



United States
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Forest
Service

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Date: May 9, 2003

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**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED**

RE: Appeal #03-03-12-0001-A251, Buzzard Roost Allotment, Pleasant Valley Ranger District,
Tonto National Forest

Dear Mr. Kennedy:

This letter documents my second-level review decision of the appeal you filed on behalf of D.G. Fenn Land and Cattle Company, LLC. The appeal is in regard to District Ranger Sensibaugh's decision to amend the 2002 annual operating instructions (AOI) for the Buzzard Roost Allotment. The appeal was filed and has been processed under the provisions of 36 CFR 251, Subpart C.

BACKGROUND

District Ranger Sensibaugh (Deciding Officer) issued a decision on December 3, 2002, amending the 2002 AOI for the Buzzard Roost Allotment. The amended AOI authorized up to 100 head of adult cattle to graze the Middle Pasture of the Buzzard Roost Allotment through February 28, 2003.

Your first-level appeal was filed on January 17, 2003. Under the provisions of 36 CFR 251.94, the Deciding Officer completed his written responsive statement to your appeal on February 13, 2003. Based on his review of the record, the Reviewing Officer affirmed the Deciding Officer's decision on March 25, 2003.

Your second-level appeal was received in this office on April 17, 2003.

POINTS OF APPEAL

My review of this appeal was confined to the substantive points raised in the appeal, the appeal record, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.

ISSUE: There is no basis for the District Ranger's decision.

Contention: The appellant contends that the Deciding Officer's decision to reduce authorized numbers from 256 head of adult cattle and 34 yearlings to 100 head for the period December 3, 2002, through February 28, 2003, is arbitrary and capricious and unjustified by range conditions.



The appellant states that the Deciding Officer did not make a determination that an “extreme emergency exists” where resource conditions are being seriously affected by livestock use. The appellant believes such a determination is necessary predicate to making a decision under Part 2(8)(b) of the grazing permit.

Discussion: Calendar year 2002 was the fourth driest in Arizona since precipitation records began in the 1890’s (NOAA, 2003). In central Arizona, climatic conditions were even worse. Phoenix received only 2.82 inches of rainfall, tying the record, set in 1956, for the lowest amount of precipitation received in one year. In 2002, Gila County went through not only the driest year in the past century, but also the warmest (NOAA, 2003).

The Society of Range Management (SRM) defines drought as “...prolonged dry weather when precipitation is less than 75% of the average amount.” For the past two calendar years, Gila and Yavapai Counties received only 30 to 50% of average precipitation (Western Regional Climate Center, 2003) well below SRM’s defining threshold for drought. To further compound the problem, precipitation has only been 70 to 90% of long-term averages for the past six years.

The major drought indices reflect the severity of the situation. The Standardized Precipitation Index for central Arizona for 2002 is listed as “extremely dry.” The Palmer Index also lists central Arizona as being in an “Extreme Drought” category (the most severe drought ranking).

Until this drought abates, it is difficult to compare its magnitude with other historic droughts. SRP (Salt River Project) believes, however, that the current drought may be approaching the severity of the worst drought on record in Arizona, which occurred between 1898 and 1904.

Rangeland plants are dependent on soil moisture for survival. Lack of adequate soil moisture affects virtually every physiological process in plants, often resulting in loss of plant vigor and, in extreme cases, plant mortality. Drought conditions that result in a reduction of vegetative ground cover can lead to increased soil erosion, a loss of site productivity, and degradation of water quality.

The origin of Part 2(8)(b) of all term grazing permits stems from the Secretary of Agriculture’s Regulations 36 CFR 222.4(a)(8) that authorize the Chief of the Forest Service to “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.” Part 2(8)(b) of all term grazing permits incorporates the Secretary’s Regulations at 36 CFR 222.4(a)(8), but qualifies them by making clear that drought is one of many factors that may be considered an extreme emergency. Additionally, the aforementioned cites to the Secretary’s regulations and all term grazing permits refer to modification of term grazing permits. The Secretary’s regulations 36 CFR 222.1(b)(10) define “modify” as a “means to revise the terms and conditions of an issued permit.” Thus, modification of a term grazing permit is a permanent change in the terms and conditions of a permit; whereas, annual operating instructions are responsive to current allotment resource conditions in any given year.

All term grazing permits provide broad discretion to issue annual operating instructions to permittees as needed for resource protection. The record reflects the Deciding Officer issued his instructions following meaningful discussions with Mr. Fenn (Deputy Forest Supervisor’s letter of December 20, 2002). Following these meaningful discussions, the Deciding Officer amended

the annual operating instructions in accordance with the term grazing permit for the Buzzard Roost Allotment, Part 2(8)(a), that 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...”. The Deciding Officer’s decision is also consistent with Part 2(8)(c) that 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.”

The record reflects the Deciding Officer based his decision on current resource conditions, including precipitation, vigor of forage plants, apparent trend of vegetation and soil, and condition of range developments such as stock water tanks.

Finding: The Deciding Officer made a balanced decision considering the need to provide sustainability of rangeland resources. The decision is neither irrational nor unsupportable.

DECISION

In these times of extended drought, we are sympathetic to, and understanding of, livestock operators’ needs for forage. Ranchers adapting to drought conditions accompanied by economic pressures caused by use reductions find this to be a very difficult time. Significant reductions in cattle use have occurred across the Western United States in response to drought, because there is little or no forage on the National Forest System lands to support the use. Continued use would impair the short- and long-term health of rangelands.

The Forest Service is being as flexible as possible in allowing changes in use, while making sure our decisions are consistent with good land stewardship. We will continue to review and assess viable options on a case-by-case basis with permittees, Universities, Cooperative Extension Agents, and other third parties in an effort to minimize the impact on the livestock industry in the Southwestern Region.

After a review of the appeal record, I find that the Deciding Officer’s decision is in conformance with applicable laws, regulations, policies, and procedures. I find no evidence indicating the Deciding Officer has acted in an arbitrary and capricious manner. The Deciding Officer’s decision to amend the 2002 annual operating plan for the Buzzard Roost Allotment is affirmed.

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

Sincerely,

/s/ Abel M. Camarena
ABEL M. CAMARENA
Appeal Reviewing Officer,
Deputy Regional Forester

cc: David M Stewart, Christina Gonzalez, Mark Sensibaugh, Mailroom R3 Tonto