

Argenta Cooperative Monitoring Group
Issue Resolution Documentation – Section 13.1 of Settlement Agreement

1. Brief Description of Situation

The BLM has embarked on a process to analyze the second round of range infrastructure projects outside of the permit renewal process. There has been discussion of a third round of projects as well and the Tomeras have mentioned that they have a long list of projects that they plan to submit applications for.

Round 2 Lotic enclosures – Three projects are included in one environmental assessment; Fire Creek, North Fork Mill Creek and Ferris Creek. An IDT has been assigned, and the sage grouse HAF has been completed and provided to the State Office for review as required. SO will coordinate with FWS and NDOW in this review. The EA kick-off meeting has been held, and an aggressive time line for completion developed. Battle Mountain is sponsoring an EA training course, which includes the development of a draft EA for Round 2 projects will be the focus of the training, and it is possible this may result in an initial draft by mid-December. The EA draft is scheduled to be available for comments in mid-January, completion by mid-February, and CCP letter by end of February. By mid-March, the process should be complete, ahead of the 8-month time frame noted in the Settlement Agreement.

This violates NEPA in at least two ways:

BLM violates NEPA by segmenting analysis of connected actions.

As a condition of the settlement of the appeals challenging BLM's temporary closure of the Argenta allotment to protect sensitive resources during the ongoing extreme drought, BLM and the permittees committed to a timeline and dates certain for completing a rangeland health assessment, evaluation, and determination, and for analyzing the effects of issuing grazing permits for continued grazing on the Argenta allotment in an EA. BLM cannot analyze and implement livestock infrastructure projects outside of the permit renewal process because the need for and justification of the fencing and other livestock facilities are completely dependent on the final grazing decisions that result from the permit renewal EA.

Under NEPA, “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a). “Connected actions” must be analyzed together in the same NEPA document. 40 C.F.R. § 1508.25; Klamath-Siskiyou Wildlands Center, 387 F.3d at 998–99.

Actions are connected if they “automatically trigger other actions which may require environmental impact statements; cannot or will not proceed unless other actions are taken

previously or simultaneously; or are interdependent parts of a larger action and depend on the larger action for their justification.” Id. at § 1508.25(a)(1)(i–iii).

BLM cannot issue its Final Decision separately from the permit renewal process, while that process is ongoing, and is clearly foreseeable. Because the decision to construct livestock grazing infrastructure is connected with the decision to authorize grazing in a grazing permit, BLM violates NEPA by segmenting those actions.

BLM’s authorization of livestock grazing infrastructure is a prior commitment of public resources that prejudices or predetermines the outcome of the permit renewal EA in violation of NEPA.

Since the infrastructure being considered is intended to allow status quo grazing to persist despite the degraded condition of nearly all of the riparian areas on the allotment, and the lack of sufficient existing water sources, BLM’s approval of the new fencing and water sources would unlawfully commit public resources now in advance of its upcoming grazing decisions.

Approval of this livestock grazing infrastructure violates NEPA because an agency shall not take action concerning a proposal that “would limit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a)(2).

2. Issues among parties

The permittees, NRST, and BLM maintain that the only way to manage livestock and protect sensitive riparian areas is through building more range infrastructure but little has been done to address the overstocking of the range which has led to the currently degraded situation. Instead, the goal seems to be to maintain the status quo in regard to the number of AUMs permitted on the allotment and address issues by industrializing the public landscape even more with range infrastructure. This is a dramatic about-face from the conclusions it made last year, based on extensive data and declarations, that range improvements such as these would be ineffective at preventing degradation of sensitive resources during the continuing extreme drought. In fact, the Letter highlights that very poor ecological conditions are still present on the allotment. Particularly, along with its monitoring reports, BLM just last year provided written testimony from BLM staff that range projects such as these would be unfeasible, unjustified, and ineffective.

Furthermore, in the words of Judge Heffernan in his April 4, 2015 order upholding the closure of the Argenta Allotment, “[i]n plain terms, the economic interests of the Permittees are trumped by the multiple use interests of the public in protecting and preserving the designated publicly owned lands.”

IRC Input: The “round two” projects do not violate NEPA, because the existing Land Use Plan identified extensive range infrastructure needed to accomplish the livestock and wildlife objectives established in that currently-effective plan.

The currently-effective 1987 RMPA ROD contains objectives, among other things, including the following:

“A. RESOURCE DECISIONS

1. Livestock Grazing

a. Objectives

...

(8) In the short-term, improve and maintain in good or better condition, 64 miles of aquatic habitat and 768 acres of riparian habitat associated with the streams and an additional 1,067 acres of other meadows, springs, and aspen groves.

9) In the long-term, improve and maintain in good or better condition, a total of 84.8 miles of aquatic habitat and 1,018 acres of riparian habitat associated with the streams and an additional 1,414 acres of other meadows, springs, and aspen groves.”

See RMPA ROD, p. 9.

In order to effect the accomplishment of the above-stated objectives (among others), the currently-effective 1987 RMPA ROD decided to, among other things, **develop 150 new water sources and install 747 miles of fence** within the Resource Area. *See* RMPA ROD, p. 8.

The October 7, 1988 Shoshone-Eureka Rangeland Program Summary, which gives more specific direction from the 1987 RMPA ROD, provides Argenta Allotment-specific objectives and rangeland improvement projects to achieve such objectives, at 1988 RPS pages 64-65:

“Wildlife Mgmt. Objectives

...

In the long term, improve 10.5 miles of riparian/aquatic habitat to good condition on the following streams:

- 0.5 mile of Mill Creek (actually the North Fork Mill Creek, as depicted on maps);
- 2.5 miles of Trout Creek
- 4.5 miles of Crippen Creek;
- 1.0 mile of Rock (Crum) Creek;
- 2.0 miles of Indian Creek;

Including **126 acres of associated riparian habitat and 132 acres of other riparian habitat in the allotment.**”

...

Manage rangeland habitat to maintain or enhance sagegrouse strutting and nesting Areas, in conformance with other objectives of the RMP.” Bold emphasis added. *See* 1988 RPS, p. 64.

In order to accomplish these wildlife habitat objectives, the RPS provides for **12 spring developments, 1 well, 4 reservoirs, 20 miles of pipeline, 90 miles of fence, and 14 cattleguards on the Argenta Allotment.** *See* 1988 RPS, p. 65.

The existing Grazing Term Permits are issued under this same LUPA/RPS, and there is no rational basis to conclude that the BLM or Permittees must somehow “wait” for the Permit renewal process to tier to the existing Land Use Plan regarding NEPA analysis of the “round 2” projects. Such NEPA analysis has already occurred under the issuance of the RMP, RMPA, RPS (and now the “sage-grouse LUPA”).

Further as to NEPA, the Shoshone-Eureka RMP was amended by the “sage-grouse LUPA” (SG LUPA), on September 18, 2015. The SG LUPA provides the following guidance and Management Decisions (MDs):

- “Tall structures”, as a negative habitat feature, does not apply to fences. *See* SG LUPA, Table 2.2, pp. 2-4 and 2-5;
- **MD SSS 11:** Design and construct fences consistent with BLM H-1741-1, Fencing Standards Manual (BLM 1990), and apply the Sage-Grouse Fence Collision Risk Tool to Reduce Bird Strikes (NRCS 2012). Bring existing fencing into compliance as opportunities arise.” *See* SG LUPA p. 2-11.
- **MD LG 14:** Build or modify livestock enclosures so that they are large enough to provide hiding cover to GRSG and other wildlife and to reduce the possibility of wildlife collisions with fences (Christiansen 2009; Stevens 2011; NRCS 2012).” *See* SG LUPA, p. 2-26.
- **MD LG 23:** Fences shall not be constructed or reconstructed within 1.2 miles from the perimeter of occupied leks, unless the collision risk can be mitigated through design features or markings (e.g., mark, laydown fences, and design).” *See* SG LUPA, p. 2-27.
- **MD LG 5:** If results from a land health assessment indicate that GRSG habitat objectives (Table 2-2) are not met in SFA, PHMAs, or GHMAs and grazing is a causal factor, and until appropriate modifications (MD LG 1) are incorporated through the permit renewal process, implement management strategies that may include, but are not limited to, the following:
 - Consider any temporary projects that can mitigate livestock impacts (e.g., temporary fencing or temporary water hauling locations.”*See* SG LUPA, p. 2-25.

Therefore, the proposed “round 2” fencing projects are consistent with permanent structures proposed to be constructed under the provisions of the existing RMP, as Amended, including their construction before the conclusion of the Permit Renewal Process. In fact, they are a fraction of the 90 miles of fences already decided by the RMP/RPS.

3. Options for Resolution (Minimum of two)

The need for the proposed fencing stems from the fact that the permittees want to expend as little time and energy as possible controlling their cattle while they graze on public lands. As an alternative to fencing, BLM could require that the permittees keep their livestock out of the sensitive areas in need of recovery by staying with the herd, and using riders to keep them out of those areas. The areas proposed for fencing are in need of recovery because the permittees’ cattle

have previously been allowed to linger there unchecked for extended periods of time without any utilization standards.

The range infrastructure projects are “needed” to maintain the unsustainable livestock numbers that BLM has authorized. The area encompassing the allotment is currently in a state of extreme drought. Even absent drought, there is limited natural water on the allotment, especially in the arid lower elevations. Further, short-sighted grazing practices have reduced the capacity of wet meadows to store water, resulting in reduced flows. As an alternative to building range infrastructure, BLM could require the permittees to reduce their livestock numbers to levels that existing water sources can accommodate.

Abandon the plans to build the range infrastructure.

Postpone the analysis of the range infrastructure to the permit renewal process.

IRC Input (ignoring the WWP subjective rationale stated in the first 2 paragraphs): Construct the projects, consistent with the identified objectives and infrastructure identified by the 1987/1988 LUP/RPS, as Amended, as discussed under “Issues Among Parties”. The identified range improvements are miniscule as compared to the 90 miles of internal fencing already decided upon and assessed by the 1987 LUPA and 1988 RPS; the 2015 SG LUPA does not otherwise prohibit such construction, and in fact sanctions such construction.

4. NRST Recommendation to Field Manager –

The dispute resolution submitted by WWP is peculiar in the sense that WWP clearly recognizes degraded riparian conditions (as do all parties in this process) and articulates an interest in seeing riparian conditions improve in the Argenta allotment (as do all parties); yet WWP appears to object to the suggested solutions for improving riparian conditions and offers two options for resolution that only delay efforts to improve riparian conditions.

NRST recommendation: The National Riparian Service Team cares deeply about the condition of riparian areas and is committed to exploring all viable solutions to improve poorly functioning riparian areas. Where WWP (and IRC) raise largely legal questions and suggests legal-like approaches, those matters should be resolved through normal administrative processes. Furthermore, NRST does not necessarily endorse or agree with these legal interpretations. Therefore, the NRST recommends that the BM District should handle the legal issues raised by WWP (and IRC) through standard legal procedures should the matters reappear in stay petitions, appeals, or other forms of litigation. For those suggested options for resolution that are not legally related matters, we offer these recommendations.

WWP’s two non-legal options for resolution include:

1. [Abandon the plans to build range infrastructure.](#)

NRST recommendation: A failure to install appropriate range infrastructure over the past few decades in the Argenta allotment has been one of the reasons the riparian areas are in the condition they are. Unfettered access to water and failure to provide adequate water supply in the form of water tanks and troughs means livestock are forced to walk to and through springs, seeps, and creeks to drink. Further delay in installation of appropriate range infrastructure will only delay recovery and could exacerbate degraded conditions. The first goal of the Settlement Agreement is stated in Section 2.a, which reads: “Protect important riparian-wetland sites.” Building appropriate range infrastructure is consistent with the stated goals of the settlement agreement and provides a reliable technique to restore proper riparian functions, which benefit many species, including sage-grouse.

2. Postpone the analysis of range infrastructure until the permit renewal process.

NRST recommendation: Postponement is unnecessary and would delay riparian recovery where infrastructure is proposed. The NRST has noted since its first technical review in March 2015 that some fencing would be needed, especially in high value riparian sites that are important sources of water production and storage. Fencing is a tool that can greatly accelerate the rate of recovery of riparian resources and the restoration of proper riparian functions.

The matters listed above constitute the sum of NRST’s recommendations. WWP’s contention that these are “connected actions,” or “prejudices or predetermines the outcome of the permit renewal EA,” are legal questions that fall outside the dispute-resolution process and were addressed in BLM’s response to WWP’s petition for stay of round one projects.

Finally, NRST would like to address some factual inaccuracies in WWP’s dispute resolution to set the record straight. For example, in Section 2 above, WWP contends:

“This is a dramatic about-face from the conclusions it [?] made last year, based on extensive data and declarations, that range improvements such as these would be ineffective at preventing degradation of sensitive resources during the continuing extreme drought.”

The reference to “it” in the cited sentence is ambiguous because the paragraph begins by lumping permittees, NRST, and the Battle Mountain BLM as the subject. For the record, NRST was not involved in the declaration cited above, so it cannot speak directly to the details of that case. However, a distinction should be made between range improvements that are intended to address riparian degradation that has resulted from chronic management practices, which is the case here, and riparian degradation that might have arisen from continuing extreme drought. It is possible that resource degradation that is attributed to extreme drought could ameliorate with the end of drought and the resumption of average or above average precipitation, which might be what the BLM Battle Mountain office was referring to. Where riparian degradation has resulted from other factors than drought, (which is the case with the riparian areas identified for

protection by these proposed range improvements), it would be inappropriate to expect recovery to occur with a cessation in drought conditions.

Also in Section 2, WWP contends:

“Since the infrastructure being considered is intended to allow status quo grazing to persist despite the degraded condition of nearly all of the riparian areas on the allotment...”

This statement mischaracterizes the intention of the range projects, which are an integral part of the techniques suggested for improving resource conditions in the Argenta allotment. The proposed infrastructure is intended to provide for an accelerated rate of riparian recovery, which should result in restoration of proper riparian function. Riparian function is necessary to support other range and wildlife resources, including sage-grouse. In addition, the proposed range infrastructure is intended to improve the success of newly implemented stockmanship, low-stress livestock handling, the use of mineral supplements and salt blocks, and the distribution of temporary water hauls to relieve livestock pressure on riparian resources. But implementing changes in grazing management requires time, resources, and effort. Measurable progress of newly implemented stockmanship practices cannot be fully realized in half a grazing season; and the installation of essential range improvements, most notable off-stream water and selective use of fence will complement the new suite of stockmanship practices. Fencing is not a universal panacea, but is appropriate where water is a limiting factor and where topography strongly affects the distribution of livestock.

Likewise in Section 2 above, WWP contends:

“Instead, the goal seems to be to maintain the status quo in regard to the number of AUMs permitted on the allotment and address issues by industrializing the public landscape even more with range infrastructure.”

To the contrary, the NRST has gone on record (see November 17-18, 2015, meeting notes, p. 9) that the status quo is not working and is unacceptable. In those meeting notes, NRST made several recommendations besides installation of range improvements to address riparian conditions, including:

- Need to change emphasis in management practices based on short-term monitoring to those based on long-term monitoring of resource conditions and sound management objectives...
- Need a change in grazing practices.
 - “Stockmanship and use of supplements need adjustments or fine tuning (learn from 2015; apply in 2016)...
 - Change in standard grazing management (time, timing, frequency, and intensity)...
- As understanding of resource conditions in Argenta improves, permittees should think about practices they can change that can improve conditions. It is probably better for permittees to determine what they can change and how to change than to try to adjust to changes imposed upon them by other parties...

- A reduction in numbers [i.e. AUMs] may not equate to a reduction in profitability.
- Considerations should be given to practices that optimize an operation, not just to maximization of gross proceeds.”

In addition, NRST would like to address a common misconception about stocking rates and riparian conditions. WWP contends (p. 2 above):

“The permittees, NRST, and BLM maintain that the only way to manage livestock and protect sensitive riparian areas is through building more range infrastructure but little has been done to address the overstocking of the range which has led to the currently degraded situation.”

First, it is inaccurate to suggest that NRST believes range infrastructure is the “**only**” way to manage livestock. NRST described in the November 17-18 CMG meeting (see meeting notes) several other practices, besides range infrastructure, to manage livestock and to improve resource conditions and riparian function (see list above). NRST has also authored technical references describing a variety of other ways to manage livestock and to protect sensitive riparian areas (e.g., Wyman et al. 2006). NRST has a 20-year history of protecting riparian areas through means other than range infrastructure. Furthermore, NRST is the foremost leader in conducting training workshops directed specifically at a number of management techniques to protect sensitive riparian areas.

Second, the Round 2 projects aren’t about building “**more**” range infrastructure as there is almost no infrastructure to speak of on this 330,000-acre allotment. There is not even a complete boundary fence around the allotment to prevent uncontrolled drift of livestock from adjacent allotments or external private lands onto the Argenta allotment. A grazing allotment cannot function properly while minimizing unintended impacts to valuable natural resources without some appropriate infrastructure to control the distribution and handling of livestock. And many range improvements are for the explicit benefit of natural resources, not for the convenience of the permittee. A water tank located on a resilient upland site protects riparian areas by providing a clean, desirable source of drinking water and discouraging concentration of livestock in riparian areas.

Third, WWP wrongly assumes that degradation of riparian areas results solely from overstocking of the range. In some situations, stocking rates could be reduced by 50%, 90% or 95% without improving the impacts to riparian areas. Riparian areas require special practices that are independent of stocking rates. The NRST has authored technical references describing a variety of these special practices (e.g., Wyman et al. 2006). Degradation to riparian areas is not always evidence of overstocking of the range, but may instead be a function of the time, timing, frequency and duration of grazing or the lack of adequate range infrastructure.

Citation.

Wyman, S., D. Bailey, M. Borman, S. Cote, J. Eisner, W. Elmore, B. Leinard, S. Leonard, F. Reed, S. Swanson, L. Van Riper, T. Westfall, R. Wiley, and A. Winward. 2006. Riparian Area Management: Grazing Management Processes and Strategies for Riparian-Wetland Areas. Technical Reference 1737-20. BLM/ST/ST-06/002+1737. U.S. Department of the Interior, Bureau of Land Management, National Science and Technology Center, Denver, CO. 105 pp.

5. Field Manager – Acceptance with of NRST recommendation (yes X no _____).

Date Received 12/23/2015

Date of Decision 1/8/2016 **Signature of FM** Jon D. Shene

Comments:

Based upon my review of the dispute and after consulting with my staff and BLM's counsel I concur with NRST's recommendations. Additionally, with respect to WWP's claims that a decision on the Round 2 Lotic exclusions will violate NEPA, BLM and WWP disagree on this point. BLM's responses to WWP's legal arguments are presented in BLM's November 2, 2015, response to WWP's petition for stay from the September 2, 2015 decision authorizing a small number of temporary water hauls and riparian exclusions. Further legal disagreements between WWP and BLM on this point are most appropriately addressed through an administrative appeal process, given the parties' differing perspectives on this.

With respect to WWP's claims that the sole purpose of the exclusions is to accommodate an unsustainable level of cattle grazing as a substitute for proper range management, BLM disagrees with this assessment. BLM agrees with NRST that riparian impacts are not only caused by cattle numbers, and that some targeted exclusions are appropriate to protect certain high-priority riparian areas that have been degraded as a result as historical grazing practices, as well as by grazing during the ongoing drought conditions, in order to jump start the recovery of these areas. The exclusions that have been identified as part of "Round 2" would allow for recovery of high priority riparian areas.

In addition to BLM agreeing with NRST's recommendations, I would like to emphasize that BLM does not agree with the legal interpretation brought forth in IRC's response to this dispute resolution.

6. District Manager – Acceptance of NRST recommendation (yes ____ no ____)

Date Received _____

Date of Decision _____ **Signature of DM** _____

Comments:

7. State Director – Final Determination

Acceptance of NRST recommendation (yes ____ no ____)

Date Received _____

Date of Decision _____ **Signature of SD** _____

Comments:

Instructions/intent for Issue Resolution Document

Purpose of Document – This tool is intended to provide a record of how decisions are made on various issues that might arise within the CMG, including how and at what level those issues are resolved. This tool will provide transparency to options and possible consequences, including the rationales for which choices are made, and specific record of the timing and outcomes of issue resolution. It will also establish a record and help create consistency in the face of changing players over time. Close communications and an environment for resolving issues at the lowest level is encouraged. Minor issues/disagreements that are easily handled in the normal team situation will not be documented in this manner; this is intended for substantive issues that affect intended outcomes under the settlement agreement.

1. *Document the situation surrounding CMG disagreement on a given issue, including if possible, the location, essential time frames, background (including reference to Settlement Agreement section if applicable), and potential scope of consequences.*

2. *Who are the parties in disagreement; what are the differing positions and the basis for each differing side?*

3. *At least two options for resolution must be described, even if one is “no action”. The CMG will be expected to problem solve and raise other possible solutions to the issue to assist the parties in disagreement. Each option will be briefly documented.*

4. *Following the problem solving activity (where needed), the NRST will select, document and provide rationale for a recommendation to the Field Manager.*

5. *If accepted, this will end the issue resolution process; if not, the NRST recommendation will be forwarded to the DM promptly, accompanied by written rationale by the FM for not agreeing to the NRST recommendation.*

6. *The DM will review the recommendation by the NRST along with the rationale statement by the FM for his/her disagreement. The DM will accept or reject the NRST recommendation; again, discussion between NRST and DM is strongly encouraged prior to determination. If the DM disagrees with the NRST, rationale should be documented and provided to the State Director along with resolution deemed more suitable by the DM.*

7. *The State Director will review the recommendation by the NRST and information in support of the differing position of the DM, and promptly render a final determination.*

Other – At each step in the process, the parties will be provided electronic copies of the various documents and determinations. The BLM Battle Mountain District Office will maintain the official record of transactions for the issue resolution process.