

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3
4 NEW MEXICO CATTLE GROWERS ASSOCIATION, et al.,

5 Plaintiffs,

6 VS.

NO. CV 23-0150 JB

7 UNITED STATES FOREST SERVICE, et al.,

8 Defendants.

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11 Transcript of Omnibus Proceedings before
12 The Honorable James O. Browning, United States
13 District Judge, Albuquerque, Bernalillo County, New
Mexico, commencing on February 1, 2024.

14 For the Plaintiffs: Mr. Dan McGuire; Mr. Spencer
15 Edelman; Ms. Jessica Blome; Mr. Steve Scholl

16 For the Defendants: Mr. Andrew Smith; Ms. Emma
17 Hamilton

18 For the Intervenor: Mr. Marc Fink

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1 THE COURT: Good morning everyone. I
2 appreciate everybody making themselves available to
3 me this morning.

4 The Court will call New Mexico Cattle
5 Growers Association, et al., versus United States
6 Forest Service, et al., Civil Case Number 23-CV-0150
7 JB/GBW.

8 If counsel will enter their appearances
9 for the Cattle Growers.

10 MR. MCGUIRE: Good morning, Your Honor.
11 Dan McGuire and Spencer Edelman on behalf of
12 Petitioner New Mexico Cattle Growers, Spur Lake
13 Cattle Company, and Nelson Shirley.

14 THE COURT: All right. Mr. McGuire, Mr.
15 Edelman, good morning to you.

16 And for Humane Farming Association.

17 MS. BLOME: Yes. Good morning, Your
18 Honor. Jessica Blome for the Humane Farming
19 Association.

20 THE COURT: Ms. Blome, good morning to
21 you.

22 And for Allen Campbell.

23 MR. SCHOLL: Good morning, Your Honor.
24 Steve Scholl.

25 THE COURT: Mr. Scholl, good morning to

1 you.

2 All right. And for the defendants.

3 MR. SMITH: Good morning, Your Honor.

4 Andrew Smith, Department of Justice, on behalf of
5 the United States and the Forest Service. And with
6 me at counsel table is my colleague, Emma Hamilton.

7 THE COURT: All right. Mr. Smith,
8 Ms. Hamilton, good morning to you.

9 And then for the Intervenor, Center For
10 Biological Diversity.

11 MR. FINK: Good morning, Your Honor. Marc
12 Fink for Center for Biological Diversity.

13 THE COURT: Mr. Fink, good morning to you.

14 Normally, I would, of course, turn to the
15 plaintiffs. But the standing issue kind of got
16 raised first in the response.

17 So what I'm going to do is I'd like to
18 hear from the defendants. Was there anything in the
19 response about the standing issues that made you
20 think that one or more of the plaintiffs had
21 standing for one or more of the claims.

22 MS. HAMILTON: Yes, Your Honor. And I
23 will --

24 THE COURT: I guess I was not wanting to
25 see all this standing stuff. Because if I do rule

1 in your favor on standing, then it's going to go to
2 the Tenth without any issue on the merits. And if I
3 get it wrong, it will come back down, and then we'll
4 have to go to the merits. But you've got to do what
5 you got to do and I got to do what I got to do. But
6 I didn't like seeing that. But it doesn't matter
7 what I like; right?

8 All right. Ms. Hamilton.

9 MS. HAMILTON: Thank you, Your Honor. I
10 will be addressing the standing arguments this
11 morning, and Mr. Smith will address the merits. So
12 there are a few issues that petitioners raised in
13 their reply brief that we would like to respond to.
14 So thank you for the opportunity.

15 First -- well, I think I would emphasize
16 just at the start that petitioners do need to make a
17 showing and meet their burden of demonstrating
18 standing for each of the two claims that they press
19 in this case. And so some of the issues with
20 standing regarding the impoundment claim,
21 particularly in regard to Mr. Shirley's and New
22 Mexico Cattle Growers Association and Spur Lake
23 standing were not sufficiently addressed or remedied
24 in petitioners' reply brief.

25 So we've already outlined in our briefing

1 that we believe plainly the Humane Farming
2 Association and Allen Campbell lack statutory
3 standing within the zone of interest of the
4 impoundment regulations to bring that claim.

5 But I would like to highlight that the
6 three remaining parties: Spur Lake Cattle Company
7 and New Mexico Cattle Growers Association, their
8 standing is predicated on petitioners meeting their
9 burden of showing that Mr. Shirley has standing.
10 And that's because, to show associational standing,
11 the New Mexico Cattle Growers Association would have
12 to present to the Court specific declarations or
13 affidavits from its members to demonstrate that
14 members would have standing to sue. And so because
15 the only declaration from a member of the Cattle
16 Growers Association is Mr. Shirley's declaration, we
17 just wanted to highlight for the Court that
18 Mr. Shirley's standing for both of these claims is
19 really key to whether those three petitioners have
20 standing at all.

21 So there are three reasons that
22 petitioners have failed to show that Mr. Shirley,
23 through his declaration, has standing to bring,
24 first, the impoundment claim.

25 First, Mr. Shirley's alleged economic harm

1 is based on a very speculative chain of
2 possibilities, Your Honor. And despite how
3 petitioners framed the Supreme Court's decision in
4 Clapper in their reply briefing, the court in
5 Clapper was very clear that injuries must be
6 certainly impending in order to confer standing, not
7 just possible. It's not limited that holding in
8 Clapper in any way to just issues that involved
9 foreign affairs or just circumstances where
10 plaintiff might have tried to manufacture standing.

11 Clapper and Summers v. Earth Island
12 Institute, which Clapper also cites as an
13 environmental challenge, lay out clearly that, "a
14 theory of standing that relies on a highly
15 attenuated chain of possibilities is not sufficient
16 to show standing."

17 So here, for the impoundment claim, the
18 chain of possibilities required for Mr. Shirley to
19 suffer economic harm through the potential
20 inadvertent removal of one of his cattle is very
21 speculative. So it would require, first, that
22 Mr. Shirley's cattle would actually wander out of
23 his allotment; not just entering the Gila
24 wilderness, but actually making it all the way to
25 the operations area, which is a little more than 15

1 miles away from the boundary of his T Bar allotment.

2 And though the Shirley declaration from
3 February 2023 does sort of generally assert that
4 Mr. Shirley's cattle are in the operations area,
5 there is no specific factual evidence or further
6 elaboration that would actually meet petitioners'
7 burden of showing the likely risks that those cattle
8 are still there.

9 So then, in this chain of speculative
10 required events that would need to occur before
11 plaintiffs might suffer a financial injury here,
12 Mr. Shirley would need to fail to collect those
13 cattle in response to the agency's 14-day impound
14 notice, then APHIS would have to accidentally shoot
15 one of his random cattle as part of the operations,
16 which is unlikely, given that the agencies conduct
17 ground and air-based location estimates and
18 reconnaissance before each operation to ensure that
19 only feral cattle are being targeted.

20 And then, finally, petitioners would have
21 to -- or Mr. Shirley would have to fail to find and
22 identify the cow that was shot, even though the
23 agencies provide GPS coordinates following the
24 operations, and would have to fail to obtain
25 available compensation from the Forest Service.

1 So the risk of all these events taking
2 place is low, and is highly speculative, Your Honor.
3 But even if they did -- oh, and I would just add
4 that this seems even less likely, given that over
5 the decades of ground removals and aerial
6 operations, only one removed cattle from this
7 operations area was ever found to be branded, and it
8 was returned to the owner in the '90s.

9 So even if all these events took place,
10 Your Honor, then Mr. Shirley has still failed to
11 demonstrate that any risk of actual concrete harm
12 stemming from aerial lethal removal, as petitioners
13 challenge, is greater or any different than the
14 possible economic harm from the ground removals that
15 plaintiffs -- petitioners support, and is their
16 preferred method of removal for these feral cattle.

17 So if the Forest Service were to impound
18 one of Mr. Shirley's cattle following the impound
19 notice under the 262.10 regulations that make up the
20 basis for the impoundment claim, Mr. Shirley would
21 have an opportunity to claim it. But under
22 262.10(e) he would have to then reimburse the Forest
23 Service for the cost of recovering and impounding
24 that cow. And that can be thousands of dollars per
25 animal, often in excess of market value. And

1 Mr. Shirley would potentially have to pay even more
2 than market value given unauthorized grazing fees
3 before recovering his cow.

4 THE COURT: Why is that cost so high?

5 MS. HAMILTON: The ground gathers, Your
6 Honor, are simply more difficult, and take more time
7 and more effort by the contractor.

8 So, in the first declaration of Camille
9 Howes, which is ECF document number 17, she
10 estimated that September 2021 gather contract for
11 ground gathering and possible impoundments totaled
12 more than \$300,000, whereas, this aerial operation
13 in February 2022 was closer to \$38,000. And that
14 removal -- the ground removal that costs
15 approximately \$300,000 only resulted in the removal
16 of a little over 60 cattle, Your Honor. And about
17 half of those actually did have to be euthanized, or
18 died during that process.

19 So the cost of recovering impoundment the
20 petitioners would seek to have the Forest Service
21 follow in every instance in many cases could
22 actually cause greater alleged economic harm to the
23 petitioners than aerial removal itself.

24 There is one final piece on the
25 impoundment claim standing that petitioners brought

1 up in their reply that I would like to address.
2 Petitioners argue that Mr. Shirley will suffer an
3 economic loss if he's deprived of the ability to
4 utilize the New Mexico Livestock Board's directive
5 that purports to allow individual permittees to
6 enter the Gila Wilderness, gather cattle, feral or
7 owned cattle that they find, and then have an
8 opportunity to purchase those cattle from the board.

9 And that argument, at first glance, is
10 also inconsistent between the petitioners'
11 overarching argument that the Forest Service impound
12 regulations should be the only method of removal of
13 these Gila feral cattle.

14 But even setting that aside, neither the
15 state directives or the Forest Service's impound
16 regulations create a right for Mr. Shirley or any
17 petitioner or any member of the public to purchase
18 feral cattle at an auction.

19 The Tenth Circuit has held that similar
20 alleged injuries that would require the court to
21 compel a federal agency to hold a sale or renew a
22 grazing permit or sell land is outside of the
23 jurisdiction of the court to order, because that
24 implicates the agency's broad discretion to act.

25 So a case on that point that's not in our

1 briefing, Your Honor, is Baca v. King; the citation
2 is 92 F.3d 1031. And in that case the Court
3 collected some case law on this issue, and
4 ultimately held that it could not compel the Bureau
5 of Land Management in this case to sell land to an
6 individual or issue permits.

7 And here, too, there is no statutory or
8 regulatory authority that would grant this Court
9 jurisdiction to compel the Forest Service to provide
10 an opportunity for petitioners or members of the
11 public to purchase cattle.

12 Finally, Your Honor, I know you don't want
13 to hear too much about standing, but I would like to
14 note a couple of issues regarding --

15 THE COURT: I didn't mean to say I didn't
16 want to hear it. It's just if I get this one wrong,
17 we'll be back. That's just the way this works.

18 MS. HAMILTON: Well, in this case, Your
19 Honor, there are a variety of reasons laid out in
20 our briefing for each of these claims and each of
21 these petitioners, why under the standing tests
22 Article III statutory and associational, there are
23 numerous, sometimes overlapping reasons why these
24 petitioners lack standing.

25 So I will just turn finally to standing to

1 bring the NEPA claim. Here, the petitioners have
2 failed to show that Mr. Shirley, and then, as I
3 described before, as a result, the New Mexico Cattle
4 Growers Association has standing to bring this NEPA
5 claim because they do not allege with sufficient
6 specificity under the controlling Supreme Court
7 case, Lujan v. National Wildlife Federation, that
8 Mr. Shirley has and plans to again recreate
9 specifically in the operations area for the aerial
10 removals, and specifically during the short annual
11 removal, and the weeks, to possibly a month or a
12 little more after that, that the carcasses would
13 still be present before decomposing.

14 So at the merits stage, Lujan is very
15 clear that vague, unspecified plans to use a broad
16 area, not just the area implicated by the challenged
17 agency action is not sufficient to show Article III
18 standing.

19 And Mr. Shirley's declaration describes a
20 recreational and aesthetic connection to the Gila
21 Wilderness, very broadly in the Gila National
22 Forest. The Gila Wilderness is over 560,000 acres,
23 and the Gila National Forest is one of the largest
24 national forests in the nation. And so he describes
25 the connection to those broad areas, but doesn't

1 describe recreating in or planning to return to the
2 specific operations area during the specific times
3 when he might encounter cattle that had been removed
4 as part of the operations. His declaration, as well
5 as petitioners' reply brief describe Mr. Shirley as
6 experiencing distress from viewing and learning
7 about dead cattle as a result of the operation.
8 They're images. But it doesn't exactly or
9 specifically state that Mr. Shirley actually
10 encountered carcasses in the operations area in
11 2022, or would be likely to do so again in the
12 future.

13 And these are the kinds of specific
14 factual showings that petitioners would need to make
15 in order to have standing under Lujan to assert
16 these NEPA claims and environmental injuries.

17 Mr. Shirley's declaration also describes
18 fears that water in the Gila River will become
19 contaminated, but petitioners don't explain or
20 grapple with the fact that the Forest Service's
21 decision authorizing future operations specifically
22 does not allow cattle to be shot near recreational
23 trails or waterways. And that they must be moved if
24 that happens inadvertently. And that APHIS will do
25 end-of-the-day surveys.

1 THE COURT: How does that take place? I
2 mean, if it's so difficult to go back and get the
3 cattle, how does the Forest Service then, if a cow
4 is shot near a waterway, go in there and move it
5 back? Those seem to be a little bit at tension.

6 MS. HAMILTON: Right, Your Honor. I know
7 this did happened after the first operation. There
8 were a couple of carcasses -- I believe it was
9 two -- found sort of in waterways. And I do know
10 that agency personnel were able to find that
11 location again and sort of drag the carcass away. I
12 don't think -- I think it would be very difficult,
13 as is laid out in the decision memo, to physically
14 remove the carcass to a totally different location.
15 But they were able to move it far enough away that
16 it wouldn't pose any risk to contaminating water.
17 And I think, once the agency has completed the
18 removal, and the GPS location is clear, then -- it
19 is very remote and rugged territory. But it can
20 be -- you know, a specific point like that can be
21 accessed.

22 But what makes ground-based removals of
23 live cattle so difficult is the rugged terrain
24 combined with them scattering or, you know, running
25 away. And part of the nature of these feral animals

1 is that they've become accustomed to evading people
2 more easily than domesticated cattle might.

3 So I think -- I believe in the second
4 declaration of Camille Howes she lays out that no
5 cattle following these surveys in the 2022 operation
6 were found to be near trails or waterways, or needed
7 to be removed like that. But that did successfully
8 happen during the first year.

9 So that's something that, again, really
10 makes any risk of water contamination, and
11 environmental injury through water contamination,
12 highly unlikely and speculative. And Mr. Shirley's
13 declaration and plaintiffs' standing arguments in
14 their reply brief simply don't address this point.

15 Mr. Shirley's allegations also rely
16 heavily on asserting aesthetic and recreational
17 injury to other employees of Spur Lake Cattle
18 Company, which cannot confer standing to Mr. Shirley
19 as an individual, nor Spur Lake as a business
20 entity. And I would note that petitioners seem to
21 have conceded in their reply brief that Spur Lake
22 Cattle Company cannot have standing to bring a NEPA
23 claim as a business entity. They do not address
24 that point in their reply brief.

25 Next, Your Honor, petitioners have failed

1 to show that the Humane Farming Association has
2 standing to bring their NEPA claim, because their
3 declarants, in this case the association, does offer
4 several declarations from specific members.

5 But these declarations don't overcome the
6 standing deficiencies that federal respondents have
7 identified for a few reasons. First, because they
8 allege injury mainly from hearing about or learning
9 about past operations, which is simply not enough.
10 The Funds for Animals v. Lujan case, that we cited
11 in our brief, talks about psychological injuries
12 under NEPA requiring, quote, "direct sensory
13 impact." And here, due to the closure orders, the
14 members of the Humane Farming Association would not
15 be able to be present in the area during operations,
16 would not be able to hear the helicopters overhead
17 or see cattle being removed from the air, as they
18 allude to in their declarations.

19 THE COURT: Is the Gila Forest and
20 Wilderness -- can just private helicopters go over
21 the forest and the wilderness?

22 MS. HAMILTON: I don't think so, Your
23 Honor. I think that's part of the analysis that the
24 agency undertook in the minimum requirements
25 analysis for petitioners' wilderness claims. But I

1 would want to double-check and provide a more sure
2 answer. Because I think the height of helicopters
3 also might make a difference. So private
4 helicopters possibly flying over -- I don't know how
5 air law works, but I don't know if that violates the
6 Wilderness Act. But I do know that there are
7 questions to assess regarding helicopter use in
8 wilderness areas.

9 But the Forest Service did assess
10 thoroughly in the minimum requirements analysis, and
11 found that the temporary short-term use of
12 helicopters that were not landing in the wilderness
13 in order to undertake this operation over just the
14 course of a few days, was a minimum disturbance
15 necessary to accomplish the action under the
16 alternative that they selected. And I believe Mr.
17 Smith will be addressing helicopter use more in his
18 presentation.

19 So the Humane Farming Association's
20 declarants, they vaguely alleged psychological
21 injury that they might suffer, if they were to
22 encounter decomposing carcasses while recreating in
23 the area. But under Lujan, again, these potential
24 risks of psychological or recreational injuries must
25 be tied to some use of the specific area where that

1 action might occur. And petitioners' declarants,
2 again, state that they enjoy recreating in the Gila
3 Wilderness broadly, by the Gila River, in the Gila
4 National Forest. And don't actually assert that
5 that they have or will in the future specifically
6 enter the operations area in order to engage in
7 these activities.

8 The case that plaintiffs cite -- or
9 petitioners cite in their reply brief, the Palma
10 case, Your Honor, they cite that case as an example
11 of courts finding that declarants that assert that
12 they have been in some areas that might be affected
13 by an agency decision, or have traversed some areas
14 that may be subject to future oil and gas leases is
15 enough under the Lujan standard. So the court in
16 the Palma case said: No, the declarants here don't
17 have to prove that they have traversed every single
18 possible area where a lease sale might occur. But
19 the Tenth Circuit still made clear in that case,
20 that under Lujan, it can't just be that petitioner
21 or a member of a petitioner organization can assert
22 that they used the broader areas, like the
23 wilderness area or an entire river generally, and
24 have that be enough to confer specific Article III
25 injury in fact.

1 And here, none of the declarants for any
2 petitioners specifically asserted that they
3 entered -- have entered, and would plan to enter the
4 actual operations area, which is about a fifth of
5 the size of the entire wilderness area, or less, and
6 is only subject to possible cattle carcasses
7 decomposing for, at most I think, a couple of months
8 during one portion of the year in February, when
9 there is the least amount of recreation activity in
10 that area.

11 The Humane Farming Association declarants
12 also alleged procedural --

13 THE COURT: Why is that? Why is February
14 the month?

15 MS. HAMILTON: My understanding is that
16 it's partly the weather, it's still cold.

17 I don't know that I am either familiar
18 with or that in the decision memo there is any
19 explanation of why. And we could certainly
20 follow-up with the agency on that. But they do keep
21 track of visitor statistics.

22 THE COURT: Is that the reason? It's just
23 the number of visitors, that's the lowest month?

24 MS. HAMILTON: My understanding is, yes,
25 that's historically been around the time when there

1 are the fewest visitors to those areas.

2 And I believe it also does not coincide
3 with hunting season. Again, this is something that
4 I would want to double-check. But I think that that
5 month -- what I know is that that month was selected
6 by APHIS and the Forest Service specifically after
7 looking at the data and information they have about
8 use of the areas to pick both a month that has low
9 visitor use, won't impact certain protected species.
10 And the leaves on the trees have not yet come back
11 for the spring, so it's easier for the aerial
12 operators to be able to get eyes on the feral cattle
13 and make the operation as efficient and successful
14 as possible.

15 So my last point on the standing
16 deficiencies of the Humane Farming Association's
17 declarants is just that a procedural injury alleged
18 under NEPA is not enough, without tying it to an
19 actual concrete and particularized injury,
20 environmental injury, to those same petitioners and
21 declarants.

22 And so for the reasons I already
23 described, these asserted environmental injuries
24 don't meet petitioners' standing burden, and so they
25 cannot bring a standalone procedural claim under

1 NEPA either.

2 And then, most importantly, the
3 petitioners' declarants on behalf of Humane Farming
4 Association assert repeatedly that they have
5 recreational interests in experiencing solitude and
6 birdwatching, and hiking and things like that in the
7 Gila Wilderness. And those pursuits and
8 recreational pursuits do not appear to be germane to
9 their organization's purpose. So petitioners
10 haven't shown that a purpose of the Humane Farming
11 Association is to protect and further its members'
12 interests in recreating in wilderness areas all
13 across the country. So for that reason, too, the
14 Humane Farming Association has failed to demonstrate
15 standing to bring the NEPA claim.

16 And a final point, Your Honor, petitioners
17 likewise appear to have conceded that Allen Campbell
18 has not demonstrated standing to bring a NEPA claim,
19 as petitioners don't make any argument to that
20 effect in their reply brief.

21 In sum, for both of the claims in
22 petitioners' complaint and each of the petitioners
23 that assert those claims, the petitioners have
24 failed to make their burden of making a, quote,
25 "factual showing of perceptible harm," end quote, as

1 required by the Supreme Court in Lujan v. Defenders
2 of Wildlife. That's necessary for petitioners to
3 have standing to bring each of their claims, and
4 they failed to do so, and failed to remedy those
5 deficiencies in their reply brief. And so for those
6 reasons the Court should dismiss both claims for
7 lack of subject matter jurisdiction.

8 THE COURT: All right. Thank you,
9 Ms. Hamilton.

10 Who wants to take the lead? Mr. McGuire,
11 do you want to take the lead on standing?

12 MR. MCGUIRE: Yes, Your Honor, I will.

13 THE COURT: It hasn't really been, in the
14 two cases before this one that I dealt with, a real
15 challenge, that I recall, to standing. But now that
16 they do it, why do the Cattle Growers care? I mean,
17 your people raise cattle and they slaughter them.
18 Why do Cattle Growers care about these cows?

19 MR. MCGUIRE: Thank you, Your Honor.
20 Well, the issue is that these cows in the
21 wilderness, specifically -- first off, it's not just
22 those cattle. One of the central ideas here is that
23 you have thousands of owned, branded, legally
24 authorized cattle in these areas that are
25 surrounding the wilderness, including Mr. Shirley

1 has an allotment that --

2 THE COURT: Well, I understand that. But
3 still, my question is: 15, 20 cows, why do the
4 Cattle Growers Association spend so much effort to
5 protect these cows?

6 MR. McGUIRE: Well, Your Honor, again, we
7 think there are broader interests here involved.
8 First off, obviously, I think we can all agree that
9 the Government should be required to follow its own
10 regulations. So they certainly have an interest in
11 just ensuring that, first of all.

12 With respect to these individual cattle --
13 and now, it may be as low as 20, based on the
14 Government's estimates at this point -- but at the
15 time these concerns were first raised, it may have
16 been over 200. At least that's what they estimated
17 and claimed to the court at the time. So,
18 obviously, those interests at that time were
19 certainly perhaps larger with respect to the
20 opportunities, for instance, to purchase these
21 cattle as part of the impoundment process.

22 While Ms. Hamilton certainly identified
23 the fact that if an owned cow was, you know,
24 happened to be caught up in these impoundment
25 actions, that maybe the owner would be responsible

1 for certain costs.

2 First off, that's not even -- it's really
3 an irrelevant fact to most of this analysis. But
4 what is important here is that if a cow is not
5 owned, so the actual Gila cattle that we're
6 referring to here that are, again, based on their
7 statement are unowned and their description of being
8 feral, when those cattle are impounded, as they have
9 been for the past several decades, when they
10 ultimately are not found to be owned by anyone, or
11 no owner comes up and actually claims them and
12 provides evidence of that, well, those cows are sold
13 at auction. That is part of the impoundment
14 process.

15 So the Cattle Growers, including
16 Mr. Shirley, also have an interest in --

17 THE COURT: Has that taken place over the
18 last 50 years?

19 MR. MCGUIRE: That Cattle Growers have
20 purchased cattle in the impoundment auctions?

21 THE COURT: From these feral cows?

22 MR. MCGUIRE: I mean, I would think the
23 answer is yes over 50 years. Again, New Mexico
24 Cattle Growers Association has 1200 members here in
25 New Mexico.

1 THE COURT: I haven't heard of any feral
2 cows being sold at auction. And you may be right,
3 but that's the first time I've ever heard of that.

4 MR. McGUIRE: Well, that is -- and part of
5 our presentation on the merits, Your Honor, is the
6 idea of walking through what that impoundment
7 process looks like. But that is a regulatory
8 requirement that, to the extent -- I mean, so all of
9 the cattle that the federal government has
10 gathered --

11 THE COURT: Well, I understand your
12 argument on the merits. But I had not heard that
13 that had ever occurred with any feral cows. It may,
14 but I hadn't heard that.

15 MR. McGUIRE: Your Honor, I don't believe
16 there is specific evidence that -- again, that any
17 specific purchases occurred. However, I would say
18 that, again, if the Government is required to do
19 that -- and there is -- obviously, there is a lot of
20 evidence --

21 THE COURT: Well, does your standing
22 argument assume that you're correct on the
23 interpretation of the regulations?

24 MR. McGUIRE: No, Your Honor. No, it's
25 not.

1 THE COURT: If you don't have the right
2 interpretation, then do you have any standing?

3 MR. McGUIRE: Yes, we do, Your Honor. We
4 do. And here's why: And if I may briefly just also
5 reference the issue of, again, the sale, and then
6 I'll answer Your Honor's question. The Government
7 has stated at various times in the record that they
8 have physically impounded hundreds of these cattle
9 over the years. If, indeed, those cattle are
10 unowned, as they claim, assuming that they followed
11 the regulatory requirements of 262.10, then those
12 cattle have to have been auctioned at some point.

13 Now, whether they were actually purchased
14 by an individual, I don't think there is evidence in
15 the record to relate to that. But I mean, I think
16 it's certainly a reasonable inference to say that,
17 if they had been impounded, hundreds of animals have
18 been impounded, if they are indeed unowned, at some
19 point there was a sale of those animals. And again,
20 if they weren't actually sold at auction, no one
21 came to buy them, they can be destroyed. And that
22 is the proper process under that regulation.

23 With respect to Your Honor's question
24 about the interpretation. No, because the issue
25 here is just the fact that the Forest Service has

1 flown helicopters through the wilderness, shooting
2 these animals -- and it's not just shooting them
3 where they lay. There is evidence in the record --
4 and this is exactly what we addressed with Your
5 Honor at the TRO hearing last February, was the idea
6 that in the February 2022 shooting operation, in
7 which 65 cattle were shot and killed, there was
8 evidence that those cattle had wandered wounded for
9 miles and miles after being shot.

10 So when we're talking about this target
11 area of the shooting, that's not really an accurate
12 reflection of -- that's not the limitation of the
13 area that's impacted by the shooting. It is, in
14 fact, the wilderness. Because these animals, again,
15 once they're shot -- again, it's also very difficult
16 to be a marksman from a moving helicopter, 100, 200,
17 300 feet above the ground. You're not always going
18 to get a one-shot kill of these large animals. So
19 in many cases, there were instances that are also
20 reflected in the record here, of cattle who were
21 shot, where their legs were broken, and they
22 effectively bled out in a river, in the Gila River,
23 miles and miles from where they were actually shot.

24 So that's where also the target area here,
25 that's not just what we're talking about. We're

1 talking about the area in which these cattle, who
2 are wounded after these shootings, could have and
3 actually did wander after they were injured.

4 So the reason why that's important, Your
5 Honor, is because hikers, campers, and obviously,
6 Mr. Campbell, his declaration addresses this in some
7 ways, and I'm sure Mr. Scholl will as well, but
8 Mr. Shirley as well, in the course of recreating,
9 going hiking and camping, horseback riding, through
10 the wilderness, there is a reasonable certainty that
11 they might encounter, and actually in many cases did
12 encounter, wounded, dead animals, dead cattle, who
13 were outside the target area because they have
14 wandered outside of there after being shot.

15 And so, obviously, Your Honor, that does
16 not rely upon a correct interpretation or our
17 interpretation of the regulations for the Court to
18 find that there is standing in the sense of those
19 dead cattle. And the experience of actually coming
20 across one of these cattle is certainly detrimental
21 to aesthetic, environmental, and recreational uses
22 of the wilderness, in and around this target area.
23 So that is independent, Your Honor, of our
24 interpretation of the regulations.

25 I do want to address also the idea here of

1 the zone of interest that is raised by the
2 Government. The Cattle Growers, Mr. Shirley and his
3 company Spur Lake, certainly fall within the zone of
4 interests of this regulation, again, for multiple
5 reasons. Number one, again, I think people in this
6 industry dealing with cattle have an interest in the
7 Forest Service following its own regulations, number
8 one.

9 Number two, they also -- their cattle may
10 be shot -- especially you have to also consider,
11 Your Honor, the context in which -- the Government
12 is not saying: We're going to go through this
13 target area, and we're just going to shoot a couple
14 cattle that we see. They have announced an intent
15 to eliminate every cow that is in this area down to
16 the last one -- that's what the whole purpose of the
17 decision memo is -- which means that any cattle that
18 Mr. Shirley owns or that other members of NMCGA own,
19 who are in this target area, are subject to being
20 shot.

21 So there is a reasonable certainty, a
22 reasonable likelihood, that their private property,
23 their cattle, will be caught up in these shooting
24 operations. The other thing that the Government
25 cannot tell you, and is not in the record anywhere,

1 is how they can distinguish between an owned cow
2 versus an unowned cow. And that's the reason it
3 goes to standing here, Your Honor, is because the
4 idea is effectively, when they're indiscriminately
5 shooting any cow they see in the target area,
6 irrespective of whether they might be owned or
7 unowned. And that's what also creates here the
8 reasonable certainty of harm to Mr. Shirley, to the
9 NMCGA, and its associational context. So that's why
10 these -- that's why my clients fall within the zone
11 of interests of the regulation at issue, Your Honor.

12 I have to address very briefly also,
13 Ms. Hamilton, again, raised the idea of the cost of
14 the impoundment process and all that. That's simply
15 a cost of them following their own regulation.
16 That's not a cost imposed by my clients or any other
17 person. That is a cost imposed by their own
18 regulation, which they could easily change.

19 With respect to their interests, again, it
20 also, in addition to the reasons I've already
21 identified, the other aspect here is that
22 Mr. Shirley does have the right, as do other NMCGA
23 members under New Mexico law, to gather these
24 cattle. And so Ms. Hamilton said something to the
25 effect of that somehow undercut our argument about

1 the impoundment regulation being the only way to
2 remove these cattle. That's not true at all. That
3 is the only way that the federal government can
4 remove these cattle.

5 THE COURT: Well, what interests does the
6 State of New Mexico or state law have on forest land
7 or the wilderness? Why would they have any interest
8 or involvement at all?

9 MR. McGUIRE: I believe that there is
10 certainly some claim, Your Honor, that these unowned
11 cattle, to the extent that they actually are
12 unowned, belong to the State of New Mexico.

13 THE COURT: Well, I understand that claim.
14 But how can that be? I mean, if it's on federal
15 land, how does the State of New Mexico have any
16 interest in that?

17 MR. McGUIRE: Well, I don't believe, Your
18 Honor, that the federal government has claimed any
19 interest either over these cattle, at least in terms
20 of a property interest. It's my understanding that
21 New Mexico law, at least the New Mexico Livestock
22 Board has again made a claim --

23 THE COURT: They made a claim, but how can
24 that be?

25 MR. McGUIRE: Yes, sir. I guess the point

1 here, though, is that there are certainly no
2 regulations that would prevent my clients from going
3 into these areas and gathering these cattle.

4 Forgive me --

5 THE COURT: That's interesting that you
6 say there is nothing to keep somebody from going and
7 getting the cattle, but you say that the federal
8 government can't shoot them. That seems very
9 incongruous to me.

10 MR. MCGUIRE: Your Honor, there is simply
11 a difference between the regulations that the Forest
12 Service has for moving these cattle, which we
13 contend they have to follow, versus a private
14 citizen exercising a right to gather these cattle.
15 No different than, for instance, a hunter who is
16 hunting elk or hunting other animals in the
17 wilderness, in the sense that -- and again, Gila
18 cattle are not that. But the difference is that
19 private -- how private citizens can interact with
20 animals on federal lands is not the same analysis as
21 what the federal government can do.

22 And, Your Honor, again, we're still
23 talking about standing here. My point is simply
24 that my clients have an interest in potentially
25 utilizing the economic use of these animals, which

1 there is an economic use. That's why, again, the
2 impoundment process was designed to allow for an
3 auction in which these animals can be used by
4 ranchers and by other individuals who wish to
5 purchase them. So those are the other interests
6 that are impacted here, Your Honor.

7 So the other thing I would also clarify, I
8 mean, Mr. Shirley and the NMCGA's standing here also
9 does -- again, even for the APA claim, not just for
10 NEPA, but even for the APA claim is also justified
11 by their aesthetic interests. The aesthetic nature
12 of their interest here is not just limited to NEPA.
13 So we would also just say the fact that we
14 established that Mr. Shirley uses the wilderness,
15 uses the areas around the wilderness for recreating,
16 in which these cattle can and have wandered after
17 being shot, and die, those interests also are
18 germane to the APA standing analysis.

19 That's all I have at this point, Your
20 Honor, for standing.

21 THE COURT: All right. Thank you,
22 Mr. McGuire.

23 Do you want to say something on this
24 issue, Ms. Blome?

25 MS. BLOME: Yes, Your Honor.

1 THE COURT: All right. Ms. Blome.

2 MS. BLOME: Thank you for the opportunity
3 to respond to the Government's argument that the
4 Humane Farming Association does not have standing.
5 The Humane Farming Association's declarations
6 estimated by their president, Bradley Miller, and
7 two standing declarants, members who recreate in the
8 wilderness, do establish that they have standing to
9 bring, first, a challenge to the impoundment
10 regulation not being followed, and second, to the
11 NEPA challenge.

12 With respect to the impoundment regulation
13 the attack appears to be that the Humane Farming
14 Association is not within the zone of interest that
15 the statute or regulation is intended to protect.
16 But Mr. Miller's declaration establishes that Humane
17 Farming Association operates the largest farmed
18 animal rescue and sanctuary in the country, and that
19 he would come down to Mexico (sic) to purchase the
20 animals at the public sale, as required by the
21 regulation, which -- I left the regulation text
22 itself at the desk, but it does say "shall"; that
23 the Government shall present these animals at public
24 sale for the purposes of selling them to the public,
25 unless someone comes and claims them.

1 And the Humane Farming Association would
2 jump at the opportunity to protect these animals
3 from intended slaughter, and has testified that they
4 would do that. That creates non-speculative harm
5 and concrete interest in that regulation being
6 enforced.

7 With respect to the NEPA claims, I think
8 my colleague did a good job going through the
9 importance of aesthetic interests, and the aesthetic
10 injury here.

11 But I would like to point out that that,
12 in addition to those points that Mr. McGuire made,
13 the Government asks the Court to squeeze standing
14 for the procedural violation of NEPA to such a
15 narrow set of circumstances that wouldn't seem
16 possible to find somebody who could meet their test
17 and establish the burden as they have set it out.

18 The wilderness is not affected by these
19 helicopter roundups, or shootings, in a vacuum, in
20 one target area for one specific time. The
21 disruption is extensive. As one court put it in
22 Idaho -- if you'll give me a moment -- "helicopters
23 carry man and his works, and are so antithetical to
24 a wilderness experience that would it be a rare case
25 where machinery is intrusive as a helicopter could

1 pass the test for being necessary to meet minimum
2 requirements for the administration of the
3 wilderness in the designated area."

4 You know, keeping that in mind, I think
5 everyone should acknowledge that disruption from
6 these helicopters, the shooting of animals while
7 they stand in place, multiple times, sometimes not
8 killing them, but just injuring them, causing them
9 to wander for miles through wilderness, disrupts not
10 just the animals themselves, who the Humane Farming
11 Association and its members have an important
12 interest in protecting, but all of the wilderness,
13 which is supposed to be untrammelled by man, and
14 exist in its as near state of wild as possible.

15 The Government gets at this point by
16 saying that the plaintiffs' standing declarants have
17 not identified appropriate geographic nexus to the
18 area; that because they've not gone to the target
19 area, somehow the injury to the wilderness and
20 injury to the cattle can't affect them, or that they
21 didn't allege they're going to return to the target
22 area. But that is precisely because plaintiffs do
23 not take the position that the injury to the
24 wilderness is in this target area, and I don't think
25 the Government does either.

1 All of its analysis is not limited to an
2 isolated impact on the target area. The Center for
3 Biological Diversity presented extensive evidence in
4 its lead-up to the decision memo that appears in the
5 decision memo itself, and in the Administrative
6 Record, demonstrating their belief that this impacts
7 the wilderness as a whole, the entire Gila River,
8 the entire watershed.

9 So to hold us to a different standard,
10 when the Government is really analyzing the entire
11 wilderness area, is not appropriate here, and it
12 does not create the claim speculative or
13 non-geographic injury.

14 And unless the Court has any other
15 questions, I'll turn it over to Mr. Scholl.

16 THE COURT: All right. Thank you.

17 Mr. Scholl.

18 MR. SCHOLL: Thank you, Your Honor. I
19 join and stand by the arguments of my co-counsel
20 here, but I do want to address a couple of issues
21 that the Government raised focused on Allen
22 Campbell, my client, just to be sure that the
23 reality of the effect of this on him doesn't get
24 lost.

25 One of the things the Government pointed

1 out in maybe a passing note in the response brief
2 was talking about Allen Campbell not having
3 standing, and not talking about, with any
4 specificity, what the injury is to him. And I think
5 that his declaration, Mr. Campbell's declaration,
6 points out how this affects him, even though he
7 doesn't own cattle or have an interest in ownership
8 of cattle or have other cattle that could be
9 affected by it. His interests is that he runs a
10 business that is dependent on people who come to the
11 Gila Wilderness where the west fork and the middle
12 fork and the east fork come together in their
13 confluence to create the Gila River. And literally,
14 if you look at a map of the Gila, where the Gila Hot
15 Springs Ranch is and the Gila Cliff Dwellings are,
16 literally at the end of that road. So everybody who
17 wants to access the Gila Wilderness in that area and
18 explore that region of the Gila finds the way to the
19 end of that road. And he makes a living selling
20 that experience, and providing a campground for
21 people to headquarter at while they venture out on
22 hikes, day hikes, or backpacking excursions, and the
23 like. And that's how this came to his attention as
24 a problem with the first killing back in '22, is
25 that people who came and paid him to stay at his

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1 place while they went and had this experience, came
2 back reporting that their experience was ruined by
3 these dead cattle in the river and dead cattle
4 strewn along some of these trails.

5 And he noticed after that two things:
6 One, that word-of-mouth spread this problem around
7 the community. I know it's post your decision
8 earlier, Your Honor, but probably everybody has
9 noticed that people around the world are paying
10 attention to this issue. And Mr. Campbell saw that
11 impact his business, because in February and March
12 of 2022, which in his declaration he says is a time
13 when he has a number of people using the Gila,
14 because they like winter camping, they like winter
15 backpacking for a number of reasons, he noticed a
16 marked decline in his customer base, and goodwill he
17 was experiencing -- actually bad will because of
18 this problem of these dead cattle being in the
19 forest floor. So he has a direct impact, he's
20 experienced a direct impact by that.

21 And this notion that he hasn't, and
22 actually in his affidavit says he can't quantify it,
23 I thought about that, and I was wondering how do I
24 answer that? And it occurred to me that -- an
25 experience that's kind of common to us. I had,

1 about two months ago, Judge, where I came out to my
2 car and the tire was low, right. I could see the
3 tire was low. And that told me I probably had a
4 problem with a leak. And I filled it up, and a day
5 later it was low again, and I was losing air. And I
6 had to figure out what was going on. I finally find
7 a nail in the tire. And at that point, I don't know
8 what the extent, total extent of the damage that
9 that nail has caused. I do know I've got a loss. I
10 do know I've got damage. I can't tell you how much
11 air I lost over those two or three fill-ups of air.
12 And I didn't know at that time what it was going to
13 take to fix it. If the nail was in the tread, I can
14 plug it. If it's in the shoulder or the sidewall,
15 I've got to replace the tire. And if that's the
16 case, depending on tread depth, I probably have to
17 replace all four tires, which is what I ended up
18 doing.

19 And the point is the fact that at the
20 beginning of that problem I couldn't tell you what
21 my total loss economically was going to be because
22 of that nail. That did not diminish the fact that
23 that nail caused me harm. And that's where Mr.
24 Campbell finds himself here. This activity by the
25 Government, by the Forest Service, has caused him

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1 harm. We're not suing for damages. We're suing to
2 stop it. So we haven't spent the time or money, and
3 won't spend the time or money to quantify what those
4 losses would be or could be into the future because
5 that's not what we're suing for. We just want to
6 stop this activity. And to that point, the
7 standing, how this affects Mr. Campbell through its
8 effect on his customers, is all of the things that
9 Ms. Blome talked about, and Mr. McGuire talked
10 about, are real problems. When you're in a place
11 like the Gila, in the wilderness, where it should be
12 quiet and a peaceful place, and that peacefulness
13 and that quiet is protected by federal law, the
14 sound of a helicopter miles away is disturbing. We
15 don't notice it living in a place like Albuquerque
16 so much, right. But in a place like that, a sound
17 of a helicopter miles away is disturbing. And you
18 add into that gunshots, rifle shots -- you know,
19 gunshots can be fired down here, and we don't hear
20 them because they get absorbed by all the other
21 ambient noise in a urban setting. But out in the
22 wilderness, the sound of a gunshot can travel miles
23 and miles and miles. And when Mr. Campbell's
24 customers come back and say: You know what, my
25 experience here was terrible. I'm not coming back

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1 because of this, that has an impact for him. And
2 what he wants is for the killing from the
3 helicopters to stop. Impound the cattle under the
4 regulations, under the rules that the Forest Service
5 set. They should follow those rules. And he has no
6 truck with them doing that. It's this extraordinary
7 means of accomplishing that, the goal of getting the
8 cattle out that's causing him trouble, is what we're
9 concerned about.

10 And I think, Your Honor, when you look at
11 that, and understand how this impacts him, his
12 standing to bring this claim and try to stop this
13 activity is available to him both under Article III
14 and under the statutes and the rules and regulations
15 that govern the Forest Service in this decision
16 making here.

17 And if you have any questions for me, I'm
18 happen to answer them, Your Honor.

19 THE COURT: Not at the present time.
20 Thank you, Mr. Scholl.

21 MR. SCHOLL: Thank you, Judge.

22 THE COURT: Mr. Fink, you have to
23 establish your standing all the time in cases when
24 you're suing the Government. What do you think
25 about the plaintiffs' standing here? Do you think

1 they got it or not? You've been in similar
2 situations to the plaintiffs?

3 MR. FINK: Thanks for the opportunity,
4 Your Honor. You're right, we go through this every
5 case. And I don't want to an extremely strong
6 stance here, because we are on the other side of
7 this very frequently.

8 But I will just raise two points that I
9 think are particularly interesting to me. One is
10 this has been going on for decades of trying to
11 remove these feral cows from this area. And during
12 that time there has been hundreds of them that have
13 been removed. And of those hundreds, only one of
14 them has been found with a brand on it. You know,
15 that sounds to me as very speculative and remote
16 possibility of causing the type of harm that would
17 result in standing.

18 Related to that, you know, each time that
19 they go up there to do this, they provide notice in
20 the newspaper, for the ranchers to, you know, let
21 the Forest Service know if they may have a stray
22 cattle out there. During that time, no rancher has
23 ever notified the Forest Service that they do have a
24 stray cattle out there. So, again, this just seems
25 like an extremely remote situation, where the

1 chances are so low that I do think this does not
2 raise up to the bar of establishing standing.

3 THE COURT: All right. Thank you, Mr.
4 Fink.

5 All right. Ms. Hamilton, do you have
6 further remarks you want to make about standing?

7 MS. HAMILTON: Thank you, Your Honor.

8 THE COURT: Can you imagine someone that
9 does have standing to challenge these regs? Can you
10 think of somebody that would?

11 MS. HAMILTON: Well, I think, Your Honor,
12 building on Mr. Fink's point, the fact that actual
13 branded, owned cattle that could or would be subject
14 to these impound procedures, and procedures for
15 auction under the impoundment regulations, that
16 petitioners rely on for claim one, if, you know, an
17 agency action was -- you know, was actually
18 depriving the cattle owner in New Mexico, so, you
19 know, I think being adoptive cattle owners in
20 different states is not, you know, relevant to the
21 question of these -- or not in New Mexico, I'm
22 sorry, but in this area that is at issue under the
23 Forest Service regulations, here in the Gila
24 Wilderness -- I think, if any of the cattle owners
25 in the area had evidence that in the past their

1 owned, branded cattle had repeatedly or frequently
2 or even once been caught up in removal operations
3 like this, it would be a different question and a
4 different assessment of the likely risk of their
5 injury to their interests that are protected under
6 this impoundment regulation.

7 So I don't think it's fair to say that
8 requiring petitioners here to show some concrete,
9 more likely than just possible chance that their
10 personal owned cattle could be inadvertently removed
11 as a part of these operations, that doesn't
12 foreclose anyone from ever having standing to
13 challenge implementation of these regulations.

14 And certainly, the required notice and
15 different provisions within 262.10, I could imagine
16 that if there was a circumstance where some of the
17 notice periods weren't followed or a cattle owner
18 didn't have the chance to or wasn't properly
19 notified about the chance to redeem branded cattle,
20 I could imagine those as other examples.

21 But here, as Mr. Fink just alluded to, the
22 history of removals, both ground-based and aerial in
23 this operations area just show that these alleged
24 possible injuries are quite speculative.

25 I had a few points to respond to, but

1 first just wanted to correct -- I misspoke earlier
2 about the Wilderness Act's prohibitions. And the
3 statute prohibits landing a helicopter in a
4 wilderness area, but does not prohibit, as Your
5 Honor asked, a private helicopter from flying over
6 the area. It doesn't prohibit planes flying over
7 the area. So the APHIS operations challenged in
8 this case would not be the only time anyone
9 recreating in or near the Gila Wilderness could ever
10 or might ever hear the sound of a distant
11 helicopter.

12 THE COURT: Are there any height
13 restrictions? Do helicopters have to fly a certain
14 height, or just open air?

15 MS. HAMILTON: Not under the Wilderness
16 Act, Your Honor. So that's 16 USC 1133. There is a
17 clear prohibition on landing. And I would note that
18 the Idaho case that counsel referred to about
19 impacts of helicopter uses involved landing.

20 So working backwards from counsel's
21 points, just discussing Mr. Campbell's alleged
22 economic harms, federal respondents have not argued
23 that Mr. Campbell would fail to show standing unless
24 he was able to perfectly and specifically and
25 completely quantify any alleged economic harm as a

1 result of these operations, and prove, you know,
2 conclusively that those losses were due to these
3 operations.

4 But in Mr. Campbell's declaration and
5 petitioners' briefing, he doesn't even make an
6 attempt to even kind of generally explain. He says
7 that he believes his business suffered or he lost
8 business or fewer people came to his campground
9 following the operations. That seems like something
10 that petitioners could at least make an attempt to
11 quantify with more specificity, if he's alleging
12 that the year after an operation fewer people
13 reserved spots at his campground or visited his
14 campground, including, at the merits stage, a
15 stronger and more specific factual predicate for an
16 alleged economic injury like this is necessary to
17 show Article III standing. And Mr. Campbell has not
18 done so here. And his recountings of stories or
19 things he heard or says that he heard from visitors
20 to his campground about their experiences possibly
21 encountering carcasses cannot support his claim of
22 economic injury without more factual specifics about
23 his alleged declined business volume operations.

24 Touching briefly on the Humane Farming
25 Association's arguments, I would just note that, you

1 know, in the decision memo the Forest Service
2 explained that in large part this operation is
3 necessary because impacts to river health and
4 watershed health and riparian area health from
5 generations of ongoing feral cattle living,
6 reproducing, and spending time in these areas is
7 harmful to the river as a whole. But talking about
8 the specific environmental and aesthetic injuries
9 that these petitioners are alleging to sustain their
10 NEPA claim, those are, you know, limited to cattle
11 carcasses being in the area as a result of these
12 lethal removal operations, and being in the
13 operations area.

14 And multiple times counsel has mentioned
15 that there is unspecified evidence in the record
16 that, after being shot, these cattle might wander, I
17 think miles and miles was what they both said. And
18 without a record cite, that's unsupported. And the
19 declaration of Keith Winter speaking about how APHIS
20 conducts these operations made clear that APHIS will
21 follow, aurally, a cow once it has been shot, and
22 make sure that that animal is deceased before moving
23 on.

24 So there is absolutely no evidence that --
25 or at least I'm not aware that there is evidence in

1 the record, and petitioners haven't pointed to it,
2 that cattle, after being shot in this 100,000 acre
3 operations area are wandering outside of that area,
4 or even for miles and miles. And so that statement
5 by petitioners appears to be unsupported by the
6 record.

7 A couple other points: I think it bears
8 mentioning that -- Mr. McGuire mentioned that his
9 clients, Mr. Shirley, New Mexico Cattle Growers
10 Association, and Spur Lake could still assert
11 aesthetic interests within the statutory zone of
12 interests of these impoundment regulations. And
13 that, again, is unsupported by the regulations
14 themselves. They are focused entirely on providing
15 cattle owners with notice before and after any owned
16 cattle are impounded, is focused on protecting those
17 property rights, and is also focused on ensuring
18 that the Forest Service is compensated for
19 impoundment efforts.

20 So petitioners have pointed to no place in
21 those regulations or any case law that would suggest
22 they can assert standing by showing an aesthetic
23 interest under these impoundment regulations.

24 Counsel for Humane Farming Association
25 suggested that these members, who are spread out

1 across the country, are injured by a loss of
2 opportunity to attend auctions and purchase feral
3 cattle. And the Humane Farming Association and its
4 declarants have not offered any evidence that its
5 members have ever tried to do this in the past,
6 after decades of gather operations. Petitioners
7 cannot demonstrate standing merely by saying they
8 might engage in a new action for the first time in
9 the future.

10 THE COURT: When you did get the hundreds
11 of cows earlier without helicopter shootings, did
12 you have auctions of those?

13 MS. HAMILTON: Your Honor, so, yes, there
14 have been auctions. You know, the decision memo
15 also notes that during these operations, often
16 approximately 50 percent can die due to stress and
17 the difficulties of operation and be euthanized on
18 site. So that's another thing to keep in mind.

19 But when the cattle that are recovered are
20 removed, they do go through the auction process.
21 And I think there are various steps involved. So
22 sometimes the Forest Service can work with the state
23 board to conduct that auction. And sometimes the
24 Forest Service, I think, could conduct it itself.
25 But I do know that auctions have certainly occurred,

1 and there is no evidence in the record that these
2 specific petitioners have made use of this
3 opportunity and purchased feral cattle from this
4 population of feral cattle in the Gila Wilderness
5 during auctions following impoundment before.

6 My understanding from the Forest Service
7 is that most of the cattle that are recovered
8 through these ground gather operations, and then
9 sent to auction, end up going to a slaughterhouse.
10 So I don't think there is any evidence in the
11 record, and petitioners, again, haven't pointed to
12 any, that in the past either Mr. Shirley or other
13 unspecified members of the New Mexico Cattle Growers
14 Association have actually purchased the cattle that
15 they now say that their right to purchase conferred
16 standing.

17 THE COURT: Any idea what the meat on
18 these feral cows tastes like?

19 MS. HAMILTON: Personally, no. You know,
20 I think -- I can't point Your Honor to a specific
21 cite in the record about this, but in discussions
22 with the agency, I think, understanding that a lot
23 of these cattle have lived their whole lives in the
24 wild, and are not being raised or grown for meat
25 consumption, I think they're not great candidates

1 for meat consumption. And that may be -- and I will
2 double-check this -- but in the responses to
3 comments from the public in the decision memo, I
4 believe some members of the public did raise the
5 question of whether these cattle could be offered up
6 to the public for hunting or for meat consumption.
7 This is ECF document 17-1. And I think the Forest
8 Service considered this, but for various reasons
9 determined that that wasn't a feasible opportunity
10 or option.

11 THE COURT: What's your position on the
12 New Mexico Livestock Board asserting that they own
13 these cows?

14 MS. HAMILTON: So, Your Honor, the New
15 Mexico Livestock Board, without authorization from
16 the Forest Service, can't grant citizens and members
17 of the public the authority to go on to federal land
18 and use and occupy that land by gathering or
19 removing or, you know, otherwise affecting the
20 environment by removing these cattle. And so the
21 New Mexico Livestock Board does not have an
22 ownership in the Gila feral cattle, and doesn't even
23 have jurisdiction over these feral cattle while
24 they're on federal land.

25 So in order for individuals to be able to

1 utilize the process set forth in this directive to
2 enter onto Forest Service land, to the wilderness
3 areas, and engage in gathering these feral cattle,
4 over which the United States has jurisdiction, they
5 would need authorization from the Forest Service to
6 do that.

7 So federal respondents disagree with the
8 position that petitioners set forth that the state
9 has an ownership interest in these cattle certainly.

10 And I would also note that, in the event
11 the Forest Service did authorize some sort of
12 operation as laid out in the Livestock Board's
13 directive that would allow members of the public to
14 go on to the forest or the wilderness and remove
15 cattle in any way, that would likely convert it into
16 a federal action.

17 So then, again, there is tension with
18 petitioners' position that the only way federal
19 agencies can take action to reduce this feral cattle
20 population or remove the cattle is by following step
21 by step these impoundment regulations. So I do
22 think there is tension there.

23 Your Honor, I want to make sure I've
24 addressed all the points I wanted to. Yes, Your
25 Honor. In conclusion, I think, as we've laid out in

1 our briefing, and just taking a close look at each
2 petitioner and how they've asserted injury under
3 each claim, the petitioners have not met their
4 burden at this merit stage of providing sufficient
5 particularized factual evidence that they have a
6 likely risk of environmental harm or harm under
7 these regulations stemming from the Forest Service's
8 decision to authorize aerial removals.

9 Thank you.

10 THE COURT: All right. Thank you,
11 Ms. Hamilton.

12 Mr. McGuire, do y'all want to say anything
13 more about standing?

14 MR. MCGUIRE: Yes, Your Honor, briefly.

15 Your Honor, two points I'd like to make
16 briefly. First off, Mr. Fink made a reference, as
17 well as Ms. Hamilton, to the idea that somehow there
18 wasn't injury here or that the likelihood of harm is
19 very low because, over the course of however many
20 years, only one branded cow was ever caught up in
21 the physical impoundment removal actions. So for
22 people not in the actual cattle industry, like
23 myself, like Your Honor, I'm sure, and opposing
24 counsel, branding is not the only way ownership can
25 be determined. So the fact that a cow may not have

1 a brand does not mean it is not owned. It's very
2 clear that they're trying to use that confusion here
3 to their advantage to say that somehow -- so we have
4 no idea how many of the cattle that have been
5 physically gathered as part of their impoundment
6 removal process, that they have followed for 25
7 years, they have no idea how many of those cattle
8 are owned.

9 THE COURT: Well, but doesn't that play
10 into their argument that this is just speculative?
11 That's what I understand Mr. Fink and also
12 Ms. Hamilton to be saying is that it's just
13 speculative.

14 MR. MCGUIRE: Well, I don't believe it is
15 with respect to our case, Your Honor, because again,
16 Mr. Shirley, and through his declaration has
17 specifically testified that his cattle have wandered
18 into the wilderness, into the target area. So he is
19 saying: I know that owned cattle are in this target
20 area. In an area, again, as I may emphasize, that
21 the Forest Service has said: We are going to remove
22 all of these cattle through this aerial shooting.
23 So put two and two together, if his cattle that are
24 owned are in this area, and the Forest Service has
25 said: We are going to shoot all cattle in this

1 area, then it's not speculative or hypothetical
2 anymore at that point, Your Honor.

3 So that certainly creates, again, a
4 reasonable likelihood of harm from their perspective
5 that certainly justifies our standing in this case.

6 The other aspect I just want to address
7 briefly, Ms. Hamilton mentioned there was no
8 evidence regarding wandering. Well, recall what the
9 point or what the position of the Forest Service has
10 been in announcing, for instance, even these
11 actions. They know that if these cattle are shot in
12 the waterways, in the Gila River, in this forest,
13 that's a problem. It poses serious environmental
14 risks. And it is a problem. And that's why they've
15 even said in their declarations, for instance,
16 supporting their position that they intentionally
17 did not shoot cattle near waterways. So that's part
18 of the evidence. Let's take that at face value.

19 We know there is evidence in the record,
20 the photographs that we even just attached are
21 included in our complaint, Your Honor, in addition
22 to the photographs that are included in the
23 Administrative Record show cattle who -- multiple
24 cattle -- who died in the waterways, in the Gila
25 River, and had to be dragged out of the river by

1 Forest Service personnel or contractors. Well, if
2 they weren't shot near those waterways, as the
3 Forest Service and APHIS claims, how did those
4 cattle get there? They got there because they
5 wandered miles and miles and miles after being shot.
6 They're wounded, and they unfortunately perish in
7 the Gila River. It's not a pleasant thing to talk
8 about, of course, Your Honor. But that shows this
9 concept of this is just a clean -- we just shoot
10 them dead where they are, and then it's over, is
11 frankly wrong. And it's factually wrong. And the
12 Administrative Record and the evidence in this case
13 supports that these cattle, once shot, oftentimes do
14 wander for miles, which would include outside of
15 target area. So there is evidence in the record
16 specifically to justify that position. So I want to
17 make that clear for Your Honor.

18 That's all I have, subject to Ms. Blome
19 and Mr. Scholl.

20 THE COURT: All right. Thank you, Mr.
21 McGuire.

22 Ms. Blome, do you have anything further?

23 MS. BLOME: Nothing further, Your Honor.

24 THE COURT: Mr. Scholl?

25 MR. SCHOLL: No, Your Honor.

1 THE COURT: All right. Mr. McGuire, do
2 you want to turn to the merits?

3 MR. MCGUIRE: Yes, Your Honor.

4 Your Honor, I just wanted to supplement my
5 argument. I've prepared a presentation here. I'd
6 provide a copy to opposing counsel, and if I may, to
7 Your Honor as well.

8 THE COURT: Please.

9 MR. MCGUIRE: May I approach?

10 THE COURT: You may. Why don't you also,
11 after the hearing, file this.

12 MR. MCGUIRE: Yes, Your Honor, we will.

13 May it please the Court. Again, thank you
14 for your time this morning. Your Honor, you asked a
15 really good question regarding my clients' interests
16 here, which I hope I adequately explained earlier.
17 But we are -- we do have kind of a broader question
18 of why are we here? And the reason why we're here
19 is because of the Government's radical departure
20 from its own established regulations about how to
21 remove these cattle. We are dealing with
22 established facts here. We're not dealing with a
23 brand-new situation. We're dealing with established
24 facts, one of which is that the Gila cattle -- there
25 is a population of cattle that have lived in the

1 wilderness, along with their progeny, of course,
2 since the 1970s.

3 Now, these cattle have been described in
4 both the pleadings, as well as by opposing counsel,
5 by the Government's counsel here, as "feral cattle."
6 That's the term they love to use, because it
7 obviously has no legal definition, it's not a term
8 of art, it won't be found in any of the regulations
9 that we're discussing today. But they use it to
10 evoke an emotion. They use "feral cattle" to evoke
11 an image of a wild-eyed, frothing at the mouth,
12 aggressive wild beast that can't be tamed, that can
13 be physically impounded. And that's why it
14 justifies their extraordinary departure from their
15 own regulations.

16 So, your Honor, this is a image that I
17 conjure up of -- this is the Government's view of
18 what a feral cow looks like. In fact, that's not
19 what they look like at all. Luckily, now we have an
20 Administrative Record that we can refer to. And, in
21 fact, this is what the feral cattle, using their
22 words, look like. They look like ordinary cattle.
23 They look like ordinary domestic cattle, standing
24 there on the land, grazing like every other modern
25 species of cattle does. These are not dangerous

1 animals. They're not wild animals, in the sense,
2 and they certainly are not feral animals to evoke
3 that type of emotion and that type of image.
4 Instead, this is what the Gila cattle -- when we're
5 referring to the Gila cattle, these are the animals
6 that we're referring to.

7 So we have those established facts, but we
8 also have established regulations. This is not,
9 again, a new regulation. It's not a new rule that
10 was promulgated by the Forest Service. These are
11 all in Title 36 of the CFRs. Parts 261 and 262 were
12 promulgated in January of '77. Part 222, which the
13 Government claims applies, was promulgated in
14 October of 1977. So we have established regulations
15 over more than 40 years that existed.

16 We also have an established interpretation
17 and process. The Forest Service already admits
18 they've removed hundreds of the Gila cattle since
19 the 1990s. And in every single instance, every
20 removal action for more than 25 years has followed
21 the impoundment process set forth in Section 262.10,
22 until now. When I say "now," of course, I mean
23 2022, but until this broader dispute that's arisen.
24 So we have 25 years of an established practice and
25 an established interpretation of these regulations

1 by the Forest Service.

2 We've already addressed standing, so I'm
3 going to skip forward, if I may, Your Honor.

4 Let's talk about deference, because
5 that -- obviously, the Court spent some time in its
6 order last February analyzing Chevron deference and
7 Auer deference. Obviously, Chevron deference is, of
8 course, referring to an agency's interpretation of
9 an ambiguous statute, if it's a reasonable
10 construction. Auer deference, of course, refers to
11 an agency's interpretation of its own ambiguous
12 regulation, if that is a reasonable construction.

13 And so it's important to talk about --
14 we're talking about Auer deference here, because of
15 the regulations at issue. And so it's important to
16 talk about the limits of deference.

17 Before I even get into that, allow me to
18 say the petitioners share Your Honor's concerns
19 about Chevron deference, and by extension, Auer
20 deference. Of course, there are cases currently
21 pending before the U.S. Supreme Court in which those
22 legal precepts may be in danger. And so we
23 certainly join those arguments, of course, to
24 challenge the constitutionality of Chevron and Auer
25 deference. We believe that those principles are not

1 found in the Constitution, and are illegal. So we
2 certainly challenge those.

3 But even within the current framework that
4 we're operating, in which those are the current
5 laws, there are limits to Auer deference in terms of
6 how regulations are interpreted. And these were
7 established a few years ago in a Supreme Court case,
8 *Kisor v. Wilkie*. And specifically, that case
9 clarified the limited Auer, by saying the deference
10 by the courts to agencies' interpretations is only
11 appropriate if a regulation is genuinely ambiguous,
12 and if the agencies' reading reflects a fair and
13 considered judgment.

14 Now, "deference is inappropriate" -- this
15 is what *Kisor* specifically was addressing and
16 clarified, that I think is obviously appropriate
17 here -- "deference is inappropriate where an agency
18 substitutes one view of a rule or regulation for
19 another." So when they changed their
20 interpretation, Auer deference is inappropriate.
21 And so this is the quote from *Kisor* here, "Courts
22 have only rarely given Auer deference to an agency
23 construction conflicting with a prior one."

24 THE COURT: Well, let me just ask Mr.
25 Smith real quickly, are you relying on Auer

1 deference at all for --

2 MR. SMITH: No, Your Honor, only in the
3 alternative.

4 THE COURT: So you're not wanting it, Mr.
5 McGuire. Mr. Smith doesn't want it. Why are we
6 discussing it?

7 MR. MCGUIRE: Well, Your Honor, I mean, if
8 they're conceding they're not relying upon Auer
9 deference --

10 THE COURT: I didn't see it in any of the
11 briefing. You think it's clear, right?

12 MR. SMITH: Yeah, we only raise it in the
13 alternative, if Your Honor does find the regulations
14 to be ambiguous, that the Forest Service has
15 presented a clear and the rational interpretation of
16 it. But we think that the analysis we're asking the
17 Court to do is a plain language, you know,
18 unambiguous interpretation of the regulation.

19 THE COURT: And that's what you're asking?

20 MR. MCGUIRE: Yes, Your Honor. But we
21 both obviously have alternative arguments here. So,
22 for instance, if the Court were to find that the
23 regulation is ambiguous -- which we don't believe it
24 is -- but if the Court were to find that, then it is
25 appropriate to still talk about this, because Mr.

1 Smith just said they would then rely upon Auer
2 deference. So Auer deference still is relevant to
3 the analysis here.

4 Again, this is why we're talking about the
5 limits, because even in that circumstance, what we
6 have, an ambiguous regulation -- which we don't
7 here -- but if we do, then Auer deference still
8 doesn't apply, because in this instance, you would
9 have, as the court in Kisor said, you have an agency
10 issuing an interpretation that conflicts with a
11 prior interpretation.

12 Then the other instance in which Auer
13 deference is inappropriate is "an agency
14 interpretation that is merely a convenient
15 litigating position, or is a post hoc
16 rationalization to defend past agency action."

17 So let's talk about the regulations at
18 issue, Your Honor, let's talk about our contention.
19 These regulations are not ambiguous in any way.
20 Let's start with Part 261 of Title 36 of the CFRs,
21 Section 261.7 prohibits "placing or allowing
22 unauthorized livestock to enter or be in the
23 National Forest System or other lands under Forest
24 Service control." The basic concept here. And that
25 is the exact regulation that the Forest Service

1 cited in its decision memo to undertake the aerial
2 shooting. Unauthorized livestock are not allowed to
3 be on the National Forest System. So the question
4 is: What constitutes unauthorized livestock?
5 That's where we look at 261.2. And there are other
6 categories of animals, Your Honor, but we --

7 THE COURT: Good back to the prior slide.

8 MR. McGUIRE: Yes, Your Honor.

9 THE COURT: When you start there, and then
10 you begin to go down your path, that first CFR just
11 doesn't seem to be dealing with our situation. I
12 mean, this is not a cattle grower that's placing or
13 allowing livestock to wander over into the Forest
14 Service and graze. And that's what that seems to be
15 saying is, you can't do that. If you're a cattle
16 grower, you've got to stay off the National Forest
17 System. And so we don't -- your first CFR seems to
18 take us, you know, down a trail that you should
19 never start, given that that's the way your
20 interpretation begins.

21 MR. McGUIRE: Well, I have two responses
22 to that, Your Honor. First off, I think arguably
23 this is implicated because the Gila cattle -- the
24 origin of this issue in the wilderness was that you
25 had a permittee who had a valid grazing permit who

1 went bankrupt. And then, because they went
2 bankrupt, they allowed their cattle, who no longer
3 at that point, as far as I understand, were
4 permitted and allowed to be on the land.

5 THE COURT: But those aren't these cows.
6 These are descendents of those cows. So it seems to
7 me that to try to start with this, nobody is placing
8 or allowing their livestock on the land. So it
9 seems to me your first step just doesn't hold water.

10 MR. MCGUIRE: Well, Your Honor --

11 THE COURT: If we were in 1970, and we
12 were talking about the bankrupt cows, then, you
13 know, okay. But we're talking about descendants
14 now.

15 MR. MCGUIRE: Yes, Your Honor, I certainly
16 understand. I do think it's not just placing, it
17 also says "allowing." So the fact that, if anybody
18 allows these cattle to be in these areas, it would
19 fall within the scope of that regulation.

20 THE COURT: Well, I agree, but nobody, no
21 cattle person, rancher is allowing their livestock
22 to go on to the Forest Service. That's not these
23 cows.

24 MR. MCGUIRE: Well, Your Honor, I
25 certainly understand that position. Again, I still

1 believe that this -- I don't believe it's that
2 narrow. I don't think it's analyzing whether it's a
3 particular group of animals.

4 THE COURT: Well, I know you don't want it
5 to be that narrow, but that's what it says. And
6 your whole argument is premised on there being cows
7 that were placed or allowed there. And these cows
8 weren't.

9 MR. MCGUIRE: Well, Your Honor, again, we
10 contend that, even if we're talking about the
11 progeny of these cattle, that is still allowing
12 unauthorized livestock in the wilderness.

13 THE COURT: It doesn't say anything about
14 progeny. These are verbs: Placing, allowing.

15 MR. MCGUIRE: Well, "allowing" certainly
16 is a little bit more passive, Your Honor. So to the
17 extent that you allow an original heard of cattle to
18 be, you know, to be unauthorized in an area where
19 they're not supposed to be, and then that herd
20 continues to procreate, you're certainly allowing
21 the continued presence of unauthorized livestock in
22 that area. So we do believe that, again, based on
23 the factual origin of these cattle, that these
24 cattle do fall within this regulation.

25 But here's the other point, Your Honor,

1 that I think also hopefully will bear on this. The
2 federal government's position has been -- and even
3 to this day is -- that this is the regulation that
4 allows them to remove the cattle by any means.

5 THE COURT: Well, what do we do with that?
6 I mean, Mr. Smith is going to have to get up and
7 talk about these pages and pages of inconsistency in
8 their position. But what do we do with that?

9 MR. McGUIRE: Well --

10 THE COURT: Right now, as a court, I'm
11 looking at these regs. And you've got your
12 interpretation, the Government has got their
13 interpretation. I've got to pick one. Does it
14 matter? Does it have any legal significance that
15 they've been inconsistent for 50 years?

16 MR. McGUIRE: Yes, it does, absolutely,
17 Your Honor.

18 THE COURT: Tell me the box that that
19 inconsistency goes in. What's the legal doctrine
20 that says the agency can't be inconsistent?

21 MR. McGUIRE: That's the Kisor case that
22 we just referred to, Your Honor.

23 THE COURT: Tell me how that plays out
24 here.

25 MR. McGUIRE: Certainly. So when the

1 Forest Service has taken a position that these
2 cattle and their progeny are unauthorized livestock
3 for 40 years, and then have followed the physical
4 impoundment process in 262.10 for 25 years, then
5 that establishes an interpretation of this
6 regulation that, again, certainly is not entitled to
7 any sort of deference, again under Auer. But it
8 also goes to --

9 THE COURT: That's the problem. If it's
10 not entitled to any deference, what do we do with
11 it? It's interesting and quirky. But it doesn't
12 seem to have a legal significance.

13 MR. McGUIRE: It goes to the reasonable
14 interpretation. Because at that point, without
15 deference, if the hand of Auer deference is not on
16 the scale --

17 THE COURT: Why are we worried about
18 reasonable? Why don't we just get it right? I
19 mean, I guess you want to beat the Government up
20 about their inconsistency. And Mr. Smith is going
21 to have to deal with that in a minute. But I still
22 don't understand the legal significance of it.

23 MR. McGUIRE: Your Honor, the legal
24 significance of their position is that -- I mean, I
25 suppose the Court should analyze what the parties

1 are arguing. And if we all agree that these -- I
2 mean, sorry, excuse me -- if the Government's
3 position for the past 25 to 40 years has been that
4 these are unauthorized livestock, that certainly
5 bears to what the correct answer is.

6 THE COURT: Well, not necessarily. I
7 mean, they may have had an interpretation and nobody
8 ever challenged it, nobody challenged it for 40 or
9 50 years. And then, all of a sudden, when their
10 authority to do something was challenged, then
11 lawyers hit the books, right, and they look at it
12 and go, you know: That's not right.

13 MR. McGUIRE: Yes, Your Honor. The one
14 other thing I would add about the reason why 261.7
15 applies -- and again, I think the history bears on
16 this -- is that this regulation also applies to the
17 Forest Service, because the Forest Service has also
18 allowed these cattle to be in the wilderness during
19 this period of time. And, obviously, they've
20 undertaken certain actions to remove these cattle
21 over time. But the regulations also -- it's not
22 just a violation -- it's not just directed to
23 private parties. It obviously can be used as an
24 enforcement action, if for instance an individual
25 rancher were to allow unauthorized livestock into

1 the wilderness or into the forest. This is not
2 limited to private parties. This is also a Forest
3 Service regulation that governs its own conduct and
4 it governs its own procedures.

5 THE COURT: How does that help you? I
6 mean, they're doing the best they can to get rid of
7 these. So if you're laying an obligation on them,
8 it looks like they're agreeing with you. They've
9 got to get rid of these.

10 MR. MCGUIRE: Exactly. They're agreeing
11 with us that this regulation applies to remove
12 unauthorized livestock. The only disagreement they
13 have is whether these particular cattle are
14 unauthorized livestock, not whether there is an
15 obligation at all for the Forest Service to remove
16 unauthorized livestock.

17 So, again, that's why, Your Honor, I think
18 it does bear on the correct answer, which I
19 understand your point here. The correct answer is
20 the Forest Service has regulations to remove
21 unauthorized livestock, which it's required to
22 follow. So that's where this regulation applies
23 from the start.

24 So with that said, again, let's analyze
25 whether these cattle actual's are unauthorized

1 livestock. So this is the definition. It says,
2 "Any cattle which is not authorized by permit to be
3 upon the land and which is not related to use
4 authorized by a grazing permit." In other words, if
5 it's not an individual -- again, it's any cattle,
6 and if they aren't authorized by a grazing permit,
7 they're not supposed to be where they are, then
8 they're unauthorized livestock by the plain meaning
9 of this regulation. There is no qualifier as to
10 what type of cattle, or cattle of a certain kind, or
11 whether they're owned or unowned. That's not in
12 this at all. This is a very straightforward, simple
13 regulation, when you look at it just limited to the
14 circumstances of "any cattle." So anytime you see
15 the phrase "any" and now in any statute or
16 regulation, it certainly is entitled to a broad
17 construction. So here, again, this is not limited
18 to certain types of cattle or a subset of cattle.
19 It is "any cattle," provided, again, that they are
20 not allowed to be on the property where they are,
21 and it's not related to use authorized by a grazing
22 permit.

23 So who is the impoundment regulation
24 itself. And this also, again, bears on what we were
25 talking earlier on with respect to the process that

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1 the Forest Service goes through when they impound
2 these cattle, and then ultimately, sell them at
3 auction. So this is 262.10. It says, "Livestock
4 may be impounded anytime 15 days after the date a
5 notice of intent to impound is first published and
6 posted at the county courthouse, and in one or more
7 local post offices." So there is this notice that's
8 required.

9 Following impoundment, you have a notice
10 of sale that they also have to post. The owner may
11 redeem before sale. And this is the issue, is
12 unauthorized livestock may be sold or, if unsold,
13 condemned and destroyed, or otherwise disposed of.
14 And I'm sorry, I don't have the -- I can potentially
15 grab it -- the actual language of the impoundment
16 regulation does say that they "shall" be sold. And
17 if they aren't sold, then they may be condemned or
18 destroyed.

19 So when Your Honor was saying, well, are
20 there actual auctions that are going on, of course
21 Ms. Hamilton acknowledged, correctly, that auctions
22 have gone on, that these Gila cattle who have been
23 physically impounded, have been sold at various
24 points. But the regulations also require that
25 process. Which, again, so the lack of the

1 opportunity for Mr. Shirley or other NMCGA members
2 to purchase those cattle, again, grants them
3 standing.

4 But this is the process that the Forest
5 Service is required to follow. And not just that
6 they're required to follow in a hypothetical or in a
7 perfect world. It's the process that they have
8 followed for 25-plus years.

9 THE COURT: All right. Mr. McGuire, I
10 need to let Ms. Bean rest her fingers. Let's take
11 about a 15-minute break.

12 MR. MCGUIRE: Of course, Your Honor.

13 THE COURT: All right. We'll be in recess
14 for about 15 minutes.

15 (The Court stood in recess.)

16 THE COURT: All right. Mr. McGuire.

17 MR. MCGUIRE: Thank you, Your Honor.

18 Okay. So where we left off, we were
19 talking about the impoundment process that is set
20 forth in Section 262.10 that requires physical
21 impoundment, as well as a notice of sale, redemption
22 by an owner, or if they're not owned, then they must
23 be put up for auction or if they are unsold, they
24 can be condemned or destroyed or disposed of.

25 So the Gila cattle that we're discussing,

1 that is the subject of this entire operation and
2 matter, are unauthorized livestock by the
3 definitions in the Forest Service's own regulation.
4 And the definition, again, is very broad. It is,
5 "any cattle" that is not authorized by a permit, and
6 that is not related to use authorized by a permit.
7 That is about the broadest definition you could
8 have. And it's also unambiguous, in that there is
9 no qualifier, there is no descriptor of what type of
10 cattle fall within this definition. It is just "any
11 cattle," with again, limitations based on
12 permitting. But other than the permitting, "any
13 cattle" fall within the definition here. That is an
14 unambiguous definition. And because it's
15 unambiguous, there should be no deference whatsoever
16 to the Government's interpretation.

17 Now, how do we know that this definition
18 is unambiguous? We know for two reasons. One, is
19 that there is only one reasonable interpretation of
20 the phrase "any cattle." That means any cattle.

21 The second reason why we actually know
22 it's unambiguous is that we actually can look to how
23 this regulation has been implemented in the past.
24 And, of course, even the Forest Service's own
25 interpretation. We can see it over time to show

1 this isn't an ambiguous regulation. And when you
2 look at that, the Government has consistently and
3 publicly interpreted unauthorized livestock to
4 include the Gila cattle.

5 The first document that we see in the
6 Administrative Record that relates to this is a
7 public fact sheet issued by the Forest Service in
8 November of 2022. Again, that is approximately four
9 to five months before the February 2023 shooting
10 occurred. And it obviously was in the midst of --
11 actually, even followed the February '22 shooting
12 that was at issue in the prior lawsuit.

13 And in this public fact sheet that was
14 available to the public, made available to the
15 public, and in the Administrative Record, there is a
16 direct question: Are the cattle in the Gila
17 Wilderness trespass cattle? And it says, "There are
18 no active allotments in Gila Wilderness Ranger
19 District, where these cattle are located. And it
20 incorporates the definition that we find in Section
21 261 -- the definition of unauthorized livestock --
22 forgive me, where it says, "Any cattle which is not
23 authorized by permit," et cetera. And it
24 effectively, almost verbatim, uses that exact same
25 definition of unauthorized livestock found in the

1 regulations. And then in the documents it says,
2 "The cattle in the wilderness fit this definition."
3 So even this public fact sheet the Forest Service is
4 telling the public its interpretation specifically
5 is that these cattle fit the definition of
6 unauthorized livestock.

7 We, of course, also have the scoping
8 letter that the Forest Service issued in November of
9 '22, announcing their intention to undertake, for
10 the second time, these aerial shooting operations.
11 And in that scoping letter it starts by saying, "The
12 Wilderness Ranger District of the Gila National
13 Forest is proposing to conduct feral cattle removal
14 from the Gila Wilderness to address the presence of
15 unbranded and unauthorized cattle." It doesn't say
16 unauthorized livestock, fair enough. But the word
17 "unauthorized," why use that word? It's because
18 they're linking -- even the scoping notice is
19 linking these cattle to the unauthorized livestock
20 in the Forest Service regulations.

21 So let's go -- let's look beyond that, and
22 see other instances in which they've acknowledged
23 that these are unauthorized livestock. As we walk
24 through 262.10, which is the impoundment, they're
25 required to post a notice that they intend to

1 impound unauthorized livestock. And what did they
2 do in this case? They, before the aerial shooting
3 began, posted a notice saying they intended to
4 impound unauthorized livestock. "Notice is hereby
5 given that pursuant to the impoundment regulation,
6 262.10, all unauthorized livestock may be
7 impounded." So the Forest Service is saying that
8 these Gila cattle that are in the forest are
9 unauthorized livestock. And it describes them more
10 generally, "Any unbranded livestock or any livestock
11 bearing brands of previously unauthorized
12 livestock."

13 So they actually followed, at least in
14 part, the impoundment regulation, with respect to
15 the 2023 aerial shooting. Yet now, they claim they
16 didn't have to follow that process at all. But they
17 did in part, by issuing this intent to impound
18 notice pursuant to Section 262.10.

19 Also look at the decision memo. This is
20 the actual document which they announce publicly
21 their decision to undertake the aerial shooting on
22 February 16, 2023. And in that decision memo even
23 it is internally inconsistent, confusing, and
24 muddles the waters of what the authority they have
25 to undertake this operation is. This is a direct

1 quote from the decision memo. "The presence of
2 feral cattle is an unauthorized activity. Allowing
3 or placing unauthorized livestock on National Forest
4 System lands is prohibited under Forest Service
5 regulations, at Section 261.7."

6 Your Honor, that's the exact regulation
7 that I believe you expressed some concern about
8 whether it applies. The Forest Service their own
9 decision memo admits it applies. They admit it
10 applies to the feral cattle that they've described;
11 in other words, the Gila cattle that they're trying
12 to remove here.

13 They also say, because of that regulation,
14 because the presence of the Gila cattle, as
15 unauthorized livestock, is prohibited in the Forest
16 Service, there is a need to remove this population
17 of feral cattle to -- and they identify one of the
18 reasons -- to meet the intent of that exact
19 regulation, which prohibits placing or allowing
20 unauthorized livestock.

21 So in two instances in the decision memo
22 they expressly reference the prohibition on
23 unauthorized livestock as a basis for undertaking
24 the aerial shooting, and removing the Gila cattle.
25 By extension, that also means that the Gila cattle

1 are unauthorized livestock by their own definition,
2 interpretation.

3 Also, before the decision memo was issued,
4 internally there was a briefing paper that was
5 prepared within the Forest Service, in January of
6 2023, in which the subject line of the briefing
7 paper is, "Unauthorized livestock in the Gila
8 Wilderness," and it describes, "Unbranded and
9 unauthorized cattle are causing increased damage to
10 riparian areas." It says, "The Forest has a strong
11 interest in resolving the unauthorized livestock
12 issue."

13 January of '23, again, about a month
14 before the decision memo was issued, the Forest
15 Service internally prepares talking points about how
16 they're going to publicly, in addition to
17 obviously -- obviously issuing the decision memo --
18 how are they going to justify this extraordinary
19 departure from the regulations? How are they going
20 to justify this cruel action to shoot these cattle
21 and leave them to die in the wilderness? How are
22 they going to justify that? And in the course of
23 doing that, preparing these talking points, it's
24 entitled, "Gila Wilderness unauthorized livestock
25 concerns letter." The background, "For nearly 30

1 years, the Forest Service has been removing
2 unauthorized livestock from the Gila Wilderness."

3 So, Your Honor, the reason why we raise
4 these, of course, is because we have a consistent,
5 uniform interpretation of the regulations, of the
6 Forest Service regulations, regarding how to treat
7 and how to remove these cattle in the wilderness.

8 And so what we're faced with here, of
9 course, is you have a 25-year track record of this
10 interpretation and a consistent process, versus the
11 February 2023 decision memo, in which they come up
12 with a new interpretation that now, for the first
13 time the Gila cattle are actually not unauthorized
14 livestock. So you have these conflicting
15 interpretations that the Court is weighing here.
16 And in their response, in the brief in particular,
17 they really raise several fundamental questions.
18 They say the Gila cattle are not cattle. They
19 actually go so far, that's position of the
20 Government, is that the Gila cattle -- that they
21 even describe as the Gila cattle in their brief --
22 are not cattle. They also say the Gila cattle are
23 not livestock as defined in a different part of the
24 regulations. And the basis for this is that they
25 claim that the Gila cattle are not actively owned or

1 managed.

2 So we have to go back to basics a little
3 bit here. What are cattle? This is the picture
4 from the Administrative Record that we've provided
5 to the Court that again shows these are the Gila
6 cattle that are at issue. These are the cattle that
7 are being shot, that the Forest Service is
8 attempting to remove from the forest. These are
9 cattle. And, importantly, when you look at a
10 picture like this --

11 THE COURT: That's the fuzziest picture.
12 Why don't we have better pictures?

13 MR. McGUIRE: Your Honor, that is a great
14 question. Unfortunately, that's how it was produced
15 in the Administrative Record.

16 THE COURT: By the way, what is a salt
17 lick doing out there next to that river?

18 MR. SMITH: Your Honor, it's unknown.
19 These particular cattle were the unusual ones that
20 didn't flee right away. So in that report the
21 Forest Service employee who observed them said they
22 don't have any evidence of ownership, but they kind
23 of act like they're owned, so we're going to check
24 with the nearest allottees, the permittees. And the
25 permittee looked at the pictures and said, "No,

1 these are not my cattle," and denied any knowledge
2 of putting the salt block out there. But the salt
3 block could be put out there to -- you know, there
4 is some idea that some people are actually
5 illegally's hunting these animals. They could be
6 putting a salt lick out there to attract animals to
7 a certain location. That salt lick was pretty
8 fresh. So, you know, even -- it's a common thing in
9 the ranching industry to use salt blocks to get
10 livestock to move to certain areas of the pasture or
11 allotment or whatever. Why it was out there, we can
12 only speculate. The Forest Service did investigate
13 it, and did not get an answer, or actually resolve
14 why someone had put it out there. But nobody is,
15 like, managing the Gila feral livestock by putting a
16 salt lick out there. They may be trying to attract
17 them to do something untoward with them. But there
18 is no evidence of anything else.

19 THE COURT: All right. Thank you, Mr.
20 Smith.

21 Mr. McGuire.

22 MR. McGUIRE: Thank you, Your Honor.

23 And if I may, that's an excellent
24 question. Again, it also bears on -- and it
25 completely undercuts the entire position of the US

1 Government, both with respect to standing as well as
2 the merits here. Because the idea here also is that
3 we actually don't know who owns these cattle. The
4 cattle that are reflected in this very picture,
5 these could be owned cattle. But they're also
6 saying that they only checked with one permittee, or
7 local permittees. Well, if it's not their cattle,
8 then maybe -- then they have to be the Gila cattle.

9 And certainly, the Government is also not
10 going to distinguish between these cattle, which
11 might be owned, because they're being taken care of.
12 There is a salt lick out there to provide them with
13 necessary sodium. And so maybe -- I mean, they are
14 being managed in some way.

15 And so the idea that the salt lick was
16 being put out there by a hunter is entirely
17 speculative. It's not in the Administrative Record
18 whatsoever. But the idea is that also raises the
19 issue of, again, these cattle could be actively
20 managed and owned, or there they could be
21 intermixed, of course. So these are all among the
22 cattle that the Government plans to shoot
23 indiscriminately.

24 So when we're talking about --

25 THE COURT: This picture always reminds me

1 when I see it like, the Loch Ness Monster or Big
2 Foot, it's always fuzzy. The one picture we've got
3 of feral cows, it's fuzzy.

4 MR. McGUIRE: Yes, Your Honor, that's
5 true.

6 So what are cattle? The Government tries
7 to muddy the waters here. They try to get into
8 dictionary definitions. Cattle is a commonly
9 understood term that does not require a dictionary
10 definition. We cited case law in our reply brief in
11 particular that says that the courts have rejected
12 attempts to look at detailed dictionary definitions,
13 or the third option of a dictionary definition, when
14 you're dealing with a commonly understood term. And
15 the term "cattle," which isn't entirely defined in
16 the regulations because it doesn't need to be
17 defined. Everyone understands what a cows is and
18 what cattle are.

19 The point is that the Gila cattle that are
20 out there in the forest are the same species as
21 other cattle that are legally authorized to be there
22 and that graze in the forest on these grazing
23 allotments. Like all modern cattle species, the
24 Gila cattle are descended from cattle that have been
25 domesticated by humans over thousands of years.

1 This is not a question of whether a certain -- you
2 know, over 20 years or 30 years the cattle can
3 become undomesticated. There is no evidence of that
4 whatsoever. Instead, we are looking at an animal
5 that inherently is domesticated over thousands of
6 years, not just over the course of 20 years, or
7 whether it's individually owned or managed by a
8 rancher.

9 And this is the key point, is that even if
10 the Gila cattle were abandoned in the '70s or in the
11 1990s, when they started being removed by the Forest
12 Service, that doesn't modify their species, doesn't
13 transform them into a different kind of animal from
14 ordinary cattle. So the Gila cattle are cattle, but
15 they're also livestock. So this is the other
16 argument that the Forest Service put up during both
17 the temporary restraining order hearing as well as
18 the response brief. They claim that there is a
19 different part of the regulations, Part 222, that's
20 within the grazing permitting regulations; in other
21 words, under what circumstances does the Forest
22 Service have to issue or should they issue grazing
23 permits to different types of animals. That's
24 entirely -- it's entirely separate and apart, of
25 course, from the enforcement action, the

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1 unauthorized livestock section of the regulations.
2 So the Government contends that because Part 222 has
3 a definition of livestock -- we'll talk about the
4 definition in a moment -- that the Gila cattle also
5 have to meet this definition as well. And they
6 claim that they don't.

7 THE COURT: Well, when we had the TRO, I
8 went and got -- which I rarely do -- just the CFRs
9 in hard copy. We're just talking about the page
10 over. I mean, it's not like, you know, it's a
11 different volume over here. I mean, it's just right
12 there. As you're looking at your regs, those regs
13 are right there, a page over. So why not use that
14 definition?

15 MR. McGUIRE: Well, because the case
16 law --

17 THE COURT: Everything kind of makes sense
18 when you use that definition. And when we use your
19 definition, we begin to -- like the very first CFR,
20 some of it just doesn't make sense. But it all
21 makes sense when we use that definition.

22 MR. McGUIRE: Well, Your Honor, I mean, we
23 believe it does make sense even -- because the
24 definition of unauthorized livestock, for instance,
25 is obviously much simpler. It just says "any

1 cattle." That's all the Court has to analyze with
2 that definition. So I certainly believe that makes
3 sense.

4 Now, as we've already discussed, the idea
5 that 261.7 says that unauthorized livestock can't be
6 in the forest, must be removed. And so that
7 definition is a standalone definition. And the
8 reason why we shouldn't have to use this definition
9 for livestock is because, although it may just be a
10 page over within the actual hard copy of the
11 regulations, Your Honor, it deals with an entirely
12 different subject matter.

13 And that is -- the case law that we've
14 cited in our brief describes that concept, of we
15 look at different parts of regulations and statutes
16 that have to deal with the same subject matter, and
17 they can bear on each other's definitions and build
18 on one another and give us clarity into what certain
19 definitions mean.

20 But here, we're talking about a completely
21 separate set of regulations, even if they're only
22 separated by a page, which deals with what animals
23 and how the Forest Service is going to issue grazing
24 permits for those animals, versus what animals are
25 not allowed to be on the Forest Service at all, and

1 the process by which you go ahead and remove them.

2 So I believe they don't necessarily have
3 to be read together. But even if they are, Your
4 Honor, our interpretation harmonizes these
5 provisions, which is another rule of statutory
6 regulatory construction; whereas, theirs does not do
7 that. It does not harmonize. Instead, it actually
8 pits those regulations against one another in
9 conflict. Our interpretation harmonizes them, and
10 here's why: The definition of livestock in Part
11 222, dealing with what animals is the Forest Service
12 going to authorize to be there under a grazing
13 permit. It says, "Livestock means animals of any
14 kind kept or raised for use or pleasure." This is
15 the phrase, of course, that is operative, "any kind
16 kept or raised for use or pleasure." The focus of
17 this definition is on the kind of animal, not
18 individual status -- the individual status of an
19 individual animal or an individual group of animals.

20 So, in other words, this is what the
21 Government's interpretation of livestock does. It's
22 impermissible because it reads out that phrase, "any
23 kind." Again, this is the definition as it actually
24 reads. I've highlighted "any kind kept or raised
25 for use or pleasure."

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1 This is what the Government's
2 interpretation does. "Livestock means animals kept
3 or raised for use or pleasure." They completely
4 eliminate "any kind."

5 THE COURT: How do you get that? I
6 haven't seen them running away from the word "any
7 kind." How are you -- where are you getting that
8 argument from?

9 MR. McGUIRE: Well, their construction is
10 that the only animals that can be livestock are
11 animals who -- if you look at a particular animal,
12 that animal is kept or raised for use or pleasure.
13 That's their argument.

14 THE COURT: All I understand "any kind"
15 means it includes pigs; includes, goats. So I don't
16 think they're reading it out.

17 MR. McGUIRE: Well, Your Honor, the way
18 that we're reading this is we believe when the
19 regulation says, "any kind," it's talking about the
20 kind of animal being kept or raised for use or
21 pleasure. So, in other words, kept or raised for
22 use or pleasure is -- again, it goes to what type of
23 animal are we talking about? Not an individual
24 animal.

25 And let me demonstrate this just through

1 even the next few slides. Here's an example. These
2 are animals that are livestock under any common
3 definition, including the definition we have here:

4 Cattle, sheep, goats. Those are livestock.

5 Here are animals that are not livestock:
6 Zebras, moose, giraffes, antelope, elephants. These
7 are not animals that are livestock.

8 And this is the important part, Your
9 Honor: The Forest Service does not perform a
10 case-by-case assessment of whether a particular
11 animal or a group of animals are kept or raised for
12 use or pleasure, and thus are livestock.

13 THE COURT: But we don't have zebras down
14 there.

15 MR. McGUIRE: You're right.

16 THE COURT: I don't understand your
17 argument.

18 MR. McGUIRE: I'm going to put it together
19 right here.

20 THE COURT: Well, you've got a picture of
21 a zebra. Tell me how that's relevant to what we're
22 doing here.

23 MR. McGUIRE: How that's relevant, Your
24 Honor, is that the Forest Service, with respect to
25 the Gila cattle, are trying to say those individual

1 cattle, that individual group of cattle, again, that
2 started at 200, now it's down to 20, but whatever
3 group it was, they're somehow different than every
4 other modern cattle species.

5 THE COURT: I think you're conflating some
6 arguments. I mean, they may have some alternative
7 arguments, but their consistent argument on this
8 regulation, I think you're -- I don't know where
9 you're going with this.

10 MR. McGUIRE: Again, Your Honor, they're
11 trying to apply special treatment and a special
12 interpretation of this definition to the Gila
13 cattle. They're trying to individually analyze are
14 the Gila cattle individually kept or raised for use
15 or pleasure? And because this individual group of
16 cattle is allegedly not kept or raised for use or
17 pleasure, they're not livestock. That is their
18 argument.

19 And what the point of this is to say, the
20 Forest Service doesn't do that with any other group
21 of animals. So if Mr. Shirley were to come --

22 THE COURT: Are zebras a real problem out
23 there?

24 MR. McGUIRE: No, Your Honor.

25 THE COURT: But I mean, seriously, I mean,

1 just because they don't do it to other animals, I
2 don't guess I understand what the argument is.

3 MR. MCGUIRE: Well, what it really shows,
4 Your Honor, again, this is a one-time interpretation
5 that the Government is trying to enforce here.

6 THE COURT: What other animal should they
7 be doing this with?

8 MR. MCGUIRE: Well, Your Honor, I'm sorry,
9 we're talking about in a grazing context.

10 THE COURT: You're the one that has zebras
11 on your pictures. So tell me if you're criticizing
12 them for applying it to cattle, what other animals
13 do you want them to apply it to?

14 MR. MCGUIRE: We don't, Your Honor. We're
15 saying they don't. That's the whole point. They
16 are implying an interpretation of this definition of
17 livestock to the Gila cattle that they do not apply
18 to any other animals.

19 The point is that, if Mr. Shirley came to
20 the Forest Service and said: I have a herd of
21 zebras that I have kept and raised for use or
22 pleasure. I have trained them, I have managed them.
23 They are, by all means, domesticated by me. I
24 control them. I would like a grazing permit for
25 these animals, for these zebras, the Forest Service

1 would never issue that permit, because they would
2 claim that zebras are not of the kind that are kept
3 or raised for use or pleasure. They're not
4 performing individual analysis of Mr. Shirley's
5 zebras to determine whether they are individually
6 kept or raised for use or pleasure.

7 And the point of this, Your Honor, is not
8 to say that there is a problem between wild zebras
9 in the Gila Forest. The point is to say that this
10 is, again, they're treating the Gila cattle
11 differently. They're applying a selective
12 interpretation of this definition to the Gila cattle
13 that they have never and would never apply to any
14 other group of animals. That is the point, Your
15 Honor.

16 THE COURT: Well, why wouldn't they apply
17 it to wild horses?

18 MR. McGUIRE: Well, wild horses are a
19 separate group that is also specifically addressed
20 by a separate statute passed by Congress.

21 THE COURT: Well, what about pigs?

22 MR. McGUIRE: Pigs are also addressed by a
23 specific authorization of Congress to remove pigs
24 from National Forest Service lands. So there is
25 separate statutory authority for both of those

1 categories of animals.

2 But the Forest Service, again, has never,
3 throughout the country as far as I understand, has
4 never taken the position that a certain group of
5 sheep or goats are somehow not livestock because
6 they are not individually owned or kept or raised,
7 at least as a particular group.

8 And so they are applying a disparate
9 treatment to this particular group of cattle for a
10 litigation advantage that we'll get to in a moment.
11 But this is a selective definition. So it's not --
12 again, like I said, it's not that there is a problem
13 with wild elephants out in the Gila Forest. But
14 they're applying this definition when they'd never
15 apply this to any other animal, especially in the
16 context of grazing permits.

17 So the essence of the Forest Service's
18 argument here is that: We can determine whether an
19 animal is livestock by whether it's owned or
20 unowned, managed or unmanaged in some way. And so
21 we go back to this photograph, the blurry
22 photograph, as Your Honor has rightly identified, of
23 the cattle that are in the wilderness in the area
24 that the Forest Service is trying to remove these
25 cattle.

1 And here's the point: They have created a
2 framework with this idea of ownership, you know,
3 whether they're owned or unowned, an impossible
4 framework they've created, because the Forest
5 Service can't determine ownership without physically
6 impounding the animal and inspecting it.

7 As we said, branding is not the only way
8 that owned cattle can be determined. But even if
9 you do have a brand, a brand can't be observed
10 across a field. Oftentimes, especially given that
11 we're talking about February, my understanding is
12 that the coat, the hair on the animal is very thick
13 for the winter. And so it's almost impossible to
14 actually observe a brand without running your
15 fingers across the animal to find the actual brand
16 scar. So that's, oftentimes, how these brand
17 inspectors have to identify owned cattle. So you
18 certainly can't, from a distance, identify whether
19 these animals are owned or unowned.

20 And the important point as well, Your
21 Honor, is that the Government, neither in the
22 decision memo or in any other materials, has
23 identified any actual way in which they plan to
24 distinguish between owned and unowned cattle when
25 they're shooting them.

1 And so, Your Honor, this is a visual of
2 hypothetically what an APHIS sniper or marksman from
3 a helicopter would be looking at, an aerial view of
4 a cow that they're about to shoot. It is impossible
5 for the Forest Service or APHIS to determine
6 ownership over a particular animal from a
7 helicopter.

8 So, Your Honor, we have those arguments
9 with respect to the actual interpretation of the
10 regulations.

11 The other aspect here is that the Forest
12 Service's position, their interpretation of
13 livestock, of unauthorized livestock, and whether
14 the Gila cattle are even cattle, this is a
15 convenient litigation position, not a good faith
16 interpretation of this regulation. And in Kisor,
17 the Supreme Court expressly said the deference,
18 which if the Court finds that this regulation is
19 subject to multiple reasonable interpretations --
20 which we do not believe that -- but if the Court
21 were to conclude that, deference is not appropriate
22 here. So the Government's interpretation, because
23 they are taking a litigation position; not, again, a
24 good faith interpretation of the regulation.

25 And here's how we know this: Because this

1 case actually presents a very unique circumstance in
2 which we already had preexisting litigation prior to
3 this interpretation being published. So, as Your
4 Honor is well aware, in 2022, the New Mexico Cattle
5 Growers Association and other petitioners initiated
6 a lawsuit against the Forest Service and other
7 federal respondents in this exact court challenging
8 the aerial shooting in February of 2022.

9 And here's what's important about this:
10 Is that that aerial shooting, in 2022, was conducted
11 under a different decision memo entirely. And that
12 decision memo did not contain any of the
13 interpretations or arguments or justifications that
14 the Forest Service has now issued in the February
15 2023 decision.

16 THE COURT: But isn't it also fair -- and
17 you can correct my memory if it's not correct -- the
18 Cattle Growers didn't make a single argument so far
19 that you made in that response in support of the
20 TRO?

21 MR. MCGUIRE: Your Honor, I do believe
22 they actually challenged the idea that -- the entire
23 basis of that lawsuit to my understanding was that
24 the Forest Service was also still required to follow
25 the exact regulations that we've identified.

1 THE COURT: I don't remember that. I
2 remember them making NEPA arguments. But we can go
3 back and look.

4 MR. McGUIRE: Your Honor, I'm almost
5 certain that my clients asserted that argument
6 regarding the Administrative Procedure Act, and the
7 failure to follow that regulation is a violation of
8 the APA. So this issue was litigated in that case,
9 at least through the initial injunction stage.

10 Now, several months afterward -- and this
11 is what ended up happening -- the parties reached a
12 stipulation of dismissal, in which the Forest
13 Service stated, "No further operations are planned
14 or shall be pursued under the September 11, 2020
15 decision memo." And that was the basis of
16 practically saying: This is moot; we're not going
17 to go forward under this decision memo anymore.

18 But this is what I want to note is that
19 the February 2023 decision memo is a position for
20 the purpose of litigation, because less than five
21 months after dismissing that lawsuit, the Forest
22 Service issued their new scoping notice, intending
23 to take the exact same action as under the prior
24 decision memo.

25 So here, we have a situation which we know

1 that the Forest Service, because they'd already been
2 sued, they already knew generally the arguments that
3 the Cattle Growers and Mr. Shirley were going to
4 make. And just dismissing the lawsuit by claiming
5 it was moot and issuing a new decision memo, and now
6 they've tailored their response, their
7 interpretation to these regulations to meet those
8 exact objections of the petitioners in that case,
9 which are the same -- largely the same petitioners
10 here.

11 So, as we said, these are the new
12 interpretations that were found in the 2023 decision
13 memo and that they're making in this lawsuit. The
14 Gila cattle are not unauthorized livestock. The
15 Gila cattle are not cattle. And the Gila cattle are
16 not livestock under Part 222. These are all
17 brand-new arguments that have been made in this
18 lawsuit, and were made in the decision memo, in
19 2023, that were not included in the prior decision
20 memo that supposedly justified that aerial shooting.

21 And so, very rarely do we actually have,
22 again, a situation in which we know that a
23 particular agency is taking action or undertaking a
24 particular interpretation to bolster a litigation
25 position. But here we know that it is, because of

1 the timing and because we know that they were
2 already previously sued under effectively the same
3 reasons.

4 So the decision memo is not entitled to
5 any deference -- to the extent we even get there,
6 it's not entitled to any deference whatsoever by
7 this Court, because it is a litigation position
8 meant to defend a previous aerial shooting, as well
9 as the ongoing aerial shootings, which falls within
10 one of these exceptions to deference identified by
11 the Supreme Court in Kisor.

12 Lastly, Your Honor, we would mention just
13 a couple evidentiary points that I think are
14 important to note here. Under the APA, an agency
15 decision must be supported by substantial evidence.
16 That's the standard from the Tenth Circuit. And
17 other courts, of course, have analyzed this. There
18 is no substantial evidence of certain things that
19 are critical in this case.

20 One of the issues that I think has been
21 raised -- we need to raise it now, because it's been
22 revealed after all the briefing was completed --
23 there is a significant question as to how many
24 cattle were present in the Gila wilderness, and
25 currently are present in the Gila wilderness.

1 Right now, again after all the briefing
2 was done, the Government has now conceded that they
3 estimate only 10 to 20 of these cattle are remaining
4 in the wilderness. But they've provided vastly
5 different estimates and numbers leading up to the
6 decision memo at issue in this case. So, for
7 instance, the original decision memo, from September
8 2020, estimated about 200 cattle in the Gila
9 Wilderness. Well, after they undertook those aerial
10 shooting operations, they killed 65 cattle in
11 February 2022. Well, that would give us at a
12 minimum somewhere around 145 cattle left.

13 So now, the decision memo, in February
14 2023, now modifies it to say it's 50 to 150. I
15 mean, that's a pretty big range. But now it's 50 to
16 150. I don't know how you get 50 after previously
17 estimating 200 and only having 65 killed, but that's
18 the estimate they provided.

19 Well, now, after the most recent aerial
20 shooting, they have 19 cattle killed in February of
21 2023. And now the estimate that the Government is
22 offering is 10 to 20 animals. And, Your Honor, no
23 one really, apparently, knows how many cattle are
24 out there. But what we do know is that the
25 estimates and the numbers here are entirely out of

1 whack. They're entirely -- what appears to be
2 speculative entirely. And in some ways we think
3 that the number of cattle that were, at least
4 initially represented to be out there, could have
5 been exaggerated to emphasize the urgency of taking
6 this action.

7 That issue was, of course, relevant to
8 both the arbitrary and capricious nature of the
9 action, especially if it's taken without substantial
10 evidence. It's also relevant to the NEPA arguments
11 this Ms. Blome will present to the Court. But that
12 just calls into question the entire analysis here,
13 when all the different estimates have changed
14 significantly, and don't match up with the actual
15 result of these aerial shootings.

16 The other issue here is that there is no
17 evidence, no substantial evidence particularly, of
18 widespread environmental damage caused by the Gila
19 cattle. And here's why: Because what is in the
20 Administrative Record are cherry-picked photographs
21 and observations that don't reflect the level of
22 damage that is conclusorily claimed by the Forest
23 Service and by the Intervenor.

24 So, for instance, we only have
25 approximately 50 photographs, 50 in the entire

1 Administrative Record. These are some of the
2 photographs, Your Honor. I know they're not too
3 large, but here are some of the photographs that
4 allegedly show damage to riparian areas in the Gila
5 Wilderness. These are two of the only photographs
6 that actually show that. The wilderness comprises
7 559,000 acres. And all the Forest Service and CBD
8 could come up with is 50 photographs. And most of
9 those aren't even showing damage to riparian areas.
10 Again, we've included two of the worst photos that
11 allegedly show that, just to show that that's it.

12 And the Gila River runs for miles through
13 the wilderness. So out of miles of riverbank, they
14 could only present a couple photographs supposedly
15 justifying this action. That's not the substantial
16 evidence required under the APA to take this action.

17 There is also no evidence of cattle
18 tracks. So for instance, Your Honor, this very top
19 photograph that has all the mud by the riverbank,
20 you'd expect that anyone who is actually undertaking
21 a legitimate scientific inquiry into whether that
22 alleged damage right there was caused by cattle,
23 would take a picture of the actual hoofprint of the
24 track and compare it to a cow. Is that the
25 hoofprint of a cow or is it a hoofprint of other

1 wildlife which exists in the wilderness, such as
2 elk? And most likely, these tracks actually are
3 caused by elk, especially around the riparian areas.
4 And that consideration was not sufficiently
5 identified, it was not sufficiently considered or
6 presented in the Administrative Record, sufficient
7 to support the substantial evidence requirement that
8 the Government was required to show.

9 And then, we also -- we supplemented the
10 Administrative Record, in part, Your Honor, with a
11 technical reference document from the Forest Service
12 that actually describes how the Forest Service
13 ordinarily goes about assessing riparian damage. If
14 we're going to claim that there has been this
15 massive amount of riparian damage, we should at
16 least have some guiding document or principles that
17 show that. Nothing in the Administrative Record
18 shows that they followed those procedures
19 whatsoever. If we're -- again, when we're talking
20 about environmental damage, it should be somewhat
21 linked to a scientific method, to have some sort of
22 controlled assessment, controlled conditions,
23 observations. None of that is in the Administrative
24 Record. So we also believe there is a problem with
25 even the substantial evidence component of the

1 action for purposes of the Administrative Procedures
2 Act.

3 So, Your Honor, that concludes the formal
4 preparation there. But the last thing, if I may add
5 before I accept any questions you have, Your Honor,
6 would be: My clients are trying to get the
7 Government to follow their own regulations. And the
8 Government has been following these exact
9 regulations for decades. And that, of course, for
10 whatever reason -- you can speculate as to maybe
11 political reasons involved -- but for whatever
12 reason they decide to flip that on a dime, flip all
13 of their established processes, interpretations on
14 their head, and say: We're going to now take this
15 other drastic action to kill these cattle in the
16 wilderness. And by doing so, not only were they
17 completely jettisoning their own regulations, but
18 they also up-ended my clients' reasonable
19 expectations and reliance on the Forest Service's
20 past practice and interpretation.

21 The essence of the arbitrary and
22 capricious standard, Your Honor, under the
23 Administrative Procedures Act, goes to that concept.
24 Is the Government taking some action that is wildly
25 inconsistent, is wildly arbitrary? And here, when

1 you have a pattern and a practice, an established
2 interpretation over several decades that is
3 completely flipped on its head, that is the
4 definition of arbitrary and capricious under the
5 Administrative Procedures Act.

6 We'd ask the Court to find this action is
7 unlawful and issue a permanent injunction to stop it
8 going forward, Your Honor.

9 THE COURT: How long does a cow live?

10 MR. MCGUIRE: Twelve years, is that right,
11 approximately? You can talk. Excuse me, Your
12 Honor. Your Honor, according to one of my clients a
13 cow lives approximately 12 years in those
14 environments. I think in a ranching environment,
15 where they're cared for by ranchers more on a
16 day-to-day basis, they may live longer.

17 THE COURT: I mean, would it make sense to
18 treat them as unauthorized livestock for the
19 original cows, but for the descendents, they would
20 not be?

21 MR. MCGUIRE: Your Honor, all I can say to
22 that is that the Forest Service believes that the
23 progeny --

24 THE COURT: But at the beginning it might
25 have made sense to treat them as somebody's cows,

1 and they were trying to get them out. But as time
2 went on, they're not anybody's cows, and they don't
3 need to be in there.

4 MR. McGUIRE: I should say this, Your
5 Honor: No one, again, is disputing that the Gila
6 cattle should be removed from the forest. That's
7 actually not the dispute at all. The dispute is:
8 If you're going to remove them, what method must you
9 take? When I say "must you," must the Forest
10 Service. And our position is that the Forest
11 Service already has established regulations that
12 governs that process. They should be required to
13 follow that process.

14 THE COURT: All right. Anything else, Mr.
15 McGuire?

16 MR. McGUIRE: Not at this time, Your
17 Honor.

18 THE COURT: Thank you, Mr. McGuire.
19 Ms. Blome, are you going to argue the
20 NEPA?

21 MR. BLOOM: Yes, Your Honor. Thank you.
22 May it please the Court?

23 THE COURT: Ms. Blome.

24 MS. BLOME: Following on Mr. McGuire's,
25 you know, statement at the end of his argument that

1 no one is arguing these cattle shouldn't be removed
2 from the Gila, I think that plays an important role
3 in assessing the adequacy of the minimum
4 requirements analysis that the Government undertook
5 in order to justify the use of helicopters in the
6 wilderness.

7 Both the Government and the intervenors
8 spend nearly all of their responsive briefing
9 arguing that the decision memo and records support a
10 finding that the removal of unauthorized livestock
11 from the Gila is necessary to preserve area. And
12 that may be. That's not what's at issue in the case
13 here. This case is about whether removal by aerial
14 shooting is necessary under the National
15 Environmental Policy Act and the Wilderness Act.

16 The plaintiffs specifically challenge the
17 Government's decision to shoot the cattle from
18 helicopters in a wilderness area, rather than use
19 the more humane, environmentally protective and
20 wholly applicable impoundment regulation. Because
21 it focuses almost exclusively on the necessity of
22 removal, as opposed to the method of removal, the
23 Government simply has failed to demonstrate that its
24 decision to use helicopters within the wilderness
25 area was necessary, as required by the Wilderness

1 Act's restriction on the use of motor vehicles,
2 motorized equipment, and helicopters.

3 Now, I know the Government is going to
4 respond, because they've already alluded to the fact
5 that they represent in their minimum requirements
6 analysis that they will not be landing helicopters
7 in the wilderness except as in emergencies. But I
8 think that that's a distinction without meaning,
9 when we're discussing the type of activity that's
10 contemplated here. The Government has, and proposes
11 to continue to fly the helicopter in a low-lying
12 manner, close enough to these feral cattle and to
13 the wildlife and to the ecosystem to be able to aim
14 and shoot them multiple times.

15 In After Action Reports they have, in
16 fact, indicated that it takes four, five, six shots,
17 and that the helicopter circle over these animals.
18 I can't imagine something more aligned or close to
19 landing a helicopter in a wilderness in terms of its
20 disruption, its length, and their reasons for the
21 prohibition on the first place.

22 In addition to the use of the helicopters,
23 the Government has violated NEPA, because the aerial
24 shooting of living animals in wilderness does not
25 fall within any categorical exclusion and will

1 clearly have significant impacts on the environment,
2 due to the extraordinary circumstances using
3 helicopter in wilderness. In fact, one of the
4 extraordinary circumstances, which I'll address
5 later, applies just to activities that occur in
6 wilderness, period.

7 And finally -- and I won't go into this
8 very much -- but as explained by my co-counsel, the
9 Government's recent admission that they woefully
10 misestimated the number of the Gila cattle in the
11 wilderness further underscores the weakness and
12 unreliability of the project rationale in total.
13 The cursory impact analysis and purported necessity
14 findings for the use of these helicopters in
15 wilderness, they simply cannot address the
16 adequate -- I'm sorry, the environmental impacts
17 adequately if they don't have an accurate count of
18 how many animals were in the wilderness.

19 So turning first to the Wilderness Act
20 prohibition on helicopters. To protect the natural
21 condition of wilderness, like the Gila Wilderness,
22 Congress has expressly prohibited certain activities
23 that are antithetical to wilderness character,
24 including the landing of any aircraft, and the use
25 of any motor vehicle motorized equipment, which

1 surely, a low-flying helicopter comports with a
2 motorized equipment, or motorboat, unless it's
3 necessary to meet the minimum requirements of the
4 administration of the area for the purposes of the
5 act.

6 Courts have construed this necessity
7 element very narrowly. And moreover, to constitute,
8 quote, "administration of the area, the activity
9 must further the wilderness character of the area.
10 The wilderness in contrast with those areas where
11 man and his own works dominate the landscape is
12 recognized as an area where the earth and its
13 community of life are untrammelled by man." I read
14 that quote earlier during the standing argument
15 about the fact that it would be a rare circumstance,
16 when helicopters could be used in wilderness to
17 support a necessity finding. And most of those
18 cases, upon analysis, are related to human health
19 and safety, whether it be training in order to
20 safely and humanely teach the BLM's staff to be able
21 to do search and rescue operations in rugged
22 wilderness, or conduct research and collaring
23 activities on wolves for a very short duration, in
24 order to ensure that collared animals are being
25 correctly monitored for recovery, but also not

1 causing harm and injury to humans in the wilderness.

2 We don't have any such allegation here.

3 In fact, the Government, through its representation
4 that the actual aerial shooting operation was
5 categorically excluded from NEPA as a public safety
6 cause.

7 So while the helicopters have been allowed
8 in those limited circumstances, there is no -- there
9 is no finding -- there is no appropriate finding
10 here. In fact, if the Court looks at the minimum
11 requirement analysis closely -- and we have cited
12 several provisions from that analysis -- all it does
13 is discuss the ways in which helicopters will affect
14 the wilderness. But it doesn't explain why that
15 helicopter use is necessary as the least difficult
16 or harmful alternative to just following the
17 impoundment regulation.

18 And I think the Government is going to
19 have a response to this, and they will say that we
20 can't round them up. We can't round them up
21 anymore. And the 200-plus that we rounded up prior
22 is clear evidence that we can't round up this last
23 10. And I think that's absurd. If they were able
24 to round up more than 200 animals over 20 years,
25 surely they can gather these last 10 without using

1 helicopters in wilderness.

2 So the second point under NEPA that I want
3 to make in argument today, is that extraordinary
4 circumstances exist here as a matter of law. So
5 when an agency decides that a categorical exclusion
6 applies to require a NEPA analysis, it must also
7 determine whether any extraordinary circumstances
8 are present that would otherwise cause that normally
9 excluded action to have a significant effect. Some
10 per se extraordinary circumstances include that
11 there are federally protected species or habitat in
12 the area; that the area is comprised of floodplains
13 or wetlands; and third, that the area is designated
14 wilderness.

15 You know, we present argument in our
16 briefing, and I'm trying to be kind of brief this
17 morning, because I know we've gone a long time. But
18 there are federally protected species or habitat in
19 the area. And obviously, the Gila River qualifies
20 as a area, a riparian corridor where there might be
21 floodplains and wetlands. But critically, this is
22 designated wilderness. And so categorial exclusions
23 should not apply to projects that are proposed in
24 designated wilderness. The Government hasn't
25 presented justification for why they didn't perform

1 an environmental assessment at a minimum, analyzing
2 what impacts their proposed project might have on
3 the wilderness.

4 So finally, even if the extraordinary
5 circumstances don't exist, and the Court finds that
6 the respondents properly invoked categorical
7 exclusions bypassing that analysis, we submit that
8 the categorical exclusions that have been identified
9 do not apply.

10 As mentioned, they have seemingly
11 withdrawn their representation that public safety is
12 a reason for not doing an environmental impact
13 analysis of the actual shooting. Everybody appears
14 to agree that that public safety exception applies
15 to the issuance of the closure order for the area.
16 But we disagree, and don't believe that there is
17 substantial evidence in the record or in the actual
18 exclusion language itself to justify aerial gunning
19 as a habitat management activity, or a law
20 enforcement investigation activity into wildlife
21 damage.

22 Here, the Government is alleging that the
23 impoundment regulation, which is the source of any
24 investigatory or criminal or civil sanctions,
25 doesn't apply. So it's sort of backward to suggest

1 that that could also be a foundation for
2 investigating these crimes, and then not conducting
3 a NEPA analysis.

4 And then finally, APHIS comes in and says
5 that the aerial shooting of cattle in wilderness or
6 the aerial shooting of any animal in wilderness is a
7 routine measure. I think it's absurd to suggest
8 that it's a routine measure. There is litigation
9 over it all the time. In this specific case there
10 is extraordinary controversy over the act. The
11 Governor has weighed in, several representatives
12 from Congress have weighed in. The New Mexico Land
13 Board has weighed in. If it were routine, I don't
14 think anybody would be paying attention.

15 And with that, I'll take questions, Your
16 Honor, or I'll allow Mr. Scholl an opportunity.

17 THE COURT: I don't have any at the
18 present time. Thank you, Ms. Blome.

19 MS. BLOME: Thank you.

20 THE COURT: Mr. Scholl?

21 MR. SCHOLL: Your Honor, I don't have
22 anything to add at this point.

23 THE COURT: All right. Mr. Smith?

24 MR. SMITH: Thank you, Your Honor.

25 It seems like it was not a whole year ago

1 that we were here before, but it's been a year. And
2 on the livestock issue Your Honor issued an opinion
3 that same day that we were here, interpreting the
4 unauthorized livestock definition in conjunction
5 with the livestock definition in Part 222.

6 And, you know, now we've briefed things.
7 We spent a year getting the Administrative Record
8 together and briefing things, and everything points
9 to the accuracy of that decision, that you need to
10 look at the entire context of the regulations to
11 interpret individual pieces of the regulations.

12 I want to start, just as an aside, since
13 plaintiffs -- both counsel raised this issue
14 claiming that the Forest Service's estimate of 50 to
15 150 Gila feral cattle out there at the time of the
16 February 2023 decision memo was somehow grossly
17 inaccurate.

18 First of all, even if it was, to have a
19 claim under the APA, they have to show how that is
20 relevant to the actual decision under the law, you
21 know, what law requires that assessment to be
22 accurate. The livestock, you know, whether these
23 are unauthorized livestock or not under the
24 regulations has nothing to do with whether that
25 number is accurate or not. So it plainly doesn't

1 apply to that claim about the definition of
2 unauthorized livestock.

3 As for NEPA, there is nothing in NEPA that
4 requires that estimate that the agency is preparing
5 to be, you know, accurate in the sense -- if
6 anything, if they underestimated the amount of Gila
7 feral livestock that are out there, then that only
8 means that there is going to be a lot less
9 environmental impact from implementing this
10 decision. So it actually strengthens the notion
11 that this should proceed under a categorical
12 exclusion.

13 But let's get to those numbers.
14 Plaintiffs said the 2020 decision memo said there
15 are approximately 200 head out there. And they
16 recognized that following that, in 2022, that 65
17 head were removed through aerial operations in 2022.
18 But they ignore the fact that at the same time, over
19 that same period, that 70 additional head were
20 removed through ground-based operations. So you
21 have 70, plus 65, so that gets you well down below
22 100, based on doing that kind of calculus alone.

23 And then, from the 50 to 150 that were
24 estimated in the February 2023 decision memo -- so
25 you know, Forest Service said we estimate 50 to

1 150 -- 19 were removed through aerial operations,
2 and another 28 were removed through ground-based
3 operations. That's 47. They now estimate that
4 there is 10 to 20 out there. Again, we emphasize
5 these are estimates. They're going on the best
6 information available, which is the standard for
7 review under the APA and NEPA and all statutes
8 regarding the agencies. There is no threshold
9 amount of substantial evidence, or whatever.

10 Your Honor, I think in your decision on
11 the TRO, you talked about how substantial evidence
12 is really no different than the arbitrary and
13 capricious standard. And the substantial evidence
14 test, as you know, just means more than a scintilla.
15 It doesn't mean there is some massive quantity of
16 evidence that the agency has to have.

17 And here, the agency has the evidence for
18 estimating population size from all the ground
19 gathers, from Forest Service personnel going out
20 there, from reports from the public. So based on
21 that, that's how they compile these numbers. But
22 they're estimates.

23 But they aren't relevant to the underlying
24 legal questions in this case. If anything, if they
25 have a low estimate, it just means less

1 environmental impacts, you know, from the operation,
2 because they'll need to be less operations.

3 THE COURT: Well, what do you do with Ms.
4 Blome's argument that, if we're just down to 20
5 cows, can you drag those out the old-fashioned way?

6 MR. SMITH: Yeah, I mean that's why this
7 case is almost moot, but we can't quite say it is,
8 right. It's moot since their whole focus is on the
9 aerial operations.

10 So, you know, we're here today, instead of
11 last December, because there is only 10 to 20 head
12 estimated to be out there left. And the Forest
13 Service did not think it was necessary to remove
14 them with aerial operations this year. Because the
15 number is low, so they're going to make a hard push
16 to get these remaining cattle out through
17 ground-based operations. So, you know, is the case
18 moot? It's pretty dang close.

19 THE COURT: And why is the Forest Service
20 changing its methods of removing the cattle?

21 MR. SMITH: The ground operations have
22 always been going on coincidentally with the aerial
23 operations. What the history has shown for these
24 decades of ground-based operations alone, is they
25 weren't effective in reducing the population. The

1 population out there was staying stable. So, you
2 know, it was like treading water; you know, the more
3 they would remove them, and then they'd reproduce
4 before they could get back out and remove more.

5 The 70 cows that I mentioned that were
6 removed by ground-based operations during the 2022
7 period, that took over 18 months to do. And at the
8 same time, in two days, APHIS removed 65. So that's
9 what's made the difference here. That's why we're
10 so close. The Forest Service is finally so close to
11 finally eradicating this nuisance population that
12 even plaintiffs have admitted need to be removed
13 from the forest.

14 THE COURT: But is it just the bad press
15 and the controversy, instead of going up and
16 shooting the last 20?

17 MR. SMITH: No. It's a matter of -- I
18 don't want to get into too much technical detail,
19 because this would not be part of the Administrative
20 Record -- but it's a matter of the efficiency and
21 effectiveness of going up and finding, you know, 10
22 to 20 livestock and removing them. I mean, in the
23 end, there is going to be some straggler livestock
24 that are going to be hard for APHIS to find by
25 helicopter. So it's got nothing to do with

1 politics. It has everything to do with pragmatism,
2 and where we are with the operation.

3 So right now, you know, we have to finish
4 that project, or these 10 to 20 are just going to
5 start reproducing again. I mean, they're
6 reproducing right now, right. But get these
7 remaining cows out, and then we'll be done with this
8 matter.

9 But we can't say the case is moot because
10 it could be that, when the ground gatherers go out,
11 they say: Oh, there is five head up in this one
12 canyon. There is no way we can get to them. So
13 maybe the only way at that point would be to resume
14 aerial operations next year. We'll see. I mean,
15 again, it's all speculative. It doesn't seem likely
16 it will happen, as long as we can make this effort
17 to complete this project now.

18 THE COURT: Who are these people that go
19 out and look for the cows? Who are those people?

20 MR. SMITH: Like, who is giving the Forest
21 Service these numbers?

22 THE COURT: Yeah.

23 MR. SMITH: So I mean one of it is Forest
24 Service personnel. So there is a report that we
25 submitted with our response brief that was -- I

1 can't remember exactly their expertise, but one of
2 them had range expertise, and another -- I can't
3 remember if he was a water expert, or whatever,
4 but --

5 THE COURT: Are they contract people?

6 MR. SMITH: No. Those two were Forest
7 Service employees, and they went out and they did a
8 survey of all these areas, and noted all this damage
9 along the areas. You know, some areas were not,
10 others were. And they took the pictures, the blurry
11 picture of those few cows, and some other ones, and
12 the damage.

13 So when plaintiffs say: Oh, you can't
14 tell. I think those are elk tracks. You know,
15 well, our experts who know what they're looking at,
16 who took that picture said: No, this is cow damage.
17 There is cow patties or hooves. I mean, it doesn't
18 even take an expert to tell the difference between
19 cow patties and cow hooves, from elk or whatever
20 plaintiffs are suggesting, based on their
21 interpretation, their attorneys' interpretation.

22 THE COURT: What about their argument -- I
23 know we're moving to the sufficiency of the record a
24 little bit here -- but their argument that there is
25 only 50 pictures, and only a few of them show

1 riparian damage?

2 MR. SMITH: So, I mean, one -- and I'll
3 get to this in a minute -- is the Forest Service
4 doesn't have to establish riparian damage in order
5 to remove these animals. These animals are feral
6 animals, they're exotic animals, and they don't
7 belong there. I mean, even plaintiffs agree they
8 don't belong there.

9 The Forest Service's underlying authority
10 here is the Organic Act of 1905, which requires the
11 Forest Service to "make provision for the protection
12 against destruction by fires and degradations upon
13 the public forests and National Forest, and to make
14 such rules and regulations, and establish such
15 service; i.e., take action, as will ensure the
16 object of such reservations; namely, to regulate the
17 National Forest occupancy and use, and to preserve
18 the forest thereon from destruction." That's the
19 Organic Act. That's the origination act for the
20 Forest Service, and how it's supposed to manage
21 these areas, and that's at 16 USC 551.

22 We cited a ton of Tenth Circuit cases
23 interpreting that duty and obligation. For
24 instance, in City and County of Denver versus
25 Birdland, cited in our brief, 1982, Tenth Circuit

1 case, it says that, "The Organic Act confers on the
2 Forest Service the duty to protect the forest from
3 injury and trespass and the power to condition their
4 use, and prohibit unauthorized uses."

5 And even going all the way back to early
6 Supreme Court decisions interpreting the Organic
7 Act, the Grimaud case from 1911. The Supreme Court
8 in that case said, "The Forest Service is required
9 to make provision to protect the National Forest
10 from degradation and from harmful uses."

11 So the Forest Service -- and I'll get back
12 to this -- this is also in the Tenth Circuit Utah
13 Native Plant Society case -- the Forest Service is
14 not required to wait for damage to occur before
15 taking action. It can take action, as it started to
16 do back in the '90s, and even earlier than that, to
17 try to get these cows out of there before they start
18 causing damage to the forest. But here, we've
19 documented that there has been extensive damage up
20 and down the river.

21 And again, the professional opinion of the
22 Forest Service employees itself is evidence, Your
23 Honor. And that's contained in the Administrative
24 Record. The pictures are evidence. I mean, if we
25 were to produce 500 photos, that makes no

1 difference; we have evidence that the areas were
2 damaged. But, again, that's an irrelevant question,
3 because the mere fact that unregulated, unmanaged
4 cattle use damages riparian areas. I mean, that's,
5 like, well settled in the literature. And that's
6 part of the reason why a lot of the arguments that
7 the Cattle Growers are making here are kind of
8 hurtful to my often defense of cattle grazing
9 against the environmental groups, who happen to be
10 sitting at my table this time. It's well settled
11 that cattle and riparian areas do not mix. And it's
12 well settled that for most of the riparian areas in
13 the southwest on National Forest System lands, there
14 is some sort of exclusion or limitation on the
15 permitted livestock that can go in that area.

16 Here, these livestock aren't being managed
17 at all. There is no one there to control them to
18 keep them out of the riparian areas and cause that
19 damage.

20 So, you know, the areas, you know, the
21 Gila River and the Turkey River are out of
22 attainment for certain criteria, because they're
23 polluted. And a contributing factor to that is the
24 presence of livestock, unregulated livestock that
25 are, one, denuding the area, the vegetation around

1 the side of the rivers, which means that there is
2 less shade on the rivers, and that causes certain
3 problems with the oxidation and how the rivers
4 present themselves. And then also, because the Gila
5 livestock go into the rivers themselves, trample it,
6 make mud, kick up sediment, and also they defecate
7 and urinate in there. So all these concerns about
8 two cows that were in the river after the first
9 aerial operations for two days and then removed, you
10 know, pale in comparison to allowing a population of
11 50 to 200, you know, whatever it is. You know, if
12 we have to stop the aerial operations, and we can't
13 successfully get all the livestock out of there, the
14 injury to the environment from a couple livestock
15 temporarily being in the river pales in comparison
16 to the persistence of hundreds of livestock over
17 decades in these river areas.

18 So would you like me to go through the
19 argument about unauthorized livestock definition?

20 THE COURT: Yeah. I mean, Mr. McGuire has
21 beat you over the head with how long the Forest
22 Service has called these cows unauthorized
23 livestock. How do you deal with that?

24 MR. SMITH: It's largely irrelevant. One,
25 because we're making a plain language, unambiguous

1 interpretation of the regulation, so it doesn't
2 matter whether the Forest Service did that or not.
3 But not once, of all their citations, did the Forest
4 Service show, you know, the Kisor step of showing a
5 reasoned analysis as to why it was calling these
6 animals unauthorized livestock. It just was. And
7 like you said, it had never been challenged with
8 that issue. So, you know, it was forced to take a
9 look at that, and went through, basically, a plain
10 language analysis itself to come up with the result
11 that's before Your Honor, that Your Honor made, you
12 know, in one day at the TRO hearing, which is the
13 same result.

14 Anyway, you know, I go through all this
15 material, and it all points to the exact same
16 direction, that feral animals, like these animals,
17 are not unauthorized livestock for purposes of the
18 regulations. I mean, plaintiffs put up slides: Oh,
19 the Forest Service is arguing that Gila cattle are
20 not cattle. It's, like, we're not arguing that
21 directly. We're arguing that Gila cattle are not
22 cattle for purposes of the regulation. That's how
23 the law works, right? There are lots of terms that
24 are in regulations and statutes that don't mean what
25 they're used for, you know, in common parlance or,

1 you know, when you're not actually looking at the
2 purpose of the regulations and what these
3 regulations are intended to accomplish.

4 So again, just start --

5 THE COURT: Any thoughts about my thought?
6 I may be the only one in the room that has this
7 thought, that it may have made sense to use the
8 impoundment and unauthorized livestock for a few
9 years, because that was really what those first cows
10 were. But over time --

11 MR. SMITH: Yeah.

12 THE COURT: -- but over time they became
13 something else, because they were not somebody's.

14 MR. SMITH: Correct, Your Honor. That is
15 spot on. And one of the cases we discussed -- two
16 of the cases actually -- in our briefs, and I was
17 going to get to this kind of at the end of this
18 argument, but since you asked now, and maybe I'll
19 touch on it later again, are the Wild Forest
20 Observers Association cases out of the State of New
21 Mexico Court of Appeals. The first case by Judge
22 Sutin; the second case by Judge Hanisee. In both
23 those cases it's like a perfectly analogous
24 situation. There is a statute in New Mexico that
25 says, you know -- maybe I should just go to it and

1 start off there.

2 So in the first case, Judge Sutin's case,
3 did involve the Placitas horses, which, you know,
4 you've probably seen as you drive up to Santa Fe.
5 They're often on the side of the road; look like
6 normal horses. I could take pictures of them and
7 say: Hey, look at these. These are horses. Horses
8 are horses. Cattle are cattle because they look
9 like cattle. That tells you nothing, tells you
10 nothing about how to apply the law.

11 So what happened in the -- first, I call
12 them the WHOA cases, W-H-O-A -- the first WHOA case
13 by Judge Sutin, that case involved the New Mexico
14 Livestock Board impounded -- so they were kind of on
15 the opposite side -- they impounded some horses,
16 some of these Placitas horses. The Wild Horse
17 Observers Association sued, and said they don't have
18 the authority to do that. They have to treat these
19 animals differently. They're not livestock. And
20 the Livestock Board in that case, in New Mexico,
21 made exactly the same arguments that plaintiffs are
22 making here: Oh, they're horses. They were
23 domesticated. Those horses were abandoned in the
24 1960s, it's estimated. They were, obviously, a
25 domesticated species. They weren't even here in the

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1 United States prior to them being brought over by
2 Europeans. And they were abandoned in the Placitas
3 area in the 1960s. And since that time, they've
4 been reproducing. I would say those animals have
5 had a lot more human care, because as we all know, a
6 lot of the Placitas neighbors go out and feed those
7 animals. And that's part of the controversy.

8 But that aside, that didn't stop the New
9 Mexico Court of Appeals from saying they were not
10 livestock.

11 So in the Livestock Code, it's statutory
12 in New Mexico, it says, "Animals" -- and this is at
13 New Mexico Statutes Annotated 77-2-1.1. The
14 definition there, which is very similar to the
15 definitions we have before the Court says, "Animals
16 or livestock means all domestic or domesticated
17 animals that are used or raised on a farm or ranch,
18 including the carcasses thereof, and exotic animals
19 in captivity, and includes equines, cattle, sheep,
20 goats, swine, bison, poultry, ostriches, emus,
21 rheas, camelids, and farmed cervidae" -- I think
22 that's elk and deer -- "upon any land in New
23 Mexico."

24 So just like plaintiffs are doing here,
25 New Mexico Livestock Board ordered: Well, under

1 that definition, horses are livestock, because it
2 doesn't put any limits on equines. It just says
3 livestock are equine, right? But there is the other
4 language around it, right, that they have to be
5 domestic or domesticated, and kept, used, or raised
6 on a farm or ranch.

7 So Judge Sutin rejected that argument
8 pretty easily. So what he said was that the term
9 livestock does not include undomesticated, unowned
10 animals, and that the enumerated examples, equine,
11 cattle, goats, sheep of domestic or domesticated
12 animals that are used or raised on a farm or ranch
13 in that provision do not mean all such animals in
14 New Mexico are livestock. I mean, that's exactly
15 the point we're making here. So just because the
16 definition says: Livestock are cattle, sheep,
17 goats, horses, hogs, doesn't mean that all those
18 animals that you could call a cattle, sheep, goat,
19 horse is a livestock under that definition. The
20 same -- it's the exact same kind of language that's
21 at issue here, was before the Court of Appeals in
22 this WHOA decision.

23 And to make its point about the
24 impoundment reg in that case, or statute actually,
25 that required impoundment, required the agency to

1 impound livestock that were out where they're not
2 supposed to be, meaning they were stray. And the
3 Court of Appeals rejected that, that they're not
4 livestock, and therefore, they're not estrays,
5 because these are undomesticated animals, even
6 though they once were domesticated.

7 The Court made the point that like the
8 wild horses, surely the legislature did not intend
9 to require that the board search for the owner,
10 which plaintiffs are trying to require here, of wild
11 animals, including sheep, bison, turkey, deer, elk,
12 and other wild animals that are not domesticated.
13 Impound them; proceed to publish notification of the
14 impoundment; and then proceed to sell them. They
15 said you can't use that notion of something being
16 livestock to force an impoundment on it, because it
17 doesn't make sense in the context of the impoundment
18 reg. The impoundment reg is intended to find the
19 owners of animals.

20 And here, in our case, we know there is no
21 owners of the animals. We're targeting the Gila
22 feral cattle. We're not targeting any other
23 animals. And again, there is no showing that there
24 is any real possibility even of branded animals or
25 owned animals. And plaintiffs kept saying that --

1 counsel -- that the animals may not be branded.
2 It's like, well, that's news to me. I think that
3 you have to have your branded to have ownership of
4 them. Of course, when a calf is firstborn, it's not
5 going to have a brand for a certain period of time.
6 But branded is the mark of ownership, a requirement
7 under New Mexico law.

8 So the court stressed in that case, again,
9 that the governing regs define a wild horse as a
10 feral horse that exists in an untamed state, having
11 returned to a wild state from domestication. These
12 horses aren't out in the wilderness. These horses
13 are right out here next to Placitas, next to the
14 freeway. And they returned to a feral state by
15 themselves, just over the years, because they're not
16 being raised and husbanded by human beings. That's
17 what that means. That's what the own -- New Mexico
18 Livestock Board's own regulations say. Again, a
19 wild horse is a feral horse that exists in an
20 untamed state, having returned to a wild state from
21 domestication.

22 Plaintiffs' argument that: Oh, cattle
23 have been domesticated over thousands of years, that
24 doesn't fly in the face of how these regulations
25 work, and agencies trying to manage animals that are

1 under their jurisdiction.

2 And then again, in the second Wild Horse
3 Observers Association case, Judge Hanisee found
4 that -- these were some horses down in Lincoln
5 County, and again, the issues were a little bit
6 different in the end, but the basic principle that
7 these wild horses, these wild feral horses, were not
8 livestock, even though they're listed in the
9 definition of livestock, Judge Hanisee found that
10 the wild feral horses at issue are not livestock
11 because they are not and were never domesticated,
12 and when there was no record of ownership of the
13 subject horses, nor have they been used or raised as
14 domestic work animals or used or raised as livestock
15 on a farm or ranch.

16 THE COURT: Where did all those horses in
17 Ruidoso come from?

18 MR. SMITH: In Ruidoso? I'm not sure the
19 history, but a lot of the history of horses like
20 that, they have come from the nearby Indian lands.
21 So I think that's how the horses in Placitas are
22 attributed to that.

23 THE COURT: From the Indian lands?

24 MR. SMITH: Yeah. But there is also --

25 THE COURT: But those horses are different

1 than the ones up by Mt. Taylor, right, the
2 Conquistador horses up there?

3 MR. SMITH: Yeah. And that's part of what
4 happens in wild horse cases, because there is a
5 special federal statute, and hence, state statutes
6 requiring that agencies, including the federal
7 government, including the New Mexico Livestock
8 Board, treat those animals differently. You
9 can't -- for instance, that's what these cases were
10 about -- the Livestock Board can't just impound them
11 and then sell them, where they might end up in
12 slaughter, or who knows what else. For the
13 Livestock Board they have to test those animals and
14 figure out their heritage. So that's what the
15 plaintiffs were arguing. In the first WHOA case
16 they're saying, these aren't livestock for purposes
17 of the statute, because they're feral wild horses.
18 And the other underlying statutes treat those
19 animals differently.

20 So again, when you're interpreting -- you
21 know, part of what was important to the New Mexico
22 Court of Appeals Judges was that, when you're
23 interpreting statutes or regulations, you can't end
24 up with an absurd result, which would be impounding
25 animals that have no owner. The whole point of the

1 impoundment process, as plaintiffs say, is to
2 protect property rights. And when the Gila feral
3 cattle have no owner, there is no property rights to
4 protect.

5 So, you know, that's getting to the end of
6 the game here but, you know, when you're looking at
7 the impound reg, it makes no sense for the Forest
8 Service to impound wild animals. Now, the fact that
9 they've done so for 25 years doesn't mean that
10 they're required to do so at all. In fact, in the
11 decision memo plaintiffs cite to various provisions,
12 and how they issued an impoundment notice, and all
13 this shows that they're admitting that they have to
14 do this. They're not admitting they have to do
15 this. Just because they do it, doesn't mean they
16 have to do it. The reason they're not doing it all
17 the time now is because it was failing to reduce the
18 population size.

19 And this kind of goes to this other
20 argument about whether aerial operations is
21 necessary. It's only been the aerial operations
22 that have actually moved this needle. You know,
23 when we were here last February, I was, like, Your
24 Honor, one of the harms to the Government here if
25 you stop this aerial operation, that's going to give

1 the population of what's remaining out there a
2 chance to rebound. And fortunately Your Honor
3 didn't enjoin that. So we were able to go out and
4 get another 19 through aerial operations, and the
5 other 28 through ground-based operations in the
6 entire year since.

7 And also, in this context the regulations
8 have to be read in light of that duty that the
9 Forest Service has under the Organic Act to protect
10 the National Forest. So to read the impoundment reg
11 as preventing the Forest Service from removing these
12 feral animals that are causing damage out in the
13 forest, you know, would be against that duty. And
14 an agency cannot abandon its duty that's required by
15 Congress. So Congress has required this here. And
16 you can't read a regulation saying: You can't take
17 care of this problem because you have this
18 regulation, this impoundment regulation. That's the
19 only thing you can do with these animals. And it
20 hasn't worked after 25 years and \$500,000 of
21 efforts, so you're stuck. You just got to let the
22 wilderness area be destroyed by these animals.

23 So what's the point? You have to
24 interpret the regulations in context of the
25 statutory regime, as well as the surrounding

1 regulations.

2 And it's interesting that in all their
3 arguments plaintiffs always start in a different
4 regulation. They don't start with the impoundment
5 regulation itself. The impoundment regulation is at
6 262.10. And it just says, you know: Unauthorized
7 livestock may be impounded by the Forest Service.
8 Again, they say this is a requirement. The language
9 itself says "may." As we pointed out in our brief,
10 "may" is discretionary. It doesn't say that's the
11 only thing that the agency can do with unauthorized
12 livestock, even if they are unauthorized livestock.

13 So that aside, they start there. There is
14 no definition of unauthorized livestock in the Part
15 262 regs anyway. So they go to 261, which is a
16 different part. In 261, the definition page and
17 provision that they're referring to, says: Under
18 this part -- I'm not sure if I'm quoting it exactly,
19 but it says: Under this part, the following
20 definitions apply, or the following definitions
21 apply to this part. And that's where they're
22 getting their unauthorized livestock definition.

23 And I'm not saying you shouldn't look at
24 that. In fact, I'm saying just the opposite, that
25 you should look at all these things. But under

1 their stringent way of looking at these things,
2 well, 222 is a different part, Your Honor. 262, or
3 the impoundment reg is also a different part than
4 this definition of unauthorized livestock that
5 they're looking at and relying on as conclusive.
6 "Any cattle" is any cattle.

7 THE COURT: You may have just answered the
8 question I was about to ask, but I mean, we are --
9 the criticism of the plaintiffs is that you and I
10 are using a provision that goes to the allotment and
11 the permitting sections, and pulling that definition
12 and bringing it over.

13 MR. SMITH: Right, because -- so
14 originally, when the Organic Act was enacted in
15 1905, and the Forest Service issued its first
16 regulations, some of its first regulations regulated
17 livestock grazing, and they included both the
18 permitting process and the trespass stuff together.
19 The regulations, as you might guess, were a heck of
20 a lot simpler way back then, right? But they
21 were -- you know, you cannot graze -- again, I'm
22 paraphrasing. But the original things were you
23 cannot graze livestock on National Forest System
24 lands without a permit. Back then, there was a lot
25 more open range and things, so it was very important

1 at that time.

2 But all that, you know, in the Supreme
3 Court in the companion Grimaud and like cases upheld
4 the Forest Service's authority to issue those
5 regulations: One, requiring a permit to graze
6 livestock on National Forest System lands; and two,
7 to impose violations, both criminal and civil, for
8 people who did not abide by that. So these
9 regulations originated together as one regulation.
10 And they were together for decades and decades, into
11 the '40s and '50s, if you go back and look at the
12 historical record.

13 The 1977 promulgations were not the first
14 promulgations of these regulations. Those were just
15 updating various provisions. One of them was for
16 FLPMA. But they've always been hand in hand. And
17 eventually, at some point, I think it was the
18 '60s -- maybe earlier -- the Forest Service decided
19 for whatever reason to separate all of its criminal
20 code violations from its say underlying management
21 code. So you separated the range management
22 provisions from the criminal provisions. But if you
23 look at the Part 261 criminal provisions, there is
24 stuff about timber in there, and other kinds of
25 things that you could do that have their own

1 separate section. But all that's doing is just
2 codifying all of the criminal provisions in one
3 place. So that you kind of have the guidance of
4 what is going to constitute a criminal violation in
5 one place. But that doesn't separate the subject
6 matter. The subject matter is still exactly the
7 same.

8 In 222 -- so the 36, 222.3 A. Again,
9 that's in the range management section. The section
10 is actually called, "Grazing and Livestock" --
11 Subpart A, "Grazing and livestock use on National
12 Forest System land." It's actually got that word in
13 there. It's not just range management. It's
14 "Grazing and livestock use." Well, 222.3(a) says,
15 "All grazing and livestock use on National Forest
16 System lands must be authorized by a grazing or
17 livestock use permit." So that's saying you have to
18 have a permit. If you don't have a permit, go see
19 the criminal regulations about unauthorized
20 livestock. You don't have a permit, it's not
21 authorized, it's unauthorized. So the language is
22 intimately related. And the way the regulations
23 work is intimately related.

24 It doesn't matter that they've moved the
25 criminal stuff for all kinds of criminal violations

1 on National Forest System lands to a different part.
2 They're still closely related to the underlying
3 management of those areas, and what you have to get
4 a permit for. And if you don't, you're violating
5 the law. And Judge Fouratt in the Canyon del Buey
6 case that I had before him expressly recognized
7 that.

8 THE COURT: Let's do this, Mr. Smith -- I
9 don't want to rush here, but let's talk about
10 scheduling. We could do a couple of things. We
11 could take a lunch break, break for an hour, and
12 come back and finish up. Or we could take a break
13 for 15 minutes, and work another hour and a half
14 before we take our lunch break. Do you have any
15 preference?

16 MR. SMITH: Personally, I don't mind
17 either way. I don't know how long this is going to
18 take.

19 THE COURT: How about the plaintiffs? Do
20 you have a preference?

21 MR. MCGUIRE: We'll go along with whatever
22 the Court prefers. I think my preference would be
23 to push through, if it's okay with your staff.

24 THE COURT: All right. We'll take a
25 15-minute break, and then we'll push through. If we

1 get to 1:30, though, I've got to take a hard break
2 and break for lunch, because we've got things later
3 in the day. But let's take a 15-minute break and
4 see how it goes.

5 All right. We'll be in recess for 15
6 minutes.

7 (The Court stood in recess.)

8 THE COURT: Mr. Smith, if you wish to
9 continue your argument.

10 MR. SMITH: Thank you, Your Honor.

11 THE COURT: Can I ask a question before we
12 go, it's just something I'll forget to ask. Mr.
13 McGuire, why did y'all put that riparian area
14 management study as one of your attachments? What
15 were you trying to tell me with that?

16 MR. MCGUIRE: May I address you from here,
17 Your Honor?

18 THE COURT: You may.

19 MR. MCGUIRE: The purpose of it was to
20 show that in order to show substantial evidence to
21 meet that threshold in some way the Government has
22 to analyze the issues in a controlled, scientific
23 way here, right? And so that reference guide
24 provides at least some guidance for how to go about
25 assessing riparian damage. The fact is that there

1 is no evidence in the Administrative Record that
2 they actually did that.

3 Instead, what they did, reflected by these
4 50 photographs that are kind of cherry-picked at
5 different points, is pick one spot. So there is
6 damage to riparian area, therefore, it must have
7 been caused by cattle and it must be extensive
8 throughout the wilderness. Whereas, that technical
9 reference really describes all the different ways in
10 which you conduct a controlled assessment, analyzing
11 similar areas, for instance, of the river. So like
12 a river bend is different than a straightaway of the
13 river, in terms of erosion and riparian areas. So
14 you have to make sure you're analyzing the exact
15 same places in the river at different points. There
16 is a controlled process by which that assessment was
17 supposed to be done, and should be done, under their
18 own guidelines, which was not followed.

19 THE COURT: All right. Thank you, Mr.
20 McGuire.

21 All right. Mr. Smith.

22 MR. SMITH: And just on that point, Your
23 Honor, there is no requirement for that. They don't
24 point to any requirement. They just say: Oh,
25 here's a Forest Service technical paper on how they

1 can do this. Right? There is no requirement in the
2 law anywhere. Again, as I said, there doesn't even
3 need to be damage in the first place for the Forest
4 Service to take this action to protect against it.

5 And it's a real dangerous argument that
6 they're making. I mean, Center for Biological
7 Diversity is here. If you were to rule on that in
8 their favor, then God knows there are 150 allotments
9 down on the Gila that aren't going to get grazing
10 authorizations until a primary function study is
11 done of the riparian areas. And that: Oh, they are
12 in good enough shape to allow livestock grazing
13 here. I mean, that is a dangerous argument that
14 they're making for what's a much more common case
15 that I'm dealing with all the time is fighting
16 against these guys: Oh, you have to get better
17 information. And the courts are like, No, they just
18 have to have best available information. You know,
19 they don't have to go out and do some five-year
20 study in order to take an immediate action to
21 prevent further damage to riparian areas.

22 THE COURT: All right.

23 MR. SMITH: So just going back again,
24 quickly, to the analysis of the language in the
25 regulations. In the Miralax from the Tenth Circuit,

1 you know, we're asking for plain language review
2 here, Your Honor. And under that review of an
3 unambiguous reg, the Tenth Circuit said: We must
4 give all defined terms their ordinary meaning, may
5 consult a dictionary to determine the plain meaning
6 of a term, or may also take into account the broader
7 context of the statute or regulation as a whole,
8 when ascertaining the meaning of a particular
9 provision. And if the meaning is plain, it
10 controls.

11 It doesn't matter what the agency has said
12 in the past. It doesn't even matter if they had an
13 interpretation saying that the impoundment reg
14 applies, and they actually had an analysis of it.
15 The plain language controls here, Your Honor. And
16 the plain language is that these regulations of
17 unauthorized livestock impoundment reg does not
18 cover cattle. And plaintiffs argue: Well, we all
19 know what cattle are. It's like, plainly not. You
20 know, if you looked at the analysis done by the WHOA
21 courts, it's like, you know, we all know what horses
22 are. Well, horses aren't necessarily horses for
23 purposes of regulations and statutes. They're not
24 necessarily livestock. So just to say: Oh, it says
25 "any cattle," doesn't mean any cattle. It says any

1 sheep, plaintiffs admit it doesn't mean the wild
2 sheep that were addressed by the Tenth Circuit. It
3 doesn't mean Big Horn sheep. It doesn't mean wild
4 goats and feral hogs, you know. They're removed by
5 aerial gunning operations all the time. Plaintiffs
6 say: Well, there is a statute that calls for that.
7 It's, like, well, that statute is not in these
8 regulations. So you're obviously importing
9 additional stuff in here to determine what's a feral
10 hog, what's not a feral hog? The definition, if all
11 hogs are hogs, then they couldn't follow that
12 provision of the statute without violating the
13 regulation at the same time.

14 So because it's not clear, you look to
15 dictionary definitions that still makes it, you
16 know, a plain language analysis for an unambiguous
17 reg.

18 And it's interesting because the
19 definition of livestock, as we've been talking about
20 in the Part 222.1(b), livestock means "animals of
21 any kind kept or raised for use or pleasure." Well,
22 the definition of livestock in the Merriam Webster's
23 Dictionary dot com, which I assume wasn't around in
24 1977, so there must have been some predecessor to
25 that, but we quote this in our brief. The

1 definition of livestock in Merriam Webster is
2 "animals kept or raised for use or pleasure." It's
3 like verbatim. It doesn't have "of any kind" in it.
4 I can tell you why that "of any kind" is in there.
5 in the promulgation of the regs, it initially didn't
6 have that "of any kind" language in there. And a
7 commenter, or many commenters, or whatever, said:
8 Hey, the Forest Service -- back in the '70s,
9 right -- the Forest Service needs to update these
10 regs to allow the permitting of some animals that
11 are now being used for ranch or other operations.
12 And, specifically, they were talking about bison.
13 So, as you know, Sandia has that nice little herd of
14 bison up there off Tramway. So that's why they put
15 that language in. But because bison can be, you
16 know, domesticated for purposes of these
17 regulations, they can be kept or raised, you know,
18 for meat. You know, you can go all over and get a
19 buffalo burger.

20 And that's why some of those animals are
21 in the New Mexico statute as well. You can
22 domesticate ostriches to a degree. So then, you
23 may -- you know, again, I don't know that the Forest
24 Service has issued permits for some of these
25 animals. I would guess there is some permit

1 somewhere for bison. But I don't know for any of
2 these other animals.

3 So that's the "any kind." But the point
4 is the animals themselves have to be kept or raised.
5 And the Gila feral cattle have never been kept or
6 raised, just like the feral horses in the WHOA cases
7 that the New Mexico Court of Appeals said: You
8 can't apply the definition of livestock to these
9 feral animals.

10 And then, you know, looking at the
11 definition of cattle and the other animals under
12 there, the definition always has the "kept or used"
13 or property language. We lay all this out in our
14 brief, so I'm not going to repeat it here. But that
15 all marries up -- it harmonizes with the
16 interpretation of the regulations, that "any cattle"
17 doesn't mean wild feral cattle. It means cattle
18 that are being kept or raised, that are someone's
19 property.

20 And then, when you look at the adjoining
21 regulations, the regulation that the unauthorized
22 livestock definition is the only part that it's
23 actually in, which is the 261 criminal regs, as Your
24 Honor noted, the 261.7, you know, putting or
25 allowing unauthorized livestock on the National

1 Forest System lands, it's a violation. But that,
2 you know, has a necessary human component to it.
3 It's not the livestock themselves that are violating
4 federal law if they're out there without a permit.
5 Livestock don't get a permit; people do. And if you
6 don't have a permit from 222 section, and you let
7 your livestock on National Forest System lands,
8 where they're not permitted to have them, you're
9 violating the 261 regs. I mean, it's as simple as
10 that. They are as intertwined as any sets of
11 regulations can possibly be. They both cover the
12 same material, the livestock, and how livestock are
13 managed or allowed or not allowed on National Forest
14 System lands.

15 And if you look at all the definitions in
16 the 222.1 part, they all use that same language
17 about being authorized or unauthorized through a
18 permit, or not. And that you have to have a permit
19 to be authorized.

20 And then, when you go to the 261.2
21 definition of unauthorized livestock, it expressly,
22 one, first refers back to the 222 regs with regards
23 to horses. And then with regards to the other
24 animals, it's impliedly referring back to the 222
25 regs. Because it's talking about: An unauthorized

1 livestock is an animal for which you're not
2 permitted to have on the lands that it's occupying,
3 the National Forest System lands that it's
4 occupying.

5 So they're plainly intertwined. Like I
6 said, they were originally always promulgated
7 together, until the Forest Service broke out its
8 criminal regulations, just like for timber and
9 minerals and other land uses. So those are all the
10 same.

11 And then, again, even in the impoundment
12 reg itself, it recognizes two categories of
13 unauthorized livestock for impoundment. And both of
14 those definitions are: If the owner is known, you
15 give five days' notice. If the owner is unknown,
16 you give 15 days' notice before impounding, before
17 starting that process. In both those instances, the
18 implication is that there is an owner, which makes
19 sense, right? The whole purpose of an impoundment
20 regulation and impoundment process is to, you know,
21 remove the animals off the land; try to find the
22 owner. Not once -- I mean, plaintiffs say: Oh, you
23 can't do this unless you impound them, right? They
24 don't know that those animals in the picture weren't
25 owned by anybody.

1 But, again, in the history of this removal
2 project, since the '90s, for decades, the animals
3 that have gone through the impoundment process, and
4 the inspection process, you know, not one of them
5 was found to be owned by anybody. And no owner ever
6 came forth. Just that one animal that the Forest
7 Service actually -- in violation of the impoundment
8 regs, I might add -- returned to its owner prior to
9 going through the next step in the impoundment
10 process.

11 So if you're going to read these
12 regulations as rigidly as plaintiffs are advocating,
13 the Forest Service can't -- let's say it goes out
14 and it sees, you know, John Doe's livestock outside
15 of his or her allotment, under their thing the only
16 thing the Forest Service can do is impound those
17 animals. They can't just, you know, usher those
18 animals back to the allotment. You know, that would
19 be a violation. That's not how the impoundment regs
20 read. The impoundment regs, you've got to take
21 those animals in, that's all you can do. I mean,
22 that's an absurd result, but that's what plaintiffs
23 are promoting here.

24 And then I just want to touch briefly on
25 the Utah Plant Society case by the Tenth Circuit.

1 In that case the animals at issue were some mountain
2 goats. And the State of Utah was releasing them
3 near National Forest System lands. The mountain
4 goats were going on to National Forest System lands,
5 and causing environmental damage. And the
6 plaintiffs sued, the environmental groups, to force
7 the Forest Service to stop the state from doing
8 that. And the Tenth Circuit basically said that
9 once the state relinquished control -- it may have
10 owned those mountain goats -- even though they're
11 generally wild animals, right -- it may have owned
12 those mountain goats while it was holding them in
13 captivity. But once the state released those
14 animals, because they're naturally wild to begin
15 with, right, so once it released them, they were no
16 longer responsible, and thus couldn't be held liable
17 for trespass, because the state no longer owned
18 those animals once they were outside their dominion
19 and control.

20 So that shows that the Tenth Circuit is
21 also, you know, under plaintiffs' thing any goats,
22 any goats are goats. We know they're goats, they're
23 mountain goats. But they say: Oh, well, those are
24 different, because those are wild animals. It's
25 like, exactly, that's our point. That's why the

1 Gila feral cattle are different, because they're
2 wild animals now, too, as the own definition of the
3 New Mexico Livestock Board says; that animals that
4 may have once been domesticated or domestic are no
5 longer domestic over time if no one is husbanding
6 them, just like the horses outside of Placitas.

7 And the other important part of that case
8 is it also recognized the United States' authority,
9 the Forest Service's authority and duty to eradicate
10 animals like that that aren't allowed, and that
11 aren't actually owned by anybody. They can be
12 eradicated by the Forest Service under its Organic
13 Act. And it also references this other New Mexico
14 State Game Commission versus Udall. And what the
15 Tenth Circuit said that the agencies can eliminate
16 animals prior to any serious deterioration of
17 habitat.

18 I mean, here, the substantial evidence by
19 far is that there is substantial damage going on to
20 the riparian areas because of these unregulated,
21 unmanaged, unowned animals down there, you know,
22 running at will, and repopulating at will, and
23 living in the riparian areas, where they often
24 wouldn't be allowed if they were on a Forest Service
25 allotment.

1 I think that's all I have on the
2 unauthorized livestock issue, Your Honor. The
3 bottom line, you have to look at the regulations as
4 a whole. It makes no sense to require the Forest
5 Service to impound animals. It doesn't matter what
6 the Forest Service calls them.

7 I mean, during my moot court yesterday, my
8 APHIS attorney goes, "We'd love that rule where
9 APHIS has wrongly done something over the years, and
10 we go to court and say: Oh, APHIS has been doing
11 this for 10 years under the regulation, so it's got
12 to stand, Your Honor.

13 So, I mean, you know, this time we're on
14 the opposite side of that. But under Auer and
15 Kisor, I mean, there was never any analysis. The
16 first analysis of this regulation was in the -- you
17 know, with regards to Gila feral cattle at least was
18 with regard to the decision memo in 2023.

19 So if you do find it ambiguous, then
20 that's entitled to deference. It's not post hoc
21 rationalization just because they had a prior
22 lawsuit. I don't know that any court has ever held
23 that. I mean, the prior lawsuit may force the
24 agency to actually look at a question, right, they'd
25 be stupid not to, and to give its reasoned analysis

1 of how these regulations actually are supposed to
2 work. And their analysis matches totally up with
3 this plain language analysis that I just provided
4 the Court.

5 THE COURT: I asked Mr. McGuire the same
6 question, but memory was that, in 2022, when we had
7 the TRO hearing, that the Cattle Growers didn't
8 raise this argument about impoundment at that time.
9 My memory was that it was a NEPA argument.

10 MR. SMITH: There was a lot of NEPA, and
11 they were making arguments about Mexican wolves
12 that, you know, they didn't make in lawsuit. But I
13 do believe they had that livestock issue. So we
14 were definitely aware of that going forward.

15 THE COURT: All right.

16 MR. SMITH: On to the NEPA arguments.

17 First off, I want to say that a large part
18 of plaintiffs' argument today, and a bit in their
19 reply brief, is an argument that the Forest Service
20 violated the Wilderness Act when they didn't make a
21 proper finding that using aerial operations was
22 necessary under the Wilderness Act. There is no
23 Wilderness Act claim in this case. So that claim,
24 that argument is not properly before the Court.
25 There is no Wilderness Act claim here.

1 And, as Your Honor knows, NEPA itself is
2 not a substantive statute. So it doesn't matter
3 whether there is a requirement of finding aerial
4 operations are necessary or not in that analysis.
5 All NEPA cares about is the agency looking at the
6 potential environmental impact, including to
7 wilderness, which they did, and we'll get to that in
8 a minute.

9 But I just want to emphasize and object to
10 the plaintiffs trying to inject a Wilderness Act
11 claim, when there has not been one in this case, and
12 there cannot be one now. We haven't briefed that
13 issue up, and it's not properly before the Court.

14 I mean, that said, you know, to the extent
15 Your Honor cares in the minimum requirements
16 analysis the agency properly looked at the proposed
17 action, which was to remove these animals from the
18 wilderness. And the question before the agency is
19 is removing the animals from the wilderness
20 necessary or not? And they found that it was
21 because the animals were degrading wilderness
22 values, degrading the habitat, degrading the habitat
23 for endangered species, and seriously impairing the
24 environment and the wilderness experience for folks
25 who are out there, and you know, people are getting

1 charged by these animals out in the wilderness where
2 they don't belong. So the agency did that, and
3 found that it was necessary for the Forest Service
4 to meet its duty to protect wilderness values by
5 eliminating these wild animals out of the
6 wilderness.

7 And then the second part of the analysis
8 is: Well, what's the minimum required means for
9 doing that, that will accomplish that goal? And it
10 looked at ground gathers alone; it looked at aerial
11 operations; and it looked at building some massive
12 corrals out there and traps that the Cattle Growers
13 have been promoting; and it looked at some other
14 options as well. But it looked mostly at those main
15 three, and it did an analysis of how each of those
16 three would potentially impact wilderness values to
17 remove these animals. And it said that the aerial
18 operation was a minimally intrusive means of doing
19 it because the ground-based operation, which had
20 itself various impacts to the wilderness were not
21 accomplishing the goal, and would allow the
22 environmental harm to last at least several more
23 years, if not longer.

24 So the Forest Service, you know, has this
25 record of trying to remove these cattle through

1 ground gatherers alone for several decades. They're
2 not working, they weren't working. So it makes
3 sense that they brought in this new method of aerial
4 operations, which have been a huge success, and the
5 population is down, almost eradicated. And,
6 hopefully, they can finish that up this year, and
7 we'll see how that goes. But, again, we can't say
8 that they will be completely successful, but
9 hopefully they will, and they won't need to use
10 aerial operations anymore anyway.

11 On their brief argument about the
12 categories, Your Honor, they basically say that:
13 Oh, we don't see how this project gets into the
14 timber stand improvement, and/or wildlife habitat
15 improvement activities. That's the main category
16 that the Forest Service used.

17 The Tenth Circuit, in the Utah
18 Environmental Congress case recognized that as long
19 as a project -- this is the case -- I'm sorry, it's
20 Utah Environmental Congress versus Bosworth, 443
21 F.3d 732, Tenth Circuit, 2006. The Tenth Circuit
22 recognized that if a project falls within
23 quote/unquote "the general confines of the category,
24 that then it's presumed to not have significant
25 effect." It fits in that category. And that any

1 concern that some particular project is a little bit
2 different than what's in the category, will be found
3 out during the extraordinary circumstances review.

4 Along those lines, you know, in trying to
5 impose certain requirements on that category here,
6 like plaintiffs do, the Ninth Circuit in a case we
7 cited in our brief, Mountain Communities, said that
8 the plain language of CE6, this is Category 6 of the
9 regulations does not limit activities -- and this
10 was a tree project -- based on tree age or size.
11 And it allows for timber activities, timber stand
12 improvement activities is focused on the first part,
13 not the wildlife improvement part, as long as --
14 there is only two restrictions, no herbicides and no
15 more than one mile of road constriction.

16 So this project doesn't have any of those.
17 Its goal is to improve wildlife habitat. Plaintiffs
18 say: Well, it's not like the example of girdling
19 trees or thinning trees. But, as the Ninth Circuit
20 said in this case, those examples, again, they
21 provide information, but they're not limiting. And
22 on their face they say: Examples include, but are
23 not limited. And girdling of a tree, of course,
24 Your Honor, would kill that tree, right? That's
25 what girdling is; that's where you ruin the cambium

1 all the way around the circumference of the tree.
2 The tree dies. Why would the Forest Service do that
3 for habitat improvement? It would do that for
4 certain big trees, if there is a shortness of dead
5 standing trees in an area or even long sometimes,
6 which is real important for nesting bird habitat,
7 you know, cavity nesting habitat, and other species.
8 So the Forest Service might girdle trees and kill
9 the big trees, right? As the Ninth Circuit said in
10 Mountain Communities, there is no category about the
11 size of the trees or the acreage that could be
12 applied to. And then same with the thinning part,
13 the Mountain Communities looked at that, and said
14 they can thin, they can remove the biggest trees out
15 there as part of thinning, that's part of the
16 process.

17 So if you look in context, Your Honor,
18 removing the feral cattle is kind of like girdling
19 the tree. It's killing the tree to improve the
20 habitat for the species that are at issue. So it's
21 a fit. The Forest Service has been using this
22 regulation for removing feral animals for a long
23 time. There is no case law on it one way or the
24 other. But it's not some new thing they invented
25 for this project. They've been using it for the

1 removal of feral hogs. And I know of an example in
2 South Carolina, one in Louisiana, and also on the
3 Cibola National Grasslands in Oklahoma and Texas.

4 And as to the APHIS regulation, the APHIS
5 category applies to routine measures, including
6 removals. I mean, it's pretty long, but that in a
7 nutshell are the pertinent language. So it's not
8 the subject of the removals that has to be routine.
9 It's whether the removal measures, it's whether the
10 technique is something new or novel or is it
11 something they've always been doing. And as we
12 pointed out in the record, APHIS removes through
13 aerial operations, including in New Mexico, in
14 wilderness areas, you know, tens of thousands of
15 animals. Just because they don't happen to be feral
16 cattle -- it's mostly feral hogs and coyotes --
17 doesn't mean that the measure is not routine. The
18 measure is shooting feral animals or wild animals
19 from a helicopter, which the APHIS has vast
20 experience with doing.

21 And then, finally, Your Honor, on
22 extraordinary circumstances --

23 THE COURT: Remind me how this fits in.
24 What's the box we're going to?

25 MR. SMITH: So once the agency determines

1 that a project fits within one of the categories.
2 And the Tenth Circuit and Council on Environmental
3 Quality, which is in charge of implementing NEPA,
4 really want these categories to be broad, because
5 they don't want agencies wasting resources on
6 preparing complex environmental documents that
7 take -- you know, can take years, and millions of
8 dollars to complete, and delay action on the ground
9 and gum up things. They want to reserve those
10 documents, environmental impact statements, for
11 truly big projects, and nationwide projects. Like
12 plaintiffs say: Oh, well, APHIS did an EIF for
13 feral hog removal. Yeah, they did, because that
14 feral hog removal was a nationwide project. It was
15 a nationwide program, you know, involving all the
16 states, involving tens of thousands of feral hogs
17 across the country in all kinds of different
18 settings. So, of course, it did an EIF for that.

19 The CE provision is for discrete projects
20 that are very focused in a certain area and a
21 certain number of animals, which we have here. The
22 CQ notice -- I think we quote this in our brief,
23 though, but it says, "The NEPA process encourages
24 agencies to identify CEs using, 'broadly defined
25 criteria,' which characterize types of actions that

1 based on the agency's experience normally do not
2 have significant environmental effects."

3 And the Tenth Circuit, again, in the Utah
4 Environmental Congress case repeated the importance
5 of categorical exclusions for efficiency and
6 promoting agency resiliency, and moving forward with
7 projects, and not getting gummed up in unnecessary
8 environmental review work.

9 This case reminds me a lot about a case I
10 had with you in the late 2000s, Wild Earth Guardians
11 case. In that case, again, this is where I feel
12 like they're making dangerous arguments for what is
13 a much more common situation. And that Wild Earth
14 Guardians case; it's at 668 F.Supp. 2d, 1314. It's
15 a 2009 decision from you. In that case, Your Honor
16 upheld the Forest Service's application of
17 categorical exclusions to 26 livestock grazing
18 allotments. And the amount of grazing -- the amount
19 of head of livestock cow-calf pairs that were being
20 authorized under those 26 permits ranged from 50 to
21 mostly around low hundreds. And, again, you're
22 talking about putting livestock on the landscape for
23 a period of 10 years. So they ranged from 50; most
24 of them were in the low hundreds. But there was a
25 couple over 200, including one that authorized 1,000

1 head of livestock on an allotment. And, Your Honor,
2 under very similar arguments to what plaintiffs are
3 making here about extraordinary circumstances, you
4 know, affirmed the Forest Service's analysis of
5 extraordinary circumstances.

6 So extraordinary circumstances are when a
7 normal excluded action impacts a certain resource.
8 And there is a list of the resources. And one of
9 them is endangered species, and one of them is
10 wilderness areas. But it has to be an impact that's
11 significant; not just any impact. The Tenth Circuit
12 has repeatedly held that mere presence of an
13 extraordinary circumstance does not rise to the
14 level of precluding use of the categorical
15 exclusion. And that's exactly the analysis Your
16 Honor did in that Wild Earth Guardians case, where
17 they were making very similar arguments about how
18 livestock grazing was going to impact endangered
19 species like the Mexican Wolf, the spotted owl, lots
20 of the same fish species that are at issue here.
21 And Your Honor looked at the biological assessment
22 that the agency had done as to these species. And
23 you affirmed that the agency -- it showed that the
24 agency had considered potential impacts on those
25 species. And that their analysis and their

1 assessment was not arbitrary and capricious. It
2 didn't go into great detail about some of the kind
3 of arguments plaintiffs are making here. It's like:
4 Oh, well, what if a cow that's being targeted runs
5 into habitat for the Southwest willow flycatcher? I
6 mean, that's not, like, the level analysis that an
7 agency would ever do, because you can't predict how
8 that is going to happen. And that would again be
9 like a one on one kind of micro thing, when NEPA is
10 looking at the big picture, like, what are the big
11 issues?

12 So the agency, for this case, they did --
13 I think it's a 12-page BA on the Mexican Wolf
14 along -- biological assessment, excuse me. And then
15 they did like a 57-page biological assessment on
16 potential impacts on all these other species,
17 including the Mexican spotted owl, and things like
18 that. So they looked at all these issues.

19 Plaintiffs point out one typo that was in
20 the biological assessment that appeared to say that
21 there were lots of spotted owl protected activity
22 centers in this action area. And it was actually a
23 typo, obviously, because there is only one protected
24 activity center in this area. And the Forest
25 Service addressed that. Because you can look at the

1 maps. I'll just give you the cites, on AR 5688, the
2 5689, those two maps -- the first one shows where
3 all these -- there is a lot of protected activity
4 centers in the Gila Wilderness, but they're outside
5 of this action area. So the Forest Service is not
6 going to come anywhere close -- the APHIS I should
7 say -- is not going to come anywhere close to
8 impacting those areas through any aerial operations.

9 There is only one -- and the Forest
10 Service explained how under the recovery plan for
11 the spotted owl that's produced by the Fish and
12 Wildlife Service, that they'll remain further away
13 than a quarter mile; and actually, in the end, half
14 mile from the protected activity area during
15 breeding season, which is what the recovery plan
16 calls for. Your Honor cited the recovery plans as
17 pertinent evidence in your Wild Earth Guardians
18 decision. And that's exactly the same process that
19 the Forest Service followed here.

20 And then the final issue, I think -- I
21 mean, they make the issue about impacts to water
22 sheds. That one is kind of a no-brainer at this
23 point with the cattle, you know, whatever it is or
24 was at the time of the decision, somewhere between
25 50 and 150 as the record shows, probably somewhere

1 around 70. You know, you have these animals living
2 in and reproducing and destroying the riparian
3 areas, you know, again defecating and urinating in
4 them. You know, people don't drink the water down
5 there not because one or two cows ends up for a
6 couple days in the water when they're killed by
7 aerial operations. They don't drink the water there
8 because there are animals in there. If you're
9 smart, you're not going to go in there and start
10 drinking that water, because there is a population
11 of Gila feral cows upstream. It's the existence of
12 the population that's causing the problem. And the
13 action of the agency is removing that problem.

14 THE COURT: Some of the declarants talked
15 about -- and the plaintiffs' lawyers mentioned it
16 today -- about the dead carcasses and the stench
17 from those. Has the Forest Service gotten the same
18 sort of complaints?

19 MR. SMITH: Not that I'm aware of, no. So
20 I mean, there has been no formal complaints that --
21 I mean, the forest supervisor is back there, and she
22 would know if they got those kind of complaints. I
23 mean, to be honest with you, it sounds like
24 something that's sort of contrived for litigation.
25 But there is no evidence of that on the record or in

1 the Administrative Record.

2 And again, you know, if you have this
3 large population out there, these animals are dying
4 out there anyway. So if you're both ground-based
5 removing them and targeting them lethally through
6 helicopter operations, yeah, you're going to get a
7 concentration of dead animals all at once.

8 But as far as environmental impacts go,
9 you know, with regards to polluting streams and
10 stuff, those animals, if you just let them go for
11 generations and generations, where do you think
12 they're dying? They're not, like, suddenly, boom,
13 gone up to heaven. They're dying out there in the
14 streams, in the rivers, in the riparian areas,
15 wherever they're saying, at least with these
16 projects they won't be dying in the riparian areas,
17 because APHIS is required, after it does its daily
18 hunt to go out and make sure that there is no
19 animals in the riparian areas. And if they are, the
20 Forest Service will go out and remove them within
21 days, as they did before. And there is a term for
22 the tool that they use to do that, Your Honor. I
23 forget what it's called, but it was an interesting
24 term -- when you asked how they got them out in
25 2022, I can't remember what it is, but it's

1 basically like a winch, and they tie it around the
2 tree, and winch the animal out, you know,
3 mechanically, without doing a motor or something
4 that would be offensive to the Wilderness Act.

5 THE COURT: And then move it?

6 MR. SMITH: Move it far enough away, so
7 that it won't have an impact on the water source
8 anymore. And that's what they did, they show in the
9 pictures.

10 THE COURT: They're not taking it out of
11 the forest, they're just moving them?

12 MR. SMITH: No, they can't remove these
13 animals from the forest alive, let alone dead. I
14 mean, that's the same thing that happens during the
15 gathers. I mean, in my opinion, I think I said this
16 at the TRO hearing, shooting these animals from a
17 helicopter for a much quicker death -- and again,
18 there is no evidence that these animals are moving
19 miles and miles. I mean, that's just crazy. There
20 is evidence that an animal was shot near a riparian
21 area and rushed towards that riparian area before it
22 was finally terminated. That's what happened to
23 those two. But no evidence that any animal is
24 getting away from APHIS and wandering around
25 wounded.

1 I forget what we were going to say on --

2 THE COURT: Well, I was asking the
3 question about --

4 MR. SMITH: Oh --

5 THE COURT: -- them being removed.

6 MR. SMITH: Yeah, I was going to say that,
7 you know, during the ground-based operations, you
8 know, more than 50 percent of those animals die.
9 And it's a much more horrific death, right? They
10 die because they're stressed in the move. They die
11 because they run away from the cowboys that are
12 trying to catch them, and they break their leg on a
13 slope, a slope of rocks or something. And then they
14 have to be shot anyway. So, and the ones that make
15 it further are getting all stressed because they're
16 not used to human contact as they're pulled out.
17 And even during auction -- I have reports that some
18 of those animals die because they don't eat.
19 They're just stressed by the human contact and the
20 confinement.

21 So to say that somehow this is less humane
22 than that process, I mean, I beg to differ. I think
23 that this is actually a more humane and more
24 instantaneous -- even if it takes a few shots -- you
25 know, dispatching these animals. They have to be

1 dispatched one way or another. But pulling them out
2 through grand gathers has not been all that
3 successful.

4 On the Wilderness Act issue with regards
5 to extraordinary circumstances, again, the agency
6 did this long analysis in the MRA, which is the
7 minimum requirement analysis, about the potential
8 impacts from these various operations, including
9 aerial operations. And it found out, while the
10 helicopter use would be very severe to impact the
11 wilderness qualities, right, because it is -- it's a
12 loud noise -- but it's short term, right, it's so
13 short term it's not going to be out there more than
14 a few hours during these operations, during the
15 course of a week. I mean, so it's short term. It
16 doesn't have any lasting effects or impacts, and
17 it's gone. So that, you know, sort of by
18 definition, while it's severe, you know, under NEPA
19 you have to look at the context. And the length of
20 time that these impacts occur is so short. And
21 nobody is out there because of the closure order.
22 So that noise impact, you know, affecting the
23 solitude of wilderness is not really impacting
24 anybody when they're not out there because of
25 closure order.

1 So it was reasonable for the Forest
2 Service, based on that detailed analysis, to
3 conclude that the helicopter use would be less
4 intrusive to wilderness values than the ground
5 gathers or building pens and traps for the animals.
6 The other ways that would have to be out there
7 pretty much, you know, for many months each year,
8 and for several years over the long term. So while
9 the immediate impact might be smaller on a
10 minute-by-minute basis, those persist for long
11 periods of time, especially, the option of building
12 corrals and traps.

13 THE COURT: My memory is on the last one,
14 the weather was real bad, and you only got like 16
15 hours or something?

16 MR. SMITH: If even that. Do you know
17 hours? She says that's about right. But they
18 didn't get a lot of opportunity to go up there.

19 So with that, Your Honor, if you have any
20 more questions, I'm happy to --

21 THE COURT: Well, maybe I shouldn't ask
22 this question, but I still am perplexed by why the
23 Cattle Growers are so concerned about this herd.
24 And have probably given some thought. Do they just
25 hate y'all, as the Forest Service, so bad that

1 they --

2 MR. SMITH: I think everybody hates the
3 Government, right? I mean, the environmental groups
4 hate us. The Cattle Growers hate us. I think, if
5 everybody hates us, we must be doing our job right.
6 That's all I can say. I have been unable to figure
7 it out myself.

8 THE COURT: All right. Anything else, Mr.
9 Smith?

10 MR. SMITH: No, Your Honor. Thank you.

11 THE COURT: Thank you, Mr. Smith.

12 Mr. Fink, you're probably here primarily
13 to -- yes?

14 MR. BLOOM: I'm so sorry, Your Honor.
15 It's probably a bit unorthodox, but I'm supposed to
16 be in Miami tomorrow morning at 8:00 a.m., and my
17 flight leaves at 2:00. So I was wondering if I
18 could just make a few brief points in rebuttal out
19 of turn, and then be excused and leave the rest to
20 my co-counsel?

21 THE COURT: Everybody okay with that? Are
22 you all right with that, Mr. Fink?

23 MR. FINK: Yeah, my flight was at 1:30, so
24 I'm dead in the water anyway.

25 THE COURT: Are you still going to try to

1 make it?

2 MR. FINK: No.

3 THE COURT: You sure?

4 MR. FINK: Yes.

5 THE COURT: Go ahead, Ms. Blome.

6 MS. BLOME: Thank you, Your Honor.

7 I just have a few brief points to make.

8 The first is that we did raise the Wilderness Act as
9 an Administrative Procedure Act claim in the second
10 cause of action at paragraph 86, which is at page 21
11 of the complaint. So I just wanted to point that
12 out quickly.

13 We also -- I don't think the
14 miscalculation of the population size is irrelevant.
15 It goes directly to whether or not the use of
16 helicopters in this wilderness area was necessary.

17 The third point I want to make is that the
18 Forest Service made a lot of arguments about
19 categorical exclusions, and application of NEPA, and
20 various types of scenarios where removal actions
21 would actually help the environment. But we aren't
22 in Forest Service lands. We are in a wilderness
23 area that is managed by the Forest Service.

24 So the Forest Service derives its
25 authority from its Organic Act, to be sure. But the

1 Wilderness Act has a cabin on what it can and can't
2 do in the wilderness area. So, once again, we're
3 arguing about the wilderness area and whether or not
4 a categorical exclusion can be used in a wilderness
5 area. And the categorical exclusion rule itself
6 says: No, not if it's in a designated wilderness.

7 And then, the last point I want to make,
8 Your Honor, is -- I mean, I don't know how relevant
9 it is, but I would truly be remiss if I didn't say
10 on behalf of my client, who is listening, that
11 aerial gunning of cattle is not more humane than
12 rounding them up. The helicopter is scary and
13 intrusive. Many of them run and break their legs in
14 that act. And many of them take a lot of bullets
15 before they fall and die. It's not a humane
16 process. A humane euthanasia would be shooting them
17 in the head like they do at the slaughterhouse.

18 If there is no questions, that's all.

19 THE COURT: Thank you, Ms. Blome.

20 So you're flying back to Berkeley? Where
21 are you going?

22 MS. BLOME: I actually have a case in
23 Miami, and I'm taking depositions tomorrow.
24 Manatees.

25 THE COURT: Thank you, Ms. Blome.

1 All right. Mr. Fink, I assume what you
2 want to emphasize with the Court is you spent a lot
3 of your career telling the Forest Service that their
4 records are insufficient, and you're going to tell
5 me, in this case, it's sufficient? That's the power
6 of your presence; right?

7 MR. FINK: I'm going to walk a fine line,
8 Your Honor.

9 I'd first like to say I've been litigating
10 against Mr. Smith for 25 years. And it's nice to be
11 on the same side for a change.

12 THE COURT: Has it happened before?

13 MR. FINK: Maybe once or twice, but
14 rarely. But it has been 25 years. So it's a
15 pleasure to follow him and support his arguments, as
16 opposed to try to pick them apart.

17 THE COURT: I'll let you say what you want
18 to say, but I'm hung up on this huge riparian report
19 that they attached, which has lots of authors from
20 Oregon. Do you know anything about this report that
21 the plaintiffs put in, the riparian report?

22 MR. FINK: I do not.

23 THE COURT: Is it part of the record? Or
24 is it just something that they're using as a
25 standard by which to judge the sufficiency of the

1 record.

2 MR. FINK: It's my understanding it's the
3 latter, Your Honor.

4 THE COURT: Does it apply to -- it seems
5 like everybody in the report was from Oregon. But
6 does it apply to the situation in the Gila?

7 MR. FINK: I certainly don't think it's
8 critical at all to your analysis here, Your Honor.

9 THE COURT: All right. Go ahead, Mr.
10 Fink.

11 MR. FINK: So the plaintiffs say they're
12 all in agreement that they want these feral cattle
13 out of the wilderness area. But they seem to be
14 failing to wrestle with the fundamental issue here,
15 which is that we have 25, 30 years of trying to get
16 the cattle out of there using ground-based controls,
17 and it's just been ineffective, and not able to get
18 the job done.

19 The Center has been working for years to
20 try to get the Forest Service to get the rest of
21 these cattle out of there. And if ground-based
22 could do it by itself, it would have happened by
23 now. They've attempted it, I think, nine times in
24 the last 25 years, and there are still cattle out
25 there.

1 And one thing that's critical to
2 understand is that they all need to come out, or the
3 problem is going to continue. Because, as we've
4 said many times this morning, they reproduce.

5 And the record explains why ground-based
6 by itself has been ineffective by itself. You know,
7 again, these are wild, never domesticated animals
8 that are hard to capture. This is a massive
9 wilderness area. It's remote, rugged. It's
10 dangerous both for the cattle and also the
11 contractors to do the ground-based removals. So if
12 the plaintiffs have their way and ground-based is
13 the only way to go, this problem is not going to get
14 resolved. I mean, 30 years of history shows that.

15 I want to hit briefly on -- the record
16 does support that these feral cows have caused
17 substantial environmental damage to the wilderness
18 area, including -- especially including riparian
19 area. You can really just look at a couple of the
20 documents in the record to get where you need to go.
21 The first is the Watershed and Air Specialist
22 report, which is at AR 5565, which talks about the
23 Forest Service experts going out on the ground to
24 analyze the situation. And they found substantial
25 damage to riparian areas. And that's really all we

1 need here. But that also links back to a more
2 lengthy report that the federal defendants attached
3 to their brief, that they clarified should have been
4 included in the record, which is at 58-2, which is
5 the report -- the more extensive report that that
6 watershed report is based on. But that goes into
7 pretty exhaustive detail about what they found on
8 the ground when, again, the experts from the Forest
9 Service went out there. They found substantial
10 resource damage to the riparian habitat. They found
11 that reproduction is still occurring. And, again,
12 they found no brands or tags observed on the cattle.

13 THE COURT: I think Mr. Smith made the
14 point that, in New Mexico, you have to have your
15 cattle branded. So -- but I've heard both you and
16 the plaintiffs use the word "tags." Can you use
17 both, or what is the significance of tags in this
18 case?

19 MR. FINK: Your Honor, I'll be honest, I
20 probably know less about this than anyone else in
21 the courtroom right now. But I have seen tags on
22 the ears of cows in pictures. So I assume that's
23 what that is referring to. But I would definitely
24 defer to others. I mean, it's another way of
25 showing ownership, I would assume.

1 Another thing referenced in the Forest
2 Service's monitoring report is that the Center for
3 Biological Diversity also goes out and monitors this
4 area. And we provide our monitoring results, along
5 with photographs to the Forest Service annually.
6 And the Forest Service cited that as more supporting
7 information to show the resource damage to the
8 riparian areas.

9 THE COURT: What do you think of the
10 criticism from the plaintiffs that there is just not
11 that many pictures of damage?

12 MR. FINK: We can provide many more
13 pictures, if that's the only problem here. I mean,
14 I honestly think it's a very low threshold, what the
15 Forest Service needs to show here to justify its
16 rationale for why it wants to remove these cattle.
17 Again, we have Forest Service experts, went out on
18 the ground, found resource damage to riparian
19 habitat, including endangered species' habitat,
20 included photographs. The photographs show the
21 damage. That should be enough to justify their
22 decision that they need to remove those cattle, to
23 both protect the wilderness and to help conserve the
24 habitat of these endangered species. The plaintiffs
25 haven't identified any sort of higher threshold that

1 hasn't been met here.

2 The Forest Service further concluded in
3 that report that if the cattle are not removed the
4 problem is going to continue. And that, again,
5 there is going to be further reproduction, and so
6 we're never going to get to the end of this.

7 So, really, what we have is, on one hand,
8 the Forest Service experts finding resource damage,
9 and on the other hand, you know, the cattle industry
10 attorneys saying: Well, maybe it was elk. And here
11 is a place where you would need to defer to the
12 Forest Service experts.

13 The record also fully supports, again,
14 that these cattle are not privately owned, and they
15 are not kept or raised for use or pleasure. Again,
16 this is well documented within the record, and well
17 supported by the Forest Service. And I'm not going
18 to belabor that, because I think we've been around
19 that enough.

20 I would like to just highlight, once
21 again, that in your decision from a year ago I think
22 you reached the key legal conclusion here, that the
23 CFR definition of livestock includes only animals
24 kept or raised for use or pleasure. These Gila
25 cattle are not authorized livestock because, as

1 feral animals, they are not kept or raised for use
2 or pleasure. And that's the key legal conclusion
3 here. And we haven't heard anything here this
4 morning that is persuasive enough to reverse that
5 conclusion. We don't have any evidence, let alone
6 persuasive evidence.

7 I'd like to conclude, as we put forth in
8 our brief, you know, the Endangered Species Act that
9 requires the Forest Service to conserve, which means
10 recover, the endangered species that are in the Gila
11 wilderness. There is the Wilderness Act itself that
12 requires this area to be, you know, untrammelled, and
13 the absence of man's presence. There is the forest
14 plan which requires the protection of this
15 endangered species habitat. There is the Forest
16 Service Organic Act. There are numerous statutes
17 that, our argument would be, that require the Forest
18 Service -- not only authorized them -- but requires
19 them to go out there and do this. So they certainly
20 have the authority under those statutes to do this.

21 And we really urge that they're allowed to
22 finally finish the job after all of these decades,
23 and get the remaining cattle out of there. Because,
24 again, if every last one isn't out of there, they're
25 going to reproduce, and we're going to be back here

1 in a few years arguing over this again.

2 Unless there is any questions, that's all
3 I have.

4 THE COURT: All right. Thank you, Mr.
5 Fink.

6 Mr. Scholl, do you have any remarks you
7 want to make?

8 MR. SCHOLL: No, Your Honor. I'll defer
9 to Mr. McGuire.

10 THE COURT: All right. Mr. McGuire, I'll
11 give you the last word on the subject.

12 MR. MCGUIRE: Yes, Your Honor. Thank you
13 very much, Your Honor, today also for your time. We
14 know it takes a lot of time on your docket. We
15 appreciate it. I'd like to make several points in
16 rebuttal here.

17 The very first one, if we can boil down
18 the Government's position -- as well as I think what
19 Mr. Fink even articulated as well -- their thesis is
20 that the ends justify the means. And that is
21 especially dangerous when we're talking about
22 government power.

23 There is a regulation that they have
24 promulgated and used for 25 years that they say is
25 ineffective. So the answer to them is not to

1 promulgate a new regulation, which would involve the
2 traditional notice and comment period. Instead,
3 it's to just disregard that regulation and say that
4 they can take any action they want, any action they
5 deem necessary, to protect the forest from any
6 threats that they deem, again, necessary and worthy.

7 And that is an exceptionally dangerous
8 standard, Your Honor. That's why we believe that
9 these regulations exist is to provide some sort of
10 framework by which the Forest Service can act, as
11 well as, of course, to provide the public, citizens,
12 with an understanding of what actions their
13 government is going to take.

14 But that's not their view here. Their
15 view is they can do whatever they want. And I
16 think, fundamentally, that's a very dangerous
17 position that the Court should take note of in
18 analyzing the arguments here.

19 You know, references to the Organic Act,
20 that's obviously a fundamental enabling statute.
21 But it really -- that's the launch point for any
22 agency -- here, the Forest Service -- to promulgate
23 regulations to provide processes by which they have
24 to act and so people can understand that. That's
25 just a fundamental aspect of our system of

1 Government. And, again, I find it very troubling
2 for the Government to take the position: We can do
3 whatever we want, which is effectively what they're
4 taking.

5 The second point is: Mr. Smith mentioned
6 that the impoundment regulation says that they "may"
7 impound. Well, that language is true, but only
8 insofar as after they have provided a notice period
9 for people to remove livestock from the Gila Forest,
10 that is when they may impound these unauthorized
11 livestock. In other words, if they are going to do
12 it, clearly the Forest Service has the discretion
13 when, where to remove these unauthorized livestock.
14 That's part of even the fundamental aspect of law
15 enforcement activities generally: A prosecutor has
16 the discretion whether to charge a particular
17 defendant with a crime. They also have the
18 discretion whether they want to remove these cattle.
19 They, obviously, have expressed an intent to do so.

20 Our point is simply -- and I think the
21 regulations and the language therein supports
22 this -- if they are going to take that action, which
23 the action itself may be discretionary -- then there
24 is a particular process that applies. And that is
25 the impoundment regulation in Section 262.10.

1 When we're talking about the plain
2 language of this, Your Honor, I mean -- and the
3 Court may be aware, I'm traditionally a commercial
4 litigator. I do not handle a lot of government
5 litigation cases. I have no problem admitting that.
6 I've been honored to represent the New Mexico Cattle
7 Growers Association and Mr. Shirley in this case.

8 But I deal with, in contractual cases, as
9 I'm sure Your Honor deals with all the time,
10 conflicts of ambiguity. I mean, that's a very
11 standard legal aspect that we encounter all the
12 time. And the similar analysis applies with
13 regulations, as it does with contracts and statutes.

14 The idea here is: Is there more than one
15 reasonable interpretation here as to ambiguity? And
16 Mr. Smith and the Government are taking the
17 extraordinary position that there is only one
18 reading here, and that is that these Gila cattle
19 are, for sure, not unauthorized livestock, and are,
20 for sure, not livestock under Part 222.

21 THE COURT: But under contract law, the
22 principle that, even though both sides have
23 differing interpretations doesn't make the contract
24 ambiguous. That's a basic tenet of contract law.
25 That it's not just because people disagree about

1 what it means, it doesn't make the provision
2 ambiguous. Isn't that the situation I'm faced with?
3 You think it's clear. Mr. Smith thinks it's clear.
4 And we just have to pick a construction. There is
5 nothing particularly ambiguous about anything. It's
6 just that y'all differ about the construction.

7 MR. MCGUIRE: Well, I mean, certainly,
8 there is a disagreement on that fundamentally. And
9 I agree that as a purely legal analysis that does
10 not create the ambiguity. But I do think, at a
11 minimum, what I can tell you is that the language
12 here clearly does not support their view that their
13 view is the only reasonable interpretation, which is
14 what the Court would have to find if the Court
15 doesn't go to an ambiguity analysis. And the reason
16 why it is important, Your Honor, and this is why I'm
17 even addressing this, is because they're trying to
18 sweep under the rug all the -- again, their entire
19 history of utilizing this regulation, the history,
20 and the numerous statements. I think you've
21 characterized as me beating them over the head. I
22 don't mean to do that, but these are their own
23 statements.

24 THE COURT: It's fun to beat people over
25 the head, opposing counsel. That's what we live

1 for, isn't it?

2 MR. McGUIRE: Well, I'll try to do it
3 respectfully, Your Honor. But I do believe in this
4 case it may be warranted. And because we have such
5 an obvious, obvious application of these regulations
6 that they want to -- I understand why they want to
7 run away from them. If I had a client who took a
8 position for 25 years, and tried to change their
9 mind, I would try to run away from that as well.

10 The reason why they're trying to argue,
11 Judge, don't get into ambiguity at all, is because
12 they know, once we're in "ambiguity land," and as
13 I've explained, I don't believe that the
14 circumstances are appropriate for any sort of Auer
15 deference, once we get into ambiguity. The Court is
16 free to look at extrinsic evidence, which would be:
17 How has this regulation been interpreted in the
18 past? How has the Forest Service actually acted in
19 the past? How have they interpreted this in the
20 past?

21 And that undeniably, overwhelmingly, is
22 consistent with our interpretation, with the
23 petitioners' interpretation here. Instead, the only
24 reason why we're here is that they have again
25 changed their interpretation, changed their

1 practice, and manufactured, effectively, an
2 ambiguity, where there was none originally. There
3 was no one ambiguity in the sense of no one disputed
4 that the Gila cattle were unauthorized livestock, or
5 were livestock even, under Section 222. No one
6 disputed that for 30 years.

7 And because that was the correct
8 interpretation, only when -- they admit that they
9 now want to change the process because they want to
10 ignore their regulation, now they come up with a
11 different justification to interpret this
12 regulation.

13 And so that's the reason why, Your Honor,
14 we believe that our interpretation, actually, is the
15 only clear and reasonable interpretation. That's
16 why you shouldn't even get into ambiguity there.

17 But we also believe that, if the Court
18 does think that there are two reasonable
19 constructions here, whether the regulation calls for
20 the animals to be of the kind that are kept or
21 raised for use or pleasure, versus specific animals
22 that have to be kept or raised for use or pleasure,
23 that may be an ambiguity that does push it into the
24 analysis of looking at extrinsic evidence. And, if
25 the Court is there, then, of course, again, also the

1 evidence overwhelmingly supports petitioners'
2 interpretation.

3 I want to address the mountain goat case
4 that Mr. Smith identified, involving the State of
5 Utah. We addressed it briefly in our reply. That
6 case is completely inapposite. It had to do with
7 the idea of tension and a dispute between the State
8 of Utah versus the federal government, as to whether
9 animals could be released into certain federal
10 areas. That said nothing about the nature of
11 animals, or how they should be construed, or whether
12 they are livestock for purposes of any sort of
13 regulation. And it certainly did not involve the
14 removal of those animals, and analyzing the Forest
15 Service authority to do so.

16 Similarly, the wild horse cases Mr. Smith
17 referenced that were addressed, apparently here in
18 the New Mexico State courts, those cases are also
19 completely inapposite, because in those cases, while
20 there was, obviously, a different state law that
21 dealt with livestock, had a different definition of
22 livestock than the definition that's here -- we can
23 go through that if we have to, but I don't think
24 it's important, and here's why: Because you had a
25 definition of livestock, while at the same time you

1 had a definition of wild horses. And so these
2 horses clearly fell into the other definition.
3 That's one of the reasons why they said: Well, we
4 provided two different definitions that would cover
5 these horses. And so, yeah, they're going to fall
6 into wild horses, they're not going to be livestock,
7 even though the definition of livestock had the term
8 "horses." Because you had these two commentary
9 definitions.

10 Here, there are no other definitions in
11 which these cattle would fall. So they haven't
12 offered any other description here, or any other
13 defined term, that would give them, again, the
14 authority, or would somehow take them out of the
15 scope of what is the broad definition of "any
16 cattle" under unauthorized livestock, and livestock
17 that are of the kind that are raised -- that are
18 kept or raised for use or pleasure.

19 And then lastly, Your Honor, to address
20 the question that you asked earlier, you asked me:
21 What was the authority for the State of New Mexico
22 potentially having an ownership claim over these
23 cattle. This is addressed in our complaint. It's
24 identified in paragraph 86.

25 The Forest Service plan -- it's

1 technically in a draft format, but it's available
2 publicly -- but that draft Forest Service plan --
3 and it quoted in our complaint, paragraph 86 -- this
4 is the statement, quote, "Unclaimed, unauthorized,
5 and unmanaged cattle are the property of the State,"
6 referring to the State of New Mexico.

7 So the Forest Service, in their own forest
8 plan, have even acknowledged that these cattle,
9 arguably, if not actually, belong to the State of
10 New Mexico. So it's not just a claim, Your Honor.
11 The Forest Service, even in their plan that will
12 eventually be finalized one day, take that same
13 position.

14 So we think that that also, again, relates
15 to the concept of the rights of my clients to again,
16 attend auctions, their interests in these cattle
17 overall.

18 The very last point I'll make, because I
19 understand the Court started the hearing this way,
20 and it's obviously important: Why does this matter?
21 It matters, first off, because it sounds cheesy,
22 I'll just admit it. These are men who are
23 intimately familiar with and connected to cattle.
24 There is something about cattle ranching -- we even
25 have -- I'm from Dallas, we have a full football

1 team that, as mediocre as they are, called the
2 Cowboys. Cowboys have a distinct --

3 THE COURT: They're above average, but
4 they're not elite.

5 MR. MCGUIRE: Thank you, Your Honor. I
6 appreciate that.

7 But, I mean, the idea of cowboys and
8 cattle ranchers has a unique culture in America that
9 is unique among the world, I would argue. And so
10 these men have a connection to cattle, even if they
11 don't actually own those cattle.

12 Now, there obviously are probably owned
13 cattle -- my clients' cattle that are mixed up in
14 that group -- and they have been shot; might be shot
15 if these continue. But the point is that there
16 actually is an interest in the humane treatment of
17 all cattle, particularly cattle that ultimately can
18 be used.

19 Again, these cattle, if they were actually
20 impounded, Your Honor, and they were sold at
21 auction, they would be used. They would be -- they
22 would actually be slaughtered appropriately,
23 humanely. Instead, they're subject to these, what
24 we view as being inhumane processes that are, again,
25 just -- they're certainly the result of the Forest

1 Service just saying: We think this is a better way
2 to do it.

3 So I hope that answers the Court's
4 question. This is why it matters.

5 THE COURT: If we put a cowboy
6 sharp-shooter up in that helicopter, you think we
7 could all get along?

8 MR. McGUIRE: Probably not, Your Honor.

9 THE COURT: Oh, okay.

10 MR. McGUIRE: So the last thing I'll say,
11 there is meaning in the Government following its own
12 regulations. We'd ask the Court to require the
13 Forest Service to do that here. And we thank you
14 for your time.

15 THE COURT: All right. Thank you, Mr.
16 McGuire.

17 Well, I need to study the standing issue.
18 Obviously, that's a prerequisite for me going on to
19 the merits. And if I find there is no standing, I
20 do think I better behave and not move to the merits,
21 but find I don't have jurisdiction and bring the
22 case to a halt.

23 I think the plaintiffs' credentials are
24 thin. But I don't think you have to have a whole
25 lot. And it has a feel to me of the same sort of

1 standing that I allow for the environmental groups.

2 And it seems to have the same feel to me.

3 So I'm inclined to think you have
4 standing. But I am going to have to work on that,
5 because that has not been -- in the two prior cases
6 that hadn't been an issue, or at least not a major
7 issue. I don't recall having really thought about
8 the standing issue before.

9 As far as the merits, I leave here today
10 more convinced. That doesn't mean that when I study
11 this more that I don't change my mind. But I feel
12 more convinced of the correctness of the
13 construction that I gave in a rather quick way in
14 2023. Now, that I've studied this much more, and
15 been more informed by the argument, I feel more
16 convinced than ever that the construction that I've
17 given these regs is correct.

18 NEPA has been brought up several times.
19 I've never been very impressed with the NEPA
20 arguments. And the Wilderness Act, I just will have
21 to give that some thought. That's kind of new to
22 me. And I'll have to see if I agree with Mr. Smith,
23 it's in or out.

24 But, in any case, I'm inclined to reach
25 the merits. I'm also inclined to agree with the

1 Government here. But I will put something together;
2 try to get it done as timely as possible. I know
3 that you'd probably like to have this done so that
4 if it's going to occur in the fall I have a firmer
5 basis for approving or disapproving of what the
6 Government is doing than what I've had in the prior
7 two cases.

8 All right. Is there anything else we need
9 to discuss while we're together? Anything else I
10 can do for you today, Mr. McGuire?

11 MR. MCGUIRE: No, Your Honor, not from the
12 petitioners' side.

13 THE COURT: Mr. Scholl?

14 MR. SCHOLL: No, sir. Thank you, Your
15 Honor.

16 THE COURT: Mr. Smith?

17 MR. SMITH: No, Your Honor. Unless you
18 want the regulation cite for cows must be branded in
19 New Mexico?

20 THE COURT: Yeah, send that to me.

21 MR. SMITH: I have it. It's New Mexico
22 Code --

23 THE COURT: What is the purpose of the
24 tags, then? Because I've seen cows with tags.

25 MR. SMITH: So sometimes, I guess, fur

1 will grow over a brand, or whatever, and the tags
2 are an easier way to spot them. But I know from
3 experience also that the Forest Service requires ear
4 tags to count, like do you have 150, like you're
5 supposed to under your permit, that they use them
6 for counting purposes, and things like that. But
7 it's just another form of identification on the
8 ears. Sometimes the ears are also clipped.

9 THE COURT: Okay.

10 MR. SMITH: So it's New Mexico Code of
11 Regulations 21.32.2.8. And that regulation says all
12 cattle in New Mexico have to be branded, with
13 certain exceptions, like dairy cows, and cows in a
14 stockyard.

15 But you can take a look at it. But again,
16 like I have no -- in all my years of doing these
17 livestock cases, have ever heard of cows out on
18 National Forest System lands that did not have
19 brands.

20 THE COURT: All right. Anything else,
21 Mr. Smith?

22 MR. SMITH: No. Thank you, Your Honor.

23 THE COURT: How about you, Mr. Fink?

24 MR. FINK: No, Your Honor. Thank you.

25 THE COURT: All right. I appreciate

1 y'all's hard work and preparations.

2 Be safe on your travels. Y'all have a
3 good afternoon.

4 (The Court was adjourned.)

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UNITED STATES OF AMERICA
DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on February 15, 2024.

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