



United States
Department of
Agriculture

Forest
Service

Southwestern
Region

517 Gold Avenue, SW
Albuquerque, NM 87102-0084
FAX (505) 842-3800
V/TTY (505) 842-3292

File Code: 1570-1

Date: August 22, 2000

Michael A. Carragher Law Office
104 South Broad Street STE 6
Globe, AZ 85501

Certified Mail – Return Receipt Requested

Re: Appeal #00-03-00-0086-A251, Dagger and A-Cross Allotments, Tonto Basin Ranger District, Tonto National Forest

Dear Mr. Carragher:

This letter documents my second level review decision of the appeal you filed on behalf of your clients, Herb and June Fletcher (permittees). The appeal is in regard to District Ranger Tina J. Terrell's October 5, 1999, decision to cancel the Fletcher's term grazing permit (# 12-796). The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

BACKGROUND

By letter dated October 5, 1999, Ranger Terrell cancelled the Fletcher's term grazing permit (# 12-796) for failing to comply with the terms and conditions of their permit. In her letter Ranger Terrell listed the following permit violations: 1) failure to remove livestock from the allotment as directed; 2) grazing livestock in excess of the numbers approved in the annual Bill for Collection; 3) failure to follow the rotation schedules specified in annual operating plans; 4) grazing livestock in areas excluded from grazing for protection of the razorback sucker; 5) failure to respond in a timely manner to remove cattle from Southwestern willow flycatcher occupied habitat on a neighboring allotment; 6) failure to follow salting practices as outlined in the permit and annual operating plan; 7) failure to tag permitted cattle as directed; and 8) exceeding utilization levels specified in annual operating plans for 1998 and 1999.

Your first level appeal and request for mediation were filed on December 7, 1999. On January 4, 2000, Acting Forest Supervisor Klabunde (Reviewing Officer) notified you that your appeal was timely and that the appeal was suspended for 45 days to allow for mediation. As provided for in 36 CFR 251.91, a stay of the decision was automatically granted for the duration of the mediation process. A mediated agreement was not reached. On March 22, 2000, Acting Supervisor Klabunde lifted the stay granted during mediation and reinstated the timeframes and procedures applicable to the appeal. Under the provisions of 36 CFR 251.94, the District Ranger completed her written responsive statement to your appeal on May 25, 2000. You elected not to file a written reply to the responsive statement with the Reviewing Officer. Based on his review of the record, Acting Supervisor Klabunde affirmed the District Ranger's decision on July 10, 2000.



Your second level appeal was received in this office on July 27, 2000. By letter dated August 3, 2000, I indicated my review decision would be made within 30 days from the date the appeal record was received.

POINTS OF APPEAL

In your second level appeal you challenged the decision by Acting Supervisor Klabunde to affirm Ranger Terrell's decision to cancel the Fletcher's term grazing permit based on the permittees' repeated failure to comply with the terms and conditions of the grazing permit. You stated: "The Fletchers have attempted to comply with all of the directives of the District Ranger and are therefore perplexed by the District Ranger's decision to cancel the permit despite the Fletcher's numerous attempts to comply with her directives." My review of this appeal was confined to the eight points of permit violations identified in the District Ranger's letter dated October 5, 1999, the District Ranger's responsive statement of May 25, 2000, the first level appeal decision dated July 10, 2000, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.

You also raised an issue related to the mediation process. 36 CFR 251.103 (e) prohibits the inclusion of notes or factual material received during mediation in the appeal record. Therefore, this issue will not be addressed in this appeal decision.

ISSUE 1 Failure to remove livestock from the allotment as directed, grazing livestock in excess of the numbers approved in the annual Bill for Collection, and failure to follow the rotation schedules specified in annual operating plans.

Discussion: A review of the record discloses that on January 29, 1998, Ranger Terrell directed the permittees to reduce the numbers of adult cattle on the A Cross/Dagger Allotments by thirty percent (removal of 128 adult cattle) for the 1998 grazing season. This action was taken to provide for resource protection because of drought conditions (Docs. C; U). On June 15, 1998, Ranger Terrell notified the permittees that they were out of compliance with their annual operating plan. Compliance issues included failing to keep their livestock in the assigned pasture within their allotment, failure to keep their livestock out of adjacent allotments, and failure to maintain riparian fences in Coon Creek and Cherry Creek (Docs. Q; R; 7).

Subsequent inspections between June 29 and September 17, 1998, revealed the permittees continued to graze cattle in pastures other than the assigned pasture specified in the annual operating plan (Docs. C; 8-12; 14-16). Therefore, in a letter dated November 16, 1998, Ranger Terrell suspended ten percent of the Permittees' permit (removal of 45 adult cattle) for 3-5 years for failure to follow their 1998 annual operating plan (Doc. U). The two actions described above ultimately resulted in reducing the number of adult cattle allowed to graze on the allotments to 272 for the 1998 grazing season. Additionally, in a letter dated February 11, 1998, the permittees notified the District Ranger that they would not be running the 200 yearlings they were permitted (200 yearlings 1/1-4/30 annually) and requested the Bill for Collection for the yearlings be cancelled (Doc. 33). Based on records acquired from the Arizona Department of Agriculture actual numbers of cattle the permittees allowed to graze on the allotments varied

between 504 and 352 head throughout the 1998 grazing season. In other words, the permittees exceeded permitted use by 837 animal unit months during the 1998 grazing season (1998 Actual Use Worksheet Doc.Y). Furthermore, the record demonstrates the permittees consistently ran excess numbers on the allotments between 1994 and 1999 totaling 4724 excess animal unit months (Responsive Statement; Actual Use Worksheets 1994-1999 Doc. Y).

Allotment inspections between February 4 and October 15, 1999, revealed the permittees continued to ignore the requirement to keep cattle in the assigned pasture as specified in their 1999 annual operating plan (Docs. 19; 21-26; 29-32).

The Secretary of Agriculture's regulations at 36 CFR 222.4(a)(4) provide the authority for Forest Officers to cancel or suspend a permit if a permittee does not comply with the provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based.

Part 1(3) of the permittees' term grazing permit states: "It is fully understood and agreed that this grazing permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comply with any of the terms and conditions specified in Parts 1, 2, and 3 hereof, or any of the regulations of the Secretary of Agriculture on which this permit is based, or the instructions of Forest officers issued thereunder; This permit can also be cancelled, in whole or in part, or otherwise modified, at any time during the term to conform with needed changes brought about by ... numbers permitted or season of use necessary because of resource conditions..." (Doc. A).

Part 2(2) provides that prior to each grazing season the Forest Service will "send the permittee a Bill for Collection specifying for the current year the kind, number, and class of livestock allowed to graze, the period of use, the grazing allotment, and the grazing fees. The bill when paid, authorizes use for that year and becomes a part of this permit." (Doc. A).

Part 2(8)(c) requires the permittee to remove livestock from Forest Service administered lands before the expiration of the designated grazing season upon request of the Forest Officer when it is apparent that further grazing would damage the resources. Part 2(8)(d) states: "The permittee will allow only the numbers, kind, and class of livestock on the allotment during the period specified in Part 1 hereof or the annual Bill for Collection, including any modifications made as provided for in Section 8(c). If livestock owned by the permittee are found to be grazing on the allotment in greater numbers, or at times or places other than permitted in Part 1 hereof, or specified on the annual Bill for Collection, the permittee ... may face suspension or cancellation of this permit." (Doc. A).

Finding: The record clearly shows that the permittees failed to remove livestock as directed by the District Ranger during the 1998 grazing season (thirty percent for drought, ten percent for suspension) consistently ran numbers in excess of what was allowed on the Bills for Collection between 1994 and 1999, and failed to follow the pasture rotation schedule specified in their 1998 and 1999 annual operating plans. The permittees' actions on these three counts are a clear violation of the terms and conditions of the term grazing permit which they signed on November 15, 1994.

ISSUE 2 Grazing livestock in areas excluded from grazing for protection of the razorback sucker, and failure to respond in a timely manner to remove cattle from Southwestern willow flycatcher occupied habitat on a neighboring allotment.

Discussion: The record demonstrates that in order to protect the razorback sucker (federally listed species) livestock would be excluded from critical habitat. This requirement was built into the annual operating plans and discussed with the permittees at annual meetings prior to the 1998-1999 grazing seasons (responsive statement). The permittees were notified their livestock were grazing in razorback sucker critical habitat on numerous occasions between July 1, 1998 and September 29, 1999 (Responsive Statement; Docs. X; 10-17; 21; 25; 30-31).

The record also demonstrates that in order to protect the Southwestern willow flycatcher (federally listed species) livestock would be excluded from occupied habitat on the Salt River. In spite of the fact the occupied habitat of the flycatcher was located outside the A Cross/Dagger Allotments, the permittees' cattle were observed grazing in occupied habitat on several occasions between December 21, 1998, and February 4, 1999. The record reflects the permittees' were repeatedly requested to remove their cattle between December 18, 1998 and February 4, 1999. (Responsive Statement; Docs. X; 17-19).

The Secretary of Agriculture's regulations at 36 CFR 222.4(a)(4) provide the authority for Forest Officers to cancel or suspend a permit if a permittee does not comply with the provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based.

Part 1(3) of the permittees' term grazing permit states: "It is fully understood and agreed that this grazing permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comply with any of the terms and conditions specified in Parts 1, 2, and 3 hereof, or any of the regulations of the Secretary of Agriculture on which this permit is based, or the instructions of Forest officers issued thereunder;" (Doc. A).

Part 2(2) provides that prior to each grazing season the Forest Service will "send the permittee a Bill for Collection specifying for the current year the kind, number, and class of livestock allowed to graze, the period of use, the grazing allotment, and the grazing fees. The bill when paid, authorizes use for that year and becomes a part of this permit." (Doc. A).

Part 2(8)(d) states: "The permittee will allow only the numbers, kind, and class of livestock on the allotment during the period specified in Part 1 hereof or the annual Bill for Collection, including any modifications made as provided for in Section 8(c). If livestock owned by the permittee are found to be grazing on the allotment in greater numbers, or at times or places other than permitted in Part 1 hereof, or specified on the annual Bill for Collection, the permittee ... may face suspension or cancellation of this permit." (Doc. A).

Finding: The record clearly shows that the permittees allowed their livestock to graze in razorback sucker critical habitat and occupied Southwestern willow flycatcher habitat during the 1998 and 1999 grazing seasons. The record also demonstrates that even after repeated requests by the District Ranger for the permittees to comply with their annual operating plans, the permittees continued to allow their cattle to graze in federally listed species habitat which was excluded from grazing. The permittees' actions are a clear violation of the terms and conditions of the term grazing permit which they signed on November 15, 1994.

ISSUE 3 Failure to tag permitted cattle as directed.

Discussion: At a meeting with the permittees on June 24, 1998, the permittees were informed they would be required to tag their cattle as they gathered them for sale. The tagging requirement was instituted to make it easy to identify ownership in the event cattle gained access to areas excluded from grazing for protection of federally listed species. The permittees were reminded of the requirement to tag their cattle on October 16, 1998. On June 7, 1999, the permittees stated that they had tagged approximately 150 cattle (approximately 69 percent of the permitted numbers). The permittees were reminded again that they needed to tag all cattle. Subsequent compliance inspections by District personnel between June 7 and October 5, 1999, showed that the permittees had not fully complied with the District Ranger's instructions (Docs. R; X).

The Secretary of Agriculture's regulations at 36 CFR 222.4(a)(4) provide the authority for Forest Officers to cancel or suspend a permit if a permittee does not comply with the provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based.

Part 2(8)(f) of the permittees' term grazing permit states: "The Forest officer in charge may, at any time, place or fasten or require the permittee to place or fasten upon livestock covered by this permit appropriate marks or tags that will identify them as livestock permitted to graze on lands administered by the Forest Service" (Doc. A).

Finding: The permittees failed to complete tagging of their permitted cattle in a reasonable period of time. The permittees failure to tag all permitted cattle as directed by the District Ranger was a clear violation of the terms and conditions of the term grazing permit which they signed on November 15, 1994.

ISSUE 4 Exceeding utilization levels specified in annual operating plans for 1998 and 1999.

Discussion: Both the 1998 and 1999 annual operating plans for the A Cross/Dagger Allotments specified that when utilization levels were reached cattle must move to the next pasture in the rotation or off the allotment. The following utilization levels were identified as appropriate levels of use: 1) Riparian – herbaceous plants, limited to fifty percent of plant species biomass, or one third of plant height; 2) Riparian – woody plants, limited to fifty percent of leaders browsed on top one third of plant; 3) Grasslands forty percent use; 4) Desert scrub forty percent maximum; 5) All other areas forty percent maximum (Doc. C).

Monitoring results from 1998 and 1999 showed utilization levels of herbaceous and woody plants consistently exceeded fifty percent throughout all riparian areas and the forty percent use level established for desert scrub, grasslands, and all other areas (Docs. J; K; 39). Documented utilization in riparian areas reached as high as ninety percent use on herbaceous plants and one hundred percent use on woody plants (Doc. 39).

The Secretary of Agriculture's regulations at 36 CFR 222.4(a)(4) provide the authority for Forest Officers to cancel or suspend a permit if a permittee does not comply with the provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based.

Part 1(3) of the permittees' term grazing permit states: "It is fully understood and agreed that this grazing permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comply with any of the terms and conditions specified in Parts 1, 2, and 3 hereof, or any of the regulations of the Secretary of Agriculture on which this permit is based, or the instructions of Forest officers issued thereunder;"

Finding: The permittees failed to follow the District Ranger's instructions regarding utilization levels specified in their 1998 and 1999 annual operating plans. This was a clear violation of the terms and conditions of the term grazing permit which they signed on November 15, 1994.

ISSUE 5 Failure to follow salting practices as outlined in the term grazing permit and annual operating plan.

Discussion: Part 3(8) of the permittees' term grazing permit states: "All salt and meal placed on the Tonto National Forest will be located on feed and not next to water unless such locations are approved in writing by the Forest Officer in charge."

The record clearly demonstrates the permittees were first notified they were violating Part 3(8) of their term grazing permit by placing salt adjacent to water on August 3, 1996. The record also shows the permittees continued to place salt adjacent to water through November 18, 1996. Additional violations of Part 3(8) of their term grazing permit were documented on September 17, 1998, and on July 1, 1999 (Docs. X; 1-5; 29; Responsive Statement).

The Secretary of Agriculture's regulations at 36 CFR 222.4(a)(4) provide the authority for Forest Officers to cancel or suspend a permit if a permittee does not comply with the provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based.

Part 1(3) of the permittees' term grazing permit states: "It is fully understood and agreed that this grazing permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comply with any of the terms and conditions specified in Parts 1, 2, and 3 hereof,"

Finding: Continuing to place salt adjacent to water is a clear violation of Part 3(8) of the term grazing permit the permittees signed on November 15, 1994.

DECISION

After review of the appeal record, I find that the District Ranger's decision to cancel the Fletcher's term grazing permit was based on a reasonable assessment of repeated violations of the terms and conditions of their permit.

The District Ranger's decision is in conformance with applicable laws, regulations, policies, and procedures. Therefore, I affirm the District Ranger's decision to cancel the Fletcher's term grazing permit on the basis of permit violations pursuant to the terms and conditions contained in the term grazing permit which they signed on November 15, 1994.

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

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

cc:
Forest Supervisor, Tonto NF
District Ranger, Tonto Basin RD
Director, Rangeland Management, R3
Appeals and Litigation Staff, R3