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14 UNITED STATES DISTRICT COURT  
15 FOR THE DISTRICT OF ARIZONA

16 WESTERN WATERSHEDS PROJECT  
17 and SIERRA CLUB,

18 Plaintiffs,

19 vs.

20 BUREAU OF LAND MANAGEMENT,

21 Defendant.

22 Case No.: 2:13-cv-1028-PGR

23 **PLAINTIFFS' RENEWED MOTION**  
24 **FOR SUMMARY JUDGMENT AND**  
25 **OPENING BRIEF RE: DEFENDANT'S**  
26 **SUPPLEMENTAL REPORT**

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1 **MOTION**

2 Plaintiffs Western Watersheds Project and Grand Canyon Chapter of the Sierra  
3 Club hereby renew their motion for summary judgment, as allowed for by this Court in  
4 its Order of February 26, 2015, because Defendant’s Supplemental Report does not  
5 remedy the legal violations found by the Court in that Order. *See* Order at 24-25 (ECF  
6 No. 55).

7 **SUPPORTING BRIEF**

8 **INTRODUCTION**

9 On February 26, 2015, this Court issued an Order granting Plaintiffs’ Motion for  
10 Summary Judgment to the extent they sought remand of Defendant Bureau of Land  
11 Management’s (“BLM”) decision allowing livestock grazing to continue over large  
12 portions of the Sonoran Desert National Monument. *Id.* The Court ruled that BLM’s  
13 Land Health Evaluation (“LHE”) was arbitrary and capricious because the agency had  
14 not adequately explained and supported some of its decisions that led to the LHE  
15 conclusion and determination that livestock grazing was compatible with protecting the  
16 resources on the monument. Order at 10-24. Rather than ordering the agency to redo its  
17 analysis, as Plaintiffs requested, the Court gave BLM an opportunity to cure the defects  
18 in its decision-making process by either providing the explanations and support that the  
19 Court found lacking, or deciding to adopt different decisions with reasoned explanations  
20 and support. Order at 24-25.

21 BLM opted to complete a supplemental report that tries to provide the missing  
22 explanations and support for its LHE. Supp. Report (ECF No. 59-1). This report fails to  
23 remedy the legal violations discussed in the Court’s Order for several reasons: (1) it  
24 provides explanations that are improper post-hoc rationalizations not found in the  
25 administrative record; (2) because those explanations were not in the LHE, compatibility  
26 determination, or Environmental Impact Statement, the public never had a chance to  
27 comment on them, in violation of the National Environmental Policy Act; (3) the  
28 supplemental report does not fully explain and support BLM’s decision-making process;

1 and (4) the report does not adequately respond to peer reviewer comments.

2 Accordingly, because BLM's report does not remedy the legal violations related to  
3 the LHE, this Court must order BLM to conduct a new LHE and grazing compatibility  
4 determination supported by adequate explanations and data. Plaintiffs do not request  
5 vacatur of BLM's existing decisions, and therefore grazing in accordance with those  
6 decisions would continue in the interim; but they do request that the Court impose a  
7 deadline for BLM to complete a new LHE and grazing determination.

## 8 ARGUMENT

### 9 I. Post Hoc Explanations are Improper under the APA and NEPA.

10 As this Court noted, BLM needed to provide an adequate explanation *in the record*  
11 to support its decisions in the LHE. Order at 12. Indeed, a court's review of an agency  
12 action is limited to the administrative record. *Nw. Motorcycle Ass'n v. U.S. Dep't of*  
13 *Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994); *see also Native Ecosystems Council v. U.S.*  
14 *Forest Serv.*, 418 F.3d 953, 963 (9<sup>th</sup> Cir. 2005) (court must be able reasonably to  
15 ascertain from the record whether the agency complied with the law). Courts may not  
16 accept post hoc rationalizations by defendants during litigation to provide an explanation  
17 that is missing from the administrative record. *Humane Soc'y of U.S. v. Locke*, 626 F.3d  
18 1040, 1049-50 (9th Cir. 2010); *Ctr. for Biol. Diversity v. BLM*, 698 F.3d 1101, 1124 (9th  
19 Cir. 2012). In a case challenging another part of this same Resource Management Plan,  
20 the court likewise stated that BLM could not cure deficiencies in the EIS by attempting to  
21 provide a post hoc rationalization during litigation. *National Trust for Historic*  
22 *Preservation v. Suazo*, case no. CV-13-1973-PHX-DGC, Order at 19 (ECF No. 43) (D.  
23 Ariz., March 27, 2015) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut.*  
24 *Auto. Ins. Co.*, 463 U.S. 29, 50(1983)). As explained below, the supplemental report here  
25 is nothing more than another post hoc rationalization that is neither found in nor  
26 supported by the documents in the actual administrative record.

27 Moreover, NEPA requires that an agency fully disclose information supporting its  
28 analysis to fulfill the Act's twin goals of ensuring that agencies have available and

1 carefully consider information concerning environmental impacts of a proposed action,  
2 and that the relevant information is available to the larger public audience. *N. Idaho*  
3 *Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008). The  
4 Supreme Court has similarly recognized that second purpose of NEPA, stating that the  
5 requirement to provide a full and fair discussion of the environmental impacts of a  
6 proposed action in an EIS “guarantees that the relevant information will be made  
7 available to the larger audience that may also play a role in both the decisionmaking  
8 process and the implementation of that decision.” *Dep't of Transp. v. Pub. Citizen*, 541  
9 U.S. 752, 768 (2004) (internal quotation omitted).

10 Failing to adequately disclose information prevents the public from providing  
11 reasoned public comments that may assist the agency in its decision-making process, in  
12 violation of NEPA. *See e.g. Native Ecosystem Council*, 418 F.3d at 965-66; *N. Plains*  
13 *Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *Kern*  
14 *v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002); *Lands Council v. Powell*, 395 F.3d 1019,  
15 1027 (9th Cir. 2005). Allowing an agency to provide a post hoc explanation for its  
16 decision thwarts the public disclosure and informed public comment purpose of NEPA.

## 17 **II. BLM’s Supplemental Report Did not Remedy the LHE Flaws.**

18 BLM’s supplemental report does not adequately remedy the legal flaws with the  
19 LHE for two key reasons: it is an unlawful post hoc explanation not found in or  
20 supported by the record, in violation of the APA and NEPA; and it does not provide the  
21 missing explanations and support for the decisions in the LHE. Thus, BLM’s LHE  
22 remains arbitrary, capricious, and contrary to law.

### 23 **A. Identification of Plant Community Objectives**

24 The Court held that BLM failed to explain in the record how it derived the desired  
25 plant community objectives and the reasons for the wide variance in adjustments made to  
26 the objectives during the LHE process. Order at 10-13. This lack of explanation  
27 occurred for objectives based on Barry M Goldwater Air Force Range/Area A  
28 (“BGR/A”) data and Ecological Site Description (“ESD”) information as well as for

1 saguaro recruitment. *Id.* As described below, BLM's supplemental report does not fix  
2 these flaws.

### 3 1. Objectives based on BGR/A data

4 BLM goes into some detail in its supplemental report describing how it used the  
5 BGR/A data along with ESD reference sheets and precipitation levels to set the final  
6 plant community objectives. Supp. Report at 2-5. However, the only documents from  
7 the administrative record cited in the report are the LHE, ESD sheets, and a map showing  
8 average annual precipitation zones in and around the monument. *See id.* (citing LHE at  
9 AR 74591, 74607-11, 74621; ESD sheets at AR 84867-85004; precipitation map at AR  
10 54933). It would be impossible for a member of the public or the peer reviewers, as well  
11 as the Court, to discern how BLM arrived at its objectives based on the documents cited  
12 in the supplemental report.

13 Nowhere in the LHE does it explain what information BLM used from the ESD  
14 sheets, what calculations it made using that information, or how it incorporated that  
15 information with the BGR/A data to set the objectives. AR 74607-11, 74621. The LHE  
16 also does not explain that BLM lowered numerous objectives because precipitation levels  
17 are supposedly lower in the northern part of the monument. *Id.* The record contains a  
18 map of precipitation zones, but no reference to that occurs in the LHE when discussing  
19 the objectives. *Id.*; AR 54933. Particularly given that BLM's treatment of this  
20 information varied between ecological sites, *see infra* pp. 7-8, there is no way to  
21 reasonably ascertain from the administrative record how BLM set the objectives and  
22 therefore whether those objectives were rational and supported by data. *Native*  
23 *Ecosystems Council*, 418 F.3d at 963.

24 Thus, because the supplemental report was not part of the record during the  
25 decision-making process, neither the public nor the peer reviewers could provide any  
26 comments on the methods BLM used or the assumptions it made that were described in  
27 the supplemental report. Even when WWP questioned in its comments on the draft EIS  
28 and protest of the draft RMP how BLM set the objectives and why it made so many

1 adjustments, BLM still did not provide the explanation it now puts forth in the  
2 supplemental report. *See* AR 72159-63 (WWP comments); 74333-36, 74344-46 (BLM  
3 response to comments); 75843, 75860-61(WWP protest); 78492, 78525 (BLM response  
4 to protest). Explaining its methods after-the-fact in a supplemental report undermines the  
5 very purpose under NEPA of public and peer review comments: assisting in the  
6 decision-making process.

7 In addition to the procedural problem of not providing the required explanation in  
8 the record, BLM's explanation in the supplemental report is not rational or supported by  
9 the data. The two key reasons BLM provided for making adjustments to the BGR/A data  
10 when setting the objectives were: (1) that precipitation is lower north of Highway 8 than  
11 in BGR/A, and (2) to incorporate information from the ESD sheets. *See* Supp. Report at  
12 2-5. However, BLM's reasoning was flawed because the information in the record does  
13 not support the precipitation rationale, and BLM was inconsistent in how it used the ESD  
14 and precipitation information when making adjustments to the BGR/A data.

15 In the supplemental report, BLM stated that it adjusted the average of the BGR/A  
16 data downward to set objectives for Limy Fan shrub composition and canopy cover,  
17 Sandy Wash canopy cover, and Limy Upland Deep shrub composition and canopy cover  
18 to compensate for lower precipitation north of Highway 8 compared to BGR/A. Supp.  
19 Report at 3-4. The report also stated that the majority of the ecological sites on the  
20 monument north of Highway 8 occur at the lower end of the 7-10" precipitation zone,  
21 with some areas occurring even slightly lower than 7" of precipitation. Supp. Report at 2.  
22 The only document cited by BLM to support these propositions is the map of annual  
23 average precipitation found at AR 54933. Supp. Report at 2. This map is insufficient to  
24 support BLM's assertions and adjustments to the objectives.

25 First, the map does not show that the majority of ecological sites north of Highway  
26 8 are at the "lower end" of the 7-10" precipitation range. Indeed, the map does not even  
27 identify where the different ecological sites occur either north of Highway 8 or in BGR/A  
28 to know which precipitation zones they fall within. AR 54933. Furthermore, according

1 to the map cited by BLM, the majority of the area north of Highway 8 falls within the  
2 8-10” precipitation zone, with the remainder in the 6-8” zone. *Id.* This map does not  
3 support the statement that the majority of ecological sites north of Highway 8 are at the  
4 lower end of the 7-10” precipitation range (which presumably would be 7-8”) given that  
5 the majority of that area is shown to receive 8-10” of precipitation. *Id.*

6 Second, the assumption that the BGR/A data is going to reflect higher  
7 precipitation levels than sites north of Highway 8 is also unsupported by the record. The  
8 BRG/A plots used to set objectives are identified in the LHE at Table F-9. AR 74621.  
9 The location of these plots is shown on the map at AR 54932. When comparing this map  
10 to the precipitation map at AR 54933, it is clear that most of the plots in BGR/A that  
11 were used to set objectives occurred in the 6-8”<sup>1</sup> or 8-10”<sup>2</sup> precipitation zones. Only four  
12 of fourteen plots used in Table F-9 occurred in the 10-12” precipitation zone.<sup>3</sup> Thus,  
13 most of the data collected in BGR/A were from the same precipitation zones found north  
14 of Highway 8. BLM’s assertion that the BGR/A data reflects higher precipitation levels  
15 than sites north of Highway 8 is not supported by the record.

16 Finally, as Plaintiffs demonstrated previously, BLM made many adjustments to  
17 the ecological site objectives between different versions of the LHE, sometimes multiple  
18 changes to the same objective. *See* Plaintiffs’ Separate Statement of Undisputed Material  
19 Facts ¶ 39 (ECF No. 37) (Table showing changes to objectives between different versions  
20 of LHE). Many of the adjustments to the objectives occurred between Doc 907 and  
21 Supp. Doc 11, with a few additional changes occurring between Supp. Doc. 11 and Doc.  
22 1068. *Id.*; AR 54303-06, 83718-22, 55116-20, 56386-92. There were no changes made  
23 between Doc. 1068 and the Final LHE. Statement of Facts ¶ 39; AR 56386-92, 74608-  
24 11. Yet, the precipitation map that supposedly supported many of the downward

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27 <sup>1</sup> Plots BHPP3, 234, 237, 240

28 <sup>2</sup> Plots BHPP1, BHPP2, 232, 233, 236, 252

<sup>3</sup> Plots 262, 269, 271, 272

1 adjustments to the objectives was not created until July 13, 2010, *after* Doc 1068. AR  
 2 54933 (map “Created 7/13/10”); AR 56364 (Doc 1068 dated June 2, 2010). Thus, this  
 3 map could not have supported the many adjustments to objectives that had occurred by  
 4 June 2, 2010.

5 In addition to the problems with the lower precipitation rationale, BLM’s use of  
 6 precipitation and ESD information in conjunction with BGR/A data was inconsistent.  
 7 BLM varied considerably in its adjustments from the BGR/A data to supposedly account  
 8 for the lower precipitation, sometimes making small adjustments while other times  
 9 making large adjustments. The supplemental report lists the following adjustments to  
 10 compensate for lower precipitation:

<u>Ecological Site</u>	<u>BGR/A Data</u>	<u>Objective</u>	<u>% Reduction</u>
Limy Fan comp.	10%	9%	10%
Limy Fan can. cover	8.8%	7%	20%
Sandy Wash can. cover	37%	34%	8%
Limy Upland Deep comp	23.5%	12%	49%
Limy Upland Deep can. cover	13%	10%	23%

15 Supp. Report at 3-4. In other words, BLM did not lower all of these objectives by the  
 16 same proportion to account for lower precipitation and did not explain why.

17 BLM’s treatment of ESD data was also inconsistent. Sometimes it considered the  
 18 ESD information while other times it did not, and sometimes it stayed within the range of  
 19 composition or canopy cover identified in the ESD reports while other times it went  
 20 outside the range. For instance, BLM noted that its final objectives for canopy cover in  
 21 the Sandy Wash and Grantic Hills ecological sites were within the ESD range for canopy  
 22 cover. Supp. Report at 4-5. Yet, it set objectives for canopy cover in the Limy Fan and  
 23 Limy Upland Deep sites without considering the ESD range at all. Supp. Report at 3-4.  
 24 In fact, each of those two objectives was well below the range identified in the ESD:

Limy Fan can. cover objective 7%	ESD range 10-15%
Limy Upland Deep can. cover objective 10%	ESD range 20-25%

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 26  
 27 Supp. Report at 3-4; AR 84947; AR 84926. Likewise, for plant composition, BLM set  
 28 objectives for Sandy Wash and Limy Upland Deep within the ESD range but set the



1 composition objective for Limy Fan below the ESD range. Supp. Report at 3-4. BLM's  
2 inconsistencies in lowering objectives to account for precipitation and use of ESD  
3 information shows its methods in setting objectives were not rational.

4 In sum, BLM still does not have a satisfactory explanation or sufficient data to  
5 support the wide variance in adjustments made to the BGR/A-based objectives during the  
6 LHE process.

## 7 **2. Objectives based on ESD data**

8 Similar problems occur with the objectives based on ESD data: lack of explanation  
9 in the record, lack of data to support the explanation in the report, and inconsistent  
10 treatment of the ESD information.

11 BLM responds to the Court's question of how it set objectives for palatable  
12 browse or perennial grass composition by stating that it used ESD vegetation production  
13 data from certain functional groups. Order at 11-12; Supp. Report at 5-7. For instance, it  
14 used ESD functional groups 1, 2, and 3 to represent grass composition, and used  
15 functional group 8 to represent palatable browse. *Id.* But this information was not  
16 provided in the LHE or elsewhere in the record and thus the public and peer reviewers  
17 would not have been able to assess and comment on BLM's choices for these objectives.

18 Other assertions BLM made in the Supplemental Report were not supported by  
19 data. First, BLM asserted that the Loamy Swale, Limy Upland, and Sandy Loam Deep  
20 ecological sites all occur *at the lower end* of the 7-10 inch precipitation gradient, citing  
21 the ESD data sheets. Supp. Report at 6-7. But the ESD data sheets simply state that  
22 "[p]recipitation ranges from 7 to 10 inches" for each of those ecological sites. AR 84951,  
23 84890, 84975. Nor does the precipitation map in the record at AR 54933 support the  
24 claim that these sites are "at the lower end" of the 7-10 inch precipitation range when that  
25 map does not even show ecological sites and the majority of the area north of Highway 8  
26 is in the 8-10" precipitation zone, as explained above. Therefore, BLM's reliance on this  
27 assertion to set objectives was not supported by the record. *See* Supp. Report at 6-7.

28 Second, BLM asserted that it set objectives for Loamy Swale canopy cover and

1 Sandy Loam Deep composition and canopy cover that were equal to current conditions at  
 2 the sites because current conditions were “acceptable.” Supp. Report at 6-7.<sup>4</sup> BLM did  
 3 not explain or provide data to show that “acceptable” conditions matched desired plant  
 4 community conditions. The objectives were set at the low end of the ESD range and  
 5 BLM did not have data to show that impacts to the sites were minimal and no  
 6 improvement to conditions could occur. *Id.* To the contrary, the record shows that the  
 7 Sandy Loam Deep ecological site only occurs “within the service use area of the Big  
 8 Horn station livestock water on the Big Horn allotment.” AR 74611. Elsewhere in the  
 9 record, BLM admits that heavy impacts from livestock occur near water sources. AR  
 10 74612. This information does not support the assumption that current conditions in that  
 11 ecological site match desired conditions but, rather, that livestock have likely caused  
 12 impacts to the site because it is within the Big Horn station livestock water service area.

13 Like with the BGR/A data, BLM was inconsistent in how it set objectives using  
 14 the ESD information. This table shows a comparison of objectives and ESD range:

<u>Ecological Site</u>	<u>Objective</u>	<u>ESD Range</u>
Loamy Swale per. grass comp.	10%	5-9%
Loamy Swale can. cover	20%	20-30%
Sandy Loam Deep comp.	16%	14-31%
Sandy Loam Deep can. cover	15%	15-25%
Limy Upland comp.	5%	6-11%
Limy Upland can. cover	12%	20-25%

20 Supp. Report at 6-7. Even within the same ecological site, BLM was inconsistent. It set  
 21 the Loamy Swale composition objective 1% above the ESD range while it set the canopy  
 22 cover objective at the very low end of the ESD range. Supp. Report at 6. It did not  
 23 explain why lower precipitation would justify setting the canopy cover at the low end of  
 24 the ESD range when it had just set the composition objective above the ESD range. For  
 25 the Limy Upland ecological site, BLM used data from the Limy Upland Deep site to set

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 27 <sup>4</sup> BLM’s circular logic for the Sandy Loam Deep site was that it set the objectives for the  
 28 site the same as current conditions because current conditions were achieving the  
 objectives. Supp. Report at 7. Thus, BLM apparently determined the site was achieving  
 the objectives before it set the objectives.

1 the canopy cover objective but did not use Limy Upland Deep data to set the composition  
2 objective. Supp. Report at 6-7. These various inconsistencies in how BLM treated the  
3 ESD information to set objectives, and its reliance on unsupported assertions about  
4 precipitation levels and acceptable conditions being the same as desired conditions, show  
5 that BLM's explanations were not rational and supported by data.

6 Finally, the supplemental report did not explain why BLM made so many changes  
7 to the objectives between various versions of the LHE when the ESD information did not  
8 change. The ESD data sheets in the record were all approved by May 2008, before BLM  
9 made any adjustments to the objectives. *See* Statement of Facts ¶ 39 (showing changes to  
10 objectives started after August 2008 version of LHE (Doc 907)); AR 84885, 84888,  
11 84906, 84909, 84924, 84927, 84945, 84949, 84969, 84973, 84988, 84991, 85002, 85004  
12 (approval dates for ESD information). BLM supposedly used the ESD information when  
13 setting objectives in the August 2008 version of the LHE. AR 54303. Yet, five of the six  
14 composition and canopy cover objectives for the Loamy Swale, Limy Upland, and Sandy  
15 Loam Deep ecological sites changed at least once between that version and the Final  
16 LHE, with several lowered significantly. Statement of Facts ¶ 39. These large  
17 adjustments to objectives when the underlying information did not change further shows  
18 the unreasonableness of BLM's methods.

### 19 **3. Objectives for saguaro recruitment**

20 For saguaro recruitment objectives, BLM ignored the BGR/A data and used data  
21 from outside BGR/A to set objectives. Supp. Report at 8. In other words, it used the  
22 existing conditions in areas that had been grazed to set the objectives. It did not assess  
23 whether the existing conditions had been impacted by grazing or whether a higher  
24 recruitment rate would be desirable. In fact, BLM's use of saguaro data from outside  
25 BGR/A to set objectives was not supported by statements made by the lead scientist who  
26 collected that data, who concluded that livestock were having an adverse effect on small  
27 saguaros. AR 62581. BLM had no support for its assumption that saguaro recruitment in  
28 grazed areas was at the desired level in the granitic hills or limy upland sites.

1 BLM also did not explain its numerous changes to the saguaro objectives between  
2 LHE drafts. Initially, BLM used objectives of +1 new recruit for the Granitic Hills and  
3 Limy Upland sites, then changed to 1 small stem/12.5 meter plot for both sites, and  
4 finally ended up at .96 small stem/12.5 meter plot for Granitic Hills and .83 small  
5 stem/12.5 meter plot for Limy Upland. Statement of Facts ¶ 39. Even if BLM  
6 determined that the BGR/A data of 1.26 small stems/12.5 meter plot was too high due to  
7 higher precipitation in BGR/A plots, BLM did not explain why 1 stem/12.5 meter plot, as  
8 used in two versions of the LHE, needed to be lowered again to .96 and .83 stems/plot to  
9 set objectives for *desired* conditions. See Statement of Facts ¶ 39 (showing Supp. Doc.  
10 11 and Doc 990 using 1 stem/12.5 m. plot).

11 Although BLM inserted a variety of calculations and explanations in the  
12 supplemental report to attempt to justify its desired plant community objectives, these  
13 explanations still fail because they were not in the record for the public and peer  
14 reviewers to assess, are not supported by the information in the record, are inconsistent  
15 and irrational, and do not fully explain all of the changes to the objectives. Thus, the  
16 setting of the plant community objectives is still arbitrary and capricious.

## 17 **B. Exclusion of Data when Determining Land Health Violations**

18 The second line of flaws with the LHE discussed in the Court's Order related to  
19 BLM's exclusion of certain data from its analysis when determining whether ecological  
20 sites met objectives and therefore achieved Land Health Standard 3. Order at 13-17.

### 21 **1. Exclusion of BLM data**

22 The Court ruled that BLM did not explain why it used 2004 data for the Beloit  
23 allotment when it used 2009 data for the other allotments. Order at 13-14. BLM claimed  
24 in the supplemental report that it made a typographical error in its data tables and actually  
25 used 2007 data rather than 2004 data for three plots on the Beloit allotment. Supp.  
26 Report at 8-9. This appears to be true. However, BLM also stated that the only data  
27 collected in 2009 was plant composition data at plot B-9. Supp. Report at 9. Yet data  
28 sheets in the record for the Beloit allotment show that data was collected at other plots on

1 the allotment in 2009. AR 58314, 58316, 58318-23, 58331. BLM did not explain why it  
2 did not use that data in its analysis. Supp. Report at 9.

## 3 **2. Exclusion of PBI data**

4 The Court next held that BLM's reasoning for excluding some of the Pacific  
5 Biodiversity Institute (PBI) data—because it failed to consider certain factors—was  
6 arbitrary and capricious when BLM's own data, and the PBI data that BLM did use, also  
7 did not incorporate those factors. Order at 15-16. BLM's response in the supplemental  
8 report as to why it excluded much of the PBI data did not address the Court's ruling at  
9 all. Supp. Report at 10-11.

10 All of the data at issue in this claim related to determining whether areas within  
11 grazing allotments were meeting the desired plant community objectives and therefore  
12 were meeting Land Health Standard 3. If land health standards were not met, then BLM  
13 determined in the *next* step whether livestock grazing was causing the violations. *See* AR  
14 74551. The supplemental report seems to confuse these issues by discussing why PBI  
15 data was not used to determine causality rather than addressing the Court's ruling and  
16 explaining why the data was not used to determine land health violations. Supp. Report  
17 at 10-11. Thus, the discussion in the supplemental report is inapposite.

18 BLM determined whether Land Health Standard 3 was being met on grazing  
19 allotments by comparing plant composition, canopy cover, and saguaro recruitment plot  
20 data from the allotments with the desired plant community objectives discussed above.  
21 *See e.g.* AR 74626, 74628 (tables showing achievement of objectives for Bighorn and  
22 Beloat allotments). For this analysis, BLM used data from 36 of its own plots as well as  
23 data from 48 PBI plots. *See* Order at 16 (citing AR 74613, 74615). PBI had collected  
24 data on 320 plots but BLM only used information from 48 of those plots. AR 50519,  
25 74348, 74615, 82395-3379. BLM explained that it excluded some PBI data from its land  
26 health determination because the data did not address factors such as livestock intensity,  
27 frequency, timing, season of use, or precipitation patterns. AR 74108, 74348-49, 74175,  
28 74353-54, 74357, 74363. As the Court noted, BLM did not explain why it used some

1 PBI plots but excluded other plots when none of the PBI data incorporated those factors.  
2 Order at 16. The supplemental report did not address that question at all.

3 The Court also found BLM's explanation arbitrary and capricious because the data  
4 from BLM's own 36 plots did not consider these factors and BLM did not incorporate  
5 them into its analysis. Order at 15-16 (citing AR 55485-96 (BLM data for Bighorn  
6 allotment), 74666-82 (data in LHE)). The Court correctly explained that "the  
7 determination of whether ecological sites met objectives was simply based on comparing  
8 the plot data to the objectives for plant cover, composition, and saguaro recruitment, and  
9 information on livestock intensity, frequency, timing, season of use, or precipitation was  
10 neither incorporated into nor considered in this determination." *Id.*; *see also* AR 74622-  
11 26 (determination for Bighorn allotment). BLM's supplemental report still did not  
12 explain why it excluded PBI data due to lack of consideration of these factors when its  
13 own data and analysis did not consider them either to determine whether ecological sites  
14 met objectives. Supp. Report at 10.

15 The only attempt at an explanation in the supplemental report was that BLM could  
16 not use PBI data to determine whether livestock grazing use was causing the non-  
17 achievement of Land Health Standard 3 because the data did not measure utilization or  
18 contain information for use pattern mapping. Supp. Report at 10-11. This explanation  
19 wholly failed to address the relevant issue of BLM's arbitrary and capricious reasoning  
20 for excluding PBI data when answering the initial question of whether Land Health  
21 Standard 3 was being met. *See* Order at 16.

22 The Court also held that BLM's reason for excluding PBI data because it was just  
23 one year of data was arbitrary and capricious when BLM relied on only a single year of  
24 its data. Order at 16-17. In response, BLM's supplemental report recited the explanation  
25 in the record that, while the PBI data added to the BLM's baseline information, one year  
26 of PBI data, in itself, was not enough to support sound conclusions in defining ecological  
27 conditions. Supp. Report at 11 (citing AR 74107-08). "Therefore, although PBI plot data,  
28 by itself, could not support a conclusion, BLM used PBI plot data in conjunction with

1 ESDs to assist BLM in establishing [desired plant community] objectives.” *Id.*

2 This statement may explain why BLM used ESD information in addition to PBI  
3 data to set objectives. However, it does not explain why, if one year of data “could not  
4 support a conclusion” when setting objectives, one year of data *was* sufficient to support  
5 a conclusion when determining whether an ecological site was meeting objectives. As the  
6 Court noted, BLM used just a single year of data from its plots when making those  
7 determinations. Order at 16. *See also* AR 74666-83 (LHE data tables), 74347, 74349  
8 (explaining that BLM used just 2009 data from its plots).

9 BLM also asserted in the supplemental report that it did not just rely on a single  
10 year of its own data because it also considered other inventory, monitoring records,  
11 assessments, and knowledge of the locale to assist in determining whether land health  
12 standards were being met. Supp. Report at 11. This statement misses the mark. The  
13 record is clear that BLM determined whether Land Health Standard 3 was achieved based  
14 solely on whether the BLM and PBI plot data showed that plant composition, canopy  
15 cover, and saguaro recruitment were meeting objectives. Order at 15-16; *see e.g.* AR  
16 74622-30 (determinations on Land Health Standard 3 for Bighorn and Beloat allotments).  
17 If BLM could rely on a single year of data from its plots and some of the single-year PBI  
18 data to make those determinations, it was unreasonable to exclude other PBI data on the  
19 basis that a single year of data could not support conclusions.

20 BLM’s supplemental report still failed to provide a reasonable explanation or  
21 support for using only 48 of the 320 PBI plots when determining whether ecological sites  
22 met desired plant community objectives. Thus, the LHE remains arbitrary and  
23 capricious.

### 24 **C. Use of Single Year Utilization Data for Causality**

25 Finally, the Court ruled that, when determining whether livestock grazing was a  
26 causal factor in failing to achieve land health standards on 50.5% of the monument, BLM  
27 did not reasonably justify its reliance on a single year of livestock utilization data. Order  
28 at 20-22. Not only did BLM fail to respond to concerns of a peer reviewer about using

1 just 2009 utilization data, it also did not explain why it was justifiable to rely on a single  
2 year of data to determine causality when it excluded data from the land health  
3 determination in part because a single year of data was not enough to support sound  
4 conclusions. Order at 21-22.

5 BLM's supplemental report repeatedly stated that utilization data from 2009  
6 represented an average year with average ephemeral production and therefore it was  
7 adequate to determine use patterns and effects during a normal year. Supp. Report at 12-  
8 13. This response did not answer the question of why livestock utilization of perennial  
9 shrubs<sup>5</sup> during one average year is enough to determine causality. Indeed, impacts to  
10 perennial vegetation are more likely to occur in drier years that have little or no  
11 ephemeral production.

12 The Court cited concerns from a peer reviewer about using just a single year of  
13 data. Order at 21. As the peer reviewer noted, the effects of livestock use may take  
14 multiple years for recovery in this area. AR 83942. In addition, the pattern of use can  
15 vary greatly throughout the year and between years so a single observation of use within  
16 one year may not be sufficient to establish that livestock use is not the causal factor in  
17 non-achievement of land health standards. *Id.* Moreover, the Court also discussed  
18 concerns by the peer reviewer of using data only from a year with ephemeral production,  
19 which would not account for long-term effects to vegetation, or use patterns, that might  
20 occur in non-ephemeral years when livestock graze further from water or further upland  
21 on more perennial plants. Order at 21; AR 83942. BLM did not explain in the  
22 supplemental report how using data only from one average year—that included  
23 ephemeral use—addressed these concerns. Supp. Report at 12-13.

24 Finally, BLM's response explaining why it excluded PBI data also did not address  
25 the real issue. The supplemental report claimed that BLM could not use PBI data in the  
26 causality determination because that data did not measure utilization. Supp. Report at 13.

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<sup>5</sup> See AR 74619-20 (showing BLM monitored utilization of key perennial shrub species).



1 But the Court's Order did not find BLM arbitrary and capricious for not using PBI data in  
2 the causality determination. The Court found BLM's analysis unreasonable because it  
3 did not explain why one year of BLM data was enough to support conclusions in this part  
4 of the LHE analysis when one year of PBI data was not enough to support conclusions in  
5 a prior step of the analysis. Order at 21-22. Livestock use levels vary considerably  
6 between years just as ecological conditions vary between years and therefore the same  
7 reasoning for rejecting reliance on a single year of data would apply. AR 74616-17  
8 (showing wide fluctuations in livestock use from 1998-2007). The supplemental report  
9 still did not address this inconsistency. Therefore, BLM's causality determination  
10 remains arbitrary and capricious. Order at 22.

11 **III. BLM's Report Does Not Remedy the Flaws in the LHE Process and**  
12 **this Court Must Remand for BLM to Redo its Analysis.**

13 For the reasons explained above, BLM's supplemental report does not remedy the  
14 flaws found by this Court in its February 26 Order. The lengthy and complicated  
15 explanations for how BLM set the desired plant community objectives were not in the  
16 record, nor could the public or peer reviewers discern BLM's methods from the record to  
17 provide comments on them. Thus, the post hoc rationalizations put forth in the  
18 supplemental report violate the APA and NEPA. *Humane Soc'y*, 626 F.3d at 1049-50;  
19 *Native Ecosystem Council*, 418 F.3d at 963, 965-66; *Pub. Citizen*, 541 U.S. at 768; *N.*  
20 *Plains Resource Council*, 668 F.3d at 1085; *Kern v. BLM*, 284 F.3d at 1073.

21 Furthermore, the explanations provided in the supplemental report for the plant  
22 community objectives, the exclusion of data, and the use of a single year of utilization  
23 data were still irrational and inconsistent, not supported by record, and failed to address  
24 many of the inadequacies found by the Court. Accordingly, because BLM's decisions in  
25 the LHE continue to lack the necessary explanation and support in the record, the LHE  
26 remains arbitrary and capricious.

27 The proper remedy must be to order the agency to do a new LHE analysis and  
28 compatibility determination, which would be incorporated into the RMP. BLM is already

1 required to redo its analysis of recreational target shooting for this RMP due to a separate  
 2 legal challenge, and this Court should likewise order the agency to redo its grazing  
 3 analysis. *See National Trust for Historic Preservation*, case no. CV-13-1973-PHX-DGC,  
 4 Order at 22. Plaintiffs, however, do not seek to vacate BLM's grazing decisions or the  
 5 grazing portion of the RMP. Therefore, grazing under the RMP can continue in the  
 6 interim while BLM completes a new LHE and compatibility determination. However, in  
 7 light of the long delays that occurred during the first analysis, Plaintiffs request that the  
 8 Court set a deadline for completion of the new analysis. *See* AR 50491 (first draft LHE  
 9 from October 2005), 58683 (final version of LHE from November 2010). This is similar  
 10 to the remedy ordered in a challenge to a BLM RMP in *Southern Utah Wilderness*  
 11 *Alliance v. Burke*, case no. 2:12-cv-257-DAK, Memorandum Decision and Order (ECF  
 12 No. 388) (D. Utah, May 22, 2015).

### 13 CONCLUSION

14 Plaintiffs respectfully request that the Court grant their renewed motion for  
 15 summary judgment, and order BLM to complete a new LHE and compatibility  
 16 determination that include the necessary explanations and support for BLM's decisions,  
 17 and incorporate those decisions into the RMP.

18 Dated: June 19, 2015

19 /s/Lauren M. Rule

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of June 2015, I caused a true and correct copy of the foregoing PLAINTIFFS’ RENEWED MOTION FOR SUMMARY JUDGMENT AND OPENING BRIEF RE: DEFENDANT’S SUPPLEMENTAL REPORT to be electronically filed with the Clerk of the Court using the CM/ECF System which sent notification of such filing to the following counsel of record in this matter:

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s/Lauren M. Rule  
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