



File Code: 1570-1
Appeal 06-04-17-05
Date: June 2, 2006

Mr. John E. Marvel, Esq.
Attorney at Law
Marvel & Krump, LTD
217 Idaho Street
P.O. Box 2645
Elko, NV 89803

Certified Receipt Requested #7005 0390 0002 6871 8284

Dear Mr. Marvel:

This is my decision on your appeal of District Ranger Jose Noriega's November 18, 2005 decision to cancel Mr. Kenneth Buckingham's term grazing permit on the Buttermilk C&H Allotment. Ranger Noriega's cancellation letter stated that his decision was based upon Mr. Buckingham's repeated noncompliance, including "grazing livestock in identified rest units, not removing livestock as directed from annual operating instructions, failure to follow instructions contained in the annual operating instructions, lack of maintenance of rangeland improvements, and grazing in project sites that have been previously outlined as requiring rest." My review was conducted under the provisions of 36 CFR 251 Subpart C.

APPEAL DECISION

I am keenly aware that this decision is very serious. I understand how important cancellation of Mr. Buckingham's Term Grazing Permit for the Buttermilk Allotment is to him personally. As a consequence, permit cancellation is an action that is rarely taken. Cancellation, in this instance, would be the final action in response to a long series of permit violations under the same or similar circumstances that have not been remedied by lesser permit actions.

For these reasons, I would only choose to affirm the District Ranger's decision if I was certain that documentation asserting permit violations was legitimate, that Mr. Buckingham's violations were grossly willful and repeated, and that a lesser penalty would not gain compliance.

The long history of Mr. Buckingham's inability to manage his livestock is not in conformance with Forest Service objectives for appropriate resource and livestock management. Mr. Buckingham states that lack of fence maintenance by other permittees was the reason for these permit violations. Mr. Buckingham states often in his Notice of Appeal that he is willing to work with the Forest Service and the other permittees to correct the fence maintenance problems and that would solve his problems of excess use. Adequate fences are an excellent tool for managing livestock, but they are not the sole way livestock are managed. Even when new fences were built and cattleguards were installed, Mr. Buckingham's livestock continued to access areas where they were not authorized. Permittees are obligated through the term grazing permit to ensure that their livestock are where they are authorized. 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.



Mr. Buckingham comments that Ranger Noriega was unfair and has singled him out for punitive actions. The history of Mr. Buckingham's non-compliance precedes Ranger Noriega's tenure on the Santa Rosa Ranger District. It is apparent that this lack of adequate management has been a chronic problem and Ranger Noriega appropriately dealt with the problem. It is expected that where there are on-going problems with permit compliance, administration of that permit will become a priority for the District. This is particularly true when the allotment involves special projects such as sensitive and important prescribed burns or watershed restoration. Ranger Noriega has dealt with other permittees when necessary, and I don't accept the claim that Mr. Buckingham was unfairly singled out.

Mr. Buckingham claims the decision was arbitrary and capricious and violated his rights under the 14th Amendment. Mr. Buckingham has been provided many opportunities over the last two decades to discuss and correct the issues of non-compliance. The Appeal Record documents repeated violations by Mr. Buckingham and efforts by the Forest Service to correct the situation. There have been three District Rangers and numerous Rangeland Management Specialists that have documented the same issues for 20+ years, and therefore this decision cannot be attributed to the perceived notion of singling the Mr. Buckingham out for punishment, nor being arbitrary and capricious.

Mr. Buckingham also claims the appeal process violates his rights of procedural due process. The Forest Service appeal process is defined at 36 CFR Part 251 Subpart C which is an administrative review of actions taken by a Deciding Official. As stated in 36 CFR 251.80 (b), "The rules in this subpart seek to offer Mr. Buckingham's a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written instruments that authorize occupancy and use of National Forest System lands." Use of the 36 CFR Part 251 Subpart C appeal regulations follows established Forest Service process and case law. If the Mr. Buckingham is not satisfied with the final administrative decision of the Forest Service there are still further measures he may take.

I have given extensive consideration to the appropriateness of this decision. There are options available to me in addressing this appeal. I could: 1) remand this decision and there would be no change to the term grazing permit, 2) partially affirm the decision requiring a partial (25%-50%) cancellation, or 3) affirm the District Ranger's decision canceling the term grazing permit in whole. In considering these three options, I believe the Appeal Record is clear. It provides ample evidence of multiple 2005 violations and repeated violations from 1983-2005 of similar circumstances. Perhaps most critically, the Appeal Record shows that three previous 25% suspensions and the June 18, 2004 partial cancellation have not compelled compliance with permit terms and conditions. Given Mr. Buckingham's history it is apparent that neither remanding the decision nor partial cancellation would change Mr. Buckingham's ability or willingness to improve his management, and therefore these options would not meet Forest Service objectives for appropriate livestock management, resulting in appropriate natural resource management.

Consequently, I am affirming District Ranger Noriega's decision to cancel Mr. Buckingham's Term Grazing Permit for Buttermilk Allotment. My rationale to affirm is

described in detail in the enclosure. The enclosure includes a process information summary; a re-statement of the issues from the Notice of Appeal as I understand them; an itemization of facts from the appeal record for each of these issues; and my conclusions based upon the facts in the record.

SECOND LEVEL DISCRETIONARY APPEAL

The provisions of 36 CFR 251.87(c)(2) establish Mr. Buckingham's right to file an appeal for a second level review with the Regional Forester. The second level appeal must be filed within 15 days of this first level appeal decision. Upon receiving a second level appeal request, the Regional Forester would promptly request the first level file from me. The Regional Forester's review would be conducted on the existing record; no additional information may be added to the file. Should Mr. Buckingham choose to request a second level review, the stay would remain in effect until the 2nd level decision is rendered.

Mr. Buckingham may file for a second level review at:

USDA Forest Service
Intermountain Region
Regional Forester Jack Troyer
324 25th Street
Ogden, UT 84401

Sincerely,

/s/ Robert L. Vaught
ROBERT L. VAUGHT
Forest Supervisor

Enclosure

cc: Jose Noriega, David J. Cassinelli, Ken Buckingham