



United States
Department of
Agriculture

Forest
Service

Prescott National
Forest

344 S. Cortez St.
Prescott, AZ 86303

File Code: 1570 / 2210

Date: March 12, 1999

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Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004-2391

**CERTIFIED
RETURN RECEIPT REQUESTED**

Attention: Edwin B. Wainscott
David L. Johnson

Re: Prescott NF Appeal #99-03-09-0001-A251- Crooks Canyon and Maverick Grazing Decision -
Appeal Decision

Dear Sirs:

I have reviewed the Bradshaw District Ranger's decision of October 2, 1998 regarding grazing in the Crooks Canyon and Maverick allotments. I find the decision is clearly supported by the data, analysis, and conclusions provided in the project record. Therefore the decision is upheld and the appeal denied.

However, the potential economic hardship to the Appellant cannot go without comment. It is not the District Ranger's desire, nor mine, that permitted livestock use be eliminated in the Crooks Canyon / Maverick area. We, the permittee and the Forest Service, have a collective interest in improving the ecological health of these areas. In recognition of that fact, it is to the Forest Service benefit that implementation of the decision not pose an untenable hardship on the permittee or his operation in the near term, yet progress must be made. We offer our commitment to work with Mr. Maughan as these measures are implemented.

Per 36 CFR 251.87(c) you are provided a second level of administrative appeal. Should you so decide, the appeal must be filed with the Regional Forester (USDA Forest Service, Southwestern Region, 517 Gold Ave. SW, Albuquerque, NM, 87102) within 15 days of this decision.

Sincerely,

/s/Michael King
MICHAEL R. KING
Forest Supervisor

enclosure

cc: Rex Maughan
Regional Forester
Ernie Del Rio, Bradshaw District Ranger



FINDINGS
Rex Maughan - Appellant
Crooks Canyon / Maverick Ecosystem Management Project Area
99-03-09-0001-A251

This document provides the background and rationale for the decision. It is formatted to display the appeal point(s) (APPEAL) and related portions of the "Responsive Statement" (RESPONSE) and reply to the responsive statement (REPLY), and the FINDINGS. In combination, the FINDINGS provide the documentation supporting the decision regarding Appellants requested relief, namely *"...that the original combined allotments of 425 cattle be permitted in the Crooks Canyon and Maverick areas without any limitations on the number of months during which the areas may be used for grazing."*

Point #1 : Adverse economic effects of decision on Appellant.

APPEAL: "Appellant is adversely affected by the Decision... The proposed grazing reductions, if implemented, would threaten the ability of Appellant to continue to raise livestock... The number of cattle...permitted under the proposed allotment would seriously impair the economies of scale necessary to continue livestock operations. (A)ny reduction in the number of months during which the areas may be used for grazing...will further burden Appellant's ability to continue livestock operations in the area."

RESPONSE: "I decided to reduce permitted numbers to address the vegetation health and vigor on full capacity rangeland while making use of the available grazing capacity.

"In the final analysis, low forage production, riparian concerns, and difficulties in distributing livestock utilization across lands of steep slopes and dense brush led me to choose no grazing in the Palace and North Units.

"...this choice comes at a high cost to the appellant's ranch operation, for he must find pasture each summer, when livestock are not allowed on the Forest.

"...I chose to improve forage and riparian plant vigor with the lowest total capital investment and operating costs. I also fully understand that while my decision did take into account costs, it did not take into account the economy of scale, or cost per unit head."

REPLY: "The proposed reduction failed to properly consider Appellant's detrimental reliance on the original full allotment and the substantial hardship the impairment on Appellant's livestock operations as set forth in the Appeal."

FINDINGS:

Unfortunately, decisions regarding the allocation of forest resources certainly do affect individuals that have come to rely on those resources. The Deciding Official so recognized and affirmed this fact in his responses to these issues (EA Appendix 7, page 6, [Project Record [PR] 230]) and, further, by carrying Issue #5 through analysis in the development of alternatives. The Deciding Official fully disclosed the potential effects of the various alternatives on the ``economics and managerial feasibility of grazing'', thus meeting his obligation under NEPA.

Point #2 : Entitlement to compensation for structural improvements.

APPEAL: "Appellant has incurred substantial expenses...as a result of, and in reliance upon, previous directives from the Forest Service. (A)ppellant incurred such expenses in response to conditions imposed by the Forest Service...with the expectation that he would be able to graze the full number of cattle previously permitted... Appellant constructed...more than seven miles of fencing within the Maverick allotment area in preparation for grazing the full allotment of cattle without reduction.

"...the proposed reduction...would constitute at least a partial cancellation of the grazing permits...and would entitle Appellant to compensation for the value of all improvements he has made to the range land."

RESPONSE: "...seven miles of fence that the appellant built in 1993-94 at his own costs will not have livestock against it. ...I don't believe that at the time either the appellant or the Forest Service could see a way around administration of a fence that constantly allowed livestock to leak into an area closed to grazing (the Prescott Watershed), peoples' yards, and group camps.

"A standard clause in any grazing permit is for the permittee to maintain the improvements assigned to the permit. In this case the fence was in such poor condition the permittee chose to re-construct the entire length so as to graze livestock in the locations authorized in the Annual Operating Plan.

"Compensation for improvements can only be made where the Forest Service cancels a term permit in whole or in part to devote the lands covered by the permit to another public purpose including disposal (36 CFR 22.6 (sic) and FSM 2237.02. In this case the lands associated with the Crooks Canyon and Maverick Grazings Allotments have not been set aside for another public purpose. The decision...were (sic) based solely on a intensive capability analysis and resource conditions not set aside for another public purpose. Therefore, compensation for range improvements for adjusted value of permittee investments is not applicable and warranted."

REPLY: "...the proposed reduction...would constitute at least a partial cancellation of the grazing permits...and would entitle Appellant to compensation for the value of all improvements he has made to the land under 43 U.S.C. § 1752 (g) and 36 C.F.R. § 222.6."

FINDINGS:

The Federal Land Policy and Management Act of 1976, Sec. 402 (g) as repeated in 36 CFR 222.6[a] provides for "a reasonable compensation for the adjusted value of his (permittee's) interest in authorized permanent improvements placed or constructed by him on the lands covered by the cancelled permit." (emphases added) This permit has not been cancelled. 36 CFR 222.4 discusses "Changes in grazing permits." Paragraph (a) authorizes the Chief, Forest Service "to cancel, modify, or suspend grazing and livestock use permits in whole or in part..." The following sub-paragraphs (1) through (6) discuss cancellation and suspension. Sub-paragraph (7) authorizes the Chief to modify terms and conditions of a permit to "conform to current situations brought about by...revision of an allotment management plan, or other management needs." Ranger Del Rio's decision of October 2 has resulted in a modification to the permit held by Appellant, not a cancellation of it.

Point #3 : Effects of previous grazing management on environmental conditions.

APPEAL: "We understand that the previous continuous use of the areas at the full allotments of cattle has not adversely affected the environmental condition of those areas... Accordingly, we believe the proposed grazing allotment reductions are arbitrary and capricious and that the Decision should be changed to provide the full grazing allotment as originally permitted.

"None of the Forest Service's reports or analyses provide substantial or conclusive evidence to the contrary."

RESPONSE: "The greatest resource concerns...are found in riparian areas and in areas of less steep slopes and/or with relatively less brush. There have been adverse effects on the amount, kind, and vigor of vegetative ground cover in these areas. Generally, there are less riparian plants, less forage plants, and more bare soil than is found in similar areas without grazing. A lack of desirable vegetation also affects wildlife habitat and the soils' ability to effectively use precipitation for plant growth. Areas of concern are parts of Ash Creek, Copper Creek, Crooks Canyon, upper Groom Creek, the Hassayampa, Indian Creek, Milk Creek, and Wolf Creek. All areas of concern are frequented by livestock. Current condition is fair, with static trend in 4 of the 9 locations. The other five locations have poor current condition with downward trend.

"The intensity of grazing is but one factor in the health, vigor, and reproductive capacity of a forage plant. The time of year a plant is grazed also affects plant vigor. Grazing has the least impact on a dormant plant, more impact on an actively growing plant. When bites are repeatedly taken from a plant while it is green the negative impact on that plant's vigor are greatest.

"Current resource conditions on the Crooks Canyon and Maverick Grazing Allotments warrants a change from current and past grazing practices. The record clearly shows that many acres of the two allotments do not lend themselves to grazing livestock due to steepness of slope and lack of sustainable forage.

"The decision I made to reduce numbers and change the season of use was based on the need to improve resource conditions. Allotment analysis, range inspections and the Environmental Analysis clearly show that a change in grazing management is needed to improve resource values of riparian areas, watershed and wildlife. I can find no indication of arbitrary or capricious conduct by Forest Service personnel related to the analysis that led to my decision."

REPLY: None

FINDINGS:

Throughout the Project Record and EA substantial evidence is provided which addresses these and related issues

``Range analysis shows conditions below those desired resulting from distribution and utilization shortcomings. This is a result of the grazing schedules and infrastructure (fences and waters)... Overgrazing occurs when plants are grazed excessively during the growing season. Uneven distribution and utilization patters are documented, with heavy and excessive use occurring in places." EA Appendix 7 (PR-230), page 20, response 65.

“Livestock impacts on riparian areas have been identified.” loc.cit., page 21, response 69. “Current stocking levels under the current management intensity exceed the carrying capacity of the land.” loc.cit., page 22, response 78.

“Livestock are concentrating near waters and in riparian areas and drainages. This uneven livestock distribution pattern leads to uneven forage utilization... The existing grazing system does not readily allow for needed recovery rest periods following grazing.” *Interdisciplinary Team Scoping Report*, no date, PR-21.

“In many locations, herbaceous plants were grazed to a short stubble height and would provide little protection from peak flows.” *Riparian Survey...Upper Hassayampa River* Letter to Bradshaw District Ranger, Stein, 1994, PR-96.

“Season of use and duration of grazing is critical to the recruitment of these woody species. Late fall or early spring grazing, for not more then (sic) 20 to 30 days, would favor recruitment of seedlings to the sapling stage.” *Riparian Survey...Indian Creek* Letter to Bradshaw District Ranger, Stein, 1994, PR-98.

“...estimates of browse impacts on the woody species are high. Recruitment potential for the willows is limited by...heavy browse activity. *Riparian Survey...Milk Creek* Letter to Bradshaw District Ranger, Stein, 1994, PR-100.

“Below the fence line, leaders clipped on the ash was 100%. This utilization impedes development of the sub-mature and mature ash trees. The limited forage on the uplands encourages concentration of cattle grazing in the riparian area. The duration of grazing during the growing season should be managed to increase riparian vegetation density.” *Ash Creek*, Letter to Bradshaw District Ranger, Stein, 1994, PR-133.

The Forest and Rangelands Renewable Resources Planning Act of 1974, Sec. 6. (i) states Resource plans and permits, contracts, and other instruments for the use of National Forest System lands shall be consistent with the land management plans. The Prescott National Forest Plan standard for riparian forage utilization, p.45, paragraph 6 states "Proper allowable use within riparian areas will not exceed 20 percent on woody species." The referenced specialist reports indicate clearly that use is in excess of the 20% allowed.

And from the *Crooks Canyon / Maverick Allotment Analysis*, PR-158:

“...areas of high grazing value are concentrated in the west and southwest portions of the project area. Areas of moderate grazing value are scattered across most vegetation types. Low grazing value dominates the project area and exists across the mid portion of the project area from northwest to southeast. (*Summary of Range Analysis*, p.1)

“Range conditions remain Poor generally. Trend is mostly Static to Down. Species composition in the brush remains about the same with increasing density and decreasing vigor and availability. (loc.cit., p.2)

"Because of uneven forage utilization patterns documented by key species / key area utilization monitoring, a realistic existing annual carrying capacity equates to 103 cattle yearlong under current management. (loc.cit.)

``Use is heaviest in gentle open areas under the pines and along riparian corridors. Areas of dense chaparral show no signs of use. (*Range Inspection Unit Exam Record, Roth, 09-06-94.*)

Point after point is made regarding the effects of poor distribution and numbers of cattle on riparian and other sensitive areas. The Forest Plan, p.42 paragraph 8, says that "No adjustments will be undertaken that will allow for prolonged maintenance of unsatisfactory watershed conditions or degradation of wildlife habitat". This direction clearly requires us to establish a stocking level and management that addresses the

adverse impacts identified in the environmental analysis. The purpose of the analysis and reason for the decision is indeed well documented, and directed toward accomplishing the stated objectives:

``Apply a livestock grazing strategy that allows vegetative structure, composition, and vigor to improve in all areas where there is the potential for improvement." and, ``Make effective use of full capacity rangeland." EA (PR-242), p.2.

Point #4 : The decision constitutes a "taking."

APPEAL: "Appellant...believes that the proposed reduction in grazing allotments constitutes a governmental action that takes private property without just compensation under the Fifth Amendment of the United States Constitution and other relevant laws, rules and regulations."

RESPONSE: "The Granger-Thye Act of 1950 pertains to National Forest lands and states 'that nothing herein shall be construed as limiting or restricting any right, title, or interest of the United States in any land or resources.' In United States vs. Fuller, the Court stated: 'The government...may not be required to compensate...for elements of value that the Government has created, or that it might have destroyed under exercise of governmental authority...(I)t would seem a fortiori that it need not compensate for value which it could remove by revocation of a permit for the use of land that it owned outright.' Thus because a grazing permit confers no property right, there is no compensable injury under the Fifth Amendment for government actions which affect grazing on permitted land."

REPLY: "The proposed action...constitutes a governmental action that takes private property without just compensation under the Fifth Amendment of the United States Constitution (See Hague (sic) v. United States, 35 Fed. Cl. 147 (1996 U.S. Claims)."

FINDINGS:

The grazing of livestock on National Forest System Lands is a privilege granted by the Chief, USDA Forest Service, to individuals who have met the established requirements of ownership of base property and livestock.

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 Acts state that the issuance of grazing permits in no way grants any rights, title, interest or estate in or to lands or resources held by the United States. 36 CFR 222.3(b) is likewise specific in this regard.

There is considerable case law that has established holding a grazing permit is noncompensable interest since it is mere privilege to graze livestock and not a right... a privilege which can be withdrawn by the United States without payment or compensation. Two of these cases are Osborn vs. U.S., 145 F.2d 892 (9th Cir. 1944) and Swim vs. Bergland, 696 F.2d 712 (9th Cir. 1983). In a most recent case, Diamond Bar Cattle Co. and Laney Cattle Co. vs. U.S., CIV-96-437-HB, (9th Cir. 1999), the court held, " Plaintiffs do not now hold and have never held a vested private property right to graze cattle on federal public lands. At the time plaintiff's predecessors began ranching, grazing on the public domain was a privilege tacitly permitted by the government by an implied license. This license was revocable at the government's pleasure and conferred no right in plaintiffs or their predecessors to graze a specific allotment of land."

Further, under the U.S. Attorney General's *Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings*, benefits and privileges bestowed by the government are expressly excluded from the definition of private property rights protected by the Fifth Amendment. The guidelines were developed to implement Executive Order 12630 of March 15, 1988, ``Government Actions and Interference with Constitutionally Protected Property Rights." The United States views a grazing permit as a privilege which can be withdrawn or modified without payment or compensation. Since grazing and livestock use permits are a privilege, E.O. 12630 does not apply.

Point #5 : Appellant request for stay.

APPEAL: "Appellant...requests a stay of implementation of the Decision and any reductions of the full allotments pending resolution of this Appeal."

RESPONSE: "While the appellant did not seek relief, he did seek a stay of implementation of the decision pending the outcome of the appeal. I leave this to the Reviewing Officer to evaluate (36 CFR 251.91[a])."

REPLY: None.

FINDINGS:

No written request for stay was filed with the Reviewing Officer by Appellant or Appellant's representative (36 CFR 251.91[c]). Moreover the request for stay included in Appellant's ``Notice of Appeal" did not provide information sufficient for evaluation of the request (36 CFR 251.91 [c][3]).