



**United States
Department of
Agriculture**

**Forest
Service**

**Apache-Sitgreaves
National Forests**

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File Code: 1570

Date: November 13, 1998

Karen Budd-Falen
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P.O. Box 346
Cheyenne, WY 82003-0346

CERTIFIED MAIL - RRR

RE: Appeal of the Pleasant Valley Allotment Annual Operating Plan Decision,
Mr. Abelardo Martinez (98-A/S-251-3)

Dear Ms. Budd-Falen:

This is my review decision on the appeal you filed on behalf of Mr. Abelardo Martinez regarding Clifton District Ranger's decision on the Amended Annual Operating Plan for the Pleasant Valley Allotment located within the Clifton Ranger District. My review of this appeal has been conducted pursuant to and in accordance with 36 CFR 251.80.

On April 30, 1998, District Ranger Frank Hayes issued an amended Annual Operating Plan for the Pleasant Valley Allotment. This decision was subject to administrative review under CFR 251.82.

On June 12, 1998, you filed a Request For Stay of Decision and a Notice of Appeal and Statement of Reasons for Mr. Abelardo Martinez.

On June 23, 1998, the Request for Stay of the Decision was denied by the Reviewing Officer.

On July 17, 1998, the Reviewing Officer extended the time frame for the Responsive Statement.

On August 12, 1998, you were provided the responsive statement from the Deciding Official.

On September 1, 1998, you replied to the Responsive Statement.

On September 4, 1998, the Reviewing Officer requested additional information.

On September 30, 1998, you complied with the request additional information.

On October 23, 1998, the Reviewing Officer closed the record for this appeal.



APPEAL SUMMARY

Appellants' issues are being addressed as organized in the Notice of Appeal. These consisted of three major issues with subparts incorporated within each major issue.

FINDINGS

The following is my evaluation and response to each of the subparts within each of the 3 major issues.

Issue A: The Consultation Agreement was improper, Arbitrary and Capricious, and in Violation of the Law.

1. Contention: The Forest Service violated the Endangered Species Act and the Administrative Procedures Act by entering into the Consultation Agreement.

Response: In accordance to Section 1536 ESA, Section 7(a)(2), each federal agency shall, in consultation with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species, or resulted in the destruction or adverse modification of habitat of such species which is determined by the Secretary. Furthermore, according to 50 C.F.R. § 402.10(a), the Forest Service shall confer with the U.S. Fish and Wildlife Service (FWS) on any action which is likely to adversely affect the continued existence of any **proposed species or result in the destruction or adverse modification of proposed critical habitat**. This is not a violation of the ESA nor of the APA.

The District Ranger is affirmed on this issue.

2. Contention: The Consultation Agreement violates the APA by forcing changes to be made through allotment management plans.

Response: The Consultation Agreement does not state that the Forest Service Biological Evaluation or Assessment and FWS Biological Opinions are implemented through the allotment management plans (AMPs). A review of the record does not indicate any changes to the AMP, only the Annual Operating Plan. The Forest Service does have the discretion to direct temporary changes to the grazing regime through Annual Operating Plans (Grazing Permit Part 1-3, Part 2 (a)(b) and (c): Forest Service Manual 2212.3, 2231.6, 2231.61, R3 Supplement 2231.41: Forest Service Handbook 2209.13, Sections 16, 16.1, 16.11, 16.13, 16.15, and 93.2.).

The District Ranger is affirmed on this issue.

3. Contention: The Forest Service violated the APA by failing to permit grazing permittees to participate in the formulation of the biological assessments under the Consultation Agreement.

Response: The Consultation Agreement stated that the Forest Service will provide notification to all affected permittees regarding their opportunity to participate in this (consultation) process as applicants. There is no requirement in the Consultation Procedures (50 C.F.R. Part 402, Subpart B) that applicants are guaranteed a role in the preparation of the Biological Assessment.

Those permittees whose on-going grazing activities received a "may affect, likely to adversely affect" determination were granted applicant status and given the opportunity to comment on the draft biological opinion.

The District Ranger is affirmed on this issue.

Issue B: The Settlement Agreement Was Improper, Arbitrary and Capricious, and in Violation of the Law

1. Contention: The Settlement Agreement violated NEPA.

Response: The settlement agreement is not a final agency action subject to NEPA. The Forest Service does have the authority to take the actions agreed to in the Settlement Agreement. Authorities identified in response to issue A(2) above are incorporated by reference. In this instance, neither the initial 1998 AOP for the Pleasant Valley Allotment nor the amended AOP, listed any fencing projects for construction during the 1998 grazing season.

The District Ranger is affirmed on this issue.

2. Contention: The Forest Service did not have the authority to enter into the Settlement Agreement.

Response: The Forest Service, through the Department of Justice, had the authority to enter into the Settlement Agreement. The Settlement Agreement documented actions the Forest Service had the authority to implement. See paragraph A(2).

The District Ranger is affirmed on this issue.

3. Contention: The Forest Service failed to complete a required takings implication analysis.

Response: Mr. Martinez holds potential claims of rights on private land holdings within the boundaries of the Pleasant Valley Allotment. These claims include specified points of diversion of appropriate water from both Dix Creek and the San Francisco River on lands of the United States Forest Service. Mr. Martinez also holds authorization for diversion structures and transmission of water across public lands to private holdings and the point of specified water use on private holdings. Changes in the Annual Operating Plan for livestock management on Forest Service Administered Lands of the Pleasant Valley Allotment does not entail encumbrance to these (potential) claims, their points of diversion, transmission across public land or points of use. The Settlement Agreement does not "take" anything including water rights or claims of rights, therefore no "taking implications assessment" is required. In this instance, water rights held by Mr. Martinez are not impaired in any way by the amended AOP.

As the Reviewing Officer, I requested that the documentation of water rights by Mr. Martinez be forwarded to me. The claims you forwarded to me (claim #36-68576 and #36-68575) appear to be filed in the wrong townships. In fact, the legals gives on these documents would not occur on the Pleasant Valley Allotment.

The District Ranger is affirmed on this issue.

4. Contention: The decision to enter into the Settlement Agreement violated the ESA.

Response: The Settlement Agreement does not violate the ESA because it deals with proposed species and proposed critical habitat. The action was within regulation and direction of the Forest Service. The answer to Issue A(1) is incorporated by reference.

The District Ranger is affirmed on this issue.

5. Contention: The decision to enter into the Settlement Agreement violated the Forest Service's own established procedures.

Response: The Settlement Agreement does not modify allotment management plans so, therefore, is not contrary to the Forest Service Manual direction.

The District Ranger is affirmed on this issue.

Issue C: The April 28, 1998, Decision Amending Mr. Martineze's Annual Operating Plan was Improper, Arbitrary and Capricious, and in violation of the Law.

1. Contention: The Forest Service decision was prompted by the illegal and improper decisions to enter into the Consultation Agreement and Settlement Agreement rather than on scientific evidence or emergency resource management needs.

Response: The decision to exclude livestock from riparian areas came from a technical review of each allotment. The San Francisco River and Dix Creek are considered to be in unsatisfactory riparian condition. Livestock grazing activities have been determined to be a contributing factor to these unsatisfactory riparian conditions. As documented in other stream systems on the Clifton Ranger District, including portions of the San Francisco River downstream of the Pleasant Valley Allotment, resting riparian areas from livestock grazing activities provides significant improvement and recovery of riparian area conditions. As per the Apache-Sitgreaves National Forest Plan, as amended, the San Francisco River and Dix Creek are considered to be Priority 1 streams for Threatened and Endangered Species. Proper management for Priority 1 streams will be implemented to address causative factors and achieve riparian recovery. In areas of unsatisfactory riparian condition where livestock grazing has been determined to be a significant factor, revisions will implement intensive management which limit grazing and provide adequate rest for riparian areas. The amended 1998 AOP is consistent with Forest Service Manual 2231.6, Forest Service Handbook 2209.13 Section 16, Species Effects Assessment for the Loach Minnow dated March 30, 1998, and the Term Grazing Permit, Part 2, Clause 8(c). The amended 1998 AOP included no new range improvement construction projects.

The District Ranger is affirmed on this issue.

2. Contention: The Forest Service acted outside the scope of its authority under the ESA by amending the AOP.

Response: The Forest Service not only has the authority, but the responsibility under the Granger-Thye Act and the Federal Land Policy and Management Act, to amend AOP's. Answer to A(1) is incorporated by reference.

3. Contention: The Forest Service failed to complete a required NEPA analysis before forcing fence construction on the Pleasant Valley Allotment.

Response: There is no fence construction identified in the AOP or amended instruction for the Pleasant Valley Allotment.

The District Ranger is affirmed on this issue.

4. Contention: The Forest Service violated the FLPMA by failing to complete the required coordination, cooperation and consultation procedure before amending the annual operating plan.

Response: Annual Operating Instructions, developed by the Forest Officer, may be used to implement the current year's management actions and responsibilities specified in the AMP and/or may constitute a temporary change from the AMP. If used, the AOP must be developed in consultation with the permittee. The amended AOP was discussed with the permittee on May 8, 1998. The changes implemented in the amended 1998 AOP required no additional areas of the allotment to be rested or excluded from livestock.

The District Ranger is affirmed on this issue.

5. Contention: The Forest Service failed to complete a required takings implication analysis before amending Martineze's AOP.

Response: As previously stated, Mr. Martinez only has claims of water rights, which do not reflect the correct legal descriptions, therefore there is no requirement to complete a "taking implication analysis (sic)".

The District Ranger is affirmed on this issue.

6. Contention: The Forest Service amendment is inconsistent with the plain meaning, purpose for and Congressional intent behind the grazing statutes.

a. Multiple Use Sustained Yield Act.

Response: The amendment to the AOP does not violate the Multiple Use Sustained Yield Act. The Multiple Use Sustained Yield Act does not intend that all uses occur on all areas of National Forest System lands. The amendment to the AOP does require exclusion of livestock from a portion of the allotment. However, provisions were made to graze in other pastures on the allotment. Livestock numbers were not reduced by the AOP.

The District Ranger is affirmed on this issue.

b. Congress has declared that public policy favors deferring large reduction in permitted grazing to protect livestock producers.

Response: The AOP does not reduce permitted livestock numbers grazing on the allotment and, furthermore, Congressional discussion of Department of Interior policy for the Bureau Of Land Management does not apply to the Forest Service.

The District Ranger is affirmed on this issue.

7. Contention: The Forest Service violated the APA by forcing construction of fenced riparian corridors.

Response: Mr. Martinez has not been forced to fence out his riparian corridors. The answer to issue C(3) is incorporated by reference.

The District Ranger is affirmed on this issue.

DECISION

After a detailed review of the records, I find the District Ranger conducted a proper process that resulted in decisions that are consistent with Forest Service policy, regulations and laws.

The District Ranger is affirmed with respect to all appellant contentions.

My decision is appealable pursuant to 36 CFR 251.87(c) with the Regional Forester. A notice of appeal for a second level review must be submitted to Regional Forester, Federal Building, 517 Gold Avenue S.W., Albuquerque, New Mexico, 87102 within 15 days of this decision.

Sincerely,

/s/ John C. Bedell
JOHN C. BEDELL
Reviewing Officer

cc:
Clifton District Ranger
R.O.