



***Bureau of Land Management and  
Forest Service  
Protest Resolution Report***

**Bears Ears National Monument  
Proposed Monument  
Management Plans and Final  
Environmental Impact  
Statement**

December 13, 2019



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## **Acronyms**

ACEC	area of critical environmental concern
APE	area of potential effects
ARPA	Archaeological Resources Protection Act
BENM	Bears Ears National Monument
BLM	United States Department of the Interior, Bureau of Land Management
BMPs	best management practices
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
EIS	environmental impact statement
ESA	Endangered Species Act of 1973
FLPMA	Federal Land Policy and Management Act of 1976
LRMP	Land and Resource Management Plan
MMP	Monument Management Plan
NEPA	National Environmental Policy Act of 1969
NFMA	National Forest Management Act of 1976
NHPA	National Historic Preservation Act of 1966
NLCS	National Landscape Conservation System
OHV	off-highway vehicle
OPLMA	Omnibus Public Land Management Act of 2009
PFYC	potential fossil yield classification
RMP	resource management plan
ROD	record of decision
ROW	right-of-way
SCC	Species of Conservation Concern
USC	United States Code
USFS	United States Department of Agriculture, National Forest Service
USFWS	United States Department of the Interior, Fish and Wildlife Service

## Protesting Party Index

Protester	Organization	Determination
Abdo, Mike	N/A	Dismissed – Comments Only
Aggarwal, Rupakshi	N/A	Dismissed – Comments Only
Ames, Mary	N/A	Dismissed – Comments Only
Angvick, Joanne	N/A	Dismissed – Comments Only
Bangeman, Johanna	N/A	Dismissed – Comments Only
Boles, Michelle	N/A	Dismissed – Comments Only
Brock, Linda	N/A	Dismissed – Comments Only
Brower, Diane	N/A	Dismissed – Comments Only
Cannavo, Angela	N/A	Dismissed – Comments Only
Charles, Natalie	N/A	Dismissed – Comments Only
Clark, Marybeth	N/A	Dismissed – Comments Only
DeVall, Sue	N/A	Dismissed – Comments Only
Dieterich, Michele	N/A	Dismissed – Comments Only
Fitch, Bruce	N/A	Dismissed – Comments Only
Hardebeck, Larry	N/A	Dismissed – Comments Only
Hoffman, C	N/A	Dismissed – Comments Only
Irwin, Michael	N/A	Dismissed – Comments Only
Jack, Shirlee	N/A	Dismissed – Comments Only
Landreth, Natalie; Campbell, Matthew; Spruhan, Paul; Searle, Jason; Wilson, Rollie <sup>3</sup>	Hopi Tribe; Navajo Nation; Ute Indian Tribe; Ute Mountain Ute Tribe; Pueblo of Zuni	Denied – Issues and Comments
Lane, Stephen	N/A	Dismissed – Comments Only
LeBeau, Barry	N/A	Dismissed – Comments Only
Lish, Christopher	N/A	Dismissed – Comments Only
Low, David	N/A	Dismissed – Comments Only
Mauldin, John	N/A	Dismissed – Comments Only
Mayer, Elaine	N/A	Dismissed – Comments Only
Mayo, Lisa	N/A	Dismissed – Comments Only
Meehan, Katie; Clark, Neal; Walker, Joro; Peterson, Tim; Beam, Ryan; Ratner, Jonathan; Nelson, Peter; Buccino, Sharon; Greene, Mary; Schoenhut, Karimah; Krupp, Chris; Nimkin, David; Silbert, Shelley; Francis Jr., Philip; Crumbo, Kim; Burke, Kelly <sup>2</sup>	The Wilderness Society; Southern Utah Wilderness Alliance; Western Resource Advocates; Grand Canyon Trust; Center for Biological Diversity; Western Watersheds Project – Wyoming Office; Defenders of Wildlife; Natural Resources Defense Council; National Wildlife Federation; Sierra Club; WildEarth Guardians; National Parks Conservation Association; Great Old Broads for Wilderness; Coalition to Protect America’s National Parks; Wildlands Network; Grand Canyon Wildlands Council	Denied – Issues and Comments
Menikheim, MI	N/A	Dismissed – Comments Only

Mooneyham, Thomas	N/A	Dismissed – Comments Only
Morgan, David	N/A	Dismissed – Comments Only
Murray, Danielle; Williamson, Sharee; Ewing, Josh; Doelle, William; Noyes, Gavin; Murdock, Erik; Polly, P. David <sup>1</sup>	Conservation Lands Foundation; National Trust for Historic Preservation; Friends of Cedar Mesa; Archaeology Southwest; Utah Diné Bikéyah; Access Fund; Department of Earth and Atmospheric Sciences	Denied – Issues and Comments
Newman Gallery	N/A	Dismissed – Comments Only
Orth, Dr.	N/A	Dismissed – Comments Only
Parisi, Nicole	N/A	Dismissed – Comments Only
Pitts, Michael	N/A	Dismissed – Comments Only
Portman, Catherine	N/A	Dismissed – Comments Only
Refsnider, Kurt	Bikepacking Roots	Dismissed – Comments Only
Rosin, Lawrence	N/A	Dismissed – Comments Only
Sanyer, Mathias	N/A	Dismissed – Comments Only
Schwartz, Sally	N/A	Dismissed – Comments Only
Sims, Aaron	Pueblo of Acoma	Denied – Issues and Comments
Smith, Winston	N/A	Dismissed – Comments Only
Strobel, Philip	Environmental Protection Agency	Dismissed – Comments Only
Templeton, Dennise	N/A	Dismissed – Comments Only
Wheary, Alena	N/A	Dismissed – Comments Only
Williams, William	N/A	Dismissed – Comments Only
Wisboro, Judy	N/A	Dismissed – Comments Only

<sup>1</sup> This letter was cosigned by multiple parties. In this report, it is referenced as Danielle Murray et al., Conservation Lands Foundation et al.

<sup>2</sup> This letter was cosigned by multiple parties. In this report, it is referenced as Katie Meehan et al., The Wilderness Society et al.

<sup>3</sup> This letter was cosigned by multiple parties. In this report, it is referenced as Natalie Landreth et al., Bears Ears Inter-Tribal Coalition

In addition to the protests received from those listed in the above table, the BLM and Forest Service received an additional 35,934 protest letters during the protest period. The agencies' review of these protest letters identified them as "form" protest letters initiated from two separate organizations, Earthjustice and the National Parks Conservation Association. The BLM and Forest Service evaluated each of these form protest letters, including those presenting slight variations of the original version. The BLM and USFS determined that these form protest letters received were incomplete since they do not provide full mailing addresses (43 CFR 1610.5-2(a)(2)(i)), and do not raise any valid protest issues (43 CFR 1610.5-2(a)(2)(ii),(III),(v)). Accordingly, these protest letters were dismissed.

## NEPA – Purpose and Need

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Throughout the Proposed Monument Management Plan, the preferred alternative does not prohibit degradation of monument resources and values and fails to safeguard these resources from harm and injury. The Proposed MMPs thus fails to satisfy its stated purpose and need to provide “the proper care and management of Monument objects and values.” This violates the monument proclamation, NEPA, and is arbitrary and capricious.

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** Protestors argue the MMP fails to address the requirements of Proclamation 9558 and multiple federal laws by failing to include the protection of Indian sacred sites and traditional cultural properties as well as adequate and meaningful tribal consultations. This is evident within the “Purpose and Needs” section of the plan, which states “[t]he purpose of the MMPs is to provide a comprehensive framework for the Bureau of Land Management and US Forest Service’s allocation of resources and management of the public lands within the Planning Area pursuant to multiple-use and sustained yield mandates of the Federal Land Policy and Management Act of 1976 and the National Forest Management Act of 1976.” This “purpose” does not comply with federal laws and clear obligations to consult with Tribes, as such all planning decisions based on this “purpose” throughout the MMP are inherently flawed.

### Summary:

The United States Department of the Interior, Bureau of Land Management (BLM) and United States Department of Agriculture, National Forest Service (USFS) violated the National Environmental Policy Act of 1969 (NEPA) by improperly establishing a purpose and need for the Proposed Monument Management Plans (MMPs)/Final Environmental Impact Statement (EIS) that does not prohibit degradation of Bears Ears National Monument (BENM) resources and values and does not require consultation with Tribes on sacred sites and traditional cultural properties. Further, the BLM and USFS violated the NEPA by identifying a Proposed MMPs alternative that fails to satisfy its stated purpose and need to provide “the proper care and management of [BENM] Monument objects and values.”

### Response:

The NEPA document must briefly specify the underlying purpose of and need for action to which the agency is responding (40 Code of Federal Regulations [CFR] § 1502.13). In accordance with the NEPA, the BLM has the discretion to establish the purpose of and need for a proposed action (40 CFR § 1502.13). Agencies have considerable discretion to define the purpose of and need for a project. *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986); *Powder River Basin Resource Council*, 183 IBLA 242, 248 (2013). The BLM must choose purposes that are reasonable. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (DC Cir. 1991). Agencies, in determining what a reasonable purpose is, must look at the factors relevant to the definition of the purpose (e.g., Congressional directives, statutory authority, and the specific needs and goals of parties involved in the sanction of a specific plan). 938 F.2d at 196 (internal citations omitted).

The BLM must construct its purpose and need to conform to existing decisions, policies, regulation, or law (BLM NEPA Handbook H-1790-1, Section 6.2). That said, the purpose and need may not be so narrow that only one alternative becomes a foreordained outcome, and may not be so broad that an infinite number of possibilities could accomplish the goals of the project. *Nat’l Parks & Conservation Ass’n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010) (quoting *City of Carmel-By-The-Sea v. US Dep’t of Transp.*, 123 F.3d 1142, 1155 [9th Cir. 1997]); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (DC Cir. 1991). The “touchstone” for reasonableness of a purpose and need statement is whether the

resulting alternatives analysis “fosters informed decision making and informed public participation.” *League of Wilderness Defenders v. USFS*, 689 F.3d 1060, 1071 (9th Cir. 2012) (citing *California v. Block*, 690 F.2d 753, 767 [9th Cir. 1982]).

The BLM and USFS appropriately established the purpose and need for the development of the BENM land use plan. The Federal Land Policy and Management Act of 1976 (FLPMA), as amended, governs the BLM’s management of public lands. The FLPMA provides that the BLM “shall manage the public lands under principles of multiple use and sustained yield . . . except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.” 43 U.S.C. 1732(a). The lands within the BENM have been dedicated to specific uses according to other provisions of law. In accordance with the Antiquities Act, Presidential Proclamation 9558, as modified by Proclamation 9681, designated the BENM and reserved the lands comprising the Shash Jáa and Indian Creek Units to provide for the proper care and management of the Monument’s objects and values. The designating proclamations further directs the BLM to provide for the proper care and management of Monument objects through compliance with applicable legal authority, such as the FLPMA, to protect the Monument’s objects and values. However, no controlling legal authority requires the agencies to manage the Monument in a particular way or to adopt management actions that are the most protective of Monument objects and values. Rather, courts have been clear that the BLM may satisfy its legal obligations by balancing the protection of the Monument’s objects and values with a desire to allow the public to enjoy and make beneficial use of the lands and resources. The purpose and need identified by the agencies is consistent with that approach and fully compliant with applicable law.

Moreover, the Proposed MMPs alternative (Alternative E) satisfies its stated purpose and need. The agencies analyzed in detail a range of alternatives which all present different management approaches to meeting the purpose and need. Each management approach explores different tradeoffs to the possible spectrum of BLM multiple use and sustained yield management that still meets the purpose and need. The Proposed MMPs alternative (Alternative E) analyzes the tradeoffs of a multiple use approach that meets the purpose and need differently than the other alternatives analyzed, but an approach that does still meet the purpose and need. In developing the goals, objectives, and management actions in the Proposed MMPs alternative (Alternative E), the agencies considered the location and distribution of Monument objects and values, their sensitivity to other uses, and the anticipated nature and intensity of existing and future resource uses. In some instances, providing for the proper care and management of Monument objects and values required placing site-specific restrictions or prohibitions on certain resources and uses. In other instances, the agencies developed stipulations, best management practices (BMPs), monitoring protocol, and other management contained in the Proposed MMPs that would be applied by the Authorized Officer to the future management of the BENM, including any proposed activities within the BENM, to provide for the proper care and management of Monument objects and values.

All future actions authorized, carried out, or funded by the BLM or USFS within the BENM are subject to site- or activity-specific environmental review, including documentation that demonstrates a proposed action is consistent with the proper care and management of the Monument objects and values consistent with the alternative to be selected as the Approved MMPs. The purpose and need for this land use planning effort provides no bearing on increasing or relieving the BLM or USFS of any requirements applicable to future actions implemented in conformance with the alternative selected as the Approved MMPs. The BLM and USFS will be required to comply with environmental laws, including the National Historic Preservation Act of 1966 (NHPA) and NEPA, prior to authorizing or undertaking any site-specific activities.

The agencies properly established the purpose of and need for development of the BENM land use plan, and its Proposed MMPs/Final EIS complies with the purpose and need. Accordingly, this protest is denied.



## **NEPA – Public Participation**

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** Lastly, the BLM and USFS have introduced a new alternative (Alternative E) that had not been previously seen in the Draft Environmental Impact Statement and draft MMPs. This failure to provide an opportunity to assess impacts or comment. Under FLPMA, BLM was obligated to provide the public the opportunity to disclose and take comment on alternatives in a management plan. BLM and USFS must give Tribes and the general public the opportunity to fully comment on the alternative.

*Pueblo of Acoma*

*Aaron Sims*

**Issue Excerpt Text:** Furthermore, the public had no opportunity to comment on Alternative E, which is a violation of NEPA and the APA as asserted above. Alternative E is problematic for a variety of reasons and the BLM/USFS should provide for a supplemental draft EIS to further consider, evaluate, and respond to the concerns of Tribes, conservation groups and the public.

### **Summary:**

By introducing a new alternative (Alternative E, the Proposed MMPs) and failing to provide an opportunity to comment on this new alternative, the BLM and USFS violated the NEPA and FLPMA.

### **Response:**

40 CFR § 1500.2(b) states that “Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.” In addition, 40 CFR § 1506.6(a) states that federal agencies shall “make diligent efforts to involve the public in preparing and implementing their NEPA procedures.”

Federal agencies must prepare a supplement to a draft or final EIS if, after circulation of a draft or final EIS but prior to implementation of the Federal action:

- The agency makes substantial changes to the proposed action that are relevant to environmental concerns (40 CFR 1502.9(c)(1)(i));
- The agency adds a new alternative that is outside the spectrum of alternatives already analyzed (see Question 29b, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (March 23, 1981)); or
- There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its effects (40 CFR 1502.9(c)(1)(ii)).

If a new alternative is added after the circulation of a draft EIS, supplementation is not necessary if the new alternative lies within the spectrum of alternatives analyzed in the draft EIS or is a minor variation of an alternative analyzed in the draft EIS. In such circumstances, the new alternative may be added in the final EIS (BLM NEPA Handbook, H-1790-1, 5.3.2 When Supplementation is Not Appropriate).

The BLM and USFS appropriately engaged the public in soliciting comments during the Proposed MMPs/Final EIS NEPA process. The agencies’ introduction of Alternative E (the Proposed MMPs) does not represent a substantial change from the alternatives previously presented in the Draft MMPs/EIS. Rather, as stated in the Proposed MMPs/Final EIS, the agencies developed Alternative E (the Proposed MMPs) based on a combination of elements already considered within the range of alternatives presented in the Draft MMPs/EIS (see Proposed MMPs/Final EIS p. ES-5).

In the Proposed MMPs/Final EIS, the agencies state that Alternative E (the Proposed MMPs) is similar in the anticipated environmental effects to the action alternatives already analyzed in the Draft MMPs/EIS

for a number of resources. While the agencies also found that some effects of Alternative E (the Proposed MMPs) would have effects that differ from those described for the alternatives analyzed in the Draft MMPs/EIS, these changes are not outside the range of effects previously disclosed. A full comparison of the environmental effects under each of the alternatives can be found in Table ES-3 on p. ES-6 of the Proposed MMPs/Final EIS. As such, Alternative E (the Proposed MMPs) is not outside of the spectrum of alternatives already analyzed.

As described above, the agencies did not violate the NEPA by presenting a new alternative (Alternative E, the Proposed MMPs) in the Proposed MMPs/Final EIS that was not included in the Draft MMPs/EIS. The new alternative is a combination of actions considered under the alternatives in the Draft MMPs/EIS, and the effects of the new alternative were determined to be within the range of the alternatives already analyzed. Accordingly, this protest is denied.

## **NEPA – Impacts Analysis – General**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs fails to document the rationale for selecting the least protective measures possible and fails to provide a full and fair discussion of the environmental impacts from their proposed action. This violates NEPA and is arbitrary and capricious.

### **Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the direct, indirect, and cumulative impacts of Alternative E (the Proposed MMPs) and failing to document the rationale for selecting this alternative.

### **Response:**

When preparing an EIS, the NEPA requires an agency to rigorously explore and objectively evaluate a range of reasonable alternatives, but not every possible alternative to a proposed action. “In determining the alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. ‘Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.’” BLM NEPA Handbook H-1790-1, p. 50 (citing Question 2a, Code of Environmental Quality [CEQ], Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, March 23, 1981); see also 40 CFR § 1502.14.

“Reasonable alternatives to the proposed action should fulfill the purpose and need and address unresolved conflicts related to the proposed action . . . Consider alternatives, even if outside the jurisdiction of the Agency. Descriptions of the alternatives should include relevant mitigation measures that could reduce the impacts of the project, even if those measures are outside the jurisdiction of the Agency.” Forest Service NEPA Handbook Chapter 10, p. 31.

Additionally, NEPA regulations (40 CFR § 1502.15) direct that EIS data and analyses must be commensurate with the importance of the impact. 40 CFR § 1500.1(b) provides that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM

NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM and USFS met the requirements of the NEPA in developing Alternative E (the Proposed MMPs). The NEPA does not require federal agencies to select the alternative with the most protective measures possible. Rather, the NEPA requires federal agencies to analyze a range of reasonable alternatives and gives federal agencies the discretion to select an alternative that meets the purpose of and need for the proposed action. All alternatives considered in Proposed MMPs/Final EIS Section 2.2 provide an appropriate balance of uses in BENM lands and meet the purpose of and need for the Proposed MMPs/Final EIS. The alternatives allow some level of all uses in the Planning Area in a manner that is consistent with applicable statutes, regulations, and BLM policy.

The BLM and USFS developed Alternative E as the Proposed MMPs, which provides for the proper care and management of BENM objects and values and satisfies the purpose of and need for the BENM land use plans, which is to provide “a comprehensive framework for the BLM’s and the USFS’s allocation of resources and management of the public lands within the Planning Area pursuant to the multiple-use and sustained yield mandates of the [FLPMA] and the National Forest Management Act of 1976 (NFMA), and the specific direction in Presidential Proclamation 9558, as modified by Presidential Proclamation 9681” (see Section 1.2 of the Proposed MMPs/Final EIS).

The BLM and USFS analyzed Alternative E (the Proposed MMPs) in the Proposed MMPs/Final EIS in an equal manner to the analysis conducted for the other action alternatives in the Draft MMPs/EIS. The analysis in the Proposed MMPs/Final EIS describes the direct, indirect, and cumulative impacts that could potentially result from the management decisions included in Alternative E (the Proposed MMPs). This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Throughout the Proposed MMPs/Final EIS, the BLM and USFS thoroughly discuss and analyze the impacts of Alternative E (the Proposed MMPs) on resources and resource uses in the Planning Area. The BLM and USFS accounted for the relationship between Alternative E (the Proposed MMPs) and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the proposed action, as has been done. Therefore, the BLM and USFS properly analyzed the impacts of Alternative E (the Proposed MMPs) in the Proposed MMPs/Final EIS.

The identification of Alternative E (the Proposed MMPs) in the Proposed MMPs/Final EIS does not constitute decision for the selection of that alternative as the Approved MMPs in the record of decision (ROD). The BLM land use planning regulations and policy do not require documenting a rationale for selecting an alternative as the Proposed MMPs. The BLM land use planning regulations and policy indicate that the identification and content of a proposed resource management plan (RMP) alternative (in this case, a proposed MMP alternative) in the Final EIS is the discretion of the state director (43 CFR 1610.4-8). The requirement that federal agencies document the rationale for the selection of an alternative is found in the NEPA regulations, which require that the agencies include documentation in the ROD.

The BLM and USFS complied with the NEPA’s requirement to analyze the relevant impacts from Alternative E (the Proposed MMPs) in the Proposed MMPs/Final EIS. Additionally, the BLM and USFS did not violate the NEPA by not providing a rationale for the identification of Alternative E as the Proposed MMPs in the Proposed MMPs/Final EIS. Accordingly, this protest is denied.

## NEPA – Impacts Analysis – Cultural Resources

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies paltry, and often nonexistent, analysis of the Proposed MMPs’ direct, indirect, and cumulative impacts to cultural resources failed to satisfy NEPA's hard look mandate.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs also failed to adequately analyze cumulative impacts to cultural resources.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies failed to take NEPA’s required hard look at the Proposed MMPs’ impacts to cultural resources, including direct, indirect, and cumulative impacts. See *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1047 (9th Cir. 2013). For instance, the agencies failed to analyze the impacts of increased visitation from designating fourteen cultural resource sites as “public use (developed)” or identify a strategy to manage increased visitation or mitigate adverse impacts. Proposed MMPs at 2-6, 3-10. The Proposed MMPs also notes that management actions related to recreation activities, including climbing routes and hiking trails, may impact cultural resources. Proposed MMPs at 3-10.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies failed to analyze the direct and indirect impacts to the known sites from establishing particular group size limits, or lack thereof. The agencies also failed to analyze the direct and indirect impacts on cultural resources from keeping open all existing OHV trails within the Monument during the many years before they adopt a travel management plan. Nor did the agencies analyze impacts to cultural resources from closing “the least number of acres of high archaeological sensitivity” and providing “limited OHV access to the greatest number of acres of high archaeological sensitivity,” compared to other alternatives. *Id.* at 3-15.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Despite making rights-of-way area designations that resulted in 238 known cultural sites being located in areas “open” to rights-of-way, and over 2,000 known sites being located in “avoidance” areas - where development is still an option - the agencies conducted no analysis of how right-of-way development from a pipeline, transmission line, or other utility could actually impact these known sites. Proposed MMPs, 3-12.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs then notes that these reasonably foreseeable future actions may also indirectly impact cultural resources by affecting the settings of cultural sites. *Id.* Simply mentioning that reasonably foreseeable future actions may cause surface disturbance and may “affect the settings” of cultural sites - which is ambiguous at best - falls far short of NEPA's searching cumulative impacts analysis requirement.

*Conservation Lands Foundation et al.**Danielle Murray et al.*

**Issue Excerpt Text:** Given that camping sites are most often established near roads, and given research cited in the MMP that cultural resource sites near roads are more likely to suffer adverse effects from human activities, the analysis in the MMP is flawed because it does not take the potential impacts from camping activities on cultural resource sites into account.

*Conservation Lands Foundation et al.**Danielle Murray et al.*

**Issue Excerpt Text:** The MMP allows and prioritizes development of new OHV routes in culturally rich and scenic areas, including Indian Creek. The MMP simply assumes these trails can be created without adverse effects to cultural resources. The analysis in the MMP is flawed because it does not take potential or cumulative impacts to cultural resources into account. The OHV review included in the MMP fails to satisfy the requirements of NEPA.

*Conservation Lands Foundation et al.**Danielle Murray et al.*

**Issue Excerpt Text:** The MMP commits the BLM and USFS to implementation-level actions prior to completion of required legal analyses and consultation (with Tribes, Consulting Parties, or the public). This is the case for the designation of Public Use sites, construction of the new Shay Mountain Vista Campground, use of existing climbing routes, and adoption of the San Juan County OHV route system. The analysis in the MMP is flawed because it does not provide a detailed analysis of the potential impacts from these actions.

*Conservation Lands Foundation et al.**Danielle Murray et al.*

**Issue Excerpt Text:** There is no discussion included under any of the alternatives in the MMP of impacts to cultural resources located in the Area of Potential Effect developed for the 13 Public Use Sites, no detailed analysis of impacts to cultural resources at the Shay Mountain Vista campground, no detailed analysis of impacts to cultural resources along open climbing routes, no detailed analysis of impacts to cultural resources along the San Juan County off-highway vehicle route system, and no detailed analysis of site-specific, local, regional, direct, indirect or cumulative impacts to cultural resources. Failure to include this information, and to coordinate NEPA and NHPA review, is arbitrary, capricious and an abuse of discretion.

**Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the direct, indirect, and cumulative impacts on cultural resources, specifically from the following management actions and activities:

- Increased visitation from designating 14 cultural resource sites as “public use (developed)”
- Developing rights-of-way (ROWs) for pipelines, transmission lines, or other utilities
- Allowing and prioritizing development of new off-highway vehicle (OHV) routes
- Keeping open all existing OHV trails prior to adoption of a travel management plan, including along the San Juan County OHV route system
- Closing “the least number of acres of high archaeological sensitivity” and providing “limited OHV access to the greatest number of acres of high archaeological sensitivity,” compared with other alternatives

**Response:**

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (i.e., take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). The CEQ regulations specify that the environmental information made available to public officials and citizens before decisions are made must be of “high quality” (40 CFR 1500.1(b)).

A “hard look” is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)). The NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Additionally, the BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM NEPA Handbook H-1790-1, Section 6.8.3). The CEQ regulations (40 CFR § 1508.7) define cumulative effects as “. . . 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 nonfederal) or person undertakes such actions.”

The BLM and USFS adequately analyzed the impacts on and from cultural resource management in the Proposed MMPs/Final EIS. The analysis in the Proposed MMPs/Final EIS focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes that would result from adoption of the alternatives in the Proposed MMPs/Final EIS. This analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Section 3.5.2 of the Proposed MMPs/Final EIS discusses and analyzes the impacts of various proposed management actions on cultural resources in the Planning Area. Specifically, Section 3.5.2.2.3 discusses the impacts of land and realty management actions (e.g., ROWs) on cultural resources, while Section 3.5.2.2.1 discusses the impacts from recreational resource management actions (including restrictions on camping) on cultural resources. The BLM and USFS accounted for the relationship between the proposed action and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed

action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the proposed action, as has been done here.

The remaining direct impacts on cultural resources cited by the protestors are implementation-level projects that can be resolved with site-specific consultation and planning by implementing specific measures to avoid, minimize, or mitigate those impacts through the NHPA Section 106 process, which is required of implementation-level projects. For example, any future ROWs and the future preparation of a travel management plan (which would involve decisions about keeping existing OHV trails open) would require additional site-specific environmental review.

The Proposed MMPs/Final EIS includes various restrictions and protective measures to ensure that camping would not impact cultural resources. For example, climbing using ropes or other climbing aids would not be allowed within cultural resource sites, including archaeological resource sites in both the Indian Creek and Shash Jáa units (see Proposed MMPs/Final EIS p. 2-13, 2-14, 2-16). Further, “sites that are prone to vandalism and/or unauthorized camping will receive regular patrols and agency law enforcement rangers” (see Appendix M, p. M-7). The agencies would consider closing climbing routes or other remedial actions through adaptive management where monitoring indicates site-specific impacts (see Proposed MMPs/Final EIS p. 2-13, 2-14, 2-16).

The implementation-level plan would use the following criteria for determining whether the agencies should identify and restrict camping to designated dispersed campsites and or areas or developed campgrounds (see Appendix O p. O-267):

- There are conflicting resource impacts that cannot be mitigated (e.g., cultural resources, visual, and wildlife impacts)
- There are recurring issues with human waste, trash, campfires, and expanded disturbance that are best addressed through additional management

Until analyzed in an implementation-level plan, dispersed camping would either be required or encouraged in designated areas/sites only. It is within the implementation-level management authority of the BLM and USFS to temporarily restrict camping and other activities if cultural or natural resources, particularly BENM objects and values, are at risk of being irreparably damaged. The Proposed MMPs/Final EIS also includes monitoring and adaptive management direction and framework plans to address recreational impacts on natural and cultural resources (see Appendices D and M). These management actions would be enacted as necessary on a site-specific, case-by-case basis until the implementation-level plans are completed (see Proposed MMPs/Final EIS Section 2.4.7).

Additionally, the BLM and USFS complied fully with the requirements of 40 CFR § 1508.7 to evaluate cumulative impacts on cultural resources. The BLM and USFS prepared a cumulative impact analysis based on the nature and scope of the proposed management options under consideration at the land use planning level. In the cumulative impact analysis, the BLM and USFS considered the effects of the MMP when added to other past, present, and reasonably foreseeable (not highly speculative) federal and nonfederal actions. The cumulative impacts section (Section 3.22) and Table RFFA-1 of the Proposed MMPs/Final EIS identify all actions that were considered in the cumulative impacts analysis. It provides a basis for the cumulative impacts analysis for each affected resource.

The analysis considered the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the Proposed MMPs/Final EIS enables the decision maker to make a reasoned choice among alternatives.

Regarding impacts on the sites allocated to public use, sites considered for a Public Use (Developed) allocation are identified in Proposed MMPs/Final EIS Section 2.4.1. Proposed MMPs/Final EIS Appendices E and G discuss the criteria used for determining archaeological site suitability for Public Use (Developed) allocations and address strategies for protecting sensitive cultural resource sites in the BENM from potential impacts from increased visitation. Such an allocation would require additional site-specific NEPA analysis; impacts from potential increases in visitation would be included in such an analysis. A general discussion of the impacts on cultural resources from increased visitation is found on page 3-13 of the Final EIS.

The BLM and USFS complied with the NEPA’s requirement to analyze the relevant direct, indirect, and cumulative impacts on cultural resources in the Proposed MMPs/Final EIS. Accordingly, this protest is denied.

### ***Pueblo of Acoma***

#### ***Aaron Sims***

**Issue Excerpt Text:** Consistently, the use of “monitoring” for adverse impacts to cultural resources while still opening most lands to public visitation and/or other public uses/rights of way is a convenient excuse for not fully assessing impacts. The BLM/USFS has not demonstrated or inquired into how this monitoring will be done, the requisite staffing levels necessary for effective monitoring and the financial capabilities of the agency to effectively monitor. Additionally, a failure to assess the cumulative impacts of Alternative E’s more relaxed recreational use provisions on target shooting climbing, pets and a new campground could easily cause foreseeable harm during a “monitoring” phase. Kicking the can down the road does little to equip the BLM/USFS with the information needed to develop a reasonable range of alternatives, and ultimately an informed decision. For instance, the BLM/USFS have failed to conduct sufficient and comprehensive Class III surveys/inventories throughout the BENM, leaving the possibility of harm in a multitude of areas that may be rich with cultural resources, as further discussed in Section III below. The cumulative impacts of failing to properly assess the extent of cultural resources, much less agency capacity to protect those resources, while opening up most lands for public and other uses will cause significant harm.

#### **Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze impacts on cultural resources by relying on future monitoring for avoiding adverse impacts, failing to assess the cumulative impacts of the Proposed MMPs alternative’s more relaxed recreational provisions, and failing to adequately provide information on how monitoring would be implemented.

#### **Response:**

The NEPA (40 CFR § 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR § 1500.1(b), it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (i.e., take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency



may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

Further, although an “EIS must discuss ‘mitigation’ in sufficient detail to ensure that environmental consequences have been fairly evaluated,” an EIS “need not present a mitigation plan that is ‘legally enforceable, funded, or even in final form to comply with NEPA’s procedural requirements.’” *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1053-54 (10th Cir. 2011) (citations omitted). “Detailed quantitative assessments of possible mitigation measures are generally necessary when a federal agency prepares an EIS to assess the impacts of a relatively contained, site-specific proposal,” but that level of detail is typically not appropriate when an EIS is prepared at a programmatic level. *Id.* at 1054.

The BLM and USFS properly analyzed the impacts of the Proposed MMPs/Final EIS on cultural resources (see response above for more detail). Additionally, the BLM and USFS appropriately considered the cumulative impacts of recreational management actions in the Proposed MMPs alternative. Protestors incorrectly state that the Proposed MMPs alternative (Alternative E) would provide “more relaxed” recreation management as it relates to the protection of cultural resources when the BLM analysis, in fact, finds that the Proposed MMPs would be more protective than the current management under the Monticello RMP and Manti-La Sal Land and Resource Management Plan (LRMP). The BLM and USFS provided an analysis of the recreational management actions on cultural resources under the Proposed MMPs alternative (Alternative E) and found that they “would help reduce impacts on cultural resources compared to Alternative A [No Action]...” (see Proposed MMPs/Final EIS p. 3-13). The BLM NEPA Handbook states that “[t]he No Action alternative provides a useful baseline for comparison of environmental effects (including cumulative effects) and demonstrates the consequences of not meeting the need for action...” (BLM NEPA Handbook H-1790-1 p. 51). In land use planning, whether any undertakings would have adverse or beneficial effects is measured by examining impacts resulting from the change in management proposed; that is, by measuring an action alternative (proposed management) to the no action alternative (current management), not by measuring action alternatives against each other.

For the Proposed MMPs/Final EIS, because some specific adverse effects cannot be predicted, a critical piece of cultural resources management in the Proposed MMPs/Final EIS is a systematic monitoring program. The BLM and USFS are currently committed to a robust monitoring and mitigation protocol of cultural resources on the BENM. Proposed MMPs/Final EIS Appendix D outlines a framework the agencies would use upon selection of an alternative for developing site-specific monitoring plans for cultural resource localities within the BENM where adaptive management strategies are applied and ongoing location-specific monitoring is necessary. Additionally, the completed implementation-level cultural resource monitoring and management plan(s) would include the site-specific resource indicators, thresholds, and adaptive management actions to be taken when thresholds are crossed. Proposed MMPs/Final EIS Appendix M also includes the monitoring strategy for management actions presented for all resource programs. This monitoring strategy would track the implementation of the land use planning decisions (implementation monitoring), and provide process for collecting data and information necessary to evaluate the effectiveness of land use planning decisions (effectiveness monitoring). This monitoring would document the agencies’ progress in implementing the selected alternative and progress towards achievement of goals and objectives.

The monitoring and mitigation approach taken by the BLM and USFS in the Proposed MMPs/Final EIS is comprehensive and relies on a site-specific approach to develop monitoring for cultural resource

localities within the BENM. In this way, the BLM and USFS would be able to consider potential impacts relative to specific areas and, as a result, apply accurate and useful monitoring efforts. In Proposed MMPs/Final EIS Appendix D, the BLM and USFS sufficiently address how monitoring would be implemented by adopting a clear monitoring framework that relies on science and data, as well as on detailed and meaningful commitments. This approach complies with NEPA requirements.

The BLM and USFS complied with the NEPA’s requirement to analyze the relevant impacts on cultural resources. Accordingly, this protest is denied.

***Conservation Lands Foundation et al.***

***Danielle Murray et al.***

**Issue Excerpt Text:** The agency failed to utilize the expertise of the Inter-tribal council in the development of the MMP. Due to the lack of input from the Inter-tribal council along with other compounding factors, the agency failed to take a “hard look” regarding cultural resources throughout the plan.

**Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze impacts on cultural resources by not utilizing Inter-Tribal Coalition expertise during Proposed MMPs/Final EIS development.

**Response:**

The NEPA (40 CFR § 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR § 1500.1(b), it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the alternatives analyzed in the Proposed MMPs/Final EIS.

The level of detail of NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Additionally, the NHPA requires that federal agencies, as part of the NHPA Section 106 process, consult with Indian Tribes that attach religious and cultural significance to historic properties potentially affected by an undertaking (54 United States Code [USC] § 302706).

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (i.e., take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The BLM and USFS appropriately took a “hard look” at cultural resources impacts in the Proposed MMPs/Final EIS. The analysis focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes resulting both from cultural resource management actions (see Proposed MMPs/Final EIS p. 3-9 - 3-10) and management actions for other resource programs such

as recreation (see Proposed MMPs/Final EIS p. 3-13 - 3-14), livestock grazing (see Proposed MMPs/Final EIS p. 3-12 - 3-13), and vegetation/forestry management (see Proposed MMPs/Final EIS p. 3-15 - 3-16). This analysis identifies identified that management decisions in the Proposed MMPs alternative (Alternative E) would generally be more protective, and certainly no less protective, than the current management under the Monticello RMP and Manti-La Sal LRMP.

Proposed MMPs/Final EIS Section 3.5.2 thoroughly discusses and analyzes the impacts of various proposed management actions on cultural resources in the Planning Area. The BLM and USFS accounted for the relationship between the proposed action and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action, as has been done here. Therefore, the BLM and USFS properly analyzed the impacts of the Proposed MMPs/Final EIS on cultural resources.

To inform its analysis, the BLM and USFS consulted and engaged with Tribes, including the Inter-Tribal Coalition, throughout Proposed MMPs/Final EIS development, as outlined in Proposed MMPs/Final EIS Sections 4.3 and 4.4. Throughout the consultation process, the BLM and USFS met with and discussed the planning process with the Inter-Tribal Coalition, soliciting and incorporating input as needed. Information from these meetings was used to inform alternative design and effects analysis of cultural resources. However, much of the Tribes' input was broad or not specific to sites or properties, preventing the agencies from being able to incorporate some recommendations into the MMPs as specific objectives or management actions. In response to the general statements received from the Tribes, the agencies developed an American Indian Tribal Collaboration Framework (also referred to as the Tribal framework; Proposed MMPs/Final EIS) as part of the Proposed MMPs/Final EIS to foster relationships and communication with Tribes in the future and to closely coordinate with American Indian Tribes as envisioned in Presidential Proclamation 9558, as modified by Presidential Proclamation 9681. The BLM and USFS continue to closely engage with Tribes through the Shash Jáa Commission and government-to-government consultation and as cooperating agencies (see Proposed MMPs/Final EIS p. F-1).

The BLM and USFS consistently engaged with the Inter-Tribal Coalition and incorporated information from these meetings into the development of the alternatives analyzed in the Proposed MMPs/Final EIS. The agencies complied with all requirements for evaluating the relevant impacts on cultural resources and initiating Tribal consultation while preparing the Proposed MMPs/Final EIS. Accordingly, this protest is denied.

## **NEPA – Impacts Analysis – Lands and Realty**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs, including the cumulative impacts section, includes no discussion of the impacts of opening lands surrounding the monument to extractive industries. As such, the agencies have not met their obligation to take a hard look at the potential impacts from lands and realty decisions extending outside of the planning area. The agencies must thoroughly analyze and discuss the direct, indirect, and cumulative impacts that will result from opening lands surrounding the monument to extractive industries and the widespread development of ROWs throughout the planning area.

### **Summary:**

The Proposed MMPs/Final EIS includes no discussion of the impacts of opening lands surrounding the BENM to extractive industries; therefore, the BLM and USFS violated the NEPA by not meeting their

obligation to analyze the potential impacts from lands and realty decisions extending beyond the Planning Area.

**Response:**

The NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR § 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR § 1500.1[b]). The agencies are required to take a “hard look” at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The agencies need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the proposed action.

Additionally, the agencies must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM NEPA Handbook H-1790-1, Section 6.8.3). The CEQ regulations define cumulative effects as “. . . 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 nonfederal) or person undertakes such actions” (40 CFR § 1508.7). Reasonably foreseeable actions are those that are sufficiently likely to occur that a prudent decision maker would take them into account when deciding (43 CFR § 46.30). Reasonably foreseeable actions include those for which there are existing decisions, funding, or proposals, but do not include those that are highly speculative or indefinite. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1123 (9th Cir. 2002); *Oregon Chapter Sierra Club, et al., IBLA 2010-150 \*4*, 2010 WL 3440490 (2010). The cumulative impacts section must take into account the combined effects of the project in addition to other reasonably foreseeable projects. *KS Wild*, 387 F.3d at 996.

The BLM and USFS appropriately addressed the impacts of extractive uses on lands surrounding the BENM. The Proposed MMPs/Final EIS analysis focuses on the direct, indirect, and cumulative impacts that could result from on-the-ground changes. This analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The Proposed MMPs/Final EIS thoroughly discusses and analyzes the impacts of various proposed management actions on resources in the Planning Area. The BLM and USFS accounted for the relationship between the proposed action and reasonably foreseeable actions there. Thus, analyzing the direct and indirect impacts of extractive uses outside of the Planning Area is beyond the scope of the current planning process. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the proposed action, as was done here. Therefore, the BLM and USFS properly analyzed the impacts of the Proposed MMPs/Final EIS on resources and resource uses within the Planning Area.

Likewise, the BLM and USFS complied fully with the requirements of 40 CFR § 1508.7 to evaluate cumulative impacts on various resources. The BLM and USFS prepared a cumulative impact analysis based on the nature and scope of the proposed management options under consideration at the land use planning level. In the cumulative impact analysis, the BLM and USFS considered the effects of the planning effort, when added to other past, present, and reasonably foreseeable (not highly speculative) federal and nonfederal actions. The cumulative impacts section (Section 3.22) and Table RFFA-1 of the Proposed MMPs/Final EIS identify all actions that were considered in the cumulative impacts analysis.

This analysis provides a basis for the cumulative impacts analysis for each affected resource. The analysis considered the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the Proposed MMPs/Final EIS enables the decision maker to make a reasoned choice among alternatives.

As described above, the BLM and USFS adequately analyzed the relevant direct, indirect, and cumulative impacts of management actions on resources and resource uses in the Planning Area in the Proposed MMPs/Final EIS; therefore, this protest is denied.

## **NEPA – Impacts Analysis – Livestock Grazing**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Throughout the Proposed MMPs, the BLM has failed to adequately address, analyze, and disclose the effects of authorizing livestock grazing on the planning area on issues such as the spread of exotics, removal of vegetation for habitat and forage for wildlife, soils and biological soil crusts, and alteration of ecosystem processes. The Proposed MMPs has not accurately or consistently represented the proposed action, violating NEPA and making any analysis arbitrary and capricious.

### **Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the environmental consequences of livestock grazing.

### **Response:**

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (i.e., take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). The CEQ regulations specify that the environmental information made available to public officials and citizens before decisions are made must be of “high quality” (40 CFR 1500.1(b)).

A “hard look” is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)). The NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)).

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM and USFS appropriately addressed the impacts from livestock grazing in the Proposed MMPs/Final EIS. The Proposed MMPs/Final EIS analysis focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes. This analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The Proposed MMPs/Final EIS thoroughly discuss and analyze the impacts of livestock grazing on various resources throughout the Proposed MMPs/Final EIS (Sections 3.5.2.2.4, 3.6.2.2.2., 3.9.2.2, 3.10.2.2.4, 3.11.2.2, 3.12.2.2.1, 3.13.2.2.3, 3.15.2.6, and 3.18.2.2). All of these sections identify the indicators and assumptions used in determining effects on these resources from various uses, including livestock grazing.

The BLM and USFS considered the relationship between the proposed action and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the proposed action, as was done here.

Further, under all alternatives, grazing management would adhere to or move toward adherence to *Standards for Rangeland Health and Guidelines for Grazing Management for BLM Lands in Utah* or to USFS desired conditions for rangelands, thus minimizing impacts from livestock grazing.

The BLM and USFS complied with the NEPA requirement to analyze the relevant environmental consequences and impacts of livestock grazing. Accordingly, this protest is denied.

## **NEPA – Impacts Analysis – Recreation**

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** The BLM’s rushed planning process delays the critically needed recreation management planning for several years, thus the agency failed to take a hard look at the cumulative impacts from recreation on the objects the monument was designed to protect. The Proposed MMPs acknowledges the risk of delaying a recreation management plan (until analyzed an implementation-level Recreation Area Management Plan/Business Plan) and fails to thoroughly evaluate the cascading repercussions of not prioritizing recreation impacts.

### **Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the cumulative impacts of recreation on BENM objects and values.

### **Response:**

The BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM NEPA Handbook H-1790-1, Section 6.8.3). CEQ regulations (40 CFR § 1508.7) define cumulative effects as “. . . 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 nonfederal) or person undertakes such actions.”

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (i.e., take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). The CEQ regulations specify that the environmental information made available to public officials and citizens before decisions are made must be of “high quality” (40 CFR 1500.1(b)).

A “hard look” is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)). The NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)).

The BLM and USFS complied fully with the requirements of 40 CFR § 1508.7 to evaluate the cumulative impacts of recreation on resources and resource uses in the Planning Area. The BLM and USFS prepared a cumulative impact analysis based on the nature and scope of the proposed management options under consideration at the land use planning level. In the cumulative impact analysis, the BLM and USFS considered the effects of the planning effort, when added to other past, present, and reasonably foreseeable (not highly speculative) federal and nonfederal actions. Table RFFA-1 of the Proposed MMPs/Final EIS identifies all actions that were considered in the cumulative impacts analysis. It provides a basis for the cumulative impacts analysis for each affected resource.

The Proposed MMPs/Final EIS thoroughly discusses and analyzes the cumulative impacts of various recreation activities on resources and resource uses in the Planning Area (see Sections 3.22.5, 3.22.7, 3.22.8, 3.22.10, 3.22.11, 3.22.13, 3.22.15, 3.22.16, 3.22.17, 3.22.18, and 3.22.19). The Proposed MMPs/Final EIS notes that incremental contributions from recreational activities on BENM objects and values would depend on how much recreational visitation occurs at a given time and has the potential to be high during peak recreational use periods, which would impact the degree and severity of cumulative impacts from recreation on resources and resource uses in the Planning Area.

The analysis considered the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the Proposed MMPs/Final EIS enables the decision maker to make a reasoned choice among alternatives. As a result, the BLM and USFS properly analyzed the cumulative impacts from recreation in the Proposed MMPs/Final EIS.

The BLM and USFS complied with the NEPA’s requirement to analyze the relevant cumulative impacts of recreation on resources and resource uses in the Planning Area. Accordingly, the protest is denied.

## **NEPA – Impacts Analysis – Riparian, Wetland, and Water Resources**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Throughout the Proposed MMPs, BLM and USFS have failed to adequately address, analyze, and disclose the effects of the various management schemes on water resources and water quality. Without such information, the agencies cannot properly design and evaluate management alternatives and cannot ensure that their ultimate decision complies with the Antiquities Act or Utah Water Quality Standards. As a result, the Proposed MMPs is arbitrary and capricious and fails to comply with NEPA.

### **Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the impacts on water resources and quality.

### **Response:**

The NEPA (40 CFR § 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR § 1500.1(b), it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (i.e., take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). The CEQ regulations specify that the environmental information made available to public officials and citizens before decisions are made must be of “high quality” (40 CFR 1500.1(b)).

A “hard look” is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)). The NEPA directs that data and analyses in an EIS must



be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)).

The BLM and USFS appropriately analyzed the impacts of land use planning decisions in the Proposed MMPs/Final EIS. The analysis focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes. This analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Proposed MMPs/Final EIS Sections 3.12.2.2 and 3.12.2.3 thoroughly discuss and analyze the impacts of various proposed management actions on water resources in the Planning Area. This analysis expressly addresses impacts on water quality and quantity in waterbodies throughout the Planning Area. The BLM and USFS considered the relationship between the proposed action and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the alternatives, as was done here. Therefore, the BLM and USFS properly analyzed the impacts of the Proposed MMPs/Final EIS on water resources.

The BLM and USFS complied with the NEPA's requirement to analyze the relevant impacts on water resources. Accordingly, this protest is denied.

## **NEPA – Impacts Analysis – Soil Resources**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Throughout the Proposed MMPs, the BLM has failed to adequately address, analyze, and disclose the effects of planning activities on soils and biological crusts and how those effects will be mitigated. The Proposed MMPs has not accurately or consistently represented the proposed action, making any analysis arbitrary and capricious.

### **Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the impacts on soil resources and explain how these impacts would be mitigated.

### **Response:**

The NEPA (40 CFR § 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR § 1500.1(b), it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Additionally, the NEPA (40 CFR § 1502.14[f] and 1502.16[h]) requires the BLM to include a discussion of measures that may mitigate adverse environmental impacts. Potential forms of mitigation are as follows (40 CFR § 1508.20):

- Avoid the impact altogether by not taking a certain action or parts of an action
- Minimize impacts by limiting the degree or magnitude of the action and its implementation
- Rectify the impact by repairing, rehabilitating, or restoring the affected environment
- Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action
- Compensate for the impact by replacing or providing substitute resources or environments

The BLM and USFS adequately disclosed and analyzed the impacts of the Proposed MMPs/Final EIS on soils and biological crusts, including the mitigations applied to protect soil resources. The analysis focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes. This analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Proposed MMPs/Final EIS Section 3.13.2.2 thoroughly discusses and analyzes the impacts of various proposed management actions on soil resources in the Planning Area. The BLM and USFS considered the relationship between the proposed action and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the proposed action, as was done here. Therefore, the BLM and USFS properly analyzed the impacts of the Proposed MMPs/Final EIS on soil resources.

As stated in Proposed MMPs/Final EIS Section 2.4.9.2, the BLM would implement various implementation-level limitations and protection measures that it would utilize to minimize and mitigate impacts on soil resources from various management actions, as required under 40 CFR § 1502.16(h). These limitations and measures include:

- Maintaining or improving soil quality and long-term soil productivity through the implementation of *Standards for Rangeland Health and Guidelines for Grazing Management for BLM Lands in Utah*, Forest Service Handbook 2209.21 (Rangeland Ecosystem Analysis and Monitoring Handbook), and other soil protection measures;
- Managing uses to minimize and mitigate impacts to soil and water resources; and
- Requiring erosion-control plans and strategies if surface-disturbing activities cannot be avoided on slopes between 21 and 40 percent

Proposed MMPs/Final EIS Section 2.4.9.2 outlines a full list of management actions to minimize and mitigate impacts on soil resources. The BLM and USFS would also implement BMPs relevant to soils, which are set forth in Section 1.6 of Appendix I of the Proposed MMPs/Final EIS. Further monitoring would be completed to ensure that the mitigation measures are working to meet the goals and objectives of the Proposed MMPs/Final EIS.

The BLM and USFS complied with the NEPA's requirement to analyze the relevant impacts on soil resources and describe mitigation measures used to reduce impacts on soil resources. Accordingly, this protest is denied.

## NEPA – Impacts Analysis – Special Status Species

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMP preferred alternative fails to fully acknowledge and prevent the potential harm to the endangered and sensitive species within the monument, including the Mexican Spotted Owl, the Southwestern willow flycatcher, Colorado River fishes, California Condor, Yellow-billed cuckoo, Jones cycladenia, and the Navajo sedge. Throughout the Proposed MMPs, the agencies fail to take the adequate hard look at direct, indirect, and cumulative impacts to these special species. Furthermore, continued management of areas around the planning area under the Monticello RMP and Manti-La Sal LRMP is likely to result in cumulative effects that are not adequately addressed in the Proposed MMPs. Such dereliction of duty violates the monument proclamation, the Endangered Species Act of 1973 (ESA), NEPA and is arbitrary and capricious.

### Summary:

The BLM and USFS violated the NEPA by failing to adequately analyze the direct, indirect, and cumulative impacts on the various endangered and sensitive species within the BENM, and failing to fully acknowledge and prevent potential harm to endangered and sensitive species within the BENM by selecting Alternative E (the Proposed MMPs).

### Response:

The NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR § 1502.15) and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR § 1500.1[b]). The BLM is required to take a “hard look” at potential environmental impacts of adopting the MMPs.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Additionally, the BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM NEPA Handbook H-1790-1, Section 6.8.3). The CEQ regulations define cumulative effects as “. . . 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 nonfederal) or person undertakes such actions” (40 CFR § 1508.7).

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (i.e., take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). The CEQ regulations specify that the

environmental information made available to public officials and citizens before decisions are made must be of “high quality” (40 CFR 1500.1(b)).

A “hard look” is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)).

The BLM and USFS appropriately analyzed the impacts of the Proposed MMPs/Final EIS on special status species. The Proposed MMPs/Final EIS analysis focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes. This analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Proposed MMPs/Final EIS Section 3.15.2 thoroughly discusses and analyzes the impacts of various proposed management actions on special status species in the Planning Area. The BLM and USFS considered the relationship between the proposed action and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the proposed action, as was done here. Therefore, the BLM and USFS properly analyzed the impacts of the Proposed MMPs/Final EIS on special status species.

Additionally, the BLM and USFS complied fully with the requirements of 40 CFR § 1508.7 to evaluate cumulative impacts on special status species. The BLM and USFS prepared a cumulative impact analysis based on the nature and scope of the proposed management options under consideration at the land use planning level. In the cumulative impact analysis, the BLM and USFS considered the effects of the planning effort when added to other past, present, and reasonably foreseeable (not highly speculative) federal and nonfederal actions. The cumulative impacts section (Section 3.22) and Table RFFA-1 of the Proposed MMPs/Final EIS identify all actions that were considered in the cumulative impacts analysis. They provides a basis for the cumulative impacts analysis for each affected resource. The analysis properly considered the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. As a result, the information presented in the Proposed MMPs/Final EIS enables the decision maker to make a reasoned choice among alternatives.

The BLM and USFS complied with the NEPA’s requirement to analyze the relevant direct, indirect, and cumulative impacts on special status species in the Proposed MMPs/Final EIS. Accordingly, this protest is denied.

## **NEPA – Impacts Analysis – Vegetation**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs fails to address the well-known, long-term resource damage and unintended consequences that chaining has inadvertently caused in the past. Monument objects are often incompatible with the high levels of surface disturbance and vegetation removal attendant in these treatments, and the long-term benefits assured by land managers often fail to materialize. The agencies

have failed to take a hard look at these impacts, as the degree of uncertainty in treatment results and long-term impacts is not taken into enough account in the Proposed MMPs.

**Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the impacts on vegetation, specifically from chaining.

**Response:**

The NEPA (40 CFR § 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR § 1500.1(b), it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). The CEQ regulations specify that the environmental information made available to public officials and citizens before decisions are made must be of “high quality” (40 CFR 1500.1(b)).

A “hard look” is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)).

The Proposed MMPs/Final EIS analysis focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes. Additionally, the analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse. Notably, though, the Proposed MMPs alternative places restrictions on appropriate use of mechanical vegetation management specifically to avoid impacts to monument objects and values (see Proposed MMPs/Final EIS p. 2-7).

Proposed MMPs/Final EIS Section 3.18.2 discusses and analyzes the impacts of various proposed management actions on vegetation in the Planning Area. Additionally, the Proposed MMPs/Final EIS includes a discussion the measures the BLM would take to reduce these impacts, stating that the

“identification of appropriate measures to reduce potential impacts resulting from new range improvements would be handled at the implementation level and through the application of appropriate [BMPs]” (see Appendix J). The BLM and USFS considered the relationship between the proposed action and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of the proposed action, as was done here. Therefore, the BLM and USFS properly analyzed the impacts of the Proposed MMPs/Final EIS on vegetation.

The BLM and USFS complied with the NEPA’s requirement to analyze the relevant impacts on vegetation. Accordingly, this protest is denied.

## **NEPA – Impacts Analysis – Other**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies fail to take a hard look at the direct, indirect, and cumulative impacts to ecological intactness, including the failure to consider the cumulative impacts from development or other surface disturbing activities on lands surrounding the planning area but within the original monument.

### **Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the impacts on ecological intactness, including the cumulative impacts that may result from development on lands surrounding the Planning Area.

### **Response:**

The NEPA (40 CFR § 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 § CFR 1500.1(b), it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Additionally, the BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM NEPA Handbook H-1790-1, Section 6.8.3). CEQ regulations (40 CFR § 1508.7) define cumulative effects as “. . . 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 nonfederal) or person undertakes such actions.”

The BLM must make a comprehensive consideration of a proposed action to evaluate different courses of action (take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency

can make an informed decision about whether there are any significant environmental impacts. *Nat'l Parks and Conservation Ass'n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 [9th Cir. 1982]); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). The CEQ regulations specify that the environmental information made available to public officials and citizens before decisions are made must be of “high quality” (40 CFR 1500.1(b)).

A “hard look” is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)).

The BLM and USFS appropriately analyzed the impacts to ecological landscapes in the Proposed MMPs/Final EIS. The Proposed MMPs/Final EIS analysis focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes. This analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The Proposed MMPs/Final EIS thoroughly discusses and analyzes the impacts of various proposed management actions on ecological intactness in the Planning Area, namely in Sections 3.20 (Wildlife and Fisheries) and 3.21 (Forestry and Woodlands). These sections discuss the impacts on ecological intactness that would result from specific management actions, including habitat fragmentation and wildlife displacement from OHV authorization and woodland product harvest. Additionally, ecological intactness is also discussed in Sections 3.8.2 and 3.12.2.2.

The BLM and USFS accounted for the relationship between Alternative E (the Proposed MMPs) and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate about all conceivable impacts, but must evaluate the reasonably foreseeable significant effects of Alternative E (the Proposed MMPs), as was done here.

Additionally, the BLM and USFS complied fully with the requirements of 40 CFR § 1508.7 to evaluate cumulative impacts on ecological intactness. The BLM and USFS prepared a cumulative impact analysis based on the nature and scope of the proposed management options under consideration at the land use planning level. In the cumulative impact analysis, the BLM and USFS considered the effects of the planning effort, when added to other past, present, and reasonably foreseeable (not highly speculative) federal and nonfederal actions. The cumulative impacts section (Section 3.22) and Table RFFA-1 of the Proposed MMPs/Final EIS identify all actions that were considered in the cumulative impacts analysis. They provides a basis for the cumulative impacts analysis for each affected resource. Further, Section 3.22.18 specifically addresses cumulative impacts on wildlife migration.

The analysis considered the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the Proposed MMPs/Final EIS enables the decision maker to make a reasoned choice among alternatives.

The BLM and USFS complied with the NEPA’s requirement to analyze the relevant direct, indirect, and cumulative impacts on ecological intactness. Accordingly, this protest is denied.

***The Wilderness Society et al.***

***Katie Meehan et al.***

**Issue Excerpt Text:** To meet NEPA’s requirements and properly analyze the climate change impacts of lands within the original monument but outside of the current planning area, BLM must incorporate the best available science and draw the appropriate conclusions from this science, meeting the “hard look” standard. In the Proposed MMPs, the agencies fail to provide adequate analysis for the decisions they are making. As such, the Proposed MMPs fails to take the “hard look” that NEPA requires and the Proposed MMPs must be updated to acknowledge the likely direct, indirect, and cumulative consequences of the proposed action.

**Summary:**

The BLM and USFS violated the NEPA by failing to adequately analyze the impacts of climate change resulting from the potential development of lands within the original Monument area but outside of the current Planning Area.

**Response:**

The NEPA (40 CFR § 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR § 1500.1(b) it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed MMPs/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM must make a comprehensive consideration of a proposed action, to evaluate different courses of action (take a “hard look” at the environmental consequences). *Kleppe v. Sierra Club*, 427 US 390, 410 (1976), n. 21; *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989). The agency may not rely on incorrect assumptions or data when analyzing effects. *Native Ecosystems Council v. US Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). The BLM takes a “hard look” when the NEPA document contains a “reasonably thorough” discussion of an action’s environmental consequences, and the agency can make an informed decision about whether there are any significant environmental impacts. *Nat’l Parks and Conservation Ass’n. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010) (citing *State of California v. Block*, 690 F.3d 753, 761 (9th Cir. 1982)); *Biodiversity Conservation Alliance, et al.*, 171 IBLA 218, 226 (2007) (internal citations omitted).

The BLM and USFS appropriately analyzed the impacts to and from climate change for the Proposed MMPs/Final EIS. The analysis in the Proposed MMPs/Final EIS focuses on the direct, indirect, and cumulative impacts that would potentially result from on-the-ground changes. This analysis identifies impacts that would result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The BLM and USFS took into account the relationship between the proposed action and reasonably foreseeable actions. The level of detail of the NEPA analysis is sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM NEPA Handbook H-1790-1, Section 6.8.1.2). The BLM and USFS need not speculate



about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action, as it has done here.

The BLM and USFS complied fully with the requirements of 40 CFR § 1508.7 to evaluate cumulative impacts on various resources. The BLM and USFS prepared a cumulative impact analysis based on the nature and scope of the proposed management options under consideration at the land use planning level. In the cumulative impact analysis, the BLM and USFS considered the effects of the planning effort, when added to other past, present, and reasonably foreseeable (not highly speculative) federal and nonfederal actions. The cumulative impacts section (Section 3.22) and Table RFFA-1 of the Proposed MMPs/Final EIS identify all actions that were considered in the cumulative impacts analysis. They provides a basis for the cumulative impacts analysis for each affected resource.

The analysis considered the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the Proposed MMPs/Final EIS enables the decision-maker to make a reasoned choice among alternatives.

The BLM and USFS complied with the NEPA’s requirement to analyze the relevant direct, indirect, and cumulative impacts environmental consequences of and impacts of cumulative actions. Accordingly, this protest is denied.

## **NEPA – Range of Alternatives**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs fails to consider a reasonable range of alternatives by assessing impacts based on comparisons from the no action alternative rather than the preferred alternative. Additionally, the differences between the various alternatives are negligible. Finally, the Proposed MMPs only considers one conservation-based alternative that seeks to manage the monument as a monument, yet this alternative does not derive or analyze management alternatives that safeguard the core monument value of ecological intactness nor enhance water quality based on a thorough assessment of existing water quality in and upstream from the planning area.

*Pueblo of Acoma*

*Aaron Sims*

**Issue Excerpt Text:** Despite these considerations, the agencies have failed to consider any alternative that provides protective management in consideration of cumulative impacts as a result of activities within and beyond the boundaries of the two units. In particular, the agencies have failed to consider whether limitations on extractive activities such as coal, oil, and gas leasing and development on the lands between and around the two “units” impacts the proper care and management of the objects of the monument. In deciding not to consider protective management extending beyond the bounds of the units... the agencies have made an affirmative decision that has significant environmental implications that they have failed to analyze.

*Pueblo of Acoma*

*Aaron Sims*

**Issue Excerpt Text:** Similarly, the differences between the BENM Final MMP/EIS alternatives are negligible and fail to provide complete and accurate information to allow for all informed comparison. No alternative provides for the possibility of significant avoidance and/or interim closures until NHPA requirements to conduct comprehensive cultural resource surveys take place. The Final MMP (pp. 2-3) concludes that any alternative that closes certain areas of the BENM to public visitation to protect

monument objects and values would not be a "reasonable" alternative. This justification is that "recreational access to and public enjoyment of the BENM is a Monument value, as described in Proclamation 9558, as modified by Proclamation 9681. Instead all alternatives must utilize the "Cultural Resources Monitoring Framework" (Appendix D), which has a vague and undefined process for monitoring. This is patently unreasonable in an area known for looting of these resources.

***Conservation Lands Foundation et al.***

***Danielle Murray et al.***

**Issue Excerpt Text:** First, the EIS failed to consider an alternative that manages for the entire Bears Ears Monument as first defined by Proclamation 9558. In defining what is a reasonable range of alternatives, BLM is required to consider alternatives "that are practical or feasible" and not just "whether the proponent or applicant likes or is itself capable of carrying out a particular alternative." More importantly, "[a]n alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable." An alternative that addressed management of all lands within the boundaries of BENM established by Proclamation 9558 was reasonable given that conservation and protection of all lands and objects in BENM is required, as described herein and due to the ongoing question about the legality of Proclamation 9681. An alternative for the entire Monument would have saved the agency time, money and resources. At a minimum, BLM should have considered management provisions on the larger landscape in order to protect the monument objects that are within the boundaries set by Proclamation 9681. By excluding those lands from all alternatives considered in the PMMP/FEIS, BLM also violated NEPA.

Second, it fails to provide a "reasonable range of alternatives" regarding recreation management. As the Draft MMP BLM states for addressing recreation " [q]ualitatively, impacts from management decisions under Alternative B would be similar to those for Alternatives D and C.", Additionally, certain management prescriptions, such as travel management, the language and implications in each alternative are practically identical. This is certainly not the " reasonable range of alternatives" that is required under NEPA. BLM failed to correct this shortcoming in the final.

Third, it includes alternatives that fail to prioritize the protection of monument objects. *Western Watersheds Project v. Abbey* found that "BLM cannot ignore the Proclamation's goal of protecting Monument objects when it determines the reasonable range of alternatives for NEPA's review of site-specific actions . . . the agency's procedural efforts to explore alternatives in the EA did not satisfy NEPA." But here, BLM included multiple alternatives that fail to prioritize protection of monument objects, in violation of NEPA.

***The Conservation Lands Foundation et al.***

***Danielle Murray et al.***

**Issue Excerpt Text:** The Agencies have failed to consider any alternative that provides protective management beyond the boundaries of the two units. In particular, the Agencies have failed to consider whether limitations on extractive activities such as coal leasing and oil and gas leasing on the lands between and around the two units is necessary to advance the proper care and management of the objects of the monument. In deciding not to consider protective management extending beyond the bounds of the units, such as administratively withdrawing lands surrounding the units from fossil fuel leasing, the Agencies have made an affirmative decision that has significant environmental implications that they have failed to analyze.

**Summary:**

The BLM and USFS violated the NEPA by failing to adequately consider a range of reasonable alternatives in the following ways:

- The Proposed MMPs/Final EIS assesses impacts based on comparisons to the no action alternative rather than to Alternative E (the Proposed MMPs)
- There are negligible differences among the alternatives
- The range of alternatives includes only a single conservation-focused alternative, and that alternative does not provide significant enough protection of BENM values
- The Proposed MMPs/Final EIS fails to analyze an alternative of the BENM as defined by Presidential Proclamation 9558

**Response:**

The BLM is required to include a range of reasonable alternatives to the proposed action, alternatives that are technically and economically feasible and that meet the purpose of and need for action. 42 USC 4332(2)(C); 40 CFR § 1502.14; 40 CFR § 1508.9(b); 43 CFR § 46.420(b). The phrase “range of alternatives” includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them (BLM NEPA Handbook H-1790-1, Section 6.6.1 quoting Question 1a, CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, March 23, 1981); see also 40 CFR § 1502.14.

The no action alternative provides a useful baseline for comparing environmental effects under each alternative (including cumulative effects) and demonstrates the consequences of not meeting the need for the action (BLM NEPA Handbook 1790-1, at 51). “The no-action alternative provides a baseline for estimating the effects of other alternatives; therefore, include the effects of taking no-action in each environmental analysis.” Forest Service NEPA Handbook 1909.15, Chapter 10, p. 35.

No specific or minimum number of alternatives is required. 43 CFR § 46.310(b); 43 CFR § 46.415(b); *Native Ecosystems Council v. Forest Service*, 428 F.3d 1233, 1246 (9th Cir. 2005); *Biodiversity Conservation Alliance, et al.*, 183 IBLA 97, 124 (2013). A “rule of reason” standard guides the range of alternatives and does not require the BLM to include or evaluate every conceivable possible alternative. *Dep’t of Transp. v. Public Citizen*, 541 US 752, 767 (2004); *Vermont Yankee Corp. v. NRDC, Inc.*, 435 US 519, 551 (1978); *Pac. Coast Fed’n of Fishermen’s Ass’ns. v. Blank*, 693 F.3d 1084, 1099 (9th Cir. 2012); *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1181 (9th Cir. 1990); *Southern Utah Wilderness Alliance*, 182 IBLA 377, 390-391 (2012). The BLM must analyze a range reasonable of alternatives, but not every possible alternative to a proposed action: “In determining the alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. ‘Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.’” BLM NEPA Handbook, H-1790-1, at 50 (citing Question 2a, CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, March 23, 1981); see also 40 CFR § 1502.14. When there are potentially a very large number of alternatives, the BLM may only analyze a reasonable number to cover the full spectrum of alternatives. What consists of a reasonable range depends on the nature of the proposal and the facts of the case (BLM NEPA Handbook H-1790-1, Section 6.6.1 quoting Question 1b, CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, March 23, 1981).

In some situations, it may be appropriate to analyze a proposed action or alternative that may be outside the BLM’s jurisdiction. BLM NEPA Handbook, H-1790-1, at 50 (citing Question 2b, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (March 23, 1981)): “An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of

what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).” “Reasonable alternatives to the proposed action should fulfill the purpose and need and address unresolved conflicts related to the proposed action . . . Consider alternatives, even if outside the jurisdiction of the Agency. Descriptions of the alternatives should include relevant mitigation measures that could reduce the impacts of the project, even if those measures are outside the jurisdiction of the Agency.” Forest Service NEPA Handbook Chapter 10 page 31.

The BLM and USFS considered an adequate range of reasonable alternatives in accordance with the NEPA. First, the NEPA does not require that the agency assess impacts based on comparisons from Alternative E (the Proposed MMPs) rather than the no action alternative. Rather, environmental impacts of the proposal must simply be presented in “comparative form.” Further, this analysis must include a no action alternative (43 CFR § 1502.14). Because the no action alternative provides a “useful baseline for comparison of environmental effects under each alternative,” under the NEPA, comparing the environmental effects of the action alternatives against the baseline conditions described under the no action alternative would provide the most informative comparison required. In land use planning, whether any undertakings would have adverse or beneficial effects is measured by examining impacts resulting from the change in management proposed; that is, by measuring an action alternative (proposed management) to the no action alternative (current management), not by measuring action alternatives against each other. Further, the Proposed MMPs/Final EIS includes a comparative summary of impacts; see Chapter 2, which includes a matrix comparing the alternatives in tabular format.

Second, the impacts of the alternatives do not have to significantly differ from each other in order to establish that a range of reasonable alternatives has been considered. The range of alternatives depends on the nature of the proposed action and the facts of the case; thus, the reasonable range will be limited by such factors, which may not create significant differentiation among the impacts from each alternative. In this instance, the BLM and USFS considered all issues related to the proposed action that were identified during scoping and created a range of reasonable alternatives responsive to those issues. This range includes those considered but not analyzed in detail (see Proposed MMPs/Final EIS Section 2.3). While some impacts described for these alternatives may be the same or similar, they are not the same in all respects and differ in ways that are feasible for the nature of the management action. It is important to note that the NEPA requires only a range of reasonable alternatives, not a reasonable range of alternatives. Even if there is little difference between the alternatives’ impacts, they are adequate as long as the spectrum of alternatives covers the nature of the issue and proposed action at hand. Accordingly, the range of alternatives considered in the Proposed MMPs/Final EIS was adequate pursuant to the NEPA requirements.

Regarding whether the agencies erred in not considering either more than one or a more stringent conservation-focused alternative, the agencies reiterate that the NEPA does not require that every conceivable alternative be included in the range. The agencies were not required to consider every degree of conservative management in the Planning Area in order to have adequately considered a range of reasonable alternatives. Again, the range of alternatives considered must be reasonable in relation to the facts of the case and the nature of the planning action at hand. To be reasonable, an alternative must meet the purpose of and need for action. The purpose of and need for the Proposed MMPs/Final EIS repeatedly identifies that the plans need to address “Presidential Proclamation 9558, as modified by Presidential Proclamation 9681” (see Proposed MMPs/Final EIS p. 1-1 - 1-2). Consequently, an alternative that analyzes the BENM as identified by Proclamation 9558 would not meet the purpose of and need for action and, therefore, is not reasonable.

In addition, and as the protestor identifies, the BLM did consider a more stringent conservation-based alternative consisting of closures and avoidance measures in the Planning Area, which was included in

Section 2.3. The Proposed MMPs/Final EIS (p. 2-3) concludes that any alternative that closes certain areas of the BENM to public visitation to protect BENM objects and values would not be a reasonable alternative. Again, the range of reasonable alternatives for the NEPA depends on the nature of the proposed action and the facts of the case. Here, a conservation-based alternative as described by the protestor would fail to meet the purpose of and need for the Proposed MMPs/Final EIS, given that the purpose and need require balancing protection of BENM objects and values and conformance with the FLPMA. As a result, by failing to meet the purpose and need, the recommended alternative for a conservation-based plan is unreasonable.

The BLM and USFS adopted a range reasonable of alternatives that meet the purpose of and need for the Proposed MMPs/Final EIS and address resource issues identified during scoping. Accordingly, this protest is denied.

## **NEPA – Response to Public Comments**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agency, however, failed to respond to the comment related to Section 219.8. See Proposed MMPs Appendix O at 222-3. The failure to respond to substantive comments is a violation of NEPA. 40 CFR 1503.4 and Forest Service Handbook 1909.15, 25.1.

*Pueblo of Acoma*

*Aaron Sims*

**Issue Excerpt Text:** Alternative E purports to address issues presented within various public comments to the Draft MMP/EIS but fails to consider Acoma’s concerns as expressed in its comments, and the concerns of other Native American Tribes and environmental groups. By failing to establish that it has given due consideration to the Tribes’ comments, it is a grand example of the federal agencies’ refusal to engage in meaningful consultation.

### **Summary:**

By failing to respond to comments from various organizations, the BLM and USFS violated the NEPA.

### **Response:**

The NEPA is a public process (42 USC § 4331[a]; 40 CFR § 1500.1[b]; 40 CFR § 1501). The BLM must “make diligent efforts to involve the public in preparing and implementing NEPA procedures” to the extent practicable (40 CFR § 1501.4[b]; Id. 1506.6[a]). The BLM must also solicit appropriate information from the public (40 CFR § 1506.6[f]). The BLM is not required to respond explicitly and directly to comments in an EIS espousing an opposing viewpoint, scientific or otherwise (40 CFR § 1502.9[b]; *Earth Island Institute v. US Forest Service*, 697 F.3d 1010, 1020 [9th Cir. 2012]).

All substantive comments received before reaching a decision must be considered to the extent feasible (40 CFR § 1503.4). All substantive and timely comments on a draft EIS must be attached to or included in a final EIS (40 CFR 1503.4(b)). Comments on a draft EIS may be summarized if they are especially voluminous (see Question 29a, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations [March 23, 1981]). Substantive comments do one or more of the following (Questions 29a and 29b, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations [March 23, 1981]):

- Question, with a reasoned basis related to the analysis, the accuracy of information in the EIS or EA;
- Question, with a reasoned basis related to the analysis, the adequacy of, methodology for, or assumptions used for the analysis;

- Present new information relevant to the analysis;
- Present reasonable alternatives other than those analyzed in the EIS or EA;
- Present issues for analysis other than those analyzed in the EIS or EA; or
- Cause changes or revisions in one or more of the alternatives.

The BLM is required to assess, consider, and respond to all substantive comments received (40 CFR § 1503.4). Federal agencies must respond to all substantive comments provided on a draft EIS in the final EIS (40 CFR 1503.4[a]). The CEQ regulations at 40 CFR 1503.4(a)(1)-(5) recognize several options for responding to comments, including:

- Modifying alternatives, including the proposed action
- Developing and evaluating alternatives not previously given serious consideration by the agency
- Supplementing, improving, or modifying its analyses
- Making factual corrections
- Explaining why the comments do not warrant further agency response, citing the sources, authorities, or reasons that support the agency's position and, if appropriate, indicating those circumstances that would trigger agency reappraisal or further response

In compliance with the NEPA, the BLM and USFS considered all public comments submitted on the Draft MMPs/EIS. The BLM and USFS complied with 40 CFR § 1503.4 by performing a detailed comment analysis that assessed and considered all comments received on the Draft MMPs/EIS. Proposed MMPs/Final EIS Appendix O presents the BLM and USFS's responses to all substantive comments on the Draft MMPs/EIS.

The BLM and USFS summarized the substantive comments raised by each comment letter and provided a meaningful response. The responses identify any modifications to the alternatives, improvements to the impacts analysis, or factual corrections made as a result of public comment. The responses also explain why certain public comments did not warrant further agency response, including how Alternative E (the Proposed MMPs) addresses substantive comments received.

The Proposed MMPs/Final EIS addressed the protestor's comment related to 36 CFR § 219.8 at page O-222. As identified in the comment provided, 36 CFR § 219.8 and 219.9 of the USFS planning rule is 'triggered' by requirements established in 36 CFR § 219.13. As stated in the response to this comment, "[t]he comment erroneously states that the alternatives considered in the MMPs/EIS would 'substantially lessen protections' from the 1986 Manti-La Sal LRMP, when in fact the proposed alternatives provide additional protections for resources on National Forest System lands that are currently in the 1986 Manti-La Sal LRMP." Because the alternatives do not meet the requirements under 36 CFR § 219.13 that would 'trigger' determinations under 36 CFR § 219.8 and 219.9 (i.e., the alternatives do not "substantially lessen protections"), there is no determination to make under 36 CFR § 219.8. See also response to "NFMA – 2012 Planning Rule," below.

To inform its analysis, the BLM and USFS consulted and engaged with Tribes, including the Inter-Tribal Coalition, throughout the Proposed MMPs/Final EIS development, as outlined in Proposed MMPs/Final EIS Sections 4.3 and 4.4. Throughout the consultation process, the BLM and USFS met with and discussed the planning process with the Inter-Tribal Coalition, soliciting and incorporating input as needed. Information from these meetings was used to inform alternative design and effects analysis of cultural resources. However, much of the Tribes' input was broad or not specific to sites or properties, preventing the agencies from being able to incorporate some recommendations into the MMPs as specific objectives or management actions. In response to the general statements received from the Tribes, the agencies developed an American Indian Tribal Collaboration Framework (also referred to as the Tribal framework; Proposed MMPs/Final EIS) as part of the Proposed MMPs/Final EIS to foster relationships

and communication with Tribes in the future and to closely coordinate with American Indian Tribes as envisioned in Presidential Proclamation 9558, as modified by Presidential Proclamation 9681 (see Proposed MMPs/Final EIS p. F-1). The BLM and USFS continue to closely engage with Tribes through the Shash Jáa Commission and government-to-government consultation and as cooperating agencies.

As described above, the BLM and USFS adequately responded to public comments on the Draft MMPs/EIS. Accordingly, this protest is denied.

## **NEPA – Supplemental EIS**

### ***Pueblo of Acoma***

#### ***Aaron Sims***

**Issue Excerpt Text:** The Final MMP/EIS creation of a new preferred alternative, Alternative E, is a significant addition to the MMP/EIS which warrants the opportunity for public comment in accordance with the APA notice-and-comment process for rulemaking through a supplemental draft EIS. Per the APA, agencies shall give interested persons an opportunity to participate in rulemaking through submission of written data, views, or arguments.

BLM/USFS’s failure to provide an opportunity for public comment on Alternative E within the Final MMP/EIS also violates NEPA. “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. One of the policies of NEPA is to “encourage and facilitate public involvement in decisions which affect the quality of the human environment.”

### ***Pueblo of Acoma***

#### ***Aaron Sims***

**Issue Excerpt Text:** An EIS must be supplemented if changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS. 23 CFR § 771.130 (a)(I); See *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10<sup>th</sup> Cir. 2009) (“NEPA requires BLM/USFS to release a supplemental EIS thoroughly analyzing its newly minted alternative at the planning stage.”). As described in the Final MMP/EIS, Alternative E includes “elements of Alternatives A, B, C, and D[.]” but is somehow “[s]imilar to D[.]” What the description of Alternative E fails to mention is that in some instances, Alternative E creates management actions that are substantively different from any of the other alternatives.

### ***Pueblo of Acoma***

#### ***Aaron Sims***

**Issue Excerpt Text:** Alternative E purports to address issues presented within various public comments to the Draft MMP/EIS but fails to consider Acoma’s concerns as expressed in its comments, and the concerns of other Native American Tribes and environmental groups. By failing to establish that it has given due consideration to the Tribes’ comments, it is a grand example of the federal agencies’ refusal to engage in meaningful consultation. Furthermore, the public had no opportunity to comment on Alternative E, which is a violation of NEPA and the APA as asserted above. Alternative E is problematic for a variety of reasons and the BLM/USFS should provide for a supplemental draft EIS to further consider, evaluate, and respond to the concerns of Tribes, conservation groups and the public.

### **Summary:**

The BLM and USFS violated the NEPA, as the creation of Alternative E (the Proposed MMPs) in the Proposed MMPs/Final EIS is a significant addition that warrants EIS supplementation, as well as additional opportunity for public comment.

**Response:**

Federal agencies must prepare a supplement to a draft or final EIS if, after circulation of a draft or final EIS but prior to implementation of the Federal action:

- The agency makes substantial changes to the proposed action that are relevant to environmental concerns (40 CFR 1502.9(c)(1)(i));
- The agency adds a new alternative that is outside the spectrum of alternatives already analyzed (see Question 29b, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (March 23, 1981)); or
- There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its effects (40 CFR 1502.9(c)(1)(ii)).

If a new alternative is added after the circulation of a draft EIS, supplementation is not necessary if the new alternative lies within the spectrum of alternatives analyzed in the draft EIS or is a minor variation of an alternative analyzed in the draft EIS. In such circumstances, the new alternative may be added in the final EIS (BLM NEPA Handbook, H-1790-1, 5.3.2 When Supplementation is Not Appropriate).

The BLM and USFS appropriately concluded that supplementation of the Proposed MMPs/Final EIS is not required. As already stated in Proposed MMPs/Final EIS Chapter 4, the agencies’ introduction of Alternative E (the Proposed MMPs) does not represent a substantial change from the Draft MMPs/EIS such that a supplemental EIS is required. Rather, as stated in the Proposed MMPs/Final EIS, the agencies developed Alternative E (the Proposed MMPs) based on a combination of elements already considered within the range of alternatives in the Draft MMPs/EIS. While some aspects of the Proposed MMPs may have effects that differ from those found originally in the Draft MMPs/EIS, these changes are not considered outside of the range of effects already previously disclosed, nor can this alternative be considered outside of the spectrum of alternatives already analyzed.

As described above, between the Draft MMPs/EIS and Proposed MMPs/Final EIS, the BLM and USFS did not make substantial or significant changes by adding Alternative E (the Proposed MMPs), thereby resulting in a need for a supplemental EIS, because the effects of the alternative are within the range of those already analyzed. Accordingly, this protest is denied.

**NEPA – Mitigation**

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** As mentioned throughout this protest, the PMMP/FEIS includes mitigation measures that are either inadequate to protect monument objects or are uncertain and ineffective, and contained in sufficient analyses of the mitigation measures that were included. Virtually no mitigation is proposed for the harmful effects that will be caused by the Proposed MMPs. Instead, the MMP claims that agencies will follow “best management practices . . . and compliance with application laws.” This does not guarantee the protection of significant cultural resources, sacred places, environmental resources, and medicinal gathering sites. Instead, it suggests that a process could be reviewed, which ultimately may result in the development and/or destruction of these resources. Increases in use within the BENM may make cultural resources more vulnerable to harm or destruction under the Proposed MMPs. The PMMP/FEIS should have disclosed the uncertainty surrounding the implementation of BMPs and evaluated such impacts.

In particular, as explained in detail above, the Proposed MMPs relies heavily on monitoring, evaluation, best management practices, and agency discretion to avoid or reduce impacts of management and uses; but these provisions are inadequate to protect resources because they are undefined, unexplained, unenforceable, and uncertain to occur. The resulting analysis in the FEIS fails to take a “hard look” at



these problems and disclose them to the public as required under NEPA. By failing to adequately include and discuss mitigation measures, and the impacts that will flow from inadequate and uncertain measures, the BLM also violated NEPA.

**Summary:**

The BLM and USFS violated the NEPA, as the Proposed MMPs/Final EIS includes mitigation measures that are either inadequate to protect BENM objects and values or are uncertain and ineffective, and contained insufficient analyses of the mitigation measures that were included.

**Response:**

The NEPA requires that the BLM include a discussion of measures that may mitigate adverse environmental impacts (40 CFR § 1502.14[f], 40 CFR § 1502.16[h]). Potential forms of mitigation include: (1) avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments” (40 CFR § 1508.20).

Although an “EIS must discuss ‘mitigation’ in sufficient detail to ensure that environmental consequences have been fairly evaluated,” an EIS “need not present a mitigation plan that is ‘legally enforceable, funded, or even in final form to comply with NEPA’s procedural requirements.”” *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1053-54 (10th Cir. 2011) (citations omitted). “Detailed quantitative assessments of possible mitigation measures are generally necessary when a federal agency prepares an EIS to assess the impacts of a relatively contained, site-specific proposal,” but that level of detail is typically not appropriate when an EIS is prepared at a programmatic level. *Id.* at 1054.

The BLM and USFS appropriately identified and relied upon mitigation measures in the Proposed MMPs/Final EIS. The protestor does not specifically identify the insufficient mitigation measures identified in the Proposed MMPs/Final EIS other than generally stating in its protest that mitigation measures for target shooting, cultural resources, and paleontological resources are inadequate.

However, the measures included in the Proposed MMPs/Final EIS, such as the adoption of BMPs in order to avoid resource impacts, are adequate under the NEPA requirements. Further, the Proposed MMPs/Final EIS includes in its appendices specific mitigation and monitoring plans for sensitive resources (see Appendices C, D, G, H, I, and J). These are presented as an initial framework with site-specific examples and a discussion of potential impacts on BENM objects and values to illustrate how the protocol would be implemented during MMP implementation. The Proposed MMPs/Final EIS also notes in several instances that prior to implementation-level activities, on-site evaluation and development of mitigation measures would occur, based on the types of impacts occurring at the site-specific level. This is to ensure that mitigation measures are specific to and sufficiently offsetting or avoiding harmful effects occurring at the implementation level. Finally, the monitoring strategies identified in the Proposed MMPs/Final EIS (see Appendix M) are to be carried out to ensure that mitigation measures are working to meet the goals and objectives of the Proposed MMPs/Final EIS upon its implementation.

The BLM and USFS adopted mitigation measures, BMPs, and monitoring strategies to ensure avoiding or offsetting impacts at the implementation level, in compliance with the NEPA. Accordingly, this protest is denied.

## NEPA – Baseline

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies fail to establish and describe the current baseline conditions in the monument. Without knowledge of where and to what extent monument resources exist, the agencies cannot adequately plan for their protection. Furthermore, the agencies should have assessed whether there is looting, vandalism, and habitat destruction within the planning area as part of the no action alternative to more adequately plan for their protection. Furthermore, the agencies should have assessed whether there is looting, vandalism, and habitat destruction within the planning area as a part of the no action alternative to more adequately describe the monument’s current management.

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** The MMP lacks adequate baseline data concerning the existing condition of significant cultural resources. BLM is required to “describe the environment of the area(s) to be affected or created by the alternative under consideration.” Establishing baseline conditions of the affected environment is an essential requirement of the NEPA process. In the MMP, BLM provides an inadequate overview of cultural resource site types and lists of National Register sites. The BLM must provide enough information in the MMP about the existing condition of significant sites—at a minimum, sites listed in or previously proposed for listing in, or determined eligible for, the National Register—to allow BLM and the public to make an informed assessment of the proposed alternatives. The MMP lacks even this bare minimum level of information about significant cultural sites, rendering it noncompliant with the requirements of NEPA. Without this information, neither BLM nor the public can fully understand the consequences of the proposed alternatives.

### Summary:

The agencies fail to establish and describe the current baseline conditions in the BENM, particularly regarding cultural and historical resources. This inadequate description of baseline conditions violates the NEPA.

### Response:

The CEQ’s regulations implementing the NEPA require that agencies use “high quality information” (40 CFR § 1500.1[b]). The NEPA regulations require the BLM to “ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements” (40 CFR § 1502.24).

The BLM NEPA Handbook H-1790-1 also directs the BLM to “use the best available science to support NEPA analyses and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed” (BLM NEPA Handbook H-1790-1, p. 55). Under the BLM’s guidelines for implementing the Information Quality Act, the BLM applies the principle of using the “best available” data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

Baseline data provide the necessary basis to make informed land use plan-level decisions. The descriptions of the affected environment must be no longer than is necessary to understand the effects of the alternatives. (BLM NEPA Handbook H-1790-1 p. 53). The NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR § 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR § 1500.1[b]). The BLM NEPA Handbook (H-1790-1) states “The affected environment section succinctly describes the existing condition and trend of issue-related elements of the human environment that may be affected by implementing the proposed action or an

alternative.... Descriptions of the specific elements be quantitative wherever possible, and of sufficient detail to serve as a baseline against which to measure the potential effects of implementing an action. The affected environment section of the environmental analysis is defined and limited by the identified issues.” (p. 53).

The best available cultural resources data were used in the preparation of the Proposed MMPs/Final EIS analysis. More than 20 different American Indian groups identify cultural affiliation with the Planning Area. The Bears Ears area has been important to the ancestors of these modern peoples for thousands of years. The area continues to provide resources important to the lifeways of American Indian Tribal communities, such as firewood, game animals, herbal medicines, and places and items of spiritual importance.

Recognizing the importance of Tribal participation in BENM management, Presidential Proclamations established and affirmed the role of a Tribal Commission to provide guidance and recommendations on MMP development and implementation, and to partner with federal agencies on other management decisions. The Shash Jáa Commission consists of one elected officer each from the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe, designated by the officers’ respective Tribes, and the elected officer of the San Juan County Commission representing District 3 acting in that officer’s official capacity.

The agencies continue to work with American Indian Tribes on the identification, prioritization, and treatment of cultural resource sites. The BLM is partnering with the United States Department of the Interior, National Park Service to conduct cultural resource stabilization projects on sites, including Ancestral Puebloan sites, across the Cedar Mesa area and within the BENM. Under a partnership between the BLM and the Friends of Cedar Mesa, Woods Canyon Archaeological Consultants was contracted to provide professional historic preservation services for various projects located across the Cedar Mesa area and within the BENM. In close coordination with American Indian Tribes and other stakeholders, the BLM is identifying cultural sites that have high visitation and potential for visitor impacts. Mitigation strategies are being developed as part of the BENM management planning efforts.

Further, the agencies have worked and will continue to work with Tribes to identify and prioritize inventory and research needs, as follows:

- In 2017, the BLM initiated intensive cultural resource (Class III) surveys of 3,500 acres over several years in the Cedar Mesa area and the BENM. Surveys focus on 75 miles of hiking routes to identify and document visitor use impacts to cultural resources. High-priority areas include North and South Mule Canyons, the Fish Canyon and Owl Canyon Loop Trail, and 10 high-use sites.
- The BLM recently completed a summary report focused on an inventory of existing information and a predictive cultural resources model (Class I survey) for the entire BLM Monticello Field Office Planning Area. This report compiles and analyzes available cultural resources data and literature.
- The USFS Heritage Program crew is conducting inventory, monitoring, and data collection at Doll House Ruin and neighboring sites. This information will facilitate developing management and interpretive strategies as part of the BENM management planning efforts.
- The USFS Heritage Program crew conducted cultural resource surveys in the Maverick and Short Point areas to determine management needs for dispersed camping.
- The USFS, partnering with the Brigham Young University Department of Anthropology, is conducting a three-dimensional scanning project using terrestrial LiDAR and Structure from Motion photogrammetry at Doll House. Research is ongoing; however, initial results demonstrate the successful application of modern technology to cultural resource management and interpretation. A stabilization project is being conducted at Moon House.

- The USFS contracted an aerial LiDAR survey of the Milk Ranch Point. This is a pilot study, and the results are pending. The LiDAR survey is expected to provide valuable landscape-scale data useful in managing cultural resources and vegetation in this area.
- The BLM is conducting a cultural resource and OHV route impact study, beginning with compiling peer-reviewed data, collecting baseline information, and developing monitoring protocols. The study is expected to help assess potential impacts due to continued travel on designated OHV routes and provide management options.
- The BLM initiated ethnographic and ethnobotanical studies to develop a better understanding of American Indian Tribal connections to the landscape of southeastern Utah, including lands within the BENM. These studies include interviews with descendants of people who lived in these areas.
- The BLM and USFS relied on previous surveys of the Indian Creek and Shash Jaa Units and projected the potential number of archaeological sites that could be found across these units.

The BLM and USFS disclosed the relevant information providing the baseline conditions as defined and limited by the identified issues collected from these sources in the Analysis of the Management Situation and in the Affected Environment sections of each resource program’s analysis in Chapter 3 of the Proposed MMPs/Final EIS. The agencies also incorporated this information into their analysis of the proposed action and, where appropriate, presented indicators to further describe current conditions and potential impacts. Additional information beyond what is described in the Analysis of the Management Situation and Affected Environment section of the Proposed MMPs/Final EIS would not provide additional information to understand the effects of the alternatives and would just be addition of needless detail uninformative to the land use planning decisions in question for these MMPs. The BLM and USFS would collect and analyze site-specific data as appropriate for subsequent project-level NEPA documents, as well as information derived from ongoing study and consultation with the Tribes.

Accordingly, the agencies compiled the best available baseline data on cultural resources found in the Planning Area and collected and disclosed the data necessary to provide descriptions of the affected environment that is no longer than is necessary to understand the effects of the alternatives.

For the reasons stated above, the BLM and USFS adequately relied on the best available baseline data to establish the baseline conditions for the planning effort, including for the cultural resources impacts analysis. Accordingly, this protest is denied.

## **FLPMA – General**

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** “PFYC assignments should be considered as only a first approximation of the potential presence of paleontological resources, subject to change based on ground verification.” The memorandum goes on to say for all PFYC classifications (1 through 5) that standard stipulations should be put in place prior to authorizing any land use action in order to accommodate an unanticipated discovery.” The final version of the management plan continues to use existing PFYC categories as a rule for determining when on-site surveys are required for surface disturbing activities, restricting such surveys only to PFYC categories 4 and 5. Not only is the plan inconsistent with BLM’s own management policies, but it is unacceptable for a national monument that was established to conserve unusually important paleontological resources.

### **Summary:**

The BLM violated the FLPMA, as its application of stipulations to potential fossil yield classification (PFYC) categories is inconsistent with its own management policies and contrary to BENM establishment.

**Response:**

Pursuant to BLM Instruction Memorandum 2016-124, “[s]tandard stipulations should always be put in place prior to authorizing any land use action in order to accommodate an unanticipated discovery” for all PFYC classes, and when the probability for impacting significant paleontological resources is moderate to high (Class 4 through 5), field assessments like pre-work surveys are usually needed.

In PFYC 4 areas, “field assessment by a qualified paleontologist is normally needed to assess local conditions,” and “paleontological mitigation strategies will depend on the nature of the proposed activity.” Further, “[d]etailed field assessment is normally required and on-site monitoring or spot-checking may be necessary during land disturbing activities. In some cases avoidance of known paleontological resources may be necessary.”

In PFYC 5 areas, paleontological mitigation may be necessary before or during surface disturbing activities, and a field survey by a qualified paleontologist is almost always needed (BLM Instruction Memorandum 2016-124). Pre-work surveys are usually needed, and on-site monitoring may be necessary during land use activities. Avoidance or resource preservation through controlled access, designation of areas of avoidance, or special management designations should be considered.

The BLM complied with the FLPMA through the application of PFYC category stipulations. The PFYC system provides an estimate of the potential that significant paleontological resources will be found in a mapped geological unit and is used to assess possible resource impacts and mitigation needs for federal actions that involve surface disturbance, land use planning, or land tenure adjustment. Implementation of the PFYC system does not require changes to existing land use plans, project plans, or other completed efforts, but integration into plans presently being developed is recommended.

The management direction related to PFYC classifications in Alternative E (the Proposed MMPs) provides that on-site surveys should be conducted in PFYC 4 and 5 areas before any surface-disturbing activities are authorized. This approach is consistent with BLM Instruction Memorandum 2016-124, which provides that field assessments are “normally needed” in PFYC 4 areas and “almost always needed” in PFYC 5 areas. By comparison, “[m]anagement considerations cover a broad range of options” in PFYC 3 areas and “may include record searches, pre-disturbance surveys, monitoring, mitigation, or avoidance.”

Additionally, Alternative E (the Proposed MMPs) provides that “[s]urface-disturbing activities would avoid or minimize impacts to paleontological resources to the degree practicable. Where avoidance is not practicable, appropriate mitigation to reduce impacts would be developed based on site-specific survey information.” Further, it states that the authorized officer has the discretion to modify survey requirements, allowing the BLM to conduct on-site surveys prior to authorizing surface disturbance where the agency deems it necessary to ensure the proper care and management of BENM objects and values (see Proposed MMPs/Final EIS p. 2-12). Therefore, the BLM proposed land use planning decisions that are consistent with the relevant federal plans in accordance with the FLPMA.

The Proposed MMPs/Final EIS is consistent with BLM Instruction Memorandum 2016-124. Accordingly, this protest is denied.

## **FLPMA—Multiple Use**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies prioritized multiple uses over the protection of the cultural resources that motivated the designation of the monument. This violates Proclamation 9558 (regardless of modification by Proclamation 9681), FLPMA, and is arbitrary and capricious.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Allowing widespread availability for development of ROWs demonstrates the flawed and illegal approach to thoughtlessly consider multiple uses throughout the monument, leaving the monument resources, objects, and values at risk. This violates Proclamation 9558 (regardless of modification by Proclamation 9681), FLPMA, and is arbitrary and capricious.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs allows for serious harm to occur to plants and animals identified in the monument proclamation, yet nowhere do the agencies justify how they will comply with their duties to protect and restore monument objects. This violates Proclamation 9558 (regardless of modification by Proclamation 9681), FLPMA, and is arbitrary and capricious.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Allowing new or increased motorized use within the monument threatened the area's natural quiet and is inconsistent with the proper care and management of monument objects and values. This violates Proclamation 9558 (regardless of modification by Proclamation 9681) and FLPMA.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs fails protect biological soil crust and soil health by failing to adequately analyze the negative effects of activities such as grazing, range improvements, mineral exploration or development, route maintenance and restoration, recreation, and other uses. This violates Proclamation 9558 (regardless of modification by Proclamation 9681), FLPMA, and is arbitrary and capricious.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs fails protect riparian vegetation within the monument by failing to adequately analyze the negative effects of activities such as grazing, range improvements, mineral exploration or development, route maintenance and restoration, recreation, and other uses. This violates Proclamation 9558 (regardless of modification by Proclamation 9681), FLPMA, and is arbitrary and capricious.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies improperly prioritized multiples uses over the protection of the water resources identified by the proclamation as monument values. Compared to the more protective alternative the agencies considered, the Proposed MMPs opens more riparian areas to surface disturbing activities and therefore fails to ensure that water resources will be properly maintained and safeguarded

from damage. This violates Proclamation 9558 (regardless of modification by Proclamation 9681), FLPMA, and is arbitrary and capricious.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** BLM and USFS have failed to prioritize protection of monument values, instead choosing a management alternative that does not adequately protect resources from air pollutants and authorizes more expansive surface disturbing activities and the consequent exacerbated adverse air quality impacts. This violates Proclamation 9558 (regardless of modification by Proclamation 9681), FLPMA, and is arbitrary and capricious.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies improperly prioritized multiples uses over the protection of the ecological intactness and remoteness identified by the proclamation as monument values. This violates Proclamation 9558 (regardless of modification by Proclamation 9681), FLPMA, and is arbitrary and capricious.

*Pueblo of Acoma*

*Aaron Sims*

**Issue Excerpt Text:** Alternative E, the newly created and preferred alternative, undercuts the area’s status as a National Monument, putting multiple uses ahead of protection of Monument values. While the multi-use ethic of FLPMA applies to lands that have not been designated as a Monument, it is not the primary policy to be employed where a Monument has been designated.

*Pueblo of Acoma*

*Aaron Sims*

**Issue Excerpt Text:** While Presidential Proclamation 9681 modified the Monument boundaries, the purpose for both proclamations is to honor the historic objects that have been sacred to native peoples for thousands of years. According to Proclamation 9558, the region constitutes “one of the densest and most significant cultural landscapes in the United States.” The Final MMP/EIS fails to treat protection of this cultural landscape, and the interrelated cultural resources defining the cultural landscape, as a priority use and value, and fails to maintain cultural landscape protection as one of many monument uses, although it is the reason for its designation. As such, BLM/USFS created its preferred Alternative E as a defacto removal of the Monument designation, characterized as a compromise alternative to accommodate various values, interests. It does not give any priority to the interests of Native American Tribes and environmental/cultural resource conservation groups seeking to preserve the cultural landscape—the primary reason for BENM’s creation.

**Summary:**

The BLM improperly prioritized multiple uses over BENM objects and values in the Proposed MMPs/Final EIS.

**Response:**

The National Landscape Conservation System (NLCS), as established by Congress in the Omnibus Public Land Management Act of 2009 (OPLMA; Public Law 111-11), is a permanent system of public lands conservation, with the stated purpose to “conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations” 16 USC § 7202(a). Through the land use planning process, the BLM identifies specific and measurable goals and objectives for each object and value (BLM Manual Section 6220.1.6.G.4.a).

Section 302(a) of the FLPMA states that public lands are to be managed under the principles of multiple use and sustained yield “except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it will be managed in accordance with such law.” For this planning effort, the area will therefore be managed in accordance with the FLPMA and the OPLMA. Land use planning decisions for each NLCS unit must be consistent with the purposes and objectives of the designating proclamation or act of Congress (BLM Manual Section 6100.1.6.B).

The term “multiple use” means managing public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; using some land for less than all of the resources; combining balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values; and applying harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output (43 USC § 1702[c]).

As noted above, while the BLM must manage BENM in accordance with the FLPMA and the direction in Proclamation 9558, as modified by Proclamation 9681, no controlling legal authority requires the agencies to manage the Monument in a particular way or to choose management actions that are the most protective of Monument objects and values. Rather, courts have been clear that the BLM may satisfy its legal obligations by balancing the protection of the Monument’s objects and values with facilitating the public’s enjoyment and beneficial use of BENM’s land and resources. The Proposed MMPs/Final EIS, which recognize the important relationships and interdependencies among the Monument’s objects and values and other natural and cultural resources, strike an appropriate balance. They do not prioritize multiple uses over protection of the Monument’s objects and values.

The BLM’s approach to protecting the Monument’s objects and values while still managing the Monument with an eye towards multiple use is exemplified by the goals, objectives, and management actions in the proposed plan. In developing the goals, objectives, and management actions, the BLM considered the location and distribution of Monument objects and values, their sensitivity to other uses, and the anticipated nature and intensity of existing and future resource uses. In some instances, providing for the proper care and management of Monument objects and values required placing site-specific restrictions or prohibitions on certain resources and uses. In other instances, the BLM developed stipulations, BMPs, monitoring protocol, and other management contained in the Approved MMPs that will be applied by the Authorized Officer to the future management of the BENM, including any proposed activities within the BENM, to provide for the proper care and management of Monument objects and values. In all situations, the BLM recognized that managing for multiple uses is only appropriate where the protection of monument objects and values is achieved. As such, all future actions authorized, carried out, or funded by the BLM within the BENM are subject to site- or activity-specific environmental review, including documentation that demonstrates a proposed action is consistent with the proper care and management of the Monument objects and values.

Alternative E (the Proposed MMPs) adequately protects BENM objects and values, thereby complying with the requirements of the OPLMA, FLPMA, and other applicable statutes. Because of these factors, this protest is denied.



## **FLPMA—Unnecessary and Undue Degradation**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs fails to manage lands with wilderness characteristics for protection of their wilderness values. As such, the agencies fail to protect the monument from “unnecessary and undue degradation,” in violation of FLPMA. The agencies also fail to weigh resource values before deciding to prioritize other land uses over managing the lands for wilderness characteristics, in violation of agency policy (2012 LWC Manual).

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** There is little discussion of how BLM determined to favor and prioritize other uses over the protection of LWC. This is inconsistent with FLPMA's mandate for BLM to protect land from "unnecessary or undue degradation."

### **Summary:**

The Proposed MMPs/Final EIS fails to protect the BENM from “unnecessary and undue degradation” by not managing lands with wilderness characteristics for protection of their wilderness values in violation of the FLPMA. Additionally, the BLM failed to weigh resource values before deciding to prioritize other land uses over managing lands for wilderness characteristics in violation of the FLPMA.

### **Response:**

Section 302(b) of the FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”

Consistent with the FLPMA and other applicable authorities, the BLM considers the wilderness characteristics of public lands when undertaking land use planning. The BLM uses the land use planning process to determine how to manage lands with wilderness characteristics as part of the BLM’s multiple-use mandate. The BLM considers a full range of alternatives for such lands when conducting land use planning. The BLM analyzes the effects of: 1) plan alternatives on lands with wilderness characteristics; and 2) management of lands with wilderness characteristics on other resources and resource uses (BLM Manual 6320). However, there is no affirmative requirement for the BLM to protect lands for their wilderness characteristics.

The BLM’s Proposed MMPs/Final EIS is consistent with the FLPMA’s mandate to prevent unnecessary and undue degradation. The Proposed MMPs/Final EIS provides for the balanced management of the public lands in the Planning Area. In developing the Proposed MMPs/Final EIS, the BLM fully complied with its planning regulations (43 CFR § 1610), NEPA requirements, and other statutes, regulations, and executive orders related to environmental quality. The Proposed MMPs/Final EIS identifies appropriate allowable uses, management actions, and other mitigation measures that prevent unnecessary or undue degradation of public lands. Proposed management changes would result in foreseeable effects on resources and uses in the BENM, but such effects could be justified in the balancing of competing interests, reflecting the BLM’s multiple-use mission. Congress recognized that through the BLM’s multiple-use mandate, there would be conflicting uses and impacts on public land.

The Proposed MMPs/Final EIS is consistent with BLM policy for lands identified for wilderness characteristics. The BLM considered the results of the wilderness characteristics inventory in the planning process, consistent with BLM Manual 6320, which provides for several potential outcomes, “including, but not limited to: 1) emphasizing other multiple uses as a priority over protecting wilderness

characteristics; 2) emphasizing other multiple uses while applying management restrictions (conditions of use, mitigation measures) to reduce impacts to wilderness characteristics; and 3) protecting wilderness characteristics as a priority over other multiple uses.” The BLM considered a number of factors in deciding whether to protect an area for its wilderness characteristics, including whether it has wilderness characteristics to begin with; whether the area can be effectively managed to protect its wilderness characteristics; the extent to which other resource values and uses of lands with wilderness characteristics would be foregone or adversely affected if the wilderness characteristics are protected; and whether the area has been previously considered as a Wilderness Study Area. The presence of wilderness characteristics in an area is only one of many factors that the agency considered in deciding whether to manage lands within the BENM for their wilderness characteristics.

Proposed MMPs/Final EIS Section 2.2 analyzed a range of reasonable alternatives for protection of areas with wilderness characteristics. Accordingly, the Proposed MMPs/Final EIS adequately followed the process required by the FLPMA, NEPA, and BLM Manual 6320 to consider whether to manage lands for protection of wilderness characteristics during the planning process. As a result, the Proposed MMPs/Final EIS provides for the balanced management of the public lands in the Planning Area and is consistent with the FLPMA’s mandate against undue and unnecessary degradation.

The Proposed MMPs/Final EIS adequately protects the BENM from “unnecessary and undue degradation.” Additionally, the BLM properly weighed resource values before deciding to prioritize other land uses over managing the lands for wilderness characteristics. For the reasons stated above, this protest is denied.

***The Wilderness Society et al.***

***Katie Meehan et al.***

**Issue Excerpt Text:** The Proposed MMPs fails to provide justification for the unnecessary and undue degradation that will occur to natural resources from allowing widespread livestock grazing throughout the monument. This is in violation of FLPMA.

**Summary:**

The BLM violated the FLPMA, as the Proposed MMPs/Final EIS fails to adequately provide justification for the unnecessary and undue degradation that may result from allowing widespread livestock grazing.

**Response:**

Section 302(b) of the FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”

The BLM’s Proposed MMPs/Final EIS is consistent with the FLPMA’s mandate to prevent unnecessary and undue degradation. The Proposed MMPs/Final EIS provides for the balanced management of the public lands in the Planning Area. In developing the Proposed MMPs/Final EIS, the BLM fully complied with its planning regulations (43 CFR § 1610), NEPA requirements, and other statutes, regulations, and executive orders related to environmental quality. The Proposed MMPs/Final EIS identifies appropriate allowable uses, management actions, and other mitigation measures that prevent unnecessary or undue degradation of public lands. Further, the Proposed MMPs/Final EIS includes BMPs for livestock grazing (see Section 1.5 of Appendix I), as well as livestock-specific monitoring (see Appendix M). These measures help to ensure that the Proposed MMPs/Final EIS’s grazing decisions would not cause unnecessary and undue degradation. Congress recognized that through the BLM’s multiple-use mandate, there would be conflicting uses and impacts on the public land. As a result, the BLM’s Proposed MMPs/Final EIS is consistent with the FLPMA’s mandate against undue and unnecessary degradation.

The Proposed MMPs/Final EIS adequately protects the BENM from unnecessary and undue degradation from livestock grazing. Accordingly, this protest is denied.

## **FLPMA—Areas of Critical Environmental Concern**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs fails to give priority to the protection and designations of ACECs by choosing the least protective alternative and failing to adequately consider citizen nominated ACECs submitted by TWS, the Trust, and SUWA in August 2018.

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** To meet FLPMA’s statutory requirement of prioritizing the protection of ACECs, BLM must apply special management to protect the values identified for each of the ACECs and designated new ACECs as nominated. BLM’s failure to do so is inconsistent with the agency’s duties under FLPMA.

### **Summary:**

The BLM violated the FLPMA by:

1. Failing to give priority to the designation and protection of areas of critical environmental concern (ACECs) by choosing the least-protective alternative;
2. Failing to apply special management to protect the values identified for each of the ACECs; and
3. Failing to adequately consider and designate citizen-nominated ACECs submitted by citizen groups.

### **Response:**

In FLPMA Section 103(a), an ACEC is defined as “an area on BLM-administered lands where special management attention is required to protect and prevent irreparable damage to important historic, cultural, or scenic values; fish and wildlife resources; or other natural systems or processes, or to protect life and ensure safety from natural hazards.” This special designation is used to delineate areas for special management to protect important and relevant resource values. Furthermore, FLPMA Section 202(c)(3) requires that, in the development and revision of land use plans, the BLM give priority to the designation and protection of ACECs. The implementing regulations at 43 CFR § 1610.7-2 provide the agency with statutory requirements for the identification and consideration of ACECs for designation and protection during the resource management planning process. However, there is no statutory or regulatory requirement that the BLM designate any or all ACECs identified or considered during the planning process. BLM Manual 1613, Areas of Critical Environmental Concern, establishes the agency’s policy and procedures for the evaluation and designation of ACECs as part of the land use planning process.

Generally, the BLM must review all nominated ACECs for the presence of relevant and important values, which is one of the two requirements for a nominated ACEC to be considered for potential ACEC designation (BLM Manual Section 1613.11). The BLM must also review those areas found to have relevant and important values for a need for special management attention, which is necessary for the BLM to designate the area as an ACEC (BLM Manual Section 1613.12). If a potential ACEC meets the criteria, the BLM must include it as recommended for designation in at least one alternative (BLM Manual Section 1613.22B).

BLM manual sections 1613.50 and 1613.51 provide additional guidance regarding the relationship of ACECs with other special designations that provide for additional resource protections, such as

designated Wilderness, National Historic/Scenic Trails, National Wild and Scenic Rivers, National Recreation Areas, and National Conservation Areas. While a potential ACEC may be contained within or overlap one of the above designations provided that the ACEC designation is necessary to protect a resource or value. If, however, the management attention provided under the special designation is adequate to protect a resource or value, the BLM policy is clear that it is not necessary *or appropriate* to designate it as an ACEC.

The BLM may not designate nominated ACECs, or portions of nominated ACECs, not found to contain relevant and important values, or for which no special management attention is needed (BLM Manual Section 1613.1). The BLM must disclose the reasons for designating or not designating an ACEC in the Proposed RMP alternative (BLM Manual Section 1613.33E). A comparison of estimated effects and trade-offs associated with the alternative leads to development and selection of the Proposed RMP Amendment/Final EIS. BLM Manual 1613.33.E provides direction for when it may choose not to designate potential ACECs. An ACEC must require special management attention unique to the relevant and important values identified to be designated (BLM Manual Section 1613.33E).

During the planning process the BLM appropriately considered the designation of ACECs in accordance with BLM Manual 1613, Areas of Critical Environmental Concern (BLM 1983). The BLM reviewed BLM-administered lands in the planning area to determine whether new areas should be considered for designation as ACECs, and whether existing ACECs should continue to be managed as ACECs, or if they should be expanded or reduced to protect the ACEC values.

The BLM did not seek ACEC nominations when the BENM Notice of Intent was published in January 2018; however, the BLM can receive ACEC nominations at any time, within or outside of the planning process (section .21(A)(2), BLM Manual 1613). Accordingly, the BLM received two specific ACEC nominations within the scope of the planning effort. The BLM reviewed the nominated relevant and important values, resources, or systems/processes (collectively “values”) and determined that the relevant values nominated in the ACECs were the same as the Monument objects and values identified by Presidential Proclamation 9558, as modified by 9681 that require protection under the Antiquities Act. Further, the BLM determined that the threats identified for the relevant and important values were adequately addressed and ameliorated by the Management Actions presented in the Proposed MMPs/Final EIS under all alternatives. Therefore, the BLM concluded, pursuant to BLM Manual 1613, that it was not necessary or appropriate designate these areas as ACECs.

The BLM also considered the three existing ACECs, totaling 1,601 acres of BLM-administered lands that are currently found in the planning area. The BLM determined that, while the values within these ACECs are consistent with the monument objects and values, carrying forward these existing ACECs would provide appropriate special management attention for these areas and provide continuity of management, especially for the San Juan River ACEC where more than eighty percent of the ACEC is located outside of the monument boundary. The existing ACECs have been established for nearly 30 years and the public has become accustomed to the areas being managed as ACECs. A change to the designation could cause public confusion that could lead to impacts to the values. Accordingly, the existing management of these ACECs as provided for under the 2008 Monticello RMP is carried forward under all alternatives (see Proposed MMPs/Final EIS p. 3-63).

While the FLPMA directs the BLM to give priority to the designation and protection of ACECs during land use planning, it does not require the BLM to select the alternative that includes the most protective measures for ACECs. As a result, the BLM did not violate the requirements of the FLPMA with the selection of the preferred alternative.

For the reasons stated above, this protest is denied.

## **Special Status Species**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies admit the serious harm that would occur to sensitive species under the preferred alternative. While the agencies point to measures in existing plans under which they operate, they do not provide a meaningful explanation as to how the Proposed MMPs will comply with their legal duties to minimize impacts, improve the status, and generally protect BLM and USFS sensitive species. This is in violation of FLPMA and NFMA.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Despite the fact that the Forest Service had developed a list of SCCs for the Manti-La Sal National Forest (and the supporting scientific information for its development) in 2017, the fact was not mentioned in the aforementioned Federal Register notices, the Proposed MMPs or other BENM planning documents. Further, the Forest Service did not invoke the SCC list and associated scientific information in the discussion of the Affected Environment or Effects Analysis (Chapter 3) for special status species in the Draft or Proposed MMPs or in the Analysis of the Management Situation (dated August 28, 2018. *see* Section 2.15.2.2.2 that specifically refers to Forest Service Sensitive Species). The Forest Service's decision to not disclose and utilize available information is arbitrary and capricious and in violation of NEPA and NFMA. Finally, because when the Draft MMP were published, the Forest Service clearly still believed that § 219.9 was not directly related to the amendment, it failed to include an analysis of the effects of the proposed action on the SCCs. and more broadly to ensure ecosystem integrity and diversity as required in § 219.9(a) in violation of NEPA and NFMA. To remedy this, the Forest Service must undertake a supplemental EIS to address this specific issue.

Finally, because when the Draft MMP were published, the Forest Service clearly still believed that § 219.9 was not directly related to the amendment, it failed to include an analysis of the effects of the proposed action on the SCCs, and more broadly to ensure ecosystem integrity and diversity as required in § 219.9(a) in violation of NEPA and NFMA. To remedy this, the Forest Service must undertake a supplemental EIS to address this specific issue.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies have failed to demonstrate that their actions under the preferred alternative will not contribute to the need for ESA listing of BLM or USFS sensitive species.

Similarly, the USFS is directed to “maintain viable populations” of sensitive species and to “[d]evelop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions.” See Forest Service Manual 2600 - Wildlife, Fish, and Sensitive Plant Habitat Management, Chapter 2670 – Threatened, Endangered, and Sensitive Plants and Animals. Section 2670.22.

Alternative E does not establish protections to minimize or eliminate threats to wildlife, including sensitive species, or even to ameliorate current activities negatively impacting these species. . . . Indeed, the Proposed MMPs itself notes that Alternative E is generally among the alternatives that would have the highest potential impacts on these species across the various types of environmental consequences analyzed. See Proposed MMPs Appendix P at P-9.

In order to provide for the reduction or elimination of threats to BLM and USFS sensitive species, to improve their status, and decrease the likelihood of ESA listing, the mere possibility that the Proposed MMPs “could” provide for the species to continue to “persist” is not adequate.

The agencies admit the serious harm that would occur to sensitive species under the preferred alternative. While the agencies point to measures in existing plans under which they operate, they do not provide a meaningful explanation as to how the Proposed MMPs will comply with their legal duties to minimize impacts, improve the status, and generally protect BLM and USFS sensitive species. This is in violation of FLPMA and NFMA.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** USFS violated procedural and substantive provisions of the planning rule and NEPA. First, USFS failed to correctly identify that § 219.8(a) is directly related to the amendment and comply with its provisions. It also failed to respond to comments related to this point that were submitted on the Draft MMP. USFS failed to identify the correct special status species list and utilize it in the analysis, failed to include an analysis of the effects of the proposed action on the SCCs, and more broadly to ensure ecosystem integrity and diversity as required in § 219.9(a). USFS failed to provide the public the opportunity to comment on its proposed amendment as required, and then erred in its use of plan components in the proposed amendment provided in the Proposed MMPs. Finally, USFS failed to provide the public a reasonable amount of time (more than one day) to respond to its directed related finding as proposed in the notification of the development of a plan amendment. The USFS must revisit and revise its analysis to comply with all of the procedural and substantive procedures mentioned above.

**Summary:**

The BLM and USFS failed to comply with their respective duties under the FLPMA, NEPA, and NFMA with respect to special status species. The BLM failed to provide an adequate explanation of how it will comply with its duties pursuant to BLM Manual 6840, thereby violating the FLPMA. By excluding the Species of Conservation Concern (SCC) list prepared for the Manti-La Sal National Forest and its associated scientific information, and by disregarding public comment on the issue, the USFS failed to protect sensitive species, as required by the FLPMA and NFMA, and failed to adequately analyze the effects of the proposed action on SCC, thereby violating the NEPA.

**Response:**

Section 302(b) of FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands;” however, Section 102(a)(7) of FLPMA declares that it is the policy of the United States that public lands be managed on the basis of “multiple use” and “sustained yield.” Section 103(c) of FLPMA defines multiple use as the management of public lands and their various resource values so that they are used in the combination that best meets the present and future needs of the American people. These vital resources include fish and wildlife species. A primary objective of the BLM special status species policy is to initiate proactive conservation measures that reduce or eliminate threats to BLM sensitive species to minimize the likelihood of and need for listing the species under the ESA (BLM Manual Section 6840.02.B). BLM Manual 6840 describes how the BLM should address BLM sensitive species and their habitats during the land use planning process (6840.2[B]), with an overall objective of initiating “proactive conservation measures that reduce or eliminate threats to [BLM] sensitive species to minimize the likelihood of and need for listing of these species under the ESA” (6840.02[B]).

There is no USFS regulation pertaining to sensitive species that is applicable to the decision. However, the USFS abides by the following directives with respect to sensitive species and SCC:

Forest Service Manual 2670.32 – Sensitive Species:

2. Review programs and activities as part of the NEPA process through a biological evaluation to determine their potential effect on sensitive species.
3. Avoid or minimize impacts to species whose viability has been identified as a concern.

4. Analyze, if impacts cannot be avoided, the significance of potential adverse effects on the population or its habitat within the area of concern and on the species as a whole. (The line officer, with project approval authority, makes the decision to allow or disallow impact, but the decision must not result in loss of species viability or create significant trends toward federal listing.)

“Species of conservation concern. For purposes of this subpart, a species of conservation concern is a species, other than federally recognized threatened, endangered, proposed, or candidate species, that is known to occur in the plan area and for which the regional forester has determined that the best available scientific information indicates substantial concern about the species' capability to persist over the long-term in the plan area” 36 CFR § 219.9(b)(c).

“The responsible official must include information in the initial notice for the amendment (CFR § 219.16[a][1]) about which substantive requirements of §§ 219.8 through 219.11 are likely to be directly related to the amendment (§ 219.13[b][5])” 36 CFR § 219.13(b)(2).

“Determine which specific substantive requirement(s) within §§ 219.8 through 219.11 are directly related to the plan direction being added, modified or removed by the amendment and apply such requirement(s) within the scope and scale of the amendment . . . (i) The responsible official’s determination must be based on the purpose for the amendment and the effects (beneficial or adverse) of the amendment, . . . (ii) When basing the determination on adverse effects: (A) The responsible official must determine that a specific substantive requirement is directly related to the amendment when scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse effects associated with that requirement, or when the proposed amendment would substantially lessen protections for a specific resource or use . . . For an amendment to a plan developed or revised under a prior planning regulation, if [SCC] have not been identified for the plan area and if scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse impacts to a specific species, or if the proposed amendment would substantially lessen protections for a specific species, the responsible official must determine whether such species is a potential SCC, and if so, apply section § 219.9(b) with respect to that species as if it were an SCC” 36 CFR § 219.13(b)(5) and (6).

“Decision document for a plan amendment. In addition to meeting the requirements of paragraph (a) of this section, the decision document must explain how the responsible official determined: . . . (2) Which specific requirements within §§ 219.8 through 219.11 apply to the amendment and how they were applied” 36 CFR § 219.14(c)(2).

“For an objection or part of an objection specific to the identification of species of conservation concern, the regional forester who identified the species of conservation concern for the plan area may not be the reviewing officer. The Chief may choose to act as the reviewing officer or may delegate the reviewing officer authority to a line officer at the same administrative level as the regional forester. The reviewing officer for the plan will convey any such objections or parts thereof to the appropriate line officer” 36 CFR § 219.56(e)(2).

#### Forest Service Handbook 1909.12, Chapter 20, Section 21.22a – Identifying Species of Conservation Concern

“The Regional Forester has the authority and responsibility to: . . .

- d. Leverage expertise of the public and local, State, Tribal, and other Federal natural resource agencies, for identifying species of conservation concern.
- e. Engage the public and invite public input when identifying species of conservation concern, as part of the public participation strategy (Forest Service Handbook 1909.12, Chapter 40, Section 42).”

The BLM and USFS appropriately addressed relevant special status species. Proposed MMPs/Final EIS Section 2.4.11.1 lists the various management actions that the BLM would implement in order to minimize and mitigate impacts on special status species. Additionally, as stated in Section 3.15.2.2, “Alternatives B, C, D, and E would apply nesting season time frame requirements that would be more reflective of management needed to avoid impacts on birds within the BENM than those under Alternative A. Further, Appendix M contains special status species monitoring requirements, while Appendix I contains BMPs related to wildlife and fisheries that may apply to [special status species]. In general, all action alternatives would include more management actions addressing potential impacts to special status bird species and the proper care and management of relevant [BENM] objects and values than Alternative A” (see Section 2.4.11.2 of the Proposed MMPs/Final EIS).

Neither the NFMA nor USFS regulations have project requirements for USFS sensitive species; therefore, there is no violation of legal mandate or regulation. The project record demonstrates consistency with USFS policy at Forest Service Manual 2670.32. The required biological evaluation was conducted and documented in the document *BENM, Shash Jáa and Indian Creek Units Biological Assessment and Biological Evaluation*. Discussion of impacts from the project are in Section 5.2, US Forest Service Sensitive Species, of that document (p. 5-135 to 5-268). A finding was made of no contribution to federal listing or loss of viability for the population or species for the Forest. The biological evaluation also includes conservation measures to avoid or minimize impacts. Implementation of the conservation measures is part of the assumption used to make the finding for the sensitive species, which means that the conservation measures should be incorporated into the MMPs. This appears to have occurred, but is difficult to be certain due to the conservation measures being written species specifically for the biological evaluation, but the “management actions” that relate to the biological evaluation’s conservation measures are written more generically.

In addition, neither the planning rule nor directives requires identification of SCC in a forest plan, a plan amendment, or the environmental analysis document for them, nor do they require identification of SCC in public notices. Contrary to the protest statement, “The Forest Service’s decision to not disclose and utilize available information is arbitrary and capricious and in violation of [the] NEPA and NFMA” and similar statements, the Proposed MMPs/Final EIS indeed includes analysis of effects to SCC in Appendix P. However, one species, *Erigeron uttermannii* (*Syn. E. carringtoniae*), is missing from the analysis. Per Forest Service communication, the species is not in the BENM area. The protest asserts that the USFS violated the NFMA by not changing the list of likely to be directly affected substantive requirements to include 36 CFR § 219.9 as a substantive requirement. The rule requires identification of likely to be directly affected substantive requirements in the initial public notification of an amendment. This was done in the USFS notices in the *Federal Register* on April 10, 2018 (*Federal Register* 83(69):15354–15355), the *Sun Advocate* on March 13, 2018, and the *San Juan Record* on March 14, 2018. The protest is correct in that the initial list did not include 36 CFR § 219.9; however, there is no rule requirement to update the likely to be directly affected substantive requirements during the planning process. The rule requires that the ROD explain how the responsible official determines which specific substantive requirements apply to the amendment and how they were applied. The ROD has not yet been issued.

As noted in the Proposed MMPs/Final EIS, “The Forest Service Responsible Official has determined that the substantive requirements at 36 CFR § 219.9 are applicable to the MMPs” (see Appendix O, Response to Comments, A-75-6, p. O-223). The ROD must discuss how it applies. The explanation in the ROD for including 36 CFR § 219.9 will relate to purpose and beneficial effects to species, which may or may not be an SCC. The Regional Forester’s identified SCC lists for the Manti-La Sal National Forest have not undergone administrative review by the Chief or Chief’s delegated authority, as required by 36 CFR § 219.56(e)(2); therefore, they are still only potential SCC. Consideration of 36 CFR § 219.9 as a substantive requirement related to a species just because it is a potential SCC would be required only if there were a finding of significant adverse effects to the species, which would translate to substantial



adverse effects or substantial lessening of protections for the resource (36 CFR § 219.13[b][5][A]). The response to comment does not specify that the discussion about 36 CFR § 219.9 applies only to those potential SCC that are related to the purpose or beneficial effects of the amendment; however, it is incorrect. The Proposed MMPs/Final EIS provides an adequate level of detail to satisfy the requirements of BLM Manual 6840.

The biological evaluation found no expected loss of sensitive species viability or significant trends toward federal listing. The finding, however, depended on implementing the conservation measures identified in the biological evaluation. To ensure consistency with Forest Service Manual 2670.32, the Forest Service should document that the conservation measures for sensitive species in the biological evaluation are covered by the “management actions” in the selected alternative, or the ROD should state that the decision includes the conservation measures identified in the biological evaluation. Per communication with the Forest Service, the missing potential SCC is not in the BENM area. Documenting this in Appendix P, an Errata, or the ROD would complete the record. The ROD must explain why the responsible official has determined 36 CFR § 219.9 to be a directly related substantive requirement and how the requirement is applied to the amendment within its scope and scale.

For the reasons stated above, this protest is denied.

## **Endangered Species Act**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Proposed MMPs is “likely to adversely affect” ESA-listed species or result in adverse modification of their habitat, as well as the potential “take” of individual members of the species. Nonetheless, the agencies choose to move forward with a management alternative that leaves ESA-listed species at risk. The agencies must revisit their analysis to comply with the ESA and protect all listed species. The agencies are required to complete and thorough Section 7 consultation, complying with all legal mandates, prior to sign a record of decision.

### **Summary:**

In order to comply with the requirements of the ESA, the BLM and USFS must complete Section 7 consultation prior to signing a ROD.

### **Response:**

Section 7(a)(2) of the ESA requires federal agencies to ensure that their proposed actions will not be “likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of the critical habitat of such species” (16 USC § 1336[a][2]). If an agency determines through a biological assessment finding that a proposed action is likely to adversely affect listed species or designated critical habitat, formal, consultation is required (50 CFR § 402.14[a]). Formal consultation may last up to 90 days, after which the United States Department of the Interior, Fish and Wildlife Service (USFWS) will prepare a biological opinion on whether the proposed activity will jeopardize the continued existence of a listed species. The USFWS has 45 days after completion of formal consultation to write the opinion.

The BLM and USFS fully complied with the requirements of ESA Section 7 as part of the BENM land use planning process. The ESA does not prohibit federal agencies from making decisions or implementing actions that would impact species or critical habitat. The ESA establishes a duty for federal agencies to avoid jeopardy of a species or adverse modification of critical habitat with any actions that are federally funded, authorized, or carried out. To determine if federal actions would result in jeopardy or

adverse modification, federal agencies complete either formal or informal consultation under ESA Section 7.

The BLM and USFS are jointly preparing a biological assessment to evaluate the potential impacts of the Proposed MMPs/Final EIS on species listed as threatened or endangered under the ESA and on designated critical habitats within the Planning Area. During the preparation of the biological assessment, the agencies engaged in informal discussions regarding the species and habitats present in the Planning Area and the likely effects of the Proposed MMPs. The USFWS was also provided with an opportunity to review and comment on the draft biological assessment, and the agencies engaged in informal telephone calls to discuss the analysis and associated management actions, stipulations, and BMPs. The BLM and the Forest Service submitted the biological assessment to USFWS on July 22, 2019, to initiate formal ESA Section 7 consultation.

The BLM and USFS committed to completing the ESA Section 7 consultation process prior to signing a decision completing the BENM land use planning process. As stated in the Proposed MMPs/Final EIS, “[t]he BLM and USFS would not sign Records of Decision until the USFWS issues a Biological Opinion and the formal Section 7 consultation is complete” (see Proposed MMPs/Final EIS Section 4.1.2). The USFWS provided the BLM and USFS with a complete Biological Opinion on September 23, 2019.

The BLM and USFS fully complied with the requirements of ESA Section 7 in developing the Proposed MMPs/Final EIS. For the reasons stated above, this protest is denied.

## **NHPA – General**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The proposed Plan violates the NHPA in at least two ways. First, the Proposed MMPs appears to define the area of potential effects as the entirety of the planning area although the agencies never use the term “area of potential effects.” Proposed MMPs at 3-5. While the planning area certainly is relevant to analyzing cultural resource impacts under NEPA, the NHPA requires the agencies to define APEs more narrowly as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties,” 36 CFR § 800.16(d), for within that area the agencies must make a “reasonable and good faith effort” to identify historic properties, 36 CFR § 800.4(b). The Proposed MMPs violates the NHPA because it authorizes several immediate uses of monument lands that could potentially impact cultural resources, such as designating 14 cultural resource sites as Public Use (Developed) but fails to define APEs for each potentially impacted area.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Second, the agencies failed to make a “reasonable and good faith effort” to identify historic properties within the monument. 36 CFR § 500.4(b). Only 8.2% of BLM lands and 34% of FS lands within the Shash Jáa Unit, and only 14.7% of the Indian Creek unit, have been surveyed for cultural resources. Proposed MMPs at 3-6 - 3-7. The agencies conducted no surveys or inventories of historic cultural properties within the monument and relied only on a review of existing literature based on previous surveys. Proposed MMPs at 3-5 - 3-8. Instead, the agencies note that a Class III cultural resource inventory will be conducted “as funding is available.” Proposed MMPs at 3-10. But the agencies’ commitment to complete a Class III survey in the future, and contingent upon elusive funding, “does not substitute for a more intensive survey now,” particularly where, as here, “the threat to historic sites is posed by existing authorized uses.” *Montana Wilderness Ass’n v. Connell*, 725 F.3d 988, 1009 (9th Cir. 2013). Indeed, even though the agencies commit that an activity-level cultural resources management

plan to “provide site-specific, implementation-level direction to effectively manage recreation and other uses while protecting the integrity of significant cultural resources,” (PMMP/FEIS at 2-5) would be developed within 2 years, the Proposed MMPs authorizes several ongoing, existing uses that could cause adverse impacts before the cultural resource management plan is completed.

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** Additionally, the agencies fail to make a “reasonable and good faith effort” to identify historic properties within the monument because the majority of the monument has not been inventoried for cultural resources. The agencies must immediately prioritize and have a clear source of funding for Class III inventories through the planning area to adequately inform management actions as well as the forthcoming implementation-level cultural resource plan.

*Pueblo of Acoma*

*Aaron Sims*

**Issue Excerpt Text:** The BLM/USFS asserts that it has engaged in a reasonable and good faith effort to identify historic properties, consistent with 36 CFR 800.4(b). See Letter from Gary Torres (BLM Monticello Field Office) to Governor Brian Vallo (Pueblo of Acoma) (Aug. 2, 2019) (Attachment 2), the agencies merely used a Class I inventory and a predictive model for the Final MMP/EIS. This methodology provides insufficient evidence that cultural resources will not be adversely affected by the issuance of the BENM MMP/EIS and the selection of the current preferred Alternative. To assume that a Class I inventory, without an independent analysis of cultural resources within the area of potential effect, is the maximum necessary action needed to identify Acoma's historic properties and traditional cultural properties is inappropriate and inadequate at this stage. Acoma takes the position that for BLM/USFS to rely exclusively on a Class I inventory is not a reasonable and good faith effort to comply with the NHP A, or meet the federal duty to meaningfully consult with Indian Tribes.

*Pueblo of Acoma*

*Aaron Sims*

**Issue Excerpt Text:** Furthermore, the BLM/USFS's use of predictive modeling is a totally inadequate means to comply with the NHPA requirements. The SWCA's methodology only surveyed a small percentage of the BENM land and the federal agencies cannot reasonably rely on its “no adverse effect” conclusion. For example, in the Indian Creek Unit less than 15% of the land was surveyed for archaeological sites and in the Shash Jáa Unit, only 8.2% of the land administered by the BLM/USFS was surveyed. See Attachment 2. The Finding of No Adverse Effect letter concludes that the “wait and see” approach to all of the alternatives in the Final MMP will sufficiently prevent adverse effects to cultural resources. This suggests that the baby can be protected AFTER it has been thrown out with the bath water. For example, Alternative B would “reroute or close the trail [within Shay Canyon] if the site was adversely affected by visitation.” The BLM/USFS will essentially wait for harm to occur before acting. This approach fails to meet NHPA Section 106 compliance.

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** Due to the failure to coordinate review under NEPA and NHPA, BLM has unlawfully foreclosed consideration of less harmful alternatives under NHPA. The procedural nature of Section 106 reinforces the importance of strict adherence to the binding process set out in the NHPA regulations: “While Section 106 may seem to be no more than a ‘command to consider,’ . . . the language is mandatory and the scope is broad.” BLM failed to adhere to this important process in violation of the clear mandates of the NHPA. BLM must conclude the Section 106 consultation process and then issue a Supplementary EIS to resolve this issue in accordance with federal law.

*Conservation Lands Foundation et al.**Danielle Murray et al.*

**Issue Excerpt Text:** The NHPA requires federal agencies to “take into account any adverse effects on historical places from actions concerning that property.” Pursuant to Section 106 of the NHPA, before approving any undertaking, a federal agency must identify all historic properties that may be affected by the undertaking and must assess the effects of the project on those properties. Here, BLM has unlawfully rushed to complete the MMP prior to completing consultation under Section 106. As a result, the agency has made final management decisions on alternatives under NEPA that will foreclose meaningful consideration of alternatives to avoid, minimize or mitigate harm to historic properties as NHPA requires.

*Conservation Lands Foundation et al.**Danielle Murray et al.*

**Issue Excerpt Text:** BLM must comply with Section 106 by considering potential adverse effects to cultural resources, and taking action to avoid, minimize or mitigate such adverse effects, for resources along all OHV routes prior to finalizing the MMP. However, BLM failed to do so in the MMP, thereby violating the NHPA.

*Pueblo of Acoma**Aaron Sims*

**Issue Excerpt Text:** By its very nature, the BLM/USFS has resigned itself to management of cultural resources through a policy of impact mitigation, without efforts to identify Acoma traditional cultural properties, eligible historic properties, cultural landscapes and other cultural resources and management activities to avoid adverse effects in the first place. This reactionary management policy to adverse effects is out of step with the NHPA obligations, and risks a commitment to manage historic properties until they may be irretrievably damaged, altered, or destroyed.

*Pueblo of Acoma**Aaron Sims*

**Issue Excerpt Text:** The National Historic Preservation Act “has been characterized as a 'stop, look and listen' provision.” The duties conferred by the NHPA, are procedural in nature. Here, these duties can only be accomplished if the BLM/USFS fulfills its procedural obligations under Section 106 to first identify Acoma's historic properties and traditional cultural properties, using qualified experts who can assess the significance of any such properties prior to the lease sale. For the arguments presented above, the Section 106 process must be completed as part of this undertaking and prior to the issuance of the final MMP/EIS as the finding of no adverse effect cannot be support. To do otherwise is a failure of BLM/USFS's duty and a violation of the National Historic Preservation Act.

**Summary:**

The BLM and USFS violated NHPA Section 106 compliance requirements by:

- failing to engage in a reasonable and good faith effort to identify historic properties;
- failing to define the area of potential effects (APE) for each potentially impacted area; and
- failing to complete the Section 106 process prior to issuing the Proposed MMPs/Final EIS.

**Response:**

Commensurate with the limitations of the proposed land use planning decisions and in accordance with applicable case law governing Section 106 obligations during the land use planning process, the BLM and USFS identified historic properties within the Monument, considered potential adverse effects, incorporated general management prescriptions aimed at ensuring the protection of historic properties, and ultimately concluded that the proposed planning decisions would not adversely affect historic properties within the Monument. The BLM's land use planning handbook (BLM-H-1601-1) instructs the BLM to develop land use plans that identify and adopt goals, objectives, allocations for resources uses,

and specific management direction, as a means of guiding future land management actions. While a land use plan may sometimes include management direction that is highly specific, land use plans do not generally authorize on-the-ground actions. Rather, land use plan decisions, in the form of either desired outcomes or allowable uses, establish how and where future actions or uses may or may not be allowed and what restrictions or requirements may be placed on those future actions to achieve land use plan objectives (BLM-H-1601, p. 12).

Implementation decisions differ from land-use planning decisions in that they generally represent the final authorization for on-the-ground action without further agency analysis or approval. It is generally at the implementation stage, when the BLM authorizes specific projects and activities, that the agency makes an irretrievable commitment of resources that may reduce its ability to prevent harm to cultural resources on a particular parcel of public land. By comparison, land use planning decisions consider overarching management objectives and uses and do not commit agency resources in a manner that jeopardizes the BLM's ability to prohibit uses on a particular parcel.

In light of the foregoing, and as detailed below, the BLM defined an appropriate APE for this planning effort, engaged in a reasonable and good faith effort to identify historic properties, and completed appropriate portions of the Section 106 process for the current planning effort. The Proposed MMPs/Final EIS, which do not contain implementation decisions and do not authorize any on-the-ground activities and projects, do not represent an irretrievable commitment of agency resources that eliminates the BLM's ability to prevent adverse effects on a particular parcel of public land. As explained more below, future, site-specific activities will require additional environmental review and authorization, including all applicable procedures to comply with the NHPA. Specifically, the agencies will conduct appropriate NHPA and NEPA analyses for implementation decisions that would authorize specific uses in specific areas, and complete consultation as necessary.

The APE is defined in 36 CFR § 800.16(d) as the “geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” Agencies must determine and document the APE as part of satisfying NHPA Section 106 (36 CFR § 800.4), which the BLM and USFS did for this planning effort. Given the scale of the BENM Planning Area and the BLM's uncertainty over where exact impacts may occur on cultural resources, the BLM properly defined the APE as the entirety of the Planning Area. An activity-level cultural resources management plan would be developed within 2 years of the completion of the MMPs in coordination with Tribes, the Monument Advisory Committee, the Shash Jáa Commission or comparable entity, consulting parties, cooperating agencies, and other interested stakeholders. The cultural resources management plan would provide site-specific, implementation-level direction to effectively manage recreation and other uses while protecting the integrity of significant cultural resources.

Section 106 of the NHPA requires federal agencies to consider the effects of their actions and use authorizations on properties included in or eligible for inclusion in the National Register of Historic Places. The BLM and the USFS are obligated under NHPA Section 110(a) to maintain a historic properties preservation program that ensures that historic properties under each agency's jurisdiction or control are identified, evaluated, and nominated to the National Register of Historic Places. The agencies fulfill that obligation in a proactive manner as resources and funding are available. Variable funding and staffing levels continue to be factors that affect the agencies' cultural resources identification, evaluation, and nomination actions. The lead agencies do not have the funding or staffing to immediately conduct cultural resources surveys of the entire BENM. As the Proposed MMPs/Final EIS states, “[as] funding is available, the BLM would conduct Class III cultural resource inventories in a manner that complies with Section 110 of the NHPA and Section 14 of the Archaeological Resources Protection Act (ARPA)” (see

Proposed MMPs/Final EIS p. 2-5). This allows the BLM to best plan for protection of cultural resources in a real-world setting. Appropriate inventories would be completed to support analysis, public involvement, and American Indian Tribal consultation for all site-specific management actions authorized, funded, or carried out by the agencies. Prior to implementation of specific projects with the potential to impact cultural resources, appropriate site-specific inventories would be conducted as necessary to meet the requirements of the NHPA and to meet the requirements of project-specific implementation-level NEPA. The Proposed MMPs/Final EIS provides impacts analysis based on existing archaeological data and a site-location model that provides for the likelihood for the presence of an archaeological site at any given location in the Planning Area. The BLM performed a thorough review of all known previous cultural inventories completed in the BENM (see Proposed MMPs/Final EIS Section 3.5.1.2). The BLM relied on this review in preparation of the Proposed MMPs/Final EIS. Additionally, the BLM conducted a Class I inventory, thereby engaging in a reasonable and good faith effort to identify historic properties, consistent with 36 CFR § 800.4(b).

Agency officials “must complete the section 106 process ‘prior to the expenditure of any federal funds on the undertaking or prior to the issuance of any license.’ This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106 . . .” (36 CFR § 800.1(c)). Federal agencies must meet the requirements of Section 106 prior to issuing a decision (CEQ and Advisory Council on Historic Preservation NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 [March 2013]). Regulations do not require federal agencies to complete the NHPA Section 106 process prior to issuing a Final EIS. As described above, the BLM and USFS engaged with the appropriate Tribal and state governments in compliance with Section 106 during the land use planning process. The agencies will meet the requirements of Section 106 prior to issuing a decision.

The BLM and USFS properly inventoried the APE for cultural resources and complied with the requirements of NHPA Section 106 in preparing the Proposed MMPs/Final EIS. For the reasons stated above, this protest is denied.

## **NHPA – Consultation**

### ***Bears Ears Inter-Tribal Coalition***

#### ***Natalie Landreth et al.***

**Issue Excerpt Text:** Despite the pervasive religious and cultural importance of properties within the entire Bears Ears National Monument to the Tribes, the Proposed MMPs and FEIS discuss adverse effects only in general terms and do not explain how BLM or USFS will fulfill their specific duties to consult with Tribes and seek their concurrence in the event of a finding of no adverse effects, or fulfill any other Tribe-specific duties under NHPA and its regulations. In brief, the NHPA and its requirements were ignored in BLM and USFS’s development of the PMMP/FEIS.

For example, the 15-member Monument Advisory Committee that only includes “Two representatives of Tribal interests” is not a valid substitution for Tribal governments, nor does it meet BLM and USFS’s requirement to consult with the Tribes on a government-to-government basis, either generally or under the NHPA.

#### **Summary:**

The agencies violated NHPA requirements by failing to meaningfully consult with Tribes during the preparation of the Proposed MMPs/Final EIS.

#### **Response:**

The NHPA requires federal agencies, as part of the NHPA Section 106 process, to consult with Indian Tribes that attach religious and cultural significance to historic properties potentially affected by an

undertaking (54 USC § 302706). The regulations implementing NHPA Section 106 require federal agencies to make a “reasonable and good faith effort” to identify historic properties within the APE in part through consultation with Indian Tribes (36 CFR § 800.4[b]). The BLM’s Tribal consultation efforts are broader than the identification of historic properties. “The NHPA Section 106 standard only applies to the agency’s effort to consult with Indian Tribes regarding historic properties of religious and cultural significance in the context of NHPA Section 106 *and not the other specific and general authorities that require tribal consultation on a government-to-government basis*” (emphasis added; BLM Manual 1780 Tribal Relations, H-1780-1, A2-1). The BLM and USFS adhered to the requirements of the NHPA for consultation with American Indian Tribes throughout the BENM land use planning process.

The Proposed MMPs/Final EIS describes how the BLM consulted with consulting parties, including American Indian Tribes. Beginning with the scoping process, the BLM and USFS committed to coordinating their public consultation obligations under the NHPA (54 USC § 306108) as provided for in 36 CFR § 800.2(d)(3). Throughout the development of the Proposed MMPs/Final EIS, the BLM engaged in consultation efforts with various consulting parties, as well as with American Indian Tribes. This process is outlined below:

- On December 14, 2018, the BLM and USFS sent a letter inviting various organizations and local governments to participate as consulting parties. In this letter, the agencies requested additional information regarding the potential effects on historic properties. Additionally, the BLM and USFS provided a list of Public Use Sites provided in the Draft MMPs/EIS.
- On January 30, 2019, the agencies invited the consulting parties to a meeting on February 28, 2019. Additionally, the agencies invited the Tribes to this meeting, as well as to the government-to-government consultation meeting on February 27, 2019. Eleven consulting parties and two Tribes attended this meeting. During this meeting, the consulting parties, Tribes, and agencies discussed the Public Use Sites, historic properties, and potential impacts from the management actions in the BENM. The BLM received formal comments concerning historic properties from consulting parties after the meeting.
- On June 10, 2019, the BLM sent the consulting parties a letter updating them on the planning process. In this letter, the BLM invited consulting parties to another meeting concerning historic properties for the MMPs/EIS on July 30, 2019.

The agencies committed to additional NHPA Section 106 consultation activities and meetings throughout the remainder of the development of the MMPs/EIS (see Proposed MMPs/Final EIS Section 4.1.3 for further detail on the NHPA Section 106 consultation process).

Separately, the BLM has a duty to engage in government-to-government consultation with American Indian Tribes. This obligation is pursuant to Executive Order 13175 and United States Department of Interior policy (see Secretarial Order 3317) and is independent of NHPA requirements. A discussion of BLM’s efforts to comply with these directives is outlined in Proposed MMPs/Final EIS Section 4.4.

As outlined above, the BLM and USFS complied with all requirements for NHPA consultation in preparation of the Proposed MMPs/Final EIS. For the reasons stated above, this protest is denied.

## **NFMA – 2012 Planning Rule**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Forest Service in its April 10, 2018 supplementary scoping notice identified the provisions that may be directly affected by the proposed action (“In the event that the Forest Service determines that it intends to amend the Forest Plan, we hereby give notice that substantive requirements of the 2012 Planning Rule (36 CFR § 219) likely to be directly related and, therefore, applicable to the

Forest Plan amendment are 36 CFR §§ 219.8 (b) (1), (5), and (6), regarding social and economic sustainability; 36 CFR §§ 219.10 (a)(1), (4), (5), (7), (8), and (10). Regarding integrated resource management for multiple use; and 36 CFR §§ 219.10 (b)(1)(ii), (iii), and (vi), regarding cultural and historic resources, areas of tribal importance, and management of designated areas.”). 83 Fed. Reg. 15,355. The agency did not identify § 219.8 that addresses ecological sustainability including watershed, water quality, water body, and riparian area management, among other things. This omission of § 219.8 and § 219.9 was raised in scoping comments and in comments on the Draft MMP. The Forest Service responded to the comments raised on the Draft MMP by saying that it determined that the requirements at § 219.9 were applicable and had applied them accordingly. Watersheds, water bodies, and riparian resources are listed as Monument objects of interest. Appendix A at A-16. The purpose of the MMP (and by extension the Forest Service amendment to the Manti-La Sa National Forest LRMP) is to provide for the proper care and management of Monument objects. Proposed MMPs I-I. Given this and absent any explanation as to why the Forest Service chose not to apply the requirements at § 219.8, it was arbitrary and capricious for the Forest Service to not find that the requirements of § 219.8 were applicable to the amendment and a violation of NFMA.

### **Summary:**

The USFS violated the NFMA 2012 Planning Rule by failing to apply the requirements of 36 CFR § 219.8 that addresses ecological sustainability including watershed, water quality, waterbody, and riparian area management, among other things, despite the identification of watersheds, waterbodies, and riparian resources as BENM objects of interest in the Proposed MMPs/Final EIS.

### **Response:**

In relevant part, the 2012 Planning Rule states the following: “The responsible official must include information in the initial notice for the amendment (36 CFR § 219.16[a][1]) about which substantive requirements of §§ 219.8 through 219.11 are likely to be directly related to the amendment (§ 219.13[b][5])” 36 CFR 219.13(b)(2).

“Determine which specific substantive requirement(s) within §§ 219.8 through 219.11 are directly related to the plan direction being added, modified or removed by the amendment and apply such requirement(s) within the scope and scale of the amendment . . . (i) The responsible official’s determination must be based on the purpose for the amendment and the effects (beneficial or adverse) of the amendment, . . . ii) When basing the determination on adverse effects: (A) The responsible official must determine that a specific substantive requirement is directly related to the amendment when scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse effects associated with that requirement, or when the proposed amendment would substantially lessen protections for a specific resource or use” 36 CFR 219.13(b)(5).

“Decision document for a plan amendment. In addition to meeting the requirements of paragraph (a) of this section, the decision document must explain how the responsible official determined: . . . 2) Which specific requirements within §§ 219.8 through 219.11 apply to the amendment and how they were applied” 36 CFR 219.14(c)(2).

For the Proposed MMPs/Final EIS, the initial notice of the possibility of a plan amendment was the USFS notice in the *Federal Register* (Federal Register 83[69]:15354-15355). That notice identified the anticipated substantive requirements likely to be directly related and, therefore, applicable substantive requirements “in the event” that a plan amendment was determined to be needed. The USFS complied with the regulation 36 CFR § 219.13(b)(2) by providing the anticipated substantive requirement information in the *Federal Register* notice.



At this time, the USFS has not yet issued a ROD. The USFS ROD would comply with the content requirements of the planning regulations at 36 CFR § 219.14(c). The responsible official will consider comments on the applicable substantive requirements in making the determination required by 36 CFR § 219.14(c)(2). There is nothing in the regulations that prohibits the responsible official from changing the determined substantive requirements that apply due to findings in the EIS or input from the public.

There is no requirement in the planning regulations for the list of likely to be directly related substantive requirements to be updated throughout the planning process, nor is there a requirement for the EIS to state which substantive requirements are likely to be directly affected. The planning record, which includes the EIS, needs to support the determination that is to be made in the ROD.

The protest is correct in that the USFS did not identify 36 CFR § 219.8(a), or parts thereof, as likely to be directly related to a substantive requirement, even though several ecosystem characteristics are specified as BENM objects and values, and the purpose of the amendment is to protect the BENM's objects and values. The rule specifies "purpose" as a criterion for identifying related substantive requirements. Updating the list of substantive requirements was not required for the Proposed MMPs/Final EIS. Identifying the relevant parts of 36 CFR § 219.8(a) as directly related substantive requirements should be done in the ROD.

No violation of regulation has occurred. Because the purpose of the amendment is to protect the BENM's objects and values, which includes several ecosystem characteristics, and the rule specifies "purpose" as a criterion for identifying related substantive requirements, the relevant parts of 36 CFR § 219.8(a) should be identified as directly related substantive requirements and discussed. This would occur in the USFS's ROD. Updating the list of substantive requirements was not required for the Proposed MMPs/Final EIS. For these reasons, this protest is denied.

## **NFMA – Other**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The Antiquities Act, as discussed earlier in this protest, requires the Forest Service to protect Monument objects, not just to work towards - or at least not foreclose the possibility of – an aspirational vision. The Forest Service, therefore, must express this legal duty to protect Monument objects in the amendment as a standard and not as a desired condition, and erred in not doing so.

### **Summary:**

The USFS misconstrued its obligation to protect BENM objects and values as an aspirational goal and not as standard, as it should have under the NFMA.

### **Response:**

The 1906 Antiquities Act, as amended (16 USC § 431-433) states "The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected."

The USFS regulations (36 CFR § 219.7[e][1][i]) define desired conditions as "A desired condition is a description of specific social, economic, and/or ecological characteristics of the plan area, or a portion of the plan area, toward which management of the land and resources should be directed. Desired conditions

must be described in terms that are specific enough to allow progress toward their achievement to be determined, but do not include completion dates.”

The USFS regulations (36 CFR § 219.7[e][1][iii]) define standard as “A standard is a mandatory constraint on project and activity decision making, established to help achieve or maintain the desired condition or conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements.”

Appendix Q of the Shash Jáa and Indian Creek Units Proposed MMPs/Final EIS is the proposed amendment, which is to designate an area (Section 1.1); add a desired condition, standard, and a suitability determination (Section 1.2); and add the Appendix G to which the new standard refers. Appendix G will be the selected alternative for the MMPs, but only those parts that pertain to the USFS.

The standard in Appendix Q states: “BENMDA-ST-01: The Bears Ears National Monument Designated Area shall be managed per the Shash Jáa Unit MMP (see Appendix G). This direction shall take precedence over other conflicting forest plan direction that may also apply to the Bears Ears National Monument Designated Area.”

Chapter 2 of the Shash Jáa and Indian Creek Units Proposed MMPs/Final EIS covers cultural resources; one of the goals and objectives listed (Section 2.4.1.1) states: “Manage cultural resources to ensure that the region’s historical features and irreplaceable components are adequately protected consistent with the protection, preservation, and enhancement of Monument objects and values.”

By adopting the management direction in the Proposed MMPs/Final EIS, the USFS established that direction as the standard within the Manti-La Sal plan amendment. The management actions addressing cultural resources within the Proposed MMPs/Final EIS requires protection of cultural resources. This direction fulfills the requirements of the 1906 Antiquities Act by upholding a USFS standard for protection of cultural resources. For these reasons, this protest is denied.

***The Wilderness Society et al.***

***Katie Meehan et al.***

**Issue Excerpt Text:** The process for amending a plan includes: Preliminary identification of the need to change the plan, development of a proposed amendment, consideration of the environmental effects of the proposal, providing an opportunity to comment on the proposed amendment, providing an opportunity to object before the proposal is approved, and, finally, approval of the plan amendment. 36 CFR § 219.5(a)(2). The Draft MMP did not include a proposed amendment, and the public was not afforded the required opportunity to comment on it. This is a violation of NFMA.

USFS failed to provide the public the opportunity to comment on its proposed amendment as required, and then erred in its use of plan components in the proposed amendment provided in the Proposed MMPs.

Finally, USFS failed to provide the public a reasonable amount of time (more than one day) to respond to its directed related finding as proposed in the notification of the development of a plan amendment. The USFS must revisit and revise its analysis to comply with all of the procedural and substantive procedures mentioned above.

**Summary:**

The USFS violated the NFMA by failing to provide an opportunity for the public to comment on the new alternative (Alternative E, the Proposed MMPs).

**Response:**

The NFMA requires every national forest or grassland managed by the USFS to develop and maintain an effective Land Management Plan (also known as a Forest Plan). The process for the development and revision of plans, along with the required content of plans, is outlined in planning regulations, often referred to as the planning rule (the 2012 Planning Rule is the current rule). Managers of individual forests and grasslands follow the direction of the planning rule to develop a Land Management Plan specific to their unit.

In relevant part, the 2012 Planning Rule states:

“36 CFR § 219.4(a)(1) Outreach. The responsible official shall engage the public—including Tribes and Alaska Native Corporations, other Federal agencies, State and local governments, individuals, and public and private organizations or entities—early and throughout the planning process as required by this part, using collaborative processes where feasible and appropriate. In providing opportunities the responsible official shall encourage participation by:

...

(iv) Federal agencies, States, counties, and local governments, including State fish and wildlife agencies, State foresters and other relevant State agencies. Where appropriate, the responsible official shall encourage, States, counties, and other local governments to seek cooperating agency status in the NEPA process for development, amendment, or revision of a plan. The responsible official may participate in planning efforts of States, counties, local governments, and other Federal agencies, where practicable and appropriate.

...

36 CFR 219.4(b)(1) Coordination with other public planning efforts. The responsible official shall coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and State and local governments.”

The March 13, 2018, scoping notice described the nature of the USFS decision: to adopt the Proposed MMPs/Final EIS for the Shash Jáa Unit for the portion that is within the Manti-La Sal National Forest. This description of the nature of the decision is consistent throughout the process, from the scoping notice to the Draft EIS to the Final EIS.

The confusion here is where the direction in the Proposed MMPs/Final EIS would eventually be housed, either as a standalone MMPs or as an amendment to the Manti-La Sal Land Management Plan.

- Note from USFS scoping notice (local release) dated March 13, 2018, “The USFS intends to use the EIS to make its decision for that part of the Shash Jáa Unit MMP it would administer. That decision may include approving a Forest Plan amendment, if analysis leads the USFS to conclude that an amendment is necessary or appropriate.”
- Note from the USFS *Federal Register* notice dated April 10, 2018, “. . . For the Forest Service, the proposed action may include amendment of the Manti-La Sal Forest Plan if analysis leads the Forest Service to conclude that the Forest Plan should be amended.”
- The publication of the Proposed MMPs and Draft EIS (August 7, 2018) did not include an appendix specific to the Manti-La Sal Forest Land Management Plan amendment. However, a USFS notice dated August 21, 2018, states “The notice has been published to ensure all persons and entities interested in Forest Service activities are aware of the BLMs expected August 17, 2018, Notice of Availability of and opportunity to comment on the Draft EIS and Proposed MMPs for Shash Jáa Unit of the BENM as well as the opportunity to comment on the Proposed MMPs as the proposed plan amendment.”

The record shows that this was not fully clarified until the Final EIS, which contains an appendix (Appendix Q) with proposed Land Management Plan components. The essence of the decision, which was to adopt Alternative E (the Proposed MMPs), did not change between the Draft and Final EISs. The only change was the details of how Alternative E (the Proposed MMPs) would be brought into the Land Management Plan, which was a minor addition to ensure consistency with plan components, as described in 36 CFR § 219.7(e)(1). The language in the Proposed MMPs in the Final EIS indirectly incorporates Alternative E (the Proposed MMPs) into the Land Management Plan through a standard, while also identifying the designated area through establishing a management area; providing the desired condition reflective of the Proclamation; and identifying the lands as not suitable for timber production, which, while included in the MMPs, is a separate plan component. While inelegant (the standard brings in direction from the MMPs that normally would not qualify as a Forest Plan component, such as analysis, assessment, and monitoring (see Forest Service Handbook 1909.12, 22.13[4]), it is not a policy violation. However, because it creates some confusion, this should be readdressed during the upcoming Manti-La Sal Land Management Plan revision.

The protestors correctly note that the BLM issued the initial scoping notice on January 16, 2018, including a statement that “to be most helpful, and to ensure inclusion in the Draft EIS, you should submit comments prior to the close of the 60-day scoping period or 15 days after the last public meeting, whichever is later.” The protestors explain that this calculation meant that the BLM was requesting comments by April 11, 2018. Meanwhile, the USFS issued a legal notice on March 13, 2018 (as cited above) and a *Federal Register* notice on April 10, 2018. The protestors allege that the net effect is that they had only 1 day to respond to the information in the USFS notice prior to the BLM’s deadline.

At issue is the identification in the March 13 and April 10, 2018, notices of the “substantive requirements” of the planning rule (36 CFR § 219.8 through 219.11) that are directly related to the associated Forest Plan amendment (if needed), and which would govern the analysis in the Draft EIS. The protestors allege that the 1-day timeframe was insufficient to comment on this information (although the legal notice appeared earlier than the *Federal Register* notice). However, this is not a violation of the USFS planning regulations. There are no timeframes specified in the regulations, and the responsible official may combine processes and associated public notifications where appropriate (36 CFR § 219.13[b][2]).

While there are no violations of law, regulation, or policies, there was a lack of clarity about the decision and how the decision would be incorporated into the overriding Manti-La Sal Land Management Plan. This should be addressed in the USFS ROD, and the upcoming Manti-La Sal Land Management Plan revision would provide appropriate public engagement. Accordingly, this protest is denied.

## **Other Laws – Omnibus Public Land Management Act of 2009/National Landscape Conservation System**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** BLM has not compiled or developed enough information or scientific evidence to assure there is no harm to monument objects, and we do not believe the BLM has identified a plan to ensure against it. The Proposed MMPs is too vague and relies overmuch on future actions to solve problems without any evidence of the efficacy of those actions. The Proposed MMPs fails to meet the requirements of the NLCS and various NEPA requirements.

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** The final MMP fails to meet standards for national monuments and units of the system for two distinct reasons: 1) The MMP states it will continue multiple uses, whereas National Conservation Lands and monuments should be managed to Conserve, protect and enhance the resources they were designated to protect: and 2) The MMP provides more flexibility in management prescriptions and maintains similar or increased recreation management levels, whereas the National Conservation Lands and monuments should be managed to only allow uses that further conservation, protection and enhancement of the natural resources the areas were designated to defend. As explained in detail above, the Proposed MMPs does not provide adequate protection for the conservation, protection, and enhancement of the monument objects and thus also violates BLM's mandate to protect and conserve units of the National Conservation Lands.

**Summary:**

The BLM and USFS violated the OPLMA in two ways:

1. The Proposed MMPs/Final EIS does not rely on adequate scientific information to assure there will be no harm to BENM objects and values; and
2. The Proposed MMPs/Final EIS does not provide adequate protection for the conservation, protection, and enhancement of the BENM objects and values and thus violates the law's mandate to protect and conserve units of the NLCS for the purposes for which they were designated.

**Response:**

The FLPMA, as amended, governs the BLM's management of public lands. The FLPMA provides that the BLM "shall manage the public lands under principles of multiple use and sustained yield ... except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." 43 U.S.C. 1732(a). The designation of the BENM by Proclamation 9558, as modified by Proclamation 9681, reserved the lands to provide for the proper care and management of the Monument's objects and values and directed the BLM to provide for the proper care and management through compliance with applicable legal authority, such as the FLPMA and the OPLMA.

Established by Congress in the OPLMA (Section 2002 of Pub. L. 111-11), the NLCS - or National Conservation Lands – is a permanent system of public lands conservation with the stated purpose to "conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations." 16 U.S.C. § 7202(a). As defined by the OPLMA, the NLCS is comprised of a number of different Presidential and Congressional designations, including National Monuments, National Conservation Areas, Wilderness Study Areas, and designated wilderness, among others. 16 U.S.C. § 7202(b). Each of these designations include an array of different management requirements for the BLM, recognizing that, the OPLMA directs the BLM to manage each component of the NLCS in in accordance with any applicable law relating to that specific component of the system and in a manner that protects the values for which the area was designated. 16 U.S.C. § 7202(c). Further, the OPLMA states that nothing in Section 2002 enhances, diminishes, or modifies any law or proclamation under which a NLCS component is established or managed, including the FLPMA. 16 U.S.C. § 7202(d). The BENM was designated under the Antiquities Act; therefore under the OPLMA the BLM is required to manage the BENM to provide for the care and management of the Monument objects and values identified in Proclamation 9558, as modified by Proclamation 9681. While the more general language in the OPLMA relating to the purpose of the NLCS provides a number of goals for the management of all system components, the more specific management language makes it clear that BLM's management responsibilities are not enhanced beyond the requirements of the Antiquities Act, designating proclamations, and FLPMA.

Secretarial Order 3308 speaks to the management of National Conservation Lands. The Order states in pertinent part that “the BLM shall ensure that the components of the NLCS are managed to protect the values for which they were designated, including, where appropriate, prohibiting uses that are in conflict with those values.” Secretarial Order 3308. The Order also requires the incorporation of science into the decision-making process for National Conservation Lands, stating, “[s]cience shall be integrated into management decisions concerning NLCS components in order to enhance land and resource stewardship and promote greater understanding of lands and resources through research and education.” *Id.* § 4(d); see also BLM Manual 6100, § 1.6(A)(9) & (F) (BLM must “use the best available science in managing NLCS units”); BLM Manual 6200, § 1.6(A)(7) & (M) (same). BLM’s 15-Year Strategy for the National Conservation Lands discusses utilizing large-scale assessments, such as BLM’s Rapid Ecoregional Assessments, to identify how to connect and protect resources at the landscape-level.

The CEQ regulations implementing the NEPA require that agencies use “high quality information” (40 CFR 1500.1(b)). The NEPA regulations require the BLM to “ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements” (40 CFR 1502.24). The BLM NEPA Handbook also directs the BLM to “use the best available science to support NEPA analyses and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed” (BLM Handbook H-1790-1, p. 55). Under the BLM’s guidelines for implementing the Information Quality Act, the BLM applies the principle of using the “best available” data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

During the planning process, the BLM staff, including scientists and NEPA specialists, reviewed both known and new studies related to the proper care and management of Monument objects and values in the planning area, and considered how these sources informed the planning decisions and environmental conditions in the BENM (see Literature Cited). The BLM staff also reviewed any new information and studies identified in the public comments received to determine if the information is substantially different than the information considered and cited in the Draft MMPs/EIS. Generally, the BLM determined that studies identified by the public did not offer information that changed the analysis of the Proposed MMPs/Final EIS and did not offer any new conditions or other information the BLM had not already considered; however, the BLM made updates to the Proposed MMPs/Final EIS as appropriate based on the sources provided.

To meet the purpose of and need for the plans, all action alternatives must be compatible with the proper care and management of the Monument objects and values outlined in Presidential Proclamation 9558, as modified by Presidential Proclamation 9681. In completing the Proposed MMPs/Final EIS, the BLM relied on high-quality information from a large number of sources to ensure that the agency used the best available science to fully analyze the impacts of plan decisions on the objects and values present in the BENM. As a result of that analysis, the agency determined that all action alternatives presented in the Proposed MMPs/Final EIS provide for the proper care and management of Monument objects and values as required by Proclamation 9558, as modified by Proclamation 9681.

These alternatives also provide for a range of multiple uses to the extent that they are consistent with the proper care and management of Monument objects and values. While the designating proclamations provide for a number of management requirements, including the overarching requirement to provide for the care and management of monument objects and values, in some circumstances those Proclamations lacked specific management direction to the agency. In the absence of such direction, the BLM has discretion in making management decisions. In other cases, the Proclamations provided the agency with more discretion for managing multiple uses, such as explicitly exempting livestock grazing from the restrictions of the proclamations or identifying “world class recreation” as integral to the character of the monument. Therefore, in making management decisions for the BENM the BLM properly sought to balance protection of the objects and values with its desire to allow the public to enjoy and make

beneficial use of the lands and resources. Using the best available science, as discussed above, the BLM established a framework that will recognize the important relationships and interdependencies among the Monument's resources, while providing for the protection of the Monument objects and values in a manner that avoids and minimizes conflicts between resources and uses and therefore protects the values for which the monument was designated in accordance with the OPLMA.

As detailed in the Final EIS, the Proposed MMPs/Final EIS provides for the proper care and management of Monument objects and values as directed by Proclamation 9558, as modified by Proclamation 9681. In areas where the BLM has discretion under the proclamations, the agency provided opportunities for other multiple uses while ensuring that the plan would minimize or avoid conflicts between public use and the protection of monument objects.

Therefore, for the reasons stated above, this protest is denied.

## **Other Laws – American Indian Religious Freedom Act/Religious Freedom Restoration Act**

*The Wilderness Society et al.*

*Katie Meehan et al.*

**Issue Excerpt Text:** The agencies failed to acknowledge, accommodate, and respect unique interests and traditions of the various American Indian Tribal Sovereign Nations that are interested in the management of the monument. The identification of a single site within the monument for all Tribes to conduct ceremonies and gatherings, while subjecting additional site approvals to review on a case-by-case basis, unreasonably burdens the Tribe's access to sacred sites and performance of religious ceremonies. This is in violation of AIRFA, Executive Order 13007, and the Religious Freedom Restoration Act. The agencies may not mandate any requirements that limit a Tribe's ability to exercise its rights under AIRFA, Executive Order 13007, the Religious Freedom Restoration Act, and status as a sovereign nation. It is illegal and unethical for the agencies to require Tribes to disclose sensitive information about location of sacred sites and ceremonies in order for case-by-case approval.

*Bears Ears Inter-Tribal Coalition*

*Natalie Landreth et al.*

**Issue Excerpt Text:** Finally, the American Indian Religious Freedom Act (AIRFA) establishes the “policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” 42 USC § 1996. “AIRFA requires federal agencies to evaluate their policies and procedures with the aim of protecting Indian religious freedom, to refrain from prohibiting access, possession and use of religious objects and the performance of religious ceremonies, and to consult with Indian organizations in regard to proposed actions.” *Wilson v. Block*, 708 F.2d 735, 745-46 (D.C. Cir. 1983). To comply with AIRFA, an agency must “obtain and consider the views of Indian leaders” and “avoid unnecessary interference with Indian religious practices.” *Id.* at 747. Similarly, Executive Order 13007 provides that agencies “shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.” 61 Fed. Reg. 26771 (May 24, 1996); see also *Te-Moak Tribe [w. Shoshone Indians of Nevada v. Us. Dep’t of the Interior*, 565 F. App’x 665, 667 (9th Cir. 2014) (citing 43 USC § 1732(b); 43 CFR § 3809.5).

In addition, the [Religious Freedom Restoration Act] provides that governmental activity may not substantially burden a person's free exercise of religion unless the activity is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 USC §

2000bb-1(a), (b). The Proposed MMPs and FEIS fail to meet these standards by purporting to set as side one single site for "permitted gatherings" with no regard to what sites the Tribes actually use. This is clearly a substantial burden without justification. Moreover, Tribes often keep such locations private as required by their beliefs and in order to protect the sites, and allowances must be made in any Proposed MMPs for this practice. None of these religious or ceremonial concerns are addressed in the PMMP/FEIS.

**Summary:**

The agencies violated the American Indian Religious Freedom Act and Religious Freedom Restoration Act by identifying a single site within the BENM for all Tribes to conduct ceremonies and gatherings, while subjecting additional site approvals to review on a case-by-case basis, which unreasonably burdens the Tribe's access to sacred sites and performance of religious ceremonies.

**Response:**

The American Indian Religious Freedom Act establishes the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites" (42 USC § 1996). Similarly, Executive Order 13007 provides that agencies "shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites" (61 Federal Register 26771, May 24, 1996).

The Religious Freedom Restoration Act provides that governmental activity may not substantially burden a person's free exercise of religion unless the activity is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest (42 USC § 2000bb-1[a-b]).

The BLM and USFS did not violate the Religious Freedom Restoration Act or American Indian Religious Freedom Act with the management actions identified in Alternative E (the Proposed MMPs); however, the protests demonstrate the need to clarify the language in question. The protests identified the following goal and objective for Alternative E (the Proposed MMPs) that has been understood differently than was the intent of the BLM and USFS, or from what was assumed for analysis in the Proposed MMPs/Final EIS: "Identify an appropriate site as a ceremonial ground and Tribal learning center for permitted gatherings, and facilitate the use of other sites for ceremony on a case-by-case basis" (see Proposed MMPs/Final EIS, p. 2-5). The BLM and USFS clarify the intent behind this goal and objective by splitting it into two parts. The intent is to make clear that the agencies are not identifying a single site within the BENM for all Tribes to conduct ceremonies and gatherings, while subjecting additional site approvals to review on a case-by-case basis.

First, the Tribal learning center and ceremonial ground identified on Proposed MMPs/Final EIS page 2-5 is intended to be an educational center and gathering space available for Tribes to use for educational purposes within their communities, such as with youth groups or for meetings with Tribal elders. The Tribal learning center would also provide a dedicated space for ceremonies associated with the educational use, or as desired to be used by the Tribes. The agencies would consult with American Indian Tribes to identify an appropriate location for the learning center.

Second, separate from the Tribal learning center and ceremony grounds, the BLM and USFS would endeavor to facilitate the use of BLM-administered lands and National Forest System lands, respectively, within BENM for Tribal religious and cultural ceremonies when provided information concerning the timing and location of religious and cultural ceremonies in advance. The agencies would facilitate this use through the management of other resources that may present conflicts with any scheduled Tribal religious or cultural ceremonies, including, for example, temporarily closing or restricting public use to the area



necessary for the Tribal ceremony. Tribes are not required to provide the BLM and USFS with timing and location information in order to hold religious and cultural ceremonies within the BENM, but the agencies can only implement protections to facilitate ceremonies when Tribes inform them.

The BLM revised the goal and objective from the Proposed MMPs/Final EIS for the Approved MMP to reflect these clarifications as follows:

- **Goal and Objective:** Identify an appropriate location for a Tribal learning center and ceremony grounds to facilitate educational opportunities within Tribal communities with youth groups, elders, or other similar groups.
- **Goal and Objective:** Facilitate American Indian Tribal use of sacred sites or other sites within the BENM for ceremonies and gatherings as identified by Tribes.

The BLM will also add the following new management action:

- **Management Action:** CUL-16: When identified by Tribes as necessary for ceremonies and gatherings, implement actions to minimize potential conflicts with other resource uses that could interfere with ceremonies and gatherings. All sensitive cultural information will be kept confidential and safeguarded from public release.

The BLM will include this revised, clarified language in the Approved MMPs.

As described above, the BLM and USFS did not violate the American Indian Religious Freedom Act/Religious Freedom Restoration Act with the goals and objectives identified in Alternative E (the Proposed MMPs). The agencies clarified the intent and assumptions for analysis of the goal and objective and will revise the goal and objective to more clearly describe the intent in the Approved MMPs. For these reasons, this protest is denied.

## **Other Laws – Archaeological Resources Protection Act**

*Conservation Lands Foundation et al.*

*Danielle Murray et al.*

**Issue Excerpt Text:** The MMP fails to identify which areas BLM would prioritize for inventory and lacks a schedule for completing the inventories. Section 14 of the Archaeological Resources Protection Act (ARPA) is unequivocal here-BLM must develop a plan and schedule for "surveying lands that are likely to contain the most scientifically valuable archaeological resources..." The MMP's future plan to prepare a cultural resources plan in no way satisfies the discrete requirements of Section 14.

### **Summary:**

The BLM and USFS violated the ARPA, as the Proposed MMPs/final EIS fails to identify which areas the BLM would prioritize for inventory and lacks a schedule for completing the inventories.

### **Response:**

Section 14 of the ARPA states that, "the Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority shall — (a) develop plans for surveying lands under their control to determine the nature and extent of archaeological resources on those lands; (b) prepare a schedule for surveying lands that are likely to contain the most scientifically valuable archaeological resources; and (c) develop documents for the reporting of suspected violations of this Act and establish when and how those documents are to be completed by officers, employees, and agents of their respective agencies."

The BLM and USFS appropriately addressed inventories of resources subject to management under the ARPA. The ARPA is applicable to the Secretary of the Department of the Interior and compels the Secretary to develop procedures for managing archaeological collections. It was enacted to strengthen permitting procedures required for conducting archeological fieldwork on federal lands, originally mandated by the Antiquities Act.

All archaeological investigations on federal lands must be conducted under a permit issued under either the ARPA or the Antiquities Act. Under the NEPA, the agencies are describing and analyzing issues at the land-use planning level. Permitting issues under the ARPA would instead arise at the implementation level. As such, issues related to the ARPA are not in the scope of those relevant to the current planning effort.

In addition, while ARPA Section 14 does impose an obligation to develop a schedule for surveying lands for archaeological resources, that section does not impose a specific timeframe for doing so. In that respect, the obligation in ARPA Section 14 is like the obligation in FLPMA Section 201 to maintain an inventory of all public land and their resources. They are both ongoing obligations, and the BLM violates neither by failing to lay out exactly how the BLM will comply with them in a land use plan.

The BLM and USFS appropriately addressed inventories of resources subject to management under the ARPA. For the reasons stated above, this protest is denied.