February 24, 2006

By Federal Express & Email

Content Analysis Team
BLM Categorical Exclusions
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Re: Notice of Proposed Revision to the Bureau of Land Management's (BLM) Procedures for Chapter 11 of the Department of the Interior's Manual 516 DM – Managing the NEPA Process.

To the Content Analysis Team:

Enclosed please find comments on the Proposed Revision to the Bureau of Land Management's (BLM) Procedures for Chapter 11 of the Department of the Interior's Manual 516 DM – Managing the NEPA Process. These comments are submitted by the following organizations:

Natural Resources Defense Council
National Wildlife Federation
Earthjustice
Western Watersheds Project

Also enclosed please find documents submitted by these organizations for inclusion in the administrative rulemaking record.

We appreciate your consideration of the enclosed comments and documents. If you have any questions, please contact me at the address, phone number, or e-mail address provided below.

Sincerely,

/s/ Bobby McEnaney

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Comments

on

Proposed Revision to the Bureau of Land Management's (BLM) Procedures for Chapter 11 of the Department of the Interior's Manual 516 DM – Managing the NEPA Process
(January 24, 2006)

Submitted by

Natural Resources Defense Council
National Wildlife Federation
Earthjustice
Western Watersheds Project

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I. The Proposed Categorical Exclusions of Grazing Permits from NEPA Analysis (516 DM 11.9(D)(11) - (12)) Are Unlawful, Unjustified, and Ill-Advised

The BLM has proposed to revise its NEPA manual to categorically exclude most term grazing permits (516 DM 11.9(D)(11)) and most temporary non-renewable grazing permits (516 DM 11.9(D)(12)) from analysis under NEPA. These proposed categorical exclusions are unlawful, unjustified, and ill-advised.

A. Incorporation by Reference

As explained below, the proposal to categorically exclude grazing permits from analysis under NEPA is intimately related to BLM's pending proposal (68 Fed. Reg. 68,452 (Dec. 8, 2003)) to amend its grazing regulations. For this reason, we request that, in evaluating this proposal, the BLM consider the comments submitted on the proposed regulatory amendments by Thomas Lustig, Johanna Wald, and Joseph Feller on behalf of a group of thirteen conservation and environmental organizations headed by the National Wildlife Federation and the Natural Resources Defense Council. **We hereby incorporate those comments by reference in these comments. We also incorporate by reference the 41 documents enclosed with those comments for inclusion in the administrative record, and we request that those same documents be included in the administrative record for this proposal to amend the BLM's NEPA Manual.**

B. The Proposed Categorical Exclusions of Grazing Permits Directly Contradict the BLM's Rationale for Pending Amendments to the Grazing Regulations

On December 8, 2003, the BLM issued proposed revisions to its public land grazing regulations. The final regulations have not yet been promulgated, but in June, 2005, the BLM released a final EIS with the text of the final regulations. Among the most controversial features of these pending new regulations is the deletion of provisions in the current regulations that require the BLM to consult with interested members of the public when it issues, renews, or modifies a grazing permit.

In justifying the proposed deletion of public input requirements from its regulations, the BLM repeatedly asserted that, the deletions notwithstanding, adequate opportunities for public input would be provided in the course of the environmental analyses required by the National Environmental Policy Act (NEPA). Specifically, the BLM stated:

> We also propose removing the requirement in paragraph (b) that BLM would consult, cooperate, and coordinate with the interested public prior to the issuance or renewal of grazing permits and leases because this consultation is redundant to consultation that already would have occurred as part of the process of completing NEPA analysis and other documentation that is pre-requisite to

permit or lease issuance or renewal.

Proposed Rule, 68 Fed. Reg. 68,452 (2003).

> Because BLM provides full opportunity for the interested public to comment during the NEPA and planning processes, and because consultation can be a time-consuming process, not generally conducive to the "rapid response" needed to take advantage of situations that would give rise to approval of an application for temporary and nonrenewable use, BLM is proposing to remove the additional public consultation requirement before issuing temporary and nonrenewable grazing permits or leases.

Id. at 68,463.

The proposed revisions to the BLM's NEPA Manual, however, would categorically *exclude* the issuance of most grazing permits, including temporary non-renewable permits, from analysis under NEPA. This proposed categorical exclusion directly contradicts the BLM's previous assertions that NEPA analyses will provide adequate opportunity for public input into the terms and conditions of grazing permits. The combined effect of the proposed categorical exclusion and the previously-proposed revisions to the grazing regulations will be to eliminate all opportunities for up-front public consultation regarding the terms and conditions of grazing permits. The only remaining opportunities for public involvement will be the provisions for after-the-fact protest and appeal under 43 C.F.R. Part 4160, and even those opportunities will be eliminated with respect to temporary, non-renewable grazing permits.

C. The Federal Courts Have Determined That Grazing Permits Significantly Affect the Human Environment

Under the applicable CEQ regulations, categorical exclusions may be applied only to "actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (definition of categorical exclusion). However, the federal courts have already determined that the BLM's issuance of grazing permits *does* significantly affect the human environment. *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 832 (D.D.C. 1974), *aff'd per curiam,* 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976). *See also Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002) (affirming district court decision requiring BLM to prepare NEPA analyses before issuing grazing permits); *Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217 (D. Idaho 2005) (striking down BLM's FONSI's for 28 grazing permits and requiring preparation of an EIS); *Western Watersheds Project v. Oke*, No. CV-N-03-197-HDM(VPC) (Aug. 18, 2004) (requiring preparation of an EIS for three grazing allotments).

In *Morton*, after reviewing the overwhelming evidence of grazing's impacts, the court stated:

> The court is therefore persuaded that the grazing permit program produces significant impacts on individual locales. And when the cumulative impact of the entire program is considered it is difficult to understand how defendants-intervenors can claim either that the impact of the program is not significant or that the federal action involved is not major.

388 F. Supp. at 835.

> In the present case over 100 million acres of public land are being leased for grazing although apparently no thorough analysis has been made of the specific impact of such activity. The court is, therefore, of the opinion that major federal actions having significant effects on the environment are being taken without full NEPA compliance, even though that Act has been in effect almost five years.

Id. at 840.

The Department of the Interior, as a party to *Morton*, is bound by the court's decision, and may not act contrary to it by categorically excluding grazing permits from analysis under NEPA. Nor may the Department escape its responsibilities under *Morton* by claiming that those responsibilities have been fulfilled by the preparation of the EISs that accompany the BLM's land use plans. The Interior Board of Land Appeals has held that the broad-scale, non-site-specific EISs accompanying land use plans do not satisfy *Morton's* mandate for EISs "which discuss in detail the environmental effects of the proposed livestock grazing, and alternatives thereto, in specific areas of the public lands which are or will be licensed for such use . . . ," 388 F. Supp. at 841. *See National Wildlife Federation v. BLM*, 140 IBLA 85, 93 - 95 (1997) (the Comb Wash case). *See also* Joseph M. Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 PUBLIC LAND & RESOURCES LAW REVIEW 25, 37 - 45 (1996) (analyzing the implications of the Comb Wash case for BLM's compliance with NEPA with respect to grazing permits).

D. The Fact That Most Grazing Permit EAs Have Resulted in FONSIs Does Not Demonstrate that EAs are Unnecessary or that Impacts Are Not Significant

The BLM's only justification for the proposed categorical exclusion of grazing permits is presented in a document dated "12/12/2005" and posted on the BLM's web site under the link "Categorical Exclusion Analysis Report: Grazing." In this document, the only "factual evidence" supporting the proposed categorical exclusions is the observation that the vast majority of environmental assessments (EAs) prepared for grazing permits have resulted in findings of no significant impact (FONSIs). However, this observation fails to justify the proposed categorical exclusions for at least four reasons.

First, the statistics presented in this document are extraordinarily misleading because they fail to reveal the multiple instances in which the federal courts or Interior Department administrative law judges (ALJs) have found that the BLM violated NEPA by failing to prepare an EIS. *See*, *e.g., Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217 (D. Idaho 2005) (striking down BLM's FONSI's for 28 grazing permits and requiring preparation of an EIS); *Western Watersheds Project v. Oke*, No. CV-N-03-197-HDM(VPC) (Aug. 18, 2004) (requiring preparation of an EIS for three grazing allotments); *National Wildlife Federation v. BLM*, 140 IBLA 85, 93 - 95 (1997) (the Comb Wash case) (affirming decision by an ALJ to require an EIS if the BLM allows the current grazing system to continue on one allotment). In fact, the FONSI's tabulated in this document probably include the 28 FONSI's found unlawful by the court in *Western Watersheds Project.*

Second, it is likely that many of the EAs and FONSIs tabulated in this document were not subject to challenge by environmental, conservation, or wildlife interests. Experience has shown that, when to subject to administrative or judicial challenge, a high percentage of BLM's FONSIs for grazing permits are found to be unlawful. If more had been challenged, it is likely that many more of the FONSIs would have been overturned and environmental impact statements (EISs) would have been required.

Third, in quite a few instances the BLM has prepared lengthy EAs that have included much of the information and analysis that would have been contained in an EIS had one been prepared.[i] In many of these instances, interested individuals and organizations have chosen to focus on the content of the EAs rather than on the labels given them. These individuals' and organizations' decision not to insist on EISs should not be taken as acquiescence in categorical exclusions that would result in *neither* EAs *nor* EISs being prepared for most grazing permits.

Fourth, even where an EA results in a FONSI, it still provides critical information to the public and gives interested citizens an opportunity to provide comments and suggestions that can prevent or correct mistakes by the BLM. *See, e.g., Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217, 1220-22 (D. Idaho 2005) (EAs revealed that, contrary to applicable land use plan, BLM was proposing to increase grazing levels despite serious impacts of grazing even at existing levels.) Categorically excluding grazing permits from NEPA analysis would remove these opportunities for public input.

Before taking the drastic step of categorically excluding grazing permits from NEPA analysis, the BLM should survey the EAs that have been prepared for grazing permits to determine the nature and scope of the information and analysis that they have contained and the public comment that they have engendered. Only in the unlikely event that the BLM determines that such information, analysis, and public comment were unnecessary and unhelpful can the BLM justify the proposed categorical exclusions.

E. Environmental Assessments of Grazing Permits are a Key Element of BLM Rangeland Management

The BLM's purported justification for the proposed categorical exclusions apparently relies on the assumption that the *only* function of an EA is to determine whether an EIS is needed, and that therefore any EA that resulted in a FONSI need never have been prepared. However, EAs perform essential functions even when they result in FONSIs. The proposed categorical exclusions, by eliminating EAs for most grazing permits, would leave a gaping hole in BLM's rangeland management.

According to the applicable CEQ regulations, among the functions of an EA is to "[a]id an agency's compliance with the Act [NEPA] when no environmental impact statement is necessary." The development of EAs for grazing permits aids the BLM's compliance with NEPA by, among other things, assembling information and informing both the public and the BLM about the resources and conditions of BLM rangelands and the effects of grazing on those resources and conditions[ii], providing opportunities for public input,[iii] and requiring the BLM to develop and consider alternatives for grazing management.[iv] In addition, EAs help the BLM to

comply with FLPMA's mandate to provide the public an opportunity to "participate in . . . the management of the public lands." 43 U.S.C. § 1739(e).[v] The proposed categorical exclusions for grazing permits, however, would eliminate all these functions currently performed by EAs for grazing permits.

F. Rangeland Health Assessments Are Not an Adequate Substitute for the Environmental Analysis Required by NEPA

The proposed categorical exclusions for grazing permits would exclude from NEPA analysis term and temporary non-renewable permits on every allotment that has been "assessed and evaluated" and the BLM has made a "determination" that the allotment is either "[m]eeting land health standards" or failing to meet such standards solely for reasons other than grazing. The amendments to the NEPA Manual do not define "assessed", "evaluated", "determination", or "land health standards." However, the document dated 12/12/2005 that purports to provide the justification for these categorical exclusions defines "assessment", "evaluation", and "determination." These definitions make clear that the "assess[ment]" to which the categorical exclusions refer is *not* an environmental assessment (EA) pursuant to NEPA but rather an assessment conducted for the limited purpose of determining whether an allotment meets the standards for rangeland health and the guidelines for grazing administration. (We will refer to such an assessment as a "rangeland health assessment.") In other words, the BLM is attempting to substitute rangeland health assessments for EAs and is attempting to equate conformance with standards and guidelines with an absence of significant environmental impacts.

The substitution of rangeland health assessments for EAs, and the assumption that there are no significant impacts of grazing on any allotment that is meeting the standards and guidelines, are entirely unjustified and turn the standards and guidelines on their head. The standards and guidelines were designed to provide a "safety net" of minimal standards that all allotments must meet. They were never intended to serve as a substitute for the thorough environmental analysis required by NEPA, or to allow the BLM to ignore all environmental impacts of grazing that do not constitute violations of the standards and guidelines.

i. Significant Impacts May Exist Even Where Standards Are Attained

The standards for rangeland health are *minimum* standards that every grazing allotment should meet and that trigger requirements for prompt action when they are violated. A determination that an allotment meets these minimum standards is *not* a determination that grazing is having no significant impacts on the allotment, and it is *not* a determination that conditions on the allotment could not be improved, or made to improve more quickly, by changes in grazing management. Therefore, there is no justification for skipping the environmental analysis and consideration of alternatives required by NEPA on all allotments where such standards are met.

For example, an allotment may be determined by the BLM to meet standards and guidelines because it has sufficient plant cover to maintain minimally acceptable levels of soil stability, water infiltration, and nutrient cycling, and water quality, yet still have far less plant cover than its natural potential. On such an allotment, a reduction in grazing intensity or other changes in grazing management might substantially improve ground cover and therefore provide better soil

stability, water infiltration, and nutrient cycling, not to mention better wildlife habitat, cleaner water, a more scenic landscape, and fewer conflicts between grazing and recreation. But under the proposed categorical exclusions, such an allotment would be excluded from the environmental analysis that might reveal the potential for such improvements and develop grazing management alternatives to achieve them.

Similarly, an allotment may be determined to meet riparian standards because its riparian areas are in "proper functioning condition," yet those riparian areas may be held in an early or mid-seral stage by grazing pressure. On such an allotment, more rest for some of the riparian areas might allow them to develop into a late seral stage that would provide additional biodiversity, habitats for different types of wildlife, and additional recreational opportunities. But under the proposed categorical exclusions, such an alternative would never be considered.

ii. Many Significant Impacts Are Not Addressed by Rangeland Health Standards

An even greater problem that will result from the substitution of rangeland health assessments for NEPA compliance will be that many of the most severe environmental impacts of grazing will not be assessed or considered at all. The standards and guidelines address an important, but limited set of environmental concerns, mostly related to soils, watersheds, and ground cover. Many important environmental impacts of grazing are *not* addressed by the standards and guidelines, including the following:

- -- impacts of grazing on archaeological sites
- -- impacts of grazing and grazing-related facilities (fences, corrals, water developments, vehicle routes) on wilderness values
- -- effects of grazing and grazing-related facilities on scenery
- -- effects of grazing and grazing-related facilities on the quality of recreational opportunities
- -- impacts of grazing on wildlife other than threatened, endangered, or special status species
- -- depletion of springs and streams by diversion of water for livestock use

A proper analysis (EA or EIS) of a grazing permit pursuant to NEPA would entail evaluation of these and all other impacts of grazing and consideration of alternatives to eliminate, reduce, or mitigate such impacts. However, under the proposed categorical exclusions of grazing permits, analysis and consideration of these impacts will never occur on any allotment that meets minimal standards for rangeland health.

iii. Experience has Shown that Rangeland Health Assessments Fail to Address Many Significant Impacts of Grazing

The potential for significant environmental impacts of grazing that are not addressed by rangeland health assessments is not merely hypothetical. In Arizona, at least, the BLM has repeatedly produced rangeland health assessments that fail to address numerous important impacts. One of the authors of these comments, Professor Joseph Feller of Arizona State University's College of Law, has carefully examined the BLM's rangeland health assessments of five grazing allotments in Arizona.[vi] Professor Feller's comments on these five assessments are

attached. The comments reveal that all five assessments examine extremely limited data and (a) fail to assess impacts that are not measured by those data, and (b) determine that rangeland health standards are met even when the limited available data indicate that resource conditions have been severely degraded by grazing.

iv. Rangeland Health Assessments Do Not Address the Cumulative Impacts of Grazing on Multiple Allotments

A key requirement of NEPA is that the BLM analyze, document, and consider the cumulative environmental impacts of grazing across multiple allotments. Analysis of cumulative impacts is an essential element of every EA and EISs, and EAs that fail to address cumulative impacts have been struck down as inadequate. *See Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217, 1223-25 (D. Idaho 2005) But BLM's rangeland health assessments focus on single allotments and usually give no consideration to cumulative impacts. The failure of rangeland health assessments to address cumulative impacts is another reason why they are not an adequate substitute for EAs or EISs

G. The Exclusion of Permits Issued as a "result of an administrative action" is Overbroad, Unjustified, and Unlawful

Section 11.9(D)(11)(b) of the proposed NEPA Manual revisions would categorically exclude from NEPA analysis any grazing permit issued as "the result of an administrative action." "Administrative action" is not defined. Two examples of "administrative action" are given, but the text states that "administrative actions" are not limited to these examples.

i. "Administrative Action" is Not Defined, and Potentially Includes All BLM Actions

The lack of a definition of "administrative action" leaves the scope of this categorical exclusion unknown and potentially unlimited. The BLM is an administrative agency and therefore *all* BLM actions are "administrative actions." In fact, NEPA applies *only* to actions by administrative agencies. Therefore, to exclude "administrative actions" from NEPA analysis is to effectively repeal NEPA.

ii. Where Site-Specific Analysis has Not Previously Been Performed, Renewal of a Grazing Permit Requires NEPA Analysis

One of the examples given of an "administrative" action to be categorically excluded from NEPA analysis is "changing permit termination date." In other words, the renewal of a grazing permit, which is achieved by changing the termination date, will be categorically excluded. This broad exclusion of permit renewals from NEPA analysis is unjustified and unlawful.

Despite the fact that NEPA was enacted in 1969, BLM only began performing site-specific environmental analyses of grazing permits in the 1990s. There remain thousands of grazing permits that have never been analyzed pursuant to NEPA. The proposed categorical exclusion would allow the BLM to renew these permits indefinitely into the future without ever complying with NEPA.

Both the federal courts and the Interior Board of Land Appeals have held that the renewal of a grazing permit, even with no changes other than the termination date, is an action requiring NEPA analysis if the site-specific impacts of the permit have not previously been analyzed under NEPA. *See Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 832 (D.D.C. 1974), *aff'd per curiam,* 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976); *National Wildlife Federation v. BLM*, 140 IBLA 85, 93 - 95 (1997) (the Comb Wash case). *See also Oregon Natural Resources v. BLM,* 129 IBLA 269 (1994) (holding that the extension of a permit's termination date and the substitution of a new permittee constitute an "action" requiring notice and opportunity to protest). The proposed categorical exclusion for "changing permit termination date" is directly contrary to these legal mandates.

H. The Proposed Categorical Exclusions of Grazing Permits Will Allow Major Changes in Grazing Management Without Environmental Analysis

i. The Proposed Categorical Exclusion for Grazing Permits Will Exclude Even New Permits and Permits with Major Changes

Remarkably, the proposed categorical exclusion for "[i]ssuance of livestock grazing permits/leases" contains *no limitations whatsoever* on the content of those permits. It does not require that the permit have the same terms and conditions as a previous permit. So long as an allotment has been determined to be currently meeting land health standards, this categorical exclusion will allow the BLM to issue a permit for any number or type of livestock, for any season, with (or without) any terms and conditions, without performing any analysis pursuant to NEPA. It would allow major increases in livestock numbers or in the lengths of grazing seasons without any NEPA analysis. It would even allow the BLM to issue, without NEPA analysis, a new permit authorizing grazing on an allotment that is currently meeting land health standards because it has been ungrazed for years or decades. Clearly, this categorical exclusion is overly broad, unjustified, and unlawful.

ii. The Proposed Categorical Exclusion of Temporary, Non-Renewable Grazing Use Will Allow Authorization of Grazing by Unlimited Numbers of Livestock Without Environmental Analysis or Public Input.

The proposed categorical exclusion for temporary, non-renewable (TNR) grazing use is also overly broad and will invite abuse. Because they are not limited by any pre-established determinations of permitted use levels, TNR permits are an enormous loophole which can be, and has been, used to circumvent legal requirements for environmental analysis and public consultation. See Western Watersheds Project v. Bennett, 392 F. Supp.2d 1217, 1225 (D. Idaho 2005). The proposed categorical exclusion for TNR permits purports to be limited by the requirement that the authorized officer document that the TNR use "will not change the status of land health on the allotments" but it provides no standards or criteria by which such a

determination must be justified. Also, it does not require any documentation of the basis for the determination; apparently a simple one-sentence declaration will suffice. Finally, and most important, the categorical exclusion provides no opportunity for advance public notice or comment on the TNR use or the determination that it will not "change the status of land health."

In summary, the proposed categorical exclusion for TNR permits allows the BLM to authorize grazing by unlimited numbers of livestock with no environmental analysis and no oversight by the public.

II. Comments on Vegetative Management

We object to the proposed categorical exclusions (CX) for vegetation management. Specifically, BLM proposes to categorically exclude vegetation management projects up to 1,000 acres.[vii] By itself, the goal of eradicating weeds and invasive species that threaten the health and vitality of the public lands administered by the BLM is admirable. Some noxious weed eradication, if administered on a case-by-case and site-specific approach, in non-sensitive, non-unique locations, with adequate public participation should be conducted legitimately. However, permitting vegetative treatments under a CX could be reckless given that such treatments are inadequately substantiated in this proposal, and can often be contrary to the goal of achieving sustainable ecosystems.

A. BLM Fails to Provide Supporting Documentation to Substantiate Their Claim

The BLM claims that past guidance through the NEPA process has established a definitive administrative record that demonstrates that the activities that meet the criteria for the proposed CXs will not in the future have significant impacts upon the lands and resources administered by the agency. This claim is simply not true with respect to vegetative treatments.

In the Federal Register notice under the Rangeland Management section, BLM states:

> The CXs are proposed after reviewing numerous EA analyses that resulted in Findings of No Significant Impact for these types of routine actions over time and over different geographic areas. These actions do not individually or cumulatively have significant impacts on the human environment and do not require additional environmental analysis.[viii]

Supporting documentation provided by the BLM to substantiate the use of a CX for mechanical vegetative treatments also attempts to show that past experiences validate its adoption. But the fine print states something else entirely:

> The activities proposed in the vegetation management CX are identical to those covered for certain post-fire rehabilitation and hazardous fuels treatment activities, but there is no CX available to cover "other" vegetation management projects. This document examines the data available to support the DOI hazardous fuels reduction CX (516 DM 2, 1.12) and post-fire rehabilitation CX (516 DM 2, 1.13), and provides rationale proposing a new CX to employ the same vegetation management treatments when hazardous fuels reduction or post-fire rehabilitation <u>are not</u> the vegetation management objectives for a project.[ix]

BLM is comparing apples to oranges in this case – the agency has failed to provide data in its justification which are actually germane to the impacts associated with mechanical vegetative

treatments. As discussed below, it seems clear that BLM lacks such data. In any case, BLM cannot use the experience of vegetative treatments used in post fire rehabilitation decisions as a proxy for mechanical vegetative treatments.

Although post fire treatments might involve similar physical endeavors, the impacts on the land can be entirely different. In addition, the prescribed treatments that are needed to achieve ecological health of a rangeland are going to differ between rangelands that have been consumed by wildfire versus those that have been despoiled by noxious plants. Since BLM has not provided specific information that actually relates to mechanical vegetative treatments, the current analysis does nothing to describe any of the potential effects, including cumulative. Given the inadequacies of the agency's rationale, the proposed CX could well have the opposite effect from the desired result.

B. BLM Does Not Acknowledge that the Current CX Policy Will be Tiered to other BLM Treatment Policy

BLM believes that, by itself, a thousand-acre CX will have no impact upon the resource. As indicated above, it has provided no support for this position. In addition, it is a given that the proposed action will not exist in a vacuum — these treatments will be combined with other treatments and/or management practices. BLM needs to provide accurate and unambiguous numbers on the potential acres to be treated and provide the context of when, how long, and in what combinations these treatments will take place. In addition, the BLM needs to clarify how this CX will interact and impact with other multiple use determinations, such as grazing permit renewals. Ultimately, BLM needs to demonstrate that the vegetative treatment CX will be used in a definitively limited basis so that it will not cause significant environmental harm.

BLM's obligation to provide an accurate assessment of this proposed CX should also take into account BLM's current attempt to implement new policy for the implementation of vegetative treatments. This policy change, which calls for a sizeable increase in the amount of land to be treated, was discussed in the agency's recently issued *Draft Programmatic Environmental Impact Statement on Vegetation Treatments Using Herbicides on BLM Lands in 17 Western States & Programmatic Environmental Report* (here on known as the Veg-DPEIS). In the Veg-DPEIS, BLM claims that current rangeland resources are being invaded by an epidemic of noxious plant communities. The agency declares that noxious weeds are the "dominant vegetation on an estimated 35 million acres of public lands."[x] BLM's preferred alternative to contain the problem of noxious weeds is to increase treatments on the agency's rangelands from the current 2 million acres annually to 6 million acres annually. It would be naïve to think that the current CX proposal bears no relationship to the Veg-DPEIS initiative. BLM is proposing to impact literally millions upon millions of acres. Surely the numbers of instances in which the proposed CX will be employed in the future will increase as the result of the new policy discussed in the Veg-DPEIS, if that policy is adopted. But neither proposal acknowledges the existence of each other. BLM needs to demonstrate how each proposal will be implemented in regards to each other.

According the BLM, one of the main reasons that the agency proposed the treatment strategies

discussed in the Veg-DPEIS was the realization that past EIS's were insufficient, too old, and addressed outdated methods of treatment.[xi] Given that this is true, it is questionable how BLM can go ahead and approve a CX for vegetative treatment based upon a body of existing NEPA documentation that the BLM has acknowledged is outdated and irrelevant.

The BLM's lack of NEPA documentation to support the proposed CX for vegetative treatments is evidenced by the fact that the Veg-DPEIS fails to provide assessment data of how past vegetative treatments have performed over the last two decades.[xii] Similarly, as noted, in its justification for this proposal, BLM has only provided data consistent with fire restoration efforts; there are no data specific to the actual vegetative treatment CX that has been proposed. Despite the fact that BLM has undertaken vegetative manipulation projects on the public rangelands for over twenty years, the agency has failed to provide statistical or other quantitative information about those projects in connection with its CX justification.

C. BLM Lacks the Resources to Adequately Implement the Proposal

The lack of accompanying data speaks directly to another glaring deficiency in this proposal — BLM's inability to fully monitor impacts upon the rangelands. Data gathered by site specific monitoring is absolutely critical in assessing whether a proposed treatment is needed for a given resource. Conversely, follow-up monitoring is critical to assess and ensure that a given treatment was effective.[xiii] This kind of monitoring informs land mangers so that future decisions can be made with the greatest amount of precision in order to improve the efficacy of a given vegetative treatment. History has clearly revealed that the BLM does not have the institutional resources to properly manage and employ a monitoring program that can correctly assess what is actually occurring on the agency's rangelands. There is even noticeable agreement within the BLM internally that the agency does not have the means to successfully monitor rangeland conditions. In 2005, a suppressed analysis formulated by BLM scientists for BLM's proposed new grazing regulations assessed that monitoring efforts on BLM lands was entirely insufficient:

> "The exact extent of such [*BLM rangelands*] is not well known since monitoring is always deficient." [xiv]
>
> "BLM, in fact, lacks sufficient funding and staffing to perform adequate monitoring." [xv]
>
> "Present BLM funding and staffing levels do not provide adequate resources for even minimal monitoring…."[xvi]

Nearly identical concerns were provided to the BLM by a Fish & Wildlife Service scientific assessment of BLM's efforts on rangeland monitoring:

> The Service is consistently told by the BLM that they lack time, sufficient personnel, and adequate funding to implement even the most basic monitoring (i.e., stubble height) even in cases where the take of a listed species is at issue. Our 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.[xvii]

And:

> by their own admission, the BLM lacks both adequate staff and funding to implement the most basic of monitoring programs. The Final EIS should assess and disclose the impacts of the monitoring requirement on the BLM's ability to take timely action in order to effectively implement conservation strategies…[xviii]

This state of affairs is readily apparent from both the Veg-DPEIS and the CX proposal — both documents lack statistical and quantitative data that should have been obtained over the past twenty years of BLM vegetative management. A 1991 BLM vegetation treatment FEIS stated that "rangeland treatments would have studies established in them to monitor treatment effects on vegetation as well as on other resources such as wildlife or water quality… "[xix] There is no evidence that BLM has followed up with any subsequent monitoring data from that EIS, nor is such data evident in the CX justification or the Veg-DPEIS. It is our contention that the lack of data specific to mechanical vegetative treatment (as opposed to post-fire rehabilitation treatments) in the CX justification is proof that the BLM simply lacks the institutional capability to monitor long term effects on the range. Given that the BLM cannot comprehensively assess what is occurring in the present, proposing to expand the use of vegetative treatments via a CX is in conflict with the agency's obligation to adequately monitor the effects of these treatments.

D. Conclusion

The vegetative treatment categorical exclusion proposal is extremely vague throughout — from the proposed action to the predicted impacts. Under the circumstances, adoption of the proposed CX for vegetative treatments is arbitrary and unjustifiable. Rather, BLM, in accordance with the dictates of the National Environmental Policy Act, the Federal Land Policy and Management Act, and the Rangeland Reform EIS, must continue to solicit public involvement and conduct an environmental review before implementing any substantive vegetative treatment undertaking. BLM must substantiate its predicted effects with a record of site-specific analysis and monitoring that ensures that acts of vegetative eradication do not bring about significant adverse impacts alone or together with similar projects — a standard that the current proposal woefully fails to achieve.

III. Adaptive Management (DM 11.4(G))

DM 11.4(G) follows the March 2004 "encouragement" inserted into the Department of Interior's NEPA Manual to "to build adaptive management practice into [the Bureaus'] proposed actions and NEPA compliance activities." 516 DM 4.16. Unfortunately, neither the March 2004 revision of the Interior Department's NEPA Manual, nor these proposed revisions to BLM's NEPA Manual, recognize or deal with the fact that adaptive management can undermine the NEPA process by allowing agencies to avoid the critical functions of an Environmental Assessment and Environmental Impact Statement: assessing significant impacts, considering alternatives, and involving the public in the government's decisions.

Accordingly, we ask that BLM not blindly incorporate adaptive management practice into its NEPA procedures until the agency deals with and involves the public in solutions to the problems of adaptive management that we discuss below.

A. Definition of Adaptive Management

In 1997 the Council on Environmental Quality ("CEQ") prepared a report[xx] that proposed a new method for managing and analyzing environmental impacts. This new prototype was called Adaptive Environmental Management ("AEM"). In a paper prepared for the Rocky Mountain Mineral Law Foundation,[xxi] attorney Denise Dragoo summarized the features of CEQ's adaptive management proposal:

> The CEQ Report introduces AEM as the new paradigm for environmental management: "predict, mitigate, implement, monitor and adapt."[xxii] AEM is proposed by CEQ as a method of <u>continuous</u> monitoring and adaptation which would extend beyond the preparation of the FEIS and the ROD to monitor changes "over the life of the project."[xxiii] Instead of investing extensive resources into the initial analysis, the AEM approach would allow agencies to develop objective criteria for "significant environmental changes in the status of the resource or ecosystem of concern (be it rangelands, wetlands, or forest)."[xxiv] CEQ envisions use of [these] criteria to allow an agency to analyze and approve a project or plan with "an uncertain outcome."[xxv] CEQ suggests AEM as a trade-off, allowing agencies "to accept more uncertainty in initial analyses" and apply AEM measures during project implementation as a way to get projects underway earlier and "dramatically reduce costs."[xxvi]

BLM's proposed embrace of adaptive management in its NEPA Manual has the same characteristics as CEQ's AEM proposal. Drawing from the 2004 DOI NEPA Manual, proposed DM 11.4(G) defines adaptive management as:

> a system of management practices based on clearly identified outcomes, monitoring to determine if management actions are meeting outcomes, and, if not, facilitating management changes that will best ensure that outcomes are met or to re-evaluate the outcomes.

BLM's proposal goes on to explain that "[a]daptive management recognizes that knowledge about natural resource systems is sometimes uncertain and is the preferred method of management in these cases."

B. Risks of Adaptive Management when applied to the NEPA process

The adaptive management approach in the CEQ Report, which the BLM now proposes to adopt, runs a substantial risk of violating NEPA by: (1) allowing BLM to defer decisions regarding mitigation – and the impacts that might result if the mitigation fails – without addressing those decisions in an EA or EIS; (2) removing significant agency decisions about mitigation, and the possible impacts, from public review and comment; (3) removing significant impacts that may be detected during the monitoring process from NEPA evaluation; and (4) heavily relying on monitoring, which the BLM is often unable to support.

i. Adaptive Management encourages making mitigation decisions without evaluating them under NEPA.

Because adaptive management anticipates making "management changes" if "monitoring … determines[s] [that] management actions are [not] meeting [identified] outcomes," the BLM is likely to design and implement new mitigation measures after the completion of the NEPA process. While NEPA does not require "that a complete mitigation plan be actually formulated and adopted," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989), it does require that "that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id*.

However, under adaptive management, post-decision alteration of mitigation measures will be routine whenever monitoring reveals that the original measures are not achieving the desired outcomes. These new mitigation measures will be crafted outside of the NEPA process, isolating the BLM from any public discussion of possible environmental consequences of or alternatives to the amended mitigation. While important changes in the initial mitigation measures could be scrutinized in a supplemental NEPA analysis, we believe it is extremely unlikely the BLM would undertake such an evaluation.

ii. Under Adaptive Management the public is excluded from valuating and commenting on amended mitigation measures.

The CEQ's regulations require that "NEPA procedures must insure that environmental information is available to public officials and citizens <u>before</u> decisions are made and <u>before</u> actions are taken." 40 C.F.R. §1500.1(b) (emphasis added). However, because adaptive management anticipates altering mitigation procedures after the BLM has issued its decision and completed the NEPA process, the public and public officials will neither be informed about these changes, nor have an opportunity to comment on them.

iii. Under Adaptive Management significant impacts detected during monitoring are excluded from NEPA's evaluation process.

Adaptive management will exacerbate the existing problem inherent in so many of the BLM's decisions that are accompanied by a Finding of No Significant Impact (FONSI), where the FONSI is based on promised mitigation: significant on-the-ground impacts never assessed at the time of the agency's decision. When the BLM employs adaptive management and begins to monitor the environmental consequences while implementing its decision, or when the BLM, using adaptive management, amends its management because the original measures were not producing the expected "outcomes," it is likely there will be significant impacts never contemplated – or evaluated – in the original decision. However, since the NEPA process will be over, those significant impacts, even if caused by post-decision amended mitigation measures, will not be evaluated under NEPA.

iv. Adaptive management depends on monitoring, which BLM is often unable to support.

Adaptive management depends on the BLM's ability to conduct post-decision monitoring in order to adjust its management (mitigation) to ensure that the outcomes it seeks actually come about. However, BLM rarely has the staff or the budget to begin, much less persist in monitoring. In an environmental analysis prepared by BLM's own scientists evaluating the agency's proposed changes to its grazing regulations, an analysis the agency subsequently suppressed, BLM's scientists made it clear that the BLM has neither the staff nor the budget to undertake monitoring:

> "The exact extent of such [BLM rangelands] is not well known since monitoring is always deficient."
>
> "BLM, in fact, lacks sufficient funding and staffing to perform adequate monitoring."
>
> "Present BLM funding and staffing levels do not provide adequate resources for even minimal monitoring…."

Given the BLM's likely inability to conduct monitoring, the principal premise of adaptive management is on shaky ground. This infirmity is particularly debilitating if the BLM intends to implement adaptive management under the CEQ's 1997 philosophy, which views adaptive management as a trade-off, allowing agencies "to accept more uncertainty in initial analyses" and apply adaptive management measures during project implementation as a way to get projects underway earlier and "dramatically reduce costs."[xxvii]

C. Adaptive Management's option to "re-evaluate the outcomes"

The final clause of DM11.4(G)'s adaptive management definition allows the agency to "re-evaluate the outcomes" if management actions are not meeting expected outcomes. There is

no explanation of what is meant by re-evaluating the outcomes, but when that occurs, the BLM will of necessity be contemplating a new decision. When the agency begins to consider a new decision, NEPA requires restarting its process to involve the public, consider alternatives, and assess likely impacts.

IV. The Proposed Categorical Exclusion of Special Recreation Permits from NEPA Analysis is Unlawful and Unjustified

The proposal to revise the categorical exclusion for Special Recreation Permits ("SRPs"), *see* 43 C.F.R. Part 2932, is also unlawful, unjustified, and ill-advised. BLM has proposed to revise its NEPA manual to expand drastically the scope of its categorical exclusion for special recreation permits (516 DM 11.9(H)), excluding approximately 84% of all SRPs from NEPA analysis without regard to significant adverse environmental impacts characteristic of certain recreational activities. *See* Bureau of Land Management, Report and recommendations on the results of a Bureau of Land Management data call for information on NEPA records associated with certain Special Recreation Permits 8 (Dec. 18, 2005) ("SRP Data Analysis").

The current BLM NEPA manual provides the following categorical exclusion for recreational activities: "Issuance of special recreation permits to individuals or organized groups for search and rescue training, orienteering or similar activities and for dog trails, endurance horse races or similar minor events." 516 DM 11.9(J)(5). This is a reasonable exclusion, and it limited to a set of activities (or other "similar minor activities") whose foreseeable environmental effects are insignificant. Although not a quantitative standard, the catch-all "similar minor events" is reasonably clear in the context of the listed activities. It is clear, for example, that a commercial boating event on a Wild and Scenic River or an overland jeep race would not fall within the scope of the exclusion. Unfortunately, the proposed Categorical Exclusion, contrary to established law and BLM's own analysis, would illegally exempt such activities from NEPA analysis, and should be rejected.

A. The Proposed Categorical Exclusion for Special Recreation Permits Is Unclear and Overly Broad

The proposed recreation categorical exclusion, 516 DM 11.9(H), would exclude from NEPA analysis "Issuance of Special Recreation Permits for day use or overnight use up to 7 consecutive nights that impact more than 3 contiguous acres; and/or for recreational activities in travel management areas or networks that are designated in an approved land use plan." BLM explains that "Example activities that would be covered by the proposed SRP CX include, but are not limited to: an organized group of bird watchers going to a specific area for the day, a scout trip, an orienteering competition, competitive dog trials, organized hunting camp, commercial sales event, organized fun runs/walks for life, and endurance horse racing." SRP Data Analysis 2 (emphasis added). The key problem with the proposed categorical exclusion, however, is that it is not limited to the relatively low-impact examples provided. Nothing in the categorical exclusion limits its applicability to other activities, with extremely serious adverse environmental consequences, such as motorized vehicle races and events and activities on Wild and Scenic Rivers. Apparently, so long as the staging area is less than "3 contiguous acres," or the activity takes place in "travel management areas or networks that are designated in an approved land use plan," there is to be no NEPA analysis.

The proposed categorical exclusion is, as an initial matter, both unclear and overly broad. How is the size of an impact area to be measured? How does the exclusion deal with activities that

don't occur on contiguous acreage, but are dispersed across public lands? What if a proposed action includes a large staging area on private lands but the impacts on public lands are dispersed? What provision is made to ensure that the LRMP travel management decisions relied on by the categorical exclusions have actually considered organized and/or commercial events, as opposed to private, individual use of travel management areas or networks? The proposed categorical exclusion is also overly broad because it incorporates no restriction on the number of people or vehicles involved. If large numbers, particularly of motorized vehicles, are involved, even a one-day event on authorized travel management networks may have significant adverse environmental impacts.

B. The Proposed Categorical Exclusion for Special Recreation Permit Includes Activities with Demonstrated Adverse, Significant Environmental Impacts

The proposed categorical exclusion also appears to apply to a variety of activities (specifically, organized motor vehicle races, gatherings, and other events) that the federal courts and the IBLA have specifically found to have significant (and adverse) effects on the human environment. Categorical exclusions may be defined only for "actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. The issuance of Special Recreation Permits, particularly for motorized and mechanized recreation events, allows activities that *do* significantly affect the human environment. In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court recognized the serious environmental concerns raised by increasing levels of motorized use on BLM public lands:

> According to the United States Forest Service's most recent estimates, some 42 million Americans participate in off-road travel each year, more than double the number two decades ago. H. Cordell, Outdoor Recreation for 21st Century America 40 (2004). United States sales of all-terrain vehicles alone have roughly doubled in the past five years, reaching almost 900,000 in 2003. See Tanz, Making Tracks, Making Enemies, N. Y. Times, Jan. 2, 2004, p F1, col. 5; Discover Today's Motorcycling, Motorcycle Industry Council, Press Release, Feb. 13, 2004, http://www.motorcycles.org (all Internet materials as visited June 4, 2004, and available in Clerk of Court's case file). The use of ORVs on federal land has negative environmental consequences, including soil disruption and compaction, harassment of animals, and annoyance of wilderness lovers. See Brief for Natural Resources Defense Council et al. as Amici Curiae 4-7, and studies cited therein.

Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 60 (2004) (emphasis added).[xxviii] The BLM has been aware of these impacts for decades. *See* NRDC Amicus Brief at 5 (citing David Sheridan, Council on Envtl. Quality, Off-Road Vehicles on Public Land 7 (1979)). Moreover, the courts and the IBLA have repeatedly recognized these impacts.

In *Sierra Club v. Clark*, 744 F.2d 1406 (9th Cir. 1985), the court reviewed the BLM's issuance of an amendment to its California Desert Conservation Area Management Plan to allow an annual off-road motorcycle race from Barstow, California, to Las Vegas, Nevada, across the public

lands. *Id*. at 1408. The race was granted a permit for the race every year from 1967 to 1974. *Id*. Beginning in 1975, following a study by the BLM documenting "adverse impacts to desert resources," permits for the race was denied from 1975 until 1983. *Id*. During this time, "protest" riders would tear across the same public lands every year with no permit causing "considerable impacts on the biological, geological, cultural and other resources of the desert environment." *Id*. In 1983, the permit for the race was granted by the BLM, but only after the California Desert Conservation Area ("CDCA") Management Plan had to be amended to allow for the race following preparation of full EIS, as well as incorporation of substantial mitigation measures to be taken before the permit could be issued. *Id*. Uncontested in *Sierra Club v. Clark* was the BLM's basic premise: the impacts of the Barstow to Las Vegas race were so significant as to require preparation of an EIS. Under the proposed categorical exclusion, however, events of similar significance would be excluded from any NEPA analysis so long as contiguous disturbance was less than 3 acres or the events took place within travel management areas or networks.

Similarly, other cases have acknowledged the significance of impacts from ORV, motorcycle, and other motorized activities and events. *See Utah Shared Access Alliance v. Carpenter*, 348 F. Supp. 2d 1265, 1269-70 (D. Utah 2004) (affirming BLM decision to restrict ORV use based on "evidence of proliferation of new OHV routes, damage and destruction to vegetation, increased soil erosion, and a likelihood of damage to cultural resources"); *Rock Crawlers Association of America*, 167 IBLA 232, 233 (2005) (rejecting challenge to BLM decision to decline issuance of a SRP permit for the California Rock-Crawling and Off-Road Championship Series, following preparation of an Environmental Assessment for an earlier event, based on unacceptable impacts from the prior rock crawler events). In *Arizona State Association of 4-Wheel Drive Clubs, Inc.*, 165 IBLA 153, 154 (2005), the IBLA affirmed the BLM's decision, following preparation of an Environmental Assessment, to exclude a particular canyon trail from an SRP for a vehicle Jamboree:

> OHV use . . .is causing unacceptable impacts to riparian and wildlife habitat values. A proper functioning condition assessment completed in 2001 indicated the area was functioning at risk. The riparian vegetation along the canyon is recovering from impacts of past land use practices. Continued OHV use will interfere with the natural vegetation development process, preventing trees, shrubs and other plants from becoming established, and damaging existing vegetation cover. Action is needed to prevent further deterioration from unmanaged OHV use.

Id. at 156. These examples are significant for two reasons. First, they reflect repeated findings that recreational events, particularly involving motorized vehicles, can have significant environmental consequences, requiring preparation of an Environmental Impact Statement under NEPA. Second, and perhaps more importantly, they reflect instances (such as the California Rock-Crawling case) where preparation of an Environmental Assessment leads to the identification of potentially-significant impacts and their avoidance. Had the Rock-Crawling event been approved pursuant to the proposed categorical exclusion, BLM might well not have conducted the analysis that led it to identify and monitor unacceptable consequences, and decline to issue later permits on that basis.

C. The BLM's Justification for the Proposed Categorical Exclusion is Flawed

The SRP Data Analysis documented, dated December 18, 2005 and posted on the BLM's website, purports to offer a quantitative justification for adopting the proposed categorical exclusion for special recreation permits. This document's reasoning is flawed, and it should not be used as a basis for adopting an illegal and overly broad categorical exclusion. First, the SRP Data Analysis fails to distinguish between significantly-different categories of activities, such as motorized versus nonmotorized recreation events. Second, the SRP Data Analysis assumes that BLM review process will ensure categorical exclusions will not be used where significant consequences may ensue, a rationale that the courts have rejected. Third, the SRP Data Analysis ignores entirely the fact that the process of conducting environmental analysis through an Environmental Assessment and accompanying public input identifies and prevents adverse environmental effects that might not have been identified or mitigated had the project avoided review through a categorical exclusion.

The SRP data analysis provides only the broadest information about the types of activities authorized under Special Recreation Permits: commercial use, organized group, and special event. SRP Data Analysis at 6. It then goes on to conclude that 84% of SRPs issued 2000-2005 would fall within the terms of the proposed new categorical exclusion (*id*. at 7-8), and approximately 97% of those projects generated no significant impacts (*id.* at 8). The SRP Data Analysis document, however, fails to make any distinction between activities such as "an organized group of bird watchers going to a specific area for the day," and the sort of intensive motorized events found to have significant effects in cases such as *Sierra Club v. Clark*. If the 3% of SRPs with significant impacts all involved motor vehicle events, would this not be an important distinction to draw? If the majority of SRPs were issued for bird watching and other low-impact events and resulted in no significant impacts, but a much smaller portion of SRPs for motor vehicle events resulted in significant impacts, how can the analysis in the SRP Data Analysis document possibly capture this distinction?

Furthermore, the SRP Data Analysis document fails entirely to address the question of whether SRP-authorized activities may contribute, when considered together with other similar actions (whether requiring an SRP or not), to cumulative impacts on the environment. The SRP Data Analysis also contends that "it appears that the requirement to review the DOI list of extraordinary circumstances for every proposed SRP is sufficient to prevent proposed action likely to have significant individual and/or cumulative impacts from being authorized through a CX." SRP Data Analysis 8; *see also* SRP Data Analysis 9 ("[T]he DOI and BLM CX review process insures that in the absence of extraordinary circumstances, 516 DM 2, Appendix 2, there are no individual or cumulative significant effects on the environment.") Although CEQ regulations require that categorical exclusions incorporate an "extraordinary circumstances" exception, 40 C.F.R. § 1508.4, the presence of the exception is not an excuse for the authorization of otherwise-improper or inadequately-justified categorical exclusions. *See Heartwood, Inc. v. United States Forest Service*, 73 F. Supp. 2d 962, 976 (rejecting as "circular" the Forest Service's argument that exceptional circumstances exception adequately compensates for failure to consider cumulative effects of a proposed categorical exclusion).

Finally, the SRP Data Analysis fails entirely to take into consideration the extent to which

adverse environmental consequences are identified and avoided through the Environmental Assessment process and accompanying public involvement. According to the SRP Data Analysis, 67% of SRPs for which BLM found adequate data "were issued through the EA process (which culminates in a 'Finding of No Significant Impact' [FONSI] or a 'mitigated' FONSI)." SRP Data Analysis at 8. Without any analysis of how many of those EA processes identified significant impacts but resulted in either (a) mitigated FONSI (whereby otherwise significant impacts were avoided through mitigation measures); or (b) modification of a proposal or adoption of a different alternative to avoid significant impacts. Nor does the BLM's methodology provide any information about the number of cases in which environmental analysis resulted in withdrawal or modification of an SRP proposal at an earlier stage of the process. The hardly-surprising fact that most EAs result in FONSIs does not alter the fact that the nature of the EA process (including consideration of alternatives and public involvement), can lead to changes in the proposed action in order to justify the FONSI.

V. Additional Comments

In the Federal Register notice announcing its proposed changes, BLM notes that its NEPA Manual has not been revised since 1992, suggesting that the Manual requires updating based upon new information and changed circumstances. Yet, nearly the entire proposal is devoted to restricting NEPA review and expanding the list of categorical exclusions. We wonder whether any time at all was devoted to examining the appropriateness of the categorical exclusions already in place. For example:

A. Withdrawal Revocations and Modifications.

We are relieved to see the Department recognize that withdrawal revocations and modifications do require compliance with NEPA and may result in significant impacts to the environment, particularly where lands are opened to the operation of mining or mineral leasing laws. However, we are concerned about the suggested use of categorical exclusions to avoid review of potential impacts in all other instances. For example, under the proposed rule, any withdrawal modification which "only establish[es] a new time period" would be excluded from review. CX E.1. However, the effect of changing a permanent withdrawal to one that exists for only a few months or a few days is clearly significant.

We are also concerned about the language of CX E.3 which suggests that as long as any subsequent activities to which the lands are opened are "in conformance" with a Resource Management Plan (RMP) or plan amendment, no review is required. This is problematic for two reasons. First, the NEPA documentation completed in conjunction with the preparation of the agency's RMPs does not examine site-specific impacts on the environment. It is, therefore, false to conclude that the impacts of the activities to which previously withdrawn lands are now open have been adequately addressed in the EIS or EA prepared at the land use planning stage. Second, most of BLM's current RMPs are nearly twenty years old. Their EISs are no longer reflective of conditions on the ground. The agency's own February 2000 Report to Congress made clear that existing land use plans do not accurately reflect current, unanticipated levels of interest and attention. See BLM Report to Congress – Land Use Planning for Sustainable Development (Feb. 2000). BLM currently is engaged in an effort to update virtually *all* of its land use plans, noting that the "earlier plans, as well as some of the more current plans, do not adequately meet the new demands and mandates that have emerged" and that updating these plans is "imperative" to address both legal obligations and "preserving and protecting" the many resources of the public lands. (*The Current Planning Initiative* –available at www.blm.gov/planning/initiative.html).

B. Actions Taken in Conveying Mineral Interest Where There are no Known Mineral Values in the Land.

We certainly wonder about BLM's capacity to determine the potential mineral value of lands. For example, the development of cyanide heap leach technology and rises in global prices have

turned flecks of gold into valuable mineral deposits. New technologies and higher energy prices have renewed interest in what were previously considered exhausted oil and gas fields.

C. **Issuance of Recordable Disclaimers**.

The use of recordable disclaimers to settle controversial RS 2477 claims should not be categorically excluded from review.

VI. Attachments

i. Comments on Beanhole Allotment Assessment

VIA FAX
ORIGINAL BY FEDERAL EXPRESS (with enclosures)

Mr. Roger Taylor, Field Manager
United States Bureau of Land Management
Arizona Strip District
345 E. Riverside Drive
St. George, UT 84790

Re: Beanhole Allotment Assessment, Final Draft

Dear Mr. Taylor,

The following are my comments on the "Final Draft" of the Beanhole Allotment Assessment, dated December 3, 2000. Linda Price of your staff has informed me that these comments will be considered if submitted by today, January 31, 2001. Accordingly, I am transmitting these comments today by fax. I am also today sending a hard copy, with enclosures, by Federal Express.

These comments are my professional opinions. They do not necessarily reflect the views of Arizona State University or the College of Law.

Incorporation by Reference

I hereby incorporate by reference the letter I wrote to Linda Price of your staff, dated September 4, 1998, along with the printout of the e-mail message, dated September 3, 1998, from Dr. Richard Conant that was enclosed with the letter. Both the letter and the e-mail message are enclosed. The Final Draft Allotment Assessment does not address the points that I raised over two years ago in that letter.

Summary of Comments

The Final Draft Allotment Assessment is fundamentally inadequate. Instead of evaluating whether conditions on the allotment meet the national Fundamentals of Rangeland Health and the Arizona Standards and Guidelines, the Assessment (1) ignores the Fundamentals (2) ignores the Guidelines, and (3) substitutes for the Standards a set of "Desired Plant Community Objectives," every one of which calls for maintaining the status quo. It then

concludes that, because conditions are apparently not declining on the allotment, the Standards are being met.

The Assessment is also deficient because it fails to consider information other than monitoring data on forage utilization, species composition, and ground cover. These data do not address many of the factors necessary to determine whether the Allotment is meeting the Fundamentals, the Standards, or the Guidelines. The Assessment ignores other indicators that should be used to determine whether the Allotment is meeting the Fundamentals, the Standards, and the Guidelines.

The Assessment fails to evaluate the condition of wildlife habitat on the allotment and how that condition is being affected by grazing. In particular, it does not address the cover and diet needs of pronghorn, birds, and small mammals and reptiles, and how those needs are affected by the 45% forage utilization that it proposes to allow.

Finally, the Assessment fails to address the deplorable ecological condition of the bottom areas of the allotment. These areas are being hammered by overgrazing, but instead of dealing with the problem, the Assessment blames the lack of native vegetation in these areas on "compacted layers," even though there is no evidence that such layers exist or that they are the cause of the poor ecological condition of these areas.

Detailed Comments

1. The Assessment fails to assess whether the Allotment is meeting the Fundamentals of Rangeland Health or the Arizona Guidelines for Grazing Management.

The BLM is required to assure that the Allotment meets the Fundamentals of Rangeland Health and the Arizona Guidelines for Livestock Grazing Management as well as the Arizona Standards for Rangeland Health. The Fundamentals contain a number of important requirements that are not contained in the Arizona Standards, including, but not limited to, requirements that (a) the upland components of watersheds are in proper functioning physical condition, and (b) hydrologic, nutrient, and energy cycles are maintained to support healthy biotic communities. The Assessment does not even mention the Fundamentals or the Guidelines, let alone assess whether the Allotment is meeting them

2. The "Desired Plant Community Objectives" in the Assessment are Inappropriate

The Arizona Standards require the existence and maintenance of "productive and diverse" plant communities. In 1980 and 1989, the BLM determined that the plant communities on the Beanhole Allotment were deficient because of the absence or paucity of several key forage species – including grama grasses, *stipa* grasses, Indian ricegrass, and four-wing saltbush – at some or all of the monitoring sites on the allotments. The depletion of these species is a hallmark of overgrazing and indicates a need for grazing reductions. Accordingly, the BLM set

objectives for increasing the frequency of these species.

The Assessment, however, completely abandons these objectives for improvement, and substitutes in their place a set of "Desired Plant Community Objectives," every one of which calls for maintenance of the status quo. There is no explanation of why the existing plant community at every site should be automatically presumed to be sufficiently "productive and diverse" to satisfy the Arizona Standards, and why the paucity or absence of several key species identified in 1980 and 1989 should now be ignored.

3. The Assessment fails to consider information other than monitoring data on forage utilization, species composition, and ground cover.

Assessment of whether the Allotment is meeting the Fundamentals and the Standards requires examination of a number of factors related to soils, vegetation, and water over a large area. Measuring species composition, forage utilization, and ground cover on five small plots provides some useful information, but it does not adequately address all, or even most of the factors that need to be considered.

The BLM Publication INTERPRETING INDICATORS OF RANGELAND HEALTH: DRAFT HANDBOOK (April, 1998) provides a guide to the type of information that should be, and can be, collected and considered along with the monitoring data. According to guidance from the Washington Office of the BLM (Information Bulletin No. 99-186), the methods described in this document "should be used in conjunction with monitoring and other inventory data to identify if resource problems exist" and "is recommended as one tool (along with existing monitoring, inventory, and other appropriate information and input) to determine if State Standards for Rangeland Health are being met."

According to the Draft Handbook, as well as common sense, relevant indicators include evidence of soil movement, physical or chemical soil crusts, compaction layers, flow patterns, rills and gullies, *distribution* as well as amount of cover, plant community structure and productivity, plant vigor, seedling recruitment, and nutrient cycling. These indicators should be observed over larger areas than the five monitoring plots considered in the Assessment, and the areas observed should include those parts of the Allotment that receive the heaviest livestock use.

The Assessment is particularly deficient in its narrow focus on plant community composition. The Arizona Standards state that plant community *structure* and *distribution* must also be evaluated and considered. The ecological status information in the Assessment, however, provides information only on species composition.

It is apparent that livestock grazing on the Beanhole Allotment is having substantial adverse impacts on plant community structure. I have observed areas of the allotment where four-wing saltbush, normally a large shrub several feet tall, is reduced to a dwarf form less than a foot high by repeated severe browsing. This stunted growth form does not provide cover and

nesting habitat for birds or mammals, is aesthetically ugly, and does not produce the seeds that a healthy shrub would. But this and other aspects of plant community structure and function are completely ignored by the Assessment.

The data in the Assessment also reveal nothing about soil conditions on the Allotment. Standard 1 of the Arizona Standards for Rangeland Health requires that soil infiltration, permeability, and erosion rates be appropriate to the soil type, climate, and landform. The Assessment states that this standard is being met, but it provides no information to support that conclusion.

In order to assess the health of the rangeland on the Allotment, the BLM must also make every attempt to ascertain the historical condition of the rangeland. In particular, it is essential to determine how much of the area that now contains only shrubs and bare soil once had a cover of perennial grasses.

The limited monitoring data presented in the Assessment simply do not adequately cover the range of factors necessary to assess the ecological health of the Allotment. Not only do they

omit many relevant indicators, but they cover an extremely limited area, and there is no information in the Assessment to show that the monitoring plots are on the parts of the Allotment most heavily affected by livestock grazing.

4. The Assessment fails to evaluate the condition of wildlife habitat on the allotment and how that condition is being affected by grazing.

While the assessment makes numerous references to wildlife habitat, it provides remarkably
little information on the condition of wildlife habitat on the Beanhole Allotment and the effects of grazing on that habitat. The Assessment states on pages 20 and 21 that habitat for nongame birds, small mammals, bats, amphibians, and reptiles is being maintained, but there is no evidence or analysis to support those conclusory statements.

An essential aspect of wildlife habitat is cover. Birds, mammals, and reptiles all require cover for protection from the elements, for refuge from predators, for nesting, and for rearing their young. Pronghorn in particular need cover for concealing their fawns, and they need it near water.

Wildlife cover depends critically on the *height* of vegetation, and of the most severe and pervasive effects of livestock grazing is the elimination of cover by reducing the height of vegetation. Grazing at a 45% utilization level reduces grasses to a few inches of stubble. Moreover, as noted above, heavy browsing on shrubs on the Allotment has, in some areas, reduced them from their potential height of several feet down to less than a foot, effectively eliminating their value as cover.

The issue of wildlife cover is ignored by the Assessment. The monitoring data on species composition and abundance reveal nothing about the abundance, distribution, and condition of wildlife cover on the allotment. The data on "ground cover" also reveal little or nothing about wildlife cover because they do not reflect the height of the vegetation.

The Assessment (page 5, 27) states that there is "no potential to improve pronghorn antelope habitat from a forage or structure perspective." This is obviously false. Allowing grasses and shrubs to attain and maintain their natural height would improve pronghorn habitat from a structural perspective.

Moreover, the Assessment later admits (page 14) that the forbs preferred by pronghorn are lacking on the allotment. But it totally ignores the role of livestock grazing in reducing the abundance and availability of such forbs. It also fails to assess or consider the effects of grazing on the dietary need of other wildlife species besides pronghorn.

5. The Assessment fails to address the deplorable ecological condition of the bottom areas on the allotment.

As the BLM is well-aware, there are substantial areas of the allotment that are nearly devoid of native vegetation. The enclosed photograph shows one such location in July, 1998. As the photograph also shows, this area is severely overgrazed. The forage utilization is virtually 100%. The density of cattle must have been quite high, as indicated by the high density of cattle manure on the ground. Given this intense level of grazing, it is no wonder that the ecological condition of the area is very poor.

Instead of addressing the overgrazing of the area, the Assessment seeks to blame the lack of native vegetation on a "compaction layer" in the soil. *There is no evidence for the existence of such a layer.* As explained in the enclosed letters, test holes dug both by BLM personnel and by Dr. Richard Conant revealed that there is no such layer.

Moreover, the Assessment repeatedly states that these areas of the allotment *meet* the Arizona Standard for soil infiltration rates and permeability. This is a fundamental contradiction. If the BLM concludes that the soil is so compacted that growth of native vegetation is prevented or inhibited, it cannot simultaneously claim that the standard for permeability and infiltration is being met.

The BLM offers a number of statements that purportedly provide evidence that these areas are improving, but in fact these statements show nothing of the sort:

– The fact that the bottoms have looked bad for a long time shows only that they have been overgrazed for a long time. The permittee's statement that he has observed a "marked improvement" is completely self-serving, unscientific, and unreliable.

– The fact that *other* areas with a component of Russian thistle show a greater, and more vigorous, component of perennial grass or an upward trend, does not in any way show that *these* areas are improving. It does, however, show that there is a *potential* for improvement if these areas are relieved of grazing.

– The fact that seedlings of desirable plants are present also shows that these areas *can* support such plants, but it does not show that they are improving.

– The claim (page ii) that "many management actions have been implemented " since 1980 to improve conditions in these areas is meaningless, since they continue to be overgrazed.

The BLM concludes that "current management is not identified as a significant factor in preventing attainment of Standard 3" in these areas. There is no evidence to support this claim, and it flies in the face of common sense and the obvious overgrazing that is occurring

II. The Assessment fails to recognize the relationship between grazing and drought.

The Assessment states, again and again, that any problems with vegetation on the allotment are the result of drought and not overgrazing. But it utterly fails to recognize that problems caused by grazing and drought are inseparable. Drought-stressed plants are more vulnerable to grazing; plants stressed by grazing are more vulnerable to drought. Plant communities in the southwest survived repeated droughts for thousands of years; it was only when the stress of grazing was added that they became unable to survive droughts.

Drought is inevitable on the Beanhole Allotment. If grazing on the allotment cannot be managed in a way that will maintain healthy plant communities during times of drought, then it should be discontinued.

ii. Comments on Santa Maria Community Allotment Evaluation

Mr. John Christensen
Field Manager
Kingman Field Office
Bureau of Land Management
Kingman, AZ 86401

July 5, 2000

Re: Santa Maria Community Allotment Evaluation

Dear John,

The following are my comments on the Santa Maria Community Allotment Evaluation (the Evaluation), which I received on June 19 under cover of a letter from you dated 15 June. These comments are my professional opinions. They do not necessarily represent the views of Arizona State University or of the College of Law

Although the Evaluation was not marked "proposed" or "draft," I conclude from your invitation for comments that it is not final. To the extent that the Evaluation constitutes a proposed decision, please consider these comments to be a Protest of that proposed decision.

If you consider the Evaluation to be final, please inform me immediately and please consider these comments to be a Notice of Appeal.

I did not attend the field trips on the Santa Maria Community Allotment because they were scheduled on days when I had to teach classes at ASU. However, if it would be helpful in resolving the issues raised in these comments, I would welcome an opportunity to visit the Allotment with you or your staff on a day when I am available.

Summary

The Evaluation contains some useful information about the Santa Maria Community Allotment (the Allotment). However, the Evaluation does not adequately assess whether the Allotment is meeting the Fundamentals of Rangeland Health (the Fundamentals), the Arizona Standards for Rangeland Health (the Standards), or the Arizona Guidelines for Livestock Grazing Management (the Guidelines). Nor does the Evaluation recommend adequate or appropriate measures for future management of the Allotment. The following are the major shortcomings of the Evaluation:

(1) The Evaluation considers only the Standards. It fails to assess whether the Allotment is meeting the Fundamentals or the Guidelines.

(2) The Evaluation fails to consider information other than monitoring data on forage utilization, species composition, and ground cover. These data do not address many of the factors necessary to determine whether the Allotment is meeting the Fundamentals, the Standards, or the Guidelines. The Evaluation ignores other indicators that should be used to determine whether the Allotment is meeting the Fundamentals, the Standards, and the Guidelines.

(3) The Evaluation fails to recognize that the monitoring data that it contains, though limited in scope, nonetheless reveal that vegetation and watershed conditions on the Allotment are unsatisfactory and getting worse.

(4) The Evaluation summarily and unjustifiably concludes that livestock grazing is not impeding progress towards meeting the Standards.

(5) The Evaluation fails to recognize that the monitoring data that it contains reveal that current forage utilization levels on the Allotment equal or exceed acceptable levels.

(6) The Evaluation unjustifiably recommends permitting a large increase in grazing use of the Allotment compared to current use and use over the last eighteen years.

(7) The Evaluation contains inappropriate objectives for the Allotment.

(8) The Evaluation fails to recommend adequate measures to improve grazing management on the Allotment.

(9) The Evaluation fails to provide a reasoned and informed analysis of whether livestock grazing is an appropriate use of the public lands on the Santa Maria Community Allotment.

1. The Evaluation fails to assess whether the Allotment is meeting the Fundamentals of Rangeland Health or the Arizona Guidelines for Grazing Management.

The BLM is required to assure that the Allotment meets the Fundamentals of Rangeland Health and the Arizona Guidelines for Livestock Grazing Management as well as the Arizona Standards for Rangeland Health. The Fundamentals contain a number of important requirements that are not contained in the Arizona Standards, including, but not limited to, requirements that (a) the upland components of watersheds are in proper functioning physical condition, (b) hydrologic, nutrient, and energy cycles are maintained to support healthy biotic communities, and (c) water quality complies with state water quality standards. The Evaluation does not even mention the Fundamentals or the Guidelines, let alone assess whether the Allotment is meeting

them.

2. The Evaluation fails to consider information other than monitoring data on forage utilization, species composition, and ground cover.

Assessment of whether the Allotment is meeting the Fundamentals and the Standards requires examination of a number of factors related to soils, vegetation, and water over a large area. Measuring species composition, forage utilization, and ground cover on five small plots provides some useful information, but it does not adequately address all, or even most of the factors that need to be considered.

The BLM Publication INTERPRETING INDICATORS OF RANGELAND HEALTH: DRAFT HANDBOOK (April, 1998) provides a guide to the type of information that should be, and can be, collected and considered along with the monitoring data. According to guidance from the Washington Office of the BLM (Information Bulletin No. 99-186), the methods described in this document "should be used in conjunction with monitoring and other inventory data to identify if resource problems exist" and "is recommended as one tool (along with existing monitoring, inventory, and other appropriate information and input) to determine if State Standards for Rangeland Health are being met."

According to the Draft Handbook, as well as common sense, relevant indicators include evidence of soil movement, physical or chemical soil crusts, compaction layers, flow patterns, rills and gullies, *distribution* as well as amount of cover, plant community structure and productivity, plant vigor, seedling recruitment, and nutrient cycling. These indicators should be observed over larger areas than the five monitoring plots considered in the evaluation, and the areas observed should include those parts of the Allotment that receive the heaviest livestock use.

In order to assess the health of the rangeland on the Allotment, the BLM must also make every attempt to ascertain the historical condition of the rangeland. In particular, it is essential to determine how much of the area that now contains only shrubs and bare soil once had a cover of perennial grasses.

The limited monitoring data presented in the Evaluation simply do not adequately cover the range of factors necessary to assess the ecological health of the Allotment. Not only do they

omit many relevant indicators, but they cover an extremely limited area, and there is no information in the Evaluation to show that the monitoring plots are on the parts of the Allotment most heavily affected by livestock grazing.

On my visits to the Santa Maria Community Allotment, I have observed large areas of bare soil where there is no vegetation except scattered Creosote Bush. I have also observed hard-packed soil, gullies, and erosion rills. These are not healthy rangelands or functioning watersheds, and they need to be accounted for in the Evaluation.

3. The Evaluation fails to recognize that the monitoring data that it contains, though limited in scope, nonetheless reveal that vegetation and watershed conditions on the Allotment are unsatisfactory and getting worse.

The limited monitoring data contained in the Evaluation reveal unsatisfactory vegetation and watershed conditions. Of the five monitoring plots, two reveal less than 25% overlap between the current species composition and the potential natural community, and are thus in an "Early Seral," usually known as "Poor," condition. Two have less than 50% overlap and are in a "Mid Seral," usually known as "Fair," condition. Only one plot has (barely) greater than 50% overlap to yield a "Late Seral," usually known as "Good" condition. Thus, the condition of four out of five plots is unsatisfactory and the fifth is barely satisfactory.

The vegetative change from the potential natural community to the current condition at the monitoring sites is characteristic of overgrazing. The worst conditions are in the bottom sites (2 and 5) where cattle use tends to be heaviest. According to the Range Site Descriptions, these sites have deep soils and very good or excellent plant-soil moisture relationships in their natural condition, and support a potential natural community dominated by perennial grasses. But the ground cover at these sites is currently dominated by bare ground and gravel, with basal live vegetation covering only 2% and 0.5% of the two sites, respectively, and litter covering less than twenty percent of each site. The perennial grasses that dominated the natural community are almost entirely gone, reduced from 70-80% of the vegetative composition to 13.5% at site 2, and reduced from 40-50% to 5% at site 5. Further, the little perennial grass that remains at these sites is almost entirely big galleta, a coarse, unpalatable grass that cattle avoid when there is anything better to eat. The good forage species, such as bush muhly, black grama, and sideoats grama, have been eliminated or nearly so. The most palatable shrub species, such as four-wing saltbush, are also gone, leaving only creosote bush, bursage, and cholla.

Comparison of the 1982 and 1999 data reveals that conditions are not improving on the allotment. If anything, they are getting worse. On site 2, grass and live vegetation cover remained approximately the same, but litter cover was reduced by nearly half. On site 5, the perennial grass component of the vegetative composition dropped from 13% to 5%, basal live vegetation cover dropped from 4.5% to 0.5%, and litter cover dropped from 32% to 17%.

Overall, the monitoring data reveal conditions ranging from poor to fair to barely good, with the poor condition areas getting worse and the fair condition areas not improving.

4. The Evaluation summarily and unjustifiably concludes that livestock grazing is not impeding progress towards meeting the Standards.

The Evaluation's discussion of whether livestock grazing is impeding progress towards meeting the Standards is limited to a couple of paragraphs on page 28. The discussion covers only one monitoring site (number 5) and addresses only the species composition data for that site. It does not address the unsatisfactory conditions at the other monitoring sites or in areas

other than the monitoring sites, and it does not address the other factors that should go into a determination of whether the Allotment is meeting the Fundamentals or the Standards.

Even the limited discussion of the vegetative composition at site 5 is misguided. It concludes that, because the few utilization measurements conducted at site 5 were less than ten percent, livestock grazing is not impeding progress towards meeting the Standards. This conclusion is unjustified for at least two reasons.First, the utilization measurements are sporadic, unsystematic, and very infrequent. There are only 5 measurements in eleven years, and no measurements at all in the five years 1995 - 1999. Most of the measurements were taken in years (1989 - 1991) when the number of cattle on the allotment was less than half of what the BLM proposes to allow. There is no correlation between the dates of the measurements and the times that livestock use the area; because the livestock are unmanaged and basically drift around the allotment on their own, there is no reason to believe that the measurements reflect the times of heaviest use at that location. There may have been times of much heavier use during the long periods – up to six years! – between measurements. (The measurement at site 1 of 27% utilization on galleta and 50% utilization on odora in April, 2000, demonstrates that this can, and does happen.) Because of the extremely low rainfall and long droughts in this area, even a single episode of heavy use can set back progress for years or even decades.

Second, even if utilization on the two, relatively unpalatable, measured species – big galleta and white bursage – is light, cattle may nonetheless be having serious impacts that would impede progress towards meeting the Standards. In a highly degraded ecosystem such as currently exists on the Santa Maria Community Allotment, even light grazing can prevent improvement. (That is why virtually all grazing management guides recommend much lower utilization rates in poor condition areas than in better areas.) Trampling by cattle hooves can compact the soil and destroy perennial plant seedlings and small shrubs. Consumption of annuals by cattle deprives the site of badly-needed litter and groundcover. Moreover, if more palatable plant species – such as bush muhly or four-wing saltbush – were germinating at the site, they could be quickly consumed by cattle (and never even show up in the monitoring data) before the cattle even touch the less palatable species – big galleta and white bursage – that the BLM is monitoring.

5. The Evaluation fails to recognize that the monitoring data that it contains reveal that current forage utilization levels on the Allotment equal or exceed acceptable levels.

Only one set of utilization data, those dated April 2000, are current. The others all date from 1994 and earlier when livestock numbers on the Allotment were much lower than they are currently. In the April 2000 data, utilization was measured on only one grass species: big galleta (*hilaria rigida*). Big galleta is a coarse, relatively unpalatable grass that will be taken by livestock only when more palatable species are unavailable. Therefore, acceptable utilization levels on big galleta should be very low.

The April 2000 data show utilization on big galleta of 27%, 12%, 18%, 18%, and 9% at

the five sites. The average over the five sites is 17%. The Santa Maria Community Allotment is currently in unsatisfactory condition, and it is being grazed throughout the spring and summer growing season every year. Under these circumstances, utilization should not be permitted to increase above the current average of 17% for the most palatable species, let alone for an unpalatable species like galleta. Utilization guidelines that the BLM has developed for southern California (Bakersfield RAC), limit utilization of key species to 15 - 25% on sites in unsatisfactory condition where less than one rest period is provided per growing season of use.[1] National Forest plans for Arizona and New Mexico limit utilization of key species to 20% on fair condition sites and *zero* on poor condition sites on allotments with continuous or season-long use. Since big galleta is a relatively unpalatable species, the limit for big galleta should be even lower. The current average utilization level of 17% on big galleta is probably already too high, and certainly should not be permitted to increase.

6. The Evaluation unjustifiably recommends permitting a large increase in grazing use of the Allotment compared to current use and use over the last eighteen years.

The average number of livestock on the Santa Maria Community Allotment over the last eighteen years has been 87 and the maximum has been 154. With this number of livestock, forage utilization levels already meet or exceed acceptable limits, and the unsatisfactory vegetation and watershed conditions on the allotment have not improved. The Evaluation, however, proposes to allow the grazing of 198 cattle on the Allotment, over twice the eighteen-year average and a 29% increase over the current number. There is no justification for such an increase.

7. The Evaluation contains inappropriate objectives for the Allotment.

On page 10, the Evaluation lists four "objectives" for the allotment. I have been an affected interest on the Allotment for ten years, but I do not recall ever being consulted regarding the establishment of these objectives, and I do not agree with them.

There is no reason to make increasing forage utilization an objective. There is no benefit to the ecosystem from increasing forage utilization and it does not aid in achieving compliance with the Fundamentals or the Standards. Moreover, as discussed above, current forage utilization on the allotment already equals or exceeds acceptable limits.

Maintaining forage to support 198 cattle yearlong is also an inappropriate objective. There is no need or reason to attempt to maintain a historic number of cattle on the allotment that far exceeds the number that the allotment has supported over the last twenty years. The 1995 amendments to the BLM's grazing regulations, upheld by the Supreme Court this year in *Public*

[1] Rangeland Health Standards and Guidelines for California and Northwestern Nevada, Final EIS, p. 2-45, footnote ##.

Lands Council v. Babbitt, affirm that the BLM has no obligation to maintain historic numbers of livestock.

Instead of framing its objectives in terms of livestock production and forage utilization, the BLM should set specific, quantitative objectives for improving the ecological condition of the allotment, including increases in vegetative cover and litter, and increases in the species of vegetation that have been reduced or eliminated by livestock grazing.

According to the Arizona Standards for Rangeland Health, the criteria for meeting Standard 3 include the following:

> "Desired plant community objectives will be developed to assure that soil conditions and ecosystem function described in Standards 1 and 2 are met. They detail a site-specific plant community, which when obtained, will assure rangeland health."

The Evaluation needs to be redone to include such objectives and measures for attaining them

8. The Evaluation fails to recommend adequate measures to improve grazing management on the Allotment.

Except for the limitation on season of use in the river corridor, livestock grazing on the Santa Maria Community Allotment is unmanaged. The Evaluation admits (page 9) that the permittee does not control his livestock. They wander at will through the south half of the allotment all year, including the entire spring and summer growing season.

The Evaluation does not propose any measures to improve this poor management. Instead it proposes to allow even more cattle (198) to graze in the same unmanaged fashion. It proposes to continue monitoring, while ignoring the clear message of the monitoring data that are already in hand.

Finally, although the Evaluation proposes to continue monitoring in the future, it gives no indication of what objectives the monitoring data will be measured against, or what management changes will be made if those objectives are not met. This is a prescription for doing nothing while allowing the degradation of the Allotment to continue.

9. The Evaluation fails to provide a reasoned and informed analysis of whether livestock grazing is an appropriate use of the public lands on the Santa Maria Community Allotment.

In the Comb Wash case (*National Wildlife Federation v. BLM*, 140 IBLA 85 (1997)), the Interior Board of Land Appeals (IBLA) held that the Federal Land Policy and Management Act (FLPMA) requires the BLM, before issuing a grazing permit, to make a reasoned and informed

decision of whether the grazing on the area covered by the permit is a use "that will best meet the present and future needs of the American people." Such a reasoned and informed decision requires a comparison of the economic and environmental harms and benefits of grazing in the area.

The BLM has never evaluated and compared the harms and benefits of grazing on the Santa Maria Community Allotment. No such evaluation and comparison can be found in the Lower Gila North Grazing EIS and MFP, and none can be found in the Santa Maria Community Allotment Evaluation. The Evaluation must be redone to include such an evaluation and comparison.

If the harms and benefits of grazing on the Santa Maria Community Allotment were compared, it is unlikely that grazing there could be justified. The desert climate there, with less than ten inches of annual rainfall, is very poorly suited to livestock grazing. The other values of the area -- including Wilderness, riparian habitat, and a potential Wild and Scenic River – far exceed the value of the livestock forage. The current grazing operation is using a large amount of land, and consuming taxpayer dollars and BLM time, for a very small amount of livestock production.

Conclusion

The Santa Maria Community Allotment is in sorry shape. Most of the original community of perennial grasses is gone, leaving expanses of creosote bush, bursage, and bare dirt. Where some perennial grass does remain, it is mostly the coarse and relatively unpalatable big galleta; the better forage species such as bush muhly, black grama, and sideoats grama are gone or severely depleted. These conditions are not improving; the trend is static at some sites and downward at others.

Abusive, virtually unmanaged grazing practices on the allotment continue. Except for the river corridor, the allotment is grazed year-round, with no rest during the spring or summer growing season.

Because the good forage species are gone, the BLM is reduced to monitoring utilization on the poor species that remain. The measured utilization levels, averaging 17% on big galleta, might be considered light if they were measured on more palatable species, on an allotment in good condition, managed to provide adequate rest periods. But given the species on which utilization is being measured, the unsatisfactory conditions on the Allotment, and the lack of grazing management, this level equals or exceeds acceptable limits.

Instead of proposing measures to improve grazing management on the Allotment, the BLM has proposed to allow a substantial increase in the stocking rate while continuing year-round grazing with no spring or summer rest periods. This is unacceptable.

Thank you for considering these comments. If you have any questions, please call me at (480) 965-3964.

Sincerely yours,

Joseph M. Feller

iii. Comments on House Rock Allotment Assessment

VIA FAX
HARD COPY BY FEDERAL EXPRESS

Joseph Feller
College of Law
Arizona State University
Tempe, AZ 85287-7906

Mr. Roger Taylor, Field Manager
United States Bureau of Land Management
Arizona Strip Field Office
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St. George, Utah 84790

July 2, 2001

Re: House Rock Allotment Assessment

The following are my comments on the "final draft" of the House Rock Allotment Assessment, dated June 1, 2001. Mr. Bob Sandberg informed me on the telephone on June 25, 2001, that these comments would be considered if received by July 2, 2001.

These comments are my professional opinions. They do not necessarily reflect the positions of Arizona State University or the College of Law.

Introduction

I have driven through the House Rock pasture of the House Rock Allotment dozens of times over the last decade, and I have always been appalled by the conditions that I have observed there. There is almost no vegetative cover, and what little vegetation there is is cropped nearly to the ground by heavy grazing. Large areas of bare soil are exposed to erosion by wind and rain, and there is virtually no cover or feed for any kind of wildlife. I was therefore perplexed to review the final draft of the House Rock Allotment Assessment (the Assessment) and discover that the BLM has concluded that that pasture, as well as all the other pastures on the allotment (with which I am less familiar), is meeting the Arizona Standards for Rangeland Health, and that the BLM has recommended continuation of current grazing practices on the entire allotment.

Digging into the appendices to the Assessment, I discovered that there is ample data to confirm my impression that the House Rock pasture is in a highly degraded condition and is being abused. According to the BLM's own monitoring, the grass and shrub species that provide the best feed for livestock and wildlife – and that constitute the majority of the potential natural vegetative community – have been almost entirely eradicated. Live vegetation cover is extremely low, and there is a large percentage of bare ground. Average forage utilization has exceeded the BLM's own standard of 50% (which is itself too high, see below) in most years. Utilization of the most desirable forage species has been as high as 80%.

Close reading of the Assessment reveals that the BLM has reached its conclusion that conditions are satisfactory on the House Rock Allotment only through a series of arbitrary and unjustifiable assumptions, manipulations, and omissions. These include, but are not limited to:

– abandoning all objectives for improvement of conditions that were established in land use plans and past management plans for the allotment;

– arbitrarily and unjustifiably declaring that the new "desired plant community" for every site on the allotment is exactly what is there now, no matter how badly degraded it is;

– arbitrarily and unjustifiably deciding that the management objective should be to maintain existing conditions on every site on the allotment;

– relying on outdated utilization data that reflect actual numbers of livestock far below what is currently authorized and what the BLM proposes to authorize in the future;

– averaging utilization data across multiple years, including years when there were very few livestock on the allotment;

– averaging utilization data between the most palatable forage species and the least palatable;

– averaging utilization across different locations on the allotment that receive different intensities of livestock use;

– ignoring data showing that basal live vegetation cover is decreasing at most measured sites on the allotment;

– ignoring key requirements of the national Fundamentals of Rangeland Health, the Arizona Standards for Rangeland Health, and the Arizona Guidelines for Grazing Administration; and

– ignoring all aspects of rangeland health, such as watershed functioning and wildlife habitat, that are not reflected in the BLM's limited and narrowly-focused monitoring data.

These and other flaws in the House Rock Allotment Assessment are discussed in detail below. In this discussion, I have focused on the House Rock Pasture, and in particular on monitoring site 3, both because that is the part of the allotment with which I am most familiar and because that is the part of the allotment that is in the worst condition. However, the BLM's analysis of conditions at other sites on the allotment follows the same pattern, contains the same assumptions, manipulations, and omissions, and is equally flawed. Therefore, the entire Assessment must be redone.

Moreover, having now commented on three different BLM grazing allotment assessments in Arizona (Santa Maria Community, Beanhole, and House Rock) I have observed that they all suffer from the same fundamental flaws. Apparently, these assessments all reflect a common, state-wide pattern. If so, then there is an urgent need for the Arizona State Office of the BLM to provide new guidance to clarify that this kind of assessment is unacceptable and does not satisfy the requirements of the BLM's regulations, the Fundamentals of Rangeland Health, or the Arizona Standards and Guidelines.

1. The Assessment Arbitrarily and Unjustifiably Makes Maintenance of the Status Quo the "Objective" for Every Pasture on the Allotment

a. The House Rock pasture is in a highly degraded condition as a result of overgrazing.

The data in the Assessment reveals that the House Rock pasture is in a highly degraded condition. At monitoring site 3 -- one of two monitoring sites in the House Rock pasture -- the majority of the ground is bare and live vegetation covers only two percent of the area. The correspondence between the current vegetation at that site and the potential natural community is only 36%. Indian ricegrass, a highly desirable forage plant which once dominated the site and which composes 40% of the potential natural community, has been reduced to a trace – less than one percent of the current vegetation. Four-wing saltbush, another major component of the potential natural community that is critical for wildlife, has been completely eliminated at site 3.

The current vegetation at site 3 in the House Rock Pasture is characteristic of overgrazing. The species of vegetation that have been wiped out are the cool-season grasses and the palatable shrubs that cattle concentrate on during the fall, winter, and spring. The only perennial plants from the potential natural community that remain in substantial abundance are warm-season grasses – blue grama and sand dropseed – that are relatively unpalatable most of the year and that are known as "increasers" because they typically increase in heavily grazed areas.

b. Vegetation on the other pastures on the allotment has also been substantially degraded by overgrazing.

Although the ecological condition of the other pastures on the House Rock Allotment is better than that of the House Rock pasture, the other pastures have also suffered from the effects of overgrazing. Of particular concern is the almost complete elimination of fourwing saltbush, an evergreen shrub that provides critical feed and structural habitat for numerous species of wildlife.
Fourwing saltbush is frequently subject to overgrazing because it is palatable in the fall and winter and in drought years when most grasses may be unavailable or unpalatable.

According to the BLM's ecological site descriptions, fourwing saltbush should be a significant component (10-15%) of the vegetative community at every site on the House Rock Allotment. But the data in the Assessment reveal that fourwing saltbush has been virtually eliminated at five out of the six sites. In 1997, fourwing saltbush made up 0% of the vegetative community at site 1 in the Sand pasture, just 2% at site 2 in the Parker pasture, 0% at site 3 in the House Rock pasture, 3% at site 4 in the Parker pasture, and 0% at site 6 in the House Rock pasture. Only at site 5 in the Sand pasture is fourwing saltbush present at anywhere near its natural abundance.

c. Past BLM management plans recognized the degraded condition of the House Rock Allotment and set objectives for improvement.

The land use plan for the area including the House Rock Allotment placed the allotment in the "Improve" category because of the need for improvement in resource conditions on the allotment. In the 1981 allotment management plan (AMP) for the allotment, the BLM set specific objectives for increasing the abundance of vegetation species that had been depleted by overgrazing, including Indian ricegrass, black grama, and fourwing saltbush.

d. The Assessment arbitrarily and unjustifiably abandons all objectives for improvement and substitutes "desired plant community objectives" of maintaining the status quo at all sites on the allotment.

The final draft Assessment for the House Rock Allotment abandons all attempts at improvement and sets "desired plant community objectives" of maintaining the status quo, no matter how degraded, at every monitoring site in every pasture on the allotment. (Actually, as will be explained below, these "objectives" even allow for substantial additional degradation at some sites.) By setting "objectives" equal to, or even below, the status quo, the BLM has made a farce out of the entire allotment assessment process. Under the BLM's new methodology, no allotment can ever possibly be found to be in an undesirable condition, because the "desirable" condition is defined to be whatever exists at the moment.

The trick of setting "desired plant community objectives" equal to or below the status quo is not only inconsistent with the land use plan that placed the House Rock Allotment in the "Improve" category and with the objectives set in the 1981 AMP, it is also inconsistent with the Arizona Standards for Rangeland Health (the Standards) and the national Fundamentals of Rangeland Health (the Fundamentals). The Standards require the existence and maintenance of "productive and diverse" communities of native species (Standard 3) and sufficient vegetative ground cover to maintain soil permeability, promote water infiltration, and prevent accelerated erosion (Standard 1). The Fundamentals require that upland watersheds be in proper functioning condition.

The Assessment does not explain, and cannot explain, why a plant community in which cool-season grasses and palatable shrubs that are essential to wildlife have been virtually eliminated, and in which the only plants remaining in substantial quantities are those unpalatable grasses that increase in response to overgrazing, should be considered "productive and diverse." The Assessment also does not explain, and cannot explain, why a site which is mostly bare soil and where live vegetation covers only two percent of the ground should be deemed to have adequate vegetative cover or to represent a properly functioning watershed.

e. The Assessment masks degraded conditions, and sanctions further degradation, by lumping together data on different species of vegetation.

Evaluation of rangeland condition requires careful attention to the way that different species of vegetation respond to livestock grazing. Overgrazing typically results in the depletion

or elimination of species of vegetation that are highly palatable to livestock and/or are intolerant of grazing ("decreasers") and an increase in species that are relatively unpalatable or are grazing-tolerant ("increasers"). The loss of the "decreasers" is of special concern because the decreaser plant species that are highly palatable to livestock tend to also be the species that are most palatable to wildlife (e.g., fourwing saltbush). For this reason, the BLM's 1981 AMP set objectives for reestablishing specific increaser species that have been reduced or eliminated, including Indian ricegrass, black grama, and fourwing saltbush

The Assessment deliberately blurs the distinction between decreasers and increasers, and misleads the public, by grouping together both types of plants in the category of "forage" plants and comparing their abundance with that of "non-forage" plants. This lumping of data creates the appearance of improvement when in fact conditions are static or even declining and the only species that are increasing are unpalatable and grazing-tolerant plants such as blue grama and galleta grass. Thus, for example, the Assessment claims that conditions are improving at site 3 in the House Rock pasture, but almost all the "improvement" consists of increases in the warm-season, relatively unpalatable grasses blue grama and sand dropseed. The best, and most severely depleted, forage species – Indian ricegrass, winterfat, and fourwing saltbush – remain absent or nearly absent at site 3.

What's worse, the Assessment replaces the previous objectives with new "desired plant community objectives" that make no reference to specific plant species but refer instead to plant community composition in terms of the broad categories of "grasses" and "shrubs." These new "objectives" would allow the BLM to claim that it is "meeting objectives" even if the most desirable grass and shrub species decline further and are replaced by more increasers, or even by invasive plants such as snakeweed.

The Assessment also sets "objectives" for the ecological condition at each monitoring site, but these, too, allow for substantial degradation by referring only to broad condition classes. Thus, for example, at site 3 on the House Rock pasture, the ecological condition rating could drop from the current 36% to 25% and the BLM could still claim that it is meeting its "objective" of maintaining the site in a "mid-seral" condition.

2. The Assessment Relies on Improper Averaging and Incomplete Data to Unjustifiably Conclude that Forage Utilization Levels on the House Rock Allotment are Acceptable

a. Data in the Assessment reveal excessive utilization levels.

The BLM has set an acceptable utilization level of 50% on key forage species on the House Rock Allotment. As I will explain below, this standard is too high. Nonetheless, even as measured by this standard, utilization of the most palatable forage species, especially the cool-season grasses and the shrubs, has often been excessive on the House Rock Allotment.

Data in Appendix Section D of the Assessment reveal that, at monitoring site 3 in the

House Rock pasture, the best forage grasses and the shrubs have repeatedly been overgrazed. Utilization of Indian ricegrass exceeded 50% in four out of eight years that it was measured, including the three most recent measurements. Utilization of black grama exceeded 50% in three out of six years that it was measured.

Palatable shrubs have fared even worse at site 3. Utilization of winterfat exceeded *60%* percent in four out of six years that it was measured. Utilization of fourwing saltbush exceeded 50% in five out of seven years that it was measured, exceeded 60% in four of those years, and reached a shocking 80% in the most recent measurement.

Overgrazing is also occurring at other sites on the allotment. At site 1 in the Sand Pasture, utilization of fourwing saltbush exceeded 50% in seven out of thirteen years that it was measured, and utilization of Indian ricegrass exceeded 50% in four of those years. At site 2 in the Parker pasture, utilization of Indian ricegrass exceeded 50% in eight out of twelve years, utilization of galleta grass exceeded 50% in eight out of twelve years, and utilization of sand dropseed exceeded 50% six out of eight years and exceeded *60%* in five of those years. At the same site, utilization of fourwing saltbush exceeded 50% six out of nine years that it was measured and reached 80% in two of those years.

At site 4 in the Parker pasture utilization of Indian ricegrass exceeded 50% in four out of thirteen years that it was measured, utilization of sand dropseed exceeded 50% in seven out of eleven years, and utilization of fourwing saltbush exceeded 50% in three out of nine years, reaching 80% in 1989. At site 5 in the Sand Pasture, utilization of Indian ricegrass exceeded 50% in four out of twelve years that it was measured, utilization of sand dropseed exceeded 50% in five out of eleven years and reached 71% in 1989, and utilization of fourwing saltbush exceeded 50% in four out of twelve years and reached 76% in 1978.

The only monitoring site where utilization of the most palatable grasses has not regularly exceeded 50% is site 6 in the House Rock Pasture, and even at that site utilization of Indian ricegrass exceeded 50% in two out of the last three measurements and utilization of sand dropseed reached 74% in one measurement. Moreover, utilization of shrubs at site 6 has been excessive. Utilization of winterfat exceeded 50% in four out of six years that it was measured, exceeded 65% in three of those years, and reached 77% in one year. Utilization of fourwing saltbush at site 6 was 62% in the only year that it was measured.

These high forage utilization levels help to explain why the BLM has failed to meet the objectives that it once set – and has now abandoned – for increasing the abundance of desirable forage species such as Indian ricegrass and fourwing saltbush on the House Rock Allotment. Simply put, the allotment is being overgrazed.

b. The Assessment masks the evidence of overgrazing by improperly averaging utilization data across space, time, and species.

Despite the data in Appendix Section D revealing substantial and repeated overgrazing in the House Rock pasture, the BLM concludes in the text of the Appendix that the BLM's objective of keeping forage utilization below 50% has been met. The BLM reaches this conclusion only by engaging in three different kinds of improper and unjustifiable averaging. First, the BLM improperly averages utilization data from different monitoring sites in different pastures. Second, the BLM improperly averages utilization data from different years, including years in which there were very few livestock on the allotment (see below). Third, the BLM improperly averages utilization data from highly palatable forage species such as Indian ricegrass, black grama, fourwing saltbush, and winterfat with data from less palatable plant species such as blue grama and galleta grass.

There is no justification for either of these three different kinds of averaging. Low forage utilization at one site in one pasture does not make up for, or mitigate, overgrazing at another site in another pasture. In the arid climate of the House Rock Allotment, overgrazing in one year can create long-lasting damage – including elimination of desirable species, which has happened on the House Rock Allotment – that will not be repaired by light utilization in one or two other years. And over-utilization of the most desirable forage species is in no way cured or mitigated by lighter utilization of less palatable plants. Indeed, it is the combination of overgrazing of the most desirable species combined with lighter utilization of other species that creates the type unbalanced and distorted vegetative community that is found in the House Rock pasture today.

c. Utilization levels on much of the allotment are even higher than those reported in the Assessment.

As high as are the forage utilization levels reported in Appendix Section D of the Assessment, they do not reflect the even higher utilization levels that are occurring on much of the House Rock Allotment. As the BLM well knows, cattle prefer to graze near water, and utilization levels fall off sharply with distance from water. Most of the monitoring sites that the BLM has used to measure forage utilization on the allotment are far from water; some as much as a mile. They therefore do not reflect the most intensive livestock use on the allotment.

I have personally observed areas in the House Rock pasture where forage utilization is virtually 100%; the plants are grazed level with the ground. This severe utilization is not limited to small sacrifice zones around watering troughs; it covers at least hundreds, and possibly thousands, of acres.

d. The stocking rate that the BLM proposes to permit in the future will result in utilization levels even higher than those that have occurred in the past.

Although the utilization data in Appendix Section D of the Assessment reveal substantial and repeated overgrazing, they do not reflect the even higher utilization levels that may be currently occurring and that are likely to occur in the future if the stocking rate proposed in the Assessment is implemented.

To be properly used in developing prescriptions for future management, utilization data must be coupled with actual use data. Utilization data resulting from actual stocking levels that are lower than those authorized or proposed will under-estimate the utilization that will occur in the future if the allotment is stocked to the authorized level.

For the two monitoring sites in the House Rock pasture, the Assessment presents no utilization data more recent than 1988 – thirteen years ago. The only actual livestock use data in the Assessment is for years *after* 1988. Therefore, for the House Rock pasture there are no years for which the Assessment contains both the utilization data and the actual use data that are required for a proper assessment of stocking rate.

Moreover, the post-1988 actual use data on page 12 of the Assessment reveal that the actual stocking rate on the allotment has always been substantially less than the authorized number of 203 (196 cattle plus 7 horses). The actual stocking rate has varied from 22% of the authorized number in 1990 to 87% of the authorized number in 1998, and the average stocking rate for the period 1989 – 1999 was 116 animals, or only 57% of the authorized number.

In other words, if the permittee were to place on the allotment the full number of 203 animals that the BLM proposes to authorize in the future, then, on average, one can expect forage utilization rates will be nearly twice as high as those reported in Appendix Section D of the Assessment. Since those utilization rates already reflect substantial overgrazing, even as measured by the BLM's utilization standard of 50%, implementation of the BLM's proposal will result in severe overgrazing of the House Rock Allotment.

e. The 50% forage utilization level that the BLM deems acceptable is far too high.

Even if forage utilization were held within the 50% level that the BLM has deemed acceptable, that would still be far too high, especially in the highly degraded House Rock pasture. In a recent comprehensive review of fifty years of research on the effects of grazing intensity on range condition and productivity (*Grazing Studies: What We've Learned*, RANGELANDS, April 1999), Holechek et al. concluded that, regardless of what grazing system is used "30 - 35% use is needed for improvement in rangeland vegetation." The Forest Service has developed detailed guidance for acceptable utilization levels based on range condition and the type of grazing system employed. For pastures in fair condition, which are rested 1 year out of 3 (which is the system proposed in the EA), a utilization limit of 25% is recommended. Guidelines that the BLM has developed for southern California (Bakersfield RAC) limit utilization of key species to 15 - 25% on sites in unsatisfactory condition where less than one rest period is provided per growing season of use.[2] By any of these measures, 50% utilization is far too high.

[2] Rangeland Health Standards and Guidelines for California and Northwestern Nevada, Final EIS, p. 2-45, footnote ##.

Moreover, a utilization level of 50% is devastating to other multiple uses, including wildlife, scenery, soil conservation, and watershed protection. 50% utilization reduces mid-grasses such as Indian ricegrass, galleta, and sand dropseed to a stubble only 2-4 inches high. This short stubble provides little or no thermal or hiding cover and no nesting sites for birds or small mammals. It leaves soils exposed to erosion by wind and rain and dessication by the sun, and is scenically ugly.

3. The Assessment fails to assess whether the allotment is meeting the Fundamentals of Rangeland Health or the Arizona Guidelines for Grazing Management.

The BLM is required to ensure that the allotment meets the Fundamentals of Rangeland Health and the Arizona Guidelines for Livestock Grazing Management as well as the Arizona Standards for Rangeland Health. The Fundamentals contain a number of important requirements that are not contained in the Arizona Standards, including, but not limited to, requirements that (a) the upland components of watersheds are in proper functioning physical condition, and (b) hydrologic, nutrient, and energy cycles are maintained to support healthy biotic communities. The Assessment does not assess whether the allotment is meeting the Fundamentals or the Guidelines.

4. The Assessment fails to adequately address soil and watershed conditions on the allotment.

a. The Assessment fails to consider information other than monitoring data on forage utilization, species composition, and ground cover.

The Fundamentals of Rangeland Health require that the upland components of watersheds be in proper functioning physical condition, and that hydrologic, nutrient, and energy cycles be maintained Standard 1 of the Arizona Standards for Rangeland Health requires that soil infiltration, permeability, and erosion rates be appropriate to the soil type, climate, and landform. Assessment of whether the House Rock Allotment is meeting these mandates requires examination of a number of factors related to soils, vegetation, and water over a large area. Measuring species composition, forage utilization, and ground cover on six small plots provides some useful information, but it does not adequately address all, or even most of the factors that need to be considered.

The BLM Publication INTERPRETING INDICATORS OF RANGELAND HEALTH: DRAFT HANDBOOK (April, 1998) provides a guide to the type of information that should be, and can be, collected and considered along with the monitoring data. According to guidance from the Washington Office of the BLM (Information Bulletin No. 99-186), the methods described in this document "should be used in conjunction with monitoring and other inventory data to identify if resource problems exist" and "is recommended as one tool (along with existing monitoring, inventory, and other appropriate information and input) to determine if State Standards for

Rangeland Health are being met."

According to the Draft Handbook, as well as common sense, relevant indicators include evidence of soil movement, physical or chemical soil crusts, compaction layers, flow patterns, rills and gullies, *distribution* as well as amount of cover, plant community structure and productivity, plant vigor, seedling recruitment, and nutrient cycling. These indicators should be observed over larger areas than the five monitoring plots considered in the Assessment, and the areas observed should include those parts of the allotment that receive the heaviest livestock use.

The Assessment is particularly deficient in its narrow focus on plant community composition. The Arizona Standards state that plant community *structure* and *distribution* must also be evaluated and considered. The ecological status information in the Assessment, however, provides information only on species composition.

It is apparent that livestock grazing on the House Rock Allotment is having substantial adverse impacts on plant community structure. I have observed areas of the allotment dominated by bare soil and where heavy grazing has left no vegetation remaining more than an inch above the ground. In other areas I have observed fourwing saltbush, a tall shrub normally several feet tall, reduced by repeated severe browsing to a dwarf form less than a foot tall. This severe grazing leaves no cover or nesting habitat for birds or mammals, is aesthetically ugly, and leaves soils completely vulnerable to wind and water erosion. But this and other aspects of plant community structure and function are completely ignored by the Assessment.

The data in the Assessment reveal virtually nothing about soil conditions on the allotment. Standard 1 of the Arizona Standards for Rangeland Health requires that soil infiltration, permeability, and erosion rates be appropriate to the soil type, climate, and landform. The Assessment states that Standard 1 of the Arizona Standards for Rangeland Health is being met, but it provides little or no information to support that conclusion. It claims that "soil loss or degradation are not at issue over most of the allotment and ground cover is adequate to protect the soil," but it again provides no data or analysis to support that conclusion. The ground cover data in Appendix Section D are limited to six small monitoring plots and there is no information in the Assessment to show that the monitoring plots are on the parts of the allotment most heavily affected by livestock grazing.

b. The limited data in the Assessment reveal very poor ground cover.

The limited data in the Assessment reveal a disturbingly low level of ground cover. At the six monitoring sites, the percentage of bare ground in 1997 was 69%, 64%, 53%, 62%, 77%, and 36%, respectively. (At site 3, the 53% bare ground represents a doubling of the bare ground percentage since 1983.) The percentage of the ground covered by basal live vegetation at these sites was only 2%
at four of the six sites, 3% at one site, and 6% at one site. These data contradict the Assessment's claim that "ground cover is adequate to protect the soil."

c. Basal live vegetation cover is declining at most sites.

The Assessment state (footnote 5, page 5) that basal live vegetation cover is the most stable measure of long-term trend. But it then goes on to ignore that statement, and to claim an "improving" trend based on measurements of total ground cover, including non-persistent litter.

Based on measurement's of basal live vegetation, the groundcover trend is **downward** on most measured sites on the allotment. From the early 1980s to 1997, basal live vegetation cover dropped by half at site 2, dropped by half at site 4, dropped by 40% at site 5, and dropped by 15% at site 6. At site 1, basal live vegetation cover stayed the same from 1982 to 1997. Only at site 3 did it increase.

Thus, by the Assessment's own criterion, groundcover on the allotment is on a downward trend. The data flatly contradicts the Assessment's statements that conditions are static or improving.

5. The Assessment fails to recommend measures to alleviate damage caused by overgrazing even in areas that it admits do not meet the Standards of Rangeland Health .

The Assessment admits that there are portions of the House Rock Allotment where soil and vegetation conditions are highly unsatisfactory. On page 19, the Assessment discusses areas of about 500 acres where perennial vegetation is lacking and where Russian thistle is the dominant plant. On page 22, the Assessment admits that soil and watershed conditions in these areas are unsatisfactory. These areas do not meet the requirements of the Fundamentals of Rangeland Health or of the Arizona Standards for Rangeland Health. However, the Assessment fails to recommend any management changes that would lead to improvement in those areas.

a. Overgrazing is the most likely cause of the degraded conditions in the thistle-dominated areas.

Russian thistle is a non-native, invasive plant that thrives on disturbed sites; it is a classic indicator of overgrazing. Moreover, as the Assessment admits, these areas are near livestock water sources, another indication that the conditions are caused by grazing.

Although the Assessment attempts to link the poor conditions to soil type, it is apparent that these conditions occur on at least two different types of soils: sandy loam uplands and silty bottoms. These are very different types of soils. The factor that the thistle-dominated areas have in common is that they are heavily grazed. Moreover, although there may be no accurate ecological site description for the silty bottoms, the ecological site description for the sandy loam uplands indicates that the dominant vegetation should be native perennial grasses. Finally, even if complete ecological information is not available for the silty bottoms, it is obvious that a plant community dominated by an exotic weed is not the natural condition of these sites.

The Assessment talks about the possible existence of "compacted layers" in the soil in

these areas but there is no evidence for the existence of such layers except the roots of some plants are being "turned." The turning of roots by variations in soil density is a very common phenomenon and does not indicate a problem that would explain why native grasses have been replaced by Russian thistle over hundreds of acres. Moreover, even if there is a compacted layer, it was almost certainly created by trampling by livestock, which is why it is found near livestock water sources.

b. The Assessment would authorize continued overgrazing of the thistle-dominated areas.

Despite the evidence pointing to livestock grazing as the obvious cause of the thistle-dominated areas, the Assessment recommends absolutely no management changes to alleviate the problem. It merely notes that authorized AUMs have decreased from 223 to 203 -- a trivial reduction of only ten percent[3] – and that the current grazing system allows spring rest in two years out of three. But the current grazing system allows utilization up to 50%, which, as noted above, is far too high to allow recovery of areas in very poor condition. And, as also noted above, the utilization data in the Assessment reveal that the 50% limit is often exceeded.

Moreover, the Assessment admits that the thistle-dominated areas are not a "key site" where utilization is monitored. Because the thistle-dominated areas are closer to water sources than are the key areas, forage utilization there is higher than in the key areas. In other words, the BLM is starting with an already-too-high limit of 50%, allowing that limit to be regularly exceeded at the monitoring sites, and allowing even greater overgrazing near water sources.

Finally, if, as the Assessment asserts, a compaction layer is the cause of the problem, then a rotational grazing system will do nothing to solve the problem. Soil compaction is caused by the weight of livestock in any season of the year; seasonal rest does not alleviate it.

c. The evidence of "improvement" in the thistle-dominated areas is illusory.

The Assessment offers a number of statements that purportedly provide evidence that these areas are improving, but in fact these statements show nothing of the sort:

– The permittees' statement that they have observed a "marked improvement" is completely self-serving, unscientific, and unreliable.

[3] Moreover, as noted above, the recommendations in Assessment would actually allow an *increase* in the number of livestock compared to recent actual use.

– The fact that *other* areas with a component of Russian thistle show a greater, and more vigorous, component of perennial plants not in any way show that *these* areas are improving. It does, however, show that there is a *potential* for improvement if these areas are relieved of grazing.

– The fact that seedlings of desirable plants are present also shows that these areas *can* support such plants, but it does not show that they are improving.

– The fact that the edges of these areas, and the surrounding ecological sites, are in better condition simply provide further evidence that overgrazing is the cause of the problem: conditions improve as one moves away from the areas of heaviest grazing.

– The claim that "many management actions have been implemented " since 1980 to improve conditions in these areas is meaningless, since they continue to be overgrazed.

6. The Assessment fails to evaluate the condition of wildlife habitat on the allotment and how that condition is being affected by grazing.

a. The Assessment fails to address the severe degradation of habitat for the House Rock Valley chisel-toothed kangaroo rat (HVCTKR or K-Rat).

The Assessment claims, with no supporting data or analysis, that "the allotment is meeting standard 3 in providing suitable, currently unoccupied habitat for the HVCTKR." This conclusion flies in the face of the information in the Assessment that reveals that, in fact, habitat for the K-Rat has largely been destroyed on the House Rock Allotment.

According to the information in the Assessment, the most critical element of suitable K-Rat habitat is fourwing saltbush. And, as discussed above, fourwing saltbush has been virtually eliminated by grazing on most of the allotment.

The Assessment also reveals that K-Rats require ground cover and are not found in areas of abundant bare soil. As note above, the data in Appendix D of the Assessment reveal that the majority of the soil is bare on five out of six monitoring sites on the allotment. The preponderance of bare soil on the allotment can be attributed to the high rate of forage utilization -- often exceeding 50% -- that leaves little residual material to form litter.

Appendix A of the Assessment reveals that there is a positive relationship between aerial shrub cover and annual ground cover and K-rat populations. Both annual ground cover and aerial shrub canopy are reduced by grazing. Even when utilization of perennial grasses is less than 50%, aerial shrub cover and annual ground cover may be severely reduced. I have personally observed areas of the House Rock allotment where annual ground cover was almost

totally removed by grazing, and shrubs were browsed to the point where they had virtually no canopy at all. Yet the Assessment completely fails to address these impacts on K-rat habitat.

Finally, the Assessment ignores the findings, conclusions, and recommendations of the study by Dr. Michael J. O'Farrell, the Executive Summary of which is reproduced in Appendix A. Dr. O'Farrell found that there was a distinct negative correlation between grazing intensity and the population density of K-rats. "Within each habitat type, the highest densities [of K-rats] were found on plots with the least amount of livestock sign." He recommended that "concentration of livestock within the blackbrush, shadscale, and fourwing saltbush habitats should be avoided." He also recommended that "[r]eduction in general use or a more frequent shift of use among existing pastures would increase the carrying capacity" for the K-rat.

The Assessment claims that the allotment contains only small islands of suitable, unoccupied K-Rat habitat, and these islands are isolated from other suitable habitat. However, the Assessment ignores the strong possibility that the suitable habitat would be much larger, and less isolated, and *occupied*, if fourwing saltbush had not been depleted and groundcover had not been reduced by grazing on so much of the allotment.

b. The assessment fails to address the effects of grazing on pronghorn.

The Assessment summarily states that there is "no potential to improve pronghorn antelope habitat from a forage or structure perspective." This statement is obviously false for at least four reasons. First, the data in Appendix Section D reveal that shrubs such as fourwing saltbush, winterfat, and Mormon tea, which provide critical winter feed for pronghorn, have been severely depleted over most of the allotment. Increasing the abundance of these shrubs would substantially improve forage for pronghorn.

Second, reduction or elimination of cattle grazing would leave more annual forbs for pronghorn. The Assessment admits (page 17) that annual forbs needed by pronghorn are typically lacking on the allotment, but dismisses the effects of livestock grazing by stating that the diet overlap between cattle and pronghorn is "not known." But it is well known that many annual forbs are highly palatable to livestock. Moreover, given the small quantity of forbs produced in many years, cattle could easily take most or all of them, leaving little or nothing for pronghorn, even if they constitute only a small percentage of the cattle's diet.

Third, allowing grasses and shrubs to attain and maintain their natural height would improve pronghorn habitat from a structural perspective by providing the over that pronghorn need to hide their fawns from predators.

Finally, the Assessment completely fails to address the effects of livestock fences on pronghorn movement. Removal of fences, or replacement of old fences with fences designed to allow pronghorn movement, would substantially improve pronghorn habitat on the House Rock

Allotment.

c. The Assessment fails to address the condition of habitat for other species of wildlife.

The Assessment states, on pages 8 and 9, that the allotment contains a variety of sensitive bat species as well as a variety of small mammals, grassland birds, raptors, and reptiles and that the allotment may also contain ferruginous hawks and western burrowing owls. The Assessment, however, provides no information on the habitat needs of any of these species, on the current condition of habitat for these species on the allotment, or on the effects of grazing on that condition.

On page 23, the Assessment claims that the habitat needs of birds, small mammals, bats, amphibians, and reptiles are all being met, but the only evidence offered in support of that claim is that "vegetation conditions are in a high seral state and generally improving." *Seral state is not a measure of wildlife habitat condition*. Seral state, as measured by vegetative species composition, tells little or nothing about the availability of food, cover, nesting, or breeding resources for wildlife.

An essential aspect of wildlife habitat is cover. Birds, mammals, and reptiles all require cover for protection from the elements, for refuge from predators, for nesting, and for rearing their young. Pronghorn in particular need cover for concealing their fawns, and they need it near water.

Wildlife cover depends critically on the *height* of vegetation, and one of the most severe and pervasive effects of livestock grazing is the elimination of cover by reducing the height of vegetation. Grazing at a 50% utilization level reduces grasses to a few inches of stubble. Moreover, as noted above, heavy browsing on shrubs on the Allotment has, in some areas, reduced them from their potential height of several feet down to less than a foot, effectively eliminating their value as wildlife cover.

The issue of wildlife cover is ignored by the Assessment. The monitoring data on species composition and abundance reveal nothing about the abundance, distribution, and condition of wildlife cover on the allotment. The data on "ground cover" also reveal little or nothing about wildlife cover because they do not reflect the height of the vegetation.

7. The Assessment fails to address the degradation of the natural scenic landscape by grazing.

The House Rock Allotment is located in one of the most scenic areas in the United States. It lies almost literally in the shadow of the spectacular Vermilion Cliffs, and for that reason much of it has been included in the Vermilion Cliffs National Monument. It also lies astride the

main highway connecting Lake Powell to the North Rim of the Grand Canyon. It forms the foreground of views of the Vermilion Cliffs from the west and views of the Kaibab Plateau from the east. Travelers to the North Rim begin their ascent of the Kaibab Plateau at the House Rock Allotment, and they look down it from the prominent scenic overlook on that ascent. For this reason, maintenance of scenic quality should be a high priority in management of the allotment. Management objectives that the BLM has set in past planning efforts have given some recognition to scenic values. Objectives RR03, RR11, and RR43 require maintenance of high-quality natural scenic landscapes. And the Assessment recognizes that "hundreds of thousands of travelers travel the highway every year and enjoy its scenic values; any management which detracts from the enjoyment of the viewshed can result in negative reactions to that management."

However, the Assessment fails to recognize how current and proposed management degrade scenic values. The House Rock pasture is an ugly scene of devastation, with grasses grazed down to nearly bare ground. The Assessment totally ignores this issue; it contains no discussion of the extreme visual impact of the 50% forage utilization that the BLM authorizes. Moreover, by focusing nearly exclusively on monitoring data gathered far from the highway, the Assessment overlooks the even higher utilization that occurs near the highway.

Thank you for considering these comments. Please keep me informed of all developments concerning the management of the House Rock Allotment. If you have any questions, please call me at (480) 965-3964, or e-mail me at joseph.feller@asu.edu.

Joseph M. Feller

iv. Comments on Santa Maria Ranch Allotment Evaluation

VIA FAX
Original by Federal Express

Mr. John Christensen April 2, 2002
Field Manager
Kingman Field Office
U.S. Bureau of Land Management
Kingman, AZ 86401

Re: Santa Maria Ranch Allotment Evaluation

Dear John,

The following are my comments on the Santa Maria Ranch Allotment Evaluation (the Evaluation). These comments are my professional opinions. They do not necessarily represent the views of Arizona State University or of the College of Law.

Thomas Lustig, senior attorney for the National Wildlife Federation, has asked me to state that the National Wildlife Federation joins and concurs in these comments.

The Evaluation is fundamentally inadequate. I urge you to take the time to re-do it, rather than rush ahead with such a flawed effort.

1. Incorporation by Reference.

The Evaluation suffers from many of the same flaws as the Santa Maria Community Allotment Evaluation. I hereby incorporate by reference my comments, dated July 5, 2000, on the latter evaluation. I also incorporate by reference all of my previous letters to you and your predecessors concerning management of the Santa Maria Ranch Allotment, including, but not limited, to the following:

– Scoping Comments for the Santa Maria Ranch Allotment dated February 18, 1990.

– Comments on the Draft Environmental Assessment for Proposed Livestock Grazing on the Santa Maria Ranch Allotment, dated February 18, 1991.

– Comments on the Santa Maria Ranch Ecological Site Inventory (March, 1993).

– Letter to you concerning forage utilization limits on the Santa Maria Ranch Allotment (February, 1994).

– Comments on the Santa Maria Ranch Evaluation, dated May 1, 1996.

2. The Evaluation Improperly Substitutes a Utilization Limit of 50% for the Lower, Species-Specific Utilization Limits Set by the BLM on April 22, 1998.

In a letter dated April 22, 1998, Field Manager John Christensen informed the lessees and other interested parties that he had set species-specific utilization limits for forage plants on the Santa Maria Ranch Allotment. The utilization limits, listed in a table enclosed with the letter, varied from a low of 10-15% for brittlebush and palo verde, to a high of 30-35% for needlegrass, big galleta, tobosa, sideoats grama, globemallow, and false mesquite. In the Evaluation, however, the BLM has completely abandoned these species-specific utilization limits and substituted instead a generic, and much higher, utilization limit of 50% for "key species."

The abandonment of species-specific utilization limits, and the raising of the utilization limits to 50% across the board, is unjustified, arbitrary, and capricious. Moreover, the 50% utilization limit is much too high. In a recent comprehensive review of fifty years of research on the effects of grazing intensity on range condition and productivity (*Grazing Studies: What We've Learned*, RANGELANDS, April 1999), Holechek et al. concluded that, regardless of what grazing system is used "30 - 35% use is needed for improvement in rangeland vegetation."

The Forest Service has developed detailed guidance for acceptable utilization levels based on range condition and the type of grazing system employed. For pastures in fair condition, which are rested 1 year out of 3, a utilization limit of 25% is recommended. Guidelines that the BLM has developed for southern California (Bakersfield RAC) limit utilization of key species to 15 - 25% on sites in unsatisfactory condition where less than one rest period is provided per growing season of use.[4] By any of these measures, 50% utilization is far too high.

3. Forage Utilization in Washes and Around Springs on the Allotment Exceeds the Limits Set by the BLM

In a decision issued just last month, Administrative Law Judge Pearlstein found that the BLM had violated its own 1991 grazing decision by permitting a grazing regime that allows cattle to congregate and remain in washes and around springs every year for six months at a time. Furthermore, Judge Pearlstein found that the BLM's monitoring data, because they are

[4] Rangeland Health Standards and Guidelines for California and Northwestern Nevada, Final EIS, p. 2-45, footnote ##.

collected in upland areas, fail to reflect forage utilization levels in washes and around springs.

To its credit, the BLM has included in the Evaluation, on page 33, some information about forage utilization in the washes (though not around the springs) on the Santa Maria Ranch Allotment. These data are expressed in terms of broad classes of "slight" (6-20%), "light" (21-40%), "moderate" (41-60%), and "heavy" (61-80%) use.

Because the species-specific utilization limits that the BLM has set for the Santa Maria Ranch Allotment vary from 10-15% to a maximum of 30-35% (see above), "light" utilization as defined in the Evaluation equals or exceeds the utilization limits, and "moderate" use as defined in the evaluation clearly exceeds the utilization limits. Therefore, the "light to moderate" use levels reported by the Evaluation in Cottonwood Canyon, East Chapo Canyon, and Black Canyon Wash, not to mention the "moderate to heavy" use reported in Black Canyon Wash, all exceed the utilization limits set by the BLM on April 22, 1998.

4. Forage Utilization at Upland Sites on the Allotment Sometimes Equals or Exceeds the Limits Set by the BLM on April 22, 1998.

The utilization data on page 32 of the Evaluation indicates that forage utilization at upland sites on the allotment also sometimes equals or exceeds the species-specific limits set by the BLM. For three-awn, perhaps the most abundant perennial grass on the allotment, the utilization limit is 20-25%. Utilization of three-awn was between 20% and 25% in 1992, 1993, 1994, and 1995, and reached 33% in 2000. Utilization of false mesquite reached the upper limit of 35% in 1995 and again in 1997.

5. The Evaluation Overstates the Number of Livestock of Actual Use on the Allotment

Monitoring data cannot be usefully analyzed without knowing the numbers of livestock of actual use that those data reflect. The actual use data in the table on page 31 of the Evaluation are inaccurate because they do not reflect the fact that the livestock are spending only about half of the year on BLM land. Therefore, the number of cattle-year-long (CYL) equivalents of actual use on BLM land is only about half of that shown in the table. In other words, actual use has ranged from around 55 CYL in 1999 and 2000 to around 136 CYL in 1993. The average has been around 70-75 CYL.

6. The Evaluation Unjustifiably Recommends Permitting a Substantial Increase in Actual Use

The evaluation recommends allowing actual use to increase up to the nominal permitted use level of 141 CYL, or roughly double the past ten years' average actual use of 70-75 CYL. Given that forage utilization in washes has constantly exceeded the BLM's utilization limits, and utilization on upland sites has sometimes equaled or exceeded those limits, this doubling of

actual use is completely unjustified.

7. The Santa Maria Ranch Allotment is Not Meeting Arizona Standard 1

Arizona Standard 1 requires the "[u]pland soils exhibit infiltration, permeability, and erosion rates that are appropriate to soil type, climate, and landform (ecological site)." The Evaluation contains no data on soil infiltration, permeability, or erosion rates. It does, however, contain data on ground cover, which is the greatest manageable factor affecting infiltration and erosion rates.

The data reveals that ground cover on the allotment is poor. In the most recent measurements (2001), live vegetation cover averaged only 8% at the six study sites and was only 3% at site 2.

Furthermore, the 2001 data reflect a year that began with an unusually wet winter. The Evaluation contains no rainfall data from 2001, but it is widely known that the winter of 2000-2001, because of its good rainfall, yielded the greatest wildflower display in the Arizona desert in decades. In years of normal or below-average rainfall, vegetation cover would likely be even lower, as it was in 1993 and 1996.

Even more important is the nature of the ground cover. The most effective ground cover in promoting water infiltration and slowing soil erosion is grasses and forbs. And the evaluation reveals that grasses and forbs are severely depleted compared to the potential of the ecological sites:

Site	Grass/Forb % in Site Potential	Grass/Forb % Currently on Site
1	70-80	19.6
2	50-60	8.9
3	50-60	12.1
4	50-60	16.9
5	60-70	29.3
6	55-65	8.9

Information presented by Jack Spears at the allotment tour on February 21 also indicated that soil erosion rates are excessive. Mr. Spears reported that enormous quantities of sediment

are delivered into Black Canyon Wash and the Santa Maria River during rainfall events, burying herbaceous riparian vegetation and creating a sediment dam in the river channel. This enormous rate of sediment production reflects excessive erosion rates on the Santa Maria Ranch and neighboring grazing allotments.

Observations of the Santa Maria Ranch Allotment by Dr. Joseph McAuliffe, Research Ecologist with the Desert Botanical Garden, contained in a letter to the BLM dated 8 April 1991, remain relevant today. Dr. McAuliffe observed the following about soil erosion on the allotment:

> "Despite the fact that these soils had formed long ago and have been preserved largely intact to the present day, these sites exhibit considerable recently initiated erosion in the form of rill cutting. These erosional rills (miniature gullies) are generally 5-10 cm deep and cut through the A horizon, exposing the underlying, clay-rich B horizon. This magnitude of rill cutting and accompanying soil erosion has only recently been initiated and is continuing today. Evidence for this is the fresh exposure of roots of cacti and shrubs by the rills (i.e., roots don't grow in air). The presence of unbroken, intact A horizons between the rills indicates that this type of rill-cutting has <u>not</u> been continuous since the end of the last ice-age 10,000 years ago. It is a recently-initiated landscape change."

A copy of Dr. McAuliffe's letter is attached to these comments.

Dr. McAuliffe's observations have repeatedly been confirmed in the intervening years by myself and by Professor Robert Ohmart of Arizona State University. As recently as last week, Professor Ohmart and I observed ubiquitous evidence of excessive soil erosion on the Santa Maria Ranch Allotment, including numerous rills and gullies and an abundance of pedestaled plants. Clearly, the allotment is not meeting Standard 1.

8. The Santa Maria Ranch Allotment is Not Meeting Arizona Standard 3

Arizona Standard 3 requires maintenance of "[p]roductive and diverse" plant communities of native species on upland, as well riparian, sites. The standards require that "[d]esired plant community objectives will be developed to assure that soil conditions and ecosystem function described in Standards 1 and 2 are met. They detail a site-specific plant community, which when obtained, will assure rangeland health."

Contrary to Standard 3, however, the Evaluation does not detail a site-specific plant community that will assure rangeland health. Instead, without any justification or analysis, it declares that the existing plant communities meet Standard 3, and that maintenance of those existing communities is sufficient to meet objectives for the allotment..

The only independent objectives in the Evaluation with which to compare the existing plant communities are the ecological site descriptions. And, contrary to statements in the Evaluation, the existing plant communities on the allotment are not within the "range of variation" of the ecological site descriptions. At every site on the allotment, the ecological site descriptions indicate that grasses and forbs should constitute a majority (by dry weight) of the plant community. However, at every site on the allotment, the percentage of grasses and forbs is less than half of what is indicated on the site description. Moreover, on three of the six cites the percentage of grasses and forbs is less than one fourth of what is indicated on the site description. Thus, the Evaluation's statements that the plant communities are "within the range of variation" for the ecological sites is simply false.

The differences between the existing plant communities and the potential natural communities on the allotment are characteristic of overgrazed rangelands. The severe depletion of grasses and forbs and their replacement by shrubs and cacti are well-documented consequences of overgrazing in the deserts of the southwestern United States. The site descriptions themselves recognize this: "As the site deteriorates from improper use or the lack of natural fires, desert shrubs and cacti increase to dominate it." (Granitic Hills 8-10" p.z. Range Site Description, page 2.)

The specific composition of the plant communities is also characteristic of overgrazed rangelands. On the Granitic Hills range sites (2, 3, 4, and 6) palatable perennial grasses such as bush muhly and black grama are major components of the potential natural community. However, at these sites on the Santa Maria Ranch Allotment, these species have been severely depleted or eliminated, and replaced by unpalatable or grazing-tolerant grass species such as threeawn, galleta, and fluffgrass, and by shrubs such as broom snakeweed and goldenweed. Again, the site descriptions recognize these changes as signs of overgrazing: "When this site is subjected to continual disturbance increaser species will be threeawns, fluffgrass, cacti, broom snakeweed, and goldenweed.." (Granitic Hills 10-12" p.z. Range Site Description, page 2.) To declare such degraded rangelands to be "productive and diverse" is arbitrary, capricious, and contrary to common sense.

The allotment is also not making "substantial progress" towards meeting either Standard 1 or Standard 3. The data in the Evaluation do not indicate that either ground cover or plant community composition have improved significantly over the last decade.

I recognize that most of the degradation of the plant communities on the Santa Maria Ranch Allotment occurred before the current grazing operation began in 1991. Nonetheless, the current condition of the allotment is unsatisfactory and does not meet the Arizona Standards and Guidelines or the Fundamentals of Rangeland Health. Under these circumstances, static trends that "maintain" existing plant communities are unacceptable. And existing grazing management,

which has not resulted in significant improvements in ecological conditions, is also unacceptable. Given the severely degraded ecological condition of the Santa Maria Ranch Allotment, extremely conservative management – either complete rest for an extended period, or a utilization level far, far less than the 50% discussed in the Evaluation – is necessary**.**

9. The Santa Maria Ranch Allotment is Not Meeting Arizona Standard 2

Arizona Standard 2 requires that riparian areas be in proper functioning condition. The Evaluation contains information on riparian conditions on the Santa Maria River, but it neglects to evaluate riparian conditions in other riparian areas on the allotment, including Black Canyon Wash (which has perennial flow), numerous perennial springs, and numerous washes. The BLM was recently taken to task by Administrative Law Judge Pearlstein for its improper management of the springs and washes on the allotment.

In my observation, riparian conditions in Black Canyon Wash are every poor. The channel is wide and largely unvegetated, there is very little herbaceous ground cover, and there is little or no recruitment of cottonwoods and willows. Conditions in washes (Placeritas, Cottonwood, and Chapo) and springs along the north side of the allotment are equally bad.

Given the scarcity of water on the uplands of the allotment, the riparian areas around springs are critically important for wildlife. The washes are important corridors for wildlife as well as people. Some of the washes have intermittent flow that could be extended, and perhaps would even be perennial, if their watersheds and riparian areas were in proper functioning condition.

These wash and spring riparian areas are not in proper functioning condition. As noted in Judge Pearlstein's decision, the BLM's improper management of grazing has allowed cattle to remain in the washes and around the springs for several months at a time. The resultant heavy utilization and trampling were documented in the appeal that led to Judge Pearlstein's decision.

Finally, much of the riparian area of the Santa Maria River is not in proper functioning condition. On the reach that we visited on the allotment tour on February 21, although there is substantial cottonwood and willow recruitment, the river channel is still excessively wide, and herbaceous ground cover is poor. Although there are some rushes and sedges, they are very few, and there are large areas of bare, wet sand that would be covered with herbaceous vegetation if the riparian system were functioning properly.

10. The Evaluation Fails to Use the Indicators of Rangeland Health Prescribed by National BLM

Assessment of whether the Allotment is meeting the Fundamentals and the Standards

requires examination of a number of factors related to soils, vegetation, and water over a large area. Measuring species composition, forage utilization, and ground cover on five small plots provides some useful information, but it does not adequately address all, or even most of the factors that need to be considered.

The BLM Publication INTERPRETING INDICATORS OF RANGELAND HEALTH: DRAFT HANDBOOK (April, 1998) provides a guide to the type of information that should be, and can be, collected and considered along with the monitoring data. According to guidance from the Washington Office of the BLM (Information Bulletin No. 99-186), the methods described in this document "should be used in conjunction with monitoring and other inventory data to identify if resource problems exist" and "is recommended as one tool (along with existing monitoring, inventory, and other appropriate information and input) to determine if State Standards for Rangeland Health are being met." The Evaluation fails to include many of the factors covered by this document.

11. The Evaluation fails to assess whether the Allotment is meeting the Fundamentals of Rangeland Health or the Arizona Guidelines for Grazing Management.

The BLM is required to assure that the Allotment meets the Fundamentals of Rangeland Health and the Arizona Guidelines for Livestock Grazing Management as well as the Arizona Standards for Rangeland Health. The Fundamentals contain a number of important requirements that are not contained in the Arizona Standards, including, but not limited to, requirements that (a) the upland components of watersheds are in proper functioning physical condition, (b) hydrologic, nutrient, and energy cycles are maintained to support healthy biotic communities, and (c) water quality complies with state water quality standards. The Evaluation does not assess whether the Allotment is meeting the Fundamentals or the Guidelines.

12. The BLM Must Re-Assess Grazing on the Santa Maria Ranch Allotment in Light of the Environmental Impacts of the RIM Plan and the Peeples Canyon Inholding Access Decision.

When the BLM authorized grazing on the Santa Maria Ranch Allotment in 1991, it did not assess or consider the environmental impacts of the road reconstruction, water development reconstruction, or motor vehicle use in the Arrastra Mountain Wilderness that would accompany that grazing. Since that time, with the issuance of the RIM Plan and the Peeples Canyon Inholding Access Decision, it has become clear that those impacts will be very significant. Under NEPA and its associated regulations, the BLM, before re-authorizing grazing on the allotment, must fully take those impacts into account, and must analyze and consider alternative grazing scenarios, including no grazing or reduced grazing, that would reduce or eliminate the need for road reconstruction, water development reconstruction, and motor vehicle use in the Wilderness.

Conclusion

The Santa Maria Ranch Allotment Evaluation is deeply and fundamentally flawed. To plunge forward with such a flawed evaluation will be an invitation to litigation that would be very costly to all concerned in terms of time, money, and resources. I urge the BLM to take the necessary time to re-do the evaluation. In the long run, doing it right this time will be less costly and time consuming than having to do it again later.

Joseph M. Feller
April 2, 2002

v. Comments on Soap Creek Allotment Assessment

VIA FAX

February 19, 2002

Joseph Feller
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Tempe, AZ 85287-7906

Field Manager
Arizona Strip Field Office
U.S. Bureau of Land Management
345 E. Riverside Drive
St. George, UT 84790

Re: Soap Creek Allotment Assessment

To the Field Manager:

The following are my comments on the "final draft" of the Soap Creek Allotment Assessment, which I received under a cover letter dated January 11. The assessment covers the Soap Creek, Buffalo Tank, Cram, Badger Tank, and Lee's Ferry Allotments, which I will refer to collectively as the Kane allotments because the permits are all held by the Kane Ranch.

These comments are my professional opinions. They do not necessarily reflect the positions of Arizona State University or the College of Law.

Incorporation by Reference of Previous Comments

On January 31, 2001, I submitted comments on the Beanhole Allotment Assessment. On July 2, 2001, I submitted comments on the House Rock Allotment Assessment. The Soap Creek Allotment Assessment suffers from most of the same failures as the Beanhole and House Rock assessments. I have not repeated here all of my comments on those two previous assessments. Instead, *I hereby incorporate by reference my comments on the Beanhole Allotment Assessment and the House Rock Allotment Assessment and ask that you fully consider them in your final review of the Soap Creek Allotment Assessment.*

The assessment fails to address the severe depletion of palatable cool-season grasses.

Standard 3 of the Arizona Standards and Guidelines requires the maintenance of

"productive and diverse" upland plant communities. An essential component of productive and diverse rangeland plant communities in the southwestern United States is an abundance of palatable cool-season grasses such as Indian ricegrass (ORHY) and needle-and-thread grass (STCO) that provide critical feed for livestock and wildlife in the fall, winter, and spring. A rangeland plant community in this essential component are missing or severely depleted is not "productive and diverse." One of the most common consequences of overgrazing is the depletion or loss of these palatable cool-season grasses and their replacement by less palatable or grazing-tolerant "increaser" species such as bottlebrush squirreltail (SIHY), galleta grass (HIJA), sand dropseed (SPCR), or blue grama (BOGR).

Palatable cool-season grasses, particularly Indian ricegrass, are severely depleted on the Kane allotments. The cool-season grass Indian ricegrass (ORHY) should be a dominant plant on the Kane Allotments. According to the BLM's own ecological site descriptions, ORHY is the largest grass component of the potential natural community (PNC) at seventeen out of twenty monitoring sites on the allotments and should constitute from 30 to 45 percent (by dry weight) of the vegetative community at those sites. However, ORHY has been lost or severely depleted at most sites. The following table compares the dry-weight percentage of ORHY in 1995 with the PNC at each monitoring site:

Site	% ORHY in 1995	% ORHY in PNC
Buffalo Tank 1	11	45
Buffalo Tank 2	2	45
Buffalo Tank 3	7	40
Buffalo Tank 4	14	30
Buffalo Tank 5	14	40
Buffalo Tank 6	0	40
Cram 1	15	45
Cram 2	19	30
Cram 3	5	40
Cram 4	0	30
Cram 5	0	45

Soap Creek 1	27	7
Soap Creek 2	47	45
Soap Creek 3	0	0
Soap Creek 4	8	45
Soap Creek 5	1	20
Lee's Ferry 1 (1993)	11	30
Lee's Ferry 2 (1993)	29	30
Badger Creek 1 (1998)	6	45
Badger Creek 2 (1998)	13	45

These data reveal that Indian ricegrass is severely depleted at the vast majority of the monitoring sites. Out of nineteen sites where ORHY should be present (i.e., all sites except Soap Creek 3), its dry-weight percentage of the plant community is less than half of what it should be at fifteen sites, less than one quarter of what it should be at ten sites, and it has been obliterated at three sites. Given this data, the BLM cannot reasonably conclude that Standard 3 of the Arizona Standards and Guidelines is being met.

The assessment unjustifiably aggregates data to conceal the severe depletion of Indian ricegrass and other palatable grasses. Throughout the assessment, the BLM uses categories such as "grasses", "forage plants", or "cool-season" to characterize ecological conditions, forage utilization levels, and management objectives. These categories lump together monitoring data on highly palatable grasses that decrease in response to grazing, such as ORHY and black grama (BOER), with data from relatively unpalatable and/or grazing-tolerant "increaser" grasses such as BOGR, SPCR, and HIJA, and three-awn (ARIST). They therefore conceal the serious distortion of the plant community that has been caused by grazing, and allow the BLM to unjustifiably claim "improvements" in ecological conditions when the "improvements" consist partially or mostly of increases in relatively unpalatable, increaser species.

The assessment unjustifiably abandons objectives of increasing Indian ricegrass and other cool-season grasses. The existing Soap Creek Allotment Management Plan (AMP) recognized the importance of Indian ricegrass by setting objectives for increasing Indian ricegrass at almost every monitoring site on the Cram, Soap Creek, Lee's Ferry, and Badger

Creek Allotments. The AMP also set objectives for increasing cool-season grasses on every monitoring site on the Buffalo Tank Allotment. The current assessment, however, abandons these objectives, and substitutes objectives for maintaining, or, at a few sites, increasing, "the grass composition."

This change in objectives is unacceptable for two reasons. First, an objective of maintaining the status quo is not acceptable where the largest component of the PNC, Indian ricegrass, is missing or severely depleted. Second, as discussed above, an objective that lumps together desirable grasses such as ORHY and BOER with relatively unpalatable, increaser species such as BOGR, HIJA, and ARIST is unacceptable.

The current grazing system and utilization limits on the allotments will not restore Indian ricegrass or other palatable cool-season grasses. The current grazing system on the Kane allotments permits grazing to a 50% utilization level in every pasture every year, and allows grazing to a 50% utilization level during the spring growing season in each pasture in two out of every three years. All available evidence indicates that this grazing system will not restore the cool-season grasses that have been depleted or eliminated by past overgrazing.

The definitive experimental work on acceptable utilization levels for Indian ricegrass is C. Wayne Cook, Effects of Season and Intensity of Use on Desert Vegetation, Utah Agricultural Experiment Station Bulletin 483 (1971). Cook determined that 50% spring utilization on Indian ricegrass is acceptable only *every other year* and only if the plants receive *complete, year-long rest* in the alternate years.

The grazing system on the Kane allotments is much harder on the plants than is the system under which Cook determined that 50% spring utilization is acceptable. The grazing system on the Kane allotments allows spring use in two out of three years instead of every other year, and allows winter use, instead of year-long rest, in the alternate years. Cook's experimental work demonstrates that this system will lead to further depletion, not an increase, in Indian ricegrass.

Cook determined that, in pastures grazed every spring, utilization must be limited to 25%. Because the grazing system on the Kane allotments allows grazing every year, and in spring two out of three years, it is much closer to an every-spring system than to the system under which Cook found 50% utilization to be acceptable. Therefore, unless the system is substantially changed, utilization limits should be closer to 25% than to 50%.

A wealth of additional experimental evidence demonstrates that the 50% utilization limit on the Kane allotments is far too high. In a recent comprehensive review of fifty years of research on the effects of grazing intensity on range condition and productivity (*Grazing Studies: What We've Learned*, RANGELANDS, April 1999), Holechek et al. concluded that, regardless of what grazing system is used "30 - 35% use is needed for improvement in rangeland vegetation."

The Forest Service has developed detailed guidance for acceptable utilization levels based on range condition and the type of grazing system employed. For pastures in fair condition, which are rested 1 year out of 3, a utilization limit of 25% is recommended. Guidelines that the BLM has developed for southern California (Bakersfield RAC) limit utilization of key species to 15 - 25% on sites in unsatisfactory condition where less than one rest period is provided per growing season of use.[5] By any of these measures, 50% utilization is far too high.

The assessment fails to address the depletion of four-wing saltbush.

Like Indian ricegrass, four-wing saltbush is an essential component of productive plant communities on the Kane allotments. On over half of the monitoring sites, it is the largest shrub component of the potential natural community. It provides essential food and cover for chisel-toothed kangaroo rats, pronghorn, and numerous other species of mammals and birds. Also like Indian ricegrass, four-wing saltbush is highly palatable to cattle. It characteristically decreases in abundance in response to heavy browsing, while invasive species such as rabbitbrush and snakeweed increases.

At sixteen out of twenty monitoring sites on the Kane allotments, four-wing saltbush is substantially depleted compared to the potential natural community (PNC). At ten of those sites, its percentage by dry weight in the vegetative community is half or less of what it should be in the PNC. At three sites, four-wing saltbush has been obliterated.

The assessment conceals the depletion of four-wing saltbush by lumping it together with other shrub species, such as snakeweed and rabbitbrush, for purposes of setting objectives and evaluating the condition of wildlife habitat This practice is incredibly misleading. Snakeweed and rabbitbrush are invasive, unpalatable species that are characteristic of overgrazed areas. An increase in snakeweed or rabbitbrush is a symptom of ecological degradation, not a sign of improvement. And a loss of four-wing saltbush with a simultaneous increase in snakeweed or rabbitbrush does not constitute "maintenance" of ecological condition.

The assessment's claims that ecological conditions are improving are unjustified.

The assessment claims that ecological conditions are improving at numerous sites on the Kane allotments. These claims are based on a comparison of data collected in 1989 and 1995.

[5] Rangeland Health Standards and Guidelines for California and Northwestern Nevada, Final EIS, p. 2-45, footnote ##.

In making these claims, however, the assessment ignores the rainfall data that it so meticulously presents. These data show that 1989 was one of the driest years on record, while precipitation in 1995 was near normal:

Gauge	1989 precip (% of normal)	1995 precip (% of normal)
Parker	54	98
Woolley	77	93
Hawkins	73	91
Badger Creek	65	100
Average	67	96

Moreover, at three of the four gauges the five year period preceding 1995 was wetter than the five-year period preceding 1989:

Gauge	1985-89 precip (% normal)	1991-95 precip (% normal)
Parker	84	99
Woolley	96	93
Hawkins	92	94
Badger Creek	89	102
Average	90	97

In previous allotment assessments, the BLM has repeatedly emphasized the importance of year-to-year rainfall variations in affecting the abundance and composition of vegetation. It is therefore ironic that in this assessment the BLM would base a claims of improving conditions on a comparison between a dry year (1989) and a normal year (1995). The comparison is not fair and the claims are not justified.

The assessment arbitrarily and unjustifiably concludes that Standard 3 is being attained.

The assessment states, on page 84, that all applicable standards for rangeland health are being met, but there is no analysis to support this conclusion. Standard 3 of the Arizona Standards for Rangeland Health requires that "productive and diverse" communities of native plants be maintained. The assessment reveals that there are several areas on the Kane Allotments that are in a low ecological condition (less than 50% of PNC), several areas that have not met previously-set objectives for improvement, and several areas in a downward ecological trend. Moreover, on the *majority* of the area of the allotments, key vegetative species such as Indian ricegrass and four-wing saltbush have been severely depleted or eliminated. How, then, has the BLM determined "productive and diverse" plant communities are being maintained everywhere on the allotments. The assessment gives no explanation.

Furthermore, Standard 3 requires the BLM to develop desired plant community (DPC) objectives that "detail a site-specific plant community, which when obtained, will assure rangeland health, State water quality standards, and habitat for endangered, threatened, and sensitive species." While the assessment purports to present "DPC objectives," these "DPC objectives" do not detail a site-specific plant community as required by Standard 3. Rather, these objectives simply require that each site be maintained in a "late seral" condition, i.e., have an ecological condition rating greater than 50%. There is no explanation of how such an ecological condition rating will guarantee rangeland health, attainment of water quality standards, or habitat for threatened, endangered, or sensitive species.

Finally, five sites on the allotment fail to meet even the limited "DPC objectives" set in the assessment. Therefore, by the assessment's own standards, these sites do not meet Standard 3.

The Assessment fails to evaluate soil and watershed conditions on the Kane allotments.

The Fundamentals of Rangeland Health require that the upland components of watersheds be in proper functioning physical condition, and that hydrologic, nutrient, and energy cycles be maintained Standard 1 of the Arizona Standards for Rangeland Health requires that soil infiltration, permeability, and erosion rates be appropriate to the soil type, climate, and landform. Assessment of whether the Kane allotments are meeting these mandates requires examination of a number of factors related to soils, vegetation, and water over a large area. Measuring species composition, forage utilization, and ground cover on small plots provides some useful information, but it does not adequately address all, or even most of the factors that need to be considered.

The BLM Publication INTERPRETING INDICATORS OF RANGELAND HEALTH: DRAFT HANDBOOK (April, 1998) provides a guide to the type of information that should be, and can be, collected and considered along with the monitoring data. According to guidance from the

Washington Office of the BLM (Information Bulletin No. 99-186), the methods described in this document "should be used in conjunction with monitoring and other inventory data to identify if resource problems exist" and "is recommended as one tool (along with existing monitoring, inventory, and other appropriate information and input) to determine if State Standards for Rangeland Health are being met."

According to the Draft Handbook, as well as common sense, relevant indicators include evidence of soil movement, physical or chemical soil crusts, compaction layers, flow patterns, rills and gullies, *distribution* as well as amount of cover, plant community structure and productivity, plant vigor, seedling recruitment, and nutrient cycling. These indicators should be observed over larger areas than the small monitoring plots considered in the Assessment, and the areas observed should include those parts of the allotments that receive the heaviest livestock use.

The data in the Assessment reveal virtually nothing about soil and watershed conditions on the Kane allotments. The Assessment states that Standard 1 of the Arizona Standards for Rangeland Health is being met, but it provides no information to support that conclusion. Except for a one-paragraph discussion of a few small areas, the only information on soil permeability and water infiltration on over 200 square miles of the Kane allotments is the vacuous statement that "[p]ermeability rates vary from very slow, to slow, to moderate, to moderately rapid, etc., depending on surface and subsurface textures and structures." Similarly, the only information on erosion rates is the equally vacuous statements that erosion hazards by wind and water are "slight to moderate, to severe, to very severe, etc. depending on surface textures and vegetation." These meaningless statements do not constitute an analysis of whether Standard 1 is being met.

The assessment states that "[a] vast majority of the allotment has sufficient ground cover to keep erosion at tolerable levels," but it provides no data or analysis to support that conclusory assertion. The data in appendix C reveal the following total ground cover percentages at the most recent reading at the twenty monitoring sites: 32%, 50%, 21%, 26%, 31%, 26%, 18%, 41%, 33%, 22%, 18%, 26%, 22%, 22%, 25%, 18%, 11%, 14%, 24%, and 21%. The average is only 25%. In other words, on average 75% of the ground is bare, and at four of the sites more than 80% of the ground is bare. The assessment contains no analysis to show why this level of ground cover should be considered sufficient.

The Assessment fails to address the condition of habitat for nongame birds, small mammals, bats, amphibians, and reptiles.

The Assessment states, on pages 62, that the objective of providing for the habitat needs of nongame birds, small mammals, bats, amphibians, and reptiles**.**. The Assessment, however, provides no information on the habitat needs of any of these species, on the current condition of

habitat for these species on the allotment, or on the effects of grazing on that condition.

The only evidence offered in support of this claim is that "vegetation conditions are in a high seral state and generally improving." *Seral state is not a measure of wildlife habitat condition*. Seral state, as measured by vegetative species composition, tells little or nothing about the availability of food, cover, nesting, or breeding resources for wildlife.

An essential aspect of wildlife habitat is cover. Birds, mammals, and reptiles all require cover for protection from the elements, for refuge from predators, for nesting, and for rearing their young. Pronghorn in particular need cover for concealing their fawns, and they need it near water.

Wildlife cover depends critically on the *height* of vegetation, and one of the most severe and pervasive effects of livestock grazing is the elimination of cover by reducing the height of vegetation. Grazing at a 50% utilization level reduces grasses to a few inches of stubble.

The issue of wildlife cover is ignored by the Assessment. The monitoring data on species composition and abundance reveal nothing about the abundance, distribution, and condition of wildlife cover on the allotment. The data on "ground cover" also reveal little or nothing about wildlife cover because they do not reflect the height of the vegetation. (Moreover, as noted above, these limited data show that ground on the allotment is very poor.)

For these reasons, the assessment's conclusion that the habitat needs of nongame birds, small mammals, bats, amphibians, and reptiles are being met is entirely unjustified.

The Assessment fails to assess whether the allotment is meeting the Fundamentals of Rangeland Health or the Arizona Guidelines for Grazing Management.

The BLM is required to ensure that the allotment meets the Fundamentals of Rangeland Health and the Arizona Guidelines for Livestock Grazing Management as well as the Arizona Standards for Rangeland Health. The Fundamentals contain a number of important requirements that are not contained in the Arizona Standards, including, but not limited to, requirements that (a) the upland components of watersheds are in proper functioning physical condition, and (b) hydrologic, nutrient, and energy cycles are maintained to support healthy biotic communities. The Assessment does not assess whether the allotment is meeting the Fundamentals or the Guidelines.

Thank you for considering these comments. Please send me the final version of the assessment

as soon as it is completed.

Joseph M. Feller

VI. *amicus curiae* Brief of Natural Resources Defense Council et al., in Norton v. Southern Utah Wilderness Alliance

For opinion see 124 S.Ct. 2373, 124 S.Ct. 462

Briefs and Other Related Documents

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Supreme Court of the United States.
Gale NORTON, Secretary of the Interior, et al., Petitioners,
v.
SOUTHERN UTAH WILDERNESS ALLIANCE, et al., Respondents.
No. 03-101.
February 17, 2004.
On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief Of Amici Curiae Natural Resources Defense Council, National Wildlife Federation Center for Biological Diversity, California Wilderness Coalition, Idaho Conservation League, Minnesota Center for Environmental Advocacy, Northwest Environmental Defense Center, Oregon Natural Desert Association, and Western Land Exchange Project In Support Of Respondents

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***xiii** Common Acronyms

APA	Administrative Procedure Act
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act of 1976
FONSI	Finding Of No Significant Impact
IMP	Interim Management Policy and Guidelines for Land Under Wilderness Review

LUP Land Use Plan

NEPA National Environmental Policy Act of 1969

OHV Off-Highway Vehicle

ORV Off-Road Vehicle

RMP Resource Management Plan

SEIS Supplemental Environmental Impact Statement

SUWA Respondents Southern Utah Wilderness Alliance, et al.

WSA Wilderness Study Area

***1** INTEREST OF THE AMICI CURIAE

The Natural Resources Defense Council, National Wildlife Federation, Center for Biological Diversity, California Wilderness Coalition, Idaho Conservation League, Minnesota Center for Environmental Advocacy, Northwest Environmental Defense Center, Oregon Natural Desert Association, and Western Land Exchange Project (collectively, "Amici") are not-for-profit public interest organizations that, inter alia, work to protect the environment and preserve the nation's remaining wilderness. [FN1] Amici's work includes advocating passage of legislation formally designating wilderness, persuading agencies to adopt regulations and policies protective of wilderness, litigating to prevent illegal degradation of wilderness, and educating and organizing the public to support the protection of wilderness. Amici regularly rely on the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., to seek enforcement of environmental laws such as the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 et seq., and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq. Amici's members regularly visit public lands managed by the Bureau of Land Management ("BLM") to recreate and enjoy land "untrammeled by man, where man himself is a visitor who does not remain." Wilderness Act, 16 U.S.C. § 1131(c).

FN1. Counsel for the parties have consented to the filing of this amici curiae brief, and the letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, Amici state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than Amici, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

Amici, who together have nearly 1.5 million members, submit this brief to provide background information on off-road vehicles ("ORVs") and their environmental effects, and to discuss the structure and purpose of FLPMA and NEPA, especially as they relate to BLM and its regulation of ORVs.

***2** INTRODUCTION

FLPMA requires BLM to manage certain public lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). Yet Petitioners propose a new rule of law under which BLM could allow these potential wilderness areas--a limited natural resource of incalculable value--to be destroyed with impunity. The Tenth Circuit appropriately described Petitioners' proposal as an attempt to create "a 'no-man's-land' of judicial review." S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1230 n.10 (10th Cir. 2002).

At issue is whether a court may compel an administrative agency to perform a mandatory, non-discretionary duty--in this case, BLM's duty to prevent the impairment of potential wilderness areas. Petitioners argue that even if BLM is failing to prevent impairment, no court may compel BLM to do otherwise because (1) a court only may compel that which would be final agency action, and (2) any court order compelling BLM to undertake final agency action to prevent impairment would be an impermissible encroachment on BLM's discretion in deciding how to prevent impairment.

But even assuming that Petitioners' first argument is correct--which it is not--Petitioners' manufactured conflict is illusory, and easily dismantled. If impairment is occurring, a court simply may order the agency to stop such impairment. Petitioners concede that such an order would be appropriate, [FN2] and given both the record here and BLM's own interpretation of FLPMA, such an order would necessarily entail BLM taking final agency action in the form of restricting or closing areas to ORV use. Similarly, because BLM's own interpretation of ***3** FLPMA and the record here require as much, a court may specifically order BLM to decide in a formal document whether to restrict or close roads to ORV use to prevent impairment. Petitioners concede that a court would be ordering final agency action in this instance as well. [FN3]

FN2. See Brief for Petitioners ("Pet. Br.") at 12 ("a court may direct an agency to act when action is clearly required by law" (emphasis in original)). All citations to Petitioners' brief refer to the pagination in the brief filed with the Court on January 5, 2004, which Petitioners formatted according to Supreme Court Rule 33.2.

FN3. See Pet. Br. at 12, 55-56; Brief for Respondents Utah Shared Access Alliance, et al., at 14-15.

Petitioners' proposed rule of law for NEPA is just as untenable as their proposed rule for FLPMA. NEPA obliges federal agencies to consider the environmental impacts of their actions. In defiance of this obligation, BLM

has refused to take a "hard look" at evidence that increased ORV use has rendered obsolete certain of its NEPA documents. Trying to defend BLM's intransigence, Petitioners seek to characterize "hard looks" as not subject to compulsion by court order. Yet a "hard look" is precisely the sort of mandatory, ministerial obligation that Petitioners concede is appropriate for a court to order. [FN4]

FN4. See Pet. Br. at 27.

The rules of law that Petitioners propose are contrary to the letter and spirit of FLPMA, NEPA, and the APA, and should be rejected. The judgment of the court of appeals should be affirmed.

BACKGROUND ON ORV IMPACTS

In 1979, the White House Council on Environmental Quality ("CEQ") published a report summarizing the environmental harm caused by ORVs: [FN5]

FN5. The term "ORVs" refers to motorized vehicles such as motorcycles, minibikes, trail bikes, dune-buggies, three- and four-wheel all-terrain vehicles, and jeeps that are used to navigate over roadless land and primitive throughways.

ORVs have damaged every kind of ecosystem found in the United States: sand dunes covered with American beach grass on Cape Cod; pine and cyprus ***4** woodlands in Florida; hardwood forests in Indiana; prairie grasslands in Montana; chaparral and sagebrush hills in Arizona; alpine meadows in Colorado; conifer forests in Washington; arctic tundra in Alaska. In some cases, the wounds will heal naturally; in others they will not, at least for millennia.

Remnant wild and semiwild areas near urban environments in the West have been particularly hard hit by ORVs.

David Sheridan, Council on Envtl. Quality, Off-Road Vehicles on Public Land 7 (1979). In the twenty-five years since CEQ's report was published, ORVs have become more powerful, faster, and capable of intruding even further into the most remote and ecologically pristine wilderness areas. [FN6] They also have become much more popular, [FN7] resulting in significant and widespread environmental harm.

FN6. See David G. Havlick, No Place Distant: Roads and Motorized Recreation on America's Public Lands 85 (2002).

FN7. See, e.g., Jason Tanz, Making Tracks, Making Enemies, N.Y. Times, Jan. 2, 2004, at F1 ("[O]ver the last few decades the popularity of off-roading has exploded. According to the Motorcycle Industry Council, a trade organization, sales of off-highway motorcycles increased 146 percent from 1998 to 2002, while Americans bought 847,000 A.T.V.'s in 2002, up from 447,000 four years before."); see also U.S. Dep't of Agric., Forest Serv., National OHV Policy & Implementation Teams: On the Right Trail! Managing Off-Highway Vehicles, at 2 (Jan. 7, 2004) (describing ORV trend), available at http://www.fs.fed.us/r10/tongass/districts/sitka/ohv_policy.htm; U.S. Dep't of Interior, Bureau of Land Mgmt., No. UT-100-3-EA-04, Environmental Assessment for Ft. Pearce Ridge Trail Designation at 1 (Mar. 2003) (same); Havlick, supra note 6, at 88-90 (same).

The deleterious effects of ORVs are well documented, and are particularly pronounced in desert and shrubland ecosystems, such as the public lands in the State of Utah that are at issue in ***5** this case. [FN8] Specifically, ORVs

cause intense soil disruption and compaction, which reduces moisture infiltration rates, soil porosity and soil permeability, and impedes seed germination and seedling growth. [FN9] In areas with arid soils, ORVs can damage fragile cryptobiotic crusts that help stabilize the soil, which may take from 40 to 250 years to recover. [FN10] ORVs are also heavy polluters; it is estimated that ORVs spill tens of millions of gallons of gasoline and oil on public lands in the United States each year. [FN11]

FN8. The studies described here were collected with the help of surveys of the literature published elsewhere. See Havlick, supra note 6, at 91-105 (citing studies); Conservation Biology Inst., Importance of Bureau of Land Management Roadless Areas in the Western U.S.A., 35-37 (Mar. 2000) (same), available at http://www.consbio.org/cbi/pdf/blm/blm_report.pdf. Similar background information was in the record before the district court. See, e.g., Expert Witness Report of Dr. Howard Wilshire at 4-6 (May 31, 2000).

FN9. See Robert H. Webb, Compaction of Desert Soils by Off-Road Vehicles, in Environmental Effects of Off-Road Vehicles: Impacts and Management in Arid Regions 51, 75-76 (Robert H. Webb and Howard G. Wilshire eds., 1983); Howard G. Wilshire, The Impact of Vehicles on Desert Soil Stabilizers, in Webb and Wilshire, supra, at 31, 45; Kristin H. Berry, A Review of the Effects of Off-Road Vehicles on Birds and Other Vertebrates, in Management of Western Forests and Grasslands for Nongame Birds, Forest Serv., U.S. Dep't of Agric., Forest Serv. Gen. Tech. Rep. INT-86 at 451, 459-60 (1980); R.E. Eckert et al., Impacts of Off-Road Vehicles on Infiltration and Sediment Production of Two Desert Soils, 32 J. of Range Mgmt. 394, 394 (Sept. 1979); H. G. Wilshire and J. K. Nakata, Off-Road Vehicle Effects on California's Mojave Desert, 29 Cal. Geology 123, 129-31 (June 1976); Eric Davidson and Martha Fox, Effects of Off-Road Motorcycle Activity On Mojave Desert Vegetation and Soil, 22 Madroño 381, 388-89 (Oct. 1974).

FN10. See Jayne Belnap, Recovery Rates of Cryptobiotic Crusts: Inoculant Use and Assessment Methods, 53 Great Basin Naturalist 89, 93-94 (1993).

FN11. See Havlick, supra note 6, at 95 & n.44.

***6** The soil damage caused by ORVs results in accelerated and excessive erosion. [FN12] In California's Mojave Desert, for example, ORVs have eroded hundreds of tons of soil and have led to major losses of animal and plant life; scientists believe the impacted desert areas will take hundreds of years to recover. [FN13] ORVs also impact vegetation directly by crushing and uprooting plants. [FN14] Data from the Mojave Desert showed an overall trend toward fewer plants and less coverage per shrub in ORV-disturbed areas than in undisturbed areas. [FN15] ORVs also significantly alter natural distributions of grass and forb cover leading to an overall reduction of plant diversity. [FN16]

FN12. See Bern S. Hinkley et al., Accelerated Water Erosion in ORV-Use Areas, in Webb and Wilshire, supra note 9, at 92-93.

FN13. See Wilshire and Nakata, supra note 9, at 130-31.

FN14. See Earl W. Lanthrop, The Effect of Vehicle Use on Desert Vegetation, in Webb and Wilshire, supra note 9, at 149, 157.

FN15. See Davidson and Fox, supra note 9, at 386.

FN16. See Christopher A. Clampitt, Effects of Human Disturbances on Prairies and the Regional Endemic Aster curtus in Western Washington, 67 Nw.-Sci. 163, 163 (1993).

The number, diversity, and biomass of vertebrates are also reduced by ORV use. [FN17] Birds are particularly susceptible to ORV disturbance, as the noise of ORVs interferes with nesting and mating. One study reported that even moderate ORV use caused a 50 percent reduction in the number of species of birds breeding in the Mojave Desert. [FN18] Sites in the Mojave Desert that were heavily used by ORVs also showed the lowest density and ***7** biomass of four species of lizard. [FN19] In the Imperial Dunes, ORV use caused a 20-fold reduction in the Colorado fringe-toed lizard. [FN20] Studies indicate that ORVs cause similar damage to frog and threatened tortoise populations, as well as to populations of small and large mammals. [FN21]

FN17. See R. Bruce Bury, Roger A. Luckenbach, and Stephen D. Busack, Effects of Off-Road Vehicles on Vertebrates in the California Desert, 8 U.S. Fish and Wildlife Serv. Rep. at 1, 18-19 (1977).

FN18. See Roger A. Luckenbach, An Analysis of Off-road Vehicle Use on Desert Avifaunas, 43 Transactions of the N. Am. Wildlife Conf. 157, 158 (1978).

FN19. See Stephen D. Busack and R. Bruce Bury, Some Effects of Off-Road Vehicles and Sheep Grazing on Lizard Populations in the Mojave Desert, 6 Biological Conservation 179, 182 (July 1974). See generally Bayard H. Brattstrom and Michael C. Bandello, Effects of Off-Road Vehicle Noise on Desert Vertebrates, in Webb and Wilshire, supra note 9, at 167, 167-206.

FN20. See Berry, supra note 9, at 457.

FN21. See Matthew L. Brooks, Benefits of Protective Fencing to Plant and Rodent Communities of the Western Mojave Desert, California, 19 Envtl. Mgmt. 65, 65-66 (1995); Brattstrom and Bondello, supra note 19, at 202; Berry, supra note 9, at 457-58.

As ORVs have become more popular, BLM has come under increased pressure to allow ORVs to travel unimpeded on BLM lands. But BLM operates under a statutory and regulatory regime that mandates that certain lands with the potential to be designated as wilderness be shielded from degradation. As a result, BLM has a choice: it can either limit ORV use to prevent impairment of the wilderness potential of certain lands; or it can succumb to pressure from ORV users, fail to limit ORV use, and allow impairment to occur. The Respondents, Southern Utah Wilderness Alliance, et al. (collectively "SUWA"), merely argue that BLM has not fulfilled its non-discretionary, mandatory duty to do the former.

SUMMARY OF ARGUMENT

BLM received its first comprehensive mandate from Congress on how to manage the lands under its jurisdiction in FLPMA, which requires BLM to manage certain lands "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). To implement this mandate, BLM promulgated the Interim Management Policy and ***8** Guidelines for Land Under Wilderness Review ("IMP"), 44 Fed. Reg. 72,014 (Dec. 12, 1979). The IMP specifically requires BLM to restrict access or close roads to ORVs if ORV use

threatens to impair the suitability of certain lands for preservation as wilderness. Beyond its mandates specifically related to wilderness, FLPMA requires that BLM manage all of its lands in accordance with land use plans that it develops with public participation. See 43 U.S.C. § § 1712, 1732(a).

The Petitioners correctly point out that BLM has discretion in deciding exactly how its obligation to prevent impairment is fulfilled, and that the agency has taken some action. But such discretion and any actions taken do not relieve BLM of the absolute obligation to prevent the impairment prohibited by FLPMA. If impairment is occurring in potential wilderness areas, a court may compel BLM to fulfill its duties under Section 706(1) of the APA, 5 U.S.C. § 706(1), including by limiting ORV use as required by the IMP.

BLM also is subject to NEPA, which requires that federal agencies be aware of and consider the effects of their actions upon the environment. In particular, NEPA requires agencies to take a "hard look" at new circumstances or information that arise in the course of undertaking an action, and that might bear on the environmental effects of that action. See Marsh v. Or. Natural Res. Council, 490 U.S. 360, 373-74 (1989); 40 C.F.R. 1502.9(c). SUWA argues that BLM failed to take a "hard look" at important evidence of increased ORV use on certain parcels of land. The "hard look" that SUWA seeks to compel under Section 706(1) of the APA is a mandatory, non-discretionary duty that is judicially enforceable.

***9** ARGUMENT

I. The APA Provides Federal Courts With Subject Matter Jurisdiction Over Respondents' FLPMA Claims

A. FLPMA Obligates BLM To Administer Certain Lands "So As Not To Impair The Suitability Of Such Areas For Preservation As Wilderness"

A decades-long effort to systematize BLM's management of public land culminated in 1976 with the enactment of FLPMA, [FN22] which instructed BLM to manage its lands "on the basis of multiple use and sustained yield," 43 U.S.C. § 1701(a)(7), and in a manner:

> FN22. See generally D. Michael Harvey, Exempt from Public Haunt: The Wilderness Study Provisions of the Federal Land Policy and Management Act, 16 Idaho L. Rev. 481, 481-99 (1980) (discussing legislative history and purpose of wilderness provisions of FLPMA).

that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use....

id. § 1701(a)(8). To this end, FLPMA instructed the Secretary of the Interior to "prepare and maintain on a continuing basis an inventory of all [BLM] lands and their resource and other values," 43 U.S.C. § 1711(a), to develop "land use plans which provide by tracts or areas for the use of the public lands," id. § 1712(a), and to manage BLM lands "in accordance with the land use plans." Id. at § 1732(a).

In addition to this general scheme, FLPMA has the specific goal of providing for the inclusion of qualified BLM lands in the National Wilderness Preservation System, which ***10** Congress created in 1964 when it enacted the

Wilderness Act, 16 U.S.C. § 1131 et seq. See 43 U.S.C. § § 1701(a)(8), 1782. [FN23] In establishing the National Wilderness Preservation System, Congress pronounced:

> FN23. The Report of the House Committee on Interior and Insular Affairs recommended passage of FLPMA due in part to an "[u]rgent need for Congressional direction" with regards to "inclusion of BLM lands in the Wilderness System." H.R. Rep. No 94-1163 at 3 (1976).

> In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas"....
>
> 16 U.S.C. § 1131(a). Congress next defined the essential characteristics of the "wilderness" to be protected:
>
> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily ***11** by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.
>
> 16 U.S.C. § 1131(c).

Congress's purpose in protecting wilderness was to preserve something of immeasurable value, which, if lost, could never be retrieved. [FN24] In an oft-cited letter that in 1960 was sent to legislators working on the Wilderness Act, the novelist and conservationist Wallace Stegner wrote:

> FN24. As a former Director of BLM simply stated on the thirty-fifth anniversary of the passage of the Wilderness Act, "Wilderness is a resource which can shrink but not grow." Patrick A. Shea, Foreword: Symposium: Wilderness Act of 1964: Reflections, Applications, and Predictions, 76 Denv. U. L. Rev. 331, 331 (1999) (quotation and citation omitted).

> Something will have gone out of us as a people if we ever let the remaining wilderness be destroyed ... so that never again will Americans be free in their own country from the noise, the exhausts, the stinks of human and automotive waste. And so that never again can we have the chance to see ourselves single, separate, vertical and individual in the world, part of the environment of trees and rocks and soil, brother to the other animals, part of the natural world and competent to belong in it.... We need wilderness preserved--as much of it as is still left, and as many kinds--because it was the challenge against which our character as a people was formed. The reminder

and the reassurance that it is still there ***12** is good for our spiritual health even if we never once in ten years set foot in it. It is good for us when we are young, because of the incomparable sanity it can bring briefly, as vacation and rest, into our insane lives. It is important to us when we are old simply because it is there--important, that is, simply as an idea. Wallace Stegner, Wilderness Letter, in The Sound of Mountain Water 145, 146-47 (1997), available at http://www.wilderness.org/OurIssues/Wilderness/wildernessletter.cfm. [FN25]

> FN25. Economists have noted "that areas with intact natural environments, protected by official wilderness or park status, have attracted higher levels of economic activity than otherwise comparable areas without intact natural environments." Thomas Michael Power, "Gifts of Nature" in an Economic World, in Return of the Wild: The Future of Our Natural Lands 55, 56 (Ted Kerasote, ed. 2001) (citing studies). "In other words, counties with higher percentages of wilderness have faster total income, employment, per capita income and population growth rates than counties without wilderness." Paul A. Lorah, Population Growth, Economic Security, and Cultural Change in Wilderness Counties, in Wilderness Science in a Time of Change Conference, U.S. Dep't of Agric., Forest Serv. No. RMRS-P-15-VOL-2 at 230, 232 (May 1999). In December of 2003, more than one hundred economists signed a letter to the President noting that the loss of roadless public lands "undermines one of the cornerstones of economic strength for communities throughout the West." A Letter from Economists to President Bush and the Governors of Eleven Western States Regarding the Economic Importance of the West's Natural Environment, at 4 (Dec. 3, 2003), available at http://www.econw.com/pdf/120303letter.pdf. As a notable columnist observed, despite their economic value, "[s]ome assets, such as wilderness areas, cannot survive if unprotected from the morals of the martketplace." George F. Will, A Word for the Wilderness, Newsweek, Aug. 19 1982, at 68.

To achieve its goal of including BLM lands in the National Wilderness Preservation System, Congress instructed the Secretary of the Interior, as part of the ongoing inventory of BLM lands, 43 U.S.C. § 1711(a), to create a list of those lands that might be designated as wilderness areas, i.e., roadless areas ***13** five thousand acres in size or larger that contain wilderness characteristics. Id. at § 1782(a). Having completed the initial list, the Secretary was to make recommendations to the President as to which areas were suitable for preservation as wilderness, id., and the President was in turn to make such recommendations to Congress. Id. at § 1782(b). Congress would then have the final say as to which areas would be designated as wilderness and thus included in the National Wilderness Preservation System. Id. at § § 1782(b) & (c).

Congress anticipated that a substantial period of time would elapse between the enactment of FLPMA and its ultimate decision on whether to designate a particular area for preservation under the Wilderness Act. [FN26] In order that its own options not be foreclosed by the press of development and that potential wilderness areas not be lost before it could make its wilderness designations, Congress instructed BLM to maintain the status quo in potential wilderness areas:

> FN26. Congress was prescient on this point. In 1980, BLM identified 2.5 million acres of land in Utah as suitable for preservation as wilderness, including the areas at issue in this case. See 45 Fed. Reg.

75,602, 75,603 (designating Moquith Mountain, Parunuweap Canyon, Sid's Mountain, and Behind the Rocks as wilderness study areas). BLM has since identified additional lands as suitable, and the Secretary of the Interior and the President have both forwarded their recommendations to Congress. As of the end of 2003, Congress had acted as to some 27,700 acres of land, but had left the ultimate status of more than 3.3 million acres of land in Utah undecided. See U.S. Dep't of Interior, Bureau of Land Mgmt., Utah Wilderness Questions & Answers, available at www.ut.blm.gov/utahwilderness/q&as.htm. See generally, H. Michael Anderson & Aliki Moncrief, America's Unprotected Wilderness, 76 Denv. U. L. Rev. 413, 425-31 (1999) (discussing history of wilderness designation in Utah).

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law ***14** in a manner so as not to impair the suitability of such areas for preservation as wilderness .... 43 U.S.C. § 1782(c) (emphasis added). At present, BLM is charged with preserving more than six hundred potential wilderness areas totaling more than 16 million acres of land in accordance with this mandate. See U.S. Dep't of Interior, Bureau of Land Mgmt., No. BLM/BC/ST-03/001+1165, Public Land Statistics 2002, at 232 (Apr. 2003).

To guide its actions and those of reviewing courts, BLM has promulgated guidelines interpreting FLPMA's mandate that wilderness suitability not be impaired--the IMP. See 44 Fed. Reg. 72,014, 72,014-16. [FN27] Where FLPMA is ambiguous, courts defer to BLM's interpretation of the statute, as articulated in the IMP. See, e.g., Sierra Club v. Clark, 774 F.2d 1406, 140-809 (10th Cir. 1985) (deferring to IMP); see also Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984).

FN27. BLM promulgated the IMP through notice and comment procedures. See Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 739 n.6 (10th Cir. 1982). As Petitioners point out, the BLM has revised the IMP over time as it has gained more information on the impacts of ORV use. See Pet. Br. at 3; U.S. Dep't of Interior, Bureau of Land Mgmt., No. H-8550-1, Interim Management Policy For Lands Under Wilderness Review (1995) ("Revised IMP"), available at http://www.ut.blm.gov/utahwilderness/imp/imp.htm.

1. The IMP Requires BLM To Take Final Agency Action To Prevent Impairment And Fulfill Its Obligations Under FLPMA

The IMP is BLM's interpretation of what the "nonimpairment mandate" requires for two categories of land: first, lands for which BLM has not completed the wilderness inventory process that is required by FLPMA; and second, Wilderness Study Areas (or "WSAs"), which are lands that BLM has determined to have wilderness characteristics, but that Congress has not yet decided to designate as wilderness. 44 Fed. Reg. 72,104; cf. Revised IMP, Introduction.

***15** Except for certain "grandfathered" mineral extraction and grazing activities, BLM has declared that an activity on a WSA is in accord with Congress's nonimpairment mandate only "if BLM determines that it meets each of the following criteria, which are referred to as the 'nonimpairment criteria' ": (a) the activity must be temporary; (b) any impact caused by the activity must "be capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area (or inventory unit) as a whole"; and

(c) when the activity and reclamation are over, "the area's wilderness values must not have been degraded so far" as to constrain the Secretary's ability to recommend the area for preservation as wilderness. 44 Fed. Reg. 72,022; cf. Revised IMP at I.B.2.

Certain activities "that protect or enhance the land's wilderness values or that provide the minimum necessary facilities for public enjoyment of the wilderness values are considered nonimpairing. For example, trails and sanitary facilities could be built for primitive recreational use." 44 Fed. Reg. 72,018; cf. Revised IMP at I.B.4. But the IMP is skeptical about whether even seemingly nondisruptive activity in wilderness lands can meet the nonimpairment criteria:

> It is recognized that many minor impacts of nonimpairing activities could accumulate to a point at which the total impact would impair wilderness suitability either by creating impacts that overall are noticeable (i.e. are not substantially unnoticeable) or by degrading the area's wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability or nonsuitability for preservation as wilderness.

44 Fed. Reg. 72,019 (emphasis in original); cf. Revised IMP at I.B.5.

The IMP expresses particular concern about the "erosion caused by increased off-road vehicle travel on trails." 44 Fed. ***16** Reg. at 72,024. As to ORV use off trails, the Revised IMP states: "Cross-Country vehicle use off boundary roads and existing ways is surface disturbing" and "must be denied." Revised IMP at I.B.3. [FN28] In other words, BLM must either prevent off-road ORV use from occurring, or risk violating FLPMA. Revised IMP at I.B.2.

> FN28. The IMP notes that while "[t]he use of motor vehicles and motorized equipment does not necessarily impair wilderness suitability," 44 Fed. Reg. at 72,020, ORVs may be used off of existing routes only in emergencies or where that use satisfies the nonimpairment criteria. Id. at 72,019-21. "Based on past practice, it is expected that ORV events involving cross-country travel (off existing ways and trails) as part of the route would rarely satisfy the nonimpairment criteria." Id. at 72,024.

The BLM is required to take the following actions if impairment is occurring:

> To prevent such cumulative impacts from impairing wilderness suitability, the BLM will monitor the cumulative impacts of ongoing activities. If those impacts are growing so great that the area's wilderness suitability could be impaired, the BLM will take steps to control that impact by adjusting the conditions of use (such as time, place, and quantity), by prohibiting the expansion of the activity, or, if necessary, by prohibiting the activity altogether on the affected lands.

44 Fed. Reg. 72,019; cf. Revised IMP at I.B.5. Thus, if ORV impacts in a WSA "are growing so great that the area's wilderness suitability could be impaired," then BLM must either (i) adjust the "time, place, and quantity" of ORV use, (ii) prohibit the "expansion" of ORV use, or (iii) prohibit ORV use "altogether on the affected lands."

As the District Court found below, SUWA has presented colorable evidence that ORV use is impairing the specific WSAs at issue here. See S. Utah Wilderness Alliance v. Babbitt, 2000 WL 33914094 at *5 (D. Utah, Dec. 22, 2000) (SUWA ***17** "presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use"). If impairment is occurring, then, under the mandates of FLPMA, BLM must do whatever is necessary to prevent impairment,

including restricting or closing areas to ORV use. See 44 Fed. Reg. 72,023 ("BLM will take all actions necessary to ensure full compliance with the Interim Management Policy."); cf. Revised IMP at II.E.

B. BLM's Failure To Fulfill Its Duties Under FLPMA And The IMP Constitutes Agency Inaction Subject To Review Under Section 706(1)

Proceeding under the APA, SUWA argues that BLM has failed to prevent ORV use from impairing the suitability of four specific WSAs for inclusion in the National Wilderness Preservation System. [FN29] Specifically, SUWA argues: under FLPMA, BLM has a mandatory, non-discretionary duty to prevent ORV use from impairing the suitability of these four WSAs for designation as wilderness; because ORV use is impairing the wilderness suitability of these four WSAs, BLM is obliged to act; and BLM has failed to act to prevent such impairment. These allegations suffice to establish subject matter jurisdiction under Section 706(1) of the APA.

> FN29. See Tenth Cir. Response Br. for Appellees Gale Norton and Bureau of Land Mgmt. at 13; Tenth Cir. Opening Br. for Appellants SUWA, et al. at 11.

1. FLPMA And The IMP Identify Mandatory, Non-Discretionary Duties That BLM Must Perform

Petitioners' first argument for reversal is that FLPMA "does not specify what would constitute 'impairment' " and does not "identify any discrete final agency action that BLM is required to take in its management of wilderness study areas." Pet. Br. at 36. It is not clear why these two objections are relevant. Judicial interpretation of FLPMA is not foreclosed by omission in the statutory language of "what would constitute 'impairment.' " See Chevron, 467 U.S. at 843 & n.9 ("The judiciary is the final ***18** authority on issues of statutory construction," including when a statute is "silent or ambiguous"). Also, FLPMA is not rendered ineffectual by its failure to identify what Petitioners deem to be "discrete final agency action." The language giving rise to SUWA's claim under Section 706(1) could not be clearer--BLM's non-impairment duty is mandatory and non-discretionary.

Moreover, as shown above, BLM's own interpretation of FLPMA in the form of the IMP not only defines impairment, but also identifies specific final agency action that BLM is required to take to prevent impairment from occurring. Regardless of Petitioners' attempt to ignore the IMP in its brief, BLM must abide by its own interpretation of FLPMA. See, e.g., Vitarelli v. Seaton, 359 U.S. 535, 545 (1959). Section 706(1) provides jurisdiction for SUWA's claims that BLM has failed to meet FLPMA's mandatory, non-discretionary duty of nonimpairment, and to take the steps (that its own IMP deems) necessary to prevent the impairment (that its own IMP deems as) resulting from ORVs.

2. SUWA Seeks To Compel Final Agency Action

Petitioners next argue that dismissal is appropriate because Section 706(1) is only available to compel final agency actions. Pet. Br. at 37-39. Petitioners misconstrue Section 706(1). [FN30] But even if not, Petitioners' argument fails because the duties SUWA seeks to compel under 706(1) would require the taking of final agency action by BLM.

> FN30. To avoid repetition, Amici hereby adopt by reference Respondent SUWA's argument that Section 706(1) is available to compel

administrative action that would not be "final" under Section 706(2).

For example, the district court could simply issue an order for BLM to take final action consistent with the IMP to prevent impairment in a specific WSA. Petitioners concede that such an order would be appropriate under Section 706(1), see Pet. Br. at 12, and, given the terms of the IMP and a record demonstrating impairment, such an order would oblige BLM ***19** to issue road restrictions and/or closures, which Petitioners concede would constitute final agency action. See Pet. Br. at 55. Alternatively, the district court, pursuant to the IMP and a record demonstrating impairment, could issue an order requiring BLM to decide in a formal document whether to restrict or close certain areas to ORV use. Petitioners concede that such an order would result in final agency action, and would provide at least part of the relief sought by SUWA. See id.

3. The Discretion Provided By FLPMA Does Not Deny A Court Jurisdiction To Compel BLM To Comply With FLPMA's Mandatory, Non-Discretionary Duties

Petitioners argue that, because BLM has some discretion in deciding how to implement FLPMA, Section 706(1) is not available to compel BLM to fulfill its mandatory, non-discretionary duties under the statute. Pet. Br. at 39-41. [FN31] Petitioners misstate the role that any discretion BLM has under FLPMA should play in a court's review of BLM's action or inaction. While BLM may have discretion in deciding how to fulfill the nonimpairment mandate, the agency does not have discretion in deciding whether to fulfill that mandate. And it is only the second of these issues--whether BLM has prevented wilderness impairment--that is at issue in determining if BLM has "unlawfully withheld or unreasonably delayed" action for the purposes of Section 706(1). If wilderness impairment has occurred, then, ipso facto, BLM has unlawfully withheld or unreasonably delayed some action it should have been taking. ***20** Any discretion BLM has in deciding how to prevent impairment is relevant only when the court decides what remedy to order--which would be after the Court has determined that BLM violated FLPMA by allowing impairment, and after the Court has found jurisdiction under Section 706(1).

> FN31. To support this argument, Petitioners characterize SUWA as seeking to compel "programmatic" relief. Pet. Br. at 39. No matter how often Petitioners repeat "programmatic" in their brief, it does not change the fact that the claims at issue here concern four specific WSAs. Such a challenge to specified parcels is exactly the type of challenge permitted by the APA. See, e.g., Sierra Club v. Peterson, 228 F.3d 559, 567-68 (5 th Cir. 2000). Petitioners also argue that Section 706(1) is limited to actions in the nature of mandamus. Pet. Br. at 39. To avoid repetition, Amici adopt SUWA's argument refuting this point.

None of this should come as any surprise to Petitioners, since no statute can possibly spell out exactly what an agency is to do in every situation. Accordingly, courts are well versed in such matters, giving appropriate deference on the merits to an agency's own interpretations of a statute. See Chevron, 467 U.S. at 843-44 & n.9; Norton, 301 F.3d at 1227-28 ("[W]e must give considerable deference to [BLM's] interpretation of the nonimpairment mandate"; however, such deference does not "immunize the BLM from its clear, nondiscretionary duty" to prevent impairment (citations omitted)).

4. BLM Is Not Immune From Judicial Review Because It Has Taken "Some" Action

Petitioners concede that jurisdiction would be appropriate under Section

706(1) if BLM had taken no action to fulfill its duties under FLPMA and the IMP. However, Petitioners contend that because BLM has taken some action toward preventing impairment, SUWA may not rely on Section 706(1) to establish jurisdiction. Pet. Br. at 39, 41. [FN32] This argument misconstrues the law, and would eviscerate the purpose of FLPMA. [FN33] FLPMA, ***21** by its plain terms, requires BLM to prevent impairment, not to take some action no matter how trivial or ineffectual. 43 U.S.C. § 1782(c). Moreover, the IMP obliges BLM to restrict or close areas to ORVs if they threaten to impair the wilderness suitability of WSAs. In short, if impairment is occurring, BLM's actions to date are largely, if not entirely, irrelevant.

> FN32. Petitioners state that "[n]either SUWA nor the court of appeals disputed that BLM is, in fact, taking measures to prevent impairment." Pet. Br. at 39. Regardless of whether this is true, it is also undisputed that Respondents have presented colorable evidence showing that impairment is occurring. See Babbitt, 2000 WL 33914094 at *5 (SUWA "presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use").
>
> FN33. The general rule Petitioners urge the Court to adopt has previously been rejected as untenable. See Ctr. for Biological Diversity v. Veneman, 335 F.3d 849, 856-57 (9th Cir. 2003); Montana Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146, 1151 (9th Cir. 2003).

C. BLM's Failure To Fulfill Its Duties Under The Land Use Plans Constitutes Agency Inaction Subject To Review Under Section 706(1)

SUWA also argues that BLM has failed to carry out its duties under two land use plans. [FN34] By the plain terms of FLPMA and the regulations that implement it, these land use plans create obligations that BLM is obliged to fulfill. See 43 U.S.C. § 1732(a) ("The Secretary shall manage the public lands ... in accordance with the land use plans") (emphasis added); see also 43 C.F.R. 1610.5-3(a). Moreover, as established above, the relief SUWA seeks would be in the form of an order compelling final agency action. See Norton, 301 F.3d at 1233-34 & n.15. Thus, according to Petitioners' own terms, jurisdiction under Section 706(1) is appropriate.

> FN34. See Tenth Cir. Response Br. for Appellees Gale Norton and Bureau of Land Mgmt. at 44-45; Tenth Cir. Opening Br. for Appellants SUWA et al. at 15-18.

D. The Judgment Of The Tenth Circuit Should Be Affirmed

FLPMA's non-impairment standard is mandatory and non-discretionary; BLM may not choose to allow impairment of WSAs. Nor may BLM choose to violate its land use plans. The Tenth Circuit properly held that the district court has jurisdiction under Section 706(1) to compel BLM to perform its mandatory, non-discretionary duties, including as set out in BLM's own IMP and land use plans.

***22** II. The APA Provides Federal Courts With Subject Matter Jurisdiction Over Respondents' NEPA Claims

A. NEPA Imposes Mandatory, Non-Discretionary Duties On BLM

As articulated by Congress, the purpose of NEPA is: "To declare a national

policy which will encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Congress sought to achieve these substantive goals through procedural means; thus, NEPA created procedural mechanisms to ensure that before reaching a decision, a federal agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated...." Id.

NEPA contains certain "action forcing" provisions, which are directives to "all agencies to assure consideration of the environmental impact of their actions in decisionmaking." Kleppe v. Sierra Club, 427 U.S. 390, 409 & n.18 (1976) (citation and quotation omitted). Most pertinent here is Section 102(C)(2) of NEPA, which requires agencies to include in every "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a "detailed statement" on "the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C).

CEQ, which was created by NEPA, 42 U.S.C. § 4342, [FN35] has issued regulations governing when and how such ***23** environmental impact statements ("EISs") are to be issued. See 40 C.F.R. 1501 et seq. Except for certain classes of actions and those instances in which the decision to prepare an EIS already has been made, an agency's compliance with Section 102(C)(2) of NEPA begins with an Environmental Assessment, or "EA." 40 C.F.R. 1501.3, 1501.4. An EA is a concise document providing evidence and analysis relating to the environmental impacts of the agency's proposed action. 40 C.F.R. 1508.9. If the agency concludes, based on its EA, that the proposed action will not have a "significant effect on the human environment," then the agency issues a document called a Finding Of No Significant Impact, or "FONSI," which briefly presents the reasons for its decision. 40 C.F.R. 1508.13. Alternatively, if the agency concludes that the proposed action will have a significant impact, it must prepare an EIS. 40 C.F.R. 1501.4.

> FN35. After passage of NEPA, President Nixon specifically charged CEQ with promulgating regulations for NEPA's "action forcing" provisions. See Exec. Order No. 11514 § 3(h), 40 C.F.R. pt. 1500, reprinted in 42 U.S.C. § 4321.

The purpose of an EIS is "to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal government." 40 C.F.R. 1502.1. Thus, CEQ has provided extensive instructions to agencies regarding the timing, contents, and structure of an EIS. See 40 C.F.R. 1502. Moreover, the issuance of an EIS or EA does not mark the end of the procedural duties that NEPA imposes on an agency. CEQ regulations require that "[a]gencies shall prepare supplements to either draft or final environmental impact statements if ... [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. 1502.9(c).

This Court discussed the standards governing the issuance of a Supplemental Environmental Impact Statement ("SEIS") in Marsh, 490 U.S. 374. [FN36] In Marsh, the Court held that "[i]f there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will

affect the quality of the human environment in a significant ***24** manner or to a significant extent not already considered, a supplemental EIS must be prepared." Id. at 374 (citations and quotations omitted). The Courts of Appeals, including the Tenth Circuit, Norton, 301 F.3d at 1238, have interpreted Marsh as requiring that:

> FN36. Petitioners do not dispute that the standards governing the issuance of a supplemental EA are identical to those governing the issuance of a SEIS.

In reviewing an agency's decision not to prepare a supplemental EIS, a court must undertake a two-step inquiry. First, the court must determine whether the agency took a hard look at the proffered new information. Second, if the agency did take a hard look, the court must determine whether the agency's decision not to prepare a supplemental EIS was arbitrary and capricious. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (citing, inter alia, Marsh, 490 U.S. at 385); see also Village of Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991). But cf. S. Trenton Residents Against 29 v. Fed. Highway Admin., 176 F.3d 658, 663 (3d Cir. 1999) (articulating three-part test consistent with the above).

B. BLM's Failure To Fulfill Its Duties Under NEPA Constitutes Agency Inaction Subject To Review Under Section 706(1)

SUWA's claims under NEPA arise from five EISs and EAs that were issued by BLM, and that study the impacts of ORV use on lands under BLM's management. [FN37] SUWA alleges that, in the years since these NEPA documents were issued, ORV use has increased dramatically on the lands studied. SUWA argues that BLM has failed to fulfill its mandatory, nond-iscretionary duty to take a "hard look" at this increased ORV use to determine whether it constitutes "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," ***25** 40 C.F.R. 1502.9(c), such that the issuance of supplemental NEPA documents would be required. The District Court, misconstruing SUWA's request for an order compelling a "hard look" to be a request for an order compelling completion of a SEIS, dismissed SUWA's claim. See Babbitt, 2000 WL 33914094 at *9. The Tenth Circuit reversed, recognizing that under the circumstances present, the district court could order BLM to take the "hard look" required by NEPA. See Norton, 301 F.3d at 1236-40.

> FN37. See Norton, 301 F.3d at 1237 & n. 18; Babbitt, 2000 WL 33914094 at *8; Tenth Cir. Opening Br. for Appellants SUWA et al. at 22-24.

Petitioners' argument for reversal of the judgment of the Tenth Circuit is narrow. Petitioners do not dispute that the information regarding ORV use contained in BLM's EAs and EISs is outdated, or that evidence of increased ORV usage constitutes "significant new circumstances or information relevant to environmental concerns." Nor, indeed, could Petitioners make such an argument, since BLM concedes that it never took a "hard look" at this new evidence. [FN38] Instead, Petitioners argue only that BLM's refusal to take the requisite "hard look" is immune from judicial review.

> FN38. BLM admitted to the district court that, "[u]p to this point, the agency has not made any formal determination as to whether ... the preparation of a supplemental EIS or EA" is required. See Appendix to Tenth Cir. Opening Br. for Appellants SUWA et al. at 745.

Petitioners proffer two bases for their proposed rule of law. First, paralleling their FLPMA argument, Petitioners argue that jurisdiction is improper under Section 706(1) of the APA because the "hard look" that SUWA seeks to compel would not constitute "final agency action." Second, Petitioners argue that, because BLM is not currently proposing any new "major federal action" on which evidence of increased ORV use might bear, BLM is relieved of any duties under 40 C.F.R. 1502.9(c). Petitioners cannot so easily defeat the purpose of NEPA.

***26** 1. BLM's Failure To Take A "Hard Look" Is Reviewable Under Section 706(1) As "Action Unlawfully Withheld Or Unreasonably Delayed"

The APA grants courts jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). SUWA argues that BLM has "unlawfully withheld or unreasonably delayed" taking a "hard look" at evidence of increased ORV use. Petitioners counter by arguing that taking a "hard look" is not "final agency action," and therefore is beyond judicial review under Section 706(1).

Petitioners' argument that a court may not order a "hard look" is contrary to the plain language of the APA. The APA provides that: (i) courts "shall ... compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1); (ii) "agency action" "includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13), 701(b)(2); and (iii) "relief" "includes the whole or a part of an agency ... taking of other action on the application or petition of, and beneficial to, a person." 5 U.S.C. § 551(11)(C). An order compelling BLM to take a "hard look" would meet all three elements, as it would be an order to (i) "compel agency action," where the "agency action" at issue was (ii) "relief" sought (iii) "on the application or petition of" SUWA. Thus, the District Court may provide the relief that SUWA seeks by compelling BLM to take the "hard look" that has been "unlawfully withheld or unreasonably delayed." Cf. Sierra Club v. Glickman, 156 F.3d 606, 612, 617-18 & n.7 (5th Cir. 1998) (finding Section 706(1) an appropriate means to compel USDA to consult with the Fish and Wildlife Service, a procedural requirement of the Endangered Species Act). [FN39]

> FN39. Moreover, as Petitioners recognize, Section 706(1) provides courts with the ability to compel an agency to respond to a rule-making petition, or to make a determination on an administrative complaint, or to act on a permit application. Pet. Br. at 20. None of these orders may be distinguished in any principled way from an order compelling an agency to take a "hard look." Rather, an order to compel BLM to take a hard look merely compels the agency to exercise its discretion without directing the outcome--which Petitioners concede Section 706(1) allows. Pet. Br. at 21.

***27** This Court's decision in Bennett v. Spear, 520 U.S. 154 (1997), on which Petitioners heavily rely, is not to the contrary. Bennett established the following test for assessing whether an agency action is "final" under the APA:

> As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process--it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences flow.'

520 U.S. at 177-78.

The Bennett test was not applied in the context of agency inaction, nor did Bennett hold that an agency action must be "final" for purposes of Section 706(2) in order to be properly compelled under Section 706(1). But even if the only actions that could be compelled under Section 706(1) were actions that were "final" under Bennett, a "hard look" would pass muster. First, taking a "hard look" is far from tentative or interlocutory. Once an agency has taken a "hard look" at evidence, it has enough information to evaluate the significance of that evidence; until the agency has taken a "hard look," it does not. The act of taking a "hard look" shifts the agency's focus onto, and advances the agency's knowledge of, environmental issues in an irreversible way, which is the "culmination" that NEPA seeks. Second, legal consequences flow from a "hard look," became a "hard look" subjects BLM ***28** to the legal obligation to make a non-arbitrary, non-capricious decision about whether or not to issue a SEIS. [FN40]

> FN40. It is well-established that federal courts "should apply the finality requirement in a 'flexible' and 'pragmatic' way." Telecomms. Research and Action Ctr. (TRAC) v. FCC, 750 F.2d 70, 75 n.27 (D.C. Cir. 1984) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 149-50 (1967)). Accordingly, in the context of agencies administering ongoing plans such as the plans BLM administers here, courts have found that the failure to consider or issue a SEIS is final agency action. See, e.g., Friends of the Clearwater v. Dombeck, 222 F.3d 552, 555, 559 (9th Cir. 2000) (holding "that the Forest Service's failure to evaluate in a timely manner the need to supplement the original EIS in light of that new information violated NEPA"); Portland Audubon Soc'y v. Lujan, 795 F.Supp. 1489, 1504-05 (D. Or. 1992) (holding that BLM's failure to prepare SEIS was final action) aff'd sub nom. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993) (affirming this holding explicitly); see also Wisconsin v. Weinberger, 745 F.2d 412, 417-24 (7th Cir. 1984) (reviewing, as final agency action, Navy's decision not to issue a SEIS to address new information regarding the environmental effect of an ongoing submarine project).

Finally, the decision whether to issue a SEIS--i.e., taking a "hard look"--is no mere procedural triviality. The purpose of NEPA is to ensure that important environmental effects "will not be overlooked or underestimated," and to do so by "focusing the agency's attention" on "environmental consequences." Methow, 490 U.S. at 349. Judicial review pursuant to Section 706(1) ensures that an agency fulfills this mandatory, nondiscretionary duty of NEPA, and understands the environmental impacts of its actions.

2. BLM's Failure To Take A "Hard Look" Is Not Excused By An Alleged Absence Of New "Major Federal Action"

Petitioners also are in error when they assert that there is no "major federal action" here that triggers the requirements of 40 C.F.R. 1502.9(c). [FN41] It is precisely because BLM's actions ***29** under the land use plans are ongoing that the agency is obliged to consider new information that may render its prior environmental studies obsolete. Indeed, this Court reached the same conclusion in Marsh, where changing circumstances during ongoing construction of a dam required the Army Corps of Engineers to take a "hard look." 490 U.S. at 363, 373-74.

> FN41. Petitioners note that "[n]either SUWA's NEPA claim nor the court of appeals' ruling allowing that claim to go forward rests on the

premise that BLM was proposing any 'major Federal action' for those lands." Pet. Br. 45. Petitioners, however, fail to mention that the reason for this is that BLM did not argue Petitioners' new theory of no "major federal action" to the Tenth Circuit until its petition for rehearing en banc.

Moreover, even accepting arguendo Petitioners' flawed contention that ongoing actions under a land use plan do not constitute "major Federal action," the CEQ regulations that define "major Federal action" define it to include failures to act that are reviewable under the APA, such as BLM's admitted failure to take a "hard look" here:

Major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly. [FN42] Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts ... under the Administrative Procedure Act ... as agency action.

FN42. This sentence refers to the language in NEPA providing that agencies shall include an impact statement in "every recommendation and report on proposals for legislation and other major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added).

40 C.F.R. 1508.18. Thus, since BLM's failure to take a "hard look" is reviewable under the APA (as shown above), that same failure constitutes a "major federal action" under NEPA. [FN43]

FN43. If nothing else, the actions remaining to be taken over the indefinite life of the land use plans constitute "major federal actions significantly affecting the quality of the human environment" sufficient to implicate 42 U.S.C. § 4332(2)(C).

***30** Most importantly, Petitioners' argument is fatally flawed because it violates the spirit of NEPA. Under Petitioners' view, no "major federal action" remains when an agency (such as the BLM) administers a plan (such as the land use plans here) for a potentially indefinite period of time. Thus, under Petitioners' view, even if significant new evidence arises that an agency's ongoing management is based on faulty information, a court cannot review-- under Marsh or any other standard--the agency's refusal to take a "hard look" at the new information. Congress and CEQ could not have intended a result so contrary to the objectives of NEPA. [FN44]

FN44. Petitioners also argue that BLM should not be compelled to take a "hard look" because it lacks the resources to do so, and because it plans to take a "hard look" soon. Pet. Br. at 46-47. The Tenth Circuit was properly skeptical of both of these defenses, given their inherent inconsistency. See Norton, 301 F.3d at 1239-40. Petitioners further contend that a court may not use Section 706(1) to redirect an agency's use of its resources. But orders compelling acts such as a "hard look" do not improperly rearrange agency resources; if they did, then Petitioners would not concede, as they do, that orders enforcing ministerial duties are appropriate under Section 706(1). Pet. Br. at 21. Finally, Petitioners argue that allowing a court to review the refusal of an agency to take a "hard look" would involve courts too often in the decision making of agencies. Pet. Br. at 47. But federal courts may only compel a "hard look" if it has been delayed "unreasonably," 5 U.S.C. §

706(1), and whether an agency has delayed "unreasonably" turns on several factors, including the extent and significance of the new evidence at issue. Thus, a court could dismiss a complaint that did nothing more than allege the agency's failure to take a "hard look" at an insubstantial piece of new evidence.

C. The Judgment Of The Tenth Circuit Should Be Affirmed

BLM admittedly has ignored significant new evidence that increased use of ORVs may be rendering its NEPA documents obsolete. Under Section 706(1), BLM may be compelled to take a "hard look" at these new circumstances.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Briefs and Other Related Documents **(Back to top)**

- 2004 WL 772086, 72 USLW 3631 (Oral Argument) Oral Argument (Mar. 29, 2004)
- 2004 WL 570657 (Appellate Brief) Reply Brief for the Petitioners (Mar. 22, 2004)
- 2004 WL 910485 (Joint Appendix) (Mar. 10, 2004)
- 2004 WL 425738 (Appellate Brief) Brief for the Petitioners (Mar. 08, 2004)
- 2004 WL 314094 (Appellate Brief) Brief Amicus Curiae of Montana Wilderness Association in Support of Respondents (Feb. 17, 2004)
- 2004 WL 314095 (Appellate Brief) Brief Amicus Curiae of Former Chairs and General Counsels of the Council on Environmental Quality in Support of Respondents (Feb. 17, 2004)
- 2004 WL 319124 (Appellate Brief) Brief of Amici Curiae Professors of Administrative and Environmental Law in Support of Respondents Southern Utah Wilderness Alliance, et al. (Feb. 17, 2004)
- 2004 WL 319126 (Appellate Brief) Brief of the National Organization of Veteran's Advocates as Amicus Curiae in Support of Respondents (Feb. 17, 2004)
- 2004 WL 328992 (Appellate Brief) Amici Curiae Brief of Defenders of Wildlife and Public Citizen in Support of Respondents (Feb. 17, 2004)
- 2004 WL 341585 (Appellate Brief) Brief Amicus Curiae of the States of California, Colorado, Connecticut, Illinois, Massachusetts, Missouri, Montana, Nevada, New Mexico, New York, Oklahoma, Oregon, South Dakota and Wisconsin in Support or Respondents (Feb. 17, 2004)
- 2004 WL 522594 (Appellate Brief) Brief of Respondents Southern Utah Wilderness Alliance, et al. (Feb. 17, 2004)
- 2004 WL 46086 (Appellate Brief) Brief for Respondents Utah Shared Access

Alliance, et al. (Jan. 05, 2004)

• 2004 WL 40303 (Appellate Brief) Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners (Jan. 02, 2004)

• 2003 WL 22363145 (Appellate Brief) Reply Brief for the Petitioners (Oct. 10, 2003)

• 2003 WL 22428082 (Appellate Petition, Motion and Filing) Brief in Opposition to Petitions for a Writ of Certiorari (Sep. 24, 2003)Original Image of this Document with Appendix (PDF)

• 03-101 (Docket) (Jul. 18, 2003)

• 2003 WL 22428580 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari (Jul. 01, 2003)Original Image of this Document with Appendix (PDF)

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VII. Notes

i See, e.g., San Juan Resource Area, Moab District, Utah BLM, Proposed Comb Wash Watershed Plan and San Juan Resource Management Plan Amendment and Environmental Assessment (EA-UT-069-97-23) (1997) (127-page EA for one grazing allotment); Lower Gila Resource Area, Phoenix District, Arizona BLM, Environmental Assessment, Livestock Use Authorization, Santa Maria Ranch Allotment (No. 05046) (EA AZ-026-91-14) (1991) (33-page EA, plus 72 pages of public comments, tables, and maps for one grazing allotment).

ii See 40 C.F.R. § 1500.1(b) ("NEPA procedures [including the development of EAs] must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.")

iii See id. §§ 1500.2(d) (Federal agencies shall "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment."), 1506.6 (Agencies shall "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.") See also Joseph Feller, Public Participation Under NEPA, in Section of Natural Resources, Energy and Environmental Law, American Bar Association, The NEPA Litigation Guide 101, 115-20 (Karin P. Sheldon and Mark Squillace, eds. 1999) (explaining the importance of EAs for public participation).

iv See 43 U.S.C. § 4332(2)(E). Development of alternatives is required even when no EIS is needed. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988).

v This provision requires "some form of public input for all decisions that may have significant impact on federal lands." National Wildlife Fed. v. Burford, 835 F.2d 305, 322 (D.C. Cir. 1987).

vi These allotments are the Beanhole, House Rock, and Soap Creek Allotments in the Arizona Strip District and the Santa Maria Ranch and Santa Maria Community Allotments in the Kingman Field Area. There is no reason to believe that the assessments of these allotments, or the impacts overlooked by those assessments, are at all unusual or atypical, at least for these BLM offices.

vii Department of Interior Federal Register Notice. 1/25/2006. p 21.

viii *Ibid.* p 3.

ix BLM. Justification for a new proposed categorical exclusion for routine small scale vegetation management activities on public lands managed by the Bureau of Land Management. 12/12/2005. p 2.

x BLM Vegetation Treatments DPEIS. 2005. p 1-1.

xi Scoping Comment Summary Report for the Vegetation Treatments Programmatic

Environmental Impact Statement. 30 June 2002. p 1-1

xii -Northwest Area Noxious Weed Control Program .Oregon State Office. December 1985.
-Supplement to the Northwest Area Noxious Weed Program. Oregon State Office. March 1987.
-Final EIS California Vegetation Management .California State Office. August 1988.
-Final EIS Vegetation Treatment on BLM Lands in Thirteen Western States. Wyoming State Office. May 1991.
-Appendices: Final EIS Vegetation Treatment on BLM Lands in the Thirteen Western States. Wyoming State Office. May 1991.
-Final Record of Decision: Western Oregon Program-Management of Competing Vegetation Final EIS. Oregon State Office. August 1992.

xiii Department of Interior. 620 DM 3.6 C. "Monitoring and evaluation of emergency stabilization and rehabilitation activities must be implemented to ensure that treatments and activities are properly implemented, effective, and maintained." Effective Date 5/20/2004.

xiv Suppressed BLM document now on file with the BLM. Submitted to BLM by NRDC & NWF in 2005.

xv *Ibid.*

xvi *Ibid.*

xvii Suppressed document, submitted to the BLM by Fish & Wildlife Service. An additional copy was provided to the BLM by NRDC & NWF via correspondence sent in 2005.

xviii *Ibid.*

xix Final EIS Vegetation Treatment on BLM Lands in Thirteen Western States. Wyoming State Office. May 1991. p 1-37.

xx EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, "The National Environmental Policy Act: A Study of its Effectiveness After Twenty-five Years" (1997) ("CEQ Report").

xxi Denise A. Dragoo, "What's New With NEPA? (Even After 30 Years)," 47 Rocky Mt Min L Inst 22-1 (Rocky Mtn. Mineral Law Fdn. 2001)

xxii CEQ Report at 33.

xxiii CEQ Report at 32.

xxiv CEQ Report at 33.

xxv CEQ Report at 33.

xxvi CEQ Report at 31.

xxvii CEQ Report at 31.

xxviii We hereby incorporate by reference in these comments, for inclusion in the administrative record for this proposal, the *amicus curiae* brief of Natural Resources Defense Council *et al*., in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), 2004 WL 319125 ("NRDC Amicus Brief").