



United States
Department of
Agriculture

Forest
Service

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File Code: 1570-1

Date: October 27, 2000

Mr. Zeno Kiehne
P.O. Box 391
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Certified Mail – Return Receipt Requested

Re: Appeal #00-03-00-0090-A251, Whiterocks Allotment, Glenwood Ranger District, Gila National Forest

Dear Mr. Kiehne:

This letter documents my second level review decision of the appeal you filed on September 12, 2000. The appeal is in regard to two decisions made by Acting District Ranger Russell Ward, herein termed the Deciding Officer. The first is the February 8, 2000, decision to amend your 1999-2000 Annual Operating Plan (AOP) (Doc. 9.0). The second is the April 13, 2000, decision to cancel your term grazing permit on the Whiterocks Allotment (Doc. 24.0). The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

BACKGROUND

By letter dated February 8, 2000, the Deciding Officer amended your 1999-2000 AOP because prior to that date you had already grazed in two pastures which were originally scheduled for use later in the grazing season (Doc. 9.0).

By letter dated April 13, 2000, the Deciding Officer cancelled your term grazing permit for failure to comply with the terms and conditions of your permit. In his letter the Deciding Officer referenced your continued unwillingness to comply with instructions issued to you on October 26, 1999, February 8, 2000, February 24, 2000, March 16, 2000 and March 31, 2000 (Doc. 24.0).

Your first level appeal, request for oral presentation and request for stay were received by Acting Forest Supervisor Rasure on May 12, 2000 (Doc. 31.0). On May 15, 2000, Acting Supervisor Rasure granted your request for an oral presentation and your stay request pending a final agency decision on the merits of your appeal (Doc. 32.0). Due to the commonality between your appeals of March 8, 2000 (Doc. 11.0) and May 10, 2000 (Doc. 31.0), Supervisor Rasure also informed you she would consolidate her response into one decision document. Under the provisions of 36 CFR 251.94, the Deciding Officer prepared and mailed you a copy, on March 27, 2000, and June 13, 2000, respectively of his written responsive statements to your appeals (Docs. 15.0; 35.0). Your reply to the June 13 responsive statement was received by Acting Supervisor Rasure on July 10, 2000 (Doc. 37.0). On July 28, 2000, Acting Forest Supervisor Libby closed the record (Doc. 39.0). Based on her review of the record, newly appointed Forest Supervisor Andre affirmed the Deciding Officer's decision on August 29, 2000 Doc. (40.0).



Your second level appeal was received in this office on September 15, 2000. By letter dated October 3, 2000, I indicated my review decision would be made within 30 days from the date the appeal record was received.

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.

ISSUE 1: Modification of 2000 AOP.

Contention: The appellant (Mr. Zeno Kiehne) contends the February 8, 2000, amendment of the AOP was illegal.

Response: The record documents that the 1999-2000 AOP for the Whiterocks Allotment called for the following pasture rotation: Middle Pasture August 15, 1999, through November 6, 1999; Upper Pasture November 6, 1999 through February 15, 2000; Lower Pasture February 15, 2000 through April 15, 2000; Bull Pasture April 16, 2000 through May 31, 2000 (Doc. 8.0). The record further documents that until approximately February 8, 2000, the pasture rotation specified in the 2000 AOP was not followed. Rather, the appellant's cattle were scattered in the Middle and Lower Pastures and on private lands along the San Francisco River. On February 8, 2000, the Deciding Officer amended the pasture rotation in the 2000 AOP as follows: Middle Pasture rest the remainder of the 2000 grazing season; Lower Pasture rest the remainder of the 2000 grazing season; Upper Pasture graze February 2, 2000, through April 15, 2000; Bull Pasture rest the remainder of the 2000 grazing season (Doc. 9.0).

Finding: The appellant failed to follow the pasture rotation specified in his 1999-2000 AOP. The Deciding Officer had full authority to amend the pasture rotation specified in the 2000 AOP in order to ensure the Middle, Lower, and Bull pastures were not overgrazed.

ISSUE 2: Cancellation of the appellant's term grazing permit on the Whiterocks Allotment.

Contention: The appellant contends he has not violated any of the terms and conditions of his permit and has tried to the best of his ability to maintain a rotation program.

Response: In his letter cancelling the appellant's permit the Deciding Officer specifically cites the appellant's continued unwillingness to comply with instructions issued on October 26, 1999, February 8, 2000, February 24, 2000, March 16, 2000, and March 31, 2000 (Doc. 24.0).

A review of the record reveals that the pasture rotation for the 1999-2000 grazing season was clearly portrayed in the 1999-2000 AOP (Doc. 8.0). The record is equally clear that leading up to the cancellation of the permit the appellant was warned repeatedly he was in violation of the terms and conditions of his permit. On August 11, 1999, previous District Ranger Baldwin suspended ten percent of the appellant's permitted numbers for the 1999-2000 grazing season (suspension was implemented by delaying entry of livestock onto the allotment until September 9, 1999, which was equal to a 10 percent suspension in numbers) for failure to follow the pasture rotation specified in the annual operating plan and for failure to maintain fences as required under part 2 of the term grazing permit (Doc. 3.1). The suspension action was based on a show cause letter dated April 27, 1999 (Doc. 2.8).

On August 31, 1999, Ranger Baldwin wrote the appellant asking him to show cause why he should not cancel ten percent of his permitted numbers and suspend an additional thirty percent of the permitted numbers for three years. This action was based on the appellant violating the ten percent suspension action by placing livestock on the forest on August 15, 1999, failing to submit a grazing application for the 1999-2000 grazing season, and placing livestock on the forest without payment of fees (Doc. 3.1). A subsequent mediation session in accordance with 36 CFR 251.103 resulted in a ten percent suspension of total animal units between August 15, 1999, and October 15, 1999. This suspension was reflected in the 1999-2000 Annual Operating Plan signed by the appellant on October 26, 1999 (Docs. 6.0; 8.0).

The appellant was also given every opportunity between October 26, 1999, and April 13, 2000, to come into compliance with the terms and conditions of his permit but failed to do so. Forest Service personnel worked continuously with the appellant to gain his cooperation in following the pasture rotation specified in the 1999-2000 AOP. On February 8, 2000, the Deciding Officer in a letter to the Appellant stated "...it took almost 3 months to get the cattle in the appropriate pasture. In addition, during this period, cattle were scattered in the Lower and Middle pastures and on private lands along the San Francisco River.... This situation is simply inexcusable. We will not tolerate any future violations of your Annual Operating Plan." The Deciding Officer went on to state "This is not the first incident of non-compliance with your Term Grazing Permit. Problems with non-compliance have been documented as far back as 1996. We will no longer tolerate any violation of the terms of your Term Grazing Permit. If a problem arises, you need to resolve it quickly. Future violations will result in my decision to take administrative action against your Term Grazing Permit." (Doc. 9.0).

On February 24, 2000, the Deciding Officer sent the appellant a show cause letter informing the appellant he intended to cancel ten percent of the permitted numbers because the appellant had cattle in the Middle Pasture, Lower Pasture, and on the Pueblo Creek Allotment in violation of the February 8, 2000, amended AOP. In this same letter the appellant was directed to remove his livestock from the Middle Pasture, Lower Pasture, and Pueblo Creek Allotment and place them in the Upper Pasture. The appellant was informed that failure to comply with these directions would result in further administrative action. In addition, the appellant was given until March 10, 2000, to respond in writing why this action would be unreasonable (Doc. 9.2). No response was ever received from the appellant (Doc. 12.2).

On March 16, 2000, the Deciding Officer sent the appellant a letter canceling ten percent of the permitted numbers. In this same letter, the Deciding Officer informed the appellant he intended to cancel thirty percent of the permitted numbers because the appellant had not removed cattle from the Middle and Lower Pastures, and from the Pueblo Creek Allotment as directed on February 24, 2000. The appellant was again directed to remove his livestock from the Middle Pasture, Lower Pasture, and Pueblo Creek Allotment and place them in the Upper Pasture by March 27, 2000. The appellant was informed that failure to comply with these directions would result in further administrative action. In addition, the appellant was given until March 27, 2000, to respond in writing why this action would be unreasonable (Doc. 12.2). Based on the appellant's March 27 response, the Deciding Officer concluded that the appellant had not presented any issues which were not previously addressed (Doc.19.0).

On March 31, 2000, the Deciding Officer sent the appellant a letter withdrawing his March 16, 2000, decision cancelling ten percent of the appellant's permitted numbers and making a new decision to cancel 30 percent of the appellant's permitted numbers. In this same letter the Deciding Officer informed the appellant he intended to cancel the appellant's entire term grazing permit for failure to follow his previous instructions of October 26, 1999, February 8, 2000, February 24, 2000, and March 16, 2000. The appellant was again directed to remove his livestock from the Middle Pasture, Lower Pasture, and Pueblo Creek Allotment and place them in the Upper Pasture by April 10, 2000. The appellant was informed that failure to comply with these directions would result in further administrative action. In addition, the appellant was given until April 10, 2000, to respond in writing why this action would be unreasonable. (Doc. 19.0). Based on the appellant's April 4 response the Deciding Officer concluded the appellant had not presented any issues which were not previously addressed (Doc.24.0).

On April 13, 2000, the Deciding Officer sent the appellant a letter withdrawing his March 31, 2000, decision cancelling thirty percent of the appellant's permitted numbers and making a new decision to cancel 100 percent of the appellant's permitted numbers. The appellant was directed to remove all his livestock from the allotment by April 15, 2000 (Doc. 24.0).

The Secretary of Agriculture's regulations at 36 CFR 222.4(a)(4) provide the authority for Forest Officers to cancel or suspend a permit if a permittee does not comply with the provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based.

Part 1(3) of the appellant's term grazing permit states: "It is fully understood and agreed that this grazing 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, or any of the regulations of the Secretary of Agriculture on which this permit is based, or the instructions of Forest officers issued thereunder; 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 season of use necessary because of resource conditions..." (Doc. 2.0).

Part 2(2) provides that prior to each grazing season the Forest Service will “send the permittee a Bill for Collection specifying for the current year the kind, number, and class of livestock allowed to graze, the period of use, the grazing allotment, and the grazing fees. The bill when paid, authorizes use for that year and becomes a part of this permit.” (Doc. 2.0).

Part 2(8)(d) states: “The permittee will allow only the numbers, kind, and class of livestock on the allotment during the period specified in Part 1 hereof or the annual Bill for Collection, including any modifications made as provided for in Section 8(c). If livestock owned by the permittee are found to be grazing on the allotment in greater numbers, or at times or places other than permitted in Part 1 hereof, or specified on the annual Bill for Collection, the permittee ... may face suspension or cancellation of this permit.” (Doc. 2.0).

Part 3(8) of the permit states “The Annual Operating Plan (AOP) will be incorporated as part of this permit.” (Doc. 2.0).

Finding: The record clearly shows that the appellant failed to follow the AOP and repeated instructions of the Deciding Officer to come into compliance with the AOP during the 1999-2000 grazing season. The record also clearly shows Ranger Baldwin and the Deciding Officer made repeated attempts through mediation and less severe administrative actions to obtain the appellant’s compliance with the terms and conditions of his term grazing permit. The appellant’s continued unwillingness to comply with instructions issued by the Forest Officer in charge is a clear violation of the terms and conditions of the term grazing permit which he signed on July 23, 1996.

ISSUE 3: Fence number 5085.

Contention: The appellant contends it is not his responsibility to maintain a portion of fence number 5085 which serves as a boundary between the Pueblo Creek and the Whiterocks Allotments. The appellant further alleges the Forest Service assigned maintenance responsibilities for the fence to him without following proper procedures for modification of the permit. The appellant also states construction of fences will place a hardship upon him.

Response: In a letter dated April 30, 1999, Ranger Baldwin acknowledged there was a discrepancy between the map accompanying the term grazing permit and the maintenance responsibility list included in part 3 of the permit. The map showed fence number 5085, from Indian Hill and the junction of fence 5090, to the San Francisco River to be the responsibility of the appellant. However, the maintenance responsibility list showed the entire fence as being the responsibility of the Pueblo Creek permittee. By letter dated April 30, 1999, Ranger Baldwin amended Part 3 of the appellant’s term grazing permit by providing him with a corrected responsibility list (Doc. 3.0).

The record clearly shows that as part of the mediated agreement of September 23, 1999, the appellant agreed to meet on the allotment with Forest Service personnel to evaluate the fence (Doc. 6.0). On October 12, 1999, the appellant and Forest Service personnel met on the Whiterocks Allotment. At this meeting it was agreed that two miles of the fence separating the Lower Pasture and the Pueblo Creek Allotment needed to be reconstructed in order to effectively control livestock movement. The appellant agreed to reconstruct one mile of the fence and Forest Service personnel agreed the Forest Service would reconstruct the other mile (Docs. 7.0; 11.1; 12.0). This agreement was made a part of the 1999-2000 AOP, Section IX (Doc. 8.0). It was further documented that before the lower pasture was grazed again reconstruction of the fence would have to be completed (Docs. 8.0; 9.0). The Forest Service portion of the fence reconstruction was completed on March 14, 2000 (Doc. 11.1).

Finding: Ranger Baldwin acted within his authority to correct the maintenance list in part 3 of the permit when an error was discovered between the maintenance list and the maintenance map. As part of the mediated agreement the appellant agreed to meet on the ground with Forest Service personnel to resolve issues related to maintenance of the fence. Resolution was reached on the ground with the Forest Service and the appellant each agreeing to reconstruct a mile of the fence. It is Forest Service policy to cooperate with grazing permittees in the construction of range improvements such as fences. Therefore, a hardship was not placed upon the appellant.

DECISION

After review of the appeal record, I find that the Deciding Officer's decision to cancel your term grazing permit was based on a reasonable assessment of repeated violations of the terms and conditions of your permit.

The Deciding Officer's decision is in conformance with applicable laws, regulations, policies, and procedures. Therefore, I affirm the Deciding Officer's decision to cancel your term grazing permit on the basis of permit violations pursuant to the terms and conditions contained in the term grazing permit which you signed on July 23, 1996.

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, Gila NF
District Ranger, Glenwood RD
Director, Rangeland Management, R3

Appeals and Litigation Staff, R3