



United States
Department of
Agriculture

Forest
Service

Gila National Forest
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File Code: 1570

Date: August 29, 2000

Mr. Zeno Kiehne
P.O. Box 391
Reserve, New Mexico 87830

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Appeal 2000-03-06-0002 and Appeal 2000-03-06-0005, Whiterocks Allotment

Dear Mr. Kiehne:

This is my review decision on the appeals you filed on Acting Glenwood District Ranger Russell Ward's decisions for the amended 2000 Annual Operating Plan (AOP) and 100% cancellation of the Whiterocks Term Grazing Permit. My review of this appeal has been conducted pursuant to and in accordance with 36 CFR 251.80. My responses are in the same order as your appeal points and the Deciding Officer's Responsive Statement. Where appropriate, additional comments to the Deciding Officer's response will be made as well as addressing the issues you have raised.

BACKGROUND

The background information provided by the Deciding Officer is incorporated in this review by reference. This information consisted of correspondence from August 3, 1987 through June 1, 2000.

In addition to this information, the following correspondence and actions were taken.

On June 8, 2000, an oral presentation from Mr. Kiehne to Acting Forest Supervisor Nora B. Rasure transpired.

On July 10, 2000, a reply from the permittee to the Responsive Statement was received by the Forest Supervisor.

On July 27, 2000, an oral presentation from Mr. Kiehne to Acting Forest Supervisor Steve Libby transpired.

On July 28, 2000, Reviewing Officer Steve Libby closed the record.



APPEAL CONTENT

Part 1 Address of the appellant and Phone Number

Mr. Zeno Kiehne (505) 533-6715 House
P.O. Box 391 (505) 533-6188 Business
Reserve, NM 87830

Part 2 Written Instrument, Date, Responsible Forest Service Officer

File Code 2230
Letter of April 13, 2000
Signed by Russell Ward, Acting District Ranger, Glenwood RD

Part 3 Description and Date

Illegal Annual Operating Plan Amendment, Letter of February 8, 2000
Cancellation of the grazing permit of the Whiterocks Allotment, Letter of April 13, 2000

Part 4 Adversely Affected by Decision

Permittee will lose ability to continue financial obligations on the permit. This will affect the permittee's ability to make a living and violation of the permittee's civil rights.

FINDINGS:

The following is my evaluation and response to each of the four major issues:

Part 5 Statement of Facts and Issues Raised

A. Production/Utilization Concern

Contention: Appellant contends forage utilization monitoring completed by the District has been done in error, employees were not qualified nor followed scientific procedure, and there has been no determination on the amount of utilization of forage by elk or trespass cattle from the Pueblo Creek allotment. Therefore, this production utilization study will not be used to determine forage utilization for his livestock.

Response: I concur with the Deciding Officer's Responsive Statement on this issue.

The District Ranger is affirmed on this issue.

Contention: Appellant claims his management of the Whiterocks allotment has not violated any terms and conditions of the permit.

Response: I concur with the Deciding Officer's Responsive Statement on this issue.

The District Ranger is affirmed on this issue.

B. Pasture Rotation

Contention: Appellant contends he does not hold authority to regulate the numerous unpermitted activities that are conducted on the Whiterocks allotment that affect his ability to completely ensure a pasture rotation system. Appellant claims gates will not stay shut because of uses such as hunting, sightseeing, prickly pear harvesting, pinon harvesting, private landowners, etc. Appellant claims it is unjustified to require a permittee to maintain rotational program without the USFS participation in regulation of these other uses.

Response: I concur with the Deciding Officer's Responsive Statement on this issue.

The District Ranger is affirmed on this issue.

Contention: On February 8, 2000, appellant claims Ranger Ward informed Pueblo Creek allotment permittee that the boundary fence was down adjoining the Whiterocks allotment. Appellant claims this portion of fence #5085 is still the responsibility of the Pueblo Creek allotment permittee.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. However, the actual date of the letter is February 7, 2000 (Project Record 8.6).

The District Ranger is affirmed on this issue.

Contention: Appellant claims that Ranger Ward then directed that all cattle on the Whiterocks allotment be placed in the Upper pasture. Appellant claims he followed the directions of Ranger Ward even though he appealed the decision. Appellant claims this directive by Ranger Ward then caused the cancellation of the permit on the Whiterocks allotment. Appellant claims Ranger Ward's decision is arbitrary and capricious.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. In addition, an inspection by Monica Klinger dated April 13, 2000, also identified that the permittee's livestock were in the Lower pasture on April 13, 2000 (Project Record 26.0), which further supports the decision to cancel the term permit. Mr. Kiehne was instructed to have livestock out of the Lower and Middle pastures, Pueblo Creek allotment and Marshall Barnes private property by April 10, 2000 (Project Record 19.0). In the same inspection, Monica also observed livestock in the Weedy Flat pasture on April 13, 2000.

The District Ranger is affirmed on this issue.

C. Water Distribution

Contention: Appellant claims that he has requested numerous times for a combined cooperative effort to finish Permit Modification 1-97 with the Forest Service. Appellant contends he has completed numerous improvement projects on the allotment, such as reworking well #5029, reconstructing over 3 miles of pipeline, construction of a new interior fence, and maintenance of other existing fences. Appellant claims these actions have been rewarded with decreases in historic livestock numbers and show cause actions for further reductions.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. In addition, citations to the Kiehne permit (Project Record 2.0), the show cause and decision letters (Project Records 9.2, 12.2, and 19.0) provide further support to the Deciding Officer's Responsive Statement, as well as a document dated October 3, 1997, which indicated the permit holder received and signed a receipt for the materials from Permit Modification 1-97. Also, a correction in the 2nd paragraph of the Response to the 1st Contention to Water Distribution should read Part 2, section **8(i)**, *not section 6(h)*.

The District Ranger is affirmed on this issue.

Contention: Appellant claims the Whiterocks allotment did not benefit from congressional appropriations from Representative Skeen for fence construction and alternate water construction for protection of riparian areas of the San Francisco River.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. In addition, a citation to the Kiehne permit (Project Record 2.0) provides further support to the Deciding Officer's Responsive Statement. The record reveals that the permit was not cancelled because the permittee did not receive appropriations from Representative Skeen.

The District Ranger is affirmed on this issue.

D. Fence # 5085

Contention: Appellant contends fence #5085 is not the responsibility of the Whiterocks allotment permittee. Appellant contends this fence was the responsibility of the Pueblo Creek allotment permittee. Appellant claims the Forest Service modified the terms and conditions of the Term Grazing Permit without following proper procedures for modification of permit.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. In addition, a citation to the Klumker permit (Project Record 1.0) provides further support to the Deciding Officer's Responsive Statement. The permit was waived from Klumker in favor of Kiehne.

The District Ranger is affirmed on this issue.

Part 6 Law, Regulation, and Policy Violation

Contention: Appellant contends Forest Service violated Civil Rights Act, Forest Service Handbook, Forest Service Manual, and all laws pertaining to Forest Service Management of Grazing Permits.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. The Acting District Ranger offered the permittee the opportunity to discuss the situation further in the decision letters dated March 16, 2000 and March 31, 2000 (Project Records 12.2, and 19.0). However, *the willingness to meet with the permittee to hear his issues and concerns* was not specifically stated in these decision letters (Project Records 12.2, and 19.0). Therefore, on June 8, 2000 and July 27, 2000 oral presentations by the permittee were held to solicit the permit holder's issues and concerns (see *Background*). In addition, on February 25, 2000, a meeting was held with the permit holder to discuss compliance with the amended AOP. At this meeting

the permittee received a copy of a show cause letter which was hand delivered on February 25, 2000 (Project Record 9.2).

The District Ranger is affirmed on this issue.

Contention: Appellant claims the maintenance responsibility on fence #5085 was falsified.

Response: I concur with the Deciding Officer's Responsive Statement on this issue which refers to the Contention Response identified in **D. Fence #5085**.

The District Ranger is affirmed on this issue.

Contention: Appellant claims the production utilization studies on the Whiterocks allotment were falsified.

Response: I concur with the Deciding Officer's Responsive Statement on this issue.

The District Ranger is affirmed on this issue.

Contention: Appellant claims the Annual Operating Plan for Whiterocks allotment was falsified.

Response: I concur with the Deciding Officer's Responsive Statement on this issue.

The District Ranger is affirmed on this issue.

Contention: Appellant claims notification procedures were violated; documents signed in September and October were not received until March of the following year.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. However, Zeno did not admit in his appeal that he signed the original AOP. This is a known fact as per the AOP meeting document (Project Record 7.1), but was not stated in the appeal. In addition, John Baldwin received a copy of a letter from NMSU dated September 29, 1999, to the permittee, which had the September 28, 1999 MOU Mediation Agreement attached (Project Record 6.0). The permittee did receive a copy of the 2000 AOP dated October 26, 1999 (Project Record 7.1).

The District Ranger is affirmed on this issue.

Contention: Appellant claims a violation of FOIA occurred in not producing a timely response.

Response: I concur with the Deciding Officer's Responsive Statement on this issue.

The District Ranger is affirmed on this issue.

Part 7 Resolve the Issue

Contention: Zeno contends appeal should be resolved by mediation with Acting Forest Supervisor.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. (see *Background*).

The District Ranger is affirmed on this issue.

Part 8 Relief

Contention: Zeno requests my decision be reversed and his permit reinstated.

Response: I concur with the Deciding Officer's Responsive Statement on this issue. A review of the record reveals consistency with 36 CFR 251.

The District Ranger is affirmed on this issue.

DECISION

After a detailed review of the records, I find the District Ranger documented 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.

Pursuant to 36 CFR 251.87(c), my decision is appealable to 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/ Marcia R. Andre

MARCIA R. ANDRE
Forest Supervisor
Reviewing Officer

cc:
Glenwood RD
RO-Appeals and Litigation