Kristin F. Ruether (*ISB # 7914*)
Lauren M. Rule (*ISB # 6863*)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)
kruether@advocateswest.org
lrule@advocateswest.org

Attorneys for Plaintiff Western Watersheds Project

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. CV09-298-E-EJL **WWP'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO BLM'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

BLM admits it improperly omitted bull trout, protected under the Endangered Species Act, from its NEPA analysis of the Rock Creek allotment. Recognizing the inadequacy of its Environmental Assessment ("EA"), BLM attempts to rely upon stale rangeland health determinations and post-hoc Endangered Species Act ("ESA") consultation documents for NEPA compliance. Reliance upon these documents are unpersuasive for numerous reasons.

The rangeland health assessments are stale, are not NEPA documents, and do not even purport to analyze the impacts of the project at issue—construction of various range projects and authorization of grazing permits from 2009 to 2019. The post-hoc consultation documents were

not before the agency when it made its challenged decisions, and do not fit into any of the Ninth Circuit's recognized exceptions to the record rule, as explained in an accompanying Response to BLM's Motion to Supplement the Record. Further, their conclusion does not serve to satisfy or erase BLM's duties under NEPA. BLM's reliance on such post-hoc information violates one of the core principles of NEPA, which is to present accurate information to the public.

BLM defends its failure to analyze any range of alternatives with respect to grazing levels by arguing that the project area did not contain any resource conflicts such as wilderness. But the 45,000+ acre project area contains not only a Wilderness Study Area, but also ESA-protected bull trout and then-sensitive species (now-ESA Candidate species) sage-grouse, both of which are impacted by grazing. Finally, BLM defends its failure to discuss sage-grouse in its cumulative impacts analysis by stating habitat impacts do not accumulate on this species in this large area. This argument is unsupported by caselaw and sage-grouse science.

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

ARGUMENT

I. BLM VIOLATED NEPA BY FAILING TO TAKE A "HARD LOOK" AT ENVIRONMENTAL IMPACTS TO BULL TROUT.

WWP's opening brief explained that BLM failed to take a "hard look" at impacts to bull trout, a species protected as "threatened" under the Endangered Species Act, because it erroneously claimed that there were no bull trout present on the Rock Creek allotment. *WWP Br. at 9–14*. This serious error in describing baseline conditions made it impossible for BLM to analyze any impacts on bull trout or provide accurate, high quality information to the public, as required by NEPA and enforced by the courts. *Center for Biol. Diversity v. BLM*, 422 F.Supp.2d 1115, 1163 (N.D.Cal. 2006), *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964–

66 (9th Cir. 2005), *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 802 (9th Cir. 2005).

A. BLM's Attempt to Create a Post-Hoc Proxy for Bull Trout, at this Late Juncture, Fails.

BLM first argues that bull trout somehow had a "proxy" in Westslope cutthroat trout. *BLM Br. at 5–6.* This argument fails. It is far too late for BLM to now assert, for the first time in litigation, that it utilized a *secret, undisclosed proxy* for an *ESA-listed species* in an EA for an activity known to impact that species.

In accordance with NEPA's "twin objectives" of considering every significant aspect of the environmental impacts of a proposed action as well as informing the public, *Earth Island Inst. v. U.S. Forest Serv*., 442 F.3d 1147, 1153–54 (9th Cir. 2006), NEPA requires that agencies "shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement." 40 C.F.R. § 1502.24. This provision requires BLM to identify the use of any "proxy" for an ESA-listed species in the actual NEPA document.

The Ninth Circuit's cases regarding the Forest Service's use of habitat as a proxy for species in the National Forest Management Act context are instructive. While the use of proxies is permissible in certain circumstances, the Ninth Circuit makes clear that the Forest Service must not only identify its use of a proxy, but explain in detail *how the proxy works*. *The Lands Council v. McNair*, 537 F.3d 981, 997–98 (9th Cir. 2008). Specifically, the Forest Service must disclose "the quantity and quality of habitat that is necessary to sustain the viability of the species in question[,] and explain its methodology for measuring this habitat." *Id*. at 998. Thus, the Forest Service's use of a proxy "may be arbitrary and capricious" if there is "no indication of the methodology used in determining what constitutes suitable habitat," if "the record fails to

describe the type or amount of habitat that is necessary to sustain the viability of the species in question," or if "the record indicates that the Forest Service based its habitat calculations on outdated or inaccurate information." *Id*. at 998 (citations omitted).

Here, BLM provided absolutely no information about the use of the supposed proxy in the EA (or the record). BLM never identified Westslope cutthroat trout as a proxy, much less why it is an appropriate proxy for the ESA-listed bull trout, the methodology used, or the scientific or other sources relied upon for selecting the proxy. 40 C.F.R. § 1502.24. To the contrary, BLM's EA affirmatively stated bull trout were not present. *AR 1908, 1922 (EA).*

Thus, BLM is forced to resort to a bare assertion in its brief that Westslope cutthroat trout is an appropriate proxy, comparing bull trout needs to an internal habitat model not even in the record. *BLM Br. at 5*. BLM recognizes that bull trout need colder water and that the two species do not even spawn during the same season, making Westslope cutthroat trout a questionable proxy at best. *See AR 329* (bull trout temperature criteria in RMP, colder than other fish).

Thus, this argument is strongly at odds with the twin objectives of NEPA and the requirement to "identify any methodologies used" in the NEPA document. 40 C.F.R. § 1502.24. Such a closed-door approach made it impossible for the public and decision makers to assess the adequacy of such proxy or understand the environmental consequences of the project on bull trout. Instead, the argument is a post-hoc rationalization, presented for the first time in litigation, and therefore is due no deference. *See Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 212–13 (1988). An agency's assertion during litigation that it used an undisclosed proxy for an ESA-listed species does not comply with NEPA.

B. BLM Did Not Consider Bull Trout Habitat, and Its Ten-Year-Old Rangeland Health Determination Does Not Cure the NEPA Violation.

Second, BLM argues that it "carefully" considered potential effects on bull trout habitat. *BLM Br. at 6*. However, this is not supported by BLM's citations to the EA, which do not assess either bull trout or bull trout habitat. Nor is it supported by BLM's heavy reliance on its 1999 Rock Creek allotment Fundamentals of Rangeland Health (FRH) determination. *BLM Br. at 6–9*. BLM's attempt to rely upon this more than ten-year-old document for its NEPA compliance falls flat. The 1999 determination is not a NEPA document, does not even purport to analyze impacts of the decision at issue (reauthorization of a permit from 2009–2019), and BLM has weakened the livestock standards suggested by the document. Thus, neither the EA nor the determination show that BLM took its required "hard look" on bull trout.

The citations to the EA provided by BLM do not indicate that BLM carefully considered effects on bull trout habitat. *BLM Br. at 6*. The cited pages include: a chart incorrectly stating that bull trout is not present in the Pahsimeroi River, *AR 1922*; general descriptions of riparian zones and water quality based on stale data from the mid- to late-1990s, with no reference made to the habitat needs of bull trout or whether they are being met, *AR 1916–18*; and the entire "Environmental Impacts" chapter of the EA, also not identifying bull trout habitat needs. *AR 1924–44*.

Nor does BLM's 1999 Fundamentals of Rangeland Health determination meet its NEPA duties, as BLM suggests. *BLM Br. 6–8*. A review of the function of FRH determinations shows that the 1999 determination cannot stand for what BLM suggests. In 1995, the U.S. Department of the Interior adopted BLM grazing regulations pursuant to the Federal Land Policy and Management Act. These regulations included the Fundamentals of Rangeland Health regulations, which establish fundamental ecological criteria for the management of livestock

grazing on BLM public lands. 43 C.F.R. § 4180 *et seq.* These regulations require BLM to assess ecological conditions on the public lands and determine whether they are meeting or making significant progress towards specific rangeland health standards. *Id*. § 4180.1. If standards are not being met, and existing grazing is a significant causal factor, BLM must implement grazing management changes on those lands no later than the start of the next grazing season. *Id*. § 4180.2(c), *Idaho Watersheds Project v. Hahn*, 187 F.3d 1035 (9th Cir. 1999) (affirming BLM duty to revise management before next year when standards are not met).

In this case, BLM first conducted an "assessment" in September 1999. *AR 2353–59.* The assessment explains that the monitoring it used is from the mid- to late-1990s. For example, riparian areas were monitored in 1995, *AR 2353*; water quality was monitored from 1995–1999, *AR 2355*; and wildlife habitat was not monitored at all. *AR 2355*. This was followed by a "determination" made in December 1999 as to whether the standards were being met. *AR 1353–57.* BLM determined that three standards were being met, but that three other standards were only partially met. *Id*. For example, BLM determined that a reach of the Pahsimeroi River was unstable and not meeting the stream channel/floodplain standard. *AR 1354*. It noted that "[l]ivestock have access to most of the river in the allotment" and that "[s]tubble height, woody use and bank shearing standards on the permit should insure the stream conditions will be maintained or continue to improve." *Id.* BLM also determined that the riparian areas/ wetlands and water quality standards were only partially met. *AR 1354, 1356*.

Here, BLM attempts to rely upon the 1999 FRH determination as some sort of substitute for an accurate NEPA analysis. This argument fails. First, the FRH determination is not a NEPA document, and a "non-NEPA document . . . cannot satisfy a federal agency's obligations under NEPA." *South Fork Band Council v. Interior*, 588 F.3d 718, 726 (9th Cir. 2009).

Second, the *1999* determination does not even purport to analyze the environmental impacts of reauthorizing the Rock Creek permit from *2009 to 2019*, as the challenged action does. *AR 2126 (Rock Creek permit)*. It would be impossible for a 1999 document to do so. The determination was a snapshot of conditions taken in 1999, based upon monitoring from as early as 1995. That monitoring is obviously now quite stale. The Ninth Circuit has held that the Forest Service violated NEPA when it utilized thirteen-year-old habitat data and about ten-year-old fish count survey data in a cumulative impacts analysis, as the data was "too outdated to carry the weight assigned to it." *The Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005). Likewise, the data used in the determination are now between ten and fifteen years old[1], and cannot seriously be relied upon as an analysis of even current conditions—much less as an analysis of environmental impacts for an action authorized from 2009 to 2019.

Third, to the extent that the 1999 determination makes a prediction about future trend, BLM cannot rely upon it. Not only is the prediction now exceedingly stale, but the prediction of progress was contingent upon adopting "[s]tubble height, woody use and bank shearing standards *on the permit*." *AR 1354 (emphasis added)*. But the 2009 Rock Creek allotment permit does not do so. *AR 2126*. The *prior* permit specifically built such limits into the permit's terms and conditions, including upland utilization, streambank shearing, and stubble height standards. *AR 1654 (prior permit)*. However, in the decision and permit at issue, BLM chose to omit those limits as terms and conditions, meaning they are less enforceable. *AR 1982* (decision,

[1] BLM implies that monitoring data from 2003 and 2004 also shows improvement in bull trout habitat, but a review of the documents cited shows this is not the case. *BLM Br. at 7–8*. The 2003 review cited is a simplistic yes/no checklist that does not contain evidence of actual monitoring, much less a trend determination. *AR 1488*. The 2004 document cited is a chart showing that the allotment met annual utilization standards of stubble height and bank shearing, which are distinct from Fundamentals of Rangeland Health standards, and does not discuss trend. *AR 1530*. In fact, WWP's biologist documented active bank collapse on the allotment in August 2008. *Attach. A to Ruether Decl*.

designating limits as "allowable use criteria," not terms and conditions), *2126* (permit, with no mention of limits). *See WWP v. U.S. Dep't of Interior*, No. 08-CV-506, 2009 WL 5218020, at *8 (D.Idaho) (explaining that terms and conditions are enforceable by penalties, in contrast to limits labeled as "Management Guidelines."). Thus, BLM's statements regarding habitat improvement ring hollow when its data is stale, and BLM in fact has weakened the terms and conditions on the permit.

C. The Post-Hoc ESA Consultation Does Not Render the Error "Harmless."

Finally, BLM argues that a post-hoc ESA consultation renders its bull trout error in some way "harmless." BLM reasons that after discovering[2] the error, it conducted a new consultation under the Endangered Species Act, which concluded that grazing the allotment was "not likely to adversely affect" Columbia River bull trout. *BLM Br. at 10*. BLM asserts it "has taken all the action it would have taken if it had not made the error." *Id*. It is surprising and disappointing that BLM admits it would not have even attempted to exercise more caution had it known that an ESA-protected species was present. Regardless, its argument fails for several reasons. First, the post-hoc consultation is not in the record and cannot be considered. Second, BLM conflates NEPA and ESA standards: the ESA finding does not serve to erase BLM's duties under NEPA. Third, BLM's argument runs roughshod over the twin objectives of NEPA. The error was not harmless, and a remand is necessary for an error of this gravity.

First, as addressed in the accompanying Response in Opposition to BLM's Motion to Supplement the Record, the ESA consultation documents were completed far after the decision was signed on August 20, 2008 and the permit was signed on February 26, 2009. *AR 1974*,

[2] BLM implies that WWP never pointed out the error. *BLM Br. at 11*. In fact, WWP discussed impacts on Pahsimeroi River bull trout in a pre-decisional email to BLM, *Attach. A. to Ruether Decl.*, and one of its administrative protests, *AR 2023*. Further, WWP discussed the error at length in its reply brief before the Office of Hearings and Appeals. *Attach. B to Ruether Decl.*

2127. Judicial review in this Administrative Procedure Act action focuses on the administrative record in existence at the time of the decision, and does not encompass any part of the record that is made initially in the reviewing court. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The post-hoc consultation documents were not in existence at the time of the decision, and none of the Ninth Circuit's record exceptions apply. BLM's Motion to Supplement invokes the exception regarding "complex subject matter," but does not in fact use the documents for this purpose in its brief. *BLM Br. at 10*. Rather, BLM uses the documents to argue that the bull trout error was harmless based on this new information, *id*., a classic and impermissible post-hoc rationalization.

Second, BLM conflates NEPA and ESA standards. It argues that because the consultation documents concluded that the action was "not likely to adversely affect" bull trout, the error was harmless. *BLM Br. at 10*. However, the phrase "not likely to adversely affect" is an Endangered Species Act term of art that does not equate to having no impact. Under the ESA, federal agencies must "insure" that their actions will not "jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat." 16 U.S.C. § 1536(a)(2). In order to fulfill these substantive mandates, consultation is required for actions that "may affect" listed species or critical habitat. *Id*., 50 C.F.R. § 402.14(a). For such actions, the action agency (such as BLM) must prepare a biological assessment to "evaluate the potential effects of the action on listed [] species and designated [] critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action." *Id*. § 402.12(a). If they do not, and the Services concur with that conclusion, the consultation is complete. *Id.* §§ 402.13, 402.14(b).

In other words, the "not likely to adversely affect" determination here means that grazing on the Rock Creek allotment was not likely to adversely affect the species of Columbia River

bull trout. It does not mean that the grazing would not degrade the bull trout's habitat (which is proposed for critical habitat designation) or even harm bull trout individuals. It does not mean that the action is being conducted in the least harmful way, or that less harmful alternatives did not exist. Thus, the finding does not serve to somehow erase an agency's NEPA duties, as BLM implies. As one court put it, "the fact that the BLM consulted with the Service on the EIS does not, in and of itself, satisfy its obligation to consider every significant aspect of the environmental impact of the [project]." *Center for Biological Diversity*, 422 F.Supp.2d at 1164.

Third, BLM's argument ignores the second of the twin objectives of NEPA—to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006). As the Ninth Circuit addressed at length in *Oregon Natural Desert Association v. BLM*, "public scrutiny is essential to implementing NEPA." 531 F.3d 1114, 1120 (9th Cir. 2008) (*ONDA v. BLM*) (quoting 40 C.F.R. § 1500.1(b)). This is because "NEPA's purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is 'almost certain to affect the agency's substantive decision[s].'" *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Thus, if the agency had analyzed bull trout, it would have had to disclose and respond to public reviews and critiques of this information—and that may have, in fact, changed its ultimate decision. Where the Supreme Court has stated that a fully informed and public analysis would have been "almost certain to affect the agency's substantive decision," *Robertson*, 490 U.S. at 350, an agency cannot just glibly state that it would have not have done anything differently. Otherwise, agencies caught in mistakes would always state that the error was harmless, and decisions would never be overturned for NEPA errors.

Of course, this is not the case. To the contrary, courts reverse and remand agency decisions for NEPA errors of less gravity than leaving out an ESA-protected species entirely. In *Powell*, where the Ninth Circuit remanded a timber sale EIS for problems including stale data, the Court explained that "the errors we have pointed out are not harmless because they prevented a proper, thorough, and public evaluation of the environmental impact of the Project." *Powell*, 395 F.3d at 1037 n. 25. More recently, in overturning an EA, the Ninth Circuit noted that "if there is uncertainty over whether the proposed project may have a significant impact, including uncertainty caused by an incomplete administrative record or an inadequate EA, the court should ordinarily remand for the agency to either prepare a revised EA or reconsider whether an EIS is required." *Center for Biol. Diversity v. National Highway Traffic Safety Admin*., 538 F.3d 1172, 1226 (9th Cir. 2008).

BLM's attempt to distinguish the case regarding invertebrates, *Center for Biological Diversity v. BLM*, is unpersuasive. 422 F.Supp.2d 1115. That court did not base its holding on the number of species omitted from its EIS, but on the principle that the Affected Environment section is the heart of the EIS, and as such must be accurate and complete. *Id*. at 1163. Omission of a species protected under the Endangered Species Act, for which agencies are directed "to afford first priority," is no less serious. *TVA v. Hill*, 437 U.S. 153, 185 (1978). And BLM also "had the opportunity to correct its error" here, when WWP informed BLM of bull trout presence before its decision as well as during the administrative appeal process. *Attach. A & B to Ruether Decl*.

For these reasons, BLM failed to take a hard look at a significant environmental impact, and the error was not harmless.

II. BLM VIOLATED NEPA BY FAILING TO ANALYZE A RANGE OF ALTERNATIVES.

In its opening brief, Western Watersheds explained that BLM violated NEPA's requirement to "[r]igorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14, by analyzing three alternatives with almost identical livestock grazing levels—including the "no action" alternative. Despite well-known conflicts between grazing and both bull trout and sage-grouse, BLM considered no alternative to avoid or minimize impacts on these species.

Significantly, BLM does not dispute that the three alternatives all authorize full levels of livestock grazing and do not meaningfully differ. Instead, BLM argues that no real range of alternatives was needed because there were no "issues," "conflicts," or "scarce resources" such as wilderness at stake. *BLM Br. at 14*. This is not the case. In fact, the project area includes not only a Wilderness Study Area, but also habitat for sage-grouse and ESA-listed bull trout, both of which are adversely impacted by grazing. BLM also argues that an EA's alternatives analysis may be less rigorous; but here BLM did not vault over even that lowered bar.

The project area does contain issues, conflicts, and scarce resources. BLM singles out the presence of wilderness as posing a "difficult question" requiring a wide range of alternatives. *BLM Br. at 14*. WWP certainly agrees. Unfortunately, BLM ignored that principle when preparing the challenged EA, as the Rock Creek allotment is within the Burnt Creek Wilderness Study Area, *AR 1909 (EA)*, yet BLM only analyzed three alternatives with identical grazing levels for the allotment. *AR 1899, 1904, 1907 (alternatives); WWP Separate Statement of Facts (SSF) at ¶13–15*. This is the allotment that also has bull trout, another independent reason to consider alternatives that was disregarded.

The presence of sage-grouse presents an equally "difficult question" with "substantial conflicts." *BLM Br. at 14*. Grazing is well-known to conflict with sage-grouse, as the EA recognizes. *AR 1930 (EA) (*grazing season and troughs in Grouse Creek allotment "likely will have a negative impact on greater sage-grouse."). *See also WWP v. Dyer*, CV-04-181-S-BLW, 2009 WL 484438, *7–*8 (D.Idaho) (sage-grouse is sensitive species in decline; livestock impacts are one of top four interrelated threats in Idaho). Thus, to avoid conflicting with sage grouse mating, nesting and brood rearing, "grazing should be limited around leks and nests to (1) periods between June 20 and August 1 (so that grazing is not occurring during the mating and nesting seasons []) and between November 15 and March 1 (when plant growth has ceased for the year)." *Id.* at *21.

Here, all three alternatives in the allotments with key sage-grouse habitat consider virtually identical livestock numbers, *WWP SSF at ¶13–15;* and schedule grazing during these sensitive times. *AR 1895–1906* (every alternative scheduling grazing before June). The EA admits that this timing will have adverse impacts upon sage-grouse. For the Grouse Creek allotment, BLM admitted that the spring/summer grazing season, which is "the peak of the nesting/ early brood-rearing period," could reduce forb (wildflower) availability for sage-grouse chicks and would reduce nesting camouflage. *AR 1930 (EA). See also AR 1931–32* (similar admissions for the Trail and Meadow Creek allotments).

However, BLM's three alternatives contain virtually identical levels of authorized grazing, and propose no methods to reduce impacts on sage-grouse. Thus, BLM provided no "clear basis for choice among options by the decisionmaker and the public" with respect to grazing, 40 C.F.R. § 1502.14; nor did the analysis "foster[] informed decision-making and informed public participation." *Calif. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). Instead, the

analysis was an "uncritical privileging of one form of use over another," which violates NEPA. *ONDA v. BLM*, 531 F.3d at 1145 (citing *Cal. v. Block*, 690 F.2d at 767).

These principles apply to EAs as well as EISs: "consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228–29 (9th Cir. 1988) (discussing structure of statute). *See also Pacific Marine Conservation Council v. Evans*, 200 F. Supp. 2d 1194, 1206 (N.D. Cal. 2002) ("NEPA requires that in the EA an agency must evaluate a reasonable range of alternatives to the agency's proposed action, to allow decision-makers and the public to evaluate different ways of accomplishing an agency goal.").

The fact that the project area is "designated as available grazing land" in the Resource Management Plan is irrelevant. *BLM Br. at 15*. Over 97% of the Challis Resource Area is so designated. *AR 238*. Such a designation hardly gives BLM permission to ignore other values or its statutory obligation under NEPA to consider a range of alternatives on this 45,000-acre project area. For these reasons, BLM did not meet the requirement to consider a reasonable range of alternatives and its decisions are arbitrary, capricious and not in accordance with NEPA.

III. BLM VIOLATED NEPA BY FAILING TO ANALYZE CUMULATIVE IMPACTS UPON SAGE-GROUSE AND OF NEIGHBORING ALLOTMENTS.

In its opening brief, WWP explained that the EA failed to consider the cumulative impacts of the proposed grazing and water developments. Specifically, the EA failed to even mention sage-grouse in the cumulative impacts analysis despite admitting that adverse impacts would occur on the individual allotments, and the EA failed to consider any adverse environmental impacts on adjacent allotments.

With respect to sage-grouse and wildlife, BLM again attempts to rely upon its stale Rangeland Health Assessments for NEPA compliance. *BLM Br. at 18*. This argument fails for

the same reasons discussed above. Again, FRH determinations are not NEPA documents, so do not satisfy BLM's obligations under NEPA. *South Fork Band Council*, 588 F.3d at 726. The determinations for the sage-grouse allotments are also based on stale data. They are dated in 2002 (Trail Creek, *AR 1454*) and 2006 (Grouse, Meadow Creek, *AR 1673, 1713*), but based on data that is even older. *E.g. AR 1444* (Trail Creek assessment, based on 2001 and 2001 sage-grouse data). As in *Powell*, the lack of up-to-date data prevents an accurate cumulative impact assessment. 395 F.3d at 1031. Nor could the determinations possibly have analyzed the impacts of the many new livestock troughs proposed in the 2008 decision, which were not yet proposed, or the impacts of the *2009–2019* grazing permits.

Next, with respect to sage-grouse, BLM makes the baffling argument that impacts on sage-grouse somehow do not accumulate in this 45,000+ acre area. *WWP SSF ¶ 3–6*. BLM states: "WWP offers nothing to suggest that a number of small [e]ffects with respect to sage grouse can be expected to accumulate directly," and suggests that "[t]he situation differs from one in which effects can be expected to add up directly," such as a stream receiving contaminants from multiple sources. *BLM Br. at 18*. This argument is unsupported by Ninth Circuit caselaw and recent ESA findings on sage-grouse; and additionally overstates Plaintiff's burden under NEPA[3].

The Ninth Circuit has recognized that impacts on species' habitat accumulate to harm the species, contradicting BLM's implication that the concept is limited to the pollution realm. The Ninth Circuit faulted BLM for failing to consider cumulative impacts on habitat for northern

[3] The Ninth Circuit recently reiterated that plaintiffs "need not show what cumulative impacts would occur," but "must show only the potential for cumulative impact." *Te-Moak Tribe v. U.S. Dep't of the Interior*, --- F.3d ---, 2010 WL 2431001 (9th Cir. 2010), *10. WWP easily meets that low bar here, where BLM itself admitted that the direct impacts of the projects will be adverse. *AR 1930–32 (EA).*

spotted owl in *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 997 (9th Cir. 2004). Just as here, the issue was that habitat was being degraded in several areas, but BLM never assessed the total amount of losses. *Id*. Even "[m]ore importantly," there was no discussion about the effect of this loss "throughout the watershed." *Id*. This EA has the identical flaw.

BLM's litigation assertion that habitat disturbance impacts (or fragmentation) would not accumulate upon sage-grouse is similarly unsupported by sage-grouse science. "Infrastructure" (such as water troughs) is another of the top four interrelated threats to sage grouse in Idaho identified by this Court. *WWP v. Dyer*, 2009 WL 484438 at *8. Indeed, the recent U.S. Fish and Wildlife Service determination finding sage-grouse warranted for protection under the ESA discusses habitat fragmentation at great length, including that: "Fragmentation of sagebrush habitats is a key cause, if not the primary cause, of the decline of sage-grouse populations, [as it] can make otherwise suitable habitat either too small or isolated to be of use to greater sage grouse (i.e., functional habitat destruction). . . ." 12-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,909, 13,962 (Mar. 23, 2010). It also explains that livestock troughs are harmful because they "can artificially concentrate domestic and wild ungulates in important sage-grouse habitat," exacerbating impacts such as "heavy grazing and vegetation trampling." *Id*. at 13,941.

The direct impacts upon sage-grouse from the final decisions here are uncontested, *AR 1930–32 (EA)*, and impacts plainly accumulate upon sage-grouse. Thus, it was a violation of NEPA's cumulative impacts duty to fail to discuss any cumulative impacts on sage grouse, tally the impacts, or analyze any effect of the habitat losses in either the project area or the watershed.

WWP further explained in its brief that BLM failed to catalogue or analyze the impacts of other past and reasonably foreseeable future actions in the area. For example, BLM does not

mention that it either recently renewed, or is in the process of renewing, the grazing permits on four directly adjacent grazing allotments. *WWP Br. at 18*.

BLM responds by citing the EA's vague discussion of improved grazing management in the Pahsimeroi valley over the past 20 years. *BLM Br. at 15–16*. The problem is that this section is entirely positive with respect to grazing impacts on public lands: it only describes supposed environmental benefits or improvements[4]. *AR 1935*. There is nothing wrong with mentioning positive impacts as part of a balanced analysis, but BLM may not whitewash *all* negative impacts. Despite many documents in the record indicating that grazing has harmed the public lands, no adverse cumulative impacts in the neighboring allotments or watershed are mentioned. *E.g. AR 139* (1999 BA describing adverse grazing impacts along many main Pahsimeroi River reaches and tributaries). BLM cannot admit direct impacts, and yet somehow assert that all cumulative impacts are positive.

The Ninth Circuit just recently invalidated a BLM mining EA's cumulative impacts analysis for the same flaw of admitting direct impacts from the project, but failing to address "combined impacts" or "discuss the existence of any cumulative impacts" from other neighboring projects. *Te-Moak Tribe v. U.S. Dep't of the Interior*, --- F.3d ---, 2010 WL 2431001 (9th Cir. 2010), *8–*9. Assessing such **impacts** from adjacent projects 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*, 387 F.3d at 994. BLM's failure to consider cumulative impacts renders its decisions arbitrary, capricious and not in accordance with NEPA.

[4] BLM discusses negative impacts on private lands only. *AR 1935*.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully prays the Court to grant summary judgment in its favor, and reverse and remand the challenged 2008 EA, FONSI, and Decisions as being arbitrary, capricious and contrary to law under NEPA.

DATED this 12th day of July, 2010.

Respectfully submitted,

/s/ Kristin F. Ruether

Kristin F. Ruether
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2010, I caused the foregoing WWP'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO BLM'S MOTION FOR SUMMARY JUDGMENT and DECLARATION OF KRISTIN F. RUETHER to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the opposing counsel of record listed below:

- Syrena Hargrove Syrena.Hargrove@usdoj.gov

/s/ Kristin F. Ruether

Kristin F. Ruether
Attorney for Plaintiff WWP