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Working to protect and restore Western Watersheds and Wildlife

Bureau of Land Management
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September 25, 2020

**Protest of the Notice of Proposed Decision for the Horseshoe Allotment #06236 Grazing
Authorization Renewal
(DOI-BLM-AZ-P030-2020-0001-EA)**

Dear Mr. Cowger,

The following protest of the Environmental Assessment (EA) and Notice of Proposed Decision for the Horseshoe Allotment Livestock Grazing Authorization Renewal and Infrastructure Project is submitted on behalf of the staff and members of Western Watersheds Project (WWP), WildEarth Guardians, and the Sierra Club-Grand Canyon Chapter.

Introduction

WWP is a west-wide conservation advocacy organization with a concrete interest in the management of livestock grazing on our public lands, in particular the Horseshoe allotment and the Agua Fria National Monument (AFNM). WWP has been engaged in the management of these lands since at least 2015.

Guardians is a non-profit, public interest, education, and conservation organization whose mission is to protect and restore the wildlife, wild places, wild rivers, and health of the American West. Guardians has more than 220,000 members and activists across the United States. Guardians' members and staff use and enjoy the Agua Fria National Monument for various purposes, including, hiking and recreation, photography, quiet contemplation, and aesthetic appreciation.

WWP's Tucson office received the notice of proposed decision on September 11, 2020, via email. WildEarth Guardians received the notice of proposed decision on September 16, 2020, via certified U.S. mail # 7018 0360 0000 1241 4502. The Sierra Club received the notice of proposed decision on September 14, 2020 via certified U.S. certified mail # 7018 0360 0000 1241 4472. This protest of the proposed decision is timely filed on September 25, 2020, in accordance with 43 C.F.R. § 4160.2.

Statement of Reasons

While we appreciate the BLM's efforts in this second attempt at conducting an environmental analysis for this grazing reauthorization, range infrastructure and weed treatment project, we unfortunately continue to see the same lack of site-specific analysis that Judge Sweitzer found lacking in his October 3, 2019 Order granting WWP's Petition to Stay the project. (AZ-P030-19-01, October 3, 2019, attached as Exhibit A.) As Judge Sweitzer noted, there are likely harms associated with this project and livestock redistribution to soils, cultural resources, vegetation, and riparian areas. While the BLM did finally include references to the AFNM Proclamation in the FEA, the analysis does not reflect the increased level of protection these lands require.

Inexplicably, the BLM has again chosen not to undertake a detailed analysis of the environmental impacts of noxious weeds and relies instead upon the Phoenix District Integrated Weed Management Plan. The BLM has continued to ignore the considerable on-the-ground damage to natural resources, damage to previously undamaged areas, and the impacts from increased livestock grazing on the drier, vulnerable uplands. The impacts are likely to cause irreparable harm. The serious questions regarding the adequacy of BLM's consideration of the environmental impacts associated with the range projects and weed treatments asked by WWP in the 2019-2020 NEPA process for this project, and highlighted by Judge Sweitzer, remain unanswered.

It is clearly unreasonable, to say the least, to allow continued damage to monument objects justified only by the imaginary need to allow 381 cows to graze these otherwise protected lands for the benefit of a single individual and corporation – the JH Cattle Company. The BLM's plans here fly in the face of the multiple use, sustained yield mandate the BLM is under.

Therefore, WWP, WildEarth Guardians, and the Sierra Club protest this proposed decision for the following reasons:

I. The BLM's Proposed Decision Violates the Endangered Species Act (ESA)

The BLM relies upon a letter of concurrence from the U.S. Fish and Wildlife Service (USFWS) based upon the October 2018 Biological Assessment (BA). This reliance on outdated information may seem trivial to the BLM, but there are significant differences between 2018 and 2020. As WWP noted in its prior comments, there have been significant changes to the project area and surrounding area since the BA and letter of concurrence were issued, including wildfires, especially in the surrounding Tonto National Forest, continued and expanded residential development surrounding the project area, and an increase in drought and air quality concerns. On August 3, 2020, the USFWS agreed to place the

Sonoran desert tortoise back on the candidate list for protection under the ESA. (See Exhibit B and image below from ecos.fws.gov accessed September 24, 2020.)

Sonoran desert tortoise (*Gopherus morafkai*)

[Range Information](#) | [Candidate Info](#) | [Federal Register](#) | [Recovery](#) | [Critical Habitat](#) | [SSA](#) | [Conservation Plans](#) | [Petitions](#) | [Biological Opinions](#) | [Life History](#)

Taxonomy: [View taxonomy in ITIS](#)

Listing Status: **Candidate**

General Information

Current Listing Status Summary

Show 10 entries

Status	Date Listed	Lead Region	Where Listed
Candidate		Southwest Region (Region 2)	Wherever found

Showing 1 to 1 of 1 entries

» Range Information

Current Range

[Wherever found](#)

Zoom in! Some species' locations may be small and hard to see from a wide perspective. To narrow-in on locations, check the state and county lists (below) and then use the zoom tool.

Want the FWS's current range for all species? Click [here](#) to download a zip file containing all individual shapefiles and metadata for all species.

* For consultation needs do not use only this current range map, please use [IPaC](#).

Despite being made aware of these concerns, these issues are not addressed in the 2018 BA nor were they considered by the USFWS in their letter of concurrence. The BLM has not included an adequate response in the FEA and has completely ignored the changed status of the Sonoran desert tortoise. The tortoise's return to the candidate species list is also new information that requires the BLM to pause and consider.

II. The BLM's Proposed Decision Violates the National Environmental Policy Act (NEPA)

As we stated in our prior comments, "NEPA is a procedural statute intended to ensure environmentally informed decision-making by federal agencies." *Tillamook Cnty. v. U.S. Army Corps of Eng'rs*, 288 F.3d 1140, 1143 (9th Cir. 2002). It requires federal agencies to take a "hard look" at a proposed project's environmental impacts, but it does not mandate particular results. *Id.* Under NEPA, federal agencies must prepare an EIS before "taking 'major Federal actions significantly affecting the quality' of the environment." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1067 (9th Cir. 2002) (quoting 42 U.S.C. § 4332(2)(C)). Council on Environmental Quality regulations requires federal agencies to consider a reasonable range of alternatives. 40 C.F.R. §§ 1502.13, 1502.14.

Here, the BLM failed to take a hard look at the impacts of the proposed decision, failed to consider a reasonable range of alternatives, failed to provide accurate information regarding the history of livestock grazing on the allotment.

A. BLM should have prepared an Environmental Impact Statement (EIS)

An agency may prepare an environmental assessment to determine whether an EIS is needed. 40 C.F.R. § 1501.4(b). If the environmental assessment shows that the agency action may significantly affect the environment, then the agency must prepare an EIS. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743, 2756-57 (2010). If an agency concludes in its environmental assessment that the proposed action will not have a significant environmental impact, then it may issue a finding of no significant impact and proceed without further study. *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 599 (9th Cir. 2010).

Here, BLM failed to adequately disclose or analyze significant impacts and is precluded from a Finding of No Significant Impact. The BLM also failed to adequately disclose the cumulative impacts by arbitrarily including only the allotment boundary in the Cumulative Effects Study Area (CESA). This myopic view precluded BLM from acknowledging and analyzing the impacts of recent wildfires, nearby residential developments, drought, and air quality concerns.

In *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, at 1149 (9th Cir. 1998), the court recognized that under 42 U.S.C. § 4332(2) an EIS "must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." "The plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared." *Id.* at 1150. This is a low standard. WWP and Guardians have raised "substantial questions" regarding the impacts livestock grazing will have in the project area and BLM has failed to address these questions. *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

We raised substantial questions regarding several environmental factors that BLM failed to address, including climate, fire, and impacts to a species newly returned to the candidate list under the ESA. We also raised concerns about the site-specific impacts of the proposed range infrastructure projects, including impacts to soils, cultural resources, watersheds, and BLM special status species. Nowhere in the FEA does BLM take a look, much less a hard look, at the impacts various aspects of this project will have on the ground. The impacts analysis is generalized, which is a violation of NEPA.

In the response to comments section of the FEA (Appendix 7), the BLM states that WWP did not state how the application of herbicides is scientifically controversial. This is inaccurate. In WWP's prior comments, we explained:

The proposed use of herbicides for vegetation treatments is extremely controversial, both from a public perception aspect, as well as scientific controversy. Glyphosate has recently been confirmed to cause cancer in those who are applying it via civil litigation against the chemical company and the Environmental Protection Agency's approval of

certain herbicides has very recently been overturned. Chemicals used to control vegetation are extremely controversial and the public is deeply concerned about the impacts of the use of these chemicals, as well as the application methods. This project could result in the widespread application of herbicides via hand application, horseback, motorized vehicles, and via aerial spraying¹ and including spraying or other application in riparian areas. 2020 EA at 13-14; 27.

...

Throughout these comments we identify our concerns about uncertain, unique, or unknown risks. The use of chemical herbicides, along with the unproven and experimental use of “biological controls” clearly indicate that even the BLM acknowledges the uncertain and unknown risks of the proposed vegetation treatments. 2020 EA at 13. The BLM states that these “experiments” “would hopefully help resource managers understand past and present conditions.” 2020 EA at 13.

The BLM has not addressed the appropriateness of utilizing experimental methods within a federally protected National Monument. Given that half of the herbicides proposed for use are non-selective in the type of vegetation they destroy, this is deeply concerning and the BLM has not disclosed what the effect will be on non-target species. 2020 EA at 15.

See WWP 2020 Comments at 5-6. We specifically asked BLM to analyze the impacts to insects, especially bees, and BLM claims to have conducted this analysis but we are unable to find any analysis of the impacts to the bee species present on the Horseshoe allotment from herbicide use.

Furthermore, there is controversy over the use of livestock for vegetation management, especially in arid areas and especially where invasive species of non-native plants are present. We asked the BLM to disclose how the proposed use of biological controls will impact desert bighorn sheep and despite our repeated requests, BLM failed to disclose these impacts. In the FEA that BLM discloses the species of livestock that will be used for biological controls to include cattle, sheep and goats. (2020 FEA at Appendix 7, p. 8) BLM claims to disclose the impacts of sheep and goats as biological controls but in reality has only stated that “[g]oats have been shown to effectively control shrubs in sensitive areas such as streams and wetlands[,]” sheep and goats consume a variety of vegetation, sometimes large quantities, stocking rates and timing are important, and that “[b]iological treatments are most effective when used in combination with other treatments.” (2020 FEA at 36, 15.)

The BLM has failed to analyze the impacts of sheep and goats in terms of disease transmission to wildlife, wildlife displacement, competition for forage (especially as it may occur with Sonoran desert tortoise). While BLM states that the allotment is not within the current or former range of the bighorn sheep, the allotment is within the foray range of the sheep. (2020 FEA at Appendix 7, p. 9; *and see*

¹ It appears BLM has removed the “aerial spraying” aspect of the proposed decision. This is likely due to the extremely controversial nature of aerial spraying of herbicides and is an indication that BLM did recognize the fact WWP raised an issue of scientific controversy regarding herbicides.

WWP 2020 at 10.) We also noted that recent nearby fires would have impacts that must be considered and a change in the range and foray range of bighorn sheep would fall within those impacts.

We provided BLM with many reasons that a Finding of No Significant Impact is inappropriate. The BLM failed to adequately acknowledge the importance and significance of this area and the significance of impacts associated with the proposed decision.

B. The BLM has not analyzed an adequate range of alternatives

NEPA's requirement that agencies "study, develop, and describe appropriate alternatives . . . applies whether an agency is preparing an [EIS] or an [EA]." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (per curiam) (citations omitted). Although an agency must still "give full and meaningful consideration to all reasonable alternatives" in an environmental assessment, the agency's obligation to discuss alternatives is less than in an EIS. *Id.* "The existence of a viable but unexamined alternative renders an [EA] inadequate." *Westlands Water Dist.*, 376 F.3d at 868 (quoting *Morongo*, 161 F.3d at 575).

The range of alternatives for this project remains inadequate, especially because a recommended and reasonable alternative was arbitrarily rejected by the BLM. In the alternatives considered but eliminated section of the EA, BLM first stated that it rejected a reduced grazing alternative because it was too similar to the Proposed Action, but in the FEA states that a reduced grazing alternative was rejected because livestock are not the causal factor for failing to meet Standard 2.

As one example of an alternative that could have, and should have been analyzed is an alternative that reduces the amount of livestock grazing and does not include vegetation treatments. We requested the BLM analyze such an alternative and there is no explanation provided as to why this alternative was not considered in any way.

C. BLM has not disclosed or analyzed an accurate history of livestock grazing in the project area.

The BLM misapprehends our request to accurately describe the history of livestock grazing as a request to disclose actual use. Rather, our request was that BLM comply with its obligation to accurately discuss the long history of livestock grazing in Arizona and on this allotment, identifying how many livestock were historically grazed, how many livestock have been grazed in the past two decades, and disclose the impacts of that livestock grazing as part of the cumulative impacts analysis. The environmental analysis should describe how livestock grazing has contributed to and continues to exacerbate altered fire regimes, invasive species, loss of species diversity, and degraded watersheds. The BLM has not adequately or accurately provided this information.

The BLM refused to disclose underlying Indigenous land claims and address environmental justice issues related to the displacement of Indigenous peoples caused by livestock grazing.

D. BLM has made arbitrary and capricious decisions regarding cumulative impacts

The BLM refused to consider recent fires in the Tonto National Forest because they were outside the Cumulative Effects Study Area and “[t]he Tonto National Forest is not within the CESA[,]” but then BLM included information regarding the impacts of the 2005 Cave Creek Fire complex, which is located on Tonto National Forest lands, as it relates to sedimentation as a causal factor for not attaining Standard 2. (2020 FEA at 19 and at Appendix 7, p. 6.) This arbitrary and capricious decision to include impacts from the Tonto National Forest (from 2005) for the analysis of some impacts, but the refusal to include impacts from the same forest from 2020 renders the analysis and Finding of No Significant Impact invalid.

E. BLM has not disclosed or analyzed the impacts as related to climate change

We specifically asked BLM to analyze the impacts of this project in light of the compounding impacts of climate change. (*See* WWP 2020 at 9-10.) Despite NEPA’s requirements that federal agencies provide for intergenerational equity, which would require a thorough analysis of climate impacts, there is no mention of climate change in the FEA.

III. This decision is a violation of the Federal Lands Policy and Management Act (FLPMA), National Conservation Lands (NCL) direction, the Bureau of Land Management Instruction Memorandum 2009-215, and the Omnibus Public Land Management Act of 2009 (OPLMA)

Instruction Memorandum (IM) 2009-215² amended BLM’s Land Use Planning Handbook H-1610-1, Appendix C. and interpreted the exception clause in section 302(a) to mean that FLPMA specifically provided for the multiple-use policy to give way when other law requires elevation of a specific use. The identification of an object for protection under the Antiquities Act, and the reservation of land necessary to protect that object, dedicates the land for the purposes of the monument, and withdraws it from uses incompatible with that purpose. The mandate to protect the Monument’s objects imposed by the Antiquities Act, and by the Proclamation, overrides the multiple-use mandate where incompatible. Thus, even where the proclamation does not expressly restrict or preclude certain uses, BLM must weigh potential uses in light of the values protected by the proclamation, and the requirement to elevate protection of the monument resources above other values. Vegetation communities and wildlife are specifically mentioned in the AFNM Proclamation as object of protection but livestock grazing is not.

The Omnibus Public Land Management Act of 2009 (OPLMA) requires BLM to manage components of the National Conservation Lands system to “conserve, protect, and restore nationally significant landscapes” and to do so “in accordance with any applicable law (including regulations) relating to any component of the system ... and in a manner that protects the values for which the components of the system were designated.” The AFNM Proclamation establishes the values for which the monument lands were designated, and is applicable law with which BLM must comply in determining how to conserve, protect, and restore the landscape. Therefore, in developing any plan for the management of areas within the monument, BLM must consider the impact on monument objects, including impacts from grazing.

The FEA consistently describes the No Grazing alternative as being the least impactful and best for natural resource recovery and stability of upland and riparian vegetation, soil health, and other

² Available at <https://www.blm.gov/policy/im-2009-215>.

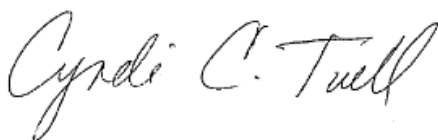
ecosystem functions. The other alternatives have grazing impacts to some degree. This analysis makes the case that AFNM would best be set aside as a grazing-free area devoted to native species and ecosystem function in accordance with the monument proclamation stipulating that “the national monument shall be the dominant reservation.”³

Conclusion

The lack of information and violations of NEPA as described above may lead to violations of Federal Land Policy Management, which requires the BLM to “take any action necessary to prevent unnecessary or undue degradation” of public lands (43 U.S.C. § 1732(b)).

For the reasons stated above, the BLM’s proposed decision is arbitrary and unsupported by the facts. As such, WWP and Guardians protests the Proposed Decision, which must be withdrawn and a full, objective NEPA analysis of a full range of alternatives must be prepared before this project is approved.

Sincerely,



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³ Bureau of Land Management. 2000. Agua Fria National Monument Proclamation. National Landscape Conservation System, Washington, DC