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20 UNITED STATES DISTRICT COURT
21 EASTERN DISTRICT OF WASHINGTON

22 WILDEARTH GUARDIANS, WESTERN)
23 WATERSHEDS PROJECT, and KETTLE)
24 RANGE CONSERVATION GROUP,)

25 Plaintiffs,)

26 v.)

27 GLENN CASAMASSA, Pacific)
28 Northwest Regional Forester, U.S.)
29 FOREST SERVICE; RODNEY)
SMOLDON, Forest Supervisor, Colville)
National Forest, and U.S. FOREST)
SERVICE,)

Case Number: 2:20-cv-00223-RMP

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

Oral Argument Requested

1 Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56, Plaintiffs
2 Wildearth Guardians, Western Watersheds Project, and Kettle Range Conservation
3 Group respectfully request that this Court grant summary judgment and relief in
4 Plaintiffs’ favor in the above-captioned action.
5

6 Plaintiffs seek declaratory relief finding that the United States Forest Service’s
7 Final Environmental Impact Statement (“FEIS”)/Record of Decision (“ROD”) and
8 revised Colville Forest Plan violate the National Environmental Policy Act (“NEPA”), 42
9 U.S.C. §§ 4321 *et. seq.*, the National Forest Management Act (“NFMA”), 16 U.S.C. §§
10 1600 *et. seq.*, and those statutes’ implementing regulations.¹ Plaintiffs additionally seek
11 declaratory relief that the Forest Service violated NEPA by failing to supplement
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17 ¹ All citations to NEPA’s implementing regulations in Plaintiffs’ supporting
18 memorandum are to the 1978 Council of Environmental Quality (“CEQ”) regulations, 40
19 C.F.R. Part 1500, which were in effect at the time the USFS issued the FEIS/ROD and
20 revised 2019 Colville Forest Plan that are challenged herein. On September 14, 2020, the
21 Trump Administration issued a final rule revising the CEQ regulations. *See* 85 Fed. Reg.
22 43304 (July 16, 2020) (Update to the Regulations Implementing the Procedural
23 Provisions of the NEPA, Final Rule). There was little substantive change, however, to the
24 “supplemental NEPA analysis” regulation that is also at issue here. *Compare* 40 C.F.R. §
25 1502.9(c)(1)(ii) (1978) to 40 C.F.R. § 1502.9(d)(1)(ii)(2020).
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1 decades-old environmental analyses for the Allotment Management Plans (“AMPs”) that
2 govern the five allotments permitted to Defendant-Intervenor, Diamond M Ranch
3 (“Diamond M”), and the Endangered Species Act (“ESA”), 16 U.S.C. § 1536, for failing
4 to consult with the U.S. Fish and Wildlife Service (“USFWS”) over the potential impacts
5 of livestock grazing to ESA-listed and candidate species that are either known to occur or
6 “may be present” in the areas encompassed by the Diamond M allotments. Plaintiffs
7 request that the Court order the Forest Service to prepare supplemental NEPA analyses
8 that considers the effects of Diamond M’s livestock grazing to gray wolves and measures
9 to mitigate wolf-livestock conflicts and to consult with the USFWS over potential effects
10 to ESA-listed and candidate species before issuing further grazing authorizations for the
11 “Diamond M” allotments, 5 U.S.C. § 706(1), 16 U.S.C. § 1540(g). Plaintiffs further
12 request that the Court vacate and set aside the FEIS/ROD and revised Colville Forest
13 Plan as they relate to wolves and domestic livestock grazing and remand the matter to the
14 agency to correct its NEPA and/or NFMA violations.

15 This motion is supported by the attached Memorandum of Points and Authorities,
16 Exhibits 1 to 13 attached to the Declaration of Jennifer R. Schwartz, the Declarations of
17 Carter Niemeyer, Jocelyn Leroux, and Timothy Coleman, and the Administrative
18 Records certified by Federal-Defendants (referenced as “AR” “DM” and “FP”).
19 Plaintiffs’ standing to pursue this action is set forth in Plaintiffs’ Compl. ¶¶ 12-20 (ECF
20 No. 1), as well as in the attached declarations of Jocelyn Leroux and Timothy Coleman.

EXHIBIT LIST

1
2 **Exhibit 1:** Excerpts from U.S. Forest Service, Forest Service Manual, FSM 2600-
3 Wildlife, Fish, and Sensitive Plant Habitat Management Chapter 2670, Sections 2672.24
4 to 2672.43

5 **Exhibit 2:** Excerpts from U.S. Forest Service, Final Environmental Impact Statement for
6 the Malheur, Umatilla, and Wallowa-Whitman National Forests Land Management Plans
7 (Volume 2: Chapter 3) (“FEIS for the Blue Mountains Forest Plan revisions”)

8 **Exhibit 3:** Richard Read, One ranch, 26 wolves killed: *Fight over endangered predators*
9 *divides ranchers and conservationists*, Los Angeles Times (Dec. 18, 2019)

10 **Exhibit 4:** Josh Adler, *Controversial killing of wolves continues in Washington State*,
11 National Geographic (August 17, 2020)

12 **Exhibits 5:** Washington Dept. of Fish & Wildlife, Incident Report Forms for Livestock
13 Depredations in July 2020

14 **Exhibit 6:** Washington Dept. of Fish & Wildlife, July 27, 2020 and August 17, 2020
15 lethal removal updates regarding the Wedge Pack

16 **Exhibit 7:** U.S. Forest Service, Forest Service Handbook, FSH 2209.13 - Grazing Permit
17 Administration Handbook, Chapter 90 – Rangeland Management Decisionmaking

18 **Exhibit 8:** 1979 Evaluation and Environmental Assessment Report for the Lambert
19 allotment and the 1976 Environmental Analysis Report for the Copper-Mires allotment.

20 **Exhibit 9:** August 3, 2020 Letter and Photographs regarding Diamond M’s turnout of
21 small calves from The Lands Council.

22 **Exhibit 10:** Gabriel Richard Spence, M.S., *Wolf Predation on Livestock in Washington*,
23 WSU Abstract (July 2017)

24 **Exhibit 11:** Don Jenkins, *Wolves breed problems for Washington ranchers*, Capital Press
25 (May 29, 2018)

26 **Exhibit 12:** Matthew Weaver, *Washington wildlife managers kill wolf*, Capital Press
27 (August 8, 2012)

1 **Exhibit 13:** Washington Dept. of Fish & Wildlife, Incident Report Forms for Livestock
2 Depredations in 2019 and Conference call notes regarding OPT Pack 2018 depredation
3 incidents.

4 **LIST OF ACRONYMS**

5 AOI Annual Operating Instruction

6 AMP Allotment Management Plan

7

8 BA Biological Assessment

9 EA Environmental Assessment

10

11 EIS Environmental Impact Statement

12 ESA Endangered Species Act

13

14 FSH Forest Service Handbook

15 FSM Forest Service Manuel

16 USFWS United States Fish and Wildlife Service

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18 NEPA National Environmental Policy Act

19 NFMA National Forest Management Act

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21 ROD Record of Decision

22 USFS United States Forest Service

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24 WDFW Washington Department of Fish and Wildlife

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INTRODUCTION

1
2 The 193 million acres of land within the National Forest System provide the
3 foundation for much of our nation’s biodiversity—containing the vast majority of
4 remaining old-growth forests and some of the best habitat for rare species and iconic
5 carnivores in need of large home ranges like the gray wolf, grizzly bear, and lynx. The
6 National Forest Management Act (“NFMA”) requires the U.S. Forest Service (“USFS”)
7 to manage national forests for diverse and viable wildlife populations. As such, the
8 agency’s role is not limited to simply managing the physical components of the land
9 itself; it also must manage human activities it authorizes to occur on these invaluable
10 public lands in a manner that protects wildlife from undue harm. In this sense, the USFS
11 and our state and federal wildlife agencies act as legal co-trustees responsible for
12 ensuring the ability of vulnerable species to persist on the American landscape.
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18 The USFS abdicated this responsibility in the case of gray wolves, which only
19 began reclaiming their historic habitat on the Colville National Forest (the “Colville”) in
20 northeast Washington little over a decade ago. By failing to assess the impacts of
21 federally permitted livestock grazing on newly recolonizing gray wolves, a state-listed
22 endangered and USFS sensitive species, and by willfully refusing to consider
23 management direction to reduce or avoid wolf-livestock conflicts on the Forest, the USFS
24 violated both NFMA and the National Environmental Policy Act (“NEPA”). To date,
25 USFS officials have sat idly by while the Washington Department of Fish and Wildlife
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1 (“WDFW”) killed 31 wolves in response to cattle depredations on the Colville, most of
2 which have been at the behest of one ranching corporation—Diamond M Ranch
3 (“Diamond M”)—which grazes its cows and young calves in heavily-treed portions of
4 the National Forest. The USFS also abdicated its responsibility under the Endangered
5 Species Act (“ESA”), by failing to ensure Diamond M’s cattle grazing doesn’t also
6 impede the recovery of critically imperiled wildlife like the threatened Canada lynx and
7 Grizzly bear. Plaintiffs, non-profit conservation organizations, now turn to this Court for
8 declaratory and injunctive relief. Compl., ¶¶A-I (ECF No. 1).

12 FACTUAL BACKGROUND

14 I. The Gray Wolf’s Historic Return to Washington and Current Status

15 Although gray wolves were once an abundant native species in Washington, with
16 as many as 5,000 ranging throughout the state, the species was persecuted with more
17 passion and zeal than any other animal in U.S. history. Wolves had been largely
18 extirpated from Washington by the 1930s through trapping, poisoning and shooting.
19 FP015358, 015365-70; DM02913, 02691 (WDFW 2011).

22 By the time the ESA passed in 1973, very few wolves remained in the lower 48
23 states and the gray wolf (*canis lupus*) was among the first species to be listed as
24 endangered and afforded federal protections under the Act. *Id.*; FP015386-89. In 1980,
25 when the gray wolf was added to Washington’s State’s list of endangered species, there
26 were few reports of wolf sign in the state. *Id.* But, in 1995-96, USFWS reintroduced
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1 wolves to Yellowstone National Park and central Idaho as part of ESA recovery efforts.

2 *Id.* As this Northern Rockies wolf population expanded, it became a source population
3 for wolves dispersing into the Pacific Northwest in the early 2000s. *Id.*; FP15371-75.
4

5 In 2008, Washington's first two wolf packs since the 1930s were confirmed. *Id.*
6 With less than a dozen wolves to start, the tiny population was able to triple in size by
7 2012 (still only totaling around 40 wolves statewide). AR01835. Since 2016, however,
8 the state's annual population growth rate has mostly hovered around 3% to 6%. *Id.* At the
9 end of 2019, WDFW counted 108 wolves in 21 packs of which 10 were successful
10 breeding pairs. AR01823 (also noting one less successful breeding pair in 2019). Most of
11 Washington's wolf population growth has occurred in its northeast corner, encompassing
12 the Colville National Forest, and is comprised of wolves both dispersing from
13 neighboring states and southward from British Columbia, Canada. AR01828, 01838.
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18 Wolf conservation and management at both the federal and state levels have been
19 fraught with controversy. Several attempts by USFWS to prematurely remove or curtail
20 federal protections for gray wolves under the ESA were found unlawful by federal
21 courts.¹ In 2011, however, Congress legislatively delisted gray wolves in the Northern
22 Rockies region through an Appropriations Act rider, removing ESA protections for gray
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27 ¹ See e.g. *Wildearth Guardians, et. al. v. Bernhardt, et. al.*, No. 3:21-cv-00349 (filed Jan.
28 14, 2021) (challenging 2020 nationwide wolf delisting rule and listing long history of
29 cases invalidating prior rules to remove ESA protections for wolves).

1 wolves in Montana, Idaho, Wyoming, and the eastern one-third of Washington and
2 Oregon. FP015388. Since then, wolf populations in those areas have been managed by
3 state wildlife agencies under the auspices of individual state wolf management plans.
4
5 And despite the fact that gray wolves still occupy less than 15% of their historic habitat in
6 the contiguous U.S., the Trump administration just issued a final rule removing ESA
7 protections for the species nationwide. 85 Fed. Reg. 69778 (Nov. 3, 2020)(Final Rule).
8

9 Though currently federally delisted throughout the country, the gray wolf remains
10 a state-listed endangered species in Washington. Under state law, once a species is listed
11 as endangered, WDFW is required to write a species recovery plan with target population
12 objectives, an implementation plan to reach those objectives, and criteria for delisting,
13 education, and monitoring. WAC 220-610-110 §11.1. In 2011, WDFW finalized its Wolf
14 Conservation and Management Plan (“WA wolf plan”). FP015348.
15
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18 According to the WA wolf plan, wolves will be removed from the state’s list of
19 endangered species when 15 successful breeding pairs are present for three consecutive
20 years, with four such pairs in each of the state’s three recovery regions and three
21 additional pairs anywhere in the state. FP015414. As the plan acknowledges, 15 breeding
22 pairs, which represent an estimated 97-361 wolves, is a “minimal objective to achieve
23 recovery” and “well below” the number experts concluded are needed for long-term
24 persistence of an isolated wolf population. FP015416. In fact, several recent studies
25 suggest that “populations of several thousand individuals may be needed to ensure long-
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1 term persistence (>90% probability for 100 years).” FP015398. Indeed, two of the three
2 blind peer reviewers said the plan’s recovery objectives were inadequate. FP015416. At
3 any rate, the plan acknowledges that the state’s wolf population would have to grow
4 beyond 15 well-distributed breeding pairs to remain viable long-term. FP015417.

6 Finally, the gray wolf, in addition to being a state-listed endangered species, is also
7 a USFS designated “sensitive species” in the Pacific Northwest region. FP108617.

9 Sensitive species are “plant and animal species identified by a Regional Forester for
10 which population viability is a concern, as evidenced by significant current or predicted
11 downward trends in population numbers or density and habitat capability that would
12 reduce a species’ existing distribution.” FP147631. USFS policy directs the agency to use
13 the NEPA process to assess the impacts of USFS programs and activities on sensitive
14 species, to mitigate any adverse impacts thereto, and to integrate conservation and
15 recovery objectives for sensitive species into forest plans. FP147623-28; Ex. 1.

19 **II. Wolf Killings in Response to Conflicts with Livestock**

21 Wolves, as “habitat generalists,” aren’t primarily threatened by habitat loss like so
22 many other imperiled species; rather, the greatest threat to the wolf’s recovery and long-
23 term viability is human intolerance—mortality from illegal poaching, government
24 sanctioned hunting and trapping, and lethal removal actions due to conflicts with
25 livestock. FP015358; DM02691, 02696; Ex. 2, p.18.

1 Gray wolves predominantly live in packs, which hunt, feed, travel, and rear pups
2 together. FP015375-78. A wolf pack usually consists of a breeding pair, their offspring
3 from the previous year, and new pups. Most packs produce only one litter each year,
4 which are usually born in April. *Id.* As wolf pups become adults, they may disperse from
5 their pack to establish new home-territories and start new packs, sometimes traveling
6 hundreds of miles before settling in a new area and finding a mate. FP015381.
7

9 Wolves are highly social animals, and a wolf pack has a well-established social
10 structure. FP015376-78. When humans remove a wolf from a pack, pack structure and
11 dynamics are disrupted, and the survival of the pack's pups may be endangered. Removal
12 of the breeding male or breeding female from a pack is particularly disruptive and
13 damaging. When humans kill members of a pack and reduce pack size it can reduce the
14 reproductive success of the wolf population. FP015489 (cited study advising against
15 lethal control from reproducing packs and around core areas); AR02178-80 (2010 study
16 finding wolf population growth declined even with substantially lower rates of human-
17 related mortality than the thresholds identified in current state and federal policies).
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22 A pack establishes an annual home territory, which is quite large, and defends it
23 from other packs and trespassing wolves. DM02931. From spring until fall, pack activity
24 is centered around its den and rendezvous sites, as the adults hunt and bring food back to
25 the pups. Rendezvous sites are specific areas that wolf packs use to rest, gather, and play
26 after the pups emerge from the den. FP015379-80.
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1 As apex predators, wolves play a crucial role in the ecosystems where they live,
2 having direct and indirect effects on multiple animal and plant species, and promoting
3 biodiversity and ecosystem balance. *See e.g.* AR02171-72, 02483-88, 02591-96;
4 FP015384-86 (describing cascading negative effects after wolves were eradicated from
5 native ecosystems in and around Yellowstone and Olympic National Parks).
6
7

8 Wolves are predominantly predators of medium and large-sized mammals, such as
9 elk and deer. FP015378-79. Gray wolves occasionally feed on livestock, but account for a
10 tiny fraction of total livestock losses, even in areas with relatively robust wolf
11 populations. *See e.g.* FP015426-27 (showing wolves in the Northern Rockies were
12 responsible for less than 0.1% of cattle deaths and 0.6% of sheep deaths); DM02749-50;
13 FP101267 (WSU study of WA wolves finding same), AR02012-13 (WA study results).
14
15

16 Recognizing that human killing of wolves is the biggest threat to the species, the
17 WA wolf plan claims that “[n]on-lethal management techniques will be emphasized
18 throughout the recovery period and beyond” to address wolf depredation on livestock (*i.e.*
19 “wolf-livestock conflicts”). FP015435. It also established a framework for WDFW to
20 provide livestock producers technical assistance on proactive, nonlethal management
21 methods as well as generous compensation for livestock killed by wolves. FP015440-44.
22
23 The plan also lists husbandry techniques that are useful in avoiding wolf depredation,
24 including the use of range riders, burying of livestock carcasses, moving sick or injured
25 livestock off grazing allotments, delaying the turnout of cattle until calving is finished or
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1 wild ungulates are born, allowing calves to reach at least 200 pounds before turning them
2 out, and avoiding grazing livestock near wolf territory core areas, especially dens and
3 rendezvous sites. FP015428; 015489-93 (emphasizing protection of den sites).
4

5 Despite the fact that wolves are still state-listed as an endangered species and have
6 yet to reach the minimum recovery objective, the WA wolf plan does allow for lethal
7 wolf removal in response to livestock depredations. FP015435. To date, WDFW has
8 exercised this discretion to kill 34 wolves from 10 packs, resulting in the near or total
9 destruction of 4 packs since 2012 in response to conflicts with livestock. Of WDFW's 34
10 lethal control actions, over 90% were either completely or partially in response to
11 predations of federally permitted cattle grazing on the Colville National Forest, with 30
12 wolves (88%) being killed largely at the behest of Diamond M. *See also* Compl., ¶¶78-99
13 (describing history of wolf-livestock conflicts on the Colville and those related to
14 Diamond M). AR01942-46, 00685, 01050; Exs. 3, 4, 5, 6 & 13.
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19 **III. Management of Livestock Grazing and Conflicts with Wolves on the Colville** 20 **National Forest**

21 The 1.1-million-acre Colville National Forest spans Ferry, Stevens, and Pend
22 Oreille Counties in northeast Washington. Geographically considered part of the northern
23 Rocky Mountains, with the Kettle River Range on the western half and the Selkirk
24 Mountains defining the eastern half, the Colville is mostly comprised of densely forested,
25 rugged terrain: prime habitat for native carnivores like wolves, grizzly bear, and lynx.
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1 The Forest also supports abundant populations of native ungulates and an array of fish,
2 wildlife and plants, many of which are endangered, threatened or sensitive. FP108608.

3
4 Being mostly covered by thick conifer forest, the majority of the Colville provides
5 little to no forage for domestic cattle. FP105187-88. Nevertheless, the Forest has a long
6 history of being widely grazed by livestock. Currently, the USFS administers at least
7
8 68% of the Forest (about 745,000 acres) as grazing allotments. FP108811-13 (FEIS). But
9 according to the agency's own range suitability assessment, only about 38% (281,999
10 acres) of this total allotment acreage is actually "suitable" for cattle grazing. FP108821.

11
12 Every summer, the USFS allows nearly 10,000 cows and young calves to graze the
13 Colville's rugged, dense forests from June 1st until mid-autumn, overlapping the period
14 when wolves are active around their dens and rendezvous sites. AR00678. In fact, just
15 this past grazing season the USFS proposed restocking vacant allotments—adding more
16
17 cattle to areas with minimal forage that are now occupied by wolves. AR01799-800.

18
19 The USFS uses the NEPA process to evaluate the effects of proposed grazing
20 management on two levels: a programmatic EIS is used to develop forest plans and
21 evaluate management direction for forest-wide grazing practices, *see* FP105187-212,
22 whereas site-specific environmental analyses are used to develop Allotment Management
23 Plans ("AMPs") for individual allotments. FP105189.

24
25 Grazing is then administered on the Forest through a permit system. *Id.* Each
26 permit grants a license to graze on a particular allotment and establishes the number,
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1 kind, and class of livestock to be grazed and the period of authorized use. *Id.*; 36 C.F.R.
2 §§ 222.1–222.4; 43 U.S.C. § 1752; *Or. Natural Desert Ass’n (“ONDA”) v. USFS*, 465
3 F.3d 997, 980 (9th Cir. 2006).

4
5 AMPs prescribe the manner in, and extent to which, grazing operations on a
6 particular allotment will be conducted in order to meet multiple-use and other goals and
7 objectives, including the protection of special resources occurring on the lands involved
8 and mitigation measures for adverse impacts. 36 C.F.R. §§ 222.1(b)(2), 222.2; FP105189;
9 Ex. 7, pp. 12-13 (FSH 2209.13 Ch. 90, § 94.1); *see also ONDA v. USFS*, 312 F.Supp.2d
10 1337, 1340 (D. Or. 2004).

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13 The USFS also issues yearly instructions to grazing permittees through annual
14 operating instructions or plans (“AOIs”). Ex. 7, p. 13 (FSH § 94.3). AOIs are used to
15 respond to conditions that the USFS could not or may not have anticipated and planned
16 for in the AMP, such as impacts to an imperiled species that was previously absent or
17 undetected but has since returned or is documented in the area. *ONDA*, 465 F.3d at 980-
18 81; FP087086 (DEIS); FP113618; FP107893 (replacing reference to “annual operating
19 instructions” with “annual plans”).

20 21 22 23 **A. Diamond M Grazing Allotment Management**

24
25 For roughly the past 75 years, the USFS has allowed Diamond M Ranch to graze
26 cattle on the Colville National Forest. AR01952. In 2013, the agency issued Diamond M
27 a 10-year term permit allowing 736 cow/calf pairs to graze between June 1 and mid-
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1 November on the Churchill, Lambert, C.C. Mountain, Hope Mountain, and Copper-Mires
2 allotments, which collectively span over 74,000 acres of public lands in the Colville’s
3 northern portion and Kettle River Range. DM03397-49. The NEPA analyses and
4 associated AMPs for Diamond M’s grazing on these allotments date back to the 1970s
5 and 1980s. DM00001-115, 00221-27, 03410-500; Ex. 8.
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8 The USFS also issues annual grazing instructions to Diamond M before the start of
9 each grazing season, which list authorized cow/calf numbers per pasture, rotation
10 schedules, and forage utilization standards. *See, e.g.*, AR1412-1581, 02145-60 (2013-
11 2020 “AOIs”). Despite recurring wolf-livestock conflicts on the Diamond M allotments
12 since 2012, including the high-profile Profanity Peak Pack conflicts in 2016, these AOIs
13 have never incorporated measures to mitigate the problem. *See e.g.*, AR01414, 1466,
14 02147 (simply listing contact information for WDFW’s “wildlife conflict” specialist,
15 range rider resources, and weekly wolf conference calls).
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19 On March 27, 2020, Plaintiffs WildEarth Guardians and Western Watersheds
20 Project (WWP) sent the USFS a letter notifying it of the need to supplement the decades-
21 old NEPA analyses for the Diamond M allotments to update the AMPs in light of wolves
22 returning to the Forest and the series of conflicts with Diamond M’s cattle in recent years.
23 AR02165-77. The letter discussed recommendations from state and federal wildlife
24 agencies for reducing wolf-livestock conflicts and pointed to the large body of science
25 that has developed over the last decade indicating that: (1) killing wolves does not
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1 decrease wolf-livestock conflict; (2) non-lethal deterrents are more effective; (3) killing
2 wolves may actually lead to more conflicts with livestock; (4) wolves play incredibly
3 important roles in maintaining balanced ecosystems, and (5) removing wolves from their
4 native ecosystems has cascading negative ecological consequences. *Id.*; AR02178-3172
5 (compilation of studies). The USFS never responded to Plaintiffs' letter or issued any
6 public notice indicating it would prepare supplemental NEPA analyses. Defs.' Ans. ¶114
7 (ECF No. 12). Instead, the USFS again authorized Diamond M to graze its cattle in prime
8 wolf habitat, including pastures that contain core wolf areas and where conflicts had
9 occurred in 2012, 2016, 2017, 2018, and 2019 that resulted in the destruction of 4 wolf
10 packs, without updating the AMPs or incorporating any conflict reduction measures into
11 the 2020 AOI. *See* AR1412-14 (2020 AOI); DM03397 (Diamond M's permit showing it
12 grazes Churchill, Lambert, CC Mountain, Hope Mountain, and Copper-Mires
13 allotments); AR00685 (listing allotments involving conflicts in 2012 to 2017); AR01943-
14 44; Exs. 3 & 4. Then, in July 2020, the USFS watched as more young calves were
15 depredated on Diamond M's allotments and WDFW killed 3 more wolves, eliminating
16 the remaining Pack members from the Wedge territory. Exs. 4, 5, & 6.

23 **B. The Colville Forest Plan Revision Process**

24 In 2011, the USFS publicly released its "Proposed Action" for revising the
25 Colville's outdated 1988 Forest Plan, which specifically noted the need to protect wolf
26 populations naturally returning to their historic habitat on the Colville from recovering
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1 source populations in the Northern Rockies. FP014443, 014478. This formal scoping
2 document, intended to elicit public feedback to develop planning alternatives in more
3 detail, acknowledged wolves were on the Forest, including den and rendezvous sites with
4 pups, and that the revised Plan “needs to address how these sites would be protected.”
5
6 FP014478. But after wolf-livestock conflicts and wolf killings emerged in 2012, the
7 agency abandoned its proposal to protect core wolf areas. In fact, the programmatic EISs
8 for the revised Colville Forest Plan contain only a couple passing references to wolves
9 and zero analysis of how proposed grazing management might affect this state-listed
10 endangered and USFS sensitive species. FP086539-87416 (DEIS); 108129-9666 (FEIS).
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14 To meet NFMA’s wildlife diversity and viability mandates at the planning level,
15 the USFS primarily followed a “coarse filter” conservation approach to develop plan
16 components aimed at meeting the ecological needs for terrestrial wildlife. FP108608-20;
17 FP014061-93. This approach uses a subset of species for which viability is a concern,
18 referred to as “surrogate species,” to represent ecological conditions that are assumed to
19 provide sustainable ecosystems for a broader group of species that share the same habitat
20 requirements and/or risk factors. *Id.*; FP101669 (explaining terminology changes). But
21 the experts who established this “coarse filter” conservation approach for forest planning
22 acknowledge that it might not adequately address risk factors unique to certain species,
23 necessitating “a species-specific approach to the analysis and plan direction,” otherwise
24 known as the “fine-filter” conservation approach. FP014064; FP014479 (Proposed
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1 Action explaining some Plan components would apply to a large group of species, while
2 other components would be “species specific”). In the case of the gray wolf, the USFS
3 initially proposed “species specific” components based on “the best available science and
4 approaches used in other conservation plans to develop management direction for den
5 and rendezvous site protection” on the Forest. FP014479.
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8 The USFS was well-informed on measures it could implement to help avoid wolf-
9 livestock conflicts while it was developing its DEIS and draft Plan—as wolves continued
10 recolonizing the Forest and more cattle depredations occurred. FP015428, 015489 (WA
11 wolf plan); AR01885-86 (measures USFWS shared in September 2014), 01912-15,
12 01921-22 (measures internally proposed in 2016). But when the draft Colville Forest Plan
13 and DEIS were released to the public for formal comment in February 2016, these
14 documents were not only silent on the wolf’s historic return to the Forest, they were
15 completely devoid of any proposed management direction specifically aimed at
16 protecting the species or its core areas (*e.g.* den and rendezvous sites). FP086941-7416.
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19 The DEIS only mentioned the gray wolf was federally delisted since the last plan,
20 FP086941, but is a Region 6 sensitive species grouped as a “habitat generalist”
21 represented by “surrogate species” for purposes of the plan’s impacts analysis and
22 developing proposed management directives. FP086941, 086945. Notably, livestock
23 grazing was not evaluated as a factor influencing the viability of the surrogate species
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1 intended to represent the gray wolf. *See* FP086951; 086980 (cursory evaluation of
2 grazing impacts to other unrelated surrogate species).

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4 Following the release of the DEIS, public controversy over repeated wolf killings
5 in response to depredations of USFS permitted cattle on the Colville (mostly linked to
6 Diamond M) rose dramatically, garnering significant media attention. AR01942-46,
7 01947, 01957-59, 01976-79, 01980-82, 02002-03, 02011, 02085-86, 02122-25, 00676-78,
8 01220-22, 01227-31, 01303-08, 01309; FP104415, 104445, 106922-23. Conservation
9 organizations, concerned individuals, and even federal agency employees all called upon
10 the USFS to manage grazing in a manner that would reduce the risk of recurring conflicts
11 and wolf killings. *See e.g.* AR01966-67 (USFS employee to Colville managers), 00144-
12 45, 02129-33, 00300-07, 00450-58 (letters from Public Employees for Environmental
13 Responsibility “PEER”); FP091006-07 (DEIS comments). Eventually even Washington’s
14 Governor urged the USFS, in cooperation with WDFW, to implement changes on federal
15 grazing allotments to reduce the conflicts. AR02138-41 (includes link to full letter).
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21 Meanwhile, local ranchers who graze cattle on the Forest, including Diamond M,
22 sought to declare a “state of emergency” over the growing wolf population and pressured
23 WDFW to swiftly eliminate entire wolf packs once livestock depredations were
24 suspected; the Colville’s Range Manager (Travis Fletcher) voiced agreement for the
25 proposition that full pack removal was the only solution once depredations of livestock
26 occur. AR01937 (link to county hearing with local ranchers and Mr. Fletcher).
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1 Despite all the public attention and the agency’s knowledge of science-backed
2 conflict reduction measures, the managers of the Colville sought to ignore the issue:

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4 It is in the Forest Service’s best interest to not be drawn into the middle of this
5 emotionally and politically charged topic. Our approach is, and should remain, that
6 wolves (as well as all wildlife) are the responsibility of WDFW, the livestock are
7 the responsibility of the rancher and the Forest Service manages habitat and we do
8 that for wolves by managing for big game species like mule deer.

9 AR01919 (statement from Range Lead), 01918 (Forest Supervisor agreeing), 01949,
10 01957 (similar sentiments). Evidently, even the USFS’s regional office advised its
11 Colville officials to “minimize the use of the gray wolf to focus management on because
12 the primary management issues were between the WDFW and the USFWS.” FP099932.

13
14 Consequently, the USFS has done virtually nothing to protect wolves from
15 conflicts with the livestock grazing it authorizes on the Colville – not at the Forest Plan
16 level and not at the allotment-specific level through updated AMPs and AOIs that
17 incorporate risk reduction measures. *See infra*. When the FEIS for the revised Forest Plan
18 and draft Record of Decision (ROD) were released for public comment in September
19 2018 they were deliberately devoid of any discussion of wolves, conflicts with federally
20 permitted cattle grazing, and any measures designed to address the issue.

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24 Notably, however, USFS officials for the Pacific Northwest region (Region 6) had
25 already carefully analyzed how the agency could protect wolves from conflicts with
26 livestock at the forest planning level during its plan revision process for neighboring
27 national forests in the Blue Mountains range (eastern Oregon/southeast Washington),
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1 where wolves were similarly dispersing from the Rockies and reclaiming their historic
2 habitat. *See* Ex. 2 (July 2018 FEIS for Blue Mtns. Forest Plan revisions); FP106439,
3 106441 (regional staff sharing wolf-related standards & guidelines from Blue Mtns.
4 Forest Plan). None of this same analysis was included in the FEIS for the revised Colville
5 Forest Plan. FP108608-666. In fact, the Colville’s Plan Revision Team Lead for Wildlife
6 had even outlined what an effects analysis for wolves at the planning level should
7 include. FP147642-43. But the managers of the Colville National Forest chose to
8 deliberately omit this critical information and analysis from their Plan revision FEIS.
9

12 Conservation groups, including Plaintiffs, filed formal objections over the FEIS’s
13 failure to consider effects to wolves as well as over the lack of a proper forest-wide
14 grazing suitability analysis. FP106515-24, 107658-61. The USFS largely responded to
15 these concerns with cursory assertions of being fully compliant with all relevant laws and
16 policies. FP107792-93. The agency also publicly formalized its position that its duty to
17 maintain viable populations of wolves on national forests does not include the
18 responsibility to mitigate conflicts with USFS permitted livestock grazing—the primary
19 threat to wolf recovery and viability in Washington. FP107801.
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23 **STANDARD OF REVIEW**

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25 This action is governed by the Administrative Procedure Act (“APA”), which
26 directs that the Court “shall” set aside agency action that is “arbitrary, capricious, an
27 abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).
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1 Section 706(1) also directs courts to “compel agency action unlawfully withheld or
 2 unreasonably delayed.” 5 U.S.C. § 706(1). While review under the “arbitrary and
 3 capricious” standard is narrow, a court’s inquiry must be “searching and careful,” and an
 4 agency must articulate a rational connection between the facts found and the conclusions
 5 made. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). This Court must
 6 disapprove an agency’s action where its “reasoning is irrational, unclear, or not supported
 7 by the data it purports to interpret.” *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544
 8 F.3d 1043, 1052 n.7 (9th Cir. 2008). A decision is arbitrary and capricious if the agency:

12 [H]as relied on factors which Congress has not intended it to consider, entirely
 13 failed to consider an important aspect of the problem, offered an explanation for its
 14 decision that runs counter to the evidence before the agency, or is so implausible
 15 that it could not be ascribed to a difference in view or the product of agency
 16 expertise.

17 *Motor Vehicle Mfrs. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

18 ARGUMENT

19 I. THE REVISED COLVILLE FOREST PLAN VIOLATED NEPA BY 20 FAILING TO ADEQUATELY EVALUATE WOLF-LIVESTOCK 21 CONFLICTS AND CONSIDER MITIGATION MEASURES.

22 NEPA is our “basic national charter for protection of the environment.” 40 C.F.R.
 23 § 1500.1(a). In NEPA, Congress declared as a national policy “creat[ing] and
 24 maintain[ing] conditions under which man and nature can exist in productive harmony.”
 25 42 U.S.C. § 4331(a). NEPA serves two purposes: (1) “it ensures that the agency, in
 26 reaching its decision, will have available, and will carefully consider, detailed
 27 information concerning significant environmental impacts,” and (2) it “guarantees that
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1 the relevant information will be made available to the larger audience that may also play
2 a role in both the decisionmaking process and the implementation of that decision.” *Dep’t*
3 *of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow*
4 *Valley Citizens Council*, 490 U.S. 332, 349 (1989)) *see also* 40 C.F.R. § 1500.1(b)
5 (requiring “high quality” information, “[a]ccurate scientific analysis” and “public
6 scrutiny”). By requiring agencies to take a “hard look” at the choices before them and
7 how they “affect the environment, and then to place their data and conclusions before the
8 public . . . NEPA relies on democratic processes to ensure . . . that ‘the most intelligent,
9 optimally beneficial decision will ultimately be made.’” *ONDA v. Bureau of Land Mgmt.*
10 (*“BLM”*), 531 F.3d 1114, 1120 (9th Cir. 2008).

15 NEPA requires the USFS to prepare an EIS for “major Federal actions
16 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).
17 Approval of a Forest Plan is considered a major federal action with significant
18 environmental effects, thus requiring an EIS. *See e.g. ONDA v. BLM*, 625 F.3d 1092,
19 1099 (9th Cir. 2010); 36 C.F.R. § 219.5(a)(2)(i) (2012).

22 In an EIS, agencies must “provide full and fair discussion of significant
23 environmental impacts and shall inform decisionmakers and the public of the reasonable
24 alternatives which would avoid or minimize impacts or enhance the quality of the human
25 environment.” 40 C.F.R. § 1502.1; *see also* 42 U.S.C. § 4332(2)(C), (E) (EIS and
26 alternatives requirements); 40 C.F.R. Pt. 1502 (same). To fulfill this mandate, agencies
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1 must “consider every significant aspect of the environmental impact of a proposed
2 action” in an EIS. *ONDA*, 531 F.3d at 1130 (citation omitted). This includes studying the
3 direct and indirect effects and cumulative impacts of the action. *See* 40 C.F.R. §§ 1508.7,
4 1508.8. An agency must disclose and discuss any “responsible opposing views” and
5 scientific information. *Id.* § 1502.9(b); *Ctr. for Biol. Diversity v. USFS*, 349 F.3d 1157,
6 1167-68 (9th Cir. 2003). NEPA’s implementing regulations also require that an agency
7 describe the environmental baseline of the areas to be affected, 40 C.F.R. § 1502.15, and
8 address “appropriate mitigation measures not already included in the proposed action or
9 alternative,” 40 C.F.R. §§ 1502.14(f), 1502.16(h). Last, an agency also must
10 “[r]igorously explore and objectively evaluate all reasonable alternatives.” *Id.* § 1502.14
11 (alternatives section is “the heart of the [EIS].”)

16 **A. Failure to Take the Requisite “Hard Look” and Inform the Public**

17 By wholly ignoring the primary conservation threat to wolves on the Forest in the
18 revised Colville Forest Plan FEIS, the USFS violated NEPA’s requirement that agencies
19 take a “hard look” at the environmental effects of their proposed actions and inform the
20 public of any reasonable alternatives that could avoid or minimize adverse impacts. 42
21 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1. Ignoring a known impact of an agency’s land
22 management activities renders a Forest Plan EIS unlawful under NEPA. For instance, in
23 *Kern v. BLM*, the Ninth Circuit held that the agency’s EIS should have analyzed the
24 potential impact of management activities spreading a pathogenic root fungus on a
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1 specific variety of cedar when “the environmental problem was readily apparent at the
2 time the EIS was prepared.” 284 F.3d 1062, 1073 (9th Cir. 2002). Similarly, in *Pacific*
3 *Rivers Council v. USFS*, the Court again invalidated a programmatic EIS for failing to
4 take the requisite hard look at how the proposed Forest Plan amendment would affect
5 individual fish species. 689 F.3d 1012, 1024-30 (9th Cir. 2012), *vacated and dismissed as*
6 *moot on other grounds* by 133 S. Ct. 2843 (2013); *see also ForestWatch v. BLM*, 2016
7 WL 5172009, at *10 (C.D. Cal. Sept. 6, 2016) (three passing references to fracking in
8 agency’s EIS for land use plan were insufficient to inform decision-makers and the public
9 of the environmental concerns unique to fracking).

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14 The USFS was well aware that wolves—a sensitive species—are primarily
15 threatened by human-caused mortality and that lethal removal in response to livestock
16 depredations is the leading risk factor for the species’ recovery and long-term viability in
17 the region (and certainly on the Colville National Forest). *See e.g.*, Ex. 2, p. 18;
18 FP015358 (2011 WA wolf plan). Yet the Colville Forest Plan FEIS is devoid of any
19 actual analysis of how livestock grazing under the planning alternatives may affect the
20 presence and viability of gray wolves on this Forest. FP108608-65, 108811-29 (FEIS
21 Wildlife and Livestock Grazing sections). This omission is particularly problematic given
22 that NFMA’s mandate that the USFS manage each national forest to ensure viable
23 wildlife populations “applies with special force to sensitive species.” *Native Ecosystems*
24 *Council (“NEC”) v. USFS*, 428 F.3d 1233, 1249 (9th Cir. 2006); *see also* 16 U.S.C.
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1 §1604(g)(3)(B); 36 C.F.R. §§ 219.19, 219.26; FP147624-26 (FSM §§ 2670.32, 2670.44);
2 FP101669-70 (Plan Revision Team lead recognizing duty to analyze impacts of planning
3 alternatives on sensitive species). Omitting a discussion about the effect of livestock
4 grazing on the Forest to the long-term viability of a sensitive species is a blatant violation
5 of NEPA. *See e.g. ONDA v. BLM*, 625 F.3d 1092 (9th Cir. 2010) (BLM’s EIS for its
6 proposed land use plan violated NEPA by failing to evaluate the plan’s potential effects
7 on areas possessing wilderness characteristics when wilderness characteristics were
8 among the resource values for which the agency must manage under FLPMA). Indeed,
9 the USFS’s own analysis of the impacts of Forest Plan alternatives to wolves similarly
10 situated in eastern Oregon plainly shows what the agency should have considered for the
11 Colville, but did not. *See Ex. 2*.

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16 The USFS was well aware of the information necessary for conducting a proper
17 analysis of the Plan’s potential impacts to wolves, including proposed livestock grazing
18 management, but the agency deliberately chose to omit this critical information from its
19 public-facing FEIS for the revised Colville Forest Plan. *See* FP147642-43 (August 2017
20 outline for planning-level effects analysis for gray wolves). Departing entirely from this
21 outline, the FEIS’s first fatal flaw was excluding wolves from the environmental baseline
22 and affected environment—it is against this information that the effects of the planning
23 alternatives were to be measured. *See* 40 C.F.R. § 1500.1(b), § 1502.15. The FEIS
24 ignored the gray wolf’s historic return to the Colville (a marked change since the 1988
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1 Forest Plan), as well as the wolf's current population size and trend on the Forest. And
2 most notably, it failed to disclose the series of wolf-livestock conflicts on the Forest's
3 grazing allotments and the resulting lethal removal of wolves and elimination of wolf
4 packs, which began in 2012 and continued throughout the Plan revision process. *See*
5 *contra* Ex. 2, pp. 17-22 (Blue Mtns. FEIS providing this essential baseline information).
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8 Second, the FEIS's grazing analysis failed to consider against this baseline how a
9 number of critical factors could influence wolf-livestock conflicts and thereby affect
10 viability. Chiefly, how: (1) the location of grazing allotments, (2) the Colville's annual
11 grazing season (June 1 until mid-November), (3) forest-wide grazing levels, (4)
12 authorizing turn-out of vulnerable young calves (*i.e.* cow/calf pairs), and (5) grazing
13 practices like the placement of salt licks, stock ponds, other areas where cattle
14 congregate, lack of range riders, etc., may affect wolves on the Forest. For example, the
15 FEIS should have, but did not, identify where grazing allotments overlap wolf core areas
16 (dens and rendezvous sites) given that wolves are active in these areas during the grazing
17 period. *See e.g.* FP147642 (USFS's 2017 outline stating: "Would especially speak to
18 anything meant to reduce disturbance around dens and rendezvous areas, conflicts with
19 livestock, etc.").
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25 Finally, since the USFS failed to address this issue at all in the FEIS, so too did it
26 fail to consider any measures to avoid or reduce the risk of wolf-livestock conflicts,
27 further violating NEPA's requirement that an EIS discuss "appropriate mitigation
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1 measures.” 40 C.F.R. § 1502.14(f), § 1508.20 (defining “mitigation”); *ForestWatch v.*
2 *BLM*, 2016 WL 5172009, at *10 (“Most importantly, the EIS must provide easily-
3 accessible detailed information about probable environmental consequences and potential
4 mitigation measures.”) (quoting *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083 (9th
5 Cir. 2006)). *See infra*, *Sec. II.B.*

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8 In sum, by sweeping this problem under the rug, the USFS materially impeded
9 informed decisionmaking and public participation—NEPA’s “twin aims.” *Kern*, 284 F.3d
10 at 1067. Given the high-profile and controversial nature of this issue, disclosure of the
11 risks and analysis of management options designed to mitigate such risks, was likely to
12 inspire vigorous debate. “It is fairly debatable issues of this kind that NEPA was designed
13 to bring out in the open, for analysis and discussion in the service of sound
14 decisionmaking.” *ONDA*, 625 F.3d at 1122. Because the USFS deliberately omitted a
15 “full and fair” discussion of this issue, as required by NEPA, it must do so on remand in a
16 revised EIS. *See Id.*

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21 **B. The Forest Plan FEIS Failed to Consider Reasonable Planning Alternatives**
22 **to Address Wolf-Livestock Conflicts.**

23 “The ‘touchstone’ for courts reviewing challenges to an EIS under NEPA ‘is
24 whether an EIS’s selection and discussion of alternatives fosters informed decision-
25 making and informed public participation.” *ONDA*, 625 F.3d at 1122 (citation omitted).
26 “The existence of a viable but unexamined alternative renders an [EIS] inadequate.” *Id.*
27 As described *supra*, in developing Forest Plan management direction for both livestock
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1 grazing and for the protection of wolves, a sensitive species, the USFS never considered
2 any alternative that included measures designed to mitigate wolf-livestock conflicts.

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4 First, the USFS failed to consider whether certain allotments or portions thereof
5 were no longer “suitable” for continued cattle grazing in light of recurring conflicts with
6 wolves, as directed by 36 C.F.R. § 219.20(b) (1982). *See infra Sec. II.B.* The USFS
7 should have conducted such an analysis in the FEIS given that: (1) the USFS knew where
8 previous conflicts had concentrated (*e.g.* Diamond M allotments); (2) it had learned of
9 some active core wolf areas on the Forest and could have sought further information from
10 WDFW but didn’t, AR01220-22, 01227-31; (3) the Colville’s Range Manager and local
11 ranchers think it’s too difficult to monitor and protect cattle in heavily treed areas of the
12 Forest, AR01937 (county hearing); and (4) conservationists also urged the agency to limit
13 grazing to “open, defensible spaces.” FP106510, 106515, 107660, 107687-88.
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18 Yet, despite this information and the livestock-wildlife conflicts component of
19 NFMA’s required suitability analysis, the FEIS never considered closing any of the
20 acreage currently allocated as grazing allotments to future livestock grazing. FP104500
21 (noting no change to grazing output and that 99% of Forest was open to grazing under
22 revised Plan). In fact, every planning alternative deemed the same amount of acreage
23 suitable for grazing, would also allow grazing on most acreage deemed *unsuitable*, and
24 would authorize the same overall grazing levels. FP104500; FP108821; FP099949;
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1 The failure to consider allocating less of the Forest for livestock grazing or
2 reducing forest-wide grazing levels may not have been fatal to the FEIS had the agency
3 considered other mitigation measures intended to reduce wolf-livestock conflicts, but it
4 did not. *See cf. ForestWatch v. BLM*, 2016 WL 5172009, at *14-15 (holding it was
5 acceptable for BLM to not consider closing more than 15% of the planning area to oil and
6 gas drilling because it considered a mix of other “tools” to mitigate impacts, *e.g.* less
7 impactful drilling methods, proximity to ecologically sensitive areas, etc.). Here, the
8 USFS was presented with several concrete measures to consider incorporating into the
9 revised Forest Plan, including the very standards and guidelines it adopted for the revised
10 Blue Mountains Forest Plans. *See* FP106441 (regional staff sharing Blue Mtns. Forest
11 Plan standards & guidelines); FP106517 (Plaintiffs’ objection); FP107687-88 (resolution
12 options proposed by objectors); FP015428, 015489; AR01885-86, 01912-15, 01921-22.
13 Despite its own original position that the revised Colville Forest Plan “needs” to have
14 species-specific components for protecting wolf dens and rendezvous sites, FP014478,
15 the USFS ultimately denied any obligation to even consider adopting wolf-livestock
16 conflict reduction measures in the revised Plan. FP107801.
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24 There is no reasonable explanation in the record for why the USFS chose not to
25 evaluate any of these recommended mitigation measures in any of its planning
26 alternatives. Indeed, the 2011 Proposed Action and revised Blue Mountains Forest Plans
27 belie any notion that such an alternative was unviable or infeasible, thus rendering the
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1 Colville Forest Plan FEIS inadequate under NEPA on these additional grounds. *See e.g.*
2 *ONDA*, 625 F.3d at 1123-24 (land use plan EIS also inadequate for failing to consider
3 more stringent limitations on motorized vehicle use); *Muckleshoot Indian Tribe v. USFS*,
4 177 F.3d 800, 812-814 (9th Cir. 1999) (rejecting USFS’s alternatives analysis which
5 failed to “even consider[]” more protective land use options).
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8 **II. THE USFS ARBITRARILY CONCLUDED THE REVISED 2019 FOREST**
9 **PLAN FULFILLS NFMA’S MANDATES.**

10 NFMA establishes a two-step process for forest planning. 16 U.S.C. § 1604(a).
11 First, the USFS must develop, maintain, and revise Land and Resource Management
12 Plans (“Forest Plans”) for each national forest. *Id.* § 1604(a). The Forest Plan guides
13 natural resource management activities forest-wide, setting standards, management goals
14 and objectives, desired conditions and monitoring and evaluation requirements. Second,
15 once a Forest Plan is adopted, all site-specific actions authorized thereunder must be
16 consistent with the broader Forest Plan. *Id.* § 1604(i); 36 C.F.R. § 219.15 (2012).
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20 **A. The USFS Failed to Comply with the Procedural Requirements of**
21 **NFMA’s Wildlife Diversity Mandate.**

22 Given the important role of national forests in biodiversity conservation, NFMA
23 included a provision specifically mandating that forest planning “provide for diversity of
24 plant and animal communities based on the suitability and capability of the specific land
25 area in order to meet overall multiple-use objectives.” 16 U.S.C. §1604(g)(3)(B); 36
26 C.F.R. § 219.26 (1982). This requirement has been highly controversial because it
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1 changed the dominant forest management paradigm, establishing biodiversity
2 conservation as a priority equal to resource use and extraction.¹ In the words of Senator
3 Hubert H. Humphrey, the primary drafter of the NFMA “diversity mandate,”
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5 The days have ended when the forest may be viewed only as trees, and trees
6 viewed only as timber. The soil and water, the grasses and shrubs, the fish and
7 wildlife, and the beauty that is the forest must become integral parts of resource
8 managers’ thinking and actions.

9 *Id.* (citing SENATE NFMA HEARINGS, 122 CONG. REC. 5619 (1976)).

10 Procedurally, to ensure wildlife diversity is adequately considered “throughout the
11 planning process[,]” the USFS must evaluate wildlife diversity, in terms of prior and
12 present conditions, based on inventories that include “quantitative data.” 36 C.F.R. §
13 219.26 (1982). The USFS’s Forest Plan Revision team must use this information to
14 consider how diversity will be affected by the proposed management practices under each
15 of the planning alternatives. *Id.*
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18 The USFS violated this procedural requirement, much like it violated NEPA. The
19 FEIS lacks even a generalized description of how wildlife diversity on the Forest has
20 changed since the 1988 Forest Plan due to the return of gray wolves. There certainly is no
21 quantitative analysis of the current wolf population on the Forest or the impacts livestock
22 grazing has had on that population over the last decade due to lethal wolf removals in
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27 ¹ Charles F. Wilkenson & H. Micheal Anderson, *Land and Resource Planning in the*
28 *National Forests*, 64 OR. L. REV. 1, 290-309 (1985).
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1 response to conflicts with livestock. Nor does the FEIS analyze how continuing grazing
2 management in the same manner would affect the Forest's future wildlife diversity in
3 terms of direct impacts to its recovering wolf population and indirect effects to the plant
4 and animal communities this apex predator is known to influence.
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6 **B. The USFS Failed to Consider Wolf-Livestock Conflicts in Determining**
7 **the Suitability of Lands for Livestock Grazing.**
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9 The USFS additionally violated 36 C.F.R. § 219.20 (1982), which provides:

10 In forest planning, the suitability and potential capability of National Forest
11 System lands for producing forage for grazing animals and for providing habitat
12 for management indicator species shall be determined as provided in paragraphs
13 (a) and (b) of this section. Lands so identified shall be managed in accordance with
14 direction established in forest plans.

14 (a) [*****]

15 (b) Alternative range management prescriptions shall consider... possible conflict
16 or beneficial interactions among livestock...and wild animal populations, and
17 methods of regulating these; [].

17 FP000221-22. Capability refers to the potential of an area of land to produce particular
18 resources, which in turn depends on the physical components of the area. FP000194-97
19 (Definitions at 36 C.F.R. § 219.3). Suitability, on the other hand, is the *appropriateness*
20 of applying certain management practices to a particular portion of the forest, “as
21 determined by an analysis of the economic and environmental consequences and the
22 alternative uses forgone.” *Id.*
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26 Here, the USFS did make a forest-wide grazing suitability determination as part of
27 the forest planning process, but it admittedly failed to consider conflict among livestock
28 and wolves and any measures the USFS could take to regulate such conflicts as part of
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1 that determination. *See* FP101456-63 (describing methodology for suitability
2 determination); FP108822-23 (maps depicting range suitability); FP108817 (FEIS citing
3 36 C.F.R. § 219.20(b) (1982) and claiming conflicts among livestock and wildlife
4 populations “are managed at the allotment level through adaptive management and
5 appropriate mitigation measures[.]”)

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8 The USFS’s interpretation that it need not consider livestock-wildlife conflicts, or
9 methods of regulating such conflicts, as part of its Forest Plan grazing suitability
10 determination – instead vaguely deferring this consideration to some unknown future date
11 – is inconsistent with the rule’s plain language that it be done “[i]n forest planning” and
12 hence deserves no deference. *See NEC v. USFS*, 418 F.3d 953, 960 (9th Cir.2005) (“an
13 agency’s interpretation does not control, where it is plainly inconsistent with the
14 regulation at issue.”) (citations omitted). Indeed, as the USFS explained in another
15 grazing related lawsuit, “these [capability and suitability] determinations made at the
16 forest plan level will ‘provide prescriptive management direction for project-level
17 analysis and subsequent NEPA decisions.’” *W. Watersheds Project v. USFS*, 2006 WL
18 292010, *6-7 (D. Idaho Feb. 7, 2006) (further explaining how these forest plan level
19 determinations serve as a baseline for project-level reviews of allotments).

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22 In short, it is entirely reasonable for the USFS to gather additional information on
23 areas of livestock-wildlife conflicts as they emerge and to use that information to inform
24 future site-specific decisions, but the agency doesn’t get a pass on taking a hard look at
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1 this critical component “[i]n forest planning” as the rule expressly requires. FP000222;
2 *see also* AR01618 (USFS guidance memo acknowledging that areas closed to livestock
3 “because of conflicts with wildlife” or for the protection of sensitive species habitats, *e.g.*
4 wolf den and rendezvous sites, would be removed from the acreage deemed suitable for
5 grazing); FP101463 (“Have IDT specialists on the planning team identify any additional
6 areas where conflicts occur between livestock grazing and other resources” and if
7 “conflicts are incapable of being resolved in a satisfactory manner, these lands would be
8 designated as non-suitable for the specific alternative for this planning cycle.”) By failing
9 to complete this component of the suitability analysis for the revised Colville Forest Plan,
10 the USFS violated NFMA.

15 **C. The Revised Forest Plan Fails to Ensure Viable Wolf Populations.**

16 Last, by allowing livestock grazing to occur in virtually all habitat on the Colville
17 that is occupied by wolves – including nearly a half-million acres deemed unsuitable for
18 grazing – without incorporating any species-specific Forest Plan components to mitigate
19 wolf-livestock conflicts, *see e.g.* FP107687-88, FP107800-01, the USFS also failed to
20 comply with 36 C.F.R. § 219.19 (1982). This rule implements the statute’s wildlife
21 diversity mandate by requiring that:
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25 Fish and wildlife habitat shall be managed to maintain viable populations of
26 existing native and desired non-native vertebrate species in the planning
27 area. For planning purposes, a viable population shall be regarded as one
28 which has the estimated numbers and distribution of reproductive
29 individuals to insure its continued existence is well distributed in the
planning area. In order to insure that viable populations will be maintained,

1 habitat must be provided to support, at least, a minimum number of
2 reproductive individuals and that habitat must be well distributed so that
3 those individuals can interact with others in the planning area.

4 FP000220-21; Ex. 1, p. 5 (FSM § 2672.32) (“For sensitive species, include objectives in
5 Forest plans to ensure viable populations throughout their geographic ranges.”)

6 Courts in this Circuit have recognized, a “[v]iability analysis that uses all currently
7 available scientific data is considered sound.” *NEC v. Krueger*, 946 F.Supp.2d 1060,
8 1081 (D. Mont. 2013) (citation omitted). Here, the USFS expressly decided behind-the-
9 scenes not to conduct a forest plan level viability analysis for the gray wolf. *See*
10 AR00486-87, FP099936-37. As noted, there was no analysis at all in the FEIS or
11 underlying Wildlife Report of how the planning alternatives may impact gray wolves on
12 the Forest, let alone one that “uses all currently available scientific data.” *Cf. Krueger*,
13 946 F.Supp.2d at 1081-97 (holding Forest Plan adequately provided for species viability
14 where programmatic EIS cited relevant scientific studies, explained how the best
15 available science was used to develop plan components, and incorporated interagency
16 conservation strategies for lynx and grizzly bear into the plan) *with Friends of Wild*
17 *Swan, Inc. v. USFS*, 966 F.Supp. 1002, 1020 (1997) (holding USFS acted in an arbitrary
18 and capricious manner, violating NFMA’s viability requirements, by adopting
19 management standards for anadromous fish without explaining how those standards
20 would ensure the viability of nonmigratory, resident bull trout populations).

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28 In a letter to the Regional Forester, the Colville’s Forest Supervisor claims:
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1 The viability of gray wolves has been addressed in the Colville plan revision by: 1)
2 following the Washington Gray Wolf Conservation and Management Plan that
3 included a viability analysis and recovery goals to achieve a viable population; and
4 2) by addressing gray wolves as an R6 Sensitive Species in a group of species
5 known as “habitat generalists.” The habitat and risk factors that influence this
6 group of species were identified and addressed in plan components (Gaines,
7 August 4, 2017).

8 FP099936; AR00486. The USFS’s position, as expressed in this internal agency letter
9 and attached memo, clearly non-NEPA documents, is arbitrary and capricious for a
10 number of reasons.

11 First, neither the FEIS nor the Wildlife Report even reference the WA wolf plan,
12 let alone explain how the USFS is allegedly following the WA wolf plan. *See* FP109021-
13 22, 103061-70 (list of references includes several WDFW reports, but not WA wolf
14 plan); *see also Krueger*, 946 F.Supp.2d at 1084 (“An agency must ‘identify any
15 methodologies used’ and ‘make explicit reference by footnote to the scientific and other
16 sources relied upon for conclusions in the [EIS].’”) (quoting 40 C.F.R. § 1502.24)
17 (citation omitted). In fact, the Forest Supervisor recommended against incorporating a
18 Forest Plan directive specifically designed to protect den sites, which the WA wolf plan
19 emphasizes for mitigating human-caused mortality. *See* FP099937; FP015489-91;
20 FP107800-01 (ultimately concluding USFS has no obligation to mitigate wolf-livestock
21 conflicts at all).

22 Simply grouping the gray wolf in with other “habitat generalists” and relying on
23 the wolverine as the sole “surrogate species” for the habitat requirements and risk factors
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1 for that group of “habitat generalists” also fails to ensure the viability of gray wolves on
2 the Colville, as the Supervisor’s letter contends. FP099936; FP108612-15 (FEIS).
3 Notably, in response to conservationists’ objections, the USFS conceded: “There is no
4 explicit discussion [in the FEIS] that explains how providing plan components for
5 surrogate species will provide for sensitive species. The plan could be strengthened by
6 making this clearer.” FP107750-51.
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9 Most importantly, conflicts with livestock grazing are not an identified risk factor
10 for wolverine, but are, of course, the primary risk factor for wolves on the Colville.
11 FP108617. Consequently, the USFS’s analysis of impacts to the wolf’s “surrogate”
12 omitted the key impact related to the viability of wolves on the Forest. Further, though
13 both species were grouped as “habitat generalists,” wolverine have much more distinct
14 habitat requirements and little overlap exists between the habitats typically occupied by
15 these two animals. Wolverine rely upon persistent spring snow cover for denning and
16 mostly occupy high elevation alpine and subalpine habitats isolated from human
17 activities like cattle grazing (making climate change a major risk factor for this species).
18 FP108612, 108620. In contrast, wolves in this region “prefer lower elevations and gentle
19 terrain where prey are more abundant, particularly in winter.” FP015380; FP108812
20 (noting most cattle grazing on the Colville also occurs at the Forest’s lower elevations).
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27 In fact, very few wolverine have been detected on the Forest in the past 20 years—
28 and none have been detected on many of the grazing allotments inhabited by wolves.
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1 AR01819 (map of sightings). In *NEC v. Tidwell*, the Ninth Circuit held that the USFS
2 failed to ensure viable populations of *existing* species under 36 C.F.R. § 219.19 by using
3 the sage grouse as a “proxy” for measuring the trends of all wildlife that rely upon
4 sagebrush ecosystems because sage grouse were virtually non-existent in the project area.
5
6 *See* 599 F.3d 926, 933-34 (9th Cir. 2010). At any rate, the USFS acknowledges that “it is
7 not expected that the population dynamics of a surrogate species would necessarily
8 represent the population dynamics of another species.” FP108612.
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11 The Blue Mountains Forest Plan FEIS again stands in stark contrast to the USFS’s
12 approach on the Colville. There, the USFS similarly used the wolverine as a “surrogate
13 species” to address risk factors related to road density and disturbance from motorized
14 recreation, as it did here, but it *also* assessed impacts to wolves by measuring the amount
15 of national forest lands deemed suitable for cattle and sheep grazing. Ex. 2, p. 18; *see*
16 *also* FP147642 (2017 outline for wolf analysis noting it “[w]ould also be good to show
17 areas on the forest that have active allotments.”) As the Blue Mountains FEIS explained,
18 this grazing-related assessment was necessary because “[g]ray wolf populations are
19 primarily limited by nonhabitat factors” (*i.e.* human-caused mortality such as lethal
20 control in response to livestock depredations). Thus, to mitigate this leading threat to the
21 species, the USFS incorporated “standards and guidelines designed to minimize conflict
22 between wolves and livestock as well as minimize disturbance to denning wolves” in all
23 the plan revision alternatives. *Id.*; FP106441 (listing Plan’s wolf-related directives). The
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1 USFS conducted no such separate analysis for wolves in the Colville Plan nor did it
2 incorporate any mitigation to address the unique threats relevant to wolves.

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4 Because the Forest Plan completely ignored the issue of wolf-livestock conflicts,
5 which is the primary threat to wolves on the Forest, and no other species can act as a
6 surrogate for analysis of that threat, the USFS failed to provide support and reasoning
7 necessary to show its continued management of livestock under the revised Forest Plan
8 would ensure the long-term viability of wolves on the Forest, in violation of NFMA.
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10 **III. THE USFS VIOLATED NEPA BY FAILING TO SUPPLEMENT** 11 **DECADES-OLD ANALYSES FOR DIAMOND M's AMPs.**

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13 An agency has an ongoing duty to comply with NEPA and must prepare a
14 supplemental NEPA analysis if “[t]here are significant new circumstances or information
15 relevant to environmental concerns and bearing on the proposed action or its impacts.” 40
16 C.F.R. § 1502.9(c)(ii); *see also Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152
17 (9th Cir. 1998) (EA must be supplemented in the same manner as an EIS), *overruled on*
18 *other grounds by Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008). If there
19 remains “major Federal action to occur, and if the new information is sufficient to show
20 that the remaining action will affect the quality of the human environment in a significant
21 manner or to a significant extent not already considered, a supplemental [NEPA analysis]
22 must be prepared.” *Marsh*, 490 U.S. at 374. An agency may not irreversibly and
23 irretrievably commit resources to a proposed action before completing NEPA analysis.
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25 *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988).
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1 Authorizing grazing through AMPs and AOIs is ongoing agency action warranting
2 supplementation of the NEPA analysis underlying an AMP when new information about
3 the potentially significant effects of that grazing comes to light. *Gallatin Wildlife Ass'n v.*
4 *USFS*, 2016 WL 3282047, at **10-11 (D. Mont. June 14, 2016) (requiring agency to
5 consider supplementing analyses for outdated AMPs due to bighorn sheep's
6 reintroduction to the area, its designation as a "sensitive species," and new information
7 on disease transmission from domestic sheep); *Friends of the Clearwater v. Dombeck*,
8 222 F.3d 552, 558-59 (9th Cir. 2000) (agency violated NEPA by failing to evaluate
9 whether new sensitive species designations were significant enough to require
10 supplemental analysis); *Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 940 (N.D. Cal.
11 2006) (new information about status of the Pacific fisher and project's effects to species
12 required NEPA supplementation).

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18 This case is similar to *ONDA v. Sabo*, 854 F. Supp. 2d 889 (D. Or. 2012). There, a
19 unique population of sensitive Oregon spotted frogs and numerous sensitive plant and
20 mollusk species were discovered to inhabit springs and fens that were being trampled by
21 cattle authorized to graze a national forest allotment. 854 F. Supp. 2d at 902-10. Although
22 the USFS was aware of the problem, the agency continued to annually authorize grazing
23 through AOIs, without first updating the AMP or completing any NEPA analysis
24 considering the effects of grazing on the newly discovered sensitive species. *See id.* The
25 court held that the agency's failure to complete supplemental NEPA analysis on the AMP
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1 to consider this significant new information, before authorizing more grazing on the
2 allotment, could further harm the sensitive species and thus was an irreversible
3 commitment of resources that was arbitrary and capricious under NEPA. *Id.* at 923-24.
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5 In this case, the presence of wolves on the Forest wasn't even a consideration when
6 the AMPs and supporting NEPA analyses for the Diamond M allotments were prepared
7 in the 1970s and 80s, as the species was still eradicated from most of the country. *See e.g.*
8 DM03459 (1979 EA stating: "There are no known rare, threatened, or endangered
9 wildlife species known to inhabit the Allotment area at this time.") But since 2008, as
10 wolves began repopulating the Forest, it has become more and more apparent that
11 Diamond M's cattle grazing has an enormous effect on wolf recovery in Washington (and
12 certainly on the Colville). *See supra Facts Sec. III.* Yet the USFS continues to manage
13 the Diamond M allotments under the same forty-year old AMPs without conducting any
14 supplemental NEPA analysis to evaluate adverse effects and explore mitigation options.
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19 The wolf's return to the Colville and the high prevalence of conflicts with
20 Diamond M's livestock is significant information that warrants supplementing the NEPA
21 analyses for these allotments. Not only is Diamond M's federally permitted cattle grazing
22 the most significant driver of Washington wolf mortality (linked to 88% of all lethal
23 control actions to date), but the rate of predation on Diamond M's cattle is significantly
24 higher than the average for other Washington livestock owners in wolf territory. *See e.g.*
25 Ex. 10, p. 29 (Spence study showing Diamond M experienced depredation rates roughly
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1 14 times higher than the statewide average); AR00453 (also citing Diamond M's
2 disproportionate rate of depredations). According to Diamond M, the first wolf
3 depredation on livestock to occur in Washington in modern times involved its cattle in
4 2008. Diamond M Ans. (ECF No. 19 at ¶ 51). Then in 2012, WDFW killed 7 wolves
5 from the Wedge Pack in response to depredations of Diamond M's cows grazing the
6 Hope Mountain and Churchill Allotments in the Colville's northern range. *See*
7 DM03390-91. In every grazing season on the Forest from 2016 to present, Diamond M's
8 cows have experienced attacks attributed to wolves, prompting lethal wolf removals.
9 AR00685, 01934, 01943-44, 02129-33; FP00300-07, 00450-58; Exs. 3, 4, 5, 6, 13. These
10 conflicts have often resulted in removals of entire packs or one or both of the breeding
11 pair, actions known to be particularly detrimental to wolf recovery and viability. *Id.*;
12 FP015489; AR02178-80.

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18 As also noted *supra*, the USFS has long been aware of science-backed nonlethal
19 deterrents and other forms of mitigation (*e.g.* adjusting the timing, location, and intensity
20 of annual grazing) that could help avoid these conflicts, but thus far has failed to update
21 Diamond M's AMPs or AOIs to incorporate any risk reduction measures. *See* AR02097
22 (USFS admitting “[n]one of these instruments [Diamond M's permit, AMPs or AOIs]
23 include specific language related to limiting livestock/wolf interactions.”)

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27 Rather than exercise its authority to address Diamond M's problematic grazing, the
28 USFS chose to “spin” the facts to make Diamond M out to be a diligent permittee that
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1 has worked closely with WDFW to avoid wolf conflicts, when in truth that is “not
2 particularly the case.” AR01952-53. For instance, the USFS knows that Diamond M has
3 refused to work with WDFW’s range riders and instead hired ineffective range riders,
4 who have been absent at critical times, and who have failed to discover injured or dead
5 calves for days after suspected or confirmed wolf attacks, increasing the likelihood of
6 additional attacks. Ex 4; Ex. 5, pp. 4, 9, 11 (July 2020 depredation reports all noting calf
7 injuries appeared several days old); Ex. 13, pp. 8, 11, 13 (same for 2019 depredations);
8 Niemeyer Decl. ¶¶15-26, 31-32. Diamond M refuses to become a signatory to WDFW’s
9 Damage Prevention Agreement and to accept compensation for wolf-caused livestock
10 losses. Ex. 12 (referring to WDFW program as a “crooked, damn deal”); FP015606
11 (describing legal requirements for agreement). Instead, Diamond M has outspokenly
12 called for a dead wolf for every dead calf, balks at the notion of protecting its cattle on
13 rugged and densely forested allotments, and continues to proclaim that it favors even
14 more lethal removals. Exs. 11, 12; AR00301; Mot. to Intervene Memo at 15 (ECF No.
15 17) (claiming “WDFW must kill thirty (30) wolves per year just to maintain the status
16 quo”); Diamond M Ans. ¶¶ 80, 81, 96, 97, 100 (claiming wolves are “overpopulated”).
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24 Further, the USFS fails to take any action to mitigate factors that are known to
25 increase the risk of conflicts. For instance, the USFS continues to allow salt blocks to
26 remain in high conflict areas (near active dens and rendezvous sites), again sitting idly by
27 while the depredations in these same areas pile up year after year and more wolves are
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1 lethally removed from the Forest. AR01942-44, 00453, 01982 (showing awareness of den
2 location by end of June 2016); Ex. 13 (2018 and 2019 depredation reports showing
3 multiple conflicts occurred near salt blocks and WDFW suggested moving them). The
4 USFS has also failed to address ongoing concerns about Diamond M turning out small
5 calves weighing less than the 200-pound minimum recommended by experts to deter
6 predation—indeed nearly all depredations involving Diamond M’s cattle have been
7 young calves. *See e.g.* AR00453 n.3; Ex. 10 (2020 Letter copied to USFS and attached
8 photos of small calves, also noting a July 2019 email regarding the same concern);
9 Leroux Decl. ¶¶31, 32 (with photos). The USFS also knows that Diamond M has violated
10 the terms of its grazing permit by failing to timely gather cattle off allotments, which
11 have led to depredations outside the authorized grazing season. Ex. 13, pp. 5-7 (2019
12 depredation report involving cattle left out on allotments over winter); Niemeyer Decl. ¶
13 18; Diamond M Ans. ¶ 86 (admitting that livestock remain on the allotment until
14 “actively gather[ed]” off). The USFS could update the AMPs and modify AOIs to adjust
15 turn-out dates; to prohibit the turn-out of small calves (less than 200 lbs.); to prohibit the
16 placement of salt blocks near dens and rendezvous sites (a key provision of the Blue
17 Mountains Forest Plans, *see* FP106441) and require cows to be moved away from such
18 sites when discovered; to require effective range riding; and to implement corrective
19 action to address permit non-compliance. Niemeyer Decl. ¶¶13-31. Instead, it turns a
20 blind eye to these problematic practices, while conflicts recur and more wolves are killed.
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1 In sum, as outlined in Plaintiffs' March 2020 letter, AR02165-77, the return of this
2 state-listed endangered and USFS sensitive species to the Forest, the presence of core
3 wolf areas on the Diamond M allotments, and the high prevalence of conflicts between
4 Diamond M cattle and wolves resulting in 88% of all lethal wolf removals in Washington
5 to date, triggers the USFS's duty to supplement its woefully outdated NEPA analyses for
6 these allotments in order to update the AMPs. The current science that Plaintiffs
7 compiled for the USFS on the (1) efficacy of nonlethal deterrents, (2) the ineffectiveness
8 of lethal control and the potential for such actions to exacerbate conflicts, and (3) the
9 ecological role of wolves and the cascading negative effects of removing them from
10 ecosystems also merit a hard look in the agency's supplemental analysis. *Id.*; AR02178-
11 3172 (compilation of studies). New information about impacts to a sensitive species'
12 viability from a USFS authorized activity is "precisely the situation in which a
13 supplemental [NEPA analysis] is necessary." *Portland Audubon Soc. v. Lujan*, 795 F.
14 Supp. 1489, 1501 (D. Or. 1992). NEPA prohibits the USFS from continuing to
15 irreversibly and irretrievably commit resources by authorizing grazing that has already
16 led to at least 30 wolf deaths without evaluating the potentially significant impacts of
17 those authorizations to this USFS sensitive species. *Sabo*, 854 F. Supp. 2d at 923-24. To
18 the extent the USFS has reviewed the new information and determined supplementation
19 is unnecessary, that decision is also arbitrary and capricious. *Marsh*, 490 U.S. at 377-78.
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1 **IV. THE USFS VIOLATED NFMA BY AUTHORIZING DIAMOND M'S 2020**
2 **GRAZING WITHOUT REDUCING RISK FACTORS TO WOLVES, AS**
3 **CALLED FOR BY THE REVISED FOREST PLAN.**

4 As noted, NFMA requires all agency decisions and site-specific activities like
5 grazing to be consistent with the governing Forest Plan. 16 U.S.C. § 1604(i); 36 C.F.R. §
6 219.15; *Buckingham v. Secretary of U.S. Dep't of Agric.*, 603 F.3d 1073, 1077 (9th Cir.
7 2010) (Grazing permits, AMPs, and AOIs all must be consistent with governing Forest
8 Plan); *ONDA*, 465 F.3d at 979-80 (holding AOIs are final agency actions challengeable
9 under APA). An action is consistent “if it conforms to the applicable ‘components’ of the
10 forest plan, including the standards, guidelines, and desired conditions that are set forth in
11 the forest plan and that collectively establish the details of forest management.” *All. for*
12 *the Wild Rockies v. USFS*, 907 F.3d 1105, 1110 (9th Cir. 2018).

13 Here, the USFS has violated NFMA by authorizing Diamond M's 2020 annual
14 grazing in a manner that is inconsistent with the following management directive from
15 the revised 2019 Colville Forest Plan:

16 ***FW-DC-WL-10. Risk Factors for all Surrogate Species***

17 Risk factors (such as roads, uncharacteristic wildfire, unregulated livestock use,
18 introduced species, invasive species, and disturbance during critical time periods)
19 for all surrogate species are reduced to contribute to the viability of surrogate species
20 and associated species.

21 FP109740; *see also* FP099937, 102007 (stating this plan component can be used to
22 protect wolf core areas and will contribute to wolf viability); FP102008 (claiming that
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1 “[i]mplementation of state requirements to reduce wolf-livestock conflicts are addressed
2 through allotment management planning and [AOIs] to permittees.”)

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4 The USFS’s 2020 annual grazing authorizations for Diamond M are inconsistent
5 with this Forest Plan directive because the AOIs failed to incorporate any measures for
6 reducing the risk of wolf-livestock conflicts—the proven leading threat to wolf viability
7 on the Colville. AR1412-14. The AOIs were arbitrary and capricious given the agency’s
8 knowledge of all the circumstances outlined above, and indeed resulted in another
9 grazing season rife with conflicts and more dead wolves. *Supra Sec. III*. This pattern is
10 virtually certain to continue unless this Court directs the USFS to incorporate concrete,
11 mandatory risk reduction measures into Diamond M’s future grazing instructions and
12 enjoins livestock turn-out on these allotments until it has done so.
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16 **V. THE USFS VIOLATED THE ESA BY FAILING TO CONSULT OVER THE**
17 **IMPACTS OF DIAMOND M’S GRAZING TO PROTECTED SPECIES.**

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19 The USFS violated Section 7(a)(2) of the ESA by failing to consult with USFWS
20 over the potential effects of Diamond M’s cattle grazing on the C.C. Mountain, Copper-
21 Mires, and Lambert allotments to ESA-listed species. 16 U.S.C. § 1536(a)(2). Section 7
22 requires federal agencies to ensure that any action they authorize, fund, or carry out is not
23 likely to jeopardize ESA-listed species or destroy or adversely modify critical habitat
24 designated for such species. *Id.*; 50 C.F.R. § 402.02 (defining terms).
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27 As explained in *Krueger*, the USFS’s first step in complying with section 7 is to
28 obtain from USFWS “a list of any listed or proposed species or designated or proposed
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1 critical habitat that *may be present* in the action area.” 946 F. Supp. 2d at 1070 (emphasis
2 original) (citing 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c)-(d)). If USFWS advises
3 that a listed species or critical habitat “may be present,” the USFS must complete a
4 “biological assessment” to determine if the proposed action “may affect” or is “likely to
5 adversely affect” the listed species. *Id.*; 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§
6 402.12(f), 402.14(a), (b)(1). The Ninth Circuit holds that “the minimum threshold for an
7 agency action to trigger consultation with [USFWS] is low.” *Id.* at 1071 (citing *W.*
8 *Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011)). “[A]ny possible
9 effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the
10 formal consultation requirement.” *See Id.* at 1071-80 (citations omitted).

11 There is no record evidence showing the USFS fulfilled these obligations for ESA-
12 listed and candidate species that are known to occur or “may be present” on these
13 allotments, such as lynx, grizzly bear, and whitebark pine. *See* AR01821, 01818; Compl.
14 ¶¶115-119; Defs.’ Answer ¶116, 118. Accordingly, the USFS violated the ESA. 16
15 U.S.C. §§ 1536(a)(2), 1540(g).

22 CONCLUSION

23 Because the USFS failed to fulfill its obligations under NEPA, NFMA and the
24 ESA, the Court should grant Plaintiffs’ Motion for Summary Judgment.
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1 Dated: January 22, 2021

Respectfully submitted,

2
3 /s/ Jennifer Schwartz

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9 *Of Counsel for Plaintiffs*

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2 **CERTIFICATE OF SERVICE**

3 I hereby certify that on January 22, 2021, I electronically filed the foregoing
4 Motion for Summary Judgment, supporting Memorandum, and all associated Exhibits
5 and Declarations with the Clerk of the Court using the CM/ECF system, which will send
6 notification of this filing to the attorneys of record.
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10
11 Dated: January 22, 2021

Respectfully submitted,

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13 */s/ Jennifer Schwartz*

14 Jennifer R. Schwartz
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