Lauren M. Rule, *pro hac vice*
Oregon Bar # 015174
Andrew R. Missel, *pro hac vice*
Oregon Bar # 181793
ADVOCATES FOR THE WEST
3701 SE Milwaukie Ave., Ste. B
Portland, OR 97202
(503) 914-6388
lrule@advocateswest.org
amissel@advocateswest.org

Richard A. Dillenburg, Esq.
Arizona Bar # 013813
RICHARD A. DILLENBURG, P.C.
2173 E. Warner Rd., Ste. 101
Tempe, AZ 85284-3503
(480) 668-1924
rich@dillenburglaw.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Neighbors of the Mogollon Rim, Inc., Plaintiff, vs. United States Forest Service; United States Fish and Wildlife Service, Federal Defendants.	No. CV-20-00328-PHX-DLR **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **Oral Argument Requested**

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INTRODUCTION

Federal Defendants' cross-motion for summary judgment/response to Plaintiff's motion for summary judgment is heavy on broad invocations of deference to agency decisionmaking but noticeably light on specific reasons to give deference to the agencies in *this* case. Federal Defendants paint in broad strokes, failing to engage with the details of the record—indeed, they suggest that such engagement is not even appropriate in some instances and insist that this Court should more or less blindly defer to them. But that is not how judicial review of agency action under the Administrative Procedure Act ("APA") works. The *scope* of this Court's review is narrow, but the *depth* of that review is not: this Court must "engage in a substantial inquiry, a thorough, probing, in-depth review" of the record and the agencies' decisions. *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009) (cleaned up). Under such an inquiry, the reasoning behind the agencies' decisions in this case quickly falls apart.

Aside from making broad invocations of deference, Federal Defendants mount a rather meek defense of their decisionmaking. One of the most glaring errors in this case is the Forest Service's near-total disregard of the aesthetic, economic, social, and health impacts on the Colcord and Ponderosa communities of opening up the Colcord/Turkey Pasture to grazing. SJ Memo. (ECF No. 33) at 20–23. Federal Defendants, apparently unable to find anything in the record to salvage the Forest Service's glaring errors on this issue, devote a single footnote to the topic and repeat the faulty reasoning of the agency. FD Resp. (ECF No. 36) at 30 n.8. Federal Defendants' terse and unconvincing discussion of this issue betrays the fact that the Forest Service simply botched its analysis of these impacts, clearly violating the National Environmental Policy Act ("NEPA").

The response to Plaintiff's arguments concerning the many numerical errors and misstatements made by the Forest Service is no more convincing. Federal Defendants ask this Court to forego a careful and searching review of the record and instead defer to the Forest Service's "expertise," FD Resp. at 3, 19–24, ignoring the fact that the errors made by the Forest Service involve simple arithmetic (or even transcription) rather than

complex scientific matters. A "thorough, probing, in-depth review" of the record shows that the Forest Service either failed to understand its own data or made simple—but serious—mathematical errors, violating the APA and NEPA.

The argument that the Forest Service reasonably concluded that it need not prepare a full environmental impact statement ("EIS") is also flawed. Federal Defendants' argument on this point ignores the new grazing scheme's potential health and human safety impacts to the Colcord and Ponderosa communities and relies heavily on the incorrect premise that the "new" adaptive management plan represents a dramatic change from existing practices. FD Resp. at 26–29. In fact, the "new" adaptive management plan is not meaningfully different from recent practices employed on the Bar X—practices that have led to impaired soil, water, and wildlife resources. Given that, it is clear that greatly increasing the amount of grazing on the Bar X and opening up long-closed pastures to grazing *may* have a significant effect on the environment, requiring an EIS.

As for the issue of whether the Forest Service violated NEPA by failing to consider a "middle ground" alternative in which the Colcord/Turkey Pasture would remain closed to grazing, Federal Defendants' arguments are nonresponsive and/or unconvincing. Federal Defendants expend considerable energy defending the "purpose and need" statement for the proposed action, FD Resp. at 11–13, which Plaintiff did not even challenge, and then repeat the same nonsensical reasons given by the Forest Service for failing to consider a "middle ground" alternative, *id.* at 13–19.

Finally, Federal Defendants briefly address Plaintiff's Endangered Species Act ("ESA") and National Forest Management Act ("NFMA") claims. FD Resp. at 31–35. Their arguments are too optimistic about the Forest Service's grazing management practices, including its "new" adaptive management plan. Because the "new" management practices do not differ substantially from recent practices, Federal Defendants cannot rely on them to explain why *dramatically* increasing the amount of grazing on the Bar X and opening up areas long closed to grazing will avoid affecting the threatened Mexican spotted owl and move the area towards "desired conditions."

ARGUMENT

I. FEDERAL DEFENDANTS FAIL TO MEANINGFULLY ADDRESS THE EFFECTS OF GRAZING ON THE COLCORD AND PONDEROSA COMMUNITIES.

A key aspect of this case is the aesthetic, economic, social, and health impacts on the Colcord and Ponderosa communities of opening up the Colcord/Turkey Pasture to grazing. In its opening summary judgment memorandum, Plaintiff devoted nearly four pages to discussing the Forest Service's failure to properly analyze such impacts during the NEPA process. SJ Memo. at 20–23. But, in response, Federal Defendants almost completely ignore this topic, mentioning it only in a footnote. FD Resp. at 30 n.8. Worse, Federal Defendants repeat the same flawed line that the Forest Service used to try to excuse its lack of analysis of such effects during the NEPA process: "Arizona is an 'open range' state where, under state law, homeowners are responsible for fencing their property if they want to ensure cattle stay off their private land." *Id.*; *see also* FS006403. As Plaintiff explained in its opening summary judgment memorandum, "build a fence" is a totally inadequate response to the concerns raised by Plaintiff and members of the Colcord and Ponderosa communities. SJ Memo at 21–23.

Similarly unavailing is Federal Defendants' suggestion that the potential impacts raised by community members did not deserve more attention in the Forest Service's environmental assessment ("EA") because they are not "significant." FD Resp. at 30 n.8. One of the central purposes of an EA is to determine *whether* the environmental impacts of a proposed action will be significant, thus triggering the requirement to prepare a full EIS. *E.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) ("*CBD v. NHTSA*"). As a matter of logic and law, Federal Defendants cannot justify the failure to properly analyze the aesthetic, economic, social, and health impacts of opening up the Colcord/Turkey Pasture on the Colcord and Ponderosa communities simply by claiming that such impacts will be "insignificant." *See Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) ("An agency cannot avoid its

statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment." (cleaned up)).

Perhaps Federal Defendants relegate their discussion of aesthetic, economic, social, and health effects to a single footnote because there is little defense to be made of how the Forest Service treated those effects during the NEPA process. Many of the effects raised by community members during the NEPA process were simply never analyzed by the agency, including the economic impacts of having to put up fencing, SOF (ECF No. 34) ¶ 63b, potential decreases in property values due to the presence of nearby cattle grazing, *id.* ¶ 63e, foul smells, *id.* ¶ 63d, and potential safety issues related to human-cow interactions, *id.* ¶ 63a. Other effects were addressed in a cursory fashion or "analyzed" in a nonsensical way. *See* SJ Memo. at 22–23 (discussing the agency's treatment of effects to recreational opportunities). Of course, completely ignoring potential impacts to the human environment in a NEPA analysis violates an agency's obligation to take a "hard look" at the effects of its actions. *E.g.*, *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 588 F.3d 718, 725–26 (9th Cir. 2010) (per curiam). Providing a conclusory or illogical analysis of effects is no more lawful. *See Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020) ("conclusory statements[] based on vague and uncertain analysis[] . . . are insufficient to satisfy NEPA's requirements" (internal quotations and citation omitted)); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (noting that the APA requires reasoned decisionmaking).

There are many flawed aspects of the agencies' analysis and decisionmaking in this case, but the Forest Service's near-total disregard for the effects of its decision on the members of the Colcord and Ponderosa communities stands out as particularly egregious. In response to the Forest Service's tentative decision to open the Colcord/Turkey Pasture to cattle grazing—a decision that would upset community members' settled expectations[1]

[1] In their response, Federal Defendants repeat the deeply misleading statement that the Colcord and Ponderosa communities have "always been located inside or adjacent to

and lead to a host of aesthetic, economic, social, and health effects—community members raised reasonable concerns with the agency. SOF ¶ 63. In response, they were told over and over again: "build a fence; it's not our problem." Perhaps not surprisingly, that is all Federal Defendants have to say on the matter in their response to Plaintiff's summary judgment motion. But NEPA demands a "hard look," not the back of the hand, and the Forest Service's failure to take such a "hard look" at the effects of its decision on the members of the Colcord and Ponderosa communities violated NEPA.

II. REVIEW OF THE AGENCIES' DECISIONMAKING MUST BE "SEARCHING AND CAREFUL," WHICH INCLUDES CHECKING THE AGENCIES' FAULTY MATH AND MISLEADING CLAIMS.

A. This Court's Review of the Agencies' Decisionmaking Must Be "Searching and Careful."

In an effort to distract from the agencies' many errors of analysis and arithmetic, Federal Defendants cite a litany of cases for the general proposition that judicial review of agency action under the APA is deferential. FD Resp. at 7–10, 19–22. They leave out the important point that judicial review must also be "searching and careful." *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009) (citation omitted). One of the central purposes of that "searching and careful" review is to "ensure that [agencies] engage[] in reasoned decisionmaking," *Fed. Energy Regulatory Com'n v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016), which is required by the APA, *Regents of the Univ. of Cal.*, 140 S. Ct. at 1905. So although it is true that this Court cannot substitute its judgment for that of the agencies, it is equally true that it is this Court's duty to ensure that the agencies did not substitute speculation, guesswork, or

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active grazing allotments," FD Resp. at 2–3, the apparent implication being that community members should have expected grazing to return to the Colcord/Turkey Pasture at any time. But it was surely reasonable for community members—particularly those who moved to the area after 1979—to "gr[ow] accustomed to a lack of grazing in nearby pastures" after so many years, FD Resp. at 3, even if the Forest Service *technically* could have started the process to authorize grazing on the Colcord/Turkey Pasture at any time. *Cf. Regents of the Univ. of Cal.*, 140 S. Ct. at 1913–14 (discussing how reliance interests do not require the acquisition of substantive legal rights).

pseudoscience for logic. *Nw. Coal. for Alternatives to Pesticides (NCAP) v. U.S. Envtl. Prot. Agency*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008). And it is also this Court's duty to ensure that the Forest Service complied with NEPA by taking a "hard look" at the environmental consequences of its proposed grazing scheme, *CBD v. NHTSA*, 538 F.3d at 1194, keeping in mind that "[a]n agency fails to meet its 'hard look' obligation when it relies on incorrect assumptions or data," *Native Ecosystems Council v. Marten*, 883 F.3d 783, 795 (9th Cir. 2018) (internal quotation, citation, and alteration omitted).

Federal Defendants suggest that this Court's "searching and careful" review should not include scrutinizing certain numerical estimates, calculations, and claims made by the Forest Service, because such scrutiny would amount to an improper lack of deference to the agency's "expertise." FD Resp. at 3, 22–23. This ignores the fact that judicial review under the APA involves "a substantial inquiry, a thorough, probing, in-depth review." *Siskiyou Reg'l Educ. Project*, 565 F.3d at 554 (cleaned up).[2] It also ignores the fact that the agency's errors were simple errors of arithmetic, unit conversion, and/or transcription. *See* SJ Memo. at 15–17. Middle-school math is not an area "involving a high level of technical expertise" at "the frontiers of science," *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 921 (9th Cir. 2018) (cleaned up), and this Court need not defer to the Forest Service's pronouncements to the effect that "2+2=5."[3] On the contrary, "[s]ignificant mathematical errors" such as the ones made by the Forest Service in this case "can render an agency decision arbitrary and

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[2] Federal Defendants confuse the *scope* of this Court's review—which is indeed narrow—with the *depth* of its review. *See NCAP*, 544 F.3d at 1052 n.7 (explaining the distinction). This Court must scrutinize the record enough "to be able to comprehend the agency's handling of the evidence cited or relied upon. . . . [W]here the agency's reasoning is irrational, unclear, or not supported by the data it purports to interpret, [this Court] must disapprove the agency's action." *Id.* (quoting *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1373 (D.C. Cir. 1985) (Wright, J., dissenting)).

[3] "Even when an agency is acting within its area of expertise, . . . [a court] need not defer to the agency when the agency's decision is without substantial basis in fact." *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067 (9th Cir. 2018) (citation and internal quotation omitted).

capricious." *Native Vill. of Chickaloon v. Nat'l Marine Fisheries Serv.*, 947 F. Supp. 2d 1031, 1056 (D. Alaska 2013), *appeal dismissed*, Case No. 13-35748 (9th Cir. Nov. 19, 2013). Such errors also violate NEPA. *See, e.g.*, *WildEarth Guardians v. Bernhardt*, Case No. 16-1724, 2020 WL 6701317, at *13 (D.D.C. Nov. 13, 2020) (pointing to a series of calculation errors that together "suggest[ed] a sloppy and rushed process, not the '[a]ccurate scientific analysis' that is 'essential to implementing NEPA'" (quoting 40 C.F.R. § 1500.1(b) (2019))).

Indeed, courts regularly check agencies' math when conducting review under the APA and other statutes that employ the "arbitrary and capricious" standard. In *Alabama Power Co. v. FCC*, for instance, the D.C. Circuit vacated an order based on the agency's "somewhat casual calculations" that had resulted in (among other things) an incorrect accounting of investments that formed the basis of certain utility rates. 773 F.2d 362, 367–68, 372 (D.C. Cir. 1985). The court explained precisely where the agency had gone wrong in its calculations, *id.* at 367–68, and concluded that such errors rendered the agency's decision arbitrary and capricious, *id.* at 372. Similarly, the court in *Native Village of Chickaloon* concluded that the agency had acted arbitrarily and capriciously by failing to apply a correction factor to visual survey data of beluga whale population densities, resulting in "an underestimation of the percentage of the beluga whale population that would be encountered in [a given] area" and an artificially low estimate for beluga whale "take." 947 F. Supp. 2d at 1054–57, 1076–77. The court faulted the agency for "failing to adequately calculate that which the agency was actually trying to calculate." *Id.* at 1056–57. These cases—and many others[4]—demonstrate that it is entirely appropriate, and even necessary, for courts to scrutinize an agency's numerical estimates, calculations, and claims when conducting review under the APA.

[4] *See, e.g.*, *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 102, 122–24 (D.D.C. 2016) (holding that the agency violated the APA because its "calculations . . . ha[d] significant mismeasurements or inaccuracies" and it had made "basic computational errors").

B. The Forest Service Made Serious Errors Related to Its Grazing Capacity Analysis and Assessment of Baseline Conditions.

Here, the Forest Service made at least two serious numerical errors that undermine its analysis and effects conclusions. As discussed in Plaintiff's opening summary judgment memorandum, those errors violate NEPA (and the APA).[5] SJ Memo. at 14–19.

First—and perhaps most importantly—the Forest Service either misinterpreted its own grazing capacity analysis or simply failed to accurately transcribe the results of that analysis, leading it to devise a grazing scheme that would allow 30% more grazing than the Bar X can support according to the analysis. SJ Memo. at 17. There is no justification in the record for adopting a grazing scheme that allows grazing in excess of the agency's own estimated grazing capacity; indeed, there is no acknowledgment in the record of the discrepancy between the capacity analysis and the maximum grazing levels in the proposed scheme.[6] *Id.* Such a disconnect between the "facts found" and the "choice made" is a textbook APA and NEPA violation. *E.g.*, *Or. Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1190–91 (9th Cir. 2019).

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[5] In a footnote, Federal Defendants state that "Plaintiff did not previously raise its objections to the AUM calculations underlying historic stocking data." FD Resp. at 20 n.7. If this is meant to be a waiver argument, it is woefully indistinct, and is itself waived. *Cf. Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2010) (a party can "waive waiver").

[6] There is likely no acknowledgement of the error because the agency did not even realize that it had made an error. It seems almost certain that the source of the agency's error was its admitted tendency to "employ[] . . . different conversion factors when calculating" animal unit months ("AUMs"). FD SOF (ECF No. 37) ¶ 22. The capacity analysis yielded an estimate for the carrying capacity of the Bar X in terms of AUMs per year. SOF ¶ 84. The capacity analysis also included estimates for the carrying capacity in terms of "animals." *Id.* ¶ 90. Those "animal" numbers—which apparently were included "to give the reader a sense of what the AUMs actually mean," FD Resp. to SOF (ECF No. 38) ¶ 90—were arrived at by simply dividing AUMs by 12 months. SOF ¶ 90. When the Forest Service used the analysis to develop the proposed action, it likely took the *animal* numbers from the analysis, then converted back to AUMs using the *proper* conversion factors (1.32 for cow-calf pairs, etc.) rather than 1.0. SOF ¶ 42 n.3. If this was the error made by the agency, one would expect the proposed action to include a maximum grazing capacity roughly 32% higher than (1.32 times) the capacity calculated in the analysis. That is indeed the case. *Compare* SOF ¶ 86 (calculated grazing capacity of 3,973 AUMs on the Bar X-associated Driveway pastures), *with* FS006405 (up to 5,250 AUMs = 1.3214 * 3,973 AUMs allowed on the Bar X-associated Driveway pastures).

Federal Defendants' response[7] to this is to wave their hands, characterize range management as "both a science and an art," and insist that the maximum grazing levels in the proposed action were "based on a wide range of factors," only one of which was the capacity analysis. FD Resp. at 19–24. But the Forest Service stated during the NEPA process that the maximum grazing levels in the proposed action were "derived from [the] capacity analysis," FS004323, making Federal Defendants' argument an impermissible post hoc rationalization. *E.g.*, *Regents of the Univ. of Cal.*, 140 S. Ct. at 1908. And, even putting that aside, the very nature of a capacity analysis[8] is such that an *upward* deviation from an estimated carrying capacity demands an explanation. Put another way, even if Federal Defendants are correct that the Forest Service *could,* in theory, justify maximum grazing levels 30% higher than the carrying capacity calculated in its analysis, there is no adequate justification for such a deviation in the administrative record, as required by NEPA and the APA. *See Ctr. for Biological Diversity v. Bernhardt*, – F.3d –, 2020 WL 7135484, at *8–*9 (9th Cir. Dec. 7, 2020) (holding that the agency acted arbitrarily and capriciously when it failed to justify an "implausible" result); *see also Greenpeace, Inc. v. Cole*, 445 F. App'x 925, 927 (9th Cir. Aug. 2, 2011) (unpublished) (holding that the

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[7] Federal Defendants do not quibble with Plaintiff's assertion that the "capacity analysis estimated that . . . the Bar X-associated Driveway pastures can support 3,973 AUMs." SJ Memo. at 17; FD Resp. to SOF ¶ 86. Federal Defendants' position on Plaintiff's assertion that the "capacity analysis estimated that the Bar X pastures—which . . . do not include the Driveway pastures—can support 3,108 AUMs" is less clear. Federal Defendants admit that the capacity analysis estimated that 3,108 AUMs is the carrying capacity "for the entire Bar X Allotment," FD Resp. to SOF ¶ 87, but then immediately contradict themselves by insisting that the 3,108 AUMs figure does not include the Colcord/Turkey Pasture, *id.* ¶ 89. But the "entire Bar X Allotment" *includes* the Colcord/Turkey Pasture, as Federal Defendants admit. *Id.* ¶ 1. Federal Defendants' confusion is no doubt caused by the poor labelling in the capacity analysis. FS001538–39. But however confusing the labels, the numbers speak for themselves: the 3,108 AUMs figure covers an area of 27,337 acres, which corresponds to the *entire* Bar X, *including* the Colcord/Turkey Pasture. SOF ¶¶ 87–89.

[8] As explained in the Region 3 Forest Service Handbook, a capacity analysis is used to estimate "carrying capacity," which is "[t]he average number of livestock and/or wildlife that may be *sustained* on a management unit compatible with management objectives for the unit." FS Handbook Region 3 2209.13, ch. 90, § 92.14a (2016) (emphasis added).

Forest Service acted arbitrarily and capriciously because it "failed to explain how it ended up with a table that identifies 100 deer per square mile as a maximum carrying capacity, but allows 130 deer per square mile as a potential carrying capacity"). Of course, it is not surprising that there is no such justification, as it appears that the agency didn't *intentionally* set the maximum grazing level in the proposed action 30% higher than the calculated capacity, but rather made a mathematical error. *See supra* n.6.

Second, the Forest Service incorrectly calculated and reported the amount of grazing that has occurred on the Bar X pastures in recent years. SJ Memo. at 15–18. Based on the annual operating instructions ("AOIs") over the relevant period and the Forest Service's own summary of those AOIs, the amount of grazing on the Bar X pastures *plus* the associated Driveway pastures from 2008–2019 was 3,187 AUMs per year. SJ Memo. at 15. Looking only at the years 2013–2019, the average amount of grazing on the Bar X pastures *plus* the associated Driveway pastures was 3,716 AUMs per year. SOF ¶ 47. And yet the EA reports that grazing levels have "averaged 3,707 [AUMs] per year" on the Bar X *alone* and that grazing levels on the Bar-X-associated Driveway pastures averaged 1,720 AUMs from 2011–2018, for a total of around 5,400 AUMs per year—much higher than the actual values. FS006373–74. In other words, the Forest Service dramatically overstated the amount of grazing that has occurred on the Bar X and associated Driveway pastures in recent years. This error violated NEPA's requirement to accurately assess baseline conditions as well as NEPA's requirement to present non-misleading information to the public and decisionmakers. *See Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095 1101 (9th Cir. 2016) (baseline conditions); *Marten*, 883 F.3d at 795 (non-misleading information).

Federal Defendants' primary response to this is to accuse Plaintiff of "recalculating and reframing the agency's own data in an attempt to make it appear faulty and misleading" and to insist that this Court should not scrutinize the Forest Service's calculations and numerical claims. FD Resp. at 3, 19–24. As discussed *supra* pp. 5–7, there is nothing inappropriate about this Court (or Plaintiff) checking the Forest Service's

math or ensuring that the agency correctly interpreted its own data—or, as the D.C. Circuit put it, ensuring that the agency "in fact calculated that which it sought to calculate." *Ala. Power Co.*, 773 F.2d at 367. Indeed, the APA and NEPA demand as much. *Siskiyou Reg'l Educ. Project*, 565 F.3d at 554; 40 C.F.R. § 1500.1(b) (2019).

Federal Defendants also offer an incorrect "interpretation" of the historical grazing data in a doomed attempt to salvage the Forest Service's faulty analysis. Federal Defendants insist that the maximum amount of grazing permitted on the Bar X pastures (not including the associated Driveway pastures) under the new proposed action (4,002 AUMs per year) "is well within the range of Bar X authorizations over the last 12 years, and is not a dramatic departure from current authorizations as Plaintiff contends." FD Resp. at 23. That is simply wrong. The Forest Service's own table summarizing grazing levels in recent years, FS001676—which is based on, and consistent with, the AOIs from those years, SOF ¶ 44–45; FD Resp. to SOF (ECF No. 38) ¶ 48—includes all grazing on the Bar X pastures *plus* the associated Driveway pastures. *Compare* FS001676 (table listing grazing levels), *with* FS000001Sup–52Sup (AOIs listing grazing levels on a pasture-by-pasture basis, with Driveway pastures included). (Indeed, in their response to Plaintiff's statement of facts, Federal Defendants *admit this*. FD Resp. to SOF ¶¶ 46–47.) And according to those records, the average amount of grazing allowed on the Bar X pastures and associated Driveway pastures *combined* from 2013–2019 was 3,716 AUMs per year, which is *lower* than the maximum amount of grazing allowed on just the Bar X pastures, *not* including the Driveway pastures, under the proposed plan. FS006405. Thus, Federal Defendants are mistaken, as a factual matter, that the maximum grazing level under the new scheme is "well within the range of Bar X authorizations over the last 12 years." The maximum amount of grazing allowed on all pastures under the proposed scheme is nearly *three times higher* than the amount of grazing in recent years, and the maximum amount of grazing on just the Bar X pastures is *at least* 54% higher than grazing levels in recent years. SJ Memo. at 15–16; *see also* SOF ¶¶ 41–49.

Federal Defendants' last tactic is to downplay the importance of both of the Forest Service's errors. According to Federal Defendants, "[t]he authorization levels in the proposed action do not hinge on a single calculation of average historic stocking levels, nor does the EA suggest as much," FD Resp. at 21–22, and Plaintiff's attacks on the Forest Service's errors are "narrow mathematical challenges," *id.* at 23–24. In other words, even if the Forest Service made a few mistakes, it still "adequately analyzed the potential impacts of the proposed new grazing levels on current range conditions," and its approval of the new grazing scheme should be upheld. *Id.* This ignores both the magnitude and the nature of the agency's errors. Again, the Forest Service approved a grazing scheme that allows over 30% more grazing than the agency determined is ecologically sustainable, and the agency never bothered to explain the discrepancy. *Supra* pp. 8–10. That is not a minor mathematical error—it is either a *major* error or an unexplained disconnect between the "facts found" and the "choice made," either of which is unlawful. *See supra* pp. 5–7. As for the Forest Service's overstatement of the amount of grazing that has occurred on the Bar X in recent years, that error, considered alone or in combination with other misstatements by the agency,[9] misled both the public and decisionmakers about the effects of the new grazing scheme, obscuring the fact that it involves a *dramatic* increase from current grazing levels. SJ Memo. at 17–18. The recitation of such misleading information during the NEPA process violates the statute.

III. FEDERAL DEFENDANTS' RELIANCE ON ADAPTIVE MANAGEMENT IS MISPLACED.

Throughout their response, Federal Defendants point to adaptive management as the key feature of the new grazing scheme that will ensure that the scheme will not cause

[9] As Plaintiff discussed in its opening summary judgment memorandum, the Forest Service made several misstatements aside from those concerning the amount of grazing that has occurred on the Bar X. SJ Memo. at 17–18. For instance, the Forest Service falsely suggested that grazing was allowed on the Colcord/Turkey Pasture in 2015 and 2018 on a trial basis in order to collect data, when in fact no utilization data was gathered following the 2015 grazing season and there was no grazing at all on the pasture in 2018. *Id.* Federal Defendants do not even address those misleading statements in their response.

significant harm to the environment and/or violate the Tonto Forest Plan. FD Resp. at 26–30, 34–35. This echoes the Forest Service's repeated claims during the NEPA process that adaptive management will ensure that greatly increasing the amount of grazing allowed on the Bar X and re-opening the long-closed pastures to grazing will somehow *improve* conditions and move the area toward the desired conditions laid out in the Tonto Forest Plan. *E.g.*, FS006409; FS006524.

The problem with the reliance on their adaptive management plan is that the Forest Service has *already been using* almost identical methods on the Bar X for years, and it has not helped environmental resources on the Bar X meet the desired conditions laid out in the Forest Plan. SJ Memo. at 23–26; SOF ¶¶ 30–40. Federal Defendants insist that the new grazing scheme "implements a formal and more robust system of adaptive management that would allow the Forest Service to continually modify grazing systems as needed to meet objectives throughout the action area." FD Resp. at 17–18. But it is difficult to see how the new adaptive management system actually differs from the system that has been in place in recent years. The table below compares the "new" adaptive management scheme to existing practices:

"New" Adaptive Management Scheme	**Existing Practices**
"Effectiveness monitoring," including "measurements to track long-term condition and trend of upland and riparian vegetation, soil, and watersheds," which would then be used "to determine if management is achieving desired resource conditions, if changes in resource condition are related to management, and to determine if modifications in management are necessary." FS006416. "Monitoring would occur at established permanent monitoring points. Both qualitative and quantitative monitoring methods would be used . . . ." *Id.*	Annual collection of data at monitoring sites in connection with the "Reading the Range" program, including "data on herbaceous and half shrub vegetative cover, utilization monitoring, forage production, frequency, browse monitoring, onsite precipitation data, and characterization of soils." FS006378–79. "Long term vegetative trend can be extrapolated from these data into the future." FS006378. This data is then used "to assist rangeland managers in making timely decisions relative to livestock management," *id.*, and to "aid [Forest Service] personnel in adjusting management to achieve goals . . . set for the allotment," Ex. 4 (ECF No. 35-4) at 3.

"Implementation monitoring would occur yearly and would include such things as inspection reports, forage utilization measurements in key areas, livestock counts, and facilities inspections. . . . The purpose of implementation monitoring is to determine if grazing meets conservative use guidelines in upland and riparian areas." FS006416–17.	"Production and utilization data has been gathered at key area monitoring sites at the same time [as] Reading the Range . . . ." FS006380. This data has been used to confirm that conservative grazing management is occurring. *Id.*; *see also* FS000008Sup (2010 AOI stating that utilization data will be gathered at the end of the growing season to confirm conservative use). "Forest personnel may conduct periodic brief inspections of pastures . . . at any time to verify actual use, improvement conditions, or other non-range related activity." FS000024Sup.
Monitoring of utilization on key forage species as part of annual implementation monitoring. FS006417. "Information would be collected through routine pasture inspections and end of season utilization monitoring." *Id.* Information would be used "to make decisions about the timing, intensity, duration, or frequency of livestock grazing in a given grazing season." *Id.*	Annual end-of-season utilization monitoring, *supra*, as well as evaluations of grazing intensity "during the growing season in order to practice pro-active management and make necessary management changes needed for plant development and recovery," SOF ¶ 37. Utilization and other data are used "to make informed management recommendations concerning pasture moves and stocking rates." *Id.* Actual grazing times on any given pasture "may vary depend[ing] upon . . . soil and range conditions, conflicts with or for protection of wildlife, water availability, utilization levels and time required to move livestock." *Id.* ¶ 38.
"Riparian components in key reaches would be monitored using riparian utilization measurements (implementation monitoring) . . . ." FS006417. "[U]se guidelines for riparian components are as follows: obligate riparian tree species—limit use to less than 50 percent of terminal leaders (top one third of plant) on palatable riparian tree species accessible to livestock (usually less than 6 feet tall); deergrass—limit use to less than 40 percent of plant species biomass; emergent species . . .—maintain six to eight inches of stubble height during the	Annual utilization monitoring, *supra*, to ensure conservative use guidelines are being met, *e.g.*, FS000008Sup. Since 2016, conservative use guidelines for riparian areas are as follows: riparian woody—50 percent of leaders on the upper 1/3 of plants up to 6 feet tall; herbaceous vegetation—40 percent of plant species biomass and maintain 6–8 inches of stubble height on deergrass. SOF ¶ 36. "The use on key species in key areas will ultimately determine the length of the grazing period in each pasture." *Id.* ¶ 39.

grazing period." *Id.* "If utilization reaches limits of recommended allowable use, livestock would be moved from the critical area or pasture considering time of year and extent of area involved." FS006418.	
"Necessary annual adjustments to grazing management on the allotment would be implemented through the AOI, which would adjust use to be consistent with current vegetation productivity and resource conditions. The AOI may change season of use and pasture rest periods and may also include mitigation measures to avoid or minimize effects to wildlife, soil, and water quality. Modifications to the AOI may be implemented at any time throughout the grazing season in response to current resources conditions or unforeseen environmental concerns such as drought, fire, flood, etc." FS006419.	"Utilization data will be coupled with other information such as vegetation condition, forage plant production and vigor, soil and watershed condition, and long term trends, in order to make informed management recommendations concerning pasture moves and stocking rates." SOF ¶ 37. In any given year, the actual rotation schedule is subject to change based on a variety of factors, including "climatic conditions, wildfire, noxious weeds, soil and range conditions, conflicts with or for protection of wildlife, water availability, utilization levels and time required to move livestock." SOF ¶ 38.

As the above table demonstrates, the "new" adaptive management scheme looks eerily similar to what the Forest Service has already been doing; it appears that the agency has just poured old wine into a new bottle.

There is another powerful piece of evidence that the Forest Service has, in effect, been practicing adaptive management on the Bar X for years: in 2007, the agency informed the USFWS *that it would be practicing adaptive management on the Bar X*. In a biological assessment ("BA") prepared that year as part of the agencies' ESA consultation over grazing on 33 allotments on the Tonto National Forest—including the Bar X—the Forest Service informed the USFWS that it had "adopted a policy of rangeland adaptive management" two years prior and that its proposed action included that policy. FS000978–82. The description of the proposed action included a discussion of adaptive management/monitoring very similar to the discussion in the Final EA in this case. *Compare* FS000979–80 (discussion of monitoring in the 2007 BA), *with*

FS006416–18 (discussion of monitoring in the Final EA). The similarities are not surprising, as both actions followed guidance from the same portion of the Forest Service Handbook. *Compare* FS000978 (citing FS Handbook 2209.13, ch. 90 (2005)), *with* FS006404 (same). Although the Forest Service did not, at that time, incorporate the new monitoring/adaptive management scheme into the allotment management plan ("AMP") for the Bar X, the agency did state that it would be implementing the new monitoring/adaptive management scheme on the Bar X (and the 32 other allotments) *even without* such changes to the AMP. FS000981. Thus, it appears that the Forest Service has been using a management scheme substantially similar to the "new" adapative management scheme since at least 2007–2008.

In reality, the Forest Service's new grazing scheme is just the old scheme, but with a *far* greater amount of grazing allowed than in recent years. *See supra* pp. 10–11 (more grazing), 12–16 (same scheme). As Plaintiff discussed in its opening summary judgment memorandum, current conditions on the Bar X, even on the pastures long closed to grazing, are far from ideal, with soil, water, and wildlife resources particularly impaired. SJ Memo. at 23–28. The notion that opening up the long-closed pastures to grazing and dramatically increasing the total amount of grazing allowed on the Bar X will somehow *improve* the condition of those resources seems implausible, and the Forest Service's explanation—adaptive management—falls apart on close inspection, because the "new" adaptive management really represents a continuation of current management practices. In short, the Forest Service failed to take a "hard look" at the effects of its new grazing scheme, and to connect the dots between the facts in the record and its conclusions, because it unreasonably relied on the ameliorative effects of a management scheme that has proven insufficient even under current grazing levels. *See Rose*, 921 F.3d at 1190–91 ("NEPA . . . require[s] [agencies] to articulate a rational connection between the facts found and the choice made instead of relying on an ipse dixit assessment of environmental impacts over . . . contrary . . . data" (cleaned up)); *see also* SJ Memo. at 23–28.

IV. CONTRARY TO FEDERAL DEFENDANTS' ARGUMENT, AN EIS IS REQUIRED BECAUSE THERE ARE "SUBSTANTIAL QUESTIONS" AS TO THE EFFECTS OF THE NEW GRAZING SCHEME.

Federal Defendants argue that the Forest Service was not required to prepare an EIS because there are not "substantial questions" as to whether the new grazing scheme "may have a significant effect on the environment."[10] FD Resp. at 29–30. Federal Defendants maintain that they "reasonably determined that the action is not likely to adversely affect" Mexican spotted owl and that there are no substantial questions about the Forest Service's NEPA analysis or reliance on adaptive management. *Id.* at 30. Both contentions are incorrect. *See infra* pp. 24–25 (Mexican spotted owl); *supra* pp. 8–16 (shortcomings of the Forest Service's NEPA analysis and its reliance on adaptive management). As discussed in Plaintiff's opening summary judgment memorandum, the new grazing scheme implicates both the "highly controversial" and "endangered species" intensity factors because of its likely effects on a variety of natural resources. SJ Memo. at 29–30; *see also* 40 C.F.R. § 1508.27(b) (2019) (setting out factors for agencies to consider when assessing a proposed action's "intensity").

Tellingly, Federal Defendants barely address Plaintiff's argument that the chosen grazing scheme also implicates the "public health or safety" and "highly controversial" intensity factors because of the probable aesthetic, economic, social, and health impacts to the Colcord and Ponderosa communities. SJ Memo. at 29–30. As discussed *supra* pp. 3–5, Federal Defendants' sole mention of the aesthetic, economic, social, and health impacts to the communities involves repeating the "build a fence" line employed by the

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[10] In their response, Federal Defendants somewhat conflate the issue of the EA's adequacy with the issue of whether it was lawful for the Forest Service to prepare an EA rather than an EIS. FD Resp. at 19–30. These are, however, separate issues. *CBD v. NHTSA*, 538 F.3d at 1225–27. For the reasons discussed in Plaintiff's opening summary judgment memorandum, SJ Memo. at 9–28, and *supra* Parts I–III, the Forest Service's EA is inadequate under NEPA and the APA, and that is true *regardless* of whether an EIS was clearly required. *CBD v. NHTSA*, 538 F.3d at 1225–27. Put another way, even if this Court finds that Plaintiff has not raised "substantial questions" as to whether the proposed action will have significant effects—thus requiring an EIS—it does not necessarily follow that the EA prepared by the Forest Service is legally adequate.

Forest Service throughout the NEPA process and downplaying the concerns of community members. FD Resp. at 30 n.8. Specifically, Federal Defendants state that the "context" of the proposed grazing scheme[11] "includes the fact that Arizona is an 'open range' state where, under state law, homeowners are responsible for fencing their property if they want to ensure cattle stay off their private land." *Id.* True enough, but, as explained in Plaintiff's opening summary judgment memorandum, many of the effects at issue would not be ameliorated by a fence, and fencing itself would have adverse effects on members of the Colcord and Ponderosa communities. SJ Memo. at 20–23; *see also* SOF ¶ 63. Moreover, the "context" of the proposed action *also* includes the very important facts that, aside from 2015, there has been no grazing on the Colcord/Turkey Pasture since 1979 and that many members of the Colcord and Ponderosa communities have *never* (aside from 2015) had to deal with grazing in or next to their backyards. SOF ¶ 12, 28, 52, 58; FS002548.

The aesthetic, economic, social, and health effects raised by community members implicate the "public health or safety" intensity factor—something that the Forest Service failed to appreciate. FS006524. And the effects of the proposed grazing scheme on the Colcord and Ponderosa communities also implicate the "highly controversial" intensity factor, because information about those effects presented to the Forest Service during the NEPA process "cast[] serious doubt upon the reasonableness of [the] agency's conclusions." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019) (citation omitted). Specifically, members of the Colcord and Ponderosa communities made it clear to the Forest Service that they (and recreators) "have come to rely on the absence of cattle on the Colcord/Turkey Pasture," SJ Memo. at 29, and that allowing grazing would therefore have serious adverse effects, *see* SOF ¶ 63, undercutting the Forest Service's claim that any effects would be insignificant because the communities

[11] Determining whether a proposed action may have a "significant" effect—and thus requires an EIS—involves evaluating the action's "context and intensity." *Blue Mtns. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); 40 C.F.R. § 1508.27 (2019).

"have always been within an active grazing allotment," FS006402–03. Indeed, the high level of concern and contention that occurred from the single year of grazing in 2015 demonstrates just how serious the effects might be of opening the Colcord/Turkey Pasture to grazing. *See* Olsson Decl. (ECF No. 35-1) ¶¶ 8–12 (discussing the effects on the communities from a single year of grazing on the Colcord/Turkey Pasture); FS001752 (same). This is precisely the sort of dispute about the "size, nature, or effect" of an action that implicates the "controversy" factor.[12] *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736–37 (9th Cir. 2001) (concluding that the "controversy" factor was implicated where public "comments urged that the EA's analysis was incomplete, and the mitigation uncertain, . . . cast[ing] substantial doubt on the adequacy of the [agency's] methodology and data"), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

The possible effects to various environmental resources from opening the Colcord/Turkey Pasture and increasing overall grazing levels—and the possible effects to the Colcord and Ponderosa communities—are such that there are "substantial questions" as to whether the proposed grazing scheme "*may* cause significant degradation of some human environmental factor." *Provencio*, 923 F.3d at 668–69 (citation omitted and emphasis added). Thus, the Forest Service must prepare an EIS.

V. FEDERAL DEFENDANTS CANNOT JUSTIFY THE FAILURE TO SERIOUSLY CONSIDER A "MIDDLE GROUND" ALTERNATIVE.

Federal Defendants spend a large fraction of their response trying to justify the Forest Service's decision to seriously consider just two alternative actions: a "no grazing"

[12] The Forest Service was eager to point out that "public opposition [to] a proposed action" does not render the action "controversial" within the meaning of NEPA. FS006525. Federal Defendants, without using the same language, echo this sentiment in their response. FD Resp. at 30 n.8. That is an accurate statement of the law, but it misses the point: the proposal to allow grazing on the Colcord/Turkey Pasture is not "controversial" because the affected communities largely oppose it; it is "controversial" because members of the affected communities raised concerns about a host of probable effects from the action that undercut the Forest Service's assumptions and reasoning.

alternative and the grazing scheme that was ultimately chosen. FD Resp. at 10–19. Their arguments, though, are either irrelevant or unconvincing. The record demonstrates that the Forest Service should have considered a "middle ground" alternative that would keep the Colcord/Turkey Pasture off-limits to grazing and that it never provided a legally adequate explanation for its refusal to do so, violating NEPA. SJ Memo. at 9–14.

Federal Defendants begin their "alternatives" argument with a vigorous defense of the "purpose and need" statement for the proposed action. FD Resp. at 11–13. But Plaintiff never attacked the purpose and need statement, for reasons that Federal Defendants' lengthy defense of the statement make clear: that statement is broad enough to accommodate a wide range of possible alternatives, including a "middle ground" alternative in which the Colcord/Turkey Pasture remains closed to grazing. SJ Memo. at 10–12. The purpose and need statement is suffused with an understanding that the Forest Service must balance competing interests when deciding where to authorize grazing and how much grazing to authorize on the Bar X. *See* FS006400–01; *see also infra* pp. 22–23. As Federal Defendants acknowledge, there is nothing in the statement—or the law—that requires the Forest Service to maximize grazing on the Bar X, *especially* when it comes to the Colcord/Turkey Pasture. FD Resp. at 18; *see also* SJ Memo. at 13 n.10.

Federal Defendants next argue that the Forest Service complied with NEPA's requirement to "thoroughly consider a no-action alternative" by giving full consideration to a "no grazing" alternative. FD Resp. at 13–14. This argument is not responsive to Plaintiff's claim. The gist of Plaintiff's alternatives claim is that the Forest Service should have given thorough consideration to at least one "middle ground" alternative, not necessarily a pure "no action" alternative (though a true "no action" alternative would keep the Colcord/Turkey Pasture closed to grazing). SJ Memo. at 10–14. The requirement to consider a "no action" alternative is separate and distinct from the requirement to consider all reasonable alternatives, and it is the latter requirement that the

Forest Service violated by refusing to consider a middle ground alternative.[13] *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 601–02 (9th Cir. 2010) ("Agencies . . . must give full and meaningful consideration to all reasonable alternatives." (citation omitted)); 40 C.F.R. § 1502.14(d) (2019) (stating that EISs must include a "no action" alternative).

Federal Defendants then spend more than four-and-a-half pages arguing that the Forest Service provided a rational explanation for refusing to give serious consideration to a "middle ground" alternative. FD Resp. at 14–19. Federal Defendants' arguments on this point miss the mark.

First, even assuming that continuing current management would not allow for meaningful adaptive management[14] and that it was therefore reasonable for the Forest Service to refuse to consider a pure "no action" alternative, FD Resp. at 14–15, 17–18, it does not follow that it was reasonable to refuse to consider *any* "middle ground" alternative. The Forest Service could have simply considered a "middle ground" alternative in which the Colcord/Turkey Pasture remains closed to grazing and robust adaptive management is formally incorporated into the management of other pastures. SJ Memo. at 12–13. Plaintiff and members of the Colcord and Ponderosa communities did not ask the Forest Service to consider a pure "no action" alternative; what they asked the Forest Service to consider was *some* alternative in which the Colcord/Turkey Pasture remains closed to grazing. *E.g.*, FS002551.

Second, contrary to Federal Defendants' argument, FD Resp. at 15–16, the supposed flexibility of the chosen alternative does not obviate the need to thoroughly examine a "middle ground" alternative in which the Colcord/Turkey Pasture remains off-limits to grazing. Under the chosen alternative, grazing *might* not occur on the

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[13] Of course, the Forest Service's general practice of treating a "no grazing" alternative as the required "no action" alternative flies in the face of NEPA in cases where there is already grazing occurring in the subject area. In this case, though, there is no need to challenge that practice.

[14] Plaintiff disputes this. *See infra* pp. 12–16.

Colcord/Turkey Pasture *every* year, but the Forest Service is free to allow grazing in any given year with little notice to the Colcord and Ponderosa communities and with no further NEPA analysis. FS006402, FS006409, FS006535–38; FS Handbook 2209.13, ch. 90, § 96.1 (2005); *see also* FS002934–35 (Region 3 version of the Forest Service Handbook). Under a "middle ground" alternative, on the other hand, the Colcord/Turkey Pasture would remain closed to grazing per the allotment management plan and term grazing permit, and any decision to open up the pasture would require further analysis and a public process. *See* FS Handbook 2209.13, ch. 90, §§ 94–96 (2005). These are two starkly different alternatives with very different consequences for the Colcord and Ponderosa communities, which is why members of the communities asked the Forest Service again and again to give full consideration to a "middle ground" alternative. SOF ¶ 64. Given how different these alternatives are, the Forest Service did not effectively analyze one when it analyzed the other. *See Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (stating that an agency need not "undertake a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences" (citation and internal quotation omitted)).

Third, the purpose and need statement for the action is broad and does not prioritize grazing over other uses, and Federal Defendants' attempt to show otherwise is unconvincing. Federal Defendants point to the Forest Service's "reasons for prioritizing the project and the statement of need that lays out the statutory and policy directions to make suitable land available to grazing" in an effort to show that Plaintiff's interpretation of the purpose and need statement is "overly broad" and that the Forest Service set out to "prioritize" grazing on the Bar X,[15] justifying its rejection of a "middle ground"

[15] A purpose and need statement prioritizing grazing on the Colcord/Turkey Pasture would arguably run afoul of NEPA, as grazing is not emphasized on that pasture under the Tonto Forest Plan. SJ Memo. at 13 n.10; *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013) ("an agency must consider the statutory context of the

alternative. FD Resp. at 16, 18. Federal Defendants ignore the fact that the purpose and need statement heavily qualifies the purportedly pro-grazing rationales for the action:

- "The purpose of this action is to *consider* livestock grazing opportunities on public lands *where consistent with management objectives*." FS006401 (emphasis added).
- "[T]he purpose of this action is to authorize livestock grazing *in a manner consistent with direction to move ecosystems towards their desired conditions*." *Id.* (emphasis added).
- Authorization is needed on this allotment because . . . *[w]here consistent with other multiple use goals and objectives*, there is Congressional intent to allow grazing on suitable lands . . . ." *Id.* (emphasis added).

Reading the statement of purpose and need as a whole, it is apparent that the Forest Service's ostensible goal in performing its NEPA analysis was to determine *whether* to allow grazing on the Colcord/Turkey Pasture and *whether* to change the amount of grazing allowed on the Bar X; the agency did not begin the NEPA process having decided that it would definitely expand grazing. Given that discretion, a "middle ground" alternative would easily meet the purpose and need of the proposed action.[16]

Finally, Federal Defendants' suggestion that it was reasonable for the Forest Service to reject a "middle ground" alternative because opening up *all* Bar X and associated Driveway pastures to grazing "allows for more flexible adaptive changes and pasture rotations," FD Resp. at 18, is an impermissible post hoc rationale for the Forest

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proposed action and any other congressional directives" when determining an action's purpose and need).

[16] Federal Defendants completely misunderstand why Plaintiff cited *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013), in its opening summary judgment memorandum. FD Resp. at 16–17. That case confirms that the purpose and need statement in this case is a broad one that can be met with a "middle ground" alternative. *See* SJ Memo. at 11–12 (comparing the purpose and need statement in *Abbey* to the one in this case). A purpose and need statement that truly prioritizes one particular use over other competing uses looks far different from the ones in this case and in *Abbey*. *See Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1067 (9th Cir. 1998) (discussing a purpose and need statement that emphasized timber production).

Service's decision. Federal Defendants cite (1) a portion of the Final EA that simply discusses the chosen grazing scheme, FS006408–09, and (2) a portion of their own statement of facts, FD SOF (ECF No. 37) ¶ 83, which itself refers to the same portion of the Final EA. The cited portion of the EA does not offer the rationale now put forward by Federal Defendants, and this Court cannot sustain the Forest Service's decision not to fully consider a "middle ground" alternative based on a reason not offered by the Forest Service at the time of its decision. *E.g.*, *Regents of the Univ. of Cal.*, 140 S. Ct. at 1908.

In sum, the Forest Service *never* offered a good reason for not giving thorough consideration to a "middle ground" alternative, and such an alternative would clearly meet the purpose and need of the action. For those reasons, the Final EA is defective. *See* SJ Memo. at 9–14.

VI. FEDERAL DEFENDANTS' ESA AND NFMA ARGUMENTS LACK MERIT.

As with several of Federal Defendants' other arguments, Federal Defendants' ESA arguments rely on an unwarranted optimism about the effectiveness of the Forest Service's grazing management strategy on the Bar X. Federal Defendants insist that their determinations that the new grazing scheme is "unlikely to adversely affect" the Mexican spotted owl reasonably relied on the ameliorative effects of sound range management practices, including management to ensure conservative utilization of vegetation. FD Resp. at 32–33. But, as discussed *supra* pp. 12–16 and in Plaintiff's opening summary judgment memorandum, SJ Memo. at 23–28, the "new" management strategy is not meaningfully different from the old strategy, and the old strategy has led to substandard conditions in grazed areas, *id.* at 23–26. Given that—and given that the Colcord/Turkey Pasture and Lost Salt Pasture, where nearly all the Mexican spotted owl protected activity centers on the Bar X are located, *id.* at 31–32, have been closed to grazing for 40 years—Federal Defendants' reliance on management practices to claim that the proposed action is "unlikely to adversely affect" Mexican spotted owl or its critical habitat is unwarranted. Whatever the merits of the *general* conclusions drawn in the 2015 Grazing

Consultation Framework regarding the effectiveness of such management practices, *see* FD Resp. at 32–33, the *specific* circumstances of the Bar X are such that the agencies needed to provide a more robust explanation for their "not likely to adversely affect" conclusions. SJ Memo. at 31–32.

Federal Defendants' chief NFMA argument suffers from a similar flaw: Federal Defendants again rely heavily on adaptive management to support the conclusion that the new grazing scheme will move the Bar X towards the "desired conditions" set out in the Tonto Forest Plan. FD Resp. at 26–29, 34–35; *see also* FS006404–21 (portion of the Final EA discussing the proposed action, including adaptive management and monitoring features). That reliance is, again, misplaced, because the "new" adaptive management is not meaningfully different from the management practices that have led to substandard conditions across the Bar X. *Supra* pp. 12–16; SJ Memo. at 23–28, 35. In light of that fact and the dramatic increase in grazing proposed under the new grazing scheme, the Forest Service has failed to "show [the new grazing scheme's] consistency with" the Forest Plan, as required by NFMA.[17] *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1107 (9th Cir. 2018); *see also* SJ Memo. at 33–35.

CONCLUSION

Federal Defendants made a host of errors in devising, analyzing, and selecting the new Bar X grazing scheme, violating the APA, NEPA, the ESA, and NFMA. Accordingly, this Court should deny their motion for summary judgment and grant Plaintiff's motion for summary judgment.

[17] Federal Defendants do not address Plaintiff's argument that the Forest Service utterly failed to explain how opening the Colcord/Turkey and Lost Salt pastures to grazing fulfills the Forest Plan's goals of maximizing harvest species and threatened species. SJ Memo. at 35.

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Respectfully submitted,

/s/ Andrew R. Missel
Lauren M. Rule, *pro hac vice*
Oregon Bar # 015174
Andrew R. Missel, *pro hac vice*
Oregon Bar # 181793
ADVOCATES FOR THE WEST
3701 SE Milwaukie Ave., Ste. B
Portland, OR 97202
(503) 914-6388
lrule@advocateswest.org
amissel@advocateswest.org

Richard A. Dillenburg, Esq.
Arizona Bar # 013813
RICHARD A. DILLENBURG, P.C.
2173 E. Warner Rd., Ste. 101
Tempe, AZ 85284-3503
(480) 668-1924
rich@dillenburglaw.com

Attorneys for Plaintiff