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Agriculture

Forest  
Service

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File Code: 1570-1/2200

Date: February 2, 2005

Michael Van Zandt  
McQuaid Bedford and Van Zandt LLP  
221 Main Street 16th Floor  
San Francisco, CA 94105-1936

Re: Appeal #04-03-08-0003-A251, Sacramento, Dry Canyon, and Davis Allotments Decision, Sacramento Ranger District, Lincoln National Forest

Dear Mr. Van Zandt:

This is my review decision concerning the appeal you filed on behalf of the Sacramento Grazing Association (SGA) regarding the Record of Decision that authorizes grazing and implements the grazing management strategy on the above-named allotments.

### **BACKGROUND**

District Ranger Martinez (Deciding Officer) issued a decision on July 28, 2004, for the Sacramento, Dry Canyon, and Davis Allotments. His decision resulted in the selection of the following alternative and authorization:

Alternative B, that authorizes 200 to 412 cattle and 5 horses from May 15 to October 31 on the summer range, Sacramento Allotment; 200 to 335 cattle and 5 horses from November 1 to May 14 on the winter range, Sacramento Allotment; and up to 75 cattle from November 1 to May 14 on the Dry Canyon Allotment. Annual stocking levels will be based on forage production and utilization monitoring. Alternative B did not authorize grazing on the Davis Allotment.

In a letter dated September 22, 2004, Forest Supervisor Martinez requested you to clarify whether your September 13, 2004, letter was intended to be an appeal of the Deciding Officer's decision to implement Alternative B. Based on your failure to respond to his letter, on October 19, 2004, Supervisor Martinez notified you (1) that your letter of September 13, 2004, contained many of the elements of an appeal and that he was proceeding with the appeal process under 36 CFR 251, and (2) requested you to notify him before November 1, 2004, of your intention to request an oral presentation or stay of the Deciding Officer's decision. Under the provisions of 36 CFR 251.94 the Deciding Officer prepared a responsive statement that Supervisor Martinez mailed to you on November 1, 2004. The record reflects that you (1) did not respond to the responsive statement, (2) did not request an oral presentation, and (3) did not request a stay of the decision pending a ruling on the merits of the appeal. On December 7, 2004, Supervisor Martinez closed the appeal record. Based on his review of the record, Supervisor Martinez affirmed the Deciding Officer's decision on January 7, 2005.

Your second level appeal of the Deciding Officer's decision was received in this office on January 24, 2005



## **POINTS OF APPEAL**

**ISSUE 1** The protection of endangered species, the elk, hunters, and recreation has reduced the SGA cattle operation by as much as 50 percent and will have an even greater impact on the SGA operation in the future.

**Discussion:** Section 1 of The Multiple Use Sustained-Yield Act of 1960 states “It is the policy of the Congress that the National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” Section 2 of the Act authorizes the Secretary of Agriculture to develop and administer the renewable surface resources of the National Forests for multiple use and sustained yield. Congress further directed the Secretary of Agriculture that “In the administration of the National Forests due consideration shall be given to the relative values of the various resources in particular areas.” Section 4 of the Act defines “Multiple use” as “...the management of all the various renewable surface resources of the National Forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.”

Section 202 of The Federal Land Policy and Management Act of 1976 directs the Secretary of Agriculture in the development of land use plans (Forest Land and Resource Management Plans) to “...(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;...”

In making his decision the Deciding Officer considered the need to improve range, riparian, and watershed conditions, balance grazing use with other resource needs, maintain the viability of listed and rare plants and animals, and to maintain a viable livestock operation (ROD p. 5). The Deciding Officer documented his finding that his decision is consistent with the Lincoln National Forest Land and Resource Management Plan as amended (ROD p. 11). The Deciding Officer’s decision to authorize a range of stocking based on forage production and utilization monitoring is consistent with Forest Service Policy (FSH 2209.13, Chapter 90) to use adaptive management strategies to set limits on such factors as timing, intensity, frequency, and duration of livestock grazing in order to respond to factors such as the tremendous variability in annual precipitation and subsequent forage production in the Southwestern United States.

**Finding:** The Deciding Officer’s decision is consistent with Federal Statutes and Forest Service Policy related to balancing grazing with other National Forest purposes during grazing allotment planning.

**ISSUE 2** The use of exclosures and protected areas for endangered species and riparian areas prevents the SGA from using its water rights, forage rights, access rights and range rights that were confirmed to the SGA and its predecessors under federal law. Therefore, the Forest Service should perform a Takings Impact Analysis.

**Discussion:** Congress established that a grazing permit is a privilege through the Granger-Thye Act of April 24, 1950, (Section 19) and the Federal Land Policy and Management Act of October 21, 1976 (Section 402h). Both of these acts state that the issuance of grazing permits in no way grants any right, title, interest, or estate in or to lands or resources held by the United States. Additionally, a long line of court cases has established that a grazing permit is a noncompensable interest since it is a privilege to use federally owned land for livestock grazing purposes. Accordingly, it is a privilege, not a right, which can be modified, withdrawn or canceled by the United States without compensation. Further, under the U.S. Attorney General's Guidelines For the Evaluation of Risk and Avoidance of Unanticipated Takings, benefits and privileges bestowed by the Government are expressly excluded from the definition of private property rights protected by the Fifth Amendment. The guidelines were developed to implement Executive Order 12630 of March 15, 1988, "Government Actions and Interference With Constitutionally Protected Property Rights."

**Finding:** Because a term grazing permit is a consensual agreement, no taking implications have arisen through the development of a new management plan and corresponding appropriate modifications to the SGA term grazing permit. Therefore, the Forest Service is not required to do a Takings Impact Analysis.

**ISSUE 3** The Forest Service should comply with the recent executive order with regard to cooperation with local government over land use decisions.

**Discussion:** Since the appellant did not identify the executive order of concern, the assumption is that it is Executive Order 13352 of August 26, 2004, that was signed more than a month after the Record of Decision was signed for the Sacramento, Dry Canyon, and Davis Grazing Allotments. Executive Order 13352 is prospective and contains no retroactive requirements that Federal Agencies must adhere to.

Irrespective of the Appellants inference that local government was not given the opportunity to be involved in the NEPA process for the Sacramento, Dry Canyon and Davis Allotments, Otero County formally requested co-operating status during the preparation of the ... "Environmental Assessment on the Sacramento Allotment." in a letter dated December 2, 1996, to Lincoln National Forest Supervisor Jose Martinez (AR 28). On December 5, 1996, in a letter to Otero County, Forest Supervisor Martinez acknowledged that County Commissioner Rardin committed that the County could provide additional information regarding the lifestyle/culture and economic effects sections of the NEPA analysis. Supervisor Martinez stated he would contact Commissioner Rardin and establish the details of the additional information and time schedule under which the Forest and County would work (AR 29). In a subsequent January 22, 1997, letter to Chairman Richard Zierlein, Supervisor Martinez affirmed again that he would consider additional information provided by the County. The January 22, 1997, letter documented discussions in a meeting between Supervisor Martinez, Ronny Rardin, and Mike Nivison on December 18, 1996 (AR 32).

Additional documents in the record related to Otero County involvement in the planning process include a report published (based on a request by Otero County) by the South Central Mountain Resource Conservation and Development Council on The Economic Impacts of Livestock Grazing in Otero County (August 1992, AR Index A, Doc. 163); June 30, 1999, comments submitted by the Otero County Board of County Commissioners relating to the published Notice

of Intent to prepare an Environmental Impact Statement for the Sacramento Grazing Allotment (AR 60); February 16, 1999, comments submitted by the Otero County Board of County Commissioners relating to the Dry Canyon Allotment (AR 86); an April 13, 1999, letter transmitting grazing capacity information for the Dry Canyon Allotment from District Ranger Goodwin to the Otero County Commission (AR 86); June 18, 2001, comments by Otero County on four-inch cover-height requirements (AR 107); a January 28, 2003, letter from Daniel A. Bryant, Attorney for Otero County, documenting that the County would be given an extension of time to file their comments on the Draft Environmental Impact Statement (AR 106); February 14, 2003, comments of Otero County on the Draft Environmental Impact Statement for the Sacramento, Dry, and Davis Allotments (AR 106); and February 20, 2003, comment of Otero County on the Draft Environmental Impact Statement (Notice of Errata AR 106).

**Finding:** The record documents that Otero County was provided full opportunity to participate in the planning process for the Sacramento, Dry Canyon, and Davis Allotments.

### **APPEAL DECISION**

After a detailed review of the record and the First Level Appeal Reviewing Officer's decision, I find that the Deciding Officer's decision to implement Alternative B in the Record of Decision was based on a reasonable assessment of the resource conditions on the allotment.

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

Sincerely,

/s/ Lucia M. Turner  
LUCIA M. TURNER  
Appeal Reviewing Officer, Deputy Regional  
Forester

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