

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

CENTER FOR BIOLOGICAL  
DIVERSITY,

Plaintiff,

vs.

HEATHER PROVENCIO, et al.,

Defendants.

No. CV 10-330 TUC AWT

**ORDER RE: CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

---

Center for Biological Diversity (“CBD”) challenges the decision made by the U.S. Forest Service (“Forest Service”), after consultation with the U.S. Fish and Wildlife Service (“FWS”) (together, “Defendants”), approving a new, ten-year livestock grazing permit for the Fossil Creek Range allotment (the “Allotment”) in the Coconino National Forest in Arizona. CBD brings claims under the National Forest Management Act (“NFMA”), the Endangered Species Act (“ESA”), and the National Environmental Policy Act (“NEPA”). The parties have cross-moved for summary judgment. For the reasons that follow, each party’s motion is granted in part and denied in part.

**I. Background and Procedural History**

**A. Management of National Forest System Lands**

1           The Forest Service is responsible for administering the lands of the National Forest  
2 System, of which the Coconino National Forest is a part. *See* 36 C.F.R. § 200.1 (2011).  
3 In so doing, it “is required by statute and regulation to safeguard the continued viability of  
4 wildlife in the Forest.” *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 961  
5 (9th Cir. 2002). In carrying out these responsibilities, the Forest Service must comply  
6 with the mandates of the NFMA, *id.*, which, *inter alia*, requires the Forest Service to  
7 develop a land and resource management plan (forest plan) for each forest that it  
8 manages. *See* 16 U.S.C. § 1604(a) (2010) (“[T]he Secretary of Agriculture shall develop,  
9 maintain, and, as appropriate, revise land and resource management plans for units of the  
10 National Forest System, coordinated with the land and resource management planning  
11 processes of State and local governments and other Federal agencies.”).

12           Each forest plan must comply with substantive NFMA requirements. *See, e.g., id.*  
13 § 1604(g)(3) (listing a number of goals, including to “insure consideration of the  
14 economic and environmental aspects of various systems of renewable resource  
15 management[;] . . . to provide for outdoor recreation (including wilderness), range,  
16 timber, watershed, wildlife, and fish[;] [and to] provide for diversity of plant and animal  
17 communities based on the suitability and capability of the specific land area in order to  
18 meet overall multiple-use objectives”). Moreover, each site-specific project that the  
19 agency undertakes – including an authorization to use land for a given purpose – “must be  
20 consistent with the applicable plan.” 36 C.F.R. § 219.19 (2011); *see* 16 U.S.C. § 1604(i)  
21 (“Resource plans and permits, contracts, and other instruments for the use and occupancy  
22 of National Forest System lands shall be consistent with the land management plans.”).  
23 To ensure compliance with both the plan and the NFMA, the Forest Service “must  
24 conduct an analysis of each ‘site specific’ action . . . .” *Native Ecosys. Council v. Tidwell*,  
25 599 F.3d 926, 932 (9th Cir. 2010) (internal quotation marks omitted).

26           Among the types of site-specific actions that the Forest Service carries out on  
27 National Forest System lands is the authorization of livestock grazing, pursuant to the  
28

1 Federal Land Policy and Management Act of 1976, on designated areas of land called  
2 “allotments.” *Buckingham v. Sec’y U.S. Dep’t of Agric.*, 603 F.3d 1073, 1076-77 (9th  
3 Cir. 2010); *see* 36 C.F.R. § 222.1(a) (2011) (“[The] Forest Service shall develop,  
4 administer and protect the range resources and permit and regulate the grazing use of all  
5 kinds and classes of livestock on all National Forest System lands . . .”). The agency  
6 authorizes grazing by issuing term grazing permits, developing allotment management  
7 plans (“AMPs”), and issuing annual operating plans (“AOPs”) or instructions (“AOIs”).  
8 *See Buckingham*, 603 F.3d at 1077. Permits “authoriz[e] livestock to use National Forest  
9 System or other lands under Forest Service control for the purpose of livestock  
10 production,” 36 C.F.R. § 222.1(b)(5); typically specify “(1) the number, (2) kind, (3) and  
11 class of livestock, (4) the allotment to be grazed, and (5) the period of use,” *Or. Natural*  
12 *Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 980 (9th Cir. 2006); and are normally  
13 issued for ten-year terms, *see* 43 U.S.C. § 1752(a) (2007). AMPs “specif[y] the program  
14 of action designated to reach a given set of objectives” as to a specific allotment,  
15 including “the manner in and extent to which livestock operations will be conducted in  
16 order to meet the multiple-use, sustained yield, economic, and other needs and objectives  
17 as determined for the lands involved.” 36 C.F.R. § 222.1(b)(2). AMPs are generally  
18 incorporated into the applicable grazing permit. *Buckingham*, 603 F.3d at 1077. AOPs or  
19 AOIs “annually convey[] [the AMP’s] more long-term directives into instructions to the  
20 permittee for annual operations.” *Or. Natural Desert Ass’n*, 465 F.3d at 980. “Because an  
21 AOI is issued annually, it is responsive to conditions that the Forest Service could not or  
22 may not have anticipated and planned for in the AMP or grazing permit . . .” *Id.* at  
23 980-81. The Forest Service typically incorporates the AOP or AOI, like an AMP, into the  
24 grazing permit, which then “governs the permit holder’s grazing operations for the next  
25 year.” *Id.*

## 26 **B. Authorization Decision and NEPA Process**

27 At issue in this case are the agency actions that resulted in the reauthorization of  
28

1 livestock grazing on the Allotment, a 42,000-acre block of land in the Red Rock Ranger  
2 District of the Coconino National Forest. The Allotment is home to a number of wildlife  
3 species, including the Chiricahua leopard frog and the Mexican spotted owl, both  
4 threatened species protected under the ESA. Grazing on the Allotment has been regulated  
5 since 1991 using an “intensive deferred-rest rotation management strategy.” AR 12207.<sup>1</sup>  
6 Prior to the reauthorization decision at issue in this lawsuit, permitted grazing use on the  
7 Allotment was equal to 5,796 animal unit months (“AUMs”).<sup>2</sup> But the agency has not  
8 always authorized annual use at that level. Since the onset of drought conditions in 2001,  
9 the Forest Service began to impose substantial limitations on actual use, and even closed  
10 the Allotment to livestock from June 2002 to February 2003, and from October 2004 to  
11 October 2006. AR 12207.

---

22  
23 <sup>1</sup> The Administrative Record consists of documents filed by the Forest Service  
24 (cited as AR \_\_\_\_ ) and by FWS (cited as AR L \_\_\_\_ and AR M \_\_\_\_ ).

25 <sup>2</sup> An Animal Unit is considered to be one mature cow of about 1,000 pounds,  
26 consuming about 26 pounds of forage per day. An AUM is the amount of forage required  
27 by one Animal Unit for a standardized period of 30 Animal-Unit days—approximately 800  
28 pounds of forage per AUM. Defs.’ Stmt. of Facts, Doc. 23 at 3 n.1; see AR 3758, 3911-13.

1 In late 2006, pursuant to the Burns Amendment of 1995,<sup>3</sup> the Forest Service  
2 embarked on a NEPA review of its planned reauthorization of grazing on the Allotment.  
3 AR 1111. NEPA, which is “our basic national charter for protection of the environment,”  
4 40 C.F.R. § 1500.1(a) (2011), requires federal agencies to “take seriously the potential  
5 environmental consequences of a proposed action” by taking a “hard look” at the  
6 ecological impacts of that action. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402  
7 F.3d 846, 864 (9th Cir. 2005); *see also* 40 C.F.R. § 1500.1(a). Specifically, the statute  
8 requires that agencies prepare an Environmental Impact Statement (“EIS”) before  
9 undertaking “major Federal actions significantly affecting the quality of the human  
10 environment.” 42 U.S.C. § 4332(2)(C) (2003). Under NEPA’s implementing  
11 regulations, an agency prepares an Environmental Assessment (“EA”) in order to  
12 determine whether to prepare an EIS or, instead, issue a Finding Of No Significant Impact  
13 (“FONSI”), the latter of which excuses the agency from its obligation to prepare an EIS.  
14 *See City of Las Vegas v. FAA*, 570 F.3d 1109, 1115 (9th Cir. 2009).

15 In March 2007, the Forest Service issued a “scoping notice,” initiating the NEPA  
16 review process. AR 1131. The notice acknowledged that a change in management of the  
17 Allotment was needed “as the allotment is not meeting or moving toward desired  
18

---

19  
20 <sup>3</sup> The Burns Amendment provides in relevant part that:

21 [e]ach National Forest System unit shall establish and adhere to a schedule for  
22 the completion of National Environmental Policy Act of 1969 (42 U.S.C. 4321  
23 *et seq.*) analysis and decisions on all allotments within the National Forest  
24 System unit for which NEPA analysis is needed. The schedule shall provide  
25 that not more than 20 percent of the allotments shall undergo NEPA analysis  
26 and decisions through fiscal year 1996. . . . Upon completion of the scheduled  
27 NEPA analysis and decision for the allotment, the terms and conditions of  
28 existing grazing permits may be modified or re-issued, if necessary to conform  
to such NEPA analysis.

Rescissions Act of 1995, Pub. L. No. 104-19, 109 Stat. 194 (July 27, 1995).

1 conditions in an acceptable timeframe. Specific desired conditions that are not being met  
2 include: soil condition, vegetation condition, and riparian area condition.” AR 1131.  
3 Therefore, the Forest Service proposed new measures “to authorize livestock grazing in a  
4 manner that maintains and/or moves the area toward Forest Plan objectives and desired  
5 conditions” (“Proposed Action”). AR 1131. Among other things, the Proposed Action  
6 would: (1) continue to allow permitted yearlong livestock grazing at a maximum of  
7 5,800 AUMs; (2) authorize actual livestock grazing at a “lower level until such time as  
8 conditions improve”; (3) employ a management guideline of “conservative use (30-40%  
9 forage utilization as measured at the end of the growing season)” to “maintain or improve  
10 rangeland vegetation and long term soil productivity”; (4) manage grazing intensity (the  
11 “amount of herbage removed through grazing or trampling during the grazing period”) at  
12 30-40% or 40-50% levels, depending on the season; (5) manage the grazing period within  
13 each pasture based on weather and growing conditions; and (6) determine annual  
14 authorized livestock numbers based on existing conditions. AR 1131-32. The Proposed  
15 Action would also require several improvements, including building fences at five stock  
16 tanks to improve wildlife habitat, and monitoring to evaluate the effectiveness of  
17 management in achieving the desired objectives on the Allotment. AR 1132.

18 In March 2008, the Forest Service completed a draft EA on the Proposed Action.  
19 CBD, among others, submitted comments on the draft EA voicing several concerns. In  
20 April 2009, the agency issued a final EA, which adopted the grazing scheme first set forth  
21 in the Forest Service’s Proposed Action, and soon thereafter it issued a FONSI approving  
22 the grazing decision.

### 23 C. ESA Process

24 Meanwhile in 2008, the Forest Service undertook an assessment of the Proposed  
25 Action in light of the ESA. The ESA is designed to “to provide a means whereby the  
26 ecosystems upon which endangered species and threatened species depend may be  
27 conserved” and “to provide a program for the conservation of such endangered species  
28

1 and threatened species.” 16 U.S.C. § 1531(b) (2010). It provides for the listing of  
2 “threatened” species – species that are “likely to become an endangered species within  
3 the foreseeable future throughout all or a significant portion of [their] range,” *id.* §§  
4 1532(20), 1533(a)(1) – and the designation of “critical habitat” for those species, *id.* §  
5 1533(a)(3)(A).<sup>4</sup>

6 Section 7(a)(2) of the ESA requires each federal agency to “insure that any action  
7 authorized, funded, or carried out by such agency . . . is not likely to jeopardize the  
8 continued existence of any endangered species or threatened species or result in the  
9 destruction or adverse modification” of the designated critical habitat of the listed species.  
10 16 U.S.C. § 1536(a)(2). To assist action agencies in complying with this provision, § 7  
11 and its implementing regulations set out a detailed consultation process for determining  
12 the impacts of the proposed agency action. *Id.*; 50 C.F.R. §§ 402.1 *et seq.* (2010). First,  
13 if listed species “may be present” in the area of a proposed agency action, the action  
14 agency must prepare a biological assessment (“BA”) evaluating (1) the potential effects  
15 of the action on listed species and designated critical habitat, and (2) whether any such  
16 species or habitat are likely to be adversely affected. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §  
17 402.12(a). If, after preparing the BA, the action agency determines “that the proposed  
18 action is not likely to adversely affect any listed species or critical habitat,” it need not  
19 initiate formal consultation with the consulting agency. 50 C.F.R. § 402.14(b)(1).  
20 Otherwise, it must submit a written request for formal consultation. The consulting  
21 agency must then review all relevant information, evaluate the current status of the listed  
22 species or critical habitat, evaluate the effects of the action and cumulative effects on the

---

23  
24 <sup>4</sup> A species’ critical habitat includes those areas whose physical or biological  
25 features make it “essential to the conservation of the species” and “may require special  
26 management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i). “Conservation” is  
27 defined as “the use of all methods and procedures which are necessary to bring any  
28 endangered species . . . to the point at which the measures provided pursuant to [the ESA]  
are no longer necessary.” 16 U.S.C. § 1532(3).

1 listed species or critical habitat, and issue a Biological Opinion (“BiOp”) assessing  
2 whether the proposed action is “likely to jeopardize the continued existence of a listed  
3 species or result in the destruction or adverse modification of critical habitat.” *Id.* §  
4 402.14(g), (h)(3), (l)(1). The BiOp must include “a summary of the information on which  
5 the opinion is based” and “a detailed discussion of the effects of the action on listed  
6 species or critical habitat.” *Id.* § 402.14(h)(1), (2). And, if “take” of a listed species “may  
7 occur,” the BiOp must also include an Incidental Take Statement (“ITS”). *Id.* §  
8 402.14(g)(7). Both the action agency and the consulting agency must use the “best  
9 scientific and commercial data available” during the consultation process and in drafting  
10 the BiOp. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d), (g)(8).<sup>5</sup>

11 In July 2008, the Forest Service prepared a BA examining the impacts of the  
12 Forest Service’s grazing scheme on endangered and threatened species on the Allotment.  
13 The BA concluded that the grazing scheme “may adversely affect” the Chiricahua leopard  
14 frog and certain other species, and “may affect but is not likely to adversely affect” the  
15 Mexican spotted owl, among other species. AR 7146-7230. The Forest Service  
16 subsequently submitted the BA to FWS for formal consultation. In February 2009, FWS  
17 issued a BiOp which concluded that the proposed grazing scheme was not likely to  
18 jeopardize the continued existence of the Chiricahua leopard frog or the other species  
19 discussed in the BA, and which concurred with the BA’s other determinations, including

---

22 <sup>5</sup> In addition to the procedural requirements of Section 7 (*i.e.*, the consultation  
23 and BiOp process), an action agency has an independent and continuing duty to avoid taking  
24 action that would jeopardize the continued existence of a listed species or adversely modify  
25 the critical habitat of such a species. 16 U.S.C. § 1536(a)(2); *Pyramid Lake Paiute Tribe of*  
26 *Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (an action agency “may not  
27 rely solely on a FWS [BiOp] to establish conclusively its compliance with its *substantive* obligations  
28 under section 7(a)(2)”). An action agency cannot abrogate its duty to ensure that its actions comply  
with Section 7; it has an independent duty to ensure that its reliance on a BiOp is not arbitrary or  
capricious. *Id.*



1 its “may affect, not likely to adversely affect” determinations for the Mexican spotted owl  
2 and its critical habitat.

### 3 **D. Subsequent History**

4 After the issuance of the FONSI, CBD administratively appealed the Forest  
5 Service’s decision reauthorizing livestock grazing on the Allotment. AR 12539-78. That  
6 appeal was denied. Several months later, CBD sent a Notice of Intent to Sue for  
7 Violations of the Endangered Species Act Regarding the Chiricahua Leopard Frog and  
8 Mexican Spotted Owl on the Fossil Creek Range Allotment. Following that notice, FWS  
9 issued a Clarified BiOp that replaced the earlier BiOp. The Clarified BioP was nearly  
10 indistinguishable from the earlier BiOp, with the exception of the ITS contained in the  
11 opinion. FWS says that it altered the language of the ITS to clarify the circumstances in  
12 which the authorized level of incidental take of leopard frogs from the proposed action  
13 would be exceeded.<sup>6</sup>

14 This lawsuit followed.

## 15 **II. Legal Standard**

16 Summary judgment is an appropriate vehicle for resolving challenges to agency actions  
17 where the court’s review is based primarily on an administrative record. *Ecology Ctr., Inc. v.*  
18 *Austin*, 430 F.3d 1057, 1062 (9th Cir. 2005), *overruled on other grounds by Lands Council v.*  
19 *McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc). The court’s role is not to resolve facts – that is  
20 the job of the agency, as factfinder – but rather to “determine whether or not as a matter of law  
21 the evidence in the administrative record permitted the agency to make the decision it did.”  
22 *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Plaintiff’s challenges to the  
23 agency actions in this case are governed by the Administrative Procedure Act, which means that  
24 the actions may be overturned only if found to be “arbitrary, capricious, an abuse of discretion,  
25 or otherwise not in accordance with law.” *Native Ecosys. Council v. Dombeck*, 304 F.3d 886,

---

26  
27 <sup>6</sup> References to the “BiOp” hereinafter refer to the Clarified BiOp.

1 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)) (reviewing decisions under NFMA, NEPA,  
2 and the ESA according to this standard).

3 The court cannot substitute its own judgment for that of the agency. *Ocean Advocates*,  
4 402 F.3d at 858-59. Instead, it evaluates “whether the [agency’s] decision was based on a  
5 consideration of the relevant factors,” “whether there has been a clear error of judgment,” and  
6 “whether the [agency] articulated a rational connection between the facts found and the choice  
7 made.” *Id.* at 859 (internal quotation marks and citations omitted). The court may not attempt to  
8 make up for any deficiencies in the agency’s decision by “supply[ing] a reasoned basis for the  
9 agency’s action that the agency itself has not given.” *Motor Vehicle Mfrs. Ass’n v. State Farm*  
10 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). The agency’s  
11 action must be upheld, if at all, on the rationale employed by the agency. *Id.* at 50.

### 12 **III. Exhaustion of Remedies**

13 Defendants argue that several of CBD’s claims against the Forest Service—three  
14 of its NFMA claims and two of its NEPA claims – were not properly exhausted in its  
15 administrative appeal. Plaintiffs must “exhaust all administrative appeal procedures”  
16 before bringing suit against the Forest Service. 7 U.S.C. § 6912(e) (2011);<sup>7</sup> *Save the*  
17 *Peaks Coalition v. U.S. Forest Serv.*, 2010 WL 4961417, at \*9 (D. Ariz. Dec. 1, 2010)  
18 (stating that under Forest Service regulations, a plaintiff “must exhaust all administrative  
19 appeal procedures, including submitting substantive comments and an appeal of the

---

20  
21 <sup>7</sup> Section 6912(e) provides that,

22 [n]otwithstanding any other provision of law, a person shall exhaust all  
23 administrative appeal procedures established by the Secretary or required by  
24 law before the person may bring an action in a court of competent jurisdiction  
25 against . . . an agency, office, officer, or employee of the Department [of  
Agriculture].

26 7 U.S.C. § 6912(e). The Forest Service is an agency within the Department of Agriculture.  
27 See <http://www.usa.gov/Agencies/Federal/Executive/Agriculture.shtml> (last visited Jan. 15,  
28 2012).

1 agency action”). This rule “allows the Forest Service to give the issue[s] meaningful  
2 consideration and to have the first opportunity to resolve concerns.” *Save the Peaks*,  
3 2010 WL 4961417, at \*9. Although this is not a jurisdictional requirement, *McBride*  
4 *Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 980 (9th Cir. 2002), “[g]iven the  
5 importance of administrative review prior to judicial intervention, . . . a court should  
6 require compliance with” it, except in certain circumstances, not present here, involving a  
7 constitutional claim. *Id.*

8 Administrative remedies are exhausted “if the appeal, taken as a whole, provided  
9 sufficient notice to the Forest Service to afford it the opportunity to rectify the violations  
10 that the plaintiffs alleged.” *Dombeck*, 304 F.3d at 899. The parties dispute the meaning of  
11 this rule; CBD argues that comments made by it or other parties outside the context of  
12 CBD’s administrative appeal – even though its appeal does not expressly incorporate  
13 those comments – can provide the notice that, according to *Dombeck*, is required. CBD’s  
14 position, however, is not consistent with the exhaustion statute that specifically governs  
15 actions against the Forest Service. That statute requires that “*all* administrative appeal  
16 procedures” be exhausted. 7 U.S.C. § 6912(e) (emphasis added). Participation in the  
17 notice-and-comment process is not part of the “administrative appeal procedures”  
18 described in Section 6912(e). Indeed, the regulations concerning “Notice, Comment, and  
19 Appeal Procedures for National Forest System Projects and Activities” clearly distinguish  
20 the notice-and-comment process from administrative appeal procedures. *See* 36 C.F.R. §  
21 215.1(a) (2011) (in addition to notice-and-comment process, providing for “an appeal  
22 process [that] identifies the decisions that may be appealed, who may appeal those  
23 decisions, the responsibilities of the participants in an appeal, and the procedures that  
24 apply for the prompt disposition of the appeal”).<sup>8</sup>

---

25  
26 <sup>8</sup> *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006), which  
27 relied on comment letters as evidence of exhaustion, is not to the contrary. *Great Basin* did  
28 not concern a challenge to the Forest Service and therefore did not implicate the exhaustion

1           There is no “bright-line” test in this circuit for determining whether a party’s  
2 administrative appeal provides sufficient notice to the Forest Service to exhaust a claim;  
3 the determination must be made on a “case-by-case basis.” *Idaho Sporting*, 305 F.3d at  
4 965. Although “claimants who bring administrative appeals may try to resolve their  
5 difficulties by alerting the decision maker to the problem in general terms, rather than  
6 using precise legal formulations, claimants are still obligated to raise their problem with  
7 sufficient clarity to allow the decision maker to understand and rule on the issue raised.”  
8 *Buckingham*, 603 F.3d at 1080 (internal quotation marks and alterations omitted); *see*  
9 *Dombeck*, 304 F.3d at 889 (claims raised in the administrative appeal and in the federal  
10 complaint must be “so similar that the district court can ascertain that the agency was on  
11 notice of, and had an opportunity to consider and decide, the same claims now raised in  
12 federal court”).

13           **A.       Unexhausted NFMA Claims**

14           CBD’s NFMA claims turn on whether the Forest Service’s site-specific action—its  
15 reauthorization of grazing on the Allotment—was consistent with the forest plan it has  
16

---

17 statute applicable to actions against that agency. Other Ninth Circuit cases that *do* implicate  
18 this statute implicitly assume that administrative exhaustion of a claim to the Forest Service  
19 requires that the issue be raised in an administrative appeal. *See McNair*, 629 F.3d at 1076,  
20 1078, 1079 n.4 (one issue was exhausted because it had been raised in plaintiff’s  
21 “administrative challenge”; others were not because they was not raised in the  
22 “administrative appeal”); *Dombeck*, 304 F.3d at 899 (exhaustion requires that the “*appeal*,  
23 taken as a whole, provided sufficient notice” (emphasis added)); *Navajo Nation v. U.S.*  
24 *Forest Serv.*, 479 F.3d 1024, 1057-58 (9th Cir. 2007), *overruled on other grounds by* 535  
25 F.3d 1058 (9th Cir. 2008) (en banc) (reasoning that because comments raising the issue were  
26 “explicitly incorporated and reasserted by reference” into the challengers’ administrative  
27 appeal to the agency, the appeal “taken as a whole . . . provided sufficient notice to the  
28 agency” (internal quotation marks and alterations omitted)). *Idaho Sporting* is the one  
possible exception. It concerns a challenge to the Forest Service and addresses an exhaustion  
issue by asking what arguments the plaintiffs “raised . . . before the Forest Service as  
disclosed in the administrative record,” 305 F.3d at 965-66, but even it does not clearly say  
that issues are exhausted if raised only during notice-and-comment, but not in the  
administrative appeal.

1 adopted to provide direction for the management of the Coconino National Forest (the  
2 “Plan”). Two of these claims are unexhausted.

### 3 1. Authorization of Grazing on Potential-Capacity Range

4 CBD’s first claim rests on a terse statement in the “Management Direction -  
5 Standards/Guidelines Forest-wide” section of the Plan that “[p]ermitted use and capacity  
6 are assigned based on full capacity range only.” AR 83. The Plan defines full capacity  
7 range as “[l]ands that are presently stable because effective ground cover is holding soil  
8 loss to an acceptable level and are, therefore, suited for grazing and can support a  
9 livestock operation.” AR 472. This provision, CBD says, cannot be reconciled with the  
10 Forest Service’s decision, as set forth in its EA and in a Range Specialist’s Report on the  
11 Allotment Project,<sup>9</sup> to allow grazing on land it had denominated as “potential-capacity,”  
12 AR 12245-47 (EA); AR 3738-39 (Range Specialist’s Report).

13 CBD did not make this argument in its administrative appeal. The appeal did  
14 mention grazing capacity, but for a different reason. It pointed to the fact that the Plan  
15 “limit[s] allowable use [for livestock grazing] depending on range condition,” and  
16 contains “specific ratings” for range condition (very poor, poor, fair, good, and excellent);  
17 and it faulted the agency’s EA for failing to use these ratings or to justify alternate ratings  
18 in describing range condition on the Allotment. CBD mentioned the EA’s use of “full  
19

---

20 <sup>9</sup> Gary Hase, a Range Management Specialist at Coconino National Forest,  
21 prepared this Range Specialist’s Report

22 to ensure consistency with the [Forest Plan], identify Units of Measure,  
23 Resource Protection Measures, and Monitoring Requirements, and to describe  
24 the Affected Environment and document the Environmental Consequences to  
25 upland vegetation resulting from the three alternatives proposed for the Fossil  
Creek Allotment.

26 AR 3736. Hase’s report concludes that grazing capacity “may be assigned to” potential  
27 capacity areas, “but conservative allowable use assignments must be made.” AR 3754. The  
28 Forest Service’s EA incorporates the Report by reference.

1 capacity,” potential capacity,” and “no capacity” only to show that it differed from the  
2 specific ratings used in the Plan, and was an insufficient proxy for the analysis that the  
3 Plan allegedly required.

4 If CBD’s challenge in this lawsuit were simply a more specific version of the one  
5 it raised to the Forest Service, the claim would properly be deemed exhausted. *Dombeck*  
6 and *Idaho Sporting* are useful illustrations. In *Dombeck*, for example, the plaintiffs  
7 originally argued that the Forest Service had violated the NFMA by amending road  
8 density standards in the forest plan. 304 F.3d at 899. That sufficed, the court said, to  
9 exhaust their more specific claim that the Forest Service had violated the NFMA by  
10 amending road density standards without preparing an EIS. *Id.* Similarly, in *Idaho*  
11 *Sporting*, the plaintiffs originally argued that the agency had failed to disclose or analyze  
12 effects of its action on sensitive species, including extirpating their habitat. 305 F.3d at  
13 965-66. This was enough to exhaust their claim that the agency failed to analyze those  
14 effects by monitoring the species’ population trends or determining how the proposed  
15 action would alter their habitat. The appeal need not have cited the relevant regulation or  
16 used magic words like “monitor” or “population trends.” *Id.* at 966.

17 But unlike in *Dombeck* and *Idaho Sporting*, CBD’s claim before this court is not a  
18 more specific version of its previous claim. Indeed, it is arguably *inconsistent* with that  
19 earlier claim. CBD said in its administrative appeal that “full capacity” and “potential  
20 capacity” are ratings that “appear to be unique to the [Allotment].” AR 12549. But now  
21 its argument is close to the opposite: (1) the ratings are part of the Plan’s forest-wide  
22 guidelines, and (2) the ratings, as used in the EA, have the same definition as used in the  
23 Plan. CBD need not have used “precise legal formulations” to exhaust this issue, *Idaho*  
24 *Sporting*, 305 F.3d at 965, but it did need to raise the specific problem well enough to  
25 enable the agency to understand and rule on it. *Buckingham*, 603 F.3d at 1080. This it  
26 did not do.

## 2. Failure To Survey Potential Mexican Spotted Owl Areas

CBD also challenges the Forest Service's compliance with a requirement in the Plan that it "[s]urvey all potential spotted owl areas including protected, restricted, and other forest and woodland types within an analysis area plus ½ mile beyond the perimeter of the proposed treatment area." AR 66. CBD indisputably failed to raise this claim, or any version of it, in its administrative appeal. In that appeal, CBD never alleged, or even hinted, that the agency had failed to survey for Mexican spotted owl. Its only challenge with respect to that species was that the grazing authorization could significantly affect the owl's critical habitat, and therefore required the preparation of an EIS. AR 12545-46. By contrast, the administrative appeal *did* document the agency's failure to survey for endangered Yuma clapper rail and southwestern willow flycatcher, AR 12547, and the Forest Service noted that failure in its decision denying the appeal, AR 12669.<sup>10</sup>

### B. NEPA Claims

One of CBD's NEPA claims is unexhausted. CBD argues that the Forest Service manipulated data to overestimate the forage available for livestock on the Allotment, and consequently overestimated the appropriate level of livestock grazing to permit.<sup>11</sup> But CBD has never previously raised this point. Its administrative appeal came closest when it argued that the proposed permitted grazing levels would harm wildlife and native vegetation, but that argument could not have alerted the Forest Service to the possibility

---

<sup>10</sup> CBD contends that it argued that "the Forest Service never surveyed for threatened and endangered species . . ." But its actual claim was much more limited. *See* AR 12547 (asserting that the Forest Service never surveyed for the "endangered Yuma clapper rail and southwestern willow flycatcher.").

<sup>11</sup> Specifically, CBD faults the agency's carrying capacity determination for "artificially" defining an AUM to mean 800 pounds of forage, when the Plan equates an AUM with 1,000 pounds of forage. CBD also argues that the calculation of carrying capacity – defined as the "maximum level at which animals can graze an area without damage to the vegetation or related use," AR 457 – "inflates the results" of the Forest Service's own production data.

1 that CBD would challenge the integrity of the agency's data collection and presentation.  
2 The dissimilarity calls to mind *Buckingham*, 603 F.3d at 1080-81, where the plaintiff said  
3 that his argument to the agency and to the district court was the same: he need not have  
4 complied with restrictions in his permit. *Id.* The court disagreed, because his reasons  
5 were too different: to the agency, he relied on others' non-compliance with their permit  
6 restrictions; to the court, he argued that his permit was unenforceable. *Id.* The same kind  
7 of dissimilarity exists here.

#### 8 **IV. Merits**

##### 9 **A. NFMA Claims**

##### 10 **1. Puported Failure To Follow Grazing Guidelines**

11 The Plan directs the Forest Service to, "[i]n consultation with the US Fish and  
12 Wildlife Service, develop site-specific forage use levels." AR 80. It goes on to say that,  
13 "[i]n the event that site-specific information is not available, average key species forage  
14 utilization in key forage monitoring areas by domestic livestock and wildlife should not  
15 exceed levels in the following table during the forage growing season." AR 80. That  
16 table which is titled "Allowable Use Guide (Percent) By Range Condition And  
17 Management Strategy," describes the amount of rest to give land in the Forest, depending  
18 on its range condition (very poor, poor, fair, good, or excellent). AR 80.

19 CBD argued in its opening brief that the Forest Service failed to adhere to this  
20 Allowable Use Guide. But, as Defendants have since pointed out, with no objection from  
21 CBD, that argument misreads the Plan. Adherence to the Guide is required *only* if "site-  
22 specific information is not available." Here, it was available: the Forest Service  
23 developed forage utilization levels, and FWS reviewed them during the NEPA process.

24 This claim – to the extent it has not already been implicitly abandoned by Plaintiff  
25 – is denied.

##### 26 **2. Failure To Maintain or Enhance Soil Productivity**



1 The Forest Service has divided the lands on the Allotment into Terrestrial  
2 Ecosystem Units (“TES Units”), derived from the Coconino National Forest Terrestrial  
3 Ecosystem Survey and based on the lands’ particular soil, climate, and vegetation  
4 qualities. AR 12223, 12371. For each TES Unit, the agency’s proposed grazing scheme  
5 adopted a “ground cover objective” of 2/3 of “maximum effective ground cover.” AR  
6 12223.<sup>12</sup> CBD contends that the objective is inconsistent with a goal of the Plan, in the  
7 section titled “Soil, Water, and Air Quality,” to “[m]aintain or, where needed, enhance  
8 soil productivity and watershed conditions.” AR 35. Specifically, CBD says that the  
9 objective will not stem soil depletion on a significant portion of the Allotment.

10 Defendants argue that this claim is unexhausted. They note that, in its  
11 administrative appeal, CBD’s allegation was procedural in nature, and related to a  
12 different statute: that, because the proposed action would cause additional soil erosion on  
13 the Allotment, NEPA required the Forest Service to prepare an EIS. *See* AR 12545. That  
14 may be true, but CBD’s administrative appeal, taken as a whole, did alert the agency to a  
15 general claim that the reauthorization decision would *increase* the amount of soil erosion  
16 on the Allotment. CBD’s allegation before this court is a more specific version of that  
17 claim: by increasing the amount of soil erosion on the Allotment, the agency action is  
18 inconsistent with a Plan requirement that it maintain or enhance soil productivity.  
19 Although this is a close question, the Court finds that this claim is similar enough to the  
20 issue presented in CBD’s administrative appeal to satisfy the exhaustion rule. *Cf. Idaho*  
21 *Sporting*, 305 F.3d at 965-66 (expressions of concern, at the administrative level, that the  
22 proposed agency action would harm certain species were enough to exhaust legal claim  
23

---

24  
25 <sup>12</sup> Effective ground cover, as defined in the EA, is the percentage “litter” of a  
26 certain size and the percentage “total plant basal area.” AR 12223. Improving effective  
27 ground cover has several benefits: it “enhance[s] soil function (minimizes soil erosion,  
28 promotes water infiltration and enhances nutrient recycling)” and “improve[s] the quality and  
quantity of desirable vegetation.” AR 12223.

1 that agency failed to specify adequate procedures to measure impact of action on those  
2 species).

3 On the merits, however, CBD's position is less convincing. The Plan language it  
4 relies upon states only a general goal; in other contexts, courts have concluded that such  
5 goals are unenforceable. In *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004),  
6 for example, the plaintiff argued that the Bureau of Land Management ("BLM") had  
7 failed to comply with certain provisions in its land use plans, thereby violating the  
8 requirement that the BLM "manage the public lands . . . in accordance with the land use  
9 plans . . . when they are available." *Id.* at 67. But the Court ruled that plan "statements to  
10 the effect that BLM will conduct 'Use Supervision and Monitoring' in designated  
11 areas—like other 'will do' projections of agency action set forth in land use plans—are  
12 not a legally binding commitment enforceable under § 706(1)."<sup>13</sup> *Id.* at 72.

13 There is also support in other environmental contexts for the notion that  
14 generalized goals are unenforceable. *Cf. Greater Yellowstone Coal., Inc. v. Servheen*, ---  
15 F.3d ----, 2011 WL 5840646, at \*15 (9th Cir. Nov. 22, 2011) (Thomas, J., concurring in  
16 part and dissenting in part) ("Unenforceable aspirational goals are not regulatory  
17 mechanisms."); *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366  
18 F.3d 692, 701, 703 (9th Cir. 2004) (citizen suits under § 304 may only be "brought to  
19 enforce specific measures, strategies, or commitments designed to ensure compliance  
20 with [national ambient air quality standards]," not to enforce "a [state implementation  
21 plan's] overall objectives or aspirational goals"); *Action for Rational Transit v. W. Side*  
22 *Highway*, 699 F.2d 614, 616 (2nd Cir. 1983) ("aims and goals of the [state  
23 implementation plan] are not enforceable apart from the specific measures designed to  
24 achieve them").

---

25  
26 <sup>13</sup> Just as the Forest Service is under a specific obligation to act consistent with  
27 the applicable forest plan, *see* 16 U.S.C. § 1604(i), the BLM is under a specific obligation  
28 to act consistent with the applicable land use plan, *see* 43 U.S.C. § 1732(a) (2007).

1 The Plan language itself suggests another reason it is not enforceable: it is  
2 extremely vague. CBD argues that the goal requires the Forest Service to “‘maintain’  
3 soils in satisfactory condition, and to ‘improve’ soils in impaired or unsatisfactory  
4 condition.” But the goal is not nearly this specific. While this may be the general import  
5 of the goal, its indeterminacy demonstrates the usefulness of specific standards and  
6 guidelines to which private parties can sensibly hold the Forest Service when it engages  
7 in site-specific action. This is not such a standard. Instead, it is a general goal that, as in  
8 *Norton*, lacks sufficient specificity to be enforceable against the Forest Service under the  
9 NFMA.

10 Even if CBD were right that this Plan language is enforceable, it cannot prevail on  
11 its claim. Courts “defer[] to the Forest Service’s interpretation of plan directives that are  
12 susceptible to more than one meaning unless the interpretation is plainly erroneous or  
13 inconsistent with the directive.” *Siskiyou Regional Educ. Project v. U.S. Forest Serv.*,  
14 565 F.3d 545, 555 (9th Cir. 2009); see *Native Ecosys. Council v. U.S. Forest Serv.*, 418  
15 F.3d 953, 960 (9th Cir. 2005) (“Agencies are entitled to deference to their interpretation  
16 of their own regulations, including Forest Plans.”). The Forest Service argues that the  
17 goal, if it were enforceable, would only require that it maintain the *status quo* soil  
18 conditions, and that by instituting a grazing regime that (until conditions improve)  
19 authorizes a much lower level of grazing than the previous grazing permit for the  
20 Allotment did, the agency is more than satisfying that standard. CBD puts forth an  
21 alternate interpretation of “maintain or, where necessary, enhance soil productivity,” but  
22 it has not demonstrated that its interpretation is the only reasonable one.

23 For these reasons, CBD is not entitled to judgment on this claim.

#### 24 **B. ESA Claims**

25 CBD argues that: (1) FWS’s BiOp ignored the impacts of the grazing scheme on  
26 the recovery of the Chiricahua Leopard Frog (“leopard frog”) on the Allotment; and (2)

1 the ITS contained in that BiOp failed to adequately quantify take, and failed to provide a  
2 meaningful surrogate.<sup>14</sup>

### 3 **1. The BiOp's Analysis with Respect to the Leopard Frog**

4 In accordance with § 7(a)(2) of the ESA, FWS prepared a BiOp that analyzed the  
5 effects of the proposed action on, *inter alia*, the leopard frog, a listed species under the  
6 ESA. According to the BiOp, the leopard frog is an inhabitant of cienegas, pools,  
7 livestock tanks, lakes, reservoirs, streams, and rivers at elevations of 3,281 to 8,890 feet  
8 in parts of the southwestern United States, including central and southeastern Arizona.  
9 AR M2855. In Arizona, slightly less than half of all known “historical localities” for the  
10 leopard frog are stock tanks. AR M2855-56. It is extant in “most major drainages in  
11 Arizona and adjacent areas of New Mexico,” but in many regions of Arizona it has not  
12 been found for a decade or more despite repeated surveys. AR M2856. The BiOp cites  
13 “[d]isruption of metapopulation dynamics” as an “important factor in regional loss of  
14 populations”: “[leopard frog] populations are often small and habitats are dynamic,  
15 resulting in a relatively low probability of long-term population persistence.” AR M2856.

16 The Recovery Plan for the leopard frog, which FWS completed in accordance with  
17 ESA requirements for listed species, delineates eight “recovery units” in key areas that  
18 are seen as valuable to the recovery of the species. AR M2857. The proposed action at  
19 issue in this case lies within one of those eight recovery units, recovery unit 5 (“RU5”).  
20 AR M2857. There are fewer records of leopard frog presence in RU5 than in some other  
21 recovery units, which the BiOp says may reflect both a lack of historical survey data and

---

22  
23 <sup>14</sup> Separately, CBD asserts a claim that the ITS does not identify proper,  
24 measurable triggers to determine when incidental take has been exceeded. This is hard to  
25 distinguish from CBD’s claim that take is not adequately quantified. These claims reduce  
26 to the same idea: take should be quantified – either numerically or by means of an adequate  
27 surrogate – so that agencies and applicants can gauge compliance and know when anticipated  
28 take has been exceeded (*i.e.*, when consultation has been triggered). Therefore the court  
treats these claims together. *See, e.g., Or. Natural Res. Council v. Allen*, 476 F.3d 1031,  
1037-40 (9th Cir. 2007) (analyzing challenges to ITS in this way).

1 the relatively dry nature of much of RU5. AR M2857. Today, the species “is confirmed  
2 present at only one livestock tank” in the area. AR M2857.

3 The Allotment “contains currently occupied, previously occupied, and suitable  
4 unoccupied Leopard frog habitat. The habitat consists entirely of stock tanks and  
5 possibly some habitat within the ephemeral drainages on the [A]llotment.” AR M2863.  
6 Until 2002, this area “appeared to contain a functioning metapopulation of leopard frogs.”  
7 AR M2863. But since then many occupied sites have died out, and FWS and state  
8 officials have “continued to monitor the decline” of the species in the area. AR M2863.  
9 Approximately eight stock tanks within the Allotment are considered “[p]reviously  
10 occupied sites,” that is, sites where the leopard frog was present in the 1990s and early  
11 2000s but is no longer present as a result of drought, crayfish, non-native fish, or other  
12 unknown disturbances. AR M2864. In addition, there are approximately 13 sites within  
13 the Allotment that are considered “suitable habitat,” that is, “areas where suitable  
14 conditions exist” for leopard frogs, but where no frogs have been detected during surveys.  
15 AR M2864.

16 In 2005, FWS, in cooperation with the Phoenix Zoo and the Arizona Game and  
17 Fish Department, established a captive breeding program with one female and three males  
18 collected from another stock tank and released into a stock tank on the Allotment. AR  
19 M2863. According to the BiOp, a few other sites “may still be occupied” as well. AR  
20 M2863. FWS and the Arizona Game and Fish Department intend to continue stocking  
21 leopard frog into these sites, and perhaps others, “to improve the status of the species  
22 within the action area.” AR M2863.

23 The BiOp contains six paragraphs analyzing the effects of the action on the  
24 leopard frog. AR M2868-69. The BiOp asserts that the proposed action will have some  
25 “benefits” for the leopard frog: as part of the reauthorization, the Forest Service  
26 contemplates the construction of fences around five stock tanks. AR M2868. In addition,  
27 FWS and the Arizona Game and Fish Department plan to continue reintroducing the  
28

1 species within the action area. AR M2868. But the BiOp notes that livestock grazing can  
2 have a number of deleterious effects on the leopard frog, including declines in the  
3 structural richness of the vegetative community; losses or reductions of the prey base;  
4 increased aridity of habitat; loss of thermal cover and protection from predators; a rise in  
5 water temperatures to levels lethal to larval stages of amphibian and fish development; a  
6 loss in soil fertility from erosion; trampling of hibernating frogs or tadpoles; erosion or  
7 siltation of stream courses; elimination of undercut banks that provide cover for frogs;  
8 loss of wetland and riparian vegetation; and spread of disease and non-native predators.  
9 AR M2868. Although building “frog fences,” as the Forest Service and FWS have agreed  
10 to do at the stock tanks that may be occupied, should “reduce the opportunity for  
11 livestock to accidentally trample frogs,” it “would not completely remove the threat.” AR  
12 M2869.

13 The BiOp concludes that the agency action is “not “likely to jeopardize the  
14 continued existence of the [leopard frog].” AR M2876. It gives three reasons: (1) the  
15 “ecological condition of the area should be maintained or improved” during the ten-year  
16 life of the authorization; (2) “[f]ull implementation of the AMP (including the  
17 conservation measures) is expected to greatly reduce the risk of direct impacts to [leopard  
18 frogs] through fencing and exclusion of livestock from portions of occupied areas”; and  
19 (3) a “[leopard frog] captive breeding and head-start program has been developed . . .  
20 [which] has resulted in the reintroduction of frogs to [one stock tank on the Allotment]  
21 and the program is expected to continue to improve the status of the species within the  
22 action area over time.” AR M2876.

## 23 2. Impacts of Agency Action on Recovery of the Leopard Frog

24 In undertaking its jeopardy analysis, FWS was required by regulation to assess not  
25 only the impacts of the Forest Service’s action on the *survival* of the leopard frog, but  
26 also on its *recovery*. See 50 C.F.R. § 402.02 (an agency action “jeopardize[s] the  
27 continued existence” of a species if it “reasonably would be expected, directly or  
28

1 indirectly, to reduce appreciably the likelihood of both the survival and recovery of a  
2 listed species in the wild by reducing the reproduction, numbers, or distribution of that  
3 species”); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 932 (9th  
4 Cir. 2008) (interpreting this regulation to require a consideration of “effects on recovery  
5 as well as effects on survival”).

6 FWS did not analyze the grazing scheme’s effects on the recovery of the leopard  
7 frog. As an initial matter, the BiOp contains no mention of the impact of the action on the  
8 species’ recovery. This is not dispositive, of course; as the court in *National Wildlife*  
9 recognized, the analysis of the impacts of an action on survival is often “intertwined”  
10 with the analysis of impacts on recovery. 524 F.3d at 932 & n.11. But there is no  
11 indication in the BiOp that FWS did even this – intertwine its analysis of the impacts on  
12 survival with its analysis of the impacts on recovery. Rather, every indication is that  
13 FWS did not consider the impacts on recovery at all.

14 None of FWS’ responses are persuasive. First, it argues that the BiOp’s emphasis  
15 on stock tanks *itself* demonstrates a consideration of the impacts of the action on the  
16 leopard frog’s recovery. It points to a line in the BiOp that stock tanks “may benefit  
17 species, such as the [leopard frog], by providing habitat that is currently needed for the  
18 species[’] recovery and survival,” AR 2873. But just because stock tanks are needed for  
19 the leopard frog’s recovery and survival does not mean that the BiOp’s focus on stock  
20 tanks reflects a focus on recovery.

21 FWS also cites “recovery actions taken on the Allotment” – captive breeding and  
22 reestablishment of leopard frogs in stock tanks, and fencing and cleaning stock tanks –  
23 without explaining why these actions are necessarily connected to recovery rather than  
24 survival. *See* AR M1832, AR M2851, AR M2873. And it cites portions of the record  
25 that allegedly demonstrate plans to implement “numerous required conservation measures  
26 for the benefit of the [leopard frog],” but actually have nothing to do with the leopard frog  
27 in particular. *See* AR 7153-54.

1 Other statements in the BiOp that are said to demonstrate a focus on recovery are  
2 that the action “is expected to result in benefits to the [leopard frog]”; that certain  
3 strategies (stock tank fencing, additional reintroductions of the species) “will contribute to  
4 the species conservation”; and that the captive breeding and reintroduction program “is  
5 expected to improve the status of the species.” The first of these immediately precedes a  
6 long narrative about the adverse effects of the action on the frog, without any analysis  
7 about whether the benefits will outweigh those adverse effects. Neither the second nor  
8 third statements actually says anything about the impact of the *grazing scheme* on  
9 recovery; a project could include some measures that “contribute” to conservation, or  
10 “improve the status of the species,” but still, on net, substantially reduce any chance of a  
11 species’ recovery.

12 But even if the third statement is construed as a conclusion that the proposed  
13 action will, on net, improve the status of the leopard frog on the Allotment over time, this  
14 is not enough to demonstrate that the agencies considered the impact on *recovery*.  
15 Recovery means more than just improved status; it means improvements to the point  
16 where the species may be delisted. *See Gifford Pinchot Task Force v. U.S. Fish &*  
17 *Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (“[T]he ESA was enacted not merely  
18 to forestall the extinction of species (*i.e.*, promote a species survival), but to allow a  
19 species to recover to the point where it may be delisted.”). Conceivably, a species could  
20 be so close to extinction that even improving its status does not do enough to avoid  
21 “reduc[ing] the odds of success for future recovery planning.” *Nat’l Wildlife*, 524 F.3d at  
22 936; *see, e.g., S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*, 723 F.  
23 Supp. 2d 1247, 1258 (E.D. Cal. 2010) (holding that it is not enough to say that an action  
24 will improve species, absent a finding that the species population is stable to begin with).

25 *Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439 (9th Cir. 2011),  
26 provides an instructive contrast. In *Rock Creek Alliance*, the Ninth Circuit relied on  
27 explicit statements about recovery to conclude that FWS had adequately considered the



1 impact of a project on the recovery of a species. *Id.* at 443. FWS expressly said that,  
2 “[a]t most, the *rate of recovery* of the core area population may slow slightly, if at all,  
3 assuming fish passage at the dams and habitat restoration continues and is successful”;  
4 and that “there may be a slight slowing in the *rate of recovery* for the core area population  
5 because of the slight loss in recruitment potential, but if current efforts to recover [the  
6 species] . . . continue to be successful and overshadow the potential loss, the *recovery*  
7 *rate* of the core area may not be affected.” *Id.* (emphasis in original). Such recovery-  
8 specific analysis is absent here.

9 Defendants have not demonstrated that they considered the effects of the proposed  
10 action on the leopard frog’s chances of recovery. Because a court “cannot simply take the  
11 agency’s word that the listed species will be protected under the planned operations,”  
12 *Nat’l Wildlife*, 524 F.3d at 935 n.16, CBD is entitled to summary judgment on this claim.

### 13 3. Deficient Quantification of Incidental Take

14 The ESA requires the consulting agency (here, FWS) not only to make a jeopardy  
15 determination, but also to consider whether the action will “take” any member of a listed  
16 species. 16 U.S.C. § 1538(a)(1)(B).<sup>15</sup> Section 9 of the ESA establishes a blanket  
17 prohibition on such takings. 16 U.S.C. § 1538(a)(1)(B). “[I]f the consulting agency  
18 concludes that the action will not jeopardize the continued existence of a listed species  
19

---

20 <sup>15</sup> Section 9 of the ESA prohibits the taking of any member of a listed endangered  
21 species. 16 U.S.C. § 1538(a)(1)(B). The ESA’s implementing regulations have extended  
22 this prohibition to threatened species, with certain exceptions not relevant here. *See* 50  
23 C.F.R. § 17.31.

24 The ESA defines the term “take” as “to harass, harm, pursue, hunt, shoot, wound, kill,  
25 trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).  
26 “Harm,” in this context, is “an act which actually kills or injures wildlife. Such act may  
27 include significant habitat modification or degradation where it actually kills or injures  
28 wildlife by significantly impairing essential behavioral patterns, including breeding, feeding  
or sheltering.” 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*,  
515 U.S. 687, 691 (1995).

1 but is likely to result in incidental takings, then it must issue an [ITS] with [its BiOp].”  
2 *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 519 (9th Cir. 2010). An ITS “exempts a  
3 specified number of incidental takings from the take prohibition of section 9.” *Id.* The  
4 ITS: (1) “specifies the impact of such incidental taking on the species”; (2) “specifies  
5 those reasonable and prudent measures that the Secretary considers necessary or  
6 appropriate to minimize such impact”; and (3) “sets forth the terms and conditions  
7 (including, but not limited to, reporting requirements) that must be complied with by the  
8 Federal agency or applicant (if any), or both, to implement the measures specified”  
9 pursuant to the preceding requirement.<sup>16</sup> 50 C.F.R. § 402.14(i).

10 Because the grazing reauthorization is anticipated to cause some take of the  
11 leopard frog, FWS’s BiOp included an ITS for that species. CBD challenges the ITS on  
12 the ground that it fails to quantify numerically the expected level of take from the grazing  
13 scheme, or at least to adopt a meaningful surrogate.

14 *a. Numerical quantification of take*

15 “Congress has clearly declared a preference for expressing take in numerical form,  
16 and an Incidental Take Statement that utilizes a surrogate instead of a numerical cap on  
17 take must explain why it was impracticable to express a numerical measure of take.” *Or.*  
18 *Natural Res. Council v. Allen*, 476 F.3d 1031, 1037 (9th Cir. 2007); *see Ariz. Cattle*  
19 *Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1249 (9th Cir. 2001); 16 U.S.C. §  
20 1536(b)(4)(C)(i) (agency is required to “specif[y] the impact of such incidental taking on  
21 the species”).

22 The first question is whether the ITS uses a surrogate. The ITS says that “it is  
23 difficult to quantify the number of individual frogs taken,” and therefore “we will  
24 attribute take at the sub-population level (hereinafter referred to as occupied sites).” AR  
25 M2878. The ITS then characterizes anticipated take as mortality or injury to a

---

26 <sup>16</sup> Take of marine mammals must comply with an additional requirement. *See*  
27 16 U.S.C. § 1536(b)(4).  
28

1 “proportion of [leopard frogs]” that is “a small enough quantity of the population at the  
2 tank that exists when the incidental take occurs to allow recovery of the population to pre-  
3 disturbance levels over time.”<sup>17</sup> AR M2878-79. FWS argues that this is not a surrogate  
4 measure of take because it is not an ecological condition, and only “ecological conditions  
5 in lieu of defining the amount or extent of take constitute[] a ‘surrogate’ for take.” But,  
6 as *Allen* made quite clear, a “surrogate” is *any* substitute for a “numerical cap on take.”  
7 *Allen*, 476 F.3d at 1037-38. FWS’ measure (an unspecified “proportion” that is “small  
8 enough” to “allow recovery of the population at [a stock] tank”) is not numerical by any  
9 ordinary definition. Therefore the ITS needed to explain why it was impracticable to  
10 express take as a numerical measure.

---

11 <sup>17</sup> The ITS sets forth four anticipated forms of take over the life of the project:  
12 significant disturbances at a tank, livestock trampling, erosion, and the increased presence  
13 of nonnative predators:

14 1. Direct mortality or injury of a proportion of [leopard frog] adults,  
15 metamorphs, tadpoles, or egg masses at one occupied livestock tank where  
16 maintenance activities result in significant disturbance at the tank (e.g.,  
dredging or silt removal, major repair of berms).

17 2. Direct mortality or injury through trampling of a proportion of [leopard  
18 frog] adults, metamorphs, tadpoles, or egg masses at one occupied site in a  
19 summer pasture from March through October; and trampling of small tadpoles  
20 and overwintering frogs at one occupied site in a winter pasture where  
livestock have access from November through February.

21 3. Harm or harassment including lost productivity of a proportion of  
22 [leopard frogs] due to loss of bankline and emergent vegetation cover,  
23 increased sedimentation of pools, or other forms of habitat at one occupied site  
where livestock contribute to erosion within or upstream of these sites.

24 4. Harassment of a proportion of [leopard frogs] at one occupied livestock  
25 tank due to unintentional benefit to, or facilitation of, nonnative bullfrogs, fish,  
26 salamanders, or crayfish that immigrate to newly constructed livestock tanks  
from nearby populations, existing or introduced.

27 AR M2878-79.

1 In the ITS, FWS gave the following reasons: dead or impaired frogs are “difficult  
2 to find”; “losses may be masked by seasonal fluctuations in environmental conditions”;  
3 the “status of the species could change over time through immigration, emigration, and  
4 loss or creation of habitat”; and the “species is small-bodied, well camouflaged, and  
5 occurs under water of varying clarity.” AR M2878.

6 As CBD points out, these reasons are unconvincing given the evidence in the  
7 record that biologists from the agencies *have* surveyed stock tanks for leopard frogs. *See,*  
8 *e.g.*, AR M2262 (June 2008 email stating that agency officials surveyed “Middle Tank  
9 yesterday evening and saw 19 frogs”); AR M2274 (July 2008 email stating that agency  
10 officials surveyed several tanks and were “able to visually spot 23 of the 26 frogs we  
11 released” at Middle Tank); AR M2275 (July 2008 email describes “over 1,000 [leopard  
12 frog] metamorphs” at the confirmed occupied site); AR M2369-70 (similar emails). FWS  
13 demeans the value of this survey data as “not giv[ing] a precise number of frogs” and  
14 only “generat[ing] presence/absence data from which inferences about abundance and  
15 trends can be made.” But determining a species’ relative “abundance” is a way of  
16 estimating its population. The data collection capability that FWS has described appears  
17 to be up to the task of estimating population for the purpose of measuring incidental take.  
18 Indeed, this is presumably how incidental take is typically measured: surveys generate  
19 data from which the agencies can draw inferences to estimate loss or growth in a species’  
20 population. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d  
21 1115, 1138 (N.D. Cal. 2006) (“[D]efendants have not pointed to any evidence in the  
22 record that it was impractical to *estimate* desert tortoise take. Indeed, the Service has  
23 estimated the numbers of desert tortoise in other areas of the Dunes . . . .” (emphasis  
24 added)); *see also Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257,  
25 1275 (11th Cir. 2009) (rejecting FWS’ argument that because a sparrow has “secretive”  
26 behavior, “cryptic” color, and “move[s] over expansive and remote areas,” a surrogate  
27 measure of take was required, and observing that FWS develops annual population data  
28

1 for the species). Defendants have not explained why an inferential, numerical  
2 quantification of take would be inappropriate here. FWS' decision not to provide one  
3 was arbitrary and capricious.

4 *b. Surrogate measure for quantifying take*

5 Even if FWS' reasons for using a surrogate measure were not arbitrary and  
6 capricious, its choice of surrogate was. As an initial matter, the surrogate is a moving  
7 target. The ITS describes anticipated take as a "proportion" of leopard frogs "at an  
8 occupied site," and defines "proportion" as "a small enough quantity of the population at  
9 the tank that exists when the incidental take occurs to allow recovery of the population to  
10 pre-disturbance levels over time." AR M2878-79. But the ITS suggests two different  
11 standards for determining when anticipated take has been exceeded: (1) when recovery  
12 of the population at an occupied site (a tank) has been "precluded"; and (2) when the  
13 "total number of occupied [leopard frog] population sites" decreases after two  
14 consecutive years.<sup>18</sup> AR M2879.<sup>19</sup>

15 \_\_\_\_\_  
16 <sup>18</sup> As an example of this second standard, the ITS says that, if after two years "the  
17 species declines below the two extant populations of [leopard frogs] identified on the  
18 [Allotment], and such decline can be attributed to livestock management, take will have been  
19 exceeded." AR M2879. This is not the actual trigger, but only an example of how it would  
20 work in practice. But CBD correctly notes that the example is flawed; FWS does not cite any  
21 evidence in the record confirming that *two* sites are occupied by the leopard frog. And the  
22 BiOp states the opposite; it asserts that only one occupied site has been confirmed. *See* AR  
23 M2857.

24 <sup>19</sup> Purporting to describe the surrogate set forth in the ITS, Defendants' briefing  
25 actually adds a third surrogate standard: when an occupied site has "cease[d] to exist" for  
26 some period of time. Defs.' Combined Mem. and Opp., Doc. 24 at 26; *see id.* at 27 ("[I]f a  
27 site occupied by [leopard frogs] becomes unoccupied as a result of livestock management  
28 activities on the Allotment, take is exceeded and reconsultation must occur.")). This is  
nothing more than a *post hoc* litigation position. *See Gifford Pinchot*, 378 F.3d at 1071 n.7  
(courts should not accept "post hoc rationalizations" because they "provide an inadequate  
basis for judicial review"). It has no basis in the ITS and indeed is inconsistent with both of  
the triggers expressed in that statement. It is inconsistent with the first trigger – which turns  
on the point at which recovery at a site has been "precluded" – unless one assumes that frogs

1           These triggers are internally inconsistent, and neither is an adequate surrogate for  
2 quantifying take. The first trigger is that take will be exceeded once the proportion of  
3 frogs at a tank is no longer adequate to “allow recovery of the population” there. AR  
4 M2879. This standard provides no way of gauging compliance; about the most that can  
5 be gleaned from it is that, given anticipated take at a tank, *some* number of frogs at the  
6 tank will remain. But without a way of determining what proportion of frogs – or what  
7 absolute number – is enough to allow recovery of the population at a tank, the standard  
8 cedes “unfettered discretion” to FWS. *Ariz. Cattle*, 273 F.3d at 1250; *see Allen*, 476 F.3d  
9 at 1038-39 (surrogate must be “able to perform the functions of a numerical limitation,”  
10 *i.e.*, contain “measurable guidelines to determine when incidental take would be  
11 exceeded” and “not be so general that the applicant or the action agency cannot gauge its  
12 level of compliance”). Moreover, the standard verges on tautological. An ITS is only  
13 prepared if FWS concludes that anticipated take will avoid jeopardy, *i.e.*, that it will avoid  
14 appreciably reducing the likelihood that the species will recover. Therefore anticipated  
15 take must by *definition* not rise to the level of preventing the population from recovering  
16 to pre-take levels. Quantifying anticipated take like this just states the obvious; it does  
17 not offer any way to determine when take has risen to a level requiring the re-initiation of  
18 consultation with FWS.

19  
20 \_\_\_\_\_  
21 have the potential to recover at a site until every single one dies out. That would be a  
22 surprising assumption to make, particularly because no record evidence supports it and the  
23 potential for a species’ recovery ordinarily ends before its potential for survival does. *Cf. id.*  
24 at 1069 (“[I]t is logical and inevitable that a species requires more critical habitat for  
25 recovery than is necessary for the species survival . . .”). In addition, Defendants’ newly-  
26 minted surrogate is inconsistent with the second trigger set forth in the ITS. It hinges only  
27 on whether the population of frogs at *any one site* is extirpated, whereas the ITS’ trigger is  
28 keyed to the *total number* of frog population sites. Because leopard frog occupancy of sites  
is “dynamic” and is expected to “change across the allotment” over the life of the grazing  
scheme, AR M2879, conceivably one population site could be eliminated while two new  
sites are created. In that case, the former trigger, but not the latter one, would be satisfied.

1 The ITS' other trigger – a reduction in the total number of occupied frog sites on  
2 the Allotment – is also arbitrary and capricious. On this point, CBD cites *Allen*. There,  
3 the court rejected a trigger describing the authorized level of take as “all spotted owls  
4 associated with the removal and downgrading of 22,227 acres of suitable spotted owl  
5 habitat.” 476 F.3d at 1039. The trigger was “coextensive with the project’s own scope”;  
6 therefore it did not actually permit FWS to “halt the project and reinitiate consultation.”

7 *Id.*

8 Although FWS' trigger here is not coextensive with the project's scope, the ideas  
9 that animated *Allen* remain a useful guide. One logical principle to extract from *Allen* is  
10 that an ITS trigger must provide a *meaningful* opportunity for revived consultation. *See*  
11 *id.* at 1041 (limitations on take in the ITS must not “be so indeterminate as to prevent the  
12 Take Statement from contributing to the monitoring of incidental take by eliminating its  
13 trigger function”). The trigger in this case does not do that. As the court reads the record  
14 evidence, it is conceivable that as little as one site on the Allotment is occupied by  
15 leopard frogs.<sup>20</sup> Assuming that is and remains true, the trigger would be toothless.  
16 Consultation would only be revived in the event that all leopard frogs are extirpated from  
17 the only site they occupy on the Allotment, which amounts to a trigger based on  
18 extirpation of leopard frogs from the entire Allotment. In these circumstances, as CBD  
19 points out, FWS would have “foreclosed any meaningful check on its own no-jeopardy  
20 determination.”

21 In short, FWS' choice (or choices) of surrogate were arbitrary and capricious.

### 22 C. NEPA Claims

---

23  
24  
25 <sup>20</sup> It is unclear how many occupied sites there are. The BiOp discusses one  
26 confirmed site and says that another four sites “may still be occupied.” AR M2863.  
27 Elsewhere the BiOp says, without support, that five sites are “likely occupied.” AR M2869.  
28 The Defendants now argue that five sites are occupied, but the portions of the record they  
cite do not support that contention.

1 “NEPA does not mandate particular results, but simply provides the necessary  
2 process to ensure that federal agencies take a hard look at the environmental  
3 consequences of their actions.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d  
4 800, 814 (9th Cir. 1999) (internal quotation marks omitted). On review of an agency  
5 decision made pursuant to NEPA, the court asks “whether the agency has taken a hard  
6 look at the consequences of its actions, based its decision on a consideration of the  
7 relevant factors, and provided a convincing statement of reasons to explain why a  
8 project’s impacts are insignificant.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241  
9 F.3d 722, 730 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson*  
10 *Seed Farms*, --- U.S. ----, 130 S.Ct. 2743, 2757 (2010) (internal quotation marks,  
11 citations, and alterations omitted).

12 CBD challenges the Forest Service’s NEPA review process in two respects. First,  
13 it argues that the agency should have prepared an EIS given the “uncertain intensity” of  
14 impacts of the grazing scheme on threatened, endangered, and sensitive wildlife species.  
15 Second, it contends that the agency’s EA and FONSI are inadequate because they do not  
16 demonstrate that the grazing scheme would sufficiently limit soil erosion. CBD is  
17 entitled to judgment on the second claim, but not the first.

### 18 1. Need for EIS

19 An EIS is required for all “major Federal actions significantly affecting the quality  
20 of the human environment.” 42 U.S.C. § 4332(2)(C). “If agency regulations do not  
21 categorically require the preparation of an [EIS], then the agency must first prepare an  
22 [EA] to determine whether a project will have a significant effect on the environment.”  
23 *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994)  
24 (citing 40 C.F.R. § 1501.4). Whether a project’s effects will be “significant” turns on  
25 “context” and “intensity.” 40 C.F.R. § 1508.27. A number of factors should be  
26 considered in evaluating intensity, including, as relevant here, “[t]he degree to which the  
27 action may adversely affect an endangered or threatened species or its habitat that has  
28



1 been determined to be critical under the [ESA].” *Id.* § 1508.27(b)(9). CBD argues that  
2 because the Forest Service lacked sufficient data to determine the degree of adverse  
3 effects, it needed to prepare an EIS.<sup>21</sup>

4 CBD relies mainly on *National Parks & Conservation Association v. Babbitt*.  
5 There, the court ruled that the agency should have prepared an EIS because the  
6 environmental effects of the proposed agency action were *admittedly* highly uncertain.  
7 *Nat’l Parks*, 241 F.3d at 731-32 (stating that “[t]he EA describes the intensity or practical  
8 consequences of these effects, individually and collectively, as ‘unknown’”). Among  
9 other admissions of ignorance, the EA in *National Parks* said that “little is known about  
10 the effects of the cruise ship disturbance on steller sea lions”; “the effect of increased  
11 levels of disturbance on Glacier Bay’s cetacean populations is unknown”; “the degree of  
12 increase [in oil spills as a result of increased traffic] is unknown”; and the effect of noise  
13 and air pollution on murrelets, bald eagles, and waterfowls remains “unknown” because it  
14 remains unstudied. *Id.* at 732 (internal quotation marks and alterations omitted).

15 The Forest Service’s analysis in this case is easily distinguishable from the  
16 agency’s analysis in *National Parks*. Here, the EA assesses the effects of livestock  
17 grazing, in general and in the context of the site-specific action, on endangered,  
18 threatened, and sensitive species on the Allotment. *See* AR 12273-12331. It also  
19 compares the impact of “no action” to the impact of the action on these species. *See id.*  
20 True, as CBD says, the Forest Service has not surveyed the populations of certain of these  
21 species in and around the Allotment. But CBD does not explain why surveys were  
22 necessary to determine the impact of the proposed action on these species, when the EA’s  
23 analysis of impact *assumes*, as a baseline condition, the key piece of information for  
24 which surveys would be useful: that particular species are present on the Allotment. *See*

---

25  
26 <sup>21</sup> CBD also claims that the Forest Service failed to identify and discuss intensity  
27 in its FONSI. That is incorrect. *See* AR 12524-28 (considering each intensity factor  
28 enumerated in 40 C.F.R. § 1508.27).

1 AR 12285-86. CBD cites no case requiring an agency to collect population data for every  
2 species that might be in a project area in order to fulfill its obligations in an EA.

3 CBD is correct that baseline conditions should be established to facilitate an  
4 accurate evaluation of the intensity of impact that the agency action will cause. *See Am.*  
5 *Rivers v. FERC*, 201 F.3d 1186, 1195 n.15 (9th Cir. 2000) (explaining that a baseline is “a  
6 practical requirement in environmental analysis often employed to identify the  
7 environmental consequences of a proposed agency action”); *Half Moon Bay Fishermans’*  
8 *Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (“Without establishing the  
9 baseline conditions which exist in the vicinity of B1 before ocean dumping begins, there  
10 is simply no way to determine what effect the proposed dumping near B1 will have on the  
11 environment and, consequently, no way to comply with NEPA.”). But none of the cases  
12 CBD cites require that baseline conditions be supported by population data for each  
13 species potentially in the action area. In *Center for Biological Diversity v. BLM*, which is  
14 closest to this case, the problem was that the baseline *omitted* numerous species believed  
15 to be endemic to the action area, and was therefore incomplete. 422 F. Supp. 2d 1115,  
16 1163 (N.D. Cal. 2006). CBD has not alleged that kind of incompleteness here.

17 CBD’s objection reduces to a complaint that the Forest Service failed to prepare an  
18 EIS while acknowledging that certain negative impacts may result from the action. That  
19 is not enough to trigger the need to prepare an EIS. *See Native Ecosys. Council v. U.S.*  
20 *Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) (“We decline to interpret NEPA as  
21 requiring the preparation of an EIS any time that a federal agency discloses adverse  
22 impacts on wildlife species or their habitat or acknowledges information favorable to a  
23 party that would prefer a different outcome. NEPA permits a federal agency to disclose  
24 such impacts without automatically triggering the ‘substantial questions’ threshold.”);  
25 *Env’t Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006) (“[T]he  
26 regulations do not anticipate the need for an EIS anytime there is *some* uncertainty, but  
27 only if the effects of the project are ‘highly’ uncertain.” (emphasis in original)).

## 2. Inaccuracies in EA and FONSI Concerning Soil Erosion

CBD faults the EA and FONSI for relying on “inaccurate information” about the impacts of the grazing scheme on the soils in the Allotment. Specifically, CBD argues that the ground cover objective adopted by the Forest Service for the Allotment – 2/3 of maximum effective ground cover, as described Part IV.A.2, *supra* – will be less effective than the agency’s EA and FONSI assume.

Defendants argue that CBD never exhausted this claim. But CBD’s administrative appeal did allege that the grazing decision would “cause continued soil erosion and sediment delivery to streams that will be *additive* to background levels. AR 12545; that “adverse cumulative effects of soil loss . . . , as well as sediment delivery to [the Allotment], are reasonably foreseeable for the duration of the grazing authorization,” AR 12546; and that the “EA fails to assess adverse effects over that timescale,” AR 12546. CBD’s claim to this court is, in a way, a more specific version of that claim: the 2/3 ground cover objective does not sufficiently address these adverse effects. *See Idaho Sporting*, 305 F.3d at 966 (claim based on a specific regulation was exhausted by raising general concern at lack of “adequate procedures to measure the impact” of the action on the species).<sup>22</sup> Therefore the Court concludes that the claim is exhausted.

On the merits, CBD accurately identifies an error in the EA’s assumptions. In a section on “Soil and Watershed Resources,” under the heading “Ground cover,” the EA includes this measure:

Manage livestock grazing at an intensity that will improve effective ground cover . . . to enhance soil function . . . and to improve the quality and quantity of desirable vegetation. Target effective ground covers for each [TES] Map Unit should be at a minimum 2/3 of maximum effective ground cover as described in the table below.

---

<sup>22</sup> CBD’s administrative appeal challenged the adequacy of the 2/3 ground cover objective in particular, but it did so on a different ground (that the Forest Service had given no *timeframe* for reaching the 2/3 objective). AR 12545. Without more, that might not suffice to exhaust the claim CBD asserts now.

1 AR 12223. A footnote explains the rationale for the use of 2/3 ground cover:

2 The purpose of the 2/3 of effective ground cover is . . . to limit erosion from  
3 exceeding natural rates of formation (soil tolerance). The [TES Survey]  
4 outlines a percent effective ground cover for each [TES] map unit where  
5 soil tolerance is met. The soil and water specialist on this project used  
6 professional judgment and assigned a 2/3 effective ground cover value (*all*  
7 *2/3 values exceed the effective ground cover for soil tolerance*).

8 AR 12223 (emphasis added). The italicized parenthetical phrase is not correct; the 2/3  
9 ground cover objective does not meet the soil tolerance—*i.e.*, the amount of ground cover  
10 required to prevent erosion from exceeding natural rates of formation—at five TES units  
11 on the Allotment (Units 350, 401, 402, 420, and 430), comprising about 45% of the  
12 Allotment’s total lands. *See* AR 12224, 4004, 857.

13 The question is not whether the EA includes the error; it is whether the error  
14 matters. “To take the required ‘hard look’ at a proposed project’s effects, an agency may  
15 not rely on incorrect assumptions or data in an EIS.” *Native Ecosys. Council*, 418 F.3d at  
16 964, 965. Whether this error demonstrates a failure by the agency to take a “hard look” is  
17 a close question, but the Court concludes that it does.

18 Defendants try to marginalize this error as a “single phrase” in a “parenthetical in a  
19 footnote.” But if the phrase explicates the basis for the Forest Service’s adopting a 2/3  
20 ground cover objective, it is important; its placement in the text matters not at all.<sup>23</sup> The  
21 Defendants also suggest that the 2/3 cover objective was not essential to the EA, given all  
22 of the other “conservation measures” adopted to protect soil condition. But the EA does  
23 not discount the importance of the 2/3 ground cover objective. To the contrary, it says

---

24 <sup>23</sup> Although the Forest Service does not ask the court to find this error harmless,  
25 even if it had, such a request would be unavailing. “In the context of agency review, the role  
26 of harmless error is constrained.” *Gifford Pinchot*, 378 F.3d at 1071. “The doctrine may be  
27 employed only when a mistake of the administrative body is one that clearly had no bearing  
28 on the procedure used or the substance of decision reached.” *Id.* (internal quotation marks  
omitted). It is impossible to say that the Forest Service’s mistake had “no bearing” on the  
procedure used or decision reached.

1 that “[t]here is a need to improve the habitat conditions for various wildlife”; one of those  
2 conditions is “[s]oil stability,” with “soil loss below tolerance”; and a way to meet that  
3 condition is to improve cover “to a minimum of 2/3 of potential as defined by TES map  
4 unit.” AR 12209-10.

5 Defendants’ best argument is that the EA and the documents supporting it  
6 demonstrate an awareness that the 2/3 cover objective will not always be effective. Defs.’  
7 Combined Mem. & Opp., Doc. 24 at 35. Defendants cite a page from the Soil and Water  
8 Specialist’s Report, AR 2159, which recognizes that two of the five TES units (Units 350  
9 and 430) identified by CBD have “inherently unstable” soil and therefore may “naturally  
10 have rates of erosion greater than tolerable limits.” They also cite an Excel spreadsheet  
11 on ground cover conditions on the Allotment, AR 900, which appears to reflect a  
12 comment by someone within the Forest Service that effective ground cover “can[’]t be  
13 done” on one of the five TES units (Unit 350) and would be “hard to achieve” on two  
14 others (Units 420 and 430). Finally, they cite a portion of the EA that refers to the 2/3  
15 ground cover objective as “effective ground cover (where achievable) averaging between  
16 a minimum of 13% to 20% within the next 10 years,” AR 12210. These documents are  
17 inconsistent with the footnote’s assertion that *all* 2/3 values exceed effective ground cover  
18 for soil tolerance.

19 But while the record reflects inconsistencies in the Forest Service’s view of the  
20 efficacy of a 2/3 ground cover objective, those inconsistencies do not immunize its  
21 decision-making process from judicial scrutiny. *See Blue Mountains Biodiversity Project*  
22 *v. Blackwood*, 161 F.3d 1208, 1213-14 (9th Cir. 1998) (ordering the Forest Service to  
23 prepare an EIS where the EA’s treatment of sedimentation issues was “cursory and  
24 inconsistent”). If the Forest Service did not rely on an incorrect assumption (that a 2/3  
25 ground cover objective would be effective Allotment-wide), it at least incorrectly stated  
26 its assumptions about ground cover objectives in a way that thwarted the public’s  
27 understanding of the environmental impacts of the action. Informing the public of these  
28

1 impacts is a key value protected by NEPA. *See Native Ecosys. Council*, 418 F.3d at 964,  
2 965 (by using a hiding cover calculation denominator that is inconsistent with that  
3 required by the governing forest plan, the agency did not take a “hard look” at the  
4 project’s true effect and failed to inform the public of the project’s environmental  
5 impact); *see also* 40 C.F.R. § 1502.1 (An EIS must “provide full and fair discussion of  
6 significant environmental impacts and shall inform decisionmakers and the public of the  
7 reasonable alternatives which would avoid or minimize adverse impacts or enhance the  
8 quality of the human environment.”).

9 It is entirely unclear from the administrative record how effective a 2/3 ground  
10 cover objective will be. The Forest Service acknowledges that three TES units (Units  
11 401, 402, and 420) may be able to achieve soil tolerance levels with some percentage of  
12 ground cover, but will not do so with the 2/3 objective set forth in the EA. *See Defs.’*  
13 *Combined Mem. & Opp.*, Doc. 24 at 35. The same may be true for at least some portions  
14 of the remaining two TES units (Units 350 and 430), which have inherently unstable  
15 soil.<sup>24</sup> Finally, even for portions of the Allotment (unidentified by the Forest Service)  
16 where no amount of ground cover would be effective, the agency has not explained why a  
17 2/3 ground cover objective is appropriate. It is not obvious – indeed, it is counterintuitive  
18 – that a lower ground cover objective should be endorsed simply because effective  
19 ground cover is unachievable at any percentage.<sup>25</sup> But that is exactly what the Forest  
20 Service seems to be advocating: the 2/3 ground cover objective is not unreasonable to  
21 apply at TES units with inherently unstable soil because, even without *any* grazing

---

22  
23 <sup>24</sup> The Forest Service says that effective ground cover may be unachievable for  
24 these units, but stops short of saying that it is *definitely* unachievable for *all* portions of them.  
25 *See Defs.’ Combined Mem. & Opp.*, Doc. 24 at 35 (stating that “some” inherently unstable  
soils have natural rates of erosion greater than tolerable limits).

26 <sup>25</sup> The TES survey itself notes the importance of maintaining ground cover, even  
27 at Unit 430—a unit with inherently unstable soil. *See* AR 4001 (“Maintenance of vegetative  
28 groundcover is essential to prevent sheet and rill erosion.”).

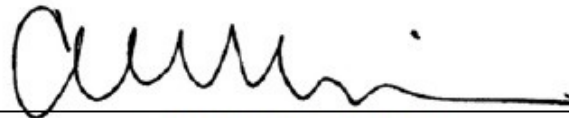
1 activity, the soil would continue to erode. *See, e.g.*, Tr. of Dec. 21, 2011 Hearing at 127  
2 (counsel for Defendants stating that the “40 percent of the allotment that plaintiffs point  
3 to [has] inherently unstable soil, so no matter what the agency does with regards to  
4 grazing, if there is no grazing allotment on there, it won’t meet a soil condition of a  
5 certain level”).

6 The Forest Service’s contradictory statements about the efficacy of its ground  
7 cover objective entitle CBD to judgment on this claim.

8 **V. Conclusion**

9 CBD’s Motion for Summary Judgment (Doc. 18-3) is **GRANTED in part**—*i.e.*,  
10 with respect to all of its ESA claims and one of its NEPA claims (the claim premised on  
11 inaccurate or inconsistent assumptions in the EA about the efficacy of the Forest  
12 Service’s 2/3 ground cover objective). Defendants’ Motion for Summary Judgment (Doc.  
13 21) is **GRANTED in part**—*i.e.*, with respect to all of CBD’s NFMA claims and the  
14 remaining two NEPA claims.<sup>26</sup>

15 DATED this 23rd day of January, 2012.

16  
17  
18 

19 A. Wallace Tashima  
20 United States Circuit Judge  
21 Sitting by Designation  
22  
23  
24

25 <sup>26</sup> In accordance with the parties’ stipulation, a Rule 16 conference shall be  
26 scheduled by separate order to address the remedial phase of this litigation. The Court  
27 invites the parties to file within 21 days their stipulation or separate suggestion as to how the  
28 remedial phase of this action should be addressed at the Rule 16 conference.