

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

JAN 13 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SILVER DOLLAR GRAZING  
ASSOCIATION, a Montana corporation,  
on its behalf and on behalf of its members,

Plaintiff - Appellant,

v.

UNITED STATES FISH AND  
WILDLIFE SERVICE, an agency of the  
United State Department of the Interior;  
GAIL NORTON, in her official capacity  
as Secretary of the Interior; H. DALE  
HALL, in his official capacity as Director  
of the U.S. Fish & Wildlife Service;  
MITCH KING, in his official capacity as  
Acting Director of the Mountain-Prairie  
Region of the U.S. Fish & Wildlife  
Service; BARRON CRAWFORD, in his  
official capacity as Refuge Manager of the  
Charles M. Russell National Wildlife  
Refuge,

Defendants - Appellees.

No. 07-35612

D.C. No. CV-06-00002-SEH

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Montana

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Sam E. Haddon, District Judge, Presiding

Argued and Submitted December 10, 2008  
Portland, Oregon

Before: O'SCANNLAIN, GRABER, and BYBEE, Circuit Judges.

The Silver Dollar Grazing Association ("SDGA") appeals the district court's decision granting summary judgment to the United States Fish and Wildlife Service ("Service") on SDGA's claims under the Administrative Procedure Act ("APA"), which asserted that the Service was arbitrary and capricious in violating the National Environmental Policy Act ("NEPA"), Executive Order 7509, and the Silver Dollar Habitat Management Plan ("SDHMP"). We affirm.

The facts and procedural history of this case are familiar to the parties, and we do not repeat them here. We review the district court's grant of summary judgment de novo. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

## I

### A. *NEPA*

A plaintiff who brings a claim under the APA for a violation of NEPA does not have standing to sue unless the interests he seeks to vindicate are within the "zone of interests" protected by NEPA. *Cantrell v. City of Long Beach*, 241 F.3d

674, 679 (9th Cir. 2001). Thus, because NEPA was intended to protect the environment, the harm a NEPA plaintiff asserts must “have a sufficiently close connection to the physical environment.” *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983). In contrast, “a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA.” *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993).

SDGA has not adequately alleged an injury-in-fact that is not economic in nature. Because the injury asserted is procedural, SDGA, to show a cognizable injury-in-fact, must allege that “(1) the [Service] violated certain procedural rules; (2) these rules protect [SDGA’s] concrete interests; and (3) it is reasonably probable that the challenged action will threaten [SDGA’s] concrete interests.” *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 969–70 (9th Cir. 2003). Because SDGA’s standing was challenged in the context of summary judgment, it must demonstrate each element “with the manner and degree of evidence required” under Federal Rule of Civil Procedure 56(e). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Assuming that SDGA has “adduce[d] sufficient facts to show” a procedural violation and a concrete environmental interest (in recreation), *Better Forestry*, 341 F.3d at 969–70, it has

failed to provide any evidence that the alleged procedural violation will threaten the organization's interests in the environmental health of the land. The evidence in the administrative record indicates at most that the prescriptive grazing alternative chosen by the Service would not improve forage conditions for sharp-tailed grouse and pronghorn antelope. It does not indicate that prescriptive grazing would *harm* the forage conditions for either species. *See Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 953 (9th Cir. 2006). The potential environmental harms SDGA asserts—such as an increased risk of forest fires and an increased probability of a “vegetative monoculture”—assume that grazing will never be permitted. The prescriptive plan, however, allows the Service to permit grazing whenever it determines that such problems are independent.

B. *Executive Order 7509*

We may review a claim under the APA asserting that an agency violated an executive order where the order has the force of law—that is, where it is explicitly promulgated “pursuant to constitutional or statutory authority” and does not contain language indicating that it was merely intended to be “issued as a housekeeping measure.” *Legal Aid Soc’y of Alameda County v. Brennan*, 608 F.2d 1319, 1330 n.14 (9th Cir. 1979). Executive Order 7509 was enacted “pursuant to

the authority vested in [the President] by” the Pickett Act of 1910, ch. 421, 36 Stat. 847 (codified as amended at 43 U.S.C. § 141). Exec. Order No. 7509, 1 Fed. Reg. 2482 (Dec. 11, 1936). The order contains no language suggesting it was intended to be merely an internal directive. Thus, we may review the agency action pursuant to Executive Order 7509.

The Service argues that its compliance with Executive Order 7509 is unreviewable because the order commits agency action to agency discretion by law. *See* 5 U.S.C. § 701(a)(2). The order, however, does not fall within this narrow exception to reviewability. Far from granting discretion incapable of judicial review, the order provides specific numerical maximums for sharp-tailed grouse and pronghorn antelope, beyond which the agency has no power to elevate wildlife forage interests above domestic grazing interests. *See Schwenke v. Sec’y of Interior*, 720 F.2d 571, 575 (9th Cir. 1983). Thus, this is not a case where “a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) (internal quotation marks omitted).

Nevertheless, although the Service’s Final Environmental Assessment (“EA”) did not conduct an inventory of the grouse or antelope populations inhabiting either the Charles M. Russell National Wildlife Refuge or the Silver

Dollar Allotment, its failure to do so was not “arbitrary, capricious, . . . or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In somewhat analogous cases involving the responsibility of the Forest Service to conduct population counts pursuant to the National Forest Management Act’s (“NFMA’s”) directive to ensure “viable populations” of certain endangered species, *see* 36 C.F.R. § 219.19 (2000), we have held that the Forest Service may analyze habitat as a proxy for population, *see Lands Council v. McNair*, 537 F.3d 981, 997–98 (9th Cir. 2008) (en banc); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 761 (9th Cir. 1996). In this case, although the population requirements are substantially more definite than those promulgated under the NFMA, it is reasonable for the Service to interpret Executive Order 7509 to allow an analysis of forage quality to approximate a simple head-count. The order directs the Service to create a “balanced wildlife population” and the SDGA has not raised any concerns that the habitat monitoring methods employed would not accurately approximate the wildlife population. *Cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647–50 (1990).

C. *The Silver Dollar Habitat Management Plan*

Although certain agencies tasked with preserving the environment are subject to a statutory scheme that mandates compliance with habitat management

plans, *see, e.g.*, 43 U.S.C. § 1732(a) (governing habitat management plans created by the Bureau of Land Management); 16 U.S.C. § 1604(i) (governing habitat management plans created by the Forest Service), no such statutory authority binds the discretion of the Service. The Service’s internal manual does indicate that the Service will create habitat management plans and govern accordingly, *see* Serv. Man. 620 FW 1, but an internal manual “does not act as a binding limitation on the Service’s authority,” *United States v. Doremus*, 888 F.2d 630, 633 n.3 (9th Cir. 1989). Thus, the SDGA has not presented any statutory authority by which the Service is compelled to act on statements in a habitat management plan.

Moreover, even if such statutory authority existed, the monitoring statements within the SDHMP do not create any duty on the part of the Service to conduct monitoring exactly as anticipated in the plan. In *Norton v. Southern Utah Wilderness Alliance* (“*SUWA*”), 542 U.S. 55, 72 (2004), the Supreme Court held that “‘will do’ projections of agency action set forth in land use plans[ ]are not a legally binding commitment enforceable under [5 U.S.C. ]§ 706(1).” Under *SUWA*, the SDHMP’s language asserting that habitat changes in the Refuge “will be evaluated” according to certain monitoring techniques cannot be the basis for a suit under 5 U.S.C. § 706(1). Thus, we will not allow a plaintiff to subvert the commands of *SUWA* by finding that a mere failure to follow a plan’s aspirational

monitoring guidelines is necessarily arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A).

## II

For these reasons, the judgment of the district court is **AFFIRMED**.