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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Western Watersheds Project, et al.,  
10 Plaintiffs,  
11 v.  
12 United States Bureau of Land Management,  
13 Defendant.  
14

No. CV-13-01028-PHX-PGR

**ORDER**

15 This case involves challenges under the National Environmental Policy Act  
16 (“NEPA”) to the Bureau of Land Management’s (“BLM”) decision regarding the  
17 management of livestock grazing on the Sonoran Desert National Monument (the  
18 “SDNM”). Specifically, Plaintiffs Western Watershed Project and Sierra Club  
19 (collectively, “WWP”) contend that the process by which BLM made its decision to  
20 allow grazing on the SDNM lands north of Interstate Highway 8 (“I-8”) was not  
21 adequately explained nor adequately supported by the administrative record (“AR”) and  
22 thus violates NEPA. The parties filed cross-motions for summary judgment, and the  
23 Court granted in part and denied in part summary judgment in favor of WWP, and denied  
24 BLM’s cross-motion for summary judgment. (Doc. 55.) At the suggestion of BLM, the  
25 Court remanded the case to BLM for further proceedings consistent with the Court’s  
26 Order and required BLM to file a supplemental report that either provided the required  
27 reasoned explanations and responses, or indicated that BLM would be adopting different  
28 decisions with reasoned explanations that supported them. (*Id.*) BLM has filed its report

1 (Doc. 59-1), and the parties have renewed their motions for summary judgment (Doc. 64  
2 (WWP); Doc. 66 (BLM)). The Court will grant summary judgment in favor of WWP to  
3 the extent WWP seeks to have BLM complete a new Land Health Evaluation (“LHE”)  
4 and compatibility determination, and incorporate that information into the Range  
5 Management Plan (“RMP”). The Court will deny BLM’s cross-motion for summary  
6 judgment.<sup>1</sup>

### 7 **Standard and Scope of Review**

8 Under NEPA, federal agencies are required to consider the consequences of their  
9 actions on the environment. NEPA’s mandate is “essentially procedural. . . . It is to  
10 ensure a fully informed and well considered decision.” *Vermont Yankee Nuclear Power*  
11 *Corp. v. NRDC*, 435 U.S. 519, 558 (1978). “NEPA itself does not mandate particular  
12 results, but simply prescribes the necessary process.” *Robertson v. Methow Valley*  
13 *Citizens Council*, 490 U.S. 332, 350 (1989). The goals of NEPA are to (1) ensure the  
14 agency will have detailed relevant information on significant environmental impacts  
15 when it makes its decisions and (2) guarantee that this information will be made available  
16 to the larger audience “that may also play a role in both the decisionmaking process and  
17 the implementation of that decision.” *WildEarth Guardians v. Montana Snowmobile*  
18 *Ass’n*, 790 F.3d 920, 924 (9<sup>th</sup> Cir. 2015) (quoting *Robertson v. Methow Valley Citizens*  
19 *Council*, 490 U.S. 332, 249 (1989)). The Court is required to “strictly interpret the  
20 procedural requirements in NEPA [and the implementing regulations] to the fullest extent  
21 possible consistent with the policies embodied in NEPA.” *WildEarth*, 790 F.3d at 924.

22 Because NEPA does not provide its own standard of review, the Court’s review is  
23 governed by the Administrative Procedures Act (“APA”). Under the APA, an agency’s  
24 decision can be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise  
25 not in accordance with law.” 5 U.S.C. § 7006(A); see *Marsh v. Oregon Natural Res.*

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26 <sup>1</sup> The Court finds that oral argument would not assist in resolving this matter and  
27 accordingly finds the pending motions suitable for decision without oral argument. See  
28 LRCiv 7.2(f); Fed.R.Civ.P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9<sup>th</sup> Cir. 1998).

1 *Council*, 490 U.S. 360, 375 (1989). Review under the arbitrary and capricious standard is  
2 narrow, and this Court is not to substitute its own judgment for that of the agency. *See*  
3 *Lands Council v. McNair*, 537 F.3d 981, 987 (9<sup>th</sup> Cir. 2008) (*en banc*).

4 While agency decisions are granted deference, such decisions are not spared a  
5 “thorough, probing, in-depth review.” *Citizens to Preserve Overton Park v. Volpe*, 401  
6 U.S. 402, 415 (1971); *see Marsh*, 490 U.S. at 378 (A court’s review of administrative  
7 action “must be searching and careful,” though “the ultimate standard of review is a  
8 narrow one.”) (internal quotation marks omitted). To withstand such review, an agency  
9 must have considered the relevant information and provided a satisfactory explanation for  
10 its actions, drawing a “rational connection between the facts found and the choice made.”  
11 *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). “An agency’s  
12 decision is arbitrary and capricious if it fails to consider important aspects of the issue  
13 before it, if it supports its decisions with explanations contrary to the evidence, or if its  
14 decision is either inherently implausible or contrary to governing law.” *In Defense of*  
15 *Animals, Dreamcatcher Wild Horse and Burro Sanctuary v. United States Dep’t of*  
16 *Interior*, 751 F.3d 1054, 1061 (9<sup>th</sup> Cir. 2014).

## 17 Discussion<sup>2</sup>

### 18 **A. Use of the Supplemental Report**

19 The Court provided BLM with the opportunity to submit a supplemental report  
20 based on the suggestion by BLM that, if given the opportunity, it would be able to fully  
21 explain its LHE analysis. BLM specifically asserted that the “contours of any  
22 supplemental explanation should be left to the discretion of the agency.” (Doc. 53 at 17  
23 n.8.) Thus, while the Court required BLM to file a supplemental report, the Court did not  
24 provide BLM with specific guidance regarding that report.

25 BLM has now filed its supplemental report and the parties disagree as to whether  
26 and to what extent the report can be used in the Court’s review of whether BLM

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28 <sup>2</sup> Background information can be found in the Court’s previous Order (Doc. 55)  
and will not be repeated here.

1 complied with NEPA. BLM argues that its supplemental report provides the reasoned  
2 explanations required under NEPA, and that the report is not an impermissible post-hoc  
3 rationalization because the report merely explains existing information in the AR, and  
4 does not provide a new rationalization for BLM's decisions. (Doc. 66 at 3.) WWP argues  
5 that the supplemental report is merely a post hoc rationalization that is neither found in  
6 nor supported by the AR, and that the report cannot provide the reasoned explanations  
7 required under NEPA. (Doc. 64 at 3-4.)

8 In determining whether an agency has complied with NEPA's requirements, a  
9 "court's review is limited to the administrative record." *Nw. Motorcycle Ass'n v. U.S.*  
10 *Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994). Reviewing courts have, however,  
11 allowed an agency to provide supplemental information in NEPA cases in certain limited  
12 situations. *See, e.g., Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9<sup>th</sup> Cir. 1984); *Cactus*  
13 *Corner, LLC v. U.S. Dep't of Agric.*, 346 F. Supp. 2d 1075, 1105 (E.D. Cal. 2004), *aff'd*  
14 *450 F.3d 428* (9<sup>th</sup> Cir. 2006). Specifically, the supplemental information provided by the  
15 agency must be merely "explanatory in nature, rather than a new rationalization of the  
16 agency's decision, and must be sustained by the record." *Kunaknana*, 742 F.2d at 1149.

17 Based on this authority and BLM's indication that it could provide an explanation  
18 for its decisions, the Court required BLM to prepare and file a supplemental report.  
19 However, the Court can use the information in the report for purposes of NEPA review  
20 only if the information is explanatory in nature and sustained by the administrative record  
21 ("AR"). *See Kunaknana*, 742 F.2d at 1149. The report cannot be used to provide an  
22 explanation that is not sustained by the record or a new rationalization for BLM's  
23 decision. *See id.* As discussed below, the vast majority of the information in the  
24 supplemental report is not sustained by the record and/or provides a new rationalization  
25 and thus does not fall within the narrow exception under which information in  
26 supplemental reports can be considered in conducting NEPA review.<sup>3</sup>

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28 <sup>3</sup> As noted, a primary objective of NEPA is to ensure information is made  
available to the larger audience so that they can play a role in both the decision-making

1 **B. Identification of Desired Plant Community Objectives (the “Setting-**  
2 **Objectives” Step)**

3 The Court previously found that BLM did not provide an adequate explanation in  
4 the AR to support its setting of, and adjustments to, the desired plant community  
5 objectives for the Limy Fan, Sandy Wash, Limy Upland, Loamy Swale, Sandy Loam  
6 Deep, Limy Upland Deep, and Granitic Hills ecological sites, and that BLM’s setting of  
7 these plant community objectives was therefore arbitrary and capricious. (Doc. 55 at 10-  
8 13.) BLM’s supplemental report does not remedy the deficiencies found by the Court as  
9 it does not provide citations to the AR that sustain the explanations set forth in the report,  
10 and the report sets forth new rationalizations for BLM’s decisions.

11 In the AR, BLM explained that Desired Plant Community (“DPC”) objectives  
12 (“objectives”) “are specific to each ecological site and based on comparison area data  
13 collected from” the BGR/A by Pacific Biodiversity Institute (“PBI”) and BLM; and that  
14 this data was analyzed for each site “along with information from the National Resources  
15 Conservation Service (NRCS) Ecological Site Descriptions [ESDs] to estimate the  
16 potential or capability of the site to produce different kinds and amounts of vegetation so  
17 that the DPC objectives are realistic in terms of what is possible to achieve.” (AR  
18 074608.) “Due to the variability within an ecological site, the average value for each  
19 attribute tied to the indicators for land health were used to quantify the DPC objectives.”  
20 (*Id.*)

21 **1. Ecological Site Objectives based on BGR/A Data**

22 According to the AR, BLM set the final objectives for the Limy Fan, Sandy Wash,  
23 and Limy Upland Deep ecological sites based on the average BGR/A value for each  
24 attribute, along with information from the ESDs. (AR 074608, 074621.) As discussed in  
25 the Court’s prior Order (Doc. 55), comparison of the BGR/A data and BLM’s final  
26 objectives demonstrates that the final objectives for these sites are not consistent with the  
27 average BGR/A data, and no explanation was provided in the AR for the adjustments

28 process and the implementation of that decision. *See WildEarth Guardians*, 790 F.3d at  
924. The non-NEPA cases BLM relies on (*see* Doc 66 at 1-3) are inapposite.

1 made. The Court also noted that BLM's explanation in its brief for the adjustments was  
2 not contained in the AR and, further, did not adequately explain or account for the wide  
3 variance in the adjustments. (Doc. 55 at 11.)

4 In the supplemental report, BLM cites two key reasons for making adjustments to  
5 the average BGR/A value<sup>4</sup>: lower precipitation north of Interstate 8 ("I-8") and  
6 information from the ESD sheets. (*See* Doc. 59-1 at 2-5.) For example, the report states:

7 In general, lower elevation and lower average precipitation levels will result in  
8 reduced potential for production, composition and canopy cover. The majority of  
9 the SDNM north of Interstate 8 occurs at lower elevations and lower average  
10 precipitation as compared to south of Interstate 8 in the BGR/A comparison area.  
11 The majority of the ecological sites in SDNM north of Interstate 8 occur at the  
lower end of the 7-10" precipitation zone and with some areas occurring even  
slightly lower than 7" of precipitation.

12 (Doc. 59-1 at 2 (citing AR 054933).)

13 In support of this explanation, BLM cites to a map showing average annual  
14 precipitation. (*See id.*) The map shows that the average annual precipitation on the  
15 BGR/A varies by area, from a high of 10-12" to a low of 6-8"; and that the average  
16 annual precipitation on the SDNM lands north of I-8 similarly varies by area, from a high  
17 of 8-10" to a low of 6-8". (*See* AR 054933.) This map does not, however, support BLM's  
18 adjustments to the BGR/A average values in setting the objectives.

19 The AR does not indicate that the map, or the lower average precipitation north of  
20 I-8, was used or considered by BLM in making the adjustments, and BLM has not  
21 provided any other citation to the AR. Further, a comparison of the precipitation map  
22 (AR 054933) with the BGR/A plots used to set objectives (*see* AR 054932, 074621)  
23 demonstrates that the majority of the BGR/A plots used to set the objectives are in the 6-  
24 8" or 8-10" precipitation zones. In other words, most of the BGR/A data was collected

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25 <sup>4</sup> The supplemental report also states that the average *and range* of the BGR/A  
26 values were used in setting the objectives. (Doc. 59-1 at 2 (emphasis added).) However,  
27 the AR does not state that the *range* of the BGR/A values was used in setting objectives;  
28 rather, the AR states that the *average* BGR/A value was used (AR 74608).

1 from the same precipitation zones that are found on the SDNM north of I-8. Thus, the  
 2 precipitation map does not sustain the lower precipitation explanation but instead  
 3 undercuts it. Further, as shown by the following table, there are large variances in the  
 4 adjustments made by BLM and BLM has provided no explanation for those large  
 5 variances.

<u>Ecological Site</u>	<u>Vegetation</u>	<u>BGR/A Avg.</u>	<u>Objective</u>	<u>% Reduction</u>
6 Limy Fan	Composition	10%	9%	10%
7 Limy Fan	Canopy Cover	8.8%	7%	20%
8 Sandy Wash	Canopy Cover	37%	34%	8%
9 Limy Upland Deep	Composition	23.5%	12%	49%
10 Limy Upland Deep	Canopy Cover	13%	10%	23%

11 In sum, and as discussed in more detail below, the citations to the AR provided by  
 12 BLM do not sustain the supplemental report's explanation that BLM relied on variance in  
 13 precipitation in adjusting the average BGR/A values and do not sustain the level of  
 14 adjustment made for each of the ecological sites or the variances in those adjustments.  
 15 Thus, the supplemental report's explanation is not sustained by the AR and the  
 16 explanation is a new rationalization for BLM's decisions. This new rationalization cannot  
 17 be used to cure the deficiencies in the AR previously identified by the Court that render  
 18 BLM's decisions in setting the objectives arbitrary and capricious.

19 **a. Limy Fan**

20 **Composition**

21 The supplemental report discusses the ESD for the Limy Fan ecological site, and  
 22 notes that this "ecological site is generally at the lower elevations and precipitation zone  
 23 of the Monument on desert flats and valley bottoms." (Doc. 59-1 at 3 (citing AR 74591,  
 24 084928, 084939-40).) The supplemental report then states: "The composition average for  
 25 BGR/A was 10% (from a range of 0-28%), and BLM made a downward adjustment to  
 26 9% for the composition objective to compensate for the lower elevation and precipitation  
 27 North of I-8." (Doc. 59-1 at 3 (citing AR 074621).) The AR at the citation provided by  
 28 BLM in support of this explanation does not, however, discuss precipitation or otherwise  
 state that the average BGR/A value was adjusted based on lower precipitation north of I-

1 8, based on lower elevation, or based on the range in BGR/A values. The supplemental  
2 report's explanation is not, therefore, sustained by the AR and the explanation is a new  
3 rationalization for the Limy Fan composition objective.

#### 4 **Canopy Cover**

5 The supplemental report states that the "objective for canopy cover for the Limy  
6 Fan ecological site was based on the canopy cover values for the BGR/A. The BGR/A  
7 canopy cover had an average value of 8.8% for this site. BLM set the objective for this  
8 site at 7% canopy for the lower precipitation and reduced canopy cover potential north of  
9 Interstate 8 as compared to BGR/A." (Doc. 59-1 at 3 (citing AR 074609).) The AR at the  
10 citation provided by the supplemental report does not, however, discuss precipitation or  
11 reduced canopy cover potential, let alone indicate that the BGR/A average value was  
12 adjusted based on these considerations. The supplemental report's explanation is not,  
13 therefore, sustained by the AR and the explanation is a new rationalization for the Limy  
14 Fan canopy cover objective.

#### 15 **b. Sandy Wash**

#### 16 **Canopy Cover**

17 The supplemental report states that the ESD for canopy cover for Sandy Wash  
18 ranges from 25% to 40%, and that the BGR/A average value is 37%. (Doc. 59-1 at 4.)  
19 The report goes on to state that BLM set the 34% objective for Sandy Wash canopy cover  
20 by adjusting downward from the average BGR/A value to "compensate for the lower  
21 precipitation and reduced canopy cover potential north of Interstate 8 as compared to  
22 BGR/A." (*Id.* (citing AR 074608, 084988).) However, the AR at the citations provided by  
23 BLM does not discuss or otherwise indicate reliance on lower precipitation or reduced  
24 potential north of I-8 in making the adjustment to the BGR/A average value. (*See* AR  
25 074608, 084988.) The supplemental report's explanation is not, therefore, sustained by  
26 the AR and the explanation is a new rationalization for the Sandy Wash canopy cover  
27 objective.  
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1                   **c. Limy Upland Deep**  
2                                 **Composition**

3                   The supplemental report states that the average composition within the BGR/A for  
4 the Limy Upland Deep ecological site is 23.5%, “which is well above the site potential  
5 average of 18.1% for composition”; that “[s]etting an objective equal to the BGR/A  
6 composition would be an unrealistic objective”; and that, in addition, the lower elevation  
7 and lower precipitation north of I-8 “led BLM to set the objective at 12%.” (Doc. 59-1 at  
8 4.) No citation to the AR is provided by BLM in support of this explanation. (*See Id.*) The  
9 supplemental report’s explanation is not, therefore, sustained by the AR and the  
10 explanation is a new rationalization for the Limy Upland Deep composition objective.

11                                 **Canopy Cover**

12                   The supplemental report states that the canopy cover for Limy Upland Deep was  
13 based on the BGR/A average of 13%, and adjusted “downward to compensate for the  
14 lower precipitation and reduced canopy cover potential north of Interstate 8 as compared  
15 to BGR/A.” (Doc. 59-1 at 4 (citing AR 074609).) The AR at the citation provided by  
16 BLM does not, however, discuss or otherwise indicate reliance on lower precipitation or  
17 reduced potential north of I-8 in making the adjustment. The supplemental report’s  
18 explanation is not, therefore, sustained by the AR and the explanation is a new  
19 rationalization for the Limy Upland Deep canopy cover objective.

20                                 **2. Ecological Site Objectives based on the ESDs**

21                   For the three ecological sites without BGR/A data – Loamy Swale, Limy Upland,  
22 and Sandy Loam Deep – BLM stated it based its objectives on the low end of the ESDs.  
23 As discussed in the Court’s prior Order (Doc. 55 at 11-12), comparison of the ESDs and  
24 BLM’s final objectives demonstrates that the final objectives are not consistent with the  
25 low end of the ESDs.<sup>5</sup> Further, BLM set objectives for “palatable browse” for the Limy

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27                   <sup>5</sup> The Court does not address whether the setting of the objectives at the low end of  
28 the ESDs can be justified based on the AR because, even assuming that it could be, as  
discussed below, BLM has not justified adjustments it made to the low end of the ESDs  
in setting the objectives.

1 Upland and Sandy Loam sites, and an objective for “perennial grass composition” for the  
 2 Loamy Swale site, but the ESDs do not include objectives for “palatable browse” or  
 3 “perennial grass composition,” and no explanation was provided in the AR on how these  
 4 objectives were set. (*Id.*) The following table sets forth the adjustment made by BLM to  
 5 the ESD for Limy Upland in setting the canopy cover objective and, as noted, where  
 6 objectives were set for Loamy Swale, Limy Upland, and Sandy Loam Deep based on  
 7 vegetation types not described in the ESDs.

<u>Ecological Site</u>		<u>ESDs</u>	<u>Objective</u>	<u>% Reduction</u>
Loamy Swale	Perennial Grass	-----	10%	-----
Limy Upland	Canopy Cover	20-25%	12%	40%
Limy Upland	Palatable Browse	-----	5%	-----
Sandy Loam Deep	Palatable Browse	-----	16%	-----

12 As discussed in more detail below, the AR at the citations provided by BLM does  
 13 not sustain the supplemental report’s explanations for the setting of these objectives, and  
 14 the explanations are new rationalizations for BLM’s decisions. These new  
 15 rationalizations and unsustained explanations cannot be used to cure the deficiencies in  
 16 the AR previously identified by the Court that render BLM’s decisions in setting the  
 17 objectives arbitrary and capricious.<sup>6</sup>

#### **a. Loamy Swale – Perennial Grass**

19 BLM set an objective for Loamy Swale perennial grass composition even though  
 20 there is no “perennial grass composition” contained in the Loamy Swale ESD. The  
 21 supplemental report states that BLM set the perennial grass composition for Loamy  
 22 Swale “at 10% using a combination of information from the ESDs and current site-  
 23 specific information.” (Doc. 59-1 at 6 (citing AR 074609).) The report explains:

24 BLM used the ESD functional groups 1, 2, and 3 to represent grass composition.

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26 <sup>6</sup> BLM also, again, relies on lower average annual precipitation north of I-8 as an  
 27 explanation for its adjustments and setting of the objectives. As already discussed in  
 28 relation to the ecological site objectives based on the BGR/A, the AR does not sustain  
 this explanation and the precipitation explanation is a new rationalization for BLM’s  
 decisions.

1 The annual production in pounds per acre for these groups ranges from 90 to 162.  
2 The total annual production pounds per acre for the site ranges from 1380 to 2220,  
3 with an average of 1800. The average of these groups, then, ranges from 90/1800  
4 = 0.05 or 5% to 162/1800 = 0.09 or 9% composition. Considering the ESD  
5 information and current state of the vegetation, BLM considered 10% as a realistic  
6 [objective].

(Doc. 59-1 at 6 (citing AR 084956-57, 084965, 084952).)

7 The AR at the citations provided by BLM are merely citations to the ESD for  
8 Loamy Swale. Although the ESD contains the figures used by BLM in its calculation, the  
9 ESD does not explain how BLM came up with the objective for perennial grass  
10 composition, does not mention the current state of vegetation, or explain why an  
11 adjustment from 9% to 10% was made in setting the objective. The AR does not,  
12 therefore, sustain the supplemental report's explanation, and the explanation is a new  
13 rationalization for BLM's setting of the Loamy Swale perennial grass objective.

14 **b. Limy Upland - Canopy Cover**

15 BLM set the canopy cover objective for the Limy Upland ecological site at 12%, a  
16 reduction from the low end of the 20-25% canopy cover potential set forth in the ESD.  
17 The supplemental report states that this objective

18 was based on the canopy cover value for the similar Limy Upland Deep site in the  
19 BGR/A. The Limy Upland Deep site is adjacent to the Limy Upland site, but at  
20 slightly lower elevations (and thus lower precipitation) and has a similar plant  
21 community and similar soils. BLM observed that the canopy cover value (13%)  
22 for the Limy Upland Deep site in the BGR/A was significantly lower than the  
23 canopy cover range identified in the ESD reference sheet for the Limy Upland site  
24 (20-25%). Because the BGR/A data was so much lower, BLM determined that  
25 setting an objective at the level identified by the ESD reference sheet would be  
26 unrealistic and unobtainable. BLM set the canopy cover objective at 12%, which is  
27 slightly higher when compared to the objective for the Limy Upland Deep site  
28 (10%) to account for the slightly higher precipitation.

(Doc. 59-1 (citing AR 084908, 074609).)

29 The AR at the citations provided by BLM does not, however, provide this or any  
30 other explanation for the adjustment made by BLM. The ESD (AR 084908) merely states  
31 the canopy cover potential for Limy Upland is 20-25%. The AR at the other citation

1 provided by BLM (AR 074609) merely states the following rationale for setting the  
2 canopy cover objective at 12%: “Appropriate vegetative cover levels will prevent  
3 accelerated erosion of ecological sites . . . and provide for wildlife habitat.” The AR does  
4 not include any reference to or indication of reliance on the BGR/A values for the Limy  
5 Upland Deep site in setting the Limy Upland canopy cover objective; nor does the AR  
6 provide any other explanation for adjusting from the low end of the ESD in setting the  
7 objective. The AR does not, therefore, sustain the supplemental report’s explanation, and  
8 the explanation is a new rationalization for BLM’s setting of the Limy Upland canopy  
9 cover objective.

10 **c. Limy Upland and Sandy Loam Deep - Palatable Browse**

11 BLM set objectives for “palatable browse” for the Limy Upland and the Sandy  
12 Loam Deep ecological sites even though there is no designation for “palatable browse”  
13 contained in the ESDs for these sites. As to the Limy Upland palatable browse objective,  
14 the supplemental report states that BLM set the palatable browse objective at 5% using  
15 ESD information and “site-specific factors,” explaining:

16 Functional group 8 of the ESDs represents palatable browse production, with a  
17 range of 10 to 20 pounds per acre. The total annual production range is 138 to 210  
18 pounds per acre, with an average of 174. The palatable browse, then, ranges from  
19  $10/174 = 0.57$  or 6% to  $20/174 = .114$  or 11%. The BLM considered this ESD  
20 information and that this site occurs at the lower end of the 7 to 10 inch  
precipitation gradient for the Ecological site. Accounting for these variabilities,  
BLM set the objective for palatable browse at 5%.

21 (Doc. 59-1 at 6 (citing AR 084900-01, 084903, 084889, 074633-34).)

22 Similarly, as to the Sandy Loam Deep palatable browse objective, the  
23 supplemental report states that BLM set the palatable browse objective at 16% using ESD  
24 information and “site-specific factors,” explaining:

25 Functional group 8 of the ESDs represents palatable browse, with the exception of  
26 triangle bursage, which is not palatable. The annual production range is 70 to 150  
27 pounds per acre. The range of the total production is 400 to 575 pounds per acre,  
28 with an average of 487 pounds per acre. The average for this site, then, ranges  
from  $70/487 = 0.144$  or 14% to  $150/487 = 0.308$  or 31%. Considering this ESD  
information and because this Sandy Loam Deep site (only one site occurs in the

1 SDNM) is currently achieving the objective at 16% for composition of palatable  
2 browse species, BLM set the objective to maintain the current acceptable  
3 conditions at this site.

4 (Doc. 59-1 at 7 (citing AR 074611, 084983, 084970).)

5 The AR at the citations provided by BLM does not, however, provide these or any  
6 other explanations for the palatable browse objectives. The ESDs do not designate  
7 “palatable browse” or explain how BLM came up with the objective for palatable browse.  
8 (See AR 084900-01, 084903, 084889, 084983, 084970.) The other portions of the AR to  
9 which the supplemental report cites (AR 074611, 074633-34) mention “palatable  
10 browse,” but do not define it or provide any explanation regarding how the palatable  
11 browse objectives were set. The AR does not, therefore, sustain the supplemental report’s  
12 explanation, and the explanation is a new rationalization for BLM’s setting of the Limy  
13 Upland and Sandy Loam Deep palatable browse objectives.

### 14 **3. Objectives for Saguaro Recruitment**

15 BLM set the objectives for saguaro recruitment for the Limy Upland ecological  
16 site at 0.96 and for the Granitic Hills ecological site at 0.83. BLM informed the Court  
17 previously that, “[i]n setting these objectives, BLM considered saguaro recruitment in the  
18 BGR/A, which occurred at a rate of 1.26 young saguaros per plot across different types of  
19 ecological sites, and then adjusted these rates downward to account for lower  
20 precipitation levels in the ecological sites containing saguaro cacti forests north of I-8.”  
21 (Doc. 49-1 at 19-20.) The Court found BLM’s explanation to be inadequate because it  
22 was not contained in the AR and, further, did not explain the wide variance in the  
23 adjustments made. (Doc. 55 at 12.)

24 The supplemental report states: “The BGR/A data are used only as a means of  
25 comparison and do not represent a direct conversion to the objectives set for the sites  
26 within the SDNM.” (Doc. 59-1 at 8.) This explanation is inconsistent with the prior  
27 representations BLM made to the Court. Specifically, BLM previously informed the  
28 Court that, in setting these objectives, BLM considered the saguaro recruitment rate in  
the BGR/A (1.26) and then adjusted the rate downward to account for lower precipitation

1 levels. (*See* Doc. 49-1 at 19-20.) Further, as discussed in more detail below, the AR does  
2 not sustain the explanations provided by BLM and the supplemental report's explanations  
3 are new rationalizations that cannot be used to cure the deficiencies in the AR previously  
4 identified by the Court that render BLM's decisions in setting the objectives arbitrary and  
5 capricious.<sup>7</sup>

6 As to Limy Upland, the supplemental report states:

7 The [PBI] Saguaro Data showed the saguaro recruitment rate ("short stems") in  
8 the SDNM (outside the BGR/A) is 0.96 . . . on the Palo Verde-Mixed Cacti-Mixed  
9 Scrub on Bajadas vegetation community, which includes Limy Upland. (AR  
10 74708). Based on a relatively small data set, PBI indicated a value of zero for  
11 saguaro recruitment in BGR/A. (AR 74708). Because the BGR/A data had zero  
12 recruitment rates, BLM used 0.96 as the objective for Limy Upland Ecological  
13 Site. Based on BLM's professional judgment this was an appropriate recruitment  
14 rate for the site. (AR 74610).

13 (Doc. 59-1 at 8.)

14 As already noted, this explanation contradicts the explanation previously provided  
15 by BLM that it set the objective based on the BGR/A data of a 1.26 recruitment rate and  
16 adjusted for lower precipitation. Further, the AR at the citations provided by BLM do not  
17 support this new explanation. The AR merely states that "[m]aintaining the current  
18 recruitment rate for saguaros of 0.96 . . . is appropriate for this ecological site north of I-  
19 8." (AR 74610.) There is no explanation in the AR of why this recruitment rate is  
20 appropriate.

21 As to Granitic Hills, the supplemental report states:

22 PBI showed a saguaro recruitment rate of 1.26 in BGR/A and 0.83 in the  
23 remainder of SDNM. The PBI, however, conducted the study of the BGR/A  
24 "primarily in the volcanic hills 7-10" and 10-13" precipitation zone ecological  
25 sites, with the data being combined from both sites." (AR 74610). "Saguaro stem  
26 count values in the [BGR/A] plots could potentially be greater due to the  
27 difference in the ecological sites and increased precipitation." (AR 74610). Also,  
28 the potential saguaro population varies by elevation, aspect, precipitation, and soil

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<sup>7</sup> Again, BLM relies on a lower precipitation justification for SDNM lands north of I-8. As already discussed in relation to the other ecological site objectives, the AR does not sustain this explanation for the adjustments made by BLM.

1 type. (AR 74610). Therefore, BLM used the SDNM plot data, outside of BGR/A,  
2 as the more accurate data to set the recruitment rate objective. (AR 74708).

3 (Doc. 59-1 at 8.)

4 Again, and as already noted, this explanation contradicts the representation  
5 previously made by BLM to the Court that it set the Granitic Hills saguaro recruitment  
6 objective based on the BGR/A data and adjusted for lower precipitation. Further,  
7 although the AR indicates that the “stem count values in the [BGR/A ] could potentially  
8 be greater due to the difference in the ecological sites and increased precipitation,” no  
9 explanation is provided in the AR as to the level of adjustment made to the BGR/A  
10 values, or why the current recruitment rate of 0.83 was appropriate. (See AR 74610.)

11 Attachment 5, which is referred to in the explanations provided by the AR for both  
12 the Limy Upland and the Granitic Hills sites, and cited to in the supplemental report, is  
13 merely a table setting forth PBI data from 2004, showing saguaro cover and stem count  
14 information for the Palo Verde-Mixed Cacti Community. (AR 74708). This table of PBI  
15 data does not provide the explanation set forth in the supplemental report, and BLM has  
16 not provided the Court with any further citations to the AR.

17 In sum, the supplemental report’s explanations for the setting of the Limy Upland  
18 and Granitic Hills saguaro recruitment objectives are not sustained by the AR. Further,  
19 these explanations contradict BLM’s previous position that the saguaro recruitment  
20 objectives were set based on BGR/A values and adjusted downward based on lower  
21 precipitation. Moreover, even in the supplemental report, BLM fails to provide a  
22 reasoned explanation supported by the record as to why the current recruitment rates are  
23 appropriate. The supplemental report has provided explanations that are not sustained by  
24 the AR and are new rationalizations for its decisions in setting the objectives.

25 **C. Determination of Whether Desired Plant Community Objectives Are Being**  
26 **Met (the “Meeting-Objectives” Step)**

27 **1. Exclusion of BLM data**

28 The Court previously found that BLM’s decision to use 2004 data for the Beloat  
allotment was arbitrary and capricious because BLM did not provide an adequate

1 explanation in the AR as to why the 2004 data was the “best available data,” rather than  
2 the 2007 and 2009 data BLM had available for that allotment. (Doc. 55 at 13-14.) In the  
3 supplemental report, BLM states that it used the most recent data available for each plot  
4 on the Beloat allotment, “except when the data collected did not follow the appropriate  
5 protocol in place at the time.” (Doc. 59-1 at 9.) This most recent data, BLM asserts, is the  
6 best data available to it.

7 BLM asserts, and WWP does not dispute, that as to three of the plots, BLM made  
8 a typographical error in its data tables and that BLM actually used 2007 data rather than  
9 2004 data. (Doc. 59-1 at 9; Doc. 64 at 12.) As plots B-1 and B-2, the supplemental report  
10 explains that these plots were not evaluated in 2007 or 2009 and that, thus, 2004  
11 vegetation composition data was the best available data. (Doc. 59-1 at 8-9.) As to canopy  
12 cover for plot B-4, the supplemental report explains that BLM used 2004 data because it  
13 determined that the field data collected in 2007 for canopy cover did not follow  
14 applicable protocol of study design that was in place at the time, and that no data was  
15 collected on B-4 in 2009. (Doc. 59-1 at 9.) Finally, as to vegetation composition for plots  
16 B-4, B-5, and B-8, the supplemental report explains that there was no 2004 or 2009 data  
17 and that BLM therefore used the 2007 vegetation composition data. (Doc. 59-1 at 9.)

18 WWP argues that the AR demonstrates that data was collected on the Beloat  
19 allotment in 2009 and that BLM does not explain why it did not use that data in its  
20 analysis. (Doc. 64 at 12 (citing AR 58314, 58316, 58318-23, 58331).) BLM, in response,  
21 notes first that some of the plots for which data is available from 2009 are outside the  
22 SDNM. (Doc. 66 at 14.) Second, BLM explains that for the plots within the SDNM, the  
23 tables WWP relies on “mistakenly describe certain data as being collected in 2009 when  
24 it was actually collected in 2007.” (Doc. 66 at 14.) A comparison of the data at the AR  
25 citations provided by BLM supports this explanation, and WWP does not contest BLM’s  
26 explanation (*See* Doc. 68 at 9). However, WWP does assert that, although these errors  
27 may not constitute a per se NEPA violation, “it certainly calls into question the accuracy  
28 of other information reported in the EIS and Supplemental Report.” (Doc. 68 at 9-10.)  
The Court agrees that these additional errors in relation to the Beloat allotment data are



1 troubling. However, the Court does not find these errors sufficient to call into question  
2 the accuracy of the other information used by BLM in the EIS and supplemental report.

3 In sum, the explanations provided by the supplemental report are sustained by the  
4 record and cure the previous deficiencies found by the Court regarding the exclusion of  
5 certain BLM data in relation to the Beloat allotment.

6 **2. Exclusion of PBI data**

7 **a. Exclusion of PBI data for failure to incorporate certain factors**

8 In determining whether desired plant community objectives were being met, BLM  
9 rejected some PBI data based in part on the failure of that data to incorporate certain  
10 factors, such as livestock intensity, frequency, timing, season of use, and precipitation  
11 pattern. The Court found this basis for rejecting some of the PBI data to be arbitrary and  
12 capricious because BLM did not provide a reasonable explanation in the AR as to why it  
13 rejected some PBI data based on failure to incorporate these factors, but then (1) used  
14 other PBI data and BLM's own plot data, even though that data also did not incorporate  
15 the same factors; and (2) did not incorporate the livestock intensity, frequency, timing,  
16 season of use, or precipitation pattern factors into its LHE analysis of whether ecological  
17 sites met objectives. (Doc. 55 at 14-15.)

18 In the supplemental report, BLM notes that it "used PBI data where the data was  
19 relevant for developing objectives" and "used data from 48 PBI plots on canopy cover  
20 and saguaro recruitment when trying to ascertain where ecological sites were achieving  
21 objectives," but that it "could not use PBI data in determining whether livestock grazing  
22 use was causing the non-achievement of Land Health Standard 3 because PBI data did  
23 not measure utilization or contain information for use pattern mapping." (Doc. 59-1 at  
24 10.) The report summarizes that it thus "used relevant PBI data for developing objectives  
25 and determining whether ecological sites met objectives," but because the "PBI data did  
26 not measure utilization or provide use pattern mapping information, BLM could not use  
27 the PBI data for determining whether livestock grazing was causing non-achievement of  
28 Land Health Standard 3." (*Id.* at 10-11.)

The supplemental report misses the point and fails to address the Court's concern

1 regarding the rejection of some PBI data at the meeting-objectives step of the LHE  
2 analysis. Specifically, the supplemental report fails to explain why, at the meeting-  
3 objectives step, BLM rejected some of the PBI data for failure to incorporate certain  
4 factors, yet used other PBI data (from the 48 plots) and BLM data that failed to  
5 incorporate those same factors in determining whether the ecological sites were meeting  
6 objectives.

7 In its cross-motion for summary judgment, BLM contends that it is only at step  
8 three – the causation step – that BLM excluded some of the PBI data because of the  
9 failure to consider the listed factors. (Doc. 66 at 16.) In support of this contention, BLM  
10 cites to its supplemental report and to AR 074554, 074659, and 074175.

11 As already noted, the supplemental report does not address the Court’s concern.  
12 Further, the supplemental report does not include the explanation that BLM is now  
13 putting forward in its brief – that BLM did not exclude the PBI data based on the failure  
14 of the data to consider the listed factors at the meeting-objectives step (step two) but  
15 instead only did so at the causation step (step three).

16 The citations to the AR BLM provides in support of its position are of no  
17 assistance. The record at two of these citations merely discusses the data analyzed in  
18 determining causation, which is step three of the analysis (AR 074554), and sets forth the  
19 general criteria for meeting Standard 3 (AR 074659).

20 The record at the third citation provided by BLM (AR 074175) actually supports  
21 WWP’s position rather than BLM’s. In this section of the record, BLM discusses the data  
22 it used for determining ecological conditions within the monument, which is the meeting-  
23 objectives (second step) of the analysis. Within this section, BLM discusses why it  
24 declined to use data from many of PBI’s plots. The reasons given by BLM are that some  
25 of the PBI plots did not fit BLM’s criteria for selection of a key area; that some of the  
26 PBI plots overlapped multiple ecological sites; and that some of the PBI plots were  
27 located too close to livestock waters. (AR 074175.) However, BLM also states in this  
28 section:

PBI’s study was of limited use because it did not address the intensity, frequency,

1 timing, class of livestock, season of use, ecological sites, precipitation patterns,  
2 and other variables the BLM needs to address the effects of current livestock  
3 grazing practices on the objects of the Monument. However, BLM did use some of  
4 PBI's plot data (where applicable) to address vegetation attributes when defining  
Ecological Site and Key Area desired plant community (DPC) objectives.

5 (*Id.*)

6 This explanation indicates that PBI data was rejected for use at the meeting-  
7 objectives step due to the failure of the data to incorporate the listed factors. The  
8 explanation also specifically notes and distinguishes the setting-objectives step (the first  
9 step), explaining that PBI data was used for that purpose. This further supports the  
10 conclusion that PBI data was rejected at the meeting-objectives (the second step) due to  
11 the failure of the PBI data to consider the listed factors. (*See id.*)

12 Further, in responses to comments objecting to BLM's use of only some of the  
13 PBI data in determining the condition of the ecological sites (the meeting-objectives  
14 step), BLM again raised the failure of the PBI data to consider the listed factors as one of  
15 the reasons for not using the data. (*See* AR 074348-49, AR 074352-52, AR 074353-54.)

16 In sum, the AR indicates that one of the reasons some of the PBI data was rejected  
17 for use in the meeting-objectives step was because the data did not incorporate the listed  
18 factors, and neither the AR nor the supplemental report provides a reasonable explanation  
19 for that rejection. To the extent BLM argues that PBI data was not rejected at the  
20 meeting-objectives step for failure to consider the listed factors, but instead was only  
21 rejected at the causation step on that basis, this is a new explanation or rationalization that  
22 is not contained in the AR and indeed is contradicted by the AR.

23 **b. Exclusion of PBI data because it was only one year of data**

24 BLM also rejected some PBI data based in part on the fact that the PBI data was  
25 only a single year's data and was thus not enough to support sound conclusions, yet BLM  
26 relied on only a single year of its own data in determining whether objectives were being  
27 met. The Court found exclusion of PBI data on this ground to be arbitrary and capricious  
28 because BLM did not provide any explanation for why it was acceptable to use just a  
single year's BLM data for its determination of whether the objectives were being met,

1 but then reject the PBI data in part because a single year's data is not enough to support  
2 sound conclusions. (Doc. 55 at 16-17.)

3 The supplemental report, again, misses the point of concern. The report states that  
4 BLM did not reject the PBI data "based only on the fact that it was a single year's data"  
5 and that although the PBI data, by itself, could not support a conclusion regarding  
6 establishment of objectives, it was used "in conjunction with ESDs to assist BLM in  
7 establishing" the objectives. (Doc. 59-1 at 11.) In other words, the report is, again,  
8 focusing on the setting-objectives step. However, the Court's concern is BLM's failure to  
9 use PBI data at the meeting-objectives step of the analysis, not at the setting-objectives  
10 step. (Doc. 55 at 16-17.)

11 The supplemental report does go on to address the meeting-objectives step, but  
12 does not discuss BLM's failure to use the PBI data at this step. Instead, the report  
13 discusses the use of a single year of BLM data at this step, stating:

14 BLM's single year data was used as a baseline to determine whether sites were  
15 meeting objectives. BLM's baseline data, by itself, also did not support a  
16 conclusion. Rather, BLM used a variety of data including inventory, monitoring  
17 records, assessments for [Land Health Standard 1 factors], and knowledge of the  
18 locale, in conjunction with the single-year data used as a baseline, to assist in  
making the determination on achievement or non-achievement of land health  
standards.

19 (Doc. 59-1 at 11 (citing AR 074553-54, 074683-84).)

20 The supplemental report provides no explanation as to why it was reasonable to  
21 reject use of some PBI data at the meeting-objectives step based in part on the ground  
22 that the PBI data was only a single year's data and a single year's data is "not enough to  
23 support sound conclusions," then use other PBI data and BLM data that was also only a  
24 single year's data. Further, the supplemental report's assertion that it did not just use the  
25 BLM data at the meeting-objectives step, but also relied on other information "in  
26 conjunction with the single-year data" (Doc. 59-1 at 11) does not explain why BLM  
27 could not, then, similarly use the single-year PBI data along with the other information at  
28 this step.

1 BLM contends, in its brief, that “the use of one year of data was not BLM’s reason  
2 for rejecting the PBI data” and that, “in fact, it used some of that data where it met key  
3 area requirements.” (Doc. 66 at 17.) However, as noted above, BLM indicated previously  
4 and in the AR that some PBI data was rejected in part due to the fact that it was only one  
5 year’s data and could not support strong conclusions. (See Doc. 59-1 at 11 (stating that  
6 the PBI data was not rejected “based only on the fact that it was a single year’s data”);  
7 AR 062582 (letter objecting to BLM’s use of data only from 48 of 320 PBI plots in  
8 determining landscape condition); AR 74107-08 (“While the PBI data added to the  
9 BLM’s baseline information, one year of PBI data, in itself, is not enough to support  
10 sound conclusions.”).)

11 Further, the AR demonstrates that BLM determined whether the objectives were  
12 being achieved based on BLM data and some PBI data. (AR 74622-30.) For example, for  
13 Limy Fan, the record states: “Data from Key Area BH-3 (11 percent) and PBI study site  
14 58 (8 percent) indicate that both achieve the canopy cover objective.” (AR 074623.)  
15 There is simply no indication that, at the meeting-objectives step, any consideration was  
16 given to other information “in conjunction with the single-year [BLM] data” and selected  
17 PBI data. (Doc. 59-1 at 11).

18 In sum, the supplemental report’s explanation for its rejection of some PBI data at  
19 the meeting-objectives step is a new rationalization and is inconsistent with BLM’s  
20 previous explanations and the AR.

21 **D. Determination of Whether Grazing Caused Failure to Meet Objectives – the**  
22 **Causality Determination**

23 At the causation step, BLM again relied on a single year’s data, in this case  
24 utilization data from 2009 (which measured livestock utilization during the 2008 grazing  
25 season). The Court previously found that BLM failed to provide a reasonable explanation  
26 in the AR for its reliance on a single year’s data in light of BLM’s rejection of PBI data  
27 in part because of BLM’s determination that a single year’s data is not enough to support  
28

1 sound conclusions.<sup>8</sup> The Court also previously found that BLM failed to address concerns  
2 raised by a peer reviewer regarding the use of a single year's data. (Doc. 55 at 20-22.)

3 In the supplemental report, BLM responds that it only possessed one year of  
4 utilization data and thus could not have relied on more than one year of data. (Doc. 59-1  
5 at 12; *see* Doc. 66 at 17.) However, the failure of BLM to collect additional data does not  
6 justify reliance on insufficient data. *See N. Plains Res. Council, Inc. v. Surface Transp.*  
7 *Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) (agency has obligation under NEPA to gather  
8 the data necessary for making an informed decision).

9 BLM contends that, by the time peer reviews occurred, it could not have gathered  
10 more data because of the deadline that had been set in *Western Watershed Project v.*  
11 *BLM*, Case No. CV-08-01472-PHX-MHM, which required BLM to release its Record of  
12 Decision by December 15, 2011. However, as BLM acknowledges, the deadline in that  
13 case was later extended to September 15, 2012. (Doc. 66 at 16.) Further, as WWP points  
14 out, BLM began the LHE process in 2005, and did not issue the final RMP until  
15 September 2012. (Doc. 68 at 11.) Moreover, the peer review comment expressing  
16 concern with the use of only a single year's utilization data is dated November 13, 2009  
17 (AR 083942), almost three years before BLM issued the RMP. BLM had also recognized  
18 by early October 2009 the problems with determining causation based only on 2009  
19 utilization data, and that additional utilization data should be collected. (*See* AR 055055  
20 ("Utilization data was collected during a season of abundant precipitation that allowed for  
21 ephemeral livestock grazing authorizations, confounding the survey results."); AR  
22 055530 ("These data were collected during a year with ephemeral livestock  
23 authorizations. In 2008 ephemeral forage plants added materially to the perennial forage  
24 base. Additional utilization data should be collected.")) BLM does not explain why it

25  
26 <sup>8</sup> The Court understands that BLM used the justification that a single year's data is  
27 not sufficient to support sound conclusions in connection with the meeting-objectives  
28 step of the LHE. *See* AR 74107-08 ("While the PBI data added to the BLM's baseline  
information, one year of PBI data, in itself, is not enough to support sound conclusions.")  
However, BLM has not explained why that justification would not apply equally to the  
use of a single year's utilization data at the causation step.

1 could not have conducted additional utilization monitoring either prior to or after it  
2 gathered the 2009 data.

3 In the supplemental report, BLM also states that it “determined that one year of  
4 utilization data was accurate to explain the causality where Land Health Standard 3 was  
5 not achieved because the precipitation/forage production represented an average year.”  
6 (Doc. 59-1 at 12 (citing AR 074616-17, 074644).) The citations to the AR provided by  
7 BLM do not, however, support this explanation. The citations are merely to pages that  
8 provide the AUMs for the years 1998-2007 (AR 074616-17); and permitted grazing  
9 allotment use and ten-year average use on the allotments on the SDNM (AR 074617,  
10 74644). Other than AR 074616, which includes a table showing perennial AUMs and  
11 ephemeral AUMs for years 1998-2007, but does not include 2008, there is no discussion  
12 of ephemeral and perennial forage. There is a discussion at AR 074617-18 regarding  
13 precipitation, and a precipitation table that shows that 2008 was an above average year  
14 for precipitation. However, there is no discussion or explanation of why using only one  
15 year of utilization data from 2009 would provide accurate or sound conclusions regarding  
16 causation.

17 As to BLM’s failure to respond to a peer reviewer’s comments (*see* Doc. 55 at 21;  
18 AR 083492), the supplemental report does not directly address that deficiency. BLM  
19 contends in its brief that it did respond to the peer reviewer’s comments “by explaining  
20 that [the 2009] data was from an average year.” (Doc. 66 at 18 (citing AR 074349).)  
21 However, the response cited by BLM was not to the peer reviewer’s comments but  
22 instead to a comment by WWP that “BLM used a year with above-average precipitation  
23 (2008) in which to measure utilization.” (AR 074349.) BLM’s response to this WWP  
24 comment states: “In 2008, precipitation at Gila Bend was slightly above average and  
25 Maricopa was slightly below average, resulting in an average production year.” (*Id.*)  
26 Thus, the cited response by BLM was to a comment by WWP and not to the peer  
27 reviewer’s comment at issue here.

28 As the Court noted previously, the peer reviewer expressed concern that utilization  
data from only one year was relied on by BLM; and that the single year’s data was from a

1 year that had ephemeral production that could be utilized by livestock and did not  
2 account for the long-term effects to vegetation, or use patterns, that might occur in non-  
3 ephemeral years in which livestock graze on more perennial plants. (Doc. 55 at 21; *see*  
4 AR 083492.) BLM still has not have provided a citation to the AR where it responded to  
5 this comment.

6 The supplemental report does explain that BLM determined “the ephemeral  
7 production in 2008 did not sufficiently depart from the norm to make utilization data  
8 from 2009 non-representative of an average year.” (Doc. 59-1 at 12.) BLM contends that  
9 this provides a sufficient explanation for its use of one year of data – that it was  
10 reasonable to do so because the year in question represented an average year and because  
11 the ephemeral production in 2008 did not sufficiently depart from the norm for an  
12 average year. (Doc. 66 at 16.) BLM has not, however, provided a citation to the AR in  
13 support of this explanation regarding ephemeral production.<sup>9</sup> (*See* Doc. 59-1 at 12; Doc.  
14 66 at 16.) Further, the explanation does not address the peer reviewer’s concern regarding  
15 the long-term impacts or use patterns that might occur in non-ephemeral years. BLM’s  
16 explanation is thus not sustained by the record and is a new rationalization for its use of  
17 only single year’s utilization data.

### 18 Conclusion

19 BLM has failed to adequately explain some of the decisions<sup>10</sup> that led to the LHE  
20 and compatibility determinations, and failed to address significant concerns raised in a  
21 peer reviewer’s comments. Although the supplemental report provided by BLM provides  
22 explanations in response to the Court’s previous Order, most of the explanations do not  
23 sufficiently address the deficiencies identified by the Court, are not sustained by the

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24  
25 <sup>9</sup> The supplemental report does cite AR 074617-18, which has a precipitation table  
26 showing average precipitation for both Gila Bend and Maricopa Counties was above  
27 average in 2008. These pages of the AR do not, however, address ephemeral production  
or otherwise provide support for the explanation provided in the supplemental report.

28 <sup>10</sup> The Court has considered and finds it unnecessary to address additional  
arguments raised by the parties.



1 record, or are new rationalizations for BLM’s decisions that cannot be used to cure the  
2 deficiencies identified by the Court. The Court therefore holds that the LHE is “arbitrary,  
3 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.  
4 § 706(2).

5 The Court will grant summary judgment in favor of WWP, and will order BLM to  
6 complete a new LHE and compatibility determination under NEPA and incorporate those  
7 decisions into the RMP. The Court will deny BLM’s cross-motion for summary  
8 judgment.

9 WWP does not seek, and the Court will not order, that BLM’s grazing decisions or  
10 the grazing portion of the RMP be vacated. Thus, grazing under the RMP can continue  
11 while BLM completes a new LHE and compatibility determination. In light of the length  
12 of time it took BLM to complete its first analysis, WWP requests that the Court set a  
13 deadline for completion of the new analysis. The Court believes that such a deadline is  
14 appropriate. However, the Court also is aware of the limited resources available to BLM  
15 and understands that BLM may need to gather additional data. The Court will therefore  
16 require the parties to confer and provide a joint statement proposing an appropriate  
17 deadline.

18 IT IS ORDERED that Plaintiffs’ Motion for Summary Judgment (Doc. 64) is  
19 granted to the extent it seeks to require BLM to complete a new LHE analysis and  
20 compatibility determination.

21 IT IS FURTHER ORDERED that Defendant’s Cross-Motion for Summary  
22 Judgment (Doc. 66) is denied.

23 IT IS FURTHER ORDERED that BLM shall complete a new LHE analysis and  
24 compatibility determination under NEPA and incorporate those decisions into the RMP.

25 ///

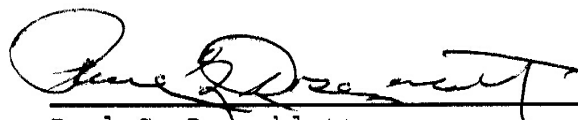
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1 IT IS FURTHER ORDERED that the parties shall confer and file, by April 22,  
2 2016, a joint statement proposing an appropriate deadline for BLM's completion of a new  
3 LHE and compatibility determination, and incorporation of that information into the  
4 RMP.

5 Dated this 31st day of March, 2016.

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10 Paul G. Rosenblatt  
11 United States District Judge  
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