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Department of
Agriculture

Forest
Service

Southwestern
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File Code: 1570-1

Date: March 31, 1999

J. R. Houghtaling, et al.
Route 11 Box 250
Silver City, NM 88061

Certified Mail - Return Receipt Requested
P 556 955 293

Re: Appeal Decision of Term Grazing Permit Cancellation - Gila National Forest

Dear Mr. Houghtaling:

This letter documents my second level review decision on the appeal (#99-03-00-0030-A251) you filed regarding cancellation of your term grazing permit (Redstone Allotment). The appeal relates to a decision issued by District Ranger Gerald Engel, Silver City Ranger District, Gila National Forest, concerning the cancellation of your term grazing permit in its entirety for non-compliance with the terms and conditions and for not complying with the instructions of the District Ranger.

Appeal Record Review

A. District Ranger Engel issued a decision on August 3, 1998, to cancel your term grazing permit for non-compliance with the terms and conditions of your permit and for not following a Forest Officer's instructions associated with the administration of your term grazing permit (Doc. 85).

B. On September 9, 1998, you filed an appeal of District Ranger Engel's decision to cancel your term grazing permit. The appeal consisted of two letters, one signed by you and the other signed by Jerry Houghtaling (Doc. 88 and 90).

C. District Ranger Engel provided you with information on the USDA, state certified mediation program during the November 20, 1998, meeting. This meeting was documented in a letter dated November 23, 1998, (Doc. 94). The record does not reflect any interest on your part to pursue mediation through this program.

D. District Ranger Engel met with you on December 2, 1998, to discuss his decision to cancel your term grazing permit, and he had also informed you that consideration had been given to all available information, including your comments.

E. District Ranger Engel submitted his responsive statements on the first level appeal on December 3, 1998.

F. Roger Lamb submitted comments on your behalf to District Ranger Engel's responsive statements on December 23, 1998.



G. On January 15, 1999, you made an oral presentation to Forest Supervisor Camarena prior to his issuance of a decision on your first level appeal. Abel Camarena, Forest Supervisor ruled on the first level of this appeal on February 16, 1999, affirming District Ranger Engel's decision to cancel your term grazing permit in its entirety.

H. On February 22, 1999, you filed a timely appeal, requesting a second level review of the administrative actions initiated by District Ranger Engel concerning the cancellation of your term grazing permit, issued March 10, 1993, (Doc. 34) and as modified on September 13, 1994, (Doc. 47), for the Redstone Allotment.

J. My review of this appeal has been conducted pursuant to and in accordance with 36 CFR 251 Subpart C, and is consistent with applicable laws, regulations, orders, policies, and procedures. I have thoroughly reviewed the appeal record, therefore, my review decision also incorporates, by reference, the entire appeal record.

Points of Appeal

Your original appeal did not clearly state your reasons for appealing District Ranger Engel's decision. My second level review evaluates your appeal based on Forest Supervisor Camarena's decision letter of February 16, 1999, the responsive statement provided District Ranger Engel in response to your appeal, your appeal letters, and your comments to the responsive statement.

For purposes of clarity, I have attempted to identify the key issues contained in your appeal letters. I have also considered the comments submitted by Roger Lamb in an attempt to define your points of appeal. Each appeal issue is a separate heading with a separate response.

ISSUE A. The permittee believes that he has a right or an entitlement to graze on the allotment due to the purchase he has made in acquiring the permit.

Response: The issuance of a Term Grazing Permit does not constitute property right or interest in National Forest System (NFS) lands. The purchase that was made is a private ranch headquarters (private land that qualifies as base property), permitted livestock, or both, for the purpose of qualifying for a term grazing permit (Doc. 34).

Congress established that a grazing permit is a privilege through the Granger-Thye Act of April 24, 1950, (section 19) and the Federal Land Policy and Management Act of October 21, 1976, [section 402(h)]. Both of these statutes state that the issuance of grazing permits in no way grants any right, title, interest, or estate in or to lands or resources held by the United States. A grazing permit is a privilege and does not convey any right, title, or interest to NFS lands.

Findings: The appellant does not have any right or entitlement to graze based solely on the purchase made to qualify for issuance of a permit. I find that the actions of the District Ranger are consistent with applicable regulations and agency policy.

ISSUE B. Problems on the allotment center around cattle use of the Gila River, but the Forest Service has not considered allowing the permittee to manage the allotment without the river included in the allotment.

Response: The significance of the Gila River, the need to maintain water gaps and other fences, and constant management of livestock distribution were identified as essential components to effectively managing the Redstone Allotment (Doc. 1). These factors were discussed between yourself and District personnel before you acquired the term grazing permit (Doc. 1).

The Gila River is separated from the rest of the pastures by a fence(s) (Doc. 19) and it has been your contention that cattle gain access to the river via open gates. On August 6, 1990, (Doc. 19), District Ranger Wayne Buckner replied acknowledging that gates have been left open which contribute towards cattle gaining access to the Gila River pasture. Ranger Buckner encouraged you to continue working at controlling cattle access to the river by riding and checking gates along trails to the river as part of your routine maintenance. Ranger Buckner suggested looking at alternative solutions to the gate problem. In that same letter, Ranger Buckner referenced where FS personnel had sighted cattle in the river pasture on three separate occasions. The central issue here had been that cattle were found in a pasture long after they should have been removed (Doc. 14, 17, 18, 19).

The record reflects that cattle were annually found in the river pasture for long periods of time (refer to Response to Issue C). Cattle were also found during the winter months along the river outside of its scheduled grazing period (Doc. 29). The appeal record contains further documentation that after an initial partial suspension of permitted numbers, cattle continued to be found in the adjoining allotments and in the wrong pastures within the Redstone Allotment. This was especially true with respect to the River pasture since it had been frequently grazed by your cattle outside of scheduled grazing periods. It is evident from the record that attempts to exclude grazing from the River pasture have not been successful. The permittee has not been successful at controlling livestock within the confines of pasture division fences or within the allotment in the past. The record reflects that there is virtually no indication that grazing use of the Redstone Allotment can successfully occur and still meet protective measures for the Gila River.

Documentation in the record (Doc. 33) addresses the need for substantial maintenance of the Buckmore-River pastures division fence, even though it was recognized as needing reconstruction. As a stop gap measure, the District Ranger offered to provide one mile of fence materials to the permittee for upgrading the division fence until it could be completely rebuilt. The record reflects that the permittee showed no interest in utilizing the fence materials made available by the FS for the Buckmore-River fence (Doc. 52, page 4).

Findings: I find that the District Ranger's actions are consistent with applicable laws and regulations. Authorizing use in other pastures that do not contain the Gila River would not have insured rest of the riparian zone due to the lack of the permittee's past performance in maintaining fences.

ISSUE C. The permittee has tried to comply with the instructions issued by the District Ranger and manage the livestock according to the Term Grazing Permit requirements.

Response: It is true that the permittee has tried to comply with the FS annual grazing instructions and the terms and conditions of the term grazing permit. The record contains the appellant's responses (Doc. 18,26,31,41,45,46,48,50,68,79,88,90,97) stating the types of actions that have been conducted to manage the permitted cattle. There is no evidence in the record, however, documenting that the permittee completed the required tasks as instructed by the District Ranger. Only one instance (Doc. 40) reflects that the permittee may have almost completed removal of cattle from the River pasture, although it suggests that there still may be cattle remaining. The record contains an overwhelming amount of documentation that repeatedly addresses livestock found in the wrong pastures or the permittee failing to follow Forest Officer's instructions (Doc. 17, 19, 22, 25, 29, 30, 35, 42, 43, 47, 52, 58, 59, 60, 63, 67, 71, 78, 80, 81, 85).

The District and Forest personnel have recognized the difficulty in managing such a large allotment in such remote and rugged terrain. The District Ranger tempered his actions with moderation, allowing extra time through extension of due dates to allow the permittee to accomplish the required tasks. Adverse actions against the permit were not taken until a reasonable amount of follow-up notices were issued which afforded the permittee more time to succeed. In spite of this, however, compliance with instructions and permit terms and conditions were not achieved.

Findings: While the permittee has tried to comply with instructions issued by the District Ranger, the record clearly documents numerous uncorrected violations of the term grazing permit. I find that the District Ranger has acted within his authority according to applicable regulations and agency policy.

ISSUE D. It is not appropriate to leave the allotment without letting livestock graze it.

Response: The subject of this appeal concerns the issue of whether or not the District Ranger acted properly (within authority) in cancelling the term grazing permit for justifiable reasons as provided for in regulations, law, or policy. The issue is not whether grazing is an appropriate use of the Redstone Allotment. Response to Issue C is incorporated by reference. The District Ranger documented on numerous occasions that: 1) violations of the annual operating plan repeatedly occurred and, 2) terms and conditions of the permit were not followed. Based on demonstrated inability of the permittee to correct the deficiencies and after repeated notices of violations had been issued, the District Ranger ultimately cancelled the term grazing permit.

Findings: I find the District Ranger's actions were proper, within his authority and consistent with regulations and agency policy.

ISSUE E. The Forest Service has not properly considered the nature of the terrain in terms of practical management of the allotment and livestock as well as the inherent problems associated with other forest users.

Response: The response to "Issue C" is incorporated by reference. The record clearly reflects that prior to acquiring the permit, the permittee was advised of the conditions on the allotment

and that substantial work would be necessary to properly manage the allotment and comply with management requirements and permit terms and conditions (Doc. 1 and 2).

The District provided ample time through extending deadlines for completing cattle movements as an acknowledgment of the difficulty in managing cattle on the allotment. The District's objective was for the permittee to manage his operation consistent with the resource management needs of the allotment. The first adverse action (permit suspension, Doc. 33) did not occur until several notices of non-compliance were issued and the permittee was given an opportunity to correct the deficiencies (Doc. 17, 19, 22, 25). The District Ranger followed the same procedure in all subsequent adverse actions taken against the term grazing permit, ultimately resulting in cancellation of the permit.

Findings: I find that the District Ranger gave ample consideration to factors such as the nature of the terrain in administration of the appellant's grazing permit. I also find the District Ranger acted properly and fully within his authority in his decision to cancel the grazing permit.

ISSUE F. Terminating the grazing permit adversely effects the economy and the permittee's economic well-being.

Response: The effect of the District Ranger's decision on the economy and the permittee's economic well being is not known and should not be a direct consideration in decisions of this nature. The record reflects the appellant was given ample opportunity to correct permit compliance deficiencies before the permit cancellation action and did not do so. The record also clearly reflects the appellant's lender, Farm Services, was notified on at least two occasions (Docs. 66 and 77) of possible permit suspension and/or cancellation action. In addition, the record clearly documents that the Forest Supervisor notified the permittee and the lending agency that the loan amount appeared to exceed the fair market value of the collateral. This correspondence informed the permittee and the lending institution that the FS did not recognize the permit as having any value, and any lien held by the lending institution was at personal risk and should be considered as unsecured (Doc. 3). The permittee was also aware that the estimated capacity was far below what the permit would be issued for (Doc. 1) and that the District Ranger strongly encouraged light stocking of the allotment (Doc. 1 and 2).

Findings: I find that the District Ranger has acted appropriately and within his authority with respect to this issue.

ISSUE G. Grazing today does not adversely affect TES Species anymore than historical grazing pressure has since the species still exist today.

Response: TES species were not a factor in the District Ranger's decision, therefore, this issue is not relevant to the action that is the subject of this appeal.

Findings: The record reflects this issue has no relevancy to the District Ranger's decision.

Decision

My second level review of this appeal was conducted in accordance with 36 CFR 251 Subpart C. After review of the appeal record, I find that the District Ranger's decision with respect to

cancellation of the term grazing permit issued to J. R. Houghtaling, et al., was based on a reasonable evaluation of the permittee's actions and that administration of the permit was conducted in conformance with applicable laws, regulations, orders, and policies and procedures. The District Ranger's decision was not unlawful, arbitrary, capricious nor an abuse of discretion. Therefore, I affirm the District Ranger's decision to cancel the term grazing permit issued to J. R. Houghtaling, et al., which is the subject of this appeal.

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

Sincerely,

/s/ John R. Kirkpatrick

JOHN R. KIRKPATRICK
Appeal Reviewing Officer
Deputy Regional Forester, Resources

cc:
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