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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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO BLM'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

BLM protests mightily the idea that the Burnt Creek allotment is still suffering from the impacts of livestock, hanging its hat on a 2007 determination that the allotment was making significant progress towards achieving the two standards the allotment violated. But BLM ignores a critical document from 2008 stating that the allotment was no longer making significant progress, and BLM's own challenged EA states that many stream and wetland resources are still "functioning at risk" from livestock impacts.

To defend against WWP's NEPA and FLPMA claims, BLM resorts to heavy reliance on a post hoc declaration from a BLM employee purporting to explain what was considered during the decisionmaking process. This is a tacit admission that the administrative record fails to provide the necessary support for the decision, and such post hoc excuses are inappropriate in a record review case, which WWP explains in an accompanying Motion to Strike the declaration.

BLM fails to show that its cumulative impacts analysis met the requirements of NEPA. It fails to respond to several omissions noted in WWP's opening brief, such as a failure to consider any negative cumulative impacts from livestock grazing on the allotment.

BLM fails to show that its wilderness analysis met the requirements of FLPMA. It is forced to rely on its post hoc declaration to support its claim that it considered the original wilderness inventory as required; but this reliance is futile as there is no evidence showing that it actually compared the inventory's baseline conditions to the current conditions, namely the 14 miles of fencing now in the WSA.

Finally, BLM unsuccessfully attempts to distinguish the *Nickel Creek* case by arguing first that the allotment is making significant progress (ignoring its own 2008 document stating it is not); and second that BLM need only ensure compliance with the Fundamentals of Rangeland Health if the obligation to take "appropriate action" has been triggered, a reading that is not supported by the plain language of the regulations.

For these reasons, the Court should grant WWP's motion for summary judgment, and deny BLM's cross motion for summary judgment.

REPLY STATEMENT OF FACTS

BLM argues that the fact presented by the parties are very different. These differences are greatly exaggerated. For example, BLM makes much hay of the fact that the 2007 Fundamentals of Rangeland Health determination, which BLM states was based on 2005 data,

BLM Brief at 4, found that the allotment was making significant progress towards meeting the two standards for which the allotment was in violation. The document speaks for itself, and WWP does not dispute that that was BLM's finding.

However, BLM incorrectly treats the 2007 determination (based on 2005 data) as being the most definitive statement on whether the allotment is making significant progress, and ignores its subsequent statement that significant progress was no longer being made. BLM stated in 2008 that the allotment was no longer making significant progress, in a brief to the Office of Hearings and Appeals in a trespass case. *AR 4404*. In that 2008 document, BLM stated that "**[t]he riparian areas/wetlands on Burnt Creek allotment are functioning at risk with a static trend**, which should be in an upward trend since the permittee for the Burnt Creek Allotment has not been able to graze since 2004." *AR 4411* (emphasis added). The reason was trespass grazing: "[t]hese areas are still functioning at risk with a static trend due to the intensity of use including forage consumption and livestock hoof damage. . . ." *AR 4407*. BLM explained that its conclusion was based on new data: monitoring in 2007 showing exceedences of two allowable use indicator criteria for the allotment, the six inch stubble height and the 20% bank alteration standard. *AR 4407–08*. BLM concluded that if its proposed trespass penalty was not imposed, "livestock use would be expected to continue without controls and at levels that have resulted in conditions **not making significant progress** toward meeting the standards for rangeland health." *AR 4412* (emphasis added).

BLM also disputes WWP's characterization of the EA and Final Decision, but again, the documents speaks for themselves. BLM objects to WWP's statement that the EA admits that conditions are degraded, despite being largely rested from grazing for four years. BLM Br. at 2. But the EA supports WWP's statement. The EA lists numerous stream reaches that are

"functioning at risk," including two reaches totaling 56% of Burnt Creek, both reaches of the East Fork of Burnt Creek, both reaches of the West Tributary of Burnt Creek, and the East Tributary of Burnt Creek. *AR 4567 (EA).* The EA lists numerous wetlands that are "functioning at risk," including "[t]he ephemeral/intermittent drainage to the East Fork of Burnt Creek" (functioning at risk with no apparent trend due to "not adequate vegetative cover"), *AR 4569–70*; a "spring/meadow complex on the bench above the creek" (functioning at risk with no apparent trend due to "not adequate riparian-wetland vegetative cover" and "hoof action and hummocks that were altering the natural surface flow patterns"), *AR 4570*; and another spring/meadow complex (functioning at risk with upward trend due to bare ground, lack of vertical stability, and hummocks). *AR 4571*. Thus, the statement that the allotment has not healed after several years of nominal rest is supported by the EA.

BLM objects to WWP's statement that the 670 AUMs authorized in the final decision are based on 2001 levels which caused FRH violations. But this statement came directly from the EA's description of Alternative 3: "The number of AUMs proposed is based on the average actual use that has occurred between 1986 and 2001. . . ." *AR 4563 (EA).* So, while it was a reduction on paper from the prior level of 858 AUMs, *id.*, it was not a reduction on the ground. There is no question that those prior levels led to violations of the Fundamentals of Rangeland Health: the 2001 FRH determination stated that "standards 2, 3, 7, and 8 are not being met and current livestock grazing management practices are significant factor." *AR 390 (2001 determination).*

BLM objects to WWP's statement that the decision apparently allows an unlimited amount of additional seasonal electric fencing. WWP Br. at 7. But that is what the final decision says. *AR 4458* (final decision at (f)). BLM now provides post hoc caveats, such as that

it will only be done "if a genuine need exists," but these are not in the final decision, and in any case do not contradict WWP's statement. BLM Objections to WWP's SSF at 14. As to the provision of the final decision to remove the Cook Allotment fence and some corrals, WWP certainly supports the removal. *AR 4459*. However, that removal does not alter BLM's obligations under NEPA to analyze the impacts of the new projects or its obligation under FLPMA to insure that the projects do not impair wilderness values. After all, the new sections of fence and the new water trough are proposed in previously undeveloped areas. The idea that "[a] reduction of fencing in a WSA cannot add to negative cumulative impacts" is too facile. BLM Br. at 22.

BLM objects to WWP's statement that BLM installed a corrugated metal headbox in a spring, despite no mention of this in the EA or Final Decision. WWP Br. at 7. BLM does not dispute that it was not mentioned or that it was constructed, but implies that the public should have known that a headbox was needed, as a necessary part of a trough. BLM Objections to WWP's SSF at 14. But it is BLM's duty to disclose and "consider every significant aspect of the environmental impact of a proposed action" *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006) (citation omitted), not the public's to guess at all the components of livestock projects.

ARGUMENT

I. BLM IMPROPERLY ATTEMPTS TO INTRODUCE POST-HOC RATIONALIZATIONS TO JUSTIFY ITS BURNT CREEK DECISION.

One of the primary flaws with BLM's argument in response to WWP's summary judgment brief is that BLM relies on improper extra-record evidence to justify its decision for the Burnt Creek allotment rather than relying on materials from the administrative record. BLM recognizes that the standard of review is based on the Administrative Procedure Act, BLM Br.

17, but then disregards the APA's well-known record review provision that limits review of an agency decision to materials in the administrative record that were before the agency at the time of its decision. 5 U.S.C. § 706. Instead, BLM heavily relies on a declaration of BLM employee Peggy Redick consisting of post hoc rationalizations of the agency's decision, such as items supposedly considered by the agency in internal meetings. Redick Decl. ¶ 4. Evidence of such consideration should be apparent from the record; if it is not, it is too late for BLM to supplement the record with excuses now. As explained in Western Watersheds' accompanying Motion to Strike, this Court must disregard the Redick Declaration because the evidence supporting the agency's decision must be in the record, not in a declaration offered at the eleventh hour.[1]

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

In its opening brief, WWP explained that the EA failed to consider the cumulative impacts on wilderness and wildlife of the proposed fencing, grazing, and water developments. The most telling part of BLM's response is what it does not address. Specifically, BLM does not even attempt to refute WWP's argument that it failed to consider any adverse environmental impacts of livestock grazing; or any cumulative impacts of the fencing or water developments on wildlife.

As explained in WWP's opening brief, the cumulative impacts section presents all environmental impacts of grazing on public land as positive, with BLM going so far as to say that cumulative impacts of grazing in the WSA include "a continuation of ecological site health

[1] In contrast, WWP submitted the Declaration of Kathleen Fite to establish its required elements of standing, including injury suffered from the challenged EA and decision. Because Ms. Redick attempted to diminish the recreational and visual harm identified by Ms. Fite, Ms. Fite submits herewith a brief Second Declaration, only to rebut the statements regarding her harm.

and scenic appeal . . . ." WWP Br. at 15 *(quoting AR 4637)*. This Court has recognized that grazing can cause adverse environmental impacts to resources such as vegetation, soils, wetlands, and wildlife; and this record contains evidence of such impacts. *E.g. AR 4412* (2008 BLM brief stating allotment no longer making significant progress due to trespass livestock); *AR 4569–71* (EA stating wetlands are functioning at risk due to livestock related problems). However, BLM never discussed the potential for adverse cumulative impacts of grazing on any public resources in authorizing a new 10-year grazing permit for this allotment.

WWP also argued that BLM failed to even consider the impacts of grazing on two adjacent allotments for which BLM issued EAs nearly simultaneously with the challenged Burnt Creek decision. WWP Br. at 15. BLM responds that the renewal of the adjacent allotment permits was not one "project" and thus BLM was not obligated to analyze all three allotments together in one EA. BLM Br. at 23. BLM misunderstands WWP's argument. WWP does not assert that the three renewals were one project that needed to be analyzed together in a single NEPA document. WWP only argues that the Burnt Creek allotment EA should have *considered* cumulative impacts from the two adjacent allotment permit renewals in conjunction with the Burnt Creek renewal. But the challenged EA does not even mention those allotments, much less consider their impacts. BLM provides no response to WWP's claim that it must consider impacts of adjoining projects of the same kind.

Looking at impacts from adjacent areas is one of the key points of a cumulative impacts analysis, as "[s]ometimes the total impact from a set of actions may be greater than the sum of the parts." *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 994 (2004). In that case, timber sale EA analyses were inadequate where BLM provided "no quantified assessment of [the] combined environmental impacts" of several timber sales in the same area. *Id*. Likewise, a

BLM cumulative impacts analysis for a gold mine was inadequate where it barely mentioned impacts from other nearby mines. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 972–73 (9th Cir. 2006). And of course, this Court found similar problems in BLM's analysis of grazing permit renewals in the Jarbidge Resource Area where four permit renewal EAs did not consider the impacts of the others.[2] *WWP v. Bennett*, 392 F.Supp.2d 1217, 1223 (D. Idaho 2005).

WWP's opening brief also pointed out that the analysis failed to include any cumulative impacts on wildlife from the new fencing; or any cumulative impacts on wilderness or wildlife from the water developments. WWP Br. at 13–14. The EA should have included impacts from these range developments on wildlife such as big game, which is a wilderness value for the Burnt Creek WSA; as well as the environmental impacts of shifting livestock use into the steeper upland areas and into upland springs. *Id*. This is particularly important when the fencing was approved in piecemeal fashion in a series of brief EAs. Again, BLM's NEPA argument provides no explanation for why all such impacts were omitted.[3]

As to WWP's argument that BLM inadequately considered the cumulative impact of fencing on the Burnt Creek WSA, BLM responds by quoting several sentences in the EA's cumulative impacts analysis on wilderness. BLM Br. at 22. However, BLM does not respond to WWP's argument that all the quoted sentences are conjectural and hypothetical: this passage

[2] BLM argues the case is not relevant because the same resources and problems are not present. BLM Br. at 23. WWP disagrees: BLM has documented sage-grouse on the allotment boundary, *AR 4602 (EA)*; BLM in 2008 found that significant progress towards FRH was no longer being made, *AR 4407–08*; and the EA clearly states the AUMs are based on past actual use (which led FRH violations). *AR 4563 (EA)*. Regardless, even with different resources and problems, such as wilderness and bull trout, the point is that the challenged EA did not consider impacts of other permit renewals in the same area.

[3] BLM does assert in its FLPMA wilderness section that the EA considered the impact of the exclosure on wildlife. BLM Br. at 21. However, it provides no citation to the EA or the record. Its only citation is to the post hoc Declaration of Peggy Redick. Because the pertinent analysis must be in the EA itself, the declaration does not rectify this omission.

speaks to the possible impacts that fencing may have on wilderness, but it does not mention any specific details about current impacts the fencing is having on the land at issue. For instance, the EA notes the "**potential**" effect of "the creation of a more noticeable human influence [on] the land" from fencing, but does not address at all to what extent the fencing is having that effect on the Burnt Creek WSA. *AR 4637* (emphasis added). It states that fencing "**may** begin to result in a decline in the recreational experience on these lands," and how mobility "**may** be increasingly inhibited or interrupted," but does not address at all whether recreational experiences on the Burnt Creek WSA are suffering from this potential decline. *Id*. (emphasis added). In fact, they are. Fite Decl. at ¶¶ 23–29; Second Fite Decl. at ¶¶ 3–8.

BLM's failure to apply these theoretical, hypothetical concerns to on-the-ground conditions in the Burnt Creek WSA runs headlong into Ninth Circuit caselaw specifying what must be included in a cumulative effects analysis under NEPA. The statements quoted by BLM are "[g]eneral statements about possible effects," which "do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005). But agencies must provide "some quantified or detailed information" about cumulative impacts. *Id*. While it may be difficult to provide "quantified" information on impacts to naturalness and recreation, it is certainly possible to provide "detailed" information about actual effects such as how the cumulative amounts of fencing will appear on-the-ground in light of the specific topography; and how it will impact the type of recreation popular in the particular WSA considering the location and type of fencing, methods and places to cross it, and the like. But this type of information is absent from the EA.

Nor does BLM's mere acknowledgement of the fact that there is now 14 miles of fencing in the WSA fulfill its cumulative impact duties, as BLM seems to imply. BLM Br. at 22. The Ninth Circuit in *Klamath-Siskiyou Wildlands Center v. BLM* explained that while listing a tally of numbers, such as total miles of road construction or acres to be harvested, is "a good start to an adequate analysis," "it is not a description of *actual* environmental effects." 387 F.3d 989, 995 (9th Cir. 2004) (emphasis in original). Thus, BLM's only attempt to quantify impacts to wilderness, the mile tally, falls short. *AR 4637 (EA)*. In sum, BLM fails to provide "a useful analysis of the cumulative impacts of past, present and future project." *Ocean Advocates*, 402 F.3d at 868.

III. BLM VIOLATED FLPMA'S NONIMPAIRMENT AND CONSISTENCY MANDATES.

BLM fails to establish that its challenged action did in fact enhance wilderness values as required by the IMP. BLM does not dispute that the IMP is binding upon it; and does not demonstrate that it complied with several procedural requirements required by the IMP in order to make a valid determination on whether the project enhanced wilderness values.

Instead, BLM's primary defense is that the project falls into an "exception" to the nonimpairment criteria. BLM Br. at 9, 19. However, this turns into a circular argument. To trigger the exception, BLM must demonstrate that its project "clearly protect[s] or enhance[s]" wilderness values, *AR 5635 (IMP)*, something BLM cannot do here. On its face, the projects do not protect wilderness values; and again, BLM failed to comply with several procedural steps required to make that determination. So, the "exception" is not much help at all to BLM.

The IMP states that "[i]n order to determine whether a proposed action enhances wilderness values within a given WSA, one must refer to the original wilderness inventory for baseline or benchmark data concerning **the particular wilderness value(s) being affected**." *AR*

5636 (IMP) (emphasis added). BLM's brief asserts that it considered the inventory. BLM Br. at 18. However, significantly, its **only** supporting citation is to its post hoc Declaration of Peggy Redick. *Id*. This explanation is not only too late, but too little. The IMP does not require BLM to consider the inventory for consideration's sake, but so it can compare the current conditions to the conditions at the time of designation, and ask whether the development would have disqualified the area from being identified as a WSA. *AR 5649 (IMP)*. In this way the IMP guards against projects that produce an "aggregate negative effect" upon wilderness values and eventually impair wilderness suitability. *AR 5636, 5649.* Here, this should have been a comparison of the wilderness values at designation versus at present, with the current 14 miles of fencing and various water developments. No such analysis is present.

Thus, even if it were admissible, BLM's statement that it considered the inventory is futile, as it cites to no evidence in the record of the comparison of conditions at designation or analysis of disqualification. Rather, BLM simply asserted in the EA without any explanation that the projects "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 (EA)*. This sentence only mentions a single wilderness value. There is no evidence of a real analysis of wilderness values. In the absence of looking at the required baseline data and assessing wilderness values, BLM's conclusion that the project truly enhances wilderness values was not based on consideration of the relevant factors and is arbitrary and capricious. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989).

Furthermore, the fencing and water developments on their face do not in fact protect "wilderness values." Wilderness values is a term of art defined by the IMP as those values identified in Section 2(c) of the Wilderness Act and further defined by the BLM Wilderness

Inventory Handbook as: "roadlessness, naturalness, solitude, primitive and unconfined recreation, size, and supplemental values." *AR 5636 (IMP)*. The 1980 Idaho Intensive Wilderness Inventory identified the following wilderness values for the Burnt Creek WSA: size, naturalness, solitude, primitive and unconfined recreation, and two supplemental values—elk winter range and archaeological sites. *AR 5607 (Inventory).*

BLM attempts to muddy the waters by asserting that "excellent riparian vegetation" is a wilderness value. BLM Br. at 18. This is not correct. BLM's inventory does not identify riparian vegetation as a wilderness value, but only notes it was mentioned in public comment. *AR 5608*. Certainly riparian vegetation is important; however, an attempt to protect it from livestock by constructing infrastructure—at the expense of actual wilderness values—does not satisfy the IMP, or give BLM grounds to override the nonimpairment mandate via its asserted exception. Rather, BLM must consider the Burnt Creek WSA's wilderness values, and therefore would have to show that the projects protect or enhance size, naturalness, solitude, recreation, elk winter range, or archaeology, which it did not do in its EA or brief. *AR 5607 (Inventory).*

For this reason, the examples provided in the IMP and quoted by BLM are not on point. BLM Br. at 9. The example italicized by BLM is a situation where a fence "is intended to correct or mitigate a situation which is degrading **wilderness values identified in the intensive inventory**." *Id. (citing AR 5637)* (emphasis added). As just explained, that is not the case. The subsequent example is similarly unhelpful to BLM, providing for "very small exclosures around springs as long as the benefits to wilderness values . . . clearly outweigh any negative impacts to naturalness or primitive recreation opportunities." *Id*. Again, BLM has not demonstrated benefits to "wilderness values," as defined by the IMP and the Wilderness Inventory. Too, the

emphasis of "very small exclosures" shows that BLM's 14 miles of exclosures has far surpassed the intent of the IMP.

Finally, BLM's invocation of the exception is not supported by the record. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Ore. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1141 (9th Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). BLM itself stated this exception **did not apply** in its own IMP checklist in the record. *AR 3411*. If BLM itself did not think it applied at the time it was actually doing its analysis, it is arbitrary and capricious for BLM to now state that the project "clearly" protects or enhances wilderness values. *AR 5636 (IMP)*. Nor does the EA claim it is exempted from the nonimpairment criteria; rather, the EA's discussion of impacts to wilderness from range projects asserts that naturalness would be reduced in the short term and improved over the long term. *AR 4625 (EA)*. Again, WWP disagrees with the conclusion, but the point here is that BLM did not invoke the exception in its original analysis and thus it cannot invoke it now.

BLM's failure to comply with the IMP establishes that the challenged decision violates the FLPMA nonimpairment and consistency mandates.

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

As explained in WWP's opening brief, BLM failed to impose into its grazing authorization for the Burnt Creek allotment the mandatory terms and conditions necessary to ensure significant progress toward compliance with the FRH. BLM states that grazing system and use criteria are necessary to enable the Burnt Creek allotment to make significant progress toward rangeland health compliance, and included them in prior permits. In **removing** these same terms and conditions from the 2008 final decision and subsequent grazing permit, BLM

violated its duty to include mandatory terms and conditions "that ensure compliance with subpart 4180." 43 C.F.R. § 4130.3-1. BLM contends that it was not required to include such terms and conditions, but its argument is both factually and legally flawed.

BLM relies upon its 2007 determination (which BLM states is based on 2005 data, BLM Br. at 4)) to argue all standards are either being met or making significant progress. BLM Br. at 24. However, BLM ignores its own statement from 2008 stating that new data from the end of the 2007 season revealed that the allotment was no longer making significant progress toward compliance with the FRH, due to impacts of trespass grazing. Again, in a 2008 brief submitted to the Office of Hearings and Appeals in a trespass case, BLM stated "[t]he riparian areas/wetlands on Burnt Creek allotment are functioning at risk with a static trend, which should be in an upward trend since the permittee for the Burnt Creek Allotment has not been able to graze since 2004." *AR 4111*. It expanded:

> The impacts that have occurred from trespass . . . occurring in 2003, 2005, 2006, and 2007 . . . has kept the neighboring Burnt Creek Allotment from meeting the fundamentals for rangeland health, specifically Standard 2 (riparian areas and wetlands) and Standard 3 (stream channel/floodplain). . . . [A]n upward trend should be apparent on riparian areas and wetlands within the Burnt Creek Allotment in the absence of any authorized grazing for the last four years. This has not occurred in the riparian areas/wetlands where Whitworth Ranches has trespassed repeatedly. These areas are still functioning at risk with a static trend due to the intensity of use including forage consumption and livestock hoof damage.

AR 4407. BLM explained that this conclusion was based on new data: specifically, that unauthorized grazing in 2007[4] caused exceedences of allowable use indicator criteria: the six inch stubble height and the 20% bank alteration standard. *AR 4407–08*. BLM now tries to sweep this data under the rug.

[4] The BLM brief states that some of the violations were found in August 2008, *AR 4407*, but it likely means 2007 since the brief was only filed in April 2008. *AR 4414*.

This Court has previously ruled that, where violations of the FRH standards have occurred and utilization limits are necessary to make "significant progress," the agency must incorporate mandatory terms and conditions into the grazing permit to ensure compliance with the regulations. *WWP v. U.S. Dep't of Interior*, No. 08-CV-506, 2009 WL 5218020, at *11 (D.Idaho) (*Nickel Creek).* In light of the 2007 data just described, BLM's primary argument for distinguishing *Nickel Creek*, that here there are no violations of the FRH standards and thus no need for any terms and conditions "that ensure compliance with subpart 4180," 43 C.F.R. § 4130.3-1, is not supported by the record.

Even if the Burnt Creek allotment was still making significant progress towards curing its violations of standards, however, BLM's argument is still flawed. This is because BLM admits that the significant progress in achieving FRH standards—which shows compliance with 4180—is dependent on compliance with the use criteria. The 2007 determination cited the fact that "[i]n 2001, annual use indicator criteria were added to the terms and conditions of the grazing permit to trigger livestock movement through the grazing system." *AR 3937, 3939.* More importantly, BLM's 2008 Final Decision specifically relied on the grazing system coupled with upland allowable use indicator/criteria to conclude that the allotment will again make significant progress. *AR 4464–65 (Final Decision).* So, even if the allotment was making significant progress, BLM itself has determined that the use criteria are necessary to "ensure" that the progress continues. Under 43 C.F.R. § 4130.3-1, BLM must include these use criteria as mandatory terms and conditions in a permit to ensure compliance with section 4180.

BLM argues that § 4130.3-1 cannot apply unless there is a finding that an allotment is in violation of FRH and not making significant progress, triggering a duty to take "appropriate action." BLM Br. at 25 (citing 43 C.F.R. § 4180.2(c)). But nowhere does § 4130.3-1 state this.

In fact, the relevant subpart, in whole, reads as follows: "Permits and leases shall incorporate terms and conditions that ensure conformance with subpart 4180 of this part." 43 C.F.R. § 4130.3-1(c). There is no reference to the duty being contingent upon a finding of no significant progress.

BLM cites *Nickel Creek* as support, but the opinion did not state that § 4130.3-1 **only** applies if a triggering event under § 4180.2(c) occurs. Rather, it stated that

> BLM's own experts testified that adherence to the utilization limits in the Management Guidelines was necessary to make "significant progress" under the FRH regulations. Accordingly, under the regulations just cited, the grazing permits must include the Management Guidelines as mandatory terms and conditions, just as the rotation schedule is now described.

Nickel Creek at *11. Again, here BLM itself has stated that the use criteria and the grazing system are needed to make significant progress. *AR 4464–65 (Final Decision)*. Consequently, the use criteria and grazing system are necessary to "ensure compliance with subpart 4180" and should have been included as terms and conditions. 43 C.F.R. § 4130.3-1. BLM admitted as much when it included them as terms and conditions in the 2001 and 2002 permits, *AR 371–72, 534*, before downgrading them in 2008.

The cramped interpretation of § 4130.3-1 urged by BLM would allow BLM to remove terms and conditions that were required to initiate progress toward rangeland health standards as soon as progress begins. BLM's interpretation would thus promote rangeland health violations, contrary to the intent of the grazing regulations.

Finally, BLM includes a long list of items that the final decision states "will" be done. BLM Br. at 25–26. However, the wording of these items is irrelevant, because they are **not** the items that BLM determined were necessary to ensure significant progress towards meeting FRH standards. The necessary items stated in the final decision were the **grazing system coupled**

with the allowable use indicator/criteria. *AR 4464–65 (final decision).* The final decision does not make FRH compliance contingent on the listed items such as redd monitoring, fence and corral removal, and the like. This Court should take BLM at its word that the grazing system and use indictor/criteria are necessary to ensure FRH compliance, and declare the decision arbitrary and capricious for removing them as terms and conditions.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully prays the Court to grant summary judgment in its favor, deny Defendants' summary judgment motion, 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.

DATED this 22nd day of April, 2010.

Respectfully submitted,

/s/ Kristin F. Ruether

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