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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, Plaintiff, vs. RYAN ZINKE*, Secretary, DEPARTMENT OF THE INTERIOR, an agency of the United States, and BUREAU OF LAND MANAGEMENT, Defendants.	No. 4:08-cv-435-BLW **PLAINTIFF'S BRIEF OPPOSING BLM'S MOTION TO RECONSIDER** (ECF #277)

* Pursuant to F.R.Civ.25(d), current Interior Secretary Ryan Zinke is automatically substituted for former Secretaries Ken Salazar and Sally Jewell.

INTRODUCTION

Three and a half years later, BLM complains that this Court erred in construing the 2003 grazing rider, Section 325 of P.L. 108-108, its September 2014 "Phase Two" partial summary judgment decision. *See Western Watersheds Project v. Jewell*, 56 F.Supp.3d 1182, 1192-94, 2014 WL 4853121 (D. Idaho 2014) (ECF #265). Yet BLM's Motion to Reconsider (ECF #277) rehashes the same erroneous arguments that it raised before, which the Court rightly rejected.

BLM again argues that Section 325 "deferred" – *i.e.*, temporarily repealed – all statutes relating to livestock grazing on BLM lands, including not only NEPA but also the Federal Land Policy and Management Act (FLPMA). Yet the statutory language contradicts BLM's reading: Section 325 expressly states that grazing permits "shall be renewed under Section 402" of FLPMA (emphasis added). By interpreting Section 325 as allowing BLM to defer NEPA analysis on expiring permits even though it must still comply with FLPMA Section 402, the Court properly construed the statutory language and gave meaning to all its parts.

Moreover, the Court's reading is consistent with the Congressional intent behind Section 325, as expressed in the language of the statute – which requires BLM to regularly report to Congress on its progress in eliminating the backlog of expiring grazing permits. BLM disregards this language in asserting that the Congressional intent instead was supposedly "to avoid harm to grazing permittees," which Congress never stated.

BLM compounds its error by asserting that the subsequent enactment of Section 3023 of the 2015 National Defense Authorization Act, P.L. 113-291 ("2015 NDAA"), "confirms" its reading of Section 325. But the 2015 NDAA says nothing about Section 325, and modified FLPMA expressly to allow BLM to delay NEPA compliance, without altering the requirements of FLPMA Section 402(a) for grazing permits. Because BLM misinterprets the 2015 NDAA as

supposedly repealing all FLPMA requirements applicable to grazing – just as it misreads Section 325 – WWP is challenging that erroneous interpretation, which BLM has followed in converting Section 325 permits at issue here into 2015 NDAA permits. *See* ECF #s 275 & 275-1 (WWP Motion for Leave and proposed First Supplemental Complaint).

Finally, contrary to BLM's accusation that the Court's construction of Section 325 "creates an absurd result," it is BLM's interpretation that is truly absurd. Under BLM's reading, it must renew grazing permits no matter how badly grazing may have harmed ecological conditions on a public lands grazing allotment, or how many permit violations the rancher might have, or even if the permittee is no longer qualified to obtain grazing permits. But Congress did not direct such absurd results, either in the 2003 grazing rider or the 2015 NDAA. The Court should thus reject BLM's misinterpretation, and deny the Motion to Reconsider.

LEGAL BACKGROUND

A. History of Grazing Riders.

The first appropriations rider addressing livestock grazing permits on public lands was adopted in Section 504 of the 1995 Rescissions Act, an appropriations bill. P.L. No. 104-19, § 504, 109 Stat. 212-13 (1995) (reproduced in Appendix hereto). Section 504 allowed the Forest Service to delay NEPA compliance in renewing grazing permits "notwithstanding any other law," but required it to "establish and adhere" to a schedule for completing NEPA. *Id.*

The first rider over BLM grazing permits was Section 124 of the 1999 Omnibus Consolidated Appropriations Act, P.L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), which provided:

> SEC. 124. Notwithstanding any other provision of law, grazing permits which expire during fiscal year 1999 shall be renewed for the balance of fiscal year 1999 on the same terms and conditions as contained in the expiring permits, or until the Bureau of Land Management completes processing these permits in compliance with all applicable laws, whichever comes first. Upon completion of processing by the Bureau, the terms and conditions of existing grazing permits may be

> modified, if necessary, and reissued for a term not to exceed ten years. Nothing in this language shall be deemed to affect the Bureau's authority to otherwise modify or terminate grazing permits.

112 Stat. at 2681-261 (emphasis added). The underscored language "notwithstanding any other provision of law" was dropped the next year, when Congress adopted Section 123 of the Fiscal Year 2000 Consolidated Appropriations Act, PL. 106-113, § 123, 113 Stat. 1501 (1999). That rider applied to grazing permits issued by the Secretary of Interior (including BLM and Park Service), and modified the prior rider language in various ways as follows:

> SEC. 123. A grazing permit or lease that expires (or is transferred) during fiscal year 2000 shall be renewed under section 402 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C.1752) or if applicable, section 510 of the California Desert Protection Act (16 U.S.C. 410aaa-50). The terms and conditions contained in the expiring permit or lease shall continue in effect under the new permit or lease until such time as the Secretary of the Interior completes processing of such permit or lease in compliance with all applicable laws and regulations, at which time such permit or lease may be canceled, suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations. Nothing in this section shall be deemed to alter the Secretary's statutory authority.

113 Stat. at 1501A-159 to 1501A-160. This language was extended in subsequent appropriations bills for fiscal years 2001, 2002 and 2003. *See* P.L. No. 106-291, § 116, 114 Stat. 943 (2000); P.L. No. 107-63, § 114, 115 Stat. 438 (2001); P.L. No. 108-7, § 328, 117 Stat. 276 (2003).

The 2003 grazing rider, at issue here, was adopted by the 108th Congress as Section 325 of the Fiscal Year 2004 Department of Interior and Related Agencies Appropriations Act, signed by President George W. Bush on November 10, 2003. P.L. 108-108, 117 Stat. 1241, 1307-08 (2003). The full text of Section 325 is much longer than prior riders, and is reproduced in full in the Appendix hereto. It modified and expanded upon the prior Section 123 language to include the Forest Service (under the Secretary of Agriculture), addressed the 1995 Rescissions Act and other statutes, and added requirements that the Secretaries of Interior and Agriculture make

regular reports to Congress on their permit renewal status. *Id.* By its terms, Section 325 was in effect from FY 2004-2008, but was later extended through FY 2013 via further riders. P.L. 111-08, § 426; P.L. 111-88, § 1406; P.L. 112-10, §§ 1104 and 1106; P.L. 112-74, § 415.

Section 142 of the same FY 2004 Interior Appropriations Act adopted a similar rider over "temporary, non-renewable" (TNR) grazing permits in BLM's Jarbidge Field Office:

> SEC. 142: Nonrenewable grazing permits authorized in the Jarbidge Field Office, Bureau of Land Management within the past seven years shall be renewed under section 402 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1752) and under section 3 of the Taylor Grazing Act of 1934, as amended (43 U.S.C. 315b). The terms and conditions contained in the most recently expired nonrenewable grazing permit shall continue in effect under the renewed permit. Upon completion of any required analysis or documentation, the permit may be canceled, suspended or modified, in whole or in part, to meet the requirements of applicable laws and regulations.

Pub. L. 108-108, § 142, 117 Stat. 1280 (2003).

A year later Congress passed a "Forest Service CE rider" allowing the Forest Service to use "categorical exclusions" to avoid conducting full NEPA analysis in renewing grazing permits under certain conditions, including that land use plan objectives were being met and no "extraordinary circumstances" were present. Section 339 of the Fiscal Year 2005 Consolidated Appropriations Act, P.L. 108-447, 118 Stat. 3103 (Dec. 8, 2004) (full text in Appendix).

B. This Court's Decisions Construing Grazing Riders.

The Jarbidge TNR Rider was the first grazing rider addressed by this Court, when Plaintiff Western Watersheds challenged BLM's reliance on it to approve grazing increases in the Jarbidge Field Office despite documented Fundamentals of Rangeland Health (FRH) violations and inadequate NEPA analysis (particularly of grazing's cumulative impacts on sage-grouse). *See* Memorandum Decision and Order, *Western Watersheds Project v. Bennett et al.,* No. 04-cv-00181-BLW (June 7, 2004) (ECF # 30) (granting temporary restraining order).

BLM argued that the TNR Rider allowed it to "suspend" complying with NEPA and the FLMPA regulations governing grazing permits for the one-year term of the TNR permits, despite an ongoing NEPA process it started in settlement of the prior Jarbidge TNR litigation. *Id.* at 3.[1] The Court rejected this argument, finding that "BLM's interpretation reads a great deal into the Rider, as the Rider itself never mentions suspending environmental laws, and never refers to the underlying EA process now underway in the Jarbidge Resource Area." *Id.* at 3-4. The Court noted that the language of the TNR Rider never said that NEPA or FLPMA were suspended, and "repeals by implication are not favored." *Id.* at 5. The Court also held that a "second flaw of the BLM's interpretation is that it ignores the Rider's second sentence," that carried forward the terms and conditions contained in the most recently expired TNR permits and required compliance with the 1996 Jarbidge TNR EA and Fundamentals of Rangeland Health regulations. *Id.* Thus, "[f]ar from suspending environmental laws, Congress was actually ensuring their application in the Rider." *Id.* at 6. But the Court observed that its reading still gave meaning to the TNR Rider, as Jarbidge ranchers who otherwise could not gain "authorization for available surplus" forage could do so "by allowing the BLM to rely on the 1996 EA. The Rider thus effected a real change even under the Court's interpretation." *Id.*

The Court affirmed this reading after the parties completed summary judgment briefings and presented oral argument on how the TNR Rider should be interpreted. Memorandum Decision and Order, *Western Watersheds Project v. Bennett, et al.,* No. 04-cv-00181-BLW (Aug. 24, 2004) (ECF # 67). Notably, neither BLM nor the ranchers appealed the Court's rulings.

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[1] *See* Memorandum Decision and Order, *Committee for Idaho's High Desert and Western Watersheds Project v. Guerrero, et al.*, No. 02-cv-521-S-MHW (D. Idaho, April 11, 2003) (ECF # 65) (granting injunctive relief over prior TNR permits); *id.*, Order entered Sept. 29, 2003 (ECF # 125) (approving settlement agreement under which BLM agreed to do new NEPA analysis and ensure compliance with FRH and other regulations before approving new TNR permits).

The Court next addressed the Section 325 rider after WWP challenged BLM's post-Murphy Fire grazing authorizations in 2008-2009. *See Western Watersheds Project v. Bennett,* No. 04-cv-00181-BLW, 2008 WL 2003114, * 7 (D. Idaho May 8, 2008) (ECF # 201) (allowing amended complaint); *id.*, 2009 WL 484438, *23 (D. Idaho Feb. 26, 2009) (ECF # 363) (Findings of Fact and Conclusions of Law). Because the relevant language of the two riders was similar, the Court cited its prior analysis of the Jarbidge TNR Rider and construed the language of Section 325 to conclude that it did not waive FLPMA, explaining that:

> Both riders contain identical language that renewals are issued pursuant to "Section 402 of [FLPMA] and section 3 of the Taylor Grazing Act. . . ."These sections require, in FLPMA's terms, that permit issuance be "consistent with the governing law." *See* 43 U.S.C. § 1752(a). Furthermore, Section 325 states that "[n]othing in this section shall be deemed to alter the statutory authority of the Secretary of the Interior. . . ." The Court previously rejected the argument that such riders divest this Court of jurisdiction to apply FLPMA, and the Court reaffirms that decision here.
>
> Finally, statutory repeals by implication are disfavored. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 190, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). This rule "applies with even *greater* force when the claimed repeal rests solely in an Appropriations Act." *Id.* (emphasis in original). The BLM and intervenors here are relying on a repeal by implication contained in an appropriations bill, a disfavored result according to *Tennessee Valley*.

2009 WL 484438, *23 (Conclusions of Law 20-24).

The Court later rejected the government's similar reading that Section 325 divested it of jurisdiction to enter injunctive relief based on the Forest Service's delays in completing adequate NEPA analysis for the North Sheep EIS process that it already started. *Western Watersheds Project v. U.S. Forest Service*, No. 05-cv-0189-BLW, 2006 WL 1697181, *2 (D. Idaho June 6, 2006). And in this litigation, the Court again construed Section 325 in denying BLM's motion to dismiss FLPMA challenges. *Western Watersheds Project v. Salazar*, No. 08-cv-435-BLW, 2010 WL 375003, * 2 (D. Idaho, Jan. 25, 2010).

All of these rulings thus form the backdrop for the Court's Phase II SJ Ruling in this case. *See Jewell*, 56 F.Supp.3d at 1192-94. The Court was careful in that decision to fully evaluate BLM's changing arguments regarding interpretation of the Section 325 rider, saying:

> In previous cases before this Court, the BLM has argued that § 325 completely absolved the BLM from following NEPA and FLPMA in renewing permits. *See WWP v. Bennett*, 2008 WL 2003114 (D. Id. 2008). The Court rejected the argument, holding that § 325 expressly required that renewals be consistent with FLPMA. *Id.* In this case, the BLM presents a new argument, that § 325 merely tolls the time for NEPA and FLPMA review, allowing that review to come after the permit is renewed. This new argument warrants a new look at § 325. . .

Id. at 1192-93 (emphasis added). But the Court again rejected BLM's reading, as follows:

> In its prior decision, this Court focused on the phrase that expiring permits "shall be renewed under section 402 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1752) ...." That statute, the Court noted, stated that permit issuance be "consistent with the governing law." *See* 43 U.S.C. § 1752(a). Thus, the language in § 325—when read together with the quoted statutory language—means that the renewals must be consistent with FLPMA. *Bennett, supra*, at *7.
>
> The BLM, changing its argument from waiver to tolling, now focuses the Court's attention on that part of § 325 stating that "[t]he terms and conditions contained in the expired, transferred, or waived permit or lease shall continue in effect under the renewed permit or lease until such time as the Secretary of the Interior ... completes processing of such permit or lease in compliance with all applicable laws and regulations ...." Other courts have interpreted that language to have a tolling effect on the BLM's duty under NEPA: "In essence, Section 325 changes the relevant environmental analysis that applies to grazing permits from a condition precedent into a potential condition subsequent; the analysis still has to occur, but for the time being, not prior to renewal of the permits." *WWP v. BLM*, 629 F.Supp.2d 951, 970 (D. Ariz. 2009); *see also Great Old Broads for Wilderness v. Kempthorne*, 452 F.Supp.2d 71, 81 (D.D.C. 2006) (holding that § 325 "require[s] reissuance of expired ... grazing permits prior to the completion of otherwise required actions").
>
> While holding that NEPA claims, among others, were tolled, neither case discussed the language cited by this Court concerning FLPMA. While the Court finds persuasive the holdings of these two cases for obligations other than FLPMA—such as NEPA—the Court cannot find that their reasoning extends to FLPMA. The rider expressly carves out an exception for FLPMA, as this Court held in *Bennett*, and the two cases cited above never address the FLPMA language in § 325. While this analysis might appear at first glance to create a

> conflict between *Bennett* and the two cases, they are actually easily reconciled: While § 325 tolls the BLM's obligation to proceed with environmental obligations imposed by laws like NEPA, it carves out an exception for FLPMA and requires a continuing obligation to follow that statute. This reading recognizes the rule of statutory interpretation that effect must be given, if possible, to every word, clause and sentence of a statute. *U.S. v. Wenner*, 351 F.3d 969, 975 (9th Cir.2003).

Id., 56 F. Supp.3d at 1193-94.

BLM did not seek reconsideration or leave to appeal this ruling after it was rendered. Yet it never adhered to the ruling, or changed its practice of automatically renewing expiring grazing permits without ensuring FLPMA compliance. As demonstrated in WWP's proposed First Supplemental Complaint (ECF #275-1), it has "converted" many Section 325 permits under the 2015 NDAA, still without performing NEPA or ensuring that FLPMA requirements are met.

ARGUMENT

I. RECONSIDERATION IS NOT WARRANTED.

Reconsideration of a prior ruling under Rule 59(e) should only be granted in "highly unusual circumstances," when (1) the district court is presented with newly discovered evidence, (2) there has been an intervening change in controlling law; or (3) the district court committed clear error or the initial decision was manifestly unjust. *Sissoko v. Rocha,* 412 F.3d 1021,1028 (9th Cir. 2005), *citing Dixon v. Wallowa County,* 336 F.3d 1013, 1022 (9th Cir. 2003). Simply rearguing an issue previously addressed by the court does not meet these standards. *Backlund v. Barnhart,* 778 F.2d 1386, 1388 (9th Cir. 1985) (upholding denial of Rule 59(e) motion where motion "presented no new arguments that had not already been raised").

Aside from invoking the 2015 NDAA – which does not constitute an intervening change in controlling law, since it came long after BLM approved the Section 325 permits at issue here – BLM presents nothing new in its Motion to Reconsider. BLM's Phase II summary judgment

briefing raised the same arguments and cases that it presents now. As quoted above, the Court thoroughly considered BLM's arguments, and rejected them. At the end of the day, the Court's interpretation was and remains correct. Thus, reconsideration is not warranted under Rule 59, and BLM's Motion to Reconsider should be denied.

II. THE COURT PROPERLY CONSTRUED THE 2003 GRAZING RIDER.

BLM's Motion to Reconsider alleges the Court's reading fails to give full effect to all provisions of the 2003 grazing rider, and defies the alleged "intent" of Congress "to avoid harm to grazing permittees." But BLM's interpretation itself is at odds with the plain language of Section 325, misstates the supposed "intent" of Congress, and leads to absurd results, as explained below. Accordingly, the Court must again reject BLM's flawed reading.

A. Section 325 Did Not Expressly or Impliedly Repeal FLPMA.

BLM contends that Section 325 should be construed as "deferring" BLM's compliance not only with NEPA, but also FLPMA and all other laws applicable to grazing permits. *See* BLM Corrected Brief (ECF # 279-1), p. 5 (Section 325 "defers compliance with all applicable laws and mandates renewal of the permits"); *id.* at 7 ("Court's ruling eviscerates the central component of Section 325, *i.e.,* the temporary automatic renewal of expired permits pending completion of environmental analyses"); *id.* at 8 (arguing Court should "interpret Section 325, consistent with its plain language, as deferring compliance with all laws, including FLPMA").

Yet BLM's Motion to Reconsider avoids acknowledging that "deferring" FLPMA and other laws constitutes a repeal of those laws, at least temporarily. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n. 8 (2007) ("It does not matter whether [a statutory] alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier,

inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals"). BLM thus ducks the principles of statutory interpretation applicable to statutory repeals, even though the Court identified them in its prior rulings.

As the Supreme Court has instructed, the repeal of a statute must be clearly expressed, and implied repeals are disfavored. *See id.,* 551 U.S. at 662-63; *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189-90 (1978). *Hill* emphasized that repeals by implication are particularly disfavored in the context of appropriations legislation, such as here, because:

> [B]oth substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.

Id. at 190-91. *See also Branch* v. *Smith,* 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute'").

Just as *Hill* found no express or implied repeal of the Endangered Species Act in an appropriations rider, Section 325 cannot reasonably be construed as an express or implied repeal of FLPMA. The relevant provisions of Section 325 underscore this conclusion, stating that:

> SEC. 325. A grazing permit or lease issued by the Secretary of the Interior . . . that expires, is transferred, or waived during fiscal years 2004-2008 shall be renewed under section 402 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1752) . . . The terms and conditions contained in the expired, transferred, or waived permit or lease shall continue in effect under the renewed permit or lease until such time as the Secretary of the Interior . . . completes processing of such permit or lease in compliance with all applicable laws and regulations, at which time such permit or lease may be canceled,

> suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations. Nothing in this section shall be deemed to alter the statutory authority of the Secretary of the Interior or the Secretary of Agriculture. . . .

P.L. 108-108, § 325, 117 Stat. at 1307-08 (emphasis added) (full text in Appendix).

As the Court previously ruled, Section 325 allows BLM to defer NEPA compliance in renewing grazing permits – its language that "the Secretaries in their sole discretion determine the priority and timing for completing required environmental analysis of grazing allotments" underscores this point. But Section 325 treats FLPMA differently, as the Court also held. It contains no language repealing or "deferring" FLPMA, as required for an express repeal. *See Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 307 (9th Cir. 1989) ("Obviously there can be no express repeal without reference to the 'repealed' statute"). Section 325 does not even include the language "notwithstanding any other provision of law" that Congress often uses in appropriations measures to signal a change in law. *See Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2002) (finding repeal by implication because legislative rider included "notwithstanding any other provision of law"); *City and County of San Francisco v. Assessment Appeals Board*, 122 F.3d 1274, 1276 (9th Cir. 1997) (finding no repeal by implication where subsequent statute did not include language "notwithstanding any other provision of law"). As noted above, such language was in the first BLM grazing rider, but not Section 325; and it was used in several other sections of the FY 2004 Appropriations Act, including before and immediately after Section 325. *See* P.L. 108-108, §§ 308, 314, 315, and 326 (all including this language). This omission further demonstrates that Section 325 did not repeal or modify the mandates of FLPMA. *See Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1067 (9th Cir. 1998 ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended").

Rather than containing any language repealing FLPMA, Section 325 instead expressly invokes Section 402 of FLPMA, stating that an expiring grazing permit "shall be renewed under Section 402 of [FLPMA]." This language demonstrates that Section 325 did not somehow repeal, waive, defer, or suspend the requirements for grazing permits under FLPMA Section 402 – it preserved those requirements.

Section 325 contains no definition of what it means for permits to be renewed "under" Section 402. Accordingly, the Court construes this term in accordance with its ordinary and natural meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The ordinary definitions of "under" include "subject to the authority, control, guidance or instruction of," or "controlled, managed or governed by."[2] Thus, according to its plain language, Section 325 requires that all grazing rider permits are "subject to the authority, control, guidance and instruction of" FLPMA Section 402. *See Bennett*, 2009 WL 484438, at *23 (reaching same conclusion). And as the Court previously held, FLPMA Section 402(a) requires that all BLM grazing permits must be "consistent with governing law," including controlling land use plans, allotment management plans, and other management direction. *Id.*, 2009 WL 484438, at *25, *citing* 43 U.S.C. § 1752(a). Thus, the language of Section 325 directs that the Secretary must renew expiring permits in accordance with these FLPMA requirements.

Notably, BLM provides no alternative explanation of the Section 325 language directing that permits be renewed "under Section 402." It selectively focuses on the next provision that terms and conditions of expiring permits "shall continue in effect" to argue the Court is not giving meaning to all parts of the rider. But the Court's reading does give effect to that

[2] *See* www.merriam-webster.com/dictionary/under; http://www.oxforddictionaries.com/definition/English/Under?=under (defining "under") (last visited Feb. 13, 2018).

provision, by agreeing that BLM may renew expiring permits on the same terms until it completes NEPA analysis, even though the rider does not excuse BLM's obligation to comply with FLPMA Section 402. BLM also ignores the subsequent language stating that "[n]othing in this section shall be deemed to alter the statutory authority of the Secretary of the Interior" – which this Court has interpreted as confirming BLM's obligation to comply with FLPMA. *Id*. It is thus BLM that improperly overlooks portions of the statute, not the Court.

In summary, the Court correctly considered the entire language of Section 325 and gave all parts meaning by interpreting it as allowing BLM and Forest Service to delay NEPA analysis of expiring grazing permits, but requiring that the basic FLPMA requirements for grazing public lands remain in effect. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) ("when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

B. BLM Misreads The Rider's Provisions For "Environmental Analysis."

BLM's Motion to Reconsider exposes the basic flaw in its reading: BLM plays fast and loose with the term "environmental analysis" to conflate NEPA requirements with its duty to ensure that grazing is consistent with governing land use plans and other requirements of the grazing regulations under FLPMA Section 402(a). *See* BLM Corrected Brief, p. 1 (asserting that Section 325 rider requires permit renewals "without additional procedural steps under FLPMA, including environmental analyses"); *id.* at 3 (Court's rulings "require BLM to withhold the issuance of grazing permits until time-consuming and resource intensive environmental analyses

can be completed"); *id.* at 9-10 (Court's reading is inconsistent with Section 325 provision that "Secretaries in their sole discretion determine the priority and timing for completing the required environmental analysis of grazing allotments") (all underscore added).

BLM's short-hand use of the phrase "environmental analysis" to interpret Section 325 disregards the specific language of the rider and the larger statutory context. FLPMA and NEPA are different statutes, with differing underlying purpose and intent. The term "environmental analysis" stems from NEPA, a procedural statute designed to ensure that federal agencies consider detailed information concerning environmental impacts, and reasonable alternatives, prior to making decisions. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). FLMPA provides substantive sideboards for managing federal public lands under the "multiple use and sustained yield" concept, and requires that all BLM actions are consistent with established land use plans. *See Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 555 (9th Cir. 2006) (reversing decision inconsistent with FLPMA). Particularly at the time Section 325 was adopted, FLPMA Section 402 nowhere imposed a requirement for conducting "environmental analysis" as part of the process for issuing grazing permits, nor did it even mention the term "environmental analysis." *See* 43 U.S.C. § 1752 (2003).

Likewise, Section 325 reflects this statutory distinction between NEPA environmental analysis and FLPMA requirements in issuing permits. The initial sections of Section 325 do not use the term "environmental analysis," but instead provide for renewal of expiring permits upon the same terms under FLPMA Section 402 until BLM "completes processing of such permit or lease in compliance with all applicable laws and regulations." *See* 117 Stat. at 1307-08. It is only in the latter part of Section 325 that the term "environmental analysis" is used, and that is within

the context of allowing the Forest Service to modify its NEPA schedules under Section 504 of the 1995 Rescissions Act. *Id.* Here, Section 325 states:

> That notwithstanding section 504 of the Rescissions Act (109 Stat. 212), the Secretaries in their sole discretion determine the priority and timing for completing required environmental analysis of grazing allotments based on the environmental significance of the allotments and funding available to the Secretaries for this purpose. . .

Id. As explained above – and quoted in full in the Appendix – Section 504 allowed the Forest Service to delay NEPA compliance in renewing expiring grazing permits but required the Forest Service to "establish and adhere" to a schedule for doing so; by modifying this requirement, Section 325 thus makes clear that the term "environmental analysis" means NEPA analysis.[3]

BLM's careless use of the term "environmental analyses" to lump together NEPA and FLPMA thus fails in light of the actual language of Section 325 and broader statutory context. Again, the Court's interpretation of Section 325 is the more natural and correct reading. Congress sought to provide BLM with temporarily relief concerning its alleged NEPA backlog, while safeguarding the substantive management provisions on nearly 260 million acres of federal public lands. Indeed, it is reasonable to expect that if Congress intended Section 325 to alter the substantive management regime on all public lands, it would have done so more clearly. BLM may delay NEPA reviews under Section 325, but it cannot avoid requirements that grazing permits be in accordance with land use plans and other requirements under FLPMA Section 402.

C. BLM Also Misstates The "Intent" Of Congress In Adopting Section 325.

BLM also disregards the statutory language in asserting that Congress's supposed "intent" in adopting the 2003 grazing rider was "to avoid harm to grazing permittees." BLM Corrected Brief at 2-3, 10-14. BLM does not address the actual language of Section 325, but

[3] Moreover, as explained below, the 2015 NDAA amendment to FLPMA also makes clear that the term "environmental analysis" applies to NEPA and not to FLPMA permit issuance.

instead lumps together all Forest Service and BLM grazing riders – despite their different language and dates of enactment – to assert that "the clear purpose of congressional grazing riders like Section 325 was, first and foremost, to ensure that ranchers were not penalized when federal land managers were unable to complete environmental analyses before a permit's expiration." *Id.* at 11 (emphasis added).

BLM's reading defies the settled rule that statutory construction presumes "the legislative purpose is expressed by the ordinary meaning of the words used." *Leisnoi, supra*, 154 F.3d at 1066-67, *quoting Seldovia Native Ass'n, Inc. v. Lujan,* 904 F.2d 1335, 1341 (9th Cir. 1990), and *Richards v. United States*, 369 U.S. 1, 9 (1962). The language of Section 325 says nothing about "avoiding harm to ranchers." What it does say is that BLM and Forest Service must regularly report to Congress on their progress in dealing with the backlog of expiring grazing permits and tell Congress what they need to clear up that backlog, as follows:

> Provided further, That beginning in November 2004, and every year thereafter, the Secretaries of the Interior and Agriculture shall report to Congress the extent to which they are completing analysis required under applicable laws prior to the expiration of grazing permits, and beginning in May 2004, and every two years thereafter, the Secretaries shall provide Congress recommendations for legislative provisions necessary to ensure all permit renewals are completed in a timely manner. The legislative recommendations provided shall be consistent with the funding levels requested in the Secretaries' budget proposals.

117 Stat. at 1307-08 (reprinted in Appendix). When considered along with the other language of Section 325 – including its specific invocation of FLPMA Section 402 and statement that it does not alter the statutory authority of the Secretary of Interior – this provision confirms the Congressional intent that BLM and Forest Service clear up their backlog of work while still ensuring that basic requirements for grazing under FLPMA are satisfied.

BLM supports its inferred legislative intent simply by citing two district court cases that construed other grazing riders, and a single legislator's statement from four years before Section

325 was adopted. *See* BLM Corrected Brief, p. 2 n. 3 & p. 11.[4] But BLM ignores the actual express of legislative intent in Section 325, as shown above. Simply citing other cases that addressed prior riders cannot overcome that statutory language. And the individual legislator statement cited by BLM was made in 1999 by Sen. Thomas – the same statement cited in *Great Old Broads*, 452 F. Supp.2d at 76 n. 2 – long before Section 325 was even proposed. Of course, "even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("*CPSC*"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

By construing Section 325 as allowing BLM to delay NEPA analysis while ensuring conformance with FLPMA Section 402, the Court is thus reading the rider's language consistently with the expressed Congressional intent.

D. To The Extent Relevant, The 2015 NDAA Confirms The Court's Analysis.

BLM's Motion to Reconsider also argues that the subsequent enactment of Section 3023 in the 2015 NDAA somehow "confirms" its reading of the Congressional intent behind Section 325. *See* BLM Corrected Brief, pp. 1, 14-15. That argument is again incorrect.

The 2015 NDAA was enacted by the 113th Congress in December 2014 – eleven years after the 2003 rider. *See* P.L. 113-291, 128 Stat. 3291 (Dec. 19, 2014). Section 3023 of the 2015 NDAA added new subsections (c)(1)-(4) and (h)-(i) to FLPMA Section 402, 43 U.S.C. § 1752, to allow BLM greater discretion in when to conduct NEPA analysis of grazing permit renewals,

[4] BLM's cases are *Great Old Broads For Wilderness v. Kempthorne*, 452 F. Supp.2d 71 (D.D.C. 2006), which addressed Park Service permits under the 1999 grazing rider (Section 123), and *WildEarth Guardians v. U.S. Forest Service*, 668 F. Supp.2d 1314 (D. N.M. 2009), which addressed the 2005 Forest Service CE rider. Neither case construed the specific legislative history of Section 325. And while BLM complains the Court's ruling is "out of step with other district courts," it only cites these and other cases that the Court has previously addressed and distinguished in the Phase II SJ Ruling. *See* BLM Corrected Brief, p. 3, n. 4.

and to authorize BLM to renew expiring permits on the same terms without having completed NEPA analysis. *See* 128 Stat. at 3763-64 (reprinted in Appendix hereto). Importantly, Section 3023 of the 2015 NDAA did not amend FLPMA Section 402(a) in any way. *Id.*

BLM does not explain how a statute adopted by the 113th Congress in 2014 somehow casts light on what the 108th Congress intended when it enacted Section 325 more than a decade earlier. Nothing in the 2015 NDAA mentions the 2003 grazing rider or any prior grazing riders; nor does it reference this Court's decisions construing the grazing riders. *Id.* As the Supreme Court cautioned: "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *CPSC, supra*, 447 U.S. at 118.

Moreover, to the extent they are relevant here, the amendments to FLPMA in Section 3023 of the 2015 NDAA are consistent with the Court's reading that Section 325 tolled NEPA compliance for expiring grazing permits, not FLPMA. Again, Section 3023 specifically addressed NEPA environmental reviews of grazing permits, without modifying FLPMA Section 402(a). 128 Stat. at 3763-64, *amending* 43 U.S.C. § 1752(c) & (h)-(i) (2015). Unlike Section 325 or prior BLM grazing riders, Section 3023 included language similar to the 1995 Rescissions Act and 2005 Forest Service CE rider, in specifying that permit renewal may occur without NEPA so long as the permittee is in compliance with all terms of the expiring permit and accepts them, and allowing use of categorical exclusions in certain conditions. *Id.* And it specifically defines "environmental analysis" as meaning NEPA analysis. *Id.*

The 2015 NDAA thus did not alter basic FLPMA requirements governing grazing management on the public lands, including that all grazing permits must be consistent with land use plans under FLPMA Section 302(a), 43 U.S.C. § 1732(a). Yet BLM is again disregarding the limited language used by Congress to claim the 2015 NDAA waived or suspended all laws

applicable to public lands grazing, including FLPMA. It is thus imperative that the Court allow Western Watersheds to challenge that unlawful reading through the proposed First Supplemental Complaint, ECF # 275-1.

E. BLM's Reading Leads To Truly Absurd Results.

Finally, BLM asserts that the Court's reading of Section 325 "creates an absurd result" because it requires BLM to ensure that FLPMA requirements are met even though the grazing rider directs that expiring permits be reissued under the same terms while BLM is conducting environmental analysis. *See* BLM Corrected Brief, pp. 1, 6-7. That result is only "absurd" if one's view is that ranchers should be able to graze public lands with no legal constraints whatsoever, or that BLM should not have to do anything to manage the public lands, which is what BLM apparently now believes.

BLM's brief recites many steps required to comply with FLPMA, but which it can utterly avoid under its reading of the 2003 grazing rider. As stated by BLM, these include ensuring "consistency with a land use plan," determining whether "a permittee has an unsatisfactory record of performance," imposing "grazing restrictions or closures" based on monitoring, preventing "unnecessary or undue degradation of the public lands," and ensuring "BLM makes progress toward meeting standards for rangeland health." BLM Corrected Brief, pp. 6-8.

BLM contends that its fulfillment of these FLPMA duties is "most often done via NEPA," *id.* at 10, but that is not accurate. BLM's monitoring of public land conditions, its evaluation of whether permittees are meeting terms and conditions of permits, and its assessment of rangeland health conditions are all non-NEPA processes. Those are basic, ongoing functions of the agency necessary to manage the public lands in accordance with its FLPMA duties. Yet now BLM seeks to utterly shirk those duties, by reading Section 325 – and the 2015 NDAA – as

supposedly waiving all of them. A much stronger and more explicit repeal of FLPMA would be required for that result than the language of Section 325 or the 2015 NDAA, neither of which purports to repeal FLPMA. *See Morton v. Mancari*, 417 U.S. 535, 550 (1974) (rejecting repeal by implication of "longstanding, important" statutory requirement, and construing statutes harmoniously to avoid implied repeal).

Accordingly, the Court should again reject BLM's interpretation of Section 325 and deny its Motion to Reconsider.

CONCLUSION

For the foregoing reasons, the Court should deny BLM's Motion to Reconsider.

Dated this 16th day of February, 2018.

Respectfully submitted,

/s/ *Laird J. Lucas*_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2018, I caused the foregoing BRIEF OPPOSING BLM MOTION TO RECONSIDER to be electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record in this matter as follows:

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APPENDIX

Section 504 of the 1995 Rescissions Act, P.L. No. 104-19, § 504, 109 Stat. 212-13 (1995):

> (a) Schedule for NEPA Compliance. -- Each National Forest System unit shall establish and adhere to a schedule for the completion of National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) analysis and decisions on all allotments within the National Forest System unit for which NEPA analysis is needed. The schedule shall provide that not more than 20 percent of the allotments shall undergo NEPA analysis and decisions through fiscal year 1996.
>
> (b) Reissuance Pending NEPA Compliance. -- Notwithstanding any other law, term grazing permits which expire or are waived before the NEPA analysis and decision pursuant to the schedule developed by individual Forest Service System units, shall be issued on the same terms and conditions and for the full term of the expired or waived permit. Upon completion of the scheduled NEPA analysis and decision for the allotment, the terms and conditions of existing grazing permits may be modified or re-issued, if necessary to conform to such NEPA analysis.
>
> (c) Expired Permits. -- This section shall only apply if a new term grazing permit has not been issued to replace an expired or waived term grazing permit solely because the analysis required by NEPA and other applicable laws has not been completed and also shall include permits that expired or were waived in 1994 and 1995 before the date of enactment of this Act.

Section 325 of the Fiscal Year 2004 Department of Interior and Related Agencies Appropriations Act, P.L. 108-108, § 325, 117 Stat. 1307-08 (2003):

> A grazing permit or lease issued by the Secretary of the Interior or a grazing permit issued by the Secretary of Agriculture where National Forest System lands are involved that expires, is transferred, or waived during fiscal years 2004-2008 shall be renewed under section 402 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1752), section 19 of the Granger-Thye Act, as amended (16 U.S.C. 5801), title III of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1010 et seq.), or, if applicable, section 510 of the California Desert Protection Act (16 U.S.C. 410aaa-50). The terms and conditions contained in the expired, transferred, or waived permit or lease shall continue in effect under the renewed permit or lease until such time as the Secretary of the Interior or Secretary of Agriculture as appropriate completes processing of such permit or lease in compliance with all applicable laws and regulations, at which time such permit or lease may be canceled, suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations. Nothing in this section shall be deemed to alter the statutory authority of the Secretary of the Interior or the Secretary of Agriculture: Provided, That where National Forest System lands are involved and the Secretary of Agriculture has renewed an expired or waived grazing permit prior to fiscal year 2004,

the terms and conditions of the renewed grazing permit shall remain in effect until such time as the Secretary of Agriculture completes processing of the renewed permit in compliance with all applicable laws and regulations or until the expiration of the renewed permit, whichever comes first. Upon completion of the processing, the permit may be canceled, suspended or modified, in whole or in part, to meet the requirements of applicable laws and regulations: Provided further, That beginning in November 2004, and every year thereafter, the Secretaries of the Interior and Agriculture shall report to Congress the extent to which they are completing analysis required under applicable laws prior to the expiration of grazing permits, and beginning in May 2004, and every two years thereafter, the Secretaries shall provide Congress recommendations for legislative provisions necessary to ensure all permit renewals are completed in a timely manner. The legislative recommendations provided shall be consistent with the funding levels requested in the Secretaries' budget proposals: Provided further, That notwithstanding section 504 of the Rescissions Act (109 Stat. 212), the Secretaries in their sole discretion determine the priority and timing for completing required environmental analysis of grazing allotments based on the environmental significance of the allotments and funding available to the Secretaries for this purpose: Provided further, That any Federal lands included within the boundary of Lake Roosevelt National Recreation Area, as designated by the Secretary of the Interior on April 5, 1990 (Lake Roosevelt Cooperative Management Agreement), that were utilized as of March 31, 1997, for grazing purposes pursuant to a permit issued by the National Park Service, the person or persons so utilizing such lands as of March 31, 1997, shall be entitled to renew said permit under such terms and conditions as the Secretary may prescribe, for the lifetime of the permittee or 20 years, whichever is less.

Section 339 of the Fiscal Year 2005 Consolidated Appropriations Act, P.L. 108-447, § 339, 118 Stat. 3103 (2004):

For fiscal years 2005 through 2007, a decision made by the Secretary of Agriculture to authorize grazing on an allotment shall be categorically excluded from documentation in an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if: (1) the decision continues current grazing management; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan, as determined by the Secretary; and (3) the decision is consistent with agency policy concerning extraordinary circumstances. The total number of allotments that may be categorically excluded under this section may not exceed 900.

Section 3023 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, § 3023, 128 Stat. 3762-64 (2014):

SEC. 3023. GRAZING PERMITS AND LEASES. Section 402 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1752) is amended--

(1) in subsection (c)—

(A) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively;

(B) by striking "So long as" and inserting the following: "(1) Renewal of expiring or transferred permit or lease.-- During any period in which"; and

(C) by adding at the end the following:

"(2) Continuation of terms under new permit or lease.--The terms and conditions in a grazing permit or lease that has expired, or was terminated due to a grazing preference transfer, shall be continued under a new permit or lease until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit or lease required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and other applicable laws.

"(3) Completion of processing.--As of the date on which the Secretary concerned completes the processing of a grazing permit or lease in accordance with paragraph (2), the permit or lease may be canceled, suspended, or modified, in whole or in part.

"(4) Environmental reviews.--The Secretary concerned shall seek to conduct environmental reviews on an allotment or multiple allotment basis, to the extent practicable, if the allotments share similar ecological conditions, for purposes of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and other applicable laws.'";

(2) by redesignating subsection (h) as subsection (j); and

(3) by inserting after subsection (g) the following:

(h) National Environmental Policy Act of 1969.--

"(1) In general.--The issuance of a grazing permit or lease by the Secretary concerned may be categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if—

"(A) the issued permit or lease continues the current grazing management of the allotment; and

"(B) the Secretary concerned--

"(i) has assessed and evaluated the grazing allotment associated with the lease or permit; and

"(ii) based on the assessment and evaluation under clause (i), has determined that the allotment--

"(I) with respect to public land administered by the Secretary of the Interior--

"(aa) is meeting land health standards; or

"(bb) is not meeting land health standards due to factors other than existing livestock grazing; or

"(II) with respect to National Forest System land administered by the Secretary of Agriculture--

"(aa) is meeting objectives in the applicable land and resource management plan; or

"(bb) is not meeting the objectives in the applicable land resource management plan due to factors other than existing livestock grazing.

"(2) Trailing and crossing.--The trailing and crossing of livestock across public land and National Forest System land and the implementation of trailing and crossing practices by the Secretary concerned may be categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

"(i) Priority and Timing for Completion of Environmental Analyses.--The Secretary concerned, in the sole discretion of the Secretary concerned, shall determine the priority and timing for completing each required environmental analysis with respect to a grazing allotment, permit, or lease based on--

"(1) the environmental significance of the grazing allotment, permit, or lease; and

"(2) the available funding for the environmental analysis."