



BUREAU OF LAND MANAGEMENT
v.
WESTERN WATERSHEDS PROJECT &
WILD UTAH PROJECT

191 IBLA 144

Decided September 22, 2017

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BUREAU OF LAND MANAGEMENT
v.
WESTERN WATERSHEDS PROJECT &
WILD UTAH PROJECT

IBLA 2013-168 & 2013-180

Decided: September 22, 2017

Appeals from a May 16, 2013, decision by Administrative Law Judge James H. Heffernan on administrative review of a final grazing decision issued by the Salt Lake City Field Office, Bureau of Land Management. UT-020-09-01

Appeal dismissed; Decision reversed.

1. Appeals: Burden of Proof;
Grazing Permits and Licenses: Adjudication;
Grazing Permits and Licenses: Appeals;
Grazing Permits and Licenses: Hearings

In challenging a decision adjudicating grazing privileges under the Taylor Grazing Act, the burden is on the appellant to show that BLM's grazing decision is not "reasonable" or does not represent "substantial compliance" with the Act and its implementing rules. This standard applies equally for appeals to an ALJ and for appeals from an ALJ to the Board. However, an appellant's burden will not be carried by mere expressions of disagreement with BLM's analysis and conclusions, and a BLM decision adjudicating grazing privileges pursuant to the TGA will not be overturned by an ALJ or this Board unless it is not supported on any rational basis and is, therefore, arbitrary and capricious.

2. Appeals: Burden of Proof;
Grazing Permits and Licenses: Adjudication;
Grazing Permits and Licenses: Appeals;
Grazing Permits and Licenses: Hearings

BLM is entitled to rely on the professional opinion of its experts concerning matters within the realm of their expertise, where it is reasonable and supported by record evidence. A party challenging such BLM reliance must show its experts' opinion is arbitrary and capricious or that, by a preponderance of the evidence, it was based on a material error in methodology, data, analysis, or conclusion. It must show with objective evidence that *either* BLM erred when collecting the underlying data, when interpreting that data, or when reaching a conclusion *or* that a demonstrably more accurate study has disclosed a contrary result. Conclusory allegations of error or a mere difference of professional opinion will not suffice to show BLM erred in relying on the professional opinion of its experts. The challenging party must not only show BLM's expert analysis and conclusion could be in error, but that they were, in fact, erroneous. Absent a preponderance of record evidence showing the professional opinion of BLM experts was wrong or based on a material error in method, data collection, or analysis, their opinion and assessment can only be rebutted by a demonstrably more accurate assessment that reached a contrary conclusion.

3. Administrative Procedure: Adjudication;
Evidence: Weight;
Grazing Permits and Licenses: Adjudication

When an appeal from a BLM decision is heard by an ALJ or appealed to this Board, there is no decision for the Department until either or both act. An ALJ or the Board may, in their exercise of *de novo* review authority, consider any and all evidence, regardless of

when it was generated and whether it was provided to BLM before it issued the decision on appeal. Such evidence will be considered by an ALJ and this Board to ensure BLM's decision is reasonable and in substantial compliance with applicable law.

4. Evidence: Weight;
Grazing Permits and Licenses: Adjudication

BLM is not required by the Taylor Grazing Act or the National Environmental Policy Act to incorporate third-party monitoring data into its grazing decision-making process. Where BLM cannot independently determine that third-party data is accurate and reliable, it is entitled to disregard such data and rely entirely on monitoring data obtained by BLM experts or experts under their supervision.

5. Grazing Permits and Licenses: Generally

BLM is not required by statute, rule, or precedent to make a carrying capacity determination before issuing or renewing a grazing permit. Rather, it is required only to ensure that permitted grazing use does not exceed the livestock carrying capacity of the allotment, which can be satisfied by use of a stock-and-monitor approach to determine whether and to what extent grazing can continue without exceeding an allotment's carrying capacity.

6. Grazing Permits and Licenses: Generally

When BLM determines permitted grazing is failing to achieve any rangeland health standard, it is required by rule to impose a duty on permittees to take action that is appropriate and will result in "significant progress" towards fulfilling that standard. Failure to take such action may subject the permittee to penalties, but there is no statute or rule requiring BLM to define what will constitute "significant progress" at the time of permit issuance, as by

establishing utilization limits, upland and riparian health conditions, or any other measurable or observable criteria. Should grazing fail to make significant progress towards fulfilling rangeland health standards, BLM is required by rule to take additional, appropriate action by the next grazing year and need not automatically suspend or cancel the permit or otherwise penalize the grazing permittee for failing to make significant progress. Grazing permit terms and conditions must be immediately enforceable and cannot be dependent upon further study or monitoring before an enforcement action can be taken. BLM may establish numeric permit limits for triggering an immediate enforcement response, but it is not required to do so if its mandatory permit terms and conditions are sufficiently clear, specific, and immediately enforceable.

7. Federal Advisory Committee Act;
National Environmental Policy Act of 1969: Generally

Where BLM does not schedule a public meeting organized by a third party at its facility, set its agenda, or run the meeting, it is not a Federal Advisory Committee Act meeting. And when BLM attends such a meeting to take advantage of an opportunity to listen to public comments on issues of mutual concern, its attendance does not transform that meeting into a public scoping meeting under NEPA and subject to NEPA requirements.

8. National Environmental Policy Act of 1969:
Environmental Assessments

BLM is required to provide significant pre-decisional opportunities for the public to be involved in the EIS process and to the extent practicable in the EA process. Such opportunities may be afforded during an initial scoping process or later, during the environmental review process leading to an EIS or EA and DR/FONSI.

9. Evidence: Burden of Proof;
Grazing Permits and Licenses: Adjudication;
Grazing Permits and Licenses: Hearings

Since grazing permittees are required by regulation to certify the accuracy of their actual use reports, BLM may rely on them without confirming their accuracy. To successfully challenge such reliance, the reports must be shown to be in clear error or inherently unreliable based on the weight of the evidence presented.

10. National Environmental Policy Act of 1969:
Environmental Assessments

BLM is required by NEPA to consider appropriate alternatives to the proposed action that will accomplish its intended purpose, are technically and economically feasible, and have a lesser environmental impact. But BLM is only obligated to consider those alternatives necessary to permit a reasoned choice and to have a clear basis for choosing among competing options. If BLM decides not to afford detailed analysis to any alternative, it is required to briefly explain the reasons for not doing so, whereupon the burden falls to an appellant to demonstrate, with objective proof, that BLM erred. Where BLM fails to consider reasonable alternatives, we must set aside its decision as violating NEPA.

APPEARANCES: John Steiger, Esq., Office of the Regional Solicitor, Intermountain Region, Salt Lake City, Utah, for Appellant - Bureau of Land Management; Judith Brawer, Esq., Boise, Idaho, for Appellee - Western Watershed Project; and Allison Jones, Executive Director, Wild Utah Project, Salt Lake City, Utah, for Appellee - Wild Utah Project.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Western Watersheds Project and Wild Utah Project (collectively, WWP) and the Bureau of Land Management (BLM) have separately appealed from a May 16, 2013, Decision of Administrative Law Judge (ALJ or Judge) James H.

Heffernan, reversing a September 12, 2008, Notice of Final Decision and Finding of No Significant Impact (Final Decision)¹ of the Acting Assistant Field Manager (Acting AFM), Salt Lake Field Office (SLFO), West Desert District, BLM. In its Final Decision, BLM approved issuance of new 10-year grazing permits and authorized related range improvements to the Duck Creek Allotment (Allotment or DCA). The Board docketed WWP's appeal as IBLA 2013-168 and BLM's appeal as IBLA 2013-180. By Order dated July 29, 2013, we granted a request to intervene in IBLA 2013-168 by the various parties to whom BLM had granted 10-year grazing permits. These parties are Linda Willis, Terry Willis, Peart Ranch, LLC, William D. Kennedy, B. Reed Groll, and Clark Willis (collectively, Permittees). They are now considered intervenors in the consolidated appeals. By Order dated August 15, 2013, we granted the parties' request to consolidate the two appeals.

In his Decision, ALJ Heffernan reversed the Final Decision, concluding that BLM had, in deciding whether to approve continued grazing in the Allotment, failed to comply with the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA)² and its implementing regulations.³ He stated that for this reason he did not reach the issues raised under the Taylor Grazing Act (TGA).⁴ He states that “[w]e will never know if BLM could have properly defended the Final Decision on appeal herein, because BLM failed to take a hard look at all of the relevant, material environmental issues”⁵ He remanded the case to BLM for compliance with NEPA, and for reconsideration of its decision to issue the grazing permits.

INTRODUCTION AND SUMMARY

Following a lengthy review process pursuant to NEPA, and based upon years of study and monitoring under the TGA, BLM determined that the Allotment should be grazed, consistent with the 1980 Randolph Management Framework Plan (MFP). Based upon the work of an Interdisciplinary Team (IDT) of BLM range management specialists (RMSs), biologists, and other

¹ Exhibit (Ex.) B-1.

² 42 U.S.C. § 4332(2)(C) (2012).

³ 40 C.F.R. §§ 1500.1-1518.4 (Council on Environmental Quality rules implementing NEPA); 43 C.F.R. Part 46 (Department rules implementing NEPA).

⁴ 43 U.S.C. §§ 315-315r (2012).

⁵ Decision at 90-91.

experts, BLM concluded that the historic grazing management system should be modified to provide for a four-pasture deferred rotational system. Under this system, the cattle would be turned out onto the Allotment on May 10 and would cycle through all four of the pastures at 30-day intervals each year of a 4-year grazing cycle, which would then repeat in subsequent years. BLM predicted that its new distribution system would result in significantly improved range conditions.

WWP's fundamental contention throughout this matter is that 100 years of grazing in a "fragile sagebrush steppe ecosystem" has rendered the Allotment an "ecological desert."⁶ In WWP's view, the Final Decision is "not predicated on a proper stocking rate, but simply maintains the past grazing levels that have caused the [existing] degraded conditions[.]"⁷ WWP asserts a new "grazing system alone" will not make significant progress towards fulfilling the *Standards for Rangeland Health and Guidelines for Grazing Management for BLM Lands in Utah* (Utah S&G) and that significant progress would be "much more likely" were BLM to lower the total number of cattle grazing the Allotment.⁸ WWP notes: "Appellants' data supports what BLM's data shows—that conditions on the allotment are degraded."⁹ It has emphasized that since the Allotment is in a much more degraded state than BLM claims, BLM is required to do more than just change cattle distribution. WWP therefore concludes: "These degraded conditions demand a serious reconsideration and analysis of the proper stocking rate[.]"¹⁰

WWP's challenge to continued grazing on the Allotment centers on its conclusion that the Allotment must be fully rested, in whole or in part, from *any* livestock grazing. WWP would manage the Allotment to "[p]rovide long-term, multi-year rest to restore productivity of native grasses such as bluebunch wheatgrass and restore riparian, stream and spring flows and ecological function for wildlife."¹¹ WWP has stated its belief that "removal of livestock from public lands is the only logical means of restoring the arid lands that have been

⁶ WWP Post-Hearing (P-H) Opening Brief at 219.

⁷ WWP P-H Reply Brief at 2.

⁸ WWP P-H Opening Brief at 199, 219.

⁹ *Id.* at 223.

¹⁰ *Id.* at 200; *see id.* at 223.

¹¹ WWP 2005 Monitoring Report at 14.

damaged by over a century of livestock grazing. . . . Ecologically based ranching . . . requires the kind of livestock grazing that leaves habitat . . . at or near its ecological potential.”¹²

Judge Heffernan found that BLM data regarding rangeland conditions was not as reliable as the data presented by WWP, and he attributed to BLM several instances of what he characterized as reversible error. Thus, he reversed BLM’s Final Decision and remanded the case for compliance with NEPA and reconsideration of the grazing permits.

In this opinion, we hold ALJ Heffernan applied an incorrect standard in reviewing WWP’s challenge to BLM’s Final Decision. He acknowledged that a BLM grazing decision will be upheld unless the appellant demonstrates the decision is not supported by a rational basis or is contrary to applicable law¹³ and that BLM is generally “entitled to rely upon its own staff experts[.]”¹⁴ He then set forth the burden of proof to be applied in considering challenges under NEPA,¹⁵ but he does not give proper weight to the fact that WWP’s appeal is from a Final Decision issued pursuant to the TGA¹⁶ or accord BLM’s decision appropriate deference and uphold its decision unless it was not supported on any rational basis. In many instances, as we show below, he did not accord any deference whatsoever to BLM’s experts, the data they compiled during their study of conditions on the Allotment, and the decision made based on their data.

What becomes clear is that even if we view this case strictly as a NEPA case, as ALJ Heffernan apparently did, WWP has not shown by a preponderance of the evidence, with objective proof, BLM failed to abide by section 102(2)(C) of

¹² WWP’s Response to BLM’s First Discovery Request at 38.

¹³ *See* Decision at 9 (citing 43 C.F.R. § 4.480(b)).

¹⁴ *Id.*

¹⁵ *See id.* at 9.

¹⁶ 43 U.S.C. §§ 315-315r (2012); *see* 43 C.F.R. § 4.480 (“No adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of part 4100[,] as supported by and in accordance with the reliable, probative, and substantial evidence [in the record].”).

NEPA.¹⁷ As the party arguing that BLM was required to prepare an Environmental Impact Statement (EIS), the burden was on WWP to make an “affirmative showing that BLM failed to consider a substantial environmental question of material significance.”¹⁸ Instead, WWP simply “pick[ed] apart a record with alleged errors and disagreements[.]”¹⁹ ALJ Heffernan should have addressed whether WWP met its burden under NEPA in light of the fact that BLM’s experts and their conclusions are entitled to added deference when they address grazing issues affecting grazing preferences under the TGA.

In challenging a BLM decision adjudicating grazing privileges under the TGA, the burden was on WWP to show that BLM’s Final Decision is not “reasonable” or does not represent “substantial compliance” with the TGA or its implementing rules.²⁰ An appellant meets its burden if it demonstrates, by a preponderance of record evidence, that BLM’s decision is unreasonable and thus lacks a rational basis.²¹

Judge Heffernan stated that “[i]t would appear . . . that the agency was simply in too big a hurry” to allow continued grazing on the Allotment, and for this reason failed to comply with NEPA.²² Nonetheless, the Tenth Circuit has stated that when a BLM grazing decision is reviewed under the arbitrary and capricious and not in accordance with the law standard, “[a] presumption of validity attaches to the agency action and the burden of proof rests with’

¹⁷ *Southern Utah Wilderness Alliance*, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); *Red Thunder*, 117 IBLA 167, 175, 97 I.D. 203, 267 (1990); *Sierra Club*, 92 IBLA 290, 303 (1986).

¹⁸ *Arizona Zoological Society*, 167 IBLA 347, 357-58 (2006) (quoting *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004)).

¹⁹ *Id.* (quoting *In re Stratton Hog Timber Sale*, 160 IBLA at 332).

²⁰ See 43 C.F.R. § 4.480(b).

²¹ See *Foianini v. BLM*, 171 IBLA 244, 250-51 (2007); *Mercer v. BLM*, 159 IBLA 17, 29 (2003); *Smigel v. BLM*, 155 IBLA 158, 164 (2001); *Nevada Division of Wildlife v. BLM*, 145 IBLA 237, 250-51 (1998); *Yardley v. BLM*, 123 IBLA 80, 90 (1992); *Stamatakis v. BLM*, 115 IBLA 69, 74-75 (1990); see also 43 C.F.R. § 4.480(a),

²² Decision at 91.

WWP.”²³ BLM correctly states that, “with little explanation, the ALJ simply chose to accept Appellants’ data over BLM’s data, and to believe Appellants’ witnesses over BLM’s witnesses.”²⁴ The ALJ was required to heed the Board’s longstanding principle that an appellant’s burden to demonstrate error in a BLM grazing decision, founded on the professional opinion of BLM’s experts, will “not [be] carried by mere expressions of disagreement with BLM’s analysis and conclusions.”²⁵

Most importantly, WWP was required to show that the Final Decision was not likely to result in an improvement in upland and riparian areas or compliance with the Utah S&G. More was needed than testimony stating that WWP did not “see prospects for change at this point in time.”²⁶ It was required to establish by a preponderance of the evidence that grazing under the new regime was not likely to change the current condition of the Allotment. By focusing on efforts to establish that BLM’s 2008 assessment of conditions on the Allotment was incorrect, WWP failed to offer any evidence to rebut or contradict BLM’s informed prediction that conditions on the Allotment were likely to substantially improve as a direct consequence of BLM’s Final Decision.

Because we conclude ALJ Heffernan erred in reversing BLM’s Final Decision, we reverse his Decision. We therefore need not address WWP’s appeal, which deals with whether the ALJ should have granted interim relief during his remand to BLM for it to perform additional NEPA review and reconsider issuance of these grazing permits.

I. BACKGROUND

This case involves BLM’s determining whether and under what terms and conditions to continue to authorize grazing in the Allotment pursuant to the

²³ *WWP v. BLM*, 721 F.3d 1264, 1273 (10th Cir. 2013) (quoting *Morris v. U.S. Nuclear Regulatory Commission*, 598 F.3d 677, 691 (10th Cir.), *cert. denied*, 562 U.S. 1045 (2010)); *see also In Re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 22, 90 I.D. 352, 356 (1983) (“Decisions issued by [BLM] state offices, pursuant to their delegated authority, are presumptively valid.”).

²⁴ BLM Statement_of_Reasons_and_Answer (BLM SOR/Answer at 3.

²⁵ *American Mustang & Burro Association, Inc.*, 144 IBLA 148, 150 (1998).

²⁶ Transcript (Tr.) 10655 (Carter).

TGA,²⁷ the Federal Land Policy and Management Act of 1976 (FLPMA),²⁸ the Public Rangelands Improvement Act of 1978,²⁹ NEPA, and their implementing regulations.³⁰ The Allotment is a community allotment consisting of 22,731 acres of public (13,090 acres (or close to 57%)), private (8,585 acres), and State (1,056 acres) lands situated in the Wyoming Basin area of northern Utah. The public lands consist primarily of upland (12,873 acres), along with riparian (52 acres), and wetland (39 acres) areas, ranging in elevation from 6,300 to 7,282 feet.³¹

The Allotment is generally considered a sagebrush steppe ecosystem. Annual precipitation averages 8 to 14 inches, occurring mainly as snowfall between October and May, plus occasional spring and fall rain events.³² It is a semi-desert, crossed by 5 perennial or intermittent streams (Duck Creek, North and South Forks of Six Mile Creek, Six Mile Creek, and Sage Creek). There are 29 springs on the Allotment, including Duck Creek Drainage and 3 associated springs, South Fork Six Mile Creek Drainage and 4 associated springs, 8 additional springs, Six Mile Creek Drainage (approximately 1.6 miles of Riparian and Overflow), and Sage Creek Drainage.³³ Overflow areas in the drainages are often near riparian areas.³⁴ The streams run a total of 3.59 miles, covering a total of 13 acres, and the springs cover a total of 38.54 acres in the Allotment. Almost all of the lotic (streams and other flowing water) (94%) and

²⁷ 43 U.S.C. §§ 315-315r (2012).

²⁸ 43 U.S.C. §§ 1701-1785 (2012).

²⁹ 43 U.S.C. §§ 1901-1908 (2012).

³⁰ *See* 43 C.F.R. Part 4100; *WWP v. Kraayenbrink*, 538 F. Supp.2d 1302 (D. Idaho 2008), *aff'd in part, vacated in part on other grounds, and remanded*, 632 F.3d 472 (9th Cir.), *cert. denied*, 565 U.S. 928 (2011) (enjoining extensive revision of Part 4100 that was effective Aug. 11, 2006 (71 Fed. Reg. 39402 (July 12, 2006)). As did BLM in its 2008 Final Decision and Judge Heffernan in his 2013 Decision, we apply the Part 4100 regulations in effect as of Aug. 10, 2006.

³¹ *See* Environmental Assessment (EA) (UT-020-2007-003) (Ex. B-2) at 13, 38, 54-55.

³² *See* EA at 38.

³³ *Id.* at 8; *see id.* at 43.

³⁴ *See* Tr. 13477-78, 13478, 13479, 14021; EA at 13, 54, 78.

lentic (springs and other still water) (99%) areas are situated in Pastures 3 and 4, in the southern half of the Allotment.³⁵

Riparian areas represent less than 1% of the Allotment. In its 1979 Final Environmental Statement on Grazing Management in the Randolph Planning Unit, Rich County, Utah (MFP Final ES), prepared in connection with the Randolph MFP, BLM stated “that many wildlife species [in the Allotment and elsewhere] in the Randolph Planning Unit have a high degree of dependence on riparian areas for all or part of their life cycle.”³⁶ BLM recognized that the “[r]iparian areas are highly susceptible to overgrazing and overuse by cattle.”³⁷

A. 2001 Grazing Permits and Proposed 2004 Amendments

At all relevant times, BLM has authorized grazing use of the Allotment, primarily by cattle but also, to a lesser extent, by sheep and domestic horses. In January 2001, BLM completed an EA³⁸ that studied the environmental impacts of issuing new 10-year grazing permits for the Allotment. Based on the EA, BLM issued a Proposed Grazing Decision on June 19, 2001, which WWP protested. On August 27, 2001, BLM issued a Final Decision (2001 Final Decision), denying WWP’s protest and approving the issuance of new 10-year grazing permits for the Allotment (March 1, 2001, to February 28, 2011). The 2001 Final Decision authorized a total of 2,134 Animal Unit Months³⁹ of livestock grazing across all of the public lands in the Allotment. AUMs were allocated by season: cattle (1,593 AUMs), May 10 to September 7; sheep (505 AUMs), May 10 to June 30, May 15 to July 1, September 20 to December 1, and October 1 to October 30; and horses (46 AUMs), May 10 to September 7 and July 1 to September 7.⁴⁰ 1,924 AUMs of the total grazing preference for the Allotment were suspended.⁴¹

³⁵ See EA at 44, Appendix 1 (Duck Creek Proper Functioning Condition Map (PFC Map)).

³⁶ Ex. B-5, at 2-46; see EA at 42, 43.

³⁷ MFP Final ES at 2-46.

³⁸ UT-020-01-38 (Part of Ex. B-8).

³⁹ See 43 C.F.R. § 4100.0-5 (“*Animal unit month (AUM)* means the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month.”).

⁴⁰ See Final Decision, dated Aug. 27, 2001 (Ex. B-9), at 2.

⁴¹ See EA at 10.

Three years later, in 2004, BLM considered amending the 10-year grazing permits primarily for the purpose of instituting a 6-pasture deferred rest/rotational grazing system, together with fencing and water developments. It did so with the participation of Rich County Coordinated Resource Management (CRM), a group formed by the Board of Commissioners of Rich County and funded by the Utah Division of Wildlife Resources (UDWR). The CRM included Federal and State agencies, business and other private interests, and environmental groups (including the Wild Utah Project), and was designed to provide natural resource management recommendations. The proposed amendment, which was advanced by BLM, conformed to the Duck Creek Grazing Plan, which had been developed by the existing permittees, BLM, CRM, and the Utah Foundation for Quality Resource Management (QRM). BLM then completed an EA that studied the environmental impacts of the 6-pasture grazing system,⁴² and issued a Proposed Decision on April 21, 2004, which WWP protested. BLM issued a Final Decision on August 6, 2004 (2004 Final Decision), denying WWP's protest and approving amendments to the existing 10-year grazing permits for the Allotment. WWP appealed the 2004 Final Decision. After a hearing on May 24, 2005, ALJ Heffernan vacated and remanded the 2004 Final Decision at BLM's request. The remand included "a modification of the grazing permits to implement the AMP [Allotment Management Plan]."⁴³

B. BLM Actions on Remand

BLM undertook to determine on remand whether and under what terms and conditions to continue to authorize grazing in the Allotment by issuing new 10-year grazing permits and adopting an AMP. In determining such terms and conditions, BLM was required by the Fundamentals of Rangeland Health (FRH) regulations⁴⁴ to follow the Utah S&G, which the Secretary of the Interior adopted in a Record of Decision (ROD) dated May 20, 1997.⁴⁵ The Secretary stated the ROD "describes policies, practices, and procedures that [BLM] in Utah will implement in order to assure BLM lands are healthy" and recognized that

⁴² UT-020-2004-0030 (Ex. W-6).

⁴³ Final Decision at 24; EA at 3, 36, 67-68.

⁴⁴ 43 C.F.R. Subpart 4180.

⁴⁵ ROD, Standards for Rangeland Health and Guidelines for Grazing Management, Utah State Office, BLM, May 1997 (Utah S&G), (Part of Ex. B-48), at 1.

“the interdependence of soil, water, plants, and animals (including livestock) is basic to maintaining healthy rangelands and the key element in BLM’s . . . Standards and Guidelines.”⁴⁶ The Secretary provided the following definitional framework: “*Standards* describe desired ecological conditions that BLM intends to attain in managing BLM lands, whereas *Guidelines* define practices and procedures that will be applied to achieve Standards.”^[47]

The FRH regulations require BLM to assess whether it is meeting the Utah S&G. The Utah S&G concern four aspects of rangeland health: upland soils; riparian and wetland areas; desired plant and wildlife species; and water quality standards. When BLM determines “existing grazing management practices or levels of grazing use on public lands are significant factors in *failing to achieve the standards [for rangeland health],*” it is required to take “appropriate action . . . that will result in significant progress toward fulfillment of the standards,” not later than the start of the next grazing year.⁴⁸ “Appropriate action may include reducing livestock stocking rates, adjusting the season or duration of livestock use, or modifying or relocating range improvements,” pursuant to 43 C.F.R. Part 4100.⁴⁹ BLM is not required to actually make significant progress toward fulfillment of the standards by the start of the next grazing year, but to take appropriate action that “will result” in such progress in the future.⁵⁰

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 43 C.F.R. § 4180.2(c) (emphasis added); see ALJ Decision at 112; BLM P-H Response Brief at 157; e.g., *Idaho Watersheds Project v. Hahn*, 187 F.3d 1035, 1036-37 (9th Cir. 1999); *Granite Trust Organization v. BLM*, 169 IBLA 237, 251-52 (2006).

⁴⁹ 60 Fed. Reg. 9894, 9899 (Feb. 22, 1995).

⁵⁰ 43 C.F.R. § 4180.2(c); see 60 Fed. Reg. at 9956 (“The Department recognizes that it will sometimes be a long-term process to restore some rangelands to properly functioning condition. . . . In some areas, it may take many years to achieve healthy rangelands The Department recognizes that, in some cases, trends may be hard to even document in the first year. . . . It is anticipated that in many cases it will take numerous grazing seasons to determine direction and magnitude of trend.”).

A BLM inter-disciplinary team (IDT) of 11 rangeland management and other resource specialists with experience or applicable training conducted in 2005 both an Upland Rangeland Health (RH) Assessment in accordance with *Interpreting Indicators of Rangeland Health* (IIRH),⁵¹ and a Riparian Proper Functioning Condition (PFC) Assessment in accordance with a technical references entitled *A User Guide to Assessing PFC and the Supporting Science for Lotic Areas*⁵² and *A User Guide to Assessing PFC and the Supporting Science for Lentic Areas*⁵³ (collectively, PFC TR).⁵⁴

1. *2005 Upland and Riparian Area Assessments*

The IDT conducted the RH Assessment to determine whether the Utah Standards were being met in the upland and riparian areas of the Allotment and whether changes in grazing management were warranted. The basic findings and determinations reflected in the RH Assessment were set forth in the EA.⁵⁵ Based on “indicators” identified in the Utah S&G,⁵⁶ BLM assessed, whether and to what extent actual conditions at particular sites in the Allotment deviated from ideal conditions on a scale of Extreme, Moderate to Extreme, Moderate, Slight to Moderate, and None to Slight.⁵⁷

⁵¹ Technical Reference (TR) 1734-6, U.S. Department of the Interior (USDI)/U.S. Department of Agriculture (USDA) (2000) (Ex. B-33).

⁵² USDI/USDA (1998) (Ex. B-29).

⁵³ USDI/USDA (Revised 2003) (Ex. B-32).

⁵⁴ TR 1737-15 to 16; *see* Tr. 11721-23, 12225-29, 12258-59, 12264-65, 12267, 12841-42, 14515-16, 14522, 14559-60, 14573-84, 15358-59; EA at 7, 55, 56.

⁵⁵ *See id.* at 42-44, 44-51 (Table 7 (Riparian Functional Health Data Summary)), 55,

56-57, 60-66 (Table 13 (Rangeland Health Data Summary)), 67; Tr. 15513 (“[T]he evaluations and determinations under the Standards are in the EA.” (Lichthardt)).

⁵⁶ *See, e.g.*, Utah S&G at 2, Standard 1, Upland Soils, (“As indicated by” sufficient cover to protect the soil surface from excessive water and wind erosion); *see also infra* note 57.

⁵⁷ *See* IIRH TR 9 (“Indicators are components of a system whose characteristics (e.g., presence or absence, quantity, distribution) are used as an index of an attribute (e.g., rangeland health)[.] . . . [C]ombinations of the 17 indicators . . .

The IDT classified actual conditions based on a preponderance of the evidence. The classifications were: functioning, functioning at risk (FAR), or improperly functioning for *upland areas*.⁵⁸ Riparian/wetland areas were classified as being in proper functioning condition (PFC), FAR, or not functioning (NF).⁵⁹ The IDT Assessments were performed on June 16, 22, 29-30, and July 6, 7, and November 2, 2005. The IDT prepared Lotic and Lentic Checklists, which primarily record BLM's PFC Assessment regarding satisfaction of applicable indicators concerning hydrology, vegetation, and erosion/deposition and its summary PFC and trend determinations, with respect to each riparian/wetland area, along with photographs of the area.⁶⁰ The IDT would deem the standards to be achieved at a particular site if it found the site to be PFC or FAR (provided the trend was "static" or "static to upward") since in both cases the site is considered to be functioning.⁶¹

The IDT, acting on a consensus of the professional opinion of its members, determined that, for the most part, all Utah Standards were being satisfied.⁶² The IDT stated: "[T]he Duck Creek allotment as a whole has been determined to be meeting Utah Standards for Rangeland Health in accordance with 43 CFR [Subpart] 4180 as it relates to livestock grazing and permit renewal."⁶³ It concluded that "the allotment has overall upward upland trends, good ecological site conditions, functional upland health, canopy cover in place to protect the soils from accelerated erosion from first raindrop impact[,] and measurable plant species diversity[.]"⁶⁴ However, it determined that the Allotment was not meeting Utah Standard 2 (Riparian and Wetland Areas) since 7 riparian/wetland areas did not meet PFC or FAR standards (with a static or

are used to gauge soil/site stability, hydrologic function, and the integrity of the biotic community of selected rangeland ecological sites."), 18-36.

⁵⁸ See Tr. 12225-28; EA at 57, 60-66 (Table 13).

⁵⁹ See Tr. 12228; EA at 42, 44-51 (Table 7); Ex. W-208.

⁶⁰ Ex. B-31.

⁶¹ See EA at 42 ("Riparian areas are 'functioning at risk' (FAR) when they are functioning properly but an existing soil, water, or vegetative attribute makes them susceptible to degradation."), 44-51 (Table 7).

⁶² *Id.* at 67.

⁶³ *Id.*

⁶⁴ *Id.* at 58.

static to upward trend) and that livestock grazing was a significant factor in failing to meet that standard.⁶⁵

BLM evaluated the seven lotic (streams) riparian areas and concluded that one of them, comprised of Segments A through D of the South Fork Six Mile Creek, was not meeting Utah Standard 2.⁶⁶ That single lotic area, which totaled 1.9 miles, was rated as FAR (with static to downward trend). The IDT determined that the single lotic area “is close to being rated at PFC but still static to downward trend away from PFC.”⁶⁷ It also determined that 6 of 29 lentic (springs) riparian areas were not meeting Utah Standard 2,⁶⁸ with one rated as NF (approximately 0.6 acres) and the other five rated as FAR (with static to downward trend) (approximately 25.05 acres).⁶⁹ In each of the lentic areas rated as FAR, BLM observed some hummocking but that “[b]ecause of gradual slope and low flow energy[,] it is *at low risk of hydrologic or soil loss*.”⁷⁰ BLM noted that one lentic area was designated as FAR “[d]ue to dewatering” and that the area rated as NF was “[d]ue to dewatering (development) and reduced spring head water at source and water level fluctuation.”⁷¹

Because BLM determined these seven riparian areas were not meeting Utah Standard 2, it was required by 43 C.F.R. § 4180.2(c) to take “appropriate action.”⁷² In order to eliminate dewatering and protect the lentic areas, BLM noted in its EA that it was already installing shut-off devices and planned to construct exclosures in the case of two water sources.⁷³

⁶⁵ *Id.* at 67.

⁶⁶ Tr. 12268-70, 12272-75 (Gates), 13706-09 (Staggs); EA at 8, 43, 44-51 (Table 7), Appendix 1 (PFC Map); Ex. B-31.

⁶⁷ EA at 43.

⁶⁸ *See id.*; Tr. 12268-70, 12272-75 (Gates), 13706-09 (Staggs); EA at 8, 43, 44-51 (Table 7), Appendix 1 (PFC Map).

⁶⁹ EA at 48.

⁷⁰ *Id.* (emphasis added); *see id.* at 49, 51.

⁷¹ *Id.* at 47, 51.

⁷² *See* BLM P-H Response Brief at 106, 157.

⁷³ *See* EA at 51-52 (citing DC-R14 and DC-R28).

2. *2005 Ecological Site Inventory*

Also in 2005, BLM conducted an Ecological Site Inventory (ESI)⁷⁴ in order to determine the current ecological conditions of the Allotment. BLM states ESIs are undertaken for the purpose of aiding in rangeland management:

Rangeland landscapes are divided into ecological sites for the purposes of inventory, evaluation, and management. *An ecological site is a distinctive kind of land in its ability to produce a distinctive kind and amount of vegetation.* It is the product of all the environmental factors responsible for its development, and it has a set of key characteristics (soils, hydrology, and vegetation) that are included in the ecological site description.^[75]

An ESI starts with appropriate “ecological site descriptions” (ESDs), which are used to categorize the current ecological state from the standpoint of key characteristics (soils, hydrology, and vegetation).⁷⁶ Included in each ESD is a determination of the appropriate “historic climax plant community” (HCPC), defined as the typical plant community that was likely to have been in existence prior to European settlement of the area.⁷⁷ Using a “similarity index,” expressed as a percentage, BLM determines the degree to which the current plant community differs from the HCPC for a particular area.⁷⁸

BLM developed appropriate ESDs for the Allotment with the assistance of the Natural Resources Conservation Service (NRCS), USDA.⁷⁹ BLM did so because earlier ESDs for the Allotment that were completed in the 1990s with the assistance of the Soil Conservation Service (SCS) (NRCS’s predecessor), were no longer applicable. BLM therefore “re-correlated” the ESDs in 2005, with the

⁷⁴ Ex. B-18.

⁷⁵ ESI TR at 19 (emphasis added); *see* EA at 53-54; *see also id.* at 7, 55-56, 60-66 (Table 13), Appendix 1 (Duck Creek ESI Map); Memorandum to File from Range Staff, BLM, dated Dec. 11, 2007 (BLM/WWP Comparison) (Ex. B-21), at 1.

⁷⁶ *See* ESI TR at 19, 28-32.

⁷⁷ *See id.* at 22.

⁷⁸ *See id.* at 45.

⁷⁹ *See* Tr. 8663-69.

assistance of the NRCS.⁸⁰ This re-correlation resulted in BLM assigning seven new ESDs to the public lands in the Allotment,⁸¹ with most assigned two new ESDs, *i.e.*, Loamy 10-14 (generally in place of Upland Loam), encompassing 6,511 acres primarily in the western part of the Allotment, and Loamy 7-9 (generally in place of Semi-Desert Loam), encompassing 4,166 acres mostly in the eastern part of the Allotment.⁸² The five other ESDs were Coarse Upland 10-14 (709 acres); Upland Loamy Shale 10-14 (488 acres); Shallow Loamy 10-14 (444 acres); Upland Stony Loam 10-14 (324 acres); and Overflow 10-14 (231 acres).⁸³ Approximately 13 acres of public land in the Allotment have no identified ESD.

BLM completed its ESI at 28 ecological sites (DC-1 through DC-28) on the Allotment. For each site, BLM measured its vegetative production by weight and compared it to expected production by weight of the HCPC associated with the site, and using a similarity index (ranging from 0 to 100%), BLM determined the appropriate seral stage, or developmental stage, of ecological succession for each site.⁸⁴ BLM determined production by clipping and weighing or estimating

⁸⁰ See Tr. 8667-69, 8676, 8726-33, 14427-29; EA at 55; BLM/WWP Comparison at 4.

⁸¹ See Tr. 14429 (citing Exs. B-22 and B-134).

⁸² See Tr. 8676-78, 8682-84, 8690-94, 14433-45; EA at 54, 55 (Table 8 (Acres and percentages of each ESD on BLM lands within the DCA)), 57; ESD, Loamy 10-14, NRCS (Loamy 10-14 ESD) (Part of Ex. B-22 (Bates 2379-2391)); ESD, Loamy 7-9, NRCS (Loamy 7-9 ESD) (Part of Ex. B-22 (Bates 2401-2412)); Map of SCS Range Sites, dated June 2009 (Ex. W-63); Range Site Description, Semi-Desert Loam, SCS (Revised Dec. 28, 1993) (Ex. W-64); Range Site Description, Upland Loam, SCS (Jan. 23, 1992) (Ex. W-65). Approximately 13 acres have no identified ESD.

⁸³ See EA at 54, 55 (Table 8); SLFO Power-Point Presentation (Part of Ex. B-45) at Bates 1904-11.

⁸⁴ See EA at 60-66 (Table 13), Appendix 1 (Duck Creek ESI Map); Ex. B-23 at Bates 1978 (DC-1), 1980 (DC-2), 1982 (DC-3), 1983 (DC-4), 1985 (DC-5), 1986 (DC-6), 1987 (DC-7), 1988 (DC-8), 1989 (DC-9), 1990 (DC-10), 1991 (DC-11), 1992 (DC-12), 1993 (DC-13), 1994 (DC-14), 1995 (DC-15), 1996 (DC-16), 1997 (DC-17), 1998 (DC-18), 2000 (DC-19), 2001 (DC-20), 2002 (DC-21), 2003 (DC-22), 2004 (DC-23), 2005 (DC-24), 2006 (DC-25), 2007 (DC-26), 2008 (DC-27), 2009 (DC-28); Ex. B-58; *see also* Tr. 12592-93; ESI TR at 45-46, 69 (“*Seral stage*”).

production, making adjustments for plant phenology or the current year's climate in order "to reduce the amount of variability attributed to the time of year the data was collected and the effects of climate on the data."⁸⁵ BLM determined not only the current vegetative production at each of 28 ecological sites (expressed as pounds per acre), but also the percentage of canopy cover provided by grasses, forbs, and shrubs (along with the percentage of litter and bare ground/rock), and the apparent trend in its ecological condition.⁸⁶ BLM determined that since most of the Allotment fell within the 51 to 75% similarity index, it was in late seral, or good, ecological condition.⁸⁷

3. *BLM Monitoring and Analysis*

BLM established ten key management area (KMA) monitoring sites in the upland areas of the Allotment (DCT-1 through DCT-10) during 2005 in order to analyze utilization and trend.⁸⁸ "Utilization" is defined as "the proportion or degree of current year's forage production that is consumed or destroyed by animals[,] which requires "a comparison of the amount of herbage left compared with the amount of herbage produced during the year."⁸⁹ "Trend" reflects

⁸⁵ BLM/WWP Comparison at 1.

⁸⁶ See EA at 55, 57, 60-66 (Table 13); BLM/WWP Comparison at 9-10.

⁸⁷ See Tr. 14029-30; EA at 56 (Table 9 (Ecological Site Condition/Similarity Index Summaries for the DCA)), 60-66 (Table 13); BLM/WWP Comparison at 4 (Early seral (Poor) (0-25%) (0 acres); Mid seral (Fair) (26-50%) (1,280 acres); Late seral (Good) (51-75%) (11,774 acres); and HCPC (Excellent) (76-100%) (23 acres)), 5 ("[J]ust over 90% of the [DCA] is in a late seral or better condition. . . . [Thus,] over 90% of the public land acres in the allotment have 51% or more of the species and production that is described in the ESD for the HCPC.").

⁸⁸ See EA at 59 (Table 11 (Monitoring KMA Studies Results 2004-2005)), 60 (Table 12 (Utilization KMA Studies Results 2005, 2007 & 2008)), Appendix 1 (Duck Creek KMA Site Map); Ex. B-19; BLM/WWP Comparison at 9-10; Ex. B-69.

⁸⁹ Utilization Studies and Residual Measurements, Interagency TR 1734-3, 1996 (Utilization TR) (Ex. B-17), at 1; see also EA at 59 (Table 11 (Monitoring KMA Studies Results 2004-2005)), 60 (Table 12 (Utilization KMA Studies Results 2005, 2007 & 2008)), Appendix 1 (Duck Creek KMA Site Map); Ex. B-19; Memorandum to File from Range Staff, BLM, dated Dec. 11, 2007 (BLM/WWP Comparison) (Ex. B-21), at 9-10; Ex. B-69.

changes in canopy cover and species diversity over time.⁹⁰ For each KMA site, BLM identified two to three “key forage species,” which included bluebunch wheatgrass (*Agropyron spicata* (AGSP)).⁹¹ It assessed utilization at all 10 KMA sites in 2005, 2007, and 2008, and trend at all 10 KMA sites in 2005 and 2007.

BLM thereafter determined, based on its ESI and assessments of rangeland health, that public lands in the Allotment were generally healthy:

[A]pproximately 12,828 acres or 98 percent [of the public lands] of the allotment has upward or static to upward trend and 89 percent [of the public lands] of the allotment classifies in late seral stage or better (similarity index of 51 percent or greater). The vegetative canopy cover ranged from 28 to 95 percent with 97 percent [of the public lands] of the allotment having 60 percent canopy cover (the summation of canopy cover for grasses, forbs and shrubs) or greater and 12,816 acres or 98 percent of the allotment’s [public] uplands [is] rated as functional or healthy.^[92] Additionally, approximately 7,886 acres or 61 percent [of the public lands] of the allotment has measurable amounts of bluebunch wheatgrass with good vigor. This is a very palatable species to cattle and would not be expected to be increasing and having good vigor if the uplands on the allotment were overgrazed.^[93]

BLM’s evaluation of riparian areas reflects not only the importance of those areas for wildlife and livestock, but also BLM’s awareness that some lotic and lentic areas in the Allotment were FAR or NF due to dewatering and livestock use:

[T]he areas primarily affected by livestock grazing . . . were the riparian areas and overflow ecological sites which represent approximately 52 and 231 acres[,] . . . respectively, of the total public lands in the allotment[.] . . . While the riparian areas only comprise a small percentage of the acreage, they are very productive often producing over 2,000 pounds per acre of palatable

⁹⁰ *See id.*

⁹¹ *See* EA at 60 (Table 12).

⁹² *See id.* at 57, 67 (Table 14 (Range of Canopy Cover Values and Average Canopy Cover Values for Ecological Sites by Grasses, Forbs and Shrubs)).

⁹³ *Id.* at 10-11.

forage. As such, they offer a ready close[-]by food source for animals seeking water. Quite naturally and predictably, livestock tend to congregate in these areas if not provided alternatives, especially in the hot summer months.

. . . [4] of the [6] lotic (stream) riparian areas are [FAR] with 1 not meeting standards due primarily to livestock impacts. Of the 29 lentic locations (springs), [1 is NF] . . . primarily due to dewatering but also some livestock impacts, [8] are [FAR] with [5] not meeting standard[s][.] . . . Of the 12 [o]verflow ecological site locations, 6 (approximately 219 acres) were rated as FAR but very close to being functional. All 12 were determined to be meeting the standards for rangeland health[.]^[94]

BLM's monitoring data showed livestock use was concentrated in the riparian areas of the Allotment, resulting in heavy utilization, with upland areas receiving some use, resulting in Slight to Moderate utilization. However, with respect to riparian areas: "The upland soils adjacent to the riparian areas are predominantly stable soils made up of gravelly fan remnants with total cover (canopy of grasses, forbs and shrubs plus litter) ranging between 55 and 95 percent. . . . As a result, there was no sign of measurable erosion or excess runoff to affect the riparian areas[.]"⁹⁵

BLM also determined, on the basis of ecological site conditions and other data collected in 2005, that existing forage on public lands in the Allotment was more than adequate to support grazing and to justify the current stocking rate (or carrying capacity). BLM stated "[f]or analysis purposes only and to get a rough idea of the stocking rate for all the public uplands in the allotment, the upland (riparian production was not included) vegetative production data collected in 2005 was adjusted for average year production and proper use factors (PUF) from 5 to 50 percent depending on the plant species and palatability."⁹⁶ BLM explained that "[b]y adjusting the production with [PUFs]

⁹⁴ *Id.* at 10-13 (emphasis added); *see id.* at 43, 57-58, 60-66 (Table 13), 78 ("Of the 231 acres [of Overflow sites] 55% are in late seral and 45% are in mid seral (similarity index of 26 to 50%.")

⁹⁵ *Id.* at 42-43.

⁹⁶ *Id.* at 12.

it allows consideration of residual vegetation cover for soil resistance to erosion and other animal needs (forage, cover, shelter etc.).”⁹⁷ BLM concluded:

The acres/AUM potentially available based on the production data for the approximately 12,873 acres of upland[s] . . . was approximately 2.7 acres/AUM. The livestock forage demand based upon active use . . . is 6 acres/AUM. . . . This indicates that the current stocking rate . . . is only at 45 percent of the amount of available forage allocated to livestock.^[98]

The 2.7 acres/AUM represents the Allotment’s “stocking rate,” which is defined as “the *amount of land* allocated to each animal unit for the entire grazable period of the year.”⁹⁹ BLM calculated that since livestock are likely to consume only 35% of the available forage in semi-arid or arid rangelands, the 12,873 acres of uplands in the Duck Creek Allotment were expected to actually provide 1.4 acres/AUM of potentially available forage and that “the amount of forage potentially available that is removed by livestock is only 23 percent.”¹⁰⁰ BLM therefore concluded “this data shows that *the forage available is more than adequate to provide for wildlife, watershed[,] and livestock.*”¹⁰¹

By adjusting its 2005 production data to reflect what forage would be produced in an “average year,” BLM took into account the fact that production in 2005 was above average due to excessive rainfall.¹⁰² It determined what forage would be available in average years, rather than in years of above average or below average rainfall. BLM further adjusted its production data to account for the fact that only a portion of different kinds of forage was deemed available for

⁹⁷ *Id.*

⁹⁸ *Id.* (emphasis added).

⁹⁹ National Range and Pasture Handbook, NRCS (September 1997) (NRPH) (Ex. B-78)

at 5.3-1 (emphasis added).

¹⁰⁰ EA at 12.

¹⁰¹ *Id.* (emphasis added).

¹⁰² *See* Tr. 1201, 13849; 2008 Monitoring Report, Appendix, at 12 (Figure 12 (Summary of precipitation history for the DCA)); Randolph Weather History (1988-May 2009) (Part of Ex. W-60).

grazing (grass and forbs (50%), palatable shrubs (40%), and Basin big sagebrush (5%)).¹⁰³

BLM determined that the 12,873 acres of uplands in the Allotment were capable of supporting a total of 4,917 AUMs, which translated into 2.6 acres per AUM, by dividing the 12,873 acres by the 4,917 AUMs.¹⁰⁴ But BLM calculated the acre/AUM for each of the four pastures, and then averaged the four figures, resulting in 2.7 acres per AUM.¹⁰⁵ The livestock forage demand was determined by dividing the total number of upland acres (12,873) by the total number of authorized AUMs (2,134), thus disclosing that, currently, one cow (or its equivalent) grazed 6 upland acres each month, resulting in one AUM of grazing use.¹⁰⁶ In effect, BLM determined there was sufficient forage on the 12,873 upland acres to sustain 4,768 cows (or their equivalents) each month of an average year, since each cow (or its equivalent) would only need 2.7 acres to provide it with necessary forage for that month. However, the number of cows (or their equivalents) then authorized to graze the 12,873 upland acres during that month would only be 2,134.

BLM determined upland forage was sufficient to sustain the current numbers of livestock authorized to graze the Allotment with no expected deterioration in rangeland conditions. However, it concluded, based on monitoring data, that there was a fundamental “need for correcting” the “distribution” and “duration [of use]” by livestock in the riparian areas of the Allotment.¹⁰⁷

4. *2007 Draft and Final EAs*

The IDT prepared a Draft EA that was tiered to the 1979 MFP Final ES, which BLM considered to be the functional equivalent of an EIS.¹⁰⁸ The MFP ES had been prepared in conjunction with approval of the 1980 Randolph

¹⁰³ See Tr. 13853-54, 13857-59.

¹⁰⁴ See *id.* at 8443-46; Ex. B-63 at Bates 1964-65.

¹⁰⁵ See Tr. 13855-57.

¹⁰⁶ See *id.* at 8452; EA at 12.

¹⁰⁷ EA at 13; see *id.* at 75.

¹⁰⁸ Ex. B-4.

MFP,¹⁰⁹ which contained the final land-use planning decisions for grazing and other resource activities in the Randolph Planning Unit.¹¹⁰ In its Draft EA, BLM considered the Proposed Action/Preferred Alternative, which provided for newly-authorized grazing use amounting to a total of 2,134 AUMs over the period from May 10 to December 1, subject to a four-pasture deferred rotational grazing system and associated range improvements on public lands.¹¹¹ BLM stated the Proposed Action was “designed to consider the overall rangeland resources present, provide for a diversity of wildlife and plant species, maintain and/or achieve functioning ecosystems, maintain and/or achieve functioning riparian areas, and maintain and/or improve ecological site condition.”¹¹² BLM also considered Alternative A in detail, which was identical to the Proposed Action, except it did not provide for any range improvements on public land.¹¹³

BLM briefly considered a no grazing alternative, *i.e.*, not authorizing any grazing use in the Allotment.¹¹⁴ But since a no grazing alternative had already been considered and rejected in the MFP Final ES for the 1980 Randolph MFP, BLM deemed the no action alternative to be precluded by that MFP, which directed it to: “Graze all areas in Rich County suitable for livestock grazing.”¹¹⁵ As stated in the MFP Final ES:

It is the policy of the Bureau . . . that all rangeland which is presently being grazed or has the potential to support grazing by livestock will be classified as to its suitability for such grazing use. The major criteria used in suitability determinations for specific range sites are: (1) distance from water; (2) slope or other physical barriers; (3) forage production; and (4) soil surface factor (SSF). . . .

¹⁰⁹ Ex. B-6.

¹¹⁰ EA at 95-96; Tr. 12160-64; MFP Final ES at 1-3; EA at 5-6, 37; Final Decision at 2.

¹¹¹ See Draft EA at 19-33.

¹¹² *Id.* at 19.

¹¹³ See *id.* at 32-33.

¹¹⁴ See EA at 35-36.

¹¹⁵ MFP at RM-1.1; see EA at 5 (“The MFP identified the [DCA] as being open for grazing within Salt Lake Grazing District Number U-I established in the late 1930’s subsequent to the TGA.”), 11, 35..

Suitable Ranges are areas which can be grazed by livestock without damage to the soil and vegetation resources.”^{116]}

The MFP designated 13,387 acres of public land in the DCA as suitable for livestock grazing and allocated a total of 2,013 AUMs to grazing: 1,522 (cattle); 480 (sheep); and 29 (horses).¹¹⁷ The EA therefore stated that a no grazing alternative “would require a plan amendment because it would not be in conformance with the Randolph MFP[], which *presently allocates this allotment for livestock grazing.*”¹¹⁸

BLM also declined to consider in detail any alternative that would reduce grazing use in the Allotment.¹¹⁹ While BLM found riparian areas in the Allotment to be degraded due to overgrazing by cattle that congregate in such areas for their water and better forage, it determined such conditions would be alleviated by implementing a grazing management system that could equally accommodate either the current number or lesser number of cattle. BLM therefore concluded that no purpose would be served by simply reducing the stocking rate for the Allotment.¹²⁰

BLM explained its procedure is to “identif[y] a need for correcting a distribution and duration [of use] . . . based on predictable animal behavior[,] not livestock stocking rates” and that “even with fewer numbers of animals” using the Allotment than currently permitted, those “fewer livestock would . . . still focus use on riparian areas and would have a similar effect”¹²¹ BLM determined that what was actually needed was a “change [in the] grazing

¹¹⁶ MFP Final ES, Appendix 10 (Methodology Used to Determine Rangeland Suitability for Livestock Grazing in the Randolph Planning Unit), at A10-1 to A10-2, A10-5 (Table 4 (Suitability for Livestock Grazing)); EA at 14.

¹¹⁷ See MFP at RM-1.2 (“[C]onduct range management activities in accordance with the decisions for each allotment as shown in the attached decision documents [(Appendix B (Range Decision Documentation)).”]; MFP, Appendix B, at B-9, B-10 (“No reduction in the level of use will be made at this time.”).

¹¹⁸ EA at 35 (emphasis added).

¹¹⁹ See *id.* at 10-14.

¹²⁰ *Id.* at 13.

¹²¹ *Id.*

management system.”¹²² BLM noted that it would be more appropriate to adjust current cattle numbers annually during the 10-year permit term based on the results of ongoing monitoring, rather than establish a fixed lesser number of fewer cattle for the entire 10-year term.¹²³ BLM stated: “Put simply, a reduced stocking rate will not alleviate the poor riparian and wetland conditions observed on the DCA, and it is unsound to simply pick a lower stocking rate that would be imposed for the life of the permit divorced from monitoring data.”¹²⁴

The Draft EA was issued for a 15-day public comment period on July 10, 2007.¹²⁵ WWP submitted comments on August 2, October 4, and October 16, 2007, after which BLM finalized its EA.¹²⁶

C. Proposed Decision and FONSI

Based on the EA, BLM issued a Proposed Decision that would adopt its Proposed Action/Preferred Alternative.¹²⁷ BLM proposed to issue new 10-year grazing permits for the Allotment that would have a four-pasture, deferred rotation grazing system and be based on the “same stocking level” over the “same season of use as under the prior permit[.]”¹²⁸ BLM provided for grazing a total of 400 cattle from May 10 to September 7, plus 765 sheep from May 10 to July 1 and September 20 to December 1, for a total of 2,134 AUMs of grazing use.¹²⁹ BLM proposed allocating cattle 1,584 AUMs, just over 74% of the total authorized 2,134 AUMs, with the remainder allocated to sheep (504 AUMs) and domestic horses (46 AUMs). Most of the use in the spring, summer, and early fall periods (May 10 to September 7) would be by cattle, with sheep use occurring in the fall and early winter, and only a small amount of domestic horse use at any time.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Notice of Appeal/Petition for Stay (NA/Petition) at 13.

¹²⁵ *See* Letter to Interested Party from AFM, dated July 10, 2007 (Part of Ex. B-4); EA at 95.

¹²⁶ *See* Exs. W-4 and W-5.

¹²⁷ Ex. B-3.

¹²⁸ Decision at 93.

¹²⁹ *See* EA at 19-20.

The “major change” in proposed use from the currently permitted use structure involved the four-pasture, deferred rotation grazing system. BLM fully expects that by limiting grazing use, the rangeland health conditions of the upland and riparian areas will improve.¹³⁰ The rotational grazing system and related measures were designed to constitute the “appropriate action” deemed necessary, under 43 C.F.R. § 4180.2(c), to ensure that significant progress was being made towards fulfilling the Utah Standards.¹³¹ BLM explained: “The Proposed Action is needed to implement changes in livestock grazing to meet Rangeland Health Standards on some of the riparian areas within the [DCA] and be consistent with 43 CFR 4180.2(c).”¹³²

Livestock would be turned out onto the Allotment on May 10 of each year on one pasture and then rotated among the other three pastures. Since the initial turn-out would be rotated among the four pastures, BLM concluded that a May 10 turn-out date was appropriate and would respond to the concern that adequate rest during the early spring growing period was only important in the context of season-long grazing.¹³³ In the present case, this new system would result in “livestock being turned out on May 10 in any given pasture only *once* every four years. . . . Thus, each pasture will receive no livestock use during the critical spring growing period for three years in a row after the year in which livestock are turned out on May 10.”¹³⁴ Even were grazing to occur too early in any pasture in any year, grazing would be deferred on that pasture during the early spring growing period for not one but three years.¹³⁵

The May 10 turn-out date is earlier than was specified in the 1980 Randolph MFP. BLM explained that it was permitted to use that earlier date because its Final Decision served as the “functional equivalent” of an AMP.¹³⁶ Judge Heffernan ruled that absent specific advance notice to interested

¹³⁰ Decision at 94; *see* Tr. 82-86, 93, 216; EA at 19-23, 74-82.

¹³¹ *See* Tr. 216 (Danvir), 12270-71 (Gates).

¹³² EA at 5; *see id.* at 67, 74-78; BLM P-H Response Brief at 157.

¹³³ *See* Tr. 15618-21.

¹³⁴ BLM P-H Response Brief at 174 (citing Tr. 12203).

¹³⁵ Tr. 3839.

¹³⁶ Final Decision at 2; *see id.* at 12 (“[T]his decision meet[s] all requirements of an [AMP].”), 24 (“The project EA is in effect by definition an [AMP] because it specifies pasture moves. . . . The concept of an AMP has been part of this project

parties, the Final Decision did not serve as an AMP, and that BLM erred in adopting an earlier turn-out date because it had not given specific advance notice to interested parties of that change.¹³⁷ However, we find BLM provided sufficient notice during its NEPA review and decisionmaking process that the Final Decision was intended to serve as an AMP and therefore satisfied the public participation requirements of 43 C.F.R. § 4120.2.¹³⁸ Moreover, WWP states on appeal that it “does not object to the [Final] Decision being considered the functional equivalent of an AMP.”¹³⁹ We see no error in BLM’s adoption of a turn-out date earlier than May 25, in accordance with the MFP, which provided that “[a]fter an effective [grazing] system is in operation, the turnout date can be set at May 16 or earlier.”¹⁴⁰

Under the proposed grazing system, cattle would cycle through all four of the pastures each year of a 4-year grazing cycle, which would then repeat in subsequent years. Each year would be broken down into four time periods (May 10-June 8; June 9-July 8; July 9-Aug. 7; and Aug. 8-Sept. 7). In the first year of the 4-year cycle (Year 1), cattle would graze in Pasture 1 during the initial time period (May 10-June 8), and then in each of the succeeding pastures (Pastures 2, 3, and 4) in each of the succeeding time periods (respectively, June 9-July 8; July 9-Aug. 7; and Aug. 8-Sept. 7), for the remainder of the grazing season. However, in each succeeding year of the 4-year cycle, the initial time period (May 10-June 8) would take place in the next succeeding pasture, first Pasture 2 (Year 2), then Pasture 3 (Year 3), and finally Pasture 4 (Year 4). Doing so would push the successive time periods forward. Thus, by Year 4, the initial time period (May 10-June 8) would take place in Pasture 4, followed by grazing in Pasture 1 (June 9-July 8), Pasture 2 (July 9-Aug. 7), and Pasture 3 (Aug. 8-Sept. 7).

from the beginning[.]”); MFP at RM-2.1 (“AMPs will be developed with multiple use objectives. . . . Key species, season of use, utilization levels and the grazing system will be determined on a case-by-case basis.”); BLM P-H Response Brief at 48; MFP at RM-2.1 (“Priority for development of AMPs [includes DCA].”); MFP, Appendix B, at B-10.

¹³⁷ See Decision at 74.

¹³⁸ See BLM SOR/Answer at 35 (citing Draft EA at 17; Proposed Decision at unpaginated (unp.) 2; and EA at 19).

¹³⁹ WWP Answer at 4 n.1.

¹⁴⁰ MFP, Appendix B, at B-11.

The grazing system similarly provided that sheep would cycle through all four pastures each year of a 4-year grazing cycle, which would then repeat in subsequent years. The four time periods are May 10-June 8; June 9-July 1 and Nov. 22-Dec. 1; Oct. 21-Nov. 21; and Sept. 20-Oct. 20. In any year, sheep use would coincide with cattle use in two of the four pastures, during successive time periods of May 10-June 8 and June 9-July 1. The two pastures are Pastures 1 and 2 (Year 1); Pastures 2 and 3 (Year 2); Pastures 3 and 4 (Year 3); and Pastures 4 and 1 (Year 4). Each of the four pastures would be rested from any grazing use during the early spring growing period for Allotment vegetation for 3 consecutive years.¹⁴¹ Thereafter, during the unrested year, all 400 cattle (396 AUMs), along with 640 sheep (204 AUMs), or a total of 600 AUMs, would graze the pasture during much of the early spring growing period.

As a consequence of the proposed system, while all cattle would be concentrated at any one time in one of four pastures, rather than spread out across the entire Allotment, such grazing use would last only 30 or 31 days, after which the pasture would be rested for the remainder of the grazing season, including a large part of the 168-day growing period for the Allotment (May 1 through October 15), when the average temperature is above 40° F.¹⁴² According to BLM, this “increased rest allows plants to re-grow and recover from any grazing each year the particular pasture is grazed.”¹⁴³ BLM expected that since substantial rest would increase future forage production in upland areas, cattle would curtail use of riparian areas, especially when use was authorized during the early part of the season when cold air hangs in such areas.¹⁴⁴ BLM also expected that even in the hot summer season, when cattle are likely to congregate in riparian areas, such use would last only half of the season over the course of two succeeding years in any of the pastures.¹⁴⁵

Under the proposed grazing system and related measures, BLM sought to redistribute grazing livestock away from the riparian areas by placing six new

¹⁴¹ See Tr. 12203, 13737-38, 13740, 13839, 13977-78; Final Decision at 5-6 (Table 4).

¹⁴² See Final Decision at 5-6 (Table 4).

¹⁴³ *Id.* at 12; EA at 79; Tr. 8935-36, 8944-54, 13722-23.

¹⁴⁴ See Final Decision at 12; EA at 75.

¹⁴⁵ See Final Decision at 12-13; EA at 75 (“The remaining two years, duration of grazing during the hot season is cut in half.”).

water troughs in the upland areas of Pastures 3 and 4, which contain most of the riparian/wetland areas in the Allotment.¹⁴⁶ The troughs would be fed by approximately 8.5 miles of pipeline running from a developed spring on private lands. They would supplement the existing eight troughs in Pastures 3 and 4, as well as the existing seven troughs in Pastures 1 and 2.

BLM also provided for permanent fencing along the pasture boundaries because existing fencing had proved inadequate. This new fencing would, together with fencing on private lands, provide a physical barrier to livestock movement.¹⁴⁷ BLM stated that this “construction of 3.82 miles of fence would be vital to the implementation of the deferred rotation grazing system by providing reliable positive physical barrier to control livestock movements between pastures.”¹⁴⁸ No vegetative treatment would occur on any public lands in connection with the Proposed Action.¹⁴⁹

Finally, BLM provided for monitoring rangeland conditions in order to ensure that grazing of the Allotment made significant progress towards fulfilling the Utah S&G, and otherwise satisfied the requirements of 43 C.F.R. Part 4100.¹⁵⁰ BLM provided for the enlargement of riparian exclosures around three springs, from which livestock are excluded. These exclosures would also be used as control areas for determining whether resource management objectives were being met outside the exclosures.¹⁵¹ BLM would periodically assess resource conditions prior to the start of and during the grazing year. If necessary, BLM would make appropriate adjustments to authorized use by altering livestock numbers, periods of use, and/or other aspects of the grazing regime to address issues of overgrazing or other management concerns. The Final Decision provides that “[t]he terms and conditions of the permits may be modified if additional information indicates that a revision is necessary to conform to the grazing regulations in 43 CFR Part 4100.”¹⁵²

¹⁴⁶ See Tr. 13715-18, 13756, 15301-03; EA at 23, 76 (“Pastures 3 and 4”), 76-77.

¹⁴⁷ See EA at 68.

¹⁴⁸ *Id.* at 81.

¹⁴⁹ See *id.* at 18.

¹⁵⁰ See Tr. 12365-70, 13757, 13760-67, 14023-24; Final Decision at 7, 9, 11; EA at 25-26, 28, 93-94.

¹⁵¹ See Final Decision at 7, 13; EA at 52-53, 77.

¹⁵² Final Decision at 8.

D. Protests to the Proposed Decision

Wild Utah Project and WWP separately protested the Proposed Decision, pursuant to 43 C.F.R. § 4160.2.¹⁵³ What animated WWP's protest and subsequent appeal to the Hearings Division, Office of Hearings and Appeals (OHA), is its factual determination, based on its own monitoring data and review of BLM monitoring data, that the Allotment is in a degraded state that cannot be rectified simply by altering the manner in which grazing takes place, as BLM proposes. WWP's position is that a substantial decrease in the numbers of livestock authorized to graze the Allotment is essential.¹⁵⁴

E. BLM's Final Decision

On September 12, 2008, BLM issued its Final Decision, adopting the Proposed Action and approving issuance of new 10-year grazing permits for the Allotment, subject to the terms and conditions of the Proposed Action and resource management objectives (RMOs) set forth in the EA.¹⁵⁵ In its Final Decision, BLM approved authorized grazing use totaling 2,134 AUMs, a four-pasture deferred rotational grazing system, and range improvements described in the Proposed Decision. BLM also approved a turn-out date of May 10 of each year. BLM concluded:

[T]he livestock management practices proposed . . . (i.e., season of use changes, utilization levels, ecological condition, trend, and rangeland health objectives) *will better manage the overall rangeland resources present*, provide for a diversity of wildlife and plant species, maintain functioning ecosystems, and maintain and/or improve ecological condition for the[] allotment[].^{156]}

BLM also noted that an April/May 2008 BLM field survey had disclosed that "conditions were favorable for grazing to occur as scheduled."¹⁵⁷

¹⁵³ See Letter to BLM from Wild Utah Project, dated June 7, 2008 (Ex. W-2); Letter to BLM from Western Watersheds Project, dated June 23, 2008 (Ex. W-219).

¹⁵⁴ See, e.g., Tr. 9300, 9301.

¹⁵⁵ See Final Decision at 2, 8.

¹⁵⁶ *Id.* at 13 (emphasis added).

¹⁵⁷ *Id.* at 14.

BLM reiterated in its Final Decision that it retained the flexibility, through monitoring, to adjust livestock grazing, including numbers, season of use, and other matters, in response to future changes in climate and other circumstances concerning forage and the effects of grazing.¹⁵⁸ BLM explained that it would manage the Allotment so that it remained at “late seral ecological site condition or similarity index of 51 to 75 percent of the [HCPC] and static to static to upward trend,” with 50% utilization of key forage species in upland and riparian areas and 40% utilization of key shrub species in upland areas.¹⁵⁹ BLM indicated that it would manage the Allotment so that bluebunch wheatgrass and other key forage species remained at “Static or Upward trend toward the suggested composition percentages listed in the [ESDs] for each [KMA].”¹⁶⁰ BLM stated that all riparian areas would be managed to achieve or maintain PFC, “with upward trend toward PFC, if it is less than PFC[] [and] . . . [s]tatic or static to upward trend toward[] potential [natural community (PNC)], if it is at PFC.”¹⁶¹ BLM made clear that it would adjust grazing use in order to achieve these specific RMOs.¹⁶²

The Final Decision included a FONSI, in which BLM determined, based on consideration of the context and intensity (or severity) factors of 40 C.F.R. § 1508.27, that approval of the proposed grazing was not likely to significantly impact the human environment and that BLM was not required by section 102(2)(C) of NEPA to first prepare an EIS.¹⁶³

F. Appellants’ Appeal and ALJ Hearing

On October 28, 2008, WWP and Wild Utah Project filed a consolidated appeal from the 2008 Final Decision with the Hearings Division, OHA, pursuant to 43 C.F.R. §§ 4.470(a) and 4160.4. ALJ

¹⁵⁸ *See id.* at 3, 9.

¹⁵⁹ EA at 79 (Established utilization limits would “automatically consider the sum of all users[] not just livestock,” such that “*all use* . . . must not exceed 40% or 50% of the current seasonal or year’s growth of the respective growth form.”); *see id.* at 8, 9, 10 (Table 5 (DCA Monitoring KMA Objectives)).

¹⁶⁰ *Id.* at 111.

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ *See* Final Decision at 2.

Harvey C. Sweitzer, to whom the case was initially assigned, issued an order on December 11, 2008, denying WWP's request for a stay of the Final Decision during the pendency of the appeal. The case was then reassigned to ALJ Heffernan, who conducted a hearing over the course of 55 days from June 8, 2009, through July 28, 2011, generating a 15,639-page transcript and 375 exhibits.¹⁶⁴ Testifying on behalf of BLM were Michael D. Gates (Acting AFM, SLFO), Tyler J. Staggs (Former Lead RMS, SLFO), Robert D. Stager (Former State RMS, Utah State Office, BLM), Lawrence Lichthardt (State Lead RMS, Utah State Office, BLM), Shane A. Green (State RMS, NRCS, USDA), Stephen G. Leonard (Certified Range Management Consultant/Professional in Rangeland Management), Rick E. Danvir (Wildlife Manager, Deseret Land and Livestock), and Michael G. Karl (RMS, Division of Resource Services, National Operations Center, BLM). Testifying on behalf of WWP were John G. Carter and James C. Catlin (members and officers of WWP and Wild Utah Project, respectively), Robert Edwards (former BLM RMS and Natural Resource Specialist), Lawrence Swanson (pilot), and Daniel Miller (aerial photographer).

G. ALJ Heffernan's Decision and Appeals

After extensive post-hearing briefing, ALJ Heffernan issued his decision on May 16, 2013, in which he concluded that BLM failed in numerous respects to comply with section 102(2)(C) of NEPA and its implementing regulations when it decided to approve the issuance of new 10-year grazing permits. ALJ Heffernan recognized that he might have found that BLM properly exercised its discretion under the TGA in managing grazing use on the Allotment. But he did not reach that question because he found that BLM did not fulfill its procedural mandate under NEPA and did not take the requisite "hard look" at likely environmental impacts and other aspects of the Proposed Action and reasonable alternatives.¹⁶⁵ He held that since BLM "did not make a fully informed decision under the

¹⁶⁴ The hearing encompassed the following days, generating a transcript volume with respect to each day: June 8-12, 15-18, and Nov. 16-18, 19-20, 2009; Jan. 11-15, May 3-4, 5-7, 10-14, and Oct. 4-8, 18-21, 2010; Feb. 14-18, 22-25, Mar. 14-17, and July 25-28, 2011.

¹⁶⁵ See Decision at 90-91.

procedural purview of NEPA,” its Final Decision “must be reversed.”¹⁶⁶ He therefore remanded this case to BLM for further NEPA review.

ALJ Heffernan also addressed WWP’s request that he adopt particular “remedies” to ensure that BLM’s specific efforts on remand fully complied with its obligations under NEPA and the TGA.¹⁶⁷ The ALJ did not identify the “remedies” requested by WWP, but BLM represents on appeal that WWP asked the ALJ to direct BLM to (1) prepare an EIS concerning proposed grazing on the Allotment that included a carrying capacity determination, considered a reduced grazing alternative, and considered WWP’s monitoring data; (2) issue grazing permits and an AMP that included mandatory terms and conditions concerning utilization and compliance with the Utah S&G; and (3) prepare an EIS addressing the 50% utilization objective.¹⁶⁸ The ALJ declined to so act because he could only affirm or reverse BLM’s decision to approve grazing under the TGA and because he did not have authority “to make de[n]ovo public land use determinations,” as had been requested by WWP.¹⁶⁹ WWP and BLM have separately appealed from ALJ Heffernan’s Decision. BLM challenges each of ALJ Heffernan’s findings of BLM error, as well as the substance of his reversal of BLM’s decision. WWP challenges only the ALJ’s refusal to adopt interim relief pending BLM’s NEPA review on remand and reconsideration of its issuance of these new grazing permits.¹⁷⁰ By Order dated August 15, 2013, we granted BLM’s petition to stay the effect of Judge Heffernan’s Decision pending resolution of its appeal. Grazing has continued on the Allotment in accordance with BLM’s Final Decision.¹⁷¹

¹⁶⁶ *Id.* at 91; *see id.* at 130 (“Should a federal regulatory agency like the BLM purport to issue a new ten year federal license, when it has inadequate detailed knowledge of the conditions on the Duck Creek Allotment? In my opinion, the answer to this question is no.”).

¹⁶⁷ *Id.* at 137.

¹⁶⁸ *See* WWP SOR/Answer at 41.

¹⁶⁹ Decision at 137.

¹⁷⁰ *See* WWP P-H Opening Brief at 219 (“[T]he [ALJ] should . . . impose interim management terms during the period while BLM performs new and scientifically valid analysis and grazing management decision for the [DCA]”); WWP SOR/Answer at 42.

¹⁷¹ *See* BLM NA/Petition at 2, 45 (“Ever since the [Final] Decision was implemented, the permittees have followed the deferred rotation grazing system

II. BURDEN OF PROOF IN TGA CASES

[1] The management of public lands pursuant to the TGA is committed to BLM's broad discretion.¹⁷² As the delegate of the Secretary, BLM is "to provide for the orderly use, improvement, and development of the [Federal] range," and "to preserve the land and its resources from destruction or unnecessary injury[.]"¹⁷³ In challenging a decision adjudicating grazing privileges under the TGA, the burden is on the appellant before an ALJ to show BLM's grazing decision is not "reasonable" or does not represent "substantial compliance" with the TGA and its implementing rules.¹⁷⁴ The Board has long-applied that standard to also decide grazing appeals from ALJ decisions.¹⁷⁵ As noted in *Kelly*

required by the Decision, which is now in its fourth year. . . . Based on monitoring data collected in 2010, 2011, and 2012 and professional observation, riparian and wetland conditions on the allotment have improved significantly and significant progress is being made toward meeting Standard 2." (citing Declaration (Decl.) of Mellissa Rosenhan, RMS, SLFO, dated June 14, 2013 (attached to NA/Petition), ¶¶ 6-9, at unp. 3-4)); *see also* WWP's Response to Stay Petition (Response) at 30 (citing Carter Decl., dated July 16, 2013; and Catlin Decl., dated July 11, 2013 (attached to Response) (WWP disputes BLM's current assessment of the favorable results of the Final Decision); Carter Decl., dated July 16, 2013, ¶¶ 18, 22, at 6-7, 8-9.

¹⁷² *See, e.g., Jose Talancon 1998 Family Trust v. BLM*, 174 IBLA 152, 161-62 (2008); *Foianini v. BLM*, 171 IBLA at 249, 251 (2007); *Glanville Farms, Inc. v. BLM*, 122 IBLA 77, 87 (1992).

¹⁷³ 43 U.S.C. § 315a (2006).

¹⁷⁴ 43 C.F.R. 4.480(b) ("No adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of part 4100."); *see* 43 Fed. Reg. 156116, 156118 (Aug. 13, 1971) (IBLA adopts BLM rule for deciding grazing appeals by a Hearing Examiner that is subject to appeal to the BLM Director or Secretary); *see also* 43 C.F.R. 1853.9 (1966) (former BLM rule).

¹⁷⁵ *See, e.g., Kelly v. BLM*, 131 IBLA 146, 151 (1994); *Ralph Eason v. BLM*, 127 IBLA 259, 260 (1993) ("[The rule at 43 CFR 4.480] considerably narrows the scope of review to be given to the District Manager's decision by the Administrative Law Judge and by this Board."); *Chris Claridge v. BLM*, 71 IBLA 46, 50 (1983); *Rachel Ballow*, 28 IBLA 264, 268 (1976); *Lloyd Pewonka*, 8 IBLA 303 (1972) ("An Administrative Law Judge's decision adjudicating

v. BLM. “Although unusual, this scope of review is consistent with the highly discretionary nature of the Secretary’s responsibility for Federal range lands.”¹⁷⁶ This means that a BLM decision adjudicating grazing privileges pursuant to the TGA will not be overturned by an ALJ or this Board unless *it is not supported on any rational basis* and is thus arbitrary and capricious.¹⁷⁷

[2] BLM’s determination of the appropriate grazing authorization for an allotment is based on an assessment by its technical experts of the carrying capacity and overall health of the Federal rangeland. It is well settled that BLM is entitled to rely on the professional opinion of its experts concerning matters within the realm of their expertise, where it is reasonable and supported by record evidence.¹⁷⁸ “When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts.”¹⁷⁹

A party challenging BLM’s reliance on the professional opinion of its experts must show their opinion to be arbitrary and capricious or, by a preponderance of the evidence, that it was based on a material error in methodology, data, analysis, or conclusion.¹⁸⁰ It must show, with objective evidence, *either* “BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion,” *or* that “a

grazing privileges within a grazing district will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal Range Code for Grazing Districts.”)(citing *Joe H. Nettleton*, 7 IBLA 282, 284 (1972)).

¹⁷⁶ 131 IBLA at 151 (citing *Eason v. BLM*, 127 IBLA at 260), and *Claridge v. BLM*, 71 IBLA at 50).

¹⁷⁷ *Smigel v. BLM*, 155 IBLA at 164; *American Mustang & Burro Association, Inc.*, 144 IBLA at 150.

¹⁷⁸ See, e.g., *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998) (range carrying capacity); *Yankee Gulch Joint Venture v. BLM*, 113 IBLA 106, 129 (1990) (discovery of valuable sodium deposit); *Western American Exploration Co.*, 112 IBLA 317, 318-19 (1990) (known geologic structure of producing oil or gas field); *American Gilsonite Co.*, 111 IBLA 1, 31-33, 96 I.D. 408, 424-25 (1989) (workability of gilsonite deposit).

¹⁷⁹ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

¹⁸⁰ *West Cow Creek Permittees v. BLM*, 142 IBLA at 238; *Western American Exploration Co.*, 112 IBLA at 318.

demonstrably more accurate study has disclosed a contrary result.”¹⁸¹ Conclusory allegations of error or a mere difference of professional opinion will not suffice to show BLM erred in relying on the professional opinion of its experts.¹⁸² Thus, the challenging party “must show not just that the results of . . . [BLM’s analysis and conclusion] *could be* in error, but that they *are* erroneous.”¹⁸³ Absent a preponderance of record evidence showing that the professional opinion of BLM’s experts was wrong or based on a material error in method, data collection, or analysis, their opinion and assessment can only be rebutted *by a demonstrably more accurate assessment that reached a contrary conclusion*.¹⁸⁴

III. ALJ RELIANCE ON DOCUMENTS NOT AVAILABLE TO BLM BEFORE ISSUING ITS DECISION

Before we address the substantive aspects of ALJ Heffernan’s reversal and remand of BLM’s Final Decision, we note that BLM has raised an initial procedural matter. BLM argues that the ALJ improperly relied on over 50 documents that WWP had failed to provide to BLM prior to issuance of its Final Decision.¹⁸⁵ BLM asks the Board to “make clear . . . that it is inappropriate [in grazing cases] . . . for an ALJ to consider documents *that were not before BLM when it made the decision under review*.”¹⁸⁶

The ALJ reported that after he issued an order on May 27, 2009, which denied BLM’s motion in limine to exclude such documents, BLM again raised this issue at the hearing and the parties then agreed to a compromise that would exclude only those documents that were generated after BLM issued the Final Decision and that this compromise was faithfully observed at the hearing.¹⁸⁷ This compromise resulted in documents being received into evidence that had

¹⁸¹ *West Cow Creek Permittees v. BLM*, 142 IBLA at 238.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See, e.g., Dorius v. BLM*, 83 IBLA 29, 37 (1984); *David M. Stanton*, 166 IBLA 234, 237 (2005); *David Abel*, 2 IBLA 87, 96, 78 I.D. 86, 93 (1971).

¹⁸⁵ *See* BLM SOR/Answer at 3-6.

¹⁸⁶ *Id.* at 6 (emphasis added).

¹⁸⁷ *See* Decision at 7-8.

not been made available to BLM prior to its Final Decision, so long as they had been prepared before the Decision.

BLM now argues that the ALJ erred in attributing any “*probative value*” to documents not provided to BLM before it issued the Final Decision.¹⁸⁸ BLM states: “Documents that never were provided to BLM are simply not probative as to whether BLM was rational in reaching its decision or whether BLM adequately considered an issue under NEPA.”¹⁸⁹

We find no support for BLM claiming any documents must be excluded from a hearing held under the TGA if they were not provided to BLM before it issued the Final Grazing Decision on appeal. The Board has long held that even documents submitted *after* a hearing may be considered by the ALJ or the Board “for the purpose of deciding whether a further hearing is warranted.”¹⁹⁰ In *Briggs v. BLM*, the Board stated that “the principal problem with evidence submitted for the first time on appeal is that it is ‘not subject to cross-examination.’”¹⁹¹ But the documents here challenged by BLM were introduced at a TGA-hearing and subject to cross-examination and rebuttal by BLM. We find no error in ALJ Heffernan considering such documents.

[3] Judge Heffernan, using his *de novo* review authority to act as the initial decisionmaker, properly considered all documents for whatever value they might have in evaluating BLM’s Final Decision. When an appeal is taken from a BLM decision to the Board, “until the Board acts [in resolving the appeal], there is *no decision for the Department*.”¹⁹² This principle is equally applicable in the case of an appeal to an ALJ, who, in the absence of an appeal to the Board, renders the “decision for the Department.”

¹⁸⁸ BLM SOR/Answer at 4.

¹⁸⁹ *Id.*

¹⁹⁰ *Briggs v. BLM*, 99 IBLA 137, 141-42 (1987), and cases cited.

¹⁹¹ *Id.* at 142 (quoting *United States v. MacIver*, 20 IBLA 352, 359 (1975)).

¹⁹² *Southern Utah Wilderness Alliance*, 157 IBLA 150, 157 (2002) (emphasis added), rev’d and remanded on other grounds, *Southern Utah Wilderness Alliance v. Norton*, 237 F. Supp.2d 48 (D.D.C. 2002) (quoting *In re Lick Gulch Timber Sale*, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983)).

What this means is that until a final decision for the Department is rendered, the Board or the ALJ may, in the exercise of their *de novo* review authority, consider any and all evidence, regardless of when it was generated and whether it was provided to BLM before it issued the decision on appeal or submitted by BLM in support of its decision.¹⁹³ Such evidence will be considered by the Board or the ALJ, for the purpose of ensuring that the final decision for the Department is reasonable and in substantial compliance with applicable law.¹⁹⁴ However, it must be emphasized that the *only probative value* of evidence not available to BLM until the hearing is its relevance to the overriding questions of whether BLM's Final Decision substantially complied with applicable law, including NEPA.¹⁹⁵ After all, BLM could hardly be faulted for not considering in a NEPA document any data generated by WWP that was not received until after BLM issued its Final Decision.

IV. RANGELAND CONDITIONS, MONITORING DATA, AND PERMIT CONDITIONS

ALJ Heffernan characterized BLM's Final Decision as a "default" decision that simply approved continued grazing under the current terms, conditions, and stocking rate. He stated BLM did "not have the personnel or budgetary resources to generate adequate, contemporary range monitoring data[.]"¹⁹⁶ He indicates that BLM's decision was fundamentally flawed because it did not act on the basis of an assessment of the appropriate stocking rate and other terms and conditions concerning authorized grazing use, in light of actual on-the-ground resource conditions.

We disagree with Judge Heffernan's characterization. BLM was required annually to collect monitoring data from 15 to 20 allotments, out of a total of 153, using a range staff of only two to three people. However, the record amply demonstrates that BLM generated "adequate, contemporary range monitoring data[.]"¹⁹⁷ The ALJ accords little to no value to the work of BLM rangeland

¹⁹³ See *Southern Utah Wilderness Alliance*, 157 IBLA at 157.

¹⁹⁴ See 43 C.F.R. § 4.480(b).

¹⁹⁵ See *Southern Utah Wilderness Alliance*, 157 IBLA at 157 (quoting *Vulcan Power Co.*, 143 IBLA 10, 24 (1998) (adequacy of EA under NEPA)).

¹⁹⁶ Decision at 11.

¹⁹⁷ *Id.*; see *id.* at 10 (citing BLM P-H Response Brief at 34 n.18).

specialists and other BLM experts in monitoring and evaluating conditions on the Allotment in preparation for issuing new grazing permits. Yet he accords high probative value to WWP monitoring data when the record shows that data to be incorrect or, at best, suspect and unreliable.

The Allotment was the subject of extensive monitoring by both BLM and WWP, with the aim of assessing current rangeland conditions as they relate to the effects of ongoing livestock grazing.¹⁹⁸ The ALJ notes that BLM, based on its monitoring, concluded that the Allotment was generally “in good condition,” whereas WWP, based on its monitoring, concluded it was “seriously degraded.”¹⁹⁹

Utilization, which is the focus of both BLM’s and WWP’s monitoring efforts, seeks to determine “the portion of forage that has been consumed by livestock, wild horses and burros, wildlife and insects during a specified period.”²⁰⁰

BLM monitoring efforts occurred in 2005, 2007, and 2008, under the supervision of Staggs, Gates, or Stager.²⁰¹ Such efforts consisted primarily of recording utilization in upland areas, which is “the portion of forage that has been consumed by livestock, wild horses and burros, wildlife and insects during a specified period,” as well as assessing PFC in riparian areas and RH in upland areas.²⁰²

WWP’s monitoring efforts were undertaken by or under the supervision of Carter or Catlin and occurred each year from 2005 through September 2008.²⁰³ Edwards participated in WWP’s monitoring in 2007 and 2008.²⁰⁴ Such efforts

¹⁹⁸ *See id.* at 71, 110.

¹⁹⁹ *Id.* at 110.

²⁰⁰ 43 C.F.R. § 4100.0-5 (“*Utilization*”).

²⁰¹ *See* Tr. 11719-21; EA at 7, 42-51, 55-67; WWP and BLM Monitoring Sites Map, dated April 2010 (Ex. W-28G).

²⁰² 43 C.F.R. § 4100.0-5 (“*Utilization*”); *see* Tr. 11719-20.

²⁰³ *See* Tr. 548-49, 9451, 10587-88, 10654 (“[T]he 2005 through 2008 data[] is the data that we focus on.”); WWP Response to BLM Interrogatories (Ex. W-20) at 2-5; WWP and BLM Monitoring Sites Map (Ex. W-28G).

²⁰⁴ *See* WWP Response to BLM Interrogatories at 5; Tr. 13094-95.

consisted primarily of recording utilization in upland and riparian areas. WWP assessed production, vegetative cover, and stubble heights in upland and riparian areas,²⁰⁵ but it did not undertake an ESI or otherwise assess the ecological status of the Allotment.²⁰⁶

A. BLM and WWP Monitoring and Results

The ALJ characterized BLM's monitoring, which he found took place primarily in 2005, as "extensive," but he concluded that it paled by comparison to WWP's "detailed, extensive, scientific monitoring . . . every year since 2004."²⁰⁷ He stated that "Appellants' witnesses know more about the environmental nuances of the Duck Creek Allotment than did BLM's witnesses," and that "Dr. Catlin and Dr. Carter spent more time on the Duck Creek Allotment than did any of BLM's own witnesses."²⁰⁸

Based on the record, we disagree with ALJ Heffernan's conclusions. BLM's efforts to evaluate the ecological health of the upland and riparian areas, by conducting both an RH and a PFC assessment, were undertaken in 2005. However, BLM assessed forage utilization in 2005, 2007, and 2008 and trend in 2005 and 2007. The ALJ did not adequately consider the fact that prior to 2005, the Allotment was subject to the same level of grazing use that is now at issue, albeit across the entire landscape rather than sequentially in individual pastures.²⁰⁹ Thus, by assessing upland and riparian health in 2005, BLM's experts were confident they could assess all of the consequences of that level of grazing use, which were expected to be lessened under the proposed deferred rotation grazing system.²¹⁰ WWP has introduced no evidence to demonstrate how additional data would have altered BLM's management decisions. WWP did not itself, *at any time*, undertake an RH and a PFC assessment of upland and riparian areas.

²⁰⁵ See Tr. 1138 (Catlin).

²⁰⁶ See *id.*

²⁰⁷ Decision at 131.

²⁰⁸ *Id.* at 111.

²⁰⁹ See Ex. B-105 (Actual grazing use from 2001 through 2008).

²¹⁰ See BLM SOR/Answer at 40-41.

BLM demonstrates clear error in ALJ Heffernan's conclusion that Catlin and Carter spent more time on the Allotment than BLM's experts. BLM points to the fact that Catlin and Carter reportedly spent, respectively, a total of 21 and 18 days on the Allotment, from 2004 through September 2008.²¹¹ BLM notes, by contrast, that "[j]ust in 2005 alone, the BLM ID team that was on the allotment that summer was there for a month."²¹² Staggs was there Monday through Friday for six consecutive weeks in 2005,²¹³ and he estimated that as an RMS from 2004 to 2010, he was on the DCA close to 300 days.²¹⁴ And Stager estimated that he was on the DCA about 60 or 65 days in 2005-2007 and 2010.²¹⁵

While recognizing BLM and WWP monitoring data reach remarkably different conclusions that are "in direct opposition" regarding the condition of the range, the ALJ finds both sets of data "useful and probative within certain parameters."²¹⁶ He found data generated by Catlin and Carter to be especially probative and entitled to "reasonable deference" because they monitored the Allotment over a longer period of time (from 2005 through September 2008).²¹⁷ By contrast, he found BLM only monitored the Allotment in 2005, which was "particularly wet" and an "atypically productive year."²¹⁸ The Judge credits WWP's monitoring data, which revealed the Allotment as "seriously degraded," more than BLM's monitoring data, which revealed it was "in good condition."²¹⁹ He ultimately found that "the overall allotment is simply *not in as good or pristine a condition as generally contended by BLM's witnesses*["]."²²⁰

As we show in the following discussion, the record does not support the ALJ's findings. He failed to recognize the depth and value of the evidence

²¹¹ See BLM NA/Petition at 38 (citing WWP Response to BLM Interrogatories at 2-5).

²¹² *Id.*; see, e.g., Tr. 8750; 14481-84.

²¹³ Tr. 12719-20.

²¹⁴ Tr. 12720; see Tr. 12721 ("[E]very time I was on [the] Allotment I was either collecting data or generally observing the environment.").

²¹⁵ Tr. 12870-71.

²¹⁶ Decision at 110, 113.

²¹⁷ *Id.* at 113.

²¹⁸ *Id.* at 111, 112; see *id.* at 110-12.

²¹⁹ *Id.* at 110.

²²⁰ *Id.* at 111 (emphasis added).

adduced by BLM, especially as compared to that proffered by WWP. He fundamentally erred in his evaluation of the probative value of BLM's evidence, as well as the results of BLM's analysis and conclusions regarding the condition of the Allotment.

B. Assessment of Forage Utilization

BLM assessed forage utilization at upland sites in the Allotment by following the Utilization TR. BLM assessed utilization using 100-foot long line transects at 8 upland sites (DCT-1 through DCT-5, DCT-7, DCT-8, and DCT-10) in 2005, 2007, and 2008, using the ESI to guide its selection of the representative sites for monitoring purposes.²²¹ It used the Key Species Method, by which utilization is determined "based on an ocular estimate of the amount of forage removed by weight on individual key species and observations are recorded in one of seven utilization classes."²²² In the case of the upland and riparian areas, BLM also undertook an RH and a PFC assessment to aid in determining whether and to what extent, as a consequence of ongoing grazing and other circumstances, these areas conformed to the Utah S&G for assessing Federal rangeland health, as required by 43 C.F.R. Subpart 4180.²²³

In accordance with the Utilization TR, WWP focused its utilization assessment on both upland and riparian sites in the Allotment.²²⁴ But notably, WWP did not undertake an RH or a PFC assessment at either upland or riparian areas.²²⁵

²²¹ See EA at 60 (Table 12); Ex. B-19; Utilization Monitoring Site Map, 2005 (Ex. W-30); Tr. 589-90, 12120-22, 12126-27, 12128 ("[The ESI] allowed us . . . to come up with the major ecological sites and make sure we were sampling inside . . . the two largest ecological sites that made up most of the acreage on the Allotment. And so we felt confident that . . . we knew what needed to be sampled." (Gates)), 12128-29, 12625, 12629; see also Ex. B-19 at Bates 2486-87.

²²² Utilization TR at 81; see *id.* at 81-84; *Filippini Ranching Co. v. BLM*, 149 IBLA 54, 61-62 (1999).

²²³ See Tr. 12228-29.

²²⁴ See Tr. 434-36, 438-39, 441, 565, 11035-40, 11155-60; 2008 Monitoring Report at 10-14; 2005 Monitoring Report, WWP, dated Feb. 20, 2006 (Ex. W-72) at 3-5, 7 (Table 4 (Utilization Summary)).

²²⁵ See Tr. 11330, 11332 (Carter), 14348-50 (Stager).

WWP assessed utilization by using 100-foot long line transects at seven upland and three riparian sites in 2005, 2006, and 2007 (U-1 through U-10), plus five additional upland sites in 2006 and 2007 (U-11 through U-15).²²⁶ It used the Paired Plot Method for determining utilization whereby “forage from protected and unprotected plots is clipped and weighed at the end of the use period. The difference between these two weights represents the amount of forage consumed or otherwise destroyed during that period.”²²⁷ WWP concluded the Paired Plot Method would provide an objective, rather than a subjective, measure of the amount of forage utilized by livestock, as well as the amount of forage actually produced for stocking rate determination purposes.²²⁸ It did not determine the utilization of key forage species, but rather looked at all forage species.²²⁹

WWP located many, but not all, of its transects in the vicinity of BLM monitoring sites.²³⁰ WWP selected upland sites “in the vicinity of BLM or [U]DWR monitoring sites in order that the [W]WP data would complement data collected by others.”²³¹ In the upland areas, WWP placed an exclosure cage at representative locations, and then ran five 100-foot long radial transects in different directions away from the cage (at 0, 72, 144, 216, and 288 degrees).²³² In the riparian areas, WWP placed an exclosure cage at representative locations, and then ran two 100-foot long linear transects, one upstream and one

²²⁶ See Utilization Monitoring Site Map, 2005; Map of WWP Utilization Monitoring Sites, dated November 2009 (Ex. W-89).

²²⁷ Utilization TR at 70; *see id.* at 70-75.

²²⁸ See Tr. 435-36, 565-66.

²²⁹ See Tr. 428, 5781 (“[I]n upland areas we clipped forbs [and grass] and put forbs in one bag and grass . . . in one bag.” (Catlin)), 6059 (“[W]e generally clipped everything in riparian areas and lumped them together.” (Catlin)).

²³⁰ See Tr. 360-62, 390-91, 445-46, 544-45, 556, 565, 568-69, 587, 9741, 10942-45, 10965, 11603; Utilization Monitoring Site Map, 2005; 2008 Monitoring Report at 11-12 (Table 1 (Upland Utilization Monitoring)).

²³¹ 2005 Monitoring Report at 2.

²³² See Tr. 439-40, 1661, 9741-42, 9745; 2008 Monitoring Report, Appendix, at 2 (Figure 1 (Sample Clipping Frame Pattern for Upland Monitoring Sites)).

downstream.²³³ In all cases, WWP recorded utilization at 50- and 100-foot intervals along each of its transects.

WWP's utilization monitoring data was recorded on Excel spreadsheets,²³⁴ and summarized in its 2005 and 2008 Monitoring Reports.²³⁵ All its data was provided to BLM following the 2005, 2006, and 2007 grazing seasons.²³⁶ WWP reported average utilization of grasses and forbs at its seven upland monitoring sites in 2005 as 53.8%, 75.1%, 67.6%, 40.3%, 53.1%, 9.8%, and 27%, at its 12 upland monitoring sites in 2006 as 70.7%, 72.6%, 50.5%, 9.6%, 65.3%, 70.7%, 19.5%, 3.2%, 62.1%, 76.2%, 76.4%, and 9.5%, and at its 12 upland monitoring sites in 2007 as 80.4%, 84%, 80.1%, 54%, 67.4%, 60.8%, -10.5%, 63.4%, 79%, -1.3%, 71.1%, and 78%.²³⁷ In the case of riparian areas, WWP reported average utilization of grasses and forbs at its three riparian monitoring sites in 2005 as 97.7%, 26.3%, and 88.3%, in 2006 as 94.5%, 84%, and 72.6%, and in 2007 as 96.4%, 90.8%, and 96.6%.²³⁸ Utilization was reported as frequently exceeding 50%.

BLM reported average utilization of key forage species at its eight upland monitoring sites in 2005 as 11%, 16/12%, 12%, 13/17%, 18/21%, 17/23%, 31/30%, and 30/44%, at its eight upland monitoring sites in 2007 as 36%, 26/25%, 11/8/12%, 34/32%, 19/21/17%, 32/30%, 29/25%, and 27/30%, and at its eight upland monitoring sites in 2008 as 42/44%, 42/37%, 29/33/27%, 28/20%, 24/27/23%, 9/8/10%, 15/8%, and 6/6%.²³⁹ In no instances did BLM report that utilization exceeded 50%.

C. BLM's Use of the 50% Utilization Objective

BLM's forage utilization objective of 50% for the Allotment is taken from the applicable land use plan, the 1980 Randolph MFP. That 50% objective is still accepted by the scientific community since it is deemed to constitute the

²³³ See Tr. 1662-63, 9742-43.

²³⁴ Exs. W-31B (2005), W-39B (2006), and W-48B (2007).

²³⁵ Exs. W-21 and W-72; see Tr. 587-88, 685-87.

²³⁶ See Tr. 585; Letter to BLM from WWP, dated Feb. 27, 2006 (Ex. W-88).

²³⁷ See Decision at 34-39.

²³⁸ See *id.* at 43-44, 46, 47.

²³⁹ See EA at 60 (Table 12).

upper end of appropriate moderate use of grasses in upland/riparian areas of a sagebrush steppe ecosystem.²⁴⁰ BLM's RMSs also determined that 50% utilization was appropriate for the Allotment.²⁴¹ BLM's goal, therefore, is to bring allotments that exceed 50% utilization, either in whole or in part, to 50% or less by decreasing livestock numbers, restricting grazing use to particular areas, limiting grazing to certain times, or other means.

WWP challenges BLM's use of the 50% utilization objective for rangeland management purposes, asserting that it is considered by "much of the scientific literature" to be too high for semi-arid public lands.²⁴² WWP cites to Dee Galt, *et al.*, *Grazing Capacity and Stocking Rate* (Galt),²⁴³ and Jerry L. Holechek, *et al.*, *Rangeland Management Principles and Practices* (Holechek),²⁴⁴ as well as to Carter's and Catlin's testimony characterizing those papers.²⁴⁵

We reject the claim that WWP has shown any error in BLM's relying on the 50% utilization objective. A flaw in WWP's analysis is that neither Galt nor Holechek specifically determined the appropriate utilization objective for the Allotment. In fact, as BLM notes, both Galt and Holechek appear to accept a 50% utilization objective for livestock use in the DCA.²⁴⁶ Since the Allotment is

²⁴⁰ See Tr. 12157-59, 12164-66, 12174-75, 13662, 13674-90, 13845; EA at 12-13, 79; MFP Final ES at 1-7 (Table 1-3 (Range Management Objectives by Allotment)) ("Limit utilization of desirable forage species by livestock to 50% for grass and 60% for browse."), 3-21 ("Overutilization (in excess of 50 to 60 % of annual growth) of preferred forage year after year will weaken and eventually remove preferred forage."); MFP at RM-1.2 ("[C]onduct range management activities in accordance with the decisions for each allotment as shown in the attached decision documents."); MFP, Appendix B, at B-10 ("If utilization exceeds the proper level (50%) appropriate [livestock] reductions will be made.").

²⁴¹ See Final Decision at 22; EA at 12-13, 79.

²⁴² WWP P-H Opening Brief at 203; *see id.* at 210-11 (citing Tr. 1616-17, 10035-36).

²⁴³ 22 RANGELANDS 7 (2000) (Ex. W-200).

²⁴⁴ 5th ed. 2004 (Ex. B-20).

²⁴⁵ Tr. 1616-17 (Catlin), 10034-35 (Carter); *see* Galt at 8; Holechek at 240, 241.

²⁴⁶ See BLM P-H Response Brief at 163-64 (citing Tr. 13667-74 (Staggs); Galt at 8 ("An alternative, more simple approach involves assigning 25% of the forage to livestock, 25% to wildlife and natural disappearance, and 50% for site

already considered capable of accommodating the existing use by mule deer, elk, and pronghorn antelope, it appears that the entire 50% utilization can be allocated to livestock.²⁴⁷ Holechek states that “[t]he harvest coefficient is the percentage of total forage produced that is assigned to grazing animals for consumption,” and that “[f]or most arid and semiarid areas, a harvest coefficient of 35% would be selected, while 50% would usually be used for annual grasslands and humid areas if the goal is moderate grazing.”²⁴⁸ Carter and Catlin offer an opinion that challenges the 50% utilization objective, but their opinion is not sufficient to show BLM error in assessing the appropriateness of grazing with a 50% utilization objective. Nor will mere references to scientific literature suffice to show error.²⁴⁹

D. Expertise of Carter and Catlin

Because ALJ Heffernan placed high value on the monitoring data gathered by Carter and Catlin and faulted BLM for not “integrating” their data with its own, BLM understandably questioned the expertise of Carter and Catlin.²⁵⁰ ALJ Heffernan stated that they both offered “expert testimony,” but he did not address their education, training, or professional qualifications.²⁵¹ Instead, he relied on the fact they had both engaged in “several years of on-the-job, on-the-ground, training conducting their extensive monitoring on the allotment[.]”²⁵² We agree their testimony was valuable since it offered first-hand information regarding the rangeland conditions of the Allotment. We find no reason to doubt their credibility, to which the ALJ attested, regarding their direct observations of rangeland conditions.²⁵³

protection.”); and Holechek at 217 (“[R]esearch was remarkably consistent in showing that moderate grazing involved about 35% to 45% use of forage.”).

²⁴⁷ See EA at 16 (“UDWR has not identified any measurable impacts on mule deer, elk or antelope under the recent past use or the existing use for the [DCA].”).

²⁴⁸ Holechek at 240.

²⁴⁹ See *Biodiversity Conservation Alliance*, 183 IBLA 97, 122 (2013).

²⁵⁰ See BLM P-H Response Brief at 10-14, 32-33.

²⁵¹ Decision at 22.

²⁵² *Id.*

²⁵³ *Id.*

However, we find no basis for concluding that either Carter or Catlin possessed the credentials that would qualify them as experts in the fields of rangeland management and wildlife biology, subjects of particular relevance to evaluating conditions on the Allotment.²⁵⁴ Nor do they appear to be uniquely suited for evaluating the issues of importance to this case, *i.e.*, the appropriate allocation of vegetative resources in the Allotment to competing use by livestock, sage-grouse, and other wildlife.²⁵⁵ Over the years, Carter and Catlin have researched the effects of livestock grazing on natural resources in the DCA and other allotments, and in doing so, have relied upon the expertise of others. At best and for the most part, the testimony of Carter and Catlin represents nothing more than their personal observations of rangeland conditions at the various times they visited the Allotment. They could not properly be considered experts in rangeland management.

E. BLM Not Required to Integrate WWP Data into Its Own Data

ALJ Heffernan observes that BLM “affirmatively rebuffed” WWP’s repeated efforts to “integrate” its monitoring data with BLM monitoring data, with the aim of achieving an “integrated final [grazing] decision[.]”²⁵⁶ He found that BLM “rejected all of Appellants’ utilization and production data,” which

²⁵⁴ See Carter Resume (Ex. W-153) (B.A. in Mechanical Engineering from Georgia Institute of Technology (1966); Masters in Business Administration from Georgia State University (1972); Ph.D. in Biology/Ecology from Utah State University (1980)); Catlin Resume (Ex. 12) (B.S. in Electrical and Electronics Engineering from Oregon State University (1971); Masters in Civil Engineering from University of Utah (1980); Ph.D. in Wildlands Science from University of California (1996)).

²⁵⁵ See, e.g., Tr. 232-33, 301-05, 902, 2050-51, 2057-58, 4340, 4778, 5502, 6060, 6671-72, 7112-13, 7119 (“Q. [BLM] . . . You’re not an expert in wildlife biology, right? A. [Catlin] No. . . . I do have some expertise in range management.”), 7119-21, 7142-45 (Catlin), 8997-99, 9001, 9045-47, 9099-9100, 9102-03, 9105, 9114, 10447-53, 10557 (“Q. [BLM] Now, you are not a certified professional in rangeland management; correct? A. [Carter] Correct.”), 10559-60, 10564-68, 10643, 11180, 11580-82 (Carter); Resume (Catlin) (Ex. W-12); Resume (Carter) (Ex. W-153).

²⁵⁶ Decision at 9.

basically “challenges the BLM conclusion that the overall allotment is in good condition.”²⁵⁷

ALJ Heffernan states his resolution of the contradictory data compiled by BLM and WWP is “largely procedural” and rules that “BLM should have more carefully, more objectively, and more publicly considered and analyzed the Appellants’ independently derived data set[.]”²⁵⁸ He ultimately found BLM’s failure to adequately incorporate WWP monitoring data into its own analysis and conclusions regarding the level and scope of grazing appropriate for the Allotment was a fundamental flaw in BLM’s grazing decision: “[T]he summary fashion in which BLM internally rejected all of Appellants’ monitoring data constituted, in my opinion, reversible error.”²⁵⁹

[4] ALJ Heffernan overlooks the fact that BLM is not required by the TGA, NEPA, or any other authority to incorporate WWP monitoring data into BLM’s decisionmaking process. As a factual matter, BLM was in no position to assess the accuracy and reliability of WWP’s monitoring data. BLM was not present when WWP collected the data. Nor did WWP provide adequately detailed information regarding the location of grazed and ungrazed plots, and other aspects of its monitoring program in the field, which was critical to BLM’s ability to oversee the data collection effort. BLM could not independently determine, years after the fact, that WWP monitoring data was accurate and reliable. In these circumstances, BLM was entitled to rely entirely on BLM monitoring data obtained by its own experts or under their supervision, since BLM could be fully assured of its accuracy and reliability.²⁶⁰

In any event, the record does not support Judge Heffernan’s finding that BLM summarily rejected WWP’s monitoring data. BLM devoted a considerable amount of time and effort to analyzing WWP data and ultimately concluding it was not reliable. In its Final Decision, BLM made this conclusion clear, stating

²⁵⁷ *Id.* at 71 (citing Tr. 11983, 12055-56; EA at 95 (“The data supplied to the BLM by WWP[] is not of a standard that should permit it to supplant the data collected by BLM.”); BLM/WWP Comparison at 1-7, 74).

²⁵⁸ *Id.* at 113.

²⁵⁹ *Id.* at 111; *see id.* at 71, 72, 110-11.

²⁶⁰ *See* 43 C.F.R. § 4.480(a) (grazing decisions must be supported by “reliable” evidence).

it “reviewed all data submitted to the [SLFO] and developed a comprehensive comparison of the two data sets” and that “SLFO determined that the data methods relied upon by WWP were not in accordance with BLM approved technical references, specifically the Paired Plot Method.”²⁶¹

BLM presented its analysis of WWP data in the EA, which incorporated the BLM/WWP Comparison by reference.²⁶² BLM stated: WWP and BLM “did not use the same methodologies”; “[BLM’s] analysis of the two datasets has shown that the data collected by BLM is rigorous enough to issue the decision resulting from this EA”; and “data supplied to the BLM by WWP[] *is not of a standard that should permit it to supplant the data collected by BLM[.]*”²⁶³ BLM described WWP data in the following terms: “[All WWP] data [is] plagued by unqualified or biased observers, inadequate or unknown protocols, limited and unrepresentative sampling, and fatal inconsistencies.”²⁶⁴ BLM’s criticisms of Carter and Catlin, their expertise, honesty, credibility, and methods of gathering data, provide BLM with a rational and credible basis for preferring data compiled by its own experts.²⁶⁵ As the agency independently charged with issuing grazing permits, BLM was not required to incorporate into its decisionmaking process any data it had evaluated and found to be unreliable.²⁶⁶ BLM had legitimate reasons for not incorporating WWP data into its own assessments regarding the appropriate levels of grazing use in the Allotment, and we conclude BLM rightly declined to incorporate that data. Simply stated, the record does not support finding that BLM’s rejection of WWP data was reversible error.

F. Ocular Method Not Less Reliable than Clip-and-Weigh Method for Measuring Forage Utilization

ALJ Heffernan assessed the validity of BLM’s and WWP’s respective methodologies for determining rangeland conditions from the standpoint of forage utilization.²⁶⁷ BLM employed the ocular method; WWP used the clip-and-

²⁶¹ Final Decision at 14.

²⁶² See EA at 95; BLM SOR/Answer at 35-37 (citing Tr. 12054-55; and BLM/WWP Comparison).

²⁶³ EA at 95 (emphasis added).

²⁶⁴ BLM SOR/Answer at 37.

²⁶⁵ See *id.*

²⁶⁶ See, e.g., 43 C.F.R. §§ 4130.1-1, 4130.2, and 4130.3.

²⁶⁷ See Decision at 23-32, 71-73.

weigh method. Both methods are designed to determine, at the end of each grazing season, the percentage of new vegetative growth for each existing forage species that was consumed during the season by grazing livestock. BLM focuses on *key* forage species, while WWP looks at *all* forage species. Each method is employed at regular intervals along several line transects placed at various locations that are deemed to be representative of grazing use in the Allotment.

In its use of the ocular method, BLM personnel first “calibrate” their visual observations by clipping and weighing the key forage species inside caged, ungrazed plots. This approach assures the accuracy of their later visual observations in assessing actual forage utilization. All of the BLM personnel engaged in measuring utilization had familiarized themselves with all of the key species. BLM personnel undertook to calibrate their visual observations of utilization, both as part of the original ESI in 2005, and later, prior to the start of every annual analysis and assessment of utilization.²⁶⁸ Once having done so, they walk the line transects, recording the percentage of forage utilization visually observed at each of the regularly-spaced intervals.²⁶⁹

In using the clip-and-weigh method, WWP personnel walk the line transects, recording the percentage of forage utilization determined by clipping and weighing the forage species inside and outside of caged, ungrazed plots, at each of the regularly-spaced intervals.

The ALJ agreed with WWP that the ocular method employed by BLM is unreliable since it is based on the subjective judgment of BLM personnel to qualitatively assess the percentage of forage utilization, whereas the clip-and-weigh method is objective and quantitatively assesses the percentage of forage utilization.²⁷⁰ However, WWP accomplished little more than question the ocular method from a theoretical standpoint. WWP offered no evidence to establish that the ocular method is unlikely to yield accurate results regarding utilization

²⁶⁸ See Tr. 12129-30, 12131-32, 12133-38, 12142, 12631, 13548-49, 15600, 15601; Utilization TR at 81-82.

²⁶⁹ See Tr. 13546-48, 13549-57.

²⁷⁰ See Decision at 23, 25, 72.

in the Allotment.²⁷¹ We find it significant that BLM offered testimony that the ocular method, routinely used by BLM, is generally considered to be reliable by the scientific community.²⁷² Finally, WWP offered no evidence to show that the ocular method, in fact, yielded inaccurate results regarding utilization in the Allotment.

The ALJ criticizes BLM efforts to calibrate its ocular methods, noting that it clipped and weighed “at only four sites[.]”²⁷³ However, he points to no authority or evidence that would require BLM’s experts to calibrate at a particular number of sites, or that, having clipped and weighed at four sites, they were not able thereafter to accurately assess the percentage of utilization of the same species later observed at other sites in the Allotment. The ALJ questions the ability of BLM personnel to assess the percentage of new vegetative growth on key forage species that was consumed by grazing livestock during the grazing season. But he does not point to any evidence to demonstrate that BLM personnel did not, in fact, accurately record that percentage. Absent any such evidence, we find no reason to discount any of the forage utilization data offered by BLM’s experts.

G. Use of Key Forage Species More Accurate than Use of All Forage Species in Measuring Forage Utilization

The ALJ was more persuaded by WWP testimony that BLM’s methodology is prone to error because it focused on key forage species, whereas WWP’s methodology looked at all forage species.²⁷⁴ The testimony and evidence adduced at the hearing does not support ALJ Heffernan’s conclusion. In making this judgment, he ignores the fact that BLM is specifically directed by the MFP to “[u]se key [forage] species for monitoring” rangeland conditions in the DCA.²⁷⁵ The MFP identifies key forage species as those that are most palatable and, thus, most likely to be grazed; measuring their percentage of utilization will

²⁷¹ See, e.g., Tr. 428-29, 435-36, 438-39, 562-63; Holechek at 196; 2008 Monitoring Report at 9-10; E-Mail to CRM from Catlin, dated Nov. 14, 2007 (Ex. W-55); Catlin Decl., dated July 11, 2013, ¶ II.3., at 3-4.

²⁷² See Tr. 13555-57, 13558, 13559-65 (Staggs), 15599-601, 15605-07 (Karl).

²⁷³ Decision at 72, 81.

²⁷⁴ See *id.* at 28-29.

²⁷⁵ MFP Final ES at 1-7 (Table 1-3).

most accurately reflect the true utilization of forage generally in the Allotment.²⁷⁶ Put simply, the key species are those species that are considered by BLM to be reasonable indicators of livestock grazing use because livestock are likely to graze them. Karl, an RMS with BLM's National Operations Center, stated: “[M]easuring utilization on a key species . . . is an indicator of the utilization . . . on the entire plant communit[y]”; “on the Key Area[,] . . . a known species . . . that is palatable to livestock . . . will be consumed;”²⁷⁷ “if the key species utilization increases, . . . the utilization on the plant community . . . in the Key Area will also increase”; and “if [the] . . . key species [utilization] declines, the rest of the utilization on the plant communit[y] in that Key Area . . . will also decline.”²⁷⁸

By comparison, in looking at all forage species, regardless of their desirability to livestock, WWP used a method of assessing utilization that is prone to error. WWP's method involved comparing the protected growth of plants *not desired by livestock* inside its cages against the utilization of the unprotected growth of plants *desired by livestock* outside the cages, or vice versa. In testimony, Karl explained that “[b]y lumping of [grasses and forbs] . . . without ascertaining a key species[,] . . . it's highly likely that . . . [WWP's] utilization [assessment]. . . includ[ed] species that weren't even consumed by livestock.”²⁷⁹ Similarly, in its BLM/WWP Comparison, BLM stated that “[i]f . . . a large specie[s] is located within the utilization cage, but a smaller species is sampled outside of the cage[,] . . . [t]his would over[-]represent the utilization, and the opposite would under[-]represent [the] utilization.”²⁸⁰ By not focusing on key species, WWP was more likely to record higher or lower utilization than is actually occurring. BLM attributed the wide divergence between BLM's and WWP's utilization data to WWP's failure to focus on key forage species.²⁸¹

On appeal, BLM further explained that WWP incorrectly assumed all grasses and forbs were “uniformly palatable or preferred by livestock” and would

²⁷⁶ *Id.*; Tr. 13487; *see also id.* 12146-47, 13485-87.

²⁷⁷ Tr. 15590.

²⁷⁸ Tr. 15608-09.

²⁷⁹ Tr. 15590; *see id.* Tr. 12013-14, 12146-47, 12609.

²⁸⁰ BLM/WWP Comparison at 7.

²⁸¹ *Id.* at 6.

be uniformly consumed.²⁸² Such an erroneous assumption would necessarily impact utilization results:

[I]f a cage [ungrazed plot] were placed in a spot with less-preferred species than the surrounding area in which the frames [grazed plots] were placed, utilization would be calculated by comparing vegetation that receives little use [in the cage] to vegetation that attracts use [in the frames]. This would skew the results to show heavier utilization than actually exists.^[283]

This result could be avoided if a specific key forage species was sampled, because if it was equally desirable to livestock inside and outside the cage, comparing ungrazed growth inside the cage to grazed growth outside the cage would accurately reflect livestock utilization in that area. ALJ Heffernan did not address that possibility in his analysis.

WWP failed to establish any *actual* error in BLM's identification of key forage species or demonstrate that the utilization observed in specific key forage species was not representative of utilization at the transect sites or throughout the KMAs. Catlin testified on behalf of WWP that "[t]he key species [method] makes the assumption that you can represent the conditions of the larger ecology of the place with a single species" and that "by collecting all of the herbaceous plants, we overcome that need to deal with th[at] assumption[]." ²⁸⁴ However, by collecting all of the herbaceous plants, including grasses and forbs not desirable to livestock, WWP's calculations would likely result in inaccurate utilization conclusions. WWP does not undermine BLM's basic premise that cattle prefer key species and that including all species in calculating utilization may well lead to skewed or inaccurate conclusions. Moreover, since key forage species are the more desirable species to livestock, BLM's method is designed to record the *highest* percentages of forage utilization throughout the Allotment, thus rendering the Key Species Method a conservative assessment of utilization.

²⁸² BLM P-H Response Brief at 90.

²⁸³ *Id.*

²⁸⁴ Tr. 567-68; *see id.* 542-43, 9744, 11097-98, 13112-13 ("[I]f your . . . key species is not chosen correctly, and many cases it's not, then . . . you're not able to obtain the correct information [regarding utilization].") (Edwards)).

Judge Heffernan nonetheless agreed with WWP and ruled that BLM should have used WWP utilization data, along with its own PFC data, to assess rangeland conditions in the riparian areas of the Allotment.²⁸⁵ The PFC TR provides that the data obtained by “the PFC method” is “the starting point—as the minimum level of assessment for riparian-wetland areas.”²⁸⁶ BLM is not required to go beyond PFC data in assessing rangeland conditions in riparian areas, and there was no need for BLM to do so since such areas will be heavily utilized by livestock, especially in a semi-desert region. As a matter of logic and common sense, heavy utilization in such areas can be assumed. The important question, however, is whether such areas are being degraded to such an extent that they are not performing in accordance with Utah S&G. That is exactly what BLM determines when it undertakes a PFC assessment. While BLM performed a PFC assessment, in accordance with the PFC TR, WWP did not. Even so, WWP claimed that BLM’s assessment does not accurately assess the degradation caused to riparian areas by grazing use. WWP was not sufficiently qualified and informed to make this judgment.

ALJ Heffernan was persuaded by WWP testimony that BLM’s PFC assessment did not accurately reflect utilization, and thus the degradation occurring in riparian areas.²⁸⁷ As evidence, he focused on *one instance* where high utilization was detected by WWP, *i.e.*, where the five-inch riparian stubble height standard was exceeded.²⁸⁸ But in most cases, WWP found the stubble height standard was not exceeded.²⁸⁹ In fact, it failed to establish that any other exceedance obscured the high utilization of riparian areas. WWP indicated that the stubble height standard comes from the 2001 EA, but we find no indication that it remains an applicable standard for assessing riparian health in BLM’s PFC assessment.²⁹⁰

²⁸⁵ See Decision at 42-43.

²⁸⁶ PFC TR (Lotic) at 4; PFC TR (Lentic) at 3.

²⁸⁷ See Decision at 45 (citing Tr. 1914, 9772-73 (Carter)).

²⁸⁸ *Id.*

²⁸⁹ See *id.* at 44-45, 46-47, 48.

²⁹⁰ See Ex. B-31; WWP 2005 Monitoring Report at 5, n.2; *but see id.* at 13 (“That standard has not been enforced.”).

H. BLM Objections to WWP Monitoring Data

The ALJ discounted all three of BLM's principal objections to WWP's use of a clip-and-weigh methodology to measure utilization in the Allotment: (1) WWP located too few monitoring sites (10 upland/riparian sites (2005) and 15 upland/riparian sites (2006 and 2007)), given the high variability of vegetation, and otherwise failed to establish that the sites were likely to generate data representative of utilization in the Allotment; (2) WWP failed, by looking at all forage species, to accurately assess utilization; and (3) WWP assessed utilization too close to caged, ungrazed plots, contrary to the 100-foot minimum distance in the Utilization TR.²⁹¹ We disagree with the ALJ's analysis and conclusions, and find merit in each of BLM's objections.

WWP did not independently determine that the Key Areas were representative of vegetative productivity in the Allotment and then locate its monitoring sites in such areas. WWP relied instead on BLM's identification of Key Areas and placed its monitoring sites in relative proximity to BLM's monitoring sites, with the apparent intent of augmenting BLM's monitoring data.²⁹² At no point did WWP define the boundaries of its own Key Areas or make any effort to explain why the sites it chose were likely to be representative of grazing utilization within any of the Key Areas.²⁹³ We are simply not persuaded that, taken together, the results of WWP's monitoring can reliably be used to determine utilization across any area larger than the monitoring site, let alone the entire Allotment. Moreover, even for its monitoring sites, WWP's utilization methodology based on all grasses and forbs is of doubtful validity, as BLM convincingly demonstrated.

The Paired Plot Method used by WWP to assess utilization was a modification of a utilization monitoring method set forth in the Utilization TR. WWP used a variation of the Paired Plot Method that was personally devised by Catlin and Carter for use in the DCA. As a utilization monitoring method, it has

²⁹¹ See Decision at 52-56; BLM P-H Response Brief at 93.

²⁹² See BLM P-H Response Brief at 75-78; Map of BLM and WWP Monitoring Sites.

²⁹³ See, e.g., Tr. 4728-29, 5638-43, 6069-70, 6094-95, 6095 ("Q. [BLM] . . . You can't tell me how far out from the cage, . . . we can extrapolate production results from the cage? A. [Catlin] No, I can't."), 6258-62.

not been scrutinized by the scientific community.²⁹⁴ We have already concluded that BLM's focus on key forage species in assessing utilization, as dictated by the Utilization TR, is more accurate and reliable than the all-forage method used by WWP.²⁹⁵ WWP has not justified its decision to deviate from that prescription.

Nor has WWP justified its decision to depart from the standard expressed in the Utilization TR that uncaged plots are to be located at least 100 feet from the caged plots.²⁹⁶ The Utilization TR states that “[a]nimals are attracted to cages and may trample unprotected plots if located too near protected plots,” and that, “[t]herefore . . . unprotected plots [should be established] a minimum of 100 feet from protected plots.”²⁹⁷ The evidence bears out BLM's opinion that utilization data obtained closer than 100 feet is not representative because livestock are drawn to cages, which contributes to higher utilization.²⁹⁸

BLM established that the Paired Plot Method, as devised by Carter and Catlin and as used by WWP, was seriously flawed. In determining utilization, WWP sought to measure forage consumed at multiple frame locations along several transect lines radiating out from one or two cages, and then comparing those results with forage produced inside those one or two cages. This approach is contrary to the Utilization TR.²⁹⁹ WWP acknowledged that forage production within only one or two fairly-small cages may not be representative of forage production generally in the Key Area, notwithstanding WWP's best efforts.³⁰⁰ But as Carter explained at the hearing: “It's not like you just pick up the cage, walk over and toss it down somewhere. . . . To me, it's an important decision and I spend a fair amount of time trying to select a site that . . . represents the true average [of forage production in the area] as best I can determine.”³⁰¹ WWP does

²⁹⁴ See Tr. 10797, 10923, 11101.

²⁹⁵ See Utilization TR at 72 (“Clip the current year's growth on key species from protected and unprotected plots.”); Tr. 11096-97, 12014-15, 15590.

²⁹⁶ See Tr. 573-75.

²⁹⁷ Utilization TR at 71.

²⁹⁸ See Tr. 12021-22, 12022, 12022-23, 15586-87; Ex. B-97 at unp. 1-6.

²⁹⁹ See Utilization TR at 71.

³⁰⁰ See BLM P-H Response Brief at 85-88, 89; Tr. 10900-01, 15584-86, 15587-89, 15591-92.

³⁰¹ Tr. 10918.

not explain why we should assume its subjective selection of sites for cage placement will yield reliable data.

What we do have is BLM's persuasive argument that WWP's approach is deficient: "[A]lthough ten frames may better capture the average vegetation production on grazed areas, one cage cannot capture the average vegetation production on ungrazed areas. . . . [I]f a cage were placed in a location more productive than the rest of the study site[,] . . . it would skew the utilization upward."³⁰² Karl testified that using only "one cage very, very much limits the representativeness of th[e] [utilization] data for the area,"³⁰³ but that WWP was "utilizing . . . the same individual cage to estimate for average production on an entire monitoring area."³⁰⁴ He concluded that "the primary reason" for the discrepancy between WWP's and BLM's utilization data "is [WWP's] bias[ed] location of the . . . ungrazed cages."³⁰⁵ WWP's assessment of the degree of utilization along its transect lines depended on whether and to what extent the production of all forage species inside the cage represented the production of all forage species outside the cage, which gave rise to a substantial probability of error. But such was demonstrably not the case with BLM, whose assessment of utilization along its transect lines was based upon its familiarity with the specific key species identifiable in a given KMA.

BLM identified one other potentially serious deficiency in WWP's collection and analysis of its monitoring data: WWP appeared to have varied the nearness to the ground at which it clipped the forage species, both inside and outside the caged, ungrazed plots. WWP clipped the species from one-half inch to one inch, which would have undermined the reliability of its utilization assessments.³⁰⁶

³⁰² BLM P-H Response Brief at 89.

³⁰³ Tr. 15607.

³⁰⁴ Tr. 15610-11.

³⁰⁵ Tr. 15609.

³⁰⁶ *See* BLM P-H Response Brief at 72 ("[I]f a cage were clipped to a half-inch and the associated grazing plots were clipped to one-inch, it would skew the results toward showing greater utilization." (citing Tr. 579, 5482, 5791, 5794, 9746, 11622)).

I. WWP Data Rejected as Unreliable

BLM was justified in declining to rely on WWP monitoring data, given the data deficiencies identified by BLM. BLM rejected WWP's data because they were inaccurate and unreliable. For example, WWP's monitoring sites were generally located in the vicinity of BLM's monitoring sites, but in 2007, both WWP and BLM recorded utilization *at the same sites for the same grazing season*. The discrepancy in data is dramatic: BLM reported utilization of 20%/30% (U-1), 23%/30% (U-2), 26%/15% (U-3), 18%/13% (U-4), 24%/15% (U-5), 21%/22% (U-9), 40%/26% (U-11), and 37%/32% (U-12),³⁰⁷ while WWP recorded utilization at the much higher rates of 80.4% (U-1), 84% (U-2), 80.1% (U-3), 54% (U-4), -10.5% (U-9), 63.4% (U-11), and 79% (U-12) at these same sites.³⁰⁸ BLM correctly determined that the disparity between WWP and BLM data could not be attributed to the fact that their sites were different because they were not.³⁰⁹ Since BLM's results agreed with data gathered from its own sites in 2007, BLM concluded that WWP data was inaccurate. WWP offers no contrary explanation for the disparity.

Given the great divergence in the utilization results disclosed in WWP and BLM data, we are convinced that BLM rightly relied upon data compiled and analyzed by its own experts. ALJ Heffernan's ruling that BLM's summary rejection of WWP data is reversible error simply does not square with the evidence we have just reviewed. To the extent BLM was required to consider WWP data in the course of its decisionmaking process, the record amply demonstrates that it did so. BLM explains it "rejected [WWP] data for several reasons, including the fact that . . . the data w[as] inconsistent with BLM's data[.] . . . [I]t is obvious that BLM's and Appellants' data present two very different pictures of the rangeland conditions on the DCA."³¹⁰ Gates testified that "two datasets being completely different, one would have to be referred to and used, and the other one . . . would have to be . . . not used."³¹¹ Given the

³⁰⁷ See Ex. B-19 at Bates 2486.

³⁰⁸ See Decision at 38, 39.

³⁰⁹ See Tr. 12047-51.

³¹⁰ BLM P-H Response Brief at 122.

³¹¹ Tr. 12056 ("[T]wo datasets being completely different, one would have to be referred to and used, and the other one . . . would have to be . . . not used." (Gates)).

lack of assurances provided to BLM regarding the accuracy and reliability of WWP monitoring methods and the great divergence in their results, BLM was entitled to rely on its own experts and data.

Since WWP failed to meet its burden to establish that BLM erred in collecting, interpreting, and reaching conclusions regarding its data, we conclude that BLM's assessment of livestock utilization of forage on the Allotment must prevail.³¹² WWP has not shown it provided a "demonstrably more accurate study" of utilization.³¹³ Absent an adequate showing that BLM's data was improperly collected or analyzed, BLM's experts were entitled to rely on that data in offering their professional opinion regarding the proper management of the Allotment. The contrary opinion offered by WWP, supported by data of doubtful accuracy and reliability, simply does not rebut or overcome the opinion of experts that BLM was entitled to rely upon.

J. Carrying Capacity Determination

Judge Heffernan agreed with WWP and ruled that BLM had been required to make a carrying capacity determination for the Allotment, *i.e.*, determine the maximum amount of livestock grazing use that this area of the public lands could sustain.³¹⁴ In reaching his conclusion, he noted that the 1980 Randolph MFP, with which BLM is required to conform its future resource management authorizations, specifies: "Carrying capacities for each allotment will be based upon the forage production on suitable acreage in each allotment."³¹⁵ Since BLM determined the carrying capacity of the Allotment to be 4,286 AUMs for livestock and wildlife but its determination was made 30 years ago in the Randolph MFP,³¹⁶ ALJ Heffernan ruled BLM was required to

³¹² See, e.g., *West Cow Creek Permittees v. BLM*, 142 IBLA at 238.

³¹³ *Id.*

³¹⁴ See Decision at 65-68, 120-24 (citing 43 C.F.R. § 4130.3-1(a)); see also 43 C.F.R. § 4100.0-5 ("*Livestock carrying capacity* means the maximum stocking rate possible without inducing damage to vegetation or related resources."); 43 C.F.R. § 4130.3-1(a) ("The authorized livestock grazing use shall not exceed the livestock carrying capacity of the allotment."); 2005 Monitoring Report at 14.

³¹⁵ MFP at RM-1.1; see Decision at 120; 43 C.F.R. §§ 1610.5-3(a) and 4100.0-8.

³¹⁶ See Decision at 120, 122; MFP Final ES, Appendix 4 (Existing and Proposed Grazing), at A4-1 ("Available Forage AUMs" for Cattle, Sheep, Deer, and

make a new carrying capacity determination for its decision to issue new 10-year grazing permits for the Allotment.

BLM admittedly did not make a new carrying capacity determination in conjunction with its NEPA review and decisionmaking process for the Final Decision.³¹⁷ Rather, it relied on the carrying capacity determination undertaken for the 1980 MFP. However, BLM was also guided in this case by current monitoring data summarized in the EA that showed ongoing grazing was not causing any of the Utah Standards for rangeland health not to be fulfilled.³¹⁸ Although seven riparian areas were not then meeting Standard 2, BLM concluded that the new deferred rotational grazing system was likely to draw cattle away from them in sufficient numbers to ensure that Standard 2 would be fulfilled in the future, without the necessity of reducing the stocking rate. BLM therefore determined that grazing could continue at the current stocking rate “without inducing damage to vegetation or related resources,” within the meaning of 43 C.F.R. § 4100.0-5. For this reason, BLM concluded grazing at the current stocking rate did not exceed the carrying capacity of the Allotment and that it was in compliance with 43 C.F.R. § 4130.3-1(a). We find no error.

WWP points to a recommendation in the scientific literature that carrying capacity determinations should be undertaken “at least every ten years.”³¹⁹ But as BLM correctly notes, WWP cites only to the paper by Galt, whose recommendation is based solely on the authors’ “belie[f],” adding that “nowhere in the [Galt] paper does it state or even imply that the mere passage of time, even in excess of ten years, calls into question a previously established carrying capacity.”³²⁰ In fact, the Galt paper claimed “[t]he best approach to determining safe stocking rate on rangelands is knowing the numbers of animals actually grazing a[n] . . . allotment over a period of years together with utilization levels,

Antelope); MFP Final ES, Appendix 6 (Methodology for Determining Level of Use); MFP Final ES, Appendix 10, at A10-5 (Table 4); MFP at RM-1.1.

³¹⁷ See Tr. 13847-48.

³¹⁸ See Tr. 8427-28, 13848 (“Q. [BLM] . . . Is it your understanding that the carrying capacity for the Allotment was set during the planning process that culminated in the [MFP]? A. [Staggs] Yes, that’s my understanding.”); EA at 10-14; BLM 2008 Monitoring Report at 35-36.

³¹⁹ WWP P-H Opening Brief at 208.

³²⁰ BLM P-H Response Brief at 160 (quoting Galt at 7).

range trend analyses, and precipitation records.”³²¹ Since this is the “stock-and-monitor” approach followed by BLM, we find it supported by Galt.³²²

[5] BLM is not required by statute, rule, or precedent to make a carrying capacity determination before issuing or renewing a grazing permit. BLM emphasizes that “the ALJ points to no expert opinion or evidence in the record standing for the proposition that, just because a carrying capacity determination may be decades old, it is necessarily unreliable.”³²³ In *WWP v. BLM*, the Tenth Circuit observed that while “[n]either the EA nor the Proposed Decision included a specific calculation of the current carrying capacity of the land,” this was not error because “we have found nothing in the record or the regulations suggesting that a quantitative calculation of carrying capacity is the only reasonable method for determining appropriate grazing limits.”³²⁴ Whenever BLM issues or renews a grazing permit, it must only ensure that authorized grazing use *does not exceed the livestock carrying capacity of the allotment*.³²⁵ BLM did so in this case by taking the carrying capacity determination from the 1980 Randolph MFP and using a stock-and-monitor approach to determine whether and to what extent grazing could continue without exceeding the Allotment’s carrying capacity.³²⁶

Rather than undertake a time-consuming and expensive carrying capacity determination, BLM explains that it uses the stock-and-monitor approach to determine whether and to what extent grazing may continue to occur. This approach is based on an assessment of past, present, and likely future effects of grazing on all aspects of the environment, the Utah S&G, and applicable RMOs.³²⁷ In this case, BLM analyzed monitoring data regarding whether

³²¹ Galt at 7.

³²² See EA at 13-14 (citing Galt).

³²³ BLM NA/Petition at 42.

³²⁴ 721 F.3d 1264, 1276-77 (10th Cir. 2013).

³²⁵ 43 C.F.R. § 4130.3-1(a); see *WWP v. BLM*, 721 F.3d at 1277 (quoting 43 C.F.R. § 4130.3-1(a) with emphasis).

³²⁶ See BLM SOR/Answer at 39 (“[T]here is no objective evidence to *prove* that the MFP’s carrying capacity determination for the DCA is no longer valid.”); BLM 2008 Monitoring Report at 36.

³²⁷ See Tr. 15478-80, 15480-85, 15487-90 (Lichthardt).

livestock, wildlife, and other RMOs are being met and found the Allotment is able to sustain current grazing use.

Starting with an assessment of the ecological condition of the uplands, BLM uses the stock-and-monitor approach to obtain a general idea of the stocking rate for the uplands and whether forage production is “still in the ballpark’ of the carrying capacity established for the MFP.”³²⁸ At the hearing, Lichthardt stated: “If we’re meeting th[e] objectives, . . . then that’s an indication that we don’t need to adjust . . . stocking capacity.”³²⁹

Relying on its 2005 ESI data, BLM calculated that the 12,873 acres of uplands were capable of producing approximately 9,524,499 pounds of forage, or 740 pounds per acre.³³⁰ Even though riparian areas would provide considerable additional forage, BLM did not include them in its assessment of the adequacy of available forage to support ongoing grazing of the Allotment. For this reason, BLM’s stock-and-monitor approach represents a conservative means of determining whether the carrying capacity of the Allotment is likely to be exceeded.³³¹ It deemed these 9,524,499 pounds of calculated forage to be capable of supporting approximately 9,525 AUMs,³³² but BLM adjusted its calculation to take into account the fact that not all of this forage is available for livestock. To make this adjustment, BLM assumed that only 50% of grasses and forbs, 40% of palatable shrubs, and 5% of Basin big sagebrush would be available for livestock.³³³ BLM then calculated that uplands were capable of producing approximately 4,916,757 pounds of forage (382 pounds per acre), which was capable of supporting approximately 4,917 AUMs and more than double what would be needed to justify proposed grazing use of 2,134 AUMs.³³⁴

³²⁸ EA at 12; BLM P-H Response Brief at 160 (quoting Tr. 13848).

³²⁹ Tr. 15480.

³³⁰ *See* Tr. 13862-64; EA at 12; Ex. B-63 at Bates 1964-65; *see also* Tr. 8430-31, 8437-39, 13848-59; BLM 2008 Monitoring Report at 34.

³³¹ *See* Tr. 13862-64; EA at 12; Ex. B-63 at Bates 1964-66.

³³² *See* Tr. 8448-49 (In translating pounds of forage into AUMs, BLM used the standard of 1,000 pounds=1 AUM).

³³³ *See* BLM 2005 Monitoring Report at 9 (“[I]n sagebrush habitats cattle were found to select grasses (76%), forbs (10%) and shrubs (14%). Sheep in those same habitats selected grasses (42%), forbs (30%) and shrubs (28%).”).

³³⁴ *See* EA at 12.

WWP determined the Allotment was capable of producing more forage in 2005 than BLM (942 pounds vs. 740 pounds of forage per acre), with considerably less in 2006 (214 pounds per acre) and 2007 (259 pounds per acre). WWP also claimed that BLM failed to take into account the fact that not all of the forage is palatable and not all of the forage is found on grazable slopes.³³⁵ We note that WWP makes no attempt on appeal to translate its production data into a general assessment of the Allotment's carrying capacity.³³⁶

BLM compared the production data obtained at corresponding BLM and WWP monitoring sites to conclude that WWP erred in the manner of its assessment of available forage.³³⁷ BLM paired each of WWP's ten monitoring sites with a BLM monitoring site in relative close proximity and in the same ESD.³³⁸ BLM noted a significant discrepancy between WWP and BLM assessments of available herbaceous forage at each of the sites. In general, while WWP determined that available forage totaled 3,397 pounds per acre, BLM determined there was 5,718 pounds per acre.³³⁹ BLM concluded that this discrepancy was likely explained by the fact that WWP did not select typical monitoring sites for the applicable ESD.³⁴⁰ Staggs testified that WWP "had no information . . . describing how they may have assured that [their sites are] . . . representative of a larger area by stratifying the Allotment," whereas "there was a stratification and full coverage of the public lands by the BLM, and that's how we were able to select . . . typical sites."³⁴¹

Contrary to WWP's claim, the record shows BLM took palatability into account in its assessment of available forage production by distinguishing between grasses, forbs, and shrubs, albeit not in terms of specific forage species. BLM concluded that the conservative nature of its assessment compensated for

³³⁵ See Decision at 123-24 (citing Tr. 401, 10010-11, 10036-37, 10071-76, 10079-81; Holechek at 238-39 (Adjustment for Slope); NRPH at 5.3-1 (Adjustment factors used to determine stocking rate); BLM 2008 Monitoring Report at 32, 39).

³³⁶ *But see* WWP P-H Brief at 217.

³³⁷ See BLM/WWP Comparison at 2-3, 5-6.

³³⁸ See Tr. 13468-83; BLM/WWP Comparison at 2 (Tables 1 and 2).

³³⁹ See *id.*

³⁴⁰ See *id.* at 3.

³⁴¹ Tr. 13482-83.

this fact.³⁴² Although BLM did not expressly account for slopes or other factors affecting the suitability of uplands for grazing, it included only 72 such acres, which provided little or no forage,³⁴³ and excluded 52 acres in riparian areas and 152 acres of aspen stands, which provided substantial forage, which more than compensated for the 72 acres that provide little or no forage.³⁴⁴ We find no material error in BLM's assessment of available forage production.

BLM concluded that existing grazing use was not exceeding the carrying capacity of the Allotment, which is all that is required by 43 C.F.R. § 4130.3-1(a). Because the Allotment has been grazed for so many years at the stocking rate now adopted in the 2008 Final Decision, BLM was able to fully assess the propriety of that stocking rate for future grazing purposes. BLM states it “did not need to further consider reducing the stocking rate in the permits primarily because its monitoring data showed that it was not necessary.”³⁴⁵ Through monitoring, BLM determined the Allotment is capable of supporting that stocking rate if livestock are properly distributed throughout the Allotment. WWP offers no evidence to the contrary.

ALJ Heffernan erred in ruling that BLM was required to make a new carrying capacity determination. Having properly determined that distribution was the problem, BLM was justified in deciding to maintain the longstanding stocking rate and incorporate appropriate measures reasonably expected to satisfactorily ameliorate that problem. BLM will continue to monitor the Allotment and, if necessary, make appropriate changes to authorized grazing use in the future.³⁴⁶ The burden to establish error in BLM's 1980 Randolph MFP carrying capacity determination, as evaluated under the stock-and-monitor approach in the EA, fell to WWP.³⁴⁷ WWP failed to show error in BLM's determination or to offer its own determination.

³⁴² See Tr. 8439-42, 13853-54, 13857-61, 13864-66; EA at 12.

³⁴³ See EA at 57; 2006 Aerial Photograph of DCA (Ex. W-201).

³⁴⁴ See Tr. 3559, 13862-64; EA at 13; Ex. B-63 at Bates 1963.

³⁴⁵ See BLM P-H Opening Brief at 160; EA at 14, 78-79.

³⁴⁶ See Final Decision at 3, 8.

³⁴⁷ See, e.g., *Dorius v. BLM*, 83 IBLA at 37.

K. Enforceable Mandatory Terms and Conditions

ALJ Heffernan ruled that BLM committed reversible error by failing to include enforceable, mandatory terms and conditions in its new grazing permits because they did not penalize “immediately, without any further Bureau action,” the permittee or order the permittee to take “appropriate action” to ensure that significant progress was being made towards fulfilling the Utah Standards.³⁴⁸ He emphasized that 43 C.F.R. § 4130.3-1(c) explicitly provides, as a mandatory term and condition, that permits ensure conformance with the Utah Standards. ALJ Heffernan stated that any new grazing permits in the Allotment should have included mandatory terms and conditions that specified supplementary requirements concerning specific utilization limits, upland and riparian health conditions, or other measurable or observable criteria that would trigger immediate corrective action in order to ensure conformance with the Utah Standards as required by 43 C.F.R. § 4130.3-1(c). He faulted the permits for being “open-ended, with no certain actions triggered if BLM subsequently finds compliance problems.”³⁴⁹ He ruled that BLM’s failure to include specific triggering circumstances that would automatically result in administrative sanctions, enforceable pursuant to BLM’s authority under 43 C.F.R. Subparts 4140, 4170, and 4180, constituted “reversible error.”³⁵⁰

We begin by noting that the ALJ misstated what are mandatory permit terms and conditions. “Mandatory terms and conditions” are set forth in 43 C.F.R. § 4130.3-1; discretionary terms and conditions are set forth in § 4130.3-2. These mandatory permit terms and conditions require BLM to “specify the kind and number of livestock, the period(s) of use, the allotment(s) to be used, and the amount of use, in [AUMs]” and “incorporate terms and conditions that ensure conformance with [43 C.F.R.] [S]ubpart 4180.”³⁵¹ BLM met these requirements in this case by delineating the kind and number of livestock, their periods of use, and amount of use (AUMs) for the Allotment.³⁵² Neither 43 C.F.R. § 4130.3-1 nor any other regulation requires BLM to mandate permittee adherence to any specific utilization limit, upland or riparian health condition, or any other measurable or observable criteria to ensure conformance with Subpart 4180. In fact, § 4130.3-1(c) does not specify any terms and

³⁴⁸ Decision at 135, 137.

³⁴⁹ *Id.* at 137.

³⁵⁰ *Id.* (citing *WWP v. Salazar*, (*Salazar*) 843 F. Supp.2d 1105 (D. Idaho 2012)).

³⁵¹ 43 C.F.R. § 4130.3-1(a), (c).

³⁵² *See* Final Decision at 2-6.

conditions that must be included in a grazing permit to ensure conformance with standards and guidelines under Subpart 4180, which leaves it to BLM discretion to devise appropriate terms and conditions to achieve that end.

The regulations at 43 C.F.R. § 4140.1(a) and (b)(1) provide BLM with authority to enforce terms and conditions in grazing permits by imposing penalties for violations. Under 43 C.F.R. §§ 4170.1-1 and 4170.2-1, BLM is given the authority to enforce any term and condition by imposing a civil penalty, including the suspension or cancellation of the permit, and a criminal penalty. In the event that a Standard is found not to have been achieved, 43 C.F.R. § 4180.2(c) requires BLM to take “appropriate action” no later than the start of the next grazing year that will result in making significant progress toward fulfillment of the Standard. Failure to follow the new grazing scheme for the Allotment (*e.g.*, grazing beyond specified periods or grazing more livestock than authorized) would be subject to an enforcement action.

The ALJ effectively concluded, based on *Salazar*, that BLM was required to specify utilization limits, upland and riparian health conditions, or other measurable or observable criteria, which if exceeded, would require BLM to take “appropriate action” by no later than the start of the next grazing year and begin making significant progress towards fulfillment of the Standard. He was concerned that a “[v]iolation of mere [management] guidelines,” rather than specific enforceable terms and conditions, “will not provide a trigger for BLM to take ‘appropriate action’ that will result in ‘significant progress’ toward fulfilling the applicable Standards.”³⁵³

The ALJ relied on *Salazar*, in which the District Court found that grazing in the various allotments at issue had failed to achieve a number of the Idaho Standards and held that in renewing their grazing permits, BLM was required to include mandatory terms and conditions that established measurable and/or observable criteria that the permittee must satisfy in order to ensure that significant progress is being made toward fulfillment of applicable Standards.³⁵⁴ The Court found BLM had not structured the permit at issue to ensure that “significant progress” was being made towards fulfilling the Standard, as

³⁵³ Decision at 135.

³⁵⁴ See 843 F. Supp.2d at 1113, 1116-17, 1118-19, 1121.

required by 43 C.F.R. § 4180.2(c).³⁵⁵ In that regard, the Court concluded that BLM must define measurable and/or observable changes “to ‘ensure [conformance]’ with the duty to make significant progress.”³⁵⁶ The Court stated: “While the BLM’s regulations did not define ‘significant progress,’ the Idaho Standards and Guidelines define it as ‘[m]easurable and/or observable . . . changes in the indicators that demonstrate improved rangeland health.’”³⁵⁷ The Court concluded that the regulation must have the same effect.

[6] But our reading of the regulations is that BLM need not include a term and condition detailing how a permittee will ensure that grazing achieves all applicable Standards and conforms with Subpart 4180. After all, grazing is already required by rule to achieve the Standards, which will conform to Subpart 4180. When BLM determines that permitted grazing is failing to achieve any Standard, BLM is already required to take “appropriate action” under 43 C.F.R. § 4180.2(c) and to bring grazing back into conformance with Subpart 4180. BLM is required to impose on permittees a duty to take specified action that is appropriate and will result in significant progress towards fulfilling the Standard (*e.g.*, implement a new grazing scheme to distribute livestock within the Allotment). Failure to take such action may subject the permittee to penalties under 43 C.F.R. §§ 4140.1(a), 4140.1(b)(1) and/or 4170.1-1 or 4170.2-1.

The ALJ would prefer that BLM draw a bright line that, once crossed, requires BLM to take immediate action, mandating the permittee to bring grazing into conformance with Subpart 4180. However, we find no requirement that utilization limits, upland and riparian health conditions, or other measurable or observable criteria need be defined as an identifiable “trigger” that would require “BLM to take any kind of ‘appropriate action’ that will result in ‘significant progress’ toward fulfilling the applicable Standards[.]”³⁵⁸ It is

³⁵⁵ *See id.* at 1128-30.

³⁵⁶ *Id.* at 1129 (quoting 43 C.F.R. § 4130.3-1(c)); *see WWP v. U.S. Department of Interior*, 2009 U.S. Dist. LEXIS 121554, at *30 (Grazing permits must include the utilization limits as mandatory terms and conditions since “BLM’s own experts testified that adherence to the utilization limits . . . was necessary to make ‘significant progress’ under the [Fundamentals of Rangeland Health] regulations.”).

³⁵⁷ 843 F. Suppl. 2d at 1128.

³⁵⁸ Decision at 134.

sufficient that the failure to achieve the Standards, as provided by 43 C.F.R. § 4180.2(c), is the trigger.

We are not persuaded that BLM is required by 43 C.F.R. § 4130.3-1(c) or any other rule to establish, in the permits here at issue, utilization limits, upland and riparian health conditions, or other measurable or observable criteria for determining whether “significant progress” is being made towards fulfilling the Utah Standards. We find no regulatory requirement that BLM define “significant progress” at the time of permit issuance. Rather, it is sufficient for BLM to determine, based upon that permitted grazing, whether significant progress is being made towards fulfilling any Standard not achieved at the time of permit issuance, which resulted in the incorporation of appropriate action terms and conditions into the permits. If significant progress is not then being made, BLM would be required, by 43 C.F.R. § 4180.2(c), to take additional “appropriate action” by the next grazing year. We find no justification for requiring BLM to adopt any bright line standard that, once crossed, would result in mandatory permit suspension or cancellation or the permittee being otherwise penalized. ALJ Heffernan’s ruling that such provisions are demanded in a grazing permit is contrary to law.

BLM included permit terms and conditions that require the permittees to follow the deferred rotational grazing system and other measures BLM determined were part of the “appropriate action” required by § 4180.2(c) for ensuring that significant progress was being made towards fulfilling the Utah Standards.³⁵⁹ Those terms and conditions constitute the “terms and conditions that ensure conformance with [S]ubpart 4180” required by 43 C.F.R. § 4130.3-1(c). If any permittee fails to abide by the terms and conditions requiring them to follow the deferred rotational grazing system and other measures to comply with 43 C.F.R. § 4180.2(c), its permit could be suspended or canceled or it could otherwise be penalized pursuant to 43 C.F.R. Subparts 4140 and 4170.³⁶⁰

³⁵⁹ See BLM SOR/Answer at 31; NA/Petition at 31-32 (citing Final Decision at 2 (Adopting Proposed Action in the EA); and EA at 19-29 (EA’s description of Proposed Action)).

³⁶⁰ See BLM NA/Petition at 32; see also 43 C.F.R. §§ 4140.1(a) (civil penalties may be assessed for “[v]iolating special terms and conditions in [grazing] permits”), 4140.1(b)(1) (civil and criminal penalties may be assessed for grazing “[i]n violation of the terms and conditions of a permit”), 4170.1-1 (grazing

Permittees are also required by permit terms to conform to the EA and its stated RMOs.³⁶¹

We hold that BLM has, in its Final Decision, adopted permit terms and conditions requiring “appropriate action . . . that will result in significant progress toward fulfillment of the standards” and has therefore ensured conformance with Subpart 4180, as required by 43 C.F.R. §§ 4130.3-1(c) and 4180.2(c). At the time of permit issuance, BLM was not required by statute or regulation to define significant progress, or define what action it would take should significant progress not be made. BLM determined that the deferred rotational grazing system and the other measures will make significant progress towards fulfilling the Standards that were not being met, and if those measures do not result in significant progress, BLM is prepared to take further action.³⁶² Whether significant progress will actually be made remains to be seen and determined at a future time, which will require BLM to review monitoring data of multiple criteria collected over time.

In a given situation, not achieving a Standard may not be due to a single or even multiple instances of a permittee failing to abide by specific permit terms. BLM may only determine that a Standard is not being achieved after considering a quantity of monitoring data involving multiple criteria gathered over time. BLM will then be justified in taking “appropriate action” based on that data and analysis to ensure that significant progress is being made toward meeting the Standard pursuant to 43 C.F.R. § 4180.2(c). Such action may include enforcing specific permit terms or modifying them if they cause or contribute to the failure to achieve a Standard. We find no basis in fact or law for imposing a bright line test for determining whether significant progress is being achieved on this Allotment or concluding, upon a finding that significant progress is not being made, that BLM must suspend or cancel permits, penalize the permittees, or take some other immediate action. Rather, BLM must have the discretion to devise appropriate action pertinent to circumstances extant at that time, consistent with its Final Decision and governing regulations. ALJ

permits may be suspended or canceled if the permittee violates any provision of Part 4100).

³⁶¹ See Final Decision at 2; BLM SOR/Answer at 32 n.33 (citing Final Decision at 8 (“The grazing use on the [DCA] will be in conformance with the Duck Creek Project EA #UT-020-07-003.”); and EA at 25-28).

³⁶² See EA at 53; Tr. 13756, 13760-61, 13765.

Heffernan erred in requiring BLM to curtail its discretion by establishing a series of automatic triggers for mandatory action.

V. NEPA ISSUES

Section 102(2)(C) of NEPA requires a Federal agency to prepare a “detailed statement” addressing the potential environmental impacts of a proposed action and alternatives thereto in the case of any major Federal action that “significantly affect[s] the quality of the human environment[.]”³⁶³ When BLM concludes in a FONSI that it is not necessary to prepare an EIS and proceeds on the basis of an EA, its decision will be deemed to comply with NEPA where the record demonstrates that BLM considered all relevant matters of environmental concern, took a “hard look” at potential environmental impacts, and made a convincing case that no significant impact will result or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures.³⁶⁴

An appellant challenging such a BLM decision must carry its burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed adequately to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by NEPA.³⁶⁵ The appellant must make an “affirmative showing that BLM failed to consider a substantial environmental question of material significance,” and cannot simply “pick apart a record with alleged errors and disagreements[.]”³⁶⁶

In assessing the adequacy of an EA, we are guided by the “rule of reason” and recognize that, in an EA, BLM need only briefly discuss the likely impacts of the proposed action: “By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues

³⁶³ 42 U.S.C. § 4332(2)(C) (2012).

³⁶⁴ *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982); *Nez Perce Tribal Executive Committee*, 120 IBLA 34, 36 (1991).

³⁶⁵ *Southern Utah Wilderness Alliance*, 127 IBLA at 350, 100 I.D. at 380; *Red Thunder*, 117 IBLA at 175, 97 I.D. at 267; *Sierra Club*, 92 IBLA at 303.

³⁶⁶ *Arizona Zoological Society*, 167 IBLA at 357-58 (quoting *In re Stratton Hog Timber Sale*, 160 IBLA at 332).

which the project raises.”³⁶⁷ Since the purpose of an EA is to assess whether the potential impacts of the proposed action are likely to be significant, it may be a “concise public document” that “brief[ly]” discusses “the environmental impacts of the proposed action and alternatives[.]”³⁶⁸ Thus, an EA will not be set aside “merely because the EA could have been more thorough,” because the burden is on the appellant to show that any omitted analysis “compromised the EA so severely as to render the FONSI arbitrary and capricious.”³⁶⁹

Of particular relevance to the present case is the principle that a decision to issue a FONSI and not prepare an EIS “implicates agency expertise.”³⁷⁰ Thus, where BLM prepares an EA that relies on the professional opinion of its technical experts concerning matters within the realm of their expertise, which is reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of evidence, error in the data, methodology, analysis, or conclusion of the BLM expert.³⁷¹ A mere difference of opinion, even of expert opinions, will not suffice to show BLM failed fully to comprehend the true nature, magnitude, or scope of the likely impacts.³⁷² “Mere differences of opinion about the likelihood or significance of environmental impacts provide no basis for overturning BLM’s decision.”³⁷³

³⁶⁷ *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (quoting *Don’t Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247 (M.D. Pa. 1992)).

³⁶⁸ 40 C.F.R. § 1508.9.

³⁶⁹ *WWP v. BLM*, 721 F.3d at 1275; see BLM SOR/Answer at 26-27.

³⁷⁰ *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004).

³⁷¹ See, e.g., *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007) (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)).

³⁷² See, e.g., *Wyoming Outdoor Council*, 173 IBLA at 235 (citing *Fred E. Payne*, 159 IBLA at 78); *John Dittli*, 139 IBLA 68, 75 (1997).

³⁷³ *Concerned Citizens for Nuclear Safety*, 175 IBLA 142, 154 (2008); see also *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974) (“[D]isagreement among experts will not serve to invalidate an EIS.”); *Wyoming Audubon*, 151 IBLA 42, 51 (1999) (“NEPA does not require . . . this Board to decide whether an EIS . . . is based on the best scientific methodology available or require us to resolve disagreements among various scientists as to methodology.”).

BLM challenges ALJ Heffernan's finding it failed to comply with NEPA and its implementing regulations and his several rulings that it engaged in reversible error: (1) BLM's June 2, 2006, public scoping meeting failed to abide by applicable scoping requirements, and generally violated WWP's rights to procedural due process of law; (2) BLM failed to adequately consider baseline conditions in the Allotment; (3) BLM failed to adequately consider the likely impacts of grazing on the sage-grouse; (4) BLM failed to adequately consider the likely impacts associated with the placement of new water troughs in the upland areas of the Allotment; (5) BLM failed, in the absence of an accurate record of actual numbers of livestock that had grazed in past years on the Allotment, to adequately address the likely future impacts of grazing; (6) BLM failed to consider likely cumulative impacts; and (7) BLM failed to consider a reasonable range of alternatives to the proposed action.

ALJ Heffernan intimates that in identifying appropriate matters for NEPA review, BLM simply acceded to whatever was proposed by the permittees and CRM.³⁷⁴ We find no evidence to substantiate that assertion and see no reason to doubt that the EA reflects BLM's independent determination of appropriate matters for NEPA review. And in a related vein and for similar reasons, we reject any notion that BLM's NEPA review and decisionmaking were biased in favor of the permittees or CRM.³⁷⁵

In addition to challenging Judge Heffernan's adverse rulings under section 102(2)(C) of NEPA, BLM also challenges his concluding it failed to comply with the TGA and its implementing regulations (*e.g.*, by failing to assess properly whether grazing was in compliance with Utah Standards 2 and 3).³⁷⁶

We address, seriatim, each of BLM's assertions of error under NEPA and the TGA.

A. BLM's Public Scoping Meeting

ALJ Heffernan concluded that a meeting attended by BLM on June 2, 2006, was a public scoping meeting that failed to comply with rules

³⁷⁴ See Decision at 14, 15.

³⁷⁵ See Tr. 10426-30.

³⁷⁶ See Decision at 59-60, 62-65, 125-27, 130.

implementing NEPA and, in general, violated WWP's rights to procedural due process of law.³⁷⁷ Although he recognized the June 2 meeting was entirely conducted by CRM and that BLM was not required to engage in any scoping preparatory to an EA, he held BLM adopted the meeting for scoping purposes and, having done so, was required to ensure it complied with applicable requirements.³⁷⁸

The ALJ ruled that BLM was required to: (1) ensure adequate public involvement in the NEPA process, 40 C.F.R. § 1500.2(d); (2) ensure that the public was properly notified of any public meeting, 40 C.F.R. § 1506.6; (3) ensure that the meeting was conducted in accordance with the applicable provisions of the Federal Advisory Committee Act (FACA),³⁷⁹ 43 C.F.R. § 46.110(e); and (4) ensure that WWP's procedural due process rights were protected under the U.S. Constitution. In holding the CRM meeting violated these standards, he stated:

BLM's scoping protocol, that is, having a purported [F]ederal regulatory agency scoping meeting at CRM facilities, with CRM chairing and controlling the meeting agenda, created an overtly hostile environment both for the Appellants, and . . . potentially [for] other interested publics. This constituted a deprivation of procedural due process for at least the Appellants, because BLM failed to provide a neutral scoping environment that was under BLM's own administrative control.^[380]

We disagree.

Judge Heffernan's analysis and conclusion are insufficient on several bases, foremost of which is the fact that BLM was not required to engage in *any*

³⁷⁷ See Decision at 11-21, 138.

³⁷⁸ See, e.g., *id.* at 16 (“BLM treated the CRM meeting[] as [a] [F]ederal scoping meeting[].”), 17 (“BLM testified that the June 2, 2006, CRM meeting was the main public scoping meeting for the Duck Creek EA.” (citing Tr., 11944, 12450, 12484)).

³⁷⁹ Pub. L. No. 92-463, 86 Stat. 770 (1972), *as amended*.

³⁸⁰ Decision at 13 (emphasis added).

scoping preparatory to its preparation of an EA.³⁸¹ Despite his assertions to the contrary, the June 2 meeting simply was not a “[F]ederal regulatory agency scoping meeting.”³⁸² It is unfortunate that the meeting may have been, from WWP’s point of view, “antagonistic and hostile” and not a forum congenial to its views regarding grazing use in the Allotment.³⁸³ But the fact remains that the meeting was chaired and controlled by CRM, which was “not a [F]ederal regulatory entity, not a [Federal] contractor, and not a FACA recognized entity.”³⁸⁴ CRM’s status as a non-Federal entity or contractor does not mean, as the ALJ stated, that BLM failed in its responsibility under Departmental regulations or the U.S. Constitution by “ced[ing] its management and supervisory responsibilities to the CRM.”³⁸⁵ BLM simply attended and was not responsible for the CRM meeting.³⁸⁶

The June 2 meeting provided a forum at which any citizen, including BLM, might raise and identify relevant issues regarding the proposal to authorize grazing use in the Allotment. BLM attended for that purpose, which was consistent fully with BLM’s practice of attending Rich County CRM meetings since 2002.³⁸⁷ As the ALJ noted, “BLM acknowledges that it did use CRM meetings for purposes of ‘scoping,’ or identifying issues that were considered by BLM in its NEPA and decision-making process.”³⁸⁸ But “[w]hen the [CRM] meetings turned to the DCA, BLM listened to whatever input the other participants had and used this to inform its NEPA analysis.”³⁸⁹ Gates testified at the hearing that at CRM meetings, BLM “just would normally talk

³⁸¹ See 43 C.F.R. §§ 46.235(a) (“[S]coping may be helpful during preparation of an [EA], but is not required.”) and 46.305(a) (“[S]coping is not required.”); 40 C.F.R. § 1501.7 (Scoping required for EIS); 73 Fed. Reg. 61292, 61306 (Oct. 15, 2008) (“[S]coping is not required for the preparation of an EA (CEQ regulations at 40 CFR 1501.7 specifically reference the preparation of an EIS).”); *Birch Creek Ranch, LLC*, 184 IBLA 307, 322 (2014) (“[S]coping is not required.”).

³⁸² Decision at 13.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ See EA at 7.

³⁸⁸ Decision at 12 (quoting BLM P-H Response Brief at 41).

³⁸⁹ BLM P-H Response Brief at 46.

about the project, where we were at in the process of the project, and just looked at it in order to identify issues or concerns for the project.”³⁹⁰ BLM “used [the CRM meetings] as an opportunity to solicit comments from the public.”³⁹¹

ALJ Heffernan takes particular note of a September 12, 2007, e-mail, in which Gates asked CRM, in the interest of “be[ing] consistent in our protocols for NEPA and public participation,” to amend “the record” to show that “BLM held a public meeting on June 2, 2006 (June CRM meeting),” which was “the public scoping meeting for the Duck Creek Project[.]”³⁹² The ALJ concludes that Gates’ conduct “constituted an overt abuse of his administrative discretion,” which “standing alone, demands reversal of [BLM’s 2008 Final Decision].”³⁹³ We disagree. Gates’ objective may have been to have the record amended to show that the June 2 meeting was a public scoping meeting. If so, he was unsuccessful. CRM did not change any document as a result of Gates’ e-mail.³⁹⁴ His e-mail did not in any discernible way cause “an overt deprivation of procedural due process against WWP,”³⁹⁵ or otherwise violate any Federal statute or regulation. His e-mail affected nothing. The ALJ’s conclusion is not adequately supported by the record.

[7] Gates’ after-the-fact e-mail did not change the nature of the June 2 meeting that actually took place. That meeting was scheduled and held by CRM, with BLM representatives in attendance, and was never intended to be a BLM public scoping meeting within the meaning of NEPA and its implementing regulations.³⁹⁶ The ALJ noted: “Gates testified that BLM was ‘just part of the

³⁹⁰ Tr. 11950; *see id.* 11939-40, 11944.

³⁹¹ *Id.* 12454; *see id.* 12446-47, 12450, 12451, 12465-66, 12468-70.

³⁹² Decision at 18 (quoting E-mail to Lupis from Gates, dated Sept. 12, 2007).

³⁹³ *Id.* at 19, 21.

³⁹⁴ *See* BLM SOR/Answer at 32 (“[N]o document was changed as a result of the email”); BLM NA/Petition at 34 (“CRM did not change the meeting notes as requested by Gates.”).

³⁹⁵ Decision at 21.

³⁹⁶ *See* Tr. 12446-47, 12450-51, 12453 (“[The Court] Was the June, ‘06, meeting a CRM meeting or a BLM meeting? The Witness [Gates]: It was a CRM meeting.”), 12453-55, 12481, 12483-84; BLM SOR/Answer at 7 n.4 (“[T]he mere fact that an agency uses a non-[F]ederal meeting for scoping purposes does not ‘federalize’ it.”); *but see* WWP P-H Reply Brief at 8 (“[The June 2 meeting] [wa]s

agenda' occurring at the end of the unrelated CRM meeting.”³⁹⁷ The ALJ's skepticism notwithstanding, Gates' testimony accurately describes the June 2 meeting. BLM did not schedule the CRM meetings, set their agendas, or run the meetings; the meetings did not take place at BLM facilities; and the meeting agendas included issues unrelated to BLM or the DCA. “Put simply, these were not BLM meetings in any shape or form.”³⁹⁸

Although BLM may have viewed the meeting as “public” and as broadly serving the aims of “scoping,” there is no evidence the June 2 meeting was “*under the auspices of NEPA*.”³⁹⁹ We disagree with the Judge's view that BLM, in some way, “delegat[ed]” its scoping duty to CRM.⁴⁰⁰ It was, as Judge Heffernan acknowledges and as all parties to the meeting were aware, a meeting conducted by CRM, at which BLM was represented, as were the Wild Utah Project and others. Since the meeting was not a BLM scoping meeting, it was not subject to the public meeting notice requirement of 40 C.F.R. § 1506.6.

Nor was the June 2 meeting subject to the FACA requirements of 43 C.F.R. § 46.110(e). Judge Heffernan notes that 43 C.F.R. § 46.110(e) provides that, “[w]hen practicing consensus-based management in the NEPA process, bureaus must comply with all applicable laws, including any applicable provisions of the Federal Advisory Committee Act[.]”⁴⁰¹ While CRM may have been trying to develop consensus on grazing in Rich County, BLM was not using that meeting to practice consensus-based management of the NEPA process. BLM did not solicit public comment at the June 2 meeting. It merely took advantage of the opportunity to listen to public comments that were offered at this CRM meeting. BLM could have notified CRM and members of the public in advance that it would consider any grazing comments offered at the meeting, but we find no requirement in the law for such notice. We therefore agree with BLM: “It is unreasonable to conclude that CEQ intended to mandate a [F]ederal

sufficiently ‘federalized’ to trigger the trappings of NEPA’s procedural due process requirements.”).

³⁹⁷ Decision at 17 (quoting Tr. 11947); *see* Tr., 12452-53.

³⁹⁸ BLM P-H Response Brief at 42; *see* Tr. 12480 (“[I]t was not an official BLM scoping meeting.” (Gates)), 12465-66.

³⁹⁹ Decision at 12 (emphasis added); *see* Tr. 12446, 12449-50.

⁴⁰⁰ Decision at 14.

⁴⁰¹ *Id.* at 12.

agency to provide public notice of meetings neither convened nor administered by the agency simply because the agency took advantage of the meeting as part of its scoping for an EA.”⁴⁰² We reject the notion that “any meeting, regardless of who is holding it, that a [F]ederal employee plans to attend to help identify issues regarding a proposal pending before the employee’s agency[,] must be [preceded] with a ‘public notice’ provided by the agency.”⁴⁰³

We do not understand ALJ Heffernan’s holding that WWP was deprived of procedural due process in conjunction with the June 2 meeting. The process that is due WWP and other citizens in connection with a scoping meeting is defined in 40 C.F.R. § 1500.1(b), which provides: “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” When preparing an EA, BLM must, “to the extent practicable, provide for public notification and public involvement” in this NEPA process, but “the methods for providing public notification and opportunities for public involvement are at the discretion of [BLM].”⁴⁰⁴

In *Lynn Canal Conservation, Inc.*,⁴⁰⁵ we addressed the extent of public participation required during BLM’s NEPA process. We held it is not required to provide a draft or final EA for public comment prior to issuing its decision on a proposed action.⁴⁰⁶ Rather, as the ALJ properly notes, we held that once BLM determines public involvement requirements are to be satisfied by affording an opportunity to comment on a draft or final EA, it must implement that process in accordance with the requirements of the CEQ regulations and Departmental policy, which included considering and responding to comments.⁴⁰⁷ Since BLM involved the public in the process of preparing the EA and considered their comments, it acted consistent with our decision in *Lynn Canal*.

⁴⁰² BLM P-H Response Brief at 42.

⁴⁰³ *Id.*; *see id.* at 43 (“BLM personnel often and routinely attend meetings.”).

⁴⁰⁴ 43 C.F.R. § 46.305(a); *see* 43 C.F.R. §46.305(b) (BLM “not required” to solicit public comment on draft EA but may do so if “the level of public interest or the uncertainty of effects warrants.”); *Lynn Canal Conservation, Inc.*, 169 IBLA 1, 4-7, 10-11 (2006).

⁴⁰⁵ 169 IBLA 1 (2006).

⁴⁰⁶ *See id.* at 7.

⁴⁰⁷ *See* Decision at 19; 169 IBLA at 10-11.

[8] BLM complied with its public participation requirement under NEPA and applicable, implementing rules in this case.⁴⁰⁸ The record shows WWP has long participated in BLM's adjudication of grazing rights in the Allotment, including BLM's 2001 and 2004 efforts to issue and amend the existing grazing permits. And WWP was afforded ample opportunity to participate in BLM's recent efforts to determine whether to issue new 10-year grazing permits. WWP submitted comments on the July 2007 Draft EA, which were addressed in the Final EA and May 2008 Proposed Decision, and filed protests that were addressed in the September 2008 Final Decision.⁴⁰⁹ The fact the Final EA differed little from the Draft EA and BLM's grazing proposals generally remained unchanged throughout the NEPA review and decisionmaking process does not mean that WWP's comments were not fully considered by BLM.

WWP was afforded ample opportunity to offer to BLM its views and "contrary interests" regarding proper grazing of the Allotment.⁴¹⁰ WWP has not been "procedurally exclude[d]" from providing its views to BLM.⁴¹¹ The ALJ stated that since "BLM was in a hurry," its "overall [consultation, cooperation, and coordination] process [concerning grazing administration in the Allotment] was . . . skewed procedurally in favor of the CRM and the permittees[.]"⁴¹² The ALJ's observation is speculative and without a basis in fact. BLM has been evaluating conditions on the Allotment, and the terms and conditions for issuing new 10-year grazing permits, since before 2001. We see no evidence that BLM was biased toward CRM and the permittees or that WWP was prevented from being able to present its views to BLM during the NEPA review and decisionmaking process.⁴¹³

⁴⁰⁸ See, e.g., *New Mexico Wilderness Alliance*, 186 IBLA 183, 196-97 (2015); *Oregon Chapter Sierra Club*, 176 IBLA 336, 347-49 (2009).

⁴⁰⁹ See EA at 7 ("The proposal was posted on the Utah BLM Environmental Notification Bulletin Board (ENBB) on . . . September 28, 2006[,] for the subject EA.").

⁴¹⁰ Decision at 14.

⁴¹¹ *Id.*

⁴¹² *Id.* at 113.

⁴¹³ *Cf.*, *Sierra Club*, 92 IBLA at 299-300 n.5 (Board declines to reverse BLM decision for failure to comply with regulation requiring public notice of NEPA

Finally, we note that WWP's appeals to the ALJ and the Board have fully satisfied its procedural due process rights to challenge BLM's 2008 Final Decision.⁴¹⁴ We fail to discern any reversible error in BLM's pre-decisional NEPA review process and reject any finding by the ALJ to the contrary.

B. Baseline Conditions in the Allotment

ALJ Heffernan concluded that BLM failed adequately to consider WWP monitoring data, which resulted in a flawed perception of the Allotment's baseline conditions, and that BLM's rejection of that WWP data compromised its assessment of likely environmental impacts of its grazing decision.⁴¹⁵ He stated BLM "ignored" and "rejected totally" extensive on-the-ground data gathered by WWP regarding existing conditions in the Allotment, data which contradicted BLM's overall conclusion that the Allotment was in good condition⁴¹⁶. He held BLM's lack of consideration of WWP data constituted a failure to take a "hard look" at the likely impacts of its decision.⁴¹⁷

The ALJ concluded that BLM was required to incorporate WWP monitoring data into its NEPA review. He provides no authority for this requirement. BLM's obligation under NEPA is to conduct a review of the likely environmental effects of continuing to authorize grazing in the Allotment.⁴¹⁸ As discussed *supra*, since BLM had legitimate concerns about the reliability of WWP's data, we reject any suggestion that BLM was required to incorporate unreliable data into its review and decisionmaking process in this case.

document, since adverse party not prejudiced by procedural violation, where afforded adequate opportunity to comment before BLM and Board).

⁴¹⁴ See, e.g., *Christopher L. Mullikin*, 180 IBLA 60, 73 (2010); *Combined Metals Reduction Co.*, 170 IBLA 56, 78 (2006); *Haines Borough Assembly*, 145 IBLA 14, 29 (1998).

⁴¹⁵ See Decision at 74-89.

⁴¹⁶ *Id.* at 74.

⁴¹⁷ *Id.*

⁴¹⁸ See, e.g., 40 C.F.R. §§ 1500.2, 1500.3, and 1501.3(a); 43 C.F.R. §§ 46.10(a), 46.100, 46.300(a), and 4130.2; *Colorado Environmental Coalition*, 125 IBLA 210, 220 (1993).

However, BLM was required to consider WWP data as part of its NEPA review, to the extent it might shed light on existing baseline conditions, which are the acknowledged starting point for an assessment of the likely impacts of a proposed action.⁴¹⁹ As the Ninth Circuit stated: “Without establishing the baseline conditions[,] . . . there is simply no way to determine what effect the proposed [action] . . . will have on the environment and, consequently, no way to comply with NEPA.”⁴²⁰ In this regard, we conclude that BLM was required and did, in fact, generally consider WWP data as part of its NEPA review, but it rejected WWP data as unreliable.⁴²¹

The ALJ noted two reversible errors in BLM’s assessment of baseline conditions associated with its ESD classifications of the Allotment. He found that these errors clouded its assessment and caused BLM to fail to take note of continuing adverse effects of overgrazing. He concluded that not only did BLM fail properly to assess rangeland conditions from the standpoint of precipitation, but it also failed to note the decline in the presence of bluebunch wheatgrass in its assessment of rangeland conditions.⁴²²

Carter testified at the hearing that the inappropriateness of BLM’s ESDs “boils down to essentially one major issue, with maybe one or two subissues.”⁴²³

⁴¹⁹ See 40 C.F.R. §§ 1502.15 (“[NEPA requires BLM to] describe the environment of the area(s) to be affected . . . by the alternatives under consideration.”) and 1508.9.

⁴²⁰ *Half Moon Bay Fishermans’ Marketing Association v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988); see also *Northern Plains Resource Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067, 1085 (9th Cir. 2011) (“[W]ithout [baseline] data, an agency cannot carefully consider information about significant environmental impacts.”); *WWP v. BLM*, 552 F. Supp.2d 1113, 1126 (D. Nev. 2008) (“In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions.”).

⁴²¹ See, e.g., BLM/WWP Comparison at 1 (“Since . . . 2005, both the BLM and [WWP] . . . have been involved with intensive data collection. . . . The following list shows the data reported to BLM by, and as collected[] by[,] WWP[.]”); EA at 7, 13 (“[WWP] has suggested that the BLM re-calculate the available forage on the [DCA] using their data.”).

⁴²² See Decision at 75-89.

⁴²³ Tr. 11394.

He defined the primary issue as the discrepancy between the ESDs and the published SCS Survey; the first subissue as “the presence of bluebunch wheatgrass in the S[CS] Survey, and the absence of bluebunch wheatgrass in the [ESDs]”; and the second subissue as “the discrepancy between precipitation in the SCS Survey and precipitation in the ESDs.”⁴²⁴ In his view, this “major difference . . . could determine perhaps a different plant community.”⁴²⁵ WWP’s approach is stated as follows: “The . . . correlation[] of the correct ESD to an allotment is extremely important because *its HCPC becomes the baseline against which the existing vegetation condition is measured* during the [ESI], and thus [grazing] management decisions are made.”⁴²⁶ The ALJ essentially agreed with WWP and found “the new ESDs are wrong because they are based on existing degraded vegetative conditions, *rather than upon the HCPC*, which is identified in the [SCS] Survey.”⁴²⁷ According to WWP, “BLM . . . assigned incorrect ESDs to the vast majority of the allotment.”⁴²⁸

WWP argued that by accepting a degraded baseline condition, BLM failed to acknowledge the effects of overgrazing in upland areas. In WWP’s view, BLM incorrectly concluded that those areas exhibited “high productivity” and could be grazed in greater numbers by redistributing cattle away from the riparian areas. WWP asserts the end result of BLM’s determination is that upland areas would suffer even more, the riparian areas would continue to suffer, and sage-grouse

⁴²⁴ *Id.* at 11395-96.

⁴²⁵ *Id.* at 11396.

⁴²⁶ P-H Opening Brief at 35-36 (emphasis added); *see* BLM/WWP Comparison at 5 (“Comparison to the HCPC is only valid if the proper ESD is used for the comparison. The use of the wrong ESD would skew the results of the comparison.”).

⁴²⁷ Decision at 77 (emphasis added); *see id.* at 78 (citing Tr. 11405 (“[W]e’ve accepted for nearly 30 years that the [SCS] Survey was the definitive document.” (Carter))), 79 (citing Tr. 11399 (“[T]he burden is on the BLM to prove that, in fact, this new [ESD] is the one that should be used.” (Carter))); WWP P-H Opening Brief at 35, 43 (“[T]he [SCS] Survey . . . is the best evidence of what plant communities were historically on the allotment. Yet, BLM . . . ignored the [SCS] Survey, and instead used the existing vegetation to determine what ESDs to apply.”).

⁴²⁸ WWP P-H Opening Brief at 45.

and other dependent wildlife species would be severely impacted.⁴²⁹ WWP claims that BLM failed to appreciate that due to overgrazing, the Allotment has retrogressed “from the HCPC to a more degraded state.”⁴³⁰ WWP asserts that grazing has, over time, substantially decreased the presence of grasses and forbs, which has promoted the invasion of sagebrush and other shrubs.⁴³¹

BLM admits it relied on the ESDs to define the HCPC for the Allotment and for determining the extent to which the area has departed from HCPC. BLM deemed the ESDs useful, along with other information, in assessing the overall ecological condition of the Allotment.⁴³² But as the Judge notes, BLM changed its evaluation of the basic ecological condition of the Allotment in 2005, taking into account existing soils, hydrology, vegetation, climate, and other aspects of the environment. As a result, BLM adopted new ESDs pursuant to guidance provided by the NRCS, which replaced longstanding ESDs developed in accordance with guidance from the SCS.⁴³³ The Judge states that BLM did so because the prior classifications were considered to be “no longer appropriate.”⁴³⁴

The Judge points out that Green, who “superintends all ESDs for the State of Utah,” testified that BLM’s “re-correlation” “tak[es] . . . existing soil survey information, whatever age[,] . . . and attempt[s] to apply the most current [ESDs] that we have today to the old existing soils data, because those have changed . . . over time.”⁴³⁵ He notes that, in doing so, BLM determined that most of the public lands in the Allotment were broken down into two areas, characterized by their deep loamy soil and dominant established shrub species (Wyoming big sagebrush). One was designated as Loamy 10-14, rather than Upland Loam Wyoming Big Sagebrush (6,511 acres), and the other was

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 50.

⁴³¹ *Id.*

⁴³² *See* NA/Petition at 41.

⁴³³ *See* Decision at 75-76 (citing EA at 55; BLM/WWP Comparison at 4 (“Near the outset of the ESI data collection the BLM recognized that the ESDs . . . were not a proper fit.”)).

⁴³⁴ Decision at 76.

⁴³⁵ *Id.* at 75, 76 (quoting Tr. 8667); *see* Tr. 8663-64, 8665-66, 8668, 8694, 8729, 11719, 12290-91, 14443-45.

designated as Loamy 7-9, rather than Semi-Desert Loam (4,166 acres).⁴³⁶ These designations presumed total annual precipitation of 10 to 14 and 7 to 9 inches, respectively.⁴³⁷ BLM adopted all of the ESD classifications recommended by Green.⁴³⁸

Before addressing the merits of the ESD classifications and their ramifications, we note that the Judge first concludes that BLM changed the ecological classification of the Allotment without affording adequate advance notice and analysis of this “major change” and that BLM failed to take a “hard look” at the consequences of this change.⁴³⁹ We find no error. Since this change was relevant to BLM’s analysis of likely impacts of the grazing proposal, BLM noted the change in the Draft and Final EA, which made it subject to comment by WWP prior to issuance of the Final Decision.⁴⁴⁰ Further, the “implications” of the change for the grazing proposal were considered by BLM “prior to finalizing the EA.”⁴⁴¹ Therefore, we conclude that WWP has had an adequate opportunity to challenge the change in the ESD classifications, so far as they concern the present grazing proposal, before the ALJ and now before the Board.

Turning to the merits, we are not persuaded that BLM failed adequately to analyze the change from the SCS to the NRCS ESD classifications.

1. ESD Classifications and Expected Precipitation

Judge Heffernan concludes that BLM improperly changed the ecological classification of the Allotment by failing to take into account actual precipitation. He found BLM improperly classified the Allotment because the two classifications chosen (Loamy 10-14 and Loamy 7-9) presumed total annual precipitation—respectively, of 10 to 14 and 7 to 9 inches—which was less than the precipitation actually received in the respective areas of the Allotment.⁴⁴² He accepted WWP’s argument that in concluding that the Allotment received less

⁴³⁶ See Tr. 8676-78, 8682-84, 8690-94, 14433-45, 14447.

⁴³⁷ See Decision at 76-77.

⁴³⁸ See Tr. 8668, 12290, 14441, 14432-45.

⁴³⁹ Decision at 80.

⁴⁴⁰ See Draft EA (Ex. B-3) at 50-52; Final EA (Ex. B-2) at 53-55.

⁴⁴¹ Decision at 80.

⁴⁴² See *id.* at 76-77.

precipitation and, thus, less forage productivity as a consequence of its ESD classification, BLM accepted the Allotment's degraded condition as the baseline. In adopting this ESD classification, WWP asserts that BLM failed not only to recognize the degradation that had already been caused by overgrazing at current levels, but also erroneously concluded that grazing could justifiably continue at current levels. According to WWP, "BLM used the high productivity of the [ecological] sites to justify its determination that the uplands are in good condition[.]"⁴⁴³

Green, who was instrumental in BLM's ESD classifications, admitted that the ESD precipitation factors were not "a perfect match" for actual conditions in the Allotment.⁴⁴⁴ However, he testified that this fact was taken into account. He stated that the total number of acres previously classified as Semi-Desert Loam, which presumed actual precipitation of from 8 to 12 inches, were reclassified as Loamy 10-14, which signified higher precipitation and thus more productivity. The less productive sites in Semi-Desert Loam were reclassified as Loamy 7-9, which entailed lower precipitation and lower production.⁴⁴⁵ In general, Green recognized that the actual precipitation did not match the expected precipitation for the two ESDs, but concluded that the ESDs were the "best fit" for the areas of the Allotment, given all of the ecological factors.⁴⁴⁶ In adopting the ESD classifications, BLM deferred to NRCS' determinations.⁴⁴⁷

WWP sought to demonstrate that the Loamy 10-14 and Loamy 7-9 ESD classifications were erroneous. For the Loamy 10-14 ESD, BLM estimated 10-14

⁴⁴³ WWP P-H Opening Brief at 41 (citing Tr. 1206 ("[T]he earlier soil survey says that the normal year production was higher than the current ecological site survey says[.] . . . This is a significant change. . . . [I]t's reflecting an acceptance of a plant community that is less than what it really was in earlier times. And you're accepting a degraded community is now the norm." (Catlin))).

⁴⁴⁴ Tr. 8682.

⁴⁴⁵ See Tr. 8684, 8689.

⁴⁴⁶ Tr. 8684, 8688.

⁴⁴⁷ See Tr. 14445 (Q. [BLM] So, did BLM defer to NRCS's . . . Green's decision? A. [Stager] We did defer to that . . . because we concurred with him. . . . [T]hese [ESDs] were the best fit for the location."); Decision at 75 ("The [NRCS] has jurisdiction over ESDs and assists agencies, such as BLM, in developing new ESDs and applying them on public lands.").

inches of annual precipitation and annual forage productivity of 1,100 pounds per acre, while WWP asserted actual precipitation of 9-16 inches and forage productivity of 986-3,017 pounds. For the Loamy 7-9 ESD, BLM estimated annual precipitation at 7-9 inches and forage productivity at 500 pounds per acre, while WWP sought to show it actually experienced 9-13 inches of precipitation with 841-1,022 pounds of forage productivity per acre.⁴⁴⁸

BLM expected the Loamy 10-14 and Loamy 7-9 ESDs to experience “[w]ide fluctuations . . . in yearly precipitation,” “result[ing] in more dry years than those with more than normal precipitation.”⁴⁴⁹ We do not regard the estimated precipitation for the ESDs (10-14 and 7-9 inches, respectively) as substantially different from WWP’s asserted actual precipitation of 9-16 and 9-13 inches, respectively.⁴⁵⁰ Nor do we regard BLM’s expected annual average forage productivity for the ESDs (respectively, 1,500 and 500 pounds per acre) as substantially different from WWP’s asserted actual forage production (respectively, 986-3,017 and 841-1,022 pounds per acre). WWP has, at best, shown an imprecise difference with little to no significance.

WWP has not shown that the difference between expected and actual annual precipitation, or between expected and actual average annual forage productivity, unreasonably skewed BLM’s ESD classifications of the Allotment.⁴⁵¹ WWP does not show BLM was not sufficiently informed regarding the ecological state of the Allotment or that its noted differences fundamentally undermined BLM’s grazing management decision. Nowhere does WWP identify

⁴⁴⁸ See WWP P-H Opening Brief at 38-41; Loamy 10-14 ESD at 1, 6; Loamy 7-9 ESD at 1, 6; Ex. B-23 (ESI Summary Sheets) at Bates 1978 (10-14 (2,116)), 1982 (10-14 (1,765)), 1986 (10-14 (2,161)), 1987 (10-14 (1,962)), 1988 (10-14 (1,962)), 1989 (10-14 (1,829)), 1990 (7-9 (938)), 1992 (10-14 (3,017)), 1995 (7-9 (1,014)), 1996 (7-9 (1,022)), 1997 (7-9 (841)), 1998 (10-14 (999)), 2002 (10-14 (986)), 2005 (10-14 (1,257)).

⁴⁴⁹ Loamy 10-14 ESD at 1; Loamy 7-9 ESD at 1.

⁴⁵⁰ See Tr. 8683 (“[Wyoming NRCS] said you should think of the 7-to-9 as being any derivative of 9, up to 9.9 inches.” (Green)).

⁴⁵¹ See BLM P-H Response Brief at 113 (“Appellants obviously believe that a precise correlation is necessary, but they provide no evidence or expert testimony supporting their view.”).

any ESD that would, more appropriately, fit the two areas of the Allotment designated as Loamy 7-9 and Loamy 10-14.

2. Decline of Bluebunch Wheatgrass

ALJ Heffernan found BLM violated NEPA by failing to account for the declining presence of bluebunch wheatgrass on the Allotment, which he characterized as “a significant environmental impact,”⁴⁵² and that it improperly accepted the Allotment’s degraded condition as the environmental baseline for grazing management purposes.⁴⁵³

Under the SCS Survey, bluebunch wheatgrass and Indian ricegrass (*Achnatherum hymenoides*) were considered the dominant grass species in the Upland Loam and Semi-Desert Loam ESDs.⁴⁵⁴ However, the NRCS Survey showed Western wheatgrass (*Pascopyrum smithii*) is the major grass species in the Loamy 10-14 ESD, and that thickspike wheatgrass (*Elymus macrourus*), Indian ricegrass, and needle-and-thread grass (*Hesperostipa comata*) are the major grass species in the Loamy 7-9 ESD.⁴⁵⁵ WWP emphasized that the absence of bluebunch wheatgrass in certain parts of the Allotment “*raised a red flag for Appellants.*”⁴⁵⁶ WWP argued that in reclassifying the Allotment, BLM completely neglected the fact that at the time of the SCS Survey there was a significant presence of bluebunch wheatgrass in the Allotment and that the loss of bluebunch wheatgrass in the years following the SCS Survey was caused by overgrazing.

⁴⁵² Decision at 89; *see id.* at 87 (“The amount of bluebunch wheatgrass on a number of BLM sites is minimal, and is less than what should be there according to . . . the ESDs.”), 88, 97.

⁴⁵³ *See* WWP P-H Opening Brief at 41 (“BLM improperly based its determination of what ESDs should apply on what plant species are present on the allotment now, instead of what should be there as determined by the [HCPC] identified in the longstanding [SCS] Survey.”).

⁴⁵⁴ *See* Tr. 941-42, 11399 (“[I]n the [SCS] Survey, all of the sites would have bluebunch wheatgrass present.”); Range Site Description, Semi-desert Loam, SCS, at 3; Range Site Description, Upland Loam, SCS, at 3; 2005 Monitoring Report at 12-13.

⁴⁵⁵ *See* Tr. 11399; Loamy 10-14 ESD at 5; Loamy 7-9 ESD at 5.

⁴⁵⁶ P-H Opening Brief at 63 (emphasis added).

WWP attributes to BLM the erroneous conclusion that the distribution of grass species had not changed following the SCS Survey, and that the absence of bluebunch wheatgrass did not reflect a degraded condition. Carter's testimony reflects this viewpoint: "[I]t just appears . . . that there is a . . . willingness to toss out the [SCS] Survey and reinvent the plant community because it may better resemble what's there today, which . . . is a degraded state."⁴⁵⁷ The ALJ agreed: "In plain terms, there is a shortage of qualifying grass on the allotment, which was never adequately analyzed by BLM."⁴⁵⁸

The fundamental fallacy in WWP's approach is its emphasis on the SCS Survey, which focused on the HCPC. BLM sought to reclassify the public lands in the Allotment in 2005 to reflect the actual rangeland conditions at that time.⁴⁵⁹ In so doing, BLM found bluebunch wheatgrass was no longer the main or dominant species. We find no error in BLM's not specifically addressing the fact that there is now less bluebunch wheatgrass on the Allotment than there was in pre-European times.⁴⁶⁰ BLM is managing the Allotment for present grazing use, not for the purpose of returning it to its pre-European condition.⁴⁶¹

The Judge also found that even if the two principal ESD classifications defined in the NRCS Survey were accepted as valid, BLM still erred by failing to recognize that bluebunch wheatgrass (or any grass species) was not present in the percentages expected by the two ESD classifications.⁴⁶² He stated there are "requisite percentages" for bluebunch wheatgrass in the Allotment and agreed with Catlin that an area of the Allotment may be vegetated but not exhibit the "right mixture of species."⁴⁶³

⁴⁵⁷ Decision at 80 (quoting Tr. 11399-400).

⁴⁵⁸ *Id.* at 86.

⁴⁵⁹ *See* Tr. 8692-93 ("[A]t some point you have to use the species that are there right now to help make the [ESD] decision or educated guess about what was there historically." (Green)), 14472-73, 14897-98.

⁴⁶⁰ *See* EA at 56 ("HCPC is the 'plant community that existed before European immigration and settlement'" (quoting ESI TR at 22)).

⁴⁶¹ *See* Tr. 6338-39 (Catlin), 12218-19 (Gates).

⁴⁶² *See* Decision at 81-89, 138.

⁴⁶³ *Id.* at 87-88 (quoting Tr. 1456).

WWP claimed BLM had ignored “plant species composition” and focused instead on the extent to which all of the vegetation present deviated from HCPC under the similarity index.⁴⁶⁴ WWP asserted BLM was “claiming that the [vegetation] community as a whole is healthy” when, in fact, “a whole component is missing or nearly missing,” specifically grasses, and especially desirable grasses.⁴⁶⁵ Catlin testified that “the composition . . . is not good on many of these sites [surveyed by BLM under its ESI] simply because, for example, *bluebunch wheatgrass, which should dominate[,] . . . is largely missing from most of the sites[.]*”⁴⁶⁶

In reviewing the record, we find that WWP and Judge Heffernan mischaracterized BLM’s assessment of the relative presence of grass/forb/shrub species in the Allotment. BLM determined through its ESI that most of the Allotment was in a late seral stage or better (90.2%), meaning it was in the later stages of its ecological succession to HCPC. The fact the Allotment was in a late seral stage was evidence of its good condition. In the WWP/BLM Comparison, BLM stated: “[O]ver 90% of the public land acres in the allotment have *51% or more of the species and production that is described in the ESD for HCPC.*”⁴⁶⁷

⁴⁶⁴ P-H Opening Brief at 49.

⁴⁶⁵ *Id.* (quoting Tr. 11416 (Carter)); *see id.* at 49-50 (citing Tr. 11421-22, 11456-57, 11459 (“[Calculating a similarity index is fine, but] I just don’t think they went far enough, because that can mask some serious deficiencies in the . . . community as a whole.” (Carter)), 50 (“If the similarity index is all you look at, then you miss the enormity of the influence of sagebrush and decline of grass species.” (citing Tr. 1296-97 (“[I]f your similarity index is all that you look at in looking at the plant community, then you miss . . . the enormity of the influence of sagebrush. . . . [T]he similarity [index] . . . masks key factors that are important ecologically[.]” (Catlin)), 51-52, 58 (citing Tr. 13128 (“[I]n order for this to be in good ecological condition, this amount of shrubs and grass [respectively, 67% and 17%] would have to be basically reversed, just the opposite of what they’re showing.” (Edwards)), 13134 (“[T]he proportions of the . . . shrubs is far too excessive . . . in relation to how much of the grass and forbs that are there for [what] . . . this site should look like if it was in good [ecological] condition.” (Edwards)))).

⁴⁶⁶ Tr. 1456.

⁴⁶⁷ BLM/WWP Comparison at 5 (emphasis added); *see* Tr. 14029-30, 15612-13; EA at 10-11, 55-58; BLM/WWP Comparison at 4 (Table 3).

In the case of the Loamy 10-14 and Loamy 7-9 ESDs, the typical plant community at HCPC is, respectively, 40-100% grasses/5-15% forbs/15-30% sagebrush and other woody species, and 65-100% grasses/5-15% forbs/10-30% sagebrush and other woody species.⁴⁶⁸ In fact, BLM “assessed species composition for each ecological site . . . in the ESI, and the difference in composition from that at HCPC for each ecological site is captured in the similarity index information presented in the EA.”⁴⁶⁹ In the process, BLM specifically noted the diversity of plant species, including the presence of bluebunch wheatgrass, across the Allotment.⁴⁷⁰

As Judge Heffernan acknowledged, BLM was well aware that grass species, and especially desirable grass species, were absent from the Allotment when it prepared the EA.⁴⁷¹ BLM was also well aware that at many sites, sagebrush and other shrub species dominated.⁴⁷² In no instance did BLM

⁴⁶⁸ See Loamy 10-14 ESD at 5, 6; Loamy 7-9 ESD at 5, 6.

⁴⁶⁹ BLM SOR/Answer at 26.

⁴⁷⁰ See Tr. 13839, 13842, 14068-69 (Q. [BLM] . . . Now, you said that bluebunch wheatgrass vigor is good across the Allotment; correct? A. [Staggs] Yeah, I’d say it’s pretty good.”); EA at 11 (“[A]pproximately 7,886 acres or 61 percent [of the public lands] of the allotment ha[ve] measurable amounts of bluebunch wheatgrass with good vigor. . . . Plant species richness was considered good . . . where the number of different species ranged from 12 to 33 species with most sampled areas having 20 or more. . . . [M]easured plant species diversity [is] very good at the current active [grazing] use[.]”).

⁴⁷¹ See Decision at 84 (“[N]o such grass percentages [75% or more] were ever measured on the allotment by either of the parties.”), 86 (“[I]n [its] 2007 comparison report, BLM acknowledges that its own ESI data shows that ‘. . . grass production for many of the sites sampled . . . are producing less grass than described by the appropriate HCPC.’” (quoting BLM/WWP Comparison at 5)). .

⁴⁷² See Decision at 84 (“[S]hrubs dominate the landscape”); Tr. 1160-61; EA at 11 (“Plant species richness was considered good based on the data results from the [ESI] and line [point] intercept trend data”), 57, 61-66 (Table 13 (“Aspect Vegetative Community”)), 67 (Table 14); Loamy 10-14 ESD at 5, 6; Loamy 7-9 ESD at 5, 6; Ex. B-23 (ESI Summary Sheets) at Bates 1978, 1980, 1982, 1983, 1985-98, 2000-09; Ex. B-69 (Line-Point Intercept Data Forms) at Bates 5212-14 (2005), 5252-54 (2007) (DCT-1), 5216-18 (2005), 5258-60 (2007) (DCT-2), 5220-22 (2005), 5264-66 (2007) (DCT-3), 5224-26 (2005), 5269-71 (2007) (DCT-4), 5228-30

obscure or ignore the extent to which grass and forb species were absent, as charged by WWP.⁴⁷³ At the same time, BLM made clear its data revealed that, in general, the Allotment was productive of herbaceous and shrub plant species. As BLM noted in its WWP/BLM Comparison: “[M]any of the sites are producing as much, if not more, total production than described in the ESD [for the HCPC] with all of the required species present. This means that the productivity of the sites is still able to produce the kind of species and amounts as listed [for] . . . the HCPC . . . described in the ESD.”⁴⁷⁴

BLM asserts that Judge Heffernan “wrongly assumed that the description of HCPC provided in an ESD is the type and composition of vegetation that should exist at a site.”⁴⁷⁵ BLM also states “Appellants obviously think that ‘good ecological condition’ exists only when the plant community has the same composition . . . as it would have at HCPC,” and that “it seems evident that Appellants’ position is driven by a desire to return rangelands to conditions that existed prior to European colonization[.]”⁴⁷⁶ In fact, as BLM states: “Catlin repeatedly contended that [BLM is] . . . require[d] . . . to manage for ‘potential’ or ‘climax[.]’”⁴⁷⁷

BLM considered whether and to what extent the current vegetative state of the Allotment differs from the HCPC. WWP claims HCPC provides “the baseline against which the existing vegetation condition is measured during the [ESI], and thus management decisions are made.”⁴⁷⁸ BLM management decisions are not dictated by whether and to what extent they will return the Allotment to HCPC. Logically, the extent to which the plant community differs from the historical ideal (HCPC) does not measure the Allotment’s current status as degraded or in good condition.

(2005), 5275-77 (2007) (DCT-5), 5232-34 (2005), 5281-83 (2007) (DCT-6), 5236-38 (2005), 5287-89 (2007) (DCT-7), 5240-42 (2005), 5293-95 (2007) (DCT-8), 5244-46 (2005), 5299-301 (2007) (DCT-9), and 5248-50 (2005), 5305-07 (2007) (DCT-10).

⁴⁷³ See Decision at 82-87.

⁴⁷⁴ BLM/WWP Comparison at 5.

⁴⁷⁵ NA/Petition at 26.

⁴⁷⁶ BLM P-H Response Brief at 120.

⁴⁷⁷ *Id.* at 125.

⁴⁷⁸ WWP P-H Opening Brief at 36.

In determining the ecological condition of the Allotment was generally good, BLM considered the extent to which it deviated from HCPC. It also took into account other factors, including the productivity of the site, the diversity of plant species, and the extent of canopy cover.⁴⁷⁹ WWP did not establish that BLM was unaware of the absence of grass species in the Allotment. What WWP did show was their preference that BLM manage the Allotment to increase the presence of particular grass species, especially “desirable” grass species, so that the Allotment achieves HCPC. WWP holds that any departure from HCPC is evidence that the Federal range is in a degraded state and unsuitable for grazing. This is the fundamental error that permeates WWP’s appeal and the ALJ’s decision.⁴⁸⁰

BLM is not precluded from managing the Allotment for continued livestock grazing simply because it does not approximate HCPC. Neither the TGA nor NEPA so require. BLM’s obligation under the TGA and NEPA is to ensure that authorized grazing use does not exceed the carrying capacity of the range; that the Utah S&G for rangeland health are met; and that the likely impacts of grazing on sage-grouse and other resource values are fully considered. As BLM correctly states:

⁴⁷⁹ See Tr. 14521, 14915-22, 15613 (“Q. [BLM] Would BLM ever rely solely on a calculation of similarity index to reach a conclusion as to ecological condition or rangeland health? A. [Karl] No.”), 15614; Ex. B-23.

⁴⁸⁰ See, e.g., Answer at 20 (“[WWP] show[s] that conditions in the uplands have declined to a more degraded state, with an overabundance of sagebrush and an alarming lack of grasses. What grasses are there show a significant decline of grazing-sensitive species such as bluebunch wheatgrass, which have been replaced by more grazing tolerant species such as western wheatgrass and Sandberg bluegrass[.]”), 21 (“The HCPC . . . is what WWP compared BLM’s ESI data to in order to determine the true existing condition of the allotment.”), 28 (“BLM . . . is accepting a degraded condition as the ecological baseline.”); Decision at 77 (“[T]he new ESDs are wrong because they are based on existing degraded vegetative conditions, rather than upon the [HCPC].”), 85 (“I believe that [the predominance of sagebrush means that the Allotment] . . . is in degraded state[.] . . . [I]t’s not at potential. And so accepting a degraded locale as at potential indicates to me that they haven’t recognized . . . the state that it’s in.” (quoting Tr. 3294-95 (Catlin))).

[T]he clear intent of the [Utah] [S]tandards is to achieve a functioning and sustainable ecosystem, *not a pristine ecosystem or one at 'potential,' or to restore historically 'degraded' lands.* . . . The plain language of these standards . . . belies Appellants' apparent attempt to transform them into a requirement that BLM manage the DCA as a wildlife preserve, botanical park, or anything different than functional, working rangelands.^[481]

C. Greater Sage-Grouse Impacts

On March 3, 2010, the Fish and Wildlife Service (FWS), U.S. Department of the Interior, determined that the Greater sage-grouse (*Centrocercus urophasianus*) is properly listed, range-wide, as a threatened and endangered (T&E) species under the Endangered Species Act of 1973 (ESA),⁴⁸² but its listing was precluded by higher priority listing actions.⁴⁸³ After extensively reexamining the status of the species and conservation efforts by Federal and State agencies, FWS concluded in 2015 that its listing under the ESA was no longer warranted.⁴⁸⁴ Nonetheless, since the Greater sage-grouse remains on BLM's sensitive species list, the BLM Manual requires that BLM ensure its actions conserve the species and its habitat by promoting removal of the species from the list of sensitive species and avoid contributing to the need to list the species under the ESA.⁴⁸⁵

⁴⁸¹ See BLM P-H Response Brief at 126 (emphasis added).

⁴⁸² 16 U.S.C. §§ 1531-1544 (2006).

⁴⁸³ See 75 Fed. Reg. 13910, 13988 (Mar. 23, 2010); *Western Watersheds Project v. U.S. Fish & Wildlife Service*, No. 4:10-CV-229-BLW, 2012 U.S. Dist. LEXIS 13771 (D. Idaho Feb. 2, 2012), at *9 (FWS recently committed, in settling a Federal lawsuit, to reconsider the warranted/but precluded status of the sage-grouse, by issuing either a proposed listing rule or a not-warranted finding, by Sept. 30, 2015).

⁴⁸⁴ See 80 Fed. Reg. 59858 (Oct. 2, 2015); 75 Fed. Reg. 13910 (Mar. 23, 2010).

⁴⁸⁵ See BLM Manual, §§ 6840.01, 6840.02, 6840.06, 6840.12, and 6840.22 (Rel. 6-121 (1/19/01)); EA at 70, 91.

The Allotment contains, *inter alia*, strutting (leks), nesting, and brood-rearing habitat for the sage-grouse.⁴⁸⁶ BLM states “it appears that the historic grazing permitted on the [DCA] has maintained sage grouse habitat” and finds “current conditions are providing more than adequate habitat for all seasonal requirements.”⁴⁸⁷ Indeed, despite the general decline in population and loss of habitat range-wide, BLM states that the UDWR, with whom BLM repeatedly consulted, reports that Rich County is “one of two areas in the State of Utah that continues to have increasing levels of sage grouse with healthy population numbers” and that “[d]ata from 2008 indicated a historical high in estimated sage grouse numbers for Rich County.”⁴⁸⁸

Notwithstanding these facts, which were presented and considered by BLM in its EA, ALJ Heffernan charges that without any knowledge of sage-grouse use of the Allotment, BLM failed adequately to consider the likely impacts of grazing on the sage-grouse.⁴⁸⁹ He regards this impacts issue as the “most important” impact in the present case, especially since it reveals BLM’s failure to take a hard look at the actual “decline in habitat conditions” between its 2004 and 2008 EAs.⁴⁹⁰ He states this decline was ignored in the 2008 EA but disclosed by WWP’s extensive monitoring data.⁴⁹¹

The ALJ found that since BLM did not determine the location of nesting and brood-rearing areas in the Allotment, it could not begin to address whether and to what extent its grazing decision would affect such habitat and associated sage-grouse.⁴⁹² He concludes: “[T]he EA provides no current information on

⁴⁸⁶ See EA at 8 (“[A]ll the potential habitat in the analysis area serves as year round habitat.”), 70-72, 84 (“Sage grouse potentially use all portions of public land [in the DCA].”).

⁴⁸⁷ *Id.* at 84.

⁴⁸⁸ *Id.* at 8; *see id.* at 8-9, 71 (“Rich County is considered to have healthy sage grouse populations which are being used by [U]DWR to supplement and/or to reestablish populations in other areas in the state.”), 72, 91 (“Rich County supports one of the largest remaining populations of sage grouse in Utah.”), 91-92, 95.

⁴⁸⁹ See Decision at 70, 89-95, 138.

⁴⁹⁰ *Id.* at 89.

⁴⁹¹ *Id.* at 90.

⁴⁹² *Id.* at 93.

areas of the allotment currently occupied by Sage Grouse; and, consequently, [the Acting AFM] rendered an uninformed Final Decision [since] . . . the EA provides no real analysis of the impacts of the new four-pasture grazing system upon Sage Grouse habitat quality and quantity.”⁴⁹³ He adds that absent such information, BLM could not assess whether such areas actually provided suitable habitat for sage-grouse during nesting and brood-rearing periods. ALJ Heffernan states BLM’s failure to conduct such an assessment is especially serious because the *Salazar* court stated that grazing should be restricted to “well-established” time frames in order to avoid adversely affecting sage-grouse in nesting and brood-rearing habitat.⁴⁹⁴ He also faults BLM for not taking into account the fact that “four times more cattle” would periodically be concentrated in one of four “pasture area[s]” under the deferred rotational-grazing system than under prior permits that allowed cattle to graze throughout the Allotment.⁴⁹⁵ He expressed concern that BLM failed to address the consequences of concentrated grazing use on sage-grouse and their habitat, including nesting and brood-rearing areas, which he stated could be “catastrophic.”⁴⁹⁶

We do not share the ALJ’s view and characterization of BLM’s consideration of impacts on sage-grouse in the Allotment. Rather, we find his characterization is inconsistent with the record. BLM’s evidence established that most of the Allotment has, over the years and despite season-long grazing throughout the Allotment, exhibited vegetative characteristics that were conducive to season-long use by sage-grouse and constituted suitable habitat.⁴⁹⁷ BLM fully expects the new rotational grazing scheme to benefit sage-grouse by providing more herbaceous material required for food and cover during sage-grouse nesting and brood-rearing periods in upland areas, improving summer habitat in riparian areas, and maintaining winter habitat for sage-grouse. In general, BLM concluded that continued grazing under this new grazing system

⁴⁹³ *Id.*; *see id.* at 91, 92.

⁴⁹⁴ *Id.* at 92 (citing 843 F. Supp. 2d at 1115).

⁴⁹⁵ *Id.* at 94.

⁴⁹⁶ *Id.*

⁴⁹⁷ *See* EA at 8, 70-72, 84-85, 91-92.

would perpetuate and even benefit existing nesting, brood-rearing, and other sage-grouse habitat in the Allotment.⁴⁹⁸

Judge Heffernan concluded that BLM did not know the location of sage-grouse nesting and brood-rearing areas in the Allotment because Staggs, a BLM RMS, stated he did not personally know the location of such areas.⁴⁹⁹ However, Staggs was not a BLM wildlife biologist and did not undertake the duties of a wildlife biologist or supervise wildlife biologists on the IDT that were involved in the decisionmaking process.⁵⁰⁰ BLM's wildlife biologists, not Staggs, were charged with the duty of locating sage-grouse use and habitat in the Allotment. While the wildlife biologists did not testify at the hearing, the results of their analysis are presented in the EA.⁵⁰¹ Since we presume they did their jobs, we find they knew where sage-grouse nesting and brood-rearing areas were and assessed the likely impacts of the grazing proposal on those areas.⁵⁰²

BLM knew there had been two leks at the time of its 2004 and 2008 EAs, knew where they were, and knew the location of the associated nesting and brood-rearing habitat, which are generally located near leks.⁵⁰³ However, it did not publicly disclose the location of leks or nesting and brood-rearing areas in the EA, adhering instead to its policy of protecting such areas from human disruption.⁵⁰⁴ We find nothing in any law, rule, precedent, or policy requiring BLM to disclose such locations in its EA, which could put them at risk of human interference.

⁴⁹⁸ *See id.* at 84 (“[A] faster increase in the overall condition of the allotment would be beneficial to sage grouse.”).

⁴⁹⁹ *See* Decision at 93 (citing Tr. 13936-37 (Staggs)).

⁵⁰⁰ *See* Tr. 8589-90, 8590 (“I’m not a wildlife biologist and I’m not tasked with collecting that data for the BLM” (Staggs)), 8590-92, 8592-93 (“I will have to defer that to . . . probably a wildlife biologist[,] . . . I don’t know what they do for documenting wildlife. . . . Though I recognized wildlife[,] . . . that is not my purview.” (Staggs)), 8593-94, 13963-64; EA at 95-96.

⁵⁰¹ *See* EA at 15-19, 69-74, 84-86, 89-90, 91-92.

⁵⁰² *See* Tr. 8590-91 (“There’s many a page in this EA that deal with wildlife. . . . I know there’s been people collecting wildlife data out there.” (Staggs)); EA at 96.

⁵⁰³ *See id.* at 8, 71; 2004 EA at 16.

⁵⁰⁴ *See* NA/Petition at 18, n.12.

The Judge states the number of leks had decreased from three to two between the 2004 and 2008 EAs and that they “paint[ed] a different picture of conditions on the allotment” regarding sage-grouse.⁵⁰⁵ Based upon this decrease in the number of leks, he concludes that BLM failed to take a hard look at “the decline in habitat conditions for sage grouse on the allotment.”⁵⁰⁶ But the ALJ misreads the facts. BLM correctly states that both its EAs reported two leks, noting that the report of a third lek at the time of the 2004 EA was from a “non-BLM document . . . attached to the 2004 EA.”⁵⁰⁷ In fact, this non-BLM document referred simply to the “[h]istorical[]” existence of three leks, which was also acknowledged by WWP.⁵⁰⁸ We find nothing in the record to support the ALJ noting anything indicative of a “decline in habitat conditions.”

The ALJ further states that BLM failed to assess whether grasses and forbs were of sufficient height to provide adequate cover for sage-grouse nesting and brood-rearing sites. He notes, as established by WWP monitoring data, that the Allotment does not generally satisfy the seven-inch minimum average height requirement for herbaceous plants identified by John W. Connelly, *et al.*, in *Guidelines to Manage Sage Grouse Populations and their Habitats* (Connelly Guidelines).⁵⁰⁹ The Connelly Guidelines state “[breeding] habitats are sagebrush-dominated rangelands with a healthy herbaceous understory” and recommend that BLM manage such habitats, which include leks, nesting, and brood-rearing areas, to support, *inter alia*, “perennial herbaceous cover averaging ≥ 18 cm [centimeters] [or close to 7 inches] in height with $\geq 15\%$ canopy cover for grasses and $\geq 10\%$ for forbs[.]”⁵¹⁰ Although Judge Heffernan recognized that the Connelly Guidelines were not binding on BLM,⁵¹¹ he finds BLM should

⁵⁰⁵ Decision at 89.

⁵⁰⁶ *Id.* at 90.

⁵⁰⁷ BLM NA/Petition at 20.

⁵⁰⁸ *Id.* (quoting DCA Proposal, dated Apr. 15, 2004 (Part of Appendix A of 2004 EA), at 1); *see* DCA Proposal at 1 (“[O]ne remaining active lek.”); Tr. 9335-36 (Carter).

⁵⁰⁹ WILDLIFE SOCIETY BULLETIN 967 (2000) (Ex. W-213); *see* Decision at 51 (citing Connelly Guidelines at 977), 91-92 (citing Tr. 10304-05, 11390 (“BLM has made the statement in the EA that they meet the sagebrush guidelines of Connelly, et al[.], but have left out the height requirement.” (Carter))).

⁵¹⁰ Connelly Guidelines at 977.

⁵¹¹ *See* Decision at 91 (“BLM is, of course, not necessarily obliged to follow the Connelly Sage Grouse Guidelines”); Connelly Guidelines at 967 (“This paper

have addressed whether the nesting and brood-rearing areas provided suitable habitat under the Connelly Guidelines or other standards. He then states: “Given that the protection of sage grouse is a high BLM priority, . . . this is just one example of numerous material procedural omissions in BLM’s EA.”⁵¹²

WWP considered grass, forb, and sagebrush cover in upland and/or riparian areas during 2005, 2007, and 2008, ostensibly for purposes of evaluating sage-grouse habitat. *Grass and forb basal cover* represents the percentage of vegetation at ground level, and *sagebrush and other woody species canopy cover* represents the percentage of the ground overhung by vegetation.⁵¹³ WWP determined in 2005 that seven upland sites averaged grass and forb basal cover, respectively, 5.8% and 2.2%, with sagebrush canopy cover averaging 27.9%, and that at three riparian sites, grass and forb basal cover averaged, respectively, 36.3% and 3.6%, with sagebrush canopy cover averaging 1.7%.⁵¹⁴ In 2007, WWP determined that five sites averaged grass and forb basal cover, respectively, 6% and 2.4%, with sagebrush canopy cover averaging 36.8% and that in 2008, 10 sites averaged grass and forb basal cover, respectively, 17.4% and 9.2%, with sagebrush canopy cover averaging 33.5%.⁵¹⁵ In addition, WWP determined in September 2008 that grasses and forbs did not satisfy a seven-inch minimum average height requirement for herbaceous plants.⁵¹⁶

BLM deemed WWP’s assessment of cover unreliable, either because BLM could not discern the methodology used by WWP or because WWP data was

summarizes the current knowledge of the ecology of sage grouse and, based on this information, provides guidelines to manage sage grouse populations and their habitats.”).

⁵¹² Decision at 92.

⁵¹³ See Tr. 600, 9846, 11596-98, 13123-24, 13153-55.

⁵¹⁴ See WWP Vegetation Cover, 2005 (Ex. W-24); WWP 2005 Monitoring Report at 4, 6 (Table 2 (DCA Cover and Residual Vegetation Amounts by Transect)), 6 (Table 3 (DCA Cover and Residual Vegetation Amounts by Vegetation Type and Pastures)).

⁵¹⁵ See Decision at 117-20; Transect Cover Surveys, dated Oct. 12, 2007 (Exs. W-225 and W-226); DCA Canopy Cover Measurement Summary, 2008 (Ex. W-216); Vegetation Canopy Studies, dated Sept. 14, 2008 (Ex. W-235).

⁵¹⁶ See Tr. 11390, 13166-67, 13169-70; Ex. W-216 at 2 (Grass and forb cover greater than 7 inches, respectively, 2.425% and 1.075%).

substantially different from BLM data, which BLM could only attribute to the methodology employed.⁵¹⁷ For 2005, which was the only year for which a reliable comparison could be made, BLM found, on average and across the Allotment, that grass basal cover, forb basal cover, shrub canopy cover, bare ground/rock, and litter were, respectively (BLM/WWP): 5.5%/5.77%; 5.1%/2.21%; 41.5%/27.93%; 19.2%/20.49%; and 54.9%/70.57%.⁵¹⁸ Although WWP estimated cover in 2005 by looking at a uniform area of ground at regular intervals along a transect, BLM deemed this method to be mathematically imprecise and a likely explanation for the discrepancy between BLM and WWP general cover data.⁵¹⁹

BLM specifically determined that most of the public lands in the Allotment exhibited vegetative characteristics that met all seasonal habitat requirements for nesting and brood-rearing sage-grouse. BLM found that Loamy 7-9 and 10-14 ESD lands in the Allotment provided suitable grasses, forbs, and sagebrush, as well as adequate food and cover needed by sage-grouse, which satisfied the Connelly Guidelines.⁵²⁰ In terms of cover, BLM noted sagebrush and sagebrush/grass canopy cover were important to sage-grouse during the winter, and to hens and chicks during the nesting and brood rearing period.⁵²¹ BLM determined that its Loamy 7-9 and 10-14 ecological sites had an average sagebrush canopy cover of 38%, which exceeded the 20-30% considered suitable for winter habitat. BLM also found those sites provided “herbaceous cover and abundance . . . suitable for both nesting and brood rearing habitat.”⁵²² Grass canopy cover at those sites averaged 25%, which was “well within” the cover preferred by sage grouse identified by Connelly (greater than 15 percent), as was forb canopy cover that averaged 15% (greater than 10 percent).⁵²³ BLM noted that sagebrush was almost the exclusive food source for all sage-grouse during the winter, as well as being consumed by them during the rest of the year. It also noted that forbs “usually constitute[d] the bulk of the[] diet [of

⁵¹⁷ See BLM/WWP Comparison at 9-10.

⁵¹⁸ See *id.* at 10 (Table 7).

⁵¹⁹ See Decision at 117-20; Tr. 600, 9806-09, 13137 (“[I]t’s better to measure [cover] than it is to estimate” (Edwards)).

⁵²⁰ See EA at 71-72, 84.

⁵²¹ See *id.* at 70-71.

⁵²² *Id.*

⁵²³ EA at 71-72; see *id.* at 60-66 (Table 13), 67 (Table 14); Connelly Guidelines at 977.

chicks] during the summer” and determined that there was “an adequate amount of important forbs for sage grouse dietary needs.”⁵²⁴

Judge Heffernan notes that BLM did not, as recommended in its Utilization TR, evaluate forage utilization in sage-grouse nesting and brood-rearing areas.⁵²⁵ The TR states that “[c]ommon locations” for utilization studies “include critical areas,” which are “areas that should be evaluated separately from the remainder of a management unit because they contain special or unique values” and “*could include . . . sage grouse nesting grounds[.]*”⁵²⁶ We see no requirement for BLM to evaluate utilization in nesting or brood-rearing areas. The Judge does not show and the record does not support a finding that BLM’s utilization assessment throughout the Allotment was not sufficient for assessing the likely effects of continued grazing on such areas.

BLM concluded that the “majority of the allotment” was meeting sage-grouse “preference conditions” regarding cover and height of sagebrush and grass species and both cover and diversity of forb species.⁵²⁷ BLM reached these conclusions even in the case of the riparian areas deemed to be NF or FAR, since it found no detrimental effects to sage-grouse arising from the decline in their functionality.⁵²⁸ BLM predicted its proposed deferred rotational system would provide herbaceous material required for food and cover during the nesting and brood-rearing period and improve “key habitat conditions.”⁵²⁹ BLM also expected the new water troughs to provide water for sage-grouse in upland areas and that by promoting the redistribution of cattle, summer habitat for sage-grouse in the riparian areas would be benefited.⁵³⁰ BLM concluded that while the current condition of the Allotment adequately supported sage-grouse, grazing under the deferred rotational grazing system would result in “a faster increase in the overall condition of the [DCA],” which would benefit sage-grouse.⁵³¹ Since the sage-grouse population in the Allotment under the existing

⁵²⁴ *Id.* at 70, 72.

⁵²⁵ *See* Decision at 92-93 (citing Tr. 13935-36; and Utilization TR at 3).

⁵²⁶ Utilization TR at 2, 3 (emphasis added).

⁵²⁷ EA at 84.

⁵²⁸ *See id.* at 72.

⁵²⁹ *Id.* at 84.

⁵³⁰ *Id.*

⁵³¹ *Id.*

grazing regime, as well as elsewhere in Rich County, was considered “healthy” by the UDWR, BLM expected that situation to continue under the new grazing regime.⁵³²

Our review of the record demonstrates that WWP failed to establish any error in BLM’s consideration of sage-grouse habitat requirements. Moreover, WWP failed to establish that sage-grouse habitat conditions have declined since BLM issued its 2004 EA. The ALJ points to no evidence supporting his view that conditions for sage-grouse had declined between the 2004 and 2008 EAs, noting only that it is “inconceivable” that conditions could have so improved since 2004.⁵³³ However, neither he nor WWP took into account the extensive vegetation treatments on close to 2,000 acres of private lands in the Allotment that were undertaken in 2003 and 2004 for the benefit of the sage-grouse, which benefit had yet to be realized by the time of the 2004 EA but that was being realized by the time of the 2008 EA.⁵³⁴ Indeed, from 2004 to 2007, the sage-grouse population in the Allotment and elsewhere in Rich County doubled.⁵³⁵ Thus, by the time of the 2008 EA, UDWR deemed the population in the Allotment and elsewhere in the County to be “healthy[.]”⁵³⁶ Importantly, the Judge does not cite any evidence showing that conditions are unlikely to improve further under the new deferred rotational grazing system.

WWP’s own evidence does not establish that the Allotment is not generally able to support sage-grouse and meet their seasonal habitat needs. At best, its evidence suggests that not all herbaceous cover may meet the seven-inch minimum average height recommended by Connolly. However, it fails to demonstrate that the sites it surveyed represent habitat or areas used by sage-grouse. Nor does it demonstrate how its assessment of grass and forb heights at a limited number of sites (5 and 10) can be extrapolated to the entire Allotment or to any nesting and brood-rearing areas.⁵³⁷ WWP also fails to establish that BLM erred in assessing that the “majority of the allotment is meeting sage grouse preference conditions in . . . cover and *height of perennial grass species*”

⁵³² *Id.* at 8, 71, 72.

⁵³³ WWP P-H Opening Brief at 181.

⁵³⁴ *See* EA at 36-37, 68, 84; 2004 EA at 32.

⁵³⁵ *See* EA at 9.

⁵³⁶ EA at 8, 71, 72.

⁵³⁷ *See* BLM P-H Response Brief at 109.

and that grasses (if not forbs) are at a height sufficient to afford adequate cover to nesting and brood-rearing sage-grouse.⁵³⁸ WWP offered nothing to undermine the results obtained by BLM regarding the adequacy of cover for sage-grouse habitat in the Allotment. WWP sought to extrapolate from the fact that grass in upland and riparian areas does not meet its “potential” HCPC to conclude that it does not meet the cover needs of sage-grouse.⁵³⁹ However, WWP inferences do not establish error in BLM’s assessment of the adequacy of cover.

WWP argued that BLM does not know how changing the grazing system, from season-long, Allotment-wide cattle grazing to short-term, pasture-limited grazing, is likely to affect sage-grouse.⁵⁴⁰ WWP stated: “Sage grouse do not know this schedule—they do not know when the entire herd of cattle will be placed in their nesting or brood rearing habitat.”⁵⁴¹ This statement reflects a misunderstanding of the possible effect of BLM’s deferred rotational system on sage-grouse. BLM did not provide for placing the entire herd in the nesting and brood-rearing habitat of the sage-grouse. Rather, it provided that cattle would be located in one of four pastures at any point in time during the grazing season, which pasture may contain nesting and brood-rearing habitat. Even then, cattle would be located in a pasture for less than 31 days per year, which would coincide with the nesting and brood-rearing period (April 1-June 15) in one of four pastures.⁵⁴² In addition, cattle would not return to that pasture during the nesting and brood-rearing period for the succeeding three years. WWP fails to offer any evidence that sage-grouse are likely to be adversely affected by this grazing regime.

WWP has failed to show BLM did not adequately consider the likely impacts of grazing on the sage-grouse. It has not established that any aspect of BLM’s sage-grouse and sage-grouse habitat analysis was deficient under NEPA.

⁵³⁸ EA at 84 (emphasis added).

⁵³⁹ See Decision at 92 (citing Tr. 11474 (“[I]f you have grasses . . . at small percentage of potential, then their cover is also going to be at a small percentage of potential. . . . And so you could use this to draw inferences [that the cover is insufficient to promote nesting and brood-rearing success][.]” (Carter))).

⁵⁴⁰ See WWP P-H Opening Brief at 193-94 (citing Tr. 10280-83).

⁵⁴¹ *Id.* at 194.

⁵⁴² See Final Decision at 4 (Table 2 (DCA Proposed Deferred Rotation Season & Duration of Use for Cattle & Horses)).

We therefore reject the ALJ's finding that BLM violated NEPA by failing to take a hard look at sage-grouse and a perceived decline in sage-grouse habitat conditions.

D. Likely Impacts of New Water Troughs

ALJ Heffernan ruled that BLM failed adequately to consider likely impacts associated with placing new water troughs in the Allotment's upland areas.⁵⁴³ He stated BLM did not consider likely impacts of increased grazing use around the troughs livestock are likely to congregate near these new water sources:

The unsupported premise that you are *going to move a herd from riparian areas to upland areas* and that there would be no measurable impacts is, in my opinion, factually unsupported. . . . Turning a herd loose on the[] . . . new trough sites would not necessarily result in unmeasurable impacts[.] . . . Rather, the areas around the . . . troughs themselves could, obviously, be heavily impacted, an issue which was never adequately analyzed by BLM in the EA.^[544]

WWP sought to illustrate the increase in upland forage consumption attributable to new water troughs by noting that in 2007, according to its monitoring data, cattle consumed 90% to 96% of approximately 1,769 to 2,273 pounds of forage per acre at 3 riparian sites.⁵⁴⁵ Thus, "livestock moving into the uplands are going to have to replace this amount of forage consumption[,] [although] . . . upland grass and forb production is extremely low, between approximately 100 to 300 pounds per acre."⁵⁴⁶ According to WWP, BLM should be "focusing on . . . the impacts of transferring use from the much more productive riparian area."⁵⁴⁷

WWP and the ALJ do not address BLM's analysis of the likely consequences of placing new water troughs in the upland areas of the Allotment.

⁵⁴³ See Decision at 68-69, 95-98, 138.

⁵⁴⁴ *Id.* at 97 (emphasis added).

⁵⁴⁵ P-H Opening Brief at 191.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

BLM was aware of the likelihood that new water troughs would promote the redistribution of cattle away from riparian areas and into the upland areas.⁵⁴⁸ BLM stated “[t]he use of upland water locations to draw livestock away from riparian areas would *reduce* the incidence of use on them”⁵⁴⁹ and that “[s]ince livestock prefer drinking clean water from a trough because they don’t have to negotiate mud at riparian areas, the additional troughs may cause livestock to congregate at troughs rather than at riparian areas.”⁵⁵⁰ BLM recognized cattle might concentrate, for a time, in the immediate vicinity of the new troughs, but that they would “enhance livestock distribution patterns.”⁵⁵¹ In fact, BLM considered this water system “to be a vital component to the success of the proposed grazing system.”⁵⁵² In its Final Decision, BLM stated that “[t]he construction of a water system would provide upland water sources which would in turn improve the condition of the riparian areas . . . by providing clean water alternatives to livestock.”⁵⁵³ It was therefore incorrect for the ALJ to say that grazing use radiating from the troughs was “completely unassessed[.]”⁵⁵⁴

BLM did not focus on grazing use in the immediate vicinity of the troughs. Instead, it addressed grazing use in the upland areas of Pastures 3 and 4 where the troughs would be installed.⁵⁵⁵ In doing so, BLM relied on Leonard’s considerable experience with the effects of grazing systems on upland and riparian areas to conclude that not all cattle grazing in a pasture would be drawn to its upland areas at any one time, but would be significantly better

⁵⁴⁸ See EA at 75, 76-77, 80, 81.

⁵⁴⁹ *Id.* at 77 (emphasis added).

⁵⁵⁰ *Id.* at 82; see Tr. 83-84, 180-81, 13717, 13719, 13738-39, 13740-41, 13750-54, 13756, 13778-85, 13791-94 (Staggs).

⁵⁵¹ See EA at 85.

⁵⁵² *Id.* at 83; see *id.*, Appendix 1 (Duck Creek Proposed Projects Map).

⁵⁵³ Final Decision at 13.

⁵⁵⁴ Decision at 96.

⁵⁵⁵ See BLM P-H Response Brief at 172 (“The EA does not contain a specific discussion about the impact of increased use in the vicinity of the new troughs.”); BLM P-H Sur-Reply Brief at 24 (“BLM is not denying that ‘heavy use’ would take place in the immediate vicinity of an upland trough.”).

dispersed between riparian and upland areas.⁵⁵⁶ BLM indicated it would be difficult to quantify the numbers of livestock that would relocate to the upland areas because of the new troughs, but it did not expect that redistribution to cause any measurable increase in the number of livestock using those areas. While BLM generally expected heavier utilization in the immediate vicinity of the troughs, it did not expect such use to exceed the utilization objective or otherwise be unacceptable.⁵⁵⁷ BLM concluded: “There should . . . be no measurable increase in use of the uplands by distributing livestock from the riparian areas. The distribution of use from less than 1% of the area occupied by riparian areas to the remaining usable upland[] area[s] . . . would be difficult to measure or quantify and is not expected to have any measurable effect on the uplands.”⁵⁵⁸

BLM noted that upland areas would benefit under the new grazing system because cattle would be located in any one pasture for only one-fourth of the grazing season, rather than for the entire grazing season as in the past, which rendered all of the upland areas accessible at all times to the entire herd.⁵⁵⁹ Thus, while BLM’s grazing system would quadruple the number of livestock in any one pasture, they would remain in that pasture for only 30 or 31 days. Further, it is important to note that the effects of the new water troughs would only occur in *the upland areas of Pastures 3 and 4*, where the troughs are to be located, where grazing would occur during the hot summer months for two years and then rested during the next two years.⁵⁶⁰

ALJ Heffernan found BLM “arbitrarily” concluded that the placement of new water troughs in the upland areas would result in no measurable impact on the quality or quantity of forage or other aspects of the environment.⁵⁶¹ He stated that BLM’s conclusion to the contrary is “factually unsupported.”⁵⁶² The

⁵⁵⁶ See Tr. 15019-20, 15027-28, 15301-03, 15342-45 (Leonard); EA at 75, 76-77, 85; Leonard Declaration at unp. 4 (“Off-site water development is likely to help any successful grazing strategy in my experience.”).

⁵⁵⁷ See Tr. 13790-91, 13795, 13958-59 (Staggs), 15303-07 (Leonard).

⁵⁵⁸ EA at 75; see *id.* at 80.

⁵⁵⁹ See Tr. 13719-20 (Staggs), 15306-07 (Leonard).

⁵⁶⁰ See EA at 77; Final Decision at 4 (Table 2).

⁵⁶¹ Decision at 96, 97.

⁵⁶² *Id.* at 97.

ALJ erred in discounting the professional opinion of BLM experts that was based on their past experience with placing water troughs on the public lands.⁵⁶³ Without reason or explanation, ALJ Heffernan ignored or “failed to give any weight to the testimony of Leonard, an undisputed expert in range [management] systems,” who “testified that he has personally observed similar situations in which the increased upland use was in fact not measurable.”⁵⁶⁴ Such expert opinion is entitled to deference and should not have been disregarded by the ALJ in the absence of credible evidence to the contrary.

The ALJ agreed with WWP’s argument that BLM improperly concluded that the congregation of cattle around the new troughs was not likely to cause excessive utilization and appears to have been persuaded by WWP evidence that “some” of the new troughs will be located in upland areas that have already experienced utilization in excess of 50% during most of the years monitored by WWP.⁵⁶⁵ But WWP offers nothing to substantiate its view that livestock will likely be drawn to upland areas and congregate around the new troughs in such numbers and at such times as to adversely affect the condition of the forage or other aspects of the environment.⁵⁶⁶ BLM, on the other hand, presented evidence showing upland areas surrounding the new troughs are currently “underutilized” and that increased use by livestock can be accommodated “without exceeding BLM’s utilization objective[.]”⁵⁶⁷ Moreover, BLM correctly notes that WWP’s evidence, to which the Judge referred, has not been shown to represent forage conditions where the new troughs will be located.⁵⁶⁸ Indeed, we find they will be located quite some distance from WWP’s utilization monitoring sites.⁵⁶⁹

⁵⁶³ *Id.*

⁵⁶⁴ BLM NA/Petition at 29.

⁵⁶⁵ *See* Decision at 97, 98 (citing Tr. 3737-40 (Catlin); Map of WWP Monitoring Sites, dated May 2009 (Ex. W-28); and Map of Water Developments, dated January 2010 (Ex. W-123)).

⁵⁶⁶ *See* Tr. 1445-46 (“[T]he assumption is that there’s going to be livestock attracted to the troughs to increase utilization of grasses in this area.”), 1446-47 (Catlin).

⁵⁶⁷ *See* Decision at 97.

⁵⁶⁸ *See* BLM SOR/Answer at 29-30; WWP P-H Opening Brief at 192-93; BLM P-H Response Brief at 173.

⁵⁶⁹ *See* Exs. W-28 and W-123.

WWP postulated that increased grazing use will radiate out from the new troughs; grazing will be most concentrated nearest any trough and decrease over a one-half mile distance in every direction, from the trough.⁵⁷⁰ WWP states generally that grazing use will increase in a 400 to 500-acre area surrounding each of the new troughs, and that given six troughs, approximately 2,400 acres of public lands in the Allotment (close to 20%) will be affected.⁵⁷¹ But most of its evidence relates to ecological conditions and the percentage of grasses, forbs, and shrubs detected at BLM's ESI sites nearest the location of the new troughs.⁵⁷² BLM properly argues that WWP's evidence does not necessarily "refute" its "conclusion that the new trough locations are currently underutilized by livestock and sufficiently productive to handle increased livestock use."⁵⁷³

WWP provided photographs purporting to show "very heavy utilization" in the vicinity of the existing water troughs.⁵⁷⁴ We are not persuaded that these aerial photographs depict heavy utilization by cattle or if they do, that such utilization is likely to occur in the vicinity of the new troughs.⁵⁷⁵ Nor are we prepared to credit Holechek's general assertion that "[t]he heavy use of vegetation around watering points is well documented," since no effort was made by WWP to provide any documentation showing heavy use is likely given the specific circumstances of the present case.⁵⁷⁶

BLM notes that these six new troughs, which are in addition to eight existing troughs, are intended "to help disperse and hold livestock away from riparian areas" and that it does not expect that they will cause substantial numbers of livestock, let alone the entire herd, to move from riparian to upland areas at any one time in either Pasture 1 or 2.⁵⁷⁷ WWP and the ALJ do not acknowledge that BLM will be monitoring grazing use in the vicinity of the water sources on the Allotment on an annual basis and that if it determines such use is unacceptable, BLM will take remedial steps (e.g., require the placement of

⁵⁷⁰ See WWP P-H Brief at 191 (citing Tr. 1447; and Holechek at 307).

⁵⁷¹ See Tr. 1448.

⁵⁷² See Decision at 97; Tr. 1405-45, 1445-46.

⁵⁷³ NA/Petition at 30 n.19.

⁵⁷⁴ Decision at 97 (citing Ex. W-136 at 69-72, 80).

⁵⁷⁵ See WWP SOR/Answer at 30.

⁵⁷⁶ Decision at 98 (quoting Holechek at 307).

⁵⁷⁷ BLM SOR/Answer at 27.

salts or “just turn off the water source”).⁵⁷⁸ BLM does not know to what extent cattle will be drawn from riparian areas to the immediate vicinity of the new troughs or elsewhere in the upland areas. Nor can it predict to what extent grazing use attributable to the new troughs is likely to measurably impact the upland areas, given a multitude of unknowns (*e.g.*, the extent of use, the period of rest afforded, and other factors) that can be considered and analyzed based on future monitoring data. However, BLM is not required to engage in a “crystal-ball inquiry.”⁵⁷⁹

In sum, we find that BLM fulfilled its NEPA obligation and took a reasonably “hard look” at likely impacts attributable to the new troughs.

E. Likely Impacts of Future Grazing

ALJ Heffernan concluded that BLM failed adequately to address the appropriate stocking level and likely future impacts of grazing because it did not have an accurate record for the actual number of cattle that had grazed the Allotment in past years.⁵⁸⁰ Instead of conducting its own cattle counts, he noted that BLM relied on the actual use reports submitted by permittees at the end of each grazing season to determine how many cattle had grazed the Allotment.⁵⁸¹ ALJ Heffernan also found that WWP raised sufficient question about the accuracy of actual use reports to question BLM’s forage utilization assessment based on reported actual use, as well as the appropriate number of cattle that should be allowed to graze in future years in order to achieve identified utilization objectives. Put simply, “if BLM did not know how many cattle were actually turned out during the grazing season, how could they know what the actual utilization was, and, in turn, how could they derive an accurate stocking rate[?]”⁵⁸²

⁵⁷⁸ BLM P-H Response Brief at 173 (citing Tr. 13763, 13782 (Staggs), 15294-96 (Leonard)).

⁵⁷⁹ *Howard B. Keck, Jr.*, 124 IBLA 44, 50 (1992), *aff’d*, *Keck v. Hastey*, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993) (quoting *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

⁵⁸⁰ *See* Decision at 107-12, 138.

⁵⁸¹ *See id.* at 109 (citing Tr. 12306-08, 12311-13, 12316, 12324-25).

⁵⁸² *Id.* at 107-08.

The ALJ's basis for questioning the accuracy of actual use reports is confusing and unconvincing. He noted only that Catlin had overflowed the Allotment on both July 26, 2006, and June 24, 2008, respectively counting 450 and 304 cattle, which differed from the actual use reports for 2006 (538 cattle) and 2008 (641 cattle).⁵⁸³ He allowed for the fact that Catlin's livestock counts were not entirely free from error, might not have observed and included all cattle then on the Allotment, and was "subject to some legitimate criticism."⁵⁸⁴ Nonetheless, ALJ Heffernan was convinced Catlin's survey was sufficiently accurate to require that BLM do more because it "did not know with any responsible degree of accuracy how many cattle were, in fact, grazing on the Duck Creek Allotment."⁵⁸⁵

The ALJ agreed with WWP's argument that since the actual number of cattle grazing the Allotment was considerably less than the number BLM calculated using actual use reports, it erred in determining that a larger number of cattle was responsible for current utilization and, consequently, "BLM's utilization calculations were skewed in the permittees' favor, because adverse impacts attributed by BLM to a larger number of cattle were actually being generated by a substantially smaller number of cattle."⁵⁸⁶

ALJ Heffernan ruled WWP had made "a prima facie case," based on two aerial livestock counts that substantially fewer cattle had grazed the Allotment

⁵⁸³ See Decision at 108, 109 (citing Tr. 1571; and Comparison of Actual Use Reports & Census, dated November 2009 (Ex. W-74C), at unpag. 1, 2); Tr. 3609-10, 3612, 3616, 3619-20, 3628-30, 12313-16.

⁵⁸⁴ Decision at 109; see Tr. 3627 ("[I]f our survey . . . of these two years is accurate and represents what is often happening in this Allotment, that means that grazing in the past also is . . . likely not to match the Actual-Use Reports.").

⁵⁸⁵ Decision at 109; see *id.* ("BLM testified that they never checked the accuracy of the permittees' actual use reports, and BLM never conducted any kind of animal census on the allotment.") ("BLM did not actually know how many cattle were turned out annually.").

⁵⁸⁶ *Id.* at 108; see *id.* at 108-09 ("Appellants also contend that any stocking rate evaluation for the next grazing year that is based on the permittees' actual use reports will be in material error, because it will allow for the potential of overgrazing, based upon the permittees' alleged over reporting of the number of cattle actually turned out.").

in the past than had been reported by the permittees in their actual use reports and that BLM failed to rebut this prima facie case.⁵⁸⁷ Since BLM did not know how many cattle had actually grazed the Allotment in the past, he found its “utilization calculations highly suspect, which . . . constitutes reversible error.”⁵⁸⁸

Our review of the record shows that the ALJ’s findings, rulings, and conclusions regarding actual cattle numbers and future grazing determinations are without merit. BLM relied on actual use data, which reported a total of 1,813 AUMs (2005), 2,818 AUMs (2006), 2,761 AUMs (2007), and 3,058 AUMs (2008).⁵⁸⁹ BLM has consistently emphasized that accurate actual use data is important, since “[i]naccurate . . . data may result in poor management decisions.”⁵⁹⁰ In its MFP, BLM stated that “[a]ctual use data is necessary to make utilization and trend studies functional and used in combination with those studies, actual use provides a means for monitoring the range program in progress.”⁵⁹¹ As Catlin stated in testimony, “[Actual use] tells you whether . . . the grazing use that occurs is actually leading to the effects that you’re measuring.”⁵⁹²

There is no impropriety in BLM relying on actual use reports provided by permittees. The permittees are required to submit those reports and to certify the use reported.⁵⁹³ In its MFP, BLM states: “Accurate actual use information must be submitted by every livestock permittee within 15 days after completing

⁵⁸⁷ *See id.* at 109.

⁵⁸⁸ *Id.* at 110.

⁵⁸⁹ *See* Ex. B-105.

⁵⁹⁰ Rangeland Monitoring, Actual Use Studies, TR 4400-2, BLM, dated April 1984 (Ex. B-35) (Actual Use Studies TR), at 1.

⁵⁹¹ MFP at RM-3.8; *see* 2008 Monitoring Report at 17; Tr. 1592-93 (“So it’s impossible to make rational decisions on grazing management unless you . . . know what cattle really grazed. Because then you can say, this was the results of that number. And we can then make a decision based on the linkage between the conditions of the land and the number of cattle that were really there.”).

⁵⁹² Tr. 3609.

⁵⁹³ *See* 43 C.F.R. § 4130.3-2 (“[BLM] may specify in grazing permits . . . [the] requirement that permittees . . . submit within 15 days after completing their annual grazing use . . . the actual use made.”)

their annual grazing use. . . . The actual use information will be submitted on a letter which includes a signed certification of the accuracy of the actual use figures.”⁵⁹⁴ BLM’s Actual Grazing Use Report (Form 4130-5 (November 2004)), states, in preprinted language: “I CERTIFY That this is a complete and accurate report of my grazing use.”⁵⁹⁵

We find no basis in fact to support the ALJ finding that these actual use reports were sufficiently inaccurate to render suspect BLM’s utilization calculations.⁵⁹⁶ And, the record raises serious and substantial questions regarding the accuracy of WWP’s aerial livestock counts. Those questions include: (1) Catlin, who performed the counts, lacked training and experience in aerial counts, and relied on Allotment maps that excluded acreage where cattle might have been found; (2) the plane flew at approximately 90 miles per hour at a height of from 500 to 1,000 feet above the ground; (3) the flight time over the 22,731-acre Allotment was less than 30 minutes on both occasions; (4) the Allotment contained, on public and/or private lands, approximately 300 acres of aspen, averaging 15 to 20 feet in height with a canopy of from 5 to 8 feet in diameter, approximately 500 to 600 acres of juniper, Basin big sagebrush, averaging 6 to 8 feet in height, typically found in the valley bottoms, and 5 steep-sided canyons, all of which could have concealed hundreds of cattle; and (5) Catlin admitted that he may have missed cattle.⁵⁹⁷ We do not find WWP’s

⁵⁹⁴ MFP at RM-3.8.

⁵⁹⁵ Part of Exs. B-40, B-41, W-116, and W-118; *see id.* (“Title 18 U.S.C. Section 1001 makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.”); Actual Use Studies TR at 2-3; Tr. 3610-14.

⁵⁹⁶ Decision at 109.

⁵⁹⁷ *See* BLM P-H Response Brief at 51-52, 61-62, 65, 66-69, 70 (citing Tr. 1590 (“There are a few small parts of the allotment that are aspen forest[.] . . . These aspen are low to the ground and you can actually see into them[.] . . . [T]hey’re really quite sparse.” (Catlin)), 3615-16, 3620 (“[In 2008] we made five passes of . . . the Allotment in a . . . loop[.] . . . And this took approximately 15 to 20 minutes in the air.”), 3622 (“[Y]ou expect the cattle to generally be evenly distributed across all of these areas” (Catlin)), 3629, 4002-05, 4010-12, 4055-58, 4069, 4224-25, 4256-58, 4290-97, 4936, 5082-83, 5120, 5135, 5152, 5153 (“[I]t’s not wooded” (Swanson)), 5196-97, 5228-31, 5244-46, 12329-40, 12657-59, 12877,

aerial counts undermined BLM's ability to rely on the permittees' actual use reports.⁵⁹⁸

[9] BLM can require and rely on actual use reports submitted and certified as accurate by grazing permittees under penalty of perjury.⁵⁹⁹ Having been accepted and relied upon by BLM for range management purposes, the actual use reports are themselves prima facie correct.⁶⁰⁰ Nowhere do we find anything that required BLM to independently verify the accuracy of the actual use reports, or, when challenged at the hearing, to establish the veracity of the reports. Given their prima facie validity, WWP was required to demonstrate, by

12879-80, 12899-901, 12901 (“And so over the years what I’d done is I just come to realize is that . . . when I finish the count, I never assume I had a hundred-percent count no matter what the terrain is. . . . I expect at least a 20- to 40-percent margin of error in there.” (Stager)), 12904-05, 12910 (“An area the size of Duck Creek would take me a minimum of two hours [to count cattle]” (Stager)), 12922-26, 12931-35, 12941 (“Q. [BLM] . . . [C]ould the people in the airplane have missed up to 300 mature animals on the Allotment? A. [Stager] Yes.”), 12941-57, 12974-77 (referring to Aerial Photographs, dated Aug. 19, 2005 (Ex. W-124) at Photograph 46), 14149-56, 14720-21, 14721 (“[T]he [aspens and juniper stands] are [pretty dense], from an aerial perspective especially.” (Stager)); 2008 DCA Livestock Census Map (Ex. W-73) (Almost all cattle in Pasture 2); 2006 DCA Livestock Census Map (Ex. W-113) (Almost all cattle in Pasture 1); June 24 Census Map (Ex. W-114); Flight Information 2005, 2006, & 2008 (Ex. W-130); EA at 55 (Table 8), 58; Allotment Boundary Map (Ex. B-56); and Actual Use Studies TR at 3 (“Aerial counts of animals grazing in tree and tall brush-covered terrain have limited value because the animals are difficult to spot.”)); 2008 Monitoring Report at 16 (“This is a grazing allotment where all livestock are viewable from the air.”), 17.

⁵⁹⁸ See Tr. 12325-26.

⁵⁹⁹ 43 C.F.R. 4130.3-2; MFP at RM-3-8 (“Accurate actual use information must be submitted by every livestock permittee within 15 days after completing their annual grazing use.”); Actual Grazing Use Report (Form 4130-5 (November 2005))

⁶⁰⁰ See *Kootznoowoo, Inc. v. Heirs of Jimmie Johnson*, 109 IBLA 128, 135 (1989); *In Re Pacific Coast Molybdenum Co.*, 75 IBLA at 22, 90 I.D. at 356 (“Decisions issued by [BLM] state offices, pursuant to their delegated authority, are presumptively valid.”).

a preponderance of the evidence, that actual use reports are not correct and cannot be relied on. This burden would be met by establishing that the actual use reports are somehow inherently unreliable or, in fact, incorrect.⁶⁰¹ WWP failed to carry that burden. All WWP established was that on two particular days Catlin counted livestock in numbers that differed from the numbers reported by the permittees. It did not establish that actual use reports are inherently unreliable or that these reports were incorrect.

F. Likely Cumulative Impacts

BLM is required by section 102(2)(C) of NEPA and applicable implementing rules to consider the potential cumulative impacts of a proposed action.⁶⁰² Such impacts are those that result from the incremental impact of the proposed action “when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”⁶⁰³ They include impacts that result from individually minor but collectively significant actions taking place over a period of time.⁶⁰⁴

ALJ Heffernan found BLM failed adequately to consider the likely cumulative impacts of the proposed grazing use and related improvements on the public lands *and* past, present, and future activities likely to occur on the 9,641 acres of private and State land within the Allotment (*e.g.*, vegetation treatment, fencing, water development).⁶⁰⁵ He specifically referred to 1,950 acres of vegetation treatment to improve sage-grouse habitat and 10.85 miles of fencing to exclude livestock from the treatment areas.

⁶⁰¹ See *Kootznoowoo, Inc. v. Heirs of Jimmie Johnson*, 109 IBLA at 135-36; *In Re Pacific Coast Molybdenum Co.*, 75 IBLA at 22, 90 I.D. at 356.

⁶⁰² 40 C.F.R. § 1508.25; see *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809-10 (9th Cir. 1999); *Howard B. Keck, Jr.*, 124 IBLA at 53.

⁶⁰³ 40 C.F.R. § 1508.7.

⁶⁰⁴ See *id.*

⁶⁰⁵ See Decision at 102-05, 138.

Vegetation treatment and fencing were undertaken on private lands in 2003 and 2004.⁶⁰⁶ In the MFP Final ES, BLM predicted that such treatments, consisting of herbicide sprayings and burnings, followed by seeding were *likely* to adversely affect sage-grouse and their habitat. The MFP Final ES stated that mechanical treatments and seeding, such as were undertaken on the private lands in the Allotment, *may* have adverse consequences for sage-grouse and other wildlife.⁶⁰⁷

ALJ Heffernan rightly observed that BLM “cannot focus exclusively on the environmental impacts of an individual project,” but must consider the combined effects of the project at issue and “related projects.”⁶⁰⁸ In concluding that BLM failed to consider cumulative impacts, he supposed the existence of such impacts based on activities that have occurred on private and State lands that are “intermixed and intertwined” with activities on the public lands of the Allotment.⁶⁰⁹ But his finding that BLM did not adequately consider potential cumulative impacts of the Proposed Action is not supported by the record.

The EA, tiered to the MFP Final ES, includes a discussion of the potential cumulative impacts of the Proposed Action.⁶¹⁰ BLM recognized that “the health of the region as a whole [is] important for the survival of many native [wildlife] species,” but stated that the proposed grazing and grazing on other private and State lands was “not . . . expected to affect [wildlife] habitat . . . to a measurable degree.”⁶¹¹ Thus, BLM concluded that the Proposed Action would not contribute to any cumulative impact to sage-grouse or other wildlife.⁶¹² BLM further noted that the UDWR had not identified any likely cumulative impacts to sage-grouse or other wildlife.⁶¹³ As noted by BLM, scientific research showed “changes in grazing practices combined with vegetation treatments could result in

⁶⁰⁶ *See id.* at 103-05 (citing EA at 36-37; MFP Final ES at 3-52; and Tr. 9990-92 (discussing MFP Final ES at 3-52)).

⁶⁰⁷ MFP Final ES at 3-52; EA at 37; *see* MFP Final ES at 1-21, 1-22, 1-24.

⁶⁰⁸ Decision at 103 (quoting *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1133 (9th Cir. 2007)).

⁶⁰⁹ *Id.*

⁶¹⁰ *See* EA at 90-93; Final Decision at 2.

⁶¹¹ EA at 91.

⁶¹² *Id.*

⁶¹³ *See id.*

substantial increases in sage grouse populations.”⁶¹⁴ Given the large-scale of treatments on the Allotment’s private lands, BLM anticipated that “sage grouse populations would increase.”⁶¹⁵ As to impacts on sage-grouse and other wildlife from new fencing, BLM expected they would be “minimal,” especially since they would be mitigated by mowing the fenceline prior to construction to reduce the likelihood of collisions.⁶¹⁶

BLM acknowledged that past vegetation treatments were undertaken to enhance sage-grouse habitat, but it did not expressly consider such activities in its assessment of cumulative impacts.⁶¹⁷ However, BLM’s analysis of the present condition of the public land portions of the Allotment in 2008 necessarily took into account any lingering effects of the vegetation treatments undertaken on the private lands in 2003 and 2004.⁶¹⁸ As BLM states, the effects of past treatments had, by the time of the EA, become “part of the baseline environmental condition that BLM used to analyze the impact of the proposed action.”⁶¹⁹ Thus, “the actions that had been undertaken on the DCA’s private lands were fully accounted for as part of the existing environment.”⁶²⁰ WWP offers nothing that undermines this conclusion.⁶²¹

WWP offered no evidence that there is likely to be an interaction between the proposed grazing and related activities on public lands or any past, present, or reasonably foreseeable future activity on private or State lands that might result in a cumulative impact which BLM did not address.⁶²² WWP did not identify any cumulative impacts that were overlooked or not adequately addressed by BLM in the EA or the MFP Final ES to which it was tiered.⁶²³ In

⁶¹⁴ *Id.* at 84.

⁶¹⁵ *Id.*

⁶¹⁶ *Id.*

⁶¹⁷ *See id.* at 36-37, 68-69, 83.

⁶¹⁸ *See, e.g., id.* at 53-67.

⁶¹⁹ BLM SOR/Answer at 17.

⁶²⁰ NA/Petition at 15 (citing, *e.g.*, EA at 68).

⁶²¹ *See* WWP P-H Opening Brief at 196-97.

⁶²² *See, e.g., Umpqua Watersheds, Inc.*, 158 IBLA 62, 73 (2000); *Klamath Siskiyou Wildlands Center*, 157 IBLA 332, 339-41 (2002); *Wyoming Outdoor Council*, 147 IBLA 105, 109 (1998).

⁶²³ *See* Answer at 14-15.

order to demonstrate a deficiency in BLM's cumulative impacts analysis, "it is not sufficient merely to note the existence of other . . . projects . . . without concretely identifying the adverse impacts caused by such other . . . projects to which the action being scrutinized will add."⁶²⁴ Since WWP did not do so, it failed to show, with objective proof, any error in BLM's cumulative impacts analysis. The ALJ's ruling to the contrary is without support in the record.⁶²⁵

G. Reasonable Range of Alternatives

Judge Heffernan errs in finding that BLM failed to consider a reasonable range of alternatives to the Proposed Action by not considering alternatives for grazing at a reduced or no-stocking rate.⁶²⁶ He specifically held that BLM should have considered an alternative that provided for grazing below that authorized by the Proposed Action, as well as a no-grazing alternative for the Allotment.

[10] BLM is required by NEPA to consider "appropriate alternatives" to the proposed action that will accomplish its intended purpose, are technically and economically feasible, and have a lesser environmental impact.⁶²⁷ It should also consider a no action alternative.⁶²⁸ If BLM decides not to afford detailed analysis to any alternative, BLM is required to briefly explain the reasons for not doing so, whereupon the burden falls to an appellant to demonstrate, with objective proof, that BLM erred in its decision.⁶²⁹ BLM is obligated to consider "only those alternatives necessary to permit a 'reasoned choice'" and to have a clear basis for choosing among competing options.⁶³⁰ Where BLM fails to consider reasonable alternatives, we must set aside its decision as violating

⁶²⁴ *National Wildlife Federation (NWF)*, 150 IBLA 385, 399 (1999).

⁶²⁵ NA/Petition at 15.

⁶²⁶ See Decision at 99-102, 138.

⁶²⁷ See, e.g., *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *Bales Ranch, Inc.*, 151 IBLA at 363.

⁶²⁸ See *Southern Utah Wilderness Alliance*, 159 IBLA 220, 240-41 (2003).

⁶²⁹ See *Biodiversity Conservation Alliance*, 171 IBLA 218, 238 (2007).

⁶³⁰ See, e.g., *State of California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

section 102(2)(E) of NEPA, “even if we agreed that the proposal would have no significant impact.”⁶³¹

The ALJ ruled BLM was obliged by NEPA to consider a reduced grazing alternative and a no grazing alternative in the EA.⁶³² He refers to *WWP v. Rosenkrance*,⁶³³ in which the U.S. District Court in Idaho addressed WWP’s NEPA challenge to BLM’s issuance of new 10-year grazing permits. The ALJ focused on the District Court ruling that BLM erred by considering only three action alternatives that provided for “nearly equivalent” levels of grazing on all of the allotments at issue and by not considering a no action alternative.⁶³⁴ The District Court found it “[m]ost troubling [] that BLM did not consider a real no action alternative” and that “BLM’s purported ‘No Action’ Alternative involves grazing,” an “alternative [that] require[s] agency action through issuing new ten-year grazing permits.”⁶³⁵ The Court stated: “No action would be no action. This is a reasonable, and obvious, alternative to issuing new grazing permits.”⁶³⁶ The Court stated that BLM’s grazing permit rule “does not compel [BLM] . . . to issue a permit . . . [or] direct BLM to prefer[] grazing over no grazing,” but simply recognizes that BLM may issue a grazing permit for public lands deemed to be *available* for grazing in the applicable land use plan.⁶³⁷ The Court also held BLM was required to consider a reduced grazing alternative: “It is also eminently reasonable that BLM should have considered an alternative that significantly reduced grazing levels from previous permits. . . .”⁶³⁸ It therefore concluded:

The “rule of reason” . . . dictates that BLM should have analyzed a no grazing alternative, or a reduced grazing alternative, or both, before issuing grazing permits. BLM’s regulations certainly do not foreclose those alternatives. Accordingly, because BLM’s EA only

⁶³¹ Decision at 101 (quoting *Powder River Basin Resource Council*, 120 IBLA 47, 56 (1991)).

⁶³² *Id.*

⁶³³ 2011 U.S. Dist. LEXIS 1288.

⁶³⁴ Decision at 101.

⁶³⁵ 2011 U.S. Dist. LEXIS 1288 at *28.

⁶³⁶ *Id.*

⁶³⁷ *Id.* at *31 (quoting 43 C.F.R. § 4130.2(a)).

⁶³⁸ *Id.* at *32.

considers three nearly equivalent alternatives and nothing else, the EA violates NEPA.^[639]

We believe the ALJ misapplied and misconstrued *Rosenkrance*. The land use plan at issue in *Rosenkrance* only made the public lands at issue “available” for grazing and did not preclude a true no grazing alternative.⁶⁴⁰ But in the present case, the 1980 Randolph MFP directed BLM to allow grazing on all public land areas determined to be suitable for grazing and determined that all public lands in the DCA were suitable for grazing.⁶⁴¹ WWP would have us readjudicate the suitability of the DCA for grazing. Although the Randolph MFP was issued nearly 30 years ago, neither the ALJ nor this Board has the authority to change its terms, which is committed to the Director, BLM.⁶⁴²

BLM considered both reduced and no grazing alternatives in this case but decided not to afford them detailed analysis.⁶⁴³ BLM concluded that the reduced grazing alternative would not achieve one of the principal purposes of the Proposed Action, which was to make significant progress towards fulfilling the Utah S&G for riparian areas, because reduced grazing would not redirect grazing use away from riparian areas.⁶⁴⁴ BLM also concluded the no grazing alternative was precluded by the applicable land use plan, which directed BLM to authorize grazing use of the public lands at issue.⁶⁴⁵ BLM properly notes on appeal that the no grazing alternative need not be considered if it would conflict with the “basic policy objectives” for managing the public lands at issue, but should be considered only at the land use planning stage when such objectives

⁶³⁹ *Id.*

⁶⁴⁰ *Id.* at *29.

⁶⁴¹ See MFP at RM-1.1; MFP Final ES, Appendix 10, at A10-5 (Table 4).

⁶⁴² See 43 C.F.R. § 1610.5-2; e.g., *Rainer Huck*, 168 IBLA 365, 396 (2006); *Joyce Padilla*, 119 IBLA 33, 43 (1991); *Idaho Department of Fish and Game*, 112 IBLA 72 (“A challenge to the suitability of land for public sale under 43 U.S.C. § 1713 (1982) is subject to the exclusive appeal procedures set forth in 43 CFR 1610.5-2.”), 74-75 (1989).

⁶⁴³ See Tr. 12360-61 (Gates); WWP P-H Opening Brief at 198 n.1.

⁶⁴⁴ See EA at 5, 10-14, 19, 75.

⁶⁴⁵ See *id.* at 35-36.

are being established.⁶⁴⁶ We also note that BLM considered both a reduced and no grazing alternative in the MFP Final ES, to which the EA was tiered.⁶⁴⁷

In any event, the no grazing alternative simply was not feasible at the time of the 2008 Final Decision because the existing 10-year permits were not due to expire until February 28, 2011. Even at the expiration of the 10-year term, in accordance with the applicable Congressional appropriations act for the Department in effect at that time, were BLM not to issue new permits, the Permittees would be authorized to graze livestock in the same manner as they were grazing under their expired 10-year permits.⁶⁴⁸ BLM simply could not then have implemented a no grazing alternative.

⁶⁴⁶ See NA/Petition at 12 (quoting *Headwaters, Inc. v. BLM*, 914 F.2d at 1180).

⁶⁴⁷ See MFP Final ES at iii (“*Alternatives Considered*”: a. Elimination of all livestock grazing on public lands[;] b. Restricted livestock use (utilization ceiling, no spring grazing, riparian habitat protection[;] c. Reduction of adverse impacts to the proposed action[;] d. No action (continuation of present management) [; and] e. Increased livestock grazing (vegetation treatments”), 1-5 to 1-11, 8-1 to 8-2, 8-3 to 8-15 (No grazing), 8-16 to 8-30 (Reduced grazing); *id.*, Appendix 4, at A4-2.

⁶⁴⁸ See Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38, 102, § 1101(a), Division B (“[Amounts appropriated] under the authority and conditions provided in applicable appropriations Acts for fiscal year 2010”); Continuing Appropriations Act, 2011, Pub. L. No. 111-242, 124 Stat. 2607, § 101 (“[Amounts appropriated] as provided in the applicable appropriations Acts for fiscal year 2010 and under the authority and conditions provided in such Acts”); Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904, 2959, § 416, Division A (“The terms and conditions of section 325 of Public Law 108-108, regarding grazing permits at the Department of the Interior . . . shall remain in effect for fiscal year 2010”); Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1307-08, § 325 (“A *grazing permit* . . . issued by the Secretary of the Interior . . . that expires . . . during fiscal years 2004-2008 *shall be renewed* . . . The terms and conditions contained in the expired . . . permit . . . shall continue in effect under the renewed permit . . . until such time as the Secretary of the Interior . . . completes processing of such permit . . . in compliance with all applicable laws and regulations[.]” (Emphasis added)); NA/Petition at 43-44.

WWP argues that BLM could have considered an alternative that not only reduced grazing use, but also redirected grazing away from riparian areas.⁶⁴⁹ But in preparing its EA, BLM decided not to afford detailed analysis to an alternative that only reduced grazing use. We find no error in BLM not pairing a reduced grazing alternative with its rotational grazing system and related measures. We conclude that BLM separately and adequately afforded such measures adequate consideration by addressing them in conjunction with the Proposed Action.

WWP relies upon *WWP v. Abbey*,⁶⁵⁰ in which the Ninth Circuit held, *inter alia*, that BLM violated NEPA by failing to consider reduced and no grazing alternatives in an EA issued in connection with the proposed renewal of a grazing permit. But *Abbey* is inapposite because it involved public lands within a National Monument that expressly required BLM to protect objects of biological significance that might be negatively impacted by grazing. The designation of the Monument effected a “change[] [in] the legal landscape of the permitting process [that required] BLM [to] consider this change in determining the reasonable range of alternatives[.]”⁶⁵¹ The Court pointed out that BLM failed to “consider both the terms of the Proclamation [creating the National Monument] and the objects of the Proclamation to be preserved . . . when it rejected without analysis the no-grazing alternative or the possibility of more limited grazing.”⁶⁵² It found “the EA process . . . deficient in its consideration of alternatives insofar as it did not consider in detail any alternative that would have reduced grazing levels on the Allotment *in light of the Monument’s protected objects.*”⁶⁵³

In the present case, BLM was not required to afford the public lands at issue special protection and need not address whether reducing or eliminating grazing is necessary to achieve such protection. Further, the Court pointed out that the change in the legal landscape was what rendered the analysis of a no grazing alternative in an earlier EIS insufficient to satisfy NEPA.⁶⁵⁴ Here, there is no such change in the legal landscape. The earlier MFP Final ES remains sufficient to satisfy NEPA.

⁶⁴⁹ See WWP Response at 8, n.1.

⁶⁵⁰ 719 F.3d 1035, 1050-53 (9th Cir. 2013).

⁶⁵¹ BLM SOR/Answer at 15 (quoting 719 F.3d at 1053).

⁶⁵² 719 F.3d at 1053.

⁶⁵³ *Id.* (emphasis added).

⁶⁵⁴ See *id.* at 1052.

Rather, we conclude that the present case is akin to *WWP v. BLM*, wherein the Tenth Circuit held that since the applicable land use plan provided for grazing, BLM was justified in not studying in detail a no grazing alternative or any other “aggressive environmentally protective alternatives”:

[A]n agency is not obligated to analyze options that it reasonably determines are outside its statutory mandate or are impractical or ineffective *as judged against the agency’s objectives for a particular action or project*. . . .

. . . .

WWP’s arguments concern one objective: improvement of rangeland health. This is an important objective, but it was not BLM’s sole concern. The agency also sought to fulfill its multiple use mandate, which is reflected in the [1987] Lander RMP, the FLPMA, and the Taylor Grazing Act--*all of which contemplate livestock grazing on the land*. The EA therefore crafted two alternatives that incorporated many of the Appropriate Actions [from the RH and PFC Assessments], with adjustments to balance the competing goal of facilitating continued grazing.

BLM’s effort to balance these competing objectives is sufficient to explain its failure to pursue aggressive environmentally protective alternatives.^[655]

Here, since the reduced and no grazing alternatives would result in BLM’s failure to adhere to its basic policy objectives, which are defined in the

⁶⁵⁵ 721 F.3d at 1275-76 (emphasis added); *see id.* at 1268 (“The Lander RMP provided for continued grazing on public lands consistent with multiple use planning.”), 1271 (“The [2009] EA did not analyze the No Grazing alternative because the 1987 Lander RMP had ‘concluded that eliminating livestock grazing from all public lands would not be a viable or necessary option,’ and this document guided BLM.”).

1980 Randolph MFP as permitting grazing on suitable public lands. BLM was not required to address such alternatives in the EA.⁶⁵⁶

Based upon the record and the controlling legal authority, we conclude that WWP did not carry its burden to establish, with objective proof, that BLM erred in its decision not to afford the reduced or no grazing alternatives detailed consideration.

VI. TAYLOR GRAZING ACT ISSUES

A. Compliance with Utah Standard 2

The ALJ held that BLM failed to properly assess whether grazing was being undertaken in compliance with Utah Standard 2, which concerns the PFC of riparian areas in the Allotment.⁶⁵⁷ But the record does not support his ruling.

Utah Standard 2 specifically provides: “Riparian and wetland areas are in properly functioning condition. Stream channel morphology and functions are appropriate to soil type, climate and landform.”⁶⁵⁸ BLM assessed the PFC status of the riparian and wetland areas in the Allotment under the PFC TR, concluding that the Standard was generally being met.⁶⁵⁹ Leonard, who participated in the preparation of the PFC TR and hundreds of actual PFC assessments, attested to the validity of BLM’s PFC assessment.⁶⁶⁰ In determining whether each of the Standards was being met, BLM relied on the Indicators identified in the Utah S&G with respect to each Standard.⁶⁶¹ These Indicators represent the specific commonly-accepted “*features of [the] ecosystem*

⁶⁵⁶ See *Oregon Natural Resources Council Action*, 148 IBLA 186, 190 (1999) (“[W]hether to allow grazing and at what levels is clearly beyond the scope of an activity level plan such as an AMP.”); *Idaho Watersheds Project*, 147 IBLA 186, 193 (1999) (“[The no grazing] alternative is only properly considered in the context of deciding whether to modify the controlling [MFP].”); *Wilderness Watch*, 142 IBLA 302, 306 (1998).

⁶⁵⁷ See Decision at 59-60, 62-65, 125-27, 130.

⁶⁵⁸ Utah S&G at 4.

⁶⁵⁹ See Tr. 12264-65; EA at 43-44, 44-51 (Table 7).

⁶⁶⁰ See Tr. 15024-27, 15033, 15036-37, 15286, 15288-89.

⁶⁶¹ See Utah S&G at 3, 4-5.

that can be measured or observed in order to gain an understanding of the relative condition of a particular landscape or portion of a landscape.”⁶⁶²

ALJ Heffernan found that BLM, as part of its PFC assessment under Standard 2, considered Indicator a (Stream Bank Stability) and Indicator c (Stream Channel), but not Indicator b (Vegetation).⁶⁶³ Indicator b requires: “Vegetation reflecting: Desired Plant Community, maintenance of riparian and wetland soil moisture characteristics, diverse age structure and composition, high vigor, large woody debris when site potential allows, and providing food, cover, and other habitat needs for dependent animal species.”⁶⁶⁴ The ALJ did not identify what aspect of Indicator b BLM failed to consider, but it appears he, like WWP, focused on the “wildlife component” of that Indicator. He addressed whether BLM properly assessed the extent to which the riparian and wetland areas of the Allotment were “providing food, cover, and other habitat needs for dependent animal species.”⁶⁶⁵ He found that none of the “[PFC] checklist items assess the vegetation-related habitat criteria of Utah Standard 2(b),” the PFC assessment “ignored the condition of riparian and wetland areas with regard to animal habitat requirements,” and BLM’s PFC assessment “was insufficient to fully and properly assess the wildlife-related riparian conditions on the [DCA].”⁶⁶⁶ However, as discussed below in connection with Standard 3, we conclude that BLM adequately considered the habitat needs of wildlife species, not only in its PFC assessment, but also in its EA and elsewhere in the record.

BLM addressed Standard 2 in terms of 17 site-specific indicators, which were deemed applicable in 28 ecological sites (DC-1 through DC-28).⁶⁶⁷ The 17 site-specific indicators reflected the following ecological conditions: 1 (Rills); 2 (Water Flow Patterns); 3 (Pedestals and/or Terracettes); 4 (Bare Ground); 5 (Gullies); 6 (Wind-Scoured, Blowouts, and/or Deposition Areas); 7 (Litter Movement); 8 (Soil Surface Resistance to Erosion); 9 (Soil Surface Loss or

⁶⁶² *Id.* at 3 (emphasis added).

⁶⁶³ *See* Decision at 59-60, 62, 125, 126.

⁶⁶⁴ Utah S&G at 5.

⁶⁶⁵ *See* Decision at 125 (“Indicator (b) applies to vegetation and animal habitat needs in the larger riparian-wetland area.”), 126, 127-28; Tr. 2069-70, 2090-91, 2123, 2182-83, 2184, 2189-91, 2195-98, 2199-202, 2907 (Catlin).

⁶⁶⁶ Decision at 129, 130, 133.

⁶⁶⁷ *See* Utah S&G at 12.

Degradation); 10 (Plant Community Composition and Distribution Relative to Infiltration and Runoff); 11 (Compaction Layer); 12 (Functional/Structural Groups); 13 (Plant Mortality/Decadence); 14 (Litter Amount); 15 (Annual Production); 16 (Invasive Plants); and 17 (Reproductive Capability of Perennial Plants).⁶⁶⁸ The ALJ noted that BLM purportedly evaluated 476 indicators (17 indicators at each of 28 ecological sites) but that Catlin disclosed that BLM rated only 21 (4%) as “Moderate” (3) or “Moderate to Extreme” (2).⁶⁶⁹ Since he thought that small number was “statistically impossible” and believed BLM had not properly considered all 17 site-specific indicators at each of the 28 ecological sites, the ALJ completely discounted BLM’s results.⁶⁷⁰

We reject the ALJ’s assumption that the results obtained by BLM were inaccurate simply because they overwhelmingly disclose that the ecological sites are in relatively good ecological condition, being rated as Slight to Moderate (4), or even None to Slight (5). The Utah S&G made clear that a Standard 2 evaluation would necessarily reflect the variability in the ecological sites: “It was not deemed possible or desirable to attempt to establish specific thresholds, acceptable limits or ranges for all the indicators for all of the BLM Lands in Utah. . . . A mix of qualifiable and quantifiable thresholds or indicators . . . will need to be determined locally because of extreme variability between locations.”⁶⁷¹ The question is whether these results reflect the situation on the ground, not whether Catlin and the ALJ believe they are statistically possible in a theoretical sense.⁶⁷² Nor is WWP’s “belief” to the contrary probative.⁶⁷³ WWP simply did not show, by a preponderance of the evidence, BLM erred in rating any of the 17 site-specific indicators at any of the 28 ecological sites.

ALJ Heffernan also found BLM erred in its assessment of certain site-specific indicators: (1) BLM found little to no bare ground (Indicator 4 (Bare Ground)) at its 28 ecological sites, a result obtained in a wet year when vegetation was abnormally present, when BLM actually measured at only 9 of the 28 sites, incorrectly estimated that conditions were even better at the remaining 19 sites, and failed to include bare ground underlying canopy cover; (2) BLM found little to no wind scour (Indicator 6 (Wind Scour)) at its ecological

⁶⁶⁸ See IIRH TR at 18-36.

⁶⁶⁹ Decision at 116; see *id.* at 117-20; Ex. W-102B.

⁶⁷⁰ See Decision at 62, 116-17 (quoting Tr. 3143 (ALJ Holt)).

⁶⁷¹ Utah S&G at 12.

⁶⁷² See Tr. 15618 (Karl).

⁶⁷³ *Id.* 3165.

sites, contrary to WWP's observations; (3) BLM found little to no soil surface loss or degradation (Indicator 9 (Soil Surface Loss or Degradation)) at its ecological sites, contrary to WWP's observations; (4) BLM found little to no or slight to moderate plant community composition and distribution (Indicator 10 (Plant Community Composition and Distribution Relative to Infiltration and Runoff)) at its ecological sites, even though this departed significantly from the HCPC of the relevant ESDs, since shrubs, rather than grasses, predominated at the sites; and (5) BLM found, in most cases, little to no or slight to moderate alteration in the relative dominance of grasses, forbs, and shrubs (Indicator 12 (Functional/Structural Groups)) at its ecological sites, even though there had been, in all cases, a significant alteration from the HCPC.⁶⁷⁴ The Judge concludes by looking at all indicators and stating there is "simply less qualifying grass on the allotment than was generally contended by BLM."⁶⁷⁵

We conclude, with regard to each of the above-identified indicator errors, that WWP failed to show BLM's assessment did not comply with the TGA, as follows: (1) regarding Indicator 4, WWP failed to show BLM did not take favorable climatic conditions into account in rating the presence of bare ground, or that BLM erred in estimating bare ground at certain sites, or that BLM's determination of bare ground was undermined by its failure to include bare ground under canopy cover; (2) and (3) regarding Indicators 6 and 9, WWP failed to establish, with supporting evidence, that its observations were sufficient to overcome BLM's on-the-ground assessment of wind scour or soil surface loss or degradation across the Allotment; (4) regarding Indicator 10, WWP incorrectly concluded that BLM improperly rated this Indicator, which was concerned with the effect of vegetation on water infiltration and runoff, by not taking into account the fact that the predominance of shrubs, rather than grasses, departed from the HCPC; and (5) regarding Indicator 12, WWP improperly concluded that BLM erred in assessing whether existing vegetation was serving its functional/structural purpose when comparing the Allotment to the expected plant composition for the HCPC of the relevant ESDs.⁶⁷⁶ In sum, WWP failed to prove BLM had, in fact, erred in its assessment regarding each indicator, which was based on actual conditions observed by BLM personnel on-the-ground.⁶⁷⁷

⁶⁷⁴ See Decision at 117-20.

⁶⁷⁵ *Id.* at 120.

⁶⁷⁶ See *id.* at 117-20.

⁶⁷⁷ See Tr. 14573-84.

Admittedly, BLM did not consider all aspects of all the general and site-specific indicators, weigh the indicators, and determine that the Standard was being met even if certain indicators were not being satisfied, but nowhere does WWP demonstrate how it would rate each indicator, based on appropriate analysis and supporting evidence. Rather, it simply questions BLM's assessment. BLM did not just consider the indicators, it also took into account all of its monitoring data in determining compliance with the Standard.⁶⁷⁸ The Utah S&G makes clear that its indicators are guidelines for assessing whether a Standard is being achieved. Even though BLM is directed to use the indicators in evaluating achievement of the Standards, the Utah S&G expressly states:

Indicators are features of an ecosystem that can [but need not] be measured or observed in order to gain an understanding of the relative condition of a particular landscape or portion of a landscape. . . . [I]t should be recognized that not every indicator applies equally to every acre of land or to every ecological site.^[679]

BLM explains that indicators “are simply tools BLM may choose to use to assess the standards in light of the indicators’ applicability to a given study site” and that “each indicator itself is not as important as the indicators in sum.”⁶⁸⁰ As testified to by Staggs: “[E]ach one of these individually aren’t as important as they are in sum. That’s why there are 17 indicators. . . . And so to look at one of these individually I think is an unfair assessment of this system.”⁶⁸¹ Stager later explained: “It’s on a site-specific basis based upon what the ID Team determines in the field to be important for that site based upon conditions and what they’re seeing out there.”⁶⁸²

To be clear, while the S&G ROD directed BLM to use the indicators in determining whether Standards are being met, it did not require BLM to use all the indicators in all cases and at all times. As discussed, it recognized there may

⁶⁷⁸ See Decision at 60, 62-63 (citing Tr. 12214-15 (Gates)), 14525-30, 14729 (Stager)).

⁶⁷⁹ Utah S&G at 3 (emphasis added); see *id.* (“Indicators will be used by the rangeland manager to determine if Standards are being met.”).

⁶⁸⁰ BLM P-H Response Brief at 129-30, 140.

⁶⁸¹ Tr. 8554 (Staggs); see BLM P-H Sur-Reply Brief at 21 (“[T]hat BLM will use these tools to determine if the standards are being met does not mean that it must use every tool in the set.”).

⁶⁸² Tr. 14527.

be circumstances where certain indicators are not applicable or only partially applicable. We find nothing in the ROD or elsewhere that requires BLM to find a Standard is not being met where only one (or even more) of its indicators are not being met, in whole or in part.

The fundamental error in the Judge's acceptance of WWP's critique of BLM's assessment is that WWP seeks to measure the Allotment against the HCPC reflected in the SCS Survey. WWP seeks ideal riparian areas that are properly functioning in every respect and to the fullest extent. Catlin stated: "I believe that the new direction that the BLM has taken is to first bring lands to their healthy condition. That's a priority over other conflicting uses of the land. I believe that's the policy stated in the Rangeland Health Standards and Guideline[s]."⁶⁸³ But his understanding is mistaken. As discussed *supra*, the Randolph MFP designates the Allotment as suitable for grazing. The Utah S&G plainly permit livestock grazing to continue in appropriate circumstances, so long as it maintains a relative balance with other competing uses and resource values. As stated in the Utah S&G: "In order to meet society's needs and expectations for *sustained* production and conservation of natural resources from BLM rangelands, use of these lands must be kept in balance with the land's ability to sustain those uses."⁶⁸⁴

WWP did not carry its burden to demonstrate that BLM failed properly to assess the condition of the Allotment under Utah Standard 2 or erred in its overall determination that the Standard was being met.⁶⁸⁵ The ALJ's contrary ruling is not adequately supported by record evidence.

B. Compliance with Utah Standard 3

ALJ Heffernan found that BLM failed properly to assess whether grazing was being undertaken in compliance with Utah Standard 3, which concerns wildlife habitat in both upland and riparian areas of the Allotment.⁶⁸⁶ We reject his conclusion.

⁶⁸³ Tr. 2667.

⁶⁸⁴ Utah S&G at 1; *see NWF v. BLM*, 140 IBLA 85, 98-101 (1997).

⁶⁸⁵ *See* WWP P-H Opening Brief at 74-80.

⁶⁸⁶ *See* Decision at 59-65, 113-20, 125-30, 132-33, 138 (citing Tr. 2071-72).

Standard 3 provides: “*Desired species, including native, threatened, endangered, and special-status species, are maintained at a level appropriate for the site and species involved.*”⁶⁸⁷ BLM assessed the status of wildlife species in upland and riparian areas of the Allotment and concluded that the Standard was being met since both maintained all pertinent wildlife species at the appropriate level. In making this assessment, “there obviously was a wildlife biologist . . . involved in this process, from the data collection through the crafting of the EA.”⁶⁸⁸ BLM specifically found that ongoing grazing of the Allotment was having little to no measurable adverse impact on any wildlife species and that it did not expect this to change with implementation of the Proposed Action:

The[] existing good conditions and diverse forage availability for mule deer, elk and antelope likely indicate that even the recent past and existing management is adequately providing good habitat. . . . UDWR has not identified any measurable impacts on mule deer, elk or antelope under the recent past use or the existing use for the [DCA]. . . . [I]t has been determined that none of the Alternatives analyzed is likely to result in any measurable impact to big game animals[.]^[689]

BLM provided the following summation: “no other big game species [are] known to utilize the grazing allotment”; “none of the alternatives would likely result in any measurable impact to small vertebrates”; and “there would be no measurable impact to migratory birds under any of the alternatives.”⁶⁹⁰

⁶⁸⁷ Utah S&G at 5.

⁶⁸⁸ Tr. 8589 (Staggs); *see id.* 8589-90, 14016; EA at 13 (“[R]iparian areas . . . offer a ready close by food source for animals seeking water”), 15-19, 42 (“Riparian areas may be of critical importance to fish, birds, amphibians, and other wildlife species”), 42-51, 70-74, 78-79 (“90.3 percent of the allotment classif[ies] in late seral stage or better (similarity index of 51 percent or greater). . . . Holechek (2001) indicates that on most grassland and shrubland ranges, a late seral stage (51-75 similarity index) would be expected to maximize plant and wildlife diversity[.]”), 84-86.

⁶⁸⁹ EA at 16-17.

⁶⁹⁰ *Id.* at 17, 18-19.

In reaching these conclusions, BLM was guided by the principle that since the ecosystems in upland and riparian areas were functioning, all wildlife species dependent on such areas would be maintained at levels appropriate for the sites and species involved. BLM concluded that designating certain species as “desired” or setting an “appropriate level” for maintaining them is not required because all that matters is whether the ecosystem is functioning, since a functioning upland or riparian ecosystem will naturally maintain all dependent wildlife.⁶⁹¹ In its Standard 3 assessment, BLM relied on all of the evidence generated in preparing the EA concerning the likely effects of the Proposed Decision on wildlife species and their habitat.

ALJ Heffernan found that BLM’s determination of compliance with Standard 3 in riparian areas was fatally undermined because BLM was not aware of which wildlife species, in what numbers, and to what extent they used these areas.⁶⁹² He finds BLM’s interpretation “legally flawed” because he believes the Standard is, by its terms, “animal-species specific and site specific in its application[.]”⁶⁹³ He states that, by not determining whether sage-grouse and other particular species are being maintained at levels appropriate to the particular sites they inhabit in the Allotment, BLM not only abrogated its regulatory responsibility, but also engaged in reversible error.⁶⁹⁴ The ALJ points out that BLM’s Allotment-wide assumption regarding the adequacy of wildlife habitat was particularly unreasonable in the case of sage-grouse. He states BLM failed to assess the adequacy of specific nesting and brood-rearing habitat and did not even know where such habitat was to be found on the

⁶⁹¹ See Decision at 60-61 (citing BLM P-H Response Brief at 127 (“BLM interprets . . . [S]tandard [3] as not requiring BLM to designate what wildlife species are ‘desired’ and setting their ‘appropriate level[.]’”), 63-64 (citing BLM P-H Response Brief at 144 (“[A] properly functioning ecosystem may be reasonably assumed to provide adequate habitat to meet the needs of dependent species”)), 114 (“Staggs, who was part of the BLM ID team for the rangeland health assessment, admitted that he did not know whether the ID team identified what wildlife species and what levels of such species are appropriate for the [DCA], nor did he know whether the ID team assessed wildlife at all. Tr. 8592.”).

⁶⁹² See *id.* at 130, 131-32 (citing Tr. 12645, 14018-19).

⁶⁹³ *Id.* at 61.

⁶⁹⁴ See *id.* at 61-62.

Allotment.⁶⁹⁵ In particular, he found it reversible error for BLM not to assess whether sage-grouse habitats were “connected at a level to enhance species survival,” as required by Standard 3.⁶⁹⁶

BLM was required generally to determine whether desired species inhabiting the Allotment are being maintained at levels appropriate to the sites they inhabit.⁶⁹⁷ But we find no requirement for BLM “to identify specific wildlife . . . species, to establish how many of each species should be on the allotment, and to assess whether these targets are being met.”⁶⁹⁸ BLM regards all wildlife present in the Allotment to be desired species, measuring compliance with Standard 3 in its RH and PFC assessments. BLM addressed in its EA the ongoing and likely future effects of grazing on wildlife and wildlife habitat in the Allotment.⁶⁹⁹ We are not persuaded it was required to do more.

BLM relied on the professional opinion of its wildlife biologists for determining whether the Allotment has been functioning for the benefit of all dependent wildlife. They assessed the ongoing effects of grazing on wildlife species and found the Standard was being achieved. Gates, for example, expressed “the presumption [that if] . . . [the upland and riparian] areas . . . [are] in good condition and meeting the [other] Standards[] then it would . . . follow that the wildlife habitat needs would be met.”⁷⁰⁰

⁶⁹⁵ *See id.* at 114, 115.

⁶⁹⁶ *See id.* at 115 (quoting Utah S&G at 2).

⁶⁹⁷ *See* BLM SOR/Answer at 20; Response at 18 (“The Duck Creek allotment has a variety of ecological sites[] . . . and species utilize each site in different ways and at different times of the year.”).

⁶⁹⁸ BLM P-H Response Brief at 127.

⁶⁹⁹ *See* Tr. 12230 (“Q. [BLM] . . . [D]id you rely on the data . . . discussed in conjunction with Standards 1 and 2 to determine whether Standard 3 was being met? A. [Gates] Yes. And we also used, . . . in order to look at the wildlife species on the Allotment in relation to Standard 3, . . . what is summarized . . . in the EA for the wildlife[.]”), 12231.

⁷⁰⁰ Tr. 12232; *see id.* 12645-46, 14013, 14543-44; BLM P-H Response Brief at 127 (“[I]f the ecosystem is functional, the needs of dependent wildlife will be met.”), 143 (“BLM used PFC assessments to provide information for its evaluation of the DCA under both Standards 2 and 3.”), 144 (“[A] properly

Judge Heffernan points to no record evidence offered by WWP to establish that BLM cannot properly determine whether all desired species in the Allotment are being maintained at their appropriate levels based on the overall functionality of the relevant ecosystems. The fact that riparian areas do not contain all plant species deemed to be part of its HCPC does not establish such areas are not functioning or, importantly, that they are not capable of supporting dependent wildlife species. Nor does the Judge point to any evidence in the record demonstrating that Standard 3 is not being achieved with respect to any particular species or any particular site within the Allotment. As BLM correctly states, WWP “fail[s] to cite to any evidence of a specific ‘desired’ species that BLM overlooked or evidence suggesting a specific ‘appropriate’ level that BLM did not consider,” as a consequence of its functionality analysis.⁷⁰¹ There is no evidence the riparian areas, even the few rated as NF or FAR, were adversely affecting sage-grouse that “use these areas in late summer and early fall[.]”⁷⁰²

We find no error in BLM’s conclusion that a riparian area that is stable, adequately vegetated, and otherwise properly functioning is meeting the food, cover, and other habitat needs of riparian-dependent wildlife. Once again, WWP seeks ideal habitat that fully meets the food, cover, and other requirements of all dependent wildlife, but ideal conditions are not required by the Utah S&G. The Utah S&G are intended to ensure that livestock grazing is permitted to continue in relative balance with other competing uses and resource values that best meet the present and future needs of the American public.

CONCLUSION

We conclude that Judge Heffernan erred in reversing BLM’s 2008 Final Decision and remanding this case to BLM for further action. Since we reverse his decision, we need not address WWP’s challenge to the Judge’s failure to adopt interim relief pending BLM action on remand and, therefore, dismiss its appeal as moot.

functioning ecosystem may be reasonably assumed to provide adequate habitat to meet the needs of dependent species.”).

⁷⁰¹ BLM SOR/Answer at 20.

⁷⁰² EA at 72.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁷⁰³ we reverse Judge Heffernan's May 2013 decision, and dismiss as moot WWP's appeal.

/s/

James K. Jackson
Administrative Judge

I concur:

/s/

James F. Roberts
Deputy Chief Administrative Judge

⁷⁰³ 43 C.F.R. § 4.1.