No. 11-17482

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE WILDERNESS SOCIETY, ARIZONA WILDERNESS COALITION, SIERRA CLUB, GRAND CANYON WILDLANDS COUNCIL, and NATIONAL TRUST FOR HISTORIC PRESERVATION

Plaintiffs-Appellants,

v.

U.S. BUREAU OF LAND MANAGEMENT; BOB ABBEY, DIRECTOR, U.S. BLM; JAMES KENNA, BLM ARIZONA STATE DIRECTOR; PAM MCALPIN, MANAGER, GRAND CANYON-PARASHANT NATIONAL MONUMENT; LINDA PRICE, MANAGER, VERMILION CLIFFS NATIONAL MONUMENT; and LORRAINE M. CHRISTIAN, ARIZONA STRIP FIELD MANAGER,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona
Civil Action No. 3:09-cv-8010-PGR
The Honorable Paul G. Rosenblatt, District Judge

APPELLANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants The Wilderness Society, Arizona Wilderness Coalition, Sierra Club, Grand Canyon Wildlands Council, and National Trust for Historic Preservation have no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

ADDENDUM STATEMENT 3

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

I. STATUTORY BACKGROUND 4

A. The Antiquities Act 4

B. The Federal Land Policy and Management Act 5

C. The National Historic Preservation Act 8

D. The National Environmental Policy Act 9

II. GRAND CANYON-PARASHANT AND VERMILION CLIFFS NATIONAL MONUMENTS 10

A. The Grand Canyon-Parashant National Monument 10

B. The Vermilion Cliffs National Monument 11

III. THE ESTABLISHMENT OF THE NATIONAL MONUMENTS 12

IV. DEVELOPMENT OF THE RESOURCE MANAGEMENT PLANS 13

SUMMARY OF THE ARGUMENT 17

ARGUMENT 20

I. STANDARD OF REVIEW 20

II. THE RMPS VIOLATE THE ANTIQUITIES ACT, THE PRESIDENTIAL PROCLAMATIONS, AND FLPMA BECAUSE THEY DO NOT PROTECT THE MONUMENT OBJECTS 21

A. BLM's "Holistic" Approach to Managing the Monuments is Contrary to the Text, Intent, and Purpose of the Presidential Proclamations and the Antiquities Act 22

B. BLM Failed to Analyze Whether the RMPs Complied With the Proclamations' Mandate to Protect Monument Objects. 26

III. BLM VIOLATED THE PRESIDENTIAL PROCLAMATIONS BY ALLOWING MOTOR VEHICLE USE OFF OF ROADS. 28

A. BLM's Overbroad Interpretation of "Road" to Include "Primitive Roads" is Inconsistent with the Text, Intent, and Purpose of the Presidential Proclamations 29

B. BLM Impermissibly Allowed Motor Vehicle Use on Trails 32

IV. BLM VIOLATED FLPMA'S ORV REGULATIONS WHEN IT DESIGNATED ROUTES IN THE MONUMENTS 35

V. BLM VIOLATED THE NATIONAL HISTORIC PRESERVATION ACT WHEN IT DESIGNATED ROUTES IN THE MONUMENTS 41

A. BLM's Inadequate Inventory Efforts Violated the NHPA 42

B. BLM's Failure to Consult the SHPO Violated the NHPA 48

VI. BLM'S RELIANCE ON THE UTAH WILDERNESS SETTLEMENT VIOLATED FLPMA AND NEPA 50

A. The Wilderness Settlement Misinterprets and Violates FLPMA 52

1. The Wilderness Settlement is Contrary to Long-Standing BLM Practice and Prior Court Decisions 52

2. The Wilderness Settlement's Reinterpretation of FLPMA Was Not Supported by Any Reasoned Analysis 55

B. BLM's Application of the Wilderness Settlement to the RMPs Violated FLPMA 57

C. BLM Violated NEPA By Failing To Consider A Reasonable Alternative 58

CONCLUSION 59

TABLE OF AUTHORITIES

FEDERAL CASES

Alabama Power Co. v. United States Deparment of Energy,
307 F.3d 1300 (11th Cir. 2002) 55

Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984).....25, 56

Center for Biological Diversity v. BLM,
746 F. Supp. 2d 1055 (N.D. Cal. 2009).....passim

Executive Business Media, Inc. v. United States Department of Defense,
3 F.3d 759 (4th Cir. 1993) 56

Greater Yellowstone Coalition, Inc. v. Servheen,
665 F.3d 1015 (9th Cir. 2011) 22

Hells Canyon Alliance v. United States Forest Service,
227 F.3d 1170 (9th Cir. 2000) 25

Humane Society of United States v. Locke,
626 F.3d 1040 (9th Cir. 2010) 26

Idaho Conservation League v. Guzman,
766 F. Supp. 2d 1056 (D. Idaho 2011) 35, 36, 39, 40

Judulang v. Holder,
132 S. Ct. 476 (2011).....26, 28, 55

Kester v. Campbell,
652 F.2d 13 (9th Cir. 1981) 29

Meister v. United States Department of Agriculture,
623 F.3d 363 (6th Cir. 2010) 27

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,
463 U.S. 29 (1983).....passim

Mountain States Legal Foundation v. Bush,
306 F.3d 1132 (D.C. Cir. 2002).....12

Muckleshoot Indian Tribe v. United States Forest Service,
177 F.3d 800 (9th Cir. 1999) 8

Narragansett Indian Tribe v. Warwick Sewer Authority,
334 F.3d 161 (1st Cir. 2003).....43

Native Ecosystems Council v. Tidwell,
599 F.3d 926 (9th Cir. 2010) 20

New Mexico ex rel. Richardson v. BLM,
459 F. Supp. 2d 1102 (D.N.M. 2006).....46

New Mexico ex rel. Richardson v. BLM,
565 F.3d 683 (10th Cir. 2009) 9, 59

Norton v. Southern Utah Wilderness Alliance,
542 U.S. 55 (2004).....5, 6, 52

Northwest Environmental Defense Center v. Bonneville Power Administration,
477 F.3d 668 (9th Cir. 2007) 26, 27, 40, 46

Oregon Natural Desert Association v. BLM,
625 F.3d 1092 (9th Cir. 2008) .....passim

Perkins v. Bergland,
608 F.2d 803 (9th Cir. 1979) 5

Pueblo of Sandia v. United States,
50 F.3d 856 (10th Cir. 1995) 43, 45, 46

Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of Interior,
755 F. Supp. 2d 1104 (S.D. Cal. 2010).....50

Sierra Club v. EPA,
--- F.3d ----, 2012 WL 164839 (9th Cir. Jan. 20, 2012) 32

Sierra Club v. Watt,
608 F. Supp. 305 (E.D. Cal. 1985) 7, 52, 53

Te-Moak Tribe of West Shoshone of Nevada v. United States Department of Interior,
608 F.3d 592 (9th Cir. 2010) 8, 20, 41

United States v. Mead Corporation,
533 U.S. 218 (2001).....25, 32

Utah Association of Counties v. Bush,
316 F. Supp. 2d 1172 (D. Utah 2004).....4, 58

Utah v. United States Department of Interior,
535 F.3d 1184 (10th Cir. 2008) 7, 51

Western Watersheds Project v. BLM,
629 F. Supp. 2d 951 (D. Ariz. 2009) 4, 20

Wilderness Society v. United States Fish & Wildlife Service,
353 F.3d 1051 (9th Cir. 2003) (en banc) 25, 29, 41

Wilderness Society v. United States Forest Service,
No. CV08-363-E-EJL, 2012 WL 551005 (D. Idaho Feb. 21, 2012).....47

Wilderness Watch, Inc. v. United States Fish & Wildlife Service,
629 F.3d 1024 (9th Cir. 2010) 21, 25, 26

Wilson v. Block,
708 F.2d 735 (D.C. Cir. 1983).....43, 45, 46

FEDERAL STATUTES

5 U.S.C. §§ 701–706.....1

5 U.S.C. § 706(2)(A).....20

16 U.S.C. §§ 431–433.....9

16 U.S.C. § 470 et seq.....18

16 U.S.C. § 470f.....passim

28 U.S.C. § 1291.....1

28 U.S.C. § 1331.....1

42 U.S.C. § 4321 et seq. 9

42 U.S.C. § 4332(2)(C) 9

42 U.S.C. § 4332(2)(C)(iii) 9, 58

43 U.S.C. § 1701 et seq. 5

43 U.S.C. § 1702(c) 5

43 U.S.C. § 1712 ..... passim

43 U.S.C. § 1712(a) 6

43 U.S.C. § 1712(c)(1) 5, 13, 59

43 U.S.C. § 1732(a) 5, 13

43 U.S.C. § 1712(c)(5)–(7) 54

43 U.S.C. § 1732(a) 5, 19, 27

43 U.S.C. § 1782 7

FEDERAL REGULATIONS

36 C.F.R. § 800.3(c) 49

36 C.F.R. § 800.4(b) 49

36 C.F.R. § 800.4 (c) 49

36 C.F.R. §§ 800.3–800.13. Section 106 ..... 8, 41

36 C.F.R. § 800.4(b)(1) 8, 42, 43

36 C.F.R. § 800.4(b)(2) 46

36 C.F.R. § 800.16(f) 49

40 C.F.R. § 1502.1 ..... 9, 58

40 C.F.R. § 1502.14 ..... 9, 58

40 C.F.R. § 1502.14(a) 9

43 C.F.R. § 19.2(e).....30

43 C.F.R. § 1610.1to 1610.8.....54

43 C.F.R. § 8342.1 .....passim

OTHER

New Mexico Natural History Institute,
78 I.B.L.A. 133 (1983) 53

Tri-County Cattleman's Association,
60 I.B.L.A. 305 (1981) 53

Wilderness Society,
81 I.B.L.A. 181 (1984) 53

63 Fed. Reg. 20496 (Apr. 24, 1998) 49

Mark Squillace, The Monumental Legacy of the Antiquities Act of 1906,
37 Ga. L. Rev. 473 (2003) 4, 14

Federal Rule of Evidence 201(b)(2) 6

Robert B. Keiter, The Monument, The Plan, And Beyond, 21 J. Land
Resources & Envtl. L. 521 (2001).....14

Secretarial Order 3308 (Nov. 15, 2010) 11

STATEMENT OF JURISDICTION

This is a challenge to the U.S. Bureau of Land Management's (BLM's) Resource Management Plans (RMPs) for the Grand Canyon-Parashant and Vermilion Cliffs National Monuments. The U.S. District Court for the District of Arizona had subject matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706. On September 30, 2011, the district court granted Defendants-Appellees BLM et al.'s (collectively, BLM) cross-motion for summary judgment on all claims. Excerpts of Record (ER) 1–31.

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. Plaintiffs-Appellants The Wilderness Society et al. (collectively, TWS) timely filed their notice of appeal on October 17, 2011. ER 32; Fed. R. App. P. 4(a)(1)(B) (providing sixty days to file notice of appeal).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether BLM violated the Antiquities Act, the Federal Land Policy and Management Act (FLPMA), and the protective and legally-binding directives in the Presidential Proclamations establishing the two National Monuments when the agency issued RMPs that BLM admits will harm the Monuments' unique archaeological ruins, wildlife, and other Monument objects.

2. Whether BLM violated the Presidential Proclamations' prohibition on motor vehicle use off of roads when it allowed motor vehicles on unmaintained routes

that did not qualify as "roads" under any nationwide "road" definition that existed when the Proclamations were issued and that are passable only by high-clearance four-wheel drive vehicles.

3. Whether BLM violated FLPMA's off-road vehicle (ORV) regulations that require ORV routes be located to minimize damage to environmental resources when the agency opened hundreds of routes in the National Monuments to ORVs without applying the regulations' "minimization criteria."

4. Whether BLM violated § 106 of the National Historic Preservation Act (NHPA) by failing to identify historic properties and consult with the State Historic Preservation Officer (SHPO) before opening hundreds of routes in the National Monuments to motor vehicle use.

5. Whether BLM violated FLPMA and the National Environmental Policy Act (NEPA) by preparing an environmental impact statement (EIS) for the RMPs that failed to consider any alternative that strictly protected wilderness-quality lands in the National Monuments.

6. Whether the Utah Wilderness Settlement upon which BLM relied when it excluded protective alternatives in the EIS misinterprets FLPMA § 202.

ADDENDUM STATEMENT

An Addendum bound with this brief includes the statutes, regulations, and Executive Orders pertinent to this appeal.

STATEMENT OF THE CASE

This is a challenge to BLM's RMPs for the Grand Canyon-Parashant and Vermilion Cliffs National Monuments in northern Arizona. President Clinton established the Monuments in 2000 to provide enhanced protections for their rare objects of historic and scientific interest. These include fragile archaeological ruins, geological riches, and outstanding wildlife. In addition to creating the Monuments, the Presidential Proclamations tasked BLM with developing new RMPs to guide Monument management in the future.

On January 29, 2008, BLM issued its inaugural RMPs for the Monuments. The RMPs officially sanction motor vehicle use on over 1,600 miles of routes throughout the Monuments and authorize other activities that BLM acknowledges will harm and degrade the very objects that motivated the Monuments' creation. This failing is compounded by a number of other substantive and procedural shortcomings that attended the RMP process and that violated the Presidential Proclamations establishing the Monuments, the Antiquities Act, FLPMA, NEPA, and the NHPA. On September 30, 2011, the district court rejected TWS's challenges to the RMPs and the route designations. This appeal followed.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

A. The Antiquities Act

The Antiquities Act of 1906, 16 U.S.C. §§ 431–433, grants the President authority to "reserve" federal lands as national monuments to protect "historic landmarks, historic and prehistoric structures," as well as "other objects of historic or scientific interest." Id. § 431. The catalyst for the Antiquities Act's passage was Congress's desire to quickly protect newly discovered archaeological sites in the Southwest from looting and destruction. See Utah Ass'n of Cntys. v. Bush, 316 F. Supp. 2d 1172, 1178 (D. Utah 2004); Mark Squillace, The Monumental Legacy of the Antiquities Act of 1906, 37 Ga. L. Rev. 473, 477 (2003). Presidents from Theodore Roosevelt to Barack Obama have invoked the Antiquities Act more than one hundred times to create national monuments that protect some of the nation's most iconic landscapes—including the Grand Canyon, the Grand Tetons, and the lands in southern Utah that would become Zion and Arches National Parks. See Squillace, supra, at 585–610.

In addition to creating a national monument, a Presidential Proclamation may specify the management directives necessary to protect a monument's objects. These directives have the force and effect of law. See W. Watersheds Project v. BLM, 629 F. Supp. 2d 951, 962–68 (D. Ariz. 2009).

B. The Federal Land Policy and Management Act

FLPMA, 43 U.S.C. § 1701 et seq., was enacted in 1976 to provide comprehensive authority and direction for the management of BLM lands. See, e.g., Norton v. S. Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 58 (2004). In general, FLPMA directs BLM to manage its lands and resources according to multiple-use sustained-yield principles, which provide BLM considerable discretion to balance various resource uses and impacts. 43 U.S.C. §§ 1712(c)(1), 1732(a). These include "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." Id. § 1702(c). As this Court has recognized, multiple-use statutes such as FLPMA "breathe[] discretion at every pore." Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979) (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975)).

FLPMA's general multiple-use mandate is superseded "where a tract of such public land has been dedicated to specific uses according to any other provisions of law." 43 U.S.C. § 1732(a). When the President or Congress dedicates BLM land to a specific use, it "shall be managed in accordance with such law." Id. Accordingly, BLM Instruction Memorandum 2009-215 (IM 2009-215) explains that a Presidential Proclamation establishing a national monument "supersedes conflicting direction" by FLPMA, and land use plans for monuments "must comply with the purposes and objectives of the [Proclamation] regardless of any

conflicts with the FLPMA's multiple-use mandate." ER 487. Similarly, Secretarial Order 3308 stresses that national monuments and other National Landscape Conservation System lands must be "managed to protect the values for which they were designated, including, where appropriate, prohibiting uses that are in conflict with those values." Addendum at A-79.[1] In sum, because the Proclamations' protective mandates must take precedence, FLPMA's multiple-use management applies only so long as the Monument objects are protected.

FLPMA § 202 requires BLM to develop and maintain land use plans for each BLM area. 43 U.S.C. § 1712(a). FLPMA does not dictate how land use plans should balance competing uses and resources according to multiple-use principles. Wilderness, however, is among the uses and resources that BLM must consider protecting when the agency develops a land use plan under § 202. See SUWA, 542 U.S. at 59 (recognizing wilderness as among the multiple-uses under FLPMA); Or. Natural Desert Ass'n v. BLM ("ONDA"), 625 F.3d 1092, 1112 (9th Cir. 2008) ("FLPMA makes clear that wilderness characteristics are among the values which the BLM can address in its land use plans" under § 202).

[1] This Court may take judicial notice of BLM handbooks, reports, Instruction Memoranda, and briefs in other courts under Federal Rule of Evidence 201(b)(2). See, e.g., ONDA, 625 F.3d at 1112 n.14. Documents that TWS submitted to the district court are included in the Excerpts of Records, and other documents are included in the attached Addendum for the Court's convenience.

For decades, BLM used its authority under § 202 to create "§ 202 Wilderness Study Areas (WSAs)" to protect wilderness-quality lands. ER 691. BLM historically provided the same strong protections to § 202 WSAs that it applied to § 603 WSAs through the "modified non-impairment" standard. ER 665–85. Section 603 WSAs protect BLM lands eligible for designation as wilderness under the Wilderness Act, and § 603 requires BLM to manage these wilderness-eligible lands so that their wilderness suitability is not "impair[ed]" pending Congress's decision on wilderness designation. 43 U.S.C. § 1782. Often, § 202 WSAs contain high-quality wilderness, but the lands are not eligible for protection under § 603 and the Wilderness Act because they are smaller than the 5,000-acre minimum in the Wilderness Act. See Sierra Club v. Watt, 608 F. Supp. 305, 311–13 (E.D. Cal. 1985) (discussing § 202 WSAs smaller than 5,000 acres); see also Utah v. U.S. Dep't of Interior, 535 F.3d 1184, 1189–89 (10th Cir. 2008) (describing §§ 202 and 603).

FLPMA's implementing regulations also require BLM to locate ORV routes in a manner that minimizes adverse impacts to various resources and conflicting uses, including air, soil, watershed, wildlife, and wildlife habitat. 43 C.F.R. § 8342.1. Collectively, these ORV regulations and resources are referred to as the "minimization criteria." See Ctr. for Biological Diversity v. BLM ("CBD"), 746 F. Supp. 2d 1055, 1071–72 (N.D. Cal. 2009).

C. The National Historic Preservation Act

The "fundamental purpose" of the NHPA, 16 U.S.C. § 470 et seq., is "to ensure the preservation of historical resources," such as the Monuments' fragile archaeological ruins. Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 609 (9th Cir. 2010).

The heart of the NHPA is § 106 and its inventory and consultation process. 16 U.S.C. § 470f; 36 C.F.R. §§ 800.3–800.13. Section 106 requires federal agencies to consider the impacts to historic resources and consult with the Advisory Council on Historic Preservation and the SHPO prior to an agency action. This process serves the Act's preservation purpose by requiring agencies to "stop, look, and listen" to the impacts on historic properties before taking action. Te-Moak Tribe, 608 F.3d at 607.

In the initial step of the § 106 process, the agency must make a "reasonable and good faith effort" to identify historic properties in the project area. 36 C.F.R. § 800.4(b)(1). After doing this, § 106 requires the agency to take several additional steps, including consulting with the SHPO to determine how the project's impacts can be avoided or mitigated. See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999) (summarizing the § 106 process).

D. The National Environmental Policy Act

NEPA, 42 U.S.C. § 4321 et seq., requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." Id. § 4332(2)(C). An EIS must include a discussion of alternatives to the proposed action. Id. § 4332(2)(C)(iii). This alternatives discussion is the "heart" of an EIS, and the "'touchstone' for courts reviewing challenges to an EIS under NEPA." ONDA, 625 F.3d at 1122; 40 C.F.R. §§ 1502.1, 1502.14.

NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). The "existence of a viable but unexamined alternative renders an [EIS] inadequate." ONDA, 625 F.3d at 1122 (quoting Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 868 (9th Cir. 2004)). An EIS is inadequate if the agency's refusal to consider an alternative is based on a legal misinterpretation. See id. at 1122–24 (vacating RMP that failed to consider an alternative based on BLM's mistaken belief that it lacked authority under FLPMA to consider wilderness values); New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 710–11 (10th Cir. 2009) (BLM violated NEPA when it rejected an alternative based on a misinterpretation of FLPMA § 202).

II. GRAND CANYON-PARASHANT AND VERMILION CLIFFS NATIONAL MONUMENTS

A. The Grand Canyon-Parashant National Monument

Grand Canyon-Parashant National Monument is located in northern Arizona on the border of "one of the most beautiful places on earth, the Grand Canyon." ER 478. The Monument is "[f]ull of natural splendor and a sense of solitude," and its more than one million acres encompass "spectacular scenic vistas, numerous rough canyons, isolated strands of ponderosa pines, expanses of pinyon/juniper woodlands, and Mojave Desert." ER 478, 205.

The Monument contains a wealth of archaeological and geological riches. ER 478–79. Grand Canyon-Parashant "has a long and rich human history spanning more than 11,000 years, and an equally rich geologic history spanning almost 2 billion years." ER 478. The area contains "[h]undreds, if not thousands," of archaeological ruins, many of which are undiscovered and in good condition because of the Monument's remoteness. ER 628, 478–79.

The Monument also contains "outstanding" wildlife and biological resources. ER 479. Numerous threatened and endangered species—including the Mexican spotted owl, the California condor, and the desert tortoise—make their home in the Monument. ER 480.

B. The Vermilion Cliffs National Monument

Vermilion Cliffs National Monument is located in northern Arizona, near the Grand Canyon and Grand Staircase-Escalante National Monument, and bordering Glen Canyon National Recreation Area. ER 236. Like Grand Canyon-Parashant National Monument, Vermilion Cliffs National Monument is a critical component in the conservation and protection of the Greater Grand Canyon Ecoregion. See Squillace, supra, at 509–10.

Vermilion Cliffs consists of over 290,000 acres of "sandstone slickrock, brilliant cliffs, and rolling sandy plateaus." ER 483, 485. "Spectacular scenic vistas" are often enjoyed "from the rims of the Paria Plateau." ER 236. Like Grand Canyon-Parashant, Vermilion Cliffs contains significant archaeological ruins and is a geological "treasure." ER 483. Ancient civilizations "explored and lived on the plateau and surrounding canyons for thousands of years." Id. The area contains "[s]ome of the earliest rock art in the Southwest," and "[h]igh densities of Ancestral Puebloan sites." Id. The Monument also includes the renowned and "geographically spectacular" Coyote Buttes. Id.

In addition, Vermilion Cliffs contains "outstanding" plants and wildlife, which have been preserved by the Monument's "remoteness" and "limited travel corridors." ER 484. California condors, over twenty species of raptors, desert

bighorn sheep, pronghorn antelope, mountain lion, and sensitive native fish are found in the Monument. Id.

III. THE ESTABLISHMENT OF THE NATIONAL MONUMENTS

On January 11, 2000, President Clinton issued Presidential Proclamation 7265 establishing Grand Canyon-Parashant National Monument, pursuant to his authority under the Antiquities Act. ER 478–82; see also Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1133–34 (D.C. Cir. 2002) (rejecting challenges to the creation of Grand Canyon-Parashant and five other national monuments). The Proclamation assigned management authority over the portion of the Monument within Lake Mead National Recreation Area to the National Park Service, and authority over the remaining 800,000 acres to BLM. ER 480–81.

On November 9, 2000, President Clinton established Vermilion Cliffs National Monument through Presidential Proclamation 7374. ER 483–86. The Proclamation again assigned BLM management authority over the Monument. ER 485.

The Presidential Proclamations for Grand Canyon-Parashant and Vermilion Cliffs explain that each Monument was established "for the purpose of protecting the objects identified" in the Proclamations (collectively, the "Monument objects"). ER 480, 485. The Monument objects are comprised of an array of scientific and historic objects, including multiple biological, geological,

hydrological, cultural, and historic resources. ER 478–80, 483–84. Each Proclamation states that BLM must "implement the purposes of this proclamation," and "protect[] the [Monument] objects." ER 480–81, 485. The Proclamations stress that the Monuments "shall be the dominant reservation" of the federal lands. ER 481, 486.

In addition, to mandating generally that Monument objects be protected, the Proclamations specify that "all motorized and mechanized vehicle use off road **will be prohibited**, except for emergency or authorized administrative purposes." ER 480 (emphasis added), see also 485 (same). This prohibition was necessary to preserve the "remoteness," "lack of easy road access," and "limited travel corridors" that are crucial to the survival of the area's rich archaeological and ecological heritage. ER 479, 484.

IV. DEVELOPMENT OF THE RESOURCE MANAGEMENT PLANS

Prior to President Clinton's creation of Grand Canyon-Parashant and Vermilion Cliffs National Monuments in 2000, the Monument lands were general BLM lands subject to FLPMA's multiple-use principles. ER 204, 235; 43 U.S.C. §§ 1712(c)(1), 1732(a). Under the multiple-use mandate, no use is paramount, and BLM has considerable discretion to balance various uses and impacts. See supra at 5–7. With the creation of the Monuments, emphasis shifted to the preservation of

the Monument objects. See supra at 12–13; ER 204, 235 (recognizing that the Proclamations "changed much of the management direction" for the Monuments).

Managing national monuments and ensuring the protection of Monument objects is a new responsibility for BLM. Until 1996, jurisdiction over national monuments established on BLM lands was transferred to agencies with a greater conservation bent, such as the National Park Service. See Squillace, supra, at 508–10. BLM had never been entrusted with management of national monuments until President Clinton created Grand Canyon-Parashant, Vermilion Cliffs, and twelve other national monuments and left them to BLM's care. See id. President Clinton took this unprecedented step, in part, to develop and promote a conservation ethic in an agency historically known for its close ties to industry, rather than conservation. Id. at 545. As then-Secretary of the Interior Babbitt explained, allowing BLM to manage national monuments challenged the agency to "show it is committed to, and capable of delivering on the conservation part of its existing legal mandate." Robert B. Keiter, The Monument, The Plan, And Beyond, 21 J. Land Resources & Envtl. L. 521, 531 (2001).

This case arose in large part because BLM failed to rise to this conservation challenge. This is especially apparent in BLM's failure to protect the Monuments' rich archaeological history. For example, when BLM issued the RMPs, it officially sanctioned unrestricted motor vehicle use on hundreds of routes in both

Monuments—totaling over 1,270 miles of open routes in Grand Canyon-Parashant and 374 miles in Vermilion Cliffs. ER 217, 247. BLM's own EIS acknowledges that such extensive vehicle use will cause "readily apparent" adverse impacts to the Monuments' irreplaceable archaeological ruins, and these impacts "would **change one or more character-defining features**" of the sites. ER 380, 383, 396 (emphasis added).

An independent archaeological survey of the Monuments in 2004 confirmed the EIS's conclusion that motor vehicle use in the Monuments will cause significant impacts. In just seven days of surveying, archaeologists Peter Bungart and Anne Raney discovered twenty-two previously unidentified archaeological sites impacted by motor vehicle use along existing routes. ER 492–97, 504. Some of the archaeological sites discovered by Bungart and Raney were located literally in the middle of existing routes. ER 498–503. Bungart's and Raney's 2006 report summarizing their surveys warned that "the network of roads and routes in the monuments has impacted and is likely to continue impacting literally thousands of cultural resource sites." ER 497.

Although it knew the Monuments were exceptionally rich in archaeological resources and that vehicle use could impair those sites, BLM made no effort to identify historic properties located along the vast majority of routes in the Monuments. ER 297 (EIS admitting that BLM conducted no scientific

investigations of historic properties in Vermilion Cliffs, and only limited excavations at a handful of sites in Grand Canyon-Parashant); ER 152 (Record of Decision deferring route designations for limited portions of just ten routes pending adequate inventories). Consequently, BLM acknowledged that it possessed no information at all on the existence or location of historic properties in over 95% of the Monuments when it issued the RMPs. ER 292, 423.

In addition to harming archaeological sites, BLM's EIS acknowledges that the route designations in the Monuments will cause "readily apparent" impacts to fossils and geological resources, which BLM admits could "involve a unique or rare resource." ER 300, 307. These adverse impacts "would **change one or more character-defining features**" of the resources. Id. (emphasis added).[2]

These substantial impacts to the Monuments' archaeological ruins, geological evidence, and wildlife result, in part, from the RMPs' remarkably expansive definition of "road." While the Presidential Proclamations expressly prohibit motor vehicle use off of roads, BLM undermined the protective intent of this restriction by concocting a new "road" definition that was so lax as to leave even unmaintained routes passable only by high-clearance four-wheel drive vehicles available to vehicle use. ER 523, 543.

[2] Also, the hundreds of open routes in the Monuments would harm wildlife due to collisions with vehicles and by fragmenting habitat and providing access corridors for weed invasions, hunting, pollution, and wildfires. ER 311, 334, 342, 375.

When BLM began developing the RMPs, the agency intended to consider management prescriptions that would fully protect wilderness-quality lands in the Monuments as § 202 WSAs. ER 212, 243; see infra at 57. Those plans were scuttled after the Department of Interior and State of Utah agreed in 2003 to the Utah Wilderness Settlement in which the federal government disavowed its authority to strongly protect wilderness-quality lands under FLPMA § 202's planning authority. Thereafter, BLM refused to consider any alternatives that created § 202 WSAs or applied WSA-level protection to even the most pristine wildlands in the Monuments.

SUMMARY OF THE ARGUMENT

President Clinton established Grand Canyon-Parashant and Vermilion Cliffs National Monuments in 2000 to provide enhanced protections to their irreplaceable archaeological ruins, outstanding wildlife, and other objects of historic and scientific interest. The President's marching orders to BLM were clear: BLM must manage Grand Canyon-Parashant and Vermilion Cliffs to protect the Monument objects. All other management considerations are secondary. This case arose in large part because the RMPs fail to afford the Monument objects the priority and enhanced protections to which they are legally entitled.

First, the RMPs violate the Antiquities Act, the Presidential Proclamations, and FLPMA by authorizing motor vehicle use and other activities that will

irreparably harm Monument objects, in particular their fragile archaeological ruins. BLM's "holistic approach" to managing Monuments—where some Monument objects can apparently be harmed as long as others survive—cannot be squared with the text, purpose, and intent of the Presidential Proclamations and the Antiquities Act.

Second, the route designations in the RMPs violated the Presidential Proclamations' prohibition on motor vehicle use off of roads. Rather than comply with the protective intent and purpose of this prohibition, BLM undermined the provision by crafting a new "road" definition that allows vehicle use on trails and unmaintained routes passable only by high-clearance four-wheel drive vehicles. This lax definition defies common sense and, more important legally, it conflicts with every one of the agency's nationwide "road" definitions that existed when the Monuments were created.

Third, BLM's route designations violate FLPMA's ORV regulations, which require the agency to locate routes to minimize damage to specified resources. BLM failed entirely to consider a number of the resources listed in the ORV regulations when it designated routes. Further, BLM violated the regulations by failing to locate ORV routes to minimize their adverse impacts. A pair of district courts have concluded that agencies must consider and apply each of the

minimization criteria in the ORV regulations to every route. BLM failed to do so here.

Fourth, BLM violated the NHPA when it issued the RMPs. President Clinton established the Monuments in part to provide enhanced protections to the area's archaeological ruins, which are subject to the NHPA's protections. Although the NHPA requires agencies to make a "reasonable and good faith" effort to identify historic properties, BLM made no meaningful inventory effort whatsoever, despite the fact that the agency had no information on the existence or location of historic properties on over 95% of the Monument lands. BLM also failed to consult the Arizona SHPO, as the NHPA requires.

Finally, BLM violated FLPMA and NEPA when it relied on the illegal Utah Wilderness Settlement and refused to consider a management alternative that would protect wilderness-quality lands in the Monuments to the same level enjoyed by BLM wildlands elsewhere. This violated FLPMA's § 202 planning provision as well as NEPA's requirement that an agency consider all reasonable alternatives to the proposed action.

In 2008, the Tenth Circuit dismissed a facial challenge to the Wilderness Settlement on ripeness grounds because an as-applied challenge would clarify the meaning and import of the Settlement. This is just such an as-applied challenge. Because BLM cannot categorically limit its discretion under FLPMA § 202 to fully

protect wildlands—as it did when it issued the RMPs for Grand Canyon-Parashant and Vermilion Cliffs—this Court must invalidate the Wilderness Settlement and reject the RMPs that relied upon it.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. Native Ecosystems Council v. Tidwell, 599 F.3d 926, 932 (9th Cir. 2010). Under its de novo review, the Court reviews BLM's actions for violations of FLPMA, NEPA, the NHPA, and the Presidential Proclamations under the Administrative Procedure Act (APA). Te-Moak Tribe, 608 F.3d at 598 (FLPMA, NEPA, and the NHPA); W. Watersheds Project, 629 F. Supp. 2d at 968 (Presidential Proclamations).

This Court must "hold unlawful and set aside" BLM's actions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the APA, an agency action must be set aside if it fails "to state a rational connection between the facts found and the decision made." Native Ecosystems Council, 599 F.3d at 932 (quoting Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870, 875 (9th Cir. 2009)). Consequently, this Court must "carefully review the record to ensure that [BLM's] decisions are founded on a reasoned evaluation of the relevant factors, and may not

rubber-stamp administrative decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv., 629 F.3d 1024, 1032 (9th Cir. 2010) (quoting Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003)).

II. THE RMPS VIOLATE THE ANTIQUITIES ACT, THE PRESIDENTIAL PROCLAMATIONS, AND FLPMA BECAUSE THEY DO NOT PROTECT MONUMENT OBJECTS.

The Presidential Proclamations creating the Monuments detail the archaeological ruins, wildlife, and other resources that constitute the Monument objects, and direct BLM to manage the Monuments to protect the Monument objects pursuant to FLPMA. ER 478, 483. FLPMA and BLM policy make absolutely clear that protecting the Monument objects must supersede any other management considerations in the Monuments, including BLM's usual multiple-use mandate. See supra at 5–6.

Rather than protecting the Monument objects, BLM adopted a pair of RMPs that approve motor vehicle use and other activities that the agency admits will fundamentally harm the Monument objects. According to BLM's own EIS, the RMPs will cause "readily apparent" impacts that would "change one or more character-defining features" of the Monument objects. ER 300, 307, 380, 383, 396. BLM's failure to protect the Monument objects violates the Antiquities Act,

the Presidential Proclamations, and FLPMA. In addition, BLM failed to satisfy its most basic duty under the APA to rationally analyze and cogently explain how RMPs allowing significant harms to Monument objects could possibly comply with the Proclamations' mandates.

A. BLM's "Holistic" Approach to Managing the Monuments is Contrary to the Text, Intent, and Purpose of the Presidential Proclamations and the Antiquities Act.

It is undisputed that the RMPs for the National Monuments will allow motor vehicle use, grazing, and other activities that will adversely impact the Monuments' archaeological sites, wildlife, and other Monument objects. BLM's own EIS frankly admits that these activities will cause impacts that "would change one or more character-defining features" of the Monument objects. ER 300, 307, 380, 383, 396. Moreover, these impacts may be "readily apparent" and "involve a unique or rare resource." Id.[3] Further, some motor vehicle routes in the Monuments run directly over fragile archaeological sites. ER 498–503.[4]

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[3] BLM's EIS assumed that mitigation through unspecified future "adaptive management" measures would ameliorate the adverse impacts of the activities authorized by the RMPs. See, e.g., ER 156, 197, 233, 261, 576. The district court excused BLM's reliance on wholly unspecified "adaptive management" measures by pointing to NEPA caselaw concerning mitigation. See ER 10–18. NEPA's procedural requirement that an agency merely **discuss** mitigation, however, is distinct from the heightened standard when an agency **relies** on mitigation to meet a **substantive** duty to protect a resource, as BLM did here. When an agency relies on mitigation to meet a substantive protective duty, the mitigation measures must be specific and certain to be implemented. See, e.g., Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1028–29 (9th Cir. 2011) (discussing mitigation

BLM did not dispute the impacts described in its EIS. Instead, when challenged by the public, BLM insisted that the harms to Monument objects are acceptable under the agency's "holistic" approach to Monument management. ER 38, 431. Under this approach, BLM apparently can allow Monument objects to be degraded or destroyed as long as at least some similar objects elsewhere in the Monuments survive. This "holistic approach" would allow the area's archaeological resources—any one of which might be historically or scientifically significant—to be destroyed one by one. In so doing, the archaeological ruins that motivated national monument designation could be lost.

The district court ruled in one paragraph that BLM's "holistic" approach was permissible, because "[t]here is no controlling legal authority mandating that BLM carry out its responsibilities in a particular way." ER 9. The fact that a statute does not mandate a particular management regime does not mean that **any** and every approach will do. It is clear from both the letter and spirit of the Presidential

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requirements under the Endangered Species Act, which imparts a substantive protective mandate). The vast majority of the mitigation measures the RMPs rely on do not meet this standard. For example, mitigation for the harms caused by Route P1025 are: "Mitigate by adaptive management monitoring of status/integrity of identified sensitive resources or special status species and/or cultural resources as their condition might relate to intensity and type of public use." ER 561. BLM cannot rely on such vague and uncertain mitigation promises to meet its substantive duty to protect Monument objects.

[4] BLM claims that impacts to Monument objects that will "change one or more character-defining features" of the object "would not diminish the integrity of the resource." ER 300, 380. BLM never explains how a change to an object's character-defining features would not diminish the object's integrity.

Proclamations and the Antiquities Act that management that allows the destruction of Monument objects is beyond the legal pale. As explained above, Congress's passage of the Antiquities Act was originally motivated by its urgent desire to preserve and protect irreplaceable archaeological sites in the Southwest from looting and destruction. See supra at 4. Under BLM's "holistic" management approach, the very types of resources that spurred passage of the Antiquities Act—archaeological ruins in the Southwest—could be lost forever. Congress did not enact the Antiquities Act to protect just **some** of the imperiled archaeological ruins in the Southwest's national monuments, as BLM's "holistic" approach seems to indicate.

BLM's "holistic" approach also is contrary to the plain language of the Proclamations establishing the Monuments. Each Proclamation states that the Monument is created "for the purpose of protecting the objects identified," and directs BLM to manage the Monuments "to implement the purposes of this proclamation." ER 480–81, 485. Moreover, each Proclamation specifically singles out the threat to Monument objects from motor vehicles and generally prohibits motor vehicle use "for the purpose of protecting the objects." ER 480, 485. Allowing motor vehicles to destroy and degrade Monument objects is incompatible with the Proclamations' protective mandate.

The Presidential Proclamations require BLM to protect **all** Monument objects, not just a subset. Some statutes allow agencies to balance competing uses when protecting a resource, while others require agencies to prioritize and protect all of a protected resource. Compare Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170, 1176 (9th Cir. 2000) (Wild and Scenic Rivers Act allows agencies to balance protection and competing uses of designated rivers), with Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1062, 1067 (9th Cir. 2003) (en banc) (Wilderness Act requires full protection of entire wilderness area). Because the Proclamations took the latter approach, BLM must protect all of the Monument objects from degradation and destruction. BLM recognized as much in its district court briefing when it acknowledged that the Proclamations require the protection of the Monument objects, "both collectively and **individually**." ER 46, 48 (emphasis added). Because BLM's RMPs for the Monuments allow the destruction and degradation of Monument objects, the RMPs violate the Proclamations and the Antiquities Act.[5]

[5] Because BLM's "holistic" approach to managing the Monuments is contrary to the Antiquities Act and the Presidential Proclamations, it is not entitled to judicial deference. See Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). In addition, BLM's "holistic" approach is due no deference because it was not based on any expert legal analysis by the agency. See United States v. Mead Corp., 533 U.S. 218, 226–27, 234–35 (2001); Wilderness Watch, 629 F.3d at 1034–35. There is nothing in the record or elsewhere that demonstrates any attempt by BLM to square its lax "holistic" approach to

B. BLM Failed to Analyze Whether the RMPs Complied With the Proclamations' Mandate to Protect Monument Objects.

An agency must engage in reasoned decisionmaking and provide evidence and explanation in the record to support its actions and conclusions. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Wilderness Watch, 629 F.3d at 1040; Humane Soc'y of U.S. v. Locke, 626 F.3d 1040, 1048 (9th Cir. 2010); Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687 & n.15 (9th Cir. 2007). As the Supreme Court has explained, while courts presume that agencies possess "expertise and experience in administering their statutes" under the arbitrary and capricious standard of the APA, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." Judulang v. Holder, 132 S. Ct. 476, 483–84 (2011).

BLM failed to engage in the necessary reasoned decisionmaking here by not considering or explaining how RMPs that cause substantial harms to Monument objects could possibly comply with the Proclamations' protective mandate. The EIS explains in detail how the activities authorized by the RMPs will cause "readily apparent" and character-changing impacts to the Monument objects. ER 300, 307, 380, 383, 396. But BLM never analyzed or determined whether a

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Monument management with the protective mandates in the Antiquities Act or the Presidential Proclamations.

management plan that allows these impacts is consistent with the Proclamations. Instead, BLM summarily declared that the RMPs protect Monument objects in accordance with the Proclamations. ER 145, 156, 187, 197.

Because the Presidential Proclamations place a substantive legal duty on BLM to protect the Monument objects, BLM must "cogently explain its actions and demonstrate a rational connection between the facts it found and the choice it made." Nw. Envtl. Def. Ctr., 477 F.3d at 687 n.15. In other words, BLM must explain how the RMPs comply with the Proclamations' protective mandate when the RMPs will cause substantial harms to Monument objects. BLM's failure to engage in this reasoned decisionmaking renders its determination arbitrary and capricious. See State Farm, 463 U.S. at 43.[6]

BLM's failure to engage in reasoned decisionmaking is highlighted by a comparison to the National Park Service's (NPS's) approach for the portion of Grand Canyon-Parashant it manages. NPS: (1) analyzed in the EIS the impacts to Monument objects resulting from its management plan, **and then,** (2) determined whether a management plan that allows such impacts is consistent with its

[6] This Court should not defer to BLM's conclusory determination that the RMPs comply with the Proclamations because "BLM used *no* method to analyze" whether the RMPs sufficiently protect Monument objects, and this Court "cannot defer to a void." ONDA, 625 F.3d at 1121; see also Meister v. U.S. Dep't of Agric., 623 F.3d 363, 367 (6th Cir. 2010) ("An agency is not entitled to deference simply because it is an agency."); CBD, 746 F. Supp. 2d at 1078 ("[S]imply citing stated goals is not tantamount to showing that the BLM actually applied" and complied with substantive protective legal requirements).

substantive protective duty under the Proclamations and the NPS Organic Act. ER 175–77. The district court ruled that BLM had no duty to conduct a similar analysis because the NPS Organic Act places a substantive protective duty on NPS while FLPMA imposes no such duty on BLM. ER 10. However, the Presidential Proclamations place a substantive protective duty on BLM akin to NPS's duty under its Organic Act. Because BLM has a substantive duty to protect the Monument objects, it must explain its conclusion that the RMPs satisfy that statutory mandate. See, e.g., Judulang, 132 S. Ct. at 483–84. BLM failed to do so.

III. BLM VIOLATED THE PRESIDENTIAL PROCLAMATIONS BY ALLOWING MOTOR VEHICLE USE OFF OF ROADS.

The Presidential Proclamations establishing the Monuments describe them as "remote and unspoiled," which are "qualities . . . essential to the protection of the scientific and historic" resources they contain. ER 478, 483. The Monuments' "remoteness," "lack of easy road access," and "limited travel corridors" have preserved their archaeological ruins and outstanding wildlife. ER 479, 484. To ensure this remains so in the future, particularly as visitorship increases, the Proclamations prohibit motorized and mechanized vehicle use off of roads. ER 480, 485.

When the Proclamations were issued, BLM classified routes as either "roads" or "trails" (also referred to as "ways"). ER 511–13. In 2006—six years **after** the Proclamations were issued—BLM created a new, intermediate category

of routes it named "primitive roads." ER 515–24. "Primitive roads" are passable only by high-clearance four-wheel drive vehicles. ER 523. Under BLM's new classification system, "primitive roads" are distinct from "roads," the latter of which have always been understood by BLM as routes maintained and passable by ordinary passenger vehicles. See id.

Rather than comply with the Proclamations' protective intent and purpose by limiting motor vehicles to "roads," BLM's RMPs permit motor vehicle use on unmaintained "primitive roads" passable only by high-clearance four-wheel drive vehicles. BLM did not even exclude mere "trails" from possible vehicle use in the RMPs.[7] By allowing motorized vehicle use on "primitive roads" and even "trails," BLM violated the off-road vehicle prohibition in the Proclamations.

A. BLM's Overbroad Interpretation of "Road" to Include "Primitive Roads" is Inconsistent with the Text, Intent, and Purpose of the Presidential Proclamations.

The Proclamations do not explicitly define the word "road" for purposes of the prohibition on motor vehicle use off of roads. Therefore, the word "road" "must be read in the[] context and with a view to [its] place in the overall statutory scheme." Wilderness Soc'y, 353 F.3d at 1060–61 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)); see also Kester v.

[7] BLM's 2006 Roads Report defines "trails" as routes "managed for human-powered, stock, or off-highway vehicle[s]," but not generally managed for high-clearance four-wheel drive vehicles. ER 523.

Campbell, 652 F.2d 13, 16 (9th Cir. 1981) (agency interpretation of an Executive Order cannot be inconsistent with the language or purpose of the order).

When President Clinton issued the Proclamations in 2000, he was not writing on a blank slate. Rather, he did so against a backdrop of nationwide BLM definitions that defined "road" consistent with the common-sense notion of a road as a route passable by ordinary passenger vehicles and maintained for continuous passenger vehicle use. For example, FLPMA's legislative history shows that Congress understood a road to be a route "improved and maintained by mechanical means to insure relatively regular and continuous use." ER 511–12. BLM used this road definition for decades in its Wilderness Inventory Handbook, which stated that "[a] route which was established or has been maintained solely by the passage of vehicles would not be considered a road, even if it is used on a relatively regular and continuous basis." ER 512. Likewise, Department of Interior regulations define roads within roadless areas as "suitable for public travel by means of four-wheeled, motorized vehicles intended primarily for highway use." 43 C.F.R. § 19.2(e). Finally, BLM's nationwide Engineering Manual defined a road as "maintained for regular and continuous use." ER 513. Thus, a "road" is distinguished from a "way," which "receives no maintenance to guarantee regular and continuous use." Id.

Rather than interpret the word "road" in the Proclamations consistent with contemporaneous nationwide "road" definitions, BLM applied an entirely new definition it promulgated in 2006, six years **after** the Proclamations were issued. ER 515–24. This new scheme abolished the distinction between roads and trails that existed in 2000 by creating an intermediate category, which it called "primitive roads." ER 523. "Primitive roads" are unmaintained and passable only by high-clearance four-wheel drive vehicles. Id. Although these "primitive roads" would not have been considered roads under any nationwide definition that existed when the Proclamations were issued, BLM left "primitive roads" available to vehicle use in the RMPs. ER 420, 543. Because "primitive roads" were not "roads" when the Proclamations were issued, they cannot be "roads" in the RMPs.

No deference is due BLM's new and overbroad interpretation. BLM released its 2006 Roads Reports six years **after** President Clinton issued the Proclamations. Moreover, BLM's 2006 Roads Report offers Bureau-wide, rather than national monument-specific, guidance. ER 515–18. BLM did not intend the 2006 Roads Report to be an interpretation particular to national monuments or the Antiquities Act. Nor did it offer the Report as an interpretation of the Presidential Proclamations. BLM's after-the-fact adoption of a "roads" definition that conflicts with the contemporaneous definitions and was adopted without any consideration of the Proclamations' language is plainly undeserving of judicial deference. See

Mead, 533 U.S. at 235 (deference due only when an agency "bring[s] the benefit of specialized experience to bear on the subtle questions" raised by statutory ambiguities); Sierra Club v. EPA, --- F.3d ----, 2012 WL 164839, at *5–6 (9th Cir. Jan. 20, 2012).

B. BLM Impermissibly Allowed Motor Vehicle Use on Trails.

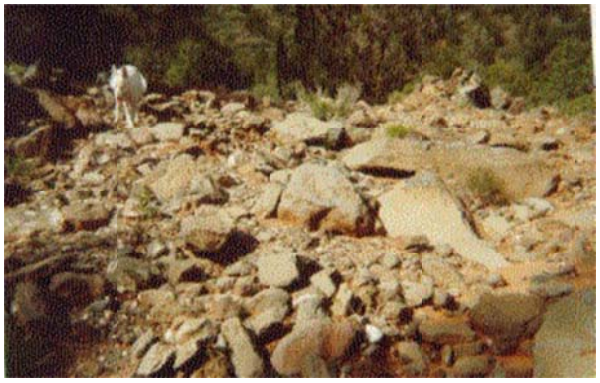
In addition to allowing motor vehicle use on "primitive roads," the RMPs allow such use even on mere trails. This plainly violates the Proclamations.

BLM's route evaluation process for the Monuments began with an inventory of all existing **routes**, which included roads, "primitive roads," and trails. ER 548, 552 ("comprehensive inventory" ranged from "divided interstate highway, to primitive single-track trails"). Each existing route, including trails, was then fed into the Route Evaluation Tree, which was the primary—if not exclusive—tool BLM used to determine which routes would be opened. ER 442, 558, 557 ("extensive route evaluation process" opened "routes (roads and trails)"); see infra at 37–38 (describing Route Evaluation Tree). The Route Evaluation Tree never distinguished between routes that were roads and trails, nor is there any evidence in the record that BLM **ever** considered whether routes were roads or trails when determining whether to leave them open. See, e.g., ER 559–81 (Route Evaluation Reports do not state whether route is a road, "primitive road," or trail).

BLM never filtered out trails in its route designation process, so some routes opened to motor vehicle use were trails, rather than roads. BLM's EIS initially admitted as much. See ER 543–44 (EIS acknowledged vehicle use "would be limited to designated roads **and trails**" in the Monuments (emphasis added)). BLM staff also recognized this explicitly at the time. For example, BLM staff recommended the agency close Route P4003 through Grand Canyon-Parashant because the "road does not exist." ER 585. Similarly, BLM staff commented that portions of Route P6015 are accessible "only . . . by ATV, if that;" it "is really hard to tell if [Route P6013] is really a road;" and a "large portion of [Route P4050B] is washed out," so it "[d]oesn't make sense that it's on [the] map." ER 582–83, 586.

Most damning of all are photographs of routes left open as "roads" under the RMPs. These photographs make plain in a way that BLM notes to the record never could, just how badly BLM's new "road" definition undermines the Proclamations' directive that motor vehicle use off of roads be prohibited.

Route P1012



Route P1089

ER 596–604.

After BLM issued the final EIS, TWS formally protested to BLM that allowing motor vehicle use on trails and "primitive roads" violated the Proclamations' prohibition on motor vehicle use off of roads. ER 588–94. BLM conceded that the EIS stated that it would allow motor vehicle use on trails, and that such use would violate the Proclamations. ER 543–44. Rather than close trails to vehicle use, however, the agency simply edited the EIS to eliminate its earlier admissions. Id. For example, BLM made the following edit to the RMPs: "Motorized and mechanized vehicle use would be limited to designated roads ~~and trails~~ on 203,859 acres on BLM land" in Vermilion Cliffs. ER 543.

Simply deleting the words "and trails" made no difference on the ground, of course. Indeed, BLM did not close a single foot of any existing route because it was a trail. The agency did nothing more than attempt to transform illegal trails into permissible roads with the stroke of a pen. The Court should set aside BLM's

route designations because they are plainly inconsistent with the Proclamations, which saw the off-road vehicle use prohibitions as a way to extend meaningful protections to the fragile Monument objects. See Wilderness Soc'y, 353 F.3d at 1060–61. Only by remanding the RMPs to BLM for revision can this Court ensure that the RMPs do not illegally leave trails open to motor vehicle use.[8]

IV. BLM VIOLATED FLPMA'S ORV REGULATIONS WHEN IT DESIGNATED ROUTES IN THE MONUMENTS.

In addition to violating the Presidential Proclamations, BLM's route designations in the National Monuments violated FLPMA's off-road vehicle (ORV) regulations, 43 C.F.R. § 8342.1, which apply generally to route designations on BLM land. See Idaho Conservation League v. Guzman, 766 F. Supp. 2d 1056, 1060–61 (D. Idaho 2011) (describing the ORV Executive Orders 11644 and 11989, upon which FLPMA's ORV regulations are based). The ORV regulations mandate that ORV routes "be located to minimize damage to" air, wilderness, watershed, wildlife, wildlife habitat, and other resources (collectively, the "minimization criteria"). 43 C.F.R. § 8342.1.

The ORV regulations require BLM to consider and apply each minimization criteria to every route it designates as open to motor vehicle use. Idaho Conservation League, 766 F. Supp. 2d at 1071–72; Ctr. for Biological Diversity v. BLM ("CBD"), 746 F. Supp. 2d 1055, 1076–77 (N.D. Cal. 2009). Thus, BLM

[8] The district court never reached this issue despite briefing by the parties.

must first consider how each route will impact air, wilderness, wildlife, wildlife habitat, and the other minimization criteria resources. See 43 C.F.R. § 8342.1. Then, BLM must apply the minimization criteria to locate every route in a manner that will minimize the impacts to the resources. See, e.g., Idaho Conservation League, 766 F. Supp. 2d at 1071–72.[9]

In this case, BLM violated the ORV regulations by designating routes using a "Route Evaluation Tree" that did not consider or apply each of the minimization criteria. Two district courts in the Ninth Circuit have faced this identical failing, and each rejected the agencies' route designation decision. See Idaho Conservation League, 766 F. Supp. 2d at 1071–74; CBD, 746 F. Supp. 2d at 1071–81. This Court should do the same.

In CBD and Idaho Conservation League, agencies designated routes using "decision trees" or "matrixes" similar to the Route Evaluation Tree utilized by BLM in this case. See ER 436–73, 477; Idaho Conservation League, 766 F. Supp. 2d at 1071–72; CBD, 746 F. Supp. 2d at 1072–74. And in each case, the court rejected the agency's route designations because they failed to consider and apply **all** of the minimization criteria to every route. Idaho Conservation League, 766 F.

[9] While Idaho Conservation League involved a challenge to the Forest Service's ORV regulations, the FLPMA ORV regulations at issue here are "substantively indistinguishable." ER 24; see also Idaho Conservation League, 766 F. Supp. 2d at 1073–74 (same).

Supp. 2d at 1071–72; CBD, 746 F. Supp. 2d at 1074–77. The Route Evaluation Tree here suffers the same fatal flaws as in CBD and Idaho Conservation League.

First, BLM's Route Evaluation Tree and route designation process entirely omitted some minimization criteria. For example, air and noise impacts are explicitly listed among the minimization criteria, but neither is considered or mentioned anywhere in the Route Evaluation Tree or the explanation of the Tree in the record. ER 464–66, 477. This fact dooms the route designations.

The district court excused this failure because the EIS considered the overall impacts to air and noise caused by activities authorized by the RMPs. ER 22. The EIS's generalized discussion of how the route designations would collectively affect air and noise in the Monuments is not sufficient to comply with the ORV regulations' requirement that BLM consider the impacts to these resources on a route-by-route basis. On similar facts, the district court in CBD correctly held that a Decision Tree that entirely failed to consider some of the minimization criteria violated 43 C.F.R. § 8342.1. CBD, 746 F. Supp. 2d at 1076–77.

Second, many routes were able to sidestep even the minimization criteria that do appear in the Route Evaluation Tree. The Tree contains three "environmental/special resource questions." ER 464–66, 477. As Appendix 2.T to the EIS explains, the first environmental question asks whether continued use of a route might impact special status species or other specially-protected resources,

such as Monument objects. ER 464. Only if the answer is "no" does the Tree ask the second environmental question: whether route closure or mitigation would address cumulative effects to "various other resources." ER 464, 477. This second environmental question regarding "various other resources" is where most of the minimization criteria considered by the Tree are located. ER 464–65 (incorporating soil, watershed, vegetation, and wildlife habitat questions into the Tree's second environmental question). But the Tree bypasses this question entirely whenever the answer to the Tree's first environmental question was "yes." ER 477.[10]

For example, Route P3085 in Grand Canyon-Parashant is open to motor vehicle use, but BLM never asked the second environmental question for the route because the answer to the first environmental question was "yes": the route would impact historic Monument objects and other resources. ER 568–70. Consequently, the agency never considered the minimization criteria incorporated into the second environmental question. So while the district court stated that the Tree considered a host of minimization criteria—such as wildlife migration routes, floodplains, wetlands, and sensitive soils—the Tree never actually considered or

[10] If the answer to the first environmental question is "yes," the Tree moves directly to the third environmental question, which asks whether the impacts to the resources identified in the first environmental question could be avoided, minimized, or mitigated. ER 465, 477.

applied these criteria to many routes because BLM never asked the second environmental question of the routes. ER 21–22.

Third, there is no evidence in the record that BLM actually **applied** the minimization criteria to locate the route in a manner that minimized adverse impacts, as the regulations require. As discussed above, the district court excused BLM's failure to consider air and noise impacts on a route-by-route basis because the EIS contained a generalized discussion of how the route designations as a whole would impact these resources. See supra at 37. The district court failed to appreciate the difference between BLM's procedural duty under NEPA to disclose impacts and its substantive duty under the ORV regulations to locate ORV routes so their impacts are minimized. The ORV regulations require better decisions, not just better disclosure. There is no evidence whatsoever in the record demonstrating that BLM complied with this substantive requirement. The courts in both CBD and Idaho Conservation League recognized the critical distinction between merely considering the minimization criteria and actually using the information to locate routes to minimize impacts, as the ORV regulations require. Idaho Conservation League, 766 F. Supp. 2d at 1072; CBD, 746 F. Supp. 2d at 1078–79.

The district court here ruled that the Route Evaluation Report for each route documents how BLM applied the minimization criteria, ER 25, but this is not the case. The Route Evaluation Reports document which minimization criteria BLM

considered for an individual route, but they do not demonstrate whether or how BLM applied the criteria to locate the route to minimize impacts. For example, Route P2005B in Grand Canyon-Parashant will directly impact desert tortoise, bighorn sheep, areas of critical environmental concern, and other plants and wildlife. ER 562. The Route Evaluation Report, however, simply states that Route P2005B is "Open to All Uses." ER 564. This says absolutely nothing about how BLM applied the minimization criteria to minimize these impacts. Because "there is nothing in the record to show that the minimization criteria were in fact applied when . . . routes were designated," BLM's route designations must be rejected. CBD, 746 F. Supp. 2d at 1079.

Absent anything in the record showing how BLM applied the minimization criteria when it designated routes in the Monuments, the agency cannot cogently explain how it met its substantive duty to minimize ORV damage under 43 C.F.R. § 8342.1. See, e.g., Nw. Envtl. Def. Ctr., 477 F.3d at 687 & n.15. As the court in Idaho Conservation League explained, conclusory statements by an agency that it applied the minimization criteria will not suffice, because "[w]ithout some description of how the selected routes were designed 'with the objective of minimizing' impacts, the Court cannot assess whether there is a 'rational connection between the facts found and the decision made.'" 766 F. Supp. 2d at 1073 (quoting Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d

1059, 1065 (9th Cir. 2004)). This Court should similarly rule that BLM has failed to comply with the FLPMA ORV regulations.

V. BLM VIOLATED THE NATIONAL HISTORIC PRESERVATION ACT WHEN IT DESIGNATED ROUTES IN THE MONUMENTS.

President Clinton established the Monuments in large part to provide enhanced protections for their irreplaceable archaeological ruins and other historic resources. ER 478–79, 483–84. The Presidential Proclamations explain that the Monuments' archaeological sites document thousands of years of human history in the canyons and on the plateaus of northern Arizona. Id. The Monuments contain "irreplaceable rock art images, quarries, [and] villages" in "good condition" compared to sites elsewhere. ER 479. In addition, the Monuments contain "historic ranch structures," historic trails, and "several old mining sites" that document the exploration and settlement of the area by Europeans in the eighteenth and nineteenth centuries. ER 479, 484.

The National Historic Preservation Act (NHPA) protects such historic properties through its § 106 inventory and consultation process. See Te-Moak Tribe, 608 F.3d at 609 (discussing NHPA's purpose). Boiled down to its essence, § 106 requires an agency to inventory a project area to determine the location of historic resources and to consult an expert agency, the State Historic Preservation Office (SHPO), to determine how the proposed agency action will affect those resources. 16 U.S.C. § 470f; 36 C.F.R. §§ 800.3–800.13.

When it adopted the RMPs in this case, BLM violated both the inventory and consultation requirements of § 106. BLM had information concerning historic properties on a mere 5% of the Monuments, and did nothing more than send copies of the draft and final EIS to the SHPO, rather than engage in a consultation process. ER 292, 423, 541. BLM's paltry inventory and consultation efforts fall far short of the legal mark and were especially egregious in light of the fact that President Clinton specifically set aside the Monuments to provide enhanced protections for their archaeological and other historic properties.

A. BLM's Inadequate Inventory Efforts Violated the NHPA.

BLM must make a "reasonable and good faith effort" to identify the historic properties that may be impacted by the RMPs. 36 C.F.R. § 800.4(b)(1). BLM Manual 8110 explains that "sound qualitative, quantitative, and geographical information about known and anticipated cultural resources," and a "professional identification of cultural resources . . . is essential to making informed resource management and land use decisions." ER 606, 609.

BLM Manual 8110 describes the general types of inventories: (1) Class I inventories compile and review all **existing** information on historic properties in the project area; (2) Class II inventories involve sample field investigations and probabilistic field surveys that characterize the probable density, diversity, and distribution of historic properties in the project area; and (3) Class III inventories

intensively survey the project area to identify and evaluate the historic properties. ER 611–20.

An agency's identification efforts must be "reasonable," and the greater the likelihood that unidentified historic properties are present in the project area, the greater the agency's efforts must be to identify the historic properties. See, e.g., Pueblo of Sandia v. United States, 50 F.3d 856, 861 (10th Cir. 1995); Wilson v. Block, 708 F.2d 735, 754 (D.C. Cir. 1983). As a result, when a Class I inventory indicates a high likelihood of unidentified historic properties in a project area, an agency must typically undertake additional identification efforts. See Wilson, 708 F.2d at 754. Moreover, "inadequacies" in the initial inventory process fatally undermine BLM's compliance with § 106, because an inadequate inventory "influence[s] all that follows in the § 106 process." Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 169 (1st Cir. 2003).

The NHPA regulations also state that an agency's identification efforts "shall take into account . . . the magnitude and nature of the undertaking." 36 C.F.R. § 800.4(b)(1). Similarly, BLM Manual 8110 explains that the agency's inventory efforts should be "at a level commensurate with the nature of the proposed undertaking and its likely effects on the protection and management of the cultural resources." ER 607. As these authorities make clear, BLM's inventory duties and efforts should have been particularly great here, where BLM

was analyzing the impacts of a plan governing National Monuments set aside in large measure to protect their unique and relatively intact cultural resources.

When BLM issued the RMPs for the National Monuments the agency possessed no information on the existence or location of historic properties in over 95% of the Monuments. ER 292, 423. In Vermilion Cliffs, BLM conducted **no** scientific investigations of cultural resources, while in Grand Canyon-Parashant BLM's scientific investigations were limited to excavations at a handful of sites. ER 297. Despite its almost total ignorance regarding the historic properties present, BLM made no meaningful effort to update or expand its knowledge. Instead, it relied almost exclusively on an alleged Class I inventory of existing information that covered less than 5% of the Monuments. ER 151,193.[11] Moreover, because much of this existing information dates from the 1970s and 1980s, ER 152, 193, agency staff recognized that the decades-old surveys were scientifically inadequate by today's standards. ER 621 ("We have inventoried less tha[n] 2.3% of the Arizona Strip, and hardly any of that was done scientifically."). Such meager and inadequate inventory efforts are not the "reasonable and good faith" effort the law requires.

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[11] The district court was impressed that BLM delayed route designations for ten "high potential areas" in Grand Canyon-Parashant until the agency performed Class III inventories. ER 28. Further inspection reveals that BLM deferred route designations for just 13 miles—or 0.8%—of the 1,600 miles of route designations in both Monuments. Compare ER 281 (1,283 miles of routes in the final EIS), with ER 152, 217 (1,270 miles of routes in the Record of Decision).

BLM should have conducted Class II or Class III inventories because the existing information indicated a very high likelihood of unidentified historic properties throughout the Monuments. See, e.g., Pueblo of Sandia, 50 F.3d at 861; Wilson, 708 F.2d at 754. For example, in 1999 BLM recognized that "[h]undreds, if not thousands, of archaeological and historic sites exist within the area proposed" for the Monuments. ER 628. Furthermore, the agency admitted "the likelihood of finding many new (and probably incredible) sites because of a distinct lack of scientific inventory and study," and remarked that "our understanding of the prehistory of this area sadly lacks any solid foundation." Id.

Archaeologists Peter Bungart and Anne Raney submitted a report to BLM in 2006 that reached the same conclusion. Bungart and Raney estimated that there may be up to 23,000 historic property sites in Grand Canyon-Parashant and 9,000 sites in Vermilion Cliffs. ER 506. The report cautioned that the "very abundant and highly significant cultural resources" in the Monuments have a "dramatic potential" to be significantly harmed or destroyed by existing routes. ER 507.

Because BLM knew there were likely tens of thousands of unidentified historic properties in the Monuments that would be impacted by the RMPs, it was incumbent upon the agency to conduct additional inventory efforts. It was not a "reasonable and good faith" inventory effort to issue the RMPs without possessing any information at all on the location, density, and distribution of historic

properties in over 95% of the Monuments. See, e.g., Pueblo of Sandia, 50 F.3d at 861; Wilson, 708 F.2d at 754. By failing to conduct adequate inventories, BLM attempts to manage and protect the Monuments' significant and unique historic resources without the information that BLM acknowledges is essential to informed management. See ER 609. The NHPA, and the Proclamations, require more.

BLM defended its meager inventory efforts by pointing to Instruction Memorandum 2007-030 (IM 2007-030), which provides guidance on NHPA § 106 compliance when BLM designates ORV routes. ER 635–37, 41–43, 151, 192.[12] However, IM 2007-030 does not categorically excuse BLM from conducting Class II or III inventories when designating existing routes as open, as BLM supposes. To the contrary, the IM is careful to note that inventory requirements "will vary" depending on the "expected density and nature of historic properties based on existing inventory information." ER 636. Indeed, the IM states that Class II or

[12] The district court also excused BLM's meager inventory efforts as a phased inventory pursuant to 36 C.F.R. § 800.4(b)(2). ER 27. BLM never claimed during the RMP process that it would conduct a phased inventory. ER 151, 192, 527–28. Thus, this Court must reject this post-hoc rationalization, which appeared for the first time in litigation. See Nw. Envtl. Def. Ctr., 477 F.3d at 688. In addition, the district court was mistaken that phased inventories are consistent with BLM's programmatic agreements. ER 27. Neither agreement cited by the court mentions the use of phased inventories, so they do not "specifically provide" any authority to exempt BLM from the usual § 106 inventory requirements, as the district court suggested. Id. Finally, phased inventories may not be conducted **after** a final agency action—route designations—that will indisputably harm unidentified historic properties. See New Mexico ex rel. Richardson v. BLM, 459 F. Supp. 2d 1102, 1125 (D.N.M. 2006), rev'd on other grounds, 565 F.3d 683 (10th Cir. 2009); 36 C.F.R. § 800.4(b)(2).

Class III inventories may be appropriate in "high potential areas" and "for larger planning areas for which limited information is currently available," which is exactly the case here. Id.[13]

In addition, BLM recently issued Instruction Memorandum 2012-067 (IM 2012-067), which "provides clarification" and "supersedes" IM 2007-030. Addendum at A-65. IM 2012-067 stresses that when BLM designates "new" routes where prior inventories have presumably not occurred, Class II and Class III inventories "in high potential areas and for specific development projects should be considered for larger planning areas for which limited information is currently available." A-66. Moreover, IM 2012-067 importantly explains that there may be times when "a road and trail network cannot be designated in a [Land Use Plan] because cultural resources inventories cannot be accomplished in time." Id. When BLM cannot complete § 106 inventories prior to issuance of a management plan, "[t]here may be cases where continued use of an [ORV] . . . route prior to

[13] Bungart's report undercuts the apparent assumption underlying IM 2007-030 that unidentified historic properties will not be found on existing routes. Bungart documented several previously unidentified historic property sites along existing routes. ER 497–504. Also, many of the existing routes in the Monuments are little more than faint trails from prior ORV use, along which no prior § 106 identification efforts have occurred. ER 582–86, 596–604. As a district court in Idaho recently noted, when such "routes [are] created over the years by use outside the designated system," often their "impact on the environment has never been analyzed." Wilderness Soc'y v. U.S. Forest Serv., No. CV08-363-E-EJL, 2012 WL 551005, at *8 (D. Idaho Feb. 21, 2012). Because there are no assurances that BLM has information or knowledge of the impacts to historic properties from existing routes, BLM cannot absolve itself of the NHPA's inventory requirements.

designation may not be authorized before [a] Class III inventory and Section 106 compliance is completed." Id. This is just such a case, and BLM should have deferred route designations until it completed Class II or Class III inventories for Monument routes in at least the most important areas historically.

In any event, BLM failed to conduct even an adequate Class I inventory. BLM Manual 8110 explains that a Class I inventory is a "professionally prepared study that includes a compilation and analysis of all reasonably available cultural resource data and literature, and a management-focused, interpretive, narrative overview, and synthesis of the data." ER 611. A Class I inventory consists of two parts: a narrative overview and a compilation of all known cultural resource information. ER 611–17. And each part must contain numerous specific elements. Id. The Manual further explains that a Class I inventory is not a mere "records check," "literature review," or "existing data review," and "[t]his level of review is not to be confused with a full class I inventory and should not be called a class I inventory." ER 612. This, though, is exactly what BLM did. ER 151, 193. Thus, even if a Class I inventory was sufficient in National Monuments set aside specifically to protect their historic properties, BLM's efforts fell short.

B. BLM's Failure to Consult the SHPO Violated the NHPA.

In addition to its inventory duties, the NHPA required BLM to consult with the Arizona SHPO regarding the identification and evaluation of the RMPs'

impacts to historic properties. 36 C.F.R. §§ 800.3(c), 800.4(b) & (c). IM 2007-030 and IM 2012-067 stress that the "SHPO[] should be consulted prior to initiating the development of a land use plan . . . and invited to participate" when BLM designates ORV routes. ER 637.

BLM claimed that it met its duty to consult by merely mailing the SHPO copies of the draft and final EISs. ER 289, 475, 529, 541; see also ER 433–35 (listing over one hundred other recipients the EIS was mailed to). Adding the SHPO's name to BLM's mass mailing list does not satisfy the NHPA, particularly when the agency action will guide management of National Monuments set aside to protect their unique historic resources. As the NHPA's Standards and Guidelines stress, "[c]onsultation is built upon the exchange of ideas, not simply providing information." 63 Fed. Reg. 20496, 20504 (Apr. 24, 1998). Moreover, the NHPA regulations explain that "consultation" means "seeking, discussing, and considering the views" of the consulted party, and "where feasible, seeking agreement with them" regarding the NHPA process. 36 C.F.R. § 800.16(f). There is no evidence in the record to suggest that any of this happened when BLM was preparing the RMPs. Nothing in the record evidences any discussion or consideration of the SHPO's views regarding BLM's negligible inventory efforts, or of the ways in which historic properties could be safeguarded by the RMPs.

The inadequacy of BLM's mailbox consultation efforts here is highlighted by a comparison to BLM's consultation efforts in Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Department of Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010). In Quechan Tribe, BLM submitted numerous documents to show it had consulted with the Quechan Tribe, which assumed the role of the SHPO in that case. These documents included phone records and correspondence between the Tribe and BLM in which the agency specifically sought tribal input and cultural resources information. Id. at 1112–16. In addition to this individualized attention, BLM pointed to newsletters and general invitations to public meetings. According to the court, however, these "recitals of law, professions of good intent, and solicitations to consult" failed to demonstrate compliance with the NHPA because agencies "are not free to glide over the requirements imposed by" the law. Id. at 1118–19 (parenthetical omitted). If the relatively extensive consultation efforts in Quechan Tribe were insufficient under the NHPA, then the agency's mailbox-only consultation efforts here surely failed.

VI. BLM'S RELIANCE ON THE UTAH WILDERNESS SETTLEMENT VIOLATED FLPMA AND NEPA.

Prior to 2003, BLM frequently used its general land use planning authority under FLPMA § 202, 43 U.S.C. § 1712, to provide strong protections to the agency's most pristine wildlands. These areas were referred to as § 202

Wilderness Study Areas (WSAs) and were managed under what was known as a "modified non-impairment" standard. See supra at 6–7; ER 665–85.

In 2003, the Department of Interior and State of Utah reached a settlement concerning BLM's creation and management of § 202 WSAs (the "Wilderness Settlement"). ER 647–64. This Settlement reversed BLM's long-standing interpretation of FLPMA § 202 and declared for the very first time that the agency lacked the authority under FLPMA to create § 202 WSAs or to impose the modified non-impairment management standard to protect wilderness-quality lands. ER 662–63.

In 2008, the Tenth Circuit dismissed a facial challenge to the Wilderness Settlement on ripeness ground. Utah, 535 F.3d at 1189–92. The court reasoned that an as-applied challenge to the Settlement was necessary because "[o]nly after the settlement is applied to the development of *specific land use plans* will the true effect of the agreement become clear." Id. at 1195. This is just such a challenge, as BLM explicitly relied on the Settlement to refuse to even consider protecting the Monuments' wilderness-quality lands to the standard enjoyed by scores of § 202 WSAs in the past. ER 209, 240, 532, 688, 690. BLM's categorical refusal to provide full protections for wilderness-quality lands in the Monuments misinterpreted FLPMA § 202 and in so doing, violated NEPA's requirement that BLM analyze a full range of reasonable alternatives for Monument management.

A. The Wilderness Settlement Misinterprets and Violates FLPMA.

The Settlement states that BLM "will not establish, manage or otherwise treat public lands, other than Section 603 WSAs and Congressionally designated wilderness, as WSAs or as wilderness pursuant to the Section 202 process absent congressional authorization." ER 662. Moreover, BLM "will refrain from applying the IMP, H-8550-1 [i.e., the modified non-impairment standard] to BLM lands other than Section 603 WSAs." ER 663. This new and legally improper interpretation of § 202 is contrary to the text of § 202, decades of agency practice, and prior court decisions. In addition, BLM failed to prepare and provide any "reasoned analysis for the change." See State Farm, 463 U.S. at 42.

1. The Wilderness Settlement is Contrary to Long-Standing BLM Practice and Prior Court Decisions.

FLPMA § 202 requires BLM to develop RMPs that utilize multiple-use principles to balance various uses, resources, and values—including wilderness values. 43 U.S.C. § 1712(c)(1); SUWA, 542 U.S. at 59; ONDA, 625 F.3d at 1112. To protect wilderness values, BLM has long managed many wilderness-quality lands as WSAs under § 202. For example, during the Carter, Reagan, and George H.W. Bush administrations 148 WSAs were created in whole or in part under § 202. ER 691.

The first Interior Secretary to interpret FLPMA, Secretary Andrus, understood it provided him authority to create § 202 WSAs. See, e.g., Sierra Club,

608 F. Supp. at 339–41. This interpretation held throughout the Reagan Administration. BLM recognized in a long line of Interior Board of Land Appeals decisions that the agency was authorized to designate and protect § 202 WSAs. See, e.g., Wilderness Soc'y, 81 I.B.L.A. 181, 184 (1984); N.M. Natural History Inst., 78 I.B.L.A. 133, 135 (1983); Tri-Cnty. Cattleman's Ass'n, 60 I.B.L.A. 305, 314–15 & nn.11–13 (1981). Moreover, after Interior Secretary Watt withdrew WSA status from 158 areas under § 603 in the early 1980s, BLM issued a series of formal Instruction Memoranda and notices to BLM's state directors in 1982 and 1983 that explicitly referenced the agency's ability to protect these areas as WSAs under § 202. See, e.g., Addendum at A-69 (IM 83-188 (Dec. 23, 1982)), A-75 (IM 83-557 (May 23, 1983)). Furthermore, Secretary Watt's successor—Secretary Clark—testified to Congress that BLM had redesignated 146,000 acres as WSAs "under authority of Section 202 of FLPMA." ER 717.

The courts have supported the prior administrations' reading of FLPMA § 202. Sierra Club arose when Secretary Watt withdrew WSA status from 158 areas that were smaller than the 5,000-acre minimum in the Wilderness Act and FLPMA § 603. 608 F. Supp. at 311–13. Secretary Watt declared that these areas no longer enjoyed WSA status under § 603 and so were open to the full range of potential development allowed under FLPMA's multiple-use mandate. Id. at 312, 338–39 & n.67. The district court disagreed, concluding that the withdrawal of § 603 status

did not leave these areas open to development, but rather transformed them into § 202 WSAs pursuant to an earlier BLM order. Id. at 340–41. In doing so, the court noted that BLM "correctly" concluded that "nothing in the law precluded the Secretary from recommending that [roadless areas under 5,000 acres] be designated for permanent wilderness status," because "pursuant to sections 202 and 302 [of FLPMA], the Secretary of Interior has discretion to determine the management protocol for these lands." Id. at 340; see also id. at 341 (stating that the prior Secretary's designation of areas smaller than 5,000 acres as WSAs was "an exercise of the discretion given him by sections 202 and 302, a discretion he clearly had"). In addition, the court in ONDA ruled that "FLPMA makes clear that wilderness characteristics are among the values which the BLM can address in its land use plans" under § 202. 625 F.3d at 1112.

As the decades of BLM practice and prior court decisions reflect, nothing in the Proclamations, § 202, FLPMA's multiple-use requirement, or elsewhere in FLPMA limits BLM's discretion to manage areas in accordance with the modified non-impairment standard used in § 202 WSAs. To the contrary, FLPMA requires BLM to weigh the long-term versus short-term benefits of potential uses, the relative scarcity of the values involved, and the present and potential uses of lands. 43 U.S.C. § 1712(c)(5)–(7); 43 C.F.R. §§ 1610.1 to 1610.8. All of these considerations could encompass the level of protection afforded § 202 WSAs

under the modified non-impairment standard. Consequently, this Court should set aside BLM's mistaken interpretation of § 202 in the Wilderness Settlement as categorically precluding the agency from applying the modified non-impairment standard under § 202. See, e.g., Ala. Power Co. v. U.S. Dep't of Energy, 307 F.3d 1300, 1306, 1312–13 (11th Cir. 2002) (no deference to an agency's legal interpretation in a settlement that is contrary to the underlying statute).

2. The Wilderness Settlement's Reinterpretation of FLPMA Was Not Supported by Any Reasoned Analysis.

The Wilderness Settlement is contrary to every prior administration's position since Congress enacted FLPMA more than thirty years ago. Consequently, BLM's decision to adopt a radically new interpretation of § 202 must be the result of reasoned decisionmaking and the agency must provide a reasoned analysis for the change. See Judulang, 132 S. Ct. at 483–84; State Farm, 463 U.S. at 41–42, 57 (when an agency changes a "settled course of behavior [that] embodies the agency's informed judgment," failure to provide a "reasoned analysis for the change" renders the decision arbitrary and capricious).

BLM, however, had no legal analysis at hand when it reinterpreted § 202. Documents obtained through the Freedom of Information Act show that one week after the Wilderness Settlement's approval, the head of BLM's wilderness program, Jeff Jarvis, met with Robert Comer, the attorney who negotiated the settlement on behalf of BLM and others. See ER 718–22. At the meeting, Mr.

Jarvis was told that the Settlement assumes a link between § 202 and § 603 WSAs created before 1993. Id. This link, Mr. Jarvis was told, "is a new and important idea" that was apparently developed just to support the Settlement. ER 719. The meeting notes also acknowledge that the notion of "Post 603 WSAs," a recurrent phrase in the Settlement, "is another new idea." Id. Thus, rather than reflecting established interpretations of FLPMA, the Settlement turns on "new ideas" concocted specially for the Settlement.

These records also reveal that BLM agreed to the "new ideas" without benefit of, or guidance from, any supporting legal opinion. Mr. Jarvis was told by Mr. Comer and others that they were unaware of any legal opinion that supported the Settlement and that "[a] legal opinion may or may not be developed in the future." ER 718. Department of Justice attorneys and BLM are not permitted to deal so cavalierly with the interpretation of BLM's organic statute. Exec. Bus. Media, Inc. v. U.S. Dep't of Def., 3 F.3d 759, 762 (4th Cir. 1993) (when Department of Justice represents an agency it "is bound by the same laws that control the agency"). While an agency may generally adopt new "reasonable" interpretations of law, it may not adopt radically new interpretations without "reasoned analysis," as BLM did with the Settlement. See Chevron, 467 U.S. at 842–44; State Farm, 463 U.S. at 41–42, 57.

B. BLM's Application of the Wilderness Settlement to the RMPs Violated FLPMA.

When BLM developed the RMPs for Grand Canyon-Parashant and Vermilion Cliffs, the agency believed the Wilderness Settlement eliminated its ability to create § 202 WSAs and apply the modified non-impairment standard in the Monuments. Early in the RMP process BLM "was working toward making recommendations for WSAs." ER 212, 243. After the Wilderness Settlement, however, BLM steadfastly refused to consider creating WSAs or applying anything like the modified non-impairment standard.

For example, BLM stated that it was "operating under the policy which resulted from [the] Utah v. Norton settlement and cannot legally designate WSAs in a land use plan." ER 428. This was not merely a matter of semantics, as BLM has sometimes claimed, but rather one that that had substantial impact on land management. When TWS and other conservation organizations urged BLM to strongly protect the Monuments' wildlands with WSA-like provisions, BLM refused to do so. See ER 725–36. According to the agency, the modified non-impairment standards "were not able to be considered as management prescriptions for areas identified for maintaining wilderness characteristics because their use would violate the intent of the [Wilderness Settlement]." ER 532; see also ER 209, 240, 688–90 (explaining how the Settlement precluded creation of § 202 WSAs or application of the modified non-impairment standard). Not surprisingly, BLM

ultimately offered the Monument wildlands significantly less protection than they would have enjoyed as § 202 WSAs. ER 425 (BLM admission that under the RMPs "the allocations, management actions, and allowable uses for these areas . . . generally[] would be **far less stringent** than designated wilderness area[s] or WSA management" (emphasis added)); ER 688–90, 723 (similarly noting that the RMPs are less protective than § 202 WSAs).

BLM's application of the legally misinformed Wilderness Settlement to the Monument RMPs violates FLPMA because BLM categorically took management options off the table when it considered how to protect wilderness-quality lands in the Monuments based on the Settlement's misinterpretation of the law. BLM had recognized since FLPMA's passage that it had discretion under § 202's multiple-use mandate to strongly protect its wilderness-quality lands. Because BLM relied on the Settlement to deny itself that management authority, this Court must reject the RMPs and vacate the Settlement upon which the RMPs wrongly rely.

C. BLM Violated NEPA By Failing To Consider A Reasonable Alternative.

NEPA requires agencies to prepare an EIS that considers a range of reasonable alternatives to a proposed action. 42 U.S.C. § 4332(2)(C)(iii). The alternatives discussion is the "heart" of an EIS, and the "'touchstone' for courts reviewing challenges to an EIS under NEPA." ONDA, 625 F.3d at 1122; 40 C.F.R. §§ 1502.1, 1502.14. An EIS is inadequate if the agency's refusal to

consider an alternative is based on a legal misinterpretation. See, e.g., ONDA, 625 F.3d at 1122–24; New Mexico, 565 F.3d at 710–11.

As explained in the prior section, the EIS for the RMPs failed to consider any alternative extending § 202 WSA-level protections because BLM believed that doing so would violate the Wilderness Settlement. See supra at 57–58. Because the modified non-impairment standard is a legal and reasonable management alternative that BLM applied hundreds of times elsewhere over the last thirty years, BLM's refusal to consider applying those protections here violates NEPA's alternatives requirement. See New Mexico, 565 F.3d at 710–11.

CONCLUSION

For the foregoing reasons, the RMPs for the National Monuments are arbitrary, capricious, and not in accordance with law. TWS respectfully requests that this Court reverse the district court and set aside and vacate the RMPs.

Respectfully submitted March 9, 2012.

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