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Agriculture

Forest  
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File Code: 1570-1

Date: August 18, 2000

Mr. Howard J. Norris  
P.O. Box 1061  
Globe, AZ 85502

Re: Appeal #00-03-12-0006-A251, Chrysotile Allotment 2000 Annual Operating Plan,  
Globe Ranger District, Tonto National Forest

Dear Mr. Norris:

This letter constitutes my review and decision on your appeal which we received April 21, 2000. Your appeal is regarding Ranger Larry Widner's March 17, 2000 decision to amend your Annual Operating Instructions (AOI) and require the removal of all livestock during the year 2000, because of extremely dry conditions and lack of forage.

I have reviewed the appeal points presented in your March 28, 2000 letter according to the provisions of the appeal regulations in 36 CFR 251.99. My review has been conducted in full consideration of the entire appeal record, federal statutes, policies and operational procedures set out in the directives system of the USDA Forest Service.

**Points of Appeal:**

The following is my review of the points in your notice of appeal:

***Your Appeal Point 1: "The decision is unfair, punitive, arbitrary and capricious."***

***Response to Appeal Point 1:***

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. Generally the objective would be to achieve adequate resource protection without causing a hardship to the grazing permittee. 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 March 17, 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.

Total removal of livestock has been necessary on approximately 45 percent of the allotments on the Forest. Most of the grazing permittees have removed livestock from the Forest on their own initiative because of lack of forage.

Continuing to allow the degradation of riparian areas and watersheds would not be a prudent decision in managing natural resources, including grazing. The District Ranger had sufficient reason to be concerned with the heavy grazing impacts on natural resources because of extremely dry conditions, lack of forage, and heavy utilization on remaining forage. Livestock numbers were reduced on practically all allotments on the Tonto National Forest because of drought, and many grazing permittees removed all their livestock from the National Forest on their own initiative. The district ranger has the authority and legal responsibility to assess the rangeland and resource conditions and protect these resources from long term impairment. While the objective is to allow for an economically profitable operation, this is dependant on ensuring the natural resources are being properly managed and protected.

***Your Appeal Point 2: “The forty-five days is an unreasonable short amount of time to demand complete removal of all livestock....”***

***Your Appeal Point 3: “The USFS is required to give a 1 year notice in regards to actions of this nature 36CFR 222.4(a)(8) and section 8 of the USFS standard form of term grazing permit.”***

***Response to Appeal Point 2 and 3:***

The Federal Regulation, 36 CFR 222.4(a), states that “The Chief, Forest Service, is authorized to cancel, modify, or suspend grazing and livestock use permits in whole or in part as follows: (8) 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.” This section of the regulations is referring to the modification of the grazing permit. 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 responsibilities for providing proper administration of the permit in accordance with USDA regulation, 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.

The term “emergency” in respect to Part 2 Section 8(b) of the permit, is in reference to an emergency situation which might necessitate not giving a one year notification before a grazing permit is permanently modified. This has no bearing on the merit of the District Ranger’s decision to issue management instruction needed to properly protect resources during the 2000 grazing season.

***Your Appeal Point 4: “If the data collected in 1997 strongly indicated a downward trend...wouldn’t that have been the logical time to begin modification of our Allotment Management Plan?”***

***Response to Appeal Point 4:***

Your conclusion sounds logical. The record indicates that action probably should have occurred before now. However, letters to you from the District Ranger (July 1, 1994; May 11, 1995; May 24, 1995; August 8, 1995; August 23, 1995; July 24, 1996; May 30, 1997; November 12, 1999), show a consistent effort, by the District Ranger, to adjust management because of rangeland condition. Other letters (June 20, 1994; June 18, 1998; October 27, 1997; June 7, 1997) are in response to your non-compliance with annual operating instructions. The record shows that the district ranger has sufficiently worked with you to implement proper management for the resources. With this “point” aside, it is important to clarify that the District Ranger’s decision was not based on your non compliance of the terms and conditions in your grazing permit, and did not involve modification of your permit. The decision involved the amendment of your annual operating instructions (AOI) for the year 2000. An important factor in the District Ranger’s March 17, 2000 decision letter is that drought has exacerbated range condition problems to a point that immediate action had to be taken on the Chrysotile Allotment.

***Your Appeal Point 5: “According to the letter, if all cattle are not removed by May 1, 2000, we should be exposed to liability under ESA.”***

***Response to Appeal Point 5:***

The District Ranger was likely referring to the grazing permittee’s obligation under Section 7(d) of the endangered species act (ESA) which “prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation of implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.” This section of ESA is referring to actions that occur during the consultation process which is not the case on the Chrysotile Allotment. Therefore, this statement does not apply to you in this context.

***Your Appeal Point 6: “The decision letter made reference to unauthorized use with cattle in pastures scheduled for rest is common...we were supposed to rotate into a pasture with the fencing is completed on the Salt River. To date this fence has not been adequately completed, and we are still waiting to begin that rotation plan, some 2 years later. The USFS did not adequately plan the Salt River fence, and livestock can still get to the river...we were told that the USFS part of the fence was completed for our allotment, and if additional fence was needed we would have to supply the materials and labor before we could use the pastures involved. Livestock from the Reservation, as well as wild cattle, can and do access these areas., for which we receive the hit of unauthorized use.”***

***Response to Appeal Point 6:***

It is difficult to find the relevance of this point on the merits of the district Ranger's decision to require the removal of your livestock during 2000. The District Ranger makes it clear in his March 17, 2000 letter that the effects of the drought are likely to be more severe because of the poor range conditions on the allotment that existed before the drought. In this case concerns with management compliance have been addressed in the District Ranger's letters as described under my response number 4.

***Your Appeal Point 7: "We believe this punitive and unfair decision has no basis in reality and certainly doesn't represent the spirit of cooperation and trust that should be fostered between the USFS and us."***

***Your Appeal Point 8: "If this decision is allowed to stand, our business will be reduced to a level below a viable economic unit."***

***Response to Appeal Point 7 and 8:***

The District Ranger had sufficient reason to be concerned with the heavy grazing impacts on natural resources because of extremely dry conditions, lack of forage, and heavy utilization on remaining forage. Livestock numbers were reduced on practically all allotments on the Tonto National Forest because of drought, and many grazing permittees removed all their livestock from the National Forest on their own initiative. The district ranger has the authority and legal responsibility to assess the rangeland and resource conditions and protect these resources from long term impairment. While the objective is to allow for an economically profitable operation, this is dependant on ensuring the natural resources are being properly managed and protected.

***Your Appeal Point 9: "This decision does not include either the criteria or reasonable timeline of livestock reintroduction."***

***Response to Appeal Point 9:***

The effective period for the AOI is generally for the grazing fee year with is March 1, 2000 through February 28, 2001. However, the reason for the decision is based on the drought, and as the District Ranger stated in his responsive statement the date that the drought will end and vegetation will recover is unknown.

***Your Appeal Point 10: "Lack of Data supporting...that all Livestock be Removed Immediately....."***

***Response to Appeal Point 10:***

The appeal record reflects that considerable monitoring data has been gathered on the allotment for a number of years and substantial data has been collected to support his statement that "recent monitoring and observations indicate that proper use levels on the Chrysotile Allotment have been exceeded and that continued grazing is resulting in unacceptable resource impacts.

***Your Appeal Point 11: “Unlawful modification of grazing permits and AMPs by means of animal operation plans... imposition of forage utilization levels.” “One years notice will be given..except in cases of emergency...one years notice wia not provided... the decisions do not expressly state that an emergency exists”***

***Response to Appeal Point 11:***

Grazing on a Forest Service Allotment first and foremost by the grazing permit. As a matter of Forest Service policy (FSM2212.03-9) “[u]pon approval, incorporate the allotment management plan as a part of the terms and conditions of the permit.” Also, as a matter of agency policy, (FSM2212) “[a]n allotment management plan is the primary document which guides implementation of forest plan direction for rangeland resources and, as such, of necessity must conform to and be consistent with the management direction contained in the Forest Plan.

Therefore, the AMP does not take precedence over the grazing permit, but rather is a part of the permit. While it is the desire of the agency to have a current AMP on all grazing allotments, the 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 the needs and response to resource management objectives. Grazing regulation, the grazing permit and agency policy and operating procedures have been developed in recognition of this fact.

All of the agency policies and operating procedures, needed for proper administration and management of national forest rangelands, cannot be included in USDA regulations. Therefore, the main provisions of how national forest grazing is to be authorized and managed are included in the USDA Regulations set out in 36 CFR Part 222- Range Management. Agency policy and operational procedures, within the framework of regulations, are then set out in the agency’s directive system. Therefore, authorization for forest officers to issue written annual operating 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 itself and in agency policy in the directives system.

An example of this includes FSM 2231.41-Annual Authorization of Grazing Permits With Term Status. “Annual grazing under a permit with term status is authorized by Forest Service issuance of a Bill for Collection and acknowledged by the permittee’s payment of fees. Use authorized on the bill for collection may be different than that shown on Part 1 of the grazing permit (emphasis added). The same provision included in Part 2, item 2 of the grazing permit.

Another example is FSM 2231.5-Issuance of Grazing Permits With Term Status. ...”The Regional Foresters and Forest Supervisors may include such special provisions in Part 3 (form FS-2200-10a) as needed to obtain compliance with grazing regulations and to secure proper management of livestock and resources. Include a copy of the allotment management plan, and the annual operating plan, as part of the permit.”

The grazing permit is very explicit. Part 2, Section 8(a) says “[t]he allotment management plan for the land described on page 1 Part 1, is a part of this permit, and the permittee will carry out

its provisions, other instructions, or both as issued by the Forest Officer in charge of the area under permit and will require employed. Agents, and contractors and subcontractors to do likewise (emphasis added)”.

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 full authority to issue instructions for proper protection and management of resources. The District Rangers decisions to issue AOI did not modify the permit but simply provided for proper administration of the permit.

***Your Appeal Point 12: “ESA Violations... Certain decisions referenced a lawsuit.. filed in December 1998.”***

***Response to Appeal Point 12:***

The District Ranger’s March 17, 2000 decision letter makes it clear that the decision involved the amendment of your “2000 annual operating instructions” (AOI). An important factor is that drought has exacerbated range condition problems to a point that immediate action had to be taken on the Chrysotile Allotment. The decision was not based on a lawsuit.

### ***CONCLUSION***

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 March 17, 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. The District Ranger’s decision was not unlawful, arbitrary, capricious nor an abuse of discretion. Therefore, I affirm the District Ranger’s decision.

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-2