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Department of
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Forest
Service

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Date: November 10, 2003

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**CERTIFIED MAIL – RETURN
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RE: Appeal #03-03-05-0001-A251, Jarillas/Lake Allotments, Nogales Ranger District,
Coronado National Forest

Dear Mr. James:

This letter documents my second-level review decision of the appeal filed on behalf of the Chilton Ranch and Cattle Company (Jim and Sue Chilton). The appeal is in regard to District Ranger Graves' decision to set utilization standards in the 2003 annual operating plan for the above-referenced allotments at 35% during the growing season and 45% during the dormant season. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

BACKGROUND

District Ranger Graves (Deciding Officer) issued annual operating instructions in February 2003 for the Jarillas/Lake Allotments. Section III, Allowable Use, imposed a 45% utilization standard for the non-growing season (October–June) and a 35% utilization standard for the growing season (July–September).

The first-level appeal was filed on March 25, 2003. On March 31, 2003, Forest Supervisor McGee (Reviewing Officer) notified the appellant that the appeal was timely and would be processed in accordance with 36 CFR 251. Under the provisions of 36 CFR 251.94, the Deciding Officer completed his written responsive statement of the appeal on April 21, 2003. On May 12, 2003, a written reply to the responsive statement was filed with the Reviewing Officer. Based on his review of the record, the Reviewing Officer affirmed the Deciding Officer's decision on June 3, 2003.

The second-level appeal was received in this office on June 18, 2003.

POINTS OF APPEAL

My review of this appeal was confined to the substantive points raised in the appeal, the appeal record, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.



ISSUE 1: The Nogales District Ranger unilaterally modified the Chilton Term Grazing Permit through issuance of Annual Operating Instructions (AOI).

Contention: The appellant contends the Deciding Officer's decision to reduce forage utilization levels on the Jarillas and Lake Allotments to 35% during the growing season and 45% during the dormant season **constitutes a substantive amendment to Chilton's Term Grazing Permit and/or Allotment Management Plans for the allotments at issue.** The appellant says that because the proposed modification is based on a perceived change in resource conditions and effectively changes the season of use and number of livestock that can be grazed on the allotments, the change required one year's advance notice, in accordance with 36 CFR 222.4(a)(8), and is, therefore, invalid. "Simply put, annual operating instructions are not a 'decision' document. Instead, they are intended to be ministerial in nature, implementing an AMP developed in cooperation with the permit holder for a particular grazing allotment. The AOI at issue here was not the proper vehicle to modify the terms of Chilton's Permit."

Discussion: The Code of Federal Regulations (Secretary of Agriculture's Regulations), 36 CFR, Part 222, Subpart A (Grazing and Livestock Use on the National Forest System), authorizes, "The Chief, Forest Service, shall develop, administer and protect the range resources and permit and regulate the grazing use of all kinds and classes of livestock on all National Forest System lands and on other lands under Forest Service control. He may redelegate this authority ..." (36 CFR 222.1(a)). The Secretary's regulations 36 CFR 222.4 (a)(7) authorize the Chief to "Modify the terms and conditions of a permit to conform to current situations brought about by changes in law, regulation, executive order, development or revision of an allotment management plan, or other management needs." 36 CFR 222.4 (a)(8) authorizes the Chief to "Modify the seasons of use, numbers, kind, and class of livestock allowed or the allotment to be used under the permit, because of resource condition, or permittee request. One year's notice will be given of such modification, except in cases of emergency." 36 CFR 222.1(b)(10) states, "*Modify* means to revise the terms and conditions of an issued permit."

The record reflects the Deciding Officer acknowledges his staff "...mistakenly informed the Chilton's that the utilization standard would be recorded as a change to the grazing permit, rather than the AOI and that this miscommunication caused the Chilton's undue concern." (Responsive Statement) The Deciding Officer also states that "...the utilization standard was correctly documented in the AOI document..." that the Chiltons received February 10, 2003.

Part 2, General Terms and Conditions, Section 8(a), of all term grazing permits provides broad discretion to issue annual instructions to permittees as needed for resource protection and also requires permittees to carry out instructions by Forest Officers for the area under permit. AOIs are required for the proper administration of grazing under the provisions of term grazing permits. Although AOIs are prepared with the participation of the affected grazing permittee, the content of an AOI is at the discretion of District Rangers for each grazing allotment and is responsive to individual allotment resource conditions and unique management needs. However, where special management needs are recurring on individual allotments, it is the policy of the Southwestern Region to schedule these allotments for site-specific NEPA analysis as soon as possible and modify term grazing permits as appropriate. The Jarillas/Lake Allotments are scheduled for site-specific NEPA in 2005 (Southwestern Region INFRA Data Base).

Finding: The Deciding Officer has the discretion under the terms of the grazing permit to establish resource protective measures through the AOI. The long-term application of moderate use levels will be analyzed in detail with full permittee involvement during the NEPA process in 2005.

ISSUE 2: The impact of drought on the allotments is undocumented.

Contention: The appellant contends "...the District Ranger cited only vague 'standard practices' and his own subjective beliefs about a regional drought whose impact on the Allotments is undocumented." The appellant contends, "The article cited at Tab Q of the Responsive Statement, aside from being utter hearsay, refers generally to a lack of water supplies in the State of Arizona, with a focus on the Colorado River Basin." The appellant further contends that the record lacks site-specific evidence supporting reduced utilization levels.

Discussion: In the Responsive Statement, the Deciding Officer relies on information presented in Exhibit Q and Exhibit R to respond to the appellant's assertion that the record lacks site-specific evidence supporting reduced utilization levels. Exhibit Q is an article from the Arizona Daily Star that generalizes the effects of runoff from the Colorado, Salt, and Verde Rivers on reservoirs. Exhibit R is a summary of precipitation records for the years 1999 through 2002. However, there is no explanation of the relationship of these records to the Jarillas and Lake Allotments. Additionally, the record reflects the permittee stocked the allotments at full permitted numbers during 2003 and slightly above permitted numbers during 2000 through 2002 on the Jarillas Allotment (Exhibit J). There is nothing in the record that indicates early removal of livestock will be necessary during the 2003 season, even though utilization standards for key species has been reduced.

Finding: The record lacks site-specific evidence to support the Deciding Officer's decision to implement conservative grazing guidelines, 35-45%, to respond to drought conditions in Southwestern Arizona.

ISSUE 3: The Forest Service reliance on the Forest wide Biological Opinion (BO) is inappropriate.

Contention A: The appellant asserts that the Deciding Officer's reliance on the US Fish and Wildlife Service's (FWS) BO regarding ongoing grazing on the Forest is not a legitimate basis for managing the Jarillas and Lake Allotments.

Discussion: As noted in the appellant's letter (p. 8, paragraph 5), the BO describes the effects on Endangered Species Act (ESA) listed species from the proposed levels of livestock grazing on 187 allotments on the Coronado National Forest for a period of 10 years (BO, pp. 8-9). Conclusions reached in the BO are based on full implementation of the project, as described in the description of the proposed action, the allotment summary tables, the appendices, and any other updated or clarified information (BO, p. 12). Changes in the proposed actions, as consulted on with the US Fish and Wildlife Service, could trigger re-consultation under the ESA.

Appendix G (Revised Allotment Summary Tables, Coronado National Forest, October 1, 2002), Tumacacori EMA, Jarillas Allotment, specifically identifies the utilization level consulted on to be 35% utilization during the growing season and 45% utilization during the dormant season. Page 13 of the BO states, "Reviews of grazing literature for southwestern habitats support the

need to limit levels of utilization (Martin 1973, 1975, Holechek et al. 1998). Martin and Cable (1974), working on the Santa Rita Experimental Range in southern Arizona, found that perennial grass vigor declined when average utilization for a 10-year period exceeded 40 percent. The numbers used by these researchers represent average utilization rates (Holechek et al. 1998)."

Finding: The Deciding Officer established the proposed action that included the 35-45% use levels. The FWS issued a biological opinion based on the proposed action. The Deciding Officer must implement the proposed action in accordance with the opinion or modify the proposed action and re-consult. Reliance upon the FWS's BO is appropriate.

Contention B: The appellant contends that the Jarillas and Lake Allotments do not contain listed species or designated critical habitat. Therefore, consultation under Section 7(a)(2) of the ESA was not required.

Discussion: The Jarillas and Lake Allotments are located within the Tumacacori EMA. The BO, p. 125, states, "We are aware of one lesser long-nosed bat roost site from within the Tumacacori EMA, in the Pajarito Mountains. The closest known bat sites next to the EMA are near Patagonia, about 35 km (15 mi) from the EMA. Approximately the east half of the EMA is within the potential 67 km (40 mi) foraging distance of bats from their day roosts in the Patagonia area. Paniculate agaves are found throughout the EMA, and saguaro are at lower elevations. The EMA is believed to provide appropriate foraging habitat for lesser long-nosed bats. This EMA is located in the general geographic corridor between maternity colonies to the west and summer roost areas farther to the east. Little survey work for this species has been completed in this rugged mountain complex." The FWS concluded, on p. 131 of the BO, "After reviewing the current status of the lesser long-nosed bats, the environmental baseline for the action area, and the anticipated effects of the re-initiation of your livestock grazing program, it is our biological opinion that the proposed action is not likely to jeopardize the continued existence of the lesser long-nosed bat. Critical habitat has not been designated for this species; therefore, none will be affected."

Page 57 of the BO identifies that the Forest Service has determined that livestock grazing on the Jarillas Allotment may adversely affect the cactus ferruginous pygmy-owl. The BO states, "In 1999, a telemetered CFPO was located on the Jarillas Allotment (Tumacacori EMA) by AGFD personnel. This individual was a dispersing juvenile bird and was last located in woodland habitat prior to the transmitter expiring." The FWS concluded, on p. 61 of the BO, "After reviewing the current status of the cactus ferruginous pygmy-owl, the environmental baseline for the action area, the affects of the proposed action, and the cumulative effects, it is our biological opinion that the proposed action is not likely to jeopardize the continued existence of the cactus ferruginous pygmy-owl. Critical habitat has not been designated; therefore, none will be affected."

Finding: The Coronado National Forest consulted appropriately under the requirements of the Endangered Species Act.

DECISION

The record reflects, "The overall trend for the allotment is static. 90% of the allotment is in high range condition with a static trend and 10% is moderately high with a static trend. 96% of the allotment is in satisfactory soil condition and 4% is impaired" Since there are no resource

problems documented in the record for the allotment, an alternative approach to consultation could have been to consult individually on the Jarillas/Lake Allotments rather than to rely on the guidance criteria to set the threshold for a likely to adversely affect determination in the biological assessment. However, the Deciding Officer had the discretion to choose the use of the guidance criteria or to have consulted separately.

I am reversing the Deciding Officer's decision, because the lack of evidence related to drought does not support the utilization standards specified in the Annual Operating Instructions. I am directing the Deciding Officer to re-examine use levels of the proposed action in light of the good allotment conditions. Any changes to the proposed action will require re-initiation under ESA Section 7 until superseded by a new biological opinion for this allotment. Any deviation from the existing biological opinion will require re-initiation until superseded by a new biological opinion for this allotment.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 251.87(e)(3)].

Sincerely,

/s/ Abel M. Camarena
ABEL M. CAMARENA
Appeal Reviewing Officer,
Deputy Regional Forester

cc: Mailroom R3 Coronado, David M Stewart, Christina Gonzalez, Keith L Graves