



United States
Department of
Agriculture

Forest
Service

Tonto
National
Forest

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File Code: 1570/2230

Date: August 21, 1998

Constance E. Brooks
C.E. Brooks and Associates, P.C.
1776 Lincoln Street
Suite 1010
Denver, CO 80203

Re: Sanborn Land and Cattle Company Appeal of September 9, 1997, Appeal No. 97-12-SO-003

Dear Ms. Brooks:

This is my decision on the appeal you made on behalf of Sanborn Land and Cattle Company. You appealed District Ranger Tina Terrell's decision in a letter of July 22, 1997 to exclude livestock grazing from a portion of the Poison Springs Allotment to protect the Southwestern Willow Flycatcher habitat on the Salt River.

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. A biological opinion which was subsequent to the Plan Amendment revealed that there were seven species, one of which was the Southwestern Willow Flycatcher, that would receive a "jeopardy" determination based on existing management. Therefore, concomitant with the Forest Plan amendment, a regional team (seven species team) was activated to identify management that was inconsistent with requirements for seven critical endangered species. Along with management recommendations for other species, the team identified management needs to protect the Southwestern Willow Flycatcher (SWWF) and habitat located in the Lake Pasture of the Poison Springs Grazing Allotment.

Based on the information presented by the "seven species team" and endorsed by the Regional Forester, District Ranger Tina Terrell issued a decision on July 22, 1997 to remove livestock grazing from the Southwestern Willow Flycatcher's occupied habitat, located in the Lake Pasture of the Poison Springs Grazing Allotment. The decision was made for the 1997 annual operating plan (AOP) and not the Term Grazing Permit. The long term management of the Southwestern Willow Flycatcher habitat, and subsequent term grazing permit would be assessed in the NEPA (National Environmental Policy Act) analysis.



My review focused on the points of your appeal that pertain to whether Ranger Terrell made a decision that was warranted and under proper authority. The evaluation of your appeal was conducted under the provisions of 36 CFR 251.99.

In your April 6, 1998 reply to the District Ranger's Responsive Statement to your appeal, you stated that the response for the District Ranger was in fact reviewed and approved by the Office of the Supervisor to whom this appeal is directed, and that the appellant has no hope of securing a fair hearing for this reason. I will assure you that no one on my staff who was involved in reviewing your appeal was involved in reviewing the District Ranger's response. Eddie Alford did not review the District Ranger's response or participate in the preparation of the response. I have given your appeal a fair review based on the appeal record.

Your contention no. 1: *The District Ranger's decision deprives appellant of crucial summer, fall and winter pasture, and of water, and appellant will face huge losses by not being given reasonable notice of the change.*

Response: I realize there was an impact to the Sanborns grazing program by not being able to graze the Lake Pasture in 1997. However, it appears that the Sanborns were given adequate warning of the limitations to the use of the pasture before they applied for and were issued a livestock grazing permit. During a meeting on October 25, 1994 (District Ranger response Exhibit A) Linny Warren told the Sanborns that they "may not be able to use the pasture (Lake Pasture) depending on the Biological Opinion." In a more favorable scenario for the permittee, Mr. Warren discussed that the allotments were currently undergoing NEPA analysis and that a preferred alternative specified that grazing would occur in the affected pasture, but only January 1 to April 15, two years out of three. Mr. Warren also pointed out that a portion of the Lake Pasture would be inundated with water part of the time and this portion of the pasture would not be available for livestock grazing. So, even in the best scenario for the appellant, use of the Lake Pasture would be limited to two years out of three and only the months of January through April 15.

There is sufficient documentation from the District Ranger that indicates there are water sources other than the Salt River for the pastures. Although water is scarce during some years, options must be used other than depending on the Lake Pasture. I realize that the appellant hauled water to some of the pastures. Water improvements are distributed throughout the Poison Springs and Sierra Ancha grazing allotments in the other 9 pastures, as indicated on page xi of the Eastern Roosevelt Lake Watershed Analysis Area (ERLWAA) EIS Summary. This includes 8 wells, 12 spring developments, 4 miles of pipeline, 7 troughs and 10 earthen stock tanks.

The District Ranger's decision did not include any requirement for the removal of livestock from the allotment. Therefore, I do not believe the rangers decision caused the appellant to face "huge economic losses by the ranger failing to given reasonable notice of the change. "

Your contention no. 2: *The closure of the pasture for an indefinite period is tantamount to cancellation of the permit.*

Response: My previous response helps put the percent of capacity of the affected area in perspective. The affected pasture is 4,064 acres in size. The entire permitted area is 65,628 acres in size. This pasture constitutes approximately 6% of the overall allotment acreage District Ranger's' response, Exhibit D).

District Ranger Terrell's decision was to implement an annual operating plan (AOP) that did not allow grazing in the Lake Pasture for the 1997 grazing year. The permit was not cancelled.

Your contention no. 3: *The decision implements a significantly different alternative than that which was analyzed in the FEIS without NEPA-mandated public comment, consultation with FWS and without coordination and cooperation with the appellant. There is no supporting evidence that this alternative meets the criteria of maintaining a viable livestock operation, nor the forage or water issues identified by the appellant. The FEIS does not address the site specific characteristics of the affected pasture, nor cumulative effects of other projects within the area (particularly BOR's Plan 6).*

Response: Your appeal is concerning District Ranger Tina Terrell's decision letter of July 22, 1997 regarding the exclusion of livestock grazing from the Southwestern Willow Flycatcher habitat on the Salt River during the 1997 grazing period. This point of contention is concerning the NEPA process that is currently underway and is not pertinent to the decision letter of July 22, 1997. You will be given an opportunity to appeal under 36 CFR 215 once the NEPA decision is made.

Your contention no. 4: *The decision was made based on Regional Direction, there was no authority for this direction, and the District Ranger had no discretion to delay implementation of the recommendations from the Regional Office. The recommendations were not peer reviewed, nor took into account all of the biological information currently available.*

Response: The information from the Regional Office was developed by Forest Service biologists, including research scientists with the Rocky Mountain Forest and Range Experiment Station. Current research and literature was reviewed before making recommendations. I feel confident that the recommendations were supported by research and that proper authorities were used to implement management to protect the Southwestern Willow Flycatcher. The recommendations were extensively reviewed within the Forest Service.

Your contention no. 5: *Eddie Alford, a representative from the Tonto Supervisor's Office, did not provide legal authority for implementing the action, nor did he address 36 CFR 216.6 or the case law requiring public comment when an EIS proposes a new alternative based on environmentally significant new information.*

Response: Annual Operating Plans (AOP) are routinely used to make adjustments in grazing practices needed to protect resources. This is especially necessary when changes in management are needed and the NEPA analysis has not been completed. This does not constitute a change to the term permit and can be accomplished on a year-to-year basis without completing NEPA. AOPs are prepared at the discretion of the district ranger for each grazing allotment and are responsive to individual allotment protection and unique management needs. The practice of 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..."

Sections 8 b and c of the Term Grazing Permit 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 Forest 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."

In applying section 8b to Ranger Terrell's decision: the resource affected is habitat for threatened and endangered species (the Southwestern Willow Flycatcher). The emergency is the urgency of being in compliance with the Endangered Species Act.

Section 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 (The Southwestern Willow Flycatcher).

Your contention no. 6: *The District Ranger's decision is nonsensical in regards to the imminent inundation of the affected pasture by BOR's Plan 6. The District Ranger's decision is contradictory, in that it was made because of a "threat" of a jeopardy opinion by FWS, and that FWS had already determined that the preferred alternative in the DEIS would jeopardize the SWWF.*

Response: The Forest Service is responsible for managing and protecting threatened and endangered species and their habitat as they now exist. This management consists of improving SWWF habitat so viable populations can survive when the lake fills to its new level of capacity. Biologists have suggested that there need to be enough individuals of the species to survive moving to a new location when water inundates the existing habitat.

The U.S. Fish and Wildlife Service (FWS) issued a non-jeopardy opinion, for the SWWF, for the preferred alternative in the DEIS (draft environmental impact statement) for the Poison Springs allotment. However, new information was presented concerning affects on SWWF after the DEIS was developed. To provide the public an opportunity to comment on this new information, the district ranger issued a supplement to the EIS and provided all identified interested and affected individuals a copy, asking for comments for a 30-day period, as required under NEPA.

The Endangered Species Act (ESA) Section 7(A)(2) requires Federal Agencies to insure that activities they authorize, fund or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. In 1997, new information on the SWWF indicated that livestock grazing in occupied habitat would cause a "jeopardy" to the SWWF.

Your contention no. 7: *Appellant contends that the District Ranger's decision "constitutes a defacto cancellation of appellant's grazing permit, or, at the very least, constitutes a substantial modification of*

the Permit", and that the District Ranger is not authorized to cancel or modify the permit based solely upon the SWWF Regional Direction.

Response: The District Ranger's decision was not to cancel all or part of the term grazing permit. The District Ranger's decision was to avoid using the Lake Pasture for the 1997 grazing year. There was no decision to remove any livestock from the allotment as a result of the decision. This authority is summarized in my response to your contention no. 5.

Your contention no. 8: *District Ranger's decision is devoid of any factors considered other than the regional direction and of any facts or other information to support her decision. Factors listed in the appeal as not being considered include: future inundation to the affected pasture, livestock cannot use tamarisk and willow stands due to their density and canopy, and the appellant will suffer extreme economic harm if its access to precious water is denied.*

Response: The District Ranger made the decision to immediately remove livestock from the affected pasture because grazing could adversely affect the SWWF and its habitat, based on information from "the seven species team."

Even though the flycatcher is not in the area from January to April, damage can occur in occupied habitat due to fragmentation (livestock moving through the vegetation).

The Southwestern Willow Flycatcher Survey 1993-1996 Summary Report (AZ Game and Fish Department, February 1997) documents the occupation and use of the dense tamarisk stands, which serve as the occupied habitat, by livestock. It is also documented that this use has created trails and fragmented patches.

Your contention no. 9: *The District Ranger had no evidence that livestock was having a detrimental impact on SWWF habitat in the affected pasture, and the decision was likely a product of threats from the SWWF team. Because of this, the District Ranger's decision is arbitrary and capricious and thus subject to reversal.*

Response: We have only recently begun collecting data on the Southwestern Willow Flycatcher Habitat at Roosevelt Lake, and more data is needed. However, ornithologists have reported that the population of the Southwestern Flycatcher is seriously imperiled; therefore, successful proliferation of this population is critical. There is not time to conduct research first to be sure there is an impact. The information provided by the "seven species team" indicates that livestock grazing in occupied SWWF habitat can be detrimental. Research has shown that livestock can fragment the habitat by retarding the growth of woody vegetation by trailing and bedding in the habitat. Livestock attract the brown-headed cowbird, which has been shown by research to parasitize the flycatcher nests. I agree that more site-specific research is needed. However, the endangered species act requires that we show that there is no detrimental effect before permitting the action, as opposed to proving that there is an effect before avoiding the action.

The District Ranger avoided a more severe impact on the appellant's grazing operation by mitigating the proposed action to protect the SWWF. Research on the Southwestern Willow Flycatcher suggested that livestock grazing needed to be excluded from a 5-mile radius from the occupied habitat. The District Ranger made a decision which balanced the actions to protect the habitat needs for SWWF and mitigate the severe economic effects on the appellants livestock operation. The District Ranger requested

removal of livestock from 4 pastures on the Poison Springs Allotment, and then build a fence which would provide future use in 3 of these pastures. This fence will exclude livestock from occupied habitat, and still allow livestock grazing in as much of the river area as possible in order to avoid reducing the capacity of the allotment.

Your Contention no 10: *The Forest Service does not have the authority to implement the SWWF direction, because it has not followed the appropriate steps outlined in the regulations (without public involvement and NEPA compliance, or consulting with the permittee per FLPM,4).*

Response: The authority to implement an AOP is covered in my response to your contention number 5.

The District Ranger's decision was warranted because Section 7(a) requires federal agencies to ensure that activities they authorize, fund or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its habitat.

Your contention no. 11: *The SWWF direction lacks a sound scientific basis upon which to base recommendations, and what information was used was not subject to peer review.*

Response: Please refer to my response to your contentions no. 4 and no 6. I have confidence in the literature research that was done by the "seven species team". Biologists and research scientists reported that an immediate threat to SWWF would occur if livestock were not removed. There is a great deal of information which substantiates that livestock fragment and adversely modify SWWF habitat and attract cowbirds, which parasitize flycatcher nests.

Your contention no. 12: *All available information was not used when the District Ranger made the decision (i.e. U Bar Ranch Study).*

Response: The District Ranger made the decision based on pertinent information received from "seven species team." The "seven species team" had access to the report from the U Bar Ranch Study as well as several others. Deborah Finch, who was part of the "seven species team" is now involved in the study of the U Bar Ranch Study. I am confident that the "seven species team" used the literature and other studies appropriately. The U Bar Ranch study was reviewed prior to the District Ranger's decision. In fact, one of the scientists who is now involved in the study was also involved with the "seven species team". The SWWF habitat at the U Bar Ranch is different from that at Roosevelt Lake, so management implications are different.

Your contention no. 13: *The District Ranger did not consider the site specific characteristics of the affected pasture as it relates to the ability of the livestock to use the occupied SWWF area and modify it when making the decision.*

Response: The District Ranger has observed that cattle in the Lake pasture are most frequently observed adjacent to the SWWF occupied tamarisk stands. They have also been observed traveling within these dense stands. This is documented in the Southwestern Willow Flycatcher Survey 1993-1996 Summary Report (AZ Game and Fish Department, February 1997).

Your contention no. 14: *Cowbird trapping may exacerbate the impacts to the SWWF by increasing parasitism.*

Response: The "seven species team" has conducted extensive literature review and suggests that credible research shows that there would be an expected decrease in parasitism with cowbird trapping. The Forest Service conducts cowbird trapping and funds surveys and monitoring, as suggested by the FWS. The requirement to trap cowbirds was made by professional ornithologists and biologists from the FWS. The success of reducing parasitism on endangered species by trapping cowbirds is documented in the scientific literature. Survey and monitoring programs at Roosevelt Lake are also conducted by professional ornithologists, biologists, and trained technicians from the Arizona Game and Fish Department and the National Biological Survey. These agencies developed and continue to use a scientific protocol, in order to minimize any impacts to the SWWF. These procedures are reviewed annually and updated to keep impacts minimal.

Your contention no. 15: *The Forest Service has in essence designated critical habitat for the SWWF in the affected area by adopting direction which closes designated areas of the National Forest to all multiple uses.*

Response: As you know, the area has not been designated as critical habitat, and is not closed, but restricted to vehicle access and to livestock grazing.

The Forest Service has a responsibility for protecting threatened and endangered species and their habitat, whether or not the area is designated as critical habitat. In her response statement, the District Ranger quoted the Federal Register, Vol. 62, No. 140, which determined the Critical Habitat for the Southwestern Willow Flycatcher. It states that "the designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of *Empidonax trailii eximius* (Southwestern Willow Flycatcher). Federal Activities outside of critical habitat are still subject to review under section 7 if they may affect the Southwestern Willow Flycatcher. Prohibitions of Section 9 also continue to apply both inside and outside of designated critical habitat."

DECISION

During the presentation you made to me on behalf of Sanborn Cattle Company on June 8, 1998, you expressed that Sanborn Cattle Company was being singled out and other grazing permittees were not having to deal with management changes because of threatened and endangered species to the extent of Sanborn Cattle Company. There are only 3 allotments that have occupied habitat for Southwestern Willow Flycatcher. All three of the permittees on these allotments have been excluded from grazing the occupied habitat. Several other permittees have been restricted from grazing critical areas for threatened and endangered species including six grazing permittees who have been restricted from grazing the Verde and Salt Rivers on their Allotments. All of these restrictions were made on an annual basis through the AOPs. NEPA analyses will be completed in the near future to address long-term management.

After a review of the record, I concluded that the District Ranger's decision to remove livestock grazing from the Southwestern Willow Flycatcher occupied habitat for the 1997 grazing year was warranted and according to the proper authority. The District Ranger's decision is affirmed.

According to the appeal regulations (36 CFR 251.87) you may file and appeal to the Regional Forester within 15 days of this decision. If you 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/ Charles R. Bazan

CHARLES R. BAZAN
Forest Supervisor and Appeal Reviewing Officer

cc: Sanborn Land and Cattle Company
R3-Regional Forester
Tonto Basin District Ranger