IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. : 14-16812

GREAT BASIN RESOURCE WATCH,
WESTERN SHOSHONE DEFENSE PROJECT

Appellants,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT, ET AL.,

Appellees,

AND

EUREKA MOLY, LLC,

Defendant-Intervenor-Appellees,

APPELLANTS' OPENING BRIEF

Roger Flynn
Jeffrey C. Parsons
WESTERN MINING ACTION PROJECT
P.O. Box 349, 440 Main Street, #2
Lyons, CO 80540
Phone (303) 823-5738
wmap@igc.org

Julie Cavanaugh-Bill
CAVANAUGH-BILL LAW OFFICES, LLC
401 Railroad St., Ste. 307
Elko, Nevada 89801
(775) 753-4357
julie@cblawoffices.org

Counsel for Appellants-Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Caselaw

State Caselaw

Federal Administrative and Executive Decisions

Federal Statutes

Federal Regulatory Material

Additional Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Appellants, Great Basin Resource Watch and the Western Shoshone Defense Project, have no parent companies, no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

STATEMENT OF JURISDICTION

Jurisdiction of the District Court

Appellants, Great Basin Resource Watch ("GBRW") and the Western Shoshone Defense Project ("WSDP") (collectively, GBRW), challenge the federal Bureau of Land Management ("BLM's") approval of the Mt. Hope Mine Project proposed by Defendant-Intervenor Eureka Moly, LLC. ("EML"), a large open pit, molybdenum mine on federal public lands in Eureka County, Nevada. GBRW appeals the decision of the district court to deny GBRW's Motion for Summary Judgment, which sought to overturn the BLM's actions.

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the action arose under the laws of the United States including: the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Federal Land Policy Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, and their implementing regulations.

Jurisdiction of the Court of Appeals

This appeal is taken from the district court's Order, and Final Judgment, denying GBRW's Motion for Summary Judgment. Excerpt of Record ("ER") 3-34. This Court has jurisdiction to review the district court's final orders and judgment under 28 U.S.C. § 1291.

Finality of Judgment and Timeliness of Appeal

The district court issued its Order denying GBRW's Motion for Summary Judgment on July 23, 2014. ER 4-34. A Final Judgment issued on August 1, 2014. ER 3. GBRW's Notice of Appeal challenging the Summary Judgment Order and Final Judgment was filed on September 22, 2014. ER 1-2. Pursuant to Fed.R.App.P. 4(a)(1)(B), this Appeal is thus timely.

STATEMENT OF ISSUES

1. Whether BLM violated FLPMA and the President's Executive Order of April 17, 1926 (known as Public Water Reserve 107) and related laws which established federal reserved water rights in the desert springs that will either be buried by mine waste or eliminated via the Project's dewatering of the regional aquifer. That Executive Order also withdrew and protected the lands surrounding the springs from the type of industrial operations approved by BLM at Mt. Hope – lands that will be either buried by mine waste and other Project facilities, or shut-off from public access and use for decades or permanently.

2. Whether BLM violated its duty under FLPMA to "prevent unnecessary or undue degradation" to public lands, by approving the Project's massive and permanent damage to the lands, surface and ground waters, air and water quality, and other public resources in and around Mt. Hope.

3. Whether BLM violated its duties under NEPA to fully review the impacts to these resources, to fully consider mitigation of the Project's impacts, and to fully involve the public in the agency's decisionmaking process.

4. Whether the district court erred in denying GBRW's Motion for Summary Judgment.

All applicable statutes, regulations, and agency policies are attached as an Addendum to this brief.

STATEMENT OF THE CASE and PROCEDURAL HISTORY

This Appeal seeks to reverse the decision of the district court denying GBRW's Summary Judgment Motion. GBRW requests this Court to vacate BLM's decision to approve the Project and to take any other appropriate action to protect public resources as required by federal law.

BLM issued the Record of Decision ("ROD") approving the Mt. Hope Project on November 16, 2012. ER 234-278. Pursuant to NEPA, BLM also prepared a Final Environmental Impact Statement ("FEIS") for the Project. ER 287-443 (excerpts of FEIS). On December 17, 2012, GBRW formally petitioned the Director of the Nevada BLM to reconsider the ROD and FEIS. ER 79-97. On January 4, 2013, BLM State Director Amy Lueders rejected GBRW's petition. ER 98. On February 15, 2013, GBRW filed its Complaint challenging the agency's decisions. ER 178-233. On February 20, 2013, GBRW filed its Motion for

Preliminary Injunction ("PI") in order to protect public resources on Mt. Hope pending a ruling on the merits.

On August 20, 2013, the parties entered into a joint stipulation to stay consideration of the PI due to the fact that, as a result of the current and ongoing economic conditions involving the Project, all major ground-disturbing construction activities had ceased. Accordingly, on August 22, 2013, the district court then denied GBRW's PI Motion, without prejudice, and required EML to provide notice to GBRW if operations were to begin, with GBRW reserving the right to re-file its PI Motion if needed. The parties then agreed to a briefing schedule that would expeditiously resolve the case based on GBRW's Motion for Summary Judgment.

Upon briefing, but without conducting any oral argument, the district court denied GBRW's Motion for Summary Judgment on July 23, 2014. This appeal followed. Based on information and belief, outside of some initial work conducted prior to the filing of the parties' joint stipulation on August 20, 2013, mining operations at the Mt. Hope Mine have yet to begin.

STATEMENT OF FACTS

THE MT. HOPE MINE PROJECT

The Mt. Hope Mine is proposed to be one of the country's largest open-pit mines, with direct operations lasting for more than 70 years, permanent alteration of the landscape, and a complete reworking of the surface and ground water hydrology

of three separate watersheds, adversely impacting over 200 square miles of public and private land for hundreds of years.

The Project will have immediate, irreparable, and permanent impacts to the local ranching and farming communities and families which have lived there since the 1860s and to the critical environmental, historical, cultural and wildlife resources that will be outright eliminated or significantly degraded by the Project. *See, e.g.,* Declarations of GBRW members Carolyn Bailey (ER 35-73) and John Hadder (ER 74-98) submitted to the district court. "We own the closest private property (in two directions) to the Mt. Hope Mine not controlled by the Project. This family has a rich legacy in ranching and agriculture in Eureka County with many generations of the family currently thriving in the area. The Bailey ranching business in Diamond Valley was established in 1863 and was listed as the sixth oldest Pioneer Company in Nevada by the Nevada Business Journal in 2003." Bailey Declaration at ¶¶ 3-4, ER 36.

As approved by BLM, "The 80-year project will have an 18- to 24-month construction phase, 44 years of mining and ore processing, 30 years of reclamation, and five years of post-closure monitoring. Concurrent reclamation will not commence until after the first 15 years of the Project." ROD 1, ER 241.

"The Project Area … covers 22,886 acres." Id. 8,355 acres will be directly disturbed (8,092 public land acres, 263 acres of EML controlled private land). FEIS

2-3, ER 305.

> The Mount Hope ore body contains approximately 966 million tons of molybdenite (molybdenum disulfide) ore that will produce approximately 1.1 billion pounds of recoverable molybdenum during the ore processing time frame. Approximately 1.7 billion tons of waste rock will be produced by the end of the 32-year mine life and approximately 1.0 billion tons of tailings will be produced by the end of the 44 years of ore processing.

ROD 2, ER 242.

"Mining would be conducted 24 hours per day and seven days per week. The mining rate, ore and waste rock combined, would average 232,000 tons per day over the life of the mine." FEIS 2-17, ER 309. The excavated mine pit will be one of the deepest mine pits in the country. "The ultimate pit depth would be approximately 2,600 feet below ground surface." FEIS 2-4, ER 306. *See also* Figure 2.1.6 (pit cross-section), ER 308.

> The Project would generate approximately 1.7 billion tons of waste rock that would occupy a total footprint of approximately 2,246 acres. Waste rock would be placed in two distinct WRDFs [Waste Rock Disposal Facility] over the life of the mine, which would almost encircle the open pit (Figure 2.1.9). The PAG [Potentially Acid Generating] WRDF would ultimately contain approximately 0.5 billion tons of waste and the non-potentially acid generating (Non-PAG) WRDF approximately 1.3 billion tons. … The total height of the WRDFs would range from 750 feet to 950 feet (Table 2.1-3).

FEIS 2-23, ER 311.

The Project will also pump and remove massive amounts of water from the regional aquifer in order to keep the mine pit dry and supply water for mine operations:

> Dewatering would be required in the open pit during the mining phase of the Project. The open pit dewatering would be achieved with in-pit sumps and, if necessary, horizontal drains and perimeter wells would also be used. The average pit inflow rate is estimated to range between 60 to 460 gpm (100 to 750 afy), commencing in Year 1 of the Project and continuing through Year 32, as shown in Table 3.2-7. In addition, ground water pumping in the KVCWF [Kobeh Valley Central Well Field] area for process-water supply would be achieved with high capacity production wells completed in the basin-fill and carbonate bedrock aquifers. The average total combined pumping rate of the well field is estimated to range between 6,540 to 7,000 gpm (10,550 to 11,300 afy), commencing in Year 1 of the Project (2012) and continuing through Year 44 (2055), as shown in Table 3.2-7.

FEIS 3-74, ER330. One acre-foot (af) of water equals approximately 325,851 gallons.

Thus, the "combined pumping rate of the well field," coupled with the 750 afy of pit pumping, equals over 3.92 billion gallons of water pumped per year. With the predicted pumping lasting roughly 43 years, this means that up to **168.8 billion gallons of water will be removed from the Mt. Hope area by the Project's dewatering**.

> The open pit dewatering activities and KVCWF pumping would lower (draw down) the water table in the vicinity of those facilities. The predicted maximum drawdown in the bedrock of the open pit area is approximately 2,250 feet, whereas in central Kobeh Valley, the predicted maximum drawdown is approximately 120 feet near the center of the well field after 44 years of pumping.

FEIS 3-74 to-79, ER 330-31. *See also* FEIS Figure 3.2.18 (showing drawdown), ER 333.

"The ground water drawdown under the Proposed Action is predicted to be

more than ten feet for two perennial stream segments (Roberts Creek and Henderson Creek) and at 22 perennial or potentially perennial spring sites (Table 3.2-8) for varying periods up to at least 400 years after the end of the mining and milling operations." Table ES-1, ER 302. The FEIS also predicts that "Impacts to surface water resources could occur in areas with less than ten feet of predicted drawdown." FEIS 3-79, ER 331. *See* Table 3.2.8 ("Springs that May be Affected by Project Activities"), ER 331-32.

"[A]ll of the springs located in the area projected to experience ten feet or more of drawdown are interconnected with the regional groundwater system and potentially could be impacted due to water-table lowering attributable to the Proposed Action." FEIS 3-87, ER 336.

> Mine dewatering, ground water pumping, and subsequent recovery of the water table is expected to draw down the ground water table in an area surrounding the open pit. As discussed in Section 3.2, modeling results show that **significant water table drawdown in the aquifer would occur in an area measuring approximately 232 square miles around the Project Area.** … Eighteen existing **stock water rights occurring within the ten-foot drawdown area may experience negative impacts including a reduction in available water or complete water loss as a result of ground water drawdown associated with the Proposed Action** (Figure 3.12.1). … Twenty-two springs and two segments of perennial streams are also located within the area predicted to be impacted by the ground water drawdown. Livestock that utilize those sources of water could be affected. Springs predicted to be impacted are shown on Figure 3.2.9.

FEIS 3-424 to -425 (emphasis added), ER 368-69.

At least four of these springs that will be dewatered are protected by Public Water Reserve # 107, which established federal reserved water rights in the springs on Mt. Hope and required the government to protect the lands surrounding the springs which were withdrawn by PWR 107. *See* Great Basin Mine Watch v. Hankins, 456 F.3d 955, 966-67 (9th Cir. 2006)(discussing applicability of PWR 107 to BLM's review and approval of mining operations).

According to BLM and the Nevada State Water Engineer, the following springs within the drawdown cone are recognized by BLM as protected PWR 107 Reserved Rights: 619 (Nevada ID R06940), 597 (R06942), 612 (R06944), 742 (R06951). Table 3.2-6, ER 325-26. *See also* Figure 3.2.18 (showing drawdown cone and location of Springs 597, 612, 619, 742 (among others)), ER 333. BLM has formally notified Nevada that these four springs are federal reserved water rights under PWR 107. ER 504-511 (BLM water right Notices under PWR 107).

In addition to the loss of the reserved water from the groundwater pumping, some of these springs will be completely and physically eliminated due their burial under Project facilities. The ROD approves the construction or location of mine facilities within one quarter mile of Springs 597, 604, 619, and 646, which is within the area withdrawn from entry under PWR 107. FEIS Figure 2.1.5 (Project facilities), ER 307. The construction or location of mine facilities such as the massive waste rock dumps will be located/constructed either right on top of, and/or

immediately adjacent to, these springs. "[S]prings (619, 639, 646) would also be directly affected by construction of Project components." FEIS 3-79, ER 331.

Regarding the open mine pit, "[m]ining the open pit itself would result in an excavation of approximately 2,300 feet below the existing water table, which would be approximately 2,640 beneath the natural surface." FEIS 2-86, ER 316. "The pit lake that is anticipated to form in the open pit is expected to fill slowly (Figure 3.3.12) and would be 900 feet deep at 200 years after the end of mining." FEIS 3-220, ER 357. It would eventually be over 1,100 feet deep. Figure 3.3.12, ER 358.

Water quality in the pit lake is predicted to exceed federal and state water quality standards for a number of pollutants. "As evaporation from the lake surface concentrates the dissolved minerals, some water quality constituent concentrations would be predicted to increase over time relative to baseline concentrations and to exceed the present Nevada water quality standards (see Table 3.3-1)." FEIS 3-220, ER 357. Despite this, "No mitigation is proposed for this impact." Id.

The Project would also significantly impact the Pony Express National Historic Trail, which was designated by Congress pursuant to the National Trails System Act, 16 U.S.C. §§ 1241 et seq. Portions of the Trail within the Project site have been determined to be eligible for listing on the National Register of Historic Sites. FEIS 3-587 to -588, ER 371-72. The Trail crosses public lands near the base of Mt. Hope and the Project would locate the tailings dump and southern waste rock

dump within a few hundred feet of the Trail and bisect the Trail with the powerlines – destroying the historical value of the Trail in that area. Figure 2.1.5, ER 307. The Trail would be blocked by the Project's perimeter fence, roads, and water and tailings waste conveyance structures. Id. Other nationally-important cultural and historical sites will be either eliminated or adversely affected, including over 260 sites eligible for the National Register of Historic Places under the National Historic Preservation Act. FEIS 3-604, ER 375.

The Project, and BLM's review, was severely criticized by the U.S. Environmental Protection Agency ("EPA"), which determined that BLM's Draft and Final EISs failed to meet the public review and related requirements under federal law and failed to adequately protect water and air quality. *See* EPA letters to BLM: ER 467-484 (comments on Draft EIS); ER 279-284 (comments on FEIS).

The Eureka County Commissioners submitted extensive comments strongly objecting to BLM's failures to fully review the Project's impacts and protect public resources – highlighting the Project's devastating impacts to local waters and the area's agricultural communities. ER 444-466 (comments on preliminary FEIS); ER 285-286 (comments on FEIS).

SUMMARY OF ARGUMENT

In its review and approval of the Project, BLM failed to fully evaluate and protect the public and public land resources, including the federal reserved water

rights and lands on Mt. Hope that will be destroyed by the Project. Also, and due in part to the FEIS's failure to adequately analyze and mitigate against air and water pollution caused by the mine, BLM failed to show that the Project will not result in "unnecessary or undue degradation" to public resources as required by FLPMA.

The agency's failure to protect the reserved public lands and waters under PWR 107 is a major violation of federal law. In an attempt to avoid this finding, which would require a revision to the Project as it is currently proposed and approved, BLM/EML argued, and the district court agreed, that the springs that will be dewatered by the Project's pumping of the aquifer, or that will be buried by millions of tons of mine waste or infrastructure facilities, are not "important" enough to qualify for the protections mandated by PWR 107. According to BLM/EML, there simply are no PWR water rights and withdrawn lands on Mt. Hope.

This ignores the very maps, tables, statements and admissions in the FEIS which acknowledge not only that these reserved rights exist but also that BLM has claimed and asserted such "water rights" on Mt. Hope specifically under PWR 107. Indeed, the FEIS specifically recognizes and lists these springs as among the "Water Rights and PWRs" that will be dewatered by the Mine. BLM/EML cannot avoid the fact that BLM has formally claimed at least four PWRs on Mt. Hope – each for substantial water flows to maintain public interests in livestock watering.

BLM also argues that it has nevertheless fully protected the PWR 107 reserved lands and waters and mitigated against all adverse impacts. Yet this defies logic, as neither BLM nor EML dispute the fact that the PWRs will either be dewatered by the Project's massive groundwater pumping, or buried by millions of tons of mine waste or infrastructure.

BLM's "mitigation" plan for these waters is simply to pump more water from somewhere else and pipe it miles away to other BLM lands. For the withdrawn lands surrounding the PWR springs on Mt. Hope, there is no mitigation plan at all – as BLM did not require EML to relocate or design its waste dumps and infrastructure away from the PWR springs. Such a failure not only violates BLM's substantive duties to protect these invaluable public resources, but its duties under NEPA to analyze measures to mitigate against these impacts as well as the effectiveness of each measure.

BLM/EML argue that all of this is permitted under the provision in the now-repealed Pickett Act of 1912 which opened the lands withdrawn around the PWR springs to the mining of "metalliferous minerals." Yet neither BLM nor EML provide any evidence whatsoever that these withdrawn lands contain the requisite valuable minerals. It is undisputed that BLM never even inquired as to whether these withdrawn lands contain valuable metalliferous minerals – it simply assumed a fact into existence without any evidence, and despite the fact that EML plans to

cover the lands in unmineralized waste rock rather than mine these lands. Under long-standing tenets of administrative law, an agency must base its decisions on verifiable evidence and make a "rational connection" between the evidence and its actions – something BLM failed to do here.

This position is also contrary to a century of Interior Department precedent, routinely holding that mining claims that do not contain valuable metalliferous minerals are not subject to the Pickett Act's provision opening the withdrawn lands to entry. The record shows that the metalliferous minerals are in the mine pit, the only area where mining will occur – and from ½ to over a full mile away from the PWR springs. Indeed, the FEIS admits that a primary reason EML located the mine waste dumps over the springs is because of the absence of suitable mining reserves underneath the waste rock facilities.

In addition, BLM approved the creation of lake that will begin to form in the mine pit once mining ceases and groundwater pumping ends. Despite BLM's own prediction that the pit lake will violate water quality standards, no mitigation is required or analyzed – a violation of FLPMA's mandate that BLM "prevent undue degradation" and comply with all environmental requirements as well as the agency's duties under NEPA to fully analyze potential mitigation measures. BLM attempts to avoid these requirements by arguing that because there is no immediate intention to use the contaminated waters when they form in the pit, there is no need

to prevent the contamination or analyze mitigation. Yet no such excuse exists under NEPA or FLPMA. If an adverse environmental impact is reasonably foreseeable (here, it is actually predicted to occur), it must be analyzed in the FEIS.

Regarding BLM's further violations of NEPA, BLM/EML and the district court ignore the last three Ninth Circuit cases dealing with BLM-approved large mining projects in Nevada. Each of these decisions, for one issue or another, specifically rejected the same arguments, and errors, put forth by BLM in this case.

For example, regarding the FEIS's failure to ascertain baseline air pollution levels at the site, BLM simply defers to the Nevada state permitting process, with no analysis. Because the state permitting process does not regulate all predicted air emissions, BLM used air quality readings from hundreds of miles away, including in a pristine National Park, as a substitute for the on-site baseline information required by NEPA. As the Ninth Circuit squarely held, in South Fork Band Council v. Department of the Interior, BLM cannot rely on the state's permitting process as a substitute for public and agency review under NEPA. The fact that the air quality baseline information involves a "technical" issue, as asserted by the BLM/EML and the district court, does not require blind deference or excuse such a fundamental omission from the NEPA public process. Rather, the FEIS must contain the requisite evidence that BLM adequately analyzed the site-specific pre-Project baseline levels of air pollution – something BLM admits did not occur here.

Another critical shortcoming of the FEIS is the failure to review the "cumulative impacts" from all "past, present, and reasonably foreseeable future activities" in the region that may incrementally add to the pollution and other impacts from the Project. BLM/EML ignore the Ninth Circuit's decisions in Great Basin Mine Watch v. Hankins, and Te-Moak Tribe v. Department of the Interior, which both overturned Nevada BLM mine-project reviews/approvals for failing to provide the necessary quantitative analysis of these other activities. BLM/EML and the district court simply re-quote passages from the FEIS that give a laundry list of other projects in the area and resources that will be affected. No quantitative data or analysis is provided, as required by these and numerous other controlling Ninth Circuit decisions.

Similar NEPA violations occurred when BLM ignored the Ninth Circuit's recent decision in South Fork Band Council, where the Court required BLM to provide a detailed analysis of the effectiveness of mitigation measures (and subject that analysis to public review). Here, for example, the FEIS completely failed to subject the reclamation financial assurance/bonding process to public review. This is required by NEPA due to BLM's admission in the ROD that the agency considers the reclamation bond to be one of the key "mitigation" requirements that BLM must approve as a pre-condition to permitting the Project. As repeatedly argued by the

EPA in its comments to BLM, BLM's failure to involve EPA, or the public, in reviewing this mitigation measure violates NEPA.

STANDARD OF REVIEW

"We review *de novo* a district court's denial of summary judgment." Karuk Tribe of California v. U.S. Forest Service, 681 F.3d 1006, 1017 (9th Cir. 2012)(En Banc). "Because this is a record review case, we may direct that summary judgment be granted to either party based upon our *de novo* review of the administrative record." Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005). Pursuant to the APA, a federal court "shall … hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] … (D) without observance of procedures required by law." 5 U.S.C. § 706(2). *See* Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998).

The Court must "engage in a substantial inquiry," and a "thorough, probing, in-depth review." Or. Nat. Res. Council Fund v. Brong, 492 F.3d 1120, 1125 (9th Cir. 2007). The agency's decisions must be "fully informed and well-considered." Save the Yaak Committee v. Block, 840 F.2d 714, 717 (9th Cir.1988). The court "need not forgive a 'clear error of judgment.'" Blue Mountains, 161 F.3d at 1208. "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of the problem, if the agency offers an explanation that is contrary

to the evidence, … or if the agency's decision is contrary to the governing law. 5 U.S.C. § 706(2)." Lands Council, 395 F.3d at 1026.

ARGUMENT

I. BLM Failed to Protect Federal Reserved Water Rights and Surrounding Withdrawn Lands

A. Background for Public Water Reserve 107.

As noted above and shown in the FEIS, groundwater pumping by EML will significantly reduce, and/or eliminate a number of springs in the area. Springs and waterholes on public land in the West are reserved for public use by PWR 107, which was created by Executive Order by President Calvin Coolidge in 1926.

> [I]t is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

Executive Order of Apr. 17, 1926 (Addendum), *quoted in* Great Basin Mine Watch v. Hankins, 456 F.3d 955, 966 (9th Cir. 2006).

> "The purpose of the reservation was to prevent monopolization of water needed for domestic and stock watering purposes." United States v. City & County of Denver, 656 P.2d 1, 32 (Colo. 1983); see also U.S. v. Idaho, 959 P.2d, 449, 453 (Idaho 1998) ("The purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stock watering").

Great Basin Mine Watch, 456 F.3d at 966. The reserved water rights and associated

land withdrawals were promulgated under the authority of Section 10 of the Stock-Raising Homestead Act of 1916, 39 Stat. 865 ("SRHA")(Addendum), which provided that withdrawn "lands containing water holes or other bodies of water needed or used by the public for watering purposes … shall, while so reserved, be kept and held open to the public use for such purposes…."[1] As stated by the Interior Department shortly thereafter: "The above order was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes." Selections, Filings, or Entries of Lands Containing Springs or Water Holes, Circular No. 1066, 51 I.D. 457, 1926 I.D. LEXIS 45, **1-2 (Addendum).

> Assuming that the water is a spring and is on public land it would be subject to the Executive Order of April 17, 1926, establishing Public Water Reserve No. 107. The Executive Order withdrew all springs and water holes on public lands and the surrounding acreage. It was designed to preserve for the general public lands containing water holes and other bodies of water needed or used by the public for water purposes.

Desert Survivors, 80 IBLA 111, 115 (1984), 1984 WL 51633, **4 (BLM required to consider and protect PWR 107 waters). The Interior Department has held that: "the purpose for reserving public springs and water holes was to prevent monopolization of the public lands by withdrawing from settlement, location, sale or entry the lands

[1] Although the SRHA and the underlying authority of the President to withdraw such lands pursuant to the Pickett Act of 1910, 36 Stat. 847, was repealed by FLPMA in 1976, withdrawals (such as PWR 107) made pursuant to those authorities remain in force. 43 U.S.C. §1701 note (c)(Addendum).

surrounding important springs and water holes on the public lands." Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107, 1983 WL 187400, **2. These reserved waters are to be used for the purposes of the reservation – i.e. public watering uses. *See* U.S. v. Idaho, 959 P.2d at 453 (affirming PWR 107 reserved rights).

In addition to creating federal reserved water rights, PWR 107 also withdrew from entry all lands within a certain area surrounding the reserved springs – precluding development on these lands that would interfere with the "public uses" protected by PWR 107. Regarding the lands withdrawn by PWR 107, if the lands had been surveyed by 1926, PWR 107 reserved the "smallest legal subdivision," or 40 acres, around the spring. If the lands were unsurveyed, PWR 107 withdrew all lands "within one quarter of a mile of every spring or waterhole" or a circle encompassing roughly 300 acres. In this case, it is not known whether the lands containing the PWR springs were surveyed by 1926, the date PWR 107 established the reserved water rights and withdrew these lands. In any event, as noted above, BLM approved the waste dumps within the 40 acres, or within ¼ mile, of the PWR 107 springs.

There is no dispute that all of EML's mining claims post-date the establishment of the PWR reserved water rights and associated withdrawn lands in 1926. "Mining claims located on lands not open to appropriation are null and void

ab initio." Mount Royal Joint Venture v. Kempthorne, 477 F.3d 745, 756 (D.C. Cir. 2007), citing Shiny Rock Mining Corp. v. United States, 825 F.2d 216, 219 (9th Cir. 1987) (same).

As justification for approving the location of the waste dumps at and adjacent to the springs, BLM/EML rely on the Pickett Act of June 25, 1910, c. 421, 36 Stat. 847 (Addendum), as amended by the Act of August 24, 1912, c. 369, 37 Stat. 497 (Addendum). The 1910 Act opened withdrawn lands to the mining of most minerals: "[A]ll lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates." 36 Stat. 847, Sec. 2.

However, in 1912 Congress amended the Act to limit the opening of withdrawn lands to only the mining of "metalliferous minerals." "[A]ll lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals." 37 Stat. 497, Sec. 2.

Under Interior Department precedent interpreting this provision, not all minerals are "metalliferous" and not every deposit of "metalliferous minerals" is considered open under the Pickett Act:

> [A]fter a careful review of the matter, taking into consideration the statute as it was enacted in 1910 and *the purpose of the amendment of 1912 to afford*

> *broader protection to withdrawals by a greater limitation on mineral exploitation*, **the Department is convinced that the terms "metalliferous minerals" was used to describe those minerals or ores of economic value from which the useful metals could be directly and advantageously extracted.**

Consolidated Ores Mines Company, 46 Pub. Lands Dec. 468, 472 (1918), 1918 WL 1078 **4 (emphasis added). This comports with long-standing Supreme Court and Ninth Circuit precedent, which hold that the mere existence of some minerals on a mining claim, without evidence that the minerals have "economic value from which the useful metals could be directly and advantageously extracted," do not qualify for the Pickett Act provision regarding metalliferous mining.

"A mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim." Lara v. Sect. of Interior, 820 F.2d 1535, 1537 (9th Cir. 1987). Discovery means "the actual physical disclosure of a valuable mineral deposit." U.S. v. Zweifel, 508 F.2d 1150, 1154 (10th Cir. 1975). Mining claims are "valid against the United States if there has been a discovery of [a valuable] mineral within the limits of the claim." Best v. Humboldt Mining Co., 371 U.S. 334, 336 (1963).

The filing of a mining claim "confers no right in the absence of discovery, both being essential to a valid claim." Cole v. Ralph, 252 U.S. 286, 296 (1920). "[T]he mere filing of a plan of operations by a holder of a mining claim invests no rights in the claimant to have any plan of operations approved. Rights to mine under

the general mining laws are derivative of a discovery of a valuable mineral deposit and, absent such a discovery, denial of a plan of operations is entirely appropriate." Great Basin Mine Watch, 146 IBLA 248, 256 (1998) (emphasis in original),1998 WL 1060687 **8.

To prove that it has made the "discovery of valuable mineral deposit," the claimant must show that the mineral can be "extracted, removed and marketed at a profit." United States v. Coleman, 390 U.S. 599, 600 (1968). The Supreme Court has long held that the mere presence of some minerals on a claim does not overcome withdrawals made for other purposes.

> [Withdrawals or reservations] are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness, and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metal in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable.

Davis's Administrator v. Weibbold, 139 U.S. 507, 519 (1891). "[T]he finding of some mineral, or even of a vein or lode, is not enough to constitute discovery – their extent and value are also to be considered." Converse v. Udall, 399 F.2d 616, 619 (9th Cir. 1968). "A mere posting of a [claim] notice … without any discovery … would be justly treated as a mere speculative proceeding, and would not itself initiate any right." Lange v. Robinson, 148 F. 799, 802 (9th Cir. 1906).

B. BLM's Duty to Protect Reserved Water Rights and Withdrawn Lands.

BLM is under an obligation to ensure that federal reserved water rights and withdrawn lands are not impaired, used, or appropriated by private interests such as EML to the detriment of the purposes for which the rights were created. In the seminal decision of Cappaert v. U.S., 426 U.S. 128 (1976), the Supreme Court rejected a challenge by private appropriators and the State of Nevada to federal protection of reserved lands and waters that would be impacted by groundwater pumping.

Federal reserved water rights and lands are federal property and are "superior to the rights of future appropriators." Cappaert, 426 U.S. at 138. "[T]he United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." Id. at 143. "Where reserved rights are properly implied, they arise without regard to equities that may favor competing water uses. *See* Cappaert v. U.S., 426 U.S. 128, 138-39." Colville Confederated Tribes v. Walton, 752 F.2d 397, 405 (9th Cir. 1985).

BLM cannot disregard its duty to protect such federal property. "Only Congress, and not an executive branch agency, can authorize the disposition of federal property." High Country Citizens Alliance v. Norton, 448 F.Supp.2d 1235, 1248 (D. Colo. 2006)(Interior Department illegally allowed the private appropriation and use of a federal reserved water right to the detriment of the

reserved water right) *citing* Gibson v. Chouteau, 80 U.S. 92, 99 (1871). *See also* Lake Berryessa Tenants' Council v. U.S., 588 F.2d 267, 271 (9th Cir. 1978)(federal agency "cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."). Thus, BLM is under an obligation to prevent any impairment of the PWR 107 reserved water rights, both under PWR 107 itself (and the SRHA) as well as the general duty to not dispose of federal property without appropriate authorization. That it failed to do here.[2]

C. BLM Failed to Protect Federal Water Rights Under PWR 107.

There is no question in this case that these springs will not only be impaired, they will disappear due to the dewatering and waste dumping.

1. The record shows that PWRs will be adversely affected by the Project.

There are at least four recognized and important BLM-owned PWR 107 Reserved Water Rights within the groundwater depletion/drawdown cone that will be either outright eliminated or severely degraded by Project operations. The FEIS lists these as either a spring number and/or a Nevada State Engineer Permit/ID

[2] BLM has recognized this duty elsewhere in the West. In one recent case, BLM/DOI successfully challenged Arizona's failure to protect federal reserved water rights from groundwater pumping. *See*, United States' Opening Brief in Robin Silver, M.D.; United States of America, U.S. Department of the Interior Bureau of Land Management, et al v. Sandra A. Fabritz-Whitney, et al., Superior Court, County of Maricopa, Arizona, No. LC2013-000264-001DT (Sept. 13, 2013), ER 114-134; United States' Consolidated Reply Brief in same case (filed Nov. 18, 2013), ER 99-113.

number. Table 3.2-6, ER 325-26. According to BLM and Nevada State Engineer, the following springs within the drawdown cone are PWR 107 Reserved Rights: 619 (Nevada ID R06940), 597 (R06942), 612 (R06944), 742 (R06951). Table 3.2-6. Id. *See also* Figures 3.2.18 and .20 (showing drawdown cone and location of Springs 597, 612, 619, 742 (among others), ER 333-34. [A]ll of the springs located in the area projected to experience ten feet or more of drawdown are interconnected with the regional ground water system and potentially could be impacted due to water-table lowering attributable to the Proposed Action." FEIS 3-87, ER 336.

"Spring 619 is the 'Mt. Hope Spring,' and was submitted by BLM as a PWR 107 Reserved Right to the State Engineer in 1994 (R06940), covering water for 400 cattle and 75 horses." Facts admitted by BLM's Amended Answer ¶ 31, ER 163; Complaint ¶ 31, ER 190. The reserved right is for .0147 cubic feet per second which equates to 6.6 gallons per minute, year round. *See* "Notification of Public Water Reserve by United States of America," ER 504-05. Spring 619 is also shown as Spring # SP-4. Compare Figure 2.1.5 (map of Project facilities), ER 307, and Figures 3.2.18 and 3.2.20 (maps of spring locations), ER 333-34.

"Spring 619/SP-4 is located immediately adjacent to, or within, the proposed north Waste Rock Disposal Facility (WRDF), which will receive the Potentially Acid Generating Waste Rock (PAG-WRDF), and is less than 1,000 feet from the

Non-PAG WRDF. FEIS Figure 2.1.5." Facts admitted by BLM's Amended Answer ¶ 32, ER 163; Complaint ¶ 32, ER 190.

"Spring 597 is known as the 'Garden Spring,' also submitted by BLM as a PWR 107 Reserved Right in 1994 (R06942), covering water for 400 cattle and 75 horses." Facts admitted by BLM's Amended Answer ¶ 34, ER 163; Complaint ¶ 34, ER 191. The reserved right is for .0147 cubic feet per second which equates to 6.6 gallons per minute, year round. *See* "Notification of Public Water Reserve by United States of America," ER 506-07. Spring 597 is also shown as Spring # SP-2 (or SP-2A). Compare Figure 2.1.5 (map of Project facilities), ER 307, and Figures 3.2.18 and 3.2.20 (maps of spring locations), ER 333-34.

"Spring 597/SP-2/2A is located within or immediately adjacent to the proposed 'Growth Media Stockpile' near the northern Project boundary, where soil, dirt, and other material will be dumped prior to its use in post-mining reclamation. Figure 2.1.5." Facts admitted by BLM's Amended Answer ¶ 35, ER 163; Complaint ¶ 35, ER 191.

"Spring 612 is also within the 10 foot drawdown cone. Spring 612 is known as 'McBride's Spring,' also submitted by BLM as a PWR 107 Reserved Right in 1994 (R06942)[sic R06944], covering water for 400 cattle and 75 horses." Facts admitted by BLM's Amended Answer ¶ 36, ER 163; Complaint ¶ 36, ER 191-92. The reserved right is for .0147 cubic feet per second which equates to 6.6 gallons

per minute, year round. *See* "Notification of Public Water Reserve by United States of America," ER 508-09.

"Spring 742 is known as the 'Lone Mtn. Spring,' submitted by BLM as a PWR 107 Reserved Right in 1994 (R06951), covering water for 100 cattle and 75 horses." Facts admitted by BLM's Amended Answer ¶ 37, ER 163; Complaint ¶ 37, ER 192. The reserved right is for .0054 cubic feet per second which equates to over 2.4 gallons per minute, year round. *See* "Notification of Public Water Reserve by United States of America," ER 510-11.

In addition, BLM admits that "springs that have not been identified as having PWRs, but may have sufficient flows (1,800 gallons per day [gpd]) to support a PWR claim could be affected." FEIS 3-79, ER 331. Yet BLM never analyzed this significant potential or took any mitigation to protect these waters. Even if not yet formally recognized, springs are reserved under PWR 107 and are entitled to all the protections afforded adjudicated PWR rights. "The [PWR 107] Order has withdrawn all lands containing springs and water holes … regardless of whether the water source has been the subject of an official finding as to its existence and location." Interior Department, Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation, and the Bureau of Land Management, 1979 WL 34241, *587 (June 25, 1979).

BLM/EML argue that there are no water rights (and associated withdrawn

lands) under PWR 107. "There are no PWRs within the ten-foot drawdown." FEIS 3-79, ER 331. The district court agreed. ER 13-14.

Yet this directly contradicts extensive evidence in the FEIS, showing on numerous maps and tables that these PWR waters exist and have long been recognized by BLM. The record clearly shows the numerous PWR rights on Mt. Hope. The FEIS contains a detailed map entitled: "Non-EML-Controlled **Water Rights and PWRs** within HSA [Hydrologic Study Area] and 30-mile Radius of Mount Hope." Figure 3.2.14 (emphasis added), ER 327. That map shows at least four "Public Water Reserves" on Mt. Hope and another one near Lone Mountain southwest of the mine pit (all within the drawdown cone of the Project). The map depicts the PWRs as small triangles covering "Water Rights Point of Diversion, By Source," with the triangles covering squares denoting the source of each PWR water right as a "spring." Id.

The FEIS also contains a table detailing the "Non-EML Water Rights That May be Affected by Project Activities." Table 3.2-6, ER 325-26. That table lists four water rights owned by BLM, three of which correspond to the four PWR rights depicted in Figure 3.2.14. As BLM does not own or control any other waters in the area except pursuant to PWR 107, there can be no doubt that these are therefore PWR reserved waters. Another FEIS table lists the "Springs that May be Affected by Project Activities," and includes the same four springs as in Table 3.2-6. Table

3.2-8, ER 331-32. These springs are numbered 597 (Garden Spring), 612 (McBrides Spring), 619 (Mt. Hope Spring), and 742 (Lone Mountain Spring). Id. *See also* Figures 3.2.18 and 20 (showing that all of these springs are directly within the area to be dewatered by the Project's pumping), ER 333-34. These are the same springs formally claimed by BLM as PWR 107 water rights. ER 504-511 (BLM PWR water right claims).

Despite this, BLM/EML asserted in their briefs that no springs within the groundwater drawdown areas are "important" enough to qualify as PWRs. In support, they rely on EML's sporadic flow measurements at some of the springs showing flows below 1,800 gallons per day (gpd). FEIS 3-79, ER 331. The 1,800 gpd number is an arbitrary number taken from the state's groundwater permit system, which requires a groundwater permit for larger depletions. *See* FEIS Appdx. H, ER 443. It does not mean that springs with lower flows are automatically not "important" enough to qualify for PWR 107.

Notably, previous Interior Department decisions have held that much lower flows are sufficient to establish PWR 107 reservations. *See* Robert L. Beery, 25 IBLA 287, 301 (1976), 1976 WL 14438 **6 (spring producing 840 gallons per day was "certainly sufficient for public watering purposes," and thus qualified under PWR 107).

BLM/EML and the district are correct that not every spring in the West is reserved under PWR 107. The determination of whether a spring is "important," however, does not hinge on an arbitrary flow number taken from the state's domestic well program. Rather, PWR 107 "withdraws those springs and water holes capable of providing enough water for general use for watering purposes." 51 I.D. 457-58, 1926 I.D. LEXIS 45, **2 (1926)(Addendum).

Here, the record shows that they are currently used for stockwatering by the public – the intent of PWR 107. For example, Table 3.2-8, entitled "Springs that May be Affected by Project Activities," acknowledges that the current "Use" for each spring includes "Livestock." FEIS 3-79, ER 331-32. *See also* Table 3.2-9, listing the "General Use" of the Garden Spring, as "Water supply for … livestock", ER 343, and of McBrides Spring as "Perennial water supply for livestock," ER 347.

As the Interior Department stated in 1926, "the withdrawal is not intended to affect springs and water holes which are manifestly not used or needed presently or in the future for public water purposes." Muhn, *Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 118 (2001)(quoting October 13, 1926 Letter from the General Land Office Commissioner)(also quoted in district court opinion, ER 12) (Addendum).

Thus, the test is not some fixed "flow" number. Rather, the test is whether the springs are "used or needed presently … for public water purposes." In this

case, as noted above, the FEIS acknowledges in multiple findings that the springs at issue are currently used for "Livestock" watering. Table 3.2-8, ER 331-32; Table 3.2-9, ER 343 and 347. This qualifies the springs as reserved waters under PWR 107.

In any event, BLM admits that one of the critical PWR 107 springs that will be dewatered, McBride's Spring, exceeds even the 1,800 gpd flow. FEIS Table 3.2-8 lists "McBrides Spring (spring 612)" with a "Flow" of 1.8 gpm which equates to 2,592 gpd – well above the purported threshold for a PWR 107 water. EML's own "Seep and Spring Report" shows that this spring (# 612) flowed at 2.3 gpm on at least one recent occasion (2.3 gpm = 3,312 gpd). ER 494.

2. BLM failed to protect the reserved waters.

The PWR 107 Reserved Rights are predicted to be either completely dewatered, or suffer substantial losses. "[W]ater rights occurring within the ten-foot drawdown area may experience negative impacts including a reduction in available water or complete water loss as a result of ground water drawdown associated with the Proposed Action." FEIS 3-424 to -425, ER 368-69. The likely impacts will be even greater, as the groundwater depletion will be far worse than 10 feet. "The predicted maximum drawdown in the bedrock of the open pit area is approximately 2,250 feet." FEIS 3-74, ER 330. *See also* Figures 3.2.18 and .20, ER 333-34.

In addition to the loss of the reserved waters from the groundwater pumping,

some of these springs will be completely and physically eliminated due their burial under Project facilities. As detailed above, the ROD approves the construction or location of mine facilities within one quarter mile of Springs 597, 604, 619, and 646, or at a minimum within the 40 acres surrounding each spring withdrawn by PWR 107, whichever is applicable. Figure 2.1.5, ER 307. Construction or location of mine facilities such as the massive waste rock dumps will be located/constructed either right on top of, and/or immediately adjacent to, these springs. "[S]prings (619, 639, 646) would also be directly affected by construction of Project components." FEIS 3-79, ER 331.

Notably, BLM's duty to protect the reserved **waters** is not eliminated by the Pickett Act's provision that withdrawn **lands** are open for the mining of "metalliferous minerals." Nothing in that provision, even if it applied in this case (which it does not as shown above and below), eliminates the federal reserved water rights, or BLM's duty to protect them from injury. As the Interior Department has held, "if this is a public water reserve of the class contemplated by Executive Order of April 17, 1926, a mineral entryman cannot legally divert or make inaccessible the water." Memorandum, Interior Dept. Regional Counsel to Manager, Land & Survey Office, Subject: "Conflict—Mining Claim and public water reserve," September 24, 1953 (District Court Docket # 5-13) (Addendum).

According to the American Law of Mining, after discussing the Pickett Act

proviso for the mining of metalliferous minerals: "Any such mining location … is subject, however, to the provision of the Stock-Raising Homestead Act of 1916 that it be 'held open to the public use' for water purposes." 2 AMERICAN LAW OF MINING § 14.06[11][a] ("AML"), ER 514. The AML cited the seminal legal analysis, Study of Withdrawals and Reservations of Public Domain Lands, which was submitted as part of the Report of the Public Land Law Review Commission established by Congress in 1964 and which formed a significant basis for the eventual passage of FLPMA in 1976.[3]

> All withdrawals of lands for public water reserves are subject to mining for metalliferous minerals by express requirement of the applicable Pickett Act; however, any such location is deemed subject to the provision of the 1916 Act [SHRA] that it be 'held open to the public use' for watering purposes.

Study at 192, citing "Memorandum from Director, BLM, to Regional Administrator, Region II (July 26, 1950), ER 519. That 1950 Interior Department legal Memorandum is also quoted in the September 24, 1953 Interior Dept. Memorandum quoted above (Addendum). According to the Department in 1950: "Mining locations when made on withdrawn lands are subject to the provisions of sec. 10 of

[3] The Supreme Court has recognized the AML as a leading treatise on federal mining law and related issues. *See, e.g.,* U.S. v. Locke, 471 U.S. 84, 94, 98 (1985); Andrus v. Charlestone Stone Products, 436 U.S. 604, 606, 609, 611 (1978). The Withdrawal Study, and the Public Land Law Review Commission Report which incorporated it, have also been viewed as authoritative. *See* Yount v. Salazar, 933 F.Supp.2d 1215, 1221 (D. Ariz. 2013) (relying extensively on the Report which was commissioned "to study existing laws and procedures relating to the administration of the public lands.").

the act of December 29, 1916 [SRHA], and the lands must be kept and held open to the public use for watering purposes." 1953 Interior Memorandum at 2.

BLM's purported "mitigation" for the elimination or significant loss of the springs is largely a plan to monitor the predicted drop in the water table and only then develop a plan to pipe water to some of the impacted springs. FEIS 3-88 to -106, ER 337-54. Thus, any mitigation plan will not even be considered, let alone implemented, until noticeable drops in the water table (and associated loss of spring waters) have already occurred.

For many of the affected springs, this "mitigation" consists of pumping additional water and installing a series of pipes and infrastructure to purportedly replenish some of the lost water. Table 3.2.9 (listing mitigation measures), FEIS 3-93 to -106, ER 341-54; Figure 3.2.21 (map of pipes and springs), ER 340.

Despite this purported "mitigation" of some of the water losses to some of the affected waters, other springs will be permanently lost (including PWR 107 springs), as noted above, due to the location of the Project's waste dumps and other facilities. For example, Springs 619, 639, and 646 (and likely 612), will no longer exist and the only "mitigation" for their complete loss is a plan to "install a guzzler designed for large game." Table 3.2.9, ER 347 (McBride's Spring), 348 (Mount Hope Spring). It also appears that other springs will be unusable due to the location of Project facilities (Springs 597 and 604). *Compare* Figure 3.2.21 (spring

location), ER 340, *with* Figure 2.1.5 (facilities map), ER 307.

For the springs to be covered and destroyed by Project facilities, no mention is made of keeping these lands open for stockwatering or public use, as required by the SRHA and PWR 107. The "mitigation" plan to "install a guzzler for large game" fails to protect livestock use, which is acknowledged to be a current use of these springs. *See* Table 3.2.9, ER 347-48. Although the FEIS claims that all of these mitigation measures will be "effective," or "highly effective," no supporting scientific analysis is provided. Id.

D. BLM Failed to Protect Lands Withdrawn Under PWR 107.

As noted above, in addition to creating federal reserved water rights, PWR 107 withdrew all lands within a certain area surrounding the reserved springs – precluding development on these lands that would interfere with the "public uses" protected by PWR 107. BLM/EML and the district court believed that the Pickett Act's provision opening the withdrawn lands for the mining of "metalliferous minerals" overrides the withdrawal and protection of these lands. ER 17-18. Yet this ignores the rule noted above that, under federal mining laws, only if one makes a "discovery of a valuable mineral deposit" on each claim does one hold any rights against the United States to mine the metalliferous minerals within the withdrawn lands. Only "valuable mineral deposits" are considered the type of metalliferous minerals that can be claimed under the mining laws.

The Interior Department has continually recognized that "the proper and controlling standard as to the definition of 'metalliferous' in the Pickett Act was adopted by the Department in 1918 when the issue was first raised." David E. Hoover and Lester F. Whalley, 99 IBLA 291, 294 (1987), 1987 WL 110721, **3, *citing* Consolidated Ores Mines Co., 46 Pub. Lands Dec. 468 (1918), 1918 WL 1078 (quoted above).

> Regarding the use of "metalliferous minerals" in the Picket[t] Act, the [Consolidated Ores] decision concluded that the term "was used to describe those minerals or ores of economic value from which the useful metals could be directly and advantageously extracted." Consolidated Ores at 472.

David Hoover, 1987 WL 110721 at **4. Without evidence that the claims contain the requisite discovery of valuable metalliferous minerals (i.e., "those minerals or ores of economic value from which the useful metals could be directly and advantageously extracted"), the claimant "cannot sustain valid locations on land withdrawn from the location of mining claims except for metalliferous minerals." Id. **5.

Thus, the mere filing (or "location") of a mining claim does not give the presumption of a discovery, and does not open the lands to the mining of metalliferous minerals under the Pickett Act. "[L]ocation is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim." Cole v. Ralph, 252 U.S. 286, 296 (1920). "Before one may obtain rights in a mining claim, one must locate

a valuable deposit of a mineral." Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 46, n. 19 (D.D.C. 2003).

Here, there is no evidence in the record that EML has discovered valuable deposits of metalliferous minerals on the claims within the withdrawn lands. Indeed, based on the fact that the only claims to be mined are located within the confines of the mine pit located a mile or more away, it is unreasonable to assume that the claims within the withdrawn lands (especially those to be used only for waste dumps and other infrastructure) contain the requisite discovery of valuable mineral deposits.

Without evidence that the mining claims covering the withdrawn lands contain the discovery of valuable deposits of metalliferous minerals, as required by controlling Interior precedent, the mere fact that EML has filed mining claims on these lands does not mean that these lands and waters are exempt from the PWR 107 withdrawals and protections. Indeed, BLM admits to the lack of "suitable mining reserves underneath the waste rock disposal facilities." FEIS ES-7, ER 294. BLM's assumption that these lands are exempt from the PWR 107 withdrawal, based solely on EML's location of claims on them, is legally incorrect, contrary to the record, and thus arbitrary and capricious.

BLM failed to comply with these requirements, as these withdrawn lands will be either buried by the Project's massive waste dumps or other facilities, and will be

completely fenced-off to public use. Thus, instead of being kept and held open for public use, they will be forever covered by mine waste and other facilities, or for those that may survive this fate, fenced-off from public use for 70+ years.

II. BLM Violated NEPA

NEPA "prevent[s] or eliminate[s] damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). As the Ninth Circuit stated in overturning a BLM-issued EIS:

> NEPA establishes "action-forcing" procedures that require agencies to take a "hard look" at environmental consequences.
> . . .
> An EIS serves two purposes:
>
> > First, [i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Center for Biological Diversity v. Dept. of Interior, 623 F.3d 633, 642 (9th Cir. 2010).

By focusing the agency's attention on the environmental consequences of the proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349

(1989). "NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 CFR § 1500.1(b). This review must be supported by detailed data and analysis – unsupported conclusions violate NEPA. *See* Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998); Northern Plains v. Surf. Transp. Brd., 668 F.3d 1067, 1075 (9th Cir. 2011)(conclusions must be supported by reliable studies).

A. The FEIS Failed to Fully Analyze the Project's Baseline Conditions and Failed to Fully Consider the Project's Total Air Emissions.

Under NEPA, BLM must "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. "Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). The lack of an adequate baseline analysis fatally flaws an EIS. "[O]nce a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effect becomes simply impossible." Northern Plains, 668 F.3d at 1083. "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment

impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision." Id. at 1085.

BLM admits that it did not obtain any data regarding the existing, or baseline, levels of air pollution at or near the Project site. FEIS 3-288, ER 362. Under the federal Clean Air Act, the EPA has promulgated "national ... ambient air quality standard[s]" ("NAAQS") to limit the amount of such "criteria pollutants" in the air, 42 U.S.C. § 7409(a), to levels "requisite to protect the public health ... [and] the public welfare." § 7409(b)(1)-(2).

BLM acknowledges that such data is necessary to determine the Project's impacts and also to ensure that the Project does not have the potential to violate any air quality standard, yet admits that "no monitoring has been performed."

> **To assess the impact of the Project on the ambient air quality, it was necessary to account for existing, or background, levels for each pollutant.** ***No monitoring has been performed within the Project Area for ambient concentrations of CO, NO_2, O_3, or SO_2***, nor does the BAPC specify background concentrations for these pollutants. However, **background values are necessary** for the purpose of comparing modeled results to the NAAQS [National Ambient Air Quality Standards] and NSAAQS [Nevada State Ambient Air Quality Standards].

FEIS 3-288 (emphasis added), ER 362. Although "complete full year (2010) hourly on-site meteorological data" to analyze baseline **meteorological** conditions was obtained, FEIS 3-282, ER 359, no such data or analysis was obtained for the critical baseline **air pollutant** levels.

FLPMA and its implementing regulations prohibit BLM from approving any mining plan that may violate air quality standards. 43 C.F.R. § 3809.420(b). Under NEPA, BLM must also evaluate "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. §1508.27(10).

However, for the critical criteria pollutants, such as PM_{10} and $PM_{2.5}$ [harmful particulate matter], BLM used data from Great Basin National Park, a protected environment well over 100 miles away. Table 3.6-7, ER 362. Yet conditions in a relatively pristine environment located in a distant National Park do not equate to site-specific baseline conditions at the Project site, located in an active agricultural and commercial region next to a State Highway.

For SO_2 (sulphur dioxide), BLM used data from well over 200 miles away. Id. For other criteria pollutants regulated under the federal and state Clean Air Acts (CO, NO_2, and some forms of SO_2), BLM assumed that the existing level of pollutant was zero, based on a communication with a state air quality agency employee in 2007 and 2008. Id.

BLM combined these figures to calculate the predicted air pollution levels at the site. Table 3.6-9, ER 363-64. BLM concluded that none of the predicted levels of the Project's emissions of the criteria pollutants (combined with the background levels) would be above the applicable standards. Id. Yet without adequate baseline

data, this conclusion is unsupportable. For example, for NO_2 (nitrogen dioxide), a noxious gas produced by many sources, BLM predicts that the Project alone will emit 162.1 *u*g/m^3, very close to the 1-Hour Clean Air Act standard of 188 *u*g/m^3. Table 3.6-9. Id. Yet this is based on a background baseline level of zero, which lacks evidentiary support.[4]

This reliance on "zero" for background conditions contradicts the record and other admissions in the FEIS. For example, BLM acknowledges that there are other current sources of NO_2 emissions in the area. In its discussion of the no-action alternative (i.e., no Project approval), BLM states that: "Combustion of diesel in the trucks and drilling rigs can produce elevated levels of CO, NO_2, SO_2, PM_{10}, $PM_{2.5}$, and O_3. The amount of these emissions under the No Action Alternative would be substantially less than under the Proposed Action." FEIS 3-305, ER 367. Although no analysis is provided to show how "substantially less" the current/background pollutant levels would be (itself a violation of NEPA's mandate to analyze these issues), it is certain that they are more than "zero."

[4] Even with the unsupported baseline levels set at zero, BLM's conclusions regarding compliance with all air quality standards are suspect. BLM modeled compliance at the Project fenceline, Figure 3.6.4, ER 366, which is what BLM considered the limit of "public access." FEIS 3-292, ER 363. Yet, public access would occur "through the Project Area during the annual Pony Express re-ride, which generally occurs in June," as well as "at other times of the year." FEIS 3-593, ER 374. Despite this public access on the Trail adjacent to the waste rock and tailings dumps, the FEIS did not analyze the air pollution levels in these public access areas.

BLM's unsupported conclusion that background levels of NO_2 (and other pollutants) is zero is further undermined by the fact that the Project abuts State Highway 278. Figure 2.1.5 (showing Highway 278 within the eastern side of the Project boundary), ER 307. As BLM admits, "combustion of diesel in the trucks" is a source of NO_2. FEIS 3-305, ER 367. BLM's assumption that there are no emissions from trucks on Rte. 278 (i.e., zero background levels) defies common sense, contradicts the record, and is thus groundless and arbitrary.

Additionally, the FEIS acknowledges that other sources of air pollution in the "Cumulative Effects Study Area (CESA)" for air emissions emit the criteria pollutants that BLM either assumed were zero or were based on data from in many cases well over a hundred miles away. For example, BLM admits that mining, oil and gas, agriculture and commercial operations in the area all "generate fugitive dust and combustion emissions." FEIS 4-54, ER 421. *See also, e.g.,* Figure 4.3.5 (showing mineral and oil and gas projects within the air quality CESA), ER 414.

BLM's decision to use "zero" for background levels and failure to have any baseline data for critical pollutants was severely criticized by both EPA and Eureka County:

> In the case of NO_2, deleting the background values enables the otherwise improper conclusion that no significant impacts will occur; **indeed the sum of the previously applied NO_2 one-hour background value and the modeling result would exceed the applicable air quality standard** thus exceeding BLMs own significance threshold. Furthermore **if BLM applied the true background concentrations to other pollutants, especially**

> **particulate matter, modeling might reveal the same result: an exceedance of air quality standards**.

County comments on Preliminary FEIS (emphasis added), ER 453. BLM failed to correct this, and other, problems raised by the County, forcing the County to conclude:

> [T]he crucial failings in the FEIS prevent informed public involvement and agency decision-making to an extent that requires BLM to prepare a revised final EIS or a supplemental EIS to address these outstanding issues and to circulate that document for public review. Anything less would contravene the letter and spirit of NEPA.

County comments on FEIS, ER 286. BLM never prepared the required revised or supplemental Final EIS.

In its comments on the FEIS, EPA notified BLM that the "background concentration of zero for these pollutants may be too low to be accurately representative." ER 283. EPA and the County also noted that the Draft EIS had used a background concentration for NO_2 of 27 *u*g/m^3 (based on EPA data) which when added to the predicted emissions of NO_2 of 162.1 *u*g/m^3, would violate the 1-Hour Clean Air Act standard of 188 *u*g/m^3. ER 453 (County); ER 283 (EPA). *See also* Draft EIS Table 3.6-7, listing background baseline levels for these pollutants, ER 487. The FEIS, however, changed these background numbers to "zero" – resulting in the appearance that the Project would comply with the NO_2 standard.

BLM thus erroneously concluded that the Project would not result in any potential violation of federal or state air quality standards and related laws. Table

3.6-9, ER 363-64. BLM also did not prepare or consider any mitigation measures for these air emissions. "No mitigation is proposed for this impact." FEIS 3-293 (for PM_{10}, $PM_{2.5}$ and Pb emissions), ER 364; FEIS 3-294 (for combustion emissions of CO, NO_2, SO_2, PM_{10}, $PM_{2.5}$ and VOCs (Volatile Organic Compounds), ER 365.

B. The FEIS Failed to Fully Analyze the Project's Direct, Indirect, and Cumulative Impacts.

NEPA requires that BLM fully consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 C.F.R. §§ 1502.16; 1508.8; 1508.25(c). Impacts that must be analyzed include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Direct effects are caused by the action and occur at the same time and place as the proposed project. 40 C.F.R. § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 C.F.R. § 1508.8(b). Id. Cumulative impacts are:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. As the Ninth Circuit noted in rejecting BLM's analysis of a mining project:

> In a cumulative impact analysis, an agency must take a "hard look" at all actions. … [A]nalysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment... Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe v. U.S. Dep't of Interior, 608 F.3d 592, 603 (9th Cir. 2010).

A cumulative impact analysis must provide a "useful analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002). This prevents agencies from undertaking a piecemeal review of environmental impacts. Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1306-07 (9th Cir. 2003). NEPA requires "mine-specific . . . cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed operations in the region. Great Basin Mine Watch, 456 F.3d at 971-74.

Although BLM admits that there will be cumulative effects/impacts from various other mining, oil and gas, agricultural, commercial, and other activities, there is no detailed discussion about the actual impacts from these activities. *See*,

FEIS Section 4, 4-1 to -75 (cumulative impacts section for proposed/approved project), ER 377-441. Instead, the FEIS merely lists these activities, notes that they will result in cumulative impacts along with the Project to various resources (e.g., air, water, wildlife, cultural/historical), provides a summary of the acreages of these activities, and a cursory mention of impacts. *See*, *e.g.*, Table 4.2-2, (listing types of activities that will cause cumulative impacts), ER 384-86.

Nowhere does the FEIS provide the "quantified assessment" of the impacts from these activities required by NEPA. The lack of any quantified analysis or data of the cumulative air emissions from the activities within the air quality CESA is especially problematic when coupled with the above-noted lack of any baseline data or analysis of air quality at/near the Project. BLM listed a host of other such activities within the Cumulative Effects Study Area that will contribute cumulative impacts, yet did not provide any quantified analysis of the environmental impacts from these projects. Id.

The district court accepted this mention of other cumulatively-impacting activities as sufficient under NEPA. ER 24-25. Yet a review of the FEIS pages cited by the court (FEIS Chapter 4, ER 377-441) shows that BLM never quantified these impacts.

Under NEPA, BLM is required "to provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the

environment." Te-Moak Tribe, 608 F.3d at 603. Without such information, "neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide." Id.

C. Lack of Adequate Mitigation and Other Analysis.

NEPA also requires that mitigation measures be fully reviewed in the FEIS, not in the future. "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." Robertson, 490 U.S. at 353. NEPA requires that documents: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," and (2) "include discussion of . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h). "Mitigation" is defined as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. §§ 1508.20 (a)-(e).

Mitigation measures must be discussed with "sufficient detail to ensure that environmental consequences have been fairly evaluated." Robertson, 490 U.S. at 352. The discussion of mitigation measures must also assess their effectiveness. "An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." South

Fork Band Council v. Dept. of Interior, 588 F.3d 718, 726 (9th Cir. 2009). BLM failed to provide the required mitigation analysis during the NEPA public review process (including the required effectiveness analysis) for a number of critical resources.

1. Failure to involve the public and other agencies in financial assurance mitigation.

A critical mitigation measure that BLM refused to submit to the NEPA process involves the reclamation of the massive disturbance and impacts to public lands and waters resources that must be reclaimed pursuant to BLM mining regulations at 43 C.F.R. Part 3809. Reclamation is projected to last 30 years after mining ceases. ROD 1, ER 241. As part of this mitigation measure, the ROD approved the imposition of financial guarantees (FG) to cover reclamation costs for the Project. ROD 30-35, ER 270-75. The FG's include the establishment of a Long Term Funding Mechanism (LTFM) to purportedly cover the costs "for post-reclamation obligations (including long-term monitoring and **mitigation**) associated with the closure process of the Mount Hope Project." ROD 31 (emphasis added), ER 271.

Despite the fact that BLM considers the reclamation FGs as "mitigation" measures needed to ensure that the Project complies with federal law, BLM never reviewed the consideration or establishment of the FGs under NEPA. GBRW and the public were never allowed to see the proposed FGs during the NEPA process,

and were never allowed to comment upon these measures, including whether they were adequate or would be effective in protecting public resources.

EPA determined that BLM violated NEPA by failing to involve the public and agencies in the review and establishment of the FGs and LTFM:

> [T]he discussion regarding post-closure financial assurance requirements remains far too general and the EIS continues to lack quantitative discussion of the trust fund requirement. **As a result, the Final EIS does not adequately disclose information critical to determining the project's long term environmental consequences**.

EPA letter to BLM on FEIS (emphasis added), ER 280. Eureka County similarly notified BLM that the failure to submit the FGs/LTFM for any public review violated NEPA:

> Without disclosing the essential characteristics of reclamation/closure bonds and the anticipated LTFM, the PFEIS prevents public reviewers from comprehending whether and how environmental impacts will be addressed upon closure or abandonment of the mine. … The public and cooperating agencies should be able to review for themselves BLM's calculations and reclamation/closure funding proposals in order to understand and provide informed commentary on the project's continuing environmental effects once the mine's extractive operations have terminated. NEPA mandates this disclosure in the name of impact analysis.

County letter on Preliminary FEIS, ER 465.

2. Failure to fully analyze mitigation for the pit lake contamination.

Regarding the pit lake that will form after the groundwater pumping ceases, BLM acknowledged that it failed to review any mitigation to alleviate the creation of the contamination that is predicted to violate water quality standards. "The pit

lake that is anticipated to form in the open pit is expected to fill slowly (Figure 3.3.12) and would be 900 feet deep at 200 years after the end of mining." FEIS 3-220, ER 357.

Water quality in the pit lake is predicted to exceed water quality standards for a number of pollutants.

> Of constituents that are regulated by the State of Nevada, fluoride, SO4 (Figure 3.3.14), Cd, Mn (Figure 3.3.15), Sb, and Zn (Figure 3.3.16) are expected to be near or above Nevada reference standards and EPA drinking water MCLs Table 3.3-3 water quality criteria (Table 3.3-1). … **As evaporation from the lake surface concentrates the dissolved minerals, some water quality constituent concentrations would be predicted to increase over time relative to baseline concentrations and to exceed the present Nevada water quality standards** (see Table 3.3-1).

Id. (emphasis added). Despite this, "No mitigation is proposed for this impact." Id. This is because, according to BLM, "[t]here would be a low potential for impacts to ground water quality due to the formation of a ground water sink in the open pit under the Proposed Action." Id. According to BLM, because "[a]ccess to the open pit by humans and livestock would be restricted," there is no need to mitigate against, or prevent, the violation of water quality standards in the pit lake. Id.

However, the "low potential for impacts to ground water quality" does not equate to "no potential for impacts." Further, the fact that the pit lake would not be accessible for humans and livestock during the life of the mine does not mean that such will always be the case in the future. BLM's statement that there is a "low potential" for water in the pit lake to migrate to the groundwater does not equate to a

similar purported low potential for future water users to use the water in the pit lake. BLM did not analyze the scenario that water in the pit could be used in the future in the same time frames that it analyzed pit lake levels.

The fact that the waters of the pit lake may not be used in the near future does not mean that this will always be the case. This is especially true in this arid agricultural area of Nevada, as there is a definite potential for future need of the water in the pit lake, a potential which the FEIS failed to recognize or analyze. Although BLM analyzed the groundwater depletion and its effects, and the creation of the pit lake, for over 400 years in the future (*see* Figure 3.3.12 showing the water level rise in the pit lake past 600 years, ER 358), it failed to consider the potential future uses of the contaminated water that will form in the pit lake for any similar or significant length of time.

3. Failure to fully analyze mitigation for the loss of surface and ground waters.

As noted above in the discussion regarding BLM's failure to protect the PWR springs, BLM's "mitigation" for the elimination or significant loss of the springs is largely a plan to monitor the predicted drop in the water table and only then develop a plan to pipe water to some of the impacted springs. FEIS 3-88 to -106, ER 337-354.

For many of the affected springs, this "mitigation" consists of pumping

additional water and installing a series of pipes and infrastructure to purportedly replenish some of the lost water. Table 3.2.9 (listing mitigation measures), ER 341-354; Figure 3.2.21 (map of pipes and springs), ER 340. Even this mitigation is inadequately analyzed. As noted in the FEIS:

> Implementation of the mitigation outlined in Table 3.2-9 would result in up to approximately 37.2 acres of additional surface disturbance associated with road and pipeline construction and maintenance, as well as the need for approximately 302 acre-feet of water that would at least initially come from EML's existing water rights if additional water rights have not yet been secured.

FEIS 3-89, ER 338. Despite the acknowledgement that an additional "302 acre-feet of water" (equating to over 98 million gallons) **per year** would be needed for this mitigation, there is no analysis of where this water will come from, or of the impacts from its withdrawal.

Although BLM says that this water "would at least initially come from EML's existing water rights," Id., there is no analysis of the reasonable likelihood that EML will need this additional water from additional sources. The EPA strongly criticized this omission, requesting that BLM prepare a Supplemental FEIS to cure this NEPA violation. "The Final EIS does not discuss the additional impact this mitigation would have on groundwater levels should the entire 302 afy be supplied by groundwater extraction in excess of EML's current allocation." ER 283. BLM never prepared the Supplemental FEIS, nor provided the needed analysis.

Despite this purported "mitigation" of some of the water losses to some of the

affected waters, other springs will be permanently lost (including PWR 107 springs), as noted above, due to the location of the Project's waste dumps and other facilities. For example, Springs 619, 639, and 646 (and likely 612), will no longer exist and the only "mitigation" for their complete loss is a plan to "install a guzzler designed for large game." FEIS Table 3.2.9, ER 347 (McBride's Spring), 348 (Mount Hope Spring).

The "mitigation" plan to "install a guzzler for large game" fails to protect livestock use, which is acknowledged to be a current use of these springs. Id. There is no support provided as to whether the mitigation for surface waters will be effective. Although the FEIS states that all of these mitigation measures will be "effective," or "highly effective," no supporting scientific analysis is provided.

III. BLM Violated FLPMA

FLPMA requires that BLM "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). This is known as the "prevent UUD" standard. This duty to "prevent undue degradation" is "the heart of FLPMA [that] amends and supercedes the Mining Law." Mineral Policy Center, 292 F.Supp.2d at 42. BLM cannot approve a mining project that would cause UUD. 43 C.F.R. § 3809.411(d)(3) (iii). "FLPMA's requirement that the Secretary prevent UUD supplements requirements imposed by other federal laws and by state law." Center for Biological Diversity v. Dept. of Interior, 623 F.3d 633, 644 (9th Cir.

2010).

In addition, BLM must ensure that all operations comply with the Performance Standards found at §3809.420. *See* 43 C.F.R. §3809.5 (definition of UUD, specifying that failing to comply with the Performance Standards set forth at §3809.420 constitutes UUD). One of the most important Performance Standards requires BLM to ensure that all operations comply with all environmental protection standards, including air and water quality standards. *See, e.g.,* 43 C.F.R. § 3809.5 (definition of UUD includes "fail[ure] to comply with one or more of the following: … Federal and state laws related to environmental protection."); § 3809.420 (b)(5)(listing Performance Standards that must be met, including the requirement that "All operators shall comply with applicable Federal and state water quality standards …."). "All operators shall comply with applicable Federal and state air quality standards, including the Clean Air Act." § 3809.420(b)(4).

As detailed above, the mine pit lake is predicted to violate federal and state water quality standards, with no mitigation proposed or required. According to the national policy of the Interior Department/BLM, failure to avoid significant impacts and failure to require mitigation that would reduce adverse Project impacts constitutes UUD. "Mitigation measures fall squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. **An impact that can be mitigated, but is not, is clearly unnecessary**." 65

Fed. Reg. 69998, 70052 (Nov. 21, 2000) (preamble to BLM's 43 C.F.R. Part 3809 mining regulations) (emphasis added). Further, as noted above, BLM's mitigation plan fails to include the required analysis of the effectiveness of each measure, thus failing to meet BLM's duties under NEPA as well as FLPMA.

BLM also failed its duty under FLPMA to protect the PWR 107 reserved rights and withdrawn lands. Federal agencies have a duty to protect federal reserved water rights under their statutory mandates to manage and protect public land and water resources. Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990). FLPMA's mandate to "prevent UUD" is one of those affirmative mandates. Id. at 1413, *citing* Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988). In Yeutter, the court dismissed the case as unripe, since plaintiffs could not show any threat to reserved waters from a proposed project. 911 F.2d at 1418. Here, the threat to federally reserved public waters from the Project is real and immediate.

The Project's impacts to Mt. Hope and its environs, including the severe degradation of and elimination of the PWR 107 waters and lands (including the loss of surface and ground waters themselves), as well as the creation of the mine pit lake that will violate water quality standards, constitutes UUD under FLPMA which BLM failed to prevent.

In addition, BLM's conclusion that the Project will not violate any applicable air quality standard, as noted above, was based on the lack of credible and accurate

information, failed to account for baseline pollutant levels, and otherwise contradicts the record. As such, BLM failed to show that the Project will not violate air quality standards, which constitutes UUD and a violation of FLPMA and the Part 3809 regulations (in addition to the NEPA violations noted above).

CONCLUSION

Due to the numerous violations of federal law and regulation, and the arbitrary and capricious nature of BLM's actions, Appellants respectfully ask this Court to reverse the decision of the district court, and vacate and set aside BLM's approval of the Project and the agency's deficient NEPA analysis contained in the FEIS.

Respectfully submitted this 23rd day of January, 2015.

/s/ Roger Flynn
Roger Flynn
Jeffrey C. Parsons
WESTERN MINING ACTION PROJECT
P.O. Box 349, 440 Main St., #2
Lyons, CO 80540
(303) 823-5738
wmap@igc.org

/s/ Julie Cavanaugh-Bill
Julie Cavanaugh-Bill
CAVANAUGH-BILL LAW OFFICES, LLC
401 Railroad St., Ste. 307
Elko, Nevada 89801
(775) 753-4357

julie@cblawoffices.org

Attorneys for Plaintiffs

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (a)(7)(C) AND CIRCUIT RULE 32-1

I certify that: Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 13,980 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words).

/s/ Roger Flynn 1-23-15

Roger Flynn Date

CERTIFICATE OF SERVICE OF ELECTRONIC FILING OF BRIEF

I also certify that on January 23, 2015, I electronically filed the foregoing brief, along with the Excerpts of Record (ER) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all of participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also sent this day the Clerk of the Court four (4) copies of the ER via Federal Express delivery.

/s/ Roger Flynn

Roger Flynn

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(b), Appellants state that there are no related cases that have been before this Court.

INDEX OF STATUTORY AND REGULATORY ADDENDUM

Statutes

1. Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706.

2. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335.

3. Federal Land Policy and Management Act (FLPMA), PL 94-579 (1976): Sec. 302 (43 U.S.C. §1732); Sec. 701; Sec. 704.

4. Mining Law of 1872, 30 U.S.C. § 22.

5. Pickett Act of June 25, 1910, c. 421, 36 Stat. 847.

6. Pickett Act, as amended by the Act of August 24, 1912, c. 369, 37 Stat. 497.

7. Stock-Raising Homestead Act of 1916, §10, 39 Stat. 865.

Regulations

8. Council on Environmental Quality NEPA Regulations, 40 C.F.R. §§ 1500-1508.

9. BLM Surface Management Regulations for Hardrock Mining, 43 C.F.R. §§ 3809.1-3809.900.

Executive Orders and Administrative Decisions

10. Public Water Reserve #107, Executive Order of April 17, 1926.

11. Selections, Filings, or Entries of Lands Containing Springs or Water Holes, Circular No. 1066, 51 I.D. 457, 1926 LEXIS 45.

12. Memorandum, Interior Dept. Regional Counsel to Manager, Land & Survey Office, Subject: "Conflict—Mining Claim and public water reserve," September 24, 1953 (District Court Docket 5-13).

Additional Sources

13. Muhn, *Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67 (2001).