



United States  
Department of  
Agriculture

Forest  
Service

Gila National Forest  
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**File Code:** 1570

**Date:** January 19, 1999

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 Frisco Plaza Allotment Annual Operating Plan Decision, Mr. and Mrs. Danny Fryar (1998-03-06-0010-251).

Dear Ms. Budd-Falen:

This is my review decision on the appeal you filed on behalf of Mr. and Mrs. Danny Fryar regarding Reserve District Ranger's decision on the Amended Annual Operating Plan for the Frisco Plaza Allotment 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 25, 1998, and supplemented on July 6, 1998, District Ranger Michael Gardner issued an amended Annual Operating Plan for the Frisco Plaza Allotment. This decision was subject to administrative review under CFR 251.82.

On August 10, 1998, you filed a Notice of Appeal and Statement of Reasons for Danny and Jacqueline Fryar.

On August 10, 1998, you filed a Request For Stay of Decision for Danny and Jacqueline Fryar.

On August 24, 1998, the Request For Stay of the Decision was denied.

On October 17, 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 are 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.

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 Settlement Agreement Was Improper, Arbitrary and Capricious, and in Violation of the Law

1. Contention: The Settlement Agreement violated NEPA.

**Response:** The Settlement Agreement does not violate NEPA in that 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 by virtue of the Term Grazing Permit. Authorities identified in response to issue A(3) above are incorporated by reference.

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, acting through the Department of Justice, had the authority to enter into the Settlement Agreement as indicated by the District Ranger in his responsive statement. The Settlement Agreement documented actions the Forest Service had the authority to implement. See paragraph A(1).

The District Ranger is affirmed on this issue.

3. Contention: The Forest Service failed to complete a required takings implications analysis.

**Response:** The Settlement Agreement 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. Appellants permitted livestock 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 the Fryars 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:** As indicated by the District Ranger in his Responsive Statement, with which I concur, 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 violate Forest Service procedure as identified in manual direction. This Settlement Agreement only modified actions to be taken in the Annual Operating Plan and no modifications were made to the Allotment Management Plan.

The District Ranger is affirmed on this issue.

Issue C: The May 14, 1998 Decision Authorizing Construction of a Riparian Area Enclosure Fence, Reducing the Season of Use, and 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 during interactions between the Forest Service and the U.S. Fish and Wildlife Service. Modification of the 1998 AOP is consistent with Forest Service Manual and Handbook direction. Answer to A(3) is incorporated by reference. The 1998 amended instructions to the AOP dated June 25, 1998, and supplemented on July 6, 1998, reveals the need to construct new fences to protect the riparian areas and, as indicated in the July 6, 1998 letter, the threatened loach minnow. The threatened loach minnow has been identified at several locations within the allotment in the San Francisco River. In reviewing the application and AOP, there was no reduction in grazing season. In reality, the District Ranger authorized the permittee to bring additional cattle on to the allotment from his allotment located on the Glenwood Ranger District.

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 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. Through the consultation between the Forest Service and the U.S. Fish and Wildlife Service, the

need for riparian protection was identified. This need was further identified in the July 6, 1998 letter to the permittee where the threatened loach minnow's presence was verified in the field survey. 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 Frisco Plaza Allotment.

**Response:** The fence construction identified in the AOP or amended instruction for the Frisco Plaza Allotment had NEPA completed prior to initiation of construction, as indicated in FSH 1909.15, Chapter 30.3 Policy 2(b), which identifies extraordinary circumstances; this being threatened and endangered species. In the July 6, 1998 supplement to the AOP, threatened loach minnows were found in stretches of the San Francisco River. As indicated in the appeal, the appellant listed projects identified in the FSM 1909.15 under Category 6 and 7, but failed to notice the statement, "examples included **but are not limited to**". In this case, fencing of the riparian area was used.

The District Ranger is affirmed on this issue.

4. Contention: The Forest Service failed to complete a required takings implication analysis before authorizing construction of the riparian fence.

**Response:** Response to Issue B(3) is incorporated by reference. As previously stated, since there is no effect on water rights owned by the Fryars, there is no requirement to complete a "takings implication analysis (sic)".

The District Ranger is affirmed on this issue.

5. Contention: The Forest Service violated the APA by forcing construction of fenced riparian corridors.

**Response:** Response to Issues A (1,2,3) 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/Stephen G. Libby*

for

ABEL M. CAMARENA

Reviewing Officer

cc:

Glenwood District Ranger

Danny and Jacqueline Fryar

R.O.