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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA**

WESTERN WATERSHEDS PROJECT, )  
INC., a nonprofit organization; and, )  
GLENN MONAHAN and NANCY )  
SCHULTZ, in their individual capacities )  
and as members of Western Watersheds )  
Project, )

Plaintiffs, )

v. )

BOB ABBEY, in his official capacity as )  
Director of the Bureau of Land Management,)  
An Agency of the United States, GARY E. )  
SLAGEL, in his official capacity as Manager )  
Of the Upper Missouri River Breaks )  
National Monument, GENE R. TERLAND, )  
in his official capacity as BLM Montana )  
State Director, and GARY L. BENES, in his )  
official capacity as Field Manager of the )  
BLM’s Lewistown Field Office, and the )  
BUREAU OF LAND MANAGEMENT, )  
an agency of the United States Department )  
of Interior, )

Defendants. )

No. 09-cv-165-DWM-JCL

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

## INTRODUCTION

1. Plaintiffs, Western Watersheds Project, along with their members Glenn Monahan and Nancy Schultz, collectively referred to hereinafter as “WWP”, bring this civil action for declaratory and injunctive relief against the above named Defendants (hereinafter, “BLM”) pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., for violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1271 et seq., the Federal Land Management Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., and Presidential Proclamation 7398, 66 Fed. Reg. 7359 (January 17, 2001), establishing the Upper Missouri River Breaks National Monument (the Proclamation).
2. The Upper Missouri River Breaks National Monument (Monument) is a national treasure that contains a spectacular array of biological, geological, and historical objects of interests.
3. The Monument includes the 149 mile Upper Missouri National Wild and Scenic River (UMNWSR) and adjacent breaks country, six Wilderness Study Areas (WSAs), the Cow Creek area of critical environmental concern, some of the largest and most viable elk and big horn sheep herds in the United States, essential winter range for sage grouse, segments of the Lewis and Clark and Nez Perce National Historic Trails, important spawning habitat for the endangered pallid sturgeon, numerous archeological and historic sites, and some of the wildest country in the Great Plains.
4. Today, the area included within the Monument remains largely intact and unchanged since Lewis and Clark first traveled through it on their epic journey in 1805.

5. This civil action arises out of the BLM's December, 2008 Record of Decision (ROD) adopting a new Resource Management Plan (RMP) for the Monument, as well as the Decision Notice (DN) issued by the Lewistown Field Manager renewing the grazing permit for the Woodhawk Allotment, which is the first site-specific decision implementing grazing pursuant to the RMP.
6. Specifically, WWP challenges the decision by BLM to exclude grazing impacts from the RMP based upon a finding that livestock grazing within sensitive riparian areas and cottonwood galleries is not a "significant issue" requiring detailed analysis in the RMP Environmental Impact Study (EIS).
7. The Woodhawk DN was issued pursuant to an Environmental Assessment (EA) that is tiered to the RMP, and thus re-affirms the BLM's decision that livestock grazing is not a significant issue in managing the Monument.

### **JURISDICTION AND VENUE**

8. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 (Federal Question).
9. This Court has the authority to review the BLM actions complained of herein, and grant the relief requested, pursuant to the APA, 5 U.S.C. § 701 et seq. WWP is challenging final agency actions and has exhausted all necessary administrative remedies.
10. The relief sought is authorized by 28 U.S.C. § 2201 (Declaratory Judgment), 28 U.S.C. § 2202 (Injunctive Relief), and 5 U.S.C. § 706 (APA).
11. Venue is properly before this Court pursuant to 28 U.S.C. § 1391(e).
12. There is a present and actual controversy between the Parties.

## PARTIES

13. Plaintiff, WESTERN WATERSHEDS PROJECT, is a non-profit organization headquartered near Clayton, Idaho, and with offices in Missoula, Montana. WWP is committed to protecting the Monument's natural resources, wilderness character, wildlife habitat, and traditional recreational opportunities. WWP's mission is to protect and restore western watersheds and wildlife through education, public policy initiatives, administrative processes, and litigation. WWP has approximately 1,400 members, with field offices in Idaho, Montana, Utah, Wyoming, Arizona and California. Many of its members visit and recreate within the Monument on a regular basis.
14. WWP's members GLENN MONAHAN and NANCY SCHULTZ operate a canoe outfitting and guiding business on the Upper Missouri River, and frequently visit the lands that are the subject of the challenged decision. Their clients frequently comment on the presence and impacts of cattle on vegetation, soils, and wildlife in the Monument, and their business has suffered as a result. Unless conditions improve dramatically, they fear they will lose their business entirely, which is their primary means of support.
15. WWP's members and staff have a specific, concrete interest in protecting, preserving, and restoring the natural, biological and historical integrity of the Monument.
16. WWP submitted comments on the BLM's draft environmental impact statement (DEIS) for the proposed management plan for the National Monument and protested the BLM's Proposed Resource Management Plan and Final Environmental Impact statement (PRMP/FEIS) for the Monument. WWP also commented on the Woodhawk Proposed EA, protested the Decision Notice, submitted new information and requested a supplemental EA/EIS, and appealed the DN to the Office of Hearing and Appeals for the

Department of the Interior. Upon denial of its petition for stay, and having been notified that the Woodhawk DN would be implemented, WWP voluntarily withdrew its appeal, and chose to pursue its legal remedies.

17. WWP frequently communicates with various BLM officials, including biologists and other staff members about public lands management issues within or affecting the Monument. WWP frequently raises concerns about the direct, indirect, and cumulative impacts of grazing on the Monument's resources.
18. WWP's members and staff have used, and will continue to regularly and repeatedly use the Monument. WWP's members and staff use the Monument for wildlife observation, research, aesthetic enjoyment, canoeing, hiking, bird watching, historic exploration, and other recreational, scientific, and educational activities.
19. WWP's members and staff derive scientific, recreational, conservation, and aesthetic benefits from using the Monument. WWP's members enjoy hunting and viewing (and being aware of) wildlife in the area and experiencing the Monument's historic significance, wilderness quality lands, wild and scenic river, diverse plant communities, and unique riparian areas and cottonwood galleries.
20. For WWP's members and staff, using the Monument in conjunction with working to protect the Monument's resources is a key component of their enjoyment of their visits to the area.
21. WWP's members and staff will continue working for the protection and restoration of the Monument's resources. Filing this civil action to ensure compliance with federal law is part of this effort. The BLM's RMP for the Monument, as implemented in the Woodhawk decision, harms WWP's concrete interests. The BLM's RMP fails to take a

hard look at, provide a reasonable range of alternatives for, and to adequately address concerns with the biggest environmental issue involving management of the Monument, that being the continuing adverse impacts from cattle grazing, and this failure, reflected in the Woodhawk decision, harms WWP's members' and staffs' ability to use and enjoy the Monument for scientific, recreational, conservation, and aesthetic purposes.

22. The BLM's preparation of an EIS, issuance of a ROD, and adoption of a new RMP without complying with NEPA, WSRA, FLPMA, and the Proclamation also results in uninformed decisions and creates an increased risk of actual, threatened, and imminent harm to WWP's members' interests in protecting and restoring the resources of the National Monument.
23. The BLM's failure to comply with NEPA, WSRA, FLPMA, and the Proclamation also significantly increases the risk of unnecessary and avoidable harm to the Monument's natural, biological, and historic resources and to WWP's concrete interests in protecting, preserving, and using those resources.
24. The BLM's failure to comply with NEPA, WSRA, FLPMA, and the Proclamation adversely affects and continues to adversely affect the interests of WWP and its staff and members. WWP brings this action on behalf of itself and its adversely affected members and staff.
25. If this Court orders the BLM to comply with NEPA, WSRA, FLPMA, and the proclamation as requested by this civil action, then the harm to WWP's interests would be alleviated.
26. Defendant GENE TERLAND is named in his official capacity as the director of the BLM's Montana State Office. As the director of the Montana State Office, Mr. Terland is

the federal official with responsibility for all of the BLM officials' inactions or actions challenged in this complaint.

27. Defendant BOB ABBEY is sued in his official capacity as the Director of the BLM with direct responsibility for all of the BLM officials' inactions or actions challenged in this complaint.

28. Defendant GARY L. BENES, is sued in his official capacity as Field Manager of the BLM's Lewistown Field Office, which is the field office with authority over the Monument, and as the official responsible for the Decision Notice and Finding of No Significant Impact for the Woodhawk Allotment Grazing Permit Renewal.

29. Defendant GARY E. SLAGEL is sued in his official capacity as the Manager for the Upper Missouri River Breaks National Monument.

30. Defendant BUREAU OF LAND MANAGEMENT (BLM) is an agency within the U.S. Department of Interior that is responsible for applying and implementing the federal laws and regulations challenged in this civil action.

#### **ALLEGATIONS COMMON TO ALL CLAIMS**

31. In 1976, Congress designated the Missouri River segment and corridor within the Monument as a Wild and Scenic River because of its magnificent and wild river resources.

32. On January 17, 2001 President Clinton established the Upper Missouri Breaks National Monument ("Monument") under the provisions of the Antiquities Act of 1906 for the explicit purpose of protecting and preserving identified historic and scientific objects. 66 Fed. Reg. 7359 (Jan. 22, 2001).

33. The Monument includes approximately 375,000 acres of BLM land in north-central Montana's Blaine, Chouteau, Fergus, and Phillips counties.
34. Stretching from Fort Benton to the Charles M. Russell National Wildlife Refuge, the Monument spans 149 miles of the Upper Missouri River, the adjacent "Breaks" country, and portions of Arrow Creek, Antelope Creek, and the Judith River.
35. The National Monument contains an array of biological, geological, and Historical objects of national interest.
36. Lewis and Clark first encountered the Monument's breaks country on their westward leg in 1805. In their journals, Lewis and Clark describe the area's unique landscape, white cliffs, and abundant wildlife, including mule deer and elk. The expedition also recorded the first scientific observation of big horn sheep.
37. The area included within the Monument has remained largely unchanged since 1805 and many of the objects and landmarks described by Lewis and Clark are still found in the area.
38. The Monument includes the most viable elk herd in Montana and one of the premier big horn sheep herds in the continental United States.
39. The Monument contains essential winter range for sage grouse as well as habitat for prairie dogs (Lewis sent President Jefferson a prairie dog from this area, noting that the animal was "new to science").
40. The lower reach of the Judith River in the Monument, just above its confluence with the Missouri, contains one of the few remaining fully functioning cottonwood gallery forest ecosystems on the Northern Plains.

41. Arrow Creek (originally called Slaughter Creek by Lewis and Clark) contains the largest concentration of antelope and mule deer in the Monument and is important spawning habitat for the endangered pallid sturgeon. Arrow Creek is also a critical seed source for cottonwood trees for the flood plain along the Missouri.
42. The cliff faces in the Monument provide perching and nesting habitat for many raptors, including sparrow hawk, ferruginous hawk, peregrine falcon, prairie falcon, and golden eagle. Several pairs of bald eagles also nest in the Monument and other pairs of eagles visit in late fall and early winter.
43. Shoreline areas in the Monument provide habitat for great blue heron, pelican, and a wide variety of waterfowl.
44. The river and its tributaries in the Monument host forty-eight fish species, including goldeye, drum, sauger, walleye, northern pike, and channel catfish.
45. The Monument has one of the six remaining paddlefish populations in the United States. The river also supports blue sucker, shovel nose sturgeon, sicklefin, sturgeon chub, and the endangered pallid sturgeon.

#### **Controlling Law**

46. *The Federal Land Policy and Management Act (FLPMA)*, 43 U.S.C. § 1701 et seq., directs the BLM to manage the public lands in a manner that will “best meet the present and future needs of the American people.” 43 U.S.C. § 1702(c). The designation of the Monument reflects a Presidential determination that the best use of BLM lands within the UMRBNM is to protect Monument objects.

47. FLPMA requires BLM to manage public lands under multiple-use principles *unless* an area has been designated by federal law for specific uses, in which case BLM must manage the land for those specific uses. 43 U.S.C. § 1732(a).
48. FLPMA mandates that BLM “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. §1732(b). BLM’s duty to prevent unnecessary or undue degradation under FLPMA is mandatory, and BLM must, at a minimum, demonstrate compliance with the degradation standard. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10<sup>th</sup> Cir. 1988) (the degradation standard is the “law to apply” and “imposes a definite standard on the BLM.”).
49. Because of its ecological significance, which also merited inclusion in the National Landscape Conservation System (Conservation System), the Monument requires more careful management than other BLM lands.
50. The Conservation System, comprised of lands created by both presidential and congressional directive, is the largest and most far-reaching conservation initiative in the history of the BLM.
51. The designation of National Monuments, together with the establishment of the Conservation System itself, represents the cornerstone of a new era in land stewardship, in which BLM focuses on a mission of stewardship to: “conserve, protect and restore nationally significant landscapes recognized for their cultural, ecological and scientific values for the American public.”<sup>1</sup>
52. The biologically diverse fish and wildlife that has traditionally been found within the Monument’s landscape is attributable to the remoteness of the Monument, as well as the

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<sup>1</sup> BLM Conservation System website, NLCS Factsheet, available at: [http://www.blm.gov/wo/st/en/prog/blm\\_special\\_areas/NLCS/fact\\_sheet.html](http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/fact_sheet.html)

“abundant plant life” endemic to the Breaks and coulees - especially in the riparian areas along the rivers.

53. Since the overriding objective of the National Monument is the permanent conservation of its natural and cultural resources, management must place priority on conserving, protecting and restoring the natural and cultural values of this landscape, and must identify and restrict those uses of the land that are secondary to that objective.
54. The BLM’s obligation to manage designated national monument lands for protection of monument objects above all other concerns was recently re-affirmed by the Department of the Interior’s Board of Land Appeals, which upheld the BLM’s denial of grazing applications for lands that had been acquired by the BLM in 1995 and were then incorporated into the Cascade-Siskiyou National Monument when it was created in 2000. Even though a final RMP had not been completed, the IBLA emphasized that: “BLM has no authority to ignore the Proclamation, and as Judge Sweitzer recognized, ‘the lands within the Monument are now to be managed primarily for the protection of the objects of interest identified in the Proclamation.’” *Jennifer J. Walt*, 172 IBLA 300, 313 (2007) (emphasis added).
55. In addition to the obligations imposed by the Proclamation, FLPMA imposes a duty on BLM to identify and protect the many natural resources found in the public lands within the Monument, requires the BLM to inventory its lands and their resource and values, "including outdoor recreation and scenic values," and obligates BLM to take this inventory into account when preparing land use plans, using and observing the principles of multiple use and sustained yield. 43 U.S.C. §§ 1711(a),1712(c)(1),(4).

56. BLM is directed by law to protect the associated wildlife, scenic values, recreation opportunities and wilderness character of public lands under its jurisdiction through management planning and decisions, including the exclusion or limitation of certain uses of those public lands for those purposes. 43 U.S.C. § 1712(e).
57. This authority to exclude and/or limit certain uses of BLM lands is necessary and consistent with FLPMA's definition of "multiple use," which identifies the importance of recreation, wildlife, and natural scenic resources, requires BLM's consideration of the relative values of these resources, and prohibits "permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative value of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." 43 U.S.C. § 1702(c).
58. ***The National Environmental Policy Act (NEPA)***, 42 U.S.C. § 4321 *et seq.*, dictates that the BLM take a "hard look" at the environmental consequences of a proposed action and the requisite environmental analysis "must be appropriate to the action in question." *Metcalf v. Daley*, 214 F.3d 1135, 1151 (9<sup>th</sup> Cir. 2000); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).
59. The goal of NEPA is two-fold: (1) to ensure that the agency will have available and will carefully consider detailed information on significant environmental impacts when it makes decisions; and (2) to "guarantee that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Robertson*, 490 U.S. at 349.

60. In order to take the “hard look” required by NEPA, BLM is required to assess impacts and effects that include: “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.8.
61. The NEPA regulations define “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.
62. A failure to include a cumulative impact analysis of actions within a larger region will render NEPA analysis insufficient. *See, e.g., Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1078 (9<sup>th</sup> Cir. 2002) (analysis of root fungus on cedar timber sales was necessary for entire area). In the context of the Monument, this analysis must include a thorough and detailed analysis of the potential impacts of management decisions on Monument objects and in the context of the priorities established by the issuance of Proclamation 7398.
63. If an agency decides not to prepare an Environmental Impact Statement for a project, or excludes an issue from an EIS, it must supply a convincing statement of reasons that make it clear the potential impacts at issue will not be significant. *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9<sup>th</sup> Cir. 1988). If the information provided by the

agency establishes instead that an agency's action "may have a significant" effect upon the environment, then an EIS must be prepared. *Id.*

64. Further, NEPA requires that the agency analyze impacts in comparison to an accurate determination of baseline data, such that BLM adequately and accurately describes the "affected environment." 40 C.F.R. § 1502.15. *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9<sup>th</sup> Cir. 1988).
65. For the Monument, the BLM should identify the location, status and trends for Monument objects, including cultural, wildlife, special status plants, and other sensitive resources, and relate the various uses of the Monument it manages to that baseline data so that members of the public can fully gauge the impacts management of the uses of the Monument has had, is having, and will potentially have on those objects required to be protected.
66. NEPA also requires that the BLM consider a range of management alternatives, which is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. NEPA requires BLM to "rigorously explore and objectively evaluate" a range of alternatives to proposed federal actions. *See* 40 C.F.R. §§ 1502.14(a) and 1508.25(c). "An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action." *Northwest Env'tl Defense Center v. Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9<sup>th</sup> Cir. 1997). An agency violates NEPA by failing to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (9<sup>th</sup> Cir. 1990) (quoting 40 C.F.R. § 1502.14). This evaluation extends to considering more environmentally protective

alternatives and mitigation measures. *See, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1122-1123 (9<sup>th</sup> Cir. 2002).

67. In the context of the Monument, the consideration of more environmentally protective alternatives is consistent with both the requirements of the Monument Proclamations and FLPMA's requirement for BLM to "minimize adverse impacts on the natural, environmental, scientific, cultural, and other resources and values (including fish and wildlife habitat) of the public lands involved." 43 U.S.C. §1732(d)(2)(a).

68. NEPA requires that an actual "range" of alternatives is considered, such that the Act will "preclude agencies from defining the objectives of their actions in terms so unreasonably narrow that they can be accomplished by only one alternative (i.e. the applicant's proposed project)." *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10<sup>th</sup> Cir. 1999). This requirement prevents the EIS from becoming "a foreordained formality." *City of New York v. Department of Transp.*, 715 F.2d 732, 743 (2<sup>nd</sup> Cir. 1983); *Davis v. Mineta*, 302 F.3d 1104 (10<sup>th</sup> Cir. 2002).

69. Under the Proclamation and the Antiquities Act, all of the alternatives considered must conserve Monument resources first (and in particular, those resources that are "objects of interest"), and then make other management decisions that do not interfere with the conservation of Monument resources. Thus, in order to comply with these requirements, the range of alternatives cannot include management decisions that will undermine protection of Monument objects in favor of other resources or uses, such as grazing, based upon political considerations or a desire to preserve the *status quo*.

70. ***The Wild & Scenic River Act (WSRA)***, 16 U.S.C. § 1271 *et seq.*, mandates that the UMNWSR be "administered in such a manner as to protect and enhance the values which

caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.” 16 U.S.C. § 1281(a). In such administration, “primary emphasis shall be given to protecting [the river’s] esthetic, scenic, historic, archeologic, and scenic values.” Id.

71. The WSRA also directs the BLM and any other federal agency having “jurisdiction over any lands which include, border upon, or are adjacent to any [designated] river” to “take such action respecting management policies, regulations, contracts, plans, affecting such lands . . . as may be necessary to protect such rivers in accordance with the purposes of [the WSRA].” 16 U.S.C. §1283(a).

72. The WSRA’s protect and enhance mandate is “interpreted as stating a non degradation and enhancement policy for all designated rivers, regardless of classification.” 47 Fed. Reg. at 39, 458. Each “component will be managed to protect and enhance the values for which the river was designated, while providing for public recreation and resource uses which do not adversely impact or degrade those values.” Id.

73. The 1993 management plan (update) for the Upper Missouri National Wild and Scenic River (UMNWSR) states that the outstandingly remarkable values that must be protected and enhanced are the River’s “scenic vistas, diverse wildlife species, breath taking geologic formations, prehistoric and historic remains and the opportunity to experience solitude; all on the last free-flowing stretch of the Missouri River.”

74. Three segments of the UMNWSR in the Monument are classified, designated, and administered as “wild” which means they are to be free of impoundments and generally accessible only by trail, with watersheds and shorelines essentially primitive and waters unpolluted. 16 U.S.C. § 1273 (b).

75. The Woodhawk Allotment is located on a portion of the UMNWSR.

**2008 Monument Resource Management Plan (RMP)**

76. The BLM finalized its Resource Management Plan (RMP) for the Upper Missouri River National Monument in December of 2008.

77. The BLM states at the outset of the RMP (at p. xi) that “[t]he Proclamation requires that the BLM manage the Monument in order to implement the purpose of the Proclamation. The purpose of the Proclamation is to set apart the Upper Missouri River Breaks National Monument, for the purpose of protecting the objects” of the Monument.

78. The BLM also acknowledges that the Monument is one of the “crown jewels” of the National Landscape Conservation System and that “[t]he mission of the Conservation System is to conserve, protect and restore nationally significant landscapes that have outstanding cultural, ecological and scientific values for present and future generations of Americans.” See, e.g., Proposed RMP, p. 2.

79. According to BLM, “The riparian zone immediately adjacent to the riverbank is the most important vegetative type in the river valley. Riparian habitat, like that along the Upper Missouri, makes up less than 1% of the vegetative mosaic of the west, yet a greater variety of wildlife species depend upon it than any other vegetative type in the West. The riparian zone is a complex ecological community. It is fragile and its survival depends upon many of the natural forces that at first glance appear to be quite harsh.” Excerpted from: Wildlife of the Upper Missouri River National Monument.

80. “Most of the 60 species of mammals, 233 species of birds, and 20 species of amphibians and reptiles that inhabit the Upper Missouri River valley are dependent in one way or another upon the riparian zone. Among the more common species are

white-tailed deer and pheasant. While at one time they only visited the area during the late fall and winter, bald eagles are again nesting in cottonwood snags.” Id.

81. The Monument Proclamation specifically notes cottonwoods among the biological “objects” that made the Breaks worthy of its designation, and the USGS elaborated on the importance of the condition of the river in the Monument in its 2005 publication entitled *Cottonwood in the Missouri Breaks National Monument*, which states: “The Missouri Breaks National Monument contains a unique portion of the Missouri River that is largely unchanged in overall character from pre-development conditions... The reach [of river] presents a rare, undeveloped contrast to other large sections of the Missouri River that have been dramatically altered by agricultural conversion, urban development, channelization, and impoundment.”
82. The BLM acknowledged in the Proposed RMP at p. 197 that “[t]he riparian areas generally are not meeting BLM’s goals of proper functioning condition. Riparian areas along the Missouri River are being impacted by flow regulations from upstream dams, livestock grazing, recreation, and nonnative exotic species. Flow regulation and past livestock grazing practices have resulted in a loss of sapling and pole age classes of preferred woody species in many locations. Riparian areas on the tributaries to the Missouri River are being impacted by irrigation withdrawals, livestock grazing, and agricultural practices. . . . Recent studies by the U.S. Geological Survey show a significant lack of regeneration of cottonwood, willow, and understory species on the Missouri River. These studies indicate the major factors affecting regeneration are flow manipulation by upstream dams on the Missouri River and continuous hot season use by livestock.”

83. According to the results of a study by the Montana Natural Heritage Program funded by the BLM, *Riparian Forests of the Wild and Scenic Missouri River: Ecology and Management*, Greg Kudray et al., “Riparian forests, comprised mostly of plains cottonwood, are the most important terrestrial habitat within the Upper Missouri Wild and Scenic River corridor. Forested riparian areas provide essential habitat for numerous wildlife species, ranging from birds and small mammals to amphibians and invertebrates. Unfortunately, most of these areas are seriously degraded by human related disturbances and the encroachment of nonnative plants. However, the Wild and Scenic portion of the Upper Missouri, although affected by upstream dams, still retains a semi-natural flow regime. Thus, unlike most other large western rivers, the Upper Missouri probably still possesses the natural hydrological processes necessary for successful cottonwood regeneration (Scott et al. 1997).”
84. The BLM set out the following goal for the Monument relative to vegetation and riparian health, stating at p. 25 of the Proposed RMP: “The BLM’s goal is to achieve, or make significant progress toward, proper functioning condition in riparian and wetland areas and to sustain a diverse age-class and composition of riparian-wetland vegetation for maintenance and recovery of riparian-wetland areas. . . . The presence and condition of riparian vegetation will be managed to maintain riparian and wetland function. Riparian-wetland species, such as sedges, rushes, and cottonwood/willow on sites capable of supporting woody species, will be managed for age-class and composition diversity...”
85. However, the BLM’s approach to managing these vital objects is to “accomplish riparian-wetland objectives through livestock grazing methods at current stocking levels.”  
Proposed RMP, p. 25.

86. Livestock grazing on arid and semi-arid landscapes adversely impacts a range of significant values found on public lands, including but not limited to riparian health, upland health, wildlife habitat, wildlife populations, wildlife watching, carbon sequestration, water quality, water quantity, fisheries, general ecological health, and much more.
87. The Monument Proclamation requires BLM to manage the Monument primarily to protect the objects of interest identified therein, to prioritize protection of Monument objects above other considerations, to subordinate grazing to other resource priorities, and to the extent that grazing jeopardizes those objects of interest, to deny grazing permit applications. Walt v. BLM, 172 IBLA 300 (Sept. 21, 2007).
88. According to another study funded by BLM, this one by the Montana Riparian Association, School of Forestry, University of Montana, “The effects of excessive use of woody vegetation in a riparian zone can generally be termed as negative (Kauffman and Krueger 1984). Knopf and Cannon (1982) found that excessive cattle grazing significantly altered the size, shape, volume, and quantities of live and dead stems of trees and shrubs. Cattle grazing was also found to influence the spacing of plants and the width of the riparian zone. Marcuson (1977) found shrub production to be 13 times greater in an ungrazed area. Canopy cover was 82% greater in the ungrazed area. However, investigators have found that upon reduction of excessive grazing, the shrub cover can increase dramatically (Crouch 1979, Davis 1982, Hansen 1985).” *Inventory, Classification, and Management of Riparian Sites Along the Upper Missouri National Wild and Scenic River*, Hansen (1989).

89. In the scoping process for the Monument RMP, the BLM acknowledged that livestock grazing would be among the “issues to be resolved”, and of the 5,700 scoping comments that BLM received, 2,150 (38%) were related to grazing. The document grouped the grazing comments into 108 categories. Of these, a total of 71 (66%) proposed limiting grazing to varying degrees.
90. In spite of the obvious need to resolve the many comments submitted regarding the importance to the public of grazing impacts on environmental concerns in the Monument,<sup>2</sup> the BLM chose to *exclude* livestock grazing and grazing management within the Monument as a “significant” environmental issue under NEPA, and to defer analysis of related environmental impacts to watershed planning and site-specific implementation of the RMP (e.g., when grazing allotment permits come up for renewal). RMP @ F-1.
91. Livestock grazing is arguably the most dominant activity occurring in the monument. Currently 93 operators are licensed to graze within the Monument. They use 116 allotments and harvest 38,000 Animal Unit Months (AUMs) of forage annually. Proposed RMP, p. 205. Nonetheless, “[l]ivestock grazing in terms of use or allocation is not addressed in the range of alternatives in this RMP.” Proposed RMP, p. 352. Further, “[a]n alternative to identify lands as not available for livestock grazing was considered but eliminated from detailed study.” Proposed RMP, p. 127.
92. In support of this exclusion of grazing as a significant issue in managing the Monument, the BLM points to the Proclamation, which “does not require nor suggest that lands need to be identified as unavailable for grazing.” Proposed RMP, p. 127.

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<sup>2</sup> See, e.g., Scoping Report, pp. 6, 7, 13, 15, 29, available at: [http://www.blm.gov/pgdata/etc/medialib/blm/mt/field\\_offices/lewistown/um\\_rmp.Par.47318.File.dat/scopingrpt.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/mt/field_offices/lewistown/um_rmp.Par.47318.File.dat/scopingrpt.pdf) Scoping Comment Summary, pp. 33 -42 (available at: [http://www.blm.gov/pgdata/etc/medialib/blm/mt/field\\_offices/lewistown/um\\_rmp.Par.11638.File.dat/scpgcmmt\\_summary.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/mt/field_offices/lewistown/um_rmp.Par.11638.File.dat/scpgcmmt_summary.pdf)).

93. A higher percentage of monument lands are used by livestock grazing than other uses such as recreation. In the Proposed RMP/FEIS BLM states, “*Livestock grazing on BLM land is an integral part of managing the Monument.*” (p. 2). Although the PRMP/FEIS lists livestock grazing as one of the “Issues Considered but Not Analyzed Further: Livestock are adversely impacting riparian and upland health” (PRMP/FEIS page 7), the RMP/FEIS itself contains 1844 references to “grazing”, 1294 references, to “livestock”, and 138 references to “cattle”.
94. According to the PRMP/FEIS at page 25, “Decisions Common to All Alternatives: Vegetation – Riparian: “The BLM’s goal is to achieve, or make significant progress toward, proper functioning condition in riparian and wetland areas and to sustain a diverse age-class and composition of riparian-wetland vegetation for maintenance and recovery of riparian-wetland areas.” This means that riparian areas within the Monument will not be treated any differently than riparian areas outside of the Monument on BLM lands. 43 C.F.R. § 4180.1
95. According to the science relied on by the BLM for the purpose of determining whether a riparian area is in a proper functioning condition, or “PFC”, “Each riparian-wetland area has to be judged against its capability and potential. Potential is defined as the highest ecological status a riparian-wetland area can attain given no political, social, or economical constraints, and is often referred to as the potential natural community (PNC).”<sup>3</sup>
96. By comparison to a site’s potential, *Prichard* defines a site’s “capability” as the “highest ecological status an area can attain given political, social, or economical constraints,

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<sup>3</sup> Prichard et al., “Riparian Area Management – A User Guide To Assessing Proper Functioning Condition and the Supporting Science For Lotic Areas,” TR 1737-15 (U.S. Dept. of Interior, BLM 1998).

which are often referred to as limiting factors.” *Id.*, p. 7. Thus, BLM considers dams on the Missouri River upstream of the Monument as constraints on the ecological potential of the Monument, since Cottonwood gallery ecosystems often form under flood conditions, and the kinds of pulse flows associated with flood conditions are dampened by operation of upstream dams.

97. In fact, BLM does have some influence over the operation of the upstream dams, and is in the process of working with the public and other agencies to alter the operation of those dams to facilitate regeneration of Cottonwood gallery ecosystems. According to BLM: “Efforts are now being directed at restoring the river to a more normal condition. Through an informal agreement, the U.S. Bureau of Reclamation (BOR) has agreed to provide a dominant discharge spring pulse out of Tiber Reservoir every four to five years for Missouri River fish migrations. This could help the Upper Missouri River flood-dependent riparian vegetation.”
98. In addition, the Missouri River still experiences flood conditions periodically in the area of the Monument due to undammed tributaries.
99. According to best available science, the Upper Missouri still retains sufficient natural flow to support healthy Cottonwood Gallery Forest Ecosystems, despite the presence of upstream dams and their associated flow regimes (Scott 1997), and seedling mortality following cottonwood seed germination on the Wild and Scenic Upper Missouri River is extremely high because of grazing. Auble (2001).
100. In spite of the BOR agreement and indications from best available science that the flow regime of the Upper Missouri River is sufficient for these purposes, the BLM has not

taken a hard look at how grazing practices would need to change in order to accommodate regeneration of Cottonwood Gallery Ecosystems in the Monument.

101. The PRMP/FEIS presents no evidence to quantify the relative impacts of dams versus other negative factors, such as grazing.

102. BLM defines “potential natural community” (PNC) as: “The stable biotic community that would become established on an ecological site if all successional stages were completed without human interference under present environmental conditions.”<sup>4</sup>

103. PFC is a measurement of a site having achieved a minimum, baseline standard of vegetative stability that is essentially a *starting point* for ecological recovery, not an end point.

104. According to the best available science, a Cottonwood Gallery Forest Ecosystem on the Upper Missouri River should consist of an overstory of cottonwoods, and a dense understory of woody shrubs (primarily *Cornus stolonifera*, *Amelanchier alnifolia*, *Prunus virginiana*, *Salix sp.*, and *Ribes sp.*) (Hansen, 1989).

105. According to the best available science, as a Cottonwood Gallery Forest Ecosystem on the Upper Missouri River becomes overgrazed the natural understory species are replaced by woody shrubs such as *Rosa sp.*, and *Symphoricarpos occidentalis*, which are indicative of a Cottonwood Gallery Forest Ecosystems that is in a ‘disclimax’ state. (Hansen, 1989) As the site continues to be degraded the woody understory is eliminated, and is replaced by herbaceous groundcover. Id.

106. According to the best available science, as livestock grazing pushes a Cottonwood Gallery Forest Ecosystem into disclimax the shrubs that are removed by livestock are those that are most important as food and cover for wildlife (*Cornus stolonifera*, *Prunus*

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<sup>4</sup> [http://www.blm.gov/nv/st/en/prog/grazing/range\\_program\\_glossary.html](http://www.blm.gov/nv/st/en/prog/grazing/range_program_glossary.html)

*Virginia*). Kudray (2004) studied 154 plots on the Upper Missouri and reported *Cornus stolonifera*, and *Prunus Virginia* present on only 29 and 20 plots, respectively.

107. Hansen (1989) believes that the woody shrub communities associated with a Cottonwood Gallery Forest Ecosystem on the Missouri River will be very difficult to restore, and recommends that management be changed before a site reaches disclimax. However, for those sites already at disclimax, Hansen notes that there are opportunities for re-seeding due to disturbed soil conditions, though livestock would need to subsequently be removed to allow for successful regeneration.
108. Many of the sites within the Monument that could or should support Cottonwood Gallery Forest Ecosystems have already been reduced to a state of severe or complete disclimax, but are nonetheless presently rated by BLM as being in Proper Functioning Condition. Thus, managing for PFC cannot and will not result in conditions that will maintain and restore Cottonwood Gallery Forest Ecosystems.
109. According to BLM, “Past management practices such as continual hot season grazing over the last 70 years have resulted in a severe loss of two age classes of cottonwoods (saplings and poles), willows, green ash, and box elder from riparian areas, especially along the Missouri River. Also, the understory of shrubs, forbs and grasses underneath mature cottonwood stands has been severely altered from the natural succession (Kudray et al. 2004)”. PRMP/FEIS, p. 353
110. The Draft RMP, in the Affected Environment section, specifically acknowledged that “... the reach of the Missouri River from mile 41 to mile 127 has no sapling/pole stage cottonwoods except on islands.” Draft RMP, p. 153 (emphasis added). However, this statement was excluded from the Proposed and final RMP.

111. Similarly, the Environmental Consequences sections of the Draft RMP (at p. 256) stated: “Past management practices such as upstream dam operations and continual hot season grazing over the past 70 years have resulted in severe loss of two age classes (saplings and poles) of cottonwoods, willows, green ash, and box elder from riparian areas, especially along the Missouri River. The lack of replacement trees means floaters and campers in the near future will have to rely on artificial shelters for shade for an extended period of time (30 to 40 years).” DRMP/EIS, p. 256. This statement was also dropped in subsequent drafts, without explanation.
112. According to research published in *Ecological Applications* in 1997 by Michael L. Scott (Colorado State U.) concerning the Missouri River corridor in the area that is now included in the Monument: “We observed many [cottonwood] seedlings that had been damaged by grazing. Recent reproduction of cottonwood seems to be more abundant at sites where cattle are excluded. It seems likely that grazing has decreased cottonwood establishment and survival.”
113. On floating the river, even casual observers notice a dramatic change in the health of riparian habitat conditions from approximately Grand Island downstream, with considerably better cottonwood regeneration and riparian habitat on entering the Charles M. Russell (CMR) National Wildlife Refuge, where cattle grazing has been severely curtailed in recent decades.
114. Factors such as upstream dams and/or scouring by ice are similar for both the Monument and the CMR, though the river widens out a bit as it moves into the CMR. The primary difference in management of the two areas relates to grazing, as the CMR mostly excludes livestock grazing along the river corridor (except in some places to

access water), while the BLM not only does not exclude cattle along the river corridor, it encourages it.

115. The BLM has ample evidence that, in addition to upstream dams and winter ice flow, grazing is significantly impacting riparian vegetation and Cottonwood regeneration in the river corridor of the Monument, but neither the Monument RMP nor the Woodhawk EA/FONSI analyze the cumulative extent of those impacts or consider a plan to recover cottonwood and other native riparian vegetation within the Monument.

116. The BLM has never prepared an EIS that includes analysis of cumulative impacts from livestock grazing within the National Monument and on its many objects of interest including cottonwoods and riparian habitat, wildlife, fisheries, threatened and endangered species, recreational experiences, and historic sites.

117. The BLM has never prepared an EIS that analyzes and considers what it would take to achieve PNC for the riparian objects of the Monument, including but not limited to Cottonwood gallery ecosystems, nor has it taken a hard look at the potential impacts of achieving (or not achieving) PNC on associated wildlife species.

118. The BLM has never considered an alternative for managing grazing in the Monument that would implement the management recommendations of Hansen (1989), including but not limited to:

- Most sites are presently subjected to heavy grazing pressures.
- With moderate to heavy grazing pressures, most shrubs will be eliminated.
- Management should emphasize the importance of the understory shrub layer.
- Managers should give serious consideration to maintaining a buffer strip of cottonwood-dominated community types immediately adjacent to rivers.

119. The BLM has never considered an alternative for livestock grazing within the Monument that would actually seek to keep cattle out of the riparian zones of the Missouri River for the purpose of allowing these riparian areas to recover naturally, or considered what the grazing capacity for the Monument would be without encouraging cattle to loiter in and along the Missouri River during the hot season and in the fall when the protein content of the grass decreases, and woody plant browsing intensifies.
120. Plaintiffs in this case objected to the failure of the BLM to consider managing the Monument to attain PNC along the Missouri River for the purpose of protecting and preserving the natural riparian conditions that are associated with the objects of the Monument, including but not limited to Cottonwood gallery ecosystems, wildlife abundance, and aquatic habitat.
121. According to BLM, birds and their habitat, including falcons, eagles, and hawks, are “objects of the monument”. PRMP/FEIS, p. 2
122. The RMP fails to establish a feasible plan to restore and/or protect bird populations within the monument, in that reliance on Proper Functioning Condition as a vegetation goal is inadequate for the Potential Natural Communities of vegetation that are necessary to provide habitat and protection for bird species.
123. Standard #3 of the “Standards for Rangeland Health and Guidelines for Livestock Grazing Management for Public Lands Administered by the Bureau of Land Management for Montana and the Dakotas” mandates that “surface and ground water on public lands fully support designated beneficial uses described in the Montana Water Quality Standards.”

124. Pursuant to 43 CFR 1480.1, the BLM is required make grazing management adjustments if existing levels of grazing or grazing management practices are significant factors in not meeting the Standards.
125. The Missouri River through the Monument is presently not meeting state water quality standards nor is it fully supporting beneficial uses due, at least in part, to alterations in stream-side vegetation and physical substrate habitat.
126. According to Montana Department of Environmental Quality, cattle grazing in riparian or shoreline zones along the Missouri River within the Monument is a probable source of the alterations in stream-side vegetation and physical substrate habitat.
127. According to BLM, “there is no documented need to reduce...livestock grazing based on the Proclamation and Standards for Rangeland Health.”
128. By excluding grazing as a significant issue in the management of the Monument, BLM did not take a hard look at alternatives that would adjust grazing management in ways that could result in meeting state water quality standards for the Missouri River within the Monument, including but not limited to eliminating hot season and late season cattle grazing along the river banks and discouraging cattle entering the river rather than managing for that outcome.
129. The endangered pallid sturgeon population in the Missouri River is in extreme danger of becoming extinct. While spawning may be occurring, there has only been one sighting of a single pallid fry in the last few decades, and no evidence yet of surviving one-year-olds.
130. Pallid sturgeon are only occasionally found in a few selected areas. Since 1980, reports of most frequent occurrence are from the Missouri River between the Marias River and Ft. Peck Reservoir in Montana, within the Monument.

131. Pallid sturgeon were proposed for listing as an endangered species on August 30, 1989 (54 FR 35901-35904). The species was listed as endangered on October 9, 1990 (55 FR 36641-36647). The reasons for listing were habitat modification, apparent lack of reproduction, commercial harvest and hybridization in parts of its range. Most authors attribute the decline of pallid sturgeon to the massive habitat alterations that have taken place over virtually all of its range (Kallemeyn 1983, Gilbraith et al. 1988, Keenlyne 1989, USFWS 1993).
132. According to best available science, many anthropogenic impacts, such as those that diminish spawning and nursery habitat, have contributed to the lack of reproduction and survival of age 0-1 pallid sturgeon (Dr. Robert Sheehan, Southern Illinois University at Carbondale (SIUC), pers. comm., as reported in Biological Opinion by USFWS).
133. Although microhabitat use data for the pallid sturgeon are limited, the general habitat needs of the species are known. Those include braided channels, seasonal flow patterns, turbidity, and extensive microhabitat diversity.
134. According to the best available science, the transition zone between the vegetated floodplain and the main channel of the Missouri once included habitats with varied depths described as chutes, sloughs, or side channels. The chutes or sloughs between the islands and shore were shallower and had less current than the main channel. Those areas provided valuable diversity to the fish habitat and probably served as nursery and feeding areas for many aquatic species, including pallid sturgeon and paddlefish (Funk and Robinson 1974).
135. According to the best available science, pallid sturgeon prefer sandy substrates, particularly sand dunes, during most times of the year, but likely prefer gravel and cobble

substrate for spawning. Pallid sturgeon prefer river reaches with sinuous channel patterns and islands and alluvial bars, which generally have more diversity of depths, current velocities, and substrates than do relatively straight channels without islands or alluvial bars. These areas are associated with subclimax riparian vegetational seres in the riparian zone. (Johnson 1993); Carlson et al. (1985); Bramblett (1996).

136. The pallid sturgeon is a BLM special status species in this ecosystem, and the Code of Federal Regulations requires “[a]t a minimum, State or regional standards developed under paragraphs... must address the following: ... (4) Habitat for endangered, ... or special status species”, and also “(9) Restoring, maintaining or enhancing habitats of Federal Proposed... and other special status species to promote their conservation.” According to these same regulations, “[c]onservation of Federal threatened ... and other special status species is promoted by the restoration and maintenance of their habitats.”

### **Woodhawk Allotment**

137. The Woodhawk Cattle Grazing Allotment was one of the first site-specific decisions implementing the Monument RMP, approving continued grazing at established levels pursuant to a permit renewal in July, 2009 that was issued after preparing an environmental assessment under NEPA.

138. Approximately 23,900 acres of public land included in the Woodhawk Allotment are located within the Upper Missouri River Breaks National Monument, and the northern boundary of the allotment is the Missouri River itself.

139. According to a 1997 EA for the Woodhawk Watershed Management Plan: “Livestock that graze in the planning area tend to concentrate along the [Missouri River] during the hot season. This livestock use, particularly grazing and trampling, along with other

factors such as ice damage, drought, low water, wildlife use and hydrologic influence from upstream dams has impacted cottonwood age class development and replacement, other woody species regeneration and riverain/riparian ecosystem successional development.”

140. The Woodhawk Grazing Allotment is within identified mule deer, elk, bighorn sheep and year-round sage-grouse habitat. Northern goshawk, bald eagle, golden eagle, ferruginous hawks, peregrine falcons, Swainson’s hawk, long-legged and long-eared myotis (bats), and Townsend’s big-eared bat, all have habitat and could occur within available habitat, but there are no recent documented roosting or nesting sites within the area. Pallid sturgeon can be found adjacent to the allotment in the Missouri River.

141. According to the Environmental Assessment prepared for the Woodhawk Grazing Allotment, at p. 3: “A Potential Natural Community (PNC) alternative was considered but not analyzed in detail because it failed to meet the purpose and need of the Woodhawk Allotment (20031) Grazing Permit Renewal Environmental Assessment (EA)... PNC is a plant community representing the latest successional stage attainable on a specific, hydrologically influenced surface. Livestock grazing, recreational uses, invasive plant species, upstream dam operations, etc. may make PNC unattainable, and therefore, an unreasonable objective.”

142. According to the best scientific information available to BLM, the appropriate PNC for the Missouri River in the area of the Woodhawk allotment is “Great Plains Cottonwood/Red-osier Dogwood Community Type”, characterized by an overstory of Great Plains Cottonwood over a dense and diverse understory of shrubs and herbs, which would include sandbar willow, red-osier dogwood and common chokecherry. *Hansen,*

“Inventory, Classification, and Management of Riparian Sites Along The Upper Missouri National Wild And Scenic River”, Univ. of Mt. (1989).

143. The objective for prioritized areas of the Missouri River riparian zone within the Woodhawk Allotment is “to increase the canopy cover class of mature willow and sapling or older cottonwood.” EA 35. While this objective includes quantitative objectives for sandbar willow, there is no mention in the EA of red-osier dogwood or common chokecherry, which are noticeably absent from these riparian areas.
144. The Woodhawk EA continues to allow, if not encourage, livestock grazing along the Missouri River during the hot season, which is associated with the intense browse levels of woody species by livestock that is recognized as one of the primary causes of reduced regeneration of many woody species in the riparian zones of the Monument.
145. According to Hansen, browsing of woody species also intensifies during the fall season, as the protein content of grass species decreases.
146. According to the Woodhawk EA: “If intense browse levels are noted on preferred woody species or the 4” stubble height requirement is met, it is time for livestock to be moved.” EA 36.
147. If livestock are not moved out of a riparian zone until *after* intense browse levels of preferred woody species is observed, then it more likely than not that those intensely browsed woody species will not successfully regenerate, but instead will become stunted, and if this is repeated over time, the woody species will never achieve maturity. In fact, this is exactly what has been observed on the Missouri River within the Monument.
148. It is readily apparent from the relatively healthy recruitment of natural vegetative species in the cattle exclosures and islands in the vicinity of the Woodhawk allotment,

where grazing by cattle is not a factor, that the vegetative diversity associated with PNC for the Missouri River would re-establish itself over time if the kind of grazing pressures that have resulted in the existing disturbance stages, described in *Hansen*, were eliminated.

149. In fact, comparing the EA for Woodhawk with the 1998 EA prepared for the same allotment, the main consistencies over time are that:

- Significant areas of the allotment along the Missouri River are not meeting riparian standards;
- Livestock management is a significant factor in this failure;
- Cottonwood/willow seedlings survive to pole/sapling/maturity stages only in those areas inaccessible to cows, such as exclosures and islands;

150. At the time BLM was considering renewing the Woodhawk Allotment Grazing Permit, Woodhawk Creek had 14.02 miles that were in proper functioning condition (PFC) and 4.17 miles that were functional at risk (static trend) because of livestock grazing impacts. The Missouri River along the Woodhawk Allotment had 12.47 miles that were in proper functioning condition (PFC), 3.21 miles that were functional at risk (upward trend), and 2.60 miles that are functional at risk (downward trend) because of livestock grazing impacts.

151. According to BLM standards generally applicable to all riparian resources, at least the 2.6 miles of FAR riparian area along the Missouri River within the Woodhawk Allotment is not meeting standards, and the only areas that could be properly considered as meeting PNC are those where grazing has been excluded or does not occur due to inaccessibility.

152. For the 2.6 miles of Missouri River riparian areas rated FAR Down, BLM's experts concluded that "Livestock use in this area has been heavy and lead to intense utilization of cottonwood/willow species, highly altered streambanks, and increases in the percentage of disturbance increaser plant species and noxious weeds."
153. For the 3.21 miles of Missouri River riparian areas rated FAR Up, BLM's experts concluded that "the density, vigor, and recruitment into older age classes of willow species were being affected by livestock grazing."
154. The BLM, in managing the Woodhawk Allotment, dating all the way back to the first AMP in 1970, has never considered reducing stocking rates below 2726 AUMs, in spite of the chronic problems associated with grazing in the riparian areas of the allotment.
155. In the challenged decision, the BLM renewed the grazing permit for the Woodhawk Allotment for a period of ten years at a level of approximately 3,120 AUMs pursuant to a "Finding of No Significant Impact."
156. There is no EIS to "tier" the Woodhawk EA to that takes a hard look at the cumulative impacts of grazing on the objects of the Monument in general, and on natural riparian vegetative communities associated with abundant wildlife in particular.
157. Thus, according to BLM's exclusion of grazing as a significant environmental issue in the Monument RMP and the FONSI for Woodhawk and other allotment permits renewed pursuant to the RMP (North Fergus and Arrow Creek), livestock grazing has no significant environmental impact on the objects of the Monument, including but not limited to Cottonwood gallery ecosystems, riparian vegetation, and the species of fish and wildlife that are dependent on those habitats.

158. In the 1998 for the Woodhawk Allotment, BLM acknowledged that the landscape was particularly ill-suited to grazing, with grazing pressures on this fragile ecosystem only “exacerbated by the steepness, size and erosive nature of the soils... and the fact that late spring and summer thunderstorms... tend to be erratic, but severe and produce relatively large amounts of precipitation over short periods of time.” (1998 Woodhawk EA, p. 45). The challenged EA characterized soils as “susceptible” to erosion, and omitted the following pertinent information included in the 1998 EA from the description of soil types in the “Affected Environment” description: 32,930 acres in the allotment are highly erosive, 3,515 acres are moderately erosive, and 1,940 acres are slightly erosive (1998 EA).

159. In the 1998 for the Woodhawk Allotment, BLM found that pallid sturgeon habitat is “affected by streamside vegetation and sediments... Some primary reasons for the species decline are destroyed or altered spawning areas, reduced food sources [and] ability to obtain food.” (p. 57).

160. *Hansen* (1989) emphasizes the importance of attaining PNC in order to provide thermal cover, debris recruitment, and streambank stability to the affected fisheries. Hansen strongly recommends that “[m]anagers should give serious consideration to maintaining a buffer strip of the [Great Plains cottonwood]-dominated community types immediately adjacent to rivers and streams” along the Missouri River to protect against streambank erosion and improve fisheries microhabitats.

161. The BLM determined in the RMP FEIS and Woodhawk EA/FONSI that there would be no cumulative effects to pallid sturgeon or their critical habitat from maintaining grazing

at present levels, including seasonally intense browsing of woody species within the riparian areas along the Missouri River.

162. The first recorded scientific observations of the sage-grouse was by Lewis & Clark during their 1804 expedition.<sup>5</sup> According to consensus estimates cited by the U.S Fish & Wildlife Service, there were probably about 1.1 million birds at that time. The 1998 range-wide spring population numbered about 157,000 – an 86% decline.

163. One significant factor complicating sage-grouse recovery efforts has to do with the fact that so much of its historic range is now held privately, and much of that has been either converted to agricultural uses or altered to support cattle grazing.

164. According to the best science currently available, livestock grazing, burning, and drought are considered to be the three major factors influencing the range-wide decline of sage-grouse across the west. See, e.g.: *Connelly and Braun* (1997); *Beck and Mitchell* (2000); *Hockett* (2002).

165. There are three primary effects on sage-grouse habitat associated with livestock grazing: 1) changes in composition, density and structure of vegetation; 2) disturbance of nesting hens and possible trampling of nests; and 3) removal of brood forage and cover.

166. Approximately 30% of sagebrush habitat in the United States is located on private property, with the percentage being highest in Montana (56%).

167. Sage-grouse populations in Montana declined at an overall rate of 1.6% per year from 1965 to 2003, or just over 60% total.

168. The 1998 Woodhawk EA noted that there were two historic sage grouse leks (mating grounds) in the allotment area, and that the two-mile radius considered to be

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<sup>5</sup> <http://mountain-prairie.fws.gov/species/birds/sagegrouse/sagegrousefactsheet.pdf>

nesting/brooding habitat was largely in the south half of the West Pasture. Almost no further analysis is provided in the current EA.

169. According to be the best available science, while the *average* distance from leks to nests range from 1 to 6 km (0.6 to 3.7 miles), the distance from the lek to a females nest may exceed 20 km (12.4 miles), and may be greater for females associated with disturbed leks (such as those in grazed landscapes) than for females from undisturbed leks. *Wakkinen et al.* 1992; *Hanf et al.* 1994; *Lyon* 2000; *Lyon and Anderson* 2003.

170. Furthermore, most published information suggests that sage grouse nest sites are selected independent of lek location. *Bradbury et al.* 1989; *Wakkinen et al.* 1992. Sage grouse will also opportunistically form new leks when adequate nesting and brooding habitat is provided.

171. Sage grouse have suffered severe impacts and reduced populations across their range, including in Montana. *Connelly et al.* 2000.

172. The CM Russell Wildlife Refuge immediately downstream from the Monument supports approximately 50 active sage grouse leks, with attendance of up to 200 grouse at each individual lek, while the entire Monument supports only about a half-dozen sage grouse leks.

173. The Woodhawk DN may result in shifting grazing pressure to upland areas, reducing herbaceous cover in sage grouse habitat that would otherwise be critical to reproductive success.

174. Though sage grouse are a proper object of the monument, and are good indicators of overall sagebrush ecosystem health, and while sagebrush ecosystems are one of the most biologically diverse ecosystems in North America, the BLM refuses to consider

managing the Monument to expand sage grouse habitat and populations at the expense of historic grazing intensity.

175. On September 21, 2009, BLM issued a policy memorandum making it clear that any specific direction contained in a presidential proclamation designating a National Monument supersedes the more general multiple use mandate or any other conflicting direction in FLPMA.

176. On or about August 28-29, 2009, Plaintiff Glenn Monahan carefully documented existing riparian conditions on the Upper Missouri River, during what is considered to be the hot season for purposes of grazing management, from Coal Banks Landing to the James Kipp Recreation Area, including the entire stretch of the river along the Woodhawk Allotment.

177. By letter dated September 5, 2009, the documentation referenced in the preceding paragraph was provided to Defendant Benes by Plaintiff Monahan.

178. By letter dated September 30, 2009, Plaintiffs formally requested Defendants to prepare a supplemental EIS for the Monument, and/or a supplemental EA/EIS for the Woodhawk Allotment, in light of the September 21, 2009 BLM policy memorandum together with the new information provided by Mr. Monahan by letter dated September 5, 2009.

**CLAIMS FOR RELIEF**

**COUNT I**

1.1. Plaintiffs repeats and incorporates by reference the foregoing paragraphs as if set forth fully herein.

1.2. The decision to exclude grazing as a significant issue from the RMP EIS for the Monument was arbitrary and capricious under NEPA, within the meaning of the APA, for any and all the reasons stated above.

1.3. The decision to exclude grazing as a significant issue from the RMP EIS violates FLPMA within the meaning of the APA, for any and all the reasons stated above.

The decision to exclude grazing as a significant issue from the RMP EIS violates the WSRA within the meaning of the APA, for any and all the reasons stated above.

1.4. The decision to exclude grazing as a significant issue from the RMP EIS violates Presidential Proclamation 7398 within the meaning of the APA, for any and all the reasons stated above.

**COUNT II**

2.1. Plaintiffs repeats and incorporates by reference the foregoing paragraphs as if set forth fully herein.

2.2. The failure to consider and/or manage the Monument to restore Cottonwood Gallery Ecosystems and/or otherwise achieve Potential Natural Community for its riparian resources violates NEPA, FLPMA, WSRA, and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

2.3. The failure to consider and/or manage the Monument to reduce or eliminate cattle grazing intensity in riparian areas during hot seasons violates NEPA, FLPMA, WSRA, and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

### **COUNT III**

3.1. Plaintiffs repeats and incorporates by reference the foregoing paragraphs as if set forth fully herein.

3.2. The BLM's Finding of No Significant Impact for the Woodhawk Grazing Allotment is arbitrary and capricious, within the meaning of the APA, for any and all of the reasons stated above.

3.3. The BLM's failure to fully disclose and take a hard look at the full range of potential environmental impacts of grazing on the ecological resources of the Woodhawk Allotment, including but not limited to soils, riparian vegetation, water quality, fish, and wildlife, violates NEPA, FLPMA, WSRA, and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

### **COUNT IV**

4.1. Plaintiffs repeats and incorporates by reference the foregoing paragraphs as if set forth fully herein.

4.2. The BLM failed to consider significant cumulative impacts of grazing on the objects of the Monument, including but not limited to the diversity of plants and animals, water quality, and fisheries, in the Woodhawk EA, in violation of NEPA, FLPMA, WSRA, and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

**COUNT V**

5.1. Plaintiffs repeats and incorporates by reference the foregoing paragraphs as if set forth fully herein.

5.2. The BLM decisions challenged herein are not based on consideration of the best available science, high quality, accurate scientific information, and reliable methodology, in violation of NEPA, FLPMA, WSRA, and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

**COUNT VI**

6.1. Plaintiffs repeats and incorporates by reference the foregoing paragraphs as if set forth fully herein.

6.2. The BLM's failure to consider an appropriate range of alternatives for the Woodhawk Allotment, including but not limited to considering a no grazing alternative and/or reduced grazing alternatives, violates FLPMA, WSRA, and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

**COUNT VII**

7.1. Plaintiffs repeats and incorporates by reference the foregoing paragraphs as if set forth fully herein.

7.2. The BLM's failure to supplement the Monument RMP and/or Woodhawk EA was arbitrary and capricious, within the meaning of the APA, and not in accord with NEPA.

### **COUNT VIII**

8.1. Plaintiffs repeats and incorporates by reference the foregoing paragraphs as if set forth fully herein.

8.2. BLM's failure to incorporate enforceable terms and conditions into the Woodhawk Allotment permit that are adequate to ensure significant progress towards compliance with its own standards violates FLPMA and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

8.3. BLM's failure to include adequate monitoring protocols and methodologies to ensure significant progress towards compliance with its own standards violates NEPA, FLPMA and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

8.4. BLM's decision to allow intense browsing of woody species along the Missouri River in the Woodhawk Allotment violates FLPMA, WSRA, and Presidential Proclamation 7398, within the meaning of the APA, for any and all the reasons stated above.

### **PRAYER FOR RELIEF**

Plaintiff repeats and incorporates by reference the allegations of all foregoing paragraphs.

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

A. Issue a declaratory judgment that the BLM's ROD and RMP for the National Monument violates NEPA, WSRA, FLPMA, and the Proclamation as described in this complaint;

- B. Issue a declaratory judgment that the BLM's DN and FONSI for the Woodhawk Allotment violates NEPA, WSRA, FLPMA, and the Proclamation as described in this complaint;
- C. Issue declaratory judgment that the BLM's violation(s) of NEPA, WSRA, FLPMA, and Proclamation, as described in this complaint, is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", and/or constitutes agency action unlawfully withheld or unreasonably delayed under the APA;
- D. Issue a mandatory injunction setting aside the BLM's ROD, FEIS, and RMP and requiring the BLM to prepare a new EIS and RMP for the National Monument that complies with all applicable laws;
- E. Issue a mandatory injunction setting aside the BLM's DN, FONSI, EA and Permit for the Woodhawk Allotment, and requiring the BLM to prepare an EIS and for the Allotment that complies with all applicable laws;
- F. Issue a mandatory and permanent injunction prohibiting the BLM from conducting and/or authorizing any and all new ground disturbing activity pursuant to the challenged RMP that may adversely impact the Monument's resources.
- G. If necessary, issue a mandatory injunction ordering the BLM to mitigate and/or remedy any harm caused by the new RMP while this civil action was or is pending;
- H. Issue such additional relief as Plaintiff may subsequently request;
- I. Grant the Plaintiff its costs and expenses of litigation, including reasonable attorneys' fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C § 2412;
- J. Grant such other relief that this Court deems necessary, just, and proper.

Respectfully submitted this 20th day of November, 2009.

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