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Department of  
Agriculture

Forest  
Service

Coronado National Forest  
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File Code: 1570-1/2230

Date: October 27, 2003

Joseph and Gywnn Patterson  
2872 Palmer Drive  
Sierra Vista, AZ 85650

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED  
NUMBER:**

RE: Appeal #03-03-05-0002-A251, Ash/Carr Canyon Allotment Permit Cancellation, Sierra Vista Ranger District, Coronado National Forest

Dear Mr. And Mrs. Patterson:

This letter constitutes my review and decision on the appeal you filed regarding cancellation of your grazing permit on the Ash/Carr Canyon Allotments.

My review was conducted according to the provisions of the appeal regulations in 36 CFR 251, Subpart C. I have considered the appeal record, federal statutes, policies, and operational procedures set out in the directives system of the USDA Forest Service. I reviewed the issues presented in your June 1, 2003, appeal as well as the District Ranger's decision and September 2, 2003, Responsive Statement.

### **Background**

By letter dated May 22, 2003, District Ranger Steve Gunzel cancelled your term grazing permit on the Ash and Carr Canyon allotments for failing to comply with the terms and conditions of the permit. In his letter, District Ranger Gunzel listed the following violations: 1) failure to maintain range improvements on the allotments and, 2) failure to validate the permit by stocking the allotment with at least 90 percent of the permitted numbers.

Your notice of appeal was filed on June 1, 2003. On July 1, 2003, District Ranger Gunzel notified you that he had overlooked informing you that you could request mediation. On July 9, 2003, you formally requested mediation; and on July 10, 2003, Forest Supervisor John McGee suspended your appeal for 45 days to provide time for the mediation process. No mediated agreement was reached, and your appeal was reinstated on August 19, 2003. Under the provisions of 36 CFR 251.94, the District Ranger completed his written responsive statement to your appeal on September 2, 2003. No written reply to the responsive statement was received from you within the 20 days provided by the regulations.



## **Points of Appeal**

My review will focus on the appeal points of your June 1, 2003, letter.

**ISSUE 1:** The Federal Government does not recognize the market value of Federal Grazing Permits.

**Contention:** You contend that federal grazing permits have market value that is recognized by banks, lending agencies, and local taxing authorities, but not the federal government. You also contend that it is unfair for the federal government to treat permits as if they do not have monetary value.

**Response:** You are correct in stating that while banks, lending agencies, and local taxing authorities may consider federal grazing permits to have market value, the federal government does not recognize that value. This is because the permit holder does not own the permit; the permit is tied to the base property insofar that the owner applies for, and qualifies for, a permit. When base property associated with the grazing permit is sold, the seller must waive the permit back to the United States, and the purchaser must then apply for, and qualify for, issuance of a new permit. Forest Service Handbook (FSH) 2209.13.18.18 provides the direction by which term grazing permits are waived and reissued due to a change in ownership. It states, "Documents offered as evidence of the purchase of livestock or base property are unacceptable to the extent they purport to assign or transfer a grazing permit. The United States does not consider purported assignment of grazing permits to be of any legal consequences so far as the United States is concerned."

FSH 2209.13.18.11 also explains, "Before confirming a waiver and issuing a permit, the District Ranger or Forest Supervisor shall provide the seller and purchaser with a thorough explanation of the requirements for approval. The prospective purchaser must understand clearly that the permit, if issued, would be subject to...changes that planned range examinations might show are necessary." In this case, the record indicates that the District Ranger had informed the previous permittee (Baumkirchner) that production/utilization studies indicated that a reduction in carrying capacity would be necessary to improve and maintain range conditions (Project Record (PR), Docs. 10 & 11). The November 9, 1993, letter (PR, Doc. 10) also indicates that the District Ranger was informing prospective buyers that changes in permit numbers and management were likely on the Ash and Carr Canyon allotments. It is reasonable to conclude that you were also made aware of these potential changes when you purchased the base property (PR, Doc. 34). By signing the permit, you acknowledged that grazing capacity would be reduced to 50 head for six months.

I find that although you may not agree with federal policy regarding the market value of grazing permits, you were informed of the policies and potential reduction in permitted numbers, and therefore, should have considered the potential reduction in the market value recognized by entities other than the federal government.

**ISSUE 2:** Subject to agency discretion, permits may be unilaterally renewed, changed, or cancelled at any time.

**Contention:** You contend that if the government can unilaterally change permits, there should be reasonable compensation to the permittee.

**Response:** Part 1.3 of the grazing permit you signed (PR, Doc. 16) specifically states, “It is fully understood and agreed that this permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comply with any of the terms and conditions specified in Parts 1, 2, and 3 hereof.... This permit can also be cancelled, in whole or in part, or otherwise modified, at any time during the term to conform with needed changes brought about by ... numbers permitted or seasons of use necessary because of resource conditions...” When permits are cancelled due to violations of terms and conditions, permittees are not entitled to any compensation (36 CFR 222.6). Compensation is only considered when the lands covered under the permit are devoted to another public use, in which case the permittee receives compensation for the adjusted value of their interest in authorized permanent improvements that they placed or constructed on the allotment.

**ISSUE 3:** Grazing rights versus privilege.

**Contention:** You imply that grazing under a term grazing permit is a right rather than a privilege with statements such as, “When Arizona was yet a territory, the Baumkirchners settled in the Eastern Huachuca Mountain area...after statehood this area was incorporated into the Coronado National Forest and the Coronado National Monument. In return, the Baumkirchner Brothers were given an area of deeded land within the forest, and attached to it were the *rights* to continue to graze the forest” (emphasis added).

**Response:** 36 CFR 222.3(b) specifically states, “Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources.” Forest Service Manual (FSM) 2230.3(2) provides additional guidance and states, “Grazing permits authorize livestock grazing on National Forest System (NFS) lands. The holding of such permits is a privilege, not a property right. Permit holders may not assign or transfer grazing privileges in whole or in part.”

**ISSUE 4:** Permit activation/validation.

**Contention:** You contend that you were given the impression that the Forest Service would be content if no grazing occurred under the permit. You feel that attitude changed approximately one year ago when you were told to activate the permit or lose it.

**Response:** Implicit in the issuance of a grazing permit is the expectation that grazing will occur at some time during the term of the permit. District Ranger Jeanne Wade issued your grazing permit in January 1997, (PR, Doc. 16). Part 2.1 of the permit requires “turning on at least 90 percent of livestock the first grazing season after the permit is issued” to validate the permit. You entered into a Memorandum of Understanding (MOU) with District Ranger Wade

authorizing nonuse for five consecutive years (PR, Doc. 17). Item #5 of the MOU states, "After the year 2001, the Forest Service may consider, but will not guarantee, the approval of continued nonuse for resource protection." The key point is that the MOU did not guarantee that nonuse for resource protection would be continued after five years. Although there is no documentation of what, if any, verbal exchanges and agreements may have occurred between you and District Ranger Wade, it is reasonable to conclude that you were aware that continued nonuse may not be approved; and, if nonuse was not approved, then you would be required to meet the terms of Part 2.1 of the permit which require that you stock the allotment with at least 90 percent of livestock to validate the permit.

**ISSUE 5:** Changes in permitted numbers.

**Contention:** You contend that the original permit was for 76 head, yearlong. You state that within six months the Forest Service changed the permit to 50 head, 6 months of winter grazing and were given no choice but to sign the permit.

**Response:** Please refer to my response to Issue 1.

The permit held by the previous permittee (Baumkirchner) was for 76 head of cattle yearlong and included 26 head on the Montezuma allotment administered by the Coronado National Memorial and 50 head on the Ash and Carr Canyon allotments (PR, Docs. 7 and 10). The record indicates that the Memorial began administering their portion of the permit in the early 1990's. So, when you were issued your permit in 1997, the 26 head on the Montezuma allotment was not included on the Forest permit, leaving 50 head on the permit for the Ash and Carr Canyon allotments. The District Ranger adequately explains the reasons for changing from yearlong grazing to winter use in his Responsive Statement (Responsive Statement, Issue 6). It is within the District Ranger's discretion to modify the permitted numbers and/or the season of use when issuing a new permit. I find no documentation in the record that you objected to the terms of the permit at the time you signed it.

**ISSUE 6:** Financial impacts of reduced permit numbers and season of use.

**Contention:** You contend that the reduction in permitted numbers and season of use resulted in a significant reduction (\$100,000) in the value of your investment. You contend that you were expected to buy other land on which to graze cattle the remaining 6 months of the year. You believe you had no way to recoup your loss and that according to the government; you just had to accept the decision without remedy. You contend you were not allowed to sell the permit without selling your canyon home.

**Response:** The District Ranger adequately addresses this issue in his Responsive Statement (Responsive Statement, Issue 7). Also, please refer to my response to Issue 1.

## **ISSUE 7:** Suggestions for action.

**Contentions:** You offer four suggestions for resolving the situation:

1. Buy back of permit at the fair market price.
2. Allow the permittee to sublease or sell permit.
3. Allow the permittee to “share-ranch” with other cattlemen who are seeking extra grazing.
4. Restore the permit to original “year-round” 76 head status.

**Response:** The District Ranger adequately explains the reasons and regulations that prohibit implementation of all these solutions in his Responsive Statement (Responsive Statement, Issues 7, 8, 9, and 10).

### **Decision**

The issues raised in your appeal do not specifically address the reasons identified by the District Ranger for canceling your permit – failure to maintain range improvements and failure to validate your permit. I note that you have not disputed either determination in your appeal. The District Ranger notified you in his May 15, 2002, Notice of Noncompliance that you were to have the improvements maintained by September 1, 2002, and that failure to do so could result in suspension or cancellation of you permit. On May 22, 2003, almost nine months after you were to have the improvements maintained, the District Ranger found that you were still out of compliance with your permit and decided to cancel your permit.

I find that the District Ranger’s decision was based on a reasonable assessment of your lack of compliance with the terms and conditions of your permit. The District Ranger’s decision is in conformance with applicable laws, regulations, policies, and procedures. The District Ranger’s decision is affirmed.

My decision is subject to further administrative review under 36 CFR 251. Any appeal of this decision to the second level must be fully consistent with 36 CFR 251.90, Content of Notice of Appeal. Pursuant to 36 CFR 251.87(c)(2), “The appeal for a second level of review is filed with the Regional Forester within 15 days of the first level appeal decision. Upon receiving such a request, the Regional Forester shall promptly request the first level file from the Forest Supervisor. The review shall be conducted on the existing record, and no additional information will be added to the file.”

Appeals must be filed with:

Regional Forester  
Southwestern Region  
333 Broadway SE  
Albuquerque, NM 87102

Sincerely,

/s/ Susan K. Kozacek  
SUSAN K. KOZACEK  
Acting Forest Supervisor

cc: Stephen L Gunzel, David M Stewart, Patrick L Jackson, Teresa Ann Ciapusci