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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

| | |
|---|---|
| **WESTERN EXPLORATION LLC, ET AL.**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**U.S. DEPARTMENT OF THE INTERIOR, ET AL.**<br><br>**Defendants, and** | Case No. 3:15-cv-00491-MMD-VPC<br><br>**PLAINTIFFS' SURREPLY IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** |

**THE WILDERNESS SOCIETY, et al.**

**Intervenor-Defendants.**

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## I. The Challenged Action Threatens Plaintiffs' Concrete Interests.

Defendants incorrectly assert that two Supreme Court decisions have, *sub silentio*, overturned the established rule relaxing the immediacy requirement for standing. ECF 95 at 1-2 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138 (2013)). Article III Standing requires an injury be concrete, particularized, and imminent; traceable to the challenged action; and redressable by a favorable ruling. However, "plaintiffs seeking to enforce a procedural requirement the disregard of which could impair" their separate concrete interest "can establish standing without meeting all the normal standards for immediacy." *Citizens for Better Foresty v. USDA*, 341 F.3d 961, 972 (9th Cir. 2003); *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007) ("[A] litigant to whom Congress has 'accorded a procedural right to protect his concrete interests . . . can assert that right without meeting all the normal standards for redressability and immediacy.'"); *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 n.3 (9th Cir. 2001). The plaintiff "must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," and must "establish the reasonable probability of the challenged action's threat to [his] concrete interest." *Citizens*, 341 F.3d at 969.

The Ninth Circuit has rejected the argument that *Summers* "repudiated" the "reasonable probability" standard, holding that "*Summers* reaffirmed the unique nature of procedural injuries—namely, that a plaintiff seeking to enforce procedures that protect his concrete interests may do so 'without meeting all the normal standards for redressability and immediacy.'" *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011). *Summers* did not impose a new immediacy requirement for procedural injuries but merely recognized that a plaintiff alleging a procedural injury must show that a concrete interest is threatened by the challenged action. The *Clapper* case does not involve standing for procedural injuries as plaintiffs there challenged the *substance* of a federal statute on constitutional grounds. 133 S. Ct. at 1146. Because the challenge was not procedural, the immediacy standard was not relaxed and the court ruled that "allegations of possible future injury are not sufficient" to establish imminent injury

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when the imminence requirement applies to **non**-procedural injuries. *Id.* at 1147. *Clapper* did not address procedural injuries, and did not up-end decades-old Supreme Court jurisprudence allowing plaintiffs asserting procedural violations to do so "without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

## II. The Counties and the Ninety-Six Ranch Have Standing

As previously asserted, "injury to [a county's] proprietary interest in revenues" is sufficient for standing purposes. ECF 83. The NVLMP results in the counties receiving less tax revenue from the sweeping land closures, which Defendants concede are final decisions. The grazing restrictions result in decreased County revenue as specified in the county-specific economic data the Counties provided through the NEPA process and consistency review that the Agencies ignored and failed to properly analyze. ECF 83 p. 31; **Ex.** 1, Goicoechea Dec.; NV 86212, 56516, 56463, 56533, 58757, 58760, 58762, 63937, 63959. The FEIS even recognized that local tax revenues may be "substantially affected in specific areas that would experience dramatic reductions in economic activity." NV 80759. Yet, Defendants undertook no meaningful analysis of the impacts of such dramatic reductions in economic activity. Because the Counties will have lower tax revenue as a result of Defendants' actions, they have sufficiently demonstrated injury to their proprietary interest for standing purposes. The Counties also have asserted harms within the NEPA and FLPMA zones of interest given the interference with their sovereign powers such as land use planning, road maintenance and repairs and protection of the public health and safety. [Ex. 1; **Ex.** 2, Gary Perea Dec.; **Ex. 3** (BLM Economic Impact Summary June 2015, prepared by BLM economist Josh Sidon for Sarah Greenberger, counsel to Secretary Jewell, estimates a loss of $31 million and 493 jobs annually for livestock, oil and gas, geothermal and wind in Nevada, stating that Nevada bore the largest impact from reduced wind energy development, with Elko and White Pine Counties hit the hardest). WO 28179-80. The Sidon analysis provided in Ex. 3 was not included in the FEIS, but concedes that it may not adequately account for economic and social impacts that some communities could experience during implementation WO 28180, which was not disclosed in the FEIS. Because this



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analysis does not account for losses resulting from the mineral withdrawals, it significantly underestimates the direct, indirect, and cumulative socioeconomic impacts to Plaintiffs.[1]

Defendants acknowledge in the FEIS the new restrictions could increase the risk of fire. NV 80525. Defendants recognize fire as a primary threat to GSG habitat and the Ninth Circuit has held that an increased risk of wildfire is sufficient to support standing. *Delta Water Agency v. United States*, 306 F.3d 938, 949-50 (9th Cir. 2002) ("the increased risk of wildfire was . . . substantial . . . [and] the incremental risk is enough of a threat of injury to entitle plaintiffs to be heard"). The Counties and the Ninety-Six Ranch have demonstrated environmental injury through the increased risk of destruction of GSG habitat.[2] Plaintiffs have concrete interests and a reasonable probability that the NVLMP threatens these interests. *Citizens*, 341 F.3d at 969-70. The immediacy requirement for standing does not apply to their procedural claims. *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007).

The Counties cannot predict when an emergency road repair will be necessitated, but can predict that emergencies will occur and their need for flexibility to respond. The White Pine County cattle guard and the Eureka County gravel pit examples in Plaintiffs' Reply put the public safety at risk and interfered with the Counties' sovereign powers and demonstrate harm. Ex. 1. Defendants argue that the Counties "suffer no cognizable injury from the federal government's decision to manage its own lands," but the Ninth Circuit has recognized proprietary interests the counties have in enforcing their own planning and regulations. Local governments have cognizable injuries, for standing, in their "ability to enforce land-use and health regulations"; "powers of revenue collection and taxation"; and "protecting [their] natural resources from harm." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198 (9th Cir. 2004). The

[1] A reviewing Court may consider extra-record evidence where, as here, admission of such evidence is necessary to determine whether the agency has considered all relevant factors and has explained its decision. *San Luis & Delta Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014).

[2] Defendants deny (for litigation purposes) that an increased fire risk exists, but that is a merits question that should not be resolved in deciding whether Plaintiffs have standing. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) ("A court may not resolve genuinely disputed facts [at the jurisdictional stage] where the question of jurisdiction is dependent on the resolution of factual issues going to the merits.").



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Ninth Circuit has "found constitutionally sufficient injury to proprietary interests where 'land management practices of federal land could affect adjacent [county]-owned land.'" *Id.* The Counties have identified numerous components of their planning and management function that are adversely impacted by the NVLMP. ECF 67, p. 42; ECF 67-2, ¶¶ 2, 13, 23, 24; ECF 67-3, ¶¶ 6, 13, 17, 22).

**III. Western Exploration ("WEX") and Quantum Have Standing**

The SFA is a final action[3] that identifies the boundaries for the withdrawal and the immediate segregation – which closed all lands within the SFA to location of mining claims. WEX and Quantum suffered harm from inclusion of the SFA and the segregation which has severely constrained their ability to secure funding for operations[4]. Defendants do not contest these companies have experienced substantial difficulties raising necessary capital following inclusion of their projects within the SFA, but erroneously argue that this injury is insufficient for standing because the harm is caused by third-parties. Because Defendants' actions are a "substantial factor" in the increased costs and losses sustained, the companies do have standing. To establish injury-in-fact for standing, "the plaintiff must offer facts showing that the government's unlawful conduct is at least a substantial factor motivating the third parties' actions," and that the plaintiff's injury was "not the result of the *independent* action of some third party." *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014). A plaintiff shows standing if they do not rely on 'speculation' about the third parties' motivations. *Id.* Defendants' placement of these lands within the SFA led to WEX's and Quantum's inability to raise capital. Defendants' unlawful action was a "substantial factor" in harming the companies.

**IV. The State of Nevada Has Standing**

Defendants admit that over 3,700 mining claims are located in SFAs and the state will sustain decreased revenue but erroneously argue this harm is too insignificant to establish

[3] The EIS BLM is preparing to evaluate the proposed mineral withdrawal will not consider an alternative to change the boundaries of the SFA because the "SFA boundaries were established in the RMPAs."

[4] The *Schlumberger* Declaration (ECF 86-1 and copy to be filed under seal) details the significant adverse effect the inclusion of Gravel Creek in the SFA has had on WEX's ability to raise capital and value. The Gustin Declaration (ECF 82-14) explained Quantum lost its interest in the lands at issue.



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Nevada's standing. ECF 95 at 13 & n.17. An "'identifiable trifle'" is sufficient to "satisfy[] standing's injury in fact requirement." *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008). Even if Defendants were right that the economic impact to the state will be exceedingly minor (they are not; *see* ECF 83 at 14-15), that is still sufficient to establish standing. Nevada's standing is further supported by its status as a state. Nevada "is entitled to special solicitude in [the Court's] standing analysis" as a state seeking to protect its "quasi-sovereign interests" and vindicate a "procedural right." *Massachusetts*, 549 U.S. at 520. Defendants cite no authority that supports dismissing a state's procedural claim against the federal government because the state's harms are not big enough. Furthermore, because plaintiffs identify a procedural injury under NEPA, the "concrete interest" Nevada must show for standing is a "geographic nexus" between Nevada "and the location suffering an environmental impact." *Cantrell*, 241 F.3d at 679 (the geographic nexus test is the same as the concrete interest test). The geographic nexus between Nevada and the area affected by the NVLMP is self-evident and Defendants do not dispute it. States need not satisfy the traditional requirements of standing. *Massachusetts*, 549 U.S. at 498 (States have a special position and interest as "a sovereign State and not, as in *Lujan*, a private individual"). Thus decisions relied on by BLM such as *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2006) are inapposite.[5]

Defendants' discussion of mining claim fees is incorrect as is their assertion that the State's loss of revenue is *de minimis*. There are two annual fees upon which NDOM relies: the recording fee and each filing pursuant to NRS 517.050, 517.080, 517.110, 517.140, 517.170, 517.200, and 517.230 requiring a filing fee under NRS 513.094 ($4.00/claim) and NRS 517.185 ($6.00/claim). The county recorder collects the filing fees and deposits them monthly with the county treasurer who pays the money quarterly to NDOM. The NRS 513.094 fee goes toward NDOM's Abandoned Mine Lands Program which provides critically important funds to help

[5] *Ashley Creek* involved a private entity "situated 250 miles from the project location, and the only interest articulated was an economic interest in preventing mining by prospective competitors." *Northwest Environmental Defense Center v. Owens Corning*, 434 F.Supp.2d 957, 969 n. 8 (D. Or. 2006) (*distinguishing Ashley Creek*); *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992) (acknowledging state standing based upon an alleged "direct injury in the form of a loss of specific tax revenues").



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secure abandoned mines that pose a threat to public safety.[6] Defendants unlawfully failed to analyze these economic impacts in the NEPA process, ignored them in the FLPMA consistency review and now incorrectly deny that they exist. ECF 95 at 13 n. 17 ("mining claim location and maintenance fees are paid to the BLM, not the state"). These defects require vacatur.

## V. Plaintiffs' Claims Are Ripe for Determination

In post-*Ohio Forestry* cases, the Ninth Circuit held that procedural challenges under NEPA are "ripe for immediate judicial review" once the procedural failure occurs. *Laub v. Dep't of Interior*, 342 F.3d 1080, 1089-90 (9th Cir. 2003); *Sierra Forest v. Sherman*, 646 F.3d 1161, 1179 n.2 (9th Cir. 2011). *Ohio Forestry* recognized the ripeness of procedural claims. 523 U.S. 726, 737 (1998) (a person injured by a NEPA violation may immediately complain of that failure, for the claim never gets riper.). *Ohio Forestry* does not preclude Plaintiffs' challenges to the NVLMP which causes immediate harm. In *Ohio Forestry*, the plaintiffs argued that certain harms, including closed roads, would occur immediately under the plan. 523 U.S. at 738. The Court refused to consider the argument because it was not made below, but recognized, and the government conceded, "that if the Sierra Club had previously raised these other kinds of harm, the ripeness analysis in this case . . . would be significantly different." *Id.* Here, too, the NVLMP requires certain land closures, grazing restrictions, and other restrictions (such as lek buffers) that are harms currently sustained by Plaintiffs. ECF 83, pp. 4-6, 16, 17. Defendants acknowledge the land closures are immediate but argue no Plaintiffs are harmed – that is untrue as the Counties presented evidence to the Agencies during the NEPA and FLPMA process of their significant harms from these closures which the Agencies ignored.

## VI. Plaintiffs' Challenge to the Withdrawal Notice Is Properly Before the Court

Defendants erroneously argue the Withdrawal Notice is not final agency action subject to review and is a distinct act not properly challenged in this lawsuit. Courts "take a pragmatic and flexible view of finality." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967); *Oregon Natl*

[6] *See* **Ex. 4** (letter from Nevada's Legislative Counsel to Administrator Rich Perry transmitting the revised regulation, Nev. Admin. Code 513.063 and 513.094 to increase this fee.). Plaintiffs request that the Court take judicial notice of this document pursuant to FRE 201(b)(2).



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*Desert Ass'n v. USFS*, 465 F.3d 977, 982 (9th Cir. 2006). "In determining whether an agency's action is final, we look to whether the action 'has a direct and immediate effect on the day-to-day operations' of the subject party, or if 'immediate compliance with the terms is expected.'" *Or. Natl Desert Ass'n*, 465 F.3d at 982. The Withdrawal Notice "has a direct and immediate effect on the day-to-day operations" of WEX and Quantum. By its own terms, the Withdrawal Notice "immediately segregate[s] from location and entry under the Mining Law" the designated lands. 80 Fed. Reg. 59858, 59878 (Oct. 2, 2015). Claim owners cannot adjust the location of their claims or locate new claims. WEX and Quantum have already sustained financial harm. Defendants' speculation that BLM could take different future action does not preclude the segregation's finality or remedy the ongoing harm from the segregation of more than 2.8 million acres in Nevada, including WEX's and Quantum's claims. In *Oregon Natural Desert Ass'n*, annual operating instructions to grazing permit holders that changed their conditions from year to year were considered final agency action. 465 F.3d at 984-85 (finding the operating instructions were a "consummation" of the agency's decision making process even though "the Forest Service reserved the right to impose additional terms and conditions"). A "pragmatic and flexible" view of the Withdrawal Notice clearly means it is ripe for review.

Defendants' argument that the Withdrawal Notice is an independent agency action that is not challenged by this lawsuit is similarly groundless. Defendants cite no authority for their argument that an agency action that causes direct harm to the plaintiffs and is compelled by the exact process the Plaintiffs challenge is somehow insulated from judicial review. Nor do Defendants respond to Plaintiffs' cited authority that courts may hear challenges to programmatic management decisions that taint future projects or decisions. ECF 83 at 22-23. Defendants have presented no evidence that the Withdrawal Notice was distinct from the NVLMP, because it was not. The NVLMP contained withdrawal recommendations, and identified the SFA boundary which was then used to identify the lands proposed in the Withdrawal Notice just two days later. Defendants' attempt to separate the two actions is belied by common sense and their own use of the SFA boundary for the Notice of Withdrawal.



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Defendants' argument that the Withdrawal Notice[7] contained all necessary information confuses the requirements of a notice and an application. 43 C.F.R. § 2310.3-1(a) specifies what must be contained in a notice of a withdrawal proposal: if the petition and application are submitted together, the notice must contain the information in 2310.3-1(b); if the proposal is without an application, the notice must contain the information in 2310.1-3. Either way, the application's required contents are unchanged, and are governed by 43 C.F.R. 2310.1-2(c). The Notice includes a conclusory statement that "no suitable alternative sites for withdrawal" exist – based on the NVLMP, the factually incorrect FEIS (which ignores NDOW's comments that the SFA excludes important habitat NV 14990, NV 90313-14) and the procedurally flawed NEPA process that Plaintiffs challenge. BLM was obligated at the petition/application stage to consider viable alternative withdrawal sites that had high habitat value and low mineral potential like the lands delineated on the maps in Governor Sandoval's January 2016 scoping comments on the withdrawal EIS, which identified low-priority habitat within the SFA and high-priority habitat near the SFA that if withdrawn from mineral entry would protect 47 GSG leks (ECF 67-8 at 7). Instead, the petition dismisses the alternatives analysis requirement saying it was "not applicable as these are the identified GRSG critical habitat areas." (WO 65798). The material omission from the Withdrawal Notice of an alternatives analysis is a direct result of the factual errors in the FEIS and procedural flaws in the LUPA process and demonstrates the connection of the processes. In addition, Defendants still must show that the Application contained the necessary detail under 2310.1-2(c) -- analysis of whether alternative sites were available and a "study comparing the projected costs of obtaining each alternative site" for the intended use, and projected costs of obtaining and developing each alternative site for uses the requested withdrawal would displace. 43 C.F.R. § 2310.1-2(c)(12). Defendants have failed to point to any document in that contains such a study. In fact, no such study was performed because when

[7]The three paragraphs in the Notice do not provide adequate information to satisfy the 43 C.F.R. § 2310 requirements for an application. The petition presents outdated and unreliable data from the USGS Mineral Resources Data System (MRDS), which BLM's locatable minerals expert criticized as "highly variable in quality and contain[ing] out of date information." WO 67490, ECF 67, p. 29 and ECF 67-14, showing the USGS' MRDS website which cautions users that the data are "somewhat problematic."



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WEX notified BLM of its new discovery at Gravel Creek, one of the top three gold discoveries in the United States that is entirely within the withdrawal area, BLM responded that this was "programmatic level planning" and it need not consider such information. NV 88931. To the contrary, Defendants were required to analyze in the LUPA process the impacts associated with withdrawing such an important gold deposit as a connected action because the NVLMP clearly was the basis for the Defendants' conclusion that the lands within the SFA boundary were those necessary for the proposed conservation use that led to the withdrawals.[8] The Application is defective and the withdrawal should be vacated. 43 C.F.R. 2310.1-2(d).

**VII. Defendants Violated FLPMA, NFMA, and MUSYA**

BLM's inadequate information in the Withdrawal Notice violates its regulations. FLPMA's directives to provide "domestic sources of minerals" from the public lands, 43 U.S.C. § 1701(a)(12), and the need to achieve a "balanced and diverse resource uses that takes into account the long-term needs of future generations for" resources including minerals, 43 U.S.C. § 1702(c), required BLM to evaluate alternatives to balance GSG habitat conservation with mineral development activities before selecting lands to propose for withdrawal. High-value habitat co-located with areas of low mineral potential, such as those suggested in Governor Sandoval's January 2016 letter (ECF 67-8), which are based on existing information that was available to BLM, are viable alternatives that BLM was required to analyze.

Defendants attempt to impose a new standard for "unnecessary or undue degradation" ("UUD") that is completely untethered from FLPMA and BLM's regulations. The statute itself rejects a "net conservation gain" standard, as "FLPMA prohibits only unnecessary and undue

[8] While the Defendants argue in this proceeding that the Withdrawal is an independent action, they repeatedly connect the withdrawal with the LUPA process emphasizing the importance the Agencies placed on the withdrawal, starting with the October 2014 Ashe memo to BLM (WO 16206) and BLM's continual emphasis on land use allocations that put lands off-limits to mining and other uses (NV13670–72, NV13661). This was the primary difference between the LUPA and the Nevada Plan. NV81058 (FEIS Chapter 6 page 6-28). The PLUPA includes the SFA withdrawal zones and the State Plan does not rely on putting lands off limits to mining or other activities to achieve its GSG conservation objectives. Responding to FWS' demands for withdrawal zones, BLM declared the State Plan inconsistent with the PLUPA despite that both the PLUPA and the Nevada State Plan have consistent purposes and different methodologies. BLM made no attempt to a find a middle ground to minimize the differences in approach.



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degradation, not all degradation." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011). BLM's 43 C.F.R. 3809 regulations define UUD applicable to locatable minerals, and do not include any net conservation gain requirement. These regulations expressly recognize that activities that are "'reasonably incident' to prospecting, mining, or processing operations" do not constitute unnecessary or undue degradation. 43 C.F.R. § 3809.5; accord 43 C.F.R. § 3809.415. Net conservation gain, which requires Plaintiffs to leave the area better than they found it, is contrary to FLPMA and BLM's regulations and should be rejected. *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) ("Having chosen to promulgate a [regulation], the [agency] must follow that policy."). Such "…an [u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars, LLC v. Navarro*, 579 U.S. at ___, Slip Op. at 9-10 (2016). Top officials were concerned that the new net conservation gain standard recommended in the 2014 USFWS report entitled "GSG Range-wide Mitigation Framework Version 1.0." exceeded the Secretary's FLPMA authority and advised Secretary Jewel that "BLM is attempting to resolve this issue while staying within the bounds of FLPMA authority that limit the bureau's ability to require compensation beyond the impact on a project level." WO 34987. Defendants inappropriately dismiss this email, which came from the Secretary's top advisors.

Although BLM has discretion to define what constitutes UUD for particular categories of land uses the agency is not authorized to reinterpret UUD to require net conservation gain without so much as a rulemaking. Plaintiffs do not conflate UUD in the 43 C.F.R. 3809 regulations to represent the limits of BLM's authority under FLPMA but instead cite the regulations to describe how BLM defines the actions necessary to prevent UUD at non-discretionary projects. ECF 83, at 38. For discretionary activities like wind energy or solar developments BLM has authority under FLPMA to interpret UUD differently; however, regardless of whether an activity is discretionary or non-discretionary, FLPMA does not authorize BLM to interpret UUD to mean that activity must improve the landscape or GSG habitat. The FEIS defines "net conservation gain" to mean "[t]he actual benefit or gain above



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baseline conditions," NV 81173, which is dramatically different from the FLPMA UUD standard, which implies that some degradation is necessary or due in order for the FLPMA list of multiple uses to occur. Responding to Governor Sandoval's GCR, BLM states that the new mitigation standard involves "additionality" (NV 90261). UUD does not mean zero impact, does not authorize "additionality," and cannot require that public land uses benefit the lands.

**VIII. Defendants Violated NEPA**

The switch from "no net loss" in the DEIS to net conservation gain in the FEIS violates NEPA because it was not subject to NEPA review and comment. (ECF 67, pp. 12, 13, 15, 16, 18, 19). The agencies' late-stage decision to make this change was issued "without the reasoned explanation that was required in light of the [ ] change in position and the significant reliance interests involved" which was required for this substantial change to "decades of industry reliance on the … prior policy." *Encino,* Slip Op. at 10. "This lack of reasoned explanation for a regulation that is inconsistent with the [Agency's] longstanding earlier position results in a rule that cannot carry the force of law." *Id.,* Slip Op. at 12. Because the shift from no net loss to net conservation gain is a significant departure from longstanding regulations and policies and is a procedurally defective addition to the FEIS and NVLMP, it gets no *Chevron* deference. *Id.* at 8.

The Coates SFA maps in NV 139030 undermine Defendants' claims that the SFA reflects the best available science. Some of the Coates Map habitat classifications shown on the upper map were ignored and GHMA, OHMA, and non-habitat were turned into PHMA (NV 5523) and included in the SFA (lower map). The map shown in NV 5834 (**Ex. 5**) does not support Defendants' contention that GHMA, OHMA, and non-habitat within the SFA are "pockets within or adjacent to high-priority habitat" and instead shows significant GHMA, OHMA, and non-habitat that are not adjacent to PHMA, especially in eastern Elko County and central Humboldt County where these areas are not "pockets" but occur along the margins of the SFA.

Defendants improperly segmented the analysis of the impacts of the mineral withdrawal

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and the other restrictions in the LUPA.[9] The segregation of the SFA stems directly from the NVLMP and is a connected action that the agencies were required to evaluate in the FEIS. Defendants' assertions that the FEIS does evaluate socioeconomic impacts to mining are incorrect. The FEIS cumulative impacts analysis omits mining in the list of employment sectors (Table 5-49, NV 81023) and inappropriately defines mining employment as geothermal and oil and gas: "The difference in mining employment by alternative (only geothermal and oil and gas) would represent only a very small share of mining related employment." NV 881024. The agencies cannot use geothermal and oil and gas employment as proxies for mining employment. In doing so, they failed to evaluate cumulative socioeconomic impacts for mining.

The cursory and inaccurate discussion of direct, indirect and cumulative impacts to mining in the FEIS violates NEPA, focuses solely on increased costs associated with validity exams (NV80749, 81007), and misrepresents the segregation's and proposed withdrawal's

[9]BLM responds that it has not improperly segmented NEPA review because withdrawal of lands from mineral entry has utility independent from that of the LUPA. This argument misstates the test for improper segmentation. "Segmentation is addressed only indirectly in the definition of scope in CEQ regulations for EISs, . . . [and] the rule against segmentation has developed through common law . . . ." M.E. Rigney, *Exploring the D.C. Circuit's Improper Segmentation Analysis in Delaware Riverkeeper Network v. FERC*, 64 Am. U. L. Rev. 1465, 1479 (2015). BLM cites one case, *Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (2006), to counter the claim of segmentation and argues "[t]he test" for whether decisions are improperly segmented is "whether the two actions have independent utility." Reply at 24. In *Great Basin Mine Watch*, the court examined two physically separate mining operations determined by BLM "to have very little connectedness." 456 F.3d at 970. The instant case presents connectedness like that in *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir.1998), where "five potential logging projects in the same watershed were cumulative and had to be evaluated in a single EIS, where they were reasonably foreseeable and 'developed as part of a comprehensive forest recovery strategy.'" *Great Basin Mine Watch*, 456 F.3d at 469. The comprehensive GSG strategy here includes both the withdrawal of lands, and the LUPA. Actions like these are connected when they "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(iii). Moreover, independent utility is not the only test. BLM made the same failed "independent utility" argument in *Western Land Exchange Project v. BLM*, 315 F.Supp.2d 1068 (D. Nev. 2004) where the two actions under consideration were "'related to each other closely enough to be, in effect, a single course of action' requiring analysis in the same NEPA document." 315 F.Supp.2d at 1090. Even if the projects are not "connected" within the meaning of NEPA, the indirect effects from development were clearly foreseen, and their analysis should not have been deferred until some other document was produced at some later date. *Id.* Other formulations of the appropriate test are used to identify improper segmentation: proposals for actions that will have cumulative or synergistic environmental impact upon a region pending concurrently before an agency must be considered together. *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014). Just because the land withdrawal is not an accomplished fact does not excuse the analysis, either. BLM need not foresee the unforeseeable, but reasonable forecasting and speculation is "implicit in NEPA." *Id.* at 1310.



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impact (both connected actions) on claimants who stand to lose their claims and any ability to conduct future mineral activities. There is no discussion of how the segregation and proposed withdrawal directly threaten to extinguish claimants' rights under the Mining Law and the viability of their businesses or disclose the hardships to claimants whose abilities to expand their operations would be greatly constrained or eliminated by the segregation and proposed withdrawal. The cost of the validity exam is trivial compared to the loss of their businesses and forfeiture of investments ($32 million for WEX, ECF 67-4 ¶ 4) made on their claims if the lands are withdrawn. Although the FEIS notes the importance of mining employment in the Counties (mining accounts for 22.2% of Elko Co. employment and 31.7% in Humboldt Co.), NV 80309, it does not assess the impacts to this employment from withdrawing the 2.8-million acre SFA.[10]

The FEIS is fatally flawed because it omits a Reasonably Foreseeable Development ("RFD") scenario that evaluates future production of locatable minerals in the planning area – despite that elsewhere the FEIS states "New locatable mineral development in the planning area is most likely to occur in proximity to existing mines and previously mined areas…the impact analysis focuses on existing mines as an indicator of areas of likely future development." NV 80636. NEPA required BLM to evaluate RFDs. 40 C.F.R. 1508.7. Plaintiffs' assertions that the socioeconomic impact analysis is fatally flawed and violates NEPA rest on the FEIS omitting a complete and correct direct and indirect impact analysis (Chapter 4) and mining from the cumulative impacts analysis (Chapter 5). Defendants mischaracterize Plaintiffs' discussion of the shortcomings in the FEIS, alleging there is no authority "requiring such a [detailed] analysis" and attempt to use the discussion about mining employment in Chapter 3 to deflect the glaring deficiencies in Chapters 4 and 5. These deficiencies can only be remedied by vacating and remanding the NVLMP and requiring preparation of a SEIS. Defendants argue that the level of detail presented is adequate for "the planning level analysis in the FEIS" and "sufficient to allow the agencies to make a reasoned choice". This argument has no merit because the FEIS presents a faulty analysis (Chapter 4) and no analysis (Chapter 5) and thus undermines the basis for the

[10] The SFA covers 2 million acres in Elko (ECF 67-2 ¶15) and 633,000 acres in Humboldt (ECF 67-5 ¶8).



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Agencies' decisions. Defendants' citations to the cumulative impacts analysis for grazing (NV 80733) and oil and gas (NV0748) do not remedy the absence of analysis of the cumulative impacts on mining and the inappropriate substitution of geothermal for mining (NV 81024). Defendants ignore the importance of discussing how mining claims in the SFA will be impacted by the proposed withdrawal. Defendants mischaracterize the emails discussing this very issue, which criticize the agencies' failure to disclose that half of all U.S. mining claims are located in Nevada: "…it is a serious omission not to include mining claim data. How can impacts to locatable minerals be adequately addressed if this data is not known?" NV 73027.

Defendants assert that the 2014 Coates Map is part of the scientific basis for the SFA but BLM changed the habitat classifications in the Coates map to achieve its policy objectives, reclassifying areas of GHMA, OHMA, and non-habitat into PHMA and including them in the SFA (NV 139030).[11] Some of the reclassified areas are along the SFA margins, which is inconsistent with Ashe's January 18, 2015 directive that "non-habitat on the edges of strongholds can be clipped."[12] NV 5703. Defendants' claim that BLM considered the 2014 Coates Map by removing over 70,000 acres of non-habitat (ECF 95, p. 27) is misinformed because much of the excluded non-habitat acres are non-habitat areas in the Jarbidge and Santa Rosa-Paradise Peak Wilderness Areas that were already off-limits to mining. **Ex. 6** (Liebler Dec.) (comparing SFA maps, NV 139030). The agencies' reclassification of non-habitat into habitat to manage it as SFA to be withdrawn is not entitled to *Chevron* deference. Similar to the facts recently before this Court in *Friends of Searchlight v. Jewell*, CV-00616-MMD-PAL, Defendants here have not fully explained certain decisions and the record does not sustain the decision in the ROD or support that as the APA requires, Defendants "examine[d] the relevant data and articulate[d] a satisfactory explanation for [their] action including a 'rational connection between facts found and the choice made." **Ex. 7**, *Searchlight Order* (citing and quoting *Humane Soc'y of U.S. v.*

[11] This habitat reclassification is explained in the June 2, 2015 email exchange with former State BLM Director, Amy Lueders: "For the SFAs, how much was not originally mapped as PHMA in the Coates map?...The SFA turned 436,600 acres of GHMA into PHMA, turned 211,100 acres of OHMA into PHMA, and turned 75,100 acres of non-habitat into PHMA." NV 5523-4.

[12] The upper and lower maps in NV 139030 show areas of non-habitat along the edge of the SFA.



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*Lock*, 626 F.3d 1040, 1048 (9th Cir. 2010). The habitat reclassification ignores available data and provides no rational connection between the facts and the decision to segregate the SFA.

**IX. The Court Should Vacate and Remand for a Supplemental EIS**

Similar to this Court's recent decision in *Searchlight*, here, vacatur of the ROD and FEIS is necessary because of the analytical gaps in the analyses underlying the ROD and FEIS. Ex 6, Order. Defendants' repeated assertion that an SEIS is not required because several of the DEIS alternatives included mineral withdrawals and lek buffers and they are qualitatively within the spectrum of alternatives analyzed is misguided – even Intervenors do not disagree with Plaintiffs on this point. Plaintiffs could not predict that that the lands on which their claims are located would be singled out for withdrawal from reading the Agencies' justification for the DEIS Preferred Alternative, which did not propose withdrawals and stated the agencies' land use decisions met their purpose and need and was consistent with multiple use (NV 44888). It is unreasonable to expect that Plaintiffs could have guessed that the DEIS alternatives B, C, and F (NV 45272-73), would be reconfigured to become the 2.8 million acre area of Nevada and include their claims. The SFA is not "within the range of alternatives [Western and Quantum] could have reasonably anticipated the [agency] to be considering." *State of Cal. v. Block*, 690 F.2d 753, 772 (9th Cir. 1982). BLM recognized that the SFA withdrawal was not "an alternative analyzed in the DEIS" and that the agency would have to justify inserting the SFA "without triggering NEPA supplementation." (WO 78592, GBR 10440, ECF 67 at 18). Top DOI officials worried the discussion of mining's minimal impact on the Bi-State Final Rule "may invite comparisons with how mining is proposed to be treated in the SFAs," WO 01957-58 -- recognizing the SFA is arbitrary and capricious. The NVLMP should be vacated and remanded for preparation of a SEIS. GSG will not be harmed by a vacatur because the Nevada Plan would protect habitat as would BLM's Special Status Species Manual 6840 protecting sensitive species like GSG including measures to "minimize the likelihood and need for listing under the ESA" as noted in BLM's response to GCR. NV 13659.

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Respectfully submitted this 2nd day of August, 2016.

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**CERTIFICATE OF SERVICE**

Pursuant to F.R.C.P. 5(b), I certify that I am an employee of Davis Graham & Stubbs LLP and not a party to, nor interested in, the within action; that on the 2nd day of August, 2016, a true and correct copy of the foregoing document was transmitted electronically to the following via the Court's e-filing electronic notice system:

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