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Agriculture

Forest  
Service

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**File Code:** 1570

**Date:** July 25, 2003

Hugh B. McKeen, Jr.  
HC-61, Box 175  
Glenwood, NM 88039

CERTIFIED MAIL 7002 2030 0005 8833 8559  
RETURN RECEIPT REQUESTED

Re: Appeal 03-03-06-0004-A251

Dear Mr. McKeen:

This letter documents my review and decision of the appeal you filed on November 9, 2002. You have appealed District Ranger Larry Raley's decision, dated September 27, 2002, which selects Alternative 5 identified in the Environmental Assessment for the Cedar Breaks Allotment. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

## **BACKGROUND**

On September 27, 2002, District Ranger Larry Raley made a decision to issue a ten-year grazing permit that implements Alternative 5 identified in the Cedar Breaks Environmental Assessment (AR 114.0). Ranger Raley is herein identified as the Responsible Official.

On November 14, 2002, I received your appeal, which was postmarked November 12, 2002 (AR 120.0).

On November 15, 2002, I acknowledged receipt of your appeal (AR 122.0). I also notified you that the District Ranger would be required to submit a Responsive Statement by December 14, 2002.

On December 10, 2002, District Ranger Raley requested an extension to prepare his Responsive Statement. Ranger Raley requested an extension through December 30, 2002 (AR 124.0).

On December 20, 2002, I granted Ranger Raley an extension through December 30, 2002 (AR 127.0).

On December 30, 2002, Ranger Raley requested an additional extension to prepare his responsive statement. Ranger Raley requested an extension through January 29, 2003 (AR 128.0)

On January 7, 2003, I granted Ranger Raley an extension through January 29, 2003 (AR 129.0).



On January 7, 2003, I received a letter from you regarding the status of four of your appeals (AR 130.0).

On January 9, 2003, I provided a response to your questions regarding the status of your outstanding appeals (AR 131.0).

On January 28, 2003, Ed Holloway hand delivered a copy of the District Ranger's Responsive Statement to you (AR 132.0).

On January 31, 2003, I informed you of the date due for comments on the District Ranger's Responsive Statement. I also encouraged you to schedule an appointment for your oral presentation (AR 133.0).

On February 12, 2003, your oral hearing was scheduled for February 21, 2003 (AR 134.0).

On February 21, 2003, you requested a 60-day extension to submit your comments regarding the District Ranger's Responsive Statement, and to reschedule your oral hearing (AR 135.0).

On March 7, 2003, I granted you an extension through May 1, 2003 (AR 136.0).

On April 18, 2003, you requested an additional extension to prepare your comments and schedule your oral hearing. You requested a date to be set after the end of May (AR 137.0).

On April 25, 2003, I granted you an extension through May 15, 2003 (AR 138.0).

On May 7, 2003, you appealed my April 25, 2003 decision to the Regional Forester (AR 139.0).

On May 12, 2003, I received a letter from you regarding the status of your above appeal (AR 140.0).

On May 16, 2003, the Regional Forester informed you that my April 25, 2003 decision was not appealable (AR 141.0).

On May 20, 2003, I proposed three dates to schedule your oral hearing (AR 142.0).

On June 16, 2003, I conducted your oral hearing (AR 143.0).

On June 25, 2003, an attempt was made by Ed Holloway and Cindy McArthur to narrow the scope of your appeal (AR 144.0).

On July 10, 2003, the appeal record was closed (AR 145.0).

## POINTS OF APPEAL

My review of this appeal was confined to the substantive points raised in the appeal, the appeal record, federal regulations, and the policies and operational procedures as set forth in the directives system of the USDA Forest Service.

### Issue: Decision and Rationale

**Contention:** Appellant contends District Ranger Larry Raley made his decision based on past relationships, rather than sound science and what is good for the land; Appellant resents the use of the word “explicitly” in reference to implementing the decision, rather than affording flexibility; Appellant contends the statement that the current grazing authorization is under administrative action is a false statement; Appellant contends the above statements are biased and should be stricken from the record.

**Response:** The District Ranger’s rationale for making this particular decision is included on pages 3 and 4 of the Decision Notice (AR 114.0). The decision is based on the following rationale:

- a) Provides the permittee the opportunity to graze 0-145 head of livestock, which will depend on weather and forage availability;
- b) The range of permitted numbers selected typifies the range of variability of stocking levels depicted in the environmental analysis conducted for this project;
- c) Provides a basis for sharing responsibility for successful implementation of this decision with the permittee;
- d) Provides for protection of the San Francisco River riparian habitat;
- e) Provides for intense monitoring to ensure that cattle are only authorized in a pasture when adequate forage is available, and that they will be removed when utilization standards are met, thus providing a guide to the Forest Service and the permittee in making needed adjustments in annual operating instructions, and in triggering livestock moves between pastures;
- f) Provides for the desired resource improvement trends;
- g) Provides for maintenance of permittee income and payments to Catron County;
- h) Makes an integrated decision concerning the amount, frequency and type of monitoring that I feel is needed to evaluate implementation of this decision;

The District Ranger identified the need to make an adaptive decision that has the **flexibility** to adjust livestock management, stocking levels and seasons of use to meet the minimum residual stubble height requirements. This was identified on Page 1, 3<sup>rd</sup> paragraph of the Decision Notice.

The District Ranger was correct in identifying the current term grazing permit as being under administrative action (reference appeal 03-03-06-0010-A251). However, the administrative appeal process is still on going for this action.

I conclude that: (a) the District Ranger's decision, logic, and rationale were, generally, clearly disclosed; (b) the benefits of the proposal were identified; (c) the proposal and decision are consistent with agency policy, direction, and supporting information; and (d) public and permittee participation and response to comments were adequate.

**Finding:** The District Ranger is affirmed on this issue.

### **Issue: Permitted Numbers**

**Contention:** Appellant contends there was not to be any number capacity set; there were simply stubble heights that would determine the use of a pasture; the duration of the grazing permit should be year-round and not 0-12 months.

**Response:** The specific elements of Alternative 5 are included on pages 5 and 6 of the Cedar Breaks Environmental Assessment (AR 94.0). In summary, Alternative 5 provides for the following:

- Issue a 10-year permit for up to 145 head of cattle, and 5 head of horses.
- The duration of grazing use, beginning March 1, will be determined by maintaining minimum stubble heights (duration of grazing can vary between 0 months and 12 months).

Comments received by the appellant on the EA (AR 102.0) concluded by stating, "Alternative 5 is the only workable grazing plan". Additionally, your consultant, Vic Jenkins, and George Douds of NMDA endorsed Alternative 5 as displayed in the EA (AR 100.0 and 107.0). The Decision Notice (AR 114.0) is consistent with the description of Alternative 5 included within the Environmental Assessment.

**Finding:** The District Ranger is affirmed on this issue.

### **Issue: Private land permit**

**Contention:** Appellant contends he has not heard of a reason for canceling the 422.5 acres of private land and its subsequent carrying capacity; the capacity of livestock attached to the unfenced private land should be included just as they have been in the past 10-year renewals.

**Response:** The inclusion of the private land permit was analyzed within the Cedar Breaks Environmental Assessment. Alternatives, 1, 3, and 4 included the private land permit. Alternatives 2 and 5 did not. The District Ranger states in his responsive statement "there has never been any consensus on how the private lands would be incorporated into management of the Cedar Breaks allotment" (AR 132.0). In addition, the Alma Flat area associated with the private land permit was identified as an area with resource issues. Therefore, no capacity was recommended for this parcel (AR 77.1, page 17). As per Forest Service Handbook 2209.13, the

Forest Service has no obligation to issue private land permits solely for the convenience of the applicant. Issuance is justified only on the basis of advantage to the United States.

**Finding:** The District Ranger is affirmed on this issue.

**Issue: River pasture fencing and cattleguards**

**Contention:** Appellant contends the Forest Service was to provide 2 cattle guards and fencing material to separate the River pasture private land from FS land on the mesa and in Wiley Morgan pasture.

**Response:** This issue relates to a separate decision, and is beyond the scope of this appeal (Reference Appeal 03-03-06-0011-A251). On March 21, 2003, I sent the appellant a letter stating that District Ranger Raley's original October 9, 2002 decision had been withdrawn. A new decision was made and documented in an agreement to you dated March 6, 2003. As a result, I dismissed the above appeal.

**Finding:** This issue is outside the scope of this appeal and has been previously addressed.

**Issue: Special use pasture permit**

**Contention:** Appellant contends that Special Use Permit No. GRS5032-01 for the 32 acres (grazing special use permit) needs to be re-instated as it was in the past.

**Response:** It is no longer Forest Service policy to issue special use permits for grazing. As per 36 CFR 222.3, unless otherwise specified by the Chief of the Forest Service, all grazing and livestock use on National Forest System lands, and on their lands under Forest Service control, must be authorized by a grazing or livestock use permit. Under Alternative 5, the 32 acres of National Forest System land, previously authorized by special use pasture permit, are being incorporated into management of the allotment.

**Finding:** The District Ranger is affirmed on this issue.

**Issue: Flexibility in grazing rotation system**

**Contention:** Appellant contends there is no flexibility in the grazing rotation system; decisions need to be based on rainfall and growth; determined by on the ground observations; not pre-determined.

**Response:** The decision and rationale clearly demonstrate the intent by the District Ranger to provide for flexible management (AR 114.0). The decision provides the appellant the opportunity to graze up to 145 head of livestock, which will depend on weather and forage availability. The season of use can vary from 0-12 months in any given year based on meeting

minimum stubble heights. Management includes a “best pasture” concept, which will depend on forage availability and water. Monitoring is utilized to adjust management.

**Finding:** The District Ranger is affirmed on this issue.

**Issue: Monitoring**

**Contention:** Appellant contends key areas, stubble height requirements and monitoring need to be accomplished in a collaborative manner; the Forest Service will not accept monitoring by the permittee; the methodology is not consistent. Potential of growth cannot, and should not, be used to make critical decisions concerning pasture use or grazing capacity; the Decision Notice sets the monitoring “in stone” and is not consistent with common sense and the present FS policy. The details of the monitoring process should not be included in a 10-year renewal as they will be variable; this whole system of deferments and livestock removal should go through the same collaborative system as the key areas and monitoring; the 10-year renewal should be a very simple document as it has been in the past. The improvements, monitoring process and grazing details should be left to the annual operating plans and not set in stone in the 10-year renewal.

**Response:** The District Ranger and his staff have collaborated with the appellant, NMDA, and RITF, on numerous occasions in establishing key areas, collecting information, and hosting training sessions regarding monitoring. This effort is expected to continue. The methodology that the Glenwood Ranger District is utilizing to conduct monitoring has been reviewed by the RITF and NMDA. In fact, the RITF and NMDA have participated with the appellant and the District in collecting this information, utilizing the same methodology. The decision provides for monitoring to be conducted by the appellant, and validated by the District.

NEPA requires that a Forest Service decision to issue a term grazing permit be accompanied by documentation, which analyzes and discloses the environmental effects of grazing prior to deciding whether or not to issue a new permit. The Council of Environmental Quality regulations clearly state that an EA must include a discussion of the alternatives. Alternatives must be described in enough detail to evaluate the effects. Livestock numbers, season of use, monitoring, improvements, and stubble height requirements are all critical elements necessary to evaluate the effects of a proposed action. These elements were appropriately evaluated through the NEPA process.

**Finding:** The District Ranger is affirmed on this issue.

**Issue: Percent use of woody species in Kellar Canyon**

**Contention:** Appellant contends percent of use on woody species in Kellar Canyon should come under the same collaborative process.

**Response:** NEPA requires that a Forest Service decision to issue a term grazing permit be accompanied by documentation, which analyzes and discloses the environmental effects of

grazing prior to deciding whether or not to issue a new permit. CEQ regulations clearly state that an EA must include a discussion of the alternatives. Alternatives must be described in enough detail to evaluate the effects. Understanding the level of livestock use that may occur in Kellar Canyon was a critical element necessary to evaluate the environmental effects of grazing this area. Therefore, this element was appropriately included and evaluated through the NEPA process.

**Finding:** The District Ranger is affirmed on this issue.

### **Issue: Implementation of Improvements**

**Contention:** Appellant contends it is anti-livestock and very strict policy to say that livestock numbers will be cut if improvements are not in place the first year.

**Response:** Range improvements are often identified as critical elements necessary to implement a proposed action. In this case, various range improvements were identified in Alternative 5 that would help achieve proper livestock distribution. Therefore, implementation of these improvements is necessary to achieve a certain environmental effect. Scheduling the completion of improvements is necessary to implement the decision. The Decision Notice states, “the following priority improvements would be replaced within the first year to support the numbers projected in the alternative. If the improvements are not in place, there will be an adjustment based on the improvements that haven’t been completed”. Adjusting management if improvements are not completed is reasonable and prudent, given the fact that these improvements were identified as necessary to achieve improved livestock distribution.

**Finding:** The District Ranger is affirmed on this issue.

### **Issue: Improvements**

**Contention:** Appellant contends 200-400 feet of drift fence in the Community pasture is completely new to him; there are not any problems of livestock accessing the river from the Community pasture; Appellant contends developing water lots around dirt tanks is a costly venture in time, maintenance, and money; Appellant contends he has never been shown or heard of fencing 2 miles in the #119 Alma Flat pasture; Appellant contends he never knew of, or agrees with the need of the Water System B4218 (1.5 miles of pipeline and trough), Corral in Alma Flat, and reconstruction of Section 5 tank.

**Response:** The above improvements were identified and evaluated in the Cedar Breaks Environmental Assessment. Under Alternative 5, it states, “proposed tank repair, priority improvements, horse management and the incorporation of 32 acres into the allotment would be identical to Alternative 3” (AR 94, page 6). The above improvements were identified in Alternative 3, page 4 of EA (AR 94.0). Comments received from the appellant on the EA (AR 102.0) conclude by stating, “Alternative 5 is the only workable grazing plan”. No comments were received from the appellant on the EA in reference to these improvements.

On June 25, 2003, an attempt was made by Ed Holloway and Cindy McArthur to narrow the scope of the appellant's appeal regarding these improvements (AR 144.0). During this meeting, the appellant agreed to reconstruct Section 5 tank if bulldozer time was reimbursed, provide labor for the Alma Flat Corral if materials were provided, and provide the labor for the B4218 pipeline. The District agreed to these stipulations.

The above improvements were developed to meet grazing management objectives by providing for better livestock distribution. Livestock distribution was identified as a significant issue in the EA (AR 94.0, page 2).

**Finding:** The District Ranger is affirmed on this issue.

#### **Issue: Income**

**Contention:** Appellant questions income to the County because the permit has been reduced by 25%; Appellant contends that the proposed range improvements are useless, and expensive to maintain; monitoring would cut into farm income.

**Response:** The 25% cancellation action is currently under appeal and is outside the scope of this appeal review.

The above improvements were developed to meet grazing management objectives by providing for better livestock distribution. Livestock distribution was identified as a significant issue in the EA (AR 94.0, page 2).

Monitoring was determined to be a critical element of the decision based on flexible numbers and management.

The appellant participated in developing this alternative (AR75.1).

**Finding:** The District Ranger is affirmed on this issue.

#### **Issue: Comments from the public**

**Contention:** Appellant questions validity of comments from the public; biased comments need to be excluded from the record.

**Response:** NEPA provides for the solicitation of comments from the public. This occurs during the initial scoping process, and 30-day review of the Environmental Assessment. Comments are included as part of the record. The interdisciplinary team identified three significant issues during the NEPA process (AR 94).

**Finding:** The District Ranger is affirmed on this issue.

**Issue: Previous Plan**

**Contention:** Appellant contends the previous 10-year plan as set forth in 1995 had some improvements and was a very beneficial system. Appellant contends the Ranger has disrupted and pushed the management process back about 30 years; Appellant contends current management was ignored.

**Response:** The current NEPA process was initiated as a result of lawsuit brought in part by the appellant. This lawsuit resulted in a stipulated agreement that required the Forest Service (defendants) to complete a site-specific analysis of the Cedar Breaks allotment (AR 01.0). Existing management was evaluated and analyzed as Alternative 1 in the Environmental Assessment. The appellant and his consultant were actively involved in developing elements of the selected alternative (AR 00, 04, 05, 07, 08, 09, 11, 12, 14, 15, 17, 21, 22, 24, 25, 30, 32, 35, 45, 48, 50, 52, 53, 54, 57, 58, 59, 60, 65, 67, 68, 71, 75, 75.1, 88.05, 94, 100, 102, and 124).

**Finding:** The District Ranger is affirmed on this issue.

**Issue: Seasonal Plan**

**Contention:** Appellant contends that if Alternative 5 is accepted in the 10-year renewal, it could be replaced with a seasonal plan sometime during the 10-year tenure.

**Response:** The Decision Notice signed by District Ranger Larry Raley describes the parameters of the decision to be made. No reference to the above statement has been included in the Decision Notice (AR 114.0). If a new proposed action were implemented, then a new analysis, public scoping, and decision would be required.

**Finding:** The District Ranger is affirmed on this issue.

**Issue: Third Party Involvement**

**Contention:** Appellant contends the NEPA process needs a third party to collaborate; Appellant asks for Section 8 and independent Range Improvement Task Force to act as a third party; Appellant asks that Vic Jenkins be involved.

**Response:** The Record demonstrates extensive involvement by outside parties (AR 00, 30, 32, 50, 52, 59, 65, 67, 75, 75.1, 88.05, 100.0).

**Finding:** The District Ranger is affirmed on this issue.

**Issue: Term Grazing Permit**

**Contention:** Appellant asks that the following statement be included in his 10-year permit renewal. . . . “The Forest officer signing this 10-year renewal will be held accountable for making knowingly false statements. This officer shall not break any Federal State or County laws. Agreements shall not be broken and personal attacks against allotment owners shall not occur. The Forest officer found guilty of breaking any of the above shall be subject to a suspension/cancellation of his position or employment depending on the severity and number of violations”.

**Response:** This issue is outside the scope of the analysis.

**Finding:** The District Ranger is affirmed on this issue.

**The following issues were raised during the oral hearing:****Issue: Time extension**

**Contention:** Appellant contends the denial of additional time to answer his appeal is further evidence of the intolerant and demanding nature of Forest Service personnel.

**Response:** On January 31, 2003, I informed you that the District Ranger’s Responsive Statement had been hand delivered. Furthermore, I informed you to file a written reply with the Reviewing Officer within 20 days (AR 133.0). The due date for comments would have been on February 20, 2003. On February 21, 2003, you requested a 60-day extension to submit your comments regarding the District Ranger’s Responsive Statement (AR 135.0). On March 7, 2003, I granted you an extension through May 1, 2003 (AR 136.0). On April 18, 2003, you requested an additional extension to prepare your comments and schedule your oral hearing. You requested a date to be set after the end of May (AR 137.0). On April 25, 2003, I granted you an extension through May 15, 2003 (AR 138.0).

**Finding:** As per 36 CFR 251.94c, within 20 days of the postmarked date of the responsive statement, the appellant(s) and any intervenor(s) may file a written reply to the responsive statement with the Reviewing Officer.

You were provided two extensions, and a total of 104 days to submit your comments on the District Ranger’s Responsive Statement.

I find that your requests for additional time were reasonably met and that you were provided significantly more time than provided for in the 36 CFR 251 appeal regulations.

**Issue: Previous Appeals**

**Contention:** Appellant requests the following appeals be included in his response: 03-03-06-0011-A251, 02-03-06-0012-A251, 03-03-06-0004-A251.

**Response:** My review and decision relates to the appeal you filed on November 9, 2002. This appeal is 03-03-06-0004-A251.

**Finding:** The above appeals, with exception of 03-03-06-0004-A251, are outside the scope of this decision.

**Issue: Alternative 5**

**Contention:** Appellant contends he did not agree with Alternative 5; things were changed and added by Forest Service personnel.

**Response:** The National Environmental Policy Act does not require agreement by the appellants on the decision to be made.

**Finding:** Comments received by the appellant on the EA (AR 102.0) concluded by stating, "Alternative 5 is the only workable grazing plan". Additionally, the Appellant's consultant, Vic Jenkins, and George Douds of NMDA endorsed Alternative 5 as displayed in the EA (AR 100.0 and 107.0). The Decision Notice (AR 114.0) is consistent with the description of Alternative 5 included within the Environmental Assessment.

**Issue: Monitoring**

**Contention:** Appellant contends there has never been a collaborative process for stubble height monitoring; Appellant contends the Forest Service has its own method, and it changes from site to site.

**Response:** The methodology that the Glenwood Ranger District is utilizing to conduct monitoring has been reviewed by the RITF and NMDA. In fact, the RITF and NMDA have participated with the appellant and the District in collecting this information utilizing the same methodology.

**Finding:** The District Ranger and his staff have collaborated with the appellant, NMDA, and RITF, on numerous occasions in establishing key areas, collecting information, and hosting training sessions regarding monitoring.

**Issue: Communication**

**Contention:** Appellant contends the lack of communication has always been a problem.

**Response:** The Record reveals an extensive effort of working with the appellant during the NEPA process (AR 00, 04, 05, 07, 08, 09, 11, 12, 14, 15, 17, 21, 22, 24, 25, 32, 35, 45, 48, 50, 53, 54, 57, 58, 59, 60, 67, 68, 71, 75, 75.1, 94, 102, and 124).

**Finding:** The District Ranger made a reasonable effort at communicating with the appellant.

**Issue: Resolution of appeal points**

**Contention:** Appellant contends it has been a waste of time discussing appeal points.

**Response:** The Record reveals three attempts at informally resolving the appellant's issues with the Decision (AR 124, 126, and 144).

**Finding:** A reasonable effort was made to informally resolve the appeal.

**Issue: Appeal 03-03-06-0012-A251**

**Contention:** This appeal relates to District Ranger Raley's decision to amend the Annual Operating Plan for the Cedar Breaks allotment, dated October 25, 2002. Appellant questions location of monitoring sites in the River pasture and District Ranger's decision to deny use of the River pasture.

**Response:** My review and decision relates to the appeal you filed on November 9, 2002. This appeal is 03-03-06-0004-A251.

**Finding:** This appeal has been previously addressed and is outside the scope of this decision.

**Issue: Forest Service personnel**

**Contention:** Appellant contends Forest Service personnel are unqualified, derelict of duty, and influenced by a religious preference.

**Response:** The Record reveals an extensive effort of attempting to work with the appellant during the NEPA process (AR 00, 04, 05, 07, 08, 09, 11, 12, 14, 15, 17, 21, 22, 24, 25, 32, 35, 45, 48, 50, 53, 54, 57, 58, 59, 60, 67, 68, 71, 75, 75.1, 94, 102, and 124). The District Ranger's rationale for making this particular decision is included on pages 3 and 4 of the Decision Notice (AR 114.0).

**Finding:** The District Ranger made a reasonable effort at collaborating and communicating with the appellant.

## **DECISION**

My review of your appeal was conducted in accordance with 36 CFR 251 Subpart C. After a review of the appeal record, I find that the District Ranger's September 27, 2002 decision to select Alternative 5 identified in the Environmental Assessment for the Cedar Breaks Allotment was based on a reasonable assessment and is in conformance with applicable laws, regulations, policies and procedures. Therefore, I affirm the District Ranger's decision.

According to the appeal regulations (36 CFR 251.87), you may file an appeal to the Regional Forester within 15 days of this decision. The second level appeal must be sent to:

Regional Forester, Southwestern Region  
333 Broadway SE  
Albuquerque, New Mexico 87102

A copy of the second level appeal should also be sent to my office.

Sincerely,

/s/ Delbert J. Griego  
MARCIA R. ANDRE  
Forest Supervisor

Enclosure

cc:

District Ranger, Glenwood Ranger District  
Lee Peters

Hubert & Hernandez, P.A.  
P.O. Drawer 2857  
2100 N. Main Street, Suite One  
Las Cruces, NM 88004

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