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Department of
Agriculture

Forest
Service

Southwestern
Region

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File Code: 1570-1

Date: March 22, 1999

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Certified Mail - Return Receipt Requested
P 556 955 920

Re: Appeal Decision on 1998 Annual Operating Plan - Gila National Forest.

Dear Ms. Budd-Falen:

This letter documents my second level review decision on the Black Bob and Deep Canyon Allotments appeal filed by you on behalf of Glen McCarty (appeal #99-03-00-0029-A251). The appeal relates to a decision issued by District Ranger Mike Gardner, Reserve Ranger District, Gila National Forest (NF), concerning the issuance of the 1998 Annual Operating Plan (AOP) and subsequent amendment, to Glen McCarty (allotment permittee).

Appeal Record Review

A. Budd-Falen Law Offices filed a timely appeal (February 11, 1999) on behalf of Glen McCarty. The appeal has been filed for second level review of administrative actions initiated by District Ranger Gardner in issuing the 1998 AOP (as amended) to the Black Bob and Deep Canyon Allotments permittee.

B. Responsive statements on the appeal were sent to the Budd-Falen Law Offices, however, the record reflects that no other comments were received from the appellant and that no oral presentation was requested.

C. District Ranger Mike Gardner issued the AOP for the Black Bob and Deep Canyon Allotments on June 1, 1998, following meetings with the permittee that discussed management for the allotment in 1998. The AOP was amended on July 6, 1998.

D. The contents of the AOP were as follows:

1. Sets numbers and seasons of use by pasture; a pasture move depends on not exceeding grazing use standards,
2. Directs installation of fences to preclude livestock use of streams and riparian areas to protect threatened or endangered species and their habitat,
3. Establishes grazing use standards (percent actual use), monitoring requirements, and standards for determining pasture moves,
4. Contains administrative requirements identified for managing livestock,



5. Reduces stocking and season of use to meet utilization standard, based on the pastures available for grazing.

E. The appeal record was received from the first level Appeal Reviewing Officer on February 18, 1999.

F. The second level review of this appeal has considered the original appeal filed with the first level Appeal Reviewing Officer (Forest Supervisor, August 20, 1998), as requested in the second level appeal letter dated February 9, 1999.

G. Abel Camarena, Forest Supervisor (Gila NF) ruled on the first level of this appeal on January 28, 1999, affirming District Ranger Gardner's action in issuing the permittee the 1998 AOP (as amended).

H. My review of this appeal has been conducted pursuant to and in accordance with 36 CFR 251 Subpart C, and it is consistent with applicable laws, regulations, orders, policies, and procedures. I have thoroughly reviewed the appeal record, therefore, my review decision incorporates, by reference, the entire appeal record.

Points of Appeal

ISSUE A. "The consultation agreement was improper, arbitrary and capricious, and in violation of the Law."

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

The appellant alleges that Section 7 of the ESA does not apply to proposed species or proposed critical habitat. The appellant also argues that the Forest Service (FS) entered into Section 7 consultation with the U.S. Fish and Wildlife Service (FWS) regarding proposed species or proposed critical habitat which the appellant claims is a violation of the Endangered Species Act (ESA) and Administrative Procedures Act (APA). Due to FS consultation with the FWS, the appellant alleges that the FS acted outside its administrative authority.

Response: Contrary to Appellant's contention, pursuant to Section 7 of the ESA, as amended, Section 7(a)(4) states "Each Federal agency shall confer with the Secretary of any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species..." (emphasis added). "Secretary", in this instance, refers to the "Secretary of the Interior", according to the definitions in the Act, whom the FWS is representing in its official capacity.

The consultation agreement was an inter-agency agreement in which both agencies could perform their legal responsibilities in compliance with Section 7 of the ESA. The agreement allowed a more expeditious consultation process to occur in an attempt to consult on a large volume of FS actions.

Findings: I find that there has been no violation of the ESA or APA. The actions of the District Ranger are consistent with applicable laws and regulations.

Issue A., Contention #2: "The FS violated the ESA and APA by failing to permit grazing permittees to participate in the formulation of the biological assessment under the Consultation Agreement."

Response: There is no provision in the statute or regulation that requires the agency to allow the permittee to participate in the development of a biological assessment (BA). Pursuant to Section 7(c)(1) of ESA, regarding BAs, the only role that "applicants" have in BAs is that they shall be notified of time extensions and reasons for extensions needed by the agency to complete the BA.

The Forest Supervisor's first level review decision which addressed this contention (appeal record, Document 7.0), states that the Consultation Agreement contained a statement that the FS would notify all affected permittees regarding their opportunity to participate in the consultation process. Those permittees whose ongoing grazing activities received a "may affect, likely to adversely affect" determination were granted applicant status if requested, and were given the opportunity to comment on the draft biological opinion, as provided in 50 CFR Part 402, Subpart B. Allotments subject of this appeal did not receive a "may affect, likely to adversely affect" determination, therefore, Mr. McCarty did not qualify for applicant status under ESA.

Findings: I find that there has been no violation of the ESA and APA by the agency in regards to this contention. The actions are consistent with applicable laws and regulations.

Issue A., Contention #3: "The Consultation Agreement violates the APA by forcing changes to be made through allotment management plans."

The appellant contends that the FS's biological evaluations and assessments and FWS's biological opinions are to be implemented through the allotment management plans (AMPs).

Response: The appellant is in error arguing that the FS biological evaluation and assessment and FWS biological opinion are to be implemented through an AMP. The findings and requirements of the referenced biological evaluation and assessment are being implemented through an AOP.

In reviewing the appeal record, the nature of the District Ranger's decision involved giving management direction in the AOP (as amended) for the 1998 grazing season. The FS has the authority and discretion to implement temporary grazing management changes on an annual basis through use of an AOP or annual grazing instructions if there are resource concerns related to livestock grazing, as well as other resource issues. The authority for such temporary changes in annual grazing management is the grazing permit itself, Part 1, Section 3, and Part 2, Section 8(a), (b), (c). Further, FS policy contained in FSM 2212.3, and R-3 Supplement 2200-91-1, 2215.04c provides direction for the preparation and use of AOPs. While it is the goal of the FS to have approved AMPs for all allotments, AOPs providing for annual grazing instruction can be used irrespective of the presence of an approved AMP, as authorized by the above referenced sections of the grazing permit. The record reflects (Doc. 5.6, 5.8) that the direction only applied to the AOP and the appellant was informed that National Environmental Policy Act (NEPA) analysis for an AMP would begin in 1999.

Findings: I find that there has been no violation of APA by the agency in regards to this contention. The actions are consistent with applicable laws and regulations, the grazing permit, and agency policy.

ISSUE B. "The Decision Authorizing Construction of Fences on Pastures with River Access Was Improper, Arbitrary and Capricious, and in Violation of the Law."

Issue B., Contention #1: "The FS decision was not prompted by scientific evidence or emergency resource management needs."

The appellant contends that the District Ranger's decision to amend the AOP was to mitigate effects on listed species. The basis for that decision was not derived from scientific data and that an analysis for the exclusion of livestock from riparian areas was also lacking.

Response: The record reflects (Doc. 9.0) that the District Wildlife Biologist had completed an assessment of the allotments based on current known information. That assessment was used in informal consultation with the Regional consultation team assigned the task of evaluating the effects of ongoing grazing on the Black Bob and Deep Canyon allotments. This assessment, and the effects determination, pre-dated the 1998 AOP. The assessment considered the potential effects of grazing on riparian dependent threatened, endangered, and proposed (TEP) species and the riparian vegetation. The assessment also recommended that fencing would be necessary to preclude grazing impacts on riparian areas, which would avoid direct effects to TEP species and their habitat, pursuant to FWS guidance criteria (Book 2, Doc. 2-4.0, appeal record). The District Ranger had analyzed (through NEPA) the need for fencing the Tularosa River for the protection of TEP species and their habitat within the allotment's riverine system (Doc. 5.3).

Findings: I find that there has been no violation of law by the District Ranger as alleged by the appellant.

Issue B., Contention #2: "The FS acted outside the scope of its authority under the ESA by ordering fence construction."

The appellant contends that the FS should have determined if livestock grazing under the present terms and conditions of the permit, and other authorities may actually affect endangered or threatened species or its habitat. Livestock grazing on the allotment without fences would not have affected the loach minnow, and the fencing was only intended to mitigate effects on non-existent critical habitat, proposed critical habitat, and proposed endangered species. ESA does not authorize an agency to take action to prevent adverse effects to proposed critical habitat. Formal consultations had not been completed prior to amending the AOP, therefore, determining an adverse effect from grazing would have been speculative. The FS failed to use the best scientific and commercial data available to determine if ongoing grazing on the Frisco Plaza allotment may affect TEP species or their habitat.

Response: The subject of this appeal applies only to the Black Bob and Deep Canyon allotments, not the Frisco Plaza allotment as alleged by the appellant. Response to Issue B., Contention #1 is incorporated by reference.

A FS fisheries biologist had determined that the loach minnow does in fact exist within the flowing rivers that pass through the allotment. Loach minnow is a federally listed, threatened species (October 28, 1986) for which a recovery plan has been in effect since 1991.

Contrary to the appellant's contention, ESA does require an agency to take action to protect TEP species and their habitat from adverse effects caused by agency approved activities, such as livestock grazing. Black Bob and Deep Canyon allotments were not subject of formal consultation because the effects determination was a "may affect , NOT likely to adversely affect" (emphasis added) based on the mitigation measures already planned by the District Ranger to restrict livestock use of loach minnow habitat. The record indicates that the District Ranger and his staff used the best information available to determine proper protective measures for the habitat.

Findings: I find that the District Ranger acted fully within the scope of his authority to protect habitat for listed species.

Issue B., Contention #3: "The FS failed to complete a required NEPA analysis before forcing fence construction on the allotments."

The appellant contends that fencing and removing livestock has an affect on the human environment. This act is not exempt from a NEPA analysis by virtue of a categorical exclusion, the FS should have completed an environmental impact statement (EIS) or at least an environmental assessment (EA). FS should have gathered data to determine if the fences and removal of livestock was necessary.

Response: The identified fence construction met the provisions of NEPA and was fully analyzed subject to the requirements of NEPA. The fence construction met the conditions for three categories, as defined by NEPA, to categorically exclude the action from documentation in an EA or EIS. The decision to build the fence was documented in a Decision Memo, which subsequently allowed the permittee to graze the allotment (Doc. 5.3). Based on the record, the District Ranger has fully complied with the NEPA.

The appellant is incorrect in claiming that an EA is necessary because an extraordinary circumstance existed due to the presence of TEP species and their habitat. The mere presence of TEP species and their habitat does not trigger preparation of an EA or EIS. A Deciding Official needs to determine a project's potential for affecting TEP species. The record contains a biological assessment (Doc. 5.3) for the fence project and it determined a "No Effect" on TEP species or their habitat, therefore, this is the basis for the project meeting the categorical exclusion criteria.

Findings: I find that the District Ranger acted fully within his authority with respect to this contention and that there were no violations of NEPA.

Issue B., Contention #4: "The FS failed to complete a required takings implication analysis before authorizing construction of the riparian fence."

The appellant contends that water rights in New Mexico are private property rights and the construction of the fence excludes use of the river by livestock and that removal of livestock from riparian areas is a taking of private property rights.

Response: Congress established that a grazing permit is a privilege through the Granger-Thye Act of April 24, 1950 (section 19) and the Federal Land Policy and Management Act of October 21, 1976 [section 402(h)]. Both of these acts state that the issuance of grazing permits in no way grants any right, title, interest, or estate in or to lands or resources held by the United States. The Office of General Counsel has assessed grazing activities with respect to Executive Order 12630. It was the conclusion of this assessment that regulatory activities associated with FS administration of grazing on National Forest System Lands do not present the risk of a taking of private property.

The appellant is incorrect in claiming that the fence and removal of livestock from the river is a taking of a private property right in New Mexico. The record contains documentation (Doc. 7.0) that there is no recorded water right for Glen McCarty in FS or State Engineer's records for watering cattle from the riverine systems upon National Forest System lands within the allotments.

Findings: I find that the District Ranger acted within his authority and has been consistent with applicable laws and regulations with respect to this contention.

Issue B., Contention #5: "The FS did not have the authority to issue the Decision."

Appellant contends that the FS has a mandate to allow grazing on all public lands. The regulations only provide for modification of the terms and conditions of grazing permits to "conform to current situations brought about by changes in law, regulation, executive order, development or revision of an allotment management plan, or other management needs". The FS may not simply modify terms and conditions of grazing permits through AOPs without scientific evidence of resource conditions changes or changes in law or changes in range management needs.

Response: Response to Issue A., Contention #3, is incorporated by reference. The FS has authority to require changes in grazing practices through instructions to permittees as documented in AOPs, which become a part of the grazing permit.

Findings: I find that the District Ranger acted fully within his authority with respect to this contention.

Issue B., Contention #6: "The decision violated the Forest Service's own established procedures."

The appellant argues that by fencing river corridors, FS has changed the AMP without trying other management options.

Response: Responses to Issue A., Contention #3 and Issue B., Contention #3, are incorporated by reference. The nature of the decision made by the District Ranger dealt with an AOP, not an AMP as explained in the referenced response. The appeal record (Doc. 5.3, 5.6, 5.8, 7.0, 9.0) contains documentation that fencing was the best option for the protection of TEP species and their habitat. The fence was built by FS personnel, which is within the agency's authority to take action for the protection of resources.

Findings: I find that the District Ranger acted within his authority and established procedures in regards to this contention.

ISSUE C. "A Deciding Office shall (1) promptly give notice of decisions appealable under Part 251 and (2) include information regarding appeal. 36 CFR 251.84."

Contention: "The decision violates FS regulations, therefore, McCarty's right to due process and the APA have been violated. The decision was not promptly issued and it did not include Mr. McCarty's appeal rights."

Response: The record (Doc. 5.6, 5.8) indicates that the District Ranger did fail to include the appeal rights language in appellant's AOP. The 1998 AOP did document that the appellant had been grazing on the allotments prior to receiving the June 1, 1998 AOP. Nevertheless, the appellant had not been adversely affected by the delay in the issuance of the 1998 AOP since he was still allowed to graze into the 1998 grazing season. The FS's intent is to meet with permittees before the grazing season starts and mail AOPs before cattle enter the allotment.

The record also reflects that the appellant already knew his appeal rights before the AOP was received due to statements contained in his letter to the District Ranger dated April 15, 1998 (received May 6, 1998, Doc. 5.4). Though the permittee did not receive notice of his appeal rights through the proper procedure, the circumstances have not adversely affected his appeal of the District Ranger's decision since both the first and second level appeals have been accepted for review and have been processed pursuant to 36 CFR 251, Subpart C.

Findings: I find that the District Ranger may not have acted entirely to the letter of the regulations, but his actions did not impede the appellant's right to an appeal or review of said appeal. I conclude that the appellant was not denied due process as a result of the administrative errors caused by the Deciding Officer as far as 36 CFR 251, Subpart C, is concerned.

Decision

My second level review of this appeal was conducted in accordance with 36 CFR 251 Subpart C. After review of the appeal record, I find that the District Ranger's decision with respect to issuing an AOP was based on a reasonable evaluation of the existing conditions on the allotment and was also in conformance with applicable laws, regulations, orders, and policies and procedures. The District Ranger's decision was not unlawful, arbitrary, capricious nor an abuse of discretion. Therefore, I affirm the District Ranger's decision to issue the 1998 AOP which is the subject of this appeal.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 251.87(e)(3)].

Sincerely,

/s/ John R. Kirkpatrick
JOHN R. KIRKPATRICK
Appeal Reviewing Officer
Deputy Regional Forester, Resources

cc:
Forest Supervisor, Gila NF
Director, Rangeland Management
Appeals and Litigation Staff, R3