United States Department of Agriculture
Forest Service
Gila National Forest
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File Code: 1570

Date: January 28, 1999

Karen Budd-Falen
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Cheyenne, WY 82003-0346

CERTIFIED MAIL - RRR

RE: Appeal of the Black Bob and Deep Canyon Allotments Annual Operating Plan Decision, Glen McCarty (1998-03-06-0011-251).

Dear Ms. Budd-Falen:

This is my review decision on the appeal you filed on behalf of Mr. Glen McCarty regarding Reserve District Ranger's decision on the amended Annual Operating Plan for the Black Bob and Deep Canyon Allotments located within the Reserve Ranger District. My review of this appeal has been conducted pursuant to and in accordance with 36 CFR 251.80.

On June 1, 1998, and July 6, 1998, District Ranger Michael Gardner issued an Annual Operating Plan for the Black Bob and Deep Canyon Allotments. This decision was subject to administrative review under CFR 251.82.

On August 20, 1998, you filed a Notice of Appeal and Statement of Reasons for Glen McCarty.

On August 20, 1998, you filed a Request For Stay of Decision for Glen McCarty.

On August 31, 1998, the Request For Stay of the Decision was denied.

On September 8, 1998, the Regional Forester decided not to exercise discretionary review to the Forest Supervisor's August 31, 1998 decision.

On November 13, 1998, a copy of Deciding Officer Gardner's Responsive Statement was mailed to you. No comments on the Responsive Statement were received.

On January 11, 1999, you were notified by the Reviewing Officer that the record had been closed and the Forest Service would proceed in processing your administrative 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 three 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: As indicated in the District Ranger's Responsive Statement, with which I concur, 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 result 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 Forest Service violated the ESA and the APA by failing to permit grazing permittees to participate in the formulation of the biological assessments under the Consultation Agreement.

Response: As indicated in the District Ranger's Responsive Statement, with which I concur, 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. In this case, Mr. McCarty's allotments did not receive a "may affect, likely to adversely affect" decision based on the agreed to management actions identified in the AOP with the Consultation Team.

The District Ranger is affirmed on this issue.

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

Response: As indicated in the District Ranger's Responsive Statement, with which I concur, 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.

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

1. Contention: The Forest Service decision was not prompted by scientific evidence or emergency resource management needs.

Response: As indicated in the District Ranger's Responsive Statement, with which I concur, the decision to exclude livestock from riparian areas came from a technical review of each allotment. Direction to construct the fence came after consultation with the Inter-Agency Consultation Team for ongoing grazing and occurred before the settlement agreement. A determination was made at that time that these were appropriate measures to provide needed protection for existing Threatened and Endangered species. The issuance of an Annual Operating Plan for management of the allotments is within Forest Service Manual direction and is identified in the terms and conditions of the Term Grazing Permit. Answer A(3) is incorporated by reference.

The District Ranger is affirmed on this issue.

2. Contention: The Forest Service acted outside the scope of its authority under the ESA by ordering fence construction.

Response: The Forest Service has the authority and responsibility under the Granger-Thye Act and the Federal Land Policy and Management Act to issue Annual Operating Plans (AOP) to individuals with Term Grazing Permits. This authority is also identified in A(3) above which is incorporated by reference.

The District Ranger is affirmed on this issue.

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

Response: In review of the record, NEPA was completed in the form of Categorical Exclusions for all fence constructions that were identified and initiated. The record shows scoping was conducted and biological and cultural clearances were completed prior to fence construction. The permittee did have the option to manage his livestock and keep his livestock out of the riparian areas through herding or other methods.

The District Ranger is affirmed on this issue.

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

Response: The issuance of the Annual Operating Plan (AOP) does not "take" any personal property, including water rights; therefore, no "taking implications assessment" is required. There is no documentation in the Forest Service records, nor in the New Mexico Office of the State Engineer records, that appellant holds water rights on National Forest System Lands for watering livestock. Appellant's permitted livestock are allowed to drink from water and stream systems on the Gila National Forest in New Mexico under the Traveler's Use Of Water (72-1-6 NMSA, 1978). The use of water associated with the Traveler's Use Of Water is not subject to ownership by individuals, nor is a water right required for its use. In this instance, water rights held by McCarty are not impaired in any way by the AOP.

The District Ranger is affirmed on this issue.

5. Contention: The Forest Service did not have the authority to issue the decision.

Response: It is unclear whether the decision at issue is the Annual Operating Plan or NEPA Decision memo. The District Ranger has authority to make both decisions. This is addressed in response to A(3) and B(3), which is incorporated by reference.

This appeal point is denied.

6. Contention: The decision violated the Forest Service's own established procedures.

Response: The decision rendered in the instructions of the Annual Operating Plan does not violate Forest Service procedure as identified in manual direction. This decision only modified actions to be taken in the Annual Operating Plan and no modifications were made to the Allotment Management Plan. Response to A(3) is incorporated by reference. As indicated in the District Ranger's response, Mr. McCarty was not forced to fence out his riparian corridors, fence construction was completed by Forest Service crews. The fencing of these riparian areas was for the protection of Threatened and Endangered Species and the maintaining of livestock grazing on the allotment.

The District Ranger is affirmed on this issue.

<u>Issue C: A Deciding Office shall (1) Promptly give written notice of decisions appealable under Part 251 and (2) include information regarding appeal. 36 C.F.R. 251.84.</u>

Response: This is correct and it is correct that the District Ranger did not provide appeal language in his decision rendered in the Annual Operating Plan. However, as discussed in the Responsive Statement by the District Ranger, Mr. McCarty was aware of his rights through discussion with the Range Staff Officer on the District during his annual meeting and as indicated in his appeal that was accepted by the Reviewing Officer in his response dated August 31, 1998 to this appeal.

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

Pursuant to 36 CFR 251.87(c), my decision is appealable to 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/Abel M. Camarena*

ABEL M. CAMARENA
Reviewing Officer

cc:
Reserve District Ranger
Glen McCarty
R.O.