

Cynthia (Cyndi) Tuell
 AZB #025301
 Western Watersheds Project
 738 N. 5th Ave, Suite 206
 Tucson, AZ 85705
 (520) 272-2454
 cyndi@westernwatersheds.org
 Attorney for Appellant Western Watersheds Project, Sierra Club - Grand Canyon Chapter, and Tricia Gerrodette

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
 Departmental Hearings Division
 351 S West Temple Suite 6.300
 Salt Lake City, Utah 84101

October 20, 2023

WESTERN WATERSHEDS PROJECT,	)	Consolidated Case #s AZ-G020-
	)	2023-06, 07, 08, 09
Appellants,)	
	)	MOTION FOR SUMMARY
	)	JUDGEMENT
)	
	)	Appeals of the April 7, 2023
v.	)	Notices of Final Decision for the
	)	SPRNCA Grazing Allotment
	)	Renewals:
	)	Babocomari Allotment (No. 5208),
	)	Brunckow Allotment (No. 5251),
	)	Lucky Hills Allotment (No. 5252),
BUREAU OF LAND MANAGEMENT,	)	Three Brothers Allotment (No. 5232)
Respondent,	)	Tucson Field Office, Arizona

APPELLANT’S MOTION FOR SUMMARY JUDGEMENT

Appellants hereby move for summary judgment in their May 5, 2023, appeal of the Bureau of Land Management’s (Bureau) decision for the four Notices of Final Decision for the San Pedro Riparian National Conservation Area (SPRNCA) grazing allotments in the Tucson Field Office. The Environmental Analysis (EA) upon which the decisions are based violates the National Environmental Policy Act (NEPA), the Federal Land and Policy Management Act (FLPMA), and

the Administrative Procedures Act (APA) because the Bureau made clear errors of fact, failed to consider important environmental aspects of the project, made clear errors of law, and authorized the unnecessary and undue degradation of federally managed lands. The Bureau's decision is therefore unlawful and should be reversed.

I. Introduction¹

We provided a more detailed introduction in our Appeal² of these decisions and do not repeat that here. Importantly, these Bureau managed lands were set aside to be managed differently than other Bureau managed lands. Specifically, the primary purpose of the management of these lands is to conserve, protect, and enhance the natural and cultural resources found therein.³ The Bureau was given explicit instruction to only allow such uses that will further the purposes of the establishment of the conservation area.⁴ The Bureau was also given the power to limit the uses of the conservation area that are appropriate for the protection of those natural and cultural resources.⁵

Livestock grazing can be authorized *only* after a finding that such use will cause no harm to the SPRNCA's resources *and* that grazing is *necessary* to enhance the ecological health of the SPRNCA. Through its EA for these grazing authorizations, as well as the Environmental Impact Statement (EIS) for the Resource Management Plan (RMP) for the SPRNCA, the Bureau has in fact made a contrary finding, identifying ongoing harm to SPRNCA resources directly and indirectly caused by livestock grazing authorizations.⁶

¹ All references to the record are noted as SPR_GRZ_XXX at xx, and refer to the Case File provided by the Bureau in August 2023, following the Bureau's file naming convention.

² WWP et al May 5, 2023 Appeal and Petition to Stay at 1-5.

³ Public Law (PL) 100-696, Sec. 460xx (a), November 18, 1988.

⁴ *Id.* at 460xx-1(a).

⁵ *Id.* at 460xx-1(b).

⁶ See Appendix A, Explanations and Admissions of harms to the SPRNCA caused by livestock grazing identified by the Bureau in the RMP EIS or other Bureau statements.

II. Standard of Review

The Interior Board of Land Appeals (IBLA) follows the procedure for summary judgment authorized in the federal courts. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.⁷ An issue is ‘genuine’ only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party.”⁸ A material fact is one that “might affect the outcome of the suit under the governing law.”⁹ The substantive law governing a claim determines whether a fact is material.¹⁰

The Bureau’s grazing regulations provide for reversal of a grazing decision if the decision is not reasonable, or is not in compliance with pertinent regulations. 43 C.F.R. § 4.480(b). To prevail, an appellant has the burden of proof to demonstrate, “by a preponderance of the evidence that the challenged BLM decision fails to substantially comply with the statutes and its implementing regulations, or that the decision is unreasonable and lacks a rational basis.”¹¹ Appellants should prevail on their motion for summary judgment because the Bureau made errors of law and demonstrable errors of fact, and failed to comply with statutes and implementing regulations.¹²

III. Argument

A. The Bureau Failed to Comply with Enabling Legislation

At the time of the designation of the SPRNCA via the Arizona-Idaho Conservation Act (AICA), on November 18, 1988, there were no Bureau managed allotments, livestock grazing

⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

⁸ *Hensley*, 195 IBLA 345, 355 (2020) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁹ *Id.*

¹⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248 (1986).

¹¹ *06 Livestock Company*, 192 IBLA at 359; see also 43 C.F.R. § 4.480(b).

¹² *Escalante Wilderness Project, et al. v. BLM*, 176 IBLA 300, 303 (2009).

was not to be authorized or reauthorized on any Bureau-managed lands within the SPRNCA and the Secretary of the Interior had no plans to authorize such use.^{13,14} The AICA specified that the Secretary of the Interior, “shall only allow such uses of the conservation area as [s]he finds will further the primary purposes for which the conservation area is established.” It also explained that the SPRNCA was established, “[i]n order to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River in Cochise County, Arizona.” The primary legal purpose of the SPRNCA is to protect its unique riparian habitat. The legislative history also makes clear that livestock grazing authorizations would only occur if found to further the purposes of the conservation area.¹⁵

According to federal regulations, the Bureau “shall manage the public lands under principles of multiple use and sustained yield ... ***except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.***”¹⁶ The designation of the SPRNCA was a dedication of the area to a specific use with a higher level of protection. A Bureau employee at the time of the designation of the SPRNCA, Jim Baca, has provided a statement about the purpose of the designation and the intent of the Bureau to retire the State Trust Lands and associated leases

¹³ See 100th Congressional Record Vol 134, pt 22 Oct. 1988 at 32189, 32194; 100th Congressional Record Vol. 134 pt 21 Oct. 1988 at 30276; 100th Congressional Record Vol 133 pt 5 March 1987 at 6623, 6624, 6625; Congressional Report 99-773, August 8, 1986 at 5. These records are attached as Appendices B, C, D, and E, respectively and the relevant language is highlighted.

¹⁴ *Id.*

¹⁵ See *Id.* at 32188 and 32189; Congressional Report 11-24 March 12, 1987 at pp. 2-3, attached as Appendices F and highlighted.

¹⁶ FLPMA, 43 U.S.C. § 1732 (a), bold emphasis added.

incorporated into the SPRNCA shortly after designation.¹⁷ Another person familiar with the designation of the SPRNCA, Michael Gregory, has alerted the Bureau that, at the time of the designation, it was the intent of all involved to exclude livestock grazing from the area.¹⁸

The Bureau admits that its decisions to authorize livestock grazing in the SPRNCA exposes protected resources to harm and damage.¹⁹ The decisions reduce the number of AUMs currently authorized, but a reduction in harm is not the same as causing no harm. These admissions that the livestock grazing authorized by these decisions is harming and will continue to harm SPRNCA resources are an admission of a violation of the AICA.²⁰

The Bureau approved an adaptive management scheme plans for the removal of livestock to improve conditions (via a 50% reduction in AUMs) ***only after three years of monitoring***. The delay will result in significant damage, which is counter to the Bureau's legal obligations.

A delay in enforcement following a violation of the Standards and Guidelines could result in long-term, adverse impacts on resources.²¹ This delay, coupled with the Bureau's funding and staffing insufficiencies which do not provide adequate resources for even minimal monitoring, will further adversely impact natural resources in the long-term. There is ample evidence that the Bureau is failing to act in timely, proactive ways to prevent harm to critical habitat caused by livestock grazing within the SPRNCA.²²

¹⁷ See Appendix G, statement by Jim Baca, former Bureau of Land Management Director.

¹⁸ See SPR_GRZ_0170_Final_EA_Appendices at C-3.

¹⁹ See Appendix A; SPR_GRZ_0170_Final_EA at C-3 through C-4; BLM's May 25, 2023 Response to Petition to Stay at 6, ln 2-5, ln 23-28, and at 7, ln 17-28, and at 8 ln 6-12 and at 9 ln 1-8 ("Alternative A would negatively impact the resources within the SPRNCA.")

²⁰ See Appendix A.

²¹ *WWP v. Public Lands Council* (9th Cir, September 1, 2010).

²² See Appendix I (entire) and J (at pages 1-2), trespass livestock documentation from the Bureau, provided to WWP via FOIA. See also Appendix K, a map of the condition of the SPRNCA boundary fence with data provided by the Bureau through FOIA.

The Bureau makes statements in the final decisions that the proposed action and alternatives are consistent with the AICA.²³ It also makes statements in the NOFDs that the decisions are consistent with the 2019 RMP, the 1992 and 1994 Safford RMP, and the Arizona Standards of Rangeland Health and therefore livestock grazing furthers the purposes of the SPRNCA designation.²⁴ However, *there is no actual evidence that livestock grazing furthers the purposes of the AICA* and, as detailed above, the record indicates livestock grazing harms SPRNCA resources. A group of scientists who have conducted (and some who are continuing to conduct) research within the SPRNCA expressed their deep concern about the impacts of livestock grazing on natural resources as well as the negative impact on current and future scientific research.²⁵ In addition, cultural resource experts noted:²⁶

...[we] have yet to find reliable evidence—from within SPRNCA or other desert uplands or riparian corridors—that livestock grazing can contribute to the fulfillment of the U.S. Congress’ intent in PL 100-696. All reliable scientific evidence indicates that livestock grazing constitutes a significant impact on cultural resources, per NEPA, and an adverse effect on historic properties, per NHPA, including cultural and historic properties present in SPRNCA. The best available evidence indicates that livestock can and do cause damage to most types of cultural resource sites. Livestock grazing also alters vegetation, soils, and drainage conditions, usually for the worse and always to the detriment of cultural resources...the clear preponderance of existing scientific evidence (and my own observations of the results of grazing within SPRNCA) indicates that livestock grazing constitutes an adverse effect on historic properties, and causes significant impacts on cultural resources, we recommend that BLM either refrain from authorizing livestock grazing within SPRNCA boundaries or conduct additional studies to assess these adverse effects and significant impacts. In any case, livestock grazing appears to be among the

²³ See Notices of Final Decisions for all four allotments. SPR_GRZ_0203_Babocomari_Final-Decision at 12, _0204_Brunckow-Hill at 11, _0205_Lucky-Hills at 10, and _0206_Three-Brothers_Final-Decision at 10.

²⁴ *Id.*

²⁵ See Appendix L, pages 1-3. Letter from 16 scientists submitted to the Bureau in 2018 during the RMP process. Appellants have submitted this letter repeatedly during this NEPA process. The Bureau indicated they would consider this letter as part of this NEPA process. SPR_GRZ_0170_Final_EA at C-13. See also, Appendix NN, Appendix MM, and footnote 57, *infra*.

²⁶ SPR_GRZ_0170_Final-EA_Appendices at C-5 and C-6, comments of Archaeology Southwest. See also, Appendix M at pages 12-14, OpEd by Archaeology Southwest published June 13, 2023.

greatest threats to the “the riparian area and the aquatic, wildlife, [and] archaeological...resources.” Current management of the allotment lands within SPRNCA is not preventing adverse effects and significant impacts.

Consistency²⁷ with the RMPs and using the very low bar of the Arizona Rangeland Health Standards as a proxy for compliance with the AICA are not an indication that the decisions actually comply with the “no harm” mandate of the AICA. Therefore the Decisions must be withdrawn.

1. AZ Standards and Guidelines are not consistent with AICA duties

The Arizona Standards and Guidelines were established in order to address “the basic components of healthy rangelands and in order to establish a general baseline for range conditions, but not to serve as the “terms and conditions of various authorizations.”²⁸ Analyzing the effects of grazing within the SPRNCA through this narrow cattle-centric lens did not lend to an objective analysis of the action. The Bureau cannot describe nor manage these specially designated lands using only rangeland guidelines and criteria.²⁹

2. Grazing is authorized despite effects of E. coli and increased sedimentation

The San Pedro River Targeted Watershed Improvement Plan identifies livestock use in the SPRNCA, as well as trespass livestock, as a potential source of *E. coli* contamination in the San Pedro River watershed.³⁰ It is documented that the Babocomari allotment is contributing to the *E. coli* contamination of the Babocomari River. The cow feces from the uplands has also been documented to cause problems with *E. coli* exceedances in violation of Arizona water

²⁷ Appellants do not concede that the decisions are in fact consistent with the RMPs.

²⁸ 60 FR 9956, February 22, 1995.

²⁹ See section III(A) above and Public Law (PL) 100-696, Sec. 460xx. See also, Congressional Report 99-773, August 8, 1986 at page 3 (of the pdf file), attached as Appendix E with the relevant language highlighted.

³⁰ Appendix N. Coronado Resource Conservation and Development (RC&D). 2013. San Pedro River Targeted Watershed *E. coli* Reduction Improvement Plan. Wilcox, Arizona. June 2013. See page 6.

quality standards. The Bureau admits that adverse effects would occur from the livestock grazing authorization, including consumption of perennial grass and other forage plants, trampling of vegetation and soil, reduction of vegetative cover in areas where livestock concentrate, and contribution to *E. coli* levels.³¹ The Bureau then justifies forging ahead with the grazing authorization by comparing the impacts from the new authorization to those that have already occurred, indicating the adverse impacts would be *reduced as compared* to the current conditions as a result of the 50% AUM suspension. Again, this is not the metric by which to gauge whether or not to authorize livestock grazing within the SPRNCA. The mandate the Bureau has for the SPRNCA is to conserve, protect, and enhance, not simply “reduce” the impacts of a commercial use. It does not matter that the “adverse effects are within the contemplated range of management options” because, for this protected area, the Bureau must meet a higher standard. Despite the known *E. coli* contaminant sources (from the Babocomari allotment), the Bureau has authorized livestock grazing and recommends only that livestock be vaccinated against *E. coli* when and if the vaccine is available.

The Bureau’s inability to manage existing allotments effectively (based on comments made at NRC meetings <https://youtu.be/dKXuB1V2Y2s?t=2118>) indicate that the Bureau will not be able to protect water quality on these same allotments moving forward. If allotments are not managed properly, we will see higher peak flows and downcutting. In response, the rainfall events of the past will have a greater impacts on downstream water quality given the known correlation between suspended sediment and *E. coli*. Good management is impossible to accomplish because of poor fence conditions and because the Bureau is woefully understaffed, as

³¹ 2022 FONSI at 2.

Scott Feldheusen stated at the SPRNCA all partners meeting on December 9, 2022 (indicating a 30-50 percent staffing shortage in the Tucson Field Office).³²

In addition to violating the AICA, these Decisions are likely to result in future ongoing violations of the Clean Water Act due to sedimentation and *E. coli* contamination.

B. Failure to Comply with FLPMA

The FLPMA requires that “public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.”³³ The Bureau uses this as the basis of its perceived “multiple use” mandate.³⁴

Here, the Bureau fails to meet this FLPMA standard of management. In addition to the impacts we identify above, the declarations of Dr. Elizabeth Makings,³⁵ Dr. Bungartz,³⁶ John Anderson,³⁷ and Jennifer Martin³⁸ clearly demonstrate that the authorization of livestock grazing on these allotments will degrade scientific, ecological, environmental, and wildlife habitat values as well as conservation efforts. The information provided by the Arizona Department of Environmental Quality regarding *E. coli* contamination and dissolved oxygen concerns,³⁹ and the information provided by the U.S. Geological Survey in the *Gungle et al* 2016 report⁴⁰

³² See Appendix O, SPRNCA Partner Meeting 12.9.22 Summary at pages 1-2.

³³ 43 U.S.C. §1701(a)(8).

³⁴ See PRMP/FEIS at 3-100, 3-126.

³⁵ Appendix P.

³⁶ Appendix Q.

³⁷ Appendix R.

³⁸ Appendix S.

³⁹ See Appendix T at pages 2-8 and 2-10.

⁴⁰ Appendix U at pages 59-62. Please note that the Bureau cites to this same Gungle *et al.* 2016 report in the RMP for the SPRNCA.

demonstrate that livestock grazing will harm recreational uses and will harm water resources.

Bruce Gungle,⁴¹ the first author of the Gungle et al. 2016 report, further states:

...it is possible if not likely that reduction of suspended sediment in the San Pedro River at Charleston and the increase in cottonwood and willow recruitment are both in part a function of the reduction in cattle grazing. In addition, the increase in cottonwood recruitment possibly resulting in part from cattle reduction may even further reduce suspended sediment in the river. In other words, there may well be an inverse relationship between the number of cattle and the health of the Upper San Pedro River.

There is no downside to the aquatic health of the river if cattle are removed from the SPRNCA but there is a serious potential downside to the river if cattle remain. Therefore, in order to manage the SPRNCA following the intent of the originating legislation, that is, “in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area,” it appears that the prudent thing to do is remove cattle from the SPRNCA.

But, as we have repeatedly noted,⁴² the FLPMA contains an exception to its overarching prescription for Bureau managed lands: multiple-use management applies, except “...where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.”⁴³ Therefore, to comply with FLMPA’s mandate, in some places conservation *must* be elevated over certain uses if a law identifies conservation as the primary use for which the land is designated. Such is the case for the SPRNCA. We discussed this more fully above, and in our Protest at pages 4-8;⁴⁴ in our May 27, 2022 comments at pages 7-8;⁴⁵ and in our June 24, 2021 comments at pages 36-27.⁴⁶

⁴¹ Appendix V.

⁴² See WWP et al. June 24, 2021 comments at 36; WWP et al. May 27, 2022 comments at 7; WWP et al. January 6, 2023 Protest at 7.

⁴³ FLPMA, as amended, Public Law No. 94-579, Title III, Sec. 302(a).

⁴⁴ Appendix W, WWP January 6, 2023 Protest.

⁴⁵ Appendix X, WWP May 27, 2022 comments.

⁴⁶ Appendix Y, WWP June 24, 2021 comments.

The Bureau’s grazing decisions, which all rely on Integrated Vegetation Management and Adaptive Management,⁴⁷ recognize that grazing harms SPRNCA resources but attempts to authorize grazing in such a way as to cause “less” harm. The Adaptive Management Plan requires that natural resources within the SPRNCA are harmed beyond a set threshold before action will be taken to reduce the number of AUMs authorized.⁴⁸ Only after at least two years of monitoring showing damage by livestock grazing will action be taken to eliminate livestock grazing within the SPRNCA, but the suspension of grazing will only be temporary.⁴⁹ After livestock grazing is eliminated, *if* annual monitoring demonstrates even a small level of recovery of perennial grass cover and a reduction in bare ground, the AUMs placed in suspension “would be restored,” allowing cows to graze and once again damage SPRNCA resources. This will happen despite the fact the Bureau will have (again) documented that livestock grazing causes harm. There does not appear to be any discretion as to whether or not to restore the AUMs – it is a forgone conclusion they will be restored. Knowing that harm will be caused and taking steps only to *reduce* that level of harm, and then to reauthorize that harmful activity, is a clear violation of the enabling legislation and therefore, FLPMA.

1. Failure to Comply with the RMP

Additionally, the Bureau violates FLMMA when it makes a decision contrary to, or in violation of, the RMP. We provide a list of specific provisions of the RMP the BLM is violating at Appendix MM.

2. Failure to prevent unnecessary and undue degradation

⁴⁷ See Notices of Final Decisions at page 1 for all allotments.

⁴⁸ See WWP et al 2021 at 21; SPR_GRZ-0169 at 2-16.

⁴⁹ See NOFDs for all allotments at 8-10.

FLPMA also requires the Bureau to take any action necessary to prevent unnecessary and undue degradation.⁵⁰ Unnecessary and undue degradation is defined as “harm to the environment that is either unnecessary to a given project or violates specified environmental protection statutes.”⁵¹ Courts have held that an action causes unnecessary or undue degradation where the level of degradation is “unnecessary to, or undue in proportion to” the proposed action.⁵² The IBLA has defined “unnecessary or undue degradation” to mean the occurrence of “something more than the usual effects anticipated” from appropriately mitigated development.⁵³

In the SPRNCA, there is evidence that livestock grazing eliminated decades ago continues to have lasting impacts. The Bureau’s own record shows that any level of grazing is likely to cause permanent impairment of productivity in the SPRNCA.⁵⁴ The level of negative impacts to these protected lands far outweighs the relatively small number of livestock authorized to graze⁵⁵ (and as compared to non-NLCS managed lands) and the benefits to just four permittees.

If a party challenges the Bureau’s decision for failure to comply with FLPMA’s mandate to prevent unnecessary or undue degradation, the party must show that the Bureau’s conclusions lack a rational basis in the record.⁵⁶ The Bureau’s duty to determine whether significant impacts are likely to occur (make a Finding of No Significant Impact or proceed to an EIS) and its responsibility to prevent unnecessary and undue degradation are separate.⁵⁷

⁵⁰ U.S.C. § 1732(b).

⁵¹ *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 723 (9th Cir. 2009).

⁵² *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 76-78 (D.C. Cir. 2011).

⁵³ *Biodiversity Conservation Alliance*, 174 I.B.L.A. 1, 5–6 (March 3, 2008).

⁵⁴ See Appendix A.

⁵⁵ 358 or 179 with the 50% reduction

⁵⁶ *Western Watersheds Project v. BLM*, 188 IBLA 234, 235 (2016).

⁵⁷ *Kendall’s Concerned Area Residents v. BLM*, 129 IBLA 130 at 137 (1994).

The Bureau admits that livestock grazing can adversely affect hydrologic processes and water quality (e.g., compaction, erosion, sedimentation, stream shade, nutrient enrichment, and waterborne pathogens), especially where animals are concentrated within riparian areas.⁵⁸ These impacts are widely documented in several decades of scientific literature, which indicates that there is no level of livestock grazing that doesn't detrimentally affect Western riparian areas. These conclusions are summarized well in Kauffman and Krueger (1984), Fleischner (1994), Krueger (1993), and Belsky, Matzke and Uselman (1999).⁵⁹ Perennial grasses and woody species also benefit significantly from exclusion of livestock.⁶⁰

The grazing allotments at issue in this appeal are only partially located within the SPRNCA. The Bureau could have authorized livestock grazing on the portions of the allotments that are outside the SPRNCA while prohibiting grazing within the SPRNCA. This demonstrates that the Bureau could have made a decision that would protect the SPRNCA from degradation and this would have had minimal impacts, if any, on the livestock permittees. This renders the impacts on the resources within the SPRNCA unnecessary and is an indication that the Bureau failed to take any action necessary to prevent this degradation.

C. NEPA Violations

The fundamental purpose of NEPA is to ensure that federal actions receive appropriately detailed environmental review.⁶¹ NEPA requires federal agencies to take a "hard look" at their actions, and to assess the environmental impacts of those actions in a forthright and public way.

⁵⁸ See Footnote 19, *supra*.

⁵⁹ Attached as Appendices Z (at pages 431-435), AA (at pages 629-635, and 638), BB (at pages 321, 323 (esp. Table 1)), and CC (at pages 1-3, 5-10, conclusion at page 11-12).

⁶⁰ Appendix LL (at pages 6-10) Radke, M. 2022 *Effects of livestock grazing exclusion on perennial grasses and woody species on the San Pedro Riparian National Conservation Area*.

⁶¹ 42 U.S.C. § 4332.

NEPA requires agencies to analyze and disclose cumulative impacts.⁶² The Bureau must disclose to the public “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.”⁶³ Here, the Bureau chose to prepare an EA, which should be a concise document that contains a brief discussion of the need, alternatives, and environmental impacts of a proposed action. The conclusion of an EA leads to either the preparation of an EIS or a Finding of No Significant Impact (FONSI). To reach a FONSI, an EA must take a hard look at the environmental consequences of a proposed action, identify the relevant areas of concern, and make a convincing case that the impacts are insignificant.⁶⁴ The obligation to conduct environmental analysis is a legal requirement of NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000); the determination regarding effects is one to be made as a matter of fact based on the record constituting the environmental document chosen.⁶⁵ This is a low standard, which the Bureau has failed to meet.

1. The FONSI do not include a convincing statement of reasons that the impacts are insignificant.

Here, the Bureau found, for each allotment, that:

Based on the analysis of potential impacts described in the EA, the BLM has determined in the FONSI that the...[a]llotment lease renewal would not have a significant impact on the human environment beyond those impacts analyzed in the Final EIS for the SPRNCA RMP (2019). Thus, an EA is the appropriate level of analysis and an EIS will not be prepared.⁶⁶

The Bureau is not free to render a FONSI under NEPA based on a prior EIS. The Bureau may only do so if the EIS addressed the impacts of livestock grazing authorizations and related

⁶² 40 C.F.R. § 1508.25.

⁶³ *Id.* § 1508.27(b)(7).

⁶⁴ Wilderness Watch et al., 168 IBLA 16, 16 (2006).

⁶⁵ *Id.* at 34.

⁶⁶ SPR_GRZ_0203_Babocomari_Final-Decision at 13, 0204_Brunckow-Hill_Final_Decision at 11, 0205_Lucky-Hills_Final_Decision at 10, and 0206_Three-Brothers_Final_Decision at 10.

infrastructure.⁶⁷ As we explained in our protest of these decisions, the 2019 SPRNCA RMP did not analyze the impacts of livestock grazing on these four allotments.⁶⁸ Instead, the Bureau framed this project was a “renewal” of the four grazing leases over our repeated objections that this is in fact a first time lease authorization.

In its response to comments,⁶⁹ the Bureau states that:

Animal Unit Month (AUM) carrying capacity levels were set for these allotments in the Eastern Arizona Grazing EIS using good, fair, and poor range conditions. While these AUM carrying capacities were set in the 1980s, the Proposed Action in the preliminary EA includes adaptive management measures which would allow the BLM to adjust AUMs based on the resource conditions, including factors such as drought.

However, the Bureau has *never* previously analyzed the carrying capacity, stocking rates, site-specific impacts, or alternatives to current management for the four leases it has continued to authorize since acquiring these lands from the Arizona State Land Department. The legislative history for the AICA indicates there was no Bureau authorized grazing within the SPRNCA at the time of designation, in 1988, and no grazing has been authorized within the SPRNCA until this 2021 grazing EA. The Eastern Arizona Grazing EIS pre-dates the creation of the SPRNCA and therefore could not have included any analysis of carrying capacity for the four SPRNCA allotments. In the SPRNCA RMP response to comments the Bureau states “The BLM will determine carrying capacity, based on AUMs at the implementation level.”⁷⁰

2. Significant effects

Under 42 U.S.C. § 4332(2) an EIS “must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor.”⁷¹

⁶⁷ *Wilderness Watch et al.*, 168 IBLA 16, 37 (2006).

⁶⁸ *See* Appendix W, WWP et al., January 6, 2023 Protest at pages 13-15.

⁶⁹ SPR_GRZ_0170_Final_EA-Appendices at C-7.

⁷⁰ Appendix DD, SPRNCA RMP FEIS Vol. 2 at page 333 of the pdf file, lines 7-11..

⁷¹ *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, at 1149 (9th Cir. 1998).

“The plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared.”⁷² We have identified significant effects from livestock grazing in our prior comments and in various sections of this motion.

3. Cumulative effects

A cumulative impact results from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. *Id.* § 1508.7. Impacts can result from individually minor actions taking place over a period of time. *Id.* Under NEPA, federal agencies must prepare an EIS before "taking 'major Federal actions significantly affecting the quality' of the environment." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1067 (9th Cir. 2002) (quoting 42 U.S.C. § 4332(2)(C)). Council on Environmental Quality regulations require federal agencies to consider a reasonable range of alternatives. 40 C.F.R. §§ 1502.13, 1502.14. We have identified significant effects from livestock grazing in our prior comments and in various sections of this motion.

4. Context and Intensity

In assessing “context,” agencies must look at different geographic scales and the short and long-term impacts of the proposed action within those different geographic scales.⁷³ Here, the project covers NLCS lands, specifically the first Riparian National Conservation Area designated in the U.S. The Decisions authorize livestock grazing for 10 years. The project is located in a heavily eroded and drought stricken area that includes rare desert riparian ecosystems that are already subject to excessive groundwater withdrawals which have caused

⁷² *Id.* at 1150.

⁷³ 40 C.F.R. § 1508.27(a).

significant harm. All of the allotments in the SPRNCA, and all of those adjacent to it, qualified for drought subsidies in 2022.

Part of the context of this project is the fact the Bureau cannot implement the adaptive management it proposes as a way to reduce the impacts from authorized grazing. The proposed grazing leases will be subject to an adaptive management process under which the Bureau will systematically reduce the number of livestock on the land until either the resource objectives are achieved or no livestock remain on the allotment. This appears to be the Bureau's attempt at mitigating the harmful impacts of its livestock grazing authorizations. The agency also plans to improve resource conditions on the allotments with "integrated vegetation management treatments" (IVM) designed to reduce shrub cover and increase the presence of perennial grasses. However, there is nothing in the final decisions that identifies the staffing or funding sources for the adaptive management or IVM. While no amount of proposed "adaptive management" is enough to protect such a sensitive riparian area from the impacts of grazing, and indeed will trigger agency action only after harm has been caused, the extremely understaffed agency cannot be counted on to properly monitor the area and protect it from harm.⁷⁴

Arizona courts have addressed mitigation measures:

NEPA requires an EA or EIS to discuss possible mitigation measures, including how those measures will minimize environmental consequences. . . . An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective.⁷⁵

⁷⁴ See Appendix R, the declaration of John Anderson, former Bureau and U.S. Fish and Wildlife Range Conservationist and Botanist which addresses this concern from an experienced agency personnel perspective.

⁷⁵ *Concerned Citizens and Retired Miners Coalition v. U.S. Forest Serv.*, 279 F. Supp. 3d 898, 937 (D. Ariz. 2017) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009)).

“A mitigation discussion without at least some evaluation of effectiveness is useless in making [a] determination” about whether anticipated environmental impacts can be avoided.⁷⁶ A mere listing of mitigation measures or a perfunctory description is not sufficient. Here, the Bureau doesn’t have the ability to implement either the Adaptive Management Plan nor the IVM treatments. decision relies on an adaptive management process to mitigate ecological harm after the fact, depends on capacity to monitor that the agency does not have, and relies on IVM treatments it cannot even contract for.⁷⁷

In assessing “intensity,” agencies must look at the severity of the impact based on several factors.⁷⁸ Here, the impacts of the decision to rare-riparian-obligate wildlife protected by the Endangered Species Act. These species benefit significantly from the no grazing alternative because trespass livestock use of the area would be reduced if fewer livestock were authorized, indicating a significant negative impact from the selected alternative. Cool season grazing in the riparian pasture will continue to degrade habitat elements required by these protected species and other riparian species under the selected alternative, again indicating significant impacts. In contrast to the significant impacts that are likely to occur with the authorization of livestock grazing on this allotment, the Bureau acknowledges that livestock grazing authorizations would not be reasonably expected to have significant impacts to the *livestock industry* in Cochise County.

5. Length of EA

The EA and FONSI are well beyond the anticipated 35 pages the public usually encounters in an EA.⁷⁹ This EA is 110 pages, the accompanying appendices are 208 pages. This

⁷⁶ *Suazo*, 2015 WL 1432632, at *10 (quoting *S. Fork Band Council*, 588 F.3d at 727).

⁷⁷ See Appendix EE, BLM Job Announcements.

⁷⁸ 40 C.F.R. § 1508.27b(1-10).

⁷⁹ See Appendix FF, Forty Most Asked Questions Concerning CEQ’s National Environmental

is exclusive the separate LHEs and their appendices. While we don't think the Bureau should reduce the number pages necessary to conduct a thorough analysis of the impacts of livestock grazing in this ecologically critical area, we do think the Bureau should be honest about the need for an EIS.

6. Range of Alternatives

Under NEPA, federal agencies are supposed to analyze a range of alternatives that suffice to explore the environmental impacts of various management possibilities.⁸⁰ The alternatives analysis is “the heart of the environmental impact statement,” and the agency must “rigorously explore and objectively evaluate all reasonable alternatives.”⁸¹ NEPA's requirement that agencies “study, develop, and describe appropriate alternatives . . . applies whether an agency is preparing an [EIS] or an [EA].”⁸² “The existence of a viable but unexamined alternative renders an [EA] inadequate.”⁸³

The range of alternatives for this project is inadequate because a recommended and reasonable alternative was arbitrarily rejected by the Bureau. Specifically, an alternative that would provide for the voluntary permanent retirement of livestock grazing. Three of the four grazing permittees have obtained their grazing permits in the last 2-3 years,⁸⁴ which is the same period of time the NEPA process was ongoing to determine whether or not to authorize livestock

Policy Act Regulations, 46 Fed. Reg. 18,026, 18,037, Question and Answer 36a. (Mar. 23, 1981) (“While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages”).

⁸⁰ 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1502.14.

⁸¹ *Id.* §§ 1500.2(e); 1508.9(b).

⁸² *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (per curiam) (citations omitted).

⁸³ *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2008).

⁸⁴ See Appendix GG, pages 1-4, see “issue date” for all allotments.

grazing. These permits would have been easy to retire, had the Bureau had considered that option.

7. Conflated IVM analysis with grazing impacts analysis

The Bureau combined the analysis of grazing impacts with the analysis of the impacts from the vegetation treatments, making it difficult, if not impossible for the public to determine the impacts from grazing alone. The analysis also compares the current condition – grazing authorized for 30+ years – to a reduction in grazing, rather than identifying what conditions would be like in the absence of grazing and using this as a baseline to compare the decisions. This skews the results to make the decisions look like an improvement over the current conditions and hides the true impacts of livestock grazing because the decisions appear to result in “less” harm. Again, this is not the metric which the Bureau should have used. We have alerted the Bureau to our concerns regarding the fact that livestock grazing has not been previously authorized within the SPRNCA since 2011. Our 2011 letter to the Bureau identifies two government documents that confirm the intent to end livestock grazing on the State Trust Land parcels incorporated into the SPRNCA in 1988 which are the four grazing allotments at issue in this appeal.⁸⁵

8. Failure to address impacts

The Bureau failed to adequately address important xeroriparian habitat and ephemeral washes outside of the main riparian corridor, confusing the mandate to protect the entirety of the SPRNCA with a mandate to protect just the “riparian” area. The Bureau failed to recognize that its actual management obligation is to ensure that optional land uses like livestock grazing don’t conflict with any of the resources described in the enabling legislation, which the agency is

⁸⁵ See Appendix HH WWP 2011 letter to the Bureau, at page 2.

supposed to be conserving, protecting and enhancing. This is arbitrary and capricious, a misread of the mandate, and improper under the management guidance for the NLCS system, all of which result in a NEPA violation.

The Bureau also failed to adequately consider the fact these allotments are located in an area where there has been significant and ongoing drought, extreme erosion, long-lasting damage from past and current trespass livestock use, and competing demands on these lands that are part of the NLCS system. This has created a context and intensity that preclude a FONSI. The impacts to fish from livestock do not appear in the Final EA even though upland grazing contributes sedimentation to fish habitat (rivers).⁸⁶ Additionally, the Bureau Failed to Act on Drought Projections. We addressed this issue in our Protest at page 19.⁸⁷

9. *The Bureau adopted an impermissible purpose and need statement*

The purpose and need for this project is stated as follows:⁸⁸

The purpose of the action is to evaluate the potential renewal of 10-year livestock grazing leases and additional actions on the SPRNCA allotments and move toward achieving land health standards.

The need for these actions are...to respond to the renewal of livestock grazing leases and to achieve land health standards on public land on the SPRNCA Allotments.

However, the first question the Bureau should have asked was whether or not livestock grazing is consistent with the primary purposes of the SPRNCA, found in the AICA. The failure to ask the appropriate question as the initial step in this NEPA process has resulted in the use of

⁸⁶ See Appendix U, Gungle *et al.* 2016. USGS Hydrological Conditions and Evaluation of Sustainable Groundwater Use in the SV Watershed, Upper San Pedro Basin, Southeastern AZ, page 59-62: suspended sediment has rebounded (increased) in recent years within the Brunckow Hill allotment near Charleston, after experiencing a decline that corresponded to reductions in livestock grazing. Removal of livestock grazing increases willow and cottonwood recruitment which reduces flow and flood peaks, reducing suspended sediment.

⁸⁷ Appendix W at 19.

⁸⁸ SPR_GRZ_0169_Final-EA at 1-4.

an incorrect environmental baseline.⁸⁹ The environmental baseline is an integral part of any NEPA analysis because it is against this information that environmental impacts are measured and evaluated. Therefore, it is critical that the baseline be accurate and complete.

When analyzing whether the Bureau provided an adequate baseline analysis, this Court must determine whether evidence in the record supports its conclusions. A no action alternative must be meaningful – a no-action alternative is meaningless if it assumes the existence of the very plan being proposed.⁹⁰

Here, the baseline is analyzed in the context of status quo, business as usual lens – grazing is assumed to be allowed. However, the ecological baseline for SPRNCA should be analyzed in the context of ecological departure from the Historic Climax Plant Community (HCPC)⁹¹ caused by human activities such as livestock grazing. The Bureau used an inaccurate baseline and continues to use a moving baseline to downplay the deleterious effects of livestock grazing in the ecosystem, in violation of NEPA.

The current and proposed livestock use of the SPRNCA is not and has never been adequately analyzed under any land use plan. Despite this fact, there are currently four active allotments in the SPRNCA: Three Brothers (5232), Brunckow Hill (5251), Babocomari (5208), and Lucky Hills (5252). As WWP informed the Bureau in 2011, and again in 2012, 2013, 2015, 2017, 2018, 2019, 2020, and 2021 the current management for the SPRNCA authorizing livestock grazing on four allotments does not comply with federal regulations. We addressed this issue extensively in our Protest at pages 13-16.⁹² Because the Bureau based its No Action alternative on the false premise that livestock grazing was legally permitted on four allotments,

⁸⁹ *Center for Biological Diversity v. BLM*, 746 F. Supp. 2d 1055 (N.D. Cal. 2009).

⁹⁰ *Friends of Yosemite Valley v. Kempthorne*, 520 F. 3d 1024 (9th Cir. 2008).

⁹¹ Appendix II, Ecological Site Descriptions for the SPRNCA.

⁹² See Appendix W, WWP January 6, 2023 Protest at 13-16.

and the Bureau compared the impacts of the other action alternatives to this misleading baseline, the entire NEPA analysis for this project is rendered inadequate.

As we noted in our prior comments, there is no “need” to graze the SPRNCA – regional livestock operators have adjusted to most of the SPRNCA being ungrazed since 1989 and there is no evidence that any social or economic need is unmet by this restriction. Grazing in the SPRNCA provides less than 1% of the jobs and income for the beef industry in Cochise County.⁹³ The narrowness with which the need was defined – to identify where and how to manage livestock grazing, not whether livestock grazing should be allowed – clearly predicted the outcome, which violates NEPA.⁹⁴

10. *The Bureau failed to adequately analyze and disclose impacts*

The Bureau failed to identify the costs of the proposed fencing necessary to maintain livestock grazing within the authorized allotments and pastures, and failed to compare the perceived financial “benefits” of livestock grazing authorizations with the costs of maintaining “well-managed” livestock grazing within the SPRNCA, or the costs of restoration necessary to counter the impacts of livestock grazing.

"NEPA requires that an agency gather all information, by independent research if necessary, that 'is essential to a reasoned choice among alternatives.'"⁹⁵ "If information essential to presenting such a discussion is incomplete or unavailable, the agency must obtain the information through independent research unless the cost of doing so would be prohibitive."⁹⁶

⁹³ SPR_GRZ_0169_Final_EA at 3-3.

⁹⁴ 40 C.F.R. § 1502.13.

⁹⁵ 40 C.F.R. § 1502.22. *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966 (S.D. Cal. 2015)

⁹⁶ 40 C.F.R. § 1502.22 ; *Save Our Ecosystems v. Clark* , 747 F.2d 1240, 1249 (9th Cir. 1984)." *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966 (S.D. Cal. 2015).

The Bureau has ample evidence that its boundary and allotment fences are in poor condition.⁹⁷ The information about how much fencing will cost (both materials and installation/labor costs) is not difficult, nor cost-prohibitive, to obtain and the costs of the fencing necessary to keep livestock within the authorized allotments or pastures is not identified. The costs of the restoration projects needed to address the impacts of livestock grazing (both historic and current) were also not disclosed.

While NEPA's regulations do not mandate disclosure of a cost-benefit analysis as part of an EA,⁹⁸ Section 102(2)(B) of NEPA requires that agencies weigh the economic benefits of a proposed action against its environmental costs.⁹⁹ *Not disclosing* a cost benefit analysis is not the same as *not conducting* a cost-benefit analysis.¹⁰⁰ Furthermore, the Arizona BLM Handbook H-1741-1 (Fencing) (1989)¹⁰¹ indicates that:

Investment analysis is an integral part of activity plan development and is required in most situations. The analysis of all projects in a plan, and of alternative "plans" with differing mixes of projects and management strategies, is necessary to determine the most economic or most cost-effective, package of projects. Analysis on a project-by-project basis is unnecessarily time-consuming, does not provide the information needed to determine cumulative effects, and does not meet the "all costs-all benefits" analysis rule. Investment analysis is also useful in situations where some or all of the benefits cannot be quantified or valued. In situations of this type, the analysis and information provided to decisionmakers should identify the package of improvements that will accomplish management objectives in the least costly manner.

Investment analysis includes the use of economic and other criteria to establish activity plan preparation priorities and to establish the priority of specific improvement and treatment projects associated with those plans (when preparing annual work plans and obligating funds).

⁹⁷ See Appendix K, map of SPRNCA fence conditions.

⁹⁸ See *Knowles v. United States Coast Guard*, 1997 WL 151397, *12 (S.D.N.Y. 1997).

⁹⁹ See 42 U.S.C. § 4332(2)(B).

¹⁰⁰ See SPR_GRZ_0170_Final_EA at C-13. The Bureau states that the cost of the proposed action and alternatives is outside the scope of the NEPA analysis.

¹⁰¹ Attached as Appendix JJ, see specifically page III-1.

The Bureau should have identified and disclosed the costs of fencing and other infrastructure, compared these costs with the benefits or harms caused by the installation of such infrastructure, as well as to the economic impact of selecting the no grazing alternative, and used this information to make a rational choice among alternatives. This is especially helpful information for decision-makers, and the public, to have so they may compare the small economic impacts these few livestock permittees have on the local community to the costs these same permittees are asking the public to bear. The failure to provide relevant information essential to informing sound decision-making renders the decision arbitrary and capricious, in violation of NEPA. The Bureau's decision to conduct an economic impact assessment of the financial contributions of livestock grazing to the community, but not conduct an economic impact assessment of the costs to the community is also arbitrary and capricious.

11. *The Bureau's description of the authorized livestock use is unclear*

Vague info does not allow for informed public participation. The decisions to authorize livestock purport to reduce the number of cows on the ground for the four grazing allotments. However, this may not be accurate. On the Babocomari allotment the NOFD states that, because the allotment is failing to meet Land Health Standard 3 due to livestock grazing which is identified as a significant causal factor for failure to meet standards, grazing will be reduced. The NOFD goes on to state that the grazing permit will be renewed for 10 years with a 50% reduction in the number of AUMs, which will be placed in temporary suspension.¹⁰² The Bureau's Range Administrative System (RAS) indicates that the Babocomari allotment was authorized in 2021 for just 15 cows. This means the currently authorized 89 cows and 190 AUMs will be "reduced" by 50% to approximately 45 cows and 90 AUMs, but this is an actual *increase* from the previously

¹⁰² We believe the Bureau should close this allotment immediately to all grazing because the LHE is more than one year old and this itself is a violation of the grazing regulations.

authorized 15 cows, though the AUMs may (or may not, it is unclear) remain the same. This appears to be an increase in the number of cows on the ground in this already degraded allotment.¹⁰³ This is also the allotment the Arizona Department of Environmental Quality has documented as the source of E. coli contamination.¹⁰⁴

For the Lucky Hills allotment, there were 90 cows and 1080 AUMs authorized in 2019, but the Bureau is authorizing 181 cows and 1080 AUMs, which appears to be an increase in the number of cows on the ground and even with the 50% suspended use to 540 AUMs upon acceptance of the lease, this will not be an improvement in terms of number of cows on the ground.

The Three Brothers allotment is also not meeting rangeland health standards. This allotment was authorized for 68 cows and 196 AUMs in 2016. The lease information at page 6-7 of the NOFD for this allotment indicates that there will be 171 AUMs authorized and 68 cows. The NOFD (at 7) says that “upon acceptance of the lease, 50% of authorized use for the Three Brothers allotment (98 AUMs) will be placed into Temporary Suspended Use until DPC objectives are met.” This is confusing because there will only be 171 AUMs authorized and a 50% reduction from this decision is 85.5 AUMs. A 50% reduction from the previously authorized grazing would be 98 AUMs, but that does not appear to be what the decision says.

Finally, for the Brunckow Hill allotment, RAS indicates only 7 cows and 84 AUMs were authorized in 2021. The decision, again on an allotment that is not meeting standards, is to authorize 20 cows and 84 AUMs. Even with the 50% reduction upon acceptance of the lease, this appears to be an increase in the number of cows on the ground from 7 currently, to 10 with

¹⁰³ See Appendix KK, the Bureau’s 2021 RAS Permit Schedule Information Report for the SPRNCA allotments.

¹⁰⁴ See Appendix T.

this decision. These confusing numbers render the decision equally confusing and in violation of NEPA.

D. Violations of the ESA

The Endangered Species Act (“ESA”) prescribes a three-step process to ensure compliance with its substantive provisions by federal agencies.¹⁰⁵ Each of the first two steps serves a screening function to determine if the successive steps are required.¹⁰⁶ Those steps are: (1) inquire of the U.S. Fish and Wildlife Service (“Service”) whether any threatened or endangered species “may be present” in the area of the proposed action; (2) if the answer to (1) is yes, the agency must prepare a biological assessment to determine if the species is “likely to be affected” by the agency’s action; and (3) if the biological assessment indicates the proposed action may affect a threatened or endangered species, formal consultation is required.¹⁰⁷

Here, the Bureau failed to adequately explain how this project would avoid negative outcomes and illegal impacts to critical habitat by moving livestock into the uplands through the installation of additional waters. Indeed, these decisions will result in livestock moving into the uplands, which may result in improved riparian habitat, but fails to analyze how this will impact the yellow-billed cuckoo habitat in the uplands, or whether this will result in harm to the critical habitat for the Western yellow-billed cuckoo.¹⁰⁸ The Bureau does acknowledge that livestock grazing harms cuckoo habitat generally, but doesn’t explain how moving cows into the uplands will affect the habitat. The 2022 Biological Opinion states, at page 19, that grazing effects recruitment and growth of xeroriparian vegetation that yellow-billed cuckoo use as nest

¹⁰⁵ See 16 USC 1536(c); 50 CFR 402.12; see also *Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1240 (N.D. Cal. 2001).

¹⁰⁶ *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

¹⁰⁷ 16 U.S.C. § 1536(c)(1).

¹⁰⁸ Appendix LL, 2022 U.S. Fish and Wildlife Biological Opinion at 19-20.

substrates and foraging areas; yellow-billed cuckoo eat invertebrates that may rely on grasses and forbs, as well as tree resources, livestock trample vegetation and seedbeds, browse cottonwood, willow, other woody plants, compact soil, create trails in breeding habitat, thus reducing habitat quality by reducing vigor, preventing growth, reproduction, and recruitment of cottonwoods and willows and other wood and herbaceous vegetation, increasing fragmentation which reduces suitability of nesting habitat, increasing nest predator access to nests, and reducing nest success.

ESA-listed plants such as Huachuca water umbel and Arizona Eryngo are both found immediately upstream and downstream of the allotments authorized by this decision. Prime recovery habitat for both species is being destroyed in real time, due to both authorized and unauthorized livestock grazing. The Bureau must provide a reasonable discussion and justification for authorizing actions that contribute to the death of the San Pedro River ecosystem but has failed to do so. We addressed this issue more fully in our Protest at page 20 and incorporate that section by reference here.¹⁰⁹

The examples we have provided of ongoing degradation of riparian zones and designated critical habitat are not described or even mentioned in the LHEs. The damage from trespass livestock was ongoing before, during, and after the NEPA process for these grazing decisions. There are no Key Area measurements taken in these important riparian areas that are critical habitat for two federally listed species. The LHEs and Key Areas do not reflect the actual conditions on the ground. A FONSI is therefore not possible, the EA analysis is inadequate, and threatened and endangered species are at risk of take, in violation of the ESA.

E. Violation of the APA

¹⁰⁹ Appendix W at 19 *et seq.*

The Administrative Procedure Act (APA) provides the legal standard used to evaluate the Bureau's compliance with FLPMA and NEPA. Under the APA, courts must "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹¹⁰ An action is arbitrary and capricious when the agency "relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.*"¹¹¹ The Administrative Procedures Act (APA) provides for judicial review of agency action.¹¹² Under the APA, a final agency action must be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹¹³

For all the reasons outlined in the sections above, the grazing decisions for the SPRNCA are arbitrary and capricious in the standards it evaluates various land uses against (baseline), in its inclusion or exclusion of relevant data, and in its decision to entirely ignore certain relevant issues. The Bureau's responsibilities under FLPMA and the AICA to protect and preserve the natural resources cannot be fulfilled if the Bureau doesn't even know the current state of the public lands in question. The Bureau has failed to make a factually supported finding that livestock grazing furthers the primary purposes of the SPRNCA designation as required by PL 100-969 Sec. 460xx.¹¹⁴ There is insufficient evidence in the Decisions to support the agency's

¹¹⁰ 5 U.S.C. § 706(2)(A).

¹¹¹ *Pacific Coast Federation of Fishermen's Ass'n v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001), emphasis added.

¹¹² 5 U.S.C. §702.

¹¹³ 5 U.S.C. §706(2)(A).

¹¹⁴ *Western Watersheds Project v. BLM*, 629 F.Supp.2d 951 at 968 (D. Ariz. 2009)

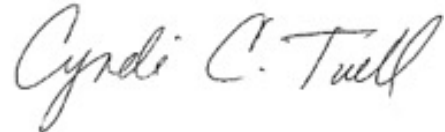
conclusions, the evidence presented could only lead a reasonable person to a decision contrary to that of the Bureau, and for this reason, the decision violates the APA.

IV. Conclusion

The SPRNCA is a unique, ecologically important, and legally protected landscape that has suffered significant and long-term damage from livestock grazing. These lands have great potential for recovery, as demonstrated by the many scientific studies we have provided as well as the declarations of several individuals, including scientists. Of the myriad causes of harm to this landscape, livestock grazing is a major contributor and perhaps the only cause the Bureau can manage. Eliminating livestock grazing throughout the SPRNCA would be the single management action that would best ensure and promote ecological recovery of riparian ecosystems and would be most congruent with the intended purpose of the designation. Native ecosystems in the desert southwest did not evolve with large grazers, and thus their ecological impact can be severe, long-lasting, and unnatural.

WWP respectfully requests an order from the hearings division that directs the Bureau to immediately stop livestock grazing (reverts to the legal status quo), and vacates and remands the Final Decisions pending resolution of the violations of federal law alleged herein.

Respectfully submitted,



Cyndi Tuell
Counsel for Appellants

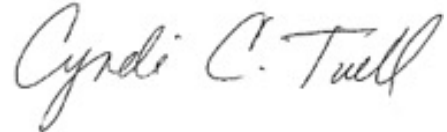
CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 2023, I sent true and correct copies of the foregoing Motion for Summary Judgement and Appendices to the following parties via email:

U.S. Department of the Interior
Office of Hearings and Appeals
Departmental Hearings Division
405 South Main Street, Suite 400
Salt Lake City, UT 84111
dchd@oha.doi.gov

Joshua Edelstein, Esq.
Rachel Kent, Esq.
Office of the Solicitor
Phoenix Field Office
U.S. Courthouse, Suite 404
401 W. Washington Street, SPC 44
Phoenix, AZ 85003-2151
Joshua.Edelstein@sol.doi.gov
Rachel.Kent@sol.doi.gov

Respectfully submitted,



Cyndi Tuell
Counsel for Appellants