



United States
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Forest
Service

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Date: November 25, 2003

Joseph W. and Gwynn R. Patterson
2872 Palmer Drive
Sierra Vista, AZ 85650

**CERTIFIED MAIL – RETURN
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RE: Appeal #03-03-05-0002-A251, Ash/Carr Canyon Allotments, Sierra Vista Ranger District,
Coronado National Forest.

Dear Mr. and Mrs. Patterson:

This letter documents the second-level review decision of the appeal filed regarding District Ranger Gunzel's (Deciding Officer) decision to cancel the term grazing permit on the Ash/Carr Canyon Allotments. The Deciding Officer's decision is documented in a letter dated May 22, 2003. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

Background

The Deciding Officer made a decision to cancel the term grazing permit for the Ash/Carr Canyon Allotments on May 22, 2003 (Doc. 22). In his decision letter, the Deciding Officer stated, "You were required to complete improvement maintenance and have it inspected by the Forest Service prior to September 1, 2002, and to validate the permit prior to February 28, 2003. These conditions were reaffirmed in my letter of August 5, 2002. Since these conditions have not been met the permit is cancelled and you no longer have standing as a grazing permittee or preferred applicant on the Ash Canyon and Carr Canyon Allotments."

The first-level appeal was received by Reviewing Officer John McGee on June 25, 2003 (Doc. 23). On July 1, 2003, the Deciding Officer wrote to the appellant stating he overlooked notifying the appellant of the opportunity for mediation pursuant to 36 CFR 251.103 (Doc. 25). On July 9, 2003, the appellant requested mediation (Doc. 26). On July 10, 2003, the Reviewing Officer suspended the appeal process pursuant to 36 CFR 251.103 (c) to allow for mediation (Doc. 27). A mediated agreement was not reached and the appeal was reinstated on August 19, 2003 (Docs. 33; 35). Under the provisions of 36 CFR 251.94, the Deciding Officer completed his written responsive statement to the appeal on September 2, 2003 (Doc. 7). The record indicates there was no reply from the appellant to the Deciding Officer's responsive statement. On September 29, 2003, the Reviewing Officer notified the appellant he was closing the record (Doc. 8). Based on his review of the record, the Reviewing Officer affirmed the Deciding Officer's decision on October 27, 2003.

The second-level appeal was received in this office on November 5, 2003.



In the second level appeal letter, the appellant stated, “This letter constitutes an appeal for a second level review of this cancellation.” Since the appellant did not identify additional specific appeal issues, the review of this appeal is confined to reviewing the substantive issues and responses provided by the first-level Reviewing Officer, the Deciding Officer’s responsive statement, the appeal record, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.

Since the appellant did not present additional issues in the second-level appeal, the responses in the Deciding Officer’s responsive statement and the first-level appeal decision are broadly summarized. The finding and decision follow the summary of responses.

Issues 1, 3 and 6 (Market Value, Rights Versus Privilege, Financial Impacts):

When base property and livestock are purchased in conjunction with the application for a term grazing permit, the value established for the property and livestock is a private matter between a willing buyer (prospective permittee) and a willing seller (former permittee). As the first-level Reviewing Officer correctly pointed out in his response, “Documents offered as evidence of the purchase of livestock or base property are unacceptable to the extent they purport to assign or transfer a grazing permit. The United States does not consider purported assignment of grazing permits to be of any legal consequences so far as the United States is concerned.”

(FSH 2209.13.18.18) Furthermore, the Secretary of Agriculture’s Regulations, 36 CFR 222.1(a) state, “...The Chief, Forest Service, shall 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. He may redelegate this authority.” 36 CFR 222.3 leaves no doubt as to the intent of Congress and the implementing regulations promulgated by the Secretary of Agriculture in terms of the relationship between the United States Government and individuals who hold term grazing permits authorizing them to occupy and use National Forest System lands. 36 CFR 222.3 (a) states, “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.” 36 CFR 222.3 (b) states, “Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources.”

Additionally, the Public Rangelands Improvement Act is the statutory basis for the current grazing fee formula on National Forest System lands. This formula was extended indefinitely under Executive Order 12548, which also set a minimum fee level of \$1.35 and provided that maximum increases and decreases in the fee could not exceed plus or minus 25 percent annually. This minimal fee is based on a base value of \$1.23 multiplied by the sum of the forage value index, the beef cattle price index, and the price paid index divided by 100, provided, as stated previously, that the change in the fee cannot be greater than 25 percent of the previous year’s fee. Consistent with the Secretary’s Regulations and Forest Service policy, the fee formula does not recognize any monetary value in the permit itself.

Issue 2 (Compensation):

The Secretary of Agriculture’s Regulations, 36 CFR 222.4, authorize Forest Service Officers to cancel, modify, or suspend term grazing permits in whole or in part. This is consistent with Part 1(3) of all term grazing permits that 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...” The record indicates the term grazing permit for Ash/Carr Canyon Allotments was canceled for failure to comply with Part 2(1) and Part 2(8)(i).

The Secretary of Agriculture’s Regulations, 36 CFR 222.6, specifically state that “only” in instances where a term permit for grazing livestock on National Forest land in the 16 contiguous western states is canceled in whole or in part to devote the lands covered by the permit to another public purpose shall the permittee receive from the United States a reasonable compensation for the adjusted value of his/her interest in authorized permanent improvements placed or constructed by him/her on the lands covered by the canceled permit. There are no provisions to compensate permit holders for changes brought about by resource conditions, natural phenomena such as drought and wildfire, or permit cancellation for failure to comply with the terms and conditions of the permit.

Issue 4 (Permit Activation):

The Memorandum of Understanding (MOU) for resource protection expired on January 2, 2001. Clause 6 of the MOU specifically stated that after 2001, the Forest Service would not guarantee continued nonuse for resource protection (Doc. 17). When the MOU expired, the appellant could have validated the permit by stocking the allotments with at least 90 percent of the permitted numbers and then waived the permit in favor of a purchaser of the livestock. Since the appellant's base property consisted of approximately 5 acres he could have also purchased other base property and waived the permit in favor of a purchaser.

Issues 5 and 7 (Change in Numbers, Suggested Actions):

As stated previously, there are no provisions to compensate permit holders for changes brought about by resource conditions, natural phenomena such as drought and wildfire, or permit cancellation for failure to comply with the terms and conditions of the permit. Part 2(11)(e) of all term grazing permits prohibits the transfer, assignment, leasing, or subleasing of the permit in whole or in part. The change to winter grazing was done to protect rangeland resources. This is explained in detail in the Deciding Officer’s responsive statement (Response 6) and the first-level Reviewing Officer’s decision letter (Issue 7).

Finding

The Deciding Officer sent the appellant a Notice of Noncompliance Letter on May 15, 2002. The appellant was given three and a half months to complete the maintenance of improvements and up until February 28, 2003, to validate the permit by grazing at least 90 percent of the permitted numbers. There is nothing in the record to indicate the Deciding Officer has acted in an arbitrary and capricious manner.

Decision

After review of the appeal record, I find that the appellant was given proper written notice and an opportunity to demonstrate compliance before the term grazing permit on the Ash/Carr Canyon Allotments was canceled. I have concluded the Deciding Officer’s decision is in conformance with applicable laws, regulations, policies, and procedures.

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, Stephen L Gunzel, Christina Gonzalez, Mailroom R3 Coronado