



United States
Department of
Agriculture

Forest
Service

Gila National Forest
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File Code: 1570

Date: October 22, 1998

Karen Budd-Falen
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P.O. Box 346
Cheyenne, WY 82003-0346

CERTIFIED MAIL - RRR

RE: Appeal of the Kelly Allotment Annual Operating Plan Decision, Mr. and Mrs. Danny Fryar
(1998-03-06-0002-251).

Dear Ms. Budd-Falen:

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

On April 28, 1998, District Ranger John Baldwin issued an amended Annual Operating Plan for the Kelly Allotment. This decision was subject to administrative review under CFR 251.82.

On June 11, 1998, you filed a Notice of Appeal and Statement of Reasons for Danny and Jacqueline Fryar.

On June 11, 1998, you filed a Request For Stay of Decision for Danny and Jacqueline Fryar.

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

On August 31, 1998, a copy of Deciding Officer Baldwin's 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 Kelly Allotment nor the amended AOP, listed any fencing projects for construction during the 1998 grazing season. It did discuss possible fencing needs to help control livestock access to the river. Any specific decision to authorize fence construction will follow appropriate NEPA analysis.

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 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: 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 April 28, 1998, Decision Amending Mr. and Mrs. Fryar'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 April 28, 1998, reveals no new range development construction, only discussion of possible fencing needs to help control livestock access to the river.

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 Kelly Allotment.

Response: There is no fence construction identified in the AOP or amended instruction for the Kelly Allotment, only reference to the need for fencing to help control livestock access to the river. The permittee was instructed to exclude livestock from the San Francisco River with regard to National Forest land within the allotment. The East Pasture would be excluded from grazing, until such time that access to the river from forest land could be controlled. In addition, livestock were still to be excluded from the Gutache Mesa Watershed Restoration Area in order to provide for recovery of that area.

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 amended AOP was discussed with the permittee on April 14, 1998. Mr. Fryar's input into the amended instruction was considered.

The District Ranger is affirmed on this issue.

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

Response: 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.

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 amendment to the AOP does require exclusion of livestock from the East Pasture of the allotment. However, provisions were made to graze in other pastures on the allotment.

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: Mr. and Mrs. Fryar have 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:
Glenwood District Ranger
Danny and Jacqueline Fryar
R.O.