IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Western Watersheds Project, et al., Plaintiffs, v. United States Bureau of Land Management, Defendant.	No. CV-21-01126-PHX-SRB **ORDER**

The Court now considers Plaintiffs Western Watersheds Project and Grand Canyon Chapter of the Sierra Club (collectively, "Plaintiffs") and Defendant United States Bureau of Land Management's ("BLM") Motions for Summary Judgment ("Motions"). (Doc. 38, WWP Mot.; Doc. 39, BLM Mot.) For the following reasons, the Court grants Plaintiffs' Motion in part and denies it in part, and grants BLM's Motion in part and denies it in part.

I. BACKGROUND

A. Sonoran Desert National Monument & BLM's Role

This case arises out of BLM's 2020 decision to allow livestock grazing on portions of the Sonoran Desert National Monument ("SDNM" or "Monument").

"The Antiquities Act grants the President broad authority to create, by presidential proclamation, national monuments from federal lands to protect sites of historic and scientific interest." *Murphy Co. v. Biden*, 65 F.4th 1122, 1124 (9th Cir. 2023) (citing 54 U.S.C. § 320301(a)–(b). In 2001, President Clinton issued a Proclamation creating the SDNM, which covers roughly 486,000 acres in southwest Arizona. AR-0009264–68. The

Proclamation tasked the Secretary of Interior with protecting the biological and cultural resources within the Monument, directing the Secretary to make a management plan for the SDNM "that addresses the actions . . . necessary to protect the objects identified in this Proclamation." AR-0009267. In addition to restricting vehicle use and land development, the Proclamation restricted livestock grazing on the Monument, mandating that:

> Grazing permits on Federal lands within the monument south of Interstate Highway 8 shall not be renewed at the end of their current term; and . . . grazing on Federal lands north of Interstate 8 shall be allowed to continue only to the extent that [BLM] determines that grazing is compatible with the paramount purpose of protecting the objects identified in this proclamation.

Id. Under the Federal Land Policy Management Act ("FLPMA"), "BLM must manage the [SDNM] in compliance with the terms of the Proclamation." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1042 (9th Cir. 2013).

In September 2012, BLM issued its Record of Decision and Approved Resource Management Plan ("2012 RMP"), the grazing compatibility determination for the land north of I-8. This northern Monument land is broken down into six allotments: Arnold, Beloat, Big Horn, Conley, Hazen, and Lower Vekol. *See* AR-0005332. Portions of each allotment extend outside of the SDNM. AR-0031516–0031518; *see* AR-0031552–0031553. The Big Horn allotment has not been grazed since 2009,[1] nor has the Hazen since approximately 2010. AR-0031540, 0031542. The Arnold allotment has been designated for exclusively ephemeral grazing.[2] AR-0031321. BLM and contracted third parties collected data on the SDNM to conduct a Land Health Evaluation ("LHE") for the 2012 RMP, meaning to determine whether "livestock grazing was compatible with protecting the objects of the Monument." *See W. Watersheds Project v. Bureau of Land Mgmt.*, No. CV–13–01028–PHX–PGR, 2015 WL 846548, at *2–5 (D. Ariz. Feb. 25, 2015) ("*WWP I*"); AR-0031514. BLM "gauged whether 'Standard One' and 'Standard Three'[3] of the

[1] BLM created a "use pattern map" in 2009 to reflect areas within the Monument where livestock frequently gathered in 2008 ("2009 Pattern Map"). *See* AR-0031552.
[2] "Ephemeral grazing" is only authorized if annual plants reach a certain density due to adequate rainfall, whereas "perennial grazing" authorizes a set amount of Animal Unit Months ("AUMs") per allotment every year. *See* AR-0031315. An AUM is the amount of forage a cow eats in one month. AR-0031536.
[3] Standard 1 is used to measure soil health. AR-0031546–0031549. A plot achieves Standard 3 when "the majority, greater than 50 percent, of the plots representing the

Arizona Standards for Rangeland Health were being met on the grazing allotments located on Monument lands north of I-8 and, if not, whether livestock grazing was the causal factor." *WWP I*, 2015 WL 846548, at *2. As part of this "causality determination," BLM created the 2009 Pattern Map to "assess livestock use of key perennial forage species." *Id.* at *2–3. "The LHE results were analyzed in a compatibility study to determine if livestock grazing was compatible with the paramount purpose of protecting the objects of the SDNM. The LHE and the compatibility findings were used to inform the 2012 [RMP]/Final Environmental Impact Statement (EIS)." AR-0031514.

In the 2012 RMP, BLM concluded that livestock grazing could continue or restart on over 157,170 acres of SDNM land north of I-8 at various intensity levels but restricted grazing on the remaining 95,290 acres. AR-0005332; (*see* Doc. 1, Compl. ¶ 72.) This included a complete prohibition on grazing on the Conley allotment and partial prohibitions on the Big Horn and Lower Vekol allotments. AR-0005332.

B. Prior Litigation

Plaintiffs challenged the 2012 RMP in this District in April 2013, arguing that the LHE and compatibility determination underlying the decision were arbitrary and capricious under NEPA. *See WWP I*, 2015 WL 846548, at *1–2. Judge Rosenblatt granted summary judgment to Plaintiffs, finding that "BLM did not provide an adequate explanation in the record to support its setting of, and/or adjustments to, the objectives for the limy fan, sandy wash, limy upland deep, and granitic hills ecological sites [within the Monument]." *WWP I*, 2015 WL 846548, at *6, 12. "BLM's setting of these plant community objectives was therefore arbitrary and capricious." *Id.* at *6. Judge Rosenblatt also found that BLM arbitrarily excluded certain data from its analysis, particularly where BLM relied on only one year of data to support its "key area analysis" yet rejected competing data because it was "only from a single year." *Id.* at *8, *11.

Although Judge Rosenblatt gave BLM an opportunity to further explain its decision,

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ecological site are achieving" desired plant community objectives. AR-0031547. Achieving Standard 3 "ensures . . . that the ecosystem is in functioning condition . . . consistent with . . . providing forage and cover for both wildlife, general and sensitive species, and livestock." *Id.*

he ultimately upheld his ruling, remanded the 2012 RMP to BLM, and ordered BLM to complete a new LHE and grazing compatibility determination regarding the effects of livestock grazing on Monument land north of I-8. *Id.*; *W. Watersheds Project v. U.S. Bureau of Land Mgmt.*, 181 F. Supp. 3d 673, 691–92 (D. Ariz. 2016). The 2012 grazing decisions—including complete prohibitions on grazing certain allotments north of I-8—remain in effect after Judge Rosenblatt's remand. *See* AR-0031514. The Court set a deadline of September 30, 2020 for BLM to complete the new LHE and compatibility determination and incorporate them into an SDNM Livestock Grazing Resource Management Plan Amendment ("Amended RMP"). (Compl. ¶ 84.)

C. Amended RMP

BLM finalized the updated LHE and compatibility determination in accordance with its September 2020 deadline. AR-0031510–0031582, 0032331–0032361. It released an updated LHE, Grazing Compatibility Analysis, and Environmental Assessment ("EA") to support the Amended RMP, all of which BLM used to conclude that grazing up to 4,232 AUMs within the northern Monument was compatible with the Proclamation.

1. Land Health Evaluation & Compatibility Analysis

The purpose of BLM's updated LHE was "to re-evaluate the Arizona Standards for Rangeland Health (Standards) on the BLM-administered public lands available for livestock use as provided for under the 2012 . . . RMP." AR-0031514. The updated LHE "contain[ed] preliminary conclusions on achievement or non-achievement of Standards and causal factors for non-achievement of Standard 1 or 3 or both." *Id.* The LHE also proposed remediation measures, or "management recommendations," for any plots within the SDNM north of I-8 which were not meeting Standards. *Id.*

By 2015, four of the six grazing allotment permits (Big Horn, Conley, Hazen, and Lower Vekol) had expired and no grazing has since occurred on the SDNM portions of the remaining two allotments. *See* AR-0031321. BLM only authorized ephemeral grazing on the Arnold allotment in 2014 and 2015. *Id.* Due to an absence of usable data regarding actual grazing in the Monument, BLM created a livestock use probability map ("use

probability map" or "probability map") to conduct the updated LHE. AR-0031602–0031603. The probability map illustrated which areas in the Monument were most to least likely to be grazed by any livestock reintroduced to the northern SDNM. *See* AR-0031553. Class 1 indicated a "high probability" of use for grazing, Class 3 indicated "moderate probability," and Class 5 indicated "low probability." *Id.*, AR-0031551. To create the probability map, BLM assumed that "livestock [generally] do not travel more than 2 miles from water on flat terrain and no more than 1 mile in rough terrain," which meant that portions of the Monument more than two miles from a water source were coded as Class 5. AR-0031625. BLM primarily relied on a single citation—Smith et al. (1986) (the "Smith Publication")—to support its two-mile benchmark.[4] AR-0031331, 0031625, 0032303. The portion of the Smith Publication reflected in the Administrative Record indicates:

> The distance between water points depends to some extent on topography and climate. Various range management textbooks state that water points should be no farther than 2 miles in flat country and 1 mile in rough. Obviously this is seldom practiced. I am not sure how these numbers were arrived at, but most desert operations I know of have water points at about twice these distances or greater.

AR-0000780.

BLM also developed desired plant community objectives to perform the LHE and complete its Grazing Compatibility Analysis. AR-0031514; *see also* AR-0032340, 0032349–51 (Grazing Compatibility Analysis reviewing plant community conclusions from LHE). The data BLM evaluated to set these community objectives came "from randomly stratified monitoring plots on each of the most prevalent ecological sites without expected livestock use or unnatural disturbances. Areas without expected livestock use was defined as areas greater than 2 miles of livestock waters." AR-0031547. BLM set the threshold for passing plant standards one standard deviation below—or, in the case of the bare ground objective, above—the mean for a healthy plant community. *See id.* The LHE confirms the definition of a plant community in its "natural condition" came from "data

[4] BLM cited two additional sources when discussing its two-mile benchmark in the context of setting objectives for plant community health on the SDNM. (*See* WWP Mot. at 16 n.7 (citing AR-0031547).) These sources do not address whether cattle are less likely to specifically move more than two miles from a water source. *See* AR-0000781 (Martin and Severson 1988), 0003124 (Blanco et al. 2009).

collected on plots located greater than two miles distance from livestock water, current or historic, and without additional unnatural disturbances." *Id.*

After setting objectives and studying plant communities within the six allotments, BLM specifically evaluated communities that were failing plant community objectives. Once BLM determined that a plant community was not meeting its objective, BLM made a causality determination as to why the community was failing standards. *See* AR-0031557. The use probability map "and field observations [were] used to determine if livestock grazing is the causal factor for non-achievement of either Standard 1 or 3." *Id.*; AR-0031549. Specifically, BLM monitored 124 "stratified random plots" across the northern Monument between 2017 and 2018, which helped "determine the variability of ecological site and vegetation community attributes." AR-0031549–0031550. But again, "[p]lots with known disturbances, from sources other than livestock or livestock management infrastructure such as mining operations and right-of-ways, and areas inaccessible by livestock were excluded from the sample design. Mining operations, roads (300 foot buffer from the centerline), and steep slopes (>30 percent) were excluded from the sampling polygons." *Id.*

All this study led BLM to conclude that "there are areas that are not achieving standards as a result of historical livestock grazing." AR-0031330 (EA discussing results of Grazing Compatibility Analysis). BLM's Grazing Compatibility Analysis, published along with the Amended RMP, specifically found that "the majority of areas near livestock waters on the Beloat, Big Horn, Conley, and Lower Vekol allotments are failing to achieve Standard 1 or 3 or both because of current or historical perennial livestock grazing." AR-0032352. Though BLM predicted grazing patterns throughout the Monument assuming only a low probability that livestock would travel more than two miles from water, BLM also noted that there were signs of livestock use in several Class 5 sites failing objectives and, where BLM observed such signs, BLM concluded that grazing caused the site to fail. AR-0031557–0031578 (discussing, *inter alia*, signs of livestock use on Class 5 plots failing standards); *see also* AR-0032349 (Grazing Compatibility Analysis detailing that "it is

possible that historical livestock grazing may have impacted the saguaro cactus forest, diversity of plant and animal species, vegetation communities, and wildlife monument objects within close proximity to livestock waters but it is unlikely to have impacted biological objects far, greater than 2 miles, from livestock waters.")

2. Environmental Assessment & Impact

BLM also conducted an EA to substantiate the Amended RMP. After evaluating several alternatives to the action proposed in the Amended RMP, including not allowing any grazing on the SDNM, taking no action, and further reducing grazing allowance, the agency settled on the instant plan. AR-0031313–031318. The agency concluded that a maximum of 4,232 AUMs[5] was compatible with protecting Monument objects, so long as BLM could manage grazing to protect objects at the implementation level. AR-0031313 (EA describing that implementation-level adjustments in authorized AUMs would be "required" for grazing to be compatible with protecting the Monument), 0031314 ("[N]o livestock grazing will be permitted on four of the six allotments (Big Horn, Conley, Hazen, and Lower Vekol) until the BLM first completes implementation-level NEPA analysis, on an allotment-by-allotment, or group of allotments, basis . . . [and] permits could be issued [on Arnold and Beloat only] pursuant to and authorized under [the] FLPMA.").

The EA also concluded that introducing up to 4,232 AUMs to the SDNM would have no significant environmental impact on the Monument, so BLM completed a Finding of No Significant Impact ("FONSI") to accompany the EA. AR-0032324; *see* 40 C.F.R. § 1508.13 (agency may issue FONSI where EA concludes agency action will have no significant effect on environment and where agency will not prepare EIS). The FONSI explained that the proposed 4,232 annual AUM allowance "represents a reduction of 5,385 AUMs or 39 percent from the historically (1985) authorized AUMs, but an increase of 914 AUMs or 21 percent above the 2012 authorization." AR-0032325. BLM acknowledged that grazing would cause adverse impacts to "wildlife, vegetation, and soils" in the

[5] BLM reached 4,232 AUMs by "by averaging the perennially, non-ephemeral, authorized AUMs for each allotment between 2007 and 2018 and calculating the amount of AUMs within the SDNM portion of each allotment by the percentage of BLM land in the SDNM." AR-0031580 (LHE explaining evaluation process).

Monument, but "[t]he degree of impacts to these resources would depend on grazing management determined at the implementation-level." *Id.* BLM proposed installing fencing around "sensitive areas," moving water sources to less sensitive areas, and authorizing fewer AUMs on the Monument to mitigate grazing impacts. AR-0032326. And "the degree of impacts from . . . implementation-level actions would depend on the extent of the development and would be evaluated under separate environmental review." *Id.*

BLM also consulted with the State Historic Preservation Office ("SHPO") regarding protection of cultural objects under the Amended RMP, as required under Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 300101, *et seq*. AR-0032329. Multiple historic trails, including at least one with significance to indigenous communities in Arizona, cross through the SDNM, and the Monument "contains many significant archaeological and historic sites, including rock art sites, lithic quarries, and scattered artifacts." AR-0031340 (EA discussing cultural sites), 0032328 (FONSI discussing same). According to BLM, "[r]oughly 80 percent of the cultural sites found on public lands in the entire SDNM reflect aboriginal occupation," but added that "an unknown number of sites have not been identified or documented." AR-0031340. Multiple Native American tribes expressed concerns about allowing grazing on the SDNM, and the Tohono O'odham Nation actively opposed "livestock grazing on the SDNM due to the potential damage to fragile-pattern archaeological sites." AR-0031343. The Gila River Indian Community shared similar concerns.[6] AR-0032329. Consultation with tribes is "ongoing." AR-0031341; *see also* AR-0031051, AR-0031083–84.

BLM assessed cultural impacts of its Amended RMP by conducting a "thorough review of project records and cultural site information," or "Class I" inventory, regarding cultural objects found on the Monument, though much of this information was collected more than two decades prior. AR-0032329 (FONSI discussing that records study revealed

[6] BLM gave the public an opportunity to comment on its proposed Amended RMP, but the ensuing feedback did not significantly alter BLM's plan. AR-0032327. According to BLM, "commenters expressed their opposition to livestock grazing, [but] none of the commenters indicated any substantial dispute in the scientific community over the nature of the effects from the Proposed Action." *Id.*

74 cultural sites within the northern SDNM, including 27 sites recommended as eligible for the National Register); *see* AR-0031055–0031063, 0031341; *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005–06 (9th Cir. 2013) (explaining inventory classes). BLM clarified to the SHPO "that allotment specific implementation-level projects would be proposed in the future . . . and would be treated as separate undertakings." AR-0031051. On June 29, 2020, the SHPO agreed with BLM that the Amended RMP would have "no adverse effects to cultural sites" within the Monument. AR-0032329.

3. Terms of Amended RMP

Based on these new analyses, BLM issued the Amended RMP on September 29, 2020. AR-0032609–0032618. BLM decided that "all allotments, including formerly unavailable portions of the Big Horn, Conley, and Lower Vekol allotments, would be available for grazing with a level of use ranging from ephemeral only to a maximum 4,232 perennially authorized A[nimal] U[nit] M[onths] across all six allotments in the SDNM north of I-8." AR-0032610. BLM underscored that the number of AUMs authorized may be far lower than the number of AUMs allowed. *E.g.*, *id.*

D. Instant Litigation

Plaintiffs filed their Complaint in this Court on June 29, 2021, challenging BLM's updated decision regarding grazing on the SDNM north of I-8. (Doc. 1, Compl.) Plaintiffs specifically claimed that the preparation and substance of the Amended RMP violated (1) the FLPMA and National Landscape Conservation System Act by issuing an RMP that failed to comply with the Proclamation; (2) the NHPA by failing to follow several procedural requirements in the statute; and (3) NEPA by issuing a FONSI that "unreasonably dismissed" criteria that should have led BLM to produce an EIS, failing to consider an adequate range of alternative actions in the EA,[7] and failing to take a "hard look" at the environmental effects of "allowing grazing across all lands on the Monument north of Highway 8." (Compl. ¶¶ 130–66.)

After litigating to designate the administrative record, Plaintiffs and BLM both

[7] Plaintiffs have since waived their argument regarding alternatives. (*See* Doc. 42, WWP Resp. at 10 n.2.)

moved for summary judgment on March 22, 2023. (Doc. 27, 07/26/2022 Order; WWP Mot.; BLM Mot.) Plaintiffs and BLM then filed their Responses to each other's Motions on May 3, 2023. (Doc. 41, BLM Resp.; Doc. 42, WWP Resp.) The Court held oral argument on the Motions on June 1, 2023. (Doc. 43, Min. Entry.)

II. LEGAL STANDARDS & ANALYSIS

BLM argues that Plaintiffs lack standing to pursue their FLPMA claim and contends that the Amended RMP complies with all relevant statutory requirements. (BLM Mot. at 13–35.) The Court addresses each argument in turn.

A. Standing

Article III of the U.S. Constitution specifies that the judicial branch's power only extends to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Standing "is a doctrine rooted in the traditional understanding of a case or controversy" that "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation omitted). There are three elements required for standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered an injury-in-fact that is "concrete and particularized" and "actual or imminent." *Id.* Second, the injury must be "fairly traceable" to the violation of law by the defendant. *Id.* at 560; *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022). Lastly, it must be "likely, as opposed to merely speculative" that the requested relief will redress the injury. *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). Plaintiffs "invoking federal jurisdiction bear[] the burden of establishing these elements" and they must demonstrate standing "for each claim . . . and for each form of relief that they seek." *Id.*; *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

Plaintiffs assert that BLM violated the FLPMA because "BLM's proxy analysis did not ensure its decision would protect all of the plants and animals identified in the proclamation," "BLM's decision that all lands on the SDNM north of Highway 8 should be available for grazing was not supported by the evidence and a rational explanation," and "[t]he record here shows that grazing all lands on the SDNM north of Highway 8 is not

compatible with protecting all biological and cultural objects of the SDNM, and it was unreasonable to side-step that conclusion by deferring decisions to later analyses." (WWP Mot. at 30–31.) BLM argues that because the Amended RMP is only "a planning decision that serves as a precursor to BLM's authorization of grazing," Plaintiffs' FLPMA claim is unripe and they lack standing to sue. (BLM Mot. at 14–17.) Courts consider three factors to determine whether a challenge to an administrative action is ripe: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)). Plaintiffs counter in their Response that their FLPMA claim is ripe because the Amended RMP failed at the programmatic level to protect Monument objects, in that the RMP is an erroneous decision based on a flawed decision-making process. (WWP Resp. at 2–9.)

Despite Plaintiffs' arguments to the contrary, their FLPMA claim[8] is unripe. Regarding delayed review, Plaintiffs have not shown that withholding review of their FLPMA claim will harm their interests. *Citizens for Better Forestry*, 841 F.3d at 977 (explaining that if injury is substantive, no hardship to plaintiffs in withholding review

[8] Plaintiffs argue that their FLPMA claim is essentially procedural, not substantive. (*See* WWP Resp. at 2–4.) Unlike an injury from an agency's substantive conclusion, "a person injured by 'a failure to comply with [a statutory] procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.'" *Env't Def. Ctr. v. Bureau of Ocean Mgmt.*, 36 F.4th 850, 871 (9th Cir. 2022) (citation omitted). Yet Plaintiffs' FLPMA claim attacks the substantive conclusions contained in the Amended RMP, alleging *inter alia* that BLM's "management plan failed to include actions necessary to protect objects identified in the proclamation because the RMP amendment did not identify any lands as unavailable for grazing." (*See* Compl. ¶¶ 133–34.) Plaintiffs also alleged that the Amended RMP "relied on a compatibility analysis that did not adequately assess impacts of grazing on all Monument objects to be protected," but this attack on BLM's procedure is fundamentally an allegation that BLM did not adequately protect the Monument. (*Id.* ¶ 134; *see also* WWP Mot. at 30 ("The RMP amendment is inconsistent with the SDNM proclamation and [the Omnibus Public Lands Management Act] because it does not protect all biological and cultural objects identified in the proclamation."); WWP Resp. at 5 (analogizing instant case to one where agency failed to comply with "substantive standards in FLPMA.").) Moreover, to the extent the Court can distinguish the purportedly procedural arguments in Plaintiffs' Moton from Plaintiffs' substantive FLPMA challenge, these attacks on BLM's decision-making process underlying the Amended RMP are addressed below with Plaintiffs' NEPA and NHPA claims.

"because the plans had not yet been implemented at the site-specific level[.]") (citation omitted); *c.f. Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1083–84 (9th Cir. 2015) (finding claim procedural where plaintiff did "not argue for a particular substantive result"). Plaintiffs argue that BLM's decision to "punt grazing management to future allotment-level decisions" will obscure larger-scale impacts of grazing across allotments, but the record does not reflect that BLM would make implementation-level decisions without considering each decision's impact on the Monument as a whole. (*See* WWP Mot. at 31); AR-0031051 ("It is anticipated that allotment specific implementation-level projects would be proposed in the future and would be evaluated through the . . . NEPA process, and would be treated as separate undertakings."), 0032359 ("[G]razing could be allowed if managed conservatively. . . . Livestock grazing management, including stocking rates and grazing schemes . . . will be analyzed in accordance with [NEPA] on an implementation-level basis in the future.").

The Court must also avoid interfering with further administrative action, meaning BLM's implementation-level decision-making. "[H]ere, the possibility that further consideration will actually occur before the Plan is implemented is not theoretical, but real." *Ohio Forestry*, 523 U.S. at 735 (finding challenge to logging plan that had yet to authorize site-specific logging was unripe as, *inter alia*, "immediate judicial review directed at the lawfulness of the [agency decision] could hinder agency efforts to refine its policies"). Plaintiffs suggest that the Amended RMP is at an "administrative resting place," which means the Court would not interfere with agency action by taking up Plaintiff's FLPMA claim. (*See* WWP Resp. at 4); *Cottonwood Env't Law Ctr.*, 789 F.3d at 1083–84. But because Plaintiffs fail to address that BLM has not enabled any grazing to occur on the Monument, may decline to authorize any grazing or authorize far fewer AUMs than the Amended RMP allows, and is continuing consultation with Native American tribes and the SHPO regarding grazing decisions, Plaintiffs do not persuade the Court that the finality of the programmatic plan makes their substantive challenge ripe. (*See* WWP Mot. at 23, 35.) The Court will give BLM the opportunity to abide by the Proclamation in its

implementation-level decisions rather than "interfere with the system that Congress specified for the agency to reach" such decisions. *Ohio Forestry*, 523 U.S. at 736.

Lastly, the Court would benefit from further factual development of Plaintiffs' FLPMA claim before adjudicating the substantive claim that BLM has "failed to protect all of the plants and animals identified in the proclamation." (WWP Mot. at 30.) There is no grazing occurring on the Monument, nor does the Amended RMP change the status quo. Plaintiffs cite *Western Watersheds Project v. Salazar*, 4:08-cv-516-BLW, 2011 WL 4526746 (D. Idaho Sept. 28, 2011) for support that an RMP only allowing, rather than authorizing, grazing still confers standing to sue under the FLPMA. (WWP Resp. at 5.) But the plaintiff's standing in *Salazar* hinged on the "key fact present [t]here—and absent in *Ohio Forestry*—[which] is that the RMPs at issue have immediate and continuing effects." 2011 WL 4526746, at *18; *see also Nat'l Trust for Historic Preservation v. Suazo*, No. CV–13–01973–PHX–DGC, 2015 WL 1432632, at *2, *5–8 (D. Ariz. Mar. 27, 2015) (reaching merits of FLPMA claim where programmatic plan allowed *ongoing* target shooting on SDNM). The Amended RMP has no "immediate and continuing effect" upon grazing in the SDNM, nor have Plaintiffs explained why they cannot once again sue should BLM issue an implementation-level decision with which Plaintiffs disagree.[9] Plaintiffs' FLPMA claim is unripe.[10] *See Ohio Forestry*, 523 U.S. at 736 ("[D]epending upon the agency's future actions to revise the Plan or modify the expected methods of implementation, review now may turn out to have been unnecessary.").

B. Statutory Challenges Under APA Review

NEPA challenges are reviewed under the Administrative Procedure Act ("APA") framework. The APA mandates that a reviewing court "shall . . . hold unlawful and set

[9] Plaintiffs raise that BLM will not issue a landscape-scale LHE upon making implementation-level decisions. (WWP Resp. at 1.) The Court anticipates that the below NEPA analysis will address at least some underlying concerns about the LHE.

[10] *Western Watersheds v. Abbey*, 719 F.3d 1035, 1042–44 (9th Cir. 2013) reached the merits of the plaintiff's FLPMA claim regarding an RMP regulating grazing. (*See* WWP Resp. at 4.) But *Abbey* addressed, *inter alia*, site-specific permit renewal, not just the interpretation of the Proclamation at the programmatic level, and found that BLM's decision to "exclud[e] from consideration programmatic changes to grazing management" did not violate the FLPMA. *See* 719 F.3d at 1039, 1041–45.

aside agency action, findings, and conclusions found to be arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). "Under . . . this 'narrow' standard of review, [courts] insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.'" *F.C.C. v. Fox Telev. Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). "[A] court is not to substitute its judgment for that of the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 513–14 (citations and internal quotations omitted). This means that a reviewing court cannot "second-guess" the agency's "weighing of risks and benefits [or] penalize[] [the agency] for departing from [a different authority's] inferences and assumptions," nor may the court "ask whether [an agency] decision was 'the best one possible' or even whether it was 'better than the alternatives.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019) (citation omitted). But agency action can be set aside "if the agency has relied on factors which Congress has 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." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *NW Coal. for Alts. to Pesticides v. U.S. E.P.A.*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) ("[W]here the agency's reasoning is irrational, unclear, or not supported by the data it purports to interpret, we must disapprove the agency's action.") (citation omitted). And courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Fox Telev. Stations*, 556 U.S. at 515 (citation omitted).

1. NEPA

NEPA "ensure[s] a fully informed and well considered decision." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). Specifically, "NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences of their proposed actions." *Bark v. United States Forest Serv.*, 958 F.3d 865, 871 (9th Cir. 2020) (citation omitted). "NEPA itself does not mandate particular results,

but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Courts are to "strictly interpret the procedural requirements in NEPA to the fullest extent possible consistent with the policies embodied in NEPA. Grudging, pro forma compliance will not do." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 668 (9th Cir. 2019) (cleaned up).

Plaintiffs argue that the Amended RMP violated NEPA in multiple respects. The Court agrees at least that BLM's unsupported assumptions and unaddressed effects underlying the EA warrant remand to the agency. *See WWP I*, 2015 WL 846548, at *12 (remanding rather than vacating 2012 RMP "to provide [BLM] with the opportunity to either articulate reasoned explanations and responses, or adopt different decisions with reasoned explanations that support them").

i. Unsupported Assumptions & Analysis

An agency decision undergoing NEPA review must demonstrate a "a rational connection between the facts found and the conclusions made" in order to survive under the APA. *WildEarth Guardians*, 923 F.3d at 672 (quoting *Or. Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997)). While an agency has "substantial discretion" to choose its scientific methodology, it still must explain its choice of scientific modeling. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 997 (9th Cir. 2014).

Plaintiffs take issue with BLM's assumptions underlying the land use probability map, arguing that "BLM's failure to use its own information to verify its probability use model undermined its analysis and violated NEPA." (WWP Resp. at 13.) Specifically, Plaintiffs argue that BLM repeatedly assumed, without any substantiation, that cattle would not travel more than two miles from water sources and would have no ecological impact on Monument land fitting that criterion. (WWP Mot. at 15.) Plaintiffs detail that BLM primarily cites the Smith Publication for the two-mile benchmark, but this document does not support the proposition that cattle move no more than two miles from water sources, nor do any other documents cited to support that specific assumption. (*Id.* at 16, 16 n.7.) BLM then used this unsupported two-mile mark to set desired plant community objectives

and to analyze in the LHE whether cattle grazing caused degraded ecological conditions on the SDNM. (*Id.* (citing AR-0031547, 0031625).)

The Court agrees with Plaintiffs that BLM arbitrarily relied on the two-mile benchmark to design its use probability map, which was integral to the conclusions in the LHE, EA, and Grazing Compatibility Analysis. *See, e.g.*, AR-0032303 (explaining to public that two-mile benchmark from LHE "applies to all sections of the Proposed RMPA/EA"); *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1103 (9th Cir. 2016) (agency cannot reasonably rely on a source without "supporting reasoning" to create baseline estimates for environmental health, particularly where agency did not "independently scrutinize th[e] estimate and decide[] it was reasonable"). BLM repeatedly cited the Smith Publication without ever qualifying its conclusions or independently explaining why the two-mile benchmark should be persuasive. AR-0032303; *see* AR-0031547 ("Areas without expected livestock use was defined as areas greater than 2 miles of livestock waters (Martin and Severson 1988; Blanco et al. 2009)."); AR-0031625 ("In general, livestock do not travel more than 2 miles from water on flat terrain and no more than 1 mile in rough terrain (Smith et al. 1986)."); AR-0031331 (citing Smith Publication to conclude that fencing not required to protect saguaro forest area more than 2 miles from water source). All parties agree that grazing impacts are most severe near water sources, but BLM provides no true substantiation or independent reasoning to justify its serial use of the two-mile benchmark. (*See* WWP Mot. at 22.)

Further, there is evidence in the record that contradicts BLM's two-mile benchmark, but BLM makes no attempt to distinguish these sources. *See Bark*, 958 F.3d at 871 (finding EA inadequate because "NEPA requires agencies to consider all important aspects of a problem" and the agency merely "reiterated its conclusions . . . but did not engage with the substantial body of research cited by Appellants"). Plaintiffs correctly raise that there is a "published study in the record that BLM failed to cite [which] states that most grazing in arid rangelands of Australia occurred within . . . 6.2 miles of water." (WWP Mot. at 16 (citing AR-0001352).) Plaintiffs also invoke the 2009 Pattern Map, which they argue

"shows that numerous areas mapped as class 5 in the 2020 [livestock use probability] map had livestock use in 2008, ranging from slight use all the way to heavy use."[11] (*Id.* at 16–17); AR-0031552, 0031553. BLM counters that "Plaintiffs mistakenly suggest that the 2020 probability map is contradicted by the 2009 actual use map. [But] [t]hese maps are based on entirely different methods and measure different variables – probability of any grazing versus intensity of use." (BLM Resp. at 7.) The Court agrees with Plaintiffs that there are disconnects between the 2020 projections and 2009 recordings that warranted further consideration. There are areas in the southeastern, central, and southwestern portions of the Monument north of I-8 where BLM recorded "heavy" livestock use in 2008, yet BLM projected low to moderate probability of livestock use in these areas. *Compare* AR-0031552 *with* AR-0031553. While such discrepancies appear to reflect no more than five square miles of underestimation between actual use in 2008 and projected use in 2020, the discrepancy underscores that BLM's two-mile benchmark lacks support in the record.

BLM counters that it "did not assume there would be no grazing impacts beyond a two mile range, but used the two mile rule of thumb as a way of analyzing past impacts and predicting future impacts." (BLM Resp. at 6.) But the record does not reflect that the two-mile benchmark was merely a "rule of thumb." While BLM noted when it observed livestock sign on sites categorized as Class 5, it still assumed throughout its analyses that SDNM areas specifically more than two miles from a water source had a low probability of livestock use. *See* AR-0031565 (noting livestock use as causal factor in Class 5 plot failing standards where there was "recent livestock sign, trails and scat" at the plot); AR-

[11] Plaintiffs make similar arguments about BLM's assumption that slopes greater than 30% will cause diminished livestock use. (*See* WWP Mot. at 17.) BLM counters that "[t]his choice represents BLM specialists' view that in the Monument 30% or steeper slopes are likely to be impassable by cattle." (BLM Resp. at 7–8 (citing AR-0031621).) BLM did not direct the Court to any authority for its assumption that terrain with more than 30% slope would be impassable by cattle. (AR-0031621; *see also* AR-0031522, 0031549 (areas with slope greater than 30% were excluded from BLM's stratified random plot monitoring).) Plaintiffs also raise that BLM assumed terrain with greater than 60% slope was impassable in the 2009 Pattern Map and point to a study in the record finding that "cattle did access high elevation rocky slopes during two years of the study, causing impacts to vegetation in those areas." (WWP Mot. at 17–18 (citing AR-0005246, 0011545).) Though BLM's assumption about 30% slope does not pervade the LHE to the same degree as its two-mile benchmark, it is similarly a product of BLM's failure to grapple with the record and explain its decision-making process.

0031546–47 (using two-mile benchmark to define where historical grazing probably affected plant community), AR-0031551 (two-mile benchmark used in generating livestock use probability map, which was used to determine whether livestock caused below-average rangeland health standards); (BLM Resp. at 6.) BLM further argues that it declined to include its previously collected or studied data because Plaintiffs' "successful challenge to the 2012 [RMP] . . . caused BLM to recognize the flaws in relying upon those past data and studies." (BLM Mot. at 28.) BLM then "revised its methodology . . . to address particular flaws . . . that the Court found in the 2012 [RMP]" when preparing the Amended RMP. (*Id.* at 29.)

Though BLM attempted to correct the flaws underlying its previous RMP, BLM still failed to "adequately explain[] its methodology and rationally tie[] its conclusions to the" administrative record. (*See* BLM Resp. at 3.); *Northwest Coal. for Alts. to Pesticides*, 544 F.3d at 1052 n.7 ("[W]here the agency's reasoning is irrational, unclear, or not supported by the data it purports to interpret, we must disapprove the agency's action"). Plaintiffs correctly raise several points in the record where even BLM's data reflect livestock use of Class 5 plots, further contradicting BLM's two-mile benchmark. (*See* WWP Mot. at 17.) For example, the 2020 LHE recorded that two of the three plots in the Limy Fan ecological site within the Big Horn Allotment were failing to achieve Standard 1. AR-0031565. Of those two failing plots, one was Class 5 "with recent livestock sign, trails and scat, and absent of palatable species." *Id.*; *see also* AR-0031578 (same on Limy Upland plot within Lower Vekol Allotment). BLM surmised that "current unauthorized livestock grazing and historical . . . livestock grazing is the causal factor for non-achievement of Standard 1 on the Limy Fan ecological site." AR-0031565. And on the Sandy Loam Deep ecological site within the Beloat Allotment, one of the four failing plots was Class 5 "with recent livestock trails, substantial use of key species, and loitering areas, and [the second] one is in livestock use probability Class 5 with livestock trails and scat." AR-0031561. These two Class 5 plots failed "likely due to prolonged stocking of the pasture and the relatively high forage quality of these areas causing livestock to travel

further in search of forage." *Id.* Yet BLM still relied on its use probability map and underlying two-mile benchmark to make conclusions about grazing compatibility. BLM's "failure to explain" its two-mile benchmark "assumption frustrated the BLM's ability to take a 'hard look' at [grazing] impacts." *Great Basin Res. Watch*, 844 F.3d at 1104.

Indeed, BLM's unsupported reasoning pervades its conclusions about grazing compatibility.[12] (WWP Resp. at 6–7.) BLM's analysis of plant communities again falters because it was based on BLM's two-mile benchmark. (*See* BLM Resp. at 6); AR-0031547. When it is possible that the mean condition for a plant community in its "natural" state actually reflects areas negatively impacted by livestock, BLM cannot adequately analyze plant community health. *See* AR-0031547. And beyond the two-mile benchmark, Plaintiffs raise that by setting the plant community objectives one standard deviation below the mean, BLM is lowering the standard of community health. (*See* WWP Mot. at 9, 9 n.5, 18.) BLM counters that "BLM did this because it 'represents the average spread, natural variability, of the normally distributed data from the mean of each vegetation community attribute absent of unnatural disturbances,' [which] . . . reduces the possibility that natural variability would be the cause of a site failing to meet Standards." (BLM Resp. at 8 (citing AR-0031547).) Yet BLM's explanation that this below-average plant health standard will promote accuracy does not appear in the portion of the administrative record where the plant community objectives were explained, nor does BLM offer any independent cite for this assertion. *See id.*; *Env't Def. Ctr.*, 36 F.4th at 878 ("'[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself' rather than '. . . counsel's

[12] The parties also dispute the significance of BLM's reliance on a single year of data. BLM argues that *WWP I* "did not say that using a single year's data is a per se violation of the APA – the Court instead found it was 'the inconsistent treatment of data' that was arbitrary and capricious." (BLM Resp. at 8); 2015 WL 846548, at *8 (noting that BLM "use[d] just a single year's data for its determination of whether the objectives were being met, but then reject[ed] the PBI data in part because a single year's data is not enough to support sound conclusions"). Plaintiffs contend that particularly given the additional data at BLM's disposal, notably the 2009 Pattern Map, BLM could not reasonably rely on a single year's data collected after the SDNM had not been grazed for years. (*See* WWP Mot. at 18–20.) Plaintiffs cite no categorical rule, nor does the Court know of any, that an agency must rely on more than one year of data to support an LHE. However, as detailed in the surrounding analysis, the Court agrees with Plaintiffs that BLM inadequately analyzed the record data at its disposal, including the 2009 Pattern Map.

post hoc rationalizations.'" (quoting *Or. Nat'l Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1120 (9th Cir. 2010))). Lowering the threshold for plant community health, without rational explanation in the EA itself, is arbitrary and capricious.

BLM argues that this Court should defer to BLM's expertise in quantifying the impacts of grazing on the SDNM, including through its land use probability map, in the absence of recent data regarding grazing on the SDNM. (BLM Resp. at 5 (citing *Safari Club Int'l v. Haaland*, 31 F.4th 1157, 1174–75 (9th Cir. 2022)). But the record is not "devoid of pre-existing studies to clarify the impact of policies on threatened animal species." *See Safari Club*, 31 F.4th at 1174 (upholding agency action under "default rule . . . to rely on a specialized federal agency's presumptive expertise in the subject" where plaintiff "identifie[d] no studies on how" challenged action would impact threatened species). In sum, unlike other agency decisions and underlying predictive modeling upheld by the Ninth Circuit, the land use probability map and its two-mile benchmark does not "make[] entire sense." *Id.* at 1175 (citing *Fox Television Stations*, 556 U.S. at 521); *c.f. Native Ecosystems Council v. Marten*, 883 F.3d 783, 795 (9th Cir. 2018).

ii. Failure to Examine Effects

Plaintiffs relatedly argue that BLM "failed to adequately assess and explain all of the direct and indirect[13] effects of its proposed grazing plan in the EA, as NEPA requires." (WWP Mot. at 21.) "The NEPA regulation requires agencies to assess the direct and indirect effects, as well as the cumulative impact, of their actions on the environment." *See Kettle Range Conservation Grp. v. U.S. Forest Serv.*, No. 2:21-CV-00161-SAB, 2023 WL 4112930, at *8 (E.D. Wash. June 21, 2023) (citing 40 C.F.R. §§ 1502.16, 1508.25(c)); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 737 (9th Cir. 2020). "Indirect and direct effects are both 'caused by the action,' but direct effects occur 'at the same time and place' as the proposed project, while indirect effects occur 'later in time or [are] farther removed in distance.'" *Bernhardt*, 982 F.3d at 737 (citing 40 C.F.R. § 1508.8(a), (b)). Courts may not perform their own review of the scientific evidence before the agency, but

[13] Plaintiffs previously argued that BLM also failed to consider the cumulative effects of the Amended RMP but has since waived this argument. (*See* BLM Resp. at 2 n.1.)

instead must only "ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *Abbey*, 719 F.3d at 1048 (citation omitted). Plaintiffs assert that BLM tries to "punt" the requisite hard look to implementation-level analyses in the future, but BLM must still perform an analysis consistent with NEPA following it duties under the Proclamation. (WWP Mot. at 23.) The Court agrees in part.

On a general note, BLM's repeated reliance on the superficiality of the Amended RMP raises concerns under NEPA.[14] BLM asserts that "there is no more than a theoretical possibility, but near-zero likelihood, that any grazing whatsoever will actually occur within the Monument prior to follow-on implementation decisions to grant grazing permits," and asserted at oral argument that it is uncertain whether any grazing will be authorized on the SDNM. (BLM Mot. at 16; *see also* Min. Entry.) If BLM's position is that even ephemeral grazing has been and will be incompatible with protecting Monument objects, this reasoning should have been reflected in the analysis it was required to perform under NEPA. *See Kettle Range*, 2023 WL 4112930, at *6 ("The statute's hard look obligation must involve a discussion of adverse impacts that does not improperly minimize negative side effects."). While an agency is not "obligated fully to evaluate the impacts of a proposed action" at the programmatic level, an agency must still "provide sufficient detail to foster informed decision-making." *See Abbey*, 719 F.3d at 1049–50 (discussing relative agency burdens at programmatic versus implementation level EIS) (citation omitted). And BLM's decision to delay further NEPA analysis until the implementation stage does not insulate the decision from remand. *C.f. Suazo*, 2015 WL 1432632, at *12 (The agency's "proposed wait-and-see approach undermines the purpose of NEPA").

Plaintiffs also argue that "it is undisputed that the greatest impacts from grazing occur near water sources," but BLM still failed to adequately consider the impacts of the Amended RMP on areas near present or proposed water sources. (WWP Mot. at 22–23.)

[14] BLM repeatedly cites implementation-level management as an extra mitigation measure ensuring that BLM's grazing decisions comply with NEPA. (*E.g.*, BLM Mot. at 21, 26, 32.) But "[m]itigation measures . . . while relevant to the adequacy of an environmental analysis . . . are not a panacea for inadequate data collection and analysis." *Oregon Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 570–71 (9th Cir. 2016) (citing *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1212–13 (9th Cir. 2004)).

BLM intends to "exclud[e] . . . sensitive areas and/or areas failing to achieve Standards in proximity to livestock waters . . ." from grazing, but Plaintiffs contend that BLM never defined the meaning of "sensitive" or "why areas around new [water] sources would be 'less sensitive' than around existing sources."[15] (*Id.* at 23.) To further illustrate the arbitrariness of BLM's assessment, Plaintiffs raise that BLM quickly dismissed an alternative plan where it would have closed portions of allotments failing standards to grazing, largely through fencing and removal of troughs, only because "the additional ground disturbance involved in subdividing allotments" would not meet the purpose of protecting the SDNM. (*Id.* at 22); AR-0031316–0031317. BLM provided no additional explanation for how fencing to facilitate grazing is less impactful on the Monument than fencing to prevent grazing in areas failing standards. BLM now argues that it "considered the approach suggested by Plaintiffs, to not allow for grazing in areas that are not meeting standards, and provided a *rational* explanation for not considering such an alternative in detail." (BLM Mot. at 25 (emphasis added).) In light of the action chosen in the Amended RMP, BLM's failure to more thoroughly consider the impacts of fencing off certain areas was, without more explanation, irrational. *See Neighbors of the Mogollon Rim, Inc. v. United States Forest Serv.*, No. 22-15259, 2023 WL 3267846, at *2 (9th Cir. May 5, 2023) ("Studying an alternative that excludes [a certain site] from grazing would not require the Forest Service to adopt that plan. Instead, it would allow the agency and the public to consider fully the effects of the different alternatives and express informed opinions." (citing *Abbey*, 719 F.3d at 1053–54)).

Plaintiffs' remaining arguments invite the Court to review the agency's scientific findings or ask more of BLM than is required from a programmatic decision in an EA. Plaintiffs argue that BLM's "failure to connect the dots between the facts and its conclusions" is exemplified by its analysis of the creosote-bursage plant community on the SDNM. (WWP Mot. at 23.) And because the historical level of grazing on the Monument

[15] The Court finds that BLM made a reasonable effort to clarify the meaning of "sensitive" in the EA, discussing "Sensitive Areas such as Cultural Sites and Saguaro Forests Unavailable to Livestock Grazing." *See* AR-0031317.

was lower than previously authorized, Plaintiffs assert that "the record does not support BLM's conclusion that 4,232 AUMs will reduce the level of grazing on the SDNM and thus conditions will improve, nor does the record explain how fencing current water sources and building new water sources will reduce impacts to an insignificant level; and the FONSI offers no further explanations" regarding both the creosote-bursage community specifically and general conditions on the SDNM. (*Id.* at 23, 27); *see* AR-0032325 (FONSI explaining historical and contemporary grazing authorizations).[16] But BLM correctly raises that its duty under NEPA is not to "improve" conditions of Monument objects, but rather follow the procedure NEPA prescribes. (BLM Resp. at 10.)

Similarly, Plaintiffs argue that BLM failed to adequately address impacts of the Amended RMP on the Sonoran desert tortoise, but the EA explained that the tortoise "potentially occur[s]" within the SDNM, admitted that livestock grazing threatens tortoise communities, and detailed that "there is little overlap in the habitat shared by livestock and [the tortoise] in most areas in Arizona, and because livestock grazing in Arizona is actively managed by land management agencies, livestock grazing is not currently thought to affect populations in Arizona." AR-0031328–0031329. Contrary to Plaintiffs' claims, even the 2009 Pattern Map reflects that there is not significant overlap on the SDNM between areas with a history of moderate to heavy grazing and tortoise habitat. (*Compare* AR-0031552 *with* AR-0032322; *see* WWP Mot. at 24.) Plaintiffs also fault BLM for failing to monitor annual plants, which certain commenters asserted were an important food source for the tortoise, but BLM explained that "[a]nnual forage production and utilization could not be measured due to the lack [of] significant precipitation and lack of livestock grazing on the SDNM since 2015." AR-0032307; (*see* WWP Mot. at 24); *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 987 (9th Cir. 2022) (an agency may legitimately acknowledge that "a lack of data made certain detailed assessments difficult, [and that] does not render the

[16] Plaintiffs argue that BLM failed to adequately analyze how climate change would exacerbate grazing impacts on the Monument. (WWP Mot. at 24–26.) Plaintiffs cite no authority for their argument that BLM must make specific findings and disclosures about how drought could affect the SDNM's biological resources. (*See id.*) Moreover, the EA acknowledged that climate change and drought could negatively impact Monument resources. AR-0031889. No more is required of BLM at the programmatic level.

agency's NEPA analysis inadequate.").[17] And BLM must more thoroughly evaluate the effects of grazing upon the Sonoran desert tortoise at the implementation stage. *See Abbey*, 719 F.3d at 1049–50. The same is true for BLM's analysis of impacts of grazing upon bighorn sheep, which BLM addressed in comments and acknowledged may be affected by livestock grazing. (*See* WWP Mot. at 25); AR-0031330 (bighorn sheep depend on forbs and shrubs for "forage and concealment"), 0032309 (BLM explaining that "[a]s described in Section 3.5.2 of the Draft RMPA/EA livestock can displace wildlife; desert bighorn sheep are typically found in rugged and steep terrain, which livestock tend to avoid.").

iii. Failure to Complete an EIS

Like other challenges under NEPA, "[a]n agency's decision not to prepare an EIS once that agency has prepared an EA is reviewed for abuse of discretion, and will be set aside only if it is arbitrary and capricious." *W. Land Exchange Project v. U.S. Bureau of Land Mgmt.*, 315 F. Supp. 2d 1068, 1086 (D. Nev. 2004) (quotations omitted) (citing *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002). "NEPA requires agencies to prepare an EIS for 'major Federal actions significantly affecting the quality of the human environment.'" *Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1007 (9th Cir. 2020) (quoting 42 U.S.C. § 4332(c)). Agencies evaluate the need for an EIS through an EA. *Id.* (agencies can prepare an EA that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." (quoting 40 C.F.R. § 1508.9(a)(1)); *see Bark*, 958 F.3d at 871. Plaintiffs assert that BLM also violated NEPA by preparing a FONSI and an EA instead of an EIS. (WWP Mot. at 27.)

Given the multiple flaws in the EA and BLM's assertion that environmental effects will only be fully evaluated in implementation-level decisions, the Court will not reach whether an EIS is necessary. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1126–27 (9th Cir. 2008) (concluding that the record was "insufficiently complete . . . to order the immediate preparation of an EIS"); *Neighbors of*

[17] Given the lack of recent grazing on the Monument, the Court similarly cannot conclude that the "EA should have revealed violations of the 20% utilization standard used for wilderness." (*See* WWP Mot. at 25.)

the Mogollon Rim, 2023 WL 3267846, at *3 ("The significant flaws in the EA undermine the [agency's] conclusion that the proposed action would have no significant effect on the environment. Because the seriously inadequate EA creates significant uncertainty, we cannot 'categorically decide' that the agency could not support its conclusions in a revised EA." (citation omitted)). If BLM again declines to prepare an EIS and Plaintiffs assert that this violates NEPA, nothing in this opinion determines the outcome of that claim. *Neighbors of the Mogollon Rim*, 2023 WL 3267846, at *3 ("NEPA is not a paper exercise, and new analyses may point in new directions." (quoting *Or. Nat. Desert Ass'n*, 625 F.3d at 1124)); *c.f. Env't Def. Ctr.*, 36 F.4th at 870 ("Programmatic environmental review 'generally obviates the need' for subsequent review at the application level 'unless new and significant environmental impacts arise.'")

The Court concludes that the EA is inadequate because BLM unreasonably relied on its two-mile benchmark and failed to consider certain environmental impacts, but the Court will not reach whether Plaintiffs have raised a substantial question that the planning-level decision may have significant environmental effect. *C.f. Env't Def. Ctr.*, 36 F.4th at 881–82 (finding agency should have issued EIS for planning-level decision where plaintiff had shown unknown risks posed by agency action and agency acknowledged "significant data gaps").

2. NHPA

Section 106 of the NHPA mandates that "prior to any federal undertaking, the relevant federal agency 'take into account the effect of the undertaking on any . . . site . . . or object that is included in or eligible for inclusion in the National Register [of Historic Places]' and 'afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment'" on the undertaking. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (per curiam) (quoting 16 U.S.C. § 470f). Specifically, "[u]nder NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R.

§ 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9(c)." *Id.*; *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 607 (9th Cir. 2010). "The NHPA implementing regulations require the BLM, at all stages of the section 106 process, to consult with tribes that 'attach[] religious and cultural significance to historic properties that may be affected by an undertaking.'" *Te-Moak Tribe*, 608 F.3d at 607 (citing 36 C.F.R. § 800.2(c)(2)(ii)).

i. Identification of Cultural Resources & Tribal Consultation

Plaintiffs contend that BLM failed to make the requisite good faith effort to identify cultural resources.[18] Specifically, Plaintiffs argue that "BLM claimed that the northern portion of the SDNM just has light-density [cultural] sites, and it can design future grazing decisions so that livestock congregation areas do not conflict with cultural resource sites. . . . Yet BLM had only surveyed 4% of the area, and most of those surveys were not targeting livestock use." (WWP Resp. at 24 (citing AR-0031051–0031052).) And the organization Archaeology Southwest informed BLM that it conducted a survey of the northern SDNM between 2017 and 2018 where it identified 40 previously undocumented cultural sites. (*Id.*; WWP Mot. at 33; AR-0029372, 0031051.)

BLM counters that it fulfilled its obligations under the NHPA by conducting a "Class I" inventory and consulting with the SHPO, which then concurred that BLM had made adequate efforts "to identify cultural resources and determin[e] eligibility and finding of effect." (BLM Mot. at 34; BLM Resp. at 19–21); AR-0031257–0031258. At this stage

[18] BLM raises in its Response that "it is not clear that Plaintiffs even have standing to bring NHPA claims." (BLM Resp. at 20 n.4, 23.) This argument is untimely. (*See id.*); *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). In any event, the Court finds that Plaintiff Sierra Club's interests, particularly as outlined in the declaration accompanying Plaintiffs' Motion, are "at the least, *arguably* within the zone of interests that the [NHPA] protects." *See Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 197 (2017) (describing requirement for prudential standing) (citation omitted); *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) ("[O[nce the court determines that one of the plaintiffs has standing, it need not decide the standing of the others."); (*see* Doc. 38-2, S. Bahr Decl. ¶ 3 (Sierra Club's mission is "[t]o educate and enlist humanity to protect and restore the quality of the natural and human environment").).

of agency decision-making, the Court agrees with BLM. Class II or III inventories may be necessary even at planning rather than implementation-level stages of agency decision-making, but such rigorous inventories are necessary where "*existing* authorized uses" pose a threat to the protection of cultural objects. *See Connell*, 725 F.3d at 1009 (emphasis original). BLM underscored in its letter to the SHPO that implementation-level decisions would follow the 2020 Amended RMP. AR-0031051; *see also* AR-0031257 (SHPO deeming BLM identification efforts appropriate "based on the understanding that any future use of any allotment would require separate environmental review and Section 106 consultation to address affects to historic properties."). The same is true for BLM's understanding with Native American tribes. *E.g.*, AR-0031083. BLM followed the procedure required for resource identification and tribal consultation in a planning-level decision under the NHPA.[19] *C.f. Connell*, 725 F.3d at 1106–09 (distinguishing between "less intensive identification efforts," appropriate where agency actions merely preserve the status quo, and "Class III inventory," required where agency action will "concentrate[] travel into areas in which historic sites will be adversely affected."); *Te-Moak Tribe*, 608 F.3d at 610 (finding BLM complied with NHPA where it had "consulted with the Tribe regarding [significant sites] within the project area for many years" and "the Tribe [made] no showing that it would have provided new information had it been consulted earlier in the . . . approval process.")

ii. "No Adverse Effect" Determination

BLM similarly complied with the NHPA in determining that the Amended RMP would have no adverse effect on cultural objects. Plaintiffs argue that SHPO's concurrence in BLM's no adverse effects determination should not be persuasive as "SHPO did not spend much time considering BLM's letter" and SHPO relied on "the assumption that future implementation-level decisions could address any effects." (WWP Resp. at 25 (citing AR-0031257).) But not only do Plaintiffs invite the Court to substitute its opinion

[19] Plaintiffs' argument that BLM failed to evaluate sites within the SDNM for National Register eligibility is similarly unavailing at this stage of agency decision-making. (*See* WWP Mot. at 34.)

for that of the SHPO and BLM's experts, but Plaintiffs incorrectly assume that implementation-level decisions would not undergo good faith NHPA analysis. (*See id.*); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts, even if a court may find contrary views more persuasive."); AR-0031083 (discussing additional measures BLM would take to identify and document Komatke trail if grazing permit were issued); AR-0031051. Unlike BLM's NEPA analysis, which contained unsupported assumptions underlying the agency's analysis of environmental impacts at the planning stage, Plaintiffs have not shown that BLM's analysis of cultural resources and tribal interests impermissibly rests on unsupported or erroneous assumptions. *C.f. United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993) ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment."). On the contrary, BLM explained its conclusions, committed to perform NHPA analysis upon implementation, and ensured that the Amended RMP had no immediate effect upon cultural objects. *See Te-Moak Tribe*, 608 F.3d at 611 (clarifying that NHPA "does not mandate protection of all parts of an eligible" area of cultural or religious importance; NHPA requires agency to consider any "alteration to the characteristics of a historic property" eligible for the National Register).

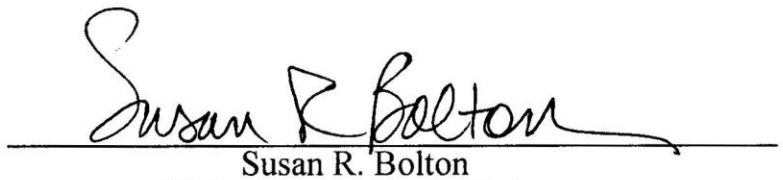
III. CONCLUSION

The Court finds that BLM failed to take the "hard look" required by NEPA and will remand the Amended RMP to the agency to address the procedural flaws described above. The Court "will deny summary judgment, without prejudice to renewal, to the extent WWP seeks to vacate BLM's decision." *WWP I*, 2015 WL 846548, at *12. Given the inadequate analysis in the EA, the Court declines to reach whether BLM should have prepared an EIS. As the Amended RMP is a planning-level decision with no imminent impact on Monument objects, the Court concludes that Plaintiffs' FLPMA claim is unripe. Similarly, given the stage of agency decision-making and BLM's ongoing tribal consultation, the Court concludes that BLM abided by the NHPA.

IT IS ORDERED granting in part and denying in part Plaintiffs Western Watersheds Project and Sierra Club's Motion for Summary Judgment (Doc. 38) and granting in part and denying in part Defendant Bureau of Land Management's Motion for Summary Judgment (Doc. 39).

IT IS FURTHER ORDERED directing the parties to meet and confer and notify the Court within thirty (30) days regarding what the next steps should be for this case.

Dated this 9th day of August, 2023.



Susan R. Bolton
United States District Judge