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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT,	)	Case No. 08-cv-435-BLW
	)	
Plaintiff,	)	**PLAINTIFF'S COMBINED RESPONSE/**
vs.	)	**REPLY MEMORANDUM IN SUPPORT OF**
	)	**ITS MOTION FOR PARTIAL SUMMARY**
KEN SALAZAR, Secretary,	)	**JUDGMENT, AND IN OPPOSITION TO**
DEPARTMENT OF THE INTERIOR, an	)	**DEFENDANTS' AND DEFENDANT-**
agency of the United States, and BUREAU	)	**INTERVENORS' CROSS-MOTIONS FOR**
OF LAND MANAGEMENT,	)	**PARTIAL SUMMARY JUDGMENT**[1]
	)	
Defendants.	)	

[1] This brief responds in opposition to Federal Defendants' Combined Memorandum in Support of Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Resp. Br.") (Docket No. 153-1), Intervenor J.R. Simplot Co.'s Memorandum in Support of Motion for Partial Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Simplot Resp. Br.") (Docket No. 156-1), and Intervenor Public Lands Council's Memorandum in Response to Plaintiff's Motion for Summary Judgment and in Support of Cross Motion ("PLC Resp. Br.") (Docket No. 149-1). Because Western Watersheds is filing a combined response brief to three separate motions for partial summary judgment, and a reply brief to three separate response memoranda, the Local Rules permit far in excess of the 37 pages used by Western Watersheds. *See* Local Rules 7.1(b)(3) (allowing 20 pages for each response brief), 7.1(c)(1) (allowing 10 pages for each reply brief). For this reason, Western Watersheds has not sought leave to file an overlength brief.

Despite filing over 100 pages of briefing, BLM, Simplot and PLC fail to defend BLM's cumulative impact analysis area, which artificially constrained BLM's cumulative impact analysis to a few areas immediately adjacent to the Rockville, East Castle Creek, Diamond Basin/Silver City, and Battle Creek allotments. Instead, BLM wrongly claims that it was not required to consider the cumulative impacts of past grazing decisions because these decisions will supposedly not "add to, overlap, or combine" with the impacts of the grazing decisions at issue here. This argument is contradicted by the best available scientific information on the impacts of livestock grazing on sage-grouse populations and habitat, as well as the evidence in the record, which shows that livestock grazing is causing violations of rangeland health standards – including the standard designed to protect habitat for sensitive species – on each of the five allotments at issue in this motion, as well as across the Owyhee and Bruneau Field Offices.

BLM similarly errs in arguing that it is entitled to defer its examination of cumulative impacts until it completes future NEPA analysis on the remaining 67 allotments in the Owyhee and Bruneau Field Offices. Contrary to BLM's claims, these decisions are not "speculative," especially since BLM is required by a court order to issue these decisions before 2013; and BLM's efforts to conduct a patchwork-quilt cumulative impact analysis through multiple separate EAs has been rejected by this Court in similar circumstances. *Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1223 (D. Id. 2005) (requiring comprehensive cumulative impacts analysis).

BLM also misinterprets its land use plans. BLM's obligations to "protect and enhance" sage-grouse habitat and populations throughout the Owyhee Field Office – and its concomitant obligations in the Bruneau Field Office to "[m]anage springs, seeps, and meadows and adjacent upland areas as key wildlife habitat" for sage-grouse, and protect native vegetation communities

– are not subsidiary to BLM's obligations to manage for a "sustained level" of livestock grazing. Resp. Br. at 34-50. This Court should not defer to BLM's current litigation position, especially since it is contradicted by the plain language of the governing land use plan.

BLM's grazing decisions also violate the Fundamentals of Rangeland Health, as BLM relied on voluntary Management Guidelines or other unenforceable criteria as one of three "key strategies" to make significant progress, contrary to this Court's holding in the *Nickel Creek* case. *Western Watersheds Project v. U.S. Dep't of the Interior*, No. 08-0506-E-BLW, 2009 WL 5218020 (D. Idaho Dec. 30, 2009). Moreover, one of the other "key strategies" – a reduction in livestock AUMs on the allotments – is illusory, as the decisions actually increase grazing on the allotments, including in key sage-grouse habitat.

For these and the reasons discussed below, this Court should grant the Western Watersheds' motion for partial summary judgment; deny BLM's, Simplot's and PLC's motions for partial summary judgment; and reverse and remand the final grazing decisions and associated environmental reviews as violating NEPA, FLPMA and the Fundamentals of Rangeland Health.

ARGUMENT

I. BLM'S CUMULATIVE IMPACT ANALYSES VIOLATED NEPA.

A. BLM Cannot Artificially Constrain Its Cumulative Impact Analysis Area.

In its opening brief, Western Watersheds explained that BLM unlawfully restricted its cumulative impacts analysis to a few areas immediately adjacent to the Rockville, East Castle Creek, Diamond Basin/Silver City, and Battle Creek allotments, and never examined the relationship between its grazing authorizations in the Owyhee and Bruneau Field Offices, the extensive violations of the Fundamentals of Rangeland Health, and the dramatic decline of

Greater sage-grouse populations and habitat. *See* Opening Br. at 19-24, *citing Bennett*, 392 F.Supp.2d at 1223.

In response, BLM never mentions or distinguishes *Bennett*, and, indeed, does not even defend its limited cumulative impact analysis area. Resp. Br. at 9-21. Instead, BLM argues that its EAs adequately examined the cumulative impacts of its grazing decisions within the confined analysis areas. *Id.* BLM's failure to support its restrictive cumulative impact analysis area is fatal to its case.

Under NEPA, an agency ordinarily has the discretion to determine the physical scope of its cumulative impacts analysis, but its choice of analysis area must be reasoned and not arbitrary. *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 973-74 (9th Cir. 2002). The agency must articulate a rational explanation justifying its chosen cumulative impact analysis area. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895-97 (9th Cir. 2002). In *Dombeck*, plaintiff challenged a Forest Service timber sale and associated road building. Plaintiff argued that the Forest Service violated NEPA by limiting its cumulative impacts analysis area to the timber sale area itself, instead of examining the effects of road building forest-wide, when the effects of the actions would impact areas outside of the immediate project area. The Ninth Circuit agreed, and held that the entire national forest was the appropriate cumulative impact analysis area. 304 F.3d at 897.

Similarly, in *Alliance for the Wild Rockies v. Bradford*, the court required a comprehensive environmental review of several actions that affected the Cabinet-Yaak population of grizzly bear. 720 F.Supp.2d 1193, 1220 (D. Mont. 2010). The court again rejected the Forest Service's efforts to restrict its cumulative impacts analysis area, because the impacts

of the actions extended beyond the analysis areas and the environmental assessments contained no discussion regarding the appropriate scope of cumulative impacts review. The court thus held that the EA lacked the "articulable reasons" required under *Dombeck*. *Id.*

The agency may choose a smaller cumulative impact analysis area only if the agency justifies its chosen level of analysis. *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 958-60 (9th Cir. 2003). In that case, the Ninth Circuit affirmed the Forest Service's restrictive cumulative impacts analysis area because the agency considered – but rejected – a broader analysis area. *Id.* at 958-59. The record in that case showed that there were no "additional, cumulative effects" outside of the project area. *Id.*

These cases control disposition of this claim, and require the Court to vacate and reverse the challenged EAs. Like in *Dombeck* and *Bradford*, BLM has adopted a cumulative impacts analysis area that ignores the breadth of immediate and cumulative impacts from BLM's grazing decisions. And, unlike in *Selkirk*, BLM has provided no "articulable reasons" for its restricted analysis area. The record is undisputed that Greater sage-grouse are a landscape scale species, known to migrate over 75 miles between seasonal habitats. Thus, BLM's grazing authorizations on the allotments at issue have the potential to impact sage-grouse populations far beyond the allotment boundaries, or even field office boundaries. Western Watersheds' Separate Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment ("SOF"), ¶ 3 (Docket No. 133-1).

A 1997 Council for Environmental Quality guidance document confirms that BLM should have considered cumulative impacts over a larger area that was biologically meaningful for sage-grouse. *See* PLC Resp. Br. at 9, *citing* Considering Cumulative Effects Under the National Environmental Policy Act ("CEQ Guidance"),

(*http://ceq.hss.doe.gov/publications/citizens_guide_to_nepa.html*) (last visited 11/22/11). This document instructs agencies, in selecting an appropriate cumulative impact analysis area, to consider the resources that could be affected by the proposed action and to determine the geographic areas occupied by those resources outside of the project impact zone. *Id.* at 15. Specifically, in determining the appropriate geographic area for an action impacting "migratory wildlife" – like most Greater sage-grouse populations in Idaho – CEQ recommends selecting all "[b]reeding grounds, migration route, winter areas, or total range of affected population units." *Id*. Again, because there is no dispute that Greater sage-grouse are a landscape-scale species known to migrate vast distances between seasonal habitats including among and between allotments, field offices, and state jurisdictional boundaries, *see* SOF, ¶¶ 1-7, BLM violated this guidance by failing to include the "geographic area" occupied by Greater sage-grouse in its cumulative impacts analysis area.

Nor do BLM's FONSIs or EAs provide any reason justifying a smaller cumulative impacts area, as required under *Dombeck* and *Selkirk*. For example, in the Rockville EA, BLM states only:

> The area used to assess the cumulative effects includes the Rockville, Juniper Springs, Sands Basin, and Poison Creek allotments, other adjoining federal allotments, and the surrounding State and private lands. The Rockville allotment is adjacent to State Highway 95 (located to the east of the allotment), therefore this analysis will not exceed the Highway to the east.

AR 23794. *See also* AR 23827 (no explanation in FONSI). This same paucity of analysis applies to the other allotments as well. *See*, *e.g.*, AR 26724 (Silver City/Diamond Basin EA); AR 11857 (East Castle Creek EA); AR 3670 (Battle Creek EA). *See also* Cole Decl., Exhs. 1 & 2 (Docket No. 134-2) (map of allotments).

Under the cases cited above, BLM violated NEPA by adopting an artificially narrow cumulative impacts analysis area, and failing to provide any reasoned analysis justifying its chosen analysis area.[2]

B. BLM Failed to Adequately Examine Past and Present Grazing Authorizations.

In addition to adopting an unlawfully narrow cumulative impacts analysis area, BLM also violated NEPA by failing to adequately consider the cumulative impacts of past and present grazing authorizations on habitat and populations of Greater sage-grouse. *See* Opening Br. at 19-29. In response, BLM first claims that Western Watersheds must do more than "summarily alleg[e] that other decisions were recently made" on other, "unspecified" allotments. Resp. Br. at 10. The Court can readily reject this argument, as Western Watersheds has specifically identified each and every grazing authorization and allotment at issue here, including the 37 allotments in the Owyhee Field Office identified in the Third Amended Complaint, and the 14 allotments in the Bruneau Field Office. *See* Third Amended Complaint, ¶ 82(a)-(k) (listing Owyhee allotments), ¶ 70 (a)-(c) (Docket No. 118). Western Watersheds also mapped these allotments and others for which BLM will issue decisions for in the near future in the Declaration of Kenneth Cole. Cole Dec. Exh. 1-5.

[2] In a footnote, BLM argues that Western Watersheds has failed to articulate "the appropriate scope of cumulative effects analysis." Resp. Br. at 10 n. 4. While there is no doubt that BLM was required to prepare a comprehensive analysis of the ecological impacts on Greater sage-grouse of these grazing decisions together with other past, present and reasonably foreseeable decisions, *see Dombeck*, 304 F.3d at 893-94 (requiring a "single NEPA review document . . . for distinct projects . . . when the projects are 'connected,' 'cumulative,' or 'similar' actions"), the precise scope of the cumulative impact area depends on "total range of affected population" of Greater sage grouse, according to the CEQ Guidance. Under the CEQ analysis, the proper geographic scope of the cumulative impacts analysis could include the entire Great Basin Core population of Greater sage-grouse, the N-Central Nevada/SE Oregon/SW Idaho subpopulation, and/or the NE Nevada/S-Central Idaho/NW Utah subpopulations, depending on the migratory status of the affected populations of Greater sage-grouse, and the potential impacts outside of the project impact zone. *See* CEQ Guidance, p. 15.

BLM's argument that Western Watersheds has failed to explain how these grazing decisions could "add to, overlap, or combine" with the impacts of the grazing decisions at issue here is also not credible. Resp. Br. at 11. Throughout the record, BLM admits that livestock grazing on these allotments is, in fact, adversely impacting the Greater sage-grouse populations and habitat at the individual allotment level. *E.g.*, AR 13823-84 (livestock grazing on East Castle Creek allotment causing violations of each and every applicable rangeland health standard, including Standards 1, 2, 3, 4, 7 and 8); AR 23541-42 (grazing causing violations on Rockville allotment); AR 26440-59 (grazing causing violations on Silver City allotment); AR 26426-39 (grazing causing violations on Diamond Basin allotment); AR 4210-39 (grazing causing violations on Battle Creek allotment). BLM cannot admit the direct adverse impacts of the authorized grazing upon sage-grouse, but deny that those impacts have the potential to become cumulative.

BLM's reliance on *Center for Environmental Law and Policy v. U.S. Bureau of Reclamation* ("*CELP*") is misplaced. 2011 WL 3629907 (9th Cir. Aug. 19, 2011). In that case, the Ninth Circuit affirmed an agency's EA despite an imperfect cumulative impacts section because the court found the EA as a whole sufficiently examined the "existing condition of the area" and "what the effects of the project would be," even though this analysis was presented in separate sections of the EA. *Id.* at *6-7.

Unlike in that case, the EAs and FONSIs here never discuss the existing conditions of sage-grouse habitat and populations throughout the Bruneau and Owyhee Field Offices, nor the impacts of BLM's grazing authorizations on sage-grouse habitat components. For example, in the Battle Creek EA, BLM briefly cited the on-going processes on the East Castle Creek and Big Springs allotment, but never examines the existing conditions of sage-grouse breeding or brood-

rearing habitat in these areas, nor does BLM present any information on sage-grouse populations. AR 3672 (claiming that the "cumulative effect of past grazing management in the Bruneau and Owyhee Field Offices has been to improve wildlife habitat")[3]. The Rockville EA and FONSI similarly lack any analysis or examination of surroundings sage-grouse habitat, or of how the proposed grazing will cumulatively impact sage-grouse habitat and populations. AR 23797-98. The other EAs fail to adequately discuss these issues, too. AR 26725-26 (Silver City/Diamond Basin EA); AR 11860-61 (East Castle Creek EA).[4] Thus, *CELP* is factually distinguishable from this case because the information is entirely absent from the EAs.

BLM is further mistaken when it claims that it can meet its cumulative impact requirements through its patchwork-quilt analysis in four separate EAs. Resp. Br. at 11-14. In fact, this Court rejected this precise argument in *Bennett*. Like in this case, in *Bennett* BLM prepared an incremental cumulative impacts analysis in four separate EAs that looked only to the cumulative impacts of grazing at the allotment level, and never looked to the overall cumulative impacts of grazing across the landscape. This Court rejected this "patch-work quilt" analysis, in part because

> BLM's incremental allotment-by-allotment approach leaves it unable to answer a simple, yet crucial, question: What is the cumulative environmental impacts of [BLM's proposed grazing authorizations] in the face of widespread FRH violations and a dramatic decline of a sensitive species? That question cannot be answered because nobody has looked at the big picture.

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[3] BLM claims that Western Watersheds "mischaracterizes" this direct quotation from the cumulative impacts section of the EA, but cites to a wholly separate section of the EA in arguing that it meant improvement in wildlife habitat conditions since 1934. *See* Resp. Br. at 12-13 n. 6.

[4] BLM's refusal to examine existing conditions of sage-grouse populations and habitat across the Bruneau and Owyhee Field Offices is particularly troubling here, because Western Watersheds repeatedly requested BLM to examine this information. *See, e.g.*, AR 23856 (Western Watersheds requesting information on the local and regional sage-grouse populations, including the change in population over time, and information on sage-grouse population viability).

392 F.Supp.2d at 1225. As discussed in Western Watersheds' opening brief – and ignored by BLM in its response – *Bennett* controls disposition of this case, and this Court should reaffirm that NEPA requires an agency to prepare a comprehensive cumulative impacts analysis examining the relationship between grazing, Fundamental of Rangeland Health violations, and the decline in sage-grouse populations and habitat. *See also Western Watersheds Project v. Rosenkrance*, 2001 WL 39651, *12 (D. Id. Jan. 5, 2011) ("An EA must show the big picture through its cumulative impacts analysis.").[5]

C. BLM Cannot Defer Its Cumulative Impacts Analysis.

BLM is wrong when its claims that it had no obligation to consider the cumulative impacts of impending future grazing decisions in the Owyhee Field Office on Greater sage-grouse populations and habitat. NEPA requires an EA to "fully address cumulative environmental effects or cumulative impacts." *Rosenkrance*, 2011 WL 39651 at * 11 (internal quotations omitted), *citing Te-Moak Tribe,* 608 F.3d at 602. This analysis must include a sufficiently detailed examination of past, present, and reasonably foreseeable future actions, and how these actions might affect the environment. *Id. See also Bennett*, 392 F.Supp.2d at 1223.

[5] In a footnote, BLM argues that this Court should ignore these violations of NEPA because Western Watersheds failed to raise this issue during the administrative process, and, thus, somehow failed to exhaust its administrative remedies. Resp. Br. at 10 n. 4. BLM is wrong on both fronts. First, Western Watersheds and others repeatedly requested BLM to prepare a comprehensive cumulative impact analysis. AR 3291 (requesting new cumulative impact analysis that examines impacts of livestock grazing on local and regional sage-grouse populations and habitat); AR 3473 (noting the EA does not examine the cumulative impacts of livestock grazing on sage-grouse populations and habitat); AR 23855-56 (requesting supplemental cumulative impact analysis examining wide-scale depletion of wildlife habitat for sage-grouse and other sagebrush species); AR 11609-19 (protesting inadequate cumulative impacts analysis). Moreover, exhaustion of administrative remedies is not required for this type of grazing decision, so even if BLM were correct – which it is not – that Western Watersheds never raised these issues during the administrative process, it would be entitled to raise these issues here. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 827 (9th Cir. 2002) (no exhaustion requirement under BLM's grazing regulations).

Notably, BLM does not dispute that it is legally required to issue new grazing decisions and environmental reviews on 67 separate allotments surrounding – and in many cases immediately adjacent to – the Rockville, Silver City/Diamond Basin, Battle Creek and East Castle Creek allotments. Resp. Br. at 14-15. *See also* Cole Decl., Exhs. 1 & 2 (maps of allotments). BLM argues, however, that it was not required to examine the cumulative impacts of these grazing decisions because they were too "speculative" to warrant review. Resp. Br. at 15. But BLM never explains how decisions that it admits it is legally required to issue can be speculative.

The cases cited by BLM are easily distinguishable on the facts. In *Headwaters v. BLM*, the Ninth Circuit held that BLM was not required to consider speculative uses of a logging access road in the absence of any evidence of future uses of the road. 914 F.2d 1174, 1182 (9th Cir. 1990). Similarly, in *Theodore Roosevelt Conservation Partnership v. Salazar*, the D.C. Circuit held that an agency was not required to consider cumulative impacts of a possible, future decision where the scope of that decision was uncertain. 616 F.3d 497, 513-14 (D.C. Cir. 2010).[6] In both of these cases, the courts held the agency was not required to consider cumulative impacts of purely speculative, future decisions; and neither of these cases address a situation – like here – where BLM is under the affirmative legal obligation to issue new grazing decisions and environmental analysis on 67 separate allotments.

This Court should also reject BLM's claim that a comprehensive cumulative impact analysis was unwarranted because the impacts of these pending decisions were not "sufficiently

[6] Nor does *Kootenai Tribe of Idaho v. Veneman* assist BLM here, as in that case the Ninth Circuit reviewed a nationwide rule protecting roadless areas, and held that the potential cumulative impacts of that decision were too speculative to examine at the programmatic level. 313 F.3d 1094, 1123 (9th Cir. 2002). Contrary to BLM's claim, *Veneman* does not allow an agency to ignore examining the cumulative impacts of reasonably foreseeable future actions, including actions required under law.

crystallized" to warrant a cumulative impacts review. Resp. Br. at 15. BLM cites no cases supporting this argument, and courts have rejected this position.

For example, in *Western Watersheds Project v. Rosenkrance*, plaintiff challenged BLM grazing decisions and EA in the Pahsimeroi Valley of central Idaho. Case No. 09-CV-298-EJL, 2011 WL 39651 (D. Id. Jan. 5, 2011). Plaintiff argued that the EA failed to examine the cumulative impacts of these proposed decisions, together with the impacts of other recent grazing permits and other likely permit renewals in the Pahsimeroi valley. Judge Lodge agreed, and held that BLM violated NEPA by failing to consider cumulative impacts of the challenged permits, together with other recent BLM permits and permits BLM is likely to issue. *Id.* at *12. The Court explained:

> BLM's EA acknowledged potential harm to wildlife on individual allotments, but the EA does not provide any quantified or detailed information about the cumulative impact on wildlife that might result from issuing permits for all four allotments. Nor does the EA include a sufficiently detailed catalogue of past, present and future actions on neighboring allotments. BLM manages much of the Pahsimeroi valley for grazing, as does the Forest Service. It is therefore likely, as WWP claims, that permits for other allotments recently have issued or soon will issue. The EA does not address those concerns.

Id.

Here, there is likewise documented evidence that current livestock grazing is adversely impacting sage-grouse populations and habitat on the five allotments at issue, and other record evidence shows that livestock grazing is one of the primary threats to Greater sage-grouse in this portion of its range. Moreover, there is no dispute that BLM is legally obligated to issue new permits on 67 surrounding allotments in the near future. This Court should likewise hold that BLM violated NEPA in refusing to consider the cumulative impacts of its past, present and required future decisions on grazing on Greater sage-grouse population and habitat.

BLM errs too when it claims that it can defer its cumulative impacts analysis until it prepares NEPA analyses on these other 67 other allotments, and the cases upon which BLM relies are distinguishable. Resp. Br. at 19-20. In each, the agency had committed to preparing a single comprehensive environmental impact statement examining the cumulative impacts of its current and future actions. For example, in *CELP*, the Bureau of Reclamation "promise[d]" to prepare a single environmental review exploring the collective impact of the challenged decision, together with the one foreseeable future decision at issue. 2011 WL 3629907, at *8. The same was true in *Northern Alaska Environmental Center v. Kempthorne*, where the BLM again committed to completing an EIS examining the cumulative impacts of the proposed action together with the future action. 457 F.3d 969, 980 (9th Cir. 2006). *See also Nw. Envtl. Defense Ctr. v. Bonneville Power Admin.*. 117 F.3d 1520, 1537-38 (9th Cir. 1997) (same).

Unlike these cases, BLM here has steadfastly refused to prepare a single comprehensive EIS examining the big picture relationship between grazing, Fundamental of Rangeland Health violations, and the decline in sage-grouse populations and habitat in and across the habitat for the Great Basin population of Greater sage-grouse. *See* Resp. Br. at 19 (claiming only that "BLM has committed itself to analyzing cumulative impacts on sage grouse in these future actions"). Indeed, as discussed above, BLM conducted a patchwork quilt cumulative impacts analysis that failed to systematically examine the impacts that livestock grazing is having on sage-grouse populations and habitat. And, BLM has not suggested that it intends to shift course moving forward regarding the remaining grazing decisions. Thus, the Court here should not permit BLM to defer examining the cumulative impacts of its grazing decisions on the Great Basin population of Greater sage-grouse.

II. THE EAST CASTLE CREEK AND BATTLE CREEK DECISIONS VIOLATE THE BRUNEAU MFP.

BLM misapprehends the plain language of the Bruneau Management Framework Plan ("MFP") and the habitat needs of Greater sage-grouse in arguing that status quo (or increased) grazing and new fencing in key sage-grouse habitat on the East Castle Creek and Battle Creek allotments complies with the MFP. BLM is also mistaken in claiming that continuing to grazing livestock during the critical growth period of native grasses will protect and enhance native vegetation communities.[7]

A. Authorized Grazing and New Fences Will Harm Sage-Grouse.

BLM's grazing schemes and new fence construction on the Battle Creek and East Castle Creek allotments do not comply with the Bruneau MFP requirement that BLM prioritize management of springs, seeps and wet meadows for sage-grouse. In arguing to the contrary, BLM misunderstands the requirements of the MFP, as well as the habitat needs of Greater sage-grouse.

As discussed in Western Watersheds' opening brief, the Bruneau MFP requires BLM to "[m]anage springs, seeps, and meadows and adjacent upland areas as key wildlife habitat" for sage-grouse. *See* Opening Br. at 33-36, citing AR 114. *See also* SOF ¶ 25. BLM completely ignores this MFP requirement, and, instead, cites only to other management obligations in arguing that the Bruneau MFP requires that BLM "improve sage grouse habitat." Resp. Br. at 36. But BLM cannot meet its FLPMA obligations by ignoring inconvenient requirements of

[7] Public Lands Council is also wrong in arguing that this claim is "indistinguishable" from *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004). PLC Resp. Br. at 15. *Norton* was brought under 5 U.S.C. § 706(1), alleging an agency failed to undertake action it was required by law to take. Here, Western Watersheds challenges final agency actions pursuant to 5 U.S.C. § 706(2). *See Bennett*, 392 F.Supp.2d at 1227 (recognizing difference between failure to act claims and challenge to final agency action that is inconsistent with governing land use plan); *Idaho Conservation League v. Guzman*, 766 F.Supp.2d 1056, 1077 (D. Id. 2011) (same).

governing land use plans. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 962 (9th Cir. 2005)("An agency's position that is contrary to the clear language of a [land management plan] is not entitled to deference.").

Moreover, BLM never disputes Western Watersheds' showing that BLM's new grazing schemes on these two allotments continue the same harmful grazing season-of-use within key sage-grouse habitat. Opening Br. at 33-36.[8] Instead, BLM argues that its proposed fencing projects on the Battle Creek and East Castle Creek allotments will meets its MFP obligations, and this decision is entitled to "substantial deference." Resp. Br. at 38-41.

This Court should not defer to BLM for several reasons. As shown above, BLM has failed to even acknowledge the requirements of the Bruneau MFP requiring it to prioritize management of seeps, springs, and wet meadows as sage-grouse habitat, and, thus, BLM never explains how building fences in these critical wildlife areas meets this management requirement. AR 114.

Moreover, constructing fences within key sage-grouse habitat is inconsistent with the best available science, and is likely to further degrade sage-grouse habitat and populations. For example, the U.S. Fish and Wildlife Service has concluded that fences adversely impact sage-grouse populations through direct mortality via collisions, creation of predator perch sites, the creation of predator corridors along fences, incursion of exotic species along the fencing

[8] More specifically, BLM does not dispute that its new grazing decisions (1) increased grazing in East Castle Creek pastures 29A and 29B; (2) adopted nearly identical season-of-use in East Castle Creek pastures 28 and 28A; and (3) maintained identical season-of-use in Battle Creek pasture 20. Opening Br. at 33-36. These pastures include the best late-brood rearing habitat for sage-grouse. *Id.* BLM's claim that it has reduced AUMs in pastures 11B and 12 in the East Castle Creek allotment by "nearly half" is also inaccurate, though BLM has indeed reduced AUMs on these pastures. Resp. Br. at 40. *Compare* AR 14023 (showing average actual use equally 1,143 on these pastures); *with* AR 11319 (allowing 753 AUMs under new grazing permit).

corridor, and habitat fragmentation. 75 Fed.Reg. 13910, 13929 (March 23, 2010) (finding Greater sage-grouse warrant "warranted but precluded" for protection under the Endangered Species Act), *citing* 2000 Sage Grouse Guidelines (AR 10828-48), and 2004 Conservation Assessment (AR 9335-9945).

These threats are particularly acute here, because BLM has proposed a series of fences within important sage-grouse late brood-rearing areas and immediately adjacent to springs and seeps. For example, BLM touts the so-called Hutch Springs Exclosure in the Battle Creek allotment as improving sage-grouse habitat, but the EA shows that the new fences will be built within key sage-grouse habitat, and, indeed, within hundreds of feet of several critical late brood-rearing areas. *See* AR 3721 (map); AR 3705 (allotment map showing pasture 20); Docket No. 137-1 (showing southern portion of Battle Creek allotment is key sage-grouse habitat).

BLM similarly claims that the Dry Creek exclosure "would continue to improve the riparian area along Dry Creek, thus improving late-summer sage grouse habitat." Resp. Br. at 38. But BLM fails to note that it is proposing to dramatically *reduce* the size of the existing exclosure here, and eliminate important upland habitat associated with late brood-rearing habitat. *See* AR 3719 (map); AR 3292-93 (discussing restoration within exclosure, which was spear-headed by local conservation group). These same problems exist in the East Castle Creek allotment, too, where BLM has proposed to build a series of small exclosures within key-sage grouse habitat that do not prioritize these areas for sage-grouse. AR 11910-12 (maps of exclosures).

BLM's decision to construct fences in key sage-grouse also runs counter to BLM's grazing system examined in the Bruneau-Kuna Grazing EIS and adopted in the Bruneau MFP. *See* AR 28560-662. Under this EIS – which remains in effect today – BLM committed to

improving sage-grouse late brood-rearing habitat by "establishing rest or deferred systems on the critical brood-rearing areas." AR 28586. In fact, in response to a public comment bemoaning the adverse impacts of the proposed action (which increased grazing across the field office) on sage-grouse, BLM modified the final action by increasing the protective measures for sage-grouse populations and habitat. Specifically, BLM noted:

> Sage grouse populations in the Draft EIS were expected to remain at current low levels. Benefits to sage grouse were assessed to balance with negative impacts of the proposed action. . . . Because of the concentration of livestock in important sage grouse meadow and brood rearing areas and the competition for forage during the early spring months, the measure to improve sage grouse habitat in the proposed action have been expanded. Grazing systems which provide rest or deferment through the critical brood rearing period and fencing of large meadow complexes would be provided. This would allow sage grouse populations to increase.

AR 28628. In other words, BLM adopted a decision that increased grazing AUMs on the Bruneau, and then off-set the expected adverse impacts by requiring rest or deferred grazing in sage-grouse brood rearing habitat; only if the rest and deferment did not work would BLM fence these areas. AR 28586 (requiring BLM to "[i]mprove meadow herbaceous vegetation, especially forbs, by establishing rest or deferred grazing systems on the critical brood rearing areas. If grazing systems do not improve the situation, large meadow complexes may be fenced . . . "). *See also* AR 49 (same); AR 28571 (calling for "[e]stablishing livestock rest or deferment systems on the critical brood rearing areas"); AR 28632 (BLM response to comment 24.14) (stating that "[d]etrimental impacts to sage grouse would be reduced by proper stocking rates, implementing grazing systems and proper utilization. Grazing systems would incorporate some degree of rest or deferment").

BLM authorized the grazing increases called for in the EIS, but has refused to adopt the conservation measures that were designed to offset the impacts. It thus should come as no

surprise that none of the improvement in sage grouse populations and habitat forecasted in the EIS and MFP have been realized. *See, e.g.,* AR 28568 (projected range condition class improvement on 70% of the area); *id.* (projecting sage-grouse populations would increase).

BLM has erred in adopting grazing system that fails to prioritize upland seeps, springs and wet meadows for sage-grouse, in direct conflict with the Bruneau MFP and the Bruneau-Kuna Grazing EIS.

B. Allowing Grazing During Growing Season Will Harm Native Vegetation.

BLM is further violating the Bruneau MFP by allowing grazing during the critical growing season for native vegetation communities, in defiance of the MFP requirement to protect the minimum growth needs of the native vegetation. AR 58 (MFP). In response, BLM claims that Western Watersheds "distorts" the MFP language and that its grazing system will meet the phenological needs of native plants, even though BLM is permitting grazing within the growing season.

First, Western Watersheds is not "distorting" the requirements of the Bruneau MFP in stating that it requires that BLM grazing decisions "meet the minimum growth needs" of native vegetation. AR 58 (MFP). While BLM has some discretion in determining how to meet these minimum needs (*e.g.*, through adjusting livestock season of use to eliminate early grazing and/or by implementing grazing systems on these ranges), *id.*, BLM may not allow grazing during the critical growing season of native vegetation, or otherwise fail to meet the growth needs of native vegetation. *Bennett*, 392 F.Supp.2d at 1227 (grazing permits must be consistent with land use plans).

BLM has previously acknowledged that permitting grazing during the growing season does not meet its MFP obligations. For example, in the Bruneau-Kuna Grazing EIS, BLM

adopted a grazing system which included "[s]easons-of-use adjustment," designed to meet the needs of native vegetation communities. AR 28599. According to BLM, these season-of-use adjustments "will result in some later turnout dates which in turn may reduce AUMs for livestock. This adjustment, however, allows plants to reach seed ripe stage – a condition necessary to improve maintenance of desired plant species, vigor & productivity." AR 28599 (internal brackets omitted). In other words, BLM recognized that grazing during the critical growing season (which does not allow plants to reach seed ripe stage) would fail to meet the needs of native plants.

BLM came to a similar interpretation of its MFP obligations in its 1999 Battle Creek Final Analysis, Interpretation, and Evaluation. AR 5690. In this analysis, BLM concluded that its native vegetation objective was "met where grazing did not occur during the critical growth period (boot stage, heads showing) of perennial grasses," and BLM then catalogued how grazing in nearly every pasture (including pastures 8, 21, 9, 12, 22, 10 and 15) occurred during the critical growth period. *Id.* BLM then concluded that only grazing in the summer pastures (pastures 14, 16, and 20) – which commenced after the important growth period – met this objective. *Id.* It is thus plain that Western Watersheds is not distorting BLM's obligations under the Bruneau MFP, especially since BLM shared Western Watersheds' view until this litigation.

Second, BLM is not correct in claiming that its grazing schemes will meet these minimum requirements. Indeed, BLM admits that the circa-1999 grazing scheme was *not* meeting the growth needs of native vegetation in the Battle Creek allotment, yet it has adopted "essentially the same" grazing system in its new grazing decisions. AR 3521 (Battle Creek EA). BLM never explains how continuing to permit grazing during the critical growth season on most pastures in the Battle Creek allotment will meet the phenological needs of native vegetation now,

when BLM admits this same system has failed to comply with the MFP requirements in the past. AR 5690. This same analysis holds true on the East Castle Creek allotment, as discussed in Western Watersheds' opening brief. Opening Br. at 37.

BLM is equally mistaken in arguing that the so-called "recommended" dates in the analysis portion of the MFP somehow trump BLM's own more recent, site-specific information on these two allotments. As discussed in Western Watersheds' opening brief, BLM has identified the plant growth stages (or phenological stages) for native vegetation in the East Castle Creek and Battle Creek allotment. AR 26941 (East Castle Creek), 5559 (Battle Creek). These allotment-specific charts present detailed information of growth stages for all native vegetation in each allotment. *See id.*

In its response brief, BLM ignores this allotment-specific information, and argues that it only needs to comply with the "recommended" timeframes in the MFP. Resp. Br. 42-44. There are two problems with this argument. First, the timeframes in the MFP are "recommended" only, and BLM cites no authority requiring the adoption of these "recommended" guidelines. AR 58. Second, BLM's understanding of the growth needs of native vegetation in these allotments has evolved since the MFP was adopted in 1983, and these guidelines no longer represent current scientific understanding within these allotments.[9] And BLM presents no reasoned analysis or explanation why recommended guidelines within a nearly 30 year-old land use plan for the entire

[9] Prior to its current litigation position, there was some dissonance within BLM regarding what was needed to meet the minimum needs for native vegetation as required under the MFP. As discussed, the Bruneau-Kuna Grazing EIS concluded that deferring grazing through seed ripe was needed to meet the minimum growth needs of native vegetation, AR 28599; whereas, BLM staff concluded that this management requirement was met on areas where "grazing did not occur during the critical growth period (boot stage, heads showing) of perennial grasses," which falls short of seed ripe. AR 5690. In either case, however, these timeframes are far more protective than the seasons-of-use adopted in BLM's grazing decisions on the Battle Creek and East Castle Creek allotments, which allows grazing during the critical growing season nearly everywhere. *See* Opening Br. at 36-38.

resource area should take precedence over more recent, site-specific information prepared by the agency in determining the minimum growth needs of native vegetation. BLM offers no explanation supporting its current interpretation of the MFP, and its current litigation position – which is counter to long-held agency interpretations – is entitled to no deference. *Native Ecosystems Council*, 418 F.3d at 962 (no deference to an agency's position that is contrary to clear language of land use plan).

III. THE SILVER CITY, DIAMOND BASIN AND ROCKVILLE DECISIONS VIOLATE THE OWYHEE RMP.

BLM's grazing decisions on the Rockville, Silver City and Diamond Basin allotments fail to protect and enhance key sage-grouse populations and habitat, and thus violate the Owyhee RMP. The Owyhee RMP requires BLM to "protect and enhance key sage grouse habitats and populations," and this requirement is unqualified. AR 30764-65. The Owyhee RMP even defines "protect and enhance" sage-grouse populations and habitat as requiring compliance with the standards identified in the 1997 Idaho Sage Grouse Management Plan and "subsequent guidance" – like the 2000 Sage Grouse Guidelines, the 2004 Sage Grouse Conservation Plan, Braun's 2006 Sage Grouse Blueprint, the 2006 Idaho Sage Grouse Conservation Plan, and others. AR 30765.

In its opening brief, Western Watersheds demonstrated that BLM's grazing decisions failed to comply with the season-of-use restrictions and the utilization limitations adopted in recent sage-grouse guidance. Opening Br. at 38-40. In response, BLM does not dispute that its grazing authorizations on these allotments permit livestock grazing in key sage-grouse habitat during the critical nesting and brood-rearing season. Nor does BLM disagree with Western Watersheds that BLM's permitted use levels (50% and 40-50% utilization levels on the Rockville and Diamond Basin/Silver City allotments, respectively) exceed the 30% utilization

standard adopted in the 2000 Sage Grouse Guidelines as necessary to meet sage-grouse habitat needs.

Instead, BLM claims that the decisions appropriately balance livestock grazing and sage-grouse populations and habitat, which – according to BLM – is all that the Owyhee RMP requires. Resp. Br. at 45. But this interpretation is inconsistent with the plain language of the Owyhee RMP, which requires BLM to "protect and enhance" sage-grouse habitat. AR 30764-65.

BLM's argument that this management obligation must yield to a superior obligation to manage all areas for a "sustained level of livestock use" is equally baseless. Resp. Br. at 45. Under the plain terms of the Owyhee RMP, BLM's duty to manage for a "sustained level of livestock use" is expressly limited by its obligation to insure that grazing is "compatible with meeting other resource objectives" – including, of course, protecting and enhancing sage-grouse populations and habitat. AR 30767. Thus, under the plain language of the RMP, BLM's duty to maintain sustain level of livestock use yields to BLM's primary obligation to "protect and enhance" sage-grouse habitat, when these objectives are in conflict. BLM's contrary interpretation is entitled to no deference. *Native Ecosystems Council*, 418 F.3d at 962.

BLM also errs when it claims that its final grazing decisions on the Silver City/Diamond Basin allotments meet its obligation to "protect and enhance" sage-grouse habitat. First, BLM does not dispute that its new grazing scheme increases grazing in key sage-grouse habitat by 54% on the East Spring Use Area, and by 76% in the West Spring Use Area above past actual use, even though these areas contain sage-grouse habitat. Opening Br. at 47; SOF ¶¶ 89, 91, 92. Instead, BLM attempts to mislead the Court into believing that it is actually reducing grazing on these pastures by comparing the new permitted use levels to the past permitted use levels, and

ignoring the fact that actual grazing on these allotments was far below permitted levels. Resp. Br. at 46-47 n. 26.[10] *See also* SOF ¶¶ 89, 91, 92. Importantly, BLM never explains how increasing grazing in key sage-grouse habitat will "protect and enhance" sage-grouse habitat and populations.

BLM's claim that continuing the prior grazing scheme in the early summer and fall pastures (i.e., Silver City pastures 5A and 5B, and Diamond Basin pastures 5 and 6, *see* AR 26675) is appropriate because this system "has already proven successful in improving sage-grouse habitat" similarly falls flat. Resp. Br. at 47. According to BLM's own data, current livestock grazing on the Diamond Basin pastures is causing violations the Fundamentals of Rangeland Health for watersheds and native plant communities, which is reducing native grasses and forbs. AR 26432. Although BLM claimed that these pastures were meeting the standard for sage-grouse habitat, a review of BLM's own data shows that BLM examined only 10 of the 31 (32%) late brood-rearing areas in these four pastures, and only one (3%) of these was in proper functioning condition. AR 26536. In light of this information, it is difficult to explain BLM's assertion that sage-grouse habitat is improving in the summer and fall use pastures. At the very least, continuing a grazing scheme that has caused only 1 of 10 sage-grouse late-brood rearing areas to be in proper functioning condition is hardly a "proven success[] in improving sage-grouse habitat." Resp. Br. at 47.

[10] BLM also implies that it instituted a rest-rotation system in all spring pastures for the first time, which is also false. Resp. Br. at 46 (stating that "BLM adjusted the grazing schedule to accommodate sage-grouse nesting. Instead of the prior, longer spring and early summer grazing season with rotations through several pastures, BLM required a shorter season and a rest-rotation system on all spring pastures"). BLM's earlier grazing scheme included the same rest-rotation system through the spring pastures, and, yet, BLM found no enhancement of sage-grouse habitat in these areas. AR 26674-75. *See also* AR 26456 (Silver City determination); AR 26437 (Diamond Basin determination).

BLM also fails to support its claim that building fences within key sage-grouse habitat will somehow protect and enhance sage-grouse populations and habitat, for all the reasons discussed previously. *See supra.*

BLM similarly misses the mark when it claims that its final grazing decision on the Rockville allotment will "protect and enhance" sage-grouse populations and habitat. Resp. Br. at 48-50. More specifically, BLM's assertion that its "incorporation of rest treatments" will improve sage-grouse conditions is ridiculous, especially since the final decision **reduces** the amount of rest on many of these pastures from once every four years to once every seven years. *See* SOF ¶ 37, *citing* AR 23517 (showing rest once every four years on pastures 1-4); 23772 (showing rest once every seven years on pastures 1-6). And, although BLM's grazing decision provides rest once every seven years in pasture 6, this rest cannot off-set the fact that BLM is maintaining the same grazing season-of-use that caused marginal sage-grouse breeding and late brood-rearing habitat in this pasture. AR 23467-68. *See also* SOF ¶ 46.

Like in the Silver City/Diamond Basin discussion above, BLM again inaccurately claims that its decisions decrease AUMs in the allotment. Resp. Br. at 49-50. The facts here show that BLM has increased grazing on the Rockville allotment by nearly 20% over average actual use (i.e., from 1,914 AUMs to 2,288 AUMs). SOF ¶ 44. Of course, because BLM never even admits that it is, in fact, increasing grazing on the Rockville allotment, it never examined the impacts of this increase on sage-grouse habitat, and certainly never determined that this increase will "protect and enhance" sage-grouse habitat and populations.

IV. BLM VIOLATED THE FUNDAMENTALS OF RANGELAND HEALTH.

BLM's ignores the plain language of its grazing decisions and NEPA analysis when it claims that it did not rely on the unenforceable guidelines in meeting its obligations under the

Fundamentals of Rangeland Health. Resp. Br. at 29-30. BLM also miscasts Western Watersheds' argument regarding BLM's grazing increases, as Western Watersheds does not argue that BLM was required to reduce grazing on these allotments to make "significant progress" under the Fundamentals. *Id.* at 33-35. Rather, Western Watersheds argues that BLM's decision is arbitrary and capricious because BLM predicated its finding of "significant progress" on a counter-factual assertion that the decision reduces grazing.

A. BLM Relied On Voluntary Measures to Make Significant Progress.

BLM does not dispute that its new grazing decisions replace mandatory terms and conditions governing livestock grazing with unenforceable, voluntary Management Guidelines or other voluntary criteria.[11] Resp. Br. at 29-30. *See also* Opening Br. at 43. Instead, BLM claims that it did not rely on these guidelines to make significant progress under the Fundamentals. *Id.* However, this litigation position is inconsistent with the plain terms of the grazing decisions and NEPA analysis.

For example, in its EA on the Rockville allotment, BLM explicitly claimed that the "rest rotation grazing schedule, AUM reduction, and adherence to Annual Grazing Use Indicators, would result in making significant progress towards meeting" the Fundamentals of Rangeland Health. AR 23781.[12] BLM confirmed this conclusion in the final grazing decisions, too, finding that "*significant* progress towards meeting [FRH] Standards will occur," based on the "identified

[11] Public Lands Council and Simplot fail to cite any record evidence supporting their claim that these management guidelines or annual indicators "are mandatory." PLC Resp. Br. at 19; Simplot Resp. Br. at 19. Even BLM does not share this view. AR 24971, 24997 (BLM disputing permittee's claim that these indicators are mandatory, and stating "[t]he proposed decision neither states that Annual Grazing Use Indicators are "mandatory" or 'other terms and conditions'").

[12] BLM is thus mistaken when it claims that "WWP can point to nothing in the administrative record demonstrating that BLM believed that significant progress would not be made towards meeting the Standards without strict compliance with the annual indicators." Resp. Br. at 32.

Grazing Management Plan; AUM reductions; and Annual Grazing Use Indicators found in the decision." AR 24997, 24999-5000. *See also* AR 24974 (stating that "[a]dherence with these indicators along with other required management actions will ensure progress towards meeting Standards for Rangeland Health and RMP Objectives occurs").

BLM reached a similar conclusion in the Silver City and Diamond Basin EA, where BLM concluded that "[a]dherence to these [management] guidelines and the prescribed grazing management program would assist in making significant progress toward meeting the Standards for Rangeland Health and meeting land use plan objectives." AR 26686 (EA), 26869 (final decision). BLM specifically concluded that implementing the grazing scheme, range developments, terms and conditions and the "Management Guidelines will improve the upland and riparian resources in the Silver City allotment where currently the Assessment and respective Determinations have identified that current livestock grazing practices are significant factors." AR 26872, 26896 (final decisions).

BLM articulates the import of these voluntary measures slightly differently in the Battle Creek and East Castle Creek decisions, but likewise relies on voluntary measures to ensure "significant progress" is made in improving rangeland conditions. For example, in the East Castle Creek decision BLM states that the "Annual Indicator Criteria, along with other required management practices will result in a reasonable expectation that long term desired conditions will be achieved." AR 11288. *See also* AR 3359-60 (Battle Creek decision).

BLM's argument that these voluntary measures are simply "thresholds" to indicate whether BLM is making significant progress – and not mechanisms to make significant progress – misses the mark. Resp. Br. at 30. This interpretation is inconsistent with BLM's own language quoted above, and, moreover, BLM never explains how these measures can act as

thresholds for compliance with the Fundamentals, especially since the permittees are not even required to comply with these measures.

BLM also fails to adequately distinguish the *Nickel Creek* case, where this Court held that grazing permits must include mandatory terms and conditions needed to make "significant progress" under the Fundamentals.[13] *Western Watersheds Project v. U.S. Dep't of the Interior*, No. 08-0506-E-BLW, 2009 WL 5218020 (D. Idaho Dec. 30, 2009). In *Nickel Creek*, the Court required utilization limits and other criteria to be enforceable terms and conditions because BLM relied on these limits as one of its "two key strategies" in making significant progress under the Fundamentals. *Id* at 2.[14]

This is the identical situation here, as BLM's Management Guidelines or Annual Use Indicators are one of the "key strategies" relied upon by BLM in concluding that the decisions would make significant progress under the Fundamentals. As discussed above, on the Rockville

[13] Simplot fails to adequately distinguish *Nickel Creek* too, basing its analysis on a misreading of the decision supported by two cherry-picked quotations used out-of-context. Simplot Resp. Br. at 19 (claiming that "[i]n *Nickel Creek*, this Court concluded that the 'grazing management program' was 'discretionary, not mandatory' and, therefore, was arbitrary and capricious"). But the Court reversed the decision not because the "grazing management program" was discretionary, but rather because the "Management Guidelines" were discretionary. 2009 WL 5218020 at * 9 (noting that the final decision "sets out the rotation grazing schedule as a 'term and condition,' and commands that grazing 'will follow' the schedule. In contrast, the Final Decision sets forth the utilization limitations under a separate heading labeled 'Management Guidelines,' and merely suggests that actually utilization 'should not exceed' the target percentages"); *id.* at 15 (reversing decision because its "failure to recognize that the Management Guidelines are voluntary, in violation of the BLM's regulations that require them to be mandatory").

[14] Note that the Court found that BLM relied on "two key strategies" in making significant progress, even though BLM argued – like here – that is was relying on far more than the grazing scheme and management guidelines to meet its obligations under the Fundamentals. *See, e.g.*, *Nickel Creek*, Case No. 08-0506-E-BLM, Docket No. 21-3, ¶ 39 (BLM's Statement of Material Facts in Support of Motion for Summary Judgment) (arguing that BLM was relying on a series of management modifications to make significant progress, including "implementing rotations, grazing periods, stocking reductions, range improvements, periodic critical growing season rest for upland forage plants, important rest during the summer season periodically for riparian plant health, changes in pasture configuration, and water developments").

allotment BLM concluded that the "rest rotation grazing schedule, AUM reduction, and adherence to Annual Grazing Use Indicators, would result in making significant progress towards meeting" the Fundamentals of Rangeland Health. AR 23781. *See also* AR 24997, 24999-5000; 24974. The same is true on the Silver City/Diamond Basin allotments, where – like in *Nickel Creek* – BLM adopted "two key strategies" to make significant progress, including "[a]dherence to these [management] guidelines and the prescribed grazing management program." AR 26686 (EA), 26869 (final decision). And this analysis applies equally to the East Castle Creek and Battle Creek decisions, which are similarly predicated on compliance with the guidelines as one of the "key strategies" to ensure compliance. AR 11288, 3359-60.

Thus, in both cases, BLM was relying on the unenforceable management guidelines to support its "significant progress" determination, and this Court should follow its analysis in *Nickel Creek* and hold that BLM violated the Fundamentals.

B. BLM's Claims of AUM Reductions Are Illusory.

In its opening brief, Western Watersheds demonstrated that BLM's grazing decisions are arbitrary and capricious because they rely on the counter-factual claim that BLM is reducing AUMs on these allotments. Opening Br. at 44-48. In response, BLM does not dispute that its decisions increase grazing over average actual use. Resp. Br. at 33-35. Instead, BLM recasts Western Watersheds' argument as seeking to "impose its preferred mechanism for how significant progress should be made" – i.e., a mandatory reduction in livestock. *Id.* at 33.

This argument misstates Western Watersheds' argument. Western Watersheds is **not** arguing that, as a matter of law, BLM was required to reduce livestock on these allotments. Instead, Western Watersheds maintains that BLM's grazing decisions are unlawful because

BLM's explanation for its decisions runs counter to the evidence in the record. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

BLM is equally mistaken when it claims that the Court should ignore actual grazing levels on these allotments, and, instead, compare the grazing levels in its grazing decisions against theoretical levels of grazing allowed under prior permits. Resp. Br. at 34-35. BLM ignores the fact that it is the past actual grazing levels – and not the theoretical, permitted grazing levels – that *actually caused* the depauperate conditions on these allotments. *See* AR 4210 (Battle Creek determination)(violations of Rangeland Health Standards 2, 3, 7, and 8); AR 13823-84 (East Castle Creek determination)(violations of Rangeland Health Standards 1, 2, 3, 4, 7, and 8); AR 23531-43 (Rockville determination)(violations of Rangeland Health Standards 1, 5 and 8); AR 26440-59 (Silver City determination)(violations of Rangeland Health Standards 1, 2, 3, 4, 7 and 8); AR 26426-39 (Diamond Basin determination)(violations of Rangeland Health Standards 1, 4, and 5).

Because it is the actual use levels that have led to these violations of standards, it is unsupported for BLM to claim that a reduction in theoretical grazing levels will make significant progress, especially when the newly authorized levels allow vast increases over past actual use.

V. BLM AND INTERVENORS' REMAINING ARGUMENTS ARE MERITLESS.

A. The Declaration of Kenneth Cole is Properly Before the Court.

This Court should deny BLM's motion to strike the Declaration of Kenneth Cole, as this declaration relies on BLM's own data and publicly available data from the Idaho Department of Fish and Game, and was submitted to assist this Court in understanding Western Watersheds' claims for relief. Moreover, BLM makes no attempt to show how these maps prejudice it in any way, nor does BLM challenge the accuracy of these exhibits. In sum, the Cole declaration and

exhibits are properly considered pursuant to exceptions to the administrative record rule, as well as demonstrative evidence summarizing voluminous information.

There are several exceptions to the general rule that review is limited to the agency's administrative record, including "when supplementing the record is necessary to explain technical terms or complex subject matter." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (quotation omitted). Cole's declaration and exhibits fit within this exception, as the maps visually present dozens of allotments' boundaries, dozens of dates on which each allotment decision was issued or is projected to be issued, and sage-grouse habitat data as mapped by the Idaho Department of Fish and Game.

In an analogous case, this Court permitted the consideration of similar maps and calculations under an extra-record exception, where "[t]he Forest Service does not quarrel with the accuracy" of the maps and calculations, and "they were calculated using the Forest Service's own GIS data." *Western Watersheds Project v. U.S. Forest Serv.*, No. CV-05-189-E-BLW, 2006 WL 292010, at *4 (D. Idaho Feb. 7, 2006) (noting "[t]his is not information that was unavailable to the agency, or that arose only after the agency made its decisions-it is the agency's own data, relied upon by the agency in making the decisions under review here.") (*citing Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir.1996)).

The maps additionally fall under the extra-record exception regarding materials "necessary to determine whether the agency has considered all relevant factors and has explained its decision." *Lands Council*, 395 F.3d at 1030. One of Western Watersheds' primary claims here is that BLM failed to consider the cumulative impacts of authorizing grazing on nearby allotments in the region also used by sage-grouse. The maps illustrate the geographic proximity of those allotments, a consideration that was missing from BLM's analysis. The Ninth Circuit

has endorsed the use of extra-record materials in similar circumstances. *National Audubon Society v. U.S. Forest Serv.*, 46 F.3d 1437, 1447–48 (9th Cir. 1993) (approving supplemental information where the plaintiff alleges 'that an EIS has neglected to mention a serious environmental consequence . . . or otherwise swept stubborn problems or serious criticism under the rug.'"), *quoting Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir.1988). Here, Western Watersheds relies on the Cole declaration and maps to demonstrate that BLM never considered the cumulative impacts of its grazing decisions in the Owyhee and Bruneau Field Offices on Greater sage-grouse.

Alternatively, the maps may simply be considered as demonstrative exhibits, and need not be admitted into the record. Demonstrative exhibits are permitted in APA cases. *See Ctr. for Biological Diversity v. Badgley*, No. CIV. 99-287-FR, 2000 WL 555333, *4 (D. Or. May 4, 2000) (permitting a declaration "because it does not offer an opinion or new evidence, and it may assist the court and the parties as a demonstrative aid."); *Miccosukee Tribe of Indians v. United States*, No. 04-21448-CIV, 2008 WL 2967654, *3 n.4 (S.D. Fla. July 29, 2008) (allowing exhibits for demonstrative purposes).

B. BLM's Laches Defense is Meritless.

BLM's attempt to shield from judicial review its final grazing decisions on the Silver City and Diamond Basin allotments fails because Western Watersheds Project timely filed this litigation, and BLM cannot demonstrate any prejudice.[15]

[15] Western Watersheds objects to the Court's consideration of this argument, as BLM's invocation of this defense is untimely. Laches is an affirmative defense that should be pleaded in response to a complaint as required under Fed. R. Civ. P. 8(c). Although the Ninth Circuit has "liberalized" the pleading requirements under Rule 8(c), an affirmative defense may be raised for the first time on summary judgment only if the defendant proves that "the delay does not prejudice the plaintiff." *Magan v. Commonwealth of the Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997). BLM has failed to demonstrate that its nearly three-year delay in

"Laches is strongly disfavored in environmental cases," in part to "avoid defeat of Congress' environmental policy," and because "the plaintiff will not be the only victim of possible environmental damage." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 862 (9th Cir. 2005); *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980). Moreover, there is a "strong presumption" that laches is inapplicable when a plaintiff files suit within the appropriate statute of limitations period. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836-37 (9th Cir. 2002), *citing Shouse v. Pierce County*, 559 F.2d 1142, 1147 (9th Cir. 1977) ("It is extremely rare for laches to be effectively invoked when a plaintiff has filed his action before limitation in an analogous action at law has run."). To overcome this presumption, defendants must show that "any part of the claimed wrongful conduct occurred beyond the limitations period." *Jarrow*, 304 F.3d at 837.

There is no question that Western Watersheds timely filed this action, and BLM does not argue that any part of the decisions occurred beyond the applicable statute of limitations period. Thus, BLM fails to overcome the "strong presumption" that laches is inapplicable. *Jarrow*, 304 F.3d at 836-37.

BLM's laches defense fails on its merits, too. Barring a case under this theory requires "[t]he district court [to] find (a) lack of diligence by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense." *Bowers*, 632 F.2d at 779

BLM cannot establish that WWP lacked diligence here. First, although BLM repeatedly claims that the Diamond Basin and Silver City grazing decisions were issued in January 2004, this date is neither accurate nor operative. The record shows here that Western Watersheds appealed the final grazing decision, and this administrative appeal was not resolved until

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invoking this affirmative defense has not prejudiced Western Watersheds here, and, thus, BLM has failed to shoulder its burden required to invoke laches.

September 13, 2006 when the Office of Hearings and Appeals dismissed Western Watersheds' appeal. *See* Exh. A (order of dismissal) (attached hereto). Accordingly, there was just over two years between when the administrative appeal was dismissed and when Western Watersheds filed suit in this case, and BLM fails to explain how the passage of two years shows any lack of diligence.

Indeed, the Ninth Circuit has found a lack of diligence in only highly unusual circumstances, like when a plaintiff "purposefully shunned" any public involvement, asked to be removed from an agency's mailing list, or completely dropped all communications for over four years prior to filing suit. *See, e.g., Apache Survival Coalition v. United States*, 21 F.3d 895 at 909, 907 (9th Cir. 1994); *The Save the Peaks Coalition v. U.S. Forest Serv.*, No. CV 09-8163-PCT-MHM, 2010 WL 4961417, at *16 (D. Ariz. Dec. 1, 2010). BLM has failed to prove that Western Watersheds took any similar action, so its claim of lack of diligence must fail.[16]

BLM has also failed to demonstrate how requiring a comprehensive NEPA analysis will cause it any "undue prejudice." *Apache Survival*, 21 F.3d at 912. Indeed, the fact that BLM has admitted that it needs to undertake a new NEPA process prior to issuing a new grazing permit in 2014 undermines its argument here, as BLM can simply combine its already planned NEPA analyses with any more comprehensive analysis (if ordered by this Court). Resp. Br. at 51.

[16] BLM also misconstrues the "diligence" factor in arguing that Western Watersheds' other litigation supports a lack of diligence. Courts have found a lack of diligence when plaintiff refused to participate in prior litigation on *the same action* now under review, and not, as BLM implies, when plaintiff brought a host of other unrelated litigation. For example, in *The Save the Peaks Coalition*, the court found laches barred plaintiffs' litigation where "Plaintiffs sat by for years while the lawsuit challenging the [same] Forest Service decision on similar bases was initiated and litigated by the Navajo Nation and other plaintiffs." 2010 WL 4961417, at *16. *See also Apache Survival Coalition v. United States*, 118 F.3d 663 (9th Cir. 1997) (laches barred suit where plaintiffs "wait[ed] to bring suit until the challenges launched by other parties have failed."). Thus, Western Watersheds' litigation on *other* allotments has no relevance to this analysis.

BLM also errs in arguing that its completion of some fencing projects also shows undue prejudice. *Id.* The Ninth Circuit cases that have found prejudice in the laches context have concerned major construction projects. For example, In *The Save the Peaks Coalition*, a major ski area improvement project was almost complete. 2010 WL 4961417, at *17. In *Apache Survival*, construction of a series of telescopes was 35% complete, over $4 million had been expended, and further delays threatened the collapse of an international consortium. 21 F.3d at 912–13. BLM has failed to provide any record evidence demonstrating similar outlays of federal funds, and a placing a few miles of barbed-wire fences on the public lands hardly compares with constructing a ski area or $4 million telescopes.

For these reasons, this Court should deny BLM's efforts to invoke a laches defense to shield its Diamond Basin and Silver City grazing decisions from judicial review.[17]

C. Western Watersheds' Challenge to the East Castle Creek Decisions Is Ripe.

BLM's efforts to shield from judicial review its East Castle Creek grazing decisions, EA and FONSI by claiming that these decisions are not ripe are similarly meritless, and should be denied. First, BLM does not dispute that its Environmental Assessment was issued on December 22, 2008, and its Finding of No Significant Impact was issued and signed on December 24, 2008, both before the First Amended Complaint was filed. AR 11915-71. *See also* First Amended Complaint (Docket No. 3)(filed on 1/23/09). In the First Amended Complaint, Western Watersheds specifically challenged the FONSI, which represents the "culmination" of the

[17] In a footnote, BLM argues that these decisions are moot because the fences and range projects have been constructed. Resp. Br. at 51 n. 17. The Ninth Circuit recently rejected this argument, however, and noted that effective relief can still be granted in the form of ceasing grazing, developing new mitigation tactics, and moving or removing the unlawful projects "so the land can repair itself." *Ore. Natural Desert Ass'n, et al. v. BLM*, No. 11-35143, 2011 WL 5357566 (9th Cir. Nov. 8, 2011), *citing Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1094 (9th Cir. 2003).

agency's decisionmaking process. *See City of Las Vegas, Nev. v. F.A.A.*, 2009 WL 1637076 , * 2 (9th Cir. June 12, 2009) (holding that FONSI is a final agency action under the APA); *Malama Makua v. Rumsfeld,* 136 F.Supp.2d 1155, 1162 (D. Hawaii 2001) ("issuance of the . . . FONSI marked the culmination of the Defendants' decisionmaking process"). Thus, Western Watersheds' NEPA challenges are properly before this Court.

Moreover, the Second and Third Amended Complaints were filed long after BLM issued its final grazing decisions on the East Castle Creek allotment, which is also the culmination of BLM's decisionmaking process for purposes of Western Watersheds' FLPMA and Fundamentals of Rangeland Health claims. *Compare* Docket No. 43 (Second Amended Complaint) (filed on 8/21/09) and Docket No. 118 (Third Amended Complaint) (filed on April 15, 2011); *with* AR 11277-416 (final grazing decisions) (issued on 2/20/09). Again, the Second and Third Amended Complaints specifically mention the East Castle Creek allotment, as well as the challenged grazing decision, environmental assessment and Finding of No Significant Impact. Docket No. 43 at ¶ 73(b); Docket No. 118 at ¶ 70(b).

BLM similarly errs when it argues that its final grazing decisions are not ripe for review until after the full administrative process has finished. Resp. Br. at 53-54. BLM cites no authority for this proposition, and this Court has a long history of reviewing BLM grazing decisions that were challenged before the conclusion of the Department of Interior's administrative proceeding, which can often take years. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 827 (9th Cir. 2002) (noting that Department of Interior's administrative appeals can "languish for years without decision").

BLM is also wrong in arguing this Court lacks jurisdiction because Western Watersheds did not exhaust its administrative remedies. Resp. Br. at 54-55. In *Hahn*, the Ninth Circuit held

a party is not required to exhaust its administrative remedies prior to challenging a BLM grazing decision in federal court. 307 F.3d at 825-828.

D. Primary Jurisdiction Does Not Bar Western Watersheds' Challenge to the Battle Creek Decisions.

The doctrine of primary jurisdiction does not apply here because the Department of the Interior's Office of Hearings and Appeals has already ruled on the issues presented in Western Watersheds' appeal of the Battle Creek final grazing decision, and Western Watersheds would be unduly prejudiced by staying or dismissing this case because there is no administrative process to which this Court can refer this matter.[18]

As the Supreme Court has repeatedly noted, primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. The court then has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice. *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 222-223 (1966); *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247, 266-267 (1913); Jaffe, PRIMARY JURISDICTION, 77 Harv. L. Rev. 1037, 1055 (1964).

The Ninth Circuit considers four factors when determining whether to invoke the doctrine of primary jurisdiction: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." *Cal-Almond v. Dep't of Agric.*, 67 F.3d 874,

[18] Simplot raises this issue only in relation to the Battle Creek allotment, and the Department of the Interior –the agency which Simplot claims has primary jurisdiction here – does not share Simplot's view regarding the application of this doctrine to the facts of this case.

882 (9th Cir.1995); *Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399 (9th Cir. 1993). In both these cases, notably, the Ninth Circuit affirmed the lower courts' refusals to invoke primary jurisdiction solely on the basis of the fourth factor, that the agency had already used its expertise to resolve the issue before the court or that the remedies in the case did not require agency expertise.

These cases are squarely on point, since the Office of Hearings and Appeals has ruled on Western Watersheds' petition for stay, and, thus, the agency already has already employed its "initial decisionmaking responsibility" in ruling on this dispute. *Syntek Semiconductor Co., LTD v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). *See* AR 536-46 (order denying stay).

Moreover, there is no available administrative avenue in which Western Watersheds' can pursue its claims, and, thus, no process for this Court to refer the issue to for administrative resolution. As the Ninth Circuit noted in *Syntek*,

> "Referral" is the terms of are employed in primary jurisdiction cases. In practice, it means that a court either stays proceedings, or dismisses the case without prejudice, so that the parties may pursue their administrative remedies. There is no formal transfer mechanism between the courts and the agency; rather, upon invocation of the primary jurisdiction doctrine, the parties are responsible for initiating the appropriate proceedings before the agency.

307 F.3d 775, 782 n. 3. In this case, Western Watersheds has already pursued its administrative remedies, and dismissed its appeal after the agency denied its petition for stay. AR 508-511 (order dismissing administrative appeal). Because there is no existing administrative appeal of BLM's grazing decisions on the Battle Creek allotment – and the timeframe for appealing these decisions has long since run – the Office of Hearings and Appeals would lack jurisdiction upon a referral to entertain an administrative appeal of these final grazing decisions. 43 C.F.R. § 4.470 (requiring appellant to file administrative appeal within 30 days of final grazing decision); *id*. at § 4.471 (requiring petition for stay to be filed with administrative appeal). Thus, staying or

dismissing this case will unduly prejudice Western Watersheds since there is no alternative administrative procedure to raise these issues, and BLM will continue to implement the grazing decisions absent judicial oversight.

Finally, resolution of whether the Battle Creek final grazing decision complied with NEPA and FLPMA is not the sort of inquiry that supports invocation of primary jurisdiction, and this Court is well-informed on grazing and sage-grouse matters. *See, e.g., Syntek*, 307 F.3d at 775 (invoking primary jurisdiction to allow Register of Copyrights to determine whether decompiled object code qualifies for registration as a source code under Copyright Act); *Brown v. MCI Worldcom Network Services, Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002) (rejecting primary jurisdiction when issue did not present far-reaching question that required "expertise or uniformity in administration"); *Affiliates, Inc. v. Armstrong*, Case Nos. 09-cv-00149-BLW, 11-cv-00307-BLW, 2011 WL 3421407 (D. Idaho Aug. 4, 2011) (referring issue to Center for Medicare and Medicaid Services because "uniformity in administration is critical").

For these reasons, the Court should reject Simplot's motion to stay or dismiss these proceedings.

CONCLUSION

BLM violated its duties under NEPA, FLPMA and the Fundamentals of Rangeland Health when it issued the final grazing decisions on the Battle Creek, East Castle Creek, Rockville, Silver City and Diamond Basin allotments. The Court should therefore grant Western Watersheds' Motion for Partial Summary Judgment; deny BLM's, Simplot's and PLC's cross-motions; and vacate and remand the challenged decisions.

Dated: November 23, 2011

Respectfully submitted,

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, I have caused the foregoing PLAINTIFF'S COMBINED RESPONSE/REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT, AND IN OPPOSITION TO DEFENDANTS' AND DEFENDANT-INTERVENORS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT to be served upon counsel of record through the Court's electronic service system (ECF/CM):

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