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Agriculture

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File Code: 1570/2350

Date: September 9, 2014

Mr. B. Keith Rogers
810 E. Oak St.
Silver City, NM 88061

**CERTIFIED MAIL – RETURN
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Dear Mr. Rogers:

This is my decision on the appeal (#14-03-00-0128-A215) you filed regarding the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) signed by Forest Supervisor Kelly Russell, for Travel Management on the Gila National Forest.

My review of your appeal was conducted pursuant to, and in accordance with, 36 CFR 215.18. My review focused on the project documentation and the issues raised in your appeal. I specifically incorporate in this decision the project record, the references and citations in the project record transmittal documentation, as well as the Appeal Reviewing Officer (ARO) analysis and documentation.

After considering your issues and the project documentation, the ARO recommends the Forest Supervisor's decision be affirmed with instructions. A copy of the recommendation and the technical review of your appeal contentions are enclosed.

Based upon a review of the project documentation provided, I find the issues were adequately considered. I agree with the ARO analysis and conclusions in regard to your appeal issues. I find the Forest Supervisor made a reasoned decision and has complied with all laws, regulations, and policy. After careful consideration of the above factors, I affirm the Forest Supervisor's decision to implement Travel Management on the Gila National Forest with the following instructions:

- In light of the July 08, 2014, Federal Register notice (Vol. 79, No. 130, pp. 38678-38746) listing the narrow-headed garter snake and northern Mexico garter snake as threatened, the Forest must initiate consultation on these species with the U.S. Fish and Wildlife Service to satisfy requirements of ESA.
- Analyze the effects of the Forest Plan amendment to Management Area 7D, the Silver City Watershed. The Forest Plan amendment for MA 7D may not be implemented until the environmental effects are disclosed through a proper NEPA analysis.
- Row 3 of Table 16 is incorrectly labeled. Through an erratum, correctly label Row 3 in Table 16 to read "Annual Maintenance" instead of "Deferred Maintenance." This does not change the results of the analysis.



- Through an erratum, correct the listing status for spikedace and loach minnow from “threatened” to “endangered.” The Forest complied with ESA Section 7(a)(2) consultation requirements for spikedace, loach minnow, and their designated critical habitat so no further action is required.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 215.18(c)]. A copy of this letter will be posted on the National Appeals Web Page at <http://www.fs.fed.us/appeals>.

Sincerely,

/s/ Gilbert Zepeda
GILBERT ZEPEDA
Appeal Deciding Officer, Deputy Regional Forester

Enclosures (2)

cc: Kelly M Russell



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File Code: 1570/2350

Date: September 4, 2014

Route To:

Subject: Appeal Recommendation, Gila Travel Management

To: Deputy Regional Forester, Gilbert Zepeda

This is my recommendation on the disposition of the appeals filed regarding the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for Travel Management on the Gila National Forest.

BACKGROUND

Implementation of the Selected Alternative (Alternative G) makes the following changes to the Forest's current motorized travel system:

- Leaves open 3,334 miles of National Forest System roads for motor vehicle use.
- Increases all-terrain vehicle (ATV) trail opportunities from 16 to 179 miles.
- Maintains one 3-acre area for motorcycle and ATV use.
- Provides approximately 1,316 miles of motorized dispersed camping corridors of 300 feet and 36 areas.
- Allows motorized big game retrieval in the same 1,316 miles of motorized dispersed camping corridors.

Forest Supervisor Kelly Russell signed the ROD on September 26, 2013; however, the legal notice of her decision was not published until June 11, 2014. Because the ROD was signed within 6 months of the March 27, 2013 effective date of the 36 CFR 218 objection regulations, the decision is subject to administrative review under the 36 CFR 215 appeal regulations.

Twenty two appeals were filed as follows:

Appeal #14-03-00-xxxx-A215	Appellant	Remarks
0126	Tom Burris	Dismissed – Appellant did not comment on DEIS
0127	Bill and Bonni Jo Rogers	
0128	B. Keith Rogers	
0129	Faith Capps	
0131	James Baruch	



Appeal #14-03-00-xxxx-A215	Appellant	Remarks
0132	Donlee Martin	Dismissed – Appellant did not comment on DEIS
0133	Mark Werkmeister, New Mexico Off Highway Vehicle Alliance (NMOHVA)	
0135	W.D. Grubb	
0136	Larry McLaud	
0138	Joanne Spivack/Jo Anne Blount, NMOHVA	
0139	Hidalgo County	
0140	Catron County	
0141	Grant County	
0142	William Faust	Dismissed – Appellant did not comment on DEIS
0143	Coalition of Arizona/New Mexico Counties	
0144	Jo Anne and Larry Blount, Van Allred	
0145	Bill Carlis	
0146	Robert Williams, Keep Our Forest Open	
0147	Upper Gila Watershed Alliance, New Mexico Wilderness Alliance, Rio Grande Chapter of the Sierra Club, and WildEarth Guardians	
0148	Joanne Spivack	Dismissed – Appellant did not comment on DEIS on her own behalf
0149	Center for Biological Diversity	
0150	Joseph Faust	Dismissed – Appellant withdrew appeal

Pursuant to 36 CFR 215.17, attempts were made to seek informal resolution of the appeals. The record indicates that informal resolution was reached on the appeal filed by Joseph Faust who withdrew his appeal. Four appeals, filed by Tom Burris, Donlee Martin, William Faust, and

Joanne Spivack, were dismissed because the appellants failed to provide comments during the 60-day comment period. Informal resolution was not reached on the remaining appeals.

Review and Findings

As provided for under 36 CFR 215.19(c), I am consolidating the remaining appeals into one recommendation. My review was conducted in accordance with 36 CFR 215.19 to ensure that the analysis and decision are in compliance with applicable laws, regulations, policies, and orders. The appeal records, including the appellant's issues and requests for relief have been thoroughly reviewed. Although I may not have listed each specific issue, I have considered all the issues raised in the appeals and believe they are adequately addressed in the attached technical review and findings documents. Having reviewed the FEIS, ROD, and the project record file, as required by 36 CFR 215.19(b), I conclude the following:

- 1) The decision clearly describes the actions to be taken in sufficient detail that the reader can easily understand what will occur as a result of the decision.
- 2) The selected alternative should accomplish the purpose and need established. The purpose and need stated in the EIS reflect consistency with direction in the Forest Plan for the Gila National Forest.
- 3) The decision is consistent with policy, direction, and supporting evidence. The record contains documentation regarding resource conditions and the Responsible Official's decision documents are based on the record and reflect a reasonable conclusion.
- 4) The record reflects that the Responsible Official provided ample opportunity for public participation during the analysis and decision making process. The Responsible Official's efforts enabled interested publics the opportunity to comment and be involved in the site-specific proposal.

After considering the claims made by the appellant and reviewing the record, I found that the Responsible Official conducted a proper and public NEPA process that resulted in a decision that is consistent with the Gila National Forest Plan.

Recommendation

I recommend that the Responsible Official's decisions relating to these appeals be affirmed with instructions. I recommend the following instructions:

- In light of the July 08, 2014, Federal Register notice (Vol. 79, No. 130, pp. 38678-38746) listing the narrow-headed gartersnake and northern Mexico gartersnake as threatened, the Forest should initiate consultation with the U.S. Fish and Wildlife Service to satisfy requirements of ESA.

- Analyze the effects of the Forest Plan amendment to Management Area 7D, the Silver City Watershed. The Forest Plan amendment for MA 7D should not be implemented until the environmental effects are disclosed through a proper NEPA analysis.
- Review of the deferred maintenance data presented in the FEIS identified inconsistencies between Tables 16 and 23 that may cause confusion. Row 3 of Table 16 is incorrectly labeled and should be corrected through an erratum. Correctly relabeling Row 3 in Table 16 to read “Annual Maintenance” instead of “Deferred Maintenance” does not change the results of the analysis.
- The Forest complied with ESA Section 7(a)(2) consultation requirements for spikedace, loach minnow, and their designated critical habitat; however, the listing status for spikedace and loach minnow should be corrected from “threatened” to “endangered” through an erratum.

/s/ Neil J. Bosworth
NEIL J. BOSWORTH
Forest Supervisor

cc: Margaret Van Gilder

Review and Findings

B. Keith Rogers

Appeal #14-13-00-0128-A215

Gila Travel Management

ISSUE 1: The Record of Decision (ROD) violates the National Environmental Policy Act (NEPA).

Contention 1a: The appellant contends that the Forest Supervisor failed to consider public input in making the travel management decision [Appeal, p. 1].

Response: The Council on Environmental Quality (CEQ) regulations at 40 CFR 1506.6(a)-(f) address public involvement and direct agencies to make diligent efforts to involve the public. Efforts include providing notice of public meetings and the availability of environmental analyses. Agencies are also directed to solicit appropriate information from the public. At 40 CFR 1503.1, agencies are to invite comments from the public on the draft environmental impact statement (DEIS). At 40 CFR 1505.2, CEQ regulations on decision making require agencies to “discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions,” in the record of decision.

Public involvement for this project was extensive and started in 2006, shortly after the Travel Management Rule (TMR) was finalized. These efforts are described in Chapter 1 of the FEIS [PR 2527, pp. 6-8]. A series of public meetings was held as part of the scoping process in 2009. People were asked to comment on the proposed action and provide site-specific information on roads, trails, and areas they wanted to see open or closed [PR 1189]. This information was used to refine the proposed action and develop alternatives. The public was invited to comment on the DEIS in 2010 [PR 1893]. The final environmental impact statement (FEIS) made changes to the alternatives based, in part on comments from the public [PR 2527, p. 13; PR 2528, pp. 507-531]. Finally, the record of decision shows that the forest supervisor considered public comments during the decision making process [PR 1526, pp. 3-6, 9].

Finding: The Forest Service complied with NEPA regulations regarding public involvement, commenting, and agency decision making.

Contention 1b: The appellant contends that some of the roads that are going to be closed lead to places such as water tanks, trails, etc. and argues that these closures are needless. He provides examples such as roads 4029E, 4028L, 4028P, 4029F, and 506 leading from Little Walnut up Bear Creek [Appeal, p. 1].

Response: The purpose of the Travel Management Rule (TMR) is to “provide for a system of National Forest System (NFS) roads, NFS trails, and areas on NFS lands that are designated for

motor vehicle use. After these roads, trails, and areas are designated, motor vehicle use ... not in accordance with these designations is prohibited” [PR 0029, p. 68289]. The TMR includes criteria the responsible official must consider when making these designations [PR 0029, pp. 68289-68290]:

- 36 CFR 212.55(a) requires the responsible official to consider the general criteria when designating roads, trails and areas for motor vehicle use. These criteria include the effects of motor vehicle designations on National Forest System natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses, and the need for maintenance and administration of roads, trails, and areas.
- 36 CFR 212.55(b) applies only to trails and areas and requires the responsible official to consider, with the objective of minimizing damage to, natural resources, harassment and disruption of wildlife, and user conflicts.
- 36 CFR 212.55(c) applies only to roads and requires the responsible official to consider safety aspects such as traffic speed, volume, compositions, road geometry, road surfacing, and rights of access in addition to the general criteria in 36 CFR 212.55(a).
- 36 CFR 212.55(d) requires the responsible official to consider rights of access by recognizing valid existing rights and the rights of use of NFS roads and NFS trails under §212.6(b).

Some of the roads that are going to be closed probably do lead to places, but the responsible official must consider the above criteria when making designations, so the closures are not needless.

For example, roads 4029E, 4028L, 4028P and 4029F are being closed to motorized use because of impacts on natural resources. Some of these roads (4029E, 4028P, and 4029F) have no drainage features and are experiencing heavy rutting and channeling [PR 1284; PR 1796, Appendix L]. In all action alternatives, FR 506 is proposed open to Cave Springs, and then proposed as ATV only to Bear Creek. The road narrows and is hazardous for full-size vehicles to drive on. Additionally, a segment of FR 506 between milepost 4.7 and 6.7 is proposed closed to motor vehicle use between private land and a segment proposed for administrative use. The short segment for administrative use is for access to private land. There is no legal access through private land on the east side of the road [PR 2528, p. 673].

At 40 CFR 1505.2, CEQ regulations on decision making require agencies to “discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions,” in the record of decision.

The ROD outlines the rationale for the Forest Supervisor’s decision [PR 1526, pp. 3-5]. Among the factors considered were public comments, the effects analysis in the FEIS, the Travel Management Rule, and the purpose and need. The ROD also described the consideration of the effects analysis in the decision [PR 2526, pp. 5-9]. This section discussed resource, environmental, social, and economic factors of the effects analysis in the FEIS that were considered in the decision.

See also the response to Contention 1a above.

Finding: The road closures are not needless because the responsible official must consider the criteria listed in §212.55 of the TMR when making designations. The Forest Service complied with NEPA regulations regarding agency decision making.

Contention 1c: The decision to restrict roads to ATV, UTV and auto is discriminatory [Appeal, p. 1].

Response: Travel Management Rule regulations at 36 CFR 212.5(a)(2)(ii) address road system management: “Roads, or segments thereof, may be restricted to use by certain classes of vehicles or types of traffic as provided in 36 CFR part 261. Classes of vehicles may include but are not limited to distinguishable groupings such as passenger cars, buses, trucks, motorcycles, all-terrain vehicles, 4-wheel drive vehicles, off-highway vehicles, and trailers. Types of traffic may include but are not limited to groupings such as commercial hauling, recreation, and administrative.” This has been incorporated into the purpose and need [PR 2527, p. 4].

This topic was also addressed in the Travel Analysis Process (TAP) report: “During the travel management process, Forest personnel will determine which roads, trails and areas will be open to motorized vehicle use and which will be restricted or closed. The TAP report defines restricted as meaning a “...road, trail or area could be closed to motorized vehicle use, could be restricted to certain types of vehicle, motorized use could be restricted to specific periods, etc.” [PR 1665, p. 5]. The TAP also noted that “National Forest System (NFS) roads are managed primarily for the use by highway-legal vehicles. The sharing of use by both off-highway vehicles and highway-legal vehicles generated the question of continued compatible use and safety concerns. Safety concerns included site distance and speed” [PR 1665, p. 8].

The text for proposed forest plan amendment #7 in Chapter 2 of the FEIS lists the criteria for restricting roads: (1) management emphasis of a specified area; (2) level of conflict between existing types of use; (3) required resource protection and (4) seasonal constraints; Special needs of users and management. [PR 2527, p. 18]. Restrictions by vehicle class are common to all action alternatives [PR 2527, p. 14].

Under all action alternatives, only 28 miles of road on the entire Gila National Forest would be affected by a change in vehicle class, as shown in table 5 in the FEIS [PR 2527, p. 25]. Vehicle class would be changed from all types of vehicles to highway legal vehicles only. Most of these segments are less than 0.5 miles long; the longest segment, 18.8 miles, is a paved road and OHV use on paved roads is prohibited by state law [PR 2527, p. viii]. Further vehicle class restrictions exist for motorized trails. Depending on the alternative, 125-205 miles of motorized trails would be accessible to ATVs and motorcycles only.

Finding: Restricting road use by vehicle type is allowed under the Travel Management Rule. This restriction is not discriminatory.

Contention 1d: The decision to restrict big game retrieval to within 100 yards of open roads violates the rights of older citizens, citizens with limited mobility, and youth [Appeal, p. 2].

Response Enforcement of non-discrimination on the basis of handicap in USDA programs or activities is addressed in 7 CFR 15e. This prohibits discrimination on the basis of handicap in programs or activities conducted by USDA. Individuals with physical or mental handicaps are covered under these regulations, regardless of age. Under section 504 of the Rehabilitation Act of 1973, no person with a disability can be denied participation in a Federal program that is available to all other people solely because of his or her disability.

Consistent with 36 CFR 212.1, Forest Service Manual (FSM) 2353.05, and Title V, Section 507(c), of the Americans With Disabilities Act, wheelchairs and mobility devices, including those that are battery-powered, that are designed solely for use by a mobility-impaired person for locomotion and that are suitable for use in an indoor pedestrian area, are allowed on all NFS lands that are open to foot travel. The Travel Management Rule at 36 CFR 212.51(b) "...allows for route designations to include "the limited use of motor vehicles within a specified distance of certain designated routes, solely for the purposes of...retrieval of a downed big game animal by an individual who has legally taken that animal."

Potential effects on the elderly and disabled were addressed throughout the FEIS. In Chapter 1, access to and use of forest roads by the elderly and disabled was considered a general concern addressed through existing law, regulation, and policy [PR 2527, p. 8]. Access for children (youth) was not listed as a concern. The text in Chapter 1 references USDA policy regarding discrimination on the basis of handicap [PR 2527, p. 8; PR 2521-20]. Access and use were also addressed in the response to comments on the DEIS [PR 2528, p. 592]. The response noted that "There is a range of road and trail miles available for motorized uses in all action alternatives and areas and corridors in Alternatives C, D, F, and G that is proposed open to all users for motorized vehicle travel. Senior citizens and persons with disabilities will have the same access rights as the general public."

The effects analysis in Chapter 3 disclosed that all of the action alternatives could affect the ability of elderly and disabled people to travel to their favorite places. This concern was also addressed in the Social and Economic section of Chapter 3 under "Lifestyles, Values, Beliefs, and Attitudes" and "Access for Disabled and Elderly Populations" and the associated specialist report [PR 2527, pp., 437-438, 444 and PR 2521-00, p. 22].

As noted in Chapter 1 and Appendix B of the FEIS, there is no legal requirement to allow persons with disabilities to use motor vehicles on roads or trails, and in areas that are closed to motor vehicle use. These restrictions on motor vehicle use are not discriminatory because they are applied consistently to everyone [7 CFR 15e.103, PR 2521-20]. In general, granting an exemption for people with disabilities would not be consistent with the resource protection and other management objectives of the travel management decision and would fundamentally alter the nature of the Forest Service's travel management program. This concept also applies to providing special provisions for aging populations that may have limited mobility.

Finding: The analysis in the FEIS addressed effects on the elderly and disabled. Restrictions on use of motor vehicles are not discriminatory because they are consistently applied to all users.

The Forest Service is also in compliance with federal laws and regulations regarding non-discrimination on the basis of handicap.