

November 27, 2019

Bureau of Land Management
Nevada State Office
1340 Financial Blvd.
Reno, Nevada 89502-7147

BUR. OF LAND MANAGEMENT
NEVADA STATE OFFICE

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BLM NVSO IAC

Re: Protest of the December 2019 Competitive Oil and Gas Lease Sale Proposed by the Bureau of Land Management Nevada State Office

Dear BLM:

Please accept this protest of the above competitive oil and natural gas lease sale being offered by the Bureau Land Management (BLM). The protesting parties are The Wilderness Society, Friends of Nevada Wilderness, Sierra Club, and Natural Resources Defense Council. In this lease sale the BLM is proposing to offer 272 parcels covering approximately 468,815 acres of public land that are located in the Ely and Battle Mountain Districts of the BLM.

In this protest we protest the sale of the 247 parcels that are being offered in the Ely District. We are not protesting the remainder of the parcels, which are located in the Battle Mountain District. This protest is filed under the provisions at 43 C.F.R. § 3120.1-3.

I. LEASE PARCELS PROTESTED

We protest the sale of all lease parcels that are located in the Ely District of the BLM in Nevada as shown in the BLM's Notice of Competitive Oil and Gas Lease Sale, December 17, 2019. https://www.blm.gov/sites/blm.gov/files/NV_OG_20191217_Sale_Notice_Signed.pdf. As mentioned, this is 247 out of the 272 parcels being offered for sale. The parcel numbers and serial numbers that are protested are also shown in the Appendix to this protest.

II. INTERESTS OF THE PROTESTING PARTIES

The Wilderness Society ("TWS") has a long-standing interest in the management of BLM lands in Nevada and engages frequently in the decision-making processes for land use planning and project proposals that could potentially affect wilderness-quality lands and other important natural resources managed by the BLM in Nevada. TWS has expended significant resources field inventorying public lands in Nevada for wilderness characteristics. TWS members and staff enjoy a myriad of recreation opportunities on BLM-managed public lands, including hiking, biking, nature-viewing, photography, and the quiet contemplation in the solitude offered by wild places. Founded in 1935, our mission is to protect wilderness and inspire Americans to care for our wild places.

Friends of Nevada Wilderness ("FNW") has taken an interest in the management of BLM lands in Nevada since the 1970s. FNW staff and members have engaged in the decision-making process for land use planning and project proposals that could potentially affect

wilderness-quality lands managed by the BLM in Nevada. FNW has invested significant resources and personnel to intensively field inventory public lands in Nevada for wilderness characteristics. FNW members and staff spend a substantial portion of their time recreating on BLM-managed public lands, including hiking, biking, nature-viewing, dark sky viewing, rock hounding, photography, and the quiet contemplation in the solitude offered by wild places. FNW was organized in 1974 and received formal 501(c)(3) status in 1985. Our mission is to protect and advocate for all wilderness qualified lands within the state of Nevada.

The Sierra Club is a national nonprofit organization of approximately 784,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Toiyabe Chapter of the Sierra Club has approximately 6,600 members in Nevada and the Eastern Sierra, including members who live and recreate in the Ely District. Sierra Club members use the public lands in the Ely District, including lands and waters that would be affected by actions under the lease sale, for quiet recreation, aesthetic pursuits, and spiritual renewal. These areas would be threatened by increased oil and gas development that could result from the proposed lease sale.

Natural Resources Defense Council ("NRDC") is a non-profit environmental membership organization that uses law, science, and the support of more than two million members and activists throughout the United States to protect wildlife and wild places and to ensure a safe and healthy environment for all living things. NRDC has a long-established history of working to protect public lands and clean air in Nevada and addressing climate change by promoting clean energy and reducing America's reliance on fossil fuels. Over 2,000 of NRDC's members reside in Nevada. NRDC members use and enjoy public lands in Nevada, including the specific lands at issue, for a variety of purposes, including recreation, solitude, scientific study, and conservation of natural resources.

III. AUTHORIZATION TO FILE THIS PROTEST

As an attorney for The Wilderness Society, Bruce Pendery is authorized to file this protest on behalf of The Wilderness Society and its members and supporters. He has been given like authority to file this protest on behalf of the Sierra Club, Friends of Nevada Wilderness, and Natural Resources Defense Council.

IV. STATEMENT OF REASONS

The protesting parties filed detailed comments on September 5, 2019 on the proposed lease parcels as described in the Environmental Assessment (EA) prepared by Ely District on August 8, 2019. Comments were not filed on the Battle Mountain District EA. At that time the BLM was proposing to offer 451 parcels covering 777,197 acres of public land in the Ely District. It has now scaled the lease sale back to only including 247 out of the 272 parcels being offered for sale with no reasons we are aware of stated for this change. To the best of our knowledge BLM has not filed any responses to our September comments. None are posted on

the BLM website at <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada> where the EAs and the lease sale notice are posted. Therefore, many elements of this protest remain unchanged from the issues we raised in the September comments and we ask the BLM to consider those concerns at this time. For that reason, our September 5, 2019 comments are incorporated into this protest by this reference and we ask that they be fully considered as part of it.

A. The Lease Sale EA for the Ely District Does not Adequately Consider or Provide for the Protection of Lands with Wilderness Characteristics.

1. *BLM should defer parcels that overlap with inventoried lands with wilderness characteristics until management decisions are made for those lands in order to comply with the National Environmental Policy Act and Federal Land Management and Policy Act.*

Lands with wilderness characteristics (LWC) are one of the resources of the public lands that must be inventoried and considered under the Federal Land Policy and Management Act (FLPMA). 43 U.S.C. § 1711(a); *see also Ore. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1122 (9th Cir. 2008). Of the 451 lease parcels originally proposed for the December, 2019 lease sale in the Ely District, 170 overlapped 20 BLM-recognized LWC units covering 183,509 acres. EA at 32-33, 45. *See also* EA at App. B Table B.4 (presenting the LWC unique identifier numbers and the lease parcels overlapping them and the acreage of overlap). The BLM has not yet made management decisions in its land use plan for how these areas would be managed relative to wilderness characteristics. *Id.* at 32-33, and 45. A comparison of the parcels now being offered at the December lease sale with the parcels shown in Appendix B Table B.4 of the Ely District EA shows a number of parcels being offered continue to overlap with LWC units. Based on an analysis we have done, there are still 144 parcels in the proposed lease sale that intersect 163,594 acres of LWC.

The BLM needs to check its LWC data to ensure what is presented in the EA is accurate. The Ely District LWC layer we have reviewed shows an overlap of 18 parcels not 20. Three LWC units (01R-09-4, 01R-12-19, and 215A) are shown as overlapping although they do not appear on the LWC layer and there is a very small overlap (<1 acre) of lease parcel NV-2019-12-2763 with LWC unit 015A-7-2012. Further, on EA page 32 BLM says there is an overlap of 20 LWC inventory units and that “eight . . . were found to poses wilderness characteristics on their own merits and “the other seven” inherited characteristics from adjacent Wilderness Areas. This is 15 overlapping LWCs not 20. And then on EA page 33 BLM says leasing would potentially impact “19 inventory units.” Thus, we are confronted with contradictory statements about 20, 15 and 19 LWC units overlapping with proposed lease parcels. This needs to be clarified and corrected.

We greatly appreciate that BLM has been updating its LWC inventory in the Ely District consistent with FLPMA and agency policy. However, BLM must preserve its ability to decide whether and how to protectively manage those newly-inventoried wilderness resources in a public planning process. Such decisions could be foreclosed by leasing those lands to the oil and gas industry at this time. Therefore, BLM should defer all leases in inventoried LWC until the agency has the opportunity to make management decisions for those areas through a public planning process.

It is well within BLM's authority to defer nominated parcels from lease sales. Neither the Mineral Leasing Act (MLA), FLPMA, nor any other statutory mandate requires that BLM must offer public lands and minerals for oil and gas leasing solely because they are nominated for such use, even if those lands are allocated as available to leasing in the governing land use plan. The Tenth Circuit Court of Appeals confirmed this discretion in *New Mexico ex rel. Richardson*, when it stated, "[i]f the agency wishes to allow oil and gas leasing in the plan area it must undertake additional analysis...but it retains the option of ceasing such proceedings entirely". 565 F.3d 683, 698 (10th Cir. 2009).

BLM regularly exercises this discretion to defer parcels in inventoried LWC for which the agency has not yet made management decisions. For example, the Grand Junction Field Office deferred lease parcels from its December 2017 lease sale in areas that BLM recently inventoried and found to have wilderness characteristics. BLM stated: "Portions of the following parcels were deferred due to having lands with wilderness characteristics that require further evaluation." DOI-BLM-CO-N050-2017-0051-DNA, p. 1. The Grand Junction Field Office completed its RMP revision in 2015 but still determined that it is inappropriate to lease areas that have been inventoried and found to possess wilderness characteristics since the RMP was completed in order to allow the agency to consider management options for those wilderness resources.

BLM Nevada should similarly defer leasing in inventoried LWC for which management decisions have not been made in the Ely District. This approach is consistent with agency policy and authority, and is critical to preserving BLM's ability to make management decisions for those wilderness resources through a public planning process.

BLM has not evaluated a reasonable range of alternatives for protecting the wilderness characteristics of parcels in the Ely District. Under the National Environmental Policy Act (NEPA), BLM must consider a broad range of alternatives to mitigate environmental impacts. 40 C.F.R. § 1502.14(a); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72-73 (D.C. Cir. 2011) (requiring BLM to consider a reasonable range of alternatives for oil and gas activity). Additionally, under current policies, BLM must fully "consider" wilderness characteristics during planning actions and evaluate a range of measures to protect wilderness characteristics during the leasing process, including measures not contained in existing RMPs. *See* Instruction Memorandum (IM) 2011-154 at Att. 2; IM 2010-117 at III. E., F. 9

A "rule of reason" is used to determine if an adequate range of alternatives have been considered; this rule is governed by two guideposts: (1) the agency's statutory mandates; and (2) the objectives for the project. *New Mexico ex rel. Richardson*, 565 F.3d at 709. Here, there is no doubt that BLM's legal mandates under FLPMA and NEPA require it to fully consider the protection of wilderness values, and under IM 2010-117, which was largely reinstated by the decision in *Western Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204 (D. Idaho 2018), the agency must treat the protection of other important resources and values as an equally important objective to leasing.

Yet, in the Ely District EA, the BLM has failed to evaluate an adequate range of alternatives that would protect the wilderness characteristics of parcels in the Ely District from the impacts of the lease sale. Such alternatives include offering the parcels with no surface occupancy (NSO) stipulations or deferring the parcels. Because the BLM has not considered

those alternatives, or additional alternatives to protect the wilderness characteristics of the proposed parcels, it must defer the parcels from the lease sale.

2. *We Submitted New Lands with Wilderness Characteristics Inventory Information with Our September 5, 2019 EA Comments that the BLM Must Evaluate in its NEPA Process.*

We have inventoried and identified two qualifying LWC units in the Ely District that overlap with parcels being offered in this lease sale (Table 1). Narrative summaries of the wilderness characteristics of each inventoried LWC are listed below, while detailed maps and photosheets were attached to our September 5, 2109 EA comments as Exhibit 1.¹ **Again, we hereby reincorporate our September 5, 2019 comments by this reference, including this Exhibit, which we will continue to refer to as Exhibit 1, which we submitted therewith on a CD, and ask that it be fully considered.**

Table 1.

Citizens LWC Unit	Total Acreage	NV December 2019 Lease Sale Parcel Overlap – Parcel Numbers
Butte Mountains	70,429	NV-2019-12-4098 NV-2019-12-4104 NV-2019-12-4106 NV-2019-12-4110 NV-2019-12-4139 NV-2019-12-4140 NV-2019-12-4157 NV-2019-12-4161 NV-2019-12-4856 NV-2019-12-4857

¹ The Exhibit was included on the CD we submitted with the hard copy of our September 5, 2019 EA comments.

Butte Mountains Highpoint	42,385	NV-2019-12-4292 NV-2019-12-4287 NV-2019-12-4192 NV-2019-12-4224 NV-2019-12-4194 NV-2019-12-4195 NV-2019-12-4210 NV-2019-12-4208 NV-2019-12-4219 NV-2019-12-4161 NV-2019-12-4134 NV-2019-12-4877 NV-2019-12-3283
Total	112,814	

Parcels NV-2019-12-4139, 4140, 4157, 4292, 4287, 4192, 4195, 4219, and 4134 continue to be included in this lease sale. These parcels overlap both the LWC Citizen Units.

The citizen inventory information included in those comments meets the minimum standards for review of new information set forth in BLM Manual 6310:

- a map of sufficient detail to determine specific boundaries of the area in question;
- a detailed narrative that describes the wilderness characteristics of the area and documents how that information substantially differs from the information in the BLM inventory of the area's wilderness characteristics; and
- photographic documentation.

BLM Manual 6310 at .06(B)(1)(b). When BLM receives information that meets these minimum standards, the agency is directed to review the information "as soon as practicable," "make the findings available to the public," and "retain a record of the evaluation and the findings as evidence of the BLM's consideration." *Id.* at .06(B)(2). Instruction Memorandum (IM) 2013-106 directs that BLM field offices should make finalized and signed wilderness characteristics inventory findings available to the public before the inventory data is used to inform decisions.

BLM must consider our LWC inventory information in order to comply with the "hard look" requirement of NEPA. *See* 42 U.S.C. § 4332(2)(C). Numerous courts have applied the hard look mandate to overturn agency decisions that ignored substantive, relevant wilderness information provided by the public, including citizen-submitted wilderness inventories. *See, e.g., Or. Natural Desert Ass'n v. Rasmussen*, 451 F. Supp. 2d 1202, 1211-13 (D. Ore. 2006) (holding that BLM violated the hard-look requirement of NEPA when it dismissed a citizen-submitted inventory "[w]ith a broad brush"); *Southern Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1265 (D. Utah 2006) ("...Utah BLM ignored significant new information...information provided by the Southern Utah Wilderness Alliance...presented a textbook example of

significant new information about the affected environment (the wilderness attributes and characteristics...”).

BLM must defer leasing in these areas until the agency has evaluated our inventory information and publicly released the agency’s findings, and should defer leasing any areas where BLM finds wilderness characteristics until management decisions are made for those areas through a land use planning process. As discussed above, it is well within BLM’s authority to defer leasing in areas with sensitive resources, even if those areas are allocated as available to leasing in the governing Resource Management Plan (RMP).

3. *Citizen Inventoried LWC Summaries*²

Butte Mountains Highpoint (42,390 acres)

- **Size:** Butte Mountains Highpoint contains over 42,390 acres of contiguous unroaded BLM lands situated between the Long Valley in the west and the Butte Valley in the east. The unit is made up of the entire middle portion of the Butte Mountains, including the highpoint of the range at 9,051 feet. At 42,390 acres in size, Butte Mountains Highpoint meets the size criterion for lands with wilderness characteristics.
- **Apparent Naturalness:** Butte Mountains Highpoint has very few human impacts for a unit of this size. A few minor routes exist in the southeast corner of the unit, but these routes and others found on the periphery of the unit have no impact whatsoever on the naturalness of the unit as a whole. A wilderness inventory road leading towards the highpoint of the unit and which is occasionally used to access the summit has been cherrystemmed out of the unit. The bulk of the 42,400 acre unit is entirely unroaded and absent of any substantially noticeable human impacts.
- **Outstanding Opportunities for Solitude and/or Primitive and Unconfined Recreation:** Outstanding opportunities for solitude are the prominent feature of the Butte Mountains. The range sits between the rarely traveled Butte Valley to the east and Long Valley to the west. The summit of Butte Mountains Highpoint is the most visited feature within the unit and the summit registers shows only a few ascents per year on average. The unit is made up of more than 40,000 acres of seldom-visited peaks and subtle drainages, mostly covered in pinyon and juniper. The elevation of the unit ranges between 9,050’ to 6,200’, and provides ample relief for those seeking solitude. Encountering another human being would be unlikely anywhere within the unit at any time of the year.

Outstanding opportunities for primitive and unconfined recreation also exist within the unit. The rolling terrain and extensive network of wild horse and wildlife game trails within the unit makes the unit lend itself to exploration by foot or horseback. The

² Exhibit 1 from our September 5, 2019 comments contains maps and photosheets of each of the units listed here. The photosheets contain georeferenced photos of the wilderness characteristics, boundary features, and human impacts of each unit. Together with the narrative summaries, this information meets the Minimum Standards for Review of New Information as described in Manual 6310.

summit ridge contains the highest point in the Butte Mountains on which sits a summit register and evidence of visits by peak-baggers. Recent but recovering wildfire scars in the unit open up the upper elevations of the unit to vast views over the Butte Valley, providing outstanding opportunities for photography and scenic observation. The unit provides excellent habitat for the mule deer and elk that occupy the area, which in turn provide outstanding primitive hunting opportunities.

- **BLM Inventory Findings:** It is unclear if this area has been inventoried by BLM in the last decade; BLM has not publicly released any Manual 6310-compliant inventory of this unit.

Butte Mountains (70,430 acres)

- **Size:** The Butte Mountains are one of the largest tracts of unroaded BLM lands in the Ely District. The unit's 70,430 acres of contiguous unroaded BLM lands meet the criterion for size as defined in Manual 6310.
- **Apparent Naturalness:** Numerous routes exist on the eastern and southern side of the unit particularly in the vicinity of the east side of Butte Valley and in Queue Valley. Most of these routes are associated with rangeland improvement projects and where these routes show signs of construction and maintenance using mechanical means they have been cherrystemmed out of the unit. Other routes in the unit are faint and overgrown or rough two-tracks and are left within the unit as primitive ways. Even if one were to draw out all routes in the unit entirely, the unit would be left with an entirely unroaded core that easily exceeds the size and naturalness criteria for lands with wilderness characteristics according to Manual 6310.
- **Outstanding Opportunities for Solitude and/or Primitive and Unconfined Recreation:** The size of the Butte Mountains unit alone provides ample outstanding opportunities for solitude. At over 70,000 acres, the unit is one of the largest tracts of contiguous unroaded BLM lands in the Ely District. The unit's varied topography—from wide open high elevation slopes to narrow and deep forested canyons to vast and lonely sagebrush and salt bush flats on the lower elevations of the Butte Valley—provides numerous and diverse opportunities to find solitude. In combination with the size of the unit and its varied topography and vegetation, the remote and seldom-visited location of the unit results in outstanding opportunities for solitude.

Primitive and unconfined recreation is also easily found in the 70,400 acres that make up the unit. The unit contains eight unique ranked peaks, including Robbers Benchmark at 8989', all of which provide climbing and hiking opportunities in a remote and isolated setting. These peaks, especially those off the main crestline of the range, shield relatively deep and large canyons; while the named canyons on the east side of the range contain two-tracks or other impacts, the major canyon systems on the west side of the range above the Long Valley are largely undisturbed and provide exceptional primitive recreation opportunities. Limestone cliff bands are also found throughout the unit, which

provide climbing and bouldering opportunities with exceptional views. This limestone also harbors fossils, which are easily found in the upper slopes of the unit.

- **BLM Inventory Findings:** It is unclear if this area has been inventoried by BLM in the last decade; BLM has not publicly released any Manual 6310-compliant inventory of this unit.

B. The Proposed Lease Sale Violates FLPMA Because it is Inconsistent with the Governing RMP Regarding Management of Sage-Grouse Habitat.

When the BLM developed this lease sale it based its analysis of sage-grouse habitat and population protection needs on the 2019 RMP Amendments that BLM had put in place earlier this year. But the 2019 plans are no longer valid and the 2015 sage-grouse plans have been reinstated. This is due to the preliminary injunction issued by the United States District Court for the District of Idaho in *W. Watersheds Project v. Schneider*, Case No. 1:16-CV-83-BLW, 2019 WL 5225454 (D. Idaho, Oct. 16, 2019). In that case the court ordered that, “[t]he BLM is enjoined from implementing the 2019 BLM Sage-Grouse Plan Amendments for Idaho, Wyoming, Colorado, Utah, Nevada/ Northeastern California, and Oregon, until such time as the Court can adjudicate the claims on the merits. The 2015 Plans remain in effect during this time.” *Id.* at 11. This decision is included as Exhibit 2 and will be referred to in the following discussion.

The BLM in Nevada, as required by the court in *Western Watersheds Project v. Schneider*, has scaled back leasing in sage-grouse habitat. We commend those efforts. For the November 2019 Nevada lease sale the BLM issued an errata that states it is deferring several parcels from the lease sale in order to comply with the decision in *Western Watersheds Project v. Schneider*. https://www.blm.gov/sites/blm.gov/files/NV_OG_20191112_Ely_Errata3_0.pdf. And after first opening the February and March, 2020 Nevada lease sales to public comment, the BLM Ely District postponed the comment period in order to comply with *Western Watersheds Project v. Schneider*. <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=1502035&dctmId=0b0003e8814fada7>. We also note that on November 13, 2019 the BLM Colorado State Office cancelled its December 19, 2019 oil and gas lease sale with the parcels to be reconsidered for a future sale due to the decision in *Western Watersheds Project v. Schneider*. See <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/colorado>.

However, the BLM has not indicated whether the Nevada December lease sale was cancelled as a result of this preliminary injunction. While the sale was scaled back considerably there have been no statements that we are aware of that the reason for this was to comply with the preliminary injunction issued in *Western Watersheds Project v. Schneider*. Based on the analysis we have done, there are still 54 parcels in sage-grouse habitat in the lease sale that impact 41,816 acres of habitat. Thus, in the following discussion we will assume that BLM is still proceeding, illegally, under the guidance of the 2019 sage-grouse plan for Nevada. We hope this is not the case.

There are several critical elements of the 2015 sage-grouse plan that must be abided by in order to comply with the preliminary injunction issued in *Western Watersheds Project v. Schneider*. BLM must demonstrate it has prioritized leasing outside of core sage-grouse habitats—general habitat management areas (GHMA) and priority habitat management areas (PHMA). It must show it has recognized and complied with the restrictions in sagebrush focal areas (SFAs). There is a need for mitigation that ensures a net conservation gain. And compensatory mitigation must be required as needed. These are all important elements of the 2015 plan—but by no means all of the important requirements—that must be complied with pursuant to the preliminary injunction issued in *Western Watersheds Project v. Schneider*. The 2019 sage-grouse plan amendments sought to eliminate or weaken these sage-grouse protections, but this is no longer permissible. Therefore, only the 2015 sage-grouse plan can guide this lease sale.

In the EA prepared for the Ely District, BLM has not prioritized leasing outside of sage-grouse habitat, as required by both the 2015 and 2019 sage-grouse Records of Decision (ROD) and Nevada and Northeastern California Approved Resource Management Plan Amendment (ARMPA). Under the 2015 Great Basin ROD, BLM must:

prioritize oil and gas leasing and development outside of identified PHMAs [Priority Habitat Management Areas] and GHMAs [General Habitat Management Areas]. This is to further limit future surface disturbance and encourage new development in areas that would not conflict with GRSG. This objective is intended to guide development to lower conflict areas and as such protect important habitat and reduce the time and cost associated with oil and gas leasing development by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.

ROD at 1-23.

The Nevada and Northeastern California ARMPA echoes this directive, including the following objective:

Priority *will be given* to leasing and development of fluid mineral resources, including geothermal, outside PHMA and GHMA. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMA and GHMA, and subject to applicable stipulations for the conservation of GRSG, priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG.

Nevada and Northeastern California ARMPA, at 2-28 (emphasis added).

The 2019 Nevada and Northeastern California Greater Sage-Grouse Record of Decision and Approved Resource Management Plan Amendment did not change this requirement. *See* Nevada and Northeastern California Proposed RMP Amendment and Final EIS at ES-7

(including “Prioritization of fluid mineral leases outside of PHMA and GHMA” in a list of issues that “do not require additional analysis in this RMPA/EIS”); Nevada and Northeastern California Greater Sage-Grouse Record of Decision and Approved Resource Management Plan Amendment at 1-7 (“The decisions in this Approved RMPA do not modify all of the existing decisions in the 2015 plans. Only those decisions pertaining to the issues identified in Section 1.3.1 are affected.”.)

FLPMA requires that lease sale decisions comply with the governing land use plans. *See* FLPMA § 302(a), 43 U.S.C. § 1732(a) (“The Secretary shall manage public lands...in accordance with land use plans developed by him under section 1712 of this title...”); *see also* 43 C.F.R. § 1610.5-3(a) (“All future resource management authorizations and actions...shall conform to the approved plan.”). Commenting on these provisions, the Supreme Court said,

The statutory directive that BLM manage “in accordance with” land use plans, and the regulatory requirement that authorizations and actions “conform to” those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan.

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 68 (2004). Thus, it is clear that BLM must abide by the ROD and ARMPA in this lease sale, and the 2015 sage-grouse plan, pursuant to the preliminary injunction issued in *Western Watersheds Project v. Schneider*. BLM’s leasing decisions, not just its development decisions, must comply with the ROD and ARMPA (“Priority will be given to *leasing*. . . of fluid mineral resources . . . outside of PHMA and GHMA.”). Yet the Ely District EA makes no reference to the prioritization requirement.

Further, the U.S. Fish & Wildlife Service (FWS) specifically identified the prioritization requirement as one of the new “regulatory mechanisms” that allowed it to determine that sage-grouse did not warrant listing under the Endangered Species Act (ESA). *See* Endangered and Threatened Wildlife and Plants; 12- Month Finding on a Petition To List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59,858, 59,981 (Oct. 2, 2015) (“The Federal Plans prioritize the future leasing and development of nonrenewable-energy resources outside of sage-grouse habitats.”). By ignoring this requirement in the context of this and other oil and gas lease sales, BLM is undermining FWS’s determination and moving sage-grouse closer to an ESA listing.

Leasing constitutes an irreversible and irretrievable commitment of resources, and in addition a lease gives a lessee the right to develop oil and gas. BLM Form 3100-11 and 43 C.F.R. § 3101.1-2. Thus, it is clear that leasing has tangible impacts that cannot be ignored if BLM is to meet the commitment to prioritize leasing outside of sage-grouse habitats. BLM clearly must apply the prioritization objective from the 2015 and 2019 ROD and ARMPA to this lease sale when parcels are proposed in or near PHMA and GHMA, and explain how its leasing decision complies with that mandate. The Ely District EA proposed to lease 108,600 acres in GHMA and 55,700 acres in PHMA, so clearly there is a need to reflect the prioritization requirement in the leasing decisions (i.e., deferral should be required). EA at 27 (Table 3.5). And while the amount of habitat in sage-grouse habitat may have been reduced

due to the lesser scale of what is now proposed for the December lease sale, no evidence of this has been provided that we are aware of.

In addition, as mentioned, the BLM must ensure it complies with other provisions of the 2015 sage-grouse plan that were not a part of the 2019 plan amendments. SFAs must be managed as no surface occupancy (NSO) areas with no waivers, exceptions, or modifications. Record of Decision and Approved Resource Management Plan Amendment for the Great Basin at 1-17. Mitigation must be put in place to ensure a net conservation gain. *Id.* at 1-17, 1-24 and 1-25. Compensatory mitigation must be provided for. *Id.* at 1-18, 1-24 and 1-25. Meeting all of these provisions are necessary to comply with the Idaho court order.

The need to consider these issues fully as provided for in the 2015 plan, and which the 2019 plan sought to eliminate, were explained by the Idaho District Court in the preliminary injunction in *Western Watersheds Project v. Schneider* where it found that the plaintiffs were likely to succeed on the merits of their claims:

. . . the plaintiffs will likely succeed in showing that (1) the 2019 Plan Amendments contained substantial reductions in protections for the sage grouse (compared to the 2015 Plans) without justification; (2) The EISs failed to comply with NEPA's requirement that reasonable alternatives be considered; (3) The EISs failed to contain a sufficient cumulative impacts analysis as required by NEPA; (4) The EISs failed to take the required "hard look" at the environmental consequences of the 2019 Plan Amendments; and (5) Supplemental Draft EISs should have been issued as required by NEPA when the BLM decided to eliminate mandatory compensatory mitigation.

Exhibit 2 at 25.

C. The proposed lease sale violates FLPMA because it fails to prevent unnecessary or undue degradation of the PHMA and GHMA lands being offered for lease.

The Ely District EA confirms that BLM will apply the 2019 Sage-grouse Plan Amendment to this lease sale, rather than the 2015 Sage-Grouse Plan, because the 2019 ROD was signed prior to the December lease sale. EA at 2-3. One of the key requirements of the 2015 Sage-grouse Plan was that when BLM "authorize[s] third-party actions [that] result in habitat loss and degradation" for sage-grouse, the agency must require "compensatory mitigation projects . . . to provide a net conservation gain to the species." Great Basin ROD at 1-25. The 2015 Sage-Grouse Plan expressly required such mitigation when oil and gas development is authorized in PHMA and GHMA. *Id.* at 1-36; Nevada and Northeastern California ARMPA at 2-6, 2-29 (Objective SSS 4 and MD MR 1); *see also id.* Exhibits F, I.

BLM, however, eliminated the 2015 ARMPA's requirement to use compensatory mitigation in the 2019 ARMPA and ROD. *See* 2019 Nevada and Northeastern California Greater Sage- Grouse Record of Decision and Approved Resource Management Plan Amendment at 1-4 to 1-6 and 2-41 to 2-43. BLM states that: "These plans reflect the BLM's

determination that the Federal Land Policy and Management Act of 1976 (FLPMA) does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of BLM-administered lands.” *Id.* at 1-2.

This conclusion was rejected by the Idaho District Court in the preliminary injunction issued in *Western Watersheds Project v. Schneider*:

The Final EISs were the first time the BLM announced it was removing the mandatory compensatory mitigation, and the public was never given notice or an opportunity to comment on those actions before they were taken. BLM’s elimination of mandatory compensatory mitigation through the Final EISs appears to constitute both a “substantial changes” to its proposed action and “significant new circumstances” under 40 C.F.R. § 1502.9(c), requiring that BLM have issued a supplemental draft EIS for public review and comment before finalizing these changes. Failing to do so “insulate[d] [the agency’s] decision-making process from public scrutiny. Such a result renders NEPA’s procedures meaningless.” *California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982).

Exhibit 2 at 24-25.

We would also note that the IM on compensatory mitigation, IM 2019-018, issued on December 6, 2018, as well as the earlier IM 2018-093 on compensatory mitigation, both of which sought to eliminate the use of compensatory mitigation, have effectively been deemed unlawful by *Western Watersheds Project v. Schneider*.³ In actuality, the direction in both IM 2019-018 and the 2019 ROD are arbitrary and capricious, and in violation of law. Consequently, BLM must include requirements for compensatory mitigation in any leases issued in PHMA and GHMA.

FLPMA unquestionably provides BLM with ample support for requiring compensatory mitigation, including its direction to manage public lands in a manner to ensure the protection of ecological and environmental values, preservation and protection of certain public lands in their natural condition, and provision of food and habitat for wildlife;⁴ and to “manage the public lands under principles of multiple use and sustained yield”.⁵ The principles of multiple use and sustained yield pervade and underpin each of BLM’s authorities under FLPMA, including the policies governing the Act,⁶ the development of land use plans,⁷ the

³ This is also true of IM 2018-026 which sought to weaken substantially the prioritization requirement of the 2015 plans. In effect, the prior more effective prioritization IM, IM 2106-143, has been resurrected. The BLM should recognize this.

⁴ 43 U.S.C. § 1701(a)(8) (Among other things, public resources should be managed to “protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values” and “provide food and habitat for fish and wildlife”).

⁵ 43 U.S.C. § 1732(a).

⁶ 43 U.S.C. § 1701(a)(7).

⁷ 43 U.S.C. § 1712(c)(1).

authorization of specific projects,⁸ and the granting of rights of way.⁹ While FLPMA does not elevate certain uses over others, it does delegate discretion to the BLM to determine whether and how to develop or conserve resources, including whether to require enhancement of resources and values through means such as compensatory mitigation.¹⁰ In sum, these statutory requirements encompass the protection of environmental and ecological values on public lands and the provision of food and habitat for fish and wildlife and are furthered by the implementation of the mitigation hierarchy, including compensatory mitigation, to protect and preserve habitat for the sage grouse.

Additional authority also exists for the use of the mitigation hierarchy in issuing project-specific authorizations. For example, project-specific authorizations must be issued “in accordance with the land use plans,”¹¹ so if the land use plans adopt the mitigation hierarchy or other mitigation principles for the sage grouse under the various authorities described above, the project authorization must follow those principles. Moreover, in issuing project-specific authorizations, BLM may attach “such terms and conditions” as are consistent with FLPMA and other applicable law.¹² This general authority also confers broad discretion on BLM to impose mitigation requirements on project applicants, including compensatory mitigation in appropriate circumstances.¹³

Finally, as a distinct authority, BLM also has the obligation to ensure that project-specific authorizations do not result in “undue or unnecessary degradation”. FLPMA states that BLM “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”¹⁴ A number of cases have found that BLM met its obligation to prevent unnecessary or undue degradation based, in part, on its imposition of compensatory mitigation. *See e.g., Theodore Roosevelt Conservation P'ship v. Salazar (“TRCP”),* 616 F.3d 497, 518 (D.C. Cir. 2010) (BLM decision to authorize up to 4,399 natural gas wells from 600 drilling pads did not result in “unnecessary or undue degradation” in light of substantial mitigation required from permittees, including prohibition of new development outside core

⁸ 43 U.S.C. § 1732(a).

⁹ 43 U.S.C. § 1765(a)(i).

¹⁰ P. L. 94-579 (Oct. 21, 1976) (stating an intent “[t]o establish public land policy; to establish guidelines for its administration; to provide for the management, protection, development, and enhancement of the public lands; and for other purposes.” (emphasis added)).

¹¹ 43 U.S.C. 1732(a).

¹² 43 U.S.C. § 1732(b).

¹³ BLM also has authority and/or obligations to ensure that all its operations protect natural resources and environmental quality, through statutes such as the Mineral Leasing Act of 1920, 30 U.S.C. 181 et seq. *see also Independent Petroleum Assn. of America v. DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002) (Act grants “rather sweeping authority” to BLM, or NEPA, 42 U.S.C. 4321; *see also* 40 C.F.R. § 1505.2(c), which requires consideration of mitigation alternatives where appropriate. In addition, BLM’s authority under FLPMA is broader than that exercised by purely regulatory agencies such as EPA or zoning boards, because BLM has authority to act as both a regulatory agency and as a proprietor. Accordingly, BLM can take action using all the tools provided by FLPMA for managing the public lands, including issuing regulations, developing land use plans, implementing land use plans or in permitting decisions. 43 U.S.C. §§ 1712(a), 1732(a), 1732(b).

¹⁴ 43 USC § 1732(b).

area until comparable acreage in the core was restored to functional habitat); *see also Gardner v. United States Bureau of Land Mgmt.*, 638 F.3d 1217, 1222 (9th Cir. 2011) (FLPMA provides BLM “with a great deal of discretion in deciding how to achieve the objectives” of preventing “unnecessary or undue degradation of public lands.”).

BLM’s implementation of a standard requiring compensatory mitigation was confirmed in *W. Expl. LLC v. U.S. Dep’t of the Interior*, 250 F. Supp. 3d 718 (D. Nev. 2017). In considering the argument that a net conservation gain standard for compensatory mitigation violated FLPMA, the court stated:

The FEIS states that if actions by third parties result in habitat loss and degradation, even after applying avoidance and minimization measures, then compensatory mitigation projects will be used to provide a net conservation gain to the sage-grouse. The Agencies’ goals to enhance, conserve, and restore sage-grouse habitat and to increase the abundance and distribution of the species, they argue, is best met by the net conservation gain strategy because it permits disturbances so long as habitat loss is both mitigated and counteracted through restorative projects. If anything, this strategy demonstrates that the Agencies allow some degradation to public land to occur for multiple use purposes, but that degradation caused to sage-grouse habitat on that land be counteracted. The Court fails to see how BLM’s decision to implement this standard is arbitrary and capricious. Moreover, the Court cannot find that BLM did not consider all relevant factors in choosing this strategy...

In sum, Plaintiffs fail to establish that BLM’s challenged decisions under FLPMA are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.¹⁵

BLM’s conclusions in the 2019 Approved RMP Amendment and ROD, and in IM 2019-018, cannot be supported by applicable law. FLPMA and other applicable laws allow BLM to require compensatory mitigation. Taking the opposite approach based on a misreading of the law is arbitrary and capricious, and moreover may violate FLPMA’s requirement to avoid unnecessary or undue degradation. Abandoning compensatory mitigation as a tool to prevent habitat degradation would violate this requirement. As noted above, the unnecessary and undue degradation standard prohibits degradation beyond that which is avoidable through appropriate mitigation and reasonably available techniques. *TRCP*, 661 F.3d at 76-77; *Colo. Env. Coal*, 165 IBLA 221, 229 (2005). Offsite compensatory mitigation is a well-established, reasonable and appropriate tool that has long been used to limit damage to public lands. Refusing to use that tool fails to meet FLPMA’s requirement that BLM avoid unnecessary or undue degradation.

Because many of the originally proposed lease parcels in the December 2019 sale in the Ely District cover PHMA and GHMA, BLM must attach a stipulation to those leases imposing the net conservation gain/compensatory mitigation requirement, pursuant to the preliminary

¹⁵ *Western Exploration, LLC*, 250 F. Supp. 3d at 747.

injunction issued in *Western Watersheds Project v. Schneider*. See generally Exhibit 2. Applying these requirements as terms of the leases is necessary to prevent unnecessary or undue degradation of the PHMA and GHMA lands being leased.

D. Facilitating speculative leasing is inconsistent with the MLA and FLPMA.

The Mineral Leasing Act (MLA) is structured to facilitate actual production of federal minerals, and thus its faithful application should focus on areas with known potential for development while discouraging speculative leasing of low potential lands. BLM's December 2019 lease sale would violate this core principle in three ways: (1) the sale continues a long-extant trend of leasing lands with little or no potential for productive mineral development; (2) as a result, the sale encourages speculative, noncompetitive leasing, which creates administrative waste, not oil and gas production; and (3) it would destroy important option values by hamstringing decisional flexibility in future management.

- 1. The December 2019 lease violates the MLA's core purpose by offering land with low mineral potential and NEPA's requirement to analyze a reasonable range of alternatives.*

The MLA directs BLM to hold periodic oil and gas lease sales for "lands...which are known or believed to contain oil or gas deposits..." 30 U.S.C. § 226(a). The Interior Department has, through its internal administrative review body, recognized this mandate. See *Vessels Coal Gas, Inc.*, 175 IBLA 8, 25 (2008) ("It is well-settled under the MLA that competitive leasing is to be based upon reasonable assurance of an existing mineral deposit.").

Here, however, BLM has provided no evidence that the proposed parcels contain oil or gas deposits, as the MLA requires. See 30 U.S.C. § 226(a). In fact, based on the pattern of lease sales in Nevada over the past several years, there is evidence to the contrary – that the lands encompassed by the parcels generally lack oil and gas resources.

The Reasonably Foreseeable Development Scenario (RFDS) referenced in the Ely District EA substantiates this point.

As of March 2019 there are 125 authorized oil and gas leases in the Ely District. Since 1907, roughly 770 oil and gas wells had been drilled in Nevada, though there are just 96 active wells at the time of this EA.

Shale Oil contains significant crude oil and may be used as a source of petroleum. The potential within the Analysis Area is low in the short term and probably low to moderate in the long term.

December 2019 EA at 35. "No nominated lands contain existing leases." *Id.* at 36. Moreover, "[t]he Ely district has only approved 14 APDs since 2008 averaging a single well per pad, however, not every APD approved is actually drilled and only 10 wells have resulted." *Id.* at

46.

Driving the point home, BLM Nevada spends an excessive amount of time and resources evaluating oil and gas leases that industry is either not bidding on or will likely never develop. Over the past three years, BLM has sold less than 10% of the acres it has offered for sale in Nevada, compared with other western states which are generally selling 70% or more.¹⁶ Multiple lease sales have garnered zero competitive bids.

Sale	Parcels (sold/offered)	Acres (sold/offered)
Mar.	13 / 24	15,244 / 25,882
June	0 / 124	0 / 256,875
Dec. 2015	0 / 3	0 / 3,641
Mar.	0 / 39	0 / 50,416
June	4 / 42	3,765 / 74,661
Mar.	20 / 67	35,502 / 115,970
June	3 / 106	5,760 / 195,614
Sept.	3 / 3	3,680 / 3,680
Dec. 2017	17 / 208	33,483 / 388,697
Mar.	11 / 40	19,432 / 69,691
June	22 / 166	38,579 / 313,715
Sept.	0 / 144	0 / 295,174
Dec. 2018	2 / 17	3,392 / 32,924
Total	95 / 83 (9.7%)	158,838 / 1,826,941 (8.7%)

Recently The Wilderness Society and the Center for Western Priorities developed a report, *America's Public Lands Giveaway*. That report can be found at <https://westernpriorities.org/2019/09/19/story-map-americas-public-lands-giveaway/> and will be referred to as Exhibit 3 and is attached hereto and incorporated herein by this reference. As the first table in Exhibit 3 shows, of the 827,651 acres that have been offered for lease in Nevada as of August 2019, only 114,339 acres were sold competitively for the minimum bid (\$ 2.00 per acre) and 526,178 acres had to be leased noncompetitively with no bid, at the minimum rental rate of \$ 1.50 per acre. This means 77 percent of the leases were leased for \$ 2.00 per acre or less. And as the second table in Exhibit 3 shows, 803,454 acres out of the total of 827,651 acres leased, or 97 percent, are sitting idle with no activity on them. Our analysis of the current proposed lease sale indicates there are still 181 parcels in low oil and gas potential lands that cover 294,896 acres.

This pattern underscores just how inefficient and wasteful the oil and gas program in Nevada has become, and also demonstrates that BLM Nevada's oil and gas leasing program is inconsistent with the direction set forth in the MLA.

¹⁶ All data obtained from BLM (<https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada>) and EnergyNet (https://www.energynet.com/govt_listing.pl).

Additionally, BLM in its December 2019 lease sale violates NEPA because it failed to consider a reasonable range of alternatives by omitting any option that would meaningfully limit leasing and development. *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018). In that case, conservation group plaintiffs argued that BLM should have considered “an alternative eliminating oil and gas leasing in areas determined to have only moderate or low potential for oil and gas development.” *Id.* at 1166. The court agreed, finding that BLM did not closely study an alternative that closes low and medium potential lands when it admits there is an exceedingly small chance of them being leased. This alternative would be “significantly distinguishable” because it would allow BLM to consider other uses for that land. *Id.* at 1167, citing *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708-09 (10th Cir. 2009). Thus, the court held that BLM’s failure to consider reasonable alternatives violated NEPA. *Id.* at 1167.

2. *The December 2019 lease sale would encourage noncompetitive, speculative leasing.*

Besides being wasteful and contrary to the MLA’s purpose, the ongoing leasing of lands with little or no development potential creates another related problem: it facilitates, and perhaps even encourages, below-market, speculative leasing by industry actors who don’t actually intend to develop the public lands they lease. This problem creates more administrative waste, and also fails to uphold the MLA’s core purpose.

Going back to the MLA’s language, lease sales are intended to foster responsible oil and gas development, which lessees must carry out with “reasonable diligence.” 30 U.S.C. § 187; *see also* BLM Form 3100-11 § 4 (“Lessee must exercise reasonable diligence in developing and producing...leased resources.”).

However, BLM Nevada’s oil and gas leasing program does not accomplish this goal. Instead, it has facilitated a surge in noncompetitive lease sales – sales that do not enjoy the benefits of market forces, and which rarely result in productive development. As previously mentioned, and as Exhibit 3 shows, of the 827,651 acres that have been offered for lease in Nevada as of August 2019, 526,178 acres had to be leased noncompetitively with no bid, at the minimum rental rate of \$ 1.50 per acre. And as the second table in Exhibit 3 shows, 803,454 acres out of the total of 827,651 acres leased, or 97 percent, are sitting idle with no activity on them,

In states like Nevada due to that lack of competition during lease sales, speculators can easily abuse the noncompetitive process to scoop up federal leases for undervalued rates, as shown in a recent report from the New York Times. *See* Exhibit 4, attached hereto and incorporated herein.

The New York Times article affirms that, “In states like Nevada, noncompetitive sales frequently make up a majority of leases given out by the federal government.” *See* Exhibit 4. It provides examples of speculators, including in Nevada, intentionally using this process to nominate parcels for sale, then sitting on the sidelines during the competitive lease sales and instead purchasing the leases cheaper after the sale at noncompetitive sales. These speculators

are then often unable to muster the financial resources to develop the lands they have leased so they sit idle: “Two Grand Junction, Colo., business partners, for example — a geologist and a former Gulf Oil landman — now control 276,653 acres of federal parcels in northeastern Nevada. But they are still looking for the money they need to drill on the land, or even to pay for three-dimensional seismic surveys to determine whether there is enough oil there to try.” *Id.* By failing to appropriately implement the MLA and ensure that parcels offered for sale have a “reasonable assurance” of containing mineral deposits, BLM is encouraging noncompetitive, speculative leasing, which deprives the public of bonus bids and royalties, and leaves taxpayers to foot the bill for industry speculation.

The speculative nature of noncompetitive leasing – and the administrative waste it creates – is evident from a common outcome in noncompetitive leasing: termination for non-payment of rent. A review of noncompetitive leases in Nevada shows that BLM frequently terminates these leases because the lessee stops paying rent, as shown in this report which we incorporate herein by this reference.¹⁷ The administrative waste this process creates is further exacerbated by the fact that there are no apparent consequences for companies engaging in this practice. Indeed, many of these companies continue to actively nominate and purchase oil and gas leases, despite the clear pattern of buying leases noncompetitively with little intent to develop, and renege on their contractual obligations shortly thereafter. This process cannot be characterized as anything other than wasteful, counterproductive, and contrary to the MLA.

Again, the stated national policy underlying oil and gas leasing is “the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs.” 30 U.S.C. § 21a. Noncompetitive, speculative leasing on low-potential land does not further this policy goal, and instead occupies BLM resource specialists’ time that would be better spent on other public lands management activities – all while taxpayers pick up the tab.

3. *BLM must analyze the “option value” of offering parcels with low or non-existent development potential.*

In addition to the concerns above, leasing lands with low potential for oil and gas development gives preference to oil and gas development at the expense of other uses while restricting BLM’s ability to make other management decisions down the road. This is because the presence of oil and gas leases can limit BLM’s willingness to manage for other resources in the future.

For example, in the Colorado River Valley RMP, BLM decided against managing lands for protection of wilderness characteristics in the Grand Hogback lands with wilderness characteristics unit based specifically on the presence of oil and gas leases, even though the leases were non-producing:

The Grand Hogback citizens’ wilderness proposal unit contains 11,360 acres of BLM

¹⁷ This research is documented in the Center for American Progress’s recent report, *Backroom Deals: The Hidden World of Noncompetitive Oil and Gas Leasing*, along with other concerns regarding speculative leasing raised in this protest. Available at <https://www.americanprogress.org/issues/green/reports/2019/05/23/470140/backroom-deals/>.

lands. All of the proposed area meets the overall criteria for wilderness character... There are six active oil and gas leases within the unit, totaling approximately 2,240 acres. None of these leases shows any active drilling or has previously drilled wells. The ability to manage for wilderness character would be difficult. If the current acres in the area continue to be leased and experience any development, protecting the unit's wilderness characteristics would be infeasible...

Proposed Colorado River Valley RMP (2015) at 3-135.

Similarly, in the Grand Junction Resource Management Plan, BLM expressly stated that undeveloped leases on low-potential lands had effectively prevented management to protect wilderness characteristics, stating:

133,900 acres of lands with wilderness characteristics have been classified as having low, very low, or no potential... While there is not potential for fluid mineral development in most of the lands with wilderness characteristics units, the majority of the areas, totaling 101,100 acres (59 percent), are already leased for oil and gas development.

Proposed Grand Junction Proposed RMP (2015) at 4-289 to 4-290. The presence of leases can also limit BLM's ability to manage for other important, non-wilderness values, like renewable energy projects. *See, e.g.*, Proposed White River Resource Management Plan at 4-498 ("Areas closed to leasing... indirectly limit the potential for oil and gas developments to preclude other land use authorizations not related to oil and gas (e.g., renewable energy developments, transmission lines) in those areas.").

In offering the leases involved in this sale, the BLM runs a similar risk of precluding future management decisions for other resources and uses such as wilderness, recreation, and renewable energy development. As stated in *America's Public Lands Giveaway*, Exhibit 3, "In September 2018 the Bureau of Land Management offered 295,000 acres of public land in Nevada for oil and gas development, many of them in prime sage-grouse habitat. Exactly zero of them sold at competitive auction, leaving all 144 parcels available for noncompetitive leasing. Within two months following the sale, 21 leases were scooped up noncompetitively for just \$ 1.50 per acre." *See* Exhibit 3; *see also* map presented in that Exhibit of noncompetitive leases issued in priority sage-grouse habitat in Nevada.

In this context, BLM can and should apply the principles of option value or informational values, which permit the agency to look at the benefits of delaying irreversible decisions. *See* Jayni Foley Hein, *Harmonizing Preservation and Production 13* (June 2015) ("Option value derives from the ability to delay decisions until later, when more information is available. . . . In the leasing context, the value associated with the option to delay can be large, especially when there is a high degree of uncertainty about resource price, extraction costs, and/or the social and environmental costs of drilling.")¹⁸

¹⁸ Available at https://policyintegrity.org/files/publications/DOI_LeasingReport.pdf.

It is well-established that issuance of an oil and gas lease is an irreversible commitment of resources. As the U.S. Court of Appeals for the D.C. Circuit held in the context of considering the informational value of delaying leasing on the Outer Continental Shelf: “[t]here is therefore a tangible present economic benefit to delaying the decision to drill for fossil fuels to preserve the opportunity to see what new technologies develop and what new information comes to light.” *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 610 (D.C. Cir. 2015).

Thus, in evaluating this lease sale, BLM should have evaluated “option value” – the economic benefits that could arise from delaying leasing and/or exploration and development based on improvements in technology, additional benefits that could come from managing these lands for other uses, and additional information on the impacts of climate change and ways to avoid or mitigate impacts on the environment. This is essential, in particular for lands with low or non-existent development potential. BLM has the ability and obligation to undertake an analysis of the benefits of delaying leasing, which can be both qualitative and quantitative, considering both economic and environmental needs, as shown by a recent federal court decision.

As previously mentioned, in *Wilderness Workshop v. Bureau of Land Mgmt.*, the conservation group plaintiffs proposed a land use planning alternative where low and medium potential lands would be closed for leasing. BLM declined to consider the alternative, claiming it had already considered and discarded a “no leasing” alternative. The court found: “This alternative would be ‘significantly distinguishable’ because it would allow BLM to consider other uses for that land.” 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018). Considering such an alternative would permit BLM to consider the option value of delaying leasing on low potential lands.

As applied here, this economic principle suggests that BLM Nevada would be well-served by deferring the December 2019 lease parcels and preparing a programmatic EIS that considers alternative approaches for managing the oil and gas program in Nevada. The point of deferring and planning would be to ensure that BLM does not commit to moving forward with oil and gas leasing when, based on Nevada’s current leasing patterns described above, economic and other indicators suggest doing so right now does not best serve the public interest. *America’s Public Lands Giveaway*, Exhibit 3, provides a detailed discussion of problems that are caused by inactive leases, many leased noncompetitively, and provides recommendations for how to improve the leasing system. Leasing at minimum bids or noncompetitively leads to many leases sitting idle with a need to be terminated and not producing royalties since oil and gas is not produced and other uses have been limited. See Exhibit 3. If BLM approached leasing based on an option value analysis many of these problems could be avoided.

In this respect we remind you of the letter that Senator Cortez Masto sent to Kemba Anderson, the BLM Branch Chief of Fluid Minerals, on November 5, 2019 regarding the November oil and gas lease sale. In that letter the Senator asked for the protection of water resources and sensitive lands near Great Basin National Park, Ruby Lakes National Wildlife Refuge, and the Ruby Mountains. As she said, “Our public lands serve as a unique and valuable

resource that boost local economies across all corners of our state, while providing public spaces for hunting, fishing, and outdoor recreation. I request that you reconsider inclusion of these parcels that are near our treasured public spaces.” The same is true of the December lease sale parcels, and if BLM employed a option value analysis it would see that many of these parcels should be deferred from leasing. And Representative Horsford in his November 26, 2019 letter to the BLM regarding the December 2019 lease sale made similar points and expressed similar concerns about a number of lease parcels.

E. BLM Must Ensure that Lease Parcels in the Ely District are not in Areas Closed to Leasing Or in Areas of Critical Environmental Concern.

Based on a comparison to the Ely District 2018 RMP, it appears that some of the lease parcels identified in the August, 2019 Ely District leasing EA may be in areas that the RMP closed to leasing or be in Areas of Critical Environmental Concern (ACEC), where leasing is inappropriate. The BLM should ensure these parcels are removed from the lease sale. Appendix F to the RMP contains a map (Map 20) showing areas that are closed to leasing. Map 1 in the Ely District EA, showing the proposed lease parcels, indicates parcels are located along what looks like East Pass Road in the Tule Desert. This road connects the Tule Desert through Barclay, Nevada all the way to Caliente. As Map 20 in Appendix F of the RMP shows, this area is closed to leasing. In addition, it appears some parcels could be located in or near the Lower Meadow Valley Wash ACEC. Map C-1 in Appendix C of the Ely District RMP presents the ACEC, and it appears, based on the parcels shown in Map 1 of the EA, that this overlap occurs. The BLM should ensure these conflicts are not present.

F. BLM Violated NEPA by Failing to Analyze and Disclose to the Public the Greenhouse Gas Emissions and Climate Impacts of its Leasing Decisions.

NEPA and its implementing regulations, promulgated by the Council on Environmental Quality (“CEQ”), 40 C.F.R. §§ 1500.1–1518.4, are our “basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1. Recognizing that “each person should enjoy a healthful environment,” NEPA ensures that the federal government uses all practicable means to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,” and to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,” among other policies. 43 U.S.C. § 4331(b).

NEPA regulations explain, in 40 C.F.R. §1500.1(c), that:

Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

Thus, while “NEPA itself does not mandate particular results, but simply prescribes the necessary process,” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989),

agency adherence to NEPA's action-forcing statutory and regulatory mandates helps federal agencies ensure that they are adhering to NEPA's noble purpose and policies. *See* 42 U.S.C. §§ 4321, 4331.

NEPA imposes "action forcing procedures ... requir[ing] that agencies take a hard look at environmental consequences." *Methow Valley Citizens Council*, 490 U.S. at 350 (citations omitted) (emphasis added). These "environmental consequences" may be direct, indirect, or cumulative. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8.

Direct effects are "caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b). Cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7.

A large and growing body of scientific research demonstrates, with ever increasing confidence, that climate change is occurring and is caused by emissions of greenhouse gases (GHGs) from human activities, primarily the use of fossil fuels. The 2018 Intergovernmental Panel on Climate Change (IPCC) Special Report on Global Warming of 1.5°C found that human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, and that warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.¹⁹ The 2018 United States Fourth National Climate Assessment (hereinafter, "NCA4") found, "that the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans' physical, social, and economic well-being are rising."²⁰ Yet in the December 2019 Lease Sale EA, BLM unlawfully failed to take a hard look at direct, indirect, and cumulative impacts to a wide range of resource values including, but not limited to, GHGs and climate change.

A 2018 analysis from the U.S. Geological Survey (USGS) found that, "[n]ationwide emissions from [fossil] fuels extracted from Federal lands in 2014 were 1,279.0 MMT CO₂ Eq. [million metric tons of carbon dioxide equivalent] for CO₂ [carbon dioxide], 47.6 MMT CO₂ Eq. for CH₄ [methane], and 5.5 MMT CO₂ Eq. for N₂O [nitrous oxide]. . . . On average, Federal

¹⁹ 2018 Intergovernmental Panel on Climate Change, *Summary for Policymakers, in* Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty 6 (Valérie Masson-Delmotte et al. eds., 2018), available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf [hereinafter, *Summary of IPCC 1.5°C Report*].

²⁰ U.S. Global Change Research Program, *Fourth National Climate Assessment: Volume II Impacts, Risks, and Adaptation in the United States* 36 (David Reidmiller et al. eds. 2018), available at: https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf (emphasis omitted) [hereinafter, *NCA4*].

lands fuels emissions . . . accounted for 23.7 percent of national CO₂ emissions, 7.3 percent for CH₄, and 1.5 percent for N₂O” over the ten years included in this estimate.²¹

Federal lands are also a critical carbon sink. The USGS found that in 2014, federal lands of the conterminous United States stored an estimated 83,600 MMT CO₂ Eq., in soils (63 percent), live vegetation (26 percent), and dead organic matter (10 percent).²² In addition, the USGS estimated that Federal lands “sequestered an average of 195 MMT CO₂ Eq./yr between 2005 and 2014, offsetting approximately 15 percent of the CO₂ emissions resulting from the extraction of fossil fuels on Federal lands and their end-use combustion.”²³ While in the December EA BLM acknowledges surface disturbance from well construction,²⁴ it fails to analyze and disclose how its leasing decision and resulting fossil fuel development could lead to the elimination or degradation of these crucial carbon sinks, resulting loss of carbon storage, and related climate change impacts, including a consideration of the time lag between leasing and reclamation and the significance of the loss of carbon sinks on GHG emissions and climate change during that time period.

BLM also failed to provide any GHG emissions or climate impacts analyses in its December 2019 lease sale EA or in the other NEPA documents it tiers to or incorporates by reference.²⁵ Instead, BLM arbitrarily asserts as follows: “[t]he physiography of the parcels analyzed in the 2018 EA is *assumed* to be similar to those currently under analysis within this EA. As such, this analysis *assumes* the impacts to air quality and climate change from future oil and gas development as described in the 2018 EA would be the same for any future development that may take place on the lease parcels currently under analysis within this EA.”²⁶ These unsupported assumptions fail to meet the informed decision-making required under NEPA.²⁷

²¹ Matthew D. Merrill et al., *Federal Lands Greenhouse Gas Emissions and Sequestration in the United States: Estimates for 2005-14: U.S. Geological Survey Scientific Investigations Report 2018-5131 6* (2018), available at: <https://pubs.usgs.gov/sir/2018/5131/sir20185131.pdf> [hereinafter, *USGS 2018 Report*].

²² *USGS 2018 Report* at 12-13.

²³ *Id.* at 1.

²⁴ Bureau of Land Mgmt., Ely District Office, December 2019 Competitive Oil and Gas Lease Sale DOI-BLM-NV-L000-2019-0005-EA (August 2019) at 24, available at: https://eplanning.blm.gov/epl-front-office/projects/nepa/1500391/20001083/250001238/!DOI-BLM-NV-L000-2019-0005-EA_Preliminary_20190808.pdf (emphasis added) [hereinafter, “December 2019 EA”].

²⁵ See December 2019 Lease Sale; Bureau of Land Mgmt., Ely District Office, December 2018 Competitive Oil and Gas Lease Sale DOI-BLM-NV-L000-2018-0002-EA (December 2018), available at: https://eplanning.blm.gov/epl-front-office/projects/nepa/112280/160464/196208/DOI-BLM-NV-L000-2018-0002-EA_Final.pdf [hereinafter, “December 2018 lease sale”]; Bureau of Land Mgmt., Ely District Office, December 2017 Competitive Oil and Gas Lease Sale DOI-BLM-NV-L030-2017-0021-EA (August 2017), available at: [https://eplanning.blm.gov/epl-front-office/projects/nepa/85574/137283/167637/2017O&G_EA_FINAL-20170926_\(2\)_508.pdf](https://eplanning.blm.gov/epl-front-office/projects/nepa/85574/137283/167637/2017O&G_EA_FINAL-20170926_(2)_508.pdf) [hereinafter, “December 2017 Lease Sale”]; Bureau of Land Mgmt., Ely District Office, Ely District Record of Decision and Approved Resource Management Plan (August 2008), available at: https://eplanning.blm.gov/epl-front-office/projects/lup/87546/137711/169132/Ely_Record_of_Decision_and_Approved_RMP.pdf [hereinafter, “Ely District RMP”]; Bureau of Land Mgmt., Ely District Office, Ely Proposed Resource Management Plan/Final Environmental Impact Statement, available at: <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=129334> [hereinafter, “Ely District PRMP/EIS”].

²⁶ December 2019 EA at 15.

²⁷ 40 C.F.R. § 1501.2; *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *11 (D. Mont. Mar. 26, 2018) (finding that the sufficiency of an agency’s consideration of

While BLM acknowledges that fossil fuel combustion results in the accumulation of GHGs,²⁸ it fails to provide an analysis of the GHG emissions or climate impacts resulting from its leasing decisions, instead, including only general statements about the nature of climate change. BLM arbitrarily asserts as follows:

While the act of leasing the parcels would produce no substantial air quality effects, potential future development of the leases could lead to increases in local and regional emissions. Since it is unknown if the parcels would be developed, or the extent of the development, it is not possible to reasonably quantify potential air quality effects through dispersion modeling or another applicable method at this time. Further, the timing, construction and production equipment specifications and configurations, and specific locations of activities are also unforeseeable at this time.²⁹

BLM affirmatively states that leasing of these parcels would produce “no substantial air quality effects” and appears to be including “other pollutants” such as carbon dioxide, methane, and nitrous oxide, in this category.³⁰ However, BLM provides no support for this statement, further asserting that it is “not possible” to quantify potential air effects at this time.³¹ Instead, BLM defers its analysis of the GHGs and climate impacts of its leasing decision to an unknown time, stating: “a subsequent NEPA analysis when lessees file an Application for Permit to Drill (APD)” will meet this need.³²

BLM’s failure to analyze and disclose to the public the impacts of its leasing decisions on GHG emissions and climate change violates NEPA. As more fully described above, lease issuance is the “point of no return” (*i.e.*, the point at which time BLM makes an irrevocable commitment of resources) for purposes of NEPA analysis. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 66 (D.D.C. 2019). BLM itself identifies lease issuance as the point of irrevocable commitment of resources:

The BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized fluid minerals activities. *By law, these impacts must be analyzed before the agency makes an irreversible commitment. In the fluid minerals program, this commitment occurs at the point of lease issuance.*³³

environmental consequences depends on “whether the EIS’s form, content and preparation foster both informed decision-making and informed public participation.”) (internal citation omitted)).

²⁸ December 2019 EA at 15.

²⁹ *Id.* at 16.

³⁰ *Id.* at 16.

³¹ *Id.*

³² *Id.*

³³ Bureau of Land Mgmt., *H-1624-1 – Planning for Fluid Mineral Resources* § I.B.2, at I-2 (Feb. 20, 2018) (emphasis added), available at: <https://www.blm.gov/sites/blm.gov/files/H-1624-1%20rel%201-1791.pdf> [hereinafter, “BLM Handbook 1624”].

It is at this point that BLM must analyze *all* direct, indirect, and cumulative impacts of its leasing decision. *See, e.g., WildEarth Guardians*, 368 F. Supp. 3d at 65-66; *see also* 40 C.F.R. §§ 1508.7, 1507.8.

It is critical that BLM undertake a comprehensive NEPA analysis now, including GHG emissions and climate change, before deciding to offer, sell and issue the protested parcels. Subsequent approvals by BLM will not be able to completely eliminate potential environmental and climate change impacts. To comply with NEPA, BLM must analyze all reasonably foreseeable impacts at the time of lease issuance. The Tenth Circuit Court of Appeals recently held that the preparation of a reasonably foreseeable development scenario (RFDS) makes it reasonably foreseeable that the number of wells identified *would be drilled*, and NEPA therefore requires BLM to consider impacts of those wells in its lease sale NEPA analysis. *Diné Citizens Against Ruining Our Env't (Diné CARE) v. Bernhardt*, 923 F.3d 831, 853 (10th Cir. 2019) (emphasis added). As the Tenth Circuit explained, once an RFDS has been issued, the wells predicted in that document were “reasonably foreseeable future actions.” *Id.* (citing 40 C.F.R. § 1508.7). Thus, for purposes of NEPA, those reasonably foreseeable wells must be considered in the agency’s cumulative impact analysis. *See id.* at 853. Yet here, BLM unlawfully forgoes this analysis, asserting that “there would be no direct effects from issuing new oil and gas leases because leasing does not directly authorize oil and gas exploration and development activities” yet acknowledging that “[t]he RFDS is the basis for indirect future or potential impacts that could occur once the parcels are leased.” BLM fails to comply with NEPA when it fails to perform the analysis that the statute requires. *See, e.g., Diné CARE*, 923 F.3d at 857; *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1254 (D.N.M. 2018); *WildEarth Guardians*, 368 F. Supp. 3d at 65.

In the December 2019 Lease Sale EA, BLM failed to analyze the direct, indirect, and cumulative impacts of these reasonably foreseeable future actions. In the RFDS scenario in the Ely District PRMP/FEIS (2007), BLM assumed that a total of 448 wells would be drilled, including small and large field developments and associated abandoned well pads, resulting in total short-term disturbance of approximately 8,400 acres and a long-term (greater than 10 years for producing wells) disturbance of approximately 1,400 acres.³⁴ In the RFDS (Section 2.4), BLM predicts that approximately 200 exploration wells would be drilled in the District in the next ten years, of which 40 would continue into development and production phases.³⁵ Yet despite the existence of this information, BLM fails to analyze and disclose to the public the direct, indirect, and cumulative impacts of the GHG emissions resulting from its decisions in this lease sale in violation of NEPA.³⁶ Instead, BLM defers the needed analysis to the APD stage.³⁷ This is despite the availability of information that BLM has at its disposal to complete such an analysis now. By limiting its analysis in this manner BLM failed to analyze all reasonably foreseeable impacts to the environment, including the impacts of GHG emissions on climate change.

³⁴ December 2018 EA at 9; Ely District PRMP/EIS at 4.18-4, 4.18-5.

³⁵ December 2019 EA at 37.

³⁶ *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 853 (10th Cir. 2019), *reh'g denied* (June 24, 2019).

³⁷ December 2019 EA at 41.

BLM also defers requiring the implementation of best management practices (BMPs) to reduce GHG emissions. Instead, BLM merely “encourages industry to incorporate and implement BMPs to reduce impacts to air quality by reducing emissions, surface disturbances, and dust. The BLM coordinates with the Environmental Protection Agency (EPA) and State agencies early in the exploration and development process to determine how best to model and mitigate for impacts to air quality.”³⁸ However, lease stipulations and notices (and their accompanying mitigation measures) do not constitute NEPA analyses. Thus, even though BLM has attached them to the leases at issue,³⁹ this does not excuse the agency from its separate legal obligation to take a “hard look” at the potential impacts of its leasing decisions under NEPA. Stipulations and notices are required by FLPMA and the MLA, but are not a substitute for a NEPA analysis. *See, e.g.*, 43 C.F.R. § 3101.1-3; 43 U.S.C. § 1732(a). Further, voluntary efforts alone are not sufficient to reduce emissions. Therefore, BLM must analyze these emissions and include mandatory mitigation measures to address them.

In addition to the foregoing, BLM violates NEPA by failing to analyze and disclose to the public the following impacts resulting from its leasing decisions:

- BLM failed to analyze and disclose the GHG emissions associated with each alternative, so it can meaningfully consider a reasonable range of alternatives that would decrease the emissions resulting from its actions. *See Western Organization of Resource Councils v. BLM*, 2018 WL 1475470 at *9 (D. Mont. March 26, 2018); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018).
- In addition to generally ignoring GHG impacts on the environment and climate, BLM failed to analyze and disclose the potential emissions of a particularly potent GHG, methane. A global warming potential (GWP) is a measure of the amount of warming caused by the emission of one ton of a particular greenhouse gas relative to one ton of carbon dioxide. The methane GWP estimates how many tons of carbon dioxide would need to be emitted to produce the same amount of global warming as a single ton of methane. This is important because methane is a much more potent greenhouse gas than carbon dioxide.⁴⁰ Thus, BLM must analyze and disclose the potential methane emissions from its leasing decisions. BLM must use the best available science by analyzing the global warming potential of methane emissions using both the IPCC’s current upper-end 100-year GWP for fossil methane of 36, and the IPCC’s current upper-end 20-year GWP for fossil methane of 87.⁴¹ *W. Org. of Res. Councils*, CV16-21-GF-BMM, 2018 WL 1475470, at *18.
- BLM failed to adequately analyze and disclose the direct, indirect, and cumulative impacts of its actions on GHG emissions and the climate. Courts have repeatedly held that agencies must analyze and disclose to the public the GHG emissions resulting

³⁸ *Id.* at 16.

³⁹ *Id.* at Appendix D at 153-169.

⁴⁰ Gunnar Nyhre & Drew Shindell et al., *Anthropogenic and Natural Radiative Forcing in IPCC, Climate Change 2013: The Physical Science Basis, Contribution of Working Group 1 to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 710-712, 714 (2013), available at: http://www.climatechange2013.org/images/report/WG1AR5_Chapter08_FINAL.pdf [hereinafter, *IPCC Physical Science Basis*].

⁴¹ *Id.* at 714.

from the production, transportation, processing, and end-use of fossil fuels that will be produced or transported as a result of agency approvals.⁴²

- BLM must analyze and disclose the cumulative impacts of its leasing decisions and its cumulative climate impacts analysis must include the incremental GHG emissions increases, added to other past, present, and reasonably foreseeable fossil fuel extraction emissions on a regional and national scale. *See* 40 C.F.R. §§ 1508.7, 1508.27(a). BLM must complete a comprehensive cumulative impacts analysis that compares GHG emissions from the lease parcels to emissions from other BLM-managed projects in this region and across the country. *WildEarth Guardians*, 368 F.Supp.3d at 76. “To the extent other BLM actions in the region—such as other lease sales—are reasonably foreseeable when an EA is issued, BLM must discuss them as well.” *Id.* at 77. Similarly, here, BLM must analyze and disclose to the public the cumulative GHGs from similar, collectively significant oil and gas lease sales within Nevada, as well as throughout the Interior West, and nationally. *Id.* at 77.
- While BLM must include quantitative estimates of the total GHG emissions resulting from its approvals, it must also include an assessment of ecological, economic, and social impacts of those emissions, including an assessment of their significance. *See* 40 C.F.R. §§ 1508.8(b); 1502.16(a)-(b). However, BLM failed to analyze and disclose to the public the significance of its actions on GHG emissions and the climate despite the numerous methods and tools available to BLM to do so, such as

⁴² *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (GHG emissions from the combustion of gas “are an indirect effect of authorizing this [pipeline] project, which [the agency] could reasonably foresee”); *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, No. 1:17-cv-02519-LTB-GPG, 2019 WL 1382785, at *8 (D. Colo. Mar. 27, 2019) (“Defendants acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the foreseeable indirect effects resulting from the combustion of oil and gas.”); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 71 (D.D.C. 2019) (“BLM failed to take a hard look at the environmental impacts of leasing because it failed to quantify and forecast aggregate GHG emissions from oil and gas development.”); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003); *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1242-43 (D.N.M. 2018) (BLM’s reasoning for not analyzing indirect GHG emissions was “contrary to the reasoning in several persuasive cases that have determined that combustion emissions are an indirect effect”); *W. Org. of Res. Councils*, 2018 WL 1475470, at *13 (D. Mont. Mar. 26, 2018) (“In light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs.”); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining Reclamation and Enft.*, 274 F. Supp. 3d 1074, 1098-99 (D. Mont. 2017) (holding indirect effects from coal trains includes the 23.16 million metric tons of GHG emissions from the combustion of coal extracted from the mine); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1156 (D. Colo. 2018) (“BLM acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the indirect effects resulting from the combustion of oil and gas in the planning area under the RMP [Resource Management Plan].”); *Diné Citizens Against Ruining Our Env’t v. U.S. Office of Surface Mining Reclamation and Enft.*, 82 F. Supp. 3d 1201, 1213 (D. Colo. 2015) (“[T]he coal combustion-related impacts of [the mine’s] proposed expansion are an ‘indirect effect’ requiring NEPA analysis”), *vacated as moot*, 643 Fed. App’x 799 (2016); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1198 (D. Colo. 2014) (“[R]easonably foreseeable effect [of downstream combustion] must be analyzed, even if the precise extent of the effect is less certain.”).

the Social Cost of Carbon,⁴³ Social Cost of Methane,⁴⁴ and global carbon budgeting, which offers a cap on the remaining stock of GHGs that can be emitted while keeping global average temperature rise below scientifically researched warming thresholds, beyond which climate change impacts may result in severe and irreparable harm.⁴⁵ BLM recently used this tool in a draft environmental assessment for the New Elk coal lease in Colorado.⁴⁶

The inclusion of the foregoing information in an agency's NEPA analysis allows members of the public and interested parties to evaluate this information, submit written comments where appropriate, and spur further analysis as needed. *W. Org. of Res. Councils*, 2018 WL 1475470, at *16. Without all the relevant information, a NEPA analysis cannot "foster informed decision-making." *Id.* (citing *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

V. CONCLUSION

Based on the foregoing, BLM must complete additional analysis and fully comply with applicable law and guidance such as FLPMA, NEPA, and the preliminary injunction issued in *Western Watersheds Project v. Schneider*, prior to moving forward with this lease sale in the Ely District.

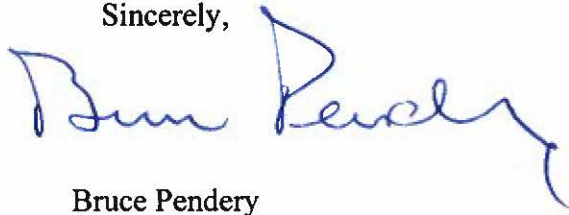
⁴³ Interagency Working Grp. on Social Cost of Greenhouse Gases (IWG), *Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12866* 1 (2016), available at: https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc_tsd_final_clean_8_26_16.pdf [hereinafter, *IWG 2016 Report*]. While Exec. Order No. 13783 (March 28, 2017) at § 5(b), disbanded the Federal Government's Interagency Working Group on the Social Cost of Carbon, and withdrew its Technical Support Document ("TSD") "as no longer representative of governmental policy," notably, the Order did not refute or undermine the scientific or economic basis of the TSD, but rather withdrew the document for political reasons. Therefore, the protocol remains a credible tool for assessing the impacts of GHG emissions. See 40 C.F.R. § 1502.22(b)(3) (requiring the use of "existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment.").

⁴⁴ Interagency Working Group on Social Cost of Greenhouse Gases (IWG), *Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide 2-3* (2016), available at: https://www.epa.gov/sites/production/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf.

⁴⁵ The Paris Agreement states that global warming must be held "well below 2°C above pre-industrial levels" with a goal to "limit the temperature increase to 1.5°C." U.N. Framework Convention on Climate Change Conference of the Parties, Twenty-First Session, *Adoption of the Paris Agreement*, Art. 2, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), available at: http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

⁴⁶ Bureau of Land Mgmt., *New Elk Coal Lease By Application, Federal Coal Lease (COC71978), Draft Environmental Assessment*, at 3-17 (April 2019) (emphasis added), available at: https://eplanning.blm.gov/epl-front-office/projects/nepa/118470/176016/214475/DOI-BLM-CO-F020-2019-14_PRELIM_EA-508.pdf; see also BLM, *Supplemental Environmental Assessment for the May 2015-August 2016 Sold and Issued Leases*, No. DOI-BLM-WY-0000-2019-0007-EA, at 12, 51-52 (May 2019), available at: <https://eplanning.blm.gov/epl-front-office/eplanning/projectSummary.do?methodName=renderDefaultProjectSummary&projectId=121368>.

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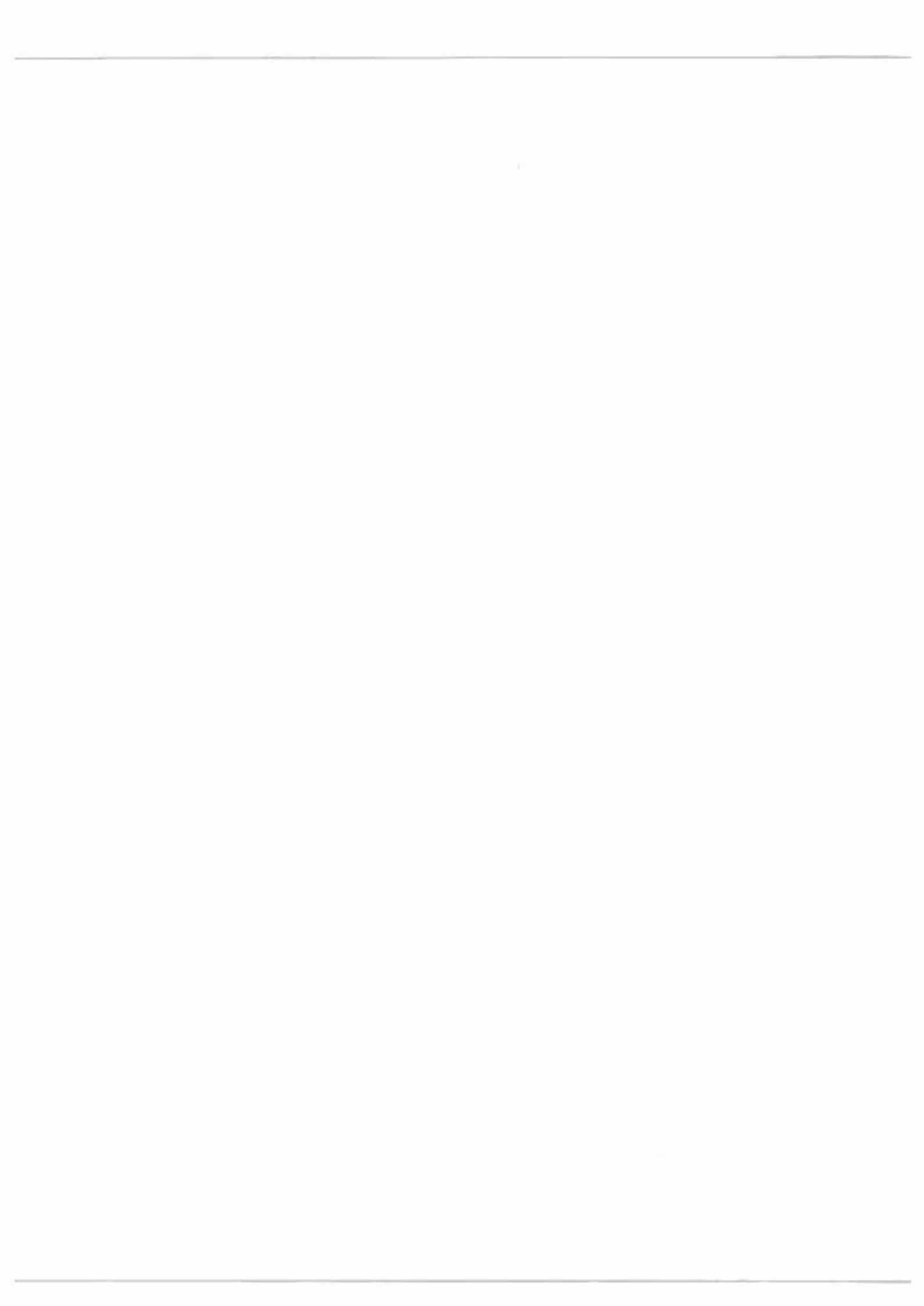
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List of Exhibits

1. Detailed maps and photosheets of citizen proposed LWC. Included on the CD submitted with the hard copy version of our comments on the EA submitted on September 5, 2019.
2. *Western Watersheds Project v. Schneider* decision.
3. Reference and internet link to *America's Public Lands Giveaway*. Available at <https://westernpriorities.org/2019/09/19/story-map-americas-public-lands-giveaway/>
4. "Energy Speculators Jump on Chance to Lease Public Land at Bargain Rates", The New York Times, Nov. 27, 2018.
5. Reports cited with URL links in Section IV.F. of this protest (Greenhouse Gas Emissions and Climate Change impacts), including the:
 - Intergovernmental Panel on Climate Change (IPCC) 2018 report,
 - U.S. Fourth National Climate Assessment 2018,
 - USGS 2018 Report,
 - BLM Handbook 1624 (2018), and
 - Interagency Working Group on Social Cost of Greenhouse Gases (IWG) reports.



Appendix
December 2019 Lease Sale Parcel Numbers and Serial Numbers that are Protested

NV-2019-12-6040; NVN 098880
NV-2019-12-4809; NVN 098886
NV-2019-12-4818; NVN 098887
NV-2019-12-4580; NVN 098937
NV-2019-12-4849; NVN 098889
NV-2019-12-6160; NVN 098977
NV-2019-12-3089; NVN 098997
NV-2019-12-4870; NVN 098892
NV-2019-12-3095; NVN 098998
NV-2019-12-3102; NVN 098999
NV-2019-12-3109; NVN 099000
NV-2019-12-3117; NVN 099001
NV-2019-12-2506; NVN 099002
NV-2019-12-3148; NVN 099003
NV-2019-12-3124; NVN 099004
NV-2019-12-3197; NVN 099006
NV-2019-12-4720; NVN 099008
NV-2019-12-3204; NVN 099009
NV-2019-12-4133; NVN 098901
NV-2019-12-4134; NVN 098903
NV-2019-12-4137; NVN 098904
NV-2019-12-4139; NVN 098905
NV-2019-12-4140; NVN 098906
NV-2019-12-4157; NVN 098907
NV-2019-12-4192; NVN 098908
NV-2019-12-3221; NVN 099012
NV-2019-12-3227; NVN 099013
NV-2019-12-4195; NVN 098911
NV-2019-12-3231; NVN 099014
NV-2019-12-4130; NVN 099015
NV-2019-12-4211; NVN 098914
NV-2019-12-4219; NVN 098915
NV-2019-12-4292; NVN 098916
NV-2019-12-4287; NVN 098917
NV-2019-12-4146; NVN 099016
NV-2019-12-4180; NVN 099017
NV-2019-12-2471; NVN 098923
NV-2019-12-2474; NVN 098924
NV-2019-12-2475; NVN 098925
NV-2019-12-2479; NVN 098926
NV-2019-12-4696; NVN 098927
NV-2019-12-4713; NVN 098928
NV-2019-12-4716; NVN 098929
NV-2019-12-4113; NVN 098930
NV-2019-12-4115; NVN 098931
NV-2019-12-4116; NVN 098932
NV-2019-12-4117; NVN 098933
NV-2019-12-4119; NVN 098934
NV-2019-12-4121; NVN 098935
NV-2019-12-4508; NVN 098936
NV-2019-12-4580; NVN 098937
NV-2019-12-4583; NVN 098938
NV-2019-12-4586; NVN 098939
NV-2019-12-4589; NVN 098940
NV-2019-12-4592; NVN 098941
NV-2019-12-4595; NVN 098942
NV-2019-12-4598; NVN 098943
NV-2019-12-4601; NVN 098944
NV-2019-12-4604; NVN 098945
NV-2019-12-4606; NVN 098946
NV-2019-12-4609; NVN 098947
NV-2019-12-4193; NVN 099018
NV-2019-12-4227; NVN 099019
NV-2019-12-4244; NVN 099020
NV-2019-12-4247; NVN 099021

NV-2019-12-4250; NVN 099022
NV-2019-12-4253; NVN 099023
NV-2019-12-4256; NVN 099024
NV-2019-12-4259; NVN 099025
NV-2019-12-4262; NVN 099026
NV-2019-12-4612; NVN 099029
NV-2019-12-4615; NVN 099030
NV-2019-12-4618; NVN 099031
NV-2019-12-4621; NVN 099032
NV-2019-12-4624; NVN 099033
NV-2019-12-4627; NVN 099034
NV-2019-12-4630; NVN 099035
NV-2019-12-4633; NVN 099036
NV-2019-12-4129; NVN 099037
NV-2019-12-4636; NVN 099038
NV-2019-12-4639; NVN 099039
NV-2019-12-4642; NVN 099040
NV-2019-12-4645; NVN 099041
NV-2019-12-3810; NVN 099042
NV-2019-12-4383; NVN 099046
NV-2019-12-3527; NVN 099047
NV-2019-12-3535; NVN 099049
NV-2019-12-3538; NVN 099050
NV-2019-12-3543; NVN 099051
NV-2019-12-3541; NVN 099052
NV-2019-12-3465; NVN 099056
NV-2019-12-3474; NVN 099059
NV-2019-12-3483; NVN 099062
NV-2019-12-4418; NVN 099074
NV-2019-12-3010; NVN 099079
NV-2019-12-3074; NVN 099087
NV-2019-12-3077; NVN 099088
NV-2019-12-3363; NVN 099089
NV-2019-12-3784; NVN 099092
NV-2019-12-4278; NVN 099105
NV-2019-12-4279; NVN 099106
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NV-2019-12-3135; NVN 099337
NV-2019-12-4445; NVN 099338

Exhibit 1

Exhibit 1 contains detailed maps and photosheets of citizen proposed LWC. It was included on the CD submitted with the hard copy version of our EA comments submitted on September 5, 2019.

Exhibit 2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT,
WILDEARTH GUARDIANS, CENTER
FOR BIOLOGICAL DIVERSITY, and
PRAIRIE HILLS AUDUBON SOCIETY,

Plaintiffs,

v.

JANICE SCHNEIDER, Assistant
Secretary of Interior; BUREAU OF LAND
MANAGEMENT; and U.S. FOREST
SERVICE,

Defendants.

Case No. 1:16-CV-83-BLW

**MEMORANDUM DECISION
AND ORDER**

INTRODUCTION

The Court has before it the plaintiffs' motion for preliminary injunction to enjoin the Federal Defendants from implementing the 2019 BLM Sage-Grouse Plan Amendments. The Court heard oral argument on the injunction motion and took it under advisement. For the reasons explained below, the Court will grant the motion.

LITIGATION BACKGROUND

The original complaint in this case was brought by four different environmental groups challenging fifteen Environmental Impact Statements (EISs) issued in 2015 that govern land covering ten western states. The gist of plaintiffs'

lawsuit was that the BLM and Forest Service artificially minimized the harms to sage grouse by segmenting their analysis into 15 sub-regions without conducting any range-wide evaluation – the agencies looked at the trees without looking at the forest, so to speak. The plaintiffs brought their claims under the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and the National Forest Management Act (NFMA).

Early in the case, the BLM filed a motion to sever and transfer arguing that, for example, the challenge to the Utah Plan should be transferred to Utah and the challenge to the Nevada Plan should be transferred to Nevada. The Court denied the motion, reasoning that “plaintiffs made overarching claims that applied to each EIS and RMP and required a range-wide evaluation that extended beyond the boundaries of any particular court.” *See Memorandum Decision (Dkt. No. 86)*.

As this litigation was underway, the Trump Administration came into office and began a process to review and revise the 2015 Sage-Grouse Plans. This litigation was put on hold pending that review. In 2017 that review was completed, and as a result, WWP alleges, Interior Secretary Ryan Zinke directed agencies to relax restrictions on oil and gas development in sage grouse habitat. The BLM responded by issuing amendments to the Sage Grouse Plans (referred to as the 2019 Plan Amendments). Plaintiffs supplemented their complaint to challenge the BLM’s 2019 Amendments, alleging that the agency – acting at the

direction of the Trump Administration – again made common errors across numerous Plans, including (1) failing to take a range-wide analysis, (2) failing to evaluate climate change impacts, and (3) generally removing protections for the sage grouse that were unjustified by science or conditions on the ground.

The Utah and Wyoming intervenors responded by filing a motion to transfer, arguing that the circumstances have changed since the Court denied the BLM's motion discussed above.¹ The intervenors argued that the interests of justice and the interests of local concerns justified transferring, for example, the Utah Plan challenges to Utah and the Wyoming Plan challenges to Wyoming. The intervenors argued that the challenges in this case are Plan-specific and will be unique to each State.

The Court disagreed and denied their motions. *See Memorandum Decision (Dkt. No. 181)*. The Court reasoned that their motions ignored the allegations of plaintiffs' complaint. Plaintiffs allege that the challenged Plans suffer from common failings that did not result entirely from errors of local Field Offices but rather were heavily influenced by directions from the Trump Administration and the Interior Secretary. Transferring these cases to various States would require plaintiffs to make duplicative arguments and courts to render duplicative – and

¹ The Idaho intervenors joined in the motions, arguing that the Court can more effectively focus on issues unique to Idaho if the other matters are severed and transferred to their respective States.



perhaps conflicting – decisions. The Court did not agree with intervenors that circumstances have changed since the Court denied the Government’s earlier motion to sever and transfer.

The Government filed a motion to dismiss or transfer, arguing that this Court was not the proper venue for resolving plaintiffs’ challenges to the 2019 Plan Amendments. The Court disagreed, finding that venue was proper under 28 U.S.C. § 1391(e)(1)(C).

The plaintiffs now seek to enjoin the BLM from implementing the 2019 Plan Amendments. The Court will resolve this challenge after reviewing the facts set forth in the record.

FACTS

Sage Grouse Decline

This Court has written extensively on the decline of sage grouse populations and habitat. Despite these declines the Fish and Wildlife Service (FWS) in 2005 determined that a listing under the Endangered Species Act (ESA) was “not warranted.” The Court reversed that decision, finding that it ignored declines in population and habitat, and was not based on the best science as required. *See WWP v. FWS*, 535 F. Supp.2d 1173 (D. Idaho 2007). The Court remanded the case to the FWS for further consideration.



On remand, the FWS issued a new finding in 2010 that the ESA listing was “warranted-but-precluded.” *See* 75 Fed. Reg. 13910 (March 5, 2010). That finding stressed the inadequacy of federal land use plans to protect sage-grouse, particularly from energy development impacts. *Id.* at 13,942. The FWS’s determination prompted the BLM and Forest Service, along with several States, to consider protections for the sage grouse to avoid a future ESA listing.

National Greater Sage Grouse Planning Strategy

The BLM and Forest Service launched their National Greater Sage-Grouse Planning Strategy in 2011 to amend federal land use plans with sage-grouse conservation measures to avoid ESA listing. To guide that Strategy, a National Technical Team of sage-grouse experts was convened and released their “Report on National Greater Sage-grouse Conservation Measures” (NTT Report) in December 2011. This Court found – after an evidentiary hearing and testimony from sage grouse expert Dr. Clait Braun – that the NTT Report “contains the best available science concerning the sage-grouse.” *See WWP v. Salazar*, 2012 WL 5880658, at *2 (D. Id. Nov. 20, 2012).

The NTT Report emphasized the protection of priority sage grouse habitats and the need for buffers around sage grouse leks. The NTT report stated that the “overall objective is to protect priority sage-grouse habitats from anthropogenic disturbances that will reduce distribution or abundance of sage grouse.” *See* NTT



Report, at 7. It identified priority sage-grouse habitats as “breeding, late brood-rearing, winter concentration areas, and where known, migration or connectivity corridors.” *Id.* The NTT Report recommended closing these priority sage-grouse habitat areas to oil and gas or other mineral leasing, concluding that “[t]here is strong evidence . . . that surface-disturbing energy or mineral development within priority sage-grouse habitats is not consistent with the goal to maintain or increase populations or distribution.” *Id.* at 19.

With regard to lek buffers, the NTT Report found that BLM’s existing 0.25 mile “No Surface Occupancy” (NSO) buffers around sage-grouse leks and 0.6 mile seasonal timing buffers were inadequate to protect sage-grouse, stating that “protecting even 75 to >80% of nesting hens would require a 4-mile radius buffer” and even that “would not be large enough to offset all the impacts” of energy development. *Id.* at 21.

In March 2013, FWS released its own report entitled the “Conservation Objectives Team Report” (COT Report) that identified “Priority Areas for Conservation” (PACs) as “key habitats necessary for sage-grouse conservation.” *See* COT Report (WO AR 1492), at 13. The COT Report emphasized that “[m]aintenance of the integrity of PACs . . . is the essential foundation for sage-grouse conservation,” but recognized that “habitats outside of PACs may also be essential,” including to provide connectivity between PACs. *Id.* at 13, 36. In



October 2014, FWS identified a sub-category of the PACs as sage-grouse “stronghold” areas, which were the basis for the “Sagebrush Focal Areas” (SFAs) designated in the 2015 Plans for highest protection from energy development and other surface disturbance. *See* WO AR 1490.

2015 Plans

In 2015, the BLM and Forest Service adopted Sage-Grouse Plans that covered ten States, revised 98 federal land use plans, and incorporated many of the NTT and COT Reports’ recommendations, such as restrictions to prevent or minimize surface disturbances in priority habitats, and requirements of compensatory mitigation for unavoidable adverse impacts to sage-grouse habitats. *See, e.g.*, BLM Great Basin ROD, at S-1 to S-2 and 1-1 to 1-41.2 As called for in the NTT and COT Reports, the 2015 Plans established new sage-grouse priority habitat designations with heightened management protections across some 67 million acres of federal land, including “Priority Habitat Management Areas” (PHMAs) – of which SFAs are a subset – and “General Habitat Management Areas” (GHMAs), along with other priority habitats in certain states (including “Important Habitat Management Areas,” or IHMAs, in Idaho). *Id.* PHMAs are “lands identified as having the highest value to maintaining sustainable GRSG populations,” and “largely coincide with areas identified as PACs in the COT Report.” *See* Great Basin ROD at 1-15. GHMAs are “GRSG habitat that is

occupied seasonally or year-round . . . where special management would apply to sustain GRSG populations.” *Id.*

2015 FWS Finding

The protections for sage grouse contained in the 2015 Plans of the BLM and Forest Service convinced the FWS to revise its 2010 finding that an ESA listing was “warranted but precluded” to a finding that listing was “not warranted.” The FWS explained this change as follows:

Since 2010, there have been several major changes in the regulatory mechanisms that minimize impacts to sage-grouse and their habitats. Foremost among these are the adoption of new Federal Plans specifically tailored to conserving sage-grouse over more than half of its occupied range. These Federal Plans now include substantial provisions for addressing activities that occur in sage-grouse habitats and affect the species, including those threats identified in 2010 as having inadequate regulatory measures. Aside from addressing specific activities, the Federal Plans include provisions for monitoring, adaptive management, mitigation, and limitations on anthropogenic disturbance to reduce impacts authorized in sage-grouse habitats. The Federal Plans are the foundation of land-use management on BLM and USFS managed lands. We are confident that these Federal Plans will be implemented and that the new changes, which are based on the scientific literature, will effectively reduce and minimize impacts to the species and its habitat.

See 80 Fed. Reg. at 59,887. The FWS was particularly impressed that the 2015 Plans followed the “COT Report and NTT guidance [by] restricting impacts in the most important habitat [thereby] . . . ensur[ing] that high-quality sage grouse lands with substantial populations are minimally disturbed and sage grouse within this habitat remain protected.” *Id.* at 80 Fed. Reg. 59,882.



The FWS also relied on provisions in the 2015 Plans ensuring that unavoidable adverse impacts from energy development and other BLM-approved actions would be offset by off-site mitigation to provide a net gain to the species: “Requiring mitigation for residual impacts provides additional certainty that, while impacts will continue at reduced levels on Federal lands, those impacts will be offset to a net conservation gain standard”. *See* 80 Fed. Reg. at 59,881.

2019 Plan Amendments

In 2017, then-Interior Secretary Zinke directed that a “Sage-Grouse Review Team” be assembled to review the 2015 Sage-Grouse Plans and recommend modifications to “enhance State involvement” and align the BLM’s actions with State plans concerning the sage grouse. Following the report of that Team recommending numerous modifications to the 2015 Plans, the BLM released six Draft Environmental Impact Statements (Draft EISs) and draft proposed plan amendments to revise the 2015 Plans in Idaho, Wyoming, Colorado, Utah, Nevada/Northeastern California, and Oregon, and allowed a 90-day public comment period. *See* 83 Fed. Reg. 19,800-11 (May 4, 2018).

The BLM received comments from, among others, the Environmental Protection Agency (EPA). *See Anderson Declaration Exhibit B (Dkt. No. 124-2)*. The EPA commented that the Draft EIS for the 2019 Plan Amendments for Idaho reduced lek buffers, representing a “major change.” *Id.* at p. 2. Finding no

scientific support for this change in the Draft EIS, the agency recommended that the “Final EIS summarize the scientific information used to develop the [provisions] to reduce lek buffers” *Id.* at p. 31.

In commenting on the 2019 Plan Amendments for Utah, the EPA noted the importance of habitat connectivity given the multi-state range of the sage grouse and the need for the protection of priority habitat. The EPA was concerned that the Draft EIS eliminated SFAs and GHMAs, “in addition to diminishing the protections that were established for PHMAs.” *Id.* at p. 42. The SFAs, GHMAs and PHMAs “straddle the borders of Nevada, Idaho, Wyoming and Colorado” but “the Draft EIS does not assess how these proposed amendments in Utah may impact populations in nearby States.” *Id.* The EPA recommended that “[g]iven sage-grouse populations cross state boundaries and because there are seven BLM state offices revising their plans, we recommend the Final EIS include a cumulative, cross-boundary effects analysis to assess the combined effects to greater sage-grouse populations and habitats associated with the revisions.” *Id.* The EPA expressed the same concerns with the 2019 Plan Amendments for Wyoming. *Id.* at pp. 36-37.

The BLM did not address the EPA’s comments, and instead issued Final EISs in December of 2018, and then Records of Decisions (RODs) in March of 2019, to amend its 2015 Sage-Grouse Plans in Idaho and the six other states. The



BLM announced that the 2019 BLM RODs were “effectively immediately.” *See* 84 Fed. Reg. 10,322–10,330 (Mar. 20, 2019).

Changes in 2019 Plan Amendments

The stated purpose of the 2019 Plan Amendments was to enhance cooperation between the BLM and the States by modifying the BLM’s protections for sage grouse to better align with plans developed by the States. While this is a purpose well-within the agency’s discretion, the effect on the ground was to substantially reduce protections for sage grouse without any explanation that the reductions were justified by, say, changes in habitat, improvement in population numbers, or revisions to the best science contained in the NTT and CTO Reports.

One example of these reductions is that the 2019 BLM Plan Amendments eliminated SFAs in all states but Oregon, downgrading SFAs to the less protective PHMA designation. In Idaho, 3,961,824 acres of SFAs were eliminated by the 2019 Plan Amendments. The Final EISs stated that removing the SFA designations “would have no measurable effect on the conservation of Greater Sage-Grouse,” but failed to identify any changes on the ground – or in the science – since the COT Report that had explained the need for the SFAs and designated those areas for the highest protection from energy development and other surface disturbance.

The 2019 BLM Plan Amendments eliminated both the “compensatory mitigation” requirement and related “net conservation gain” standard. As discussed above, these features were crucial to the FWS finding in 2015 that an ESA listing for the sage grouse was not warranted. *See* 80 Fed. Reg. at 59,882 (“Requiring mitigation for residual impacts provides additional certainty that, while impacts will continue at reduced levels on Federal lands, those impacts will be offset to a net conservation gain standard”).

The 2019 Amendments included significant changes to mandatory buffers around sage-grouse leks in designated habitat areas. *See* App. A at 2. In Idaho and Nevada/California, the BLM reduced existing lek buffers by several miles. *Id.* Colorado removed the prohibition on oil and gas leasing within 1 mile of active sage-grouse leks, opening up approximately 224,000 acres of previously-protected habitat. *Id.* The application of buffers around lek sites was changed from mandatory to discretionary in Colorado, Utah, and Nevada/California, and the plans in Idaho and Wyoming now allow BLM officers to exempt projects from buffers in more circumstances. *Id.*

The 2019 Amendments included a series of measures undermining the 2015 Plans’ mechanisms of “hard and soft triggers” requiring BLM to take corrective action when monitoring data shows that sage-grouse populations or habitats fall

below specified thresholds. *See* App. A at 4. In Nevada/NE California, for example, BLM replaced “hard” triggers requiring management changes with “warnings” and will now apply triggers only at the lek cluster scale, which could allow individual leks to blink out without corrective management action. *Id.* The Utah ROD similarly undermined the certainty that concrete steps will be taken once adaptive management “triggers” are met, by lengthening time-frames for management response and introducing qualifications on when corrective strategies must be implemented. *Id.* The Final EISs claimed that these changes will be “beneficial” for sage-grouse or failed to evaluate them at all. *Id.*

LEGAL STANDARDS

Injunctive Relief

Injunctive relief is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs must show that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Id.* at 20 (rejecting the Ninth Circuit’s earlier rule that the mere “possibility” of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction).

NEPA

The purpose of NEPA is twofold: “(1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011). “In order to accomplish this, NEPA imposes procedural requirements designed to force agencies to take a ‘hard look’ at environmental consequences.” *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005).

Administrative Procedures Act

NEPA does not provide a separate standard of review. Thus, NEPA claims are reviewed under the standards of the Administrative Procedures Act (APA). *See San Luis v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA, “an agency action must be upheld on review unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ ” *Jewell*, 747 F.3d at 601 (quoting 5 U.S.C. § 706(2)(A)). A reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* The reviewing court’s inquiry must be “thorough,” but “the standard of review is highly deferential; the agency’s decision is entitled to a presumption of regularity, and [the court] may not substitute [its] judgment for that of the agency.” *Id.*

Although a court's review is deferential, the court “must engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it.” *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 927 (9th Cir. 2007). “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’ ” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The reasoned-decision making requirement, the Supreme Court has often observed, includes a duty to explain any “departure from prior norms.” *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *see also Int'l Union, UAW v. NLRB*, 802 F.2d 969, 973-74 (7th Cir. 1986) (“[A]n administrative agency is not allowed to change direction without some explanation of what it is doing and why.”).

ANALYSIS

Plaintiffs' Declarations

The plaintiffs ask the Court to consider the Declaration of Dr. Clait Braun (Dkt. No. 124-3) although it is not part of the administrative record. The Court may properly consider material outside the administrative record like Dr. Braun's Declaration to determine whether BLM failed to consider important factors in its NEPA analysis. *See Ctr. for Biol. Diversity v. BLM*, 698 F.3d 1101,

1123 n. 14 (9th Cir. 2012). Considering extra-record evidence is warranted “where the plaintiff alleges ‘that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism under the rug.’” *Nat’l Audubon Soc. v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993); *see also Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (“It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not”). The burden is on plaintiffs to satisfy this standard. *Id.*

The Court finds that plaintiffs have satisfied that burden here. There is a serious issue in this case whether the BLM neglected to evaluate a serious environmental consequence or failed to consider an important factor – that is, whether the BLM based its reductions on protections for the sage grouse on something other than merely a desire to adopt State plans.

For example, did the BLM fail to consider the science on sage grouse? Dr. Braun’s Declaration directly addresses that issue. As discussed, the Court has previously found Dr. Braun to be a leading expert on sage grouse after hearing his testimony during an evidentiary hearing. In his Declaration filed in this case, Dr. Braun states that “subsequent scientific research and studies” confirm his earlier

opinion that the NTT Report was the “gold standard” for management recommendations to protect sage grouse populations and habitat. *Id.* at ¶ 3. While he found the 2015 Plans largely follow the NTT Report recommendations, he finds that the “2019 Plan Amendments eliminate or substantially weaken important aspects of the 2015 Plans in contradiction of the best available science, and would allow BLM to approve extensive new oil and gas and other energy and industrial developments, as well as unscientific and damaging livestock grazing and vegetation management projects” *Id.* at ¶ 5. He also finds that in the years since the 2015 Plans, sage grouse habitats have “suffered extensive losses and fragmentation” due to wildfire and oil and gas development. *Id.* at ¶ 31. After reviewing the Final EISs for the 2019 Plan Amendments, he concludes that the “BLM seems to have wholly avoided addressing these recent trends, and completely failed to evaluate what they reveal for the future of sage-grouse” *Id.* at ¶ 32. He concludes further that “BLM essentially ignored analyzing either current habitat conditions and fragmentation, or how plan changes may impact sage-grouse habitats. The failure of BLM to undertake such analysis in the 2019 Plan Amendments is wholly inconsistent with standard practices and the best available science.” *Id.* at ¶ 45.

Here, Dr. Braun’s Declaration shows that the BLM wholly failed to consider a serious environmental consequence. The same analysis applies to the

Declarations of Dr. Amy Haak (who compiled data relied upon by Dr. Braun in reaching his conclusion that habitat has suffered extensive losses and fragmentation due to wildfire and oil and gas development) and Dr. John Connelly (a sage grouse expert who reviewed the 2019 Plan Amendments for Idaho and Wyoming). Both Dr. Haak and Dr. Connelly reach the same conclusion as Dr. Braun that the BLM failed to consider serious environmental consequences in the adoption of the 2019 Plan Amendments.

The Government objects that plaintiffs failed to file a motion to supplement the administrative record and simply filed these Declarations with their motion for summary judgment. This tactic, defendants argue, “effectively shift[s] the burden to Federal Defendant to explain why the materials should not be considered.” *See Government Brief (Dkt. No. 43)* at p. 3. But the Court is not shifting that burden – the burden remains on plaintiffs to show that the admission of the Declarations “is necessary to determine whether the agency has considered all relevant factors.” *Powell*, 395 F.3d at 1030. The Court finds that plaintiffs have carried that burden with respect to the Declarations of Drs. Braun, Haak, and Connelly.²

² Plaintiffs have moved to file a supplemental Declaration of Dr. Braun updating his discussion of sage grouse conditions while Intervenor has moved to file a Declaration of Joshua Uriarte, discussing why the data in Dr. Braun’s supplemental Declaration might be misleading. The Court will allow both Declarations to be filed and finds both helpful but neither determinative.

In addition, the Declarations are appropriate to establish that irreparable harm will result if the 2019 Plan Amendments are not enjoined. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833–34 (9th Cir. 2002) (reviewing extra-record declaration when considering injunction); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 797 (9th Cir. 2005) (affirming preliminary injunction based upon extra-record expert declarations). The Court will therefore consider those three Declarations.

The Court will now turn to a discussion of each element required for injunctive relief.

Likelihood of Success – Failure to Consider Reasonable Alternatives

In addition to evaluating the proposed agency action, every EIS must ‘[r]igorously explore and objectively evaluate all reasonable alternatives’ to that action. *See* 40 C.F.R. § 1502.14(a). The analysis of alternatives to the proposed action is “the heart of the environmental impact statement.” *Ctr. for Biological Diversity v. U.S.*, 623 F.3d 633, 642 (9th Cir. 2010).

In this case, the Final EISs identified the purpose and need of the 2019 BLM Plan Amendments as follows: (1) to enhance cooperation and coordination with the states, (2) to align with Dept. of Interior and BLM policy directives issued since 2015, and (3) to incorporate measures to better align with state conservation plans. *See, e.g.*, ID Final EIS at ES-2. To achieve these purposes, each Draft EIS

identified two alternatives: (1) the “No Action” alternative (i.e., keeping the 2015 Plans intact), and (2) BLM’s preferred “Management Alignment Alternative,” (i.e., proposed modifications for each state). *See, e.g.*, Idaho DEIS at ES-5. The Final EISs modified the “Management Alignment Alternative” slightly, to arrive at the Proposed Plan Amendments approved in the RODs.

However, the “No Action” alternative was not in fact an alternative but was included only for comparison purposes because the BLM had decided that it would not meet the three purposes and needs listed above. *See, e.g.*, ID ROD at 1-9. The Final EISs thus only considered BLM’s preferred outcome.

In order to be adequate, an environmental impact statement must consider “not every possible alternative, but every reasonable alternative.” *Protect Our Communities Foundation v. LaCounte*, 2019 WL 4582841 (9th Cir. Sept. 23, 2019). The stated goals of a project necessarily dictate the range of “reasonable” alternatives. *Id.* An agency need not consider alternatives that are “unlikely to be implemented or those inconsistent with its basic policy objectives.” *Id.*

Here, the BLM’s stated goals – set forth above – generally seek to align its actions with the State’s plans but do not mention sage grouse protections. Nevertheless, the BLM defends the EISs as continuing to protect the sage grouse, and so the Court will assume that is a key goal. But given that goal, the weakening

of protections without justification does not make “reasonable” the single “alternative” considered.

In *Protect our Communities (POC)*, decided just last month, the Ninth Circuit reaffirmed its holding in *Muckleshoot Indian Tribe v. U.S.*, 177 F.3d 800, 813 (9th Cir. 1999) (per curiam). In *Muckleshoot*, the Circuit held that an alternatives analysis was deficient because it “considered only a no action alternative along with two virtually identical alternatives.” *Id.* at 813. The Circuit distinguished *Muckleshoot* in *POC* because the EIS in *POC* combined an analysis of two projects – labeled Phase I and Phase II – and an alternative to the preferred alternative was considered for the project as a whole even though no alternatives were considered for Phase II itself. The *POC* decision states that “if Phase II constituted the entire project, . . . *Muckleshoot* would require us to conclude that the alternatives analysis was deficient.” *Id.* at *6.

This case is closer to *Muckleshoot* than *POC*. Each EIS is a separate NEPA document and none of the EISs considered any alternative other than the Management Alignment Alternative. Common sense and this record demonstrate that mid-range alternatives were available that would contain more protections for sage grouse than this single proposal. The Court therefore finds that plaintiffs are likely to succeed on their claim that the BLM failed to consider reasonable alternatives in violation of NEPA.

Likelihood of Success – Failure to Take a “Hard Look”

In *WWP v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011), the Ninth Circuit held that the BLM failed to take a hard look at the environmental consequences of regulatory changes when it ignored comments of the FWS and EPA, among others, expressing concerns about those changes. The Circuit found that the BLM gave “short shrift” to the concerns of the FWS and EPA and “neither responded to their considered comments objectively and in good faith nor made responsive changes to the proposed regulations.” *Id.* at 493. The Circuit went on to hold that “[w]hen an agency, such as the BLM, . . . offers no meaningful response to serious and considered comments by experts, that agency renders the procedural requirement meaningless and the EIS an exercise in form over substance.” *Id.* at 492-93.

In the present case, as explained above, the EPA expressed several concerns about the proposed 2019 Plan Amendments. Those Amendments weakened many of the protections that the FWS relied upon in finding that an ESA listing was not warranted. The weakening of protections is contrary to the science contained in the NTT and COT Reports.

Certainly, the BLM is entitled to align its actions with the State plans, but when the BLM substantially reduces protections for sage grouse contrary to the best science and the concerns of other agencies, there must be some analysis and justification – a hard look – in the NEPA documents. It is likely that plaintiffs will

prevail on their claim that this hard look was not done with respect to all six EISs challenged here, just as it was missing in *Kraayenbrink*.

Likelihood of Success – Failure to Consider Cumulative Impacts

The EPA expressed concerns about the lack of a substantive cumulative impact analysis, as discussed above. Part of that concern was due to the manner in which the BLM divided up the analysis among six separate EISs each focusing on a single State.

Under NEPA, courts must give deference “to an agency’s determination of the scope of its cumulative effects review.” *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 959 (9th Cir. 2003). The geographical scope is not necessarily limited to the project’s geographical boundaries or to state borders. *Id.* “Agencies are not obligated to explain why they exclude every possible area that might be included in the cumulative effects area. Instead, they must justify on the record the chosen level of analysis.” *Id.*

Here, the six EISs at issue are State specific despite clear evidence in the record that the sage grouse range covers multiple states and that a key factor – connectivity of habitat – requires a large-scale analysis that transcends the boundaries of any single State. The BLM is in a unique position, as compared to each individual State, to conduct an analysis that evaluates the cumulative impacts of each State plan – and the BLM’s own actions – over the entire range of the sage

grouse. While courts must give deference to an agency's scope decision, the BLM's focus on individual States required a robust cumulative impacts analysis given the range of the sage grouse. Because that is lacking, the plaintiffs are likely to succeed in their claim that the BLM's EISs do not contain a sufficient cumulative impacts analysis under NEPA and, most importantly, do not contain any justification for that failure.

Likelihood of Success – Elimination of Compensatory Mitigation Requirements

As discussed above, the FWS relied on the mandatory compensatory mitigation provisions of the 2015 Plans to make its finding that an ESA listing was not warranted. The Draft EISs for the 2019 Plans assumed that the mandatory compensatory mitigation provisions of the 2015 Plans would remain in effect, *see e.g., Idaho Draft EIS* at 4-15, but stated that the BLM was still evaluating whether to maintain those provisions. *Id.* at 2-4.

The Final EISs were the first time the BLM announced it was removing the mandatory compensatory mitigation, and the public was never given notice or an opportunity to comment on those actions before they were taken. BLM's elimination of mandatory compensatory mitigation through the Final EISs appears to constitute both a "substantial changes" to its proposed action and "significant new circumstances" under 40 C.F.R. § 1502.9(c), requiring that BLM have issued a supplemental draft EIS for public review and comment before finalizing these

changes. Failing to do so “insulate[d] [the agency’s] decision-making process from public scrutiny. Such a result renders NEPA’s procedures meaningless.” *California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982).

For these reasons, the plaintiffs are likely to succeed on this claim.

Conclusion on Likelihood of Success on the Merits

The BLM had a duty to explain any “departure from prior norms.” *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *see also Int’l Union, UAW v. NLRB*, 802 F.2d 969, 973-74 (7th Cir. 1986) (“[A]n administrative agency is not allowed to change direction without some explanation of what it is doing and why.”). To summarize the discussion above, the plaintiffs will likely succeed in showing that (1) the 2019 Plan Amendments contained substantial reductions in protections for the sage grouse (compared to the 2015 Plans) without justification; (2) The EISs failed to comply with NEPA’s requirement that reasonable alternatives be considered; (3) The EISs failed to contain a sufficient cumulative impacts analysis as required by NEPA; (4) The EISs failed to take the required “hard look” at the environmental consequences of the 2019 Plan Amendments; and (5) Supplemental Draft EISs should have been issued as required by NEPA when the BLM decided to eliminate mandatory compensatory mitigation.

Irreparable Harm

As discussed above, the BLM has ordered that the 2019 Plan Amendments be effective immediately. That means that all BLM approvals of discretionary actions affecting sage-grouse habitats must now follow the 2019 Plan Amendments. *See* 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a). Under these weakened protections, the BLM will be approving oil and gas leases; drilling permits; rights-of-way for roads, pipelines, and powerlines; coal and phosphate mining approvals; and livestock grazing permit renewals. *See Saul Declaration (Dkt. No. 124-16)* . ¶¶ 22–31; *Anderson Declaration (Dkt. No. 124-2)*. ¶¶ 26–59. It is likely that these actions will cause further declines of the sage grouse under the weakened protections of the 2019 Plan Amendments.

Defendants argue that such actions are not imminent, but the Court disagrees. The record shows that the 2019 Plan Amendments were designed to open up more land to oil, gas, and mineral extraction as soon as possible. That was the expressed intent of the Trump Administration and then-Secretary Ryan Zinke. There is no indication that current Secretary David Bernhardt is proceeding at any slower pace.

Numerous site-specific applications of the 2019 Plan Amendments that are upcoming (or have already occurred) include oil and gas well drilling and associated road and pipeline construction in Wyoming; coal mining projects in Utah; gold and other surface mining projects in Nevada; and large phosphate

mining projects in Idaho. *See Saul Declaration, supra*, at ¶¶ 22–31; *Anderson Declaration, supra*, at ¶¶ 53–58.

Given these circumstances, the Court finds that plaintiffs are likely to suffer irreparable harm in the absence of injunctive relief.

Balance of Hardships & Public Interest

Plaintiffs do not seek injunctive relief preventing BLM from approving any new oil and gas well or lease, grazing permit, or other discretionary authorization for use of public lands. Plaintiffs only ask the Court to enjoin BLM from approving such uses based on the 2019 Plan Amendments. Under the requested injunction, BLM may continue applying the 2015 Plans to upcoming permits, licenses and other approvals; and plaintiffs reserve the right to challenge such actions as may be appropriate. But this Court is not asked to enjoin them now.

These circumstances tip the balance of hardships toward plaintiffs – the sage grouse will suffer more hardships from the 2019 Plan Amendments than the defendants will suffer from reverting to the provisions of the 2015 Plans.

With regard to the public interest, the Ninth Circuit has recognized “the well-established public interest in preserving nature and avoiding irreparable environmental injury.” *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008), *overruled on other grounds by Winter v. NRDC*, 555 U.S. 7 (2008)). And “[s]uspending a project until [environmental analysis] has occurred . . . comports

with the public interest,” because “the public interest requires careful consideration of environmental impacts before major federal projects may go forward.” *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dept. of Interior*, 588 F.3d 718, 728 (9th Cir. 2009).

Conclusion

The plaintiffs have satisfied all the elements for injunctive relief, and the Court will therefore grant their motion for a preliminary injunction. The BLM is enjoined from implementing the 2019 BLM Sage-Grouse Plan Amendments for Idaho, Wyoming, Colorado, Utah, Nevada/Northeastern California, and Oregon, until such time as the Court can adjudicate the claims on the merits. The 2015 Plans remain in effect during this time.

Because plaintiffs are non-profit environmental groups seeking to advance the public interest in this litigation the Court will waive the injunction bond requirement under Rule 65(c). *See Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999)

ORDER

In accordance with the Memorandum Decision above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion for preliminary injunction (docket no. 124) is GRANTED. The BLM is enjoined from implementing the 2019 BLM Sage-Grouse Plan Amendments for Idaho, Wyoming,

Colorado, Utah, Nevada/Northeastern California, and Oregon, until such time as the Court can adjudicate the claims on the merits. The 2015 Plans remain in effect during this time.

IT IS FURTHER ORDERED, that the plaintiffs' motion to supplement with the declaration of Dr. Braun (docket no. 182) and intervenor's motion to supplement with the declaration of Uriarte (docket no. 183) are GRANTED.



DATED: October 16, 2019

A handwritten signature in black ink that reads "B. Lynn Winmill". The signature is written in a cursive style and is positioned above a horizontal line.

B. Lynn Winmill
U.S. District Court Judge

Exhibit 3

Exhibit 3 is the reference and internet link to *America's Public Lands Giveaway*. This Exhibit is available at <https://westernpriorities.org/2019/09/19/story-map-americas-public-lands-giveaway/>

Exhibit 4

New Your Times Article

<https://www.nytimes.com/2018/11/27/business/energy-speculators-public-land-leases.html>

Energy Speculators Jump on Chance to Lease Public Land at Bargain Rates

The Trump administration's policy of encouraging more oil and gas drilling combined with a loophole in federal rules has been a boon for investors with a taste for gambling — and has drawn criticism that it is a bad deal for taxpayers.

By Eric Lipton and Hiroko Tabuchi

Nov. 27, 2018

MILES CITY, Mont. — Robert B. Price, the chief executive of a London-based oil and gas company, came up with a creative tactic to grab bargain drilling rights to a sprawling piece of federal land here in eastern Montana — each acre for less than the price of a cup of coffee.

He first asked the Interior Department to auction off rights to as much as 200,000 acres in Montana through a process that allows energy companies to identify the public land they would like to develop. But when the auction took place last December, Mr. Price sat on the sidelines and waited for the clock to run out — betting no one else would bid.

His gamble worked. With no other bidders showing interest, the government allowed him to secure drilling rights on nearly 67,000 acres east of Miles City in a special noncompetitive sale the very next day. His cost: just \$1.50 an acre a year in rent, compared with the more than \$100-an-acre average paid by bidders, on top of rent, in competitive auctions in Montana in the final four years of the Obama administration.

"We're still interested in much more," said Mr. Price, reached by phone before he was scheduled to fly to London to meet with his investors.

Robert B. Price's gamble that no one else would bid on the land he was eyeing in Montana paid off.

The maneuver is one of many loopholes that energy speculators like Mr. Price are using as the Trump administration undertakes a burst of lease sales on federal lands in the West.

Major oil and gas companies like Chevron and Chesapeake Energy are frequent buyers of the leases. But the Trump administration has put so much land up for lease that it has also created an opening for super-low-price buyers like Mr. Price.

The plots of land the speculators bid on typically sell for such dirt-cheap prices because there is little evidence that much oil or gas is easily accessible. The buyers are hoping that the land will increase in value nonetheless, because of higher energy prices, new technologies that could make exploration and drilling more economical or the emergence of markets for other resources hidden beneath the surface.

In some cases they hope to resell access to deep-pocketed oil companies at a premium. In others they are hoping to raise money to search for oil or gas on their own. Either way, they are the latest in a long line of speculators willing to take a shot — sometimes a very long shot — at a big payoff in America's oil fields.

The percentage of leases being given away through noncompetitive sales, like the one that Mr. Price engineered, surged in the first year of the Trump administration to the highest levels in over a decade,



according to an analysis of federal leasing data by Taxpayers for Common Sense, a nonpartisan group that highlights what it considers wasteful actions by federal government agencies.

In states like Nevada, noncompetitive sales frequently make up a majority of leases given out by the federal government, the group's database shows.

The growth of the amount of land put up for lease combined with the sharp increase in noncompetitive leasing has resulted in major drops in the price companies pay per acre in certain states, like Montana, where the average bid has fallen by 80 percent compared with the final years of the Obama administration.

Two Grand Junction, Colo., business partners, for example — a geologist and a former Gulf Oil landman — now control 276,653 acres of federal parcels in northeastern Nevada. But they are still looking for the money they need to drill on the land, or even to pay for three-dimensional seismic surveys to determine whether there is enough oil there to try.

The percentage of leases being given away through noncompetitive sales — like in this part of eastern Montana —surged in the first year of the Trump administration.

In the case of Mr. Price, whose investors include Haliburton, the oil-services industry giant, he is convinced that there is an unusually high level of helium mixed in with natural gas that could be drilled in eastern Montana. Because helium sells at a much higher price than even oil, he is selling investors on the potential for lucrative returns. But the prospect of him delivering remains in doubt.

Rajan David Ahuja, vice president at R&R Royalty, a Texas-based company that has leases on land roughly equivalent to the size of Rhode Island, said that building landholdings like this was a crashshoot.

"We don't make money on 90 percent of the things we do," Mr. Ahuja said. "It is a really risky game."

The surge in noncompetitive transactions has intensified debate over how well the federal government handles the task of auctioning off access to taxpayer-owned lands. Taxpayers get 12.5 percent of revenues produced from any oil or gas extracted from leased public land — or nothing but trivial rent payments if speculators fail to develop the land successfully.

More than 11 million acres of land leased by the federal government lies idle — or about half of all the land out on lease — property that may or may not ever be drilled for oil and gas.

The speculation, critics say, allows companies to lock up millions of acres of federal land in leases, complicating efforts to set it aside for other uses, such as wildlife conservation areas or hunting and recreation zones.

"People come to Montana and stay in Montana not because of the best weather or highest wages or the best beaches," said John Todd, the conservation director at the Montana Wilderness Association. "They come here because we have access to ample public land, most of it that is in the same shape as it was when Lewis and Clark came here or before that."

Because the speculators can resell the leases, they could also reap the gains from any increase in the value of their landholdings, gains that otherwise would go to American taxpayers, said Ryan Alexander, president of Taxpayers for Common Sense.

"We should not be flooding the market so it is easy for companies to sit back and wait to get to leases at fire-sale prices," Ms. Alexander said. "The acceleration of leasing is doing just that. The industry is getting a great deal and taxpayers are not."

Ryan Zinke, the interior secretary, said this month that overall taxpayer revenue from energy production on federal lands jumped in 2018 as a result of rising production in states like Wyoming and New Mexico.

"President Trump's energy dominance strategy is paying off, and local communities across America are the beneficiaries," Mr. Zinke said in a statement.

The Speculators' Walmart

Inside the George R. Brown Convention Center in downtown Houston, thousands of energy industry executives converged in August for an event known as Summer NAPE, a giant gathering of hundreds of owners of potential oil and gas drilling sites. Most of them were there to raise money to turn their speculative gambles into real drilling plans.

"STRIKE WHILE THE DEALS ARE HOT," the banner at the entrance to the meeting hall said.

At Booth 2315, in front of a poster boasting about the more than 261,000 acres of federal leases they had secured in Nevada, stood Larry R. Moyer, a Colorado-based oil geologist, and his business partner, Stephen Smith, a former Gulf Oil landman, pitching their land to any prospective investor who walked up.

"You want to get in our deal — get your checkbook out," Mr. Smith said to one visitor.

Northern Nevada, Mr. Smith admits upfront, is a risky place to look for oil. Nevada has one of the highest percentages in the country of leased land that is sitting idle: Just 3 percent of the 715,441 acres of federal land in the state leased for oil and gas were actually producing energy as of late last year.

"There are a lot of people who have spent a lot of money drilling dry holes in the past," Mr. Smith said.

"We are working to overcome the conventional wisdom," Mr. Moyer added.

Mr. Moyer took to a small stage at the Houston conference for a "Shark Tank"-like presentation.

"What we are looking for — or we would ask someone — is about \$10 million," Mr. Moyer said, money they would use for a seismic survey and to drill test wells.

"If you find a billion barrels, your finding cost is going to be a penny a barrel," he said before wrapping up his presentation by saying, "Think about taking a swing."

Waiting on the Sidelines

Outside Miles City, Mont. Buyers in Montana and elsewhere are able to lease land for as little as \$1.50 per acre each year in the noncompetitive leasing program.

The bidding process typically begins when an oil and gas company asks the Interior Department to open up a new chunk of taxpayer-owned land to drilling.

Once the department agrees, it schedules an internet-based auction for registered bidders. Hot competition for the most sought-after land, where there are proven energy reserves, can drive these so-called bonus bids up close to \$100,000 per acre, as happened in New Mexico in September. But to ensure that there is at least some upfront payment, the Interior Department requires a minimum per-acre bid of \$2.

But there is a loophole. If no one bids, the land is then transferred into a program that allows anyone to approach the department within two years of the auction, without an upfront bid payment.

The only money that needs to be put down is the \$1.50-per-acre annual lease payment for the first year of a 10-year lease, and a \$75 filing fee. This is how Mr. Price managed to secure access to land in Custer County, east of Miles City, part of the 116,000 acres of federal leases his company, Highlands Montana, says it holds.

"We're a small company. We didn't want to get in a bidding process," said Mr. Price, whose company has raised at least \$6 million from investors since 2016.

Mr. Moyer and Mr. Smith also secured a large share of their holdings in Nevada through these noncompetitive purchases, after sitting and watching the auctions play out without bidding.

But Neil Kornze, the former head of the Bureau of Land Management, the branch of the Interior Department that runs the leasing process, said this was a flawed policy.

"Someone should have to bid in the auction to get the land," said Mr. Kornze, who served as director in the final three years of the Obama administration.

The Trump administration made three times as much land available to bid on in the last fiscal year as the average for the last four years of the Obama administration. But only about 11 percent of the land attracted any bidders in 2018 — a total of 1.35 million acres. The rest of that land is now available for noncompetitive leases.

Highlands Montana has drilled a few test wells on adjacent state land it has leased here. But for now, most of Mr. Price's leased land remains undeveloped.

Ms. Stevenson and her husband own a cattle ranch near the remote part of Montana where Mr. Price hopes to drill for natural gas and helium.

Large-scale development would be quite a shock in this part of Montana, where there is now very little oil and gas drilling.

From the back porch of the cattle ranch owned by Karen Aspevig Stevenson and her husband, the view stretches for miles, with ponderosa pines and juniper bushes swaying in a wind that blows so strong it sounds almost like ocean waves.

"This is our public lands. We all own this land," Ms. Stevenson said, as she walked through the rolling hills, her cattle-herding dog running ahead. "To come in here and just start drilling — that does not make sense."

Eric Lipton reported from Miles City and Houston, and Hiroko Tabuchi from New York. Rachel Shorey contributed research.

Eric Lipton is a Washington-based investigative reporter. A three-time winner of the Pulitzer Prize, he previously worked at The Washington Post and The Hartford Courant. @EricLiptonNYT

Hiroko Tabuchi is a climate reporter. She joined The Times in 2008, and was part of the team awarded the 2013 Pulitzer Prize for Explanatory Reporting. She previously wrote about Japanese economics, business and technology from Tokyo. @HirokoTabuchi • Facebook

Exhibit 5

Reports cited with URL links in Section IV.F. of this protest (Greenhouse Gas Emissions and Climate Change impacts), including the:

- Intergovernmental Panel on Climate Change (IPCC) 2018 report,
- U.S. Fourth National Climate Assessment 2018,
- USGS 2018 Report,
- BLM Handbook 1624 (2018), and
- Interagency Working Group on Social Cost of Greenhouse Gases (IWG) reports.

