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Forest
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File Code: 1570-1

Date: May 24, 1999

Streich Lang, P.A.
c/o Michael J. Phalen
and Edwin B. Wainscott
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Re: Appeal of Decision Concerning Authorization and Management of Livestock Grazing on the Crooks Canyon and Maverick Allotments (Appeal #99-03-09-0001-A251), Bradshaw Ranger District, Prescott National Forest

Dear Mr. Phalen and Mr. Wainscott:

This letter documents my second level review decision of the appeal you filed on behalf of your client, Rex Maughan (allotment permittee) regarding grazing management actions for the Crooks Canyon/Maverick Allotments. The appeal relates to a decision issued by District Ranger Ernest Del Rio, Bradshaw Ranger District, Prescott National Forest, concerning a reduction in permitted use (numbers and season) and the grazing management strategy to be implemented through the term grazing permit and allotment management plan.

Background

- A. The Prescott National Forest completed an environmental assessment (EA) on July 13, 1998, for the Crooks Canyon and Maverick Ecosystem Management Area, involving both the Crooks Canyon and Maverick Grazing Allotments (Doc. 242).
- B. On July 14, 1998, the EA was mailed to all parties that had been involved in the NEPA planning process.
- C. Comments to the EA and responses to comments were entered into the project record on September 21, 1998 (Doc. 268).
- D. District Ranger Ernest Del Rio signed the Decision Notice and Finding Of No Significant Impact (DN/FONSI) on September 30, 1998, (Doc. 271). Legal notice of the decision was published in The Daily Courier newspaper in Prescott, Arizona, on October 9, 1998 (Doc. 273).
- E. On November 20, 1998, David L. Johnson (representing Streich Lang, P.A., as legal counsel) filed an appeal on behalf of Rex Maughan, with Forest Supervisor Michael R. King for first level review of District Ranger Del Rio's decision selecting Alternative E (Doc. 279A).



F. The Appeal record was closed by Forest Supervisor King on January 29, 1999, (Doc. 279D).

G. Forest Supervisor King ruled on the first level appeal on March 12, 1999, affirming District Ranger Del Rio's decision (Doc. 279F).

H. On March 26, 1999, Michael J. Phalen (representing Streich Lang, P.A., as legal counsel) filed an appeal, on behalf of Rex Maughan for second level review of District Ranger Del Rio's decision with Regional Forester Eleanor Towns (Doc. 279H).

I. My review of this appeal has been conducted pursuant to and in accordance with 36 CFR 251 Subpart C, and it is consistent with applicable laws, regulations, orders, policies, and procedures. I have thoroughly reviewed the appeal record, therefore, my review decision incorporates, by reference, the entire appeal record.

Points of Appeal

Issue #1. Economic Hardship

Contention: The appellant contends that District Ranger Del Rio's decision adversely affects the permittee by threatening the economic viability of the ranching operation. The decision further jeopardizes the economies of scale necessary to continue livestock operations of the entire ranching unit.

Response: The EA (Doc. 242) contains an analysis which evaluates the effects of each alternative on the social/economic, physical, and biological components of the environment . The "Economic" effects analysis projected that Alternative E (Alt. E) would have an adverse effect on the economic earning capability of the permittee due to a 45% reduction in the number of calves available for sale.

The EA and agency decision making process is issue driven. The EA contained six key issues, one of which addressed the impacts of changing grazing management on the economic and management feasibility of grazing cattle on the allotment. This issue was carried through the analysis and at least one alternative addressed maintenance of the economic viability of the ranching operation. The EA also identified existing conditions which reflected resource problems in riparian areas, heavy use areas by livestock, rangeland conditions, inadequate distribution of cattle, grazing capability and stocking capacity, and other resource concerns. A desired condition was described in the EA with specific management objectives to improve vegetative, soil, watershed, and wildlife resources as well as other non-grazing concerns while implementing an action that is cost effective. The DN/FONSI (Doc. 271) stated that Alt. E met the purpose and need, desired conditions, and management objectives for the allotments. The DN/FONSI acknowledged that all alternatives were not economically favorable for continuing ranching operations. Alt. E implements an action to achieve desired conditions in a cost effective manner, meeting the objectives identified in the EA.

The Deciding Official weighed many factors relating to social and biological concerns before making a decision. The analysis of existing conditions indicates that this reduction in livestock numbers is necessary to improve resource conditions, and the resource needs outweigh economic effects to the permittee.

Findings: I find that the District Ranger recognized and considered the economic impact to the permittee in his decision. However, the District Ranger's decision must respond to management objectives in conformance with the Forest Land and Resource Management Plan. This decision will pose an economic impact to the permittee. To account for this, implementation of the decision must be in compliance with agency policy contained in Forest Service directives to give permittees ample time to make changes in their livestock operations. The DN/FONSI also indicates a potential to increase the capacity of the allotments by 339 head months if potential capacity range improvements are made. Based on the record, the District Ranger has made a rational and informed decision. The District Ranger is affirmed in regards to this issue.

Issue #2. Detrimental Reliance

Contention: Appellant contends that the Forest Service (FS) directed the construction of over seven miles of fence on the Maverick Allotment. The appellant believed that upon completion of the fence that he could rely on the use of the land for grazing permitted livestock in the area adjacent to the fence location. In addition, the appellant contends that the FS has caused an unnecessary expenditure of funds in rebuilding the fence, and if the permitted number of livestock and allotment area is to be reduced, the Forest Service should compensate the permittee for the cost of the range improvements. The appellant asserts that he has been harmed because he reconstructed the boundary fence and will now be excluded from livestock use of the area.

Response: The term "detrimental reliance" is a contract concept which is not applicable to the administration of national forest grazing permits. Grazing permits are not contracts nor do they convey any right, title, or interest to any National Forest System (NFS) lands. Part 2, Section 8(i) of the grazing permit states "... This permit is issued and accepted with the provision that the permittee will maintain **all** (emphasis added) range improvements, whether private or Government owned, that are assigned for maintenance to standards of repair, orderliness, and safety acceptable to the Forest Service".

Findings: There are no provisions in the regulations or agency policy providing for compensation to permittees under the circumstances as described in this appeal point. The permittee reconstructed the fence in order to comply with the permit in effect at that time. The District Ranger is affirmed in regards to this issue.

Issue #3. Arbitrary and Capricious

Contention: Appellant asserts that the proposed reductions are not necessary to preserve environmental, wildlife, or other valid interests. Appellant argues that the reductions proposed by the District Ranger's decision have nothing to do with resource conditions but are a result of litigation brought against the agency by third party interests. The appellant claims that the FS has not adequately assessed the benefits of grazing such as using grazing as a method to suppress the threat of wildfire. The appellant believes that the FS has been arbitrary and capricious in issuing its decision.

Response: The appeal record and the EA (Doc. 242) provide a description of the resource conditions on the allotments. In addition, the EA lists the resource conditions that are desired for the biological, physical and socio-economic components of the environment.

The District Ranger went through an extensive public involvement process, which included public meetings, an open house, and large scale mailings of the scoping report, EA (30 day notice and comment period), and EA with DN/FONSI (Docs. 242, Section 5.0 and Appendix 10; Docs. 243,244,245). The record (Docs. 170 to 222) contains the responses received from the public during the notice and comment period. The interdisciplinary team processed and incorporated those comments that were within the scope of the analysis.

Two documents were entered into the Project Record (Docs. 158, 266) that describe the range resource conditions which were used in determining estimated grazing capacity by alternative. These documents describe the vegetation composition, density of forage species, soil resource condition, landform, animal grazing patterns, amount of land area able to support grazing, and trend studies.

I find that the record contained a substantial amount of information, both from the public and agency records regarding resource issues, resource conditions, and land capability. The interdisciplinary team utilized this information, along with input from the Deciding Official to frame the scope of the analysis and define the decision(s) to be made. The EA and DN/FONSI (Doc. 271) contain the information necessary for the Deciding Official to make a rational and informed decision. Fire management activities were not considered to be within the scope of the analysis (Appendix 2, EA, Doc. 242).

Findings: I find that the adjustment in numbers and season of use is appropriate given the resource conditions as supported by the record. The decision is neither arbitrary nor capricious and the District Ranger's conclusions are both reasonable and rational. The District Ranger is affirmed in regards to this issue.

Issue #4. Burden of Proof

Contention: The appellant contends that the FS has no supporting evidence that the resource is in a degraded condition, nor has overgrazing been documented. The appellant further contends that since the FS has not proven that resource conditions are degraded the proposed reductions are unnecessary.

Response: Reference is made to the response to Issue #3 which is also relevant to this issue . The record reflects that a range analysis was conducted between 1992 and 1995 by FS personnel documenting resource conditions. The range analysis provided resource data on forage utilization, range condition and trend, forage production, grazing capability, as well as other information on site productivity, precipitation, and forage utilization patterns (Doc. 158). The allotments were mapped according to their capability for grazing and the data was summarized in tabular form to derive a composite value for capacity and acreage of grazeable rangeland (full and potential capacity).

The range analysis data is summarized in the EA (Doc. 242) under section 1.3 Existing Conditions. In summary, heavy grazing use and degraded conditions were documented in riparian areas where livestock concentrate, with light use occurring in upland sites. Approximately 27% of the land area within the allotments were classified as "no capacity" range due to steep slopes, unstable soils, and dense vegetation that limits forage production.

Findings: I find that the record contains substantial data that defines the resource conditions and clearly establishes an environmental basis for needed changes in permitted livestock numbers and grazing management. The District Ranger is affirmed in regards to this issue.

Issue #5. Taking

Contention: The appellant contends "that the proposed reduction in grazing allotments constitutes a governmental action that results in a taking of private property without just compensation under the Fifth Amendment of the United States Constitution, and other relevant laws and regulations". The appellant further contends that to "discontinue grazing in the North Unit of the Maverick Allotment and the Palace Unit of the Crooks Canyon Allotment ..." and "... constitutes a permit cancellation pursuant to 36 CFR 222.6(a) and a taking under the U.S. Constitution".

Response: The decision at hand is an administrative action that affects livestock grazing on the allotments as the subject of this analysis and decision. 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". There has been no taking of private property by virtue of the changes in livestock numbers and season of use, subject of this decision.

This decision does not constitute a cancellation of the term grazing permit. As such, this decision is not subject to the provisions of 36 CFR 222.6(a) with respect to compensation for permittees' interest in authorized range improvements.

Findings: I find that the District Ranger's action does not constitute a taking of private property. The District Ranger is affirmed in regards to this issue.

Issue #6. Request For Stay

Contention: The appellant requests a stay of the District Ranger's decision pending the resolution of this appeal, pursuant to 36 CFR 251.91.

Response: A "request for stay" is not an issue. This decision is not being implemented during the administrative review period, therefore, a stay is not necessary.

Findings: The request for stay is denied pursuant to 36 CFR 251.91(b).

Decision

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

After review of the appeal record, I find that the District Ranger's decision with respect to grazing permit reductions and grazing management changes was based on a reasonable assessment of the resource conditions within the allotments. The District Ranger reached a logical conclusion, resulting in an informed decision based on the information contained in the record and documented in the DN/FONSI, signed September 30, 1998.

The District Ranger's decision is in conformance with applicable laws, regulations, orders, and policies and procedures. I find no evidence which would support the allegations that the District Ranger acted in an arbitrary and capricious manner. Therefore, I affirm the District Ranger's decision to adjust the term grazing permit and implement the grazing management changes specified in the DN/FONSI.

The District Ranger needs to inform the permittee of how this decision will be implemented in accordance with 36 CFR 222.4(a)(8) with respect to one year's notice and in accordance with Forest Service Manual 2231.61 and Forest Service Handbook 2209.13, Chapter 10, subpart 16.1.

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

Sincerely,

/s/ Louis Volk for

JOHN R. KIRKPATRICK
Appeal Reviewing Officer
Deputy Regional Forester, Resources

cc:
Forest Supervisor, Prescott NF
District Ranger, Bradshaw RD
Director, Range Management, R3
Appeals and Litigation Staff, R3