



United States
Department of
Agriculture

Forest
Service

Apache-Sitgreaves
National Forests

P.O. Box 640
Springerville, AZ 85938-0640
(520) 333-4301 Fax: 333-6357
TTY/TDD: 333-6292

File Code: 1570

Date: December 30, 1998

Ms. Karen Budd-Falen
Budd-Falen Law Office, PC
623 West 20th Street
P.O. Box 346
Cheyenne, WY 82003-0346

CERTIFIED MAIL - RRR

RE: Appeal of Ranger Settles' Decision to Suspend 10% of Glen McCarty's Grazing Permit on the Coyote-Whitmer and Turkey Creek Allotments # 99-A/S-251-1

Dear Ms. Budd-Falen:

This is my review decision on the appeal you filed on behalf of Mr. Glen McCarty regarding Alpine District Ranger's decision to suspend 10% of the livestock numbers on the Turkey Creek and Coyote-Whitmer allotments located within the Alpine Ranger District. My review of this appeal has been conducted pursuant to and in accordance with 36 CFR 251.80.

On August 21, 1998, District Ranger Phil Settles issued a show cause letter as to why he should not suspend 10% of Glen McCarty's permit for non-compliance with Terms and Conditions of the Permit.

On August 27, 1998, Ranger Settles issued a letter to Mr. McCarty with a decision to suspend 10% of his permitted livestock numbers.

On October 15, 1998, you filed a notice of appeal and request for stay of decision.

On November 13, 1998, the request for stay of decision was denied.

On November 13, 1998, you were provided a responsive statement prepared by the Deciding Officer Phil Settles and given 20 days to respond to the responsive statement, to be filed with the Reviewing Officer.

No response to the responsive statement was received, and the record was closed on December 2, 1998.

APPEAL SUMMARY



Appellants, issues are being addressed as organized in the Notice of Appeal. These consist of three major issues with subparts incorporated within each major issue.

ISSUE A: Ranger Settles denied Mr. McCarty Due Process of Law.

Response:

The United States views a grazing permit as a privilege which can be withdrawn without payment or compensation. This position has been affirmed by the courts. The fact that a grazing permit is a privilege has been established in Acts of Congress--Granger-Thye Act of April 24, 1950, (Section 402(h)). When a grazing permit is cancelled or suspended in part or in whole there is no taking under the Fifth Amendment. The U.S. Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (implementation of EO 12630) expressly exclude the benefits and privileges bestowed by the Government from the definition of private property rights protected by the Fifth Amendment.

The District Ranger is affirmed on this issue.

1. Contention: Notice was inadequate.

Response: The record is clear that Mr. McCarty received notice on August 17 and August 18 with a written show cause notice on August 25. The envelope you provided indicates receipt on August 26 is what you base the inadequate notice by Ranger Phil Settles. This envelope you provided is from the Gila National Forest and not from the Deciding Officer's station of Alpine Ranger District, Apache-Sitgreaves National Forest. Regardless of your confusion of the dates, the Deciding Officer did not make his decision until after he had met with Mr. McCarty on August 25, thus fulfilling policy and regulation set forth by the Forest Service.

The District Ranger is affirmed on this issue.

2. Contention: Glen McCarty was Denied an opportunity to be heard.

Response: Glen McCarty was heard on August 25, 1998, in response to a possible show cause 10% temporary suspension, which is prior to August 28, 1998. This satisfies the requirement "by August 28, 1998" as stated in Ranger Settles' letter dated August 21, 1998. Additional instructions were issued to Mr. McCarty at the meeting on August 25, to remove cattle from the Whitmer Pasture by August 27. The issue of cattle in non-permitted locations was clearly discussed at the August 25 meeting held at the Alpine Ranger Station, phone call on August 17, follow-up phone call of August 18, and Ranger Settles' letter to Mr. McCarty dated August 21. These communications are consistent with Title 2200 Range Management, Apache-Sitgreaves Supplement 2200-95-1, effective 09/20/95 and CFR 251.93. Also, notice to comply with the current Term Grazing Permit, including but not limited to Part 2, Clause 8, was provided on December 14, 1995, when Mr. McCarty signed the current permit. The permit was amended on 06/26/97 with a copy to Mr. McCarty.

The District Ranger is affirmed on this issue.

3. Contention: Notice in the letter is inaccurate, thus invalid.

Response: The show cause letter issued by Ranger Settles states that a response by Mr. McCarty must be received by August 28, 1998. Mr. McCarty complied with that request and met with Ranger Settles on August 25, 1998. Ranger Settles made his decision after the meeting with the Permittee. The purpose of the timeframes is to allow the Permittee to be heard, thus fully complying with CFR 251.93 as well as Forest Service manual direction.

The District Ranger is affirmed on this issue.

ISSUE B: The Decision is arbitrary and capricious and otherwise not in accordance with law.

1. Contention: Forest Service did not provide Mr. McCarty an opportunity to resolve alleged permit non-compliance before issuing a formal decision.

Response: The record indicates that in fact Ranger Settles did comply with CFR 251.93 and did meet with Permittee Glen McCarty prior to making his decision. The record would also indicate the District Ranger gave Mr. McCarty an opportunity, beginning on August 17, 1998, five separate occasions to comply with the terms and conditions of his permit and the annual letter of instructions.

The District Ranger is affirmed on this issue.

2. Contention: The Forest Service ignored important provisions contained in the Forest Service Handbook concerning suspension of a grazing permit.

Response: Glen McCarty was notified by phone on August 17, 1998, and on August 18 that cattle were still on the Lower Campbell Blue allotment and on the highway. On August 21 Ranger Settles issued a show cause letter dated August 21. This is a reasonable amount of time. Ranger Settles, District Range Staff Buck McKinney, and Permittee McCarty met at the Alpine Ranger Station on August 25. The August 25 meeting satisfies the requirement in Ranger Settles August 21 show cause letter which states "by August 28, 1998". During the August 25 meeting, Ranger Settles provided an additional two days for Permittee McCarty to remove cattle from the Whitmer Pasture of the Coyote-Whitmer Allotment. The phone calls, show cause letter, meeting at the Alpine Ranger Station, and the additional two days to move cattle are consistent with FSM 2200 and Title 2200 - Range Management, Apache-Sitgreaves Supplement 2200-95-1, effective 09/20/95 and CFR 251.93.

The District Ranger is affirmed on this issue.

3. Contention: The decision is arbitrary and capricious based on facts.

Response: Specifically, Mr. McCarty's current term grazing permit, part 2, clause 8(a) states "The Allotment management plan for the land described on page 1, part 1 is part of the permit, and the permittee will carry out its provisions, other, instructions, or others as issued by the

Forest Officer in charge for the area under permit and will require employees, agents, and contractors and subcontractors do likewise; part 2, clause 8(e) states "The permittee will not allow owned or controlled livestock to be upon any area of Forest Service-administered lands not described in either part 1 hereof or the annual Bill-for-Collection". Six range inspections revealed cattle on non-permitted areas of National Forest Lands.

Livestock still remained on the Lower Campbell Blue allotment on August 20, 1998, after instructions to remove cattle by August 19, 1998. Information from permittee McCarty revealed cattle still on the Lower Campbell Blue allotment and the Whitmer Pasture of the Coyote-Whitmer allotment through October 24. This is documented in approximately 17 letters from Mr. McCarty and range inspections.

Ranger Settles complied with FSM 2231.62 by electing to temporarily suspend rather than cancel the permit in whole or part. A 10% suspension for 3 years is within a maximum of 5 years. Title 2200 - Range Management, Apache-Sitgreaves Supplement 2200-95-1, effective 09/20/95 provides 10% for 1 to 3 years. Permittee was provided phone calls and a show cause letter resulting in a meeting with Mr. McCarty on August 25, 1998. An additional two days were provided to Mr. McCarty to comply with Ranger Settles instructions. These communications are consistent with FSM Range Management - Apache-Sitgreaves Supplement 2200-1-95, effective 09/20/95 and CFR 251.93.

The District Ranger is affirmed on this issue.

ISSUE C: The decision violates mandatory notice provisions.

1. Contention: The decision does not give Mr. McCarty adequate notice of his appeal rights.

Response: CFR 251.84 states the notice provisions the Forest Service will utilize when making a CFR 251 decision regarding grazing. The District Ranger Phil Settles provided Mr. McCarty his appeal rights in his August 27, 1998, decision letter. You have appealed that decision on behalf of Mr. McCarty and was received in a timely manner.

The only valid contention which you raise in this area is that CFR 251.84 states that the Deciding Officer will make a statement that the Deciding Officer is willing to meet with the holders to hear and discuss any concerns related to the decision.

The decision letter issued on August 27 by Ranger Settles did not specifically express a willingness to discuss the decision with Mr. McCarty. I believe the record indicates that both the Deciding Officer and the permittee are communicating, and I am assured that Ranger Settles would be very willing to discuss the decision with Mr. McCarty in person.

The District Ranger is affirmed on the portions of this issue dealing with the proper appeal rights given to the grazing permittee. I am also directing the Deciding Officer to extend an offer to Mr. McCarty to meet and discuss the decision he made August 27, 1998.

DECISION

After a detailed review of the records, I find the District Ranger conducted a proper process that resulted in decisions that are consistent with Forest Service policy, regulations and laws.

The District Ranger is affirmed with respect to all appellant contentions, except for Issue C, Contention 1, which directs the Deciding Officer Phil Settles to contact the permittee, Glen McCarty, and express a willingness to discuss the decision in person.

My decision is appealable pursuant to 36 CFR 251.87(c) with the Regional Forester. A notice of appeal for a second level review must be submitted to Regional Forester, Federal Building, 517 Gold Avenue S.W., Albuquerque, New Mexico, 87102 within 15 days of this decision.

Sincerely,

/s/ John C. Bedell
JOHN C. BEDELL
Reviewing Officer

cc:
Alpine District Ranger
R.O.