No. 10-1290

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

AMICUS BRIEF OF THE COLORADO CATTLEMEN'S ASSOCIATION AND THE COLORADO WOOL GROWERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Colorado Cattlemen's Association ("Cattlemen's") and Colorado Wool Growers Association ("Wool Growers"), collectively herein "Colorado Agricultural Associations," respectfully submit their brief in support of the Petition for a Writ of Certiorari. The Colorado Agricultural Associations request that this Court grant the Petition for a Writ of Certiorari to use its supervisory power because the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") has departed from this Court's decisions addressing Article III standing, ripeness, National Environmental Policy Act's ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, "hard look" requirement and the Endangered Species Act's ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, consultation requirement. These are matters of national importance and of critical importance to the *Amici Curiae*.

Cattlemen's is a nonprofit trade organization representing the social, economic and educational interests of more than 12,000 beef producers throughout

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* certifies that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters on file with the Clerk's office. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae*'s intention to file this brief.

the State of Colorado. Founded in 1867 (prior to Colorado's admittance to the Union), Cattlemen's mission is to promote the interests of Colorado's beef industry and protect Colorado's land, water and forage resources.

Wool Growers is a nonprofit trade organization representing the economic, educational and animal health interests of more than 1,600 sheep farms and ranches. Colorado is the fourth largest sheep and lamb producer in the United States. The Wool Growers mission is to promote the interests of Colorado's lamb and wool industry and the ecological balance of the natural resources.

The members of the Colorado Agricultural Associations are farmers and ranchers who are directly dependent upon farming and ranching as a way of life. Many members of the Colorado Agricultural Associations have worked the same private and public land for generations. The Colorado Agricultural Associations pride themselves on good stewardship and care of their own private lands, as well as the federal public lands upon which they rely to graze cattle and sheep. The continued health and vibrancy of the private and public lands is critical to the livelihoods of the Colorado Agricultural Associations. The Colorado Agricultural Associations depend upon the ability to use Colorado's natural resources, including water resources and federally-managed lands. The Colorado Agricultural Associations also depend on the ability to access and use federally-managed lands and water resources which come from those areas. The

Colorado Agricultural Associations comply with the terms of their grazing permits and federal land use plans.

In 2006, the U.S. Bureau of Land Management ("BLM") adopted regulations governing its administration of cattle and sheep grazing on the public range ("2006 Regulations"). *See* BLM Grazing Administration, 71 Fed. Reg. 39,402 (July 12, 2006). The Colorado Agricultural Associations participated in the 2006 Regulations public comment process. While the Colorado Agricultural Associations do not agree with all of the 2006 Regulations as a whole, they believe that the 2006 Regulations provide a framework which respects the interests of those who use the land and the nature of the land ownership in the West. The landownership pattern in much of the West is a situation of mixed, intermingled, unfenced ownership among the federal government, the States, and private lands. Federal, State and private natural resources are best conserved when all of the mixed ownerships are managed under a similar set of resource objectives that have been developed by a partnership among the various owners. The 2006 Regulations supported such a partnership while providing for meaningful public participation. The Ninth Circuit decision flies in the face of longstanding congressional directives aimed at multiple uses of federal lands. When Congress passed the Federal Land and Policy Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, it made clear that federal

lands were to be used for many uses, including grazing.

In addition, the Ninth Circuit's willful disregard of this Court's precedent on Article III standing and NEPA's "hard look" requirement in this case pales only to the Plaintiff's unabashed attempt to circumvent the will of Congress.

SUMMARY OF THE ARGUMENT

The *Amici Curiae* concur with the Petitioner's questions presented and argument contained in the Petition for Writ for Certiorari. The Ninth Circuit disregarded this Court's precedent. In addition to the Petitioner's arguments, the Ninth Circuit 1) improperly weighed BLM's Amendments to the public participation requirements when it concluded that the agency violated NEPA's "hard look" requirement; 2) improperly concluded that the Plaintiffs have Article III Standing, particularly regarding regulations concerning joint ownership; 3) erroneously considered internal deliberations, ignoring the precedent that an agency is free to change its mind; and 4) improperly held that consultation pursuant to the ESA was required for non-discretionary actions pursuant to FLPMA and the 2006 Regulations.

ARGUMENT

The Ninth Circuit has departed from this Court's decisions addressing Article III standing, ripeness, NEPA's "hard look" requirement and consultation under the ESA. Should it stand, the Ninth Circuit's decision would fundamentally alter well-established precedent for all federal agency decision making. It would also weaken Article III standing which could ultimately result in further litigation and gridlock. The decision in this case concerns matters of national importance and of critical importance to the *Amici Curiae*.

I. THE NINTH CIRCUIT IMPROPERLY WEIGHED BLM'S AMENDMENTS TO PUBLIC PARTICIPATION WHEN IT CONCLUDED THAT THE AGENCY VIOLATED NEPA'S "HARD LOOK" REQUIREMENT.

BLM should not be precluded from limiting public participation[2] in grazing decisions to those parties that participate throughout the decision making process. Congress and the agencies have recognized such reasonable restraints in today's litigious environment. *See, e.g.*, Healthy Forests Restoration Act of

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[2] The 2006 Regulations define "interested public" as persons who actively participate in rangeland management by providing written requests to participate *and* submit written comments on a grazing allotment. The prior regulations defined "interested public" as persons who submit written requests *or* written comments.

2003, 16 U.S.C. §§ 6501 *et seq.*; U.S. Forest Service Notice of Intent to Prepare an Environmental Impact Statement, Willow Creek Pass Fuel Reduction Project, 74 Fed. Reg. 15,691, 15,692 (Apr. 7, 2009).

Public participation must be timely and meaningful so that it alerts the agency to the public's position and contentions. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978). This can only be expressed through active participation in the public participation process. Furthermore, comments must show not only why a mistake is alleged, but why the alleged mistake is of possible significance in the results. *Id.* (citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.D.C. 1973)). Administrative proceedings "should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that 'ought to be' considered." *Vermont Yankee*, 435 U.S. at 553-54. This Court has found that when the public declines to clarify its comments when asked by the agency, it virtually declined to participate. Here, the Ninth Circuit bristled at BLM's reasonable limits in the 2006 Requirements, impermissibly substituted its judgment for that of the Secretary of the Interior's and improperly held that BLM failed to take a "hard look" at the environmental impacts of the 2006 Regulations as required by NEPA. Pet'r App. 49.

The validity of placing parameters around public participation has been recognized not only in this Court's holdings but in *City of Angoon v. Hodel*, 803

F.2d 1016, 1022 (9th Cir. 1986) (discussing the responsibility of a public participant to demonstrate an alternative would be less environmentally harmful than the chosen alternative in an environmental impact statement).

II. THE NINTH CIRCUIT IMPROPERLY CONCLUDED THAT THE PLAINTIFFS HAVE ARTICLE III STANDING, PARTICULARLY REGARDING THE REGULATIONS CONCERNING JOINT OWNERSHIP.

The Ninth Circuit decision supporting Plaintiff's standing is contrary to established Article III standing precedent.

> To seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Summers v. Earth Island Inst., 129 S.Ct. 1142, 1149 (2009) (citations omitted). A plaintiff bears the burden of showing that he has standing *for each type of relief sought. Id.* (emphasis added). The Ninth Circuit failed to hold the Plaintiffs to this standard, especially when considering the joint ownership of rangeland improvements and water rights.

The Ninth Circuit concluded the 2006 Regulations as a whole posed an imminent harm to Plaintiffs' "aesthetic enjoyment of the rangeland and to their involvement in public land grazing management." Pet'r App. 26. This is unsupported in the context of joint ownership. Joint ownership does not modify the permittees' obligations to meet the permit conditions and the land use plan requirements – in fact, its connection to the aesthetic enjoyment and public involvement is non-existent.

The Ninth Circuit also ignores that in most Western States, the use of water by owners is limited to beneficial purposes for which they put the water to use. The development of the water rights to be jointly held by permittees and the United States are limited to those places and those quantities for the sole purpose of watering livestock. Any water appropriated by the United States for fish and wildlife purposes could not be jointly owned by permittees and the United States.

The Ninth Circuit ignores the benefits that joint ownership can provide. The 2006 Regulations provide the permittee ownership of cooperative range improvements in proportion to their contribution to on the ground costs. This change, along with joint ownership of water, provides for restoring permittee interest in range improvements on federal lands that were less apparent under the 1995 Regulations.

III. THE NINTH CIRCUIT ERRONEOUSLY CONSIDERED INTERNAL DELIBERATIONS, IGNORING THE PRECEDENT THAT AN AGENCY IS FREE TO CHANGE ITS MIND.

The Ninth Circuit may not overturn an agency's final decision based on internal deliberations. As the Supreme Court recently held:

> With regard to the various statements made by the involved agencies' regional offices during the early stages of consideration, the only "inconsistency" respondents can point to is the fact that the agencies changed their minds – something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's *final action*, see 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658-59 (2007). The Ninth Circuit similarly found, in a case where petitioners alleged the U.S. Fish and Wildlife Service's ("Service's") final finding differed from a "draft finding" without citing any new data, that "the Service may change its mind after internal deliberation. . . .'" *NW Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007) (citations omitted).

Here, the Ninth Circuit almost solely relied upon the internal deliberations of the BLM and ignored the Final Environmental Impact Statement. "[An] agency does not have a burden to explain a change in position from a proposed rule to the final rule, and that lack of an explanation for the change is not in itself evidence of arbitrariness." *Fed'n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1163 (N.D. Cal. 2000). Indeed, a "paramount purpose of the A[dministrative] P[rocedure] A[ct] is to make an agency publish its preliminary rule and then to *rethink* that position, in light of the comments and additional information received." *Id.* (citation omitted). To go further into this line of inquiry is to invite the Court to probe the mental processes of the agency. But, "[j]ust as a judge cannot be subjected to such scrutiny, . . . so the integrity of the administrative process must be equally respected." *United States v. Morgan*, 313 U.S. 409, 422 (1941).

Also, this Court affirmed that there is no basis in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, or in Supreme Court precedent "for a requirement that all agency change be subjected to more searching review." *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1810 (2009). The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.* at 1811. Thus, the Ninth Circuit's reasoning is

insufficient to render the BLM's reasoned decision arbitrary in this case.

III. THE NINTH CIRCUIT IMPROPERLY HELD CONSULTATION UNDER THE ESA WAS REQUIRED FOR NON-DISCRETIONARY ACTIONS UNDER FLPMA AND THE 2006 REGULATIONS.

Section 202 of FLPMA requires BLM to develop and maintain land use plans for public lands. It is these land use plans which provide guidance for future management actions and the development of subsequent plans for resources and uses. Land use plans are developed under the multiple-use and sustained-yield mandate of FLPMA. These plans identify lands that are available for grazing and the parameters under which grazing is to occur. Land use plans require the BLM to consult with the Service regarding land use actions that may affect listed species and designated critical habitat.

The 2006 Regulations do not replace land use plans. The 2006 Regulations guide BLM's required mandates under FLPMA. Because BLM has to meet mandates under FLPMA (rather than discretionary action), consultation under the ESA is not required.

The consultation process required under the ESA concerns only discretionary agency actions and does not attach to actions that an agency is required by statute to undertake. *Home Builders*, 551 U.S. at 669. To require the consultation process for actions which

are non-discretionary is not only unreasonable, but also comports with the canon against implied repeals because it stays the required consultation mandate where it would "effectively override otherwise mandatory statutory duties." *Id.* Here, BLM is required under FLPMA to develop land use plans to provide for the multiple-use of public lands. The 2006 Regulations provide direction to BLM staff for the development of these mandatory plans. Under the land use planning process, BLM then consults on discretionary actions therein as required by the ESA with the Service.

The Ninth Circuit's decisions appear to suggest that the BLM and the Service must consult on and examine all the species and critical habitat contained within the 253,366,500 acres of land under BLM's exclusive jurisdiction and then speculate as to how the land use plans may change and evolve as a result of the 2006 Regulations. This misapplies the ESA and ignores that BLM would then again consult with the Service under the land use planning requirements for each BLM management area.

To require BLM to consult for regulations that will be applied to various site-specific land use plans is duplicative, unnecessary and not required by the law.

CONCLUSION

For the reasons set out above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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