UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE
1130 17th Street NW
Washington, DC 20036

SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 8411

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR
1849 C St., NW
Washington, DC 20240

BUREAU OF LAND MANAGEMENT
1849 C St., NW
Washington, DC 20240

Defendants.

No. 22-cv-1891

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Defenders of Wildlife and Southern Utah Wilderness Alliance (collectively, Conservation Groups) bring this action for declaratory and injunctive relief against Defendants United States Department of the Interior (Interior) and Bureau of Land Management (BLM), challenging their adoption of a December 2020 so-called "Pinyon-Juniper Categorical Exclusion Rule," which purports to authorize extensive destruction of native pinyon-juniper habitats across the American West without requiring prior analysis and public disclosure of possible environmental impacts or alternatives under the National Environmental Policy Act (NEPA). *See* National Environmental Policy Act Implementing Procedures for the Bureau of Land Management (516 DM 11), 85 Fed. Reg. 79504 (Dec. 10, 2020) (PJ CX Rule).

2. The PJ CX Rule amends the Department of Interior's Manual on NEPA implementing procedures by adopting a new "categorical exclusion" that allows BLM to approve projects destroying (by cutting, masticating, and mulching) up to 10,000 acres each of pinyon pine and juniper forests across habitat for the greater sage-grouse and mule deer without first preparing any Environmental Impact Statement or even any Environmental Assessment under NEPA. *See* PJ CX Rule, 85 Fed. Reg. at 79517. The PJ CX Rule contains no limit on the number of such pinyon-juniper treatment projects that BLM may approve in sage-grouse and/or mule deer habitat across the American West.

3. In adopting the PJ CX Rule, Defendants claimed that this category of pinyon-juniper removal projects would have no significant effect on the public lands and wildlife. That decision is arbitrary, capricious, and contrary to law, including because it is riddled with errors and oversights, and is inconsistent with the best available scientific information.

4. For example, in adopting the PJ CX Rule, Defendants refused to consider the cumulative effects of pinyon-juniper removal projects, citing 2020 NEPA regulation changes adopted by the Council on Environmental Quality (CEQ) to assert that "NEPA specifically does not require evaluation of cumulative effects."[1] Yet the NEPA revisions did not eliminate BLM's

[1] On July 16, 2020, CEQ issued a Final Rule amending its NEPA regulations. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020) ("2020 NEPA Rule"). The 2020 NEPA Rule became effective September 15, 2020, and Defendants applied the 2020 NEPA Rule in adopting the PJ CX Rule here. This Complaint thus cites the 2020 NEPA Rule, unless noted otherwise. But the validity of the 2020 NEPA Rule is currently being challenged before several courts, and Secretarial Order ("SO") No. 3399 bars implementation of the 2020 NEPA Rule "in a manner that would change the application or level of NEPA that would have been applied to a proposed action before the 2020 Rule went into effect on September 14, 2020." *See* Secretarial Order 3399 (April 16, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3399-508_0.pdf. (last visited June 30, 2022).

obligation to consider reasonably foreseeable cumulative effects, as the CEQ expressly noted. *See, e.g.,* 2020 NEPA Rule, 85 Fed. Reg. at 43355 ("the final rule does not ignore cumulative effects").

5. Defendants also arbitrarily relied on unverified observations and a selective review of prior BLM vegetation treatment projects (including prior pinyon-juniper treatments) to support their assertion that approving pinyon-juniper removal projects under the PJ CX Rule will have no significant environmental impacts, instead of obtaining credible and verified monitoring data. CEQ's own rules and guidance requires that project-specific "Findings of No Significant Impacts" (FONSIs) cannot be "relied on as a basis for establishing a categorical exclusion unless the absence of significant environmental effects has been verified *through credible monitoring of the implemented activity*." *See* Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75628, 75630 (Dec. 6, 2010) (emphasis added). Defendants ignored this requirement and refused to collect any credible monitoring information to inform their conclusions. Defendants similarly erred by recasting the available scientific information and public comments to support its new policy, as discussed in detail below.

6. Defendants' unlawful adoption of the PJ CX Rule has harmed the Conservation Groups and the public, including by depriving them of NEPA's procedural safeguards, and threatening irreparable environmental and other harms. Accordingly, Conservation Groups respectfully pray that the Court hold unlawful, reverse, and set aside the PJ CX Rule, and enter such preliminary or permanent injunctive relief as may be requested hereafter to forestall irreparable harm and protect the public interest pending adjudication of their claims.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), because Plaintiffs allege that Defendants violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., and/or the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., in adopting the PJ CX Rule. This Court also can provide relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 553, 702, and 706 (Administrative Procedure Act).

8. The challenged PJ CX Rule is a final agency action subject to judicial review pursuant to 5 U.S.C. §§ 702, 704, and 706.

9. Venue in the District of Columbia is appropriate under 28 U.S.C. § 1391(e)(1) because Defendants U.S. Department of Interior and BLM are headquartered in Washington, D.C.; the primary author of the PJ CX Rule, Stephen Tryon, the Director of the Department of Interior's Office of Environmental Policy and Compliance, is located in Washington, D.C.; Plaintiff Defenders of Wildlife is headquartered in Washington, D.C.; Plaintiff Southern Utah Wilderness Alliance maintains an office in Washington, D.C.; and a substantial part of the events and omissions at issue occurred in this District, including the administrative process associated with promulgation of the PJ CX Rule and its approval by Federal Defendants in this District.

PARTIES

10. Plaintiff DEFENDERS OF WILDLIFE (Defenders) is a national non-profit conservation organization with 2.1 million members and supporters. Defenders is headquartered in Washington, D.C., with offices throughout the country. Defenders focuses in particular on conserving and recovering wildlife species that are listed under the Endangered Species Act or otherwise recognized as being of conservation concern, including the greater sage-grouse and

pinyon jay, a bird that lives in the pinyon-juniper forest and was petitioned for listing under the Endangered Species Act by Defenders in April 2022. Defenders has a long and consistent track record of working on the conservation of at-risk species in the interior West including sage-grouse and Defenders advocates for these imperiled species in multiple ways, including through scientific research, engaging in land management planning processes, and advocating to government agencies for heightened conservation protections.

11. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE (SUWA) is a non-profit organization based in Salt Lake City, Utah, and SUWA also has an office in Washington, D.C. SUWA has more than 14,000 members from all fifty states, the District of Columbia, and several foreign countries. SUWA's mission is the preservation of the outstanding wilderness and other sensitive public lands and wildlife habitat at the heart of the Colorado Plateau. SUWA advocates for proper management of these lands and wildlife habitat, and the associated natural and cultural resources, in their natural state for the benefit of all Americans. SUWA promotes local and national recognition of the region's unique character through research and public education; supports both administrative and legislative initiatives to permanently protect Utah's wild places within the National Park and National Wilderness Preservation Systems or by other protective designations where appropriate; and builds support for such initiatives on both the local and national level. Specifically, SUWA engages frequently on site-specific federal agency management actions that have the potential to harm or enhance sagebrush and pinyon-juniper habitat through vegetation removal, and places specific emphasis on protecting species like the pinyon jay in its comments and recommendations during the NEPA process for these projects.

12. Conservation Groups rely on the information and analysis made available by BLM (and other federal agencies) under NEPA to understand the likely harms of proposed

actions, to critique errors in the BLM's understanding or judgment, to provide information about harms that BLM is not aware of or has overlooked, to inform other members of the public that their interests may be affected, to provide feedback about public preferences and values with respect to specific areas of the forests, to offer alternatives that may accomplish BLM's goals with less harm, and ultimately to assist BLM to avoid causing significant harms to the public lands and wildlife habitat and the people who use and depend on them for recreational, spiritual, economic, and aesthetic benefits.

13. Conservation Groups' collective efforts, made possible by the NEPA process, have been effective at helping inform BLM decisions and avoid significant harms. Because of informed, site-specific public input, BLM has abandoned prior efforts to implement pinyon-juniper or other so-called vegetation "treatment" projects across public lands and important wildlife habitats, along with many other ecologically, socially, and culturally important areas that are valued by Plaintiffs' members.

14. By removing NEPA's procedural safeguards for consequential site-specific decisions, the PJ CX Rule will cause significant harms to the public lands where Conservation Groups have concrete interests—harms that otherwise could have been prevented or lessened by public involvement and accountability. Conservation Groups have also been injured by Defendants' refusal to conduct a NEPA analysis disclosing the harmful impacts of the PJ CX Rule. Conservation Groups will also suffer harm through implementation of the PJ CX Rule because it will lead to the loss of important sagebrush and pinyon-juniper habitats across the American West, including habitats for greater sage-grouse and pinyon jay, without detailed environmental review. Conservation Groups and their members, staff, and supporters view, experience, utilize, recreate, and otherwise enjoy the landscapes subject to pinon-juniper

treatments under the PJ CX Rule. Conservation Groups will not be able to use, enjoy, or appreciate the pinyon-juniper forests and other areas of public lands affected by pinyon-juniper destruction under the PJ CX Rule if they are implemented without detailed environmental review following disturbances.

15. Conservation Groups bring this action on their own behalf, and on behalf of their members, staff, and supporters who live and work on and around BLM-managed public lands in the American West. Conservation Groups' members, staff, and supporters enjoy viewing and studying wildlife, and recreating in natural environments that they know are inhabited and sustained by diverse wildlife, including species such as greater sage-grouse and pinyon jay that rely on native habitats. Such members, staff, and supporters derive recreational, scientific, aesthetic, inspirational, educational, and other benefits from such use. These uses include hiking, camping, trail running, mountain biking, appreciation of archaeological resources and natural quiet, journaling, birdwatching, ecosystem research, and photography. They regularly enjoy BLM-managed sagebrush and woodland habitats for these uses and plan to continue doing so.

16. Conservation Groups suffer injury-in-fact because they have devoted time, energy, and organizational resources and money to protecting public lands and wildlife – including habitat for the greater sage-grouse and pinyon jay, and advocating for responsible management of these precious public lands. Conservation Groups have diverted resources from other efforts to pursue their missions and have instead used those resources to submit public comments to the BLM, file administrative objections, and engage with federal officials about their concerns with the PJ CX Rule.

17. Defendants' violations of NEPA and the APA in adopting the PJ CX Rule have injured and will continue to injure Conservation Group's recreational, aesthetic, scientific,

educational, spiritual, conservation, commercial, informational, and other interests, and the interests of their staff, members, and supporters. These are actual, concrete injuries caused by Defendants' legal violations, for which judicial review and the relief requested are required to redress. Conservation Groups have no adequate remedy at law.

18. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR (Interior) is a federal agency responsible for managing about 500 million acres of federal public lands across the United States. Interior, through the Office of the Secretary, adopted the PJ CX Rule as a final rule on December 10, 2020.

19. Defendant BUREAU OF LAND MANAGEMENT (BLM) is a federal agency within the Department of the Interior. BLM is responsible for managing the public lands subject to the PJ CX Rule, and BLM prepared the so-called BLM Pinyon Pine and Juniper Management Categorical Exclusion Verification Report, which purported to substantiate Interior's adoption of the PJ CX Rule as adhering to the requirements of NEPA.

20. Defendants have waived federal sovereign immunity pursuant to the APA. 5 U.S.C. § 701.

LEGAL FRAMEWORK

A. National Environmental Policy Act

21. NEPA's twin aims are: (1) to foster informed decision making by requiring agencies to consider the environmental impacts of their proposed actions; and (2) to ensure that agencies inform the public that they considered environmental concerns. 42 U.S.C. § 4331; 40 C.F.R. § 1500.1. To accomplish these goals, federal agencies must prepare an Environmental Impact Statement (EIS) to consider the effects of every "major Federal action[s] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

22. If it is uncertain whether a project may have significant impacts, an agency may first prepare an environmental assessment (EA), which provides a briefer analysis of the project's impacts and alternatives. Based on the EA's analysis, if the project is likely to have significant impacts, the agency must prepare an EIS. Otherwise, it may issue a Finding of No Significant Impact (FONSI). 40 C.F.R. § 1501.6.

23. BLM may avoid preparing an EIS or EA only if a proposed action falls within an identified categorical exclusion. Categorical Exclusions (CXs) are limited to actions that "normally do not have a significant effect on the human environment." 40 C.F.R. § 1501.4(a). The Department of the Interior has codified approximately 86 separate departmental CXs (exclusive of categorical exclusions established or directed by statute), which apply to minor, insignificant, administrative, or ministerial agency functions. *See* Interior Manual, Chapter 516, Section 11.9.

24. In considering the "significance" of impacts under NEPA, agencies must analyze both "the potentially affected environment" and the "degree of the effects of the action." 40 C.F.R. § 1501.3(b). To assess the "potentially affected environment," agencies should consider "the affected area (national, regional, or local) and its resources, such as listed species and designated critical habitat under the Endangered Species Act." *Id.* § 1501.3(b)(1). To assess the "degree of the effects," agencies should consider "[b]oth short- and long-term effects," "[b]oth beneficial and adverse effects," "[e]ffects on public health and safety," and "[e]ffects that would violate Federal, State, Tribal, or local law protecting the environment." *Id.* § 1501.3(b)(1)(i)–(iv).

25. In determining whether a type of action may be categorically excluded from NEPA review, agencies must consider possible cumulative effects, especially "where the categorical exclusion is nationwide in scope and has the potential to impact a large number of

acres." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1028 (9th Cir. 2007). If an agency cannot predict the cumulative effects of repeatedly using a proposed categorical exclusion, then adoption of the CX is improper. *Id*. at 1029–30.

26. Additionally, an agency "cannot focus only on the beneficial effects" of the departmental categorical exclusion, even where it will be deployed for important purposes, but must also consider its adverse impacts. *Id*. at 1029; *see also* 40 C.F.R. § 1508.8 (1978) (requiring consideration of detrimental effects "even if on balance the agency believes that the effect will be beneficial"); 40 C.F.R. 1508.1(g)(1) (2020) (same).

27. Unlike projects authorized using an EIS or EA, documentation for a CX does not include site-specific analysis, informed public comment, and consideration of alternatives. *See* 40 C.F.R. § 1501.5 (stating the requirements for the development of an EA) and 40 C.F.R. § 1501.4(a) (specifying that CXs "do not require preparation of an [EA]").

B. Administrative Procedure Act

28. The APA is a federal statute that was enacted "to improve the administration of justice by prescribing fair administrative procedure." Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946); 5 U.S.C. § 551 et seq.

29. An agency undertaking rulemaking shall publish a general notice of the proposed rulemaking in the Federal Register. 5 U.S.C. § 553(b). The notice must include three elements: 1) a statement of the time, place, and nature of public rulemaking proceedings; 2) reference to the legal authority under which the rule is proposed; and 3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. *Id*. After publishing notice, the agency shall give all interested persons an opportunity to participate in the rulemaking through submission of written comments, with or without opportunity for oral presentation. 5 U.S.C. §

553(c). The agency then incorporates in the adopted rule a concise general statement of the rule's basis and purpose. 5 U.S.C. § 553(c). This process is generally referred to as informal rulemaking or notice-and-comment rulemaking.

30. Under the APA, an agency is required to supply a reasoned decision when promulgating a new rule. Without a reasoned decision reflected in the administrative record, the agency action is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2).

31. The APA provides for judicial review of final agency action, including notice-and-comment rulemaking. 5 U.S.C. § 706. A court may decide all relevant questions of law, interpret constitutional statutory provisions, and determine the meaning or applicability of the terms of an agency action. In doing so, the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

32. The Supreme Court has held that an agency action is arbitrary and capricious "if [an] agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, 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." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983). Further, the Court stated that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id*.

33. An agency's rationale for a new policy must be clearly disclosed and adequately sustained in the administrative record. *SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943).

34. The APA requires an agency to provide interested persons an opportunity to

participate in the rulemaking through submission of written data, views, or arguments, and the agency must respond to significant comments. 5 U.S.C. § 553(c); *Perez v. Mortgage Bankers Ass'n,* 575 U.S. 92, 96 (2015). "Significant" comments are "those which raise relevant points and which, if adopted, would require a change in the agency's proposed rule." *American Mining Congress v. U.S. E.P.A.,* 965 F.2d 759, 771 (9th Cir. 1992) (*citing Home Box Office v. FCC,* 567 F.2d 9, 35 & n. 58 (D.C. Cir. 1977)). Failure to respond to significant comments may be grounds for reversal if the failure reveals the agency's decision was not based on consideration of the relevant factors. *Id. (citing Thompson v. Clark,* 741 F.2d 401, 409 (D.C. Cir. 1984)).

FACTUAL BACKGROUND

Sagebrush Habitats and Losses

35. Sagebrush ecosystems once encompassed up to 150 million acres—virtually half of the American West. But over the past century and a half, much of what was once a "Sagebrush Sea" across western North America–containing a variety of ecosystems including those with pinyon-juniper trees and woodlands–has been degraded and transformed.

36. Sagebrush ecosystems are now considered to be some of the most imperiled ecosystems in North America, and currently occupy only about one-half of their historic land area because of changes in land use and destruction of native sagebrush habitats.

37. Remaining Sagebrush ecosystems are mostly located on public lands, where federal agencies—particularly BLM—have been largely responsible for the degradation and transformation of large acreages by digging them up, cutting them down, chaining, burning, spraying with herbicides, and other "vegetation treatment" activities to remove native vegetation and increase forage.

38. A variety of human impacts have contributed to the loss, fragmentation, and degradation of Sagebrush habitats, including agricultural and urban development, infrastructure (including roads, highways, power lines, fences, pipelines, and others), livestock grazing, and oil and gas and other energy or mineral development.

39. Exotic invasive species have also contributed to the degradation and transformation of sagebrush habitats, particularly cheatgrass invasions that are transforming vast areas of the Great Basin, Colorado Plateau, and other areas of the Interior West and are spread by human activities and disturbance, including vegetation clearing and livestock grazing.

40. Pinyon pine and juniper forests are also native ecosystems distributed widely across the interior west, and provide habitats often intermingled and around sagebrush habitats in many western states across the Sagebrush Sea.

41. The greater sage-grouse is a "sagebrush obligate" species, meaning it relies on the sagebrush ecosystem for all its habitat needs. The fate of the sage-grouse thus depends on ensuring that healthy and well-distributed sagebrush habitat exists across its range.

42. Greater sage-grouse once numbered in the millions across the western U.S and Canada, but loss and fragmentation of their native sagebrush habitats have caused populations to decline precipitously over the last century. The current population of greater sage-grouse is estimated at less than 20% of historic population levels, *i.e.*, sage-grouse populations have experienced a 80% or more decline.

43. The abundance and distribution of greater sage-grouse have similarly declined dramatically in North America. Greater sage-grouse have been extirpated in Nebraska, Arizona, New Mexico, and significant parts of Oregon, Washington, North and South Dakota, and central eastern California.

44. Historically, the Intermountain West ecoregion was the epicenter of mule deer distribution, which occupy and utilize native sagebrush and other habitats—including juniper and pinyon pine woodlands. Losses of sagebrush and other mule deer habitats have contributed to mule deer population declines in many western states in recent decades.

Questionable Effectiveness of PJ Treatments to "Improve" Sagebrush Habitats.

45. Defendants contend that the PJ CX Rule was adopted to "improve" sagebrush habitats utilized by sage-grouse and/or mule deer and thereby help offset these population losses.

46. But the efficacy of vegetation treatments to remove pinyon and juniper woodlands to enhance sage-grouse populations and Sagebrush Sea ecosystem integrity is highly questionable, and vegetation treatments that are mismanaged can have significant detrimental effects, especially when projects involve very large acreages, as allowed under the PJ CX Rule.

47. Vegetation treatments can damage native ecosystems because they increase the spread and abundance of non-native noxious weeds including cheatgrass, which changes the fundamental characteristics of native ecosystems. The presence of cheatgrass and other non-natives will increase the likelihood of further non-native invasion, establishment, and persistence. Pre-treatment understory composition, especially the relative abundance of native perennial grasses and forbs, is a primary determinant of the success or failure of efforts to restore plant communities by removing or thinning the trees.

48. Mechanical vegetation treatments can also damage native ecosystems by disturbing soils through project-associated vehicle compaction and crushing, undermining their ecosystem function by removing biological crusts critical to soil stability and formation and facilitating soil loss and exotic weed invasion. Soils in arid environments, once damaged, can take hundreds of years to redevelop.

49. The Service has warned against permitting any vegetation treatments and projects in known sage-grouse winter habitat, except when the treatment is expressly designed to strategically reduce wildfire risk around or in the winter range, and will maintain winter habitat quality.

50. The Service has also recommended that all vegetation treatment areas within sage-grouse habitat – including mechanized treatments to remove pinyon pine and juniper trees – receive rest from livestock grazing for two full growing seasons.

The Proposed PJ CX Rule

51. The 2018 Farm Bill amended the Healthy Forests Restoration Act to establish a statutory framework for BLM and the U.S. Forest Service to develop a departmental categorical exclusion to improve habitat for sage-grouse and mule deer. *See* Public Law 115-334, § 8611; 16 U.S.C. § 6591e. That statutory framework provided the agencies with some discretion in implementing the terms of the categorical exclusion, but included mandatory limitations and prohibitions as well—including by limiting such pinyon-juniper treatment projects to 4,500 acres in size.

52. Rather than rely on this statutory authorization for pinyon-juniper treatment projects and comply with the 4,500-acre limit prescribed by Congress, however, Trump administration officials determined to self-authorize much larger pinyon-juniper treatment projects, up to 10,000 acres in size, as reflected in the challenged PJ CX Rule.

53. The PJ CX Rule was formally launched on March 13, 2020, when Interior published in the Federal Register a notice announcing its proposal to revise departmental NEPA implementing procedures for BLM to include the proposed PJ CX Rule. *See* National Environmental Policy Act Implementing Procedures for the Bureau of Land Management (516

DM 11), 85 Fed. Reg. 14700 (proposed March 13, 2020). According to that notice, "[e]stablishing the new proposed departmental categorical exclusion would streamline the process for pinyon pine and juniper tree removal projects," and "more quickly . . . reduce pinyon pine and juniper density and cover" in sage-grouse and mule deer habitat across the American West. *Id.*

54. Under the proposed departmental categorical exclusion, BLM could approve without any substantive NEPA review an unlimited number of "actions [across] up to 10,000 acres within sagebrush and sagebrush-steppe plant communities to manage pinyon pine and juniper trees." *Id.* For scale, 10,000 acres is roughly the size of most of Manhattan, or equivalent to 7,562 football fields. The proposed rule allowed a variety of vegetation treatment methods (including commercial logging), as follows: "[m]anual or mechanical cutting (including lop-and-scatter); mastication and mulching; yarding and piling of cut trees; pile burning; seeding or manual planting of seedlings of native species; and removal of cut trees for commercial products, such as sawlogs, specialty products, or fuelwood, or noncommercial uses." *Id.*

55. Mastication is a mechanical vegetation treatment designed to remove pinyon pine and juniper trees by shredding trees and shrubs and distributing the resulting woody debris across the landscape. "Bull Hog" masticators mow down trees with giant mulchers attached to front-end loaders or excavators. These machines turn living trees into piles of wood chips and stumps, quickly removing whole stands of native pinyon pine and juniper, and leaving behind dead and drying organic matter, as shown below in Photos 1 and 2.

Photo 1: Bull Hog masticating a juniper tree.

Photo 2: Mulch piles left behind after mastication

56. Under the PJ CX Rule, BLM did not limit mechanical mastication and other impactful vegetation removal methods to individual trees or small acreages. Instead, the PJ CX

Rule allows projects that mechanically masticate and eliminate entire forests of pinyon pine and junipers, as shown below.

Photo 3: Results of mastication

Draft Verification Report

57. To support its proposed PJ CX Rule, BLM issued a draft report, entitled REPORT ON THE RESULTS OF A BUREAU OF LAND MANAGEMENT ANALYSIS OF NEPA RECORDS AND FIELD VERIFICATION IN SUPPORT OF ESTABLISHMENT OF A CATEGORICAL EXCLUSION FOR PINYON PINE AND JUNIPER MANAGEMENT PROJECTS (Draft Verification Report). The Draft Verification Report asserted that the vegetation treatments authorized under the new PJ CX Rule "do not normally have a significant impact on the environment."

58. The Draft Verification Report relied on two methods to purportedly substantiate BLM's conclusion here, including selectively choosing and informally evaluating the post-treatment impacts of 18 prior BLM vegetation treatment projects, and reviewing available scientific literature and research to determine the impacts of these treatments.

59. On April 13, 2020, Conservation Groups and others submitted detailed comments on the proposed PJ CX Rule and Draft Verification Report. In their comments, Conservation

Groups expressly challenged BLM's approach of supporting its conclusion that approving a departmental categorical exclusion will have no significant impact on the environment by selectively reviewing 18 prior projects, noting that the chosen projects are different in both scale and scope than the projects to be authorized by the proposed PJ CX Rule. For example, only five of the 18 projects even occurred in the sagebrush and sagebrush-steppe vegetation communities of the American West, while the majority were located in different habitats, such as in the Sierra Nevada mountains, or in the Great Plains of eastern Montana.

60. Moreover, BLM failed to provide even a scintilla of credible and verifiable monitoring data to support its "no significant effect" conclusion, in express contradiction to CEQ's Final Categorical Exclusion Guidance, which requires that conclusions on impacts of prior projects must be "verified through credible monitoring of the implemented activity." Instead, BLM relied exclusively on private telephone conversations with its own staff, and the Draft Verification Report is devoid of monitoring data on the efficacy of the past projects.

61. BLM's reliance on these informal, private telephone conversations is particularly inapposite because many of the projects have yet to be fully implemented. For example, one project (Vya Habitat Restoration & Fuels Reduction Project) calls for hand-cutting and treatment of 100,000 acres, yet BLM has only implemented treatments on about 16,000 acres since 2014. On another vegetation removal project, BLM has implemented projects on only 3.3% of the allowable acreage (*i.e.,* 4,931 acres implemented of a 150,000-acre project). The Draft Verification Report does not explain why the agency failed to fully implement the projects, but it is clear that any reliance on these (and other) incomplete projects to establish that prior pinyon pine and juniper removal projects do not normally impact the environment is inappropriate.

62. Conservation Groups' comments also challenged BLM's misuse and inappropriate recasting of available scientific information to support its conclusions. For example, they highlighted BLM's misinterpretation of the scientific literature to support BLM's "overwhelming conclusion" that mechanical removal of pinyon pine and juniper trees enhance understory vegetation and improve site-level ecohydrological function, and that tree removal has positive effects on soils, soil erosion, and hydrological function.

63. Conservation Groups also raised concerns over the potential impacts of the proposed PJ CX Rule on the pinyon jay, a pinyon-juniper forest species which has experienced a collapse in population of 83.5 percent (similar to that of the greater sage-grouse) since the late 1960s. The pinyon jay is a BLM sensitive species and is covered under the Migratory Bird Treaty Act (MBTA). In April 2022, it was petitioned for listing under the Endangered Species Act. Contrary to BLM's "no significant impact" assertion regarding pinyon-juniper treatments, the available scientific data shows that pinyon jay use declines after vegetation treatments in pinyon pine and juniper woodlands; and the Service data suggests that vegetation thinning within pinyon jay nesting sites can alter the suitability of the habitat or cause the birds to abandon treated areas, and that complete removal of the colony site removes nesting substrate altogether. For this reason, the Service recommends avoiding any treatments of pinyon jay colony sites. Importantly, pinyon jay distribution and preferred habitat occurs throughout areas that may be targeted by the PJ CX Rule: pinyon pine and juniper woodlands and trees that are adjacent and transitioning into sagebrush shrubland.

64. Conservation Groups also raised questions and concerns over the Draft Verification Report's refusal to consider the overlapping and cumulative impacts of the PJ CX Rule together with the growing threats of climate change, non-native weed expansion, altered

fire regimes and increased frequency and severity of wildfires, other recently issued (or soon-to-be issued) departmental categorical exclusions, and other factors.

Intervening NEPA & Other Categorical Exclusion Rulemakings

65. On January 10, 2020, CEQ issued a proposed rule overhauling and weakening the framework of NEPA regulations applicable to all agencies. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (proposed Jan. 10, 2020). As noted above, CEQ finalized its new rule on July 16, 2020, with an effective date of September 14, 2020. *See* 2020 NEPA Rule, 85 Fed. Reg. at 43304. *See also* fn. 1, *supra*.

66. Under prior CEQ NEPA regulations, a departmental categorical exclusion was defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (1978) (emphasis added). Under the 2020 NEPA Rule, CEQ defined a departmental categorical exclusion as "a category of actions that . . . normally do not have a significant effect on the human environment." 40 C.F.R. § 1508.1(d) (2020). Although the 2020 regulations removed references to cumulative impacts, CEQ explained that they were not intended to eliminate an agency's obligation to consider reasonably foreseeable cumulative effects. *See, e.g.,* 2020 NEPA Rule, 85 Fed. Reg. at 43355 ("the final rule does not ignore cumulative effects. . .").

67. During this same time period in 2020, Interior and BLM established a host of other departmental categorical exclusions, covering (1) activity conducted pursuant to the Mineral Leasing Act for the purpose of exploration or development of natural gas; (2) BLM's issuance of new grazing, trailing, and crossing permits for livestock; and (3) a wide range of other vegetation treatments CXs (including mechanical mastication, cutting, or mowing,

mechanical piling and burning, chaining, broadcast burning, yarding of pinyon pine and juniper trees; as well as the application of herbicides, seeding of non-native species, livestock grazing, installation of fences, and a host of other activities on BLM-managed public lands). *See* National Environmental Policy Act Implementing Procedures for the Bureau of Land Management, 85 Fed. Reg. 25472 (May 1, 2020).

68. On the very same day that Interior promulgated the PJ CX Rule, it separately promulgated a departmental salvage logging categorical exclusion, which permits BLM to log dead and dying trees on an area not to exceed 3,000 acres, and construct up to one mile of permanent road to facilitate the covered actions without any substantive NEPA review whatsoever. *See* National Environmental Policy Act Implementing Procedures for the Bureau of Land Management, 85 Fed. Reg. 79517 (Dec. 10, 2020) (Salvage CX Rule).

Final Verification Report

69. On November 20, 2020, BLM issued its Final Verification Report, to substantiate the decision to adopt the PJ CX Rule. Although Conservation Groups had submitted nearly 150 pages of comments on the Draft Verification Report – including (as noted above) detailed discussion and analysis of the 18 projects upon which BLM relied, and a robust discussion of peer-reviewed science showing the potential ecological impacts (and uncertainties) of implementing pinyon pine and juniper treatments across the sagebrush and sagebrush-steppe vegetation communities – the Final Verification Report made only minor edits to the draft report, and largely ignored these comments.

70. As in the Draft Verification Report, in the final report BLM presented no verifiable and credible monitoring data supporting its conclusion that past projects to remove pinyon pine and juniper forests in sagebrush and sagebrush-steppe habitat communities

"normally" have no significant environmental impact. Instead, BLM again relied on private telephone conversations within BLM employees—many about projects that were not even fully implemented yet—to undergird its conclusion.

71. The Final Verification Report similarly failed to consider and examine the overlapping and cumulative impacts of the PJ CX Rule together with the growing threats of climate change, non-native weed expansion, altered fire regimes and increased frequency and severity of wildfires, and other factors. The Final Verification Report also failed to examine the overlapping impacts of the PJ CX Rule together with the impacts flowing from the other departmental categorical exclusions issued around this same time, including the departmental categorical exclusions related to oil and gas drilling; placement of a pipeline; issuance of grazing, trailing and crossing permits; other mechanized and herbicide treatments to remove pinyon pine, juniper and other vegetation; and salvage logging.

72. Indeed, BLM failed to prepare any comprehensive cumulative effects analysis to justify adopting the PJ CX Rule; and specifically did not examine: (1) the geographic area which will be affected by pinyon pine and juniper treatments; (2) the impacts that are expected in that area from the projects; (3) other vegetation treatments and other actions – past, proposed, and reasonably foreseeable – that have had or are expected to have impact in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

73. Instead, BLM claimed only that the 2020 NEPA Rule "specifically does not require evaluation of cumulative effects."

74. The Final Verification Report also repeated from the draft report BLM's mischaracterizations of the best available science, with one notable exception. In the draft report,

BLM concluded that "the overwhelming conclusion [of prior published studies] has been that PJ removal has positive effects on soils, soil erosion, and hydrological function." After Conservation Groups submitted specific comments challenging this conclusion, BLM modified the final report to state that, "[w]hile the . . . impacts of treatments on PJ woodlands largely depend on (1) the degree to which perturbations alter vegetation and ground cover structure, (2) the initial conditions, and (3) inherent site attributes, studies of mechanical PJ removal have predominantly shown positive effects on soils, soil erosion, and hydrological function."

75. Despite this (forced) re-assessment of current science, the Final Verification Report failed to discuss vegetation and ground cover structure, site attributes, or even the initial conditions of the public lands subject to pinyon pine and juniper treatments to determine if these factors may impact the possibility of adverse impacts flowing from PJ CX Rule. In fact, the final report is completely devoid of even the barest information on range and resource conditions within the expansive project area, and there is simply no support or basis for BLM to conclude its treatments will have no significant impact.

Final PJ CX Rule

76. On December 10, 2020, Defendants promulgated the PJ CX Rule and amended Interior's Department Manual allowing BLM to approve new pinyon pine and juniper treatment projects of up to 10,000 acres each in sage-grouse and/or mule deer habitat, as noted above, without any NEPA analysis. *See* PJ CX Rule, 85 Fed. Reg. at 79504.

77. Defendants did not prepare an analysis of the effects of the PJ CX rulemaking under NEPA, instead concluding that the Final Rule does not have any reasonably foreseeable significant impact on the environment.

78. Defendants also did not consult with the Service under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, over the impacts of the new PJ CX Rule on the threatened and endangered species that occupy BLM-managed lands. Instead, in the Federal Register, Defendants asserted – in one sentence and without any discussion, analysis, or support – that the PJ CX Rule "has no effect on listed species or critical habitat."

79. Such "no effect" determination is arbitrary and capricious, and Conservation Groups reserve the right to amend this Complaint to add claims alleging that Defendants' refusal to conduct consultation with the Service over the PJ CX rule violates ESA Section 7, after providing the required 60-day written notice.

FIRST CLAIM FOR RELIEF
Violations of the Administrative Procedure Act:
Failure to Demonstrate a Reasoned Decision in Rulemaking

80. Conservation Groups reallege and incorporate by reference all preceding paragraphs.

81. Defendants' promulgation of the PJ CX Rule is a "final agency action" subject to judicial review under the APA. 5 U.S.C. § 704.

82. Defendants' adoption of the PJ CX Rule is arbitrary, capricious, an abuse of discretion, and/or not in accordance with law for multiple reasons, including:

A. Defendants failed to supply a reasoned decision supporting their adoption of the PJ CX Rule, and failed to make a rational connection between the facts in the record, including comments submitted by Conservation Groups;

B. Defendants failed to consider the potential significant effects of the PJ CX Rule, including by ignoring or minimizing extensive scientific evidence contradicting BLM's assertions about the effects of pinyon-juniper vegetation treatments, and failed to address

extensive science documenting adverse effects of pinyon-juniper treatments on wildlife, water quality, soils, and fire risk, among other issues;

C. Defendants failed to consider and examine the overlapping and cumulative impacts of the PJ CX Rule together with the growing threats of climate change, non-native weed expansion, altered fire regimes and increased frequency and severity of wildfires, and other factors; and

D. Defendants refused to respond to, much less address candidly, the Conservation Groups' extensive comments showing that BLM's reliance on prior vegetation treatment projects was factually and scientifically improper, misleading, and inaccurate, and BLM failed to conduct monitoring or provide monitoring results for such prior projects.

83. By disregarding the potential significance of the PJ CX Rule and the effects it may have on the natural environment by allowing BLM to proceed with an unlimited number of new pinyon-juniper treatment projects that each could destroy up to 10,000 acres of pinyon-juniper habitat on public lands, the PJ CX Rule is arbitrary and capricious in violation of the APA. The PJ CX Rule has caused or threatened serious prejudice and injury to the rights and interests of Conservation Groups and their supporters, members and staff.

WHEREFORE, Conservation Groups pray for relief as requested below.

SECOND CLAIM FOR RELIEF
Violations of the National Environmental Policy Act and APA

84. Conservation Groups reallege and incorporate by reference all preceding paragraphs.

85. This Second Claim for Relief challenges Defendants' violations of NEPA in adopting the PJ CX Rule. This claim is brought pursuant to the judicial review provisions of the APA. 5 U.S.C. § 706.

86. Defendants' adoption of the PJ CX Rule is a "major federal action which may significantly affect the quality of the human environment," triggering the requirement to prepare a full EIS. 42 U.S.C. § 4332(2)(C). *See also* 40 C.F.R. § 1508.1(q)(1) ("major federal action" upon which an EIS may be required includes "new or revised agency rules, regulations, plans, policies, or procedures").

87. The environmental effects that must be considered in an EIS include "effects that occur at the same time and place as the proposed action or alternatives and may include reasonably foreseeable effects that are later in time or farther removed in distance from the proposed action or alternative." 40 C.F.R. § 1508.1(g); 43 C.F.R. Part 46.30 (noting that this analysis must take into account the "cumulative impact" of other "reasonably foreseeable future actions"). Defendants failed to address these requirements in approving the PJ CX Rule, in violation of NEPA.

88. Defendants further failed to prepare even an EA to evaluate the potential environmental consequences of the PJ CX Rule and take the NEPA-required "hard look" at its potential impacts.

89. As alleged in more detail above, NEPA requires that federal agencies take a "hard look" at all direct, indirect, and cumulative impacts of their proposed actions, using high-quality information, accurate scientific analyses, and scientific integrity. Defendants violated these requirements by relying on the Final Verification Report to justify the PJ CX Rule without taking a "hard look" at potential environmental impacts, including:

A. Failing to fully examine and disclose potential adverse impacts of the PJ CX Rule on the soils, soil crust, native vegetation communities, fire risks, wildlife habitat, and non-native weeds across the project area;

B. Refusing to identify and adopt objective and measurable thresholds for determining whether the impacts of the PJ CX Rule will "significantly affect" the environment;

C. Failing to consider the unique characteristics of the affected lands and waters, the degree to which the effects on the quality of the environment are controversial or the risks unknown, the degree to which the PJ CXs might establish a precedent for future actions, and the degree to which the actions might affect endangered, threatened, and BLM-identified sensitive species including migratory birds;

D. Failing to fully examine and disclose the overlapping and cumulative impacts of the PJ CX Rule together with the impacts of previously-approved vegetation treatments and other ground disturbing actions (e.g., livestock grazing, rights-of-way and roads, energy infrastructure, timber harvests, etc.) across the same affected area;

E. Failing to fully examine and disclose the overlapping and cumulative impacts of the PJ CX Rule, together with the projected impacts of other reasonably foreseeable future actions, including but not limited to recently promulgated departmental categorical exclusions across the same project area covering (1) exploration or development of natural gas; (2) permits for new livestock grazing, trailing and crossing; (3) other vegetation treatments; and (4) salvage logging; and

F. Failing to fully examine and disclose the overlapping and cumulative impacts of the PJ CX Rule together with the growing threats of climate change, non-native weed expansion, altered fire regimes and increased frequency and severity of wildfires, and other factors.

90. Defendants further violated NEPA by adopting the PJ CX Rule without preparing an EA or EIS that: (a) examines a reasonable range of alternatives; (b) has a statement of purpose and need that corresponds to the agency's proposed action; (c) identifies the correct no action

alternative baseline for comparing and assessing direct, indirect, and cumulative environmental effects; (d) uses high-quality scientific information; and (e) examines the overarching direct, indirect, and cumulative environmental effects of the PJ CX Rule.

91. Defendants' violations of NEPA in adopting the PJ CX Rule is thus arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of NEPA and the APA. 5 U.S.C. § 706(2). The PJ CX Rule has caused or threatened serious prejudice and injury to the rights and interests of Conservation Groups and their supporters, members and staff.

PRAYER FOR RELIEF

WHEREFORE, Conservation Groups respectfully pray that this Court grant the following relief:

(1) Order, adjudge, and declare that Federal Defendants violated the National Environmental Policy Act, the Administrative Procedure Act, and/or their implementing regulations in adopting the PJ CX Rule;

(2) Reverse, hold unlawful, set aside, and vacate the PJ CX Rule;

(3) Enjoin Defendants from implementing, enforcing, or relying upon the PJ CX Rule when conducting, permitting, or allowing any future vegetation treatments;

(4) Enter such other preliminary and/or permanent injunctive relief as Conservation Groups may specifically request hereafter;

(5) Award Conservation Groups their reasonable costs, litigation expenses, and attorney's fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. §§ 2412 *et seq.*, and/or all other applicable authorities; and/or

(6) Grant such other and further relief as the Court deems just and proper.

Dated: June 30, 2022

Respectfully submitted.

/s/ Todd C. Tucci
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