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**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 MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT**

Oral Argument Requested

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MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and LRCiv 56.1, Plaintiff Neighbors of the Mogollon Rim, Inc. hereby moves this Court to award summary judgment in its favor on all of the Claims for Relief in its Complaint (ECF No. 1) Summary judgment is appropriate as these claims involve no genuine disputes of material fact and Plaintiff is entitled to judgment as a matter of law.

This motion is supported by the memorandum below; Plaintiff’s Statement of Facts, which is filed as a separate docket entry; the administrative records filed with the Court by Federal Defendants; the standing declarations of Jim Olsson, Paula Adams, and Kathy Doolittle, which are filed as attachments to a separate docket entry; excerpts from the Forest Service’s supplemental administrative record, which are filed as attachments to a separate docket entry; the Complaint; and such other and further material as may be presented to the Court before decision hereon. Plaintiff requests that the Court hold oral argument on this motion at an appropriate time.

Because the Court granted the parties’ request to separately brief any issues of remedy, if necessary, ECF No. 25, at 3, the memorandum below does not address any such issues.

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INTRODUCTION

1
2 The Colcord Estates, Ponderosa Springs, and Ponderosa Springs Estates
3 communities near Young, Arizona are nestled in the ponderosa pine forest just under the
4 spectacular Mogollon Rim. The communities are surrounded by the Tonto National
5 Forest, which affords ample opportunities for recreation and greatly enhances the quality
6 of life of residents of the communities. Though cattle have been grazed in the general
7 vicinity for over a hundred years, they have been kept out of the pastures surrounding the
8 Colcord and Ponderosa communities since 1979, when the U.S. Forest Service found that
9 cattle grazing had devastated the environment.

10 Now, though, the Forest Service has decided to allow cattle grazing on the
11 pastures directly surrounding the Colcord and Ponderosa communities—figuratively, and
12 even literally, in community members’ backyards. This is part of a larger decision to
13 substantially increase grazing on the set of allotments known as the Bar X allotments and
14 on adjacent portions of the Heber-Reno Sheep Driveway. Both the substance of the
15 decision and the procedures used to authorize it are severely flawed and will lead to
16 significant degradation of environmental and human interests. The agency ignored or
17 downplayed community members’ concerns about the effects of cattle grazing so close to
18 their homes; refused to seriously consider an alternative grazing scheme that would
19 continue the status quo of no grazing on pastures immediately surrounding the
20 communities; misinterpreted or ignored its own studies and data concerning the effects of
21 grazing; failed to disclose to the public or, worse, misled the public about those same
22 studies and data; and failed to properly consider the effects of its decision on several
23 environmental resources, including soils and water, wildlife, and the Mexican spotted
24 owl, which is listed as threatened under the Endangered Species Act (“ESA”). In short,
25 the Forest Service committed a wide range of textbook administrative law errors, using
26 shoddy reasoning and a flawed process to reach an unreasonable conclusion.

27 The Forest Service’s flawed environmental analysis of its new grazing scheme
28 violated the National Environmental Policy Act (“NEPA”), the ESA, and the

1 Administrative Procedure Act (“APA”). Furthermore, the new scheme is inconsistent
 2 with the Tonto Forest Plan, and thus violates the National Forest Management Act
 3 (“NFMA”). Accordingly, the agency’s decision to adopt its new grazing scheme must be
 4 set aside, and the agency must be ordered to prepare a full environmental impact
 5 statement (“EIS”) in connection with any decision to reauthorize grazing on the Bar X.

6 **BRIEF FACTUAL BACKGROUND**¹

7 **I. HISTORY OF THE BAR X**

8 **A. Bar X Basics**

9 The Bar X consists of four separate grazing allotments that are managed together:
 10 the Bar X, Haigler Creek, Young, and Colcord Canyon Allotments. Statement of Facts
 11 (“SOF”) ¶ 1. The Bar X is located in the northeastern part of the Tonto National Forest,
 12 about eight miles north of Young, Arizona, in Gila County. *Id.* ¶ 2. The topography of the
 13 Bar X consists of a mixture of rolling, gently undulating hills and areas of steep, rugged
 14 slopes and rock outcroppings. Answer (ECF No. 20) ¶ 22. Elevation ranges from 4,600
 15 feet in the southern portion to 7,600 feet in the northernmost areas. *Id.* The lower
 16 elevations in the southern portion provide the majority of the grazing capacity for
 17 livestock. *Id.* This is due in part to the fact that the ponderosa pine ecotype that dominates
 18 the northern portion of the Bar X has a lower density of grasses and forb than other
 19 ecotypes, contributing to a lower forage production capacity. SOF ¶ 8.

20 Bisecting the Bar X from southwest to northeast is the Heber-Reno Sheep
 21 Driveway (“Driveway”), a roughly two-mile wide string of eight pastures that is part of a
 22 route used to move sheep between private land near Chandler, Arizona and certain
 23 allotments on the Apache-Sitgreaves National Forests. SOF ¶ 3; FS001554.² Every year,
 24 up to 8,000 sheep are herded along the Driveway in the spring and again in the late
 25 summer. Answer ¶ 25. Cattle grazing has also periodically occurred on the Driveway. *Id.*

26 _____
 27 ¹ In accordance with LRCiv 56.1(a), this memorandum recites certain “undisputed facts
 28 (such as those providing background about the action or the parties)” that are not
 contained in the separate statement of facts.

² A very detailed map of the Bar X and Driveway is located at FS001554.

1 Historically, four pastures on the Driveway have been associated with the Bar X: Lost
2 Salt, Naegelin, McInturff, and Walnut. SOF ¶ 4.

3 The northernmost portions of the Bar X are the Colcord Canyon Allotment and the
4 Turkey Peak Pasture, which is part of the Haigler Creek Allotment. *Id.* ¶ 5. Plaintiff will
5 refer to this area as the “Colcord/Turkey Pasture.” The Colcord/Turkey Pasture consists
6 of mountainous terrain and steep slopes dominated by ponderosa pine. *Id.* ¶ 6. Almost the
7 entire Colcord/Turkey Pasture is characterized as belonging to the ponderosa pine
8 ecotype. *Id.* ¶ 7. Haigler Creek, a stream popular for fishing and recreation, cuts across
9 the southern half of the Colcord/Turkey Pasture. *Id.* ¶ 9. The Colcord/Turkey Pasture is
10 bounded on the north by the Mogollon Rim, which is a 200-mile long escarpment in
11 central Arizona that forms the southern edge of the Colorado Plateau. *Id.* ¶ 10. The
12 Mogollon Rim contains a large diversity of flora and fauna, with species from Rocky
13 Mountain ecotypes living on the top of the plateau, and species native to lower elevation,
14 drier ecotypes below the Rim. Answer ¶ 20. The area is home to much wildlife, including
15 elk, deer, and turkey. *Id.* The area’s beauty and diverse flora and fauna attract many
16 outdoor enthusiasts from the Phoenix area, other parts of Arizona, and other states. *Id.*

17 The communities of Colcord Estates, Ponderosa Springs, and Ponderosa Springs
18 Estates (collectively, the “Colcord and Ponderosa communities”) comprise over 300
19 homes situated on private enclaves in the Colcord/Turkey Pasture. SOF ¶ 11. Most of
20 those homes do not have fences capable of keeping cattle out. *Id.* ¶ 12. Residents of the
21 Colcord and Ponderosa communities report enjoying the natural beauty of the area and
22 the recreational opportunities afforded by the Forest, including hiking, fishing in Haigler
23 Creek, hunting, and wildlife viewing. *Id.* ¶ 13.

24 **B. Grazing on the Bar X Before 1979**

25 Cattle grazing has occurred in the Bar X area for over a century, FS006431, often
26 with devastating effects on the environment. SOF ¶¶ 22–23. A 1977 analysis conducted
27 by a Forest Service wildlife biologist concluded that grazing had “drastically reduced
28 forage production[and] increased soil compaction and erosion” on the Bar X, leading to

1 a decline in habitat quality and a “serious impact on the wildlife resource.” FS000037.
2 Several studies conducted by the Forest Service in the late 1970s reached similar
3 conclusions. A 1978 “allotment analysis” stated that “[r]ange condition on the Bar X is
4 generally poor with a downward trend” and that the cause of such poor conditions was
5 “[a] prolonged history of overstocking and unsatisfactory management.” FS000106. That
6 same analysis found that “[t]he Ponderosa Pine type”—which comprises nearly all of the
7 Colcord/Turkey Pasture and all of the Lost Salt Pasture, SOF ¶ 7—“has been depleted
8 severely by overgrazing,” FS000123, and that riparian areas, including Haigler Creek,
9 “are all severely denuded by grazing,” FS000125. The Driveway was also devastated by
10 cattle grazing in the 1970s. SOF ¶ 24.

11 In 1979, the Forest Service prepared an environmental analysis (“1979 EA”) in
12 connection with its decision to alter the management of grazing on the Bar X. FS002602–
13 03. Relying on the “thorough on-the-ground investigation[s] concerning conditions on the
14 Bar X” that had been synthesized in the 1978 allotment analysis, the 1979 EA compared
15 several management alternatives, including closing the entire Bar X to domestic livestock
16 grazing. FS002603, FS002609–10. The Forest Service ultimately selected an alternative
17 in which grazing levels on the Bar X were reduced dramatically, but grazing was not
18 altogether prohibited. SOF ¶ 25. However, the selected alternative excluded the
19 Colcord/Turkey Pasture from grazing “due to the lack of grazing capability and severe
20 conflicts between grazing and other resources” on that pasture. *Id.* ¶¶ 25–26.

21 C. The Forest Begins to Recover

22 In 1985, following a few years of production-utilization studies³ suggested that the
23 Bar X could possibly support more grazing, the Forest Service prepared a new
24 environmental assessment (“1985 EA”) analyzing the effects of increased grazing levels.
25 FS000528. The 1985 EA noted that “[r]ange, soil, watershed, and wildlife habitat
26

27 ³ “Production utilization studies are conducted as a snapshot in time of an area’s carrying
28 capacity. They measure how much herbaceous forage is available in a given key area
compared to how much is being consumed by cattle.” FS006380.

1 conditions have improved significantly since the 1978 range analysis.” FS000529. The
2 1985 EA pointed specifically to “the renewed presence of elk below the Naegelin Rim”
3 as evidence of improved wildlife habitat, and also cited an increase in the abundance of
4 turkey on the Bar X and improvements to the riparian habitat along Haigler Creek as
5 positive developments. FS000530; *see also* SOF ¶ 29 (discussing examples of wildlife
6 rebounding following closure of the Colcord/Turkey Pasture)

7 In 1985, the Forest Service elected to increase the amount of grazing allowed on
8 the Bar X but continued to exclude cattle from the Colcord/Turkey Pasture. FS000532–
9 33, FS000544–45. That same year, the Forest Service completed the Tonto Forest Plan,
10 which is still the governing forest plan. FS006376; *see also* FS000197–000525 (plan).
11 The Forest Plan “defines the long-term direction for managing the Tonto National
12 Forest.” FS000197. The Forest Plan contains goals, standards, and guidelines that provide
13 management direction for various resources and uses of the Forest. SOF ¶¶ 14–21.

14 In 2007, the Forest Service and the U.S. Fish and Wildlife Service (“USFWS”)
15 began an ESA consultation over the effects of livestock grazing on 33 allotments in the
16 Tonto National Forest, including the Bar X. FS000978, FS000983. The agencies
17 considered the effects of grazing on several species, including the Mexican spotted owl,
18 which had been listed as threatened in 1993. FS001006. By 2007, seven protected activity
19 centers (“PACs”)—areas “surrounding known owl nest/roost sites,” FWS000555—had
20 been identified on the Bar X and its associated Driveway pastures, six of them on the
21 Colcord/Turkey and Lost Salt pastures. FS001013. The Forest Service and the USFWS
22 agreed that, because there would be no grazing on those pastures, grazing the Bar X
23 would have little to no adverse effect on Mexican spotted owls. FS001013; FWS000525.

24 **D. Grazing on the Bar X Since 2008**

25 The Bar X, LLC purchased the Bar X ranch around 2006 or 2007 and was issued a
26 grazing permit by the Forest Service in 2007. Answer ¶ 25. In 2010, the Forest Service
27 began allowing the Bar X permittee to graze some of the Driveway pastures associated
28 with the Bar X. SOF ¶ 41. That same year, the Forest Service began authorizing the Bar

1 X permittee to graze at levels exceeding the level set forth in the term permit: the 2010
 2 annual operating instructions (“AOI”)⁴ for the Bar X authorized 162 cattle to graze year-
 3 long, 60 yearlings to graze for two-and-a-half months, and 12 bulls to graze for nine
 4 months—far more than the 130 cattle year-long allowed under the term permit.
 5 FS000007Sup, FS000010Sup. From 2012 through 2017, the Forest Service continued to
 6 allow the Bar X permittee to graze Driveway pastures and continued to authorize grazing
 7 at levels in excess (sometimes far in excess) of the term permit. SOF ¶¶ 42–49. In 2014,
 8 for instance, the Forest Service authorized the permittee to graze 225 cows, 16 bulls, and
 9 100 yearlings for a total of around 4,700 animal unit months (“AUMs”)—more than
 10 twice as much as authorized in the term permit.⁵ *Id.* ¶ 30, 42.

11 In 2015, the Forest Service authorized the Bar X permittee to graze the
 12 Colcord/Turkey Pasture. FS000023Sup. This was the first time since 1979 that cattle had
 13 been allowed to graze the Colcord/Turkey Pasture. SOF ¶ 28. No explanation was offered
 14 in the 2015 AOI for why the pasture had been reopened after 35 years, nor was any
 15 NEPA analysis conducted prior to the authorization. FS000022Sup–25Sup; FS006373.
 16 Understandably, the unexpected presence of cattle near the Colcord and Ponderosa
 17 communities caused a great deal of concern, annoyance, and fear among community
 18 members. Olsson Decl. (Ex. 1) ¶¶ 8–11; Adams Decl. (Ex. 2) ¶¶ 4–12.⁶ Community
 19 members mounted a campaign to make the Forest Service aware of their concerns,
 20 sending over 120 petitions to the Forest Supervisor asking that the Colcord/Turkey
 21 Pasture remain closed to grazing. FS002156. In 2016 and 2017, the Forest Service

22
 23 ⁴ “[P]rior to the beginning of a grazing season, the Forest Service issues an AOI to
 24 grazing permit holders. Whereas the [allotment management plan] relates the directives
 25 of the applicable forest plan to the individual grazing allotment, and the grazing permit
 26 sets grazing parameters through a ten-year period, the AOI annually conveys these more
 long-term directives into instructions to the permittee for annual operations.” *Or. Nat.*
Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977, 980 (9th Cir. 2006).

27 ⁵ An AUM is a measure of grazing intensity equal to an “animal unit” grazing for one
 month. FS004329.

28 ⁶ All exhibits are included as attachments to a list of exhibits, which is filed as a separate
 docket entry.

1 continued to authorize grazing on the Bar X well in excess of permitted levels, did not
2 allow grazing on the Colcord/Turkey Pasture. FS000026Sup–35Sup.

3 In 2018, however, the Forest Service issued an AOI authorizing grazing on the
4 Colcord/Turkey Pasture in the amount of 240 cows and 18 bulls from June 15 to October
5 15, again with no public input, NEPA analysis, or explanation in the AOI for reopening
6 the Colcord/Turkey Pasture. SOF ¶ 57; FS006373.

7 II. PREVIOUS LITIGATION

8 Following the issuance of the 2018 AOI authorizing grazing on the
9 Colcord/Turkey Pasture, Plaintiff filed suit against the Forest Service in this Court.
10 Answer ¶ 57. Plaintiff alleged that the agency had violated NFMA by authorizing
11 livestock grazing on the Bar X in 2012–18 in a manner inconsistent with the Tonto Forest
12 Plan. *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.*, No. CV-18-01111-PHX-
13 DLR, ECF No. 1 (Apr. 11, 2018). Plaintiff also alleged that the Forest Service’s
14 authorization of livestock grazing on the Bar X in 2012–2018 violated NEPA for failing
15 to analyze the impacts of the changed grazing management. *Id.*

16 In June 2018, the Forest Service issued an amended 2018 AOI. FS000041Sup. The
17 amended AOI reduced the level of grazing to be consistent with the term grazing permit
18 and did not authorize grazing on the Colcord/Turkey Pasture or on any of the Driveway
19 pastures. FS000041Sup–44Sup.

20 In October 2018, Plaintiff and the Forest Service entered into a settlement
21 agreement and stipulation of dismissal of the case. Answer ¶ 59. As part of the
22 settlement, the Forest Service agreed to “ensure that future AOIs . . . for the Bar X
23 Allotment are consistent with the existing term grazing permit for the Bar X Allotment
24 while this Settlement Agreement is in effect.” *Neighbors of the Mogollon Rim, Inc.*, CV-
25 18-01111-PHX-DLR, ECF No. 29 (Oct. 9, 2018). By its own terms, the settlement
26 agreement was to remain in effect “until the Forest Service issues a new term livestock
27 grazing permit and Allotment Management Plan for the Bar X Allotment, accompanied
28 by a new NEPA analysis and a new consultation under the [ESA], as appropriate.” *Id.*

1 Consistent with the parties' settlement, the 2019 AOI, like the revised 2018 AOI,
2 allowed grazing at the levels set out in the term grazing permit and did not authorize
3 grazing on the Colcord/Turkey Pasture or the Driveway. FS000049Sup–000052Sup.

4 **III. THE NEPA PROCESS AND FINAL DECISION**

5 In response to Plaintiff's first lawsuit, the Forest Service initiated a NEPA analysis
6 to determine whether and how to modify grazing management on the Bar X. FS001542.
7 By as early as October 2018—before it had even issued a scoping notice to the public
8 under NEPA, FS001698—the agency had tentatively decided to dramatically expand
9 grazing on the Bar X and to allow grazing on the Colcord/Turkey Pasture and all four
10 Driveway pastures associated with the Bar X. SOF ¶ 60. Over the next 14 months,
11 despite fervent opposition from Plaintiff, Colcord and Ponderosa community members,
12 and others, the Forest Service did not waver from its path: its plan to dramatically expand
13 grazing on the Bar X and open the Colcord/Turkey and Lost Salt pastures to grazing after
14 40 years of non-use remained intact throughout the NEPA process. *Id.* ¶¶ 60–62, 70–72.
15 Moreover, the Forest Service gave in-depth consideration to just one alternative to its
16 plan, a “no grazing” option in which all grazing on the Bar X is terminated. FS006421–
17 23. The agency expressly declined to give serious consideration to a “middle ground”
18 alternative in which grazing is allowed to continue, but overall levels are kept roughly the
19 same and cattle are kept off the Colcord/Turkey Pasture. SOF ¶ 65.

20 In September 2019, the Forest Service issued a Final Environmental Assessment
21 (“Final EA”) and a Draft Decision Notice/Finding of No Significant Impact (“Draft
22 DN/FONSI”) adopting the new grazing scheme analyzed during the NEPA process.
23 Answer ¶ 105. In the Draft DN/FONSI, the Forest Service found that its new grazing
24 scheme—which allows for nearly *three times* the amount of grazing on the Bar X and
25 Driveway than has occurred in recent years and reopens the Colcord/Turkey Pasture to
26 grazing after 40 years of non-use (aside from 2015), SOF ¶¶ 28, 46–47, 71–72—will not
27 have a significant effect on the environment, obviating the need for a full EIS under
28 NEPA. FS003244. The Forest Service also concluded that the new scheme is consistent

1 with the Tonto Forest Plan. FS003255. The USFWS, for its part, concurred with the
 2 Forest Service’s conclusion that the new plan is “not likely to adversely affect” the
 3 Mexican spotted owl. FWS002405–06.

4 Plaintiff (and many others) objected to the draft decision under the administrative
 5 process set out in the 26 C.F.R. part 218 regulations. FS003283. The Forest Service did
 6 not change course in response to the objections, and released a Final DN/FONSI in
 7 December 2019. FS006520. (The agency also released a revised Final EA that month.
 8 FS006366.) Later that month, the Forest Service issued a new term grazing permit and
 9 released a new allotment management plan for the Bar X. Answer ¶ 107; *see also*
 10 FS006531, FS006549. Plaintiff then filed this lawsuit in February 2020. ECF No. 1.

11 ARGUMENT⁷

12 The Forest Service violated four separate statutes with its decision to adopt its new
 13 grazing scheme. It violated NEPA by failing to consider a reasonable range of
 14 alternatives, failing to take a “hard look” at the effects of its proposed action, and failing
 15 to prepare a full EIS. It violated the ESA and APA by failing to provide a reasoned
 16 explanation for its conclusion that resuming grazing in the Colcord/Turkey Pasture is not
 17 likely to adversely affect Mexican spotted owls. And it violated NFMA and the APA by
 18 selecting a grazing scheme that is inconsistent with the Tonto Forest Plan—or at least
 19 failing to provide a rational explanation for how the scheme is consistent with the Plan.

20 **I. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO** 21 **CONSIDER AN ADEQUATE RANGE OF ALTERNATIVES.**

22 The Forest Service considered just two alternatives in depth during its
 23 decisionmaking process: a “no grazing” alternative and the proposed action. SOF ¶ 65.
 24 NEPA required the Forest Service to consider a wider range of alternatives. In particular,
 25 the Forest Service should have analyzed a “middle ground” alternative in which grazing

26 ⁷ Plaintiff has submitted declarations by Jim Olsson (Ex. 1), Paula Adams (Ex. 2), and
 27 Kathy Doolittle (Ex. 3) that establish Plaintiff’s associational standing. *See Or. Advocacy*
 28 *Ctr. v. Mink*, 322 F.3d 1101, 1108–13 (9th Cir. 2003) (discussing the requirements for
 associational standing under Article III).

1 is allowed on parts of the Bar X, but the Colcord/Turkey and Lost Salt pastures remain
2 closed to grazing—in essence, continuing the status quo. The Forest Service violated
3 NEPA and the APA by failing to either consider such an alternative in depth or provide a
4 reasoned explanation for why it should not be considered in depth.

5 “[C]onsideration of alternatives is critical to the goals of NEPA.” *Bob Marshall*
6 *All. v. Hodel*, 852 F.2d 1223, 1228–29 (9th Cir. 1988). “Agencies are required to consider
7 alternatives in . . . EAs and must give full and meaningful consideration to all reasonable
8 alternatives.” *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d
9 592, 601–02 (9th Cir. 2010) (citation omitted). Whether an alternative is “reasonable”
10 turns on the relationship between the alternative and the nature and purpose of the project
11 under consideration: “[a]lternatives that do not advance the purpose of the . . . [p]roject
12 [are] not . . . considered reasonable” *Native Ecosystems Council v. U.S. Forest Serv.*,
13 428 F.3d 1233, 1246–47 (9th Cir. 2005). Agencies should consider a broad range of
14 alternatives. *See Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538
15 F.3d 1172, 1218–19 (9th Cir. 2008) (“*CBD v. NHTSA*”) (faulting the agency for
16 considering “a very narrow range of alternatives”). If an agency decides to eliminate from
17 detailed consideration a particular alternative, it must give “an appropriate explanation”
18 for doing so. *Native Ecosystems Council*, 428 F.3d at 1246. “The existence of a viable but
19 unexamined alternative renders an EA inadequate.” *W. Watersheds Proj. v. Abbey*, 719
20 F.3d 1035, 1050 (9th Cir. 2013) (citation, quotation, and alteration omitted).

21 The Forest Service should have analyzed at least one “middle ground” alternative
22 in addition to the “no grazing” alternative and the proposed action. The most obvious
23 middle ground alternative is one that roughly maintains the same grazing that has
24 occurred in recent years while leaving the Colcord/Turkey Pasture and the Lost Salt
25 Pasture closed to grazing. Plaintiff and other commenters repeatedly suggested that the
26 Forest Service consider such an alternative in depth. SOF ¶ 64.

27 Such a middle ground alternative would meet the purpose and need of the action,
28 which “is to *consider* livestock grazing opportunities on public lands *where consistent*

1 *with management objectives*” and “to authorize livestock grazing *in a manner consistent*
2 *with direction to move ecosystems towards their desired conditions.*” *Id.* ¶ 59 (emphasis
3 added). This broad statement of purpose and need reflects Congressional and agency
4 intent to balance uses in national forests and manage resources in a sustainable manner.
5 *See Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1268 (10th Cir. 2011) (noting that
6 “Congress acknowledged” in the Multiple Use and Sustained Yield Act “that ‘some . . .
7 land will be used for less than all of the resources’ identified” (quoting 16 U.S.C.
8 § 531(a) (alteration omitted)); 36 C.F.R. § 219.1(b) (“[T]he Forest Service manages
9 [national forests] to sustain the multiple use of [their] renewable resources in perpetuity
10 while maintaining the long-term health and productivity of the land.”). A middle ground
11 alternative that allows grazing in some areas but not in others is surely consistent with the
12 broad, multiple-use goals reflected in the statement of purpose and need.

13 The Ninth Circuit’s decision in *Western Watersheds Project v. Abbey* is instructive
14 on this point. In that case, the Bureau of Land Management (“BLM”) prepared an EA in
15 connection with the renewal of a ten-year grazing permit. 719 F.3d at 1040–41. In
16 preparing the EA, BLM “considered four alternatives in detail” and “considered but did
17 not analyze in detail alternatives that would reduce or eliminate grazing. These reduced-
18 grazing alternatives were eliminated because BLM determined that they did not meet the
19 purpose” and need of the action. *Id.* at 1040–41, 1050. The stated purpose and need of the
20 action was similar in its breadth to the stated purpose and need in this case: “to evaluate
21 rangeland health standards and modify current grazing practices on the allotment so that
22 progress can be made toward meeting the standards.” *Id.* at 1052; *compare with*
23 FS006401. The court held that, given the stated purpose and BLM’s authority to reduce
24 grazing levels to meet various statutory and regulatory obligations, a reduced-grazing
25 alternative “could still reasonably meet the purpose” of the action and should have been
26 considered in detail. *Id.* at 1051–52. The same is true here with respect to a middle
27 ground alternative. (Indeed, a middle ground alternative would be *more* consistent with
28 the stated purpose and need of this action than the proposed alternative, because the

1 proposed alternative is unlikely “to move ecosystems towards their desired conditions.”
2 *See infra* pp. 34–35.) Because a middle ground alternative would essentially continue the
3 same grazing that has occurred for years, it is certainly “viable” and “feasible” and
4 “could . . . reasonably meet the purpose” of this action. The agency’s failure to analyze
5 any such alternative violated NEPA. *Abbey*, 719 F.3d at 1051–53.

6 Furthermore, the agency never provided an adequate explanation for *why* it
7 refused to give in-depth consideration to a middle ground alternative.⁸ *See Native*
8 *Ecosystems Council*, 428 F.3d at 1246 (noting that an agency must give “an appropriate
9 explanation” for eliminating an alternative from detailed consideration); *Dep’t of*
10 *Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (stating that
11 the APA “requires agencies to engage in ‘reasoned decisionmaking’” (quoting *Michigan*
12 *v. EPA*, 576 U.S. 743, 750 (2015))).

13 The agency did provide an explanation for refusing to consider a “no action”
14 alternative, but that explanation does not suffice, because (1) it is unreasonable and (2) it
15 does not account for why the agency could not consider a *different* middle ground
16 alternative. The Forest Service rejected a “no action” alternative for essentially three
17 reasons: (1) such an alternative would not “formally incorporate adaptive management,”
18 (2) such an alternative would be “within the range of alternatives between the No Grazing
19 and the Proposed action,” and (3) such an alternative would “not meet the purpose and
20 need to manage resources in a manner that achieves Forest Plan objectives and desired
21 conditions.” FS006421–22. The first reason is factually incorrect, as current practices *do*
22 incorporate adaptive management. *Compare* SOF ¶¶ 37–40 (current practices), *with* SOF
23 ¶¶ 73–74, 76 (description of new scheme). But even putting that aside, the explanation

24
25 ⁸ In APA terms, the Forest Service’s alternatives analysis was both “not in accordance
26 with law” (because it failed to consider in depth all reasonable alternatives, as required by
27 NEPA) and “arbitrary and capricious” (because it failed to give a reasonable explanation
28 for eliminating a middle ground alternative from detailed consideration). *See East Bay*
Sanctuary Covenant v. Barr, 964 F.3d 832, 845–54 (9th Cir. 2020) (discussing a claim
that an agency action was “not in accordance with law” as distinct from a claim that the
same action was “arbitrary and capricious”).

1 does not account for why the agency couldn't consider a middle ground alternative *with*
2 adaptive management formally included. The second reason simply makes no sense. A
3 middle ground alternative would be meaningfully different from the proposed alternative
4 and from a "no grazing" alternative, as it would keep cattle off of the Colcord/Turkey
5 Pasture and would hold overall grazing levels steady rather than substantially increasing
6 them.⁹ As for the third reason, the statement that a no action alternative would not meet
7 the purpose and need of the project was entirely conclusory and thus woefully
8 insufficient, particularly considering that the Forest Service has been authorizing that
9 grazing management for years.¹⁰ *See Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872 (9th
10 Cir. 2020) ("conclusory statements[] based on vague and uncertain analysis[] . . . are
11 insufficient to satisfy NEPA's requirements" (citation and internal quotation omitted));
12 *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 220 (D.C. Cir. 2013) (noting that
13 reviewing courts "do not defer to [an] agency's conclusory or unsupported suppositions"
14 under the APA's arbitrary and capricious standard (citation omitted)). In short, the
15 agency *never* provided an adequate explanation for not giving serious consideration to a
16 middle ground alternative.

17
18 ⁹ It is true that an agency need not consider an alternative "that [is] substantially similar
19 to other alternatives." *Native Ecosystems Council*, 428 F.3d at 1248–49. But a middle
20 ground alternative along the lines suggested by Plaintiff and other commenters is not
21 "substantially similar" to either of the alternatives considered by the Forest Service.

22 ¹⁰ To the extent that the Forest Service's reason for rejecting a middle ground alternative
23 was that the Colcord/Turkey Pasture is "suitable" for grazing per the 1985 Tonto Forest
24 Plan and the agency *must* allow (or even maximize) grazing on suitable lands, *e.g.*,
25 FS004358, that reason is legally unsound. *See Wyoming*, 661 F.3d at 1234–35 (discussing
26 how the Forest Service has "broad discretion to regulate the national forests, including for
27 conservation purposes," under the relevant statutes); *W. Watersheds Proj. v. U.S. Forest*
28 *Service*, 2006 WL 292010, at *7 (D. Idaho Feb. 7, 2006) ("land found capable [for
grazing in a Forest Plan] may become off-limits if warranted by later site-specific
studies"); FS Handbook 2209.13, ch. 90, § 91 (2005) ("Although an area may be deemed
suitable for use by livestock in a [Forest Plan], a project-level analysis evaluating the site-
specific impacts of the grazing activity . . . is required in order to authorize livestock
grazing on specific allotment(s)."). Indeed, as the agency admits, "forage use through
livestock grazing is not emphasized" in the Forest Plan for the Colcord/Turkey and Lost
Salt pastures. FS004346; *see also* SOF ¶¶ 16–20.

1 The Forest Service violated NEPA by failing to either consider a middle ground
2 alternative in depth or give a reasonable explanation for not doing so. For that reason, the
3 EA is inadequate. *Abbey*, 719 F.3d at 1050.

4
5 **II. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO TAKE A
“HARD LOOK” AT THE EFFECTS OF THE PROPOSED ACTION.**

6 NEPA requires an agency preparing an EA to take a “hard look” at a project’s
7 probable effects on the human environment so that the agency can decide whether those
8 effects may be “significant.” *CBD v. NHTSA*, 538 F.3d at 1194. “[T]he ‘hard look’
9 requirement . . . entail[s] both a complete discussion of relevant issues as well as
10 meaningful statements regarding the actual impact of proposed projects.” *Earth Island
11 Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1172 (9th Cir. 2006), *abrogated on other
12 grounds by Winter v. NRDC*, 555 U.S. 7, 21–22 (2008). “General statements about
13 possible effects and some risk do not constitute a hard look absent a justification
14 regarding why more definitive information could not be provided.” *Abbey*, 719 F.3d at
15 1047 (quoting *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011)).

16 **A. Overall Deficiencies of the Forest Service’s Analysis**

17 In conducting its analysis of the new grazing strategy, the Forest Service made
18 several significant errors that undermined its assessment of impacts. First, the agency
19 used inaccurate baseline data and made incorrect or unsupported assumptions in its
20 analysis. Relatedly, the Forest Service misrepresented the nature of its analysis and data
21 throughout the NEPA process, misleading both the public and decisionmakers. Finally,
22 the agency almost completely ignored several in-depth studies of grazing impacts on the
23 Bar X, choosing instead to rely on sketchy or, in some cases, nonexistent data.

24
25 *1. Inaccurate Descriptions of Baseline Conditions and Reliance on
Incorrect Assumptions, Data, and Calculations*

26 “An agency fails to meet its ‘hard look’ obligation [under NEPA] when it relies on
27 incorrect assumptions or data.” *Native Ecosystems Council v. Marten*, 883 F.3d 783, 795
28 (9th Cir. 2018) (internal quotation, citation, and alteration omitted). “[T]he data the

1 Forest Service provides to the public to substantiate its analysis and conclusions must . . .
2 be accurate.” *Id.* (quoting *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d
3 920, 926 (9th Cir. 2015)). Relatedly, an agency’s “assessment of baseline conditions
4 ‘must be based on accurate information and defensible reasoning.’” *Great Basin Res.*
5 *Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016) (quoting *Or. Nat.*
6 *Desert Ass’n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016)).

7 The Final EA states that livestock numbers on the Bar X have “averaged 3,707
8 [AUMs] per year” over the last 12 years. FS006373. That is simply false. According to
9 the Forest Service’s own records, the average level of grazing on the Bar X *plus the*
10 *associated Driveway pastures* from 2008–2019 was just 3,187 AUMs. SOF ¶ 46.
11 Looking at the AOIs from 2013–2019—each of which lists the authorized level of
12 grazing pasture-by-pasture—the average amount of grazing on the Bar X pastures (which
13 does *not* include the Driveway pastures) during that seven-year stretch was between
14 1,800 and 2,600 AUMs—far less than the 3,707 AUMs reported in the Final EA.¹¹ *Id.*
15 ¶ 48. Even assuming the maximum amount of grazing allowed under the AOIs occurred
16 on the Bar X pastures, grazing levels have only twice reached as high as 3,707 AUMs on
17 the Bar X pastures during the period from 2008–2019. *Id.* ¶ 42; FS001676.

18 This is not a minor mathematical error. This overstatement of past grazing levels
19 means that adverse environmental effects observed on the Bar X pastures in recent years
20 have been caused by a *significantly* lower level of grazing than the levels reported in the
21 EA, and that the proposed grazing levels analyzed in the EA are *much* higher than current
22 levels. In other words, the Forest Service’s analysis relies on inaccurate baseline
23 conditions. *See Great Basin Res. Watch*, 844 F.3d at 1101 (“assessment[s] of baseline
24 conditions must be based on accurate information and defensible reasoning”) (citation
25 and internal quotation omitted)). The result of this mistake is that the proposed alternative
26 seems like less of a departure from the status quo than it really is. In fact, it is a radical
27

28 ¹¹ The reason there is a range is explained in the Statement of Facts. *See* SOF ¶ 42.

1 departure: under the proposed plan, grazing levels on the Bar X pastures (not including
2 the Driveway pastures) could be as high as 4,002 AUMs, FS006405, which is at least a
3 54% increase from average grazing levels in recent years and higher than any single year
4 in the past decade, SOF ¶ 42, 48; FS001676. And the total amount of grazing allowed on
5 the combined Bar X pastures and Driveway pastures under the new plan could be as high
6 as 9,250 AUMs, FS006405, which is nearly *three* times higher than the average amount
7 of grazing in recent years, SOF ¶¶ 46–47. The Forest Service does not acknowledge this
8 substantial increase in grazing levels under the proposed action. Such a “skewing” of data
9 prevented the EA from “provid[ing] a full and fair discussion of the potential effects of
10 the” new grazing scheme and violated NEPA. *Native Ecosystems Council v. U.S. Forest*
11 *Serv.*, 418 F.3d 953, 964–65 (9th Cir. 2005) (citation and internal quotation omitted).

12 Similarly, the Final EA contains an inaccurate description of the history of grazing
13 on the Colcord/Turkey Pasture. The Final EA states that the Colcord and Ponderosa
14 communities “have always been within an active grazing allotment” and relies on that
15 supposed fact to support its conclusion that the proposed grazing plan will not have a
16 “significant” effect on those communities. FS006403. But, as the Forest Service admits,
17 Bar X cattle have not been allowed to graze the Colcord/Turkey Pasture—which is where
18 the Colcord and Ponderosa communities are located—since 1979. SOF ¶ 11, 28. Whether
19 the Colcord/Turkey Pasture was, in a technical sense, “closed” to grazing¹² during that
20 period is not relevant for NEPA purposes; what matters is that, aside from 2015, there has
21 not *actually* been grazing there and thus there have been no impacts from cattle grazing
22 during that time. *See ONDA v. Jewell*, 840 F.3d at 569 (“the BLM had a duty to assess, in
23 some reasonable way, the *actual* baseline conditions at the . . . site” (emphasis added)).
24 The Forest Service had a duty to accurately assess and disclose that baseline condition in
25 the EA, and it violated that duty. *Id.*

26
27
28 ¹² It appears that the Forest Service’s refusal to admit that the Colcord/Turkey Pasture
was “closed” to grazing is based on a hyper-technical usage of that term. *See* FS004346.

1 Finally, the Forest Service erred by relying on its recent capacity analysis to
2 support its grazing scheme. According to the agency, the grazing levels in the proposed
3 action are supported by the capacity analysis. SOF ¶ 83. But that is simply not true. The
4 capacity analysis estimated that the Bar X pastures—which, again, do not include the
5 Driveway pastures—can support 3,108 AUMs and that the Bar X-associated Driveway
6 pastures can support 3,973 AUMs. *Id.* ¶¶ 86–89. The proposed grazing scheme, however,
7 allows up to 4,002 AUMs on the Bar X pastures and 5,250 AUMs on the Driveway
8 pastures—around 30% more grazing than is supported by the capacity analysis.
9 FS006405. There is no justification anywhere in the record for this. Indeed, nothing in the
10 record even reflects an acknowledgment of the gap between the capacity analysis and the
11 higher grazing levels authorized under the proposed action. It appears that the Forest
12 Service simply misinterpreted its own capacity analysis, leading it to the erroneous
13 conclusion that its proposed scheme is supported by that analysis. Such an error violates
14 both NEPA and the APA. *See NRDC v. U.S. Forest Service*, 421 F.3d 797, 807, 810 (9th
15 Cir. 2005) (holding that the Forest Service violated the APA when it misinterpreted a
16 report, leading it to erroneously estimate timber demand); *id.* at 811–13 (holding that the
17 same error violated NEPA).

18 2. *Misleading Statements Regarding Conditions and Data*

19 “An agency fails to meet its ‘hard look’ obligation when it . . . presents
20 information that is so incomplete or misleading that the decisionmaker and the public
21 could not make an informed comparison of alternatives.” *Marten*, 883 F.3d at 795
22 (internal quotation and citation omitted).

23 The Draft and Final EAs are riddled with statements that are at best misleading
24 and at worst outright false. In addition to the inaccurate descriptions of baseline
25 conditions and the results of the capacity analysis described above, the Forest Service
26 also seriously misrepresented other aspects of the analysis it conducted in developing its
27 new grazing scheme. The Final EA states that “[c]urrent management history [wa]s
28 evaluated by looking at the last 12 years of data,” FS006373, but there are only four years

1 of forage data available for the Colcord/Turkey Pasture and *no* forage data for the Lost
2 Salt Pasture, SOF ¶¶ 79–82. The Final EA suggests that production-utilization studies
3 were done to evaluate the probable effects of the new grazing scheme, *id.* ¶¶ 67–69, but it
4 is not possible that any such study was done for the Colcord/Turkey and Lost Salt
5 pastures, because the Forest Service has not gathered utilization data for those pastures in
6 the recent past, *id.* ¶ 28, 53, 79. Similarly, the EA’s repeated statements about “trial
7 grazing” periods on the Colcord/Turkey Pasture in 2015 and 2018 (*see id.* ¶¶ 66–67) are,
8 at best, seriously misleading: the record makes clear that grazing was not authorized on
9 Colcord/Turkey in 2015 for trial purposes, *id.* ¶¶ 50–56, no utilization data was actually
10 gathered following that grazing season, *id.* ¶ 53, and there was no grazing at all on
11 Colcord/Turkey in 2018, *id.* ¶ 58.

12 Any one of those misrepresentations might by itself be enough to render the Forest
13 Service’s NEPA analysis unlawful, but they are even more problematic when viewed in
14 the aggregate. Throughout the NEPA process, the agency painted a picture of a careful
15 grazing analysis involving “12 years of data,” production-utilization studies, and trial
16 grazing periods to gather information. But that story was largely fiction, especially with
17 regard to the Colcord/Turkey and Lost Salt pastures. Furthermore, the one piece of data
18 the Forest Service did have that might support a decision to open the Colcord/Turkey
19 Pasture—the capacity analysis—was misinterpreted by the agency. The agency’s
20 misleading and, in some cases, outright false statements “misled” the public “in its
21 opportunity for comment” and similarly misled decisionmakers, making “an informed
22 comparison of . . . alternatives” impossible and violating NEPA. *NRDC v. U.S. Forest*
23 *Serv.*, 421 F.3d at 813. “Had the decision makers and public known of the accurate”
24 information regarding the history of grazing on the Bar X and the thoroughness of the
25 Forest Service’s studies, they “may have selected an alternative with less adverse
26 environmental impact, in less environmentally-sensitive areas.” *Id.* at 812.

1 3. *Reliance on Scant or Nonexistent Data Over In-Depth Studies*

2 When reviewing an agency’s EA, courts ordinarily “defer to [the] agency’s
3 technical expertise and *reasonable* choice of methodology.” *Or. Nat. Desert Ass’n v.*
4 *Rose*, 921 F.3d 1185, 1191 (9th Cir. 2019) (emphasis added). But, because the touchstone
5 of both NEPA and the APA is reasoned decisionmaking, an agency must at least provide
6 a reasonable explanation for its choice of methodology. *See Regents of the Univ. of Cal.*,
7 140 S. Ct. at 1905 (noting that the APA requires reasoned decisionmaking); *Sierra Club*
8 *v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (stating that an agency’s NEPA “analysis
9 must be ‘reasonable and adequately explained,’ but the agency’s ‘choice among
10 reasonable analytical methodologies is entitled to deference’” (quoting *Cmtys. Against*
11 *Runway Expansion, Inv. v. Fed. Aviation Admin.*, 355 F.3d 678, 689 (D.C. Cir. 2004))).

12 The Forest Service more or less ignored the in-depth studies of the Bar X
13 conducted in the late 1970s and 1980s in favor of “the most current data.” FS006373; *see*
14 *also* FS004343. Though this *sounds* like a perfectly reasonable explanation for paying
15 little attention to the older studies, it falls apart under scrutiny, because “the most current
16 data” is in no way comparable to the older in-depth studies, especially where the
17 Colcord/Turkey and Lost Salt pastures are concerned. As discussed above, “the most
18 current data” includes *no* production-utilization data for the Colcord/Turkey and Lost Salt
19 pastures and, more generally, almost no data showing the effects of grazing on those
20 pastures. *Supra* pp. 17–18. In contrast, the older studies—which the Forest Service itself
21 called “thorough on-the-ground investigation[s] concerning conditions on the Bar X,”
22 FS002603—were based on years of careful field research and production-utilization data
23 and reflected the effects of cattle grazing. SOF ¶¶ 22–23. Given the paucity of recent data
24 for the Colcord/Turkey and Lost Salt pastures, the Forest Service is essentially flying
25 blind in reopening those pastures to grazing. In that context, its refusal to give more
26 weight to the older studies is unreasonable and violates NEPA and the APA. *See Ctr. for*
27 *Biological Diversity v. Zinke*, 900 F.3d 1053, 1068–69 (9th Cir. 2018) (holding that the
28

1 agency had acted arbitrarily and capriciously by “ignoring available data” without an
2 adequate explanation).

3 **B. Aesthetic, Economic, Social, and Health Impacts**

4 The Forest Service failed to adequately consider the aesthetic, economic, social,
5 and health impacts of the new grazing scheme, particularly the impacts affecting the
6 Colcord and Ponderosa communities. NEPA’s focus is on the “human environment,” 42
7 U.S.C. § 4332(C), which “include[s] [both] the natural and physical environment *and the*
8 *relationship of people with that environment*,” 40 C.F.R. § 1508.14 (2019) (emphasis
9 added).¹³ Therefore, an agency preparing an EA must consider the “aesthetic, . . .
10 economic, social, [and] health” effects that might be caused by a proposed action, 40
11 C.F.R. § 1508.8, provided those effects have a “sufficiently close connection to the
12 physical environment,” *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S.
13 766, 778 (1983). This includes effects on recreational opportunities, *LaFlamme v. Fed.*
14 *Energy Regulatory Com’n*, 852 F.2d 389, 399–400 (9th Cir. 1988); effects on human
15 health and well-being caused by an action’s sounds and smells, *Montana Wilderness*
16 *Ass’n v. Connell*, 725 F.3d 988, 1003 (9th Cir. 2013); and economic effects, including
17 effects on property values, *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d
18 1301, 1324–25 (D.C. Cir. 2015); *see also* 40 C.F.R. § 1508.14 (“When . . . economic . . .
19 and natural or physical environmental effects are interrelated, then the environmental
20 impact statement will discuss all of these effects on the human environment.”).

21 Throughout the Bar X NEPA process, the Forest Service displayed an almost total
22 disregard for the effects of its proposed grazing scheme on the Colcord and Ponderosa
23 communities. In the Draft EA, for instance, the Forest Service stated that “[u]nfenced
24 private property exists within the [Bar X], causing contention with some homeowners,”
25 and noted that “[a] number of residents in these neighborhoods . . . voiced concerns and

26 ¹³ The NEPA regulations were recently revised. 85 Fed. Reg. 43,304 (July 16, 2020).
27 However, because the NEPA process in this case was completed before September 14,
28 2020, the “old” versions of the regulations apply here. 85 Fed. Reg. at 43,372–73.
Accordingly, all citations to NEPA regulations are to the “old” versions.

1 disapproval over the Proposed Action and the possibility that cattle may enter onto their
2 private property, damage their septic systems, or be present on roadways.” FS002300.
3 But rather than analyze and discuss the likelihood and severity of such impacts, the
4 Forest Service simply concluded that it would be “the responsibility of private
5 landowners and private communities to construct a lawful fence to keep out cattle.” *Id.*
6 This was not responsive to the concerns expressed by Bar X residents, because privately-
7 constructed fences would not prevent all the negative impacts of cattle grazing to
8 residents of the Colcord and Ponderosa communities. *See* SOF ¶ 63. Even if fencing were
9 a panacea, though, the Forest Service failed to analyze the economic and aesthetic
10 impacts associated with building those fences. Such impacts must be taken into account
11 in a proper NEPA analysis. *See Ctr. for Env'tl. Law & Policy v. U.S. Bureau of*
12 *Reclamation*, 655 F.3d 1000, 1011 (9th Cir. 2011) (“Agencies conducting NEPA review
13 must also consider the indirect effects of the proposed project. Indirect effects are those
14 effects ‘caused by the [agency] action [that] are later in time or farther removed in
15 distance, but are still reasonably foreseeable.’” (citing 40 C.F.R. § 1508.8(b))).

16 In response to the Draft EA, Plaintiff continued its efforts to persuade the Forest
17 Service to take a serious look at the effects of cattle grazing on the well-being of the
18 Colcord and Ponderosa communities. Plaintiff pointed out that building fences to keep
19 out cattle would cost hundreds of thousands of dollars, FS002548, and that the proposed
20 action would have potentially serious effects on recreational opportunities in the
21 surrounding forest, particularly at Haigler Creek, FS002547. Members of the Colcord and
22 Ponderosa communities made similar comments in response to both the scoping notice
23 and the Draft EA, and also brought up a host of other effects that the Forest Service had
24 failed to address in any meaningful way, including the very serious threat of physical
25 harm to humans from cattle trespassing on private property; potential decreases in
26 property values; and the possibility of cattle blocking nearby roads. SOF ¶ 63.

27 Rather than take a “hard look” at these potential impacts, the Forest Service
28 responded to residents’ concerns in the Final EA by (1) repeating its statement from the

1 Draft EA concerning private responsibility for fencing, (2) claiming that any effects on
2 the Colcord and Ponderosa communities would not be “significant” because “these
3 subdivisions have always been within an active grazing allotment,” and (3) stating that
4 “‘same place-same time’ encounters between uses . . . are not considered conflicts or
5 safety issues that require consideration in grazing authorization planning analyses.”
6 FS006402–03. This response does not suffice under NEPA or the APA.

7 First, as discussed above, simply stating that members of the Colcord and
8 Ponderosa communities would be responsible for constructing fences to keep cattle off
9 their property fails to engage with all impacts of cattle grazing, including odor-related
10 impacts, recreation impacts, and property devaluation. Second, impacts should be
11 analyzed and disclosed in an EA even if they are not “significant” within the meaning of
12 NEPA—indeed, by definition, *only* “insignificant” impacts may be analyzed in an EA
13 rather than an EIS, 40 C.F.R. § 1502.3—so a conclusory statement that an action will not
14 have significant impacts of a certain type cannot substitute for an analysis of those
15 impacts. Third, the statement that the Colcord and Ponderosa communities have “always
16 been within an active grazing allotment” is, at best, deeply disingenuous: aside from
17 2015, there has been no grazing on the Colcord/Turkey Pasture since 1979. SOF ¶ 28.
18 Finally, “‘same-place same-time’ encounters” between cattle and “other uses” *are* the
19 types of impacts that must be considered under NEPA. The introduction of cattle to an
20 area that has not seen grazing for decades is a “change in the physical environment” of
21 the area, *Metro Edison Co.*, 460 U.S. at 773, and, because impacts to safety, recreation,
22 and other interests resulting from encounters between humans and cattle are closely tied
23 to that change, those impacts must be analyzed under NEPA, *id.* at 773–75 & 775 n.9.

24 The only aesthetic, economic, social, or health impact raised by Bar X residents
25 during the NEPA process that the Forest Service addressed at any length in the Final EA
26 was the potential impact to recreational opportunities. But the agency’s analysis of this
27 impact was far from the “hard look” required by NEPA. The Forest Service failed to
28 assess how increased cattle grazing near Haigler Creek might affect recreational

1 opportunities there, even though that specific issue had been raised in several comments.
2 SOF ¶ 63g, 63h. And though the EA admits that the increase in grazing on the Bar X and
3 the overlap between grazing schedules and seasonal recreation patterns “could result in
4 more frequent human/cow encounters,” it then simply states that “[t]hese encounters
5 could result in a positive or negative experience depending on the individual recreational
6 user’s attitude towards livestock and their desired recreational experience.” FS006501–
7 02. This statement does not pass muster under NEPA. *See Abbey*, 719 F.3d at 1047
8 (“General statements about possible effects and some risk do not constitute a hard look
9 absent a justification regarding why more definitive information could not be provided.”
10 (citation omitted)).

11 The Forest Service’s decision to increase grazing on the Bar X and open up the
12 Colcord/Turkey Pasture to grazing will undoubtedly have profound economic, social, and
13 health effects on the residents of the Colcord and Ponderosa communities and visitors to
14 the Tonto National Forest. But the Forest Service simply ignored many of those effects in
15 the EA, violating NEPA. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668
16 F.3d 1067, 1082 (9th Cir. 2011) (completely failing to address effects of a certain type
17 violates NEPA). The few impacts that the agency did address were analyzed in a cursory
18 or irrational way, which also violates NEPA and the APA. *Earth Island Inst.*, 442 F.3d at
19 1172; *Regents of the Univ. of Cal.*, 140 S. Ct. at 1905.

20 C. Impacts to Soil Resources

21 The Forest Service also failed to take a “hard look” at the effects of its proposed
22 grazing scheme on soil resources. The agency concluded, in the face of contrary evidence
23 and without a reasonable explanation, that dramatically increasing the amount of grazing
24 on the Bar X will somehow have no effect—or even a *positive* effect—on soil conditions.
25 FS006427–34. NEPA required the Forest Service “to articulate a rational connection
26 between the facts found and the choice made instead of relying on an ipse dixit
27 assessment of environmental impacts over . . . contrary . . . data.” *Rose*, 921 F.3d at 1191
28 (citation and internal quotation omitted).

1 The Final EA acknowledges, as it must, that cattle grazing has deleterious effects
2 on soil resources. *See* FS006434 (noting that “[h]oof action of cattle can cause direct
3 impacts by compacting soils” and “[g]razing can have detrimental effects on the amount
4 of biological crusts”); FS006427 (stating that “[e]xcessive grazing” in ponderosa pine
5 areas “may reduce plant diversity and decrease soil stability”). And the Final EA also
6 acknowledges that current soil conditions on the Bar X are far from ideal, with *no*
7 pastures rated as having “good” soil conditions. FS006382–88. Even the Colcord/Turkey
8 Pasture—which has been grazed just one year since 1979, SOF ¶ 28—has “fair” soil
9 conditions. FS006384. As discussed *supra* pp. 15–16, the proposed grazing scheme
10 would dramatically increase the amount of grazing on the Bar X and open the
11 Colcord/Turkey and Lost Salt pastures to grazing, increasing the impacts to soil that will
12 occur compared to prior grazing levels.

13 The Forest Service considered all these facts and yet somehow concluded that the
14 proposed grazing scheme will not have negative effects on soil resources. FS006434. The
15 agency justified this conclusion by relying on “adequate management” and compliance
16 with “allowable use guidelines.” *Id.* This “explanation,” such as it is, is insufficient. The
17 “allowable use guidelines” in the proposed action are the same guidelines that have been
18 used in recent years. *Compare* SOF ¶ 75 (guidelines in proposed action), *with* SOF
19 ¶¶ 34–36 (guidelines in recent years). And “adequate management” is too vague to
20 support the conclusion that increasing the amount of grazing on the Bar X will somehow
21 have no effect on (or even improve) soil conditions when those conditions are already
22 degraded. *See Bark*, 958 F.3d at 872 (“conclusory statements[] based on vague and
23 uncertain analysis[] . . . are insufficient to satisfy NEPA’s requirements” (citation and
24 internal quotation omitted)). This is particularly true for the Colcord/Turkey and Lost Salt
25 pastures, which have “fair” soil conditions despite *no* grazing (aside from 2015) for 40
26 years. If keeping cattle almost entirely off those pastures has not led to “good” soil
27 conditions, how can the introduction of cattle possibly improve matters? The Forest
28 Service did not provide an adequate answer to that obvious question. *See Ctr. for*

1 *Biological Diversity v. U.S. Dep’t of the Interior*, 623 F.3d 633, 648 (9th Cir. 2010)
2 (“*CBD v. DOI*”) (stating that agencies must “support and explain their conclusions with
3 . . . reasoned analysis”).

4 **D. Impacts to Water Resources and Riparian Areas**

5 The Forest Service failed to take a “hard look” at the proposed grazing scheme’s
6 effects on water resources and riparian areas, especially Haigler Creek. As with its
7 analysis of soil effects, the Forest Service acknowledged the harm that cattle grazing
8 causes to water and riparian resources, and acknowledged that those resources are already
9 impaired in the Bar X area, but then came to the unreasonable conclusion that its new
10 grazing scheme will somehow *improve* those resources. NEPA requires that agencies
11 “support and explain their conclusions with . . . reasoned analysis,” and the Forest
12 Service did not do so. *CBD v. DOI*, 623 F.3d at 648.

13 The Final EA admits that “[t]en of the 11 watersheds that touch the project area
14 are considered functioning at risk,” FS006434, and that riparian vegetation is in “fair”—
15 not “good”—condition in the four primary watersheds affected by the project, FS006391.
16 Moreover, soils are “impaired” in a significant portion of the riparian area in the
17 Colcord/Turkey Pasture, FS003910, FS003913, and Haigler Creek is not attaining all
18 designated uses because of a measured *E. coli* exceedance, FS006392. The Final EA also
19 admits that, because cattle tend to congregate near water, they can have especially
20 deleterious effects on riparian areas and water quality. For instance, they “tend to deposit
21 a greater amount of waste close to water sources than they create in other areas of the
22 range,” leading to an increase in disease-causing organisms in the water. FS006436.

23 Despite all this, the Forest Service concluded that its grazing scheme—which
24 would lead to a dramatic increase in overall grazing levels and would also open up a huge
25 riparian area in the Colcord/Turkey Pasture to grazing—is “not likely to limit the
26 attainment” of desired conditions for riparian areas and water quality in the Bar X.
27 FS006438. Because those “desired conditions” include “properly functioning”
28 watersheds and water bodies that “fully support[] designated beneficial uses,” FS006391—

1 94, the Forest Service’s conclusion assumes that its grazing scheme will allow for
2 *improvements* to riparian and water resources.

3 The agency’s attempts to justify this seemingly far-fetched conclusion in the EA
4 fall short. The EA states that the new grazing scheme will not harm riparian vegetation
5 (and thereby watershed health) because “[r]iparian utilization guidelines” will be used
6 and “cattle [will be] moved when use guidelines are met.” FS006436. But the new
7 scheme has the same riparian utilization guidelines as the old one, *see supra* p. 24, and
8 those guidelines have proven insufficient to protect riparian vegetation under current
9 stocking levels. The discussion of water quality is similarly flawed. The EA admits that
10 “the probability of disease-causing organisms contaminating areas with full or partial
11 body contact increases with the intensity of livestock use” and that “livestock grazing
12 along Haigler Creek and Cherry Creek has the potential to contribute *E. coli* to the
13 waterways,” but then reasons that “recreation [along Haigler Creek and Cherry Creek]
14 would also likely contribute to water quality concerns.” FS006436. Whether recreation
15 use *also* contributes to contamination is irrelevant to the discussion about what impacts
16 cattle grazing will have on water resources. The EA fails to address the disconnect
17 between the facts concerning cattle grazing’s negative effects on water quality and the
18 Forest Service’s conclusion that increased grazing will somehow improve water quality.

19 In sum, the Forest Service did not provide a reasoned analysis explaining how
20 dramatically increasing grazing levels on the Bar X and opening up a huge swath of
21 riparian habitat to grazing on the Colcord/Turkey Pasture will somehow lead to
22 improvements in riparian resources and water quality, in violation of NEPA. *CBD v.*
23 *DOI*, 623 F.3d at 648.

24 **E. Impacts to Elk, Deer, and Turkey**

25 The Forest Service also failed to adequately consider the effects of its new grazing
26 scheme on wildlife—particularly elk, deer, and turkey. Overgrazing largely drove those
27 species out of the area in the 1970s, SOF ¶¶ 22–23, but they have since made a
28 comeback, *id.* ¶ 29, with elk and turkey maintaining stable populations in recent years,

1 FS006488. According to the EA, both elk and turkey are concentrated in the same areas:
2 Canyon Creek, the Colcord Mountains, Naegelin Canyon, Turkey Peak, and Christopher
3 Mountain. FS006488. The EA neglects to mention that all of these areas (aside from
4 Christopher Mountain¹⁴) are in the Colcord/Turkey and Lost Salt pastures—the areas that
5 have been off-limits to cattle for almost all of the last 40 years. FS001554; SOF ¶ 28.

6 The Forest Service ignored this history, instead stating in the Final EA that
7 “[i]nformation on impacts of grazing on individual wildlife species in the southwest is
8 lacking in scientific and government literature.” FS006492. The agency did acknowledge
9 the obvious fact that cattle can compete for food with elk and deer and that elk and deer
10 “would likely prefer grazing in pastures with no livestock,” FS006494. Likewise, the
11 agency acknowledged that grazing negatively affects turkey and other bird species by
12 reducing ground cover needed for nesting, FS006493, FS006496–97. But despite these
13 known effects, the history of cattle displacing wildlife on the Bar X, and the obvious
14 (though unacknowledged) geographic correlation between areas of high wildlife
15 concentration and areas that have not been grazed for decades, the agency concluded that
16 its new grazing scheme will not significantly affect turkey, elk, and deer. FS006494–95,
17 FS006501. As with so many of its effects determinations, the agency’s conclusion rested
18 on the new scheme’s “rotational grazing management system,” conservative utilization
19 guidelines, and limitation on grazing periods. FS006494–97. That reasoning is flawed,
20 though, because the old grazing scheme possessed the same features, and led to a
21 situation in which elk, deer, and turkey are concentrated in pastures not grazed by cattle.
22 *Compare* SOF ¶¶ 73–76 (features of proposed action), *with* SOF ¶¶ 32–40 (features of
23 old grazing scheme). The EA does not address how opening up those areas after 40 years
24 will affect the elk, deer, and turkey that have concentrated there.

25 Because the Forest Service relied on flawed reasoning, neglected to consider the
26 past effects of grazing on wildlife on the Bar X, and failed to grapple with the obvious
27

28 ¹⁴ Christopher Mountain is not in the Bar X at all. FS001554.

1 geographic correlation between wildlife concentrations and a lack of cattle grazing, its
2 conclusion that its new grazing scheme will not seriously negatively affect wildlife such
3 as deer, elk, and turkey is unreasonable and violates NEPA and the APA.

4
5 **III. THE FOREST SERVICE'S FONSI IS ARBITRARY AND CAPRICIOUS
AND THE AGENCY SHOULD HAVE PREPARED A FULL EIS**

6 The Forest Service concluded that its new grazing scheme “will not have
7 significant effects on the quality of the human environment.” Because the Forest Service
8 failed to take a “hard look” at the potential environmental impacts of the new scheme in
9 the EA, *supra* pp. 14–28, its FONSI is necessarily flawed. *CBD v. NHTSA*, 538 F.3d at
10 1223–24. And, because the record before the Forest Service “demonstrates that the [new
11 grazing scheme] *may* have a significant impact” on the human environment, it should
12 have prepared an EIS. *Id.* at 1225 (emphasis added).

13 An agency must prepare a full EIS if a proposed “action *might* significantly affect
14 environmental quality.” *WildEarth Guardians v. Provencio*, 923 F.3d 655, 668–69 (9th
15 Cir. 2019) (emphasis added). In other words, “to prevail on a claim that [an agency]
16 violated its statutory duty to prepare an EIS, a plaintiff need not show that significant
17 effects will in fact occur. It is enough for the plaintiff to raise substantial questions
18 whether a project may have a significant effect on the environment.” *Id.* at 669 (quoting
19 *Blue Mtns. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal
20 quotations omitted)). Whether an action “may” have a significant effect depends on the
21 action’s “context and intensity.” *Id.* Taking into account an action’s “context” requires
22 understanding that “[s]ignificance varies with the setting of the proposed action. . . . [I]n
23 the case of a site-specific action, significance . . . usually depend[s] upon the effects in
24 the locale rather than in the world as a whole.” 40 C.F.R. § 1508.27(a). The “intensity” of
25 a proposed action depends on many factors, ten of which are set out in NEPA’s
26 implementing regulations. *See id.* § 1508.27(b) (listing factors). “One of these factors
27 may demonstrate intensity sufficiently on its own, although the presence of one factor
28 does not necessarily do so.” *Wild Wilderness v. Allen*, 871 F.3d 719, 727 (9th Cir. 2017)

1 (citation omitted). An agency’s decision not to prepare a full EIS is reviewed under the
2 “arbitrary and capricious” standard of the APA. *Provencio*, 923 F.3d at 675.

3 Because this is a site-specific action, the “significance” of the proposed grazing
4 scheme depends on the scheme’s likely effects in and around the Bar X. Viewed in that
5 context, the record clearly demonstrates that the new grazing scheme “may” have a
6 significant effect on environmental quality. At least three of the factors identified in the
7 NEPA regulations are present here. First, there is a serious threat that “the proposed
8 action [will] affect[] public health or safety.” 40 C.F.R. § 1508.27(b)(2). As discussed
9 *supra* pp. 20–23, the Forest Service’s proposal to open the Colcord/Turkey Pasture to
10 grazing caused serious concern among members of the Colcord and Ponderosa
11 communities, who worried (and continue to worry) that the presence of cattle so close to
12 their homes might cause a host of safety and health issues. Additionally, the expansion of
13 grazing—particularly opening up of a large section of Haigler Creek that runs through the
14 Colcord/Turkey Pasture—runs the risk of further contaminating water bodies used for
15 recreation and leading to increased cattle/human encounters. *See supra* pp. 22, 25–26.

16 Second, the new grazing scheme’s “effects on the quality of the human
17 environment are likely to be highly controversial,” 40 C.F.R. § 1508.27(b)(4), in the
18 sense that “there is a substantial dispute about the . . . effect” of the scheme, *Provencio*,
19 923 F.3d at 673 (citation and alteration omitted). “A substantial dispute exists when
20 evidence, raised prior to the preparation of an EIS or FONSI casts serious doubt upon the
21 reasonableness of an agency’s conclusions.” *Provencio*, 923 F.3d at 673 (citation
22 omitted). In the Final EA, the Forest Service concluded that its new grazing scheme will
23 not have a significant effect on the Colcord and Ponderosa communities because they
24 “have always been within an active grazing allotment,” FS006402–03, implying that the
25 new scheme will not constitute a dramatic change from the status quo. But evidence put
26 before the agency throughout the NEPA process undercut that conclusion, making clear
27 that the residents of the communities as well as recreators have come to rely on the
28 absence of cattle on the Colcord/Turkey Pasture. SOF ¶ 63. Furthermore, the “thorough

1 on-the-ground investigation[s] concerning conditions on the Bar X” from the late 1970s
2 and 1980s, FS002603, cast serious doubt on the Forest Service’s conclusions regarding
3 the effects of its new plan, particularly where the Colcord/Turkey Pasture is concerned.
4 Given the complete absence of any current production-utilization data for the
5 Colcord/Turkey Pasture, SOF ¶¶ 28, 53, those studies, though 40 years old, are still the
6 best indication of what will happen if cattle are allowed to graze there, and they suggest
7 that the effects may be devastating, *id.* ¶¶ 22–23. At the very least, the studies “raise
8 substantial questions whether [the new scheme] may have a significant effect on the
9 environment,” requiring an EIS to be prepared. *Provencio*, 923 F.3d at 669 (citation
10 omitted).

11 Third, there is a threat that “the action may adversely affect an endangered or
12 threatened species or its habitat that has been determined to be critical under the [ESA].”
13 40 C.F.R. § 1508.27(b)(9). As discussed *infra* pp. 31–33, there are seven Mexican spotted
14 owl PACs on the Colcord/Turkey and Lost Salt pastures. The presence of six PACs was
15 in the past at least part of the motivation for keeping the pastures closed to grazing.
16 FWS001865; FS002751. This suggests that there is, at the very least, a possibility that
17 opening the pastures to grazing could negatively affect the Mexican spotted owl.

18 Taken separately or together, these factors demand that the Forest Service prepare
19 a full EIS. *See Wild Wilderness*, 871 F.3d at 727 (presence of one factor can be
20 sufficient). Especially in light of the possible effects to health and public safety from
21 opening the Colcord/Turkey Pasture to grazing and the serious dispute about the extent to
22 which opening that pasture would represent a deviation from the status quo, it was
23 arbitrary and capricious for the Forest Service to conclude that it need not prepare an EIS.

24 25 **IV. THE “NOT LIKELY TO ADVERSELY AFFECT” DETERMINATION FOR MEXICAN SPOTTED OWL IS ARBITRARY AND CAPRICIOUS**

26 The USFWS concurred with the Forest Service’s conclusions that the proposed
27 grazing scheme is “not likely to adversely affect” the Mexican spotted owl or its critical
28 habitat. FS002787–89. Those determinations are arbitrary and capricious.

1 A federal agency proposing to take an action need not undertake formal ESA
2 consultation with the relevant expert agency if it concludes that the action “is not likely to
3 adversely affect listed species or critical habitat” and the expert agency concurs with that
4 conclusion. 50 C.F.R. § 402.13(c). An action is “not likely to adversely affect” a listed
5 species and/or its critical habitat if any effects to the species/habitat “are expected to be
6 discountable, or insignificant, or completely beneficial.” FWS000109. The USFWS’s
7 concurrence that the new grazing scheme is “not likely to adversely affect” the Mexican
8 spotted owl or its critical habitat is reviewed under the APA’s “arbitrary and capricious”
9 standard. *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1256–57, 1262 (9th Cir. 2017); *see*
10 *also Friends of the River v. Nat’l Marine Fisheries Serv.*, 786 F. App’x 666, 669 (9th Cir.
11 Oct. 3, 2019) (“The issuance of either a biological opinion or letter of concurrence is a
12 final agency action subject to judicial review.”). This Court may review the Forest
13 Service’s biological assessment insofar as that assessment underlies the USFWS’s
14 concurrence. *Or. Wild v. U.S. Forest Serv.*, 194 F. Supp. 3d 1156, 1164 (D. Or. 2016).

15 The Mexican spotted owl was listed under the ESA in 1993. FWS000013. Critical
16 habitat for the owl was designated in 2001 and 2003. FWS000370, FWS000399. Large
17 portions of the Bar X were included in the 2003 critical habitat designation, including
18 almost the entire Colcord/Turkey Pasture and the Lost Salt Pasture. FWS000488,
19 FWS001927–28. By 2007–2008, when the Forest Service engaged in ESA consultation
20 with the USFWS over grazing on the Bar X and many other allotments in the Southwest,
21 seven Mexican spotted owl PACs had been identified on the Bar X, six of which were in
22 the Colcord/Turkey or Lost Salt Pasture. FS000974, FS001013.

23 Neither the Forest Service (in its biological assessment) nor the USFWS (in its
24 concurrences) provided a reasonable explanation for why expanding grazing into the
25 Colcord/Turkey and Lost Salt pastures is “not likely to adversely affect” the Mexican
26 spotted owl. The agencies relied on “rotational grazing management” and moderate to
27 conservative utilization guidelines to claim insignificant effects, FWS001811–15, but
28 failed to acknowledge that *any* grazing of the Colcord/Turkey and Lost Salt pastures

1 would increase effects compared to the last 40 years. Indeed, the most recent studies
2 conducted when grazing occurred in those pastures found they were “depleted severely
3 by overgrazing,” FS000123, with herbaceous vegetation “mowed to the roots” in many
4 areas, FS000061; *see also* SOF ¶¶ 22–23. Given that the Mexican spotted owl depends on
5 sufficient herbaceous vegetation to provide food and cover for prey, FWS001811–12, the
6 substantial *increase* in grazing that will occur in the owl’s prime habitat on the Bar X
7 under the new grazing scheme will certainly affect the owl’s prey base, thereby affecting
8 the owl. Yet the agencies failed to recognize and analyze the impact of re-opening to
9 grazing the prime habitat of the owl on the Bar X, which had previously been decimated
10 by cattle. This omission in their analyses renders the conclusion that the new grazing plan
11 will have only “discountable” or “insignificant” effects on the owl arbitrary and
12 capricious. *See Zinke*, 900 F.3d at 1068–69 (holding that the agency had acted arbitrarily
13 and capriciously by “ignoring available data” without an adequate explanation).

14 The agencies’ conclusions were also arbitrary and capricious because they failed
15 to account for the change in position from 2008. Both the biological assessment and the
16 concurrences state that cattle were “excluded . . . from grazing the [Colcord/Turkey] or
17 Lost Salt pastures” in 2008 “due to the presence of Mexican Spotted Owl” PACs,
18 FWS001865; FS002751, but neither document explains what circumstances occasioned
19 the decision to now open those pastures to grazing. If anything, the record suggests that
20 there should be *more* reason (from a Mexican spotted owl perspective) to exclude grazing
21 from the Colcord/Turkey and Lost Salt pastures now than there was in 2008: there are
22 additional PACs in the pastures that were added in 2018 after two new pairs of birds were
23 found. FWS001910, FWS001916–17. Both the Forest Service and the USFWS thus
24 failed to provide a “reasoned explanation . . . for disregarding facts and circumstances
25 that underlay . . . the prior policy” of excluding grazing from the Colcord/Turkey and
26 Lost Salt pastures to protect the Mexican spotted owl. *F.C.C. v. Fox Television Stations,*
27 *Inc.*, 556 U.S. 502, 515–16 (2009). In other words, neither agency explained why, if the
28 presence of Mexican spotted owl PACs on those pastures was part of the reason to

1 exclude cattle in 2007–08, the presence of even *more* PACs should not be enough to
2 exclude cattle today. The failure to provide such an explanation violates the APA. *Id.*

3
4 **V. THE FOREST SERVICE VIOLATED NFMA BY APPROVING THE
NEW GRAZING SCHEME**

5 The Forest Service violated NFMA by choosing to move forward with a grazing
6 strategy that is inconsistent with the Tonto Forest Plan.¹⁵ At the very least, the Forest
7 Service did not provide a reasoned explanation for how the new grazing scheme is
8 consistent with the Forest Plan.

9 “NFMA charges the Forest Service with the management of national forest land,
10 including planning for the protection and use of the land and its natural resources.” *All.*
11 *for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1109 (9th Cir. 2018). The
12 Forest Service conducts planning at the forest-wide level when it prepares land and
13 resource management plans, also known as forest plans. *Id.*; 16 U.S.C. § 1604(a). Later
14 site-specific actions—including grazing authorizations—must be consistent with the
15 forest plan. 16 U.S.C. § 1604(i); *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 957 F.3d
16 1024, 1035 (9th Cir. 2020). An action is not consistent with a forest plan if it will move
17 the forest away from desired conditions in the long run. *All. for the Wild Rockies*, 907
18 F.3d at 1115–16. Courts review an agency’s consistency determination for a given site-
19 specific action under the APA. *Id.* at 1112. An agency’s consistency determination may
20 violate NFMA and the APA for two distinct reasons: (1) the action is so plainly
21 inconsistent with the forest plan that it is “not in accordance with law,” *see Idaho*
22 *Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 969–70 (9th Cir. 2002); or, more
23 commonly, (2) the agency has provided an inadequate or unreasonable explanation for

24
25 ¹⁵ If the Court finds in Plaintiff’s favor on any of the NEPA claims, there may be no need
26 to address the NFMA claim. *See Great Basin Res. Watch*, 844 F.3d at 1111 (declining to
27 address substantive challenges to an agency decision after ruling in the plaintiffs’ favor
28 on a NEPA claim because “NEPA is not a paper exercise, and new analyses may point in
new directions” (citation omitted)); *Nw. Ecosystem All. v. Rey*, 380 F. Supp. 2d 1175,
1197 (W.D. Wash. 2005) (“Pending further compliance by the Agencies with NEPA,
there is no need to address the merits of [the] NFMA and FLPMA claims.”).

1 how the action is consistent with the forest plan, violating the requirement of reasoned
2 decisionmaking embedded in the “arbitrary and capricious” standard, *see All. for the Wild*
3 *Rockies*, 907 F.3d at 1115–16.

4 The Tonto Forest Plan includes the following relevant goals, standards, and
5 guidelines: for soils, “emphasize improvement of soil productivity”; for the range
6 resource, “[e]mphasize a program of range administration which will bring the range
7 resource under proper management and improve range forage conditions,” and “[s]trive
8 to attain good to excellent range conditions”; for riparian areas, “enhance riparian
9 ecosystems, by improved management,” “move degraded riparian vegetation toward
10 good condition as soon as possible,” and prevent “[d]amage to riparian vegetation,
11 streambanks, and channels”; and, for watersheds, “manage watersheds in a manner aimed
12 at improving them to or maintaining them at a satisfactory or better condition.” SOF ¶ 14.
13 The Forest Plan also states that the Forest Service should “[a]llow for forage to *maximize*
14 *Threatened and Endangered . . . species, management indicator species, and emphasis*
15 *harvest species.*” *Id.* ¶ 15 (emphasis added). For Management Area 5D—which includes
16 nearly all of the Colcord/Turkey and Lost Salt pastures—the Forest Plan provides that the
17 “primary emphasis” of management should include “creation of wildlife habitat diversity,
18 increased populations of emphasis harvest species, and recreation opportunity.” *Id.* ¶¶
19 16–17. The Plan also discusses some of the strategies needed to achieve and monitor
20 progress towards these goals and compliance with these standards and guidelines. For the
21 range resource, the Plan emphasizes “the need for range analyses and production
22 utilization studies to determine” the appropriate level of grazing on each allotment so that
23 permitted grazing use does not exceed forage capacity. *Id.* ¶ 21. The Plan reiterates the
24 importance of production-utilization studies in several other places. *Id.*

25 The Forest Service’s new grazing scheme will not move the Tonto National Forest
26 towards the long-term resource goals set out in the Forest Plan, nor is the new scheme
27 consistent with the Forest Plan’s emphasis on production-utilization studies as a tool for
28 determining proper stocking levels. As discussed *supra* pp. 23–26 in the context of

1 NEPA, the Forest’s soil resources are impaired, none of its watersheds are functioning
2 properly, riparian vegetation is rated as “fair” (rather than “good”), and Haigler Creek is
3 not achieving all designated uses due to an *E. coli* exceedance. All of these conditions
4 reflect years of grazing at levels much less than the levels proposed in the new scheme
5 and with 40 years of non-use of the Colcord/Turkey and Lost Salt pastures. Re-opening
6 those pastures will not only degrade the soil, vegetation, and riparian resources, it will
7 displace species like deer, elk, and turkey, and degrade habitat for threatened Mexican
8 spotted owls, when cattle reduce forage levels. Given this, the new scheme will so clearly
9 fail to move the Forest towards its goals that it is not consistent with the Forest Plan and
10 thus “not in accordance with” NFMA. *Rittenhouse*, 305 F.3d at 969–70. And the Forest
11 Service’s failure to conduct any production-utilization studies before authorizing grazing
12 on the Colcord/Turkey and Lost Salt pastures is also clearly inconsistent with the Plan.

13 But even putting aside the substantive invalidity of the new scheme, the Forest
14 Service failed to adequately explain how the scheme is consistent with the Forest Plan.
15 As discussed *supra* pp. 23–28, the Forest Service’s explanations for why its scheme will
16 not have negative effects on soil, riparian, wildlife and water resources were
17 unreasonable and thus violated NEPA. Likewise, the agency never explained how re-
18 opening the Colcord/Turkey and Lost Salt pastures fulfills the Forest Plan’s goals of
19 maximizing harvest species and threatened species. FS000255, FS000385. Those
20 inadequate explanations do not suffice under NFMA and the APA, because they do not
21 “show [the scheme’s] consistency with” the Forest Plan. *All. for the Wild Rockies*, 907
22 F.3d at 1115. The Forest Service was required to explain, in a reasonable way, how its
23 new grazing scheme will move the Forest towards the long-term goals set out in the
24 Forest Plan, and it utterly failed to do so.

25 CONCLUSION

26 For the foregoing reasons, this Court should find that the Forest Service violated
27 NEPA, the ESA, NFMA, and the APA in developing, explaining to the public, and
28 approving its new grazing scheme for the Bar X.

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Dated: October 2, 2020

Respectfully submitted,

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