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Department of
Agriculture

Forest
Service

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File Code: 1570-1

Date: December 13, 2000

Clark DeSchweinitz
Community and Indian Legal Services
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Certified Mail – Return Receipt Requested

Re: Appeal #01-03-00-0006-A251, Rito Segundo Allotment, Questa Ranger District, Carson National Forest

Dear Mr. DeSchweinitz:

This letter documents my second level review decision of the appeal you filed on November 1, 2000, on behalf of your client Mr. Porfirio Cisneros. The appeal is in regard to the decision by District Ranger Thibedeau, herein termed the Deciding Officer, to deny Mr. Cisneros' application for a new domestic sheep permit on the Rito Segundo Allotment. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

BACKGROUND

By letter dated May 24, 2000, the Deciding Officer notified you that he was denying Mr. Cisneros' application for a new domestic sheep permit on the Rito Segundo Allotment.

Your first level appeal and request for oral presentation were received by Forest Supervisor Vigil on July 5, 2000 (Doc. 53). An oral presentation was held on September 8, 2000 (Doc. 58). Following the oral presentation Supervisor Vigil extended the timeframe for written reply to the Deciding Officer's responsive statement to September 30, 2000 (Doc. 58). The written reply to the responsive statement was hand delivered to Supervisor Vigil on September 20, 2000. Supervisor Vigil closed the appeal record on September 21, 2000 (Doc. 59). Based on his review of the record, Acting Forest Supervisor Okamoto affirmed the Deciding Officer's decision on October 18, 2000 Doc. (60).

Your second level appeal was received in this office on November 2, 2000. By letter dated November 15, 2000, I indicated the appeal record was received by the Regional Office on November 9, 2000, and that my review decision would be made within 30 days from that date.

POINTS OF APPEAL

My review of this appeal was confined to the substantive points raised in the appeal, the appeal record, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.

In your appeal you keep referring to the Cisneros family permit. The permittee of record when



the NEPA decision was signed in 1996 was Floyd A. Cisneros. Following settlement of Floyd's estate, his father, Mr. Porfirio Cisneros is the qualified applicant for a term grazing permit. Therefore, the merits of your appeal will be judged on how your appeal points relate to Mr. Floyd Cisneros or Mr. Porfirio Cisneros as applicable.

ISSUE 1: The denial of the Cisneros family sheep permit is an abuse of discretion and is contrary to law and regulations. The Forest Service misconstrues its own grazing regulations under 36 CFR 222.1.

Contention 1: The appellant contends that when the Cisneros family did not appeal the Rito Segundo NEPA decision back in 1996 does not mean they have lost their right to appeal that decision. The appellant further contends to deny them the opportunity to appeal the NEPA decision is contrary to law and a clear abuse of administrative discretion.

Response 1: The record demonstrates that Mr. Porfirio Cisneros was notified by mail on February 24, 1995, that the Rito Segundo Allotment would be undergoing NEPA analysis for purposes of reissuing his grazing permit (the authorization of grazing). On March 13, 1995, Mr. Cisneros and his son came to the Questa Ranger District office to gain a better understanding of the February 24 scoping letter (Doc. 34a). On April 7, 1995, and June 13, 1995, Mr. Cisneros submitted written comments to the District Ranger Thibedeau (Doc. 45).

On August 16, 1995, District Ranger Thibedeau identified the conflict between domestic sheep grazing and reintroduction of bighorn sheep (disease and competition for forage) in the Latir Peak Wilderness Area as a key issue to be resolved through the analysis of various alternatives. Alternative C would evaluate continuation of the existing permit and Alternative D would evaluate continuation of the existing permit but include a stipulation in the new term grazing permit stating that upon transfer of the permit to a new permit holder, the class of livestock for the permit would be changed entirely to cattle (Doc. 38).

On December 2, 1995, Mr. Porfirio Cisneros waived his permit back to the Forest Service indicating he had sold his permitted livestock to his son Mr. Floyd A. Cisneros. On January 10, 1996, District Ranger Thibedeau issued a new ten year term grazing permit to Mr. Floyd A. Cisneros (Doc. 9).

On January 16, 1996, District Ranger Thibedeau released a environmental assessment (EA) for public comment as required by 36 CFR 215.5. By letter dated January 16, 1998, both Floyd and Porfirio Cisneros were provided a copy of the environmental assessment which identified the proposed conversion from sheep to cattle (Docs. 16; 39).

On April 16, 1996, Forest Supervisor Leonard Lucero issued a decision notice selecting Alternative D. In his decision Supervisor Lucero stated "...Two new ten year term grazing permits will be issued. One permit will be issued for a ewe/lamb operation of 115 head and a cow/calf operation of two head used from July 1st to August 31st. This permit will contain a stipulation that states upon transfer of the permit to a new permit holder, the class of livestock for the permit will change to cattle only." Supervisor Lucero also stated that his decision was subject to appeal in accordance with 36 CFR 215.7 and that any appeal must be in writing and

filed with the Regional Forester within 45 days of the date of legal notice of his decision in the Taos News (Doc. 41). The record substantiates that not only did Mr. Floyd Cisneros receive a copy of the decision notice advising him of the decision and his right to appeal the decision, but that District personnel met with Floyd and his father Porfirio to explain the decision (Doc. 16). The record indicates Mr. Floyd Cisneros, holder of the term sheep grazing permit on the Rito Segundo Allotment, never commented on the EA nor did he appeal the April 16, 1996, decision of Supervisor Lucero implementing Alternative D. In addition, on February 13, 1999, Mr. Porfirio Cisneros stated in a letter to District Ranger Thibedeau that he realized that Floyd missed the deadline for challenging the April 16, 1996, NEPA decision for the Rito Segunda Allotment (Doc. 17).

The process established in Part 215 constitutes the final administrative opportunity for the public to influence National Forest System project decisionmaking prior to implementation of a decision (36 CFR 215.1(b))

Contention 2: The appellant contends there has been no proper and legally correct cancellation of the Cisneros permit and thus no requirement that it be subject to a “transfer” for any new permit holder. The appellant argues the 1996 NEPA decision circumvented Forest Service regulations at 36 CFR 222.1 regarding termination or modification of term grazing permits. . The appellant argues the Forest Service improperly used the April 17, 1996, Decision Notice for the Rito Segundo Allotment to adversely affect and to now deny the Cisneros family a sheep permit.

Response 2: The National Environmental Policy Act (NEPA) applies to Federal Agency planning and decision making for actions which may affect the environment (NEPA Section 102). Actions include new and continuing activities including projects and programs approved by federal agencies [40 CFR 1508.18(a)]. Federal actions include approval of specific projects, such as authorization of grazing located in a defined geographic area. Projects include actions approved by permit [40 CFR 1508.18(b)(4)]. The record demonstrates that District Ranger Thibedeau initiated the NEPA process (scoping letter) for authorization of grazing on the Rito Segundo Allotment on March 7, 1995. This was necessary because the allotment did not have current NEPA to ensure that management of the allotment was consistent with the Forest Plan, and the term grazing permit held by Mr. Porfirio Cisneros was due to expire on December 31, 1995 (Docs. 34; 34(a)).

The Forest Service has the discretion and the duty to determine appropriate uses of the National Forests and may authorize appropriate uses by issuing permits. Any decision by a Forest Service line officer to authorize a use is clearly a federal action subject to NEPA procedures.

Mr. Porfirio Cisneros became eligible for a term grazing permit on the Rito Segundo Allotment through settlement of his son’s estate. Under Forest Service regulations and policy there is no requirement to waive a permit back to the United States through the settlement of an estate. Thus, the permit held by Mr. Floyd Cisneros was not subject to transfer, but a new permit could be issued to the qualified recipient of his estate by simply submitting a grazing application to the Forest Service. The only requirement Mr. Cisneros needed to meet in order to qualify for a term grazing permit was to hold legal title to permitted livestock or base property through settlement

of the estate. This is consistent with Forest Service policy at FSH 2209.13, Chapter 10, 13.3-Changes in Ownership, which states ...”A term grazing permit may be issued to an applicant under the following circumstances:...3. The applicant has inherited permitted livestock or base property....” FSH 2209.13, Chapter 10, 18.14-Inheritance states “Term grazing permits may be issued in connection with inheritance of base property or permitted livestock. Recognize such permits in the same manner as term grazing permits issued because of sale and purchase of base property or permitted livestock.

Although Supervisor Lucero’s decision letter talks about “transfer of a permit” there is no such terminology in Forest Service regulations or policy. Term grazing permits may be waived back to the United States and then issued to a qualified applicant or, as indicated above, issued to the qualified recipient of an estate. It is clear that the intent of Supervisor Lucero’s decision was to make the conversion from sheep to cattle on the Rito Segundo Allotment when a new applicant applied for a term grazing permit regardless of the circumstances precipitating the application. The environmental assessment clearly displayed the environmental effects associated with the selected alternative including social and economic considerations. The subsequent decision became the authorization for grazing and incorporated future actions to allow for reintroduction of bighorn sheep in the Latir Peak Wilderness Area. To issue a term grazing permit for sheep, as the appellant argues should be done, would require a new NEPA analysis and decision. This would not be appropriate because the 1996 analysis and decision reflect the current needs of various rangeland resources on the Rito Segundo Allotment including domestic livestock and various wildlife species.

Finding: Forest Service line officers provided for public notification and comment on the proposed action and selected alternative for long term management of the Rito Segundo Allotment in accordance with the Agency’s administrative appeal regulations (36 CFR 215). The NEPA decision (selected alternative) was also identified as being subject to appeal in accordance with the Agency’s appeal regulations. The District Ranger’s May 24, 2000, decision to deny the application for a term grazing permit for sheep grazing on the Rito Segundo Allotment is consistent with the 1996 NEPA decision and Forest Service policy related to inheritance of base property or permitted livestock.

ISSUE 2: The decision notice for the Rito Segundo Allotment violated due process of law by not giving the Cisneros family proper and adequate notice and the right to a hearing in order to contest the removal and essential termination and denial of the sheep permit.

Contention: The appellant contends 36 CFR 251.80, Subpart C, lays out the Forest Service obligations to due process and appeals. The appellant argues the Forest Service violated its own regulations for notice and appeal with a hearing by failing to allow the Cisneros family to appeal the NEPA decision under 36 CFR 251.80.

Response: Forest Service appeal regulations at 36 CFR Subpart C provide a process by which those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System lands, may appeal a written decision by a authorized Forest Service line officer with regard to issuance, approval, or administration of the written instrument. Forest Service appeal regulations at 36 CFR 215.8(c) also allow the holder of a written instrument to

appeal a decision regarding their permitted occupancy and use of National Forest System lands. However, 36 CFR 215.8(c) is clear that permit holders may appeal a decision under one of the regulations, but not both.

Finding: Although a record review indicates that Mr. Floyd Cisneros did not receive notice of the right of appeal under 36 CFR part 251, he was aware of the decision and the opportunity to appeal under 36 CFR part 215. While it would have been desirable to provide notice to Mr. Cisneros explaining that he could appeal the NEPA decision under one, but not both of the appeal regulations, he was not denied due process in the NEPA decision concerning the management of the Rito Segundo Allotment.

ISSUE 3: The notice of decision, and now its most recent manifestation, the denial letter of May 24th, together violate Region 3 policy on managing National Forest land in Northern New Mexico.

Contention: The appellant contends that according to Forest Service policy the management of the Forests in Northern New Mexico is different and that the Forest Service must make adjustments in its concepts and policies of range management. The appellant argues that a significant underlying reason for the denial of the Cisneros sheep permit is the decade long pressure to allow Big Horn sheep to roam the allotment and the Latir Peaks.

Response: The policy letter which the appellant refers to, dated March 6, 1972, provided guidance to Forest Service line officers to ensure that social and economic considerations were incorporated into their day to day decisions relating to management of Northern New Mexico Forests. However, the letter was never included in the Forest Service Manual because it was intended to heighten the awareness of social and economic considerations but did not impart hard and fast policies which are different from those governing the management of National Forest System lands in other parts of the Southwestern Region. In addition, it did not imply that Forest Service line officers had the latitude to circumvent the laws, regulations, and policies relating to management of National Forest System lands.

Since 1972 there have been numerous laws passed which have further influenced how Forests throughout the National Forest System are managed. A primary piece of legislation at issue here is the National Forest Management Act (NFMA) of 1996 (P.L. 94-588). The NFMA regulations (36 CFR 219) set forth a process for developing, adopting, and revising land and resource management plans for the National Forest System. Forest Plans provide an overall framework of standards and guidelines for management of individual Forests. Project decisions implementing Forest Plans must be consistent with the plan. If individual project proposals are inconsistent with a plan either the proposal must be changed or the plan must be amended to allow for the proposal.

Management direction found under Management Area 17 (Wilderness) in the Carson National Forest Plan requires line officers to cooperate with the New Mexico Game and Fish in stabilizing Rocky Mountain bighorn sheep to goals established in the New Mexico Game and Fish Department Comprehensive Plan. Bighorn sheep occur only in portions of the Wheeler Peak and Latir Wildernesses (Doc. 39). The 1996 NEPA analysis and subsequent decision implemented

this direction by a decision to allow the permittee, Mr. Floyd Cisneros, to continue to graze domestic sheep. But, at some unspecified time the decision also provided for issuance of a term grazing permit for cattle when the permit was issued to a new permit applicant. This action was consistent with the requirement in NFMA to bring existing permitted uses into compliance with Forest Plan direction as soon as practicable.

The record clearly demonstrates that Forest Supervisor Vigil and District Ranger Thibedeau recently went out of their way to find viable alternatives for Mr. Porfirio Cisneros to continue traditional grazing of sheep and cattle. Specifically, Mr. Porfirio was offered his choice of a sheep permit on the Tres Piedras Ranger District or on Bureau of Land Management lands administered by the Taos Field Office. Either arrangement would have permitted Mr. Cisneros to continue to maintain a cattle permit on the Rito Segundo Allotment for 27 head of cattle from 7/1-8/31(Docs. 16; 18; 23; 27; 28; 60). Additionally, Forest Supervisor Vigil offered Mr. Cisneros the opportunity to move his permitted livestock from the Rito Segundo Allotment to the Valle Vidal Allotment (Doc. 28). The record also documents earlier offers to Mr. Floyd Cisneros to graze on other sheep allotments on the Carson National Forest, the Rio Grande National Forest, and on Bureau of Land Management lands (Doc. 28).

Finding: The Forest Supervisor and the District Ranger demonstrated sensitivity to the cultural and economic aspects of maintaining small term grazing permits by finding alternative allotments for Mr. Porfirio Cisneros to graze his sheep. The District Ranger's decision to deny Mr. Porfirio Cisneros' application for a sheep permit is consistent with the prospective decision by Forest Supervisor Lucero to convert from sheep to cattle when a new applicant applied for the term grazing permit.

DECISION

After review of the appeal record, I find that the Deciding Officer's decision to deny Mr. Porfirio Cisneros' application is in conformance with the intended purpose of the 1996 decision authorizing grazing on the Rito Segundo Allotment. I also find that the Forest Supervisor and the Deciding Officer have provided reasonable alternatives for Mr. Cisneros to continue grazing sheep on public lands.

The Deciding Officer's decision is in conformance with applicable laws, regulations, policies, and procedures. I find no evidence indicating the Deciding Officer has acted in an arbitrary and capricious manner. Therefore, I affirm the Deciding Officer's decision to deny your application to graze sheep on the Rito Segundo Allotment.

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

/s/ James T. Gladen

JAMES T. GLADEN
Appeal Reviewing Officer

Deputy Regional Forester, Resources

cc:

Forest Supervisor, Carson NF

District Ranger, Questa RD

Director, Rangeland Management, R3

Appeals and Litigation Staff, R3