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File Code: 1570/2200
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
NUMBER: 70011940000315075759

RE: Appeal #03-03-05-0001-A251, Jarillas and Lake Allotment 2003 AOI, Nogales Ranger District, Coronado National Forest

Dear Mr. James:

This letter constitutes my review and decision on the appeal you filed on behalf of Jim and Sue Chilton regarding utilization rates established in the Annual Operating Instructions (AOI) for the Jarillas and Lake Allotments.

My review was conducted according to the provisions of the appeal regulations in 36 CFR 251 Subpart C. I have considered the appeal record, federal statues, policies, and operational procedures set out in the directives system of the USDA Forest Service. The appeal points presented in your March 25, 2003, appeal, and your May 12, 2003, reply to the District Ranger's responsive statement were reviewed as well as the District Ranger's decision and April 21, 2003, Responsive Statement.

Points of Appeal

My review will focus on your appeal points in Sections II, III, and IV of your March 25, 2003 letter.

ISSUE 1: Chilton's permit cannot be unilaterally modified through annual operating instructions without notice.

Contention: You contend that 43 USC 1752(d) and the regulations at 36 CFR 222.1(b)(2) recognize the allotment management plan (AMP) as the primary tool for managing livestock within the terms and conditions of the grazing permit and that annual operating instructions cannot be used to modify the terms of grazing permits. You state that the regulations at 36 CFR 222.4(a)(7)(8) require one year's notice of permit modification.

Response: Section 402(d) [43 USC 1752(d) allows the Secretary to incorporate an AMP into a term permit but does not require the Secretary to do so. Section 402(e) provides the authority for the Secretary to incorporate terms and conditions necessary for management and protection of rangeland resources into term permits in accordance with the laws applicable to management of

National Forest System lands. Section 402(e) also authorizes the Secretary to adjust any aspect of grazing at any time to protect rangeland resources.

The regulations at 36 CFR 222.2(c) provide the authority for the Forest Service to manage forage producing lands for livestock grazing and ensures that if allotment management plans are prepared they are consistent with land management plans.

The grazing permit is the primary instrument used to administer grazing on the Jarillas and Lake allotments. As a matter of Forest Service policy (FSM 2212.03-9) the AMP is incorporated as a part of the terms and conditions of the permit. Inclusion of the AMP as a term and condition of the permit does not lock management of the allotment in stone or take precedence over other terms and conditions of the permit. Determining proper levels of grazing and management is an iterative and adaptive process based on immediate resource needs and management objectives. The AOI is used to address immediate needs or convey annual management directions. Authorization for the District Ranger to issue written instructions that document utilization levels and/or provide additional direction necessary for proper management of rangeland resources is contained in the grazing permit and in agency policy.

The District Ranger has not modified the grazing permit; therefore, one year's notice is not required. The District Ranger has redeemed his responsibilities for providing proper administration of the permit in accordance with USDA regulation, and agency policy and procedures. Any permanent modifications to the permit will be made in conjunction with the National Environmental Policy Act (NEPA) process to authorize grazing.

In summary, the District Ranger correctly used his authority to issue instructions for proper protection and management of resources. His decision to issue the AOI did not modify the permit but simply provided for proper administration of the permit.

ISSUE 2: There is no basis for the reduction in forage utilization levels.

Contention: You assert that the District Ranger did not provide any documented rationale for his decision to reduce utilization levels.

As discussed above, the District Ranger has the authority to issue instructions through the AOI that address resource concerns and management objectives. In his responsive statement, the District Ranger references readily available information regarding the ongoing drought conditions in Southeast Arizona as well as precipitation records for the current grazing year which indicate a lack of significant moisture. Forest policy during this prolonged drought period has been to apply light to moderate grazing utilization standards (35 to 45 percent) across the Forest to address concerns regarding reduced forage production and lack of available water. These utilization levels are within the range identified in the management area standards and guidelines of the Forest Plan.

Additionally, the U.S. Fish and Wildlife Service based its biological opinion (BO) on utilization levels of 35 percent during the growing season and 45 percent during the non-growing season on the Jarillas allotment (AESO/SE 2-21-98-F-399-R1). As a matter of statutory compliance with

the Endangered Species Act (ESA), grazing must be administered in compliance with the BO. By using the AOI to instruct the Chiltons not to exceed utilization levels of 35 percent during the growing season and 45 percent during the non-growing season, the District Ranger is not modifying the permit but is administering the grazing in accordance with the BO.

I find that the District Ranger properly used his authority to issue instructions reducing utilization levels for the protection and management of resources. The decision is neither irrational nor unsupportable.

ISSUE 3: The 2002 Final Biological Opinion is not a legitimate basis for the proposed reductions.

Contention: You contend that the BO does not mandate a reduction in utilization levels; that the BO is an advisory opinion issued by the Fish and Wildlife Service; and that the ultimate decision to proceed with an agency action is vested with the agency action, not the Fish and Wildlife Service. You further contend that the Jarillas and Lake allotments should not have been included in the consultation because they do not contain listed species or critical habitat.

Response: The biological assessment prepared by Forest Service biologists determined that although there are no known occurrences of listed species on the allotments, suitable habitat for listed species is present. The proposed action included utilization levels of 35 percent during the growing season and 45 percent during the non-growing season on the Jarillas allotment. The U.S. Fish and Wildlife Service based its BO on these utilization levels (AESO/SE 2-21-98-F-399-R1). As a matter of statutory compliance with the ESA, grazing must be administered in compliance with the BO. Modification of the proposed action (i.e., modification of the utilization levels) would require the Forest Service to reinitiate consultation.

The District Ranger is using the AOI to administer the grazing permit in accordance with the BO by including utilization rates in the AOI until scheduled NEPA documentation is completed on the allotments, at which time any needed permit modifications will be made. In the interim, I find that the District Ranger is properly using the authority granted in Part 1 Section 3 and Part 2 Section 8(a)(b)(c) of the permit.

DECISION

After review of the appeal record, I find that the District Ranger's decision to set utilization levels at 35 percent during the growing season and 45 percent during the non-growing season on the Jarillas and Lake allotments was based on a reasonable assessment of current resource objectives and conditions. The District Ranger's decision is in conformance with applicable laws, regulations, policies, and procedures. I find no evidence indicating the District Ranger has acted in an arbitrary or capricious manner. The District Ranger's decision is affirmed.

My decision is subject to further administrative review under 36 CFR 251. Any appeal of this decision to the second level must be fully consistent with 36 CFR 251.90, content of notice of appeal. Pursuant to 36 CFR 251.87(c)(2), "the appeal for a second level of review is filed with the regional forester within 15 days of the first level appeal decision. Upon receiving such a

request, the regional forester shall promptly request the first level file from the forest supervisor. The review shall be conducted on the existing record and no additional information will be added to the file."

Appeals must be filed with:

Regional Forester
Southwestern Region
333 Broadway SE
Albuquerque, NM 87102

Sincerely,

/s/ John M. Mcgee
JOHN M. McGEE
Forest Supervisor

cc: Keith L Graves, Teresa Ann Ciapusci