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Department of
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Forest
Service

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Date: June 22, 2004

Michael J. Van Zandt
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San Francisco, CA 94105-1936

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED**

RE: Appeal #04-03-08-0001-A251, Sacramento Allotment, Sacramento Ranger District,
Lincoln National Forest

Dear Mr. Van Zandt:

This letter documents my second-level review decision of the appeal filed on behalf of the Sacramento Grazing Association. The appeal is in regard to District Ranger Martinez' issuance of the 2003/2004 (November 1, 2003, through May 15, 2004) annual operating instructions for the winter pastures of the above-referenced allotment. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

BACKGROUND

District Ranger Martinez (Deciding Officer) issued annual operating instructions in October 2003 for the winter pastures of the Sacramento Allotment. Ranger Martinez' decision provided for 50 cattle in the Alamo Canyon Pasture from November 1 to January 31, 130 head of cattle in the Pasture Ridge and Sid West Pastures from November 1 to May 14, and 50 head of cattle in the Grapevine Pasture from November 1 to May 14. The instructions also provided that cattle from the Alamo Pasture would be moved to Pasture Ridge and Sid West Pasture prior to February 1 and remain there through May 14.

The first-level appeal was filed on December 11, 2003. On December 19, 2003, Forest Supervisor Martinez (Reviewing Officer) notified the appellant that the appeal was timely and would be processed in accordance with 36 CFR 251. Under the provisions of 36 CFR 251.94, the Deciding Officer completed his written responsive statement of the appeal on January 9, 2004. Based on his review of the record, the Reviewing Officer affirmed the Deciding Officer's decision on May 7, 2004.

The second-level appeal was received in this office on May 21, 2004.

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: The Forest Service has acted arbitrarily and capriciously in reducing the number of cattle permitted to graze in the winter pastures.

Contention: The appellant contends the measurements used to modify the annual operating instructions were unscientific.

Response: The record indicates the Deciding Officer based his decision on baseline forage capacity studies conducted in the 1990s by the Forest Service and University scientists, current moisture and forage production, and joint field observations made by Forest Service and Range Improvement Task Force scientists (AR A, B, H, J, P).

Finding: Part 2(8)(c) of the all Term Grazing Permits provides for annual adjustments in authorized numbers based on resource conditions. The Deciding Officer appropriately considered the best available resource information and consulted appropriately with qualified range scientists before making his decision.

ISSUE 2: The Forest Service has failed to act in accordance with the law in directing such reduction.

Contention: The appellant contends the Forest Service has violated law, regulation, and policy in reducing authorized numbers on the winter range. The appellant also contends the reduction violates the due process rights of the Sacramento Grazing Association, because there was no adequate notice of the basis for the reduction and no opportunity to comment prior to the reduction taking effect.

Response: The Secretary of Agriculture's Regulations, 36 CFR 222.3(c), authorize the Forest Service to issue permits for livestock grazing on National Forest System lands. 36 CFR 222.3(c)(1)(vi) requires the Forest Service to prescribe the provisions and requirements for the issuance, renewal, and administration of term grazing permits. Part 2(8)(c) of all Term Grazing Permits provides for annual adjustments in grazing based on resource conditions. Annual adjustments are made through annual operating instructions (AOIs) for the proper administration of grazing under the provisions of the term grazing permit. The term grazing permit provides broad discretion to issue instructions to permittees, as needed, for resource protection. Each AOI is responsive to individual allotment resource conditions and unique management needs. Furthermore, AOIs are prepared with the participation of affected grazing permittees. The record indicates the Deciding Officer communicated with the permittee early and often regarding the lack of precipitation and poor forage production and the possibility that stocking adjustments would be needed (AR G, P).

Findings: The Deciding Officer acted within his discretion under the terms and conditions of the grazing permit to adjust stocking on the winter range to respond to resource needs. The Deciding Officer followed agency policy in communicating with the permittee early and often regarding the lack of precipitation and poor forage production, including the opportunity to be present during pre-season monitoring of conditions on the Sacramento Allotment winter range (AR G, P). The appellant's contention the Forest Service has violated law, regulation, and policy in reducing authorized numbers on the winter range has no basis and is beyond the scope of the Deciding Officer's decision, because his decision did not involve the modification of the term grazing permit or result in the initiation of permit suspension or cancellation proceedings.

ISSUE 3: The reduction has resulted in a deprivation of private property rights owned by the Sacramento Grazing Association without due process.

Contention: The appellant contends the Sacramento Grazing Association owns extensive property rights on the Sacramento Allotment under the Mining Act of 1866, and the local custom and laws of the State of New Mexico.

Findings: The appellant's contention is the subject of a complaint filed by the appellant in the United States Court of Federal Claims on May 4, 2004. Therefore, it is not appropriate to respond to the appellant's contention related to private property rights.

ISSUE 4: The reduction in forage production on the winter pasture is caused by Forest Service failure to manage the herds of elk that are consuming forage and water.

Contention: The appellant contends the reduction in forage production on the winter pasture is not caused by the appellant's cattle, but purportedly by the failure of the Forest Service to manage the herds of elk that are consuming forage and water in these pastures to the detriment of the Sacramento Grazing Association and its property rights.

Response: The State of New Mexico is responsible for setting seasons and harvest levels for wild ungulates. However, the Forest Service makes harvest recommendations to the New Mexico Department of Game and Fish prior to the annual commission meetings that set seasons and harvest levels. In addition, Lieutenant Governor Bradley established a collaborative group including the Forest Service, BLM, New Mexico State Land Office, New Mexico Department of Game and Fish, and the Farm Bureau to seek resolution of elk livestock issues. The Sacramento Allotment is included in one of a series of pilot projects in New Mexico. These projects are ongoing today and provide efforts to resolve conflicts between elk and livestock.

Finding: The appellant's contention has no basis and is beyond the scope of the Deciding Officer's decision to adjust authorized levels of livestock for the 2003–2004 winter grazing season. Management of elk numbers is longer term in nature and is being addressed through a collaborative interagency process.

ISSUE 5: The appeal process provided by the Forest Service violates due process rights of the Sacramento Grazing Association.

Contention: The appellant contends the Reviewing Officer and his supervisors have already participated in the underlying decision or have set the policies that precipitate such decisions.

Response: The Secretary of Agriculture's Regulations, 36 CFR 251 Subpart C, offer appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written instruments that authorize the occupancy and use of National Forest System lands. The first- and second-level reviews were done independently considering the appeal record, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.

Finding: The Forest Service has not violated the due process rights of the Sacramento Grazing Association.

DECISION

After review of the appeal record, I find that the Deciding Officer's decision is in conformance with applicable laws, regulations, policies, and procedures. I find no evidence indicating the Deciding Officer has acted in an arbitrary and capricious manner. The Deciding Officer's decision is affirmed.

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: Mailroom R3 Lincoln, Frank R Martinez, David M Stewart, Constance J Smith