



United States
Department of
Agriculture

Forest
Service

Southwestern
Region

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File Code: 1570-1

Date: November 28, 2000

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

Dear Mr. James:

This letter documents my second level review decision of the appeal you filed on September 22, 2000, on behalf of your client Johnson Cattle Company. The appeal is in regard to the April 7, 2000, decision by District Ranger Lopez requiring your client to remove all livestock from the Cartwright Allotment pending completion of NEPA and formal consultation with the U. S. Fish and Wildlife Service (FWS). The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

BACKGROUND

By letter dated April 7, 2000, Ranger Lopez instructed your client to remove all livestock from the Cartwright Allotment by May 20, 2000. Ranger Lopez is herein identified as the Responsible Official.

Your first level appeal and request for stay were hand delivered to Acting Forest Supervisor Klabunde on April 25, 2000. On May 2, 2000, Acting Supervisor Klabunde denied your stay request pending a final agency decision on the merits of your appeal. On May 10, 2000, I notified you that I would not review the first level Reviewing Officer's denial of your stay request. Under the provisions of 36 CFR 251.94, the Responsible Official prepared and mailed to you a copy, on June 13, 2000, of his written responsive statement to your appeal. Your reply to the June 13 responsive statement was received by Acting Supervisor Klabunde on July 12, 2000. On August 28, 2000, Acting Forest Supervisor Klabunde closed the record. Based on his review of the record, Deputy Forest Supervisor Klabunde affirmed the Responsible Official's decision on September 18, 2000.

Your second level appeal was received in this office on September 25, 2000. By letter dated October 19, 2000, I indicated my review decision would be made within 30 days.



POINTS OF APPEAL

My review of this appeal was confined to the substantive points raised in the appeal, the appeal record, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.

ISSUE 1: The Responsible Official's decision describes an illegal process undertaken by the Forest Service that clearly violated the appellant's rights.

Contention: The appellant contends a secret deal was negotiated between the Forest Service and the FWS to establish forage utilization levels in riparian areas within the Cartwright Allotment to protect potential habitat for Southwestern willow flycatcher. The appellant contends this was illegal because:

- A) The Endangered Species Act (ESA) does not protect a species' potential habitat. The appellant asserts no Southwestern willow flycatchers have ever been observed within the Cartwright Allotment, nor is any critical habitat designated for the flycatcher found within the allotment. The appellant concludes the March 31, 1999, biological assessment found that there is no suitable flycatcher habitat found within the Cartwright Allotment.
- B) The appellant asserts that the District Ranger indicates that livestock have been excluded in order to abide by allowable use limits set by the "Biological Evaluation amendment". Thus, the appellant contends the purpose of a biological evaluation is to determine whether a proposed action may affect a listed species or its critical habitat and not to make changes in grazing management and management prescriptions.
- C) The appellant contends they became an applicant upon initiation of consultation and were entitled to participate in on-site inspections, meetings and other communications between the Forest Service and FWS. The appellant asserts they were excluded from extensive discussions between the two agencies.

Response:

- A. In enacting the Endangered Species Act of 1973, as Amended (Act), Congress found "that -
 - (a) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
 - (b) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
 - (c) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the nation and its people;
 - (d) The United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife or plants facing extinction..."

Congress identified “[t]he purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.”

Congress “further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”

Congress also defined that “[t]he terms ‘conserve’, ‘conserving’, and ‘conservation’ mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”

The appellant contends the Act does not protect a species’ potential habitat. Nowhere in the Act does it state an agency is precluded from managing potential habitat to conserve a threatened or endangered species. Nor does the Act limit an agency to conserving just occupied suitable habitat as the appellant contends. In fact, the Purpose and Policy of the Act make it very clear that the Forest Service shall use all methods and procedures necessary to recover a threatened species or endangered species and the ecosystems upon which they depend.

B. The Forest used the informal consultation process with the FWS between April 1999 and June 2000 to provide the FWS with all the information they needed to be able to complete consultation. During this informal process, the Forest and the FWS identified forage allowable use levels for occupied, unoccupied suitable, and potential Southwestern willow flycatcher habitat. Levels of use were determined for riparian habitat during the growing season, riparian habitat outside the growing season, and areas outside of riparian habitat. The use levels identified were ones that would result in a “may affect, not likely to adversely affect” determination. Any levels of use above these would result in a “may affect, likely to adversely affect” determination.

During this informal consultation process, it was also identified that allowable use above these limits could result in a jeopardy opinion from the FWS under Section 7 (b) of the Act. The FWS would then provide a ‘reasonable and prudent alternative’ to be implemented, which would likely be, to use the allowable use levels identified in the Amendment to the Biological Evaluation (AR Sections I through III).

During allotment monitoring, the Forest identified the level of use on the Cartwright Allotment was near or had exceeded the levels of use identified for the Southwestern willow flycatcher due to the dry conditions, lack of forage, and lack of available water. Since the consultation process was ongoing, the Forest was correct in implementing Section 7(d) of the Act (District Ranger Lopez’ April 7, 2000, letter) which states “[a]fter initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent

alternative measures which would not violate subsection (a)(2).” Failure to implement Section 7 (d) on their part would have resulted in a violation of the Act (AR Sections II and III). .

C. The Forest provided the appellant with all material necessary to become an applicant. The Forest identified how and when the appellant would be involved as an applicant and what they should expect to receive for review and comment. It is very apparent from the record that the Forest and appellant have worked together very closely prior to and during this difficult time (AR Section II).

Finding: Based on review of the record and a good understanding of the applicable laws, the Responsible Official did not violate the Endangered Species Act of 1973, as amended or violate the appellant’s rights as the appellant contends.

ISSUE 2: Under Section 7 of ESA and FWS regulations, consultation should have been completed more than a year ago.

Contention: The appellant contends consultation must have concluded no later than 150 days after it was initiated, or by August 28, 1999.

Response: The Forest submitted the consultation package for the 25 allotments, which included the Cartwright Allotment, to the FWS on March 31, 1999. Between April 1999 and June 2000, the Forest provided the FWS the additional information they needed to begin the consultation process. Allowable forage use levels for Southwestern willow flycatcher and other species habitats were part of this information. It was not until June 21, 2000, that the FWS had all of the information they needed and could thus begin the consultation period, as they are the “keepers of the clock” for consultation (50 CFR 401.14(C)). The Forest has granted the FWS a 60-day extension for completion of their Biological Opinion, which will be completed in November 2000 (AR Sections II and III).

Finding: Consultation is within the 150 days allowed for under the Act.

DECISION

After review of the appeal record, I find that the Responsible Official's decision to require removal of livestock from the Cartwright Allotment was based on a reasonable assessment of the resource conditions on the allotment.

The Responsible Official's decision is in conformance with applicable laws, regulations, policies, and procedures. I find no evidence indicating the Responsible Official has acted in an arbitrary and capricious manner.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 251.87(e)(3)].

/s/ James T. Gladen
JAMES T. GLADEN
Appeal Reviewing Officer
Deputy Regional Forester, Resources

cc:
Forest Supervisor, Tonto NF
District Ranger, Cave Creek RD
Director, Rangeland Management, R3
Appeals and Litigation Staff, R3