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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WESTERN WATERSHEDS PROJECT and THE CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

U.S. FOREST SERVICE,

Defendant.

Civil No. 11-8128-PCT-NVW

FEDERAL DEFENDANT'S CONSOLIDATED MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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1
2 **I. INTRODUCTION**

3 The National Environmental Policy Act ("NEPA") requires federal agencies to
4 analyze the environmental consequences of major federal actions before adopting them. See
5 42 U.S.C. § 4332(C). Because modern environmental analysis often depends on the
6 resolution of complex scientific or technical issues and consequently can be time-consuming,
7 it can divert resources from other aspects of an agency's public mission, especially in an era
8 of budgetary austerity.

9 In 2005, Congress determined that the United States Forest Service ("Forest Service")
10 had encountered unacceptable delays in completing its NEPA documentation for the
11 numerous decisions authorizing grazing on federal lands. Therefore, in the Consolidated
12 Appropriations Act of 2005 ("Appropriations Act"), Congress modified the NEPA
13 requirements for livestock grazing on Forest Service lands by reallocating and balancing the
14 time and resources devoted to the more complicated NEPA documents, "an environmental
15 assessment or environmental impact statement," with those required by one of NEPA's
16 shorter and simpler determinations, styled a categorical exclusion decision. Appropriations
17 Act, P.L. No. 108-447, § 339, 118 Stat. 2809.

18 The Appropriations Act restricts the Forest Service's discretion to analyze grazing
19 allotment decisions under in NEPA by requiring that every decision authorizing grazing must
20 be made under a categorical exclusion decision if three conditions are met. The Forest
21 Service must adopt a categorical exclusion where its grazing allotment decision: (1)
22 continues existing "grazing management;" (2) meets or moves satisfactorily toward the
23 objectives of the applicable land and resources management plan ("forest plan"), as indicated
24 by "monitoring;" and (3) is consistent with the Forest Service's policy for defining the
25 "extraordinary circumstances" to which a given categorical exclusion may or may not be
26 subject. See id (directing that grazing decisions meeting these three conditions "shall be
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categorically excluded from [additional] documentation" under NEPA).

In challenging the eight categorical exclusion decisions at issue here, plaintiff cannot prevail unless the Forest Service violated one of these three conditions ("statutory conditions"). Nevertheless, plaintiff does not seriously address any of the statutory conditions. Instead, it rests its Memorandum in Support of Summary Judgment ("Pl. Mem.") on citations to the record or simple assertions that cannot show that the Forest Service did not meet these three conditions. Repeatedly, for example, plaintiffs point out that the vegetation on different parts of the challenged allotments was rated at one time as good, fair, or poor, just as different soils on these allotments were previously rated at one time as satisfactory, impaired, or unsatisfactory. See e.g., Pl. Mem. at 10-12.

By themselves, the vegetation and soil ratings presented by plaintiff have nothing to do with the threshold issue of whether the Forest Service complied the Appropriation Act's conditions because plaintiff limits them to a single point in time. This is a fatal error. Under the Appropriations Act, a categorical exclusion decision authorizing grazing must be upheld if it continues the Forest Service's existing management, moves satisfactorily toward achieving applicable forest plan objectives, and is consistent with the Forest Service's policy concerning "extraordinary circumstances" under NEPA. P.L. No. 108-447, § 339, 118 Stat. 2809 (emphasis supplied). Thus, the Appropriations Act does not, as plaintiff urges: prohibit poor soils or poor vegetation; require the Forest Service to eliminate these conditions regardless of whether they were caused by its rangeland management; or prohibit grazing itself. Instead, the Appropriations Act requires the Forest Service to respond to rangeland conditions with the applicable management tools as necessary to either meet or move "satisfactorily" toward forest plan objectives. Id.

The record demonstrates that the Forest Service properly met each of the Appropriation Act's three statutory grazing conditions and that the Forest Service supported its categorical exclusion decisions with rational, well-documented environmental analysis that was "neither arbitrary nor capricious." Wong v. Bush, 542 F.3d 732, 737 (9th Cir. 2008);

Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1447-1450 (9th Cir. 1996) (applying this standard to uphold Forest Service categorical exclusion decision under appropriations law modifying NEPA). Accordingly, this Court should deny plaintiff's motion for summary judgment and grant the Forest Service's cross-motion.

II. STATUTORY BACKGROUND AND RELATED STANDARDS OF REVIEW

Two primary statutes require the Forest Service to consider proposed grazing on federal lands, authorize it if appropriate, and regulate it as necessary: the Multiple-Use Sustained Yield Act of June 12, 1960 ("MUSYA"), 16 U.S.C. §§ 528-531, and the National Forest Management Act ("NMFA"), see 16 U.S.C. §§ 1600-1614. Two other statutes require the Forest Service to consider the environmental effects of proposed grazing decisions before adopting them: NEPA, 42 U.S.C.§ 4332, and the Appropriations Act, which modifies NEPA for the decisions challenged here. P.L. No. 108-447, § 339, 118 Stat. 2809.

A. MUSYA

In MUSYA, Congress stated that the national forests "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. MUSYA authorizes the Forest Service to administer the "renewable surface resources" of national forest lands for the "multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. § 529. Congress defines this "[m]ultiple use'" management as the

> management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions.

16 U.S.C. § 531(a).

B. NFMA

In NFMA, 16 U.S.C. §§ 1600-1614, Congress prescribed the management mechanisms and direction by which the Forest Service must manage the national forests for

long-term, forest-wide, and project-specific objectives. NFMA provides for forest planning at two management levels: forest-wide management of a given national forest, and management specific to an individual project. See id.

For forest-wide management, NFMA requires the Forest Service to adopt management standards and guidelines in a Land and Resource Management Plan ("forest plan"). Each forest plan must establish long-term management goals, standards, and guidelines for a given national forest that consider environmental and economic factors. See 16 U.S.C. § 1604(g)(1)-(3). Further, all management decisions made at the individual project level after a given forest plan is effective (such as approving or denying proposed individual grazing allotments or permits) must be consistent with that forest plan. 16 U.S.C. § 1604(I).

NFMA requires the Forest Service, in developing or administering forest plans, to provide for the "multiple use and sustained yield" of national forest resources and also incorporate MUSYA's definitions of those terms into its management decisions. 16 U.S.C. § 1604(e). Under Forest Service regulations construing NFMA and MUSYA, grazing allotments must be designated in the national forests "where the land is available for grazing." 36 C.F.R. § 222.2(a). Further, where a given national forest produces forage, national forest lands "will be managed for livestock grazing...consistent with land management plans." Id., § 222.2(c).

C. NEPA

If in agency determines that a proposed major federal action will significantly affect "the quality of the human environment," NEPA generally requires the agency to prepare an environmental impact statement ("EIS"). An EIS is a more detailed environmental analysis subject to extensive regulations that dictate format, content, methodology, public comments, and inter-agency consultation and coordination. 40 C.F.R. §§ 1502.1-1502.22. However, where the proposed action does not significantly affect the environment, NEPA does not require an EIS. 42 U.S.C. § 4332(C); see also Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374, 385 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 394 (1976).

The Council on Environmental Quality ("CEQ") has issued regulations governing agency compliance with NEPA. 40 C.F.R. § 1500.1. Those regulations provide that a federal agency should first determine whether its proposed action would normally require the preparation of an EIS or, alternatively, whether this action would normally be approved under a "categorical exclusion." 40 C.F.R. § 1501.4(a)(1) and (2). Where a proposed action does not fall within either category, then the agency should prepare an environmental assessment ("EA") to determine whether its proposed action would have a significant environmental impact necessitating an EIS. 40 C.F.R. § 1501.4 (a)-(c). NEPA's regulations define an EA as "a concise public document . . . that serves to [b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1).

A categorical exclusion is "a category of actions which do not individually or cumulatively have a significant effect on the human environment" and, therefore, does not require the preparation of either an EIS or EA. 40 C.F.R. §§ 1508.4, 1508.10. However, where agencies adopt procedures for excluding a category of proposed agency actions from additional NEPA analysis, they also must provide for the "extraordinary circumstances" under which a proposed action that would otherwise qualify as a categorical exclusion "may have a significant environmental effect" and thus require an EIS or EA. 40 C.F.R. § 1508.4.

Under its regulations, the Forest Service must consider several environmental factors in determining whether "extraordinary circumstances" exist that would preclude application of a categorical exclusion, including the presence of wildlife species listed as threatened or endangered under federal law, Native American "religious or cultural sites," and "[a]rcheological sites." 36 C.F.R. § 220.6(b)(1) and (2). Further, the "mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion." Id.

NEPA's provisions impose procedural, not substantive, constraints on the government. Therefore, NEPA does not dictate a federal agency's programmatic goals, a particular degree of environmental protection or economic development, or otherwise

1 mandate any particular decision. Instead, NEPA governs the manner in which an agency
2 reaches its decisions. Its dominant purpose is to ensure that federal agencies consider the
3 "significant environmental impacts" of their proposed actions in advance of a final decision
4 and "that the relevant information will be made available" to the public. Robertson v.
5 Methow Valley Citizens Council, 490 U.S. 332, 349-351 (1989); Lands Council v. McNair,
6 537 F.3d 981, 1000 (9th Cir. 2008) (NEPA intended to "ensure a process," not "impose any
7 substantive requirements on federal agencies").

8 **D. THE APPROPRIATIONS ACT AND ITS PREDECESSORS**

9 Congress first modified NEPA for grazing decisions on Forest Service lands in 1995.
10 In the Rescissions Act, Congress directed the Forest Service to establish and comply with a
11 schedule for completing NEPA decisions that analyze grazing allotments on Forest Service
12 lands ("schedule"). See Rescissions Act of 1995, P.L. 104-19, §§ 501-504, 109 Stat. 194,
13 212 (July 22, 1995). Where any grazing permit expired before this NEPA analysis was
14 completed under the schedule, the Rescissions Act required the Forest Service to reissue the
15 expired permit "on the same terms and conditions as before," pending NEPA compliance.
16 Id. § 504(b), 109 Stat. at 212-213.

17 In 2003 and 2009, Congress strengthened these protections of existing livestock
18 grazing by directing that the terms and conditions of grazing permits "shall remain in effect"
19 until the Forest Service completes its processing of a renewed permit under "all applicable
20 laws." See 2003 Omnibus Appropriations Act, P.L. No. 108-7 § 328, 117 Stat. 11, 276 (Feb.
21 20, 2003); 2009 Omnibus Appropriations Act, P.L. No. 111-8 § 426, 123 Stat. 524, 729
22 (Mar. 11, 2009)(extending this provision through Fiscal Year 2009).

23 In the 2005 Appropriations Act, Congress supplemented its previous decisions by
24 requiring a more streamlined means of complying with NEPA in certain cases. It directed
25 that the Forest Service's grazing decisions would be categorically excluded from further
26 review under NEPA where three statutory conditions are satisfied. Appropriations Act, P.L.
27 No. 108-447 § 339, 118 Stat. 2809, 3103. The Appropriations Act's modification of NEPA
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reads:

> For fiscal years 2005 through 2007, a decision made by the Secretary of Agriculture to authorize grazing on an allotment shall be categorically excluded from documentation in an environmental assessment or an environmental impact statement under [NEPA] if: (1) the decision continues current grazing management of the allotment; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan, as determined by the Secretary; and (3) the decision is consistent with agency policy concerning extraordinary circumstances. The total number of allotments that may be categorically excluded under this section may not exceed 900.

Id.

Congress enacted the Appropriations Act because it was "extremely concerned with the lack of progress the [Forest Service had] made in completing the environmental review of grazing allotments that are governed by the Rescission Act." Senate Appropriations Committee Report, S. Rep. 108-341, 108th Cong., 2d Sess. at 54 (Sept. 14, 2004).[1/] The Senate Appropriations Committee stated that Congress' purpose was "to make the environmental review process more efficient by reducing the amount of documentation and expense required to conduct reviews for allotments where the level of complexity of environmental issues is negligible so that the Agency may devote its limited resources to allotments that require a more sophisticated analysis." Id. In 2008, Congress prohibited the Forest Service from making a categorical exclusion decision for grazing in federal wilderness areas but otherwise extended the Appropriation Act's modification of NEPA through fiscal year 2008. P.L. 110-161, § 421 (2008).

E. JUDICIAL REVIEW STANDARDS

Judicial review of the Forest Service's decisions to invoke categorical exclusion decisions under the Appropriations Act is the same as judicial review of other informal agency decisions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq.:

[1/] Two recent federal district court decisions have analyzed the Appropriations Act's language and purpose. Western Watersheds v. U.S. Forest Service, 2012 WL 1094356 at 3 (N.D. Cal. 2012); WildEarth Guardians v. U.S. Forest Service, 668 F.Supp.2d 1314, 1322-1333 (D.N.M). 2009).

this Court must decide whether the challenged categorical exclusion decisions are "arbitrary and capricious." Wong v. Bush, 542 F.3d 732, 737; Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999); Southwest Center, 100 F.3d at 1447-1449; see also Marsh, 490 U.S. at 374, 375-376, 377 n. 23, 378, 385.

The Supreme Court has defined the type of analysis that courts must uphold under this standard of review. It has concluded that NEPA documents must be upheld if an agency conducts a "reasoned evaluation" of the applicable environmental factors in them. Marsh, 490 U.S. at 378, 385. A "reasoned evaluation" has two components: an agency must (1) consider "the relevant factors" and (2) articulate "a rational connection between the facts found and the choice made." Baltimore Gas Co. v. NRDC, 462 U.S. 87, 105 (1983); Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 859; see also Lands Council, 537 F.3d at 987 (judicial review under APA "is narrow" because courts must not substitute their "judgment for that of the agency"); Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 573 (9th Cir. 1998) (NEPA decisions will be upheld where they were "based on a consideration of the relevant factors" and where there was no "clear error of judgment").

This standard requires that, even where a challenged decision has "less than ideal clarity," courts must uphold it if "the agency's path can be reasonably discerned." McFarland v. Kempthorne, 545 F.3d 1106, 1113 (9th Cir. 2008). In assessing whether the agency's decision was rational, the reviewing court should examine the administrative record in addition to the agency's decision document or formal statement of reasons. Id.

Where agencies analyze conflicting or uncertain scientific data in their NEPA documents within their areas of technical or scientific expertise, reviewing courts are highly deferential. Marsh, 490 U.S. at 378; Baltimore Gas, 462 U.S. at 93, 103, 105; Lands Council, 537 F.3d at 992-994 (requiring "particularly deferential review" within agency's "field of discretion"); Southwest Center, 100 F.3d at 1449 (Forest Service "entitled to rely on the opinions and recommendations of its own experts").

III. REGULATORY BACKGROUND

Plaintiff initially challenged 15 categorical exclusion decisions for proposed grazing permits on Forest Service lands. Consolidated Notice of Filing Final Index to Administrative Record at 1 (filed 7 May 2012); see also Complaint at ¶ 1. In its motion for summary judgment, however, plaintiff withdrew its challenge to seven of these decisions and now only seeks relief for eight categorical exclusions governing the Angell, Casner, Cosnino, Pine Creek, Seven C Bar, Twin Tank, Chino Valley, and V-Bar grazing allotments. Compare id. with Pl. Mem. at 1 n.1, 7-12.

A. THE ANGELL ALLOTMENT DECISION

The Angell grazing allotment is located on 51,696 acres in the Coconino National Forest in Coconino County, Arizona. See AN 1662 (2006 decision).[2] In the categorical exclusion decision for this allotment ("Angell decision"), the Forest Service reissued a grazing permit on July 25, 2006 that it had previously issued in 2001. Id. at AN 1662, 1668; AN 2136 (expired 2001 grazing permit). The Forest Service authorized grazing for up to 425 cattle in 2006, the same number it had authorized in 2001. Id. It also determined that this allotment's mix of dominant vegetation(grasslands and juniper and ponderosa pine stands) was the same in 2006 as it was in 2001, except for increases juniper and ponderosa pine trees. AN 1663-1664. Grazing regulated by the Forest Service did not cause these increases in tree cover because "[c]attle do not typically graze the densely treed areas." Id.

After analyzing the Angell allotment's wildlife and archeological resources, among other environmental factors, the Forest Service concluded that there were no "extraordinary circumstances" applicable to the new Angell grazing permit that would or could

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[2] This citation to the disc to the administrative record filed on May 10, 2012 refers to the Angel Allotment ("AN") part of the record and the Bates-stamped pages 1662. It can be accessed most conveniently by (1) clicking on the "Angell Allotment" section of this record; (2) scrolling down to the separate index to the Angell allotment, separately listed among the documents in that section; and (3) clicking on the hyperlinked "Doc" listed next to "AN001662." See Federal Defendants' Notice of Filing Disc for Final Administrative Record (filed 9 May 2012).

"significantly affect the environment." Id. at 1665-1666. It determined that the new grazing permit "will not alter or impact habitat conditions" for endangered, threatened, or sensitive species." Id. at 1665. On the basis of an archeological survey and clearance report, the Forest Service also determined that there would be no anticipated effects on archeological resources or sites. Id. at 1666.

B. THE CASNER PARK/KELLY SEEP ALLOTMENT DECISION

The Casner Park/Kelly Seep grazing allotment ("Casner allotment") is located on 28,047 acres in the Coconino National Forest. CA 1386. In the challenged decision for this allotment ("Casner decision"), the Forest Service reissued a grazing permit on September 26, 2008 that it had previously issued in 2001. Id. at 1386, 1391 (2008 decision)[3/]; CA 1833 (expired 2001 grazing permit). It authorized grazing for up to 395 cattle in 2008, the same number authorized in 2001. Id. It also determined that the mix of dominant vegetation on this allotment (ponderosa pine stands and grasslands) was the same in 2008 as it was in 2001, except for increases in ponderosa pine trees in some areas. CA 1386, 1388.

After analyzing the Casner allotment's effect on "Mexican spotted owls," if any, among other environmental factors, the Forest Service concluded that there were no "extraordinary circumstances" that would or could significantly affect the environment. Id. at 1389-1390. The Forest Service determined that the new Casner grazing permit was "not likely to adversely affect" these owls because (1) the permit required that between 60 and 70 percent of the allotment's forage would be available each year after grazing; (2) this remaining forage would adequately support the rodents on which Mexican spotted owls prey;

[3/] This citation to the disc to the administrative record refers to the Casner Allotment ("CA") part of the record and the Bates-stamped pages 1386 and 1391. It can be accessed most conveniently by (1) clicking on the "Casner Allotment" section of this record; (2) scrolling down to the separate index to that allotment, separately listed among the documents of that section; and (3) clicking on the hyperlinked "Doc" listed next to "CA001386." See Federal Defendants' Notice of Filing Disc for Final Administrative Record (filed 9 May 2012). This retrieval procedure may be used for all of the grazing allotments at issue here. In the administrative record disc filed by federal defendants, each of these allotments challenged by plaintiff has an index specific to it.

1 and (3) designated spotted owl habitat areas are "rarely used by livestock." Id. at 1389.
2 Three primary monitoring mechanisms ("three-part environmental monitoring") are
3 part of the grazing allotment management plan adopted in the Casner decision, which is also
4 typical of the monitoring adopted for the other allotments. CA 1319, 1322. Three-part
5 environmental monitoring includes: (1) annual inspections by both the Forest Service and the
6 permittee; (2) periodic long-term monitoring at seven monitoring stations; and (3) annual
7 monitoring at one representative station to record forage production, vegetation cover, and
8 other environmental benchmarks. CA 1322, 1387.
9 **C. THE COSNINO ALLOTMENT DECISION**
10 The Cosnino allotment is located on 9,500 acres of Forest Service lands in the
11 Coconino National Forest. CO 1321. In the Cosnino decision, the Forest Service reissued
12 a grazing permit on September 26, 2008 that it had issued in 2005. See CO 1323 (2008
13 decision); CO 1802 (expired 2005 permit). The Forest Service authorized grazing for up to
14 160 cattle in 2008, the same number authorized in 2001. Id. It also determined that this
15 allotment's mix of dominant vegetation(juniper woodland and blue gamma grasses) was the
16 same in 2008 as in 2001, except for some increases in ponderosa pines. CO 1319, 1321.
17 After analyzing this permit's effect on several resources and environmental factors,
18 including threatened and endangered species, the Forest Service concluded that there were
19 no "extraordinary circumstances" that would or could "significantly affect the environment."
20 Id. at 1321-1322. The Forest Service determined that there "are no threatened or endangered
21 species or critical habitat in the project area." Id. at 1322. The Cosnino decision adopts the
22 same three-part environmental monitoring mechanisms adopted in the Casner and other
23 allotment decisions. See CO 1288, 1320. This monitoring is part of the Forest Service
24 "Proposed Action" adopted in the Cosnino decision. Id.
25 **D. THE PINE CREEK ALLOTMENT DECISION**
26 The Pine Creek allotment is located on 8,374 acres of Forest Service lands in the
27 Kaibab National Forest in Coconino County, Arizona. PI 1203. In the challenged Pine
28

Creek decision for this allotment, the Forest Service reissued a grazing permit on September 26, 2008 that it had previously issued in 2006. See PI 1207 (2008 decision); PI 1271 (expired 2006 grazing permit). The Forest Service authorized grazing for up to 250 cattle in 2008, the same number it had authorized in 2006. Id. It determined that (1) the mix of dominant vegetation on this allotment (grasslands, pinyon/juniper, and ponderosa pine stands) was the same in 2008 as it was in 2006; (2) 78 percent of the allotment was in "satisfactory soil/watershed condition; and (3) soil condition on the allotment has "improved" since 1984. PI 1204-1205.

After analyzing this permit's possible effect on threatened and endangered species, as well as other factors, the Forest Service concluded that there were no "extraordinary circumstances" that could have significant environmental impacts. Id. Thus, it determined that reissuing the permit would have no effect on these factors. Id.

E. THE SEVEN C BAR ALLOTMENT DECISION

The Seven C Bar allotment is located on 177 acres of Forest Service lands in the Kaibab National Forest. SE 1153. In the Seven C Bar decision, the Forest Service reissued a grazing permit on September 26, 2008 that it had previously issued in 2007. See SE 1157 (2008 decision); SE 1200 (2007 permit). The Forest Service authorized grazing for up to 20 cattle every other year, beginning in 2008, the same number authorized in 2007. Id. It also determined that (1) the mix of dominant vegetation on this allotment (grasslands and ponderosa pine trees) was the same in 2008 as in 2007; (2) 100 percent of the allotment was in "satisfactory range condition;" and (3) soil condition on the allotment had "improved" since 1984. SE 1153-1155.

The Forest Service concluded there were no "extraordinary circumstances" that could have significant environmental impacts after analyzing this permit's possible effects on different environmental factors, including threatened and endangered species and their habitat. Id. at 1227. It determined that reissuing this permit "is not likely to adversely affect" these factors. Id.

F. THE TWIN TANKS ALLOTMENT DECISION

The Twin Tanks allotment is located on 11,940 acres of Forest Service lands in the Kaibab National Forest. TW 1224. In the Twin Tanks decision, the Forest Service reissued a grazing permit on September 26, 2008 that it had previously issued in 1999. See TW 1229 (2008 decision); TW 1252 (expired 1999 grazing permit). The Forest Service authorized grazing for up to 1025 sheep in 2008, the same number authorized in 1999. Id.; TW 778. It also determined that (1) the mix of dominant vegetation on this allotment (grasslands, pinyon/juniper, and ponderosa pine trees) was the same in 2008 as it was in 1999; (2) current management is maintaining or improving rangeland vegetation conditions; (3) 88 percent of the allotment was in "satisfactory" soil condition; and (4) soil condition on the allotment has "improved" since 1986. TW 1225-1227.

The Forest Service concluded that there were no "extraordinary circumstances" that could have significant environmental impacts after also analyzing this permit's possible effects on threatened and endangered species, among other factors. Id. at 1205. It determined that reissuing this permit "is not likely to adversely affect" these factors. Id.

G. THE CHINO VALLEY ALLOTMENT DECISION

The Chino Valley allotment is located on 3,382 acres of Forest Service lands in the Prescott National Forest in Yavapai County, Arizona. CH 349. In the Chino Valley decision, the Forest Service reissued a grazing permit on September 28, 2007 that it had previously issued in 1998. See CH 355 (2007 decision); CH 364 (1998 grazing permit). The Forest Service authorized grazing for up to 48 cattle in 2007, less than the 50 cattle authorized in 1998. Id. It also determined that the dominant vegetation on this allotment (pinyon/juniper woodlands and related understory grasses) was the same in 2007 as it was in 1998, except for increases in the "overstory" (canopy) occasioned by the continued growth of these woodlands. CH 258, 349. Based on a 2007 study and related monitoring of this allotment, 57 percent of its soil units had a "satisfactory" soil rating condition, with no "unsatisfactory" soils. CH 300-301.

1 The Forest Service concluded that there were no "extraordinary circumstances" that
2 could have significant environmental impacts after also analyzing this permit's possible
3 effects on different environmental factors, including both wilderness areas and 52 threatened,
4 endangered, or sensitive species and their habitat. CH 352. It determined that reissuing this
5 permit would not harm or affect any applicable species, wilderness, or other environmental
6 factor. Id.

7 **H. THE V-BAR ALLOTMENT DECISION**

8 The V-Bar allotment is located on 20,736 acres of Forest Service lands in the Prescott
9 National Forest. VB 563. In the V-Bar decision, the Forest Service reissued a grazing permit
10 on September 28, 2007 that it had previously issued in 1997. See VB 569 (2007 decision);
11 VB 577 (expired 1997 grazing permit). The Forest Service also decided to both continue and
12 refine "Holistic Range Management" and "adaptive management" mechanisms that it had
13 used under the 1999 permit. See VB 563; VB 271. Adaptive management principles are
14 common to all of the allotment decisions challenged here. See id.

15 Under holistic or adaptive management generally, the Forest Service may authorize
16 different numbers of livestock each year. These variable numbers are set either annually or
17 by designated months, according to climatic conditions, forage abundance, and available
18 water. Id. The V-Bar allotment's annual or monthly grazing limits have varied from
19 prohibiting all grazing for the 2002-2003 grazing period to authorizing up to 190 and 265
20 cattle in 2005 and 2006 respectively. VB 585-594.

21 The Forest Service determined that the mix of dominant vegetation on this allotment
22 (pinyon/juniper woodlands and grasslands/desert shrub) was the same in 2007 as it was in
23 1999, except for natural increases in woodlands and "species diversity" improvements
24 because of increased precipitation. VB 344-345, 353; VB 563. Based on a 2007 study and
25 related monitoring of this allotment's soils, 55 percent of this allotment had a "satisfactory"
26 soil condition, and no soils were unsatisfactory. VB 274.

27 The Forest Service concluded that there were no "extraordinary circumstances" that
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would or could have significant environmental impacts after also analyzing the V-Bar permit's possible effects on wilderness areas and 53 threatened, endangered, or sensitive species, among other factors. VB 565-566. It determined that reissuing this permit would not harm or affect any applicable species, wilderness, or other environmental factor. Id.

III. ARGUMENT

THE CHALLENGED CATEGORICAL EXCLUSION DECISIONS COMPLIED WITH THE APPROPRIATION ACT'S MODIFICATION OF NEPA

In the Appropriations Act, Congress expressly modified NEPA by requiring the Forest Service to invoke the statutory categorical exclusions for all decisions authorizing grazing if three conditions are met: an approved grazing allotment must: (1) continue existing "grazing management" ("status quo condition"); (2) meet or move satisfactorily toward the objectives of the applicable forest plan, as indicated by monitoring ("forest plan consistency and monitoring condition"); and (3) be consistent with the Forest Service's policy for defining the "extraordinary circumstances" that must occur before a decision otherwise qualifying as a categorical exclusion would have a significant environmental impact ('extraordinary circumstances condition"). P.L. No. 108-447 § 339, 118 Stat. 2809, 3103.

Plaintiff admits that it cannot prevail in challenging the categorical exclusion decisions at issue unless the Forest Service's determinations that it complied with the three statutory conditions are "arbitrary and capricious." Pl. Mem. at 13; see also Southwest Center, 100 F.3d at 1445, 1450 (upholding Forest Service categorical exclusion decision under law modifying NEPA because it was not "arbitrary and capricious"). In applying this standard, a reviewing court must determine whether the challenged agency has established "a rational connection between the facts found and the choice made." Forest Guardians v. U.S. Forest Service, 329 F.3d 1089, 1097-1099 (9th Cir. 2003) (quoting Baltimore Gas, 462 U.S. at 105); Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 859 (applying same standard to categorical exclusion decision).

Under this standard, the Court must dismiss plaintiff's complaint because the Forest

Service predicated its decisions that the challenged categorical exclusions complied with the Appropriations Act on rational, well-documented agency analysis that plaintiff has not controverted. See id.

A. The Angell Allotment Decision Was Rational.

Plaintiff does not dispute that the Forest Service complied with the Appropriation Act's status quo condition in adopting the Angell decision. See Pl. Mem. at 8-9, 13-16. Both the number of authorized cattle and the dominant vegetation were the same in 2006 as in 2001, except for natural increases in juniper and ponderosa pine trees. AN 1663-1664. Further, the Forest Service adopted the same management measure to protect rangelands, "adaptive management," in both the 2001 and 2006 permits. AN 1667, 2136. Under adaptive management, where the Forest Service's three-part environmental monitoring indicates that desired rangeland and other ecological conditions are not being met, the Forest Service may: adjust the "timing and duration" of cattle movement; reduce or eliminate the authorized number of cattle; and even cancel the grazing permit itself, "in whole or in part," if necessary. Id.; see also AN 2137 (permit conditions 8(b) and (c)); see also AN 1667 (three-part environmental monitoring).

Plaintiff instead argues that the Forest Service violated the forest plan consistency and monitoring condition by surveying "only four percent" of the Angell allotment's 51,696 acres for cultural and archeological resources. Pl. Mem. at 15-16, citing AN 585 (forest plan). Plaintiff concedes, however, that this forest plan requires the Forest Service to ensure that the applicable allotment is "inventoried" for these resources. Id. at 14. This is precisely what the Forest Service did in its detailed Archeological Survey and Cultural Resources Report. AN 1640-1661; Pl. Mem. at 14 (applying same report).

Although plaintiff quarrels with this report's sample size, the forest plan does not prescribe a minimum sample size. AN 585. Instead, the plan provides that the specific "sample fraction" should be "determined in consultation with the State Historic Preservation Officer." Id. Indisputably, Arizona's Historic Preservation Officer was consulted about, and

later concurred with, all relevant aspects of the Forest Service's cultural resources analysis and plan, including the Forest Service's determination that the Angell allotment would have "no [anticipated] effects [on] archeological resources or sites." AN 1579 (forest plan consistency study); AN 1666. Plaintiff also concedes that the Forest Service complied with a related Forest Plan requirement: consulting with Native Americans about sites "of known religious or cultural importance." AN 1579 (forest plan direction). None of the seven tribes consulted about these sites expressed concerns about the project. Id.; Plaintiff's Separate Statement of Material Facts at ¶ 8 (filed 1 June 2012).

Finally, plaintiff claims that the Forest Service violated the Appropriations Act's extraordinary circumstances condition by erroneously applying the Forest Service's categorical exclusion regulation. Pl. Mem. at 14-15. This argument has no merit. The Appropriations Act specifically requires the Forest Service's allotment decisions to be "consistent with agency policy concerning extraordinary circumstances." 118 Stat. 2809, 3103. Plainly, the Forest Service's categorical exclusion regulation is an authoritative statement of its policy. Thus, by conducting the analysis to ascertain the presence or absence of "extraordinary circumstances" that its categorical exclusion regulation requires, the Forest Service complied with the Appropriations Act. In both the Angell decision and an Archeological Survey and Cultural Resources Report ("Report") supporting it, the Forest Service analyzed: religious sites, cultural sites, archeological sites, and historic properties (hereafter referred to collectively as "cultural resources"). Compare AN 1666 and AN 1639-1661 with 36 C.F.R. § 220.6(b) (Forest Service regulation for "Categorical exclusions").

Plaintiff asserts that the Forest Service's determination that there are no extraordinary circumstances "that may significantly affect the environment" is arbitrary and capricious because the Forest Service did not "show certainty" that the Angell decision would not have significant impacts. Pl. Mem. at 16. However, nothing in the administrative record suggests that the Forest Service was "uncertain" about this specialized determination.

Plaintiff also alleges that the Report might have ignored potentially significant impacts

by determining that the Angell decision's effect on cultural resources would be equivalent to those of the "status quo" in the area, which has encompassed livestock grazing regulated by the Forest Service since "1906." AN 1643-1644. However, the Forest Service's reliance on the Report to determine that the Angell decision would not have impacts on cultural resources that may "significantly affect the environment" was rational. AN 1665-1666. The Report determined that the Angell decision would have "no effect" on cultural resources if the Forest Service continued four ongoing protective or monitoring measures: (1) prohibiting ground-disturbing livestock activities in 79 sites that were either listed or proposed to be listed in the National Register of Historic Places; (2) requiring all grazing management activities that tend to attract or "concentrate" livestock (such as haying and watering) to "be located away from cultural resources"); (3) obtaining "cultural resources clearance" from the Forest Service's "Zone or Forest Archeologist" before initiating any project activities; and (4) periodic monitoring of known sites by Forest Service archeologists, in conjunction with participating university professors and their students. AN 1643-1644.

Plaintiff has not adduced a paper, other material, or a documented instance in which the Forest Service or any other entity or individual has discontinued these protective measures, deemed them ineffective, or not cooperated with them. Pl. Mem. Thus, the Angell decision's detailed analysis of cultural resources is entitled to deference. See Lands Council, 537 F.3d at 991-994 (granting Forest Service "latitude" in choosing sampling and monitoring methods, even where it rejects "on the ground analysis"); Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 857, 859 (deferring to Forest Service's construction of categorical exclusion regulation where not "plainly erroneous"); Southwest Center, 100 F.3d at 1449-1450 (deferring to Forest Service where it "did not abuse its discretion in issuing the categorical exclusion" pursuant to appropriations law); see also Thomas Jefferson v. Shalala, 512 U.S. 504, 512-513 (1994); Citizens' Committee to Save Our Canyons v. Forest Service, 297 F.3d 1012, 1023 (10th Cir. 2002) (giving "controlling weight" to Forest Service's construction of categorical exclusion).

1 **B. The Casner Decision Was Rational.**

2 Plaintiff does not dispute that the Forest Service complied with the Appropriation
3 Act's status quo condition in adopting the Casner decision. See Pl. Mem. at 17-20. The
4 number of authorized cattle, the mix of dominant vegetation, and the adaptive management
5 measures adopted to protect the rangelands were the same in 2008 as in 2001, except for
6 natural increases in ponderosa pine trees. CA 1386-1388; CA 1833, 1835.

7 Plaintiff claims instead that the Forest Service violated the Appropriation Act's forest
8 plan consistency and monitoring condition because the Forest Service supposedly made all
9 monitoring contingent on funding, despite a requirement in the forest plan that the Forest
10 Service conduct "annual allotment inspections." Pl. Mem. at 18, citing CA 305 (forest plan).
11 However, the Forest Service specifically determined that it would comply with this standard
12 by conducting both these annual inspections and any additional monitoring necessary to
13 protect the Mexican spotted owl, a threatened species. CA 1328; CA 1387; AN 1580, 1585
14 (consistency analysis for this part of forest plan).

15 Plaintiff complains that the Forest Service might violate this standard in future fiscal
16 years because the Casner decision had not "guaranteed" future funding. Pl. Mem. at 17-20.
17 However, no part of the forest plan requires the Forest Service to guarantee either monitoring
18 funds or the "fallback" monitoring urged by plaintiff, irrespective of Congressional funding.
19 Instead, the forest plan standard for wildlife operations provides that the Forest Service
20 should use the "best **available**...resource data." AN 1580 (emphasis supplied).

21 Plaintiff also claims that the Forest Service violated the Appropriations Act's
22 extraordinary circumstances condition by erroneously applying the Forest Service's
23 categorical exclusion regulation to Mexican spotted owls. It asserts that, in the event funds
24 are unavailable for monitoring these owls in the future, the measures that the Casner decision
25 adopted to protect these owls might be ineffective. Pl. Mem. at 18-19. The Forest Service's
26 categorical exclusion regulation, however, does not require the Forest Service to guarantee
27 future monitoring funds for Mexican spotted owls. Instead, it requires the Forest Service to
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consider the Casner decision's effects, if any, on "[f]ederally listed threatened or endangered species," among other species. 36 C.F.R. § 220.6(b)(1)(I). The Forest Service complied with this regulation by rationally determining that the Casner decision's possible effects on spotted owls would not "significantly affect the environment." CA 1389.

The Forest Service rested its decision that grazing regulated by adaptive management would not significantly or adversely affect spotted owls on at least three specialized determinations or protective measures. First, it required the grazing permit holder to leave between 60 and 70 percent of the forage available each year after grazing, which was deemed sufficient to sustain the rodents on which Mexican spotted owls prey. CA 1326; CA 1389. Plaintiff asserts that this protective measure is irrational because, in 2007, two pastures in the allotment (the Coulter and Little Horse Park pastures)[4] were left with only 20 to 39 percent of this forage after grazing. Pl. Mem. at 20, citing CA 1248-1249. Plaintiff is wrong. The 60 and 70 percent of the original forage that must remain each year after grazing is calculated for the Casner allotment as a whole, not for every discrete pasture in this allotment at all times. CA 1386-1387, 1386 n.1, 1389.

Under the Forest Service's adaptive management measures, any pasture exceeding the designated forage utilization level in a given growing season will be gradually restored to the required utilization level during the next growing season or seasons. Id. at 1321-1322. If forage utilization reaches between "21-50 percent" in a given pasture during a growing season, for example, adaptive management requires the Forest Service to (1) discontinue grazing on that pasture by moving livestock "from one pasture to another" and (2) adopt new grazing limits in "Annual Operating Instructions" to protect "plant, soil, and watershed

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[4] Plaintiff errs in attempting to identify the two pastures analyzed in the study on which it relies. The first pasture to which plaintiff refers, which it does not name, is the "Coulter Pasture." CA 1248. The second pasture that plaintiff erroneously describes as the "Ward Camp" pasture or meadow is known and regulated as the "Little Horse" pasture. CA 1249; CA 1291-1292 (2008 "Annual Operating Instructions" imposing new adaptive management limits for the Casner allotment).

1 conditions," including new grazing dates or authorized cattle numbers if necessary. Id. at
2 1386-1387.

3 In 2008, the Forest Service adopted new adaptive management Annual Operating
4 Instructions ("annual instructions") for all applicable Casner pastures, including the Little
5 Horse and Coulter pastures emphasized by plaintiff. CA 1291-1297; CA 1386. To protect
6 the spotted owl and other parts of the environment by enforcing the permit requirement that
7 between 60 and 70 percent of the forage must remain after grazing, the Forest Service (1)
8 discontinued grazing on the Little Horse pasture for a year and (2) changed the prescribed
9 grazing dates for the Coulter pasture from the July 29 to September 1 period required in 2007
10 to a cooler period in 2008, September 1 through September 30. CA 1181-1183 (2007 annual
11 instructions); CA 1292-1293 (2008 instructions). Plaintiff suggests that this adaptive
12 management may not protect spotted owls in the future because future monitoring may be
13 insufficient. Pl. Mem. 20. However, the Forest Service determined that adaptive
14 management has been effective in the recent past. Between 1998 and 2008, "utilization has
15 been below the 35 percent guideline established for this allotment." CA 1327-1328.

16 The Forest Service also relied on a second measure to protect spotted owls. For all
17 Protected Activity Centers ("PACs") in the Casner allotment in which spotted owls have
18 been observed, it prohibited all "human disturbance and construction actions" linked to
19 grazing during the owls' "breeding season," March 1 through August 31. CA 1327; CA
20 1389. The Forest Service determined that this measure would be effective because only 7
21 percent of the spotted owls residing in the Coconino forest rely primarily on the ponderosa
22 pine habitat that dominates the Casner allotment. CA 1326; CA 1386. It also determined
23 that, even without this protective measure, grazing would not significantly affect spotted
24 owls within their PACs because these areas are "rarely used by livestock," given the limited
25 forage that exists under the ponderosa pine trees' "high canopy." Id. at 1389. Finally, the
26 Forest Service determined that three-part environmental monitoring discussed above, supra
27 at 11, would be effective in evaluating both spotted owls and the management measures
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protecting them. CA 1319, 1322, 1328; CA 1387.

Plaintiff has not rebutted the Forest Service's well-supported analysis of spotted owls. Therefore, this Court should defer to the Forest Service's decision under its categorical exclusion regulation that there are no "extraordinary circumstances" implicating spotted owls or significantly affecting the environment. CA 1389; see also Lands Council, 537 F.3d at 991-994; Alaska Center, 189 F.3d at 859; Southwest Center, 100 F.3d at 1449-1450.

C. The Cosnino Decision Was Rational.

Plaintiff claims that the Forest Service violated the Appropriations Act by not guaranteeing funds for monitoring in future years, regardless of Congressional funding. Pl. Mem. at 21. Plaintiff is wrong for the same reasons specified above in the Forest Service's rebuttal of plaintiff's identical Casner decision claims: the Appropriation Act's forest plan consistency and monitoring condition and its extraordinary circumstances condition do not require the Forest Service to guarantee funds for future monitoring. Thus, the three-part environmental monitoring that the Cosnino decision specifically adopted is more than sufficient. CO 1222-1225; CO 1320.

D. The Pine Creek Decision Was Rational.

In challenging the Pine Creek decision, plaintiff does not dispute that the Forest Service complied with the Appropriation Act's status quo or extraordinary circumstances conditions. Pl. Mem. at 21-25. The number of authorized cattle, the dominant vegetation, and the adaptive management measures adopted to protect the rangelands were the same in 2008 as in 2006. PI 1202-1204 (2008 permit); 1271, 1273 (2006 permit).

Plaintiff limits its argument to an assertion that the Forest Service violated the Appropriation Act's forest plan consistency and monitoring condition by not maintaining "soil productivity" or "soil conditions." Pl. Mem. at 21; PI 1108-1109 (forest plan direction). This assertion is mistaken because plaintiff does not link any of the adverse or poor soil conditions about which it complains to particular grazing management tools or activities that the Forest Service must conduct to either meet or move "satisfactorily" toward forest plan

objectives. P.L. No. 108-447 § 339, 118 Stat. 2809, 3103. For example, plaintiff asserts that the Forest Service violated its forest plan because, for the 21 percent of the Pine Creek soils rated unsatisfactory, existing erosion rates may occasion a "permanent loss in site productivity" by exceeding applicable thresholds. Pl. Mem. at 23-24, citing PI 1036, 1142. However, the study to which plaintiff refers is dated 1995. PI 1142. The most recent monitoring data shows "an upward trend in soil condition" in 2007, with an overall soil condition rating for the allotment averaging "good." PI 1165-1167; PI 1205.

Further, plaintiff's data does not link the particular soils rated "unsatisfactory" to any grazing activity or grazing management decision necessary to meet or move toward an applicable forest plan objective. Id. All of the Pine Creek allotment's "unsatisfactory soils are on steeper slopes." PI 1031. Steep slope habitat is "rarely used by livestock." CA 1389. Similarly, the Pine Creek allotment had been suffering from a severe drought that affected this forest during the 10-year period preceding the Pine Creek decision. PI 1028. During this drought, the Forest Service determined that the dominant vegetation did not differ appreciably between areas in which grazing had been excluded ("exclosures") and ongoing grazing regulated under adaptive management. PI 1166-1167; PI 1205. Notably, plaintiff fails to identify any management tool or authority that the forest plan required the Forest Service to adopt, and that it did not duly adopt, during this drought. Pl. Mem.

Plaintiff erroneously asserts that "bare soil" and "plant litter" have consistently increased during this drought, "at every site since 1996." Pl. Mem. at 22-23. Plaintiff misreads the data. A higher soil condition score means less soil disturbance and, therefore, less bare ground and less plant litter. PI 1165. Under this correct soil condition score, bare ground and plant litter have (1) improved or remained the same in every soil unit between 1983 and 1996 and (2) improved between 1996 and 2007 in 60 percent of the units for which there are complete figures. PI 1165-1166.

Finally, plaintiffs posit that the Forest Service violated its forest plan because the vegetation condition of 60 percent of the monitored sites declined between 1996 and 2007.

Pl. Mem. at 24-25. However, on the same pages cited by plaintiff, the Forest Service determined that these declines were caused by vegetative responses to the 10-year drought, not grazing. PI 1165-1166; see also PI 1028-1029, 1038-1039; PI 1205. It also determined that rangeland managers would continue using adaptive management measures to mitigate the effects of this drought. PI 1203-1205. Therefore, plaintiff's case fails because it has not identified a management measure or grazing activity that a particular forest plan objective required the Forest Service to adopt during this drought that it did not actually adopt.

In sum, none of the citations to the record on which plaintiff relies to identify poor soil or vegetation conditions links those conditions to a management tool that the Forest Service should have used, but did not use, to either achieve or move satisfactorily toward achieving an applicable forest plan objective. Thus, plaintiff cannot show that the Forest Service violated the Appropriations Act's requirement that it meet or move toward these forest plan objectives. See Forest Guardians, 329 F.3d at 1098-1099 (Forest Service determination that adaptive management complies with forest plan "accorded substantial deference" where it "is neither plainly erroneous nor inconsistent with" its regulations).

E. The Seven C Bar Decision Was Rational.

Plaintiff does not dispute that the Forest Service's Seven-C Bar decision complied with the Appropriation Act's status quo and extraordinary circumstances conditions. Pl. Mem. at 25-26. The Forest Service authorized the same livestock numbers and adaptive management mechanisms to protect rangelands in 2008 that it had authorized in 2007. See SE 1153-1154 (2008 decision); SE 1200, 1202 (expired 2007 grazing permit). It also determined that the allotment's dominant vegetation was the same in 2008 as in 2007, and that soil conditions had "improved" since 1984. SE 1153-1155; SE 1121.

Plaintiff claims that the Forest Service violated the forest plan consistency and monitoring condition by failing to "correct" (1) rangeland vegetative conditions that have declined from a "Fair" rating in 1984 to "Poor" or "Very Poor" rating in 2007 and (2) a trend in range condition that is "down since 1984." SE 1154-1155; see also Pl. Mem. at 25, citing

1 PI 209 (forest plan direction). However, because these ratings only measure "the
2 composition, density, and vigor of the vegetation and the physical characteristics of the soil,"
3 they cannot distinguish by themselves between the effects of climate on these soils and the
4 effects of grazing management on them. SE 1119. Thus, there is no necessary correlation
5 "between range condition [evaluations] and ecological condition" because a "Poor" rating
6 could simply signify an area with a "low value for livestock grazing" that was caused by
7 climate or geology, not by the particular grazing management required by an applicable
8 forest plan objective. SE 1119.

9 Plaintiff does not dispute the Forest Service's determinations that the fair or poor
10 rangeland evaluations about which it complains were caused by the 10-year drought, not
11 grazing. SE 1121-1122; SE 1154-1155. Even if plaintiff had controverted these
12 determinations, the particular forest plan direction invoked by it does not require the Forest
13 Service to reverse the effects of a drought that cannot be linked to grazing management.
14 Instead, this direction requires the Forest Service to respond to "[l]ess than satisfactory range
15 conditions" by using one adaptive management method (prescribing an allotment's grazing
16 capacity) to "bring permitted grazing use in line with grazing capacity." PI 209.

17 This is exactly what the Forest Service did. It confirmed that livestock were
18 consuming only 34 percent of this allotment's available forage and 84 percent of its
19 authorized grazing capacity. SE 1123-1124. Thus, the Forest Service determined that forage
20 utilization was beneath the permit's authorized 35 percent figure, and that grazing capacity
21 was also within the allotment's "carrying capacity." SE 1153-1154.

22 Further, under the adaptive management measures adopted in this decision, the Forest
23 Service may protect rangeland conditions during a drought by varying or eliminating
24 authorized grazing numbers and grazing periods if necessary. SE 1127; SE 1153-1154.
25 Thus, there was no grazing at all on the Seven C Bar allotment in 2006 and 2007, which were
26 drought years. SE 778. By properly using adaptive management in conjunction with its
27 forage utilization and carrying capacity tools, the Forest Service complied with the
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Appropriations Act by moving "satisfactorily" toward all applicable forest plan vegetation objectives, including producing "the maximum amount of forage, consistent with other resource values, for use by wildlife and livestock on a sustained yield basis." SE 1069 (forest plan and related consistency determination). See Forest Guardians, 329 F.3d at 1098-1099; Inland Empire Public Lands Council v. U.S. Forest Service, 88 F.3d 754, 760-761, 763 (9th Cir. 1996) (deferring to Forest Service's habitat management where not "arbitrary and capricious" under applicable regulations).

F. The Twin Tanks Decision Was Rational.

Plaintiff does not dispute that the Forest Service's Twin Tanks decision complied with the Appropriation Act's status quo and extraordinary circumstances conditions. Pl. Mem. at 26-28. The Forest Service authorized the same livestock numbers and adaptive management measures to protect rangelands in 2008 that it had authorized in 1999. TW 1225-1226; TW 1252. It also determined that the dominant vegetation was the same in those years and that 88 percent of the soils were in "satisfactory" soil condition. TW 1225-1227.

Plaintiff instead claims that the Forest Service violated the Appropriation Act's forest plan consistency and monitoring condition but does not refer to any forest plan objective. Pl. Mem. at 27. Instead, plaintiff alleges that there is a "downward trend" for both rangelands and soils on this allotment and hints that the forest plan required the Forest Service to reverse that trend. Id. at 27-29.

Again, plaintiff misreads the applicable studies. To study changes in rangeland vegetation over time, the Forest Service compared the vegetation score for a soil unit or "transect" studied in 1960 to 11 representative transects that it studied in 2007 and 2008.[5]

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[5] The Forest Service determined that these studies and monitoring years were more statistically significant and ecologically accurate as points of comparison than other monitoring numbers derived from a Terrestrial Ecosystem Survey conducted from 1979 to 1986 ("1986 TES numbers"). Because the 1986 TES numbers measured "average to wet[,] cool and warm seasons," they did not "realistically represent the potential range of productivity and diversity" for the plant communities and soils typical to the area during a 10-year drought preceding the

The rangeland condition of each of the 11 transects improved from the "poor" rangeland rating received in 1960. Seven of these soil units improved to a higher rangeland condition score in 2007 but stayed within the poor ranking; the remaining four units also improved in 2007, moving up one rangeland ranking to "fair." TW 1157-1158, 1173-1216.

Plaintiff also erroneously reads the applicable soil studies. As with rangeland vegetation, the Forest Service compared the score for a representative "transect" that it had studied in 1960 with 11 transects that it studied in 2007 and 2008. Each of the 11 soil units improved to a higher soil condition score (and therefore a lower degree of soil disturbance) in 2007. TW 1158-1159. One of these units improved to a higher score in 2007 but stayed within the poor ranking. Five units improved one soil ranking to fair, two units improved two rankings to good, and three units improved three soil rankings to excellent. Id.

Again, the Forest Service cautioned that these scores should be used carefully because they only measure the allotment's capability to support grazing but do not attribute grazing productivity to climate, geology, or grazing management. TW 1156. Thus, the Forest Service determined that declines in cool season and warm season bunchgrasses, and commensurate increases in warm season sodgrasses, were caused by a "10 year drought" on the forest, not grazing or grazing management. TW 1046, 1056; TW 1153, 1159; TW 1227.

The adaptive management mechanisms adopted in the Twin Tanks decision required the Forest Service to respond to drought conditions by limiting forage utilization, protecting the allotment's carrying capacity for sheep, and limiting sheep numbers if necessary. TW 1226. The Forest Service consequently: limited forage utilization each year to 35 percent of the available forage; determined that there had been no recent utilization over this limit; and confirmed that authorized grazing amounted to only 61 percent of the allotment's carrying capacity for sheep. Id. The Forest Service also determined that, "in response to drought conditions," the actual numbers of sheep it had authorized under previous annual operating

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Twin Tanks decision. TW 1046-1047.

instructions were substantially less than the maximum numbers authorized in the permit in 9 of the previous 18 years. TW 1154.

Thus, by complying with the forest plan objective that it should produce the maximum forage "consistent with other resource values," the Forest Service also complied with the Appropriation Act's forest plan consistency and monitoring condition. See SE 1069; see also 36 C.F.R. § 222.2(a) and (c) (requiring Forest Service to manage forests producing forage for "livestock grazing" where "consistent with" forest plans) .

G. The Chino Valley Decision Was Rational.

Plaintiff does not dispute that the Chino Valley decision complied with the Forest Service's status quo condition. Pl. Mem. at 29-30. The Forest Service authorized grazing for slightly fewer cattle in 2007 than in 1998 while continuing the same adaptive management measures to protect rangelands. CH 349, 351; CH 364, 366. It also determined that the dominant vegetation was the same in 2007 as in 1998, except for natural increases in woodland growth. CH 258, 349.

Plaintiff asserts that the Forest Service violated the Appropriation Act's forest plan consistency and monitoring condition and its extraordinary circumstances condition by not protecting and improving both soils and watersheds. Pl. Mem. at 29, citing CH 184-187 (forest plan). The record citations on which plaintiff relies establish the opposite, however. Between 2000 and 2007, the Chino Valley's soils improved substantially under the Forest Service's adaptive management.

In a 2000 study of seven soil units, 29 percent of the soil units were rated satisfactory, 14 percent were unsatisfactory, and 57 percent were impaired. CH 300. When these units were adjusted for their size and acreage, 53 percent of the allotment's soils were rated satisfactory, 46 percent were rated impaired, and only 1 percent were rated unsatisfactory. Id. In a 2007 study of seven representative sites from two of these soil units, all of these soil condition percentages improved. Thus, 57 percent of the soil units studied had a satisfactory soil condition in 2007, no soils were rated unsatisfactory, and 43 percent were rated as

impaired. CH 300-301. Further, after accounting for the relative acreages of the soil units studied in 2007, the Forest Service determined that 64 percent of the allotment's soils were rated satisfactory, and only 36 percent were unsatisfactory. CH 315.

Relying on a sentence fragment divorced from context, plaintiff posits that there is evidence that grazing management is contributing to "decreased soil productivity" in the allotment. Pl. Mem. at 29, citing CH 301 ("Soil Resource Report"). However, this study refers to only one of the seven soil units studied, "unit 445." After the quoted language, the Forest Service determined that "recovery will occur with an adaptive management regime [and] will result in positive outcomes with **reversal** of lost productivity." CH 301 (emphasis supplied). Thus, applying the Soil Resource Report and other studies, the Forest Service adopted adaptive management measures by reducing the number of cattle authorized from 50 to 48 and also limiting annual forage utilization by livestock in riparian areas to only 20 percent of the amount available for "riparian forage species." CH 350-351. Because the studies cited by plaintiff actually show that the Forest Service's adaptive management improved applicable soil conditions even during "drought conditions," the Forest Service complied with the Appropriation Act's forest plan consistency and monitoring condition. CH 252; see also Forest Guardians, 329 F.3d at 1098-1099.

Plaintiff also claims that the Forest Service violated the Appropriation Act's extraordinary circumstances condition. However, it does not refer to the Forest Service's categorical exclusion regulation, even though the Appropriations Act requires the Forest Service's categorical exclusion decision to be consistent with its extraordinary circumstances "policy." 118 Stat. 2809, 3103. The Forest Service's categorical exclusion regulation requires it to analyze two resource conditions in determining whether a proposed action will or will not precipitate extraordinary circumstances, among others: federally listed threatened, endangered, and other species; and flood plains, wetlands, and municipal watersheds. 36 C.F.R. § 220.6(b)(1)(I) and (ii).

Applying this regulation, the Forest Service determined that the Chino Valley

decision's actual or possible environmental effects would not be significant because: (1) these effects would not impair or adversely affect the population or habitat of 52 applicable species and (2) there are no impaired or threatened waters, municipal watersheds, perennial streams, or adverse conditions in the allotment's waters or riparian zones. CH 301; CH 352. Thus, by complying with its categorical exclusion regulation, the Forest Service also complied with the Appropriation Act's extraordinary circumstances condition. See Alaska Center, 189 F.3d at 859; Southwest Center, 100 F.3d at 1449-1450.

H. The V-Bar Decision Was Rational.

Plaintiff does not dispute that the Forest Service's V-Bar decision complied with the Appropriation Act's status quo and extraordinary circumstances conditions. Pl. Mem. at 30-34. The Forest Service decided to adopt and refine the same "Holistic Range Management" and "adaptive management" procedures in 2007 that it had applied in 1997. VB 271; VB 564; VB 577-578. It also determined that the dominant vegetation on this allotment was the same in 2007 as it was in 1999, except for natural increases in woodlands and "species diversity." VB 345, 353, 563.

Plaintiff asserts that the Forest Service violated the Appropriation Act's forest plan consistency and monitoring condition because it did not (1) manage grazing to meet soil, watershed, and riparian protection objectives and (2) integrate "wildlife habitat management activities" into its rangelands management. Pl. Mem. at 30, citing VB 19, 20, 38 (forest plan directions). This assertion fails because plaintiff attempts to support it with soil and "bare ground" numbers or ratings limited to a single year. Because these single-year ratings cannot show a trend between two or more different points in time, they cannot address one of the threshold issues of the Appropriation Act's forest plan consistency and monitoring condition: is the Forest Service's grazing management meeting or "satisfactorily moving toward" forest plan objectives? See P.L. No. 108-447, § 339, 118 Stat. 2809.

Plaintiff rests its argument that the Forest Service management did not adequately protect soils on numbers that the Forest Service does not dispute: in 2000, "45 percent" of

1 the allotment's soils, measured as a percentage of its total acres, were rated "impaired." Pl.
2 Mem. at 30; VB 274. After discussing these and other numbers limited to a single year,
3 however, plaintiff leaps to a conclusion for which there is no record support: it erroneously
4 asserts that there is no trend or "sign of improvement" that Forest Service management has
5 improved the allotment's soils. Pl. Mem. at 31.

6 On the contrary, the applicable monitoring studies demonstrate that adaptive
7 management has substantially improved these soils. To study changes in rangeland soils
8 over time, the Forest Service compared the soil condition scores for 10 soil units that it had
9 studied and monitored in 2000 to 26 representative sampling sites on four of those units that
10 it studied in 2007. In 2000, 60 percent of the soil units studied were rated impaired, and 40
11 percent were rated satisfactory. VB 274. When these numbers were adjusted for these units'
12 size and acreage, 45 percent of the soils in this allotment were rated as impaired and 55
13 percent were rated satisfactory. Id. In 2007, only 38 percent of the 26 sampling sites were
14 rated as impaired while 62 percent were rated satisfactory. VB 273, 275-278.

15 Plaintiff does not adduce evidence or analysis to show that these favorable soil trends
16 are erroneous. Instead, its speculates that there might be too much "bare ground" but does
17 not attribute the percentage of it to any aspect of grazing management. Pl. Mem. at 31.
18 Therefore, plaintiff cannot controvert the Forest Service's determination that "bare ground
19 is expected to continue to decrease" because of observed natural increases in "pinyon-
20 juniper" trees and "woody and herbaceous canopy." VB 344, 353. Similarly, although
21 plaintiff complains that there was too much plant "litter" in one year, it does not dispute the
22 Forest Service's determination that this litter was caused by natural increases in both pinyon
23 juniper trees and their canopy, not by any failure to adopt a grazing management measure
24 needed to move satisfactorily toward a forest plan objective. Pl. Mem. at 30-31; VB 353.

25 Without discussing more than one data point in time, plaintiff also worries that two
26 miles of a particular stream were found to be "at risk" and that "increased runoff" has
27 occurred because of impaired soils on uplands areas in another watershed. Pl. Mem. at 32-34.
28

However, there is no evidence in the record that these watershed issues were caused by any failure to make satisfactory progress in achieving forest plan objectives. On the contrary, for all of these impaired or at risk riparian areas, "[t]here was no evidence of detrimental direct impacts from the hoof action of cattle." VB 278-279. Thus, the Forest Service determined that the V-Bar decision would not adversely affect riparian and wetland areas because (1) some of this "riparian ecosystem is inaccessible to livestock as a result of steep gradients, rock outcrops, and boulders" and (2) the remaining parts can be improved and restored by adaptive management measures because they are "concentrated" and therefore easy to isolate from grazed areas. VB 279-280.

Plaintiff also worries that the Forest Service may not have responded properly to the Arizona Game and Fish Department's concerns about its habitat management for wildlife species, including pronghorn. Pl. Mem. at 32. However, the Forest Service adopted numerous measures to protect the pronghorn and other species in response to these and other comments, including (1) requiring livestock fences to be redesigned to facilitate pronghorn movement; (2) requiring the permittee to ensure that its rangeland watering for livestock can also be readily used by this and other species; (3) applying adaptive management measures to increase "fawning cover habitat;" and (4) suspending grazing each year in a pronghorn habitat area until after the fawning period. VB 553; VB 566.

The Forest Service also recognized that "some evidence" supports a view that past and current grazing management contributed to decreased soil productivity for the particular impaired soils that the Forest Service had studied and monitored in 2000. VB 273-274, 278. However, the Forest Service also analyzed contrary evidence that regulated grazing does not impair soil or rangelands productivity, including a 7-year study of nine fenced areas in the same soil unit, three of which were ungrazed and six of which were grazed under adaptive management. VB 343-344. This study determined that differences in precipitation, not adaptive management grazing, was the primary factor determining both vegetative cover and species composition. Id.

After analyzing these studies, the Forest Service determined that continuing to use and refine adaptive management techniques "will result in positive outcomes with reversal of lost [soil] productivity" while protecting stream and other riparian areas. VB 278-280; VB 544. Thus, the Forest Service adopted continued adaptive and "holistic" management measures in the V-Bar decision that would allow it to authorize different annual or monthly numbers of cattle, according to changing climate, forage, and water conditions. VB 271; VB 564. These measures protected rangelands, riparian areas, and riparian species by (1) prohibiting grazing in 2002, a drought year; (2) requiring that all grazing of upland forage must leave 65 percent of this forage intact; and (3) requiring that all grazing of riparian forage must leave 80 percent of it intact. VB 345; VB; 544; VB 564; 594.

In sum, by complying with the forest plan objectives governing the protection of soils, watersheds, and wildlife, the Forest Service also complied with the Appropriation Act's forest plan consistency and monitoring condition. See Forest Guardians, 329 F.3d at 1098-1099; Inland Empire , 88 F.3d at 760-761, 763; 36 C.F.R. § 222.2(a) and (c).

V. CONCLUSION

The Forest Service predicated all of the challenged categorical exclusion decisions on rational, well-documented determinations that these decisions complied with the Appropriation Act's three statutory conditions. Plaintiff has not rebutted these determinations with any persuasive analysis or evidence. Therefore, this Court should uphold the Forest Service's construction of its own categorical exclusion regulation, its specialized analysis of the applicable forest plans and plan objectives, and its specialized analysis of both rangeland conditions and related monitoring. Lands Council, 537 F.3d at 991-994 (upholding Forest Service's choice of monitoring methods); Forest Guardians, 329 F.3d at 1098-1099 (upholding Forest Service determination that adaptive management complies with applicable forest plan directions); Alaska Center, 189 F.3d at 859 (applying Forest Service's construction of its categorical exclusion regulation).

Respectfully submitted this 29th day of June, 2012.

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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing were served on 29 June 2012 by electronic filing to :

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