ATTACHMENT "G"

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March 21, 2003

Mr. Delvin Lopez
Cave Creek District Ranger
40202 No. Cave Creek Rd.
Scottsdale, Arizona 85262

Re: Response to letter from District Ranger dated 27 February 2003

Dear Delvin,

Thank you for providing the Johnson Ranch with the extension of time requested to respond to your letter of February 27, 2003. In that letter, you solicit the Johnson Ranch's response to your selection of Alternative D of the E.A. and your proposal of research on the effects of grazing management in the Davenport Pasture.

At the outset, your decision to exclude non-growing season livestock use of the Lower Chalk Pasture, in reversal of your October 29, 2002, determination allowing such, is both disappointing and inappropriate for a number of reasons. First, your analysis of what the Southwestern Willow Flycatcher Recovery Plan calls for in regard to the Lower Chalk Pasture is in error. Because your exclusion of the Lower Chalk Pasture from all livestock use since 1998 was based on an agency position regarding potential flycatcher habitat that has since been rejected by the 9th Circuit Court of Appeals in Arizona Cattle Growers' Association (2001), grazing was, and in fact yet remained, a lawful, ongoing activity in the Lower Chalk Pasture when new flycatcher nests became established --- not withstanding your unilateral decision to wrongly exclude this pasture from all use. Therefore, continuing lawful use of this pasture with monitoring is both appropriate and incentive driven, as called for by the Recovery Plan for the flycatcher.

Second, the Recovery Plan does not state that grazing should not be reinitiated in the Lower Chalk Pasture. According to Appendix G of the Southwestern Willow Flycatcher Recovery Plan, ... "[t]he intent of these general grazing guidelines is to promote recovery of the southwestern willow flycatcher while allowing conservative livestock grazing where appropriate and to provide flexibility for adaptive management in order to maintain or enhance southwestern willow flycatcher habitat." (Appendix G at p.24).

Third, the Recovery Plan does not exclude livestock grazing below 6,000' in elevation in occupied, suitable unoccupied, or potential flycatcher habitats. (Appendix G at pp. 26-

27). Because the Lower Chalk Pasture is below 6,000' in elevation and because the Recovery Plan states that ... "[i]n order to provide incentives for private landowners and public grazing permittees to improve and manage for southwestern willow flycatcher habitat, flexibility through adaptive management must be an integral part of the recommended grazing guidelines," (Appendix G at p. 25), non-growing season use of the Lower Chalk Pasture by livestock is thus also appropriate for these additional reasons according to the Recovery Plan.

Fourth, your reliance on the Regional Grazing Guidance Criteria of April 15, 2002, as grounds for reaching your determinations is also misplaced. This Guidance Criteria does not have the force of law because it was not promulgated as a rule as required by the Administrative Procedure Act. Instead, the Forest Service circumvented the rulemaking process by adopting this criteria as policy, without input from the regulated public that would be substantially impacted by it, in violation of the APA.

While the Recovery Plan recognizes the value of providing incentives for private landowners and public grazing permittees, such as the Johnson Ranch, to improve and manage southwestern willow flycatcher habitat through flexible and adaptive management, apparently the Forest Service does not. The Johnson Ranch bases this conclusion on your February 27 response to the concerns raised in its February 21 letter to you.

Your February 27 response to the twin concerns raised by the Johnson Ranch --- lack of incentives and the Forest Service's continuing policy of excluding all livestock from potential flycatcher habitat by policy fiat --- was essentially three-fold in nature. First, the Forest Service will not consider either of these concerns. Second, you have decided to reverse your decision of October 29, 2002, allowing non-growing season livestock use of the Lower Chalk Pasture by the Johnson Ranch without any input from the Johnson Ranch. Third, you have selected Alternative D of the E.A. without providing the Johnson Ranch any notice of your intention to do so. This is hardly an approach that provides incentives or promotes the kind of coordination and cooperation with private landowners and public grazing permittees called for by the Southwestern Willow Flycatcher Recovery Plan.

Moreover, because the restrictions on livestock grazing imposed by the Regional Grazing Guidance Criteria of April 15, 2002, for the willow flycatcher are not based on objective analysis of the best scientific and commercial information available, the exclusion of all grazing from potential habitat and within 2 to 5 miles of occupied flycatcher habitat cannot be supported. Therefore, the Johnson Ranch is filing a petition with the Forest Service under the Data Quality Act to correct these errors in the Criteria, concurrent with this letter to you.

Further, because the Forest Service has 60 days to respond to this petition, and because the Johnson Ranch then has the right to appeal that decision, should it need to, any agency selection of an E.A. alternative for the Johnson Ranch is therefore not currently possible and lawfully premature. Thus, the Forest Service must await the

outcome of the Johnson Ranch's DQA petition before it can rationally determine which of the alternatives in the E.A. for the Johnson Ranch, if any, are still in fact viable.

In closing, Delvin, the Johnson Ranch nevertheless remains ready to resume its participation in the development of a research area proposal on the stretch of the Verde River involving the ranch, should the Forest Service decide upon reconsideration to implement the incentives and appropriate levels of non-growing season livestock use of occupied, suitable unoccupied, and potential habitat for the flycatcher sought by the Johnson Ranch, and called for by the Southwestern Willow Flycatcher Recovery Plan. Again, any suggestions you may have as to how this can be accomplished are welcomed by the Johnson Ranch.

Sincerely,

Dennis Parker

Dennis Parker,
Attorney for the Johnson Ranch

Cc: S.O., Chris Udall, Josh Penry