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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,	)	
Plaintiff,	)	Case No. 08-cv-435-BLW
v.	)	
	)	
S.M.R. JEWELL ¹ , Secretary,	)	PLAINTIFF’S OPENING BRIEF
DEPARTMENT OF THE INTERIOR, an	)	IN SUPPORT OF MOTION FOR
agency of the United States, and	)	PARTIAL SUMMARY
BUREAU OF LAND MANAGEMENT,	)	JUDGMENT
Defendants.	)	
	)	
J.R. SIMPLOT CO., <i>et. al</i> ,	)	
Defendants-Intervenors.	)	

¹ S.M.R. Jewell has been substituted for Ken L. Salazar pursuant to Fed. R. Civ. P. 25(d).

INTRODUCTION

Plaintiff Western Watersheds Project seeks summary judgment reversing and remanding Defendant Bureau of Land Management's (BLM) final grazing decisions on the Jim Sage, Cassia Creek, Chokecherry, and Almo-Womack allotments because these decisions violate the National Environmental Policy Act (NEPA), the Federal Lands Policy and Management Act (FLPMA), and the governing land use plan.

BLM violated NEPA by failing to adequately examine the cumulative impacts on sage-grouse of its grazing decisions, together with other past, present and future grazing authorizations and other actions. In its four-paragraph cumulative impacts analysis, BLM eschewed any quantitative analysis of potential cumulative impacts, and instead relied on demonstrably inaccurate claims that “[t]here are no know adverse cumulative impacts associated with the proposed action,” and “future grazing permit renewals will be aimed at improving sage-grouse habitat.” Courts have routinely reversed as arbitrary and capricious similar cumulative impact analysis. *See Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) (rejecting general statements about possible effects); *W. Watersheds Project v. Salazar*, 843 F.Supp.2d 1105, 1125-28 (D. Id. 2012) (rejecting BLM's cumulative impacts analysis).

BLM also violated NEPA by failing to consider an adequate range of alternatives. As explained in detail below, BLM's EA looked at three alternatives, all of which were nearly identical to one another in terms of AUMs, seasons-of-use, and grazing patterns. The record shows that BLM did not consider any alternative that reduced livestock grazing or otherwise increased protections for sage-grouse habitat, riparian areas, and other important resources. BLM's alternative analysis must be reversed as arbitrary and capricious. *W. Watersheds Project v. Salazar*, No. 08-cv-00516-BLW, 2011 WL

4526746 (D. Idaho Sept. 28, 2011) (reversing EISs for inadequate alternatives)

BLM's decisions also violate FLPMA by authorizing grazing in violation of the Cassia Resource Management Plan (Cassia RMP). For example, the Cassia RMP requires that BLM "protect/enhance" crucial sage-grouse habitat including strutting, brood-rearing, and winter use areas, and "[p]rotect meadow seeps and springs to provide for needed production of water, forbs and insect" within sage-grouse habitat. Yet, the record reveals that BLM has authorized harmful grazing, including grazing in critical nesting and brood-rearing habitat during the precise time that sage-grouse use these areas, and otherwise permitted unrestrained livestock grazing in upland seeps, springs and wet meadows. This court has not hesitated to reverse agency decisions that violate the governing land use plan. *Salazar*, 843 F.Supp.2d at 1130-34, *W. Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1223 (D. Id. 2005) (reversing grazing decisions which harm sage-grouse in violation of RMP).

Western Watersheds also seeks reversal and remand of BLM's so-called grazing rider permits as violating FLPMA and BLM's grazing regulations. This Court has repeatedly held that Section 325 of P.L. 108-108 (the grazing rider) does not exempt BLM from compliance with FLPMA, the Fundamentals of Rangeland Health, and the governing land use plan. *See, e.g., W. Watersheds Project v. Dyer*, No. 04-cv-00181-BLW, 2009 WL 484438, p. *23 (D. Idaho Feb. 26, 2009). BLM continues to interpret the grazing rider as repealing all environmental laws, however, and has invoked the rider to permit grazing on fully 84% (168 of 200 allotments) of all allotments with permits issued since 2005 in the Burley Field Office. This Court should reaffirm its interpretation of the grazing rider, hold these grazing permits unlawful, and enjoin BLM's improper use of Section 325.

FACTUAL BACKGROUND

Greater Sage-Grouse Populations and Habitat

Greater sage-grouse (sage-grouse) is a unique species of grouse found only in sagebrush dominated habitats of western North America. Separate Statement of Undisputed Material Fact in Support of Motion for Partial Summary Judgment, ¶ 1 (SOF) (filed herewith). Sage-grouse typically inhabit large, interconnected expanses of sagebrush habitat, and thus are characterized as a landscape-scale species. *Id.* at ¶ 2.

Historically, the distribution of sage-grouse was closely tied to the distribution of sagebrush, and sage-grouse once occupied parts of 12 states within the western United States and three Canadian provinces. SOF ¶ 2. Its abundance and distribution has declined dramatically in North America, however, due to the destruction, fragmentation, and degradation of sagebrush habitats over past decades – including through the effects of livestock grazing and grazing-related infrastructure, vegetation treatments, energy and oil and gas development and associated infrastructure, and other factors. *Id.* at ¶¶ 2, 4. These factors have led to a substantial decline in sage-grouse populations and range. *Id.* at ¶¶ 4, 8-11.

Livestock grazing is known to be deleterious to sage-grouse populations and habitat in many direct, indirect, and cumulative ways. SOF ¶ 6. Livestock grazing causes long-term changes in plant communities and reduces habitat components, such as biological soil crusts, which contribute to the health of sagebrush habitat. *Id.* Grazing also reduces the residual grass height and forbs needed for successful sage-grouse nesting and reproduction; while livestock also batter and break sagebrush plants that are essential for cover, winter feeding, and other sage-grouse needs. *Id.* Livestock also degrade riparian habitats, essential for sage-grouse survival and reproduction. *Id.*

Livestock promote invasion of cheatgrass and other exotic weed species, thus contributing to fire frequency and severity, which further reduces the extent and quality of sage-grouse habitats. *Id.* In addition, pipelines, fences, and water developments constructed to accommodate livestock production fragment habitat and become source areas for the spread of weeds; and fences also cause direct mortality of sage-grouse. *Id.*

Burley Field Office

The Burley Field Office encompasses 1,629,472 acres located in south-central Idaho, and is located mostly in Cassia County. SOF ¶ 12. The area is bordered on the north by the Snake River; on the west by Twin Falls County and the Sawtooth National Forest; on the south by Nevada and Utah; and on the east by Power and Oneida Counties and the Sawtooth National Forest. *Id.*

Elevation varies from 4,100 feet in the valley bottoms to 8,048 feet in the mountains, and annual precipitation varies from 9 to 24 inches. SOF ¶ 13. Sagebrush dominates the vegetation of the lower elevations, with shadscale, greasewood, native perennial grasses, rabbitbrush, and juniper found throughout the area. *Id.* at ¶ 14. Riparian areas constitute only one percent of the area – totaling approximately 189 acres – and BLM considers these riparian areas “the most environmentally sensitive” areas within the entire field office. *Id.* at ¶ 15.

These lands provides habitat for an array of wildlife, including sage-grouse. SOF ¶ 16. *See also* Declaration of Kenneth Cole, Exhs. 1-4, 6 (map of sage grouse habitat within Burley Field Office) (Cole Decl.) (filed herewith). BLM acknowledges that “[s]age grouse were once the most widely distributed and abundant game bird in the [Burley Field Office]. They are still scattered throughout, although their numbers have declined due to loss of habitat through conversion of sagebrush lands to cropland and/or

grassland and the impact of livestock grazing on crucial nesting/brood-rearing areas associated with wetland/riparian sites.” SOF ¶ 16.

Cassia Resource Management Plan

In September 1983, BLM issued a Draft Environmental Impact Statement and Draft Cassia Resource Management Plan (Draft EIS/RMP), which documented the abysmal conditions of the public lands within the Burley Field Office. SOF ¶ 19. For example, BLM concluded that fully 70% of all public lands were in fair to poor condition and the remaining 30% in good to excellent condition. *Id.* BLM found that the trend in rangeland conditions was problematic, too, with only 16 percent in an upward (or improving) trend, and fully 81 percent in a static or downward trend. *Id.* BLM found the areas in and around the Jim Sage allotment suffered degradation. *Id.* at ¶ 20.

BLM attributed these poor conditions and worsening trend of the public lands in part to the prevalence of livestock grazing. SOF ¶¶ 21-24. BLM concluded that grazing was adversely impacting soils, riparian areas, and sage-grouse habitat. *Id.* In fact, BLM concluded that current livestock grazing “would not allow sage grouse habitat and populations to improve. A rapid removal of forbs by livestock on spring and summer ranges would have an adverse impact on juvenile sage grouse, especially those areas where forbs are scarce.” *Id.* at ¶ 24.

To rectify these poor conditions, the Draft Cassia EIS/RMP identified an alternative – Alternative C – that was designed to improve the conditions of the public lands, and meet BLM’s legal obligation to manage the public lands under the principles of multiple use and sustained yield. SOF ¶¶ 25-32. More specifically, Alternative C proposed a series of mandatory terms, conditions, guidelines and mitigation measures to improve wildlife habitat and range conditions, including (a) “Streams and wetlands

will be managed to restore, protect, and enhance the quality and quantity of the aquatic habitat on public lands,” (b) “Rangeland management grazing systems will be implemented to protect or improve riparian/wetland areas,” (c) BLM will “[t]ake necessary measures to eliminate conflict or land uses that will jeopardize threatened, endangered, or sensitive species,” (d) “Where conflicts between wildlife and other land uses occur, conflicts will be resolved in favor of wildlife,” and (e) “Public lands will be managed to maintain or improve wildlife habitat.” *Id.*

On January 24, 1985, BLM approved the Cassia RMP, which adopted and implemented the mandatory measures, conditions, guidelines and other elements of Alternative C from the Draft EIS/RMP. SOF ¶¶ 33-38. The Cassia RMP also identified specific, quantifiable requirements for improvement, including: “[i]mprove 51,978 acres of poor and fair condition rangeland to good,” and “[m]aintain or improve . . . 5,730 acres of sage grouse winter habitat and 1,201 acres of sage grouse brood-rearing habitat.” *Id.* at ¶ 37. The RMP requires BLM to “protect/improve” crucial sage-grouse habitat, including all strutting, brood-rearing, and winter use areas; and “[p]rotect meadow seeps and springs to provide for needed production of water, forbs, and insects within upland game ranges.” *Id.*

The Jim Sage, Cassia Creek, Chokecherry, and Almo-Womack Allotments

The Jim Sage allotment contains over 66,000 acres, and is located due east of Elba and Almo, Idaho, in the central portion of the Burley Field Office. SOF ¶ 39. This allotment contains outstanding natural resources, including winter, breeding, and late brood-rearing habitat for sage-grouse, much of which the Idaho Department of Fish and Game (IDFG) considers “key” sage-grouse habitat. *Id.* at ¶¶ 39-42. *See also* Cole Decl., Exh. 1 (map of Jim Sage allotment).

In 1999, prior to issuing new grazing permits authorizing status quo livestock grazing on the Jim Sage allotment, BLM documented poor resource conditions, including unacceptable conditions for sage-grouse and other sensitive species. SOF ¶¶ 45-47 (noting BLM will correct “habitat deficiencies” in the coming assessment process).

In 2003, BLM issued a Rangeland Health Evaluation for the Jim Sage allotment, which largely confirmed the poor conditions on the allotment – including marginal to poor sage-grouse nesting and brood-rearing habitat, failure to comply with the Cassia RMP requirement to improve range conditions, poor conditions of riparian areas and wetlands, and an overall “decrease” in sage-grouse winter habitat. SOF ¶¶ 48-52.

Later that same year, BLM issued a formal Rangeland Health Determination, which again documented the poor conditions within this allotment. SOF ¶ 54. BLM concluded that it was violating the minimum rangeland health standards for Standard 2 (Riparian Areas and Wetlands), Standard 3 (Stream Channel/Floodplain), Standard 4 (Native Plant Communities), Standard 5 (Seedings), Standard 7 (Water Quality) and Standard 8 (Threatened, Endangered and Sensitive Species), and livestock grazing was the significant factor leading to many of these violations. *Id.*

The Cassia Creek, Chokecherry and Almo-Womack allotments are small allotments, within or adjacent to the Jim Sage allotment. SOF ¶¶ 58, 68, 76. Portions of each of these allotments were converted to non-native grasslands in the 1950s through 1970s, yet sagebrush habitats have rebounded in the intervening years and IDFG now considers much of these allotments as “key” sage-grouse habitat. *Id.* at ¶¶ 58-60, 63, 65-66, 68-69, 71, 76-77, 79. *See also* Cole Decl., Exhs. 2-4 (map of allotments).

In 2002 and 2003, BLM prepared an allotment assessment for each allotment, in which BLM found generally poor habitat conditions – including unsuitable sage-grouse

nesting and late brood-rearing habitat – largely due to low forb cover and diversity. SOF ¶¶ 64-66 (Cassia Creek), 72-74 (Chokecherry), 80 (Almo-Womack). Shortly after, BLM issued a Rangeland Health Determination on each allotment, in which BLM concluded that some standards were met, but that Standard 8 (Threatened, Endangered and Sensitive Species) was not met on the Chokecherry and Almo-Womack allotments. *Id.* at ¶¶ 67 (Cassia Creek), 75 (Chokecherry), 81-83 (Almo-Womack).

New Grazing Decisions, EA and FONSI

In early 2005, BLM commenced a process to reauthorize livestock grazing on the Jim Sage, Cassia Creek, Chokecherry and Almo-Womack allotments (Jim Sage allotments), with BLM staffers noting that “all alternatives should be similar and reflect the overall grazing pattern” for the allotments. SOF ¶ 83. On November 6 and 17, 2007, BLM issued a draft Environmental Assessment (EA) and proposed grazing decisions, respectively, proposing to allow status quo livestock grazing on these allotments. *Id.* at ¶ 84. Western Watersheds submitted detailed comments – including asking BLM to more fully assess the cumulative impacts of BLM’s proposed grazing scheme on sage-grouse populations and habitat, as well as a request to consider additional alternatives. *Id.* at ¶ 85. IDFG also submitted comments asking BLM to explore a wider range of alternatives, including alternatives to provide increased protections for sage-grouse. *Id.*

On March 6, 2008, BLM issued its final EA, 20 final grazing decisions, and 20 Findings of No Significant Impact (FONSI) authorizing status quo livestock grazing on these allotments. SOF ¶ 86. BLM rejected IDFG and Western Watersheds’ request to consider additional alternatives; instead, the final EA looked at only three alternatives, all of which were nearly identical to the current situation and to one another, in terms of AUMs, seasons-of-use, and grazing use patterns. *Id.* at ¶¶ 86-90. The EA did not

consider a “no grazing alternative” or any alternative that reduced livestock grazing across the four allotments, or otherwise increased protections for sage-grouse habitat, riparian areas, and other important resources. *Id.*

In the EA, BLM adopted a cumulative impact area it called the Raft River Cumulative Effects Analysis Unit (RRCEAU). SOF ¶ 94. But BLM never examined the cumulative impacts of its decisions on the Jim Sage allotments, together with other past, present and reasonably foreseeable grazing decisions on allotments in the RRCEAU. *Id.*

Western Watersheds appealed and petitioned to stay the new grazing decisions. SOF ¶ 96. The Office of Hearings and Appeals denied Western Watersheds’ petition, and dismissed Western Watersheds’ appeal. *Id.* at ¶ 97.

Grazing Rider and BLM’s Grazing Rider Permits

On November 10, 2003, President Bush signed P.L. 108-108, authorizing appropriations for the Department of the Interior and related agencies. 117 STAT. 1321, P.L. 108-108. As discussed in detail later, this appropriations bill included a one-paragraph rider, contained in Section 325, which BLM interprets to effect a broad repeal of all environmental laws. *See* Section V, *supra*.

Since 2004, BLM’s Burley Field Office has used Section 325 to shield its grazing program from public and judicial review, including by issuing 165 grazing permits without first preparing any FLPMA consistency review and documentation, without adhering to the Cassia RMP provisions for protection and enhancement of sage-grouse breeding and late-brood rearing habitat, without consulting with Western Watersheds and other interested publics, and without following the procedural requirements for issuing proposed and final grazing decisions. SOF ¶¶ 98-117.

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).

Under the Administrative Procedures Act (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 this 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. *Id.*

II. BLM’S GRAZING DECISIONS VIOLATE NEPA.

BLM violated NEPA by failing to adequately consider the potentially significant cumulative impacts of its grazing decisions and other foreseeable grazing decisions on sage-grouse populations and habitat and failing to consider a reasonable range of alternatives to BLM’s status quo grazing scheme.

A. BLM’s Cumulative Impacts Analysis Was Inadequate.

BLM failed to prepare an adequate cumulative impacts analysis prior to authorizing grazing on the Jim Sage allotments. An EA must “fully address cumulative environmental effects or cumulative impacts.” *Te-Moak Tribe of Western Shoshone of*

Nev. v. U.S. Dep't of the Interior, 608 F.3d 592, 602 (9th Cir. 2010). “A cumulatively significant impact is an impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *Bennett*, 392 F.Supp.2d at 1223 (internal quotations and ellipses omitted), *quoting Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002). *See also* 40 C.F.R. § 1508.7.

In considering cumulative impacts, this Court has noted that an agency must provide “some quantified or detailed information” because “[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Bennett*, 392 F.Supp.2d at 1223, *citing Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005). *See also Rosenkrance*, No. 09-cv-00298-EJL, 2011 WL 39651, pp. *11-13 (D. Idaho January 5, 2011). This cumulative analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Bennett*, 392 F.Supp.2d at 1223.

In this case, BLM adopted a cumulative impact area it called the Raft River Cumulative Effects Analysis Unit (RRCEAU), which included scores of grazing allotments surrounding the Jim Sage allotments. SAR 43, 1234 (map). *See also* Cole Decl., Exh. 6 (outline of RRCEAU). BLM adopted this cumulative impacts area based on “shared watershed boundaries and common resources,” including sage-grouse habitat among other linked resources. SAR 43.

Despite the admitted connectivity in sage-grouse populations and habitat throughout the RRCEAU, BLM never examined the cumulative impacts of its grazing decisions on the Jim Sage allotments, together with other past, present and reasonably

foreseeable grazing decisions in the RRCEAU, as NEPA requires. SAR 47-48. In fact, the EA contains no discussions of the conditions of sage-grouse breeding, late brood-rearing, or winter habitat in these surrounding allotments, and the EA provides no quantitative information on current or future grazing decisions, vegetation treatment decisions, sage-grouse leks, lek counts or sage-grouse populations on these connected allotments. *Id.*

This failure is particularly surprising here because early in the process, BLM's Interdisciplinary Team acknowledged that "S[tandards] & G[uidelines] permit renewals" in surrounding allotments were "[r]easonably foreseeable actions." SAR 987 (handwritten notes). Moreover, at the time BLM was preparing the EA on the Jim Sage allotments, it was undertaking an environmental review on the North Cotterel, South Cotterel and other grazing allotments to the immediate north. *See* Cole Decl., Exh. 5 (showing allotments within RRCEAU with new grazing permits); *id.* at Exh. 8 (information on North and South Cotterel allotment permits). But, BLM's EA fails to even mention these on-going processes, and certainly never discusses or examines the overlapping impacts grazing is causing to sage-grouse habitat in these areas. SAR 47-8. *See Rosenkrance*, 2011 WL 39651, at *12 (overturning cumulative impacts analysis in part due to failure to analyze grazing on neighboring allotments).

Moreover, BLM has used the grazing rider to authorize grazing on over 160 allotments in the Burley Field Office – including dozens within the RRCEAU containing important sage-grouse habitat – without any NEPA or FLPMA review whatsoever. *See* Cole Decl., Exhs. 5, 6 (maps of grazing rider permits in Burley Field Office); SAR 7526-28, 7539-41, 7547-49, 7554-56, 7574-76, 7601-03, 7609-11, 7619-21, 7627-29 (grazing rider permits highlighted in this round of litigation). BLM's use of the grazing rider to sidestep NEPA and FLPMA environmental review procedures elevates the importance of

a comprehensive cumulative impacts analysis in the EA, especially because this analysis was one of the only opportunities BLM had to review conditions of sage-grouse habitat and populations in this area for the next decade or more. Unfortunately, BLM's four-paragraph cumulative impacts analysis fails to even acknowledge its issuance of hundreds of grazing rider permits, never mind actually examining the conditions within these allotments. SAR 47-48.

Instead of looking at the synergistic impact on sage-grouse populations and habitat of BLM's grazing decisions on the Jim Sage allotments – together with other recent or reasonably certain future decisions – BLM provided a perfunctory analysis at best. *Id.* BLM first claimed that “[t]here are no know adverse cumulative impacts associated with the proposed action.” *Id.* But the record is teeming with evidence that grazing was degrading sage-grouse habitat and causing extensive violations of the Fundamentals of Rangeland Health – including violations of the standard designed to protect sage-grouse habitat and populations. SAR 769 (Jim Sage Determination); 757-58 (marginal and unsuitable sage-grouse habitat in Chokecherry allotment); 715 (unsuitable sage-grouse nesting habitat in Almo-Womack); 738 (noting “current sage-grouse nesting and late brood-rearing habitat in the Cassia Creek allotment is of low value due to low forb cover and diversity in all pastures”). *See also* SAR 995-98, 3275-77 (IDFG comments on negative impacts of grazing on sage-grouse); SAR 3286 (Idaho Department of Environmental Quality (IDEQ) letter commenting on negative impact of grazing on springs and creeks in Jim Sage allotment).

BLM also erred in claiming that all “future grazing permit renewals” in the RRCEAU would be aimed at maintaining or improving conditions for sage-grouse. SAR 47. This claim ignores the fact, of course, that BLM has aggressively used the grazing rider

to shield its grazing program from public oversight, and has issued grazing permits on over 160 allotments in the Burley Field Office, alone, in the recent past without any effort to maintain or improve sage-grouse habitat or populations. Cole Decl., Exhs. 5, 6 (maps). *See also* Dkt No. 181-1 (list of grazing rider permits issued in Burley Field Office). *See also* Cole Decl., Exh. 8 (BLM's list of appropriation rider permits).

BLM's FONSI's similarly provide no analysis. In fact, the entirety of BLM's cumulative impact analysis in its FONSI's – which are supposed to include a “convincing statement of reasons” explaining why a project will have no significant cumulative impact on the environment, *see Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1220 (9th Cir. 2008) – is as follows:

The EA did not identify any significant effects. Outside this project area, additional Standards and Guidelines Assessments, Determinations, and subsequent permit renewal decisions will be made, potentially resulting in changes in livestock management actions, stocking levels, and season of use. However, those actions in combination with this decision are expected to have beneficial cumulative effects by implementing changes necessary to meet Idaho Standards for Rangeland Health

SAR 92.² Thus, the FONSI's provide no analysis at all, and instead BLM relies on conclusory assertions that no significant cumulative impacts will occur. BLM cannot meet its NEPA obligations in this way, and the Ninth Circuit has routinely rejected similarly vacant cumulative impact analyses. *Te-Moak Tribe*, 608 F.3d 592 (reversing EA for inadequate cumulative impact analysis); *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d. at 989 (same). In fact, this Court has rejected nearly identical cumulative impacts conclusions in the earlier round of this litigation, as well as in litigation in the

² This identical language was included in each of the 20 Final Grazing Decisions and FONSI's BLM issued on the Jim Sage, Cassia Creek, Chokecherry and Almo-Womack, which are challenged in this round of litigation. *See* SAR 120, 148, 175, 203, 231, 260, 285, 316, 344, 372, 400, 428, 456, 484, 513, 540, 568, 596, 624.

neighboring Jarbidge Field Office. *See Salazar*, 843 F.Supp.2d at 1126 (quoting FONSI); *Bennett*, 392 F.Supp.2d at 1223. *See also Rosenkrance*, 2011 WL 39651 at *11-13 (reversing cumulative impact analysis where “the EA offers no real analysis about cumulative impacts; instead, it makes conclusory statements and refers to the rangeland health assessments for support.”).

This Court should likewise hold that BLM’s failure to provide any quantitative information and analysis considering the cumulative impacts of BLM’s grazing decisions on the Jim Sage allotments on sage-grouse populations and habitat, together with other past, present and reasonably foreseeable grazing decisions, violated NEPA.

B. BLM Failed to Examine a Reasonable Range of Alternatives.

BLM violated NEPA by also failing to consider an adequate range of alternatives, and refusing to examine any alternative that would reduce grazing or otherwise increase protections for sage-grouse habitat, riparian areas, and other important resources. NEPA mandates that federal agencies “[s]tudy, develop, and describe alternatives to recommended courses of action in any proposal which involves conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). One of the primary purposes of NEPA is to “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

The purpose of analyzing alternatives is to “present the environmental impacts of the proposal and the alternatives” and to “thus sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. To that end, the agency must “[r]igorously explore and objectively evaluate all reasonable alternatives.” *Id.* “The touchstone for our inquiry is whether an EIS’s

selection and discussion of alternatives fosters informed decision-making and informed public participation.” *Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). The alternative requirement also applies to EAs. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228–29 (9th Cir. 1988)

As explained above, BLM examined three alternatives in the EA. See SOF ¶¶ 86–88. See also SAR 7-17. However, these alternatives are nearly identical to the current situation and to one another in all material respects. *Id.*

For example, under Alternative 2 (the alternative BLM ultimately adopted), “permitted AUMs . . . would remain the same as described in the proposed action [alternative].” SAR 14. Permitted AUMs in the proposed action alternative “reflect what is currently allocated and will not change.” *Id.* at 8, Table 3. And, under Alternative 1, “[p]ermits would be issued at the current AUM level.” *Id.* at 13. Thus, all three alternatives proposed identical AUM levels.³

All three alternatives propose a nearly identical grazing season-of-use, too. More specifically, the proposed action alternative planned an identical season-of-use as Alternative 1 (which is the “existing situation”) for 17 of 20 permittees allowed to graze these allotments, and only minor adjustments for the remaining three permittees. SAR 7, Table 3. Under Alternative 1, BLM proposed to continue “current season of use for each allotment as described in the proposed action (see Table 3).” *Id.* at 13. Alternative

³ BLM claims that Alternative 1 reduces livestock grazing in the Cassia Creek allotment by 22% to 545 AUMs, SAR 13-14, but this purported reduction is an illusion, since average actual use (413 AUMs) on the Cassia Creek allotment is far below current permitted use (697 AUMs), and even below the so-called reduced levels proposed by BLM (545 AUMs). Compare SAR 14, Table 4 (showing “Current AUMs” totaling 699 AUMs), with *id.* (showing “Proposed AUMs” totaling 545 AUMs), and SAR 60, Table 1 (showing average actual use from 1996-2007 totaling 413 AUMs). See also SOF 61. Thus, none of the alternatives would change the number of livestock actually grazed.

2 similarly proposed that “management in these areas [i.e., the Jim Sage, Cassia Creek, Chokecherry and Almo-Womack allotments] would continue as described in the proposed action alternative.” *Id.* at 15.

In fact, the narrow breadth of alternatives in the EA confirmed what BLM’s Interdisciplinary Team intended from the very beginning – i.e., “all alternatives should be similar and reflect the overall grazing pattern” for the allotments. SAR 989 (handwritten notes).

This Court has twice recently held that BLM’s failure to examine alternative grazing levels and grazing schemes violates NEPA. *See Salazar*, 2011 WL 4526746 at *14; *Rosenkrance*, 2011 WL 39651 at *9-11. In *Salazar*, this Court reversed BLM EISs that failed to consider any alternative that would reduce livestock grazing across the Pinedale and Craters of the Moon areas, holding that this level of alternatives analysis fails to “rigorously explore all reasonable alternatives.” 2011 WL 4526746 at *14 (internal quotations omitted).

Judge Lodge came to the same conclusion in *Rosenkrance*. In that case, BLM issued an EA and new grazing decisions on several allotments in central Idaho. 2011 WL 39651 at *1. BLM’s EA examined three alternatives, which were nearly equivalent in the level of grazing permitted and only “slightly different” in the proposed seasons-of-use. *Id.* at *9. The Court held that this alternatives review violated NEPA, especially because BLM’s analysis “evinced[s] precisely the sort of uncritical privileging of one from of use over another that the Ninth Circuit has held violates NEPA.” *Id.* (internal quotations and alterations omitted), *citing Ore. Natural Desert Ass’n v. BLM*, 625 F.3d 1092, 1124 (9th Cir. 2010).

This Court should follow *Salazar* and *Rosenkrance*, and hold BLM’s alternative

analysis unlawful. Like in those cases, BLM has again failed to examine any alternative that reduced grazing or modified the season-of-use on the allotments.

BLM also failed to analyze any alternative that would “avoid or minimize adverse impacts or enhance the quality” of sage-grouse habitat. 40 C.F.R. § 1502.1. The four allotments at issue here contain large portions of key sage-grouse habitat, including sage grouse breeding habitat, late brood-rearing habitat, and winter habitat. *See* Cole Decl., Exhs. 1-4 (map of sage-grouse habitat in allotments). *See also* SOF, ¶¶ 41-42, 60, 71, 79. It is well known that livestock grazing adversely impacts sage-grouse habitat, and BLM’s own Rangeland Health Determinations document the adverse impacts grazing is having on sage-grouse habitat in these allotments. SAR 765-770 (Jim Sage Determination) (showing violations of Fundamentals of Rangeland Health, and concluding that livestock grazing is significant factor).

To avoid or minimize these impacts to sage-grouse habitat, BLM could have considered an alternative examining the “well-established” seasonal and use restrictions on grazing within critical sage-grouse habitat. *Salazar*, 843 F.Supp.2d at 1115 (discussing season-of-use and utilization restrictions). *See also* AR 9450-63 (Sage-Grouse Conservation Assessment) (discussing seasonal habitat requirements); AR 3473 (citing these proper use timeframes); *Dyer*, 2009 WL 484438 at *21 (Finding of Fact ¶¶ 245-46) (reciting seasonal and use restrictions). But BLM refused to even consider doing so.

BLM’s failure to consider any alternative increasing protections for sage-grouse habitat is particularly striking here because IDFG repeatedly asked BLM to do so, by considering an additional alternative that would take account of the seasonal habitat needs of sage-grouse, including by reducing livestock utilization limits, modifying

season-of-use in sage-grouse habitat, and adequately protecting sage-grouse late brood-rearing habitat and other wetland habitat. SAR 995-998. *See also* SAR 3275-3277 (earlier IDFG letter requesting BLM modify grazing similarly).

Western Watersheds similarly submitted extensive comments requesting BLM consider alternatives to reduce the adverse impacts of livestock on sage-grouse. SAR 922, 923, 925, 930 (requesting BLM consider “[a] series of alternatives aimed at minimizing such livestock impacts”). In fact, Western Watersheds requested BLM examine alternatives designed to increase protections for sage-grouse at every stage of the administrative process. *See* SAR 1041-1055, 1051 (scoping comments) (requesting BLM “consider a wide range alternatives that incorporate reductions in AUMs, restoration, measurable standards of use as triggers for movement, and herding rather than structural projects”); SAR 1613-1674 (protest comments); SAR 1699-1737 (appeal and petition for stay). BLM ignored IDFG and Western Watersheds’ repeated requests. Like in *Rosenkrance*, under the facts of this case, it was “eminently reasonable that BLM should have considered an alternative that significantly reduced grazing levels from previous permits.” 2011 WL 39651 at *10.

BLM also erred in failing to consider a “no action” or “no grazing” alternative, as *Rosenkrance* and *Salazar* also held. SAR 18 (noting BLM refused to analyze a “no grazing” alternative). In its EA, BLM claimed that the “No Action” alternative equated with the “existing situation” – *i.e.*, continuing grazing under the same terms and conditions as the expiring permits. SAR 13. BLM made this identical argument in *Rosenkrance*, which the Court rejected as “troubling”:

Most troubling is that BLM did not consider a real no action alternative. BLM's purported “No Action” Alternative involves grazing; that alternative required agency action through issuing new ten-year

grazing permits. If BLM truly did take no action, then the old grazing permits would expire, no new permits would issue, and no range improvements would occur. No action would be no action. This is a reasonable, and obvious, alternative to issuing new grazing permits. BLM, however, dismissed a real no action alternative out of hand

2011 WL 39651 at *10. This Court should likewise find that BLM violated NEPA by failing to examine a “no action” alternative.

In conclusion, BLM’s constrained alternatives analysis prevented any “clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. It is impossible for an analysis to “sharply defin[e] the issues” surrounding livestock grazing when the alternatives are all the same. *Id.* Nor does a “comparison” of almost identical alternatives “foster[] informed decision-making and informed public participation.” *Cal. v. Block*, 690 F.2d at 767. Because BLM failed to study a reasonable range of alternatives in the EA, its decisions are arbitrary and capricious.

III. BLM’S GRAZING DECISIONS VIOLATE FLPMA.

The final grazing decisions violate FLPMA, 43 U.S.C. §§ 1701 *et seq.*, because they are inconsistent with the provisions of the Cassia RMP requiring BLM to “protect/enhance” sage-grouse breeding habitat and “protect” upland seeps, springs and wet meadows.

FLPMA is the basic “organic act” for management of the BLM public lands. Under FLPMA, BLM must develop land use plans for the public lands under its control, 43 U.S.C. § 1712, and all resource management decisions must be in accordance with those plans. *Id.* § 1732(a), 43 C.F.R. § 1610.5-3(a). *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004) (this requirement “prevent[s] BLM from taking actions inconsistent with the provisions of a land use plan”); *Salazar*, 843 F.Supp.2d at 1114 (reversing grazing decisions as inconsistent with Owyhee and Bruneau land use plans);

Bennett, 392 F.Supp.2d at 1227 (reversing grazing decisions as inconsistent with Jarbidge land use plan).

A. BLM's Decisions Fail to Protect and Enhance Sage-Grouse Breeding Habitat.

BLM's grazing decisions on the Jim Sage allotments fail to adhere to the Cassia RMP provision requiring BLM to "protect/enhance" crucial sage-grouse upland habitat. SAR 6899 (RMP), 7033 (Draft RMP explaining that under adopted approach, BLM is required to manage public lands to "maintain or improve wildlife habitat").

Protection and enhancement of sage-grouse nesting habitat requires both seasonal and use restrictions. As this Court noted in *Salazar*, to protect sage-grouse habitat, grazing must be limited to mid-summer months (*i.e.*, June 20-August 1) to avoid adverse impacts to sage-grouse nesting and late brood-rearing habitat, or to late fall and winter months (*i.e.*, November 15-March 1) to minimize impacts on herbaceous vegetation prior to the next nesting season. 843 F.Supp.2d at 1115 (citing literature). Grazing must also be limited to 30% utilization in sage-grouse habitat to ensure adequate herbaceous cover for sage-grouse nesting. AR 10828-46 (2000 Sage-Grouse Guidelines). *See also Dyer*, 2009 WL 484438 at *21, Finding of Fact ¶¶ 245-46 (February 26, 2009) (reciting seasonal and use restrictions) (citing literature). BLM's grazing decisions on these allotments fail to adhere to these requirements.

More specifically, according to the IDFG, the North Use Area of the Jim Sage allotment contains large portions of critical sage-grouse habitat, as does the East Use Area, the southeastern portion of the South Use Area, and the southern portion of the West Use Area. *See Cole Decl.*, Exh. 1 (map). The East Use Area also contains most of the sage-grouse leks on the allotment. SAR 2153 (map of leks), SAR 56 (map of use

areas). *See also* Cole Decl., Exh. 1.

But the record shows that BLM has authorized grazing in these areas during the critical season-of-use for sage-grouse. In the East Use Area, the area with the greatest amount of key sage-grouse habitat and leks, BLM has permitted twice-over grazing every year from April 1 to June 10, and then again from September 16-November 22. SAR 9 (outlining grazing system under proposed action alternative), SAR 14-15 (noting that the grazing system under adopted alternative (Alt. 2) “would continue as described under the proposed action alternative”).

Continuing the status quo grazing scheme in the East Use Area is particularly troubling since in its Allotment Evaluation, BLM concluded that every monitoring site visited in this use area was providing “marginal” or “poor” sage-grouse habitat, with many areas lacking the grass and forb component necessary for sage-grouse. SAR 781-85. In its Rangeland Health Determination, BLM similarly concluded that livestock grazing was causing violations of the Rangeland Health Standards and Guidelines in the East Use Area. SAR 769-770.

This same situation is repeated in the North and South Use Areas. BLM's grazing decisions permit grazing in key sage-grouse habitat from June 1 through September 8 and from May 1 through October 15 in the North and South Use Areas, respectively. SAR 8-9. Importantly, these are the same areas where BLM earlier concluded that current livestock grazing practices were causing violations of the Fundamentals of Rangeland Health. SAR 769-770.

According to IDFG, the Cassia Creek allotment also contains large areas of key sage-grouse habitat, including almost the entire West and Center pastures, and large portions of the East Pasture. SAR 742 (pasture map); Cole Decl., Exh. 2 (sage grouse

habitat map). BLM's own data shows that these areas are providing poor, marginal or unsuitable sage-grouse habitat, and BLM documented "heavy utilization" by cows, as well as sites "dominated" by cheatgrass. SAR 2514, 2543, 2547, 2555. *Compare* SAR 2513 (map of monitoring point in Cassia Creek allotment), *with* Cole Decl., Exh. 3 (map of key sage-grouse habitat). BLM admitted that "low forb cover and diversity in all pastures" is leading to poor condition of sage-grouse habitat. SAR 738.

Like in the Jim Sage allotment, despite these poor conditions BLM has authorized status quo livestock grazing, with grazing occurring every year in the spring (May 1-June 15), and again in the fall (September 9-28). SAR 7, 9 (noting the new grazing is same as the prior scheme).

This same situation is repeated on the Almo-Womack allotment. BLM has repeatedly documented "unsuitable" or "marginal" habitat conditions for sage-grouse, even within areas IDFG considers key sage-grouse habitat. *See* Cole Decl., Exh. 4 (map); SAR 2464, 2469, 2476, 2481, and 2490 (noting "heavy utilization"). But, again, BLM authorized status quo livestock grazing, including spring grazing every year (May 1-June 15) and then doubling back to graze these areas in the fall (October 16-November 15). SAR 7-8, 10.

The same is true for the Chokecherry allotment, with poor conditions within key sage-grouse habitat, and BLM authorizing status quo livestock grazing. *See* Cole Decl., Exh. 3 (sage-grouse habitat map); SAR 2647-57 (sage grouse habitat worksheets); SAR 7-8, 10 (showing status quo spring grazing from May 1-June 15 every year).

In its EA, FONSI and grazing decisions, BLM never discusses its obligation to "protect/enhance" sage-grouse habitat, and BLM certainly never claims that maintaining status quo livestock grazing will meet this RMP requirement. Nor could it.

In light of the undisputed evidence in the record, it is evident that BLM's seasons-of-use will adversely impact sage-grouse populations during the critical spring nesting and breeding seasons.

BLM also fails to adhere to widely accepted limitations on livestock use within sage-grouse habitat. The scientific information in the record shows that livestock utilization within sage-grouse habitat must be limited to 30%, to allow for a residual herbaceous grass cover to approach seven inches (or 18 cm). AR 10828-46 (2000 Sage-Grouse Guidelines); Idaho Conservation Plan, at D-18. Yet, BLM has adopted a 60% utilization guideline in many pastures containing key sage-grouse habitat (including the three pastures in the Cassia Creek allotment⁴; the North, Central and South pastures of the Almo-Womack allotment; and the Chokecherry, Cottonwood Riparian and Halogeton Meadows pastures of the Chokecherry allotment. *See* SAR 11 (discussing 60% utilization levels); Cole Decl., Exh. 1-4 (map of sage-grouse habitat by allotment and pasture). On other areas containing key sage-grouse habitat, BLM adopted similarly inappropriate utilization levels of 50% or 40%. *See* SAR 11.

Here again, BLM never discusses how this level of utilization will “protect and enhance” sage-grouse populations and habitat, as required under the Cassia RMP, and the scientific evidence shows that BLM's grazing authorizations will adversely impact sage-grouse habitat in these allotments.

B. BLM's Decisions Fail to Protect Sage-Grouse Late Brood-Rearing Habitat.

BLM's grazing decisions also fail to adopt any protective measures designed to

⁴ In the EA, BLM mistakenly identifies these pastures as the “Upper, Middle, and Lower” pastures, when they are properly named the West, Center and East pastures. *Compare* SAR 11 (EA), *with* SAR 742 (allotment evaluation), SAR 57

protect riparian areas that provide critical late-brood rearing habitat for sage-grouse. Under the Cassia RMP, BLM is required to “[p]rotect meadow seeps and springs to provide for needed production of water, forbs and insects” within sage-grouse habitat. SAR 6920. In discussing this then-proposed requirement in the Draft EIS, BLM noted that “[s]treams and wetlands will be managed to restore, protect, and enhance the quality and quantity of aquatic habitat on public lands,” and “[r]angeland management grazing systems will be implemented to protect or improve riparian/wetland area.” SAR 7025. *See also id.* at 7026 (noting that “[w]here conflicts between wildlife and other land uses occur, conflicts will be resolved in favor of wildlife”).

It is undisputed that these upland riparian areas are critical to sage-grouse hen and chick survival. AR 9457-60 (Sage Grouse Conservation Assessment). According to the Conservation Assessment, sage-grouse late brood-rearing habitat consists of upland riparian areas, including seeps, springs and wet meadows. AR 9457-8. These sites typically provide an abundance of forbs and insects for sage-grouse hens and chicks; and as the upland sagebrush habitats dry out, hens move to these more mesic sites. *Id.* *See also Salazar*, 843 F.Supp.2d at 1111-12 (noting that springs, seeps and wet meadows are “critical late-brood rearing habitat”); *Dyer*, 2009 WL 484438 at *5-8 (discussing sage-grouse seasonal habitat requirements).

However, BLM has failed to adopt any enforceable terms and conditions designed to “protect” these critical sage-grouse areas, as required under the Cassia RMP. In fact, BLM never even examined the conditions of many of these upland riparian areas prior to authorizing status quo grazing on the Jim Sage allotment. *See* SAR 1-86 (EA) (no discussion of condition of uplands seeps, springs and wet meadows).

A closer look at the record demonstrates that BLM has authorized unrestrained

livestock across this critical late brood-rearing habitat. For example, the North Use Area and the West Use Area of the Jim Sage allotment contains approximately 12 and 14 springs, respectively, according to the U.S. Geological Survey. *See* Cole Decl., Exh. 1. Many of these springs are located in key sage-grouse habitat, with others located in areas of high restoration potential. *Id.*

Yet, BLM has permitted grazing in the North Use Area from June 1 through September 8, and in the West Use Area from May 1 through June 30, which allows livestock grazing during the most harmful time for sage-grouse hens and chicks. *See* SAR 8 (showing season-of-use); *Salazar*, 843 F.Supp.2d at 1115 (noting that it is “well-established” that to “avoid conflicts with sage grouse nesting and late brood-rearing habitat grazing should be limited to mid-summer (June 20 to August 1)”). *See also* AR 9456-57 (Conservation Assessment) (discussing late brood-rearing habitat).

By authorizing grazing in these critical late brood-rearing areas during BLM’s authorized season-of-use for this extended length of time, BLM’s grazing schemes threaten to turn sage-grouse migration (from nesting to late brood-rearing habitat) into an annual “death march” for sage-grouse hens and chicks, alike, as noted by renowned sage-grouse expert Dr. Clait Braun. *Dyer*, 2009 WL 484438 at *6, Finding of Fact ¶ 18.

BLM’s grazing scheme will also adversely impact these critical riparian areas directly, also in violation of the Cassia RMP. It is well-known that livestock will congregate in and around riparian areas – including upland riparian areas – during the summer and early fall hot season, as the more arid areas desiccate under the hot summer sun. SAR 997 (IDFG recommending BLM reduce concentrated livestock use at riparian areas); SAR 3286 (IDEQ letter noting “degradation” of springs, creeks, and canyons). Yet, as noted above, BLM’s grazing scheme permits livestock grazing in these

areas during the hot season, which will lead to further degradation of these important natural resources. *See also* SOF, ¶ 6.

Under these facts, BLM's grazing schemes violate the Cassia RMP requirement that BLM "[p]rotect meadow seeps and springs to provide for needed production of water, forbs and insect" within sage-grouse habitat. SAR 6920.

IV. BLM'S JIM SAGE DECISIONS VIOLATE THE FUNDAMENTALS OF RANGELAND HEALTH.

Western Watersheds also seeks partial summary judgment on its Seventh Claim for Relief, which alleges that BLM is violating the Fundamentals of Rangeland Health in its grazing authorizations on the Jim Sage allotment. *See* Third Amended Complaint, ¶¶ 109-120. Despite finding that livestock grazing is causing violations of Standards For Rangeland Health – including Standard 8 (Threatened, Endangered and Sensitive Species) – on the Jim Sage allotment, BLM's final grazing decisions do not implement necessary changes in grazing management to achieve – or to make significant progress toward achieving – the Fundamentals, the Idaho Standards for Rangeland Health and Guidelines for Livestock Grazing Management, as required under 43 C.F.R. § 4180 et seq. SAR 765-70 (Determination). Instead, like the decisions challenged in the earlier round of summary judgment briefing, BLM's grazing decisions fail to adopt any mandatory terms and conditions necessary to remedy the rangeland health violations.

A. Legal Requirements Under the Fundamentals.

BLM adopted the Fundamentals of Rangeland Health (Fundamentals) as part of the 1995 Rangeland Reforms rulemaking, to establish minimum ecological requirements that grazing must meet on BLM lands – and to require quick action when those requirements are not being met. *See W. Watersheds Project v. Kraayenbrink*,

538 F.Supp.2d 1302 (D. Idaho 2008) (describing the FRH as “critical to improving rangeland conditions, especially riparian areas”) (internal quotations omitted), *aff’d in relevant part*, 632 F.3d 472 (9th Cir. 2011).

Under these regulations, BLM established four basic ecological criteria – termed the “fundamentals” of rangeland health – which are applicable to grazing across all BLM lands, and generally require that BLM maintain watersheds, ecological processes, water quality, and habitats in healthy conditions, or that significant progress is being made toward attaining such conditions. *See* 43 C.F.R. § 4180.1; *Kraayenbrink, supra*. If BLM determines that these basic criteria are not being met due to existing grazing management, the regulations mandate that BLM “shall take appropriate action . . . as soon as practicable but not later than the start of the next grazing year . . . to ensure” that the criteria will be met or significant progress made toward achieving them. 43 C.F.R. § 4180.1. These regulations require that grazing permits include mandatory terms and conditions “that ensure compliance with subpart 4180.” 43 C.F.R. § 4130.3-1. *See also W. Watersheds Project v. U.S. Dep’t of the Interior*, No. 08-cv-00506-BLW, 2009 WL 5218020 (D. Id. Dec. 30, 2009) (*Nickel Creek*).

In addition, the regulations provided for each BLM State Director to adopt site-specific Standards for Rangeland Health and Guidelines for Livestock Grazing Management (Standards and Guides), which BLM has done for Idaho. *See* 43 C.F.R. § 4180.2. *See also* <http://www.blm.gov/id/st/en/prog/grazing/Range-Health-Stds.html> (Idaho Standards and Guidelines) (last visited September 5, 2013). If BLM determines that the Standards and Guidelines are not being met due to grazing, the regulations again require that BLM “shall take appropriate action . . . that will result in significant

progress toward fulfillment of the standard and significant progress toward conformance with the guidelines.” 43 C.F.R. § 4180.2(c)

B. BLM Violated the Fundamentals By Relying on Unenforceable Guidelines.

BLM’s has again relied on unenforceable measures to correct its violations of the Fundamentals and Standards and Guidelines. BLM’s regulations require that grazing authorizations include mandatory terms and conditions necessary to ensure compliance with these minimum rangeland health standards. 43 C.F.R. § 4130.3-1. And this Court has repeatedly rejected BLM’s efforts to rely on voluntary, unenforceable management guidelines to comply with the Fundamentals and Standards and Guidelines. *Salazar*, 843 F.Supp.2d at 1128-30; *Nickel Creek*, 2009 WL 5218020 at *8-11.

In *Nickel Creek*, the Court rejected BLM’s approach to remedy its Fundamentals violations by adopting so-called “Management Guidelines,” which were not enforceable, mandatory terms and conditions. 2009 WL 5218020 at *8-11. This Court affirmed this analysis earlier in this litigation, when it held that BLM’s reliance on “Annual Indicator Criteria” on the Battle Creek allotment (and other similarly unenforceable guidelines on the other allotments) failed to adhere to the requirements of 43 C.F.R. § 4180. *Salazar*, 843 F.Supp.2d at 1130.

BLM’s grazing decisions on the Jim Sage allotment suffer the same deficiencies as *Nickel Creek* and *Salazar*. In each case, BLM found extensive violations of the FRH, including violations of the standard designed to protect and enhance sage-grouse populations and habitat. *Nickel Creek*, 2009 WL 5218020, at *2; *Salazar*, 843 F.Supp.2d at 1113-21. See SAR 765-70 (Jim Sage Determination).

Like in *Nickel Creek* and *Salazar*, BLM here adopted only voluntary, unenforceable guidelines to meet its requirements under the Fundamentals. For example, BLM adopted so-called “Annual Indicator Criteria” identifying utilization targets instead of mandatory terms and conditions identifying utilization limits. SAR 95.⁵ Moreover, the season-of-use for livestock grazing and the grazing rotations identified in the final grazing decisions are similarly voluntary, and BLM further allows for maximum “[m]anagement flexibility” – a euphemism allowing BLM and the permittee to modify the season-of-use, livestock numbers and even grazing rotation without any public involvement whatsoever. *Id.*

For the very reasons this Court reversed BLM’s prior efforts to rely on voluntary measures, this Court should follow its analysis and holding in *Nickel Creek* and *Salazar* and again hold that BLM violated the FRH by failing to adopt mandatory, enforceable terms and conditions required to meet its obligations under 43 C.F.R. § 4180.

V. BLM’S GRAZING RIDER PERMITS ARE UNLAWFUL UNDER FLPMA.

This Court has repeatedly held that Section 325 of P.L. 108-108 does not waive FLPMA and that BLM may not issue new grazing permits without first complying with FLPMA’s procedural and substantive requirements. *See, e.g., Dyer*, 2009 WL 484438 at *23 (Feb. 26, 2009) (holding that grazing rider did not block FLPMA challenge to grazing). However, BLM continues to issue grazing permits without first complying with FLPMA and its implementing regulations, in direct violation of this Court’s prior orders. *See, e.g., SAR* 7526-28, 7539-41, 7547-49, 7554-56, 7574-76, 7601-03, 7609-11, 7619-21, 7627-29 (representative grazing rider permits).

⁵ This identical language was included in each of the 15 Final Grazing Decisions BLM issued on the Jim Sage allotment, each of which is challenged in this round of litigation. *See SAR* 123, 178, 206-07, 235, 263, 347, 375, 403, 431-32, 487, 543, 571, 599-600, 627.

Through this motion, Western Watersheds seeks partial summary judgment reversing and remanding as unlawful BLM grazing permits issued under the auspices of the grazing rider, because BLM failed to comply with FLPMA. Specifically, BLM failed to ensure that they comply with the Cassia RMP, failed to adopt terms and conditions necessary to protect the public lands and wildlife habitat, failed to issue proposed or final grazing decisions, and failed to serve notice on Western Watersheds or other interested publics prior to issuance. *See* SOF, ¶¶ 98-115.

A. Grazing Permit Administration

Congress declared in FLPMA that public lands shall be managed in a manner that will “protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.” 43 U.S.C. § 1701(a)(8). Section 402 of FLPMA requires that all grazing permits and leases shall be consistent with governing law, including controlling land use plans, allotment management plans, and other management direction. *Id.* at § 1752 (a). *See also* *Dyer*, 2009 WL 484438 at *25, *citing* 43 U.S.C. § 1752(a); 43 C.F.R. §§ 1601.0-5(b), 4100.0-8.

The process of obtaining a grazing permit or lease commences when the prospective permittee or lessee files a grazing application. 43 C.F.R. § 4130.1. BLM must ensure that all prospective permittees meet certain “minimum qualifications,” including being a U.S. citizens or an appropriate business entity, and having a “satisfactory record of performance.” *Id.* at § 41101.1(a)(1)-(3), (b)(1)-(2). In making the latter determination, BLM must determine that the applicant has been in “substantial

compliance” with other federal grazing permits. *Id.*

Prior to issuing a permit or lease, BLM “shall consult, cooperate and coordinate” with the applicant, the appropriate State, and the interested public.” *Id.* at §§ 4130.2(b), 4130.3-3. After consultation, BLM must serve a proposed decision to issue a grazing permit or lease upon the applicant and other affected permittees, and “shall” send a copy of the proposed decision to the interested public. 43 C.F.R. § 4160.1. Within 15 days, “any applicant, permittee, lessee, or other interested public” may protest the proposed decision. *Id.* at § 4160.2. If no timely protest is filed, then the proposed decision automatically becomes a final decision. *Id.* at § 4160.3(a). If a protest is filed, BLM shall reconsider the proposed decision in light of the new information, and serve any final decision on the protestant and the interested public. *Id.* at § 4160.3(b).

B. Section 325 of P.L 108-108

On November, 10, 2003, President Bush signed P.L. 108-108 into effect. 117 STAT. 1321, P.L. 108-108. Tucked into this appropriations bill is Section 325, which provides, in part,

SEC. 325. 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

Public Law 108-108, Section 325.⁶

Since 2004, BLM's Burley Field Office has aggressively used Section 325 and its progeny to shield its grazing program from public and judicial review. BLM has invoked the grazing rider on 165 of 225 grazing permits BLM issued since 2005, representing over 73% of all grazing permits issued during this time. *See* Cole Decl., ¶¶ 22-26. *See also* Cole Decl., Exhs. 5 (map of allotments subject to grazing rider permits). In terms of permitted AUMs, BLM has invoked the grazing rider in authorizing fully 83% of all livestock AUMs since 2005. *See id.*, at ¶¶ 23, 25. Thus, BLM has only completed NEPA and FLPMA review on 27% of all grazing permits issued since 2005, representing only 17% of all livestock AUMs permitted. *Id.* at ¶¶ 22-25. *See also id.* ¶ 26 (84% of all allotments with post-2005 grazing permits have Section 325 permits).

Moreover, BLM has used the grazing rider to authorize grazing within some of the most important sage-grouse habitat in the Burley Field Office, including areas BLM considers "preliminary priority habitat" and "preliminary general habitat," as well as areas of heavy lek concentration. *See* Cole Decl., Exh. 6 (map of allotments subject to grazing rider permits with overlay of sage-grouse habitat).

C. Section 325 Does Not Repeal FLPMA.

There is no dispute that BLM issued a series of grazing permits without first complying with the substantive and procedural requirements of FLPMA. The Administrative Record includes nine grazing permits BLM recently issued under the

⁶ Congress has extended this provision through Fiscal Year 2013 via a series of subsequent legislative riders. *See* P.L. 112-74, § 415 (extending Section 325 through Fiscal Years 2012 and 2013); P.L. 112-10, §§ 1104(a)(4), 1104, and 1106 (extending Section 325 through Fiscal Year 2011); P.L. 111-88, § 1406 (extending Section 325 through Fiscal Year 2010); P.L. 111-08, § 426 (extending Section 325 through Fiscal Year 2009).

auspices of Section 325 of P.L. 108-108, where BLM failed to prepare any FLPMA consistency review and documentation, failed to adhere to the Cassia RMP provisions for protection and enhancement of sage-grouse breeding and late-brood rearing habitat, failed to consult Western Watersheds and other interested publics prior to issuing the permits, and failed to adhere to the appropriate procedural requirements for issuing proposed and final grazing decisions. SAR 7526-28, 7539-41, 7547-49, 7554-56, 7574-76, 7601-03, 7609-11, 7619-21, 7627-29 (grazing rider permits).⁷

BLM errs in again invoking the grazing rider to justify its failure to adhere to the requirements of FLPMA and BLM's grazing regulations. Indeed, this Court has previously (and repeatedly) held that Section 325 does not waive FLPMA. *See, e.g., Salazar*, Memorandum Decision and Order, pp. 3-4 (Jan 25, 2010) (Dkt. No. 89) (rejecting BLM's arguing that the grazing rider exempted compliance with FLPMA); *Dyer*, 2009 WL 484438 at *23 (holding that grazing rider did not block FLPMA challenge to grazing); *Bennett*, 2008 WL 2003114, *7 (D. Idaho May 8, 2008) (holding that Section 325 does not "divest this Court of jurisdiction to apply FLPMA" to grazing permits). In *Dyer*, this Court expressly rejected BLM's proposed interpretation of Section 325, and held that

⁷ BLM's failure to comply with the Cassia RMP is particularly problematic, because a review of the Administrative Record shows that these rider permits allow livestock grazing within critical sage-grouse habitat during the most harmful times. For example, BLM issued a grazing rider permit on the Point Springs allotment, which is almost entirely sage-grouse preliminary priority habitat. Cole Decl., Exh. 7. The new rider permit allows livestock grazing in the critical sage-grouse habitat from April 1-November 1 every year. SAR 7574-7576. This same pattern is repeated on other rider permit allotments as well. *Compare, e.g.,* Cole Decl., Exh. 7 (map of sage-grouse habitat in Western Stockgrowers and Meadow Creek allotments), *with* SAR 7526 (permit allowing grazing in key sage-grouse habitat in Meadow Creek from May 1-August 4 every year), SAR 7539, 7619, 7627 (permits allowing grazing in key sage-grouse habitat in Western Stockgrowers allotment from April 23-May 20, May 1-May 20, and April 29-May 20 every year, respectively).

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.

2009 WL 484438, *23.

As this Court has held, to effectuate the change in federal environmental laws that BLM advocates, BLM must demonstrate that Section 325 acts as an express or implied repeal of FLPMA and BLM's own grazing regulations. *Id.*, citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978). *See also Morton v. Mancari*, 417 U.S. 535, 549 (1974), quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Firebaugh Canal Co. v. U.S. Dep't of the Interior*, 203 F.3d 568, 575 (9th Cir. 2000) (stating that doctrine of disfavoring repeals by implication applies with "full vigor" when the subsequent legislation is an appropriations measure); *City and County of San Francisco v. Assessment Appeals Board*, 122 F.3d 1274, 1276 (9th Cir. 1997); *Env'tl. Defense Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir. 1995). BLM cannot meet these standards justifying a repeal of FLPMA.

First, BLM is foreclosed from establishing that Section 325 expressly repeals FLPMA because the grazing rider does not reference the statute. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 307 (9th Cir. 1989) (rejecting implied repeal). *See also Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1317 (9th Cir. 1990), *overruled on other grounds*, 503 U.S. 429 (1992). In rejecting an express repeal argument, the Ninth Circuit has stated that "[o]bviously there can be no express repeal without reference to the 'repealed' statute." *Hodel*, 866 F.2d at 307, citing SUTHERLAND STAT. CONST. § 23.07 (4th ed.). Since Section 325 does not reference FLPMA or BLM's grazing regulations, BLM cannot seriously argue that it expressly repeals these environmental laws and

regulations.

Furthermore, BLM cannot establish repeal by implication. As this Court noted in *Dyer*, “repeals by implication are disfavored.” 2009 WL 484438, *23, *quoting Tennessee Valley Authority*, 437 U.S. at 189-90. Repeals by implication only occur where there is (1) an irreconcilable conflict between two statutes, and (2) the later act covers the whole subject matter of the earlier and is clearly intended as a substitute. *Lujan-Armendariz v. INS*, 222 F.3d 728, 743 (9th Cir. 2000). As this Court previously concluded, BLM cannot establish that Section 325 repealed by implication FLPMA and BLM’s grazing regulations. *Dyer*, 2009 WL 484438 at *23.

Moreover, the first sentence of the grazing rider does not include the language “notwithstanding any other provision of law,” which may suffice for an appropriations rider to temporarily repeal other laws. Yet, by contrast, several other different sections of the 2004 Appropriations Act include such language. *See, e.g.*, P.L. 108-108, Secs. 110, 113, 114 & 117-119, 133, 308, 314, 315, and 326 (all including this language). The fact that Congress did not include “notwithstanding any other provision of law” language in Section 325, while including it in other parts of the 2004 Appropriations Act, thus further demonstrates that Congress did not repeal or modify the mandates of FLPMA. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1067 (9th Cir. 1998), *citing* 2A Sutherland, STATUTORY CONSTRUCTION, § 46.06 (5th ed. 1992 & Supp. 1997) (“when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended”). *Cf. 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 language indicating effectiveness “notwithstanding any other provision of law”).

BLM's argument that the grazing rider repeals (expressly or silently) FLPMA and the grazing regulations is further undermined by the provisions of the rider permits themselves. In these permits, BLM acknowledges that FLPMA and its grazing regulations survive the grazing rider, including the provision requiring the permittee to have a satisfactory record of performance. *See* SAR 7526, 7539, 7547, 7554, 7574, 7601, 7609, 7619, 7627 (requiring compliance with grazing regulations, 43 C.F.R Part 4100). The terms of the permits further plainly acknowledge the continuing application of FLPMA to each permit by stating that "THIS PERMIT . . . IS SUBJECT TO . . . THE TAYLOR GRAZING ACT, . . . THE FEDERAL LAND POLICY AND MANAGEMENT ACT, . . . AND THE RULES AND REGULATIONS NOW OR HEREAFTER PROMULGATED THEREUNDER." SAR 7528, 7541, 7549, 7556, 7576, 7603, 7611, 7621, 7629.⁸

Thus, BLM's claim that the grazing rider repealed all environmental laws – including FLPMA and BLM's grazing regulations – runs headlong into the plain language of the grazing rider and the grazing rider permits themselves, and this Court should again reaffirm its conclusion that the grazing rider does not repeal FLPMA and BLM's grazing regulations.

D. The Grazing Rider Does Not Apply Because BLM Changed the Permit Terms and Conditions.

The grazing rider does not insulate BLM from its non-compliance with FLPMA

⁸ The continued application of FLPMA and BLM's grazing regulations to grazing rider permits has been subsequently confirmed by an Instruction Memorandum (IM) from the Assistant Director of the BLM. *See* IM 2012-96 (April 10, 2012) (located at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-096.html) (last visited September 5, 2013). Here, BLM affirms that FLPMA and BLM's grazing regulations continue to apply post-grazing rider. *Id.* at 3 (stating that "[a] permittee seeking a renewed permit [under the grazing rider] must satisfy the 'mandatory qualifications' as laid out in 43 CFR § 4110.1").

and NEPA because BLM modified the terms of the grazing permits. Again, the operative language of the grazing rider states:

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

Section 325, P.L. 108-108. Regardless of the breadth of the first sentence – i.e., whether it embraces a complete repeal of all environmental laws as BLM believes, or represents a more targeted temporal delay of only NEPA’s environmental review requirements as Western Watersheds advocates – the second sentence of the grazing rider expressly limits BLM’s discretion in re-issuing grazing permits under the grazing rider. *Id.* Under the second sentence, BLM may only re-issue grazing permits under the same terms and conditions contained in an expired, transferred, or waived permit. *Id.* Thus, any modification to the terms and conditions of a grazing permit precludes BLM from relying on the grazing rider to excuse its failure to comply with NEPA and FLPMA, even under BLM’s most generous reading of the grazing rider.

The record here shows that BLM has repeatedly altered the terms and conditions of the expiring permits at issue in this round of litigation – with these changes inuring to the benefit of the livestock permittee. For example, the new grazing permit on the Western Stockgrowers allotment – which contains large portions of key sage-grouse habitat – extended the season-of-use in the spring and increased AUMs by nearly 12%. *Compare* SAR 7537 (old permit), *with* 7539 (new permit). *See also* Cole Decl., Exh. 7 (map of sage-grouse habitat within Western Stockgrowers allotment).

Importantly, BLM's new grazing rider permit also weakened protections for springs and creeks – the same critical sage-grouse late brood-rearing areas the Cassia RMP requires BLM to “protect” – by eliminating the prohibition on all supplemental feeding or salting within $\frac{1}{4}$ mile of all springs and creeks. *Compare* SAR 7538 (old permit) (prohibiting all supplemental feeding and salting within $\frac{1}{4}$ mile of springs, creeks and livestock watering facilities), *with* SAR 7540 (new permit) (prohibiting supplemental feeding and salting only within $\frac{1}{4}$ mile of livestock watering areas). The new grazing permit also eliminated the permittees' obligation to maintain and repair range developments, seemingly transferring that financial and labor burden to BLM. *Compare* SAR 7537, *with* 7539-41.

In fact, BLM weakened the protection for springs and creeks on each of the permits highlighted in this round of litigation, and similarly eliminated the permittees' obligation to maintain and repair range developments on many of them. *See* SAR 7523, 7527; 7538, 7540; 7542, 7547; 7550, 7555; 7557, 7574; 7596, 7602; 7605, 7610; 7612-13, 7620; 7622, 7628.

BLM has also used the grazing rider to modify the expiring grazing permits in many other ways, including by:

1. lengthening the season-of-use and increasing permitted AUMs on the Highway Common allotment, *see* SAR 7522, 7526;
2. changing the number of cattle permitted and the percent public land subject to livestock grazing on the Point Ranch allotment, *see* SAR 7557, 7574;
3. increasing the number of livestock permitted to graze in the Western Stockgrowers allotment, changing the season-of-use, and changing the total AUMs permitted on the allotment, SAR 7612, 7619; and

4. including a new term and condition on riparian vegetation on the Western Stockgrowers allotment, SAR 7622-23, 7627.

BLM's modification of these grazing permits further confirms that BLM improperly invoked Section 325 of P.L 108-108 in issuing these grazing permits. Instead, BLM was required to undertake lawful review under FLPMA. In failing to do so, BLM has acted arbitrarily, capriciously and in violation of FLPMA.

CONCLUSION

For the foregoing reasons, this Court should grant Western Watersheds' motion, and vacate and remand the challenged decisions and permits.

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Respectfully submitted,

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