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

WESTERN WATERSHEDS PROJECT,	)	Civ. No. 05-297-E-BLW
	)	
Plaintiff,	)	<b>OPENING BRIEF IN</b>
	)	<b>SUPPORT OF MOTION FOR</b>
vs.	)	<b>IMMEDIATE INJUNCTION</b>
	)	<b>RE: NEPA VIOLATIONS</b>
JOE KRAAYENBRINK, et al.,	)	
	)	
Defendants.	)	

**INTRODUCTION**

Plaintiff Western Watersheds Project seeks immediate injunctive relief barring BLM from implementing its new grazing regulations, *see* 71 Fed. Reg. 39402 (7/12/06), based on BLM’s violations of the National Environmental Policy Act (NEPA) in failing to disclose and misrepresenting the serious adverse environmental impacts that the new regulations will have. Because the regulations will take effect on August 11, injunctive relief is sought before then.<sup>1</sup>

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<sup>1</sup> Western Watersheds is also separately moving for an injunction based on BLM’s violations of the Endangered Species Act. *See Opening Brief In Support of Motion for Immediate Injunction Re: ESA Violations, filed herewith.*

If not enjoined, the new grazing regulations will cause Western Watersheds irreparable injury as BLM may immediately begin excluding it from a wide array of grazing decisions, thereby reducing Western Watersheds' effectiveness as an education and advocacy organization, and harming the interests of its thousands of members. The new regulations will also begin vesting ownership of water rights, fences, pipelines, troughs, and other public lands structures in the names of ranching permittees, thus creating property "rights" that will be difficult if not impossible to unravel later. Most importantly, the new regulations will authorize grazing degradation on allotments across Idaho and other states, causing irreparable environmental harms including soil erosion, water quality impairment, and harms to fish, wildlife, and other public resources. *See First Amended Complaint and supporting Declarations of Jon Marvel, Dr. John Carter, Kathleen Fite, Erick Campbell, and Robert House* (explaining the new regulations and their impacts in detail).

These irreparable injuries will occur due to many changes in the existing grazing regulations, which BLM has adopted to favor ranchers and handcuff its ability to protect ecological values of the public lands from grazing degradation. For example, the new regulations would eviscerate the existing Fundamentals of Rangeland Health, including by: (1) imposing new multi-year monitoring requirements, that BLM lacks the staffing or funding to fulfill, before BLM can even determine whether grazing is meeting ecological requirements on specific allotments; (2) eliminating the present requirement that BLM must promptly change grazing when it finds rangeland health violations, by stretching out the process for adopting new grazing plans over several years; and (3) "phasing in" over another five years grazing reductions greater than 10%, when livestock levels need to be reduced to avoid overgrazing. *Id.*

BLM is also giving ranchers greater authority to increase grazing, and decide for themselves when and where grazing will occur, without public notice or review; granting them new ownership of public lands “range improvements” and water rights; and excluding the public from many grazing management decisions, including permit renewals and TNR approvals. *Id.*

Yet BLM flatly misrepresents the scope and nature of these new regulations, claiming they are simply “administrative” steps needed to “improve efficiency” in its grazing management. BLM’s NEPA documentation for the new regulations – a January 2004 Draft EIS, June 2005 Final EIS, and March 2006 Addendum to the Final EIS<sup>2</sup> – fail to disclose the serious adverse environmental impacts the new regulations will have. This is despite the fact that an outpouring of comments from leading scientists, other agencies, and conservationists – including Western Watersheds – all advised BLM that the grazing regulation changes would have serious, adverse environmental consequences. Not only has BLM wrongly rejected this scientific input, but it even suppressed and changed the views of its own experts, who likewise warned that the changes will cause long-term harm to the environment while impairing BLM’s grazing management effectiveness. *See Declaration of Erick Campbell*, filed herewith.

By misrepresenting the regulations and avoiding the adverse environmental impacts they pose, BLM has thus violated NEPA, as a wealth of Ninth Circuit opinions underscore. *See Earth Island v. USFS*, 442 F.3d 1147 (9<sup>th</sup> Cir. 2006); *NRDC v. U.S. Forest Service*, 421 F.3d 797 (9<sup>th</sup> Cir. 2005); *Lands Council v. Powell*, 395 F.3d 1019 (9<sup>th</sup> Cir. 2005); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9<sup>th</sup> Cir. 2000) (all reversing EISs for failure to employ sound science and failing to discuss adverse effects of proposed actions). At a minimum, Western Watersheds has

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<sup>2</sup> The Final EIS, Addendum, and other NEPA documents are available on BLM’s website at <http://www.blm.gov/grazing/>; and thus are not being submitted as exhibits.

demonstrated both a likelihood of prevailing on its NEPA challenges and that irreparable harms may occur if the regulations take effect, warranting the requested injunction. *See Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1298 (9<sup>th</sup> Cir. 2003) (injunction is proper remedy where plaintiff shows likelihood of prevailing on NEPA claims, and even a possibility of environmental harm).

An injunction is also appropriate here to preserve the status quo, since there is absolutely no reason why the new regulations must go into effect while this case is being adjudicated. BLM's leisurely approach to this rulemaking – which began in 2003 –underscores there is no urgency in adopting the new rules. And during the requested injunction, the existing 1995 grazing regulations – which BLM adopted after a comprehensive environmental review, and which were upheld over livestock industry challenges in *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000) – will remain in effect, thus protecting the public interest.

Accordingly, based on the NEPA violations addressed below, as well as the ESA violations that are being separately briefed, the Court should enjoin the new BLM grazing regulations from taking effect.

### **STATEMENT OF RELEVANT FACTS**

#### **The Existing “Rangeland Reform” Grazing Regulations.**

The BLM grazing regulations control management of livestock grazing on more than 160 million acres of public lands in the West (excluding Alaska). *See Final EIS at ES-1 & Fig. 1-1*. BLM authorizes over 18,000 grazing leases and permits on these lands. *Id.*, at 1-12.

BLM adopted its existing grazing regulations in 1995, as part of Interior Secretary Babbitt's Rangeland Reform initiative. *See* 43 C.F.R. Part 4100 (1995). The 1995 regulations were based on a 1994 Rangeland Reform EIS, which found that the public lands remained badly

degraded by grazing. *See First Amended Complaint ¶¶ 24-30, 35-45*; 60 Fed. Reg. 9893 (Feb. 22, 1995) (discussing Rangeland Reform EIS and reasons for the regulations). The 1995 regulations increased public participation in grazing decisions; adopted the Fundamentals of Rangeland Health; and established that the United States holds title to range improvements and water rights on the public lands – which BLM explained were all needed to improve its grazing management and help restore degraded areas on the public lands. *Id.*

In particular, BLM adopted the Fundamentals of Rangeland Health to set minimum ecological standards for grazing on the public lands; and to require prompt changes in grazing management when these standards are not being met. *See* 43 C.F.R. § 4180 (1995); *Idaho Watersheds Project v. Hahn*, 187 F.2d 1035 (9<sup>th</sup> Cir. 1999) (upholding BLM duty to change grazing management prior to next grazing year, when rangeland health standards are not being met due to grazing). BLM emphasized that these measures “are **critical** to ensuring that BLM’s administration of grazing helps . . . restore healthy conditions to those areas that currently are not functioning properly, especially riparian areas.” 60 Fed. Reg. at 9898 (emphasis added).<sup>3</sup>

The 1995 rulemaking also established a new category of “interested publics” entitled to receive information and participate in all aspects of grazing management decisions, because “the public interest will be best served if a wide range of interests are represented when decisions are being made. Thus, increased public participation is essential to achieving lasting improvements in the management of our public lands.” *See* 60 Fed. Reg. at 9895. The 1995 regulations also provided that the United States would hold title to range improvements and water rights on BLM

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<sup>3</sup> BLM also eliminated a provision – that it is now reinstating – requiring “phase-in” of livestock cuts greater than 10% over 5 years. BLM explained this provision would “inhibit[] responsive action in situations where reductions in use are most needed,” and BLM requires “more flexibility to deal with situations in which immediate action was necessary to protect rangeland resources.” 60 Fed. Reg. at 9931; *Rangeland Reform EIS at 1-14*.

lands, to promote BLM's grazing management flexibility and be consistent with Forest Service practices. *Id.*, at 9897.

### **The Current Attempt To Gut The Rangeland Reforms.**

The livestock industry vigorously opposed these and other parts of the 1995 Rangeland Reform regulations. *See First Amended Complaint*, ¶¶ 46-51. But the courts rejected their challenges, including to the Fundamentals of Rangeland Health and the adequacy of BLM's 1994 Rangeland Reform EIS. *See Public Lands Council v. Babbitt*, 167 F.3d 1287 (10<sup>th</sup> Cir. 1999), *aff'd* 529 U.S. 728 (2000).

Failing in the courts, the livestock industry is now seeking to gut the Rangeland Reforms through the new grazing regulations; and it is aided in that effort by the Administration's success in packing the Department of Interior with livestock industry lobbyists, advocates, and permittees. *See First Amended Complaint* ¶¶ 52-58 (providing examples).

Asserting that it needs to "improve working relationships" with ranchers, BLM thus began the current rulemaking in March 2003, and published the text of proposed regulation changes in December 2003. *See* 68 Fed. Reg. 68,452 (Dec. 8, 2003). As described in a 2004 law review article, the proposed grazing regulation changes:

are a virtual wish list for ranchers seeking liberation from environmental constraints and restoration of their historic position as dominant users of the western public lands. The amendments would repeal some environmental standards, delay implementation of others, and render most of the rest unenforceable. They would remove critical opportunities for public land users other than ranchers to provide input into management decisions, slant environmental analyses and appeals procedures to favor ranchers over environmentalists, and even make it easier for ranchers convicted of environmental crimes to obtain grazing permits. The proposed amendments would also allow ranchers to obtain ownership of water rights, fences, wells, and pipelines on public lands, thus crippling BLM's ability to manage the land in the greater public interest.

*See* Prof. J. Feller, "Ride 'Em Cowboy: A Critical Look At BLM's Proposed New Grazing Regulations," 34 Environmental Law 1123, 1125-26 (2004) (citations omitted).

### **Suppressing Science And Adverse Comments.**

Notably, BLM failed to release a draft EIS when it published the proposed regulations in December 2003, as required under NEPA. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.5(d).

That is because BLM officials were busily revising the analysis prepared by a 15-member team of BLM wildlife biologists and other scientists, known as the Administrative Review Copy-DEIS, or “ARC-DEIS.” *See First Amended Complaint ¶¶ 61-62, 93-96; Marvel Decl. (Docket No. 3), Exhs. 1-2; Declaration of Erick Campbell* (testimony of BLM wildlife biologist on ARC-DEIS); *Declaration of Dr. John Carter, Exh. 7* (attaching excerpts from ARC-DEIS). In the ARC-DEIS, BLM’s inter-disciplinary team of scientists discussed at length scientific literature about grazing impacts; and found that the proposed grazing regulation changes would pose serious adverse consequences for the public lands and BLM’s grazing management. *Id.*

Rather than disclose these adverse views of its own experts, BLM suppressed the ARC-DEIS from the public, and hastily convened a new team of range staffers to rewrite the Draft EIS to eliminate any suggestion that the regulations would have significant effects. *Id.* As explained in the accompanying declaration by a now-retired BLM biologist who was on the ARC-DEIS team, the “sanitized” Draft EIS deleted much of the ARC-DEIS scientific discussion about grazing’s adverse impacts; and altered its analysis that the new regulations would have long-term adverse wildlife impacts – to say instead that they would be “beneficial to animals.” *Campbell Decl., ¶¶ 19-22.*

This Draft EIS was then released in January 2004 for public comment. In contrast to the Rangeland Reform process, where BLM held 49 public meetings across the country, it conducted just 6 public meetings during this period. *See Final EIS at 1-25.*

Western Watersheds, along with many scientists, conservationists, and public land users, submitted comments expressing their concerns – similar to those of BLM’s scientists in the ARC-DEIS – that the proposed regulations would benefit the livestock industry while harming the environment and public interest; and that the Draft EIS failed to disclose and address the likely adverse impacts. *First Amended Complaint* ¶¶ 63, 67; *Carter Decl., Exhs. 1-6* (attaching copies of comments from WWP and others). Other federal and state agencies expressed their own concerns about the likely adverse impacts of the proposed grazing regulations. *Id.* The Nevada Department of Wildlife (NDOW), for instance, expressed strong opposition to the proposed changes that would reduce public involvement in grazing, require multi-year monitoring to determine whether rangeland standards are being met, delay implementing needed changes in grazing management, allow increased livestock use and rancher control over grazing decisions and range projects, and other aspects of the proposed regulations. *See Carter Decl., Exh. 5* (copy of NDOW comments). NDOW noted that:

Western rangelands, in many areas, continue to decline in condition as a result of improper grazing strategies, drought without appropriate management changes for harsh conditions, livestock distribution problems, livestock trespass. . . and loss of significant habitats due to wildfire and associated exotic annual weed invasions and domination of these rangelands. All of these factors are contributing to more and more petitions for federal Endangered Species Act listing and ultimately to more restricted and costly management of federal lands. The BLM would be more responsible and the public better served if BLM were to use resources available to them for on-the-ground management addressing these resource problems rather than initiating more national and programmatic level planning processes. . . . *Id., at p. 1.*

As just one example, NDOW explained that the new regulations changing the Fundamentals of Rangeland Health – to allow BLM many years to implement new grazing decisions if rangeland health standards are not being met – would unnecessarily harm fragile desert ecosystems and the interests of ranchers alike:

The imperiled ecosystems of the Great Basin and the fragile Southwest deserts cannot tolerate this extended time frame for implementation of changes specifically identified and documented through this process as needed. Impacts of these delays in these ecological areas will only lead to additional justifications for continued petitions for federally listing species under the ESA, continued degradation of rangelands, and ultimately severe impacts on consumptive users of these regions. *Id.*, at p. 3

U.S. Fish and Wildlife Service similarly prepared comments noting that the new regulations would undermine the government's ability to protect and restore fish, wildlife, water quality, and other values on the public lands, while elevating livestock interests over sound management, including these statements:

the Proposed Revisions constrain biologists and range conservationists from recommending and implementing management changes based on their best professional judgment in response to conditions that may compromise the long-term health and sustainability of rangeland resources. Taken together we believe these aspects of the Proposed Revisions have the potential to be detrimental to fish and wildlife resources. . . .

The Proposed Revisions would change fundamentally the way the BLM lands are managed temporally, spatially, and philosophically. **These changes could have profound impacts on wildlife resources.**

*Carter Decl.*, Exh. 2 (emphasis added).

The EPA also commented that the new regulations would reduce BLM's ability to protect water quality and riparian areas from livestock degradation. *First Amended Complaint* ¶ 100. But just as the Administration suppressed the contrary views of BLM's experts in the ARC-DEIS, it prevented these critical comments from the Service and EPA from surfacing publicly, until after the comment period was over and the Final EIS was published in June 2005. *Id.*; *Marvel Decl.* (Docket No. 3), Exhs. 1-2 (news stories about the suppressed comments).

### **The Final EIS and Regulations.**

Underscoring that there is no urgency whatsoever in implementing the new grazing regulations, BLM actually printed the Final EIS in October 2004, but then did not release it to the public until June 2005. *First Amended Complaint*, ¶¶ 68-70.

In July 2005, after the Final EIS was published, Western Watersheds filed this action with an injunction motion to stop the regulations from going into effect. *Docket Nos. 1 & 3*. In response, BLM delayed publishing the final regulations, and promised to conduct further NEPA review. Western Watersheds thus voluntarily withdrew its injunction motion and its claims challenging the regulations, while reserving the right to renew them if and when BLM finalized the regulations. *See Docket Nos. 5 & 9*.

Despite its earlier promise, BLM did not allow any new comment period; and did not even allow the public to review and comment on the previously-suppressed EPA and Fish and Wildlife Service comments. Instead, BLM issued a March 2006 “Addendum” as part of the June 2005 Final EIS, reiterating that the new regulations will have positive environmental effects and improve grazing management. *See Addendum*.

BLM then published the new grazing regulations on July 12, 2006, in a lengthy Federal Register notice that again repeats its assertions that the regulations are mainly for administrative convenience, and will have positive effects on the public lands. *See 71 Fed. Reg. 39402*. Western Watersheds is thus reinstating and updating its challenges to the regulations, through a First Amended Complaint (and motion for leave to amend) submitted herewith. *Docket No. 23-24*.

As the Draft EIS, Final EIS, Addendum, and Federal Register notice all demonstrate, BLM never wavered in its determination to give the livestock industry its “wish list” of environmental rollbacks and greater rancher control over public lands management. Neither did BLM provide any meaningful analysis in the Final EIS (including the Addendum) of how the regulation revisions would fundamentally alter its grazing management, and cause long-term adverse harms to the health of the public lands, streams, wildlife, and other resources. Indeed,

the Final EIS differs very little from the “sanitized” Draft EIS, as evidenced by the “changes” section at the beginning of each chapter of the Final EIS.

The Final EIS portrays the new regulations as minor revisions to improve BLM’s administrative efficiency, which will not have any long-term adverse impacts on the environment. The following quotes from the EIS Executive Summary sound these themes, which are repeated over and over throughout the rest of the document:

- “This rulemaking is designed to provide limited refinements to the larger grazing reforms made in 1995. The BLM does not anticipate that the proposed changes would have significant environmental effects. . . .” *Final EIS at ES-1.*

- “There are no irreversible or irretrievable commitments of resources directly resulting from the proposed regulation changes nor are there any projected discernible effects from short-term uses on long-term productivity of resources arising from this rulemaking. Most of the proposed regulatory changes have little or no adverse impacts on the human environment. . . . In the long-term, it is expected that the effects of these provisions would be beneficial to rangeland health.” *Final EIS at ES-5.*

- “A determination was made that the regulatory changes would have no adverse effects to proposed, candidate, threatened or endangered species, or designated or proposed critical habitat from the proposed regulation changes.” *Final EIS at ES-6.*

These assertions are false and misleading – there is no other way to describe them. In truth, BLM has determined to abolish or change key elements of the existing grazing regulations, which it adopted in 1995 as critical to improving its grazing management and avoiding ecological harms; and which were upheld by the courts. In so doing, BLM is ensuring that serious environmental harms will occur, which it has not disclosed, in violation of NEPA.

## **Effects Of The New Regulations.**

The First Amended Complaint and supporting declarations describe the effects of the new regulations in great detail. *See First Amended Complaint, ¶¶ 72-90, 102-119; Marvel Decl. (Docket No. 3); Campbell, House, Carter, and Fite Declarations (filed herewith).* Major changes that will immediately be made in BLM's grazing management regime under the new regulations, if they are not enjoined, include the following:

### **1. Gutting The Fundamentals of Rangeland Health.**

Although BLM denies it, the revised regulations will gut the Fundamentals of Rangeland Health as a meaningful grazing management tool, through three basic changes:

(1) Removing the requirement in 43 C.F.R. § 4180.1 to assess compliance with the Fundamentals themselves, if state-specific Standards and Guidelines are in place, despite BLM's prior insistence that both are necessary to improve the conditions of the public lands, *see First Amended Complaint, ¶ 80;*

(2) Forbidding BLM from relying on all available data about current ecological conditions in determining whether grazing is violating the Rangeland Health Standards and Guidelines, under 43 C.F.R. § 4180.2(c)(1), and instead requiring it to use only multi-year "monitoring" data. This reverses BLM's previous emphasis that it needs to consider all available information, and that relying only on new monitoring data is undesirable. *See 60 Fed. Reg. at 9931, 9956.* BLM also ignores the fact that it lacks the staff and funding to do such monitoring, and has rarely if ever done it in the past – even though the ARC-DEIS and many comments pointed this out. *See First Amended Complaint, ¶¶ 80-82, 96C; Carter Decl., Exhs. 1, 3, 5-7.*

(3) Prohibiting BLM from taking immediate action to correct grazing abuses, as currently required by 43 C.F.R. § 4180.1, *see IWP v. Hahn*, 187 F.3d 1035 (9th Cir. 1999) (holding that

BLM must revise grazing management by next year when Fundamentals of Rangeland Health ecological standards are not being met); and instead requiring BLM to take 24 months just to adopt a new grazing decision, and then an additional year to implement it. The new regulations also forbid BLM from immediately implementing reductions in livestock use greater than 10% in most instances; and instead require it to “phase-in” any such reduction over a 5-year timeframe. Again, this reverses BLM’s prior position that such a delay in making livestock reductions improperly limits its management authority, and would allow excessive degradation to continue. *See* 43 C.F.R. §§ 4110.3-3(a)(1) & 4180.2(c)(1); *First Amended Complaint*, ¶¶ 83-85.

The effect of these changes will be dramatic, if the regulations are not enjoined. *See Feller, supra*, 34 *Env. Law* at 1132-37; *Marvel, House, Campbell, Carter, and Fite Decls.*; *Carter Decl., Exhs. 1-7*. BLM will now be free to ignore the vast majority of its own ecological data, as well as data provided by other agencies, scientists, and Western Watersheds, **even if** that information shows that streams, uplands, and wildlife habitats are badly degraded by livestock – such as on many Idaho allotments that are scheduled for review in coming weeks and months. *See Fite Decl.*, ¶¶ 56-64; *Marvel Decl.*, ¶¶ 64-71. By limiting its consideration to multi-year “monitoring” data, BLM can thus put off making determinations of whether allotments are meeting basic ecological requirements for years, if not decades. *Id.*

Further, BLM already lacks the funding and staffing to do this kind of monitoring for the vast majority of allotments; and those limitations will only grow more intense over time. *Fite Decl.*, ¶¶ 50-53; *Carter Decl.*, ¶¶ 17E, 51-53. So it will be the rare instance, indeed, when BLM may find Fundamentals of Rangeland Health violations in the future, even when allotments are highly degraded – as many currently are in Idaho and other states – and violate the Fundamentals of Rangeland Health standards. *Id.*

Moreover, even if BLM eventually does find a problem, the regulation changes allow it to delay any meaningful livestock grazing reductions for **eight years** thereafter. As a result, many public land allotments in the Upper Salmon basin and elsewhere – particularly those with listed or sensitive species, such as salmon, bull trout, or sage grouse – will continue to suffer serious adverse harms from grazing, without any effort by BLM to improve them. *See Fite Decl.*, ¶¶ 59-68; *House Decl.*, ¶¶ 41, 43; *Marvel Decl.*, ¶¶ 38-42, 62-63, 69, 74-76.

Again, BLM’s own scientists, U.S. Fish and Wildlife Service, NDOW, independent scientists, and Western Watersheds all advised BLM in their comments that these adverse impacts will occur, *see Carter Decl., Exhs. 1-7*; yet BLM has rejected these views, falsely insisting that the changes to the Fundamentals of Rangeland Health are “minor” and will have no long-term adverse impacts.

## **2. Excluding Public Involvement In Grazing Management.**

A second major change in the grazing regulations, also long sought by the livestock industry, is to exclude Western Watersheds and other members of the public from having any meaningful role in grazing management decisions. *See First Amended Complaint*, ¶¶ 73-76; *Feller, supra*, at 1130-32. Again, BLM accomplishes this result through numerous revisions of the 1995 regulations, which it again falsely claims are intended just to improve its “efficiency” and supposedly will not have any real world impacts.

Most notably, BLM now is eliminating the requirement that it must “consult, cooperate, and coordinate” (CCC) with interested publics before undertaking many grazing management decisions. Grazing decisions which previously required BLM to engage in CCC with the public, but which now will exclude it, include: (a) issuing or renewing grazing permits under 43 C.F.R. § 4130.2(b); (b) modifying terms in grazing permits, under 43 C.F.R. § 4130.3-3(a); (c) changing

grazing use within terms and conditions of permits, under 43 C.F.R. § 4130.4(b)(3); and (d) issuing “temporary non-renewable” (TNR) grazing authorizations, under 43 C.F.R. § 4130.6-2(a). *See First Amended Complaint*, ¶ 73; *Fite Decl.*, ¶¶ 69-93. The revisions also would allow BLM and permittees to reach private, closed-door “agreements” over grazing decisions without any public involvement under 43 C.F.R. § 4110.3-3(a)(1). *Id.*

Moreover, by revising 43 C.F.R. §§ 4130.6-2 & 4160.1(c), BLM will be able to issue TNR authorizations that have immediate effect, with no ability by Western Watersheds or other interested publics to be advised, protest, or appeal. *First Amended Complaint*, ¶ 74. As this Court is aware, BLM has unlawfully issued massive amounts of TNR authorizations on the Jarbidge Resource Area alone in recent years. *See Western Watersheds Project v. Bennett*, No. CV-04-181-S-BLW (D. Idaho 2004) (entering injunction and summary judgment over 2004 TNR authorizations); *Stipulated Settlement Agreement, Committee for the High Desert and Western Watersheds Project v. Guerrero*, Civ. No. 02-0521-S-MHW (D. Idaho, 8/19/03) (BLM admitting it did not comply with NEPA and FLPMA in issuing TNR). The new regulations would thus allow BLM to avoid even having to advise Western Watersheds of similar TNR authorizations in the future, and insulate BLM from being held accountable for the adverse environmental impacts that such actions will have on native habitats, streams, fish and wildlife values. *Fite Decl.*, ¶¶ 90-93.

Further, in revising 43 C.F.R. § 4100.0-5, BLM is making it more burdensome to remain an “interested public” to receive information about specific allotments. *See First Amended Complaint*, ¶ 75. Under the current regulations, Western Watersheds has interested public status on hundreds of BLM allotments encompassing at least 50 million acres of public lands in Idaho, Nevada, Utah and other states. *Marvel Decl.*, ¶¶ 6-7; *Fite Decl.*, ¶¶ 15-19, 95; *Carter Decl.*, ¶

10. As an interested public, Western Watersheds is entitled to receive notices and information about BLM's monitoring and decisions for these allotments, and to participate in all grazing management processes, as it does regularly – but it cannot always respond whenever BLM seeks input or comment on each allotment. *Marvel Decl.*, ¶¶ 27-31; *Fite Decl.*, ¶¶ 95-96. Under the revised regulations, BLM will simply eliminate Western Watersheds as an interested public on an allotment, if Plaintiff fails to respond to each and every BLM request for comments, and will stop providing even final grazing decisions thereafter. This will harm Western Watersheds' ability to continue monitoring that allotments, to inform its members and the public, and undertake other aspects of its mission; and result in BLM issuing many rancher-driven grazing decisions that will cause irreparable environmental harms. *First Amended Complaint*, ¶ 116; *Marvel Decl.*, ¶¶ 16, 25-71, 74D, 76B-C; *Fite Decl.*, ¶¶ 97-100; *Carter Decl.*, ¶¶ 17C, 52, 63-74. Again, however, BLM has simply ignored these impacts of the new regulations, both on the interested public and on the quality of its grazing management decisions.

### **3. Giving Ownership And Control To The Livestock Industry.**

Third, the new grazing regulations surrender to the livestock industry far more control and ownership of public land resources, even while BLM again contends falsely that these are insignificant revisions. *See First Amended Complaint*, ¶¶ 76, 86-90; *Feller, supra*, at 1137-40.

Among other changes, the new regulations: (a) require BLM to consult with local grazing boards on certain grazing decisions, a step that BLM rejected in 1995; (b) reinstate “grazing preferences” previously eliminated in the 1995 regulations, which may result in large increases in actual grazing use (since many past “preferences” were grossly overstated, and have not been utilized for years); (c) reverse the 1995 regulations by allowing permittees to own partial title to permanent range improvements on the public lands; (d) eliminate the existing requirement that

BLM must hold ownership of water rights (where allowed by state law); and (e) allow permittees to change “terms and conditions” of grazing with no public notice or oversight. *Id.*

Again, these changes will have significant, adverse effects on BLM’s grazing management and ecological conditions of the public lands. As explained in the accompanying declarations of expert scientists Robert House (former BLM fisheries biologist), Dr. John Carter (Ph.D ecologist), and Kathleen Fite (former IDFG biologist with extensive experience in sage-steppe ecosystems), among other impacts these new regulations will promote further development of springs, construction of pipelines and fences, and other infrastructure developments that fragment and degrade wildlife and fisheries habitats, and facilitate the invasion of weeds. *House Decl.*, ¶¶ 42,45; *Fite Decl.*, ¶¶ 25, 33-34, 101-111; *Carter Decl.*, ¶¶ 17B, 57-62. Further, BLM’s ability to change grazing management to protect fish, wildlife or other ecological values will be impaired even more than it already is, through giving permittees “preference” rights and ownership and control over the infrastructure facilities, water rights, and expenditure of funds. *Id.* Yet again, BLM has totally avoided acknowledging these impacts, saying only that they will be “beneficial” to wildlife.

As explained below, because BLM has falsely represented the adverse environmental impacts of the new grazing regulations, suppressed and avoided the criticisms of knowledgeable scientists and other agencies, and otherwise violated NEPA in multiple respects, the Court should thus enjoin the regulations from taking effect.

## **ARGUMENT**

### **I. TRADITIONAL STANDARD FOR INJUNCTIVE RELIEF.**

Under the traditional standard for injunctive relief, applicable to this motion addressing BLM’s NEPA violations, Western Watersheds is entitled to a preliminary injunction if it

“demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor.” *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1298 (9<sup>th</sup> Cir. 2003). Both ends of this “sliding scale” test are easily met here, thus warranting the requested injunction.<sup>4</sup>

## **II. BLM VIOLATED NEPA.**

NEPA requires that BLM take a “hard look” at the direct, indirect, and cumulative environmental impacts of its regulation changes. 42 U.S.C. § 4332(2)(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). This “hard look” must be “taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1166 (9<sup>th</sup> Cir. 2003); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9<sup>th</sup> Cir. 2000). To do so, the EIS must rely on complete and accurate information. *See* 40 C.F.R. §§ 1500.1(b) & 1502.24 (EIS requires high quality information, accurate scientific analysis, and professional and scientific integrity).

As discussed in detail below, BLM met none of these NEPA obligations. To the contrary, BLM presented incomplete and misleading information in its NEPA documents, hiding the adverse impacts of the proposed changes to the regulations, and ignoring well-established science. Although these are not the only NEPA violations raised in Plaintiff’s First Amended Complaint – which will be briefed in further detail on the merits – they are more than enough to warrant the requested injunction.

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<sup>4</sup> Again, Western Watersheds is separately moving for an injunction under the ESA, which modified the traditional injunction test to mandate protection of endangered and threatened species. *See Opening Brief In Support Of Motion For Immediate Injunction Re: ESA Violations*, pp. 17-19.

**A. The EIS Is Misleading And Inaccurate.**

As the Ninth Circuit has repeatedly held, an EIS that relies on incorrect assumptions or data, or that is so incomplete or misleading that the decision-maker and the public cannot make an informed decision, violates NEPA. *See Earth Island*, 442 F.3d 1147 (holding unlawful EIS that presented misleading information and did not explain its conclusions); *NRDC v. U.S. Forest Service*, 421 F.3d 797, 813 (9<sup>th</sup> Cir. 2005) (holding EIS unlawful where it contained misleading information, violating NEPA's requirement to “present complete and accurate information to decision makers and to the public”); *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 964-66 (9<sup>th</sup> Cir. 2005) (holding EIS unlawful when it relied on inaccurate and misleading information that did not allow for a “full and fair discussion of the potential effects of the project”); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9<sup>th</sup> Cir. 1998) (holding that NEPA requires that the public receive the underlying data from which an agency expert derived her opinion); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704-05 (9<sup>th</sup> Cir. 1993) (reversing EIS that rested on “stale scientific evidence, incomplete discussion of environmental impacts, and false assumptions”).

BLM has violated NEPA’s requirements here even more egregiously than in these cited cases. Indeed, the very process that BLM followed in preparing its EIS thwarted full disclosure and objective analysis, in violation of NEPA, by actively suppressing and changing the views of its own experts that the regulations would have long-term adverse impacts; and by simply rejecting the similar views of other scientists and agencies, even though they were solidly grounded in science and real-world knowledge of BLM grazing management.

Again, as the record before the Court confirms, a team of BLM scientists first wrote the ARC-DEIS analyzing existing conditions and effects of livestock grazing on various resources

(the “Affected Environment”), as well as the environmental consequences of the proposed regulation changes. *See Campbell Decl.*, ¶¶ 8-10. This analysis cited extensive scientific literature to describe the many harmful impacts to resources from livestock grazing; and concluded that the proposed regulations would cause substantial long-term adverse effects. *Id.*, ¶¶ 11-19 (discussing and quoting analysis); *Carter Decl., Exh. 7* (ARC-DEIS excerpts). But then BLM managers in Washington, D.C. prevented the ARC-DEIS from being released for public review and comment; and “sanitized” it to eliminate reference to any literature and scientific conclusions that portrayed the new regulations in a negative or harmful light. *Campbell Decl.* ¶¶ 21-23; *Marvel Decl., Exhs. 1-2*.

The specific passages eliminated from the ARC-DEIS underscore how BLM has presented misleading information to the public about the regulations’ impacts. The sanitized Draft EIS, as well as the Final EIS which is identical to the draft in all material respects, eliminated numerous discussions and statements from the ARC-DEIS “Affected Environment” section about adverse effects from livestock grazing to riparian and upland communities, fish and wildlife, and special status species, as well as citations and references to numerous studies describing these harmful effects – often completely reversing the analysis by replacing passages describing harmful impacts with those discussing compatibility of livestock grazing with wildlife and riparian vegetation. *Compare Carter Decl. Exh. 7* (ARC-DEIS) *at 1* (Terrestrial Wildlife), *10-11* (Special Status Species), *18-19* (Riparian, Wetland, and Aquatic Communities), *21-23* (same plus Fisheries) *with Draft EIS at 3-29, 3-33 to 3-34, 3-18 to 3-20, 3-32 to 3-33; see also First Amended Complaint ¶ 95*.

Likewise, the conclusions reached by BLM scientists in the “Environmental Consequences” section of the ARC-DEIS concerning effects of the proposed regulations to fish,

wildlife, and riparian communities were removed or altered prior to issuing the Draft EIS, which the Final EIS perpetuated. For instance, when discussing the No Action alternative, the ARC-DEIS noted that: (1) “[i]mpacts on wildlife resources are most beneficial under the No Action alternative;” (2) broad public participation in grazing decisions has resulted in decisions benefiting multiple uses and more diverse ecosystems; (3) BLM ownership of range improvements has allowed projects to be more easily modified for safe wildlife use; and (4) timely implementation of grazing decisions to correct environmental damage has benefited ecosystems and species. *Carter Decl., Ex. 7, at 24-26*. Yet all of these statements were removed from the Draft and Final EISs. *See Draft and Final EISs at 4-10, 4-13*.

Further, BLM altered or eliminated many of the scientists' conclusions in the ARC-DEIS about the effects of the Proposed Action, including that: (1) it “will have slow, long-term adverse impact on wildlife and biological diversity in general;” (2) joint ownership of range improvements and water rights could lead to takings challenges similar to the *Hage v. United States* cases, and reduce the ability of BLM to regulate grazing for wildlife or water resource purposes; (3) extending time frames for implementing changes to protect rangeland health “would result in a long-term, adverse impact upon wildlife resources and biological diversity, including threatened and endangered and special status species;” (4) the new monitoring requirements will cause further delays, and adversely impact wildlife as BLM “funding and staffing levels do not provide adequate resources for even minimal monitoring;” and (5) the change in the definition of “interested public” and the deletion of requirements to consult with the public will limit the ability of environmental groups to participate in grazing decisions, resulting in adverse impacts to wildlife, special status species, and riparian communities. *Carter*

*Decl., Ex. 7 at 27, 28, 29, 30, 33, 35, 37; compare to Draft and Final EISs at 4-28 to 4-29, 4-24, 4-27; see also First Amended Complaint ¶ 96.*

Despite removing this material from the ARC-DEIS, BLM still received thousands of comments, many from other state and federal agencies as well as independent scientists, opposing the regulation changes and noting their negative impacts, very similar to the analysis of BLM's own experts. *See Carter Decl. Exhs. 1-6.* Yet BLM ignored these voluminous comments and scientific citations in the Final EIS, still insisting that no negative impacts will occur. *Final EIS, pp. 4-30 to 4-40.*

In short, by suppressing and altering the analysis of its own ARC-DEIS team, by rejecting or ignoring the science-based comments of other agencies and experts, and by falsely insisting that the new regulations will not have any significant environmental affects, BLM has abrogated its duty to use scientific integrity and accurate analysis; and hence violated NEPA under the cases cited above.

**B. BLM Failed To Consider Direct, Indirect, And Cumulative Impacts.**

Similarly, the Final EIS also violates NEPA's requirement to study the environmental consequences of a proposed action, including all foreseeable direct, indirect, and cumulative impacts. 40 C.F.R. §§ 1502.16,1508.7; *Earth Island Institute, supra*, 442 F.3d at 1159-60. This "hard look" at the effects of an action "should involve a discussion of adverse impacts that does not improperly minimize negative side effects." *Id.*

The Final EIS (including the Addendum) fails to fulfill these requirements in multiple respects. Not only did BLM ignore direct and indirect adverse impacts that were highlighted by its own as well as other agency and independent scientists, but it failed to adequately discuss, or in some cases even acknowledge, cumulative impacts from other BLM actions underway.

1. Reducing Public Participation.

First, BLM failed to discuss any adverse impacts from the regulation changes that reduce public participation in grazing management decisions. Again, the new regulations both change the definition of “interested public” to make it harder for the public to be informed of allotment actions; and remove the requirement for consultation with the interested public on numerous grazing decisions.

BLM admits that the definition change would result in individuals and organizations being dropped from the “interested publics” list if they do not respond to each opportunity for comment or other “consultation, cooperation and coordination.” *Final EIS at 4-27*. Thus, if an organization or individual fails to respond even once, they will be excluded from any further notification of grazing-related activities, projects, or decisions. This will have significant impacts to groups such as Western Watersheds, by preventing them from obtaining necessary information and having meaningful involvement in future grazing decisions. *See Fite Decl.*, ¶ 97-100; *Marvel Decl.*, ¶ 16, 25-71, 74D, 76 B, C; *Carter Decl.*, ¶ 17B, 52, 63-74.

For groups that monitor BLM grazing activities on hundreds of allotments, such as Western Watersheds, this requirement will also add a substantial burden just to remain on the interested public list for each allotment and receive notification of all grazing decisions. *See Marvel Decl.* ¶¶ 30-31; *Fite Decl.* ¶¶ 94-96. This increased burden will force Western Watersheds and other groups either to reduce the number of allotments they monitor, or the amount of time spent on other projects. And it will require interested publics to comment even on projects about which they might not be concerned, increasing BLM's administrative burden to process these extra comments. *Id.* None of these impacts were discussed or even acknowledged

by BLM. *Final EIS*, pp. 4-5 to 4-62. Instead, BLM mentioned only its own “minor administrative costs savings.” *Id.*, p. 4-27.

In addition to making it more difficult to remain an interested public, the new regulations also eliminate the requirement of “consultation, cooperation, and coordination” (CCC) with interested publics – while retaining the requirement that BLM must CCC with permittees and States – on important grazing decisions, including modifying, renewing, and issuing permits; issuing emergency closures; and issuing TNR. *See* 43 C.F.R. §§ 4130.3-3(a), 4130.2(b), 4110.3-3(b)(1), 4130.6-2(a). Again BLM failed to discuss the adverse impacts of this change from the 1995 Rangeland Reform regulations, which implemented the CCC requirement because BLM recognized that allowing public input early in the process improves the quality of its grazing decisions, and lowers the chance of later appeals and litigation. *See* 60 Fed. Reg. 9893, 9924 (Feb. 22, 1995). BLM admitted elsewhere in the EIS that appeals and litigation result in labor and dollars being diverted from the grazing program, *Final EIS at 4-12*, but never mentioned litigation is now likely to increase due to this change, when considering the elimination of public consultation requirements. *Id.*, at 4-27 to 4-28.

Neither did the EIS acknowledge any adverse impacts to fish and wildlife, vegetation, soils, water resources, or special status species from the elimination of public participation in these grazing management decisions. *Final EIS at 4-32 to 4-39*. But as BLM’s staff and other commenters noted, reducing the public’s opportunities to present information to BLM, or providing localized knowledge about resources on the allotment, helps increase the effectiveness of BLM’s grazing decisions and protect natural resources from unnecessary grazing degradation. *See House Decl.*, ¶ 48; *Carter Decl. Exh. 7 at 30, 35* (ARC DEIS), *Exh. 2 at 5* (FWS comments) & *Exh. 5 at 3* (NDOW comments). For example, Western Watersheds staff has spent countless

hours gathering information and communicating concerns to BLM, which has resulted in improvements to riparian areas, upland vegetation, wildlife habitat, and other resources. *Marvel Decl.* ¶¶ 25, 28-29, 33-63; *Carter Decl.* ¶¶ 61-72; *Fite Decl.* ¶¶ 71-78.<sup>5</sup>

In the 1994 Rangeland Reform EIS, BLM explained that expanded opportunities for public involvement would increase the diversity of viewpoints about how to achieve ecologically sound resource objectives, which benefits BLM’s management of the public lands for multiple uses. *See 94 Rangeland Reform EIS at 4-42, 4-49 to 4-50; Carter Decl., Exh. 7 at 24* (ARC DEIS, addressing this). BLM also noted in the Final EIS here that cooperation with local grazing boards “would be a valuable tool for gathering additional local input for BLM’s decision-making processes,” and may benefit vegetation resources due to “the inclusion of local expert knowledge.” *Final EIS at 2-20, 4-31, 4-32*. But BLM did not follow that same reasoning to admit there will be adverse impacts from **excluding** the local expert knowledge and input of the interested public; and omitted any mention of the public participation regulation changes in discussions about consequences of the proposed action to soils, water resources, wildlife, or special status species. *Final EIS, at 4-34 to 4-39*.

## 2.   Gutting The Fundamentals of Rangeland Health.

Second, BLM is also revising the regulations relating to the Fundamentals of Rangeland Health in ways which will gut their effectiveness in limiting grazing’s ecological harms, while again failing to discuss the adverse impacts from these changes.

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<sup>5</sup> As one of many examples, WWP Biodiversity Director Kathleen Fite recently discovered that BLM was proposing to build 18.5 miles of pipeline and up to 11 water troughs **inside** the Craters of the Moon National Monument, when it erroneously thought – based on poor information from permittees – they would be outside the Monument. *Fite Decl.*, ¶ 73-75.

Again, the new regulations now provide that, when assessing whether livestock grazing is causing violations of the Standards and Guidelines for Rangeland Health, BLM **must** rely only on multi-year monitoring data to make that determination; whereas before BLM was directed to use **all** available information. *43 C.F.R. § 4180.2(c)(1)*. In many instances, BLM does not have such monitoring data and would need to collect this data over several years before it could make a determination, thus increasing the “data collection workload within the grazing program.”

*Final EIS at 4-26.*

Yet, BLM did not discuss in the EIS the number or percentage of allotments that lack such data, the length of time required to collect the necessary data, or how it will fund and staff the increased data collection burden. Numerous scientists, including BLM's own scientists, stated that the agency currently has a lack of monitoring data; and does not have funding or staff available to do increased monitoring. *See Carter Decl., Exh. 2 at 14* (FWS comments), *Exh. 3 at 5* (NDOW comments), *Exh. 3 at 5* (comments of leading scientists), & *Exh. 7 at 29* (ARC DEIS). The Fish and Wildlife Service noted that “[t]he Service is consistently told by the BLM that they lack time, sufficient personnel, and adequate funding to implement even the most basic monitoring,” and that the Service's experience “shows that monitoring of rangeland standards is not being completed in a timely, effective manner under current requirements due to funding and staffing limitations.” *Carter Decl., Exh. 2 at 14*. Western Watersheds has been told the same thing time and again. *Fite Decl., ¶ 50*.

BLM acknowledged that its budget will likely not increase over time, and stated in the EIS that it will address this workload increase by “reprioritizing work” or “finding alternative means to collect monitoring data.” *Final EIS at 4-9, 4-26*. But it does not explain what these “alternative means” might be, what other work it will reprioritize, or the environmental impacts

of such reprioritization. Further, BLM recognized that the additional time needed to collect monitoring information could delay implementation of management changes necessary to protect rangeland health, *see Final EIS at 4-24, 4-36, 4-37*, but did not assess the impacts of those delays to vegetation, wildlife, or special status species. *Id.*, *at 4-31 to 4-32, 4-33 to 4-34, 4-37 to 4-39*.

A second change to the Fundamentals of Rangeland Health allows BLM to extend the timeframe by years – if not indefinitely – for taking action to revise grazing when it is violating rangeland health standards. Rather than requiring BLM to implement grazing reductions or other changes before the next grazing season if standards are being violated, as under the 1995 Fundamentals of Rangeland Health regulations, the new regulations give BLM two years to issue a decision and another year to implement it – unless another agency's legally required processes prevent completion within this timeframe, in which case there is no deadline for implementation of appropriate action. 43 C.F.R. § 4180.2(c). Further, if the appropriate action calls for reducing grazing by more than 10%, the decrease must be phased-in over five years, 43 C.F.R. § 4110.3-3, resulting in a possible seven year timeframe to fully implement the necessary changes in grazing use, on top of the initial delay required to gather monitoring information.

The adverse effects of these changes are readily understood by reference to the prior Owyhee Resource Area litigation before this Court. There, in response to the Court's injunction in *IWP v. Hahn* – upheld by the Ninth Circuit – BLM undertook assessments on many large allotments, and found widespread violations of rangeland health standards and guidelines. *See Fite Decl.*, ¶¶ 44-46. Under the new regulations, BLM would not have been allowed even to find these grazing problems; and even if did, neither would it implement livestock reductions needed to prevent future overgrazing. *Id.* Thus, for example, instead of the 50% grazing reductions that BLM implemented for the Cliffs Allotment to prevent “hot season” grazing from

harming streams and water quality there – and which this Court upheld over rancher challenges, see *Memorandum Opinion and Order, LU Ranching v. Babbitt, CV-00-285-BLW (D. Idaho, 4/12/2001)* – the new regulations would perpetuate over-grazing for several years, at least.

Again, BLM failed to take a hard look at the impacts from these new provisions, mentioning only the extended time to implement new grazing decision may cause short-term adverse impacts to some resources like vegetation and wildlife, and ignoring the possibility of any long-term adverse impacts to any resources. *Final EIS at 4-32 to 4-39; Addendum at 8-10.* BLM also failed to tie these provisions together and assess their individual and combined direct and indirect adverse effects on multiple resources.

By contrast, BLM's scientists stated that these provisions “would result in a long-term, adverse impact upon wildlife resources and biological diversity, including threatened and endangered and special status species.” *Carter Decl. Exh. 7 at 29, 33* (ARC DEIS). Likewise, Fish and Wildlife Service noted that these extended timelines may result in irreversible long-term impacts to vegetation communities and fish and wildlife species. *Carter Decl. Exh. 2, at 6, 13.* And as quoted above, NDOW commented that delaying adjustments to grazing is particularly troubling in imperiled ecosystems of the Great Basin and the fragile Southwest deserts, which cannot tolerate such delays when changes are needed. *Carter Decl., Exh. 5 at 3.* The extensive scientific comments submitted by Western Watersheds and other scientists and conservation groups reiterated these points. See *Carter Decl., Exhs. 1, 3, 4 & 6.* Yet once again, BLM essentially ignored these scientific comments; and did not thoroughly assess the adverse impacts of these rule changes.

These serious omissions again demonstrate that BLM is rolling back the Fundamentals of Rangeland Health protections without fully disclosing and taking a hard look at the impacts of those changes, in violation of NEPA.

3. Ownership Rights.

A third set of regulation changes that BLM did not properly analyze deal with privatization of range improvements and water rights. Again reversing course from 1995, BLM will now give ranchers partial title to new range improvements, such as fences, pipelines, and water developments. 43 C.F.R. § 4120.3-2(b). BLM is also allowing permittees to hold title to water rights on the public lands they graze. *Id.*, § 4120.3-9.

Many of the comments submitted to BLM opposed these changes because they reduce BLM's flexibility to remove or modify range improvements and water developments, as well as its ability to manage the water itself, to benefit wildlife or other resources. *See Carter Decl. Exh. 5 at 4* (NDOW comments), *Exh. 2 at 7-8* (FWS comments), *Exh. 6 at 47-50* (NWF comments). For example, as its ARC-DEIS noted, BLM might be more reluctant to require removal of or changes to structures or water use if a potential "takings" claim would be available to ranchers who owned part of the structure or water right, similar to the claims raised by Wayne Hage in the well-publicized *Hage v. United States* litigation. *See Carter Decl., Exh. 7 at 28* (ARC DEIS), *Exh. 6 at 46-50* (NWF comments).

BLM never considered this adverse impact in the Final EIS. In fact, BLM never discussed any impacts from these two regulation changes to vegetation, soils, water resources, wildlife, or special status species, other than to assert briefly – and without supporting data –

that the range improvement provision would benefit vegetation by improving livestock grazing management, and the water rights provision would have no effect on water resources. *Final EIS 4-30 to 4-39.*

In addition, BLM asserts that these changes in the regulations will provide incentive for ranchers to construct **more** range improvements and water developments. *Final EIS at 2-19, 4-25, 4-28, 4-31, 4-32, 5-63.* Yet again, the agency did not assess any impacts to resources from this predicted increase in permanent developments on the public lands, other than to assert summarily – and again without supporting data – that they would “benefit” wildlife. *Id., at 4-30 to 4-39.* BLM thus ignored extensive scientific data and literature, and its own experiences, showing that construction of fences, pipelines, spring developments, and other such structures pose significant adverse impacts to many resources, including vegetation, water resources, fish, and wildlife. *See Fite Decl. ¶¶ 25-26, 33-34, 101-111; Carter Decl. ¶¶ 17B, 57-60 & Exh. 2 at 7, 16 (FWS comments).*

For instance, fences reroute and channel livestock travel, which increases soil erosion and compaction, and promotes weed invasion on these heavily used routes. *Carter Decl., ¶ 57.* They also impair wildlife by fragmenting habitat, and providing roost sites for predatory birds or causing mortalities when birds such as sage-grouse fly into them. *Fite Decl. ¶¶ 102-106; Carter Decl., Exh. 2 at 16 (FWS comments).* Water developments also cause adverse impacts to soils and vegetation by attracting livestock, creating concentrated use areas, or “sacrifice areas,” that result in severe degradation with soil compaction, loss of ground cover, and weed infestations. *Fite Decl. ¶ 102-106; Carter Decl. ¶ 58 & Exh. 1 at 19 (WWP comments).* By simply ignoring all these adverse resource impacts from constructing more such these structures on public lands, BLM has failed to disclose foreseeable effects of its regulations, and therefore violated NEPA.

4. Additional Flexibility For Ranchers

Fourth, BLM failed to consider the consequences of regulations that provide additional flexibility to ranchers by extending grazing seasons for up to one month and allowing immediate implementation of TNR, all with no public or environmental review. 43 C.F.R. §§ 4130.4(b), 4130.6-2, 4160.1(c).

These new provisions will result in significant environmental harm. Under the new regulations, a rancher will be “within the terms and conditions of his permit” as long as he grazes within 14 days prior and 14 days later than his permitted season of use, and stays within his permitted amount of “active use.” 43 C.F.R. § 4130.4(b). A rancher must apply to use the additional 14-day periods, but BLM will approve this extended use without conducting any consultation with the public, without issuing a new decision that could be protested or appealed, and without conducting any NEPA analysis if BLM believes the temporary changes fall within the scope of an existing analysis. *Final EIS at 2-27.*

Establishing the season of use in a permit is often necessary to ensure grazing does not impair other resource values, such as to avoid: (1) hot season grazing of uplands and/or riparian areas, (2) the active growing period of native bunchgrasses, (3) big game critical winter periods, or (4) salmon, steelhead, and bull trout spawning periods; or to help make significant progress toward meeting rangeland health standards. *Fite Decl.* ¶ 87. Allowing BLM to approve grazing outside the permitted season of use without any further review or oversight by the public could harm such vegetation or wildlife resources. *Id.*, ¶¶ 88-89.

In the Final EIS, BLM stated that this change would allow ranchers additional flexibility to address seasonal or annual changes, and claims – again without supporting data – that it may benefit vegetation. *Final EIS at 4-28, 4-32.* BLM never acknowledged the likely adverse effects

to multiple resources from extending the season of use, or entirely cutting the public out of these decisions. *Id.*, at 4-23 to 4-49.

Similarly, BLM is removing all public participation opportunities from TNR decisions. Now BLM will be able to issue TNR effective immediately, without any consultation with the public, or the opportunity to protest a proposed decision. 43 C.F.R. § 4130.6-2, 4160.1(c). Significantly, BLM added the provision allowing it to issue TNR effective immediately upon issuance in the errata at the very end of the Final EIS. *FEIS Revisions and Errata at 4*. BLM never discussed this change in the body of the EIS, and stated in the Errata only that this change will be beneficial by improving administrative efficiency. *Id.* It thus ignored any adverse impacts from completely removing public oversight of TNR permits.

As this Court is aware, BLM has abused its TNR authority in the past at the expense of public resources. *See Committee for the High Desert v. Guerrero*, Civ. No. 02-0521-S-MHW (D. Idaho 2002); *Western Watersheds Project v. Bennett*, No. CV-04-181-S-BLW (D. Idaho 2004); *Fite Decl.* ¶¶ 91-93. Without any ability to participate in these decisions, the public will have no oversight over TNR authorizations, and BLM will be free to continue its abuse of this authority unchecked, causing overgrazing and damage to resources similar to that found in the Jarbidge Resource Area. Nowhere does the Final EIS consider the adverse effects from this regulation change, especially in light of the fact that part of the change is discussed only in one paragraph in the Errata. *FEIS Errata at 4*. By looking only at the benefit to ranchers, and ignoring all negative effects from these regulation changes, BLM has thus again violated NEPA.

##### 5. Cumulative Impacts

Finally, in addition to minimizing or ignoring multiple adverse direct and indirect effects from these regulation changes, BLM also violated NEPA because it failed to assess in any

meaningful way the **cumulative** impacts of its grazing regulation changes; and in fact has studiously avoided acknowledging that there will be cumulative effects from its new grazing regulations along with other policy initiatives currently underway, which will further exclude grazing management from NEPA review and public involvement.

Under NEPA, the agency is required to consider cumulative impacts, which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions. *40 C.F.R. § 1508.7; Lands Council v. Powell*, 395 F.3d 1019 (9<sup>th</sup> Cir. 2005); *Klamath Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993 (9<sup>th</sup> Cir. 2004).

BLM initially included only two pages within the Final EIS discussing cumulative impacts, *see Final EIS at 4-60 to 4-62*, which is patently inadequate under the *Lands Council* and *Klamath* decisions. After Western Watersheds raised this defect in its initial injunction motion filed last summer (withdrawn when the agency promised to do supplemental NEPA analysis), BLM replaced that discussion with a new section on cumulative impacts in the March 2006 Addendum. *Addendum at 10-18*. This new discussion remains inadequate, however, because it fails to provide detailed information about BLM activities and their effects, and does not consider at all other proposed policy changes along with the new grazing regulations.

A cumulative effects analysis must contain “some quantified or detailed information . . . [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.” *Klamath Siskiyou*, 387 F.3d at 994 (internal quotations omitted). When discussing present and future activities, the Addendum identifies a number of BLM initiatives and programs, but has little detail about those programs and virtually no information about their likely effects. *Addendum at 13-17*. It simply includes one paragraph generally describing for each initiative and its status.

Without discussing in some detail the effects of these projects on the environment individually, as well as in conjunction with the new regulation changes, the Final EIS does not contain an adequate cumulative effects analysis. *Klamath Siskiyou*, 387 F.3d at 997.

For example, BLM's cumulative effects analysis fails to address proposed revisions to BLM's NEPA Manual, which will interact with the new grazing regulations to further eliminate public involvement in grazing decisions. According to a notice dated January 25, 2006, BLM proposes to establish new categories of agency decisions that would be excluded from detailed NEPA analysis, as "categorical exclusions," including both grazing permit renewals and TNR authorizations for allotments that are either meeting rangeland health standards, or not meeting standards due to factors other than livestock grazing. *See* 71 Fed. Reg. 4159, 4165-66 (Jan. 25, 2006). This new policy would thus apparently allow BLM to avoid preparing an EA or EIS for a large majority of grazing permits and TNR authorizations. *Id.*,

Yet BLM did not include this proposed NEPA policy change in its cumulative effects analysis of the March 2006 Addendum, even though the new policy proposal was published in the Federal Register two months prior and is relevant to consideration of the effects of the new grazing regulations. Indeed, BLM previously justified its reduction of public involvement in grazing decisions under the new regulations by asserting in the Final EIS that the public would still receive proposed and final grazing decisions **and NEPA documents**. *Final EIS at 2-25, 4-27 to 4-28*. But, according to BLM's own estimates, its new NEPA policy would excuse from all NEPA analysis the majority of grazing permits and TNR authorizations. This means that the new grazing regulations plus the new changes in BLM's NEPA policies for grazing will, taken together, deprive the public of any meaningful notice or involvement in virtually all BLM grazing decisions. Yet BLM never discussed this cumulative impact of its proposed NEPA

policy changes combined with the new grazing regulations, and therefore did not assess all foreseeable future actions, in violation of NEPA.

In sum, BLM did not address in any meaningful way the direct, indirect, and cumulative impacts of the new grazing regulations. The Ninth Circuit recently reversed several EISs that failed to provide a complete discussion of relevant issues and explain the basis for the agency's conclusion that the action would not adversely affect various resources. *See Earth Island*, 442 F.3d 1147 (reversing EIS that failed to adequately analyze adverse effects to species or explain its conclusions); *Ecology Center v. Austin*, 430 F.3d 1057, 1065-67 (9<sup>th</sup> Cir. 2005) (holding unlawful EIS that did not address scientific uncertainties about impacts of logging old growth or explain the basis for its conclusion that such treatment would not adversely effect woodpeckers); *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 965 (9<sup>th</sup> Cir. 2005) (holding EIS inadequate where agency did not take a hard look at project's true effect and failed to inform public of project's environmental impact). Again, BLM's violations of NEPA are even more severe than those seen in these cases.

Perhaps most apposite here is *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9<sup>th</sup> Cir. 1993), where the Ninth Circuit reversed an EIS because it "did not address in any meaningful way the various uncertainties surrounding the scientific evidence" on which the proposed action rested. "It would not further NEPA's aims for environmental protection to allow the Forest Service to ignore reputable scientific criticisms that have surfaced" over its management strategy. *Id.* The court also held that the "EIS rests on stale scientific evidence, incomplete discussion of environmental impacts . . . and false assumptions regarding the cooperation of other agencies and application of relevant law." *Id.*, at 704-05. Those criticisms are directly applicable to BLM's NEPA documents here, as explained above.

In short, Plaintiff has demonstrated a likelihood of prevailing on its NEPA claims, thus warranting injunctive relief.

### **III. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM.**

Having shown that it is likely to prevail on its NEPA challenges, Western Watersheds is entitled to an injunction here, because many forms of irreparable harm will occur if the revised regulations are allowed to go into effect. *See Earth Island*, 351 F.3d at 1298; *High Sierra Hikers v. Blackwell*, 390 F.3d 630 (9<sup>th</sup> Cir. 2004) (injunction proper to prevent “possible” or “likely” irreparable harm when an agency has violated NEPA).

As discussed in detail in the First Amended Complaint and the supporting declarations, these irreparable harms include direct injuries to Western Watersheds’ organizational, procedural, and informational interests, and to the public interest; as well as irreparable environmental harms. *See First Amended Complaint*, ¶¶ 114-19; *Marvel Decl.*, ¶¶ 9-78; *Carter Decl.*, ¶¶ 16-74; *House Decl.*, ¶¶ 41-60; *Fite Decl.*, ¶¶ 3-4, 40-118.

First, the new regulations will authorize BLM to cease providing information as of right to Western Watersheds on dozens of allotments in the Idaho Falls District of eastern Idaho, plus hundreds of other allotments elsewhere in Idaho and the West. *See Marvel Decl.*, ¶ 5-8, 27-31; *Fite Decl.*, 69-84, 93. The changes in the role of “interested publics” under the revised regulations will allow BLM to exclude Western Watersheds from information gathering, communications and other processes relating to a host of grazing management decisions, including the issuance and renewal of grazing permits as well as TNR authorizations. This will prevent or impair Western Watersheds from gathering site-specific allotment information, communicating it to BLM in a timely fashion, and participating in all decision-making stages for grazing management on these allotments; while ranchers will have full and unfettered access to

BLM to promote their interests. *Id.* Depriving Western Watersheds of information and procedures that are central to its mission, and of vital importance to its members, alone constitutes irreparable harm that warrants an injunction here.

Second, this exclusion of Western Watersheds and other members of the public will also result in adverse impacts to the environment in many ways, as discussed in the ARC-DEIS and the comments of U.S. Fish and Wildlife Service, and many others. *See Marvel Decl.*, ¶¶ 73-78; *Carter Decl.*, ¶¶ 63-74 & *Exhs. 1-7*; *Fite Decl.*, ¶¶ 56-64, 69-100. Further, gutting the Fundamentals of Rangeland Health will result in irreparable harms to the public lands, streams, and wildlife values that Western Watersheds seeks to defend and protect, in Idaho and many other places – including Upper Salmon basin allotments that have high biological importance for many imperiled fish and wildlife species. *Id.*

The Marvel and Fite Declarations illustrate these points by addressing several specific allotments where the regulation changes will lead to the exclusion of Western Watersheds from upcoming grazing decisions, and allow continued degradation of fisheries and uplands habitats vital to many wildlife species. *Fite Decl.*, ¶¶ 56-64; *Marvel Decl.*, ¶¶ 64-71.

Moreover, the “management flexibility” and turn-over of ownership to ranchers of range projects and water rights will further impair BLM’s ability to manage grazing on the public lands in a responsible manner and in compliance with FLPMA and other statutes; and lead to irreparable environmental harm. *See First Amended Complaint*, ¶¶ 118-19. By vesting ownership of water rights and range improvements in the names of permittees, the new regulations will create alleged “property rights” that will prove very difficult to unravel later, if the regulations are not enjoined; and will both limit BLM’s management flexibility while subjecting it to possible “taking” claims such as those raised in the *Hage v. United States*

litigation. Again, the comments submitted by Western Watersheds, the ARC-DEIS team, U.S. Fish and Wildlife Service, NWF, and others underscore this point. *Marvel Decl.*, ¶¶ 73-77; *Carter Decl., Exhs. 1-7*.

**Each** of these forms of irreparable harm warrants an injunction here. “In the NEPA context, irreparable injury flows from the failure to evaluate the impact of a major federal action.” *High Sierra Hikers*, 390 F.3d at 642-44, *citing Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). While “an injunction does not automatically issue” upon finding a NEPA violation, “the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction.” *Id.* (citations omitted). If “environmental injury is sufficiently likely, the balance of harms will usually favor an injunction.” *Id.*

Because Western Watersheds has abundantly shown that BLM violated NEPA, threatening irreparable harms of the kinds described above, an injunction should thus be issued to prevent the regulations from taking effect.

#### **IV. AN INJUNCTION WILL MAINTAIN THE STATUS QUO UNDER THE 1995 REGULATIONS.**

Finally, an injunction is also appropriate here to preserve the status quo, by leaving the existing 1995 regulations in effect while this case is adjudicated, and thereby avoid irreparable harm to Western Watersheds and the environment. *See Regents of the Univ. of Cal. v. American Broadcasting Co.*, 747 F.2d 511, 514 (9<sup>th</sup> Cir. 1984) (the “function of a preliminary injunction is to preserve the status quo *ante litem*,” which is defined as “the last, uncontested status which preceded the pending controversy”).

Many federal courts have likewise enjoined new regulations from taking effect, particularly where – as here – existing regulations are in place already. In *National Assoc. of Farmworkers v. Marshall*, 628 F.2d 604 (D.C. Cir. 1980), for instance, the D.C. Circuit enjoined

Department of Labor regulations approving the use of pesticides and chemicals on crops, without sufficient information on the health impacts of these chemicals. It found that the Department of Labor could not establish harm from enjoining the regulations, because an injunction would simply maintain the status quo in place before the new regulations. *See* 628 F.2d at 614-616.

Similarly, in *American Medical Assoc. v. Weinberger*, 522 F.2d 921 (7<sup>th</sup> Cir. 1975), the Seventh Circuit affirmed an injunction of new Medicare and Medicaid regulations sought by patients and physicians. In contrast to the substantial risk of irreparable injury to plaintiffs posed by the challenged regulations, the Court noted, “[i]t can hardly be said . . . that [the government] will suffer irreparable harm in the period that the preliminary injunction is in effect to preserve the status quo until the complex issues raised by this case can be disposed of in an orderly and judicious fashion . . . . it hardly behooves the Secretary to claim the preliminary injunction is causing him irreparable harm.” 522 F. 2d at 926.

Further, an agency’s own delay in adopting new regulations underscores the propriety of an injunction to preserve the status quo under existing regulations. In *Manufacturing Chemists Assoc. v. Costle*, 451 F. Supp. 902 (W.D. La. 1978), chemical manufacturers and others sued the EPA over new regulations identifying 271 chemicals as hazardous substances, which EPA had issued two years after it noticed the proposed regulations. The district court enjoined application of the new regulations until after it had ruled on the merits, emphasizing that the “languor that has characterized the entire process of developing the challenged regulations indicates that immediate implementation is by no means essential.” 451 F. Supp. at 906.

Here, BLM similarly followed a languid pace in adopting the grazing regulation revisions. As noted above, it first proposed the revisions in March 2003; and although it finalized the EIS in October 2004, BLM did not release it until June 2005. BLM then delayed

another year, while it prepared the March 2006 Addendum; and then finally published the regulations in July 2006 – over three years after it began the rulemaking process. And by BLM’s own characterization, the regulations are supposedly just “minor” rule changes for administrative convenience. Hence, where BLM itself sees no urgency in implementing the regulation changes and downplays their importance, an injunction to preserve the status quo under the existing regulations is appropriate.

### **CONCLUSION**

For the foregoing reasons, and also for the reasons set forth in the accompanying motion based on BLM’s ESA violations, the Court should issue an injunction prohibiting BLM from implementing its grazing regulation revisions pending adjudication of the merits of Western Watersheds’ challenges.

Dated: July 12, 2006

Respectfully submitted.

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