UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

C.L. "BUTCH" OTTER, and the **IDAHO STATE LEGISALTURE,**

Plaintiffs,

vs.

S.M.R. JEWELL, JANICE SCHEIDER, NEIL KORNZE, BUREAU OF LAND MANAGEMENT, THOMAS J. VILSACK, THOMAS L. TIDWELL and **UNITED STATES FOREST SERVICE,**

Defendants,

and

PUBLIC LANDS COUNCIL, **NATIONAL CATTLEMEN'S BEEF ASSOCIATION**, **IDAHO CATTLE ASSOCIATION**, **AMERICAN FARM BUREAU FEDERATION**, and **IDAHO FARM BUREAU FEDERATION**,

Amici Curiae.

Civil No. 1:15-cv-01566-EGS

PUBLIC LANDS COUNCIL, **NATIONAL CATTLEMEN'S BEEF ASSOCIATION**, **IDAHO CATTLE ASSOCIATION**, **AMERICAN FARM BUREAU FEDERATION**, and **IDAHO FARM BUREAU FEDERATION**
AMICI BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTERESTS OF AMICI

Amici curiae represent businesses and families in the ranching, livestock, and farming business that depend, in part, on continued access to public lands for their livelihood. Amici are concerned that the sub-regional Idaho and Southwestern Montana Greater Sage Grouse Land Use Plan Amendment ("LUPA") will significantly affect the ability of ranchers to continue to graze livestock on public lands. Amici are also concerned about the effect of the LUPA on the viability of ranches, farms, and rural communities across the West, due to the plan's adverse impacts on permit rights, improvements on their allotments, access to and maintenance of water rights, and the value of adjacent or intermingled private ranch and farm lands.

Public Lands Council ("PLC"), represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC is a Colorado nonprofit corporation, whose membership comprises state and national cattle, sheep, and grasslands associations, as well as individual ranchers. These ranchers own nearly 120 million acres of the most productive private land in the West. PLC members also manage vast areas of public land and national forests in grazing allotments under permits and leases from the Bureau of Land Management ("BLM") and the Forest Service, including in Idaho.

National Cattlemen's Beef Association ("NCBA") represents cattle producers in every state and at all levels of production. NCBA is a Colorado nonprofit corporation, whose direct membership consists of about 30,000, but through its affiliated associations NCBA represents nearly 140,000 producers. Many of NCBA's members hold grazing permits and leases authorizing livestock grazing on federal lands, including in Idaho.

Idaho Cattle Association ("ICA") is an Idaho nonprofit corporation whose primary objective is to protect, promote, and pursue the livelihood and cultural viability of the Idaho beef

industry. It has long been an advocate of responsible, environmentally sensitive use of natural resources along with careful concern for best practices regarding the welfare of animals. First organized in 1915, the ICA remains the standard bearer for every segment of the livestock industry in Idaho—including private landowners, ranchers, and permittees who utilize public lands in their grazing operations.

American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Through its state and county Farm Bureau organizations, AFBF represents about 6 million member families in all fifty states and Puerto Rico, including members in Idaho. Many of AFBF's members in the state of Idaho rely on grazing permits for access of grazing on federal lands located in Idaho.

Idaho Farm Bureau Federation ("IFB") is an Idaho nonprofit corporation. IFB is a voluntary membership organization of farm and ranch families, which is united for the purpose of assessing and acting to further educational improvement, economic opportunity, and social advancement for its members. Founded in 1939, IFB is a member of AFBF. Members of IFB include receive a significant amount of their income from production agriculture within Idaho, depending on grazing permits for access to public lands.

These associations ("grazing amici") are deeply concerned with the prospect of significant reductions in permitted use levels, as well as drastic changes in the conditions placed on permittees concerning the management of their livestock on federal lands. Many of the grazing amici members own land intermingled with or adjacent to BLM and Forest Service rangeland and are concerned with how the management under the LUPA may diminish the quality and quantity of water under their water rights that are essential to their ranching and

farming operations. While grazing amici are supportive of environmentally responsible management practices, the LUPA establishes a management scheme that violates core standards that protect grazing as a viable, continuing multiple use of public lands. In particular, grazing amici object to the LUPA's net conservation gain for sage grouse standard and the establishment of extensive sage grouse focal areas that employ draconian restrictions on grazing. Grazing amici are concerned that these restrictions will diminish the health of the range and lead to conditions that promote wildfires to the detriment of both sage-grouse and intervenors. As these new standards are implemented, they will have a huge economic impact on grazing amici, whose members depend on continued access to federal lands, not to mention the unquantifiable impacts on rural communities that their businesses support.

II. APPLYING THE NET CONSERVATION GAIN STANDARD TO SAGE-GROUSE VIOLATES FLPMA

The Federal Land Policy and Management Act ("FLPMA") does not require the BLM to offset their impacts on a landscape to achieve a "net conservation gain" for sage-grouse and BLM can cite no such statutory authority. To the contrary, FLPMA requires the BLM provide for multiple uses of the public lands to the extent that such use does not impair the long-term sustainability of public lands resources. 43 U.S.C. § 1732. In essence BLM has turned FLPMA on its head through the Idaho sage grouse LUPA by abandoning the multiple-use mandate of the statute and inserting sage grouse as the primary use of federal lands. The sage grouse is not listed as a threated or endangered species. Yet, the net conservation gain standard and the sage grouse focal area set-asides in effect treat the bird as a listed species under the Endangered Species Act (ESA) which limits "take" and adverse modification or destruction of critical habitat is prohibited. 16 U.S.C. §§ 1532(19), 1536(a)(2). At least under the ESA, there are provisions to allow incidental take in localized situations so long as the entire species is not jeopardized.

The express terms of FLPMA contemplate use of the public lands under the BLM's multiple-use mandate will have some impacts, and thus requires the agency to ensure only that management actions prevent "unnecessary or undue degradation" ("UUD") of the public lands. 43 U.S.C. § 1732(b). The Department of the Interior's Board of Land Appeals has interpreted "unnecessary or undue degradation" to mean the occurrence of "something more than the usual effects anticipated" from appropriately mitigated development. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011) (citing *Biodiversity Conservation Alliance,* 174 I.B.L.A. 1, 5-6 (March 3, 2008)). The UUD requirement flows from the BLM's overarching statutory mandate that it manage the public lands resources according to principles of multiple-use and sustained yield. 43 U.S.C. § 1732(a).

The UUD standard must be viewed in light of FLPMA's overarching mandate that the BLM employ principles of multiple-use and sustained-yield in management decisions. *Theodore Roosevelt*, 661 F.3d at 76. The obligations to prevent UUD and employ multiple-use principles, while distinct, are "interrelated and highly correlated." *Id*.

Indeed, "by following FLPMA's multiple-use and sustained-yield mandates, the [BLM] will often, if not always, fulfill FLPMA's requirement that it prevent environmental degradation because the former principles already require the Bureau to balance potentially degrading uses . . . with conservation of the natural environment." *Id*. In other words, by appropriately balancing use of resources through mineral extraction, grazing, or timber harvest and following principles of sustained yield, BLM will often have taken the steps necessary to prevent unnecessary or undue degradation. *Id*.

Adhering to the UUD standard is vital to BLM's ability to fulfill its multiple-use mandate because providing for productive *use* of rangeland, forests, and minerals on the public lands

necessarily entails some impact to the landscape, and by allowing impacts so long as they do not rise to the level of unnecessary or undue degradation, BLM ensures that the public lands and resources remain open to a variety of consumptive uses over the long term.

To carry out its multiple-use mandate in the context of livestock grazing, the BLM sets "permitted use" levels for grazing permittees during the development of general forest management plans or specific allotment management plans. *See* 43 C.F.R. § 4110.2-2(a) (Permitted use). This permitted use attaches to "base property," or the private land and resources which are required to serve as a base of operations and capable of supporting authorized livestock during the year. 43 C.F.R. §§ 4100.0-5, 4110.2-2(b), 4110.2-1. In general, the BLM sets permitted use levels based on the forage and water available on certain allotments. *Id.* § 4110.2-2.

While the UUD standard embraces multiple-use principles, the "net conservation gain" mandate frustrates them by precluding some uses that may result in short-term adverse degradation necessary to permit the resource use, but does not impair the long-term productivity of the public lands. Numerous standards and guidelines described in the FEIS illustrate how application of the "net conservation gain" standard will frustrate FLPMA's multiple-use mandate.

The most glaring example of this is that, in order for BLM to approve a proposed project, such as a grazing permit, the project must satisfy several criteria during a "screening and assessment" phase, including that the project "results in a net conservation gain to [greater sage-grouse] Key habitat." FS 116595 (FEIS at 2-32). The BLM is precluded from approving a new use of the public lands unless all impacts of the proposed use on the sage-grouse and its habitat areas are "fully offset by compensatory mitigation projects that provide a net conservation gain

to the species." FS 116622 (FEIS at 2-59). Thus rather than balancing the impacts of multiple uses, a single use dictates whether any other uses are allowed.

Additionally, Adaptive Management Standard GRST-AM-ST-011 contemplates that under some circumstances, "more conservative or restrictive implementation measures," such as extended seasonal restrictions or modifications to seasons of use for livestock grazing, will be implemented to achieve the net conservation gain mandate. FS 116624 (FEIS at 2-61). These more restrictive management actions will be applied whenever a "soft trigger" is identified, which is vaguely defined as an "intermediate threshold indicating that management changes are needed at the implementation level to address habitat or population losses." *Id*., FS 117609 (FEIS at 8-20).

Other impacts of the Resource Management Plan Amendments include modifying grazing strategies or rotation schedules, changing the season of use or kind and class of livestock, closing portions of allotments, or reducing livestock numbers. FS 117212-13 (FEIS at 4-201 to 4-202). The BLM concedes that implementation of the management direction described in the Resource Management Plan Amendments will likely result in the reduction of AUMs on some allotments, and thus a reduction in the overall viability of livestock operations. FS 117213 (FEIS at 4-202). The new management direction will also impact livestock operators by increasing their overall operational costs and the time spent managing livestock on the affected lands. *Id*.

The FEIS also describes restrictions on the construction of certain range improvements necessary to livestock grazing operations on the public lands. For example, Livestock Grazing Standard GRSG-LG-ST-036 precludes BLM from approving construction of water developments necessary for livestock production, unless the construction is beneficial to greater

sage-grouse habitat. FS 116628 (FEIS at 2-65). Similarly, Livestock Grazing Guideline GRSG-LG-GL-042 restricts the construction of permanent livestock facilities such as windmills, water tanks, corrals. *Id*.

Finally, Livestock Grazing Guideline GRSG-LG-GL-038 encourages BLM to "consider closure of grazing allotments, pastures, or portions of pastures, or managing the allotment as a forage reserve" where livestock removal contributes towards achieving a "net conservation gain." *Id*. These restrictions on livestock grazing are included in the FEIS, despite the BLM expressly acknowledging that "grazing is not considered a discrete surface-disturbing activity for the purposes of monitoring and calculating disturbance," FS 139843 (ROD at 1-23), and even a complete cessation of livestock grazing in sage-grouse habitat would likely be inadequate to achieve habitat objectives. FS 117185 (FEIS at 4-174).

Because the requirement of "net conservation gain" for the sage-grouse is inconsistent with BLM's statutory mandate to manage the public lands according to multiple-use principles that permit degradation that is necessary to resource production but is not "undue," BLM violated FLPMA by incorporating it in the RMPs at issue here. FLPMA simply does not authorize BLM to manage large swaths of federal lands for the protection of a single unlisted species at the cost of all other uses of those federal lands.

III. THE NET CONSERVATION GAIN STANDARD VIOLATES THE TAYLOR GRAZING ACT

The Taylor Grazing Act ("TGA") provides for the establishment of grazing districts (designated as "chiefly valuable for grazing") on BLM lands and authorized the Secretary of the Interior to regulate and "provide for the orderly use, improvement, and development of the range." 43 U.S.C. §§ 315, 315a; *see Natural Resource Defense Council v. Hodel*, 624 F. Supp. 1045, 1048 (D. Nev. 1985) ("The supervision of grazing on those lands is the principal activity

of the BLM."). When the TGA was enacted, "grazing preference" was granted to landowners engaged in the livestock business, settlers, and water rights holders, among others, and the Secretary was directed to grant permits to preference holders authorizing the grazing of livestock. 43 U.S.C. § 315b. The TGA further requires that these grazing privileges granted by the BLM "shall be adequately safeguarded." *Id.* 315b.

Under the Supreme Court's decision in *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000) certain BLM actions, such as the one at issue here, violate the TGA's "adequately safeguard" language. In a concurring opinion, Justice O'Connor noted:

> It is of particular importance, . . . that the Secretary has assured us that the new regulations do not in actual practice "alter the active use/suspended use formula in grazing permits" and that " 'present suspended use would continue to be recognized and have a priority for additional grazing use within the allotment.'" . . . ***Should a permit holder find, however, that the Secretary's specific application of the new regulations deviates from the above assurances and in the process deprives the permit holder of grazing privileges to such an extent that the Secretary's conduct can be termed a failure to adequately safeguard such privileges, the permit holder may bring an as-applied challenge to the Secretary's action at that time.*** The Court's holding today in no way forecloses such a challenge.

Babbitt, 529 U.S. at 751 (J. O'Connor, Concurring) (emphasis added).

The *Babbitt* Court also signaled that rules adopted by the BLM may depart so significantly from established agency policy regarding grazing practices as to constitute "arbitrary and capricious" action in violation of the Administrative Procedure Act (APA):

> Under our decision in *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 42, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), an agency that departs from its previous rules will be found to have acted arbitrarily and capriciously if it fails "to supply a reasoned analysis for the change. . . ." Although petitioners pressed precisely such an "arbitrary and capricious" challenge before the District Court, for whatever reason, they chose not to raise it before this Court. Regardless of whether the "arbitrary and capricious" claim remains open to these permit holders, the Court's decision does not foreclose such an APA challenge generally by permit holders affected by the 1995 regulations.

Babbitt, 529 U.S. at 752 (O'Connor, concurring).

Here, the BLM's new management direction outlined in the Resource Management Plan Amendments fails to adequately safeguard grazing rights in violation of the TGA, despite noting that "grazing is not considered a discrete surface-disturbing activity for the purposes of monitoring and calculating disturbance." FS 139843 (ROD at 1-23).

In its Record of Decision, the BLM expressly states that "All forms of new development in [Priority Habitat Management Areas]—from energy, to transmission lines, to recreation facilities and grazing structures—are *excluded, avoided, or allowed only if the resultant effect is neutral or beneficial to the [greater sage-grouse]*." FS 139856 (ROD at 1-36) (emphasis added). The adoption throughout the Resource Management Plan Amendments of a policy that makes sage-grouse preeminent on grazing districts throughout Idaho violates the BLM's duty to adequately safeguard grazing privileges in violation of the TGA. Again, Congress did not adopt the TGA with the intent of protecting a single species to the exclusion of grazing and all other uses of federal lands.

IV. FEDERAL DEFENDANTS FAILED TO PROVIDE ADEQUATE OPPORTUNITY TO COMMENT ON THE REQUIREMENT OF "NET CONSERVATION GAIN" OF SAGE-GROUSE, IN VIOLATION OF FLPMA, NEPA, AND THE APA

Federal Defendants violated FLPMA, NEPA, and the APA by introducing novel and significant "net conservation gain" for sage-grouse mandate for the first time in the FEIS.

Under the APA, the BLM must provide the public with adequate notice and an opportunity for comment before a rule is promulgated. 5 U.S.C. § 553. The notice must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* § 553(b)(3). FLPMA requires the BLM provide the public "adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating

to the management of the public lands." 43 U.S.C. § 1712(f). BLM's regulations implementing FLPMA's public participation mandate further require BLM to provide opportunity for the public to "meaningfully participate in and comment on" the preparation of RMPs and RMP amendments. 43 C.F.R. § 1610.2(a). BLM must also publish notice whenever it begins the process of preparing, amending, or revising an RMP, which must include, *inter alia*, a description of the proposed action and the general types of issues to be addressed. *Id.* § 1610.2(c)(1) and (3).

By incorporating the standard of "net conservation gain" for sage grouse into the FEIS without first addressing it in the Idaho DEIS, BLM failed to provide adequate notice of the standard and denied the public any meaningful opportunity to comment on this new policy. This is true whether the change is viewed in the context of rulemaking under the APA or supplementation under the National Environmental Policy Act (NEPA).[1] *See* Section V. *infra.* Both APA and NEPA support public involvement in significant agency decision making.

A change in wording between proposed and final rules will not necessarily violate the notice requirement if the final rule is a "logical outgrowth" of the proposed rule. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (quotation omitted). A final rule qualifies as a logical outgrowth only "if interested parties 'should have anticipated' that the change was possible." *Id.* If the deviation from the proposed rule is too sharp, affected

[1] Amici's argument that the net conservation gain standard is a new and significant policy is also supported by President Obama's executive memorandum issued November 3, 2015 in which he cites a "moral obligation to future generations" by creating a new "federal principle" of a "no net loss" goal that will fundamentally undermines the statutory mandates of FLPMA. https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related. The executive memorandum cannot provide BLM the authority for the net conservation gain standard for it must be derived from BLM's existing statutory authority for which it has none.

parties will not have had adequate notice and opportunity for comment. *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985). "[A]n unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated." *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

The new, undefined mandate of "net conservation gain" for sage-grouse that appears for the first time in the FEIS was neither foreseeable nor a logical outgrowth of the Idaho DEIS because interested parties would have had to "divine [BLM's] unspoken thoughts" to anticipate adoption of the new standard. *CSX*, 584 F.3d at 1079-80 (quotation omitted). The BLM acknowledges that the first time the mandate for "net conservation gain" of sage-grouse is addressed is in the FEIS by including it in the list of changes between the DEIS and FEIS. FS 1165646 FEIS at 2-4.

The Idaho FEIS does not constitute a logical outgrowth of the DEIS under even the more forgiving interpretations of the public notice requirement. For example, in *Career College Ass'n v. Riley*, 74 F.3d 1265, 1276 (D.C. Cir. 1996), the court held that the agency satisfied the notice requirement by requesting comments relating to a disputed issue. The "net conservation gain" standard for sage grouse was completely absent from the Idaho DEIS and BLM did not solicit public comment on whether management of all the other resources should be subservient to the standard. Thus, the Idaho FEIS is not a logical outgrowth of the DEIS. Indeed, even if the BLM *had* used referred to the new standard of "net conservation gain" for sage-grouse in the DEIS, more than a mere passing reference to the issue is necessary to provide adequate notice that the issue was on the table. *See MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1141-42 (D.C. Cir. 1995) (statements provided insufficient notice when placed in a footnote to the background section, appended to a discussion of a completely separate topic).

In the D.C. Circuit "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). This standard "substantially lessens if not altogether eliminates a challenging party's burden, for there will rarely if ever be no uncertainty as to the error's effect, and the party is not even required to identify additional considerations [it] would have raised in a comment procedure." *AFL-CIO v. Chao*, 496 F. Supp.2d 76, 89 (D.D.C. 2007) (quotations and citation omitted). In this case, amici would have submitted extensive comments on the new "net conservation gain" for sage grouse management policy, as they did on numerous other aspects of the Idaho DEIS. The failure to provide a comment period for the "net conservation gain" for sage grouse standard was not harmless error.

The denial of an opportunity for public comment on this key aspect of the RMP revisions is a violation of FLPMA and the APA. *See* 43 U.S.C. § 1712(f); 5 U.S.C. § 553. Without the observance of the procedures required by the APA, the incorporation of the "net conservation gain" standard is in excess of the BLM's statutory authority under FLPMA and in violation of the APA. 5 U.S.C. § 706(2).

V. SAGEBRUSH FOCAL AREAS REFLECT SIGNIFICANT CHANGES REQUIRING SUPPLEMENTAL ANALYSIS

As with the net conservation gain standard, Federal Defendants added the novel and material Sagebrush Focal Areas ("SFAs") and their unique management prescriptions to the ROD/FEIS *after* the close of the public comment period. Once again, the Federal Defendants deprived the public from the opportunity to comment on a key tool to restrict grazing on federal lands. The law requires the agency to conduct supplemental analysis and allow for additional public review before attempting such a significant shift in management direction. Through the

establishment of SFAs, the agencies have essentially made a de facto designation of critical habitat without the required consideration of economic impacts of designation as required under 16 U.S.C. § 1533(b)(2) and imposed greater restrictions on the management of SFAs than would be imposed under the ESA.

The ROD/FEIS announced a number of changes between the Draft LUPA/EIS and Proposed LUPA/Final EIS. These changes were in response to "public comment, best science, cooperating agency coordination, and internal review…." FS 116564 (FEIS at 2-1). These changes, which in even n bulleted formatting stretch five pages, are claimed to be "a variation of the co-preferred alternative[s]" and "within the range of alternatives analyzed in the DEIS." *Id*.

SFA are neither a variation of the co-preferred alternatives nor within the range of DEIS alternatives. In fact, SFA concept is completely absent in the DEIS. *See* FS 117058-59 (FEIS Table 4-15) (identifying acreage allocations across alternatives, showing 3,842,900 acres of SFA in the Proposed Action and no category for SFA in any DEIS alternative). As plaintiffs properly note, "SFAs include areas that were not previously identified as priority or important habitat, and include millions of acres that are not sage-grouse habitat at all." Plaintiffs' Memorandum in support of Motion for Summary Judgment ("Pls.' Mem") at 22 (citing WO_0059118; WO_0061318-20). According to the FEIS, SFA will "be managed as PHMA" but with "the following additional management: recommended for withdrawal; NSO without waiver, exception, or modification for fluid mineral leasing; and prioritized for management and conservation actions including, but not limited to review of livestock grazing permits/leases." FS 116565 (FEIS at 2-2). The FEIS states these individual management components were separately discussed in various parts of DEIS and thus the newly-configured Proposed Action "is qualitatively within the spectrum of [DEIS] alternatives analyzed." *Id*.

SFAs cannot be properly understood without additional explanation of their genesis and role in the broader context. SFAs, though not explicitly named as such, were essentially demanded in the October 27, 2014 not by BLM or the USFS, but by the U.S. Fish & Wildlife's Director Ashe through the "Ashe Memorandum." WO 16206. This document followed on the heels of an "October 1, 2014 leadership discussion regarding the federal land management planning process for greater sage-grouse (sage-grouse) conservation and as a continuation of our ongoing coordination and advice regarding your [BLM/Forest Service] land management plan revisions and amendments…." *Id.* The Ashe Memorandum proceeds "to identify a subset of priority habitat most vital to the species persistence, within which we recommend the strongest levels of protection." *Id.* (emphasis added). The Ashe Memorandum later emphasizes that it's "attached maps highlight areas where it is most important that BLM and Forest Service institutionalize the highest degree of protection to help promote persistence of the species." WO 16207 (emphasis added).

FWS would normally provide a significant voice in a NEPA-driven agency dialogue. Here, the role of FWS was exponentially greater, if not illegally so, and provides insight into why the GRSG LUPAs in effect provide protections more akin to the ESA than the statutes governing federal lands management. The GRSG LUPAs reflect a monumental but frantic effort to establish "existing regulatory mechanisms" well in advance of an FWS determination on whether or not Endangered Species Act listing was warranted for GRSG. A deadline for this FWS determination was established through *In Re: Endangered Species Act Section 4 Deadline Litigation* – Case No. 10-mc-377-EGS, 2011 WL 2695639 (D.D.C. 2011). The deadline for the FWS determination was September 30, 2015. This backdrop explains why the various LUPAs/RODs were issued on September 16 and 21, 2015, for roughly 67 million acres across

ten western states. The train had to leave the GRSG station, and postponement or delay of that departure, for even a grave mechanical defect, was simply not an option.

An agency can make changes between a DEIS and FEIS, but "[i]f the final action departs substantially from the alternatives described in the draft EIS, however, a supplemental draft EIS is required…." *Russell Country Sportsmen v. U.S. Forest Service*, 668 F.3d 1037, 1045 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2439 (2012). The applicable regulation directs that an agency "shall prepare" a supplemental to an EIS "if…[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns…." 40 C.F.R. § 1502.9(c). The focus is on "whether the commenting public would regard the change as a minor variation or find the new alternative to be qualitatively within the spectrum of alternatives previously considered." *Russell Country*, 668 F.3d at 1045 n.12; *New Mexico ex. rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009) (rejecting agency's mere "category of impacts" justification as contrasted to "recombined or modified" elements of previously discussed alternatives "whose impacts could easily be predicted from the existing analysis"). These questions reflect the broader "rule of reason" under NEPA, but with recognition that the bar for whether "significant effects" may occur is a low standard. *American Bird Conservancy v. F.C.C.,* 516 F.3d 1027, 1033-34 (D.C. App. 2008).

These requirements exist to protect and facilitate informed public dialogue in agency planning. *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 368 (1989), (An "EIS's form, content and preparation foster both informed decision-making and informed public participation."). Supplementation here is necessary to fully and fairly inform the public about how an area will be impacted. Supplementation must look at the specific application of the change at issue in light of "NEPA's 'twin aims' of informed agency decisionmaking and public

access to information." *Richardson*, 565 F.3d at 707. Meaningful public participation is "at the heart of the NEPA review process" and "requires responsible opposing viewpoints to be included in the final EIS." *California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982).

It would be virtually impossible for any member of the public to have anticipated and intelligently commented upon the Proposed Action. SFAs were not identified, and the three-layered habitat designation/prescription was well established within the range of DEIS alternatives. There was no way to predict that a fourth layer of habitat designation would be added to the analysis and the agencies cannot offer a set of alternatives in a DEIS and then discard them for a fourth alternative never before disclosed to the public. It is still unclear exactly where and how the SFA overlays/additions to the habitat scheme might affect present/future uses. *See, e.g.,* FS 117636 (FEIS Appx. A, Figures 2-3) (Proposed Action showing SFAs); FS 117650-55 (Figures 2-17 through 2-22) (Habitat Management Area maps for Alternatives A through F). The cumulative application of different management prescriptions against a previously-undisclosed array of geographical areas could not have been predicted and addressed by the reviewing public. This is almost exactly the scenario addressed in *Richardson*, where the Tenth Circuit rejected BLM's assertion that a newly-configured decision merely shuffled the "category of impacts" or was a modification of "the same type of effects as previously analyzed alternatives." *Richardson*, 565 F.3d at 707.

Federal defendants are likely to echo their arguments from the District of Nevada litigation. Specifically, they argued that "the management decisions applicable to [SFAs] were analyzed in the DEIS" and that "the DEIS discussed a range of potential management actions, including the management actions that were ultimately applied to [SFAs]…." *Western Exploration, LLC v. U.S. Dept. of Interior*, No. 3:15-cv-491-MMO-UPC (D. Nev.), Dkt. 22,

Defs.' Opposition to Pls.' Mot. for Prelim. Inj. at 19. There are several flaws in this position. First, the argument only addresses the management prescriptions themselves, as opposed to their application to entirely different geographical areas. Second, the "management actions" associated with SFA were not analyzed in the DEIS, at least not in any combination that could be reasonably anticipated, and thus commented upon, by the public. Third, defendants' position simply ignores the fact that the entire SFA concept is entirely missing from the DEIS. Through the "dismissive footnote" technique defendants brush under the rug the critical fact that SFAs "include some areas…which were outside of mapped Priority or General Habitat in the DEIS." *Id.* at n.12. There is an inherent contradiction in defendants' position – that the SFA concept was a critical lynchpin insisted upon by FWS, yet was only a "minor variation" of the alternatives made available for public review/comment.

The detailed discussion in *Block* is insightful here. The Ninth Circuit's discussion in that case, which provides a foundation for subsequent judicial analysis of the supplementation requirement, concludes "the EIS process should serve both to alert the public of what the agency intends to do and to give the public enough information to be able to participate intelligently in the EIS process." *Block*, 690 F.2d at 772. The Court explained "this general rule calls for a pragmatic judgment: (1) whether the alternative finally selected by the Forest Service was within the range of alternatives the public could have reasonably anticipated the Forest Service to be considering, and (2) whether the public's comments on the draft EIS alternatives also apply to the chosen alternative and inform the Forest Service meaningfully of the public's attitudes toward the chosen alternative." *Id*.

The *Block* court emphasized three factors in concluding the final outcome "differed substantially from the alternatives canvassed in the draft EIS to warrant the circulation of a draft

supplement…." *Id*. First, the selected action involved allocations of large land areas between different alternatives and the selected action "differed substantially" from any alternative, "seriously diluting the relevance of public comment on the draft EIS alternatives. *Id*. Second, while some common "decisional criteria" existed, "none of the draft EIS alternatives utilized all or most of the decisional criteria found in the Proposed Action." *Id*. Third, public comment focused "on the final acreage allocations rather than the decisional criteria, lessening the importance of the similarity between the criteria used in the draft EIS alternatives and the criteria used in the Proposed Action." *Id*. These observations apply with at least equal force to SFAs. Most notably, the SFA is an entirely new designation that did not even exist in the DEIS. Defendants cannot credibly downplay this fact in light of FWS's insistence on SFA "where it is most important that BLM and Forest Service institutionalize the highest degree of protection." WO 117058-59 (FEIS Table 4-15) (summarizing Designated Habitat Types and depicting SFA solely in the Proposed Plan column). Defendants' counsel thus tap dances between defendants' eleventh hour capitulation to FWS elevation of SFAs to the top of the complex list of GRSG management priorities, and a requested ruling from this Court that the entirely new, top priority for management was a reasonably foreseeable "recombination" of prior alternatives. In fact, SFA boundaries and management descriptions are not only entirely new, but still escape meaningful definition, as perhaps best revealed in the FEIS characterization that they would include "additional management" prescriptions punctuated by codespeak that SFA will be "prioritized for management and conservation actions including, but not limited to review of livestock grazing permits/leases." FS 116565 (FEIS at 2-2). SFAs will reflect the top management priority, but include new areas and an unspecified list of management actions.

SFAs were added at the insistence of FWS, which exerted unique influence as the arbiter of the decision whether to list GRSG under the ESA. There was simply no time to conduct supplemental analysis, hence defendants' need to now justify the unprecedented last-minute changes to a decision affecting tens of millions of acres of federal land. The Court is uniquely positioned to rectify this illegal departure from lawful NEPA procedure.

VI. CONCLUSION

For the foregoing reasons, Amici urge the Court to grant plaintiffs' motion for summary judgment.

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