In The
Supreme Court of the United States

PUBLIC LANDS COUNCIL,

Petitioner,

v.

WESTERN WATERSHEDS PROJECT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2006, the U.S. Bureau of Land Management ("BLM") adopted regulations governing its administration of cattle and sheep grazing on the public range. The regulations establish administrative requirements only, and do not establish substantive grazing standards or authorize any projects or activities on the public range. The regulations have not been applied.

Upholding the plaintiffs' facial, pre-enforcement challenge to the regulations, the Ninth Circuit held that (1) the plaintiffs have Article III standing to facially challenge the regulations, (2) the plaintiffs' facial challenge is ripe for review, (3) the BLM violated the National Environmental Policy Act ("NEPA") by not taking a "hard look" at the environmental effects of the regulations in the Environmental Impact Statement ("EIS"), and (4) the BLM violated the Endangered Species Act ("ESA") by concluding that the regulations would not affect endangered species and therefore that the ESA consultation requirement did not apply.

The questions presented are:

1. Whether the Ninth Circuit's decision – in holding that the plaintiffs have Article III standing to facially challenge the BLM's non-applied regulations – conflicts with this Court's recent decision in *Summers v. Earth Island Institute*, 129 S.Ct. 1142 (2009),

QUESTIONS PRESENTED – Continued

which held that the plaintiffs did not have Article III standing to facially challenge agency regulations that had not been applied to any specific projects on the regulated lands, because the plaintiffs had not suffered concrete and particularized injury.

2. Whether the Ninth Circuit's decision – in holding that the plaintiffs' facial challenge to the BLM's non-applied regulations is ripe for review – conflicts with this Court's decisions, such as *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990), holding that regulations that have not been applied to specific projects or activities are "ordinarily" not ripe for review, and are ordinarily ripe only when they have been applied.

3. Whether the Ninth Circuit's decision – in holding that the BLM violated NEPA's "hard look" requirement – failed to properly apply the Administrative Procedure Act's ("APA") narrow and deferential standard of review, by considering the regulations on the merits and by not granting any deference to the BLM's analysis of environmental effects in the EIS.

4. Whether the Ninth Circuit's decision – in holding that the BLM violated the ESA by concluding that the regulations would not affect endangered species – failed to properly apply the APA's narrow and deferential standard of review, by not granting any deference to the BLM's judgment that the regulations would not have such effects.

PARTIES TO THE PROCEEDINGS

The petitioner is the Public Lands Council, which was an intervenor and appellant below.

The respondents, who were plaintiffs and appellees below, are the Western Watersheds Project; Ralph Maughan; Idaho Wildlife Federation; Idaho Conservation League; Natural Resources Defense Council; and National Wildlife Federation.

The federal defendants named in the complaint are Joe Kraayenbrink, Dave Pacioretty and James L. Caswell, officials of the U.S. Bureau of Land Management; the U.S. Bureau of Land Management; and Dirk Kempthorne, the Secretary of the Interior. The federal defendants participated in the district court proceeding, but did not appeal to the Ninth Circuit.

The American Farm Bureau Federation was an intervenor and appellant below.

CORPORATE DISCLOSURE STATEMENT

The Public Lands Council is a trade organization that represents public lands ranchers who are members of the National Cattlemen's Beef Association, the American Sheep Industry and the Association of National Grasslands, and is not a publicly-held corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Public Lands Council ("PLC") respectfully petitions this Court for a writ of certiorari to review the Ninth Circuit Court of Appeals decision below.

OPINIONS BELOW

The Ninth Circuit's amended opinion (App. 1) is reported at 632 F.3d 472 (9th Cir. 2011), and its original opinion at 620 F.3d 1187 (9th Cir. 2010). The district court's opinion (App. 63) is reported at 538 F.Supp.2d 1302 (D. Idaho 2008).

JURISDICTION

The Ninth Circuit issued its amended opinion, and denied the petition for rehearing, on January 19, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutes and regulations are set forth in the Appendix. App. 113.

STATEMENT OF THE CASE

1. The Bureau of Land Management Regulations

In 2006, the U.S. Bureau of Land Management ("BLM") adopted regulations governing its administration of cattle and sheep grazing on the public range. 71 Fed. Reg. 39402 (2006). The regulations substantially changed regulations adopted in 1995, and substantially restored earlier regulations rescinded by the 1995 regulations.

The plaintiffs in this action facially challenged several parts of the 2006 regulations. The challenged regulations are as follows:

(a) Public Participation

The 2006 regulations define the "interested public" – which is authorized to receive notice of the BLM's rangeland management decisions – as persons who actively participate in rangeland management by submitting written requests to participate *and* submit written comments on a grazing allotment, rather than, as provided by the prior regulations, as persons who submit written requests *or* written comments. 71 Fed. Reg. 39404, 39413, 39414 (2006).

(b) Joint Ownership of Rangeland Improvements

The regulations authorize ranchers to share title with the United States to rangeland improvements in

proportion to their contribution to the costs of the improvements. *Id.* at 39410. The regulations restored a similar provision in the pre-1995 regulations that had been removed by the 1995 regulations. *Id.*

(c) Joint Ownership of Water Rights

The regulations authorize ranchers to possess water rights under state law in common with the United States. *Id.* at 39462-39465. The regulations restored a similar provision in the pre-1995 regulations that had been removed by the 1995 regulations. *Id.*

(d) Enforcement Standards

The regulations provide that the "Fundamentals of Rangeland Health" ("Fundamentals"), which establish "broad goals" of rangeland management that are implemented by "standards and guidelines," are enforced by the "standards and guidelines" themselves and not by the Fundamentals *per se*, which are otherwise unchanged. *Id.* at 39492-39493.

(e) Enforcement Timeframes

The regulations provide that the BLM must commence enforcement actions for grazing violations "not later than 24 months," rather than by "the start of the next grazing year," as provided in the 1995 regulations. *Id.* at 39413, 39491.

(f) Monitoring Requirements

The regulations provide that the BLM must use monitoring data to establish grazing violations. *Id.* at 39411-39412.

(g) Grazing Reductions

The regulations provide that grazing reductions exceeding 10% must be phased in over five years, unless a shorter period is necessary to comply with applicable law. *Id.* at 39409, 39454. The regulations restored a similar provision in the pre-1995 regulations that had been removed by the 1995 regulations. *Id.*

2. The Case Below

The plaintiffs brought an action for declaratory and injunctive relief against the Secretary of the Interior, the BLM, and BLM officials, facially challenging the regulations prior to their enforcement. The plaintiffs' complaint alleged that the regulations violated (1) the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, (2) the Federal Land and Policy Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, and (3) the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*

Petitioner PLC, which represents cattle and sheep ranchers in the western states, and the American Farm Bureau Federation ("AFBF"), which represents farmers in the western states, intervened on

the side of the federal defendants in support of the regulations.

The district court held that the regulations violated NEPA, FLPMA and ESA, and enjoined the regulations. App. 63, 112. Intervenors PLC and AFBF appealed. The federal defendants appealed but later withdrew their appeal.[1]

On appeal, PLC argued that the plaintiffs lack Article III standing to facially challenge the regulations in light of the Supreme Court's recent decision

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[1] Since the district court enjoined the 2006 regulations and its injunction has not been stayed, the BLM is not currently enforcing the 2006 regulations, and instead is enforcing the 1995 regulations that had been rescinded by the 2006 regulations. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force.") If this Court grants review and reverses the Ninth Circuit decision, the district court injunction will no longer be in effect, and the BLM will then be required to enforce the 2006 regulations. The APA establishes procedures that an agency must follow in adopting, or changing, regulations. 5 U.S.C. §§ 551 *et seq*. Therefore, an agency cannot adopt or change regulations – or accomplish the same thing by enforcing previously-rescinded regulations rather than extant regulations – without complying with the APA's procedures. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (a "properly promulgated" agency regulation has the "force and effect of law"); *U.S. Telecom Ass'n v. FTC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) ("New rules that work substantive changes . . . to prior regulations are subject to the APA's procedures.") The BLM followed the APA procedures in adopting the 2006 regulations, and – absent a court-issued injunction – must follow the same procedures in enforcing the previously-rescinded 1995 regulations rather than the extant 2006 regulations.

in *Summers v. Earth Island Institute*, 129 S.Ct. 1142 (2009), and that the regulations are not ripe for review. PLC also argued that the regulations do not violate NEPA, FLPMA or the ESA.

The plaintiffs argued that intervenors PLC and AFBF lack standing to appeal because the federal defendants had withdrawn their appeal. The plaintiffs also argued that they have Article III standing to facially challenge the regulations, and that their facial challenge is ripe for review. They also argued that the regulations violate NEPA, FLPMA and ESA.

3. Ninth Circuit Decision

The Ninth Circuit held as follows:

1. Intervenors PLC and AFBF have standing to appeal, App. 19;

2. The plaintiffs have standing to facially challenge the regulations, App. 24;

3. The plaintiffs' action is ripe for review, App. 28;

4. The regulations violate NEPA because the BLM failed to take a "hard look" at the environmental effects of the regulations in the Environmental Impact Statement ("EIS"), App. 29;

5. The BLM violated the ESA by concluding that the regulations would not affect endangered species and therefore that the ESA consultation requirement did not apply, App. 50; and

6. The district court applied the wrong review standard in reviewing the plaintiffs' FLPMA claim, and the claim is remanded to the district court for further consideration, App. 59.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This petition presents several nationally-important issues worthy of this Court's review – Article III standing, ripeness, NEPA's "hard look" requirement, and the ESA's consultation requirement. This Court should grant review, however, primarily because of the Ninth Circuit's failure to follow – and indeed utter disregard for – this Court's decisions addressing these issues.

The BLM in 2006 adopted regulations governing its administration of cattle and sheep grazing on the public range. The regulations substantially restored regulations that had been in place prior to 1995, and that had been rescinded by regulations adopted that year. The newly-adopted regulations establish administrative requirements only, and do not authorize projects or activities of any kind on the public range. The regulations authorize ranchers to jointly own rangeland improvements and water rights, establish enforcement standards and timeframes for BLM's public range regulation, and establish public participation requirements. The regulations have not been applied.

The Ninth Circuit upheld the plaintiffs' facial, pre-enforcement challenge to the regulations, and specifically held that (1) the plaintiffs have standing under Article III of the Constitution to facially challenge the regulations, (2) the regulations are ripe for review, (3) the BLM violated NEPA by not taking a "hard look" at the environmental effects of the regulations in the EIS, and (4) the BLM violated the ESA by concluding that the regulations would not affect endangered species and therefore that the ESA consultation requirements did not apply.

The Ninth Circuit in its standing and ripeness analyses disregarded and ignored this Court's controlling precedents, and in its NEPA and ESA analyses failed to follow this Court's decisions establishing a narrow and deferential standard of review.

First, the Ninth Circuit in its standing analysis did not follow – and indeed did not even mention the relevant portions of – this Court's recent decision in *Summers v. Earth Island Institute*, 129 S.Ct. 1142 (2009), even though *Summers* is directly on point and controls the standing issue here. In *Summers*, this Court – reversing the Ninth Circuit – held that the plaintiffs lacked Article III standing to facially challenge agency regulations that had not been applied to any specific projects or activities on the regulated lands, because the non-applied regulations had not caused the plaintiffs to suffer imminent and concrete harm. As in *Summers*, the plaintiffs here facially challenge agency regulations that do not authorize any projects or activities on the regulated lands and

have not been applied. Since *Summers* held that the plaintiffs lacked standing, the same conclusion applies here.

The Ninth Circuit did not mention or attempt to distinguish *Summers*, to the extent that *Summers* held that Article III restricts the standing of plaintiffs to challenge non-applied agency regulations. Instead, the Ninth Circuit – citing its own pre-*Summers* decisions – held that the plaintiffs have standing because they have a cognizable *interest* in the subject of the agency regulations. In *Summers*, this Court held that a cognizable *interest* is insufficient to establish standing, and that the plaintiff must demonstrate concrete *harm* to that interest. The Ninth Circuit interpreted and applied the Article III standing requirement differently than *Summers*, and simply ignored *Summers*' interpretation.

Second, the Ninth Circuit's conclusion that the plaintiffs' facial challenge is ripe for review conflicts with this Court's decisions, such as *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990), holding that facial challenges to non-applied agency regulations are ordinarily not ripe for review, and are ripe only when they have been applied to a site-specific project or activity. Since the BLM regulations have not been applied to a site-specific project or activity – and do not even authorize a project or activity – they are not ripe for review. The Ninth Circuit held that the ripeness doctrine does not apply to procedural claims, such as NEPA claims. In *Lujan*, however, this Court held that the plaintiff's NEPA claim was not

ripe. The Ninth Circuit decision conflicts with *Lujan* and its progeny.

Third, the Ninth Circuit, in concluding that the BLM violated NEPA's "hard look" requirement, failed to properly apply – and did not even mention – the applicable review standard of the Administrative Procedure Act ("APA"), which is narrow and deferential and precludes the courts from considering the merits of the agency action. The Ninth Circuit openly disagreed with the regulations on the merits, stating that they are "inconsistent with the 1995 Regulations and discordant with the lessons learned from the history of rangeland management in the west." App. 48. The Ninth Circuit in its "hard look" analysis primarily relied on internal agency documents that opposed the regulations on the merits, and made scant reference to the EIS itself. In fact, the BLM extensively discussed the environmental effects of the regulations in the EIS, as required by the "hard look" requirement. By deferring to internal dissenting views rather than the agency's institutional judgment, the Ninth Circuit intruded into the Secretary of the Interior's decision-making authority and substituted its judgment for that of the Secretary, contrary to the APA's narrow and deferential review standard.

Fourth, the Ninth Circuit also failed to properly apply the APA's narrow and deferential review standard in overturning the BLM's judgment that the regulations would not affect endangered species and therefore that the ESA consultation requirement did not apply. The BLM concluded that the regulations

would not affect endangered species because they establish administrative requirements only, and do not authorize any projects or activities on the public range that might affect endangered species. The BLM's conclusion was reasonable, and not arbitrary and capricious. The Ninth Circuit granted no deference to the BLM's judgment, and failed to apply the APA's deferential review standard in its ESA analysis, as in its NEPA analysis.

In sum, the Ninth Circuit disregarded this Court's decisions in addressing the standing and ripeness issues, and failed to follow this Court's decisions establishing a narrow and deferential review standard in addressing the NEPA and ESA issues. The Ninth Circuit altogether ignored the relevant portions of this Court's decision in *Summers*, and its decision was written as if *Summers* had never been decided. In its NEPA and ESA analyses, the Ninth Circuit openly expressed its disdain for the BLM regulations, opining that they are "discordant with the lessons learned" from the past, even though the APA review standard precludes the courts from considering the merits of the agency action. The BLM, not the Ninth Circuit, is responsible for managing the public range, and for determining what "lessons" are to be learned from the past. This Court should grant review because of the Ninth Circuit's impermissible intrusion into the agency's decision-making authority, and its blatant disregard for this Court's jurisprudence precluding such judicial intrusion.

I. THE NINTH CIRCUIT DECISION, IN HOLDING THAT THE PLAINTIFFS HAVE ARTICLE III STANDING, CONFLICTS WITH THIS COURT'S DECISION IN *SUMMERS v. EARTH ISLAND INSTITUTE*.

A. The Ninth Circuit Decision Conflicts With *Summers*.

In *Summers v. Earth Island Institute*, 129 S.Ct. 1142 (2009), this Court recently held that the plaintiffs lacked Article III standing to facially challenge agency regulations that did not authorize any projects or activities on the regulated lands and that had not been applied, because, the Court stated, the plaintiffs had not shown that the non-applied regulations caused them to suffer concrete and particularized injury.

In *Summers*, the U.S. Forest Service adopted regulations establishing a public participation process – consisting of notice, comment and appeal – for approval of projects and activities implementing its management plans. 129 S.Ct. at 1147. The Forest Service regulations categorically excluded certain projects and activities from the public participation process. *Id.* The plaintiffs facially challenged the regulations because they precluded public participation.

This Court – reversing the Ninth Circuit – held that the plaintiffs lacked Article III standing to facially challenge the Forest Service non-applied regulations because the plaintiffs had not demonstrated

"concrete and particularized injury." *Id.* at 1149. Framing the issue as whether the plaintiffs had standing to challenge agency regulations "in the absence of a live dispute over a concrete application of those regulations," *id.* at 1147, this Court answered the question in the negative, stating that the plaintiffs had failed to identify any "application of the invalidated regulations that threatens imminent and concrete harm" to them, and that their claimed injury "was not tied to any application of the challenged regulations." *Id.* at 1150. The Court stated that the plaintiffs had failed to show that the regulations had been applied to a specific "project" in which they had an interest, except for one project that was no longer a source of controversy.[2] The Court rejected the plaintiffs' argument that they suffered imminent harm because their members had "visited" and had "plans to visit" some national forests, stating that the plaintiffs had failed to "allege that *any* particular timber sale or other *project* claimed to be unlawfully subject to the regulations will impede a *specific and concrete plan* of [the plaintiffs] to enjoy the National Forests." *Id.* (first emphasis original; other emphases added). The Court concluded:

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[2] The Court stated that the plaintiffs might have had standing to challenge the regulations as applied to the Burnt Ridge Project, but that the parties had reached a settlement concerning the project and the project no longer sufficed as a basis for standing. 129 S.Ct. at 1149-1150.

> The regulations under challenge here neither require nor forbid any action on the part of the respondents. . . . Here respondents can demonstrate standing only if application of the regulations by the Government will affect *them* in the manner described above.

Id. at 1149 (original emphasis). Thus, *Summers* held that plaintiffs cannot facially challenge agency regulations unless the regulations have been "applied" to a specific "project" in a way that causes them to suffer concrete harm.

This case is similar to *Summers*, and the plaintiffs here are similarly situated to the *Summers* plaintiffs. As in *Summers*, the plaintiffs facially challenge agency regulations that do not authorize any specific projects or activities on the regulated lands, and that have not been applied. Since *Summers* held that the non-applied regulations did not cause the plaintiffs to suffer concrete and imminent harm, the same conclusion applies to the BLM's non-applied regulations here.

More specifically, the BLM regulations establish administrative requirements only, and do not establish any substantive grazing standards or otherwise authorize any projects or activities on the public range that might conceivably cause concrete harm to the plaintiffs. For example, the regulations authorize ranchers to jointly owned rangeland improvements and water rights, establish enforcement standards and timeframes, and establish public participation requirements. *See* pages 2-4, *supra*. None of these

regulations authorize ranchers to engage in any activity that may cause concrete harm to the plaintiffs, such as building a fence or digging a ditch on a grazing allotment. To paraphrase *Summers*, the BLM regulations do not authorize any "project" that will "impede" a "specific or concrete plan" that the plaintiffs have in grazing allotments. *Summers*, 129 S.Ct. at 1150. Under *Summers*, the BLM regulations do not cause the plaintiffs to suffer concrete harm.[3]

Indeed, the plaintiffs here have a lesser basis for standing than the *Summers* plaintiffs. The Forest Service regulations in *Summers* categorically *precluded* public participation, while the BLM regulations here conditionally *authorize* public participation. *See* page 2, *supra*. Nowhere in its opinion did the Ninth Circuit state or suggest that the plaintiffs were

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[3] The United States in *Summers* made the same argument that the petitioner makes here. The United States argued that the plaintiffs did not have standing because the Ninth Circuit had not "identified any site-specific activity other than the Burnt Ridge Project that was (1) governed by the challenged regulations, (2) was the subject of a site-specific decision approving the project, and (3) would result in injury to [the respondents' members] who used the area affected by the project." Brief for the Petitioners, *Summers v. Earth Island Institute,* No. 07-463, p. 29 (October Term 2007). The United States argued that the plaintiffs' "generalized conclusion" that the regulations "may yield diminished recreational enjoyment" of the national forests "falls far short of the requirement . . . that, to satisfy Article III, injury must be both 'concrete and particularized' and 'actual or imminent.' " *Id.* (citations omitted).

unable to meet the conditions for public participation contained in the regulations.

Rather than attempting to distinguish *Summers*, the Ninth Circuit simply ignored *Summers*. The Ninth Circuit made no mention of *Summers*' holding restricting the Article III standing of plaintiffs to facially challenge non-applied agency regulations. Instead, the Ninth Circuit – citing its own pre-*Summers* decisions – held that the plaintiffs have standing because they have a "concrete *interest*" in the subject of the BLM regulations. App. 26 (emphasis added). Describing the plaintiffs' interests, the Ninth Circuit cited declarations of two plaintiff members, one stating that he "has personally visited and continues to visit, study, enjoy" and "pursue[ ] recreational activities" in certain grazing allotments, and the other stating that she "visits, studies, [and] works to protect" certain allotments, and would be "exclude[d] from participating in various management decisions." App. 25.

In *Summers*, this Court held that these same interests are insufficient to establish Article III standing. The Court stated that the plaintiffs did not have standing simply because they "visited" and had "plans to visit" certain national forests or because the regulations denied their right to participate in Forest Service management decisions. 129 S.Ct. at 1150-1151. The plaintiffs' lack of "ability to file comments on" certain Forest Service activities, this Court stated, is not a "concrete and particularized" injury that satisfies Article III standing requirement. *Id.* at

1151. Thus, while *Summers* held that the plaintiffs' interests were insufficient to establish standing, the Ninth Circuit held that the plaintiffs' virtually identical interests were sufficient to establish standing.

More fundamentally, the Ninth Circuit decision interpreted and analyzed the Article III standing requirement differently than *Summers*. Although *Summers* held that the plaintiffs must demonstrate both a cognizable *interest* in the subject of the agency action and concrete *harm* to that interest, the Ninth Circuit – following its own pre-*Summers* decisions – concluded that the plaintiffs have standing because they have a cognizable *interest* in the subject of the BLM regulations, but failed to consider whether the regulations have caused concrete *harm* to that interest. In *Summers*, this Court acknowledged in dictum that the plaintiffs may have cognizable *interests* – in the form of "recreational" and "aesthetic" interests – in the subject of the Forest Service regulations, 129 S.Ct. at 1149, but held that the plaintiffs had not demonstrated that the Forest Service's non-applied regulations caused imminent and concrete *harm* to those interests. *Id.* at 1149-1151; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (in demonstrating "injury in fact," plaintiff must show that the injury is "actual or imminent, not conjectural or hypothetical"). The Ninth Circuit here, citing the *Summers* dictum, held that the plaintiffs have standing because they have "recreational" and "aesthetic"

interests in BLM's management of the public range. App. 26.[4] The Ninth Circuit did not, however, undertake the further inquiry – required by *Summers* – into whether the regulations have caused concrete harm to their interests. Indeed, the Ninth Circuit flatly stated that the plaintiffs must demonstrate only a "concrete *interest*," App. 26 (emphasis added), not concrete *harm* to that interest. The Ninth Circuit conflated the interest and harm in interpreting and applying the Article III standing requirement, rather than analyzing them separately as required by *Summers*.

B. The Ninth Circuit Erroneously Held That The Plaintiffs Have Standing To Assert A "Procedural Claim" Under NEPA.

The Ninth Circuit held that the plaintiffs have standing to assert a "procedural claim" under NEPA because there is a "geographical nexus" between certain plaintiffs and grazing allotments in which they have an interest. App. 26. In *Summers*, however,

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[4] Citing its pre-*Summers* decisions, the Ninth Circuit held that an environmental group has standing to bring a NEPA claim "when its members *enjoyed* photographing marine life, fishing, and watching marine life in the area potentially affected by the challenged government action," and "where the groups' members regularly *used and enjoyed* an area inhabited by the imperiled species." App. 24-25 (emphasis added; citations omitted). The "use" and "enjoyment" of an activity or area does not demonstrate that an agency action has caused concrete harm to that interest.

this Court held that the plaintiffs did not have standing to assert a "procedural injury" under NEPA because they had not shown that their "[in]ability to file comments" on certain Forest Service actions "threatened to impinge on their concrete plans to observe nature in that specific area." *Summers*, 129 S.Ct. at 1151. The Court stated "it would exceed [Article III's] limitations if . . . we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." *Id.* at 1151 (citation omitted). Thus, a plaintiff cannot assert a "procedural injury" under NEPA simply because of a "geographical nexus." Rather, under *Summers*, the plaintiff must show that the agency action "injures him in a concrete and personal way." *Id.* The Ninth Circuit, again, focused on the plaintiffs' interests rather than whether the agency action caused concrete harm to those interests.

C. The Ninth Circuit Erroneously Held That The Plaintiffs Have Standing To Assert Their ESA Claim.

The BLM concluded that its regulations would have "no effect" on endangered species and therefore that the ESA consultation requirement did not apply. The Ninth Circuit held that the plaintiffs have standing to challenge the BLM's "no effect" decision because some plaintiff members "regularly used and enjoyed an area inhabited by the imperiled species." App. 25 (citations omitted). Again, the Ninth Circuit focused on the plaintiffs' interests – their "use[ ] and

enjoy[ment]" of the area – rather than whether the agency action caused concrete harm to those interests. The Ninth Circuit failed to explain how the BLM's "no effect" decision had caused – or even conceivably could cause – any concrete harm to the plaintiffs. As this Court has held, "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Friends of the Earth v. Laidlaw Env. Services*, 528 U.S. 167, 181 (2000). By failing to consider how the BLM's "no effect" decision has caused the plaintiffs to suffer concrete harm, the Ninth Circuit decision conflicts with *Summers* for this additional reason.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT FACIAL CHALLENGES TO NON-APPLIED AGENCY REGULATIONS ARE ORDINARILY NOT RIPE FOR REVIEW.

This Court has held that a facial challenge to a non-applied agency regulation is "ordinarily" not ripe for review, and is ripe only when "the scope of the controversy has been fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *see National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 58 (1993). Since the BLM regulations do not authorize any projects or activities on the public range and

have not been applied, they are not ripe for review under *Lujan*, *National Park Hospitality* and *Reno*. They would be ripe only when the BLM takes subsequent actions that may present a ripe controversy, such as by issuing a grazing permit for an allotment.

The Ninth Circuit held that the plaintiffs' action is ripe because they assert a "procedural claim" under NEPA. App. 29. In effect, the Ninth Circuit held that the ripeness doctrine does not apply to "procedural" claims, such as NEPA claims. The court did not discuss whether the plaintiffs' ESA claim was ripe, although, since an ESA claim is a "procedural" claim, presumably the court's analysis applies equally to ESA claims.

In *Lujan*, this Court held that the plaintiff's NEPA claim was not ripe because the federal regulations had not been "applied" to the plaintiff's situation. 497 U.S. at 875, 879.[5] Thus, *Lujan* held that the ripeness doctrine applies to "procedural" claims, such as NEPA claims, contrary to the Ninth Circuit decision.

To be sure, a "procedural" claim, such as a NEPA claim, challenging an agency regulation may be ripe even though the regulation has not been applied, if the regulation authorizes a specific project or activity that may cause harm to the plaintiffs. In

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[5] The Court also held that the plaintiff's FLPMA claim was not ripe. *Id.*

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1998), this Court considered whether a facial challenge to a U.S. Forest Service regulation, which authorized logging and clearcutting in Ohio's Wayne National Forest, was ripe for review under the National Forest Management Act ("NFMA"), pursuant to which the regulation was adopted. The Court held that the plaintiffs' facial challenge was not ripe under the NFMA, but stated in dictum that a NEPA claim might have been ripe, because a person with "standing" to assert a NEPA claim may assert the claim "at the time the failure takes place, for the claim can never get riper." *Ohio Forestry*, 523 U.S. at 737. The Ninth Circuit here relied on the *Ohio Forestry* dictum in holding that the ripeness doctrine does not apply to a "procedural claim" under NEPA. App. 29.

Lujan and the *Ohio Forestry* dictum appear facially inconsistent, because *Lujan* held that a NEPA claim was not ripe and the *Ohio Forestry* dictum stated that a NEPA claim is always ripe. In fact, *Lujan* and the *Ohio Forestry* dictum are reconcilable. In *Ohio Forestry*, the ripeness issue arose in the context of a site-specific project and activity, namely logging practices in the Wayne National Forest in Ohio. In *Lujan*, the ripeness issue did *not* arise in the context of a site-specific project or activity, and instead arose in the context of a general program to reclassify some public lands and return others to the public domain. *Lujan*, 497 U.S. at 875, 879. Although a NEPA claim may be ripe where a specific project or activity is involved, as in *Ohio Forestry*, it is not ripe

where no specific project or activity is involved and further action may be necessary to ripen the claim, as in *Lujan*.

This case is similar to *Lujan* rather than *Ohio Forestry*, because the BLM regulations do not authorize any site-specific projects or activities on the public range, and it is thus speculative to consider at this juncture whether the regulations have environmental effects. This inquiry should be deferred until the BLM authorizes a site-specific project or activity, such as by issuing a permit for a grazing allotment, when the environmental effects can be more concretely assessed. To paraphrase *Lujan*, the BLM regulations have not been "fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." 497 U.S. at 891. The Ninth Circuit's decision that the plaintiffs' facial challenge is ripe conflicts with *Lujan* and its progeny.

In any event, this Court should grant review to resolve the facial inconsistency between the *Lujan* holding and the *Ohio Forestry* dictum.

III. THE NINTH CIRCUIT FAILED TO APPLY THE ADMINISTRATIVE PROCEDURE ACT'S NARROW AND DEFERENTIAL STANDARD OF REVIEW IN CONCLUDING THAT THE AGENCY VIOLATED THE "HARD LOOK" REQUIREMENT.

A. The Administrative Procedure Act Establishes A Narrow And Deferential Standard Of Review.

Under NEPA, an agency is required to prepare an Environmental Impact Statement ("EIS") before taking an action that may affect the environment, and the agency must take a "hard look" at the environmental effects of the action in the EIS. *Robertson v. Methow Valley Citizens Council, et al.,* 490 U.S. 332, 350 (1989); *Kleppe v. Sierra Club, et al.,* 427 U.S. 390, 410 n. 21 (1976). The Ninth Circuit held that the BLM violated NEPA because it failed to take a "hard look" at the environmental effects of the regulations in the EIS. App. 29-50.

The Administrative Procedure Act ("APA"), pursuant to which an agency's action in adopting an EIS is reviewed, establishes a narrow and deferential standard of review. Under the APA, an agency's action can be overturned only if it is arbitrary and capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2) (App. 113); *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 375-376 (1989); *Citizens to Preserve Overton Park v. Volpe*,

401 U.S. 402, 416 (1971). As this Court recently explained:

> Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (citation omitted). The APA's narrow and deferential standard applies in reviewing an agency's compliance with NEPA's "hard look" requirement. *Robertson*, 490 U.S. at 350; *Kleppe*, 427 U.S. at 410 n. 21. As this Court stated in *Kleppe*:

> Neither the statute [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role of the court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken.

427 U.S. at 410 n. 21 (citation omitted).

B. The Ninth Circuit Misapplied The APA Review Standard By Considering The Merits Of The Regulations Rather Than Whether The Agency Adequately Considered Their Environmental Effects.

The Ninth Circuit failed to apply the APA's narrow and deferential standard of review in its "hard look" analysis, and did not even mention the APA review standard – just as it did not mention *Summers* in its standing analysis. Rather than deferring to the agency's judgment, the Ninth Circuit openly disagreed with the agency's judgment on the merits. The court stated:

> Here, the BLM decreased its regulatory authority over rangeland management, decreased the role of the public in overseeing that management, and granted permittees and lessees increased ownership rights. *These changes are inconsistent with the 1995 Regulations and discordant with the lessons learned from the history of rangeland management in the west*, which has been moving towards multiple use management and increased public participation.

App. 48 (emphasis added). The Ninth Circuit – by opining that the BLM regulations are "discordant with the lessons learned" from the past and expressing its preference for the 1995 regulations – plainly disagreed with the merits and wisdom of the agency action. The Ninth Circuit failed to apply the APA's narrow and deferential standard of review, which precludes the courts from considering the merits and

wisdom of the agency action. *FCC v. National Citizens Comm.*, 436 U.S. 775, 803 (1978); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

The Ninth Circuit's misapplication of the APA review standard permeated its "hard look" analysis. The court did not engage in a thorough, fact-specific analysis of the EIS to determine whether it adequately analyzed environmental effects, and indeed made little reference to the EIS. App. 34-35, 36-37, 39, 40. Instead, the Ninth Circuit primarily relied on two internal documents within the Department of the Interior that opposed the regulations on the merits, and concluded on the basis of these internal dissenting documents that the BLM failed to satisfy the "hard look" requirement.

More specifically, the BLM's 2006 regulations were somewhat controversial within the Department of the Interior, because they substantially changed regulations adopted in 1995 and substantially restored regulations that had been in place prior to 1995. The 2006 regulations, like the pre-1995 regulations, provided greater benefits to ranchers than the 1995 regulations, by, for example, authorizing ranchers to jointly own rangeland improvements and water rights. *See* pages 2-3, *supra*. The BLM concluded that the regulations would provide for more efficient and effective administration of the public range, and would properly balance the needs of the range itself and the needs of those, such as ranchers, who depend on the range for their livelihood. Department

of the Interior, Bureau of Land Management, "Final Environmental Impact Statement: Proposed Revisions to Grazing Regulations for the Public Lands," pp. 1-22 (Oct. 2004) (hereinafter "EIS") (Ninth Circuit Excerpts of Record ("ER") 8-29).[6]

Not everyone within the Department of the Interior agreed, however. An internal review committee within the BLM – called the "Administrative Review Committee-Draft Environmental Impact Statement" ("ARC-DEIS") – reviewed the proposed regulations early in the rulemaking process, and submitted a document strongly opposing the proposed regulations. As quoted by the Ninth Circuit, the ARC-DEIS argued that the provisions granting rights to the ranchers and reducing public participation, among others, would adversely affect the public range. App. 32-33, 37, 38, 40. Similarly, the U.S. Fish and Wildlife Service ("FWS") submitted an unsigned "draft" document also opposing the regulations. App. 33, 34 & n. 8, 37. The FWS document argued, for example, that the regulations would make "grazing a priority use over other uses" and affect FWS' "mission." ER 759. These internal documents openly disagreed with the BLM's assessment that the regulations would promote sound rangeland management. The Ninth Circuit primarily relied on and extensively quoted

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[6] The 606-page EIS is not included in the Appendix because of its length, but the petition will cite the pages of the Excerpts of Record that were before the Ninth Circuit where the relevant pages of the EIS are found.

from these internal dissenting documents in concluding that the BLM violated the "hard look" requirement. App. 32-33, 33-34, 37, 38, 40.

In fact, these internal dissenting documents were irrelevant to whether the BLM satisfied the "hard look" requirement. The documents were prepared early in the rulemaking process, long before the final EIS was adopted,[7] and therefore they did not address – and could not have addressed – whether the BLM's later-adopted final EIS satisfied the "hard look" requirement. Moreover, the documents primarily addressed the merits of the regulations – speculating about long-term effects that "could" occur – and were irrelevant to whether the BLM satisfied the "hard look" requirement for this additional reason. As this Court has explained, NEPA "does not mandate particular results but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council, et al.,* 490 U.S. 332, 350 (1989). Since the internal dissenting documents did not speak to whether the BLM followed the "necessary process," the Ninth Circuit's reliance on them was inconsistent with NEPA itself, as well as the APA's deferential review standard. The documents may have been relevant to the BLM's judgment in adopting the regulations, but not to whether the BLM adequately considered the environmental effects of the regulations in the EIS.

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[7] The ARC-DEIS was issued in November 2003, the FWS document in May 2004, and the Final EIS in July 2006. ER 8, 607, 707, 759.

Since the Ninth Circuit relied on internal dissenting documents rather than engaged in a fact-specific analysis of the EIS, this Court, if it grants review, need not engage in a fact-specific review of the EIS to determine whether the Ninth Circuit failed to properly apply the APA review standard. Rather, this Court need only determine that the Ninth Circuit, as a matter of law, misapplied the APA review standard by considering the wrong factors.

In fact, the BLM complied with NEPA's "hard look" requirement by extensively considering the environmental effects of the regulations in the EIS. The EIS – consisting of a 606-page document that took more than three years to prepare – provided a thorough analysis of the environmental effects of the regulations, ranging from the effects on individual components of the public range (such as vegetation, air quality, wildlife and riparian habitat) to the effects of each individual regulation on the public range. ER 1-605. The document's very name – an "environmental impact statement" – reflects the extent of its analysis of environmental effects. The BLM received more than 18,000 public comments, and the EIS contained a lengthy 127-page response to the public comments. EIS 5:16-145 (ER 185-314). The Ninth Circuit made scant reference to the EIS in its "hard look" analysis.

The EIS fully addressed the concerns raised in the internal dissenting documents submitted by the ARC-DEIS and FWS, contrary to the Ninth Circuit's statement that the EIS "did not address"

these concerns. App. 42. The ARC-DEIS' and FWS' comments were similar to other public comments – relating, for example, to public participation, the rights of ranchers, and enforcement standards and timeframes – and the EIS' responses to the public comments fully addressed the concerns of the ARC-DEIS and FWS.[8]

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[8] For example, as quoted by the Ninth Circuit, the ARC-DEIS argued that allowing ranchers to acquire joint ownership of rangeland improvements and water rights would "reduce wildlife habitat quality by promoting wildlife-livestock conflicts," App. 40, and that reducing public participation would result in the "exclusion" of non-ranchers and would give ranchers "greater access to the decision making process at the expense of conservation groups," which would cause "long-term adverse effects" on fish and wildlife, App. 32, 33. The EIS extensively discussed these subjects, and concluded that the regulations would allow members of the public who are actively involved in the BLM's management to fully participate in the BLM's management decisions, and that the regulations do not authorize any projects or activities that may have adverse effects on fish and wildlife. EIS 4:27-28, 5:94-98 (ER 135-136, 263-267) (public participation); EIS Addendum 36-39 (ER 576-579) (same); EIS 5:34-36 (ER 203-205) (fish and wildlife); EIS Addendum 21-23 (ER 561-563) (same). While the FWS argued that the regulations would make "grazing a priority use over other uses," ER 759, the EIS stated that the regulations do not give a "priority" to ranchers over other resources, that the BLM "manages the public land on the basis of multiple use and sustained yield," and that the regulations do not "weaken environmental standards" but instead "strengthen[ ] standards by requiring monitoring and land assessment in areas that do not meet rangeland health standards due to grazing practices. . . ." EIS 5:20-21 (ER 189-190).

The EIS specifically responded to the ARC-DEIS' comments, although the Ninth Circuit made no mention of the EIS' response. The EIS stated that the ARC-DEIS contained "mischaracterizations" and "erroneous interpretations" of the proposed regulations, "imprecise analysis," and "misstatements of law." EIS Addendum 50-54 (ER 590-593). Although the BLM plainly disagreed with the ARC-DEIS' analysis, the Ninth Circuit granted no deference to the agency's institutional judgment, as required by the APA review standard, and instead deferred to dissenting views within the agency.[9]

In sum, the Ninth Circuit did not examine to any appreciable degree the EIS' analysis of environmental effects, and instead relied on internal dissenting

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[9] The Ninth Circuit also selectively quoted from comments submitted during the EIS public comment process by the Environmental Protection Agency and the California Department of Fish and Game, which discussed the merits of certain regulations, such as the enforcement timeframes and the monitoring requirement. App. 34, 37-39. Apart from the fact that the BLM thoroughly considered the environmental effects of these regulations in its response to public comments, EIS 5:16-145 (ER 185-314), the comments of these two agencies addressed the regulations on the merits and thus were irrelevant to whether the BLM took a "hard look" at environmental effects in the subsequently-adopted EIS. A public comment on the merits of a proposed regulation submitted during the public comment process is entirely irrelevant to whether an agency satisfies the "hard look" requirement in its EIS. Notably, the Ninth Circuit did not cite or quote from the many public comments that were favorable to the regulations, including several submitted by state agencies.

documents that opposed the regulations on the merits – and that supported the Ninth Circuit's policy judgment that the regulations were "discordant with the lessons learned" from the past. App. 48. Under the APA review standard, however, the question is not whether the reviewing court believes that internal dissenting views or the agency's institutional views are better reasoned or might result in better rangeland management. Rather, the question is whether the agency adequately considered the environmental effects of its action in the EIS, and substantial deference must be accorded to the agency's judgment that it adequately considered these effects. *Robertson*, 490 U.S. at 350; *Kleppe*, 427 U.S. at 410 n. 21; *cf. National Ass'n of Home Builders*, 551 U.S. at 662. Internal agency disagreements concerning policy, science and other matters are not uncommon when an agency proposes to change its regulations or take other action, and the head of the agency – in this case the Secretary of the Interior – is responsible for resolving these internal agency disagreements. The Secretary of the Interior resolved the internal agency disagreement here by approving the regulations. The Ninth Circuit – by concluding that the regulations are "discordant" with sound rangeland management and by openly siding with dissenting views within the Department of the Interior – improperly intruded into the Secretary's decision-making authority and substituted its judgment for the Secretary's judgment, contrary to the APA review standard.

C. The Ninth Circuit Improperly Applied A Heightened Standard Of Scrutiny Because The Agency "Changed" Its Regulations.

The Ninth Circuit stated that the BLM must provide a "reasoned explanation for the BLM's change of policy from the 1995 Regulations," citing this Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 32 (1983). App. 48. This Court recently held, however, that:

> We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to a more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first place.

FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1810 (2009). By subjecting the BLM's action to heightened scrutiny because the agency changed its 1995 regulations, the Ninth Circuit decision conflicts with this Court's decision in *Fox Television*.

D. The Ninth Circuit Decision Is Part Of A Recent Ninth Circuit Trend Invalidating Agency Actions On "Hard Look" Grounds.

The Ninth Circuit decision is part of a recent trend of Ninth Circuit decisions invalidating agency actions for failure to comply with NEPA's "hard look" requirement. *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 929 (9th Cir. 2010); *National Parks & Conservation Ass'n v. Bureau of Land Management, et al.*, 606 F.3d 1058 (9th Cir. 2010); *Te-Moak Tribe, et al. v. U.S. Dep't of Interior, et al.*, 608 F.3d 592 (9th Cir. 2010); *Center for Biological Diversity v. U.S. Dep't of Interior ("CBD")*, 581 F.3d 1063 (9th Cir. 2009); *South Fork Band Council, et al. v. U.S. Dep't of the Interior,* 588 F.3d 718 (9th Cir. 2009); *Alaska Wilderness League v. Kempthorne, et al.,* 548 F.3d 815 (9th Cir. 2008), *withdrawn as moot* 559 F.3d 916 (9th Cir. 2009), 571 F.3d 859 (9th Cir. 2009); *cf. Humane Society v. Locke, et al.*, 626 F.3d 1040 (9th Cir. 2010) (invalidating agency action under NEPA on other grounds); *Oregon Natural Trust Ass'n, et al. v. Bureau of Land Management, et al.*, 625 F.3d 1092 (9th Cir. 2010) (same).[10] This case presents an opportunity for this Court to clarify NEPA's "hard look" requirement, and to ensure that the Ninth Circuit and other courts

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[10] Dissenting opinions were filed in *Tidwell* (Kozinski, C.J.), *Kaiser Eagle Mountain* (Trott, J.), *CBD* (Tallman, J.), and *Kempthorne* (Bea, J.).

properly apply the APA's narrow and deferential standard in applying the requirement.

This Court recently reversed two other Ninth Circuit decisions that applied an improper review standard in enjoining agency actions for alleged violations of NEPA. *Monsanto Co. v. Geertson Seed Farms, et al.*, 130 S.Ct. 2743 (2010); *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). This Court should grant review here to similarly clarify the applicable review standard for NEPA's "hard look" requirement.

More recently, this Court reversed a Ninth Circuit decision *per curiam* for its failure to apply the "highly deferential standard" of the Antiterrorism and Effective Death Penalty Act of 1996 in evaluating state court rulings. *Felkner v. Jackson*, No. 10-797, Slip Op. 4 (Mar. 21, 2011). The Ninth Circuit decision here similarly failed to apply the APA's deferential review standard, and its decision should be similarly reviewed and reversed.

IV. THE NINTH CIRCUIT FAILED TO GRANT APPROPRIATE DEFERENCE TO THE AGENCY'S JUDGMENT THAT THE REGULATIONS WOULD NOT AFFECT ENDANGERED SPECIES.

Section 7 of the ESA requires an agency to engage in consultation before taking any action that the agency "has reason to believe . . . will likely affect" a listed endangered species. 16 U.S.C. § 1536(a)(3)

(App. 115); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). The BLM did not consult because it concluded that the regulations would have "no effect" on any listed endangered species. EIS 4:38 (ER 146); EIS Addendum, App. G, 1-8 (ER 598-605). The BLM reasoned that the regulations establish administrative requirements only, and do not authorize any projects or activities on the public range that might affect any listed species. *Id.* The BLM stated that it would be required to consult under the ESA when, and if, the BLM takes subsequent actions that may affect a listed species, such as by issuing a grazing permit for an area inhabited by a listed species. *Id.*

The plaintiffs challenged the BLM's "no effect" decision under the ESA citizen suit provision. 16 U.S.C. § 1540(g). As the Ninth Circuit recognized, actions under the ESA citizen suit provision are governed by the APA standard of review. App. 52; *Bennett v. Spear*, 520 U.S. 154, 171-175 (1997). As this Court has stated, "[r]eview under the [APA's] arbitrary and capricious standard is deferential." *Home Builders,* 551 U.S. at 657-658.

The Ninth Circuit accorded no deference whatever to the BLM's "no effect" conclusion, and did not even mention the BLM's rationale for its decision. Instead, the Ninth Circuit held that the BLM's "no effect" conclusion was arbitrary and capricious based on the court's speculation that the regulations might have abstract and theoretical future effects on endangered species. The court stated that the "sheer

number of acres" affected by the regulations and "number of special status species who reside on these lands" demonstrate that the regulations must have an effect on listed species and their habitats. App. 53. The court did not describe how the regulations might cause such effects, or what effects might occur, or even what species might be affected. Although the regulations apply to many public rangelands and many endangered species are located on those lands, it does not follow that the regulations – which authorize no projects or activities – would have any effects on any endangered species on the lands. The Ninth Circuit's conclusion otherwise has no foundational support and is based on the court's own speculation and conjecture. The Ninth Circuit substituted its judgment for the agency's judgment and failed to properly apply the APA's narrow and deferential standard of review.[11]

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[11] The Ninth Circuit also stated that the FWS' unsigned "draft" document, described earlier, *see* page 28, *supra,* concluded that the regulations would affect endangered species. App. 54-55. The FWS document, which was prepared early in the rulemaking process, did not consider or discuss whether the BLM would be required to consult before adopting the regulations. The FWS document speculated that the regulations "could" have long-term, generalized effects on endangered species, as part of its policy argument that the BLM should not adopt the regulations. ER 770, 783. As quoted by the Ninth Circuit, for example, the FWS document stated that endangered species "are all influenced by the presence and distribution of livestock in the western sagebrush-steppe ecosystem," and that the BLM regulations "seek to change the ways livestock will be managed spatially and temporally." App. 54. Since the BLM

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The Ninth Circuit established a substantially higher standard for ESA consultation than the ESA regulations. The ESA regulations require consultation only if the agency action "*reasonably would be expected*, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species. . . ." 50 C.F.R. § 402.02 (App. 122-123) (definition of "jeopardize") (emphasis added). In initiating formal consultation, the agency must describe the "specific area" that may be affected, "any listed species or critical habitat" that may be affected, and "the manner in which the action may affect" the listed species. 50 C.F.R. § 402.14(c) (App. 125). Thus, the ESA regulations require consultation only if the

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regulations do not establish substantive grazing standards or otherwise authorize grazing or other activities on the public range, they do not affect the "presence and distribution of livestock" on the public range or "seek to change the ways livestock will be managed. . . ." The FWS' speculation about possible long-term effects of the regulations – which comprised its policy argument that the regulations should not be adopted – provides no basis for the Ninth Circuit's conclusion that the BLM's "no effect" decision was arbitrary and capricious.

The Ninth Circuit also cited three individual declarations submitted at the district court level arguing that the BLM regulations might affect endangered species. App. 56-57. These declarations were not part of the administrative record and thus were inadmissible under the APA, which precludes review of extra-record evidence. 5 U.S.C. § 706 (App. 114); *Camp v. Pitts*, 411 U.S. 138, 141 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). Further, these extra-record declarations, as quoted by the Ninth Circuit, also speculated about possible and theoretical effects on endangered species, and were thus irrelevant as well as inadmissible.

agency action might reasonably be expected to affect a specific listed species, and if the specific area and manner of effect are identified.

This Court has held that the ESA establishes a proximate cause relationship between an action that may cause harm to an endangered species and the harm itself. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 709 (1995) (O'Connor, J., concurring) (ESA section 9, 16 U.S.C. § 1538, which prohibits "take" of endangered species, establishes "ordinary principles of causation, which introduces notions of foreseeability"). Therefore, the ESA does not require consultation based on speculation and conjecture concerning possible or theoretical effects, whether by an agency or a court.

Here, the BLM concluded that its regulations would not affect any listed endangered species because they do not authorize any projects or activities on the public range that reasonably would be expected to have such effects. The BLM's conclusion was reasonable, and not arbitrary and capricious. In concluding otherwise, the Ninth Circuit failed to properly apply the APA's narrow and deferential review standard.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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