



Working with Communities to Protect Their Land, Air, and Water

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Re: comments on *the Draft Environmental Impact Statement for the Proposed Gibellini Mine Project, Eureka, NV*

Great Basin Resource Watch (GBRW) considers the proposed vanadium mine (Project) as potentially a significant impact to the area, and should be studied in great detail. The comment period of only 45 days does a great disservice to the public. A mine plan such as this should have a minimum of 90 days.

I. BLM Wrongly Assumes that Nevada Vanadium Company (NVV) has Statutory Rights to Use and Occupy All of Its Mining Claims for All Project Operations and Wrongly Limits Its Discretion Over Activities On Mining Claims that Have Not Been Shown to Be Valid.

BLM bases its review and potential approval of the Project on the legally-erroneous assumption that NNV has statutory rights under the 1872 Mining Law, 30 U.S.C. §21 et seq., to use and occupy federal public lands for all of its various facilities, such as the acres covered by the heap leach pad, when there has been no determination that these lands actually meet the requirements of the Mining Law for such perceived rights. BLM cannot limit its discretion over these types of ancillary facilities based on the unsupported assumption that NVV has valid rights under the Mining Law.

“Before an operator perfects her claim, because there are no rights under the Mining Law that must be respected, BLM has wide discretion in deciding whether to approve or disapprove of a miner’s proposed plan of operations.” Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 48 (D.D.C. 2003). “The court expressly rejects NMA’s [intervenor National Mining Association] view that only the UUD standard [“unnecessary or undue degradation” standard under FLPMA, 43 U.S.C. §1732(b)] may properly apply to all mining activities performed on public land.” Id. at 48, n. 24.

Yet that is what BLM has done here. Without even inquiring, let alone knowing, whether all the mining claims covering the ancillary uses are valid and have statutory rights under the Mining Law that would arguably limit its discretion, BLM has decided not to exercise its full discretion over NVV’s operations and erroneously limits its authority to only the UUD standard.

But NVW has no rights to occupy its mining claims on public lands without showing that it has discovered a “valuable mineral deposit” of a locatable mineral on all of its mining claims proposed to be used/occupied by its operations. To prove that it has made the “discovery of a 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). “Each lode claim must be independently supported by the discovery of a valuable mineral within the location as it is marked on the ground.” Lombardo Turquoise Mining & Milling v. Hemanes, 430 F.Supp. 429, 443 (D. Nev. 1977) *aff’d* 605 F.2d 562 (9th Cir. 1979).

In Center for Biological Diversity v. US Fish and Wildlife Service, 33 F.4th 1202 (9th Cir. 2022), the appeals court with jurisdiction over Nevada rejected the government’s position that a mining claimant has a “right” to use and occupy its mining claims absent a showing that a valuable mineral deposit had been discovered on those claims (i.e., the claims were valid under the Mining Law). That case dealt with the federal government’s approval of the “Rosemont” mine, a large open pit copper mine on mostly federal land.

The court rejected the view that the mere filing of a mining claim, and the Mining Law in general, conveys a right to occupy federal lands with ancillary facilities: “In the absence of a discovery of a valuable mineral deposit, Section 22 [of the Mining Law] gives a miner no right to occupy the claim beyond the temporary occupancy necessary for exploration.” Center for Biological Diversity, 33 F.4th at 1209. Section 22 states that: “All valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase.” 30 U.S.C. § 22. Ruling on that language, the court held:

[T]he right of “occupation” depends on valuable minerals having been “found” on the land in question. See 30 U.S.C. §§ 23, 26. If no valuable minerals have been found on the land, Section 22 gives no right of occupation beyond the temporary occupation inherent in exploration.

Center for Biological Diversity, 33 F.4th at 1219. “[V]alidity of a mining claim is a necessary prerequisite to post-exploration occupancy of a claim.” *Id.* at 1217-18. “Our court has also explained the distinction drawn in Section 22 between the right of temporary occupation for exploration purposes and the right of occupation for mining purposes after discovery of valuable minerals.” 33 F.4th at 1220 (then quoting Davis v. Nelson, 329 F.2d 840, 844-45 (9th Cir. 1964)). The court further noted that “mere exploration, without discovery, does not confer a privilege to obstruct surface use.” 33 F.4th at 1220, quoting United States v. Allen, 578 F.2d 236, 238 (9th Cir. 1978).

The court also held that the agency’s failure to inquire into whether the mining claims were valid under the Mining Law, which is what BLM has done here for the Gibellini Project, was essentially the same as assuming the claimant had a right to use and occupy the waste dump lands – and that such an assumption illegally created statutory rights where none exist.

In the FEIS, the Service either assumed that Rosemont's mining claims on that land were valid or (what amounted to the same thing) did not inquire into the validity of the claims. Based on its assumption that the mining claims were valid, the Service concluded that Rosemont's permanent occupation of the claims with its waste rock was permitted under the Mining Law.

Center for Biological Diversity, 33 F.4th at 1212. "The Government's argument is not only foreclosed by the text of Section 22. It is also foreclosed by a century of precedent." *Id.* at 1219.

That the Rosemont ruling dealt with the Forest Service's approval of ancillary facilities under asserted rights under the Mining Law and Section 612 of the 1955 Surface Resources Act, 30 U.S.C. § 612, rather than BLM's similar approval of such operations here, does not reduce its applicability. Although the Rosemont case did not strictly involve BLM's authority under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*, but rather the Forest Service Organic Act of 1897 (Organic Act), 16 U.S.C. §§ 478, 482, 551, and while these public land laws do differ between the agencies, it is a distinction without a difference here when it comes to the overarching applicability of the Mining Law and Section 612.

The Mining Law and Section 612 apply to both agencies equally. Except for a general introductory discussion about the Organic Act, the Ninth Circuit's ruling contains little analysis of that statute. Center for Biological Diversity, 33 F.4th at 1210. It is primarily focused on the Mining Law and Section 612. The fact that BLM's permit review and environmental standards under FLPMA (such as the prohibition against "unnecessary or undue degradation" to public lands, 43 U.S.C. § 1732(b)), differ from the Forest Service's duty under the Organic Act to protect against "depredateions upon the public forests," 16 U.S.C. § 551, does not affect the Ninth Circuit's rulings on the Mining Law and Section 612.

Because the Mining Law and Section 612 indisputably apply to both agencies, BLM cannot evade the Ninth Circuit's clear interpretations of both statutes. A mining claim on BLM land is treated the same under the Mining Law as a claim on Forest Service land. The same "valuable mineral deposit" requirements apply to both. The prohibition against approving waste dumping and related operations under improperly-assumed rights under the Mining Law and Section 612, as ruled by the Ninth Circuit, thus applies equally to the Forest Service and BLM.

Indeed, a review of the Department of Justice's brief to the Ninth Circuit shows that it made the same arguments, with the same language, regarding the assertions of "rights" to use and occupy the lands approved for the ancillary uses. Federal Appellants' Brief, 2020 WL 3455289, **17-18.

The government further urged the Ninth Circuit to reject the argument, raised by plaintiffs in Rosemont, that Section 22 of the Mining Law mandates that rights to "occupation" for the waste dumps requires the discovery of a valuable mineral deposit on those claims. As the government argued: "Nor should the Court join Plaintiffs in reading such a restriction into the phrase 'the lands in which [valuable mineral deposits] are found.' 30 U.S.C. § 22. Plaintiffs claim that this language limits a miner's right of occupation under § 22 to only lands containing actual, validated valuable mineral deposits." 2020 WL 6833548, *3 (Reply Br.).

But that is precisely what the circuit court did, agreeing with plaintiffs on that very issue. “[T]he right of ‘occupation’ depends on valuable minerals having been ‘found’ on the land in question. See 30 U.S.C. §§ 23, 26. If no valuable minerals have been found on the land, Section 22 gives no right of occupation beyond the temporary occupation inherent in exploration.” Center for Biological Diversity, 33 F.4th at 1219.

As shown in the DEIS, NVV ancillary facilities such as the heap leach pad are far removed from the ore body (and indeed are purposely located to infiltrate water away from the ore body so as not to affect mining operations). See DEIS Figure 1-2 (Proposed Project Layout map). There is no credible argument that the lands slated for the heap leach pad and other ancillary activities/facilities contain the required valuable mineral deposit, nor has BLM even inquired into whether NVV has met the statutory requirements for its assertion of such rights.

BLM also ignores the fact that both BLM and Forest Service mining regulations interpret the same language regarding “operations authorized by the mining laws.” The focus of BLM’s mining regulations is to “Prevent unnecessary or undue degradation of public lands authorized by the mining laws.” 43 C.F.R. § 3809.1 Although the underlying environmental standard is different from BLM’s, Forest Service regulations also focus on what is “authorized by the mining laws”: “It is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws ... shall be considered.” 36 C.F.R. § 228.1.

Thus, the primary focus of the Ninth Circuit’s decision, determining what is “authorized by the mining laws,” applies to both agencies. The Ninth Circuit recognized that, only if the claims slated for the ancillary uses were valid, then the use and occupancy was “authorized by the Mining Law.” Center for Biological Diversity, 33 F.4th at 1221. “If Rosemont’s dumping of its waste rock is authorized by the Mining Law because its mining claims are valid,” the dumping would be covered by the agency’s mining regulations. Id. Thus, there is no credible reason why the same rule does not apply to the BLM, albeit under its 43 C.F.R. Part 3809 mining regulations and FLPMA.

Lastly, in upholding the district’s court’s vacatur of the Record of Decision and FEIS, and as part of its remand instructions to the agency, the Ninth Circuit ordered the agency to reconsider its permitting authority based on the rule that claimants have no right to occupancy for ancillary facilities such as the RIBs unless a valuable mineral deposit had been discovered on each claim, and that the agency has broad discretion over these activities (discretion not applied by BLM here). Id. at 1223-24. Although the agency permitting regimes differ, BLM must also regulate these facilities without any unsupported assumption of valid rights under the Mining Law and Section 612, and subject these operations to its full discretionary authority.

II. The Project and BLM’s Review Does Not Comply with FLPMA.

Even if the NVV can show that all of its facilities on its mining claims meet the strict test for valid rights under the Mining Law, as an overarching mandate for BLM’s management of public lands, FLPMA requires that BLM “take any action necessary to prevent unnecessary or undue degrada-

tion of the lands.” 43 U.S.C. §1732(b) (the “UUD standard”). “FLPMA’s requirement that the Secretary prevent UUD supplements requirements imposed by other federal laws and by state law.” Ctr. for Biological Diversity v. U.S. Dept. of the Interior, 623 F.3d 633, 644. This duty is “the heart of FLPMA [that] amends and supersedes the Mining Law.” Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 42 (D.D.C. 2003). BLM cannot under any circumstances approve a mining project that would cause UUD. 43 C.F.R. §3809.411(d)(3)(iii).

As part of preventing UUD, 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 constitutes UUD). These Standards require BLM to ensure that all operations comply with all environmental protection standards, including standards for air and water. See 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.”).

For example, those rules: “retain[ed] the general performance standards (paragraphs (a)(1) through (a)(5) from the 2000 rule because they provide an overview of how an operator should conduct operations under an approved plan of operations and clarify certain basic responsibilities, including the operator’s responsibility to comply with applicable land use plans and BLM’s responsibility to specify necessary mitigation measures.” 66 Fed. Reg. 54835, 54840 (Oct. 30, 2001). One of these standards is BLM’s duty to impose “mitigation measures to protect public lands.” 43 C.F.R. § 3809.420(a)(4).

While BLM does not have to impose every conceivable mitigation measure, “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 rule section that remains in force).

BLM’s mitigation policy, as detailed by the Interior Solicitor, acknowledges the need to ensure compliance with an RMP as part of its mitigation duties under the FLPMA UUD standard. In discussing the previous rulemaking (quoted above) with approval, the Solicitor reiterated “‘the operator’s responsibility to comply with applicable land use plans and BLM’s responsibility to specify necessary mitigation measures.’ Id. at 54,840 (emphasis supplied).” M-37039, The Bureau of Land Management’s Authority to Address Impacts of its Land Use Authorizations through Mitigation, 20, n. 115 (Dec. 21, 2016)(Mitigation Opinion).¹

The Solicitor noted that “in the hardrock mining context, the BLM has long recognized that the UUD requirement creates a ‘responsibility [for the BLM] to specify necessary mitigation measures’ when approving mining plans of operations.” M-37039, at 19 (citations omitted). “The BLM regulations addressing surface management of hardrock mining operations on public lands have consistently included mitigation as a requirement for preventing UUD, including as part of the general performance standards in the current regulations.” Id.

¹ The 2016 Mitigation Opinion was temporarily revoked in 2017, but was recently reinstated by the Solicitor. M-37075, Withdrawal of M-37046 and Reinstatement of M-37039 (April 15, 2022).

In addition, as discussed more fully below, under FLPMA, BLM cannot approve any activity that is not in full compliance with the applicable land use plans, known as Resource Management Plans (RMPs). FLPMA requires that all activities approved by BLM comply with the requirements of binding RMPs. "The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available." Id. §1732(a).

A. The Project Will Violate Nevada Ground Water Quality Standards and Cause UUD.

To comply with FLPMA's mandate to prevent UUD, BLM must review and ensure that projects comply with all environmental protection requirements—including Federal and state water quality standards. 43 C.F.R. §3809.420(b)(4) ("All operators shall comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act [Clean Water Act], as amended (30 U.S.C. 1151 et seq.).")

The Project fails to meet these requirements, as harmful pollutants will be released into the groundwater in violation of water quality standards. According to the DEIS:

"Metal concentrations in alluvial groundwater are typically below Nevada Profile I reference values with the exceptions of iron and manganese in water from well GHM-3 and arsenic in water from GPWM-2. GHM-3 is located near the southwestern corner of the proposed HLP and has iron and manganese concentrations that average 2.1 and 1.2 mg/L, respectively." (Supplemental Environmental Report Final Water Resources and Geochemistry 16, p. 36).

Therefore, baseline, background levels are not elevated except for a few constituents in some samples. Furthermore, the DEIS explains that there is a clear and short path to the alluvial aquifer under the open pit area:

"During closure, water that drains from the open pit through the slot-drain would impact surface water quality within the drainage downgradient of the slot-drain. The slot-drain is a riprap-filled retention basin to both minimize outflow and to remove suspended sediment from the water flow. Surface flow conveyed by the slot-drain would report to the ephemeral drainage on the south side of the pit where it would flow a short distance and infiltrate to alluvium." (Supplemental Environmental Report Final Water Resources and Geochemistry 16, p. 74).

However, Meteoric Water Mobility analysis and Humidity Cell tests demonstrate the run-off and drainage from the open pit into the alluvial aquifer will contain elevated levels above Nevada Profile I standards of a number of toxic elements (COPC's). According to the DEIS:

"During closure, the pit would be configured as a free-draining facility and discharged water would convey a chemical load to the receiving environment. Using a pit exposed surface area of 85 acres and the assumption that runoff would be equal to 30 to 70 percent of average annual precipitation, **between 17.0 and 39.6 ac-ft/yr of water would be discharged from the slot-drain and report to alluvium.** The estimated chemical

mass that would be discharged from the slot-drain assuming attenuation is provided in Table 14. These estimates were made using MWMP data for PAG and non-PAG mine rock, combined as 1.75 parts non-PAG to 1.0 parts PAG, which is consistent with attenuation column testing as described in Schafer (2014). Impacts on alluvial groundwater from the pit after closure including increased recharge to alluvium in the natural drainage below the slot-drain and changes in **groundwater quality caused by loading of constituents of potential concern (COPCs) in pit runoff would be major, long-term, and localized.**" (Supplemental Environmental Report Final Water Resources and Geochemistry 16, p. 74).

The COPC's listed in the DEIS are antimony, arsenic, cadmium, copper, molybdenum, nickel, selenium, total dissolved solids, vanadium, and zinc. Given the baseline conditions it is clear that there at least a "potential" that alluvial groundwater will be degraded, which is a violation of Nevada State law. However, DEIS provides no mitigation plan to either intercept these releases prior to degrading groundwater or prevent these releases of pollutants in excess of standards. BLM only states: "Any impacts on groundwater below the pit from infiltration of precipitation would be confined as the aquifer below the pit is isolated from down-gradient aquifers." Supplemental Environmental Report Final Water Resources and Geochemistry 16, p. 87) It does not matter that the aquifer below the pit is likely to be perched and not well connected to the regional groundwater aquifer. This is still groundwater degradation and therefore UUD and a violation of Nevada law.

BLM's approval of the Project without any plan to prevent the contamination, in the face of the predicted exceedances, violates its mandate under FLPMA and the Part 3809 regulations to prevent UUD.

III. BLM Failed to Prepare a NEPA-Compliant Draft EIS

Because the DEIS is legally deficient, as shown herein, BLM must redo the DEIS and subject it to public review as required by NEPA.

A. The DEIS fails to fully analyze all direct, indirect, and cumulative impacts.

BLM must fully review all direct, indirect, and cumulative environmental impacts of the Project. 40 C.F.R. §§1502.16, 1508.8, 1508.25(c). Direct effects are caused by the action and occur at the same time and place as the proposed project. §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. §1508.8(b). Types of impacts 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]." *Id.*

The Council on Environmental Quality's ("CEQ") guidance on the issue of a "stale" NEPA analysis notes that an EIS "more than 5 years old should be carefully reexamined to determine if the criteria in Section 1509.2 compel preparation of an EIS supplement." *Forty Questions*, 46 Fed. Reg. 18,026, 18,036 (March 23, 1981). See also Or. Natural Res. Council Action v. USFS, 445 F. Supp. 2d 1211, 1232 (D. Or. 2006)(finding this CEQ provision particularly applicable with EAs

over 10 years old, citing, inter alia, the CEQ language). An agency must also carefully reexamine whether the passage of time warrants preparation of new EAs or EISs and explain whatever decision it makes. S. Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983) (noting that the continuing duty to evaluate new information is especially relevant where the original environmental analysis was more than five years old); see, e.g., N. Plains Res. Council v. Surface Transp. Bd., 668 F.3d 1067, 1086 (9th Cir. 2011) (“Reliance on data that is too stale to carry the weight assigned to it may be arbitrary and capricious.”); Lands Council v. Powell, 395 F.3d 1019, 1031 (9th Cir. 2005) (holding that six-year-old data, without updated habitat surveys, was too stale); Nat'l Wildlife Fed'n v. NMFS, 184 F. Supp. 3d 861, 875 (D. Or. 2016) (citing CEQ “40 questions” guidance).

Regarding cumulative impacts, in a leading mining and NEPA case dealing with two nearby Nevada mining projects, the Ninth Circuit held that, even though the two mines were not “connected actions” under NEPA, the NEPA review document for each mine had to fully review the cumulative effects/impacts of the two mines together on the regional environment. Great Basin Mine Watch v. Hankins, 456 F.3d 955, 968-74 (9th Cir. 2006).

Under Secretarial Order # 3399, BLM applies the pre-2020 CEQ NEPA regulations, and the CEQ recently reinstated the definitions of actions/effects/impacts that must be analyzed, including for cumulative impacts/effects.

§ 1508.1 Definitions.

- (g) Effects or impacts means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include the following:
- (1) Direct effects, which are caused by the action and occur at the same time and place.
 - (2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.
 - (3) Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. §1508.1.

“In a cumulative impact analysis, an agency must take a ‘hard look’ at all actions. An [EIS’s] analysis 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 of Western Shoshone v. U.S. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting BLM's EA for the adjacent HC/CUEP mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations)(citations omitted).

The Ninth Circuit has repeatedly faulted the Nevada BLM's failures to fully review the cumulative impacts of mining projects. In one case, vacating BLM's approval of the nearby Mt. Hope Mine, the court stated that "'in a cumulative impact analysis, an agency must take a 'hard look' at all actions that may combine with the action under consideration to affect the environment.'" Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1104 (9th Cir. 2016)(quoting Te-Moak Tribe). BLM violated NEPA because it "did not 'identify and discuss the impacts that will be caused by each successive project, including how the combination of those various impacts is expected to affect the environment.'" Id. at 1105, quoting Great Basin Mine Watch, 456 F.3d 973-74.

In Great Basin Mine Watch, the Ninth Circuit required "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 mining operations in the region. Id. at 972-74. The agency cannot "merely list other [projects] in the area without detailing impacts from each one." Id. at 972. See also ONRC v. Goodman, 505 F.3d 884, 893 (9th Cir. 2007).

The DEIS air quality cumulative effects analysis for air quality under and RFFA (Past, Present, and Reasonably Foreseeable Future Actions) should include exploitation of oil and gas leases, but does not. Table 13 (Source Emissions for Cumulative Analysis) in the "Final Supplemental Environmental Report 2" does not list and oil and gas leases, but Table 15 (Past, Present, and RFFAs in the CESA) in the "Supplemental Environmental Report Final Water Resources and Geochemistry 16" does acknowledge the existence of 10,229 oil and gas leases and 22,997 as "Reasonably Foreseeable Future Actions." These operations certainly affect air quality and needed to be included in the DEIS for cumulative air quality analysis.

The fact that leasing does not initially approve actual oil and gas operations does not mean that BLM is not capable of analyzing foreseeable air emissions, or is not required to include this analysis in the DEIS. Indeed, the BLM Battle Mountain District did so in its own 2019 Lease Sale EA (EA and ROD approval attached). In that EA, BLM prepared a detailed "Air emissions inventory for a representative oil and gas well" to estimate air pollution emissions from a typical well. 2019 Lease Sale EA at 22. BLM prepared a "Reasonably Foreseeable Development (RFD) Scenario" to estimate potential air emissions from the leasing, "predict[ing] a maximum of 25 wells in the Battle Mountain District. The number in any given area is unknown but potential emissions would be multiplied appropriately." Id. Just one well could reasonably be expected to emit 15.6 tons per year of NOx, 6.9 tons per year of PM10, and 10.4 tons per year of Hazardous Air Pollutants (HAPs), among at least a dozen other pollutants. Id. (Table 3).

Under federal mineral leasing laws, BLM only issues leases for oil and gas development "which are known or believed to contain oil or gas deposits." 30 U.S.C. §226(a). BLM cannot plausibly argue that there is no reasonable potential for later development on the leases it itself issued for these "known or believed" deposits.

Across the West, BLM acknowledges the reasonably foreseeable emissions that would be expected to occur on an issued oil and gas lease. For example, in BLM's 2019 Lease Sale EA in New Mexico, it specifically projected reasonably foreseeable emissions from issuance of the lease. EA, Oil and Gas Lease Sale June 2019, DOI-BLM-NM-F010-2019-0032 (Farmington, NM, Office), at 23-25, and Appendix H – projecting reasonably foreseeable emissions from leasing of oil and gas. See also EA, Oil and Gas Lease Sale, June 2019, DOI-BLM-NM-010-2019-0002-EA (Pecos, NM, District Office); In Montana, BLM did the same, in a 2019. EA, Oil and Gas Lease Parcel Sale July 30, 2019, DOI-BLM-MT-0000-2019-0001-EA (Billings, Miles City, Havre, and North Dakota Offices), at 26-28. Another Montana BLM review in 2019 did the same. EA, Oil and Gas Lease Parcel Sale March 27, 2019, DOI-BLM-MT-0000-2018-0007-EA (Billings, Dillon, Glasgow, Havre, Miles City, South Dakota, and North Dakota Offices), at 21-27. More recent BLM leasing analysis in Utah do the same. September 2020 Competitive Oil and Gas Lease Sale DOI-BLM-UT-0000-2020-0004-EA, at 25-29; December 2020 Competitive Oil and Gas Lease Sale DOI-BLM-UT-0000-2020-0005-EA, at 25-27.

As part of BLM's NEPA and FLPMA review duties, BLM must fully consider and respond to the commenting groups' highlighting these BLM practices and policies in Nevada and across the West, as evidenced by these BLM documents. These BLM documents are part of these comments and thus are included in the administrative record for BLM's consideration.

Federal courts regularly require BLM to provide quantified estimates of air pollution that may result from the issuance of oil and gas leases, and analyze potential environmental impacts that may result from oil and gas leasing, including both the indirect and cumulative impacts. The courts have specifically rejected BLM's argument that such analysis need not be done at the leasing stage because the agency would later consider impacts when it approved future drilling permits. In *Western Watersheds Project v. Bernhardt*, 543 F.Supp.3d 958, 990-91 (D. Idaho 2021), the court noted that BLM was required to provide a "Reasonably Foreseeable Development Scenarios" (RFDs), for each proposed oil and gas lease. These RFDs analyze impacts to various environmental resources, such as wildlife and air quality. In *Wildearth Guardians v. BLM*, 457 F.Supp.3d 880, 892-894 (D. Mont. 2020), the court required BLM to analyze the expected air pollution that would be reasonably expected from development on the leases. See also *Center for Biological Diversity v. Forest Service*, 444 F.Supp.3d 832, 851-853 (S.D. Ohio 2020); *San Juan Citizens Alliance v. BLM*, 326 F.Supp.3d 1227 (D.N.M. 2018); *Wild Earth Guardians v. Zinke*, 368 F.Supp.3d 41 (D.D.C. 2019).

B. The DEIS Failed to Fully Analyze the Closure of the Heap Leach Pad

The waste rock management plan calls for separating out the roughly 16% Potentially Acid Generating (PAG) waste rock (320,000 tons) and commingling it with the ore on heap leach pad. Given that 25 million tons of ore is anticipated the PAG material will by mass be about 7.7% of the material in the heap leach pad. GBRW does agree that combining the PAG in this way in an acid leach pad would seem to be a good approach as opposed to having a separate PAG waste rock dump. Clearly, the PAG material will produce acid that could aid in the leaching process. But, the DEIS provides to analysis as to whether this additional acid generating, and potentially long-term source of acid is included in the draindown profile for the heap leach pad. The PAG

material could be a long-term source of acid well past the time expected for the added sulfuric acid to be rinsed out of the pad. This factor needs to be addressed in the DEIS and is not discussed anywhere.

In general, there is no analysis provided on the draindown profile over time. The DEIS needs to provide data and analysis that shows the expected volume of drainage over time and including the predicted water quality over time. Without this information it is not possible for the public to fully evaluate the viability of the closure plan. DEIS merely states that draindown to 24 gpm (gallon per minute) is expected in the 3 years after leaching has been discontinued, and at that time a semi-passive process will be initiated. And, that NVV expects to conduct semi-passive treatment and evaporation for 30 years. Presumably after the 30 years NVV will be able to walk away from the site, but will there still be drainage? The DEIS implies that drainage is likely to continue:

“Long-term drainage from the HLP would be managed in accordance with NDEP and Nevada BLM Reclamation/Closure requirements so that the facilities would not degrade waters of the State. Under standard design, operation, and monitoring requirements, passive management of leachate from the HLP would prevent solution from discharging to surface water or infiltrating to groundwater. Therefore, impacts on water resources from operation and closure of the HLP are not expected to occur.” (Supplemental Environmental Report Final Water Resources and Geochemistry 16, p ES-7)

There is no analysis and discussion of how much this “long-term drainage” will be or the chemical profile of the drainage. How long will this be left to drain on the land for the public to manage?

The E-cells are designed to handle a 100-year, 24-hour storm event, but there is no discussion of how climate change will affect the need to change this design capacity. The world is already seeing that storm events are becoming more ferocious with greater amounts of rain, and predictions are that this will increase. Estimations on the amount of precipitation in a 100-year, 24 hour storm event are already shifting to greater amounts. The DEIS does not address this at all.

Finally, there needs to be an 80-mil liner failure analysis. The DEIS needs to discuss leakage expectations for routine and common liner failures. This kind of analysis is commonly done, and given that the HLP is an acid leach including uranium extraction the leachate will be very toxic. This potential for toxifying the groundwater underneath HLP and possible degradation of groundwater needs to be analyzed even though the depth to groundwater is great.

IV. Wildlife Considerations

The project area contains a seasonal wildlife corridor used for exchange between the Fish Creek HMA and the Pancake HMA (Ely). This corridor has historically been used by mule deer and pronghorn as well as wild horses, and is located in the southwest quadrant. Disturbance could influence movement into off-HMA areas and into the Ely district by wild horses. In the area of this corridor, golden eagles have been noted every year, for the last ten years.

In 2015, the MLFO agreed that additional monitoring and evaluation of the wild horse population was needed to reevaluate AML and address management deficits. The data was to be incorporated into an HMAP-EA in lieu of updating the 1989 LUP. The HMAP-EA would have provided the needed data to appropriately mitigate the exact disturbances presented in this DEIS.

BLM MLFO has been negligent in addressing their responsibility to manage wild horses. The BLM should be required to complete the HMAP contemplated and discussed in 2015 prior to finalizing this DEIS to afford an opportunity for appropriate mitigation for wild horses. At the very least, an additional water haul/solar well location inside the Fish Creek HMA, to the northwest of the disturbance area, could mitigate wild horses moving out of Fish Creek into Pancake to avoid disturbance and help diminish the risk of horse/vehicle collisions.

CONCLUSION

GBRW sees a number of deficiencies the DEIS and potentially in the mine plan itself and does not support the Gibellini Mine Project as proposed and discussed in the DEIS.

Thank you for the opportunity to submit these comments. Please feel free to contact John Hadder if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "John Hadder". The signature is written in a cursive, flowing style with a large initial "J" and a long, sweeping underline.

John Hadder
Great Basin Resource Watch

Laura Leigh
Wild Horse Education