



Wheeler Pass SPRING  
Mt. Stirling  
United States Department of the Interior

BUREAU OF LAND MANAGEMENT  
STATELINE RESOURCE AREA  
4765 VEGAS DRIVE  
P.O. BOX 26569  
LAS VEGAS, NEVADA 89126

2-16-95  
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AMERICA

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4160  
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FULL FORCE AND EFFECT DECISION  
MT. STIRLING ALLOTMENT

Bow and Arrow Cattle Co.  
c/o Cal Baird  
7043 N. Jones  
Las Vegas, NV. 89131

Dear Mr. Baird:

On January 03, 1995, this office received a grazing application from you to graze 50 cattle on the Mt. Stirling allotment from March 1, 1995, to May 31, 1995. You grazed 50 cattle for the period December 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 USFWS 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 affect decisions."

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

The Mt. Stirling allotment has grazing prescriptions 1, 2, and non-prescription. Grazing prescription areas within your allotment and the administrative boundaries between the United State Forest Service (USFS) and BLM are delineated on enclosure 1, titled Mt. Stirling allotment map.

Since the USFS did not issue you a grazing permit for USFS administered lands, it is not clear how you will keep your livestock off Prescription 1 areas.

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

Therefore, based on the Opinion dated August 14, 1991, my Final Decision is to deny your application dated and signed December 29, 1994, in its entirety for all 50 cattle for the period March 1, 1995, to May 31, 1995. This Final Decision is to be placed in Full Force and Effect commencing March 1, 1994, through May 31, 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 (CFR), part 402, which identifies the procedures for complying with the Act, and in Title 43 of the CFR.

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 CFR, 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 ~~rest~~ 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 affect decisions". This decision is placed in Full Force and Effect in order to comply with all provisions of Section 7 of the Act.

In Title 43 CFR 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 of 50 CFR Part 402 provide an administrative appeal remedy to the interested parties.

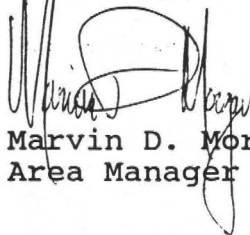
Thus, the Office of Hearings and Appeals (OHA) within this department has no authority to review the merits of U.S. Fish and Wildlife Service biological opinions. Any review of biological opinions must necessarily be limited to the federal district courts pursuant to Section 11 (g) of the ESA (16 U.S.C. 1540 (g)). Department bureaus retain limited discretion to determine how to

best implement a biological opinion from the FWS. Consistent 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 a Administrative Law Judge, in accordance with 43 CFR 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 Stateline Resource Area Manager at the following address: Bureau of Land Management, Stateline Resource Area, Attn. Area Manager, 4765 Vegas Drive, P. O. Box 26569, Las Vegas, NV 89126.

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

Sincerely,



Marvin D. Morgan  
Area Manager

Enclosure:

Mt. Stirling Allotment Map (1 pp.)

cc: Wild Horse Organized Assistance, Inc.  
Nevada Department of Wildlife  
Desert Tortoise Council  
Animal Protection Institute of America  
National Park Service,  
Lake Mead National Recreation Area  
U.S. Fish and Wildlife Service,  
Reno Field Station  
Johanna H. Wald,  
Natural Resources Defense Council  
Sierra Club,  
c/o David Brickey  
Resource Concepts, Inc.  
c/o John McClain  
N-5 Board,  
c/o Kenneth D. Lee  
National Wild Horse Association,  
National Headquarters  
Barbara Spolter,  
Regional Associate,  
The Wilderness Society  
Tom Williams  
Karen Budd-Fallen  
NV-931  
NV-053

ATTACHMENT 1

MOUNT STIRLING

AREA 23

AREA 22

USFS

PRESCRIPTION 1

PRESCRIPTION 2

2

