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Department of
Agriculture

Forest
Service

Tonto
National
Forest

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File Code: 1570-1

Date: September 22, 2000

Sanborn Land and Cattle Company
ATTN: Prior F. Sanborn
HC R4, Box 25
Globe, Arizona 85501

Certified Mail - Return Receipt Requested

Re: Appeal #00-12-SO-003, Poison Springs/Sierra Ancha Allotment 2000 annual operating plan, Tonto Basin Ranger District, Tonto National Forest

Dear Mr. Sanborn:

This letter constitutes my review and decision on the appeal you filed concerning Ranger Tina Terrell's March 10, 2000 decision. Your appeal is regarding Ranger Terrell's decision to amend your Annual Operating Instructions (AOI) and require the removal of all livestock during the year 2000 because of drought and lack of forage.

I have reviewed the appeal points presented in your March 10, and April 21, 2000 letters according to the provisions of the appeal regulations in 36 CFR 251.99. My response to your appeal points are addressed below. The first appeal point was in your original appeal letter dated March 10, 2000, and appeal points 2 through 13 are in your April 21, 2000 supplement.

Appeal point number 1. "Removal of livestock from the Poison Springs and Sierra Ancha allotments will ruin me financially."

My response to appeal point number 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 10, 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.

Appeal point number 2. There is a lack of data supporting the requirement that all livestock be removed immediately from the allotment.

The District Ranger's decision letter states that monitoring conducted on the Sierra Ancha and Poison Springs in 1998 and 1999 indicate utilization levels exceed 70% in most cases, especially in the riparian areas of Coon Creek, Chalk Creek, Dry Creek, and Lower Cherry Creek. Also, streambank alteration exceeds 100% in Coon Creek.

The District Ranger must use all the information that was available to assess resource condition in a short time period. The methods of acquiring the information include vegetation monitoring, condition and trend studies, and observations made by Forest Service personnel. The lack of forage production and heavy utilization was supported by the various methods. The effects the drought has had on herbage production on the Sierra Ancha and Poison Springs Allotment is easily observed, even by the public who have been in the area and made comments. The Sierra Ancha and Poison Springs allotments were not the only allotments severely affected by the drought. The drought has had a widespread and severe effect on herbage production throughout most of the Tonto National Forest. Livestock numbers were reduced on 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.

Appeal point number 3. In response to a request for information to the Forest Supervisor of the Tonto National Forest relating to the request from District Rangers that permittees immediately remove their livestock for an allotment, the Arizona Cattle Growers Association (ACGA) was not provided with any studies, reports, or other compilation of data indicating that, with respect to each allotment, resource conditions throughout the allotment justified finding of an emergency.

I am not aware of a request from the ACGA to which we have not responded. It is our desire to cooperate with the ACGA and provide information that is requested. Whether or not we provided the information requested by the ACGA does not relieve the District Ranger's responsibility to manage and protect the natural resources.

Appeal point number 4. Unlawful Modification of Grazing Permits and AMPs by Means of Annual Operating Instructions.

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 addressing immediate needs, or annual management instructions, are issued through AOIs as provided for in

clause 8(c) of your permit. 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 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 her 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.

Appeal point number 5. The implementation of the Forage Utilization Levels Adopted in the 1996 Record of Decision for Amendment of 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 proper protection and management of resources.

Appeal point number 6. The Decision is unlawful for it is based on removing any violations as it pertains to ESA and the Southwest Center for Biological Diversity lawsuit.

The District Ranger's March 10, 2000 letter clearly defines the reason for requiring the removal of livestock was because of low forage production and lack of water, which caused heavy utilization levels in riparian and upland areas. Such levels of use could lead to effects on listed species as was pointed out in the Ranger's March 10, 2000 letter. The District Ranger used her authority properly to issue instructions for appropriate protection and management of resources.

Appeal point number 7. The Southwest Center's lawsuit was administratively closed and is presently inactive by order of the court dated November 18, 1999s.

The District Range's responsibilities include 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. Her March 10, 2000 letter clearly portrayed the situation to be that dry conditions had caused lower forage production, and utilization levels exceeded acceptable levels.

Appeal point number 8. Management Changes cannot be made by means of a biological assessment.

The record supports that the BA was properly used to determine the effects on threatened or endangered species. The Annual Operating Instructions (AOI) was the instrument used to make a decision on the management that would be implemented.

Appeal point number 9. The biological assessment is required only in connection with a major construction project or its equivalent, i.e., an action that requires the preparation of an EIS.

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. 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.

To summarize this point of appeal, the BA process was consistent with the ESA and agency policy and the procedures were properly applied.

Appeal point number 10. 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. 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 current management for the Sierra Ancha and Poison Springs Allotments would not cause "irreversible or irretrievable commitment of resources." In the event that management changed, or the utilization standards were exceeded, 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, 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.

Appeal point number 11. The consultation is complete on grazing management on 25 allotments on the Tonto National Forest as Judge Young ruled the Southwest Center's Section 7 claim was moot.

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)).

Appeal point number 12. Section 7(d) is intended to prevent federal agencies from proceeding with major projects while facing the risk that the project may have to be halted as a

consequence of a jeopardy determination in the biological opinion.”

The ESA Section 7(d) determination was completed for the “25 Allotments” to determine if “irreversible or irretrievable commitment of resources would occur, 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.”

Appeal point number 13. The Forest service has acted unlawfully in denying permit holders the right to participate in the consultation.

Sufficient documentation in the record indicates that you were was not denied the right to participate in the consultation process. The Forest Supervisor’s May 10, 1999 letter to Sanborn Land and Cattle Company advised you of the Biological Assessment and encouraged you to request a copy at the Forest Service District Office, and discuss the findings or questions with the District Ranger. The letter also advised you that consultation with the US Fish and Wildlife Service would be initiated and that you 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 you will have the opportunity to provide comments on it to the FS. 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 Sanborn Cattle Company).

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 10, 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-6

