



File Code: 1570-1/2230

Date: May 7, 2004

Jimmy Goss  
Sacramento Grazing Association  
P.O. Box 596  
Weed, NM 88351

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED  
NUMBER: 7001 0320 0003 8427 2153**

Mr. Michael Van Zandt  
221 Main Street, 16<sup>th</sup> Floor  
San Francisco, CA 94105-1936

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED  
NUMBER:**

Dear Mr. Goss and Mr. Van Zandt:

This is my first-level review decision concerning Appeal # 04-03-08-0001-A251 that you filed regarding the modification of the annual operating instructions associated with your term permit for livestock grazing on the Sacramento Grazing Allotment.

### **BACKGROUND**

The Sacramento Grazing Association (Association) was issued a Term Grazing Permit authorizing 553 cattle on the Sacramento Allotment. The permit was issued to Jimmy Goss on November 23, 1999, the president of the Association. The District Ranger, Max Goodwin, authorized the permit. For the winter grazing seasons from 2000-2003, the Annual Operating Instructions (AOI) authorized 330 cattle. (Exhibit H) For the 2003-2004 winter grazing season, authorized use was reduced to 230 cattle, a reduction of 100 head of cattle. (Exhibit J).

The Sacramento District Ranger, Frank R. Martinez, is the Responsible Official, whose decision of October 28, 2003 is subject to administrative review under 36 CFR 251 appeal regulations. I have reviewed the original decision, the issues you raised in your appeal, the Responsible Official's responsive statement to your issues, the appeal record, your oral presentation, as well as the policies and operational procedures as set out in the directives system of the USDA Forest Service, as follows:

**Issue 1** – Appellant alleges that the Forest Service has acted arbitrarily and capriciously in reducing the number of cattle permitted to graze in the winter pasture.

*Response:* The decision to modify the annual operating instructions for the Term Grazing Permit issued to the Sacramento Grazing Association (SGA) was based on: 1) the observed and recorded conditions on the allotment; 2) the effects of the permittee's management practices implementing the AOI; and 3) other laws requiring conservation and protection of natural resources on public land, for the public interest, that are impacted by grazing. (Exhibit J) The Ranger invited the independent observation of conditions by the Range Improvement Task Force in order to gain the best science for consideration. (Exhibit F) The range survey was conducted on October 24<sup>th</sup> as scheduled, but the permittee chose not to attend with the Ranger, Task Force



representative, and County Commissioners. Later that morning after concluding the survey, the Ranger incidentally met Justin Goss in Alamo Canyon and summarized the survey findings. (36 CFR 222.4 (a)(7), (8), and 36 CFR 222.4(b))

The decision to modify the AOI, temporarily reducing livestock numbers on the winter pasture, was consistent with the range conditions observed at that time. Since the District Ranger and his staff evaluated range conditions, sought input from the Range Improvement Task Force, the permittee, and County Officials, I do not consider this action arbitrary or capricious. (Exhibit J)

**Issue 2** – Appellant alleges the Forest Service has failed to act in accordance with the law in directing such reduction.

*Response:* The authority to issue, suspend or modify special use grazing permits has been delegated by the Secretary of Agriculture to Line Officers at the Regional, Forest, and Ranger District Level at 36 CFR 222.1 (a). By virtue of the appellant signing the Special Use Permit application and the Term Grazing Permit (FS 2200-10), the issuing authority and permittee certify, by signature, an understanding of the terms and conditions set in paragraph 3. (Exhibits C and K) The grazing permit holder's right to appeal a written decision of the authorizing official affecting the term permit was contained in the last paragraph of his October 28, 2003 letter of decision. (Exhibit J) (36 CFR Part 251.87)

**Sub issues a, b, d, e, f, g, and h** References to laws, CFRs, and Forest Service Manual direction used in the appellants arguments in these sub issues pertain to actions that cancel, suspend, or modify the Term Grazing Permit, in whole or in part, specifically. The SGA appealed the Ranger's decision to modify the AOI, which is not a permit modification. The Ranger's decision to modify the AOI also does not change the public purpose of the land within the allotment. These lands remain under the purpose of multiple-use. Livestock grazing remains one such use. Therefore, the direction referenced by the appellant is not appropriate to this decision. (Appeal Document, **Section II-B: a.** 5 USC 558, **b.** 43 USC 1752, **d.** FSM 2231.02, **e.** FSM 2231.61, **f.** 36 CFR 222.4 (a)(1); FSM 2231.62d, **g.** 36 CFR 222.4 (a)(8), **h.** and 36 CFR 222.6(a))

**Sub issue b and c.** The Ranger's decision modified the AOI. This action does not interfere with water rights or other alleged rights the permittee may have.

**Sub issue i.** Exhibits F, G and J demonstrate that the Ranger has communicated with the permittee and provided an opportunity for the permittee to have input concerning allotment conditions, drought ramifications, and actions being considered.

**Sub issue j.** The Code of Ethics referenced here applies to scientific research and development within the agency. This Code is not applicable to the actions taken by the Ranger.

The Forest Service, in turn, has the discretion to require any change it deems necessary. (see USC 1601, Sec 580 l; 43 USC Sec 1752 (e); 36 CFR 222.3 (c) (1)(vi), including discretion to set the "number of animals to be grazed and the season of use."(43 USC Sec 1752 (e); 36 CFR 222.3 (c) (1)(1) Federal Lands Legal Consortium v U.S., 195 F.3d 1190,1198 (10<sup>th</sup> Cir. 1999)

**Issue 3** – Appellant alleges that the reduction violates the due process rights of the SGA in that there has been no adequate notice of the basis for the reduction and no opportunity prior to the reduction taking effect.

*Response:* The record demonstrates the opportunities that were provided to the permittee to have input prior to the decision. (Exhibits D, F, and G) As stated in the response to Issue 1, the permittee chose not to participate in the range survey that formed the basis for the decision to reduce cattle numbers for the 2003-2004 winter grazing season.

36 CFR 251.87 provides the approved process for consideration of issues generated by this modification of the annual operating instructions. The written document issued to modify the annual operating instructions for the Sacramento Allotment provided the opportunity for the permittee to appeal the decision. (Exhibit J)

**Issue 4** - The reduction has resulted in a deprivation of private property rights owned by the SGA without due process.

*Response:* The decision being appealed requires the permittee to stock a lesser number of livestock for the 2003-2004 winter grazing season in order to avoid further resource damage and allow range resource recovery. (Exhibit J) The decision to reduce the number of livestock on the winter range by 100 head, therefore, does not change or cancel use of the allotment permit issued on November 23, 1999 (Exhibit C), as it does not devote any public land within the Sacramento Allotment to another public purpose. (36 CFR 222.6) In addition, 36 CFR 222.3(b) states, “Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any land or resources.” (36 CFR 222.3(b)) The Term Grazing Permit, therefore, gives the permittee merely a license to use federal land, not a vested right in the land. (See *Diamond Bar Cattle Co. v. U.S.*, 168 F.3d 1209, 1217 (10<sup>th</sup> Cir. 1999))

**Issue 5** - Appellant alleges the reduction in forage production on winter range is not caused by SGA’s cattle but by failure of the Forest Service to manage elk on the Sacramento Allotment winter range.

*Response:* Drought was the main cause for below-normal forage production. (Exhibit J) Over-use of existing forage has been a contributing factor, whether caused by livestock or wildlife. The Forest Service has no direct authority to determine, regulate, or control the elk population, but may provide input and assistance to the New Mexico State Game Commission. As a result of prior litigation and settlement agreements addressing the elk population by the appellant, the State Game Commission has initiated actions to reduce populations from 4,000 animals (surveyed in 2001) to 1,000 animals by 2005. The most recent survey (2003) estimated the population to be @ 1,700, with two years remaining to reach their goal. (US District Court for New Mexico, CIV 00-1240 JP/RPL, 1999)

**Issue 6** - Appellant alleges that due process right of SGA was violated because the reviewing officer and his supervisors have participated in the decision or have set the policies that result in such decisions. Appellants allege there is no impartial forum where the SGA appeal can be heard. Appellants allege violation of due process because there is no right to a hearing or opportunity to call or cross-examine witnesses.

*Response:* Each level of Forest Service management bears the responsibility for the proper interpretation and implementation of laws, regulations, and policy guiding the use of public land under its control. The appeal process for issues generated by this process, from modifications to the term grazing permit or annual operating plan, is found at 36 CFR 251.87, which provides the opportunity for a levels of review beyond this decision level.

Addressing due process, since the appellant has not been deprived of a protected interest in property, there needs to be no inquiry as to whether the Forest Service appeal procedures comport with due process.

## **DECISION**

After a detailed review of the issues presented in your appeal, the decision of the Responsible Official, the project record, and your oral presentation, I affirm the Responsible Official's decision as being in conformance with applicable laws, regulations, policies, and procedures.

A request for a second level of review of this appeal decision may be filed with the Regional Forester, Southwestern Regional Office, 333 Broadway SE, Albuquerque, NM 87102, within 15 days of the receipt of this decision. (36 CFR 251.8(c)(2))

Sincerely,

/s/ Jose M. Martinez  
JOSE M. MARTINEZ  
Forest Supervisor

cc: Mary Ann Joca, Patrick L Jackson, David M Stewart, Frank R Martinez, Larry Cosper, Michael Niveson, Doug Moore