



United States
Department of
Agriculture

Forest
Service
Tonto
National
Forest

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File Code: 1570-1

Date: September 20, 2000

Mr. J.A. Whitney, Jr. and John A. Whitney, III
P.O. Box 17071
Fountain Hills, AZ 85269

Re: Appeal #00-03-12-0008-A251, Sunflower Allotment 2000 Annual Operating Instructions,
Mesa Ranger District, Tonto National Forest

Dear Mr. Whitney, Jr. & Mr. Whitney, III:

This letter constitutes my review and decision on your appeal of May 2, 2000. Your appeal is regarding Ranger Arthur Wirtz's April 3, 2000, decision to amend your Annual Operating Instructions (AOI) and require the removal of all livestock during the year 2000, due to the resource impacts resulting from extremely dry conditions and lack of forage.

I have reviewed the appeal points, presented in your May 2, 2000, letter according to the provisions of the appeal regulations in 36 CFR 251.99. My review has been conducted in full consideration of the entire appeal record, federal statutes, policies and operational procedures set out in the directives system of the USDA Forest Service.

Points of Appeal:

The following is my review of the points in your notice of appeal:

Your Appeal Points 1 thru 3 are information and background references, thus no response is provided.

Your Appeal Point 4: "As a permittee we have a real property right in the permits allowed use"

Response to Appeal Point 4:

The United States does not recognize livestock grazing through a Term Grazing Permit as a property right, but as a grazing privilege with terms and conditions. The 36 Code of Federal Regulations 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." There has been no property right conveyed with the Sunflower Allotment Grazing Permit and no "taking" has occurred.



Paragraph 1 of Your Appeal Point 5: “The decision administered by District Ranger Wirtz on April 3, 2000, is completely arbitrary.” The Appellant refutes that the Sunflower Allotment area is in a severe drought.

Response to Appeal Point 5: (Paragraph 1)

The District Ranger has the responsibility for providing proper stewardship and protection of natural resources, as well as providing for compatible, properly managed use of natural resources. Generally, the objective is to achieve adequate resource protection without causing a hardship to the grazing permittee. However, severe conditions have developed with the extended drought during the past several years. It is well known that Arizona is currently experiencing one of the driest periods on record. Nationally used indices, including the Palmer Drought Severity Index and the Standardized Precipitation Index, as well as local rainfall data from four gages maintained by the Maricopa Flood Control District, indicate that the Sunflower Allotment is in a severe drought. A summary of the information is provided below.

The Climate Prediction Center Press Release dated June 1, 2000, including a map that showed the Sunflower Allotment vicinity to be in an area of “Drought-First Stage”. It further stated, “October 1999-April 2000 was the second driest in 105 years of record for Arizona (surpassed only by 1903-1904).”

The long term Palmer Index released from NOAA indicates that Gila County is in an “Extreme Drought and that Maricopa County is in “Severe Drought”. The Sunflower Allotment, which is in Maricopa County and borders Gila County is clearly in a “Severe Drought” condition or worse.

The Standardized Precipitation Index indicated that Maricopa County is “Moderately Dry” whereas Gila County is “Very Dry”. This too supports the position that the Sunflower Allotment is in a drought.

More important than determining whether a drought exists is the condition of resources on the allotment. The current situation is a continuation of a dry weather pattern that has generally prevailed since 1996. Forage production remains far below normal and available water sources are severely limited. The lack of water and forage has resulted in severe pressure on riparian areas. It is clearly evident that the Forest’s rangeland and riparian resources would be at risk unless adjustments were made in stocking levels.

Total removal of livestock has been necessary on approximately 45 per cent of the allotments on the Forest. Most of the grazing permittees have removed livestock from the Forest on their own initiative because of lack of forage and water.

Continuing to allow the degradation of riparian areas and watersheds would not be an acceptable decision in managing natural resources, including grazing. The District Ranger had sufficient reason to be concerned with the heavy grazing impacts on natural resources because of extremely

dry conditions, lack of forage, and heavy utilization on remaining forage. Livestock numbers have been reduced on practically all allotments on the Tonto National Forest because of drought.

The district ranger has the authority and legal responsibility to assess the rangeland and resource conditions and protect these resources from long-term impairment. While the objective is to allow for an economically profitable livestock operation, this is dependant on ensuring the natural resources are being properly managed and protected.

Paragraph 2 of Your Appeal Point 5: “According to the Section 8(b) of our grazing permit we must be given (1) one full year notice of any schedule reduction in number or period of use become effective”

Response to Appeal Point 5 (paragraph 2):

The Federal Regulation, 36 CFR 222.4(a), states that “The Chief, Forest Service, is authorized to cancel, modify, or suspend grazing and livestock use permits in whole or in part as follows: (8) Modify the seasons of use, numbers, kind, and class of livestock allowed or the allotment to be used under the permit, because of resource condition, or permittee request. One year’s notice will be given of such modification, except in cases of emergency.” This section of the regulations is referring to the modification of the grazing permit. Through issuance of the AOI, the District Ranger has not modified the permit. The grazing permit remains as originally issued. The District Ranger has simply redeemed his responsibilities for providing proper administration of the permit in accordance with USDA regulation, agency policy and operating procedures. Any permanent modifications in the permit will be made in conjunction with the current NEPA process to authorize grazing, which is ongoing at this time and to be completed in the near future.

The term “emergency” with respect to Part 2 Section 8(b) of the permit refers to situations that might necessitate not giving a one-year notification before a grazing permit is permanently modified. This clause recognizes “factors such as fire, drought, or insect damage” as examples of emergencies. This has no bearing on the merit of the District Ranger’s decision to issue management instruction needed to properly protect resources during the 2000 grazing season. (Clause 8(c) is the basis for the District Ranger’s decision.)

Paragraph 3 of Your Appeal Point 5: “Another interesting fact is that we received a letter dated November 24, 1999, which was approved by District Ranger Wirtz, states that no drastic changes be made to the usage of the Sunflower Allotment.”

Response to Appeal Point 5 (paragraph 3):

The decision under appeal does not modify the Term Grazing Permit, whereas the actions being considered in the November 24, 1999, letter pertain to the Sunflower Allotment NEPA Analysis that is underway, affecting only the Cottonwood and Cline Units.

The two actions are not contradictory because the November letter outlined NEPA alternatives for long-term management, which could affect the Term Grazing Permit, while the April letter is in response to the drought situation. In short, the two letters are referring to two separate processes.

Paragraph 4 of Your Appeal Point 5: “Another contradiction contained in the April 3, 2000, letter is the percentage of leaders browsed section.”

Response to Appeal Point 5 (paragraph 5):

The 100% utilization of riparian woody leaders in 1998 and 49% by the beginning of the summer grazing season is unacceptable. It is only reasonable to expect the 49% use level to increase significantly by the end of the summer grazing season.

Your Appeal Point 6: A. “Lack of Data supporting the requirement that all Livestock be removed immediately from the Allotment.”

B. “Unlawful modification of Grazing Permits and AMP’s by Means of Annual Operating Instructions.”

Response to Appeal Point 6:

(A) The District Ranger’s decision was based on resource conditions on the Sunflower Allotment resulting from severe drought.

(B) The District Ranger decision is in response to extreme drought conditions and is a temporary action. It does not modify the Term Grazing Permit or Allotment Management Plan. The decision to temporarily remove livestock due to drought does not amend the forest plan. It also was not based on any lawsuits, consultation, or Endangered Species act or Biological Assessments. The Appellant continues to have applicant status and will have the opportunity to review the draft Biological Opinion when available.

Your Appeal Point 7: “As stated before, we have tried numerous times with verbal communication and the May 1, 2000, proposal to try to remedy this issue to no avail. Throughout this process at all times we have been willing to discuss and compromise on this issue. So far that has not been afforded an option.”

Response to Appeal Point 7:

The Mesa District Ranger and Staff have had numerous meetings and trips to the field with you to discuss the drought and this issue. This extreme drought situation affords very limited compromises that would not result in serious damage to the resources on the Sunflower Allotment.

Response to Appeal Point 8: “We request that the decision made by District Ranger Wirtz be revoked due to the fact that it is unlawful, unconstitutional, violates numerous federal laws, the Forest Service’s regulations and will cause unnecessary hardship to our family cattle ranch.”

Response to Appeal Point 8:

District Ranger Wirtz’s decision was based on resource conditions brought on by drought and is consistent with the terms and conditions of the Term Grazing Permit #12-690.

CONCLUSION

My review of your appeal was conducted in accordance with 36 CFR 251 Subpart C. After review of the record, I conclude that the District Ranger’s April 3, 2000, decision to amend your Annual Operating Instructions (AOI), and require the removal of all livestock during the year 2000, was warranted and 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.

According to the appeal regulations (36 CFR 251.87) you may file an appeal to the Regional Forester within 15 days of this decision. The second level appeal must be sent to: Regional Forester, Southwestern Region, 517 Gold Avenue, SW, Albuquerque, New Mexico 87102. A copy of the second level appeal should also be sent to my office.

Sincerely,

/s/ **Thomas J. Klabunde**
THOMAS J. KLABUNDE
Deputy Forest Supervisor and Appeal Reviewing Officer

Cc: Regional Forester, R-3
District Ranger, D-2

GHolder/Iy:09/06/00