No. 21-35936

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILDEARTH GUARDIANS, WESTERN WATERSHEDS PROJECT, and KETTLE RANGE CONSERVATION GROUP,
Plaintiffs-Appellants,

v.

U.S. FOREST SERVICE, *et al*.,
Defendants-Appellees,

and

DIAMOND M RANCH, a Washington General Partnership,
Defendant-Intervenor-Appellee.

On Appeal from the United States District Court
for the Eastern District of Washington
No. 2:20-cv-00223-RMP

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants WildEarth Guardians, Western Watersheds Project, and Kettle Range Conservation Group are all non-profit organizations that have no publicly-traded shares and no corporate parent or affiliates with publicly-traded shares.

LIST OF ACRONYMS

AOI	Annual Operating Instruction
AMP	Allotment Management Plan
DEIS	Draft Environmental Impact Statement
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FSH	Forest Service Handbook
FSM	Forest Service Manual
USFWS	United States Fish and Wildlife Service
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
ROD	Record of Decision
USFS	United States Forest Service
WDFW	Washington Department of Fish and Wildlife

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INTRODUCTION

This case centers on the U.S. Forest Service ("USFS") abdicating its responsibility to properly manage livestock grazing across the Colville National Forest in northeast Washington in order to protect gray wolves – a state-listed *endangered* and USFS-designated *sensitive* species – from undue harm. Plaintiffs' complaint, briefing, and standing declarations below show that the analysis they sought under the National Environmental Policy Act ("NEPA") and National Forest Management Act ("NFMA") would ensure full and fair consideration of actions the agency could take to prevent conflicts between USFS-permitted domestic cattle and still recovering gray wolves reclaiming their historic habitat on the Forest. The procedures that Plaintiffs alleged were violated are necessary for the USFS to fulfill its substantive duties to protect sensitive species from the adverse effects of USFS-permitted activities and to ensure the wolf's long-term viability on the Colville National Forest.

Lethal control actions by the Washington Department of Fish and Wildlife ("WDFW") in response to cattle depredations on this Forest's federal grazing allotments are the leading source of wolf mortality in the state. But had the USFS complied with the requisite procedures, when developing the 2019 Colville Forest Plan or in updating decades-old Allotment Management Plans, it could have incorporated measures that proactively reduce the risk of livestock being predated

upon while grazing in prime wolf habitat. And because the conflict reduction measures Plaintiffs requested the USFS consider are the most effective for avoiding wolf-livestock conflicts within rugged, heavily treed national forest terrain – measures which are not already required by WDFW – these results would redress Plaintiffs' procedural injuries.

Yet the district court, misunderstanding the applicable legal framework and key facts, and disregarding precedent on the relaxed causation and redressability standard for procedural claims, found Plaintiffs lack standing to pursue their NEPA and NFMA claims. The court also held that Plaintiffs' procedural claims challenging the Forest Plan were not ripe for review, even though it is well established that plaintiffs may challenge an agency's failure to follow a required procedure "at the time the failure takes place." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). Because the district court's ruling was both legally and factually wrong, this Court should reverse.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331 because Plaintiffs alleged violations of NEPA, 42 U.S.C. § 4321 *et seq*., NFMA, 16 U.S.C. § 1600 *et seq*., and sought judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. Compl. ¶¶ 9, 120-140 (2-ER-141-42, 184-91). The district court issued an Order on Cross Motions for Summary

Judgment (Order) and entered final judgment on September 10, 2021. 1-ER-2-38. Plaintiffs timely filed their notice of appeal on November 8, 2021. 9-ER-2062. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

(1) Whether Plaintiffs have standing to bring a procedural challenge under NEPA and NFMA alleging the USFS failed to publicly disclose and analyze the environmental impacts of permitting livestock grazing in occupied gray wolf habitat, and refusing to consider science-backed measures known to reduce the risk of wolf-livestock conflicts on the Colville National Forest (the "Colville") at either the programmatic forest planning level or at the site-specific level.

(2) Whether Plaintiffs' NEPA and NFMA claims regarding the 2019 Colville Forest Plan and underlying Final Environmental Impacts Statement ("FEIS")/Record of Decision ("ROD") are ripe for judicial review when they are *procedural* claims alleging the USFS failed to comply with requirements for analyzing management directives that could reduce conflicts between livestock and wolves during the forest planning process.

STATEMENT OF THE CASE

Plaintiffs filed their Complaint on June 17, 2020, challenging the USFS's FEIS/ROD approving the 2019 Colville Forest Plan and the agency's failure to

conduct supplemental NEPA analysis for decades-old Allotment Management Plans. Compl. ¶¶ 120-140 (2-ER-184-91).

At the programmatic level, Plaintiffs alleged the USFS violated NEPA's "hard look" mandate and NFMA's forest planning procedures by adopting the 2019 Colville Forest Plan without: (1) publicly disclosing and analyzing the impacts of livestock grazing on sensitive gray wolves and by refusing to consider grazing management directives that could avoid or reduce the risk of wolf-livestock conflicts on the Forest, and (2) adequately considering how the proposed forest-wide grazing management direction will affect wildlife diversity or provide "methods for regulating" conflicts between wolves and livestock. Compl. ¶¶ 120-123, 130-134 (2-ER-184-86, 188-89).

At the site-specific level, Plaintiffs alleged the USFS violated NEPA's implementing regulations by failing to conduct supplemental NEPA analyses for decades-old Allotment Management Plans dating back to the 1970s and 1980s in light of significant new information and circumstances pertaining to the wolf's historic return to the National Forest and recurring wolf-cattle conflicts on the five federal grazing allotments leased to Diamond M Ranch ("Diamond M"). Compl. ¶¶ 124-129 (2-ER-186-88). Plaintiffs also raised a substantive NFMA claim, alleging that the USFS's 2020 annual grazing authorizations for Diamond M were

inconsistent with the new 2019 Forest Plan's directive for reducing risk factors to "surrogate species." Compl. ¶¶ 135-140 (2-ER-190-91).[1]

On September 10, 2021, the district court dismissed without prejudice all of Plaintiffs' NEPA and NFMA claims for lack of standing without reaching the merits of those claims. 1-ER-3-38.

First, the district court found Plaintiffs failed to demonstrate redressability for their procedural claims because "the lethal removal of gray wolves is the prerogative of the WDFW, a third party not before the Court." 1-ER-18-25. The court presumed that Plaintiffs' interests in keeping wolves from being killed by WDFW in response to conflicts with USFS permitted cattle on the Colville could not be redressed by the USFS actually analyzing the impacts of its grazing program or practices on gray wolves and considering grazing management directives that could effectively mitigate wolf-livestock conflicts. *Id*.

Second, the district court determined that Plaintiffs lacked standing to challenge the 2019 Forest Plan for failing to demonstrate a cognizable harm given the Plan itself does not authorize lethal wolf removals or give anyone "a legal right to graze livestock." 1-ER-26-31. In this holding, the court failed to recognize that Plaintiffs' claims regarding the adequacy of the 2019 Forest Plan FEIS/ROD under

[1] Plaintiffs also raised a claim under the Endangered Species Act that is not at issue in this appeal. Compl. ¶¶ 141-145 (2-ER-191-92).

both NEPA and NFMA's planning regulations are procedural in nature. The court also incorrectly determined that grazing permits issued before the adoption of the new Plan continue to be governed under the old 1988 Forest Plan. 1-ER-29-31. Plaintiffs timely appealed. 9-ER-2062.

LEGAL BACKGROUND

The issues currently on appeal before this Court are purely procedural; however, because Plaintiffs' underlying legal claims are central to the Court's inquiry, Plaintiffs provide a brief overview of the statutes and related policy objectives upon which their merits claims are based.

A. NEPA

NEPA is "essentially a procedural statute." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). The NEPA process ensures that an agency carefully considers information concerning potentially significant environmental impacts, and that the public may scrutinize the information and participate in the decision-making process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The process aims to "foster excellent action" by helping public officials understand environmental

consequences and take actions that "protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c).[2]

To this end, NEPA requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for all major federal actions that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). An EIS must "provide full and fair discussion" of all potentially significant environmental impacts and "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1; *see also* 42 U.S.C. § 4332(2)(C), (E) (EIS and alternatives requirements); 40 C.F.R. Pt. 1502 (same); *Or. Nat. Desert Ass'n ("ONDA") v. Bureau of Land Mgmt. ("BLM")*, 531 F.3d 1114, 1130 (9th Cir. 2008) (agencies must "consider every significant aspect of the environmental impact of a proposed action" in an EIS). This includes studying the direct, indirect, and cumulative effects of the action. *See* 40 C.F.R. §§ 1508.7, 1508.8. An agency must disclose and discuss any "responsible opposing views" and scientific information. *Id.* § 1502.9(b); *Ctr. for Biological Diversity v. USFS*, 349 F.3d 1157, 1167-68 (9th Cir. 2003). NEPA's implementing regulations also require that an agency address "appropriate mitigation measures not already

[2] All citations are to the 1978 Council on Environmental Quality regulations, 40 C.F.R. Part 1500, which were in effect at the time the USFS issued the challenged Forest Plan FEIS/ROD.

included in the proposed action" and "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §§ 1502.14, 1502.16(h).

An agency's duties do not end upon completing a NEPA analysis, however; agencies must prepare a supplemental NEPA analysis when "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" emerge. 40 C.F.R. § 1502.9(c)(1)(ii).

Approval of a resource management plan (*e.g.*, a "forest plan") is considered a major federal action with significant environmental effects, thus requiring an EIS. *See e.g. ONDA v. BLM*, 625 F.3d 1092, 1099 (9th Cir. 2010); 36 C.F.R. § 219.5(a)(2)(i)(2012). In addition, the USFS must prepare NEPA analyses for proposed site-specific actions implementing the Forest Plan, like livestock grazing. *See, e.g., Natural Res. Def. Council v. Morton*, 388 F. Supp. 829, 840 (D.D.C. 1974), *aff'd without opinion*, 527 F.2d 1386 (D.C. Cir. 1976) (issuance or renewal of a federal livestock grazing permit is a major federal action triggering NEPA review).

B. NFMA

NFMA establishes a two-step process for forest planning. 16 U.S.C. § 1604(a). First, the USFS must develop, maintain, and revise forest plans for each national forest. *Id.* § 1604(a). The forest plan guides natural resource management activities forest-wide, setting management goals, objectives, and standards, desired

conditions, and monitoring and evaluation requirements. Second, once a forest plan is adopted, all site-specific actions authorized thereunder must be consistent with the broader forest plan. *Id*. § 1604(i); 36 C.F.R. § 219.15 (2012); 36 C.F.R. § 219.10 (e)(1982).[3]

NFMA also requires that the USFS adopt regulations specifying guidelines for forest plans. *Id*. § 1604(g)(3); *see* 36 C.F.R. § 219 *et seq*. Given the important role of National Forests in biodiversity conservation, NFMA included a provision specifically mandating that forest planning "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. §1604(g)(3)(B); 36 C.F.R. § 219.26 (1982).

Procedurally, to ensure wildlife diversity is adequately considered "throughout the planning process[,]" the 1982 NFMA planning regulations applicable here require the USFS to evaluate wildlife diversity, in terms of prior and present conditions, based on inventories that include "quantitative data." 36 C.F.R. § 219.26 (1982). The agency must then use this information to consider

[3] These planning regulations are now superseded, but the transition provisions of the 2012 NFMA planning rule allowed the agency to follow and adopt the 1982 NFMA planning procedures for forest plan revisions that were underway prior to the adoption of the 2012 rule. Because the USFS elected to apply the 1982 NFMA planning provisions for the 2019 Colville Forest Plan, it must comply with the 1982 regulations quoted herein. 5-ER-1037 (ROD).

how wildlife diversity will be affected by the proposed management practices under each forest planning alternative. *Id*.

Substantively, the 1982 rule requires the USFS to adopt management direction in forest plans that ensures fish and wildlife habitat will be managed "to maintain viable populations of existing native and desired nonnative vertebrate species in the planning area [*i.e*., throughout the relevant national forest]." 36 C.F.R. § 219.19; *see also Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 961-62 (9th Cir. 2002). A "viable population" is defined as one "which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." 36 C.F.R. § 219.19. The USFS's duty to ensure viable wildlife populations within each National Forest "applies with special force to sensitive species" like gray wolves on the Colville. *Native Ecosystems Council v. USFS*, 428 F.3d 1233, 1249 (9th Cir. 2005).

Another procedural requirement of the 1982 rule is the USFS's obligation to evaluate the capability and suitability of National Forest System lands for domestic livestock grazing during the forest planning process. 36 C.F.R. § 219.20. Capability refers to the potential of an area of land to produce particular resources, such as forage to support the needs of both native wildlife and domestic livestock, which in turn depends on the physical components of the area. *Id*. § 219.3. Suitability, on the other hand, is the *appropriateness* of applying certain

management practices to a particular portion of the forest, "as determined by an analysis of the economic and environmental consequences and the alternative uses forgone." *Id*. In determining the suitability of lands for grazing, the USFS must expressly consider possible conflict between livestock and the Forest's wild animal populations, and methods of regulating such conflicts. *Id*. § 219.20(b).

C. Forest Service Sensitive Species Policy Directives

The Forest Service Manual ("FSM" or "Manual") articulates directives aimed at fulfilling the agency's wildlife diversity and viability obligations under the NFMA with regards to "sensitive species." 9-ER-1963-80; Addendum pp.15-21 (FSM 2600, Ch. 2670). Sensitive species are "plant and animal species identified by a Regional Forester for which population viability is a concern[.]" 9-ER-1978.

Accordingly, the Manual directs the USFS to ensure that specific management objectives for sensitive species conservation are included in forest plans. 9-ER-1973-74; Addendum p. 19 (FSM Ch. 2670, §§ 2670.44, 2672.32). Further, when a state or federal wildlife agency has an approved recovery plan for a particular species, the USFS must integrate that plan's recovery objectives into its own forest plans. *Id*. § 2670.44. The USFS must also review and document possible effects of all permitted programs and activities on sensitive species through "biological evaluations" as part of the NEPA process to ensure sensitive

species "receive full consideration in the decisionmaking process" and that USFS actions "do not contribute to loss of viability" of any such species. *Id*. §§ 2670.32; 2672.4; 2672.41. When actions on National Forest System lands "may have a significant effect on sensitive species population numbers or distributions" the USFS is directed to establish management objectives in cooperation with the states. *Id*. § 2670.32.

FACTUAL BACKGROUND

A. The Gray Wolf's Historic Return to Washington and Current Status

Although gray wolves were once an abundant native species in Washington, with as many as 5,000 ranging throughout the state, the species was persecuted with more passion and zeal than any other animal in U.S. history. Wolves had been largely extirpated from Washington by the 1930s through trapping, poisoning and shooting. 7-ER-1647, 1655-60.

By the time the Endangered Species Act ("ESA") passed in 1973, very few wolves remained in the lower 48 states and the gray wolf (*canis lupus*) was among the first species to be listed as endangered and afforded federal protections under the Act. 7-ER-1675-79. In 1980, when the gray wolf was added to Washington State's list of endangered species, there were few reports of wolf sign in the state. *Id*. But, in 1995-96, the U.S. Fish & Wildlife Service ("USFWS") reintroduced wolves to Yellowstone National Park and central Idaho as part of ESA recovery

efforts. *Id*. As this Northern Rockies wolf population expanded, it became a source population for wolves dispersing into the Pacific Northwest in the early 2000s. 7-ER-1660-64.

In 2008, Washington's first two wolf packs since the 1930s were confirmed. *Id*. With less than a dozen wolves to start, the tiny population tripled in size by 2012 (still only totaling around 40 wolves statewide). 3-ER-251. Since 2016, however, the state's annual population growth rate has mostly hovered around 3% to 6%. *Id*. At the end of 2019, WDFW counted 108 wolves in 21 packs of which 10 had successful breeding pairs. 3-ER-239. Most of Washington's wolf population growth has occurred in its northeast corner, encompassing the Colville National Forest, and is comprised of wolves both dispersing from neighboring states and southward from British Columbia, Canada. 3-ER-244-54.

Wolf conservation and management at both the federal and state levels have been fraught with controversy. Several attempts by USFWS to prematurely remove or curtail federal ESA protections for gray wolves have been found unlawful by federal courts. *See Defenders of Wildlife v. USFWS*, -- F.Supp.3d --, 2022 WL 499838, *2-3 (N.D. Cal., Feb. 10, 2022) (describing series of cases invalidating wolf delisting rules). Notably, in vacating the most recent of such attempts, the District Court for the Northern District of California expressly observed that because "U.S. Forest Service land management plans in the West Coast states do

not contain standards and guidelines specific to wolf management[,]" despite "sensitive species listings," it was arbitrary for the USFWS to conclude that wolves inhabiting these federal public lands are adequately protected when "delisted" from the ESA. *Id*. at *14.

This recent ruling, however, did not restore federal protections for wolves in eastern Washington. In 2011, Congress legislatively delisted gray wolves in the Northern Rockies region through an Appropriations Act rider, which removed ESA protections for gray wolves in Montana, Idaho, Wyoming, and the eastern one-third of Washington and Oregon. 7-ER-1677. Since then, wolf populations in those areas have been managed by state wildlife agencies under the auspices of individual state wolf management plans.

Though federally delisted in the state's eastern one-third, the gray wolf remains a state-listed endangered species throughout Washington. 3-ER-245 (map). Under state law, once a species is listed as endangered, WDFW is required to write a species recovery plan with target population objectives, an implementation plan to reach those objectives, and criteria for delisting, education, and monitoring. WAC 220-610-110 §11.1. In 2011, WDFW finalized its Wolf Conservation and Management Plan ("WA wolf plan"). 7-8-ER-1637-1937.

The WA wolf plan allows livestock producers or state agency staff to kill wolves in response to "repeated" livestock losses and/or attacks. 8-ER-1725-29.

WDFW's lethal removal protocol is operative despite wolves still being a state-listed endangered species that has yet to reach the state's minimum recovery objective, and despite acknowledging that recent studies show lethal wolf removal programs have limited to no effect on reducing the recurrence of livestock depredations. 8-ER-1721. And though the plan generally provides that the State or others must have tried nonlethal measures that failed to resolve wolf-livestock conflicts before WDFW will authorize lethal control, 8-ER-1728, there are no mandatory requirements in place to define the parameters of the state's lethal wolf removal protocol. In other words, the nonlethal mitigation measures set forth in the WA wolf plan and WDFW's checklist protocol are not binding on WDFW or any federal agency, they are purely "guidance." 3-ER-233-35 (checklist protocol); *Wildlands v. Woodruff*, 151 F. Supp. 3d 1153, 1161-63 (W.D. Wash. 2015) (describing discretionary nature of WA wolf plan and lethal control protocol).

Instead, WDFW decides on a case-by-case basis whether a livestock producer claiming wolf-caused losses employed some undefined level of mitigation using its checklist as a guide. 3-ER-233-37. The lack of any specific requirements for triggering the state's lethal wolf removal is notable for two key reasons: (1) some measures on WDFW's checklist are not effective measures for deterring wolves, particularly on large federal grazing allotments, meaning producers may be credited for deploying nonlethal measures even though such

measures are ineffective or untested, *see e.g.*, 5-ER-967 (scientific literature review used to develop WDFW's lethal control protocol), and (2) while WDFW does *not* mandate that livestock producers who graze on federal lands employ measures shown to be most effective for avoiding conflicts with wolves in heavily treed and remote areas, the USFS has the authority to do so as a precondition to authorizing grazing on National Forests. *See infra Section I.C*.

Between 2012 and 2020, WDFW exercised its discretion to kill 34 wolves from 10 packs, resulting in the near or total destruction of 4 packs in response to conflicts with livestock. Of these 34 lethal control actions, over 90% were either completely or partially in response to depredations of federally permitted cattle grazing on the Colville National Forest, with the vast majority being killed largely at the behest of a single permittee—Diamond M Ranch.[4] *See* 2-ER-161, 168-70 (Compl. ¶¶61, 81-87).

B. The USFS's Management of Livestock Grazing and Conflicts With Wolves on the Colville National Forest

[4] Reportedly the largest cattle producer in Washington, the USFS has allowed Diamond M to graze its cattle on the Colville National Forest for over 75 years. The USFS most recently reissued a ten-year term grazing permit to Diamond M in 2013 authorizing it to graze 736 cow/calf pairs (1,472 head of cattle) on five allotments collectively spanning over 74,000 acres in the Colville's northern portion and Kettle River Range. 7-ER-1617-26 (term permit for grazing on Churchill, Lambert, C.C. Mountain, Hope Mountain, and Copper-Mires allotments). All the site-specific NEPA analyses and associated AMPs for these allotments date back to the 1970s and 1980s. 9-ER-1989-2022.

The 1.1-million-acre Colville National Forest spans Ferry, Stevens, and Pend Oreille Counties in northeastern Washington. 6-ER-1347-48. Geographically considered part of the Northern Rockies, with the Kettle River Range on the western half and the Selkirk Mountains defining the eastern half, the Colville is mostly comprised of densely forested, rugged terrain: prime habitat for wide-ranging native carnivores with large territories like wolves. 6-ER-1349.

Because it is densely forested, the majority of the Colville provides little to no forage for domestic cattle. 6-ER-1356-57. Nevertheless, the Forest has a long history of being widely grazed by livestock. Currently, the USFS administers nearly 70% of the Forest (over 745,000 acres) as grazing allotments. *Id*. But, according to the agency's own range suitability assessment, only about 38% of this total allotment acreage is actually "suitable" for cattle grazing. 6-ER-1366.

Every summer, the USFS allows approximately 10,000 cows and young calves to graze the Colville's rugged, dense forests from June 1st until mid-autumn, overlapping the period when wolves are rearing offspring and active around their dens and rendezvous sites.[5] 7-ER-1491-92. In fact, the USFS recently proposed restocking vacant allotments—adding even more cattle to areas with minimal forage that are now occupied by wolves. 3-ER-225-26.

[5] Rendezvous sites are specific areas that wolf packs use to rest, gather, and play after the pups emerge from the den. 7-ER-1668-70. From spring until fall, pack activity is centered around its den and rendezvous sites. *Id*.

The USFS uses the NEPA process to evaluate the effects of proposed grazing management on two levels: a programmatic EIS is used to develop forest plans and evaluate management direction for forest-wide grazing practices, whereas site-specific environmental analyses are used to develop Allotment Management Plans ("AMPs") for individual allotments. *See* 6-ER-1356-85 (FEIS); 6-ER-1190-92, 6-ER-1230-31, 6-ER-1235-37 (Forest Plan).

Through a programmatic EIS, forest plans are intended to identify the capability and suitability of allocating areas of National Forests for livestock grazing, and to establish forest-wide direction for grazing activities, including objectives, standards, guidelines, and monitoring requirements that ensure permitted grazing does not adversely affect sensitive species and other natural resources. 36 C.F.R. §§ 219.11, 219.19, 219.20, 219.26, 219.27; Addendum pp. 22-37 (Rangeland Management Policy Handbook, FSH 2209.13, Ch. 90, §91).

Allotment Management Plans prescribe the manner in, and extent to which, grazing operations on a particular allotment will be conducted in order to meet management goals and objectives, including protecting special resources occurring on the lands involved and mitigating adverse environmental impacts. 36 C.F.R. §§ 222.1(b)(2), 222.2; 6-ER-1358; Addendum p. 34 (FSH 2209.13 Ch. 90, § 94.1); *see also ONDA v. USFS*, 312 F.Supp.2d 1337, 1340 (D. Or. 2004). AMPs must be consistent with the governing forest plan. 36 C.F.R. § 222.2.

Though the USFS's regulations direct the agency to update AMPs as needed, *id*., it has never done so for the vast majority of grazing allotments on the Colville. 3-ER-221-23. Nearly all of the existing 53 AMPs date back to the 1970s and early 80s, meaning the USFS never updated these site-specific management plans to conform to the old 1988 Forest Plan. *Id*. Further, because the AMPs for this Forest were developed at a time when wolves were still eradicated from most of the contiguous United States, the USFS never considered including site-specific grazing management direction to help avoid or reduce the risk of wolf-livestock conflicts. *See e.g*., 9-ER-2001-010 (environmental assessment of grazing impacts to wildlife for development of 1979 AMP).

In light of the wolf's return to the Colville and the series of high-profile conflicts and wolf removals that subsequently ensued, Plaintiffs called upon the USFS to conduct supplemental NEPA analyses to evaluate the impacts grazing has on this sensitive species and to consider updating decades-old AMPs to include conflict reduction measures. 3-ER-289-301. Along with the letter, Plaintiffs submitted recommendations from state and federal wildlife agencies for reducing wolf-livestock conflicts and pointed to the large body of science that has developed over the last decade indicating that: (1) killing wolves does not decrease wolf-livestock conflict; (2) nonlethal measures well-suited for remote and forested landscapes are effective at deterring conflicts; (3) killing wolves may actually lead

to more conflicts with livestock; (4) wolves play an incredibly important role in balancing ecosystems, and (5) removing wolves from their native ecosystems has cascading negative ecological consequences. *Id*.; 3-5-ER-302-1030. Despite these submissions, the USFS failed to respond or supplement its outdated NEPA analyses to update AMPs with wolf-livestock conflict reduction measures.

Grazing is then administered on National Forests through a permit system. 6-ER-1358. Each permit, which is typically for a 10-year term, grants a license to graze on a particular allotment and establishes the number, kind, and class of livestock to be grazed and the period of authorized use. 36 C.F.R. §§ 222.1–222.4; 43 U.S.C. § 1752; *ONDA v. USFS,* 465 F.3d 977, 980 (9th Cir. 2006). Grazing permits incorporate AMPs and any other grazing instructions and must also be consistent with the governing forest plan. *Id*.; *see also Buckingham v. Sec'y of U.S. Dep't of Agric*., 603 F.3d 1073, 1077 (9th Cir. 2010). Agency regulations instruct the USFS to modify the terms and conditions of grazing permits if needed to conform to changes in law, the development or revision of an AMP, or any other management needs, including the protection of special resources. 36 C.F.R. § 222.4; *see also* 7-ER-1618 (Diamond M permit). Likewise, NFMA's 1982 planning rule directs the Forest Supervisor to ensure that all outstanding permits and other instruments authorizing the use of affected lands are made consistent

with a forest plan as soon as practicable after the plan's approval. 36 C.F.R. § 219.10(e)(1982).

Typically, the USFS also issues yearly instructions to grazing permittees through annual operating instructions or plans ("AOIs"). Addendum pp. 34-35 (FSH 2209.13, Ch. 90, § 94.3). AOIs are used to respond to conditions that the USFS could not or may not have anticipated and planned for in the AMP, such as impacts to an imperiled species that was previously absent or undetected but has since returned or is documented in the area. *ONDA v. USFS*, 465 F.3d at 980-81. As this Court observed, AOIs are final agency actions that must be consistent with forest plans. *Id*. at 983. While it was the practice of the USFS to issue AOIs for permittees on the Colville,[6] the agency argued below that it no longer issues AOIs for grazing on this National Forest—only "Grazing Management Strategy Notes." 1-ER-30. Regardless of the label, the USFS has never incorporated wolf-livestock conflict reduction measures into its annual grazing instructions.

C. The Colville Forest Plan Revision Process

In 2011, the USFS publicly released its "Proposed Action" for revising the

[6]*Compare e.g.*, 7-ER-1506-22 with 3-ER-197-211, showing no meaningful distinction between what the USFS previously labeled AOIs and recently issued guidelines from annual meetings with permittees; *see also* 3-ER-221, 7-ER-1543, 8-ER-1957, 7-ER-1477, 7-ER-1614 (all discussing use of AOIs).

Colville's outdated 1988 Forest Plan, specifically noting the need to protect wolf populations naturally returning to their historic habitat on the Colville. 8-ER-1938-44. This formal scoping document, intended to elicit public feedback to develop planning alternatives in more detail, acknowledged wolves were on the Forest, including den and rendezvous sites with pups, and that the revised Plan "needs to address how these sites would be protected." 8-ER-1941-42 (further proposing to use "the best available science and approaches used in other conservation plans to develop management direction for [wolf] den and rendezvous site protection.") Numerous public comments in response to the 2011 Proposed Action also highlighted concerns over potential wolf-livestock conflicts and requested the USFS "[d]isclose the relationship between the revised Forest Plan and the [WA wolf plan]." 7-ER-1630-36.

But after wolf-livestock conflicts and state-sanctioned wolf killings arose in 2012, and continued throughout the Colville Forest Plan revision process, the USFS abandoned its proposal to protect core wolf areas on the Forest. In fact, both the draft and final programmatic EISs for the revised Forest Plan contain only a couple passing references to wolves—devoid of any analysis of how proposed grazing management might affect this state-listed endangered and USFS sensitive species. *See e.g.*, 6-ER-1351, 1355 (FEIS simply listing gray wolf's status).

The omission of this key wildlife issue from the public-facing analysis for the Forest Plan revision was deliberate; the USFS knows that the primary risk factor to wolves in the region is human-caused mortality, particularly illegal killing and lethal control actions in response to conflicts with livestock. *See* 7-ER-1647 (WA wolf plan observing that these are the leading sources of wolf mortality in the northwestern U.S.). That is why the USFS has recognized that the best way for the agency to help ensure viable populations of wolves on National Forests, and to support wolf recovery, is to proactively reduce the risk of conflicts between wolves and livestock. *See e.g.*, FEIS for Blue Mountains Forest Plan revision[7][8]; 9-ER-2041-42 (USFS's 2006 Biological Evaluation for a cluster of grazing allotments stating: "2 issues drive wolf recovery: 1. providing a wild ungulate prey base, and 2. **keeping them from getting killed [], which translates into keeping them from contact with livestock**[.]"); 7-ER-1604 (acknowledging that "[m]aintaining wild, large predators on the landscape involves reducing the likelihood that they prey on

[7] *Malheur, Umatilla, and Wallowa-Whitman National Forests Land Management Plans, Final Environmental Impact Statement*, U.S. DEP'T OF AGRIC., 225-29, 234-41, 279-86 (2018), available online at (last visited March 17, 2022) https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd584614.pdf [hereinafter Blue Mountains FEIS]. Courts may consider extra-record evidence that allows plaintiffs to establish standing. *Cent. Sierra Env't Res. Ctr. v. USFS*, 916 F. Supp. 2d 1078, 1086 (E.D. Cal. 2013) (*citing Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir.1997)).

livestock."); 7-ER-1476-77 (internal USFS memos acknowledging this primary risk factor); 7-ER-1494 (draft outline of analysis for wolves highlighting need to discuss livestock conflicts and protecting core areas).

The USFS was also well-informed on measures it could adopt to help reduce wolf-livestock conflicts on the Colville. 8-ER-1718-20, 1779-81 (measures recommended by the WA wolf plan); 7-ER-1565, 3-ER-337-38 (USFWS recommended measures to reduce effects of federal grazing to wolves), 7-ER-1604-07, 7-ER-1566-67 (measures internally proposed in 2016). Most notably, other USFS officials for the Pacific Northwest region (Region 6) had already analyzed how the agency could protect wolves from conflicts with livestock at the forest planning level during the plan revision process for neighboring national forests in the Blue Mountains range of eastern Oregon and southeast Washington, where wolves were similarly dispersing from the Rockies and reclaiming their historic habitat. *See* Blue Mountains FEIS, *supra* note 7, at 280-86; 7-ER-1452-53 (Regional Range Program Manager sharing related forest plan standards with the Colville's staff). And the Colville's lead wildlife biologist for the Plan revision had outlined what an effects analysis for wolves at the planning level should include. 7-ER-1494-95 (noting analysis should "especially speak to anything meant to reduce disturbance around dens and rendezvous areas, conflicts with livestock, etc."). Yet

none of this critical information and analysis was included in the Colville's public-facing forest planning documents.

Perhaps unsurprisingly, these deliberate omissions were made amid rising public controversy and media attention over repeated wolf killings in response to depredations of USFS permitted cattle on the Colville (mostly linked to Diamond M Ranch). 5-ER-862-66, 6-ER-1390-92, 7-ER-1553-61, 7-ER-1531-42, 7-ER-1465-69, 7-ER-1461-62, 7-ER-1491-93, 7-ER-1454-58, 7-ER-1428-36. Conservation organizations, concerned individuals, and even federal agency employees all called upon the USFS to manage grazing in a manner that would reduce the risk of recurring conflicts and thus result in far fewer lethal wolf removals. *See e.g.* 7-ER-1544-45 (USFS employee to Colville managers), 7-ER-1615-16, 6-ER-1388-92, 7-ER-1497-1505, 7-ER-1523-30 (letters from Public Employees for Environmental Responsibility "PEER"); 7-ER-1596-97 (Forest Plan DEIS comments). Eventually even Washington's Governor urged WDFW and the USFS to work together in implementing changes on federal grazing allotments to reduce the conflicts. 5-ER-1094 (includes link to full letter).

Meanwhile, local ranchers who graze cattle on the Forest, including Diamond M, sought to declare a "state of emergency" over the growing wolf population and pressured WDFW to swiftly eliminate entire wolf packs once livestock depredations were suspected; the Colville's Range Manager (Travis

Fletcher) voiced agreement for the proposition that full pack removal was the only solution once depredations of livestock occur. 7-ER-1562 (link to county hearing with local ranchers and Mr. Fletcher).

Despite all the public attention and the agency's knowledge of science-backed conflict reduction measures, the managers of the Colville elected to ignore the issue at all planning levels:

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

7-ER-1570-71 (statement from Range Lead and Forest Supervisor agreeing), 7-ER-1540-41, 7-ER-1553 (similar sentiments).

Conservation groups, including Plaintiffs, filed formal objections over the FEIS's failure to consider effects to wolves as well as over the lack of a proper forest-wide grazing suitability analysis. 7-ER-1437, 1442-46; 7-ER-1419-27. In response, the USFS took the position that it was under no obligation to even consider adopting measures to mitigate conflicts with USFS permitted livestock grazing—the primary threat to wolf recovery and viability in Washington. 7-ER-1408 (USFS's objection response stating: "There is no reason for the FS to place itself in this decision space that is managed between the regulatory authority responsible for wolves and the livestock operator.")

SUMMARY OF THE ARGUMENT

The district court erred in two main ways. First, the court erred by failing to recognize that Plaintiffs satisfied the relaxed standard for showing causation and redressability for procedural injuries. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011). Plaintiffs met their burden by demonstrating there is "some possibility" that, had the USFS complied with NEPA and NFMA's procedures by properly analyzing the impacts of USFS-permitted grazing on wolves and measures that can reduce the risk of wolf-livestock conflicts, it might have incorporated such measures into its grazing management directives for the revised 2019 Forest Plan and/or updated AMPs. *Mass. v. E.P.A.*, 549 U.S. 497, 518 (2007). In turn, they showed these measures would likely reduce the circumstances by which WDFW is called upon to lethally remove wolves on the Colville, protecting Plaintiffs' interests in the environment there. Accordingly, there is a "causal connection" between Plaintiffs' ultimate injury-in-fact (killing of wolves in response to cattle depredations on the Colville) and "the conduct complained of" (the USFS's failure to analyze grazing impacts to wolves and consider imposing mandatory grazing management directives that mitigate the problem). *See Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984 (9th Cir. 1994) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs also satisfy the "relaxed" redressability standard for procedural injuries. This Court's precedent does not require plaintiffs alleging procedural injuries to show that the procedures they request would certainly lead to a particular result, only that the procedures could influence the agency's decision-making. *E.g., WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1156 (9th Cir. 2015). By holding that Plaintiffs could not prove standing unless they essentially showed that a decision in their favor would result in no lethal wolf removals by WDFW, the district court overlooked the relaxed redressability standard for procedural claims and improperly required Plaintiffs to demonstrate that a certain substantive outcome would result.

Second, the district court erred when it held Plaintiffs' claims are not ripe for review. Procedural claims against a programmatic decision like a forest plan are ripe as soon as the agency promulgates the underlying FEIS/ROD, even before it approves a site-specific implementing action. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998); *Kraayenbrink*, 632 F.3d at 486. Here, the USFS's procedural violations of NEPA and NFMA resulted in a revised Forest Plan that fails to comply with regulatory requirements to provide grazing management direction that mitigates wolf-livestock conflicts. Consequently, Plaintiffs' interests are immediately harmed by this procedural flaw and their claims against the 2019 Colville Forest Plan are thus ripe for review.

STANDARD OF REVIEW

The Court reviews a grant of summary judgment and determinations on standing de novo. *Cottonwood Env't. Law Ctr. v. USFS*, 789 F.3d 1075, 1079 (9th Cir. 2015).

ARGUMENT

Plaintiffs have Article III standing because a revised programmatic NEPA analysis for the new Colville Forest Plan, as well as supplemental site-specific NEPA analyses for outdated AMPs, could redress their procedural injuries. If the USFS were to at least consider grazing management directives proven to reduce conflicts between wolves and livestock on national forest grazing allotments, it might require permittees to alter their grazing in ways known to reduce wolf-livestock conflicts. It does not matter that the state wildlife agency is the entity to ultimately authorize lethal wolf removal in response to repeated livestock depredations—if the USFS imposed measures to prevent conflicts from recurring, those lethal removals would not be called for in the first instance.

I. Plaintiffs Have Standing to Sue.

Plaintiffs have made the requisite showing for Article III standing under the Constitution. To have standing, a plaintiff must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative,

that the injury will be redressed by a favorable decision.

Friends of the Earth v. Laidlaw Env't. Services, 528 U.S. 167, 180-81 (2000), quoting *Lujan*, 504 U.S. at 560-61. Plaintiffs have done so here.

A. Plaintiffs Have Demonstrated Injury.

To demonstrate standing for a procedural claim – such as the violations of NEPA and NFMA asserted here – a plaintiff "must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Kraayenbrink*, 632 F.3d at 485. For an environmental interest to be "concrete," there must be a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *Id*. "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw*, 528 U.S. at 183. Once plaintiffs seeking to enforce a procedural requirement establish injury, "the causation and redressability requirements are relaxed." *Kraayenbrin*k, 632 F.3d at 485.

Plaintiffs' standing declarations set forth their interests in wolf recovery in Washington, their geographic nexus to the Colville National Forest, and the injuries they have suffered from the USFS's failure to even consider measures to avoid and mitigate wolf-livestock conflicts on the Colville. *See* 2-ER-104-18

(Declaration of Timothy Coleman); 2-ER-119-36 (Declaration of Jocelyn Leroux). For example, Declarant Timothy Coleman, who lives just outside the National Forest boundary, has been recreating on the Colville for 38 years. 2-ER-108-09 (Coleman Decl. ¶¶ 10, 11). He states, "The recovery of wolves, lynx and grizzly bear are important to me from an ecological, ethical, and spiritual standpoint. Apex carnivores belong on our public lands and are critical to healthy functioning ecosystems." 2-ER-111 (*Id*. ¶ 17). Mr. Coleman photographed a wolf on the Forest in 2017, found a wolf pup shot dead on the Lambert allotment in 2014 (leased to Diamond M), and described in detail his personal unavailing efforts to advocate for better management of wolf-livestock conflicts on the Forest after that discovery. 2-ER-108, 113-14 *(Id*. ¶¶ 10, 25). Both declarants described their recreational and aesthetic interests in observing wolves and wolf sign on the Colville and being able to enjoy healthy, diverse native ecosystems, complete with thriving populations of ecologically important apex predators on the Forest. *See* 2-ER-106-14 (Coleman Decl., ¶¶ 6, 9-25); 2-ER-121-24, 126-36 (Leroux Decl. ¶¶ 5-8, 11-12, 15, 21, 26-39). As the Supreme Court has recognized, such "desire to use or observe an animal species," *Lujan*, 504 U.S. at 562-63, or averred interests in "aesthetic and environmental well-being," *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), are cognizable interests for standing.

Plaintiffs also have strong interests in being engaged in decisions around management of public lands and wildlife and in having the USFS comply with federal law. *See, e.g.*, 2-ER-113 (Coleman Decl. ¶¶ 23-24), 2-ER-126-28 (Leroux Decl. ¶¶ 21-22). The risk that important environmental consequences will be overlooked due to an agency's violation of NEPA "is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have." *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).

But that is exactly what has happened here. By burying its head in the sand in the face of public controversy over wolves, the USFS has overlooked its authority to manage livestock grazing in ways that could avoid wolf-livestock conflicts entirely, or, at a minimum, substantially reduce them. As declarant Jocelyn LeRoux explained, "because the Forest Service has never considered the effects of its livestock grazing authorizations to Diamond M or other permittees on recovering gray wolves in a NEPA analysis—either at the Allotment Management Plan level or the Forest Plan level—it has never considered that those authorizations are the leading contributor to anthropogenic wolf mortality in Washington. Neither has the Forest Service provided information about the impacts of the grazing it authorizes on wolf recovery or the environment to the

public." 2-ER-127-28 (LeRoux Decl. ¶ 22). Mr. Coleman explained how his interests are harmed by the USFS's abdication of this responsibility:

> Knowing that nearly 90% of the wolves killed by WDFW to date have been in response to conflicts with cattle authorized by the Forest Service to graze the Colville National Forest, without the Forest Service ever publicly evaluating and carefully considering measures to prevent these conflicts from happening, in the Forest Planning process or in other grazing authorizations, harms my interests in seeing a long-term viable wolf population maintained on these public lands. The Forest Service has the authority to require grazing permittees to take measures such as herding techniques that keep cattle moving away from core wolf areas, avoiding habituation that harms vegetation and wildlife, requiring GPS component to ear tags the agency already requires to make calves more easily locatable and by providing daily and near daily human presence particularly during evening, night and early mornings when wolves are most active to prevent predation of livestock.

2-ER-114-15 (Coleman Decl. ¶ 26).

The NEPA and NFMA procedures that Plaintiffs allege were violated were meant to protect these interests by requiring the agency to account for adverse effects to sensitive species from the USFS's management of livestock grazing. The NFMA forest planning procedures at issue here require forest plans provide adequate protections for sensitive species like gray wolves from USFS permitted programs and site-specific activities like livestock grazing. 36 C.F.R. § 219.19, § 219.26 (1982 rule's wildlife diversity and viability provisions); 36 C.F.R. § 219.20 (duty to consider conflicts between wildlife and livestock and methods for regulating such conflicts in determining the suitability of lands for grazing); *see also* 9-ER-1963-80; Addendum pp. 15-21 (Sensitive Species Policy).

Likewise, the NEPA process, by requiring the USFS to take a "hard look" at the grazing management choices before it and how they affect sensitive wildlife populations, and to disclose that data and analysis to the public, is intended to ensure "the most intelligent, optimally beneficial decision will ultimately be made." *ONDA v. BLM*, 531 F.3d at 1120. This Court has consistently observed that environmental plaintiffs are "surely harmed" by the "added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comments) of the likely effects of their decision" because "NEPA's object is to minimize [] the risk of uninformed choice." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003). Plaintiffs have thus met the "injury" element of standing. *Kraayenbrink*, 632 F.3d at 485.

B. The Analysis Plaintiffs Sought Under NEPA and NFMA Would Redress their Procedural Injuries.

As the U.S. Supreme Court explained in *Lujan v. Defenders of Wildlife*, "the person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." 504 U.S. at 572 n.7. The relaxed redressability standard means, for instance, that a person who lives next to a proposed site for a federally licensed dam has standing to challenge the licensing agency's failure to prepare an EIS, even though that analysis might not cause any changes to the decision to issue the

license. *Id.*[9]

Under this relaxed standard, a litigant asserting procedural injury has standing "if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Mass. v. E.P.A.*, 549 U.S. at 518 (emphasis added). The litigant "need not show that further analysis by the government would result in a different conclusion. It suffices that the agency's decision could be influenced by the environmental considerations that the relevant statute requires an agency to study." *Citizens for Better Forestry*, 341 F.3d at 976; *see also Cottonwood*, 789 F.3d at 1083 (noting no need to show that the procedures sought would lead to a different result to redress procedural injury). This is "not a high bar to meet." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008).

Relying on this standard, this Court has repeatedly held that an improved NEPA analysis redresses plaintiffs' injuries stemming from NEPA violations. For instance, in *Cantrell v. City of Long Beach*, this Court held that a new EIS could redress the injury of birdwatchers who opposed destruction of an abandoned naval station that served as bird habitat, even though a revised EIS might not result in a

[9] Because causation and redressability "are two sides of the same coin," Plaintiffs address the factors together. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 835 (9th Cir. 2006), *vacated*, 490 F.3d 725 (9th Cir. 2007); *Nat. Res. Def. Council v. E.P.A.*, 542 F.3d 1235, 1245 (9th Cir. 2008) (discussing procedural causation and redress together because the factors "are closely related").

different plan for the station and the buildings and trees they sought to preserve had already been bulldozed. 241 F.3d 674, 678-82 (9th Cir. 2001). The Court explained that litigants asserting procedural injury "need not demonstrate that the ultimate outcome following proper procedures will benefit them." *Id*. at 682; *see also Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) (holding a plaintiff "who asserts inadequacy of a government agency's environmental studies under NEPA need not show that further analysis by the government would result in a different conclusion.").

Plaintiffs' declarants explained in detail how compliance with NEPA and NFMA during both the forest planning process and site-specific analyses of allotments would redress their injuries. For instance, Ms. LeRoux stated:

> Had the Forest Service completed a NEPA analysis considering the effects of the livestock grazing it authorizes on wolves and the environment, the public could have scrutinized and provided input on that analysis, which might ultimately have led the Forest Service to change grazing authorizations to better protect wolves and the environment. The Forest Service could also have considered alternatives that might have better protected these species and their habitats. This outcome would better protect my interests and those of WWP. Even if the Forest Service did not ultimately change grazing as a result of the analysis, however, it would still protect my interests to have the Forest Service follow the required procedure especially because more information about Forest Service grazing management on Diamond M's allotments and its impacts on wolves and the environment would be readily available to the public. Instead, it appears that the Forest Service has not considered how its management might affect the survival and recovery of gray wolves on the Forest at all.

2-ER-127-28 (LeRoux Decl. ¶ 22). Mr. Coleman also explained, "if the Forest Service complied with its legal duty to consider wolves…in making decisions regarding grazing, not only would more high-quality information be available to the public, but there would likely be more opportunities for public participation around these grazing authorizations—all results that could improve substantive outcomes of the Forest Service's decision processes." 2-ER-116 (Coleman Decl. ¶ 28). That is exactly what the NEPA process is designed to do. *See e.g.*, *Robertson*, 490 U.S. at 349; 40 C.F.R. § 1500.1(b) (requiring "high quality" information, "[a]ccurate scientific analysis" and "public scrutiny").

Instead, the USFS ignored information provided by the public that, if considered in the forest planning process or within supplemental NEPA analyses for individual allotments, could have led to changes in grazing management that would benefit wolves. For instance, Plaintiffs specifically requested the USFS consider the following as forest-wide standards and guidelines in the new Forest Plan to direct grazing management in AMPs and AOIs:

- Prohibit livestock grazing within one mile of a known active wolf site, den, or rendezvous.
- Implement appropriate seasonal restrictions based on site-specific consideration and potential activity effects to reduce disturbance to wolves and protect livestock.
- Prohibit turnout or grazing of sick or injured livestock.
- Remove sick and injured livestock and carcasses so they do not become predator attractants.

- Do not authorize the placement of mineral blocks (*e.g.* salt licks) or other livestock attractants near a known, active wolf den or rendezvous site.
- Do not authorize turnout of livestock in an area of known (during the same calendar year that use is documented) wolf den or rendezvous site. Offer alternative grazing sites away from known wolf areas when possible.
- Remove livestock from grazing allotments when conflict with wolves or other wildlife occurs.
- Require a 24-hour human presence on an allotment following documented conflict with wolves or other wildlife to protect livestock and public trust wildlife.

7-ER-1426-27, 7-ER-1442-46; *see also* 3-ER-292-93 (measures Plaintiffs also requested the USFS consider for updating AMPs for allotments leased to Diamond M where conflicts keep recurring). Though WDFW recommends such measures, only the USFS has the authority to impose such measures on permittees as preconditions for grazing on National Forests. Yet the USFS refused to consider any mitigating measures in the NEPA analysis for the revised Forest Plan or in any supplemental NEPA analysis for the Diamond M allotments.

The failure to incorporate that information in such analyses is particularly egregious because the agency knows that wolf-livestock conflicts are concentrated on the five allotments leased to Diamond M, and the actions of the permittee contribute to those conflicts. *See e.g.*, 7-ER-1548; 3-ER-273-83 (WDFW report of Profanity Peak pack conflicts on allotments leased to Diamond M, showing Diamond M does not maintain a regular human presence with its herds as carcasses and injured calves often aren't discovered until days after predation events;

showing all conflicts involved young calves; many conflicts were near active core wolf areas; that the USFS allowed Diamond M to leave salt blocks near a known high use area even after depredations in those areas had already occurred; and that Diamond M regularly fails to timely move its cattle off pastures and allotments per the terms of its grazing permit and AOIs, which has resulted in preventable depredations).

Were the USFS to conduct a proper forest-wide grazing suitability analysis, it "could" choose a number of proposed "methods of regulating" recurring conflicts in these areas, as directed by NFMA's planning rule. 36 C.F.R. § 219.20(b) (directing USFS to consider methods of regulating conflicts between wildlife and livestock). Likewise, if it completed supplemental NEPA analyses for the Diamond M allotments, it could choose to analyze and incorporate such measures within new AMPs. As noted, agency officials internally discussed several measures they could impose to reduce potential wolf-livestock conflicts on the Colville, and the USFS had already analyzed and agreed to adopt similar measures for the Blue Mountains National Forests. Blue Mountains FEIS, *supra* note 7, at 280-86; 7-ER-1452-53. In fact, the Colville's managers were willing to adopt forest-wide restrictions on domestic sheep grazing to protect native bighorn sheep from disease transmission. *See* 6-ER-1173 ("Grazing of domestic sheep shall not be authorized within or adjacent to bighorn sheep source habitats.") Yet when

it came to protecting wolves from conflicts with cattle, the agency chose to deliberately avoid the issue and disclaimed any responsibility to even consider Plaintiffs' proposed grazing management changes. 7-ER-1407-09; 7-ER-1570-71; 7-ER-1553; 7-ER-1540. As a result, the USFS failed to analyze measures it has authority to impose which could help prevent wolf-livestock conflicts and needless wolf mortalities.

In sum, Plaintiffs have demonstrated a "causal connection" between their ultimate injury-in-fact (killing of wolves in response to cattle depredations on the Colville) and "the conduct complained of" (the USFS's failure to analyze grazing impacts to wolves and consider imposing mandatory grazing management directives that could prevent and mitigate wolf-livestock conflicts on the Forest). *See Alaska Ctr. for the Env't*, 20 F.3d at 984 (citing *Lujan*, 504 U.S. at 560). Considering and analyzing the above grazing management changes in the forest planning process or supplemental NEPA for the allotments would redress Plaintiffs' procedural injuries. Because there is "some possibility" that procedural compliance would have "prompt[ed]" the USFS to "reconsider" its grazing management and alter its grazing directives in the revised Forest Plan and/or updated AMPs to protect wolves on the Forest, the relaxed standards for procedural causation and redressability are satisfied. *Mass. v. E.P.A.*, 549 U.S. at 518; *Cantrell*, 241 F.3d at 682.

C. The District Court Erred By Holding That WDFW's Participation in Lethal Wolf Removal Defeated Redressability For Plaintiffs' Procedural Injuries.

The district court erroneously presumed that the management directives Plaintiffs sought the USFS to impose could not redress the ultimate harm to Plaintiffs' interests in wolves on the Forest because the WA wolf plan states that lethal wolf removal "is conditioned upon non-lethal measures being tried but failing to resolve the conflict." 1-ER-25. In presuming such, the district court failed to follow this Circuit's precedent that applies the lowered causation and redressability standard for procedural violations even in cases involving an independent third party. The district court also disregarded key facts. For one, it ignored the non-binding nature of the WA wolf plan and WDFW's lethal control protocol. Second, it also failed to recognize that the measures that have satisfied WDFW's undefined threshold for authorizing lethal control are not effective for large, heavily treed federal grazing allotments. Third, the district court erroneously suggested that measures Plaintiffs seek from the USFS are already in place. *See* 1-ER-25 (stating "at least some mitigation measures that Plaintiffs seek are already in place and reflected in current removal rates.")[10] Last, the district court dismissed

[10] In support of this finding, the district court cited the journal notes of one USFS official, 3-ER-218, mentioning conversations with permittees and other agency staff about possibly moving livestock to other pastures in response to wolf activity; far from the equivalent of clear, consistent, and enforceable management directives set forth in a Forest Plan or AMP.

the fact that only the USFS has the legal authority to impose the measures Plaintiffs seek as mandatory grazing management directives on National Forest System lands. Because the district court's findings are both legally and factually flawed, this Court should reverse.

i. Ninth Circuit Precedent Requires Relaxed Causation and Redressability Standards, Even When a Third Party is Involved.

This Court has repeatedly applied the lowered causation and redressability standard for procedural violations even in cases involving an independent third party. *E.g.*, *W. Watersheds Project v. Grimm*, 921 F.3d 1141, 1147-49 (9th Cir. 2019), *WildEarth Guardians*, 795 F.3d at 1156-57, *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1017-19 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004) (not addressing standing); *Ctr. for Biological Diversity v. USFWS,* 807 F.3d 1031, 1044 (9th Cir. 2015).

At bottom here, the only relevant inquiry is whether there is a "reasonable probability" that the USFS's procedural NEPA and NFMA violations–*i.e.*, failing to analyze grazing impacts to wolves and refusing to consider grazing management directives that protect wolves from conflicts with livestock–could impair Plaintiffs' concrete interests in keeping wolves alive. *See Hall,* 266 F.3d at 977 (plaintiffs asserting a procedural injury "need only establish 'the *reasonable probability* of the challenged action's threat to [their] concrete interest.'") (emphasis added); *Public Citizen,* 316 F.3d at 1016-17. Because the USFS's disregard of these

procedural requirements make it more likely that repeated livestock depredations on the Forest will result in wolves being killed by the state, "the lower threshold for causation in procedural injury cases" is satisfied. *Id*. at 1017-18.

Likewise, Plaintiffs bear "a relatively easy burden" for establishing redressability, because the USFS's revised Forest Plan decision and updated AMPs "*could be influenced* by the environmental considerations that [NEPA and NFMA] requires [it] to study." *Id*. at 1019 (citing *Hall*, 266 F.3d at 977). Indeed, Plaintiffs argue that compliance with such procedures is necessary for the USFS to fulfill its substantive duty under NFMA to adopt Forest Plan directives that protect sensitive species' viability on the Forest and to ensure that all site-specific grazing is then consistent with such directives. *See Supra Legal Background Sections B & C*.

Ctr. for Biological Diversity v. USFWS is illustrative. There, plaintiff challenged a memorandum of agreement ("MOA") governing groundwater usage by federal and non-federal parties. 807 F.3d at 1035. The MOA "neither authorize[d] nor approve[d]" any groundwater pumping but contained commitments to mutually agreed conservation measures to protect an endangered fish. *Id*. at 1040. The USFWS as one of the parties to the contract consulted over the impacts to the listed fish pursuant to ESA Section 7, and the plaintiff challenged the adequacy of the resultant biological opinion. *Id*. at 1042.

Defendants challenged the plaintiff's showing of causation and

redressability, arguing that "any threat to the [fish's] survival is caused exclusively by" third parties, specifically "non-federal entities pumping groundwater pursuant to a non-federal" pumping order issued by the state engineer. *Id*. at 1044. Defendants asserted that, if the MOA were vacated, the pumping and its negative impacts on the fish "could continue unabated." *Id*.

However, applying the lowered standard for causation and redressability for procedural claims, the Court upheld the plaintiff's standing. *Id*. at 1044. Despite agreeing that third party actions were "*an* ultimate cause of [plaintiff's] injury," the court noted that plaintiff's claims were focused on the USFWS's failure to properly consult, which plaintiff alleged caused the MOA at issue to contain inadequate mitigation measures. *Id*. at 1044. The Court further observed that were the biological opinion and MOA vacated, USFWS would be obligated to reinitiate consultation, which "'may influence FWS's ultimate decision as to whether to participate in the MOA' and on what terms." *Id*. Ultimately the USFWS's participation in a contract that could have contained more protective measures was sufficient to support standing, and the Court did not require the plaintiff to show how the third parties might respond were new consultation to occur. *Id*.

Similarly, while lethal wolf removal will remain the "prerogative of WDFW," 1-ER-23, a revised programmatic FEIS for the Forest Plan or supplemental NEPA analysis for outdated AMPs, "could" result in measures and

grazing management changes that effectively preclude or minimize the opportunity for recurring wolf-livestock conflicts on the Forest. Given WDFW only authorizes lethal control in response to "repeated" depredations, 8-ER-1726, Plaintiffs have sufficiently demonstrated that the USFS could take actions that would substantially limit WDFW's lethal control of wolves on the Colville.

Second, the Supreme Court, this Court, and several other courts have all made clear that the existence of two causes (or even multiple causes) of a plaintiff's injury does not defeat causation and redressability. *E.g.*, *Mass. v. E.P.A.*, 549 U.S. at 523-24; *Grimm*, 921 F.3d at 1147-48. "A causal chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausible.'" *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 953 (9th Cir. 2013) (citations omitted). And a plaintiff need not show that the defendant agency's actions (or inactions) are "the very last step in the chain of causation." *Id.* Applied here, it cannot be said that WDFW's killing of wolves on the Colville – the ultimate harm to Plaintiffs' interests – breaks the causal chain when that proverbial final link in the chain would not exist but for the USFS's failure to manage grazing in a manner that avoids "repeated" wolf-livestock conflicts. Put differently, the manner in which the USFS manages livestock grazing on the Colville, is "determinative" of whether this third party is called upon to kill wolves on the Forest. The USFS is the sole

cause of Plaintiffs' procedural injuries and a court order requiring it to fulfill its legal duty to consider measures to prevent wolf-livestock conflicts would redress those injuries because it could protect Plaintiffs' interests in wolves on the Forest. The district court erred by focusing on WDFW's lead authority to "manage" wolves, when the focus of Plaintiffs' case and the relief sought is the USFS's responsibility to manage livestock grazing.

ii. The Facts Demonstrate that Plaintiffs Have Met Their Burden.

Factually, the district court erred in finding that the grazing management directives Plaintiffs requested the USFS consider adopting in the revised Forest Plan and/or updated AMPs are already in place. Specifically, the district court was wrong in assuming that the WA wolf plan requires such measures be employed before WDFW will lethally remove wolves in response to "repeated" depredations. 1-ER-25. The WA wolf plan and WDFW's lethal control checklist are purely nonbinding "guidance" documents. *See* 3-ER-233-37 (*e.g.* identifying measures Plaintiffs seek, such as keeping livestock away from active core wolf areas and requiring a regular human presence when grazing in the vicinity of wolves, as "recommended" and not "essential"); *Woodruff*, 151 F.Supp.3d at 1161-63 (holding same). Rather, WDFW authorizes lethal wolf removal even when livestock producers have only tried *unproven* and *minimally effective* deterrent measures for just a short period of time.

In deciding whether to promulgate binding requirements for certain non-lethal measures, WDFW recently stated:

> Although WDFW promotes and encourages the use of non-lethal measures to deter wolf-livestock conflict through non-binding guidance, current law does not explicitly require implementation of non-lethal conflict deterrence measures appropriate for the conflict scenario prior to agency authorization of lethal removal of wolves.[11]

The state agency further explained that because it could not "mandate, regulate, or enforce the management of livestock operations or animal husbandry practices," it could not require livestock producers to employ range riders, to keep track of their livestock, to group livestock in open areas, or remove sick and/or injured livestock from allotments.[12] Nor can WDFW instruct livestock producers to move salt sites on federal allotments away from core wolf areas, to delay the turnout of livestock calves to forested/upland grazing pastures until calves reach at least 200 pounds and after wild ungulates are born in mid-June, or ensure proper sanitation of livestock carcasses so as not to serve as attractants. *Id*. In contrast, the USFS could require any or all of these measures through Forest Plan directives or terms and conditions within AMPs, grazing permits or AOIs.

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[11] *Notice of Proposed Rulemaking*, WASH. DEP'T OF FISH AND WILDLIFE (Feb. 16, 2022), available online at (last visited March 17, 2022): https://wdfw.wa.gov/sites/default/files/2022-02/WSR%2022-05-092.pdf

[12] *Wolf-Livestock Conflict Deterrence Rule Making, Draft Supplemental Environmental Impact Statement*, WASH. DEP'T OF FISH AND WILDLIFE, pp. 3, 8, 12, 17 (Feb. 22, 2022), available online at (last visited March 17, 2022): https://wdfw.wa.gov/sites/default/files/publications/02312/wdfw02312.pdf.

The fate of the Old Profanity Territory ("OPT") wolf pack, named after the former Profanity Peak pack that occupied the same territory before that entire Pack was killed off by WDFW in 2016, illustrates the fact that the key measures Plaintiffs seek from the USFS are *not* already in place—certainly not on any clear, consistent, and *mandatory* basis. In 2018, the USFS allowed Diamond M to turn its cattle out to the very same locations where repeated depredations had occurred the previous two seasons (in 2016 and 2017). 3-ER-273-74. The USFS also allowed Diamond M to continue placing salt blocks in areas of "high wolf-livestock overlap" and to keep its cattle on the allotment after WDFW confirmed a high use area (likely rendezvous site) within the allotment. 3-ER-274-76. According to WDFW's annual report, increased range riding was only implemented after the first depredation event in 2018, despite recurring conflicts in the very same vicinity the prior two years. *Id*. Then, days after four injured calves and one dead calf were discovered, WDFW staff placed "fox lights"–a visual scare device with no support for its efficacy in deterring wolves–at two salting areas on the allotment. 3-ER-276; 5-ER-967. This vague level of "increased" range riding and *untested* fox lights was enough to satisfy WDFW's undefined threshold for authorizing lethal control of the OPT pack. 3-ER-276. This is a far cry from the mandatory conflict avoidance measures that Plaintiffs seek from the USFS.

Had the USFS engaged in a proper forest-wide grazing suitability analysis under 36 C.F.R. § 219.20, it *could* have deemed this high conflict area no longer "suitable" for continued grazing due to: (1) repeated depredations in the same vicinity during the prior two grazing seasons, (2) the Kettle Crest's densely forested and rugged terrain seem to make it impossible for Diamond M to both protect its cattle and to timely move its cattle off pastures and allotments per the terms of its grazing permit and AOIs[13], and (3) the fact that every time WDFW has eliminated a wolf pack in this area, a new pack moves in, showing a strong affinity for this habitat. *E.g.*, 3-ER-273-83; 5-ER-862-66; 2-ER-161, 168-70 (Compl. ¶¶61, 81-87).

Even if the USFS did not deem the area unsuitable, it could have imposed several other conflict avoidance measures that would have been more likely to reduce future depredations. Indeed, it *could* have required Diamond M to maintain a 24-hour human presence with its cattle after the first depredation event of that grazing season. The USFS *could* have prohibited the turnout of young calves or placement of salt in this high conflict area. And, of course, the USFS *could* have required Diamond M to promptly move its cattle off the pasture or allotment once

[13] *See e.g.*, 3-ER-277-78 (noting that Diamond M is routinely unable to timely move all its cow/calf pairs and detailing predations on two calves and a cow left stranded on the allotment over winter, well after Diamond M's turnoff date); 7-ER-1463 (Diamond M acknowledging inability to keep livestock in assigned pasture due to high use by Old Profanity Peak pack).

the first depredation was discovered. But none of those measures were required. Instead, just days after WDFW killed a juvenile wolf from the Pack, five more injured calves were found in the same vicinity. 3-ER-276-77.

Notably, the report indicates the calves' injuries were likely five to seven days old by the time range riders discovered them. 3-ER-277. This suggests Diamond M was not maintaining a regular human presence with its herds even after multiple conflicts, nor promptly removing injured livestock off the allotment so they did not serve as attractants for more depredations. Nevertheless, WDFW authorized the lethal removal of another OPT pack member, this time the breeding female. *Id*. But the depredations of young calves just kept repeating. *Id*. And once again the report states that the calves' injuries were several days old by the time Diamond M discovered them. *Id*.

Thus, under WDFW's nonbinding and nebulous framework for addressing wolf-livestock conflicts, the threshold for lethal control is easily satisfied, whereas the USFS has the authority to impose more stringent conflict avoidance measures as *mandatory preconditions* for permittees to graze their livestock on the Forest. Meanwhile WDFW recognizes it has no authority to impose livestock management requirements for permittees on federal lands. *See* 8-ER-1770 (WA wolf plan recognizing this lack of authority).

Only the USFS–the entity charged with managing grazing on National Forests in a manner that protects sensitive species–can impose these measures as legally binding conditions upon grazing permittees through AMPs, term permits or annual instructions. For instance, only the USFS can close allotments, pastures, or portions thereof to seasonal grazing when wolves are known to be active in those areas in order to prevent conflicts. 9-ER-1974 (FSM § 2670.44 directing USFS to approve closures of National Forest System lands as necessary to protect habitats or populations of sensitive species). Only the USFS can exclude livestock from areas deemed unsuitable for grazing due to terrain conditions that contribute to recurring wildlife-livestock conflicts. 36 C.F.R. § 219.20(b). Likewise, only the USFS can modify grazing permits, AMPs and AOIs to adjust the timing, intensity, duration, and location of annual grazing, or the class of livestock (*e.g.* authorizing only adult cows or calves older than six months to graze federal allotments). *See Supra Factual Background Section B*. And only the USFS can impose the many other measures Plaintiffs requested it consider. 7-ER-1426-27; 7-ER-1442-46; 3-ER-292-93. But as Plaintiffs demonstrated, and WDFW acknowledges, the third-party actor here does not, and cannot, require such measures to be implemented before it kills wolves due to livestock depredations.

Thus, WDFW's ability to lethally remove wolves in response to repeated depredations does not defeat Plaintiffs' redressability because there is at least a

"reasonable probability" that the USFS's compliance with NEPA and NMFA procedures would result in management directives that prevent or at least reduce repeated livestock depredations from occurring in the first place.

II. Plaintiffs' Procedural Challenges to the 2019 Forest Plan are Justiciable and Ripe for Review.

A. Procedural Injuries From Programmatic Analyses are Ripe Even Before the Agency Approves an Implementing Action.

Precedent holds that procedural challenges to a programmatic decision are ripe as soon as the agency issues the underlying FEIS/ROD, even before it approves a site-specific implementing action. As the Supreme Court explained, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry*, 523 U.S. at 737. In *Kraayenbrink*, the plaintiff brought a facial challenge to the BLM's adoption of nationwide grazing regulations and its underlying programmatic FEIS for violations of NEPA, the ESA, and the Federal Lands Policy and Management Act ("FLPMA"). 632 F.3d at 476-77. This Circuit determined that the plaintiff's claims were ripe for review even before BLM actually applied the regulations to any site-specific grazing, because that might be their only opportunity to challenge the regulations on a programmatic basis. *Id*. at 486 (relying on *Ohio Forestry*).

Faced with a similar situation in *Idaho Conservation League v. Mumma*, this Circuit reasoned:

> [I]f the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.

956 F.2d 1508, 1516 (9th Cir. 1992). Similarly, in *Seattle Audubon Soc'y v. Espy,* this Circuit held plaintiffs had standing to challenge the FEIS/ROD for a regional spotted owl management plan under both NEPA and NFMA, despite the plan not authorizing any site-specific timber sales, "because the threatened harm to owl viability resulting from further logging in old-growth forests, in the absence of an owl management plan which complies with the requirements of NEPA and the NFMA, is concrete, specific, imminent, caused by agency conduct in question, and redressable by a favorable ruling." 998 F.2d 699, 703 (9th Cir.1993); *see also Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011) (holding "a procedural injury is complete after a [Forest Plan] has been adopted, so long as is it is fairly traceable to some action that will affect the plaintiff's interests.")

More recently, in *WildEarth Guardians*, the Court held that the plaintiffs had standing to challenge a programmatic EIS for a nationwide predator control program even though that EIS did not authorize any site-specific predator control actions. 795 F.3d at 1155. "If plaintiffs did not have standing to challenge a non-

site-specific EIS, the program as a whole could never be reviewed." *Id*. (citation omitted). The same is true here for the procedural injuries Plaintiffs assert under NEPA and NFMA's planning procedures against the 2019 Forest Plan FEIS/ROD.

As a threshold matter, the district court failed to understand that NFMA and its "planning" regulations have both procedural and substantive components—Plaintiffs' NFMA claims under 36 C.F.R. § 219.26 and § 219.20 (1982) are *procedural* claims like their programmatic NEPA claims. 1-ER-28-29. These provisions of the 1982 planning rule direct what the USFS must "consider"—*i.e*., the data it must gather and analyze—*during the forest planning process*. *See* 36 C.F.R. § 219.20 (requiring USFS to consider conflicts between native wildlife and livestock and methods of regulating such conflicts "[i]n forest planning"); *Id*. § 219.26 (requiring USFS to consider how proposed management practices and uses of the National Forest will affect wildlife diversity "throughout the planning process.") Because these mandatory considerations must be components of the forest planning process, they must be analyzed within the programmatic FEIS for the revised Forest Plan. However, they were not incorporated into the Forest Plan FEIS/ROD at issue here. Accordingly, Plaintiffs challenge the adequacy of the Forest Plan FEIS/ROD for failing to comply with NFMA's planning *procedures*.[14]

[14] These NFMA claims pertaining to the Forest Plan FEIS/ROD are in contrast to Plaintiffs' *substantive* NFMA claim in which they alleged Diamond M's site-specific grazing in 2020 is inconsistent with the 2019 Plan's management directive

B. The District Court Erred When it Held Plaintiffs' Procedural Claims Regarding the 2019 Forest Plan Were Not Ripe.

Because the district erred in recognizing that Plaintiffs' programmatic challenge to the 2019 Plan is based on procedural violations, its entire reasoning on the "immediacy" of the harm to Plaintiffs' interests is inapposite. 1-ER-26-31 (finding "Plaintiffs have not demonstrated cognizable harm which has flowed immediately from the adoption of the revised 2019 Forest Plan" because the Forest Plan "does not give anyone [] a legal right to graze livestock.") 1-ER-28. But as this Circuit recognizes, the ripeness analysis is different "depending on whether a substantive or procedural challenge is made." *See Citizens for Better Forestry*, 341 F.3d at 977. Procedural violations are ripe as soon as the challenged agency action is final, which is the case here with the 2019 Forest Plan FEIS/ROD. *See id*. (explaining the Ninth Circuit adopted the dicta from *Ohio Forestry,* finding procedural challenges are ripe because the injury occurred "when the allegedly inadequate EIS was promulgated."); *Kraayenbrink*, 632 F.3d at 486.

The district court ignored what this Circuit has long-recognized: land management plans have legal consequences in that they establish the parameters for site-specific actions. *See Idaho Conservation League*, 956 F.2d at 1516 (forest

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for "surrogate species." 2-ER-190-91 (Compl. ¶¶135-40), alleging violation of NFMA's substantive mandate that all site-specific activities must be consistent with the governing forest plan, 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15 (2012).

plan "plays some, if not a critical, part in subsequent decisions"); *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708 (9th Cir. 1993) (challenge to a decision not to supplement programmatic timber management plans was ripe for review because the plans "necessarily drive the location and volume decisions" for site-specific timber sales). Indeed, that is why NFMA's *substantive* mandates in turn require that all site-specific projects and activities be consistent with the approved forest plan's management directives. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15 (2012); 36 C.F.R. § 219.10(e)(1982).

Plaintiffs sufficiently demonstrated that the USFS's failure to comply with the applicable NEPA and NFMA forest planning procedures in developing and approving the 2019 Colville Forest Plan threatens harm to their concrete interests. This is because fewer environmental safeguards in a forest plan, "in turn will likely result in less environmental safeguards at the site-specific [] level." *Citizens for Better Forestry*, 341 F.3d at 975. For instance, the Forest Plan is where the agency determines which lands are suitable for livestock grazing, which must incorporate consideration of conflicts between livestock and wildlife and potential "methods of regulating" such conflicts. 36 C.F.R. § 219.20(b)(1982). Yet here, the FEIS acknowledges that the USFS did not consider wolf-livestock conflicts as part of the agency's forest-wide grazing suitability analysis because it interprets this NFMA

planning rule as allowing it to consider the wildlife conflicts issue "at the allotment level through adaptive management." 6-ER-1362.

Plaintiffs argue this interpretation of 36 C.F.R. § 219.20 is inconsistent with the rule's plain language and intent—a question of law that "would not benefit from further factual development" and can thus be decided upon now. *Cf. Ohio Forestry*, 523 U.S. at 727. By claiming it can avoid this component of its forest-wide grazing suitability determination, deferring it to some unknown future date, the USFS has not conducted the comprehensive large-scale analysis that is meant to inform site-specific grazing management decisions—a cognizable harm flowing from this programmatic procedural violation. *See e.g., W. Watersheds Project v. USFS*, 2006 WL 292010, *6-7 (D. Idaho Feb. 7, 2006) (explaining how forest plan level grazing "capability and suitability" determinations serve as a baseline for project-level reviews of allotments).

Second, in order for the USFS to fulfill its substantive duty to ensure the viability of sensitive species on the Forest, NFMA's planning regulations direct the agency to consider how each proposed forest planning alternative affects wildlife diversity. 36 C.F.R. § 219.26. Likewise, the USFS's Sensitive Species Policy expressly directs the agency to ensure specific management objectives for protecting sensitive species are included in forest plans and that recovery objectives from any state approved recovery plan is integrated into the USFS's

forest plans. *Supra Legal Background Section C*. Indeed, the 2019 Forest Plan contains management directives designed to mitigate the adverse effects grazing can have on various other forest resources, including fish and wildlife, just not sensitive gray wolves. *See e.g.*, 6-ER-1119, 6-ER-1150, 6-ER-1173-78, 6-ER-1190-91, 6-ER-1231, 6-ER-1235-37.

Moreover, the Forest Plan can dictate the types of substantive terms the USFS should incorporate into AMPs and/or AOIs. Yet here, the USFS failed to analyze or even consider any alternatives that included regulating wolf-livestock conflicts in the forest planning process.

Resolving these issues concerning the 2019 Plan's compliance with required procedures will enable the USFS to conform its grazing management direction to NFMA's statutory and regulatory mandates. Absent review at the planning stage, the USFS may proceed with continuing to authorize site-specific grazing without any measures to mitigate wolf-livestock conflicts, in turn failing to fulfill the agency's substantive obligations under NFMA, the 1982 planning rule, and its own Sensitive Species Policy. As this Court aptly observed in *Citizens for Better Forestry*, "[p]ursuant to NEPA and the NFMA, these are injuries that we must deem *immediate,* not speculative. Indeed, short of assuming that Congress imposed useless procedural safeguards, [] we must conclude that the [Forest Plan] plays some, if not a critical, part in subsequent decisions." 341 F.3d at 973-75, 977

(holding plaintiffs' procedural claims challenging nationwide forest planning rule were ripe for review).

Thus, just as this Court held in *Kraayenbrink*, 632 F.3d at 499-500, that plaintiff's FLPMA claim relating to procedures governing public participation in land management planning were justiciable and ripe for review, as were plaintiff's NFMA claim in *Seattle Audubon Soc'y*, 998 F.2d at 703, so too are Plaintiffs' programmatic NEPA and NFMA claims here pertaining to what the USFS should have considered during the Forest Plan revision process but did not.

C. Grazing Permits Must Be Modified to Conform to the Revised 2019 Forest Plan.

The district court misapplied a statement in the Forest Plan ROD, erroneously determining that the new Plan is wholly inapplicable to livestock grazing until the USFS renews 10-year term grazing permits. *See* 1-ER-30-31 (quoting ROD's statement at 5-ER-1075: "[p]reviously approved and ongoing projects and activities are not required to meet the direction of the revised land management plan and will remain consistent with the direction in the 1988 plan."). But the court's application of this statement to grazing permits was unreasonable given the 1982 planning regulations expressly provide:

> As soon as practicable after approval of the plan, the Forest Supervisor shall ensure that, subject to valid existing rights, **all outstanding** and future **permits**, contracts, cooperative agreements, **and other instruments for occupancy and use of affected lands are consistent with the plan**.

36 C.F.R. § 219.10(e)(1982).[15] The district court's finding renders this regulatory requirement meaningless, because it essentially holds that the USFS can simply wait for 10-year term grazing permits to expire before requiring grazing to conform to the new Forest Plan.

The court's finding is also at odds with the terms stipulated in the Colville's grazing permits themselves, which expressly provide:

> This permit can also be cancelled, in whole or in part, or otherwise modified, at any time during the term to conform with the needed changes brought about by law, regulation, Executive order, allotment management plans, **land management planning**, numbers permitted or seasons of use necessary because of resource conditions, or the lands described otherwise being unavailable for grazing.

7-ER-1617.

Moreover, this finding produces the illogical result of allowing grazing under 10-year term permits that were recently renewed just before the adoption of the 2019 Forest Plan ROD to forego consistency with the new Plan's management directives for several years, allegedly still being governed by the superseded 1988 Forest Plan, until the 2019 Plan itself is nearly ripe for another revision. *See* 36 C.F.R. § 219.10(g)(1982) (providing that forest plans "shall ordinarily be revised on a 10-year cycle or at least every 15 years.")

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[15] The new 2012 forest planning regulations similarly provide: "existing authorizations and approved projects or activities" must be made consistent with a revised Forest Plan "as soon as practicable." 36 C.F.R. § 219.15(a)(2012)

Furthermore, the USFS's headquarters office even wrote to the Regional Forester in response to concerns over statements in the draft ROD regarding the new Plan's applicability to ongoing grazing, 7-ER-1414, expressly instructing: "the Region should correct the language in the ROD to reflect that Term Grazing Permits must be modified, and Allotment Management Plans amended to comply with revised Forest Plan direction." 7-ER-1417. In response, the final ROD provides, albeit in not the clearest terms, "[g]razing permits will be modified to incorporate understood and known direction contained in the revised plan." 5-ER-1087. In short, the district court's finding is at odds with the requirements of 36 C.F.R. § 219.10(e)(1982), the terms set forth in the grazing permits themselves, and the express direction from the USFS's headquarters.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the district court's Order, and hold that Plaintiffs have established Article III standing for their NEPA and NFMA claims.

Dated: March 18, 2022.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases pending before this Court.

Dated: March 18, 2022

Respectfully submitted,

/s/ *Jennifer Schwartz*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **13,997 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: March 18, 2022

Respectfully submitted,

/s/ *Jennifer Schwartz*

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 18, 2022

Respectfully submitted,

/s/ *Jennifer Schwartz*

ADDENDUM

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CHAPTER 36 - FOREST AND RANGELAND
RENEWABLE RESOURCES PLANNING
SUBCHAPTER I - PLANNING
Sec. 1604 - National Forest System land and resource management plans From the U.S. Government Publishing Office, www.gpo.gov

§1604. National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976, and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this subchapter, the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest

System pursuant to this section, the Secretary shall assure that such plans—

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.

528–531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained- Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

(g) Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall in accordance with the procedures set forth in section 553 of title 5, promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528–531] that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to—

(1) specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.], including, but not limited to, direction on when and for what plans an environmental impact statement required under

section 102(2)(C) of that Act [42 U.S.C. 4332(2)(C)] shall be prepared;

(2) specifying guidelines which—

(A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on the various renewable resources, and soil and water, including pertinent maps, graphic material, and explanatory aids; and provide for methods to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which—

(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish;

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;

(C) insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land;

(D) permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree improvement if (i) such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960, and (ii) such harvest levels are decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned;

(E) insure that timber will be harvested from National Forest System lands only where—

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because

it will give the greatest dollar return or the greatest unit output of timber; and

(F) insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where—

(i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

(ii) the interdisciplinary review as determined by the Secretary has been completed and the potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale area have been assessed, as well as the consistency of the sale with the multiple use of the general area;

(iii) cut blocks, patches, or strips are shaped and blended to the extent practicable with the natural terrain;

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including provision to exceed the established limits after appropriate public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would approve the harvest proposal: *Provided*, That such limits shall not apply to the size of areas harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm; and

(v) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

(h) Scientific committee to aid in promulgation of regulations; termination; revision committees; clerical and technical assistance; compensation of committee members

(1) In carrying out the purposes of subsection (g) of this section, the Secretary of Agriculture shall appoint a committee of scientists who are not officers or employees of the Forest Service. The committee shall provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted. The committee shall terminate upon promulgation of the regulations, but the Secretary may, from time to time, appoint similar committees when considering revisions of the regulations. The views of the committees shall be included in the public information supplied when the regulations are proposed for adoption.

(2) Clerical and technical assistance, as may be necessary to discharge the duties of the committee, shall be provided from the personnel of the Department of Agriculture.

(3) While attending meetings of the committee, the members shall be

entitled to receive compensation at a rate of $100 per diem, including traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, for persons in the Government service employed intermittently.

(i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.

(j) Effective date of land management plans and revisions

Land management plans and revisions shall become effective thirty days after completion of public participation and publication of notification by the Secretary as required under subsection (d) of this section.

(k) Development of land management plans

In developing land management plans pursuant to this subchapter, the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary, and shall assure that, except for salvage sales or sales necessitated to protect other multiple-use values, no timber harvesting shall occur on such lands for a period of 10 years. Lands once identified as unsuitable for timber production shall continue to be treated for reforestation purposes, particularly with regard to the protection of other multiple-use values. The Secretary shall review his decision to classify these lands as not suited for timber production at least every 10 years and shall return these lands to timber production whenever he determines that conditions have changed so that they have become suitable for timber production.

(l) Program evaluation; process for estimating long-term costs and benefits; summary of data included in annual report

The Secretary shall—

(1) formulate and implement, as soon as practicable, a process for estimating long- terms [1] costs and benefits to support the program evaluation requirements of this subchapter. This process shall include requirements to provide information on a representative sample basis of estimated expenditures associated with the reforestation, timber stand improvement, and sale of timber from the National Forest System, and shall provide a comparison of these expenditures to the return to the Government resulting from the sale of timber; and

(2) include a summary of data and findings resulting from these estimates as a part of the annual report required pursuant to section 1606(c) of this title, including an identification on a representative sample basis of those advertised timber sales made below the estimated expenditures for such timber as determined by the above cost process; and [2]

(m) Establishment of standards to ensure culmination of mean annual increment of growth; silvicultural practices; salvage harvesting; exceptions

The Secretary shall establish—

(1) standards to insure that, prior to harvest, stands of trees throughout the National Forest System shall generally have reached the culmination of mean annual increment of growth (calculated on the basis of cubic measurement or other methods of calculation at the discretion of the Secretary): *Provided*, That these standards shall not preclude the use of sound silvicultural practices, such as thinning or other stand improvement measures: *Provided further*, That these standards shall not preclude the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow or other catastrophe, or which are in imminent danger from insect or disease attack; and

(2) exceptions to these standards for the harvest of particular species of trees in management units after consideration has been given to the multiple uses of the forest including, but not limited to, recreation, wildlife habitat, and range and after completion of public participation processes utilizing the procedures of subsection (d) of this section.

(Pub. L. 93–378, §6, formerly, §5, Aug. 17, 1974, 88 Stat. 477, renumbered §6 and amended
Pub. L. 94–588, §§2, 6, 12(a), Oct. 22, 1976, 90 Stat. 2949, 2952, 2958.)

References in Text

The Multiple-Use Sustained-Yield Act of 1960, referred to in subsecs. (e) and (g), is Pub. L. 86– 517, June 12, 1960, 74 Stat. 215, as amended, which is classified generally to sections 528 to 531 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 528 of this title and Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (g)(1), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

Amendments

1976—Subsec. (a). Pub. L. 94–588, §12(a), substituted "section 4" for "section 3" in the original, which, because of the translation as "section 1602 of this title" required no change in text.

Subsecs. (c) to (m). Pub. L. 94–588, §6, added subsecs. (c) to (m).

Transfer of Functions

For transfer of certain enforcement functions of Secretary or other official in Department of Agriculture under this subchapter to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 1601 of this title.

Revision of Forest Plans

Pub. L. 112–74, div. E, title IV, §409, Dec. 23, 2011, 125 Stat. 1039, provided that: "The Secretary of Agriculture shall not be considered to be in violation of subparagraph 6(f)(5)(A) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)(A)) solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System. Nothing in this section exempts the Secretary from any other requirement of the Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 1600 et seq.) or any other law: *Provided*, That if the Secretary is not acting expeditiously and in good faith, within the funding available, to revise a plan for a unit of the National Forest System, this section shall be void with respect to such plan and a court of proper jurisdiction may order completion of the plan on an accelerated basis."

Similar provisions were contained in the following prior appropriation acts: Pub. L. 111–88, div. A, title IV, §410, Oct. 30, 2009, 123 Stat. 2957.

Pub. L. 111–8, div. E, title IV, §410, Mar. 11, 2009, 123 Stat. 746.

Pub. L. 110–161, div. F, title IV, §410, Dec. 26, 2007, 121 Stat. 2146.

Pub. L. 109–54, title IV, §415, Aug. 2, 2005, 119 Stat. 551.

Pub. L. 108–447, div. E, title III, §320, Dec. 8, 2004, 118 Stat. 3097.

Pub. L. 108–108, title III, §320, Nov. 10, 2003, 117 Stat. 1306.

Pub. L. 108–7, div. F, title III, §320, Feb. 20, 2003, 117 Stat 274.

Pub. L. 107–63, title III, §327, Nov. 5, 2001, 115 Stat. 470.

Expeditious Completion of Management Plans of Forest Service and Bureau of Land Management; Continuation of Existing Plans; Judicial Review

Pub. L. 101–121, title III, §312, Oct. 23, 1989, 103 Stat. 743, provided that: "The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600) [16 U.S.C. 1604(c)], the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to

the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged."

Similar provisions were contained in the following prior appropriation acts: Pub. L. 100–446, title III, §314, Sept. 27, 1988, 102 Stat. 1825.

Pub. L. 100–202, §101(g) [title III, §314], Dec. 22, 1987, 101 Stat. 1329–213, 1329–254.

Pub. L. 99–500, §101(h) [title II], Oct. 18, 1986, 100 Stat. 1783–242, 1783–268, and Pub. L. 99–591, §101(h) [title II], Oct. 30, 1986, 100 Stat. 3341–242, 3341–268.

[1] *So in original. Probably should be "long-term".*

[2] *So in original. The "; and" probably should be a period.*

Code of Federal Regulations

Title 36 - Parks, Forests, and Public Property

Volume: 2
Date: 2012-07-01
Original Date: 2012-07-01
Title: Section 219.15 - Project and activity consistency with the plan.
Context: Title 36 - Parks, Forests, and Public Property. CHAPTER II - FOREST SERVICE, DEPARTMENT OF AGRICULTURE. PART 219 - PLANNING. Subpart A - National Forest System Land Management Planning.

§ 219.15 Project and activity consistency with the plan.

(a) *Application to existing authorizations and approved projects or activities.* Every decision document approving a plan, plan amendment, or plan revision must state whether authorizations of occupancy and use made before the decision document may proceed unchanged. If a plan decision document does not expressly allow such occupancy and use, the permit, contract, and other authorizing instrument for the use and occupancy must be made consistent with the plan, plan amendment, or plan revision as soon as practicable, as provided in paragraph (d) of this section, subject to valid existing rights.

(b) *Application to projects or activities authorized after plan decision.* Projects and activities authorized after approval of a plan, plan amendment, or plan revision must be consistent with the plan as provided in paragraph (d) of this section.

(c) *Resolving inconsistency.* When a proposed project or activity would not be consistent with the applicable plan components, the responsible official shall take one of the following steps, subject to valid existing rights:

(1) Modify the proposed project or activity to make it consistent with the applicable plan components;

(2) Reject the proposal or terminate the project or activity;

(3) Amend the plan so that the project or activity will be consistent with the plan as amended; or

(4) Amend the plan contemporaneously with the approval of the project or activity so that the project or activity will be consistent with the plan as amended. This amendment may be limited to apply only to the project or activity.

(d) *Determining consistency.* Every project and activity must be consistent with the applicable plan components. A project or activity approval document must describe how the project or activity is consistent with applicable plan components developed or revised in conformance with this part by meeting the following criteria:

(1) *Goals, desired conditions, and objectives.* The project or activity contributes to the maintenance or attainment of one or more goals, desired conditions, or objectives, or does not foreclose the opportunity to maintain or achieve any goals, desired conditions, or objectives, over the long term.

(2) *Standards.* The project or activity complies with applicable standards.

(3) *Guidelines.* The project or activity:

(i) Complies with applicable guidelines as set out in the plan; or

(ii) Is designed in a way that is as effective in achieving the purpose of the applicable guidelines (§ 219.7(e)(1)(iv)).

(4) *Suitability.* A project or activity would occur in an area:

(i) That the plan identifies as suitable for that type of project or activity; or

(ii) For which the plan is silent with respect to its suitability for that type of project or activity.

(e) *Consistency of resource plans within the planning area with the land management plan.* Any resource plans (for example, travel management plans) developed by the Forest Service that apply to the resources or land areas within the planning area must be consistent with the plan components. Resource plans developed prior to plan decision must be evaluated for consistency with the plan and amended if necessary.

1982 Rule

National Forest System Land and Resource Management Planning

National Forest System Land and Resource Management Planning Authority. Secs. 6 and 15, 90 Stat. 2949, 2952, 2958 (16 U.S.C. 1604, 1613); and 5 U.S.C. 301. Source: 47 FR 43037, Sept.
30, 1982, unless otherwise noted.

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Sec. 219.10 Forest planning--general procedure.

(a) Responsibilities--(1) Regional Forester. The Regional Forester shall establish regional policy for forest planning and approve all forest plans in the region.

(2) Forest Supervisor. The Forest Supervisor has overall responsibility for the preparation and implementation of the forest plan and preparation of the environmental impact statement for the forest plan. The Forest Supervisor appoints and supervises the interdisciplinary team.

(3) Interdisciplinary team. The team, under the direction of the Forest Supervisor, implements the public participation and coordination activities required by Sec. 219.6 and Sec. 219.7. The team shall continue to function even though membership may change and shall monitor and evaluate planning results and recommend revisions and amendments. The interdisciplinary team shall develop a forest plan and environmental impact statement using the process established in Sec. 219.12 and paragraph (b) below.

(b) Public review of plan and environmental impact statement. A draft and final environmental impact statement shall be prepared for the proposed plan according to NEPA procedures. The draft environmental impact statement shall identify a preferred alternative. To comply with 16
U.S.C. 1604(d), the draft environmental impact statement and proposed plan shall be available for public comment for at least 3 months, at convenient locations in the vicinity of the lands covered by the plan, beginning on the date of the publication of the notice of availability in the Federal Register. During this period, and in accordance with the provisions in Sec. 219.6, the Forest Supervisor shall publicize and hold public participation activities as deemed necessary to obtain adequate public input.

(c) Plan approval. The Regional Forester shall review the proposed plan and the final environmental impact statement and either approve or disapprove the plan.

(1) Approval. The Regional Forester shall prepare a concise public record of

decision which documents approval and accompanies the plan and final environmental impact statement. The record of decision shall be prepared according to NEPA procedures (40 CFR 1505.2). The

approved plan shall not become effective until at least 30 days after publication of the notice of availability of the final environmental impact statement in the Federal Register, to comply with 16 U.S.C. 1604(d) and 1604(j). (2) Disapproval. The Regional Forester shall return the plan and final environmental impact statement to the Forest Supervisor with a written statement of the reasons for disapproval. The Regional Forester may also specify a course of action to be undertaken by the Forest Supervisor in order to remedy deficiencies, errors, or omissions in the plan or environmental impact statement.

(d) Public appeal of approval decision. The provisions of 36 CFR part 211, subpart B apply to any administrative appeal of the Regional Forester's decision to approve a forest plan. Decisions to disapprove a plan and other decisions made during the forest planning process prior to the issuance of a record of decision approving the plan are not subject to administrative appeal.

(e) Plan implementation. As soon as practicable after approval of the plan, the Forest Supervisor shall ensure that, subject to valid existing rights, all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan. Subsequent administrative activities affecting such lands, including budget proposals, shall be based on the plan. The Forest Supervisor may change proposed implementation schedules to reflect differences between proposed annual budgets and appropriated funds. Such scheduled changes shall be considered an amendment to the forest plan, but shall not be considered a significant amendment, or require the preparation of an environmental impact statement, unless the changes significantly alter the long-term relationship between levels of multiple-use goods and services projected under planned budget proposals as compared to those projected under actual appropriations.

(f) Amendment. The Forest Supervisor may amend the forest plan. Based on an analysis of the objectives, guidelines, and other contents of the forest plan, the Forest Supervisor shall determine whether a proposed amendment would result in a significant change in the plan. If the change resulting from the proposed amendment is determined to be significant, the Forest Supervisor shall follow the same procedure as that required for development and approval of a forest plan. If the change resulting from the amendment is determined not to be significant for the purposes of the planning process, the Forest Supervisor may implement the amendment following appropriate public notification and satisfactory completion of NEPA procedures.

(g) Revision. A forest plan shall ordinarily be revised on a 10-year cycle or at least every 15 years. It also may be revised whenever the Forest Supervisor determines that conditions or demands in the area covered by the plan have changed significantly or when changes in RPA policies, goals, or objectives would have a significant effect on forest level programs. In the monitoring and evaluation process, the interdisciplinary team may recommend a revision of the forest plan at any time. Revisions are not effective until considered and approved in accordance with the requirements for the development and approval of a forest plan. The Forest Supervisor shall review the conditions on the land covered by the plan at least every 5 years to determine whether conditions or demands of the public have change significantly.

(h) Planning records. The Forest Supervisor and interdisciplinary team shall develop and maintain planning records that document the decisions and activities that result from the process

of developing a forest plan. Records that support analytical conclusions made and alternatives considered by the team and approved by the Forest Supervisor throughout the planning process shall be maintained. Such supporting records provide the basis for the development of the forest plan and associated documents required by NEPA procedures.

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Sec. 219.20 Grazing resource.

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

(a) Lands suitable for grazing and browsing shall be identified and their condition and trend shall be determined. The present and potential supply of forage for livestock, wild and free-roaming horses and burros, and the capability of these lands to produce suitable food and cover for selected wildlife species shall be estimated. The use of forage by grazing and browsing animals will be estimated. Lands in less than satisfactory condition shall be identified and appropriate action planned for their restoration.

(b) Alternative range management prescriptions shall consider grazing systems and the facilities necessary to implement them; land treatment and vegetation manipulation practices; and evaluation of pest problems; possible conflict or beneficial interactions among livestock, wild free-roaming horses and burros and wild animal populations, and methods of regulating these; direction for rehabilitation of ranges in unsatisfactory condition; and comparative cost efficiency of the prescriptions.

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Sec. 219.26 Diversity.

Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition. For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices. (Refer to Sec. 219.27(g).)

FOREST SERVICE MANUAL
NATIONAL HEADQUARTERS (WO)
WASHINGTON, DC

FSM 2600 - WILDLIFE, FISH AND SENSITIVE PLANT HABITAT MANAGEMENT

CHAPTER 2670 - THREATENED, ENDANGERED AND SENSITIVE PLANTS AND ANIMALS

Amendment No.: 2600-2009-1

Effective Date: July 24, 2009

Duration: This amendment is effective until superseded or removed.

Approved: Richard W. Sowa
Acting Associate Deputy Chief

Date Approved: 07/22/2009

Posting Instructions: Amendments are numbered consecutively by title and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this title was 2600-2005-2 to 2670 contents.

New Document	2672.24b-2676.17c	24 Pages
Superseded Document(s) by Issuance Number and Effective Date	2672.24b-2676.17e (Amendment 2600-90-1, 06/01/1990	17 Pages

Digest:

2673.5 - Translocation. Clarifies responsibilities and procedures for species translocation.

2674 - Reintroduction. Clarifies responsibilities and procedures for species reintroduction.

2676 - Specific Direction on Individual Species. Editorial improvements and corrections are made throughout, as well as updates to reflect new information and the current status of grizzly bears. The Directives are broadened to be applicable to populations that are listed as Threatened under the Endangered Species Act, and to Distinct Population Segments that are de-listed.

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2672.24b - Coordination with State Agencies

Fully coordinate recovery strategies for fish and wildlife with the objectives of state fish and wildlife agencies. These strategies should become an element of state-wide Comprehensive Plans prepared pursuant to the Sikes Act. Coordinate objectives for plants with the appropriate state agency if listed as threatened or endangered by the state. Incorporate the strategies with Forest Service land management planning. Assign and report "recovery increments" toward the recovery objectives through the program planning and budgeting process.

2672.24c - Process for Preparing Recovering Strategies

Regional Foresters shall prepare recovery strategies within 1 year of Recovery Plan approval and shall provide a copy to the Washington Office Wildlife and Fisheries Director. The Deputy Chief approves Forest Service recovery strategies for listed species with multi-Regional distribution in order to ensure coordination and to monitor Regional objectives and accomplishments toward recovery targets. Exhibit 01, section 2672.24a, is to be a key part of the Annual Wildlife and Fisheries Report. It displays yearly accomplishments toward objectives.

For species without recovery plans, the Deputy Chief and Regional Foresters must develop a schedule that establishes priorities among species and dates for completion of interim recovery strategies. They must update the schedule as new species become listed, or as completion dates must be renegotiated.

For multi-Regional species, the lead Region coordinates proposed recovery strategies with other units and submits the proposal to the Chief for approval.

2672.24d - Standards for Recovery Strategies

Recovery strategies shall include the following:

1. Apportionment of population recovery objectives by Regions and Forests and projected time frames for achieving recovery objectives.

2. Identification of known essential or critical habitat to meet recovery objectives.

3. An annually updated 5-year schedule of activities, funds (appropriation/function), outputs (recovery increments), by decision variable for each Federally listed species. The Washington Office Wildlife and Fisheries Staff provides instructions and format annually to facilitate input to budget formulation.

2672.3 - Regional Guide and Forest Land and Resource Management Plans

Refer to FSM l920 and 2620 for specific direction on planning for endangered, threatened, proposed, and sensitive species.

2672.31 - Forest Plan Objectives for Federally Listed Species

Federally listed species Forest Plan objectives must relate to the overall goal of effecting recovery and achieving eventual delisting. Management to achieve species recovery levels is required by law. Management at recovery levels specified in Recovery Plans equates with the National Forest Management Act requirement to maintain viable populations of native and desired non-native vertebrate species. Forest Plan preferred alternatives must meet or exceed recovery objectives.

2672.32 - Forest Plan Objectives for Sensitive Species

For sensitive species, include objectives in Forest plans to ensure viable populations throughout their geographic ranges. Once the objectives are accomplished and viability is no longer a concern, species shall not have "sensitive" status.

2672.4 - Biological Evaluations

Review all Forest Service planned, funded, executed, or permitted programs and activities for possible effects on endangered, threatened, proposed, or sensitive species. The biological evaluation is the means of conducting the review and of documenting the findings. Document the findings of the biological evaluation in the decision notice. Where decision notices are not prepared, document the findings in Forest Service files. The biological evaluation may be used or modified to satisfy consultation requirements for a biological assessment of construction projects requiring an environmental impact statement.

2672.41 - Objectives of the Biological Evaluation

1. To ensure that Forest Service actions do not contribute to loss of viability of any native or desired non-native plant or contribute to animal species or trends toward Federal listing of any species.

2. To comply with the requirements of the Endangered Species Act that actions of Federal agencies not jeopardize or adversely modify critical habitat of Federally listed species.

3. To provide a process and standard by which to ensure that threatened, endangered, proposed, and sensitive species receive full consideration in the decisionmaking process.

2672.42 - Standards for Biological Evaluations

In order to meet professional standards, biological evaluations must be conducted or reviewed by journey or higher level biologists or botanists (FSM 2634). Biological evaluations shall include the following:

1. An identification of all listed, proposed, and sensitive species known or expected to be in the project area or that the project potentially affects. Contact the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) as part of the informal consultation process for a list of endangered, threatened, or proposed species that may be present in the project area.

2. An identification and description of all occupied and unoccupied habitat recognized as essential for listed or proposed species recovery, or to meet Forest Service objectives for sensitive species.

3. An analysis of the effects of the proposed action on species or their occupied habitat or on any unoccupied habitat required for recovery.

4. A discussion of cumulative effects resulting from the planned project in relationship to existing conditions and other related projects.

5. A determination of no effect, beneficial effect, or "may" effect on the species and the process and rationale for the determination, documented in the environmental assessment or the environmental impact statement.

6. Recommendations for removing, avoiding, or compensating for any adverse effects.

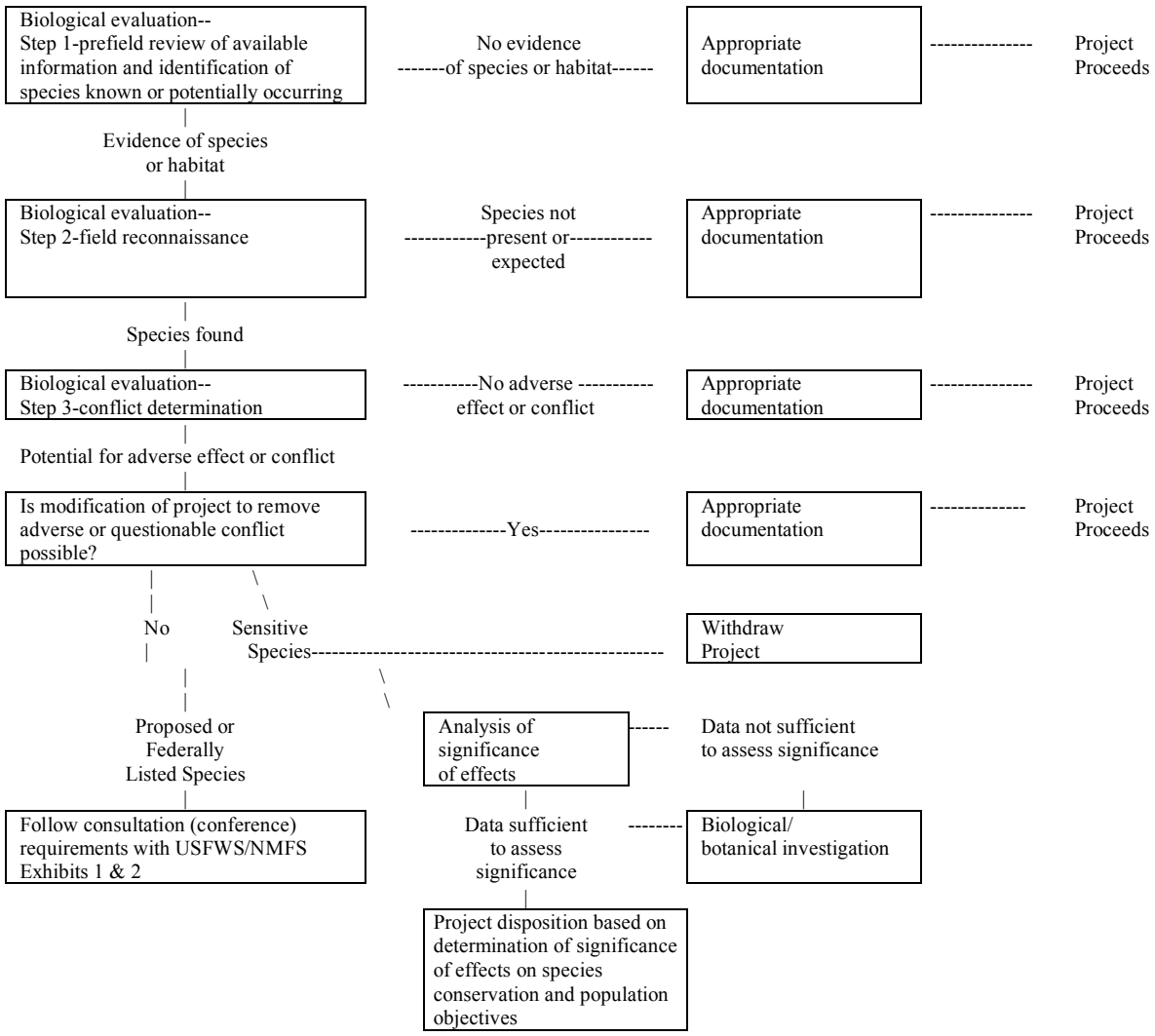
7. A reference of any informal consultation with the Fish and Wildlife Service as well as a list of contacts, contributors, sources of data, and literature references used in developing the biological evaluation.

2672.43 - Procedure for Conducting Biological Evaluations

A suggested procedure for conducting and documenting findings of a biological evaluation is outlined in exhibit 01.

2672.43 - Exhibit 01

BIOLOGICAL EVALUATION PROCESS - THREATENED, ENDANGERED, PROPOSED AND SENSITIVE SPECIES PROJECT PROPOSAL



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This chapter focuses on National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.) analysis, NEPA-based decisions, and the implementation of those decisions regarding rangeland management and livestock grazing with an objective of achieving and maintaining desired rangeland conditions on National Forest System (NFS) lands. The direction that follows is for determining whether livestock grazing is an acceptable use on a given allotment of National Forest System land. General environmental analysis requirements are set forth in regulations adopted by the Council on Environmental Quality at 40 CFR 1500 et seq. and at FSH 1909.15.

A proposed action may be relatively broad, encompassing several actions intended to achieve desired rangeland conditions, or the proposed action could be relatively narrow and focus only on the authorization of livestock grazing. In the latter case, the proposed action need only be consistent with the land and resource management plan (LRMP).

Most livestock grazing on National Forest System lands has occurred in the areas presently grazed, in a variety of forms, for over a hundred years. Typically during that time numerous grazing systems have been implemented along with accompanying range improvements. Stocking rates and seasons of use have been adjusted; the timing, intensity, frequency, and duration of grazing have been continually fine tuned over time. More recently, further adjustments have been made on many allotments to provide for the needs of species listed under the Endangered Species Act (ESA) of 1973 (16 U.S.C. 1531 et seq.), clean water, and archeological structures and artifacts. This dynamic evolution of management, on most allotments, results in the ability to narrow the range of alternatives that must be analyzed in detail. When a proposed action includes authorization of livestock grazing, and lacks any significant issues identified during scoping, alternatives analyzed in detail would be limited to: the proposed action, no action (which is no grazing), and current management.

91 - RANGELAND MANAGEMENT DIRECTION IN LAND AND RESOURCE MANAGEMENT PLANS (PROGRAMMATIC PLANNING LEVEL)

Among other things, LRMPs identify the suitability of land on National Forest System units to produce forage for grazing animals and establish programmatic direction for grazing activities, including goals, objectives, desired conditions, standards, guidelines, and monitoring requirements. Although an area may be deemed suitable for use by livestock in a LRMP, a project-level analysis evaluating the site-specific impacts of the grazing activity, in conformance with NEPA, is required in order to authorize livestock grazing on specific allotment(s). See FSM 1920 and FSH 1909.12 for basic direction for addressing rangeland resources in LRMPs.

91.1 - Consistency with Land and Resource Management Plan

Under the National Forest Management Act (NFMA) of 1976 (16 U.S.C. 1600 et seq.), project-level decisions, which authorize the use of specific National Forest System lands for a particular purpose like livestock grazing must be consistent with the broad programmatic direction

established in the LRMP. Consistency is determined by examining whether the project-level decision implements the goals, objectives, desired conditions, standards and guidelines, and monitoring requirements from the LRMP. Where necessary, grazing permits must be modified to ensure consistency with the LRMP.

91.2 - Relationship of Land and Resource Management Plans to Grazing Permit

Pertinent direction in LRMPs relating to livestock grazing are included directly in part 3 of the grazing permit (sec. 94.2) on Forms FS-2200-10a, FS-2200-10b, and FS-2200-10c if an allotment management plan (AMP) either does not exist or is inconsistent with the LRMP. The AMP becomes a part the grazing permit form, part 3. These forms are available electronically on the forms webpage on the FS Web/Intranet.

92 - PHASES OF RANGELAND MANAGEMENT PLANNING

There are three distinct phases in the rangeland project planning process:

1. The analysis process leading up to and including the development of a proposed action, referred to as "plan-to-project";

2. Project initiation; and

3. The project-level planning and NEPA compliance process which is focused on site-specific analysis of the proposed action and alternative actions.

These analyses may be conducted on an allotment or group of allotments that share similar ecological conditions and resource issues. If a thorough analysis is conducted in development of the proposed action, the NEPA process can move more quickly and efficiently.

92.1 - Plan-to-Project Analysis

The responsible official has broad discretion in determining what analysis precedes formal NEPA analysis and documentation. The steps that follow lend themselves to those project proposals that involve a higher level of complexity and can be adjusted as warranted. These are important steps that, if taken in preparation for a project-level NEPA proposal, increase the efficiency of the NEPA planning process. These steps include:

1. Identification of desired conditions (sec. 92.11);

2. Identification of existing conditions (sec. 92.12);

3. Identification of resource management needs (sec. 92.13);

4. Identification of possible practices (sec. 92.14), and

5. Identification of information needs (sec. 92.15).

92.11 - Identification of Desired Conditions

A team, using an interdisciplinary approach, identifies the desired conditions for rangelands and other related resources within the analysis area. Desired conditions should be specific, quantifiable, and focused. Desired condition statements have two distinct scales.

1. At the landscape scale, desired conditions are generally taken directly from the LRMP.

2. At the broad scale, desired conditions are then further described on a site-specific scale for reference areas.

Monitoring can then tie to these reference areas as a means of determining progress toward meeting the desired conditions.

92.12 - Identification of Existing Conditions

An analysis team examines the existing conditions within the analysis area for all pertinent resources for which a desired condition is identified, such as ecological status of the vegetation, composition and arrangement of plant communities, status and function of riparian areas and wetlands, stream bank and stream channel characteristics, wildlife and fish habitat characteristics, cultural resource protection, soil protection, and water quality.

Existing conditions should be specific and quantified where possible. Existing conditions may be evaluated at two scales.

1. At the landscape scale, existing conditions are generally taken from watershed-level or other area assessments.

2. At the project-level, existing conditions may be identified through a myriad of sources, including rangeland inspections, rangeland analyses, environmental analysis documentation for other actions in the area, electronic resource databases, and anecdotal information from previous or current grazing permittees or other knowledgeable sources.

The data and information must be pertinent to identifying differences between existing and desired conditions related to rangeland resources. Data collected should address the appropriate timing, intensity, frequency, and duration issues of livestock grazing so that alternatives can be developed that utilize an adaptive management approach based on specific monitoring criteria.

Do not collect needless information that may not help identify rangeland resource problems and that is not specific to the project area.

The preferable sequence of project-level planning is to complete large-scale assessments, encompassing a watershed or sub-watershed, prior to initiating the project-level decisionmaking process. This allows for efficient use at the project level of the inventory, analysis, and assessment information gathered at the larger scale. Upon the completion of large-scale assessments, site-specific analyses, and project-level decisions may be scaled down to allotments that share similar ecological conditions and resource issues. Project-level decisionmaking conducted in this manner is more expeditious and efficient.

92.13 - Identification of Resource Management Needs

Identification of resource management needs is simply the comparison of desired conditions with existing conditions to determine the extent and rate at which current management is meeting or moving toward those desired conditions. Where a particular existing condition and desired condition are the same, there is no need for change. Conversely, where an existing condition and a desired condition are not the same, there is a need for change. A need for change should equate to the purpose and need for the action to be proposed.

Monitoring (sec. 95) and permit administration may have already identified certain "concerns" on an allotment. That means that there is already knowledge of specific existing conditions that are not the same as desired conditions. The plan-to-project analysis helps to methodically identify existing conditions, desired conditions, and any disparity between them so that the analysis team and the line officer can reach agreement on rangeland resource management concerns before identifying possible practices.

Inspections, monitoring, and continual dialogue with permittees provides an ongoing feedback loop for the need to maintain or change management on the ground. Issuance of a permit and subsequent allotment administration, by its very nature, establishes an obligation for close working relations between agency personnel and permittees.

92.14 - Identification of Possible Practices

Identify possible practices or actions that may be undertaken to meet the identified management needs. The responsible official may, in his or her discretion, limit the list of possible practices to various livestock grazing practices, or alternatively consider all types of practices that may be employed to reach desired rangeland conditions. Ultimately, the responsible official decides which of the identified possible practices are carried forward to a proposed action. In doing so, the responsible official should consider a full array of likely possibilities in the proposed action.

92.15 - Identification of Information Needs

1. Evaluate the quality, accuracy, and usefulness of the information being used to describe existing conditions.

2. Identify any important gaps in knowledge that keep the analysis team from understanding and evaluating differences between desired and existing conditions.

3. Estimate what it would cost in terms of time, money, and effort to obtain missing information, and if it is worthwhile to collect it.

4. Identify how the information gap relates to the decision framework.

5. Determine if the information is important enough for the decision that the information must be gathered or the decision rationale will be lacking.

92.2 - Project Initiation

To initiate a project, the following steps are then taken:

1. Development of a decision framework (sec. 92.21);

2. Development of a purpose and need statement (sec. 92.22); and

3. Development of a proposed action (sec. 92.23).

92.21 - Decision Framework

Before characterizing the nature of a livestock grazing authorization decision, it is important to establish whether or not a valid decision already exists. If a decision has already been made to authorize livestock grazing in a specific area, and resource conditions are at or moving toward desired conditions, a new decision may not be necessary. Review the environmental analysis documentation and assess whether there is sufficient new information, technology, or changed conditions to warrant a new analysis and decision. If a previous analysis and decision are still valid, document this finding and continue to implement the decision to authorize livestock grazing by issuing a new permit and continuing to apply management as prescribed in the decision (sec. 96).

There is a two-part decision to be made for authorizing livestock grazing.

1. Whether livestock grazing should be authorized on all, part, or none of the project area.

2. If the decision is to authorize some level of livestock grazing, then what management prescriptions will be applied (including standards, guidelines, grazing management, and monitoring) to ensure that desired condition objectives are met or that movement occurs toward those objectives in an acceptable timeframe.

92.22 - Purpose and Need

Neither the Council on Environmental Quality regulations at 40 CFR parts 1500-1508, nor the courts have made a distinction between the terms "purpose" and "need." Therefore, "purpose and need" is referred to as a single item. The purpose and need statement should simply explain why the action is being proposed. The purpose and need statement should answer the questions: "Why here?" and "Why now?"

The purpose and need for the proposed action has its origin in the gaps between desired resource conditions and existing conditions. These gaps, articulated as "resource management needs" (sec. 92.13), provide the basis for describing the purpose and need for action. Where existing resource conditions are meeting or moving toward the desired conditions, the purpose and need for action may simply be that a qualified applicant has requested authorization to graze livestock.

92.23 - Proposed Action

1. The proposed action is initially developed as a possible practice during the plan-to-project analysis (sec. 92.1). A proposed action may undergo many refinements before being formally proposed. Once an action is proposed, the NEPA process begins. Agency personnel should actively work together with permittees to resolve identified management problems. Development of a proposed action is ideally a partnership effort done informally within the obligations imposed by the grazing permit (sec. 94.2). The agency defines the desired land condition; permittees have a stake in helping to determine how to get there when livestock grazing is authorized. If a plan-to-project analysis indicates that livestock grazing is a possible management practice, then the proposed action should include the authorization of livestock grazing and the required livestock grazing management practices necessary to maintain or attain desired resource conditions.

2. A proposed action that includes authorization of livestock grazing shall also include the basic elements of an allotment management plan (AMP) (sec. 94.1) because these elements will ultimately be obtained directly from the NEPA-based decision and will be included in part 3 of the grazing permit Forms FS-2200-10a, FS-2200-10b, and FS-2200-10c) as an AMP. Both the issuance of the permit and the development or amendment of an AMP that becomes a part of the permit is considered an administrative action that implements the NEPA-based decision (sec. 94). The pertinent parts of an AMP include:

a. Management objectives in terms of the condition and trend of the rangeland resources;

b. Required livestock management practices including maximum amount of use in terms of allowable use levels to achieve management objectives;

c. Structural or non-structural improvements that are necessary and ripe for implementation; and,

d. Appropriate monitoring to determine if management objectives are being met or if adaptive management alterations are needed.

3. When the proposed action includes an adaptive management approach, there should be a change from specifying a fixed number of livestock and on- and off- dates to specifying the maximum limits or parameters for the appropriate timing, intensity, frequency, and duration variables (sec. 92.23b).

92.23a - Scope of Proposed Action

The responsible official determines the scope of a proposed action. This means that the line officer with the delegated authority to implement a proposed action also has the discretion to decide how complex or narrowly focused a proposed action is. A proposed action that is broad in scope may encompass a suite of activities designed to achieve various desired resource conditions. Alternatively, a proposed action that is narrow in scope may focus exclusively on authorization of livestock grazing.

While there is no requirement regarding how narrow or broad the scope of a proposed action is defined, the scope has a direct bearing on the complexity of the environmental analysis. Combining several activities into one proposed action may be efficient for analysis purposes, but analysis timeframes generally increase with the breadth of scope. Trade offs are generally associated with time or cost. Proposed actions that are broad in scope generally take more time to analyze, but planning costs are less per activity. Conversely, proposed actions that are narrow in scope generally take less time to analyze, but planning costs per activity may be higher. Responsible officials should consider these trade offs when developing proposed actions.

92.23b - Adaptive Management

1. When livestock grazing is proposed using an adaptive management strategy, the proposed action shall set defined limits using adaptive management principles of what is allowed, such as timing, intensity, frequency, and duration of livestock grazing. These limits set standards that can be checked through monitoring to determine if actions prescribed were

followed, and if changes are needed in management. The NEPA analysis discloses the effects for these standards. Administrative actions within the defined limits of the resultant NEPA-based decision can then be implemented without additional NEPA. Examples of administrative decisions include:

a. Determination of specific dates for grazing,

b. Specific livestock numbers,

c. Class of animal,

d. Grazing systems, and

e. Range readiness when these variables fit within the NEPA-based decision.

2. Adaptive management utilizes the interdisciplinary planning and implementation process that provides:

a. Identification of site-specific desired conditions;

b. Definition of appropriate decision criteria (constraints) to guide management;

c. Identification of pre-determined optional courses of action, as part of a proposed action to be used to make adjustments in management over time, and

d. Establishment of carefully focused project monitoring to be used to make adjustments in management over time.

Planning for adaptive management may be initiated during development of the proposed action. It involves identification of future management options that may be needed to accelerate or adjust management decisions to meet desired conditions and/or project standards and objectives, as the need is determined through monitoring.

3. In circumstances where changes in conditions warrant implementation of a management option that has not been provided for in the NEPA analysis, or when the predicted effects of implementation are determined to be greater than the effects originally predicted, a supplemental or new NEPA analysis and NEPA-based decision is needed.

4. Building adaptive management flexibility into management allows for decisions that are responsive to needed adjustments in permitted actions. Historically, decisions have been too narrowly focused, such as deciding to authorize a specific number, kind, or class of livestock with specific on- and off-dates under a specific type of grazing system. These kinds of decisions have restricted management flexibility in meeting desired conditions and project objectives.

5. The key to development of adaptive management actions is to focus on factors that are essential to ensure management objectives are met. Critical factors may consider issues, such as timing restrictions in specific areas to manage conflicts with fisheries, big game, or recreation; or allowable use standards to ensure retention of defined levels of cover or riparian residual vegetation to trap and retain sediments. In any case, the focus must be on defining criteria that are critical to management success and to move away from making decisions that unduly restrict flexibility. Yet, in all cases, the proposed action must adequately detail the type and level of activities that can take place on a given allotment(s).

6. With a well-crafted adaptive management approach, the NEPA-based decision can remain viable for an extended period of time as long as there is periodic review of the actions for consistency with the NEPA-based decision. In most cases, the only situations that would require an updated NEPA analysis would be where unforeseen changed conditions have occurred that require management actions that have not been considered, and which may produce effects outside the scope of those predicted within the original NEPA analysis document.

92.3 - Project-Level Planning and NEPA Compliance

Project-level decisionmaking is usually more expeditious and efficient when it is based upon the completion of large scale assessments, followed by site-specific analyses on allotments that share similar ecological conditions and resource issues.

Except where expressly provided for by law, a site-specific analysis of environmental effects of livestock grazing projects on affected National Forest System lands and resources must be completed pursuant to NEPA before the grazing activity can be authorized.

General environmental analysis requirements are set forth in regulations adopted by the Council on Environmental Quality at 40 CFR 1500 et seq. and in the Forest Service Directive System at FSH 1909.15.

92.31 - Alternatives

Analysis of alternatives requires consideration of a range of reasonable alternatives. The range of reasonable alternatives includes both alternatives that warrant detailed analysis, and alternatives that are considered but eliminated from detailed study. In cases where the design and configuration of the proposed action can mitigate resource concerns to acceptable levels, the proposed action may be the only viable action alternative. When there is a significant issue with the proposed action, an alternative to the proposed action shall be developed and analyzed in detail (FSH 1909.15, sec. 14). In all cases, the rationale and development of alternatives shall be addressed and disclosed in the NEPA analysis for the project.

In addition to the proposed action, the "no action" alternative shall always be fully developed and analyzed in detail. "No action" is synonymous with "no grazing" and means that livestock grazing would not be authorized within the project area.

Current management should also be analyzed in detail as an alternative to the proposed action if current management meets the stated purpose and need for action. This alternative shall be based on the current management actions being implemented, specifically, current management over the last 3 to 5 years. Current management direction may be contained in an allotment management plan (sec. 94.1), annual operating instructions (AOI) (sec. 94.3), or a combination thereof. The current management alternative may also be the proposed action. This would be appropriate when current management is determined to be consistent with the land and resource management plan and has been shown to be effective in meeting resource objectives through monitoring over time.

Detailed direction for development of alternatives is found in FSH 1909.15, section 14.

92.32 - Effects of Alternatives

The evaluation of a proposed action's environmental effects must include:

1. The potential effects of all actions,

2. All adaptive management options included in the alternatives, and

3. Those actions that may be implemented at some future point in time. For example, if one potential option is to fence off a riparian area, the effects of that fence must be evaluated even if that management option may never actually be implemented.

Detailed direction for estimating effects of each alternative is found in FSH 1909.15, section 15.

92.33 - Documentation

The level of environmental analysis and documentation required for Forest Service projects is guided by the NEPA procedures set out at FSH 1909.15, chapters 20 and 40.

93 - INTEGRATION OF OTHER LEGAL REQUIREMENTS INTO RANGELAND MANAGEMENT DECISIONMAKING PROCESS

93.1 - Endangered Species Act (ESA)

For direction on compliance with ESA, refer to 50 CFR part 402, implementing regulations of ESA, and FSM 2670.

93.2 - National Historic Preservation Act (NHPA) of 1966 (16 U.S.C. 470 *et seq.*)

For further direction, refer to the National Programmatic Agreement between the Forest Service and the Advisory Council on Historic Preservation Regarding Rangeland Management Activities on National Forest System lands (FSM 1539.61), and also to State or local programmatic agreements.

93.3 - Clean Water Act (CWA)

Compliance with the CWA is achieved through the proper site-specific design, implementation and monitoring of Best Management Practices (BMP). BMPs are practices approved by the State and the Environmental Protection Agency (EPA) that are intended to result in compliance with State water quality standards. BMPs are usually a component of land and resource management plans (LRMPs), and are often listed in Chapter 2 of a LRMP with Forest Standards. As approved practices or as Forest Standards, BMPs are one of the required elements of each environmental assessment and AMP. A key concept of BMPs is that if monitoring identifies any circumstance of noncompliance with State water quality standards, then the Forest Service is obligated to respond to the situation to restore compliance. As long as BMPs have been applied and monitoring and adjustments are ongoing, then the Forest Service is in compliance with the CWA. See EPA's SAM-32 direction, 8/87, *http://www.epa.gov/waterscience/library/wqstandards/npscontrols.pdf* for further direction.

When an allotment contains streams or lakes included on a State's 303(d) list of impaired waters (these waters are also included in the State's bi-annual 305(b) report), it means that a State-led Total Maximum Daily Load (TMDL) process for restoration is required. The process is the responsibility of the States to design, and the Forest Service to implement and monitor. The TMDL shall include specific restoration and monitoring requirements, even on Federal lands. Check with your Regional Office to determine whether a Memorandum of Understanding has been established with the State that allows the Forest Service to perform the required TMDL process, or allows collaboration with the State in its development. Prior to the establishment of a formal TMDL, management may continue as long as BMPs are applied and subsequent monitoring is implemented.

94 - NEPA-BASED DECISIONS AND IMPLEMENTING ACTIONS THAT FOLLOW

Except as authorized under section 504(a) of the Rescissions Act of 1995 (Pub.L. 104-19) or the 2004 Omnibus Appropriations Resolution (Pub.L. 108-108, Nov. 10, 2003), the project-level NEPA-based decision to authorize grazing on one or more allotments is made by the authorized officer upon completion of site-specific environmental analysis. The decision to authorize

grazing is made in the NEPA-based decision document whose major focus is on maintaining or achieving the desired land condition. The grazing permit, accompanying allotment management plan (AMP) (sec. 94.1) as appropriate, and annual operating instructions (sec. 94.3) all serve to implement the project-level decision to authorize grazing (sec. 96). The AMP becomes a part of the grazing permit. If an AMP currently exists, it should be revised to reflect new information from the most recent project-level decision. The grazing permit is then modified to include the revised AMP. Subsequent modifications to grazing or related management activities may be made as long as those changes are within the scope of the project-level decision.

94.1 - Allotment Management Plans (AMPs)

AMPs contain the pertinent livestock management direction from the project-level NEPA-based decision (sec. 92.23, para. 2). AMPs also refine direction in the project-level NEPA based decision deemed necessary by the authorized officer to implement that decision. AMPs should be developed concurrently with the completion of the site-specific analysis and project-level decision.

Each AMP shall become a part of Part 3 of the grazing permit with a letter to the permittee(s) notifying them of this modification.

94.2 - Grazing Permits

A grazing permit is the instrument that authorizes a specific holder of the grazing permit to graze livestock on certain National Forest System or other lands under Forest Service jurisdiction. The grazing permit contains specific terms and conditions as provided by the NEPA based decision that authorized the grazing use. The timely issuance of a grazing permit constitutes implementation of a project-level NEPA-based decision. The terms and conditions of the grazing permit must be consistent with the project-level decision. Where site-specific analysis and a project-level decision are completed subsequent to issuance of a grazing permit pursuant to section 504(a) of the Rescissions Act, or the 2004 Omnibus Appropriations Resolution (Pub.L. 108-108, Nov. 10, 2003) it may be necessary to modify the existing permit or issue a new permit with new terms and conditions to ensure that it conforms to the direction of the project-level decision.

94.3 - Annual Operating Instructions (AOI)

The AOIs specify those annual actions that are needed to implement the management direction set forth in the project-level NEPA-based decision. Actions in the AOIs must be within the scope of the project-level decision, and as such are not required to undergo any additional site-specific environmental analysis.

To the extent feasible, the AOI should be developed with the permittee. The AOIs shall clearly and concisely identify the obligations of the permittee and the Forest Service, and clearly articulate annual grazing management requirements, standards, and monitoring necessary to document compliance.

The AOIs should set forth:

1. The maximum permissible grazing use authorized on the allotment for the current grazing season and should specify numbers, class, type of livestock, and timing and duration of use.

2. The planned sequence of grazing on the allotment, or the management prescriptions and monitoring that will be used to make changes.

3. Structural and non-structural improvements to be constructed, reconstructed, or maintained and who is responsible for these activities.

4. Allowable use or other standards to be applied and followed by the permittee to properly manage livestock.

5. Monitoring for the current season that may include, among other things, documentation demonstrating compliance with the terms and conditions in the grazing permit, AMP (sec. 94.1), and AOI. In addition, the permittee may be asked to provide information regarding livestock distribution or the condition of improvements. Where adaptive management prescriptions are being followed, this section of the AOI must provide details about those monitoring items and decision points needed to determine when a change is necessary and to guide the direction that those changes take (sec. 95).

95 - MONITORING

Monitoring shall be included in the project-level decision. This includes monitoring required as a result of section 7 of the Endangered Species Act regarding consultation (sec. 93.1). Monitoring can determine whether the project-level decision is being implemented as planned (implementation monitoring) and, if so, whether the objectives identified in the LRMP and AMP (sec. 94.1) are being achieved in a timely manner (effectiveness monitoring). Allotment monitoring should be an open, cooperative, and inclusive process. Invite participation from rangeland users and other interested parties where feasible. Implementation and focused effectiveness monitoring are critical to determine when or if adaptive management changes should be made and to guide the direction that those changes take.

As the project decision is implemented, monitoring should indicate whether actions are being implemented as planned and are meeting standards and design criteria (implementation monitoring), and whether those actions are effective in meeting or moving toward desired resource conditions (effectiveness monitoring). If monitoring indicates that desired conditions are not being met, other pre-determined management options (such as adaptive management) included in the project decision may be selected for implementation. If monitoring indicates that management is meeting standards, and is meeting or moving toward the desired conditions in an acceptable timeframe, the initial management options may continue.

Finally, management requires the interdisciplinary team and authorized officer to periodically evaluate monitoring results and to determine if other described management options are warranted.

95.1 - Types of Monitoring

The two types of monitoring to consider in the site-specific analysis and project-level decision are:

1. Implementation monitoring. This type of monitoring determines if activities are implemented as designed.

2. Effectiveness Monitoring. This type of monitoring determines if activities are effective in meeting objectives. Evaluation of the results of effectiveness monitoring is used to implement adaptive management.

95.2 - Monitoring and Evaluation Methods

Interagency Monitoring Technical References provide the monitoring methodologies that should be used (FSM 2206). Technical references may be supplemented by Regional Handbooks (FSM 2209).

95.3 - Allowable Use

Not exceeding allowable use is a responsibility permittees assume when they accept a term grazing permit. Term permits are described in FSH 2209.13, chapter 10.

96 - REVIEW OF EXISTING PROJECT-LEVEL NEPA-BASED DECISIONS

Review of existing project-level NEPA-based decisions (sec. 94) must be conducted periodically to determine if the analysis and documentation remain valid or if new information exists that requires some further analysis and potential modification of the activity. If the authorized officer

determines that correction, supplementation, or revision is not necessary, implementation of existing decisions shall continue. The findings of the review shall be documented in the project file. See FSH 1909.15, section 18 for further direction on review and analysis requirements related to existing project-level NEPA-based decisions.

96.1 - Modifications Not Requiring New NEPA-Based Decisions

A project-level NEPA-based decision remains valid as long as the authorized activity complies with laws, regulations, LRMP, and is within the scope of the project-level NEPA-based decision. Therefore, it is not necessary to initiate a new site-specific analysis in order to undertake a modification that has already been analyzed, decided upon, and documented. Management actions should be adjusted when monitoring indicates that those actions are not effective in reaching defined objectives. This is the basic premise behind adaptive management (sec. 92.23b).

96.2 - Adaptive Management Modifications

Adaptive management options that would be activated if the authorized activity is not achieving the anticipated objectives must be specified in the project-level decision. When monitoring indicates the need for implementation of adaptive management modifications disclosed in the project-level NEPA-based decision, those modifications can be implemented without further NEPA review.