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Department of
Agriculture

Forest
Service

Tonto
National
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Date: September 25, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

BEUS Gilbert PLLC, Attorneys at Law
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Suite 1000 Great American Tower
3200 N. Central Avenue
Phoenix, Arizona 85012-2430

RE: Appeal No. 00-03-12-0005-A251
George Ewing for George T. Cline Equity Trust

Dear Mr. Mills:

This letter constitutes my review and decision on the appeal you filed on behalf of George Ewing for the George T. Cline Equity Trust. Your appeal concerned District Ranger Tina Terrell's March 14, 2000 decision to amend your annual operating Annual Operating Instructions (AOI) and require the removal of all livestock from the Tonto Basin Allotment during the year 2000. In your April 11, 2000 letter you requested an oral presentation. Although the oral presentation was not scheduled, the record had not been formally closed. A representative from your office called Eddie Alford during the week of July 10th and scheduled the oral presentation August 25, 2000. The appeal record was closed August 25, 2000, following the presentation.

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 11, 2000 appeal, April 28, 2000 letter supplementing the appeal, and your May 24, 2000 reply to the District Rangers response statement were reviewed as well as your oral presentation of August 25, 2000. The District Ranger's March 14, 2000 decision, and May 11, 2000 Responsive Statement were also reviewed in support of my decision.

Points of Appeal:

The following is my review of the points in your appeal. Your appeal points are *highlighted and italicized*, and followed by my response.

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 would 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 preparing biological assessment and evaluations, including requirements for determining 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: identifying and describing 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 affect 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 Tonto Basin 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 that determining effect and identifying conditions and grazing actions on a Forest allotment that would require formal consultation with Fish and Wildlife Service. Therefore, the determination of effect of the current Forest grazing action on Tonto Basin Allotment is within the Forest Service’s authority.

To summarize this point of appeal, the District Ranger required removal of livestock from the Tonto Basin allotment 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 concerns for resource conditions and habitat for threatened and endangered species were justified and the procedures were properly applied.

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.*

The District Ranger stated in her May 11, 2000 letter that proper use levels on the Tonto Basin Allotment had been exceeded and that continued grazing would result in unacceptable resource impacts. She also articulated that the drought was causing a reduction in available water, reduced forage production, and concentration of livestock. She based her decision on her knowledge of the conditions on the allotment.

My review of this point of appeal will focus on whether the ranger made an informed decision and whether the decision necessary. As discussed under I (A), the District Ranger has the discretion to make management decisions to protect resources depending on local and immediate

needs. The severity of the drought demanded prompt action on most allotments on the Tonto Basin District. In this case there was not adequate time, or a need to collect extensive amounts of data. The severity of the drought was easily recognized throughout the Ranger District. Due to the urgent need for information, the District Ranger must use several of methods to gain information to make decisions. The methods include monitoring, range inspections, and general observations.

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 the State of 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 affected by drought since 1996. Forage and water for livestock have become increasingly scarce during the past few years. Livestock numbers were reduced on practically 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. 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, this program was used by Mr. Ewing for removal of a portion of his livestock from the National Forest.

The utilization measurements at the Greenback monitoring site were not completed. However, the monitoring crew evaluated the site and noted that there was no production, and therefore current year utilization levels could not be measured. The monitoring reports show that 100% of the meristems on the cottonwood, velvet ash and desert hackberry were grazed in Reno Creek. More than 60% use was measured on sedge. The report also shows no perennial grasses or palatable woody vegetation were present in the monitoring plot in Park Creek. This report was not included in the District Ranger's responsive statement because they are generally grazed by Steve Cline's cattle and not Mr. Ewing's. However, these areas are on the Tonto Basin Allotment and are not fenced from the areas typically grazed by Mr. Ewing. All areas measured provide the District Ranger with information on the overall conditions on the allotment.

Additional reports support that low production and heavy utilization were causing severe impacts on the Tonto Basin Allotment. With the information presented in my review summary, I believe the District Ranger had sufficient information, and made a well informed and necessary decision.

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.

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 any changes in management of the allotment in 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 the fact that adjustment may need to be made from time to time, both by permittees, both by permittees and the agency.

All agency policies and operating procedures for proper administration and management of national forest rangelands are not 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. 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 FSM 2231.41-Annual Authorization of Grazing Permits With Term Status, which states "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 was 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.

D. ESA Violations

1. Southwest Center for Biological Diversity Lawsuit.

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. Her March 10, 2000 letter clearly portrayed the situation to be that dry conditions had resulted in lower forage production, and utilization levels exceeded acceptable levels.

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

The appeal 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.

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. 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 Tonto Basin 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.

4. The Forest Service has Acted Unlawfully in Denying Permit Holders 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 Service (FS) will send a copy of the draft Biological Opinion to the appellant and he will have the opportunity to provide comments. 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 who have allotments involved in the BO.

The FS has granted a 60 day extension to the FWS for the BO. As you stated, 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 her authority correctly to follow procedures, and to issue instructions for proper protection and management of resources.

Your May 24, 2000, letter included appeal points against the District Ranger's decision based on the needs for the loach minnow or its habitat. The District Ranger's responsive statement could be somewhat confusing as to the purpose of the decision. However, the decision letter of March 14, 2000 is clear that the purpose of the decision was to remove all livestock from the Tonto Basin Allotment due to unacceptable utilization levels caused by the lack of precipitation and forage production. The objectives are to protect watersheds, riparian areas and habitat for wildlife, but there is no indication that the loach minnow or proposed habitat needs were the reason for the decision.

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,

/s/ Thomas J. Klabunde

THOMAS J. KLABUNDE
Deputy Forest Supervisor and Appeal Reviewing Officer

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