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Forest
Service

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File Code: 1570-1/2200

Date: October 20, 2004

Dawn G. Meidinger
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Phoenix, AZ 85012-2913

RE: Appeal #04-03-09-0021-A251, Antelope Hills Allotment, Chino Ranger District, Prescott National Forest

Dear Ms. Meidinger:

This letter documents my second-level review decision of the appeal you filed on behalf of Silkie Perkins of Clarksdale, Arizona. The appeal is in regard to District Ranger Jackson's decision (Deciding Officer) to implement Alternative 5, Modified Proposed Action, which authorizes 936-1200 animal months (cow/calf) to graze a variable season on the Antelope Hills Allotment between 1/1 and 12/31 annually.

BACKGROUND

The Deciding Officer made a decision to implement Alternative 5 for management of livestock use on the Antelope Hills Allotment on February 4, 2004.

Ms. Perkins' first-level appeal was filed with Forest Supervisor King on March 22, 2004. In Ms. Perkins' appeal was a request for an oral presentation (36 CFR §251.97). In a letter dated March 24, 2004, Forest Supervisor King indicated that Ms. Perkins' appeal was timely and would be processed in accordance with 36 CFR§251. Under the provisions of 36 CFR§251.94, the Deciding Officer prepared and mailed a copy on April 21, 2004, of her written responsive statement to Ms. Perkins. Ms. Perkins responded to the Deciding Officer's responsive statement on May 12, 2004. On June 17, 2004, you requested the oral presentation be postponed until the month of July. The oral presentation was subsequently rescheduled for July 16, 2004. Following the oral presentation your firm provided supplemental information on July 30 regarding Ms. Perkins' claimed water rights. On July 31, 2004, Ms. Perkins also provided additional supplemental information to the oral presentation. Supervisor King subsequently closed the record on August 2, 2004 and documented this in a letter dated August 10, 2004. Based on his review of the record, Supervisor King affirmed the Deciding Officer's decision on September 1, 2004.

Your second level appeal of the Deciding Officer's decision was received in this office on September 16, 2004. By letter dated September 21, 2004, I indicated my review decision would be made within 30 days from the date the appeal record was received from the first level Reviewing Officer.



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: Appellant states the current permit includes the Verde River pasture and the Forest Service cannot exclude areas of the permit without evaluating it for grazing. This is an arbitrary and capricious decision and violates the Administrative Procedures Act.

Response: In interdisciplinary team meeting notes, Antelope Hills and river grazing is recognized as an integral part of the allotment plan (PR #433). Reviews of possible grazing of the river pasture concluded with concerns about grazing utilization and resource effects (PR #453) and effects to bird species (PR #458). Effects to listed fish species were inconclusive and additional study is needed, although watershed condition has improved by reduced numbers and development of water away from the river (PR #460, 546). Grazing of the River Pasture was included in Alternative 4, Permittee Alternative, (PR #557). In the Decision Notice and Finding of No Significant Impact (PR #556) the Deciding Officer documented her rationale for not choosing to implement Alternative 4. The analysis of alternatives indicates that vegetation and soil resources would move away from desired conditions under Alternative 4. Additionally, the Deciding Officer states the relationship of livestock grazing/native fish/non native fish interactions needs additional study before conclusions on the significance of livestock grazing exclusion is available. Therefore, the Deciding Officer did not choose grazing the Verde River corridor at this time (PR #556).

Finding: The Deciding Officer reviewed the status of the river pasture as part of the allotment and determined it was not available for livestock grazing at this time. She followed appropriate procedures in disclosing analysis in the NEPA document and documenting her rationale in the Decision Notice and Finding of No Significant Impact.

ISSUE 2: The Forest Service did not do consultation on grazing the River Pasture under the Endangered Species Act. The Permittee in her first-level appeal states that there was no request for a Biological Opinion concerning grazing though she was told that before grazing could be reinstated along the River Pasture, a BO would be required. Appellant goes on to say that the USFS is using the threat of a likely to adversely effect ruling by the USFWS to illegally restrict a lawful act by the permittee.

Response: The Forest Service consults on the proposed action after parameters of the project have been determined. Since Alternative 4 (Permittee Alternative) was not chosen as the Proposed Action there is no requirement to do either a biological assessment or a biological opinion for that alternative. The response to Issue 1 describes the analysis and selection of a proposed action that was consulted on.

Finding: The Deciding Officer followed appropriate procedures in selecting a proposed alternative and in ESA consultation procedures for this proposed action.

ISSUE 3: Adjudication, or lack thereof, doesn't circumvent my claimed water rights. In supplemental comments submitted July 30, 2004, the appellant claims that exclusion of grazing in the River Pasture prevents the appellant from accessing her claimed water rights at Big

Springs, Summer Springs, Unnamed Spring, Cress Spring, the Verde River, and various springs adjacent to the Verde River within the River Pasture.

Response: On March 22, 2004, the same day that the appellant filed an appeal under 36 CFR 251 regarding the Decision Notice on the Antelope Hills Allotment, the appellant filed a number of Statement of Claim forms for water sources on National Forest System Lands. The appellant was issued reference numbers for each filing, and provided with a letter from the Arizona Department of Water Resources stating, in part, that “The Department does not presume to either adjudicate the validity of the claims or determine who should hold the claims”. The reference numbers for a Statement of Claim begin with 36. A *Statement of Claim of Rights to Use Public Waters of the State of Arizona* is a claim form for uses that allegedly pre-date the June 12, 1919 Public Water Code. These uses are not issued a permit or a certificate by the state, and are subject to challenge. In Arizona, the amount claimed for stockwater has to be calculated by a formula provided by the State. The appellant claimed 300 bred pairs at 30 gallons a head for 365 days per year, and calculated the annual use at 10.08 acre foot per year. She then claimed 10.08 acre foot per year for every water source on each Statement of Claim. The claims themselves are thus unsupported by actual use prior to the most recent decision regarding allotment management.

Even if some quantity of water use were to eventually be adjudicated to the appellant, Arizona case law does not support the appellant’s assumption that she has a right to any specific water location. To quote from Fennemore Craig, P.C. response to Tribes Motion for declaration of full appropriation in the Gila River system: “Arizona courts have long recognized that substitution of sources is permissible. The Supreme Court in *Adams v. Salt River Valley Water Users’ Ass’n*, 53 Ariz. 374, 387-88, 89 P.2d 1060, 1066 (1939), explained the rule concisely:

We agree with plaintiffs that in water-right law in the arid west “first in time is first in right.” We also agree that such right, when perfected, is a vested right and may not be taken from its owner except by his consent. Such vested right is not in the water but in its use. Waters of the state subject to appropriation for irrigation are public property, and the policy of the state is to limit the right of appropriation to their use. The right the law gives to an appropriator to the use of water for irrigation is not necessarily in the water flowing in a given stream or at a particular point of diversion in such stream. The source of his supply may be changed without his consent, providing the quality of the water is not lowered and he is put to no expense, and of course such change can be made when he consents.”

Finding: Although use of water for livestock grazing in the River Pasture is being restricted, Arizona case law provides for substitution of water sources. Water sources are being developed in the selected alternative to provide a supply of water for the permitted livestock use.

ISSUE 4: A range of numbers is still against policy where cattle and use are previously documented.

Response: There is nothing in Forest Service Policy that restricts the Deciding Officer from using a range of numbers when making a NEPA decision related to the authorization of grazing. Forest Service Handbook 2209.13 Chapter 90 provides guidance in developing adaptive

management strategies. Section 92.23 describes a change from specifying a fixed number of livestock and on- and off- dates, to specifying the maximum limits or parameters for the appropriate timing, intensity, frequency, and duration variables. These are subsequently checked through monitoring to determine if changes are needed in management. Adaptive management decisions also ensure NEPA decisions remain viable for an extended period of time and are not the target of litigation.

Finding: Forest Service policy provides guidance in developing adaptive management strategies that incorporate timing, intensity, frequency, and duration of livestock grazing. A range of numbers in the NEPA decision is appropriate.

ISSUE 5: Range condition on the allotment is exemplary. Stocking should be based on forage, not just availability of water.

Response: The record documents that 92 percent of the Antelope Hills Allotment is in satisfactory rangeland management status (PR# 557). About 54 percent of the allotment is considered capable of supporting grazing (PR# 549) and 85 percent of those acres are in satisfactory rangeland management status. On the remaining 15 percent of the capable acres there is a downward trend in range condition due to limited stock water sources. The term grazing permit will be issued with variable numbers of 936 to 1,200 animal months grazing each year. The current term permitted level of grazing, 936 animal months, will be the maximum number authorized to graze until there are sufficient water developments in place to implement deferred grazing across the entire allotment. As water developments are completed and monitoring indicates additional stocking is appropriate, authorized numbers can increase to 1,200 animal months grazing each year, or a 19 percent increase over currently permitted numbers. Reference EA page 2-8 (PR# 557) and Decision Notice pages 1-2 (PR# 556).

Finding: There is nothing in the record to indicate the Deciding Officer did not make a reasoned decision in setting permitted numbers. Development of additional water sources and monitoring of rangeland resources will determine when it is appropriate to implement the upper range of variable numbers identified in the NEPA decision.

ISSUE 6: Consultation happens at the initiation of the project, not after decisions including parameters of the project have already been decided. In first-level appeal appellant states that she was not consulted per regulations, prior or during initiation of this process.

Response: The project record shows a lot of correspondence and contact with the permittee on this project and that the permittee did not agree with the proposed action put forward (PR #32, 39, 42, 90, 100, 130, 137, 161, 162, 466, and 519). The record shows there were several discussions and work done cooperatively with the Forest to build a permittee alternative for each allotment that would be analyzed by the decision maker (PR #46, 143, 144, 146, 150, 180-2, 191-2, 212, 299, 308, 443, and 448).

Finding: The permittee was consulted at the beginning of the planning of this project and consultation continued throughout the development and analysis of the alternatives.

ISSUE 7: There is very little actual sound science in the decision. Most was produced on the computer in the office without the accompanying fieldwork. Information on grazing potential cannot be assessed without production/utilization studies. Information available concerning

bank and crossing impacts on allotment were not assessed. Many inspections have been done over the past 6 years concerning stray use, and the amount of impact in these areas is nil.

Response: Forest Plan standards and guidelines related to activities such as production/utilization studies are prospective in nature and are largely dependent on other competing priorities for resources to accomplish the work. In the Reviewing Officer's first level appeal decision he points out that projected effects, by alternative, were derived from field data including inspections and from the Prescott National Forest ecological database. The Reviewing Officer points out that the appellant accompanied District personnel on various field inspections during the NEPA process (PR# 519). Areas grazed by livestock were evaluated in addition to areas of potential grazing capacity. Plot data collected for the Ecological Inventory and Terrestrial Ecosystem Survey provided information on existing vegetation and soil condition.

The record documents that the use of the GIS computer model used to determine grazing capacity was identified as a non-significant issue during scoping. This issue was not carried forward in the subsequent environmental analysis because the method used followed the principles outlined in a scientific, peer reviewed, and published document (Holechek 1988) (PR# 557).

Finding: The Interdisciplinary Team considered an appropriate level of information, including inspections, in conducting the analysis of the Antelope Hills Allotment. Implementation and effectiveness monitoring will be used to adjust management as the NEPA decision is implemented.

ISSUE 8: The economic analysis did not consider the amount of money lost yearly because the permittee cannot use the River Pasture.

Response: All alternatives were analyzed for economic effects to the permittee using breakeven calf prices as a measure of ranch operation's financial status, and costs of range improvements by alternative (EA PR# 557 pp. 3-2 to 3-6). Individual pasture units were not analyzed for financial effect and it is not a requirement for analysis. Project level requirements for social and economic analyses are described in Forest Service Manual (FSM 1970) and Forest Service Economic and Social Analysis Handbook (FSH 1909.17). The responsible line officer determines the scope, appropriate level, and complexity of economic and social analysis needed (FSM 1970.6). The analysis looked at effects such as permitted season reductions and reduction in livestock numbers, with results on breakeven calf prices and a best estimate of ranch operation viability. The selected alternative for Antelope Hills allotment would have prices within 1 percent of current operations, which has very high breakeven calf prices (EA PR# 557).

Finding: The economic analysis is consistent with regulation and manual and handbook direction for project-level analysis and is not in violation of applicable laws, regulation, or policy.

Decision

My second level review of this appeal was conducted in accordance with 36 CFR§251 subpart C. After review of the appeal record, I find that the District Ranger's decision with respect to continued authorization of livestock grazing for the Antelope Hills Allotment is based on a reasonable assessment of the resource conditions on the allotment.

The District Ranger's decision is in conformance with applicable laws, regulations, policies and procedures. I find no evidence which would support the allegations that the District Ranger acted in an arbitrary and capricious manner. Therefore, I affirm the District Ranger's decision to implement Alternative 5, the Modified Proposed Action.

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

Sincerely,

/s/ Abel M. Camarena
ABEL M. CAMARENA
Appeal Reviewing Officer, Deputy Regional
Forester

cc: Linda L Jackson, David M Stewart, Mailroom R3 Prescott, Constance J Smith, Joy Kimmel