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

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONER'S REPLY BRIEF

I. THE PLAINTIFFS LACK STANDING.

The respondents argue that the Ninth Circuit "cited" – and therefore "did not ignore" – this Court's decision in *Summers v. Earth Island Inst.*, 129 S.Ct. 1142 (2009). Res. Br. 8; Pet. App. 26. In fact, the Ninth Circuit cited *Summers*' *dictum* that a plaintiff's "recreational" or "aesthetic" interest is sufficient for standing purposes, but made no mention of *Summers*' *holding* that the plaintiff must demonstrate "concrete and particularized injury" to that interest. *Summers,* 129 S.Ct. at 1149; Pet. 17-18. *Summers* held that the plaintiffs lacked standing because – even though they may have had a sufficient *interest* – they had failed to demonstrate concrete *harm* to that interest. The Ninth Circuit made no mention of and utterly ignored *Summers*' holding that plaintiffs do not have standing absent a showing of concrete harm. As one *amici* has observed, this case is "on all fours with *Summers*," and the Ninth Circuit's failure to apply or even mention *Summers*' holding is inexplicable. Brief of Mountain States Legal Foundation, *et al*., 16.

The respondents assert that the Ninth Circuit properly applied the standing requirement by stating – in a single sentence – that the Bureau of Land Management ("BLM") regulations cause the plaintiffs to suffer "imminent harm." Res. Br. 9; Pet. App. 25. The Ninth Circuit's statement was conclusory and failed to explain how the regulations specifically cause the plaintiffs to suffer imminent harm. The

respondents, attempting to fill in the gap, argue that the "harm" consists of "ongoing damage to specifically identified grazing allotments" in which the plaintiffs have an interest. Res. Br. 10. The respondents fail to explain how the regulations cause any concrete harm to any allotments in which they have an interest. The regulations cause no such harm, because they do not establish substantive grazing standards applicable to the allotments, or otherwise authorize grazing or other activities on the allotments. Instead, the regulations establish administrative requirements only:[1] they authorize ranchers to jointly own rangeland improvements and water rights, establish enforcement standards, and establish public participation requirements. None of these regulations cause the plaintiffs to suffer concrete harm, and the Ninth Circuit failed to explain how they cause or could cause such harm.

The respondents argue that they have standing because they visited and have plans to visit specific grazing allotments in specific areas. Res. Br. 13-14; Pet. App. 25. *Summers*, however, rejected the plaintiffs' arguments that they had standing because they "visited" and had "plans to visit" the national forests; they lacked standing, the Court held, because they had not shown that the Forest Service regulations "will impede a concrete and specific plan of [the plaintiffs]

[1] The respondents argue in several places that the petitioner has improperly characterized the regulations as "administrative." Res. Br. 4, 5, 15. In fact, the BLM itself characterized its regulations as "administrative." ER 598, 605.

to enjoy the National Forests." 129 S.Ct. at 1150. Like the *Summers* plaintiffs, the respondents have failed to show how the BLM regulations "impede" any "concrete and specific plan" they have concerning any grazing allotment. Since the regulations do not authorize grazing or establish substantive grazing standards, they cannot make this showing. The respondents' standing argument boils down to the assertion that the regulations cause them to suffer harm by reducing their right of public participation. *Summers* rejected the same argument, stating that the plaintiffs' lack of "ability to file comments on" Forest Service activities did not satisfy Article III standing requirements. *Summers*, 129 S.Ct. at 1151.

The United States in *Summers* opposed a virtually identical standing argument to that made by the respondents here. The United States argued that the plaintiffs had not "identified any site-specific activity" that was the subject of a "site-specific decision" that would result in "injury" to plaintiffs "who used the area affected by the project." Pet. 15 n. 3.

Going beyond the Ninth Circuit decision, the respondents argue that their declarations show that "livestock grazing *already occurring* on specific BLM grazing allotments is *currently* harming respondents' interests." Res. Br. 6 (first emphasis added; second original). The respondents' argument reveals, perhaps unwittingly, that their claimed harm, which they fail to identify, is caused by grazing rather than the regulations. The regulations do not authorize grazing or establish substantive grazing standards on the

allotments or elsewhere, and the regulations have been enjoined virtually since their adoption. Even assuming *arguendo* that the respondents are being harmed by current grazing, they are not being harmed by the regulations, because the regulations do not authorize or regulate grazing and have been enjoined.

The respondents characterize the petition as arguing that the Ninth Circuit misapplied a properly-stated rule of law, which they argue is generally not a ground for review. Res. Br. 12. First, the Ninth Circuit – by ignoring the *Summers* holding – neither correctly stated nor correctly applied the rule of standing. Second, *Summers* itself reviewed and reversed a Ninth Circuit decision that properly stated the rule of standing but failed to properly apply it. Since *Summers* clarified the rule and the Ninth Circuit ignored *Summers*, there is a stronger basis for review here than in *Summers* itself.

The respondents argue that other Ninth Circuit decisions have applied *Summers* in holding that plaintiffs lacked standing. Res. Br. 10-12, & n. 4. Regardless of whether other Ninth Circuit decisions have applied *Summers*, the Ninth Circuit in this case did not apply *Summers* or mention its holding, and the other Ninth Circuit decisions are inapposite here.

II. THE PLAINTIFFS' ACTION IS NOT RIPE.

The respondents assert that this Court's statement in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) – that a non-applied agency

regulation is "ordinarily" not ripe for review until it has been "fleshed out" by "concrete application" – is dictum. Res. Br. 18. Therefore, the respondents argue, the petition at most raises a conflict between the *Lujan* dictum and the dictum in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998), that a NEPA procedural claim is always ripe. Res. Br. 20.

In fact, the *Lujan* statement was not dictum. *Lujan* held that the plaintiff's claims, including its NEPA procedural claim, were not ripe for review. *Lujan*, 497 U.S. at 875, 879: Pet. 21.

The respondents argue that the *Lujan* statement is a "generalization" and does not apply here because the respondents would suffer "hardship" if review of the regulations were deferred. Res. Br. 19. As explained above, the respondents would not suffer hardship because the regulations do not authorize grazing or other activities that may cause such hardship.

The respondents argue that the petition's suggested distinction for ripeness purposes between regulations that authorize specific projects or activities and regulations that do not, Pet. 22-23, is "incoherent." Res. Br. 19. In fact, the distinction is suggested by *Lujan* and *Ohio Forestry* themselves. *Lujan* held that the plaintiff's NEPA procedural claim was not ripe, in the context of regulations that did not authorize specific projects or activities. *Ohio Forestry* stated in dictum that a NEPA procedural claim is always ripe, in the context of regulations authorizing

a specific project in a specific national forest. The decisions suggest that a court is better able to assess the environmental effects of an agency action that involves a specific project or activity than an agency action that does not, and that the former action is more likely to be ripe than the latter.

III. THE AGENCY DID NOT VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT.

The respondents argue that the Ninth Circuit applied the proper review standard in reviewing the National Environmental Policy Act ("NEPA") issue, because the court cited the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"). Res. Br. 22; Pet. App. 17. The Ninth Circuit, however, failed to state or acknowledge anywhere in its NEPA analysis that the APA review standard is "narrow" and "deferential," as this Court has repeatedly held. *E.g., National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) ("deferential"); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971) ("narrow"). As this Court has stated, "[t]he court is not empowered to substitute its judgment for that of the agency." *Volpe,* 401 U.S. at 416. The Ninth Circuit made no mention of these limitations in its NEPA analysis, or of any obligation to defer to the agency's judgment, and instead appeared to review the NEPA issue *de novo*.

The respondents argue that this Court should not grant review of the NEPA issue because it is

"factbound." Res. Br. 24, 28. The issue is not "factbound" at all, because the Ninth Circuit followed the wrong legal path in its NEPA analysis by considering the merits of the regulations. The court made scant reference to the BLM's Environmental Impact Statement ("EIS") itself, and instead primarily relied on internal dissenting documents that opposed the regulations on the merits, mainly the Administrative Review Copy-Draft Environmental Impact Statement ("ARC-DEIS"). Pet. 27-29. Indeed, the respondents candidly acknowledge that the ARC-DEIS opposed the regulations on the merits, stating that the ARC-DEIS "concluded that the proposed changes [in the regulations] should not be adopted because of their adverse effects." Res. Br. 5. Since these internal dissenting documents opposed the regulations on the merits, they are not relevant to whether the EIS adequately considered the environmental effects of the regulations, and the Ninth Circuit could not have properly relied on them for this purpose. In fact, the EIS amply considered and discussed the ARC-DEIS and the other dissenting documents, Pet. 30-31, a fact that the respondents ignore.

By relying on the internal dissenting documents in its NEPA analysis, the Ninth Circuit plainly considered the merits of the regulations and effectively substituted its judgment for the agency's judgment, even to the point of opining that the regulations reflected poor public policy because they are "discordant with the lessons learned from" the past. Pet. App. 48. The APA review standard and NEPA itself

preclude the courts from considering the merits of the agency action and substituting their judgment for the agency's. Pet. 24-25. "NEPA merely prohibits uninformed – rather than unwise – agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). Thus, this Court need not engage in a "factbound" analysis to determine whether the Ninth Circuit's "hard look" analysis was correct. The Court need only determine that the Ninth Circuit improperly considered the merits and substituted its judgment for the agency's judgment.

The *amicus* brief of the Pacific Legal Foundation ("PLF") describes how the Ninth Circuit's non-deferential "hard look" analysis departs from the deferential "hard look" analyses of other circuit courts – the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, District of Columbia and Federal Circuits – as well as this Court's precedents. PLF Br. 6-22.

The respondents argue that the Ninth Circuit has properly applied the "hard look" requirement in other cases, principally in its *en banc* decision in *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2000). Res. Br. 21-24. First, these other Ninth Circuit decisions are irrelevant to whether the Ninth Circuit properly applied the "hard look" requirement here. Second, as mentioned in the petition, the Ninth Circuit in just the last two years has invalidated several agency actions on "hard look" grounds. Pet. 35. As one dissenting Ninth Circuit judge commented in deploring this trend, "It has been said that the life of a canary

in a coal mine can be described in three words: short but meaningful. So, too, apparently was the life of our decision in *Lands Council v. McNair*,. . . ." *Center for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 659 (9th Cir. 2010) (Tallman, J., dissenting).[2]

The respondents argue that since the Ninth Circuit correctly *stated* the APA standard of review, it is irrelevant for purposes of review whether the Ninth Circuit properly *applied* the standard. Res. Br. 24. In fact, the Ninth Circuit wholly disregarded the APA's deferential review standard by failing to grant any deference, or even acknowledging that deference is required. The respondents' argument might have more weight if the Ninth Circuit decision were an aberration that might be soon forgotten or corrected in a future decision, but the Ninth Circuit decision is part of a recent trend of Ninth Circuit decisions improperly invalidating agency actions on "hard look" grounds. Pet. 35. This Court should grant review to bring this trend to a halt.

IV. THE AGENCY DID NOT VIOLATE THE ENDANGERED SPECIES ACT.

The respondents argue that the petition does not raise an issue of national importance concerning the

[2] After the petition was filed, the Ninth Circuit in a 2-1 decision again invalidated an agency action on "hard look" grounds, with Judge O'Scannlain dissenting. *Southeast Alaska Conservation Council v. Federal Highway Administration, et al.*, 2011 U.S. App. LEXIS 9097 (9th Cir., May 4, 2011).

BLM's "no effect" decision. Res. Br. 32. On the contrary, the Ninth Circuit decision fails to grant any deference to an agency's judgment that its action will not affect an endangered species, and requires the agency to consult under the Endangered Species Act ("ESA") even though it is entirely speculative whether any effects will occur. Pet. 37-40. Although the BLM concluded that the regulations would not affect endangered species because they authorize no projects or activities that may have such effects, the Ninth Circuit did not defer to the BLM's judgment and instead held that consultation was required because, in the court's view, the regulations will necessarily have some effects on some endangered species somewhere on the public range – even though the court failed to identify how any such effects would reasonably be likely to occur. *Id*. The Ninth Circuit's decision raises an important national issue concerning the standard that an agency must apply in deciding whether to consult under the ESA, and the standard that the courts must apply in reviewing the agency decision.

The respondents argue that the Ninth Circuit correctly stated the proper review standard regardless of whether it properly applied it, and also that other Ninth Circuit decisions have adopted a deferential approach in evaluating agency "no effect" decisions. Res. Br. 30. The Ninth Circuit's failure to grant deference to the BLM's decision here, however, renders the APA's deferential review standard meaningless, and

other Ninth Circuit decisions analyzing agency "no effect" decisions are irrelevant here.

V. THE RESPONDENTS' ARGUMENTS ON THE REGULATION'S MERITS ARE WITHOUT MERIT.

The respondents argue throughout their brief that the BLM regulations, on the merits, will adversely affect the public range by eliminating the Fundamentals of Rangeland Health ("Fundamentals") as an enforcement standard. Res. Br. 4, 13, 15, 25, 31. The respondents' argument misconstrues the nature of the Fundamentals. According to the BLM's EIS, the Fundamentals establish "broad national goals" that are implemented by Standards and Guidelines at the local level, and the regulations eliminated the Fundamentals as an enforcement standard to avoid the "redundancy" of enforcing them where the Standards and Guidelines are separately enforced. ER 542, 544. Indeed, the BLM has never taken enforcement actions based solely on the Fundamentals. ER 547. The regulations otherwise make "no substantive changes" in the Fundamentals. ER 634. Thus, the elimination of the Fundamentals as an enforcement standard will have no effect on the BLM's administration of the public range, according to the BLM itself. The respondents simply disagree with the BLM's judgment in administering the public range, just as the Ninth Circuit disagreed.

VI. THE RESPONDENTS' OTHER GROUNDS FOR DENIAL ARE WITHOUT MERIT.

The respondents argue that the petition should be denied for other reasons. First, they argue that the petition should be denied because the BLM is currently administering the 1995 regulations rather than the 2006 regulations. Res. Br. 32-34. As the petition explained, the BLM is administering the former regulations because the current regulations have been enjoined, and the BLM could not legally administer the former regulations otherwise. Pet. 5 n. 1. The fact that the BLM is administering the former regulations pursuant to an injunction provides no basis for denying a petition that attempts to overturn the injunction.

Second, the respondents argue that the petition should be denied because the BLM did not appeal below. Res. Br. 32-34. The Ninth Circuit decision has, however, caused public lands ranchers to suffer concrete harm by precluding them from jointly owning rangeland improvements and water rights, subjecting them to more stringent enforcement standards and timeframes, and eliminating phased-in grazing reductions. Pet. 2-4. These burdens are substantial and onerous, and not, as the respondents argue, "modest." Res. Br. 33. The BLM's decision not to appeal does not lessen the concrete harm suffered by public lands

ranchers, or diminish their legitimate rights and interests in this case.[3]

Third, the respondents argue that the petitioner, as an intervenor below, may lack standing to appeal. Res. Br. 34-35. This issue was resolved favorably to the petitioner below, Pet. App. 19-23, and the respondents did not file a conditional cross-petition raising the issue, as they might have done. Supreme Court Rule 12.5. Therefore, the issue is not properly before this Court. In effect, the respondents ask this Court to deny the petition because of the respondents' own failure to properly raise an issue on which the petitioner prevailed below. If this Court believes that the issue of the petitioner's standing should be addressed, the Court should grant the petition and direct the parties to address the issue, although the harm to public range ranchers is so obvious and direct that the issue does not appear worthy of review. In any event, the Court should not deny the petition because of the respondents' failure to properly raise the issue.

[3] Although, as the respondents note, the BLM filed an *amicus* brief below opposing the petitioner's standing to appeal, Res. Br. 2, 34, the BLM's brief did not oppose any of the petitioner's arguments concerning the justiciability or merits of the respondents' action, which are the issues raised in this petition.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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