



United States  
Department of  
Agriculture

Forest  
Service

Gila National Forest  
505-388-8201

3005 E. Camino del Bosque  
Silver City, NM 88061  
FAX 505-388-8204  
TDD 505-388-8489

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**File Code:** 1570

**Date:** October 22, 1998

Karen Budd-Falen  
Budd-Falen Law Office, PC  
623 West 20th Street  
P.O. Box 346  
Cheyenne, WY 82003-0346

CERTIFIED MAIL - RRR

RE: Appeal of the East Apache Creek Allotment Annual Operating Plan Decision,  
Kenneth Brumit (1998-03-06-0008-251).

Dear Ms. Budd-Falen:

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

On May 21, 1998, District Ranger Jerry Hibbetts issued an amended Annual Operating Plan for the East Apache Allotment. This decision was subject to administrative review under CFR 251.82.

On July 6, 1998, you filed a Notice of Appeal and Statement of Reasons for Mr. Brumit.

On July 6, 1998, you filed a Request For Stay of Decision for Mr. Brumit.

On July 20, 1998, the Request For Stay of the Decision was denied.

On August 25, 1998, a copy of Deciding Officer Hibbetts Responsive Statement was mailed to you. No comments on the Responsive Statement were received.

On September 24, 1998 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 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 East Apache 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:** The Settlement Agreement does not "take" any personal property including water rights; therefore, no "taking implications assessment" is required. In this instance, water rights held by Mr. Brumit are not impaired in any way by the amended AOP.

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 May 21, 1998, Decision Amending Mr. Brumit'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. Modification of the 1998 AOP is consistent with Forest Service Manual and Handbook direction. Answer to A(2) is incorporated by reference. The 1998 amended instructions to the AOP dated May 21, 1998, reveals no new range development construction. Livestock grazing was not scheduled until January 1999. The settlement agreement merely stipulated the existing schedule. Amending the 1998 AOP was to inform the permittee that the existing schedule had been stipulated in the original agreement.

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 East Apache Allotment.

**Response:** There is no fence construction identified in the AOP or amended instruction for the East Apache Allotment. The permittee was instructed to exclude livestock from the Tularosa waterlot #4426 (also known as "Chaddick's waterpoint) with regard to National Forest System land within the allotment. This was to exist during the remainder of 1998.

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 record indicates that the permittee was involved. His input into the AOP was considered. The permittee agreed to provisions of original AOP, which did not schedule or authorize grazing in this pasture for the remainder of the grazing season. The amended AOP did not change these instructions, but merely added a positive instruction to prevent livestock within the area.

The District Ranger is affirmed on this issue.

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

**Response:** As previously stated, since there is no effect on water rights owned by Mr. Brumit, there is no requirement to complete a "takings 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 records indicate the amendment to the AOP does require exclusion of livestock from the allotment. The AOP did not require removal of livestock since they had already left the allotment for the summer season. The AOP did not prohibit stocking of livestock on this area, rather it scheduled use for January after the summer growing season.

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:** The record indicates that Mr. Brumit has not been forced to fence out their 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.

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:  
Quemado District Ranger  
Kenneth Brumit  
R.O.