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Agriculture

Forest  
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File Code: 1570-1/2200

Date: November 25, 2003

Hugh B. McKeen, Jr., and Margie McKeen  
HC 61, Box 175  
Glenwood, NM 88039

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED**

RE: Appeal #03-03-06-0010-A251, Cedar Breaks 25% Permit Cancellation, Glenwood RD,  
Gila NF

Dear Mr. and Mrs. McKeen:

This letter documents the second-level review decision of the appeal filed regarding District Ranger Raley's (Deciding Officer) decision to cancel 25% of the permitted numbers on the term grazing permit for the Cedar Breaks Allotment. The Deciding Officer's decision is documented in a letter dated October 8, 2002. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

### **BACKGROUND**

The Deciding Officer made a decision to cancel 25% of the permitted numbers on the term grazing permit for the Cedar Breaks Allotment on October 8, 2002 (Doc. 45). In his decision letter, the Deciding Officer stated, "Based on these continued incidents of noncompliance, the documentation in my September 13, 2002 letter, and my concern about present and continuing resource damage, I am, with this letter, withdrawing my June 5, 2002 decision, which canceled 5% of your Term Permitted Numbers and suspended an additional 20% of your Term Permit Numbers for a period of two years, and issuing a new decision to cancel 25% of your Term Permitted Numbers. Your Term Grazing Permit is hereby modified from 145 Cattle (Cow/Calf) to 108 Cattle (Cow/Calf), effective immediately."

The first-level appeal was filed on November 16, 2002 (Doc. 54). Also in the appeal was a request for an oral presentation and mediation. On November 27, 2002, Forest Supervisor Andre (Reviewing Officer) indicated that the appeal was timely and would be processed in accordance with 36 CFR 251. The Reviewing Officer also granted the request for an oral presentation (Doc. 57.1). On December 10, 2002, the Reviewing Officer granted a stay of the Deciding Officer's decision for the duration of the mediation period (36 CFR 251.91(a)). In this same letter, the Reviewing Officer also granted the request for a stay of the Deciding Officer's decision pending the outcome of the administrative appeals process (Doc. 58.1). On January 24, 2003, the Reviewing Officer notified the appellants that since a mediated agreement could not be reached, the time frames and procedures applicable to an appeal were reinstated. Under the provisions of 36 CFR 251.94, the Deciding Officer completed his written responsive statement to the appeal on April 4, 2003 (Doc. 77). On June 2, 2003, the Reviewing Officer notified the appellants that the oral presentation was scheduled for June 16, 2003 (Doc. 82).



On July 10, 2003, the Reviewing Officer indicated she was closing the record (Doc. 84). Based on her review of the record, the Reviewing Officer affirmed the Deciding Officer's decision on August 22, 2003.

The second-level appeal was received in this office on September 9, 2003.

### **POINTS OF APPEAL**

In the first-level appeal dated November 16, 2002, the appellants requested that the 25% reduction in "allotment numbers" be re-instated. The review of this appeal was confined to the substantive points raised in the appeal related to the 25% cancellation of permitted numbers for the term grazing permit on the Cedar Breaks Allotment, 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:** Withdrawal of one decision and replacing it with another is arbitrary and capricious.

**Contention:** The appellants contend that by withdrawing the June 5, 2002, decision and issuing a new decision, the Deciding Officer denied the appellants their day in court.

**Response:** The Secretary of Agriculture's regulations, 36 CFR 251.93(c), state, "The Deciding Officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all parties to the appeal and the Reviewing Officer must receive written notice."

The Deciding Officer provided appropriate notification that he was withdrawing his decision in a letter dated October 8, 2002, in which he stated, "Based on these continued incidents of noncompliance, the documentation in my September 13, 2002 letter, and my concern about present and continuing resource damage, I am, with this letter, withdrawing my June 5, 2002 decision, which canceled 5% of your Term Permitted Numbers and suspended an additional 20% of your Term Permit Numbers for a period of two years, and issuing a new decision to cancel 25% of your Term Permitted Numbers. Your Term Grazing Permit is hereby modified from 145 Cattle (Cow/Calf) to 108 Cattle (Cow/Calf), effective immediately." (Doc. 45)

In this same letter, the Deciding Officer provided the appellants with appeal rights relating to his new decision to cancel 25% of the permitted numbers of the term grazing permit.

**Finding:** The Deciding Officer's withdrawal of his June 5, 2002, decision is consistent with the Secretary of Agriculture Regulations 36 CFR 251, Subpart C. The Secretary of Agriculture Regulations 36 CFR 251, Subpart C, offer appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written instruments that authorize the occupancy and use of National Forest System lands. The Deciding Officer followed Agency procedures by providing the appellants with the opportunity to appeal his new decision that canceled 25% of numbers of livestock on the term grazing permit for the Cedar Breaks Allotment. The appellants have been provided due process through an opportunity to correct the violation and through the USDA Forest Service administrative appeals process.

**ISSUE 2:** The NEPA process between the allotment owner and the Forest Service has not been approved.

**Contention A:** The appellants contend that since the NEPA process is under appeal, the Forest Service cannot legally include monitoring requirements similar to those in the NEPA decision as a part of the annual operating instructions.

**Response:** Annual operating instructions are required for the proper administration of grazing under the provisions of the term grazing permit. Part 2, Section 8, of all term grazing permits provides broad discretion for Forest Service line officers to issue instructions to permittees, as needed, for resource protection. The contents of annual operating instructions are at the discretion of District Rangers for each grazing allotment and are responsive to individual allotment resource conditions and unique management needs. The record reflects that the annual operating instructions for the 2002 grazing year identified the grazing system, approximate time frames for grazing pastures, utilization standards, monitoring requirements, and livestock distribution guidelines (Doc. 6). The annual operating instructions for the 2001 grazing year were essentially the same as 2002, with exception of the time frame pastures would be grazed (Doc. 6.2).

**Finding:** The record reflects the annual operating plans have been consistent with the provisions of the term grazing permit and the principles of sound rangeland management. There is nothing in the record that indicates the Deciding Officer included unreasonable requirements.

**Contention 2:** The appellants contend it is wrong to hold them accountable for monitoring when they have not been trained in the process.

**Response:** In the first-level appeal, the Reviewing Officer addressed the appellants' assertion that they had not been trained in the monitoring process. In response to Issue 5, the Reviewing Officer concluded, "The Appellant has been invited, or has directly participated in monitoring, on several occasions (AR 12.0, 23.0, 33.0, 43.0, 44.0, 48.0, 50.0, 71.0 and 72.0). In addition, on 1/28/03, the Glenwood Ranger District and Range Improvement Task Force hosted a monitoring workshop on the Cedar Breaks Allotment. The purpose of this workshop was to review a new methodology developed by the Glenwood Ranger District, and reviewed by Dr. Holechek, to implement monitoring on the Cedar Breaks Allotment (AR 69.0). The Appellant, Range Improvement Task Force, New Mexico Department of Agriculture, and Forest Service participated in this workshop (AR 70.0)." The documents referenced by the first-level Reviewing Officer span a period from February 26, 2001, through October 23, 2002. The appellants were invited on all monitoring trips and actually participated in 55% of the trips.

**Finding:** Monitoring of grazing is necessary to ensure allowable forage use standards are not exceeded and that the objectives for proper rangeland management are met. Although the appellants are responsible for ensuring that utilization levels are not exceeded on the Cedar Breaks Allotment, the Forest Service does periodic compliance checks. This is consistent with the direction in which the Agency is moving in the effort to collaborate more closely with permittees, universities, and other third parties in the management of rangeland resources. Additionally, the record reflects the appellants had ample opportunity to learn basic monitoring skills.

## **DECISION**

In addition to responding to the substantive points in the appeal, the record was reviewed to ensure the appellants were given proper written notice and an opportunity to demonstrate compliance before administrative action was taken against their term grazing permit.

On May 15, 2001, the Deciding Officer made a decision to suspend 20% of the McKeen term grazing permit on the Cedar Breaks Allotment for a period of one year, after the permittee repeatedly failed to follow the Deciding Officer's instructions to keep permitted livestock out of occupied loach minnow habitat in the San Francisco River, Gila National Forest (Docs. 0.1; 1.0).

Subsequently, the Deciding Officer and the appellants entered into mediation, as provided for in 36 CFR 251.103. Mediation was successful and the Deciding Officer's decision was modified to suspend 5% of permitted numbers for a period of one year, effective June 1, 2001. The mediated agreement also provided that, "Any further violation of the terms and conditions of the permit will result in 5% cancellation of the permit and an additional 20% suspension of permitted numbers for two years." "Specifically, a term permit violation was defined to occur if any livestock were observed within the 35 acres of National Forest along the San Francisco River, and these livestock were not removed within 12 hours of permittee notification." (Docs. 77; 3)

On May 24, 2002, the Deciding Officer sent the appellants a Notice of Non-Compliance for violating the terms and conditions of their permit. In his Notice of Non-Compliance, the Deciding Officer identified that the appellants were in violation of Part 2, Section 8, of their term grazing permit for not complying with the annual operating plan. Section E (7) of the annual operating instructions specifically states, "Livestock are not authorized on National Forest Land in the San Francisco River or its floodplain." (Doc. 6.0) The Deciding Officer advised the appellants what must be done to achieve compliance, specifically, "...remove all livestock immediately from National Forest System Lands on the San Francisco River." The Deciding Officer set a period of time to correct the violation and achieve compliance, specifically, "You will have until the end of the day on Saturday, May 25, 2002 to remove all livestock." Lastly, the Deciding Officer included a warning that the appellants' failure to correct the violation within the prescribed time could result in the initiation of permit suspension or cancellation proceedings by stating, "Failure to correct this violation within the prescribed time period, as well as preventing further livestock access to these lands, may result in adverse action against your term-grazing permit." (Doc. 11)

On May 30, 2002, the Deciding Officer notified the appellants by certified mail that approximately 40 head of their cattle were in the San Francisco River and its floodplain. In his letter, the Deciding Officer stated, "Once again, I want to re-iterate that you are not authorized to use National Forest System lands along the San Francisco River." (Doc. 13.0)

On June 5, 2002, the Deciding Officer sent the appellants a certified letter stating, "As a result of observations on May 23 and May 28, 2001, and specifically the Notice of Non-Compliance Letter that was hand delivered to you on May 24, 2002, I am canceling 5% of your Term Permitted Numbers and suspending an additional 20% of your Term Permit Numbers for a period of two years. This permanent cancellation and additional suspension will begin immediately. Therefore, you are permitted to graze 110 head of livestock on the Cedar Breaks allotment from June 5, 2002 thru June 4, 2004". (Doc. 14)

On August 8, 2002, the Deciding Officer sent the appellants a certified letter amending the annual operating instructions for the 2002 grazing season (March 1 2002, through February 28, 2003) (Doc. 25.0). The Deciding Officer specifically stated, "On August 1, 2002, a field inspection was conducted on the South Cedar Breaks Pasture. This inspection has identified that

you are in non-compliance on Alma Flat within South Cedar Breaks Pasture due to over utilization of herbaceous forage. Additionally, forage is not available there; therefore, I am directing you to remove all livestock from the South Cedar Breaks Pasture into North Cedar Breaks pasture. You are authorized to graze livestock on Stout Mesa within North Cedar Breaks Pasture from 8/1/02 to 9/1/02 ... Time frames are estimates. Assigned utilization standards (following) should supersede dates when use standards are met for a given pasture. If utilization levels are exceeded in a portion of a pasture, such as a key area, ridge top or mesa, cattle must be removed from the entire pasture unless reasonable management can be attained in the pasture which controls cattle access and use to the area in which utilization has been reached....” (Doc. 25.0)

On August 23, 2002, the Deciding Officer sent the appellants a certified letter notifying them approximately 7 head of livestock still remained in the South Cedar Breaks Pasture. In his letter, the Deciding Officer stated, “As per the August 8, 2002 Amendment to your Annual Operating Plans/Instructions cattle are not approved in the South Cedar Breaks Pasture due to resource concerns. I am allowing you until Wednesday, August 28, 2002, to move the remainder of cows into the North Cedar Breaks Pasture, as described in the August 8, 2002 AOP/I amendment.” (Doc. 31.1)

On September 12, 2002, the Deciding Officer sent the appellants a Notice of Non-Compliance for violating the terms and conditions of their permit. In his Notice of Non-Compliance, the Deciding Officer identified that the appellants were in violation of part 2, paragraph 8(a) of their term grazing permit for not complying with the August 8, 2002, letter amending the annual operating instructions for the 2002 grazing season. Specifically, the Deciding Officer stated, “On September 6<sup>th</sup> and 8<sup>th</sup>, 2002, livestock were observed in the South Cedar Breaks pasture. Failure to follow my instructions is a violation of the terms and conditions of your grazing permit, specifically part 2, paragraph 8(a). ...In addition, excess utilization has been documented in the South Cedar Breaks pasture in the Alma Flat area, based on an August 1, 2002 inspection report....” The Deciding Officer advised the appellants what must be done to achieve compliance, specifically, “...remove all your cattle from the South Cedar Breaks Pasture ... and follow the grazing schedule outlined in your Annual Operating Instructions. In order to achieve compliance throughout the remainder of the 2002 grazing season as well as in subsequent years in reference to meeting utilization standards you must move your livestock out of a pasture before maximum use levels specified in your annual operating instructions are exceeded.”

The Deciding Officer set a period of time to correct the violation and achieve compliance, specifically, “...you must remove all your cattle from the South Cedar Breaks Pasture by September 13, 2002...” Finally, the Deciding Officer included a warning that the appellants failure to correct the violation within the prescribed time could result in the initiation of permit suspension or cancellation proceedings by stating, “Your failure to remove all your cattle from the South Cedar Breaks Pasture by September 13, 2002 and follow the grazing schedule outlined in your Annual Operating Instructions will result in the initiation of permit suspension or cancellation proceedings. In addition, any subsequent violations of excessive utilization may result in permit suspension or cancellation. The Cedar Breaks Allotment will be inspected on September 14, 2002, to determine if you have complied with my instructions. If you comply with my instructions prior to September 13<sup>th</sup>, please notify me by phone ...” (Doc. 36.0)

On October 8, 2002, the Deciding Officer notified the appellants by certified mail that, based on the October 3, 2002, monitoring, forage utilization in the Community Pasture exceeded 80 percent. In his letter, the Deciding Officer stated, "Utilization standards are in place for all pastures on the allotment. Your Annual Operating Plan/Instructions and every amendment you have received specify **Adherence to utilization levels is mandatory and should be the limiting factor in adjusting grazing management. Adjustments in numbers, rotation schedule, or season of use will be made if allowable use standards are met. Cattle will be moved to the next scheduled pasture or off the allotment when these forage utilization standards are met.**' ...In a Notice of Non-Compliance sent to you on September 12, 2002, I specifically stated that; **In order to achieve compliance throughout the remainder of the 2002 grazing season as well as in subsequent years in reference to meeting utilization standards, you must move your livestock out of a pasture before maximum use levels specified in your annual operating instructions are exceeded.**' Based on these continued incidents of noncompliance, the documentation in my September 13, 2002 letter, and my concern about present and continuing resource damage, I am, with this letter, withdrawing my June 5, 2002 decision, which canceled 5% of your Term Permitted Numbers and suspended an additional 20% of your Term Permit Numbers for a period of two years, and issuing a new decision to cancel 25% of your Term Permitted Numbers. Your Term Grazing Permit is hereby modified from 145 Cattle (Cow/Calf) to 108 Cattle (Cow/Calf), effective immediately. In addition you are directed to remove all livestock from the Community Pasture ... no later than the end of the day on October 10, 2002. As you discussed with Cynthia and Ed, livestock may be moved to the East CCC Pasture, or as you identified, your private land. **In order to achieve compliance throughout the remainder of the 2002 grazing season as well as in subsequent years, you must move your livestock out of a pasture before maximum use levels specified in your annual operating instructions are exceeded."**  
(Doc. 45.0)

After review of the appeal record, I find that the appellants were given proper written notice and an opportunity to demonstrate compliance before administrative action was taken against their term grazing permit. I have concluded 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. I affirm the Deciding Officer's decision to cancel 25% of your grazing permit.

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

Sincerely,

/s/ Abel M. Camarena  
ABEL M. CAMARENA  
Appeal Reviewing Officer,  
Deputy Regional Forester

cc: David M Stewart, Mailroom R3 Gila, Christina Gonzalez, Larry Raley