



United States
Department of
Agriculture

Forest
Service

Southwestern
Region

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File Code: 1570-1

Date: October 8, 1997

Mr. David T. Hardy
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Tucson, AZ 85749

CERTIFIED MAIL -- RETURN
RECEIPT REQUESTED

Re: Tucson Rod & Gun Club Shooting Range Special Use Permit Appeal
#97-03-00-0034-A251, Coronado National Forest.

Dear Mr. Hardy:

This is my review decision on the appeal filed on behalf of the Tucson Rod & Gun Club. You have appealed the Coronado National Forest Supervisor's March 10, 1997, decision to immediately temporarily suspend shooting at the Tucson Rod and Gun Club ("TR&GC", "Appellant", or "Club") Rifle Range. The appeal was timely and has been accordingly processed under the provisions of 36 CFR § 251, subpart C.

BACKGROUND

On March 10, 1997, the Coronado National Forest Supervisor, John M. McGee, issued a decision to immediately temporarily suspend shooting at the TR&GC range in Sabino Canyon, on the Santa Catalina Ranger District. His decision was prompted by several things including; evidence in the file, field visits and a study prepared by Mr. Glen Shumsky and Mr. Paul Condon which concluded that, in its present configuration, the range posed a serious threat both to people living nearby and to people using National Forest System lands.

On March 26, 1997, Deputy Regional Forester John Kirkpatrick made an on-the-ground review of the permit area and the suspension of shooting, and listened to the Club's concerns regarding the suspension, pursuant to 36 CFR 251.60(f). He issued a decision on April 4, 1997, affirming the need for immediate action by the Forest Supervisor, concluding that the safety of local residents, visitors and schoolchildren was paramount, and finding that containment of bullets could not be currently assured with the present configuration of the range.

On March 28, 1997, Appellant filed a Complaint and Motion for Preliminary Injunction in Federal District Court, requesting the judge to stay the temporary closure of the Club's range. After a three day evidentiary hearing



on the motion, Judge Roll concluded that there was insufficient evidence that you would succeed on the merits, and denied your request except as to the use of the archery range. Both parties stipulated to a stay of the proceedings during the administrative review and until an amended complaint is filed.

This office received your appeal of Forest Supervisor McGee's decision on April 28, 1997. In accordance with the provisions of 36 CFR 251.94, the Forest Supervisor prepared and mailed to you a copy of his written responsive statement on May 23, 1997, (Administrative Record Document Number "AR" 2099). On June 13, 1997, the Regional Forester received a written reply from you which responded to the Forest Supervisor's responsive statement (AR 2125). In June, the Club requested that the Forest Service lift the suspension of shooting for air guns and BB guns. Because the shot from air guns and BB guns will not leave the permitted area, the Forest Supervisor lifted the suspension as to those two activities on June 25, 1997, (AR 2133). As the Forest Service had suspended only shooting activities, and not training classes, meetings, or other gatherings, and Judge Roll authorized archery, my references to the "suspension" will be to the suspension of shooting activities with the exception of archery, air guns and BB guns.

Due to concerns regarding the Shumsky/Condon Risk Assessment (SCRA), the Regional Forester ordered an independent expert review of the TR&GC range, various safety studies, and the Club's proposed modifications (Review Report and Design Criteria, Sabino Canyon Shooting Range, Ken Buster, Brian Danielson and Richard C. Whiting ["Report of Buster et al."] AR 2152.) You were given a copy of the report on August 19, 1997, and you responded with your comments in a letter dated September 8, 1997, (AR 2161). You did not raise any concerns regarding the three experts who performed this second review. During the course of the appeal, you have been periodically notified of the status of your appeal. You did not elect to make an oral presentation on this appeal. By letter dated September 11, 1997, the Regional Forester notified you that the appeal record for this appeal was being closed (AR 2164).

In order to respond to the issues raised in your appeal, I reviewed the Administrative Record, including (but not limited to) the permit, amendments thereto, correspondence between the Forest Service and the Club, permit administration records, and other pertinent documents, including:

- * Deputy Regional Forester Kirkpatrick's affirmation of the immediate temporary suspension after his on-the-ground review pursuant to 36 CFR 251.60(f) (AR 2039).
- * the Hronek Report (AR 1869),
- * the Shumsky/Condon Risk Assessment (AR 1891),
- * the report by Buster et al. (AR 2152)
- * the pleadings, testimony, evidence and Order from the hearing on the Motion for Preliminary Injunction (AR 2070, 2071, 2083),
- * the Appeal, the Request for Stay, expert reports, replies and all other correspondence from the Club (AR 2077, 2128, and others), and
- * the Forest Supervisor's decision and Responsive Statement (AR 1897 and 2099).

Mr. David T. Hardy

In addition, I reviewed other applicable documents including:

* Forest Service regulations, manual and handbook provisions, and

National Environmental Policy Act and regulations promulgated thereunder.

DISCUSSION

Your appeal relief in form of: of the order either or conditioned its closing the smallbore and making improvements." The has offered to make several improvements to the range during the pendency of this appeal.

Contention:

Appellant that the temporary suspension the special permit was in accordance with the provisions of 5 U.S.C. § 558.

A Forest Special Use (in this an annual use permit) issued under conferred by U.S.C. § and is a license purposes of U.S.C. § The immediate suspension of permit is a sanction, does not

II. The Suspension Violated NEPA:

Contention

Appellant asserts an agency prior to any action, an Environmental and that, a NEPA was not prior to immediate temporary

Response:

36 CFR 251.60(f), which for immediate suspension of use authorizations, NEPA analysis not required to the officer immediately a special authorization when determines it to protect public health or safety or the environment.

find that authorized officer the authority immediately temporarily a special permit, without NEPA, when is necessary protect the health and and that the Forest Supervisor used this authority appropriately.

III: The Suspension Was Unjustified:

Contention A:

Appellant claims that the suspension was premised upon a report written by an author lacking relevant credentials, who has no training or credentials in any field, and that his opinions are of no validity in judging range safety.

Response:

Based on testimony presented at the hearing on the Motion for Preliminary Injunction, it is clear that Mr. Shumsky exaggerated the scope of his academic credentials. After hearing all of appellant's contentions regarding the SCRA, however, Judge Roll found that the Club failed to disprove the report's conclusions, and that it was unlikely that appellants would succeed on the merits of their case except as to archery (AR 2083, Order, p. 6, finding # 31). Having reviewed the record, I conclude that the Forest Supervisor's acceptance of the SCRA's conclusions was reasonable.

Contention B:

Appellant makes the argument that the Forest Supervisor based his decision to temporarily suspend shooting activities on the SCRA.

Response:

In his testimony at hearing and in his Responsive Statement, the Forest Supervisor discussed the bases for his decision. These bases were;

1. The Forest Supervisor stated that he had experienced bullets and ricochets passing near him on several visits to the range and the surrounding area (AR 2083, Transcript of Proceedings, April 11, 1997, Testimony of John McGee pp. 179 - 180).
2. The administrative record has numerous recorded instances of neighbors, employees and hikers complaining of bullets leaving the range. In his responsive statement, the Forest Supervisor compiled a list of safety incidents which had been documented in the record since 1956, and of which he was aware (AR 2099, Appendix 2). The record shows that the Forest Supervisor and Forest Service employees found numerous bullets outside and down range of the permitted area.
3. The record also shows that in 1995, the first Vice President of the Club, Bob Haskin, admitted that bullets were leaving the range permit area. Mr. Haskin apparently also admitted that people were misusing the pistol range, and that bullets were being shot over the top of the berms and too many bullets were ricocheting out of the area. He also acknowledged that the shotgun range should be closed, but stated that this would not be popular among members (AR 924).

4. A written Bruce indicated bullets leave permitted with enough force and velocity to cause fatal injuries (AR 1869).

shows the surrounding TR&GC was uninhabited the was approved 1952, that that the has heavily with neighborhoods. record that are two schools, over children attendance the boundary the The indicates the Canyon area over million annually, that is great from number visitors when permit

6. Clause of Permit "[t]he shall the and to of orderliness, sanitation safety to forest officer in charge" (AR 59).

find the Supervisor numerous and prior making decision immediately suspend activities the (AR Transcript proceedings, 11, testimony John p. AR and his although timing prompted large by conclusions the included consideration a amount information addition that in SCRA.

on evidence to Forest at time made decision immediately suspend activities the I that decision

Contention C:

claims that club has noncommercial group permit, suspension which is warranted under the noncommercial group use permit regulations.

Response:

TR&GC special permit is a noncommercial use permit to Forest regulations at CFR § and has been treated such. One signature of commercial permit the length time for on the In the of TR&GC, site has occupied under current permit over 30 The target a long land use requires payment a land fee to United States. 2721.46 prescribes minimum fee this type land use. has been a fee its permit its inception (AR 7).

characteristic of permits is participants are a fee participate. Permit 23 requires the range open to public. Clause authorizes the to charge fee to public. The has a tiered fee: annual membership \$30.00 or daily fee of \$8.00 (AR 2036 and AR 2049). Either charge constitutes a participation fee.

I find that the TR&GC permit is a commercial permit and that it falls under the rules of suspension as determined by the Forest Supervisor following commercial use rules.

IV: The Suspension Imposes An Arbitrary Standard:

Contention A:

Appellant alleges that 5 U.S.C. § 558 provides that a permit issuer cannot generally suspend a permit for noncompliance without advance notice of the noncompliance and an opportunity to remedy.

Response:

Provisions of 5 U.S.C. § 558 apply to licenses and sanctions, not to Forest Service special use authorizations.

Contention B:

Appellant alleges (1) that there is no connection between the alleged violation and the commanded remedy, (2) what comprises the alleged violation is not clear from the suspension decision, and (3) that the "total containment" requirement is outside the scope of the permit.

Response (1):

The Forest Supervisor's letter dated March 10, 1997, (AR 1897) states:

Because of significant public health and safety concerns, ... I have decided to suspend all shooting operations authorized by your special use permit ... for a period of 60 days during which I will further assess the situation. ... This suspension is necessary because of the identified safety concerns ... There are persons and property at risk from bullets leaving the Sabino Range permit area. ... The construction and design of the Sabino Range as it currently exists does not adequately contain the bullets fired therein. ... The bullets are not being contained within the Shooting Range permit area, ...

Appellant contends that there is no connection between the alleged violation and the commanded remedy. The "commanded remedy" set out in the Forest Supervisor's letter is that he is "suspend[ing] all shooting operations authorized by [the club's] special use permit as of 6:30 a.m. on March 10 for a period of 60 days while [he] further assess[es] the situation." I find that there is a sufficient connection between the violation and the remedy.

Response (2):

Appellant contends that the alleged violation is not clear for the suspension decision. The Forest Supervisor's letter states that persons and property are at risk from bullets leaving the Sabino range permit area and that the construction and design of the range does not adequately contain bullets.

I find that the Forest Supervisor's basis for action was the threat to public health and safety caused by bullets leaving the range, and that he provided sufficient notice of that basis in his decision.

Response (3):

Appellant contends that "[t]he 'total containment' addition is arbitrary and beyond the permit." The permit requires the permittee to "maintain the improvements and premises to the standards of ... safety acceptable to the forest officer in charge." The Forest Supervisor is the officer in charge of administering the permit. The Forest Supervisor has the authority to require the permittee to meet safety standards as he deems acceptable. Given the apparent increase in population immediately surrounding the TR&GC range, both from homeowners, schoolchildren and visitors to the National Forest, the Forest Supervisor decided that bullets should not be leaving the permitted area. Nothing in the permit, in Forest Service regulations, in the enabling statutes or the Administrative Procedures Act supports the contention that the Forest Service must allow the continuation of activities which have become unsafe, simply because those uses did not pose as great a threat when they began.

I find that the Forest Supervisor's decision to immediately temporarily suspend shooting activities for 60 days, while he further assesses the situation, to be an appropriate use of his authority in administering the permit and the uses on the Santa Catalina Ranger District. I find that the goal of total containment of bullets is reasonable and neither arbitrary nor beyond the permit.

DECISION

Because of concerns raised by the Appellant about the SCRA at the hearing, the Regional Forester ordered an expert review panel to study the safety of the range and the area surrounding it. We obtained the services of Kenneth Buster, Brian Danielson and Richard Whiting for that panel. The report of Buster et al. unequivocally supports the Forest Supervisor's decision to immediately temporarily suspend all shooting activities at the range, stating: "...the ranges should not be operated in their current configuration, and that modifications should be made over a predetermined period of time to keep bullets and shot within the boundaries of the permit area" (AR 2152 pp. 11, 16, and 22). Appellant has not contested the qualifications, experience or training of these three experts.

Based on information developed after the Forest Supervisor's decision, I find no reason to overturn or modify that decision at this time.

My review of this appeal was conducted in accordance with 36 CFR § 251 subpart C. After a detailed review of the record, I find that the Forest Supervisor's decision for an immediate temporary suspension was proper and based upon the best available information to protect public safety. His actions resulted in a decision that is consistent with the requirements of applicable laws and regulations.

Therefore, I affirm the Forest Supervisor's decision to immediately temporarily suspend all shooting activities with the exception of archery, air guns and BB guns.

In accordance with the provisions of 36 CFR 251.99 and 251.100, a copy of this appeal decision has been sent to the Chief of the Forest Service who will decide, within 15 days of receipt of this decision, whether or not to exercise discretionary review of this decision.

Sincerely,

/s/ Paul Johnson
PAUL JOHNSON
Reviewing Officer
Deputy Regional Forester

cc:
Coronado NF:R03F05A
Chief (1570)
John Ross
Senator Jon Kyl
Senator John McCain
Congressman Jim Kolbe
Congressman Don Young