

**DISCRETIONARY REVIEW DECISION**

**ON THE**

**CHIEF'S APPEAL DECISION**

**REGARDING THE**

**ARAPAHO AND ROOSEVELT NATIONAL FORESTS**

**AND**

**PAWNEE NATIONAL GRASSLAND**

**REVISED LAND AND RESOURCE MANAGEMENT PLAN**

**NORTHERN COLORADO WATER CONSERVATION DISTRICT, ET AL.**  
**(#98-13-00-0016)**

/s/David P. Tenny  
**DAVID P. TENNY**

3/21/03  
**Date**

**Deputy Under Secretary for  
Natural Resources and Environment  
United States Department of Agriculture**

## Table of Contents

Procedural Background.....	1
Statutory and Regulatory Authorities .....	1
Deputy Under Secretary Decision Summary.....	2
Summary of the Issues.....	3
Arapaho and Roosevelt National Forests and Pawnee National Grasslands Revised Land and Resource Management Plan.....	4
Detailed Discussion of the Issues	
<i>Water Resource Management and Special Use Authorizations</i> .....	4
<i>State Authority to Issue Water Rights</i> .....	5
<i>Respect for Water Rights Granted by the States</i> .....	5
<i>Forest Service Responsibility for Managing Water Resources on Federal Land</i> .....	5
<i>Federal and State Cooperation</i> .....	7
<i>Report of the Federal Water Rights Task Force (August 25, 1997)</i> .....	7
Clarification of 2001 Discretionary Review Language.....	8
Instruction.....	9

**Discretionary Review Decision  
On The  
Chief's Appeal Decision  
Regarding the**

**Arapaho and Roosevelt National Forests and Pawnee National Grassland  
Revised Land and Resource Management Plan**

Northern Colorado Water Conservation District, et al (#98-13-00-0016)

**Procedural Background**

This is my discretionary review decision under 36 CFR 217 on the January 15, 2003 appeal decision of the Reviewing Officer for the Chief of the Forest Service regarding the appeal by the Northern Colorado Water Conservation District and others, of the Arapaho and Roosevelt National Forests and Pawnee National Grassland (ARNFPNG) Revised Land and Resource Management Plan (Revised Forest Plan) and its accompanying Final Environmental Impact Statement (FEIS). Acting Regional Forester Tom L. Thompson signed the Record of Decision (ROD) approving the Revised Forest Plan on November 19, 1997.

The appellants are:

Northern Colorado Water Conservation District, City of Greeley and Greeley Water and Sewer Board, Coalition for Sustainable Resources, Inc., Sabre Middlekauff, Poudre Canyon Group Sierra Club(2), Cache La Poudre Water Users Association and Water Supply and Storage Company, City of Boulder, and Pawnee Grazing Association.

Gloria Manning, Reviewing Officer for the Chief, signed the appeal decision (Chief's appeal decision) on January 15, 2003. I requested the appeal record from the Chief on January 30, 2003. The appeal record was received on February 4, 2003. I announced my decision to review the Chief's appeal decision on February 19, 2003. My decision is based on a review of the appeal record and the Chief's appeal decision.

The relief requested and the procedural background are both summarized in the Chief's appeal decision.

**Statutory and Regulatory Authorities**

Regulations governing forest plan appeals were promulgated in 1989 at 36 CFR 217 (47 FR 3357, January 23, 1989). These regulations are not based on any statutory requirement for an appeal process, but instead aid the Department of Agriculture in meeting its responsibilities under the Organic Administration Act (16 USC 472, 551), the Multiple-Use Sustained-Yield Act (MUSYA) (16 USC 528-531) and the National Forest Management Act (NFMA) (16 USC 1600, et seq.). The Under Secretary of Agriculture is responsible for protecting, managing, and administering the National Forests (7 CFR

2.20 (a)(2)(ii). The Under Secretary is also charged under 7 CFR 2.20 (a)(2)(viii) to “exercise the administrative appeal functions of the Secretary of Agriculture in review of decisions of the Chief of the Forest Service pursuant to 36 CFR parts 215 and 217 and 36 CFR 251, Subpart C.” Under 7 CFR 2.59, all duties and powers delegated to the Under Secretary may be performed by the Deputy Under Secretary.

The appeal regulations allow discretionary review of the Chief’s decision by the Under Secretary. The Under Secretary has unlimited discretion in deciding whether or not to undertake a discretionary review. The regulation identifies factors that should be considered in making a determination of whether to undertake a discretionary review. These factors include, but are not limited to, such factors as the “controversy surrounding the decision, the potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy.” The Chief’s appeal decision involves all of these factors. Accordingly, I concluded that a discretionary review of the Chief’s appeal decision was warranted.

The Revised Forest Plan was prepared under NFMA and its implementing regulations promulgated in 1982 at 36 CFR 219 (47 FR 43073, Sept. 30, 1982). Under the terms of the newly issued NFMA planning regulations at 36 CFR 219 (65 FR 67514, November 9, 2000), the Arapaho and Roosevelt National Forests and Pawnee National Grassland Forest Plan is governed by the 1982 version of these regulations. Accordingly, I based my review on the 1982 regulations. Likewise, any additional planning necessary under my decision will be conducted under the 1982 regulations. All references to 36 CFR 219 in this decision refers to the 1982 version of those regulations.

**Deputy Under Secretary Decision Summary**

The Chief’s appeal decision identifies issues raised in the Notice of Appeal (NOA) and grouped them in five topic areas. The appeal decision also contains an analysis of the appeal points for each issue in each topic area, and the Chief’s decision. All this information was analyzed and considered during my discretionary review. Based upon a review of the appeal record, I have decided to affirm with clarifying discussion and instructions the Chief’s January 15, 2003 appeal decision. My decision on each issue discussed in the Chief’s appeal decision is as follows:

- 1. Water.....Chief is affirmed, with clarifications and instructions
- 2. Wildlife and Fisheries .....Chief is affirmed
- 3. Lands.....Chief is affirmed
- 4. Research Natural Areas.....Chief is affirmed
- 5. Access and Travel Management.....Chief is affirmed

This decision is the final administrative determination of the Department of Agriculture under 36 CFR 217. By copy of this decision, I am notifying all participants of my decision.

## **Summary of the Issues**

The Chief affirmed the Regional Forester on three appeal issues in the Wildlife topic area. These include compliance with consultation requirements for endangered species in downstream waters, Biological Assessments analysis of the effects of annual water depletions, and compliance with the Endangered Species Act consultation requirement in the Plan Revision. I agree with the Chief's analysis of these issues as presented in the appeal decision and I incorporate all of the Chief's analysis and conclusions regarding these seven issues into this decision by reference. Based on that information and for the same reasons, I affirm the Chief's decision on these three issues. This decision includes no further discussion of these issues.

The Chief affirmed the Regional Forester regarding the Silver Lake Watershed and the City of Boulder. I incorporate all of the Chief's analysis and findings regarding what should be included in the Forest Plan, as determined by significance to decision makers, and what should be excluded. Based on that information and for the same reasons, I affirm the Chief's decision on this issue. This decision includes no further discussion of this issue.

The Chief affirmed the Regional Forester's finding that the Forest Plan is not required to designate all existing utility corridors and that the ROD is consistent with applicable requirements. I incorporate all of the Chief's analysis and conclusions regarding this issue into this decision by reference. Based on that information and for the same reasons, I affirm the Chief's decision on this issue. This decision includes no further discussion of this issue.

The Chief affirmed the Regional Forester on six appeal issues related to Research Natural Areas. The Chief grouped these issues into two topic areas; 1) disclosure of The Nature Conservancy's influence on RNA decisions; and 2) utilization of The Nature Conservancy advice and recommendations. I agree with the Chief's analysis of these issues as presented in the appeal decision and I incorporate all of the Chief's analysis and conclusions regarding these six issues into this decision by reference. Based on that information and for the same reasons, I affirm the Chief's decision on these issues. This decision includes no further discussion of these issues.

The Chief affirmed the Regional Forester on eight appeal issues related to Access / Travel Management. The Chief grouped these issues into three topic areas; Motorized Use of Designated Travelways, Designation of Travelways Created by Use, and Quantifying System Road Obliteration. I agree with the Chief's analysis of these issues as presented in the appeal decision and I incorporate all of the Chief's analysis and conclusions regarding these eight issues into this decision by reference. Based on that information and for the same reasons, I affirm the Chief's decision on these issues. This decision includes no further discussion of these issues.

The Chief affirmed the Regional Forester on eight issues related to water. The Chief grouped these issues into four topic areas; bypass flow authority, water rights task force,

standards and guides requiring supplemental EIS, and alternative to maximize water yield. I affirm, with clarifications and instructions, the Chief's decision to affirm the Regional Forester regarding these eight issues.

I agree with the Chief's analysis of a maximum water yield management alternative. I incorporate all of the Chief's analysis and conclusions regarding this issue into this decision by reference, noting that, although the forest is not legally required to include water yield as a forest management objective, water yield should be considered when developing vegetation management strategies and decisions.

Clarification and instructions are necessary with respect to the remaining three topics and related issues.

### **Arapaho and Roosevelt National Forests and Pawnee National Grassland Revised Land and Resource Management Plan**

The ARNFPNG Revised Plan was prepared under the Multiple-Use Sustained-Yield Act (MUSYA), the Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974 as amended by the National Forest Management Act (NFMA) (16 U.S.C. 1600 *et seq.*), the implementing regulations of the NFMA (36 CFR 219), and the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1500-1508). The original Forest Plan for the ARNFPNG was approved in 1985. The NFMA requires such plans to be revised at least every 15 years; revision of the 1985 ARNFPNG Plan satisfies this requirement.

The Revised Plan is a programmatic framework for management of the ARNFPNG, an administrative unit of the National Forest System. The Record of Decision (ROD) (p. 56) and the Revised Plan (Introduction pp. i-vi) explain what the Revised Plan is and what it is not. The Regional Forester appropriately identifies and subsequently discusses six fundamental components of all LRMPs (ROD, p. 18). The Revised Plan (Chapter 1, pp. 1-3) defines forest-wide goals and objectives. These are subsequently elaborated in greater detail throughout the remainder of the Revised Plan. Programmatic standards and guidelines, to follow in pursuit of the goals, also are articulated.

### **Detailed Discussion of the Issue**

#### *Water Resources Management and Special Use Authorizations*

There are four basic cornerstones to managing water resources on National Forest System lands. First, the Department recognizes and respects the authority of states to allocate water available for appropriation, and to manage water quality under the Clean Water Act. Second, the Department respects valid, existing water rights. Third, the Department, through the USDA Forest Service, is responsible for managing water uses on National Forest System lands consistent with both state and federal law as provided under the Organic Administration Act of 1897, 30 Stat.11. Fourth, water uses on National Forest System lands should be managed through cooperation with states, other

federal agencies, Tribal governments, holders of valid water rights and the interested public, rather than through unilateral regulatory action by the Forest Service.

*1. State Authority to Issue Water Rights:*

The states are responsible for the allocation of water available for appropriation. In western states, water is allocated through granting water rights for identified beneficial uses. The Forest Service must apply for water rights under state and federal law for use of water on National Forest System lands, and must identify water needed during state water rights adjudications when joined in those adjudications under the McCarran Amendment, 43 U.S.C. §666 (the McCarran Amendment). Because the management of land and water are intimately connected, a clearly defined and executed state system of water rights adjudication and granting of water rights provides for the certainty necessary for land management. Such a system also provides for the orderly distribution of rights between competing interests for a limited resource.

*2. Respect for Water Rights Granted by the States:*

Water rights are valuable property interests that are granted, exercised, transferred and otherwise managed in accordance with state law. These rights are held by private and public entities, including the federal government, and are assigned priority based upon the date on which they were established. In many instances, water rights predate the reservation of federal lands and the establishment of the national forest system.

Recognition of and respect for these rights is a fundamental tenet of responsible federal land management and is essential to maintaining order and predictability among water uses and water users. Frequently the exercise of a water right is connected to or dependent upon the permitted occupancy or use of national forest system lands. In these instances, it is incumbent upon the federal land manager to pursue land, water and other resource management objectives in a manner that minimizes potential negative impacts to the exercise of these rights. As noted below, there are some cases where conflicts will exist. However, such conflicts can and should be resolved through cooperation among the Forest Service, water right holders, state, tribal and local governments, and other interested parties.

*3. Forest Service Responsibility for Managing Water Resources on Lands:*

The responsibilities and duties of the Forest Service for managing water resources on the National Forests begins with the U.S. Property Clause of the Constitution. Article IV, Section 3 confers plenary authority to Congress over all federal property, which includes the land and resources of the National Forest System.

Congress used this authority to pass laws that establish and govern the National Forests, and define Forest Service management responsibility, including: the Organic Administration Act of 1897, 30 Stat.11; the Multiple-Use Sustained-Yield Act of 1960

(MUSYA) 74 Stat. 215; and the Federal Land and Policy Management Act (FLPMA) 90 Stat. 2743.

The Organic Administration Act of 1897 (“Organic Act”) (16 U.S.C. 473 *et seq.*) provided for the withdrawal of lands from the public domain and for the establishment of National Forests. The Organic Act defines the original purpose of the National Forests “to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber” (16 U.S.C. 475), and provides the Secretary of Agriculture with the authority to protect lands by making “...such rules and regulations and establishing such service as will insure the objects of such reservations, namely, to regulate their occupancy and use to preserve the forests”(16 U.S.C. 551). With respect to water resources, the Organic Act provides that “waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the states wherein such national forests are situated, or under the laws of the United States and the rules and regulations established there under, 16 U.S.C. 481.

The Multiple-Use Sustained-Yield Act of 1960 further defined the purposes of the national forests to include “outdoor recreation, range, timber, watershed, and wildlife and fish purposes”(16 U.S.C. 528). The Act directed the Secretary to administer the national forests so as to provide a sustained yield of renewable surface resources in a multiple-use context (16 U.S.C. 529). Section 4 of the Act further requires “the harmonious and coordinated management of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output” (16 U.S.C. 531). While the MUSYA clearly expanded the purpose for which the lands were to be administered, thereby broadening Forest Service management responsibility, it did not change the requirements of the Organic Act with respect to water resources.

The Federal Land Policy and Management Act of 1976 (as amended), governs the permitting of rights of way for private resource use on the national forest system lands and requires the Forest Service to condition such permits when necessary for the protection of the resources on the National Forests. Specifically, the Act requires that “[e]ach right-of-way shall contain (a) terms and conditions which will (i) carry out the purposes of this Act,” in order to “minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment; . . .” (Section 505, 43 U.S.C. 1765).

While the Forest Service derives its mandate for managing the National Forest System primarily from these statutes, each defines only a portion of the universe governing resource management and none should be construed in isolation. As pointed out by the Chief, “to understand them these acts should be considered as a group.” (Chief’s Appeal Decision, page 5). Thus, while the MUSYA requires the Forest Service to manage the National Forest System for multiple uses, and the FLPMA requires the Forest Service to manage rights of way in a manner that minimizes damage to the environment, these mandates should be harmonized with the Organic Act and must, therefore, be carried out

consistent with the direction of that act, namely that the Forest Service manage water uses in accordance with state and federal law.

#### *4. Federal and State Cooperation*

Managing water uses on National Forest System land in accordance with state and federal law requires the Forest Service to coordinate its water resource objectives with state appropriation and allocation processes. Water needed to meet federal land management responsibilities, for example, should be identified by the Forest Service and the states in a cooperative planning effort that involves local governments, and the interests of water rights holders and other interested parties. This approach should be used to identify the amount of water on National Forest System lands available for appropriation.

Occasionally conflicts will arise between federal responsibilities, such as the requirement to protect and recover federally listed threatened and endangered species, and the administration of water rights pursuant to state authority. These conflicts are best avoided through careful advance planning. However, in those instances when conflicts do arise, they should be resolved by federal and state authorities working together in cooperation with water right holders, and where appropriate tribal and local governments, and other interested parties, not through unilateral regulatory action on the part of the Forest Service.

#### *Report of the Federal Water Rights Task Force (August 25, 1997)*

One issue raised on appeal was that the Revised Forest Plan did not include or address the findings of the Report of the Federal Water Rights Task Force. In his Decision, the Chief noted that the ARNFPNG began scoping for the Revised Plan in July 1990 and the comment period on the DEIS ended in June 1996. Since the Task Force Report was not issued until August 1997, the Task Force information was not available until well after the comment period ended. The Chief is technically correct.

The Task Force Report does, however, include information and recommendations that are helpful in identifying methods to improve cooperation between the Forest Service, states, water right holders, and the public. For example, the Task Force Report recommends that National Forest purposes be achieved whenever possible, using alternative water management strategies (e.g., system optimization, watershed approaches, etc.), rather than using bypass flow requirements; that the Forest Service recognize and use state programs that protect instream flows, to acquire rights and provide water for National Forest purposes wherever adequate state programs are available; and that the Forest Service should seek voluntary agreements with nonfederal water rights holders who might otherwise use their rights inconsistently with National Forest purposes.

The Task Force Report also offers a number of specific recommendations that can be helpful in future efforts to develop state / federal cooperative programs including:

- “The United States should assert, when joined as a party in a proceeding pursuant to 43 U.S.C. §666 (the McCarran Amendment) any claims it may have under federal or state law to the use of water for National Forest Purposes”.
- “...the Forest Service should determine ... whether the exercise of water rights owned or used for non-federal purposes will ... ensure that instream flows will be protected”.
- “Where state laws allow water rights, reservations, or conditions to be established for protection of instream flows or minimum lake levels, the Forest Service should use these laws to attain National Forest purposes”.
- “The Forest Service should attain National Forest purposes relating to the protection of minimum instream flows for environmental and watershed management purposes in a manner that recognizes the laws and circumstances of each state where it seeks to acquire water rights for this purpose”.
- “Optimization of the operations of water supply facilities that are subject to FLPMA land use authorization requirements can, in some cases, provide environmental benefits without interfering with the diversion, storage, and use of water supplies provided from facilities located on National Forest lands”.

*From: Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of P.L. 104-127, August 25, 1997, Part VII: Task Force Recommendations, pp 1-6.*

The Forest Service should, therefore, consider the Task Force Report as an important source of input to future policy addressing the management of water resources on National Forest System lands.

### **Clarification of 2001 Discretionary Review Language**

The Chief addressed the question raised by the appellants as to whether Standard (135) and Guideline (136) constituted new information requiring supplemental NEPA to allow for additional public review. While I agree with the Chief’s discussion and decision on that issue, the rationale for why there was adequate opportunity for the public to comment raised an important issue that requires clarification and instructions. The Chief noted that stream flow requirements for recreational purposes were largely satisfied by Water Resources Standard 12. While Standard 12 was not specifically questioned in these appeals, it underlies the objection raised on appeals regarding the Forest Service’s authority to regulate instream flows under Standard (135) and Guideline (136). It is, therefore, necessary to address standard 12, standard 135 and guideline 136 together to ensure clarity and consistency in the Revised Forest Plan.

The Department provided instructions to the Forest Service in its March 29, 2001 discretionary review of the Chief’s decision regarding the Rio Grande National Forest appeal, and his decision regarding the Routt National Forest appeal. The instructions were to comply with the Federal Land Policy and Management Act with respect to forest plan goals, standards and guidelines addressing the issuing and reissuing authorizations for water storage and diversions facilities.

The relevant section of FLPMA for water resources requires that “[e]ach right-of-way shall contain (a) terms and conditions which will (i) carry out the purposes of this Act,” in order to “minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment; . . .” (Section 505, 43 U.S.C. 1765). FLPMA describes the outcomes of water resource management, not the means. The means of achieving the outcomes should be defined at the project level and should be determined through cooperation consistent with statutory direction.

Because standard 12, standard 135, and guideline 136 prescribe the means for completing with section 505 of FLPMA they exceed the scope of direction required by the 2001 discretionary review. (e.g. return and/or maintain sufficient stream flows.)

### **Instruction**

Based upon the forgoing clarification, I instruct that Forest Plan Standards in the Revised Plan be changed to comply with Section 505 of FLPMA and 26 CFR 251.56.

I instruct that standard 12 (ST) for Water Resources on page 13 of the Revised Forest Plan be changed to read:

“ 12.(ST) Cooperate with state, tribal and local governments, holders of water rights, and other interested parties to manage water resources to minimize damage to scenic and aesthetic values, fish and wildlife habitat, and to otherwise protect the environment.”

I further add the instruction that standard 135 and guideline 136 for Managing for Recreational Users on page 34 of the Revised Forest Plan be changed to read:

135.(ST) Generally, Standard 12 provides for most recreation-related water uses, but additional water may be needed for special recreational features and heavy-use recreational areas. Cooperate with state, tribal and local governments, holders of water rights and other interested parties to maintain enough additional water in associated streams to sustain the water-dependent recreational values. A preliminary assessment identified the key areas where these values exist and they are shown in Table 1.16. Additional areas may be identified during plan implementation.

136.(GL) Cooperate with state, tribal and local governments, holders of water rights and other interested parties to protect instream flows at outstanding recreation features. Such features include, but are not limited to, designated/study wild, scenic, or recreational rivers, stream segments used for commercial boating, or segments having developed recreation sites or vistas; or national recreation/historic/scenic trails of scenic byways from which the segment(s) is visible in the foreground or middle ground. Protection of water quality and quality is vital to recreation experiences. See Table 1.16. Bypass flow and

instream flow water rights are distinctly different, but settlement of reserved water rights claims can meet this criterion if the negotiated flows are decreed to the United States by a court of jurisdiction. In addition, the word “outstanding” in this guideline is meant in the generic sense, and should not be confused with the use of the word to describe and analyze Wild and Scenic River characteristics.