

APPENDIX J

Review of Law, Regulations, and Policy Affecting Decision for Proposed Native Fish Restoration Activities and Structures on Fossil Creek in the Mazatzal Wilderness

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Summary

The proposed structure would be a nonconforming wilderness use. It would be consistent with law and policy to build the proposed structure in wilderness if it is determined to be necessary to meet minimum requirements for administration of the area as wilderness, and if the results of the project inside wilderness would be superior to the results gained outside of wilderness. If the decision is to build the structure within wilderness, the second analysis required is which tool or method should be used to complete the project that results in the least impact to the physical resource or wilderness values.

To answer the question of whether it is necessary to meet minimum requirements for wilderness administration, review the sections below that refer to FSM 2320.2, FSM 2323.3 the 1986 MOU for Policies and Guidelines for Fish and Wildlife Management in National Forest and Bureau of Land Management Wilderness, and the relevant sections of the Mazatzal Wilderness Plan.

To answer the question of whether the location within the wilderness is superior to the location outside of wilderness, see the "Fisheries Benefits Determination for Fossil Creek" prepared by Amy Unthank.

To answer the question about the minimum tools needed to implement the wilderness alternative, see the "Minimum Tools Analysis" prepared by the Wilderness Team.

Review of Relevant Sections of Wilderness Law and Policy

Law and policy concerning management of wildlife and fish within wilderness areas relevant to the proposed action (referred to hereafter as the PA) are defined in the Wilderness Act of 1964, 36 CFR 293.6, FSM 2323, FSM 2326, the 1986 MOU for Policies and Guidelines for Fish and Wildlife Management in National Forest and Bureau of Land Management Wilderness, and the Mazatzal Wilderness Management Plan.

The following cites sections of these documents, followed by a discussion, as needed.

Wilderness Act

Sec. 2 (c) "A wilderness...is hereby recognized as an area where the earth and its community of life are untrammelled by man...an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvement or human

habitation, which is protected and managed so as to preserve its natural conditions, and which generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable...."

Sec. 4. (c) "... except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area."

Sec. 4 (d)(4) "...the President may...authorize...other facilities needed in the public interest...."

Regulations

36 CFR 293.6 (c) The Chief, Forest Service, may authorize ... motorized equipment, mechanical transport, aircraft, ..., or structures ... to meet the minimum requirements for authorized activities to protect and administer the Wilderness and its resources....

Forest Service Manual Policy

Decision Authorities

FSM 2326.04b – The Regional Forester is responsible for approving:...Transport and supply by aircraft...Hand portable motorized equipment...FSM 2326.1, 5. To meet minimum needs for protection and administration of the area as wilderness, only as follows: a. A delivery of application problem necessary to meet wilderness objectives cannot be resolved within reason through the use of nonmotorized methods, or b. An essential activity is impossible to accomplish by nonmotorized means because of such factors as time or season limitations, safety, or other material restrictions.

Discussion: The Regional Forester may approve use of aircraft and hand-portable motorized equipment to meet minimum needs for protection and administration of the area as wilderness.

FSM 2323.04c – Regional Forester is responsible for...approving fish control projects...approving control measures for predators or problem fish and wildlife species... approving the use of pesticides within wilderness.

FSM 2320.2 - Objectives

1. Maintain and perpetuate the enduring resource of wilderness as one of the multiple uses of National Forest System land.

2. Maintain wilderness in such a manner that ecosystems are unaffected by human manipulation and influences so that plants and animals develop and respond to natural forces.
3. Minimize the impact of those kinds of uses and activities generally prohibited by the Wilderness Act, but specifically excepted by the Act or subsequent legislation.
4. Protect and perpetuate wilderness character and public values including, but not limited to, opportunities for scientific study, education, solitude, physical and mental challenge and stimulation, inspiration, and primitive recreation experiences.
5. Gather information and carry out research in a manner compatible with preserving the wilderness environment to increase understanding of wilderness ecology, wilderness uses, management opportunities, and visitor behavior.

FSM 2323.3 Management of Wildlife and Fish

FSM 2323.31 - Objectives

FSM 2323.31(1) – Provide an environment where the forces of natural selection and survival rather than human actions determine which and what numbers of wildlife species will exist.

Discussion: A central question regarding the PA is whether it would “provide an environment where the forces of natural selection and survival rather than human actions determine which and what numbers of wildlife species will exist”. The PA clearly defines several “human actions” that “determine which and what numbers of wildlife species will exist” (Fossil Creek Fish Restoration Project PA); however, the “forces of natural selection and survival” have obviously been heavily altered within the Fossil Creek watershed to the extent that T&E and indigenous species have likely been extirpated both before and following Wilderness designation (Fossil Creek EA Draft). Other indigenous species are still present, but are being adversely impacted by the human action of introduction of species that are not indigenous to the Southwest. The question then is whether to attempt remedy of past “human actions” that have affected “the forces of natural selection and survival”, or to ignore those past affects and allow the “forces” to begin their selection and survival functions with the presence of species alien to the ecology of the area that have come to dominate much of the stream system. (Reference Mazatzal WMP for language addressing alien species).

FSM 2323.31(2) – Consistent with objective 1, protect wildlife and fish indigenous to the area from human caused conditions that could lead to Federal listing as threatened or endangered.

Discussion: PA implementation using the Wilderness barrier site would “protect...fish indigenous to the area from human caused conditions that could lead to Federal listing as threatened or endangered”. Note: the project is designed to benefit native fish currently present in the system below Fossil Springs dam, as well as species that have likely been extirpated from the creek. At present nonindigenous species occur throughout Fossil Creek, except for approximately ¼ mile above Fossil Springs dam, which will likely be

partially or completely removed with the decommissioning of the Childs-Irving hydroelectric project. Because the indigenous species remaining in Fossil Creek are being adversely affected, there is concern about declining population trends that could lead to species' being listed under the Endangered Species list. Roundtail chub, for instance, occupy only 18% of their historic range in the Colorado River Basin, and are identified as sensitive species or species of concern by the Forest Service (Southwestern Region), Arizona Game and Fish Department, and U.S. Fish and Wildlife Service. As of April, 2003, the roundtail chub has been petitioned to be listed under the ESA. FSM 2323.31(3) – Provide protection for known populations and aid recovery in areas of previous habitation, of federally listed threatened or endangered species and their habitats.

Discussion: The PA would not “provide protection for known populations” of T&E species since none exist presently on Fossil Creek above the proposed Wilderness barrier site. The PA would “aid recovery in (likely, but not known with certainty since reliable and complete fish surveys have not been completed until recently) areas of previous habitation, of federally listed threatened or endangered species and their habitats.”

FSM 2323.32(2) – Wildlife and fish managed programs shall be consistent with wilderness values.

Discussion: A more narrow focus on the “human actions” proposed in the PA would tend to favor a “no action” response to protect wilderness values; while a broader interpretation of human actions to include the full range of actions affecting the watershed over the past century (introduction of non-native fish to the system, diversion of the stream flow, elimination of travertine dams, etc.) would tend to favor PA implementation as a remedy “consistent with wilderness values” (see discussion of FSM 2323.31(1) above).

FSM 2323.32(3) – Discourage measures for direct control (other than normal harvest) of wildlife and fish populations.

Discussion: The PA implementation would be counter to 2323.32(3), however, FSM 2323.34f specifically allows for use of chemical treatments to prepare waters for reestablishment of indigenous and threatened and endangered species, or to correct undesirable conditions caused by human influences.

FSM 2323.32(4) – Manage wilderness to protect known populations of federally listed threatened or endangered species where necessary for their perpetuation and aid in their recovery in areas of previous habitation. When alternative areas outside of wilderness offer equal or better protection, take actions to recover threatened or endangered species outside of wilderness areas first.

Discussion: PA implementation would not “protect known populations of federally listed threatened or endangered species” (2323.32(4)) since no T&E populations are known to exist in Fossil Creek, but would “aid in their recovery in areas of (likely*) previous

habitation" (*according to the draft Fossil Creek EA, T&E species were likely to have occurred in Fossil Creek, based on remnant populations in the adjacent Verde River, and on anecdotal evidence, but no base line data exists to prove this).

FSM 2323.33a – Reintroductions. Reintroduce wildlife species only if the species was once indigenous to an area and was extirpated by human induced efforts. Reintroductions shall be made in a manner compatible with the wilderness environment. Motorized or mechanical transport may be permitted if it is impossible to do the approved reintroduction by nonmotorized methods.

Discussion: Assuming the prior existence of T&E species in Fossil Creek, the PA would be consistent with 2323.33a that directs reintroduction of wildlife species "only if the species was once indigenous to an area and was extirpated by human induced events".

FSM 2323.34 – Fisheries Management. Emphasize quality and naturalness in managing fisheries in wilderness.

FSM 2323.34a – Stocking Programs. In cooperation with the States, develop fish-stocking programs that meet wilderness management objectives.

FSM 2323.34b – Stocking Methods. Stocking shall normally be done by primitive means...landings are prohibited.

FSM 2323.34c – Stocking Policy. The order of preference for stocking fish is: a. Federally listed threatened or endangered, indigenous species. b. Indigenous species. c. Threatened or endangered species if species is likely to survive and spawn successfully. d. Native species if species is likely to survive and spawn successfully.

Policies and Guidelines for Fish and Wildlife Management in National Forest and Bureau of Land Management Wilderness (FS BLM & IAFWA—August 1986):

All management activities within wilderness are to be done without motorized equipment or landing of aircraft, unless truly necessary to administer the area. Wilderness managers must determine that such use is the minimum necessary to accomplish the task. In rare instances, facility development and habitat alteration may be necessary to alleviate adverse impacts caused by human activities on fish and wildlife. Actions necessary to protect or recover threatened or endangered species must be necessary for the perpetuation or recovery of the species and it must be demonstrated that the actions cannot be done more effectively outside wilderness. When areas outside of wilderness offer equal or better opportunities for species protection, take action there.

Matatzal Wilderness Implementation Plan:

III. C. 3.h. - Management of Wildlife, Fish, and Habitat (All Species not on Federal Threatened and Endangered List). Non-indigenous species entering the Wilderness (washing down of swimming upstream) is acceptable for those species which were

established before this area's designation as Wilderness. (Note – this part of the Wilderness was designated in 1984. Although one species of nonnative fish may have been present prior to 1984, the remaining three nonnative species have only recently invaded Fossil Creek).

III.C.4.d. – Management of Wildlife, Fish, and Habitat (All Species not on Federal Threatened and Endangered List). Where necessary to minimize their negative affects on the Wilderness resource, non-indigenous species now established in the Wilderness will be eliminated, with consultation and approval of AG&F Commission.

III.D. Threatened and Endangered Plant and Animal Species (Federally-listed).

Implementation Objective: To re-establish all Federally-listed Threatened and Endangered (T&E) species known to have inhabited the Mazatzal Wilderness; and to maintain viable populations of those species still found there.

III.D.3.d. Threatened and Endangered Plant and Animal Species (Federally-listed).

Native species may be re-established (if eliminated by human influence) following NEPA analysis and in a manner compatible with the Wilderness environment.