Killing Kaibab Industries:

A Remedial Policy Recommendation Concerning the Endangered Species Act, the "Economic Baseline Gap" and the Kaibab Mountain

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~INTRODUCTION~

"Storm clouds are buildin' above the timber line
The Lightning's flashin' across the mountain side
The Thunder's rollin' down the canyons of his mind
Somewhere beyond the great divide."[2]

In Northern Arizona, the Kaibab Plateau is known for its forested beauty rising from the surrounding desert. The plateau was long ago carved in two by the Colorado River, with portions of it now forming the North and South Rims of the Grand Canyon. For decades, the Kaibab Mountain, as it is locally called, provided several small logging communities the means to thrive in the unforgiving American West. In fact, Kaibab Industries, Inc., with its namesake sawmill in Fredonia, Arizona, was one of the largest employers in the Arizona Strip region. Things drastically changed in 1993 when the Mexican Spotted Owl was listed as a threatened species under the Endangered Species Act. In their efforts to include the Kaibab as critical habitat for the Mexican Spotted Owl, environmentalist groups endlessly appealed timber harvest permits in the North Kaibab Ranger District, resulting in an injunction on timber harvesting on the Kaibab.

Kaibab Industries had been a linchpin of the Fredonia, Arizona economy, but when the environmentalist groups succeeded in "road blocking" logging on the Kaibab, there was no longer enough timber to keep the mill open. Soon after, in 1995, Kaibab Industries permanently shuttered its doors. Roughly two hundred workers lost their jobs in Fredonia and another one hundred lost their jobs in nearby Panguitch, Utah. In the years that followed, poverty and unemployment soon took the place of what were once vibrant, bustling rural communities. Today, twenty-five years later, Fredonia has never fully recovered from the hit it took when Kaibab turned out the lights.

[2] *See* CHRIS LEDOUX, *Call of the Wild*, *on* WHATCHA GONNA DO WITH A COWBOY (Capitol Records 1992) (produced by Jimmy Bowen and Jerry Crutchfield).

Although the Mexican Spotted Owl was listed in 1993, the rule designating critical habitat was not finalized until 2004. The "2004 Final Rule" designated approximately 8.6 million acres as critical habitat for the Mexican Spotted Owl, divided into fifty-two individual units ranging across four states, including the North Kaibab Ranger District as part of Colorado Plateau Unit 10 ("CP-10"). In the saga spanning almost three decades, the case of *Arizona Cattle Growers Ass'n v. Salazar* is a short, yet important chapter in the killing of Kaibab Industries. In that case, the Arizona Cattle Growers' Association challenged the 2004 Final Rule, particularly the inclusion of the North Kaibab Ranger District. The Ninth Circuit Court of Appeals upheld the rule in 2010, and as of 2020, the North Kaibab Ranger District remains part of Unit CP-10.

Using the North Kaibab Ranger District and Unit CP-10 as a case study, this article will accomplish four things:

Part I of this article will analyze the dangers of using the "economic baseline approach." The "economic baseline approach" is a method of conducting the economic impact studies at the critical habitat designation stage, as required by the Endangered Species Act. The "economic baseline approach" was used as part of the development of the 2004 Final Rule, and Part I will highlight the economic devastation the resulting "Economic Baseline Gap" wreaks on rural communities like Fredonia.

Part II of this article will show that in light of the recent intervening Supreme Court case of *Weyerhaeuser v. U.S. Fish and Wildlife*, and the resulting regulations put in place by the Trump Administration, there is a valid argument that the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n v. Salazar* could be revisited and reversed. Here, reversing the Ninth Circuit would invalidate the entire 2004 Final Rule across all fifty-two critical habitat units for the Mexican Spotted Owl.

Part III will provide a policy recommendation that can be used to avoid future litigation similar to the *Arizona Cattle Growers' Ass'n* case, and also avoid future economic debacles caused by the government's use of the economic baseline approach. These policy-based changes provide suggested amendments that the Trump Administration can make to the current Fish & Wildlife Service regulations, as well as amendments Congress can make to the Endangered Species Act itself.

Part IV provides a unique solution to the situation on the North Kaibab and proposes a compromise. Instead of invalidating the entire 2004 Final Rule, a voluntary exclusion of the North Kaibab Ranger District from Unit CP-10 should be granted, because the negative economic impacts outweigh any benefit of including it. Firstly, extensive evidence shows that since 1991 no Mexican Spotted Owls have been documented actually living or residing in the North Kaibab Ranger District. Secondly, the aptly named "Warm Fire" in 2006 destroyed the forest/habitat in Unit CP-10 to a point that it cannot provide habitat for the Mexican Spotted Owl for at least 100–200 years from now.

If the commonsense policy proposals contained herein are followed on the Kaibab, and mirrored in similarly situated areas, perhaps a positive "turnaround" can begin in Fredonia, as well as in so many other "no name" towns across the West. Perhaps if these, and other changes are made, our nation can dissipate the political and social "storm clouds" that are slowly building out there, somewhere beyond the great divide.

~ PART I ~

THE DESTRUCTIVE "ECONOMIC BASELINE GAP"

1. Background: Listing and Critical Habitat Designation Process

The Endangered Species Act (ESA)[3] only protects species of wildlife (or plants) that have been "listed" as endangered or threatened.[4] Broadly speaking, once a species is "listed," it is then afforded certain protections to prevent the "taking" (killing or harming) of any individual within that species without a permit or exemption.[5] To determine if a species should be listed, the ESA requires the Secretary of the Interior[6] (Secretary) to consider various factors including the destruction or modification of its habitat or range, its overutilization for commercial, recreational or educational purposes, as well as disease, inadequacy of existing regulations or other natural or manmade factors.[7] At the listing stage, the Secretary is not permitted to consider the economic effects of the listing, because the ESA requires that the listing determination be made "solely[8] on the basis of the best scientific and commercial data available."[9]

Once a species is listed the Secretary is required to designate that species' critical habitat at the same time, unless the designation would be imprudent or the critical habitat is

[3] *See* U.S. Fish & Wildlife Service, *Endangered Species Act | A History of the Endangered Species Act of 1973*, United States Fish & Wildlife Service (Jan. 30, 2020), https://www.fws.gov/endangered/laws-policies/esa-history.html (originally passed in 1973).
[4] *See generally* 16 U.S.C. § 1533(a).
[5] *See* Paul Foreman, ENDANGERED SPECIES: ISSUES AND ANALYSES 1, NOVA SCI. PUB. INC. (1st ed. 2002).
[6] While the ESA delegates decision making authority to the Secretary of the Interior, in practice, almost all authority is then further delegated to the U.S. Fish & Wildlife Service (FWS). Thus, while the Act refers to the Secretary, most actions are taken by the FWS.
[7] *See* 16 U.S.C. § 1533(a)(1).
[8] *See* Foreman, *supra* note 5, at 3 (the word "solely" was added in the 1982 amendments to the Act to clarify that the determination of endangered or threatened species was intended to be made without reference to extraneous conditions such as economic factors).
[9] *See* 16 U.S.C. § 1533(b)(1)(A).

indeterminable.[10] Specifically, the act states that the Secretary "shall concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any . . . which is then considered to be critical habitat."[11] While the ESA specifically requires critical habitat designations to occur "concurrently" with the listing, rarely does this happen. If the designation is not made contemporaneously with the listing, regulations allow the agency an extra twelve months from listing to designate the critical habitat.[12] However, the twelve-month extension is routinely abused, as shown by the critical habitat designation for the Mexican Spotted Owl (MSO). The MSO was first listed as threatened in 1993 and critical habitat was not designated until 2004, leaving an eleven-year gap.[13]

In contrast to the process for listing a species, in which economic factors cannot play a part, economic factors are required to be considered in critical habitat designation.[14] If the Secretary concludes that the economic impacts outweigh the benefit of including any area as critical habitat, that area may be excluded from the critical habitat. [15]

[10] *See* STANFORD ENVT. LAW SOCY, THE ENDANGERED SPECIES ACT 62 (2001).
[11] *See* 16 U.S.C. § 1533(a)(3)(A)(i)-(ii).
[12] *See* Lawrence R. Liebesman & Rafe Petersen, ENDANGERED SPECIES DESKBOOK 21 (Envtl. Law Inst., 1st ed. 2003).
[13] *See* Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1162 (9th Cir. 2010) [hereinafter *Salazar*].
[14] *See* Foreman, *supra* note 5, at 5.
[15] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto . . . on the basis of the best scientific data available and *after taking into consideration the economic impact*, the impact on national security, and any other relevant impact, of specifying *any particular area* as critical habitat. The Secretary may exclude *any area* from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.") (emphasis added).

The U.S. Fish & Wildlife Service (Service or FWS)[16] may designate critical habitat that is either "occupied" or "outside the geographical area occupied" by the species.[17] This "[d]ifferentiation between occupied and unoccupied habitat is necessary so that the Service may apply the proper ESA analysis."[18] Further, "the statutory conditions that must be met before designating unoccupied areas are more onerous than those needed for occupied habitat, requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species."[19] However, while Congress did provide a list of definitions in the ESA, it chose not to define "occupied," and consequently the Service has retained flexibility when defining the term.

The listing process for the MSO began in 1989 when Dr. Robin D. Silver submitted a petition requesting that the Service consider listing the owl under the ESA.[20] The Service responded by listing the MSO as a threatened species in March of 1993, but it did not concurrently designate critical habitat, finding that designating critical habitat was "prudent, but not determinable at [that] time."[21] After the Service failed to designate critical habitat within the one-year "extension,"[22] environmental groups brought suit to force the designation.[23] Multiple "final" designations were put forth and subsequently retracted, and in August 2004 the Service published

[16] Because the sources directly cited in this article refer to the U.S. Fish & Wildlife Service as both the "Service" and the "FWS" this article will do the same. Accordingly, hereinafter, the terms "Service" and "FWS" will both refer to the U.S. Fish & Wildlife Service.
[17] *See* 16 U.S.C. § 1532(5)(A) ("(i) the specific areas within the geographical area occupied by the species, at the time it is listed…, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed…, upon a determination by the Secretary that such areas are essential for the conservation of the species.") (ESA's definition of a species' critical habitat).
[18] *See* Ariz. Cattle Growers' Ass'n v. Kempthorne, 534 F. Supp. 2d 1013, 1028 (D. Ariz. 2008) [hereinafter *Kempthorne*].
[19] *See Salazar*, 606 F.3d at 1163.
[20] *See Kempthorne*, 534 F. Supp. 2d at 1017.
[21] Final Rule to List the Mexican Spotted Owl as a Threatened Species, 58 Fed. Reg. 14, 248 (Mar. 16, 1993) (codified at 50 C.F.R. pt. 17).
[22] *See Kempthorne*, 534 F. Supp. 2d at 1017.
[23] *See* Ctr. for Biological Diversity v. Norton, 240 F. Supp. 2d 1090, 1091-1092 (D. Ariz. 2003).

the Final Rule (the "2004 Final Rule") designating critical habitat for the MSO.[24] The 2004 Final Rule designated approximately 8.6 million acres as critical habitat for the MSO.[25] The designation included fifty-two individual units[26] spanning the "Four Corners" states of Arizona, New Mexico, Colorado, and Utah, with Arizona containing the largest amount of land designated critical habitat.[27] The North Kaibab Ranger District (NKRD) was included as part of Unit CP-10, which in itself is huge, encompassing 918,847 acres.[28]

2. The NKRD Highlights the Problem with the Economic Baseline Approach

(a) The Economic Baseline Gap

As stated, under the ESA, economic impacts are not allowed to be considered at the listing stage, but are required to be considered at the critical habitat designation stage.[29] To meet this requirement, the FWS has long employed the economic "baseline" approach "whereby the FWS would only examine, 'those economic impacts that were solely attributable to the critical habitat designation for the species and any economic impacts that were attributable to different causes, such as listing . . . were not considered.'"[30] The FWS has reasoned that "because the impacts of listing a species [are] co-extensive with the impacts of critical habitat . . . no real impact result[s]

[24] Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl, 69 Fed. Reg. 53,182 (Aug. 31, 2004) (codified at 50 C.F.R. pt. 17).
[25] *See Id.*
[26] *Id.* at 53, 213.
[27] *See Salazar*, 606 F.3d at 1168; *see also* U.S. FISH AND WILDLIFE SERVICE, MEXICAN SPOTTED OWL CRITICAL HABITAT DESIGNATION: QUESTIONS AND ANSWERS, SOUTHWEST REGION, https://www.fws.gov/southwest/es/Docs/MSO_FAQ.pdf. Under the 2004 Final Rule, acreage amounts included as MSO critical habitat by state, arranged most-to-least is, Arizona – 3,983,042, Utah – 2,252,857, New Mexico – 2,089,523, and Colorado – 322,326. *Id.* at 2. Arizona had a total of 25 critical habitat units, New Mexico had 20, Utah had 5, and Colorado had 3. *Id.*
[28] *See* Final Designation of Critical Habitat for the Mexican Spotted Owl, *supra* note 24, at 53, 213-14.
[29] *See* Foreman, *supra* note 5, at 5.
[30] *See* Liebesman, *supra* note 12, at 21 (quoting Bldg. Indus. Legal Def. Found. v. Norton, No. 01-2311, slip op. at 102 (D. D.C. Oct. 30, 2002)).

from the critical habitat designation."[31] That reasoning may ring true if the listing and the designation occurred concurrently, as required, but in practice this rarely happens. The MSO, and the NKRD provides an example of the problem with the baseline approach. The FWS listed the MSO in 1993, but did not designate critical habitat[32] until 2004 when 8.6 million acres were designated[33] across fifty-two individual units[34] including the NKRD as part of Unit CP-10.[35] Because the MSO was listed in 1993, but critical habitat was not designated until 2004, this obviously resulted in an eleven-year gap.

In subsequent litigation (which will be examined in depth in Part II) the U.S. Ninth Circuit Court of Appeals upheld the use of the baseline approach in the case of the NKRD and the MSO,[36] allowing the FWS to consider economic effects resulting from the designation, and nothing before.[37] Accordingly, no economic impacts could be considered at listing of the MSO (1993), but could be considered at designation (2004). This eleven-year gap is harmful, because as a practical matter, using the "baseline approach," the economic effects that occurred during the eleven-year period between 1993 and 2004 were never allowed to be considered.[38]

In the case of Fredonia, Arizona, and Kaibab Industries, almost the entire economic downturn occurred in that eleven-year gap. While no other scholarly sources have yet used the term, hereinafter, this vast period between the listing and critical habitat designation wherein the economic harm occurred, will be referred to as "*The Economic Baseline Gap.*" Applying the baseline approach, at no point in the listing/designation process was the Economic Baseline Gap

[31] *Id.* (citing Trinity Cty. Concerned Citizens v. Babbitt, No. CIV.A. 92-1194, 1993 WL 650393, at *3 (D. D.C. Sept. 20, 1993)).
[32] *See* Final Rule to List the Mexican Spotted Owl as a Threatened Species, *supra* note 21.
[33] Final Designation of Critical Habitat for the Mexican Spotted Owl, *supra* note 24.
[34] *Id.* at 53, 213.
[35] *Id.*
[36] *See Salazar*, 606 F.3d at 1162.
[37] *See infra* Part II: Revisiting *Arizona Cattle Growers Association v. Salazar* (2010).
[38] *See Salazar*, 606 F.3d at 1162.

allowed to be taken into account. Therein lies the glaring flaw of the "baseline approach" applied by the Service – an entire industry and town can be crippled and killed, but if it occurs during the Economic Baseline Gap then it is permissible. This was the case with Fredonia, Arizona, and Kaibab Industries.

(b) Kaibab Industries and the Economic Baseline Gap

Kaibab Industries got its start in 1952, when the Whiting family built a modern sawmill at the base of the Kaibab Plateau, north of the Grand Canyon. Because of the beauty and rich heritage associated with the area, "Kaibab" (a Paiute word meaning "The Mountain Lying Down"), was chosen as a fitting name for the new family venture.[39] From its first sawmill in Fredonia, Arizona, Kaibab Industries provided several small logging communities on the Arizona Strip[40] and in Southern Utah[41] the means to survive and thrive in the decades that followed.

Kaibab Industries had been a linchpin of the Fredonia economy, but that all changed in the 1990s when Kaibab Industries ceased operations at the Fredonia mill. The closure came closely after the listing of the MSO as a threatened species, and when the environmentalists and special-interest groups succeeded in blocking most of the logging on the Kaibab, there was no longer enough timber to keep the mill open.[42] On December 1, 1994, Bruce Whiting (then President of

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[39] *See* Kaibab Industries, *Who We Are*, Kaibab Inc., http://kaibabindustries.com/who-we-are/ (2019).
[40] (The Arizona Strip is the part of Arizona lying north of the Colorado River. The difficulty of crossing the Grand Canyon causes this region to have more physical and cultural connections with Southern Utah and Nevada than with the rest of Arizona. The Strip stretches for more than 7,800 square miles between the Grand Canyon and Utah border). *See generally* Washington County Historical Society, *Arizona Strip, Arizona*, Washington County, Utah, http://wchsutah.org/az-strip/az-strip.php (n.d.); *see also* Springs Stewardship Institute, *Arizona Strip*, Museum of Northern Arizona, http://springstewardshipinstitute.org/arizona-strip (n.d.).
[41] *See* Peter B. Nelson, *Perceptions of Restructuring in the Rural West: Insights from the "Cultural Turn"*, 15 Society & Natural Resources 903–21, 909 (2002); *citing* Salt Lake Tribune, *Meanwhile in Utah*, at D10 (Jan. 27, 1995) (Since the 1950's, Kaibab Industries operated a lumber mill in Fredonia, AZ, just south and within commuting distance of Kanab [Utah]. Over half of the mill's work force lived in Kanab).
[42] *Id.*; *citing* Salt Lake Tribune, *Meanwhile in Utah*, at D10 (Jan. 27, 1995) (Sawmill officials cited lack of adequate timber supplies on the nearby Dixie and Kaibab National Forests as the reason behind the mill closure).

Kaibab Industries) stood and wiped tears from his eyes as he told hundreds of family business employees that they would lose their jobs. He told them:

> I can't think of anything we did wrong. We have good employees, we have a good product, we gave good service, we did everything that you learn you're supposed to do in school. And not one time did anyone ever say to me, your government might put you out of business because they don't like your industry anymore. It's not fair to you, and it's not fair to your families, and it's not fair to Fredonia, and Kaibab and other communities. It's not fair to the citizens of the United States. It's not fair to that forest for us not to be up there.[43]

Soon after, in 1995, Kaibab Industries permanently shuttered its doors and roughly two hundred workers lost their jobs in Fredonia.[44] Approximately another one hundred workers lost their jobs that same year when Kaibab shut down its second sawmill in nearby Panguitch, Utah.[45] Speaking on the closure of Kaibab Industries, Jim Matson, a former manager of the Kaibab Industries mill in Fredonia, stated:

> The controversy over the Endangered Species Act's protection of the . . . Mexican spotted owl . . . played a major role in the decision to close the Fredonia mill . . . environmentalists have used the act to force the timber companies out of the Kaibab National Forest . . . The Fredonia mill depended almost entirely on that forest.[46]

According to Matson, the mill closure was a victim of "appeals of federal timber sales on the Kaibab National Forest . . . brought by environmentalists."[47] "The appeals didn't stop timber sales but served as a delaying tactic."[48] In fact, the "North Kaibab Forest . . . had one of the highest

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[43] Raja Krishnamoorthi, *Bruce Whiting*, Our Campaigns, https://www.ourcampaigns.com/CandidateDetail.html?CandidateID=2619 (2018).
[44] *See* Emery Cowan, *Is Fredonia Forgotten?*, Arizona Daily Sun, https://azdailysun.com/news/local/is-fredonia-forgotten/article_81077fd1-f880-5285-8ef7-7e1089a0c8e2.html (Jul. 16, 2017).
[45] *See* Paul Larmer, *Beauty and the Beast*, High Country News, https://www.hcn.org/issues/102/3148 (1997).
[46] *See* Brent Israelsen, *Activists Won't Take Blame for Axing of Arizona Mill*, Deseret News, https://www.deseretnews.com/article/403925/ACTIVISTS-WONT-TAKE-BLAME-FOR-AXING-OF-ARIZONA-MILL.html (Feb. 12, 1995).
[47] *See* Larmer, *supra* note 45, at 7.
[48] *See* Reed Madsen, *Will Work Resume at Sawmill?*, Deseret News, https://www.deseretnews.com/article/459554/WILL-WORK-RESUME-AT-SAWMILL.html (1995) (The appeals caused Kaibab Product's supply to be cut to only three months while a two-year supply of timber under contract was typical in the late 1980s).

appeal percentages in the county" with "97 percent of the volume of timber offered for sale had been appealed. This caused serious delays in lumber production."[49] Ted Atherly, another former manager of the Fredonia mill, also placed the blame for the mills closure squarely on the environmentalists and the lack of trees. "The (U.S.) Forest Service has not put any timber sales up. The environmentalists won't let them. Therefore, the raw material is just not available to run this [Fredonia mill]."[50]

While the timber industry blames the closure on the environmentalist groups, the environmentalists say they are weary of being the perennial scapegoats for the demise of the timber economy, with one activist stating that "it's ingenuous for the big timber companies to say environmentalists are destroying the communities because it just isn't so."[51] However, proof that environmentalist suits over the Mexican Spotted Owl caused the Forest Service to halt all timber sales is supported by a statement from the Economic Analysis conducted by the FWS as part of the 2004 Final Rule. That report states that one of the factors that affected the timber industry of the Kaibab Forest, was a timber harvesting injunction in USFS Region 3 (including the Kaibab) in 1995, due to consultation requirements after the owl was listed.[52] People like Cindy Robinson and others in Fredonia still "blame environmental groups for the loss of the . . . 200 jobs when Kaibab Industries shut its 30-year-old sawmill in Fredonia. They're mean people . . . . They cut down

[49] *Id.*
[50] *See* Israelsen, *supra* note 46.
[51] *Id.* (This statement comes from George Nickas, assistant coordinator for the Utah Wilderness Association.)
[52] *See* Division of Economics U.S. Fish and Wildlife Service, *Final Economic Analysis of Critical Habitat Designation for the Mexican Spotted Owl*, at 2-16, https://www.fws.gov/southwest/es/Documents/R2ES/Mexican_Spotted_Owl_FINAL_Critical_Habitat_Economic_Analysis 8-19-04.pdf (2004) ("Injunctions against USFS Region 3 halting timber harvest. In 1994, USFS Region 3 was sued for continuing to harvest timber under existing Forest Plans prior to completing formal consultation with the Service after the MSO was listed. In July 1995, the District Court of Arizona suspended all timber harvesting in USFS Region 3. This injunction continued until USFS Region 3 completed consultation with the Service on its existing LRMPs in November 1996.").

power poles and chain themselves to Forest Service buildings . . . [in the past] you could make a good living. Now, you have to struggle."[53]

And struggle they have. While ranching continues to be an important segment in the local economy, with the killing of the timber industry, tourism is the only other option. In 1997, the High Country News published an article finding that:

> [N]ot long ago, tourism was balanced by a substantial natural-resource-based economy. The scales tipped during the early 1990s, when Kanab lost more than 500 timber and uranium mining jobs. Families that had a primary breadwinner earning $20 to $30 an hour suddenly had to move or change occupations. Those who wanted to stay had to send Dad to work as a trucker or laborer in a distant city and add Mom, grandma and the kids to the work force, most often cleaning hotel rooms and flipping hamburgers for tourists at $5 an hour.[54]

This situation, which has created a growing rift between the locals who still believe in a resource driven economy, versus the tourists and retirees who move in with out-of-town money, led one writer to assert that the Mountain States are quickly becoming the "most socially divided region" in the country.[55]

Contentions and social divisions aside, with a lack of jobs, most of the workforce and younger families were simply forced to move out of Fredonia. For example, from 1990 to 2000 (five years before closure to five years after closure), Fredonia experienced a -13.45% drop in the population.[56] Additionally, from 1990 to 2000, the young people who would be entering the local workforce moved out of the area, (-28.72% change in those under 18) and were replaced with older

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[53] *See* Max Jarman, *Power Surge*, Arizona Republic, Center for Biological Diversity Archives, https://www.biologicaldiversity.org/news/media-archive/AZUranium5-28-06.pdf (May 28, 2006).
[54] *See* Larmer, *supra* note 45.
[55] Arizona National Forests Socioeconomic Assessment Team, *Socioeconomic Assessment of the Kaibab National Forest*, at 9, The Kaibab National Forest and USFS Region 3, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm91_050016.pdf (2005).
[56] *See* Nelson, *supra* note 41, at 903; *citing Newsweek* byline, at 24 (July 15,1995) (Can cowboys coexist with droves of cappuccino-loving settlers? With their gentrified new houses and chic art galleries, affluent newcomers are turning the traditional Mountain States into the nation's most fashionable – and most socially divided – region.).

retirees (+59.72% change in those over 65).[57] This mass move-out affected all facets of life in the small community of Fredonia, including its local high school which saw a 20.6% drop in enrollment between 1995 (mill closure) and 2004 (critical habitat designation).[58]

In the years following 1995, poverty and unemployment took the place of a vibrant, bustling rural community. Today, twenty-five years later, Fredonia has never fully recovered from the hit it took when Kaibab Industries closed its doors, leading one writer to ask, "is Fredonia forgotten?"[59] For example, as of 2019 the Fredonia per capita income is $21,418 (20% lower than Arizona average and 28% lower than national average).[60] The median household income is $42,404 (17% lower than Arizona average and 23% lower than national average).[61] The Fredonia unemployment rate is 7% (53% higher than national average), and the Fredonia poverty rate is 20% (34% higher than the national average).[62] With high unemployment, high poverty, and low per capita income, many of the locals could echo the sentiment expressed by one, fifth generation rancher from Kane County, Utah back in 2002:

> They have taken all the country away from us. The Lord put this country here and put us on it to survive by the resources in this land . . . . All of these people are getting away from that knowledge. Your animal rights people, and it has been taken out of perspective so much. Pretty soon it is going to make it awful hard in the future to survive . . . . If you want to go out here . . . and make a living, you can't do it.[63]

In short, the situation "on the ground" for locals trying to survive is bleak, and yet, this reality was never reflected in the actions taken by the Service when designating the Kaibab as critical habitat for the MSO. In the Economic Analysis conducted for the 2004 Final Rule, the

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[57] *Id.* at 11.
[58] *See Arizona High School Enrollment Figures (1912-2005)*, http://aiaonline.org/files/2911/arizona-high-school-enrollment-figures-1912-2005.pdf (2005).
[59] Cowan, *supra* note 44.
[60] Area Vibes, *Fredonia, AZ Emp.* (2019), https://www.areavibes.com/fredonia-az/employment/.
[61] *Id.*
[62] *Id.*
[63] Nelson, *supra* note 41, at 903.

FWS looked at the "Regional Economic Impact of Reduced Timber Harvest" in the Kaibab Forest. Applying the baseline approach, the study found the ongoing "Direct Effect on Employment" from reduced timber harvesting on the Kaibab Mountain would be somewhere between $0 and $0.7 million annually.[64] The study also found the total effect (direct and indirect) on employment in the region would only amount to between $0 and $1.3 million annually.[65] Ultimately, the FWS determined that the benefits of designating the Kaibab outweighed this slight economic impact.[66]

Applying the competing co-extensive approach[67] that takes into account the losses during the eleven-year Economic Baseline Gap, the economic impact that Fredonia suffered is much higher than the estimates given by the FWS under the baseline approach. For example, applying some rudimentary math to the High Country News article cited above, which stated that a family's primary breadwinner working at the Fredonia mill in 1995 could make, on the low end, $20 an hour,[68] reveals that sawmill workers would bring home an estimated average of $40,800/year (in 1995 dollars).[69] The Fredonia mill laid off 200 workers in 1995, and accordingly 200 workers at $40,800/year is a direct employment effect of $8.16 million annually in lost wages. Additionally, there were untold indirect economic effects felt in the community. For example, the mill indirectly supported other ancillary industries such as trucking and mechanic services. Plus, with the loss of 200 workers' wages, other service positions and retail sales (convenience stores, restaurants, etc.) all suffered as well. Thus, even with these indirect effects discounted, on the extreme low end, the

[64] Div. of Econ. U.S. Fish and Wildlife Serv., *supra* note 52.
[65] *Id.*
[66] *See generally Kempthorne*, 534 F.Supp. 2d at 1028.
[67] *See infra* Part II(1)(a) (explaining the co-extensive approach).
[68] *See* Larmer, *supra* note 45.
[69] (Assume that worker only puts in 40 hours a week, x 51 weeks a year (subtract one week for vacation/holidays), that would amount to 2,040 hours per year. Multiply 2,040 hours by $20 an hour, that worker would bring home $40,800 a year).

true economic effect felt by the Fredonia/Kanab area was not $0 to $1.3 million, as stated by the Service, but instead was at least[70] an estimated $8.16 million annually.

This true economic effect was, as shown, never considered by the Service. Applying the baseline approach in 2004 allowed the FWS to say that the effect on timber harvesting employment in the region would only be $0 to $0.7 million annually. So of course, the study found there was no economic impact on the economy after 2004 by delaying designation by eleven years, the damage had already been done. The baseline approach allowed the agency to completely discount the ~$8.16 million dollars of employment wages lost annually during the Economic Baseline Gap, and the untold indirect economic effects as well.[71] Therein lies the glaring flaw of the "baseline approach" applied by the Service, an entire industry can be killed and a town economically and socially crippled, but if it occurs during the Economic Baseline Gap, then it is "ok."

The Service's use of the destructive "baseline approach" as part of the 2004 Final Rule was later challenged in court by the Arizona Cattle Growers Association. This litigation, as well as a solution to the Economic Baseline Gap, is the subject matter of Parts II & III.

[70] *See* Southern Utah Forest Products Ass'n, *Distribution of Timber Sales on Dixie and Fishlake Nat'l Forests, 1985 - 2001*, at 20-21, https://foreststewardsguild.org/wp-content/uploads/2019/06/dist_timber_sales_dixie_fishlake.pdf (2002) (The overall economic effect on the entire Arizona Strip and Southern Utah was likely much, much higher than the $8.16 million annual figure cited here. For example, from 1985 to 1993 Kaibab Industries purchased 62,832 MBF of timber from the Dixie National Forest and Fish Lake National Forest. At $200.00 per MBF, those timber sales from 1985 - 1993 were worth $12,566,400.00, which in turn provided jobs across Northern Arizona and Southern Utah. The Fish Lake and Dixie National Forests encompass Kane, Washington, Iron, Garfield, Piute and Wayne Counties in Utah, and all were affected by the shutdown of Kaibab Industries. However, because this article ("Killing Kaibab Industries") is pertaining to the Fredonia mill in particular, those other counties listed, and their respective economic impacts, were not taken into account).

[71] This analysis is obviously not meant to be an entire economic analysis of Fredonia during the economic gap ignored by the baseline approach, but rather, to show the flaw of simply never taking it into account.

~ PART II ~

REVISITING *ARIZONA CATTLE GROWERS ASSOCIATION v. SALAZAR* (2010)

1. Arizona Cattle Growers Ass'n v. Salazar (2010)

In 2006, the Arizona Cattle Growers Association ("AZCGA") brought suit challenging the 2004 Final Rule, and particularly the inclusion of the North Kaibab Ranger District as part of Unit CP-10, in *Arizona Cattle Growers Ass'n v. Kempthorne*.[72] The AZCGA lost on its motion for summary judgment in 2008, and in *Arizona Cattle Growers' Ass'n v. Salazar,* appealed to the U.S. Ninth Circuit Court of Appeals which affirmed the district court in 2010. [73] Having lost again, the AZCGA appealed to the U.S. Supreme Court, and certiorari was denied in 2011.[74] However, in light of the recent intervening Supreme Court case of *Weyerhaeuser v. U.S. Fish and Wildlife,* and the resulting regulations put in place by the Trump Administration, there is a valid argument that the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n v. Salazar* should be revisited and reversed. [75]

To understand the significance of revisiting the AZCGA litigation, it is important to first understand the two main issues that the AZCGA used to challenge the 2004 Final Rule. First, the use of the economic "baseline" approach, and second, the definition of "occupied" critical habitat. Both of these issues will be discussed in turn.

(a) *AZCGA*: The Economic Baseline Approach

[72] Complaint, Arizona Cattle Growers' Ass'n v. Kempthorne, 534 F. Supp. 2d 1013 (2008) (2:06-cv-1744).
[73] *Salazar*, 606 F.3d at 1162.
[74] Arizona Cattle Growers'' Ass'n v. Salazar, 562 U.S. 1216, 131 S. Ct. 1471, 179 L. Ed. 2d 300 (2011).
[75] Weyerhaeuser v. U.S. Fish and Wildlife, 139 S. Ct. 361 (2018).

As thoroughly analyzed above, in contrast to the process for listing a species, in which economic factors cannot play a part, economic factors are **required** to be considered in critical habitat designation.[76] To fulfill the requirement to consider the economic impact of designating the MSO critical habitat[77] as part of the 2004 Final Rule, the Service used the economic "baseline approach."[78] The first issue that the AZCGA used to challenge the 2004 Final Rule was that by using the baseline approach, the Service violated the "co-extensive" rule adopted by the Tenth Circuit in *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Service (NMCGA).*[79]

In *NMCGA*, initially the Service applied the economic baseline approach where only those economic impacts that would have occurred *but for* the critical habitat designation are considered;[80] thus, only impacts *exclusively* attributable to the designation, and none that were also attributable to the listing were accounted for.[81] The Tenth Circuit rejected the use of the baseline analysis and adopted the competing approach known as the "co-extensive approach," which "take[s] into account all of the economic impact[s] of the [critical habitat designation], regardless of whether those impacts are caused co-extensively by any other agency action (such as listing) and even if those impacts would remain in the absence of the [designation]."[82] In short, the *NMCGA* rule "requires that co-extensive economic impacts—i.e., those impacts [resulting] from both listing and critical habitat designation—be considered during the critical habitat designation

[76] *Foreman*, *supra* note 5, at 5.
[77] 16 U.S.C. § 1533(b)(2) (2003).
[78] *Kempthorne*, 534 F. Supp. 2d at 1032.
[79] New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv., 248 F.3d 1277 (10th Cir. 2001) (hereinafter *NMCGA*) (The New Mexico Cattle Growers Association challenged the economic impact analysis used by the Service during the critical habitat designation stage for the southwestern willow flycatcher, and in particular, the use of the baseline approach).
[80] *Id.* at 1280.
[81] *Kempthorne*, 534 F. Supp. 2d at 1032*; citing NMCGA*, 248 F.3d at 1283.
[82] *Kempthorne*, 534 F. Supp. 2d, at 1032.

process."[83] In other words, the co-extensive approach considers economic impacts both before and after the "baseline" (i.e., the critical habitat designation), while the baseline approach only considers economic impacts after the critical habitat designation, or "baseline."

The AZCGA argued that the co-extensive approach should have been applied to the MSO's economic analysis as part of the 2004 Final Rule. Ultimately, however, the district court[84] and the Ninth Circuit disagreed with the AZCGA and upheld the use of the baseline approach.[85] In doing so, the Ninth Circuit specifically rejected the Tenth Circuit's use of the co-extensive approach[86] adopted in *NMCGA*.[87] The court also rejected the final arguments raised by the AZCGA that if the FWS had "designated critical habitat at the same time as it listed the species, as it is required to do, here would be no baseline to which to compare the critical habitat designation,"[88] and that "the baseline approach allows the FWS to treat the economic analysis as a mere procedural formality."[89]

(b) A*ZCGA*: Definition of Occupied Critical Habitat

The second main issue presented by the AZCGA to challenge the 2004 Final Rule was the definition of "occupied" critical habitat. Because the Service has retained flexibility when defining the term "occupied" critical habitat, it chose to interpret "occupied" to include those "areas where

[83] *Id.* at 1036; *citing Ct. for Biological Diversity*, 422 F. Supp. 2d at 1153 (The Service may not rely on economic impacts from below the baseline when either designating critical habitat or weighing exclusions from habitat, yet it may assess such information to facilitate informed decision making during those processes).
[84] *Salazar*, 606 F.3d at 1172.
[85] *Id.* ("Under the co-extensive approach, the agency must ignore the protection of a species that results from the listing decision in considering whether to designate an area as critical habitat. Any economic burden that designating an area would cause must be counted in the economic analysis, even if the same burden is already imposed by listing the species and, therefore, would exist even if the area were not designated.").
[86] *Id.* at 1173; *citing NMCGA*, 248 F.3d at 1285.
[87] U.S.C. §1533(a)(3) (2003).
[88] *Salazar*, 606 F.3d at 1173-74.
[89] *See* 16 U.S.C. §1532; Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 120 (D.D.C.2004) (finding that the ESA does not define "occupied" and that the Service has retained flexibility when defining the term).

[o]wls are known to occur or are likely to occur." [90] The AZCGA claimed that by using the "likely to occur" standard, the 2004 Final Rule "blurred the distinction between occupied and unoccupied critical habitat."[91] Because the term "occupied" is not defined in the ESA, the AZCGA urged the court to not rely on the agency's interpretation, but to apply the ordinary dictionary meaning, which denotes that "an area is occupied by the species if the species resides there."[92] The district court rejected the "resides" definition suggested by the AZCGA, and instead upheld the Service's "likely to occur" definition as "a reasonable interpretation" of the ESA.[93]

Although the ESA does not define "occupied critical habitat" the agency has defined it in its Endangered Species Consultation Handbook.[94] On appeal, the Ninth Circuit relied on the Handbook's definition of "occupied critical habitat"[95] and also found the likely to occur standard a reasonable interpretation of the statute.[96] "The court noted that whether a species 'occupies' an area…should be evaluated on a case-by-case basis…and that limiting occupied areas to those in which a species 'resides' focuses too narrowly on survival and ignores the broader statutory purpose of the critical habitat designation."[97]

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[90] *See* 16 U.S.C. § 1532; Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 120 (D.D.C.2004) (finding that the ESA does not define "occupied" and that the Service has retained flexibility when defining the term).
[91] *Kempthorne*, 534 F. Supp. 2d, at 1028-29; 16 U.S.C. § 1532(5)(A); 69 Fed. Reg. at 53, 185.
[92] Plaintiff's Points & Authorities in Support of MSJ, at 20, Ariz. Cattle Growers' Ass'n v. Kempthorne, 534 F. Supp. 2d 1013 (2010) (No. 2:06-cv-01744), (2007 WL 5395956); citing *Webster's Third New International Dictionary* at 1561.
[93] *Kempthorne*, 534 F. Supp. 2d, at 1029; 16 U.S.C. § 1532(5)(A); 69 Fed. Reg. at 53, 185.
[94] *Salazar*, 606 F.3d at 1165 (citing U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK 4-36 (1998), https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) (The Handbook defines "occupied critical habitat" as "critical habitat that contains individuals of the species at the time of the [Section 7] project analysis. A species does not have to occupy critical habitat throughout the year for the habitat to be considered occupied . . . . Subsequent events affecting the species may result in this habitat becoming unoccupied").
[95] *Id.*
[96] *Id.* At 1167
[97] Katherine Lee, *"Bears Need Room to Roam": The Ninth Circuit's Questionable Interpretation of Critical Habitat Designation*, 59 B.C.L. REV. 206, 216 (2018).

The Ninth Circuit then turned to the NKRD, the specific location about which the AZCGA provided evidence in the form of government letters and studies to show "that the agency treated the NKRD as occupied despite evidence that owls were in fact, absent from the District."[98] Over 224,000 acres of critical habitat on the NKRD was designated as "occupied," despite extensive surveys spanning several years, during which "no owls were located in the NKRD."[99] Moreover, additional areas had "been surveyed several times since 1991 without documenting a single owl."[100]

Despite the evidence, the Ninth Circuit deferred to the agency's finding that based on the "likely to occur" standard that the area was occupied.[101] While the letters and studies confirmed that "no owls were located in the NKRD," the court instead relied on "habitat characteristics" studies, in which the court noted "significant record support for owl occupancy of these areas in the form of studies correlating the habitat characteristics of protected and restricted areas with owl

[98] *Salazar*, 606 F.3d at 1171.

[99] Appellant's Opening Brief, Arizona Cattle Growers' Ass'n v. Kempthorne, 534 F. Supp. 2d 1013 (9th Cir. 2008) (No. 08-15810) 2008 WL 4133395 at *35.

[100] *Id.*; ("FWS's prior acknowledgment that restricted areas are unoccupied is confirmed by the best available science. The North Kaibab Ranger District ('"NKRD"'), included within critical unit CP-10 in the Final Rule, provides a specific example of FWS's flawed application of the ESA. FWS designated over 224,000 acres of critical habitat in the NKRD, all of which was characterized as "occupied." ER 0179; ER 0065. Yet the Forest Service had surveyed over 215,500 acres (over 96 percent) of this area, following FWS survey protocol by visiting each survey point at least eight times to complete the survey. ER 0171-172. Despite these extensive survey efforts spanning several years, no owls were located in the NKRD. *Id.* Nevertheless, FWS characterized this area as "occupied" in the Final Rule. ER 0066; *see also* ER 0216-217 (comment letter from BLM explaining almost 10,000 acres of '"potential habitat"' proposed in Arizona have been surveyed several times since 1991 without documenting a single owl'").

[101] Lee, *supra* note 97, at 216–17 ("Other circuits have refused to give as much deference to the agency in regard to critical habitat designations. For example, in *Otay Mesa Property, L.P. v. United States Department of Interior*, the United States Court of Appeals for the District of Columbia Circuit held that there was not 'substantial evidence' provided by the FWS to support a critical habitat designation for the San Diego fairy shrimp. The FWS had based the proposed habitat designation on eight surveys of the plaintiff's land. Seven of the surveys did not find any fairy shrimp on the plaintiff's property; yet, the FWS still included the property in the critical habitat designation based on the fact that the fairy shrimp had been identified there on one occasion. The court held that this was not enough to show that the shrimp 'occupied' the land in question.").

presence."[102] To further bolster its position, the Ninth Circuit went on to state "that where the FWS did include areas in which owl presence was uncertain–such as the [NKRD]…it did so after thoughtful consideration of owl occupancy."[103]

Thus, in the end, "after thoughtful consideration of owl occupancy" the Service still designated the NKRD as occupied. It did so even though its own studies concluded that (1) "owl presence was uncertain" in the NKRD,[104] (2) it could not identify with certainty "a known owl"[105] and (3) had to substitute "habitat characteristics"[106] because its own studies confirmed that no one had documented a single owl since 1991.[107] Relying on this shaky evidence, the court upheld the "likely to occur" standard, and concluded that "the agency designated only 'occupied' areas[108] as critical habitat, even though it may not have identified with certainty in all cases a known owl constantly inhabiting that territory."[109]

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[102] *Salazar*, 606 F.3d at 1167 (comparing Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1066 (9th Cir. 2004) and Environmental Protection Information Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1017 (9th Cir. 2006)) (rather than counting individual animals, an agency may in appropriate cases use habitat as a proxy).
[103] *Id*. at 1168.
[104] *Id.*
[105] *Id.* at 1171.
[106] *See* Lee, *supra* note 97, at 215-16.
[107] Appellant's Opening Brief, *supra* note 99, at *35.
[108] See *Appellant's Opening Brief, supra* note 99, at *32 (Prior to the 2004 Final Rule, the FWS proposed critical habitat for the Mexican Spotted Owl that included areas defined as unoccupied restricted habitat. ("Restricted habitat should be managed to retain or attain the habitat attributes believed capable of supporting nesting and roosting owls."). "The previous critical habitat designations demonstrate that substantial portions of the so-called 'restricted' habitat are not legally eligible for designation as critical habitat because such habitat is not currently 'suitable,' i.e., it does not contain the primary constituent elements needed by the MSO . . . (holding FWS unlawfully 'designated as critical habitat areas that it knew did not contain essential physical or biological features')." *Id.* at n. 9. "FWS abruptly changed course in the [2004] Final Rule, referring to the unoccupied restricted areas as 'suitable habitat' and ignoring the fact that these areas are unoccupied. This change was made in July 2004, just over one month before the Final Rule was published. At that time, FWS internally decided that 'most of the 'unoccupied habitat' statements will be changed to suitable habitat…Substituting 'suitable' for 'unoccupied,' however, does not alter the fact that these areas are unoccupied . . . .')." *Id.* at *33.
[109] *Salazar*, 606 F.3d at 1171.

(c) *AZCGA:* The Resulting Obama Administration Regulation

Following the Ninth Circuit's ruling, the AZCGA appealed to the U.S. Supreme Court, which denied certiorari in 2011.[110] The next year, in 2012, "[f]ollowing resolution of the *Arizona Cattle* litigation, President Obama issued a memorandum to the Secretary of Interior directing him to revise the ESA regulations to require the USFWS to publish draft economic analyses at the time it proposes critical habitat for designation."[111] "In response to that memorandum, the Services proposed the rule promulgated . . . that mandates not just simultaneous publication of economic analyses,[112] but employment of the 'baseline' approach that was rejected by the Tenth Circuit [in *NMCGA*]." "The Services added language to 50 C.F.R. § 424.19 to 'clarify that impact analyses evaluate the incremental impacts of the designation.'"[113]For purposes of economic impacts analysis under ESA section 4(b)(2), governing

critical habitat, incremental impacts are:

> [T]hose probable economic, national security, and other relevant impacts of the proposed critical habitat designation on ongoing or potential federal actions that would not otherwise occur without the designation. Put another way, the incremental impacts are the probable impacts on Federal actions for which the designation is the 'but for' cause. To determine the incremental impacts of designating critical habitat, the Services compare the protections provided by the critical habitat designation (the world with the particular designation) to the combined effects of all conservation-related protections for the species (including listing) and its habitat in the absence of the designation of critical habitat (the world without designation, i.e., the baseline condition).[114]

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[110] Ariz. Cattle Growers' Ass'n v. Salazar, 562 U.S. 1216 (2011).
[111] Jessica Ferrell, *The Cost of Species Protection*, MARTEN LAW (Sep. 10, 2013, 1:44 PM), https://www.law360.com/articles/470804/the-cost-of-species-protection (citing Presidential Memorandum of February 28, 2012, *Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens Memorandum for the Secretary of the Interior 77 Fed. Reg. 12985* (March 5, 2012)).
[112] *Id.* (citing NMFS Press Release (2012)) ("NOAA already issues draft economic analyses concurrent with a proposed designation of critical habitat, so the proposed rule will codify an existing practice for the agency.").
[113] *Id.*
[114] *Id*. (citing 77 F.R. at 51506-01 (2012)).

In short, the Obama Administration rule went into effect in 2013, and "formalize[d] the Services' interpretation of the ESA and reiterate[d] the Ninth Circuit's affirmation of that policy."[115] In other words, the Obama era rule codified into federal regulations the use of the baseline approach as laid out in *AZCGA.*

Thus, as of 2020, the 2004 Final Rule remains in effect, the North Kaibab Ranger District remains part of Unit CP-10, and the baseline approach has been made part of the federal regulations. Even still, the AZCGA case raised two very important issues, namely whether "occupied" critical habitat is habitat where a species "resides" or conversely where it is "likely to occur" and whether the economic baseline approach is permissible. These holdings by the Ninth Circuit have been impacted in a huge way by a recent landmark Supreme Court case, *Weyerhaeuser Company v. U.S. Fish & Wildlife.*

2. Weyerhaeuser v. U.S. Fish and Wildlife (2018)

In 2018, the United States Supreme Court decided the landmark[116] case of *Weyerhaeuser v. U.S. Fish and Wildlife*[117] addressing two main questions: "(1) whether 'critical habitat' under the ESA must also be habitat; and (2) whether a federal court may review an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation."[118] As a direct result of the holdings in this litigation, the Service, under the direction of the Trump Administration, promulgated three new rules amending the implementation of the

[115] *Id.*
[116] *See* Roger A. McEowen, *Top 10 Developments in Ag Law and Tax for 2018, Number 7,* WASHBURN AGRICULTURAL LAW AND TAXATION BLOG, https://lawprofessors.typepad.com/agriculturallaw/2019/01/top-10-developments-in-ag-law-and-tax-for-2018-numbers-8-and-7.html (Jan. 4, 2019) (*Weyerhaeuser's* significance is highlighted by the fact that it was included as one of the "Top 10 Developments in Agricultural Law" in 2018 by Professor Roger McEowen, the Kansas Farm Bureau Professor of Agricultural Law and Taxation at Washburn University School of Law).
[117] *Weyerhaeuser* 139 S. Ct. at 67
[118] *Id.* at 368.

ESA.[119] The *Weyerhaeuser* holding and the subsequent Trump Administration regulations have direct, intervening effects, on the Ninth Circuit's holding in *AZCGA*. Because of this, the holdings and the regulations will each be discussed in turn below.

(a) *Weyerhaeuser:* Critical Habitat Must Also Be Habitat

The first question decided in *Weyerhaeuser*, is that "critical habitat" under the ESA must also be habitat. There, the FWS listed the dusky gopher frog as endangered in 2001, and designated critical habitat in 2010.[120] Unit 1 of the critical habitat designation was a 1,544-acre site in Louisiana, owned by Weyerhaeuser Company and a group of family landowners.[121] The frog had once lived in Unit 1, but the land had long been used as a commercial timber plantation,[122] and no frogs had been spotted there since 1965.[123] Including Unit 1 in the designation resulted in a loss of $33.9 million to the landowners.[124] "[A]ccording to the FWS, that potential lost economic value [was] not "disproportionate" to the…benefits of the designation…[and] it decided to not exclude [Unit 1] from the…critical habitat."[125] The landowners challenged the designation claiming that for Unit 1 to be critical habitat, the frog must actually be able to survive there, and in its current state, the frog could not survive there, hence it could not be critical habitat.[126] The Service countered that Unit 1 fit the statutory definition of "critical unoccupied habitat," because it contained various elements that made it essential for the conservation of the species.[127] Essentially,

[119] *See* 84 F.R. 45022-01 (2019).
[120] *Weyerhaeuser*, 139 S. Ct. at 362.
[121] *Id.* at 366.
[122] *Id.*at 362.
[123] *See* McEowen, *supra* note 116.
[124] *Weyerhaeuser*, 139 S. Ct. at 362.
[125] McEowen, *supra* note 116.
[126] *Weyerhaeuser*, 139 S. Ct. at 367 ("Survival would require replacing the closed-canopy timber plantation encircling the ponds with an open-canopy longleaf pine forest.").
[127] *Id.* at 366.

even though no frogs lived there, it was still considered critical habitat because it met the "statutory definition" of the frogs' habitat.[128]

The Supreme Court, in a unanimous 8-0 ruling made two important findings.[129] First, that:

> [A]ccording to the ordinary understanding of how adjectives work, '"critical habitat"' must also be '"habitat."' Adjectives modify nouns–they pick out a subset of a category that possesses a certain quality. It follows that '"critical habitat"' is the subset of '"habitat"' that is '"critical"' to the conservation of an endangered species.[130]

Secondly, that the first finding:

> Seemingly mirrored the petitioners' argument that for a place to be *critical habitat*, it must first be *habitat*. At the argument, FWS did not dispute this grammatical truism; instead, the agency argued that the definition of *habitat* should include those areas imbued with special features requisite for a species' habitat that could support the species with 'some degree of modification to support a sustainable population of a given species.'[131]

The court acknowledged that the ESA has defined "critical habitat," while allowing the Secretary to "identify the subset of habitat that is critical, but leaves the larger category of habitat undefined."[132] Because the Fifth Circuit "did not interpret the term *habitat*…the Court…remanded to the 5th Circuit to explicitly consider what constitutes *habitat* under the ESA."[133] While the case has been remanded to define "habitat," the important holding here is that "[a]n area is eligible for designation as critical habitat under [the ESA] only if it is habitat for the species."[134] On remand, the Fifth Circuit has yet to rule on the definition of "habitat," but the Trump Administration has

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[128] *Id.*
[129] S. Beaux Jones, *La., U.S. Supreme Courts Weigh in by Not Weighing in on Highly Watched Cases*, 66 LA. B.J. 365, 366 (2019) (Justice Kavanaugh took no part in the proceedings).
[130] *Weyerhaeuser*, 139 S. Ct. at 368.
[131] *Id.* at 369.
[132] *Id.*
[133] Jones, *supra* note 129, at 366.
[134] *Weyerhaeuser*, 139 S. Ct. at 369 n.2; (citing Brief for Petitioner 27-28 and Brief for Respondent Markle Interests, LLC, et at. In Support of Petitioner 28-31) ("Because we hold than an area is eligible for designation as critical habitat . . . only if it is habitat for the species, it is not necessary to consider the landowners' argument that land cannot be 'essential for the conservation of the species,' and thus cannot satisfy the statutory definition of unoccupied critical habitat, if it is not habitat for the species.").

taken action in the form of regulations to aid in implementing the holding of *Weyerhaeuser* on this "habitat" issue, which will be addressed below.

(b) *Weyerhaeuser:* An Agency Determination Not to Exclude an Area as Critical Habitat is Judicially Reviewable

The second main question decided in *Weyerhaeuser* is that an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation is now judicially reviewable. The Weyerhaeuser Company claimed the Service had failed to adequately weigh the benefits of designating Unit 1 against the economic impact, and challenged the process used in its decision not to exclude Unit 1.[135] The Fifth Circuit never considered this question, instead holding "the Service's decision not to exclude Unit 1 was committed to agency discretion by law and was therefore unreviewable."[136] Addressing the reviewability question, the Supreme Court found that the agency's decision whether or not to exclude an area from critical habitat is "the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under [APA] §706(2)(A)."[137] Thus, the decision whether to exclude any area from critical habitat is now judicially reviewable under *Weyerhaeuser*.

Although remanded to make further determinations on the two issues presented, the implications of this case cannot be overstated. The main question of "whether it's lawful for the [FWS] to designate land as critical habitat, and therefore impose . . . significant regulatory burdens if the land isn't currently habitat for the species, and in its current condition can't contribute to the

[135] *Weyerhaeuser*, 139 S.Ct. at 369-70 (Weyerhaeuser claimed the Service improperly weighed the costs of designating Unit 1 against the benefits of designating all critical habitat, rather than the benefits of designating Unit 1 in particular).
[136] *Id.* at 367; (citing Markle Interests, LLC v. United States Fish and Wildlife Serv., 837 F.3d 452, 473-75 (5th Cir 2016)).
[137] *Id.* at 371.

species recovery,"[138] was decided, and now "an area is eligible for designation as critical habitat only if it is habitat for the species."[139] "Critical habitat determinations have serious consequences . . . and designations of critical habitat that go beyond what the statute allows cost jobs and tax revenue."[140] This holding reins in the Service from going beyond what the ESA allows. Second, in weighing the factors in deciding whether to exclude any area from a critical habitat designation "the consideration and weight given to any particular impact is completely within the Secretary's discretion."[141] Prior to *Weyerhaeuser*, these decisions to exclude or not exclude any given area were not judicially reviewable. This is important because, as the analysis in Part I of this article has shown, "giving the Service a complete pass on their decision-making invites abuse."[142]

(c) ***Weyerhaeuser:*** The Resulting Trump Administration Regulations

Following close on the heels of the *Weyerhaeuser* decision, and in direct response to the Supreme Court's holding, on August 12, 2019 "U.S. Secretary of the Interior David Bernhardt unveiled improvements to the implementing regulations of the ESA designed to increase transparency and effectiveness and bring the administration of the Act into the 21st century."[143] The changes applied specifically to "ESA sections 4 and 7. Section 4, among other things, deals

[138] *See* Jonathan Wood, *Weyerhaeuser Company v. United States Fish and Wildlife Service [SCOTUS brief]*, The Federalist Society https://fedsoc.org/commentary/videos/weyerhaeuser-company-v-united-states-fish-and-wildlife-service-scotusbrief (2018).
[139] *See Weyerhaeuser*, 139 S.Ct. at 363.
[140] *See Weyerhaeuser*, 139 S.Ct. 361 (2018); Brief of Alabama and 19 Additional States as Amici Curiae in Support of Petitioner, 1, 2018 WL 2059535 (U.S., 2018).
[141] *See* Stanford Environmental Law Society, *supra* note 10, at 68.
[142] *See* Damien M. Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas from Critical Habitat Should Be Reviewable Under the APA*, 47 Envtl. L. Rep. News & Analysis 10352, 10365 (2017).
[143] *See* USDOI, *Press Releases: Trump Administration Improves the Implementing Regulations of the Endangered Species Act*, U.S. Department of the Interior, https://www.doi.gov/pressreleases/endangered-species-act (Aug. 12, 2019).

with adding species to or removing species from the Act's protections and designating critical habitat; section 7 covers consultations with other federal agencies."[144]

In short, the changes made apply to the NKRD in two main ways. First, the new regulations promote much-needed transparency as to the cost-benefit of listing a species. As one political commentator, Daren Bakst, put it:

> The Endangered Species Act requires that science alone should determine whether to list a species. . . . However, the federal government has used this science-only requirement as an excuse to prohibit the identification of the benefits and costs of listing a species. Based on the final regulations, the federal government would still make listing decisions without considering costs, but would start to identify and communicate the impacts of these listing decisions. There is nothing novel about informing the public about cost data that isn't used in agency decision-making. . . . When legislators and the public know what the actual costs and benefits are for conserving species, they can better understand the Endangered Species Act and how existing law might be changed to achieve desired policy outcomes."[145]

While this regulation does not directly address the use of the baseline approach at the critical habitat designation stage, by injecting a cost-benefit analysis at the listing stage, it seems to indicate that unlike the baseline approach, now, the economic impacts prior to the critical habitat designation stage are at least to be considered and communicated to the public. This is a step in the right direction for replacing the baseline approach.

The second main way the Trump regulations are applicable to the NKRD is that they did much in "stopping critical habitat designations that don't help to conserve species."[146] The regulations state:

> "The Supreme Court recently held that an area must be habitat before that area could meet the narrower category of 'critical habitat,' regardless of whether that area is occupied or unoccupied. *See Weyerhaeuser Co. v. U.S. FWS*, 139 S Ct. 361 (2018). We have addressed

[144] *Id.*
[145] *See* Daren Bakst, *3 Ways Trump's New Regulations Will Better Protect Endangered Species,* The Heritage Foundation, https://www.heritage.org/environment/commentary/3-ways-trumps-new-regulations-will-better-protect-endangered-species (Aug. 13, 2019).
[146] *Id.*

> the Supreme Court's holding in this rule by adding a requirement that, at a minimum, an unoccupied area must have one or more of the physical or biological features essential to the conservation of the species in order to be considered as potential critical habitat. We note that we do not in the rule attempt to definitively resolve the full meaning of the term 'habitat.'"[147]

Analyzing this section of the regulations, Daren Bakst stated:

> "Under the Endangered Species Act, the federal government designates critical habitat for listed species, which may include areas that are not occupied by the species. These unoccupied areas, however, must be essential to the conservation of the species. The new final regulations would help to ensure any unoccupied areas are truly essential, and therefore help to prevent extreme situations, such as what happened in Louisiana…They may pose a problem for those who are more interested in blocking development than the welfare of threatened and endangered species. For those though who want to improve recovery efforts, these regulations are an important step forward."[148]

As stated by Mr. Bakst, these regulations are an important step forward. While these regulations may help prevent extreme situations in the future, such as in Louisiana or on the Kaibab, to fully address the problems with the implementation of the ESA and specifically, the use of the baseline approach, more needs to be done—including revisiting *AZCGA*.

3. ***AZCGA*: Possibility for Review by the Ninth Circuit**

Going forward, by holding that "an area is eligible for designation as critical habitat . . . only if it is habitat for the species," *Weyerhaeuser* has major implications for the *AZCGA* case. Firstly, the definition of "occupied" critical habitat proposed by AZCGA was that the MSO must actually "reside" there versus the standard used by the FWS, that the owl was "likely to occur" there. The standard adopted by *Weyerhaeuser* seems to be much more like the AZCGA "resides" in standard, and a lot less like the FWS "likely to occur" standard. Secondly, under the new Trump regulations, an "unoccupied area must have one or more of the physical or biological features

[147] *See* 84 FR 45022.
[148] *See* Bakst, *supra* note 145.

essential to the conservation of the species in order to be considered as potential critical habitat."[149] Thus, not only does the NKRD fail to meet the standard for occupied habitat, but as will be shown in Part IV, due to mismanagement by the Forest Service, the NKRD no longer meets the new Trump requirement for unoccupied habitat either.

Although the U.S. Supreme Court denied the AZCGA's petition for writ of certiorari in 2011,[150] precedent exists for having the Ninth Circuit revisit one of its decisions in light of an intervening Supreme Court decision. The Ninth Circuit has held that a circuit precedent can be effectively overruled by subsequent, intervening Supreme Court decisions that "are closely on point," even though those decisions do not expressly overrule the prior circuit precedent, particularly if the intervening Supreme Court decision "undercut the theory" of the Ninth Circuit decision.[151] Here, the subsequent, intervening Supreme Court case of *Weyerhaeuser* is closely on point, and its holding that "critical habitat must be habitat," clearly undercuts the theory used by the Ninth Circuit in *AZCGA* that critical habitat could include those areas where the owl was "likely to occur."[152]

Aside from the economic wreckage the baseline approach disregards, a separate issue that deserves to be addressed, as highlighted by the *AZCGA* case, is the fact that the 52 MSO critical habitat units are in four different states.[153] Three of those states (Utah, New Mexico, and Colorado)

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[149] Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (Sept. 26, 2019)(codified at 50 C.F.R. pt. 424).
[150] *See Salazar*, 562 U.S. at 1216.
[151] *See Miller v. Gammie*, 335 F.3d 892, 900 (9th Cir. 2003) (citing Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002)) ("[W]e may overrule prior circuit authority without taking the case en banc when an 'intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.'"); *see also Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 495 (9th Cir. 1979) (holding that an intervening Supreme Court decision "undercut the . . . theory" of the Ninth Circuit decision).
[152] Weyerhaeuser, 139 S.Ct. at 363; *see* Kempthorne, 534 F. Supp. 2d at 1028.
[153] *See Salazar*, 606 F.3d at 1168; *see also* U.S. FISH AND WILDLIFE SERVICE, *supra* note 27.

are in the Tenth Circuit.[154] The Tenth Circuit rejected the baseline approach in *NMCGA* and adopted the co-extensive approach.[155] Only one of the states, Arizona, is in the Ninth Circuit, which allows the baseline approach.[156] The problem that arises because of this circuit split is that the Ninth Circuit's erroneous use of the baseline approach is governing the MSO critical habitat in states within the Tenth Circuit, which has explicitly rejected its use.

In addition to the Tenth Circuit, in recent years, "the FWS' reliance on its baseline theory in order to avoid detailed economic analysis has been soundly rejected by several courts."[157] The Fifth Circuit has rejected the baseline approach, "[reaching] the common-sense conclusion that designation has significant consequences apart from the listing."[158] In some instances:

> [T]he FWS has begun to recognize that its prior policy is not correct . . . In several recent cases, the FWS has taken voluntary remands of designations in order to conduct new economic analyses that look at the cumulative and incremental impacts of the designation. These decisions to vacate the designation during the remand process have largely been upheld . . .[159]

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[154] *See General Information*, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, https://www.ca10.uscourts.gov/clerk.

[155] *See NMCGA*, 248 F.3d at 1285 (The Tenth Circuit set aside a critical habitat designation that was based on faulty theory that designation causes little to no economic impact beyond what is caused by listing species. The court noted that "Congress clearly intended that the FWS conduct a full analysis of all of the economic impacts of a [critical habitat designation]," regardless of whether those impacts are attributable co-extensively to other causes. Realizing that the required economic analysis might lead to exclusion of certain areas, the court stated that this will not undermine protection of the species, as the significant protections afforded by the listing will remain in place).

[156] *See Map of the Ninth Circuit*, UNITED STATES COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135.

[157] *See* LIEBESMAN , *supra* note 12, at 21 (citing *Middle Rio Grande Conservancy District (MRGCD) v. Babbitt*, Nos. 99-870 et al. (D.N.M. 2001)).

[158] *Id.*; s*ee also MRGCD*, slip op. at 23 (citing *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 6 ELR 20344 (5th Cir. 1976)). (In *MRGCD*, the plaintiffs challenged a proposed designation due to the fact that it would cause substantial curtailment of irrigated agriculture and would result in significant negative ecological, economic, aesthetic, cultural, and social changes, and that applying the baseline approach the FWS failed to consider those effects).

[159] *See* LIEBESMAN , *supra* note 12, at 22 ("[R]ecent cases where voluntary remands were approved and designations vacated while the FWS reconsiders its designation include: *Building Indus. Legal Defense Found. V. Norton*, No. 01-2311 (JDB) (Oct. 30, 2002) (Riverside fairy shrimp and Arroyo southwestern toad); *Home Builders Ass'n of N. Cal. V. Norton*, No. 01-1291 (RJL) (Nov. 6, 2002)(California red-legged frog); *National Ass'n of Home Builders v. Evans*, No. 00-2799 (CKK)(Apr. 30, 2002)(salmon and steelhead)) . . ."

It is true that some courts, such as the D.C. Circuit Court and District Courts in Florida, as well as the Ninth Circuit still allow the baseline approach,[160] and it has been included in the regulations by the Obama Administration.[161] However, as shown that approach is being rejected by the Tenth Circuit, and the FWS itself is beginning to recognize the baseline approach is not sound policy.

"Due to its [broad] geographic scope, the Ninth Circuit hears the majority of appeals related to ESA critical habitat designations."[162] The *AZCGA* case "exemplifie[d] how the Ninth Circuit has consistently given deference to agencies in determining both the scope of the area set aside for critical habitat designation and the economic impacts worthy of consideration."[163] Consequently, revisiting the *AZCGA* case has broad implications for not only the MSO and the Kaibab, but also for species across the West that have been affected by the Ninth Circuit's now seemingly erroneous rulings. The *AZCGA* case deserves to be revisited and reversed to address the improper use of the baseline approach, however, there is another policy-based approach that could be used to ensure that the baseline approach is not used in the future. This policy approach/recommendation is the subject matter of Part III.

~ PART III ~

A Policy Recommendation for Replacing the Economic Baseline Approach

The use of the economic baseline approach is in need of serious policy reform. As shown by the analysis in Parts I & II, "critical habitat designations impose significant economic and social costs . . . throughout the country."[164] When the ESA was passed, "Congress intended that the FWS

[160] *See* Matthew Groban, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give a Hoot About the Public Interest It "Claims" to Protect?*, 22 VILL. ENVTL. L.J. 259, 264-69 (2011).
[161] *See* Ferrell, *supra* note 111 (citing 77 Fed. Reg. at 51506).
[162] *See* Lee, *supra* note 101, at 215–17 (Aside from its large geography, the Ninth Circuit's holdings have huge nationwide effects on a vast number of species, seeing as "[t]he states within the Ninth Circuit contain over one-hundred endangered or threatened species listed by the FWS").
[163] *Id.*
[164] *See* Schiff, *supra* note 142.

conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes."[165] "Requiring that the FWS comply with the intent of the [Congress], . . . does not inject economic considerations into the listing process, but rather, situates those considerations in precisely the spot intended by Congress."[166] When the baseline approach is allowed, those significant economic and social costs, as well as the people who have to shoulder them, are completely disregarded in the designation process. Thus, to rectify decades of significant economic and social costs that have been shouldered by individual citizens across the country as a result of the government's use of the baseline approach, and to prevent such abuse in the future, the federal regulations should be reformed.

As discussed in Part II, the Trump Administration has done much to correct the implementation of the ESA, but to address the baseline approach, new regulations should be drafted and adopted by the Trump Administration's Department of the Interior and Fish & Wildlife Service. Specifically, the Trump Administration should amend the Obama era rule, now codified at 50 C.F.R. §424.19, to mandate that at the critical habitat designation stage that all economic impact analysis use the "co-extensive approach" as outlined by the Tenth Circuit. Additionally, the rule should make it clear that the use of the "baseline" approach is specifically disallowed nationwide.

However, it is simply a reality that political winds and Presidential administrations change with time; the regulatory changes proposed here would potentially only be as permanent as the turning of the next political tide. Therefore, to permanently fix the Economic Baseline Gap problem, Congress should revisit and amend the Endangered Species Act itself. The ESA should

[165] *See NMCGA*, 248 F.3d at 1285.
[166] *Id.*

be amended to state that the economic baseline approach *may only be used if* the critical habitat is designated simultaneously with the listing or within one year of listing, as currently required by the ESA.[167] Reasoning being, if the critical habitat is designated simultaneously with the listing, then with no time gap, i.e., no harmful Economic Baseline Gap, and therefore the baseline approach is appropriate. However, if the critical habitat is not designated within one year of listing, then the ESA should be amended to explicitly state that the economic baseline approach is disallowed after one year, and the co-extensive approach must be used.

Given our nation's current political situation, the proposed regulatory approach is the more likely option to succeed, as getting Congress to revisit the ESA and amend it may not be a practical option at this time. Either way, by adopting the proposed regulatory and/or statutory changes as outlined above, this policy shift would:

> (i) resolve the Ninth and Tenth Circuit Court's inconsistent application of the economic baseline approach across the 52 MSO critical habitat units (as shown in Part II);
> (ii) avoid future Economic Baseline Gap hardships similar to those experienced in Fredonia, Arizona (as shown in Part I); and
> (iii) inject economic consideration into "precisely the spot intended by Congress."[168]

While this change to the federal law would do much to prevent future hardships and failures across the country, the truth is until then, the situation on the NKRD remains the same and requires a unique solution that addresses its current station. This solution is the subject matter of Part IV.

~ PART IV ~

EXCLUDING THE NORTH KAIBAB RANGER DISTRICT FROM UNIT CP-10

[167] *See* 16 U.S.C. §1533(a)(3)(A)(i)-(ii) (2018).
[168] *Id.*

In light of *Weyerhaeuser*, it is true that the *AZCGA* case could and should be revisited. While challenging the 2004 Final Rule on the grounds suggested herein would be completely justified, if *AZCGA* were to be revisited, then the entire 2004 Final Rule spanning 52 units would be on the table. It is likely that the government and environmentalist community do not want to see the entire rule challenged yet again. Instead, Part IV of this article proposes a compromise - instead of invalidating the entire 2004 Final Rule, a voluntary exclusion of the NKRD from Unit CP-10 should be granted by the Secretary, because the negative impacts outweigh any benefits of including it. To show that the negative impacts outweigh any benefit, this section will first address the negative impacts in turn, then address the lack of benefits.

1. Negative Impacts of the Inclusion of the NKRD in Unit CP-10

a. Economic Downturn

As extensively analyzed in Part I, the economic impact to Fredonia, Arizona, and surrounding communities as a result of the MSO listing and subsequent designation, was severe. Suffice it to say that the economic impact on the Fredonia region due to lack of logging on the Kaibab was a loss of at least $8.16 million in wages per year.[169]

b. Decreased Biodiversity, Destroyed Historic Conditions, and Massive Fire Risk

Of the 8.6 million acres of total designated MSO critical habitat, 918,847 acres are in Colorado Plateau Unit 10 (Unit CP-10), which is located predominantly within the Grand Canyon National Park but also includes 231,280 acres of the NKRD.[170] Critical Habitat Unit CP-10

[169] *See* SOUTHERN UTAH FOREST PRODUCTS ASS'N, *supra* note 70, at 20-21.
[170] *See* Appellees' Answering Brief at 10-11, Ctr. for Biological Diversity v. U.S. Forest Serv., 2010 WL 5780624 (C.A.9) (citing 69 Fed. Reg. at 53,213, 53,214, 53,233, ER 199-201); *see also* U.S. FISH & WILDLIFE SERVICE, UNIT MAP 4, https://www.fws.gov/southwest/es/MSO_CH_map4.html.

is managed by both the Forest Service, and the Park Service[171] and in fact, the North Kaibab Mountain itself is managed by those two respective agencies. "One would expect the difference between two forests to be fairly subtle, but, between Kaibab National Forest and Grand Canyon National Park's forest on the North Rim there is a noticeable difference."[172] Appendix C contains a photo taken from space, which shows an obvious boundary between the two forests.

The visual difference portrayed in Appendix C is explained as follows: "The forests in Kaibab National Forest are more open, and have a lower density of trees, due to extensive timber sales and logging in the past."[173] On the other hand, "[t]he forests in Grand Canyon National Park are more dense and homogenous, with fewer disturbances from fire or logging, with older trees and much more shade-tolerant fir trees. . . . This also means that the national park has greater danger of serious fires because of the fuel build-up."[174] The Grand Canyon Historical Society addressed this difference in tree density by asking:

> Which forest is the most like a natural forest should be[?] . . . The suggestion could be made that the closest example of what a natural forest would be is from those photographs and descriptions of Northern Arizona's forests in the 1880's. Since then, national forests and national parks have been managing their forests in different ways. Evidence seems to indicate that trees at that time, both north and south of the canyon, were generally further apart than they are now.[175]

The difference between the two forests is not a trivial distinction. The past years of logging in the NKRD created a forest more conducive to biological diversity. For example, the North

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[171] *See* U.S. FISH & WILDLIFE SERVICE, UNIT MAP 4, https://www.fws.gov/southwest/es/MSO_CH_map4.html-; *see also* Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl, *supra* note 24.

[172] *See* Keith Green, *The Visible Boundary Between the Forests of Kaibab National Forest and Grand Canyon National Park*, 21 THE OL'! PIONEER, no. 1, Winter 2010, at 8-9, https://grandcanyonhistory.org/uploads/3/4/4/2/34422134/top_2010_1.pdf.

[173] *Id.*

[174] *Id.* (citing Christopher Holcomb, *Ecological Divergence Across a Jurisdictional Boundary and the Need for Cooperative Management, Kaibab Plateau, Arizona*, (2009) (unpublished master's thesis, Northern Arizona University) (on file with author)

[175] *See* Green, *supra* note 172 (Captain John Hance said he could ride a horse at a gallop through the forest because the trees were so far apart).

Kaibab Plateau is "home to the densest breeding population of rare northern goshawks on earth. Their success is due to decades of careful, conscientious select-cut logging by Kaibab Industries in partnership with foresters and biologists."[176] This select-cut logging "opened biological deserts of over-dense trees into paradises of diversity."[177] Since Kaibab Industries closed in the 1990's, there has been no large-scale commercial timber operations on the Kaibab, as environmentalists continuously blocked any attempts to responsibly log/manage the forest.[178] This has led to overgrowth, and greater tree density more akin to the forest managed by the Park Service.[179] Thus, not only did the critical habitat designation economically cripple the area, but it also decreased biodiversity, reversed years of responsible logging that had kept the Kaibab in its historic condition, and caused overgrowth and greater tree density, creating greater fire risk to the MSO critical habitat.[180] That increased fire risk is exactly what happened in 2006.

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[176] *See* Steve Rich, *Playing with Fire*, RANGE MAGAZINE, 47-48 (Winter 2007); *see also* COMMISSION ON THE ARIZONA ENVIRONMENT, ARIZONA ENVIRONMENTAL & RESOURCE CONSERVATION DIRECTORY 2, (1987) (showing that Kaibab Industries took an active role in providing greater habitat not only for the goshawk, but for other environmental resources is shown by the fact that Kaibab Industries is listed in the 1987 directory of "Businesses, Organizations, and Agencies concerned with Environmental Resources in the State of Arizona").

[177] Rich, *supra* note 176, at 48 (In the adjacent unlogged Grand Canyon National Park far fewer goshawks dwell in narrow strips on points of the canyon's rim and forest edges. In the long-logged national forest the hawks penetrate every wooded habitat – even into pinon/juniper woodland treated with openings for wildlife and cattle).

[178] Gary Ghioto, *Kaibab National Forest Supervisor Overrules Old-Growth Logging Appeal*, ARIZ. DAILY SUN, (Nov. 4, 1999), https://azdailysun.com/kaibab-national-forest-supervisor-overrules-old-growth-logging-appeal/article_7eabca66-3651-54a8-9108-dd7b4896909b.html (Government foresters say the logging restrictions and guidelines in the Forest Service's goshawk recovery guidelines promote forest health by reducing congested stands of trees and lowering the risk of catastrophic forest fires).

[179] *See Press Release, U.S. Forest Serv.*, Kaibab Plateau Ecological Restoration Project Environmental Assessment Open for Public Comment 10_10 (Oct. 10, 2019), https://www.fs.usda.gov/detail/kaibab/news-events/?cid=FSEPRD670619, (As of late 2019, the US Forest Service and North Kaibab Ranger District has announced its plan to implement the Kaibab Plateau Restoration Project. The project is due to the fact that "*the condition and structure of the project area's forests, woodlands, shrublands and grasslands have changed dramatically from natural conditions*, in large part because fire has been excluded due to decades of successful fire suppression. Most of the Kaibab National Forest's vegetation is adapted to recurring wildfires, and fire plays a vital role in maintaining ecosystem health. *Today, the project area contains uncharacteristically dense forests with many more young trees than were present historically,* and factors such as climate change and regional drought are making them potentially more vulnerable to high-intensity wildfires." Accordingly, the Forest Service has proposed "this landscape scale restoration project [that] includes a combination of prescribed fire and non-commercial, mechanical vegetation treatments on approximately 518,000 acres of the North Kaibab Ranger District" in an effort to thin the overgrown forest) https://www.fs.usda.gov/detail/kaibab/news-events/?cid= (*emphases added*).

[180] *Id.; see also* Holcomb, *supra* note 174.

2. The "Warm Fire" and Resulting Litigation

A mere two years after the finalization of the 2004 Final Rule, one of the worst forest fires on the Kaibab Mountain incinerated thousands of acres of forest, including much of the newly designated Unit CP-10. "Decades of fire suppression let thickets [on the Kaibab] grow dense, turning them into fuel for wildfires."[181] "On June 18, 2006, forest rangers found a lightning-strike fire 30 inches across" on the North Kaibab, in the Warm Springs Canyon.[182] Experienced locals warned the "dangerous fire should have been extinguished immediately," but instead the Forest Service let it burn.[183] The fire initially "met the Forest Service's criteria for letting a fire burn, but winds pushed it out of the agency's control and it spiraled into a high-intensity fire."[184] In the end, it destroyed 58,000 acres of forest, burning within 14 miles of the Grand Canyon.[185]

The Forest Service simply labeled this tragedy the "Warm Fire."[186] "Locals could go to jail . . . and be fined millions for a particle of the damage this fire caused, [but t]here [were] no consequences to those who let it happen."[187] "The district fire management officer wondered on regional TV (KSL-Salt Lake City) what the big deal was."[188] "In two or three hundred years it will look just the same . . . A human lifetime's just a blip on the radar screen."[189] In 2019, locals still

[181] *See* Alex Devoid, *Cattle or Chainsaws: Is Livestock Grazing Effective for Thinning Arizona's Fire-Threatened Forests?*, ARIZ. REPUBLIC (Nov. 21, 2018), https://www.azcentral.com/story/news/local/arizona-environment/2018/11/21/grazing-right-tool-thinning-arizona-fire-threatened-forests/1285261002/.
[182] *See* Rich, *supra* note 176, at 47.
[183] *Id.* (Drought maps showed the area in red – severe drought – and in fact, the Forest Service had prohibited the public from using open flames in Kaibab National Forest).
[184] *See* Devoid, *supra* note 181.
[185] *See* Rich, *supra* note 176, at 48.
[186] *Id.*
[187] *Id.*
[188] *Id.* (KSL-Salt Lake City).
[189] *See* Rich, *supra* note 176, at 48. ("He didn't mention endangering hundreds of such blips, including his own crews, the $8 million suppression cost, a similar cost for rehabilitation, the half-billion dollars in lumber or the dead wildlife and habitats.").

deal with the devastating effects of the negligent Warm Fire,"[190] and many share the view expressed by Steve Rich:[191]

> Folks in the small towns of Kanab and Fredonia . . . could do a much better job managing the Kaibab Plateau and other forests than the Forest Service can under lawsuit-skewed, politically correct pressures and policies. We . . . love the Kaibab Forest. We've cared for it; cherished it. Many of our best memories were in places the Warm Fire destroyed. We spent childhoods and lifetimes there and took our kids there to fill their lives with beauty. It's unspeakably painful to see the destruction. Don't tell us it will be O.K. in 300 years.[192]

In the Warm Fire's aftermath, in 2007, the Forest Service developed the "Warm Fire Recovery Project," that, among other things, proposed salvage logging within the areas burned, including the critical habitat Unit CP-10, to recover the economic value of the downed timber.[193] The Recovery Project Area would cover "39,112 acres of the NKRD, including 9,381 acres within the . . . MSO critical habitat,"[194] and open 3,460 acres of burned timber within critical habitat Unit CP-10 to salvage logging.[195] The Center for Biological Diversity (CBD) brought suit challenging the project, specifically, the Forest Service's "determination that the project 'is not likely to adversely affect' the MSO critical habitat."[196]

Ironically, while the FWS had fought so hard in the *AZCGA* litigation to show that the MSO was "likely to occur" on the North Kaibab (to justify including it as critical habitat), in the Warm Fire case, the Forest Service fought just as hard to show that the MSO was in fact absent

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[190] *See* Devoid, *supra* note 181. (One local rancher on the Kaibab Mountain, Justun Jones, said because of the Warm Fire, he lost access to large swaths of the forest . . . Thick regrowth and scattered, dead, burned trees block him from these sections. "The cattle can't hardly get in there to graze. You can't hardly ride in there to get 'em out," he said. "It's just become such a mess.").
[191] *See* Rich, *supra* note 176 (Rich is the President of the Rangeland Restoration Academy in Salt Lake City, Utah).
[192] *Id.* at 49.
[193] *See* Kaibab National Forest; Arizona; Warm Fire Recovery Project, 71 Fed. Reg. 78, 132 (Dec. 28, 2006); *see also* FR AR doc. 426 at 16939-41. (noting that "thousands of acres of suitable timberland burned in the Warm Fire are now occupied by dead and dying trees."
[194] *See* Appellees' Answering Brief, supra note 170, at 14.
[195] *Ctr. for Biological Diversity v. U.S. Forest Serv*., No. CV-09-8116-PHX-FJM, 2009 WL 3740732, at *1 (D. Ariz. Nov. 5, 2009), aff'd, 408 F. App'x 64 (9th Cir. 2011) (hereinafter *CBD*).
[196] *Id.*

from the North Kaibab (to justify their position that the salvage logging project would not harm any MSO).[197] In the *Warm Fire* litigation, the CBD attempted to show that MSOs would be harmed in the salvage logging, relying on the 2004 Final Rule: the same rule challenged by the AZCGA.[198] Recall the 2004 Final Rule stated that the NKRD was occupied based on the "likely to occur" standard. In the *Warm Fire* case, the Forest Service effectively discounted the 2004 Final Rule, by stating that:

> [G]iven the "massive scale" of the 2004 designation, FWS conceded that it had been unable to conduct the fine-scale mapping necessary to physically exclude all of the areas that do not contain primary constituent elements of critical habit . . . but . . . it would treat both protected and restricted areas as occupied by the MSO "because they currently possess the essential habitat requirements for nesting, roosting, foraging, and dispersal.[199]

Ultimately, "the FWS's 2004 conclusion that the NKRD was 'more likely than not occupied by' the MSO, had been based largely on the availability of functional habitat – i.e., the Kaibab possessed the essential habitat requirements for nesting, roosting, foraging and dispersal."[200] In short, the only reason that the NKRD was included as part of Unit CP-10 in 2004 was "because the entire area contained appropriate habitat features, FWS determined that the MSO likely occupied the area."[201]

During the *Warm Fire* case, to support its position that the MSO did not live on the Kaibab, the Forest Service provided further evidence to show that "MSO's are known to nest in the Grand Canyon, although they have never been detected inside the Park above the Canyon's North Rim

[197] *See Salazar*, 606 F.3d at 1162; *see also* Rich, *supra* note 176.
[198] *See Salazar*, 606 F.3d at 1162.
[199] *Ctr. for Biological Diversity*, 2009 WL 3740732, at *9-*10
[200] *Id.* at *26-*27 (citing ER 89).
[201] *Id.* at *4.

(in the Kaibab Plateau portion of the Park that borders the NKRD). FWS has nonetheless hypothesized that the NKRD may provide 'dispersal habitat' for MSO's."[202] Further,

> [T]here were twenty-four unconfirmed reports of MSOs in the NKRD between 1978 and 1991, but "follow up surveys done after reports were received never detected a MSO. Moreover, extensive surveys conducted to protocol from 1992 through 2005 . . . have never resulted in a MSO detection. . . ." Specifically, "portions of the Recovery Project area were surveyed in 2000, 2004, 2005 and 2006 . . . and no MSO were documented."[203]

Not one.

Based on this evidence in the *Warm Fire* case, ultimately, the Ninth Circuit concluded "that the [salvage logging] project was not likely to adversely affect the MSO. Given the lack of MSO sightings and because the Project Area was severely burned by the Warm Fire, the FWS determined that the MSO's occurrence in the Project Area was 'extremely unlikely.'"[204] The

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[202] *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, Appellees' Answering Brief, *supra* note 170, at 25; *citing* SER 242; ER 134. (Similar to the idea of "dispersal habitat" used by the FWS, is the "Shifting Mosaic of Habitat" theory, or simply Shifting Habitat Mosaic. To be clear, the FWS did not use the Shifting Habitat Mosaic theory in any of the litigation surrounding the Kaibab. However, it is an important concept to address in understanding what constitutes habitat and also offers another point of view to consider. Under the Shifting Habitat Mosaic theory, any given animals' habitat is not "static" - meaning, it does not simply stay in one place. Instead, an animal's habitat can change depending upon the season, or depending upon their life stage or activity.

> "For example, prairie chickens, pheasants and quail may nest in relatively dense vegetation but then move their young chicks into areas where they can walk and feed easily but have overhead cover from predators. Other animals may spend the winter nestled in the grass litter beneath tall grasses but then seek out areas of shorter or patchier vegetation for the summer. *A shifting mosaic of habitats allows animals to move around the landscape and find their preferred habitat when they need it.* Alternatively, less mobile animals might temporarily thrive in some years but suffer population declines in others as conditions change from favorable to unfavorable. As long as those unfavorable conditions don't last too long, however, those populations can ride them out until good times come again." (*emphasis added*).
>
> *See* Chris Helzer, *Prairie Word of the Day: Shifting Mosaic of Habitat,* The Prairie Ecologist, https://prairieecologist.com/2016/03/08/prairie-word-of-the-day-shifting-mosaic-of-habitat/ (Mar. 8, 2016).

Under this theory, it is possible that the NKRD could have been habitat for the MSO at one time. However, as the studies cited in the *Warm Fire* litigation emphasize, no MSOs have been seen or documented in the NKRD since 1991, so even if this theory was applied to the MSO and the NKRD, if the NKRD truly was mosaic habitat for the MSO, surely an MSO would have been documented at some point since 1991).

[203] See *id.*, citing *SER* at 242, *ER* at 134 (note that the studies indicate that between 1978 and 1991 the only reports of MSOs on the Kaibab Mountain were "unconfirmed" reports. Thus, while the surveys cited clearly indicate that after 1991 no MSOs were present in the NKRD, the "unconfirmed nature of MSO reports prior to 1992 raises some question as to whether the MSO was even present from 1978 to 1991 as well.

[204] *See Ctr. for Biological Diversity*, 2009 WL 3740732 at 2 (citing FS AR doc. 399).

evidence allowed the agency to "conclude that there is not a resident population" of MSOs in the project area."[205] In fact, the evidence showed that, based on the severity of the fire within the critical habitat area, the "areas subject to salvage harvesting no longer provide key MSO habitat components . . . and are not likely to provide suitable MSO habitat for at least 1 to 2 centuries."[206]

In sum, what has been shown to this point in Part IV is that the negative impacts suffered by the Fredonia region far outweigh any benefits of including the NKRD as part of Unit CP-10. First, without a full economic analysis, suffice it to say that the economic impacts suffered during the Economic Baseline Gap were extensive. Second, as this analysis has shown, not only did the critical habitat designation economically cripple the area, but it also decreased biodiversity, reversed years of responsible logging that had kept the Kaibab in its historic condition, and caused overgrowth and greater tree density, creating greater fire risk to the MSO critical habitat. That increased fire risk came to a head in 2006, when the Warm Fire caused by negligent Forest Service fire management scorched thousands of acres within the CP-10 Unit, effectively making the NKRD unable to "provide suitable MSO habitat for at least 1 to 2 centuries." [207]

Lastly, the *Warm Fire* litigation showed that there is no resident MSO population in the area.[208] In an ironic turn of events, during the *Warm Fire* case, the Forest Service effectively discredited the 2004 Final Rule's finding of occupied critical habitat, and instead provided multiple studies to prove that not one single MSO had been spotted on the NKRD since 1991. Not one. Not only that, but "MSO's are known to nest in the Grand Canyon, although they have never been detected inside the Park above the Canyon's North Rim (in the Kaibab Plateau portion of the Park

[205] Ctr. for Biological Diversity v. U.S. Forest Serv., 408 F. App'x 64, 66 (9th Cir. 2011).
[206] See Appellees' Answering Brief, *Ctr. for Biological Diversity v. U.S. Forest Serv*., *supra* note 170, at 10.
[207] *Id.*
[208] *Id.*

that borders the NKRD)."[209] Ultimately, not one single owl has been documented in the NKRD since 1991, and the NKRD is no longer suitable habitat for the bird—it cannot survive there. If the species cannot currently survive there, then under *Weyerhaeuser*, it cannot be included as critical habitat. These negative impacts suffered by Fredonia, weighed against the fact that not one single owl has been documented on the NKRD since 1991, and the additional fact that the MSO cannot survive in the NKRD for another 1 or 2 centuries–the NKRD deserves to be excluded from Unit CP-10.

3. Exclusion of the NKRD vs. The Entire Unit CP-10

The ESA states:

> The Secretary shall designate critical habitat, **and make revisions thereto** . . . on the basis of the best scientific data available and *after taking into consideration the economic impact* . . . and any other relevant impact, of specifying *any particular area* as critical habitat. The Secretary may exclude ***any area*** from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.[210]

The Secretary's discretion to exclude any area if the benefits of exclusion outweigh the benefits of including it "is limited only to the extent that the Service may not exclude areas from a designation if it determines that failure to designate such areas as critical habitat will result in the extinction of the species."[211]

While most exclusions exclude entire units of critical habitat, there is precedent in the Ninth Circuit for excluding portions of units, and not simply the entire unit,[212] provided that "if the FWS wants to change the boundaries of the critical habitat, it might do so . . . after notice and

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[209] *See* Appellee's Answering Brief, *Ctr. for Biological Diversity v. U.S. Forest Serv*., *supra* note 170, at 25; *citing* SER 242; ER 134.
[210] *See* 16 U.S.C. § 1533(b)(2) (emphasis added).
[211] *See Kempthorne*, 534 F. Supp. 2d at 1032.
[212] *See* Ctr. For Biological Diversity v. Bureau of Land Mgmt., 422 F. Supp. 2d 1115, 1143 (N.D. Cal. 2006) ("The areas excluded constitute a portion of 'Unit 1B' and all of 'Unit 1C.'").

comment."[213] The Endangered Species Act itself seems to imply that a portion could be excluded, because it says "any area" can be excluded, and that the Secretary, after designating critical habitat, "may, from time-to-time thereafter as appropriate, revise such designation."[214]

The NKRD presents the perfect opportunity to apply this language of the ESA and "as appropriate, revise such designation." The current Unit CP-10 contains portions of the Grand Canyon, as well as the NKRD, as exhibited in Appendix A.[215] As stated in the 2004 Final Rule, "the majority of [Unit CP-10] contains steep-walled canyon habitat, but the unit also contains forested habitat within the North Kaibab Ranger District and Grand Canyon National Park."[216] As shown by the *Warm Fire* litigation, "MSOs are known to nest in the Grand Canyon, although they have never been detected inside the Park above the Canyon's North Rim (in the Kaibab Plateau portion of the Park that borders the NKRD)."[217] In fact, "[e]xtensive surveys (>500,000 acres) of forested land in the Colorado Plateau indicate that owls are usually not found in large forests but typically occur in steep-walled rocky canyons below 8,000 feet elevation with no or few trees."[218]

In sum, because Part IV has shown the negative impacts far outweigh the benefits of including the NKRD as part of Unit CP-10, an exclusion should be granted. However, as a means of compromise, instead of excluding the entire Unit CP-10, where MSOs have been spotted in the steep-walled canyon habitat found within the Grand Canyon National Park portion of the unit, but

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[213] *See* Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1076 (9th Cir.), *amended by* 387 F.3d 968 (9th Cir. 2004).
[214] 16 U.S.C. § 1533(a)(3)(A)(i)-(ii), (b)(2).
[215] *See* Appendix A.
[216] *See* Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl, *supra* note 24, at 53, 214.
[217] *See* Appellees' Answering Brief, *Ctr. for Biological Diversity vs. U.S. Forest Service*, *supra* note 170, at 9; (citing SER 242; ER 134).
[218] *See* Frank Howe, *The Mexican Spotted Owl on the Colorado Plateau – Recovery Update*, Great Salt Lake Waterbird Survey 1997 – 2001, available at: attp://works.bepress.com/frank_howe/30/ (1998) (explaining that "nests in southern Utah have only been found in caves, cracks, or ledges in these steep walled canyons").

have never been spotted or documented in the forested habitat within the NKRD since at least 1991, the proposed exclusion would only apply to the forested portion of Unit CP-10 lying within the boundaries of the NKRD,[219] as specifically outlined in Appendix B.[220] Therefore, where the ESA states that "the Secretary may exclude *any area* from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat,"[221] and where "if the FWS wants to change the boundaries of the critical habitat, it might do so . . . after notice and comment,"[222] the second major policy proposal of this article is that the Secretary, and consequently, the FWS do just that—exclude the NKRD from Unit CP-10 as outlined in Appendix B.[223]

As shown by the *AZCGA/Weyerhaeuser* analysis, the entire 52-unit designation could be found invalid if the *AZCGA* case is revisited and reversed. Because the Kaibab was the single specific location where the AZCGA claimed that no owls existed, it will clearly be the focal point of any further litigation. The other option, aside from revisiting *AZCGA* and invalidating all 52 units, is 52 separate lawsuits to withdraw entire units based on economic exclusions, now that those decisions are judicially reviewable under *Weyerhaeuser*. Instead of pursuing further litigation, this proposed compromise, by which a portion of the unit can be excluded without

[219] Delineating the exclusion boundaries, or "drawing the line" in this manner would likely be challenged by activists, who would likely ask "how can one simply draw a line stating that an animal lives on one side of a line, but not the other? They may even challenge the exclusion on the basis of "dispersal habitat" or the "shifting mosaic" theory. As was analyzed herein, *supra* note 195, it is possible that the NKRD could have been habitat for the MSO at one time. However, as the studies cited in the *Warm Fire* litigation emphasize, clearly no MSOs have been seen or documented in the NKRD since 1991, and the "unconfirmed" nature of MSO reports prior to 1992 raises some questions as to whether the MSO was even present from 1978 to 1991 as well. So even if the shifting mosaic theory was applied to the MSO and the NKRD, if the NKRD truly was mosaic habitat for the MSO, surely an MSO would have been documented at some point since 1978. Accordingly, excluding the forested portions of the NKRD is an appropriate place to "draw the line."
[220] *See* Appendix B.
[221] *See* Appellees' Answering Brief at 25, *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 2010 WL 5780624
[222] *See* Ctr. for Biological Diversity v. U.S. Forest Serv., 408 F. App'x 64, at 1 (9th Cir. 2011).
[223] *See* Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1076 (9th Cir.), *amended by* 387 F.3d 968 (9th Cir. 2004).

throwing out the entire designation or the entire unit, is extremely beneficial in situations like the NKRD, where no owls have been seen in over twenty years. Although this approach has not been used before, by using the language of the ESA and various Ninth Circuit precedents,[224] to grant an exclusion for the NKRD would be a win-win for most involved. It would give some sort of restitution/reparation to the affected industry and communities, avoid further litigation, and provide a framework that could be mirrored across the other fifty-one units to reach a compromise without revoking the entire rule.

[224] *See CBD, supra* note 195, at 2; *citing* FS AR doc. 399; *See also* Ctr. for Biological Diversity v. U.S. Forest Serv., 408 F. App'x 64, at 1 (9th Cir. 2011).

~ CONCLUSION ~

"The bugle of the bull elk echoes through the pines

The north wind moans her lonesome lullaby

He hungers for the freedom of an eagle as she flies

Somewhere beyond the great divide…

The mountain's callin' to him like a mother calls her child

He's heard the call of the wild"[225]

It is no secret that in places across the Intermountain West, there is a growing rift between the locals who still believe in a resource driven economy, versus the tourists and retirees who move in with out-of-town money, which, as stated in Part I, has led one writer to assert that the Mountain States are quickly becoming the "most socially divided region" in the country.[226] Nothing seems to stir up this social division quicker than a discussion (or an article for that matter) about endangered species or natural resource extraction industries. One of the most important points that gets lost in the fray is that most people on both sides of the issue have a sincere love for the environment. Particularly when it comes to the Kaibab, most locals can echo the following sentiment expressed earlier in Part IV regarding the Warm Fire:

> We . . . love the Kaibab Forest. We've cared for it; cherished it. Many of our best memories were in places the Warm Fire destroyed. We spent childhoods and lifetimes there and took our kids there to fill their lives with beauty. It's unspeakably painful to see the destruction.[227]

While logging on the Kaibab was the bedrock of the local economy for decades, the men and women who pursued that career did not do so with utter disregard for the environment. In fact, most did it because they enjoyed earning a living while being out in the mountains. The logging

[225] *See* LeDoux, *supra* note 2.
[226] *See* Nelson, *supra* note 41.
[227] *See* Rich, *supra* note 176, at 49.

also gave them the means to be able to live in a rural community with close access to places like the Kaibab, in towns where their families have lived for generations.[228] Most people on both sides of the issue want what is best for the environment, the forest, and the species themselves, but they disagree on what that looks like in practice. In practice, the Endangered Species Act has some serious flaws that disregard those very people and communities in the regulatory procession and discards them along the wayside.

Surely, some may argue that there is a price to be paid for preserving endangered species for future generations, and "angry westerners" should simply get on board to help protect our nation's wildlife. However, the Endangered Species Act has largely failed at that very thing. It has failed in its purpose of saving wildlife and plants from extinction, because "only 3% of the 1,661 species listed as endangered or threatened since 1973 have been recovered. Meanwhile . . . the Act has been weaponized to block economic development, cordon off lands and halt forest management while cultivating a tangled thicket of federal regulations."[229] People like Representative Don Young (R-AK) still support the Endangered Species Act—in fact, he is the only sitting lawmaker left who voted for it in 1973—but, he says, "the law aimed at saving wildlife and plants from extinction has since become little more than a 'bureaucratic nightmare.'"[230] Taking a step back, perhaps westerners are angry because they have been forced to shoulder the full price of a failed system since 1973.

[228] The sentiments expressed in this paragraph come from the author's personal experience. Having grown up in Fredonia, Arizona, and having worked as a sawmill laborer at the Canyon Country Mill and Resources after high school, the author has heard many stories, experiences and sentiments relayed to him from former loggers and employees of Kaibab Industries, many of whom are/were avid hunters, fishers, outdoorsman, and conservationists.
[229] Valerie Richardson, *Claws out after Trump administration overhauls 'bureaucratic Endangered Species Act*, The Washington Times, available at: https://www.washingtontimes.com/news/2019/aug/12/endangered-species-act-revisions-trump-decried/ (2019).
[230] *Id.*

This failed system with its "bureaucratic nightmare" has recovered only 3% of species listed, at an unbearable social and economic cost, resulting in a serious structural imbalance. This structural imbalance is why it is important that changes be made to the existing law, and that cases like the AZCGA litigation be revisited. While the Trump Administration has made commendable efforts to "bring the Act into the 21st century,"[231] there is still work to be done.

Accordingly, this article has sought to accomplish four things:

Part I of this article extensively highlighted the pitfalls of using the economic baseline approach, as used in the 2004 Final Rule, and the economic devastation the resulting Economic Baseline Gap reeks on rural communities like Fredonia.

Part II has shown there is a valid argument that, in light of the Supreme Court's holding in *Weyerhaeuser*, the Ninth Circuit's decision in *Arizona Cattle Growers Ass'n* could/should be revisited and reversed to invalidate the entire 2004 Final Rule.

Part III suggested policy changes that the Trump Administration could make to the federal regulations to prevent the future use of the destructive baseline approach as codified by the Obama Administration, as well as amendments Congress could make to the ESA itself to accomplish the same purpose.

Part IV has provided a unique compromise that is extremely beneficial in critical habitat situations like the North Kaibab Ranger District, where no Mexican Spotted Owls have been documented since 1991. The compromise would give some sort of restitution/reparation to the affected industry and communities, avoid further litigation, and provide a framework to reach compromise across the other 51 units without revoking the entire rule.

[231] *Id.*

What this means for the people of Fredonia, and whether logging will ever return to the Kaibab Mountain in an economically meaningful way, is still to be determined. If the Riedhead family[232] or the Fredonia locals were asked if they would go back to logging, given the chance, they would probably give you the same answer given by a Fredonia miner (when asked if he would work for the mines if they reopened): "Hell, yes."[233] It would be a long battle to bring the former logging community back to life. Maybe if the recommendations proposed herein are followed and implemented, there is hope for the folks of the Arizona Strip. Maybe it is finally time to pick up the people who rely on The Mountain Lying Down.

More than anything, however, this analysis provides a word of caution. While well intentioned, the Endangered Species Act has serious flaws. When those flaws remain uncorrected, they can be exploited to create grief and economic devastation beyond the comprehension of "do-gooder" bureaucrats, judges, and environmentalists who have never lived or worked among those being afflicted. If serious reform is not made to the ESA, then local communities across the West will continue to relive the same events that crippled Fredonia, Arizona and killed Kaibab Industries.[234]

[232] *See* Cowan, *supra* note 44 (With Kaibab Industries dead and gone, the largest employer in Fredonia is the one logging company that still exists; Canyon Country Mill and Resource, with about 34 employees. The company was once a contractor for Kaibab Industries, but since Kaibab shut down "hanging on has taken a lot of creativity," said Duke Reidhead, the plant manager. "Canyon Country has survived by diversifying its operation to use everything from dead trees cleared from fire scars to smaller trees from forest thinning projects." Reidhead's family is "building the business year after year, but it's slow going.").
[233] *See* Jarman, *supra* note 53.
[234] *See* Kaibab Industries, *supra* note 39. Kaibab Industries, Inc. is no longer in the logging industry, as its namesake sawmill in Fredonia, Ariz. was shut down in 1995, and has never resumed operations. The Phoenix, Ariz. based company is now a parent company to various diversified holdings in other parts of Arizona and Utah, including a health club, theatres, and various real estate projects.

~ EPILOGUE ~

During the Summer of 2020, while this article was going through the editorial process in preparation for publication, tragedy once again struck the Kaibab Mountain. On June 8, 2020 a wildfire was discovered in the NKRD "burning in an area southwest of Jacob Lake and a little more than 15 miles north of the boundary of the North Rim of Grand Canyon National Park."[235] With high winds, low humidity, and plenty of dry fuel from years of lack of logging, the fire spread quickly,[236] and was soon visible from nearby Fredonia, as seen in Appendix E. The fire (named the Mangum Fire because of its origin near Mangum Springs) destroyed "two older cabins and two outbuildings."[237] The fire soon threatened to eliminate the small community of Jacob Lake with its historic Jacob Lake Inn, but fire crews managed to divert the flames and Jacob Lake was narrowly spared.[238] The fire spread north, and by the time it was fully contained in early July, the area of the forest destroyed totaled 71,450 acres (roughly 23% more than the 58,000 acres burned in the devastating Warm Fire of 2006).[239] Appendix D contains a map showing the final fire perimeter. Officially, the cause of the fire remains "under investigation."[240] However, "according to Gerry Perry, the Mangum fire information officer" the fire was "human caused."[241] Unofficially, many of the local population have reason to suspect that the fire was actually caused by negligent

[235] *See* Cody Blowers, *UPDATED: Mangum Fire near Kaibab Plateau in Arizona grows to more than 500 acres*, St. George News, https://www.stgeorgeutah.com/news/archive/2020/06/09/cgb-mangum-fire-near-kaibab-plateau-in-arizona-grows-to-more-than-500-acres/#.X43b0dBKhPY (2020).
[236] *See generally* Ryne Williams, *Human-caused Mangum fire now 4% contained with 64,509 acres burned,* St. George News, https://www.stgeorgeutah.com/news/archive/2020/06/20/rmw-human-caused-mangum-fire-now-4-contained-with-64509-acres-burned/#.X43ZkdBKhPY (2020).
[237] *Id.*
[238] K. Sophie Will, *Inside how the Jacob Lake Inn narrowly survived the Mangum Fire,* St. George Spectrum & Daily News, https://www.thespectrum.com/story/news/2020/07/07/jacob-lake-inn-near-grand-canyon-narrowly-survives-mangum-fire/3264827001/ (2020).
[239] *See* National Wildfire Coordinating Group, *InciWeb – Incident Information System Maps,* National Wildfire Coordinating Group, https://inciweb.nwcg.gov/incident/maps/6748/ (2020); *see also* Rich, *supra* note 176.
[240] *See* National Wildfire Coordinating Group, InciWeb – *Incident Information System Information,* National Wildfire Coordinating Group, https://inciweb.nwcg.gov/incident/6748/ (2020).
[241] *See* Williams, *supra* note 236.

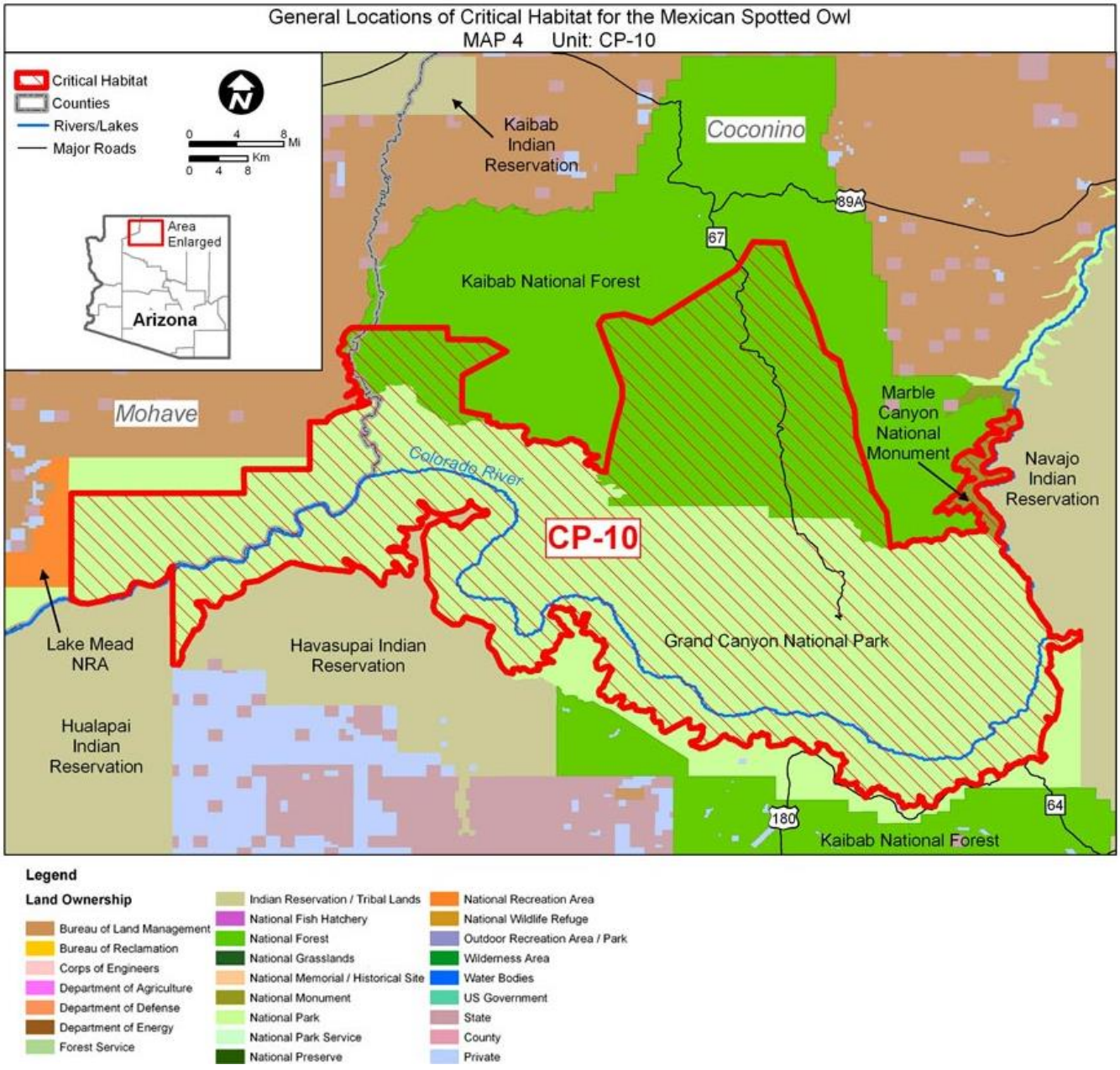
Forest Service employees.[242] Adding to local suspicion is that, as of Fall 2020, much of the Kaibab Mountain remains closed to the public, including to ranchers who utilize the mountain for grazing and need access to maintain water and other infrastructure.[243]

Regardless of the cause of the Mangum Fire, one pertinent fact remains – decades of lack of logging due to the alleged presence of the MSO on the Kaibab Mountain has turned the entire mountain into a tinderbox. When that tinderbox gets lit, the locals bear the consequences. The Mangum Fire presents just one more glaring piece of evidence pointing to the need for comprehensive reform. Not just reform to the ESA, but more specifically, reform of the critical habitat boundaries of the MSO on the Kaibab Mountain. The mountain, and the locals, deserve as much.

[242] Anonymous.
[243] *Id.; see also* National Wildfire Coordinating Group, *InciWeb – Incident Information System, Mangum Fire Maps*, National Wildfire Coordinating Group, https://inciweb.nwcg.gov/incident/map/6748/0/99745 (2020).

APPENDIX A

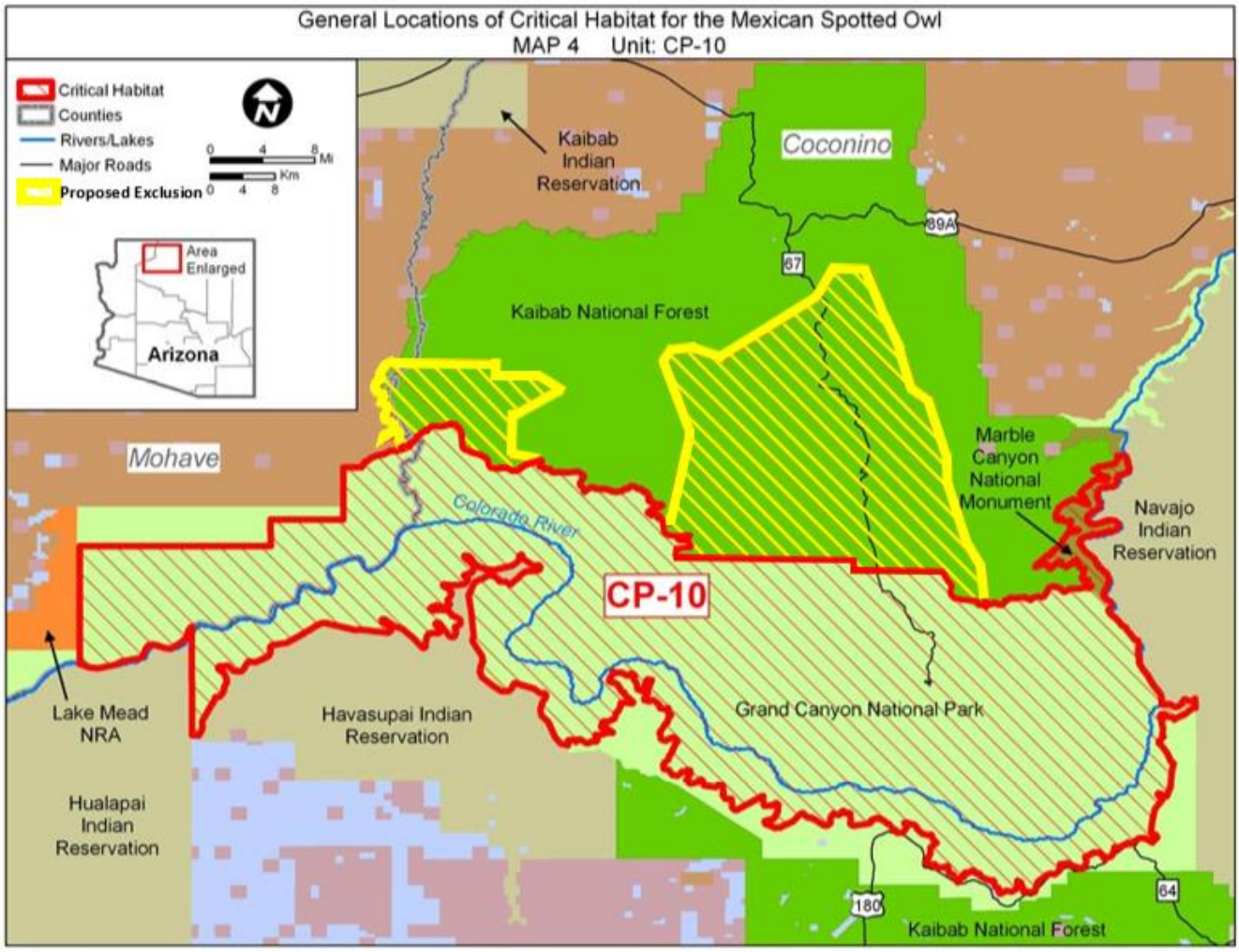
Current Mexican Spotted Owl Critical Habitat Unit CP-10[244]



[244] *See* USFWS, *Unit Map 4,* U.S. Fish & Wildlife Service, *available at:* https://www.fws.gov/southwest/es/MSO_CH_map4.html (n.d.); *see also* Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl, *supra* note 24.

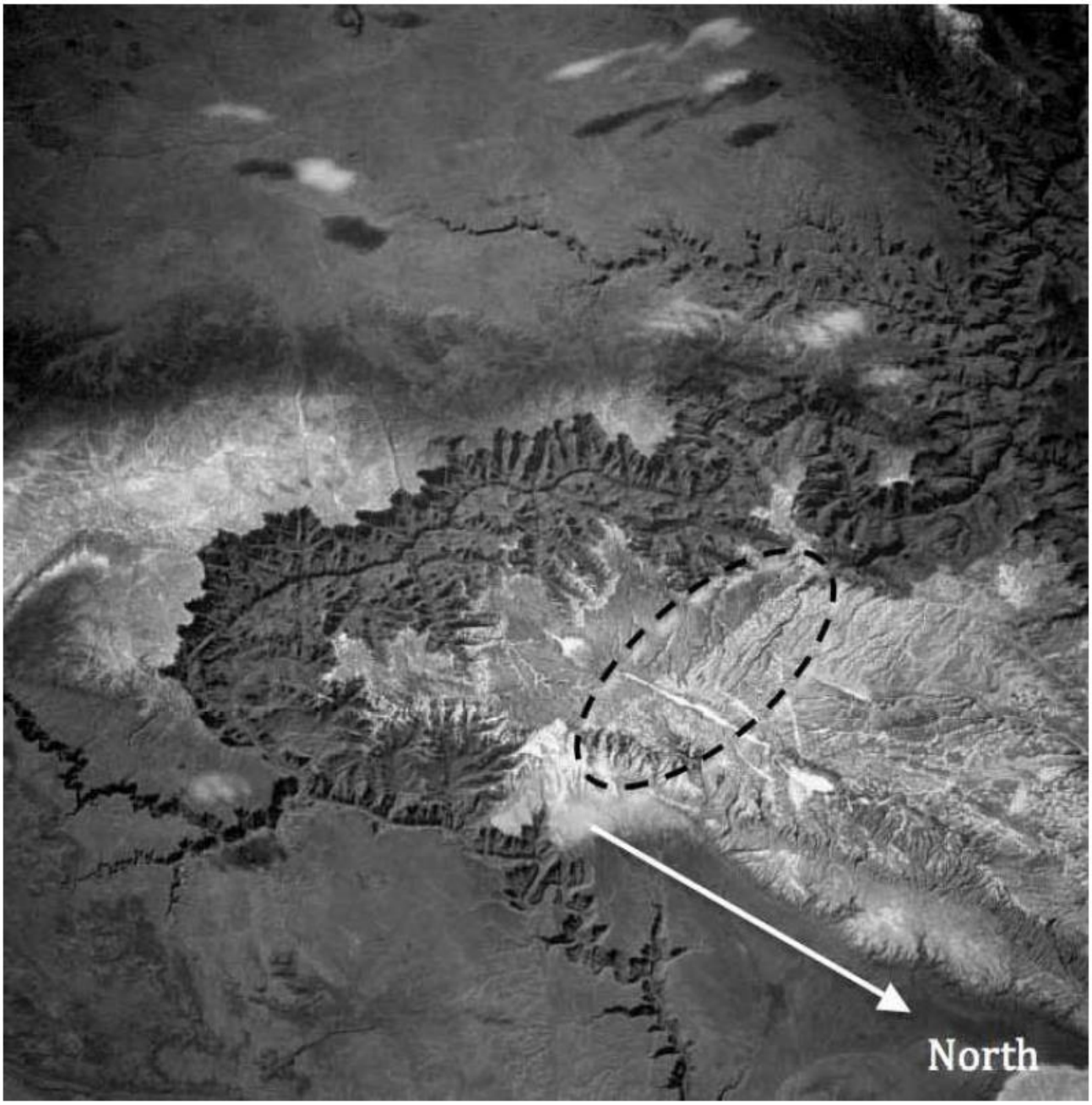
APPENDIX B

Proposed Exclusion from Mexican Spotted Owl Critical Habitat Unit CP-10



APPENDIX C

North Kaibab Mountain Aerial Tree Density Comparison Between Kaibab National Forest (North), and Grand Canyon National Park (South)[245]

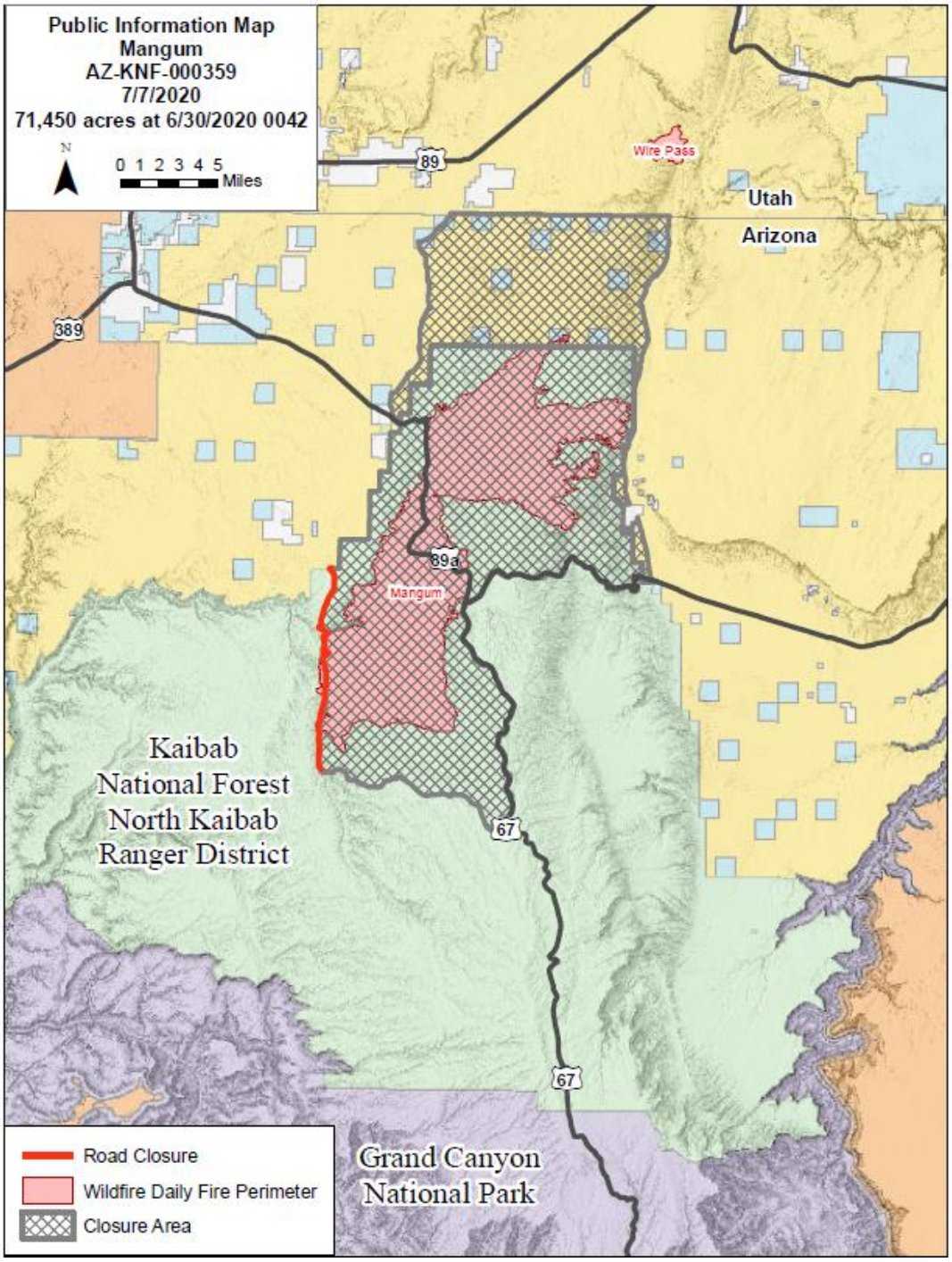


Divergent forest conditions along the administrative boundary between Grand Canyon National Park and Kaibab National Forest on the North Rim are visible from space (see arrow on above image).

[245] *See* Green, *supra* note 172, at 9.

APPENDIX D

Final Result of the 2020 Mangum Fire [246]



[246] *See* National Wildfire Coordinating Group, InciWeb – Incident Information System Maps, National Wildfire Coordinating Group, https://inciweb.nwcg.gov/photos/AZKNF/2020-06-08-2129-Mangum-Fire/picts/2020_07_07-11.11.07.430-CDT.pdf (2020).

APPENDIX E

The Mangum Fire as Seen from Fredonia, Arizona
(Note the Fredonia High School Football and Baseball Fields in Foreground)[247]

[247] *See* David Baker, *Mangum Fire near Grand Canyon's North Rim grows to over 70,000 acres*, AZFamily.com, https://www.azfamily.com/news/arizona_wildfires/mangum-fire-near-grand-canyons-north-rim-grows-to-over-70-000-acres/article_4033dc0c-ad1e-11ea-ac76-0fe76ae5ab95.html (2020).