



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Caliente Resource Area
P.O. Box 237
Caliente, Nevada 89008



IN REPLY REFER TO:

4160
Grazing Case File
(NV-055.01)

(702) 726-8100

MAR 07 1994

CERTIFIED MAIL # P 998 558 614
RETURN RECEIPT REQUESTED

GRAZING DENIAL

FULL FORCE AND EFFECT DECISION

DELAMAR ALLOTMENT
AND
LOWER LAKE EAST ALLOTMENT

Delamar Valley Cattle Company
Cortney Dahl, Manager
P.O. Box 627
Alamo, NV 89001

Dear Mr. Dahl:

On January 26, 1994 I received a for grazing application from you signed and dated January 19, 1994 you to graze cattle on the Delamar and Lower Lake East allotments from March 1, 1994 to February 28, 1995 for 463 cattle on the Delamar allotment and 53 cattle on the Lower Lake East allotment.

As a result of an administrative error, a grazing bill was issued on January 31, 1994 to you for the Lower Lake East allotment authorizing 54 cattle from March 1, 1994 to February 28, 1995.

The *Biological Opinion for the Proposed Livestock Grazing Program Within Desert Tortoise Habitat in Southern Nevada* as amended (File No.: 1-5-91-F-36), herein referred to as the Opinion, was issued on August 14, 1991, by the United States Fish and Wildlife Service (FWS) (1-5-91-F-36). The Opinion stated that "The proposed licensing of livestock within Desert Tortoise habitat in southern Nevada is not likely to jeopardize the continued existence of the Desert Tortoise."

The Opinion also stated "In order to be exempt from the prohibitions of Section 9 of the Act, the Bureau must ensure that all allottees/lessees comply with various terms and conditions which implement the reasonable and prudent measures described..." in the Opinion.

Term and condition number 4 b. of the Opinion states in part that, "Grazing Prescription 1 shall be applied to all allotments that contain Categories I, II, and/or Intensive III tortoise habitat... In those allotments in which both grazing prescriptions could be applied, but the necessary range improvements... required to segregate the allotment are not physically in place on the ground,..." will be managed as Prescription 1.

Term and condition 1 a. states that, "Grazing Prescriptions 1 and 2 shall be implemented prior to March 1, 1992, and shall take effect on that date as full force and effect decisions."

Prescription 1 grazing stipulates that livestock use will not occur from March 1 to June 14.

The Delamar allotment has both grazing prescriptions 1 and 2. The Lower Lake East allotment has grazing prescription 1. Grazing prescriptions within your allotments are delineated on Attachments 1 and 2, titled Delamar and Lower Lake East allotment maps, respectively.

Those portions of the allotment which are not categorized as Prescription 1 in the Opinion and cannot be managed or grazed separately from Prescription 1 areas are included in this decision.

We met with Keith Whipple who was representing the Delamar Valley Cattle Company on February 22, 1994 to discuss the above grazing application. He indicated that he may be reconsidering the application for use in prescription 1 areas of these allotments and asked that I delay in responding to the application dated January 19, 1994 and the billing issued for the Lower Lake East allotment on January 31, 1994. On February 28, 1994 I was notified by Alma Whipple, who is the Agent Stake President over the Delamar Valley Cattle Company, that the original application would not be modified by the applicant.

Therefore, based on the Opinion dated August 14, 1991 my Final Decision is to deny your grazing application signed and dated January 19, 1994, in part. Your application is denied for grazing use from March 1, 1994 to June 14, 1994 within prescription 1 areas and approved from June 15, 1994 to February 28, 1995 for the Delamar and Lower Lake East allotments. The grazing bill (G27507626) issued on January 31, 1994 for the Lower Lake East allotment is hereby cancelled. This Final Decision is to be placed in Full Force and Effect commencing March 1, 1994 through June 14, 1994 in order to be in compliance with Section 7 (a) (2) and (b) (4) of the Endangered Species Act of 1973 as amended.

The authority for this decision is contained within the pertinent sections of the Endangered Species Act of 1973 as amended, in Title 50 of the Code of Federal Regulations (C.F.R.), part 402, which identifies the procedures for complying with the Act, and in Title 43 of the C.F.R.

Section 7 (a) (2) of the Act states in part "Each Federal Agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species..."

Under Section 7 (b) (4) (A) of the Endangered Species Act of 1973 as amended, it states in part that the Secretary will offer the Agency after consultation "... reasonable and prudent alternatives which the Secretary believes would not violate..." Section 7 (a) (2) of the Act.

Title 50 C.F.R., Sub Part B Section 402.14 (i) (1) (iii) states that the U.S. Fish and Wildlife Service will provide in the Opinion to the Agency requesting a formal consultation a statement that, "Sets forth the terms and conditions... that must be complied with by a Federal Agency or any applicant to implement the measures specified...." as reasonable or prudent measures.

In the Opinion, Reasonable and Prudent Measure number 5 states "Measures shall be taken to insure compliance with all conditions required in this Biological Opinion."

In the terms and conditions of the Opinion for the Proposed Livestock Grazing Program Within Desert Tortoise Habitat in Southern Nevada (File No.: 1-5-91-F-36) it states in part that, "Grazing Prescriptions 1 and 2 shall be implemented prior to March 1, 1992, and shall take effect on that date as full force and effect decisions." This decision is placed in Full Force and Effect in order to comply with all provisions of Section 7 of the Act.

Title 43 C.F.R. 4160.3 (c): states in part: "The authorized officer may place the final decision in full force and effect in an emergency to stop resource deterioration. Full force and effect decisions shall take effect on the date specified, regardless of an appeal."

In this specific instance, the effect is to stop resource deterioration of desert tortoise habitat and subsequent impacts to the tortoise per the Opinion.

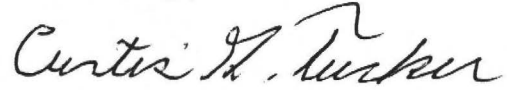
Under the existing delegations identified in 209 Departmental Manual (DM) 6 and 242 DM 1.1A, the Director of the U.S. Fish and Wildlife Service is authorized to exercise the authority of the Secretary of the Interior concerning matters relating to endangered and threatened species. Joint regulations promulgated by the Department of Commerce and the Department of the Interior vest responsibility in the Regional Directors of the FWS to carry out consultations and to issue biological opinions under Section 7 of the Endangered Species Act (ESA) (16 U.S.C. 1536) (subject to review by the Director, FWS, at his/her election). See 50 C.F.R. sections 402.02 (definition of "Director") and 402.14. Neither the Departmental Manual nor the regulations at 50 C.F.R. Part 402 provide an administrative appeal remedy to interested parties.

Thus, the Office of Hearings and Appeals (OHA) within this department has no authority to review the merits of U.S. Fish and Wildlife Service biological opinions. Any review of biological opinions must necessarily be limited to the federal district courts pursuant to Section 11 (g) of the ESA (16 U.S.C. 1540 (g)). Department bureaus retain limited discretion to determine how to best implement a biological opinion from the FWS. Consistent with applicable case law and regulations promulgated under ESA Section 7 (16 U.S.C. 1536), the action agency determines how to implement the opinion, giving due deference for the biological finding of the FWS. However, when an agency implements reasonable and prudent alternatives set out in a biological opinion, or where it implements mandatory terms and conditions in an incidental take statement attached to that opinion, neither the FWS biological opinion nor any terms and conditions prescribed by FWS to implement that opinion are subject to OHA review.

Subject to the limitations on OHA jurisdiction identified above, if you wish to appeal this decision for the purpose of a hearing before an Administrative Law Judge, in accordance with 43 C.F.R. 4160.3 (c), 4160.4, and 4.470, you are allowed thirty (30) days from receipt of this notice within which to file an appeal with the Caliente Resource Area Manager at the following address: Bureau of Land Management, Caliente Resource Area, Attn. Area Manager, P.O. Box 237, Caliente, NV 89008.

The appeal shall state the reasons, clearly and concisely, as to why you think this Final Decision is in error.

Sincerely,

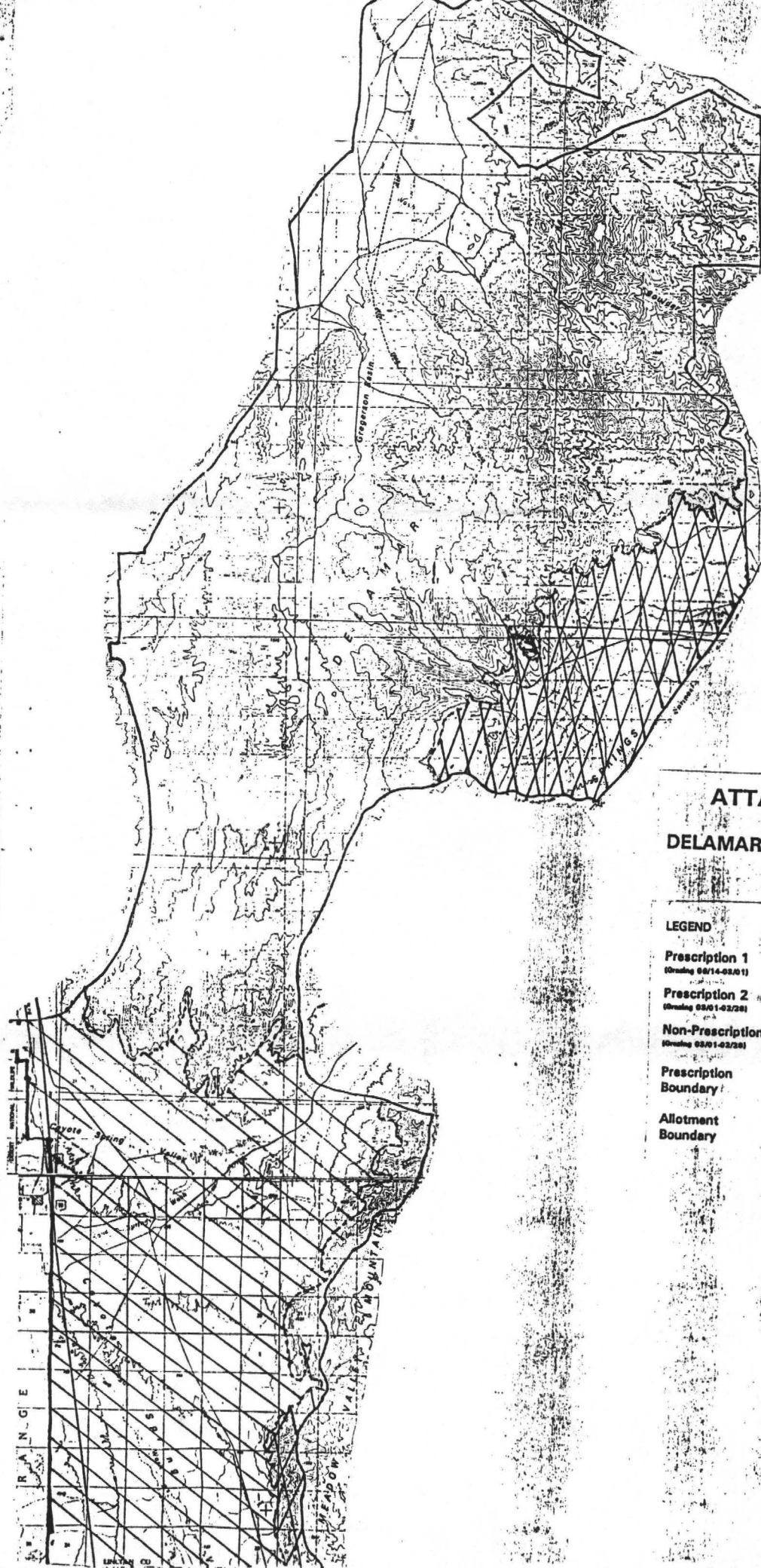


Curtis G. Tucker
Area Manager

Attachment:

Delamar Allotment Map (1 pg.)
Lower Lake East Allotment Map (1 pg.)

cc: Wild Horse Organized Assistance, Inc.
Nevada Division of Wildlife
Desert Tortoise Council
Animal Protection Institute of America
U.S. Fish and Wildlife Service
Natural Resources Defense Council
Sierra Club
Resource Concepts, Inc.
N-5 Board
Silver State Pleasure Riders
National Wild Horse Association
The Wilderness Society
Keith Whipple
Alma Whipple
Lincoln Co. Commissioners
Las Vegas Grazing Advisory Board
Karen Budd-Fallen



ATTACHMENT 1
DELAMAR ALLOTMENT MAP

LEGEND

Prescription 1
(Shading 02/14-02/20)



Prescription 2
(Shading 02/01-02/20)



Non-Prescription
(Shading 02/01-02/20)



Prescription Boundary



Allotment Boundary

