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File Code: 1570/2350

Date: September 9, 2014

Mr. W.D. Grubb  
PO Box 819  
Silver City, NM 88062

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED  
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Dear Mr. Grubb:

This is my decision on the appeal (#14-03-00-0135-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**

**W. D. Grubb**

**Appeal #14-13-00-0135-A215**

**Gila Travel Management**

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

**Contention 1a:** The appellant contends the decision does not consider his private property rights and that his comments arbitrarily and capriciously received no consideration in regard to his private property [Appeal, p. 1].

**Response:** The Council on Environmental Quality (CEQ) Regulations at 40 CFR 1501.7 state that there shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.

The scoping process is also used to refine and clarify the scope of the project. The scope consists of the range of actions (including connected actions), alternatives, and impacts to be considered in an Environmental Impact Statement (EIS) (40 CFR 1508.25).

Furthermore, an agency preparing an FEIS shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement: (1) modify alternatives including the proposed action; (2) Develop and evaluate alternatives not previously given serious consideration by the agency; (3) Supplement, improve or modify its analysis; (4) Make factual corrections; (5) Explain why the comments do not warrant further agency response, citing sources, authorities, or reasons which support the agency's position and, if appropriate; indicate those circumstances which would trigger agency reappraisal or further response [40 CFR 1503.4 (a)].

Additionally, the CEQ regulations require that all substantive comments be attached to the final statement regardless of whether the comment is thought to merit individual discussion [40 CFR 1503.4(b)].

Forest Service Manual (FSM) 1950.41 provides the responsible official direction in making a decision. The direction is to review and consider the environmental document, the public and agency comments, the agency response, and make a decision within the range of alternatives in the environmental document [36 CFR 220.49(c)].

The test used to measure if an agency's action is arbitrary and capricious follows:

- The agency fails to consider an important aspect of a problem – **Overlooked evidence**

- The agency offers an explanation for the decision that is contrary to the evidence. There is not a rational connection between the facts presented and the decision made – **Unwarranted by the facts.**
- The agency’s decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise – **Lacks logic.**
- If the agency’s decision is contrary to the governing law, or the Agency standards are applied in an inconsistent manner—**A clear error of judgment.**

“Also, a decision is arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (internal quotations and citation omitted).

The ROD [PR 2526, p.10] documents the public involvement process and opportunities for comments. Comments on the proposed action that were submitted during the scoping period were analyzed by the interdisciplinary team and recorded in the Scoping Content Analysis Summary – version 1, [PR 1716] and the Scoping Content Analysis Summary – version 2, [PR 1726]. The comments submitted on the Draft EIS, during the 60-day comment period were analyzed by the interdisciplinary team and recorded in Appendix B of the FEIS, [PR 2528 p. 535-771].

The appellant submitted two comments during the DEIS 60-day comment period, [PR 2528, p. 677, comment numbers 03072011-218-2 and 03072011-218-2a]. Both comments were in regards to a request to designate the roads as private roads. Both comments were determined to be outside the scope of this project. The purpose of and need for the project, stated in the FEIS [PR 2526, pp. 4-5] is complying with the Travel Management Rule [36 CFR 212.51(a)].

The Travel Management Rule (TMR) requires the responsible official to recognize rights of access in designating roads, trails, and areas. Right of access include valid existing rights and rights of use of National Forest System (NFS) roads and NFS trails [PR 0029, p. 68290]. The TMR does not affect reciprocal rights-of-way between the Forest Service and private landowners. The Forest has attempted to not designate roads across private lands for which there is no acquired easement or right-of-way [PR 2528, p. 536]. To this point, the Forest did consider the appellants private property rights in the decision, and considered comments in regard to private property rights. The segment of road 4090Y that goes through private land is shown as a private road [PR 2528, p. 696; PR 2534, map G-28]; similarly, the segment of road 836 that goes through private land is shown as a private road [PR 2534, map G-28]. The Forest also took into consideration (and agreed with) the comment that motorized dispersed camping corridors should not be designated on road 4090Y for resource reasons [PR 2528, p. 529].

However, there are instances where jurisdiction remains unresolved and public access has not been ruled out with certainty, and therefore, motorized travel through private land is displayed [PR 2528, p. 536]. This is in compliance with regional guidance [PR 416, p. 1].

**Finding:** The Forest followed law, regulation, and policy. The comments submitted by the appellant were considered in a manner consistent with the purpose of and need for the project. The scope of the project was based on the purpose of and need for the project and considered comments submitted by the public that should be discussed in the same impact statement. As required by the TMR, the decision does consider the effects of the action alternatives to private property rights. However, the Forest found that designating rights of way or special use permitting of a road to a private individual was not within the purpose of and need for the project.

**Contention 1b:** The appellant expresses concern about the Forest Service attempt to sell him a right-of-way to his private land in Section 1, T21S R16W [Appeal, p. 1].

**Response:** It does not make sense that the Forest Service would attempt to sell the appellant a right-of-way to his private land. It is possible the appellant means that he expresses concern about the Forest Service attempt to sell him a written authorization to access his private land. Regardless, whether it is an issue of determining right-of-way, or of the necessity of a written authorization, the appellant's concern is beyond the scope of the purpose of the TMR, and of the decision.

The purpose of the project is to comply with the TMR by providing a system of roads, trails, and areas designated for motor vehicle use by class of vehicle and time of year on the Gila National Forest [PR 2527, p. 4].

**Finding:** The appellant's concern is outside the scope of the TMR, and of the decision.

**Contention 1c:** The appellant contends the agency arbitrarily and capriciously ignored his comment regarding his private property rights which are crossed by Forest Roads 861 and 859. He demands that the portions of these roads on private land be designated as private roads. The appellant claims that Forest Service refusal to do so will constitute an illegal taking of private property rights without due process of law or compensation [Appeal, pp. 1-2].

**Response:** The Travel Management Rule (TMR) requires the responsible official to recognize rights of access in designating roads, trails, and areas. Rights of access include valid existing rights and rights of use of National Forest System (NFS) roads and NFS trails [PR 0029, p. 68290]. The TMR does not affect reciprocal rights-of-way between the Forest Service and private landowners. The Forest has attempted to not designate roads across private lands for which there is no acquired easement or right-of-way [PR 2528, p. 536]. The Forest recognizes that segments of FR 861 and 859 go through private land [PR 1284, p. 18], and did respond to comments regarding FR 859 and 861 [PR 2528, p. 677]. However, there are instances where jurisdiction remains unresolved and public access has not been ruled out with certainty, and therefore, motorized travel through private land is displayed [PR 2528, p. 536]. This is in compliance with regional guidance [PR 416, p. 1]. Determining jurisdiction and issues of right-of-way are outside the scope of the TMR and of the decision.

**Finding:** As required by the TMR, the decision does consider private property rights, and comments were taken into consideration in regard to private property. The Forest is in

compliance with regional guidance for routes with difficult-to-determine jurisdiction. Determining jurisdiction and issues of right-of-way are outside the scope of the TMR, and of the decision.

**Contention 1d:** The appellant claims the Forest Service agreed in writing on April, 3, 1987, to not maintain Forest Roads 861 and 859 on his private land in Knight Canyon and demands that the Forest Service comply with the written agreement [Appeal, p. 2].

**Response:** The purpose of the project is to comply with Subpart B of the Travel Management Rule by providing a system of roads, trails, and areas designated for motor vehicle use by class of vehicle and time of year on the Gila National Forest [PR 2527, p. 4]. Agency direction for maintenance of the Forest Transportation system is provided in Subpart A of the Travel Management Rule, 36 CFR 212.1. Agency guidance for specific road maintenance activities such as maintenance prescriptions, maintenance plans, and maintenance schedules are in Forest Service Handbook (FSH) 7709.59. Decisions regarding maintenance of specific roads are outside the scope of the project.

**Finding:** The appellant's request for the Forest to not maintain road is outside the scope of the project and of the decision.

**Contention 1e:** The appellant contends the decision arbitrarily and capriciously failed to consider his concern about resource damage on private land and the lack of law enforcement and administrative action to prevent the damage [Appeal, p. 2].

**Response:** The purpose of the project is to comply with the Travel Management Rule (TMR) [PR 0029, all] by providing a system of roads, trails, and areas designated for motor vehicle use by class of vehicle and time of year on the Gila National Forest [PR 2527, p. 4]. The decision does change where people can drive in the forest. Previously, the Gila National Forest was open to motorized use unless marked "restricted to motor vehicle use." But the TMR and the decision reverses that procedure: the forest will be closed to cross-country motorized use except where specifically designated for motor vehicle use and displayed on the motor vehicle use map [PR 2527, p. 12]. The decision designates roads, trails and areas that are open to motor vehicle use, and prohibits motor vehicle use not in accordance with these designations.

The decision itself addresses the resource concerns the appellant expresses regarding unauthorized OHV use [Appeal, p. 8], by providing a system of roads, trails and areas 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]. Additionally, the Forest took into consideration (and agreed with) the comment that motorized dispersed camping corridors should not be designated on road 4090Y for resource reasons [PR 2528, p. 529].

Regarding enforcement, designated roads, trails and areas shall be identified on a motor vehicle use map [PR 0029, p. 68290]. It is the public's responsibility to obtain that map and stay on designated routes. However, the Forest will continue to work with partners such as state police, sheriff departments, NM Department of Game and Fish, and others to assist in enforcement [PR 2527, p. 9]. Additionally, a travel management implementation plan will be developed to address

enforcement (in addition to addressing monitoring, education and engineering). By designating routes and prohibiting off-road travel (except in corridors designated for motorized dispersed camping and big game retrieval), law enforcement is simplified because motor vehicle use off of designated routes is prohibited [PR 2527, p. 141].

**Finding:** The decision itself addresses the resource concerns the appellant expresses regarding unauthorized OHV use by providing a system of roads, trails and areas designated for motor vehicle use, and by prohibiting motorized travel not in accordance with the designated system.