



United States
Department of
Agriculture

Forest
Service

Southwestern
Region

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File Code: 1570-1/2200

Date: March 13, 2001

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Certified Mail – Return Receipt Requested

Re: Appeal #01-03-06-0001/0002-A251, Frisco Plaza & Kelly AOPs, Glenwood and Reserve Ranger Districts, Gila National Forest

Dear Mr. Jensen:

This is my second level review decision on the appeals you filed on February 9, 2001 and February 21, 2001 on behalf of your clients, Mr. and Mrs. Danny Fryar. Your appeals are in regard to Reserve District Ranger Gardner's November 9, 2000, decision to amend the 2000 annual operating plan for the Frisco Plaza Allotment and Glenwood Acting District Ranger Raley's November 8, 2000, decision to amend the annual operating plan for the Kelly Allotment. Supervisor Andre issued her first level review decision on these appeals on January 18, 2001 and reiterated her decision on February 13, 2001. Due to the commonality between these appeals I have chosen to consolidate my review in one review decision. Your appeals were filed and have been processed under the provisions of 36 CFR 251, Subpart C.

Discussion

In both your first and second level appeals you contend that the Forest Service has improperly authorized construction of fences on the Kelly and Frisco Plaza Allotments and has conditioned the use of pastures, adjacent to the San Francisco River, on the completion of said fences. You argue the decision authorizing construction of a riparian area enclosure fence was improper, arbitrary, and capricious, and in violation of federal law. Specifically you contend:

1. "The Forest Service failed to meet the requirements of NEPA before authorizing mandatory fencing requirements for the Frisco Plaza grazing Allotment."
2. "The Forest Service failed to authorize the fencing requirements through cooperative agreements or memorandums of understanding with the permittees as required by FLPMA."
3. "The Forest Service failed to complete the required archeological and cultural clearances as required by NHPA before authorizing mandatory fencing requirements for the Frisco Plaza grazing Allotment."



4. “The Forest Service failed to provide the Fryars with any notice as to the fence requirements or specifications.”
5. “The Forest Service acted outside the scope of its authority under the ESA by ordering fence construction.”

On January 18, 2001, the first level Reviewing Officer completed her review of your appeals and concluded that the annual operating plans did not direct construction of new fences to keep permitted livestock out of riparian areas along the San Francisco River. In her appeal decision, the Reviewing Officer acknowledged the importance of excluding livestock from the San Francisco River riparian areas. However, she determined that Forest Service personnel and the permittee would be monitoring the river and that fencing was an option to consider in the future, if it was determined excessive livestock use was occurring in the riparian areas along the river. The Reviewing Officer went on to say that “Any decision to construct additional fences will be documented in a Decision Notice or Decision Memo and an appropriate permit modification, and will be subject to appeal.”

Decision

After my review of the appeals and the appeal record, I conclude that the scope of your appeals is limited to a perceived requirement to construct new fences. I find that the amended annual operating plans did not direct construction of new fences to keep permitted livestock out of riparian areas along the San Francisco River. These annual operating plans merely notified the permittee of the potential need for additional fencing. In addition, I can find no evidence supporting the allegations that the Deciding Officers acted in an arbitrary and capricious manner or have violated Federal Law. Therefore, I affirm the District Rangers’ decisions amending the Kelly and Frisco Plaza annual operating plans. This decision is the final administrative determination of the Department of Agriculture.

Sincerely,

/s/ James T. Gladen
JAMES T. GLADEN
Appeal Reviewing Officer
Deputy Regional Forester

cc:
Forest Supervisor, Gila NF
District Ranger, Glenwood RD
District Ranger, Reserve RD
Director Rangeland Management, R3
Appeals and Litigation, R3