



File Code: 1570-1/2720

Date: October 16, 2002

CERTIFIED MAIL:

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James R. Scarantino
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RE: Appeal #02-03-00-0025-A251, United States Outfitters, Apache-Sitgreaves National Forests

Dear Mr. Scarantino:

This is my decision on the appeal dated March 22, 2002, that you filed on behalf of George Taulman (Appellant), United States Outfitters (USO), concerning the partial suspension of the authorized statewide outfitter/guide special use permit on the Clifton Ranger District, Apache-Sitgreaves National Forests.

This appeal was received in this office on June 25, 2002. On August 14, 2002, supplemental information for the administrative record (AR) was requested from John Bedell, the Deciding Officer. The Deciding Officer provided supplemental information to this office, as well as to your office. The Appellant made an oral presentation in this office on September 5, 2002. Additional information for the AR was then submitted by your office, on behalf of the Appellant on September 12, 2002, and included as part of the AR. The AR was formally closed on September 16, 2002.

This appeal review is being conducted pursuant to 36 CFR §251.87(b)(1).

BACKGROUND

1. All outfitter guide special use permits and operating plans (Reference: AR #41) issued to the Appellant for hunting seasons 1996 - 2001 stated, in part:

“A temporary corral may be constructed if approved by a local Forest Officer. Permanent corrals under the care of a grazing permittee will only be used after coordination with the permittee.”

“In general, all developed recreation sites and administrative sites are excluded from use.”

2. Various memos and correspondence from the District and Supervisor Offices' addressed facilities “available for use” or “not available for use” by authorized outfitters and guides on the Clifton Ranger District, the Alpine Ranger District, and the Apache-Sitgreaves National Forests. This correspondence indicates no consistent definition of the availability of facilities across the Forest. (Reference: AR #1, #8, #19, #21, and #23)



ISSUE 1: “USO did not use the Sawmill Cabin, and there has been no contention to the contrary.”

Discussion: The AR indicates that USO did use and occupy the Sawmill Cabin at least once during the 1997-1998 hunting season. A November 19, 1997 letter to the district files from Range Technician Robert C. Whitten states, in part:

“United States Outfitter had a camp at Sawmill Cabin on East Eagle Creek. When I arrived at the camp the cook (first name ‘Jim’ from Alpine), two guides (last name ‘Cochran’ also from Alpine), and two clients were in the cabin. The cook was just finishing the dishes from breakfast, and I did not think that the use of the cabin was in compliance with the permit; the rest of the permit appeared to be clean.”

Finding: The Appellant did use and occupy Sawmill Cabin at least once during the 1997-1998 hunting season. A Violation Notice was issued and the collateral forfeited. The partial suspension of the 2002-2003 statewide outfitter guide permit is not based on this Violation Notice.

ISSUE 2: “The Operating Plan permits use of corrals upon coordination with grazing permittee.”

Discussion: While the AR reflects correspondence addressing those facilities that would or would not be allowed for annual outfitter/guide use, this direction is not reflected in the AR as a Forest Supervisor’s Order or as specific direction found within the authorized special use permit or annual operating plan. In addition, various correspondence from line officers to the authorized outfitters and guides, including USO, does not consistently describe those facilities that could be available.

The terms and conditions of the authorized outfitter guide special use permits for the Appellant, from 1996 through 2001, specifically stated: “Permanent corrals under the care of a grazing permittee will only be used after coordination with the permittee.”

Finding: The AR is clear that in each of the authorized outfitter and guide permits and operating plans, from the 1996 to the 2001 hunting season, consistent direction was given to the Appellant:

“A temporary corral may be constructed if approved by a local Forest Officer. Permanent corrals under the care of a grazing permittee will only be used after coordination with the permittee.”

“In general, all developed recreation sites and administrative sites are excluded from use.”
(Reference: AR# 41)

As part of the operating plan, this language does not imply or refer to any consent, approval, or disapproval by the Authorized Officer or by the range permittee, simply just the “coordination with the grazing permittee” on the part of the Outfitter/Guide. There is no further documentation of specific facilities that may or may not be approved for use.

ISSUE 3: “There is no amendment to the Special Use Permit and Operating Plan.”

Discussion: This issue focuses on whether an amendment to the special use permit and operating plan was needed to effect changes to the permit.

The Appellant stated in the Appeal that an amendment was needed specifically for the authorized special use permit for the 2001-2002 hunting season and that they “were operating under the express written terms of its Operating Plan, unaffected by any written amendment.”

The Deciding Officer responded: 1) no amendment was necessary because of the history of notification of no less than 8 times since the 1996 season; 2) it is the responsibility of the permittee to check about any restrictions or special areas of concern; 3) no amendment was needed because the operating plan stated that each Forest had special Forest Supervisor’s orders which established local restrictions; and 4) the permittee should make local inquiries as to specific questions that might arise. (See Responsive Statement)

Forest Service Manual 2714 prescribes that permit amendments may be used to effect minor changes to the terms and conditions of the permit. The terms and conditions of the permit (I.D.) speak to the actions of incorporating new terms, conditions and/or stipulations as a function of amendments to the permit. The permit itself states, “Operating...per the following terms and conditions, and the operating conditions outlined in the attached operating plan.”

Finding: An amendment to the permit or specific change to the operating plan was necessary to change the permit.

ISSUE 4: “The Forest Supervisor and District Ranger did not provide the mandatory notice and opportunity for corrective action.”

Discussion: A letter dated June 13, 2002, (Reference: AR #35) partially suspended USO’s statewide outfitter/guide special use permit for a period of one year on the Clifton Ranger District. Based on this letter, the temporary suspension is in effect from February 22, 2002 to February 22, 2003.

The outfitter/guide special use permit issued to the Appellant, dated 8/06/01, (Reference: AR#22) states, in part:

“Prior to revocation or suspension for cause pursuant to Section V (B), the authorized officer shall give the holder written notice of the grounds for each action and a reasonable time, not to exceed 90 days, to complete the corrective action prescribed by the authorized officer.”

The Code of Federal Regulations (36 CFR §251.60(2)(D), 36 CFR §251 subpart C, and 36 CFR §251.80-251.100) describes the actions required for suspension of a permit. Additionally, the AR reflects no attempt to resolve the specific issue with the Appellant, per 36 CFR §251.93.

Finding: The terms and conditions of the authorized outfitter guide special use permit, specifically address the administrative procedure for a suspension or partial suspension of a

permit. Direction concerning a suspension or partial suspension of a permit is also specified in 36 CFR §251.60(2)(D) and 36 CFR §251 subpart C.

A “history” of non-compliance does not alter the fact that this process for a suspension or partial suspension of a permit is specific and must be made available to a permittee. The Appellant was not provided the opportunity to take the corrective actions or remedy the situation according to the terms and conditions of the permit and the CFR’s. In fact, the District Ranger notified the Appellant that further activities not authorized by the permit would result in a suspension, and then the suspension was made several months later without further discussion or communication.

DECISION

After a detailed review of the original AR and the additional documents provided by the Deciding Officer and the Appellant, I am reversing the decision of the Deciding Officer, which suspended a portion of USO’s outfitter/guide special use permit on the Clifton Ranger District based on the following:

1. The prescribed process for suspending the authorized permit to the Appellant was not followed nor offered to the Appellant either through the terms and conditions of the authorized special use permit, nor the regulations found in 36 CFR §251.60 and 36 CFR §251 subpart C.
2. There is no clear forest policy or direction that defines the availability of or restrictions on, the use of specific forest facilities by outfitters. Also, there are no amendments to permits or operating plans to address any differences and no Forest Supervisor orders are in effect.

DISCRETIONARY REVIEW

Unless the Chief of the Forest Service exercises his discretion to review this appeal decision within 15 calendar days from the date of receipt, this is the final administrative determination for the Department of Agriculture (36 CFR §§251.87(e)(1) and 251.100(c)).

Sincerely,

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

cc: Apache-Sitgreaves National Forests, Christina Gonzalez, John Beckley