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Department of  
Agriculture

Forest  
Service

Southwestern  
Region

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File Code: 1570-1

Date: November 20, 1998

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Dear Mr. James:

This is my second level review decision on the appeal you filed (appeal # 98-03-12-0034-A251) on behalf of the Johnson Cattle Co., an Arizona partnership (Johnson). Johnson holds a grazing permit authorizing grazing on the Cartwright Allotment, located within the Cave Creek Ranger District of the Tonto National Forest. Specifically, Johnson's appeal is in respect to two letters of instruction (January 7, 1998, and January 26, 1998) issued to Johnson serving as annual operating instructions (AOI) for the 1998 grazing season for the Cartwright Allotment. Due to the large volume of litigation, appeals, and related activities concerning the Region's program of rangeland management, I have had to defer review of your appeal until this time per the provisions of 36 CFR 251.89. Your patience is much appreciated. Your appeal was filed and has been accordingly processed under the provisions of 36 CFR 251, subpart C.

**Background:**

Johnson has a grazing permit for 640 adult cattle yearlong and 336 yearling cattle for a season of use of January 1 to May 31, annually. Included as part of Johnson's permit is an allotment management plan (AMP), approved by the Forest Supervisor in June of 1989. Also, as part of the grazing permit is a Memorandum of Understanding (MOU) providing for continuation of nonuse for 150 of the 640 adult cattle, leaving the actual number of livestock grazing the allotment at 490 adult cattle yearlong annually and the natural increase (N.I.) for a season of use of 1/1-5/31 annually for the period of 12/31/94 through 12/31/97. This MOU is an extension of a previous, similar MOU. The stated purpose of this MOU is as follows:

"Prior to the end of the period of nonuse, the Forest Service will make certain inspections and studies of the allotment. (The permittee is invited and urged to participate.) These studies are to determine if the desired level of resource management or grazing capacity has been achieved and if the desired ecological condition can be achieved during the nonuse period. If it is determined that the allotment will not support the full obligation, the term permit numbers and/or season of use will be adjusted to correspond with the Forest Service findings as per part 2, clause 8(b) of the permittee's term permit."

The record for this appeal reflects that the above mentioned studies included as part of the MOU were completed near the end of calendar year 1997 or early 1998. According to the project



record (District Ranger's responsive statement) a formal decision to adjust the permit in accordance with the provisions of the MOU, will be made by the end of 1998.

According to the record, Johnson's appeal of the District Ranger's AOI was filed on March 12, 1998. On May 1, 1998, Johnson requested a stay of the District Ranger's AOI, which was subsequently denied by the Forest Supervisor. The Forest Supervisor's denial of the request for stay was delayed until July 8, 1998, apparently due to an oversight on the part of the Tonto National Forest in not mailing out the denial letter of May 14, 1998 (formal denial of the request for stay was issued by the Forest Supervisor on July 8, 1998, and this office subsequently denied discretionary review of the Forest Supervisor's stay denial in a letter dated, July 28, 1998, from this office).

The District Ranger subsequently provided a responsive statement to the appeal and Johnson's reply to the deciding officer's responsive statement was filed on June 5, 1998. Johnson waived entitlement to an oral presentation in a letter also dated June 5, 1998, to the first level reviewing official, Mr. Charles Bazan, Forest Supervisor of the Tonto National Forest. Forest Supervisor Bazan issued his first level review decision on July 13, 1998. Your second level appeal, dated July 27, 1998, was received in this office on July 28, 1998.

My review of your appeal has been conducted pursuant to and in accordance with 36 CFR subpart C, and consistent with applicable laws, regulations, orders, policies, and procedures. I have thoroughly reviewed the appeal record and the Biological Opinion for the 1996 amended Forest Plans referred to by the Forest Supervisor and the appellant. My review decision hereby incorporates by reference the entire appeal record.

### **Points of Appeal:**

My review of your appeal was confined to substantive points of the appeal, the merit and rationale of the District Ranger, and the Forest Supervisor as documented in the District Ranger's AOI letters, his responsive statement, your response to the District Ranger's responsive statement, and the Forest Supervisor's first level review decision. My review has been conducted in full consideration of the entire appeal record, federal statutes, and the policies and operational procedures set out in the directives system of the USDA Forest Service.

The following in my review of the substantive points in your notice of appeal for second level review:

***Appeal Point 1: "[t]here was no court imposed requirement mandating changes to Johnson's grazing system."***

Issues raised by the appellant related to this point of appeal have to do with the following:

1) efforts by the Tonto National Forest with respect to conforming grazing on the Cartwright Allotment with guidance and requirements of the Tonto National Forest Plan, 2) the role and influence of court proceedings under Forest Guardians v. Dombek may have had on the Cartwright AOI, 3) whether or not the Johnson's grazing permit and grazing activities in general on the Cartwright Allotment are considered to be in conformance with the Tonto Forest Plan, and

4) the declaration of David M. Stewart, dated February 10, 1997, with respect to Forest Guardians v. Thomas.

***Response to Appeal Point 1 and Related Issues:***

In Forest Guardians v. Dombeck the salient issue under question was whether the Forest Service's decision to implement the 1996 Forest Plan Amendments prospectively, rather than retroactively violates the National Forest Management Act (NFMA). In part, the 1996 amendments provided new standards and guidelines for grazing activities on national forest lands throughout the Southwestern Region to provide additional protection, recovery, and continued existence of threatened and endangered species and habitats. While the government prevailed in this litigation the obligation of the Forest Service, in respect to this litigation and NFMA, does not end with the decision of December 15, 1997, by the Ninth Circuit Court of Appeals.

With respect to prospective application of forest plan amendments, NFMA clearly states "[t]hose resource plans and permits, contracts, and other such instruments in existence shall be revised as soon as practicable to be made consistent with such plans [section 1604(i)]." While the appellant is correct that this litigation had no direct bearing or implications to the Cartwright Allotment, the implications of this litigation have potential indirect ramifications for all national forest grazing activities throughout the Southwestern Region.

Documents in the record for this appeal clearly reflect that during the fall of 1997, the Tonto National Forest assembled an "NFMA consistency team" to review grazing activities and make determinations of consistency of these activities with the Tonto National Forest Plan and, in the event activities are not consistent, determine what changes need to be made to bring the activity consistent. With respect to the Cartwright allotment, the Forest Supervisor clearly articulated in his first level review decision "that the current Cartwright Allotment AMP is not consistent with the Tonto LRMP."

The 1989 AMP indicates that a site-specific determination regarding forage utilization was made in the course of developing the AMP in conformance with the grazing guidance in the 1996 Forest Plan Amendment. Based upon my review of the record, the determination of the Tonto National Forest "NFMA consistency team" was that there are other provisions of the Forest Plan with which grazing activities on the Cartwright Allotment are not in conformance.

The appeal record indicates that the team's evaluation of the Cartwright Allotment concluded: 1) that additional consultation with Fish and Wildlife Service (FWS) is needed; 2) that there may be current issues associated with proper protection of listed species and/or habitats; and 3) that the allotment may be excessively stocked.

The appeal record also reflects that considerable monitoring data has been gathered on the allotment in recent years to substantiate these determinations. In fact, the District Ranger states in his responsive statement, "...[t]he District has been collecting allotment capacity data by conducting Production/Utilization surveys for the past 3 years." Further, the District Ranger states, "...[t]his data is being used in the NEPA process, which we anticipate to complete by the end of 1998." It should be pointed out that the National Environmental Policy Act Process

(NEPA) is the basic process utilized by the agency to bring project level activities, such as grazing permits, into compliance with forest plans.

While the February 10, 1997, declaration of David M. Stewart, referenced by the appellant, and filed in the court proceedings for *Forest Guardians v. Thomas*, declared the Cartwright Allotment "consistent with the amended plan for the Tonto National Forest," this determination was made based on information in a grazing decision and resulting AMP made at least eight years in advance of the current NFMA consistency determination by the Tonto National Forest. While Mr. Stewart was using only the information in the 1989 AMP that established the then current forage utilization guidance for the Cartwright Allotment upon which to base his determination, the Tonto National Forest determined the Cartwright Allotment is not in conformance with the Tonto National Forest Plan 10 months (December, 1997) after Mr. Stewart's declaration. The appeal record reflects that the Forest's determination was made with the benefit of least 3 years of production/utilization data from the Cartwright Allotment and other new information on the effects of grazing not available to Mr. Stewart when making his determination in the February 1997 declaration.

In summary of this appeal point, while "there was no court imposed requirement mandating changes to Johnson's grazing system", the District Ranger had plenty of evidence, some of which was at least indirectly related to litigation, upon which to base changes in annual grazing management from the established grazing system in the 1989 AMP. It should also be noted that 1998 was not the first year changes from the AMP were made in annual grazing instructions as indicated in the District Ranger's Responsive Statement, "[a]s permittee on the Cartwright Allotment, he (Johnson) has never managed according to the grazing schedule of the AMP."

***Appeal Point 2: "...the District Ranger's letter dated January 7, 1998, stated that the FWS had ordered him to adjust grazing on the allotment (a statement subsequently acknowledged by the District Ranger to be incorrect)."***

Issues raised by the appellant related to this point of appeal have to do with the following: 1) modifications of the grazing activity necessary for protection of the Gila topminnow, 2) the August 20, 1981, MOU between the Forest Service, FWS, and AGFD acknowledging the "experimental" nature of the Gila topminnow stocking program, 3) the May 13, 1982, FWS biological opinion covering the Gila topminnow stocking program, and 4) implications of the Biological Opinion dated December 19, 1997, for Land and Resource Management Plans, as amended, within the Southwestern Region.

***Response to Appeal Point 2 and Related Issues:***

Providing proper stewardship and protection of species listed as threatened or endangered is a high priority for Southwestern Region National Forests. It is evident from the appeal record, that Tonto National Forest personnel conversed with personnel of the FWS to determine proper stewardship measures to be incorporated into the grazing AOI for the Cartwright Allotment for the 1998 grazing season, as rightfully they should. Basic to conforming grazing activities to be consistent with the amended Forest Plans is full consideration of standards and guidelines and the Biological Opinion for the Forest Plans as amended.

It is clear from the record that the District Ranger is engaged in informal consultation with FWS. This process is used to determine appropriate protection measures to include in the AOI, and to determine what permanent changes may be needed in the grazing activity. Changes in the grazing activity will be determined through the NEPA, AMP and grazing authorization process which is presently being conducted for the Cartwright Allotment (see District Ranger's Responsive Statement).

While the District Ranger's original statements in the January 26, 1998, AOI concerning "orders" from the FWS to restrict grazing were retracted in his responsive statement, the important issue is that the Forest Service and FWS are communicating in order to agree on appropriate adjustments in grazing practices. These grazing practices are based on new information about the habitat needs of the Gila topminnow as documented in the consultation process and December 19, 1997, Biological Opinion on the amended forest plans and new information on the impacts of grazing since 1989 on the Cartwright Allotment through monitoring studies completed by the Forest Service since implementation of the 1989 AMP. For the District Ranger to ignore this information and simply maintain the "status quo" would be in complete defiance of his obligations under federal statutes, regulations, and policies of the agency to provide proper stewardship and protection of natural forest resources.

The appellant is correct that "...failure of the stocked topminnow populations at these locations (within the Cartwright Allotment) is attributable to extreme weather events: flooding and desiccation of the water source." However, this in no way relieves the Forest Service of its obligation to maintain the basic watershed, riparian, and aquatic resources upon which these fish are dependent. It is the objective of the agency to maintain the best ecological condition possible so the habitat for the Gila topminnow is resilient to such climatic events. Effects of such climatic events on habitats such as that needed by the Gila topminnow, and other species dependent on riparian and aquatic resources, are often greatly exacerbated by ecological conditions being in less than a desirable state.

The Forest Supervisor, in his first level review decision, erred in his references to Section 7(d) of ESA, and the avoidance of "take" as to why the District Ranger employed certain requirements in the AOI, differing from the AMP. Provisions of Section 7(d) apply only in the event that formal consultation with FWS is in process pending the issuance of a biological opinion. Similarly, statements of incidental take are only brought forth through formal consultation and resulting reasonable and prudent measures and terms and conditions for the avoidance of excessive levels of take as documented in a biological opinion. While the Tonto National Forest is presently engaged in informal consultation with FWS the record does not reflect that formal consultation has been initiated in respect to grazing activities on the Cartwright Allotment.

This aside, the District Ranger could not avoid the current requirements of the amended Forest Plan and the need for compliance with the Forest Plan and the resulting Biological Opinion of December 19, 1997. Through the January 1998 AOI, it appears the District Ranger is conforming grazing activities with standards and guidelines for endangered and threatened species and range management activities for the Arizona Agave and the Gila topminnow contained in the amended Forest Plan. He is also complying with the Terms and Conditions as contained in the December 19, 1997, Biological Opinion for the amended Forest Plan.

While the Forest Supervisor and the District Ranger have made "technical" errors in their articulation of the reasons for additional protective measures in the AOI, as contained in various documents in the appeal record, the substantive actions taken by the District Ranger to properly conform grazing activities with current direction in the Forest Plan and the December 19, 1997, Biological Opinion through the AOI are appropriate.

With respect to the MOU of August 20, 1981, and the resulting Biological Opinion of May 13, 1982, for introduction of Gila topminnow into various locations throughout national forests in Arizona; neither of these documents intended to exempt future agency actions from additional Section 7 consultations and Biological Opinions and/or additional protective measures which might be needed based on new information about this species. The referenced MOU and Biological Opinion were developed and written based on the status and management needs of this species as they were known in 1981.

A clearer understanding of this MOU and resulting Biological Opinion in relation to ongoing collective efforts between the Forest Service, FWS, and the Arizona Game and Fish Department can more clearly be understood in a reading of the letter dated October 19, 1989, from the Phoenix FWS Ecological Services Office to the Director of the Arizona Game and Fish Department. This letter is included in the appeal record as an attachment to the District Ranger's Responsive Statement. The salient portion of this letter is as follows:

"Confusion has arisen regarding the Sections 7 and 9 protections which apply to the populations reintroduced under the auspices of the MOU. A common misconception among USFS personnel is that these are "experimental" populations and therefore not subject to Section 7 or Section 9 protection. This misunderstanding is fostered by the use of the word "experimental" in the MOU to describe these populations. When the MOU was signed in 1981, the word "experimental" had no legal definition under the Endangered Species Act (Act). Following 1982 amendments to the Act, the term "experimental" assumed a specific legal definition which did not apply retroactively to populations such as the MOU populations unless appropriate rules were promulgated through Federal Register publication. Therefore, all Gila topminnow populations stocked under the MOU are fully protected under Sections 7 and 9 of the Act and require Section 7 consultation for any Federal actions that may affect the topminnow and are not within the actions originally consulted on. Permits from the FWS are required for any take. The biological opinion issued on the MOU addresses activities ongoing at that time and found those activities to comply with Section 7(a)(2). No further formal consultation is needed on those activities. Interpretation as to what was or was not an existing activity at that time and how much change in that activity constitutes a new or additional activity subject to further Section 7 Consultation must be made on a case by case basis."

Obviously, grazing activities on the Cartwright Allotment have changed considerably since the above referenced MOU and resulting Biological Opinion (i.e. the 1989 AMP and resulting monitoring activities). New information has also come forward concerning potential effects of grazing and other activities on this species. An obvious example of this is the Biological Opinion for the amended Forest Plans and resulting Terms and Conditions.

To summarize this point of appeal, the District Ranger has made appropriate changes in grazing management through the AOI to provide protective measures needed for the Gila topminnow.

While mistakes were made by both the Forest Supervisor and the District Ranger in articulating the reasons for the actions, the substantive actions are reasonable and correct. There is no conflict between the actions implemented in the AOI and provisions of the 1981 MOU and 1982 Biological Opinion for introductions of the Gila topminnow in various locations throughout the Cartwright Allotment.

***Appeal Point 3: The Deciding Officer lacks authority to arbitrarily modify grazing practices through letters.***

Issues raised by the appellant related to this point of appeal have to do with the following: 1) the Kirkpatrick declaration, errors aside, is ultimately irrelevant to this appeal, since it is not part of the administrative record, and cannot be used to justify the decision, 2) Forest Service Regulations do not mention annual operating plans, "AOPs" or similar operating instructions, 3) the principal management tool that the Forest Service uses in conjunction with the permit is an AMP, 4) Forest Service line officers are not authorized to unilaterally issue orders that are inconsistent with the permit and AMP, and 5) Mr. Bazan argues that an "emergency" exists because the Forest Service is obligated to comply with the ESA.

***Response to Appeal Point 3 and Related Issues:***

I agree that the Kirkpatrick declaration dated February 7, 1998, is not part of the administrative record for this appeal, therefore, in and of itself cannot be used in this appeal. This declaration simply explains long standing grazing administration procedures used by the agency through issuing annual instructions to permittees, as needed, for protection of resources. The fact this declaration was referenced by the Forest Supervisor, without being included in the appeal record had no bearing on the Supervisor's decision since the authority for issuing these instructions is fully authorized in the grazing permit itself, and long standing policy of the agency contained in the directives system.

Appellant makes the point that "...the manner in which livestock are grazed on the Cartwright Allotment is governed by the AMP..." This statement is true only to a certain extent. Grazing on the Cartwright Allotment is governed first and foremost by the grazing permit. As a matter of Forest Service policy (FSM 2212.03-9) "[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, (FSM 2212) "[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 (emphasis added).

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 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. Grazing regulations, the grazing

permit, and agency policy and operating procedures, therefore, have been developed in recognition of this fact.

To think or propose that all agency policies and operating procedures needed for proper administration and management of national forest rangeland resources could possibly be included in USDA regulations is completely impractical. Therefore, the main substantive provisions of how national forest grazing is to be authorized and managed are included in the USDA 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 directives system.

Therefore, 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 and in agency policy in the directives system.

Examples of this include FSM 2231.41-Annual Authorization of Grazing Permits With Term Status. "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). This 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 for the area under permit and will require employees, 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 his responsibilities for providing proper administration of the permit in accordance with USDA regulations, and agency policy and operating procedures. Any permanent modifications in the permit will 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.

The term "emergency" in respect to Part 2, Section 8(b) of the permit, is in reference to an emergency situation which might necessitate not giving a one year notification before a grazing permit is permanently modified. In this respect it appears the Forest Supervisor has inappropriately referenced an "emergency" relative to the AOI which does not have the effect of modifying the permit. While this appears to be a mistake on the part of the Forest Supervisor, it has no bearing on the merit of the District Ranger's decision to issue management instructions needed to properly protect resources during the 1998 grazing season.

To summarize this point of appeal, the District Ranger has full authority to issue instructions for proper protection and management of resources. The District Ranger's decisions to issue the AOI did not modify the permit but simply provided for proper administration of the permit.

**Decision:**

My second level review of your appeal was conducted in accordance with 36 CFR 251 Subpart C. After review of the record, I find the District Ranger's decision with respect to issuing the 1998 AOI for the Cartwright Allotment was reasoned and in conformance with applicable laws, regulations, orders, and policies and procedures. The District Ranger's decision was not unlawful, arbitrary, capricious nor an abuse of discretion. Therefore, I affirm the District Ranger's decision to issue annual operating instructions as documented in his letters to Johnson of January 7, and 26, 1998.

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

Sincerely,

/s/ John R. Kirkpatrick  
JOHN R. KIRKPATRICK  
Deputy Regional Forester

cc:  
Tonto National Forest