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Sent Via Electronic Mail
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RE: Protest of Bureau of Land Management's Sutey Ranch Land Exchange

INTRODUCTION AND BACKGROUND

Through undersigned counsel, the Colorado Wild Public Lands Inc. (CWPL) hereby protests the June 20, 2014 decision of the Bureau of Land Management (BLM) to approve the Sutey Ranch-BLM Land Exchange (the "Land Exchange"), including the offer to donate land to the federal government. The parties to the Land Exchange are BLM and Leslie and Abigail Wexner (the proponents). The Land Exchange involves six parcels of Federal lands (referred to as Parcels A, B, B-1, C, D and E) and two parcels owned by the proponents (referred to as Parcels 1 and 2). In connection with this Land Exchange, BLM reviewed the environmental impacts under the National Environmental Policy Act (NEPA) in an environmental assessment and finding of no significant impact, and contracted with an appraiser to determine the market value of the private and federal parcels. This protest raises issues under the Federal Land Policy and Management Act (FLPMA), its regulations, BLM's Land Exchange Handbook, and NEPA, as well as standards set forth under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Because the Land Exchange does not comply with these laws, BLM should rescind its approval.

This protest is filed pursuant to, and under the authority of, 43 C.F.R. § 2201.7-1(b), § 2201.7-2 and the Bureau of Land Management's Land Exchange Handbook (H-2200-1) Chapter 9(F). In accordance with BLM's regulations (43 C.F.R. § 2201.7-2) and the agency's notices to

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the public on its webpage and in its June 20, 2014 press release, the filing of this protest by CWPL stays implementation of the Land Exchange. As a result, the exchange of the various parcels involved in BLM's decision cannot be completed until this protest and, if filed, an administrative appeal to the Interior Board of Land Appeals are resolved. CWPL files this protest to ensure it exhausts administrative remedies, to the extent exhaustion is required to challenge a BLM land exchange.

INTERESTED PARTY: COLORADO WILD PUBLIC LANDS INC.:

Colorado Wild Public Lands Inc. was formed in 2014 and is operating as a 501(c)(3) non-profit corporation. CWPL's business address P.O. Box 590, Basalt, Colorado 81621, and the telephone number is 970-948-0771.

CWPL's mission is to protect the integrity, size and quality of the public lands in Colorado from diminution by private interests. CWPL's members are concerned citizens who value our public lands and waters for their recreational use, for providing habitat for wildlife and their wild-land character, as well as their economic assets. CWPL advocates for economically and environmentally sensible management of the public lands and related resources and assets. Through the monitoring of public land transactions, decision-making, and management, CWPL advocates for retention of public land assets, access to these lands, to maintain their ecological integrity and for the true economic value of public lands.

CWPL and its members use and enjoy the federal lands at issue in the Land Exchange and lands adjacent to the private lands that are the subject of the Land Exchange for recreational, educational, aesthetic and conservation purposes. CWPL members, including Anne Rickenbaugh, Hawk Greenway, Francis and Heather Froelicher, Chuck Downey, Diane Kenney, Helene Gude and John McCormick, have provided comments on the Land Exchange, at both the scoping stage and on the draft environmental assessment. The Land Exchange will harm CWPL and its members' interests by conveying accessible public lands to private ownership, by not ensuring the former federal lands are managed to protect natural resources, and by stressing existing BLM management budgets in relation to newly-acquired lands. The Land Exchange injures CWPL and its members because it is poor public policy, violates federal law, and results in the loss of valuable public lands. Voiding the Land Exchange will remedy the injuries to CWPL and its members.

STATEMENT OF THE ISSUES TO BE RESOLVED THROUGH THIS PROTEST

I. VIOLATIONS OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT

A. Legal and Factual Background

The Land Exchange must conform to FLPMA (43 U.S.C. § 1701 *et seq.*), applicable regulations (including 43 C.F.R. §§ 2201 *et seq.*), and BLM's Land Exchange Handbook. Section 205 of FLPMA authorizes BLM to acquire lands by exchange or donation. 43 U.S.C. § 1715(a). Here, BLM is proposing to acquire the Sutey Ranch through an exchange and donation. Section 206 permits BLM to "dispose" public lands through a land exchange. *Id.* § 1716(a). Land disposal, however, must be in the "public interest," which means it provides for better federal land management and serves the needs of the public. *Id.*; *id.* § 1701(a)(1) (land disposal must "serve the national interest"). Parcel A is adjacent to the privately-held Two-Shoes Ranch and will be disposed as part of the proposed Land Exchange.

BLM must receive "fair market value" for lands being disposed. 43 U.S.C. § 1701(a)(9). Market value means the "probable price" in a "competitive and open market" where parties are "prudent and knowledgeable," and the "price is not affected by undue influence." 43 C.F.R. § 2200.0-5(n). In establishing market value, BLM is required to, among other things, (1) "determine highest and best use of the property" and (2) assume private ownership. *Id.* § 2201.3-2(a). As defined by the Uniform Appraisal Standards for Federal Land Acquisitions, the "highest and best use" is what is physically possible, legally permissible, financially feasible, and provides the highest value. *See id.* § 2201.3.

In addition to ensuring lands are valued at market prices, BLM may only conduct a land exchange provided the properties are "equal value." 43 U.S.C. § 1716(b). To ensure this requirement is met, appraisals on all properties are performed. *Id.* § 1716(d)(1). As detailed in the regulations, "lands or interests to be exchanged shall be of equal value or equalized in accordance with the methods set forth in § 2201.6 of this part." 43 C.F.R. § 2200.0-6(c). These equalization methods include modifying or eliminating certain lands from a proposed exchange, and the use of cash equalization payments. *Id.* § 2201.6(a). A cash equalization may not "exceed 25 percent of the value of the Federal lands to be conveyed." *Id.* § 2201.6(b).

All properties involved in the Land Exchange underwent an appraisal. The appraisals were effective as of November 2012. They were not released and made available during the public comment period on the draft environmental assessment (April 29, 2013). Because the properties are not equally valued based on the appraisals, Parcel 1 (Sutey Ranch) was split into Parcels 1A and 1B, whereby Parcel 1A was part of the exchange and Parcel 1B was offered to BLM as a donation. This splitting of Parcel 1 occurred during BLM's administrative process and after circulating the draft environmental assessment for public review and comment.

B. Statement of Issues Protesting

1. The Appraisals Should Be Revised Because They Were Prepared in November 2012

Chapter 9, Section J of the BLM Land Exchange Handbook states that appraisals are valid for “about six to twelve months from the effective date of the value opinion.” The Handbook’s timeframes for valid appraisals are particularly important in the Roaring Fork Valley. The real estate market in this area is extremely volatile and has changed between the time of the original appraisals in November 2012 and BLM’s decision to approve the Land Exchange in June 2014. Indeed, the local market is subject to unique drivers, including extraordinary real estate values, limited available private land, a very restrictive development code, and a high demand from very affluent people.

Here, all the appraisals prepared for the Land Exchange are outdated under BLM’s Land Exchange Handbook and cannot be relied upon to support BLM’s findings under FLPMA of fair market and equal value. See 43 U.S.C. § 1701(a)(9); § 1716(b). The appraisal associated with Parcels A, B and B-1 is from November 2012. It should be re-done to reflect the current market conditions before the Land Exchange is completed.

The original appraisal for Sutey Ranch is also older than 12 months (effective as of November 2012). BLM performed a “supplement” to the appraisal in August 2013, but this did not update market conditions. Rather, the supplement simply divided the value of Parcel 1 (Sutey Ranch) into two parcels, whereby Parcel 1A is the exchange parcel and Parcel 1B is the donation parcel. The supplement did not involve any new or updated assessment of current market conditions or value, but merely calculated values for the two newly-divided parcels based on the same price-per-acre (\$9,500/acre) used in the November 2012 appraisal. Based on the BLM’s decision date of June 2014, the market values employed for the private lands are older than 12 months and should be updated.

On a related issue, in a memorandum dated November 5, 2013, the appraiser purports to have reviewed market values relevant to the Sutey Ranch, and verbally informed BLM in phone conversation that an additional appraisal took place. DOI Memorandum, Nov. 5, 2013. According to this BLM document, the appraiser determined that, “based on the more current market analysis and other general appraisal work [],” “the current market still accurately reflects the values previously reported.” *Id.* at 1. Under Uniform Standards of Professional Appraisal Standards, this new verbal appraisal is subject to all development and reporting requirements (Standards 1 and 2), but the November 5, 2013 verbal appraisal did not comport with these requirements. As USPAP Advisory Opinion 3 states: “Regardless of the nomenclature used, when a client seeks a more current value or analysis of a property that was the subject of a prior assignment, this is not an extension of that prior assignment that was already completed, it is

simply a new assignment.” This means that the new appraisal for the Sutey Ranch described in BLM’s November 5, 2013 memorandum must be redone: it must adhere to applicable standards and requirements, its conclusion must be memorialized in new appraisal reports, and it must reflect any changes in the market and/or subject properties.

2. The Selected Highest and Best Use of Sutey Ranch In The Appraisal Does Not Reflect BLM’s Intended Use of this Property

As set forth in BLM regulations, market value is to be based on the “highest and best use of the property being appraised.” 43 C.F.R. § 2201.3-2(a). “Highest and best use means the most probable legal use of the property, based on market evidence as of the date of valuation.” *Id.* § 2200.0-5(k). This phrase is defined in the appraisal as “the reasonably probable and legal use of vacant land or improved property that is physically possible.” Appraisal at 28. The “use conclusion must be clearly supported by market evidence, with the burden of proof on the appraiser if this differs from the existing use of the subject property.” *Id.*

The appraisal determined that the highest and best use of Sutey Ranch was “rural residential development, versus just agricultural production value.” Supplemental Appraisal for Sutey Ranch Parcels (Aug. 2013). BLM’s review of the Supplemental Appraisal states that “the Highest and Best Use for both Parcel 1A and Parcel 1B remains rural residential development with year-round home sites with a minimum lot size of six to 35 acres.” BLM Supplemental Appraisal Review Report at 1. The appraisal’s \$9,500 per acre valuation was based on the property being used for a rural residential development. *Id.* (“concluded a value per acre of \$9,500 per acre based on the potential for rural subdivision”).

However, BLM’s most probable and reasonable use of the Sutey Ranch parcels is recreation and agriculture, not rural residential development. Both Parcels 1A and 1B are adjacent to the Red Hill Special Recreation Management Area, which is public land managed by BLM. BLM’s rationale for acquiring Sutey Ranch in the Land Exchange relates to recreational opportunities. As BLM states in its Public Interest Determination: “The non-Federal lands have county road access and provide more recreational opportunities and public benefits than the Federal lands. BLM’s Decision Record at 2. More specifically, “non-Federal Parcel 1 has high recreational values because it is adjacent to the BLM’s Red Hill Special Recreational Management Area, a popular network of non-motorized trails.” *Id.* (“The BLM expects the exchange to enhance recreational opportunities for the public with improved access to public lands, including the popular Red Hill SRMA”). BLM readily acknowledges that recreation is the expected future use of the Sutey Ranch, claiming the existing recreational management plan for the Red Hill SRMA “provides a justifiable template for how these lands might be managed should the land exchange be approved.” Final EA at 2-5, n.18. Similarly, the Final EA touts the fact that Sutey Ranch “has high disperse recreation values because it is adjacent to a popular non-motorized trail network on BLM Lands in the Red Hill SRMA.” Final EA at 1-2 – 1-3.

Further, the proponents agreed, as part of the Land Exchange, “to fund the development and implementation of a site-specific management plan to manage, protect and enhance resources on the non-Federal lands upon acquisition by the United States of America.” Decision Record at 6; see also Final EA at 2-4 – 2-5 (describing purpose of monies donated for management plan and long-term management). In short, the appraisal should be redone to assess Sutey Ranch’s market value based on BLM’s anticipated use of the property. The existing appraisal of Sutey Ranch was based on the wrong use.

The courts have ruled that BLM’s required findings under FLPMA must be based on intended use of the lands involved and the laws applicable to those lands. Two related Ninth Circuit decisions underscore the importance of evaluating the market value based on future intended uses. In Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir. 2000), a land exchange involves federal lands that had been used for mining. However, because these lands were going to be used as a landfill, the court ruled that the appraisal was required to determine market value based on its use as a landfill, and not a mine. Desert Citizens Against Pollution, 231 F.3d at 1181-83. The court set aside the land exchange because the appraisal valued the land as a mine site or open space. Id. Several years later, the same proposed land exchange was before the Ninth Circuit. NPCA v. BLM, 606 F.3d 1058 (9th Cir. 2010). Again, the court ruled that, although the intended use of federal parcel was still a landfill, the appraisal wrongly valued the parcel as though it would continue to be a mine or as open space. Id. at 1067-69. Citing its prior decision, the Ninth Circuit ruled that “the use of the land as a landfill was not only reasonable, it was the stated intent of the exchange.” Id. at 1068.

Relatedly, BLM cannot ignore the laws that will be applicable to the lands being exchanged. In Ctr. for Biological Diversity v. U.S. Dep’t of Interior, BLM entered into a land exchange with a mining company. 623 F.3d. 633 (9th Cir. 2010). In rendering its FLPMA public interest determination, BLM ignored the disadvantages of the land exchange, including the fact that the public lands turned over to the mining company would no longer be subject to federal land laws (such as FLPMA). Id. at 646-47. The court explained: “[t]he manner in which Asarco engages in mining on the selected lands is likely to differ depending on whether the land exchange occurs, and the environmental consequences will differ accordingly.” Id. at 647. As a result, the court held BLM’s analysis of and conclusion regarding the “public interest” under 43 U.S.C. § 1716(a) were flawed and illegal. Id.

As these cases demonstrate, the appraisal of the Sutey Ranch property is flawed because it was based on current uses, rather than the uses and consequences of the Land Exchange. It is undisputed that BLM intends to use these parcels for recreation, and not for residential development. Accordingly, the appraisal and the land exchange should be set aside and remanded to evaluate Sutey Ranch’s market value based on BLM’s intended use of this property.

3. The Donation of Sutey Ranch Parcel 1B Violates FLPMA's Equal Value Rules

FLPMA requires that the lands to be exchanged must be "of equal value." 43 U.S.C. § 1716(b); 43 C.F.R. § 2200.0-6(c). The values may be "equalized" by modifying the lands involved in the land exchange and through cash equalization payments. 43 C.F.R. § 2201.6(a)-(c). Cash equalization payments cannot exceed 25% of the value of the federal parcels. Id. § 2201.6(b).

Based on the appraisals, the market value of the Sutey Ranch and its 556 acres significantly exceeds the market value of the federal parcels (Parcels A, B and B1). The value of the non-federal lands, including Sutey Ranch, totaled \$6,240,000; the federal lands included in the Land Exchange amounted to \$4,000,000.

To address the equal value requirement for Sutey Ranch, BLM's Feasibility Report anticipated a cash equalization payment or waiver would be needed to address the difference. Feasibility Report at 6. However, a cash equalization payment was unavailable because the difference (\$2,240,000) exceeded the 25% limit. The 3% waiver also could not be used to achieve equal value. See 43 C.F.R. § 2201.6(c).

At some point during the administrative process, BLM and the proponent agreed to divide Sutey Ranch into two, whereby Parcel 1A would be valued at \$3,050,00 and Parcel 1B at \$2,240,000, and claim Parcel 1B was no longer part of the Land Exchange. Parcel 1B would be donated to BLM instead, and thus transferred to BLM as contemplated by the Land Exchange.

This arrangement is illegal and circumvents the rules that ensure that the properties included in a land exchange are of equal value. Dividing Sutey Ranch at this stage of the administrative process and characterizing Parcel 1B as a donation is an abuse of discretion and is not legally authorized. FLPMA does not allow the use of donations to be part of a Land Exchange. Rather, the regulations permit limited cash equalization payments and, in some circumstances, waivers of cash equalizations so that land exchanges are equal value. See 43 C.F.R. § 2201.6(b) & (c). BLM cannot bypass this regulatory restriction simply by purporting to accept Parcel 1B as a donation. The donation is plainly part of the Land Exchange: but for the Land Exchange, the proponents would not be divesting themselves of a portion of the Sutey Ranch and donating it to BLM.

4. The Market Value Determined for "Parcel A" In The Appraisal Is Flawed

The appraisal for Parcel A is deficient in several respects. First, the appraisal finds that the market value of Parcel A is detrimentally affected by a lack of access. Two Shoes Appraisal at 12 ("there is no vehicle access to the subject property"); id. (noting "private roads that traverse

the holding are controlled by the proponent”); id. (adjusting downward to account for lack of access). The appraisal further claims that “the highest and best use of the subject property is limited to agriculture and/or recreation due to the lack of vehicle access.” Id. at 31.

The appraisal’s finding on access is false, and unsupported by available evidence. Once Parcel A is included within the proponents’ Two Shoes Ranch, Parcel A will be more accessible than it is currently. The private ranch has access to Parcel A through existing roads (ex. from Prince Creek Road, across proponent’s land). Parcel A will thus have the same access as other portions of the Ranch. See BLM Appraisal Review at 5 (“Each parcel has seasonal vehicular access from private roads from adjoining Two Shoes Ranch.”). Moreover, Parcel A has potential access from the north through an existing residential subdivision with seven privately-owned parcels adjacent to Parcel A. The appraisal makes no mention of these potential access points to Parcel A. Accordingly, claiming Parcel A lacks access is contradicted by the facts and evidence before the agency. The appraisal, therefore, should have valued the property as though it has suitable access, consistent with the purpose of the Land Exchange and property’s intended use. See Desert Citizens Against Pollution, 231 F.3d at 1181-83; NPCA, 606 F.3d at 1068; Ctr. for Biological Diversity, 623 F.3d. at 646-47.

Second, BLM’s appraisal chose a market value of \$2,500 per acre based on six comparable sales. In doing so, however, the appraisal ignored the values associated with the Two Shoes Ranch. That is, the proponents of the Land Exchange purchased two base properties to create the Two Shoes Ranch, which total 4,186 acres, between 2002 and 2006. These properties were acquired at a purchase price of \$15,525/acre, totaling approximately \$65,000,000. The appraisal ignores these acquisitions, their relationship to the proponents of the Land Exchange, and fact that these parcels are adjacent to, and physically similar to, Parcel A. The appraisal does not discuss these relevant and related acquisitions, which occurred within the same timeframe as the comparable sales used in the appraisal.

Similarly, the proponents also bought a related and nearby property of 140 acres, which was sold twice in recent years for \$8,571/acre in 2005 and \$13,928/acre in 2010. (A portion of this 140-acre parcel is part of the Land Exchange - Parcel 2). The appraisal uses the 2005 acquisition as a comparable sale, but not the more recent sale to the proponent. The appraisal does not explain credibly why the more recent 2010 transaction was not used as a comparable sale, especially considering it involved the same party as in the Land Exchange.

A third flaw in the appraisal for Parcel A is that it failed to consider an exclusive ranch retreat as the highest and best use of this property. In conclusory fashion and without explanation or support, the appraisal dismisses this high value use, which is a typical use in the Roaring Fork Valley and the use intended by the Land Exchange. See Desert Citizens Against Pollution, 231 F.3d at 1181-83; NPCA, 606 F.3d at 1068; Ctr. for Biological Diversity, 623 F.3d. at 646-47. Further, while the appraisal maintains that the “only logical buyer” of Parcel A is

Two Shoes Ranch (Appraisal at 12), the appraisal fails to explain why the private parcels to the north of Parcel A would not be willing and able buyers. In addition, whereas the appraisal rejects the use of Parcel A as an exclusive ranch retreat due to a lack of access, private access through the Two Shoes Ranch or the subdivision to the north could provide access. Moreover, the appraisal relies on existing land use designations and restrictions, yet ignores county exemptions processes and the potential for zoning changes initiated by landowners and achieved through negotiations or litigation.

Fourth, BLM's appraisal for Parcel A (1,240 acres) was limited to assessing this BLM property, ignoring the value resulting from combining Parcel A with the existing Two Shoes Ranch. Two Shoes Ranch is private property that surrounds and is contiguous with Parcel A, and the only reason the private proponents is engaged in the Land Exchange is to enlarge its existing private ranch by adding Parcel A. With the Land Exchange, the proponents will own a significantly larger piece of property that will no longer be bifurcated by federal land. Nonetheless, the appraisal does not consider this added value to the proponents and their Two Shoes Ranch. See Land Exchange Handbook at 7-3, Section D(7) (requiring "discussion addressing the value impacts of the proposed exchanges on adjoining or related properties"). Rather, the appraisal limits the value of Parcel A to agriculture and/or recreation, ignoring the value flowing to Parcel A from its relationship with the Two Shoes Ranch. Appraisal at 31.

Lastly, the appraisal arbitrarily discounts the market values of the comparable sales parcels. The appraisal's reasons for the various downward adjustments lack support and/or explanation. For example, in the appraisal for Parcel A, comparable sale #2 employs a 75% reduction based on a purported market decline and lack of access. Yet, the record shows that the purchasers acquired access shortly thereafter, as was anticipated, such that a lack of access did not justify the 50% discount used in the appraisal.

5. The Land Exchange Was Not Envisioned In BLM's Planning Documents

FLPMA, section 205(b) states that land acquisitions "shall be consistent with the mission of the department involved *and with applicable departmental land-use plans.*" 43 U.S.C. § 1715(b) (emphasis added). Relatedly, FLPMA and its regulations require that all site-specific actions, including land exchanges, are consistent with the applicable resource management plans. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a) ("All future resource management authorizations and actions . . . shall conform to the approved plan."); Id. § 1601.0-5(b) (defining conformity as "a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment"); Id. § 1601.0-5(c) (defining consistent as requiring that management actions "will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans"). Further, BLM's Land Exchange Handbook states that BLM must consider land exchanges that "meet needs identified in the land use planning

documents.” Land Exchange Handbook at 1-8, Section G(1)(c). Similarly, for proposals designed by third party facilitators, like the Western Land Group, the lands involved must be reflected as priorities in the applicable land use plan. Land Exchange Handbook at 1-13, Section G(7(a); see also Land Exchange Handbook at 1-8 (land exchange proposals must reflect BLM’s needs and priorities).

Nothing in the applicable resource management plan (the RMP for the Glenwood Springs Field Office) identifies the Sutey parcels for acquisition. Indeed, BLM notes the RMP did not even address land acquisition generally, let alone the specific Sutey Ranch property. BLM Decision Record at 6. Furthermore, the draft RMP for the Colorado River Valley Field Office, which BLM prepared in September 2011 and will govern these lands once finalized, does not anticipate or prescribe acquiring these Sutey parcels.

Indeed, CWPL is unaware of any BLM plans prior to the proposed Land Exchange regarding the Sutey Ranch. Although the proponents of the Land Exchange recently acquired the Sutey Ranch, there was no indication that BLM made an offer to purchase this property when the property was on the market, or was otherwise involved in that transaction. Moreover, had these Sutey Parcels been a BLM target for acquisition, the Implementation Plan for the Red Hill Special Recreational Management Area would have included directions and actions to acquire this property or to manage these parcels in anticipation of acquisition. The 1999 Implementation Plan did not do so. Consequently, the decision to enter into the Land Exchange is not in accordance with FLPMA and inconsistent with the applicable RMP.¹

Furthermore, as BLM notes in the EA, the Glenwood Springs RMP calls for BLM to identify public lands suitable for disposal based on certain criteria. EA at 2-11 - 2-12. However, the record lacks evidence that BLM identified Parcel A as warranting disposal in the RMP or any other prior decision. Disposing Parcel A was not a BLM need or priority. See Land Exchange Handbook at 1-8, Section G(1)(c); id. at 1-13, Section G(7(a). Accordingly, the Land Exchange was not consistent with BLM’s disposal criteria.

6. BLM Failed to Consider Alternative Means Of Acquiring the Sutey Ranch Parcels

The Land Exchange Handbook provides that BLM must evaluate “the full range of land disposal and acquisition tools available to accomplish these objections prior to proceeding with a land exchange proposal.” Land Exchange Handbook at 1-8, Section G(1)(a). The Land Exchange Handbook calls for BLM to evaluate alternatives in a Feasibility Analysis. Id.

¹ BLM maintains that the Aspen Valley Land Trust targeted this parcel for acquisition in 2008. However, FLPMA dictates that BLM targets are those that are relevant.

BLM violated these requirements. Acquisition funds to purchase the Sutey Ranch through the Land and Water Conservation Fund were not sought. BLM also did not seek state funds through the Great Outdoors Colorado trust fund (GOCO), via a land trust or local government, to acquire Sutey Ranch. No other financing tools, short of a land exchange with federal lands, were pursued to acquire the Sutey Ranch. Further, BLM's December 2011 Feasibility Analysis does not present or consider alternative tools for land acquisition. Rather, the Feasibility Analysis merely describes the Land Exchange, as proposed. BLM's own Handbook required the agency to do more.

II. VIOLATIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

A. Factual and Legal Background

NEPA was enacted "to reduce or eliminate environmental damage and promote the understanding of the ecological systems and natural resources important to the United States." Wyoming v. Dep't of Agric., 661 F.3d 1209, 1236 (10th Cir. 2011). These goals are accomplished through two main directives. First, NEPA requires that all federal agencies take a "hard look" at environmental impacts of their proposed actions. New Mexico v. BLM, 565 F.3d 683, 704 (10th Cir. 2009). Second, NEPA mandates agency transparency by informing and involving the public in the process. Baltimore Gas v. NRDC, 462 U.S. 87, 97 (1983); Dine Citizens Against Ruining our Environment v. Klein, 747 F.Supp.2d 1234, 1256 (D. Colo. 2010). As the Tenth Circuit noted, "[b]y focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decision-making by agencies and allows the political process to check those decisions." New Mexico, 565 F.3d at 703. "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989).

Under NEPA, each federal agency must circulate for public review an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. Federal agencies may first prepare an EA that includes "sufficient evidence and analysis" to determine whether impacts are significant enough to warrant an EIS. 40 C.F.R. § 1508.3. An EA must "provide for determining whether to prepare an [EIS]." Id. §§ 1501.4(c), (e), 1508.9(a). If an agency determines that an EIS is unnecessary, it must issue a "finding of no significant impact" (FONSI) that provides a convincing statement of reasons why the action "will not have a significant effect on the human environment." Id. §§ 1508.9, 1508.13; The Wilderness Soc'y v. Wisely, 524 F. Supp.2d 1285, 1308 (D. Colo. 2007); Ocean Advocates v. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005).

NEPA regulations dictate that impacts are assessed based on their “context” and “intensity.” 40 C.F.R. § 1508.27(a)-(b). The “intensity” factors include: impacts to threatened species, public health and safety, and areas with “unique characteristics” like Refuges, beneficial effects, controversial actions and their impacts, actions with uncertain or unknown risks, and actions that threaten violations of Federal or State law. 40 C.F.R. § 1508.27(b). Agencies must analyze and disclose all “direct,” “indirect,” and “cumulative” impacts of its actions as well as impacts of “connected actions.” *Id.* §§ 1508.7, 1808.8(a) & (b), 1508.25(a) & (c); *Sierra Club v. DOE*, 275 F.Supp.2d 1177, 1183-85 (D. Colo. 2002). Agencies must conduct this analysis “before an ‘irretrievable commitment of resources’ is made.” *New Mexico*, 565 F.3d at 718.

BLM’s Land Exchange is a major federal action requiring NEPA compliance. In 2012, BLM initiated a scoping process, identifying the environmental impacts associated with this proposed action. The agency released a draft environmental assessment in April 2013 for public review and comment. The comment period closed on May 29, 2013. Relevant documents associated with the Land Exchange – namely, the appraisals that were prepared in November 2012 – were not released to the public for comment.

B. Statement of Issues Protesting

1. BLM Did Not Consider A Reasonable Range of Alternatives

The alternatives analysis lies at the “heart” of NEPA’s procedural duties. *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999). NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E); 42 U.S.C. § 4332(C)(iii); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) (ensure agencies “gather information sufficient to permit a reasoned choice of alternatives”). A detailed evaluation of alternatives includes the environmental impacts of each alternative action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). The duty to consider and disclose a range of alternative actions applies when an agency prepares an environmental assessment. *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002).

The range of alternatives that an agency must consider is guided by the purpose of the action. Although agencies may “reject alternatives that [do] not meet the purpose and need of the project, they [can] not define the project so narrowly that it foreclose[s] a reasonable consideration of alternatives.” *Davis*, 302 F.3d at 1119. Moreover, “appropriate alternatives” are “non-speculative” and are “bounded by some notion of feasibility.” *Utahns for Better Transportation v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002); *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 432 (10th Cir. 1996). When an agency elects to dismiss alternative actions from a detailed discussion, the agency must “explain” and “briefly

discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14 (a); Utahns for Better Transportation v. 305 F.3d at 1167. An agency’s conclusion to reject an alternative from detailed study must not be arbitrary and capricious or contrary to law. Davis, 302 F.3d at 1122.

BLM states in the EA that the purpose and need of the Land Exchange was to “consolidate land ownership boundaries in the Red Hill” area, and “improve management of, and public access, to public lands.” EA at 1-7. The alternatives BLM considered included the proposed action and the “No Action” alternative, which, of course, did not fulfill the stated purpose and need. No other alternatives were considered, although several were eliminated from detailed study and public review and comment.

As noted above, there are several alternative ways to acquire lands, including the Sutey Ranch. Funds for public land acquisition are available through Land and Water Conservation Fund or GOCO through land trusts or local governments. However, none were considered as alternatives to achieve the stated goal of consolidating land ownership in the Red Hill area.

BLM dismissed an alternative that included using the LWCF because it had not sought such funds. EA at 2-10. This explanation is circular and self-fulfilling. It does not support dismissing this alternative from detailed study. Similarly, BLM did not consider, as an alternative, a public-private partnership to acquire Sutey Ranch with the Aspen Valley Land Trust and with a local government with GOCO funding. BLM did not consider this alternative, despite the relying on the Aspen Valley Land Trust’s interest in the Sutey Ranch as a reason for the Land Exchange.

2. The EA/FONSI Violates NEPA By Relying On Conservation Easements And A Management Plan

The Land Exchange includes a conservation easement to be located on the federal lands (Parcel A), which will become part of the Two Shoes Ranch, and the development and implementation of a management plan for the Sutey Ranch, which will be funded by the proponents up to \$1.1 million. BLM makes general observations that the conservation easement will protect against residential development associated with the Two Shoes property, and the management plan will address recreational use of the Sutey Ranch property.

Agencies must support their reliance on mitigation measures to formulate a FONSI. Davis, 302 F.3d at 1125; Colo. Env’tl. Coal., 185 F.3d at 1173; Wyoming Outdoor Council v. Army Corps, 351 F. Supp.2d 1232, 1250-52 (D. Wy. 2005). Several courts have rejected an agency’s reliance on mitigation to offset known impacts. One court found the mitigation measures “were not even developed, much less evaluated.” San Luis Valley Ecosystem Council v. USFWS, 657 F.Supp.2d 1233, 1245-46 (D. Colo. 2009) (noting FWS did not “evaluate[] the efficacy of many of the proposed safeguards”). Another court determined that absent “detailed

mitigation plans,” BLM could not support a FONSI because the severity of impacts was unknown. Klein, 747 F.Supp.2d at 1259 (noting “permit revision decision document contains only vague reference to ‘mitigation/data recovery plans’ which will be conducted”). Further, a court also held an agency’s reliance on mitigation was unlawful because the EA/FONSI only provided a " cursory discussion of the reclamation activities it plans to perform following the logging.” Rocky Mountain Wild v. Vilsack, 843 F.Supp.2d 1188, 1197 (D. Colo. 2012).

Here, BLM violated NEPA by failing to publicly disclose in the EA the impacts that are purportedly being addressed by the conservation easement and the management plan. Absent this evaluation, BLM and the public cannot determine whether these mitigation actions are sufficient to ensure impacts are not significant and support a FONSI. For example, CWPL cannot discern whether \$1.1 million for a future management will adequately address recreational impacts without knowing what those impacts will be. Similarly, whether the conservation easement, as proposed, is sufficient to eliminate impacts from potential residential development (or other uses) cannot be fully evaluated unless BLM fully discloses the details of any possible development.

Furthermore, BLM’s reliance on a management plan for the Sutey Ranch is unlawful. BLM notes that a management plan will be prepared for Parcels 1A and 1B and that the proponent will fund its development and implementation. However, the plan was not developed prior to completion of the Land Exchange. Absent its completion, BLM lacks a basis to conclude that the impacts of the Land Exchange are not significant and cannot support its FONSI. The management plan’s adequacy at addressing recreational impacts on the Sutey Ranch parcels is unknown.

BLM notes that it prepared the Implementation Plan for the Red Hill Special Recreational Management Area and that a management plan for the Sutey parcels would be similar. However, the Red Hill Implementation Plan was prepared in 1999, over 15 years ago. BLM has not shown the Plan contains objectives and management actions applicable to Sutey Ranch, or that the objections and actions identified in 1999 continue to be relevant and applicable. Further, although the Implementation Plan adopts deadlines for competing certain management actions, BLM has provided no information or supporting documentation detailing whether these actions were implemented in a timely fashion, if at all. In sum, BLM lacks a factual basis upon which to rely on a proposed, undeveloped management plan to mitigate the adverse environmental impacts of the Land Exchange.

3. An EIS Was Required Because The Land Exchange Is Highly Controversial And Sets A Precedent

The Land Exchange was highly controversial within the regional community and sets new precedent regarding land exchanges, and thus required preparation of an EIS rather than an

EA/FONSI. See 40 C.F.R. § 1508.27(b)(4), (b)(6). An action is controversial when there is “a substantial dispute as to the size, nature, or effect of the action.” Norton, 294 F.3d at 1229 (identifying disputes over amount of water needed and farmland lost to designated critical habitat); San Luis Valley Ecosystem Council v. USFS, 2007 WL 1463855, *10 (D. Colo. May 17, 2007) (finding controversy over effect of land exchange).

Here, the controversy over the Land Exchange stemmed from the nature of the action. That is, the land exchange was driven by a private party’s desire to enhance the size of its property and exclude the public from recreating on public land. The Land Exchange also permits BLM to circumvent regulations intended to ensure land exchanges are of equal value. The appraisals also failed to consider and value the relevant parcels based on intended use, which is contrary to law. In these respects, the Land Exchange is controversial and sets precedent that contravenes applicable law.

4. An EIS Is Required Due to Impacts to the Harrington’s Penstemon

The Harrington’s penstemon is a BLM “sensitive species.” It occurs on Parcels A and C. The Land Exchange will convey over 55 acres of Harrington’s penstemon habitat out of public ownership and BLM management. BLM’s management involved a livestock grazing allotment, which includes actions (in the term grazing permit, allotment management plan and/or annual operating instructions) designed to limit livestock impacts to this sensitive plant species and other natural resources.

However, conveying these lands out of federal ownership and management means these conservation measures, as well as any future measures BLM could include in amendments or revisions, would no longer apply and livestock grazing under new management will adversely impact the Harrington’s penstemon. Moreover, the proposed conservation easement applicable to Parcel A does not address impacts from livestock grazing to the Harrington’s penstemon or its habitat. Accordingly, the loss of the 55 acres of Harrington’s penstemon habitat from BLM management means the Land Exchange may result in significant environmental impacts and warrants preparation of an EIS.

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CONCLUSION

If you have any questions or wish to discuss the issues raised in Protest, please contact the undersigned on behalf of Colorado Wild Public Lands Inc. Thank you.

Sincerely,

/s/ Neil Levine

Neil Levine
Attorney for Colorado Wild Public Lands Inc.