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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether the Bureau of Land Management has taken a "hard look" at the environmental impacts of its amended grazing regulations, as required under the National Environmental Policy Act, did the Ninth Circuit err in substituting its judgment for the judgment of the agency, in conflict with the decisions of other Circuits and this Court?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation ("PLF") submits this brief amicus curiae in support of Public Lands Council's petition for a writ of *certiorari*.

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal organization of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide, advocating limited government, individual rights, free enterprise, and a balanced approach to environmental regulation. PLF attorneys were counsel of record in this Court in *Rapanos v. United States*, 547 U.S. 715 (2006), which addressed the issue of federal wetlands jurisdiction under the Clean Water Act. They participated as amicus curiae in this Court regarding legal issues arising under NEPA and other environmental laws in *Winter v. NRDC*, 129 S. Ct. 365, 376 (2008), *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), and *Bennett v. Spear*, 520 U.S. 154 (1997). In addition, PLF attorneys served as

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

amicus in dozens of NEPA cases in federal courts across the nation.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION[2]

The National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), requires federal agencies to carefully identify and analyze the environmental effects of their proposed actions, a principle known as the "hard look" doctrine. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 226-28 (1980). Because NEPA is a procedural statute, the doctrine does not mandate particular results or require agencies to reach particular substantive conclusions. *Id.* Although courts must ensure that agency judgments are based upon defensible data and reasonable scientific principles, if a court simply disagrees with an agency's substantive conclusion, it may not substitute its environmental judgment for that of the agency. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

In the case below, the Bureau of Land Management ("BLM") prepared a 600-page Environmental Impact Statement ("EIS") under NEPA in which it concluded that amendments to its administrative regulations governing grazing on federal lands would not have significant environmental impacts. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 487 (9th Cir. 2011). Under the guise of

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[2] The Petitioner's writ of *certiorari* seeks review of the case below on several grounds. This brief in support is filed with regard to the "hard look" doctrine under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* Amicus takes no position regarding other grounds for review set forth in the writ.

the "hard look" doctrine, the Ninth Circuit substituted its judgment for that of BLM by holding that the amendments would have significant environmental impacts. *Id.* at 491-95. This is the most recent example of the Ninth's Circuits use of the "hard look" doctrine to achieve environmental results it deems desirable, in conflict with decisions of other Circuits and this Court.

The vast majority of Federal Circuits follow this Court's instructions regarding how the "hard look" doctrine may be used, but the Ninth Circuit has consistently charted its own course and used the doctrine to substitute its judgment for that of administrative agencies. Following the Ninth Circuit's lead, the Fourth Circuit recently adopted a similar approach. *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 197 (4th Cir. 2005).

Because the Ninth Circuit's view of the "hard look" doctrine under NEPA is an outlier in conflict with most other Circuit courts, this Court should resolve the conflict. This case is a palpable illustration of how the Ninth Circuit's approach brings to a halt efforts of administrative agencies to streamline their regulatory procedures, save taxpayer dollars, and make complex regulations more user-friendly. Accordingly, this Court should resolve conclusively this conflict among the Circuits by reaffirming the nature, extent, and limitations of the "hard look" doctrine. For these reasons, the petition should be granted.

ARGUMENT

NEPA directs all federal agencies to take environmental issues into consideration in connection with their proposed actions "consistent with other essential considerations of national policy." 42 U.S.C. § 4331(b). More specifically, NEPA requires agencies to include a detailed statement of environmental consequences, known as an EIS, in every "proposal[] for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). When an agency is uncertain whether an EIS is necessary, it prepares a preliminary Environmental Assessment ("EA"), by which it makes an initial determination of whether a proposed action may be environmentally significant. 40 C.F.R. § 1508.9(a)(1) (defining an EA as a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact"). NEPA's "action-forcing" provisions were intended as a directive to all agencies to assure consideration of the environmental impact of their actions in decisionmaking. *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

Importantly, NEPA is a process-oriented statute requiring federal agencies to identify and consider the environmental consequences of their proposed actions, but it does not mandate particular results or require agencies to reach particular substantive conclusions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action."

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) (footnote omitted).

NEPA does not itself authorize judicial review of federal agency NEPA compliance, but such review is available pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), under which agency action can be reversed only if it is arbitrary and capricious, or otherwise not in accordance with law. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

I

THIS COURT'S "HARD LOOK" DOCTRINE REQUIRES LOWER COURTS TO ENSURE THAT FEDERAL AGENCIES HAVE FULLY CONSIDERED ENVIRONMENTAL ISSUES BUT FORBIDS THEM FROM SUBSTITUTING THEIR JUDGMENTS ON SUCH ISSUES FOR THOSE OF THE AGENCIES

> Neither [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 for a 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.

Kleppe v. Sierra Club, 427 U.S. at 410 n.21 (citations and quotation marks omitted).

Since *Kleppe*, this Court has held consistently that the "hard look" requirement does not constitute a license for lower courts to substitute their environmental judgments for those of administrative agencies.

> Congress in enacting NEPA . . . did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a "hard look" at the environmental consequences before taking a major action. The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.

Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 97-98 (1983) (citations omitted). *See Winter v. NRDC, Inc.*, 129 S. Ct. at 376 (NEPA imposes procedural requirements only and does not mandate particular results.).

II

FOLLOWING THIS COURT'S "HARD LOOK" DOCTRINE, MOST FEDERAL APPELLATE COURTS DO NOT SUBSTITUTE THEIR ENVIRONMENTAL JUDGMENTS FOR THOSE OF ADMINISTRATIVE AGENCIES

United States Courts of Appeals for the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, District of Columbia, and Federal Circuits follow the *Kleppe* mandate and do not substitute their own environmental judgments for those of

administrative agencies. The following discussion analyzes the most recent NEPA "hard look" decision in each of these federal appellate courts.

A. First Circuit

In *Town of Winthrop v. FAA*, 535 F.3d 1 (1st Cir. 2008), two local residents and a town near a municipal airport sought review of an order by the Federal Aviation Administration ("FAA") permitting the construction of a new taxiway at the airport, claiming that the FAA's decision not to require a supplemental environmental impact statement was arbitrary and capricious. The Court found that the concerns the petitioners brought to FAA's attention after the EIS had been completed were reasonable but nevertheless refused to second guess the FAA's decision that reopening the EIS was unnecessary. The Court held that the FAA complied with the "hard look" requirement by adequately considering the new information, even though it did not take the specific action suggested by the petitioners. "NEPA does not prevent agencies from . . . deciding that the benefits of a proposed action outweigh the potential environmental harms [and does not guarantee] specific outcomes." *Id.* at 4.

B. Second Circuit

NRDC, Inc., ex rel. Lockyer v. U.S. Department of Agriculture, 613 F.3d 76 (2d Cir. 2010), addressed the federal response to the environmental threat presented by plant pests and pathogens introduced into the nation through the importation of solid wood packaging material. Plaintiffs claimed that the Department of Agriculture violated NEPA by failing to fully consider in the EIS the alternative of a phased-in

substitute materials requirement before adopting a final rule requiring that all solid wood packaging material be either heat treated or fumigated with methyl bromide prior to being used in the importation of goods. The Court noted that in its view there were uncertainties not covered by the EIS, that every alternative was not evaluated in the way the Court would have preferred, and that events occurring in foreign markets were not analyzed in the way the Court would have analyzed them. *Id.* at 84-86. Nevertheless, the Court refused to substitute its judgment for that of the agency and upheld the EIS. "NEPA does not mandate particular results . . . . Our only role in reviewing agency action for compliance with the NEPA is to insure that the agency has taken a hard look at environmental consequences." *Id.* at 84 (citations and quotation marks omitted).

C. Third Circuit

In *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission*, 869 F.2d 719 (3d Cir. 1989), the Third Circuit issued a balanced opinion in which it held that the Nuclear Regulatory Commission's EIS properly gave a "hard look" to certain environmental consequences but not to others, rejecting the EIS solely in connection with two of the many issues raised by the petitioners. Specifically, the court held that the Commission failed to take a "hard look" at severe accident mitigation design alternatives and the training to be provided to the evacuation plan participants. With regard to other important safety issues raised by the petitioners, however, the Court noted that, while the objections were not without merit, the Commission conducted the requisite "hard

look," and the Court refused to substitute its judgment for that of the Commission.

D. Fifth Circuit

In *City of Dallas v. Hall*, 562 F.3d 712, 717-23 (5th Cir. 2009), after preparing an Environmental Assessment of the proposed Neches Wildlife Refuge in East Texas, the U.S. Fish & Wildlife Service ("FWS") found no significant environmental impact would result from the project, obviating the need to prepare an EIS. FWS then set an acquisition boundary for the refuge and accepted a conservation easement within that boundary, which precluded construction of a reservoir the City of Dallas and the Texas Water Development Board had proposed for the site. Dallas and the Texas Water Development Board claimed that the assessment was flawed and that an EIS was required under NEPA. Even though the Court noted that FWS used certain information the Court believed was outdated, did not consider all conceivable alternative actions, and took certain action inconsistent with FWS' own guidelines, the court refused to hold that FWS' decision not to prepare an EIS was arbitrary and capricious. *Id.* at 720-22. "Courts may not use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency." *Id.* at 717.

E. Sixth Circuit

In *City of Riverview v. Surface Transportation Board*, 398 F.3d 434 (6th Cir. 2005), the Riverview Trenton Railroad Company sought an exemption from the Surface Transportation Board that would allow it to operate an intermodal transportation facility on

property located in the Cities of Trenton and Riverview, Michigan. The local governments protested that the Railroad's proposal was a sham designed to prevent them from taking the property by eminent domain as part of their riverfront redevelopment plans. The Railroad's proposal was evaluated by the Board and underwent an environmental review pursuant to NEPA. The Board issued an Environmental Assessment concluding that, as long as certain conditions were met, the project would have no significant impact on the environment. In the face of the local governments' contentions that certain alternatives, air impacts, noise levels, traffic considerations, and impacts on emergency responders were not adequately addressed in the assessment, the Court refused to substitute its judgment for that of the agency, holding that, because NEPA is a procedural statute, it could not overturn the agency's decision under the "hard look" doctrine because the agency had conducted a sufficient review and its decision was not unreasonable. *Id.* at 442-43.

F. Seventh Circuit

In *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897, 900-03 (7th Cir. 2010), petitioners challenged a Forest Service management project for failing to comply with NEPA's requirement to fully and fairly analyze the cumulative environmental impacts of all past, present, and reasonably foreseeable future actions across a forest. The Court observed that a potential project had not been evaluated by the Forest Service and that the Service did not disclose all relevant information regarding that project to the public. Nevertheless, the Court refused to substitute its judgment for that of the

Forest Service, holding that the environmental review was adequate because the "hard look" doctrine did not require the Forest Service to disclose and discuss cumulative effects of a potential project that may or may not be implemented.

G. Eighth Circuit

In *Newton County Wildlife Association v. Rogers*, 141 F.3d 803, 809 (8th Cir. 1998), the Forest Service prepared an EIS reviewing cumulative impacts of a resource management plan on watershed resources, road construction, timber sales, wildlife, and fish for the 1,118,500-acre Ozark National Forest. Subsequently, it decided to prepare Environmental Assessments, but not supplemental EISs, for discrete timber sales within the larger study area. In refusing to substitute its judgment for that of the Forest Service, the Court stated: "We 'must affirm if the Service took a "hard look" at the project.'" *Id.* at 809 (quoting *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 838-39 (8th Cir. 1995)). The Court held that the Forest Service's approach qualified as a "hard look" because the EIS took into account cumulative impacts of the project as a whole and each subsequent EA of approximately 100-pages constituted a reasonable way of dealing with individual timber sales.

H. Tenth Circuit

In *Utah Environmental Congress v. Bosworth*, 439 F.3d 1184 (10th Cir. 2006), a Forest Service project was designed to improve habitat conditions to promote long-term ecosystem health in a specified area. The primary objective of the project was to reduce densities of aspen and spruce stands that were most at risk of spruce beetle infestation, while the secondary objective

was to maintain a forested appearance. Under the secondary objective, the project was intended to supply local resource-dependent enterprises with raw materials in an economically feasible manner. *Id.* at 1195. In response to a NEPA challenge that the two objectives were defined so narrowly that the range of alternatives was unduly circumscribed, the Court cited its inability to second guess the Forest Service under the "hard look" test and held that the Service had the discretion to choose the objectives of the project and, given those objectives, it conducted the requisite "hard look" at the reasonable alternatives. *Id.*

I. Eleventh Circuit

In *Fund for Animals v. Rice*, 85 F.3d 535 (11th Cir. 1996), environmentalists sued to prevent construction of a municipal landfill on a site they claimed was an indispensable habitat for the protected species Florida panther and Eastern indigo snake. The United States Army Corps of Engineers had granted a permit to fill 74 acres of wetland for the landfill based on an Environmental Assessment, deciding that an EIS was not necessary. Refusing to substitute its judgment for that of the Corps of Engineers, the Court held that the agency did not act arbitrarily or capriciously by concluding that it had before it sufficient information to determine that the project would not significantly affect the quality of the environment and that preparation of an EIS was therefore unnecessary. *Id.* at 546-47. Citing *Strycker's Bay,* the Court stated: "Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself

within the area of discretion of the executive." *Id.* at 547 (citation and quotation marks omitted).

J. District of Columbia Circuit

In *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010), under a Regional Management Plan, a large resource area was open to oil and gas leasing, subject to restrictions around historic trails, sage grouse breeding grounds, and big game winter range. BLM began review and approval for a gas field development project. The Record of Decision anticipated approving approximately 2,000 new natural gas wells over the span of 30 to 50 years, expecting the development to cause surface disturbance to approximately 13,600 acres during the life of the project, which might cause the sage grouse population to decline, precluding improvement of its species status. Challengers asserted that BLM had defined the project too narrowly and therefore did not fully vet alternatives. Citing *Vermont Yankee,* the Court stated that NEPA requires a well-considered decision, not necessarily the best decision. *Id.* at 503. The Court held that NEPA's "hard look" requirement does not mandate BLM's analysis of the cumulative impacts of all conceivable potential projects, even where some of the projects have been identified, and the Court left it to BLM's discretion to determine the reasonable likelihood that particular projects would proceed to implementation. *Id.* at 508-16.

K. Federal Circuit

In *Defenders of Wildlife v. Hogarth,* 330 F.3d 1358, 1368-73 (Fed. Cir. 2003), the National Marine Fisheries Service satisfied the "hard look" requirement

by identifying the relevant areas of environmental concern and looking at the dolphin mortality problem in a reasonable manner. The Court refused to substitute its judgment for that of the Service, even though it characterized as "serious" challenges that were raised regarding the Service's refusal to prepare an EIS. *Id.* at 1368-73.

L. Summary of Decisions

The foregoing review of recent Circuit court decisions shows that most Circuit courts closely adhere to this Court's mandate that the "hard look" doctrine not be used by courts to substitute their environmental judgments for those of administrative agencies. This majority approach stands in stark contrast to the approach taken by the Ninth Circuit.

III

THE NINTH CIRCUIT'S "HARD LOOK" TEST, UNDER WHICH IT CONSISTENTLY SUBSTITUTES ITS JUDGMENT FOR THOSE OF ADMINISTRATIVE AGENCIES, DIFFERS RADICALLY FROM THE TEST EMPLOYED BY MOST CIRCUITS, WHILE AT THE SAME TIME DEVIATING FROM THIS COURT'S APPROACH

For over twenty years, while paying lip service to this Court's decision in *Kleppe* and its progeny, the Ninth Circuit has charted its own course, substituting its judgment for the judgment of federal administrative agencies in determining whether agencies take a "hard look" at environmental issues under NEPA. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th

Cir. 2011), the case below, is the most recent, and the most striking, example.

In *Western Watersheds*, BLM in 2006 amended its administrative rules governing grazing on publicly owned lands, essentially reinstating rules that were in place prior to 1995. The 2006 amendments provide for several categories of administrative changes that may be broadly summarized as follows: (1) ranchers who improve rangeland may share title to the improvements with the United States in proportion to their contribution to the cost of the improvements; (2) ranchers may share water rights with the United States to the extent authorized by state law; (3) enforcement of the public range "Standards and Guidelines," will continue but the broad goals upon which they are based, the "Fundamentals of Rangeland Health," will no longer be enforceable; (4) the time period within which enforcement of the Standards and Guidelines must be commenced is extended from the beginning of "the next grazing year" to within 24 months of the grazing violation; (5) BLM must use *monitoring data to prove grazing violations; (6)* any mandated grazing reductions exceeding 10% must be phased in over a five-year period; and (7) direct notice of BLM's rangeland management decisions will be made to those who both submit written requests to participate and in fact participate by submitting written comments on grazing allotment proposals, rather than those who do one or the other. Significantly, the administrative amendments do not in any way authorize any activity on the public range. 71 Fed. Reg. 39,402 (July 12, 2006).

BLM prepared an EIS for the proposed amendments, consisting of over 600 pages, including

127 pages of responses to over 18,000 filed public comments. EIS 5:16-145 (ER 185-314); Petitioner Public Lands Counsel Petition at 30. Based upon the EIS, BLM found that the rule amendments would not have any significant environmental effect. Respondents challenged the BLM's finding, arguing, among other things, that BLM did not take a "hard look" at environmental consequences and that the amendments had a significant environmental impact because they: (1) decreased the likelihood of public participation in rangeland grazing decisions; (2) made the enforcement provisions less stringent by (a) delaying enforcement, (b) requiring monitoring data to prove violations, and (c) making the Fundamentals of Rangeland Health unenforceable; and (3) expanded private rights to improvements and water. *Western Watersheds*, 632 F.3d at 487.

The Ninth Circuit agreed with the Respondents on all three issues. First, BLM's EIS stated that its decision to send notices of grazing allotment management decisions to those who requested to participate and in fact participated in grazing allotment proposals was made to improve efficiency and reduce the costs of sending periodic mailings to persons who were not truly interested in and were unaffected by such decisions. BLM concluded that these administrative changes would have no impact on the environment. The EIS further stated that the changes would allow BLM to make timelier management decisions, thereby having a beneficial effect on vegetation resources. *Id.* at 488. The Ninth Circuit observed that, before the issuance of the EIS, some BLM employees (the "dissenters") objected to the public notice changes on the grounds that the changes could impact the environment because fewer members

of the public would receive actual notice of grazing management decisions. *Id.*

The Ninth Circuit agreed with the position taken by the dissenters and disagreed with the position taken by BLM, stating that, because BLM did not adopt the dissenters' position, it had failed to take a "hard look" at the environmental consequences of the rule amendments. *Id.* at 492. In so doing, the Ninth Circuit substituted its judgment for that of BLM, in conflict with most Circuit courts, which follow *Kleppe*'s proscription: "The only role for a 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 (citations and quotation marks omitted).

Second, the Ninth Circuit substituted its judgment for BLM's judgment in connection with the enforcement issues raised by the BLM grazing rule amendments. Acknowledging in the EIS that some commenters were concerned that the Fundamentals of Rangeland Health would no longer be directly enforceable, BLM concluded that the Fundamentals document was simply a generalized statement duplicating what the Standards and Guidelines set forth more precisely. 71 Fed. Reg. at 39,492-93. With regard to allowing for greater flexibility in bringing enforcement actions, BLM relied on a five-year BLM study assessing 58 million acres of federal land, concluding that potential enforcement delays would affect only a relatively small number of allotments. 632 F.3d at 490. The Ninth Circuit observed that the same BLM dissenters, as well as FWS, EPA, and the California Department of Fish and Game, expressed

concern that delays occasioned by the enforcement portions of the amendments could result in adverse impact to wildlife resources, biological diversity, and rangeland health. *Id.* at 489-90.

Agreeing with the BLM dissenters, the two federal agency commenters, and the California Department of Fish and Game, the Ninth Circuit again substituted its judgment for that of the lead federal agency and held that BLM failed to adequately take into account the environmental consequences of the enforcement parts of the rule amendments, once again relying on its unique view of the "hard look" doctrine. In so doing, the Ninth Circuit again came into conflict with most federal Circuit courts, which follow the *Kleppe* proscription against substituting judicial environmental judgments for those of administrative agencies. 427 U.S. at 410 n.21.

Third, the Ninth Circuit used its unique "hard look" test to second guess BLM's decision to allow joint ownership of improvements and water. BLM's EIS concluded that allowing ranchers to share title to certain improvements and water would not have a significant impact on the environment. Once again, BLM dissenters disagreed and, once again, the Ninth Circuit agreed with the dissenters, holding that BLM did not take a "hard look" at the issue and that allowing ranchers to share title when authorized by state law would significantly impact the environment. 632 F.3d at 491. Interestingly, in reaching the conclusion that BLM failed to take a "hard look" at such environmental consequences, the Court cites a 32-page discussion in the EIS addressing the very issue the Court asserts had not been adequately discussed. *Id.*

Thus, the case below stands for the proposition that the "hard look" test permits a court to substitute its environmental predilections for the judgments of an administrative agency to whom Congress delegated authority to make such judgments. This approach directly conflicts with the approach taken by the vast majority of Circuit courts.

Significantly, another case decided within weeks of *Western Watersheds* illustrates further the Ninth Circuit's unique "hard look" approach. In *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011), a Department of Energy decision that its designation of national interest electric transmission corridors would not have environmental effects failed the "hard look" test because the Ninth Circuit determined the decision was "conclusory," even though the Court acknowledged that the environmental effects in that case "may be uncertain and difficult to quantify." Again, the Court substituted its judgment for that of an administrative agency, this time because it disagreed with the Department of Energy's decision that any possible environmental effects of the designation were so remote and speculative that they could not be analyzed in a reasoned manner. *Id.* at 1095-98.

Moreover, cases decided by the Ninth Circuit over the past twenty years confirm that its "hard look" decisions under NEPA conflict with those of the majority of other Circuit courts, and the Ninth Circuit has not attempted to reconcile, distinguish, or harmonize its approach with those of other Circuits.

In *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1311-13 (9th Cir. 1990), the Ninth Circuit substituted its judgment for that of the agency by

holding that an EIS failed to take a "hard look" at environmental consequences because the agency did not discuss in enough detail the extent to which its contracts were subject to recision, renegotiation, or amendment, and the agency's discussion of cumulative impacts was incomplete because the agency did not address impacts of certain additional timber sales that may or may not occur in the future, as the Court would have done had it been in the agency's shoes. In *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998), the agency's evaluation of the effects of risks did not pass muster under the "hard look" test because the evaluation was "unpersuasive" to the Court.

The Ninth Circuit proceeded along the same lines in *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002), where, under the guise of the "hard look" test, the Court negated an agency's decision to use "home range" scale rather than "landscape analysis" scale to determine habitat. In *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 964-65 (9th Cir. 2005), the Court held that the Forest Service's EIS failed the "hard look" test because it used assumptions and data with which the Court disagreed. More recently, in *Center for Biological Diversity v. U.S. Department of Interior*, 623 F.3d 633, 642-43 (9th Cir. 2010), BLM's detailed EIS regarding a land exchange, which addressed the impacts of future copper mining activities on the land, failed the "hard look" test even though the land long had been used for copper mining purposes and the future use would remain identical to the past use. In a vigorous dissent, Judge Tallman expressed his frustration with the Court's insistence on second guessing the agency. *Id.* at 650-66. Observing that the

Court may not impose upon agencies its own notions of the best procedures or the most likely public good, the dissent states unequivocally that "[t]his attempt to regulate agency action by judicial fiat quite clearly exceeds our authority." *Id.* at 661.[3] This recent dissent shows there is strong disagreement within the Ninth Circuit itself regarding its approach to the "hard look" doctrine.

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[3] Under the guise of the "hard look" doctrine, the Ninth Circuit has substituted its judgment for that of an administrative agency in numerous other cases. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (Forest Service failed to take a hard look at adverse environmental impacts of a timber sale because it relied on expert opinion and was vague.); *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000) (National Marine Fisheries Service's EA did not constitute a "hard look" because the Court thought it should have been prepared at a different *time*.); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072-79 (9th Cir. 2002) (EIS in connection with BLM's resource management plan violated the "hard look" requirement because the Court disagreed with the agency's conclusions.); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003) (Forest Service failed to take a "hard look" at environmental consequences because it did not discuss more fully what the Court considered certain particularly "responsible" opposing views.); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1029-33 (9th Cir. 2007) (Forest Service's issuance of a categorical exemption for certain fuel reduction projects failed the "hard look" test because it was "unpersuasive."); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1167 (9th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007) (Forest Service failed to take a "hard look" at certain data underlying its analysis because the Court disagreed with the Forest Service's evaluation of the data.); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 606 (9th Cir. 2010) (Interior Department's EA did not constitute a "hard look" at cumulative impacts, even though the agency concluded the impacts were too remote and speculative to undergo reasoned evaluation.).

These cases illustrate that the Ninth Circuit has consistently used the "hard look" doctrine to substitute its judgment for those of the administrative agencies to which Congress has delegated the authority to make environmental judgments, in conflict with the approach of most other federal appellate courts and in contravention to the *Kleppe* proscription.

IV

A RELATIVELY RECENT CASE INDICATES THE FOURTH CIRCUIT HAS STRAYED ALSO FROM THIS COURT'S "HARD LOOK" TEST

In *National Audubon Society v. Department of the Navy*, 422 F.3d at 197, the Fourth Circuit held that the Navy failed the "hard look" test because its reason for omitting a cumulative impacts analysis at one of many sites covered by an EIS was "problematic," in the Court's view. The Fourth Circuit's "problem" was that it disagreed with the Agency's decision that a particular site was not "in proximity" to the sites for which environmental evaluations were conducted, and the Court did not articulate any particular reason for its disagreement. *National Audubon Society* shows that the Fourth Circuit relatively recently has joined the Ninth Circuit in using the "hard look" test to substitute its judgment for that of an administrative agency in connection with the evaluation of environmental issues under NEPA.

CONCLUSION

Under the guise of NEPA's "hard look" doctrine, the Ninth Circuit consistently has substituted its judgment for the judgments of administrative agencies when it disagrees with the agencies' substantive conclusions. The decision below represents the most recent, and perhaps the most extreme, example.

This Court should review the case below to enforce its unequivocal pronouncements in *Kleppe*, *Strycker's Bay*, *Vermont Yankee*, *Robinson*, and *Home Builders* that the "hard look" doctrine may not be used to second guess the environmental judgments of administrative agencies. Although most Circuit courts scrupulously adhere to those pronouncements, the Ninth Circuit has consistently flouted them, and this Court remains the only recourse to reestablish the proper scope of the "hard look" doctrine in the nation's most populous Circuit.

Significantly, approximately 40 years ago Congress enacted a statute that it designated as the *National* Environmental Policy Act. Over time, it has become clear why Congress used the term "National" in the title of the Act. NEPA environmental analyses substantially affect both the environment and the economy of every region in the nation. Accordingly, there should be a uniform national standard under which agency NEPA decisions are reviewed by federal courts.

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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