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RE: Administrative Appeal of the Record of Decision for Travel Management on the Gila National Forest

The Center for Biological Diversity hereby submits this administrative appeal of the U.S. Forest Service's Record of Decision ("ROD") for Travel Management on the Gila National Forest, signed by the responsible official, Kelly Russell, Gila National Forest Supervisor, on September 26, 2013.

This appeal is filed pursuant to, and in compliance with, 36 C.F.R. § 215.14 (2014). Appellant provided timely comments on the Draft Environmental Impact Statement ("DEIS"), giving it standing to appeal under 36 C.F.R. § 215.11(a).

STATEMENT OF REASONS

I. The Forest Service Erred in Failing to Fully Close the Lower San Francisco River to Motorized Use

In November 2007, the Center for Biological Diversity and other conservation organizations petitioned the Forest Service to implement interim and permanent protections for this unique and important waterway. Our petition cited the need for immediate action based on the Forest Service's duty to protect the area's outstanding ecological and quiet recreational values from potentially irreparable harm. Closing the San Francisco River to motor vehicles would also help to ensure the agency's compliance with the Endangered Species Act, the Clean Water Act, and the National Forest Management Act. The San Francisco River is a landscape-scale ecological and biological refuge that provides a home for extensive fish and wildlife populations; a free-flowing, natural river system; extensive riparian habitats; and interconnected watershed and forest habitats. In our 2007 closure petition, we asked the Forest Service to close the San Francisco River. Specific to the Gila National Forest, we requested the Forest Service to:

- (2) maintain the existing but distinct Gila National Forest (GNF) closure from the Arizona-New Mexico border to Mule Creek (6.6 miles);
- (4) close the San Francisco River and its environs to motorized recreation use from Mule Creek to the San Francisco Hot Springs (10.3 miles);
- (5) close the San Francisco River upstream from private land above the Hwy 180 ("Alma") bridge up to where the river crosses State Hwy 435/FR141 approximately 6 miles south of Reserve (19.2 miles);

- (6) close the San Francisco River through the "Frisco Box" upriver from private land at the northern terminus of FR 41 up to private land at the eastern terminus of FR 210 (5.9 miles);
- (7) maintain closure of the Blue River and its environs from its confluence with the San Francisco River up to the boundary of the Blue Range Primitive Area (14.6 miles);
- (8) close Big Dry Creek from its confluence with the San Francisco River to its intersection with Little Dry Creek and close Little Dry Creek from its intersection with Big Dry Creek to the gate that currently exists on FR 68 denoting a boundary between public and private land (4.6 miles).

Center for Biological Diversity *et al.*, 2007:1, numbering is from original. We also asked the Forest Service to, “[d]uring the travel planning process, designate the Frisco-Blue Area closures as permanently closed to motorized recreation use...” and noted that [a]s part of the travel planning process, the Forest Service should prepare a systematic assessment of these important riparian areas to gauge baseline water qualities, the presence and diversity of fish & wildlife, and otherwise assess ecological, biological, and quiet-use recreational values. *Id.* at 2. We again reiterate these requests and ask that the closure petition be made part of the Travel Management project record for the Gila National Forest.

By protecting the San Francisco River from the negative impacts of motorized uses, the Forest Service ensures compliance with its myriad of legal responsibilities pursuant to, among other laws, the National Forest Management Act (“NFMA”), the Endangered Species Act (“ESA”), and the Clean Water Act (“CWA”). In addition to bald eagle, Chiricahua leopard frog, loach minnow, and spikedace, white-nosed coati, yellow billed cuckoo, black hawk, southwestern willow flycatcher, bighorn sheep and pronghorn are known to inhabit the area. Wildlife Specialist Report at 21, 46, 95, 97. Key habitat areas within this management area include the San Francisco River and Mule Creek, among others. Importantly, the Forest Service has assumed that if habitat contains necessary life elements for a species the habitat is occupied. Forest Service 2011 DEIS at 102. The U.S. Fish and Wildlife Service has determined that the San Francisco River contains suitable habitat for all life stages of spikedace. USFWS 2010:147-148.

Ongoing motorized recreational use in these areas is incompatible with federal law. Any motorized designations in the San Francisco/Big Dry Creek/Little Dry Creek complex would be highly suspect given current conditions and the legally-protected ecological, biological, and recreational values that are paramount. Ongoing motorized recreational use, by causing adverse impacts such as soil compaction, bank erosion, and damage to vegetation, will not only harm the ecological, biological, and recreational values of this area, but will also brush up against, if not exceed, legal thresholds provided by federal law. Additionally, as a principle of both ecology and common sense, it is far easier to prevent degradation to riparian areas than to attempt – with little guarantee of success – to repair it.

Prohibiting motorized uses of the San Francisco River will also ensure the Forest Service is in compliance with numerous prescriptions in its own Forest Plan:

- Recreation use of riparian zones will be managed to avoid damage to riparian resources. (Amendment Number 1, June 1987)
- Manage wild and scenic river study areas to protect existing characteristics through the study period and until designated or released from consideration. (Standards and Guidelines Amendment 9)
- Rivers identified for study are managed to maintain their outstanding values. (Standards and Guidelines Amendment 9)
- For Wild river segments: no roads or other provision for overland motorized travel would be permitted within a narrow incised river valley, or if the river valley is broad, within ¼ mile of the

riverbank. Motorized travel on land or water could be permitted, but is generally not compatible with this classification. (Standards and Guidelines Amendment 9, referring to the Forest Service Handbook 1909.12, 8.2)

- For Scenic River segments: roads may occasionally bridge the river area and short stretches of conspicuous or longer stretches of inconspicuous and well-screened roads...could be allowed. Motorized travel on land or water may be permitted, prohibited or restricted. (Standards and Guidelines Amendment 9, referring to the Forest Service Handbook 1909.12, 8.2)
- For Recreational River segments: Paralleling roads or railroads could be constructed on one or both riverbanks. Motorized travel on land or water may be permitted, prohibited or restricted. (Standards and Guidelines Amendment 9 Forest Service Handbook 1909.12, 8.2)
- Outstandingly remarkable values of the identified river area must be protected and, to the extent practicable, enhanced. (Standards and Guidelines Amendment 9)
- Management and development of the identified river and its corridor cannot be modified to the degree that eligibility or classification would be affected. (Standards and Guidelines Amendment 9)
- Manage riparian areas to protect the productivity and diversity of riparian-dependent resources by requiring actions within or affecting riparian areas to protect and where applicable, improve dependent resources. Emphasize protection of soil, water, vegetation and wildlife and fish resources prior to implementing projects. (Standards and Guidelines Amendment 10)
- Give preferential consideration to resources dependent on riparian areas over other resources. Other resource uses and activities may occur to the extent that they support or do not adversely affect riparian-dependent resources. Improve riparian ecosystems in unsatisfactory condition to satisfactory condition. Maintain riparian ecosystems currently in satisfactory condition. (Standards and Guidelines Amendment 10)
- LRMP 28-Management requirements needed to maintain or enhance the habitat for endangered and threatened species will be incorporated into implementation plans for individual areas.
- Federal Endangered species will be protected 29-30:
 - Peregrine Falcon
 - Bald Eagle
 - Gila Trout
 - Plants
- LRMP 29-For turkey management areas
 - Manage open road densities to maintain and restore habitat islands without vehicle intrusion.
- LRMP 30-Riparian Areas
 - Give consideration to resources dependent on riparian areas over other resources.
 - Improve all riparian areas to satisfactory condition by 2030.
 - Improve riparian ecosystems in unsatisfactory condition to satisfactory condition.
- LRMP 36-Provide the management of sensitive soils in all surface disturbing activities to minimize or control erosion. Recognizing increase cost associated with the management of sensitive soils.
- LRMP 36-Maintain or improve watershed conditions to satisfactory condition on 70-90 percent of the unsatisfactory watersheds by the end of the 5th decade. This should be accomplished through a combination of resource management and watershed structures.
- LRMP 38- Road construction will be avoided in riparian areas.

The New Mexico Senate Joint Memorial Report (SJM 40), completed in 2008, notes the serious negative impacts off-road vehicles have on riparian ecosystems. New Mexico Environment Department 2008:51-52. As a part of this study, the New Mexico Department of Game and Fish

was asked: “Is ORV activity a threat to fishing and fish habitat in New Mexico? If yes, please describe the threats, including affected species.” NMDGF responded:

As stated in Appendix 1 (NMDGF 2005) roads (and by inference, trails and their motorized uses) have long been recognized as the primary human-caused source of soil and water disturbances in forested environments. Motorized road and trail crossings through aquatic habitats degrade water quality and increase sediment deposition, reducing habitat quality for aquatic species, including fishes and their aquatic insect food sources. In addition to native cutthroat trout populations, ORV use, depending on magnitude, timing, and other factors, could adversely affect other native fishes such as the state- and federally-listed loach minnow, pikedace, and Gila trout.

NRD, 2008 at 51. The Forest Service must consider the impacts of this route on loach minnow, spikedace, Gila trout, Southwestern willow flycatcher, Chiricahua leopard frog, any other threatened or endangered species, native fish, the spread of invasive species (specifically, but not limited to salt cedar), the potential for erosion, soil and water disturbance and contamination, degradation of water quality and habitat for aquatic species. In addition, the Forest Service must disclose and analyze its potential liability for designating a route that the Forest Service will not be able to maintain, that is inherently dangerous, does not and cannot meet engineering standards, and that must be re-signed at least twice per year when high water flows obliterate any signage that is put in place.

A. The Forest Service Violated NEPA, NFMA, the Wilderness Act, and Public Law 96-550 By Failing to Maintain the Wilderness Character of the Lower San Francisco and Hells Hole Wilderness Study Areas

In 1980, Congress passed legislation requiring that the Secretary of Agriculture review, under the National Forest Management Act of 1976 and the Wilderness Act, certain specified lands in New Mexico to assess their suitability for preservation as wilderness. Public Law 96-550 § 103, 94 Stat. 3223 (Dec. 19, 1980). Those lands included approximately eight thousand eight hundred acres on the Lower San Francisco River designated as the Lower San Francisco Wilderness Study Area, and 18,860 acres in the Hells Hole Wilderness Study Area. P.L. 96-550 § 103(a)(5). The legislation further specified that “[s]ubject to valid existing rights, the wilderness study areas designated by this section shall, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.” P.L. 96-550 § 103(b). It further allowed for the continuation of then-current levels of motorized use, but only “subject to such reasonable rules and regulations as the Secretary of Agriculture shall prescribe. P.L. 96-550 § 103(b). The Forest Service’s 1986 plan concluded that the both Wilderness Study Areas were “recommended for nonwilderness uses,” Gila National Forest Plan 6 (1986), and closed the portion of the Lower San Francisco WSA below Mule Creek to motorized use. Contrary to Congress’ and the Forest Service’s apparent expectation in 1980-1986, Congress has taken no further action on this recommendation in the ensuing nearly three decades. Regardless of these expectations, the law remains clear that unless and until Congress takes further action, the Forest Service retains a duty to maintain or enhance the wilderness eligibility and the wilderness character, including opportunity for solitude, of the area, relative to its state in 1980. *See Montana Wilderness Ass’n v. McAllister*, 666 F.3d 549, 557-58 (9th Cir. 2011) (“consistent with the Wilderness Act and with the Service's own past practice, that the Study Act requires the Service to maintain a study area's 1977 wilderness character for the enjoyment of current users. Thus, because wilderness character depends in part on the availability of opportunities for solitude, the Service must "provid[e] current users with opportunities for solitude comparable to those that existed in 1977." *Russell County Sportsmen v. United States Forest Service*, 668 F.3d 1037, 1039 (9th Cir. 2011).

The Ninth Circuit, in interpreting equivalent language from a comparable 1977 Montana wilderness study bill, has held that this provision “imposes two requirements. First, the Service must administer study areas so as to maintain their wilderness character as it existed in 1977. Second, the Service must administer the areas so as to maintain their potential for designation as wilderness areas — i.e., as part of the National Wilderness Preservation System.” *Russell County Sportsmen*, 668 F.3d at 1041. The Ninth Circuit went on to hold:

One of the Act's express aims is to preserve a study area's "wilderness character" throughout the study period. The Study Act does not define the term "wilderness character," but the parties agree that it borrows a definition of wilderness from the Wilderness [1043] Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. § 1131(c)).⁷ The Wilderness Act defines "wilderness as an area that has, among other things, 'outstanding opportunities for solitude or a primitive and unconfined type of recreation.'" *Greater Yellowstone Coal. v. Timchak*, No. CV-06-04-E-BLW, 2006 U.S. Dist. LEXIS 85067, 2006 WL 3386731, at *2 (D. Idaho Nov. 21, 2006) (applying the Wyoming Wilderness Act of 1984, which contains language identical to the Study Act) (quoting 16 U.S.C. § 1131(c)).⁸ The Study Act accordingly "requires the Forest Service to administer [wilderness study areas] to maintain" overall wilderness character, including "opportunities for solitude or primitive and confined recreation[,] that existed there in [1977]," until the area is either designated as a wilderness area or removed from the Study Act. 2006 U.S. Dist. LEXIS 85067, [WL] at *3; see also 2006 U.S. Dist. LEXIS 85067, [WL] at *3-*6 (overturning the Service's decision permitting increased heli-skiing in the Palisades Wilderness Study Area where the Service failed to show that increased helicopter use would not diminish current users' available opportunities for solitude compared to 1984 levels). The Service can accomplish this purpose — providing current users with opportunities for solitude comparable to those that existed in 1977 — when the Service either preserves against decline or enhances wilderness character.

Russell County Sportsmen, 668 F.3d at 1041. Building on this holding, the Ninth Circuit held in the 2011 *Montana Wilderness Association* decision that travel management decisions affecting statutorily-designated wilderness study areas must consider how motorized access affects opportunities for solitude, relative to a baseline equivalent to the date of designation. *Montana Wilderness Ass'n*, 666 F.3d at 558:

The Service recognized that motorized use has increased in volume, but reasoned that it need not account for the increase because the area's physical features, such as "size, presence of vegetative or topographic screening, [and] distance from civilization," had not changed. This is non-responsive. Increased volume of motorized use has obvious and potentially significant impacts on the opportunities for solitude available within a study area, even if the area remains physically unchanged. Increased noise from snowmobiles and motorcycles, for example, may greatly disturb users seeking quiet and solitude. See *Timchak*, 2006 U.S. Dist. LEXIS 85067, 2006 WL 3386731, at *3. If a hypothetical hiker traversing a certain route in 1977 would have encountered one noisy motorcycle, but today would encounter 20, his opportunities for solitude have plainly decreased, unless the impact can somehow be offset by other factors or considered so small as to make no qualitative difference.

The Service made no attempt to consider or account for these impacts of increased volume of use. There is nothing in the travel plan or FEIS that explains how current users' ability to seek solitude in the study area has not declined since 1977, given the increased volume of motorized and mechanized vehicles. Cf. *id.*, 2006 U.S. Dist. LEXIS 85067, 2006 WL 3386731, at *4 ("If the FEIS had discussed how the overall . . . wilderness

character — that is, the opportunities for solitude and primitive recreation — would be maintained by the [Service's decision], despite the tenfold increase in the effects of helicopter use, the FEIS would comply with the Wyoming Wilderness Act[, which contains an identical mandate to maintain 1984 wilderness character]. However, that analysis is missing." The Service therefore entirely failed to consider an important aspect of its obligation to maintain 1977 wilderness character, making the travel plan arbitrary and capricious. See *Lands Council*, 537 F.3d at 993 (describing arbitrary or capricious review). The Service must take a fresh look at its decision and determine, after taking into account all of the impacts of increased motorized use volume, whether the motorized use restrictions it imposes are adequate to maintain 1977 wilderness character for the enjoyment of current users

The 1980 New Mexico Wilderness Act similarly references the Wilderness Act without separately defining “wilderness character,” and therefore the Wilderness Act’s definition — “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain” — applies. Importantly, however, the court in *Russell County Sportsmen* held that the Forest Service’s duty under 1977 legislation substantially equivalent to the 1980 Act was not simply to maintain the status quo as of the time of designation, but to maintain or improve the wilderness characteristics (including opportunity for solitude) of the area. It is clear under the language of the 1980 Act that although the Act permits the Forest Service to allow motorized access equivalent to 1980 levels, it also confers on the agency considerable discretion to subject that use to “reasonable rules and regulations.” P.L. 96-550 § 103(b). Reading this language together with the Ninth Circuit’s holdings in *Russell County Sportsmen* and *Montana Wilderness Association*, the Forest’s Service obligation is clear: it must maintain or improve wilderness eligibility and opportunities for solitary, natural recreation, relative to a time-of-designation baseline. The Service’s 1986 recommendation against permanent designation does not relieve it of this obligation, at least not until such time as Congress acts to release the 1980 designation. Unfortunately, while the TMP’s implementation of the Travel Rule reduces negative impacts to the WSA in some respects, by leaving a motorized access point open on the Lower San Francisco without exploring how this affects wilderness quality relative to a 1980 baseline, the Service fails to meet its obligations under the 1980 Act, the Wilderness Act, NFMA, and NEPA.

Appellants commend the Forest Service for its recognition that motorized access to the Lower San Francisco area causes negative impacts not just to wilderness character, but also to “water quality, streambank stability, riparian vegetation, and aquatic species including critical habitat for loach minnow and spikedace.” ROD at 6. Review of the ROD, FEIS, and “IRA and WSA Report,” however, reveal that the Forest Service has failed to address the fundamental obligation recognized in *Montana Wilderness Association* — to assess how its actions affect the availability of a solitary, natural experience, relative to a 1980 baseline. See *Montana Wilderness Ass’n*, 666 F.3d at 558. The FEIS acknowledges the Service’s obligation to maintain wilderness character, but admits that “[n]o baseline monitoring data has been collected for the wilderness character within these WSAs.” FEIS 135; see also IRA and WSA Report 27. The EIS for the 1986 Forest Plan, and its recommendation against wilderness designation, acknowledges that conflicts between motorized and non-motorized users in the area existed at that time, but makes no effort to quantify levels of motorized use. Environmental Impact Statement, Gila National Forest Plan 96-99 (1986).

The ROD, FEIS, and IRA and WSA report are admirably clear that Alternative G, by (theoretically) eliminating motorized use at 39 of 40 stream crossing points within the Lower San Francisco WSA, would significantly reduce negative impacts to nonmotorized recreation, water quality, and species habitat relative to the current (2014) level of motorized use. See ROD 6, FEIS 137-38, IRA/WSA Report 30-41. The EIS acknowledges that this area is a source of considerable conflict between motorized and non-

motorized users, FEIS 137, and that unauthorized and decommissioned roads within the area are currently seeing motorized use and impacts, *id.* The FEIS then goes on to quantify the comparative levels of authorized motorized access within the WSA under the status quo and the various proposed alternatives. *Id.* at 137-38. The preferred alternative, Alternative G, would close many, although not all, motorized routes within the Lower San Francisco WSA, leaving a 0.7-mile road segment open for motorized access. *Id.* at 138. As noted above, Appellants appreciate that this reduction in officially-authorized use, while preventing significant enforcement problems, is a significant step towards reducing negative impacts on habitat, water quality, and wilderness character. Unfortunately, however, the analysis continues to suffer from the same deficiency identified by the Ninth Circuit in *Montana Wilderness Association*: nowhere in the ROD, EIS, or supporting reports does the Forest Service make even a general attempt to quantify how motorized use under the various alternatives compares to the statutory baseline – 1980 – as opposed to the current (2014) baseline. Just as in the Montana case, “There is nothing in the travel plan or FEIS that explains how current users' ability to seek solitude in the study area has not declined since [1980], given the increased volume of motorized and mechanized vehicles.” *Montana Wilderness Ass’n*, 666 F.3d 558. Absent such an analysis, the Forest Service’s decision to leave a motorized access route open into the WSA violates both its substantive and procedural obligations under the 1980 Act, the Wilderness Act, NFMA, and NEPA.

RELIEF SOUGHT: The Forest Service should close to motorized use the entire Lower San Francisco WSA, as requested in our 2007 Closure Petition, and the Hells Hole WSA, until such time as it completes a supplemental analysis of how its proposed action would affect the maintenance and/or improvement of wilderness character and opportunity for solitude relative to a 1980 baseline.

II. The Forest Service must initiate consultation with the U.S. Fish and Wildlife Service in light of the listing of the narrow-headed gartersnake and northern Mexican gartersnake as threatened under the Endangered Species Act.

Under Endangered Species Act (“ESA”) regulations, the Forest Service is required to confer with the U.S. Fish and Wildlife Service (“USFWS”) “on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat.” 50 C.F.R. § 402.10(a). However, if the Forest Service does not find a likelihood of jeopardy or adverse modification for a proposed species or critical habitat, there is no requirement for conference. Importantly, “If the proposed species is subsequently listed or the proposed critical habitat is designated prior to completion of the action, the [Forest Service] must review the action to determine whether formal consultation is required.” *Id.* §402.10(c)..

“If a new species is listed or critical habitat designated that may be affected by the identified action” or “If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,” the Forest Service must reinitiate formal consultation for a project. *Id.* at §402.16(b), (d). Formal consultation for this project was completed, but did not include the narrow-headed or northern Mexican gartersnake. *See* Final Biological Opinion. In the Final Environmental Impact Statement (“FEIS”) and Wildlife Specialist Report for this travel management action, the Gila National Forest analyzed effects to the narrow-headed gartersnake and New Mexican gartersnake as “Sensitive/proposed” species. DEIS at 262, Tbl. 74. Based on the analysis completed by the Forest Service, the action alternative chosen, Alternative G, was found to have an impact determination of “May Impact.” DEIS at 313, Tbl. 116. Yet the Fish and Wildlife Service’s Biological Opinion contains no analysis whatsoever of the impact on these two now-listed snake species.

The Record of Decision (“ROD”) for this action was signed on September 26, 2013. Official public notice of this decision was not published until June 12, 2013, opening the appeal period, which ends on July 28,

2013. The final notice of listing for both the narrow-headed and northern Mexican gartersnakes as “threatened” under the ESA was published in the *Federal Register* on July 8, 2014. 79 Fed. Reg. 38678. This listing ruling becomes effective on August 7, 2014. *Id.* This travel management action will not be complete or implemented until all appeals have been resolved, at which time the listing of these species will be in effect.

This action will result in the designation and use of .73 miles of new routes and .3 miles of new OHV trails within northern Mexican gartersnake habitat. Wildlife Report at 78, Tbl. 50. It will result in 2.59 miles of new routes and .48 miles of new OHV trails within narrow-headed gartersnake habitat. *Id.* at 79, Tbl. 51. Within the listing ruling for the northern Mexican gartersnake, the USFWS states that a northern Mexican gartersnake was documented along the Gila River in 2013, but that the population in that river is “Likely not viable” and “could be threatened with extirpation.” 79 Fed. Reg. at 38681-38683. Likewise, the narrow-headed gartersnake is believed to be “Likely not viable” in most streams within New Mexico, including in the Gila and San Francisco Rivers. *Id.* at 38686-38687. This newly published information represents new information about the likely status of these species within the Gila National Forest and may affect the analysis of impacts of this action, especially the designation of new routes and trails within gartersnake habitat, on both gartersnake species.

NEPA imposes a continuing duty to supplement an analysis to respond to “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1509(c)(1)(ii); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998). The analysis must be supplemented if there remains action to occur and the new information shows that the remaining action will affect the environment in a significant manner or to a significant extent not already considered. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989). At the least, the agency must evaluate the information to determine whether or not it is of such significance as to require supplementation. *See Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980) (“When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require an [SEIS].”).

Because the Forest Service has not considered the information contained in the new ruling, and because this ruling represents a new listing of species, the Forest Service is required to re-analyze the effects of this action on these species and reinitiate consultation with the USFWS, as required by the ESA.

RELIEF SOUGHT: The Forest Service should reinitiate consultation for this action with the U.S. Fish and Wildlife Service to determine the impacts to the narrow-headed and northern Mexican gartersnake and incorporated any necessary mitigation measures into the travel management plan.

III. The Forest Service must revise the FEIS to acknowledge the listing of spikedace and loach minnow as endangered and the additional designation of critical habitat.

The ruling uplisting the spikedace and loach minnow from threatened to endangered, and revising the designation of the species critical habitat, was published in the *Federal Register* on February 23, 2012. 77 Fed. Reg. 10810. This listing became effective on March 26, 2012. *Id.* The ROD for this action was not signed until September 26, 2013. Therefore, the Forest Service should have been aware that both the spikedace and loach minnow had been listed as endangered before the ROD was signed, and the decision maker should have taken this listing and the impacts to the species into account before making a decision about this project.

However, within the FEIS, both these species are classified as “threatened.” *See* FEIS at 243, 245. Likewise, the Aquatic Specialist Report also classifies these species as “threatened.” Aquatic Report at

21. Additionally, while the FEIS displays the miles of routes within 300 feet of designated critical habitat for both species, the FEIS does not make clear whether this critical habitat includes the additional critical habitat for loach minnow designated in 2012. Specifically, the USFWS added 14.2 miles of critical habitat for the loach minnow within the San Francisco River. 77 Fed. Reg. at 10827-10828.

A “threatened” species is defined under the ESA as a species “which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20) (2012). Conversely, an “endangered” species is one “which is in *danger of extinction* throughout all or a significant portion of its range.” *Id.* §1532(20) (emphasis added). The difference between these classifications is significant. While impacts to a threatened species may not lead to its extinction, impacts to an endangered species, even if small, may lead to extinction of the species. As stated above, NEPA imposes a continuing duty to supplement an analysis to respond to “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1509(c)(1)(ii); *Idaho Sporting Congress v. Thomas*, 137 F.3d at 1152. In this case, the Forest Service’s analysis must be supplemented because its action may affect the viability of the endangered spikedace or loach minnow in a “significant manner or to a significant extent not already considered” when it was previously classified as “threatened.” *Marsh*, 490 U.S. at 374.

If the Forest Service analyzed the action assuming that the loach minnow and spikedace were merely threatened, its determinations as to these species and the action as a whole are arbitrary and capricious.

RELIEF SOUGHT: The Forest Service should supplement its EIS regarding the impacts of the proposed alternatives on spikedace, loach minnow, and their critical habitat in light of the listing of these species as endangered and the designation of additional critical habitat.

IV. The Forest Service must revise the map for Alternative G to show the closure of Route 68 within the San Francisco River.

According to the FEIS, Alternative G, the selected alternative for this action, “proposes to close routes along the San Francisco River,” while maintaining “motorized use in Little and Big Dry Creeks.” FEIS at 138. However, on Map Index G-16, there is a small portion of Route 68 that is shown as being open within the San Francisco River. This is inconsistent with the FEIS and the appellants understanding of the Forest Service’s intent.

RELIEF SOUGHT: The Forest Service should amend the ROD and the FEIS for clarification of the location of open routes within the San Francisco WSA, and should correct this clerical error in the maps posted online and in the subsequent MVUM.

V. The Forest Service violated NEPA by designating unauthorized routes and trails as official system routes without completing site-specific analysis of these routes.

In the FEIS, the Gila National Forest states that effects of the various alternatives were “discussed at the national forest level, with analyses displayed as trends or potential effects. This is adequate for assessing effects.” FEIS at 45. The Gila National Forest erred in concluding that such a level of analysis was sufficient for determining the effects of newly designated routes, none of which were planned or evaluated by the Forest Service previously. Other forests that have had their route designations challenged have withstood judicial review because they “not only identified each non-system route that they converted to a system route, they provided rationale as to why the road was converted” and gave “careful consideration of the environmental impacts of their decisions.” *Pryors Coalition v. Weldon*, 803 F. Supp. 2d 1184, 1190 (D. Mont. 2011).

In this case, the Gila National Forest specifically identified unauthorized routes that it intended to designate through this action, but did not adequately assess the environmental impacts of such designation. This is made clear by the following statement found within the FEIS:

The following method was used for all direct and indirect effects analyses in this report, based on the premise that: A – The effects of a motorized route system, motorized dispersed recreation, motorized big game retrieval, and motorized areas on a key resource are considered the same under all alternatives; and B – More or less of these effects occur, or have the potential to occur, under each alternative, based on each alternative's design.

1. The direct/indirect effects* to the resource are described
2. Measures of the indicator for the resource area are used to compare each action alternative to the no action alternative.
3. These results of these measures are compared to determine relative risk
4. Results are summarized under each resource area

FEIS at 197. This specific passage relates to the Watershed and Soils analysis within the FEIS, but is indicative of the general evaluation and discussion of effects through the FEIS.

For instance, within the Lower San Francisco WSA, the Gila National Forest decided to designate three unauthorized routes, Glenwood Proposed Routes (GPR) 14, 15, and 16, totaling 0.3 miles, open to all vehicle types. FEIS at 138. Analysis of the selected alternative on the IRA and WSA characteristics of the Low San Francisco Area are discussed generally in terms of how all routes and motorized use within the IRA and WSA under the selected alternative will affect those characteristics. *See* FEIS at 153-63. However, the Gila National Forest provides no site-specific analysis for the designation of the three unauthorized routes. Relying on general trend analysis and overall improvements in environmental impacts from the entire motorized system does not replace the need to analyze the specific impacts of proposed new designated routes under NEPA. Without such analysis, it is possible that the Gila National Forest would neglect to consider negative impacts on forest resources from these routes because of the overall positive trend associated with the change in motorized management within the IRA and WSA.

No where does the FEIS analyze all unauthorized routes that will be designated for their specific impacts on forest resources. These routes, even if they existed on the ground pre-designation, should be treated the same as routes that would be designed and built by the Forest Service: site-specific NEPA analysis should be completed to understand the potential effects of use and maintenance of these roads on forest land. Neglecting to complete this analysis would have the effect of allowing anyone, including the Forest Service, to construct a road on forest property and then later designate the road as official without site-specific NEPA by incorporating the designation into a larger project and merely stating that there was no overall positive or negative impact to the forest caused by the project. Such an action would violate NEPA, and the Forest Service cannot avoid its responsibilities under that law merely by incorporating new routes into the official system during a forest-wide travel management process and analyzing the general impacts of the entire system.

The problem with the Gila National Forest's approach in this FEIS is highlighted by the fact that for those roads closed in this action, any decommissioning work that might be completed later will need to go through site-specific NEPA analysis before completion. Likewise, site-specific NEPA analysis of new routes needs to be completed before continued use and maintenance of these routes is allowed. The proper time and place for such analysis is within the FEIS for this project.

RELIEF SOUGHT: The Forest Service should supplement the FEIS with detailed consideration of the environmental impacts of official designation of each unauthorized road selected for designation in the decision. While such analysis is being completed, unauthorized roads that were designated under this decision should remain closed to the public.

VI. The Forest Service violated the TMR by designating unauthorized routes and trails as official system routes without addressing how designation of these routes met the minimization requirements of the TMR.

Executive Order 11644 required federal agencies, including the Forest Service, to designate off-road vehicle roads and trails in such a manner as to minimize “damage to soil, watershed, vegetation, or other resources,” “harassment of wildlife or significant disruption of wildlife habitats,” and conflicts between users. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972). These minimization criteria were codified in the TMR. 36 C.F.R. § 212.55(b).

Federal courts that have addressed this issue have determined that the Forest Service must explain how the minimization criteria have been applied in route designation decisions. *E.g., Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1074 (D. Idaho 2011); *Wildlands CPR, Inc. v. U.S. Forest Serv.*, 872 F. Supp. 2d 1064, 1082 (D. Mont. 2012).

The Gila National Forest failed to apply the minimization criteria to newly designated routes in this decision. Nowhere in the FEIS does the Gila National Forest address how each unauthorized road was selected in order to meet the minimization criteria. Instead, the rationale given for unauthorized route selection by the Gila National Forest appears to be that the routes “already have a footprint on the ground and are currently being used,” and/or that not designating them will result in traces of the route remaining for some time before plants will grow back. FEIS at 137. There are no reasons provided as to why these specific routes were necessary to meet the purpose and needs for this project, nor is there any discussion of how the routes meet the minimization criteria provided.

Additionally, the only mitigation measures included in this decision are to minimize impacts to cultural resources. FEIS at 30. No other mitigation measures are included for unauthorized routes, or any route for that matter, even though the Gila National Forest admits that “[u]nauthorized routes may not be in acceptable condition, as they were created without engineering design.” FEIS at 195. Further, there are many times within the FEIS where the need for or suggestion of mitigation measures best management practices to protect certain resources is mentioned, but no such measures for these resources are actually included in the decision. *See, e.g.*, FEIS at 352 (recommending mitigation measures to avoid negative impacts to burrowing owls) and 453 (“Site-specific evaluation would be appropriate during establishment of these new routes to insure that mitigation measures or best management practices are in place to minimize the effects to the soil resource.”). The final biological opinion of the USFWS likewise contains recommendations that the Forest Service should continue to consult with the USFWS to determine if additional changes can be made to routes to minimize impacts to the spikedace and loach minnow. Final BiOp at 89-90.

Accordingly, the Gila National Forest has failed to comply with the minimization criteria contained within the TMR and executive orders in its designation of unauthorized routes as official system routes.

RELIEF SOUGHT: The Forest Service should remove designation of unauthorized routes that do not meet the minimization criteria from this decision or remand the FEIS with a requirement that the Forest Service apply the minimization criteria to each unauthorized route proposed to be designated as an

official system route. The Forest Service should further incorporate mitigation measures into the decision that will meet the minimization requirements.

VII. The Forest Service route that provides access to and from Kelly Ranch should be designated as open to administrative use only.

Based on this decision, the Forest Service has designated the terminus of county maintained road C 012, going from the L Kelly Ranch to the K Kelly Ranch, which previously was FR 32 on the older forest maps as “open to the public.” However, this road only provides access to private property and is used only by the Forest Service and private land owners. The designation of this road as open to public use is arbitrary and capricious.

RELIEF SOUGHT: The Forest Service should amend this decision by designating this road open for “administrative use only.”

Thank you for your consideration of this appeal. If you have any questions about the issues raised in this appeal, please do not hesitate to contact me.

Sincerely,



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