



United States
Department of
Agriculture

Forest
Service

Intermountain Region

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File Code: 1570-1
#04-04-00-0055
(Forest #03-0417-07, 09)
Date: July 7, 2004

W. Alan Schroeder
Schroeder & Lezamiz Law Offices, LLP
P.O. Box 267
Boise, ID 83701

CERTIFIED MAIL – RETURN
RECEIPT REQUESTED

Dear Mr. Schroeder:

This is my second-level review decision on the appeal you filed on behalf of Buck Creek Ranch, Incorporated; Three Creek Ranch Company; Brackett Livestock, Incorporated; Noy Elbert Brackett III and Paula A. Brackett; Simplot Livestock Company; TM Ranch Company; M&L Investments Company; and Petan Company of Nevada, Incorporated. On May 18, 2004, Forest Supervisor Robert Vaught affirmed all aspects of the decision, with the exception of portions of the decisions which assigned specific stream categories. The grazing permits involved in these decisions are located on the Humboldt-Toiyabe National Forest. My review was conducted under the provisions of 36 CFR 251 Subpart C.

APPEAL DECISION

I affirm the decision by Forest Supervisor Vaught. I find that his decision complied with applicable laws, regulations and agency policy. Enclosed is a more detailed response to the points raised in your second-level appeal.

This decision constitutes the final administrative determination of the United States Department of Agriculture (36 CFR 251.87(e)(3)).

Sincerely,

/s/ Norbert C. Kulesza
NORBERT C. KULESZA
Appeal Reviewing Officer

Enclosures

cc: Humboldt-Toiyabe NF (Forest Supervisor)



Appeal Issues and Responses
Buck Creek Ranch, Incorporated; Three Creek Ranch Company; Brackett Livestock, Incorporated; Noy Elbert Brackett III and Paula A. Brackett; Simplot Livestock Company; TM Ranch Company; M&L Investments Company; and Petan Company of Nevada, Incorporated Grazing Permit
#04-04-00-0055

Issue 1: The District Rangers Violate the 1991 Decisions.

Appellants are required to comply with the specific terms and conditions established in section 3 of their permits. The 2003 modifications simply reflect corrections to the allotment inventories of several riparian areas and streams, in accordance with the Forest Plan. The reclassification of several riparian areas and subsequent permit modifications was necessary in order to ensure the permittees were in compliance with standards and guidelines established in both Amendment Number 2 and appellants' permits (Responsive Statement (RS), Exhibit 3; and Appellants' Appeal, Exhibits A, C, E, G, I, L, N, and P).

The District Rangers did not violate the 1991 decisions by modifying appellants' permits to comply with standards established in Amendment Number 2 to the Forest Plan. In July 1990, the Forest Service amended the Land and Resource Management Plan for the Humboldt National Forest for the second time. Amendment Number 2 imposes restrictions on the level of grazing throughout the Forest by establishing "maximum forage utilization levels." Amendment Number 2 also requires the Forest Service to "delineate and evaluate riparian areas prior to implementing any project activity" and requires classification of all streams and riparian areas into one of five categories. Areas classified as Category I areas are associated with the highest resource values and receive the most protection; Category V areas have the lowest resource values and receive the least protection. (RS, Exhibit 3).

In April 1999, bull trout was listed as "threatened" under the Endangered Species Act. Additionally, information was obtained regarding the existence of populations of native red band trout, a native salmonid species. In order to comply with the standards and guidelines established in Amendment Number 2, the assignment of categories for riparian areas were updated in 2003 (habitat for bull trout was designated as Category I and habitat for red band trout as Category II). Upon updating the riparian areas, the Forest Service modified the relevant grazing permits to reflect the adjustments. The modifications were necessary to comply with the Forest Plan. As shown in the table for Maximum Utilization Values for riparian areas, the mere presence of a species is enough to place its habitat into Riparian Categories I-IV (RS, Exhibit 3). These category definitions state that if any of the listed criteria are met (e.g., associated with a fisheries habitat), the riparian habitat falls within that category.

The 2003 modifications do not violate the 1991 decisions. The 1991 decisions did not require the Forest Service to complete additional site-specific National Environmental Policy Act (NEPA) documentation and Allotment Management Plan (AMP) planning prior to updating or modifying the classification assigned to streams and riparian areas on

an allotment. The 1991 decisions simply provided that prior to adjusting the forage utilization standards established in Amendment Number 2, Categories I-V, the Forest Service would conduct site specific NEPA. The Forest Service has not altered the utilization standards established in each category.

Issue 2: The District Rangers Violate the Consultation, Coordination, and Cooperation (CCC) Process, AMP Process and Decision-making Process.

The District Rangers did not violate the CCC, AMP, or decision-making process. The Federal Land Policy and Management Act of 1976, Section 202 (43 U.S.C. Section 1701) and the Public Rangelands Improvement Act of 1978 (PRIA) (Public Law 95-514, 43 U.S.C. Section 1752), provide for a consultation, coordination, and cooperation (CCC) process. Section 8 of PRIA states that this process will be followed “if the Secretary concerned elects to develop an allotment management plan for a given area . . .”. These 2003 decisions did not involve development of an allotment management plan; therefore, there is no requirement to use the CCC process. However, as evidenced by the record, the Forest did involve at least one of the appellants during the process for development of the Caudle Creek C&H Allotment Management Plan [(Environmental Analysis Report (RS, Exhibit 12) and Allotment Management Plan (RS, Exhibit 13)].

Changing the management category for a riparian area can result in a different utilization standard for that riparian area; however, updating the classifications of a standard for a riparian area in Part III of a Term Grazing Permit does not require a NEPA analysis. Riparian management categories are part of the Forest Plan standards and guides and can be placed directly into the permit [Supplement to Final Environmental Impact Statement for the Humboldt National Forest Land and Resource Management Plan (SEIS), pp. 9-10]. Site-specific NEPA analysis for specific allotments is a separate planning process and may result in similar or more restrictive utilization levels (SEIS, p. 9).

Appellants claim the District Rangers’ decisions were issued without notice of appeal rights and without issuance of AOI; however, appellants availed themselves of the administrative appeal process when they filed an appeal dated July 14, 2003. In addition, the August 1, 2003 letters clearly indicate the decision is subject to administrative review, provide instructions for filing an appeal, and include a copy of the modification to each term grazing permit (Appellants’ Supplement to Notice of Appeal, Exhibits S, T, and U).

Issue 3: The Forest Service Provides No Data to Show Need for a Modification.

The Forest had data that indicated a need for modification. Modification of the term grazing permits was necessary to reflect the correct riparian classifications resulting from federal listing of bull trout, new fishery data provided by the Nevada Department of Wildlife, and data that was overlooked during the original classification of streams (RS, Exhibits 10 and 11). The data from these multiple sources indicate the need for permit

modifications in accordance with the terms contained in appellants' term grazing permits and Amendment Number 2 for the Forest Plan.

The appellants are not entitled to a one-year notice before modification of their permits because there was no change in permitted season of use or livestock numbers. Regulations at 36 CFR 222.4(a)(8) provide for a one-year notice before a permit modification takes effect only when season of use, numbers, kind, and class of livestock is changed (RS, Exhibit 15).

Issue 4: Forest Service Violated the National Environmental Policy Act in not Completing any NEPA Documentation as a Condition Precedent to the Modification.

The Forest Service did not violate the National Environmental Policy Act by not completing site-specific NEPA documentation prior to modification of appellants' permits. Modification of appellants' permits was in accordance with the Forest Plan and the October 29, 2003 Stipulated Settlement Agreement between Western Watersheds Project and the Forest Service [Western Watersheds Project, et al., v. K. Lynn Bennett, et al. (Civil No. 02-0533-S-BLW) (D. Idaho)]. Appellants were intervenors in this case.

Modification of appellants' permits reflects the proper condition and corresponding category for areas on each allotment. The modifications were required under Amendment Number 2 of the Forest Plan and did not require additional NEPA. Appellants allege that the 1991 Decisions require the Forest Service to conduct site-specific NEPA prior to modification of permits. Appellants' assertion is inaccurate. As stated in the Forest Service's response to Issue 1 above, the 1999 Decisions did not require site-specific NEPA prior to modification of a permit, but only prior to altering the specific forage utilization values established in Amendment Number 2 of the Forest Plan. Further, this issue was specifically addressed in Bell, et al., v. United States Department of Agriculture, et al., 106 F.3d 406 (9th Cir. 1996). In Bell, the Ninth Circuit specifically held:

[f]urther, the Forest Service is not only allowed to modify term grazing permits to conform with the standards and guidelines contained in the Forest Plan, but it is unequivocally required by law to make such modifications.

Bell at p. 12.

Moreover, appellants' assertion was rejected by the United States District Court for the District of Idaho in Western Watersheds Project, et al., v. K. Lynn Bennett, et al. (Civil No. 02-0533-S-BLW). In this case, appellants intervened in the case and challenged the settlement agreement reached between the Western Watersheds Project and the Forest Service. The court denied appellants' motion to deny approval of the settlement agreement holding:

The settlement simply requires the Forest Service to conduct NEPA reviews and follow the law. It does not impose any obligation on the [appellants] and does not prejudice their legal claims, grazing permits, or water rights. Indeed, the [appellants] are proceeding with their legal claims in an administrative proceeding pending before the Forest Service.

Feb. 26, 2004 Order at p. 2.

The Forest Service is not required to complete site-specific NEPA documentation prior to modification of the classification of the streams and riparian areas contained in an allotment into the appropriate category established in Amendment Number 2 of the Forest Plan.

Appropriate NEPA analysis was conducted for the Riparian Management Categories in the Forest Plan and documented in the Environmental Impact Statement (EIS), Record of Decision (ROD), and SEIS for Amendment Number 2. The Court in Bell agreed that doing further NEPA to add forest plan standards and guides into grazing permits would be redundant and repeat the process for modifications of permits.

Issue 5: Forest Service's Fact Finding Procedures are Contrary to Constitution Right, Power, or Privilege, or are Otherwise Inadequate.

The Forest Service appeal process at 36 CFR 251-Subpart C is an administrative review of actions taken by a Deciding Official. The review is conducted by the Forest Service line officer at the next higher level. As stated in 36 CFR 251.80(b), "The rules in this subpart seek to 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." These instruments include term grazing permits [(36 CFR 251.82(c)], such as that issued to the appellants. The Forest Service process provides for an administrative review based on the record.

In addition, this administrative appeal process provides for permittees to request an opportunity for an oral presentation to the Appeal Reviewing Officer. Appellants availed themselves of this opportunity on April 14, 2004 (RS, Oral Presentation).

Further, in Bell, the Court specifically addressed this issue, holding that additional process would be redundant because the law requires that permits conform to forest plans (RS, Exhibit 4).

The 2003 Decisions followed established Forest Service process and case law.