



United States
Department of
Agriculture

Forest
Service

Southwestern
Region

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Date: December 7, 2000

Law Offices of BEUS Gilbert PLLC
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Certified Mail – Return Receipt Requested

Re: Appeal #00-03-12-0005-A251, Tonto Basin Allotment, Tonto Basin Ranger District, Tonto National Forest

Dear Mr. Mills:

This letter documents my second level review decision of the appeal you filed on October 6, 2000, on behalf of your client George Ewing for George T. Cline Equity Trust. The appeal is in regard to the March 14, 2000, decision by District Ranger Terrell, herein termed the Deciding Officer, to amend the 2000 annual operating instructions for the Tonto Basin Allotment. The amended instructions required your client to remove all livestock from the Tonto Basin Allotment. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

BACKGROUND

By letter dated March 14, 2000, the Deciding Officer instructed your client to remove all livestock from the Tonto Basin Allotment by May 1, 2000.

Your first level appeal and request for stay were received by Acting Forest Supervisor Klabunde on April 12, 2000. On April 13, 2000, Acting Supervisor Klabunde denied your stay request pending a final agency decision on the merits of your appeal. On April 19, 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 Deciding Officer prepared and mailed to you a copy, on May 11, 2000, of her written responsive statement to your appeal. Your reply to the May 11 responsive statement was received by Acting Supervisor Klabunde on May 31, 2000. On August 25, 2000, Acting Forest Supervisor Klabunde closed the record. Based on his review of the record, Deputy Forest Supervisor Klabunde affirmed the Deciding Officer's decision on September 25, 2000.

Your second level appeal was received in this office on October 12, 2000. By letter dated October 19, 2000, I indicated my review decision would be made within 30 days from the date the appeal record is received from the first level Reviewing Officer [36 CFR 251.99(d)].



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: Lack of data supporting the requirement that all livestock be removed immediately from the allotment.

Contention: The appellant contends one year's notice was not provided to the permittee to remove all their livestock as required under 36 CFR 222.4(a)(8) and Part 2(8)(b) of the term grazing permit. The appellant asserts the Deciding Officer's decision does not expressly state that an emergency exists but rather relies on severe drought conditions and low forage production as factors contributing to resource problems.

Response: The term "emergency" in respect to 36 CFR 222.4(a)(8) and Part 2(8)(b) of the term grazing permit is in reference to an emergency situation which might necessitate not giving a one year notification before a grazing permit is permanently modified. Through issuance of annual operating instructions (AOI), the Deciding Officer has not modified the permit. The grazing permit remains as originally issued. The Deciding Officer has simply redeemed her responsibilities for providing proper administration of the permit in accordance with USDA regulations and agency policy and operating procedures. In this case the Deciding Officer took necessary steps to protect rangeland resources in light of the continuing lack of moisture and forage production.

Finding: The Deciding Officer had full authority to issue instructions for proper protection and management of rangeland resources. The Deciding Officer's decision to amend the 2000 annual operating instructions did not modify the permit but simply provided for proper administration of the permit.

ISSUE 2: Unlawful modification of grazing permit and Allotment Management Plan (AMP) by means of the AOI.

Contention: The appellant contends the decision "reflects a new (and unlawful) trend within the Forest Service. The appellant asserts that 43 USC 1752(d) and the Secretary of Agriculture's regulations recognize the AMP as the principal management document. Thus an AOI merely implements the standards and guidance contained in the AMP for an allotment, and may only provide for minor changes in the manner in which an allotment is managed. The appellant argues imposition of forage utilization levels or similar restrictions constitute a major change.

Response: The appellant is incorrect in concluding that 43 USC 1752(d) and the Secretary's regulations recognize the AMP as the principal management document for purposes of administering term grazing permits issued by the Forest Service.

Although Section 402(d) [43 USC 1752(d)] allows the Secretary to incorporate an allotment

management plan into a term grazing permit, it does not require the Secretary to do so. Section 402(e) provides authority for the Secretary to incorporate terms and conditions necessary for management and protection of rangeland resources into term grazing permits pursuant to the laws applicable to management of National Forest System lands. Section 402(e) also authorizes the Secretary to adjust any aspect of grazing at any time to protect rangeland resources.

The Secretary's regulations at 36 CFR 222.2(c) (identified in Section 1A of appellant's overview of legal and regulatory framework) simply provides authority for the Forest Service to manage forage producing lands for livestock grazing and ensures that if allotment management plans are prepared they are consistent with land management plans.

Grazing on the Tonto Basin Allotment is governed first and foremost by the grazing permit. Forest Service Manual (FSM) 2212.03-8 states "Upon approval, incorporate the allotment management plan as a part of the terms and conditions of the permit." Also, as a matter of agency policy, FSM 2212 states "...An allotment management plan is the primary document which guides implementation of forest plan direction for rangeland resources and, as such, must conform to, and be consistent with, the management direction contained in the Forest Plan".

The grazing permit is very explicit. Part 2(8)(a) states "The 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 for the area under permit...."

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.

Therefore, the authorization for Forest Officers to issue written AOI's that document temporary stocking adjustments and/or provide the additional direction necessary for proper management of rangeland resources is contained in the grazing permit and in agency policy. For example, FSM 2231.41 states that "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." This same provision is included in Part 2(2) of the grazing permit. FSM 2231.5 states "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...."

Finding: The AMP is not the principal document for administration of term grazing permits. Rather it is included as a term and condition of the permit. The Deciding Officer had full authority to issue annual instructions to the permittee for proper protection and management of rangeland resources.

ISSUE 3: The implementation of the forage utilization levels adopted in the 1996 record of decision for amendment of forest plans by means of an AOI is unlawful.

Contention: The appellant contends the Deciding Officer appears to be attempting to implement and enforce the allowable use standards for grazing ungulates that were adopted by the Regional Forester in the Record of Decision (ROD) for Amendment of Forest Plans, issued on June 5, 1996. The appellant argues that if the forage utilization referenced in the Deciding Officer's decision are indeed derived from the ROD, and they are being implemented and enforced through the annual operating instructions, then the Deciding Officer is acting illegally, and to the extent that her decision is based on those utilization levels, the decision is likewise illegal.

Response: The use of forage utilization guidelines on the Forests within the Southwestern Region (R-3), including the Tonto National Forest, are not new. Forage utilization levels are determined based on guidelines set out in the R-3 Allotment Analysis Handbook (FSH 2209.21). This handbook specifically describes appropriate forage utilization levels recommended for the purpose of improving rangeland condition. R3 Rangeland Management Specialists, Ecologists, and other scientists have developed these guidelines over a period of 50 years.

The appellant appears to be alluding to a May 24, 2000, court order enjoining the Forest Service from including the forage utilization levels found in the table on page 94 of the Record of Decision for Amendment of Forest Plans, dated June 5, 1996, in any annual operating plan (AOP) or similar instructions until issuance of a project-level decision involving a site-specific assessment of grazing management needs has been completed (Arizona Cattle Growers' Association v. Towns, CIV No. 97-1868 PHX RCB). However, the court in its order also stated "Defendants, however, may include limiting levels on forage utilization in AOP provided that those limiting levels are supported by appropriate guidelines or other data, available from a source independent of and apart from the 1996 ROD." In other words, Defendants can enforce through AOP any limitations on forage utilization that they could enforce through AOP prior to the 1996 ROD, as well as any limitations on forage utilization supported by guidelines or data formulated subsequent to the 1996 ROD but that were devised on some basis independent of the forage utilization levels found in the 1996 ROD."

The AOP for the Tonto Basin Allotment clearly states that "Allowable use is based on plant physiological needs...." Thus, utilization levels identified in the AOP are directly related to range condition and trend and the improvement of riparian and stream condition (Docs. V; H).

Finding: The Deciding Officer did not rely on the Record of Decision for Amendment of Forest Plans, issued on June 5, 1996 when setting utilization levels for the AOP for the Tonto Basin Allotment. The AOP for the Tonto Basin Allotment was found to be consistent with the five situations described above. Regardless of the appellant's contention, compliance with the May 24 2000 court order does not excuse compliance with the laws promulgated for the purpose of managing National Forest System lands and the obligation under those laws to protect rangeland resources from the adverse effects of livestock grazing.

ISSUE 4: The Forest Service's unilateral action, improper survey, and failure to give public notice.

Contention: The appellant contends that in reaching its decision to require the complete removal of cattle from the allotment, the Forest Service failed to comply with the mandates of the ESA. Specifically, the Forest Service failed to: 1) determine the impacts of grazing on the loach minnow using the best scientific and commercial data available; 2) perform a complete review of the status of the loach minnow over the entire area; 3) consider the economic impact to the permittee; and 4) determine whether any portion of the allotment should be excluded from a critical habitat designation. The appellant argues the Forest Service is attempting to side step its obligations to consult with and seek the assistance of the FWS, the secretary of the Interior, and/or the Secretary of Commerce.

Response: The appellant provided an overview of the consultation process identified in Section 7 of the Endangered Species Act of 1973, as amended (ESA). As part of this overview, the appellant contends ESA does not protect (unoccupied) suitable or potential habitat. 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.

The appellant further identified the consultation process, including development of a Biological Assessment and informal and formal consultation. The Forest prepared a Biological Assessment (AR C) for the 25 allotments identified in the Southwest Center for Biological Diversity v. U. S. Forest Service, No. 99-0795-PHX-WGY (D. Ariz). Submission of this Assessment to the US Fish and Wildlife Service on March 31, 1999 was the reason the above-mentioned lawsuit was administratively closed.

The loach minnow is the species being consulted on for the Tonto Basin Allotment. This assessment fully met the appellant's contention items 1 and 2 above by determining the impacts of grazing on the loach minnow and performing a review of the status of the loach minnow over the entire area. The appellant's contention items 3 and 4 are outside the scope of the consultation process. These actions are the responsibility of the Fish and Wildlife Service as part of their designation of critical habitat for the species.

All other Threatened, Endangered, and Proposed species affected by the Tonto Basin Allotment had been consulted on through the consultation for the Tonto Basin AMP (Doc. J).

Finding: The Forest did not violate ESA nor are they attempting to side step their consultation requirements under the Act as the appellant contends.

ISSUE 5: Southwest Center For Biological Diversity Lawsuit.

Contention: The appellant contends that based on this lawsuit formal consultation was initiated with the FWS on March 31, 1999. Additionally, the appellant contends that consultation should have been completed by August 1, 1999. Therefore, reliance on pending consultation as an excuse for requiring the immediate removal of livestock is unlawful.

Response: The Forest submitted the consultation package for the 25 allotments, which included the Tonto Basin Allotment, to the FWS on March 31, 1999 to initiate consultation. Between April 1999 and June 2000, the FWS requested additional information they needed to begin the consultation process. It was not until June 21, 2000, that the Forest provided FWS with 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 was to be completed in November/December 2000.

Finding: Considering the 60-day extension granted to FWS, consultation is within the timeframe allowed for.

ISSUE 6: Management changes cannot be made by means of a biological assessment.

Contention: The appellant contends the agency cannot use a biological assessment to modify an existing action. The appellant argues that in this case, any significant changes to the manner in which livestock are grazed on the allotment would have to be made by means of revising the AMP through site-specific analysis and compliance with the National Environmental Policy Act.

Response: The Deciding Officer relied on allotment monitoring data to determine the utilization levels identified in the appellants 1998 and 1999 AOP's had been exceeded (Docs.V; A; H). Although these levels were also identified in the Biological Assessment, the assessment was not used to modify an existing action.

Finding: The Forest did not use the Biological Assessment to modify an existing action as the appellant contends.

ISSUE 7: Section 7(d) of the ESA does not support any of the decisions.

Contention: The appellant contends the Deciding Officer's reliance on Section 7(d) is misplaced. The appellant argues Section 7(d) would not prevent or otherwise restrict grazing because the impacts of livestock grazing over a period of several months obviously would not rise to the level of an irreversible or irretrievable commitment of resources.

The appellant also contends the requirements of Section 7(d) terminated when consultation with FWS was completed. In this case, consultation should have been completed by August 1, 1999.

Response: During allotment monitoring the Forest identified the level of use on the Tonto Basin Allotment was near or had exceeded the levels of use identified in the 1998 and 1999 annual operating plans due to the dry conditions, lack of forage, and lack of available water. The Forest relied on Part 2 Section 8 of the appellant's grazing permit to modify the 2000 annual operating plan (Docs. V; A; H).

Finding: Section 7(d) of the Act was not used to prevent or otherwise restrict grazing on the Tonto Basin Allotment as the appellant contends (Doc. A).

ISSUE 8: The Forest Service has acted unlawfully in denying permit holders the right to participate in the consultation.

Contention: The appellant contends the Forest Service failed to recognize the rights of the permittee as an applicant in the consultation process. The appellant argues FWS regulations grant applicants extensive rights with respect to consultation, including the right to prepare and submit studies, reports, or other compilations of data for consideration, participation in on-site inspections, meetings and communications between agencies, and review and comment on the draft biological opinion. The appellant argues that in this case the permittee was not allowed to participate in any aspect of consultation.

Response: Forest Supervisor Bazan's May 10 letter to the George T. Cline Equity Trust (Doc. K) notified the appellant the Biological Assessment had been submitted to Fish and Wildlife Service to initiate consultation and that the assessment was available for review through the District Ranger. This same letter explained the appellants rights as an applicant and how to gain applicant status. Since consultation is still ongoing, the appellant can still take part in this process as an applicant if he chooses.

Finding: The Forest Service has not denied the permit holders their rights as an applicant.

ISSUE 9: Failure to provide any time frame for the reintroduction of livestock into the effected allotments.

Contention: The appellant contends the Deciding Officer should have provided some measurable criteria that need to be in place for the reintroduction of livestock, i.e. a specific amount of rainfall, a certain amount of grass, or a certain amount of new growth.

Response: Forest Officers must use the best available data when making decisions related to administration of grazing permits. In this case there was a demonstrated continuing lack of moisture and forage production (Docs V; X). The Deciding Officer's action was necessary in order to protect rangeland resources in light of current drought conditions and long term weather predictions for continued dry weather (Docs. II; X). Rangeland management is an ongoing adaptive process and Forest Officers have the responsibility to adjust grazing management strategies annually based on existing and projected conditions. The Deciding Officer has full authority to allow the permittee to restock the allotment when resource specialists determine that forage species have recovered sufficiently to sustain a proper level of livestock grazing.

Finding: The Deciding Officer had the responsibility to direct the removal of livestock in light of severe drought conditions in order to protect rangeland resources. There is nothing in law, regulation, or Forest Service policy requiring Forest Officers to second guess when conditions favorable for livestock grazing will return. The decision to resume grazing is made on a case by case basis by resource specialists as conditions change.

ISSUE 10: The biological assessment conducted by the Forest Service is flawed.

Contention: The appellant contends the biological assessment was limited to only two small sections of the Cline Mesa and Greenback Allotments. Therefore, the appellant argues the decision does not justify a decision requiring removal of all cattle from the entire allotment. The appellant also contends the biological assessment also failed to take into account the effects of the long drought on the woody and herbaceous riparian plants mentioned in the study. The appellant argues the lack of water explains the absence of woody and herbaceous riparian plants, not excess cattle grazing.

Response: The Biological Assessment covered only the effects of livestock grazing on the loach minnow (Doc. C) because all other Threatened, Endangered, or Proposed species were covered by the biological assessment for the Allotment Management Plan (Doc. K). The appellant is

apparently referring to the monitoring that determined utilization exceeded the levels identified in the permittee's 1998 and 1999 AOP's. The areas monitored represent the "key areas" for the allotment without implementation of the improvements identified in the 1996 Allotment Management Plan, EA, and consultation (Doc. I; L; J). The Deciding Official's letter requesting removal of cattle (Doc. A) and responsive statement (Doc. V.) clearly identify the rationale for why removing livestock from the allotment was the only way protection of the riparian areas and stream banks can be accomplished during this continued drought.

Finding: The Forest properly monitored the allotment to determine forage utilization levels and riparian and stream bank condition. The biological assessment was not directly relied on to determine that livestock needed to be removed from the allotment.

ISSUE 11: The decision is excessive.

Contention: The appellant argues the Deciding Officer's decision goes far beyond what is reasonably necessary for the protection of endangered species within the allotment, i.e. removal of cattle from effected areas rather than the entire allotment, and the opportunity for the permittee to fence portions of the allotment in order to ensure the protection of the species discussed in the biological assessment and evaluation.

Response: The record demonstrates that monitoring of rangeland conditions confirmed utilization levels had been exceeded on the entire allotment (Docs. II; N; X). It is further documented in the record that the permittee was informed during development of the AOP that cattle would be required to be removed from the allotment when utilization levels across the entire allotment were reached (Docs. H; V).

The record also documents that although the AMP for the Tonto Basin Allotment calls for a number of fences and water developments to better manage livestock grazing, only a very few of the improvements are in place (Docs. V; I). The permittee signed the management plan on August 9, 1996. Additionally, the record indicates the authorization of grazing and the management of the allotment is currently being updated through the NEPA process. The permittee will have ample opportunity to provide input into all aspects of management of the allotment, including the protection and recovery of threatened and endangered species (Doc. II).

As pointed out in the response to issue 3, guidelines related to appropriate levels of forage utilization for protection of rangeland resources have been developed over a period of 50 years by R3 Rangeland Management Specialists, Ecologists, and other scientists. Forage utilization guidelines take into account all resource needs including soil and water, plants, threatened and endangered species and other wildlife needs.

Finding: The record demonstrates utilization levels had been exceeded over the entire allotment. The Deciding Officer had no alternative but to require complete removal of livestock. The Deciding Officer's decision did not go beyond what was reasonably necessary for protection of rangeland resources, including threatened and endangered species.

ISSUE 12: The Forest Service has failed to consider the economic impact of the decision.

Contention: The appellant argues the economic impact on the permittee, the community of Tonto Basin, and Gila County will be devastating. The appellant also notes that other permit holders have been given similar directions to remove cattle from Tonto Basin.

Response: Both the Deciding Officer's March 14, 2000, decision to require complete removal of livestock and the Deciding Officer's May 11, 2000, Responsive Statement acknowledge the economic effects of her decision (Docs. V; X). However, the Southwestern Region of the Forest Service has generally been in a very dry cycle since 1996 (Doc. II). Southern Arizona forests, particularly the Tonto, have been experiencing the most severe conditions. While the Forest Service recognizes the negative economic impacts associated with dry weather cycles, the primary consideration must be the long term effects on public lands from overgrazing during dry years. When plants are already stressed due to lack of rain, overuse can lead to damage that may take years to heal.

Many permittees on the Tonto National Forest have removed livestock from the Forest on their own initiative because of lack of forage. Money has been available to Gila County permittees through the Emergency Watershed Protection program for those who voluntarily defer grazing from rangeland areas that have suffered from dry weather conditions over the past several years. Other permittees have decided to reduce or liquidate their herds in conjunction with the strong cattle market and wait until average annual precipitation results in an overall improvement in rangeland conditions (Doc. II).

In cases where rangeland resources are at risk and permittees do not remove livestock under their own initiative, then Forest Officers must take measures to ensure there will be no long term damage.

Finding: The Deciding Officer was in no position to favor economics over her obligation to protect rangeland resources.

DECISION

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

The Deciding Officer's decision is in conformance with applicable laws, regulations, policies, and procedures. I find no evidence indicating the Deciding Officer 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, Tonto Basin RD
Director, Rangeland Management, R3
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