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**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION**

WESTERN WATERSHEDS PROJECT &
WILDERNESS WATCH,
Appellants,

v.

BUREAU OF LAND MANAGEMENT,
Respondent,

ID- _____

Appeal of December 21, 2018 Decision by
Bruneau Field Manager Tanya M. Thrift to
Approve the Final Grazing Decisions, Final
Environmental Assessment (EA), and
Finding of No Significant Impact (FONSI),
for the Battle Creek, East Castle Creek, and
Owens Allotments Grazing Permit
Renewals (DOI-BLM-ID-B020-2018-0002-
EA).

NOTICE OF APPEAL & PETITION FOR STAY

NOTICE OF APPEAL

Pursuant to 43 C.F.R § 4.470, Appellants Western Watersheds Project and Wilderness Watch (collectively, Appellants) hereby appeal the December 21, 2018 Final Decisions, final Environmental Assessment (EA), and Finding of No Significant Impact (FONSI), for the Battle Creek, East Castle Creek, and Owens Allotments Grazing Permit Renewals (DOI-BLM-ID-B020-2018-0002-EA).

The nine Final Decisions authorize a significant increase in livestock grazing above average actual use, and approve the construction of approximately 30 miles of new fence, 12 new troughs, and 9.6 miles of new water pipeline. EA at 16. As discussed in detail below, this increase in livestock grazing, along with the new fences, troughs, and pipelines, will irreparably harm vital riparian areas, greater sage-grouse brood-rearing habitat, and the natural, undeveloped, and untrammled character of the Little Jacks Creek Wilderness.

This appeal is timely because Appellants received the Final Decision on December 26, 2018. 43 C.F.R. § 4.470(a).

STATEMENT OF STANDING

BLM's Final Decisions, EA, and FONSI on the Battle Creek, East Castle, and Owens allotments (collectively, BECO allotments) adversely affect the interests of Appellants and their staff, members, and supporters. 43 C.F.R. § 4.470(a). Appellants and their members use the public lands and resources of the Bruneau Field Office, including those within the BECO allotments, for aesthetic, recreational, scientific, inspirational, professional, educational, and other purposes on a regular and continuing basis and will continue to do so in the immediate future. Appellants' members appreciate and enjoy viewing sage-grouse, migratory birds, and many other native plant and animal species present on the BECO allotments. Appellants work actively to protect and recover watersheds, uplands, riparian areas, water quality, native species, and Wilderness characteristics within the BECO allotments and Little Jacks Creek Wilderness.

Western Watersheds Project (WWP) is a non-profit organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP has approximately 1,500 members and over 5,000 supporters around the West. WWP members, including the undersigned, have participated extensively in this project's NEPA

process and have also worked extensively within the project area for over 10 years. *See* Declarations of George Wuerthner and Paul Ruprecht (filed herewith).

Wilderness Watch is a non-profit organization with its principal place of business in Missoula, Montana and with satellite offices in Idaho and Minnesota. Wilderness Watch has over 2,000 members and over 35,000 supporters, many of whom reside and/or recreate in Idaho. Wilderness Watch is dedicated to the protection and proper stewardship of Wilderness and Wild and Scenic Rivers. Its members use and will continue to use the Owyhee Canyonlands Wildernesses, including the Little Jacks Creek Wilderness, for outdoor recreation and professional pursuits of all kinds, including hiking, solitude, research, and wildlife viewing. BLM's decisions adversely affect Wilderness Watch's organizational interests, particularly its interests in ensuring the preservation of wilderness character, as well as its members' use and enjoyment of the Little Jacks Creek Wilderness. *See* Declaration of George Wuerthner.

As noted, the Final Decisions authorize construction of new infrastructure on public lands to intensify livestock grazing on the project area, including within the Little Jacks Creek Wilderness. The infrastructure will harm Appellants' use and enjoyment of the public lands in and around the BECO allotments in various ways. The ground disturbance caused by the construction will introduce new weed vectors in the area. The projects will harm native wildlife, such as sage-grouse, by increasing predation, fence collisions, habitat fragmentation, and the risk of West Nile Virus. The effect of the projects will be to intensify livestock grazing in areas of uplands that were more intact habitats until now. And the projects will detract from the naturalness and aesthetic quality of the area, including the Congressionally recognized Wilderness characteristics of the Little Jacks Creek Wilderness.

The resulting intensive livestock grazing authorized by the Final Decisions will channel and direct livestock use to the surrounding areas of new water sources, leading to increased use of uplands and other riparian areas, increased erosion, additional utilization of native upland plant species, introduction and spread of invasive plants, and degradation of water quality and riparian vegetation.

A partial stay of the Final Decision followed by an order from the Hearings Division finding the decision unlawful and setting it aside would remedy these injuries. *See* Declarations of George Wuerthner and Paul Ruprecht.

BACKGROUND

I. The BECO Allotments

The BECO allotments are located within Idaho's "ruggedly beautiful" Owyhee region, an area "[s]tartling in its ecological diversity, from arid sagebrush desert to lush juniper woodlands," where the rivers "have sculpted spectacular and wild canyonlands out of the Owyhee's volcanic rock formations." *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 821 (9th Cir. 2002). The allotments are home to numerous BLM-designated sensitive species, including greater sage-grouse, pygmy rabbit, California bighorn sheep, redband trout, and Columbia spotted frog. EA at 47-48. Other wildlife in the area include elk, pronghorn antelope, mule deer, black-collared lizard, bald eagle, northern goshawk, mountain quail, prairie falcon, golden eagle, ferruginous hawk, great horned owl, red-tailed hawk, Swainson's hawk, loggerhead shrike, Brewer's sparrow, and scores of species of nongame birds and mammals, many of which fulfill an important ecological niche as prey species for avian and mammalian predators. *Id.*

II. Bruneau Grazing EIS & MFP

In 1982, BLM issued the Bruneau-Kuna Grazing Final Environmental Impact Statement, in which BLM proposed to implement “an improved rangeland management program” on the public lands within what is now the Bruneau Field Office. USDO I BLM, Bruneau-Kuna Final Grazing Environmental Impact Statement (1982) at 1 [hereinafter, “Bruneau-Kuna Grazing EIS”]. The purpose of BLM’s proposal was to improve the soil, water, and vegetation resources within the area. *Id.* Improvement was necessary—according to BLM—because only “trace” acreage of public lands within the Bruneau was in excellent condition and 14% was in good condition. *Id.* at 7-8. Fully 73% of the public lands were in poor or fair condition. *Id.*

Under the proposed action, BLM claimed that 70% of the area would improve in range condition, and BLM proposed to “[i]mprove 939,000 acres of sage-grouse habitat to increase nesting, brood rearing and wintering areas.” *Id.* at 13. Overall, BLM predicted that “sage-grouse population levels would increase.” *Id.* at 3. More specifically, BLM proposed to improve sage-grouse late brood-rearing habitat—*i.e.*, upland seeps, springs and wet meadows—by establishing rest or deferred grazing systems on these upland areas. *Id.* at 21. Deferring grazing until after seed ripe in the uplands would also benefit the native vegetation communities, according to BLM, because allowing native plants to reach seed ripe is “necessary to improve maintenance of desired plant species, vigor and productivity.” *Id.* at 34.

In 1983, BLM issued its Final Bruneau Management Framework Plan (Bruneau MFP or MFP), which remains the land use plan in effect today. *See generally*, USDO I BLM, Bruneau Management Framework Plan (1983). The Bruneau MFP adopted the proposed action identified in the Bruneau-Kuna Grazing EIS, and it requires that BLM manage the public lands within the Bruneau Field Office to rectify the degraded resource conditions. *Id.* Under the MFP, BLM is required to manage the public lands to comply with a number of wildlife-specific objectives and

management requirements, including: improve sage-grouse nesting, brood rearing and winter habitats; adjust management of livestock or exclude grazing on sage-grouse brood-rearing areas to improve habitat; manage sensitive species habitats to “maintain or increase” existing and potential populations; manage upland game habitats—including habitat for the greater sage-grouse—to increase populations; manage springs, seeps and meadows and adjacent upland areas as key wildlife habitat for Greater sage-grouse and other upland game species, and exclude livestock from these areas if conditions do not improve; and adjust livestock season of use on spring and summer range to meet the minimum growth needs of preferred native vegetation, including by deferring grazing until after seed ripe. *Id.* at 4-8, 58, 108, 114-15; *see also Western Watersheds Project v. Salazar*, 843 F. Supp. 2d 1105, 1132 (D. Idaho 2012) (filed herewith as Attachment 1).

On July 16, 2001, the BLM published in the Federal Register a notice of intent to prepare an environmental impact statement and a new resource management plan for the Bruneau Field Office. 66 Fed. Reg. 41263 (August 7, 2001). However, BLM has failed to issue a draft or final EIS or RMP in the intervening 18 years, and the Bruneau MFP remains in place.

III. Prior Rangeland Health Assessments

Unfortunately, BLM has consistently ignored the Bruneau MFP’s direction to “maintain or increase” sensitive species populations. Conditions within the BECO allotments remain degraded. *Salazar*, 843 F. Supp. 2d at 1132-33. In 2007 BLM conducted rangeland health evaluation and determination for the Battle Creek allotment, which documented that Standards 2, 3, 7, and 8 and Guidelines 1, 3, 5, 6–9, 10, 12, and 17 were not met due to current grazing. *Id.* at 1119. A 2008 rangeland health assessment for the East Castle Creek found similarly poor conditions in sage-grouse habitat, where fully 74% of all late brood-rearing habitat was found to be unsuitable or marginal, and BLM concluded that the trend was downward. *Id.* at 1121. Even

the suitable sites lacked forbs and grass when compared to reference sites, and bare ground was more than double expected levels in many areas. *Id.* BLM concluded that grazing was causing violations of each and every applicable rangeland health standard, including standards for watersheds, riparian areas and wetlands, stream channel and floodplain, native plant communities, water quality and sensitive status species. *Id.*

IV. Prior Litigation

Despite these findings, BLM issued final grazing decisions for the Battle Creek and East Castle Creek allotments in 2008 that—like the Final Decisions at issue here—authorized cattle numbers far above the permittees’ average actual use, permitted grazing in key sage-grouse habitat during spring and summer, and failed to include mandatory terms and conditions governing livestock grazing. *See generally Salazar*, 843 F. Supp. 2d 1105.

WWP challenged these decisions in federal court, and in 2012 the court ruled that BLM’s final grazing decisions violated NEPA, FLPMA, the Bruneau MFP, and the Fundamentals of Rangeland Health. *Id.* Specifically, the court determined that the decisions “violate[ed] the Bruneau MFP’s direction to manage livestock grazing in ‘springs, seeps and meadows and adjacent upland areas.’” *Id.* at 1132-33. The court also noted that the decisions maintained grazing during the critical spring and summer months, contrary to the MFP’s direction to “adjust livestock season of use on spring and summer ranges to meet minimum growth needs of preferred plant or forage species.” *Id.* at 1133. The court rejected BLM’s chosen approach of “refusing to reduce AUMs or change seasons-of-use but instead building fences and other range projects,” for two reasons:

First, while fencing might protect the springs from livestock, it also ensures that this potential critical habitat cannot be used by sage-grouse. Second, fencing hurts sage-grouse: The 2004 [State of Idaho] Conservation Assessment concludes that fencing provides a perch for sage-grouse predators and a collision hazard that can result in death.

Id. at 1133. The court also noted that BLM’s final decisions violated the Fundamentals of Rangeland Health because BLM failed to include “measurable and/or observable changes in the indicators” like stubble height, stream bank stability, and plant utilization, that would help ensure progress toward meeting standards. *Id.* at 1129. Finally, the court rejected BLM’s NEPA analysis, holding that BLM’s various grazing EAs failed to analyze the cumulative impacts of livestock grazing, especially “given the poor conditions for the sage-grouse” within the Bruneau and Owyhee Field Offices. *Id.* at 1127.

V. The 2018 Proposed Grazing Decisions

The court ordered BLM to complete a new NEPA analysis and issue new grazing decisions, but failed to set a deadline or vacate the 2008 decisions. Consequently, BLM did not issue a new rangeland health assessment until March 2018. BLM’s 2018 rangeland health assessment and evaluation found that the Battle Creek, East Castle Creek, and Owens allotments were not meeting standards 2, 3, 4, 7, and 8. *See generally* USDOJ BLM, Battle Creek, East Castle, and Owens Determination (June 1, 2018). BLM further determined that current livestock grazing practices were a “significant” factor in not meeting standards 2 (riparian areas and wetlands) 3 (stream channels and floodplains), and 8 (threatened, endangered, candidate, and sensitive species), and that grazing on the allotments’ higher-elevation pastures did not conform with guidelines 3, 5, 6, 7, 10, 11, and 12 for livestock grazing management. *Id.* BLM explained that riparian areas within “priority” sage-grouse habitat areas “are not properly functioning in the region,” “do not provide the late season herbaceous species[,] and have less water availability” due to current livestock grazing practices. *Id.* at 18. BLM also admitted in related litigation that the Battle Creek and East Castle Creek allotments were “deteriorating.” *Western Watersheds Project v. Zinke*, Case 4:08-cv-00435-BLW, Dkt. No. 296, Memorandum Decision & Order (September 27, 2018), at 9 (filed herewith as Attachment 2).

In August 2018 BLM issued an EA, Finding of No Significant Impact, and proposed grazing decisions for the BECO allotments. The Proposed Decisions selected Alternative 3 from the EA, with some additional projects proposed by the permittees. Although the *Salazar* court in 2012 rejected BLM’s “standard practice” of “refusing to reduce AUMs or change seasons-of-use but instead building fences and other range projects,” the Proposed Decisions did just that— Alternative 3 does not meaningfully alter stocking rates or seasons of use, but instead relies almost entirely on “range projects” to meet or make progress toward the Idaho Standards of Rangeland Health. *See, e.g.*, EA at 54. Alternative 3 also includes four new projects in the Little Jacks Creek Wilderness area. *Id.* at 16.

Like the 2008 decisions, the 2018 Proposed Decisions did not contain terms, conditions, “measurable or observable indicators,” or “specific management thresholds” that will ensure that the BECO allotments make “measurable or observable progress” toward meeting the Idaho Standards of Rangeland Health. As the *Salazar* court noted, the Fundamentals of Rangeland Health require “measurable and/or observable changes in the indicators” like stubble height, stream bank stability, and plant utilization, wherever standards are not met. 843 F. Supp. 2d at 1129. *See also* 43 C.F.R. § 4130.3–1; *WWP v. U.S. Dept. of Interior*, 2009 WL 5218020 (D. Idaho 2009). The Proposed Decisions however, contain no reference to ecological indicators, and actually claim to provide more “flexibility” to permittees when moving between pastures.

VI. Appellants’ 2018 Protests

Appellants timely protested the Proposed Decisions. Citing the 2012 *Salazar* opinion, Appellants noted that the Proposed Decisions carried forward all of the basic flaws of BLM’s 2008 decisions. For instance, the Proposed Decisions, like the 2008 decisions, relied almost entirely on fences and water developments to address downward trends in rangeland health, even though the *Salazar* court determined that fences and water developments harm sage-grouse, and

even though BLM's own EA acknowledged that "developed" riparian sites in all three allotments have been "dried out due to hoof action by livestock and are contributing toward marginal conditions for sage-grouse broods." EA at 49. The protests also noted the lack of enforceable terms and conditions, and pointed out that BLM's NEPA analysis had once again failed to examine the cumulative impacts of BLM grazing decisions across the interconnected habitats of the Northern Great Basin. Finally, Appellants protested BLM's authorization of motorized travel and new construction in the Little Jacks Creek Wilderness, as contrary to both the letter and the spirit of the Wilderness Act and Public Law 111-11.

VII. The 2018 Final Grazing Decisions

BLM issued final grazing decisions on December 21, 2018. The final decisions made few changes from the Proposed Decisions, with one exception: the Final Decisions would apply Alternative 5 (stocking reduction) on an interim basis, until certain "critical" range improvement projects are completed. In other words, the Final Decisions would modify seasons of use and significantly lower stocking rates until the projects are built. Even the interim decisions, however, authorize grazing during the spring and summer, allow up to 50% utilization on upland forage grasses, and would permit motorized access and new construction in designated Wilderness.

PETITION FOR STAY

Appellants respectfully ask the Hearings Division for a partial stay of BLM's Final Grazing Decisions. Although Appellants maintain that the Final Decisions were unlawfully issued and therefore invalid in their entirety, Appellants request only a partial stay in order to protect wildlife habitat and Wilderness values during the pendency of this appeal. Specifically, Appellants request a stay of the nine Final Decisions insofar as they authorize: (1) construction of new range improvement projects; (2) motorized travel in the Little Jacks Creek Wilderness for

the purpose of constructing new range improvement projects; (3) implementation of Alternative 3 after “critical” range improvement projects are constructed; (4) authorization of motorized intrusions into the Little Jacks Creek Wilderness for other grazing-related purposes; and (5) authorization of water hauls to support grazing. Appellants do not seek to stay the Final Grazing Decisions insofar as they implement Alternative 5 (40% stocking reduction) without wilderness travel, projects, or water hauls.

Appellants are entitled to a partial stay because they meet each of the regulatory factors in 43 C.F.R. § 4.471(c). A stay is warranted pending the resolution of an appeal if an appellant shows sufficient justification based on the following four factors:

- 1) The relative harm to the parties if the stay is granted or denied;
- 2) The likelihood of the appellant’s success on the merits;
- 3) The likelihood of immediate and irreparable harm if the stay is not granted; and
- 4) Whether the public interest favors granting the stay.

43 C.F.R. § 4.471(c). Applying this test, “relief may be granted with either a high probability of success and some injury, or vice versa.” *Oregon Natural Desert Association*, 135 IBLA 389, 393 (1996) (quoting *NRDC v. EPA*, 806 F. Supp. 275, 277 (D.D.C. 1992)); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (an injunction “is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor” if “the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest”).

I. Irreparable Harm

Appellants and their members, staff, and supporters will be irreparably harmed by implementation of BLM’s Final Decisions, both immediately and in the long-term. These harms

include aesthetic, recreational, procedural, and ecological harms. *See* Declarations of George Wuerthner and Paul Ruprecht.

Environmental harm is nearly always irreparable. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable”); *see also National Wildlife Federation et al. v. BLM*, 140 IBLA 85 (1997) (affirming injunction of grazing in Comb Wash allotment). Further, the Ninth Circuit recognizes that “[i]n the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action.” *High Sierra Hikers v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004); *see also Soda Mountain Wilderness Council v. BLM*, 534 Fed. Appx. 680, 684 (9th Cir. 2013).

As noted, the Final Grazing Decisions for the BECO allotments authorize construction of approximately 30 miles of new fence, 12 new troughs, and 9.6 miles of new water pipeline. EA at 16. These projects require ground disturbance. *See* EA at 27-28. The EA states that BLM will employ barbed wire fencing, which will require clearing fencelines with chainsaws and excavators, mowing, and driving wooden and steel fence posts into the ground. *See id.* Water pipeline corridors will be cleared when needed, and pipelines will be constructed with heavy equipment to place the pipe in a surface incision. *See id.* Water tanks and other structures also require heavy equipment.

Weed infestations inevitably follow this kind of surface disturbance. In fact, the EA admits that construction would kill native vegetation and “increase” invasive cheatgrass along fences and pipeline corridors “as a result of the initial surface disturbance and ongoing effects of grazing.” *Id.* at 30. “The indirect increase in cheatgrass along project construction corridors

would act as a source for further spread of cheatgrass and could increase the risk of fire spread.”

Id.

It is well established, moreover, that these types of projects harm sage-grouse. The U.S. Fish and Wildlife Service (USFWS) summarized the adverse effects of range projects in its 2010 “warranted” finding. 75 Fed. Reg. 13,910 (Mar. 23, 2010) (filed herewith as Attachment 3). USFWS noted that infrastructure in the sagebrush landscape fragments sage-grouse habitat, resulting in direct habitat loss, habitat alteration causing functional loss for sage-grouse, and preclusion of the use of habitat within fences through physical barriers or avoidance behavior. *Id.* at 13,927 (defining fragmentation as “the separation or splitting apart of previously contiguous, functional habitat components of a species”). It explained that the negative effects to sage-grouse from fencing included mortality through collisions, creation of predator perch sites and predator corridors, and incursion of exotic species. *Id.* at 13,929; 13,941. Direct mortality to sage-grouse from fencing occurs because sage-grouse frequently fly low and fast across sagebrush flats and strike fences. Marking fences with visible reflectors does not remove the risk to sage-grouse from collisions; even marked fences kill sage-grouse. *See, e.g.*, N.J. Van Lanen et al., *Evaluating Efficacy of Fence Markers in Reducing Greater Sage-Grouse Collisions with Fencing*, 213 *Biological Conservation* 70-83 (2017) (filed herewith as Attachment 4) (concluding that fence markers fail to prevent 43 percent of collision mortalities).

Fences and other grazing structures create perching or nesting areas that allow raptors and corvids (such as ravens) to more successfully hunt and prey on sage-grouse. Studies show that sage-grouse choose nesting sites with fewer avian predators. Sage-grouse inherently avoid tall structures and fencing, presumably to minimize risk of predation. This avoidance results in

effective habitat loss around structures, even if actual habitat is not directly removed. 75 Fed. Reg. at 13,927–29.

Those findings were not disputed in USFWS’s 2015 “not warranted” finding, which indeed confirmed the harms of infrastructure on sage-grouse, but assumed that construction of further infrastructure would essentially cease in the most important habitats under BLM’s Approved Resource Management Plan Amendments (ARMPAs). 80 Fed. Reg. 59,858 at 59,893 (Oct. 2, 2015) (filed herewith as Attachment 5). According to USFWS’s interpretation, the ARMPAs “include measures to avoid placing new infrastructure in the most important habitats for the species, thereby reducing the future risk of infrastructure development in those areas.” *Id.*

Ground-disturbing harm and habitat preclusion from project construction—within the most important habitat of an imperiled species—is irreparable. As noted, environmental harm is nearly always irreparable. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable”); *see also National Wildlife Federation et al. v. BLM*, 140 IBLA 85 (1997) (affirming injunction of grazing in Comb Wash allotment). Sage-grouse are imperiled, and the species has a low reproductive rate and recovers slowly. 75 Fed. Reg. at 14,005. Vegetation, too, is slow to recover in southwest Idaho’s arid high desert environment. Thus, the harm to the sage-grouse populations and habitat, and Appellants’ interests in the same, would be irreparable if BLM were permitted to fully implement the Final Grazing Decisions. Even if BLM improbably decided that the fences should be removed at some later time, irreparable harm to the areas surrounding the exclosures and to sage-grouse and other wildlife populations is likely to occur in the meantime.

The new projects would also harm the Wilderness character of the Little Jacks Creek Wilderness. As the EA notes, implementation of BLM's selected alternative (Alternative 3), would "impact" the "[u]ntrammeled, undeveloped and natural characteristics" of the Little Jacks Creek Wilderness. EA at 69. The harm to Wilderness values here is especially egregious because the new projects would be built to accommodate increased numbers of livestock. See Appendix A of House Report 101-405 ("[T]he construction of new improvements should be primarily for the purpose of resource protection and the more effective management of these resources rather than to accommodate increased numbers of livestock.").

A stay is therefore needed to prevent this imminent irreparable environmental harm. The Final Decisions anticipate construction of all new range improvements within the next 2-3 years, including 30 miles of new fence, 12 new troughs, and 9.6 miles of new water pipeline. EA at 16. This would add to the 24 stock ponds, 32 developed springs, and 494 miles of fence already installed on the BECO allotments. EA at 7-10, Appendix A. BLM admits these extensive developments have already degraded sage-grouse habitat, and despite BLM's assurances to the contrary, the existing network of projects has utterly failed to prevent violations of the Idaho Standards of Rangeland Health. In fact, projects have contributed to Rangeland Health violations. The EA reports that "wetland and riparian areas, *particularly at developed sites*, have been dried out due to hoof action by livestock and are contributing toward marginal conditions for sage-grouse broods, as well as for spotted frogs." EA at 49 (emphasis added). Projects are also not maintained; according to the EA, 15 of the 32 developed springs are in need of "redevelopment." See EA, Appendix C. Consequently, a stay is needed to halt the imminent construction of additional projects and prevent further, irreparable harm to important sage-grouse habitat.

II. Likelihood of Success

Appellants are likely to succeed on the merits because the BECO Final Grazing Decisions, EA, and FONSI violate the National Environmental Policy Act (NEPA), the Federal Lands Management and Policy Act (FLPMA), the Bruneau MFP, the Fundamentals of Rangeland Health regulations, and the Wilderness Act.

A. The EA, FONSI, and Final Decisions Violate NEPA.

The BECO EA, FONSI, and Final Decisions violate NEPA because BLM refused to take a comprehensive look at the direct, indirect and cumulative impacts of its grazing decisions on the habitat and populations of greater sage-grouse. BLM also violated NEPA because it failed to adequately consider impacts to the Wilderness characteristics of the Little Jacks Creek Wilderness.

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

To determine whether an EIS is necessary, an agency must consider ten “intensity” factors—including whether the proposed action would affect “unique” environmental characteristics and “ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3). “Ecologically critical areas” include Wilderness, potential Wilderness, *Cascadia Wildlands v. U.S. Forest Service*, 937 F. Supp. 2d 1271, 1281 (D. Or. 2013), and important wildlife habitat. *Native Ecosystems Council & Alliance for the Wild Rockies v. U.S. Forest Service ex rel. Davey*, 866 F.

Supp. 2d 1209, 1228 (D. Idaho 2012); *Helena Hunters & Anglers v. Tidwell*, 841 F. Supp. 2d 1129, 1136–38 (D. Mont. 2009).

Whether or not an EIS is ultimately necessary, NEPA requires an agency to take a “hard look” at any direct or indirect environmental impacts of the proposed action. 40 C.F.R. §§ 1502.16, 1508.8, 1508.25(c). Agencies must also consider potentially significant cumulative impacts. 40 C.F.R. § 1508.27(b). “A cumulatively significant impact is an impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1223 (D. Idaho 2005) (internal quotations and ellipses omitted), quoting *Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002). *See also* 40 C.F.R. § 1508.7.

In considering cumulative impacts, courts have noted that an agency must provide “some quantified or detailed information” because “[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Bennett*, 392 F.Supp.2d at 1223, *citing Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2005). *See also Western Watersheds Project v. Rosenkrance*, Case No. 09-CV-298-EJL, 2011 WL 39651 at *11-13 (D. Idaho January 5, 2011) (reversing cumulative impact analysis as arbitrary and capricious). This cumulative analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Bennett*, 392 F.Supp.2d at 1223; *Salazar*, 843 F. Supp. 2d 1125.

1. The BECO EA Does Not Adequately Consider Cumulative Impacts.

The BECO EA runs afoul of NEPA because although BLM claims to assess cumulative impacts across large portions of the Owyhee and Bruneau Field Offices, the EA in fact fails to provide any details or “useful analysis” of any past, present or future livestock grazing

authorizations, vegetation treatments, fuel breaks, or other actions in this area. The EA lists approximately 25 projects and activities that may have impacts on wildlife, including greater sage-grouse, but it never examines the cumulative environmental impacts of these projects. Nor does BLM even mention the status of sage-grouse populations and habitat in the Bruneau Field Office or the Great Basin. *Id.* And nowhere in the EA does BLM support its conclusions with data or analysis.

For example, BLM never mentions the 170 livestock grazing permits BLM has issued since 2015 in the Bruneau and Owyhee Field Offices. BLM even ignores the 128 allotments in the Bruneau and Owyhee Field Offices where it issued new grazing permits without any environmental analysis whatsoever.¹ Where BLM does purport to examine cumulative environmental impacts, it offers only conclusory statements that assume progress without citing to supporting data.

The EA contains no site-specific or project-specific discussion of cumulative impacts. Concerning BLM's selected alternative (Alternative 3), the EA states only:

Alternative 3 would contribute toward beneficial livestock grazing management changes and range improvements that would improve conditions for the wildlife species analyzed. The effects from this alternative would not cumulatively contribute toward any negative effects to wildlife species and would have a countervailing effect for any past, present, and reasonably foreseeable future actions that would have a negative impact to any wildlife species.

EA at 64. Again, BLM cites no data or analysis to support any of these conclusions regarding cumulative impacts. *See id.*

Based on the paucity of analysis, it appears that BLM believes simply identifying a sufficiently large analysis area and a sufficient number of projects is sufficient to meet its NEPA requirements. The Ninth Circuit has repeatedly rejected this position, however. In *Neighbors of*

¹ These figures were computed using BLM's publicly-available RAS database.

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

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

Moreover, BLM relies on plainly inaccurate assertions in its cumulative impact analysis. As noted, BLM concludes that there will be no significant cumulative impacts to sage-grouse habitat. But the record in this case demonstrates that livestock grazing on the Battle Creek, East Castle, and Owens allotments is causing extensive violations of the Fundamentals of Rangeland Health, including Standards that apply to sage-grouse habitat. Again, BLM’s Evaluation and Determination concludes that current grazing was causing violations of Rangeland Health Standards 2, 3, 4, 7, and 8 and Guidelines 3, 5, 6, 7, 10, 11, and 12.

Livestock harm to sage-grouse habitat has been confirmed in numerous federal court decisions, many of which concerned sage-grouse habitat in the Owyhee region. *See, e.g., Idaho*

Watersheds Project v. Hahn, 307 F.3d 815 (9th Cir. 2002) (68 permits in the Owyhee Field Office) (noting that “cattle overgrazing now threatens the life of the Owyhee [Resource Area]”); *Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217 (D. Idaho 2005) (28 allotments in Jarbidge Field Office); *Western Watersheds Project v. Dyer*, 2009 WL 484438 (D. Idaho February 26, 2009) (36 allotments in the Jarbidge Field Office); *Western Watersheds Project v. U.S. Dep’t of the Interior*, 2009 WL 5218020 (D. Idaho Dec. 30, 2009) (Nickel Creek allotment in the Owyhee Field Office); *Western Watersheds Project v. Dyer*, 97-0519-S-BLW (Trout Springs, Castlehead Lambert and Pole Creek allotments in Owyhee Field Office); *Salazar*, 843 F. Supp. at 1112. As described above, the same holds true for many other allotments in this area, including the Big Springs, Garat, and Rockville allotments.

Moreover, as courts have found many times, BLM violates NEPA if, when authorizing grazing, it fails to consider the collective impacts to sage-grouse or other species from grazing on nearby allotments. *W. Watersheds Project v. Jewell*, 56 F. Supp. 3d 1182, 1190 (D. Idaho 2014); *W. Watersheds Project v. Salazar*, 843 F. Supp. 2d 1105, 1126–28 (D. Idaho 2012); *W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1223 (D. Idaho 2005); *Rosenkrance*, 2011 WL 39651, at *13; *see also Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1306-06 (9th Cir. 2003) (NEPA analysis for timber sale was inadequate where it failed to consider the cumulative impacts of the sale on spotted owl habitat on adjacent forest).

In light of this record evidence, there is no credible basis for BLM’s claim that there will be no cumulative, synergistic effects of grazing within and around the BECO allotments. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (decision is arbitrary and capricious if agency’s explanation for its decision that runs counter to the evidence before the agency). And because BLM relied on this counterfactual claim to support its

cumulative impact analysis, the Hearings Division should reverse and remand the BECO EA, FONSI and underlying grazing decisions.

2. The BECO EA Does Not Adequately Consider Direct, Indirect, and Cumulative Impacts to Wilderness Characteristics.

The BECO EA, FONSI, and Final Grazing Decisions also violate NEPA because they do not consider adverse impacts to Wilderness characteristics from grazing and range improvement projects. Specifically, the EA does not provide site-specific analysis of Wilderness impacts; it does not compare alternatives to determine which would best benefit the Little Jacks Creek Wilderness area while still continuing nonconforming activities associated with grazing; and, like BLM’s cumulative impacts analysis, the Wilderness portion of the EA relies on conclusory, unsupported assumptions rather than data or analysis.

For example, the EA does not disclose the length of any motorized intrusions into Wilderness—either in terms of duration or physical length—for construction of new range projects. Nor does the EA disclose the methods and materials BLM will use to develop new installations or structures. Motorized use is generally prohibited in wilderness, but there is a narrow exception carved out in the Congressional Grazing Guidelines for motorized access to maintain grazing support facilities “where practical alternatives do not exist.” Congressional Grazing Guidelines, House Report 96-1126. The EA is silent on how the motorized use in this case meets this narrow standard, and BLM’s failure to consider this question violates NEPA.

In addition, BLM’s Wilderness analysis is sloppy, inconsistent, and misleading, making it impossible for the public to compare Wilderness impacts under the various alternatives. For instance, the EA gives different figures concerning how much new fence would be constructed in Wilderness under Alternative 3—BLM’s selected alternative. Table 39 on pages 70 and 71 gives figures that add up to 4720 feet, but the narrative at the top of page 70 states that more than a

mile of new fence would be constructed. The EA is also inconsistent as to the number of new projects in Wilderness: Table 39 lists only three new projects under Alternative 3, but the narrative on page 69 states that Alternative 3 includes four new projects in Wilderness.

More inconsistencies become apparent upon examining the Final Decisions. For instance, the Anchustegui Final Decision states on page 17: “No motorized or mechanized vehicles or equipment is authorized within the Little Jacks Creek Wilderness Area with the exception of emergencies.” Yet the same decision states on page 22 states: “I authorize one wilderness incursion for salt placement and one wilderness incursion per 10 years for reservoir maintenance in the Battle Creek allotment with this Final Decision.” Table 39 of the EA, moreover, notes that neither alternative 3 nor 5 authorize occasional motorized or mechanized use.

Similarly, the King decision states on page 18: “No motorized or mechanized vehicles or equipment is authorized within the Little Jacks Creek Wilderness Area with the exception of emergencies.” But page 22 of the same decision states: “I authorize one wilderness incursion for salt placement and one wilderness incursion per 10 years for reservoir maintenance in the East Castle allotment with this Final Decision.”

These internal contradictions, along with the absence of any quantified or detailed information about Wilderness impacts, violate BLM’s mandate under NEPA to take a “hard look” at impacts to “ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3); *Cascadia Wildlands*, 937 F. Supp. 2d at 1281

The lack of analysis in the EA regarding motorized use authorizations also violates the March 2016 settlement agreement resolving Appellants’ challenge to the Record of Decision and Finding of No Significant Impact for the Owyhee Canyonlands Wilderness and Wild and Scenic

Rivers Management Plan, which provides management guidance for the Little Jacks Creek Wilderness. That agreement states, “During the life of the Management Plan, proposals and authorizations for motorized and/or mechanized use to facilitate grazing operations within the Owyhee Canyonlands Wildernesses will normally be addressed as part of the grazing permit renewal process, on a case-by-case basis, *and will be analyzed through the NEPA process.*” See Joint Settlement Agreement, Case Nos. IBLA-2015-174, IBLA-2015-175, Attachment 2, ¶ 7 (filed herewith as Attachment 6) (emphasis added). While the EA indicates that a separate, internal, minimum requirements analysis was done to analyze motorized use requests, EA at 69, that internal document was never provided to the public and does not satisfy BLM’s obligations under NEPA or the terms of the settlement agreement.

Finally, BLM failed to follow its own Manual direction regarding public notification.

BLM Manual 6340 states:

Field office managers must provide public notice of proposed actions within wilderness areas. *Notification should occur as soon as practicable*, such as when the purpose and need for a proposal . . . is defined. . . . The notice should include enough information for the recipient to understand the purpose, location, nature, size, and expected implementation date of the proposed action.

(Emphasis added.) Here, BLM clearly did not notify the public as soon as practicable. Nowhere in BLM’s scoping letter for these grazing permit renewals, and nowhere in the Rangeland Health Assessment and Evaluation Report, is it mentioned that there would be or could be development in the Little Jacks Creek Wilderness. BLM only disclosed this fact when the proposed decision and EA became publicly available. And nowhere does the EA provide information about the “size, and expected implementation date of” individual projects. As noted, the public has not been informed about the length of any authorized motorized incursions—in either time or distance—for construction of new projects. Indeed, the only detail provided is the total length of new fence, and as discussed above, that detail is inconsistently reported.

Accordingly, the EA and FONSI violate NEPA’s mandate to take a “hard look” at environmental impacts—including impacts to “ecologically critical areas” such as Wilderness—and to provide the public and decisionmakers with “quantified or detailed information” about direct, indirect, and cumulative impacts. *See Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005); *Cascadia Wildlands*, 937 F. Supp. 2d at 1281.

B. The Final Decisions Violate the Bruneau MFP, Idaho ARMPA, and FLPMA.

The final grazing decisions for the BECO allotments violate the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.*, because they are inconsistent with the Bruneau Management Framework Plan and Idaho ARMPA—the governing land use plans covering the Bruneau Field Office.

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

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

with the Plan and, consequently, violate FLPMA”). Grazing decisions specifically must be consistent with the governing RMP. 43 C.F.R. § 4100.0–8. Here, the applicable land use plans are the Bruneau Management Framework Plan (Bruneau MFP) and the Idaho/Southeast Montana ARMPA.

The Bruneau MFP states that the BLM will “manage sensitive species habitats in the [Bruneau Field Office] to maintain or increase existing and potential populations.” USDI BLM, Bruneau Management Framework Plan (1983) at 6, 86 [hereinafter “Bruneau MFP”]. It also states that the BLM will “[m]anage springs, seeps and meadows and adjacent upland areas as key wildlife habitats for upland game.” *Id.* at 114. To accomplish this, the BLM will “[c]ontrol livestock grazing on these habitats by the implementation of grazing systems, season of use and other management practices such as salting away from water sources.” *Id.*

The Bruneau MFP further requires BLM to “manage 520,000 acres of sage-grouse range . . . to improve nesting, brood rearing, and winter habitats.” *Id.* at 115. The MFP recognizes that “[r]iparian and meadow vegetation are important [sage-grouse] brooding areas if suitable adjacent protective cover is present. Without such cover, total habitat and thus the potential population is adversely affected.” *Id.* at 117. To protect that necessary cover, the MFP states that the BLM will “adjust livestock season of use on spring and summer ranges to meet minimum growth needs of preferred plant or forage species.” *Id.* at 58.

As summarized by the *Salazar* court:

[T]he Bruneau MFP gives priority to sensitive species like the sage-grouse and requires the BLM to manage livestock grazing in “springs, seeps and meadows and adjacent upland areas” and to adjust livestock season of use to meet minimum growth needs of preferred plants and forage species that provide sage-grouse habitat.

843 F. Supp. 2d at 1132.

The Idaho/Southeast Montana ARMPA, meanwhile, requires BLM to “[m]aintain and/or increase the abundance, distribution and connectivity” of sage-grouse “by reducing, eliminating or minimizing threats to [sage-grouse] habitats.” Idaho ARMPA at 2-4. “When livestock management practices are determined to not be compatible with meeting or making progress towards achievable habitat objectives,” the ARMPA requires BLM to “implement changes in grazing management through grazing authorization modifications, or allotment management plan implementation.” *Id.* at 2-24. Moreover, if the governing RMP—in this case the Bruneau MFP—contains more protective measures for sage-grouse, those more protective measures continue to apply under the APRMAs. Idaho ARMPA at 2-1 (“In the event there are inconsistencies or discrepancies with previously approved RMPs, this ARMPA’s decisions will be followed, unless there are more restrictive decisions in the existing plans”).

The BECO allotments contain important sage-grouse brood-rearing and late-summer habitat, including high-elevation riparian areas. EA at 40; Assessment at 101. BLM has developed over half of these critical sage-grouse brood-rearing areas, however, to provide water for livestock, and most of these springs (59%) are in non-functioning or functioning-at-risk condition. BECO Assessment and Evaluation Report at 31-36. In addition, 40% streams within the BECO allotments are in non-functioning or functioning-at-risk condition. *Id.* At the same time, monitoring results indicate that riparian areas across the allotment are over-utilized by livestock. BLM’s most recent assessment found that, “utilization within many monitoring locations [was] close to or did exceed 10% stream bank alteration and/or did not have recorded herbaceous stubble height above 4 inches (10 cm) at the end of the growing season.” *Id.* at 33. These conditions contributed to BLM’s conclusion that the allotment was not meeting Standard 8 (endangered species) due to cattle grazing.

Some of the most important remaining sage-grouse brood-rearing habitat is located in Battle Creek pasture 20, especially along Dry Creek and Hutch springs. The East Castle Creek allotment also contains important late summer habitat for sage-grouse, including within pastures 12, 29A-D, 28 and 28A. According to BLM, however, many of these riparian areas are not in suitable condition, and crucial springs are unsuitable due to “un-vegetated, bare[,]” and “altered hydric soil.” USDOJ BLM, Battle Creek, East Castle Creek, and Owens Determination (August 6, 2018), at 33. BLM also notes that “[s]pring sources . . . adjacent to livestock water developments” are subject to “repeated, heavy livestock use.” *Id.* According to BLM’s Rangeland Health Determination, “[r]iparian areas that [are in] functioning at risk or non-functioning condition have had repeated hot season grazing and livestock use, which has resulted in insufficient residual vegetation needed to improve, restore, or maintain riparian-wetland functions and structure.” *Id.* at 18. BLM concluded that the BECO allotments did not meet Standard 8 (threatened, endangered, candidate, and sensitive species) due to the poor condition of upland riparian areas, and that “livestock grazing management practices are significant factors,” in not meeting the standard. *Id.*

Despite these depauperate conditions, BLM’s grazing decisions on the Battle Creek, East Castle Creek, and Owens allotments continue to allow livestock grazing in sage-grouse brood-rearing habitats during the spring and summer months—even though the Bruneau MFP and the 1982 Bruneau-Kuna Grazing EIS requires BLM to manage these areas as key wildlife habitat for Greater sage-grouse and other upland game species. Bruneau MFP at 114. *See also* Kuna Grazing EIS (BLM claiming that measures to improve sage-grouse habitat have been adopted, and now require “[g]razing systems which provide rest or deferment through the critical brood rearing period”); Sage-Grouse National Technical Team, A Report on National Greater Sage-

Grouse Conservation Measures (December 2011), at 14 (“Within priority sage-grouse habitat, reduce hot season grazing on riparian and meadow complexes to promote recovery of maintenance of appropriate vegetation and water quality”) (filed herewith as Attachment 7).

For example, on the Battle Creek allotment, pasture 20 includes the most important sage-grouse brood-rearing habitat, and BLM has not changed the season of use on this pasture. The current season of use in Pasture 20 runs from early summer to early fall, which encompasses both the “hot season” and sage-grouse brood rearing. Idaho Sage-grouse Advisory Committee, Conservation Plan for the Greater Sage-grouse in Idaho 2-4 (2006) (noting that late brood-rearing runs from mid-July to September). BLM’s new final decisions would maintain grazing during June and August—the hottest two months of the year. And while BLM has incorporated rest into the rotation schedule for Pasture 20 (one out of every three years), it has also intensified use. According to the EA, “[p]asture stocking of livestock” under BLM’s selected alternative “could be more intense than what has been observed in the past.” EA at 42. “Other summer use pastures would have riparian and wetland utilization and disturbance during hotter, drier conditions and possibly higher stocking rates than what has been observed.” *Id.* BLM has provided no analysis of the impacts of these higher stocking rates; nor has it provided data showing that the beneficial effects of rest will outweigh the adverse impacts of more intense hot-season use.

On the East Castle Creek allotment, BLM has maintained summer use in pastures 28, 28A and 29A-B, which, as noted, also contain also critical sage-grouse brood-rearing habitat. On these pastures, BLM is authorizing grazing between July 1 and August 31, while under the old scheme, grazing started two weeks later and ran through the middle of August. As in Battle Creek, BLM has incorporated one year of rest in every four-year cycle on pasture 28A, and rest

every three years on the other pastures. But permitted stocking rates remain above average actual use, and BLM has not provided analysis or data showing that such heavy use—even with periodic rest—will adequately protect sage-grouse nesting and brood-rearing habitat.

Indeed, BLM’s own final decisions suggest that permitted stocking rates, even with pasture rotation and periodic rest, will violate the Bruneau MFP. BLM believes that range improvement projects—which would add more fencing, troughs, and water pipelines in and around the riparian habitats of the BECO allotments—are necessary to protect sage-grouse brood rearing habitat from livestock impacts. Accordingly, the Final Decisions reduce actual use by 40% until these projects are constructed. The Final Decisions explain that that “a substantial reduction in AUMs and reducing hot season grazing” is needed to “improve riparian areas and promote progress towards meeting” rangeland health standards. Simplot Decision at 22. Without fences, in other words, BLM’s stocking rates are too high, and its seasons of use are incompatible with the Bruneau MFP’s requirement to manage springs, seeps and meadows as key sage-grouse habitat.

BLM’s strategy of fencing out riparian areas, moreover, is also inconsistent with the Bruneau MFP. As the *Salazar* court explained, the “standard BLM practice” of “refusing to reduce AUMs or change seasons-of-use but instead building fences and other range projects” violates the Bruneau MFP for two reasons:

First, while fencing might protect the springs from livestock, it also ensures that this potential critical habitat cannot be used by sage-grouse. Given the rapidly diminishing habitat for these birds, that is a serious deficiency. Second, fencing hurts sage-grouse: The 2004 Conservation Assessment concludes that fencing provides a perch for sage-grouse predators and a collision hazard that can result in death.

843 F. Supp. 2d at 1132-33. And, as the EA acknowledges, “developed” riparian sites in all three allotments have been “dried out due to hoof action by livestock and are contributing toward

marginal conditions for sage-grouse broods.” EA at 49. In sum, BLM’s own decisions and environmental analysis indicate that its grazing scheme on the BECO allotments fails to meet Bruneau MFP and ARMPA requirements to manage upland riparian areas as key sage-grouse habitat, because the decisions continue to allow inappropriate “hot season” livestock grazing and would increase harmful fencing in critical sage-grouse brood-rearing habitat.

C. The Final Decisions Violate the Fundamentals of Rangeland Health

Despite finding that livestock grazing is causing violations of standards 2, 3, 4, 7, and 8, BLM’s final grazing decisions do not implement necessary changes in grazing management to achieve—or to make significant progress toward achieving—the applicable Idaho Standards of Rangeland Health and the Fundamentals of Rangeland Health, as required under 43 C.F.R. § 4180 *et seq.* Indeed, BLM’s grazing decisions fail to adopt any mandatory terms and conditions necessary to remedy the rangeland health violations, and actually increase grazing across each allotments, including within important sage-grouse habitat.

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

Under these regulations, BLM established four basic ecological criteria—termed the “fundamentals” of rangeland health—which are applicable to grazing across all BLM lands, and which generally require that BLM maintain watersheds, ecological processes, water quality, and habitats in healthy conditions, or that significant progress is being made toward attaining such

conditions. *See* 43 C.F.R. § 4180.1; *Kraayenbrink, supra*. If BLM determines that these basic criteria are not being met, the regulations mandate that BLM “shall take appropriate action . . . as soon as possible but not later than the start of the next grazing year . . . to ensure” that the criteria will be met or significant progress made toward achieving them. 43 C.F.R. § 4180.1. These regulations require that grazing permits include mandatory terms and conditions “that ensure compliance with subpart 4180.” 43 C.F.R. § 4130.3-1; *see also Western Watersheds Project v. U.S. Dep’t of the Interior*, Case No. 08–0506–E–BLW, 2009 WL 5218020 (Dec. 30, 2009).

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

BLM’s Final Decisions here violate the Fundamentals of Rangeland Health because the allotments are not meeting the Idaho Standard of Rangeland Health, and the Final Decisions lack the kind of mandatory terms and conditions necessary to ensure compliance with these minimum rangeland health standards. 43 C.F.R. § 4130.3-1. As the *Salazar* court explained:

The duty to make “significant progress” must mean something. Under the plain language of the regulation, it requires “measurable and/or observable changes in the indicators” like stubble height, stream bank stability, and plant utilization. At the same time, the BLM has a duty to use mandatory Terms and Conditions to “ensure compliance” with the duty to make significant progress.

843 F. Supp. 2d at 1129.

The Idaho/Southeast Montana ARMPA also calls for “specific management thresholds” based on sage-grouse habitat objectives like perennial grass height and sagebrush cover, ecological site potential, and “one or more defined responses that will allow the authorizing

officer to make adjustments to livestock grazing,” after a permit has been issued. Idaho ARMPA at 2-25. To “ensure compliance” with these terms and conditions, the ARMPAs require “field checks” focusing on “[a]llotments within SFA, followed by those within PHMA, and focusing on those containing riparian areas, including wet meadows.” *Id.* Similarly, BLM’s National Technical Team recommends developing “specific objectives to conserve, enhance, or restore priority sage-grouse habitat,” and “incorporat[ing] sage-grouse habitat objectives and management considerations into all BLM grazing allotments though [allotment management plans] or permit renewals.” Sage-Grouse National Technical Team, A Report on National Greater Sage-Grouse Conservation Measures (December 2011), at 14.

The decisions here, of course, include mandatory terms and conditions that establish grazing schedules, supplement placement, pasture rotations, and a certain degree of “flexibility” for permittees when moving between pastures. *See, e.g.*, Simplot Decision at 16. But as the *Salazar* court also explained, terms and conditions establishing “seasons-of-use” or “field rotation plans” are not sufficient to meet BLM’s mandate under the Fundamentals of Rangeland Health—these are “strategies or tactics that hopefully lead to ‘measurable’ change, and are not themselves the ‘measurable’ change.” 843 F. Supp. 2d at 1129. “In contrast, criteria like stubble height and plant utilization are the ‘measurable’ change itself—they are the criteria the BLM is monitoring, on a regular basis, to determine whether it is making “significant progress.” 843 F. Supp. 2d at 1129-30. Because BLM’s final decisions do not include mandatory terms and conditions to ensure progress towards meeting the Idaho Standards of Rangeland Health, the decision violate the Fundamentals of Rangeland Health and FLPMA. *Id.*

BLM’s grazing decisions further violate the Fundamentals and Standards and Guidelines because BLM has not rationally explained how the increases in livestock grazing under these

decisions will allow “significant progress” toward achieving these minimum rangeland health criteria. The decisions here increase stocking rates to over twice average actual use, and far above the levels of cattle use currently contributing to Rangeland Health violations. For instance, The Battle Creek decisions authorize 11,399 AUMs per grazing season, a slight reduction from the currently authorized level of 11,477 AUMs. But according to BLM’s own estimates, average actual use on the Battle Creek allotment from 2008 to 2016 was 5,329 AUMs. The proposed decision therefore authorizes over twice the number of AUMs that have caused habitat degradation and violated the Fundamentals of Rangeland Health. The decision also maintains the current season of use, which runs from April 1 to January 31 and overlaps the “critical growth period” for native bunchgrasses and forbs.

The East Castle Creek decision also maintains current stocking rates. It authorizes 10,645 AUMs—an increase from the currently permitted 10,436. But average actual use on the East Castle Creek allotment from 2008 to 2016 was 6,884 AUMs. Again, BLM has proposed to authorize several thousand AUMs above the level that has caused Rangeland Health violations under the current permit. And while the proposed decisions change the season of use on the East Castle Creek allotment, they authorize year-round grazing—again overlapping the “critical growth period.”

The Owens decisions are much the same. They re-authorize the currently permitted rate of 1,536 AUMs and maintain the current season of use: June 1 through September 30. The average actual use on the Owens allotment, meanwhile, was 1,231 AUMs between 2008 and 2016. Thus, just as in *Salazar*, “a key factor in BLM’s finding that [its decision] would make ‘significant progress’ in curing FRH violations has no support in the record.” 843 F. Supp. 2d at 1114.

Instead of adjusting stocking rates and seasons of use, BLM proposes to build new range improvement projects—such as fences, pipelines, and toughs—to control livestock distribution. But fences and water developments will ensure that potential brood-rearing habitat cannot be used by sage-grouse. In addition, fences harm sage-grouse by providing a perch for sage-grouse predators and a collision hazard that can result in death. U.S. Fish & Wildlife Service, 12-Month Findings for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 75 Fed. Reg. 13910, 13927-29 (March 23, 2010); *see also Salazar*, 843 F. Supp. 2d at 1132-33.

BLM further proposes to mark fences, and claims that this will make “impacts due to collision ... insignificant.” EA at 47. But fence marking does not reduce collision mortality to “insignificant” levels. According to Stevens (2012), collisions still occur at marked fences less than 500 meters from large leks, and moving or removing fences may be necessary. B.S. Stevens et al., *Mapping Sage-Grouse Fence Collision Risk: Spatially Explicit Models for Targeting Conservation Implementation*, 37 Wildlife Society Bulletin 409-415 (2012) (filed herewith as Attachment 8). A more recent study found that marked fences have a 57 percent lower probability of collisions; in other words, fence markers fail to prevent 43 percent of collision mortalities. N.J. Van Lanen et al., *Evaluating Efficacy of Fence Markers in Reducing Greater Sage-Grouse Collisions with Fencing*, 213 Biological Conservation 70-83 (2017); *see also* 75 Fed. Reg. 13927-29.

BLM also ignores existing range developments and their negative impacts on wildlife. As noted, the EA reports that “wetland and riparian areas, *particularly at developed sites*, have been dried out due to hoof action by livestock and are contributing toward marginal conditions for sage-grouse broods, as well as for spotted frogs.” EA at 49 (emphasis added). Projects are also not maintained; according to the EA, 15 of the 32 developed springs are in need of

“redevelopment.” *See* EA, Appendix C. Clearly, existing projects have not arrested downward ecological trends, and there is nothing in the EA or Rangeland Health Assessment to indicate that new projects would somehow succeed where numerous other, similar measures have failed.

Consequently, BLM’s reliance on new projects to cure rangeland health violations—instead of adjusting stocking rates and seasons of use to minimize impacts to sage-grouse and other wildlife species—violates the Fundamentals of Rangeland Health and FLPMA. *See Salazar*, 843 F.Supp.2d at 1133. The Final Decisions also violate the Fundamentals of Rangeland Health because they do not include mandatory terms and conditions to ensure progress. *Id.*

D. The Final Decisions Violate the Wilderness Act and the Owyhee Canyonlands Wilderness Act (Public Law 111-11 Subtitle F, Section 1503(b)(2)(A)).

In addition to the NEPA and FLPMA violations identified above, the Final Grazing Decisions ignore the Congressional Grazing Guidelines for Wilderness areas (Appendix A of House Report 101–405) and thus violate the Wilderness Act, 6 U.S.C § 1133.

BLM has an obligation under the Wilderness Act to preserve the Wilderness character of the Little Jacks Creek Wilderness under 16 U.S.C. § 1133(b). The Wilderness Act allows the continuation of grazing “subject to such reasonable regulations as are deemed necessary.” 16 U.S.C. § 1133(d)(4). In this case, the Congressional Grazing Guidelines define what is “reasonable” and “necessary.” BLM’s Final Decisions violate the Congressional Grazing Guidelines, and thus abdicate BLM’s duty under the Wilderness Act to preserve the Wilderness character of the Little Jacks Creek Wilderness.

The Congressional Grazing Guidelines provide policy direction for new grazing structures like fences or other development in Wilderness—areas where structures are generally prohibited with certain, detailed exceptions for grazing-related facilities. Congress required that

the agencies adopt these policies, and they are incorporated into the legislation that created the Little Jacks Creek Wilderness. Specifically, Public Law 111-11 Subtitle F, Section 1503(b)(2)(A) requires that management be “consistent with section 4(d)(4) of the Wilderness Act (16 U.S.C. 1133(d)(4)) and the guidelines described in Appendix A of House Report 101–405.”

Appendix A of House Report 101–405 states that, “the construction of new improvements should be primarily for the purpose of resource protection and the more effective management of these resources *rather than to accommodate increased numbers of livestock.*” (Emphasis added.)

As noted above, however, implementation of Alternative 3—which would add structures in Wilderness—increases use well beyond the permittees’ average actual use over the last ten years. Consequently, the Final Decisions violate the Grazing Guidelines and the Wilderness Act because the Decisions authorize new construction in the Wilderness “to accommodate increased numbers of livestock.” Although BLM claims that a stocking reduction under Alternative 5 would improve ecological conditions and benefit Wilderness values, it has nevertheless decided to increase grazing and construct new anthropogenic structures in Wilderness. As the EA admits, these structures will detract from the “natural, undeveloped, and untrammled” character of the Little Jacks Creek Wilderness. This decision therefore runs contrary to the Wilderness Act, which requires BLM to prioritize Wilderness characteristics over commercial uses such as livestock grazing.

BLM claims fences are necessary for resource protection, but this is nothing more than wishful thinking—as noted, fences have actually been shown to harm sage-grouse and contribute to ecological degradation:

[W]hile fencing might protect the springs from livestock, it also ensures that this potential critical habitat cannot be used by sage-grouse. Given the rapidly diminishing habitat for these birds, that is a serious deficiency. Second, fencing hurts sage-grouse: The 2004 Conservation Assessment concludes that fencing provides a perch for sage-grouse predators and a collision hazard that can result in death.

Salazar, 843 F. Supp. 2d at 1132-33. And, as the EA acknowledges, “developed” riparian sites in all three allotments have been “dried out due to hoof action by livestock and are contributing toward marginal conditions for sage-grouse broods.” EA at 49. Consequently, the new fences and other projects authorized in the Final Decisions are likely to cause, rather than prevent, resource damage in the Little Jacks Creek Wilderness. Such projects are not compatible with BLM’s mandate to protect Wilderness characteristics.

Similarly, the motorized use authorizations violate the Congressional Grazing Guidelines. Motorized use in wilderness is generally prohibited with certain, narrow exceptions detailed in the Guidelines. The Guidelines are clear that “the use of motorized equipment for emergency purposes” is permissible, but “[t]his privilege is to be exercised only in true emergencies, and should not be abused by permittees.” Furthermore, motorized access for grazing-related maintenance activities may only be authorized “[w]here practical alternatives do not exist.” The EA and associated Decision documents do not demonstrate that the authorized motorized use meets this standard. Consequently, the Final Decisions violate the Wilderness Act and Public Law 111-11.

III. Balance of Harms

The balance of harms favors partially staying the implementation of BLM’s Final Decisions. The balance of equities tips in favor of an appellant when the agency faces only delay. *See Alliance for the Wild Rockies v. Marten*, 200 F. Supp. 3d 1110, 1112 (D. Montana 2016) (citing *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 765 (9th Cir.

2014)). Moreover, BLM asserts here that it has the ability to meet its mandate of making significant progress towards meeting the Idaho Standards for Rangeland Health by implementing Alternative Five's 40% stocking reduction until "critical" projects are completed. Simplot Decision at 21. Thus, no harm will befall the BLM (or apparently its rangeland health goals) from a partial stay of these Final Decision.

Any harm to Appellants, on the other hand, is effectively permanent. As noted, Appellants' interests in recreation, wildlife, aesthetics, Wilderness values, and protection and recovery of sage-grouse will irreparably be harmed by new projects, which will pose significant risk to sage-grouse both immediately and in the long term. Consequently, the real environmental harm caused by the infrastructure projects weighs heavily against any delay in implementation, and the balance of harms tips in favor of a stay.

IV. Public Interest

The public has a strong interest both in the protection of native wildlife and sensitive resources. The public has an equally strong interest in BLM's lawful administration of private grazing operations on public lands and in Wilderness areas. The public interest is also served when public resources are not prematurely or irretrievably committed. Here, appellants contend that BLM violated NEPA, FLPMA, the Bruneau MFP, the Fundamentals of Rangeland Health, and the Wilderness Act in approving the Final Grazing Decisions. Thus, the public interest tips in favor of a partial stay.

Courts recognize "the public interest in careful consideration of environmental impacts" before projects go forward, and "that suspending such projects until that consideration occurs 'comports with the public interest.'" *Alliance for the Wild Rockies*, 632 F.3d at 1138 (quoting *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009)). As the Hearings Division has recognized, "[t]he public interest favors maintaining the

status quo until the merits of a serious controversy can be fully considered.” *See, e.g. Raymond Page v. BLM*, CA-N070-090-01, Order dated Nov. 18, 2009 (citing *Valdez v. Applegate*, 616 F.2d 570, 572-573 (10th Cir. 1980)).

The public interest favors a stay here because there is no immediate threat to the environment if the exclosures, troughs, and pipelines are not constructed. As stated in the Final Decisions, BLM believes Alternative 5 will protect riparian areas and make progress toward meeting the Idaho Standards of Rangeland Health. Since there is no imminent threat from any delay in construction of projects, “the public’s interest in maintaining the environment and requiring that agencies follow proper procedures” favors a stay. *Alliance for the Wild Rockies*, 200 F. Supp. 3d at 1112.

CONCLUSION

For these reasons, Appellants respectfully request that the Hearings Division grant a partial stay of the challenged BLM Final Decisions.

Dated this 22nd day of January, 2019.

Respectfully submitted,

/s/ Scott Lake
Scott Lake
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