



United States  
Department of  
Agriculture

Forest  
Service

Southwestern  
Region

517 Gold Avenue, SW  
Albuquerque, NM 87102-0084  
FAX (505) 842-3800  
V/TTY (505) 842-3292

File Code: 1570-1

Date: March 9, 1999

Budd-Falen Law Offices, P.C.  
c/o Ms. Karen Budd-Falen  
P.O. Box 346  
Cheyenne, WY 82003-0346

Certified Mail - Return Receipt Requested  
P 556 955 288

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 Frisco Plaza Allotment appeal, on behalf of Mr. and Mrs. Danny Fryar, appeal #99-03-00-0028-A251. The appeal relates to a decision issued by District Ranger Mike Gardner, Reserve Ranger District (RD), Gila National Forest (NF), concerning the issuance of the 1998 Annual Operating Plan (AOP) to the Frisco Plaza Allotment permittee (Mr. and Mrs. Danny Fryar).

### **Appeal Record Review**

A. Budd-Falen Law Offices filed a timely appeal (February 4, 1999) on behalf of Mr. and Mrs. Danny Fryar. The appeal has been filed for second level review of administrative actions initiated by District Ranger Gardner (Reserve RD) in issuing the 1998 AOP to the Frisco Plaza Allotment 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 had been requested.

C. District Ranger Mike Gardner issued the AOP for the Frisco Plaza Allotment on June 25, 1998, following meetings that discussed management for the allotment in 1998.

D. The contents of the AOP were as follows:

1. Set numbers and season of use by pasture; a pasture move depends on not exceeding grazing use standards.
2. Install water sources and fences to preclude livestock use of streams and riparian areas to protect threatened or endangered species and their habitat.
3. Established grazing use standards (percent actual use), monitoring requirements, and standards for determining pasture moves.
4. Administrative requirements identified for managing livestock.
5. Reduced stocking pending the results of multi-year monitoring.



E. The appeal record was received from the first level Appeal Reviewing Officer on February 8, 1999.

F. The second level review, of the above mentioned appeal, considered the original appeal filed with the first level Appeal Reviewing Officer, Forest Supervisor (August 10, 1998).

G. Abel Camarena, Forest Supervisor (Gila National Forest) ruled on the first level of this appeal on January 19, 1999, affirming District Ranger Gardner's action in issuing the permittee the 1998 AOP.

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, also incorporates by reference the 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 (ESA) and Administrative Procedures Act (APA) 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 ESA and the 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 expedient consultation process to occur in an attempt to informally 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 records, document 8.0), 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.

**Findings:** I find that there has been no violation of APA by the agency with regard 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 biological evaluations and assessments and FWS 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 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.

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

**ISSUE B. The Settlement Agreement was improper, arbitrary and capricious, and in violation of the law.**

**Issue B., Contention #1:** The Settlement Agreement violated the National Environmental Policy Act (NEPA).

The appellant argues that implementing the Settlement Agreement caused fences to be constructed and removal of livestock from riparian areas. The appellant further alleges that the Settlement Agreement made a decision that required an analysis of effects in accordance with NEPA.

**Response:** The Settlement Agreement is not a final agency action subject to NEPA. The Settlement Agreement merely documented actions that were already occurring through term grazing permit administration in compliance with the requirements of informal consultation with the FWS and the need to properly protect resources. The actions described in the Settlement Agreement were documented as instructions from the District Ranger in an AOP through the authority of the permit (Issue A., Contention #3 response is incorporated by reference).

The record reflects that the 1998 AOP did not require the permittee to complete any fencing in 1998. FS identified the need to fence the allotment streams for the protection of T&E species and their habitat. The FS built the fence without any permittee financial contributions, thus allowing the permittee to continue grazing on the allotment. The record indicates that herding practices would not be adequate to prevent livestock from using the stream corridor, since it was the primary water source for some pastures.

The record reflects (Doc. 5.6) that NEPA was followed in approving the fence construction along the riparian zones. A Decision Memo was completed documenting that the fence project met the conditions of three categories defined in NEPA that do not require documentation through an EA or Environmental Impact Statement (EIS). Construction of the fence is within FS authority to protect T&E species and their habitat, pursuant to Part 2 of the term grazing permit.

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

**Issue B., Contention #2:** The FS did not have the authority to enter into the Settlement Agreement.

**Response:** The FS through the Department of Justice, had the authority to enter into the Settlement Agreement. The Settlement Agreement documented the actions the FS had the authority to implement (see also the response to Issue A., Contention 3).

**Findings:** I find that the agency acted within its authority with respect to this contention.

**Issue B., Contention #3:** The FS failed to complete a required takings implication analysis.

**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 (FLPMA) 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 Settlement Agreement did not "take" any personal property including water rights from the appellant. According to the appeal record, water rights held by the permittee were not impaired in any way by the Settlement Agreement or the AOP. In fact, the record contains documentation (Doc. 5.10) that the FS was going to pursue acquiring a water right for diverting flow (from Negrito Creek) in order to provide water for the appellant's livestock. If the appellant had, in fact, a prior existing water right for flow from the creek, there would not have been a need for the FS to acquire such a right for the purposes of watering the permittee's livestock.

**Findings:** I find that the agency has acted fully within its authority with respect to this contention. A taking implication analysis was not needed with respect to the Settlement Agreement.

**Issue B., Contention #4:** The decision to enter into the Settlement Agreement violated the ESA.

The appellant argues that entering into the Settlement Agreement by the FS violated ESA because the Settlement Agreement dealt with proposed species and proposed critical habitat which is outside the agency's authority to consult on under Section 7 of ESA.

**Response:** The Settlement Agreement does not violate the ESA because it dealt with proposed species and proposed critical habitat. The response to Issue A., Contention #1, is incorporated by reference.

**Findings:** I find that the agency acted within its authority consistent with applicable laws and regulations. I find no violations of the ESA.

**Issue B., Contention #5:** The decision to enter into the Settlement Agreement violated the Forest Service's own established procedures.

The appellant argues that by entering into the Settlement Agreement, the FS has "incorporated fencing riparian corridors into AMPs" without attempting to use other management options.

**Response:** Responses to Issue A., Contention #3, and Issue B., Contention #1, 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 responses. The appeal record (Doc. 5.6) contains documentation that fencing was the best option for the protection of T&E species and their habitat. Fencing was not required of the permittee and it was not enacted through an AOP. The fence was built by FS, which is within its authority to protect resources.

**Finding:** I find that the agency has acted within its authority and established procedures with regard to this contention.

**ISSUE C. The May 14, 1998 decision authorizing construction of a riparian area enclosure fence, reducing season of use, was improper, arbitrary and capricious, and in violation of the law.**

**Issue C., Contention #1:** The FS 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 record (Doc. 5.7) indicates that the District Ranger, and/or his staff, met with the appellant to discuss possible management changes for the 1998 AOP. Prior to that, (Doc. 5.4) a meeting was also held with the appellant and other permittees to discuss management options and the need for fencing. The record contains a clear basis for building the fence and defining pasture use schedules. The season of use did not change, although certain pastures were designated specific grazing periods for 1998. The response to Issue A., Contention #3, is incorporated by reference.

**Findings:** I find that the District Ranger acted within his authority consistent with applicable laws, regulations and provisions of the grazing permit.

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

**Response:** The need for fence construction was determined through the informal consultation process with FWS. The decision to build the fence considered the Guidance Criteria for Preliminary Effects Determination (Book 2, Doc. 4.0), knowledge of existing loach minnow populations and habitat, and livestock behavior.

A meeting was held with the permittee regarding the management of the allotment, in which the need to protect loach minnow habitat (Doc. 5.4) had been discussed. Riparian fencing had been determined by the FS as the only viable option to protect the T&E habitat and still allow some level of grazing on the allotment. District personnel documented (Doc. 5.9) the occurrence of loach minnow in the streams within the allotment. It was determined at that time, that total exclusion of livestock from the known occupied habitat was the best protection possible for the species.

Providing protective measures for a known T&E species and its habitat is in compliance with ESA and within FS authority. The permittee was not forced to build the fence, in contrast, FS personnel were used in fence construction. Pursuant to 36 CFR 222.9(a) and according to various statutes, the FS has the authority to construct range improvements for the purpose of managing the range resource, in which the riparian zone is considered part of the rangeland.

**Findings:** I find that the District Ranger acted within his authority consistent with applicable laws, regulations, policies, and the grazing permit with respect to this issue.

**Issue C., Contention #3:** The FS failed to complete a required NEPA analysis before forcing fence construction on this allotment.

**Response:** The identified fence construction met the provisions of NEPA and had been 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. 5.6). Based on the record, the District Ranger has fully complied with the NEPA.

**Findings:** I find that the District Ranger acted within his authority and there has been no violation of the law.

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

**Response:** In response to this contention, the response to appeal Issue B., Contention #3, is incorporated by reference. The AOP did not "take" any private property rights, including water rights from the appellant. According to the appeal record, water rights held by the permittee were not impaired in any way by the AOP.

**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. A takings implication analysis is not required or needed for the issuance of an AOP.

**Issue C., Contention #5:** The FS violated the APA by forcing construction of fenced riparian corridors.

**Response:** The responses to Issue B., Contention #1 and Issue C, Contentions #3 and #4 are incorporated by reference which also respond to this issue.

**Findings:** The appeal record does not substantiate the claim of a forced construction of riparian fences. There is no violation of APA.

**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  
Appeals and Litigation Staff, R3  
Rangeland Management Staff, R3