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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,)	
)	
Plaintiff,)	Case No. 08-cv-435-BLW
vs.)	
)	
KEN SALAZAR, Secretary,)	PLAINTIFF’S OPENING MEMORANDUM
DEPARTMENT OF THE INTERIOR, an)	IN SUPPORT OF MOTION FOR PARTIAL
agency of the United States, and BUREAU)	SUMMARY JUDGMENT
OF LAND MANAGEMENT,)	
)	
Defendants.)	

Plaintiff Western Watersheds Project respectfully seeks summary judgment reversing and remanding Defendant Bureau of Land Management’s (BLM) final grazing decisions on the Battle Creek, East Castle Creek, Rockville, Diamond Basin, and Silver City allotments, because these decisions violate the National Environmental Policy Act (NEPA), the Federal Lands Policy and Management Act (FLPMA), the Fundamentals of Rangeland Health, and the governing land use plans.

BLM violated NEPA by refusing to take a comprehensive look at the direct, indirect and

cumulative impacts of its grazing decisions on the habitat and populations of Greater sage-grouse, an imperiled bird species which the U.S. Fish and Wildlife Service has determined warrant protection as “threatened” under the Endangered Species Act. Although the scientific evidence in the record demonstrates that sage-grouse is a wide-ranging species known to migrate more than 75 miles between seasonal ranges, BLM never considered the potentially significant cumulative impacts on sage-grouse populations and habitat of its grazing decisions together with BLM’s other grazing authorizations on nearby grazing allotments. Indeed, BLM eschewed any quantitative analysis of its past, present and reasonably foreseeable grazing authorizations on surrounding public lands; instead, BLM claimed – counterfactually – only that “the cumulative effect of past grazing management in the Bruneau and Owyhee Field Office has been to improve wildlife habitat,” and it “hoped” this improvement would continue. AR 3672. The Ninth Circuit has routinely reversed as arbitrary and capricious similar cumulative impact analysis. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) (rejecting general statements about possible effects and some risks)

Moreover, BLM’s efforts to tier its analysis to a nearly 30-year old Environmental Impact Statement does not cure the BLM’s lack of cumulative impact analysis, as the EIS’s general and conclusory analysis is likewise inadequate to provide the “hard look” NEPA requires. *Id.* at 997 (tiering to an EIS was insufficient to cure an EA’s shortcomings where the EIS contained only general statements about the cumulative impacts).

BLM also violated FLPMA by authorizing grazing in direct violation of the applicable land use plans. For example, the land use plan governing grazing on the Battle Creek and East Castle Creek allotments requires that BLM “[m]anage [sage-grouse] habitats to maintain or increase existing and potential populations,” and “[m]anage springs, seeps, meadows, and

adjacent upland areas as key wildlife habitats for [sage-grouse].” The record here shows that BLM is permitting grazing in key sage-grouse habitat during spring and summer on these allotments, which the scientific evidence shows is the most harmful time of the year for Greater sage-grouse. This court and others have not hesitated to reverse agency decisions that violate the governing land use plan. *Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1223 (D. Id. 2005); *Oregon Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1128 (9th Cir. 2007).

The record here also demonstrates that the grazing decisions violate the Fundamentals of Rangeland Health. As discussed in detail below, the grazing decisions at issue here shun any mandatory terms and conditions governing livestock grazing, and, instead, BLM adopted voluntary management guidelines to meet its requirements under the Fundamentals. This Court has recently rejected this approach. *See Western Watersheds Project v. U.S. Dep’t of the Interior*, No. 08-0506-E-BLW, 2009 WL 5218020 (D. Id. Dec. 30, 2009) (*Nickel Creek*).

For these and the additional reasons discussed below, this Court should grant Western Watersheds’ motion for partial summary judgment, and vacate and remand BLM’s final grazing decisions on the Battle Creek, East Castle Creek, Rockville, Diamond Basin, and Silver City allotments as violating NEPA and FLPMA.

FACTUAL BACKGROUND¹

Greater Sage-Grouse

The Greater sage-grouse (*Centrocercus urophasianus*) – first described by Meriwether Lewis near the confluence of the Marias and Missouri rivers in Montana in 1805 – is a unique species of grouse found only in sagebrush-dominated habitats of western North America. SOF ¶

¹ Pursuant to Local Rule 7.1, Western Watersheds files herewith a Separate Statement of Undisputed Material Facts (“SOF”), which sets out fully the facts underlying this motion with citations to the Administrative Record.

1. Greater sage-grouse were once widely distributed across the western U.S and Canada, numbering in the millions. *Id.*

Sage-grouse typically inhabit large, interconnected expanses of sagebrush habitat, and thus are characterized as a landscape-scale species. *Id.* at ¶ 2. Historically, the distribution of sage-grouse was closely tied to the distribution of the sagebrush biome, and Greater sage-grouse once occupied parts of 12 U.S. states and three Canadian provinces. *Id.* Sage-grouse are known to migrate between seasonal home ranges, with research indicating that sage-grouse can move more than 75 miles between seasonal habitats. *Id.* at ¶ 3.

The abundance and distribution of Greater sage-grouse have declined dramatically in North America. *Id.* at ¶ 4. The destruction, fragmentation, and degradation of sagebrush habitats over past decades – including through the effects of livestock grazing and grazing-related infrastructure, fire, vegetation treatments, energy and oil and gas development and associated infrastructure, and other factors – have caused substantial declines in Greater sage-grouse populations and range reduction of about 44% from their estimated historic range. *Id.* 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. *Id.* at ¶ 5.

Livestock grazing is known to be deleterious to sage-grouse populations and habitat in many direct, indirect, and cumulative ways. *Id.* at ¶ 6. Livestock grazing causes long-term changes in plant communities and reduces habitat components, such as biological soil crusts, which contribute to the health of sagebrush habitat. *Id.* Grazing also reduces the residual grass height and forbs needed for successful sage-grouse nesting and reproduction; while livestock also batter and break sagebrush plants that are essential for cover, winter feeding, and other sage-grouse needs. *Id.* Livestock also cause destruction of riparian habitats, essential for sage-grouse

survival and reproduction. *Id.* Livestock promote invasion of cheatgrass and other exotic weed species, thus contributing to fire frequency and severity, as noted above, which further reduces the extent and quality of sage-grouse habitats. *Id.* In addition, pipelines, fences, and water developments constructed to accommodate livestock production further fragment habitat and become source areas for the spread of weeds; while fences also cause direct mortality of sage-grouse through collisions. *Id.*

Great Basin Core Population of Greater Sage-Grouse

In 2004, leading scientific experts on Greater sage-grouse published the Conservation Assessment of Greater Sage-Grouse and Sagebrush Habitats. *Id.* at ¶ 8.² The Conservation Assessment identified the Great Basin Core population of Greater sage-grouse as one of the five largest remaining core sage-grouse populations across the entire range of the species. *Id.* The Great Basin Core population is itself comprised of seven subpopulations of sage-grouse, including the North-Central Nevada/Southeast Oregon/Southwest Idaho population, and the Northeast Nevada/South-Central Idaho/Northwest Utah population. *Id.* at ¶ 9.

Based on the movement patterns of Greater sage-grouse, birds within the North-Central Nevada/Southeast Oregon/Southwest Idaho subpopulation of the Great Basin Core population migrate within and between the public lands managed by BLM's Owyhee and Bruneau Field Offices in Idaho, and the Elko and Winnemucca districts in Nevada. *Id.* at ¶ 10. In fact, according to the Conservation Assessment, this population is "loosely connected" with the NE NV/S-Central ID/NW UT population, which is directly to the east. *Id.*

² The scientific analysis and conclusions in the 2004 Conservation Assessment have been further developed and confirmed by leading experts within the U.S. Fish and Wildlife Service, most recently with the Service's finding that Greater sage-grouse warrant listing as a "threatened" species under the Endangered Species Act. *See* 75 Fed. Reg. 13910 (March 23, 2010).

Sage-grouse in the Great Basin Core population have seen similar declines in population abundance as the larger Greater sage-grouse population. *Id.* at ¶ 11. For example, the Conservation Assessment concluded that every major metric in sage-grouse population abundance has decreased since 1965-69 in the Great Basin Core population, including (1) percent active leks, (2) average males per lek, (3) median males per lek, (4) average males per active lek, and (4) median males per active lek. *Id.* Moreover, population abundance of the Great Basin Core population has decreased significantly between 1964 and 2004. *Id.* These same population and abundance trends apply to the seven subpopulations as well, as identified in detail in the Conservation Assessment. *Id.*

Bruneau and Owyhee Field Offices

The Bruneau and Owyhee Field Offices (previously called the Bruneau and Owyhee Resource Areas) are located within Idaho's "ruggedly beautiful" Owyhee region, an area "[s]tartling in its ecological diversity, from arid sagebrush desert to lush juniper woodlands," where the rivers "have sculpted spectacular and wild canyonlands out of the Owyhee's volcanic rock formations." *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 821 (9th Cir. 2002).

The Bruneau Field Office is located in southwestern Idaho's Owyhee County, and it encompasses nearly 1.5 million acres of mostly public lands. SOF ¶ 12. The topography of the field office is gently rolling to mountainous, and the lands are dissected by several major stream and canyon systems. *Id.* The Bruneau Field Office includes a large diversity of landforms and vegetation types ranging from vast expanses of sagebrush covered plateaus to rugged mountains blanketed with juniper woodlands, and desert low sagebrush and native grass vegetation communities. *Id.*

The Owyhee Field Office is located immediately to the west of the Bruneau Field Office,

and encompasses nearly 1.8 million acres of mostly public lands in southwestern Idaho's Owyhee County. *Id.* at ¶ 13. The area is bounded on the west by Oregon; on the south by Nevada; on the north by the Snake River; and on the east by Castle Creek, Deep Creek, the Owyhee River and the Duck Valley Indian Reservation. *Id.* These public lands contain the northern extent of the Owyhee Mountain Range and lies within the Columbia Plateau, which is an elevated plateau with mountains separated by canyons draining to the Pacific Ocean via the Snake and Columbia Rivers. *Id.* The public lands in the Owyhee Field Office contain the same diversity of vegetation types and landforms as the Bruneau Field Office, and fall largely within the sage-steppe ecosystem frequently called the "Sagebrush Sea." *Id.*

The public lands administered by the Bruneau and Owyhee Field Office are home to numerous BLM-designated sensitive species, including Greater sage-grouse, pygmy rabbit, California bighorn sheep, redband trout, and Columbia spotted frog. SOF ¶ 15. Other wildlife in the area include elk, pronghorn antelope, mule deer, black-collared lizard, bald eagle, northern goshawk, mountain quail, prairie falcon, golden eagle, ferruginous hawk, great horned owl, red-tailed hawk, Swainson's hawk, loggerhead shrike, Brewer's sparrow, and scores of species of nongame birds and mammals, many of which fulfill an important ecological niche as prey species for avian and mammalian predators. *Id.*

The Bruneau Field Office historically offered abundant suitable habitat for sage-grouse breeding, nesting, rearing, overwintering and other essential biological functions; and sage-grouse were once abundant in the area year-round. *Id.* at ¶ 16. The Bruneau Field Office remains a sage-grouse stronghold, as it contains the largest unburned, intact sagebrush habitat remaining anywhere in Idaho. *Id.* at ¶ 17. This area comprises over 1,525,000 acres of key sage-grouse habitat – as determined by BLM and the Idaho Department of Fish and Game – and

contains the largest area with a high density of leks in Idaho. *Id.* Although BLM and Idaho Department of Fish and Game lack consistent lek data within the Bruneau Field Office, there is no doubt that sage-grouse population levels in the Bruneau – as well as across the N-Central NV/SE OR/SW ID subpopulation of Great Basin Core sage-grouse – have declined significantly over the recent past. *Id.* at ¶ 18.

Similarly, the Owyhee Field Office contains vast areas of sage-grouse habitat, much of which is considered “key” sage-grouse habitat. *Id.* at ¶ 19. Both the Bruneau and Owyhee Field Offices fall within the so-called Owyhee Sage-Grouse Planning Area, under the Idaho Conservation Plan. *Id.* at ¶ 20. This area is approximately 2.6 million acres in size, and the BLM administers – through the Owyhee and Bruneau Field Offices – approximately 83% of the sage-grouse habitat within the planning area. *Id.* In 2006, nearly three quarters of the entire planning area was considered “key sage-grouse habitat.” *Id.*

Bruneau Grazing EIS and Management Framework Plan

In 1982, BLM issued the Bruneau-Kuna Grazing Final Environmental Impact Statement, in which BLM proposed to implement “an improved rangeland management program” on the public lands within the Bruneau. *Id.* at ¶ 21. The purpose of BLM’s proposal was to “improve the soil, water, and vegetation resources within the area.” *Id.* Improvement was necessary – according to BLM – because only “trace” acreage of public lands within the Bruneau was in excellent condition and 14% was in good condition. *Id.* Fully 73 percent of the public lands were in poor or fair condition. *Id.*

Under the proposed action, BLM claimed that 70% of the area would improve in range condition, and BLM proposed to “[i]mprove 939,000 acres of sage grouse habitat to increase nesting, brood rearing and wintering areas.” *Id.* at ¶ 22. Overall, BLM predicted that “sage

grouse population levels would increase.” *Id.* More specifically, BLM proposed to improve sage-grouse late brood-rearing habitat – i.e., upland seeps, springs and wet meadows – by establishing rest or deferred grazing systems on these upland areas. *Id.* at ¶ 23. Deferring grazing until after seed ripe in the uplands would also benefit the native vegetation communities, according to BLM, because allowing native plants to reach seed ripe is “necessary to improve maintenance of desired plant species, vigor and productivity.” *Id.*

In 1983, BLM issued its Final Bruneau Management Framework Plan (Bruneau MFP or MFP), which remains the land use plan in effect today. *Id.* at ¶ 24. The Bruneau MFP adopted the proposed action identified in the Bruneau-Kuna Grazing EIS, and it requires that BLM manage the public lands within the Bruneau Field Office to rectify the degraded resource conditions. *Id.* Under the MFP, BLM is required to manage the public lands to comply with a number of wildlife-specific objectives and management requirements, including: improve sage-grouse nesting, brood rearing and winter habitats; adjust management of livestock or exclude grazing on sage grouse brood-rearing areas to improve habitat; manage sensitive species habitats to “maintain or increase” existing and potential populations; manage upland game habitats – including habitat for the Greater sage-grouse – to increase populations; manage springs, seeps and meadows and adjacent upland areas as key wildlife habitat for Greater sage-grouse and other upland game species, and exclude livestock from these areas if conditions do not improve; and adjust livestock season of use on spring and summer range to meet the minimum growth needs of preferred native vegetation, including by deferring grazing until after seed ripe. *Id.* at ¶ 25.

On July 16, 2001, the BLM published in the Federal Register a notice of intent to prepare an environmental impact statement and a new resource management plan for the Bruneau Field Office. 66 Fed. Reg. 41263 (August 7, 2001). However, BLM has failed to issue a draft or final

EIS or RMP in the intervening 10 years, and the Bruneau MFP remains in place. SOF ¶ 24.

Owyhee Resource Management Plan

As a result of earlier litigation brought by Western Watersheds Project, BLM issued a new Owyhee Resource Management Plan (Owyhee RMP or RMP) and accompanying Final Environmental Impact Statement (EIS) in 1999. *Id.* at ¶ 26. According to the Owyhee RMP and EIS, the condition of native rangelands within the Owyhee Field Office reflected serious degradation from human activities, especially livestock grazing – i.e., less than 1% of the public lands were in excellent condition, and only 11% were in good condition. *Id.* The remaining 88% were either in poor (43%) or fair condition (43%), or had recently been treated due to fire or other disturbance (3%). *Id.*

In adopting the Owyhee RMP, BLM committed itself to managing the public lands within the Owyhee Resource Area to rectify these degraded conditions. *Id.* at ¶ 27. Indeed, 9 of 11 major components of the Owyhee RMP focused on improving degraded conditions to benefit the public lands, waters, wildlife populations, habitat and/or recreation. *Id.*

The Owyhee RMP further “emphasized improvement in ecological conditions and protection of most of the sensitive resources,” *Id.* at ¶ 28. Under the Owyhee RMP, BLM must prioritize management of the public lands for “special status” species habitat above other uses. *Id.* at ¶ 29. Prioritizing sensitive species habitat means that BLM is required to “protect and enhance habitat” for special status species, and “[m]anage special status species and habitat to increase or maintain populations at levels where their existence is no longer threatened and there is no need for listing under the Endangered Species Act.” *Id.* The Owyhee RMP also specifically requires that BLM “protect and enhance key sage grouse habitats and populations.” *Id.* at ¶ 30.

The Final Grazing Decisions at Issue in this Motion³

Bruneau Field Office

BLM has issued a series of new grazing authorizations in the Bruneau Field Office in recent years, including several new grazing permits issued under a grazing rider, as well as grazing decisions on the Battle Creek and East Castle Creek allotments. SOF ¶ 103. *See also* Declaration of Kenneth Cole Decl., Exhs. 1, 4 (maps of Bruneau allotments).

Battle Creek Allotment

The Battle Creek allotment is located southeast of Grand View in Owyhee County, Idaho, and includes 145,085 acres of BLM-administered public lands. SOF ¶ 104. The Battle Creek allotment is home to a wide array of native wildlife species, including Greater sage-grouse. *Id.* at ¶ 107. Fully 64,000 acres of lands within the Battle Creek allotment are considered key sage-grouse habitat, and the higher elevation areas of the Battle Creek allotment are occupied sage-grouse habitat, and are used for winter, nesting, breeding, and late brood-rearing habitat. *Id.* at ¶ 108. Currently, the lower elevation pastures in the Battle Creek allotment no longer provide suitable sage-grouse habitat – though they once did – because they lack adequate grasses and cover, are dominated by cheatgrass, or have burned. *Id.* at ¶ 109. BLM wildlife biologists have identified 7 leks within the Battle Creek allotment. *Id.* at ¶ 108.

³ In this first stage of summary judgment briefing, the parties agreed to litigate BLM's grazing decisions on the Battle Creek and East Castle Creek allotments in the Bruneau Field Office, and the Rockville, Silver City and Diamond Basin, and Pleasant Valley and Pleasant Valley FFR allotments in the Owyhee Field Office. *See* Docket Nos. 107 & 109. Western Watersheds hereby dismisses its challenge to the Pleasant Valley and Pleasant Valley FFR decisions, however. *See* Third Amended Complaint, ¶ 82(d). Prior to reviewing the administrative record in this matter, the undersigned counsel was unaware that Western Watersheds' prior counsel informally expressed his non-opposition to the settlement agreement between BLM and the permittees on these allotments, which is now subject to this litigation. *See id.* *See also* AR 22316-18. Although Western Watersheds is in no way bound by these informal discussions of its counsel, Western Watersheds hereby dismisses its claims challenging the Pleasant Valley and Pleasant Valley FFR stipulated settlement agreement.

Unfortunately, conditions within the Battle Creek allotments are degraded. *Id.* at ¶¶ 111-118. In 2007, BLM issued an allotment evaluation and determination for this allotment, which documented that Standards 2, 3, 7, and 8 and Guidelines 1, 3, 5, 6–9, 10, 12, and 17 were not met in the Battle Creek allotment due to current grazing. *Id.* at ¶ 118. In January 2008, BLM prepared an EA and FONSI to reauthorize grazing on the Battle Creek allotment, as well as construct multiple new range projects across the allotment. *Id.* at ¶ 119.

Despite these violations of the Fundamentals and Standards and Guides, BLM refused to examine any alternative that reduced grazing in the Battle Creek allotment. *Id.* at ¶ 120. Each alternative maintained the same numbers of cattle previously permitted, as well as the 40-50% utilization guideline and the same season of use. *Id.* In its EA, BLM admitted that resources conditions would not make significant progress under its proposed alternative. *Id.* at ¶ 122. Rather, BLM admitted that degradation would continue in some areas, only “slight progress” would occur in some areas, and static conditions would pervade in others. *Id.* at ¶¶ 122-23.

In the EA, BLM also failed to take a look at the cumulative impacts of its decision, and failed to even identify and discuss other past, present and reasonably foreseeable actions in the surrounding areas. *Id.* at ¶ 124. On February 20, 2008, BLM issued its final grazing decisions on the Battle Creek allotment, which adopted the proposed action discussed in the EA. *Id.* at ¶¶ 126-27.

East Castle Creek Allotment

The East Castle Creek allotment is located southwest of Grand View in Owyhee County, Idaho, immediately adjacent to the Battle Creek allotment. SOF ¶ 128. *See also* Cole Decl., Exhs. 1, 4. The allotment contains 96,578 acres of BLM-administered public lands, as well as over 16,500 acres of state and private lands, and it runs about 34 miles southwest into the

Owyhee Mountains. SOF ¶ 128. According to the Idaho Department of Fish and Game, the East Castle Creek allotment contains over 40,000 acres of key sage-grouse habitat, with the higher elevation pastures providing nesting habitat, the lower pastures providing critical late brood-rearing habitat, and the central portion of the allotment containing winter habitat for Greater sage-grouse. *Id.* at ¶¶ 130-32.

On February 1, 2008, BLM issued an allotment assessment for the East Castle Creek allotment, which reviewed range and wildlife data, and described the conditions and trends across the allotment. *Id.* at ¶¶ 136-39. BLM found degraded upland conditions across the allotment, including in the pastures used for winter, early spring, spring and summer grazing. *Id.* at ¶ 137. These same degraded conditions were found in streams and riparian areas, too, and BLM documented severe overgrazing of riparian areas. *Id.* at ¶ 138. BLM found similarly poor conditions in sage-grouse habitat, where fully 74% of all late brood-rearing habitat was found to be unsuitable or marginal, and BLM concluded that the trend was downward. *Id.* at ¶ 139. Even the suitable sites lacked forbs and grass when compared to reference sites, and bare ground was more than double expected levels in many areas. *Id.*

In May 2008, BLM issued its determination under the Fundamentals of Rangeland Health, concluding that grazing was causing violations of each and every applicable rangeland health standard, including standards for watersheds, riparian areas and wetlands, stream channel and floodplain, native plant communities, water quality and sensitive status species. *Id.* at ¶ 140. In its Determination, BLM concluded that the “[c]ause of the downward trend [in sage-grouse habitat] is heavy use by livestock, erosion and hoof-shearing of wet soils.” *Id.*

In December 2008, BLM issued an EA and FONSI for reissuing permits on the allotment. *Id.* at ¶ 141. BLM’s proposed action increased grazing by nine percent above average actual use

allotment-wide, including nearly 50% in the winter pastures and similar increases in spring and summer pastures, including within key sage-grouse habitat. *Id.* at ¶¶ 142-47. In its proposed alternative, BLM again removed existing terms and conditions limiting livestock grazing, and adopted “Annual Indicator Criteria” instead. *Id.* at ¶ 148. BLM failed to examine in detail the cumulative impacts of its proposed grazing scheme, together with other past, present and reasonable certain future actions, on Greater sage-grouse populations. *Id.* at ¶¶ 152-53.

In February 2009, BLM issued its final grazing decisions on the East Castle Creek allotment, which adopted BLM’s proposed grazing scheme identified in the EA. *Id.* at ¶ 155.

Owyhee Field Office

Since 2003, the Owyhee Field Office has reauthorized grazing on at least 38 allotments, including the Rockville, Silver City and Diamond Basin allotments. SOF ¶ 31. These allotments encompass several hundred thousand acres of public lands, including vast areas of key sage-grouse habitat. *Id.* See also Cole Decl., Exhs. 1-3 (maps of Owyhee allotments) (filed herewith).

Rockville Allotment

The Rockville Allotment is located on the Idaho-Oregon border about 18 miles south of Marsing, Idaho. SOF ¶ 32. The Rockville allotment encompasses almost 14,000 acres of mostly public land, and habitat for Greater sage-grouse is found throughout the allotment – including breeding habitat and early-brooding rearing habitats in the uplands, and some late brood-rearing habitat in the mesic areas in the north and central portions of the allotment. SOF ¶¶ 32-37. In 2004, BLM issued an allotment assessment and Fundamentals of Rangeland Health Determination on the Rockville allotment, which found indicators of soil erosion and loss of hydrologic function in each of the six pastures, and degraded conditions in Greater sage-grouse breeding and brood-rearing habitat, mostly documenting a lack of available native grasses and

forbs. *Id.* at ¶¶ 38-41. In its determination, BLM concluded that livestock grazing was causing violations of Standard 1 (Watersheds), 5 (Seedings) and 8 (Sensitive Species). *Id.*

In June 2008, BLM prepared an EA to reauthorize livestock grazing on the Rockville allotment. *Id.* at ¶¶ 43-51. In its EA/FONSI, BLM prepared a one-paragraph cumulative impact analysis looking at the impacts of livestock grazing on Greater sage-grouse, and concluded – without any analysis whatsoever – that the cumulative impacts of BLM’s decisions “are not expected to result in cumulatively significant impacts.” *Id.* at ¶¶ 52-53.

In August 2008, BLM issued its final grazing decisions on this allotment, which increased grazing by 20% over average actual use; reduced rest on several pastures from once every four years to once every seven years; and allowed grazing unchanged in some pastures, despite concluding that grazing was causing marginal sage-grouse habitat. *Id.* at ¶¶ 37, 45, 57. Moreover, BLM’s final decisions dispatched with mandatory terms and conditions governing grazing, and instead adopted so-called “Annual Grazing Use Indicators,” which BLM admitted later were neither “mandatory” nor “other terms and conditions” of the grazing permit. *Id.* at ¶¶ 48, 57.

Silver City and Diamond Basin Allotments

The Silver City and Diamond Basin allotments are located in northern Owyhee County, Idaho, and contain approximately 71,000 acres of mostly public land. SOF ¶ 60-61. These allotments contain key sage-grouse habitat, including nesting, breeding and late-brood rearing habitat, and other important resource values. *Id.* at ¶ 62-63.

In June 2003, BLM issued an allotment assessment on these allotments, which concluded that many of the pastures were in poor condition, with erosion in the uplands leading to extensive flow patterns and pedestalling of grasses, extensive bare ground, and a loss of the

perennial grass components. *Id.* at ¶ 73-80. BLM concluded that these conditions were degrading habitat for the Greater sage-grouse, because many pastures lacked tall perennial bunchgrasses and were dominated by cheatgrass. *Id.*

At this same time, BLM also issued determinations under the Fundamentals of Rangeland Health for these allotments, which concluded that livestock grazing was a significant factor in failing to achieve each and every applicable rangeland health standard on both allotments, including Standard 1 (Watersheds), Standard 2 (Riparian Areas and Wetlands), Standard 3 (Stream Channel/Floodplain), Standard 4 (Native Plant Communities), Standard 7 (Water Quality), and Standard 8 (Threatened and Endangered Plants and Animals) on the Silver City allotment, and Standards 1, 2, 4, 5 and 8 on the Diamond Basin allotment. *Id.* at ¶¶ 81-85.

In November 2003, BLM prepared an EA to re-authorize grazing on these allotments. *Id.* at ¶¶ 86-94. Under its preferred alternative, BLM proposed to combine the Silver City and Diamond Basin allotments, rename the pastures, continue largely the same spring grazing system with the same pastures, and increase grazing approximately 20% allotment-wide, within more severe increases in individual pastures. *Id.* This alternative also included a host of range developments, including fence construction, cattleguards, and other structures. *Id.* at ¶ 88.

In the EA's cumulative impacts section, BLM claimed – again without any analysis whatsoever – that the cumulative impacts of BLM's decisions “are not anticipated to result in cumulatively significant impacts.” *Id.* at ¶ 96.

In January 2004, BLM issued new final grazing decisions and FONSI's on these allotments, which called for an increase in grazing over average actual use, including a 76% and 54% increase in some critical spring-use pastures, and a 20% increase allotment-wide. *Id.* at ¶¶ 98-100, 91-93. Like the other allotments subject to this motion, BLM's final decision removed

mandatory terms and conditions governing grazing that were present on the prior permit, instead adopting voluntary “management guidelines.” *Id.* at ¶ 88.

Forthcoming Decisions in the Owyhee Field Office

In addition to reauthorizing grazing on these 38 allotments, in early 2009 BLM agreed to a schedule to finally prepare new environmental analyses and issue new final grazing decisions and grazing permits on fully 67 separate allotments in the Owyhee Field Office, including many allotments within the habitat for the Greater sage-grouse. SOF ¶ 101. These are the same permits and allotments that this Court reversed and remanded over 12 years ago, as part of earlier litigation over the Owyhee Field Office’s management of livestock grazing. *See Idaho Watersheds Project v. Hahn*, 97-cv-0519-S-BLW, Memorandum Decision and Order (March 31, 1999) (Docket No. 129). As the maps attached to the Cole Declaration further illustrate, these allotments are located across the Owyhee Field Office, and again include key habitat for the Great Basin Core population of sage-grouse. *See* Cole Decl., Exhs. 1-3. *See also* Idaho Conservation Plan at 3-29 (map of key sage-grouse habitat).

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

Summary judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Review of agency decision-making is governed by the judicial review provision of the Administrative Procedure Act, which requires a Court to hold unlawful and set aside an agency decision that is “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law,” or was adopted “without observance of procedure required by law.” 5 U.S.C. § 706(2).

A decision is arbitrary and capricious if the 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 Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A court’s inquiry must be “searching and careful,” and an agency must articulate a rational connection between the facts found and the conclusions made. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

II. BLM’S CUMULATIVE IMPACTS ANALYSES VIOLATED NEPA.

BLM violated NEPA by failing to adequately consider the potentially significant cumulative impacts of its grazing decisions and other foreseeable grazing decisions in and around the Bruneau and Owyhee Field Offices on habitat and populations of the Greater sage-grouse.

A. NEPA Requires A Comprehensive Cumulative Impacts Analysis.

NEPA requires agencies to prepare an Environmental Impact Statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). If there is a substantial question that a proposed action may be “significant,” then the agency is required to perform an EIS. *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (“plaintiffs need not demonstrate that significant effects will occur. A showing that there are substantial questions whether a project may have a significant effect on the environment is sufficient”). “Plaintiffs must show only the potential for cumulative impact” to require an EIS. *Te-Moak Tribe v. U.S. Dep’t of the Interior*, 608 F.3d 592, 605 (9th Cir. 2010).

To determine whether an EIS is necessary, an agency must consider ten “intensity” factors – including potentially significant cumulative impacts. 40 C.F.R. § 1508.27(b). “A cumulatively significant impact is an impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1223 (D. Id. 2005) (internal quotations and ellipses omitted), quoting *Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002). See also 40 C.F.R. § 1508.7.

In considering cumulative impacts, this Court has noted that an agency must provide “some quantified or detailed information” because “[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Bennett*, 392 F.Supp.2d at 1223, citing *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2005). See also *Western Watersheds Project v. Rosenkrance*, Case No. 09-CV-298-EJL, 2011 WL 39651 at *11-13 (D. Idaho January 5, 2011) (reversing cumulative impact analysis as arbitrary and capricious). This cumulative analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Bennett*, 392 F.Supp.2d at 1223.

B. BLM’s Cumulative Impacts Analyses on the Rockville, East Castle Creek, Diamond Basin, and Silver City Allotments Are Inadequate.

BLM failed to prepare an adequate cumulative impact analysis prior to authorizing livestock grazing on the Rockville, East Castle Creek, Diamond Basin and Silver City allotments. The record is undisputed that the Greater sage-grouse found in the Bruneau and Owyhee Field Offices are part of the same sage-grouse population – i.e., the Great Basin Core population. AR 9592 (Conservation Assessment); AR 9595, Fig. 6.37; AR 3616 (Battle Creek EA); AR 11814 (East Castle Creek EA). Indeed, BLM admits the public lands at issue here constitute “one of the two regions of the west that

are still considered sage-grouse strongholds” – i.e., the region that includes southwest Idaho, southeast Oregon, and northern Nevada. AR 3616, 11814. *See also* AR 9592 (this region’s sage-grouse are part of a N-Central NV/SE OR/SW ID subpopulation). Sage-grouse migrate between and among habitats in the Owyhee and Bruneau Field Offices, as well as the public lands administered by the Elko and Winnemucca Field Offices in central Nevada. Complaint, ¶¶ 47-48; Answer, ¶¶ 47-48.

Despite this connectivity between sage-grouse populations and habitat in the Owyhee, Bruneau and surrounding areas, BLM never examined the cumulative impacts of its grazing decisions on the Rockville, East Castle Creek, Diamond Basin, and Silver City allotments, together with other past, present and reasonably foreseeable grazing decisions on surrounding public lands, as NEPA requires.

For example, the Rockville allotment is located in the northern portion of the Owyhee Field Office immediately to the east of the Idaho/Oregon state boundary. AR 23528 (allotment assessment); AR 30902 (Owyhee RMP). In its EA, BLM limited its cumulative impact analysis to the three allotments immediately to the north of the allotment. AR 23794.⁴ BLM failed to provide any reasoned explanation why it was limiting its cumulative impact analysis to this area. *Id.*

Indeed, in its cumulative impact analysis, BLM never acknowledged that it had recently issued new grazing permits on 37 other allotments in the Owyhee Field Office – including several allotments immediately adjacent to the Rockville allotment. *See* Complaint, ¶¶ 82(a)-(k); Answer, ¶¶ 82(a)-(k). *See also* Cole Decl., Exh. 1-3. As the Cole maps demonstrate, BLM considers many

⁴ BLM adopted a similarly cramped analysis area in the East Castle Creek EA and the Diamond Basin and Silver City EA, where BLM considered in its cumulative impact analysis only small areas immediately adjacent to these allotments. AR 26724 (Silver City and Diamond Basin EA), AR 11857 (East Castle Creek EA). Based on the similarity in BLM’s treatment of cumulative impacts on these allotments, the following analysis and argument applies equally to these allotments and EAs.

of these 37 allotments key habitat or high priority restoration habitat for the Great Basin Core population of Greater sage-grouse, and yet BLM never considered the synergistic impacts of its Rockville decision together with impacts from these other 37 allotments on habitat and population for Greater sage-grouse. *Id.*

Moreover, prior to issuing the Rockville final grazing decision at issue here, BLM agreed to finally prepare new environmental analyses and issue new final grazing decisions and grazing permits on fully 67 separate allotments in and around the Rockville allotment in the Owyhee Field Office. *Western Watersheds Project v. Dyer*, Case No. 97-519-S-BLW, Docket No. 451 (Stipulated Settlement Agreement). *See also id.* at Exh. A (stipulated schedule for issuing new grazing decisions); *id.* at Docket No. 455 (order approving settlement agreement). As the Cole maps show, several of these allotments are immediately adjacent to the Rockville allotment, again within key habitat for the Great Basin Core population of sage-grouse. *See Cole Decl.*, Exh. 1.

But BLM's EA and FONSI on the Rockville allotment never mentions these recent and reasonably foreseeable grazing decisions on at least 105 separate allotments in the Owyhee Field Office, much less examine the cumulative impacts of them on the population and habitat for the Great Basin Core population of sage-grouse.

Instead of looking at the synergistic impact of BLM's grazing decisions on the Rockville allotment – together with its recent or reasonably certain future decisions – on Greater sage-grouse populations and habitat, BLM provided a perfunctory analysis at best. AR 23827. In fact, the entirety of BLM's cumulative impact analysis in its FONSI – which is supposed to include a “convincing statement of reasons” explaining why BLM's grazing scheme will no significant cumulative impact on the environment, *see Ctr. for Biol. Diversity v. NHTSA*, 538 F.3d 1172, 1220 (9th Cir. 2008) – is as follows:

The analysis did not identify any known significant cumulative or secondary effects (EA #ID130-05-006). Outside this project area, additional Standards and Guidelines assessments, determinations and subsequent decisions have been made, resulting in changes in livestock management actions, stocking levels and seasons of use. However, those actions in combination with this decision are not expected to result in cumulatively significant impacts.

AR 23827.⁵

This Court has previously rejected a nearly identical cumulative impact analysis, and held that BLM was required to prepare an EIS examining the cumulative impacts of BLM's grazing decisions across 28 allotments in the neighboring Jarbidge Field Office. *Bennett*, 392 F.Supp.2d at 1223. In that case, this Court rejected BLM's limited cumulative impact analysis for several reasons, including (1) the geographic scope of the allotments at issue; (2) sage grouse were in steep decline; (3) BLM acknowledged that grazing was a factor in the decline of sage-grouse populations; (4) Fundamental of Rangeland Health violations existed on the allotments; (5) BLM was proposing to increase grazing over past actual use; and (6) BLM's analysis was "like a horse with blinders, hampered by a restricted field of vision." *Id.*

The facts here are even more compelling than in *Bennett*. Like in *Bennett*, here there is no doubt that sage-grouse are in decline, that livestock grazing is a factor in this decline, that BLM found extensive Fundamentals of Rangeland Health violations on the Rockville and other allotments, and that BLM increased grazing above the average actual use over the past decade. *See* AR 4210-4239 (Rockville determination); AR 13823-84 (East Castle Creek determination); AR 26426-39 (Diamond Basin determination); AR 26440-59 (Silver City determination); Separate Statement of Undisputed Material Facts (SOF) ¶¶ 37, 45, 67, 91-93, 134, 143-146 (comparing grazing under prior system to new systems on allotments).

⁵ BLM's FONSI's on the Silver City and Diamond Basin allotments, and the East Castle Creek allotment, contain almost identical cumulative impacts analyses. *See* AR 26864, 26888, 11916-17.

Moreover, here BLM has issued or will issue new grazing decisions on fully 105 allotments in the field office, as well as over a dozen in the neighboring Bruneau Field Office. Yet, BLM refused to take a comprehensive look at the cumulative impacts of its foreseeable grazing authorizations within the Owyhee and Bruneau Field Offices. BLM, “like a horse with blinders,” similarly limited its field of vision for cumulative impact purposes to the Rockville allotment and three allotments to the immediate north, instead of looking at the big picture relationship between BLM’s grazing authorizations in the Owyhee and Bruneau Field Offices, the dramatic decline of Greater sage-grouse populations, and the widespread violations of the Fundamentals of Rangeland Health. *Bennett*, 392 F.Supp.2d at 1223. *See also Western Watersheds Project v. Rosenkrance*, No. 4:09-CV-298-EJL, 2011 WL 39651 at *11-13 (D. Idaho January 5, 2011) (reversing cumulative impact analysis as arbitrary and capricious).

For many of these same reasons, BLM’s EAs and FONSIIs on the Silver City and Diamond Basin allotments are similarly inadequate. AR 26724-26 (EA). Like its analysis on the Rockville allotment, BLM never mentions or discusses the 105 grazing decisions that it has issued or will issue in the foreseeable future around the Silver City and Diamond Basin allotments within the Owyhee Field Office, or the new grazing permits that BLM issued in the neighboring Bruneau Field Office. This same analysis applies equally to the East Castle Creek decision, too, where BLM again ignored its recent grazing decisions around the East Castle Creek Allotment, including within the Owyhee and Bruneau Field Offices. AR 11860-1 (EA).

When BLM has systematically ignored past, present and reasonably foreseeable grazing activities on so many nearby allotments, there is a significant potential for cumulative impacts. *See Te-Moak Tribe*, 608 F.3d at 605 (requiring plaintiff to show “only the potential for cumulative impacts”). This is especially true here where the scientific evidence in the record demonstrates that

livestock grazing can have negative impacts on sage-grouse populations and habitat – indeed, BLM has concluded that livestock grazing is currently adversely impacting sage-grouse habitat in and around the allotments as issue here. *See* AR 9636-45 (Conservation Assessment); AR 4210-4239, 13823-84, 26426-39, 26440-59 (determinations). Thus, BLM’s perfunctory cumulative impact analysis on the Rockville, Diamond Basin, Silver City and East Castle Creek allotments violated NEPA.

C. The Battle Creek Cumulative Impacts Analysis is also Inadequate.

BLM’s cumulative impact analysis on the Battle Creek allotment violates NEPA for different reasons. The Battle Creek EA runs afoul of NEPA because although BLM claims to assess cumulative impacts across all lands in Owyhee County through 2018 – which includes the entire Owyhee and Bruneau Field Offices, and much of the Jarbidge Field Office – the EA in fact fails to provide any details or “useful analysis” of any past, present or future livestock grazing authorizations or other actions in this area.

As noted, a cumulative impact analysis must provide “some quantified or detailed information” about cumulative impacts – “[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Ocean Advocates*, 402 F.3d at 868. A cumulative impact analysis must include a “useful analysis of the cumulative impacts of past, present and future projects.” *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997) (citation omitted).

BLM’s cumulative impact analysis on the Battle Creek allotment is deficient in a number of respects. Most obviously, BLM never even mentions any past, present or future projects in the Owyhee, Bruneau or Jarbidge Field Offices that may have synergistic impacts on Greater

sage-grouse, never mind actually examining these impacts. AR 3672-73. Nor does BLM even mention the status of sage grouse populations and habitat in these field offices. *Id.*

For example, BLM never mentions the 38 allotments where BLM recently issued grazing decisions in the Owyhee Field Office, nor the 67 allotments where BLM agreed to issue new grazing decisions and environmental analyses before 2013, although these allotments fall within Owyhee County. AR 3670-74. BLM even ignores the 13 allotments in the Bruneau Field Office where it issued new grazing permits without any environmental analysis whatsoever. *See* Complaint, ¶ 70(c). *See also* Cole Decl., Exhs. 1-5 (map of allotments). BLM similarly completely overlooks the on-going Jarbidge RMP process – which is examining lands within Owyhee County.

Surprisingly, the Battle Creek EA never even examines the cumulative impacts of the grazing scheme on the East Castle Creek allotment, even though this allotment is immediately adjacent to the Battle Creek allotment, and the Bruneau Field Office issued its Battle Creek EA only one month before issuing its East Castle Creek Determination. AR 13911 (East Castle Creek allotment assessment dated 2/08); AR 13823 (East Castle Creek Determination dated 5/08). In other words, the same field office was working on similar administrative processes on two neighboring allotments, and the BLM never even mentions the potential synergistic impacts of the Battle Creek and East Castle Creek grazing decisions on sage-grouse habitat and populations.

This oversight is particularly problematic here because on the East Castle Creek allotment, BLM concluded that livestock grazing was causing violations of each and every applicable rangeland health standard, including the standard for threatened, endangered and sensitive species. *See, e.g.*, AR 13873 (noting that “very heavy” livestock grazing caused 74%

of late brood-rearing habitat to be marginal or unsuitable habitat for Greater sage-grouse); AR 13879 (listing violations).

Similarly, the 2008 Battle Creek EA never acknowledges or examines the impacts of the 2007 Murphy Complex Fire, which burned hundreds of thousands of acres of public lands and sage-grouse habitat in the Bruneau Field Office and the neighboring Jarbidge Field Office. *See* AR 3268-69 (WWP Appeal). As this Court has recognized, the Murphy Fire was a “catastrophic wildfire that burned 425,815 acres, destroying 70% of the remaining sage-grouse nesting habitat” in the neighboring Jarbidge Field office.” *Western Watersheds Project v. Dyer*, 2009 WL 484438 at *3 (D. Idaho February 26, 2009).

Based on the paucity of analysis, it appears that BLM believes simply identifying a sufficiently large analysis area is sufficient to meet its NEPA requirements. The Ninth Circuit has repeatedly rejected this claim, however. In *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998), the Ninth Circuit rejected a cumulative effects analysis and noted that “some quantified or detailed information is required. Without such information neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide.” Similarly, in *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005), the court rejected a cumulative impact analysis, holding that this analysis “must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.”

Instead of providing quantitative information on the scope of potential cumulative impacts, BLM provided only general statements about past impacts and counter-factual

assertions. For example, in its FONSI, the entirety of BLM's cumulative impact analysis follows:

The analysis did not identify any known significant cumulative or secondary effects (Section III.M, EA ID-120-2007-3353). Outside this project area, additional Standards and Guidelines assessments, determinations, and subsequent decisions have been implemented or are planned, resulting in changes in livestock management actions, stocking levels and seasons of use (Section III M, EA ID-120-2007-3353). However, those actions in combination with this decision are not expected to result in cumulatively significant impacts. The proposed actions associated with this EA and other grazing decisions are expected to improve habitats for native fish and wildlife species.

AR 3514-15. The FONSI provides no analysis at all, and instead relies on BLM's conclusory assertions that no significant cumulative impacts will occur. BLM cannot meet its NEPA obligations in this way, and the Ninth Circuit has routinely rejected similarly vacant cumulative impact analyses. *See Te-Moak Tribe*, 608 F.3d 592 (reversing EA for inadequate cumulative impact analysis); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d. 989 (9th Cir. 2004) (same).

Moreover, BLM relies on plainly inaccurate assertions in its cumulative impact analysis. BLM concludes that there will be no significant cumulative impacts to sage-grouse habitat because the "cumulative effect of past grazing management in the Bruneau and Owyhee Field Offices has been to improve wildlife habitat." AR 3672. But the record in this case demonstrates that livestock grazing on the Battle Creek allotment is causing extensive violations of the Fundamentals of Rangeland Health, including for sage-grouse habitat. Again, BLM's 2007 Battle Creek Allotment Evaluation and Determination concluded that current grazing was causing violations of Rangeland Health Standards 2, 3, 7, and 8 and Guidelines 1, 3, 5, 6-9, 10, 12, and 17. AR 4210-39.

Livestock harm to sage-grouse habitat has been confirmed in numerous other cases before this Court and others, too. *See, e.g., Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002) (68 permits in the Owyhee Field Office) (noting that “cattle overgrazing now threatens the life of the Owyhee [Resource Area]”); *Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217 (D. Idaho 2005) (28 allotments in Jarbidge Field Office); *Western Watersheds Project v. Dyer*, 2009 WL 484438 (D. Idaho February 26, 2009) (36 allotments in the Jarbidge Field Office); *Western Watersheds Project v. U.S. Dep’t of the Interior*, 2009 WL 5218020 (D. Idaho Dec. 30, 2009) (Nickel Creek allotment in the Owyhee Field Office); *Western Watersheds Project v. Dyer*, 97-0519-S-BLW (Trout Springs, Castlehead Lambert and Pole Creek allotments in Owyhee Field Office),

As described above, the same holds true for many other allotments in this area. 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).

In light of this record evidence, it is arbitrary and capricious for BLM to now claim that the cumulative effect of past grazing in Owyhee County has been to improve wildlife habitat. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (decision is arbitrary and capricious if agency’s explanation for its decision that runs counter to the evidence before the agency). And because BLM relied on this counterfactual claim to support its cumulative impact analysis, this Court should reverse and remand the Battle Creek EA, FONSI and underlying grazing decision as arbitrary and capricious.

D. Tiering to a 30-Year Old EIS Does Not Cure the Inadequate Cumulative Impacts Analyses on the Bruneau Allotments.

BLM cannot cure its inadequate cumulative impact analysis for the Battle Creek and East Castle Creek allotment by relying on the generalized statements and conclusory analysis from the 1982 Bruneau-Kuna Grazing EIS. Indeed, the existence of this badly-outdated EIS confirms that BLM must undertake a new, comprehensive look at the impacts of its livestock grazing authorizations on Greater sage-grouse.

An agency may “tier” one NEPA document to another NEPA document. *See* 40 C.F.R. §§ 1502.20, 1508.28. However, tiering does not eliminate the need to determine whether a project threatens significant effects. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (“Nothing in the tiering regulations suggests that the existence of a programmatic EIS . . . obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project.”). Indeed, tiering is only permissible if the tiered-to document actually analyzed the impacts in question, and the analysis is current. *See Te-Moak Tribe*, 608 F.3d at 605 n.13 (rejecting BLM EA’s attempt to tier when the tiered-to documents did not analyze the impacts in question). *See also S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (“*South Fork Band*”) (same); *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989 (9th Cir. 2004) (same).

In *Te-Moak Tribe*, plaintiffs challenged BLM’s approval of an amended plan of operations for a mining project. Plaintiffs claimed BLM’s environmental assessment failed to adequately examine the cumulative impacts of the mining expansion. BLM sought to undergird the EA’s cumulative impact analysis by tiering to a number of other EAs and EIS, including the project’s original EA. The Ninth Circuit reversed the EA and FONSI, and held that tiering to other analyses was inappropriate because “these documents do not supplement the EA’s

incomplete [cumulative impacts] analysis. Like the EA [at issue], the EA for the original [project] did not discuss cumulative effects.” *Id.* at 605 n. 13.

Similarly, in *South Fork Band*, the Ninth Circuit rejected BLM’s efforts to tier its NEPA analysis to another EIS. 588 F.3d at 726. In that case, the court rejected tiering because the effects of the proposed action were never considered in the earlier EIS, and the Court noted that “[t]hough ‘tiering’ to a previous EIS is sometimes permissible, the previous document must actually discuss the impacts of the project at issue.” *Id.*

Te-Moak Tribe and *S. Fork Band* control disposition of this case, and require this Court to reject BLM’s efforts to tier to a 30 year-old EIS. Like in those cases, here BLM has sought to tier its EAs to an existing environmental analysis. AR 3670 (Battle Creek EA); AR 11857-58 (East Castle Creek EA). Tiering fails because the 1982 EIS does not itself examine the cumulative impacts of livestock grazing on Greater sage-grouse habitat across Owyhee County, including the Bruneau, Owyhee, and Jarbidge Field Offices. AR 28560-662 (EIS). In fact, like in *Te-Moak Tribe* and *South Fork Band.*, the 30 year-old analysis does not even discuss cumulative impacts. *Id.* Thus, the 1982 EIS cannot supplement the BLM’s incomplete cumulative impact analysis.

Moreover, tiering to the 1982 EIS fails because of BLM’s numerous, inaccurate assumptions and conclusions concerning the impacts of grazing on rangeland health and sage-grouse. *See Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 997 n. 3 (9th Cir. 2004). In that case, the Ninth Circuit rejected BLM efforts to tier an EA to an earlier RMP-EIS because the earlier analysis included no specific information about the cumulative impacts, and any generalized assumptions on impacts were no longer valid in light of changed circumstances. *Id.*

Like in *Klamath-Siskiyou Wildlands*, this Court should not permit BLM to tier to the 1982 Bruneau-Kuna Grazing EIS because its assumptions and conclusions on grazing impacts on sage-grouse are outdated and invalid. For example, in the 1982 EIS, BLM claimed that “sage grouse populations levels would increase” under the adopted grazing plan. AR 28568. Similarly, BLM claimed in the EIS that livestock grazing in the Bruneau Field Office would “[i]mprove 939,000 acres of sage grouse habitat to increase nesting, brood rearing and wintering habitat.” AR 28578. More specifically, BLM asserted that it would “[i]mprove meadow herbaceous vegetation, especially forbs, by establishing rest or deferred grazing systems on the critical brood rearing areas.” AR 28586.

Of course, none of these improvements in sage-grouse habitat and populations have occurred – although that has not stopped BLM from increasing grazing on these allotments. It is undisputed that the population levels – as well as every other indicator of population dynamics – of the Greater Basin Core population of Greater sage-grouse have declined since 1982. AR 9883 (data on Great Basin Core population); AR 9914-20 (data on specific subpopulations within Great Basin Core populations); AR 9592 (identifying Great Basin Core population and subpopulations). This same analysis applies for Greater sage-grouse across Idaho, where researchers found negative trends for population levels and lek size. AR 9562-65.

In conclusion, BLM’s attempt to tier to its 30-year-old EIS to rescue its inadequate cumulative impact analyses fails where that 1982 EIS did not consider the cumulative impacts of BLM’s grazing authorizations on Greater sage-grouse populations and habitat, and where the EIS’s underlying assumptions and conclusions on the impacts of grazing on sage-grouse have proven wildly inaccurate. *See Te-Moak Tribe*, 608 F.3d 605 n. 13, and *Klamath-Siskiyou Wildlands*, 387 F.3d at 997 n. 3.

III. BLM'S GRAZING DECISIONS ARE INCONSISTENT WITH THE GOVERNING LAND USE PLANS.

The final grazing decisions at issue here violated the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.*, because they are inconsistent with the Bruneau Management Framework Plan or the Owyhee Resource Management Plan, which are the governing land use plans covering the Bruneau and Owyhee Field Offices, respectively.

A. FLPMA's Consistency Requirement.

FLPMA is the basic “organic act” for management of the public lands under BLM’s administration. Under FLPMA, BLM must develop land use plans for the public lands under its control. 43 U.S.C. § 1712. FLPMA further requires that all resource management decisions “shall conform to the approved [land use] plan.” 43 C.F.R. § 1610.5-3(a). *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004) (the “statutory directive that BLM manage ‘in accordance with’ land use plans, and the regulatory requirement that authorizations and action ‘conform to’ those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law” pursuant to the APA); *Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1227 (D. Id. 2005) (reversing Jarbidge Resource Area grazing decisions as being inconsistent with controlling land use plan).

If a proposed action is not consistent with the land use plan, BLM must either rescind the proposed action or amend the plan, complying with NEPA and allowing for public participation. 43 C.F.R. §§ 1610.5-3, 1610.5-5. *See also Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1128 (9th Cir. 2007) (holding that BLM project components “are inconsistent with the Plan and, consequently, violate FLPMA”).

B. The Battle Creek and East Castle Creek Decisions Are Inconsistent with the Bruneau MFP.

BLM's grazing decisions on the Battle Creek and East Castle Creek allotments are inconsistent with the Bruneau MFP. As noted, the Bruneau MFP requires BLM to manage springs, seeps and meadows as key sage-grouse habitat; and adjust livestock season of use on spring and summer range to meet the minimum growth needs of native plant species. AR 8, 58, 108, 114. The record here shows that BLM is failing to conform to these mandatory requirements.

1. BLM's Decisions Fail to Prioritize Upland Riparian Areas for Greater Sage-Grouse.

BLM's grazing decisions on the Battle Creek and East Castle Creek allotments fail to adhere to the Bruneau MFP provisions requiring BLM to manage upland riparian areas as key sage-grouse habitat. Upland riparian areas are critical to sage-grouse hen and chick survival. AR 9457-60. According to the Conservation Assessment, sage-grouse late brood-rearing habitat consists of upland riparian areas, including seeps, springs and wet meadows. AR 9457-8. *See also* AR 11814 (East Castle Creek assessment). These sites typically provide an abundance of forbs and insect for sage-grouse hens and chicks; and as the upland sagebrush habitats dry out, hens move to these more mesic sites. *Id. See also Western Watersheds Project v. Dyer*, 2009 WL 484438 at *5-8 (D. Idaho February 26, 2009) (discussing sage-grouse seasonal habitat requirements).

The Battle Creek allotment contains "critical" sage grouse brood-rearing habitat, including 18 upland riparian areas. AR 4234 (determination); AR 4459 (assessment). BLM has developed over half of these critical sage-grouse brood-rearing areas (n=10), however, to provide

water for livestock, and most of these springs are in non-functioning or functioning-at-risk condition. AR 4459-60.

Some of the most important remaining sage-grouse brood-rearing habitat is located in pasture 20, especially along Dry Creek and Hutch springs. AR 4234. According to BLM, neither of these areas is in suitable condition, and Hutch Springs is “unsuitable due to erosion reducing the wetted area and the potential to remain wet through the summer, and heavy grazing use creating bare ground where plants could be growing.” AR 4234 (determination). BLM also noted that livestock grazing in this area is causing “compaction of the soil and alterations in the plant communities mak[ing] these areas more prone to erosion, less able to retain water, and reduce potential for and quality and quantity of food plants in a key habitat for sage grouse.” AR 4235.

The East Castle Creek allotment also contains “[i]mportant” late summer habitat for sage-grouse, including within pastures 12, 29A-D, 28 and 28A. AR 11814. *See also* AR 13872 (determination) (noting these areas are “critical”). Unfortunately, BLM has rated most of this brood-rearing habitat (70%) as marginal or unsuitable, “due to heavy livestock grazing use.” AR 11816. *See also* AR 13871 (noting that 74% of examined upland riparian areas were marginal or unsuitable due to erosion and high livestock use levels); AR 13997-14003 (assessment).

Specifically, BLM noted in its East Castle Creek EA that

the grazing use level in upland areas at the upper end of pasture 12 was heavy on a landscape scale, which matched the heavy hoof-shearing and cuts found at any wet areas. Another eroded area is the head tributaries of Battle Creek in pasture 29A, with heavy use on wet soils leading to headcuts and drying of the meadow. All unfenced wet areas in pasture 28 were heavily used with erosion, large bare areas and drying of meadows.

AR 11814. BLM also concluded that the trend in sage-grouse habitat conditions was downward, due to “heavy use by livestock, erosion and hoof-shearing of wet soils.” AR 13873.

Despite these depauperate conditions, BLM's grazing decisions on the Battle Creek and East Castle Creek allotments continue to allow livestock grazing in "critical" sage-grouse brood-rearing habitats during the summer months – even though the Bruneau MFP and the 1982 Bruneau-Kuna Grazing EIS requires BLM to manage these areas as key wildlife habitat for Greater sage-grouse and other upland game species. AR 114. *See also* 28628 (Grazing EIS) (BLM claiming that measures to improve sage-grouse habitat have been adopted, and now require "[g]razing systems which provide rest or deferment through the critical brood rearing period"). Idaho Conservation Plan at 2-4 (noting that late brood-rearing runs from mid-July to September).

For example, on the Battle Creek allotment, pasture 20 includes the most important sage-grouse brood-rearing habitat, and BLM has not changed the season of use on this pasture. AR 3534 (showing season of use by alternative) (compare Alternatives A and D). BLM's refusal to modify grazing on this pasture is especially surprising because BLM concluded that the old grazing scheme was causing violations of Standard 8 for sage-grouse habitat. AR 4235 (determination). In fact, in 1999 BLM concluded that this precise grazing scheme was not meeting the Bruneau MFP requirement to manage seeps, springs and wet meadows as key sage-grouse habitat, yet BLM has made no effort to modify the grazing scheme to meet the habitat needs of Greater sage-grouse. AR 5697 (1999 assessment); AR 3534 (EA) (showing identical season of use between "Pre-1999" grazing scheme and Alternative D).

On the East Castle Creek allotment, BLM's decisions actually increase grazing in some sage-grouse brood-rearing habitat. For example, on pastures 29A and 29B BLM previously allowed 280 head of livestock to graze from 6/25-8/31 or 7/25-8/31 in alternating years. AR 11718, 11733 (EA). Under the new plan, however, BLM has permitted 380 cows to graze from

7/15-8/31 every other year, thus increasing AUMs on the sage-grouse brood-rearing areas from roughly 300 AUMs to over 570 AUMs. *Id.*

On other areas, BLM is maintaining the same grazing system despite concluding that the system was causing violations of the Fundamentals. This is the case on pastures 28 and 28A – also critical sage-grouse brood-rearing habitat. On these pastures, BLM is authorizing grazing between June 16 and August 6 each year, AR 11733, and under the old scheme, grazing started two weeks later and ran through the end of August. AR 11718. In other words, BLM simply moved the use period up by two weeks, but did nothing to reduce grazing or eliminate grazing during the timeframe when sage-grouse hens and chicks occupy these late brood-rearing habitats – even though the past grazing system was causing violations of Standard 8. *Id. See also* AR 13871-73 (noting that “[u]se levels at springs and wet meadows throughout the allotment are generally very heavy These high use levels caused 75% of 47 springs and wet meadows to be in marginal or unsuitable habitat condition for sage grouse”); AR 13879 (showing pastured 28 and 28A not meeting Standard 8).

In conclusion, BLM has itself concluded that its grazing scheme in the Battle Creek allotment fails to meet the Bruneau MFP requirements to manage upland riparian areas as key sage-grouse habitat, and its decision on the East Castle Creek allotment similarly allows inappropriate livestock grazing in critical sage-grouse brood-rearing habitat.

2. BLM’s Decisions Fail to Protect Native Plant Communities.

BLM’s decisions on the Battle Creek and East Castle Creek allotments also fail to protect native plant communities, which provide essential cover and food for sage-grouse. Under the Bruneau MFP, BLM is required to adjust livestock season of use on spring and summer range to meet the minimum growth needs of native vegetation communities. AR 58 (Rangeland

Management Objective 1.5 or RM 1.5). This management requirement is met only when livestock grazing does not occur during the critical growth period – i.e., the so-called “boot” and “head showing” stages of plant development. AR 5690 (1999 assessment). *See also* AR 5559, 26941 (plant growth stages in Battle Creek and East Castle Creek).

The final grazing decisions on these allotments fail to adjust grazing to provide rest or deferment necessary to meet the needs of the native plant communities, however. For example, BLM’s grazing decisions on the East Castle Creek allotment allow grazing in Pastures 8B, 8BI, and 8BIII from April 1-30 and May 1-30 in alternating years. AR 11733 (EA). These use dates overlap the critical growth period for Sandberg’s bluegrass – which is found on this pasture – and thus does not provide for adequate rest or deferment. AR 26941. In fact, BLM recognized as much in its Determination, finding

Livestock grazing use in these pastures [i.e., Pastures 8B, 8BI, and 8BIII] does not conform to guidelines (numbers 4, 9, 12). Periodic rest or deferment during the critical growth stages is not allowed in these pastures. Use dates overlap the critical growth stages for Sandberg’s bluegrass and therefore do not provide adequate deferment.

AR 13858. The same holds true for pastures 10B, 11B, and 12, all of which are grazed within the critical growth stage of native vegetation, and none of which receive any rest or deferral during the critical growth stage. AR 11733, 26941. *See also* AR 13859 (determination).

BLM’s grazing scheme on the Battle Creek allotment similarly contravenes the requirements of the Bruneau MFP to protect native plant communities. Prior to 1999, BLM authorized grazing in pastures 8 and 21 from April 1-May 31; in pasture 9 and 22 from May 6-July 10, and in pasture 12 from May 20-July 20. AR 3534 (EA) (under “Alternative A, Pre-1999, & 2004-2007”). In its 1999 assessment, BLM concluded that this grazing system was not meeting the minimum growth needs for native plant communities. AR 5690.

BLM's new final grazing decisions on the Battle Creek allotment adopt these same seasons-of-use. AR 3534 (compare column entitled "Alternative A, Pre-1999, & 2004-2007" with Alternative D Proposed Action"). Thus, BLM's earlier conclusions are equally applicable here, and BLM has failed to comply with the Bruneau MFP by failing to provide rest or deferment of the native grass communities across Battle Creek pastures 8, 9, 12, 21 and 22, and East Castle Creek pastures 8B, 8BI, 8BIII, 10B, 11B and 12.

C. The Owyhee Decisions Are Inconsistent with the Owyhee RMP.

BLM's decisions on the Rockville, Diamond Basin and Silver City allotments violate the Owyhee Resource Management Plan and FLPMA, too. First, the decisions fail to follow the RMP's mandatory requirement to protect and enhance key sage grouse habitat and populations. These decisions also allow livestock grazing in sage-grouse habitat that is incompatible with the seasonal and use restrictions for Greater sage-grouse, which is also inconsistent with the Owyhee RMP.

BLM adopted the Owyhee RMP to rectify the degraded conditions in the Owyhee Resource Area. AR 30736-941 (RMP). To accomplish this goal, the RMP prioritizes management of the public lands for "special status" species habitat above other uses, and specifically requires that BLM "protect and enhance key sage grouse habitats and populations." AR 30764-65.

As this Court knows well, protection and enhancement of sage-grouse nesting habitat requires both seasonal and use restrictions. More specifically, to protect sage-grouse habitat, grazing must be limited to mid-summer months (i.e., June 20-August 1) to avoid adverse impacts to sage-grouse nesting and late brood-rearing habitat, or late fall and winter months (i.e., November 15-March 1) to minimize impacts on herbaceous vegetation prior to the next nesting

season. *See* AR 9450-63 (Sage-Grouse Conservation Assessment) (discussing seasonal habitat requirements); AR 3264-326 (administrative appeal citing these timeframes from Braun (2006), A Blueprint for Sage-Grouse Conservation and Biology); AR 3473 (citing these proper use timeframes). Grazing must also be limited to 30% utilization in sage-grouse habitat to ensure adequate herbaceous cover for sage-grouse nesting. AR 10828-46 (2000 Sage-Grouse Guidelines). *See also Western Watersheds Project v. Dyer*, 2009 WL 484438 at *21, Finding of Fact ¶¶ 245-46 (February 26, 2009) (reciting seasonal and use restrictions). BLM's grazing decisions on the Rockville, Silver City and Diamond Basin meet neither of these requirements.

For example, BLM's grazing system on the Rockville allotment allows grazing in Pasture 1 during this restricted timeframe in fully four of the seven years in the grazing rotation, even though BLM concluded that livestock grazing was violating the Fundamentals for sage-grouse habitat in this pasture. AR 24985 (final grazing decision); AR 23541-2 (determination); 23460-68 (allotment assessment). The same holds true for pasture 2, too, where BLM is allowing grazing during the critical season-of-use for sage-grouse in six of seven years – despite BLM's earlier conclusion that grazing was causing “marginal” habitat in pasture 2. *Id.* The situation is worse in pasture 6, where BLM has authorized early spring grazing (3/14-4/4) every year, although livestock grazing was again causing degradation of sage-grouse habitat. *Id.*

This situation repeats itself on the Diamond Basin and Silver City allotments, too. On these allotments,⁶ BLM is allowing grazing in key-sage grouse habitat during the critical sage-grouse mating and nesting seasons every other year. AR 26867 (final grazing decision). *See also* Cole Decl., Exh. 1-3 (map of key sage-grouse habitat on these allotments). Indeed, the final

⁶ BLM's final decisions combine the Silver City and Diamond Basin allotments into one allotment, called the Silver City allotment. *See* AR 26883 (a comparison between the old pasture names and number versus the new pasture names and numbers); AR 26632 (old pasture names and numbers).

decisions do not change the seasons-of-use in the spring pastures, despite BLM's conclusion that the prior scheme was causing "unsuitable" sage-grouse habitat on these pastures. AR 26437 (Diamond Basin determination); AR 26456 (Silver City determination).

In these decisions, BLM never discusses or claims that these decisions will protect and enhance sage-grouse habitat, and, in light of the undisputed scientific evidence, it is evident that BLM's seasons-of-use will adversely impact Greater sage-grouse populations during the critical spring nesting and breeding seasons.

BLM also fails to adhere to widely accepted limitations on livestock use within sage-grouse habitat. As noted above, livestock utilization within sage-grouse habitat must be limited to 30%, to allow for a residual herbaceous grass cover to approach seven inches (or 18 cm). AR 10828-46 (2000 Sage-Grouse Guidelines); Idaho Conservation Plan, at D-18. Yet, BLM has adopted a 50% utilization guideline on the Silver City and Diamond Basin allotments, including within sage-grouse habitat. AR 26869, 26893 (Silver City and Diamond Basin decisions). BLM has similarly adopted an inflated utilization guideline on the Rockville allotment, too, allowing 40-50% utilization on key upland herbaceous vegetation. AR 24986, 25012 (Rockville decisions).

Here again, BLM never discusses how this level of utilization will "protect and enhance" Greater sage-grouse populations and habitat, as required under the Owyhee RMP, and the scientific evidence shows that BLM's grazing authorizations will adversely impact Greater sage-grouse habitat in these allotments.

IV. BLM'S GRAZING DECISIONS VIOLATE THE FUNDAMENTALS OF RANGELAND HEALTH.

Western Watersheds also seeks partial summary judgment on its Fourth, Fifth, and Sixth claims for relief, which allege that BLM is violating the Fundamentals of Rangeland Health in its

grazing authorization on the five allotments at issue in this motion. *See* Third Amended Complaint, ¶¶ 109-120. Despite finding that livestock grazing is causing violations of each and every rangeland health standard on these five allotments, BLM’s final grazing decisions do not implement necessary changes in grazing management to achieve – or to make significant progress toward achieving – the applicable Idaho Standards of Rangeland Health and the Fundamentals of Rangeland Health, as required under 43 C.F.R. § 4180 et seq. Indeed, BLM’s grazing decisions fail to adopt any mandatory terms and conditions necessary to remedy the rangeland health violations, and actually increase grazing across each allotment, including within important sage-grouse habitat.

A. Legal Requirements Under the Fundamentals Of Rangeland Health.

As this Court knows, the Fundamentals of Rangeland Health regulations were adopted as part of the 1995 Rangeland Reforms rulemaking, to establish minimum ecological requirements that grazing must meet on BLM lands – and to require quick action when those requirements are not being met. *See Western Watersheds Project v. Kraayenbrink*, 538 F.Supp.2d 1302 (D. Idaho 2008) (noting that BLM’s 1995 rulemaking described the Fundamentals of Rangeland Health as “critical to improving rangeland conditions, especially riparian areas”) (internal quotations omitted), *aff’d in relevant part*, 632 F.3d 472 (9th Cir. 2011).

Under these regulations, BLM established four basic ecological criteria – termed the “fundamentals” of rangeland health – which are applicable to grazing across all BLM lands, and which generally require that BLM maintain watersheds, ecological processes, water quality, and habitats in healthy conditions, or that significant progress is being made toward attaining such conditions. *See* 43 C.F.R. § 4180.1; *Kraayenbrink*, *supra*. If BLM determines that these basic criteria are not being met, the regulations mandate that BLM “shall take appropriate action . . . as

soon as possible but not later than the start of the next grazing year . . . to ensure” that the criteria will be met or significant progress made toward achieving them. *See* 43 C.F.R. § 4180.1. These regulations require that grazing permits include mandatory terms and conditions “that ensure compliance with subpart 4180.” 43 C.F.R. § 4130.3-1. *See also Nickel Creek*, 2009 WL 5218020.

In addition, the regulations provided for each BLM State Director to adopt site-specific Rangeland Health Standards and Guidelines, which BLM has done for Idaho. *See* 43 C.F.R. § 4180.2. If BLM determines that the state-specific Rangeland Health Standards and Guidelines are not being met due to grazing, the regulations again require that BLM “shall take appropriate action . . . that will result in significant progress toward fulfillment of the standard and significant progress toward conformance with the guidelines.” 43 C.F.R. § 4180.1(c)

2. BLM Violated the Fundamentals By Relying on Unenforceable Guidelines.

BLM’s grazing authorizations on the five allotments violate the Fundamentals of Rangeland Health because the decisions rely on voluntary measures to make “significant progress” under the Fundamentals of Rangeland Health and Standards and Guidelines. BLM’s regulations require, however, that grazing authorizations include mandatory terms and conditions necessary to ensure compliance with these minimum rangeland health standards. 43 C.F.R. § 4130.3-1. This Court has previously rejected BLM’s efforts to rely on voluntary, unenforceable management guidelines to comply with the Fundamentals and Standards and Guidelines. *Nickel Creek*, 2009 WL 5218020.

In that case, BLM found violations of the Fundamentals on the Nickel Creek allotment in the Owyhee Field Office, and chose to remedy its violations by adopting so-called “Management Guidelines” informing livestock grazing. *Id* at *8-10. This Court rejected this approach, holding

that under the Fundamentals of Rangeland Health, grazing permits must include mandatory terms and conditions needed to make “significant progress,” and that BLM cannot rely on unenforceable guidelines. *Id.* at *11.

The facts of this case cannot be materially distinguished from the Nickel Creek case. In both cases, BLM found extensive violations of the Fundamentals of Rangeland Health, including violations of the standard designed to protect and enhance sage-grouse populations and habitat. *Id.*, 2009 WL 5218020, at *2. *See also* AR 26440-59, 26426-39, 23531-43, 13823-84, 4210-4239 (allotment determinations).

Like in *Nickel Creek*, BLM here adopted only voluntary, unenforceable guidelines to meet its requirements under the Fundamentals. For example, on the Rockville allotment, BLM replaced the mandatory terms and conditions with so-called Annual Use Criteria. *See* AR 25012-3 (final grazing decision) (identifying Annual Use Indicators); AR 23776, 23781, 23786 (EA) (finding “adherence to Annual Grazing Use Indicators” will promote compliance with the Fundamentals). BLM even admitted that these Annual Use Indicators were not mandatory or enforceable; in response to a permittee’s comment regarding whether these indicators were mandatory, BLM stated

The proposed decision neither states that Annual Grazing Use Indicators are ‘mandatory’ or “other terms and conditions.” If Annual Grazing Use Indicators were intended to be such, they would be listed under “the Mandatory Terms and Conditions” or “other Terms and Conditions” of this [final] decision. If that were the case, when an Annual Grazing Use Indicator was found not to be in conformance, the authorized officer shall take immediate action against a permit. This is not how Annual Grazing Use Indicators were intended to be used

AR 24971, 24997 (final grazing decisions).

BLM relied on similarly voluntary guidelines to meet its obligations under the Fundamentals on the other four allotments at issue. *See, e.g.*, AR 26869-70, 26893-94 (adopting

voluntary “Management Guidelines” on the Diamond Basin and Silver City allotments); AR 11316-317, 11288-89, 11344-45, 11372-73, 11400-01 (adopting voluntary “Annual Use Criteria” on the East Castle Creek allotment); AR 3359-60, 3379-80, 3399-3400, 3419-20, 3437-38, 3455-56 (adopting voluntary “Annual Indicator Criteria” on the Battle Creek allotment).

This Court should follow its analysis and holding in the Nickel Creek case, and again find that BLM violated the Fundamentals of Rangeland Health by failing to adopt mandatory, enforceable terms and conditions required to meet its obligations under 43 C.F.R. § 4180 to make “significant progress” towards meeting these minimum rangeland health requirements.

3. The Grazing Decisions Will Not Make “Significant Progress” Toward Achieving Fundamentals.

BLM’s grazing decisions further violate the Fundamentals and Standards and Guidelines because the increases in livestock grazing under these decisions will not make “significant progress” toward achieving these minimum rangeland health criteria. In fact, BLM’s refusal to openly acknowledge or examine the impacts of these increases in livestock grazing – and, instead, claiming counter-factually that the decisions reduce grazing on the allotments – is arbitrary, capricious and contrary to law. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (decision is arbitrary and capricious if agency’s explanation for its decision that runs counter to the evidence before the agency).

For example, on the Rockville allotment, BLM determined that livestock grazing was causing violations of Standards 1, 5, and 8 as well as Guidelines 1, 3, 4, 7, 8, 9, 12 and 13. AR 23531-43. In its EA, BLM claimed that its new grazing scheme will make “significant progress” in improving the condition of soils, native vegetation, and wildlife habitat because – according to BLM – the decisions reduce AUMs on the allotment. AR 23776, 23780-81, 23786 (claiming the “AUM reduction” would help improve conditions of soils, native vegetation and wildlife

habitat)⁷. The Administrative Record shows that this claim runs counter to the facts in the record, and the grazing decisions on the Rockville allotment do not reduce grazing.

According to the EA, since 1990 average actual use by livestock on the Rockville allotment totals 1,914 AUMs, including both sheep and cows. AR 23813. Under the final decisions, however, BLM authorized active grazing of 2,112 cattle AUMs, and an additional 176 AUMs for sheep, for a total of 2,288 AUMs. AR 24983, 25009 (grazing decisions). Thus, the final grazing decisions authorize a nearly 20% increase in actual use on the Rockville allotment – though BLM claims that its decisions somehow amount to an “AUM reduction,” and then employs this counter-factual assertion to support its finding of “significant progress.” AR 23776, 23780-81, 23786.

BLM makes the same error on the East Castle Creek allotment, where BLM found that livestock grazing was a significant factor in failing to meet each and every applicable rangeland health standard, including Standards 1, 2, 3, 4, 7 and 8. AR 13823-84. Under the prior grazing regime, average actual use totaled 8,531 AUMs on the allotment. SOF ¶ 134. The new grazing scheme permits 9,295 AUMs, however, an increase of nine percent. AR 11733 (EA). Strikingly, BLM allowed a nearly 50% increase in Pasture 5B (from 1,829 to 2,735 AUMs), despite BLM’s own conclusion that this pasture was failing to meet the minimum rangeland health standards required under the Fundamentals. SOF ¶ 143. *See also* AR 13823-84 (determination), AR 13173 (noting “High utilization ~80%” on this pasture under prior lower AUM levels).

⁷ BLM also claims that adherence to the Annual Grazing Use Indicators will make “significant progress” under 43 C.F.R. § 4180. For the reasons just discussed, BLM’s reliance on these voluntary guidelines to make “significant progress” violates BLM’s own grazing regulations.

BLM's grazing scheme also proposes an increase in grazing in important sage-grouse brood-rearing habitat on the East Castle Creek allotment, even in areas that are failing to provide suitable sage-grouse habitat due to livestock grazing. For example, pasture 10B provides important sage-grouse late brood-rearing habitat; yet according to BLM's own data, only 25% of these areas are in suitable condition, 25% are in marginal condition, and fully 50% are in unsuitable condition. AR 14001 (allotment assessment). These areas generally lack grasses and forbs necessary for sage-grouse chick survival, largely because they were "heavily grazed." *Id.* See also AR 14039 (rangeland health assessment) (showing moderate to extreme departure from reference conditions for bare ground, ground litter, and hydrologic functioning, and other signs of impaired rangeland condition).

Yet, as part of the new spring grazing scheme, BLM authorized an increase in grazing in the early springs pastures – including pasture 10B – and allowed turnout on these critical brood-rearing habitats prior to sage-grouse use, thus directly eliminating the grasses and forbs that are essential to chick survival. See SOF ¶ 142. AR 9457-60 (Conservation Assessment) (discussing habitat characteristics).

Despite these increases in grazing levels, BLM's conclusion for the East Castle Creek allotment relies on its claim that the "lower stocking rates" – including the "reduction of livestock numbers and AUMs in the spring pastures" – will make significant progress toward meeting the Fundamentals and Standards and Guidelines. AR 11732, 11756.

The same pattern is repeated on the Diamond Basin and Silver City allotments. There, BLM determined that livestock grazing was causing violations of Standards 1, 2, 3, 4, 7, and 8. AR 26440-59 (Silver City determination), 26426-39 (Diamond Basin determination). The final decisions permit an increase in grazing from 4,134 AUMs average actual use under the prior

grazing regime to 4,932 AUMs under the new decisions, which represents a nearly 20% increase in AUMs. *See* SOF ¶¶ 67, 93.

The Diamond Basin and Silver City final decisions implemented even greater increases in spring use areas, which include sage-grouse breeding habitat – despite BLM’s conclusion that the habitat in these pastures is unsuitable for sage-grouse nesting and breeding. AR 26534 (allotment assessment). Indeed, BLM increased grazing in the spring system during odd years from 444 AUMs to 683 AUMs, or a 54% increase. *See* SOF ¶¶ 89, 91. *See also* AR 26867, 26891 (final decisions), 26519 (allotment assessment), 26632 (map of previous pastures), 26906-07 (map of current pastures, showing no change in the pastures making up the spring pastures).

BLM adopted an even larger AUM increase in the spring pastures during even years, totaling a 76% increase (i.e., from 570 AUMs to 1,003 AUMs) on these critical sage-grouse nesting areas. *See* SOF ¶ 92.

The record evidence here thus shows that BLM’s grazing decisions on the Rockville, East Castle Creek, Diamond Basin and Silver City allotments authorize allotment-wide increases in grazing, as well more precipitous increases in some critical spring pastures.⁸ Yet, BLM never even admitted these increases in grazing, instead claiming that the decisions will result in reductions in livestock grazing. BLM compounded this error by then relying on its supposed grazing reductions to support its conclusions that the decisions will make “significant progress” toward meeting the requirements of the Fundamentals of Rangeland Health and Idaho Standards and Guidelines.

⁸ BLM’s final grazing decisions on the Battle Creek allotment do not provide sufficient details to determine use levels by pasture, thus it is not possible to compare livestock use under the final decisions with past actual use. *See, e.g.*, AR 3353-466 (final grazing decisions) (failing to identify use by pasture); AR 4539-40 (allotment assessment) (showing actual use by pasture).

Where one of BLM's primary rationales for its conclusion of "significant progress" is wholly unsupported by the record, its conclusion is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (decision is arbitrary and capricious if agency's explanation for its decision that runs counter to the evidence before the agency).

Moreover, BLM has not demonstrated that increasing grazing on Rockville, East Castle Creek, Diamond Basin and Silver City allotments will make "significant progress" towards meeting the minimum rangeland health requirements. Indeed, according to BLM's own determinations, the prior levels of grazing are what caused the extensive violations of the Fundamentals of Rangeland Health in the first place. Thus, BLM's decisions and underlying environmental analyses must be reversed.

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, and vacate and remand the challenged decisions.

Dated: August 5, 2011

Respectfully submitted,

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