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Via postal mail and e-mail: [comments-southwestern-gila-black-range@fs.fed.us](mailto:comments-southwestern-gila-black-range@fs.fed.us)  
RE: Comments on Hermosa Allotment Draft Environmental Assessment (draft EA)

Dear Mr. Sam,

Thank you for providing our office with a copy of the Hermosa Allotment draft EA. These comments are submitted on behalf of Forest Guardians, the Center for Biodiversity, the Southwestern Environmental Center, and our collective members who care about, and are affected by, the management of our National Forests.

Forest Guardians is a non-profit public interest organization dedicated to preserving the wild lands and wildlife of the American Southwest. Forest Guardians has a long history of interest and involvement in Forest Service activities with respect to grazing, riparian areas, water quality, and wildlife. The staff and 1,650 members of Forest Guardians use and enjoy the public lands, waters, and natural resources within the Gila National Forest for recreational, scientific, spiritual, educational, aesthetic, and other purposes. Forest Guardians and its members also participate in information gathering and dissemination, education and public outreach, commenting upon agency actions, and other activities relating to the Forest Service's management and administration of the public lands in New Mexico and Arizona.

The Center for Biological Diversity is a non-profit conservation-advocacy organization that works to protect wild places and imperiled species through science, law and policy. The Center's 25,000 members use and enjoy the public lands of this country for diverse interests and pursuits: recreation, spirituality, aesthetics, and science. We have actively monitored grazing impacts in the Gila National Forest for over sixteen years.

The Southwest Environmental Center (SWEC) is a New Mexico non-profit corporation with its principal office in Las Cruces, New Mexico. SWEC has approximately 1,000 members, the majority of whom reside in New Mexico. SWEC's mission is to protect and restore native wildlife and their habitats in the Southwestern borderlands through

education, advocacy and restoration projects. Members of SWEC frequently use and enjoy the deserts, forests and grasslands of the Southwest, especially the Gila National Forest, including the Hermosa Allotment, for wildlife viewing, recreational, aesthetic, and scientific activities. We will continue to do so. As part of its Desert Lands and Wildlife Program, SWEC has actively worked to protect and restore Mexican gray wolves and other native species within their historic range.

Livestock grazing has long subjected our southwestern public lands to ecological disrepair. Recent scientific studies have indisputably shown that grazing in arid lands, such as Arizona and New Mexico, eradicates native flora and fauna and degrades water quality.<sup>1</sup> These devastating effects stem from the fact that cattle denude the landscape while trampling soils and destroying stream banks. The ubiquity of subsidized livestock ranching on our National Forests is quickly destroying the unique treasure of biodiversity that was once rich in the places in which we now live, work, and play.

Modern scientific thought on southwestern cattle ranching is rapidly altering public opinion of the same. Many concerned citizens, including those in our own membership, seek change for range management on our public lands. Simply put, we feel that livestock grazing on the Gila National Forest is unsustainable and incompatible with the public interest. It is from this perspective that we now comment on the proposed action for the Hermosa Allotment.

## **PROJECT DEFINITIONS AND LEGAL PARAMETERS**

The purpose and need of the project at issue is “to allow the use of the Hermosa Allotment under a grass bank concept” so that the Forest Service (USFS) can “work towards restoring fire adapted ecosystems.”<sup>2</sup> In essence, the proposed project will take the Hermosa Allotment out of approximately 20 years of non-use and make it a place of additional forage utilization for outside permittees on an as-needed basis. The draft EA purports to analyze the environmental impacts of introducing livestock grazing on the Hermosa Allotment.

Because livestock grazing on this allotment specifically- and on our public lands in general- wreaks havoc on the environment, depletes public resources, and impairs recreational opportunities, any decision to reauthorize grazing at this time cannot be taken lightly. Indeed, the need for sound agency decision-making is reflected in the myriad of federal rules and regulations that govern both the way in which the environmental review process proceeds, and the ultimate conclusions which must be reached.

The USFS meet the procedural requirements of the National Environmental Policy Act (NEPA), 42 U.S.C §§ 4321 *et seq.* when developing the Hermosa Allotment EA, and all

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<sup>1</sup> See e.g. Wuerthner, George and Mollie Matteson (eds). *Welfare ranching: the subsidized destruction of the American west*. Island Press (2002).

<sup>2</sup> Hermosa Allotment draft EA, at 1.

future range management decisions on this allotment must comply substantively with NEPA, the National Forest Management Act (NMFA), 16 U.S.C §§ 1600 *et seq.*, the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1751 *et seq.*, the Public Rangelands Improvement Act (PRIA), 43 U.S.C. §§ 1901 *et seq.*, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, the Administrative Procedures Act (APA), 5 U.S.C. §§ 500 – 596, 701 – 706, the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*, the Multiple-Use, Sustained-Yield Act (MUSY), 16 U.S.C. §§ 528 *et seq.*, the National Forest Grazing Act (NFGA), 16 U.S.C. §§ 580c *et seq.*, the United States Forest Service (USFS) Federal Regulations for Grazing and Livestock Use on the National Forest System, 36 C.F.R. Part 222, the Gila National Forest Plan (GNFP), and the 1996 Record of Decision for Amendment of Forest Plans, Arizona and New Mexico (ROD). In short, the USFS is compelled to manage our forests in the public interest by preserving their natural integrity and balancing competing uses.

The Hermosa Allotment draft EA should have reflected the USFS's aforementioned charge by realistically analyzing the environmental and financial costs of continued grazing, along with the benefits of long-term rest. The draft EA, however, failed to take either of these factors fully into account. Instead, the preferred action on the Hermosa Allotment inappropriately and unjustifiably reflects the USFS's overarching policy of favoring the preservation of an ambiguous "ranching culture" over all other potential uses. In doing so, the USFS turns a blind eye to the real costs of public lands ranching, and fails to disclose the tangible benefits that could be realized by allowing our National Forests to be put to the panoply of other uses, which are now unrealistic on the 69% of USFS land that is currently devoted to livestock grazing.<sup>3</sup>

The following comments explore the inadequacies of the Hermosa Allotment draft EA. We will discuss issues that should have been addressed therein, and which the USFS should incorporate into its final EA. As discussed in detail below, the USFS has a legal obligation to expand its analysis before deciding whether to reauthorize livestock grazing on the allotment.

## **THE INADEQUACY OF THE HERMOSA ALLOTMENT DRAFT EA**

The draft EA for the introduction of grazing on the Hermosa Allotment fails to meet the requirements of the Council on Environmental Quality (CEQ),<sup>4</sup> as promulgated in accordance with NEPA. Therefore, we strongly suggest that changes be made to the current analysis, and that the final EA be brought into legal compliance. The sections that follow discuss the general role of an EA in the agency decision-making process, and point out the way in which *this* final EA should be properly developed.

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<sup>3</sup> Wuerthner (2002).

<sup>4</sup> The CEQ regulations are codified at 40 C.F.R. §§ 1500 *et seq.*

## **Purpose and Function of an EA Generally**

When, as here, an action is not categorically excluded from environmental review, the USFS may begin the NEPA process with the preparation of an EA.<sup>5</sup> The purpose of an EA is to determine whether the federal action is significant enough to require an EIS, *i.e.*, whether the federal action will have a significant effect on human health or the environment.<sup>6</sup> To facilitate such determination, the EA must contain, *inter alia*, brief discussions of the need for the proposed action, alternatives to the proposal, and the environmental impacts of the proposal and the alternatives.<sup>7</sup> Additionally, an EA must consider the cumulative impacts of the proposed action.<sup>8</sup>

An EA is meant to be a concise public document, which serves to provide sufficient evidence and analysis for determining whether to prepare an EIS or, on the other hand, make a finding of no significant impact (FONSI).<sup>9</sup> Although not as thorough or as detailed as an EIS, an EA requires enough of an investment of agency resources to carry out a preliminary environmental inquiry. Should such inquiry reveal that the federal action may significantly affect the quality of the environment, the USFS must prepare and EIS.

Closing the environmental review process on any major federal action<sup>10</sup> before providing the public sufficient evidence and analysis of its environmental impacts is contrary to law. The USFS will act in such a contrary manner if it does not expand the analysis set forth in the Hermosa Allotment draft EA. The following sections detail our rationale.

## **Specific Inadequacies of the Hermosa Allotment draft EA**

The Hermosa Allotment draft EA constitutes inadequate environmental review for three main reasons. First, the draft EA fails to disclose and discuss the true environmental impacts of cattle grazing to riparian areas, water quality, wildlife, and threatened and endangered (T&E) species. Second, the draft EA offers an insufficient substantive range of alternatives to the proposed action. Third, the draft EA includes an inadequate discussion of the cumulative impacts of continued livestock grazing throughout the Gila National Forest.

Taken either collectively or separately, these three failures bar the USFS from adopting the draft EA as its final EA. We submit that each of the following three issues is significant enough to warrant the development of an expanded final EA, and urge the USFS to do so in a timely manner. The following sections provide an elaboration of our position.

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<sup>5</sup> See 40 C.F.R. §§ 1501.3 and 1501.4(a)-(c).

<sup>6</sup> 42 U.S.C. § 4332(2)(C).

<sup>7</sup> See 40 C.F.R. § 1508.9.

<sup>8</sup> See *e.g.* *Kern v. BLM*, 284 F.3d 1062 (9<sup>th</sup> Cir.2002); *Hall v. Norton*, 266 F.3d 969 (9<sup>th</sup> Cir.2001); *Blue Mountains Biodiversity Project*, 161 F.3d 1028 (9<sup>th</sup> Cir.1998); *Idaho Sporting Cong. V. Thomas*, 137 F.3d 1146 (9<sup>th</sup> Cir.1998).

<sup>9</sup> See 40 C.F.R. § 1508.9.

<sup>10</sup> The issuance or re-issuance of a USFS grazing permit is a major federal action under NEPA.

## 1. FAILURE TO PROVIDE SUFFICIENT EVIDENCE AND ANALYSIS OF ENVIRONMENTAL IMPACTS

Any EA must provide enough evidence and analysis of environmental impacts for the USFS to make an informed decision as to whether it should prepare an EIS. Despite this NEPA requirement, the actual environmental consequences of continued livestock grazing are not mentioned in the Hermosa Allotment draft EA. This is unacceptable. Without any knowledge of the environmental impacts that can be expected to flow from the proposed action, an informed decision as to whether those impacts are significant cannot be made.

The following sections explore the well documented and scientifically accepted environmental impacts of livestock grazing in the arid southwest. Although not politically appealing, these impacts are non-speculative and ecologically relevant. Their disclosure in the Hermosa Allotment final EA is required by law.<sup>11</sup>

### *Cattle Grazing Destroys Riparian Areas & Impairs Water Quality*

Riparian and stream ecosystems represent only 0.5 to 1% of the surface area of arid lands in the eleven western United States,<sup>12</sup> yet support an estimated 60 to 70% of Western bird species<sup>13</sup> and as many as 80% of wildlife species in Arizona and New Mexico.<sup>14</sup> Despite the immense ecological importance of these areas, grazing by livestock has damaged 80% of the streams and riparian ecosystems in arid regions of the western United States.<sup>15</sup> As recently as 1990, the U.S. Environmental Protection Agency reported that “extensive field observations suggest that riparian areas throughout much of the West are in their worst conditions in history.”<sup>16</sup> In addition, a joint Bureau of Land Management (BLM) and USFS report concluded that “riparian areas have continued to decline” since grazing reforms in the 1930’s.”<sup>17</sup>

The result of cattle grazing in and around riparian areas is nothing short of ecological collapse. A recent survey of scientific literature reported on the effects of livestock grazing on Western streams and riparian zones.<sup>18</sup> Cattle have a negative effect on water quality and seasonal quantity, stream channel morphology, hydrology, riparian zone soils,

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<sup>11</sup> 40 C.F.R. § 1508.9(b).

<sup>12</sup> U.S. General Accounting Office. 1988. *Public rangelands: some riparian areas restored by widespread improvement will be slow*. GAO/RCED-88-105; see also Belsky, A.J., A. Matzke, and S. Uselman. 1999. *Survey of livestock influences on stream and riparian ecosystems in the Western United States*. *Journal of Soil and Water Conservation* 54: 419-431.

<sup>13</sup> Omart, R.D. 1996. *Historical and present impacts of livestock grazing on fish and wildlife resources in western riparian habitats*. Pp. 245-279. In: P.R. Krausman (ed.), *Rangeland wildlife*. Society for Range Management: Denver, CO; see also Belsky et al. (1999).

<sup>14</sup> Chaney, E., W. Elmore, and W.S. Platts. 1990. *Livestock grazing on Western riparian areas*. Northwest Resource Information Center, Inc.: Eagle, ID; see also Belsky et al. (1999).

<sup>15</sup> U.S. Department of Interior. 1994. *Rangeland reform '94, draft environmental impact statement*. Bureau of Land Management: Washington D.C.; see also Belsky et al. (1999).

<sup>16</sup> Chaney et al. (1990).

<sup>17</sup> U.S. Department of Interior (1994).

<sup>18</sup> Belsky et al. (1999).

instream and stream bank vegetation, and aquatic and riparian wildlife.<sup>19</sup> Strikingly, this comprehensive survey of peer-reviewed, experimental and comparative studies found no positive environmental impacts due to cattle grazing.<sup>20</sup>

Cattle not only destroy wildlife habitat through the degradation of water quality; they also impair human water supplies. Agriculture is the major source of water quality impairment in this country. Siltation, introduction of excessive “nutrient” materials, bacteria, proliferation of oxygen-depleting substances, and pesticides rank as the top causes of water quality decline in rivers, and agriculture- including livestock production- is linked to all of them.<sup>21</sup>

Authorizing cattle grazing on the Hermosa Allotment will continue to degrade water quality. The USFS has a legal duty to protect the rivers, streams, springs, seeps, and wetlands of the Gila National Forest from its grazing permittees’ pollution. The New Mexico Environment Department (NMED) and USFS have an agreement that states that the USFS will endeavor to minimize and mitigate all potential non-point source pollution activities. CWA § 313 requires federal agencies to “comply with...all state...and local requirements, administrative authority, and process sanctions respecting the control and abatement of water pollution in the same manner and to the same extent as any non-governmental activity.”<sup>22</sup>

Although not officially designated, the Rio Grande in southern New Mexico is a borderline waterway, impaired due to coliform levels that exceed allowable limits under existing water quality standards. Accordingly the New Mexico Environmental Department is currently planning to develop a total maximum daily load of pollutants (TMDL) for the reach below Caballo, and private organizations will be developing a Watershed Restoration Action Strategy focused on addressing nonpoint sources of coliform to the river. Because the streams on the Hermosa all drain into the Rio Grande, riparian pollution from cattle grazing should be curbed.

This agreement with the NMED must be considered when authorizing grazing on the Hermosa Allotment. The USFS will violate CWA § 313 if it allows its permittees to degrade the water quality on the Gila National forest to such an extent that the New Mexico and/or Arizona water quality standards are exceeded. Moreover, if the USFS authorizes grazing on an allotment where state water quality standards are known to be exceeded, it will be in violation of APA § 706(2)(A), as such action is surely arbitrary and capricious.

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<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> U.S. Environmental Protection Agency, *The Quality of Our Nation’s Water: 1996- Executive Summary of the National Water Quality Inventory: Report to Congress*, EPA841-S-97-001 (Washington, D.C.: USEPA, Office of Water, 1998).

<sup>22</sup> 33 U.S.C. § 1323(a)(1).

## *Cattle Grazing Harms Wildlife and Native Vegetation, and Imperils Species*

The Hermosa Allotment has been rested for thirteen of the last fourteen years, and yet the range conditions on the allotment are still in poor to fair states, and the trend is universally downward. This is attributed to historic grazing uses and ongoing drought conditions, and yet the USFS proposes to authorize active grazing on this allotment through this analysis. The poor and declining trends on the allotment impact plants, wildlife, and their habitats, and the draft EA contains an insufficient analysis of how the proposed action will contribute to the continued deterioration of range conditions on the allotment.

The detrimental effects of cattle grazing on wildlife and federally listed T&E species are numerous and far reaching. Nearly one-quarter of all of the imperiled species listed under the ESA are imperiled by livestock grazing; in the southwest, grazing is a leading cause of species endangerment.<sup>23</sup> Large numbers of permitted livestock on lands completely unsuitable for such grazing pressure causes ecosystem disruption and imbalance. Grazing depletes food sources necessary for sustaining wildlife by denuding the landscape of vegetation. Native plants are integral components of the ecosystem, and they not only provide direct nutritional value for herbivorous species, but this serves to nourish the prey base for carnivorous ones. As native vegetation is grazed to oblivion, exotic weeds invade, threatening grass and shrub ecosystems and disturbing the soil surface.

Livestock grazing depletes native vegetation communities and wildlife habitat through destruction of a basic ecological component: biological soil crusts. Biological (cryptobiotic, cryptogamic) soil crusts are important elements of arid and semi-arid ecosystems. These crusts contribute to increased organic matter, increased minerals, increased soil stability, reduced water run-off, enhanced germination and seedling establishment of native plants, decreased germination of some alien plant species, and increased survivorship of native vascular species.<sup>24</sup> Biological soil crusts provide little fuel to carry fire and may act as refugia, slowing fire, decreasing its intensity, and contributing to the mosaic pattern of vegetation.<sup>25</sup>

Despite the fundamental importance of biological crusts, the Hermosa draft EA fails utterly to discuss their occurrence on the Hermosa Allotment or the impact that livestock grazing has on the formation and persistence of these soils. Livestock negatively impact

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<sup>23</sup> Flather, C. T., L. A. Joyce, and C. A. Bloomgarden. 1994. Species endangerment patterns in the United States. Pp. 42. USDA Forest Service, Ft Collins.

<sup>24</sup> Belnap, J. 1994b. Potential role of cryptobiotic soil crusts in semiarid rangelands. Pp. 179–185 in S. B. Monsen and S. G. Kitchen (compilers), Proceedings — Ecology and Management of Annual Rangelands. General Technical Report INT-GTR-313. USDA Forest Service Intermountain Research Station, Ogden, UT.; Belnap, J. and J. S. Gardner. 1993. Soil microstructure in soils of the Colorado Plateau: the role of the cyanobacterium *Microcoleus vaginatus*. Great Basin Naturalist 53: 40–47; Belnap, J. R. Rosentreter, S. Leonard, J. H. Kaltenecker, J. Williams, and D. Eldridge. 2001. Biological soil crusts: ecology and management. Technical Reference 1730-2. U.S.D.A. BLM National Science and Technology Center Information and Communications Group, P.O. Box 25047, Denver, CO 80225-0047

<sup>25</sup> Belnap et al. 2001

biological crusts through trampling and compaction, especially during dry seasons.<sup>26</sup> Both cover and biomass of the biological soil crust has been found to be reduced on areas grazed by domestic livestock and exposed soil to increase. Significant correlations can exist between biological soil crust cover and the composition of vascular plant communities, so that damage can result in an altered vascular flora.<sup>27</sup> Grazing can reduce nitrogen fixation by as much as 95%.<sup>28</sup>

Degradation of soils and decreases in vegetation caused by livestock grazing has consequential effects in riparian areas as well, by increasing run-off and sediment loads, thereby decreasing water quality and habitat for aquatic species.

Terrestrial species are also harmed by cattle grazing. Fencing and other so-called range “improvements” fragment habitat, creating edge effects and isolating populations. Barbed wire fencing causes significant mortality in raptor and other bird species populations.<sup>29</sup> Further, perceived benefits of water development to wildlife should be evaluated in the context of natural adaptations of species.<sup>30</sup>

Birds, bears, wolves, frogs, snails, prairie dogs, sage grouse, and bison are but a few examples of wildlife being put at risk for the sake of subsidized public lands ranching. The Hermosa Allotment provides habitat for numerous wildlife species, as well as to T&E species, including the Mexican gray wolf, bald eagle, Mexican spotted owl, and Chiricahua leopard frog. The USFS must actively protect these species, and merely listing the projected effects in table-form<sup>31</sup> without any discussion of reasonably foreseeable effects of the alternatives is insufficient under NEPA, NFMA, and the ESA. The complete EA should thoroughly assess the variable consequences of each alternative.

When authorizing and/or issuing grazing permits on federal public land inhabited by T&E species, the USFS must comply with ESA §§ 7 and 9. ESA § 7(a)(1) requires the USFS to “carry out programs for the conservation of endangered species and threatened species....” Courts have interpreted this mandate as “a specific, rather than a generalized duty to conserve species.”<sup>32</sup> This means that the USFS “must utilize all [of its] authorities to ‘conserve’ the endangered [species there].”<sup>33</sup> The USFS must take active measures to encourage the propagation of healthy populations of T&E species on the Gila

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<sup>26</sup> Anderson, D.C., K.T. Harper, S.R. Rushforth. 1983. Recovery of cryptogamic soil crusts from grazing on Utah winter ranges. *Journal of Range Management* 35(3): 355-359; Belnap and Gardner 1993; Beymer and Klopatek 1992; Belnap et al. 2001.

<sup>27</sup> Beymer and Klopatek 1992.

<sup>28</sup> Belnap et al. 2001.

<sup>29</sup> Anderson, H. L. 1977. Barbed wire impales another great horned owl. *Raptor Research* 11:71-72; Avery, M. L., P. F. Springer, and N. S. Dailey. 1978. Avian mortality at man-made structures: An annotated bibliography. U.S. Fish and Wildlife Service; Fitzner, R. E. 1975. Owl mortality on fences and utility lines. *Journal of Raptor Research* 9:55-57.

<sup>30</sup> Burkett, Douglas W. and Bruce C. Thompson. 1994. Wildlife association with human-altered watersources in semi-arid vegetation communities. *Conservation Biology* 8(3): 682-690.

<sup>31</sup> Draft EA, at 32-33.

<sup>32</sup> *Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir.1998); *Defenders of Wildlife v. Secretary, U.S. Dept. of the Interior*, 2005 WL 221253 (D.Or. Jan. 31, 2005).

<sup>33</sup> *Rio Grande Silvery Minnow v. Keys*, 2002 WL 32813602 (D.N.M. April 19, 2002).

National Forest. Because there is a direct causal link between livestock grazing and declining populations of each of the T&E species that inhabit the Black Range Ranger District, the USFS must actively relieve livestock pressures on the Gila.

ESA § 7(a)(2) requires the USFS to consult with the FWS regarding the likely effects of its proposed actions on protected species known to inhabit the area. We have no record that the USFS has initiated informal consultation with the FWS regarding its decision to authorize cattle grazing on the Hermosa Allotment. If the FWS has issued a biological opinion (BO) for this decision, please provide our offices with this document. As we have adequately described above, cattle grazing has severe impacts on the health and habitat of wildlife and T&E species. Failing to initiate consultation when actions may affect T&E species is violative of the ESA and the APA.

ESA § 9 prohibits any person from “taking” a threatened or endangered species. “Take” is defined broadly under the ESA to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.<sup>34</sup> “Take” includes direct as well as indirect harm, and need not be purposeful.<sup>35</sup> Indeed, a take may even be the result of an accident.<sup>36</sup> Causing or attempting to cause almost any level of injury to an endangered species is prohibited by law. “Take is defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”<sup>37</sup>

The ESA not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. Section 9 prohibits individuals, *as well as federal and state agencies*, from taking T&E species.<sup>38</sup> “[A] governmental third party pursuant to whose authority an actor directly exacts a taking... may be deemed to have violated the provisions of the ESA.”<sup>39</sup> Therefore, ESA § 9 prohibits the USFS from issuing a grazing permit that authorizes a third party’s cattle operation if that operation harms or threatens to harm protected species or their critical habitat.<sup>40</sup>

Again, the authorization of grazing on the Hermosa allotment must accommodate all legal requirements. The ESA, the NFMA,<sup>41</sup> and the GNF and ROD<sup>42</sup> all speak to

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<sup>34</sup> 16 U.S.C. § 1532(19).

<sup>35</sup> See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995).

<sup>36</sup> See *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9<sup>th</sup> Cir.1994).

<sup>37</sup> *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8<sup>th</sup> Cir.1989).

<sup>38</sup> 16 U.S.C. § 1532(13).

<sup>39</sup> *Strahan v. Coxe*, 127 F.3d 155, 163 (1<sup>st</sup> Cir.1997). See also *Defenders of Wildlife v. Administrator, EPA*, 688 F.Supp. 1334 (D.Minn. 1988), *aff’d* by *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294 (8<sup>th</sup> Cir.1989); *Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231 (11<sup>th</sup> Cir.1998), *cert. denied*, 526 U.S. 1081 (1999); *Sierra Club v. Lyng*, 694 F.Supp. 1260 (E.D.Tex. 1988), *aff’d* by *Sierra Club v. Yeutter*, 926 F.2d 429 (5<sup>th</sup> Cir.1991); and *U.S. v. Town of Plymouth, Mass.*, 6 F.Supp.2d 81 (D.Mass. 1998).

<sup>40</sup> See also *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8<sup>th</sup> Cir. 1989); and *Sierra Club v. Yeutter*, 926 F.2d 429 (5<sup>th</sup> Cir.1991).

<sup>41</sup> Specifically, NFMA § 6(a) imposes a substantive duty on the USFS to provide sufficient habitat to maintain viable, well-distributed populations of wildlife species throughout their existing ranges.

maintaining and improving wildlife habitat in general, and to maintaining and improving T&E species in particular. NEPA requires the disclosure of sufficient evidence and an analysis of the real impacts grazing will have on the Hermosa Allotment and to wildlife and T&E species. The draft EA completely fails in this regard- mentioning grazing effects only in context of a table and without detailed discussion- and is therefore inadequate and contrary to law.

It is important to note that the summary of the draft EA states, in context of the areas that will no longer be used for grazing under the proposed action, “The areas closed will continue to progress towards desired conditions, mainly reducing the impacts to Chiricahua Leopard frog and Mexican spotted owl habitats.” It is curious that while acknowledging the desired conditions can be best achieved through grazing rest, the USFS is still proceeding with a proposed action that would logically produce less-than-desirable results on the grazed portions of the Hermosa Allotment.

The Chiricahua leopard frog relies upon functional riparian environments for its habitat. The draft EA does not disclose the occurrence of this imperiled species on the allotment and does not identify which drainages and riparian areas serve as its habitat. At least two of the riparian and wetland areas on the allotment (Circle Seven Creek and North Seco Creek) are Functioning at Risk with downward trends, and this will impede the recovery and expansion of Chiricahua leopard frog populations on the Hermosa Allotment. Despite a “may affect, not likely to adversely affect” determination, the draft EA provides no analysis of the alternatives in context of leopard frog recovery, nor distinguishes how varying riparian protections across alternatives will impact the riparian systems conditions or trends.

## 2. FAILURE TO PROVIDE SUBSTANTIVE RANGE OF ALTERNATIVES

NEPA requires federal agencies to consider alternatives to their proposed actions, and examine the environmental impacts of those alternatives. This requirement implements NEPA’s environmental policies. It requires federal agencies to consider whether they can carry out their proposed action in a less environmentally damaging manner, and whether alternatives exist that make the action unnecessary. In fact, the CEQ has described the alternatives requirement as the “heart” of environmental review.<sup>43</sup> The courts have been correspondingly emphatic, calling the alternatives requirement the “linchpin” of the EIS.<sup>44</sup> “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”<sup>45</sup>

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<sup>42</sup> These directives contain pertinent management direction that requires “maintaining conditions at or above a condition which assures recovery and continued existence of threatened and endangered species.”

<sup>43</sup> See 40 C.F.R. § 1502.14

<sup>44</sup> See *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2<sup>nd</sup> Cir.1972).

<sup>45</sup> *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9<sup>th</sup> Cir.1995).

Importantly, the alternatives requirement also applies to the preparation of an EA.<sup>46</sup> NEPA § 102(2)(E) requires all agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in *any* proposal which involves unresolved conflicts concerning alternative uses of available resources” (emphasis added).<sup>47</sup> The CEQ regulations require that an EA include “brief discussions of the need for the proposal, of alternatives as required by [NEPA § 102(2)(E)], [and] of the environmental impacts of the proposed action and alternatives.”<sup>48</sup> Courts, too, have stressed the importance of the alternatives requirement in the development of EAs. In doing so, they have required federal agencies “to study alternatives to any actions that have an impact on the environment, even if [it is ultimately determined that] the impact is not significant enough to require a full-scale impact statement.”<sup>49</sup>

Some courts have concluded that the duty to discuss alternatives in an EA under NEPA § 102(2)(E) is *at least as broad and may be broader* than the duty to discuss alternatives in an EIS. For instance, the Fifth Circuit has held that NEPA § 102(2)(E) is “supplemental and more extensive” than the alternatives requirement of an EIS.<sup>50</sup> That court further stated that the purpose of NEPA § 102(2)(E) is “to insist that no major federal project would be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project...”<sup>51</sup>

Here, the CEQ requires the USFS to present the realistic environmental impacts of its proposed action on the Hermosa Allotment, as well as to present all reasonable alternatives to that action in comparative form.<sup>52</sup> A proper alternatives analysis should “rigorously explore” and “objectively evaluate” these alternatives, which means it should “devote substantial treatment to each alternative considered in detail- including the proposed action- so that reviewers may evaluate their comparative merits.”<sup>53</sup>

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<sup>46</sup> See e.g. *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10<sup>th</sup> Cir.2004); *Highway J Citizens Group v. Mineta*, 349 F.3d 938 (7<sup>th</sup> Cir.2003); *Mt. Lookout-Mt. Nebo Prop. Prot. Ass’n v. Federal Energy Regulatory Comm’n*, 143 F.3d 165 (4<sup>th</sup> Cir.1998); *Sierra Club v. Epsy*, 38 F.3d 792 (5<sup>th</sup> Cir.1994); *Senville v. Peters*, 327 F.Supp.2d 335 (D.Vt. 2004).

<sup>47</sup> 42 U.S.C. § 4332(2)(E).

<sup>48</sup> 40 C.F.R. § 1508.9(b).

<sup>49</sup> See *City of New York v. United States Dep’t of Transp.*, 715 F.2d 732 (2<sup>nd</sup> Cir.1983), *appeal dismissed*, 465 U.S. 1055 (1984).

<sup>50</sup> *Environmental Def. Fund. Inc. v. United States Army Corps of Eng’s*, 429 F.2d 1123 (5<sup>th</sup> Cir.1974); accord *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9<sup>th</sup> Cir.1988).

<sup>51</sup> *Id.*

<sup>52</sup> See 40 C.F.R. § 1502.14.

<sup>53</sup> 40 C.F.R. § 1502.14(b); see also Council on Environmental Quality, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 Fed. Reg. 18026, 18027, 18028 (1981): Question 5 (degree of analysis devoted to each alternative to be substantially similar to degree of analysis devoted to proposed action); Question 7 (contrasting discussion of alternatives with discussion of environmental consequences and suggesting that discussion of alternatives be presented concisely in comparative form, including charts and tables); see also 40 C.F.R. § 1502.2(d) (impact statement must state how alternatives achieve goals of statute); 40 C.F.R. § 1505.1(e) (alternatives considered by decision maker must encompass those included in impact statement); 40 C.F.R. § 1503.25(b) (alternatives to include no-action alternative, other reasonable courses of action and mitigation measures).

The range of alternatives to be set forth in an EA is governed by the “rule of reason,” and defined by the “purpose and need” of the action itself.<sup>54</sup> Again, the purpose and need of the action at issue is to introduce livestock grazing on the Hermosa Allotment under a grass bank concept. Certainly, the USFS need not consider an infinite range of alternatives, but it must seriously consider reasonable and feasible ones.

The USFS failed to meet the alternatives requirement in the Hermosa Allotment draft EA because there are significant issues- beyond riparian degradation- that exist on the allotment but are not considered in the EA. Additionally, the draft EA failed to accurately disclose the benefits of adopting the No Grazing Alternative, and inappropriately and inexplicably assumed that the “restoration of fire adapted ecosystems” cannot be achieved without a grass bank.

#### *Significant Issue- Mexican Gray Wolf Recovery*

An endangered species on the Gila National Forest, which requires the USFS’s consideration is the Mexican gray wolf (*Canis lupus baileyi*). The Mexican gray wolf has the potential, and is ultimately expected, to occupy nearly all of the Gila National Forest.

The USFS is a signatory to the 2003 Memorandum of Understanding (2003 MOU)<sup>55</sup> and a full member of the Mexican Wolf Adaptive Management Oversight Committee (AMOC), which makes decisions regarding the Mexican wolf reintroduction project underway in the Blue Range Wolf Recovery Area (BRWRA). The stated purpose of the 2003 MOU, which establishes the AMOC, is “to establish a framework for adaptively managing the Mexican wolf reintroduction project in and around the BRWRA to contribute toward recovery, including downlisting and delisting.” The BRWRA includes the entire Gila National Forest and, by inclusion, the entire Hermosa Allotment.

A livestock-free Hermosa allotment is tremendously important to successful Mexican wolf recovery. The allotment has been free of cattle for approximately twenty years, and is adjacent to Ladder Ranch, a large tract of private land that accepts and tolerates wolves that move out of the BRWRA. This type of voluntary “wolf harboring” is allowed under the Mexican wolf reintroduction rule,<sup>56</sup> and rests solely at the discretion of the landowner.

Active wolf recovery efforts have already been launched within the Hermosa Allotment. North Seco Creek, which flows through the Hermosa, is one of six approved release sites for Mexican wolves within the Gila National Forest. On April 28, 2006, the FWS released the Nantac Pack- comprised of one adult mated pair- onto North Seco Creek.

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<sup>54</sup> See 40 C.F.R. § 1502.13.

<sup>55</sup> This MOU was signed by *Arizona Game and Fish Department, New Mexico Game and Fish Department, U.S.D.A. Animal and Plant Health Inspection Service/Wildlife Services, U.S.D.A Forest Service, U.S. Fish and Wildlife Service, White Mountain Apache Tribe, Arizona Counties of Graham, Greenlee, and Navajo, New Mexico Counties of Catron and Sierra, and the New Mexico Department of Agriculture* on October 31, 2003.

<sup>56</sup> Federal Register 63:1752-1772; January 12, 1998.

Wolf-livestock conflicts present a major hurdle to Mexican wolf recovery. Thus, one of the criteria initially used in choosing these six wolf release sites was the absence of cattle. Now, the USFS is proposing to locate the Hermosa South Grazing Pasture less than one mile from North Seco Creek. The introduction of cattle onto the allotment now will most likely make it uninhabitable for Mexican wolves, and disqualify North Seco Creek as a future release site.

On December 31, 2005, the AMOC issued the Mexican Wolf Blue Range Reintroduction Project 5-Year Review- a comprehensive assessment of the progress of the reintroduction project from 1998-2003. The review documents an unsustainable mean annual “failure rate” of 64%, meaning that without continued releases of wolves the population would continue to decline. The failure rate is comprised of wolves that die, wolves that are removed for dispersing outside the BRWRA boundary, and wolves removed to resolve conflicts with domestic livestock. To date, all continuing conflicts between livestock and wolves have been ultimately resolved by removing wolves, and a significant component of the removal rate (26%) is attributable to wolves that prey on livestock.

Annual reports issued by the U.S. Fish and Wildlife Service (FWS) and the AMOC for the years 2004 and 2005 document declines in the BRWRA Mexican wolf population.<sup>57</sup> The estimate population in 2003 was 55 wolves; in 2005, officials estimated that the population has dropped to 42 and was perhaps as low as 35. These numbers are not exact and may even be slightly high.

Wolves continue to be removed when conflicts arise between livestock and wolves, further reducing the BRWRA wolf population. To date, the AMOC has not required any changes in livestock management or husbandry practices by allotment permit holders. This needs to change. The implementation of preventive measures could reduce livestock-wolf conflicts and increase the survival and tenure of reintroduced wolves and their offspring on the BRWRA.

As with all species listed as threatened or endangered under the ESA, the USFS has a mandate to “carry out programs for the conservation of endangered species...”<sup>58</sup> Despite this federal charge, the draft EA baldly asserts without explanation that the proposed action is “not likely to jeopardize” the Mexican wolf. We find this 4-word assessment grossly inadequate and contrary to law. Simply signing the 2003 MOU does not, in and of itself, constitute “conservation.”

Because the Hermosa Allotment is within the BRWRA, which hosts a wolf population, the USFS must now take vigorous steps to protect these animals. This means refusing to introduce livestock onto the Hermosa allotment, or at the very least, setting forth

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<sup>57</sup> USFWS. 2005. Mexican wolf recovery program: January 1 - December 31, 2004. Progress Report #7. U.S. Fish and Wildlife Service, Albuquerque, New Mexico. See also USFWS. 2006. Mexican wolf recovery program: January 1-December 31, 2005. Progress Report #8. U.S. Fish and Wildlife Service, Albuquerque, New Mexico.

<sup>58</sup> 33 U.S.C. § 1323(a)(1).

mitigating strategies to deal with, and prevent, potential wolf-livestock conflicts on the allotment and throughout surrounding areas. Decisions now made that would reduce the potential for livestock-wolf conflicts and simultaneously increase populations of deer and elk would enhance the value of this allotment and the BRWRA for Mexican wolf recovery.

NEPA assessments, as required by the Rescissions Act of 1995 (Public Law 104-19), provide an opportunity to systematically re-evaluate policy decisions on an allotment-by-allotment basis in light of the BRWRA Mexican gray wolf reintroduction project and the recovery requirements of the ESA. We have identified five measures that would serve individually and collectively to conserve and recover the endangered Mexican wolf in the BRWRA: 1) reduce or eliminate livestock; 2) increase native prey, especially elk and deer; 3) remove, or render unpalatable, livestock carcasses; 4) eliminate open-range calving by livestock; 5) adjust the seasonality of grazing. We elaborate on each of these measures below, and reiterate that a similar analysis should have been offered as part of the alternatives requirement of the Hermosa Allotment draft EA.

- ***Reduce or eliminate livestock.*** Wolves maintain large home ranges in their search for prey. The more livestock that are present within the BRWRA and the more widespread their distribution, the greater the probability of wolves encountering and possibly preying on livestock. Under current wolf management, this results in the “take” and removal of wolves, either through capture or kill. The success of gray wolf recovery in the northern Rocky Mountains is attributed in large part to the existence of large livestock-free core areas where wolves need not be managed or controlled for interactions with livestock.<sup>59</sup>

Livestock grazing is a permitted privilege within the BRWRA “where consistent with other multiple use goals and objectives.” The elimination of grazing privileges within the BRWRA would not significantly affect the livestock industry as a whole.<sup>60</sup>

However, the success of the BRWRA Mexican gray wolf reintroduction project is entirely dependent on wolves thriving and persisting within the BRWRA. We believe that these facts elevate the priority of Mexican wolf recovery above that of livestock production within the BRWRA, and that this priority should be reflected in the pending decision by the USFS on the Hermosa Allotment and other allotments within the BRWRA.

- ***Increase native prey.*** The primary prey of Mexican gray wolves in the BRWRA are elk and deer, especially elk. Presently, wolves have a near equal opportunity of encountering native prey and domestic livestock in the BRWRA. Logical reasoning suggests that by increasing elk and deer, conflicts between livestock and wolves would be reduced. This would increase the survival and persistence of wolves in the BRWRA and contribute to their conservation and recovery. Domestic livestock

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<sup>59</sup> Bangs E.E., S.H. Fritts, J.A. Fontaine, D.W. Smith, K.M. Murphy, C.M. Mack, and C.C. Niemeyer. 1998. *Status of gray wolf restoration in Montana, Idaho, and Wyoming*. Wildlife Society Bulletin 26:785-798.

<sup>60</sup> Donahue, D.L. 1999. *The Western Range Revisited*. University of Oklahoma Press, Norman.

compete with native ungulates for vegetation and the removal of livestock has been shown to correspond to increases in deer and elk populations.

- ***Remove or render unpalatable livestock carcasses.*** Scavenging on dead livestock “may predispose wolves to eventually prey on livestock”;<sup>61</sup> 11% of wolves that depredated livestock were known to have previously scavenged dead livestock prior to their first documented depredation incident.<sup>62</sup> Livestock operators on public lands within the BRWRA should be required to “take some responsibility for carcass management/disposal to reduce the likelihood that wolves become habituated to feeding on livestock.”<sup>63</sup> Such a provision will reduce livestock-wolf conflicts and, thus, contribute to the conservation and recovery of the Mexican wolf.
- ***Eliminate open-range calving by livestock.*** Wolves prey disproportionately on young animals, including livestock. Dispersed open-range calving of untended cows invites depredation by wolves, which leads to wolves being removed from the BRWRA, and contributes to the failure of wolf recovery efforts. We have recently learned of some confined calving operations in the Apache National Forest that reportedly resulted in increased calf survival. If grazing is authorized on the Hermosa Allotment, confined calving should be a condition of the Hermosa Allotment management plan and of all other allotment management plans in the Gila National Forest.
- ***Adjust the seasonality of grazing.*** Mexican gray wolf project personnel report that fewer livestock depredation incidents occur on seasonally grazed allotments, especially those stocked with livestock during mid summer after the elk have given birth to their calves. Young wolves learn to identify prey from their parents and older pack members and form a “search image” for the prey they are taught to hunt. Wolves that stick to known prey species would be expected to fare better than wolves that experiment with potential prey with which they lack experience, unless known prey becomes scarce. The success of the Mexican wolf reintroduction project in the BRWRA hinges in large part on their recognition of elk and deer as their preferred prey. If livestock are on the range less than half of the year, wolves would have a reduced incentive to switch from known prey (i.e., elk and deer) to domestic livestock. In the case of the Hermosa allotment, the proposed action actually expands the seasonal parameters for grazing use without discussing the potential beneficial or adverse effects of doing so.

We were able to easily develop and articulate the above five measures to help conserve and recover the endangered Mexican gray wolf in the face of cattle grazing on the allotment; the draft EA made no attempt to discuss these issues. Whether livestock grazing should be introduced on the Hermosa Allotment turns, in part, on the magnitude

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<sup>61</sup> Paquet, P.C., J.A. Vucetich, M.K. Phillips, and L.M. Vucetich. 2001. *Mexican wolf recovery: Three-year program review and assessment*. US Fish and Wildlife Service, Albuquerque, New Mexico.

<sup>62</sup> Mexican Wolf Adaptive Management Oversight Committee. 2005. *Mexican wolf Blue Range Reintroduction Project 5-year review*. US Fish and Wildlife Service, Albuquerque, New Mexico.

<sup>63</sup> Paquet, et al. 2001.

and proposed resolution of potential wolf-livestock conflicts. As such, a “wolf alternative” falls well within the “rule of reason.” Accordingly, environmental review of the proposed action cannot close until this integral alternative is developed and submitted for public comment.

#### *Insufficient Discussion- No Grazing Alternative*

Throughout the Hermosa Allotment draft EA, the USFS implies that it cannot work towards restoring the natural fire ecology of the area without creating this grass bank. The USFS asserts that somehow healthy, fire adapted forests cannot be achieved unless the Hermosa is taken out of twenty years of non-use and once again subjected to cattle grazing. This presumption is unjustified and devoid of scientific logic.

We agree that fire adapted ecosystems are desirable. Because we always advocate for wild nature and ecological balance, we applaud the USFS for wanting to undertake fire restoration efforts on our public lands. However, the USFS need not, and should not, provide alternate forage on the Hermosa Allotment for permittees who are displaced from their own allotments due to conservation efforts.

Further, it is astounding that given the premise of the purpose and need for this action, the draft EA did not discuss the impacts of livestock grazing on fire cycles. Livestock grazing increases the risk of catastrophic wildfires. Livestock promote the spread and colonization of alien plants, which can increase fire frequencies.<sup>64</sup> Livestock alter vegetation communities by changing the composition and structure of upland forests. Livestock grazing reduces the biomass and density of understory grasses which otherwise out-compete conifer seedlings and prevent dense stands, and reduces the abundance of fine fuels, which formerly carried low-intensity fires.<sup>65</sup>

Table 1 of the draft EA states the current condition is a “landscape out of balance as a fire-adapted ecosystem, adversely affecting dependent resources,” and identifies the desired condition as the “[r]estor[ation of] a fire-adapted ecosystem throughout the landscape.” The USFS proposes to “[d]o this by allowing the Hermosa Allotment to be used as a grass bank for other permittees when they are displaced by management activities designed to restore fire to the ecosystem.” The Hermosa Allotment being used

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<sup>64</sup> Billings, W. D. 1990. *Bromus tectorum*, a biotic cause of ecosystem impoverishment in the Great Basin. Pages 301-322 in G. M. Woodwell, editor. *The earth in transition: patterns and processes of biotic impoverishment*. Cambridge University Press New York; Billings, W. D. 1994. Ecological impacts of cheatgrass and resultant fire on ecosystems in the western Great Basin. Pp. 170-175 in Monsen, S. B. and S. G. Kitchen (compilers), *Proceedings – Ecology and Management of Annual Rangelands*. General Technical Report INT-GTR-313. US Department of Agriculture, Forest Services, Intermountain Research Station, Ogden, UT; Belsky, A. J. and J. L. Gelbard. 2000. Livestock grazing and weed invasions in the arid West. Oregon Natural Desert Association. Portland, OR; Rosentreter, R. 1994. Displacement of rare plants by exotic grasses. Pp. 170-175 in Monsen, S. B. and S. G. Kitchen (compilers), *Proceedings – Ecology and Management of Annual Rangelands*. General Technical Report INT-GTR-313. US Department of Agriculture, Forest Services, Intermountain Research Station, Ogden, UT.

<sup>65</sup> Belsky, J. and D. Blumenthal. 1997. Effects of livestock grazing on stand dynamics and soils in upland forests of the interior west. *Cons. Biol.* 11 (3).

as a grass bank does nothing to help the Hermosa allotment recover; indeed, to suggest that grazing on this allotment will help restore a landscape level fire-adapted ecosystem is to ignore the best available science which indicates that decades of over-grazing (among other ill-advised management activities) has actually caused the imbalance. Current science, such as the references cited above, clearly shows how grazing contributes to the fire-cycle disruption. The EA fails to analyze the impacts of livestock grazing on the fire cycle of the Hermosa Allotment while simultaneously declaring it necessary to graze. This is a non-linear argument based largely on meeting the economic needs of the permittees of other allotments and not on restoring ecological conditions at all.

*Grazing permits confer no property rights to permittees.* The TGA explicitly defines “grazing privileges” as revocable licenses, stating that “the creation of a grazing district or the issuance of a permit...shall not create any right, title, interest, or estate in or to the lands.”<sup>66</sup> The USFS is authorized to cancel, modify, or suspend grazing use permits in whole or in part where lands grazed thereunder are devoted to another public purpose.<sup>67</sup> Certainly, restoring natural fire ecology to our National Forests is a legitimate public purpose. However, the USFS has no moral obligation, nor legal authority, to move “displaced” cattle onto the Hermosa Allotment while it pursues this public purpose. Under the circumstances, the correct action is not to *move* the cattle around the Gila National Forest, but to *remove* them from the forest altogether through permit cancellation or suspension.

Even if the USFS were to provide alternate forage to displaced permittees, it may not do so on the Hermosa Allotment. According to the GNFP and ROD, an allotment contains “suitable rangelands” only where the benefits of grazing are “commensurate with costs,” and do not “impair land productivity.” This is surely not the case on this allotment.

The benefits of grazing on the Hermosa are not commensurate with the costs. The draft EA proposes that livestock grazing will benefit the allotment by “increasing plant species diversity” beyond the current monotypic populations of “blue gramma and other drought resistant species,” which were “allowed to increase in abundance with little or no grazing.”<sup>68</sup> This sounds nice, but does not stand up to modern scientific study.<sup>69</sup> It also fails to specify that desirable diversity is composed of native, locally genotypic plant species instead of false enhancements like non-native or exotic floral elements.

Exotic weed invasion is one of the greatest ecological threats to grass and shrub ecosystems in the arid West.<sup>70</sup> Despite what is stated in the draft EA, livestock grazing does not hamper the spread of invasive species. Quite to the contrary, grazing is the leading cause of weed invasion in places like the Gila National Forest. Livestock carry in weed seeds on their coats and in their digestive systems, weaken native plants by grazing

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<sup>66</sup> 43 U.S.C. § 315b.

<sup>67</sup> 36 C.F.R. § 222.4(a)(1).

<sup>68</sup> See Hermosa draft EA, at 19.

<sup>69</sup> It should be noted that the one and only scientific study the USFS relied on for these contentions is now over 20 years old.

<sup>70</sup> Belsky J and JL Gelbard. (2002) *Comrades in harm: livestock and exotic weeds in the intermountain west* in Wuerthner.

them, and disturb soil surfaces, thereby creating more favorable conditions for exotic invaders and less favorable conditions for native plants.

In truth, the only “benefit” of grazing on the Hermosa Allotment is that of a financial subsidy to the displaced, outside permittees. The public has no obligation to financially support one rancher who is engaged in an economically dwindling and environmentally destructive industry. When, as here, the benefits of ranching are not commensurate with the costs, the USFS has no legal obligation to do so either.

Besides failing to outweigh the ecological costs of grazing on the Hermosa Allotment, the benefit of continued grazing does not outweigh the financial burden to the American taxpayer. The Government Accountability Office (GAO) has reported the federal government spends *at least* \$144 million each year managing private livestock grazing on federal public lands, but collects only \$21 million in grazing fees. This equates to a net loss of *at least* \$123 million per year.<sup>71</sup> Considering the additional direct and indirect costs not included in the GAO report, economists have estimated that the federal public lands grazing on only BLM and USFS lands may cost as much as \$500 million to \$1 billion annually.<sup>72</sup>

However, there are numerous benefits that would flow from the elimination of livestock on these public lands, and the USFS is under a legal duty to accurately disclose these benefits in the completed EA or EIS.<sup>73</sup> Besides its inherent value, livestock-free and fence-free wildlife habitat enhances opportunities for ecological services and recreational uses. There is rising demand for outdoor recreation on our public lands. Therefore, the final EA or EIS should attempt an accurate projection of enhanced hunting and recreational income and non-monetary ecological and social benefits arising from the cessation of all grazing and devotion of the allotment to wildlife and other unique resources on the allotment. The USFS must consider socio-economic benefits not only to permittees and local communities, but also to the entire public now and in future generations, who are the ultimate owners and inheritors of this land.

Furthermore, any consideration of the “lifestyle and culture” of ranching must be weighed explicitly against the “lifestyle and culture” interests of the far more numerous hikers, hunters, fishers, and professional or amateur mycologists, ornithologists, entomologists, herpetologists, botanists, mammalogists and other zoologists, wilderness lovers and bird watchers that frequent and enjoy the biodiversity and landscape of this allotment. Through appropriate social survey, the USFS should estimate the actual demand for these services, and incorporate this useful information into the cost-benefit

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<sup>71</sup> GAO. 2005. Livestock grazing: federal expenditures and receipts vary, depending on the agency and the purpose of the fee charged. GAO-05-869. Government Accountability Office. Washington, D.C.

<sup>72</sup> Moscovitz, K. and C. Romaniello. 2002. *Assessing the full cost of the federal grazing program*. Center for Biological Diversity. Tuscon, AZ. The estimated cost of the federal grazing program at \$500 million is consistent with estimates developed by other experts.

<sup>73</sup> See *Sierra Club v. Sigler*, 695 F.2d 957 (1983) (holding that NEPA mandates at least a broad, informal cost-benefit analysis by federal agencies of economic, technical and environmental costs and benefits of particular action).

analysis of the No Grazing Alternative. Only then, will the Hermosa Allotment EA be representative of adequate environmental review.

### *Other Concerns*

We note also that there is a significant difference in the current management of the allotment and the proposed management which is not discussed or clearly disclosed in the EA. The current permit is for 876 yearlings to grazing from February 1 to October 31 and 5 horses yearlong. The proposed action changes this to yearlong grazing for all AUMs, with some pasture adjustments seasonally. However, winter use on the allotment has not occurred since 1983, with the exception of one season in 2003. This change could have serious consequence for wildlife that occupy the allotment in the winter, and will also increase pressure on vegetation being grazed during dormant and growing seasons.

Nearly two-thirds of the allotment is admitted to be unsuitable for livestock grazing. The summary paragraph of the draft EA states that 43,146 acres of the 63,009 total will be closed to grazing because they are too rugged, steep, or otherwise unsuitable for livestock. However, the EA did not explore an alternative that would have refined the allotment boundaries and did not explain how distribution had been achieved in the past. It is not clear if the previously permitted numbers ranged over the entire allotment and now the same numbers are being proposed for merely a fraction of the area. We support the overall reduction in permitted head months in the proposed action, but the draft EA provides no explanation of the current carrying capacity of the 19,863 acres that will be used.

We are also concerned that none of the alternatives specify how monitoring will be achieved on this allotment. Since and including 1980, monitoring has only been conducted on the allotment three times (1980, 1993, and 2005). If grazing is authorized on the allotment, the USFS will be required to monitor to ensure compliance with rotation schedules, utilization, and permit compliance. The draft EA does not disclose whether the Black Range ranger has adequate resources to accomplish this or whether the public can reasonably expect it will be conducted in a timely and efficient manner to ensure resources are not being harmed. Monitoring and mitigation are required elements of environmental analyses: “A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.”<sup>74</sup> The Ninth Circuit has consistently held that a “mere listing” of mitigation measures does not satisfy NEPA’s requirements, but that an agency must also include some analysis with respect to the alleged effectiveness of those measures.<sup>75</sup> In the draft EA, no monitoring is stipulated and no mitigation is discussed.

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<sup>74</sup> 40 C.F.R. § 1505.2(c).

<sup>75</sup> *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9<sup>th</sup> Cir. 1998).

### 3. FAILURE TO CONDUCT CUMULATIVE IMPACTS ANALYSIS

Although not explicitly required by NEPA, a discussion of the cumulative environmental effects of a proposed action is an essential part of the environmental review process,<sup>76</sup> for otherwise the combined environmental effect of related actions will not be evaluated. Although the CEQ regulations explicitly apply to EISs, the courts readily apply these regulations to EAs.<sup>77</sup> “Cumulative impact” is defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions...Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”<sup>78</sup>

The CEQ interprets NEPA and its corresponding regulations to require an analysis and a concise description of the identifiable present effects of past actions. The USFS must do this to the extent that past actions are relevant and useful in analyzing whether the reasonably foreseeable effects of the current proposal may have a continuing, additive and significant relationship to past impacts.<sup>79</sup> The courts of appeal have adopted different tests to determine what cumulative impacts of actions must be included in a discussion of environmental impacts. The Ninth Circuit, for example, applied the CEQ regulation that all “reasonably foreseeable” actions that have potential cumulative impacts must be addressed in an EIS or EA.<sup>80</sup>

Given the damage caused by livestock grazing, the authorization of grazing on the Hermosa Allotment cannot be analyzed in a vacuum. Actions currently taken on this allotment will be felt far beyond its boundaries and well into the future. Indeed, it is the culmination of effects brought on by the government-sanctioned grazing of over 300 million acres<sup>81</sup> of land in the arid west that has led to biological travesty that is now unfolding. The Hermosa Allotment is part of a larger ecosystem and should be analyzed as such.

The draft EA should have explored how the introduction of cattle on the Hermosa Allotment will further exacerbate the degradation of all connected watersheds, and how additional fragmentation may affect overall accessibility of wildlife habitat. The fact that the Hermosa Allotment plays a critical role in Mexican wolf recovery makes cumulative

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<sup>76</sup> See *Tomac v. Norton*, 433 F.3d 852 (D.C. Cir.2006).

<sup>77</sup> See e.g., *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998); *American Canoe Ass'n v. White*, 277 F. Supp. 2d 1244 (N.D. Ala. 2003); 40 C.F.R. § 1508.9; and 40 C.F.R. § 1508.8.

<sup>78</sup> 40 C.F.R. § 1508.7; see also *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754 (9th Cir. 1996); and *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60 (D.C. Cir. 1987).

<sup>79</sup> See 40 C.F.R. § 1502.22.

<sup>80</sup> See e.g. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998) (environmental assessment for timber sale must address cumulative effects of other “reasonably foreseeable” timber sales in the forest); *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062 (9th Cir. 2002) (timber sales); *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800 (9th Cir. 1999) (land exchange); *City of Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990) (logging in forest); *Northern Alaska Envtl. Center v. Norton*, 361 F. Supp. 2d 1069 (D. Alaska 2005) (oil and gas leasing, must analyze effects of proposed plan amendment).

<sup>81</sup> Wuerthner (2002).

impacts analysis here even more imperative. The cumulative impacts of grazing on the Gila National Forest as a whole must be analyzed in light of wolf recovery efforts in the BRWRA. Because the cumulative impacts analysis in the draft EA did not search the issue in this way, it must be expanded in the final EA and EIS.

## **THE NEED FOR EXPANDED ENVIRONMENTAL REVIEW**

In light of the inadequacies described above, the USFS must undertake expanded environmental review in its final EA for the authorization of grazing on the Hermosa Allotment under a grass bank concept. The USFS may not adopt the draft EA as its final EA. This is because the public is legally entitled to be made aware of this project's full environmental impacts to the Gila National Forest and Mexican gray wolf recovery efforts. Only then, will the USFS be proceeding lawfully.

We expect that the EA will determine that the effects of the proposed action will be significant, and that an EIS will be required before any grazing decisions are made. Given the substantial environmental consequence of initiating grazing on an allotment that has been rested and allowed to recover for twenty years, the USFS would be ill-advised to proceed with a FONSI for this project for any action alternative.

## **A CALL TO ADOPT THE NO GRAZING ALTERNATIVE**

Again, we strongly encourage the USFS to develop a more thorough final EA and EIS. We feel that a realistic analysis of both the consequences of continued grazing on the Hermosa Allotment and the benefits of eliminating livestock there will lead to the adoption of the No Grazing Alternative. We have adequately demonstrated above how livestock grazing severely damages our publicly owned natural resources in general and the Hermosa Allotment in particular. The introduction of cattle grazing on this allotment after twenty years of non-use will stifle any progress thus far realized towards restoring the natural ecological balance thus far realized.

The USFS already knows this is the best alternative, and the draft EA states, "This alternative provides the highest rate of upward trend and would likely result in the best watershed conditions over the next ten years," it "provides the greatest opportunity to maintain and/or improve satisfactory watershed conditions," and "The Hermosa allotment no grazing alternative is ideal for implementing the prescribed and fire use fire on this allotment."

Continued rest would be the best and most sustainable use of the Hermosa Allotment at this time, and we believe the USFS should consider withdrawing the unsuitable portions of the allotment from the lands considered "capable and suitable for grazing," in the forthcoming GNFP revision.

Any initiation of livestock grazing on the Hermosa Allotment is inconsistent with the broader public interest mandate of the USFS, and the allotment's active grazing management would be enormously costly to the general public for the benefit of a few. We are dismayed at the USFS's longstanding policy of prioritizing the livestock grazing permittee's economic benefit over all other concerns, including benefits to wildlife, riparian areas, watershed health, and the United States taxpayer. The USFS should begin to adjust this policy to reflect the growing interest of all Americans in conservation of our public lands. The USFS can begin doing so now by giving serious consideration to the ecological and economic benefits of the No Grazing Alternative to the authorization of grazing on the Hermosa Allotment.

Thank you again for this opportunity to participate in this planning process, and please keep us apprised of future actions for this allotment.

Respectfully submitted,



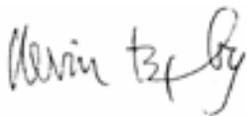
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