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

WESTERN WATERSHEDS PROJECT,)
)
Plaintiff,)
)
v.)
)
DAVID ROSENKRANCE, Field Manager,)
Challis Field Office; and **BUREAU OF**)
LAND MANAGEMENT,)
)
Defendants.)
_____)

No. CV09-298-E-EJL

**WWP’S OPENING BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Western Watersheds Project (WWP) respectfully seeks summary judgment reversing four decisions that reauthorized ten-year livestock grazing permits on 45,000 acres of public land in Idaho’s Pahsimeroi Valley, because Defendant Bureau of Land Management (BLM) violated requirements of the National Environmental Policy Act (NEPA).

As explained below, BLM violated NEPA by making a serious error in its Environmental Assessment regarding the presence of bull trout, a species protected as “threatened” under the Endangered Species Act. BLM stated bull trout was not present on the Rock Creek allotment, when numerous documents in the record—including the then-governing Endangered Species Act

consultation documents—establish it was in fact present. Thus BLM entirely failed to describe the impacts that livestock grazing will have on bull trout—impacts that are likely because livestock have direct access to the bull trout habitat on the allotment. BLM also violated NEPA by analyzing three alternatives with virtually identical livestock grazing levels, defeating the entire purpose of NEPA’s alternatives requirement—comparison and choice between *different* management options.

Finally, BLM violated NEPA by preparing an inadequate cumulative impacts analysis. Specifically, the cumulative impacts analysis failed to provide any quantified or detailed information about impacts of the grazing permits and associated range projects on bull trout or wildlife, instead implying the decision will have largely positive impacts. The analysis also failed to mention that BLM has either recently issued or is about to issue grazing permits on at least four allotments adjacent to the subject allotments. Thus the analysis failed to identify any collective impacts from those foreseeable actions.

These violations cause harm to the interests of WWP and its members, as demonstrated in the accompanying declarations of Kathleen Fite and Laurence Zuckerman. Therefore, this Court should reverse and remand the challenged 2008 Environmental Assessment, Finding of No Significant Impact, and decisions for violating NEPA.

STATEMENT OF FACTS

The Four Subject Allotments.

The Grouse Creek, Trail Creek, Meadow Creek, and Rock Creek allotments together encompass over 45,000 acres on the southwestern side of the beautiful Pahsimeroi Valley, in the foothills of the Lost River Range. *See Separate Statement of Undisputed Facts (“SSF”) ¶ 3–6 (acreage totals); AR 1923 (EA), 1949 (map)*. The high mountain peaks of the Lost River Range (which includes Borah Peak, Idaho’s highest), tower above the allotments. *See AR 1923 (EA)*,

105 (BA). The southernmost allotment at issue, the Rock Creek allotment, lies within the Burnt Creek Wilderness Study Area. *AR 1909 (EA)*.

The Pahsimeroi River was historically a stronghold for bull trout, Snake River steelhead trout, and Snake River Chinook salmon, which are all now protected under the Endangered Species Act.¹ *See AR 92 (BA)*. The Rock Creek allotment, which is managed in conjunction with the adjacent Forest Service Upper Pahsimeroi allotment, contains a reach of the mainstem Pahsimeroi River that is occupied by bull trout. *AR 131 (BA)*. In fact, the U.S. Fish and Wildlife Service recently proposed to designate this reach of the Pahsimeroi River as bull trout critical habitat. Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States, 75 Fed. Reg. 2270, 2409 (Jan. 14, 2010).

In addition to bull trout, the allotments are habitat for sage-grouse, pygmy rabbit, bighorn sheep, pronghorn antelope, elk, and mule deer. *SSF ¶ 3–6*. In fact, three of the four allotments (Grouse Creek, Trail Creek, and Meadow Creek allotments) are considered “key” sage-grouse habitat by the Idaho Department of Fish and Game. *Id.*

1999 Bull Trout Consultation.

In 1999, BLM prepared a Biological Assessment for Federally Listed Salmonids in the Pahsimeroi River Watershed, pursuant to the Endangered Species Act’s consultation requirement. *AR 89 (BA)*. The consultation assessed the impacts of BLM and the Forest Service’s ongoing activities, including livestock grazing, upon all three ESA-listed fish species in the watershed. *AR 98–99*. Livestock grazing can harm bull trout habitat because it can:

¹ Western Watersheds has long sought to protect the imperiled fish in this watershed. In 2000, for instance, WWP challenged the use of crude water diversions in Mahogany Creek, a nearby Pahsimeroi tributary, as violating the ESA “take” provision. *IWP v. Whitworth*, CV-00-728-E-BLW (D. Id.). WWP is also currently challenging the failure of BLM and other federal agencies to conduct ESA consultation over their grazing authorizations and other activities in the Pahsimeroi watershed. *WWP v. Rosenkrance*, CV-09-532-BLW.

promote streambank erosion and sedimentation and limit the growth of riparian vegetation important for temperature control, streambank stability, fish cover, and detrital input []. In addition, grazing often results in increased organic nutrient input in streams []. These activities can directly and immediately threaten the integrity of the essential physical and biological features

75 Fed. Reg. at 2282 (scientific citations omitted). These concerns are particularly relevant when livestock have direct access to a stream (e.g., they are not blocked by fencing or other physical barriers), which is the case for Rock Creek. *See AR 1255* (Fish and Wildlife Service noting that BLM could explore option to fence reaches to limit access).

In the Biological Assessment, BLM and the Forest Service evaluated BLM's Rock Creek allotment and the Forest Service's Upper Pahsimeroi allotment together, noting that they contained "occupied habitat for bull trout" as well as "unoccupied designated critical salmon habitat." *AR 131*. The agencies noted that "historic grazing use of these allotments has created adverse impacts on riparian and aquatic habitats along many main Pahsimeroi River and West and East Fork Pahsimeroi River reaches," including "bank shearing, bank trampling or riparian vegetative community alteration." *AR 139 (BA)*. Indirect grazing impacts included "increased sedimentation, reduced shading, and potentially increased water temperatures and altered stream and channel morphology." *Id.* The agencies concluded that grazing these allotments "may affect" but were "not likely to adversely affect" listed salmonids based on management, monitoring, and additional mitigation measures in the form of grazing use standards. *AR 153*.

In a 1999 Letter of Concurrence, the Fish and Wildlife Service noted that "riparian areas within the [Upper Pahsimeroi and Rock Creek] allotments have been degraded in the past due to livestock use including streambank sloughing, bank shearing, hummocking, [and] elevated sediment levels," but concurred with the "not likely to adversely affect" determination based on the mitigation measures. *AR 1255*.

BLM's Environmental Assessment for the Four Allotments.

BLM issued a Pre-Decisional EA for the Authorization of the Grouse Creek, Meadow Creek, Rock Creek and Trail Creek Allotment permits on January 30, 2008. *AR 1751*. Western Watersheds submitted written comments on March 23, 2008. *AR 1845*.

BLM issued a final EA on August 20, 2008, *AR 1882*, along with an attached Finding of No Significant Impact (FONSI)² and four Proposed Grazing Decisions (one for each of the four permittees that graze livestock on one or more of the four allotments). *AR 1958, 1974, 1991, 2006*.

The EA analyzed three alternatives. Alternative 1 (the proposed alternative) was “based on the concerns of the permittees” and proposed the same levels of grazing as currently authorized, except for allowing one permittee to switch from sheep to cows, adding increased “seasonal flexibility,” and constructing numerous range improvements including several miles of new pipeline, five new livestock water troughs, and reconstruction of several projects. *AR 1895–96 (EA)*. Alternative 2 (the BLM-developed alternative) proposed the same livestock numbers as Alternative 1 and several new range projects, although fewer in number than Alternative 1. *AR 1900–04 (EA)*. Alternative 3, the “no action” alternative, also largely proposed the same livestock numbers as Alternative 1, except that the sheep permittee did not convert to cows; and no new range projects were proposed. *AR 1904–08 (EA)*. Thus, all three alternatives analyzed almost identical levels of livestock grazing. *See SSF ¶ 13–15 (showing authorized livestock numbers of each alternative for each allotment)*.

The EA’s “Affected Environment” chapter erroneously stated that all four allotments “contain no threatened or endangered aquatic species.” *AR 1908 (EA)*. It further stated:

² WWP cannot locate the FONSI in the record, but will work with BLM to locate it and supplement the record if necessary.

No adverse effects to the environmental baseline were identified in the Pahsimeroi River Section 7 Watershed BA . . . [t]he BA determined that due to the lack of listed salmonids or their habitats within the allotments . . . , livestock grazing on the allotment [sic] would have no effect on federally listed salmonids.

Id. A chart further incorrectly specified that the Pahsimeroi River does not contain bull trout in the Rock Creek allotment. *AR 1922 (EA)*.

Consequently, BLM failed to assess the impacts to bull trout in the EA's "Environmental Impacts" chapter, which likewise assumed bull trout were not present in the Rock Creek allotment. *AR 1933 (EA)*. Instead, the Environmental Impacts chapter only noted that bull trout are upstream of the allotment in the East and West Forks of the Pahsimeroi River, and again incorrectly stated that the 1999 Biological Assessment determined that the allotment was "Not Likely to Adversely Affect" federally listed salmonids "due to the lack of listed salmonids or their habitats³ within the allotment." *Id.* It thus concluded that "federally protected fisheries and associated critical habitat should not be negatively affected . . . as a result of the livestock grazing on this allotment." *Id.*

BLM did admit in the EA that the grazing and/or projects on the four separate allotments would have negative impacts on wildlife, particularly sage-grouse. For example, the EA admitted that the grazing season and the new proposed troughs in the Grouse Creek allotment "likely will have a negative impact on greater sage-grouse." *AR 1930 (EA)*. First, it explained that grazing would reduce the quantity of grasses that provide nesting camouflage. *Id.* Second, the spring/summer grazing season, which is "the peak of the nesting/ early brood-rearing period," could reduce forb (wildflower) availability for sage-grouse chicks. *Id.* The new proposed troughs would modify livestock distribution by drawing cows to uplands, so "will

³ This is also in error because the Pahsimeroi River is designated Chinook salmon critical habitat. *AR 131 (BA)*.

contribute to the impacts on residual grasses and forbs.” *Id.* The grazing and troughs are also expected to adversely impact big game by reducing potential winter forage and redistributing livestock into new areas previously left to big game. *AR 1930–31.*

The EA makes similar admissions for the other allotments, including that the grazing season in the Trail and Meadow Creek allotments corresponds to sage-grouse nesting and reproductive seasons. *AR 1931–32.* Based on a lek in close proximity, it is likely that nesting occurs on the Meadow Creek allotment, so “potential exists for negative effects from livestock grazing,” including “disturbance of incubating birds.” *AR 1932.* The extent of impact is “unknown.” *Id.* Inexplicably, the EA’s wildlife discussion for Trail Creek and Meadow Creek allotments does not discuss impacts on sage-grouse from the three new troughs on Trail Creek and the reconstructed projects on Meadow Creek. *AR 1931–32.*

Despite these admitted direct impacts on wildlife, the EA’s cumulative impacts analysis failed to discuss impacts to sage-grouse at all. *AR 1934–36.* BLM concluded that the proposed alternative would “maintain or improve the current ecological condition of the vegetation” and would cause no “significant direct, indirect, or cumulative impacts.” *AR 1936.*

BLM’s Decisions.

BLM issued four Proposed Grazing Decisions (one for each of the four permittees that graze livestock on one or more of the four allotments) on August 20, 2008. *AR 1958, 1974, 1991, 2006.* The decisions most closely resemble Alternative 1, as the Grouse Creek sheep permit is converted to cows, *AR 1996,* and the decisions authorize many new range projects. Specifically, the decisions for the Grouse Creek allotment include authorization of four new troughs, three miles of new pipeline, a new spring development and enclosure, and reconstruction of an existing spring development. *AR 1980.* The decisions for the Trail Creek

allotment include authorization of three new troughs, 2.5 miles of new pipeline, and enlargement of a spring exclosure. *AR 1965*. The decision for the Meadow Creek allotment includes authorization of reconstruction of a spring development and associated pipelines, troughs, and exclosure fencing. *AR 2012*.

Western Watersheds submitted administrative protests of the proposed decisions that BLM received on September 12, 15, and 16, 2008. *AR 2039 (BLM letter); AR 2019, 2020 (protests)*. BLM determined that none of the protests were timely. *AR 2039 (BLM letter)*. Under BLM regulations, in the absence of a timely protest, proposed decisions automatically revert to final decisions. 43 C.F.R. § 4160.3(a).

Western Watersheds submitted an administrative appeal and petition for stay on the EA, FONSI, and four decisions before the Department of Interior's Office of Hearings and Appeals on October 8, 2008. *AR 2056*. On November 4, 2008, the Office of Hearings and Appeals denied the petition for stay. *AR 2106*. WWP subsequently dismissed its appeal, *AR 2115, 2117*, and has exhausted all required administrative remedies before electing this forum to pursue its challenges to the decisions.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Under the APA, this Court shall hold unlawful agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §

706(2)(A). Under the arbitrary and capricious standard, the Court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989). While the scope of review under APA § 706(2)(A) is narrow, an agency must articulate a rational connection between the facts found and the conclusions made. *Marsh*, 490 U.S. at 378.

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

A. **NEPA’s Hard Look Requirement: Ensuring Federal Agencies Fully Consider the Environmental Consequences of Proposed Actions and That the Public is Fully Informed.**

NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). It requires federal agencies to “take seriously the potential environmental consequences of a proposed action” by taking a “hard look” at the action’s consequences in an Environmental Assessment or Environmental Impact Statement. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005) (citation omitted). The statute’s twin objectives are (1) to ensure that BLM “consider[s] every significant aspect of the environmental impact of a proposed action” and (2) to “inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006) (citing *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir.2002)); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983).

NEPA requires BLM to prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). A shorter Environmental Assessment may be prepared when an EIS is not necessary. 40 C.F.R. § 1508.9. The NEPA document must “provide full and fair discussion of significant environmental impacts.” *Id.* §

1502.1. Agencies must “consider every significant aspect of the environmental impact of a proposed action.” *Ore. Natural Desert Ass’n v. BLM*, 531 F.3d 1114, 1130 (9th Cir. 2008) (*ONDA v. BLM*) (citing *Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978)). This includes studying the direct and indirect effects and cumulative impacts of the action. *See* 40 C.F.R. §§ 1508.7, 1508.8.

To meet the twin objectives, the NEPA regulations provide that the “information must be of high quality,” as “[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). Likewise, “[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” *Id.* § 1502.24. Specifically, agencies shall accurately describe baseline conditions of the area to be affected by the action. *Id.* § 1502.15.

The agency must share this accurate information with the public prior to making its decision. “NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken.” 40 C.F.R. § 1500.1(b) (emphases added). “NEPA’s purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is ‘almost certain to affect the agency’s substantive decision[s].’” *ONDA v. BLM*, 531 F.3d at 1120 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). This emphasis on “the importance of coherent and comprehensive up-front environmental analysis [] ensure[s] informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998).

B. BLM Failed to Take a Hard Look at Impacts on Bull Trout.

BLM utterly failed to take a “hard look” at ESA-protected bull trout in its NEPA decision-making process, because it erroneously claimed that there were no bull trout present on the Rock Creek allotment.

As explained above, the EA’s “Affected Environment” chapter incorrectly states that bull trout are not present on the Rock Creek allotment and incorrectly characterizes the 1999 Biological Assessment as saying the same. *AR 1908, 1922 (EA)*; *see also 131 (BA stating bull trout present)*. The omission is difficult to comprehend in light of the fact that the 1999 consultation, which indicated bull trout are present, *AR 131 (BA)*, was the governing Endangered Species Act consultation at the time of BLM’s analysis and decision.⁴

Because of this error in the EA’s description of baseline conditions, the EA contains no analysis of the impacts of the ten-year livestock grazing permit on the Rock Creek allotment to bull trout. Instead, relying upon the error, it concludes that “federally protected fisheries . . . should not be negatively affected . . . as a result of the livestock grazing on this allotment.” *AR 1933*. Put simply, an agency did not take a hard look at environmental impacts to a resource **it failed to analyze**.

The Ninth Circuit Court of Appeals has explained that “[w]ithout establishing the baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” *Half Moon Bay Fishermen’s Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

⁴ Plaintiff has learned that the 1999 consultation was recently superseded with a 2009 consultation for the Rock Creek allotment, but that consultation is not relevant to this case, since it occurred after BLM’s decision. The final consultation is not in the record. Additionally, ESA consultation does not satisfy agency duties under NEPA. *See Center for Biological Diversity v. BLM*, 422 F.Supp.2d 1115, 1164 (N.D.Cal. 2006).

Courts have accordingly overturned agency decisions for factual errors that undermined the baseline. Under very similar facts, a court overturned a NEPA document for failing to take a “hard look” when BLM omitted several species. *Center for Biological Diversity v. BLM*, 422 F.Supp.2d 1115 (N.D.Cal. 2006) (*CBD*). There, BLM prepared an EIS for a Recreation Area Management Plan (which opened areas to off-road vehicle use), *id.* at 1128, but failed to mention at all several endemic invertebrate species known to occur in the project area, despite extensive information in the record indicating the species’ presence. *Id.* at 1163. The court explained that because the “Affected Environment” chapter “sets the ‘baseline’ for the environmental analysis that is the heart of the EIS, it is important that the baseline be accurate and complete.” *Id.* Thus, if “numerous species are omitted from the environmental baseline, neither the Court nor the public can be assured that the BLM took a ‘hard look’ at the environmental impacts on those species.” *Id.*

Likewise, here, the “Affected Environment” chapter contains incorrect baseline information, *AR 1908, 1922*, despite numerous documents in the record indicating the presence of bull trout including the then-governing Biological Assessment and Letter of Concurrence, as well as fish survey data. *See SSF ¶ 8–10 (summarizing consultation and fish survey data)*. Here too, there is no assurance that BLM took a hard look at bull trout, and BLM failed to consider “every significant aspect of the environmental impact of a proposed action,” *Vermont Yankee*, 435 U.S. at 553.

The Court of Appeals has also overturned agency decisions that were not based on “high quality” and “accurate” information. 40 C.F.R. § 1500.1(b). In *Native Ecosystems Council v. U.S. Forest Service*, the Forest Service miscalculated the amount of elk habitat in its NEPA document. 418 F.3d 953, 964–66 (9th Cir. 2005). The Court explained that “an agency may not

rely on incorrect assumptions or data in an EIS,” and held that “the [] EIS did not provide a ‘full and fair’ discussion of the potential effects of the project on elk hiding cover.” *Id.* at 964–65.

In another analogous case, a Forest Service EIS misinterpreted an economic study, which led to an inaccurate projection of timber demand. *Natural Res. Def. Council v. U.S. Forest Service*, 421 F.3d 797, 802 (9th Cir. 2005) (*NRDC*). The Court explained the error was harmful, because “[h]ad the decision makers and the public known of the accurate demand forecast for Tongass timber . . ., the Forest Service may have selected an alternative with less adverse environmental impact, in less environmentally-sensitive areas.” *Id.* at 812. Thus it held that “the Forest Service violated NEPA’s procedural requirement to present complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives considered in the EIS.” *Id.*

Here, too, BLM’s error violates NEPA’s requirements to present “high quality” and “accurate” information to the public. Had BLM and the public known of the presence of bull trout in the allotment, BLM might have developed and selected an alternative with fewer potential environmental impacts on bull trout, like keeping livestock away from the river, strengthening livestock use standards for river vegetation, or reducing livestock numbers. Thus, BLM’s significant error in describing baseline conditions prevented BLM from conducting a full and fair analysis, violated its duty to present accurate information, and caused the public to be “misled in its opportunity for comment.” *NRDC*, 421 F.3d at 813.

Nor was BLM’s error in this case a harmless, typographical one. After all, this is a species protected by the Endangered Species Act, which requires “agencies to afford first priority to the declared national policy of saving endangered species.” *TVA v. Hill*, 437 U.S. 153, 185 (1978). The authorized activity, a ten-year grazing permit where the livestock have ready access

to the stream, is one that inarguably has the potential to adversely affect bull trout and its habitat, as demonstrated amply by the record. *See SSF ¶¶ 7–10 (surveys and consultation documents describing livestock impacts to Pahsimeroi River)*. The Court of Appeals has also recognized that grazing in fish habitat causes impacts. *E.g., Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 821 (9th Cir. 2002) (describing that grazing practices harm riparian habitat); *Arizona Cattle Growers*, 273 F.3d 1229, 1248 (9th Cir. 2001) (“sedimentation resulting from grazing ... can adversely affect loach minnow habitat” and “that this indirect effect, along with the direct crushing of loach minnow eggs and the reduction in food availability, will result in take of the loach minnow”). These failures violate NEPA’s hard look requirement and render BLM’s decision arbitrary, capricious and not in accordance with NEPA.

II. BLM VIOLATED NEPA BY FAILING TO STUDY A REASONABLE RANGE OF ALTERNATIVES WITH RESPECT TO LIVESTOCK GRAZING.

NEPA also mandates that federal agencies “[s]tudy, develop, and describe alternatives to recommended courses of action in any proposal which involves conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). One of the primary purposes of a NEPA document is to “inform decisionmakers and the public of the reasonable alternatives which would *avoid or minimize adverse impacts* or enhance the quality of the human environment.” 40 C.F.R. § 1502.1 (emphasis added). The alternatives analysis is “the heart of the environmental impact statement,” *id.* § 1502.14, and applies to both EISs and EAs. *See id.* § 1508.9(b).

The purpose of analyzing alternatives is to “present the environmental impacts of the proposal and the alternatives” and to “thus sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. To that end, the agency must “[r]igorously explore and objectively evaluate all reasonable alternatives.” *Id.* “The touchstone for our inquiry is whether an EIS’s selection and discussion of alternatives

fosters informed decision-making and informed public participation.” *Calif. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

As explained above, all three alternatives analyzed in the EA—including the “no action” alternative—propose almost identical livestock grazing levels, varying only in their amount of range projects. *SSF* ¶ 13–15. The *only* difference in grazing levels between the alternatives is that Alternatives 1 and 2 allow one of the Grouse Creek allotment permittees to convert from sheep to cows. *Id.* BLM’s failure to analyze alternative levels of grazing violates NEPA.

BLM failed to analyze any alternatives that would “avoid or minimize adverse impacts or enhance the quality” of bull trout (or sage-grouse) habitat. 40 C.F.R. § 1502.1. The project area contains one allotment where livestock have direct access to occupied bull trout habitat, and three allotments consisting of “key” sage grouse habitat. *SSF* ¶ 3–5, 7–10. Livestock grazing impacts both. *SSF* ¶ 7–10, 18–20. In order to avoid or minimize impacts to fish and wildlife, BLM could have easily considered an alternative that drew cattle away from the stream to prevent livestock trampling of bull trout habitat, altered timing so as to not graze during sage-grouse reproductive season, strengthened livestock use standards, or reduced livestock numbers, but it refused to do so.

There is simply no “clear basis for choice among options by the decisionmaker and the public” with three alternatives proposing almost identical livestock grazing levels.

40 C.F.R. § 1502.14. It is impossible for the analysis to “sharply defin[e] the issues” surrounding livestock grazing when they are all the same. *Id.* Nor can it be said that a “comparison” of almost identical alternatives “fosters informed decision-making and informed public participation.” *Cal. v. Block*, 690 F.2d at 767. As the Court of Appeals recently held in *ONDA v. BLM*, when reviewing a Resource Management Plan that “considered no alternative

that proposed closing more than a fraction of the area to ORV use,” it is “precisely this sort of uncritical privileging of one form of use over another that we have held violates NEPA.” *ONDA v. BLM*, 531 F.3d at 1145 (quotation omitted) (citing *Cal. v. Block*, 690 F.2d at 767). Because BLM failed to study a reasonable range of alternatives in the EA, its decisions are arbitrary, capricious and not in accordance with NEPA.

III. BLM VIOLATED NEPA BY FAILING TO ANALYZE THE CUMULATIVE IMPACTS OF THE ACTION ON FISH AND WILDLIFE.

The EA additionally violated NEPA by failing to address in any meaningful or legally adequate manner the cumulative impacts of the decisions. Specifically, the EA failed to consider the cumulative impacts on fish and wildlife caused by the decisions for all four allotments covered in the challenged decisions—much less the impacts caused by grazing other adjacent allotments for which BLM is in the process of issuing permits.

Under NEPA, agencies must take a “hard look” at cumulative impacts, which are impacts that “result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions.” 40 C.F.R. § 1508.7. Cumulative impacts “can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

In analyzing the cumulative effects of a proposed action, an agency must do more than just catalogue “relevant past projects in the area”: it must also 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). Agencies 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.

When an EA does not “sufficiently identify or discuss the incremental impacts” expected from successive projects, or “how those individual impacts might combine or synergistically interact with each other to affect the [] environment,” it does not satisfy NEPA. *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004).

The EA’s cumulative impacts analysis is deficient in a number of respects. Most strikingly, BLM never assesses the cumulative impacts on wildlife that the four decisions will have on the 45,000-acre area as a whole. In fact, wildlife such as sage-grouse are *not even mentioned* in the cumulative impacts section, despite the EA’s prior admissions that the proposed actions would be harmful to wildlife on each individual allotment. *AR 1934–36 (EA)*. For example, the EA’s discussion of direct impacts on wildlife for Grouse Creek admits harmful impacts on sage-grouse, but states “it is considered unlikely that the disturbance level would be sufficient *across the allotment* so as to impact any breeding population as a whole.” *AR 1930 (EA)* (emphasis added). But BLM never assessed whether the disturbance levels on *all four allotments* would.

Furthermore, other than some erroneous soil disturbance calculations,⁵ the cumulative impacts analysis contains no “quantified or detailed information.” *Ocean Advocates*, 402 F.3d at 868. Nor is there any “justification regarding why more definitive information could not be provided.” *Id.* Instead, the EA’s cumulative impacts analysis consists almost entirely of supposed *positive* impacts of grazing in general, and the decision specifically. *AR 1934–36*. The only negative impacts mentioned are potential private lands impacts, plus an acknowledgement that livestock watering troughs cause soil disturbance. *Id.* BLM then summarily concludes that

⁵ BLM states that troughs disturb an average of 0.7 acres, but then concludes that the four existing troughs on one allotment impact a total of 0.3 acres and an additional three would bring the total to 0.5 acres. *AR 1936*. The totals for four and seven troughs should be 2.8 and 4.9 acres, respectively.

“[n]o significant direct, indirect, or cumulative impacts are expected as a result of the proposed alternative.” *AR 1936*.

Finally, BLM failed to catalogue or analyze the impacts of other past and reasonably foreseeable future actions in the area. Instead, BLM has taken a piecemeal approach to its NEPA analysis across the Pahsimeroi Valley. BLM either recently completed NEPA analysis or is currently in the process of NEPA analysis for the reauthorization of ten-year grazing permits on four additional allotments that are *directly adjacent* to the allotments at issue in this case. *See Attach. A to Fite Decl. (BLM map of Challis BLM Resource Area allotments)*. Reissuance of a ten-year grazing permit for BLM’s Upper Pahsimeroi allotment, a large allotment that connects the Grouse Creek and Rock Creek allotments at issue in this case, *see id.*, has a projected decision date of March 1, 2010.⁶ Reissuance of ten-year grazing permits for Donkey Hills and Pines/ Elkhorn allotments, both likewise adjacent to the Grouse Creek allotment, *see id.*, are also currently undergoing NEPA analysis, with a projected decision date of April 15, 2011.⁷ The Burnt Creek allotment, adjacent to the Rock Creek allotment at issue here and also part of the Burnt Creek Wilderness Study Area, had a ten-year permit renewal Final Decision, EA, and FONSI issued on September 8, 2008⁸—less than a month after the August 20, 2008 issuance of the decisions at issue here. *See Attach. A to Fite Decl. (excerpts of Burnt Creek EA)*.

⁶ *See* <http://www.id.blm.gov/planning/nepa/databases/project.php?id=366> (last visited Mar. 26, 2010) (BLM NEPA planning site for permit renewal of Upper Pahsimeroi and Goldberg allotments, showing “Projected/ Actual Decision Date” of 3/1/2010). To Plaintiff’s knowledge the decision has not yet been issued.

⁷ *See* <http://www.id.blm.gov/planning/nepa/databases/project.php?id=1325> (last visited Mar. 26, 2010) (BLM NEPA planning site for permit renewal of Donkey Hills and Pines[/] Elkhorn allotments, showing “Projected/ Actual Decision Date” of 4/15/2011).

⁸ The Burnt Creek EA is currently being challenged in *WWP v. Rosenkrance*, 09-365-E-BLW (D. Id., filed July 28, 2009).

And yet, BLM failed to even mention these adjoining permit renewals, which were, at the least, “reasonably foreseeable,” 40 C.F.R. § 1508.7, and hence required to be considered in this NEPA analysis. The cumulative impacts analysis fails to catalogue “relevant past projects in the area”—much less “include a useful analysis of the cumulative impacts of past, present and future projects.” *City of Carmel-by-the-Sea*, 123 F.3d at 1160. Thus, BLM never identifies or discusses the “incremental impacts” expected from the multiple renewals, or “how those individual impacts might combine or synergistically interact with each other to affect the [] environment.” *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 997.

Under similar facts, this Court held that BLM violated NEPA when it approved four separate grazing EAs in the same Resource Area, covering numerous allotments, but failed to identify any cumulative effects over the larger area. *WWP v. Bennett*, 392 F.Supp.2d 1217, 1221–23 (D. Id. 2005). There the Court relied in part upon the presence of sage-grouse, a sensitive species in decline, and the fact that “the EAs were, like a horse with blinders, hampered by a restricted field of vision.” *Id.* at 1223. That same species is present here, and it has now been found to be “warranted” for protection under the Endangered Species Act, although “precluded” by other priorities. 12-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,909 (Mar. 23, 2010). BLM’s EA surely wore blinders, when it failed to note, or analyze, the multiple decisions happening all around the subject allotments.

By piecemealing its actions into a multitude of separate EAs that fail to consider the impacts of the others, BLM has “divid[ed] a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Native Ecosystems Council v. Dombek*, 304 F.3d 886, 894 (9th Cir. 2002). As in *Bennett*, “[t]he only way the BLM could avoid this problem would be to engage in a detailed

cumulative impacts analysis,” but it failed to do so. *Bennett*, 392 F.Supp.2d at 1223. BLM’s failure to consider cumulative impacts renders its decisions arbitrary, capricious and not in accordance with NEPA.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully prays the Court to grant summary judgment in its favor, and reverse and remand the challenged 2008 EA, FONSI, and Decisions as being arbitrary, capricious and contrary to law under NEPA.⁹

DATED this 26th day of March, 2010.

Respectfully submitted,

/s/ Kristin F. Ruether

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⁹ Plaintiff respectfully reserves the right to subsequently seek injunctive or remedial relief.