United States Department of Agriculture | Forest Service | Tonto National Forest | 2324 E. McDowell Rd. Phoenix, AZ 85006

File Code: 1570/2230

Date: July 13, 1998

Law Office of Fennemore Craig
ATTN. Norman D. James
3003 N. Central Ave.
Suite 2600
Phoenix, AZ 85012-2913

RE: Appeal No. 98-12-SO-003

Dear Mr. James:

This is my decision on the appeal you made on behalf of Johnson Cattle Company. You appealed the 1998 Annual Operating Plan for Johnson Cattle Company on the Cartwright Grazing Allotment. Your appeal raised issues concerning the legality for District Ranger Delvin Lopez to modify the Cartwright Allotment Management Plan (AMP) and grazing permit by letter. This review was conducted according to the provisions of the appeal regulation at 36 CFR 215. You brought up many points of contention concerning Johnson Land and Cattle company's grazing on the Cartwright Allotment as well as the Endangered Species Act interpretations. My review was focused on your points that pertain to whether Ranger Lopez made a decision that was warranted and with proper authority.

BACKGROUND

On June 5, 1996 Forest Plans were amended on the National Forests within the Southwestern Region. Implementation of this amendment was carried out consistent with the decision in the Forest Guardians, et.al. v. Dombeck et.al. 131 F.3d 1309 (9th Cir. 1997), as well as the position the Forest Service represented to the District Court in that litigation. The Biological Opinion (BO) for the amendment was issued by the U.S. Fish and Wildlife Service on December 19, 1997.

Implementation of the amended Forest Plans for the National Forests in the Southwestern Region was described by John Kirkpatrick in his February 7, 1998 declaration to the United States District Court for the District of Arizona in the Arizona Cattle Growers Association et. al. v. John R. Kirkpatrick and Mike Dombeck litigation. In his declaration Mr. Kirkpatrick described that "adjustments in grazing practices needed to protect resources are determined on an annual basis and documented in annual instructions to permittees in the form of annual operating plans (AOPs). District rangers prepare AOPs with participation of the affected permittees. For the 1998 grazing year, AOPs throughout the Southwestern Region will be prepared in consideration of the need to protect resources and to follow forest plan direction and the biological opinion for the amended forest plans issued by the U.S. Fish and Wildlife Service on

December 19, 1997. AOPs are prepared at the discretion of district rangers for each grazing allotment and are responsive to individual allotment protection and unique management needs."

On January 7, District Ranger Delvin Lopez's issued a letters which served as the annual operating plan for Johnson Cattle Company on the Cartwright Allotment. You filed an appeal on behalf of Johnson Cattle Company on March 12, 1998. The appeal recorded was closed on June 10, 1998.

ISSUE 1. LEGAL ARGUMENT

Contention: You questioned that the Deciding Officer has authority to modify the Cartwright AMP and the grazing permit on an emergency basis by means of his letters.

Response: The practice in implementing the Annual Operating Plan is specified in Forest Service Manual Region 3 Supplement 2215.04c. It states: Prior to the grazing season, the District Ranger will prepare an operating plan with the grazing permittee. The plan will be based on the forest land and resource management plan and the allotment management plan. The plan will include statements of how the livestock will be grazed on the range that season, developments planned, improvements to be maintained, salting, herding bedding, and other instructions...

> The annual operating plan (January 7, 1998 letter from Ranger Delvin Lopez) specifies a schedule of which pastures will be used by livestock during 1998. The annual operating plan pertains only to the year 1998 and does not modify the term grazing permit or the Allotment Management Plan (AMP).

It has been a common practice during the past several years for a representative of Johnson Cattle Company and the range conservationist on the Cave Creek District to agree on the annual operating plan for the year, which is then approved by the District Ranger. The Terms and Conditions 8a, 8b and 8c state conditions under which AOPs can direct needed changes in management of the allotment for the current year. Section 8a states:

> The allotment management plan for the land described on Part I is a part of the permit. The permittee will carry out its provisions and /or other instructions issued by the Forest officer in charge for the area under permit and will require employees, agents, and contractors and subcontractors do likewise.

In this case the "other instructions" is the AOP issued by letter on January 7, 1998. Sections 8b and c also gives the District Ranger the authority to make changes in use on the allotment on an annual basis.

> The number, kind, and class of livestock, period of use, and grazing allotment specified in the permit may be modified when determined by the officer in charge to be needed for resource protection. Except in extreme emergencies where resource conditions are being seriously affected by livestock use or other factors, such as fire, drought, or insect damage, notice of a scheduled reduction of

> numbers of livestock or period of use under a term permit will be given one (1) full year before, a modification in permitted numbers or period of use becomes effective. This does not apply to annual adjustment in grazing as provided for in Section 8 (c).

Section 8c states:

> When, in the judgement of the Forest Officer in charge, the forage is not ready to be grazed at the beginning of the designated grazing season, the permittee, upon request of the Forest Officer, will defer placing livestock on the grazing allotment to avoid damage to the resources. The permittee will remove livestock from Forest Service-administered lands before the expiration of the designated grazing season upon request of the Forest officer when it is apparent that further grazing will damage the resources.

As described in section 8b the resource that needs to be protected, on the Cartwright Allotment, is habitat for Threatened and Endangered Species. The "emergency" is the obligation to be in compliance with the Endangered Species Act. Section 8b allows for 1 year for adjustment in numbers of livestock grazed before decreasing permitted numbers. The one year delay is to allow the permittee to cull and reduce numbers gradually and avoid a poor market for selling livestock. In this case the Johnson Cattle Company was not asked to remove livestock from the allotment in the AOP. The numbers of livestock grazed by Johnson Cattle Company on the Cartwright Allotment increased as of June 1, 1998 over the number that was grazed in 1997.

Clause 8c, states the permittee will remove livestock from Forest Service-administered lands before the expiration of the designated grazing season upon request of the Forest officer when it is apparent that further grazing will damage the resources." In this case the resource is habitat for the Threatened and Endangered Species and habitat.

The Biological Opinion which was subsequent to the June 5, 1996 amended Forest Plans identified management guidelines to protect threatened and endangered species. The Gila topminnow which is located on the Cartwright allotment is one of the species that is protected under the Endangered Species Act. Consultation with U.S. Fish and Wildlife Service on the Allotment Management Plan for the Cartwright Allotment is not current. Section 7D of ESA does not allow the irretrievable irreversible taking of a species without going through formal consultation with U.S. Fish and Wildlfie Service. Since Formal Consultation had not been completed for the Gila topminnow on the Cartwright Allotment it was necessary for Ranger Lopez to implement management through the AOP that would assure that there would be no irreversible taking of the species. Therefore the changes were incorporate in the AOP.

Contention: The Cartwright AMP is consistent with the Tonto LRMP

Response: The Cartwright AMP was written in 1989. The latest amendment to the forest plan was implemented in June of 1996. The amendment identified management guidelines (especially concerning

endangered species) that are not consistent with the 1989 Cartwright Allotment Management Plan. Therefore, the Cartwright AMP is not consistent with the Tonto LRMP.

You are correct in your statement that the Forest Guardians v. Dombeck lawsuit did not force the management that are in effect. Mr. Kirkpatrick's February 7, 1998 declaration states: "Consistent with the language of the (record of decision) ROD and the February 10, 1997, Declaration of Charles W. Cartwright, Jr., forest managers are not required to apply the 1996 amendment Grazing Management standards and guidelines to permits in effect at the time the ROD was issued nor to the AOPs. However, forest managers retain the discretion to apply the protective measurers of the utilization table found on page 94 of the ROD through the AOP process as they deem appropriate for the protection of the resource." Mr. Kirkpatrick's declaration also states: There is no mandatory requirement to apply the grazing utilization percentages, as shown on page 94 of the ROD and titled "Allowable Use Guide (percent) by Range Condition and Management strategy" to ongoing grazing activities. The guidance in this table is intended to be a broad based stewardship measure oriented specifically toward the needs of listed (threatened and endangered) species to be applied on a discretionary, as needed basis, by district rangers pending the completion of site-specific NEPA analysis and the preparation of AMPs as called for by individual forest NEPA schedules.

Regardless of the direction given in the Forest Guardians v. Dombeck lawsuit, the Forest Officer still has the responsibility to comply with ESA. The BO for the amended forest plan identified conservation measures needed to protect the Gila Topminnow. Section 7D of the ESA does not allow the irretrievable irreversible taking of a species without consultation with U.S. Fish and Wildlife Service. Since Formal Consultation had not been completed for the Gila topminnow on the Cartwright Allotment it was necessary for Ranger Lopez to implement management through the AOP that would have no affect on the Gila topminnow. Therefore the changes were incorporate in the AOP. Even if no new action were proposed on the Cartwright Allotment, consultation is still required if new species are listed or new information is gained on a species that may be affected by permitted actions.

Contention: There is no evidence suggesting that grazing under current management prescription is causing the death of injury of members of Gila topminnow and therefore there is no "take." The Fish and Wildlife Service did not order the Forest Service to restrict grazing.

Response: This is an argument that has been taken up by biologists and scientists in the field. There is agreement among biologists on the habitat needs (protocol) for the Gila topminnow. This protocol is used when consulting on actions that "may affect" the Gila Topminnow.

DECISION

After review of the record, I conclude that the District Rangers decision on the Annual Operating Plan for the Cartwright Grazing Allotment was warranted and according to the proper authority. The District Ranger's decision on the Annual Operating Plan is affirmed. According to the appeal regulations (36 CFR 251.87) you may file an appeal to the Regional Forester within 15 days of this decision. If you so choose, the second level appeal must be sent to: Regional Forester, Southwestern Region, 517 Gold Avenue, SW, Albuquerque, New Mexico 87102. A copy of your appeal should also be sent to my office.

Sincerely,

/s/ Eddie A Iford, for

CHARLES R. BAZAN
Forest Supervisor and Appeal Reviewing Officer

cc:
Regional Forester, R-3
District Ranger, Cave Creek