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Date: October 4, 1999

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Re: Appeal of Decision to not reissue the Term Grazing Permit for the Rain Tank Allotment (Appeal #99-03-00-0063-A251), Tusayan Ranger District, Kaibab National Forest

Dear Mr. Hirsch:

This letter documents my second level review decision of the appeal you filed on behalf of your client, Grand Canyon Buffalo Range, Inc. (GCBR) as the allotment permittee, regarding failure to comply with the terms and conditions of the term grazing permit issued on March 29, 1988. This appeal relates to a decision issued by District Ranger Renee C. Thakali, Tusayan Ranger District, Kaibab National Forest, not to issue a new term grazing permit to GCBR for noncompliance with the terms and conditions of the previous expired term grazing permit.

Background

A. GCBR (Marvin R. Hatch, President), was issued a term grazing permit on March 29, 1988, by Forest Supervisor, Leonard A. Lindquist (Doc. 7). The base property for the permit was described as Upper Wagoner Tank, 40 acres, in the Northeast quarter of the Southwest quarter of Section 12, Township 30 North, Range 1 west of the Gila and Salt Base and Meridian, Coconino County, Arizona.

B. On July 24, 1992, a Warranty Deed was signed by Marvin R. Hatch (President) on behalf of GCBR (permittee of record) conveying four parcels of land (Exhibit A of warranty deed), including the designated base property for the Rain Tank allotment, to Sierra Verde Estates, Inc. (SVE). This warranty deed was recorded on August 7, 1992, with the Coconino County Recorder as an official county record (Doc. 2).

C. On July 27, 1992, a Warranty Deed was signed by Marvin R. Hatch (President) on behalf of Sierra Verde Estates, Inc. conveying two parcels of land (Exhibit A of warranty deed) to GCBR which did "not" include the base property for the Rain Tank allotment. This warranty deed was recorded on August 7, 1992, with the Coconino County Recorder as an official county record (Doc. 3).

D. On August 7, 1992, a Deed of Trust was executed and recorded by GCBR (signed by Marvin R. Hatch, President) as Trustor, in favor of First American Title Insurance Company, as Trustee, acting on behalf of Debentureholders (Doc. 4). The Deed of Trust included Exhibit B, containing legal descriptions of the same four parcels of land that had been conveyed to Sierra Verde Estates, from GCBR on July 24, 1992 (Doc. 2).

E. On August 7, 1992, GCBR (signed by Marvin R. Hatch, President) executed an Escrow Waiver in favor of the Debentureholders of record as security for a loan. The Escrow Waiver described the base property being mortgaged to the Debentureholders as Upper Wagoner Tank, in the Northeast quarter of the Southwest quarter of Section 12, Township 30 North, Range 1 west of the Gila and Salt River Base and Meridian, Coconino County, Arizona. (Doc. 5). The Escrow Waiver was confirmed on September 8, 1992, by the District Ranger.

F. On September 18, 1997, a Trustees Deed was executed by First American Title Insurance Company (FATIC) conveying the same 4 parcels of land that had been conveyed to Sierra Verde Estates from GCBR on July 24, 1992, to the Johnson Living Trust (Doc. 6). This conveyance was made pursuant to the power of sale conferred upon FATIC by the Deed of Trust dated August 7, 1992 (Doc.4).

G. Mr. Hatch submitted a hand-written note on March 23, 1998, to David Brewer of the Kaibab National Forest, requesting redesignation of base property to a tract of land that contains 18 acres, which is less than the minimum requirement to hold a grazing permit on the Kaibab National Forest (Doc. 8).

H. On June 24, 1998, a meeting was held between Mr. Hatch (representing GCBR), District Ranger Thakali, David Brewer, and other Forest Service personnel to discuss issuance of the term grazing permit, status of base property, and redesignation of base property. Mr. Hatch confirmed on this date that he no longer had ownership of the base property identified in the GCBR's term grazing permit due to foreclosure by Johnson Living Trust (Doc. 9).

I. On August 17, 1998, District Ranger Thakali issued a decision not to issue a new term grazing permit issued to GCBR due to past permit violations and lack of base property (Doc. 14).

J. Mr. Hatch, on behalf of GCBR, filed an appeal with the Forest Supervisor on September 22, 1998, regarding District Ranger Thakali's decision not to issue a new term grazing permit (Doc. 19). This appeal was supplemented on September 28, 1998, by Mr. Hatch (Doc. 22).

K. The District Ranger submitted a responsive statement addressing the appeal points to the Forest Supervisor on October 23, 1998 (Doc. 26).

L. An oral presentation was made by the appellant (Mr. Hatch and Mr. Steven Hirsch, legal counsel representing GCBR) on November 25, 1998 (Docs. 30 and 31).

M. On December 10, 1998, the Forest Supervisor sent GCBR a letter stating that the appeal record would remain open until April 30, 1999, or until the Forest Supervisor had received documentation that clarified ownership of base property, whichever came first (Doc. 33).

N. On April 29, 1999, Mr. Hirsch, on behalf of GCBR, requested a time extension until June 15, 1999, to allow the record to remain open (Doc. 36). On April 30, 1999, the Forest Supervisor denied Mr Hirsch's request for an extension of time, stating that ample time had been allowed for the appellant to submit additional information into the record. Therefore, the record was closed on April 30, 1999 (Doc. 36).

O. On May 11, 1999, the Forest Supervisor was asked by the appellant to reconsider closure of the record. On May 25, 1999, the Forest Supervisor declined to re-open the record (Docs. 38; 39). On June 2, 1999, the Forest Supervisor issued a decision on the first level review of the appeal, affirming the District Ranger's decision not to issue a new term grazing permit to GCBR (Doc. 40).

Points of Appeal

Issue #1. Do the Forest Service's actions constitute a cancellation of the Rain Tank allotment permit or a non-renewal of the permit?

Contention: The appellant asserts that the District Ranger's decision is a cancellation of the permit rather than a decision not to renew the permit, because under the express term of the permit, its expiration date is December 31, 1998. The appellant contends that the express terms of the permit must control.

Response: Section 402(a) of The Federal Land Policy and Management Act of 1976 (Public Law 94-579) states that "Except as provided in subsection (b) of this section, permits and leases for domestic livestock grazing on public lands issued by the Secretary of Agriculture, with respect to lands within National Forests in the sixteen contiguous Western States, shall be for a term of ten years subject to such terms and conditions the Secretary concerned deems appropriate" The regulations of the Secretary of Agriculture (Secretary), 36 CFR 222.3(c)(1) state: "Grazing permits with priority for renewal may be issued as follows: On National Forests in the 16 contiguous western States 10-year term permits will be issued unless the land is pending disposal, or will be devoted to other uses prior to the end of ten years, or it will be in the best interest of sound land management to specify a shorter term." The Forest Service manual (FSM) 2230.5 defines term period as "the period for which permits with term status are issued, the maximum being 10 years." Forest Service policy found at FSM 2231.11 is to "Issue term permits to livestock operators for a period up to 10 years, to graze a specified number, kind, and class of livestock, for a specific season and area of use." The term grazing permit was issued to GCBR on March 29, 1988, with a yearlong grazing season. The grazing season ran from March 29 of one calendar year to March 28 of the following calendar year. GCBR's first grazing season began on March 29, 1988. Therefore, the tenth grazing season ended on March 28, 1998, at which time the permit technically expired. The term of the permit should have been written to expire on February 28, 1998, which is 10 years from the date of issuance. If the issuing officer desired to terminate the permit at the end of the calendar year, then the term should have been written to end on December 31, 1997. Both scenarios would have been consistent with regulation and policy. The Issuing Officer's inadvertent error in establishing the term of the permit (Doc. 7) does not negate law, regulation or policy concerning the 10 year limit on term grazing permits .

The Secretary's regulations, 36 CFR 222.3(c)(1)(ii), state "A term permit holder has first priority for receipt of a new permit at the end of the term period provided he has fully complied with the terms and conditions of the expiring permit." The record shows that GCBR conveyed the base property to Sierra Verde Estates in 1992 without notifying the Forest Officer in charge (Doc. 2). It was not until March, 1998, that the Forest Service became aware that GCBR no longer owned the base property identified in Part 3 of the term grazing permit (Docs. 7; 34). Had the Forest Service become aware of the 1992 conveyance earlier, adverse permit action in the form of permit cancellation would have been taken against GCBR. The record shows that the District Ranger did not issue a new term grazing permit to GCBR due to a permit violation involving failure to immediately notify the Forest Officer in charge of a change in control of base property [Grazing Permit Part 2(11)(c)] (Doc.14).

Findings: The District Ranger did not issue a new term grazing permit because GCBR violated the terms and conditions of the permit by failing to notify the Forest Officer in charge of changes relating to base property. The Ranger's action is consistent with the Secretary's regulations and the terms and conditions of the term grazing permit.

Issue #2. Does Mr. Hatch's failure to notify the Forest Service that the base property was conveyed to Sierra Verde Estates, Inc. in 1992 constitute a permit violation and was the Forest Service harmed by GCBR's purported failure to report change in base property?

Contention: The appellant asserts that the Forest Service was not injured by the change of control of the base property in 1992 because Sierra Verde Estates, Inc. is wholly owned by Mr. Hatch, and Mr. Hatch continued to operate the Rain Tank Allotment Permit as if it were still owned by GCBR. The appellant also contends that "failure to notify the Forest Service of the loss of the base property in 1992 does not constitute a knowing and willful false statement under 36 CFR, §222.4(a)(5)".

Response: The Secretary's regulations, 36 CFR 222.3(b), state that "Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources". A permit holder is required, as a condition for holding a permit, to comply with "**all**" the terms and conditions set forth in the permit, and as amended or modified by the agency as it deems necessary (Doc. 7).

GCBR is the only recognized legal entity that has been issued a term grazing permit on the Rain Tank allotment. SVE or Mr. Hatch are not holders of a Forest Service grazing permit, and therefore, are not recognized as parties of interest in the GCBR permit. Mr. Hatch is recognized as an agent of the Corporation and not an individual party entitled to any interest in the grazing permit.

The appellant's claim that the Forest Service was not harmed by the failure to notify the Forest Service regarding changes in base property is irrelevant to permit administration. GCBR violated the terms and conditions of the term grazing permit by transferring ownership of the base property without prior notification and acknowledgment of the Forest Service as required by Part 2, 11(c), and Part 3, Other Term and Conditions, Base Property, which states "Changes in base property designation must be applied for by the permittee and approved in writing by the Forest Supervisor". Mr. Hatch was fully aware of the requirements of owning and controlling base property as a condition of the term grazing permit. The provisions of the term grazing permit

were acknowledged as being reviewed with the permittee by Forest Officer Charles J. Jankiewicz on February 26, 1988, before Mr. Hatch (President of GCBR) signed the permit on February 28, 1988 (Doc. 7). Additionally, in 1986 Mr. Hatch was involved in a dispute over permit violations regarding ownership requirements of base property and livestock. The record shows that Mr. Hatch was reminded of the permit requirements of maintaining ownership of base property and notification of any changes to base property as required in the grazing permit (Doc. 1). GCBR knowingly operated for almost five years without base property, and therefore had not been a qualified entity to hold a grazing permit, pursuant to 36 CFR 222.3(c)(1)(i).

The appellant's contention that failure to notify the Forest Service of the loss of the base property in 1992 does not constitute a knowing and willful false statement under 36 CFR, §222.4(a)(5) is correct. However, the issue does not relate to an application for a term grazing permit as the appellant claims. The issue is whether or not GCBR complied with the terms and conditions as specified in the term grazing permit. The record shows that Mr. Hatch knowingly transferred the base property from GCBR to SVE in 1992 but failed to notify the Forest Officer in charge and obtain approval of the Forest Supervisor as required in Parts 2 and 3 of the term grazing permit. The warranty deed had an attached exhibit clearly describing the lands in question (Docs. 2). Mr. Hatch acknowledged upon his own signature, in the presence of Notary Publics, the conveyance of the properties.

Findings: The District Ranger's decision is consistent with the Secretary's regulations and the terms and conditions in the term grazing permit. Furthermore, GCBR has been unqualified to hold a term grazing permit since 1992 by not fully complying with the terms and conditions of the permit.

Issue #3. Does Mr. Hatch's notification to the Forest Service in December 1997 of the foreclosure of the base property in September 1997 constitute a permit violation?

Contention: The appellant asserts that Mr. Hatch notified the Forest Service (Dave Brewer) about the loss of base property through foreclosure just a few months after it happened, therefore it is not significant enough to be considered a violation.

Response: The record shows that prior to March, 1998, the Forest Service had no knowledge of the transfer of the base property through foreclosure to the Johnson Trust in September, 1997 (Doc. 34). It is the duty of the Forest Service to determine the significance of permit violations. In this case, failure to "immediately" notify the Forest Service at the onset of possible foreclosure, or even after foreclosure had been completed is a permit violation in and of itself.

The permittee did not notify the Forest Service of the changes in base property occurring in 1992, or in 1997, as required by the term grazing permit. Both instances are clear violations of the terms and conditions of the term grazing permit. Mr. Hatch jeopardized GCBR's qualifications to hold a term grazing permit in 1992 and failure to notify the Forest Service of the foreclosure proceedings exacerbated the extent of the violation. The permit clearly states in Part 2, Section 11(c), "The permittee will immediately notify the Forest officer in charge of any change in control of base property, ownership of livestock, or other qualifications to hold this grazing permit". GCBR had prior knowledge of the importance of notifying and gaining approval from the Forest Service prior to making changes in base property due to the incident Mr. Hatch was involved with in 1986 (Doc. 1).

Findings: GCBR violated the terms and conditions of the term grazing permit on two separate occasions (1992 and 1997). Each violation was sufficient to warrant action against the term grazing permit. The District Ranger acted appropriately within her authority not to issue GCBR a new term grazing permit.

Issue #4. Has the base property been lost if the property has been titled to SVE, which is a corporation that is also wholly owned by Marvin Hatch?

Contention: The appellant contends that the base property has not been lost since it has been titled to SVE, a corporation wholly owned by Marvin Hatch. Mr. Hatch also wholly owns GCBR, therefore, the property is still owned indirectly by the same individual. The Forest Service was arbitrary and capricious in not allowing more time for GCBR to resolve the title issues.

Response: GCBR was the permittee of record, not Mr. Hatch, as an individual, or SVE. GCBR was recognized as a sole and separate entity which was issued a term grazing permit [36 CFR 222.1(b)(16) and (18)]. Ownership of real property is recognized by "chain of title" as recorded in the public records of a county register. According to the warranty deed (Doc. 2) executed by Mr. Hatch, on behalf of GCBR, the base property was conveyed to SVE on August 7, 1992 (date recorded). That same day, Mr. Hatch executed another warranty deed, on behalf of GCBR, conveying two parcels of land back to GCBR, neither of which included the base property. As of August 7, 1992, the official owner of the base property was SVE, while GCBR became an unqualified permit holder due to lack of base property. The record does not reflect any evidence that GCBR, through Mr. Hatch, notified the Forest Service of the transaction, or attempted to redesignate base property at that time. As an entity GCBR did in fact lose ownership of the base property, rendering GCBR as unqualified for the term grazing permit.

The Forest Supervisor allowed Mr. Hatch until April 30, 1999 to present additional information that could clarify the issue of base property ownership (Doc. 33). Collectively, there was more than five months of time allowed for the appellant to provide information regarding ownership of the base property. The appellant presented no evidence into the record during that time period which demonstrated GCBR met base property ownership requirements (Doc. 37).

Findings: The record shows that GCBR did in fact lose ownership of the base property to SVE and that the Forest Supervisor provided ample time to the appellant to provide evidence of base property ownership.

Issue #5. Was Mr. Hatch entitled to a 1 year notice to meet base property requirements according to 36 CFR §222.3 and F.S.[R]. §2[3]31.22a, assuming that the base property was lost.

Contention: The appellant contends that once GCBR was found to have given up control of the base property, either through foreclosure or title transfer to SVE, the Forest Service was required to give GCBR written notice that it was no longer qualified to hold a permit and be given 1 year to reestablish base property. The Forest Service was notified prior to expiration of the term permit that GCBR lost control of the base property and therefore should have been given the opportunity to reestablish it. There is nothing in the federal regulations that requires the Forest Service to receive notice prior to disposal of base property before the 1 year grace period applies.

Response: The record clearly shows that GCBR failed to give immediate notification and receive approval from the Forest Service to change the base property designation, both in 1992 and 1997. Mr. Hatch, on behalf of GCBR, accepted all of the terms and conditions as stated in the term grazing permit when the grazing permit was issued (Part 2, 11(c) and Part 3, Base Property) (Doc. 7).

Under normal circumstances, if GCBR had given immediate notice that it desired to change base property, the Forest Service would have given written notice and 1 year's time to redesignate the base property. Mr. Hatch did not follow procedures as stipulated in the term grazing permit. Mr. Hatch executed several documents in 1992 (Docs. 2,3,4,) that clearly described the transfer of base property ownership without any discussion or approval by the Forest Service. Once GCBR was found to be in violation of its term grazing permit, it no longer became a simple case of changing base property, but one of administering the terms and conditions of the term grazing permit. GCBR was found as not fully complying with the terms and conditions of the expiring term grazing permit, for actions that occurred in 1992 and 1997 but never disclosed the the Forest Service. Therefore, GCBR is not entitled to the 1 year grace period to redesignate base property.

Findings: GCBR did not disclose loss of control of base property at the time it happened. Therefore, GCBR is not entitled to one year to reestablish base property requirements.

Issue #6. Is Mr. Hatch entitled to compensation for the cancellation of the Rain tank allotment Permit?

Contention: The appellant contends that due to cancellation, GCBR is entitled to compensation for the cost of the range improvements that GCBR has made on the allotment.

Response: The term grazing permit (Doc. 7) was accepted by Mr. Hatch, on behalf of GCBR, with all of its terms and conditions, including Part 2, 11(d), which states, "The permanent improvements constructed or existing for use in conjunction with this permit are the property of the United States Government unless specifically designated otherwise or covered by a cooperative agreement. They will not be removed nor compensated for upon cancellation of this permit, except in the National Forests in the 16 contiguous Western States, when cancelled, in whole or part, to devote the land to another public purpose including disposal".

Compensation for range improvements may be made if the lands are devoted to other public uses such as disposal through land exchanges. There is nothing in the record that suggests that the allotment would be devoted to other uses or disposal which would render the allotment as unavailable for grazing.

Findings: GCBR is not entitled to compensation for the cost of range improvements that GCBR may have made on the Rain Tank allotment.

Issue #7. Failure to grant one year temporary permit as requested.

Contention: The appellant contends that the Forest Service did not issue a one year temporary permit as requested to allow time to resolve the title issues associated with the base property. The Forest Service decision to not issue the temporary permit was arbitrary and capricious.

Response: The appellant's request for temporary permit (Doc. 31) surfaced as relief at the oral hearing on November 25, 1998. This request was documented in a letter from Mr. Hatch's attorney on December 4, 1998. On December 10, 1998, the Forest Supervisor informed GCBR, through Mr. Hatch, that the appeal record would remain open until April 30, 1999 (Doc. 33). The Forest Supervisor made this decision in order to allow Mr. Hatch the opportunity to resolve the title issues related to the ownership of base property. Since the intended purpose of the temporary permit was not to graze livestock, but in essence, to extend the period for the disposition of the appeal, it would have been inappropriate to issue such a permit.

Findings: The Forest Supervisor allowed the appellant a reasonable amount of time to resolve the title issues related to the ownership of base property. The Forest Supervisor conducted the first level appeal review in accordance with the Secretary's regulations.

Issue #8. Failure to reconsider request for extension of time to supplement the record on appeal.

Contention: The appellant contends the Forest Supervisor stated the appellant could ask for more time if it needed to supplement the record by submitting a written request. Appellant asserts that the request for extension of time was denied on the basis that there was no justification for the requested extension because the Forest Service did not state that a justification was required. The Forest Service abused its discretion when it did not allow an extension of time to supplement the record.

Response: Pursuant to 36 CFR 251.95, the Reviewing Officer may issue such procedural orders as deemed appropriate for the orderly, expeditious, and fair review of the appeal provided that such orders are consistent with other provisions of this part. The appeal record is to be closed upon receipt of appellant's reply to the responsive statements or at the conclusion of an oral presentation [36 CFR 251.98(d)]. The Forest Supervisor allowed the record to remain open until April 30, 1999, or approximately five months following the oral presentation. However, no new information was brought forward by the appellant.

Findings: The Reviewing Officer allowed an appropriate extension of time.

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 not to issue a new term grazing permit to GCBR was based on a reasonable assessment of the permittee's actions. The District Ranger acted within her authority not to issue a new term grazing permit to GCBR based upon violations of the terms and conditions stated in the term grazing permit.

The District Ranger's decision is in conformance with applicable laws, regulations, orders, and policies and procedures. I find no evidence which would support the allegations that the District Ranger acted in an arbitrary and capricious manner. Therefore, I affirm the District Ranger's decision not to issue a new term grazing permit to GCBR on the basis of permit violations pursuant to the terms and conditions contained in the March 29, 1988, permit.

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

Sincerely,

/s/ James T. Gladen
JAMES T. GLADEN
Appeal Reviewing Officer
Deputy Regional Forester, Resources

cc:
Forest Supervisor, Kaibab NF
District Ranger, Tusayan RD
Director, Range Management, R3
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