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File Code: 1570-1/2200
Date: July 23, 2009

Jay Lininger
Center for Biological Diversity
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Flagstaff, AZ 86002-1178

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

RE: Appeal #09-03-04-0001-A215, Fossil Creek Allotment, Red Rock RD

Dear Mr. Lininger:

This is my review decision on the appeal filed electronically on June 15, 2009, regarding the Decision Notice (DN), Environmental Assessment (EA), and Finding of No Significant Impact (FONSI) on the above-referenced project. The decision selecting the Proposed Action alternative provides for yearlong grazing on the approximately 42,200 acre Fossil Creek allotment, with a maximum number of 5,800 AUMs (483 AUs yearlong). This maximum number of AUMs would only be permitted under favorable climatic conditions once desired conditions for vegetation and soil have been reached. Initial permitted numbers will be a maximum of 3,600 AUMs (300 AUs yearlong) until soil and vegetation conditions improve.

BACKGROUND

District Ranger Heather Provencio made a decision on April 28, 2009, and published on April 29, 2009, for the Coconino National Forest on the Fossil Creek Allotment project. The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR § 215 appeal regulations.

Pursuant to 36 CFR § 215.17, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR § 215.18. I have reviewed the appeal record, including the recommendations of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer found that: A) the actions to be taken are clearly described in the decision; B) the selected alternative should accomplish the purpose and need of the project and reflects consistency with direction in the Coconino National Forest Plan; C) the decision is consistent with agency policy, direction and supporting evidence; and D) scoping and the public involvement process was appropriate and there was ample opportunity for public participation. A copy of this recommendation letter is enclosed.

APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision on the Fossil Creek Allotment Project.

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/ Joseph P. Stringer
JOSEPH P. STRINGER
Appeal Deciding Officer

cc: Heather C Provencio
David M Stewart
Berwyn Brown
Carol Boyd
Yewah Lau
Mailroom R3 Coconino
Michael Chaveas
Mailroom R3

2 enclosures (Review and Findings and ARO letter)

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REVIEW AND FINDINGS

of

Center for Biological Diversity's

Appeal #09-03-04-0001-A215

Fossil Creek Allotment, Coconino NF

For the purposes of this review, contentions have been re-arranged from the original appeal order so that they are addressed in the context of applicable laws, regulation and directives.

ISSUE 1: The Fossil Creek project violates NEPA.

Contention A: Stehr and Boulder pastures will be grazed under this project in the Riparian Area (Management Area 12). Ongoing soil loss and sediment delivery to Fossil Creek will continue and the cumulative effects are foreseeable over time. The EA fails to assess adverse effects for the future and an EIS is required (appeal pp.5-7). Cattle grazing in riparian zones is a potentially significant effect because of credible opposing science, and the controversy requires an EIS (appeal p.8).

Response: Preparation of an EIS is not required or necessary to demonstrate the agency has taken a requisite "hard look" at the environmental consequences of a proposal. Agencies may initially prepare an environmental assessment (EA) and if the analysis supports a Finding of No Significant Impact (FONSI), the action is exempt from the requirement to prepare an EIS (40 CFR 1500.4(q)). In preparing a FONSI, the agency considers both the context and intensity of effects related to the listed significance factors (40 CFR 1508.27).

The Soils and Water Specialist Report (PR #133), on page 12, states that Fossil Creek allotment's water quality meets Arizona Department of Environmental Quality standards, and that implementation of the Proposed Action should maintain or improve water quality. On the same page, the specialist states that over time, improved vegetation and litter cover should reduce sediment delivery to less than current levels. In Stehr and Boulder pastures, three watering sites along Fossil Creek would be added, increasing cattle access by about 400 linear feet (PR #133 p.13). Adaptive management measures to exclude cattle from some riparian areas following two consecutive periods of cattle use would minimize any negative effects to riparian areas (PR #133 p. 14). Additionally, under the Proposed Action the watering locations along Fossil Creek would be reduced by approximately 50 percent from 7.27 acres under current management to 3.64 acres (PR #237 pp.147-149).

The FONSI states that based on the environmental effects on riparian and watershed conditions disclosed in Chapter 3 of the EA (PR #237) and analyzed in the Soils and Water specialist

report's analysis (PR #133), the effects of cattle grazing within the riparian area are likely to be reduced, and not likely to be significant or highly controversial (DN/FONSI, PR #251, pp. 6-7, 8, 9, 12, 14). The management practices proposed for riparian protection are described in the management direction for riparian areas of the Coconino National Forest Land and Resources Management Plan (summarized in PR #133, pp. 20-24).

The EA effectively incorporated public comments and concerns into its analysis. Numerous publications were reviewed and considered and a wide range of studies, monitoring results and published research findings were integrated into the EA (PR #197 and EA PR #237). The best available science was used and the effects were determined to not be highly controversial from a scientific or technical standpoint (DN/FONSI PR #251, p. 12). The appellant has not brought forth any new scientific research which would indicate a level of controversy.

Finding: The analysis supports the conclusions of the FONSI. In the absence of significant effects or scientific controversy, preparation of an EIS is not required.

Contention B: Endangered razorback sucker and threatened loach minnow and spikedace will be adversely affected by increases of sediment delivery into Fossil Creek as shown in the EA pages 128-9. Grazing will also adversely affect Chiricahua leopard frog, even with fencing. The project will adversely affect Mexican spotted owl prey by diminishing plant cover through grazing and forage for MSO prey species (appeal p. 7). There is uncertainty regarding effects of grazing to endangered Yuma clapper rail and southwestern willow flycatcher. The FS never surveyed for these species in the Fossil Creek area but the EA acknowledges that suitable habitat exists. The potential direct, indirect and cumulative effects from this activity are unknown (appeal p.8).

Response: The Biological Assessment (BA) assumed or noted species presence for the determination of effects**.** For example it states that the razorback sucker, loach minnow and spikedace were recently "stocked" or "repatriated" (BA PR #220 pp. 43, 48, 51). The BA also assumes that there is a potential for Chiricahua leopard frog to occur in Fossil Creek and therefore determined direct effects to "suitable… frog sites" (PR #220 p. 33). There is very little suitable habitat for Mexican spotted owl (MSO) on the Fossil Creek Allotment (PR #220 p. 10-12), nonetheless, while there may be "localized areas that do not provide for the needs of prey, the BA concluded that the Proposed Action Alternative "will not likely adversely affect" the owl and its designated habitat. Habitat is marginal for the Yuma clapper rail in the Verde River and Fossil Creek but livestock do not access the Verde River, and only access Fossil Creek at three water access sites (BA #220 p.22). In 2002 and 2003 forest personnel conducted Southwestern willow flycatcher surveys for the species and suitable habitat; no flycatchers were detected and only a few patches of potential habitat were present (PR #220 p. 15).

Direct, indirect and cumulative effects are discussed in the BA (PR #220) on pages 44 and 45 for the razorback sucker, on pages 47 and 48 for the loach minnow, pages 50 and 51 for spikedace, pages 32 and 33 for the Chiricahua leopard frog, page 13 for the Mexican Spotted Owl (relative to adjacent allotments) and page 19 for the Southwestern willow flycatcher.

The Decision Notice found the Proposed Action Alternative will have no significant effects on any threatened, endangered, candidate, proposed, or Forest Service sensitive species, including the Yuma clapper rail and the Southwestern willow flycatcher (PR #251 p.14).

Per FSM 2672.42, a Biological Assessment was prepared (PR #220). Formal consultation was conducted under ESA Section 7(a)(2) for the two fish species and the U.S. Fish and Wildlife Service (FWS) issued a Biological Opinion (PR #232) on February 9, 2009. Due to limited direct livestock access to Fossil Creek, the FWS did not assign "take" per ESA Sections 9 and 4(a); in the Biological Opinion for the razorback sucker, loach minnow, and spikedace (BO PR #232 p. 33). "Take" for Chiricahua leopard frog comes from the June 2005 Eleven Forest LRMP BO as referenced in the Fossil Creek Project BO (PR #232 p. 32). The FWS concurred with the "not likely to adversely effect" determinations in the BA for Mexican spotted owl, Southwestern willow flycatcher and Yuma clapper rail (PR #232 pp. 47-48).

Finding: Effects to these threatened, endangered and other species were analyzed and disclosed. Cumulative effects were addressed.

Contention C: The EA fails to indicate if any of the known impaired soils or potential capacity rangelands exist within the Fossil Springs and Mazatzal Wilderness Areas. The FS arbitrarily dismisses continued grazing effects to Wilderness values, stating that there will be no direct, indirect or cumulative effects to those values, while contradicting its conclusion that continued grazing will have effects to range, soil, and watershed conditions (appeal p.8).

Response: The Soil and Water specialist report (PR #133 p.66) provides a map of soil conditions, including impaired soils, across the entirety of the Fossil Creek allotment. The project record includes separate maps showing soil categories and wilderness boundaries (PR #133, p.66 and PR91). Correlating this map with that of the wilderness areas (PR #91), indicates that soils other than fully satisfactory do exist within the Fossil Springs Wilderness and Mazatzal Wilderness.

The soils section of EA Chapter 3 (PR #237 pp. 59-69) states that the reduced livestock impacts of all three analyzed alternatives compared to current conditions would result in improvements to soil vegetative cover and compaction levels, leading to improvements in soil conditions, over periods of more than 10 years for all three alternatives.

Grazing capability classes across the allotment (full capacity, potential capacity, and no capacity classes) are outlined by acres and description under slope and soil condition (satisfactory, unsatisfactory or inherently unstable soil conditions) respectively, in the Range Specialist Report (PR #143 pp.5-7). The grazing capacity which is based on capability, forage production, topography and allowable use; was estimated for the allotment and includes Management Area 1- Fossil Springs Wilderness at 3,399 acres. There are only 12 acres of Mazatzal Wilderness estimated to be within the allotment (PR #136 p.14). Grazing capacity is summarized in the EA (#237 p.51).

Direct, indirect and cumulative effects of the Proposed Action on wilderness areas are analyzed and discussed in the EA (PR #237 pp. 144-145), with a conclusion that no new improvements are

proposed in the wilderness areas and that grazing would continue as it has in the past. Additionally, the Recreation Specialist report (PR #136) states in Table 4 on page 24, that none of the three alternatives will affect wilderness values.

While continued grazing will have effects to range, soil, and watershed conditions, as analyzed in the EA, there is no contradiction with Wilderness values because Congress has determined that *"the grazing of livestock, where established prior to the effective date of this Act, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture."*(Section 4(d)(4)(2) of the Wilderness Act). The Wilderness Act goes on to state that "*There shall be no curtailments of grazing in wilderness areas simply because an area is, or has been designated as wilderness, nor should wilderness designations be used as an excuse by administrators to slowly "phase out" grazing***."**

Furthermore, the Proposed Action is consistent with the Forest Plan. The Recreation Specialist report (PR #136 p.17-18) summarizes the management emphasis for the Mazatzal Wilderness which is found in the adjacent forest, in the Tonto National Forest Plan: *Management Area 1B Emphasis: Manage for wilderness values while providing livestock grazing and recreation opportunities that are compatible with maintaining wilderness values and protecting resources."* The Coconino LRMP Management Area 1: Wilderness, applies to the Fossil Springs Wilderness, (PR #237 p.15) and its management emphasis for wilderness is: *"Emphasize wilderness recreation and watershed condition while maintaining wilderness resource values. Manage grazing under Congressional guidelines for grazing in wilderness. (Forest Plan amendment 3, page 105)"*.

Finding: The analysis and DN/FONSI exhibited appropriate consideration of the impacts of livestock grazing management on wilderness values, and complied with agency direction and Congressional guidelines on grazing.

Contention D: The allotment contains Fossil Creek, a recently designated Wild and Scenic River with outstandingly remarkable values that include fish, wildlife, and riparian community. Grazing is likely to degrade all three of those remarkable values. The EA fails to discuss effect on the Wild and Scenic River other that its eligibility for designation (appeal p.8).

Response: The EA (PR #237), the Recreation Specialist's Reports -Wild and Scenic Rivers (PRs #136 and #137), and the Decision Notice (PR #251) all discuss Fossil Creek as a Wild and Scenic River. There are five outstandingly remarkable values associated with the river: geologic, fisheries, wildlife, historic and riparian (PR #137 p.11).

Over the last 10-15 years, livestock have had access to grazing along about 1.2 miles of Fossil Creek but under the Proposed Action Alternative livestock access will be removed from Fossil Creek with the exception of three water access points (PR #137 p. 7). This would leave only about 0.6 acres along the creek accessible to livestock (PR #193).

The Biological Assessment discusses impacts to fish habitat. It states that the potential exists for trampling of fish (razorback sucker, loach minnow and spikedace) and their spawning habitat by

livestock at the water access points along Fossil Creek. However, the potential for these direct effects is limited (PR #220 pp.45, 48, 51).

The Wildlife Specialist's Report discusses impacts to wildlife species associated with riparian areas. These include the sensitive species: common black hawk, Abert's towhee, lowland leopard frog, Arizona toad, narrow-headed garter snake, and Mexican garter snake among others. While the Proposed Action Alternative will impact some individuals of these species, it is not likely to result in a trend toward federal listing for any of these species. This is primarily because livestock use on Fossil Creek is limited to the water access points in just alternate years, and the maximum utilization on woody riparian vegetation is 20 percent (PR #139 p. 78-79, 84, 87, 89, 92, 94).

Other documents discuss impacts to the riparian community. The Soils and Water Specialist Report states that there will be some bank trampling along Fossil Creek at the [three] designated watering sites, but for the reach as a whole, this will provide little negative effect to Fossil Creek (PR #133 p. 55). In addition, it notes that managing utilization at 20 percent, along with adaptive management, is "designed to maintain or improve riparian conditions" (PR #133 p. 14). The Decision Notice also notes that impacts "would be moderated since the allowable use will not exceed 20 percent on the woody vegetation" (PR #251 p. 12).

The EA states that there would be minimal impacts to the riparian community at the three livestock water access points during grazing, [and] eligibility or designation as a Wild and Scenic river will not be affected" (PR #237 pp. 147-148).

Finding: The EA and various other documents cited above address not only eligibility of Fossil Creek as a Wild and Scenic River but also analyze impacts to its fish, wildlife and riparian outstandingly remarkable values.

Contention E: The spatial scale of cumulative effects analysis for range resources (vegetation and grazing capacity) is limited to the Fossil Creek allotment itself. This masks effects that would show up with a combined analysis of grazing in adjacent allotments in the same watershed. In contrast, effects to soils, water and riparian resources and wildlife are defined at the 5th Code Lower Verde watershed level which masks effects to particular site-specific areas in Fossil Creek. Cumulative effects of authorized grazing on site-specific resources such as soil condition categories, map units, and riparian habitats in the Stehr and Boulder pastures are not analyzed (appeal p.9).

Response: The analysis of cumulative effects begins with consideration of the direct and indirect effects on the environment that are expected or likely to result from the alternative proposals for agency action. Agencies then look for present effects of past actions that are, in the judgment of the agency, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for agency action and its alternatives. CEQ regulations do not require the consideration of the individual effects of all past actions to determine the present effects of past actions. Simply because information about past actions may be available or obtained with reasonable effort does not mean that it is relevant and necessary to informed decisionmaking.

Past actions that are relevant to the proposed action are identified in Tables 8 and 9 of the environmental consequences, Chapter 3 (EA PR #237 pp.45-46). These include grassland maintenance, the Childs/Irving Hydroelectric decommissioning, native fish restoration, wildlife habitat improvement, dispersed recreation, road maintenance, and fire suppression.

Major ongoing actions are identified in Tables 10 and 11 (PR #237 pp.46-47). These include 19 (PR #237 p.48) active grazing allotments, the Childs/Irving Hydroelectric decommissioning, dispersed recreation, hunting, road maintenance, wild ungulate grazing, and treatment of invasive species.

Foreseeable actions occurring within the cumulative effect analysis area are identified in Table 12 and include travel management, other allotment NEPA, reissuing special use permits, Forest Plan amendment for fire use, treatment of noxious weeds, fuel wood gathering, personal use small forest products, and the Copper Canyon 69 KV Power line Project (PR #237 p.48).

The aforementioned actions are identified as being within the Fossil Creek Allotment and the Lower Verde 5th code Watershed. The cumulative effects analysis for rangeland resources indicates the cumulative effects associated with the proposed action will not result in a decline of vegetation condition or trend with no measurable differences between any of the alternatives considered in detail. Increased retention of litter will improve effective ground cover and soil condition, and reduce soil loss. Riparian function will improve and reaches that are not in proper functioning condition (PFC) will move toward PFC. An exception to this may be the at-risk reach of Fossil Creek that has heavy recreation impacts (PR #237).

The scale of the cumulative effects analysis for the range resource is confined to the Fossil Creek allotment because the focus of the analysis is on upland vegetation which received little influence from off site activities (PR #237 p.53).

Finding: The EA documents the assessment of the cumulative effects of the actions considered (including past, present, and reasonable foreseeable future actions) on the affected environment including grazing [36 CFR 220.4(f)].

Contention F: The EA is silent about potentially significant cumulative effects of cheatgrass spread resulting from livestock grazing, fails to relate weed occurrence to any particular site or infestation, does not indicate extent of project area that would be affected, and overlooks fire suppression operations that can spread weeds (appeal pp.11-12).

Response: The design features of the proposed action include eleven Best Management Practices for invasive species including prevention practices focused on preventing the spread of invasive species and cooperative weed management (PR #237 p.28). These practices are designed to prevent and control weeds, minimize transport of weed seed into and within allotments, maintain healthy desirable vegetation that is resistant to weed establishment, minimize ground disturbances, and encourage permittees to prevent the introduction and spread of weeds.

Invasive weeds were not identified as an issue during public scoping for this project (PR #237 pp.17-18).

Other general practices included in the design features to prevent and control weeds include: removing mud, dirt, and plant parts from project equipment before moving it into a project area; cleaning all equipment before leaving a project site; and inspecting, removing, and properly disposing of weed seed and plant parts found on clothing and equipment (PR #237 pp.28-30).

A weeds assessment and inventory was completed as part of the analysis (Invasive Plant species Specialist Report PR #122). Resource protection measures were taken from the Weed EIS for the Forest (FEIS 2005, not in record), and are identified and required for all action alternatives (PR #237 pp.28-30). These prevention and control practices were carried forth into the aforementioned design criteria. The presence of invasive species will be monitored as part of overall monitoring and mapped and entered into the NRIS-TESP/Invasive Plants database and scheduled for treatment.

Thirteen species of concern identified on the allotment are presented in Table 4 (PR #122 and EA PR #237 Table 31 p.139). The majority of weeds are located along Highway 260 and at the hydropower project site. Weeds are noted by occurrence at sites and spread of weeds is over the allotment. Cheatgrass is listed in Table 31 as occurring near the Irving powerplant and is just one of 13 weed species of concern identified and for which direct, indirect and cumulative effects are analyzed in the EA (PR #237 pp.138-141). Recreation use rather than fire suppression is a major vector of weeds. The cumulative effects of the proposed action presented in Table 6 of the Invasive Plant Species Specialist Report (PR #122) recognizes there would be more new populations established under the proposed action as opposed to the no action/no grazing alternative.

Finding: Potential impacts from weed species, including cheatgrass, are analyzed in the EA. The magnitude of effects from the decision will not be significant due to best management practices and monitoring efforts. The design features apply allotment wide and will prevent uncontrolled spread of species such as cheatgrass on the allotment. Best management practices related to cleaning equipment and clothing are applicable to all projects whether they are related to range management practices, fire suppression, or other reasons.

Contention G: The Fossil Creek Allotment project fails to meet the purpose and need. The initial number of livestock and maximum authorized number are based on projections of a wetter weather cycle which is not a valid assumption. The EA does not assess foreseeable effects of prolonged drought on range conditions due to ongoing climate change (appeal p.12). The Decision Notice at page 6 makes an arbitrary and capricious statement that the Proposed Action Alternative meets the purpose and need but the No Action Alternative does not, while the EA states that the No Action Alternative does meet the purpose and need on page 20 (appeal pp. 12-13).

Response: The effects of prolonged drought are built into the proposed action as part of an adaptive management strategy. Specifically, mitigating measures identified in the proposed action include adjusting the timing, intensity, frequency, numbers, and rangeland management

system as necessary to minimize the effects of drought on soil productivity, water quality, and herbaceous and woody vegetation (PR #237 pp.30-32). In times of severe drought the allotment may be totally de-stocked. This would be determined annually based on climatic conditions. Grazing history shows that actual use in the past has been drastically reduced in periods of drought (EA PR #237 p.49).

The purpose and need clearly states that the purpose is "to *authorize livestock grazing* in a manner that maintains and/or moves the area toward Forest Plan objectives and desired conditions." Therefore, the Decision Notice is correct in that the No Action alternative does not meet the purpose and need since it is equivalent to No Grazing. The EA clearly supports this in Table 7 (PR #237 p.35). The text referred to by the appellant on page 20 of the EA is describing portions of the purpose and need that the No Action alternative does meet, i.e. maintaining and improving rangeland vegetation conditions, maintaining and improving soil conditions, and improving riparian conditions along streams and springs.

Finding: The adaptive management strategy contained in the proposed action will ensure protective measures for soil, water, and vegetative resources are in place in the event of prolonged drought. The Decision Notice is correct in that the proposed action meets the purpose and need, while the No Action alternative does not.

Contention H: The EA fails to consider a range of reasonable alternatives and does not analyze maximum authorized grazing levels. The EA should include at least one alternative that reflects maximum authorized grazing levels in the proposed action (appeal pp. 13-15).

Response: The EA examined three alternatives in detail, including the proposed action. A new alternative was developed as a result of issues raised during the public scoping process; the "Reduced Utilization and Grazing Intensity Alternative" (PR #237 pp.17-18). The effects for all resources from Maximum authorized grazing levels of 5,800 AUMs yearlong were analyzed in the EA for both the proposed action and the reduced utilization and intensity alternative (PR #237 p.43).

Finding: A reasonable range of alternatives was considered in the EA, and effects from the maximum authorized grazing level of 5,800 AUM were analyzed under two of those alternatives.

<u>ISSUE 2:</u> Fossil Creek Allotment project violates the Coconino Forest Plan and NFMA.

Contention A: The description of range conditions in the Fossil Creek allotment project is not related to the Forest Plan guidelines/ratings which limit allowable use. The EA provides no factual basis in its discussion of grazing capacity for the forage utilization levels authorized or that the authorized levels are better than the Forest Plan guidelines. Similarly, the range conditions in the allotment project are not related to the deferred rotation strategy or shown to comply with Forest Plan pasture rest guidelines (appeal pp.9-10).

Response: Although the appellant is unclear in their contentions, it is assumed the appellant is referring to the Southwestern Region 1996 Forest Plan amendment that applied to all Forest Plans in the Southwestern Region. The 1996 amendment provided utilization guidelines that

could be used as NEPA was being completed on individual grazing allotments. However, it is not mandatory for Forests to use the utilization guidelines if they chose to develop site specific utilization guidelines during the NEPA process. In the case of Fossil Springs site specific guidelines were developed with ESA Section 7 consultation and concurrence on them.

Finding: The Coconino Forest Land Management Plan has not been violated.

Contention B: The project does not follow Forest Plan guidelines for Mexican spotted owl restricted habitat. The project fails to explain how the authorized grazing utilization level will maintain owl prey availability within the allotment or in adjacent allotments. The EA does not assess the effects of noxious and invasive weeds on spotted owl prey forage species (appeal p.10).

Response: The Coconino National Forest Plan incorporates Mexican Spotted Owl Recovery Plan direction including that for restricted habitat, and the Proposed Action Alternative is consistent with and responds to the goals and objectives of the Coconino National Forest Plan (DN #251 p.14)

Restricted habitat for Mexican spotted owls (MSO) on the Fossil Creek Project area is limited (BA PR #220 p. 11). The types of restricted habitat present are 1) riparian forest of which there are 333 acres on the allotment, and 2) mixed conifer of which there are 3 acres. This total of 336 acres of restricted MSO habitat represents less than 1% of its approximately 42,200 acres. The BA notes that while there may be "localized areas that do not provide for the needs of [MSO] prey", it concluded that the Proposed Action Alternative "may affect but will not likely adversely affect" the owl and its designated habitat (BA PR #220p. 14). The US Fish and Wildlife Service concurred with this conclusion (PR #232).

The Invasive Plant Species Specialist Reports (PR #122) identifies "Design Features and Mitigation Measures" for key invasive species (taken from the 2005 FEIS for the Integrated Treatment of Noxious or Invasive Weeds, Coconino, Kaibab and Prescott National Forests). These features and mitigations are adopted as *Resource Protection Measures* which are required for the Proposed Action Alternative (PR #122 p. 3) in order to protect forest resources such as wildlife and aquatic habitat (PR #122 p. 12). The BA states that noxious or invasive weed populations will be identified and treated in order to mitigate impacts to threatened, endangered and sensitive species by reducing the risk of infestations in populations or habitats (PR #220 p. 7).

Finding: Determinations relative to MSO prey species and their habitat are made in consideration of the required *Resource Protection Measures* as part of the Proposed Action Alternative. The Proposed Action does not violate the Forest Plan. Potential effects to Mexican spotted owls, their habitat and their prey have been assessed properly.

<u>ISSUE 3:</u> The use of adaptive management and the FSH Chapter 90 violates NEPA and ESA.

Contention A: The EA should disclose the maximum authorized levels of grazing. The Proposed Action on Fossil Creek Allotment project is so general, as stated by Arizona Game and Fish Dept comments, that there could be effects exceeding those analyzed in the EA. The EA does not analyze effects of management options (appeal pp.14-15).

Response: Under the selected action permitted livestock numbers will be a maximum of 5,800 animal unit months (AUMs) yearlong, as described in the proposed action (PR #237 p.14). This is the maximum number of AUMs that can be supported during times of adequate moisture once desired conditions for vegetation and soil have been achieved. Current conditions will not support this level of grazing. Therefore, livestock numbers will be permitted at a lower level initially, a maximum of 3,600 AUM, until such time as monitoring indicates that rangeland management actions are achieving resource management objectives (PR #76; PR #237).

The proposed action is very specific and discloses structural range improvements, monitoring, and detailed resource protection measures under an adaptive management strategy that is consistent with Chapter 90 (FSH 2209.13). The proposed action includes a range of management actions that may be implemented in order to meet desired conditions as determined through monitoring. The environmental consequences of implementing the actions to be taken and the monitoring required in order to use adaptive management are disclosed (PR #237, beginning on p.43).

The authorization discussion discloses management guidelines. Conservative use guidelines for grazing (30-40%) will be used except for a 20% guideline of allowable use on woody vegetation within riparian areas (PR #237 p.22).

Finding: Maximum numbers of authorized and permitted levels of grazing are disclosed. Contrary to the appellant's allegations the proposed action is very specific and is consistent with NEPA.

Contention B: Adaptive management direction for grazing requires an EIS. The project violates NEPA because it relies on Chapter 90, a new administrative rule for livestock grazing in the FS Handbook that itself did not undergo NEPA review in an EIS. The rule calls for site-specific NEPA analyses of grazing allotments that may analyze one level of livestock grazing yet authorize a different, higher level of grazing as is the case on the Fossil Creek EA. The Chapter 90 rule includes no requirements that monitoring actually occur or that changes to management rely on those data. Chapter 90 authorizes a process of grazing management that circumvents procedural requirements of NEPA in decision making about livestock grazing. The Fossil Creek EA and Biological Assessment analyzed the effects of one level of grazing while authorizing a separate higher level of livestock grazing (appeal pp.15-16).

Response: The Forest Service Directives system consists of numerous volumes by numerical code and subject matter. These directives contain legal authorities, responsibilities, delegations, and general instruction and direction needed on a continuous basis by Forest Service officers to plan and execute programs. The parent text is issued by the national headquarters and sets forth policies and other guidance applicable Service-wide. Conversely, Forest Service Handbooks contain instructions, procedures, and other material issued to assist Forest Service Officers in

managing National Forests and Grasslands on a day to day basis in accordance with direction set out in the Forest Service Directives system.

Involvement of the public in the formulation of Forest Service manual direction is covered in the Secretary of Agriculture Regulations 36 CFR Part 216. Under 36 CFR 216.3(a)(2) instructions and procedures issued in Forest Service Handbooks such as Chapter 90 are not subject to public participation opportunities because they are guidance to Forest Officers in managing National Forests and Grasslands on a day-to-day basis in accordance with direction set out in the Forest Service Manual system.

Chapter 90 of the Grazing Permit Administration Handbook (FSH 2209.13) focuses on National Environmental Policy Act analysis, NEPA-based decisions, and the implementation of those decisions regarding rangeland management and livestock grazing with an objective of achieving and maintaining desired rangeland conditions on National Forest System lands. Chapter 90 provides a process for achieving adaptive management for situations such as those found on the Fossil Creek Allotment through a stock and monitor approach towards achieving land management objectives. Adaptive management utilizes the interdisciplinary planning and implementation process that provides:

a. Identification of site-specific desired conditions;
b. Definition of appropriate decision criteria (constraints) to guide management;
c. Identification of pre-determined optional courses of action, as part of a proposed action to be used to make adjustments in management over time; and
d. Establishment of carefully focused project monitoring to be used to make adjustments in management over time.

Regional supplementation to national direction, R3 2209.13-2207-1 further refines options within adaptive management including:

a. Stocking rates, grazing strategies, and season of use are all tools to implement the decision.
b. Levels of livestock use, (e.g., livestock numbers, maximum or a range of livestock numbers, etc.) and seasons of use described are only approximations and recognize the natural ecological fluctuation in forage production.

Under the selected action permitted livestock numbers will be a maximum of 5,800 animal unit months (AUMs) yearlong (PR #237 p.14). This is the maximum number of AUMs that can be supported during times of adequate moisture once desired conditions for vegetation and soil have been achieved. Current conditions will not support this level of grazing. Therefore, livestock numbers will be permitted at a lower level initially until such time as monitoring indicates that management actions are achieving resource management objectives (PR 76; PR #237 p.14).

Desired conditions for soil and vegetative conditions and Chiricahua leopard frogs and other important wildlife that occupy or use habitat at earthen tanks, springs and other riparian areas; and objectives for achieving desired conditions are documented in Chapter 1 of the Environmental Assessment (PR #237, pp 13,14, 27-33)

Key grazing area monitoring includes grazing intensity utilization, production, vegetative condition and trend. Ground cover objectives by map unit for grazing are included. Chapter 4 of the EA describes annual monitoring requirements on allotments and pastures. Precipitation is recorded as well as forage utilization and trend (PR #237 pp. 28, 159-162).

National Environmental Policy Act Procedures are found in 36 CFR Part 220. 36 CFR 220.7(b)(2)(iv) provides that the proposed action or one or more alternatives to the proposed action may include adaptive management. Under this provision adaptive management requires consideration of the actions to be taken and the monitoring required in order to use adaptive management. The environmental consequences of the proposed action are documented in Chapter 3 of the Environmental Assessment. Monitoring requirements are documented in Chapter 4 of the Environmental Assessment (PR #237). The Deciding Officer documented the rationale for a Finding of No Significant Impact in her April 2, 2009 Decision Notice and Finding of No Significant Impact (PR #251).

Finding: Chapter 90 is not a new administrative rule for livestock grazing. It is a Forest Service Handbook that assists Forest Service Officers in making NEPA-based decisions, and implementing those decisions regarding rangeland management and livestock grazing with an objective of achieving and maintaining desired rangeland conditions on National Forest System lands.

The Deciding Officer did not circumvent procedural requirements of NEPA in her decision to continue permitted grazing on the Fossil Creek Allotment. A lower level of livestock use will be permitted on the Fossil Creek Allotment unless monitoring indicates that a higher level of livestock use would be appropriate.

Contention C: The project violates ESA because it relies on Chapter 90, a new administrative rule for livestock grazing in the FS Handbook that itself did not undergo Endangered Species Act Section 7 consultation. Prior to being used at the project level, Chapter 90 must undergo ESA Section 7 consultation. Chapter 90 authorizes a process of grazing management that circumvents procedural requirements of ESA for disclosure of effects that the maximum grazing level may cause to listed species. The Fossil Creek EA and Biological Assessment analyzed the effects of one level of grazing while authorizing a separate higher level of livestock grazing. The EA, BA submitted to FWS for consultation, and the FWS Biological Opinion all rely on a combination of lower level livestock authorizations, monitoring and adaptive management to justify conclusions that authorized grazing will not jeopardize listed species or adversely modify Critical Habitat (appeal pp.15-16).

Response: Section 7 of the ESA requires Federal Agencies to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.

The effects analysis and required consultation under Section 7 of ESA evaluated livestock grazing for five threatened or endangered wildlife species, and five fish species. Detailed

analysis and findings are documented in the Wildlife Specialist's Report (PR #139), Biological Assessment and Evaluation, (PR #220), and the Biological Opinion (PR #232).

It was determined that the Proposed Action may adversely affect the Chiricahua leopard frog and its habitat (PR #220). The Forest Service requested initiation of formal consultation under Section 7 of ESA on July 7, 2008 (PR #221). A Biological Opinion was received from the U.S. Fish and Wildlife Service (FWS) on February 9, 2009 (PR #232). The FWS concluded that the Proposed Action is not likely to jeopardize the continued existence of the Chiricahua leopard frog.

As stated in the finding for Contention B, Chapter 90 is not a new administrative rule for livestock grazing. It is a Forest Service Handbook that assists Forest Service Officers in making NEPA-based decisions, and implementing those decisions regarding rangeland management and livestock grazing with an objective of achieving and maintaining desired rangeland conditions on National Forest System lands.

The publication of Chapter 90 by the Forest Service Chief does not fall under the actions contemplated in Section 7 of ESA and is therefore not subject to consultation.

Finding: The Deciding Officer did not circumvent procedural requirements of ESA in her decision to continue permitted grazing on the Fossil Creek Allotment based on both formal and informal consultation as noted above.

Forest Service

Peaks/Mormon Lake Ranger Districts

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File Code: 1570-1/2200 **Date:** July 17, 2009
Route To:

Subject: ARO, Appeal #09-03-04-0001-A215, Fossil Creek Allotment, Red Rock RD, Coconino National Forest

To: Joseph Stringer, Coconino Acting Forest Supervisor, Appeal Deciding Officer

This is my recommendation on the disposition of the appeal filed electronically on June 15, 2009 regarding the Decision Notice (DN), Environmental Assessment (EA), and Finding of No Significant Impact (FONSI) on the above-referenced project. The decision selecting the Proposed Action alternative provides for yearlong grazing on the approximately 42,200 acre Fossil Creek allotment, with a maximum number of 5,800 AUMs (483 AUs yearlong). This maximum number of AUMs would only be permitted under favorable climatic conditions once desired conditions for vegetation and soil have been reached. Initial permitted numbers will be a maximum of 3,600 AUMs (300 AUs yearlong) until soil and vegetation conditions improve.

District Ranger Heather Provencio signed a decision on April 28, 2009, and published on April 29, 2009 in the *Arizona Daily Sun*, for the Coconino National Forest on the Fossil Creek Allotment project. The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR § 215 appeal regulations. One appeal was filed by Jay Lininger of Center for Biological Diversity.

Informal Disposition

Pursuant to 36 CFR § 215.17, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached, as the appellant declined to meet with the Responsible Official on this matter.

Review and Findings

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, polices, and orders. The appeal records, including the appellant's issues and requests for relief have been thoroughly reviewed. Having reviewed the Environmental Assessment (EA), decision, 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 EA reflect consistency with direction in the Forest Plan for the Coconino 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 Coconino National Forest Plan. I found no violations of law, regulations, or Forest Service policy.

Recommendation

I recommend that the Responsible Official's decisions relating to this appeal be affirmed with respect to all of the appellant's contentions.

/s/ Michael Chaveas
MICHAEL CHAVEAS
Deputy District Ranger
Appeals Reviewing Officer

cc: Constance J Smith