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SUMMONS AND COMPLAINT

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AO 440 (Rev. 06/12) Summons in a Civil Action

ENR

UNITED STATES DISTRICT COURT

for the

District of Arizona

Smith, Andrew

Neighbors of the Mogollon Rim, Inc.

Plaintiff(s)

v.

U.S. Forest Service; U.S. Fish and Wildlife Service

Defendant(s)

Civil Action No. CV-20-328-PHX-GMS

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL
RESOURCES DIVISION

FEB 26 2020

SUMMONS IN A CIVIL ACTION

EXECUTIVE OFFICE

To: (Defendant's name and address) United States Fish and Wildlife Service
Main Interior
1849 C Street, NW
Room 3331
Washington, DC 20240-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Richard A. Dillenburg, Esq.
RICHARD A. DILLENBURG, P.C.
2173 E. Warner Rd., Ste. 101
Tempe, AZ 85284-3503

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ADVOCATES FOR THE WEST
3701 SE Milwaukie Ave., Ste. B
Portland, OR 97202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Sig



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SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) United States Forest Service
c/o Chief Vicki Christiansen
1400 Independence Ave, SW
Washington, DC 20250-1111

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 Neighbors of the Mogollon Rim, Inc.,

No.

17 Plaintiff,

18 vs.

COMPLAINT

19 United States Forest Service;
20 United States Fish and Wildlife Service,

21 Defendants.
22

23
24 **INTRODUCTION**

25 1. Plaintiff Neighbors of the Mogollon Rim, Inc. challenges Defendant U.S.
26 Forest Service's new livestock grazing management strategy for the Tonto National

1 Forest Bar X allotments (“Bar X”) and Heber-Reno Sheep Driveway (“Driveway”). The
2 Forest Service’s new scheme authorizes cattle grazing in a portion of the Bar X that has
3 been closed to grazing for 40 years, threatening both the health of forest resources and the
4 well-being of local communities. The new grazing strategy also allows more than twice
5 the amount of grazing on the Bar X and Driveway than has occurred in recent years,
6 despite the fact that large portions of the area are nowhere close to achieving resource
7 objectives set out in the Tonto National Forest Plan (“Tonto Forest Plan”).

8 2. The Forest Service adopted its new grazing strategy despite careful and
9 extensive on-site studies demonstrating the negative effects of high levels of grazing on
10 the Bar X; indeed, the Forest Service expressly discounted those studies in favor of data
11 that is either nonexistent, inadequate, or inconclusive. And Defendant U.S. Fish and
12 Wildlife Service (“USFWS”) agreed with the Forest Service that the new grazing strategy
13 is unlikely to adversely affect the Mexican spotted owl and the narrow-headed
14 gartersnake on the basis of a similarly flawed analysis that ignores key facts and data
15 and fails to explain the departure from USFWS’ prior determination that part of the Bar
16 X and Driveway should remain closed to livestock to protect Mexican spotted owls.

17 3. The closed portion of the Bar X is located in the ponderosa pine forest
18 directly under the spectacular Mogollon Rim and surrounds the communities of Colcord
19 Estates, Ponderosa Springs, and Ponderosa Springs Estates (“Colcord and Ponderosa
20 communities”). In 1979, following years of study that showed a history of overgrazing
21 which devastated natural resources and wildlife populations, the Tonto National Forest
22 Supervisor excluded grazing in the subject area. The Forest Service could not permit
23 grazing in this area unless it determined in future evaluations that the area had recovered
24 and is capable of supporting livestock grazing on a sustained yield basis.

25 4. The 1979 decision also significantly reduced the level of grazing on the
26 remainder of the Bar X to just 59 cattle. The agency later increased the amount of

1 grazing, but not nearly to pre-1979 levels. The Driveway—which bisects the Bar X—was
2 officially closed to cattle grazing in 1963.

3 5. Over the course of the last decade, the Forest Service has repeatedly
4 expanded grazing on the Bar X and the Driveway. Starting in 2010, the Forest Service
5 began authorizing the Bar X permittee to graze cattle on portions of the Driveway
6 adjacent to the Bar X; in conjunction with that decision, the agency authorized grazing on
7 the Bar X at levels exceeding the term grazing permit. And in 2015, after 35 years of
8 non-use, the Forest Service authorized grazing on the closed portion of the Bar X for one
9 year. The Forest Service issued each of those decisions without conducting the
10 environmental analysis required by the National Environmental Policy Act (“NEPA”).
11 The Forest Service also failed to ensure that its Bar X grazing decisions complied with
12 the National Forest Management Act (“NFMA”) and the Federal Land Policy and
13 Management Act (“FLPMA”).

14 6. In early 2018, the Forest Service announced its decision to again allow
15 grazing on the long-closed portion of the Bar X and exceed the permitted use levels. In
16 April 2018, Plaintiff Neighbors of the Mogollon Rim sued the Forest Service in this
17 Court, alleging that that decision—along with the earlier decisions described above—
18 violated NEPA, NFMA, and FLPMA. In response to Plaintiff’s lawsuit, the Forest
19 Service reversed course and revised its 2018 grazing authorization to prohibit grazing in
20 the closed area and restrict use to the levels allowed under the permit. As part of a
21 settlement agreement with Plaintiff, the Forest Service promised not to authorize grazing
22 beyond the terms of the grazing permit unless and until it completed a new NEPA
23 process and issued a new grazing permit. *Neighbors of the Mogollon Rim v. U.S. Forest*
24 *Serv.*, No. 2:18-cv-01111-DLR, ECF No. 29 (D. Ariz. Oct. 9, 2018).

25 7. The Forest Service has now completed its NEPA analysis and made a
26 decision to adopt a new grazing management strategy for the Bar X and Driveway. That

1 decision is embodied in a Final Decision Notice & Finding of No Significant Impact
2 (“Final Decision Notice/FONSI”), a new allotment management plan for the Bar X
3 (“2019 AMP”), and a new term grazing permit (“2019 Grazing Permit”).

4 8. The Forest Service’s decision is both procedurally and substantively
5 unlawful. The decision is based on a deeply flawed NEPA analysis that ignores or
6 downplays grazing’s effects on the human environment and relies on scant or entirely
7 fictitious monitoring data instead of in-depth studies. Moreover, the Forest Service made
8 its decision on the basis of an environmental assessment (“EA”) rather than a full
9 environmental impact statement (“EIS”) despite the fact that the drastic increase in
10 grazing and re-opening of the long-closed area will have significant environmental
11 effects. The new grazing scheme is also inconsistent with the Tonto Forest Plan and thus
12 violates NFMA. Finally, USFWS’ determination that the new scheme is unlikely to
13 adversely affect the Mexican spotted owl and the narrow-headed gartersnake—a
14 determination relied on by the Forest Service in making its final decision—is
15 unreasonable and violates the Endangered Species Act (“ESA”) and the Administrative
16 Procedure Act (“APA”). For those reasons, the Court should set aside the Final Decision
17 Notice/FONSI, the 2019 AMP, the 2019 Grazing Permit, the EA, and USFWS’ ESA
18 concurrences for the Mexican spotted owl and the narrow-headed gartersnake.

19 JURISDICTION AND VENUE

20 9. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this
21 action arises under the laws of the United States, including NFMA, 16 U.S.C. § 1600 *et*
22 *seq.*, NEPA, 42 U.S.C. § 4321 *et seq.*, the ESA, 16 U.S.C. § 1531 *et seq.*, and the APA, 5
23 U.S.C. § 701 *et seq.* An actual, justiciable controversy exists between the parties, and the
24 requested relief is therefore proper under 28 U.S.C. §§ 2201–02 and 5 U.S.C. §§ 701–06.

25 10. Venue is proper in this Court under 28 U.S.C. § 1391 because all or a
26 substantial part of the events or omissions giving rise to the claims herein occurred within

1 this judicial district and Plaintiff Neighbors of the Mogollon Rim resides in this district.

2 11. The federal government waived sovereign immunity in this action pursuant
3 to 5 U.S.C. § 702.

4 12. Plaintiff Neighbors of the Mogollon Rim has exhausted all administrative
5 remedies as required by the relevant statutes and regulations.

6 **THE PARTIES**

7 13. Plaintiff Neighbors of the Mogollon Rim, Inc. is a non-profit organization
8 whose mission is to represent and advocate for the interests of concerned neighbors of the
9 Mogollon Rim who seek to preserve and protect the scenic and natural beauty, fish and
10 wildlife, ecological, and other natural resource values of the Mogollon Rim area.
11 Neighbors of the Mogollon Rim directors, volunteers, and supporters are property owners
12 and residents of the Colcord and Ponderosa communities who are dedicated to protecting
13 and conserving public lands and natural resources in the Mogollon Rim area.

14 14. Directors, volunteers, and supporters of Neighbors of the Mogollon Rim
15 regularly use and enjoy the Tonto National Forest, including the Bar X area, for various
16 recreational, aesthetic, and other purposes. For instance, they routinely hike, hunt, and
17 fish the forested areas under the Mogollon Rim, including hunting for deer, elk, and
18 turkey in the forest and fishing for trout in Haigler Creek. They enjoy picnicking and
19 photography and derive spiritual fulfillment from their experiences in the Tonto National
20 Forest under the Mogollon Rim.

21 15. Neighbors of the Mogollon Rim directors, volunteers, and supporters are
22 gravely concerned about damage to the wildlife populations, riparian areas, native
23 vegetation, and soils caused by re-introduction of cattle in the excluded pastures
24 surrounding their communities as well as overgrazing on the remainder of the allotment.
25 In the past, heavy cattle grazing severely damaged resources on the Bar X, including by
26 reducing numbers of elk, deer, and turkey, damaging riparian areas and fish habitat along

1 Haigler Creek and other creeks, reducing native vegetation, and causing soil erosion.
2 Damage to resources from current and future livestock use and the very presence of cattle
3 on the Bar X impairs Neighbors of the Mogollon Rim's directors', volunteers', and
4 supporters' enjoyment of the Tonto National Forest when they recreate, hunt, fish, take
5 photographs, and enjoy the aesthetic beauty of nature.

6 16. Neighbors of the Mogollon Rim's directors', volunteers', and supporters'
7 interests in using and enjoying the Tonto National Forest, particularly the area
8 surrounding their communities that had been closed to grazing for more than 35 years
9 before cattle were reintroduced in 2015, are being directly harmed and/or will be directly
10 harmed by Defendant's actions. Unless the relief prayed for herein is granted, Plaintiff
11 and its directors, volunteers, and supporters will continue to suffer injury to their
12 interests.

13 17. Defendant U.S. Forest Service is an agency or instrumentality of the United
14 States and is charged with managing the public lands and resources of the Tonto National
15 Forest in accordance and compliance with federal laws and regulations.

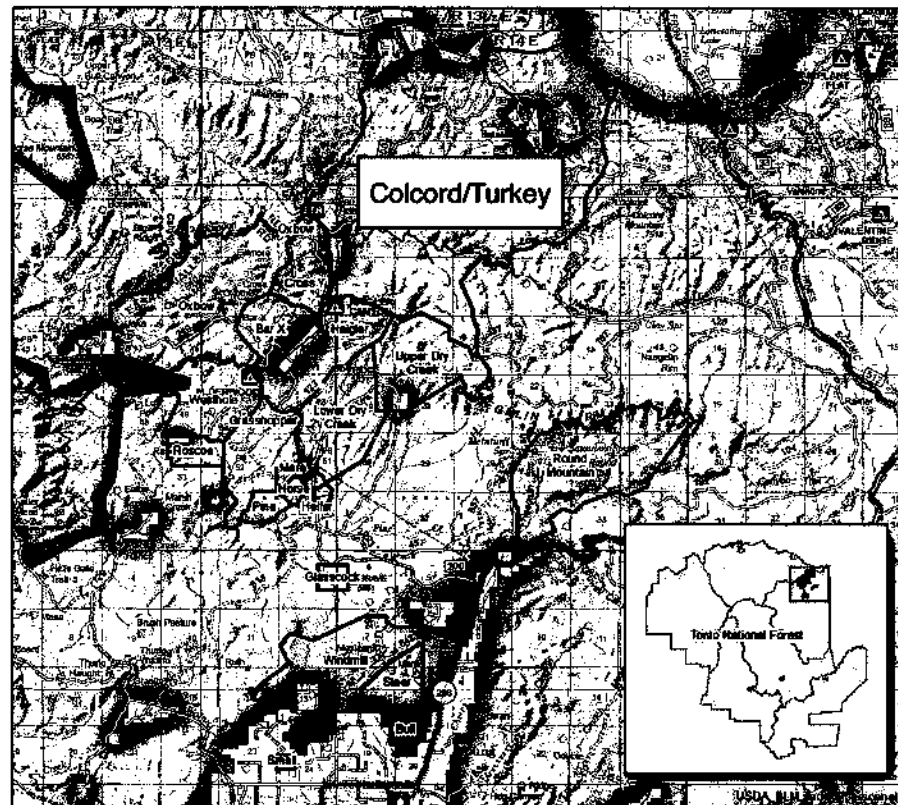
16 18. Defendant U.S. Fish and Wildlife Service is an agency or instrumentality of
17 the United States and is charged with administering the provisions of the ESA with
18 regard to threatened and endangered terrestrial and freshwater aquatic species, including
19 the threatened Mexican spotted owl and narrow-headed gartersnake, each of which is
20 found in and around the public lands of the Bar X allotment.

21 STATEMENT OF FACTS

22 I. Bar X Locale and Resources

23 19. The Tonto National Forest is located northeast of Phoenix. As one of the
24 closest National Forests to that major metropolitan area, it provides extensive
25 opportunities for recreation and respite from urban life. One of the primary purposes for
26 establishing the forest was watershed protection, and thus protecting soil and water

1 resources is a high priority. The Bar X allotments (including the area that was closed for
 2 more than 35 years) cover approximately 30,000 acres, and are located in the northeast
 3 part of the forest, near the Mogollon Rim. A map of the Bar X is shown below.



17 *The Bar X Pastures*

18 20. The Mogollon Rim is a 200-mile long escarpment in central Arizona that
 19 forms the southern edge of the Colorado Plateau. The Rim is characterized by tall cliffs
 20 cut by dramatic canyons, and elevations change from 4,000–5,000 feet south of the Rim
 21 to more than 8,000 feet on top. Extensive ponderosa pine forests are found on the slopes
 22 of the Rim and on the plateau north of it. Because of the rapid change in elevation, the
 23 Mogollon Rim contains a large diversity of flora and fauna, with species from Rocky
 24 Mountain ecotypes living on the top of the plateau, and species native to lower elevation,
 25 drier ecotypes on the slopes below the Rim. This area is home to much wildlife, including
 26 elk, deer, turkey, mountain lion, bobcat, black bear, fox, goshawk, and golden eagle. The

1 area's beauty and diverse flora and fauna attract many outdoor enthusiasts from the
2 Phoenix area, other parts of Arizona, and other states.

3 21. The Bar X contains other special features that provide habitat for a variety
4 of fish and wildlife and are popular recreation areas. For instance, Haigler Creek is a
5 lovely trout stream popular with fishermen, hikers, and campers, and is being considered
6 for designation as a Wild and Scenic River. The Naegelin Rim is another destination on
7 the Bar X for hikers, hunters, and photographers. Imperiled species listed as threatened or
8 endangered under the ESA have been observed on the Bar X, such as Mexican spotted
9 owls, narrow-headed gartersnakes, and occasionally Mexican gray wolves. Plaintiff's
10 directors, volunteers, and supporters use these National Forest lands to relax and enjoy
11 the natural setting and the fish and wildlife that inhabit these areas.

12 22. The topography of the Bar X consists of a mixture of rolling, gently
13 undulating hills and areas of steep, rugged slopes and rock outcroppings. The lower
14 elevations in the southern portion provide most of the grazing capacity for livestock.
15 Elevation ranges from 4,600 feet in the southern portion to 7,600 feet along the Mogollon
16 Rim.

17 23. The Bar X actually consists of four separate allotments managed together:
18 the Bar X, Haigler Creek, Young, and Colcord Canyon Allotments. The area that was
19 closed in 1979 consists of the Turkey Peak Pasture in the Haigler Creek Allotment and
20 the entire Colcord Canyon Allotment, an area roughly 11,000 acres in size. Over the
21 years, the Forest Service has referred to this area as "Colcord Canyon," "Turkey Pasture,"
22 "Colcord Pasture," or "Turkey Peak Pasture." Plaintiff will refer to it as the
23 Colcord/Turkey Pasture.

24 24. The Colcord/Turkey Pasture is the most northern portion of the Bar X,
25 located directly under the Mogollon Rim, with its northern boundary at the very top of
26 the Rim abutting the Apaches-Sitgreaves National Forests. The area consists of

1 mountainous terrain and steep slopes dominated by ponderosa pine. The majority of the
2 Colcord/Turkey Pasture, being primarily forested uplands, has scarce forage for
3 livestock. While the northern reaches of the Colcord/Turkey Pasture abut the Mogollon
4 Rim, the southern portion includes Haigler Creek, and is near the area of the Pleasant
5 Valley Wars, which, in the 1800s, pitted cattlemen against shepherders for the limited
6 forage resources that exist in the area. The communities of Ponderosa Springs, Ponderosa
7 Springs Estates, and Colcord Estates are located within the Colcord/Turkey Pasture. The
8 communities consist of over 300 properties.

9 25. The Heber-Reno Sheep Driveway bisects the Bar X from northeast to
10 southwest. It consists of a string of eight pastures and is roughly two miles wide. The
11 Driveway is used to move sheep between private land near Chandler, Arizona and certain
12 allotments on the Apache-Sitgreaves National Forests. Every year, up to 8,000 sheep are
13 herded along the Driveway in the spring and again in the late summer. Cattle grazing has
14 also periodically occurred on the Driveway. In particular, Forest Service studies
15 conducted in the 1970s noted cattle crazing on the Driveway.

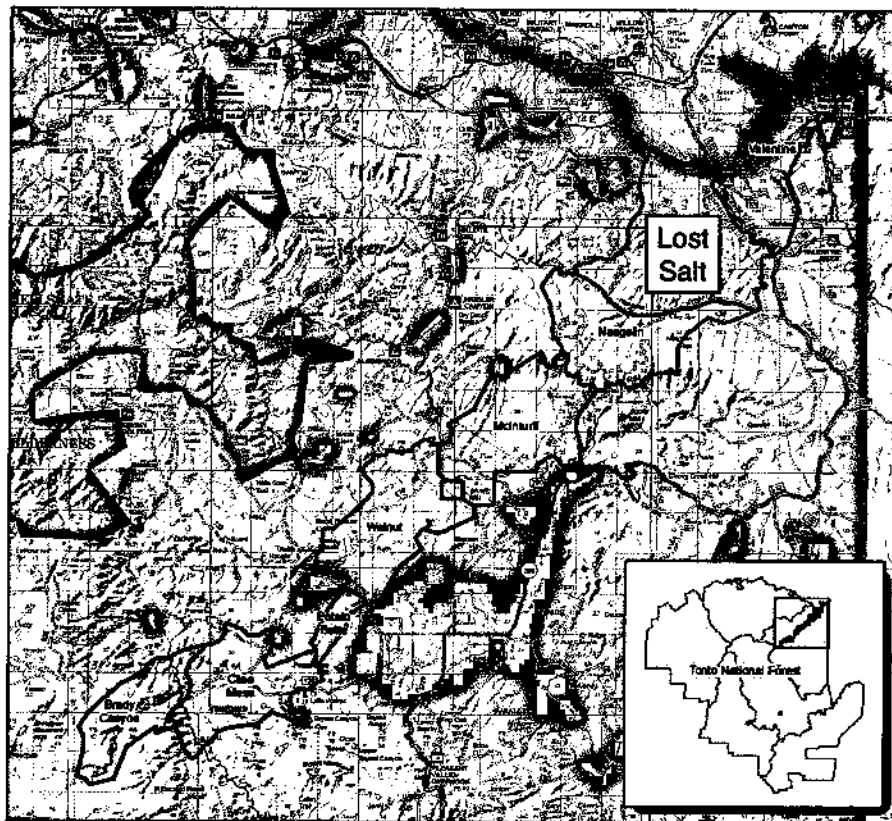
16 26. Historically, four pastures on the Driveway have been associated with the
17 Bar X: Lost Salt, Naegelin, McInturff, and Walnut. The Lost Salt Pasture is the
18 northernmost of the four pastures. Like the Colcord/Turkey Pasture, Lost Salt is
19 dominated by ponderosa pine. A map showing the Driveway pastures is shown on the
20 next page.

21 **II. Prior Overgrazing of the Bar X Allotment and Driveway**

22 27. Overgrazing on the Bar X and Driveway was a serious concern in the
23 1970s. At the time, the four allotments—Bar X, Haigler Creek, Young, and Colcord
24 Canyon—consisted of approximately 30,000 National Forest acres, run under one unit
25 referred to collectively as the Bar X. The four allotments combined were permitted to
26 graze 468 cattle year-long and 207 yearlings for ten months, which equaled 7686 animal

1 unit months (“AUMs”).¹ Of this total, the Colcord Allotment was permitted for 35 cows
2 year-long and no yearlings, or 420 AUMs.

3 28. A Range Analysis was conducted on the Bar X from 1975 through 1978 to
4 determine grazing capability. Grazing capability classifications were broken into three
5 categories: (1) No Capacity—terrain incapable of being grazed by domestic livestock on
6 a sustained yield basis under reasonable management; (2) Potential Capacity—terrain
7 presently undergoing accelerated erosion because it does not have sufficient effective
8 ground cover to protect the soil; and (3) Full Capacity—terrain presently stable because
9 effective ground cover is holding soil loss to an acceptable level.



23 *The Driveway Pastures*

24
25
26 ¹ An animal unit month is the amount of forage an “animal unit” will eat in one month’s
time. It appears that the Forest Service currently uses a value of approximately 1.32
AUMs for each cow/calf pair, 0.7 AUMs for each yearling, and 1.2 AUMs for each bull.

1 29. The 1978 Range Analysis found that the four Bar X allotments contained
2 24,654 acres that were No Capacity, 4,813 acres that were Potential Capacity, and 742
3 acres that were Full Capacity. Of the Full Capacity acres, 579 were in poor or very poor
4 range condition with a downward trend, 163 were in fair condition with a downward
5 trend, and none were in good or excellent condition.

6 30. Areas were determined to be No Capacity because they were not capable of
7 producing enough vegetation naturally, had soils with accelerated erosion, were covered
8 by dense brushfields, or had steep slopes. Much of the pine ecotype on the Bar X was
9 delineated as No Capacity because of steep slopes in conjunction with a lack of forage.

10 31. Following the Range Analysis, an environmental assessment under NEPA
11 was completed in July of 1979 (“1979 EA”). The 1979 EA found “[s]evere overgrazing
12 and poor management have depleted not only the range resource, but wildlife habitat,
13 soils, and watershed quality.” The 1979 EA referenced the “thorough on-the-ground
14 investigation” documenting conditions on the Bar X completed for the 1978 Range
15 Analysis.

16 32. Other findings by the Forest Service contained in the 1978 Range Analysis
17 and 1979 EA were as follows (quoted or paraphrased):

- 18 a. The Ponderosa Pine type has been depleted severely by overgrazing;
- 19 b. Riparian areas are severely denuded by grazing, including Colcord
20 Canyon, Naegelin Canyon, Cherry Creek, Haigler Creek, and Pine
21 Creek;
- 22 c. Of the three primary needs of all wildlife species, food and cover have
23 been the most severely damaged [by overgrazing], which has reduced
24 the capability of the land to support viable populations of wildlife
25 species that one would expect to find;

- 1 d. Current Bar X conditions are a result of the excessive abuse and
- 2 mismanagement of the grazing resources;
- 3 e. Watershed conditions are quite deteriorated throughout the woodland
- 4 zone, with many dry denuded riparian areas that were at one time dotted
- 5 with springs;
- 6 f. Excessive soil loss occurs on 97% of the land in the Bar X;
- 7 g. Deer and cattle are in direct competition for browse, especially in the
- 8 Pine type;
- 9 h. The vegetative resource of the Bar X is depleted drastically in terms of
- 10 forage production, plant density, desirable species composition and
- 11 diversity. Historic overstocking, as well as current overstocking, have
- 12 induced plant community retrogression.

13 33. The Forest Service set long-term goals for the Bar X of reversing the
14 downward trend of the range condition, improving and enhancing wildlife habitat,
15 improving aquatic habitat along perennial streams, improving deteriorated watershed
16 conditions, and improving soil conditions by controlling erosion.

17 34. The 1979 EA considered closing the entire Bar X to domestic livestock
18 grazing as one management alternative. Other alternatives put the Bar X under an
19 intensive grazing management system while sharply reducing the number of cattle. The
20 Forest Service noted: “[t]he continuation of present management and overgrazing will
21 over a short period of time irreversibly and irretrievably destroy the range resource due to
22 excessive plant and soil loss.”

23 35. The Forest Service selected the preferred alternative from the 1979 EA,
24 which divided the Bar X into three grazing units, each of which consisted of two to four
25 pastures, and use of the units would be rotated across years. Notably, these three units
26 excluded the Colcord/Turkey Pasture (that is, the Turkey Peak Pasture within the Haigler

1 Creek Allotment and the entire Colcord Canyon Allotment). This alternative reduced the
2 number of cattle permitted to graze from an “unsupportable” high of 468 cattle and 207
3 yearlings (7686 AUMs) to 59 cattle (710 AUMs), and closed the Colcord/Turkey Pasture.

4 36. In 1981, the Forest Service issued the Bar X, Haigler Creek and Young
5 Allotments Management Plan 1981–1985 (“1981–1985 AMP”). The plan noted that the
6 Bar X Ranch was comprised of the Bar X Allotment, Oxbow Unit of the Haigler Creek
7 Allotment, and the Young Allotment; the Turkey Peak Pasture in the Haigler Creek
8 Allotment and the Colcord Canyon Allotment were not listed as part of the Bar X Ranch.
9 The plan described the northern boundary of the Bar X as the bluffs along Haigler Creek,
10 and stated that construction of a fence along that boundary was necessary “to exclude
11 livestock from the areas closed to grazing.” The acreage of the permitted area was about
12 22,600 acres, and the estimated capacity was 710 AUMs, equating to 59 cattle grazing
13 year-long. An Addendum to the AMP stated that the Forest Service could reopen the
14 Turkey/Colcord pasture if further evaluations determined the area had recovered and is
15 capable of supporting livestock on a sustained yield basis.

16 37. An environmental assessment conducted in 1985 (“1985 EA”) evidenced
17 improved range conditions on the Bar X due to the decreased cattle use and intensive
18 management. The Forest Service noted that the wildlife habitat “has improved greatly.
19 Probably the greatest evidence supporting this statement is the renewed presence of elk
20 below the Naegelin Rim, historically an elk winter range. . . . The abundance of turkey
21 has also increased throughout the allotment. . . . Riparian habitat along Haigler Creek has
22 responded favorably to improved management.” The 1985 EA estimated the Bar X
23 grazing capacity as 1300 AUMs and the Forest Service decided to permit grazing of 1200
24 AUMs (100 cattle year-long) under the same management system prescribed by the 1979
25 EA and 1981–1985 AMP. The Colcord/Turkey Pasture remained closed to grazing.

26

1 38. Also, in 1985, the Forest Service completed the Tonto Forest Plan, which is
2 still the governing forest plan.² The Tonto Forest Plan contains goals, objectives,
3 standards, and guidelines that provide management direction for various resources and
4 uses of the forest. This includes direction related to protection of fish and wildlife habitat,
5 vegetation, riparian areas, and soils, as well as direction related to management of
6 livestock grazing and other forest uses. For range management, the Plan states that
7 “[l]evels of estimated permitted use and grazing capacities are based on current estimated
8 land capabilities to produce forage for domestic livestock on a sustained yield basis.” The
9 long-term goal for the range resource in the Forest Plan is to “[e]mphasize a program of
10 range administration which will bring the range resource under proper management and
11 improve range forage conditions.”

12 39. The Tonto Forest Plan standards and guidelines that pertain to the Bar X
13 consist of forest-wide standards and guidelines, as well as those for Management Area
14 5D—Mogollon Rim-Sierra Ancha Area. The forest-wide prescriptions include various
15 restrictions on livestock grazing in riparian areas; providing forage to maximize
16 threatened and endangered species, management indicator species, and emphasis harvest
17 species; managing livestock grazing to maintain Mexican spotted owl prey availability,
18 promote owl habitat, and restore riparian ecosystems; using Range Analyses to document
19 needed adjustments in grazing; and documenting specific allotment guidelines in
20 allotment management plans.

21 40. Management Area 5D is to be managed “for a variety of renewable
22 resource outputs with primary emphasis on intensive, sustained yield timber
23 management, timber resource protection, creation of wildlife habitat diversity, increased
24 populations of emphasis harvest species, and recreation opportunity.” Direction for this
25

26 ² The Forest Service is currently revising the Tonto Forest Plan, but the existing plan is what governs the decisions challenged here.

1 particular area is to manage “suitable rangelands” at “Level D” and improve grazing
2 management for rangeland in less than satisfactory condition. “Suitable range” is defined
3 as “[r]ange accessible to livestock or wildlife, and that can be grazed on a sustained yield
4 basis without damage to other resources.” Managing at “Level D” means “[m]anagement
5 seeks to optimize production and utilization of forage allocated for livestock use
6 consistent with maintaining the environment and providing the multiple use of the
7 range.” For suitable rangelands, the Tonto Forest Plan calls for the Forest Service to
8 evaluate “grazing capacity” for allotments through production/utilization surveys.
9 “Grazing capacity” is the “maximum number of animals that can graze an area without
10 damage to the vegetation or related resources.”

11 41. Forage production can change over time, altering the capability and
12 capacity of an area to support livestock. The Forest Service acknowledged winter and
13 spring moisture are very important in the physiological development of cool season
14 grasses in the Bar X allotments. The precipitation statistics in the 1979 EA show that the
15 average annual precipitation between 1971 and 1977 was 20.75 inches. In contrast, the
16 average annual precipitation from 2011 to 2018 for the same area was around 14 inches.³
17 Reduction in precipitation reduces forage production, which in turn reduces the capability
18 of the area to support livestock grazing.

19 42. Based on the Forest Service’s 1979 decision, there were no Bar X cattle
20 grazed on the Colcord/Turkey Pasture between 1979 and 2015.

21 43. Overgrazing by cattle has also severely affected the Heber-Reno Sheep
22 Driveway. In 1963, large portions of the Driveway were fenced off from adjacent
23 allotments and closed to cattle grazing in order to allow vegetation to recover.

24 44. It is unclear whether the Driveway was authorized for grazing by Bar X
25

26 ³ 2011–2018 precipitation data for the Pleasant Valley Ranger Station site, Young, Arizona, found at <http://usclimatedata.com>.

1 cattle in the 1970s. Whether authorized or not, extensive grazing occurred on the
2 Driveway in the 1970s, which resulted in severely reduced forage production and
3 increased soil compaction and erosion. A 1977 Wildlife Habitat Analysis of the Bar X
4 and Driveway described the devastating effects that cattle grazing had had on the
5 Driveway and stated that, due to those effects, the Driveway could “support only low
6 numbers of cattle and sheep.”

7 **III. Subsequent Management of the Bar X.**

8 45. The Forest Service manages grazing through three types of decision
9 documents. Allotment management plans (“AMPs”) are long-term plans that set
10 objectives and guidelines for managing allotments. Term grazing permits authorize
11 permittees to graze certain allotments, usually for ten years, and establish the maximum
12 number, kind (cattle, sheep, horse), and class (cow, bull, yearling) of livestock that can
13 graze as well as the period of use. Annual operating instructions (“AOIs”) are annual
14 documents issued to permittees that provide the specific terms and conditions for grazing
15 that particular year, including the number of livestock and season of use authorized, and
16 the pasture rotation for that particular year.

17 46. Various individuals or entities have had permits to graze the Bar X since
18 1979. The current permittee is a limited liability company, The Bar X, LLC. The Bar X,
19 LLC, on information and belief, purchased the Bar X Ranch in or around 2006/2007. The
20 Forest Service issued Bar X, LLC a ten-year term permit in 2007 to graze 130 head of
21 cattle year-long on the Bar X, Haigler Creek, and Young Allotments, permit #12083.⁴
22 The permit stated that the 1981–1985 AMP—which identified the Colcord/Turkey
23 Pasture as closed—was incorporated as part of the permit. The permit did not authorize
24

25 ⁴ A review of records obtained from the Forest Service do not make clear when or why
26 the Forest Service increased the permitted use from 100 cattle to 130 cattle.

1 grazing on the Driveway.

2 47. In 2008, USFWS sent a letter of concurrence to the Forest Service as part
3 of an ESA consultation over grazing in the Tonto National Forest. The agencies agreed
4 that the Colcord/Turkey Pasture and the Lost Salt Pasture would remain closed to cattle
5 grazing due to the presence of Mexican spotted owl protected activity centers (“PACs”)
6 in those areas.

7 48. Beginning in 2010, the Forest Service authorized the Bar X permittee and
8 permittees of nearby allotments to graze cattle on the Driveway. From 2010 through
9 2017, Bar X cattle were authorized to graze on the Naegelin, McInturff, and Walnut
10 Pastures. The 2014 AOI listed the Lost Salt Pasture as an “optional pasture” that could be
11 used in case of drought. In all other years, there was no grazing authorized on the Lost
12 Salt Pasture.

13 49. From 2012 through 2017, the Forest Service issued AOIs allowing the Bar
14 X permittee to graze more cattle than permitted under the term grazing permit. During
15 that six-year span, the Forest Service authorized an average grazing level of around 4,000
16 AUMs⁵ on the Bar X and Driveway combined, with a minimum of 2,623 AUMs in 2013
17 and a maximum of around 5,000 AUMs in 2014.⁶ The term grazing permit allowed the
18 Bar X permittee to graze 130 cattle year-long on the Bar X, corresponding to around
19 2,000 AUMs.

20 50. Each year’s AOI identified which pastures would be used at which times
21 and also included a list of “optional pastures” to be used as an “adaptive management

22
23 ⁵ A review of the 2012–2018 AOIs provided by the Forest Service suggests that the
24 agency has not always been consistent about using 1.32 AUMs for cow/calf pairs. For
that reason, there is some uncertainty about the precise level of AUMs allowed each year.

25 ⁶ The 2014 AOI provided by the Forest Service lists the AUMs allowed that year as
26 5,471, but that number appears to be an error given the number of cattle allowed. The
correct number of AUMs allowed is closer to 5,000.

1 tactic in response to drought.” Each year’s AOI also included “allowable use standards”
2 setting limits on the amount of vegetation that could be consumed by livestock in
3 different areas—*e.g.*, up to 30%–40% of the plant biomass of key forage plants in key
4 pasture areas. Each AOI stated that “[u]tilization is measured at the end of the growing
5 season” but that “grazing intensity will be evaluated during the growing season in order
6 to practice pro-active management and make necessary management changes needed for
7 plant development and recovery.”

8 51. The AOIs from 2012–2014 did not allow grazing in the Colcord/Turkey
9 Pasture. In 2015, however, the Forest Service authorized grazing in the Colcord/Turkey
10 Pasture at the level of 230 cows and 19 bulls from July 19 to September 30 despite the
11 pasture’s closed status. Prior to allowing cattle back into the Colcord/Turkey Pasture,
12 there had been no “evaluations” of whether the resources in the closed area had recovered
13 or the current capability of the area to support livestock grazing on a sustained yield
14 basis, as required by the 1981–1985 AMP. Furthermore, no Range Analysis or NEPA
15 analysis was completed prior to this authorization. An email in April 2016 claimed that
16 the pasture was grazed in 2015 after many years of non-use in order to spread out
17 livestock use on the Bar X, and incorrectly stated that the pasture had been included in
18 the stocking capacity assessment for the group of allotments and had never been removed
19 from the grazing allotment.

20 52. The Bar X cows degraded the resources in the Colcord/Turkey Pasture and
21 caused significant problems in the Colcord and Ponderosa communities during those few
22 months in 2015. Monitoring at one site on the south side of the Colcord/Turkey Pasture
23 showed that cattle grazing reduced the percentage of ground covered by live basal
24 vegetation from 6% to 1%—a utilization rate of over 80%.

25 53. On August 1, 2016, Plaintiff’s directors sent a letter to Neil Bosworth,
26 Tonto National Forest Supervisor, informing him of the Forest Service’s improper

1 authorization of grazing in an area that was supposed to be excluded from grazing. The
2 Forest Service responded to this letter with a different explanation from that in the April
3 2016 email, stating that the cattle were allowed into the excluded pasture in 2015 on a
4 “trial basis” pursuant to Forest Service Handbook Section 2209.13.16.16. However, a
5 Freedom of Information Act request shows that there were *no* Forest Service documents
6 created prior to the 2015 AOI that mentioned grazing the closed pasture on a “trial basis”
7 under Section 2209.13.16.16, and the 2015 AOI itself did not discuss it. Nor was there
8 any written determination that such grazing was consistent with the Tonto Forest Plan
9 and would benefit management of the rangeland resource.

10 54. The 2016 and 2017 AOIs did not allow grazing on the Colcord/Turkey
11 Pasture.

12 55. In 2017, the Forest Service renewed the Bar X term permit for another ten
13 years, again permitting 130 cattle to graze year-long on the Bar X, Haigler Creek, and
14 Young Allotments. The 2017 permit issued to Bar X, LLC included the following
15 provisions: (1) Pastures lacking a serviceable fence around the entire pasture may not be
16 authorized for use; (2) The Tonto Forest Plan is made a part of the permit; (3) the 1981–
17 1985 AMP is made a part of the permit.

18 56. The Forest Service issued a 2018 AOI in January 2018. That AOI
19 authorized grazing on the Colcord/Turkey Pasture in the amount of 240 cows and 18
20 bulls from June 15 to October 15. The AOI did not include any justification for
21 authorizing grazing on the closed pasture.

22 **IV. Prior Litigation**

23 57. In April 2018, Plaintiff Neighbors of the Mogollon Rim brought suit
24 against the Forest Service in this Court. Plaintiff alleged that the agency had violated
25 NFMA by authorizing livestock grazing on the Bar X in 2012–18 in a manner
26 inconsistent with the Tonto Forest Plan. Plaintiff also alleged that Defendant’s

1 authorization of livestock grazing on the Bar X in 2012–18 violated NEPA for failing to
2 analyze the impacts of the changed grazing management, and violated FLPMA for
3 exceeding the permitted level of use.

4 58. In June 2018, the Forest Service issued an amended 2018 AOI. The
5 amended AOI listed the authorized use as 120 cows and 10 bulls year-long, consistent
6 with the grazing permit. The amended 2018 AOI did not authorize grazing on the
7 Colcord/Turkey Pasture or on any of the Driveway pastures.

8 59. In October 2018, Neighbors of the Mogollon Rim and the Forest Service
9 entered into a settlement agreement and stipulation of dismissal of the case. As part of the
10 settlement, the Forest Service agreed to “ensure that future AOIs . . . for the Bar X
11 Allotment are consistent with the existing term grazing permit for the Bar X Allotment
12 while this Settlement Agreement is in effect.”

13 60. By its own terms, the settlement agreement was to remain in effect “until
14 the Forest Service issues a new term livestock grazing permit and Allotment Management
15 Plan for the Bar X Allotment, accompanied by a new NEPA analysis and a new
16 consultation under the [ESA], as appropriate.”

17 61. The 2019 AOI, like the revised 2018 AOI, allowed grazing consistent with
18 the term grazing permit: 113 cows and 17 bulls year-long, and no grazing on the
19 Colcord/Turkey Pasture or the Driveway.

20 **V. The Forest Service’s NEPA and ESA Processes**

21 62. In late 2018, the Forest Service prepared a Biological Assessment (“BA”)
22 containing its analysis of the effects of a new grazing strategy on threatened and
23 endangered species in the Bar X area. The BA concluded that the new grazing strategy—
24 which included opening up the Colcord/Turkey Pasture and the Lost Salt Pasture to
25 grazing—would be unlikely to adversely affect the Mexican spotted owl and the narrow-
26 headed gartersnake as well as their critical habitats. The Forest Service sent the BA to

1 USFWS as part of the agencies' ESA consultation.

2 63. In early 2019, the Forest Service released a Preliminary EA outlining its
3 proposed plan to alter the grazing strategy on the Bar X. Under the plan set out in the
4 Preliminary EA, grazing would be allowed across the Bar X, including on the
5 Colcord/Turkey Pasture. In addition, the proposed plan would allow the Bar X permittee
6 to use all four of the Driveway pastures associated with the Bar X—including the Lost
7 Salt Pasture—for cattle grazing. The proposed plan would also increase the maximum
8 permitted amount of grazing on the Bar X and associated Driveway pastures to 9,250
9 AUMs, more than twice the amount of actual grazing in recent years and over four times
10 the amount allowed under the 2007 and 2017 term permits.

11 64. In June 2019, the Forest Service released a Draft EA. The Draft EA
12 analyzed a proposed grazing scheme substantially identical to the one analyzed in the
13 Preliminary EA—one that would increase the total amount of grazing permitted on the
14 Bar X and associated Driveway pastures up to 9,250 AUMs and would open up the long-
15 closed Colcord/Turkey Pasture and the Lost Salt Pasture to grazing. The Forest Service
16 invited comments on the Draft EA.

17 65. Plaintiff commented on the Draft EA, criticizing several aspects of the
18 Forest Service's reasoning and conclusions. Several other organizations and individuals
19 also submitted comments on the Draft EA. One recurring theme in those comments was a
20 concern that the Forest Service had failed to give enough consideration to how opening
21 the Colcord/Turkey Pasture to grazing would affect the Colcord and Ponderosa
22 communities and the wildlife in that area.

23 66. In August 2019, USFWS issued a Biological Opinion ("BiOp") regarding
24 the effects of the proposed grazing scheme on endangered and threatened species in the
25 Bar X area. The BiOp included concurrences with the Forest Service's determinations
26

1 that the new scheme “may affect,” but would “not likely . . . adversely affect,” the
2 Mexican spotted owl and narrow-headed gartersnake as well as their critical habitats.

3 67. The Forest Service issued a Final EA in September 2019 along with a Draft
4 Decision Notice/FONSI. The Forest Service elected to keep essentially the same
5 proposed grazing scheme as the one described in the Preliminary and Draft EAs. The
6 Forest Service released a revised version of the Final EA in December 2019.

7 **VI. Features of the Final EA**

8 **A. Range of Alternatives Considered in the Final EA**

9 68. The Final EA analyzes just two alternatives: a “no grazing” alternative and
10 the proposed action. The Draft EA analyzed the same two alternatives.

11 69. Plaintiff criticized the lack of alternatives in its comments on the Draft EA,
12 noting that the two alternatives analyzed were on the extreme ends of the spectrum of
13 possible grazing plans. Plaintiff suggested that the Forest Service should consider some
14 “in between” alternatives, including a “no action” alternative that would continue the
15 same grazing as under the prior permits, and an alternative in which the Colcord/Turkey
16 Pasture remains closed to grazing while some grazing is permitted on the Driveway.

17 70. In the Final EA, the Forest Service states that a “no action” alternative “was
18 not analyzed in detail as it does not meet the purpose and need to manage resources in a
19 manner that achieves Forest Plan objectives and desired conditions, or formally
20 incorporate adaptive management that allows for sufficient management flexibility.” This
21 was the same explanation offered in the Draft EA for the lack of a no action alternative.
22 The Forest Service added another statement to the Final EA in an apparent attempt to
23 explain the small number of alternatives considered: “[C]urrent [AUMs] are less than the
24 Proposed Action. Additionally, within the existing current allotment management, there
25 is no opportunity for adaptive management, making it difficult to change yearly
26 authorized AUM’s as necessary based on current resource conditions. The scope of

1 current management places it within the range of alternatives between the No Grazing
2 and the Proposed Action. As such, the Proposed Action was developed with the strategy
3 to minimize or eliminate the need for additional alternatives to be developed.”

4 **B. Description of Current Conditions**

5 71. The Final EA’s analysis of the current state of vegetation on the Bar X and
6 Driveway is largely based on the results of monitoring at 16 sites from 2007–2019. Eight
7 of those sites were established in 2007 and eight more were established between 2007
8 and 2014. Two monitoring sites exist on the nearly 11,000-acre Colcord/Turkey Pasture:
9 one on the south side of the pasture and one on the north side of the pasture. No
10 monitoring sites exist on the nearly 7,000-acre Lost Salt Pasture.

11 72. Several of the sites have shown decreased amounts of live vegetation over
12 the monitoring period. The two sites on the Colcord/Turkey Pasture—which was grazed
13 just once, in 2015—have shown stable vegetation levels, according to the Final EA.

14 73. Though the Final EA discusses *trends* in vegetation, it does not analyze
15 how the current state of vegetation on the Bar X compares to the desired conditions for
16 the forest. For instance, the Final EA states that there should be “a minimum of 30%
17 effective ground cover for watershed protection and forage production, especially in
18 primary wildlife forage producing areas,” but it does not discuss whether such ground
19 cover currently exists or how much it diverges from the 30% objective.

20 74. According to the Final EA, several pastures on the Bar X and Driveway are
21 rated “poor” for soil productivity and erosion, including many pastures (McInturff,
22 Walnut, and Bar X among them) that have been heavily grazed in recent years. Colcord
23 Canyon Pasture and Lost Salt Pasture are rated “fair” for soil productivity and erosion.
24 None of the pastures is rated “good” for this parameter.

25 75. The Final EA contains an analysis of the health of the watersheds that are at
26 least partly in the Bar X and Driveway. The analysis, which is based on data from 2011,

1 reflects that 10 of the 11 watersheds are “functioning at risk” and the other watershed has
2 “impaired function.” None is functioning properly.

3 **C. The Proposed Action**

4 76. The Final EA states that the proposed action “consists of four components:
5 authorization, improvements, conservation measures, and monitoring.”

6 77. The proposed action deviates from current grazing authorization practices
7 in the following ways:

- 8 a. Grazing would be allowed on the Colcord/Turkey Pasture;
- 9 b. Grazing would be allowed on all four of the Driveway pastures
10 associated with the Bar X, including the Lost Salt Pasture;
- 11 c. The maximum amount of grazing allowed on the Bar X would be
12 increased to 4,002 AUMs; and
- 13 d. The maximum amount of grazing allowed on the Driveway pastures
14 associated with the Bar X would be increased to 5,250 AUMs.

15 78. The proposed action does not provide any further details about the grazing
16 scheme, such as pasture rotation or level of grazing in any particular area. The Final EA
17 states that the entire herd can graze each pasture for an undetermined amount of time.

18 79. The proposed action includes limits on vegetation utilization. For upland
19 herbaceous vegetation, utilization in excess of 30–40% of a given year’s growth would
20 trigger changes to grazing practices; for upland browse, utilization in excess of 50%
21 percent of a given year’s growth would trigger changes. For riparian woody vegetation,
22 the threshold is 50% browse of leaders on the upper one-third of plants up to six feet tall.
23 For riparian herbaceous vegetation, the threshold is 40% utilization of plant biomass for
24 some species, such as deergrass, and a minimum stubble height of 6–8 inches for rushes,
25 sedges, cattails, and horsetails. These limits are the same or substantially the same as the
26 “allowable use standards” included in the 2012–2019 AOIs.

1 80. The Final EA identifies a few specific range improvements such as fences
2 or water troughs that will be built in the next two years, with several improvements to be
3 built on the previously closed pastures, including a corral in between the Colcord and
4 Ponderosa communities. But the Final EA also states that an unspecified amount of
5 “additional infrastructure may be constructed if needed in the future” and that such
6 infrastructure will not trigger further environmental analysis. That infrastructure includes
7 fencing, pipelines, troughs, trick tanks and catchments, and livestock handling facilities.

8 81. The proposed action includes both “effectiveness monitoring” measures—
9 measures intended to “track [the] long-term condition and trend of upland and riparian
10 vegetation, soil, and watersheds”—and “implementation monitoring” measures—annual
11 measures intended to ensure that grazing is occurring consistent with the permit and
12 yearly authorizations. Effectiveness monitoring “would occur at established permanent
13 monitoring points,” while implementation monitoring would occur “at a minimum” in
14 key areas. Like the measures set out in the 2012–2019 AOIs, the measures set out in the
15 proposed action would allow for pasture moves and/or reductions in livestock numbers to
16 respond to changing resource conditions.

17 82. The Final EA states that grazing management “may” be adjusted in
18 response to monitoring data, including data showing that desired resource conditions are
19 not being met. However, the Final EA is vague as to the details of how the Forest Service
20 will choose to respond to such monitoring data. Instead, the Final EA simply lists several
21 possible actions that “may” be appropriate “to respond to certain resource conditions.” In
22 addition, the Final EA does not identify what specific triggers would lead to management
23 changes.

24 **D. Data and Studies Relied On**

25 83. During the NEPA process, Plaintiff and others asked the Forest Service to
26 place more weight on the in-depth studies of the Bar X conducted in the late 1970s and

1 1980s, including the 1978 Range Analysis. In the Final EA, the Forest Service states that,
2 “[w]hile studies from the Bar X’s past were reviewed and considered,” the “analysis was
3 focused on the most current data.” The Forest Service specifically cites “the last 12 years
4 of data, when the current permittee [sic] was first issued a permit for Bar X.”

5 84. Aside from that passing mention of “studies from the Bar X’s past,” the
6 Final EA does not address the many in-depth studies of grazing effects on the Bar X
7 conducted in the late 1970s and 1980s.

8 85. The Final EA also references the 2008 letter of concurrence from USFWS
9 agreeing that the Colcord/Turkey and Lost Salt Pastures should remain closed to
10 livestock grazing due to Mexican spotted owl PACs, but does not otherwise engage with
11 that document.

12 86. Because grazing has occurred on the Colcord/Turkey Pasture just once in
13 the last 40 years (2015), there is no “last 12 years of data” showing the effects of yearly
14 grazing on that pasture. And there is *no* data from recent years showing the effects of
15 grazing on the Lost Salt Pasture. These pastures occur in the ponderosa pine ecotype, and
16 have different soil and vegetation characteristics than the other Bar X and Driveway
17 pastures. One of the two monitoring sites on the Colcord/Turkey pasture had the lowest
18 forage production of all the Bar X and Driveway sites.

19 87. The Final EA contains multiple statements that are misleading or not
20 supported by underlying data. In discussing the amount of grazing that has been allowed
21 on the Bar X over the last decade, the EA states that “livestock numbers [on the Bar X]
22 have slowly increased but averaged 3,707 [AUMs].” According to the AOIs from that
23 period, however, the average amount of grazing on the Bar X has been far lower. The
24 3,707 AUMs figure reflects the amount of grazing allowed on the Bar X in the initial
25 2018 AOI that was eventually replaced by a revised AOI. The *average* amount of grazing
26 allowed on the Bar X (which does not include the Driveway pastures) in recent years is

1 closer to 2,000–2,500 AUMs, according to the AOIs for those years, and has *never* been
2 as high as 3,707 AUMs.⁷ Thus, recent monitoring data for the Bar X pastures would
3 reflect use levels averaging less than 2,500 AUMs.

4 88. In several places, the Final EA states that grazing was allowed on the
5 Colcord/Turkey Pasture in 2015 and 2018 on a trial basis for the purpose of gathering
6 data on the effects of grazing on that pasture. However, there was no grazing allowed on
7 the Colcord/Turkey Pasture in 2018 and, as mentioned earlier, Forest Service documents
8 indicate that the “trial basis” rationale for allowing grazing on the Colcord/Turkey
9 Pasture in 2015 was a post-hoc explanation for that action.

10 89. The Final EA cites a 2018 capacity analysis as one of the key studies the
11 Forest Service relied on in developing the proposed action. A FOIA request for that
12 analysis returned a document named “Capacity_BarX&Driveway.” That document
13 reflects a maximum capacity of 3,973 AUMs for the four Driveway pastures associated
14 with the Bar X. The proposed action allows up to 5,250 AUMs on those four Driveway
15 pastures. The capacity analysis also appears to reflect a maximum capacity of 3,108
16 AUMs for the Bar X, *including* the Colcord/Turkey Pasture. The proposed action allows
17 up to 4,002 AUMs on the Bar X.

18 **E. Analysis of Effects on Vegetation, Soil, and Water Resources**

19 90. The Final EA predicts that the proposed action will not have adverse effects
20 on vegetation/range resources. In reaching that conclusion, the Final EA relies heavily
21 on: (1) the “trial grazing periods” in 2015 and 2018, which supposedly showed that the
22 closed pastures can be grazed in a way to “maintain or achieve desired conditions,” and
23 (2) the claim that “[m]onitoring has demonstrated that current management has resulted
24 in improvements to vegetative condition in the allotment.”

25
26 ⁷ As discussed in ¶ 49, the average amount of grazing on the Bar X *plus* its associated
Driveway pastures from 2012–2017 was around 4,000 AUMs.

1 91. As mentioned earlier, there was no “trial grazing period” in 2018 on the
2 Colcord/Turkey Pasture and the “trial grazing period” in 2015 was not, in fact, a trial.
3 Moreover, there has been no “trial” grazing on the Lost Salt Pasture at any time, and no
4 monitoring data showing how grazing will affect that pasture.

5 92. The EA does not explain how current conditions and trends in vegetation
6 health support the conclusion that more than *doubling* the amount of grazing on the Bar
7 X and its associated Driveway pastures will maintain or improve vegetation health.

8 93. In its discussion of the proposed action’s effects on soil resources, the Final
9 EA states that “[s]oils most likely to have impaired or unsatisfactory conditions . . . are
10 likely to continue to receive a substantial amount of use.” Yet the Final EA concludes
11 that such soils “should begin to improve” if “allowable use guidelines are not exceeded.”
12 The EA does not square this prediction with the fact that soils in the long-closed pastures
13 have had decades to recover but are still rated as “fair” rather than “good,” nor with the
14 fact that soil conditions in grazed pastures are poor or fair despite the use of “allowable
15 use guidelines” similar to those in the proposed action.

16 94. According to the Final EA, “[a]reas of traditional livestock concentration
17 . . . may recover fastest in the absence of livestock grazing, [but] . . . such areas can also
18 be maintained or improved under the proposed action.” Again, the EA does not explain
19 how this prediction is supported by the data on soil conditions.

20 95. The EA acknowledges that cattle tend to concentrate around water sources,
21 including in riparian areas, and that cattle “tend to deposit a greater amount of waste
22 close to water sources than they create in other areas of the range.” The EA also
23 acknowledges that large swaths of Haigler Creek have not seen grazing in 40 years. The
24 EA nonetheless concludes that introducing cattle to the long-closed pastures will not
25 significantly affect water quality and riparian resources in and near Haigler Creek. In
26 general, the Final EA concludes that the proposed action is unlikely to have significant

1 effects on water quality and riparian resources in the Bar X area.

2 96. As with its analysis of soils, the Final EA's analysis of water and riparian
3 resources does not square its predictions about insignificant effects of *increased* grazing
4 with the fact that such resources are not functioning properly even in areas that have been
5 closed to grazing for years.

6 97. The Final EA also dismisses effects of climate change combined with
7 effects of increased grazing as insignificant cumulative effects despite acknowledging
8 that the climate is getting drier and 12 years of drought occurred between 2000 and 2018.

9 **F. Analysis of Effects on the Colcord and Ponderosa Communities**

10 98. The Final EA notes that members of communities in and around the Bar X,
11 particularly those living within the boundary of the Colcord/Turkey pasture, "voiced
12 concerns and disapproval over . . . the possibility that cattle may enter onto their private
13 property, damage their septic systems, or be present on roadways," but there is no
14 analysis of the likelihood of such events or the magnitude of their impacts on community
15 members' aesthetic enjoyment and economic well-being.

16 99. The EA acknowledges that "it is the responsibility of private landowners
17 and private communities to construct a lawful fence to keep out cattle," but does not
18 analyze in any way how the Colcord and Ponderosa communities will be affected,
19 economically and otherwise, by the sudden need to construct fencing and other
20 infrastructure to prevent or mitigate damage caused by cattle grazing.

21 100. The Final EA concludes that the proposed action will not have a significant
22 impact on communities in the Bar X because they "have always been within an active
23 grazing allotment." In fact, Ponderosa Springs Estates was not developed until *after* the
24 Colcord/Turkey Pasture was closed to grazing, and residents of Colcord Estates and
25 Ponderosa Springs have not experienced grazing near their communities for 40 years
26 except in 2015, when cattle damaged property and frightened homeowners.

1 **G. Analysis of Effects on Wildlife**

2 101. Cattle damage to riparian areas, such as Haigler Creek, degrades habitat for
3 the narrow-headed gartersnake, which is highly water-dependent. The Final EA,
4 consistent with USFWS' concurrence, concludes that the proposed action may affect, but
5 is unlikely to adversely affect, the narrow-headed gartersnake, which is listed as
6 threatened under the ESA. Many of the areas in Haigler Creek in which gartersnakes
7 have been found are located in the long-closed Colcord/Turkey Pasture, and much of the
8 proposed critical habitat for the narrow-headed gartersnake is located in that pasture, as
9 well. The Final EA, like USFWS' concurrence, does not address whether and how
10 grazing impacts to the narrow-headed gartersnake might be more significant in areas that
11 have previously been closed to grazing.

12 102. By grazing native ground vegetation and compacting soils, cattle degrade
13 habitat of small mammal populations, thereby reducing the prey base of Mexican spotted
14 owls, a threatened species under the ESA. The Final EA concludes that the proposed
15 action may affect, but is unlikely to adversely affect the Mexican spotted owl. The EA,
16 like USFWS' August 2019 concurrence, fails to disclose that almost all of the spotted
17 owl PACs and designated critical habitat that overlap the Bar X and associated Driveway
18 pastures are located in the long-closed Colcord/Turkey and Lost Salt Pastures, which
19 contain the pine ecotype used by the owls. And the EA, like USFWS' concurrence, fails
20 to explain what has changed since 2008, when the Forest Service and USFWS agreed that
21 those pastures should remain closed to grazing due to the presence of Mexican spotted
22 owl PACs.

23 103. According to the Final EA, the proposed action will not have significant
24 impacts on elk, deer, and other big game. That conclusion is based in part on the idea that
25 elk and deer would benefit from the installation and maintenance of water improvements.
26 However, the EA fails to note that elk, deer and turkey have made a remarkable

1 comeback in the last 40 years in the Colcord/Turkey Pasture *without* such improvements.
2 In general, the EA does not explain whether or how the reintroduction of cattle to areas
3 that have not been grazed for 40 years will affect elk, deer, and other animals that
4 compete with cattle for forage and water when prior cattle grazing had almost eliminated
5 such wildlife from those areas in the 1970s.

6 104. The Final EA does not grapple with the fact that the stable elk populations
7 in the Bar X area are concentrated in the Colcord/Turkey Pasture and the Lost Salt
8 Pasture, where there has been no grazing.

9 **VII. The FONSI and Final Decision**

10 105. The Draft Decision Notice/FONSI released in September 2019 adopted the
11 proposed action laid out in the Final EA. The Forest Service concluded that the proposed
12 action will not have a significant impact on the quality of the human environment and
13 that the proposed action is consistent with the Tonto Forest Plan and NFMA.

14 106. The release of the Draft Decision Notice/FONSI started the administrative
15 review and objection period. *See* 26 C.F.R. pt. 218. Plaintiff, along with many others,
16 submitted objections. In December 2019, the Forest Service responded to those
17 objections and released the Final Decision Notice/FONSI. The Forest Service did not
18 change course in response to the objections it received—the Final Decision
19 Notice/FONSI is substantially identical to the Draft Decision Notice/FONSI.

20 107. In late December 2019, the Forest Service issued the 2019 AMP and the
21 2019 Grazing Permit.

22
23 **FIRST CLAIM FOR RELIEF**
24 **VIOLATION OF NATIONAL ENVIRONMENTAL POLICY ACT**
25 **Failure to Prepare an EIS**

26 108. Plaintiff realleges and incorporates by reference the preceding paragraphs.

1 109. This first claim for relief challenges the Forest Service’s decision to issue a
2 FONSI and not prepare a full Environmental Impact Statement in connection with its
3 decision to alter the grazing scheme for the Bar X, in violation of NEPA. This claim for
4 relief is brought under the APA’s provisions for judicial review of final agency action, 5
5 U.S.C. § 706(2)(A).

6 110. NEPA requires an agency to prepare a full EIS when it proposes to take an
7 action that “significantly affect[s] the quality of the human environment.” 42 U.S.C.
8 § 4332. If an agency determines that a proposed action will not “significantly affect the
9 quality of the human environment,” it may issue a FONSI and an EA rather than a full
10 EIS. An agency should prepare an EIS whenever there are “substantial questions . . . as to
11 whether the [proposed action] *may* cause significant degradation of some human
12 environmental factor.” *WildEarth Guardians v. Provencio*, 918 F.3d 620, 633 (9th Cir.
13 2019) (citation and quotation omitted and emphasis added).

14 111. The Forest Service’s FONSI—its conclusion that the new grazing scheme
15 will not “significantly affect the quality of the human environment”—is arbitrary and
16 capricious under APA § 706(2)(A). The Forest Service’s FONSI is arbitrary and
17 capricious for reasons including, but not limited to, the following:

- 18 a. The Forest Service improperly discounted or ignored the serious
19 negative environmental effects of allowing grazing in the
20 Colcord/Turkey Pasture and the Lost Salt Pasture, which have long been
21 closed to grazing;
- 22 b. The Forest Service improperly discounted or ignored the serious effects
23 of more than doubling the total amount of grazing on the Bar X and
24 associated Driveway pastures;
- 25 c. The Forest Service improperly discounted or ignored the serious effects
26 of the proposed action on the communities in and around the Bar X,

1 including the Colcord and Ponderosa communities, that have either
2 never had livestock grazing in their vicinity or have not experienced it
3 for 40 years;

4 d. The Forest Service improperly discounted the serious effects of the
5 proposed action on Mexican spotted owls and narrow-headed
6 gartnersnakes, most of which are located in areas long closed to grazing;
7 and

8 e. The Forest Service improperly discounted the cumulative effects of
9 grazing combined with climate change as insignificant.

10 112. The record before the agency clearly shows that there is at the very least a
11 “substantial question[] . . . as to whether the project *may* cause significant degradation of
12 some human environmental factor,” thus triggering the Forest Service’s obligation to
13 prepare an EIS. *Provencio*, 918 F.3d at 633. Accordingly, the Forest Service’s decision to
14 issue a FONSI rather than prepare an EIS was arbitrary, capricious, an abuse of
15 discretion, and contrary to NEPA. Under 5 U.S.C. § 706(2)(A), the court must set aside
16 the Final Decision Notice/FONSI, as well as the 2019 AMP and 2019 Grazing Permit
17 that relied on the FONSI.

18
19 **SECOND CLAIM FOR RELIEF**
20 **VIOLATION OF NATIONAL ENVIRONMENTAL POLICY ACT**
21 **Failure to Consider an Adequate Range of Alternatives**

22 113. Plaintiff realleges and incorporates by reference the allegations in
23 paragraphs 1 through 107.

24 114. This second claim for relief challenges the Forest Service’s choice to
25 analyze just two alternatives in the Final EA, neither of which was a “no action”
26 alternative, in violation of NEPA. This claim for relief is brought under the APA’s
provisions for judicial review of final agency action, 5 U.S.C. § 706(2)(A).

1 115. A proper NEPA analysis for a project or action must include “meaningful
2 consideration [of] all reasonable alternatives.” *Te-Moak Tribe of W. Shoshone of Nev. v.*
3 *U.S. Dep’t of the Interior*, 608 F.3d 592, 601–02 (9th Cir. 2010); *see also* 42 U.S.C.
4 § 4332(E). Furthermore, an agency must consider a “no action” alternative in which the
5 status quo is maintained. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233,
6 1245 (9th Cir. 2005).

7 116. The Forest Service violated NEPA by refusing to consider meaningfully
8 any alternatives other than the proposed action and a “no grazing” alternative. The Forest
9 Service rejected without reasonable explanation the “middle-ground” alternatives
10 suggested by Plaintiff—including an alternative in which grazing would be allowed on
11 parts of the Driveway but not on the Colcord/Turkey Pasture, and the agency’s reasons
12 for failing to consider a “no action” alternative in any detail were irrational.

13 117. Because the Forest Service failed to consider a reasonable range of
14 alternatives, the EA is arbitrary, capricious, an abuse of discretion, and contrary to
15 NEPA. Under 5 U.S.C. § 706(2)(A), the court must set aside the Final EA, as well as the
16 Final Decision Notice/FONSI, 2019 AMP, and 2019 Grazing Permit that relied on the
17 Final EA.

18
19 **THIRD CLAIM FOR RELIEF**
20 **VIOLATION OF NATIONAL ENVIRONMENTAL POLICY ACT**
21 **Failure to Take a “Hard Look” at the Effects of the Action**

22 118. Plaintiff realleges and incorporates by reference paragraphs 1 through 107.

23 119. This third claim for relief challenges the Forest Service’s Final EA for
24 failing to take a “hard look” at the environmental consequences of the new grazing
25 scheme, in violation of NEPA. This claim for relief is brought under the APA’s
26 provisions for judicial review of final agency action, 5 U.S.C. § 706(2)(A).

 120. NEPA requires that federal agencies “take a hard look at the environmental

1 consequences of their actions” in order to “foster[] both informed decision-making and
2 informed public participation.” *San Diego Navy Broadway Complex Coal. v. U.S. Dep’t*
3 *of Def.*, 817 F.3d 653, 659 (9th Cir. 2016) (quotations and citations omitted).

4 121. In taking a hard look at the environmental consequences of its new grazing
5 scheme, the Forest Service was required to consider all direct, indirect, and cumulative
6 effects of the proposed action, including “effects on natural resources and on the
7 components, structures, and functioning of affected ecosystems”; aesthetic effects;
8 economic effects; social and health effects; and effects on cultural resources. 40 C.F.R.
9 § 1508.8(b).

10 122. NEPA required the Forest Service to ensure the accuracy and scientific
11 integrity of its analysis—that is, to use “accurate information and defensible reasoning”
12 in assessing the probable environmental effects of the new grazing scheme. 40 C.F.R.
13 § 1500.1(b), 1508.9(a)(1); *Or. Nat. Desert Ass’n v. Jewell*, 840 F.3d 562, 570 (9th Cir.
14 2016). Similarly, if the Forest Service presented “information so incomplete or
15 misleading that the decisionmaker and the public could not make an informed
16 comparison of alternatives,” then its analysis violated NEPA. *Native Ecosystems Council*
17 *v. Marten*, 883 F.3d 783, 795 (9th Cir. 2018) (quotation and citation omitted).

18 123. In its NEPA analysis, the Forest Service failed to take a hard look at the
19 effects of its proposed grazing scheme. It failed to do so in many different ways,
20 including, but not limited to, the following:

- 21 a. The Forest Service did not adequately disclose or analyze the impacts of
22 opening the closed pastures on vegetation, soil, and water resources;
- 23 b. The Forest Service did not adequately disclose or analyze the impacts of
24 opening the closed pastures on the health, safety, recreational
25 opportunities, aesthetic enjoyment, and economic well-being of the
26 human population living nearby;

- 1 c. The Forest Service did not adequately disclose or analyze how opening
2 the closed pastures will affect multiple wildlife species that occupy that
3 area;
- 4 d. The Forest Service relied on and presented inaccurate data and
5 information throughout the NEPA process, including an overstatement
6 of the amount of grazing that has occurred on the Bar X in recent years,
7 false claims about the number and intent of so-called “trial” grazing
8 periods on the Colcord/Turkey Pasture, and false statements about the
9 Colcord and Ponderosa communities’ past experiences with grazing;
- 10 e. The Forest Service failed to adequately consider and disclose to the
11 public highly relevant data about the effects of yearly grazing on
12 Colcord/Turkey and Lost Salt Pastures and instead drew unreasonable
13 conclusions from scant or, in the case of the Lost Salt Pasture,
14 nonexistent data; and
- 15 f. The Forest Service failed to adequately consider and disclose to the
16 public highly relevant data about the effects of grazing on other portions
17 of the Bar X and instead provided an unsupported conclusion that
18 greatly increasing the amount of grazing on the allotment will somehow
19 *improve* the condition of the area’s already-degraded resources.

20 124. By failing to take a “hard look” at the environmental consequences of the
21 new grazing scheme, the Forest Service issued a Final EA that was arbitrary, capricious,
22 an abuse of discretion, and contrary to NEPA. Under 5 U.S.C. § 706(2)(A), the court
23 must set aside the Final EA, as well as the Final Decision Notice/FONSI, 2019 AMP, and
24 2019 Grazing Permit that relied on the Final EA.

FOURTH CLAIM FOR RELIEF
VIOLATIONS OF THE NATIONAL FOREST MANAGEMENT ACT
Failure to Act Consistently with Tonto Forest Plan

125. Plaintiff realleges and incorporates by reference paragraphs 1 through 107.

126. This fourth claim for relief challenges the Forest Service's Final Decision Notice/FONSI, 2019 AMP, and 2019 Grazing Permit for violating NFMA and its implementing regulations. This claim for relief is brought under the APA's provisions for judicial review of final agency action, 5 U.S.C. § 706(2)(A).

127. Under NFMA, site-specific projects, authorizations, and activities must be consistent with the governing forest plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e) (1998). A project or activity is not consistent with the Forest Plan if it moves the forest away from the long-term goals set out in the Forest Plan. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1115–16 (9th Cir. 2018).

128. As described above, the Tonto Forest Plan includes goals, objectives standards, and guidelines related to livestock grazing and protection of resources on the forest. The Forest Service's new grazing scheme is not consistent with the Tonto Forest Plan in at least the following respects:

- a. The reintroduction of grazing on the Colcord/Turkey Pasture and the Lost Salt Pasture will damage soil, water, vegetation, wildlife and other resources on those pastures, in violation of Forest Plan direction;
- b. The drastic increase in the amount of grazing allowed on the Bar X and its associated Driveway pastures will move forest resources, including vegetation and soil resources, away from desired conditions and long-term forest goals; and
- c. The adaptive management measures that will supposedly minimize negative effects to forest resources are too nebulous and speculative to ensure compliance with the Tonto Forest Plan.

1 129. The Forest Service’s explanation of how the new grazing scheme is
 2 consistent with the Tonto Forest Plan is riddled with speculation, logical errors, and
 3 unreasonable inferences drawn from scant data. As such, the agency’s conclusion that the
 4 new grazing scheme adopted in the Final Decision Notice/FONSI, 2019 AMP, and 2019
 5 Grazing Permit is consistent with the Tonto Forest Plan was arbitrary, capricious, an
 6 abuse of discretion, and contrary to NFMA. Accordingly, under 5 U.S.C. § 706(2)(A), the
 7 court must set aside the Final Decision Notice/FONSI, 2019 AMP, and 2019 Grazing
 8 Permit.

9
 10 **FIFTH CLAIM FOR RELIEF**
 11 **VIOLATIONS OF THE ENDANGERED SPECIES ACT**
 12 **Arbitrary and Capricious “Not Likely to Adversely Affect” Concurrences**

13 130. Plaintiff realleges and incorporates by reference paragraphs 1 through 107.

14 131. This fifth claim for relief challenges USFWS’ concurrences accompanying
 15 the 2019 BiOp that apply to the Mexican spotted owl and narrow-headed gartersnake as
 16 well as their respective critical habitats. This claim for relief is brought under the APA’s
 17 provisions for judicial review of final agency action, 5 U.S.C. § 706(2)(A).

18 132. USFWS’ concurrence that a particular agency action “may affect, but is not
 19 likely to adversely affect,” a species protected under the ESA or that species’ critical
 20 habitat is reviewed under the APA’s arbitrary and capricious standard. *Oregon Wild v.*
 21 *U.S. Forest Serv.*, 193 F. Supp. 3d 1156, 1163–64 (D. Or. 2016). Insofar as a concurrence
 22 relies on the action agency’s BA, the BA itself can also be reviewed. *Id.* at 1164.

23 133. USFWS’ concurrences with the Forest Service’s determinations that the
 24 new grazing scheme may affect, but is not likely to adversely affect, the Mexican spotted
 25 owl and the narrow-headed gartersnake, as well as their respective critical habitats, are
 26 arbitrary and capricious for reasons including, but not limited to, the following:

- 1 a. USFWS improperly discounted the serious effects of the proposed
2 action on Mexican spotted owls and narrow-headed gartersnakes, most
3 of which are located in areas long closed to grazing;
- 4 b. USFWS's concurrences rely on the BA's inaccurate and misleading
5 descriptions of the proposed grazing scheme's effects and baseline
6 conditions on the Bar X; and
- 7 c. Neither the concurrences nor the Forest Service's BA explain what has
8 changed since 2008, when the agencies agreed that the Colcord/Turkey
9 and Lost Salt Pastures should remain closed to protect Mexican spotted
10 owl PACs.

11 134. Under 5 U.S.C. § 706(2)(A), the court must set aside USFWS'
12 concurrences for Mexican spotted owl and narrow-headed gartersnake and their critical
13 habitats, as well as the Final Decision Notice/FONSI, 2019 AMP, and 2019 Grazing
14 Permit that relied on those concurrences.

15
16 **PRAYER FOR RELIEF**

17 A. Adjudge and declare that the Forest Service's Final EA, Final Decision
18 Notice/FONSI, 2019 AMP, and 2019 Grazing Permit violate NEPA, NFMA, and their
19 implementing regulations, and thus are arbitrary, capricious, an abuse of discretion,
20 and/or not in accordance with law under the judicial review standards of the APA, 5
21 U.S.C. § 706(2);

22 B. Adjudge and declare that USFWS' concurrences concerning the Mexican
23 spotted owl and narrow-headed gartersnake, as well as those species' critical habitats,
24 violate the ESA, and thus are arbitrary, capricious, an abuse of discretion, and/or not in
25 accordance with law under the judicial review standards of the APA, 5 U.S.C. § 706(2);

26 C. Vacate and set aside the Final EA, Final Decision Notice/FONSI, 2019

1 AMP, 2019 Grazing Permit, and USFWS concurrences;

2 D. Order the Forest Service to comply with the requirements of NFMA,
3 NEPA, and their implementing regulations before issuing further grazing authorizations
4 for the Bar X;

5 E. Order the Forest Service and USFWS to reinitiate consultation over the
6 effects of the new grazing scheme on the Mexican spotted owl and narrow-headed
7 gartersnake, as well as those species' critical habitats;

8 F. Order such other declaratory relief and temporary, preliminary, or
9 permanent injunctive relief as may be prayed for hereafter by Plaintiff to remedy
10 Defendant's violations of law;

11 G. Award Plaintiff its reasonable attorney fees, costs, and litigation expenses
12 under the Equal Access to Justice Act and/or any other applicable provision of law; and

13 H. Grant such further and additional relief as the Court deems just and proper
14 in order to remedy the violations of law alleged herein and to protect the interests of
15 Plaintiff, the public, and the lands at issue.

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19
20 Dated: February 12, 2020

Respectfully submitted,

21 /s/ Richard A. Dillenburg
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

In the matter of)
)
MANDATORY INITIAL)
DISCOVERY PILOT PROJECT)
)
_____)

NOTICE TO PARTIES -
MANDATORY INITIAL DISCOVERY
PILOT PROJECT

Effective May 1, 2017, this Court began participating in a Mandatory Initial Discovery Pilot ("MIDP") project approved by the Judicial Conference of the United States. This case is subject to the pilot project. The details of the MIDP are set forth in General Order 17-08, a copy of which is attached. It is the responsibility of the parties to read the General Order carefully to ensure familiarity and compliance with the requirements. Please note that the General Order was amended on November 1, 2018. The amendment eliminates the MIDP's previous requirement that parties file answers even when certain motions have been filed under Federal Rule of Civil Procedure 12, including Rule 12(b)(6). Answers – which trigger the obligation to make MIDP disclosures – are now due within the time specified in Rule 12(a). A Checklist summarizing the key features and deadlines of the MIDP is also attached to this Notice for the parties' convenience. Particular attention should be paid to the deadline for filing the initial and supplemental MIDP responses. Any party seeking affirmative relief must serve a copy of this Notice, including General Order 17-08 and the MIDP Checklist, on each new party when the Complaint, Counterclaim, Crossclaim, or Third-Party Complaint is served.

1 During the Fed. R. Civ. P. 26(f) conference, parties must discuss the MIDP
2 responses and seek to resolve any limitations or objections they have made or intend to
3 make in their responses. A description of the discussion regarding the MIDP responses
4 must be included in the Rule 26(f) report to the Court.

5 MIDP responses are not required to be filed if the parties submit (and the Court
6 approves) a written stipulation by all parties that no discovery will be conducted in the
7 case. Similarly, a party may defer the submission of MIDP responses once for 30 days if
8 all parties file a notice with the Court certifying that they are attempting to settle the case
9 and have a good faith belief that it will be resolved within 30 days of the due date of the
10 MIDP responses. The deadline for final supplementation of the MIDP responses normally
11 will be stated in the Court's Case Management Order. If no deadline is stated, final
12 supplementation must occur by the fact discovery deadline set in the Case Management
13 Order.

14 A notice must be filed with the Court when filing the MIDP responses and
15 supplements, but there is no requirement to file the documents themselves, unless there is
16 an unresolved dispute regarding the responses and supplements that the Court must
17 resolve during the Rule 16(b)(1) conference.

18 After the MIDP responses have been served, discovery under Fed. R. Civ. P. 30-
19 36 and 45 may commence.
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

In the matter of

MANDATORY INITIAL DISCOVERY
PILOT PROJECT IN THE DISTRICT OF
ARIZONA

(AS AMENDED NOVEMBER 1, 2018)

GENERAL ORDER 17-08

IT IS HEREBY ORDERED: Effective May 1, 2017, the United States District Court for the District of Arizona will begin participation in a Mandatory Initial Discovery Pilot Project approved by the Judicial Conference of the United States.

The Mandatory Initial Discovery Pilot Project applies to all civil cases filed on or after May 1, 2017, other than cases listed in Rule 26(a)(1)(B), actions under the Private Securities Litigation Reform Act (“PSLRA”), cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation, and cases under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The discovery obligations addressed in this General Order supersede the disclosures required by Rule 26(a)(1) and are framed as court-ordered mandatory initial discovery pursuant to the Court’s inherent authority to manage cases, Rule 16(b)(3)(B)(ii), (iii), and (vi), and Rule 26(b)(2)(C). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this General Order does not allow the parties to opt out.

A. Instructions to Parties.

1. Any party seeking affirmative relief must serve a copy of the Notice to the Parties of Mandatory Initial Discovery Pilot Project, including this General Order and the

1 MIDP Checklist, on each new party when the Complaint, Counterclaim, Crossclaim, or
2 Third-Party Complaint is served.

3 2. The parties to this litigation are ordered to provide mandatory initial
4 discovery responses before initiating any further discovery in this case. The responses are
5 called for by the Court, not by discovery requests actually served by an opposing party.
6 Part B of this order sets forth the categories of information that must be provided in each
7 party's mandatory initial discovery responses. After the mandatory initial discovery
8 responses have been provided, additional discovery may proceed under the Federal Rules
9 of Civil Procedure and as set forth in a case management order to be entered by the Court.

10 3. Each party's response must be based on the information then reasonably
11 available to it. A party is not excused from providing its response because it has not fully
12 investigated the case, it challenges the sufficiency of another party's response, or another
13 party has not provided a response. Responses must be signed under oath by the party,
14 certifying that it is complete and correct as of the time it was made based on the party's
15 knowledge, information, and belief formed after a reasonable inquiry, and signed under
16 Rule 26(g) by the attorney.

17 4. Parties must provide the requested information as to facts that are relevant to
18 the claims and defenses in the case, whether favorable or unfavorable, and regardless of
19 whether they intend to use the information in presenting their claims or defenses. The
20 parties also must provide relevant legal theories in response to paragraph B.4 below. If a
21 party limits the scope of its response on the basis of privilege or work product, the party
22 must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the
23 Court orders otherwise. If a party limits its response on the basis of any other objection,
24 including an objection that providing the required information would involve
25 disproportionate expense or burden, it must explain with particularity the nature of the
26 objection and its legal basis, and provide a fair description of the information being
27 withheld.

28

1 5. Parties must file answers, counterclaims, crossclaims, and replies within the
2 time set forth in Rule 12(a). Upon a showing that a defendant cannot reasonably respond
3 to a complaint within the time set forth in Rule 12(a), the court may, with or without
4 awaiting a response from the opposing party, grant a one-time extension of up to 30 days
5 to respond to the complaint.

6 6. A party seeking affirmative relief must serve its responses to the mandatory
7 initial discovery no later than 30 days after the first pleading filed under Rule 12(a) in
8 response to its complaint, counterclaim, crossclaim, or third-party complaint. A party
9 filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its
10 initial discovery responses no later than 30 days after it files its responsive pleading under
11 Rule 12(a). In cases removed from state court, the responses must be filed within 30 days
12 of removal if a responsive pleading was filed in state court before removal, and within 30
13 days of the response date set in Rule 81(c)(2) if a responsive pleading was not filed in state
14 court before removal. In all cases, (a) no initial discovery responses need be served if the
15 Court approves a written stipulation by the parties that no discovery will be conducted in
16 the case; or (b) initial discovery responses may be deferred, one time, for 30 days if the
17 parties jointly certify to the Court that they are seeking to settle the case and have a good
18 faith belief that it will be resolved within 30 days of the due date for their responses, and
19 the Court approves the deferral.

20 7. Unless the Court orders otherwise, initial responses and later supplements
21 shall not be filed with the Court, but Parties shall file a notice of service of their initial
22 responses and later supplements.

23 8. The duty to provide mandatory initial discovery responses set forth in this
24 order is a continuing duty, and each party must serve supplemental responses when new or
25 additional information is discovered or revealed. A party must serve such supplemental
26 responses in a timely manner, but in any event no later than 30 days after the information
27 is discovered by or revealed to the party. The Court normally will set a deadline in its Rule
28 16(b) case management order for final supplementation of responses, and full and complete

1 supplementation must occur by the deadline. If the Court fails to set a deadline, final
2 supplementation must occur by the fact discovery deadline set by the Court in its case
3 management order. If new information is revealed in a written discovery response or a
4 deposition in a manner that reasonably informs all parties of the information, the
5 information need not be presented in a supplemental response.

6 9. Parties should include in the Rule 26(f) report to the Court a concise
7 description of their discussions of the mandatory initial discovery responses. The report
8 should also include a concise description of the resolution of any limitations invoked by
9 any party in its response, as well as any existing disagreements requiring resolution by the
10 court. The parties shall attach the initial and supplemental responses and any other
11 discovery requests, objections, and responses involved in any existing disagreements.
12 During the Rule 26(f) conference, parties should discuss the mandatory initial discovery
13 responses and seek to resolve any limitations they have made or intend to make.

14 10. Production of information under this General Order does not constitute an
15 admission that information is relevant, authentic, or admissible.

16 11. Rule 37(b)(2) shall apply to mandatory discovery responses required by this
17 order.

18 **B. Mandatory Initial Discovery Requests.**

19 The parties must respond to the following Court-issued discovery requests without
20 awaiting discovery requests from the opposing parties, and at the times set forth above.

21 1. State the names and, if known, the addresses and telephone numbers of all
22 persons who you believe are likely to have discoverable information relevant to any party's
23 claims or defenses, and provide a fair description of the nature of the information each such
24 person is believed to possess.

25 2. State the names and, if known, the addresses and telephone numbers of all
26 persons who you believe have given written or recorded statements relevant to any party's
27 claims or defenses. Unless you assert a privilege or work product protection against
28 disclosure under applicable law, attach a copy of each such statement if it is in your

1 possession, custody, or control. If not in your possession, custody, or control, state the
2 name and, if known, the address and telephone number of each person who you believe
3 has custody of a copy.

4 3. List the documents, electronically stored information (“ESI”), tangible
5 things, land, or other property known by you to exist, whether or not in your possession,
6 custody or control, that you believe may be relevant to any party’s claims or defenses. To
7 the extent the volume of any such materials makes listing them individually impracticable,
8 you may group similar documents or ESI into categories and describe the specific
9 categories with particularity. Include in your response the names and, if known, the
10 addresses and telephone numbers of the custodians of the documents, ESI, or tangible
11 things, land, or other property that are not in your possession, custody, or control. For
12 documents and tangible things in your possession, custody, or control, you may produce
13 them with your response, or make them available for inspection on the date of the response,
14 instead of listing them. Production of ESI will occur in accordance with paragraph C.2
15 below.

16 4. For each of your claims or defenses, state the facts relevant to it and the legal
17 theories upon which it is based.

18 5. Provide a computation of each category of damages claimed by you, and a
19 description of the documents or other evidentiary material on which it is based, including
20 materials bearing on the nature and extent of the injuries suffered. You may produce the
21 documents or other evidentiary materials with your response instead of describing them.

22 6. Specifically identify and describe any insurance or other agreement under
23 which an insurance business or other person or entity may be liable to satisfy all or part of
24 a possible judgment in the action or to indemnify or reimburse a party for payments made
25 by the party to satisfy the judgment. You may produce a copy of the agreement with your
26 response instead of describing it.

27 7. A party receiving the list described in Paragraph 3, the description of
28 materials identified in Paragraph 5, or a description of agreements referred to in Paragraph

1 6 may request more detailed or thorough responses to these mandatory discovery requests
2 if it believes the responses are deficient. A party may also serve requests pursuant to Rule
3 34 to inspect, copy, test, or sample any or all of the listed or described items, to the extent
4 not already produced in response to these mandatory discovery requests, or to enter onto
5 designated land or other property identified or described.

6 **C. Disclosure of Hard-Copy Documents and ESI.**

7 1. *Hard-Copy Documents.* Hard-copy documents must be produced as they are
8 kept in the usual course of business.

9 2. *Electronically Stored Information (ESI).*

10 a. *Duty to Confer.* When the existence of ESI is disclosed or discovered,
11 the parties must promptly confer and attempt to agree on matters relating to
12 its disclosure and production, including:

13 i. requirements and limits on the preservation, disclosure, and
14 production of ESI;

15 ii. appropriate ESI searches, including custodians and search
16 terms, or other use of technology assisted review; and

17 iii. the form in which the ESI will be produced.

18 b. *Resolution of Disputes.* If the parties are unable to resolve any dispute
19 regarding ESI and seek resolution from the Court, they must present the
20 dispute in a single joint motion or, if the Court directs, in a conference call
21 with the Court. Any joint motion must include the parties' positions and the
22 separate certification of counsel required under Rule 26(g).


23 c. *Production of ESI.* Unless the Court orders otherwise, a party must
24 produce the ESI identified under paragraph B.3 within 40 days after serving
25 its initial response. Absent good cause, no party need produce ESI in more
26 than one form.

27 d. *Presumptive Form of Production.* Unless the parties agree or the
28 Court orders otherwise, a party must produce ESI in the form requested by

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the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.

DATED this 1st day of November, 2018.



G. Murray Snow
Chief United States District Judge

**MANDATORY INITIAL DISCOVERY PILOT PROJECT
CHECKLIST**

Applicability of the MIDP Project General Order:

- Is this a civil case filed prior to May 1, 2017?
- Is the proceeding exempt from initial disclosure under Rule 26(a)(1)(B)?
- Is this an action under the Private Securities Litigation Reform Act?
- Was the case transferred for consolidation by the MDL panel?
 - If the answer is ‘yes’ to any of these questions, the case is not subject to the MIDP.

Rule 26(f) Conference:

- The parties must discuss the mandatory initial discovery responses, which probably will have been made by the time of the conference, and seek to resolve any disagreements on the scope of their responses.
- The parties should include a description of their discussions, including resolved and unresolved disagreements or other discovery issues, in their Rule 26(f) report to the Court.
 - Parties must file the Rule 26(f) report in the CM/ECF system using the *Rule 26(f) Report re MIDP* event under the “MIDP Filings” category.

Responsive Pleadings [answer/counterclaim/crossclaim/reply]:

- Must be filed within the time set in Rule 12(a).

Exception: Upon a showing that a defendant cannot reasonably respond to a complaint within the time set forth in Rule 12(a), the court may, with or without awaiting a response from the opposing party, grant a one-time extension of up to 30 days to respond to the complaint.

Initial Discovery Responses:

- *Party seeking affirmative relief:* must serve its initial discovery responses and file a notice of service with the Court within 30 days after the first responsive pleading filed in response to its complaint, counterclaim, crossclaim, or third-party complaint.
 - Parties must file the notice of service in the CM/ECF system using the *Notice of Service of Mandatory Initial Discovery Responses* event under the “MIDP Filings” category.

- *Party filing a responsive pleading:* must serve its initial discovery responses and file a notice of service with the Court within 30 days after it files its responsive pleading.
 - Parties must file the notice of service in the CM/ECF system using the *Notice of Service of Mandatory Initial Discovery Responses* event under the “MIDP Filings” category.

Exceptions: No discovery responses required if the Court approves a written stipulation by the parties that no discovery will be conducted in the case.

Deadline for serving initial discovery responses may be deferred once for 30 days if the parties jointly certify to the Court that they are seeking to settle the case and have a good faith belief that it will be resolved within 30 days of the due date for their responses.

- Initial responses and later supplements will not be filed with the Court on the date they are served, but a notice of service must be filed with the Court.
 - Parties must file the notice of service for initial responses in the CM/ECF system using the *Notice of Service of Mandatory Initial Discovery Responses* event under the “MIDP Filings” category.
 - Parties must file the notice of service for supplements in the CM/ECF system using the *Notice of Service of Supplemental Mandatory Initial Discovery Responses* event under the “MIDP Filings” category.

Exception: Parties must file initial responses and later supplements with their 26(f) report or discovery dispute filings if there is an unresolved dispute regarding the responses or supplements that the Court must resolve.

- Responses must be signed by the party, under oath, and by counsel under Rule 26(g).
- Limitations to scope of initial response asserted by the parties:
 - If based on a claim of privilege or work product, the party must produce a privilege log under Rule 26(b)(5).

Exception: No privilege log required if the parties agree or the Court orders otherwise.

- If based on any other objection, the party's response must explain with particularity the nature of the objection and provide a fair description of the information withheld.

Electronically Stored Information (ESI):

- If the existence of ESI is disclosed or discovered, the parties must confer and address the issues listed in ¶ (C)(2)(a)(i)-(iii) of the General Order.
- The party must produce its ESI within 40 days after serving its initial response (unless modified by the court).
 - ESI must be produced in the form requested by the receiving party, or if no form is specified, in any reasonable form that will enable the receiving party to access, search, and display the ESI.

Rule 16 Conference and Case Management Order:

- Rule 16 conference should be held within the time specified in Rule 16(b)(2) (as soon as possible but not later than the *earlier* of 90 days after any party has been *served* or 60 days after *appearance* by any party).
- Case management order should set deadline for final supplementation of responses.
 - If the Court fails to set a deadline, final supplementation must occur by the fact discovery deadline set by the Court in its case management order.

Supplemental Responses:

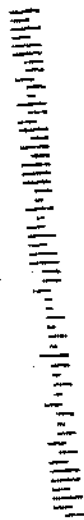
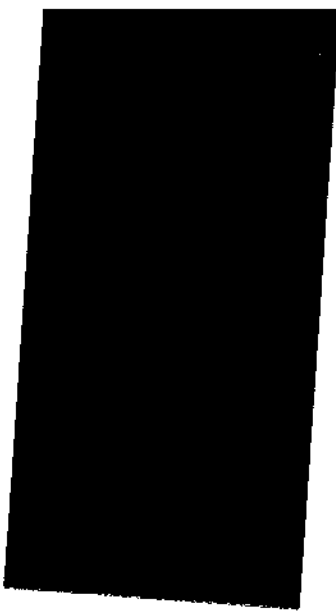
- Must be served in a timely manner, and no later than 30 days after the information is discovered or revealed. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response. A notice of service must be filed when a supplemental response is served.



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U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL
RESOURCES DIVISION



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FEB 21 2020

DOJ MAILROOM

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