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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, Plaintiff, v. **DAVID ROSENKRANCE**, Field Manager, Challis Field Office; and **BUREAU OF LAND MANAGEMENT**, Defendants.	No. CV-09-365-E-BLW **WWP'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

It has been nearly eight years since this Court reversed and remanded BLM's last grazing decision on the Burnt Creek allotment as violating the National Environmental Policy Act ("NEPA"). *Western Watersheds Project v. Snyder*, 03-314-E-BLW. In the intervening years, the allotment has largely been off-limits to livestock grazing, with the exception of repeated unauthorized trespass. Yet, the conditions in the allotment have yet to significantly improve, and BLM's own analysis shows that livestock grazing continues to cause violations of the Fundamentals of Rangeland Health. In spite of these degraded conditions, BLM recently issued a 2008 Final Decision allowing grazing to resume at the same levels as the past and authorizing the construction of a series of range developments (fences and water developments) within the Burnt Creek Wilderness Study Area ("WSA").

As explained below, the Court must reverse and remand the 2008 decision and associated NEPA documents, because BLM failed to analyze the cumulative impacts of the Burnt Creek grazing permit and range developments upon the wilderness and wildlife values of the Burnt Creek WSA, thus again violating NEPA. Moreover, BLM's decision to construct additional fences and water developments within the Burnt Creek WSA also violated BLM's substantive duties under the Federal Land Policy and Management Act ("FLPMA") to prevent impairment of wilderness values in the Burnt Creek WSA. Because BLM did not even address the cumulative impacts of BLM's extensive fencing and range projects on the Burnt Creek WSA – which are already impairing wilderness values, as demonstrated in the accompanying Declaration of Kathleen Fite – again the Court must reverse and remand the Burnt Creek decision and NEPA documents for violating NEPA and FLPMA.

Finally, reversal is also required here for the same reason as this Court recently reversed the BLM's Nickel Creek decision – for failing to adopt mandatory Terms and Conditions

necessary to satisfy rangeland health standards. *See Western Watersheds Project v. U.S. Dep't of Interior*, 2009 WL 5218020 (D. Id. 2009) ("*Nickel Creek*"). As in *Nickel Creek*, BLM here refused to include mandatory terms that it admits are needed to make progress in rectifying rangeland health violations on the Burnt Creek allotment, thus violating the Fundamentals of Rangeland Health regulations.

STATEMENT OF FACTS

The Burnt Creek Wilderness Study Area.

The 24,980-acre Burnt Creek Wilderness Study Area is part of the spectacular wilderness landscape surrounding the soaring peaks of Idaho's Lost River Range. *AR 5611–12*. The snow-capped peak of Mt. Borah, Idaho's highest peak, is visible from the Burnt Creek WSA, and the WSA is adjacent to and contiguous with the Forest Service's Borah Peak Roadless Area. *Id.* The 4,884-acre Burnt Creek allotment is entirely within the WSA, save for a road. *AR 4524.*

The Burnt Creek WSA lies in the headwaters of the Pahsimeroi River, historically a stronghold for bull trout, Snake River steelhead trout, and Snake River Chinook salmon, all now protected under the Endangered Species Act. *AR 183*. Burnt Creek, a tributary to the Pahsimeroi River, is used as spawning habitat by bull trout, *AR 4591*, and was recently proposed as bull trout critical habitat. 75 Fed. Reg. 2270, 2409 (Jan. 14, 2010). Burnt Creek is also designated as critical habitat for Chinook salmon and steelhead. *AR 4530.*[1]

In addition to fish, the Burnt Creek WSA is wildlife habitat for bighorn sheep, sage grouse, mule deer, pronghorn antelope and elk. *AR 4610*. Nearly the entire allotment is bighorn

[1] As the Court will recall, Western Watersheds has long sought to protect the imperiled fish in this watershed. In 2000, for instance, WWP challenged the use of crude water diversions in Mahogany Creek, a nearby Pahsimeroi tributary, as violating the ESA "take" provision. *IWP v. Whitworth*, No. 00-0728-E-BLW (D. Id.). WWP is also currently challenging the failure of BLM and other federal agencies to conduct ESA consultation over their grazing authorizations and other activities in the Pahsimeroi watershed. *WWP v. Rosenkrance*, CV-09-532-BLW.

sheep winter range, with 625 acres of elk winter range. *AR 4610.* A sage-grouse lek is located about a mile from the allotment boundary. *AR 4602*. *See also Separate Statement of Undisputed Facts ("SSF") at ¶ 3.*

Because of the fantastic scenery and recreational values, BLM determined that the Burnt Creek area qualified for designation as a WSA in 1980, as part of BLM's Idaho Intensive Wilderness Inventory (conducted pursuant to Congressional mandate in FLPMA). *AR 5606.* BLM explained that "[m]an-made imprints are not substantial within the western portion of the unit" (where the Burnt Creek allotment is located). *AR 5607.* Further, the area contained outstanding opportunity for solitude due to its "large size, excellent topographic relief, moderate vegetative screening, lack of nearby development, and remoteness." *Id*. The opportunity for primitive and unconfined recreation was also deemed outstanding because "*there are no continuing barriers or man-made developments to limit recreation activities,*" including hiking, horseback riding, cross-country skiing, snowshoeing, camping and backpacking. *Id*. (emphasis added). The attached map shows no fencing along Burnt Creek. *AR 5609.* Finally, BLM noted supplemental values of elk winter range and archaeological sites. *AR 5607.*

In 1991, BLM issued its Idaho Wilderness Study Report, in which it formally recommended that 8,300 acres of the Burnt Creek WSA (including the Burnt Creek allotment) be designated as wilderness, based on the "outstanding wilderness quality, lack of conflicts with other resource uses, ease of management" and value as an extension to the adjacent Forest Service roadless area. *AR 5612.* BLM found that the area's naturalness was "outstanding," with its "primitive nature" adding "a spectacular example of sagebrush- and grass-covered hills with pockets of timber giving way to awesome rugged mountains rising into the adjacent [Forest Service roadless] Area. Both areas are dominated by the 12,655-foot Borah Peak, the highest

point in Idaho." *Id*. Further, "most of the sights and sounds of man are not evident or are screened out by the vegetative cover." *AR 5616*. The area's opportunities for solitude and primitive, unconfined recreation were also "outstanding," because the area "is extremely hilly and steep," the "openness of the hilltops creates vistas," the area "is isolated from human influences that occur on the adjacent nonrecommended portion," and there is a lack of nearby development. *AR 5614, 5616*. Of note, BLM's decision *not* to recommend other portions of the WSA for wilderness designation was due in part to the need to construct fences, which BLM determined "would further degrade the wilderness values by lessening the visitor's perception of solitude and primitive and unconfined recreation." *AR 5612*.

Burnt Creek Allotment History.

The Burnt Creek allotment has been plagued by conflicts between livestock grazing and bull trout for at least 25 years. Instead of addressing the root of the problem through reducing livestock levels, BLM has constructed an ever-expanding web of barbed-wire and electric fencing along Burnt Creek. The fencing—constructed in an incremental, piecemeal fashion over the past 25 years—now totals over *14 miles within the WSA*. *AR 4637*.

In 1985, BLM issued the first of what was to be many fencing projects intended to stave off livestock damage to Burnt Creek. *AR 822*. BLM's three-page EA explained that "excessive vegetative removal by livestock" was negatively impacting water quality. *AR 823*. BLM constructed a 1.5-mile *permanent* fence in the Burnt and Upper Pahsimeroi allotments, rejecting temporary electric fencing. *AR 823–24*. Later in 1985, BLM issued another three-page EA, this one proposing another half mile of permanent electric and barbed wire fencing along Burnt Creek in the two allotments. *AR 834*.

In 1998, BLM issued another brief EA and decision to fence the entire length of Burnt Creek, both within and outside the WSA, to control livestock impacts. *AR 917.* The fence was eight miles long outside the WSA and four miles long inside the WSA, for a total of twelve miles. *Id*. The proposed action was to construct *temporary* electric fence within the WSA, as BLM admitted permanent fence would "not meet the nonimpairment criteria for the Burnt Creek WSA." *Id*. *at 918, 923.*

In 1999, BLM initiated Endangered Species Act consultation with the Fish and Wildlife Service ("FWS") to assess the impacts of BLM management activities in the Pahsimeroi watershed, particularly livestock grazing, upon the recently-listed bull trout. *AR 179*. Its Pahsimeroi Watershed Biological Assessment noted that Burnt Creek was subject to "excessive livestock use," with stream conditions "at unacceptable levels." *AR 229*. To mitigate grazing impacts, BLM assured FWS it would comply with quantitative grazing standards, *AR 238,* as well as construct extensive "[p]ermanent fencing" prior to livestock turnout in 1999. *AR 221*. *See also AR 375* (creek was "permanently fenced" in 1999).

In 2001, BLM issued a ten-year livestock grazing permit on the Burnt Creek allotment. *AR 371*. The permit incorporated, as Terms and Conditions, the grazing standards BLM determined were needed in its BA: stubble height, streambank shearing, woody plant use, and upland utilization standards. *AR 371–72.*

Later in 2001, BLM made determinations that livestock grazing was causing violations of four out of the five applicable rangeland health standards, including: Idaho Standards 2 (riparian areas and wetlands), 3 (stream channel/ floodplain), 7 (water quality), and 8 (threatened and endangered plants and animals). *AR 385–90.* BLM's assessment admitted "stream bank

alteration and instability . . . are excessive on virtually all stream reaches where livestock have access to the streams." *AR 379. See also SSF at ¶ 16* (trespass and violations in 2001).

In 2002, BLM issued a decision to renew the Burnt Creek allotment grazing permit for ten years, along with an environmental assessment ("EA"). *AR 507* (EA), *532* (decision). Western Watersheds challenged that decision as violating NEPA and FLPMA, including for failing to consider any alternatives to reduce grazing. In 2004, this Court held that BLM violated NEPA and reversed the decision. *AR 3095*. The Court explained that NEPA required BLM to consider and assess the impacts of a reasonable range of alternatives, but in the 2002 EA, "the only alternative to the permittee's proposal was to maintain the status quo," rendering the EA a "foreordained formality." *WWP v. Snyder*, CV-03-314-E-BLW, slip op. at 6–7 (D. Id. Sept. 22, 2004) (citation omitted). Following this Court's ruling, grazing was not authorized on the allotment between 2005 and 2008, *AR 4407*, with the exception of one week in 2007, *AR 4571*, and repeated trespass incidents. *See SSF ¶ 18* (summarizing the trespass).

In 2007, BLM completed a new Rangeland Health Assessment and Determination, finding that two Standards were still not being met on the allotment due to livestock grazing, even after several years of rest: Standards 2 (Riparian Areas and Wetlands) and 3 (Stream Channel/ Floodplain). *AR 3931*. Specifically, 70% of streams were in functioning-at-risk condition, and "lacked adequate cover to stabilize streambanks." *AR 3936, 3938. See also AR 3681* (FWS noting tributaries still exhibit "substantial degradation" from grazing following two or more years of rest).

The trespass in 2007 was particularly severe, involving up to 80 trespass cows. *AR 4218*. In the context of prosecuting that trespass, BLM explained that the trespass "has kept the . . . Burnt Creek Allotment from meeting the fundamentals [of] rangeland health." *AR 4407*. It also

explained that since grazing had not been authorized in four years, an upward trend should be apparent; but that areas on the allotment were "still functioning at risk with a static trend due to the intensity of use including forage consumption and livestock hoof damage." *Id*.

The 2008 EA and Final Decision.

In July 2007, BLM issued a draft EA and a proposed decision reauthorizing grazing on the Burnt Creek allotment. *AR 3948* (decision), *3815* (draft EA). WWP administratively protested the decision. *AR 4003.* BLM issued a Final Decision, Finding of No Significant Impact ("FONSI"), and final EA for the Burnt Creek allotment permit reissuance on September 8, 2008. *AR 4453* (decision and FONSI), *4523* (EA).

The EA admits that conditions on the allotment remain degraded, despite being largely rested for four years. For example, riparian areas of the East Fork, West Fork, and East Tributary of Burnt Creek and several wetland areas are all "functioning at risk." *AR 4567–71*.

Yet BLM's Final Decision authorizes permitted grazing use of 670 AUMs, a figure based on the actual use between 1986 and 2001, *AR 4563*, a level that *caused violations* of 4 of 5 applicable Standards in 2001. *AR 385–90.* The Final Decision also authorizes several new range projects inside the WSA: a mile of new fencing that expands the Burnt Creek onto an upland bench, about half a mile of new electric fencing, and a new livestock trough and pipeline. *AR 4459*. Further, the decision apparently allows an *unlimited* amount of additional seasonal electric fencing. *AR 4458*. BLM also installed a corrugated metal headbox in a spring complex, despite no mention of this in the EA or Final Decision. *AR 4809 (photos)*. The Final Decision does not designate either the "grazing system" or the "allowable use criteria" as mandatory permit terms and conditions, *AR 4457–59*, nor does the subsequent permit or grazing bill. *AR 5687–93.*

WWP filed an administrative appeal and petition for stay of the 2008 Burnt Creek EA, FONSI, and Final Decision before the Department of Interior's Office of Hearings and Appeals ("OHA") on October 9, 2008. *AR 4727*. On November 21, 2008, OHA denied the petition for stay. *AR 4769*. WWP subsequently dismissed the appeal, *AR 4796*, and has exhausted all required administrative remedies before electing this forum.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The APA sets forth standards governing judicial review of decisions made by federal administrative agencies. *See Dickinson v. Zurko*, 527 U.S. 150, 152 (1999); *Mtn. Rhythm Res. v. FERC*, 302 F.3d 958, 963 (9th Cir. 2002). Under the APA, this Court shall hold unlawful agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the arbitrary and capricious standard, the Court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989). While the scope of review under APA § 706(2)(A) is narrow, an agency must articulate a rational connection between the facts found and the conclusions made. *Marsh*, 490 U.S. at 378.

II. BLM VIOLATED NEPA AND FLPMA BY AUTHORIZING NEW PROJECTS AND GRAZING WHILE FAILING TO ANALYZE CUMULATIVE IMPACTS ON WILDERNESS VALUES AND WILDLIFE.

A. BLM's "Nonimpairment" Mandate to Protect Wilderness Study Areas.

Congress defines a "wilderness" by (1) size (at least 5,000 contiguous acres of roadless public land), (2) naturalness (the area "generally appears to have been affected primarily by the forces of nature" and "imprints of man's work" are "substantially unnoticeable"), and (3) either outstanding opportunities for solitude or for a primitive and unconfined type of recreation. *See* 16 U.S.C. § 1131(c) (Wilderness Act definition); 43 U.S.C. § 1702(*i*) (FLPMA adopting same). Wilderness also may contain "supplemental values" such as ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c).

In enacting FLPMA in 1976, Congress required BLM to systematically review all public lands under its management, and designate those possessing these characteristics as Wilderness Study Areas, for possible designation as Wilderness by Congress. 43 U.S.C. §§ 1711, 1782. After having designated WSAs, BLM also must – with only a few exceptions – manage these lands "so as not to impair the suitability of such areas for preservation as wilderness." *Id*., § 1782(c). *See Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004); *Ore. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1118–20 (9th Cir. 2008) (describing this intersection of FLPMA and the Wilderness Act).

In 1995, BLM promulgated an "Interim Management Policy For Lands Under Wilderness Review" ("IMP"), which specifies how BLM will implement this FLPMA nonimpairment mandate. *See AR 5623* (copy of IMP as published in Federal Register). The IMP provides that when BLM makes management decisions affecting WSAs, an "overriding consideration . . . must be that the preservation of wilderness values within a WSA is paramount and should be the

primary consideration when evaluating any proposed action or use that may conflict with or be adverse to those wilderness values." *AR 5634* (emphasis in original). Thus, with few exceptions, "wilderness resource management objectives within a WSA should take precedence over all other resource management program objectives." *Id.*

The IMP is thus "the BLM's binding interpretation of this non-impairment mandate," *So. Utah Wilderness Alliance v. Norton*, 326 F.Supp.2d 102, 122 (D.D.C. 2004), and a violation of the IMP indicates a violation of the nonimpairment mandate. Furthermore, here, the governing Challis Resource Management Plan affirmatively adopted the IMP, *AR 2115 & 2136*, meaning that a violation of the IMP is additionally a violation of BLM's "consistency" obligation under FLPMA to ensure that land management decisions conform to the applicable land use plan. *See* 16 U.S.C. § 1732(a), 43 C.F.R. § 1610.5-3(a), *WWP v. Bennett*, 392 F.Supp.2d 1217, 1228 (D. Id. 2005) (applying FLPMA consistency mandate in Jarbidge Resource Area).

To implement the nonimpairment mandate, the IMP imposes substantive and procedural duties upon BLM. Substantively, the BLM may not authorize any action that will cause impairment to a WSA, with limited exceptions. For an activity to satisfy the nonimpairment mandate, two criteria must be met. First, the activity must be "temporary" and "not create surface disturbance" or "involve permanent placement of facilities," where surface disturbance means "any new disruption of the soil or vegetation, including vegetative trampling, which would necessitate reclamation." *AR 5635*. Second, after the activity ends, wilderness values must not be degraded so far as to significantly constrain Congress's prerogative regarding wilderness designation. *Id*. With respect to livestock developments, the IMP specifically states that new, temporary livestock developments may only be approved if, in addition to satisfying the nonimpairment criteria, "they truly enhance wilderness values." *AR 5667* (emphasis in original).

If the proposed action would degrade wilderness values or cause an unacceptable additional *increment* of impact on wilderness values, it must not be allowed. *AR 5636*.

The IMP also contains detailed procedural requirements, which dovetail closely with NEPA in that they require BLM to rigorously analyze impacts on wilderness values through an EA or EIS. *AR 5645*. Specifically, in order to determine whether an action enhances wilderness values, BLM must "refer to the original wilderness inventory for baseline or benchmark data concerning the particular wilderness value(s) being affected." *AR 5636*. BLM must analyze a "description of the affected environment, considering both the specific site and *the WSA in its entirety*." *AR 5648*. (emphasis added). This includes a review of "[w]ilderness characteristics as documented in the intensive inventory report or Wilderness Study Report." *Id*. Additionally, BLM must analyze:

> --If the project's impacts, including cumulative impacts, had existed at the time of the intensive inventory, would those impacts have disqualified the area . . . ?
>
> --Will the addition of this proposal produce an *aggregate negative effect* upon the area's wilderness characteristics and values that would constrain Congress's decision to designate the area as wilderness, considering the condition of the area at the time the Secretary sent the recommendation to the President? . . .
>
> --Will the addition of this proposal reduce or improve the *overall wilderness quality* of the WSA or a portion of the WSA?

AR 5649–50 (emphasis added).

B. BLM Violated NEPA by Failing to Analyze Cumulative Impacts of its Range Developments and Grazing Upon Wilderness and Wildlife Values.

The 2008 Burnt Creek EA here violates these requirements in several ways, including by failing to address in any meaningful or legally adequate manner the cumulative impacts of the past and proposed range developments, along with the impacts of past and proposed livestock grazing, upon the wilderness and wildlife values of the Burnt Creek Wilderness Study Area.

Under NEPA, of course, agencies must take a "hard look" at cumulative impacts, which are impacts that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions." 40 C.F.R. § 1508.7. Cumulative impacts "can result from individually minor but collectively significant actions taking place over a period of time." *Id.* Agencies must provide "some quantified or detailed information" about cumulative impacts – "[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive in formation could not be provided." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005). The analysis "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present and future projects." *Id*. When an EA does not "sufficiently identify or discuss the incremental impacts" expected from successive projects, or "how those individual impacts might combine or synergistically interact with each other to affect the [] environment," it does not satisfy NEPA. *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004).

BLM failed to fulfill these requirements here, because it failed to analyze the combined impacts of past and proposed range developments and livestock grazing on wilderness and wildlife values of the Wilderness Study Area.

As to range developments, BLM admits there are now 14 miles of fence within the WSA. *AR 4637*. However, BLM's analysis of the cumulative impacts of adding another 1.5 miles (or more) of fencing consists only of a few hypothetical sentences stating that the total amount of fencing "may" or "can be expected to" result in cumulative impacts to the character, natural setting, and recreationalist mobility. *AR 4637, 4639*. BLM then summarily concludes that "[n]o significant direct, indirect, or cumulative impacts are expected" for any alternative. *AR 4640*. No

explanation is given for why those hypothetical concerns will not come to pass; nor is there any detailed information on anticipated impacts to the Burnt Creek WSA's wilderness values of naturalness, solitude, recreation, elk winter range, and archaeological sites. This is particularly problematic where BLM constructed the fencing in piecemeal fashion, using very brief EAs claiming the fencing was temporary, only to later deem it permanent, *SSF at ¶ 11*, meaning the total amount and true nature of the fencing has never been analyzed in *any* NEPA document.

In fact, the cumulative impacts of the additional fencing, on top of the existing 14 miles, will certainly create an "aggregate negative effect" on wilderness values such as naturalness and recreation. Indeed, BLM locks the Burnt Creek exclosure gates during the grazing season—mid-June to late August—to prevent livestock from getting inside. *AR 4457* (decision). This means that any recreational user wishing to cross Burnt Creek in a wide area within the WSA, during the majority of the hiking season, is forced to crawl around closely-spaced electrified wires. As WWP's Biodiversity Director Kathleen Fite explains in her accompanying declaration, "Crossing the electric fencing is difficult because the bottom wire is only about one foot off the ground. This means that there is little room for error as one is awkwardly squeezing under the wire, head pressed in the dirt, and if a body part sticks out too far, it will be painfully shocked by the fence." *Fite Decl. at ¶ 26*. The fencing presents an even greater barrier for people with pets, children, or horses. *Id. at ¶¶ 27, 28.*

BLM also does not mention any cumulative impacts on wildlife from the additional fencing, which again are likely. As this Court has noted previously, "[c]heatgrass is spread, in part, along infrastructure like fences used to control livestock grazing. The posts of these fences also provide perch sites for predators, and the barbed wires often injure or kill the low-flying sage grouse." *WWP v. Dyer*, 2009 WL 484438, *8 (D. Id.) (citing sage-grouse conservation

plan). Fencing impedes big game, *AR 4610*, which are a wilderness value here. *AR 5607*. Further, because the fencing expands the exclosure, it will serve to concentrate livestock on the steeper hillsides and upland springs and seeps, increasing livestock impacts on upland wildlife. BLM entirely ignores these cumulative impacts on wildlife from the miles of electric and barbed-wire fencing in the WSA and adjacent allotments.

BLM's discussion of cumulative impacts from water developments is even more brief than for fencing. In a single sentence, BLM states that water developments "can also be expected to begin incrementally affecting the naturalness of WSAs at a localized scale," *AR 4639*, before concluding there are no impacts. *AR 4640*. BLM gives no explanation for why these concerns, too, will not come to pass, or how the proposed livestock trough and metal headbox, in combination with the other developments in the WSA, will not degrade naturalness and scenery. *See AR 4808* (photo of trough from a distance, with its pale circular form highly visible against the dark sagebrush). Livestock concentrating at the trough will lead to soil compaction, *AR 4558–59*, which will inevitably lead to bare ground and even greater visibility. However, there is no discussion of how a new area of bare ground will further impact wilderness values. And BLM failed to disclose it would build a metal headbox in a spring. *See AR 4459* (Final Decision, not mentioning this). In sum, BLM's brief, "[g]eneral statements about possible effects and some risk" on some aspects of its range improvements, and complete lack of analysis on others, "do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Ocean Advocates*, 402 F.3d at 868.

As to livestock grazing, BLM did not discuss any cumulative impacts of authorized grazing on wilderness values or wildlife. *AR 4636–39*. Rather, it focused on the supposedly reduced impacts of livestock grazing in the Pahsimeroi Valley in recent years, and stated that

impacts on the Burnt Creek WSA will include "enhancement of the natural ecological conditions of the vegetation [and] the visual conditions of the lands and waters" and "a continuation of ecological site health and scenic appeal." *AR 4637.*

This is an astonishing brush-off of the negative impacts of livestock grazing documented abundantly in the record. Grazing has degraded and continues to degrade the environment in this very steep, high elevation, and arid WSA. Even after four years of rest, streams are functioning at risk due to lack of vegetative cover caused by livestock grazing, *AR 3936,* and BLM has repeatedly documented livestock impacts such as hummocking and bank collapse. *AR 348–49.*

Further, grazing analysis is devoid of any examination of the cumulative impacts of BLM's renewal of multiple grazing permits in the same vicinity. BLM is currently in the process of renewing the permit for the adjoining Upper Pahsimeroi allotment: it issued an EA in December 2008 (three months after the Burnt Creek decision). *Fite Decl., Exh. A.* BLM issued an EA on another adjoining BLM allotment, the Rock Creek allotment, in August 2008—less than a month from issuance of the Burnt Creek decision.[2] *Fite Decl., Exh. B.* Both of these adjacent allotments contain portions of the Burnt Creek WSA. *Exh. A at 70, Exh. B at 20, 70.* And yet, BLM failed to even mention these two adjoining permit renewals, which were not only "reasonably foreseeable," 40 C.F.R. § 1508.7, but practically simultaneous, and hence required to be considered in this NEPA analysis. BLM's incremental, allotment-by-allotment approach does not address the cumulative, collective impacts to wilderness values and wildlife.

This Court has held before that BLM violated NEPA when it approved separate EAs on adjoining allotments and failed to identify any cumulative effects. *Bennett,* 392 F.Supp.2d at 1223. There the Court relied upon the presence of a sensitive species in decline, FRH violations,

[2] This EA is currently being challenged in *WWP v. Rosenkrance,* 09-298-EJL.

an increase in grazing, and the fact that "the EAs were, like a horse with blinders, hampered by a restricted field of vision." *Id*. Here, too, there is the presence of that same sensitive species, sage-grouse; FRH violations; maintenance of grazing levels that caused FRH violations, *AR 4563*, where the allotment has still not recovered despite four years of rest; a restricted field of vision; and additionally a WSA. By constructing the WSA's fencing in a piecemeal fashion over 25 years via brief EAs, and dividing the WSA's grazing authorizations into completely separate (yet simultaneous) EAs, BLM has "divid[ed] a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002). As in *Bennett*, "[t]he only way the BLM could avoid this problem would be to engage in a detailed cumulative impacts analysis," but it failed to do so. *Bennett*, 392 F.Supp.2d at 1223.

C. BLM Violated FLPMA's Nonimpairment And Consistency Mandates By Approving Range Developments And Grazing In The Burnt Creek WSA.

BLM's 2008 Final Decision and EA for the Burnt Creek allotment not only violated NEPA, but also violated the FLPMA nonimpairment and consistency mandates by failing to establish that the new range developments "truly enhance wilderness values." *AR 5667* (IMP). The IMP explains that "[i]n order to determine whether a proposed action enhances wilderness values," BLM must "refer to the original wilderness inventory for baseline or benchmark data." *AR 5636*. *See also AR 5648* (same). If the action would "result in a negative or detrimental change in the state or condition of the wilderness value(s) then that wilderness value would be degraded or impacted and the proposed action must not be allowed." *AR 5636.*

But BLM's EA did not discuss the wilderness inventory. *See AR 4618, 4624, 4636.* Nor does BLM discuss whether the cumulative impacts of the project (now over 14 miles of fencing and numerous troughs) would have disqualified the area from being identified as a WSA. *Id*.

This failure, particularly the failure to mention the original lack of fencing, is important because in designating the area a WSA, BLM specifically cited the fact that "there [were] no continuing barriers or man-made developments to limit recreation activities" including hiking, horseback riding, and backpacking. *AR 5607*. This is simply no longer true: the miles of fencing now form a significant physical barrier to recreation, particularly in the summer, when the gates are locked. Indeed, BLM did not recommend part of the area for wilderness designation because of the need to construct fences, which it admitted would degrade the wilderness values. *AR 5612*.

Nor did BLM analyze whether each identified wilderness value would be improved or degraded, as required, *AR 5636, 5649*, or perform the required balancing analysis between the degradation and enhancement caused by the projects in order to determine whether they create an "*aggregate* negative effect" and "reduce or improve the *overall* wilderness quality" of the WSA. *AR 5649–50* (emphasis added). Instead, the EA's discussion of impacts upon wilderness values for Alternative 2 (most similar to the selected alternative in terms of range projects) consists of one short paragraph asserting that there would be no new surface-disturbing activities, and that the fencing "would reduce the naturalness of the WSA in the short term, though improving the overall health and naturalness of the WSA over the long term." *AR 4625*.

Thus, BLM did not conduct a balancing analysis at all, but simply stated an unsupported conclusion. BLM never acknowledges the profound degradation of naturalness from livestock infrastructure, or actually explains *why* the projects will help naturalness in the long term. Further, its assertion *completely ignores* the other wilderness values identified in the inventory: solitude, recreation, elk winter range, and archaeological sites. *AR 5607*. In truth, of course, BLM cannot show the range developments are designed to enhance wilderness values, because they are not. Rather, they are another last-ditch band-aid for the damage that livestock grazing

causes to bull trout habitat: an issue BLM has refused to address head-on for 25 years. The decision is one to accommodate livestock grazing at the expense of wilderness, in direct conflict with the IMP's command that wilderness objectives "should take precedence over all other resource management program objectives." *AR 5634.*

BLM's failure to comply with critical requirements of the IMP—to analyze baseline wilderness conditions and ask whether the WSA would qualify today, to balance the gains and harms to wilderness values, and to truly enhance wilderness values—means the decision violates the FLPMA nonimpairment and consistency mandates. The failures further show that BLM did not base its decision "on a consideration of the relevant factors"—the factors required by the IMP—meaning it is arbitrary and capricious under the APA. *Marsh*, 490 U.S. at 378.

III. BLM VIOLATED FLPMA BY FAILING TO MANDATE COMPLIANCE WITH RANGELAND HEALTH STANDARDS.

As this Court is aware, BLM adopted the Fundamentals of Rangeland Health ("FRH") regulations in 1995 to establish ecological criteria for the management of livestock grazing on BLM public lands. *See* 43 C.F.R. § 4180 *et seq.; Western Watersheds Project v. Kraayenbrink*, 538 F. Supp.2d 1302 (D. Id. 2008) (addressing BLM grazing regulations). Under the FRH regulations, BLM must implement grazing management changes no later than the start of the next grazing season when rangeland health standards are not met due to grazing. *See* 43 C.F.R. § 4180.2. *IWP v. Hahn*, 187 F.3d 1035 (9th Cir. 1999).

Further, "[t]he FRH regulations require that permits include mandatory terms and conditions 'that ensure compliance with subpart 4180.'" *Nickel Creek*, 2009 WL 5218020 at *11 (citing 43 C.F.R. § 4130.3-1). This Court recently reversed and remanded BLM's Nickel Creek grazing decision for failing to include mandatory terms and conditions necessary to achieve rangeland health standards. *Id. at *15*. BLM has committed the same error here.

As noted above, rangeland health standards are not being met on the Burnt Creek allotment due to livestock grazing. *AR 3931*. To make significant progress in rectifying these FRH violations, BLM determined that it was necessary for grazing to comply with a "deferred" grazing system and several "annual use indicator criteria," including four- to six-inch stubble height requirements; no more than 20% of the streambank being sheared by livestock; and 50% nipping on woody plants. *AR 3937–39* (FRH Evaluation). Likewise, in its Final Decision, BLM states that the standards, as well as a "deferred" grazing system, are necessary to achieve compliance with the Standards for Rangeland Health:

> This action will ensure maintenance of and/or significant progress toward achievement of Standards for Rangeland Health and is in compliance with the Guidelines for Grazing Management. **The implementation of a deferred grazing system coupled with upland allowable use indicator/criteria** should hasten or maintain natural re-vegetation by improving plant vigor and permitting desirable species to produce seed . . . This will in turn improve watershed protection . . . . The selected alternative **will apply allowable use indicator/criteria that will maintain or improve current upland and riparian plant community conditions**. . . . **The use of allowable use indicator/criteria should limit the impacts that are occurring to the resources**.

AR 4464–65 (Final Decision) (emphasis added).

As in *Nickel Creek*, however, BLM failed to designate the use criteria as mandatory Terms and Conditions in its Final Decision and permit; and it *further* failed to so designate the grazing system. *AR 4457–59*. Although both were designated as Terms and Conditions in BLM's prior permits, *AR 371–72, 534*, in the current decision and permit, BLM "downgraded" them to sections titled "Grazing System" and "Allowable Use Indicator/Criteria." *AR 4458–59*. These sections contain nothing whatsoever to ensure their enforcement, so as in *Nickel Creek*, are unenforceable. Thus, BLM's backsliding violated its duty under the FRH regulations to include mandatory terms and conditions "that ensure compliance with subpart 4180." 43 C.F.R. § 4130.3-1. This violation renders the decision arbitrary, capricious, and in violation of FLPMA.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully prays the Court to grant summary judgment in its favor, and reverse and remand the challenged 2008 Burnt Creek EA, FONSI, and Final Decision as being arbitrary, capricious and contrary to law under NEPA and FLPMA.[3]

DATED this 3rd day of March, 2010.

Respectfully submitted,

/s/ Kristin F. Ruether

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[3] Plaintiff respectfully reserves the right to subsequently seek injunctive or remedial relief.