



United States
Department of
Agriculture

Forest
Service

Tonto National Forest
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1905-2005*

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File Code: 1570

Date: January 22, 2003

Attention: Warren & Joan Smith
Red Creek Ranch, LLC
7700 Slayton Ranch Road
Flagstaff, AZ 86004

RETURN RECEIPT REQUESTED

Dear Warren & Joan Smith:

This letter documents the closing of the record and my review and decision of your appeal #02-03-12-0009-A251 dated October 11, 2002 for the Red Creek allotment term grazing permit. The appeal is in regard to District Ranger Lopez's decision to modify the Term Grazing Permit for the Red Creek allotment to assign additional range fence maintenance responsibilities to the permit holder. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C. Appeal record documents are numbered as (AR1), (AR2), etc.

BACKGROUND

AR1 – September 26, 2002 grazing permit modification #2002-1 that assigns new maintenance responsibilities to the term grazing permit for the Red Creek allotment. A map is attached revealing the locations of the new assigned fence maintenance responsibilities. Cave Creek District Ranger Lopez is herein identified as the responsible official.

AR2 – September 26, 2002 transmittal letter to the permit holder with the modification #2002-1 dated September 26, 2002 as an attachment. The letter also identifies the Forest Service purchasing extra gate panels for the use by the permit holder.

AR3 - October 11, 2002 Notice of Appeal from Red Creek allotment permit holder Warren Smith to Tonto Forest Supervisor Karl Siderits.

AR4 - October 16, 2002 letter from Forest Supervisor Siderits to Ranger Lopez regarding the preparation of the appeal responsive statement.

AR5 - October 16, 2002 letter from Forest Supervisor Siderits to Red Creek allotment permit holder Warren Smith acknowledging the October 15, 2002 receipt of the notice of appeal.

AR6 - November 12, 2002 letter from Forest Supervisor Siderits to permit holder Warren Smith that states a time extension has been granted to Ranger Lopez to complete the appeal responsive statement.



AR7 - November 12, 2002 letter to Ranger Lopez regarding the time extension for the appeal responsive statements.

AR8 - November 27, 2002 letter from Ranger Lopez to Forest Supervisor Siderits. The appeal responsive statement are attached.

AR9 - November 27, 2002 letter from Ranger Lopez to permit holder Warren Smith with attached appeal responsive statement.

AR10 - February 26, 1999 Red Creek Riparian Fence Decision Memo approved by Ranger Lopez. The decision memo documents the decision to construct a new livestock exclosure fence in the lower portion of the Red Creek drainage within the Red Creek pasture.

AR11 - February 25, 1999 transmittal letter to District Ranger Lopez with the attached Biological Assessment and Evaluation (BAE) dated February 25, 1999 prepared by Jerome A. Stefferud. The BAE was conducted for the new construction of a livestock exclosure fence in the lower portion of the Red Creek drainage within the Red Creek pasture.

AR12 – Construction of Red Creek Riparian Protection Fence Decision Memo to construct a new livestock exclosure fence in Red Creek within the Tangle pasture of the Red Creek allotment.

AR13 - January 25, 1999 meeting notes that includes the permit holders. The purpose of the meeting was to clarify a proposal by Arizona Game and Fish Department to fund construction of range improvements so that the Red Creek permit holders will be able to use the Red Creek pasture.

AR14 - Term Grazing Permit – Parts 1 and 2 issued to Red Creek Ranch, LLC for the Red Creek allotment dated April 16, 2001.

AR15 - Certificate of Final Inspection for the Red Creek riparian exclosure fence dated August 1, 1999.

AR16 - Riparian Field Form dated June 23, 1992

AR17 - Summary of Conditions dated January 8, 1992.

AR18 - Summary of Conditions dated July 18, 1997.

AR19 - Riparian Field Form dated February 4, 1999.

AR20 - Topographic map of livestock exclosure fence in Tangle Creek.

AR21 - Topographic map of Red Creek photo points.

AR22 - Topographic map of Red Creek photo points.

AR23 - Forest Service Handbook 2209.13 section 16.1 and 16.11.

AR24 - 36 Code of Federal Regulations (CFR) 222.9 and 222.10.

AR25 - Forest Service Manual 2231.61.

AR26 – 36 Code of Federal Regulations (CFR) 222.4

POINTS OF APPEAL

My review of this appeal was confined to the substantive points raised in the notice of appeal, the appeal record, federal regulations, provisions of the grazing permit and the policies and operational procedures as set forth in the directive system of the USDA Forest Service.

Issue 1: Basis for the modification was trespass of cattle into the enclosure areas. In all situations, employees of the permittee informed the Forest Service that they needed to fix the fence. The permittee continually reminded the FS of ongoing repair needs.

Contention: The Appellant contends that the reason for the permit modification was trespass cattle in the enclosure areas.

Response: Ranger Lopez identified the benefits and rationale for keeping cattle out of the riparian enclosures in his modification #2002-01(AR1 and AR9). Based on these needs to properly protect resources, the district ranger modified the grazing permit for permittee maintenance responsibility (AR1). This permit modification to assign maintenance for these enclosure fences is based on Part 2, Clause 8(h) of the term permit and is consistent with 36 CFR 222.4[a][7] (AR26).

The District Ranger is affirmed on this issue.

Issue 2: The Upper Red Creek Enclosure was constructed for the purpose of enclosing the campground along Upper Red Creek. It was not constructed for the purpose of excluding cattle from Red Creek.

Contention: The appellant contends that the purpose of the upper enclosure was to exclude cattle from a campground and not from the riparian area of the creek.

Response: The purpose of the enclosure is to provide protection to suitable and/or potential habitat of the Gila Topminnow (AR10, AR11 and AR13).

The District Ranger is affirmed on this issue.

Issue 3: When the permittee chose not to construct the campground fence, the FS constructed a fence around a larger portion of Upper Red Creek and agreed to allow the permittee to lightly use the pasture for calving heifers and/or sick cattle.

Contention: The appellant states that the campground was the initial reason to construct the enclosure fence and that livestock grazing would continue for light use by calving heifers and/or sick cattle.

Response: See response to issue 2.

The District Ranger is affirmed on this issue.

Issue 4: The FS, without informing the permittee, utilized funding that would then require the area within the fence to be an enclosure area. The area in question was not fenced for the purpose of removing cattle grazing; rather it was enclosed simply due to the funding utilized to construct the fence.

Contention: The appellant contends that the purpose of the livestock enclosure was to fence livestock from a campground and that the funding utilized was only for excluding cattle from a campground.

Response: See response to issue 2.

The District Ranger is affirmed on this issue.

Issue 5: The Upper Tangle Creek Enclosure encloses the Administration Center utilized by the FS. These fences have been down for several years and repair has not been fully completed therefore making the trespass of cattle into this area inevitable.

Contention: The appellant contends that the enclosure is part of the Tangle Creek Administrative site and therefore, it should be maintained by the Forest Service.

Response: The riparian enclosure is outside of the Tangle Creek administrative site boundary (AR1 and AR14). Ranger Lopez stated that there has been a problem keeping these watergaps up (AR9). Modifying the term grazing permit for fence maintenance is consistent with the purpose as described in permit modification #2002-01(AR1). The approval of permit modification #2002-01 is consistent with Part 2, Clause 8(h) of the term grazing permit and 36 CFR 222.4(a)(7).

The District Ranger is affirmed on this issue.

Issue 6: The Lower Tangle Creek Enclosure was constructed for the purpose of research on riparian areas and the fence has continued to become dilapidated and neglected by the FS that allows trespass of cattle.

Contention: The appellant contends that the area has not been utilized for collecting data for at least 10 years. In addition, the appellant contends that cattle have trespassed regardless of efforts by the permit holder to repair fences.

Response: The District Ranger has provided documents in his responsive statement that reveals data has been collected over the last 10 years (AR16-22). Ranger Lopez also states that TRIMM surveys have just been conducted at the lower enclosure and that photopoints are taken each year in and adjacent to all enclosures. Ranger Lopez also states that the Forest Service has had difficulty in maintaining this fence (AR9). The purposes that are described in permit modification #2002-01 reflect a need to modify the permit to include permittee maintenance responsibility (AR1).

The District Ranger is affirmed on this issue.

Issue 7: It is not proper to require the permit holder to maintain fences for areas not utilized by his cattle. Additionally, the Upper Red Creek enclosure be returned to light use as a winter heifer calving pasture as was originally agreed upon.

Contention: The appellant contends that the most appropriate method for resolving the maintenance questions is for the Forest Service to maintain the riparian enclosure fences and to allow light grazing use in the Upper Red Creek enclosure.

Response: Ranger Lopez identified the need to modify the term grazing permit in the purpose statements in permit modification #2002-01 (AR1). These purpose statements reveal that maintenance responsibilities are essential for the proper protection and management of resources administered by the Forest Service. Part 2, Clause 8(h) of the term permit addresses the permittee's responsibility to maintain range improvements that are essential for this purpose (AR14). In addition, the Forest Service Manual 2231.61 (AR25) and Forest Service Handbook 2209.13, section 16.1(AR23) reveals the authority of the responsible official to modify other terms and conditions of the permit, including provision for construction or reconstruction, and/or maintenance of range improvements.

Also, the 36 CFR 222.9(b)(5)(6), 36 CFR 222.10(a) and 36 CFR 222.4(a)(7) reveal the reasons and authority for the responsible official to modify the term grazing permit (AR24 and AR26). The Decision Memo approved by Ranger Lopez and dated February 26, 1999 clearly states that the portion of Red Creek between Thicket Spring and the Red Creek Ranch property will be fenced to exclude livestock, except for one access point at the Forest Road 16 crossing (AR10). Additionally, the Biological Assessment and Evaluation for the Red Creek Riparian Enclosure Fence dated February 25, 1999 clearly states the preferred alternative is to construct a livestock enclosure fence to exclude livestock from Red Creek in the Red Creek pasture (AR11). This range fence will provide complete protection for suitable and potential habitat for Gila topminnow, an endangered species (AR11).

The District Ranger is affirmed on this issue.

DECISION

My review of your appeal was conducted in accordance with 36 CFR 251 Subpart C. After review of the appeal record, I find that the District Ranger's permit modification #2002-01 is

based on Forest Service policy and is in conformance with applicable laws, regulations, policies, and procedures. Therefore, I affirm the District Ranger's decision.

I also encourage the permit holder to communicate and closely work with Ranger Lopez and his staff on the management of the Red Creek allotment.

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
333 Broadway SE
Albuquerque, New Mexico 87102

Sincerely,

/s/ Thomas J. Klabunde
Thomas J. Klabunde
Appeal Reviewing Officer
Deputy Forest Supervisor

CC: Cave Creek District Ranger
Regional Forester, USDA Forest Service, Southwestern Region