



United States  
Department of  
Agriculture

Forest  
Service  
Tonto  
National  
Forest

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File Code: 1570

Date: September 18, 2000

Law Offices of Fennemore Craig  
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Phoenix, AZ 85012-2913

Certified Mail - Return Receipt Requested

Re: Appeal #00-03-12-0007-A251, Cartwright Allotment 2000 AOI, Cave Creek Ranger District, Tonto National Forest

Dear Mr. James:

This letter constitutes my review and decision on the appeal you filed on behalf of Johnson Cattle Company. Your appeal concerned District Ranger Delvin Lopez's April 7, 2000 decision to amend the annual operating Annual Operating Instructions (AOI), issued to Johnson Cattle Company, and require the removal of all livestock from the Cartwright Allotment during the year 2000.

My review was conducted according to the provisions of the appeal regulations in 36 CFR 251.99. I have considered the appeal record, federal statutes, policies, and operational procedures set out in the directives system of the USDA Forest Service. The appeal points presented in your April 25, 2000 appeal, and your July 10, 2000 reply to the District Rangers response statement were reviewed as well as the District Ranger's April 7, 2000 decision, and June 13, 2000 Responsive Statement.

**Points of Appeal:**

My review will focus on your appeal points in Section II (D) and subcategories, of your April 25, 2000 letter. This section of your appeal stated that "*The Decision is Based on the Tonto National Forest's Illegal Conduct and Must be Set Aside.*" Section I, II (A and B) describe basic appeal information, and your representation of the Section 7 Consultation which I will not provide a direct response.

**Your Appeal Point 1: *Unlawful "MALAA" Determinations.***

**Response to Appeal Point 1:**

The Forest Service Manual provides direction for preparation of biological assessment and evaluations, including requirements for determination of effects, rationale for the determinations and formal consultation.



FSM 2670.21 provides direction to “manage National Forest System habitats and activities for threatened and endangered species to achieve recovery objectives so that special protection measures provided under the Endangered Species Act are no longer necessary.” FSM 2670.31 requires the Forest “through the biological evaluation process, <to> review actions and programs authorized, funded, or carried out by the Forest Service to determine their potential effect on threatened and endangered species and species proposed for listing.” It also directs the Forest to “avoid all adverse impacts on threatened and endangered species and their habitats when it is possible to mitigate adverse effects totally through alternatives identified in a biological opinion rendered by the FWS...”

FSM 2670.5 defines adverse effect as “an action that has an apparent direct or indirect adverse effect on the conservation and recovery of a species listed as threatened or endangered.” Implicit in the recovery of a species is the removal of threats to the species and factors limiting species populations, so as to maintain viable populations in the areas of concern. Therefore, Forest management actions must be planned and implemented so as to remove threats and protect and improve habitat to meet species recovery goals.

FSM 2671.44 addresses the determination of effects on listed or proposed species. It directs “Forest units <to> make full use of internal biological expertise and informal consultation with the Fish and Wildlife Service... to reach supportable determinations of effects. The biological evaluation also must consider effects on suitable unoccupied habitat essential to the recovery of the species.”

FSM 2672.42 provides standards for biological evaluations. Requirements include: identification and description of all occupied and unoccupied habitat recognized as essential for listed or proposed species recovery; an analysis of the effects of the proposed action on species or their occupied habitat or on any unoccupied habitat required for recovery; and a determination of no effect, beneficial effect, or may effect on the species and the process and rationale for the determination. Determinations are made by journey level biologists.

A determination of effect of a project on threatened or endangered species is made in order to identify whether the Forest Service needs to request formal consultation with the U.S. Fish and Wildlife Service. The determination is made or approved by a journey level biologist based on compliance with recovery plans, conservation documents or other available scientific literature, related professional expertise and the biologist’s professional judgment. Our biologists based the determination of effect of ongoing grazing for the Cartwright Allotment on the guidance criteria for term grazing permits developed by Region 3, Forest Service and Region 2, Fish and Wildlife Service. These criteria provide thresholds for making a determination of effect and under what conditions grazing actions on a Forest allotment would require formal consultation with Fish and Wildlife Service. Therefore, the determination of effect of the current Forest grazing action on Cartwright Allotment is within the Forest Service’s authority.

With respect to the MOU of August 20, 1981, and the resulting Biological Opinion (BO) of May 13, 1982, for introduction of Gila topminnow; neither of these documents intended to exempt future agency action from additional Section 7 consultations and BO and or additional protective measures which might be needed based on new information about the species. The referenced

MOU and BO were developed based on the status and management needs of the species as they were known in 1981. The MOU, in part stated that “new uses at the sites or stocking of additional sites would require additional Section 7 consultation.” Changes in listings, new protocols, and other new information often lead to additional consultation for the same activity.

Grazing activities on the Cartwright Allotment have changed considerably since the referenced MOU and BO. Grazing management changed in 1989 when a new AMP was written. The BE for that AMP did not address Gila topminnow or habitat at Lime Cabin Spring, Lime Creek, Seven Springs Wash, or Cave Creek. A new AMP is considered a change in action, and potential effects on T&E species must be addressed. The status of Gila topminnow has declined considerably since the 1982 MOU and BO were prepared, thus new analysis of effects of ongoing activities is called for.

To summarize this point of appeal, the District Ranger has required the removal of livestock from the Cartwright in order to protect National Forest resources during a severe drought that has caused production of available feed to decline and utilization levels in key areas to increase. The concern for the resource conditions and habitat for threatened and endangered species were justified and the procedures were properly applied.

**Your Appeal Point 2: *Southwest Center for Biological Diversity Lawsuit.*”**

**Response to Appeal Point 2:**

The District Ranger has the responsibility for providing proper stewardship and protection of natural resources, as well as providing for compatible, properly managed use. This responsibility includes protecting habitat for threatened and endangered species. Ranger Lopez had sufficient reason to be concerned with the heavy grazing impacts on natural resources (not just endangered species) because of extremely dry conditions, lack of forage, and heavy utilization on remaining forage. His April 7, 2000 letter clearly portrayed the situation to be that dry conditions had caused lower forage production and the lack of water for livestock causing cattle to seek out green feed and water in the riparian area along Cave Creek. This situation caused utilization levels to be exceeded before the dry low-forage-producing part of the year began.

**Your Appeal Point 3: *Management Changes cannot be Made by Means of a Biological Assessment.***

References to the Biological Assessment (BA) as a management or decision document is incorrect. The BA is not intended as a range management decision document. The District Ranger’s statement that “it [the BA] sets allowable use standards of 20% in riparian areas...” was improperly stated. The “action” was amended through the AOI to limit the use levels. However, the record supports that the BA was properly used to determine the effects on threatened or endangered species. The Annual Operating Instructions (AOI) included in the April 7, 2000 letter to the Johnson Cattle Company was the instrument used to make a decision on the management that would be implemented.

The grazing permit is the instrument used to administer grazing on Forest Service Allotments. As a matter of Forest Service policy (FSM2212.03-9) the allotment management plan (AMP) is incorporated as a part of the terms and conditions of the permit. Determining proper levels of grazing and management is an iterative and adaptive process based on immediate needs in response to resource management objectives and often variable conditions. In order to implement the proper levels of grazing and management and protect resources, the District Ranger has the discretion to set utilization levels depending on local needs. The directions dealing with immediate needs, or annual management instructions, are issued through AOIs. Authorization for forest officers to issue written instructions that document temporary stocking adjustments and /or provide the additional direction necessary for proper management of the rangeland resource is contained in the grazing permit and in agency policy.

Through issuance of the AOI, the District Ranger has not modified the permit. The grazing permit remains as originally issued. The District Ranger has simply redeemed his/her responsibilities for providing proper administration of the permit in accordance with USDA regulation, and agency policy and operating procedures. Any permanent modifications in the permit will be made in conjunction with the current NEPA process to authorize grazing which is ongoing at this time and to be completed in the near future.

To summarize this point of appeal, the District Ranger has used his authority correctly to issue instructions for proper protection and management of resources. The District Rangers decision to issue AOI did not modify the permit but simply provided for proper administration of the permit.

***Your Appeal Point 4: Section 7(d) of the ESA Does Not Support the Decision.***

I agree that the provisions of Section 7(d) apply during the time formal consultation is in process pending the issuance of a BO. The statement concerning Section 7(d) in the District Ranger's decision letter was ambiguous. However, a section 7(d) determination was made for the "25 Allotments." After initiating consultation, a determination was made to identify if "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of and reasonable and prudent alternative measures which would not violate subsection (a)(2) of ESA."

The Forest Service determined that management as described in the AOP for the Cartwright Allotment would not cause "irreversible or irretrievable commitment of resources." In the event that management changed, or the utilization levels increased, the same section 7(d) determination might not apply. This is not to say that section 7(d) would be violated, but the action might have changed so the description of the action being evaluated would be different.

To summarize this point of appeal, although the statement in the District Ranger's decision was ambiguous, the application of procedures to evaluate the effects on resources and make management decisions was properly implemented. The decision identified the need to take action "to protect the riparian areas and watersheds" as well as concerns for effects on Threatened and Endangered Species habitat.

***Your Appeal Point 5: The Forest Service has Acted Illegally in Denying Appellant the Right to Participate in the Consultation.***

Sufficient documentation in the record indicates that the appellant was not denied the right to participate in the consultation process. The Forest Supervisor's May 10, 1999 letter to Johnson Cattle Company advised the appellant of the Biological Assessment and encouraged him to request a copy at the Cave Creek District Office, and discuss the findings or questions with the District Ranger. The letter also advised him that consultation with the US Fish and Wildlife Service would be initiated and that he could be granted applicant status if desired. It further states that if granted applicant status the Forest Service (FS) will send a copy of the draft Biological Opinion and he will have the opportunity to provide comments on it to the FS. The letter to you, from the Forest Supervisor (September 8, 1999) advises that the grazing permittees, on the "25 allotments" which are the subject of the BA, were granted applicant status. We have not received the BO from Fish and Wildlife Service (FWS) yet. Once it is received we will send copies to each of the permittees (including Johnson Cattle Company).

The FS has granted a 60 day extension to the FWS for the BO. As you stated under section II(A)(2), the agency may extend the 90-day consultation period without the consent of the applicant by an additional 60 days. The FWS considered June 21, 2000 to be the initiation date for the "25 Allotment Consultation," because this was the date their office received, all of the required information from the FS (50 CFR§401.14(C)).

To summarize this point of appeal, the District Ranger has used his authority correctly to follow procedures, and to issue instructions for proper protection and management of resources.

***CONCLUSION***

The District Ranger has the responsibility for providing proper stewardship and protection of natural resources, as well as providing for compatible, properly managed use of natural resources. However, severe conditions have developed with the extended drought during the past several years. It is well known that Arizona is currently experiencing one of the driest periods on record. The current situation is a continuation of a dry weather pattern which has generally prevailed since 1996. Forage production is far below normal and available water sources are severely limited. The lack of water and forage has resulted in severe pressure on riparian areas. As stated in the District Ranger's April 7, 2000 decision letter, monitoring data showed forage utilization by domestic livestock was approaching unacceptable levels throughout the Forest at the beginning of calendar year 2000. It was clearly evident that the Forest's rangeland and riparian resources would be at risk unless adjustments were made in stocking levels.

My review of your appeal was conducted in accordance with 36 CFR 251 Subpart C. After review of the record, I conclude that the District Ranger's April 7, 2000 decision to amend your Annual Operating Instructions (AOI), and require the removal of all livestock during the year

2000, was warranted and in conformance with applicable laws, regulations, orders, and policies and procedures. According to the appeal regulations (36 CFR 251.87) you may file an appeal to

the Regional Forester within 15 days of this decision. The second level appeal must be sent to: Regional Forester, Southwestern Region, 517 Gold Avenue, SW, Albuquerque, New Mexico 87102. A copy of the second level appeal should also be sent to my office.

Sincerely,

THOMAS J. KLABUNDE  
Acting Forest Supervisor and Appeal Reviewing Officer

CC:  
Regional Forester, R-3  
District Ranger, D-1  
Johnson Cattle Company