United States Department of Agriculture | Forest Service | Intermountain Region | 324 25th Street Ogden, UT 84401 801-625-5605

File Code: 1570-1
#06-04-00-0043-A251-2
Date: July 26, 2006

John E. Marvel
Marvel & Kump, LTD.
217 Idaho Street
Elko, NV 89803

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Dear Mr. Marvel:

This is my second-level review of the appeal filed on June 19, 2006. The appeal requested a review of the appeal decision by Humboldt-Toiyabe National Forest Supervisor Robert Vaught. Supervisor Vaught affirmed the November 18, 2005 decision by Santa Rosa District Ranger Jose Noriega, which cancelled Mr. Kenneth Buckingham's term grazing permit on the Buttermilk C&H Allotment for violations of the terms and conditions of the permit.

APPEAL DECISION:

I affirm the appeal decision by Supervisor Vaught. I have reviewed the appeal record and the issues identified in the second-level appeal. I find that the first-level appeal decision, as well as the decision by District Ranger Noriega to cancel the permit, is supported by the record documenting violations, and complies with applicable laws, regulations, and agency policy. Enclosed is a more detailed response to the issues raised in the second-level appeal.

Cancellation of a term grazing permit is a very serious action, which we do not take lightly. The Forest Service livestock-grazing program is an important part of local economies, as well as a tool for managing our rangeland vegetation resources. However, to control use of National Forest System lands requires a planned approach. To this end the Forest Service is authorized to permit and regulate the use of grazing resources on National Forest System lands.

Failure to follow the terms and conditions of a grazing permit can lead to a notice of noncompliance, which provides a remedy for the noncompliance. Failure to remedy the noncompliance, or repeated instances of noncompliance, can lead to partial or full suspension or cancellation action against the permit. In this instance, there is a long history of documented and repeated noncompliance over the tenure of several District Rangers. Numerous notices of noncompliance have been issued. Partial suspension and partial cancellation actions have provided ample opportunity to demonstrate compliance with the permit. Nonetheless, noncompliance has continued. Now, the appropriate action is to cancel the permit in its entirety.

This constitutes the final administrative determination of the United States Department of Agriculture under 36 CFR 251.87 (e)(3).

Sincerely,

/s/ Cathrine L. Beaty
CATHRINE L. BEATY
Appeal Reviewing Officer

Enclosure

Buckingham C&H Allotment - Kenneth Buckingham
Appeal #06-04-00-0043-A251-2

APPEAL ISSUE A: The Forest Supervisor totally ignored the issues and arguments presented by the appellant at the first level appeal.

RESPONSE: I have carefully reviewed the record and in particular the review decision of your first level appeal made by the Forest Supervisor. I find that the District Ranger's decision and the Forest Supervisor's review are in accordance with Forest Service direction (Forest Service Handbook (FSH) 2209.13, Section 2, Region 4 Supplement). Direction titled "Failure to Follow Management Instructions"; states that when there are repeat offenses involving failure to follow management instructions, the permit will be cancelled in full.

The record clearly indicates that there has been ample communications between the parties. While the District Ranger did not meet the appellant in the field every time it was requested, he and his staff did meet with the appellant on several occasions (District Ranger Responsive Statement). It is also apparent that the District Ranger and his staff spent considerable time on the allotment during and after the 2005 grazing season. Several of the requests from the appellant for field visits were to review other permittees fence maintenance in areas not in question for the appellant's livestock being in the wrong place on his allotment at the wrong time. The record indicates that the district staff did monitor other permittees maintenance responsibilities. It is not necessary that the appellant accompany the staff on inspections. Notification by the appellant of what was seen, where, is adequate for the district staff to follow up.

The real issue is, that on numerous occasions, appellant's cattle were in areas where they were not authorized. For the 2005 grazing season the record indicates district staff found appellants livestock in the wrong place on the Buttermilk allotment on the following dates: July 23, August 12, 13, 23, September 14, 18, 20, 22, 26, 28 and November 10 (District Ranger Cancellation letter of November 18, 2005).

APPEAL ISSUE B: The Forest Supervisor refused to conduct a field inspection with the appellant during the appeal review. Neighboring permittees failed to maintain the Alkali fence until after appellant's cattle had been in the Lye Creek allotment for over a month. Appellant removed his livestock from the Lye Creek Unit by trailing them through the Buttermilk Unit over a (2) day period.

RESPONSE: The Forest Supervisor stated in his letter of May 4, 2006 that he would consider an additional field review after he had conducted the oral presentation and reviewed the record. In his letter of May 30, 2006 he stated: "After a thorough examination of the documentation, I have determined that a (sic) current record is adequate for me to make an informed decision and field review is not needed nor would [one] add substance to the decision process." The appeal regulations do not require field

reviews. The Forest Supervisor's decision that one was not necessary given the substantial record and the oral hearing was reasonable.

The appellant alleges that Mrs. Thomas, a neighboring permittee, failed to maintain her portion of the fence, which resulted in his livestock drifting into the Buttermilk unit. Documentation in the record indicates that there were maintenance issues with Mrs. Thomas' fence but that the district dealt with the issue and she completed the fence maintenance on August 23, 2005 (District Ranger Responsive Statement). The appellant continued to have cattle in places that were not in compliance with the permit and the Annual Operating Instructions (AOI) long after August 23, 2005 (District Ranger Cancellation letter of November 18, 2005).

The appellant alleges that he removed his livestock from the Buttermilk unit within the required 2 days. The record documents that the appellant's cattle were not moved from the Lye Creek Unit through the Buttermilk unit in a two-day period. Appellant's cattle were observed in the Buttermilk unit on September 19, 20, 22, 26, 28 and 29, 2005 (District Ranger Cancellation letter of November 18, 2005 and DRRS).

APPEAL ISSUE C: The Forest Supervisor's statement that, "Mr. Buckingham has repeatedly neglected to take adequate measures to ensure he is in compliance with the terms and conditions of his term grazing permit" is without merit.

RESPONSE: The record documents numerous instances of failure to maintain fences and repeated requests that the appellant remove livestock from areas where they were not authorized to be within the Buttermilk Allotment. The record includes Notices of Noncompliance for repeated instances of failure to keep livestock out of unauthorized areas and both suspension and partial cancellation of the appellant's term grazing for the same violations.

The record shows that appellant offered to trade fence maintenance responsibility with other permittees, but there is no record of appellant providing agreements from other permittees to do so. It is the appellant's responsibility to work with other permittees to adjust maintenance responsibilities.

APPEAL ISSUE D: The District Ranger is biased against appellant. The Forest Supervisor has chosen to condone and participate in such unlawful treatment. The Forest Supervisor chose to ignore the absolute bad faith demonstrated against the appellant by the District Ranger at the mediation session held in conjunction with this appeal. The Forest Supervisor failed to address the unlawful, unethical treatment of appellant by Ranger District employee Marnie Bonesteel as discussed on page 2 of appellant's reply.

RESPONSE: The appeal regulations allow for a mediation process in states that have such a program. There is no regulation that requires the Forest Service to come to an agreement in mediation. The regulations allow the appeal timeframe to be suspended

during a mediation process and then if the mediation is not successful, the appeal timeframe resumes. Since mediation proceedings are strictly confidential and by regulation are not allowed to become part of the record of an appeal, neither the Forest Supervisor as the first level reviewing officer, nor I as the second level reviewing officer, have any of the information from the mediation.

Appellant's allegations of unethical conduct are in the record but since they were raised in appellant's reply to the District Ranger's Responsive Statement there was no opportunity for the district to respond to them. There is also no mention of these allegations in the notes from the oral hearing. Since they do not reflect on the issue of the repeated instances of appellant being in noncompliance with his term permit and AOI, they are not appropriate for this forum. The record does document that the issue under appeal has a history that precedes the tenure of the current District Ranger and of Marnie Bonesteel. Therefore, this issue is clearly not a personal vendetta by these two employees.

The appellant also alleges violations of his 5th and 14th Amendment rights, Presidential Executive Order for the Facilitation of Cooperative Conservation, Presidential Executive Orders 12630 and 12866, any laws, rules, and regulations pertaining to grazing permits and property rights on Forest Service lands, or violations of Federal Ethics Laws and Standards of Ethical Conduct. There are no facts in the record to substantiate that there has been any violation of these rights.

APPEAL ISSUE E: The Forest Supervisor attempts to justify the cancellation decision largely upon the paper trail generated by the District Ranger's office over a lengthy period of time.

RESPONSE: The issue is appellant's cattle frequently being in areas where they were not authorized. The record documents that this noncompliance goes back many years and over the tenure of several District Rangers and several Rangeland Management Specialists. The appellant's term grazing permit on the Buttermilk allotment has been suspended and partially cancelled in the recent past for this same type of permit noncompliance. The record shows a continuance of this type of noncompliance. For the 2005 grazing season the record indicates appellants livestock were found by district staff in the wrong place within the Buttermilk allotment on the following dates: July 23, August 12, 13, 23, September 14, 18, 20, 22, 26, 28 and November 10 (District Ranger Cancellation letter of November 18, 2005). This long history of noncompliance is what led to the decision to cancel the appellant's term grazing permit on the Buttermilk allotment.

APPEAL ISSUE F: The Forest Supervisor also chose to ignore the documented demonstration of cooperative grazing management and dispute resolution between appellant and the Bureau of Land Management (BLM).

RESPONSE: Issues dealing with appellants grazing permits on BLM allotments are not pertinent to this appeal.

APPEAL ISSUE G: The Forest Supervisor made a fatal procedural error with regard to the intervention he purportedly granted to David J. Cassinelli.

RESPONSE: The record indicates Mr. Cassinelli requested attendance at the oral hearing. He was notified he could attend to listen but could not participate. Oral presentations may be open to the public at the discretion of the reviewing officer (36 CFR 251.97 (c)). The record indicates Attorney Marvel was notified via phone message that Mr. Cassinelli would attend the oral hearing on 5/18/2006, and that Attorney Marvel questioned the "Forest Invite" to Mr. Cassinelli and Jean Thomas. After the hearing, Mr. Cassinelli did request intervener status. Forest Supervisor informed appellant (attorney Marvel) that Mr. Cassinelli's request for intervention had been granted. However, no documents were received from Mr. Cassinelli and on May 30, the Forest Supervisor closed the record.

APPEAL ISSUE H: Other permittees have cattle enter unauthorized use areas yet appellant has been singled out.

RESPONSE: The record indicates that when other permittees have had livestock in areas in violation of their term permit or AOI, they have been sent notices of noncompliance, and their noncompliance has been remedied without a history of reoccurring events. The appellant has had repeated occurrences for years and has been given numerous opportunities to correct the situation. Repeated noncompliance may lead to cancellation of a grazing permit (R-4 Supplement to FSH 2209.13, Section 2).

APPEAL ISSUE I: The cancellation was based solely on unauthorized grazing use and not on allegations of any resource allegations of any resource damage.

RESPONSE: Permit noncompliance and the long history of repeat noncompliance is the issue of this appeal. Resource damage is not the issue. Forest Service regulations do not require proof of resource damage occurring prior to taking permit action.

APPEAL ISSUE J: The decision adversely affects appellant's ability to exercise his water rights under Nevada water law.

RESPONSE: Appellant's water rights are not relevant to the appeal. The record indicates the permit action was taken in response to repeated noncompliance with the terms and conditions of the appellant's term grazing permit (District Ranger Cancellation letter of November 18, 2005).

APPEAL ISSUE K: The economic impact to appellant's ranching operation as a consequence of the decision is potentially devastating.

RESPONSE: The Forest Service does not recognize a value to the term grazing permit, but does recognize that the loss of a permit will affect the economics of the ranch operation. However, the Forest Service's responsibility is to the land resources and the proper management of those resources. Term grazing permits are issued with terms and conditions that provide control over livestock use of the resources. Failure to adhere to the terms and conditions is grounds for suspension or cancellation of the permit in whole or in part (Term Grazing Permit, Page 1, Item 3). Appellant has a history of non-compliance, including previous suspensions and a partial cancellation of his term permit for the most recent instance of non-compliance (District Ranger Decision letter of 11/18/2005). Given the repeated instances of noncompliance, Forest Service direction is to cancel the permit in its entirety (R-4 Supplement, FSH 2209.13, section 16.4).