



United States
Department of
Agriculture

Forest
Service
Tonto
National
Forest

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File Code: 1570

Date: September 26, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Greenback Valley Ranch
C/O Mr. William Conway
HC6 Box 1420
Payson, AZ 85541

RE: Your appeal of June 23, 2000 (No. 00-03-12-0009-A251)

Dear Mr. Conway:

This letter constitutes my review and decision on the appeal you filed concerning Ranger Tina Terrell's May 10, 2000 decision. The decision limits the number of livestock to 41 head, for the year 2000, on the Greenback Allotment.

I have reviewed the appeal points presented in your June 23, 2000 letter and the attached "Forest Service Appeal Brief." My review was conducted according to the provisions of the appeal regulations in 36 CFR 251.99.

My response to your appeal points is addressed below. I will respond to appeal points one through five of your June 23, 2000 letter first, and then to the "Forest Service Appeal Brief."

Your appeal points number 1 and 2.

Numbers 1 and 2 of your June 23, 2000 letter give basic information on the appeal and do not need a response.

Your appeal point number 3:

Here you further define the decision and register a complaint concerning the district ranger's timeliness in formally notifying you of your appeal rights.

My response to your appeal point number 3:

In her responsive statement, the District Ranger gives a summary of the meeting she had with you on April 21, 2000 where she discussed your Annual Operating Instructions (AOI) and informed you of your appeal rights. You are correct that the appeal information should have been included in the District Ranger's May 10, 2000 letter and was not included until she wrote the June 8, 2000 letter.



Given the fact that your appeal was received and the review process was initiated, I will consider the purpose of this appeal point to be for “registering a complaint” as you described it, and will not provide a further response.

Your appeal point number 4:

You described that the decision to limit numbers to 41 cattle during the year 2000 will cause extreme economical hardship.

My response to your appeal point number 4:

The District Ranger’s responsive statement describes the purpose of the decision being to protect resources during the severe drought that has persisted during the past four years.

The District Ranger had reason to be concerned with the effects of drought because of the widespread impacts that were occurring. The National Oceanic Atmospheric Administration (NOAA) reported that conditions in Arizona are the driest they have been in 103 years. Governor Hull proclaimed Arizona to be in a Drought Emergency situation during 1999 and 2000. The Tonto National Forest was hit particularly hard, being impacted by drought since 1996. Forage and water for livestock have become increasingly scarce during the past few years. Livestock numbers were reduced on all allotments on the Tonto National Forest. Thirty-two grazing permittees removed all their livestock from the National Forest on their own initiative because of drought. In response to the severe drought a Federal Emergency Drought Program was available to grazing permittees during 1999. The program provided funding to grazing permittees for removing livestock to protect watersheds from heavy use because of drought. In fact, you used this program and removed all of your livestock from the National Forest from December 1, 1999 through April 30, 2000.

With the continued dry conditions during the time your cattle were off of the allotment, it is reasonable to expect that resources could not have sufficiently recovered. The news media has continued to report the severe conditions of the drought in Central Arizona, so it is well known that the drought has not subsided and the lack of forage and water on the National Forest continues to be a problem.

Your appeal point number 5:

In this appeal point you disputed the district Ranger’s capacity estimate.

My response to your appeal point number 5:

To evaluate this appeal point I reviewed the record to determine if the District Ranger considered the proposal you presented, and if the methods used were according to Forest Service methods or other credible scientific methods. I did not scrutinize the professional judgment involved in the estimates.

The appeal record reveals that the District Ranger listened to and evaluated your proposal. Adequate consideration was given to the estimates you made as well as Forest Service estimate. The District Ranger gave consideration to the process used for estimating capacity, current resource conditions, soil conditions, topography, current structural improvements, and history of use. Therefore, I consider the estimate made by the District Ranger to be supported by resource conditions and justified by the needs of the Allotment during this year of extremely low productivity, because of dry conditions.

Your appeal point number 6:

This appeal point involves the attachment to your June 23, 2000 letter titled “Forest Service Appeal Brief.”

My response to your appeal point number 6:

I. Overview of the legal and regulatory framework.

A. Grazing Management on National Forest System Lands”

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 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 are issued through Annual Operating Instructions (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 in clause 8(c) 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 her/her responsibilities for providing proper administration of the permit in accordance with USDA regulation, and agency policy and operating procedures. Any permanent modifications to 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 her authority properly to issue instructions for appropriate protection and management of resources. The District Ranger’s decision to issue AOI did not modify the permit but simply provided for proper administration of the permit.

B. Section 7 Consultation

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 consult 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.

II. *The Forest Service’s Legal and Regulatory Violations.*

A. *Lack of Data Supporting the Requirement that all Livestock be Removed Immediately from the Allotment.*

All livestock were not removed from your allotment. The District Rangers decision involved limiting numbers of livestock to 41 head during the year 2000 because of drought. The discussion concerning estimation of capacity is covered under appeal point number 5.

B. Unlawful Modification of Grazing Permits and AMPs by Means of Annual Operating Instructions.

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 preclude changes in the management, or take precedence over other terms and conditions of the permit. 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, 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 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 in clause 8(c) and in agency policy in the directives system.

An example is found in 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 is 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 her/her responsibilities for providing proper administration of the permit in accordance with USDA regulation, and agency policy and operating procedures. Any permanent modifications to 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 authority to issue instructions for proper protection and management of resources. The District Ranger’s decisions to issue AOI did not modify the permit, but simply provided for proper administration of the permit.

C. The Implementation of the Forage Utilization Levels Adopted in the 1996 Record of Decision for Amendment of the forest Plans by Means of AOPs is Unlawful.

The appeal record sufficiently shows that the District Ranger did not use the forage utilization table from the 1996 ROD or any portion of that table. The District Ranger used her authority properly to issue instructions for appropriate protection and management of resources. The discussion concerning estimation of capacity is covered under appeal point number 5.

D. ESA Violations

1. Southwest Center for Biological Diversity Lawsuit.

This appeal point is in reference to the “25 Allotment” Lawsuit, which your allotment was not named in. However, 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 Terrell 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.

2. Management Changes Cannot be Made by Means of a Biological Assessment.

This appeal point is in reference to the “25 Allotment” BAE, which your allotment was not named in.

3. Section 7(d) of the ESA Does Not Support any of the Decisions.

I agree that the provisions of Section 7(d) apply during the time formal consultation is in process pending the issuance of a BO. However, this appeal point is in reference to the “25 Allotment” BAE, which your allotment was not part of.

4. The Forest Service has Acted Unlawfully in Denying Permit Holders the Right to Participate in the Consultation.

Again, this appeal point is in reference to the "25 Allotment" BAE, which your allotment was not a part of.

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 May 10, 2000 decision to limit the number of livestock to 41 cattle for the year 2000 is warranted and in conformance with applicable laws, regulations, orders, and policies and procedures. 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,

/s/ Thomas J. Klabunde

THOMAS J. KLABUNDE
Acting Forest Supervisor and Appeal Reviewing Officer

CC: Regional Forester, R-3
District Ranger, D-6