No. 20-4120

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WESTERN WATERSHEDS PROJECT,
Plaintiff-Appellant,

v.

INTERIOR BOARD OF LAND APPEALS &
U.S. DEPARTMENT OF THE INTERIOR,
Federal Defendants-Appellees,

and

STATE OF UTAH, UTAH DEP'T OF AGRIC. AND FOOD, STATE OF UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION,
Defendants-Intervenors-Appellees.

On Appeal from the United States District Court for the District of Utah
No. 1:19-CV-95-TS (Hon. Ted Stewart)

APPELLANT'S OPENING BRIEF
(Oral Argument Requested)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Western Watersheds Project is an Idaho non-profit organization recognized by the IRS as a Section 501(c)(3) public charity. It has no public shares and no corporate parent or affiliate with public shares.

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STATEMENT OF PRIOR OR RELATED CASES

Counsel for Plaintiff-Appellant are unaware of any prior or related cases pending before this Court.

GLOSSARY OF ACRONYMS AND TERMS

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
BLM	Bureau of Land Management
CCC	Consultation, Cooperation and Coordination Procedures
CEQ	Council on Environmental Quality
CRM	Rich County Coordinated Resource Management
DCA	Duck Creek Allotment
DOI	Department of Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
FONSI	Finding of No Significant Impact
FRH	Fundamentals of Rangeland Health
IBLA	Interior Board of Land Appeals
NEPA	National Environmental Policy Act
OHA	Office of Hearings and Appeals
Secretary	Secretary of Interior
TGA	Taylor Grazing Act
WWP	Western Watersheds Project

INTRODUCTION

Plaintiff-Appellant Western Watersheds Project (WWP) respectfully prays that this Court reverse the district court's erroneous dismissal for lack of Article III standing (Addendum A hereto); and hold unlawful a 2017 decision of the Interior Board of Land Appeals (IBLA), *Bureau of Land Mgmt. v. W. Watersheds Project,* 191 IBLA 144 (2017), remanding for Defendants to correct their violations of the National Environmental Policy Act (NEPA) and other legal requirements in authorizing livestock grazing on the Duck Creek Allotment (DCA) in Utah.

As explained below, WWP prevailed after a 55-day evidentiary hearing before a Department of Interior (DOI) Administrative Law Judge (ALJ), who held that the Bureau of Land Management (BLM) violated NEPA and BLM's grazing regulations in approving 2008 DCA grazing permits based on an inadequate Environmental Assessment (EA) and Finding of No Significant Impact (FONSI).

In reversing the ALJ, the IBLA imposed an erroneous legal standard of extreme deference to BLM, "ignored overwhelming evidence" supporting the ALJ's determinations, and misapplied NEPA, requiring reversal under precedents of this Court, including *Foust v. Lujan,* 942 F.2d 712, 715 (10th Cir. 1991), *Hoyl v. Babbitt*, 129 F.3d 1377, 1382 (10th Cir. 1997), *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1575 (10th Cir. 1994), and *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704–05 (10th Cir. 2009).

Despite WWP's showing of these defects in the IBLA Decision, the district court dismissed WWP's Complaint for lack of standing, saying the 2008 permits expired after ten years and WWP failed to challenge 2018 renewed permits—even though the permits were renewed automatically on the same terms. The court simply ignored WWP's challenges to the IBLA Decision, which continues to authorize ecologically-destructive livestock grazing on the DCA under the renewed permits, and sets unlawful precedent that harms WWP's interests. The district court's dismissal was thus clearly erroneous in failing to address WWP's standing to challenge the IBLA Decision.

Additionally, the district court erred by misconstruing 2014 amendments to the Federal Land Policy and Management Act (FLPMA), under which the 2008 permits were automatically renewed. Contrary to the court's misreading, those amendments do not preclude judicial relief holding unlawful and vacating the IBLA Decision or the DCA grazing scheme it approved in violation of NEPA, BLM's grazing regulations, and the Administrative Procedure Act (APA). Nor do they prevent entry of judicial relief to cure those legal violations.

Conducting de novo review, this Court should thus reverse the district court's dismissal for lack of standing, and hold unlawful and set aside the IBLA Decision based on the NEPA and other errors shown below, remanding back to Defendants to cure their legal violations.

Should this Court remand to the district court instead, WWP respectfully requests that it reverse the district court's erroneous denial of WWP's Motion to Recuse (Addendum B hereto) and order reassignment of the case.

STATEMENT OF JURISDICTION

WWP's Complaint challenged the IBLA Decision along with BLM's 2008 DCA Decision and EA/FONSI under NEPA, 42 U.S.C. § 4321 *et seq.*; FLPMA, 43 U.S.C. § 1701 *et seq.*; and the APA, 5 U.S.C. §§ 701–706. *See* 1-App-012–033.[1] The district court had jurisdiction under the APA and 28 U.S.C. § 1331.

On September 11, 2020, the district court held that WWP lacked Article III standing, and dismissed without prejudice. *See* 1-App-148–152 (Addendum A). WWP timely filed its notice of appeal on November 6, 2020. 1-App-153; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES ON APPEAL

1. Should the Court reverse the district court's erroneous determination that WWP lacks Article III standing?

2. Should the Court reverse the IBLA Decision as being unlawful, and remand to Defendants?

[1] Pursuant to 10th Cir. R. 28.1(A)(1), "X-App-XXX–XXX" denotes the Appendix volume and page numbers (printed in large bold font on the lower right corner) where the cited materials are located.

3. Should the Court reverse the erroneous denial of WWP's Motion to Recuse, and order reassignment if it remands to the district court?

LEGAL BACKGROUND

A. Statutory Background for Grazing on Public Lands.

The public rangelands were unregulated until 1934, allowing severe overgrazing that culminated in the Dust Bowl era. *See Pub. Lands Council v. Babbitt,* 529 U.S. 728, 731–33 (2000); *Natural Res. Def. Council v. Hodel,* 618 F. Supp. 848, 855–56 (E.D. Cal. 1985) (describing history of public lands grazing). In 1934, Congress enacted the Taylor Grazing Act (TGA), requiring federal permits to authorize livestock grazing on public lands to preserve them from injury due to overgrazing. 43 U.S.C. § 315b; *Babbitt*, 529 U.S. at 733.

Congress enacted FLPMA in 1976, in response to studies revealing that grazing continued to degrade public lands despite TGA regulation. *See Hodel,* 618 F. Supp. at 857; 43 U.S.C. § 1751(b)(1) (finding "that a substantial amount of the Federal range lands is deteriorating in quality"). FLPMA directs the Secretary of Interior (Secretary) to manage public lands under principles of multiple use and sustained yield, and to protect their ecological, environmental, and other values. 43 U.S.C. §§ 1701(a)(8), 1732(a). FLPMA also requires the Secretary to adopt land use plans to fulfill these purposes. *Id.* § 1732(a)–(b).

FLPMA mandates public participation in both BLM's land use planning and management decisions. *See* 43 U.S.C. §§ 1702(d), 1712(f), 1739(e). It requires permits for livestock grazing on public lands, which must contain terms and conditions to meet FLPMA's requirements and goals; and authorizes the Secretary to cancel, suspend, or modify any grazing permit, including to protect resource values. *Id.* § 1752(a).

B. National Environmental Policy Act.

Congress enacted NEPA to "promote efforts which will prevent or eliminate damage to the environment and biosphere." 42 U.S.C. § 4321. NEPA requires an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

The Council on Environmental Quality (CEQ) regulations implementing NEPA are binding on all federal agencies. 40 C.F.R. §§ 1500 *et seq.* (1978).[2] They allow an agency to prepare an EA in deciding whether the environmental impact of a proposed action is significant enough to warrant an EIS. 40 C.F.R. § 1508.9(a).

[2] CEQ adopted revised NEPA regulations effective September 14, 2020, but those are not applicable here. *See* 85 Fed. Reg. 43,304 (July 16, 2020). The 1978 regulations, in effect when the challenged actions occurred, are available at https://www.govinfo.gov/content/pkg/CFR-2019-title40-vol37/pdf/CFR-2019-title40-vol37-chapV.pdf (last visited Feb. 16, 2021).

But the regulations underscore that public participation is an "essential" part of the NEPA process. 40 C.F.R. §§ 1500.1(b), 1500.2, 1501.4(b), 1506.6.

In *Natural Res. Def. Council v. Morton*, 388 F. Supp. 829, 838–40 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976), the federal courts confirmed that NEPA requires site-specific analysis of public land grazing authorizations. *See also W. Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1273–78 (10th Cir. 2013) (addressing NEPA challenges to BLM grazing decision).

C. 2014 FLPMA Amendments.

In December 2014, Congress enacted the National Defense Authorization Act for Fiscal Year 2015, of which Section 3023 amended FLPMA Section 402 by directing the Secretary to automatically renew expiring grazing permits if NEPA analysis had not yet been conducted, and affording the Secretary discretion to determine when to conduct such NEPA analysis, based on environmental significance and available funding. *See* Pub. L. 113-291, § 3023 (Dec. 19, 2014), 128 Stat. at 3763–64, amending 43 U.S.C. §§ 1752(c), 1752(i) (Addendum C).

D. BLM Grazing Regulations.

BLM comprehensively revised its grazing regulations in 1995 to address problems of continued overgrazing. 60 Fed. Reg. 9,894 (Feb. 22, 1995); 43 C.F.R. Part 4100 (1995). The Supreme Court upheld the 1995 regulations over challenges by the livestock industry. *Babbitt*, 529 U.S. 728. A BLM effort to weaken the

grazing regulations in 2006 was held unlawful, so the 1995 regulations remain in effect. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 477 (9th Cir. 2010), *cert. denied* 565 U.S. 928 (2011) (affirming permanent injunction keeping 1995 regulations in effect).[3]

The 1995 regulations expanded public involvement in grazing decisions, and "place[d] greater emphasis on stewardship of the rangeland resource." *Id.* at 478. Any individual or group concerned about an allotment can become an "interested public" to receive notice of BLM grazing management actions. *See* 43 C.F.R. § 4100.0-5. BLM must involve the "interested public" through "consultation, cooperation and coordination" (CCC) procedures, including in approving or modifying grazing permits. *See* 43 C.F.R. §§ 4120.2(a), 4130.2(b), 4130.3-3(a), 4130.4(b)(3), 4160.1(a), 4160.2.

The 1995 regulations also adopted new ecological mandates for grazing on public lands, called the Fundamentals of Rangeland Health (FRH). *See* 43 C.F.R. § 4180 *et seq*. These establish "fundamentals" of rangeland health, comprising ecological criteria that all public lands must meet, 43 C.F.R. § 4180.1; and require BLM to adopt and meet state-specific "standards and guidelines" of rangeland

[3]Although the 1995 regulations remain in effect under *Kraayenbrink*, the 2006 disapproved regulations remain published in the Code of Federal Regulations. The 1995 regulations are available at https://www.govinfo.gov/content/pkg/CFR-2005-title43-vol2/pdf/CFR-2005-title43-vol2-part4100.pdf (last viewed Feb. 16, 2021). All citations in this brief are to the 1995 regulations.

health as well. 43 C.F.R. § 4180.2*; see also W. Watersheds*, 721 F.3d at 1268–71 (addressing FRH requirements).

The FRH regulations mandate that BLM must promptly change grazing management—no later than the next grazing year—if any of the "fundamentals" or "standards and guidelines" of rangeland health are not met on an allotment, and to include mandatory terms and conditions in grazing permits to ensure significant progress toward achieving the FRH requirements. 43 C.F.R. §§ 4180.1, 4180.2(c)*; see also Idaho Watersheds Project v. Hahn,* 187 F.3d 1035, 1037 (9th Cir. 1999) (upholding BLM duty to change management when rangeland health standards not met due to grazing); *W. Watersheds Project v. Salazar*, 843 F. Supp. 2d 1105, 1128–30 (D. Idaho 2012) (enforcing requirement of mandatory permit terms and conditions to meet rangeland health standards).

E. Administrative Appeals Process for Grazing Decisions.

The grazing regulations provide that any "person whose interest is adversely affected" by a BLM decision may take an administrative appeal to DOI's Office of Hearings and Appeals (OHA), pursuant to DOI's appeal regulations. *See* 43 C.F.R. §§ 4160.3, 4160.4. Under those regulations, ALJs are vested with authority to conduct evidentiary hearings and decide administrative appeals on behalf of the Secretary. 43 C.F.R. §§ 4.1(a), 4.474–.478; *see also Nat'l Wildlife Fed'n v. Bureau of Land Mgmt.*, 140 IBLA 85, 103 (1997) (explaining ALJ authority).

As the highest appeals body in OHA, the IBLA has de novo review authority over BLM and ALJ decisions, and "has the authority to make decisions concerning the public lands as fully and finally as might the Secretary himself." *United States v. Dunbar Stone Co*., 56 IBLA 61, 67 (1981), citing 43 C.F.R. § 4.1; *see also IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1009–10 (10th Cir. 2000) (discussing IBLA authority and review standards).

STATEMENT OF THE CASE

A. The Duck Creek Allotment.

Located within BLM's Salt Lake Field Office, the DCA encompasses 22,731 acres in Rich County, Utah. *See* 1-App-155 (map). It includes 13,090 acres of BLM lands, plus 9,641 acres of private and state lands. 2-App-451.

The DCA historically provided habitat for a variety of fish and wildlife, including greater sage-grouse and pygmy rabbit, both BLM-designated special status species. 1-App-227–232. But heavy livestock grazing has reduced native vegetation, caused denuded and eroding slopes, and trampled wetlands and riparian (streamside) areas, degrading these habitats. 1-App-120–147.

As an "interested public," WWP has been monitoring conditions and grazing impacts on the DCA for two decades, seeking to improve BLM's grazing management to protect its wildlife and fisheries habitats, as detailed below. 1-App-120–147.

B. Prior NEPA Analysis of DCA.

In 2001, BLM issued an EA and Decision amending grazing permits on the DCA, which WWP challenged along with other northern Utah grazing permits approved by the BLM at the same time. *See W. Watersheds Project v. Carpenter*, No. 2:02-cv-0352-PGC (D. Utah). In April 2005, the court approved a settlement under which BLM agreed "to undertake a comprehensive review of livestock grazing" on the public lands managed by BLM's Salt Lake Field Office, including the DCA. *See id.*, ECF No. 98 (April 15, 2005), p. 2.

While that litigation was pending, a group called "Rich County Coordinated Resource Management" (CRM) was formed by local ranchers and others "to provide natural resource management recommendations" to BLM. 2-App-453; 2-App-303. In response to a CRM-proposed "Duck Creek Grazing Plan," BLM issued a 2004 EA and Decision for the DCA to institute a new six-pasture rotation grazing system with new fences and water developments. 2-App-453. WWP appealed to OHA, and after a hearing with "considerable testimony" revealing defects in BLM's analysis, BLM moved to vacate and remand the 2004 Decision, which was granted in May 2005. 2-App-304.

C. 2005-2008 DCA Monitoring.

To assess the DCA's ecological conditions for a new NEPA analysis, BLM conducted monitoring in 2005, while WWP's scientists Dr. John Carter, Dr. James

Catlin, and Robert Edwards conducted extensive monitoring from 2005-2008. 2-App-323–332.

Dr. Carter is a Ph.D. ecologist, with expertise in upland and riparian ecology, habitat monitoring, and scientific validation of land management methods. 1-App-120–130; 2-App-291–300. He has been an expert witness on range conditions and ecology in other federal court and OHA cases. *See W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1323 (D. Idaho 2008) (Dr. Carter a "recognized expert"); 2-App-294–296 (listing cases). Dr. Catlin has similar education and expertise in ecosystem planning and habitat monitoring. 2-App-309 & 2-App-322. Mr. Edwards worked for BLM more than 30 years in range and resource management positions. 2-App-323–324.

These WWP scientists collected data on the DCA each year from 2005–2008, including amount of available forage ("production"), consumption of forage by livestock ("utilization"), vegetation cover, riparian habitat conditions, and other parameters. 2-App-333–351. Their data reflected high livestock utilization and impacts that threatened to permanently impair the allotment. *Id.*

D. NEPA Process for 2008 DCA Decision.

In July 2007, BLM issued a draft EA for grazing on the DCA, which it released as a final EA in May 2008 after taking public comment. 1-App-156; 2-App-467; 2-App-304.

As the 2008 EA disclosed, BLM's 2005 monitoring found that 6 out of 29 springs and 1 out 5 streams were not meeting Utah's FRH Standard 2 for Riparian and Wetland areas, and others were "functioning at risk." 1-App-166. The EA's stated purpose was to adopt new grazing management on the DCA to rectify these FRH violations. 1-App-163. But the EA identified only two nearly identical alternatives, involving a four-pasture rotation system and a new "water system" with 8.5 miles of pipeline, 6 watering troughs, and 3.8 miles of new fences; and did not consider any reduced grazing or other alternatives. 1-App-177–182.

Based on the EA, BLM issued a final Decision and FONSI on September 12, 2008, adopting the proposed action from the EA and approving new DCA grazing permits with the new pipelines, troughs, and fences. 1-App-260–290. On October 28, 2008, WWP timely appealed to OHA. 2-App-473.

E. ALJ Proceedings.

WWP's appeal was assigned to ALJ James Heffernan, who conducted an evidentiary hearing over 55 days between June 8, 2009, and July 28, 2011. The hearing generated a 15,639-page transcript and 375 exhibits. 2-App-474.

Dr. Carter, Dr. Catlin, and Mr. Edwards testified over several weeks about their DCA monitoring and results, giving ALJ Heffernan extensive opportunity to evaluate their qualifications, knowledge, and credibility. 2-App-322–351. BLM presented testimony from its assistant field manager and range management staff,

but did not present any biologist to address sage-grouse or other wildlife issues. *See* 2-App-474 & 2-App-537.

In May 2013, Judge Heffernan issued his ALJ Decision with evidentiary and witness credibility determinations, findings of fact, and conclusions of law. 2-App-301–440. ALJ Heffernan found the expert testimony of Drs. Carter and Catlin "credible" and entitled "to receive reasonable deference." 2-App-322. In contrast, he found the testimony of BLM's staff to be "at various times notably uninformed, inconsistent, and contradictory." *Id.*

The ALJ Decision discussed the "very heavy burden of proof" that WWP must meet in challenging BLM's 2008 Decision and EA/FONSI. 2-App-308–311. It stated that reversal was appropriate under IBLA precedents only if BLM's decision "is not reasonable or is not in compliance with pertinent regulations," or "where the hearing shows that BLM made a clear error of law or fact; failed to consider important environmental aspects; or its decision is not grounded upon technical expertise of staff competent in their field." 2-App-309.

ALJ Heffernan also noted that "in the typical grazing appeal" challengers "rarely have independent monitoring data" and simply "critique the purported accuracy of BLM's data and documents," which "fails to meet the high burden of proof." 2-App-309. By contrast, here WWP's scientists "were on the ground monitoring on the [DCA] for years," and "proffered their own, independently

derived and detailed documentary monitoring data," with "very extensive testimony and accompanying exhibits," "academic and scholarly supportive exhibits," and "first-hand, on-the-ground, knowledge." 2-App-309–310.

The ALJ Decision thoroughly discussed the DCA monitoring data presented by both WWP and BLM. 2-App-323–373. As it explained, the "main difference" was that "BLM primarily relied on visual, ocular estimates," while WWP's scientists "actually clipped and weighed at each and every one of their monitoring sites." 2-App-323.[4] In contrast to WWP's multi-year monitoring, BLM also did not monitor intensively any year except 2005, and did not conduct any riparian stubble height monitoring. 2-App-371–372. Yet BLM rejected all WWP's data, claiming it was "not in accord with BLM's Technical References," "inconsistent with BLM's [data]," and "biased." 2-App-371.

ALJ Heffernan made many findings rejecting these BLM criticisms. Citing a leading rangeland treatise, he noted that BLM's "ocular" estimates "are subjective and their reliability cannot be readily quantified." 2-App-325. Moreover, both "BLM and [WWP] deviated to some extent from the precise methodologies set out in the [BLM] Technical Reference," but that is "perfectly permissible" as it is just a guideline and not mandatory. 2-App-323 & 2-App-371–372.

[4] BLM clipped and weighed plants at four sites, but "at the vast majority of their monitoring sites BLM eyeballed their key forage species and then noted their visual estimates on their field data sheets." 2-App-323.

After weighing the evidence, Judge Heffernan concluded that BLM committed "reversible error" in numerous ways. *See* 2-App-438–439 (summarizing errors). Three particular errors are noteworthy here.

First, the ALJ held that BLM violated its duties to engage in "CCC" with WWP under the grazing regulations, including by improperly rejecting WWP's data and using CRM meetings to conduct public scoping while excluding WWP. *See* 2-App-313–315 & 2-App-413.

Second, the ALJ held that BLM's 2008 Decision violated the FRH requirements by failing to adopt mandatory measures needed to make "significant progress" in correcting the violations of Utah Standard 2. 2-App-412–420.

Third, the ALJ held that the EA was inadequate under NEPA, including in the following ways:

(a) Environmental baseline: The "EA fails to provide adequate baseline information . . . because BLM rejected totally [WWP's] very extensive and comprehensive data base . . . which shows that the current level of grazing is having a significant impact on both upland and riparian vegetation," and "would have facilitated BLM in taking a more informed 'hard look' at direct, indirect and cumulative impacts." 2-App-374–375.

(b) Greater sage-grouse: The "discussion of the protection of sage grouse habitat is probably the weakest and most inadequate portion of the entire EA," 2-

App-356, and "BLM violated NEPA by failing to provide a full and fair discussion of the potential environmental impacts of the proposed grazing system upon Sage Grouse." 2-App-302; 2-App-369–370; 2-App-389–395.

(c) Riparian areas and impacts of new troughs: The EA was "insufficient to fully and properly assess the wildlife-related riparian conditions," 2-App-433, and "didn't adequately analyze the site-specific impacts" of new upland water troughs, leaving "completely unassessed the important issue of radiating grazing impacts from the new troughs." 2-App-396.

(d) Range of alternatives: The EA only addressed two action alternatives having the "same deferred rotation grazing system, the same terms and conditions, and the same management objectives," and thus failed to consider a reasonable range of alternatives, including reduced grazing. 2-App-402–405.

(e) Cumulative impacts: The EA never addressed cumulative impacts of fencing, water developments, and vegetation treatments on intermixed private and state lands in the DCA., and violated NEPA "because a much more detailed cumulative impacts analysis was required." 2-App-402–405.

Based on these and other findings, the ALJ Decision reversed the 2008 Decision and EA/FONSI, and remanded to BLM "for further action in accord with this decision." 2-App-439.

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F. Proceedings Before the IBLA.

BLM appealed to the IBLA, and on August 15, 2013, the IBLA granted BLM's petition to stay the ALJ Decision pending appeal, allowing grazing to continue under BLM's 2008 Decision. 2-App-475.

Four years later—without any explanation for its lengthy delay—the IBLA issued its Decision on September 22, 2017, reversing the ALJ. 2-App-441–573. Citing TGA grazing preference adjudication standards, the IBLA Decision held that ALJ Heffernan failed to give extreme deference to BLM; reversed the ALJ's expert witness credibility and other determinations; and upheld BLM's 2008 Decision and EA/FONSI as complying with NEPA and the grazing regulations. *See id*. Each of those holdings was in error, as discussed below.

G. Proceedings in the District Court.

WWP filed this case in the District of Idaho, where WWP is based, naming the IBLA as lead defendant with DOI. 1-App-012–033. The Complaint challenged the IBLA Decision along with BLM's 2008 Decision and EA/FONSI that the IBLA upheld. *Id.*

In August 2019, the District of Idaho granted a discretionary venue transfer to the District of Utah. ECF No. 19.[5] That resulted in the district court treating the Complaint as a Petition for Review under District of Utah Local Rule 84 and

[5] "ECF" citations here refer to entries in the district court docket, 1-App-001–011.

Olenhouse, 42 F.3d at 1580. Utah and two state agencies were granted intervention on October 15, 2019. ECF No. 39.

On November 8, 2019, WWP filed a Motion to Recuse the assigned judge, Judge Ted Stewart, under 28 U.S.C. §§ 144 and 455(a). 1-App-036–105. Complying with § 144, WWP included a declaration from Erik Molvar, WWP's Executive Director, and a certificate of counsel that WWP's Motion to Recuse was made in good faith. 1-App-036–057. On January 16, 2020, Judge Stewart denied WWP's motion. 1-App-106–119 (Addendum B).

WWP filed its Opening Brief on February 10, 2020, seeking reversal of the IBLA Decision and the 2008 BLM Decision and EA/FONSI. ECF No. 49. WWP also submitted declarations of its members and staff, Dr. Carter and Jonathan Ratner, to confirm WWP's Article III standing, along with a 2017 research article they published regarding WWP's monitoring and findings of ecological conditions and grazing impacts on the DCA. 1-App-120–147. Those submissions attested to WWP's ongoing visits to the DCA and monitoring of ecological conditions since the OHA hearing, and documented that ecologically-damaging grazing is continuing under the terms and conditions approved by the 2008 EA/FONSI, and affirmed by the IBLA Decision. *Id*. WWP and Defendants stipulated that these submissions could be considered in evaluating WWP's Article III standing, which the court approved. ECF Nos. 65–66.

In their Answer Brief filed in June 2020, Defendants argued, for the first time, that WWP lacked standing or its claims were moot because the 2008 DCA grazing permits expired by their terms after ten years. ECF No. 57, at 18–23. Defendants provided no evidence of any new permits—instead, they asserted that the 2008 permits were automatically renewed in 2018 on the same terms and conditions under the 2014 FLPMA amendments. *Id.*

WWP's Reply Brief pointed out that expiration of the 2008 permits did not affect its challenges, since their automatic renewal meant that livestock grazing was still occurring under the same terms and conditions in the 2008 EA/FONSI. ECF No. 70, at 2–8. WWP cited numerous cases holding that challenges to expiring permits remain justiciable where, as here, "the conditions of the expired permit remain in effect," *Nat'l Parks Conservation Ass'n v. U.S. Army Corps of Eng'rs*, 574 F. Supp. 2d 1314, 1323 (S.D. Fla. 2008); the "same controversy exists after the issuance of the renewal permit," *Kescoli v. Babbitt,* 101 F.3d 1304, 1309 (9th Cir. 1996); or the expired permits otherwise have a "continuing presence" such that the courts can provide relief, *see Montgomery Envtl. Coal. v. Costle,* 646 F.2d 568, 578–79 (D.C. Cir. 1980), and *Mine Reclamation Corp. v. Fed. Energy Regulatory Comm'n,* 30 F.3d 1519, 1522–23 (D.C. Cir. 1994).

The district court *sua sponte* allowed Defendants and Intervenors to file sur-reply briefs on the issues of standing and mootness. ECF Nos. 72–73. The court

provided no opportunity for WWP to submit further briefings and did not conduct oral argument, although WWP requested it. ECF No. 70.

In its decision and judgment issued on September 11, 2020, the court dismissed WWP's Complaint for lack of standing. 1-App-148–152 (Addendum A). The court did not address WWP's standing declarations or WWP's challenges to the IBLA Decision. Instead, it held that WWP lacked standing because it had not challenged the renewed 2018 permits, and the court could afford no relief under the 2014 FLPMA amendments. *Id.* Those rulings were erroneous and must be reversed, as explained below.

SUMMARY OF ARGUMENT

This district court wrongly ignored WWP's challenges to the IBLA Decision, which continues to authorize ecologically-damaging livestock grazing on the DCA and harms WWP by requiring extreme deference to BLM in grazing appeals. The court also erred in its redressability analysis, as WWP's injuries would be remedied by reversing the IBLA Decision and remanding for Defendants to cure their legal violations, relief not precluded by the FLPMA amendments. This Court must thus reverse the dismissal for lack of Article III standing.

Upon de novo review, the Court should reverse and set aside the IBLA Decision as unlawful for the following reasons:

1. The IBLA applied an erroneous legal standard requiring extreme deference to BLM, wrongly replacing the standards of NEPA and the APA.

2. In reversing the ALJ's expert credibility determinations, the IBLA disregarded overwhelming record evidence and its own rule upholding such ALJ findings when supported by substantial evidence, as they were here.

3. The IBLA violated NEPA in upholding BLM's 2008 EA, which was legally inadequate in failing to take a "hard look" at baseline conditions, direct and cumulative impacts, or any reduced grazing alternative.

WWP is prejudiced by these errors, and the Court should thus reverse the IBLA Decision and remand to Defendants to cure their legal violations.

The district court also abused its discretion in denying WWP's Motion to Recuse, which cited Judge Stewart's public statements that created—at least—an appearance of bias such that his impartiality could reasonably be questioned. If the Court remands to the district court, it should thus order reassignment.

ARGUMENT

I. THE DISTRICT COURT WRONGLY DISMISSED FOR LACK OF STANDING, REQUIRING REVERSAL.

A. Standard of Review.

The Court reviews de novo the district court's dismissal of WWP's complaint for lack of Article III standing. *Fish v. Schwab*, 957 F.3d 1105, 1118 (10th Cir. 2020); *see also Wilson v. Glenwood Intermountain Properties, Inc.*, 98

F.3d 590, 593 (10th Cir. 1996) ("We review the standing issue de novo because standing is a question of law").[6]

B. Article III Standing Requirements.

Because the jurisdiction of federal courts is limited, "the party invoking federal jurisdiction bears the burden of proof." *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005) (citation omitted). "Standing is determined as of the time the action is brought." *Smith v. U.S. Court of Appeals for the Tenth Circuit*, 484 F.3d 1281, 1285 (10th Cir. 2007) (citation omitted).

To satisfy Article III's standing requirements, "a plaintiff must show (1) it suffered an 'injury in fact' that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Lujan,* 504 U.S. at 560, n. 1.

"In general, this inquiry seeks to determine 'whether [the plaintiff has] such

[6] Per 10th Cir. R. 28.1(A), WWP addressed its Article III standing below in its Complaint, 1-App-012–016; opening brief, ECF No. 49 at 7 & n.2; standing declarations and exhibits, 1-App-120–147; and reply brief, ECF No. 70, at 2–8.

a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (quoting *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 517 (2007)). Proving an organization's standing requires "specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.,* 555 U.S. 488, 498 (2009).

C. WWP Proved Its Article III Standing.

Under these legal standards, WWP has amply proved its Article III standing, as this Court must confirm upon de novo review.

First, the record demonstrates that WWP as an organization, and its members and staff individually, have longstanding interests in enjoying and protecting the public lands of the DCA and their ecological, wildlife, and other values. WWP staff and members (including Dr. Carter, Mr. Ratner, and others) have visited the DCA repeatedly since at least 2000. 2-App-322–331; 1-App-120–147. WWP has conducted monitoring of ecological conditions on the DCA for two decades, documenting negative impacts of BLM's livestock grazing authorizations there. 1-App-120–147. WWP confirmed that such visits and monitoring continued through 2020 as the district court proceedings were underway, and will continue into the foreseeable future. *Id.* These detailed facts amply satisfy the evidentiary

requirements for establishing Article III standing under *Summers,* 555 U.S. at 492–94, *Laidlaw,* 528 U.S. at 168–69, and *Lujan*, 504 U.S. at 560–61.

Second, WWP demonstrated that both the IBLA Decision, and BLM's 2008 Decision and EA/FONSI that it approved, cause ongoing injury to WWP's interests by authorizing ecologically-damaging grazing to continue on the DCA. These injuries were detailed at the administrative hearing and documented in WWP's declarations. 2-App-333–351; 1-App-120–147. This showing satisfies the standing requirements for injury-in-fact and causation, by demonstrating the "geographical nexus" between WWP and the DCA and how the challenged decisions are causing environmental degradation that harms WWP and its members. *See Sierra Club v. Envtl. Prot. Agency,* 964 F.3d 882, 888 (10th Cir. 2020) ("In environmental suits, an injury-in-fact exists when the petitioner 'use[s] the affected area' and is a person 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity") (citing *Laidlaw*, 528 U.S. at 183); *Diné Citizens Against Ruining Our Env't v. Bernhardt,* 923 F.3d 831, 840–43 (10th Cir. 2019) (standing shown by members that used public lands and alleged harms from NEPA violations).

Contrary to the district court's ruling, WWP also met the third standing requirement of redressability. Again, the IBLA Decision allows ecologically-harmful grazing to continue on the DCA under the terms of the unlawful 2008

Decision and EA/FONSI. As explained further below, judicial relief holding the challenged decisions unlawful and remanding for Defendants to cure their legal violations would remedy these harms to WWP in several ways, including by potentially improving grazing on the DCA—which this Court has confirmed is adequate to establish standing. *See Sierra Club*, 964 F.3d at 890 ("the potential for further improvement satisfies the requirement of redressability"); *WildEarth Guardians v. Bureau of Land Mgmt.,* 870 F.3d 1222, 1230–32 (10th Cir. 2017) (plaintiff had standing to challenge coal leases approved in areas used by its members, where remand for further NEPA analysis could cure agency violations).

The IBLA Decision further harms WWP by imposing an unlawful standard of proof in OHA grazing appeals of extreme deference to BLM, as also discussed below. That precedent resulted in improper reversal of the ALJ Decision here, after WWP invested enormous resources conducting DCA monitoring and proving its claims at the evidentiary hearing. Not only is WWP particularly injured by that lost investment of resources and staff time, but the IBLA Decision's precedent wrongly requiring extreme deference to BLM in grazing appeals has further impaired WWP by resulting in dismissal of other WWP grazing appeals. *See* 1-App-027; 1-App-138–139 (citing *S. Nev. Water Auth. v. Bureau of Land Mgmt.*, 191 IBLA 382,

402–03 (Oct. 13, 2017)).[7] These are concrete, personalized harms suffered by WWP and caused by the IBLA Decision, that would be remedied by reversing the IBLA Decision as unlawful. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (a "plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself"); *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement,* 620 F.3d 1227, 1234–35 (10th Cir. 2010) (environmental group had standing to challenge DOI agency procedural violation that harmed its interests); *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1137–39 (10th Cir. 2011) (holding that Bureau of Indian Affairs had standing to appeal district court's adverse "interpretation of the law governing the BIA's approval process" of a tribal land transfer).

Upon de novo review, this Court must thus conclude that WWP has demonstrated its Article III standing.

D. The District Court Erred by Disregarding WWP's Challenges to the IBLA Decision.

In dismissing WWP's Complaint for lack of standing, the district court first erred by focusing on expiration of the 2008 permits, without addressing WWP's

[7] Other appeals in which OHA has ruled against WWP based on the IBLA's Duck Creek Decision include *W. Watersheds Project v. Bureau of Land Mgmt.*, AZ-G010-17-01 (May 24, 2018); *W. Watersheds Project et al. v. Bureau of Land Mgmt.*, UT-W010-18-1 (July 9, 2018); and *Petan Co. of Nevada v. Bureau of Land Mgmt.*, ID-BD-3000-2015-002 (Nov. 7, 2018).

challenges to the IBLA Decision—a final agency action which continues in effect and harms WWP's interests in several ways, as explained above.

The district court's September 2020 opinion mischaracterized WWP's claims as only challenging the "expired" 2008 permits, stating that "the permits expired in 2018, before Plaintiff brought this action," and that WWP "seeks review of a decision authorizing grazing permits that have now expired." 1-App-149–150.

The district court recognized that the 2008 permits were automatically renewed in 2018 under the same terms and conditions pursuant to the 2014 FLPMA amendments. 1-App-150. Yet it disregarded that fact in holding that WWP lacked standing because it had not challenged the 2018 permits. 1-App-150. The district court never addressed the cases WWP cited, holding that challenges over expired permits are justiciable where their terms remain in effect, as here. *See Kescoli*, 101 F.3d at 1309; *Montgomery Envtl. Coal.*, 646 F.2d at 578–79; *Mine Reclamation Corp.*, 30 F.3d at 1522–23; *Nat'l Parks*, 574 F. Supp. 2d at 1323.

Moreover, the district court's sole focus on the expired 2008 wholly ignored WWP's challenges to the IBLA Decision. Yet the IBLA Decision constitutes a "final agency action" subject to judicial review under the APA. *See Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1155 (10th Cir. 2004). Indeed, under 43 C.F.R. § 4.1(b)(2), the IBLA Decision represents the final decision of the Secretary authorizing livestock grazing on the DCA. By reversing

the ALJ Decision—which had ordered BLM to conduct a new decisionmaking and NEPA process to rectify the multiple legal violations it found—the IBLA Decision authorizes livestock grazing to continue to this day on the DCA under the same terms and conditions and unlawful NEPA process, causing continued ecological degradation and harm to WWP's interests. *See* 1-App-120–140. The district court ignored these facts.

In disregarding WWP's challenges to the IBLA Decision, the district court also failed to recognize that it continues to injure WWP's interests in ways that would be redressed by judicial reversal—including by requiring a new NEPA process to correct BLM's prior violations, and/or by removing a negative precedent that is impacting WWP in other grazing appeals.

The district court's dismissal for lack of standing was thus clearly erroneous in misconstruing WWP's Complaint and ignoring WWP's challenges to the IBLA Decision, and must therefore be reversed.

E. The District Court Also Erred in Its Redressability Analysis.

Additionally, the district court erred in its redressability analysis when it cited the 2014 FLPMA amendments to conclude it could order no relief for WWP. *See* 1-App-150. Its reasoning was as follows:

> Plaintiff simply argues that reversing and remanding the agency action would require the BLM to conduct a new NEPA analysis and issue new grazing permits. However, this action is already required by statute. The timing of when new NEPA analysis is conducted is left to the discretion of

> the Secretary of the Interior. Thus, any decision by the Court would have no affect [*sic*] on the current grazing permits or the future NEPA analysis.

1-App-150. (citing 43 U.S.C. § 1752(i)).

This reasoning is incorrect for two reasons: (1) the court failed to analyze the remedial relief it might order, and (2) it did not conduct a proper analysis of the 2014 FLPMA amendments, which did not limit or prevent judicial relief that may be ordered to remedy WWP's injuries here.

1. Failure to evaluate possible remedies.

First, judicial relief reversing the IBLA Decision would provide meaningful remedies that the district court failed to recognize. As noted, the district court held that a new NEPA analysis "is already required by statute" under the 2014 amendments, and discretion is granted to the Secretary to determine when to conduct that analysis, so it could afford no relief. This failed to recognize that courts have authority to review agency actions under the APA for violations of NEPA or other requirements, and remand to cure those violations; and the FLPMA amendments do not alter that authority.

Under the APA, a judicial decision holding unlawful the IBLA Decision and/or the 2008 EA/FONSI would require that those agency actions be vacated and set aside. *See WildEarth Guardians*, 870 F.3d at 1239 ("Under the APA, courts 'shall' 'hold unlawful and set aside agency action' that is found to be arbitrary or capricious," quoting 5 U.S.C. § 706(2)(A)). Judicial relief holding unlawful and

vacating the IBLA Decision alone affords relief to WWP by eliminating its precedential impact on other grazing appeals.

WWP would obtain further relief from a judicial ruling identifying NEPA and other legal violations in the 2008 EA/FONSI, which the IBLA Decision wrongly affirmed. As the ALJ Decision found, and the record before this Court confirms, BLM violated NEPA in particular ways, including by not adequately addressing baseline conditions, potential impacts to sage-grouse and other habitats, cumulative effects, or a reasonable range of alternatives. *See* Argument Section II.D, *infra*. A judicial ruling identifying these legal violations would afford WWP relief by establishing the errors that Defendants must correct in conducting subsequent NEPA analysis—which is still required by the FLPMA amendments.

Moreover, upon holding the challenged decisions unlawful under the APA, further judicial relief would be afforded by remanding for Defendants with instructions to cure their adjudicated legal violations. *See WildEarth Guardians*, 870 F.3d at 1239; *Sierra Club*, 964 F.3d at 890; *Diné Citizens,* 923 F.3d at 859 (all remanding for agencies to cure legal violations)*; see also Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1172–73 (10th Cir. 1997) (reversing and remanding with instructions for Secretary to continue processing patent application unlawfully delayed). As discussed further below, remand options would depend on the legal violations found, but could include (a) remand to the IBLA to reevaluate the ALJ

Decision and determine whether to affirm it under the proper legal standards, and/or (b) remand to the IBLA with instructions to require BLM to correct its violations of NEPA and/or the grazing regulations. Yet the district court failed to consider any of these forms of possible relief.

2. Erroneous reading of FLPMA amendments.

Second, the district court erred as a matter of law in reading the 2014 FLPMA amendments as precluding it from entering any relief. While those amendments require renewal of expiring permits on the same terms and give the Secretary discretion when to conduct new NEPA analysis over the renewed permits, they do not exempt BLM from ever having to comply with NEPA. Neither do they prohibit courts from holding that BLM violated NEPA, the grazing regulations, or the APA in originally issuing the permits that remain in effect, or from ordering the agency to cure those violations in conducting a new NEPA process, which must still be done under the FLPMA amendments.

As the Supreme Court has instructed, careful analysis is required to evaluate the extent to which an amendment may have modified or repealed other statutory requirements. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662–64 (2007); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189–90 (1978); *Branch* v. *Smith,* 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter

Act covers the whole subject of the earlier one and 'is clearly intended as a substitute'"). Yet the district court failed to undertake any such analysis of the 2014 FLPMA amendments—it simply assumed that the amendments precluded any relief here. *See* 1-App-150.

Proper statutory analysis of the 2014 amendments reveals they modified FLPMA Section 402 in limited ways, without purporting to repeal any other requirement of law, including NEPA, other FLPMA provisions, or the APA and its judicial review provisions. *See* Addendum C.

There is no language in the 2014 amendments expressly repealing any other statutory requirement, for example, as would be required to conclude that Congress somehow intended to abrogate the judicial review and relief provisions of the APA. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.,* 534 U.S. 124, 143–44 (2001) ("when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"); *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 307 (9th Cir. 1989) ("Obviously there can be no express repeal without reference to the 'repealed' statute"). The district court thus erred in presuming that the FLPMA amendments limited judicial review or relief under the APA.

The 2014 amendments also did not alter FLPMA Section 302(a), 43 U.S.C. § 1732(a) (requiring the Secretary to manage public lands in accordance with land

use plans), or Section 402(a), 43 U.S.C. § 1752(a) (requiring that grazing permits have necessary terms and conditions to comply with law). Section 402(a) works in tandem with Section 302(a) to underscore that BLM must ensure all grazing permits are consistent with land use plans and comply with regulations, including the FRH requirements of 43 C.F.R. § 4180 *et seq*. Since none of these statutory provisions was altered by the 2014 amendments, all these provisions of FLPMA must be construed together to give them effect. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (rejecting repeal by implication of "longstanding, important" statutory requirement, and confirming that courts must construe statutes harmoniously to avoid implied repeal).

These are important considerations given the facts here, where BLM disclosed in the 2008 EA that grazing on the DCA was causing violations of FRH Utah Standard 2, triggering the requirement that BLM change grazing management promptly to ensure significant progress is made in meeting the FRH standards. *See* 43 C.F.R. §§ 4180.1, 4180.2(c); *Hahn,* 187 F.3d at 1037; *Salazar*, 843 F. Supp. 2d at 1128–30. The ALJ Decision also found that BLM did not adopt mandatory permit terms and requirements necessary to ensure significant progress in meeting those standards. 2-App-412–420; 2-App-424–437. The ALJ was acting with the

authority of the Secretary in reversing BLM's 2008 Decision and EA/FONSI, and remanding for BLM to undertake a new NEPA process to cure the identified violations. *See* 43 C.F.R. §§ 4.1(a), 4.474–.478.

Judicial relief reversing the IBLA Decision and the 2008 EA/FONSI, and remanding for Defendants to cure their legal violations, does not run afoul of the 2014 FLPMA amendments, including the discretion granted in 43 U.S.C. § 1752(i). As noted above, remand with instructions for the IBLA to reevaluate the ALJ Decision under the correct legal standards could result in it adopting the ALJ Decision and its remand order directing BLM to cure its violations of NEPA and the grazing regulations. Since the IBLA and ALJ act with the Secretary's authority, such an order would not run afoul of the discretion granted to the Secretary in the 2014 amendments.

Neither would a remand order specifying the legal violations that BLM must cure in a new NEPA process violate the discretion given to the Secretary in determining when to conduct the new NEPA—it would specify steps that BLM must take upon performing that analysis, to rectify its prior errors.

Nor do the 2014 FLPMA amendments preclude judicial relief reversing the IBLA Decision under the APA for adopting an unlawful legal standard of extreme deference to BLM in grazing appeals, when NEPA and the APA impose lesser burdens (as discussed further below). Again, the IBLA Decision is a final action

properly reviewed under the APA, and WWP is injured by its negative precedent, which reversal would remedy.

In short, the district court erred in reading the 2014 FLPMA amendments as preventing any judicial relief in this case. Because WWP has demonstrated injuries caused by the IBLA Decision that may be remedied through various forms of judicial relief, this Court should hold that WWP has Article III standing, reverse the district court's erroneous dismissal for lack of standing, and proceed to hold the IBLA Decision unlawful for the reasons below.

II. THE COURT SHOULD REVERSE THE IBLA DECISION FOR ITS LEGAL ERRORS.[8]

A. Standards of Review.

This Court conducts de novo review in evaluating whether a challenged agency action violated NEPA or other requirements of law under the APA. *Richardson*, 565 F.3d at 704–05; *Utah Envtl. Cong. v. Russell,* 518 F.3d 817, 823 (10th Cir. 2008) ("[w]e take an independent review of the action's action").

Under the APA, the Court determines whether an agency action was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, or not in accordance with law. *See* 5 U.S.C. § 706(2)(A) & (D); *Pennaco Energy*, 377 F.3d at 1157. The Court considers the "whole record" in reviewing an IBLA

[8] Per 10th Cir. R. 28.1(A), WWP raised these IBLA errors in its opening and reply briefs before the district court, ECF Nos. 49 & 70.

decision. *Pennaco Energy*, 377 F.3d at 1157. Thus, it must examine the BLM, ALJ, and IBLA decisions here, but "because the IBLA is the final decision maker of the agency, we apply the deferential standard of review" to the IBLA Decision. *IMC Kalium*, 206 F.3d at 1010 (citing *Four B Corp. v. Nat'l Labor Relations Bd.*, 163 F.3d 1177, 1182 (10th Cir. 1998)).

An agency decision is arbitrary and capricious if it "(1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment." *Richardson*, 565 F.3d at 704 (internal quotations omitted). "The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse,* 42 F.3d at 1574 (citations omitted).

An agency also acts "arbitrarily and capriciously when its actions depart from well-established agency precedent without a reasoned explanation." *Hoyl*, 129 F.3d at 1384. "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986)

(citations omitted). "[T]he court must require the agency to adhere to its own pronouncements or explain its departure from them; an agency must apply criteria it has announced as controlling or otherwise satisfactorily explain the basis for its departure therefrom." *Midwestern Transp., Inc. v. Interstate Commerce Comm'n*, 635 F.2d 771, 777 (10th Cir. 1980) (citations omitted).

B. The IBLA Decision Applied an Improper Legal Standard of Extreme Deference to BLM.

The IBLA Decision must be reversed, first, because it adopted an incorrect legal standard of extreme deference to BLM in grazing appeals, which the IBLA derived from the TGA instead of applying the correct legal standards under NEPA and the APA.

Specifically, the IBLA Decision asserted that BLM grazing decisions receive "added deference" compared with other BLM land management decisions, and cited a TGA regulation for adjudication of grazing preferences for support. *See* 2-App-448–449 & n.16 (citing 43 C.F.R § 4.480(b)); 2-App-476–478 (discussing "burden of proof" and quoting 43 C.F.R § 4.480(b)). The IBLA reversed the ALJ Decision for not applying this "added deference" standard, stating:

> ALJ Heffernan should have addressed whether WWP met its burden under NEPA in light of the fact that BLM's experts and their conclusions are entitled to added deference when they address grazing issues affecting grazing preferences under the TGA. . . .

2-App-449 (emphasis added; internal citations omitted).

The term "grazing preference" is defined as a "superior or priority position against others for the purpose of receiving a grazing permit or lease." 43 C.F.R. § 4100.0-5*; see also* 60 Fed. Reg. 9,894, 9,922 (Feb. 22, 1995) (explaining that grazing preference "refers only to a person's priority to receive a permit or lease, and not to a specific number" of grazing animals). But this case has nothing to do with adjudicating grazing preferences: WWP did not assert any grazing preference, nor dispute grazing preferences held by DCA permittees. The IBLA Decision utterly failed to explain why it relied on 43 C.F.R § 4.480(b) regarding TGA adjudication of grazing preferences when grazing preferences were not in dispute here. The IBLA's unexplained reliance on a statute and regulations not at issue in this case constitutes clear error, requiring reversal. 5 U.S.C. § 706(2)(A); *Richardson*, 565 F.3d at 704.

Moreover, the IBLA wrongly elevated the TGA over NEPA and the APA, which do not impose such extreme deference. *See WildEarth Guardians,* 870 F.3d at 1238 (addressing NEPA burdens and declining to "extend the additional layer of deference the BLM requests" in NEPA case); *Mt. Emmons*, 117 F.3d at 1170 ("an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning the statute can bear") (quoting *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994)).

NEPA obligates federal agencies "to consider every significant aspect of the environmental impact of a proposed action." *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1207 (10th Cir. 2002), quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). The NEPA regulations direct that federal agencies must utilize high-quality information, including accurate scientific analyses, in their NEPA analyses, 40 C.F.R. § 1500.1(b), and ensure their NEPA documents are based on professional and scientific integrity. 40 C.F.R. § 1502.24.

NEPA thus places the duty on the federal agency—BLM here—to consider all potential impacts in a NEPA document. A party challenging an agency's NEPA analysis under the APA bears the burden only of showing that the agency did not take a "hard look" at information relevant to the decision, including a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action. *See Richardson,* 565 F.3d at 704; *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). While the courts conducting NEPA and APA review will defer to agency expertise, the agency's exercise of that expertise must have a rational basis and take "into consideration the relevant factors." *Utah Shared Access*, 288 F.3d at 1213; *Comm. to Preserve Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993).

Rather than heed these NEPA and APA standards, the IBLA Decision wrongly held that BLM receives extreme deference in grazing appeals, thus imposing a much higher and erroneous burden of proof to WWP's challenges—and making it virtually impossible to challenge any BLM grazing decision. Again, such an extremely deferential standard is not consistent with NEPA or the APA. *WildEarth Guardians,* 870 F.3d at 1238. Because the IBLA erred as a matter of law, reversal is required.

C. The IBLA Wrongly Reversed the ALJ's Expert Witness Credibility Determinations.

The IBLA committed a second legal error in reversing the ALJ's expert witness credibility determinations—which were key to his other findings and conclusions—in blatant disregard of substantial evidence and without acknowledging that it was violating its own precedents.

Although it has de novo review authority, the IBLA has long followed the rule that it should accord deference to ALJ findings of fact based on credibility determinations when they are supported by substantial evidence. *See United States v. Miller*, 165 IBLA 342, 377 (2005) (citing *United States v. Higgins*, 134 IBLA 307, 316 (1996), and *Bureau of Land Mgmt. v. Carlo*, 133 IBLA 206, 211–12 (1995)). "[T]he basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the demeanor of the witnesses and is in the best position to judge the weight to be given to conflicting testimony." *Id.*

(citing *Yankee Gulch Joint Venture v. Bureau of Land Mgmt.*, 113 IBLA 106, 136 (1990), and *United States v. Whittaker*, 95 IBLA 271, 286 (1987)).

Here, the focus of the administrative hearing was on the adequacy and accuracy of BLM's monitoring and assessment of grazing impacts; and ALJ Heffernan detailed the reasons why he found the evidence presented by WWP's experts to be more credible and reliable than BLM's. *See* 2-App-371–437.

Yet, in a single paragraph, the IBLA reversed the ALJ's credibility findings and dismissed the testimony of WWP's experts, Drs. Catlin and Carter, as being merely "personal observations" by non-experts, stating:

> [W]e find no basis for concluding that either Carter or Catlin possessed the credentials that would qualify them as experts in the fields of rangeland management and wildlife biology, subjects of particular relevance to evaluating conditions on the Allotment. . . . At best and for the most part, the testimony of Carter and Catlin represents nothing more than their personal observations of rangeland conditions at the various times they visited the Allotment. They could not properly be considered experts in rangeland management.

2-App-489 (underscore added). Having rejected the ALJ's findings that WWP's experts were more credible than BLM's—a key predicate for his further findings—the IBLA then held that WWP failed to meet its burden of showing any reversible error by BLM. 2-App-449–450; 2-App-500–506; 2-App-525–572.

The IBLA gave no deference to ALJ Heffernan's findings of fact or credibility determinations, and never evaluated whether they were supported by substantial evidence; a departure from the IBLA's precedents cited above. This

alone requires reversal because, as this Court has held, the IBLA acts "arbitrarily and capriciously when its actions depart from well-established agency precedent without a reasoned explanation," *Hoyl*, 129 F.3d at 1384. The IBLA, like other agencies, is "under an obligation to follow [its own] precedents, or provide a rational explanation for their departures." *Big Horn Coal*, 793 F.2d at 1169; *see also Olenhouse*, 42 F.3d at 1575 n.25 ("arbitrary and unexplained departure from agency precedent" is grounds for reversal). The IBLA Decision failed to even acknowledge that it was departing from its own precedents affording deference to ALJ credibility findings, much less try to explain why it did so here, thus requiring reversal as in *Hoyl* and *Big Horn Coal*.

Moreover, in conducting review of an ALJ decision, the IBLA must consider the "whole record," including all hearing evidence. 43 C.F.R. § 4.480. The IBLA cannot simply disregard substantial evidence in the record, as it did here in saying it could "find no basis" that WWP's witnesses qualified as experts, thus jettisoning all the ALJ Decision's findings based on their expert testimony. *See Foust,* 942 F.2d at 714–15 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight") (quoting *Bowman Transp. v. Ark.–Best Freight Sys.*, 419 U.S. 281, 284 n. 2 (1974) (citation omitted)); *Olenhouse*, 42 F.3d at 1575–76. The evidence supporting the ALJ's credibility determinations and factual findings was overwhelming, yet the IBLA summarily reversed without

considering it. *See Foust,* 942 F.2d at 715–17 (reversing where IBLA "ignored overwhelming evidence" from hearing); *W. Watersheds Project v. U.S. Dep't of Interior*, No. 08-0506-E-BLW, 2009 WL 5218020, at *8 (D. Idaho Dec. 30, 2009) (reversing where IBLA "re-drafted [the ALJ's] decision to turn it into a weak strawman, and then proceeded to knock it down"). The Court must similarly reverse the IBLA Decision for these legal errors.

D. The 2008 EA/FONSI Violated NEPA.

Finally, upon de novo review, the Court should reverse the IBLA and hold that the 2008 EA/FONSI violated NEPA and the APA in the following ways:

1. Range of alternatives.

The Court applies a "rule of reason" to determine whether the range of alternatives considered by an agency was adequate. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1166 (10th Cir. 2002), *as modified on reh'g,* 319 F.3d 1207 (10th Cir. 2003). A reasonable alternative is one that is "non-speculative . . . and bounded by some notion of feasibility." *Id.* at 1172.

BLM's stated purpose for its 2008 NEPA analysis was "to implement changes in livestock grazing to meet Rangeland Health Standards on some of the riparian areas within the Duck Creek Allotment." 1-App-163. However, the EA analyzed only two action alternatives, both having the same grazing system, terms and conditions, and management objectives, and both of which relied on new

upland troughs to draw livestock away from riparian areas. 1-App-177–195. The ALJ held this violated NEPA for not considering a reduced grazing alternative along with rotational grazing, citing numerous federal court cases. 2-App-399–402.

Reversing, the IBLA reasoned that "reduced grazing would not redirect grazing use away from riparian areas," and thus "[w]e find no error in BLM not pairing a reduced grazing alternative with its rotational grazing system and related measures." 2-App-559–561.

IBLA's finding of "no error" is plainly erroneous. A reduced grazing alternative along with rotational grazing that redirected livestock away from riparian areas was neither speculative nor unfeasible. As ALJ Heffernan correctly held, while BLM is not required to adopt such an alternative, it is required to analyze it in order to have a legally sufficient EA. 2-App-401. The IBLA's reliance on *W. Watersheds*, 721 F.3d at 1275–76, is inapplicable. That case addressed consideration of a "no grazing" alternative precluded by the applicable land use plan, not whether reduced grazing alternatives are proper to meet FRH requirements and NEPA's commands, as the ALJ explained. 2-App-400–401.

Because the 2008 EA failed to consider a reasonable range of alternatives, such as reduced grazing, this Court must reverse. *See High Country Conservation Advocates v. U.S. Forest Serv.,* 951 F.3d 1217, 1224–27 (10th Cir. 2020) (reversing "one-sided approach" that refused to consider alternatives) (citing *Colo.*

Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1175 (10th Cir. 1999) and *Richardson*, 565 F.3d at 710); *Utahns,* 305 F.3d at 1166.

2. No "hard look" at sage-grouse impacts.

ALJ Heffernan found that the "issue of the Decision's impacts upon sage grouse habitat is, in my opinion, the most important impacts issue in this case," 2-App-389, and yet "the EA's discussion of the protection of sage grouse habitat is probably the weakest and most inadequate portion of the entire EA." 2-App-356. Upon de novo review, the Court must conclude he was right: BLM did not even know where key sage-grouse habitats were located on the DCA, much less evaluate their conditions or how the new grazing scheme and infrastructure developments might impact them.

Specifically, the EA asserted that "most of the BLM lands within the (DCA) . . . meet all seasonal habitat requirements for sage grouse," 2-App-389, yet the ALJ found that "BLM did not even know where the sage grouse leks [mating areas] were located, and, consequently, had inadequate knowledge of what the habitat conditions were in the areas surrounding sage grouse leks on the allotment." *Id.*; 2-App-356; 2-App-393. BLM further did not consider sage grouse nesting grounds in locating its monitoring sites, and "there is no evidence in the EA . . . that BLM assessed in any context the height of perennial grasses and forbs as cover for sage grouse nest sites." 2-App-391–393.

The EA also failed to consider adverse impacts of the new grazing rotation scheme on sage-grouse habitats. 2-App-390. Because BLM "did not know and did not determine the locations of sage grouse nesting and brood rearing areas on the allotment, BLM had no way of knowing, or even estimating, the impacts which the four pasture rotation system will have on sage grouse"—including "whether this rotation system, with its increased concentration of livestock in one of the four pastures on a periodic basis, would have a catastrophic impact, or no impact at all, upon sage grouse nesting and brood rearing areas." 2-App-390; 2-App-394.

The IBLA reversed the ALJ's findings by relying on factual misstatements and non-record presumptions, stating:

> While the wildlife biologists did not testify at the hearing, the results of their analysis are presented in the EA. Since we presume they did their jobs, we find they knew where sage-grouse nesting and brood-rearing areas were and assessed the likely impacts of the grazing proposal on those areas.

2-App-537 (emphasis added).

This "presumption" that wildlife biologists "did their jobs," "knew where" the sage-grouse habitats were, and "assessed likely impacts" is not supported by the record. BLM biologists did not testify at hearing, and the EA itself did not disclose the locations of sage-grouse habitats or discuss potential impacts with specificity at all. *See* 1-App-166–167; 1-App-228–230; 1-App-241–243; 1-App-247–250 (EA discussions). Moreover, as the IBLA has itself held, it may not rely on self-serving assertions of BLM staff when contradictory evidence is presented

at hearing: "[I]t has never been the practice of this Board to accept the conclusory opinions of BLM's experts as a proper basis for a decision in the face of conflicting testimony." *Filippini Ranching Co. v. Bureau of Land Mgmt.*, 149 IBLA 54, 78 (1999). By relying on presumptions instead of heeding the facts in the record, the IBLA Decision is again unsupported by substantial evidence. *See Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) ("grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record"); *Olenhouse*, 42 F.3d at 1575 n.25 ("inferences arbitrarily drawn" are reversible).

BLM has a NEPA duty to take a "hard look" at potential impacts of a proposed action on special status species and their habitats, such as sage-grouse. *See Salazar,* 843 F. Supp. 2d at 1123; *Or. Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 564 (9th Cir. 2016) (reversing where BLM failed to adequately analyze sage-grouse habitats); *W. Watersheds Project v Abbey,* 719 F.3d 1035 (9th Cir. 2013) (NEPA analysis must analyze site-specific sage-grouse habitats). Because the EA failed to take that "hard look" at impacts on sage-grouse, this Court must hold it inadequate and reverse.

3. Cumulative impacts.

BLM's EA did not even attempt to analyze the cumulative impacts of projects on the DCA's intermixed private and state lands along with the new

grazing system, pipeline, water troughs, and fencing adopted in the 2008 Decision. 2-App-402–405. As the ALJ found, those private and state land projects include vegetation treatments, fencing, and water developments which may impact wildlife habitats, including sage-grouse. *Id.* "In a case of this complexity and magnitude," BLM's failure to discuss and analyze these cumulative impacts violated NEPA, "which requires a much more detailed cumulative impacts analysis." 2-App-405 (citing *W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1223 (D. Idaho 2005)).

This analysis was correct, as this Court should confirm on de novo review. *See Diné Citizens,* 923 F.3d at 856–59 (holding EAs/FONSIs unlawful for failing to address cumulative effects adequately). "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Utahns*, 305 F.3d at 1172–73 (citing 40 C.F.R. § 1508.7). A reviewing court will "examine the administrative record, as a whole, to determine whether the [agency] made a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision making." *Fuel Safe Wash. v. Fed. Energy Regulatory Comm'n*, 389 F.3d 1313, 1331 (10th Cir. 2004) (internal citations and quotations omitted).

The IBLA Decision here upheld the 2008 EA, even though it did not address cumulative impacts of private and state lands developments, by arguing it "tiered"

to the BLM's land use plan and EIS from 1979-80. 2-App-555. But obviously, those documents could not have analyzed cumulative impacts from actions that occurred decades later, and thus cannot make up for the deficiencies of the EA.

The IBLA also held that past projects on state and private lands were necessarily included in BLM's baseline assessment. 2-App-556–557. But baseline conditions and cumulative impacts are two separate NEPA analyses. *See Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016); 40 C.F.R. § 1508.7. Arguing that cumulative impacts are necessarily accounted for in baseline conditions obscures the effects of past and present impacts, ignores future impacts, and frustrates the NEPA process. *Id.*

Accordingly, the Court must again hold the 2008 EA/FONSI inadequate under NEPA, and reverse the IBLA Decision that wrongly upheld them.

III. WWP IS PREJUDICED BY THE IBLA DECISION, WHICH SHOULD BE SET ASIDE AND REMANDED FOR DEFENDANTS TO CURE THEIR LEGAL VIOLATIONS.

Based on the foregoing errors, the Court must reverse the IBLA Decision, because the multiple legal violations it committed are serious and prejudice WWP. *See Prairie Band of Pottawatomie Nation v. Fed. Highway Admin.*, 684 F.3d 1002, 1010 (10th Cir. 2012) (discussing harmless error rule).

Again, grazing is ongoing under the unlawful IBLA Decision and 2008 EA/FONSI it approved, causing severe ecological impacts documented by WWP.

1-App-120–147. Moreover, the IBLA Decision sets unlawful precedent of extreme deference to BLM in grazing appeals, erecting an insurmountable bar for WWP in seeking to challenge BLM grazing decisions. Reversal is required both to rectify the harmful grazing continuing on the DCA, and to set aside IBLA's erroneous legal precedent.

Upon reversing the IBLA, the Court should also remand with instructions for Defendants to cure the legal violations adjudicated by this Court. *See Mt. Emmons*, 117 F.3d at 1172–73 (reversing and remanding with instructions for Secretary to continue processing patent application); *Diné Citizens,* 923 F.3d at 859 (reversing and remanding for further NEPA process). As noted above, there are several remand options, depending on the legal violations found, which are available under the APA and would not infringe the Secretary's discretion under the FLPMA amendments, including:

(A) If the Court reverses the IBLA for applying an improper legal standard or not following its own rule of deferring to AJL credibility determinations, it may remand to the IBLA to reevaluate the ALJ Decision and determine whether to affirm it under the proper legal standards.

(B) If the Court holds the EA/FONSI violated NEPA, it may remand to the IBLA with instructions to require BLM to correct those violations when it conducts a new NEPA analysis under the 2014 FLPMA amendments.

(C) The Court could also remand to Defendants based on the NEPA and other violations shown by WWP with instructions that the Secretary determine when the new NEPA analysis will be conducted, under the discretionary factors (environmental significance and resources) identified in the FLPMA amendments.

IV. THE DISTRICT COURT WRONGLY DENIED WWP'S MOTION TO RECUSE.[9]

If the Court does not remand to Defendants, but instead remands to the district court for further proceedings, then it should direct that the case be reassigned to a different judge, because Judge Stewart wrongly denied WWP's Motion to Recuse.

A. Standard of Review.

The Court reviews a district court's denial of a motion to recuse for abuse of discretion. *Burke v. Regalado*, 935 F.3d 960, 1052 (10th Cir. 2019) (citing *United States v. Mendoza*, 468 F.3d 1256, 1262 (10th Cir. 2006)); *Bryce v. Episcopal Church*, 289 F.3d 648, 659 (10th Cir. 2002)).

B. Standards for Judicial Recusal.

A judge "shall proceed no further" if a party seeking recusal files a "timely and sufficient affidavit" that the judge has a "personal bias or prejudice." 28 U.S.C. § 144. All factual allegations in a § 144 affidavit must be taken as true, and the

[9] Per 10th Cir. R. 28.1(A), WWP raised its recusal arguments below in its Motion to Recuse, 1-App-036–105, and reply briefing on same, ECF No. 47.

court decides only whether the affidavit is timely and legally sufficient. *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976).

Under 28 U.S.C. § 455(a), a judge must recuse from "any proceeding in which his impartiality might reasonably be questioned." Recusal is required "when there is the appearance of bias, regardless of whether there is actual bias." *Bryce*, 289 F.3d at 659.

C. Judge Stewart's Public Statements.

Prior to his appointment to the federal bench, Judge Stewart served as Executive Director of Utah's Department of Natural Resources and chief of staff to then-Utah Governor Mike Leavitt. 1-App-051. While serving in those positions, Judge Stewart made numerous public statements reflecting his opinions in favor of the livestock industry and against environmental groups like WWP, which advocate for stronger federal environmental regulation on public lands. Those comments—all submitted with WWP's Motion to Recuse and not disputed—included labeling environmentalists as "zealots," "obstructionists," and "the common enemy." *See* 1-App-094; 1-App-105; 1-App-099; 1-App-036; 1-App-048. Judge Stewart also opined that public lands grazing reforms—*i.e.*, the same 1995 regulations with their FRH and other requirements at issue here—would "doom rural communities." 1-App-063. These statements condemning environmentalists

and supporting public lands grazing were given in public venues and widely reported. *See* 1-App-058.

D. Judge Stewart Should Have Proceeded No Further under 28 U.S.C. § 144.

WWP's Motion to Recuse included the Molvar Declaration identifying these public statements and attaching copies of the articles in which they were published. 1-App-036–105.[10] The Motion to Recuse also included a certificate of counsel attesting that the "Motion to Recuse is made in good faith." 1-App-046. These submissions were sufficient under 28 U.S.C. § 144, and required that Judge Stewart "proceed no further" in the actions. *Bray*, 546 F.2d at 857.

In denying WWP's Motion to Recuse, however, Judge Stewart held that WWP failed to specifically certify that the Molvar Declaration was made in good faith. *See* 1-App-111. This was an abuse of discretion. WWP's Motion to Recuse included the Molvar Declaration (and its exhibits in support), all filed together in the same docket entry. 1-App-036–105. The Molvar Declaration was thus part of the Motion to Recuse, and counsel's certification that the entire motion was brought in good faith necessarily included the Molvar Declaration, thus satisfying the counsel certification required by § 144.

[10] Pursuant to 28 U.S.C. § 1746, the sworn Molvar Declaration constituted the "affidavit" called for under 28 U.S.C. § 144.

Moreover, the purpose of requiring a certified affidavit under § 144 "is to shield a court which cannot test the truth of the facts alleged" against false or speculative allegations. *United States v. Hoffa*, 382 F.2d 856, 860 (6th Cir. 1967); *Berger v. United States*, 255 U.S. 22, 33 (1921) (the good faith certification is a "precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury"). This purpose was illustrated in *Sec. Exch. Comm'n v. Loving Spirit Found., Inc*, 392 F.3d 486, 494–96 (D.C. Cir. 2004)—cited by Judge Stewart—where the D.C. Circuit encountered a § 144 motion and affidavit containing numerous false statements and frivolous allegations. The *Loving Spirit* court noted that the affiant's oath and the attorney's good faith certification "play[] a critical role" to "guard against the removal of an unbiased judge through the filing of a false affidavit." *Id*. at 496.

Here, by contrast, there is no dispute as to the veracity of WWP's allegations regarding Judge Stewart's statements, which were detailed in the Molvar Declaration and exhibits submitted in support of the Motion to Recuse that WWP's counsel certified was brought in good faith. Not only did Judge Stewart wrongly rely on *Loving Spirit* to deny recusal, his cramped reading of § 144 undermines public faith in an impartial judiciary, one of the primary goals of the statute. *See, e.g., Hodgson v. Liquor Salesmen's Union*, 444 F.2d 1344, 1348 (2d Cir. 1971).

Because Judge Stewart abused his discretion regarding § 144, his denial of WWP's Motion to Recuse should be reversed.

E. Judge Stewart Should Have Recused Under 28 U.S.C. § 455(a).

Judge Stewart's personal, extrajudicial statements also demonstrate the appearance of bias under 28 U.S.C. § 455(a). *See* 1-App-036–105. Again, a judge "must recuse himself when there is the *appearance* of bias, regardless of whether there is *actual* bias." *Bryce*, 289 F.3d at 659 (emphasis added).

In denying WWP's motion under § 455(a), Judge Stewart abused his discretion by asserting that "[a] reasonable person would not harbor doubt of impartiality because none of the undersigned's alleged prior statements refer expressly or implicitly to any party in this case." 1-App-114. Yet Judge Stewart undisputedly called environmentalists "zealots," "obstructionists," and "the common enemy." 1-App-048–105. These statements were not specific to any particular group, but swept in *all* environmental groups. *See* 1-App-114. Merely because his statements did not refer "expressly" to WWP does not remove the *appearance* of bias toward environmental groups, including WWP.

Further, Judge Stewart's description of groups like WWP as "zealots," "obstructionists," and "the common enemy" are simply not legal or policy opinions, as he claimed. *See* 1-App-113–114. Rather, such statements are expressions of the speaker's values, and show clear resentment toward

environmental groups. Judge Stewart thus abused his discretion by characterizing his negative statements toward groups like WWP as mere commentary on public policy or law.

Finally, Judge Stewart abused his discretion by presuming that 28 U.S.C. § 455(b)(3) more specifically applied to the circumstances presented in WWP's motion, instead of § 455(a). *See* 1-App-118–119. Section 455(b) states that a judge "shall *also* disqualify himself in [specified] circumstances," an expansion of the circumstances in which a judge must disqualify himself, not a limitation on the application of § 455(a). *See* 28 U.S.C. §§ 455(a) and (b) (emphasis added).

In sum, Judge Stewart abused his discretion by denying WWP's Motion to Recuse pursuant to § 455(a) because "his impartiality might reasonably be questioned" based on his past statements. Judge Stewart's denial of WWP's Motion to Recuse must be reversed; and if the Court remands to the district court, it should order reassignment to a different judge.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's erroneous dismissal for lack of standing; hold unlawful and reverse the IBLA Decision and the 2008 EA/FONSI that it affirmed; and remand for Defendants to cure their violations. In the alternative, should the Court remand this case to the district court, the Court should order reassignment to a different judge.

Date: February 17, 2021

Respectfully submitted,

/s/ Laurence J. Lucas

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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests the opportunity to present oral argument before this Court, as the procedural, factual, and legal issues are complex, and oral argument will assist the Court in understanding the relief requested by WWP.

CERTIFICATE OF COMPLIANCE

I hereby certify to the following:

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), this document contains 12,810 words. I relied on my word processor to obtain this word count.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface—Times New Roman, 14-point font size—using Microsoft Word 2016 in plain, roman style.

Dated this 17th day of February, 2021. */s/ John Persell*

Attorney for Plaintiff-Appellant

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify to the following:

1. All required privacy redactions have been made per 10th Cir. R. 25.5.

2. This digital submission is an exact copy of the hard copies to be delivered to the Court within five business days of the Court issuing notice that the electronic version of Appellant's opening brief is compliant.

3. This digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program—Microsoft Defender, Version 4.18.2101.9, last updated February 14, 2021—and according to the program is free of viruses.

Dated this 17th day of February, 2021. */s/ John Persell*

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, John Persell, hereby certify that on February 17, 2021, I electronically filed the foregoing Opening Brief through the Court's CM/ECF system, which caused all counsel of record to be served by electronic means.

Dated this 17th day of February, 2021. */s/ John Persell*

Attorney for Plaintiff-Appellant

ADDENDUM A

Memorandum Decision and Order Dismissing Motion
for Review of Agency Action and Judgment (Sept. 11, 2020)
(1-App-148–152)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

WESTERN WATERSHEDS PROJECT, Plaintiff, v. INTERIOR BOARD OF LAND APPEALS and UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants, and STATE OF UTAH, UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, AND UTAH DEPARTMENT OF AGRICULTURE, Defendant-Intervenors	MEMORANDUM DECISION AND ORDER Case No. 1:19-CV-95-TS-JCB District Judge Ted Stewart

This matter is before the Court on a request for review of agency action by Plaintiff Western Watersheds Project ("WWP"). For the following reasons, the Court concludes that Plaintiff lacks standing, requiring dismissal without prejudice.[1]

I. BACKGROUND

WWP is a conservation group devoted to improving grazing management across the western public lands. WWP brought this lawsuit to reverse a decision of the Interior Board of Land Appeals ("IBLA") and to reverse the Bureau of Land Management's ("BLM") decision

[1] *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006) (holding that dismissal for lack of standing should be without prejudice).

renewing grazing permits on the Duck Creek allotment. The permits at issue expired in 2018,[2] before Plaintiff brought this action.[3]

II. DISCUSSION

Defendants argue that Plaintiff lacks standing and that its claims are moot. The Court agrees that Plaintiff lacks standing. "Standing is determined as of the time the action is brought."[4] "Mootness usually results when a plaintiff has standing at the beginning of a case, but, due to intervening events, loses one of the elements of standing during litigation."[5] Because the grazing permits Plaintiff challenges expired prior to the commencement of this action, the Court concludes that standing, rather than mootness, is the applicable doctrine.

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability."[6] "To demonstrate redressability, a party must show that a favorable court judgment is likely to relieve the party's injury."[7] "In addition, the plaintiff must demonstrate that a favorable judgment would have a binding legal effect."[8]

Here, Plaintiff cannot show that a favorable judgment would relieve its alleged injuries or have a legal binding effect. Plaintiff seeks review of a decision authorizing grazing permits that

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[2] *See* Docket No. 49-1, at 32 (stating that the grazing permits at issue were approved for a ten-year term on September 12, 2008).

[3] This action was filed in the District of Idaho in January 2019. *See* Docket No. 1.

[4] *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005).

[5] *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1182 (10th Cir. 2012).

[6] *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

[7] *City of Hugo v. Nichols*, 656 F.3d 1251, 1264 (10th Cir. 2011).

[8] *WildEarth Guardians*, 690 F.3d at 1182.

have now expired. By operation of law, the expired permits are "continued under a new permit . . . until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit . . . required under the National Environmental Policy Act ["NEPA"] of 1969."[9] Only after this analysis is completed may the permit "be canceled, suspended, or modified, in whole or in part."[10]

Plaintiff does not challenge the renewed permits.[11] Thus, even if Plaintiff succeeds in this action, grazing will continue under the new permits until the Department of Interior conducts an updated NEPA analysis. Only then may the permits be canceled, suspended, or modified. Plaintiff fails to explain how reversing the decision authorizing the expired permits would affect the renewed permits or the forthcoming NEPA analysis. Plaintiff simply argues that reversing and remanding the agency action would require the BLM to conduct a new NEPA analysis and issue new grazing permits. However, this action is already required by statute. The timing of when the new NEPA analysis is conducted is left to the discretion of the Secretary of the Department of Interior.[12] Thus, any decision by the Court would have no affect on the current grazing permits or the future NEPA analysis.

Based upon this, a favorable decision from this Court would not provide Plaintiff any meaningful relief. Plaintiff has not shown that a favorable judgment would relieve its alleged injuries or have a legal binding effect. Therefore, the Court finds that Plaintiff lacks standing. As a result, the Court need not address the parties' remaining arguments.

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[9] 43 U.S.C. § 1752(c)(2).

[10] *Id.* § 1752(c)(3).

[11] Docket No. 70, at 6 ("WWP has no need to challenge [the new permits] before this court.").

[12] 43 U.S.C. § 1752(i).

III. CONCLUSION

It is therefore

ORDERED that WWP's Motion to Review Agency Action (Docket No. 49) is DISMISSED WITHOUT PREJUDICE FOR LACK OF STANDING.

DATED September 11, 2020.

BY THE COURT:

Ted Stewart
United States District Judge

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

District of Utah

WESTERN WATERSHEDS PROJECT,

Plaintiff,

v.

INTERIOR BOARD OF LAND APPEALS and UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants, and

STATE OF UTAH, UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, AND UTAH DEPARTMENT OF AGRICULTURE,

Defendant-Intervenors

JUDGMENT IN A CIVIL CASE

Case Number: 1:19-CV-95 TS

IT IS ORDERED AND ADJUDGED

that this action is dismissed without prejudice.

September 11, 2020
Date

BY THE COURT:

Ted Stewart
United States District Judge

ADDENDUM B

Memorandum Decision and Order Denying Motion to Recuse (Jan. 16, 2020)
(1-App-106–119)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

WESTERN WATERSHEDS PROJECT, Plaintiff, v. INTERIOR BOARD OF LAND APPEALS and UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants, and STATE OF UTAH, UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, AND UTAH DEPARTMENT OF AGRICULTURE, Defendant-Intervenors	MEMORANDUM DECISION AND ORDER DENYING MOTION TO RECUSE Case No. 1:19-CV-95-TS-PMW District Judge Ted Stewart

This matter is before the Court on a Motion to Recuse by Plaintiff Western Watersheds Project ("WWP"). For the following reasons, the Court will deny the Motion.

I. BACKGROUND

WWP is a conservation group devoted to improving grazing management across the western public lands. WWP brought this lawsuit to reverse a decision of the Interior Board of Land Appeals ("IBLA") and to reverse the Bureau of Land Management's ("BLM") decision renewing grazing permits on the Duck Creek allotment. The Duck Creek Allotment consists of 1,078 acres of state lands, 8,617 acres of private land, and 13,090 acres of federal land located wholly in Utah.

In 2008, WWP presented BLM with evidence that grazing on the Duck Creek allotment was degrading fish and wildlife habitat among other damage in violation of environmental

statutes.[1] Nevertheless, BLM approved a new grazing decision for the Duck Creek allotment. [2] WWP appealed the BLM decision, and an administrative law judge reversed and remanded BLM's decision.[3] BLM appealed the reversal to IBLA, which reversed the administrative law judge's rulings and upheld BLM's 2008 decision.[4]

WWP responded to IBLA's decision by filing this case in the United States District Court for the District of Idaho.[5] IBLA filed a motion to transfer venue, and before that motion was ruled upon, the State filed a motion to Intervene.[6] The Idaho Court granted IBLA's Motion to transfer venue to this Court but did not rule on the Motion to Intervene.[7] On September 18, 2019, this case was randomly assigned to the undersigned.[8] On October 15, 2019, the Court granted the Intervenor-Defendant's Motion to Intervene.[9] Approximately three weeks later, WWP filed the Motion arguing that this Court should recuse itself because of an actual and/or appearance of bias towards "environmentalists, environmental conservation groups, and federal regulation of public lands livestock grazing."[10] The Federal Defendants and Intervenor-Defendants both oppose WWP's Motion to Recuse.[11]

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[1] *See* Docket No. 15, at 2–3

[2] *See id.* at 3.

[3] *See id.* at 3–5.

[4] *See id.* at 5.

[5] *See generally* Docket No. 1.

[6] *See generally* Docket Nos. 6, 12.

[7] *See* Docket No. 19.

[8] *See* Docket No. 35.

[9] *See* Docket No. 39.

[10] *See* Docket No. 41, at 2.

[11] *See* Docket Nos. 45, 46.

WWP supports its Motion by relying on statements allegedly made by the undersigned over 20 years ago. Those alleged statements include:

1. "Stating '[t]he livestock industry is just one vote away from being obliterated' in reference to President Clinton's proposed increase in public land grazing fees."
2. "Stating '[i]f we pursue policies that destroy rural America, then we are losing a national treasure more valuable than any national park or monument we spend tax dollars on now,' in reference to grazing reform."
3. "Asserting that rural communities are 'a unique natural resource' and should be sustained 'as an important part of the ecosystem' and environment.'"
4. "Stating that 'maintenance of sustainable resources often requires active management by humans,' and 'it has been frequently demonstrated that proper, intensive management of livestock can improve the land and riparian areas to the betterment of wildlife habitat and watershed.'"
5. "Referring to environmentalists as the 'common enemy.'"
6. "Characterizing President Clinton's 1996 decision to designate 1.7 million acres as the Grand Staircase-Escalante National Monument in Utah as 'a day of infamy.'"
7. "Stating '[r]ural Utah feels like a battleground, everything that would promote economic growth is being objected to by obstructionists—environmentalists.'"
8. "Calling the Southern Utah Wilderness Alliance 'Zealots.'"
9. "Stating '[w]e are concerned when we see decisions reached by Federal officials, often in concert with State and local governments, overturned by the actions of interest groups.'"

10. "Stating 'if rural Utahns don't watch out, they could lose control of their destiny' in reference to proposed fee hikes and royalties for extractive industries would drive business from Utah public lands."

11. "Arguing that 'range reform' is one 'of a few examples of the issues [Utah] faces today which are imposed on us in a way by the Federal Government.'"[12]

II. LEGAL STANDARD AND DISCUSSION

Plaintiff moves to recuse under two provisions, 28 U.S.C. § 144 and 28 U.S.C. § 455(a). Section 144 states that when a party "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." Procedurally, the judge against whom an affidavit of bias is filed may determine the affidavit's timeliness and sufficiency.[13] While making an initial determination of the facial sufficiency of the affidavit, the judge must not determine the truth or falsity of the facts stated therein.[14] Finally "[a] trial judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true."[15]

Section 455(a) states "[a]ny . . . Judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455, unlike Section 144, has no express procedural hurdles.[16] Under this section, a Judge is "under a

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[12] Docket No. 41, at 5–6.

[13] *See, e.g.*, *Berger v. United States*, 255 U.S. 22, 32–34 (1922); *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978); *Hall v. Burkett*, 391 F. Supp. 237, 240 (W.D. Okla. 1975).

[14] *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir. 1976); *Azhocar*, 581 F.2d at 738.

[15] *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976).

[16] *See United States v. Hines*, 696 F.2d 722, 728 (10th Cir. 1982).

continuing duty to ask himself what a reasonable person knowing all the relevant facts would think about his impartiality."[17] Unlike Section 144, under Section 455, the Judge against whom impartiality is charged makes the recusal determination.[18]

A. Recusal under 28 U.S.C. § 144

To recuse a Judge under Section 144, "an affidavit of bias and prejudice must be timely, sufficient, made by a party, and accompanied by a certificate of good faith of counsel."[19] Importantly, "the mere fact that a party has filed a § 144 motion, accompanied by the requisite affidavit and certificate of counsel, does not automatically result in the challenged judge's disqualification."[20] "Rather, the statute only requires recusal upon the filing of a timely and sufficient affidavit."[21]

Notably, given that the Court must assess the sufficiency of the affidavit and must assume the factual allegations are true, Section 144 mandates that "the attorney presenting the motion . . . sign a certificate stating that both the motion and declaration are made in good faith."[22] This certification requirement protects the integrity of the recusal process and "guard[s] against the removal of an unbiased judge through the filing of a false affidavit."[23]

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[17] *Id.*

[18] *See, e.g.*, *id.* at 729; *United States v. Cooley*, 1 F.3d 985, 992 (10th Cir. 1993).

[19] *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987) (per curiam).

[20] *Robertson v. Cartinhour*, 691 F. Supp. 2d 65, 77 (D.D.C. 2010); *see also Bray*, 546 F.2d at 857.

[21] *Robertson*, 691 F. Supp. 2d at 77 (internal quotation marks omitted).

[22] *S.E.C. v. Loving Spirit Found. Inc.*, 392 F.3d 486, 496 (D.C. Cir. 2004).

[23] *Id.*

Here, WWP filed a Motion to Recuse and Memorandum in Support,[24] a Certification by WWP's counsel that "this Motion to Recuse is made in good faith,"[25] and a Declaration in Support of Motion to Recuse signed by Erik Molvar, WWP's executive director.[26] WWP's counsel, however, has certified only that the "Motion to Recuse is made in good faith," but makes no certification that the accompanying Affidavit and the substantive factual allegations have also been filed in good faith. Section 144's plain language undoubtedly requires that counsel certify to the Court that both the motion and declaration are made in good faith.[27] Section 144's technical requirements are not pointless procedural preconditions. Rather, they "guard against the removal of an unbiased judge through the filing of a false affidavit."[28] Courts have routinely concluded that failure to comply with this requirement is grounds for denying the motion.[29] Accordingly, WWP has not complied with Section 144's procedural requirements and the Court will deny the Motion under this statute.

B. *Recusal under 28 U.S.C. § 455*

Section 455(a) states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "A judge has a continuing duty to recuse under § 455(a) if sufficient factual grounds exist to cause a reasonable, objective person, knowing all the relevant facts, to question

[24] *See* Docket No. 41.

[25] *Id.* at 11.

[26] *See* Docket No. 41-1.

[27] *Loving Spirit Found. Inc.*, 392 F.3d at 496.

[28] *Id*.

[29] *United States v. Miller*, 355 F. Supp. 2d 404, 405–06 (D.D.C. 2005); *accord Galella v. Onassis*, 487 F.2d 986, 997 (2d. Cir. 1973); *Sataki v. Broad. Bd. of Governors*, 733 F. Supp. 2d 54, 60 (D.D.C. 2010); *Burt v. First Am. Bank*, 490 A.2d 182, 187 (D.C. 1985); *United States v. York*, No. 86-CR-315, 1988 WL 105342, at *1 (N.D. Ill. Sept. 20, 1988).

the judge's impartiality."[30] Section 455 echoes Section 144 in many ways, but unlike Section 144, it has "no express procedural hurdles . . . ."[31]

To disqualify under Section 455, WWP must demonstrate that a reasonable person, knowing all the relevant facts, would harbor doubt about the Court's impartiality towards WWP.[32] In doing so, the Court's analysis is limited "to outward manifestations and reasonable inferences drawn therefrom."[33] "[T]he Judge's actual state of mind, purity of heart, incorruptibility or lack of partiality are not the issue."[34] The Court also recognizes that "cases within § 455(a) are extremely fact driven 'and must be judged on their unique facts and circumstances more than by comparison to situations considered in prior jurisprudence.'"[35] The Tenth Circuit has also made clear that Section 455 "is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice."[36] Section 455 should also not be so broadly construed that recusal is mandated "upon the merest unsubstantiated suggestion of personal bias or prejudice."[37] With that being said, the Tenth Circuit has compiled a nonexhaustive list of various matters not sufficient to require Section 455 recusal:

> (1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters; (2) the mere fact that a judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or

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[30] *United States v. Pearson*, 203 F.3d 1243, 1277 (10th Cir. 2000).

[31] *Hines*, 696 F.2d at 728.

[32] *See Cooley*, 1 F.3d at 992 ("[t]he test in this circuit is whether a reasonable person, knowing all the relevant facts, would harbor doubt about the judge's impartiality." (internal quotation marks omitted)).

[33] *See Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995).

[34] *Id.* (quoting *Cooley*, 1 F.3d at 997).

[35] *Id.* (quoting *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995)) (alteration omitted).

[36] *See Switzer v. Berry*, 198 F.3d 1255, 1258 (10th Cir. 2000) (internal quotation marks omitted).

[37] *Id.* (internal quotation marks omitted).

> a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or another proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; (5) baseless personal attacks on or suits against the judge by a party; (6) reporters' personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading; and (7) threats or other attempts to intimidate the judge.[38]

WWP argues that a reasonable person would harbor doubt of impartiality because "Judge Stewart's personal, extrajudicial statements . . . demonstrate . . . at least the appearance of bias . . . in favor of the State of Utah, resource extraction, and public lands grazing, and against environmental groups, environmental conservation, and federal public lands management . . . ."[39] Defendants challenge this assertion by arguing that courts have routinely rejected the notion that "a judge's previous advocacy for a legal, constitutional, or policy position is a bar to adjudicating a case, even when that position is directly implicated in the case before the court."[40] Defendants also argue that there is only a "tangential relationship between the evidence in this case and Judge Stewart's alleged prior statements . . . ."[41] In other words, "[a]llegations of bias toward Plaintiff raised against Judge Stewart are based on speculation, drawing incomplete parallels with Judge Stewart's previous statements about different environmental groups and different issues."[42]

The Court is unconvinced that the undersigned's alleged statements would cause a reasonable person to harbor doubt about the Court's impartiality. WWP's list of alleged

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[38] *Cooley*, 1 F.3d at 993–94 (citations omitted).

[39] *See* Docket No. 41, at 8

[40] *See* Docket No. 46, at 1 (quoting *Carter v. W. Pub. Co.*, No. 99-11959-EE, 1999 WL 994997, at *9 (11th Cir. Nov. 1, 1999)).

[41] *Id.* at 4.

[42] Docket No. 45, at 5.

statements do not concern the parties or issues in this case, and a judge's prior comments on public policy and the law are not grounds for recusal.

WWP relies only on the undersigned's past, alleged comments to support its argument of bias for Defendants and against WWP.[43] Specifically, WWP argues that the "totality of Judge Stewart's comments"[44] demonstrate "a pattern of hostility against both environmental organizations and federal oversight, demonstrating bias . . . ."[45] In other words, "Judge Stewart's prior comments disparaged environmentalists, environmental groups, and federal oversight of public lands, while amplifying the social and economic benefits of State-based land management and public lands livestock grazing."[46] From this, WWP argues that "[t]hese statements show personal bias regarding key issues and parties in this case."[47]

A reasonable person would not harbor doubt of impartiality because none of the undersigned's alleged prior statements refer expressly or implicitly to any party in this case. Also, the statements do not refer to this case's issues. For example, as stated on multiple occasions by WWP in prior briefing, "this case challenges the Duck Creek decision by Defendant [IBLA] for applying erroneous legal standards and arbitrarily overturning witness credibility determinations . . . ."[48] Also, "the focus of WWP's claims in this Court" are the "legal and factual errors by Defendant IBLA."[49] This case—by WWP's own statement—is not about grazing fees, national monuments, the Clinton administration's Rangeland Reform initiative, or

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[43] *See* Docket No. 41, at 8.

[44] Docket No. 47, at 3.

[45] *Id.* at 2.

[46] *Id.* at 3.

[47] *Id.*

[48] *See* Docket No. 15, at 2.

[49] *Id.* at 8.

the Southern Utah Wilderness Alliance; all topics the alleged comments discuss. Instead, as framed by WWP in its complaint, this case concerns the narrow issue of whether IBLA's decisions were "arbitrary, capricious, not supported by substantial evidence, an abuse of discretion, and otherwise not in accordance with law . . . ."[50] A reasonable person would not conclude that comments allegedly made twenty years ago about a narrow set of political issues are demonstrative of bias towards this case's narrow issue.[51]

WWP relies on *Cooley* to argue that the Court should consider "the totality of Judge Stewart's comments" and conclude, as the *Cooley* court did, that the undersigned's prior statements were disqualifying. *Cooley*, however is distinguishable from the present case. First, WWP provides no citation for the proposition that this Court is to look to the totality of a Judge's prior statements and then infer from those statements a bias towards a group. In fact, the *Cooley* court did not follow this "totality approach" but instead focused in on a narrow set of statements made during one media interview while "not address[ing] the effect of other interviews . . . ."[52] Second, the *Cooley* court's primary concern on appeal was comments made by the District Judge during a media interview while the Judge was a commissioned, Article III Judge.[53] Here, the undersigned was not a district court judge when the alleged comments were made, but was the

[50] *See* Docket No. 1 ¶ 68.

[51] *See Wessmann by Wessmann v. Bos. Sch. Comm.*, 979 F. Supp. 915, 917–18 (D. Mass. 1997) ("declining to require recusal when a judge has helped to formulate policy or been associated with relevant, politically-charged issues," such as school desegregation and civil rights issues); *Nat'l Rifle Ass'n of Am., Inc. v. City of Evanston*, No. 08 C 3693, 2008 WL 3978293, at *2–5 (N.D. Ill. Aug. 22, 2008) (declining to recuse based on comments regarding gun control in a case challenging the city's ban on handgun possession).

[52] *See Cooley*, 1 F.3d at 995.

[53] *See id.* ("It was an unusual thing for a judge to do . . . .").

Executive Director of Utah's Department of Natural Resources.[54] For these reasons, this case is distinguishable from *Cooley*.

WWP's bias allegations also attempt to overgeneralize the alleged statements by extrapolating statements about specific issues to include broad, undefined groups such as "environmentalists, environmental groups," and those who believe in federal (as opposed to state) oversight of public lands.[55] This is an example of a composition fallacy.[56] It does not follow that just because the undersigned allegedly expressed an opinion that "rural communities" are "a unique natural resource,"[57] that the 1996 decision to designate the Grand Staircase-Escalante National Monument was a "day of infamy,"[58] or that the Southern Utah Wilderness Alliance are "zealots"[59] that a reasonable observer would conclude that the undersigned is biased towards all environmentalists or environmental groups. Were the Court to follow WWP's logic then "[o]ne might as well say that someone who becomes a judge following a career as a prosecutor is disqualified in all criminal cases . . . because prosecutors are partisans and all partisans favor the causes they have espoused."[60]

The Court will also deny WWP's Motion because Courts have consistently rejected the argument that statements made by a judge, prior to his rise to the bench, regarding legal or policy

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[54] Docket No. 41, at 5.

[55] *See* Docket No. 47, at 3.

[56] *See Rosen v. Unilever U.S., Inc.*, No. C 09-02563, 2010 WL 4807100, at *5 (N.D. Cal. May 3, 2010) ("The 'fallacy of composition' is committed when one reasons from the properties of a 'part' to the properties of the 'whole.'").

[57] *See* Docket No. 41, at 6.

[58] *Id.*

[59] *Id.*

[60] *Guardian Pipeline, L.L.C. v. 950.82 Acres of Land*, 525 F.3d 554, 556–57 (7th Cir. 2008).

positions are not grounds for forced recusal.[61] WWP does not challenge this legal proposition but argues that the alleged statements "cannot reasonably be characterized as legal or policy views."[62] WWP argues that *Laird* is inapplicable because, unlike *Laird*, the statements here were not made in a deliberative forum and were not given for the purpose of exploring the nuances of any particular area of law.[63] Also, the statements "were clearly offered in political settings as rhetorical hyperbole meant to advance a particular interest."[64]

WWP's attempt to distinguish *Laird* and its progeny from the present case is unconvincing. Neither *Laird* nor any of its progeny support WWP's proposition that statements must be: 1) made in a deliberative forum; 2) made for purposes of exploring nuances of a particular area of law; 3) not offered in a political setting; and 4) not overstated or used to advance a particular interest. For example, in *United States v. Corbin*, the judge relied on *Laird* to deny a motion to recuse based on statements the judge made to a newspaper reporter regarding the dangers of methamphetamine.[65] Those comments were later reported in a Maine

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[61] *See, e.g.*, *Laird v. Tatum*, 409 U.S. 824, 835 (1972) ("Since most justices come to the bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretations . . . . It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers . . . . Yet whether these opinions have become at all widely known may depend entirely on happenstance."); *Bray*, 546 F.2d at 857; *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 471 F.3d 1355, 1358 (D.C. Cir. 2006) (Kavanaugh, J.); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982) (affirming a district court judge's decision to not recuse "merely because he holds and had expressed certain views on [a] general subject"); *Carter v. West Pub. Co.*, No. 99-11959-EE, 1999 WL 994997, at *9 ("Courts have uniformly rejected the notion that a judge's previous advocacy for a legal, constitutional, or policy position is a bar to adjudicating a case, even when that position is directly implicated in the case before the court.").

[62] Docket No. 47, at 4.

[63] *Id.*

[64] *Id.* at 5.

[65] 827 F. Supp. 2d 26, 29 (D. Me. 2011).

newspaper.[66] The defendant moved to recuse the judge from the defendant's methamphetamine distribution trial because the judge's comments demonstrated bias.[67] The judge denied the motion, stating that his methamphetamine comments were "entirely general in nature and not in any way case specific."[68] Here, as in *Corbin*, many of the undersigned's alleged comments were not made in a deliberative forum and were reported in newspapers. Also, the undersigned's comments, like those in *Corbin*, were not for purposes of exploring the nuances of law but were made to advance a particular interest. *Corbin*'s analysis cuts against WWP's rationale for distinguishing *Laird*. Therefore, *Laird's* proposition—that a judge's commentary on public policy and the law are not grounds for recusal—is applicable here.

Finally, under two separate canons of statutory interpretation, recusal under Section 455(a) is improper. First, "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence."[69] Second, statutes should be interpreted to prevent the statute from contradicting itself.[70] Here, Section 455(b)(3) addresses the scenario when a judge previously worked for the government in some capacity.[71] The judge should recuse when the judge "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."[72] WWP makes no allegations that Section 455(b)(3) is applicable here. Instead, it only relies on Section 455(a)'s

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[66] *Id.*

[67] *See id.* at 30.

[68] *Id.* at 32.

[69] *See United States v. Largo*, 775 F.2d 1099, 1102 (10th Cir. 1985) (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980)).

[70] *Liteky v. United States*, 510 U.S. 540, 552 (1994).

[71] *See Levine v. Gerson*, 334 F. Supp. 2d 376, 377 (S.D.N.Y. 2003).

[72] 28 U.S.C. § 455(b)(3).

more general provisions. Section 455(b)(3) is more specific because it applies directly to former government employees and thus should be given precedence. Also, interpreting 455(a) to eliminate the more specific limitations under Section 455(b)(3) would cause the statute to materially contradict itself. For these reasons and those stated above, the Court will deny the Motion.

III. CONCLUSION

It is therefore

ORDERED that WWP's Motion to Recuse (Docket No. 41) is DENIED.

DATED January 16, 2020.

BY THE COURT:

Ted Stewart
United States District Judge

ADDENDUM C

National Defense Authorization Act for Fiscal Year 2015, § 3023
Pub. L. 113-291, 128 Stat. 3763-64 (Dec. 19, 2014)

by striking "the rate" and all that follows through the period at the end of the sentence and inserting "a rate equal to the sum of the Federal short-term rate determined under section 6621(b) of the Internal Revenue Code of 1986 plus 1 percentage point.".

SEC. 3022. INTERNET-BASED ONSHORE OIL AND GAS LEASE SALES.

(a) AUTHORIZATION.—Section 17(b)(1) of the Mineral Leasing Act (30 U.S.C. 226(b)(1)) is amended—

(1) in subparagraph (A), in the third sentence, by inserting ", except as provided in subparagraph (C)" after "by oral bidding"; and

(2) by adding at the end the following:

"(C) In order to diversify and expand the Nation's onshore leasing program to ensure the best return to the Federal taxpayer, reduce fraud, and secure the leasing process, the Secretary may conduct onshore lease sales through Internet-based bidding methods. Each individual Internet-based lease sale shall conclude within 7 days.".

(b) REPORT.—Not later than 90 days after the tenth Internet-based lease sale conducted under the amendment made by subsection (a), the Secretary of the Interior shall analyze the first 10 such lease sales and report to Congress the findings of the analysis. The report shall include—

(1) estimates on increases or decreases in such lease sales, compared to sales conducted by oral bidding, in—

(A) the number of bidders;

(B) the average amount of bid;

(C) the highest amount bid; and

(D) the lowest bid;

(2) an estimate on the total cost or savings to the Department of the Interior as a result of such sales, compared to sales conducted by oral bidding; and

(3) an evaluation of the demonstrated or expected effectiveness of different structures for lease sales which may provide an opportunity to better maximize bidder participation, ensure the highest return to the Federal taxpayers, minimize opportunities for fraud or collusion, and ensure the security and integrity of the leasing process.

SEC. 3023. GRAZING PERMITS AND LEASES.

Section 402 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1752) is amended—

(1) in subsection (c)—

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

(B) by striking "So long as" and inserting the following:

"(1) RENEWAL OF EXPIRING OR TRANSFERRED PERMIT OR LEASE.—During any period in which"; and

(C) by adding at the end the following:

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

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

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

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

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

"(h) NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—

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

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

"(B) the Secretary concerned—

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

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

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

"(aa) is meeting land health standards; or

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

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

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

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

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

"(i) PRIORITY AND TIMING FOR COMPLETION OF ENVIRONMENTAL ANALYSES.—The Secretary concerned, in the sole discretion of the Secretary concerned, shall determine the priority and timing for completing each required environmental analysis with respect to a grazing allotment, permit, or lease based on—

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

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

16 USC 6214.

SEC. 3024. CABIN USER AND TRANSFER FEES.

(a) IN GENERAL.—The Secretary of Agriculture (referred to in this section as the "Secretary") shall establish a fee in accordance with this section for the issuance of a special use permit for the use and occupancy of National Forest System land for recreational residence purposes.

(b) INTERIM FEE.—During the period beginning on January 1, 2014, and ending on the last day of the calendar year during which the current appraisal cycle is completed under subsection (c), the Secretary shall assess an interim annual fee for recreational residences on National Forest System land that is an amount equal to the lesser of—

(1) the fee determined under the Cabin User Fee Fairness Act of 2000 (16 U.S.C. 6201 et seq.), subject to the requirement that any increase over the fee assessed during the previous year shall be limited to not more than 25 percent; or

(2) $5,600.

(c) COMPLETION OF CURRENT APPRAISAL CYCLE.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall complete the current appraisal cycle, including receipt of timely second appraisals, for recreational residences on National Forest System land in accordance with the Cabin User Fee Fairness Act of 2000 (16 U.S.C. 6201 et seq.) (referred to in this section as the "current appraisal cycle").

(d) LOT VALUE.—Only appraisals conducted and approved by the Secretary in accordance with the Cabin User Fee Fairness Act of 2000 (16 U.S.C. 6201 et seq.) during the current appraisal cycle shall be used to establish the base value assigned to the lot, subject to the adjustment in subsection (e). If a second appraisal—

(1) was approved by the Secretary, the value established by the second appraisal shall be the base value assigned to the lot; or

(2) was not approved by the Secretary, the value established by the initial appraisal shall be the base value assigned to the lot.

(e) ADJUSTMENT.—On the date of completion of the current appraisal cycle, and before assessing a fee under subsection (f), the Secretary shall make a 1-time adjustment to the value of each appraised lot on which a recreational residence is located to reflect any change in value occurring after the date of the most recent appraisal for the lot, in accordance with the 4th quarter of 2012 National Association of Homebuilders/Wells Fargo Housing Opportunity Index.

(f) ANNUAL FEE.—

(1) BASE.—After the date on which appraised lot values have been adjusted in accordance with subsection (e), the annual fee assessed prospectively by the Secretary for recreational residences on National Forest System land shall be in accordance with the following tiered fee structure: