



United States
Department of
Agriculture

Forest
Service

R3 Regional Office

333 Broadway SE
Albuquerque, NM 87102
FAX (505) 842-3800
V/TTY (505) 842-3292

File Code: 1570-1/2200

Date: November 27, 2001

Karen Budd-Falen
Budd-Falen Law Offices
P.O.Box 346
Cheyenne, WY 82003-0346

**CERTIFIED MAIL –
RETURN RECEIPT REQUESTED
7000 2870 0000 1135 8804**

Re: Appeal #01-03-12-0002-A251, Copper Creek Allotment, Cave Creek Ranger District,
Tonto National Forest

Dear Ms. Budd-Falen:

This is my second-level review decision on the appeal you filed on behalf of your client, Charlie Wilcox. The appeal is in regard to District Ranger Lopez' decision to suspend 20 percent of Mr. Wilcox's term grazing permit for a period of 2 years. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

Background

On May 31, 2001, District Ranger Lopez issued a decision suspending 20 percent of Mr. Wilcox's term grazing permit for a period of 2 years.

Deputy Forest Supervisor Klabunde received Mr. Wilcox's first-level appeal on July 10, 2001. Mr. Wilcox did not request an oral presentation, request for stay, or a request for mediation in his appeal (33 CFR 251.90). Under the provisions of 36 CFR 251.94, Ranger Lopez prepared and mailed a copy to Mr. Wilcox of his written responsive statement to Mr. Wilcox's appeal on August 6, 2001. Mr. Wilcox replied to the responsive statement on August 27, 2001. Based on his review of the record, Deputy Supervisor Klabunde affirmed Ranger Lopez' decision on September 28, 2001.

Your second-level appeal of Ranger Lopez' decision was received in this office on October 15, 2001. By letter dated October 29, 2001, I indicated my review decision would be made within 30 days from the date the appeal record was received from the first-level Reviewing Officer.

Points of Appeal

My review of this appeal was confined to the substantive points raised in the appeal; the administrative record including Ranger Lopez' responsive statement of August 6, 2001; appellant's August 27, 2001, reply to the responsive statement; the first-level appeal decision dated September 28, 2001; and federal regulations and the policies and operational procedures of the USDA Forest Service.



ISSUE 1: The decision is not supported by the evidence.

Contention: The appellant contends drift of his cattle had occurred, but that such drift was beyond his control. The appellant argues that in order to suspend his permit, the Forest Service must prove the violations were intentional.

Response: The Secretary of Agriculture's regulations at 36 CFR 222.1(a) direct the Forest Service Chief to develop, administer, and protect the range resources and permit and regulate the grazing use of all kinds and classes of livestock on all National Forest System lands and on other lands under Forest Service control. The Chief is authorized to re-delegate this authority. 36 CFR 222.3(a) provides that, "Unless otherwise specified by the Chief, Forest Service, all grazing and livestock use on National Forest System lands and on other lands under Forest Service control must be authorized by a grazing or livestock use permit." Subsection (b) states that "Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources." The Secretary's regulations at 36 CFR 222.4(4) authorize the Chief to "(c)ancel or suspend the permit if the permittee does not comply with 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 a term grazing permit states "It is fully understood and agreed that this 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 the Forest officers issued thereunder..." Part 2(8)(a) of the term grazing permit states, "The allotment management plan for the land described on page 1, Part 1, is a part of this permit, and the permittee will carry out its provisions, other instructions, or both as issued by the Forest officer in charge for the area under permit and will require employees, agents, and contractors and subcontractors to do likewise." This section of the term grazing permit provides broad discretion to issue annual operating instructions to permittees prior to the beginning of the grazing season. These instructions are prepared jointly with the permittee and may be amended during the season, as needed, for resource protection. Forest Service and Bureau of Land Management personnel met with the appellant on December 14, 2000, to develop an operating plan for calendar year 2001. This meeting was documented in a letter from Ranger Lopez to Mr. Wilcox on January 4, 2001 (Doc. 25). It is the sole responsibility of a permittee to ensure pastures are used according to the schedule developed in the annual operating instructions and that livestock are moved when utilization levels have been reached. When a grazing permittee fails to comply with instructions of a Forest Officer, the term grazing permit is subject to suspension or cancellation, in accordance with the Secretary of Agriculture's regulations and the terms and conditions of the permit, as outlined above.

Finding: Permittees holding Forest Service term grazing permits are responsible for maintaining control of their livestock. Failure to do so, intentionally or otherwise, may result in administrative action in the form of suspension or cancellation of the term grazing permit.

ISSUE 2: The District Ranger did not attempt to resolve this matter prior to issuance of his written decision.

Contention: The appellant contends the Forest Service made no attempt to meet in person, or by phone, to reach a common understanding and agreement prior to the issuance of a decision.

The appellant argues this is a clear violation of 36 CFR 251.93(a). Therefore, the decision to suspend 20 percent of Mr. Wilcox's permit was arbitrary and capricious.

Response: As documented in the record, a meeting to develop an annual operating plan for the 2001 grazing season was held December 14, 2000, at the Cave Creek Ranger Station. Those attending the meeting were: Tim Hughes, Wildlife Biologist at the Phoenix Field Office of the Bureau of Land Management (BLM); Wade Reeves, Fuels Specialist from the Kingman Office of the BLM; Bruce Olson, Range Technician from the Phoenix Field Office of the BLM; Rink Goswick, the appellant's ranch manager; Gary Daniel, Assistant Fire Management Officer for the Cave Creek Ranger District; and Patti Fenner, Range/Watershed Program Manager for the Cave Creek Ranger District. Prescribed burns, riparian area management, and pasture rotations were discussed at the meeting (Doc. 25).

The following pasture rotation on National Forest System lands was set at the December 14 meeting: The Bobcat Pasture was scheduled concurrently with BLM's Boone Pasture for yearlings between February 25 and March 15, 2001. The following pastures on the National Forest were scheduled for cow/calf numbers: Cattle would remain in the Brooklyn Pasture until the end of January; Mesa Butte Pasture, February and March; Granite Pasture, April; Cornstock Pasture, May; Lousy and Joe's Hill Pastures, June through August; Perry Mesa Pasture, September through October; and return to the Brooklyn Pasture in November (Doc.25).

The record shows that as early as March 7, 2001, Patti Fenner notified the appellant by e-mail that a yearling belonging to the appellant was observed in the Cornstock Pasture (Doc. 21). On March 19, 2001, Patti personally informed the appellant and his ranch manager they needed to get into compliance with the pasture rotation approved in the annual operating instructions (Doc 13). On March 28, 2001, Ranger Lopez wrote the appellant directing him to remove 75 head of cattle from the Cornstock Pasture and additional cattle from the Bobcat Pasture. In his letter, Ranger Lopez specifically stated, "Part 2, #8 of the General Terms and Conditions of your grazing permit states that the permittee will carry out provisions of the Allotment Management Plan and other instructions as issued by the Forest Officer in charge, and will require employees, agents, and contractors and subcontractors do likewise. Annual operating instructions that are issued each year by this office are instructions that are to be carried out. Noncompliance with these instructions constitutes a violation of the terms of your permit, and grounds for suspension or cancellation. The District will be checking use on the allotment throughout the year. I will expect cattle to be in scheduled pastures unless other arrangements have been made with Patti and/or me." (Doc. 15). On April 9, 2001, Ranger Lopez instructed the appellant to remove cattle from the Bobcat, Cornstock, and Perry Mesa Pastures. In his letter, Ranger Lopez also notified the appellant he had two weeks to show cause why permit action should not be taken against his term grazing permit. On April 12, 2001, Mrs. Wilcox informed Patti Fenner all cattle had been removed from the Cornstock Pasture (Doc. 12). A follow-up inspection of the allotment on April 19, 2001, revealed there were still cattle in both the Bobcat and Cornstock Pastures (Doc. 11).

Finding: The Deciding Officer tried for over a month to get the appellant to comply with the pasture rotation before suspending 20 percent of the appellant's permit. The Deciding Officer's decision was not arbitrary and capricious.

ISSUE 3: The District Ranger violated 36 CFR 251.97 in issuing the decision.

Contention: The appellant contends the decision failed to notify the appellant of the opportunity for an oral hearing.

Response: The regulations at 36 CFR 251.90(c) provide an appellant the opportunity to include one or more of the following in a notice of appeal: a request for oral presentation, a request for stay of the decision, and in those States with a Department of Agriculture certified mediation program, a request for mediation of grazing permit cancellation or suspension actions. There are no requirements in the 251 appeal regulations that the Deciding Officer notify a permittee of the opportunity for an oral presentation. It is the Reviewing Officer's responsibility to notify the appellant of the procedures that will be followed during the appeal review. The Reviewing Officer outlined the timelines and procedures in a letter to the appellant dated August 2, 2001. In this letter, the Reviewing Officer specifically stated that the appellant could request an oral presentation at any time prior to the closing of the appeal record. In a subsequent letter dated August 6, 2001, Ranger Lopez also informed the appellant that he could request an oral presentation prior to the closing of the appeal record.

Finding: The Deciding Officer did not violate the procedural provisions of 36 CFR 251.97.

ISSUE4: The District Ranger violated 36 CFR 251.84 in issuing the decision.

Contention: The appellant contends the Deciding Official's decision failed to offer the appellant the opportunity to discuss any concerns or issues related to the decision, or to inform the appellant of the opportunity to request mediation since the decision involved a suspension of the appellant's term grazing permit.

Response: Based on the record, it is evident the Deciding Official inadvertently excluded information relating to the opportunity to meet and discuss the issues either through an informal meeting or a structured mediation session. However, the Reviewing Officer corrected this error in his August 2, 2001, letter outlining timelines and procedures to be followed during the appeal review. In this letter, he specifically notified the appellant he could request mediation, and that an automatic stay of the Deciding Officer's decision would be implemented during mediation. Furthermore, the intent of the broader requirement to meet informally to discuss issues was met when the Reviewing Officer notified the appellant of the opportunity to pursue mediation. Additionally, in his letter, the Reviewing Officer encouraged the appellant to contact Eddie Alford or Paul Stewart in the Supervisor's Office if he had any questions. There is nothing in the record to indicate the permittee responded to the Reviewing Officer's August 2 letter.

Finding: The Reviewing Officer corrected the inadvertent procedural errors in the Deciding Officer's decision.

ISSUE 5: The severity of the punishment is arbitrary and capricious.

Contention: The appellant argues the allegations are minor and that the 20 percent suspension does not fit the crime.

Response: The requirements in the Secretary's regulations and the term grazing permit are intended to ensure soil and water, vegetative resources, and wildlife habitat are protected. Federal statutes such as the Endangered Species Act carry stringent penalties for violating the

provisions of the act. Continuing violations of the Secretary's regulations or a term grazing permit are serious. It is not the policy of the Forest Service to eliminate term grazing permits through adverse permit actions. However, when continuing violations occur, suspensions and cancellations are intended to bring a permittee into compliance with the terms and conditions of the permit. Every violation must be evaluated on a case-by-case basis. In this case, violations of the 2001 annual operating plan continued over a period of several months. Even after Ranger Lopez notified the appellant he was considering taking action against the permit and instructed him to remove cattle from the Bobcat, Cornstock, and Perry Mesa Pastures, the appellant did not fully comply Ranger Lopez' instructions.

Finding: After a thorough review of the appeal record, I find there is nothing to indicate that the Deciding Officer's decision was arbitrary or capricious.

Decision

After review of the appeal record, I find that the District Ranger's decision to suspend 20 percent of the appellant's permit is consistent with the Secretary of Agriculture's regulations and the terms and conditions of the term grazing permit. I find no evidence that would support the allegations that the District Ranger acted in an arbitrary and capricious manner. Therefore, I affirm the District Ranger's decision to suspend 20 percent of the appellant's permit for 2 years.

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

Sincerely,

/s/ Bob Leaverton, for
JAMES T. GLADEN
Reviewing Official,
Deputy Regional
Forester, Resources

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