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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WESTERN EXPLORATION LLC, ET AL. **Plaintiffs,** **v.** **U.S. DEPARTMENT OF THE INTERIOR, ET AL.** **Defendants.**	Case No. 3:15-cv-00491-MMD-VPC **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs The State of Nevada, ex Rel. Adam Paul Laxalt, Attorney General; Churchill County, Nevada; Elko County, Nevada; Eureka County, Nevada; Humboldt County, Nevada; Lander County, Nevada; Lincoln County, Nevada; Pershing County, Nevada; Washoe County, Nevada; White Pine County, Nevada; Western Exploration LLC; Quantum Minerals LLC; Paragon Precious Metals, LLC, and Ninety-Six Ranch, LLC (collectively the "Plaintiffs") hereby submit this Motion for Summary Judgment. This Motion is made pursuant to Fed. R. Civ. P. 56, the Order on Stipulation Regarding Expedited Briefing, the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument the Court may allow.

Respectfully submitted this 1st day of April, 2016.

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and Plaintiffs Western Exploration LLC, Quantum Minerals LLC, Paragon Precious Metals, LLC, and Ninety-Six Ranch, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The enormous land closures, widespread land use restrictions, and proposed mineral withdrawals in the Nevada Land Management Plans ("NVLMP") at issue threaten Nevada's future. Affected citizens, the Counties and State agencies and officials must be apprised of the impact of the changes between draft and final plans and the science and data relied upon. The public was unlawfully deprived of the disclosure and impact analysis required under the National Environmental Policy Act ("NEPA") and the Federal Land Policy and Management Act ("FLPMA"). In September 2015, the U.S. Bureau of Land Management ("BLM") and the U.S. Forest Service ("USFS") published Records of Decision ("ROD's") for Land Use Plan Amendments ("LUPAs") impacting 23 million acres with Greater Sage-grouse ("GSG") habitat.

The administrative record ("AR") reveals astonishing overreach and disregard for public involvement and statutory requirements to impose a top-down policy engineered by three officials in the Department of Interior (who named themselves the "Grouseketeers") who met, after the public comment period had ended, with ENGOs to get insight as to what would be required for ENGO "buy-in" on the LUPAs. The Grouseketeers facilitated a process that suppressed concerns of their own high-level staff who raised the same issues as Plaintiffs: the need for a Supplemental Environmental Impact Statement ("SEIS"), lack of scientific data to support new restrictions imposed at the insistence of the United States Fish and Wildlife Service ("FWS"), and the failure to compile or review readily available information about mineral potential and grazing management on the lands at issue. FWS drew boundaries for what became Sagebrush Focal Areas ("SFA") based on maps and information from the "conservation community" and then the BLM, unlawfully, ignored the Nevada Department of Wildlife ("NDOW") who demonstrated the boundaries were inconsistent with the State's data and actual science.

The record reveals BLM ignored their own consultant's advice to prepare an appropriate socioeconomic analysis and their own staff's concerns about the counties and public who certainly would object to the lack of meaningful analysis of the substantial economic impacts that would result from the unprecedented closure of millions of acres of land to primary uses (such as ranching, mining, grazing, and renewable energy). BLM ignored its own solid minerals staff's comment explaining the availability of relevant information essential to the impact analysis and describing the existing analysis as "incredibly thin given the **enormous impact of withdrawing 20% of the decision area to locatable minerals and 72% to salable and non-energy leasable minerals.**" NV_0073026-027. The lawless process that produced the NVLMP included the agencies preparing form responses to the governors' consistency reviews ("GCR") before even receiving them and cookie cutter responses to the public and county protests which are identical in form regardless of the issues raised. BLM drafted language saying the GCR and appeals would be rejected **ten days before the July 29th deadline for the GCRs and more than six weeks before the September 4, 2015 deadline for the appeals**. The agencies rushed through the FLPMA protest, consistency review and appeal processes because they deemed meeting the FWS' September 30, 2015 ESA listing deadline more important than complying with NEPA requirements and FLPMA's mandate that federal land use plans be consistent with state and local plans to the maximum extent possible. BLM ignored the Counties' and State's comments, made no attempt to address or reduce inconsistencies in the NVLMP with the state and local plans, and violated FLPMA. The agencies' unlawful action requires the RODs be vacated and remanded for preparation of an SEIS and completion of a consistency review.

SUMMARY OF RELEVANT FACTS[1]

BLM's and USFS' land use planning for over 23 million acres with GSG habitat in the NVLMP planning area (NV_0091808, FS_0140067) has closed millions of acres of land to important uses (WO_0065678–699) and includes four last-minute significant changes (SFA, net

[1] As agreed by the parties rather than providing a separate statement of facts, Plaintiffs include a summary and then identify material facts with proper citation throughout the Argument section.

conservation gain, lek buffers, and adaptive management triggers) that were not evaluated in the 2013 DEIS or subject to public comment. The agencies made these changes in late 2014 in response to FWS' demand for land closures and additional restrictions purportedly to avoid listing the GSG under the Endangered Species Act ("ESA"). The agencies justified the additions by citing three post-DEIS references and one post-FEIS/PLUPA reference that were reverse-engineered studies with pre-determined conclusions designed to defend the NVLMP changes.

One of these changes, the SFA, was added in response to the October 27, 2014 memo from FWS Director, Dan Ashe ("Ashe Memo") to the BLM and USFS. (WO_0016206-14). The Ashe Memo described "strongholds" or "best of the best habitat" recommended by the "conservation community as having the highest density of the species" and urged that areas shown on maps attached to the Ashe Memo be withdrawn from mineral entry. Up until that point, the agencies' Administrative Draft Proposed Plan (ADPP) (the final draft of the Proposed Plan before it gets published as the FEIS/Proposed Plan) did not include withdrawing lands from mineral entry (WO_0033491). The Ashe Memo changed everything, derailing the nearly completed ADPP and the agencies' land use planning process. Ultimately the agencies capitulated to FWS' demand, requiring substantial changes to the ADPP to incorporate the stronghold areas, which became SFA. This drastically changed the agencies' planning direction from the DEIS Preferred Alternative and threw the process into turmoil as agency staff scrambled to justify the SFA. BLM immediately recognized that the SFA withdrawal was not "an alternative analyzed in the DEIS" and that the agency would have to somehow justify inserting the SFA "without triggering NEPA supplementation." (WO_0078592).

It soon became apparent the SFA was not "the best of the best GSG habitat" – or habitat at all (WO_0059006). Top Nevada BLM officials knew that roughly 26 percent (723,000 acres) of the 2.8 million acre Nevada SFA was not priority habitat – it included lower priority habitat and 75,100 acres of non-habitat (GBR 0021278). They also knew from NDOW's comments on the ADPP that the State's wildlife experts said the SFAs "do not fully represent the most important landscapes." NDOW expressed concerns about the re-prioritization of management

actions to the SFA given the lack of state input and that the "conservation priorities **may be misplaced as a result of policy-based, rather than science-based, planning**." NV_0014990.

The agencies ignored NDOW's comments despite NDOW's key role as a cooperating agency in the planning process, and ignored public input through protests during the final stages of the LUPA process. BLM quickly dismissed 40 protests on the Proposed LUPA ("PLUPA")/FEIS, including from Nevada counties and the Nevada Sagebrush Ecosystem Program (FS_0131929-946), using a form letter with a generic rationale for categorically rejecting all protests. BLM conducted a perfunctory review of Governor Sandoval's July 29, 2016, 334-page consistency review letter (NV_0090308-641), answering it on August 6, 2015 using a template written prior to receiving the GCR (FS_0131946, GBR_0010918, FS_0146276-287). BLM denied Governor Sandoval's appeal (NV_0017531-538) in ten days (NV_0090293-297). The agencies' final decision in the NVLMP closed over ten million acres of Nevada lands to wind and solar energy, salable minerals, and non-energy leasable minerals; more than five million acres to oil and gas, geothermal, and rights of way (**Exhibit 1**); and proposes withdrawal of 2.8 million acres (WO_0065678–699) including nearly 723,000 acres of low priority habitat and non-habitat (NV_0005523) from locatable minerals development. The FEIS does not satisfy NEPA's requirement to take a hard look at the impacts on the human environment resulting from these vast closures. The proposed withdrawal is unlawful because it fails to consider the mineral potential of the lands to be withdrawn, as required under FLPMA and BLM's regulations.

ARGUMENTS

Plaintiffs bring their claims under the APA and satisfy both Article III standing and the "zone of interests" test. *See Bennett v. Spear*, 520 U.S. 154, 163 (1997). There are three elements to Article III standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs have established that they have suffered and will continue to suffer irreparable harm from the final agency actions. *See* ECF No. 4, Pls.' MPI and Dahl, Goicoechea, and Cleary Decls; ECF No. 13, Suppl to MPI, Herman and French Decls.; ECF No. 18, Stewart Decl.; ECF No. 50, Suppl. Brief, Steadman Decl.; Declarations are attached

hereto as **Exhibits 2 through 7** and submitted with Plaintiffs' Motion for Enlargement of the Record, filed concurrently herewith. Plaintiffs assert procedural claims for which the second and third standing elements are relaxed. Where, as here, litigants are vested with a procedural right, they have "standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed" them. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). An order vacating and remanding the RODs will grant plaintiffs relief. The zone of interest test in the APA context is "not especially demanding" in light of the "generous review provisions" of the APA – simply requiring the plaintiffs have a right to sue under the substantive statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387-89 (2014). The State and Counties manage GSG and administer land use in Nevada and have an elevated and critical role in the FLPMA and NFMA land use planning processes. The private plaintiffs have substantial interests the decision adversely affects. The Plaintiffs have standing to challenge the NVLMP.

Courts review NEPA and FLPMA violations under the Administrative Procedures Act ("APA"), which requires that a court "hold unlawful and set aside agency action" that is arbitrary, capricious or not in accordance with law. 5 U.S.C. § 706(2)(A). While a court cannot substitute its judgment for that of the agency, the APA requires the court to "engage in a substantial inquiry" and a "thorough, probing, in-depth review." *Native Ecosystems Council v. USFS*, 418 F.3d 953, 960 (9th Cir.2005) (applying arbitrary and capricious standard to find NEPA violation); *Center for Biological Diversity v. BLM*, 422 F.Supp.2d 1115 (N.D.Cal.2006) (BLM acted arbitrarily and capriciously when it approved a LUPA based on outdated data). An agency's action is arbitrary and capricious if the agency failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before it. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856 (1983). BLM actions will be reversed under the APA when it fails to give adequate public opportunity for NEPA comment. *Sierra Nevada Forest Protection Campaign v. Weingardt*, 376 F.Supp.2d 984 (E.D.Cal.2005). The evidence in the AR demonstrates the agencies failed to

consider important aspects of achieving GSG habitat conservation and balancing multiple-use mandates and offered an explanation for their decisions that runs counter to the evidence.

A. The Agencies Unlawfully Closed Millions of Acres of Lands to Achieve a Policy Objective, Ignored Relevant Science & Eliminated Public Review of the SFAs

BLM internal emails admit "…the only reason we in Nevada are managing non-habitat as Priority Habitat Management Area ("PHMA") is so we can apply our management actions to that land." WO_0010789. "**We know there are no leks in "other mapped habitat" or in "non-habitat**"". NV_0005500. BLM staff worried about how to justify the last-minute addition of the SFA with no supporting data and asked about documentation:

> **….no record in any of our plans that these landscapes were important** beyond the Priority Habitat designation **that would warrant the additional LUP restrictions** in our proposed plans. **No record that anyone from the conservation community referenced in the notation identified these landscapes in any prior communication with the BLM**…we will need something beyond what was given from WO [BLM Washington Office]…to justify decisions on these lands in our plans. WO_0005242.

In June 2015, then BLM Nevada State Director, Amy Lueders, asked: "For the SFAs, how much was not originally mapped as PHMA in the Coates map?" NV_0005524. Staff replied: "There is **an <u>additional 722,800</u> acres of PHMA in the Proposed Plan**. . . The SFA turned 436,600 acres of GHMA into PHMA, 211,100 acres of OHMA into PHMA, and 75,100 acres of non-habitat into PHMA." NV_0005523. USFS officials also knew that a portion of the SFA on national forest system lands was comprised of nearly 175,000 acres that was not "the best of the best" or even habitat at all. GBR_0021278. NDOW's comments on the ADPP made clear the SFA were not the "best of the best" habitat in Nevada and in fact undervalued habitats of high importance. NDOW identified a **fundamental inconsistency with the criteria BLM used to draw the SFA boundary which did not match NDOW's science based assessment of breeding bird density** or resistance and resilience mapping statewide. NDOW asked "what criteria were applied to determine which landscapes qualify as being essential to conservation and persistence of the species." NV_0014989. NDOW expressed concern over "the re-prioritization of management actions to SFAs" given the lack of state input and that the "SFAs do not fully represent the most

important landscapes for GRSG" and, thus **conservation priorities may be misplaced as a result of policy-based, rather than science-based, planning**. NV_0014990.

"Some areas in SFAs may not have been PHMAs, but they are now, i.e., areas of nonhabitat/GHMA are now PHMA." FS_0088838. The NDOW maps included in Governor Sandoval's January 2016 withdrawal EIS scoping comments demonstrate that large portions of the SFA are not important habitat and recommend they be removed from the SFA. (**Exhibit 8**). In addition to the SFA, the NVLMP put millions of acres of non-habitat off limits to important land uses in Nevada. (Ex. 1, Table 2). The SFA were based on erroneous information, never disclosed for NEPA review. Director Ashe stated that this subset "represent[s] recognized 'strongholds' for the species that have been **noted and referenced by the conservation community** as having the highest densities of the species and other criteria important for the persistence of the species." WO_0016206. NDOW notified BLM prior to the FEIS publication that the Ashe Memo map was wrong, NDOW had identified the areas of highest densities of the species and they did not coincide with the SFA boundaries. The FWS' insistence on adding the SFA without regard to NDOW's concerns is unlawful and inconsistent with the FWS' COT Report that recognizes state wildlife agencies' management expertise and authority for GSG.[2] The erroneous data used for the SFA renders the agencies' conclusions in the FEIS/PLUPA and ROD invalid. Identifying lands as the "best of the best" habitat when the state agency with jurisdiction over the GSG said those lands are not the most critical undermines the agencies' closure of 2.8 million acres to mineral exploration and development, solar, wind, geothermal and to limit grazing.

B. The Agencies Violated NEPA

1. BLM Improperly Segmented its NEPA Analysis

BLM promised the details about locatable mining activities would be fully disclosed and analyzed in the NEPA process to assess impacts including socioeconomic impacts of each of the

[2] FWS, Greater Sage-Grouse (*Centrocercus urophasianus*) Conservation Objectives: Final Report (2013) ("COT Report")). The COT Report identified a need for flexibility for local ecological and socioeconomic conditions. *See* COT Report Cover Letter; COT Report at 31.

alternatives. GBR_0015070; NV_0079566. This promise was broken. NEPA requires preparation of an EIS to inform the public and decision-makers of impacts that result from major federal action. 42 U.S.C. § 4332(c). The law requires a "hard look" at the impacts. *Pit River Tribe v. USFS*, 469 F.3d 768, 781 (9th Cir. 2006). General statements about possible effects "do not constitute a hard look absent a justification" why more "definitive information could not be provided." *Western Watersheds Project v. Lueders*, 122 F.Supp.3d 1039, 1048 (D. Nev. 2015); *Klamath–Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993 (9th Cir.2004). Federal actions cannot be considered in isolation from one another; a single NEPA study may be required for distinct projects when there is a single proposal for the projects, or the projects are "connected," "cumulative," or "similar" actions. *Native Ecosys. Council v. Dombeck*, 304 F.3d 886, 893–94 (9th Cir.2002). Logically connected and reasonably foreseeable actions must be considered together. *Barnes v. Babbitt*, 329 F.Supp.2d 1141 (D. Ariz. 2004); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)). A central purpose of an EIS is lost "if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken." *Thomas v. Peterson*, 753 F.2d 754, 761 (9th Cir. 1984). Actions must not be segmented to avoid the requisite analysis. An agency "impermissibly segments NEPA review when it divides connected, cumulative, or similar federal actions into separate projects" and fails to address the true scope and impact. *Myersville Citizens for a Rural Community, Inc. v. F.E.R.C.*, 783 F.3d 1301 (D.C. Cir. 2015). Here, BLM impermissibly segmented the analysis for the withdrawal and land closure. Withdrawal is a *centerpiece* of the LUPA, yet the BLM evaded meaningful review of the impacts with the promise that will come later, after the commitment is made, the lands segregated, and the course of the State, counties, and companies with claims in the SFA already altered. Courts will weed out projects *pretextually* segmented and prevents circumvention of NEPA. *Wilds v. South Carolina DOT*, 9 Fed.Appx. 114, 120 (4th Cir. 2001); *Western Radio Svcs Co. v. Glickman*, 123 F.3d 1189 (9th Cir. 1997); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893 (9th Cir.2002). The agencies improperly segmented the analysis of the withdrawal and the RODs must be remanded for the study it deserves and the law requires.

The FEIS erroneously describes withdrawal of 2.8 million acres in Nevada from mineral entry as being a "variation of the preferred alternative (Alternative D) . . .within the range of alternatives analyzed in the DEIS." NV_0079601. The DEIS' description of alternatives and impact analysis are so vague that they are meaningless. A reader must hunt and peck through a series of lengthy tables, and small-scale statewide maps describing the DEIS alternatives, and

still is left with a vague description. Discussion of impacts is equally amorphous[3] and yet BLM plainly committed to the withdrawal in the FEIS. The FEIS identifies the number of acres to be withdrawn from mineral entry but the impacts discussion for minerals gives the conclusory and erroneous analysis that there are no active mines in the 2,731,600 acres in the SFA and that because new locatable mineral development is most likely to occur in proximity to existing mines, anticipated impacts on locatable minerals under the proposed plan would be concentrated in these areas. NV_0080636. This is wrong as demonstrated by Plaintiff WEX whose Gravel Creek discovery is not proximal to an operating mine. Many promising Nevada mineral exploration projects are not near operating mines and BLM had access to abundant information to know that, if it had bothered to look. NV_0073027. The socioeconomic impacts discussion is evasive. Instead of a hard look at the social and economic changes withdrawal will cause, there is a page and a half of studied equivocation. NV_0080748-749. The discussion admits the absence of meaningful analysis of impacts from the mineral withdrawal:

> No Reasonably Foreseeably Development scenario for locatable minerals was developed for this landscape level planning amendment that forecasts production of locatable minerals on Federal lands in the study area. In the absence of this information, it is not possible to quantify potential economic impacts across alternatives. NV_0080749.[4]

As discussed below, the failure to complete a mineral potential report ("MPR") was unlawful and the BLM admits that without the MPR it could not complete a proper economic impact analysis. What should have been an intensive discussion of impacts concludes simply that there are no active mines in the proposed withdrawal area and to the extent exploration and mining

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[3] Less than a page in the DEIS (Ch. 4, p. 245) describes economic impacts of withdrawal: "under Alternatives B and F [C is not mentioned despite proposing withdrawal of all priority habitat], some lands would be petitioned for withdrawal from locatable mineral entry" Of the impacts from withdrawal, it offers this trite set of conclusions:

> BLM specialists generally expect that the production of gold, silver, and copper would remain the same across all alternatives (BLM 2013g), at least in the first three to five years after any withdrawal from locatable mineral entry is implemented. In the long run, production of locatable minerals would be affected only to the degree that the cost of conducting a mineral examination would affect individual operators' decisions to pursue claim, which would depend on site-specific and operator-specific conditions.

For social impacts, the DEIS offers the vapid comment that interested groups would experience adverse impacts from Alternatives B, C, D, and F, but especially Alternatives C and F.

[4] The Administrator of the Nevada Division of Minerals predicts that the State Division of Minerals ("NDOM") will suffer a loss of revenue caused by the elimination of mining claims on withdrawn lands. *See* Affidavit of Rich Perry (**Exhibit 9**) (submitted in conjunction with Plaintiffs' Motion for Enlargement of the Record, filed concurrently herewith).

were to occur in the areas, there would be less economic activity. NV_0080750. This "analysis" is inadequate and an obvious improper segmentation in violation of NEPA.

2. Inadequate Disclosure of Science and Methodologies

NEPA's implementing regulations require that agencies "insure the professional integrity, including scientific integrity, of the discussions and analyses" in an EIS and mandate that methodologies and scientific sources be disclosed. 40 C.F.R. § 1502.24. "NEPA requires that the public receive the underlying environmental data from which [an] ... expert derived her opinion." *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998). An agency cannot rely upon science or information not available to the public. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1213-1214 (9th Cir. 2004). NEPA requires that an EIS contain "high-quality information and accurate scientific analysis." 40 C.F.R. § 1500.1(b). The EIS must disclose if there is incomplete, conflicting, or unavailable relevant data. 40 C.F.R. § 1502.22. The agencies violated these requirements and made their decision based on policy instead of science. Knowing the information they relied on in the FEIS/PLUPA had serious shortcomings the agencies withheld it from public disclosure. This violates NEPA's mandate of disclosures of relevant shortcomings in the data or models. *Id.*; *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005).

Top BLM officials admit in their internal emails that the DEIS did not include best available science and requested a literature search to support substantial changes in the FEIS. Lek buffers were discussed during August 2014 agency meetings for the proposed Plan. The U.S. Geologic Survey ("USGS") was directed to do a "quick literature search to harvest the **latest research results on buffers to contrast with what we currently have in our administrative draft proposed plans**." WO_0000196. In September, Deputy Assistant Secretary Jim Lyons acknowledged the failure to use "best available science" in setting lek buffers in the DEIS put out for public comment. WO_0001457. This admission at the highest level should have triggered an SEIS but instead, the directive was to take the risk. FS_0145816

In April 2014, BLM's solid minerals staff informed management that the data being used for the FEIS/ADPP were out of date, incomplete, and inaccurate: "There is no consistency, justifications or rationale for the different decision[s] that have been made. The documents do

not explain why certain restrictions exist for some resources but not for others. There are too many gaps in the documents. " WO_0060899. They expressed **concerns that the FEIS did not properly evaluate the impacts of putting so much land off limits to mining**: "…all mineral materials go to some type of use to benefit the public…The NEPA analysis is supposed to consider impacts to the human environment, not just to the birds." WO_0060900. **BLM fluid minerals staff expressed concerns about the lack of scientific rationale for the land use restrictions**: "What is more difficult to explain away is the basis for some of the proposed restrictions [that] seem to be based on convenience, program bias, or fears, rather than on science." WO_0060898. There is no scientific basis for the proposed 2.8 million acre withdrawal of lands in light of the impacts. BLM's admission that 26 percent of the SFA is not the "best of the best" – it is GHMA, OHMA, and non-habitat (NV 250 NV_0005523) – validate NDOW's comments that the SFA are "a result of policy-based, rather than science-based, planning." NV_14990. Despite BLM's projection that mining would have limited impacts on GSG habitat for the next 20 years and top BLM officials' knowledge that the SFA "turned 722,800 acres of GHMA, OHMA, and non-habitat into PHMA" (NV_0005523), BLM acquiesced to FWS' demand to designate 2.8 million acres for withdrawal. DOI officials were concerned that the SFA included so much land that was marginal or non-habitat: "The SOL and Dept/FWS/BLM are meeting on [the non-habitat in the SFAs] at noon." WO__0073621. BLM officials sought an acknowledgement from FWS: "…that the strongholds that [FWS] mapped include some areas that were not identified as PHMA or PPH in the draft plans." WO_0002564

The agencies omitted an entire body of science that demonstrates that properly managed grazing can be beneficial to GSG habitat. The BLM's erroneous statement that there are "no science-based studies that demonstrate that increased livestock grazing on public lands would enhance or restore GRSG habitat" (FEIS at 2-460, NV_0080054) ignores the published scientific references Elko and Eureka Counties' and the State Plans provided.[5] The agencies do not explain

[5] BLM deleted text from the FEIS that included published references documenting the benefits of managed grazing: "Grazing can reduce the spread of invasive grasses, if applied annually before the grasses have cured and become

why they ignored scientific literature on managed grazing and habitat conservation and the FWS COT Report that gives deference to local management plans that provide an effective strategy for minimizing wildfire risks. The FWS COT Report recognizes the importance of local ecological conditions for grazing management strategies and using local data on threats and ecological conditions, and that strategies or actions necessary to achieve conservation objectives "***must be developed and implemented at the state or local level, with the involvement of all stakeholders.***" COT Report at 52, 38, 41. The Counties have done this and the SFA, travel restrictions, habitat objectives and lek buffers disregard and interfere with these local efforts.

3. NEPA Required an SEIS for the Substantial Changes from the DEIS to FEIS

An SEIS is required for substantial changes to the proposed action that are relevant to environmental concerns; or significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. *Id.*§ 1502.9(c)(1). NEPA required Defendants prepare an SEIS given that the final action incorporates four new federal actions not analyzed in the DEIS: (1) designation of 2.8 million acres of SFA; (2) imposition of uniform lek buffers across all habitat zones based on a post-DEIS USGS study; (3) mandating a new "net conservation gain" mitigation standard based on a post-DEIS FWS Mitigation Framework; and (4) hard-trigger adaptive management requirements. The PLUPA/FEIS differed dramatically from the DEIS Preferred Alternative because it introduced for the first time the SFA, described in the FEIS as a "new concept" (FEIS at 1-1, NV 0079543), which precluded "meaningful consideration" by the public and required circulation of an SEIS. *State of Cal. v. Block*, 690 F.2d 753 (9th Cir. 1982). The agencies admitted that the proposal to withdraw lands from mineral entry, close these lands to renewable energy and oil and gas development, and expedite processing of grazing permits is a new "additional recommendation" presented for the first time in the FEIS. (NV_ 0079595; NV_ 0088869-70).

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unpalatable (Strandand Launchbaugh 2013; Reisner et al. 2013). Properly managed grazing can be compatible with maintaining wildlife habitat objectives, and may support native bunchgrass restoration by controlling invasive spread." GBR_0011820.

In October 2014, one year after publishing the DEIS, the agencies were working to resolve new issues raised by FWS' comments regarding the regulatory mechanisms to be implemented to avoid listing GSG that included: closures, withdrawals; lek buffers; mitigation; disturbance caps; addressing improper grazing; and resolving priority habitat boundaries. WO_0000276-77. During the remainder of 2014, the agencies evaluated these issues and substantially modified the LUPA to include new land use restrictions that were not analyzed in the DEIS. By January 30, 2015, the agencies had finalized the revised the proposed Plan that was ultimately disclosed for the first time in the May 2015 FEIS/PLUPA and implemented in the RODs. NV_0170891- 0931. This violated NEPA.

Public comment is "at the heart" of the NEPA process and requires responsible opposing viewpoints be disclosed reflecting the "paramount Congressional desire to internalize opposing viewpoints into the decision-making process." 40 C.F.R. § 1502.14. The public had no opportunity to comment on the SFA, the new lek buffers, the net conservation gain paradigm and the adaptive-management hard triggers, or to evaluate data supporting these changes. Failure to include these significant elements of the NVLMP in the DEIS Preferred Alternative defeats this aim and has resulted in NVLMP restrictions radically different in the FEIS. By failing to disclose such substantial changes until the FEIS, after opportunity for NEPA comment had passed, the agencies unlawfully insulated their decision-making process from public scrutiny rendering NEPA's procedures meaningless. *Id.*; *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988) (agencies must give adequate time and provide sufficient factual detail to permit interested parties to comment). Supplementation is required where, as here, modifications to a proposed action "alter the overall cost-benefit analysis of the proposed action." *Russell County Sportsmen v. USFS*, 668 F.3d 1037, 1048 (9th Cir. 2011). The NVLMP restrictions put tens of millions of acres of lands off-limits to many key uses and impose millions of dollars of costs on the Counties, and threaten destruction of WEX, Paragon, the Ninety-Six Ranch and other small mining and ranching businesses. *See* Ex. 2 ¶20, 31; Ex. 3 ¶8; Ex. 4 ¶10, 14. These impacts were never disclosed. The agencies ignored their obligation to compare

potential benefits of the proposed conservation against the economic impacts of prohibiting development and putting lands with some of the greatest mineral potential off limits. *See, e.g.*, *Block*, 690 F.2d at 767.

These new provisions authorize future land closures that are not analyzed in the FEIS/PLUPA and should have been evaluated in an SEIS that examined the impact of the new requirements with a socioeconomic analysis on how they would affect ranchers, mineral exploration, renewable energy, travel, the Counties, and the State. The agencies refused to do an SEIS because they ran out of time as they rushed to publish the RODs to influence FWS' decision whether to list GSG under the ESA.

a. *Closure of tens of millions of acres of land in Nevada at FWS' Demand*

In a September 2014 memo to Secretary Jewell, Jim Lyons, complained that there were no ACECs (Areas of Critical Environmental Concern) proposed in the state plans and that "FWS has raised this at several of our family meetings and would like to see this tool used." WO_0003441. One week later, BLM stated that they were "[l]eaning towards no withdrawals" but keeping the discussion on the table with FWS which responded that it would provide a map of the "Best of the Best" which FWS wanted "to see become ACECs." WO_0033491. BLM shifted dramatically in response to FWS' pressure that the Proposed Plans had to include closures and mineral withdrawals amounting to "sagebrush reserves." WO_0080757. FWS' insistence that the LUPAs include closures and mineral withdrawals morphed into the stronghold concept in the Ashe Memo, WO_0016206-214, which abruptly and radically changed the land use planning process from the 2013 DEIS Preferred Alterative that did not recommend withdrawing lands from mineral entry, to embrace the strongholds that became known as SFA and the basis for the proposed withdrawal of 2.8 million acres in Nevada. The Ashe Memo was sent to BLM State Directors and described as "a new map identifying areas where they [e.g., FWS] want to focus the most restrictive management." FS_0064268. FWS created the map of its own accord (WO_0033492) and thrust it upon the agencies to force them to acquiesce to FWS' requirements for closures and mineral withdrawals. (WO_0059006). The insertion of the SFA

was a drastic change that put the process into turmoil as agency staff scrambled to respond to this significant change and justify the eleventh-hour addition of the SFA. BLM recognized that the SFA withdrawal is not "an alternative analyzed in the DEIS" and BLM would have to somehow justify inserting the SFA into the FEIS/PLUPA "without triggering NEPA supplementation." WO_0078592. Agency staff was told in 2014 that an SEIS was "a non-starter." FS_0153920.

The maps in the FEIS/PLUPA show various land use closures and restrictions but do not adequately explain that more than ten million acres are closed to wind and solar, energy, salable minerals, and non-energy leasable minerals; and more than five million acres are closed to oil and gas, geothermal, and rights-of-way; *see* Table 1, Ex. 1. These closures include millions of acres of non-habitat as shown in Table 2, Ex. 1. WO_0065678-699. As seen in the tables in Exhibit 1, which the BLM prepared but did not share with the public, closing millions of acres is not a "minor variation" of the DEIS alternatives, which applied particular management measures to different degrees in different geographic areas. Agency analysts recognized that the SFA and the closures listed in Exhibit 1 created economic impacts that had not been analyzed in the DEIS. FS_0151607. Creation of SFA and these massive closures extended beyond simply recombining or modifying components of the DEIS alternatives to create a "new" alternative whose impacts the public could not easily predict from the existing analysis[6] especially in light of the DEIS Preferred Alternative which the Agencies selected to meet their mission of multiple-use. (DEIS at 24, FS_0056286). An SEIS is required because there is no direct or reliable way to compare the effects of the combined SFA, net conservation gain, lek buffers, and adaptive management restrictions to the effects of the restrictions analyzed in the DEIS in different locations and combinations. *California v. Block*, 690 F.2d 753, 772 (9th Cir. 1982) (SEIS required when the selected alternative "could not be fairly anticipated by reviewing the draft EIS alternatives").

In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755 (9th Cir. 2014), the Forest Service was required to prepare an SEIS when it

[6] *Cf. Forty Questions*, 46 Fed. Reg. at 18,035 (a decision to build 5,000 housing units would be within the scope of an EIS analyzing effects of 4,000 or 6,000 houses and not require an SEIS).

rescinded a policy regulating off-road motorized travel and reducing the amount of roads within a national forest after the publication of a DEIS on a proposed logging project. When the public reviews an EIS, the public should not be required to parse the agency's statements to determine how an area will be impacted, and particularly to determine which portions of the analysis rely on accurate and up-to-date information, and which are no longer relevant. *Id.; Oregon Natural Res. Council Fund v. Forsgren*, 252 F. Supp. 2d 1088 (D. Or. 2003) (requiring SEIS for new Forest Service mapping direction for primary lynx habitat).

b. *The Agencies Viewed the New Restrictions in the FEIS as Significant*

Defendants themselves viewed the SFA, net conservation gain requirement, and lek buffer zones as necessary for FWS to reach a "not warranted" listing under the ESA. Therefore, the agencies must have considered these new requirements would have significant environmental effects in order to play such a material role in the not warranted decision-making process. WO_001993; WO_0034992–96. Defendants justified all of these major post-DEIS modifications based on environmental publications completed after the DEIS was issued. FS_0052795 (DEIS 1-18) (science used to analyze impacts in DEIS is current through August 2013). The agencies reverse-engineered the land use planning process. They established land management directives to achieve policy objectives to limit multiple-use of public lands. USGS and FWS then published the research papers listed in **Exhibit 10** to provide enough "scientific" gloss to validate the new restrictions.[7]

[7] The outcome-driven research publications include: Knick et al, 2013, designed to support the universal 3% disturbance cap in the PLUPA/ROD that was not part of the 2013 DEIS or the FEIS but is referenced in the ROD (NV_0091868) (Knick, S. T., S. E. Hanser, and K. L. Preston. 2013. Modeling ecological minimum requirements for distribution of greater sage-grouse leks: Implications for population connectivity across their western range, USA. Ecology and Evolution, 3(6):1539-1551; ROD pp. 5-3, NV_0091868); the September 3, 2014 FWS "Greater Sage-Grouse Range-wide Mitigation Framework Version 1.0," introducing "net conservation gain" to replace the "no net unmitigated loss" standard in the DEIS (ROD pp. 5-3, NV_0091868); the November 21, 2014 USGS lek buffer study, to justify the four-mile radius lek buffer in the FEIS/PLUPA WO_0065639-0065656 (Manier, D. J., Z. H. Bowen, M. L. Brooks, M. L. Casazza, P. S. Coates, P. A. Deibert, S. E. Hanser, and D.H. Johnson. 2014. Conservation buffer distance estimates for Greater Sage-Grouse—A review: US Geological Survey Open-File Report 2014–1239; ROD pp. 5-3; NV_0091868); and the September 8, 2015 Crist, Michele R., Steven T. Knick, and Steven Hanser. 2015. Range-wide network of priority areas for greater sage-grouse—A design for conserving connected distributions or isolating individual zoos? US Geological Survey Open-File Report 2015-1158. ROD page 5-2, NV_0091867 (published days before the ROD to justify the size of the SFA and defend that the SFA contains

In accordance with 40 C.F.R. § 1502.9(c)(1)(ii), when determining whether to issue an SEIS an agency must "apply a 'rule of reason,'" not supplementing "every time new information comes to light" but continuing to maintain a "hard look" at the impact of agency action. Determining if new information is "significant" requires consideration of "context" and "intensity." *Marsh v. Ore. Natural Res. Counc.*, 490 U.S. 360, 374 n.20 (1989). The NEPA regulations require the significance of an action to be analyzed "in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). Intensity refers to the severity of impact. Id. § 1508.27(b). "A significant effect may exist even if the Federal agency believes that, on balance, the effect will be beneficial." *Id.* § 1508.27(b)(1). The last minute closure of millions of acres of public lands to existing uses, including withdrawing 2.8 million acres of lands from mineral entry, is significant to the humans affected, including ranchers, exploration companies, the Counties and the State.

The principal author of the lek buffer study recognized the importance of locality in cautioning that the results of his literature search conducted for BLM to justify the new lek buffers did not provide a "simple, one-size-fits-all solution that was based solely on science" explaining that many of the complications are not "specified biologically" explaining that "scientific results will not provide all answers needed to" render the BLM's desired outcome:

> In the end, trying to balance political and conservation desires and needs with what we understand to be the basic biological requirements of the species of concern (s-g in this case) is the hard work…our collective ability to "respect biological requirements" for conservation while allowing for nuances based on social impetus (e.g., NSO or closure of seasonal habitats in one state versus strict use of buffers and seasonal closures/limits in another state could both be viable options for protection of nesting habitat) ***that can incorporate local understanding and social needs is the task at hand***." WO_0035879.

In other words, according to their own "best available science" completed ***after*** publication of the DEIS, there was a political agenda rather than a scientific basis for requiring withdrawals and absolute prohibitions on development and use. The public had a legal right to review and comment on this information in an SEIS. WO_0048001 (biologist expressing concerns that "the

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lands that are not high-priority habitat). Exhibit 10 contains hyperlinks to the research papers for the Court's

way the buffers have been written into the document as [required design features] ***really makes them management measures not analyzed in the drafts***" and "avoiding the NEPA process by including un-analyzed management actions in an appendix").

The Solicitor's office had concerns about the new studies requiring an SEIS: "It will be important for the agency to have a record showing how it evaluated the USGS studies and why it determined that a supplemental analysis was not warranted." GBR_0010440, GBR_0010453. Comments in the margins of this document (a draft of the ROD) from Deputy Assistant Secretary Lyons reveal BLM's intent to use the 2015 Crist study to defend the inclusion of large areas of lower priority habitat and non-habitat in the SFAs: "The footnote below [the reference to Crist] is important for 2 reasons" asserting that it provides "rationale for the SFAs and a justification for added habitat protections included in the plans for GHMAs. The edits included here relate specifically to the SFAs and get us beyond the "FWS told us to do it" rationale to one that is based on peer-reviewed science for the more recent USGS studies." GBR_0010440. The footnote mentioned in Lyons' comment is on Page 1-16 of the ROD (NV_0091809). Mr. Lyon's internal comment on this document reveals BLM reverse-engineered the outcome based on new scientific justification to try to conceal BLM's unlawful delegation of authority to FWS.

Similarly, introduction of the new net conservation gain requirement in the Proposed Plan was not included in any of the DEIS alternatives. The net conservation gain standard was not on the agencies' radar until September 2014 (WO_0000602) when FWS published its September 3, 2014 Mitigation Framework document. All of the DEIS alternatives included the no net loss mitigation standard; they did not evaluate the net conservation gain standard. A change of a key policy, such as the net conservation gain standard, after publication of an EIS requires preparation of an SEIS. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 760–61 (9th Cir. 2014); *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 561 (9th Cir. 2006). "Net conservation gain" is defined as "[t]he actual benefit or gain above baseline conditions." FS_0140300. The FEIS/LUPA rely on future working

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convenience.

groups to develop a mitigation strategy to implement the standards. FS_0140296–300; FS_0139845–46. "Programs that are structured with a goal of only no net loss will be evaluated more conservatively by [FWS] because they are unlikely to positively influence the conservation status of the species." WO_0036195. The FEIS does not discuss how the impacts of the "net conservation gain" standard differ from the "no net loss" standard, yet Defendants viewed the new standard as a significant change. FS_0118706 ("No net unmitigated loss has been removed from the Proposed Plan.") As the Grouseketeers[8] explained to the Secretary:

> We agreed to adopt an approach to mitigation that will be consistent with the recently released FWS framework for Greater Sage-Grouse mitigation which recommends a net conservation benefit for any compensatory mitigation actions…This approach (in contrast to the "no net unmitigated loss" standard originally in the NPT Guidance and BLM plans) will help address the need to protect or improve habitat… to address the conditions that led to a "warranted" determination by the FWS. WO_0002024.

This internal email includes admissions demonstrating an SEIS is required: DOI's top management acknowledged (i) the standard was different from what was in the DEIS, (ii) the standard was new, and (iii) the standard would make a significant difference environmentally – protecting or improving habitat. BLM's ROD states the net conservation gain standard "…is consistent with the recommendation in the Greater Sage-Grouse Range-wide Mitigation Framework Version 1.0 (FWS 2014b)." BLM ROD at 1-25. FWS published the mitigation framework document on September 3, 2014[9] specifically to influence the land use management directives in the FEIS/ADPP. BLM staff also recognized the substantial change and conflict with the "no net loss" standard and asked for clarification: "In discussion today at the GRSG meeting in Denver it became apparent that the FWS Mitigation Framework strives for net conservation benefit and appears to conflict with our striving for no net loss…" WO_0000602.

An agency may not decline to analyze a new alternative "simply because the overall level of environmental protection it offers falls between that offered by analyzed alternatives."

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[8] Secretary Jewell's top GSG advisors: Jim Lyons, Sarah Greenberger, Counselor to the Secretary, and Michael Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[9] http://www.fws.gov/greaterSageGrouse/documents/Landowners/USFWS_GRSG%20RangeWide_Mitigation_Framework20140903.pdf

Richardson v. BLM, 565 F.3d 683, 706 n.28 (10th Cir. 2009); *Lemon v. McHugh*, 668 F. Supp. 2d 133, 140-41 (D.D.C. 2009). Defendants are required to supplement the FEIS under 40 C.F.R. § 1502.9(c)(1). *Russell Country Sportsmen v. U.S. Forest Serv*., 668 F.3d 1037, 1048 (9th Cir. 2011) (SEIS may be required when changes, although lessening environmental impacts, alter the overall cost-benefit analysis of the proposed action). Defendants' last minute changes will have substantial environmental, social, and economic impacts throughout Nevada that were not analyzed in the DEIS. NEPA public review and comment is not a step agencies are allowed to skip. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Even more troubling, while the agencies deprived the public of an opportunity to consider the substantial changes, they had conversations with ENGOs regarding what would secure their buy-in. In December 2014, Lyons wrote to Greenberger: "I also spoke with Ed Arnett[10] (TRCP) and Matt Holloran...I can fill you in on the outcome of that discussion. But, bottom line was that Ed and Matt recommended that a clear "no go" area needed to be a part of the strategy. WO_0031555. A "clear no go" area was exactly what they got in the SFA.

The significant impacts of the massive closures and withdrawal of 2.8 million acres affect Plaintiffs in radically different ways that were not analyzed in the DEIS. Statements in the FEIS and Protest Report that most mineral deposits and new exploration mainly occur around active mines is erroneous. WEX's discovery of Gravel Creek is estimated to be a $3 billion project[11] located within the SFA and is not near an active mine which clearly refutes this conclusion. Ex. 4 ¶7. Affected parties cannot respond and understand the basis of the agency's ultimate decisions when such information is not made available, and courts do not view such eleventh hour additions lightly. By failing to make information "available at the outset, defendants made it impossible for state and local governments, the public, and special interest groups" to review and comment upon the changes the Plan would effect and the data upon which these actions were

[10] Ed Arnett is Director, Center for Responsible Energy Development, Theodore Roosevelt Conservation Partnership.

[11] A recent third-party technical evaluation of the Gravel Creek deposit determined that it contains a mineral inventory of over 1.4 million ounces of gold and 21 million ounces of silver.

based.[12] *American Motorcycle Ass'n*, 534 F. Supp. at 935. The agencies acknowledge in the FEIS and Protest Report that the SFA is a new policy recommendation based on the Ashe Memo. *See* **Ex.** . There was ample time between October 2014 and publication of the FEIS to give the public opportunity to comment on the new SFA maps. Yet, the agencies waited until May 29, 2015 to publish the maps in the FEIS. Their failure to prepare an SEIS, to disclose the science or data relied upon in the SFA map and seek public comments on such information violates NEPA.

NEPA mandates the public and stakeholder scrutiny of the impacts resulting from the new mitigation standard, SFA, and lek buffers. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556-57 (9th Cir. 2000) ("[NEPA] guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision."). Defendants' failure to comply with NEPA's mandates before making a final, highly controversial decision was arbitrary and capricious, unlawful and requires preparation of an SEIS. NEPA regulations require the agencies to invite the participation of affected state and local governments. 40 C.F.R. § 1501.7(a)(1).[13] To ensure that the agencies took a "hard look" at the consequences of the LUPA, they were required to "involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a); 5 U.S.C. § 553(c) (USFS was under an obligation to afford "interested persons an opportunity to participate in the rule making."). The agencies failed to explain inconsistencies with state, local, and county plans as required by NEPA and its implementing regulations at 40 C.F.R. § 1506.2. BLM's response that such identification would occur in the ROD does not comply with the express mandate that an EIS discuss any inconsistency of a proposed action with approved State or local plans and laws. Where an inconsistency exists, the EIS must describe the extent to which the agency would reconcile its proposed action with the plan or law. BLM provided only a cursory

[12] The DEIS had 15 appendices; the FEIS had 23 appendices, many of which are new policies and directive that were not in the DEIS. The public was deprived of an opportunity to review and comment on the new appendices, which include important information about the agency's FEIS/PLUPA. **Exhibit 11.**

[13] An agency may not merely go through the motions; its "grudging, pro forma" compliance with these regulations violates NEPA's procedural safeguards." *See Block*, 690 F.2d 753, 769.

acknowledgment of inconsistencies, and, thus, the FEIS, the ROD and Protest Report fail to describe how BLM intends to reconcile the NVLMP with those plans. The agencies' assertion that this discussion will occur later does not cure the FEIS' fatal deficiency under NEPA.

4. The Agencies Failed to Evaluate Socioeconomic and Cumulative Impacts

FLPMA requires the BLM, in collaboration with cooperating agencies, estimate and display the physical, biological, economic, and social effects of each alternative considered in detail guided by the planning criteria and procedures implementing NEPA. 43 C.F.R. § 1610.4-6. The FEIS summarizes cumulative effects in broad terms, but does not offer quantified or detailed data about these effects. General statements about possible effects do not constitute a hard look absent a justification regarding why more definitive information could not be provided. *Klamath-Siskiyou*, 387 F.3d at 993-94. Uncertainty is an inherent part of NEPA which requires analysis of reasonably foreseeable future actions. Even if BLM was unable to predict with certainty the consequences from LUPA implementation, NEPA requires a cumulative effects analysis to predict future conditions. Agencies can explain projections with reference to uncertainty; they may not rely on a statement of uncertainty to avoid attempting the requisite analysis as they did here. *Oregon Natural Resources Council v. Brong*, 492 F.3d 1120 (9th Cir. 2007).

Prior to the November 2013 DEIS, BLM economists expressed concerns about the scope of the cumulative effects analysis for socioeconomic impacts that were largely ignored:

> We are concerned with the lack of direction we have been given regarding cumulative impacts. There are substantial efforts being coordinated regarding the cumulative impacts approach for sage grouse, but **very little discussion and coordination on how cumulative impacts should and will be approached for other resources including socioeconomics**. The three of us have little doubt that **our public, especially our cooperating agency counties, will be concerned if social and economic impacts are not evaluated across all the planning efforts**…I have not been successful in communicating this concern to project leadership - but I have tried on several occasions. WO_0068818. (emphasis added)

As of March 2014, these concerns remained unresolved but staff did not pursue a rigorous socioeconomic impact analysis concerned they would be "adding another complex and incomplete wrinkle to an already overwhelmed process." GBR_0020593. BLM ignored its socioeconomic

contractor who recommended incorporating proposed GSG conservation actions in neighboring sub-regions as reasonably foreseeable future actions for the cumulative effects. GBR_0020600

BLM staff noted substantial changes for minerals could "magnify some of the comments" received on the DEIS's lack of impact analysis for disturbance caps, noting that "change to levels of activity and outputs under each of the economic sectors would imply changes to economic impacts and discussions of impacts." GBR_0021033. BLM's economist, Dr. Josh Sidon, noted that public comments on the DEIS asserted the economic impacts analysis was inadequate and misleading with no quantitative analysis completed for socioeconomic impacts to locatable minerals. Dr. Sidon requested assistance in "developing a more defensible rationale/justification for the current qualitative economic analysis or help providing more specific information on potential impacts to locatable minerals" noting "a quantitative analysis is not possible" because no MPR was developed. GBR_0020979-80. The BLM's decision not to prepare a MPR violated FLPMA and prevented a proper NEPA socioeconomic analysis for locatable minerals.

In May 2014, BLM staff noted there was considerable public concern about the economic impacts caused by the land use allocations in the DEIS. WO_0002366. A March 2014 third-party report on the "aggregate economic impacts" of proposed GSG conservation measures, combined data from all GSG-related plan amendments to provide aggregated annual economic impacts west-wide: 1) for the preferred alternative, a loss of 5,600 jobs and $839 million in economic output; and 2) for the most restrictive alternatives, a loss of 31,000 jobs and $5.6 billion in output. WO_0002366. BLM staff discussed the challenges in estimating west-wide economic impacts, including the limitations of IMPLAN which is a "static model" which should only be used for estimating the economic effects on a limited area over a short time span – and not for larger study areas like the NVLMP planning area and 20-year timeframe. WO_0002366. By July 2014, BLM decided it would not include a detailed socioeconomic impacts analysis in the FEIS stating, "the socioeconomics perspective will be presented **outside the EIS process**." GBR_0007174. This violates NEPA and FLPMA and requires the ROD be vacated and

remanded for an SEIS. The socioeconomic implications of closing tens of millions of acres of land **must** be completed for the public's review and comment before an amended ROD issues.

In April 2015, just weeks before the FEIS/PLUPA was published, the agencies acknowledged that the addition of the restrictions in the SFA had significant implications for the socioeconomics impact analysis noting that the SFA "will in fact add some lands subject to more restrictions/limitations/exclusions" and that increased "restrictions (e.g., exclusions) on activities in some general habitat and non-habitat areas" would increase the potential for economic impacts under the proposed plan. GBR_0021278. USFS did not know how to handle the economic impacts from the SFA: "Currently, we are not really bringing that up at all… Can you let me know of some specific examples we might want to be noting in the econ sections" to capture increases in economic impacts associated with SFAs? GBR_0021279. But the agencies did nothing and failed to prepare a socioeconomic impact analysis that satisfies NEPA, FLPMA's land use planning requirements to compile such data for public comment or to address the public comments on the DEIS regarding economic impacts. Difficulty in conducting analysis does not excuse the agency from taking the required hard look and conducting a meaningful analysis.

C. Defendants Have Violated FLPMA and NFMA

FLPMA requires that BLM conduct land management "on the basis of multiple use and sustained yield." 43 U.S.C. §§ 1701(a)(7), 1712(a); *Kern BLM*, 284 F.3d 1062, 1067 (9th Cir.2002). The process for developing and revising resource management plans is controlled by regulations at 43 C.F.R. §§ 1601.0-1610.8 (2006). Once a land use plan is developed, "[a]ll future resource management authorizations and actions" must conform to the approved plan. 43 C.F.R. § 1610.5-3(a). Thus, the NVLMP restrictions and requirements are final and being applied to restrain all resource management decisions. (ROD at 1-41, NV 0091834 (the decisions "go into effect when the ROD is signed"; including closure of lands and OHV area designations)); *see also* **Exhibit 12**, Lueders Test. 11/17/2015 at 261-263, 295. Future project proponents' permit applications will be categorically denied if they are inconsistent with the NVLMP and proposals for activities prohibited in the millions of acres closed will be rejected

without review demonstrating the finality of the NVLMP. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (observing that the statutory directive in 43 U.S.C. § 1732(a) "prevent[s] BLM from taking actions inconsistent with the provisions of a land use plan."). *Klamath Siskiyou Wildlands Center v. Boody*, 468 F. 3d 549, 557 (9th Cir. 2006). The NVLMP is final and if not vacated all future project level decisions **must** be consistent with the provisions adopted in an unlawful process.

1. The Agencies Were Required to Prepare a Mineral Potential Report

FLPMA requires that BLM, **in collaboration with cooperating agencies**, arrange for **resource**, environmental, **social**, **economic** and institutional data and information to be collected, or assembled if already available. 43 C.F.R. § 1610.4-3. New information and data collection must emphasize significant issues and decisions with the greatest potential impact. This mandates that BLM collaborate with the Counties, NDOW and the State to collect and assemble the social and economic data relevant to the closure of millions of acres of land to multiple-use, and the proposed withdrawal of 2.8 million acres for locatable minerals. Governor Sandoval provided this data in his scoping comments on the EIS for the proposed withdrawal, including maps, using information from NDOW about lek locations and breeding densities, and information from the NDOM on areas within Nevada with known mineral potential and existing mining claims.[14] These maps identified the "best of the best" GSG habitat in a manner that avoids putting lands with known mineral potential off limits and also shows SFA lands with no leks that should not be included in the SFA. BLM was legally required to compile, analyze and disclose this information to the public in the DEIS or an SEIS. In addition to breaching its obligation to prepare a MPR, BLM didn't use readily available information about mining claims in the area in its LR2000 database, despite input from BLM Solid Minerals Staff explaining the availability of relevant information essential to the impact analysis and describing the existing

[14] The NDOM maps on mineral deposits and claim location information are based on publicly available information including BLM's LR 2000 online database and Nevada Bureau of Mines and Geology ("NBMG") and USGS published documents, many of which are available online and all of which were available to BLM during the NEPA and land use planning process at issue.

analysis as "incredibly thin given the enormous impact of withdrawing 20% of the decision area to locatable minerals and 72% to salable and non-energy leasable minerals." NV_0073026-027.

2. The Notice of Withdrawal is Invalid and the Process Must Be Enjoined

As explained above, the SFAs identifying the boundaries for the proposed withdrawal are based on erroneous data and an unlawful process and for those reasons alone the withdrawal process should be enjoined until the underlying NVLMP identifying the lands for withdrawal goes through an SEIS. In addition, under the BLM's regulations implementing FLPMA, the withdrawal notice is facially defective. A withdrawal petition must contain, *inter alia*: a preliminary identification of the mineral resources in the area. *Id*. §§ 2310.1-3(b)(5). In addition, 43 C.F.R. 2310.1-2(c)(12) ***requires*** a "statement as to whether any suitable alternative sites are available for the proposed use or for uses which the requested withdrawal action would displace." That statement "shall include a study comparing the projected costs of obtaining each alternative site in suitable condition for the intended use, as well as the projected costs of obtaining and developing each alternative site for uses that the requested withdrawal action would displace." There is no study to satisfy this requirement. The omission of a MPR is fatal to the NVLMP and the notice of withdrawal which provides no such report but instead summarily concludes "no alternatives" exist and ignore the economic impact analysis requirement.[15]

In 2012, BLM staff members discussed preparation of a MPR during the NEPA process for the NVLMP. WO_0029783. In October 2012, BLM Planning and Environmental Coordinator and NE California/Nevada Sub-Region GSG Strategy Project Manager wrote:

> WO is looking into the requirement for a Mineral Potential Report for amendments. **BLM Manual 3060 outlines the mineral report (MP) requirements for activities and planning is one of those activities** …the solar PEIS had MPs… for each Solar Energy Zone (SEZ) and that was a programmatic amendment of many plans across six states…if we are proposing anything for withdrawal in these amendments in regards to minerals, e.g. the NTT alternative and others, then yes, a MP for the amendments is required per our manuals…For the …Great Basin side, which are amending plans without working through existing RMP revisions, then it could be a very large issue (VLI) if we have

[15] The Secretary's unlawful failure to report closures to Congress as FLPMA 202(e) mandates, also requires action on the closures be enjoined until she complies with her statutory obligations.

> alternatives proposing withdrawals. **If it is the case that we make recommendations for withdrawals without a MP, this will be an immediate protest point from industry in that they will aver BLM did not follow our process** and BLM cannot make those recommendations absent an MP." GBR_0014774. (emphasis added)

The July 2012 Solar PEIS[16] includes detailed information about the geology and mineral potential for five Nevada SEZs and references a contemporaneous MPR[17] used to assess the impacts of the proposed withdrawal of the SEZs from mineral entry using existing data including information from the NBMG to develop geology and mining district maps for each SEZ. The MPR also included information obtained in June 2012 from BLM's online LR2000 database on mining claims in the SEZs.[18] (*See* **Exhibit 13**, MPR, page 9).

BLM's preparation of the contemporaneous MPR and the SEZ PEIS further demonstrates the need for a MPR in conjunction with the FEIS/PLUPA. BLM cannot satisfy the MPR requirement retroactively, as it is doing here for the SFA lands, which were segregated prior to preparation of the MPR. BLM Manual 3060 governs MPR preparation and requires that mineral reports "shall be prepared" for planning documents. (Manual 3060 at .04B, .11). BLM complied with Manual 3060 when it prepared the Solar PEIS and MPR but ignored the requirement in the FEIS/PLUPA, a similar type of land use planning effort – according to the Protest Report which states this was a programmatic EIS. (FS_0134790) BLM's detailed, fact-based analysis for the

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[16] Final Programmatic Environmental Impact Statement (PEIS) for Solar Energy Development in Six Southwestern States, Volume 4 Nevada Proposed Solar Energy Zones Chapter 11 July 2012. The Ninth Circuit has previously taken judicial notice of publicly-available environmental impact statements and assessments. *See, e.g., Center for Environmental Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, n 5 (9th Cir. 2011) (taking judicial notice of a draft EIS); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011) (explaining that the Court could take judicial notice of an EA).

[17] Assessment of the Mineral Potential of Public Lands Located within Proposed Solar Energy Zones in Nevada, July 2012.

[18] Plaintiff WEX's Protest Letter emphasizes that the agencies should have used NBMG information on geology and mineral resources to prepare the FEIS/PLUPA. (*See* WEX Protest Letter, FS_0131732, FS_0131735). The WEX protest also states that BLM should have consulted the LR2000 database for information on active mining claims that would be affected by the closures in the PLUPA and the SFA. FS_0131735. BLM ignored the merits of the WEX protest. A number of the geologic references in the SEZ MPR include information on the geology and mineral potential of Plaintiff WEX's Gravel Creek-Doby George project area. Additionally, BLM could have readily obtained information on the status of WEX's mining claims for these projects from the same LR2000 database that BLM used to prepare the SEZ MPR. BLM should have used the same kind of information to evaluate the proposed SFA withdrawal of the Gravel Creek-Doby George area during preparation of the FEIS/PLUPA as they conducted for the SEZ PEIS and MPR. *See* footnote at FS_0131787.

proposed mineral withdrawals in the Solar PEIS stands in marked contrast to the perfunctory approach in the FEIS/PLUPA which omits sections on geology and mineral resources, data from the NBMG, and information from the LR2000 database on the number of claims affected.[19] BLM decided there would be no MPRs (WO_0029790) and sought to stifle this controversy:

> Many emails have been circulated conveying handbook and manuals for review and consideration [on mineral reports]… **I hope you can steer the discussion away from requiring mineral reports. We do not need to put more of a burden on the states. The key point is making sure they utilize the available data to determine where the mineral potential exists**. WO_0032220 (emphasis added)

In violation of FLPMA and Manual 3060 BLM did no MPR and failed to utilize available data in its LR2000 database or from the NBMG or NDOM both of which were used for the Solar PEIS.

One week before distribution of the Ashe Memo, BLM minerals staff commented that minerals would be **significantly affected** by new GSG management restrictions. WO_0066480-81. One week after the Ashe Memo, BLM solid minerals staff was asked to evaluate a mining claim map and provide a data set "for locatable minerals in the Areas of Significance" for the BLM Director. WO_0067491. In response, Adam Merrill (BLM's solid minerals group) wrote:

> **I have had no input on these maps nor was I asked to do so**. Asking around it does not appear that anyone else in WO-320 [BLM's solid minerals group] has had an opportunity either. **The data for the mining claim maps is now 2 years old…since 2012, 90,000 data points have changed**. By the end of the year, we will have the 2014 number, and the 2012 data will be even more out of date. I recommend that if possible, that the most recent data should be used. WO 4261; WO_0067489. (emphasis added)[20]

[19]The Solar PEIS set precedent for claims within the SEZ prior to the segregation. As explained in the MPR, if the lands are withdrawn; valid mining claims filed prior to the date the lands were segregated would "take precedence over future solar energy development right-of-way (ROW) application filings." (Ex. 14, MPR, page 7). Claimants' rights on existing claims within the SFA should be treated the same and take precedence over the proposed withdrawal of the SFA lands. The FEIS/PLUPA recognizes existing claims and permits as a Valid Existing Right ("VER"). NV_0081185. Plaintiffs' mining claims are mineral rights and their Plans of Operation are permits. BLM must treat these VERs like they treated the claims in the SEZ, and recognize the plaintiffs' rights cannot be extinguished by the future use of the claims as SFA; existing claims should be excluded from the SFA.

[20]Merrill said that BLM should not use data on mining claims as a proxy for mining disturbance or impacts: "Keep in mind that the data show only the mining claims on BLM which represent a potential disturbance. A rough estimate by the solid mineral division indicates that less than 1% of mining claims will be disturbed by a notice or plan of operations." WO 4261 WO_0067489.

Merrill informed BLM management about the shortcomings of the USGS Mineral Resources Database ("MRDS") that BLM used for the maps – that they included information is **highly variable in quality and contained out of date information**. WO_0067490. The USGS' MRDS website[21] includes a disclaimer that MRDS is "somewhat problematic" and as of 2011, "USGS has ceased systematic updates to MRDS, and is working to create a new database." The use of outdated unreliable mineral information extended to top BLM officials who made important policy decisions based on erroneous assumptions about the habitat characteristics and the distribution of mining claims in the Nevada areas that they were soon to designate as SFA. On October 24, 2014, Michael Bean's email to Jim Lyons stated his belief that the northern PAC in Nevada had "relatively few existing mining claims" and, therefore, withdrawal of those lands from mineral entry would protect the PAC from mining which he believed to be the "principal anthropogenic threat in Nevada" by "prohibiting new mining claims in the northern PACs (through a withdrawal)." WO_0000849. These assumptions are wrong: there are 3,762 mining claims in the SFA; some of the habitat in the SFA is not the "best of the best" and includes many acres of OHMA and non-habitat as confirmed by NDOW's comments on the ADPP; and, FWS' listing determination acknowledges mining does not significantly impact habitat.

With no MPR the agencies could not evaluate impacts to minerals resulting from the SFA and other restrictions in the NVLMP. The FEIS is fatally flawed because it does not include a section on geology and mineral potential, which should be the foundation for evaluating impacts on mineral development. USFS' planning policies for mineral resources require recognition of the probable occurrence of various minerals; the potential for future mineral development; [and] access requirements for mineral exploration and development. WO_0029703. The FEIS/PLUPA and FS ROD do not comply with these requirements. The FEIS fails to evaluate any of these required planning criteria. The faulty and incomplete analysis of impacts to locatable minerals is largely due to the lack of appropriate information, as described above by BLM solid minerals

[21] http://mrdata.usgs.gov/mrds; **Exhibit 14.**

staff. Instead of a MPR or data from BLM's LR2000 or the NDOM (as used in the Solar PEIS), all the public got in the FEIS/PLUPA was an erroneous vague statement that new "locatable mineral development in the planning area is most likely to occur in proximity to existing mines and previously mined areas. Due to the large number of previously mined areas in the planning area and the lack of reliable data on those areas, the impact analysis focuses on existing mines as an indicator of areas of likely future development." (FEIS at 4-306, NV_0080736). The statement about "the lack of reliable data on those areas" is incorrect – as demonstrated in BLM's evaluation of mineral potential in the Solar PEIS which used the abundant, publicly available information. Restricting the analysis in the FEIS/PLUPA to existing mines based on the faulty premise that there is no useful data on previously mined areas, leads BLM to erroneously minimize the impacts of the SFA and proposed withdrawal to locatable minerals.

In May 2014, BLM staff discussed with FWS a methodology for evaluating impacts from mineral development that quantified the number of claims in Nevada and the very limited impact mineral activities are likely to have on GSG habitat, based on past mineral development that suggests only an estimated ten percent of the 250,000 claims in Nevada would be developed. BLM considered a "process to move forward regarding locatable minerals": identify the number and acres of active mining claims in PPH and PGH; the projected level of development based on past history, projecting a percent of claims that would be developed and equate this to acres. BLM projected that foreseeable mineral development in the next 20 years would be less than 100,000 acres (approximately 1/2% of sage-grouse habitat) and recommended including an adaptive management trigger to request a withdrawal from mineral entry if the amount of future disturbance shows a disproportionate level of disturbance or is projected to exceed the level projected in 20 years. NV_0013360. The FEIS/PLUPA did not follow this logical impacts analysis protocol (or even disclose it as a possibility) to evaluate the direct, indirect, and cumulative impacts of mineral development on GSG habitat or to assess the direct, indirect, and cumulative impacts that the GSG conservation measures would have on mineral development.

BLM states in the FEIS: "Reasonably foreseeable locatable mineral development in MZ III is expected to increase over the 20-year analysis period." FEIS at 5-56, NV_0080840. BLM does not explain why mineral development will increase in MZ III in spite of the mineral withdrawals and land use restrictions in the NVLMP or explain why it is possible to evaluate reasonably foreseeable locatable development in MZIII but not elsewhere. BLM's erroneous omission of a MPR, their own best available data relative to mineral potential, and failure to request the State compile that information violations FLPMA and NEPA; the NVLMP cannot serve as a legal basis to defend this facially deficient "analysis" on this critical issue. BLM's top officials recognized the process requirements which were never completed. As described in the May 15, 2015 memo from Sara Greenberger to the Secretary, that process is supposed to include filing: "…a petition/application" with the Secretary for such a withdrawal which requires the 15 items described in 43 C.F.R. 2310.1-2 and 3, including a description of the boundaries of the withdrawal and a preliminary identification of mineral resources. WO_0001429. BLM knew of the requirement to identify the mineral resources to be withdrawn and ignored it. The FEIS does not satisfy this requirement because it does not include any data regarding the presence of known mineral resources in the SFA or evaluate the impacts on the known mineral resources of withdrawing the land from mineral entry. The Notice of Withdrawal was required to include a report evaluating potential alternatives for the conservation areas and the estimated cost to displaced users such as Plaintiffs. The Notice's omission of this report means it is unlawful and should be enjoined as it was triggered by the SFA decision in the NVLMP.

The SFA land withdrawal proposal, originated with FWS and includes National Forest System lands, and was not made "in accordance with the provisions and limitations of [43.U.S.C. § 1714]" because neither FWS nor USFS[22] submitted an application to withdraw the SFA. FLPMA's implementing regulations on withdrawal require pre-application consultation with BLM. 43 C.F.R. § 2310.1-1 (requiring contact with the State BLM "well in advance of the

[22] In Elko County alone, the SFA withdrawal includes 395,000 acres. Withdrawal of these land must comply with the withdrawal procedures at § 1714 and its implementing regulations

anticipated submission date of an application" for early consultation to "assist in determining the need for a withdrawal, taking possible alternatives into account.") After consultation, "before the authorized officer can take action on a withdrawal proposal, a withdrawal application in support thereof shall be submitted." *Id.* § 2310.1-2. USFS did not engage in pre-application consulting with BLM or file a withdrawal application. The agencies cannot ignore FLPMA's requirements to apply for withdrawal through informal exercises or agreements. *Clayton W. Williams,* Jr., *Exxon Corp.,* 103 IBLA 192, 205A (1988) (informal agreement resulting in a lease moratorium "'fit squarely' within the definition of withdrawal as found in FLPMA," which can only be done under the procedures in 43 U.S.C. § 1714.) BLM cannot circumvent FLPMA's limitations on withdrawal authority. *Casey E. Folks, Jr. et al.,*183 IBLA 24 (2012).

In addition, USFS failed to comply with its own procedures when it accepted, wholesale, the FWS' proposed SFA withdrawal. Before requesting BLM withdraw lands, USFS should notify "permittees holding permits on lands open to mineral development of their risks and liabilities," and document new withdrawal of lands by: (a) an assessment of the mineral potential; (b) an evaluation of alternatives, and (c) an analysis showing the use or special features of the area cannot be adequately preserved or protected through other means. USFS Manual 2761.03, *Special Uses Management: Withdrawals.* Moreover, USFS directs forest officers to "[i]nclude in the withdrawal the minimum area needed for the intended use." *Id*. The USFS did not perform any of the required functions in proposing the land withdrawal to BLM.[23]

3. BLM Prepared A Form Denial of the Governor's Consistency Review (GCR) Before Ever Even Receiving It in Violation of FLPMA Section 202(c)(9)

Defendants violated Section 202(c)(9) of FLPMA, 43 U.S.C. § 1712(c)(9), and 43 C.F.R. § 1601.4, which require that in amending land use plans, the Secretary coordinate with state and

[23] A "withdrawal petition" is a request to file an application for withdrawal that is originated within the DOI. *Id.* § 2300.5(p). The withdrawal petition must be submitted to the BLM. *Id.* § 2310.1-3. A withdrawal petition must contain, *inter alia*: "[a] preliminary identification of the mineral resources in the area." *Id.* §§ 2310.1-3(b)(1),(2),(5). If a petition is submitted with a withdrawal application, *the information requirements pertaining to withdrawal applications are required*. *Id.* § 2310.1-3(c). FWS is an agency within DOI, and it must submit a withdrawal petition to BLM. The record contains no evidence FWS applied to request withdrawal of the SFA, or submitted a proper withdrawal petition to BLM, as FLPMA requires.

local governments, consider state and local plans "that are germane to the development of land use plans for public lands" and provide for **meaningful public involvement of State and local government officials."** FLPMA recognizes states and counties have expertise in land use planning and *requires* the Secretary develop land use plans that "are consistent with State and local plans to the maximum extent" such plans are "consistent with Federal law and the purposes of [the] Act." *Id.*§ 1712(c)(9). FLPMA honors federalism principles allowing states to develop solutions and collaborate with local governments to solve state problems. EO 13232, Aug. 4, 1999, 64 Fed. Reg. 43255. BLM made no attempt to reconcile inconsistencies between the NVLMP and the state and local plans in violation of FLPMA § 202(c)(9) and EO 13232. Under 43 C.F.R. § 1601.4-2(c)-(d), the Counties and the State notified BLM of significant inconsistencies between their plans and the PLUPA. BLM was required to resolve these inconsistencies or explain why resolution is not possible. BLM ignored the inconsistences violating 43 U.S.C. § 1712(c)(9) and 43 C.F.R. § 1601.4. *American Motorcyclist v. Watt*, 534 F. Supp. 923 (1981). BLM failed to cooperate with the State and Counties or analyze whether the State and local plans benefit and conserve GSG. The NVLMP restrictions violate FLPMA by their inconsistencies with the County and the State plans which balance multiple-use and conservation while not interfering with ranching, mining, recreation and other important uses.

In March 2014, BLM voiced concerns that the GCR process could cause delays and indicated it may not complete a thorough review: "Concern that the Governor's consistency process may add time to the schedule as well. Need to assume we will have Governor's consistency for now." GBR_0007146. By October 2014, the schedule was delayed nearly a year and assumed a "smooth protest resolution process;" and no GCR appeals. WO_0000128. The October 2014 schedule shows only two months between publishing the FEIS and signing the ROD, documenting that BLM did not intend to conduct meaningful consistency review. The agencies spent the rest of 2014 and early 2015 considering the SFA and other changes. In May 2015, BLM had developed a table of 14 inconsistencies between the FEIS/PLUPA and the Nevada Plan including a column for BLM's response to these inconsistencies, and a column

labeled "Potential Resolution." NV_0005705-6 (**Exhibit 15**, NV 289 Table). For the SFAs, the mineral withdrawals, and No Surface Occupancy ("NSO") for fluid minerals in the SFAs, BLM's response is perfunctory referencing "National Direction" and the Potential Resolution column is blank. The "Potential Resolution" column is blank for 13 of 14 inconsistencies demonstrating BLM made no attempt to reconcile the PLUPA with the State Plan.

When the FEIS/PLUPA was finally published on May 29, 2015, just four months before FWS' September 30, 2015 listing decision deadline, there was barely enough time for the mandated 30-day protest period, which ended on June 29, 2015; the 60-day GCR period, which ended on July 29, 2015; and the governor's 30-day appeal period, which ended on September 4, 2015. WO_0000138. Faced with this compressed schedule, BLM started drafting responses to the GCR letters before the end of the consistency review period. FS_0088843. BLM sent a sample response letter with template language for the GCR letter to Project Managers on July 24th (FS_0088855). BLM established July 31st as the deadline for its draft responses to the consistency review letters (just two days after the GCR review period ended) and set August 5th as the target date for replying to the GCRs. (FS_0088850-51).

By July 19, 2015 – before even receiving the governors' letters, BLM had already drafted a briefing paper and the Federal Register Notice of Availability for the RODs that said BLM had received consistency review letters from the governors of Idaho, Montana, Nevada[24], Oregon and Utah and appeals from the governors of Idaho, Montana, Nevada, and Utah. The July 19th draft reported the "BLM Director affirmed the BLM State Directors' decisions to reject" the GCRs, that the Director communicated his decisions in the Federal Register on September 14, 2015, and that only minor modifications were made in response to the GCRs and protests. GBR_0010918. BLM drafted language saying the GCRs and appeals would be rejected **ten days before the July 29th deadline for the GCRs and more than six weeks before the September 4, 2015 deadline**

[24] NV protest letter, FS_0131929-46; GCR, NV_0090308-90641; appeal, NV_0017531 – 538.

for the governors' appeals. BLM ran out of time[25] and never intended to make any substantive changes to the PLUPA in response to the GCRs or appeals. BLM gave superficial responses to the governors, violating FLPMA 202(c)(9) and its planning regulations.

As of January 2014, the ADPP and the Nevada Plan were largely consistent. BLM reported "working with [the] state Sagebrush Ecosystem Technical Team;" and that "BLM plan may be very consistent with their plan." GBR_0007131. Neither the Nevada Plan nor the ADPP put areas off-limits to mineral exploration and development and other multiple uses at that time. The Ashe Memo and FWS' insistence that the LUPAs include withdrawals of the SFA from mineral entry changed everything and made consistency between the PLUPA and the Nevada Plan impossible. The other last-minute additions to the FEIS/PLUPA (lek buffer zones, net conservation gain, and administrative management triggers) differed substantially from the multiple use principles in the Nevada Plan and eliminated any possibility of consistency between the Nevada Plan and the PLUPA. BLM's responses to the Governor were woefully deficient. Governor Sandoval raised the inconsistency of the SFA with State and local plans and that the State Plan, in contrast to the PLUPA takes into account indirect effects to sage-grouse, limiting habitat, ecological site descriptions, state-and transition-modelling, and resistance and resilience concepts that are scientifically superior to the exclusion areas. NV_0017544.

Governor Sandoval objected to the agencies' omission of public comment for the SFA proposal. NV_0017544. The GCR provided pursuant to 43 C.F.R. 1610.3-2 (e), were extensive. NV_0089863-0090123. In response, BLM responded simply that the letter "does not itself identify a particular inconsistency for BLM to resolve" - ignoring the serious inconsistencies the State raised. NV 90252- 90255. This violated FLPMA. 43 C.F.R. 1610.3-2 (b). The BLM ignored the State Plan and all the scientific evidence contained in the state plan. The BLM relied on an unspecific response to deny several of Nevada's recommendations. For example: The BLM respectfully declines to adopt this recommendation because it is not consistent with the purposes,

[25] To be in place prior to the FWS' September 30, 2015 listing decision the RODs had to be signed in mid-September within about one week after receiving the governors' appeals.

policies and programs of federal laws and regulations applicable to public lands. FS_0146282 This response is specious and nearly identical to the text used to deny the GCRs across the western states – the form responses to all of the Governors prepared before the deadline for GCRs even passed. BLM violated 43 U.S.C. § 1712 (c)(9) and 43 C.F.R. § 1610.3-2 and the RODs should be vacated and remanded for the BLM to conduct the consistency review.[26]

4. BLM Deprived the Counties Meaningful Involvement Per FLPMA 202(c)(9)

BLM failed to provide the Counties with the meaningful involvement FLPMA 202(c)(9) requires. "BLM State Directors and District Managers are required to keep apprised of state and local plans, to assure that consideration is given to them and to assist in resolving inconsistencies between BLM plans and such plans to the extent practical." *American Motorcycle Ass'n v. Watt*, *534 F. Supp.* 923, 936 (C.D. Cal. 1981). Where an agency has not followed consistency review procedures, which include failure to present "adequate evidence of their response" to the County's "list of inconsistencies," violations of 202(c)(9) are ripe for consideration. The Counties identified inconsistencies with the Proposed LUPA and their local plans that interfere with county roads needed for access to ranching operations on public and private lands and to some of the best mineral exploration and development terrain in the world; county noxious weed control programs; livestock grazing programs to conserve habitat; pinyon-juniper removal programs; and collaborative public-private GSG conservation efforts. Ex. 2, Dahl Dec.; Ex. 3, JJG Dec., Ex. 5 French Dec. BLM's failure to discuss or adequately comment on those inconsistencies violates FLPMA.

While FLPMA permits a LUPA to be inconsistent with state or local plans to the extent such plans are inconsistent with Federal law, FLPMA does not allow BLM to ignore local plans that are more consistent with Federal law than the NVLMP and use more accurate data. The NVLMP creates severe economic hardships to the Counties and environmental harm due to the

[26]Like FLPMA, NFMA provides states a role in land management planning efforts, requiring planning be "coordinated with the land and resource management planning processes of State and local governments." *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572, 585 (1987); 16 U.S.C. § 1604(a). USFS, like BLM, unlawfully ignored this requirement.

livestock grazing restrictions that will lead to increased risks of wildfires that will destroy GSG habitat. The Counties formally participated as cooperating agencies in the LUPA process. As discussed with specificity in the Counties' comments on the DEIS, ADPP, and protests, (**Exhibit 16**, Table detailing AR cites). The NVLMP is inconsistent with the Nevada counties' land use and conservation plans in violation of FLPMA. BLM received comments on the DEIS from counties in all of the sub-regions stating concerns that the conservation measures in the DEIS were not consistent with counties' plans. GBR_0007182. In August and September 2014, BLM cavalierly dismissed the importance of responding to the widespread concerns about the DEIS from numerous western counties: "Group feels that the consistency evaluation does not have to occur until after DEIS and FEIS (i.e., the proposed plan is not the final decision). Group does not feel that it warrants a response or thorough evaluation at this time." GBR_0007182. The agencies did "…not intend to go through the county land use plans" in Nevada and Northeastern California. "Until we have a ROD with a decision, we are not inconsistent with any plan. At what point do we need to do this review?" FS_0050984. BLM's position that they could delay the consistency review with the counties plans until after the ROD was signed is unlawful. By August 2015, BLM decided to ignore its responsibility under the FLPMA consistency mandate.[27] Declaring they had run out of time, BLM ignored the counties' comments: "I think you sent it [Eureka County's ADPP comments] directly to the solicitor and the decision was made to only go through comment by comment on the state of NV and SETT comments (due to time constraints)." NV_0051396. This acknowledged FLPMA violation requires remand to properly complete the consistency review.

BLM gave the Nevada counties just two weeks to provide comments on the 1,600-page ADPP. Despite the unreasonableness of this request, the Counties attempted to review this massive document in their capacity as cooperating agencies. Elko County described the agencies' tremendous failure to adequately coordinate with Elko County to "include our

[27] Land use plans of the Secretary shall be consistent with State and local plans to the maximum extent consistent with Federal law and the purposes of this Act." 43 U.S.C. 1712(c)(9)

comment or evaluation to any extent and strive for consistency with our local plans, policies, and controls." NV_0014774. Eureka County expressed frustration with "the overwhelming failure of BLM/USFS to adequately coordinate with Eureka County to include our proposals to the maximum extent possible and strive for consistency with our local plans" and asked again "that BLM/USFS properly and adequately coordinate with us to incorporate changes for maximum consistency with our local plans, policies, and controls before the Final EIS is published." NV_0014769. Humboldt and Lincoln Counties informed Governor Sandoval of the significant inconsistencies with their plans. The GCR includes attachments from Elko, Eureka, Lincoln, and Washoe Counties (FS_0146257) which the BLM ignored. (FS_0146276-287).[28]

Elko County participated as a cooperating agency in the LUPA process and submitted DEIS comments. Elko County estimated that the NVLMP would result in a $31 million annual loss in revenue from agricultural productivity (NV_0087336) and that the county had already lost over $500 million that Phase 1 of the China Mountain wind project would have generated but for BLM's deferral of the permitting process for this Elko County project due to GSG habitat concerns. NV_0087336. Despite the serious concerns about substantial economic impacts from the PLUPA, the agencies largely ignored the county's comments (FS_0131425). Elko County's participation in the LUPA process and its first-hand expertise in conserving GSG habitat merited more than a one-page dismissal in the FEIS and a two-page cookie cutter response to its protest (NV_0089009) that was identical to BLM's response to all of the other counties' protests. NV_0089015, NV_0089039, NV_0089055. All protesters including WEX (NV_0089011) and the Ninety Six Ranch (NV_0087769-786), and ENGOs that are litigants in other GSG cases (NV_0089027) received the same form-letter response from BLM demonstrating the predetermined intent to deny all protests regardless of their merit due to the rush to sign the ROD before the September 30, 2015 listing deadline.

[28]BLM denied the Counties' requests for more time to review the ADPP stating that they were rushing to meet the FWS' listing determination deadline. NV_0014766-67.

The SFA covers, which more than 2 million acres in Elko County and roughly 633,000 acres in Humboldt County, creates special concerns because it closes a substantial portion of each county's lands to mining, renewable energy, and oil and gas, and threatens to reduce ranching operations.[29] The SFA is grossly inconsistent with the multiple use principles in the Elko and Humboldt Counties' plans and will cause significant hardships in both counties. BLM disregarded this glaring inconsistency.

Eureka County also was a cooperating agency in the LUPA process. As described in its protest letter (NV_0087741-768) Eureka County lists the eight detailed comment letters including March 2012 scoping comments and 125 pages of substantive comments on the DEIS (NV_0052300) that it provided during the LUPA process that all focus on the inconsistencies between the proposed land use restrictions and Eureka County's policies, and why Eureka County's plans would provide superior GSG conservation and habitat enhancement compared to the PLUPA, while still maintaining the ranching and mining foundations of the county's economy and way of life. The agencies dismissed Eureka County's comments and denied its protest (NV_0089015) with the same form letter they provided all other protesters. BLM violated FLPMA by ignoring the Counties, failing to identify specific inconsistencies in the county plans with federal law, and evading its responsibilities pursuant to FLPMA 202(c)(9) consistency that demanded BLM to minimize the NVLMP inconsistencies with the state and the counties' plans to the maximum extent possible. Both the Elko and Eureka Plans are more consistent with FLPMA's multiple-use mandate and the FWS COT Report[30] than the NVLMP and present conservation strategies including managed livestock grazing to reduce the spread of invasive non-native grasses as a proven way to reduce wildfire risks,[31] predation control, and pinyon-

[29]The WEX and Quantum projects are located in the Elko County SFA; Paragon's project is located in the Humboldt County SFA. Plaintiff Ninety-Six Ranch's operations are located in Humboldt County.

[30] The COT Report recognizes fire and invasive grass species as a primary threat to GSG habitat and defers to local plans that already provide an effective strategy for fire – specific strategies or actions necessary to achieve "conservation objectives ***must be developed and implemented at the state or local level, with the involvement of all stakeholders.***" COT Report at 52, 38, 41.

[31] Reducing wildfire risks is critical in the Humboldt-Toiyabe National Forest in Elko, Eureka, Humboldt, Lander,

juniper removal based on the best available science superior to those presented in the NVLMP. The BLM unlawfully ignored that the state and local plans *are* consistent with FLPMA and other Federal laws and do achieve conservation using measures based on local expertise that the COT Report endorsed. The Agency skipped this step in the process, relying on generalized form responses that they prepared before ever even receiving the GCR. BLM did not respond to the Counties' comments that the LUPA doesn't follow their local plans or Nevada guidance; that water rights and non-adjudicated road jurisdictional issues are left in limbo; that managed grazing can improve GSG habitat and reduce fire risks, or that BLM didn't use best available science. Ex. 2, Dahl Dec. ¶24, 23, 5; Ex. 3, JJG Dec. ¶27, 17, 15; Ex. 5, French ¶¶ 4, 7, 9. The NVLMP violates FLPMA.

5. BLM Violated FLPMA By Failing to Properly Consider Valid Protests

BLM also violated the protest procedures in its planning regulations at 43 C.F.R. § 1610.5-2 by predetermining its responses. By July 19, 2015 –20 days after the protests were due – BLM had already concluded that it would deny all 133 of the protests.[32] GBR_0010918. Protests included those from plaintiffs WEX (FS_0131732-747), Quantum Minerals (FS_0131947-952), Elko (FS_0131421-437), Eureka (FS_0132003-2030), Lincoln (FS_0131748-49), and White Pine (FS_0131897-907) counties, and the State of Nevada (FS_0131929-946). The July 19th draft briefing paper and Federal Register Notice of Availability for the ROD (GBR_0010916 - GBR_0010934) discussing the protest denials as a *fait accompli* demonstrates that BLM had no intention resolving the protests. BLM should have provided substantive responses to issues like those raised in Quantum's protest that the USFS provided a biological evaluation concluding no GSG habitat was within its project area and then having the area swept entirely within the supposed "best of the best" SFA region now proposed for withdrawal (FS_0131951-2) – a consequence of the Agencies' use of faulty data. Any

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Lincoln, White Pine and Washoe Counties where wildfire has affected the most acres of priority habitat in any of the Great Basin Sub-region national forests (FS_0136297)

[32] BLM waited nearly two months until September 15, 2015 to send the protest denials to the entities that sent protest letters.

meaningful response would have considered the mineral potential of lands proposed for withdrawal like WEX's Gravel Creek project which has an estimated gross value of over $2 billion and is within an SFA. However, the agencies did not prepare a MPR, consider BLM's LR 2000 database, or include information on geology and mineral resources in the EIS. This information should have led to the exclusion of WEX's and Quantum's projects from the SFA. NV_0073027. Plaintiffs got the same cookie-cutter response all other protesters received. BLM violated FLPMA and its planning rules because did not make a credible effort to resolve protests.

6. Defendants ignored FLPMA & NFMA's multiple-use mandates

FLPMA requires BLM manage public lands for multiple-use in a manner that recognizes the nation's need for domestic sources of minerals. 43 U.S.C. § 1701(a)(12). "Multiple use" means "management of the public lands and their various resource values so that they are utilized in the combination that will *best meet the present and future needs of the American people*" providing a "combination of *balanced and diverse resource uses*" with consideration "to the relative values of the resources." 43 U.S.C. § 1702(c). The NVLMP fails to provide for "balanced and diverse resource uses." BLM provided inadequate analysis of "the relative values of the resources" and, instead, selected GSG conservation measures based on faulty science and without consideration of viable alternatives go balance resources. With no MPR BLM had no way to balance resource uses because they did not consider data on lost mineral potential.

NFMA requires the USFS to manage National Forest System lands consistent with the Multiple Use and Sustained Yield Act, 16 U.S.C. § 528, to consider **both environmental and economic goals,** 16 U.S.C. § 1604(g); 36 C.F.R. § 219.1(a), **while taking into account the Nation's needs for minerals,** 16 U.S.C. § 528. The SFA withdrawal zones and travel restrictions in the NVLMP violate this multiple-use mandate based on faulty science and without meaningful consideration of economic goals or the Nation's need for minerals. The agencies' Preferred Alternative (Alternative D) in the DEIS did not include the SFA withdrawal zones instead emphasizing "***balancing resources and resource use among competing human interests, land uses, and the conservation of natural and cultural resource values*** . . .." The

agencies selected Alternative D to comply with multiple use mandates: "Formulated by the planning team, the preferred alternative represents those goals, objectives, and actions determined to be most effective at resolving planning issues and balancing resource use." The DEIS Preferred Alternative satisfied the purpose and need, the agencies' multiple-use mission, and interdisciplinary team recommendations. (DEIS, 2-24, FS_0056286). The FEIS abandoned the Preferred Alternative's multiple-use approach under pressure from FWS.

The NVLMP's proposed withdrawal of 2.8 million acres of land, onerous travel restrictions on 16 million acres, and restrictions on grazing do not balance multiple-uses. The DEIS Preferred Alternative provided for "no unmitigated loss" and included a suite of actions to offset or restore disturbance to GSG habitat. DEIS 2-13, FS_0056275. Without explanation, the FEIS drastically changed this multiple-use approach and instead proposed to withdraw 2.8 million acres, close millions of acres to important land uses, replace "no unmitigated loss" with a requirement for "net conservation gain," and create uniform lek buffers that are no-go zones. The NVLMP violates multiple-use mandates without any explanation as to why closures and onerous restrictions on millions of acres are necessary when State and local plans provide for multiple-use and focus on reducing the key threats to GSG habitat - wildfire and the infestations of highly flammable non-native grasses. The NVLMP interferes with local planning, police powers, and the Counties' wildfire reduction programs, resulting in harm to the Plaintiffs and to the environment.[33] Ex. 2, Dahl Decl. ¶ 2, 13, 23, 24; Ex. 3, JJG Decl. at ¶ 6, 13, 17, 22.

7. Changes in the FEIS Would Have Required Amendment of a LUP

FLPMA requires that BLM ensure the views of the public are incorporated into the land planning process. 43 U.S.C. § 1701(a)(5); 43 C.F.R. § 1610.2. The substantial changes in the FEIS/PLUPA from what was provided to the public in the DEIS Preferred Alternative do not

[33] BLM unlawfully ignored Eureka County's comments that the LUPA/FEIS fails to analyze long and short-term benefits to the County's residents. The agencies rely on the Impact Analysis for Planning Model to demonstrate that they considered such impacts. A model is only as good as its inputs. Eureka County provided county-specific economic data that were not used. NV_0086258. Available information about Nevada's mineral resources and mining employment numbers were not considered in the LUPA/FEIS, calling the accuracy of the model inputs into

qualify as a minor change in data under § 1610.5-4 for plan maintenance, which "shall not result in expansion in the scope of resource uses or restrictions," is not considered a plan amendment, and shall not require the formal public involvement and interagency coordination process. By comparing § 1610.5-4 with § 1610.5-5 for plan amendment, it is evident the latter captures a wider spectrum of agency action – requiring amendment to consider "**new data, new or revised policy**, a change in circumstances or a proposed action that may result in a **change in the scope of resource uses** or a change in the terms, conditions and decisions of the approved plan." These provisions ensure that meaningful changes to management plans are made via amendment, supported by scientific environmental analysis and public disclosure. The changes between the DEIS and FEIS were based on "new data" and "new or revised policy" from FWS and resulted in a "change in the scope of resources uses" by closing millions of acres of land.

E. The New Net Conservation Gain Requirement Violates FLPMA & NEPA

BLM acknowledged the inconsistency of the "net conservation gain" requirement with FLPMA: "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_0034987. BLM's staff raised this conflict with FLPMA's unnecessary and undue degradation ("UUD") standard (43 U.S.C. 1732(b)) and BLM's surface management regulations for hardrock mining, 43 C.F.R. 3809: "Mitigation is limited [to] prevention of UUD as defined in 43 CFR 3809.5 and addressed in 43 CFR 3809.415…Limitation of the use of mitigation measures and the application of UUD is found in Solicitor's Opinion M-37007 and supported in court (*Mineral Policy Center v. Norton* No. 01-00073 District Court, DC, November 18, 2003)." NV_0073023. The net conservation gain mitigation standard is inconsistent with FLPMA's multiple use mandate which means that some degradation of the land is inevitable – it is necessary and due in order for the activity to occur. If FLPMA imposed a zero-impacts standard rather than the UUD standard, multiple-use would be impossible: roads

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question. The model inputs were not based on known factors. The agencies' explanation of long-term and short-term benefits in Nevada are inaccurate in violation of FLPMA 202(c)(7).

and transmission lines could not be built; minerals and oil and gas could not be explored for and developed; livestock could not be grazed. Net conservation gain goes beyond zero impacts; it requires that multiple uses of public lands improve the habitat. BLM's regulations define UUD, for mining purposes, as prohibiting "conditions, activities, or practices" that are "not reasonably incident to prospecting, mining, or processing operations." 43 C.F.R. § 3809.5. The Court of Appeals for the D.C. Circuit held that BLM properly applied the UUD standard, in the context of a plan amendment with impacts on GSG, where BLM recognized that some degradation was necessary to achieve the development authorized. *TRCP II*, 661 F.3d at 76-77. The court affirmed BLM's selection of a lek buffer mitigation condition that BLM conceded would not avoid adverse consequences to GSG, holding that "FLPMA prohibits only unnecessary and undue degradation, not all degradation." *Id.* at 78; *see Lands Council v. McNair*, 537 F.3d 981, 995 n.7 (9th Cir. 2008) (implementing multiple use does not require improved habitat).

F. BLM Unlawfully Delegated its Statutory Authority to FWS & Violated Procedures

BLM has sole authority to develop resource management plans under FLPMA, with few exceptions. 43 U.S.C. § 1601.0-1. USFS and FWS must apply to BLM to withdraw lands. An administrative agency cannot delegate its statutory authority to act without express Congressional authorization. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Ruley v. Nevada Bd. Prison Com'rs*, 628 F.Supp. 108 (D. Nev. 1986). An agency improperly delegates its authority when it shifts to another party "almost the entire determination of whether a specific statutory requirement ... has been satisfied." *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 567 (D.C. Cir. 2004). Responsibility is also delegated where an agency abdicates its "final reviewing authority." *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F.Supp.2d 7, 19 (D.D.C.1999).[34] In 1981, FWS unlawfully delegated to USGS administrative responsibilities over approval of § 3142(e) plans for the Arctic Wildlife Refuge, contrary to Congressional intent that FWS approve the plans. *Trustees for Alaska v. Watt*, 524 F. Supp 1303, 1305-06 (D. Alaska

[34] It is not permissible for an agency to delegate authority to a non-subordinate agency, absent congressional authorization. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1352 (9th Cir. 2011).

1981). That is what BLM did here – abandoning the multiple-use approach in the DEIS Preferred Alternative to acquiesce to the FWS' insistence upon "strongholds" resulting in SFAs. BLM unlawfully subdelegated its land management authority to FWS and improperly conflated it with FWS' species protection under the ESA. **Exhibit 17**, Dunkleberger Test. 11/18/2015 at 355-358.

FLPMA authorizes BLM to "make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section." 43 U.S.C. § 1714(a). BLM may propose withdrawal, or it may consider withdrawal **upon application** from an entity outside BLM. *Id*. § 1714(b)(1). USFS acknowledges it must propose withdrawal to BLM through the application process. *See U.S. v. Smith Christian Min. Enterprises, Inc*., 537 F. Supp. 57, 60-61 (D. Ore. 1981). USFS's manual provides that requests for mineral withdrawals "should be made rarely." Manual 2760.01, *Special Uses Management: Withdrawals*. **FWS is required to apply to BLM for withdrawals**. Here, there was no time for that given the agencies' time crunch.

CONCLUSION

For these reasons, Plaintiffs are entitled to summary judgment and request the RODs be vacated and remanded to the agencies to prepare an SEIS and a MPR for use in **this** NEPA process, and conduct a consistency review and that the withdrawal process be enjoined until a properly revised notice is prepared based on a revised NVLMP prepared in accordance with law.

Dated this 1st day of April, 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 1st day of April, 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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