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Mr. Glen Contreras,  
Data Quality Team Leader ORMS Staff  
USDA Forest Service  
Mail Stop 1150 1S Yates Building  
14<sup>th</sup> & Independence Avenue SW  
Washington, D.C. 20250-1150

**Re: Request for Reconsideration of USDA Forest Service's Denial of Request for Correction No. 3008, File Code 1300, Submitted on Behalf of Mr. Eddie Johnson of the Johnson Ranch in Arizona**

Dear Mr. Contreras,

At this time, Mr. Eddie Johnson formally submits his Request for Reconsideration of the Forest Service's denial of his Request for Correction of USDA information made under the authority of the Data Quality Act. At the outset, it must be noted that the Forest Service did not comply with its own guidelines here by failing to provide Mr. Johnson with instructions regarding the procedure to follow for requesting reconsideration of that decision (see decision letter from Thelma J. Strong dated August 22, 2003, attached). As a result, Mr. Johnson relies on instructions provided in a previous letter received from the Forest Service for direction in submitting this Request for Reconsideration (see letter from Pamela Gardiner dated June 30, 2003, attached).

Mr. Johnson also relies on two separate arguments in support of his Request for Reconsideration and reversal of the Forest Service's decision. These arguments show that (1) the Forest Service has no lawful authority to exempt publicly disclosed information from Data Quality Act Challenge, and (2) even if the Forest Service did have such authority, it nevertheless initiated and sponsored distribution of the information here challenged when it made Mr. Johnson's agents aware of this information's existence and then provided them with a copy of this same information free of any charge.

## A. The Facts

In March of 2003, Mr. Johnson submitted a petition to the Forest Service under the authority of the Federal Data Quality Act, 44 U.S.C. Sec. 3516, requesting the correction of data and information contained in the "*Guidance Criteria for Determining the Effects of On-Going Grazing and Issuing Term Grazing Permits on Selected Threatened and Endangered Species, and Species Proposed for Listing and Proposed and Designated Critical Habitat,*" April 15, 2002 (hereinafter, "Grazing Guidance Criteria"). Mr. Johnson became aware of this information generated by the Forest Service after his agents were informed of its existence and provided a copy of it free of charge by the Forest Service's Cave Creek Ranger District Office in the fall of 2002. The Forest Service acknowledged receiving Mr. Johnson's Request for Correction of this Grazing Guidance Criteria in March of 2003, in a letter to Mr. Johnson dated June 30, 2003 (see Gardiner letter).

Mr. Johnson requested the correction of certain information within this Guidance Criteria to comport with the current state of knowledge regarding livestock presence and parasitism of Southwestern willow flycatchers by Brown-headed cowbirds. The current state of knowledge on this subject is that provided by ten years of scientific studies of the largest known population of Southwestern willow flycatchers conducted by private and Forest Service biologists on the U Bar Ranch in southwestern New Mexico. These studies reveal that on the U Bar Ranch, where Southwestern willow flycatchers and livestock occur either together or in close proximity to one another, flycatcher reproductive success rates are the highest and parasitism rates by cowbirds are the lowest known for this species.

These scientific facts directly contradict the Forest Service's assumptive and contrary conclusions contained within the April 15, 2002, Grazing Guidance Criteria. According to the Forest Service, proper "grazing guidance" in regard to Southwestern willow flycatchers necessitates the exclusion of all livestock within 2-5 miles of occupied or potential flycatcher habitats in the absence of an agency-approved cowbird trapping program. According to the Grazing Guidance Criteria, the imposition of such an extremely restrictive policy is necessary because of the perceived threat of increased cowbird parasitism posed to the flycatchers by the mere presence of livestock within 2-5 miles of either occupied or potential habitats.

By early 2003, Cave Creek District Ranger, Delvin Lopez, was relying exclusively on the flycatcher/livestock/cowbird information contained in the Grazing Guidance Criteria for justification of his continuing, permanent exclusion of Mr. Johnson's livestock from the Lower Chalk and Yearling pastures (see Lopez letter attached) on the Sears-Club / Chalk Mountain Allotment. Concurrently, District Ranger Lopez was relying on this same information to prepare an Environmental Assessment of livestock grazing on the Sears-Club / Chalk Mountain Allotment for purposes of permit renewal. Mr. Lopez was only days away from releasing his draft Environmental Assessment for public review when Mr. Johnson filed his Data Quality Act Request for Correction of this information on March 25, 2003. As a result, further action on this draft Environmental Assessment has been halted, pending the final outcome of Mr. Johnson's Request for Correction.

After receiving Mr. Johnson's Request for Correction in late March of 2003, the Forest Service twice refused to address the merits of this request. On June 30, 2003, the Forest Service informed Mr. Johnson that it would only address his petition in comment submitted during the public comment process for the draft Environmental Assessment it claimed was ongoing when Mr. Johnson's petition reached the Forest Service (see Gardiner letter in attachment). According to the Forest Service, the public comment process offered the advantage, apparently over the Data Quality Act, of placing its response in the context of other comments in a venue that is familiar and accessible to the public.

There was, however, no public comment process regarding the Environmental Assessment of livestock grazing on the Sears-Club / Chalk Mountain Allotment then ongoing when the Forest Service received Mr. Johnson's Request for Correction. Mr. Johnson lodged this objection with the Forest Service and demanded evidence from the Forest Service supporting its claim to the contrary (see Johnson letter of July 7, 2003, to Gardiner in attachment). No evidence of the alleged ongoing public comment process cited by the Forest Service as justification for not addressing the merits of Mr. Johnson's Request for Correction was ever provided to Mr. Johnson by the Forest Service.

Nearly two months passed before Mr. Johnson again heard from the Forest Service regarding the status of his Request for Correction. On August 29, 2003, in a letter dated August 22, 2003, the Forest Service informed Mr. Johnson that it had rejected his Request for Correction of the information contained within the Grazing Guidance Criteria because the information being challenged by Mr. Johnson had not been "disseminated" to the public by the Forest Service after all. No mention of any alleged, ongoing public comment process was made by the Forest Service in its letter of decision (see Strong letter).

According to the Forest Service, because the Grazing Guidance Criteria ... "is for, and has been used as "intra- or inter-agency guidance," "it has not been disseminated to the public" – despite the fact that Mr. Johnson's agents were made aware of its existence and provided a copy of this same Grazing Guidance Criteria free of charge by the Forest Service in the fall of 2002. Thus, according to the Forest Service, because the Grazing Guidance Criteria does not meet the definition of information "disseminated" to the public under either OMB's or the Department of Agriculture's data quality guidelines, the Grazing Guidance Criteria and any information contained within it is exempted from a Request for Correction made under the authority of the federal Data Quality Act. From this decision, Mr. Johnson Appeals.

**B. The Paperwork Reduction Act's Data Quality Guidelines Apply to All Information That Federal Agencies Have In Fact Made Public and Neither the OMB Nor the Forest Service Has Lawful Discretion to Create Any Exemptions**

The Data Quality Act amends the Information Dissemination provisions of the Paperwork Reduction Act (PRA) by requiring the Office of Management and Budget (OMB) to issue interagency data quality guidelines for ensuring and maximizing the quality, objectivity, utility, and integrity of the information that federal agencies distribute to the public. OMB's guidelines require, among other things, that federal agencies subject to the PRA issue information quality guidelines for the information these agencies distribute to the public and that they also establish administrative

mechanisms allowing affected persons to seek and obtain correction of information disseminated on or after October 1, 2002, that does not comply with OMB's or the agency's guidelines.

Like the PRA's other Information Dissemination requirements, these new data quality guidelines apply to any and all information that federal agencies, such as the Forest Service, have in fact made public. Moreover, there are no statutory exemptions from the PRA's Information Dissemination requirements.

OMB's and the Forest Service's attempts to create exemptions by restricting the definition of "dissemination" in their interagency and intra-agency guidelines also contradict Congress's clear intent and preemptive usage of this term. The legislative history and statutory text of the Information Dissemination provisions of the PRA demonstrate Congress's clear intent that the only restriction on the terms "dissemination" or "disseminated" is that they apply to information that an agency has in fact made public. "Public Information," in turn, is defined by the PRA, for purpose of use in its Information Dissemination provisions, to mean "any information, regardless of form or format, that the agency discloses, disseminates, or makes available to the public." 44 U.S.C. Sec. 3502(12).

Here, Mr. Johnson's agents were made aware of the existence of the Forest Service's Region 3 Grazing Guidance Criteria by the Forest Service during a meeting with the Forest Service at the Cave Creek District Ranger's Office in the fall of 2002 (see copy of the Grazing Guidance Criteria, attached). At that meeting's end, the Forest Service provided Mr. Johnson's agents with a copy of this Grazing Guidance Criteria free of charge.

In March of 2003, District Ranger Delvin Lopez relied specifically on this same Grazing Guidance Criteria to justify the continued exclusion of Mr. Johnson's livestock from the Lower Chalk and Yearling Pastures. Concurrently, District Ranger Lopez relied specifically on this same Grazing Guidance Criteria as the basis for developing a draft Environmental Assessment of livestock grazing on the Sears-Club / Chalk Mountain Allotment (see Lopez letter). The development of this draft Environmental Assessment was put on hold, however, when Mr. Johnson filed his Request for Correction of this same information, and has yet to be released for public review.

Thus, because the Forest Service disclosed the existence of Region 3's Grazing Guidance Criteria to Mr. Johnson's agents and then in fact made this same information public by providing Mr. Johnson's agents with a copy of it, the Forest Service caused this Grazing Guidance Criteria to meet the PRA's definition of "public information." When the Forest Service then disclosed its reliance on this same Grazing Guidance Criteria in March, 2003, for purposes of continued livestock exclusion from the Lower Chalk and Yearling pastures and for purposes of developing and Environmental Assessment of livestock grazing on the Sears-Club / Chalk Mountain Allotment, the Forest Service also re-disseminated this information after October 1, 2002. Thus, because Region 3's Grazing Guidance Criteria was in fact made public by the Forest Service, and because the Forest Service continued to re-disseminate this Grazing Guidance Criteria after October 1, 2002, Region 3's Grazing Guidance Criteria meets the PRA's definition of disseminated information and, as such, is therefore subject to appropriate challenge by Mr. Johnson under the authority of the federal Data Quality Act. It must necessarily follow then, that the Forest Service's decision to the contrary is wrong and therefore must be reversed.

**C. Even If the OMB and the Forest Service Had Discretion  
To Create Exemptions in Their Guidelines, Region 3's Grazing Guidance  
Criteria Would Still Meet Both the OMB's and the Forest Service's Definitions  
Of "Dissemination" Under Current OMB and Forest Service Guidelines**

OMB's guidelines define "dissemination" as "agency initiated or sponsored distribution of information to the public." 67 F.R. at 8460. Not included within OMB's definition of "dissemination" is distribution of information limited to "government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law." *Id.* Also not included in OMB's definition of "dissemination" is information "distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes." *Id.*

Similarly, the USDA's guidelines do not include information "intended only for intra-agency or inter-agency use or sharing of government information" within its definition of "disseminated" information "*unless* the receiving agency disseminates the information to the public." USDA Quality of Information Guidelines (emphasis mine). According to the Forest Service, because the Grazing Guidance Criteria challenged by Mr. Johnson "is for, and has been used as "intra- or inter-agency guidance" ... [i]t has not been disseminated to the public." (See Strong letter)

Just because the Grazing Guidance Criteria "is for, and has been used as "intra- or inter-agency guidance" does not, in and of itself, render this information unchallengeable. This is particularly true when, as here, the information is disseminated to the public by a receiving agency.

Here, the Grazing Guidance Criteria was developed at the Region 3 level in Albuquerque, New Mexico, by the Forest Service. This information was then received by the various National Forests in Arizona and New Mexico within Region 3, and by each of the many District Ranger Offices located within the National Forests of the Region.

The Cave Creek Ranger District in Arizona was thus a receiving agency of this information. Therefore, when the Cave Creek Ranger District made Mr. Johnson's agents aware of this Grazing Guidance Criteria's existence and then provided those agents with a copy of it free of charge, as a receiving agency of the Forest Service, the Cave Creek Ranger District disseminated the Grazing Guidance Criteria to the public, and thus rendered that information subject to proper Data Quality Act challenge by Mr. Johnson.

Moreover, the Cave Creek Ranger District's distribution of the Grazing Guidance Criteria also meets the definition of "dissemination" contained in OMB's guidelines regardless of whether the Cave Creek Ranger District is characterized as a receiving agency. This is because OMB's guidelines define "dissemination" as "agency initiated or sponsored distribution of information to the public." 67 F.R. at 8460. Here, the Cave Creek Ranger District of the Forest Service initiated distribution of the Grazing Guidance Criteria to the public by informing Mr. Johnson's agents of this information's existence. The Cave Creek Ranger District then also sponsored distribution of the Grazing Guidance Criteria to the public when it provided Mr. Johnson's agents a copy of this same

information free of charge. Thus, because the Cave Creek Ranger District's distribution of the Grazing Guidance Criteria here challenged also meets OMB's definition of publicly disseminated information, the Grazing Guidance Criteria is subject to proper Data Quality Act challenge on this additional basis as well.

Additionally, the Forest Service's Information Quality Guidelines "apply not only to information the USDA generates, but also to information that USDA disseminates that was provided by or obtained from outside parties and which USDA adopts, endorses, or uses to formulate or support a regulation, *guidance*, or other agency decision or position. USDA Quality of Information Guidelines (emphasis mine). Here, the Forest Service relied on information obtained from outside parties – in this case nothing more than a personal communication from a former Fish and Wildlife Service employee – to formulate and support a policy of livestock exclusion within 2-5 miles of potential and occupied Southwestern willow flycatcher habitat through generation of the Grazing *Guidance* Criteria here challenged. Thus, because the Grazing Guidance Criteria is also information subject to USDA's Information Quality Guidelines on this basis, it is thus also disseminated information, and as such, is therefore also subject to proper challenge made under the authority of the federal Data Quality Act.

Further, because the Grazing Guidance Criteria here challenged has been used extensively by the Forest Service for decision making and has been relied on by USDA agencies or offices and the public as official, authoritative, government information, this information has, in effect, been constantly re-disseminated. Thus, the Forest Service's Grazing Guidance Criteria for Region 3 is also subject to USDA's Quality of Information Guidelines on this additional basis.

Finally, yet one more reason argues strongly for a finding that this Grazing Guidance Criteria is in fact subject to USDA's Information Quality Guidelines. That reason is public policy.

The public policy that Congress intended to serve by its passage of the Data Quality Act was to ensure that federal agencies use and disseminate accurate information. Federal agencies are required by the Data Quality Act to issue information quality guidelines that ensure the quality, utility, objectivity and integrity of information that they disseminate and to provide mechanisms for affected persons to correct such information.

From a public policy position, the Forest Service's contorted interpretation of the word "disseminated," if followed to its illogical and accountability avoiding conclusion, would make mockeries of both the Data Quality and Administrative Procedure Acts. Under the Forest Service's current interpretation of the term "disseminated," any information developed by the USDA that is intended only for intra- or inter-agency use or sharing would be immune from Data Quality Act challenge – even when, as here, that information is in fact made public by the Forest Service.

Moreover, according to the Forest Service's position, "dissemination" is not actually a physical action, but a function of subjective intent for determining whether the Forest Service will address the merits of any particular Request for Correction of information it receives. Evidently, the same would hold true even when, as here, the guidance policy in question was adopted by the Forest Service in violation of the APA by not being promulgated as a rule and without the knowledge of nor

input from the regulated public that would be and has been substantially impacted by that guidance policy's adoption.

Apparently, according to the Forest Service, no challenge of this APA-violating policy would be possible under the Data Quality Act because even though private citizens were made aware of this policy's existence by the Forest Service, and even though the Forest Service then provided those same private citizens with a copy of that policy free of charge, the agency nevertheless did not disseminate that policy to the public – under either OMB's or USDA's information quality guidelines – because the Forest Service *never actually intended* that the public become aware of the APA-violating policy it had adopted!

Clearly, use of such a contorted interpretation of the term “disseminated” by the Forest Service in an obvious attempt here to avoid addressing the quality, utility, objectivity and integrity of information it has in fact made available to the public serves neither public policy nor Congress's clearly expressed intent in passing the Data Quality Act. Thus, because public policy also argues strongly against the Forest Service's contorted interpretation of the term “disseminated,” the Grazing Guidance Criteria here challenged should be subject to USDA's information quality guidelines, and therefore the subject of proper, Data Quality Act challenge, from a public policy perspective as well.

#### **D. Relief Requested**

For all of the reasons heretofore stated within, Mr. Johnson requests that the USDA act on his Request for Reconsideration by reversing the Forest Service's rejection of his Request for Correction of Region 3's Grazing Guidance Criteria. Mr. Johnson also requests that the USDA then address the merits of his Request for Correction and adopt the changes to this information stated in that Request. Because this Request for Reconsideration involves influential scientific and regulatory information, Mr. Johnson further urges the Forest Service to designate a panel of officials to perform this function. Typically, such a panel would include a Reconsideration Official from the agency that made the initial determination (the Forest Service) and two Reconsideration Officials from other USDA agencies. Procedure to Seek Correction of Information Disseminated by USDA.