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' REPLY BRIEF

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LIST OF ACRONYMS

AOI	Annual Operating Instructions
AMP	Allotment Management Plan
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
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

There is no conjecture when it comes to the causal chain that establishes Plaintiffs' standing in this case. The Forest Service's (USFS) grazing decisions determine whether livestock depredations will occur, and recur, in wolf-occupied habitats on National Forest lands, because the USFS controls all aspects of grazing. The USFS decides whether, where, and when to allow that activity to occur and under what particular management strategies. It can restrict grazing in areas of the Forest that are unsuitable for that use due to recurring conflicts between native wildlife and domestic stock, when other mitigation measures have not resolved the problem. In fact, NFMA's planning regulations require the USFS to engage in a grazing suitability analysis that accounts for wolf-livestock conflicts, which can result in closing high-risk areas to future grazing. 36 C.F.R. § 219.20.

"Repeated livestock depredations" that "are likely to continue" is Washington Department of Fish and Wildlife's (WDFW) sole basis for killing wolves. 8-ER-1728. Thus, the USFS's grazing authorizations for the Colville dictate whether WDFW is called upon to lethally remove wolves on these public lands. Changes to those authorizations–including prohibiting livestock from areas that are identified as unsuitable for grazing–could redress Plaintiffs' injuries here.

Plaintiffs have also demonstrated that their concrete interests in keeping wolves alive on the Colville National Forest are within the "zone of interests" that

NEPA and NFMA are designed to protect. Further, because Plaintiffs' programmatic claims challenge the *procedural* adequacy of the Forest Plan FEIS, those claims are ripe for review.

ARGUMENT

Plaintiffs have a procedural right under NEPA and NFMA to have the USFS publicly disclose and honestly evaluate the impacts of its grazing authorizations on sensitive gray wolves and measures to mitigate wolf-livestock conflicts. Such procedurally adequate analyses *could* protect Plaintiffs' concrete interests in keeping wolves alive and ensuring their long-term viability on the Colville National Forest. Opening Br., 33-40. That is all Plaintiffs must demonstrate for standing here. *See Cottonwood Env't Law Ctr. v USFS*, 789 F.3d 1075, 1082-83 (9th Cir. 2015) (Where a procedural violation is at issue, "a litigant need only demonstrate that he has a procedural right that, if exercised, could protect his concrete interests and that those interests fall within the zone of interests protected by the statute at issue.")

The USFS tries to muddy the waters by dismissing its ability to influence wolf-livestock conflicts on the Forest. Initially, and also behind closed doors, the USFS acknowledged its authority and responsibility to protect wolves from being killed by mitigating conflicts with federally permitted livestock. *E.g.*, 7-ER-1476-77 (internal memo); 7-ER-1494 (internal draft outline); 7-ER-1604-07 (internal

communications); 9-ER-2041-42 (2006 Biological Evaluation for Colville allotments); 8-ER-1941-42 (2011 Proposed Action); Further Excerpts of Record (FER) 72, 76 (2018 Blue Mountains Forest Plan FEIS); 7-ER-1452-53. But then, as the concerned public increasingly called upon the USFS to change its grazing management on the Colville to effectively prevent recurring wolf-livestock conflicts on federal allotments, the USFS swept the issue under the rug—omitting any discussion of grazing impacts on still recovering gray wolves from its public-facing analysis for the Forest Plan revision. Opening Br., 22-23; FER-35-47. Ultimately, the USFS disclaimed any responsibility to even consider incorporating conflict avoidance measures at either the programmatic- or site-specific levels. Opening Br., 19-26; 7-ER-1408; FER-77.

Now, in this litigation, the USFS insists that there is no causal connection between its grazing authorizations and wolves being killed in response to repeated livestock depredations on the Forest. It falsely claims that stopping grazing in unsuitable areas altogether or incorporating science-backed conflict avoidance measures into its Forest Plan, AMPs or other grazing instructions cannot remedy the conflicts that lead to wolf killings. Instead, the USFS purports that only WDFW's list of non-binding "example deterrence measures" can influence whether the state agency lethally removes wolves in response to livestock depredations on federal grazing allotments. According to Defendants' faulty

narrative, any *mandatory* grazing management directives from the USFS to its permittees would simply be "duplicative." Plaintiffs have shown this is false. *See infra Sec.* I.C.

Defendants even claim that the USFS is *incapable* of adopting management directives that would protect core wolf areas, because WDFW will not share location data of wolf dens and rendezvous sites with its officials—the very federal employees tasked with managing livestock grazing and protecting the viability of wolves on the Colville National Forest. Response Br., 44. That argument breezes past the USFS's prior acknowledgements of how it can protect core wolf areas on the Forest, *e.g.*, 8-ER-1938-44, 7-ER-1452-53, 7-ER-1476, 7-ER-1494, and ignores the USFS's lip service about closely coordinating with WDFW "to reduce the potential for wolf-livestock interactions," *e.g.*, 7-ER-1484, 7-ER-1481, 7-ER-1492. WDFW's wolf plan and conflict protocol also expressly recognize the critical role of federal land managers like the USFS in minimizing conflicts near core wolf areas on federal allotments. 8-ER-1770, 1795-96; FedSer-026. Even Washington's Governor, fed up with the "status quo of annual lethal removal," directed WDFW to work closely with the USFS to reduce conflicts on federal allotments that are "prime wolf habitat." FER-80-81. Given all this, the notion that the USFS's hands are tied because WDFW only shares location data with grazing permittees (and apparently the county sheriff's office and county commissioners),

7-ER-1455, but *not* federal officials who actually manage grazing where the vast majority of wolf-livestock conflicts are occurring, is unconvincing.

The truth it seems, is that the Colville's managers deliberately chose to turn a blind eye, dodge their responsibility, and point the finger back at WDFW. *See e.g.,* 7-ER-1461-62; 7-ER-1454-58 (emails showing the Colville's officials have not asked WDFW to share location data on active core wolf areas within allotments in recent years). But that reflects a policy decision by the USFS, not its management authority and responsibility to protect sensitive species from the adverse impacts of its livestock grazing authorizations.

I. Plaintiffs Have Established Causation and Redressability for Their Procedural Injuries.

To prove causation, and to "plausibly allege that the injury was not the result of the *independent* action of a third party, the plaintiff must offer facts showing that the government's unlawful conduct is *at least a substantial factor* motivating the third parties' actions." Response Br., 25 (citing *Novak v. U.S.*, 795 F.3d 1012, 1019 (9th Cir. 2015) (second emphasis added). Plaintiffs have made this showing.

The USFS decides whether to authorize grazing at all–as well as the where, when, and how–in light of this activity's environmental impacts. At the programmatic-level, the USFS's determination of where on the Forest it is

appropriate[1] to authorize livestock grazing should be based on a suitability analysis that accounts for conflicts between wildlife and domestic livestock. 36 C.F.R. § 219.20 (1982); FER-6-11 (Range Report for Forest Plan FEIS). If the USFS determines through its forest-wide suitability analysis that wolf-livestock conflicts keep recurring in certain portions of the Forest and that other nonlethal methods have allegedly been properly implemented but did not resolve the problem, it can identify those areas as unsuitable for grazing and stop authorizing livestock use in those high-risk areas. *See infra, Sec.* I.A.

In areas it deems suitable for grazing, the USFS must then provide management direction that addresses all relevant facets of that grazing in order to adequately protect the Forest's natural resources. *See* Opening Br., 8-12, 18-22. This management direction determines the site-specific location of grazing within individual allotments. Accordingly, the USFS could decide to prohibit grazing around active wolf dens and rendezvous sites. *Id*. The agency must also authorize a specific season of use that directs the timing and duration of grazing. As part of this decision, the USFS could prevent grazing from overlapping with high risk periods, such as when wolves are rearing their offspring, or it could dictate that

[1] "Suitability" 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." 36 C.F.R. § 219.3 (1982).

cattle be moved to other areas if a depredation occurs. *Id.* Last, grazing authorizations guide the manner of the grazing itself by imposing management requirements permittees must follow. This direction could specify the grazing strategies/animal husbandry practices that permittees must employ to avoid repeated livestock depredations. *Id*. Thus, the USFS's grazing decisions are not just *a* "substantial factor" in whether repeated livestock depredations on the National Forest will occur and in turn get wolves killed, they are the primary determinant.

A. Authorizing Grazing in Unsuitable Areas Gets Wolves Killed, But the USFS Can Prevent that Outcome.

Lethal removal of wolves on the Colville directly correlates to the USFS's programmatic decision in its revised Forest Plan to authorize roughly 10,000 cows/calves to annually graze across nearly 70% of the Forest from June 1 to mid-autumn *without* any management direction for avoiding wolf-livestock conflicts. Opening Br., 17. This decision allows grazing to occur when wolves are most active around their den and rendezvous sites, including within remote, rugged, densely treed areas where permittees have been unable to closely monitor their herds. *Id*. The USFS's complete failure to account for the factors that drive recurring conflicts between wolves and livestock in the Forest Plan FEIS and associated suitability analysis is a programmatic-level procedural injury that can be redressed by a favorable court ruling.

According to the USFS's own methodology for rendering a programmatic-level grazing suitability determination, planning team specialists should:

> [I]dentify any additional areas where conflicts occur between livestock grazing and other resources to the extent that the conflicts cannot be resolved or satisfactorily mitigated, and where the other resource values are proposed in the alternative to take precedence over livestock use. If the planning recommendation is that livestock use in these areas is incompatible, or the conflicts are incapable of being resolved in a satisfactory manner, these lands would be designated as non-suitable for the specific alternative for this planning cycle.

FER-11.

When the USFS makes a programmatic suitability determination that certain portions of the Forest must be closed to grazing in order to avoid wildlife-livestock conflicts, it can then modify the affected grazing permit(s) to conform to that Plan direction. *See* Opening Br., 18-21; 7-ER-1617 (grazing permit clause regarding modification); FER-11 (explaining that areas the USFS closes to grazing due to conflicts with wildlife or to protect the habitats of threatened, endangered, or sensitive species, are no longer identified as "suitable" for future grazing); *E.g.*, *W. Watersheds Project v. USFS*, 2007 WL 3407679 (D. Ida., Nov. 13, 2007) (upholding USFS's permit modification to close allotments to sheep grazing for the protection of bighorns).

Here, the USFS *did* conduct a grazing suitability analysis during the forest planning process, but it admittedly failed to consider conflicts among livestock and wolves and any measures it could take to regulate such conflicts as part of that

analysis. 6-ER-1362 (claiming the wildlife-livestock conflicts component of 36 C.F.R. § 219.20(b) is addressed "at the allotment level through adaptive management and appropriate mitigation measures[.]") Plaintiffs, however, can easily point to examples of how a *proper* suitability analysis that does account for wildlife-livestock conflicts can redress their ultimate injury-in-fact.

For instance, the USFS stopped authorizing domestic sheep grazing on multiple allotments in the Payette National Forest in central Idaho because its suitability determination for its amended Forest Plan found that continuing such grazing in those particular areas posed too great a risk of disease transmission to native bighorn sheep (also a USFS designated sensitive species).[2]; *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1109-10 (9th Cir. 2016) (upholding FEIS/ROD closing approximately 70% of the Payette's allotments to future sheep grazing due to conflicts with bighorns).

The USFS can do the same here for areas identified as most at risk of recurring wolf-livestock conflicts, where other mitigation measures have allegedly

[2] *Record of Decision for the: Final Supplemental Environmental Impact Statement and Forest Plan Amendment Identifying Suitable Rangeland for Domestic Sheep and Goat Grazing to Maintain Habitat for Viable Bighorn Sheep Populations*, Payette National Forest (2010). Available online (last visited July 8, 2022): https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5238683.pdf. The parties appear to agree that Courts may consider extra-record evidence that allows plaintiffs to establish standing. *See* Opening Br., 23, fn. 7; Response Br., 34-36.

failed to solve the problem. Indeed, the USFS has recognized the causal connection between limiting the acres it deems suitable for grazing and keeping wolves from getting killed in response to livestock depredations. FER-76 (Blue Mountains FEIS stating Alternative C "may have the greatest positive impact to wolves" because it would also "greatly reduce the number of acres for domestic livestock use potentially reducing the risk of interaction with livestock that could lead to lethal removal of wolves.")

In sum, prohibiting cattle from occupying unsuitable areas axiomatically eliminates the possibility of livestock depredations recurring in areas where they previously concentrated. No cattle = no cattle depredations = no lethal wolf removal. The chain of causation here is clear and direct, not speculative or tenuous.

B. Where Livestock and Wolves Overlap on Large, Remote, and Densely Forested Allotments, the USFS's Grazing Management Strategies Determine Whether Depredations Result.

Even in areas that may be suitable for grazing, several recent studies show that the USFS can effectively reduce wolf-livestock conflicts on the Forest by incorporating the grazing management strategies that Plaintiffs proposed into its Forest Plan, AMPs, and annual grazing instructions.[3] Again, these specific measures/key strategies include:

[3] *See*, 5-ER-958-1018 (*Wolf-Livestock Nonlethal Conflict Avoidance: A Review of the Literature With Recommendations for Application to Livestock Producers in Washington State*); 4-ER-730-814 (*Reducing Conflict with Grizzly Bears, Wolves*

- Only authorizing grazing on acreage determined to be capable and suitable for that use through proper grazing capability and suitability analyses;
- Requiring permittees to maintain a regular human presence, closely monitor their herds, and limit grazing to open, defensible portions of allotments;
- Prohibiting grazing within one mile of a known active wolf den or rendezvous site;
- Requiring permittees to expeditiously remove injured and dead stock so they do not become predator attractants;
- Not authorizing the placement of salt licks or other livestock attractants near a known, active wolf den or rendezvous site;
- Not authorizing livestock turnout in areas of known wolf den or rendezvous sites (during the same calendar year that use is documented);
- Requiring livestock be removed from allotments when conflict with wolves occurs;
- Requiring a 24-hour human presence following a documented depredation;
- Implementing appropriate seasonal restrictions;
- Delaying turnout of calves until calving is finished and calves reach at least 200 lbs.

7-ER-1437, 1444-45, 1450-51 (Plaintiffs' Forest Plan objection); 7-ER-1406-09, 7-ER-1421, 7-ER-1426-27, 7-ER-1442-46 (objection meeting notes/responses); 3-ER-292-93 (Plaintiffs' supplemental analysis letter). The best available literature shows that these are the grazing management strategies and animal husbandry practices that are most effective for avoiding wolf-livestock conflicts on large, predominantly forested, "open range" systems like the federal allotments here.

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and Elk: A Western Landowners' Guide); 4-ER-638-685 (*Livestock Management for Coexistence with Large Carnivores, Healthy Land and Productive Ranches*); 4-ER-596-622 (*Livestock and Wolves: A Guide to Nonlethal Tools and Methods to Reduce Conflicts*); 3-ER-377-410 (*A Ranchers Guide: Coexistence Among Livestock, People & Wolves*).

For instance, a literature review of 103 research studies, 5-ER-958-1018, found the following management strategies most effective for densely forested landscapes like the Colville: (1) Developing a management plan based on site conditions that accounts for high depredation risk factors; (2) grazing livestock away from wolf activity, especially denning and rendezvous sites; (3) delaying turnout for cow-calf pairs; and (4) expeditiously removing dead and injured livestock. 5-ER-967. Using range riders/herders to maintain a regular human presence and keep livestock away from "wooded areas" is also highly effective. *Id*.

Indeed, numerous studies in the record show that "cattle mortality can be reduced most effectively by improving husbandry practices," 3-ER-351, identifying high-risk areas, and taking seasonal patterns of depredations into account when developing grazing management strategies. All these studies show that it is essential for livestock producers grazing on large, "open range" systems, to closely monitor their herds so they can *immediately* remove sick and dead stock, best protect younger/smaller calves, and keep livestock bunched up in open spaces and away from high-risk areas where wolves are known to be most active (*e.g.,* dens and rendezvous sites). *See,* 3-ER-383-386, 397-401; 4-ER-666; 4-ER-674 (emphasizing that predation-prevention tools are ineffective when livestock are scattered over large areas); 4-ER-730, 762-66, 769, 778; 5-ER-873-76; 4-ER-596 (identifying key depredation risk factors to consider: the number, age and type of

livestock; the season; the size of the grazing area and how often people check on the livestock); 3-ER-429, 433-34 (showing much higher predation rates on smaller/younger calves); 4-ER-601-602 (need to promptly remove sick and dead stock); 4-ER-608-609 (need for regular human presence); 4-ER-612 (moving livestock away from high-risk areas); 3-ER-384, 3-ER-407 (risk assessment identifying grazing yearlings or calves from May-September in areas of rugged terrain with wolves rearing pups is *highest* risk).

These same types of measures are both recommended by state and federal agency wildlife experts and used by WDFW to develop its recent list of "example deterrence measures." 8-ER-1718-20, 1779-81 (wolf plan); 7-ER-1565, 3-ER-337-38 (USFWS's recommendations).[4] Notably, WDFW's protocol highlights coordination between livestock producers and "landowners" (*e.g.*, federal land managers) over: (1) the timing of turn-out onto allotments; (2) appropriate grazing areas vs. restricted areas; (3) when cattle should be moved; (4) sanitation practices; (5) where stock water/mineral blocks should be located; and (6) "other annual allotment plan instructions related to wolf-livestock interactions." FedSer-028. If these measures had no influence on whether repeated livestock depredations occur on federal allotments, then presumably WDFW would not recommend them. *Id*.

[4] *See* FedSER-023 (citing the literature review at 5-ER-958-1018 and also endorsing the measures recommended by 4-ER-596-622 and 4-ER-638-685).

Though the USFS has abdicated its responsibility to consider incorporating these conflict avoidance measures into the Colville Forest Plan or site-specific grazing instruments, 7-ER-1408, FER-77, Plaintiffs need only demonstrate that if the USFS properly analyzed such measures, it *could* take actions that protect wolves on the Forest from being killed in response to repeated livestock depredations. *Cottonwood*, 789 F.3d at 1082-83; *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) (plaintiffs asserting a procedural injury "need only establish 'the reasonable probability of the challenged action's threat to [their] concrete interest.'") In fact, incorporating these measures as mandatory directives in the Forest Plan, AMPs, and/or other grazing instructions enables the USFS to suspend or terminate grazing privileges should a permittee fail to comply. 36 C.F.R. § 222.4; 7-ER-1617. Thus, by showing the myriad ways that the USFS can effectively prevent and mitigate wolf-livestock conflicts, Plaintiffs satisfy the redressability test.

C. Mandatory Requirements the USFS Could Impose Do Not Duplicate Non-mandatory Measures Recommended by WDFW.

Another one of Defendants' strawman arguments is: "WDFW already ensures that grazers implement two deterrence measures prior to lethal removal," so it would be "duplicative" for the USFS to adopt the particular conflict avoidance measures Plaintiffs advocate for as mandatory directives in its Forest Plan, AMPs, or other grazing instructions. Response Br., 32, 37-43. This is simply false.

Defendants conveniently ignore the fact that WDFW has publicly stated it merely "promotes and encourages" nonlethal deterrence measures through its "non-binding guidance." Opening Br., 47. As WDFW further stated: "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.**" *Id*. (emphasis added). To satisfy WDFW's lethal removal threshold, producers need only employ *any* two possible deterrence measures. FedSer-022. This can include measures that are not applicable to, or effective for, reducing conflicts on large, remote, densely treed federal grazing allotments, including measures a producer may have employed on their own private land pastures prior to turning cattle out on the National Forest.[5]

Moreover, the two chosen measures, whatever they may be, need only be in place for as little as *one week* before the depredations occur (and possibly for an even shorter duration) to satisfy WDFW's threshold for lethal removal. FedSer-023. This is certainly not the equivalent of a USFS grazing suitability determination or permit modification that results in closing "non-suitable" conflict areas to future grazing. Nor is it even the same as including legally binding management directives, such as those that Plaintiffs have proposed, in the revised

[5] *See e.g.,* 3-ER-279 (showing WDFW counted Diamond M's use of private property for the birthing of calves before trucking its cow-calf pairs to the Colville National Forest as a nonlethal deterrence measure).

Forest Plan, AMPs, or AOIs that would direct grazing practices for the entirety of the annual grazing season.

Contrary to Defendants' assertions, WDFW has not ensured that the grazing management strategies that Plaintiffs want the USFS to adopt were in place on the Colville's federal grazing allotments before it authorized the killing of 31 state-listed endangered wolves between 2012-2021. *See* 2-ER-160-161, 167-175 (Complaint). In addition to the facts surrounding the killing of the OPT pack in 2018, Opening Br., 48-51, Plaintiffs can point to numerous other records that demonstrate this point. *See e.g.*, FER-30-32, 58-62; FER-82-198.

For instance, WDFW eliminated the entire Profanity Peak pack in 2016 despite Diamond M failing to move its cattle away from known active core wolf areas. WDFW had confirmed an active den site within the C.C. Mountain allotment by the end of June 2016 (where the USFS authorizes Diamond M to annually graze 198 cow/calf pairs). 7-ER-1534-35; 7-ER-1617. But since WDFW only *recommends* producers move their livestock to other pastures or allotments once an active den or rendezvous site is discovered, Diamond M was free to let its cattle wander right into these high-risk areas. That's precisely what happened; a couple weeks after WDFW discovered the den site, it also confirmed the first depredation. 7-ER-1535. Notably, according to an extensive study of cattle predation in Washington (the "Spence study"), the Profanity Peak pack did *not*

depredate on livestock *until* Diamond M's cattle were right at the pack's den site. FER-156-158. *Then* the Profanity Peak pack went on to kill more cattle throughout its territory. *Id*. Diamond M's cattle were also allowed to overlap with the pack's known rendezvous sites. *Id*.; 7-ER-1535. But, as the Spence study indicates (as well as several other studies), such depredations could be avoided or mitigated were the USFS to impose "small changes in grazing timing and location" and by "[k]eeping livestock out of [active] den and rendezvous sites[.]" FER-158; *Supra Sec*. I.B.

WDFW also did not require Diamond M to move its salt blocks away from known core wolf areas prior to authorizing lethal wolf removals in 2016, or, again, in 2018 and 2019 when the OPT pack moved into the same territory. *See* FER-166 (showing WDFW had asked USFS officials to move salt blocks from the Betty pasture on the C.C. Mountain allotment in September 2018–the same location where conflicts previously occurred in 2016 and 2017, *see* ER-1535, ER-1498); FER-172, 177, 182, 184 (2019 depredation reports showing multiple conflicts occurred near salt blocks). Though its protocol recommends moving attractants away from known core wolf areas, FedSER-026, ultimately WDFW acquiesced with Diamond M's refusal to do so. 3-ER-275. Yet, this is another key measure the USFS *could* incorporate into its Forest Plan. *E.g.*, 7-ER-1452-53.

Further, while Diamond M claimed that moving salt blocks would not mitigate conflicts because its cattle would still congregate in that high-risk area, 3-ER-275, that is precisely what effective range riders can prevent. FedSer-026; *supra Sec* I.B. The USFS can require permittees who graze in wolf-occupied habitat to employ *daily* range riders, whereas WDFW will authorize lethal wolf removal even when producers like Diamond M only sporadically monitor their herds. 3-ER-281 (2019 report showing Diamond M refuses to work with WDFW-contracted range riders); 3-ER-283 (showing Diamond M did not have nonlethal deterrents in place when multiple depredations of its cattle occurred in 2019); FER-87-97 (declaration of conflict expert, Carter Niemeyer ¶¶14, 17-31); FER-104-122 (showing Diamond M's range riders were only on the allotments for six full days and eight partial days out of the 26 days leading up to the conflicts of the 2020 grazing season).

Likewise, the USFS could mandate that permittees only turnout calves that are *at least* 200 lbs. and *expeditiously* remove injured and dead stock. Yet, again, available evidence shows WDFW authorized lethal wolf removals on behalf of Diamond M despite this permittee routinely turning out vulnerably small calves and failing to promptly detect depredations (as needed to deter repeated attacks). 7-ER-1500 (footnote 2); FER-123-128 (2020 letter with photos); 2-ER-132-133 (Leroux Declaration, ¶ 32 with photos); FER-88-97 (Niemeyer Decl. ¶¶15-31); 3-

ER-277; FER-121; FER-172, 175, 177, 185, 188-89, 194, 196 (2019 and 2020 depredation reports noting calf injuries appeared several days old).

Accordingly, the USFS's continued authorization of grazing, particularly across the Diamond M allotments, without any closures or mandatory mitigation measures is the primary causal factor in lethal wolf removals. However, there are multiple actions the USFS can take–from completely preventing cattle presence in high conflict areas to imposing a suite of mandatory management strategies–to more effectively reduce depredations and thus limit subsequent lethal wolf removals. Defendants' assertions that such mandatory direction would merely be "duplicative" of WDFW's nonbinding protocols and fail to influence the rate of wolf-livestock conflicts on the Forest is a red herring.

D. This Circuit's Precedent Supports Plaintiffs' Standing.

Finally, Defendants point to largely inapposite third-party cases to obfuscate the requisite showing for plaintiffs under the "relaxed" causation and redressability standards for procedural injuries. For instance, in *Novak* and *San Diego Cnty. Gun Rights Comm. v. Reno*, plaintiffs only alleged economic injuries with various market forces at play, not procedural injuries. *Novak*, 795 F.3d at 1018-20; *Reno*, 98 F.3d 1121 (9th Cir. 1996). This stands in stark contrast to Plaintiffs' concrete interests in keeping wolves alive on the Forest, which NEPA, NFMA, the 1982 planning regulations, and the USFS's Sensitive Species Policy are all meant to

protect. *See Cottonwood*, 789 F.3d at 1082-83 (for procedural violations plaintiffs need only show their concrete interests fall within the "zone of interests" protected by the statute(s) at issue).

Even the cases cited by Defendants that do involve procedural injuries are highly distinguishable. For instance, in *Ctr. for Biological Diversity v. Export-Import Bank*, plaintiffs alleged that the defendant bank ("Ex-Im") failed to adequately consider the environmental impacts of two liquid natural gas projects in Australia before approving minor financial contributions to the projects. 894 F.3d 1005, 1009-10 (9th Cir. 2018). Plaintiffs failed to establish redressability, because they did not show that Ex-Im was a "necessary party" for the projects to proceed. Specifically, the projects were already well underway before Ex-Im approved any financing and Ex-Im's contribution was only a "small" percentage of the funding needed to complete each project. *Id.* at 1014. The Court further observed that even if Ex-Im did not provide the funds, other financing partners would have. *Id*. Thus, plaintiffs did not show that there was a reasonable probability the projects would be halted if Ex-Im's funding was vacated—the "hoped-for substantive action." *Id*. at 1013-14.

In this case, however, Plaintiffs' ultimate injury-in-fact would never arise "but for" the USFS's grazing authorizations because WDFW's sole basis for killing wolves on the Colville are "repeated livestock depredations that are likely

to continue." *See Export-Import,* 894 F.3d at 1013-14 (distinguishing the role of Ex-Im bank from the actions of the defendant agency in *Nat. Res. Def. Council v. Jewell*, 789 F.3d 776, 782-85 (9th Cir. 2014) where "[b]ut for the agency's actions, the alleged injury in fact never would have arisen."). Unlike Ex-Im bank, this makes the USFS a "necessary party." The USFS can stop authorizing grazing in unsuitable portions of the Forest. *Supra Sec.* I.A. No cattle in high-risk areas means fewer cattle depredations. The USFS is also the only party that can require permittees to follow management strategies based on science-backed conflict avoidance measures as a precondition for grazing livestock on the National Forest. *Supra Sec.* I.B-C. Thus, Plaintiffs' "hoped-for substantive action" from the USFS bears directly on whether WDFW is called upon to kill wolves in response to recurring, unresolved conflicts with livestock. *See id*. at 1013.

In *Idaho Conservation League ("ICL") v. Mumma*, the Court rejected causation arguments similar to Defendants'. 956 F.2d 1508, 1517-18 (9th Cir. 1992). There, plaintiffs similarly challenged a Forest Plan FEIS under NEPA and NFMA based on alleged procedural violations relating to the USFS's failure to recommend roadless areas be designated as wilderness, which could result in those areas being protected from logging. *Id*. at 1511-18. Defendants argued that the alleged injury was not traceable to the USFS's programmatic decision because whether or not those roadless areas ultimately got logged depended on "a

confluence of factors, including the actions of Congress [needed to officially designate wilderness], private parties, and larger economic trends." *Id*. at 1517. Rejecting that reasoning, the Court held that the third parties could not undertake future actions that might ultimately result in the degradation of those roadless areas, "but for" the challenged USFS decision. *Id*. at 1518. Similarly, WDFW could not undertake lethal wolf removal "but for" the USFS authorizing the presence of cattle that leads to repeated livestock depredations. A chain of events does not negate the fact that Plaintiffs' injury is entirely dependent on the USFS's grazing authorizations. *Id*.

II. Plaintiffs Can Challenge the Procedural Adequacy of the Forest Plan FEIS, Before the USFS Renews 10-Year Term Grazing Permits or Conducts Allotment-Specific NEPA Analyses.

Defendants' "imminent, concrete harms" and ripeness arguments track the same flawed reasoning of the district court; incorrectly contending Plaintiffs are barred from challenging the Forest Plan FEIS until the 2019 Plan is applied to site-specific grazing. *See* Response Br., 50-55 (wrongly insisting that no cognizable injury can flow from the 2019 Forest Plan because it does not authorize lethal wolf removal or site-specific grazing). This position contradicts clear precedent, including several post-*Summers* opinions, holding that a procedural dispute is ripe "at the time the [procedural] failure takes place." *Ohio Forestry Ass'n Inc. v. Sierra Club,* 523 U.S. 726, 737 (1998). As this Court just reaffirmed: "the

imminence or occurrence of site-specific action is irrelevant to the ripeness of procedural injuries, which are ripe and ready for review the moment they happen." *Envt'l Def. Ctr. ("EDC") v. Bureau of Ocean Energy Mgmt.,* 36 F.4th 850, 2022 WL 1816515, at *9-10 (9th Cir. June 3, 2022); *Cottonwood*, 789 F.3d at 1083-84; *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003).

Defendants fail to grasp that "where a procedural violation is at issue, a plaintiff need not 'meet all the normal standards for redressability and immediacy.'" *Cottonwood*, 789 F.3d at 1082 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7 (1992)); *Citizens for Better Forestry*, 341 F.3d at 972. As the Court explained in *Citizens for Better Forestry*, to satisfy the "concrete interests" test environmental plaintiffs need to show a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact." 341 F.3d at 971-72. Plaintiffs have done just that with the detailed standing declarations of Timothy Coleman and Jocelyn Leroux. Opening Br., 30-34. As the Court further explained, plaintiffs alleging procedural violations need not assert any specific, imminent injury because "the 'asserted injury is that environmental consequences might be overlooked' as a result of deficiencies in the government's analysis under environmental statutes." *Id*. (citation omitted).

Accordingly, Defendants reliance on *Summers v. Earth Island Institute* to suggest that Plaintiffs' alleged procedural injuries are injuries "*in vacuo*" is misplaced. Response Br., 51, 55 (citing 555 U.S. 488, 496 (2009)). *Summers* does not stand for the proposition that plaintiffs may *never* suffer injury from a procedural violation standing alone, as the USFS suggests. 555 U.S. 488 (2009). This Court's post-*Summers* precedent expressly supports Plaintiffs' ability to challenge the procedural adequacy of the Forest Plan FEIS at the programmatic-level, "without also challenging an implementing project that will cause discrete injury." *Cottonwood*, 789 F.3d at 1081; *EDC,* 2022 WL 1816515, at *9-10; *Sierra Forest Legacy*, 646 F.3d at 1179-80.

In *Cottonwood*, the Court also distinguished the sole standing affidavit in *Summers* wherein the affiant only noted general plans to visit a national forest that would be affected by the challenged regulations from the specificity of Cottonwood's declarations. *Id*. at 1079-81. The same is true of Plaintiffs' highly specific declarations here. 2-ER-104-136.

The factors that actually matter for determining whether Plaintiffs can pursue their programmatic challenge to the procedural adequacy of the Colville Forest Plan FEIS are: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further

factual development of the issues presented." *Ohio Forestry*, 523 U.S. at 733. Plaintiffs satisfy this test.

First, as the Court just recognized:

> Delaying review of these procedural injuries would cause hardship to Plaintiffs by denying them the fundamental safeguards provided by the th[ese] environmental statutes. The "asserted injury is that environmental consequences might be overlooked." Delaying review would extend and compound the harms Plaintiffs allege. Programmatic environmental review "generally obviates the need" for subsequent review at the application level "unless new and significant environmental impacts arise." And any additional protective measures Plaintiffs could obtain by challenging the agency's conclusions later, at the time the agencies review specific applications, would only apply at the site-specific, not the programmatic, level. If the programmatic procedures offend the law, they should be reviewed now.

EDC, 2022 WL 1816515, *9 (citations omitted).

Forest Plans are meant to guide site-specific activities like grazing and ensure the viability of sensitive species like wolves at the *forest-wide* scale. Here, the 2019 Colville Plan cannot do this because there was no proper analysis of grazing impacts to wolves and conflict mitigation measures at the programmatic-level. This is the procedural injury at issue. So "short of assuming that Congress imposed useless procedural safeguards" under NEPA and NFMA, courts "must conclude that the management plan plays some, if not a critical, part in subsequent decisions." *ICL*, 956 F.2d at 1516; *Citizens for Better Forestry*, 341 F.3d at 973.

This case presents exactly the type of action where judicial intervention is not only appropriate, but *critical*. Delaying review until grazing permits are

renewed is especially problematic, because they are typically issued for ten-year terms. 36 C.F.R. § 222.3. Hence the need to modify existing permits or authorizations "as soon as practicable" after the approval of a new Forest Plan to conform to new programmatic direction. 36 C.F.R. § 219.10(e)(1982); 36 C.F.R. § 219.15(a)(2012).[6]

Moreover, allotment-level NEPA analyses do not coincide with the renewal of term grazing permits because Congress granted the USFS "sole discretion" to determine "the priority and timing for completing each required environmental analysis with respect to a grazing allotment, permit, or lease…[.]"[7] Under the Rescissions Act/FLPMA language the USFS has continuously renewed grazing permits without conducting allotment-level NEPA analyses[8]—a key point the district court failed to recognize. *See* 1-ER-29 (incorrectly stating "[n]o grazing will take place under the 2019 Forest Plan until the [USFS] engages in project-level NEPA analysis."). Thus, as demonstrated by the facts here, the USFS may never conduct site-specific NEPA analyses for any allotments of concern within

[6] *See also,* Opening Br., 59-61 (explaining how that regulatory language, as well as language in the term permits, and direction from the USFS's Headquarters, would all be rendered meaningless if Forest Plans cannot govern ongoing grazing until a 10-year term permit is renewed).
[7] Pub. L. 113-291, § 402, 128 Stat. 3292 (2014) ("FLPMA rider"), codified at 43 U.S.C. § 1752(i); 2004 Interior Appropriations Act, § 325 (P.L. 108-108); 1995 Rescissions Act, § 504 (P.L. 104-19).
[8] *See* 43 U.S.C. § 1752(c)(2).

the life of the 2019 Forest Plan. Opening Br., 16, fn. 4, 19 (pointing to decades-old NEPA analyses and AMPs, such as for the Diamond M allotments, which escaped analysis during the entire 30-year lifespan of the 1988 Forest Plan).[9]

Defendants also argue that the USFS no longer issues AOIs to permittees on the Colville and so Plaintiffs purportedly could not challenge the newly minted "Grazing Management Strategy Notes" as final agency action implementing the 2019 Plan. *See* 1-ER-30; Response Br., 16, fn. 2. Therefore, Defendants' assertions that future site-specific grazing analyses could address Plaintiffs' concerns entirely misses the mark. Response Br., 56. Rather, under Defendants' theories, the 2019 Forest Plan could forever escape judicial review with respect to programmatic-level grazing management. *See ICL*, 956 F.2d at 1516 ("[I]f the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review.").

Second, there is no risk of improper judicial interference in the USFS's forest planning process because it is at an "administrative resting place" with the issuance of the Forest Plan FEIS/ROD. *See Citizens for Better Forestry*, 341 F.3d at 977; *EDC*, 2022 WL 1816515, *9. No further programmatic-level review of

[9] Plaintiffs argued below, however, that the Rescissions Act/FLPMA rider did not bar Plaintiffs' "supplemental" NEPA claim under 40 C.F.R. § 1502.9(c)(ii)(1978), which establishes a separate obligation to address only significant new information or circumstances that have emerged since the prior allotment-level NEPA.

grazing impacts to wolves remains. *E.g., id*. Indeed, the USFS maintains that it has no responsibility to address this issue or measures to mitigate wolf-livestock conflicts in its Forest Plan FEIS and associated grazing suitability analysis—questions of law that "would not benefit from further factual development." *See Wilderness Soc'y v. Thomas*, 188 F.3d 1130, 1134 (9th Cir. 1999); 7-ER-1408; 6-ER-1362.

Third, as discussed further *infra*, no additional factual development is necessary because Plaintiffs' programmatic claims are based on procedural injuries. *See Ohio Forestry*, 523 U.S. at 737; *EDC*, 2022 WL 1816515, at *10; *Cottonwood*, 789 F.3d at 1084.

Accordingly, Plaintiffs' procedural claims against the Forest Plan FEIS are justiciable and ripe for review. This Court should reject, as it has done before, the USFS's insistence that Plaintiffs must also establish how procedural deficiencies in a programmatic FEIS will lead to imminent, discrete injuries at the site-specific level. *Cottonwood*, 789 F.3d at 1082-83.

III. Plaintiffs' NFMA Claims Under 36 C.F.R. § 219.26 and § 219.20 Challenge the Procedural Adequacy of the Forest Plan FEIS and Grazing Suitability Analysis, Not the Plan's Substantive Deficiencies.

Like the Court found in *Cottonwood*, the USFS's arguments here also "rest on the false premise" that Plaintiffs' claims under NFMA's planning regulations, 36 C.F.R. § 219.26 and § 219.20, are substantive. 789 F.3d at 1084. This is not so.

Plaintiffs are arguing that the USFS failed to comply with the procedural requirements of these two regulations, not that the agency failed to reach a particular substantive result. Opening Br., 55-59.

As the Court observed in *ICL*, NFMA and its planning regulations describe the "*process*" for developing Forest Plans, *i.e.*, what the USFS must analyze, which expressly encompasses the duty to prepare a programmatic EIS under NEPA. *ICL*, 956 F.2d at 1511. Plaintiffs' argument that the Forest Plan FEIS failed to comply with 36 C.F.R. § 219.26 rested on the same facts presented for their programmatic NEPA claim. *See* FER-47-49. The crux of both claims is whether the USFS adequately evaluated the management implications of wolves returning to the Colville after many decades of this apex predator's absence—a major change from prior Forest conditions. *Id*. Though the hoped-for-substantive action is that a proper analysis ensures NFMA's substantive wildlife diversity and viability goals are met, just like the goals of a proper ESA consultation are to ensure federal actions do not "jeopardize" listed species, that does not make Plaintiffs' alleged procedural violations substantive claims. *See*, *Cottonwood*, 789 F.3d at 1083; *EDC*, 2022 WL 1816515, *9-10. Plaintiffs merely seek completion of the analysis required by the regulations.

Likewise, Plaintiffs' claim under 36 C.F.R. § 219.20 is that the USFS failed to properly complete its suitability analysis by ignoring the wildlife-livestock

conflict component that the regulations state must be included. This failure foreclosed the potential for a programmatic-level determination that high-risk areas with recurring conflicts are unsuitable for future grazing, thus causing Plaintiffs' procedural injury. As Defendants acknowledge, a suitability analysis is not itself a substantive "decision to graze livestock on any specific area of land." Response Br., 15. But an order for the USFS to re-do its analysis with the wildlife-livestock conflict component included would redress Plaintiffs' claim because the agency *could* find high-risk areas unsuitable for grazing due to recurring conflicts and no longer allow those areas to be grazed.

Plaintiffs' claims under 36 C.F.R. § 219.20 and § 219.26 are procedural in nature and ripe under the *Ohio Forestry* factors. These NFMA claims are distinct from Plaintiffs' substantive claim that the Plan itself is deficient because it fails to ensure the viability of wolves on the Forest under 36 C.F.R. § 219.19 (1982). *See* FER-51-56; *Sierra Forest Legacy*, 646 F.3d at 1179 (substantively, plaintiffs also challenged the Forest Plan for violating NFMA's duty to maintain viable wildlife populations).

This case is distinguishable from the "generic challenge" presented in *Thomas*. 189 F.3d at 1133-34. There, plaintiffs argued the USFS violated NFMA by adopting a Forest Plan before conducting a grazing suitability determination. *Id*. Here, the USFS *did* conduct a grazing suitability analysis for the Forest Plan, but

erred as a matter of law in concluding that it did not have to consider wildlife-livestock conflicts and methods of regulating such conflicts as part of that programmatic analysis. 6-ER-1362 (vaguely deferring this consideration); *Native Ecosystems Council v. USFS*, 418 F.3d 953, 960 (9th Cir. 2005) ("[A]n agency's interpretation does not control, where it is plainly inconsistent with the regulation at issue."). Moreover, Plaintiffs here show how this procedural failure threatens their concrete interests in preventing wolf-livestock conflicts, because it foreclosed the potential for a programmatic determination that high-risk areas are unsuitable for future grazing, which is within the "zone of interests" protected by 36 C.F.R. § 219.20.

Accordingly, this Court should reject Defendants' insistence that Plaintiffs' programmatic NFMA claims are substantive and unripe for judicial review.

CONCLUSION

For the reasons here and in their opening brief, Plaintiffs respectfully request that the Court reverse the judgment of the district court.

Respectfully submitted this 8th day of July, 2022.

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