



File Code: 1570/2230

Date: April 20, 1999

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#P 238 468 016

Law Offices of Fennemore Craig
Attn: Jay L. Shapiro
3003 N. Central Avenue, Suite 2600
Phoenix, AZ 85012-2913

Re: Richard and Anna Bragg Revocable Inter-Vivos Trust Appeal No: 99-12-SO-001

Dear Mr. Shapiro:

This is my review decision on the appeal you filed on December 21, 1998 concerning Cave Creek District Ranger Delvin Lopez's November 6, 1998, decision to cancel grazing permit #12-768, issued to the Richard and Anna Bragg Revocable Inter-Vivos Trust, with Stephen Bragg as trustee, on January 12, 1999. Mr. Lopez's decision was in response to failure to pay grazing fees within established time limits, non-compliance with provisions and requirements in the grazing permit, and knowingly and willfully making false statements or representation in the grazing application or amendments thereto.

I closed the appeal record on February 22, 1999. The current permit, #12-768, for 400 cattle year-long was issued to Richard and Anna Bragg Revocable Inter-Vivos Trust, with Stephen Bragg as Trustee on January 12, 1999. One hundred twenty head of these 400 are suspended until December 31, 1999.

On September 1, 1998, Ranger Lopez mailed the permittees a letter asking them to show cause why the New River Allotment permit to graze cattle should not be cancelled. The reasons for this permit action were:

- 1) the permittees failed to submit information requested by the District concerning tagging of cattle on the allotment.
- 2) failure to apply or pay for grazing fees for cattle that grazed on the New River Allotment in 1998. This is a violation of Part 2, #8d of their grazing permit which 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 shall be billed for excess use at the unauthorized use rate and may face suspension or cancellation of this permit."

It is also a violation of Part 3, #1;

"Each year the permittee will file with the District Ranger an application for changes from the use specified in the term grazing permit. It is to be submitted substantially in advance of the desired grazing season. Approval of the application, in whole or in part will be reflected in the ensuing Bill for Collection. If fees assessed through the Bill for Collection are not paid by the date specified thereon and livestock are placed on (or in the case of yearlong permits, are on) the allotment, term permit numbers and/or season of use may be suspended and/or cancelled. In addition, grazing use by livestock during the delinquent period will be assessed at the 'excess use rate' minus regular fees if already paid and applicable."

3) as of September 1, 1998, the permittees had failed to sign the modified Term permit to graze 280 cattle on the New River Allotment, that had been mailed to them in June. This modified permit superseded the previous grazing permit of April 15, 1991 for 550 cattle and reflects Ranger Delvin Lopez's July 17, 1997 decision to reduce the number of livestock permitted on the New River Allotment. Mr. Lopez's decision allowed one year to reduce the herd size to 280 cattle.

Background

On September 8, 1998, Mrs. Bragg stated to District Staff that all cattle had been removed from the New River Allotment since June 12, 1998. Mrs. Bragg signed the Term Permit which had been mailed to her in June 1998, which permits 280 cattle to graze the allotment. She had also enclosed an application to graze 290 head of cattle for time that had already elapsed in 1998 (March 1 - June 12), and 290 head of cattle plus 11 horses from November 12, 1998 - February 28, 1999. (This would be 21 head over numbers authorized on the modified Term permit.) Inspection papers were also included for shipment of 215 head of cattle with brands authorized to run on the New River Allotment. The permittees declared that 95% of the 290 head of cattle on the Forest as of 6/98 were tagged. All livestock were to be tagged with the red ear tags which were issued by the Cave Creek Ranger District office to attain accountability for livestock numbers.

On November 3, 1998, personnel from the Cave Creek District office conducted an inspection of the New River Allotment to ensure there were no livestock remaining on the allotment prior to restocking with properly permitted cattle.

174 cattle were counted in 17 different locations scattered across the allotment. Cattle were observed in Cottonwood, East Mesa, the River, Cook's Mesa, Moore's Gulch, and Willow Springs pastures. This was clearly not a localized problem of a few cattle slipping through a gate that was left open or other breaks in fences. Many areas where cattle were seen had been heavily grazed during this past summer season. At least half of these animals did not have red ear tags.

According to Part 1, #3 of your Term permit,

"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 forest officers issued thereunder; or for knowingly and willfully making a false statement or representation in the permittee's grazing application, and amendments thereto.."

Findings

Based upon the above violations of the Term Permit and Federal Regulations, I am supporting Ranger Lopez's decision to cancel the Term Grazing Permit issued to the Richard and Anna Bragg Revocable Inter-Vivos Trust to graze the New River Allotment.

This is not an action I take lightly. Careful consideration was given to the past history of permit violations and management problems on this allotment. During the 8-year tenure of the permit, the permittee has failed to pay fees, removed livestock from the allotment and taken non-use without prior approval, grazed lands outside permitted areas, ignored their Annual Operating instructions, failed to make annual validation, failed to construct improvements described in the Allotment Management Plan and Permit Modifications, and made false statements and deliberately misrepresented the facts to the District Ranger. Numerous inspections by personnel from this office and the Ranger District have documented cattle in wrong pastures or grazing at times the permittee has said they were not on the allotment. Attempts were made to allow the permittee to demonstrate accountability by tagging their cattle. After 2 1/2 years, this, too, has failed.

There is a history of administrative actions that have been taken on this permit: the first on March 7, 1995, for noncompliance with the range development program, for which 10% of permitted numbers were suspended for a period of 1 1/2 years; another on July 17, 1997, to suspend 120 head of cattle due to non-compliance with management required in the Allotment Management Plan and Annual Operating Instructions.

The first time that unauthorized grazing occurred on the allotment when the Permittee told the District Ranger that no cattle were on the allotment, the District responded in a very conservative fashion. No punitive actions were taken at that time, other than to take action to obtain accountability by requiring the Permittee to tag.

According to the Term Permit, Part 3, #3(a)2, for a second offense of grazing excess livestock, the Term Grazing permit will be suspended or canceled by twice the percentage of excess numbers. If excess is 50% or greater, total suspension or cancellation will result. According to 36 CFR 222.4 (a) 2, the Forest Service is authorized to cancel a permit in the event the permittee:

``Fails to pay grazing fees within established time limits, does not comply with provisions and requirements in the grazing permit, or knowingly and willfully makes a false statement or representation in the grazing application or amendments thereto".

The District has provided the permittee numerous opportunities over 8 years to demonstrate that they will abide by the terms and conditions of their permit. I see no basis to allow continued attempts at management of this Allotment by your clients.

Decision

My first level review of this appeal was conducted in accordance with 36 CFR 251 Subpart C. After review of the appeal record, I find the District Ranger's decision with respect to cancellation of the Term Grazing permit issued to Richard and Anna Bragg Revocable Inter-Vivos Trust with Steven Bragg as Trustee, was based on a reasonable evaluation of the permittees actions and that administration of the permit was conducted in conformance with applicable laws, regulations, orders, 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 to cancel the term grazing permit issued to Richard and Anna Bragg Revocable Inter-Vivos Trust, which is the subject of this appeal.

This decision is subject to a second level of appeal to the Regional Forester under 36 CFR 251.87. In order for the second level appeal to be considered, you must file the appeal within 15 days of receipt of this decision, and direct it to: Regional Forester, Southwestern Region, 517 Gold Avenue, SW, Albuquerque, New Mexico 87102.

If you have questions concerning the appeal process, please contact Paul Stewart or Eddie Alford at (602) 225-5200.

Sincerely,

/s/ Thomas J. Klabunde

THOMAS J. KLABUNDE
Deputy Forest Supervisor and Reviewing Officer