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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, Plaintiff, vs. JOE KRAAYENBRINK, BLM Idaho Falls District Manager; KATHLEEN CLARKE, BLM Director; and BUREAU OF LAND MANAGEMENT, Defendants.	Civ. No. 05-297-E-BLW **OPENING BRIEF IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF**

INTRODUCTION

Western Watersheds Project respectfully seeks an injunction prohibiting BLM from implementing revisions to its grazing regulations, at 43 C.F.R. Part 4100.

Unless enjoined, these revised regulations will irreparably harm Western Watersheds and the environment in profound ways, including by gutting the Fundamentals of Rangeland Health, excluding Western Watersheds and other "interested

publics" from BLM's grazing management decisions, and surrendering greater control of our public lands and resources to ranching permittees.

As explained below, BLM has violated NEPA several ways in adopting the revised regulations, including by misrepresenting the scope of these changes and failing to disclose the serious impacts they will have. Indeed, BLM suppressed the views of its own and other agency scientists, who warned that the changes will cause long-term harm to the environment while impairing BLM's grazing management effectiveness. *See Declaration of Jon Marvel, filed herewith, Exhs. 1-2.* Further, BLM has failed to justify why it is now seeking to exclude the public from its grazing decisions and eviscerate the Fundamentals of Rangeland Health, when it adopted these provisions in 1995 as vital measures necessary to improve public lands degraded by livestock.

An injunction to preserve the status quo is also appropriate, since there is no urgent reason why the revised regulations must go into effect immediately. BLM has taken a leisurely pace for the rulemaking, even printing its Final EIS in October 2004 but not bothering to release it until a couple weeks ago. Meanwhile, the existing 1995 grazing regulations – which BLM adopted after a comprehensive environmental review, and which were upheld over livestock industry challenges in *Public Lands Council v. Babbitt, 529 U.S. 728 (2000)* – will remain in effect and adequately protect BLM's interests, as well as the public, while this case is being litigated.

Accordingly, the Court should grant this Motion for Injunctive Relief, and issue an injunction prohibiting BLM from implementing the grazing regulation revisions pending adjudication of the merits of Western Watersheds' claims.

STATEMENT OF RELEVANT FACTS

BLM approved the grazing regulation revisions in a June 2005 Final Environmental Impact Statement, entitled *"Proposed Revisions to Grazing Regulations for the Public Lands, Final Environmental Impact Statement FES 04-39* ("Final EIS" or "FEIS").[1] BLM is expected to publish the revised regulations in the Federal Register shortly; and they will take effect 30 days thereafter, unless enjoined by this Court. *See FEIS, Errata, p. 11.*

The revised grazing regulations will control BLM's management of livestock grazing on 160 million acres of public lands in the West (excluding Alaska). *See FEIS, p. ES-1 & Figure 1-1.* BLM authorizes over 18,000 grazing leases and permits on these lands. *Id., pp. 1-12 to 1-13.*

The revisions will immediately harm Western Watersheds' interests and cause irreparable environmental harm on these public lands, including allotments having exceptional biological values in the Upper Salmon basin and other parts of BLM's Idaho Falls District of eastern Idaho. *See Complaint, ¶¶ 13-19, 114-19, 141-45; Marvel Decl., ¶¶ 3-19, 25-73* (detailed factual discussion of harms from the revised regulations).

The Existing "Rangeland Reform" Grazing Regulations.

BLM's existing regulations were adopted in 1995, after its comprehensive "Rangeland Reform" review found that public lands remain degraded by grazing – and indeed, may even be in worse condition than 1934, when Congress adopted the Taylor Grazing Act to remedy decades of overgrazing. *See Complaint, ¶¶ 24-30, 35-45; 60 Fed.*

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[1] The Final EIS is available on BLM's website at www.blm.gov/grazing/EIS. Appendix A shows the revisions to 43 C.F.R. Part 4100 in strikeout/replace format.

Reg. 9893 (Feb. 22, 1995). The 1995 regulations thus increased public participation in grazing decisions; adopted the Fundamentals of Rangeland Health; established that the United States holds title to range improvements and water rights on the public lands; and implemented other measures, that BLM explained were needed to improve its grazing management and help restore degraded areas on the public lands. *Id.*

In particular, BLM established the Fundamentals of Rangeland Health to set minimum ecological standards for grazing on the public lands; and to require prompt changes in grazing management when they are not being met. *See 43 C.F.R. § 4180 et seq.; Idaho Watersheds Project v. Hahn, 187 F.2d 1035 (9th Cir. 1999)* (upholding BLM duty to change grazing management prior to next grazing year). BLM explained that these measures "are **critical** to ensuring that BLM's administration of grazing helps . . . restore healthy conditions to those areas that currently are not functioning properly, especially riparian areas." *60 Fed. Reg. at 9898* (emphasis added).[2]

The 1995 rulemaking also underscored the importance of full public participation in grazing administration: "[BLM] believes that the public interest will be best served if a wide range of interests are represented when decisions are being made. Thus, increased public participation is essential to achieving lasting improvements in the management of our public lands." *60 Fed. Reg. at 9895*. It also emphasized that the United States should

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

hold title to range improvements and water rights, to improve its management flexibility and be consistent with Forest Service practices. *Id., at 9897.*

The Current Attempt To Gut The Rangeland Reforms.

The livestock industry vigorously opposed these and other parts of the 1995 regulations. *See Complaint, ¶¶ 46-51.* But the courts rejected all of their challenges (except to a single provision, not relevant here, authorizing "conservation use"), including to the Fundamentals of Rangeland Health and the adequacy of BLM's 1994 Rangeland Reform EIS. *See Public Lands Council v. Dept. of Interior, 929 F. Supp. 1436 (D. Wyo. 1996), aff'd in part and rev'd in part sub nom Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999), aff'd 529 U.S. 728, 120 S.Ct. 1815 (2000).*

Failing in the courts, the livestock industry is now seeking to gut the Rangeland Reforms through the current regulation revisions; and it is aided in that effort by the Administration's efforts to pack BLM with livestock industry lobbyists, advocates, and permittees. *See Complaint, ¶¶ 52-58* (providing examples).

After conducting so-called "scoping" in March 2003, BLM published the text of its proposed changes in December 2003 – asserting that it needed to "improve working relationships" with ranchers. *See 68 Fed. Reg. 68,452 (Dec. 8, 2003).* As described in a 2004 law review article, the proposed revisions:

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

pipelines on public lands, thus crippling BLM's ability to manage the land in the greater public interest.

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

Suppressing Science And Adverse Comments.

Notably, no draft EIS accompanied the proposed regulations published in December 2003, as required under NEPA and the APA. That is apparently because top Administration officials had just learned that BLM's draft EIS – known as the Administrative Review Copy (or "ARC-DEIS") – expressed the views of BLM wildlife biologists and other scientific staff that the proposed revisions would result in long-term adverse harms to the environment, and reduce BLM's ability to manage the public lands. *Complaint, ¶¶ 61-62, 93-96; Marvel Decl., Exh. 1.* So BLM "deep-sixed" the offending parts of the ARC-DEIS, and ordered a hasty rewrite to eliminate any suggestion that the regulations would have significant effects. *Id.*

The "sanitized" draft EIS was released in January 2004; and BLM allowed public comment until March 2004. In contrast to the Rangeland Reforms, where BLM held 49 public meetings, it conducted just 6 public meetings during this period. *FEIS, p. 1-25.*

Western Watersheds along with many scientists, conservationists, and public land users submitted comments expressing their concerns – similar to those of BLM's scientists in the ARC-DEIS – that the proposed changes would benefit the livestock industry at the expense of the environment and public interest, and that the draft EIS failed utterly to disclose and address these adverse impacts. *Complaint, ¶¶ 63, 67.*

Other federal agencies shared these concerns. *Id., ¶¶ 97-100.* The U.S. Fish and Wildlife Service – a sister agency to BLM, within the Department of Interior – prepared

comments that the regulation revisions would undermine the government's ability to protect and restore fish, wildlife, water quality, and other values on the public lands, while elevating livestock interests over sound management, including these statements:

> the Proposed Revisions constrain biologists and range conservationists from recommending and implementing management changes based on their best professional judgment in response to conditions that may compromise the long-term health and sustainability of rangeland resources. Taken together we believe these aspects of the Proposed Revisions have the potential to be detrimental to fish and wildlife resources. . . . The Proposed Revisions would change fundamentally the way the BLM lands are managed temporally, spatially, and philosophically. These changes could have profound impacts on wildlife resources.

Id; Marvel Decl., ¶ 76 & Exh. 2.

The EPA prepared similar comments that the regulation changes would reduce BLM's ability to protect water quality and riparian areas from livestock degradation. *Id.*, ¶ *77& Exh. 2.* But just as the contrary views in the ARC-DEIS were suppressed, the Administration ensured that these critical comments were excluded from the rule-making process too, such that the public did not learn of them until just recently. *Id.*

The Final EIS and Revised Regulations.

Underscoring its own lack of urgency in implementing the revised regulations, BLM actually printed the Final EIS in October 2004; but did not release it to the public until June 2005. *Complaint, ¶ 68-70; FEIS, Errata p. 1.*

Further, despite the outpouring of critical comments from scientists and the public, BLM never wavered in its determination to give the livestock industry its "wish list" of environmental rollbacks and greater rancher control over public lands management. Neither did it provide any meaningful analysis in the Final EIS of how the regulation revisions would fundamentally alter its grazing management and cause long-

term adverse harms to the health of the public lands, streams, wildlife, and other resources. Indeed, the Final EIS differs very little from the "sanitized" draft EIS, as evidenced by the "changes" section at the beginning of each chapter of the Final EIS.

Instead, the Final EIS portrays the changes as minor revisions to improve BLM's administrative efficiency, which will not have any long-terms adverse impacts on the environment. These quotes from the Executive Summary sound these themes, which are repeated over and over in the rest of the document:

- "This rulemaking is designed to provide limited refinements to the larger grazing reforms made in 1995. The BLM does not anticipate that the proposed changes would have significant environmental effects. . . ." *FEIS, p. ES-1.*

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

- "A determination was made that the regulatory changes would have no adverse effects to proposed, candidate, threatened or endangered species, or designated or proposed critical habitat from the proposed regulation changes." *FEIS, p. ES-6.*

These assertions are false and misleading – there is no other way to describe them. In truth, BLM has determined to abolish key elements of the existing grazing regulations, which it adopted in 1995 after thorough analysis and which were upheld by

the courts. And in so doing, BLM is ensuring that serious environmental harms will continue on the public lands, in violation of the statutes adopted by Congress.

The Complaint herein describes the effects of these revisions in great detail. *See Complaint, ¶¶ 72-90, 102-119.* To summarize, some of the major changes that will be made in BLM's grazing management regime include the following:

1. Gutting The Fundamentals of Rangeland Health.

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

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

(2) Forbidding BLM from relying on all available data about current ecological conditions in determining whether grazing is violating the Standards and Guidelines, under 43 C.F.R. § 4180.2(c)(1), and instead requiring it to use only multi-year "monitoring" data – even though BLM previously emphasized that it needs to consider all available information and that only relying on monitoring is undesirable. *See 60 Fed. Reg. at 9931, 9956.* BLM does not acknowledge that it lacks the funding to do such monitoring, and has rarely if ever done it in the past, even though the ARC-DEIS pointed this out. *See Complaint, ¶¶ 80-82, 96C.*

(3) Prohibiting BLM from taking immediate action to correct grazing abuses, and instead requiring BLM to take 24 months to adopt a new grazing decision, and an

additional year to implement it. The new regulations also forbid from BLM immediately implementing a reduction in livestock use greater than 10%, and instead require it to "phase-in" any such reduction over a 5-year timeframe – again reversing BLM's prior position that such a delay in making livestock reductions improperly limits its management authority and would allow excessive degradation to continue. *See 43 C.F.R. §§ 4110.3-3(a)(1) & 4180.2(c)(1); Complaint, ¶¶ 83-85.*

The effect of these changes will be dramatic. *See Feller, supra, 34 Env. Law at 1132-37; Marvel Decl.* BLM will now be free to ignore the vast majority of its own ecological data, as well as data provided by Western Watersheds or other members of the public, even if it shows that streams, uplands, and wildlife habitats are badly degraded by livestock. By limiting its consideration to multi-year "monitoring" data, BLM can put off making determinations of whether allotments are meeting basic ecological requirements for years, if not decades. And even if BLM were eventually to find a problem, the regulation changes allow it to further delay any meaningful livestock grazing reductions for **eight years** thereafter. As a result, many public land allotments in the Upper Salmon basin and elsewhere – particularly those with sensitive species, such as sage grouse – will continue to suffer serious adverse harms from grazing, without any effort by BLM to improve them. *Marvel Decl., ¶¶ 20-77.*

Yet even though BLM's own scientists, the Fish and Wildlife Service, EPA, and independent scientists all recognize that these adverse impacts will occur, BLM falsely contends that these changes to the Fundamentals of Rangeland Health are "minor" and will have no long-term adverse impacts.

2. Excluding Public Involvement In Grazing Management.

A second major change in the grazing regulations, also long sought by the livestock industry, is to exclude Western Watersheds and other members of the public from having any meaningful role in grazing management decisions. *See Complaint,* ¶¶ *73-76; Feller, supra, at 1130-32.* Again, BLM accomplishes this result through numerous revisions, which it claims are intended just to improve its "efficiency."

Most notably, BLM intends now to eliminate the requirement that it must "consult, cooperate, and coordinate" with interested publics before issuing or renewing grazing permits under 43 C.F.R. § 4130.2(b)*;* modifying terms in grazing permits, under § 4130.3-3(a); changing grazing use within terms and conditions of permits, under § 4130.4(b)(3)*;* and issuing "temporary non-renewable" (TNR) grazing authorizations, under § 4130.6-2(a). *See Complaint,* ¶ *73.* The revisions also would allow BLM and permittees to reach "agreements" over grazing decisions without any public involvement under 43 C.F.R § 4110.3-3(a)(1). *Id.*

Moreover, by revising 43 C.F.R. §§ 4130.6-2 & 4160.1(c), BLM will be able to issue TNR authorizations that have immediate effect, with no ability by Western Watersheds or other interested publics to be advised, protest, or appeal. *Complaint,* ¶ *74.* As this Court is aware, BLM has unlawfully issued massive amounts of TNR authorizations on the Jarbidge Resource Area in recent years. *See Western Watersheds Project v. Bennett, No. CV-04-181-S-BLW (D. Idaho 2004)* (entering injunction and summary judgment over 2004 TNR authorizations*); Stipulated Settlement Agreement, Committee for the High Desert and Western Watersheds Project v. Guerrero, Civ. No. 02-0521-S-MHW (D. Idaho, 8/19/03).* These revisions would thus allow BLM to avoid

even having to advise Western Watersheds of similar TNR authorizations in the future, and help insulate BLM from being held accountable for the adverse environmental impacts that such actions will foreseeably have on native habitats, streams, fish and wildlife values.

Further, in revising 43 C.F.R. § 4100.0-5, BLM is making it more burdensome to remain an "interested public." *See Complaint, ¶ 75.* Under the current regulations, Western Watersheds has interested public status on hundreds of BLM allotments encompassing about 40 million acres of public lands. *Marvel Decl., ¶¶ 6-7.* As an interested public, Western Watersheds is entitled to participate in all grazing management processes – and does so regularly on these allotments – but it cannot always respond whenever BLM seeks input or comment on each allotment. *Id., ¶¶ 27-31.* Under the revised regulations, BLM will simply eliminate Western Watersheds as an interested public if it fails to respond to any BLM request for comments, and will stop providing even final grazing decisions thereafter. This will harm Western Watersheds' ability to inform its members and the public and undertake other aspects of its mission. *Id.; Complaint, ¶ 116.*

3. Giving Ownership And Control To The Livestock Industry.

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

Among other changes, the revised regulations would: (a) require BLM to consult with local grazing boards on certain grazing decisions (even while excluding consultation

with the public), a step that BLM rejected in 1995; (b) reinstate "grazing preferences" previously eliminated in the 1995 regulations; (c) also reverse the 1995 regulations by allowing permittees to own title to permanent range improvements on the public lands; (d) eliminate the existing requirement that BLM must hold ownership of water rights (where allowed by state law); and (e) allow permittees to change "terms and conditions" of grazing with no public notice or oversight. *Id.*

Again, these are issues that the livestock industry contested in the *Public Lands Council* litigation – and lost. Now, BLM is abandoning its prior insistence that these are important elements of sound grazing management, while denying that it is doing so. In failing to explain, much less justify, these abrupt reversals in its regulations, BLM has thus violated NEPA and the APA, as explained below, warranting injunctive relief.

ARGUMENT

I. BLM HAS VIOLATED NEPA.

Western Watersheds is entitled to a preliminary injunction if it "demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *A&M Records v. Napster, 239 F.3d 1004, 1014 (9th Cir. 2001); Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1298 (9th Cir. 2003).*

Under the first prong of this "sliding scale" test, the Court need look no further than Western Watersheds' First Claim for Relief, which alleges that the Final EIS and regulation revisions violate NEPA and the APA. *See Complaint, ¶¶ 146-49.* BLM's NEPA violations are so blatant than an injunction is warranted on this claim alone,

without even considering Western Watersheds' additional claims under FLPMA, the ESA, and other statutes *(see Complaint, ¶¶ 150-58).*

NEPA requires BLM to take a "hard look" at the direct, indirect, and cumulative environmental impacts of its proposed regulation changes, and to consider a reasonable range of alternatives. *42 U.S.C. § 4332(2)(C); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348-51 (1989).* NEPA also obligates BLM to consult with and obtain comments from other federal agencies; to make those comments available to the public; and to have them accompany the proposal through the agency review process. *See 42 U.S.C. § 4332(2)(C).*

The NEPA regulations further underscore BLM's obligations to ensure that environmental information is of high quality, and its scientific analysis is accurate, *see 40 C.F.R. §§ 1500.1(b) & 1502.24;* and to disclose and discuss any responsible opposing views, *see 40 C.F.R. § 1502.9(b).*

BLM met **none** of these NEPA obligations. Rather than acknowledge it is rescinding most of the grazing management reforms adopted in 1995, BLM's Final EIS falsely asserts that the changes are minor. Rather than analyze the adverse effects these changes will have upon the public lands and its ability to effectively manage grazing, BLM falsely asserts there will be no real impacts. And rather than ensure the scientific integrity and accuracy of its NEPA analysis, BLM instead suppressed and ignored the views of its own experts and those of sister agencies, as noted above.

Each of these defects violates NEPA, in letter and in spirit, as other cases confirm. *See Center For Biological Diversity v. United States Forest Service, 349 F.3d 1157 (9th Cir. 2003)* (failure to disclose opposing scientific opinion violates NEPA); *Idaho*

Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (agency has a duty to use high quality information and accurate scientific analysis); *California v. Block, 690 F.2d 753 (9th Cir. 1982)* (reversing nationwide EIS for failing to take a hard look at environmental impacts and consider alternatives); *Seattle Audubon Soc. v. Lyons, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994)* (EIS must "disclose responsible scientific opinion in opposition to the proposed action and make a good faith, reasoned response to it"); *Friends of the Earth v. Hall 693 F. Supp. 904, 934 (W.D. Wash. 1988)* (EIS that fails to disclose and respond to "the opinions held by well-respected scientists concerning the hazards of the proposed action is fatally deficient").

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

BLM's violations of NEPA are even worse here. Again, it actively **suppressed** the views of its own experts, setting forth in detail numerous ways that the regulation changes would have long-term adverse impacts on the environment and its own grazing management effectiveness. *See Marvel Decl., ¶¶ 73-78 & Exh. 1.* BLM also falsely asserts that the changes will have no impacts on fish and wildlife resources, when the

U.S. Fish and Wildlife Service found the opposite to be true – but its comments were suppressed as well, even though BLM had a duty under NEPA to obtain and address them. *Id. & Exh. 2.* Instead of truly assessing likely impacts, BLM simply relies on its assertions that there will be none. *See FEIS at 4-30 to 4-40; Complaint ¶¶ 110-112.*

Neither did BLM assess the **cumulative impacts** of its actions, as NEPA requires. *See Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005); Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989 (9th Cir. 2004)* (both holding that NEPA requires substantial detail in cumulative effects analyses). The Final EIS spends only two pages on a cursory mention of cumulative effects, but fails to analyze them in any detail – although BLM is currently approving massive energy developments and other actions on the western public lands, that will combine with the adverse impacts of livestock grazing to further degrade and fragment native habitats and wildlife values. *See FEIS, pp. 4-60 to 4-62; Complaint, ¶ 112.*

In short, BLM's NEPA process here is a sham, designed to mislead the public and squelch scientific dissent. Because BLM violated NEPA at its most fundamental level – by failing to take a "hard look" at the effects of its proposed actions – the Court is thus justified in enjoining the revised regulations.

II. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM.

Not only is Western Watersheds entitled to an injunction based on BLM's NEPA violations, but also because many forms of irreparable harm will occur if the revised regulations are allowed to go into effect. *See Earth Island, 351 F.3d at 1298; High Sierra Hikers v. Blackwell, 390 F.3d 630 (9th Cir. 2004)* (injunction proper to prevent "possible" or "likely" irreparable harm when an agency has violated NEPA).

As discussed in detail in the accompanying Marvel Declaration and the Complaint, these irreparable harms include direct injuries to Western Watersheds' organizational and information interests, as well as irreparable environmental harms. *See Complaint, ¶¶ 114-19; Marvel Decl., ¶¶ 9-78.*

First, the new regulations will authorize BLM to cease providing information as of right to Western Watersheds on dozens of allotments in the Idaho Falls District, plus hundreds of other allotments elsewhere in Idaho and the West. *Id.* The changes in the role of "interested publics" under the revised regulations will allow BLM to exclude Western Watersheds from information gathering, communications and other processes relating to a host of grazing management decisions, including the issuance and renewal of grazing permits as well as "TNR" authorizations. This will prevent or impair Western Watersheds from gathering site-specific allotment information, communicating it to BLM in a timely fashion, and participating in all decision-making stages for grazing management on these allotments, while ranchers will have full and unfettered access to BLM to promote their interests. *Id.*

Second, this exclusion of Western Watersheds and other members of the public will also result in adverse impacts to the environment in many ways, as discussed in the the ARC-DEIS and the comments of U.S. Fish and Wildlife Service, and many others. *See Marvel Decl., ¶¶ 73-78.* Further, gutting the Fundamentals of Rangeland Health will result in irreparable harms to the public lands, streams, and wildlife values that Western Watersheds seeks to defend and protect, in the Idaho Falls District and many other places – including Upper Salmon basin allotments that have high biological importance for many imperiled fish and wildlife speices. *Marvel Decl., ¶¶ 33-71.* The Marvel

Declaration illustrates these points by addressing several specific allotments where the regulation changes will lead to the exclusion of Western Watersheds from upcoming grazing decisions, and allow continued degradation of fisheries and uplands habitats vital to many wildlife species. *Id.*

Moreover, the "management flexibility" and turn-over of ownership to ranchers of range projects and water rights will further impair BLM's ability to manage grazing on the public lands in a responsible manner and in compliance with FLPMA and other statutes; and again lead to irreparable environmental harm. *See Complaint, ¶¶ 118-19.* Again, the comments submitted by Western Watersheds, the ARC-DEIS team, U.S Fish and Wildlife Service, and others underscore this point. *Marvel Decl., ¶¶ 73-77.*

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

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

III. AN INJUNCTION IS PROPER TO MAINTAIN THE STATUS QUO UNDER THE EXISTING REGULATIONS.

Finally, an injunction is also appropriate here to preserve the status quo, by leaving the existing regulations in effect while this case is adjudicated and thereby avoid

irreparable harm to Western Watersheds and the environment. *See Regents of the Univ. of Cal. v. American Broadcasting Co., 747 F.2d 511, 514 (9th Cir. 1984)* (the "function of a preliminary injunction is to preserve the status quo *ante litem*," which is defined as "the last, uncontested status which preceded the pending controversy").

Many federal courts have likewise enjoined new regulations from taking effect, particularly where – as here – existing regulations are in place already. In *National Assoc. of Farmworkers v. Marshall, 628 F.2d 604 (D.C. Cir. 1980),* for instance, the D.C. Circuit enjoined Department of Labor regulations approving the use of pesticides and chemicals on crops, without sufficient information on the health impacts of these chemicals. It found that the Department of Labor could not establish harm from enjoining the regulations, because an injunction would simply maintain the status quo in place before the new regulations. *See 628 F.2d at 614-616.*

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

Further, an agency's own delay in adopting new regulations underscores the propriety of an injunction to preserve the status quo under existing regulations. In

Manufacturing Chemists Assoc. v. Costle, 451 F. Supp. 902 (W.D. La. 1978), chemical manufacturers and others sued the EPA over new regulations identifying 271 chemicals as hazardous substances, which EPA had issued two years after it noticed the proposed regulations. The district court enjoined application of the new regulations until after it had ruled on the merits, emphasizing that the "languor that has characterized the entire process of developing the challenged regulations indicates that immediate implementation is by no means essential." *451 F. Supp. at 906.*

Here, BLM similarly has followed a languid pace in adopting the grazing regulation revisions. As noted above, it first proposed the revisions in March 2003; and although it finalized the EIS in October 2004, BLM did not release it until June 2005. And by BLM's own characterization, the revisions are simply "minor" changes for administrative convenience. Hence, where BLM itself sees no urgency in implementing the regulation changes and itself downplays their importance, an injunction to preserve the status quo under the existing regulations is appropriate.

CONCLUSION

For the foregoing reasons, the Court should issue an injunction prohibiting BLM from implementing its grazing regulation revisions pending adjudication of the merits of Western Watersheds' challenges to them.

Dated: July 22, 2005 Respectfully submitted.

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