improving vegetative ground cover, improve plant vigor to improve the ecological condition of plant communities, and improve riparian conditions in order to sustain the T&E species and its habitat. The inclusion of the terms and conditions of the Biological Opinion into the AOP is consistent with the intent of Section 7 of the ESA, and other applicable laws and regulations that govern grazing authorizations on National Forest lands. Compliance with the Biological Opinion is essential to allow grazing on the Wildbunch allotment, otherwise, no grazing maybe necessary to protect Loach Minnow and its habitat until permitted use is within capacity and the resource conditions have improved.

Findings: The District Ranger is implementing resource management through the Annual Operating Plan, as he deems necessary. The Biological Opinion is consistent with applicable laws and regulations, and protects other threatened and endangered species which occur on or adjacent to the allotment. The Annual Operating Plan is not inconsistent with the Biological Opinion, nor has the Ranger relied totally on the parameters in the Biological Opinion. The Deciding Official is affirmed in regard to this issue.

Decision

My first level review of this appeal was conducted in accordance with 36 CFR 251 Subpart C.

After review of the record, I find that the Deciding Official's decision with regard to amending the 1999-2000 Annual Operating Plan (AOP) for the Wildbunch grazing allotment was reasonable and justifiable given the existing resource conditions at the time. The Deciding Official's decision was in conformance with applicable laws, regulations, orders, and policies and procedures. I find no evidence to support the appellant's issues. Therefore, I affirm the Deciding Official's decision to amend the 1999-2000 Annual Operating Plan (AOP) for the Wildbunch grazing allotment.

The Deciding Official's decision is subject to second level review pursuant to 36 CFR 251.87(c)(2). You may submit a second level appeal to the Regional Forester within 15 days from the date this decision is received, by certified mail or facsimile. The Regional Forester will review your second level appeal on the existing record.

Sincerely,

/s/ John C. Bedell
JOHN C. BEDELL
Forest Supervisor

cc:
District Ranger, Clifton RD
Appeals and Litigation Staff, R3
Carlyle and Martha Cathcart, Permittee