SPRUCE GRAZING ASSOCIATION, LLC
c/o CLAY NANNINI
P.O. BOX 5491
TWIN FALLS, IDAHO 83303

September 17, 2015

Certified Mail, Return Receipt Requested:

Melanie A. Peterson, Field Manager
Wells Field Office
USDI-BLM
3900 East Idaho Street
Elko, Nevada 89801-4611

Re: Protest and Comments to: (1) T-NV-0300-15-11-003 - *Proposed Trespass Decision* dated August 28, 2015; (2) T-NV-0300-15-11-003 - *Trespass Notice* dated August 6, 2015; and (3) T-NV-0300-14-11-001 - *Letter* dated June 16, 2015.

Dear Ms. Peterson:

We are in receipt of the: (1) BLM's *Proposed Trespass Decision* dated August 28, 2015 ("2015 BLM Decision") (Exhibit 1) (*see also* BLM's Letter dated August 27, 2015, Exhibit 2A, as to delivery of some information to SGA relative to Proposed Trespass Decision),[1] which was received by Spruce Grazing Association, LLC ("SGA") on September 2, 2015 (Exhibit 1 at page 19); (2) BLM's *Trespass Notice* dated August 6, 2015 ("2015 Trespass Notice) (Exhibit 3), which was received by SGA on August 11, 2015, and which was preliminarily responded to by SGA on August 13, 2015 (Exhibit 4); and (3) BLM's *Letter* dated June 16, 2015 ("2015 Letter) (Exhibit 5), which was received by SGA on June 23, 2015, and which was preliminarily responded to by SGA on June 24, 2014 (Exhibit 6). All are hereinafter referred to as "2015 BLM Claim."[2]

SGA protests the 2015 BLM Claim in accordance with 43 C.F.R. 4160.2.

[1] Independent of the request for documents made by SGA in its Response to BLM's August 6th Trespass Notice (Exhibit 4) and its Response to BLM's June 16th Letter (Exhibit 6), SGA sent to BLM a more specific *Freedom of Information Act* ("FOIA") request on August 21, 2015 or on September 17, 2015. *See* Exhibit 2B, FN 1. As of the date of this letter, BLM has not responded to this FOIA request.

[2] SGA is also in receipt of BLM's Notice of Violation dated August 6, 2015 ("NOV") (Exhibit 7), which was received by SGA on August 20, 2015 (Exhibit 8). This NOV involves most of the same factual claims discussed herein, but NOV implicates other claimed violations under the *Archaeological Resources Protection Act* (16 U.S.C. § 470ee and 43 C.F.R. Part 7). SGA intends to separately respond to the NOV on or before October 2, 2015, in accordance with 43 C.F.R. 7.15(d).

SGA also comments/protests the 2015 BLM Claim in accordance with 43 C.F.R. Parts 2800, 2920, and subparts 5452, 9239, and 9265, and otherwise permitted by the 2015 BLM Decision. *See* Exhibit 1 at 10-11 ("Additional Notice and Opportunity for Comment").

INTRODUCTION

This is an unwarranted dispute within an extensive on-going maintenance activity by SAM/SGA between March 1, 2014 and June 9, 2015, as to various Wells, water haul locations, springs, and pipeline developments riddled throughout the Spruce Allotment. This maintenance was coordinated and directed by the BLM under the authority of the existing range improvement authorizations and the discretion exercised by the BLM relative to such range improvement authorizations. In fact, BLM called even the latest maintenance activity by SGA giving rise to this dispute as "good solid work".

Notwithstanding, BLM seems to now take the view that SGA's latest maintenance activity by SGA within the Upper Spruce, Lower Spruce, and Basco areas as not authorized. However, this hindsight view is neither lawful nor rational *under the circumstances*. First, as discussed more fully below, this latest maintenance activity was within the authority of the existing range improvement authorizations, as follows:

- The maintenance activity upon Upper Spruce Spring was on private land.
- The maintenance activity upon Lower Spruce Spring was on private land.
- The maintenance activity upon Lower Spruce Spring (to the extent any occurred on public land) and on Basco Spring (upon public land) was not limited by scope or by stipulations per the 1940 Range Improvements Permits and the 1998 FMUD. In fact, the 1998 FMUD was unequivocal to SGA that it would "[i]mprove, enhance, or develop" Lower Spruce Spring and Basco Spring.
- The maintenance activity upon Upper Spruce Pipeline (partially on private land and partially on public land), Basco Pipeline (on public land), and Lower Spruce Pipeline (partially on private land and partially on public land), was within the scope and stipulations per the 1971 Cooperative Agreement and 1986 Range Improvement Permits (as well as RS 2339 rights-of-way); prescribing only that the BLM wanted SGA to try to keep the maintenance work within the pre-existing path of the pipelines. SGA conformed to that prescription under the circumstances.

Second, as discussed more fully below, this latest maintenance activity was within the discretion exercised by BLM relative to such range improvement authorizations. The course of conduct exercised by BLM relative to SAM/SGA between March 1, 2014 and June 9, 2015, demonstrated a directive by BLM to get SAM/SGA to maintain the generally non-functional status of the various range improvements upon the public and even (unfenced) private lands within the Spruce Allotment. This made sense since BLM desired to make available a broader range of water sources for permitted livestock, for wildlife, for wild horses, and for other public

land resources. It was always agreed, at least through June 9, 2015, that what SAM/SGA was doing was within the range improvement authorizations. Up until June 9, 2015, BLM never said any of the maintenance activity or intended maintenance activity, including that associated with Upper Spruce, Lower Spruce, and Basco, was beyond the scope or stipulations of any of the range improvement authorizations. In fact, in one example, involving Latham Pipeline, BLM got upset when SAM/SGA left a new pipe above ground and did not rip the new pipe into the ground. Given the totality of all of these circumstances, SGA should not be held accountable, responsible, or liable for violating any applicable law, regulation, or authorization relating to the latest maintenance work by SGA.

Based thereon, SGA requests that no final decision be issued; that BLM respond to SGA's FOIA Request dated September 17, 2015 (Exhibit 2B); that BLM *meet and confer* with SGA to resolve the matter; that BLM authorize SGA to complete the maintenance on Latham Spring and Pipeline, as directed by the BLM; that BLM authorize SGA to complete the maintenance on Basco, Upper Spruce, and Lower Spruce; and that BLM otherwise lift its "cease and desist" letter to allow SGA to continue its maintenance on the authorized range improvements within the Spruce Allotment, as prescribed by its Grazing Permit.

STATEMENT OF FACTS

I. Character of the Spruce Allotment, Wells Field Office, Elko Grazing District, Nevada, Bureau of Land Management, U.S. Department of the Interior.

The Spruce Allotment encompasses nearly 800,000 acres of public land and private land, though with the allotment divisions in BLM's Final Multiple Use Decision dated January 30, 1998 ("1998 FMUD") (*see* Exhibits 9, 10, 11, 12) and with the refinements at the time of the Sorensen-OTS Transaction in 2010 (as to certain Use Areas), the Spruce Allotment is now approximately 600,000 acres. This is a large allotment, relatively speaking, even at Nevada standards. *See generally* Exhibit 13.

The Spruce Allotment includes various multiple-uses, including authorized livestock grazing, wild horse use, and wildlife use. These latter three (3) uses are to be managed under the 1998 FMUD. *See* Exhibits 9, 10, 11. 12.

While not necessarily unique to Nevada, the Spruce Allotment fundamentally relies upon artificially developed water to support the permitted livestock and to rotate the livestock around the allotment per a grazing rotation prescribed by the 1998 FMUD. *See* Exhibits 9, 13, 14. The 1998 FMUD includes a "deviation" term; allowing flexibility of the grazing rotation due to resource and other conditions. The reliance upon water haul locations, Wells, spring developments, and spring-pipeline developments are not only essential, but critical, to the proper use of the public lands in the Spruce Allotment by cattle, as well as by wild horses and by wildlife. It is not an exaggeration to say that *but for* the functionality of the various water developments on the public lands within the Spruce Allotment that the allotment could not

support the numbers of livestock authorized in the Grazing Permit, as well as the numbers of wild horses and wildlife on the allotment.

II. Status of various water developments within the Spruce Allotment prior to the purchase of Spruce Ranch by OTS, LLC in 2010.

As of 2010, BLM's own information generally showed that the wells, spring developments, and spring-pipeline developments within the Spruce Allotment were in a non-maintained status at time of purchase by OTS, LLC of the grazing preference, permitted use, range improvements, and the associated water rights within the Spruce Allotment (*see* Exhibit 15) as well as at the time that Saving America's Mustangs ("SAM") acquired the Grazing Permit in 2012, and as well as at the time that SGA acquired the Grazing Permit in 2014, though, as discussed below, some maintenance was completed during SAM's tenure. This was particularly true as to the range improvements at issue in the 2015 BLM Claim; namely Basco Spring, Basco Pipeline, Upper Spruce Spring, Upper Spruce Pipeline, Lower Spruce Spring, and Lower Spruce Pipeline. *See* Exhibit 15. *See also* Exhibit 16 (Map of the Basco, Upper Spruce, and Lower Spruce springs and pipelines).

III. Grazing Use within the Spruce Allotment between 2010 and 2015, particularly as related to maintenance of the various water developments within the allotment.

In 2010, OTS, LLC acquired the Grazing Permit on the Spruce Allotment. Based thereon, BLM issued a Grazing Permit to OTS, LLC on September 23, 2010. Exhibit 17. Under information and belief, between September 2010 and April, 2012, OTS, LLC did not schedule any of its Active Use on the Spruce Allotment and applied for non-use. *See* Exhibit 18.

Thereafter, in 2012, SAM acquired the Grazing Permit on the Spruce Allotment. Based thereon, BLM issued a Grazing Permit to SAM on April 12, 2012. Exhibit 19. Between April 2012 and May 2014, SAM did not schedule much of its Active Use on Spruce Allotment and applied for mostly non-use. *See* Exhibits 20-30. This non-use occurred due to several factors. *See e.g.*, Exhibits 23, 26.

The non-use taken by OTS and by SAM between September 2010 and May 2014 was a significant concern to SAM relative to SAM's grazing permit status and water right status. This concern was shared with the BLM via letters. *See* Exhibits 31, 32, 33. In response, BLM downplayed the risk of the non-use relative to permit status. Specifically, BLM informed SAM that the non-use would likely not adversely impact the permit status. *See* Exhibit 32; *see also* Exhibit 33. However, BLM did not downplay the risk of non-use relative to water right status. In fact, BLM acknowledged the "possibility" of the forfeiture of SAM's "groundwater [water] rights as a result of non-use" but BLM committed to SAM that BLM would "work with SAM to ensure that the target water right can be put to beneficial use" so as to "ensure that no forfeiture occurs." Exhibit 33 at 3. SAM took (and continues to take) the BLM at its word regarding the non-use relative to permit status and water right status.

During the 2014 grazing season (i.e. March 1, 2014 to February 28, 2015), and specifically beginning May 1, 2014, SAM scheduled its Active Use for the spring/summer grazing rotation within the Spruce Allotment (i.e. March 1 to October 31). Exhibit 34. BLM and SAM coordinated this grazing use. This coordination included an on-the-ground field inspection on April 28, 2014. *See* Exhibit 35 (Map of the general path of the inspection). BLM authorized this scheduled use but in so doing the BLM specifically relied upon the "deviation" term in the 1998 FMUD to authorize a viable grazing system during the 2014 grazing season due to the non-maintained status of the various water developments (as discussed above), due to apparent large number of wild horses, and due the continuing low, but improving, moisture conditions. BLM principally let the observed utilization control cattle movements through the various Use Areas within the Spruce Allotment.

During the mix of the 2014 grazing season, SGA acquired the Grazing Permit on the Spruce Allotment via a base property lease with SAM. Based thereon, BLM issued a Grazing Permit to SGA on September 4, 2014. Exhibit 36. SGA has held the Grazing Permit and otherwise controlled the grazing use on the Spruce Allotment since September 4, 2014. The authorized officer for SGA for BLM purposes is and remains Clay Nannini.

Like SAM at the beginning of the 2014 grazing season, SGA scheduled its Active Use for the fall/winter grazing rotation within the Spruce Allotment (i.e. November 1 to February 28). BLM and SGA coordinated this grazing use. This coordination included an on-the-ground field inspection on September 28, 2015. *See* Exhibit 37 (Map of the general path of the inspection). BLM authorized this scheduled use (Exhibit 38), but in so doing the BLM again specifically relied upon the "deviation" term in the 1998 FMUD to authorize a viable grazing system due to the non-maintained status of the some water developments (as discussed above), due to the now maintained status and on-going maintenance status of some other water developments (as discussed below), due to apparent large number of wild horses, and due the improving moisture conditions. Again, BLM principally let the observed utilization control cattle movements through the various Use Areas within the Spruce Allotment.

During the 2015 grazing season, BLM slightly changed course relative to the authorized grazing use. *See* Exhibits 39, 40; *see also* Exhibit 41 (Map of the general path of the inspection on April 18, 2015). BLM wanted to rely less on the "deviation" term in the 1998 FMUD and wanted to rely more on the grazing system and maximum Use Area AUM levels prescribed in the 1998 FMUD. BLM said that it would not abandon use and reliance upon the "deviation" term but BLM just wanted more focus on conformity to the grazing system and maximum Use Area AUM levels prescribed in the 1998 FMUD. SGA agreed to this course on the premise that SGA could still continue in its maintenance of the various Wells, spring, and pipeline developments since all agreed that without the functionality of the various water developments, SGA could not conform to the grazing system prescribed in the 1998 FMUD and otherwise provide water to wild horses and wildlife. *See also* Exhibits 42-46 (wherein BLM knew of the intended maintenance of Basco, Upper Spruce, and Lower Spruce in April/May, 2015, and wherein BLM encouraged, welcomed, and directed such maintenance).

See Exhibit 42 - wherein Daniel Zvirzdin, BLM Rangeland Management Specialist, reported to SGA **on April 7, 2015**, that "**one of the most important things we can do this year to mitigate the effects of drought is to get all livestock watering facilities fully operational**. Currently, the Spruce and Spruce Springs Pipelines are almost completely non-functional, the Townsite Spring Pipeline is only partially functional, and the Basco Pipeline needs some work; in addition, the Latham Springs Pipeline needs to be moved belowground, as agreed upon last year. Fixing these range improvements will greatly increase the effective forage availability on Spruce Mountain while reducing maximum utilization levels. In short, the functionality of these range improvements will likely determine the number of cattle we'll be able to authorize on Spruce Mountain this year." Emphasis supplied.

See Exhibit 43 - wherein Zvirzdin reported **on April 18, 2015**, relative to the April 18th field inspection with SGA that "We also discussed the need to maintain many of the spring developments and pipelines found on the allotment that have become dysfunctional. Specifically, the Basco, Spruce, and Township Spring pipelines need substantial work. We spent much of our time in the field determining what measures need to be taken to maintain these pipelines and discussing the differences between maintenance and reconstruction."

See Exhibit 44 - wherein Zvirzdin reported to SGA **on April 28, 2015**, relative to SGA's spring/summer grazing application (Exhibit 40), that SGA's application was conditionally approved as to the grazing use in Use Areas E-1, E-2, and E-3 (*see* Exhibits 10, 13, 14) based upon the availability of "an alternative water strategy" being developed by "the beginning of June". This "alternative water strategy" specifically related to Basco, Upper Spruce, and Lower Spruce which implicates Use Areas E-1 and E-2. *See also* Exhibits 10, 13, 14.

See Exhibit 45 - wherein W. Alan Schroeder, a legal representative of SGA, reported to BLM on April 30, 2015, that a "significant amount of water development maintenance" had been completed by SGA "over the last year and which will continue into 2015." *See* further discussion below as to water development maintenance by SAM and SGA in 2014 and 2015.

See Exhibit 46 - wherein Nannini and Zvirzdin exchanged emails on May 6, 2015, relative to the positive impact maintenance work had upon Upper Spruce Spring.

IV. Directions from the BLM to maintain the authorized range improvements.

BLM emphasized to SAM/SGA in the various coordination meetings with the BLM during the 2014 grazing season and during the 2015 grazing season (through at least April 2015) of the requirement to maintain the Wells, spring developments, and pipeline developments so to get them in a functional status and so as to conform to the "maintenance term" in the grazing permit. In other words, if SAM/SGA did not maintain, BLM could and would sanction the grazing permit issued to SAM/SGA. This "BLM speak" was heard by SAM/SGA loud and clear. *See also* "3-year non-use" term, 43 C.F.R. 4130.2(g)(2); "substantial use" term, 43 C.F.R. 4140.1(a)(2).

In addition, SAM/SGA needed to get the various water developments maintained so as to provide water for their cattle as well as wildlife and wild horses. This was necessary, since beginning in 2014, SAM and SGA were coordinating with the BLM to more fully schedule the authorized grazing use in their respective grazing permits. The scheduling of this grazing use necessitated the maintenance of the various water developments, as BLM encouraged, welcomed, and directed SAM/SGA in at least Exhibits 42, 43, 44, 46.

Independent of BLM, SAM/SGA needed to get the various water developments maintained so as to make beneficial use of its water rights since there was some risk of forfeiture of water rights, even according to BLM, as discussed above.

As such, independent of BLM's statements to SAM/SGA to conform to the "maintenance term", SAM/SGA joined the BLM in the mutual interest to maintain the various water developments for the use, protection, and enhancement of the public land resources within the Spruce Allotment, including resources like wild horses and wildlife.

V. 2014 and 2015 - Maintenance of Wells, Springs, and Pipelines.

To conform to the BLM's directions, as discussed above, the *primary* focus by SAM/SGA during the 2014 and 2015 grazing seasons was to maintain the various wells, springs, and pipelines within the Spruce Allotment. *See* Exhibits 13, 14. This was done with coordination and/or with the knowledge of the BLM during the 2014 and 2015 grazing seasons. *See* Exhibit 47 (Map of the Spruce Allotment with the various Well locations, and timing of maintenance of such Wells); Exhibit 48 (Map of the Spruce Allotment with various trough/pipeline locations, and timing of the maintenance). As of the date of this letter, all of the various the Wells have been maintained by SAM/SGA, except for a few (Exhibit 47),[3] and only some of the various springs and pipelines have been maintained by SAM/SGA, as discussed further below.[4] *See* below, further discussion as to maintenance of Latham, Basco, Upper Spruce, and Lower Spruce.

[3] It is relevant to footnote that some of the wells required various degrees of maintenance, with some maintenance involving nearly everything associated with the well, i.e. pump, pump-jack, power source, trough, protective fence, and/or overflow area. BLM never questioned this degree of maintenance activity by SAM/SGA.

[4] It is relevant to footnote that in the process of doing maintenance upon the various wells, BLM also directed SAM in 2014 to pick-up the junk at the various well locations. BLM acknowledged to SAM that this junk was not the product of SAM's use or management, but nevertheless, BLM directed that SAM pick it up. SAM/SGA was willing to conform since it too had an interest in doing its part to protect and enhance the public lands. However, in the process of SAM removing this junk, BLM questioned SAM. Specifically, BLM implicitly threatened SAM with trespass/archeological violations for picking up "old" junk as opposed to "new" junk. *See* Exhibits 49, 50, 51. SAM candidly told the BLM that it really did not know the difference, but that SAM said that based upon BLM's concern that SAM would stop picking up the junk at well locations until the BLM identified for SAM what junk was "old" and what junk was "new". Exhibit 50. SAM/SGA have not yet received any response from the BLM relative to such identification, though SGA remains ready, willing, and able to continue picking up the "junk" when it knows what junk is "old" and what junk is "new".

VI. 2014 and 2015 - Water Haul locations.

To conform to the BLM's directions, as discussed above, the *secondary* focus by SAM/SGA during the 2014 and 2015 grazing seasons was to coordinate and use the various water haul locations within the Spruce Allotment. *See* Exhibits 48 (Map, wherein references to "Water Tank" and "Water Trough" illustrate some of the water haul locations). This was done with coordination and/or with the knowledge of the BLM during the 2014 and 2015 grazing seasons. As of the date of this letter, many of the water haul locations have been confirmed and used, though this remains a work-in-progress as to the balance of the water haul locations.

VII. 2014 - Maintenance of Latham Spring and Pipeline.

To conform to BLM's directions, as discussed above, SAM maintained Latham Spring and a portion of its related Latham Pipeline. *See* Exhibits 52, 53, 54 (range improvement authorizations related to Latham Springs and Pipeline); *see also* Exhibit 48 (Map of location of Latham Spring & Pipeline). This activity was coordinated and/or with the knowledge of the BLM during the 2014 grazing season. This activity specifically related to maintaining the spring area and trough location; the pipeline to the second trough location on the pipeline; and a portion of the pipeline to the third trough location. This spring and troughs were maintained, but the pipe was left above-ground. This was done because SAM's contractor at the time did not have the necessary equipment to put the pipe in the ground.

On September 5, 2014, BLM met with SGA on the ground to inspect the maintenance work that was done on Latham Spring & Pipeline. *See* Exhibit 55 (map of the general path of the inspection on September 5, 2015). BLM welcomed the maintenance on the spring and pipeline so as to provide water to permitted livestock, as well as wild horses and wildlife. However, BLM directed that a particular cross-pole on the first trough be removed to improve ease of access by big game and directed that the pipe be buried. *See also* Exhibit 42 (wherein Zvirzdin confirmed this direction in his email to SGA on April 7, 2015, wherein he stated that "the Latham Springs Pipeline needs to be moved belowground, as agreed upon last year"). SGA was willing to conform, but due to the timing of the year and due to logistics, SGA was going to be unable to complete this further maintenance work until 2015. In fact, as discussed further below, this further maintenance work was scheduled to be completed by Nathan B. "Toter" Sagers (SGA's contractor) in 2015, though this work has since been deferred due to BLM's "cease and desist" letter dated June 16, 2015 (Exhibit 5). SGA stands ready, willing, and able to complete this maintenance work, as directed by the BLM, when BLM lifts its "cease and desist" letter.

VIII. 2015 - Coordination of Maintenance of Upper Spruce, Lower Spruce, and Basco.

Specific to implementation of the grazing use and grazing rotation for the 2015 grazing season, BLM and SGA discussed and agreed that to implement the spring/summer grazing rotation prescribed in the 1998 FMUD that immediate focus needed to occur in maintaining

Upper Spruce Spring[5] and Upper Spruce Pipeline[6] (Exhibits 56A, 56B, 56C), Lower Spruce Spring (Exhibits 57A, 57B, 57C),[7] Lower Spruce Pipeline (Exhibits 57D, 57E),[8] Basco Spring (Exhibits 58A, 58B, 58C),[9] and Basco Pipeline (Exhibit 58D, 58E)[10] due to the non-functional status of such water developments. *See* Exhibits 42, 43. Each of these water developments provided the necessary water for the permitted livestock, as well as any wild horses and wildlife, within Use Areas E-1 and E-2. *See* Exhibits 10, 13, 14 (illustrating, among others, Use Areas E-1 and E-2 relative to these water developments). Absent the maintenance, and thus functionality of such water developments, it would have not been possible for SGA to graze the Use Areas E-1 and E-2 covered by these water developments. BLM directed the maintenance of such water developments since the 1998 FMUD prescribed grazing use within the Use Areas covered by such water developments in the early part of the spring/summer rotation. *See also* Exhibits 42, 43.

Consistent with the foregoing preliminary discussions about maintaining, Upper Spruce, Lower Spruce, and Basco (as well as Townsite), on April 7, 2015, Zvirzdin emailed to Nannini a Google Earth mapping program, illustrating the general location and path of these various water developments, though Zvirzdin noted that the map was "not perfect." Exhibit 59. This April 7th email, with the associated map, helps demonstrates the BLM's actual knowledge of intended

[5] Upper Spruce Spring (Exhibit 56A) is on private land. *See* Exhibits 16, 56A. There is also a 1919 water right on Upper Spruce Spring. Exhibit 56C.

[6] Upper Spruce Pipeline (Exhibit 56B) is subject to a 1971 Cooperative Agreement ("CA") (Exhibit 56C). There are no stipulations in the CA as to no blading, and the map of the pipeline within the CA is general; there is not any "as constructed" map of the pipeline in the CA. As noted, there is a 1919 water right on Upper Spruce Spring that serves the Upper Spruce Pipeline (Exhibit 56D) and there is also a 1919 water right on Lower Spruce Spring that serves the Upper Spruce Pipeline (Exhibits 16, 57A, 57C), and thus an RS 2339 Right-of-Way right/claim exists thereon.

[7] Lower Spruce Spring (Exhibit 57A) is on private land absent a survey proving otherwise. *See* Exhibits 16, 57A. Lower Spruce Spring is also subject to a 1940 Range Improvement Permit ("RIP"). Exhibit 57B. There are no stipulations in the RIP as to no blading, and there is not any map of the spring in the RIP. There is a 1919 water right on Lower Spruce Spring (Permit Number 5742) (Exhibit 57C), and thus an RS 2339 Right-of-Way right/claim exists thereon to the extent Lower Spruce Spring may be on public land, in whole or in part.

[8] Lower Spruce Pipeline (Exhibit 57D) is partly on private land (Exhibits 16, 57D) and is subject to a 1986 Range Improvement Permit ("RIP") (Exhibit 57E). There is a stipulation in the RIP as to no blading, though the stipulation could relate to only to initial "construction", as opposed to maintenance, and the map of the pipeline within the RIP is general; there is not any "as constructed" map of the pipeline in the RIP.

[9] Basco Spring (Exhibit 58A) is subject to a 1940 Range Improvement Permit ("RIP") (Exhibit 58B). There are no stipulations in the RIP as to no blading, and there is not any map of the spring in the RIP. There is a 1920 water right on Basco Spring (Permit Number 6173) (Exhibit 58C), and thus an RS 2339 Right-of-Way right/claim exists thereon.

[10] Basco Pipeline (Exhibit 58D) is subject to a 1986 Range Improvement Permit ("RIP") (Exhibit 58E). There is a stipulation in the RIP as to no blading, though the stipulation could relate to only to initial "construction", as opposed to maintenance, and the map of the pipeline within the RIP is general; there is not any "as constructed" map of the pipeline in the RIP.

nature and scope of the intended maintenance before the actual on the ground coordination occurred on April 18, 2015, and before the actual on the ground maintenance began relative to Upper Spruce, Lower Spruce, and Basco.

On April 18, 2015, BLM (Zvirzdin) along with Nannini (authorized representative for SGA), Jeff Roche (member of SGA), and W. Alan Schroeder (legal representative for SGA) met on the ground on the Spruce Allotment, field inspecting the intended maintenance as to Upper Spruce, Lower Spruce, and Basco, as well as Townsite) *See* Exhibit 41 (Map of the general path of the inspection on April 18, 2015). It was understood at the time by the BLM, like the Latham situation discussed above, the non-functional status of these water developments. *See* Exhibit 42, 43. It was also understood at the time by the BLM that maintenance could/would include, like the Latham situation discussed above, the replacement of the spring boxes, pipe, and troughs. BLM expressed no reservations to this maintenance only noting that SGA should try to keep any new pipe within the existing road or existing pipeline path, and that SGA not put in any new pipe on a particular leg of Townsite Spring because of a claimed lack of range improvement authorization. BLM did not direct that no blading occur as to this activity. BLM did not direct that SGA conform to any particular stipulations in the various range improvement authorizations discussed in Footnotes 6-10 herein. Had BLM done so, SGA would have not bladed and would have conformed to any applicable stipulations provided by the BLM.

It should be noted that Zvirzdin's contemporaneous memo as to the inspection on April 18, 2015, does not include any statements to the contrary as to what is stated above. *See* Exhibit 43. In fact, a reading of Zvirzdin's April 18th Memo states:

> We also discussed the need to maintain many of the spring developments and pipelines found on the allotment that have become dysfunctional. Specifically, the Basco, Spruce, and Township Spring pipelines need substantial work. We spent much of our time in the field determining what measures need to be taken to maintain these pipelines and discussing the differences between maintenance and reconstruction.

Exhibit 43 at 2. However, interestingly, Zvirzdin's post hoc *updated* April 18th Memo dated June 16, 2015 backtracked. *See* Exhibit 60 at 2 (part way down the page). Specifically, Zvirzdin stated on June 16, 2015, among other things, that:

> The entire tenor of the conversation [on April 18, 2015] was that all actions taken would be minimal and within the existing footprint; blading was clearly not acceptable. For example, in the course of the day there were several areas where entirely new pipe was needed, but we agreed that no action would be taken as ripping in a pipe with a bulldozer would result in too much disturbance.

Exhibit 60 at 2. *See also* Exhibit 1 at pages 2, 5 (wherein the 2015 BLM Decision echoes the post hoc rationalization by Zvirzdin at pages 2 and 5; specifically stating at page 2 that "On 18 April, 2015, you indicated to Daniel Zvirzdin, BLM Rangeland Management Specialist, through

Clay Nannini and your counsel Alan Schroeder that you would like to conduct maintenance on your water developments. You received verbal approval from BLM to begin basic maintenance on the Basco Spring, Spruce, and Spruce Springs Pipelines. Mr. Zvirzdin informed you at that time that all maintenance work would need to be carried out in a manner that minimizes ground disturbance, i.e., it should be virtually unnoticeable to members of the public who use those public lands. BLM also informed you that any work to clean out the existing spring box at Basco Spring would be limited to only minor maintenance work since the spring box was on public land.")

SGA was not privy to BLM's *updated* April 18th Memo until after SGA's receipt of the requested information from the BLM (Exhibits 4, 6) on August 27, 2015 (Exhibit 2A). SGA was given no opportunity to review or comment upon BLM's *updated* April 18th Memo dated June 16, 2015, until now. While SGA disagrees with BLM's re-characterization of the events/statements in the *updated* Memo, it is compelling to note that the BLM provided no such characterization or direction as to the previous maintenance activity as to the wells, as discussed above, or as to the Latham Spring and Pipeline, as discussed above. BLM was content that all of SAM/SGA's maintenance activities through May/June, 2015, were within the range improvement authorizations and/or within the discretion of the BLM within the context of the range improvement authorizations until BLM took a different position as to Upper Spruce, Lower Spruce, and Basco on June 9, 2015.

IX. 2015 - Maintenance of Upper Spruce, Lower Spruce, and Basco.

After the April 18, 2015 coordination meeting, SGA completed some maintenance during May and June 2015, on Basco Spring,[11] Basco Pipeline,[12] Upper Spruce Spring,[13] Upper Spruce Pipeline,[14] Lower Spruce Spring,[15] and Lower Spruce Pipeline[16]. *See* Exhibit 16. The word "some" is used because BLM verbally told SGA to stop this work on or about June 9, 2015, before SGA could complete the intended maintenance. *See* Footnotes 11-16. BLM confirmed its verbal stop work order in its cease and desist letter dated June 16, 2015. Exhibit 5. SGA immediately conformed to BLM's order even though SGA disagreed with it (Exhibits 4, 6) and

[11] Maintenance is complete as to **Basco Spring**, except for recontouring and reseeding part of the intended maintenance.
[12] Maintenance is complete as to **Basco Pipeline**, except for recontouring and reseeding part of the intended maintenance.
[13] Maintenance is complete as to **Upper Spruce Spring** (which is on private land), except for recontouring and reseeding part of the intended maintenance.
[14] Maintenance is only partially complete as to **Upper Spruce Pipeline**; still requiring the laying of the pipe in the trench, troughs, and recontouring and reseeding part of the intended maintenance.
[15] Maintenance is complete as to **Lower Spruce Spring** (which is on private land, in whole or in part), except for recontouring and reseeding part of the intended maintenance.
[16] Maintenance is only partially complete as to **Lower Spruce Pipeline**; still requiring the laying of the pipe in the trench, troughs, and recontouring and reseeding part of the intended maintenance.

even though SGA requested BLM to allow it to complete the maintenance (which intended to be inclusive of any necessary rehab work).[17]

The 2015 BLM Decision not only characterizes the maintenance work as not authorized, but states that the work "in a number of specific areas defies reason and logic", stating:

> (1) over a dozen areas unassociated with pre-existing troughs were cleared to a width of over 60 feet to install a 2" pipeline,
> (2) 1.6 acres were excavated to illegally redevelop a 1/10th of an acre spring (which work was completely outside the range improvement authorizations),
> (3) over 685 trees were destroyed and left in slash piles over 8 feet tall, and
> (4) side slopes were contoured to a depth of over six feet to install a pipeline that would be buried half that depth.
>
> These actions were not accidental or inadvertent, and required significant effort to carry out. No reasonable person could have interpreted this level of disturbance as falling within the scope of authorized maintenance work.

Exhibit 1 at pages 4-5. *See also* Exhibit 1 at page 2-3 (wherein the 2015 BLM Decision stated that "On 09 June, 2015 the BLM discovered that you were conducting work on all three pipelines that greatly exceeded basic pipeline maintenance, as follows: (1) Under the guise of basic maintenance work on a 1 ½" wide pipeline you bladed 28 acres of public land - an area 9 miles long and averaging 20 feet wide - despite the fact that blading of the pipeline route was unauthorized except along a short 10-foot wide section on the Spruce Springs Pipeline. In a number of areas the width of the bladed path was 80 feet, wider in some areas when associated slash piles are taken into account. Side slopes were contoured to a depth of over six feet. (2) More than 4 of the 9 miles you bladed were undisturbed before this trespass; while in some locations the undisturbed areas you bladed were within 100 feet of the original pipeline (still well beyond the scope of authorized maintenance for the pipelines), 1.5 bladed miles were not even in the vicinity of the original pipelines. (3) Despite being authorized to disturb an area only 50 feet in diameter to clear and level trough locations, you cleared and leveled trough locations to a diameter of up to 150 feet, which resulted in a disturbed area nine times larger than authorized. (4) You excavated a 1.6 acre area around Basco Spring, destroyed natural hydrologic features, and installed an access road and a completely new spring collection system. All of this was done without any consultation with BLM, without authorization to develop the spring, and with full knowledge that this spring is located on public land. (5) Without a permit or authorization, you destroyed a minimum of 685 trees on public land; these trees were left in large slash piles throughout the disturbed area. (6) Material from the original pipeline was left as trash throughout

[17] It is relevant to note that SGA requested the BLM on or about June 16, 2015, to allow it to complete the maintenance work so as to minimize any further claimed impacts that would/could be caused by any subsequent work and so as to avoid the significant cost to remove the equipment and materials from the site only to have to return them later to the site to complete the maintenance and/or to complete the intended rehab work associated with any maintenance work. BLM refused this request.

the disturbed area, much of it embedded in the ground. (7) Your work disturbed, altered, or destroyed known and/or potential breeding habitat, causing take and/or injury to listed migratory birds or their nest or eggs during the breeding season for a number of migratory bird species. (8) Your work further resulted in the unauthorized disturbance and fragmentation of designated Mapped Habitat for Greater Sage-grouse within the Spruce Mountain Allotment").

SGA disagrees.

At the outset, the suggestion that the path of the bulldozer averaged "20 feet wide" is not correct. *See* Exhibit 1 at page 2. The track width of the bulldozer was only 9 feet, and the blade width of the bulldozer was only 14 feet, as illustrated in the photographs in Exhibits 61A, 61B, 61C. In addition, the suggestion that the pipe laid was 2 inches in size is not correct. *See* Exhibit 1 at page 5. The pipe that was laid, to the extent any pipe was laid before BLM's stop work order on or about June 9, 2015, was only 1.5 inches, as illustrated in the photographs in Exhibits 62A, 62B. In addition, the suggestion that SGA "left … trash throughout the disturbed area" is not correct. *See* Exhibit 1 at page 3. It is not correct because the statement presumes that SGA was complete in its intended maintenance. As discussed above, BLM issued SGA a stop work order in the mix of the maintenance work. SGA thereafter took no further action, including picking up any "trash … in the disturbed area" so as to conform to the BLM's order.

The suggestion that the maintenance work should <u>not</u> have been inclusive of blading a path for the dozer/tractor to roll the pipe into the trench is not correct *under the circumstances*.[18] The standard operating procedures ("SOPs") to maintain a spring and pipeline system in the type of terrain at Basco, Upper Spruce, and Lower Spruce involved the following SOPs and involved other considerations than the type of terrain that BLM illustrates in Exhibit 63[19]:

> First, *safety first*. When the terrain is steep, the terrain includes trees, and/or the terrain includes large rocks in the corridor, the blading of the path is rationally necessary. This is because in the absence of blading in such terrain there is a risk that the dozer/tractor will tip-over due to the slope, due to hitting a tree, and/or due to hitting a rock, causing injury/death to the dozer/tractor operator and/or causing damage to the equipment.

[18] There is a three step process to lay a pipe into a trench. First, the blading of a path averaging 3-6 inches and simultaneously "ripping" of the trench. Second, the rolling in of the pipe with a bulldozer/tractor within the path into the trench. Third, the recontouring and reseeding of the area, i.e. rehab.

[19] Within the mix of BLM's documents proffered to SGA in its August 28, 2015 letter (Exhibit 2A), BLM included various pictures which are identified herein as Exhibit 63. BLM seems to suggest by these pictures in Exhibit 63 that SGA's degree of disturbance in its maintenance should have been consistent with such photographs, as opposed to what actually occurred at Basco, Upper Spruce, and Lower Spruce. The "but is" that the pictures in Exhibit 63 illustrate a materially different terrain; primarily a gentle terrain, void of any trees and large rock. Undeniably, the terrain at Basco, Upper Spruce, and Lower Spruce is not like the terrain illustrated in the pictures in Exhibit 63.

Second, *fire prevention*. When the terrain is steep, the terrain includes trees, and/or the terrain includes large rocks in the corridor, the blading of the path is rationally necessary. This is because in the absence of blading in such terrain there is a risk that the dozer/tractor will hit a rock when laying the pipe, sparking a fire.

Third, *reliability of the pipe*. When the terrain is steep, the terrain includes trees, and/or the terrain includes large rocks in the corridor, the blading of the path is rationally necessary. This is because in the absence of blading in such terrain there is a risk that pipe is not laid flat in the trench. If the dozer/tractor that is rolling in the pipe in the trench does not cross a level/smooth surface that pipe will have highs and lows in the trench. This adversely impacts the ability of the water to flow and the ability of the water to drain when it is not flowing; leaving water in the low areas of the pipe results in a risk of rupture when the water freezes in the pipe.

Fourth, *minimize impact*. When the terrain is steep, the terrain includes trees, and/or the terrain includes large rocks, the blading of the path is rationally necessary. This is because in the absence of blading in such terrain there is a risk that the impact of the maintenance would be significantly greater. For example, ducting-and-dodging of standing trees and/or large rocks expands the intended corridor, further impacting a larger area of the ground.

The SOPs followed by SGA's contractor, Sagers, as to his maintenance work during May and June 2015 at Basco, Upper Spruce, and Lower Spruce have been SOPs followed by Sagers for many years and consistent with construction work and maintenance work he has done for the BLM in other BLM District Offices and Forest Service Ranger District Offices for over 30-years. In fact, Sagers recently completed similar type of maintenance work, involving similar terrain, wherein BLM expressed praise to him for his work, and certainly did not make the kind of statements/remarks made by the BLM Elko District, Wells Field Office, here in the 2015 BLM Decision, particularly at pages 2-3 and 4-5, as quoted above.

In addition, the suggestion that the maintenance work went beyond the area of the pre-existing pipeline and/or road corridor is not correct *under the circumstances*. *See* Exhibits 64A, 64B (wherein BLM purports to claim departures from the pre-existing pipeline and/or road corridors). First, there was a need to conform to the SOPs, as discussed above. Second, the available information did not provide any "as constructed" maps of the location of the pipelines or any status of the specific functionality of all of the segments of the pipelines. This lack of information required reconnaissance work by SGA to determine the likely location of the pre-existing pipeline and to determine the degree of maintenance required. As to the former, this reconnaissance work involved, among other things, making observations on-the-ground as to previous ground disturbance and/or as to old or broken pipe lying above/near the ground surface. As to

the latter, this reconnaissance work involved, among other things, putting an air compressor at various sections of the various pipelines to assess the functionality. As such, the SOPs and objective evidence were relied upon by SGA to try to stay within the pre-existing corridor, as directed by the BLM, to the extent the degree of maintenance required any new pipe. SGA contend that it did so under the circumstances.

X. During maintenance of Basco, Upper Spruce, Lower Spruce

During the mix of the maintenance work in the Spruce area on June 8, 2015, a person in an apparent *Nevada Division of Wildlife* vehicle made contact with Sagers; inquiring as to what Sagers was doing. This person was apparently looking for elk and there was an exchange between this person and Sagers as to location of any elk herd. Sagers noted that he had observed significant big game use in and around the maintained troughs he had completed in the area.

The next day, June 9, 2015, BLM contacted Nannini about the maintenance work. A conversation record dated June 9, 2015, which SGA recently received within the mix of BLM's documents proffered to SGA in its August 28, 2015 letter (Exhibit 2A), which is identified herein as Exhibit 65, noted that:

> Clay [Nannini] seemed confused as to why the operator bladed the entire length and why he didn't stick to the road, where the pipeline had been ripped in originally in many locations. He said many times that he didn't know what to say and seemed puzzled at the actions of the operator.

Exhibit 65. While Nannini acknowledges this discussion, and while Nannini acknowledges that he may have seemed "confused" and unclear as to "what to say" during the telephone call, this was because Nannini was surprised by the exasperation in the voice of Zvirzdin; given the consultation, coordination, and cooperation between BLM and SGA relative to the intended maintenance work on Basco, Upper Spruce, and Lower Spruce, as well as all of the maintenance work over the last 1.5 years relative at water haul locations, at wells, and at Latham. It seemed odd to Nannini at the time, as well as seems odd to this day, that Zvirzdin was surprised at the maintenance activity; given what is stated herein.

After Nannini received the telephone call from Zvirzdin, Nannini called Sagers on June 9, 2015, informing him that he may see a group of people that day to check the maintenance work. Sagers did see a group of people on June 9th that arrived in apparent BLM vehicles; reviewing some of the work Sagers had done and was doing. One of the BLM employees complimented Sagers that it was "good solid work" as to what he was doing. An exchange occurred between Sagers and one of the BLM employees as to the benefits the maintenance provided to elk and other wildlife that Sagers already had actually observed. Notwithstanding, BLM told Sagers that he needed to stop his activity; Sagers replied that he was out of fuel and he had to stop for the day anyway.

Thereafter, on or about June 9, 2015, BLM verbally ordered Nannini to have the maintenance work stop.

XI. BLM's Cease and Desist letter dated June 16, 2015, received by SGA on June 20, 2015.

Despite the ongoing communication between SGA and BLM, BLM issued a "cease and desist" letter on June 16, 2015. The 2015 Letter stated that BLM had "discovered unauthorized use of the public lands," which included the "unauthorized use of bulldozing and blading within the Spruce Allotment - Unit E2, near Basco Springs, Spruce, and Spruce Springs Pipelines." Exhibit 5 at 1. The 2015 Letter stated that this alleged unauthorized use was in violation of a number of laws and regulations, including:

- Taylor Grazing Act of June 28, 1934, as amended; Section 2, 48 Stat. 1270; 43 USC 315a
- Federal Land Policy and Management Act of October 21, 1976, Sections 303 and 402, 43 USC 1733 and 1152 respectively
- 43 CFR 4140.1(a)(4) and (b)(3).

Id. at 1-2. The 2015 Letter then ordered that "all work in the area must cease and desist immediately." *Id.* at 2.

XII. SGA's response to the BLM's June 16th letter dated June 24, 2015.

SGA responded to BLM's 2015 Letter with a letter of its own on June 24, 2015. SGA's Response stated that the activity in question was no longer taking place and requested a meeting with BLM to resolve the issues identified in the 2015 Letter, but also denied the claims made by BLM therein. *See* Exhibit 6 at 1. SGA's response also requested any information relating to the alleged trespass be sent to SGA, including invoking the *Freedom of Information Act* if necessary. *Id.*

XIII. BLM's Trespass Notice dated August 6, 2015, received by SGA on August 16, 2015.

Notwithstanding SGA's responsive letter, BLM sent SGA a Notice of Violation on August 6, 2015. The Trespass Notice claims that SGA:

> Performed unauthorized construction beyond the scope and terms and conditions of your authorized use on Basco Springs Pipeline (JDR #505560, built in 1986), Spruce Pipeline (JDR #504403, built in 1971), and Spruce Springs Pipeline (JDR #505559, built in 1986). Bladed the length of all three of the aforementioned pipelines to an average width of 20 feet, clearing over 28 acres of public land. Cleared and leveled springs and trough locations to a diameter of over 150 feet in multiple locations. Damaged a public spring. Destroyed 685 trees.

Exhibit 3 at 1. The Trespass Notice adds that this claimed activity occurred within:

T. 30 N., R. 63 E., Sections 1, 2, and 12
T. 30 N., R. 64 E., Sections 4, 5, and 9
T. 31 N., R. 63 E., Sections 25 and 36
T. 31 N., R. 64 E., Sections 31 and 32

Exhibit 7 at 1. The Trespass Notice further adds that this claimed activity purportedly violated the following laws:

- Taylor Grazing Act of June 28, 1934, as amended; Section 2, 48 Stat. 1270; 43 USC 315a.
- Federal Land Policy and Management Act of October 21, 1976, Sections 303 and 402, 43 USC 1733 and 1152 respectively.
- Migratory Bird Treaty Act of 1918, as amended; U.S.C., Title 16, Chapter 7, Subchapter II, § 703

The Trespass Notice stated that the "Violations, if continuing, … stop immediately", and also asks that "If you have evidence or information which tends to show you are not a trespasser as we have alleged, you are allowed 5 days from receipt of this notice to present such evidence or information at the Bureau of Land Management office shown on the front of this form." Exhibit 7 at 2.

XIV. SGA's response to the BLM's August 6th Trespass Notice dated August 13, 2015.

SGA likewise responded to BLM's Trespass Notice on August 13, 2015. SGA denied the claims set forth in the Trespass Notice and notified BLM that the claimed activity was no longer taking place. Exhibit 3 at 1. SGA once again requested to meet with BLM to resolve the issues identified in the Trespass Notice; adding that it would respond to the Trespass Notice after receipt of the requested documents. *Id.*

XV. BLM's letter dated August 27, 2015, and CD of requested documents.

BLM sent a letter and CD on August 27, 2015 containing some documents that SGA requested in relation to claimed Trespass. *See* Exhibit A-2.

XVI. BLM's Proposed Decision dated August 28, 2015, received by SGA on September 2, 2015.

BLM set forth the basis of its Trespass Notice in a Proposed Decision dated August 28, 2015. *See* Exhibit 1. The stated purpose of the 2015 BLM Decision is:

BLM is issuing this proposed trespass decision for your (Spruce Grazing Association LLC) unauthorized maintenance work and construction that exceeded

> the scope and terms and conditions of your Range Improvement Permits for the Basco Springs Pipeline, Spruce Pipeline, and Spruce Springs Pipeline, thereby causing significant damage to public land resources.

Exhibit 1 at 1. BLM thus acknowledged that it had issued several range improvement permits authorizing the projects in question - specifically, the 1971 Spruce Pipeline permit (JDR #504403), the 1986 Basco Springs Pipeline permit (JDR #505560), and the 1986 Spruce Springs Pipeline (JDR #505559), each of which called for the construction of 1.5-inch pipelines. Exhibit 1 at 1-2. BLM also outlined the recent history of this infrastructure, including SGA's receipt of approval from BLM to begin the maintenance and construction of these projects in April 2015. Exhibit 1 at 2.

The 2015 BLM Decision goes on to state on June 9, 2015, the agency discovered that SGA was "conducting work on all three pipelines that greatly exceeded basic pipeline maintenance" for the following reasons:

> (1) Under the guise of basic maintenance work on a 1 ½" wide pipeline you bladed 28 acres of public land – an area 9 miles long and averaging 20 feet wide – despite the fact that blading of the pipeline route was unauthorized except along a short 10-foot wide section on the Spruce Springs Pipeline. In a number of areas the width of the bladed path was 80 feet, wider in some areas when associated slash piles are taken into account. Side slopes were contoured to a depth of over six feet.
> (2) More than 4 of the 9 miles you bladed were undisturbed before this trespass; while in some locations the undisturbed areas you bladed were within 100 feet of the original pipeline (still well beyond the scope of authorized maintenance for the pipelines), 1.5 bladed miles were not even in the vicinity of the original pipelines.
> (3) Despite being authorized to disturb an area only 50 feet in diameter to clear and level trough locations, you cleared and leveled trough locations to a diameter of up to 150 feet, which resulted in a disturbed area nine times larger than authorized.
> (4) You excavated a 1.6 acre area around Basco Spring, destroyed natural hydrologic features, and installed an access road and a completely new spring collection system. All of this was done without any consultation with BLM, without authorization to develop the spring, and with full knowledge that this spring is located on public land.
> (5) Without a permit or authorization, you destroyed a minimum of 685 trees on public land; these trees were left in large slash piles throughout the disturbed area.

(6) Material from the original pipeline was left as trash throughout the disturbed area, much of it embedded in the ground.
(7) Your work disturbed, altered, or destroyed known and/or potential breeding habitat, causing take and/or injury to listed migratory birds or their nest or eggs during the breeding season for a number of migratory bird species.
(8) Your work further resulted in the unauthorized disturbance and fragmentation of designated Mapped Habitat for Greater Sage-grouse within the Spruce Mountain Allotment.

Exhibit 1 at 2-3. Given these alleged bases of violation, BLM asserted that SGA was violating the following laws:

- Taylor Grazing Act of June 28, 1934, as amended; Section 2, 48 Stat. 1270; 43 USC 315a.
- Federal Land Policy and Management Act of October 21, 1976, Sections 303 and 402, 43 USC 1733 and 1752(a) respectively.
- Migratory Bird Treaty Act of 1918, as amended; U.S.C., Title 16, Chapter 7, Subchapter II, § 703(a)

Exhibit 1 at 3. Based on this conclusion, BLM determined that it would suspend all of SGA's current and future grazing authorization pending the resolution of this trespass issue. *See* Exhibit 1 at 4.[20]

Notably, the 2015 BLM Decision asserts that the allegedly "unauthorized blading and excavation work … constitutes a willful violation" because the maintenance and construction work was purportedly far in excess of what BLM had previously authorized. Exhibit 1 at 4. For instance, BLM makes the following accusation against SGA:

> …under the guise of "maintenance work" **you disturbed an area over seven times what was required to build the original pipelines and over fourteen times what could reasonably be construed as maintenance**.

Exhibit 1 at 4. (emphasis in original). The 2015 BLM Decision goes on to claim that "the scale of the disturbance in a number of specific areas defies reason and logic," using the following examples:

[20] Exhibit 1 at 4: "Based on the facts and circumstances of this case as described above, and in accordance with 43 CFR Parts 2800, 2920, 4100, and Subparts 5462, 9239 and 9265, I have determined that Spruce Grazing Association LLC's unauthorized disturbance and damage to the public lands constitutes willful trespass, that damages in the amount of $126,699 are owed to the United States, and that all current and future grazing authorizations held by Spruce Grazing Association LLC will be suspended until payment of these trespass damages has been made in fun to the United States."

(1) over a dozen areas unassociated with pre-existing troughs were cleared to a width of over 60 feet to install a 2" pipeline,
(2) 1.6 acres were excavated to illegally redevelop a 1/10th of an acre spring (which work was completely outside the range improvement authorizations),
(3) over 685 trees were destroyed and left in slash piles over 8 feet tall, and
(4) side slopes were contoured to a depth of over six feet to install a pipeline that would be buried half that depth.

Exhibit 1 at 4.

Taking the allegedly willful nature of these activities into account, BLM made a series of calculations in order to determine the damages associated with the claimed trespass by SGA. *See* Exhibit 4 at 5-6; *see also id.* at 12 (Attachment 1) (containing a itemization of alleged damage to trees due to SGA's activities). The damages totaled by BLM ultimately totaled **$126,699**, broken down as follows:

The trespass damages, which total $**126,699,** are broken out as follows:

(1) BLM's administrative costs:	$21,085
(2) Three times the market value of 685 trees:	$39,402
(3) Rental and associated penalty fees for 26acres[3]	$1,496
(4) Rehabilitation and stabilization	
(a) Recontouring:	$41,104
(b) Herbaceous reseeding:	$8,913
(c) Mahogany replanting:	$13,098
(d) Travel Management:	$1,601
	$126,699

Exhibit 1 at 6. In addition to these monetary penalties, and as mentioned above, BLM also suspended SGA's current and future grazing authorization pending the resolution of this trespass claim. Exhibit 1 at 6. BLM based its decision on the following sources of regulatory authority:

- 43 CFR 2808.10
- 43 CFR 2808.11
- 43 CFR 2920.1-2
- 43 CFR 4140.1
- 43 CFR 5462.2
- 43 CFR 9239.1-1(b)
- 43 CFR 9239.1-2(a)
- 43 CFR 9239.1-3(a)

- 43 CFR 9265.6(a)

Exhibit 1 at 6-10. The 2015 BLM Decision also provided for an opportunity to protest and comment to the BLM's conclusion within 15-days of receipt pursuant to 43 CFR 4160.2. Exhibit 1 at 10.

DISCUSSION OF LAW and ARGUMENT

I. SGA is not liable for the trespass alleged by BLM.

A. BLM's legal authority under 43 C.F.R. §§ 2808, 4140.

Under BLM's regulations, 43 C.F.R. § 2808 provides the agency with authority to enforce claims of trespass against public lands users, and 43 C.F.R. § 4140 describes the particular categories of prohibited use in the context of public lands grazing. BLM relied upon both of these sections in issuing the 2015 BLM Decision. *See* Exhibit 1 at 6-10.

As to BLM's trespass regulations under Part 2800, the Interior Board of Land Appeals ("IBLA") recognizes that:

> Subsection (a) of 43 CFR 2801.3 (2004) provided, in its entirety, that "[a]ny use, occupancy, or development of the public lands that requires a right-of-way, temporary use permit, or other authorization pursuant to the regulations of [43 CFR] [P]art [2800] and that has not been so authorized, or that is beyond the scope and specific limitations of such an authorization, or that causes unnecessary or undue degradation, is prohibited and shall constitute a trespass as defined in [43 CFR] § 2800.0-5 [(2004)]." See Tom Watson, 154 IBLA 140, 147-48 (2001); Gifford Engineering, Inc., 140 IBLA 252, 263 (1997). When improvements are placed on public lands in trespass, BLM is authorized to require their removal. John T. Alexander, 157 IBLA 1, 11 (2002); Dalton Wilson, 156 IBLA 89, 98-99 (2001).

Southwest Wireless Networks, 167 IBLA 327, n.22 (2006). In this context, BLM's "cease and desist" letter dated June 16, 2015 alleged that SGA was performing "unauthorized acts" defined in 43 CFR §§ 4140.1(a)(4) ("Failing to comply with the terms, conditions, and stipulations of cooperative range improvement agreements or range improvement permits") and 4140.1(b)(3) ("Cutting, burning, spraying, destroying, or removing vegetation without authorization").[21]

Furthermore, the regulations distinguish between willful and non-willful trespass. *See* 43 C.F.R. 2808.10(c). In distinguishing between whether an alleged trespass is willful or non-willful, the IBLA states that:

[21] This argument also extends to 43 C.F.R. §§ 2920.1-2 and 5462.2, as relied upon by BLM, given their similar language. *See* Exhibit 1 at 8-9.

> We have held that a trespass will be considered willful when the evidence "objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake." *Eldon Brinkerhoff*, 24 IBLA 324, 338, 83 I.D. 185, 191 (1976). That standard was adopted by the court in *Holland Livestock Ranch v. United States*, 655 F.2d 1002, 1006-07 (9th Cir. 1981).

Wayne D. Klump v. BLM, 130 IBLA 119, 131 (1994).

B. SGA is not liable for trespass because it had authorization from BLM to maintain the range improvements in question.

There are a number of factors which preclude SGA's liability for trespass, whether in whole or in part, as described below.

1. BLM exercised its discretion and has consistently authorized SGA to perform the maintenance work in question on the Upper Spruce, Lower Spruce and Basco areas.

SGA cannot be held liable for performing activities which it has consistently been authorized by the BLM to perform. BLM perpetuated an exercise of discretion with SAM and with SGA during 2014 and 2015 relative to SAM/SGA grazing authorization and range improvement authorization, as well as to protect/enhance the public lands and to provide necessary water for wild horses and wildlife. This exercise of discretion within the context of such authorizations did not occur through any additional written direction, approvals, or decision-documents due to, among other things, BLM's position that sufficient authorization already existed in the Grazing Permit and in the related range improvement authorizations. As described below, through June 9, 2015, SAM and SGA relied upon such exercise of discretion and course of conduct by the BLM, as interpreted and applied by the BLM at the time, in variety of aspects:

> Grazing Authorizations – While SAM/SGA has timely submitted and coordinated with BLM all necessary grazing applications for grazing use during 2014 and 2015, SAM and SGA have not received any signed/approved grazing application from the BLM during 2014 and 2015; demonstrating BLM's discretion that such applications and coordination had been sufficient to authorize grazing within the applicable laws, regulations, and authorizations.

> Removal of Junk – While SAM/SGA acknowledge its duty to maintain the various range improvement authorizations and related thereto its obligation to keep the range improvement sites neat and orderly, SAM did not receive any signed/approved direction to pick-up the junk in 2014; demonstrating BLM's discretion that such obligation existed within the applicable laws, regulations, and

authorizations, though when SAM was informed that it should not pick-up what would appear to be "old" junk at Well locations, SAM abstained from picking-up any junk at Well locations until BLM assessed and informed SAM what junk to pick-up.

Maintenance of Wells – While SAM/SGA acknowledges its duty to maintain the various range improvement authorizations, SAM and SGA did not receive any signed/approved direction to maintain the Wells during 2014 and 2015. This maintenance required various degrees of activity to make the Wells functional, with some maintenance involving nearly everything associated with the Well, i.e. pump, pump-jack, power source, trough, protective fence, and/or overflow area. SAM and SGA did not receive signed/approved direction or any stipulations from the BLM as to the manner to maintain the Wells; demonstrating BLM's discretion that the manner of the maintenance performed by SAM/SGA was within the applicable laws, regulations, and authorizations.

Use of Water Haul sites – SAM and SGA did not receive any signed/approved direction to use various water haul locations during 2014 and 2015. SAM and SGA also did not receive any stipulations from the BLM during 2014 and 2015 as to the manner to use the water haul locations; demonstrating BLM's discretion that the use and manner of use of the various water haul sites was within the applicable laws, regulations, and authorizations.

Maintenance of Latham Spring – While SAM/SGA acknowledges its duty to maintain the Latham Spring, SAM did not receive any signed/approved direction to maintain this spring during 2014. SAM also did not receive any stipulations from the BLM during 2014 as to the manner to maintain this Spring, except, after-the-fact, BLM directed that SAM remove a pole across the trough to ease access to the water by big game with antlers (like elk) and that SAM bury the pipe in the existing roadbed; demonstrating BLM's discretion that the manner of the maintenance performed by SAM was within the applicable laws, regulations, and authorizations, including the ripping of a trench to bury the pipe in the existing roadbed.

Maintenance of Basco, Upper Spruce, and Lower Spruce – While SAM/SGA acknowledges its duty to maintain these springs and pipelines, SGA did not receive any signed/approved direction to maintain these springs and pipelines. SGA also did not receive any stipulations from the BLM as to the manner to maintain these springs and pipelines, except BLM directed that the maintenance, i.e. the installing of any pipe, be put within the pre-existing roadbed or pipeline corridor. At the time, and consistent with the course of conduct discussed above, SGA relied upon this exercise of discretion by BLM to maintain Basco, Upper Spruce and Lower Spruce as within the applicable laws, regulations, and authorizations.

Accordingly, given BLM's consistent authorization of multiple types of activity on the Spruce Allotment, BLM cannot claim that SGA was acting without authority when it did the maintenance relative to Basco, Upper Spruce and Lower Spruce.

2. BLM omits noting some of range improvement authorizations and BLM also omits noting that SGA has not violated any applicable terms and conditions in such authorizations.

The apparent foundation for the 2015 BLM Decision is that the claimed activities by SGA "exceeded the scope and terms and conditions" of the 1971 Cooperative Agreement as to Upper Spruce Pipeline (Exhibit 56C), the 1986 Range Improvement Permit as to Lower Spruce Pipeline (Exhibit 57E), and the 1986 Range Improvement Permit as to Basco Pipeline (Exhibit 58E). *See* Exhibit 1 at pages 1-2. However, beyond the fact that SGA denies those claims as stated in subsection 1 above, BLM omits at least three (3) other range improvement authorizations issued to SGA; namely, the 1940 Range Improvement Permit as to Lower Spruce Spring (Exhibit 57B); the 1940 Range Improvement Permit as to Basco Spring (Exhibit 58B); and the 1998 FMUD as to Lower Spruce Spring and Basco Spring (Exhibit 9 at 10) (as well as the RS 2339 Right-of-Way rights/claims discussed in subsection 3 below). In fact, it is compelling to note that the 1998 FMUD did not have any limitation as to the scope or stipulations for the maintenance of Lower Spruce Spring and Basco Spring, stating:

> **Improve, enhance, or develop** at least 3 springs in the Spruce Allotment from the list below.

Exhibit 9 at 10 (emphasis supplied). *See also* Exhibit 9 at 10 (Table, which includes "Basco Spring"[22] and "Lower Spruce Spring").

As to the "scope" of the pipelines, the 2015 BLM Decision claims that SGA went beyond the "scope" of the 1971 CA for Upper Spruce Pipeline (Exhibit 56C) and the 1986 RIPs for Basco and Lower Spruce Pipelines (Exhibits 57E, 58E) by putting in 2 inch in diameter pipe, when the authorizations cited in the 2015 BLM Decision only spoke of a 1.5 inch in diameter pipe. *See* Exhibit 1 at page 1. However, BLM is mistaken. SGA put in only 1.5 inch in diameter pipe as to Basco Pipeline. *See* Exhibits 62A, 62B. SGA stayed within the "scope". [Note, as stated in footnotes 14 and 16, SGA has not put in any pipe as to Upper Spruce and Lower Spruce Pipelines, but intended to use only 1.5 inch in diameter pipe.]

As to the "terms and conditions", the 2015 BLM Decision claims that SGA went beyond the "terms and conditions" of the various range improvement authorizations by blading which also purportedly implicated claimed "undue damage". *See* Exhibit 1 at pages 1-2. However,

[22] It should be noted that the 1998 FMUD legally described Basco Spring as within T30N R63E, Section 2, NENE (Exhibit 9 at 10), and the 1940 RIP (Exhibit 58B) legally described Basco Springs as within T30 R63E Section 2, SENE. The difference is immaterial since a map illustrates Basco Spring as potentially within either quarter-quarter section.

there are no stipulations prohibiting blading in the maintenance of range infrastructure contained in SGA's various range improvement authorizations at issue, nor has any prohibition on blading been a term and condition that SGA has been required to abide by in the context of these authorizations (as discussed above). *See* Exhibits 56B and 56C (Upper Spruce Pipeline map and related 1971 Cooperative Agreement); Exhibits 57A and 57B (Lower Spruce Spring map and related 1940 RIP); Exhibits 57D and 57E (Lower Spring Pipeline map and related 1986 RIP); Exhibits 58A and 58B (Basco Spring map and related 1940 RIP); and Exhibits 58D and 58E (Basco Pipeline map and related 1986 RIP). SGA acknowledges that there is a stipulation in the 1986 RIPs relating to Lower Spruce Pipeline and Basco Pipeline as to no blading, though the stipulation could relate to only to initial "construction", as opposed to ongoing maintenance. *See* Exhibits 57E and 58E.

As to the "trash", the 2015 BLM Decision claims that SGA went beyond the "terms and conditions" of the various range improvement authorizations by not removing "trash". *See* Exhibit 1 at pages 1-2. However, to the extent there are stipulations as to "trash", BLM omits acknowledging that it issued a "cease and desist" order to SGA; prohibiting SGA from completing the intended maintenance what would have included any necessary rehab and removal of any "trash". *See* Exhibit 5 (wherein the BLM directed SGA on June 16, 2015, that "all work in the area must cease and desist immediately").

As to "sage grouse" or any "migratory birds", the 2015 BLM Decision claims that SGA maintenance "work disturbed, altered, or destroyed known and/or potential breeding habitat … to migratory birds" and "further resulted in the authorized disturbance … for … Sage-grouse." While SGA denies this claim for the reasons stated herein, this claim is unfounded on the grounds that BLM cannot deny that it knew that SGA was going to perform maintenance work at the times and areas in question. If BLM was truly concerned that this maintenance, regardless of the degree, could impact migratory birds or sage-grouse, then BLM should have told SGA. It did not.

3. SGA is not liable for trespass on the parcels upon which it has valid RS 2339 rights-of-way.

SGA is also not liable for trespass to the extent to which it has valid rights-of-way granted pursuant to Revised Statute 2339.

In order to address the issue of private rights-of-way across federally administered public land, the United States Congress enacted the Act of July 26, 1866, 14 Stat. 251-253 (July 26, 1866), which was later re-codified as Revised Statute 2339. This Act officially opened mineral lands to exploration and occupation upon the public domain of the United States of America and made a variety of grants upon the public domain of the United States of America. Pertinent herein, this Act allowed the construction of rights-of-way across and upon the public domain of the United States of America, which included the State of Nevada. Section 9 of the Act states:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.

Section 9 of the Act of July 26, 1866 (R.S. 2339), ch. 262, 14 Stat. 251, 253 (43 U.S.C. § 661). This Act (including Section 9) continued to be effective until October 21, 1976, when it was repealed by the *Federal Land Policy and Management Act*, 43 U.S.C. § 1701 *et seq*. However, its repeal did not "terminat(e) any right-of-way or right-of-use heretofore issued, granted, or permitted." 43 U.S.C. § 1769(a).

From July 26, 1866 until its repeal on October 21, 1976, Section 9 of the Act of July 26, 1866, codified as 43 U.S.C. § 661 (R.S. 2339), allowed the construction of rights-of-way across and upon the public domain of the United States of America, which included the State of Nevada. Under an 1866 Act right-of-way, a ditch to convey water is established and recognized under state law creating a right-of-use. R.S. 2339 acknowledged and confirmed the rights-of-way already established by local custom and law. *Jennison v. Kirk*, 98 U.S. 453, 460 (1878); *Rivers v. Burbank*, 13 Nev. 398, 1878 WL 3947, slip op 2 (Nev. 1878).

Nevada law recognizes the prior appropriation system for establishing water rights as codified in 1913 under the Nevada General Water Law Act ("Water Code"). *See* NRS Chapter 533. Water rights prior to the 1913 Water Code are established through application of water to a beneficial use under then existing law, and are generally referred to as vested rights. NRS 533.085. A vested right "means simply that a right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provided by the water law, and is a right which is regarded and protected as property." *In re Waters of Duff Creek*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949). "A vested water right becomes fixed and established … either by actual diversion and application to beneficial use or by appropriation … and is a right which is regarded and protected as property." *Hage v. United States*, 51 Fed.Cl. 570, 577 (2002), *quoting*, *In re Waters of Duff Creek*, 66 Nev. 17, 202 P.2d 535, 537 (1949). The diversion to beneficial use can be evidenced by watering livestock directly from the source. *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967); *Hage v. United States*, 51 Fed.Cl. 570, 577 (2002). Nevada law and custom support appropriation of water from the natural stream as a beneficial use for stock watering as well as other purposes. *See Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163, 295 P. 772 (1931).

Though Congress repealed R.S. 2339 on October 21, 1976 via FLPMA § 706, it was specified that any "valid" R.S. 2339 rights-of-way "existing on the date of approval of this Act" (October 21, 1976) would continue in effect. FLPMA § 701(a). *See Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1104 (9th Cir. 2006). R.S. 2339 was self-granting and therefore, application, ratification or approval by the federal government was not required to perfect a R.S. 2339 right-of-way. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1105 (2006); *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (10th Cir. 1988) (relating to R.S. 2477 rights-of-way). Because rights-of-way under the 1866 Act are perpetual and do not require renewal, no authorization under *Federal Land Policy and Management Act* exits or is required in the future. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1105 (2006). Unless a right-of-way holder substantially deviates from the right-of-way the government has no opportunity to step in and regulate. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1105 (2006).

In analyzing whether a ditch right-of-way exists, the United States Federal Claims Court developed a three step process: 1) The court must determine the claimant's interest in the 1866 Act ditches by reviewing claimants, and their predecessors in interest, establishment and use of the 1866 Act ditch; 2) the court must examine the proof submitted for each ditch to determine whether the ditch was established prior to the date when the lands the ditches are on, became part of the public lands administered by the BLM; and 3) the court must determine the extent of the right-of-way. *Hage v. United States*, 51 Fed.Cl. 570, 580-583 (2002).

Consistent with the grant of authority under Section 9 of the Act of July 26, 1866, and Nevada law, SGA and its predecessors-in-interest appropriated water and obtained a right-of-way and related facilities across and upon the public domain of the United States to deliver the water legally appropriated. Construction/location of the place of appropriation predated the conversion of the pertinent public domain via the repeal of said Section 9 (subject to pre-existing rights). As evidenced in the BLM's own regulations, a right-of-way issued under R.S. 2339 is not subject to the BLM's right-of-way regulations in 43 C.F.R. Part 2800. *See* 43 C.F.R. 2801.6(b)(6) (October 1, 2011 Edition). The holder of any R.S. 2339 right-of-way is not required to consult with BLM prior to conducting maintenance within the right-of-way or using the right-of-way in the same manner as it was used on or before October 21, 1976. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1105-1106 (2006).

Here, SGA has at least[23] three valid RS 2339 rights-of-way relevant to the case at hand. First, there is a 1919 water right on Upper Spruce Spring that serves the Upper Spruce Pipeline (Exhibit 56C) and there is also a 1919 water on Lower Spruce Spring that serves the Upper Spruce Pipeline (Exhibits 16, 57A, 57C), and thus an RS 2339 right/claim exists as to the **Upper Spruce Pipeline** (Exhibit 56B) since the Upper Spruce Pipeline was constructed prior to 1976, i.e. 1971. Second, there is a 1919 water right on Lower Spruce Spring (Permit Number 5742)

[23] Under information and belief, SGA understands that Basco Pipeline and Lower Spruce Pipeline were initially constructed in the 1970s, prior to the issuance of the actual RIPs in 1986. SGA continues to research this understanding. If this understanding turns out to be valid, then a RS 2339 right-of-way right/claim exists as to Basco Pipeline and Lower Spruce Pipeline.

(Exhibit 57C), and thus an RS 2339 right/claim exists as to the **Lower Spruce Spring** (to the extent it may exist upon public land) (Exhibit 57A) since the Lower Spruce Spring was constructed prior to 1976, i.e. 1919/1940. Third, there is a 1920 water right on Basco Spring (Permit Number 6173) (Exhibit 58C), and thus an RS 2339 right/claim exists as to **Basco Spring** (Exhibit 58A) since the Basco Spring was constructed prior to 1976, i.e. 1920/1940. Accordingly, given that these RS 2339 rights-of-way constitute private rights on federal land, BLM cannot claim that SGA is liable in trespass to the extent that it implicates these rights-of-way and the maintenance of them.

4. SGA is not liable for trespass on the parcels upon which it has private land.

SGA's trespass liability naturally only extends to the public lands in question here; consequently, SGA cannot be held liable for performing any claimed unauthorized acts on the several parcels of private land on the Spruce Allotment. *See generally* Exhibit 16 (map showing several parcels of private land interspersed within the public land in question on the Spruce Allotment). Specifically, Upper Spruce Spring is on private land. *See* Exhibits 16, 56A; *see also* Exhibit 56C (SGA's 1919 water right on Upper Spruce Spring). In addition, Lower Spruce Spring is on private land. *See* Exhibits 16, 57A; *see also* Exhibit 57B (1940 range improvement permit on Lower Spruce Spring); Exhibit 57C (1919 water right on Lower Spruce Spring). Finally, the Lower Spruce Pipeline is partly on private land. *See* Exhibits 16, 57D; *see also* Exhibit 57E (1986 range improvement permit). This absence of a clear prohibition on blading is also noteworthy in light of certain IBLA precedent:

> Section 2920.1-1 provides: "Any use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part." The authorized uses include "residential, **agricultural**, industrial, and commercial." This section provides for land use authorizations in the form of leases, **permits**, or easements, depending on the circumstances.

Alfred Jay Schritter, 177 IBLA 238, n.14 (2009) (emphasis added) (citing 43 C.F.R. 2920.1-1). Accordingly, the absence of any stipulation, term, or condition specifically prohibiting the maintenance work on these private lands further undercuts BLM's claim of willful trespass.

C. If SGA is in fact liable for any unauthorized activity, SGA is only liable for non-willful trespass because this activity was the product of "mistake or inadvertence."

The foregoing discussion demonstrates that the activities performed by SGA on the Spruce Allotment were all done pursuant to some form of authorization by BLM. For the sake of argument, however, assuming that any maintenance activity was *not* within the existing range improvement authorizations and/or within the discretion exercised by BLM within the context of the existing range improvement authorization, this unauthorized activity does not amount to any willful trespass. On the contrary, at most, SGA's actions would only constitute non-willful

trespass because it would have been "committed by mistake or inadvertence." 43 C.F.R. § 2808.10(c)(2). Assuming that such was the case here, the evidence does not "objectively [show] that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake." *Wayne D. Klump v. BLM*, 130 IBLA 119, 131 (1994). Given BLM's course of conduct outlined above, as well as the absence of any specific prohibition on certain activities (e.g., as contained in SGA's various CA and RIPs), BLM could only claim a non-willful trespass at most.

D. BLM should not use SGA's alleged trespass liability as a grounds for withholding its grazing authorization because a "legitimate dispute" exists.

As stated above, the 2015 BLM Decision intends to suspend all of SGA's current and future grazing authorization "until such time as the trespass damages have been paid in full." *See* Exhibit 1 at 6. In light of the situation described in this Protest as well as SGA's repeated attempts at resolving this ongoing dispute (*see* Exhibits 4, 6), BLM should determine that a "legitimate dispute" exists pursuant to 43 C.F.R. § 9239.7-1(c) so as to maintain/sustain SGA's grazing authorization pending resolution and/or pending adjudication by the Office of Hearings and Appeals. The withholding of SGA's grazing authorization would cause immediate and irreparable harm to SGA and its members.

II. SGA is not liable for damages as alleged by the BLM.

In addition to the trespass liability asserted by BLM under 43 C.F.R. Subparts 2808 and 4140, SGA also protests BLM's determination of damages under 43 C.F.R. Subparts 2920 and 9200. As described below, BLM's determination of $126,699 in damages is far in excess of any amount that can be reasonably claimed. In fact, it is likely that $126,299 far exceeds the fair market value of the claimed 26 public land acres in question, i.e. 4,857.65 per acre.

A. SGA is not liable for any damage because its actions were authorized by BLM.

1. SGA is not liable for $21,085 for "BLM's administrative costs" because its actions do not constitute willful trespass.[24]

There should be no "willful" damages assessed against SGA because the activities that occurred were coordinated with BLM and were performed with the full knowledge of BLM. As described above in Section I.B, SGA is not liable for any willful trespass, largely because BLM has authorized the various activities SGA performed on the Spruce Allotment that form the basis of this trespass claim. Moreover, as described above in Section I.C, even in the worst case, SGA's actions only rise to level of non-willful trespass given that any unauthorized activity

[24] It should be noted that BLM's records do not report such sum, but instead reports a sum of $20,253.13. Exhibit 66. Presently, BLM has not provided SGA with the underlying, supporting documents as to the hours stated in Exhibit 66.

(assuming such could be proven) was the product of "mistake or inadvertence" as per 43 C.F.R. 2808.10(c)(2). Therefore, BLM has no authority under 43 C.F.R. 2920.1-2(a) to claim $21,085 in "administrative costs" as damages.

2. SGA is not liable for $39,402 for treble damages regarding "the market value of 685 trees" because any unauthorized use it performed (assuming such exists) was not willful.[25]

As described above in Section I.B, SGA is not liable for any willful trespass, largely because BLM has authorized the various activities SGA performed on the Spruce Allotment that form the basis of this trespass claim. Moreover, as described above in Section I.C, even in the worst case, SGA's actions only rise to level of non-willful trespass given that any unauthorized activity (assuming such could be proven) was the product of "mistake or inadvertence" as per 43 C.F.R. 2808.10(c)(2). Therefore, BLM has no authority under 43 C.F.R. 2920.1-2(b)(2) to assess treble damages for the alleged loss of 685 trees because SGA's actions were not "knowing and willful." Moreover, SGA denies that the trees in question had much, if any, market value, given that they were largely juniper species. *See* Exhibit 73 at 2. In fact, it is interestingly to note that, under information and belief, BLM spent thousands if not tens of thousands of dollars removing juniper in the last few years immediately adjacent to the area in question. Thus, the claimed damage of $39,402 for 685 trees is unreasonable.

3. SGA is not liable for $1,496 for "rental and associated penalty fees" because SGA utilized a 14-foot blade, not a 20-foot blade proscribed by BLM.[26]

SGA fundamentally disagrees with BLM's determination that 26 acres were implicated by the allegedly unauthorized activities which occurred on the Spruce Allotment. This is because BLM's 26-acre figure appears to be based on the agency's assumption that SGA made an average 20-foot wide corridor during its blading work. *See* Exhibit 1 at page 2. However, this is not the case. SGA only utilized a 14-foot blade not a 20-foot blade, which means that a 20-foot corridor could not have been created by SGA's blading work. *See* Exhibit 61C (photograph showing only 14ft blade on the D8 tractor used). Thus, it is unreasonable of BLM to claim "[r]ental and associated penalty fees for 26 acres" of $1,496 given at least the inaccurate width of the bladed corridor and erroneous 26-acre determination.

[25] While it should be noted that BLM's records do report such monetary sum (*see* Exhibit 67), BLM's own records report that 334 of the trees are of the juniper variety (*see* Exhibits 67, 73). In addition, BLM has not presently provided SGA with the underlying, supporting documents as to the trees stated in Exhibit 73.

[26] It should be noted that BLM stated in Exhibit 1 at page 5 that this amount is calculated from some formula which totals $1,272, but yet the decision seeks $1,496. BLM does not explain the reason for the difference. In addition, presently, BLM has not provided SGA with the underlying, supporting documents as to the acreages figures.

B. Although BLM misstates the degree to which rehabilitation is necessary, SGA is willing to bear the cost of some of rehabilitation work.

1. SGA disputes BLM's determination that 26 acres are in need of rehabilitation; SGA should only be responsible for a portion of this rehabilitation work.

Seeing as BLM's conclusion that 26 acres were impacted by SGA is erroneous, SGA should not be legally responsible for damages [$41,104 (recontouring) + $8,913 (herbaceous reseeding) + $13,098 (mahogany replanting) + $1,600.60 (travel management)] to such an exaggerated area. *See* Section II.A.3 above. *See* Exhibit 68 (earthwork damage claim); Exhibit 69 (herbaceous seeding damage claim); Exhibit 70 (mahogany replanting damage claim); Exhibit 71 (travel management costs).[27]

2. Alternatively, this point is moot because SGA is willing to conduct rehabilitation work regardless of the actual acreage implicated.

Even though BLM inaccurately states that 26 acres were impacted by the allegedly unauthorized activity performed by SGA, SGA is nonetheless willing to conduct rehabilitation work -- recontouring and herbaceous reseeding -- regardless of the actual acreage of the area that was impacted by its maintenance work. Indeed, SGA has always made this position clear throughout its course of conduct; being a relevant part of any maintenance work. E.g. junk/trash removal matter.

C. SGA cannot be held liable for preexisting damage, particularly to the soil profile.

SGA cannot reasonably be held responsible for any damage that was preexisting on the public lands in question. Range infrastructure has been developed throughout this portion of the Spruce Allotment over the course of several decades. The particular range improvements in question deal with range improvement authorizations issued as far back as 1940 and 1986, and water rights extending back to 1919. *See* Exhibits 58A through 58F. As such, a great deal of initial construction and maintenance work has already been done on the public lands in this area over the course of nearly 100-years. Indeed, much of SGA's work in the past two years was merely corrective attempts to maintain existing infrastructure. *See* Exhibits 56E, 57F, 58F (wherein in the files for Upper Spruce Pipeline, Lower Spruce Pipeline, and Basco Pipeline, there are pictures of blading and trenching (with a ripper) within the area in question]. These photographs illustrate previous disturbance.

[27] It should be noted that these amounts appear to assume, among other things, a particular acreage figures. *See* Exhibit 68, 69, 70, 71. In addition, the seeding amount in Exhibit 69 does not add up as related to BLM related seed figures in Exhibits 69A - 69F. In addition, presently, BLM has not provided SGA with the underlying, supporting documents as to the acreage/miles figures cited in Exhibit 68 (earthwork), Exhibit 69 (seeding), Exhibit 70 (mahogany), and Exhibit 71 (travel management).

D. To the extent that SGA was "off-line," there was a mistake of fact and SGA's actions were reasonable.

Although SGA denies that it went "off-line" in blading and re-contouring the springs and pipelines at issue here (see above), in the event that SGA did in fact go off-line, this was not intentional. Rather, SGA contends that any failure to abide by the previous contour line was a non-willful, inadvertent mistake, and that SGA overall performed objectively reasonably in its maintenance work on the pipelines.[28]

III. SGA is prepared to pursue mitigation efforts.

A. SGA is committed to rehabilitation work.

As described in Section II.B.2 above, SGA is and has always been committed to performing the necessary rehabilitation work on the Spruce Allotment.

B. SGA should be allowed to finish the work it has already begun.

Despite BLM's claim of trespass, BLM should allow SGA to finish the maintenance work it has started on the Spruce Allotment so as to fulfill the purposes of the range improvements. SGA has previously cooperated and coordinated with BLM as to the Latham Pipeline in 2014, and both parties recognized the need to complete the maintenance on Latham Pipeline in that particular case. The same reasoning applies to Basco Spring, Basco Pipeline, Upper Spruce Spring, Upper Spruce Pipeline, Lower Spruce Spring, and Lower Spruce Pipeline. *See* Footnotes 11-16. It makes little sense for BLM to piecemeal its approach to range improvements on the Spruce Allotment, particularly given their interrelated function. Moreover, a holistic approach to range infrastructure management would be a practical way of resolving alleged trespass issues without eliminating SGA's grazing authorization under 43 C.F.R. § 9239.7-1. The completion of the maintenance work would allow intended use of the springs and pipelines in the Basco, Upper Spruce and Lower Spruce area for the benefit of permitted livestock, wild horses, and wildlife, as well as the public lands in general.

CONCLUSION – REQUEST FOR RELIEF

Based upon the foregoing, SGA requests that no final decision be issued; that BLM respond to SGA's FOIA Request dated September 17, 2015 (Exhibit 2B); that BLM *meet and confer* with SGA to resolve the matter; that BLM authorize SGA to complete the maintenance on Latham Spring and Pipeline; that BLM authorize SGA to complete the maintenance (including what BLM's characterizes as "recontouring" and "reseeding") on Basco Spring, Basco Pipeline, Upper Spruce Spring, Upper Spruce Pipeline, Lower Spruce Spring, and Lower Spruce Pipeline (*see* footnotes 11-16); and that BLM otherwise lift its "cease and desist" letter to allow SGA to

[28] SGA disagrees with BLM's conclusion in the 2015 BLM Decision that SGA was not even remotely within the vicinity of the original pipelines. *See* Exhibit 1 at 2.

continue its maintenance on the authorized range improvements within the Spruce Allotment, as prescribed by its Grazing Permit.

Very truly yours,

Spruce Grazing Association, LLC

By _____
Clay Nannini

Enclosures: CD of Exhibits 1 – 73