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**Final agency action regarding decision below:**

**AACCEP Agency accepts decision: Commissioner's DECISION AND ORDER  
ADOPTING THE RECOMMENDED DECISION OF THE HEARING OFFICER was  
dated, signed and issued 4-1-98\cct**

**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

**IN THE MATTER OF GRAZING LEASE  
APPLICATIONS NO. 05-103431 AND NO.  
05-103432 FOR THE STATE LANDS  
DESCRIBED THEREIN,**

97F-032-LAN

**RECOMMENDED DECISION  
OF ADMINISTRATIVE  
LAW JUDGE**

**APPELLANT: JOHN HORNING on behalf  
of FOREST GUARDIANS**

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**HEARING:** February 3, 1998. The record was kept open until February 17, 1998.

**APPEARANCES:** Appellant was represented by its attorney, Tim Hogan. The State Land Department was represented by Assistant Attorney General Theresa Craig.

**ADMINISTRATIVE LAW JUDGE:** Brian Brendan Tully

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Evidence and testimony were presented and, based upon the entire record, the following Findings of Facts, Conclusions of Law and Recommended Order are made:

**FINDINGS OF FACT**

1. Appellant, Forest Guardians, is a New Mexico non-profit corporation. The Santa Fe-based corporation has six employees and approximately 2,000 members. There are about 300 members in Arizona.

1           2. Appellant is involved in environmental issues in Arizona, New Mexico,  
2 southern and central Colorado and northern Mexico.

3           3. John Horning is an employee of Appellant. He works in Appellant's Watershed  
4 Protection Program.

5           4. The Arizona-New Mexico Enabling Act granted millions of acres of land to  
6 Arizona in trust for trust beneficiaries when Arizona was admitted into the Union.

7           5. The State Land Commissioner ("Commissioner"), as trustee of the trust,  
8 manages the State Trust lands for the benefit of the trust and trust beneficiaries.

9           6. The State Land Commissioner has the statutory authority to classify State  
10 Trust lands.

11           7. The Commissioner has the statutory power to reclassify State Trust lands  
12 when he determines that reclassification is in the best interest of the trust.

13           8. State Trust lands that are classified as grazing lands by the Commissioner  
14 may be leased for grazing uses for a term up to ten years.

15           9. Annual rentals for State grazing leases are established by a statutory formula  
16 based upon the grazing lands' forage and annual carrying capacity, measured in animal  
17 units months. The annual rental is established by multiplying the total animal unit  
18 months to be grazed on the lands times the true value rental rate per animal unit month  
19 as established by the Commissioner.

20           10. State Trust lands may be classified for commercial uses by the  
21 Commissioner.

22           11. Annual rentals for State commercial leases are determined by appraisal of  
23 the land.

24           12. By letter dated July 18, 1997, Horning, on behalf of Appellant, wrote to the  
25 State Land Department inquiring about the Department's application process for leasing  
26 State Trust lands.

27           13. Stephen M. Williams, Range Section Manager at the State Land Department,  
28 wrote a letter dated July 24, 1997, to Horning in response to his July 18, 1997, letter.  
29 Among other items discussed in William's letter, he explained to Horning that if  
30 Appellant wanted to exclude livestock grazing from State Trust land and manage it for

1 wildlife habitat or preservations, then it should obtain a commercial lease for that  
2 purpose rather than a grazing lease. Apparently Williams had previously advised  
3 Horning of that in a prior telephone conversation.

4 14. Horning, on behalf of Appellant, filed Grazing Lease Applications No.05-  
5 103431 and No.05-103432 with the State Land Department on July 25, 1997. Appellant  
6 applied for grazing leases for a term of 10 years each. Horning also requested that the  
7 State Land Commissioner authorize the use of those State Trust lands for purposes  
8 other than domestic livestock grazing pursuant to A.A.C. R12-5-705. Horning stated in  
9 his transmittal letter to the State Land Department that Appellant was "...ready, willing  
10 and able to make any modifications necessary to make the applications more  
11 complete...".

12 15. Grazing Lease Application No. 05-103431 covers the following described  
13 State Trust lands (hereinafter called "State Tract 1"): Lots 1, 2, 3 and 4, the South Half of  
14 the North Half (S/2N/2), and the South Half (S/2) of Section 2; Lots 1, 2 and 4, the  
15 South Half of the Northwest Quarter (S/2NW/4), the Southeast Quarter of the Northeast  
16 Quarter (SE/4NE/4), and the South Half (S/2) of Section 3; the North Half (N/2), the  
17 North Half of the South Half (N/2S/2), the South Half of the Southwest Quarter  
18 (S/2SW/4), and the Southwest Quarter of the Southeast Quarter (SW/4SE/4) of Section  
19 11; Section 12; Section 13; Section 14; Section 24; and Section 25; all in Township 29  
20 North, Range 2 West, Coconino County, Arizona.

21 16. Grazing Lease Application No. 05-103432 covers the following described  
22 State Trust Lands (hereinafter called "State Trust 2"): Lots 1,2 and 3, and the Northeast  
23 Quarter of the Northeast Quarter (NE/4NE/4) of Section 32, Township 20 South, Range  
24 18 East, Santa Cruz County, Arizona.

25 17. In paragraph 7 of both submitted grazing lease applications Appellant  
26 indicates that it does have a registered brand, which is a requirement for issuance of a  
27 grazing lease.

28 18. In paragraph 8 of the grazing lease application for State Tract 1, Appellant  
29 claims a superior right to use this tract. The basis for Appellant's claim is a willingness  
30 to pay twice the minimum grazing lease rental and " by not stocking the land we

1 (Appellant) will increase the value of the land to conservationists, prospective livestock  
2 interests and trust beneficiaries". Appellant also makes the same claim in its application  
3 for State Tract 2, except that it states a willingness to pay five times the minimum  
4 grazing lease rental for those lands.

5 19. In paragraph 9 of both applications Appellant indicates that it was not  
6 authorized to do business in the State of Arizona as a foreign corporation at the time it  
7 filed the applications. Appellant did advise that an application had been filed with the  
8 Arizona Corporation Commission and that approval was pending. There is no evidence  
9 that Appellant has received authority to conduct business in this state.

10 20. In a letter dated August 11, 1997, Williams advised Horning that if it is  
11 Appellant's intention to lease State Trust lands for habitat preservation and/or riparian  
12 restoration rather than to range livestock, then Appellant should properly apply for  
13 commercial leases pursuant to A.A.C. Rule R12-5-502 instead of grazing leases.  
14 Appellant was requested to advise the State Land Department whether or not it  
15 intended to withdraw the grazing lease applications and pursue commercial lease  
16 applications for the State Trust lands.

17 21. In a letter dated August 15, 1997, Horning advised Williams that Appellant  
18 was not interested in either withdrawing its grazing lease applications or submitting  
19 commercial lease applications.

20 22. The Commissioner subsequently denied the Appellant's two applications for  
21 grazing leases in Order No. 147-97/98 and Order No.148-97/98. The basis for the  
22 Commissioner's denial of the grazing applications was that Appellant did not intend to  
23 range livestock on State Tracts 1 and 2, and that Appellant's proposed conservation use  
24 required it to apply for a commercial lease.

25 23. On November 6, 1997, Appellant filed notices of appeal of the denial of its  
26 two applications for grazing leases with the State Land Department.

27 24. It is determined that Appellant wants to acquire these grazing leases to stop  
28 grazing on them.

29 25. Appellant does not intend to graze any livestock on the grazing leases if  
30 issued grazing leases by the Commissioner.

1 26. Appellant's fund-raising activities market its acquisition of state grazing  
2 leases to present and potential members. Appellant's acquired leasehold interests are  
3 advertised as available for recreational use by its membership.

4 27. Appellant's proposed uses of State Tracts 1 and 2 are to fence the  
5 boundaries, exclude others from the leases, initiate restoration of vegetation and rest  
6 the lands from grazing. However, there is evidence that Appellant would also allow its  
7 members to use the those State lands for recreational uses, including camping, to the  
8 exclusion of non-members.

9 28. Appellant's proposed non-grazing use falls outside the use permitted under a  
10 State grazing lease.

11 29. The totality of the evidence of record supports a finding that Appellant's  
12 proposed uses for State Tracts 1 and 2, being conservation and recreational uses by  
13 paid members, are uses permitted under a State commercial lease.

14 30. Appellant is adamant that it is not interested in applying for a commercial  
15 lease because it does not want to pay the higher commercial lease fees and rentals.

16 31. The Commissioner may authorize non-use to grazing lessees. Non-use is  
17 appropriate when the grazing lessee is unable to graze, such as during a drought.  
18 Conservation and recreational uses are deemed inappropriate reasons for the  
19 Commissioner to issue a grazing lease and authorize non-use of the grazing use.

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21  
22 **CONCLUSIONS OF LAW**  
23

24 1. The Arizona-New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, granted  
25 over 10 million acres of land to Arizona in trust for the benefit of trust beneficiaries.  
26 Article 10 of the Arizona Constitution accepts the grant.

27 2. The State Land Department is vested by statute with the administration, charge  
28 and control of State Trust lands. A.R.S. § 37-102.

29 3. The Commissioner has the authority, pursuant to A.R.S. § 37-132 (5) to  
30

1 classify and appraise all state lands for the purpose of lease.

2 4. There are thirteen statutory classifications for State Trust lands. Those  
3 classifications include, among others, lands suitable for grazing purposes, lands  
4 suitable for commercial purposes and Trust lands suitable for conservation purposes  
5 pursuant to A.R.S. §§ 37-211 (B), 37-311 et seq.

6 5. State Tracts 1 and 2 have previously been classified by the Commissioner as  
7 grazing lands, which are defined as "...lands which can be used only for the ranging of  
8 animals". A.R.S. §37-101 (11) Unless and until the Commissioner reclassifies those  
9 State Trust lands, the only permitted use on those lands is the ranching of livestock.

10 6. Grazing leases are a license to graze livestock and to use the leased State  
11 Trust land pursuant to the terms of the lease. A.A.C. Rule R12-5-705 (A)(I). The State of  
12 Arizona reserves the right to grant other forms of leases or permits for the use of State  
13 Trust lands subject to a grazing lease. Ibid.

14 7. State Trust lands may be classified as commercial lands, which includes  
15 recreational usage or "any general purpose other than agricultural, grazing, mining, oil,  
16 homestead or rights-of-way". A.R.S. §37-101 (7).

17 8. The Commissioner did not violate his fiduciary duty to the Trust and trust  
18 beneficiaries by denying Appellant's applications for grazing leases. Appellant has left  
19 no doubt that it does not intend to use forage on State Tracts 1 and 2 for livestock  
20 ranging, but instead would use those lands for conservation and recreational usages.  
21 Appellant's intended uses for those lands do not meet the criteria for a grazing lease.  
22 Appellant could seek to obtain a commercial lease, which would allow for its intended  
23 uses, but it declines to do so because it does not want to pay the higher commercial  
24 lease fees and rentals.

25 9. A.R.S. § 37-285(H) does not allow the Commissioner to waive grazing and  
26 authorize non-use of the grazing use to an applicant who has no intention to ever use  
27 the lands for ranging livestock. Non-use is appropriate when there is insufficient forage  
28 to sustain livestock. The statute does not justify the issuance of a grazing lease for non-  
29 grazing purposes.

30 10. Appellant does not have a valid claim to a superior right to use State Tracts 1

1 and 2. The fact that Appellant is willing to pay more than the present annual grazing  
2 lease rentals would be persuasive if it intended to use the lands for ranging livestock  
3 rather than for conservation and recreational uses. However, the value of its proposed  
4 conservation and recreational uses cannot properly be established solely by an offer to  
5 pay more than the estimate of forage usage, which is the basis for annual grazing lease  
6 rentals. Under present statutes and State Department promulgated rules, conservation  
7 and recreational uses of State Trust lands, unless eligible for classification as Trust  
8 lands suitable for conservation pursuant to A.R.S. §37-311 et seq., fall under the  
9 appraisal process for commercial lease classification.

10 11. The Commissioner fulfilled his fiduciary duties to the Trust and trust  
11 beneficiaries by denying Appellant's applications for grazing leases while Appellant  
12 avowed that it did not intend to range livestock. Appellant's position that it is entitled to  
13 grazing leases for non-grazing uses because it is willing to pay more than the present  
14 annual grazing lease rentals is unpersuasive. Accepting Appellant's argument would  
15 mean that any applicant could apply to the State Land Department for a grazing lease  
16 with no intention of ranging livestock instead of applying for a more expensive but  
17 appropriate lease solely on the basis that it is willing to pay more than the present  
18 rentals, which are based upon forage use. Appellant is aware that if it is required to  
19 properly apply for a commercial lease, then it will pay higher fees and rentals. The  
20 Commissioner's denial of Appellant's applications for grazing leases and advice that it  
21 properly apply for a commercial lease permitting conservation and recreational usage,  
22 with higher fees and rentals, is determined to be in the best interest of the Trust and  
23 trust beneficiaries.

24 12. The Commissioner has the statutory authority to classify and reclassify State  
25 Trust lands as suitable for conservation. A.R.S. § 37-212 and 37-311 et seq. However,  
26 State Tracts 1 and 2 are not eligible for reclassification as suitable for conservation  
27 pursuant to A.R.S. § 37-312 (A) and (B).

28 13. The Commissioner did not breach his statutory and fiduciary duties by not  
29 reclassifying State Tracts 1 and 2 to commercial lands. Those lands have been grazing  
30 lands under lease for some time. Appellant is the only party interested in using those

1 State Trust lands for conservation and recreational uses. Appellant has stated  
2 repeatedly that it will not apply for or accept a commercial lease covering those lands.

3 14. Appellant has failed to sustain its burden of showing cause why the prior  
4 denial of its applications for grazing leases by the Commissioner should be  
5 reconsidered.

6 **RECOMMENDED ORDER**

7  
8 In view of the foregoing, it is recommended that Appellant's appeal in this matter  
9 be dismissed, and that the State Land Commissioner's Orders No. 147-97/98 and No.  
10 148-97/98 be affirmed.

11  
12 Done this day, March 9, 1998.

13  
14  
15  
16 BRIAN BRENDAN TULLY  
17 Administrative Law Judge

18  
19 Original transmitted by mail this  
20 \_\_\_\_ day of \_\_\_\_\_, 1998, to:

21  
22 Mr. J. Dennis Wells, Director  
23 State Land Department  
24 1616 West Adams  
25 Phoenix, AZ 85007

26  
27  
28 ATTN: Merv Mason

29  
30  
By \_\_\_\_\_