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On-line via the ePlanning website, https://go.usa.gov/xsVs8

Re: GoldRush Mining Project Draft EIS

Dear Mr. Distel and BLM,

Pursuant to the BLM's public notice, Bureau of Land Management Accepting Comments for Goldrush Mine Project Bureau of Land Management (blm.gov), please accept these comments on Nevada Gold Mines (NGM)'s Goldrush Mining Project and BLM's Draft EIS (DEIS) from Great Basin Resource Watch, Western Shoshone Defense Project, the Center for Biological Diversity, and the Progressive Leadership Alliance of Nevada.

At the outset, the DEIS and BLM's website for the Project lacks critical information about the Project and associated activities to fully evaluate all the impacts of the Project or to develop mitigations. For much of the DEIS, BLM relies on previous documents and NEPA reviews that were not available at the beginning of the comment period and only very recently re-appeared on BLM's e-planning site such as for the Deep South Project. For the older NEPA documents (e.g., Cortez Hills, etc.) they are not on BLM's websites at all. None of these previous approvals and NEPA documents are available on the BLM's website for the Goldrush Project. Although "tiering" to previous NEPA documents is allowed under certain limited circumstances, that is not an excuse for BLM to omit critical information from the DEIS, referring the public to documents that are not readily available.

The point of the National Environmental Policy Act (NEPA) is for BLM to make an informed decision and to facilitate public involvement. Without the needed information it is impossible for the public to determine if all potentially significant environmental impacts and all pertinent issues have been identified and considered. The commenting groups reserve the right to submit additional comments as more information becomes publicly available.

I. BLM Wrongly Assumes that NGM 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 NGM 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 hundreds of acres covered by the Rapid Infiltration Basins (RIBs), 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 NGM 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 NGM's operations and erroneously limits its authority to only the UUD standard.

But NGM 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 Goldrush 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 "depredations 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, NGM's ancillary facilities such as the RIBs 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 2-4 (Proposed Project Facilities map). There is no credible argument that the lands slated for the RIBs and other ancillary activities/facilities contain the required valuable mineral deposit, nor has BLM even inquired into whether NGM has met the statutory requirements for its assertion of such rights.

The Ninth Circuit's ruling regarding Section 612, rejecting the government's position that claimants have a statutory right to conduct "reasonably incident" uses on their claims, also applies to both the Forest Service and BLM. Indeed, the Forest Service relied on the Interior Department's Solicitor's Opinions (written in 2005 and 2020) which had stated that BLM need not inquire into claim validity, and that a claimant had a right under Section 612 to all "reasonably incident uses" the same exact way BLM does here. *See* Center for Biological Diversity, 33 F.4th at 1216 (refusing to defer to or follow the Opinions).

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 NGM 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 degradation 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.

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), including those governing the protection of the Greater Sage Grouse. 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. BLM Has Not Ensured that Water Quality, Flows, Fish and Wildlife and Habitat, and Other Public Resources in Horse Creek Will Be Protected and Thus Has Not Prevented UUD.

The DEIS admits that the Project will result in the severe loss of flows in Horse Creek.

> The No Action Alternative predicted that simulated groundwater discharge to Horse Creek in 2024 would increase from pre-mining conditions to approximately 40 acre-feet per year due to the currently authorized RIB operations in Pine Valley. Under the No Action Alternative, simulated groundwater Water Resources and Geochemistry Supplemental Environmental Report for the Goldrush Mine Project January 2022 discharge to Horse Creek returns to pre-mining conditions, which was estimated at 28 acre-feet per year at the time of the modeling conducted for the No Action Alternative, at the end of mining for the No Action Alternative (2032). Under the Proposed Action, the pre-mining flow rate to Horse Creek was estimated at 18 acre-feet per year. **With the addition of the Goldrush Mine dewatering (included in the cumulative analysis for the authorized environment), groundwater discharge is predicted to decrease to approximately zero acre-feet per year in 2024 through 2106. Flow recovery is predicted to begin in 2107**, reaching a flow rate of 16 acre-feet per year at approximately 2543 (SRK 2016, 2020b). The existing and predicted groundwater budgets for the area of analysis are detailed in the Groundwater Flow Model Report for the Deep South Expansion Project (SRK 2016) and the Groundwater Flow Modeling Report for the Goldrush Project (SRK 2020b). **Under the previous authorization for the Deep South Project, BLM has required that NGM supplement the flow in Horse Creek to maintain the flow and reduce potential impacts** predicted from Deep South, which included a cumulative dewatering analysis with Goldrush as a future action.

DEIS Appendix, Water Resources, section 3.2.2 (Surface Water Quantity) (emphasis added)

[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). The 2016 and 2022 Opinions are attached.

To prevent the loss of flows, and the associated serious impacts to water quality, wildlife and habitat in Horse Creek, BLM relies on its "previous authorization for the Deep South Project" which required NGM to "supplement the flow in Horse Creek to maintain the flow and reduce potential impacts." Id. No details are provided about the mitigation in the DEIS or the water report, just this general reference to other unnamed documents. As noted above, BLM must include these mitigation and other plans in the DEIS (or its appendices) online to provide an adequate opportunity for the public to comment.

At best, BLM may be referring to the Water Resources Report for the Deep South Project: "Potential flow reductions in perennial stream reaches attributable to mine-induced drawdown would be addressed through the implementation of BCI's proposed Contingency Mitigation Plan for Surface Water Resources as identified in Section 2.3.3, Applicant-committed Environmental Protection Measures, and discussed below." Water Resources report for Deep South at 3-69. But that document mostly lists a variety of potential mitigation measures, with little if any data and analysis to support a conclusion that the replacement water scheme has been fully reviewed under NEPA and will meet the strict requirements of FLPMA and the CWA for the decades or more that will be required.

In its comments on the Deep South EIS, the EPA was highly critical of this mitigation scheme:

> Horse Creek
> Dewatering is expected to eliminate baseflow in Horse Creek for nearly 100 years (DEIS, pg. 3.2-44) beginning in 2043—11 years after the end of mining. Lack of baseflow would likely result in complete loss of riparian ecological function along Horse Creek. Furthermore, the projected cumulative groundwater drawdown below Horse Creek is at least 1500 feet at the end of mining (Figure 3.2-17), and 100 feet 500 years post-mining (Figure 3.2-20). The proposed mitigation action is to pipe water from a new or existing well to the Horse Creek channel. It is unclear whether drilling new wells more than 1500 feet deep is a feasible mitigation strategy. Recommendation: Multiple lines of evidence indicate that baseflow within Horse Creek's 3.8 perennial stream miles would be eliminated; therefore, EPA recommends developing a preemptive mitigation plan and not treating the mitigation as "contingent." The goal of the mitigation plan should be to preserve ecological function along Horse Creek. Maintaining flow duration is critical to preserving higher level ecological function. Assess whether the proposed mitigation strategy of drilling new wells along Horse Creek is feasible given the predicted drawdown. Identify an alternate source of water if local conditions are not suitable.

Deep South FEIS, at F-6.[2] In response, instead of actually answering EPA's concerns, BLM merely referred to the plan for the "installation of mitigation wells in the Horse Creek area to maintain baseflows as described in the CMP within one year of receiving all necessary permits and authorizations." Id.

In any event, since the "supplement" or replacement water is anticipated to come from pumped groundwater, it is likely that this water will not match the chemical and ecological profile of Horse Creek and therefore adversely affect the Creek's ecology. BLM must require NGM to match the chemical and physical profile of Horse Creek for augmentation.

[2] The Deep South FEIS is already part of the administrative record, as it is relied upon by BLM in the DEIS for the Goldrush Project. *See* DEIS Appendix I.

Furthermore, the DEIS does not ensure that this supplement/replacement water will meet all standards, including temperature (as groundwater will be much warmer than the pre-mining stream conditions, particularly due to the geothermal features in the area). There is no plan to treat this water to ensure compliance with all standards and match existing Horse Creek water conditions, as mandated by FLPMA, the Clean Water Act (CWA) and the Part 3809 regulations. Further, regarding quantity, the water report says that NGM will "maintain the flow" of Horse Creek, but is silent about whether the flows would return to the required pre-mining flow of 28 acre-feet/yr (let alone the 18 acre-feet/yr noted in the water report above, where BLM does not explain these discrepancies). Overall, the DEIS does not analyze the quantity and quality aspects of this replacement water, both on Horse Creek itself as well as the groundwater source regime which will be pumped to provide the replacement waters.

Additionally, since the pumped groundwater will be discharged into Horse Creek, NGM must obtain a point source discharge permit under the federal Clean Water Act and the Nevada Water Pollution Control Act which requires compliance with all applicable water quality standards, including aquatic life, drinking water, temperature, and other standards.

> 1. Except as authorized by a permit issued by the Department pursuant to the provisions of NRS 445A.300 to 445A.730, inclusive, and regulations adopted by the Commission, it is unlawful for any person to:
>
> (a) Discharge from any point source any pollutant into any waters of the State or any treatment works.

NRS 445A.465.

Although the Nevada Division of Environmental Protection (NDEP) is eventually responsible for issuing this discharge permit, BLM is required under NEPA to fully analyze all aspects of this activity. BLM cannot rely on eventual NDEP permitting (which does not require compliance with NEPA) to fulfill BLM's NEPA and FLPMA obligations. "'[A] non-NEPA document ... cannot satisfy a federal agency' obligations under NEPA'. … and the reference to the Project's Clean Air Act permit did nothing to fix that error." Great Basin Res. Watch v. BLM, 844 F.3d 1095, 1104 (9th Cir. 2016) (quoting South Fork Band Council v. U.S. Dept. of the Interior, 588 F.3d 718, 726 (9th Cir. 2009)). "[N]or have we allowed federal agencies to rely on state permits to satisfy review under NEPA." Env'l Defense Ctr. v. Bureau of Ocean Energy Mgt., 36 F.4th 850, 874 (9th Cir. 2022).

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.)."

Here, there is little, if any, analysis of the quality of the water to be discharged into Horse Creek, the baseline conditions of Horse Creek (such as aquatic life, full chemical and parameter analysis, etc.), nor of the impacts from this "replacement" dewatering itself to the local hydrologic system and springs and streams that might be affected by this dewatering. Simple statements that the discharged water will meet water quality standards, without all of the required detailed supporting analysis, is essentially

meaningless. References to "previous authorizations" in no way satisfies these requirements, especially when the documents for Deep South and the other approved operations do not contain this critical information.

At most, BLM provides vague generalities of this purported mitigation plan, with no supporting analysis. "As stated previously, new wells used to supplement or replace baseflow impacted by the mine-induced drawdown would be located in close proximity to the original water source as defined in the proposed Contingency Mitigation Plan for Surface Waters (BCI and Stantec 2018). Considering the close proximity of the new wells to the sources, it is likely that the well would intercept the same geologic formations that controlled discharge to the original spring. In this case, the water quality would be expected to have the same or similar geochemical characteristics as the original spring discharge." Water Resources Report for Deep South, at 3-73.

In addition, under the federal Clean Water Act (CWA), Section 313, 33 U.S.C. §1323, BLM cannot approve the Plan of Operations unless BLM ensures that all aspects of the Project, including the discharges to Horse Creek, comply with all water quality requirements. Also, BLM cannot approve the Plan until the State of Nevada certifies that the Project meets all applicable requirements under Section 401 of the CWA, 33 U.S.C. § 1341. To date, NGM has neither applied for a point source discharge permit or for Section 401 certification that covers the Horse Creek discharges.

Also, NEPA requires that the EIS "shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act [NEPA] and other environmental laws and policies." 40 C.F.R. §1502.2(d). *See* Montana Wilderness Ass'n v. McAllister, 658 F.Supp.2d 1249, 1256 (D. Mont. 2009)("By failing to explain how the changes meet the requirements of the Wilderness Study Act, the Forest Service violated NEPA. See 40 C.F.R. §1502.2(d)."); Center for Biological Diversity v. U.S. BLM, 2017 WL 3667700, at *14 (D. Nev. 2017) (same NEPA violation, regarding Clean Water Act compliance). *See also* 40 C.F.R. §1506.2(d) ("statements [EISs] shall discuss any inconsistency of a proposed action with any approved State … laws.").

Further, as noted herein, under FLPMA, BLM has a duty to mitigate against this loss of flows, as well as ensure that all water quality standards in Horse Creek are met at all times. And under NEPA, BLM has a duty to fully analyze the baseline water quality, quantity, wildlife and habitat conditions in and around Horse Creek, as well as fully analyze the quality of the supplemental/replacement water. Based on the information available to the public from BLM, these mandates have not been, and will not be, met.

B. 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. Yet BLM approved the Project without a mitigation plan to prevent these releases of pollutants in excess of standards. BLM admits that releases from the Rapid Infiltration Basins (RIBs) will violate Nevada groundwater standards, as the quality of the water from the dewatering wells that will be released by the RIBs, without any treatment, exceed various standards:

> **Groundwater downgradient of the Goldrush Mine has the potential to be used for drinking water, and therefore, Nevada drinking water standards would apply to mine-related activities that affect groundwater (NAC 445A.424).** The NDEP-BMRR has established reference values for use in compliance monitoring of groundwater quality downgradient of the mine facilities. The NDEP-BMRR reference values are derived from (and equivalent to) the Nevada primary and secondary maximum contaminant levels for drinking water.
>
> Groundwater quality is monitored on a quarterly basis in an extensive network of monitoring wells and dewatering wells in the Cortez Mine area (Figure 2-9). NGM installed and sampled numerous monitoring wells in the Goldrush area as shown on Figure 2-9. Twelve of the new wells in the Goldrush area were monitored on quarterly basis following installation including GRMW-01, 06, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, and 18. In general water quality met NDEP Profile I but **showed exceedances of arsenic, iron, manganese, antimony, and pH**. Figure 2-9 also shows other monitoring points in the area of analysis (Geomega 2020).
>
> A summary of the water quality in the vicinity of dewatered areas in the area of analysis is provided in Table 2-5. The background groundwater quality in the vicinity of the Pipeline Complex is based on sampling through 2015 at nine wells located in the pit vicinity (Geomega 2016a). The average chemistry for these wells indicates that the groundwater has a circum-neutral pH with abundant alkalinity (231 [mg/L]) and total dissolved solid (TDS) concentration of 595 mg/L. All constituent concentrations were below their respective NDEP Profile I reference values **with the exception of arsenic and manganese**, which appear to be naturally elevated in this area.

DEIS Appendix, Water Resources, section 2.3.5.2 (Groundwater Quality) (emphasis added). In order to unambiguously fully protect against groundwater degradation, actual water treatment should be required, even though some attenuation may eventually occur. Any potential attenuation process will also result in a build-up of toxins in the alluvium soils that could be purged in a significant precipitation event or series of events. The DEIS did not explore this possibility and therefore the effectiveness of attenuation was not adequately determined. The fact that some of the contamination may eventually be attenuated does not change the fact that UUD will likely occur to public resources, and that "Groundwater downgradient of the Goldrush Mine has the potential to be used for drinking water, and therefore, Nevada drinking water standards would apply to mine-related activities that affect groundwater (NAC 445A.424)." Id.

Infiltration of groundwater into the underground mine workings will degrade groundwater and violate Nevada law and result in UUD. The DEIS admits this degradation stating:

> Antimony and manganese are predicted to remain at concentrations greater than the reference values meaning that the groundwater down gradient of the underground workings would be impacted. Thallium is predicted to occur at or slightly above the reference concentration. (DEIS 4-38)

Analysis cited in the DEIS indicates that the groundwater contaminants as expected to be attenuated limiting the contamination plume to within 400 feet of the operations but persistent to last 538 years. BLM then carelessly states that the "predicted impacts to downgradient groundwater would be negligible to minor" (DEIS 4-38), but does go on to admit that the contamination would be "long-term to permanent." Thus, BLM is allowing the degradation with no attempt to propose or require mitigation for long-term to permanent degradation of groundwater that could be accessed by future groundwater wells. The bedrock aquifer is expected to be contaminated and degradation will occur, and thus there is the "potential" to degrade groundwater, 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.

C. BLM Fails to Adequately Analyze and Protect Waters and Lands Affected by the Project

The DEIS does not analyze much of the surface waters, especially springs, that might be affected and fails to justify this lack of analysis and the failure to prevent these impacts. The same is true for groundwater and the surface connections of groundwater dependent ecosystems. As a result, the general approach to these waters is a "wait and see" method, which does not attempt to prevent the impact.

BLM cannot avoid its duty to fully analyze the specific effects on surface and ground waters. As previously found by the Ninth Circuit, the 2008 FEIS for the Cortez Hills Expansion Project contained an "inadequate study of the serious effects of ... exhausting water resources." South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 728 (9th Cir. 2009). "The Tribes contend the BLM failed to conduct an appropriate mitigation analysis with respect to the environmental consequences of mine dewatering." South Fork Band Council, 588 F.3d at 726-27. The Ninth Circuit agreed with the Tribes. Id. at 727. The appeals court also held that the Final SEIS for the Cortez Hills Expansion Project failed to "adequately consider[] ... mitigation of the adverse impact on local springs and streams." Id. at 722.

The court also rejected BLM's contention that it was "impossible to conclusively identify specific springs and seeps that would or would not be impacted."

> That these individual harms are somewhat uncertain due to BLM's limited understanding of the hydrologic features of the area does not relieve BLM of the responsibility to discuss mitigation of reasonably likely impacts at the outset. See National Parks [Conservation Assoc. v. Babbitt], 241 F.3d at 733 ("lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.").

588 F.3d at 727.

The lack of any analysis in the DEIS repeats the same error found by the appeals court in the FEIS for Cortez Hills: "Nothing whatsoever is said [in the FEIS] about whether the anticipated harms [to surface and ground waters] could be avoided by *any* of the listed mitigation measures. This discussion is inadequate." Id. (emphasis in original). "NEPA requires that the agency give some sense of whether the drying up of these water resources could be avoided." Id. The appeals court also found that the FEIS "does not in fact assess the effectiveness of the mitigation measures related to groundwater," as required by NEPA. Id.

The Ninth Circuit further required BLM to "do the necessary work to obtain" the necessary underlying information regarding the "hydrologic features" that will be adversely affected by the Project as part of an adequate mitigation plan and EIS, as well as conducting an adequate "study of the serious effects of exhausting water resources." Id. at 727-28.

The Goldrush DEIS repeats the same error by not completely applying the available science to determine which surface waters are likely to be affected, how they will be affected, and how to avoid those impacts to surface and ground waters and their dependent environmental, cultural, and religious resources and values (see below discussion on the importance of these waters to Western Shoshone).

Also, the Water Resources Report depicts numerous springs and streams that have yet to be surveyed and reviewed, as required by NEPA and FLPMA. Report Figure 2-3. This undermines BLM's assertion that there are not any Public Water Reserves (PWR 107) that may be affected by the Project (as a PWR 107 federal reserved water right does not have to be formally adjudicated, or even applied for, to exist).

Even if not yet formally adjudicated or claimed by BLM, springs and waters 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)(emphasis added).

Under PWR 107 and FLPMA, the lands around the springs are withdrawn from entry and the agency cannot approve any activities that would adversely impact these lands and waters or be located in the withdrawn lands around the springs. BLM gives no reason why these important waters have yet to be surveyed/analyzed, nor why they have not been protected under FLPMA and PWR 107.

Further, as detailed below, the DEIS's erroneous reliance on the use of 10 foot drawdown plus an arbitrary one mile buffer to determine potentially affected surface waters fails to adequately analyze the effects of the drawdown but also fails to protect the affected waters, lands and associated habitat and other public resources.

D. The Project Would Violate the RMPs Designed to Protect the Greater Sage Grouse and Cause UUD to the Sage Grouse.

1. FLPMA Requires BLM To Comply with Its RMP.

FLPMA mandates that BLM "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" of the public's land. 43 U.S.C. §1701(a)(8). BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation" (UUD) of these lands. Id. §1732(b). FLPMA further requires that all activities approved by BLM comply with the requirements of binding RMPs, known as "land use plans." "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). This is particularly applicable to operations not covered by valid "rights of any locators or claims" under the Mining Law, as discussed above for the ancillary facilities. Id. §1732(b).

BLM's FLPMA regulations require that all resource management decisions "shall conform to the approved [land use] plan." 43 C.F.R. §1610.5-3(a). BLM defines "conformity" as meaning that "a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." Id. §1601.0-5(b). "Consistent" means that decisions "will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans." Id. §1601.0-5(c). Complying with the RMP also meets BLM's duty to prevent UUD, which mandates that BLM ensure that all environmental protection standards will be met. See 43 C.F.R. §3809.5 (UUD includes "fail[ure] to comply with one or more of the following: … Federal and state laws related to environmental protection.").

Mining operations are not exempted from FLPMA's requirement to comply with the RMP simply because they are mining operations. "[W]hen BLM receives a proposed plan of operations under the 2001 [and still current] rules, pursuant to Section 3809.420(a)(3), it assures that the proposed mining use conforms to the terms, conditions, and decisions of the applicable land use plan, in full compliance with FLPMA's land use planning and multiple use policies." Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 49 (D.D.C. 2003). In Western Exploration v. U.S. Dept. of the Interior, 250 F. Supp. 3d 718, 747 (D. Nev. 2017), the Court held that mining and other uses must comply with RMP standards to protect the sage-grouse in order to prevent UUD under FLPMA. The court rejected a challenge from the mining industry and others and upheld the Interior Department's RMP requirements to mitigate and "counteract" degradation to sage-grouse as part of the UUD mandate. Id.

2. Violation of RMP and FLPMA Requirements to Protect the Greater Sage-Grouse.

a. The RMPs Established Binding Standards to Protect Sage-grouse.

After the U.S. Fish and Wildlife Service (FWS) found in 2009 that the Greater sage-grouse was warranted for listing under the Endangered Species Act (ESA) due to inadequate regulatory mechanisms in federal land-use plans and its imperiled status across the region, BLM and the U.S. Forest Service began an inter-agency process to revise land-use plans in sage-grouse range to adopt sage-grouse protection measures. *See* Western Exploration, 250 F. Supp. 3d at 727 (summarizing history); see also W. Watersheds Project v. Schneider, 417 F. Supp. 3d 1319, 1325-28 (D. Idaho 2019) (summarizing history through 2019). "Ultimately, on September 16 and 21, 2015, the Agencies issued

Records of Decision approving their respective management plan amendments, which govern 67 million acres of federal lands across ten western states." Western Exploration, 250 F. Supp. 3d at 727. The Plan Amendments "guide future land and resource management decisions on lands administered by BLM and the Forest Service." Id. Relying on the strict protection requirements in the RMPs, the FWS then determined that the sage-grouse was not warranted for listing under the ESA. 80 Fed. Reg. 59857 (Oct. 2, 2015).

The relevant RMPs here were amended by the Record of Decision and Approved Resource Management Plan Amendments for the Great Basin Region (Great Basin ROD) to include binding protective standards for sage-grouse. Attachment 2 to the Great Basin ROD established standards for the Greater sage-grouse. The Great Basin ROD adopted the Nevada and Northeastern California Greater Sage-Grouse Approved 2015 RMP Amendment (ARMPA).

Because sage-grouse are a landscape species that rely on intact expanses of sagebrush habitat to support their lifecycle, the Plans focused on identifying and protecting key sage-grouse habitats. To this end, the FWS convened a "conservation objectives team," (COT) which issued a report that identified and mapped sage-grouse "priority areas for conservation" (PACs), maintaining the integrity of which is "the essential foundation for sage-grouse conservation." COT Report at 36.

In the ARMPA, BLM identified "Priority Habitat Management Areas" (PHMAs), "General Habitat Management Areas" (GHMAs), and, in Nevada and California, "Other Habitat Management Areas" (OHMAs). PHMAs are "BLM-administered lands identified as having the highest habitat value for maintaining sustainable GRSG populations" which largely coincide with the FWS PACs. Great Basin ROD at 1-15. The ARMPA established specific management direction and sage-grouse protections in PHMAs, GHMAs, and OHMAs.

> The GRSG is a BLM BMDO and EDO sensitive species. The BLM has amended RMPs throughout the range of the GRSG to afford additional protection to this species, which previously was a candidate for listing under the ESA. GRSG within the area of analysis are part of the Southern Great Basin Population (BLM 2015a) and Central Great Basin Biologically Significant Unit (BLM 2015b). The Central Nevada Population is among the largest in the state. This population is divided further into Population Management Units (PMUs). The area of analysis intersects the Shoshone, Three Bar, and Cortez GRSG PMUs.
> GRSG are known to occur within the area of analysis (ERM 2018; BLM 2019). Strutting grounds, or leks, are GRSG breeding sites. Based on NDOW (2020a) data, there are 11 GRSG leks present within the area of analysis. These leks and their activity status are presented in Table 2-8. It is likely that GRSG occur within the area of analysis on a regular basis throughout the year.

DEIS Appendix, Wildlife Report, at 2-28. "GRSG within the area of analysis are part of the Southern Great Basin Population (BLM 2015a) and Central Great Basin Biologically Significant Unit (BLM 2015b). The Central Nevada Population is among the largest in the state. This population is divided further into Population Management Units (PMUs). The area of analysis intersects the Shoshone, Three Bar, and Cortez GRSG PMUs." Wildlife Report at 2-28.

Much of the Project area is designated PHMA, including all of the lands at and around the RIBs; the rest of the Project lands are mostly designated GHMA. Wildlife Report Figure 2-7. "The Proposed Action would remove a total of 1,352 acres of the 125,852 acres of mapped GRSG habitat, including approximately 1,125 acres of PHMA, 215 acres of GHMA, and 12 acres of OHMA (BLM 2022) (Table 3-4). The remainder of the land (96 acres) is either non-habitat or private land." Wildlife Report at 3-9.

In addition to this total removal of sage grouse habitat, the Project will result in long-term direct and indirect impacts (e.g., noise and other disturbances to nearby leks and habitat):

> The Proposed Action would add to the vegetation removal and construction of mine infrastructure that has already occurred within the area of analysis from other past and present activities including mineral development and exploration activities and would result in habitat fragmentation. The Proposed Action would likely result in increased predation and decreased nesting success. Human presence and noise also occur within the area of analysis which may further stress GRSG. The construction, maintenance, and operation of mine infrastructure under the Proposed Action would add additional human presence and disturbance around the leks during the life of the mine and reclamation activities, **which would likely cause GRSG to avoid the leks and negatively impact nesting activities with leks located near the proposed RIB galleries.** Distances from the leks to the ancillary facility, main mine ancillary features that may provide additional perching opportunities for predators, are provided in Table 3-5. The closest proposed disturbance to the leks are as follows: the Horse Creek 01 lek is located approximately 0.33 miles south of the waterline leading to RIB gallery 1; Horse Creek 02 and Horse Creek 03 leks located approximately 0.66 miles and 1.69 miles northeast of the waterline leading to the treatment plant and ancillary disturbance, respectively; and the Quartz Road lek is located approximately 2.24 miles northeast of the road to RIB Gallery 2. **Impacts would occur, as GRSG have high site fidelity and would likely be displaced to less-suitable habitat. Impacts from the construction, maintenance, and reclamation of new, mine infrastructure within the area of analysis would be moderate to major, long-term, and localized.** Noise impacts to GRSG from the Proposed Action are further discussed in the Noise SER for the Goldrush Mine Project (BLM 2021d).

Wildlife Report at 3-10 (emphasis added).

The Project would also threaten sage-grouse populations in the region and negatively impact sage-grouse conservation efforts at the regional level. Scientists at the University of Nevada, Reno studied the genetic structure of sage-grouse populations in Eureka County, and found that leks that would be adversely affected by the Project, including the Horse Creek leks, represent an important genetic linkage between different sage-grouse populations. Fine-Scale Genetic Structure Among Greater Sage-Grouse Leks in Central Nevada, Jahner et al., BMC Evolutionary Biology (2016) 16:127 (attached for BLM consideration and review and inclusion in the administrative record).

Thus, impacts to these leks represent a serious threat to overall sage-grouse populations in the region. This was not considered in the DEIS, as baseline sage-grouse populations in the region were not

analyzed and the cumulative effects to these populations not adequately considered.[3] Loss of these leks could impact the genetic diversity, distribution, and persistence of the species. The revised DEIS must fully acknowledge and analyze these populations and impacts. The loss of the important Horse Canyon leks would violate the ARMPA and constitute UUD under FLPMA.

Recognizing the importance of preserving expanses of interconnected sagebrush habitats to sage-grouse conservation, the ARMPA requires that: "In PHMAs and GHMAs, apply the concept of 'avoid, minimize, and compensatory mitigation' for all human disturbance in areas not already excluded or closed, so as to avoid adverse effects on GRSG and its habitat. The first priority will be to avoid new disturbance; where this is not feasible, the second priority will be to minimize and mitigate any new disturbance." Objective SSS 4, ARMPA at 2-6. *See also* Standard MD SSS 9a, ARMPA at 2-11; MD SSS-1, ARMPA at 2-6 (requiring BLM to avoid and mitigate impacts "whether in accordance with a valid existing right or not").

To further minimize impacts, the ARMPA caps disturbance in PHMA at 3% at both the PMU and project scale. MD SSS 2A. "Under the BLM Plan, a 3 percent human disturbance cap immediately applies to lands classified as PHMA." Western Exploration, 250 F. Supp. 3d at 737. BLM must also impose "Required Design Features" (RDFs) and other conservation measures on each approved project as a further means to protect sage-grouse on public land. ARMPA Appx. C.

b. BLM Has Not Ensured Compliance with the ARMPA and Sage Grouse Requirements

The record does not show that BLM will comply with the various provisions of the ARMPA, Great Basin ROD, and the relevant RMPs.

First, BLM did not "avoid or minimize" impacts to sage-grouse as the ARMPA requires. Objective SSS 4, ARMPA at 2-6; Standard MD SSS 9a, ARMPA at 2-11. This is required "whether in accordance with a valid existing right or not." MD SSS-1, ARMPA at 2-6.

Second, there is no analysis showing that the Project will meet the 3% disturbance cap requirement, nor that BLM meets the criteria for an exception to the 3% disturbance cap because it never convened the mandated technical team to determine whether the Project can be modified to a "net conservation gain" to the species.

Third, BLM has not applied all of the ARMPA's Required Design Features (RDFs), ARMPA Appendix C, and other requirements to minimize disturbance to sage grouse. MD SSS 2B, Appx. 2 to Great Basin ROD, at 2-8. The RDFs include lek buffer distances, MD SSS 2D (Id.) and seasonal restrictions to manage surface-disturbing activities and uses to prevent disturbances to sage-grouse during seasonal life-cycle periods. MD SSS 2E, Id. at 2-8 to 2-9.

[3] The Jahner Report details the importance of leks in the overall area, including those that would be directly affected by other mining operations such as the BLM-approved Mt. Hope Mine. Report at 3, Figure 1 (showing the Horse Canyon leks, and the Kobeh Valley and Lone Mountain leks that are in the project or review boundary of the Mt. Hope Mine). The DEIS improperly failed to analyze the cumulative effects of the Mt. Hope Mine, as well as the cumulative impacts of other activities that may affect the other important leks studied in the Jahner Report.

Fourth, BLM failed to apply the ARMPA's strict noise limits which require BLM to limit noise from activities to a maximum of 10 decibels above ambient sound levels at least 0.25 miles from active and pending leks, from 2 hours before to 2 hours after sunrise and sunset during the breeding season. MD SSS 2F, Id. at 2-9. While the DEIS presents figures showing that noise would reach—but not exceed—10 dBA above "baseline" it appears that the DEIS's "baseline" includes existing mining operations in the area. See DEIS at 2-27 and Noise SER.

Consequently, the Project's noise "baseline" does not reflect "ambient" sound levels, but rather the cumulative impacts of all of the mining activities and associated infrastructure currently existing in the area. The "baseline" is thus more properly characterized as a cumulative impact which, combined with the proposed Goldrush project, may cause noise levels in the area to exceed the ARMPA's 10 dBA limit. Subsequent drafts of the EIS must clarify the noise analysis and ensure that noise levels associated with the Project are properly measured from "ambient" and not "baseline" conditions. This is critical as figures from several locations show Project-related noise levels reaching the 10 dBA threshold.

In addition, the DEIS explains that noise levels were calculated using "predictive modeling." DEIS at 2-27 and Noise SER. While modeling is useful at preliminary planning phases, it is essential that the Project employ real-time monitoring to ensure that noise levels stay within acceptable parameters for sage-grouse. If noise levels exceed the ARMPA threshold, it will negatively impact sage-grouse in a manner not currently considered or analyzed in the DEIS and require additional compensatory mitigation to achieve a net conservation gain. With all of the mining activity occurring in the area, BLM has ample means to accurately measure noise/sound from NGM's current operations.

Fifth, where habitat or populations "triggers" are reached, as is likely the case in the PMUs where the Project lies, BLM was required to, but did not, take additional management and mitigation actions set forth in MD SSS 17 through 24. Id. at 2-12 to 2-13.

Lastly, BLM did not ensure mitigation and provide a "Net Conservation Gain" to Sage-grouse. BLM must "ensure that a net conservation gain of GRSG habitat is achieved in mitigating human disturbances in PHMAs and GHMAs (see Appendix F) on all agency-authorized activities." MD SSS 9a, ARMPA at 2-11. *See also* Objective SSS 4, ARMPA at 2-6. BLM must "ensure mitigation that provides a net conservation gain to the species." MD SSS 2B (PHMA), Apdx. 2 to Great Basin ROD, at 2-8 to 2-9. *See also* MD SSS-1, ARMPA at 2-6 (requiring BLM to avoid and mitigate impacts "whether in accordance with a valid existing right or not").

"[I]f actions by third parties result in habitat loss and degradation, even after applying avoidance and minimization measures, then compensatory mitigation projects will be used to provide a net conservation gain to the sage-grouse." Western Exploration, 250 F. Supp. 3d at 747. The RMP's "goals to enhance, conserve, and restore sage-grouse habitat and to increase the abundance and distribution of the species, … is best met by the net conservation gain strategy because it permits disturbances so long as habitat loss is both mitigated and counteracted through restorative projects." Id.

The DEIS fails to specifically describe any proposed compensatory mitigation measures for achieving a "net conservation gain." With regard to sage-grouse impacts, it simply states: "Impacts from the Proposed Action would be offset by either the BEA or the Conservation Credit System (CCS).

Potential impacts to GRSG habitat would be calculated in accordance with the terms of the BEA between the USFWS, BLM, and NGM (BLM et al. 2015).” DEIS at 4-47. But little to no details are provided. There is no discussion as to whether the CCS/BEA potential mitigation offsets the Project’s impacts, including groundwater drawdown that will affect riparian and wet meadow habitat and waters used by sage-grouse for decades and centuries. Further, there is no assurance that the conservation credits will offset effects to other resources, or impacts from noise. Nor does BLM discuss how the credits may only apply to impacts near the Project’s footprint, and not more distant, but still significant impacts from the dewatering.

The process by which conservation “credits” and “debits” are developed and exchanged under the CCS and BEA is opaque and unclear. Consequently, any assurances that the project will rely on the CCS for mitigation must be accompanied by a detailed description of the actions that will be taken to achieve the 2015 ARMPA’s requirement of a “net conservation gain” and other requirements. Simply stating that transactions will occur in the future does not satisfy NEPA’s requirement to fully inform decisionmakers and the public about the environmental impacts of the proposed action, and leaves many question unanswered. For example, what actions will be conducted to mitigate this project’s impacts? Where will those actions occur? How will they be funded? Who will carry them out? How will the mitigation actions achieve a “net conservation gain”? And how will conservation or mitigation “success” be assessed? Please address these questions in the revised DEIS and eventual FEIS. The DEIS provides “credit” and “debit” estimates for the Project, indicating that BLM currently has the information necessary to provide an informed and detailed response. DEIS at 4-47.

Furthermore, the DEIS suggests that impacts to sage-grouse from the Project will not be fully or adequately mitigated, violating the ARMPA’s requirement for a “net conservation gain” and other mandates. For example, the DEIS relies solely on the CCS and/or BEA, even though these systems are not designed to mitigate for the loss of leks or population-level impacts such as the loss of genetic connectivity that would likely result from abandonment of the Horse Creek leks. As the Nevada Sagebrush Ecosystem Council has acknowledged, compensatory mitigation exchanges based on “functional acres,” such as the CCS and BEA, are not capable of mitigating for the loss of a lek or large-scale habitat fragmentation. During its February 24, 2022 meeting the SEC discussed the issue of lek extirpations, noting that the CCS is not cannot compensate for direct impacts to a lek, and comparing CCS mitigation for projects that cause lek abandonment to “decorating for a big party where party [where] no one shows up.” The minutes from the SEC’s February 24 meeting are attached for BLM’s review and consideration and inclusion in the administrative record, and the meeting recording is available at: https://sagebrusheco.nv.gov/Meetings/2022/ 2022/.

More broadly, BLM’s NEPA and FLPMA compliance analysis must determine whether a “net conservation gain” for sage-grouse is actually achieved through use of the CCS or BEA. In addition to the lek impacts described above, the Project would result in the degradation, destruction, or abandonment of locally unique and essential habitat for sage-grouse, including nesting, brood-rearing, and winter habitat, both within and outside of the Project area. BLM must consider the importance of this habitat to sage-grouse at both the local and regional level. If especially important habitat is impacted, it is not shown that protecting or restoring a different type of habitat somewhere else would effectively compensate for the loss, or provide a net conservation gain. Nor is it clear how conservation outcomes under the CCS or BEA are determined, or what data BLM is relying on to make these determinations. As currently presented, BLM’s general references to the CCS and BEA in the DEIS

fail to show that compensatory mitigation would be effective at achieving the ARMPA's requirements, and therefore do not comply with NEPA and FLPMA.

The DEIS admits that consideration of impacts to sage-grouse, and determination of the actual purported mitigation of those impacts (and the effectiveness of that mitigation), has yet to be analyzed, as BLM relies instead on generalized references to future use of the CCS or BEA.

> **Potential impacts to GRSG habitat** from the Goldrush Mine **would be evaluated** under the terms of the Bank Enabling Agreement (BEA) between the USFWS, BLM, and NGM or through the Nevada Conservation Credit System. NGM is committed to sage-grouse mitigations via the BEA, which is recognized in NAC 232.460(c). **Compensatory mitigation would be determined** in accordance with the BEA or the state system. NGM would implement approved habitat restoration, enhancement, and/or preservation actions to offset impacts with a net conservation gain for GRSG habitat.

DEIS at 2-27 (emphasis added).

Yet the proposed mitigation measures must be discussed and evaluated in the DEIS and made subject to public review. Vague agency assurances that certain adverse environmental consequences will not occur because the agency or a third party will take unspecified future actions to avoid such results does not satisfy NEPA's requirements. *See e.g.*, Oregon Natural Res. Council v. Marsh, 832 F.2d 1489, 1493 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 360 (1989) (rejecting EIS that relied on assurances that mitigation measures "will be developed"); High Country Conservation Advocates v. United States Forest Service, 52 F. Supp. 3d 1174, 1197 (D. Colo. 2014) ("The agency cannot rely on unsupported assumptions that future mitigation technologies will be adopted."); High Sierra Hikers Ass'n v. U.S. Dept. of Interior, 848 F. Supp. 2d 1036, 1049-1051 (N.D. Cal. 2012) (stating that "the EIS cannot merely assert a perfunctory description of mitigating measures").

BLM must present a mitigation plan for public review, as the public must have an opportunity to review and comment upon the plan. Future plans and analysis cannot be used to satisfy BLM's NEPA and FLPMA duties. "Such late analysis, 'conducted without any input from the public,' impedes NEPA's goal of giving the public a role to play in the decisionmaking process and so 'cannot cure deficiencies' in a [NEPA document]." Or. Nat. Desert Ass'n v. Rose, 921 F.3d 1185, 1192 (9th Cir. 2019)(quoting Great Basin Res. Watch, 844 F.3d at 1104). *See also* Western Exploration, 250 F. Supp. 3d at 748.

As the Ninth Circuit held in rejecting BLM's EIS for the Cortez Hills Project, "[a]n 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). Further, without a full evaluation of both the project's impacts and the effectiveness of the proposed mitigation measures, subject to public review, BLM's conclusions regarding compliance with the ARMPA and FLPMA (including the UUD standard) are unsupportable.

In addition, as noted herein, reliance on a state permitting or mitigation system cannot substitute for BLM's independent and separate NEPA and FLPMA duties to fully review all impacts and mitigation, with full public review and comment opportunities. "'[A] non-NEPA document ... cannot satisfy a

federal agency' obligations under NEPA'. … and the reference to the Project's Clean Air Act permit did nothing to fix that error." Great Basin Res. Watch v. BLM, 844 F.3d 1095, 1104 (9th Cir. 2016) (quoting South Fork Band Council, 588 F.3d at 726). "[N]or have we allowed federal agencies to rely on state permits to satisfy review under NEPA." Env'l Defense Ctr. v. Bureau of Ocean Energy Mgt., 36 F.4th 850, 874 (9th Cir. 2022).

Further, BLM's reliance on the Habitat Quantification Tool will not meet the mandate for a "net conservation gain" with respect to this project because the HQT is only designed to mitigate for term impacts to sage-grouse and sagebrush habitat, and not the longer water and riparian area impacts.

There will be major impacts to GRSG from the dewatering and other hydrologic impacts. Loss or degradation of wet meadows, springs, seeps, and associated habitat could likely result in significant and long-term impacts to GRSG within and well outside the Project Area. Yet these were not analyzed in the DEIS.

Further, the credit calculations are generally based on the length of time the mine is operating. Under the current structure, the credit calculation would not include impacts that extend beyond the mine life. Given that hydrologic impacts are still present decades and centuries later, there are significant and permanent impacts that would not be mitigated under the CCS.

In addition, some of the mentioned mitigation options, rely on yet-to-be-determined habitat projects, such as noxious weed treatments, pinon-juniper removal, water developments, sagebrush and forb seeding, and wildfire prevention fuel breaks. Yet, some of these types of projects may actually be harmful to sage-grouse, and neither option describes how a "net conservation gain" would be achieved – because there is no specific plan in place. Thus, BLM did not require the mandated "compensatory mitigation projects [that] will be used to provide a net conservation gain to the species." Western Exploration, 250 F. Supp. 3d at 747.

c. FLPMA Requires BLM to Fully Mitigate All Impacts to Sage Grouse Habitat

In addition to the ARMPA requirements, BLM has a duty to fully mitigate these impacts under FLPMA's UUD mandate. Of particular relevance to this case is the Solicitor's ruling that failure to require mitigation to protect important habitat constitutes UUD. "Although mitigation may contribute in some instances to the avoidance of UUD, in other cases, the impacts to resources may be of a nature or magnitude such that they cannot be mitigated sufficiently to prevent UUD." M-37039 at 20. This applies, at a minimum, to BLM's duty to require sufficient mitigation to protect the sage-grouse's designated "Priority Habitat" here. According to the Solicitor:

> **the destruction of unique habitat in a particular place might not be adequately compensated by post-use restoration or protection of lesser habitat elsewhere**. In such a case, where mitigation cannot prevent UUD, the BLM has authority to reject the application for approval of the public land use based on the proponent's inability to prevent UUD. The obligation to avoid UUD is a complementary but distinct source of authority for requiring mitigation under FLPMA.

M-37039 at 20 (emphasis added). The Solicitor recognized that, without adequate mitigation, "the destruction of unique habitat in a particular place" would constitute UUD. M-37039 at 20. Importantly, this is not just limited to species listed under the Endangered Species Act. As BLM stated to the court in Western Exploration v. U.S. Dept. of the Interior, 250 F. Supp. 3d 718 (D. Nev. 2017), BLM's Sensitive Species Policy under FLPMA requires practices that "improve the condition of the species' [Sage-grouse] habitat on BLM-administered lands."

In addition to the ARMPA requirements, as part of its duties to prevent UUD to public land resources under FLPMA, BLM has established a national policy to prevent undue degradation to designated Special Status Species (also known as Sensitive Species) such as the sage-grouse. "The objectives of the BLM special status species policy are: … B. To initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA." Special Status Species Mgmt. Manual 6840 at 3.

The Project will not comply with these requirements. For example, as discussed herein, BLM failed to ascertain the baseline numbers of sage grouse in the analysis area, and the numbers that will be directly or indirectly affected by the Project by itself, and cumulatively with other activities in the area. BLM cannot credibly assert that it will fully protect the sage grouse under the FLPMA, ARMPA and Sensitive Species mandates without knowing this critical information.

This is especially problematic due to BLM's acknowledgement that there would major impacts to sage grouse from the Project. "The construction, maintenance, and operation of mine infrastructure under the Proposed Action would add additional human presence and disturbance around the leks during the life of the mine and reclamation activities, which would likely cause GRSG to avoid the leks and negatively impact nesting activities with leks located near the proposed RIB galleries. … Impacts would occur, as GRSG have high site fidelity and would likely be displaced to less-suitable habitat. Impacts from the construction, maintenance, and reclamation of new, mine infrastructure within the area of analysis would be moderate to major, long-term, and localized." Wildlife Report at 3-10 (emphasis added). Outside of these vague generalities, no details are provided.

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. BLM Must Consider the Project as a Connected Action with the Processing and Transport Operations at Gold Quarry/Goldstrike, As Well As the NGM Operations Around Mt. Tenabo.

The DEIS acknowledges that the Goldrush Project cannot operate without transporting its ore to NGM/ Barrick/Newmont's Gold Quarry or GoldStrike Mines/Operations. As such, they are "connected actions" that must be considered together. Although the DEIS generally references these operations, little details are provided, especially since BLM reviews in the past did not consider the ore processing requirements needed to enable the Goldrush project.

This is also true for the other NGM operations around Mt. Tenabo connected to the Goldrush Project. Although BLM references the previous NEPA documents for these operations, many were issued a decade or more ago. The DEIS does not contain current information on these operations, including whether all of the environmental reviews and projections made in the old EAs and EISs are still valid, and verified by current data and analysis. As just one example, these documents (and the DEIS) do not discuss the potential use of per- and polyfluoroalkyl substances – known as PFAS at these operations, which are hazardous materials that exist forever. NEPA and FLPMA require BLM to fully analyze the PFAS issue at the Goldrush and other associated sites (Gold Quarry/Goldstrike, Cortez Hills, Deep South, Pipeline, etc.)

A leading mining industry technical group, Golder & Assoc., highlighted the concerns with PFAS use in the mining industry. As a 2019 report states:

> To date, mines have not been a major focus for assessment of potential PFAS impacts. However, PFAS have long been used in mining, as part of both processing and firefighting activities. PFAS may be present due to the use of aqueous film-forming foams (AFFFs) for firefighting, but also through inclusion in surfactants, ore-floating processes and other performance chemicals such as hydraulic fluids and fuel additives. This means that PFAS contamination is a risk for the mining sector and should be assessed and managed appropriately.
>
> Who and what is at risk?
>
> Each situation is unique, but the risks of PFAS contamination typically depend on key factors related to the site conditions and the use and value of water resources, such as the extraction and use of groundwater, and the ecological value of surface water bodies.
>
> On and around mine sites, the risks from PFAS include the exposure of mine workers who have used or maintained fire-fighting equipment or used contaminated surface or groundwater, for instance as process make-up water or for dust control. Drinking water is a major concern too: Do mine workers, site visitors or off-site residents use the surface or groundwater as drinking water or for washing? Has livestock been exposed via surface water, groundwater or irrigation? If so, people consuming that livestock may have been exposed. Similarly, with PFAS being so easily transported through water, they may have been taken up by aquatic organisms, as well as by the birds and other animals that consume them. Local communities such as traditional owners may, in turn, be exposed via their consumption.

Mundle, Why Do PFAS Matter In The Mining Sector, and What Can Be Done? (2019)(attached).

When preparing an EIS, an agency must consider all "connected actions," "cumulative actions," and "similar actions." 40 C.F.R. §1508.25(a).[4] Actions are "connected" if they trigger other actions, cannot proceed without previous or simultaneous actions, or are "interdependent parts of a larger action and depend on the larger action for their justification." Id. § 1508.25(a)(1). If one project cannot proceed without the other project (i.e., "but for" the other project), or if the first project is not "independent" of

[4] Under Interior Secretarial Order #3399 (April 16, 2021), BLM must apply the NEPA regulations in effect prior to the 2020 revisions.

the second project, the two projects are considered connected actions and must be reviewed in the same NEPA review. Thomas v. Peterson, 753 F. 2d 754, 758-60 (9th Cir. 1985). "The purpose of this requirement is to prevent an agency from dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact. … The crux of the test is whether each of the two projects would have taken place with or without the other and thus had independent utility." Great Basin Mine Watch v. Hankins, 456 F.3d 955, 969 (9th Cir. 2006).

Even if the Project could conceivably occur without the previous or simultaneous occurrence of the Gold Quarry/Goldstrike operations (and the other NGM operations around Mt. Tenabo), which is not the case here, if it could not occur without such actions it is a connected action and must be considered within the same NEPA document as the underlying action. "[E]ven though an action could conceivably occur without the previous or simultaneous occurrence of another action, if it would not occur without such action it is a 'connected action' and must be considered within the same NEPA document as the underlying action." Dine Citizens Against Ruining Our Env't v. Klein, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010).

B. 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.

At the outset, regarding all of the NGM operations in the area, whether considered connected actions, or resulting in cumulative impacts, the DEIS must review the old NEPA documents and verify that the assumptions, analysis and determinations are still valid, and supported by current data and analysis. This also includes the requirement to fully analyze the issues surrounding the use of PFAS at the Goldrush Project and the other operations such as Gold Quarry and Goldstrike, and the operations around Mt. Tenabo (which were not reviewed in the old NEPA documents for these operations). BLM cannot "tier" to old NEPA documents unless those documents fully reviewed all relevant issues, which is not the case with these old BLM mining EISs and EAs.

The Council on Environmental Quality's ("CEQ") guidance on the issue of a "stale" NEPA analyses 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).

Overall, the DEIS is severely lacking in the required full analysis of the cumulative impacts from all of the other past, present, and reasonably foreseeable future activities within the Cumulative Effects Study Areas (CESAs) for all affected resources such as wildlife, plants, air and water, cultural, recreation, etc.. *See* DEIS Figure 4-1.[5] Instead, the DEIS provides generalized mentions of potential cumulative impacts in Section 4.20.

But there is none of the detailed and quantified analysis required by the Ninth Circuit and NEPA. "Major past and present land uses and disturbances within the resource CESAs that are projected to continue into the future include mineral development and exploration, utilities, infrastructure and public purpose projects, roads, wildland fires, livestock grazing, agriculture, and mining. Dispersed recreation (including hunting, fishing, and OHV use) and residential development also occur and are expected to continue in portions of the CESA." DEIS 4-49.

Although the various tables in Section 4.20 list the projected acreages of impacts from these activities, no details as to the impacts from all these activities is provided. Very little information is provided about the various projects that will occur on these acres. "A calculation of the total number of acres to be impacted by other projects in the watershed is a necessary component of a cumulative impacts effects analysis, but it is not a sufficient description of the actual environmental effects that can be expected from [impacting] those acres." Great Basin Mine Watch v. Hankins, 456 F.3d 955, 973 (9th Cir. 2006).

For example, the cumulative impacts discussion for air quality says that "The Cortez Mine and Fire Creek Mine were included in this analysis." DEIS 4-52. But this essentially admits that BLM neglected to include the emissions from the other current and reasonably foreseeable future activities (RFFAs) within the air quality CESA.

For the other affected resources, there is no quantification of cumulative impacts at all. This includes for wildlife such as the imperiled sage grouse, where the DEIS speaks in simplified language about impacts from a variety of activities. DEIS 4-90 to -93. But "general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 993 (9th Cir. 2004).

[5] As discussed above, BLM's review of cumulative impacts to sage-grouse failed to include the lands, and leks, that would be affected by the Mt. Hope Mine, even though the Jahner Report highlights the interconnectedness of the various leks in Eureka County.

Even for the various current and RFFA projects that are listed (but with no detailed analysis), the DEIS essentially ignores the reasonably foreseeable impacts from mineral activities and operations on the oil and gas leases that BLM has approved within the CESA areas. This BLM office has issued oil and gas leases and authorized mineral operations (including Notices of Intent) across the region. For example, BLM recently issued leases within the CESAs. *See* April 2019 Lease Sale Environmental Assessment (EA) for over 40 new leases, many within the Goldrush CESAs. DOI-BLM-NV-B000-2019-0004-EA (attached for BLM's review and consideration and inclusion in the administrative record). *See also*, BLM's 2012 FEIS for the Mt. Hope Mine, Figure 4.3.5, (showing existing oil and gas leasing and mineral/mining operations within the various CESAs)(attached for consideration and review by BLM and inclusion in the administrative record).

In addition, in 2016, 2017, 2018, 2019, and 2020, the Nevada BLM reviewed and approved other oil and gas leases covering lands within the CESAs for air quality, water resources, and other affected resources. *Compare* maps in these EAs with DEIS Figure 4.1 (CESAs). None of these leases, and the reasonably foreseeable future impacts expected from operations on the leases, were considered in the DEIS or supporting analysis (e.g., air, water, wildlife, etc.). The BLM documents for these leases are listed below:

Elko District March 2016 Lease Sale
FEA: https://www.blm.gov/sites/default/files/DOI_BLM_NV_E000_2015_EA-Final_0.pdf
DR: https://www.blm.gov/sites/default/files/uploads/NV_OG_EKDO_20160308_DR_Signed.pdf

Elko District March 2017 Lease Sale
FEA: https://eplanning.blm.gov/public_projects/nepa/68207/86720/103927/
EKDO_2017_O&G_EA_508.pdf
DR: https://www.blm.gov/sites/default/files/uploads/NV_OG_20170314_Elko-DR_Signed.pdf

Battle Mountain District June 2017 Lease Sale
FEA: https://eplanning.blm.gov/public_projects/nepa/71152/105088/128656/DOI-BLM-NV-B020-2017-0002-EA_REVISED-508.pdf
DR:
https://eplanning.blm.gov/public_projects/nepa/71152/109473/134096/20170612_DR_June2017OilGasLeaseSale.pdf

Elko District March 2018 Lease Sale
FEA:
https://eplanning.blm.gov/public_projects/nepa/88094/130063/158162/2018_O&G_EA_508_2nd_Revised.pdf
DR: https://eplanning.blm.gov/public_projects/nepa/88094/136911/167265/
Elko_2018_O&G_Sale_DR_esign_508.pdf

Elko District June/July 2019 Lease Sale
FEA: https://eplanning.blm.gov/public_projects/nepa/119823/170255/206892/
July2019_oilGasLeaseSaleEACombined2Epurentes4April2019_508.pdf
DR: https://eplanning.blm.gov/public_projects/nepa/119823/20001386/250001561/
NV_OG_20190730_DR_Signed_508.pdf

Elko District October 2019 Lease Sale:
DNA: https://eplanning.blm.gov/public_projects/nepa/117894/175035/212589/DNA_March2019_Oil_Gas_Lease_sale_SGrevised_esign_508.pdf
Decision: https://eplanning.blm.gov/public_projects/nepa/117894/20004980/250005850/October_2019_O&G_Lease_Sale_Decision.pdf

Battle Mountain District June 2020 Lease Sale:
FEA: https://eplanning.blm.gov/public_projects/nepa/1504167/20016161/250023192/DOI-BLM-NV-B000-2020-0007-EA_FINAL.pdf
DR: https://www.blm.gov/sites/default/files/NV_OG_20200908_DR_Signed.pdf

In addition to these links, showing how all the documents are in BLM's possession, the EAs and approval decisions are part of these comments and are attached (in PDF format) for BLM's review, consideration, and inclusion in the administrative record.

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.

For example, in the March 2018 Oil and Gas Lease Sale EA (DOI-BLM-NV-2017-0017-EA), BLM highlights the expectation of future development of the leases in the Pine Valley area, which is where the Project would be located. In its discussion of the "Reasonably Foreseeable Development Scenario" on the 2018 leases, BLM stated: "This scenario notes that **most exploration and development is expected in the Pine Valley area as that is the area in which discoveries have occurred in the past**." March 2018 Lease EA, Appendix C, at 2 (emphasis added)(as noted above, attached to, and part of, these comments).

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).

Further, reasonably foreseeable oil and gas operations on these leases will also have significant impacts to water resources, along with other resources such as wildlife (including sage-grouse and other species), cultural, recreation, etc., as drilling necessarily involves removal of substantial quantities of water, which affects the groundwater and uses reliant on that groundwater, but also raises questions of disposal of the pumped/removed groundwater, quality and quantity of such water, and other cumulative impacts. All of these impacts and issues were ignored by BLM in the DEIS.

BLM's 2019 Lease Sale acknowledged that oil and gas exploration, drilling, and production could include well stimulation and hydraulic fracturing which uses "appreciable" amounts of water, up to 800,000-10,000,000 gallons. Lease Sale EA, at 17, 28-29.

In that EA, the same BLM Battle Mountain District office stated that "The consequences of oil and gas exploration or development in wetlands and riparian areas are potentially severe, as these environments are extremely sensitive to perturbation." 2019 Lease Sale EA at 29. The U.S. EPA specifically faulted BLM for not analyzing these cumulative impacts in its recent comments on BLM's FEIS for the nearby Mt. Hope Mine. EPA Sept. 23, 2019 letter to BLM at 2, quoting BLM Lease Sale EA at 17 (attached to these comments for BLM review and consideration and inclusion in the administrative record).

In addition to the fundamental cumulative impacts review requirements noted above, NEPA regulations also require that the agency obtain the missing "quantitative assessment" information. 40 C.F.R. §1502.22. "The regulations implementing NEPA require agencies to obtain missing information when it is 'essential to a reasoned choice' and the costs of obtaining it are not 'exorbitant.' 40 C.F.R. § 1502.22(a). The agencies have not provided convincing reasons for why these data gaps are not essential or could not be mitigated through further study." Env'l Defense Ctr. v. Bureau of Ocean Energy Mgt., 36 F.4th 850, 881 (9th Cir. 2022). "If there is 'essential' information at the plan- or site-specific development and production stage, [the agency] will be required to perform the analysis under § 1502.22(b)." Native Vill. of Point Hope v. Jewell, 740 F.3d 489, 499 (9th Cir. 2014).

Here, the adverse impacts from the Project when added to other past, present or reasonably foreseeable future actions in the region, including those involving energy minerals' leasing and/or development, mining and exploration, grazing, recreation, ORV/OHA use, water use, etc., is clearly essential to BLM's determination (and duty to ensure) that the Project complies with all legal requirements and protects public land resources, as well as meeting all its NEPA responsibilities.

The limited cumulative impacts discussion also neglects to even list, let alone analyze, the impacts from other current and RFFAs. For example, the impacts from BLM's approved Mt. Hope Mine are ignored, even though its impacts extend into CESAs for the Goldrush Project. *See* DEIS Figure 4-1 (depicting CESA areas covering the Mt. Hope Mine northwest of Eureka).

As discussed above, for the other NGM operations around Mt. Tenabo connected to the Goldrush Project, and that will add to the cumulative impacts from Goldrush, although BLM references the previous NEPA documents for these operations, many were issued a decade or more ago. The DEIS does not contain current information on these operations, including whether all of the environmental reviews and projections made in the old EAs and EISs are still valid, and verified by current data and analysis.

BLM also failed to include a full and current review of the cumulative and connected impacts from the transportation and processing of the ore and Gold Quarry/Goldstrike. *See* Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011). *See also* Sierra Club v. U.S. Dept. of Energy, 255 F.Supp.2d 1177, 1185 (D.Colo. 2002) (agency must review impacts from "reasonably foreseeable" mine on private land when preparing NEPA document for federal land easement related to the future mine. "The fact that a private company will undertake the mining is irrelevant under NEPA regulations. See 40 C.F.R. § 1508.7 ('regardless of what agency or person undertakes such other actions')").

This review of the impacts must also include an analysis of the baseline conditions at the other mines in the region that may feed the mill (as well as for the mill itself), as well as the site characteristics and impacts of the mining such as the geochemical aspects of the mineral deposits, waste rock, etc., at the various mine sites.

As with any project that may have significant impacts to the environment, the EIS must identify and analyze all potential impacts from mine and mill operations and transportation (as well as non-mining/ milling projects in the region) including, but not limited to, impacts to air quality, noise, water resources, water quality, plants and wildlife, recreation, and religious and cultural resources.

For example, the EIS's connected actions, or at a minimum cumulative impacts, analysis must include a full review of the impacts from delivering the ore to the mill, as well as mill operations. The federal court's have rejected BLM's attempt to avoid looking at the off-site transportation and other impacts when reviewing a Plan of Operations for a mining/milling project. South Fork Band Council v. Department of the Interior, 588 F.3d 718, 725-726 (9th Cir. 2009). This includes impacts to air quality, traffic, safety, recreation and cultural resources.

Regarding off-site impacts from the milling and transportation, as well as on-site mining impacts, federal courts have rejected the argument that reliance on state-issued permits or analysis satisfied the agency's independent duty under NEPA. "'[A] non-NEPA document ... cannot satisfy a federal agency' obligations under NEPA'. … and the reference to the Project's Clean Air Act permit did nothing to fix that error." Great Basin Res. Watch v. BLM, 844 F.3d 1095, 1104 (9th Cir. 2016) (quoting South Fork Band Council, 588 F.3d at 726). "[N]or have we allowed federal agencies to rely on state permits to satisfy review under NEPA." Env'l Defense Ctr. v. Bureau of Ocean Energy Mgt., 36 F.4th 850, 874 (9th Cir. 2022).

C. The EIS failed to fully analyze all baseline conditions.

The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process. "NEPA clearly requires that consideration of environmental impacts of proposed projects take place before [a final decision] is made." LaFlamme v. FERC, 842 F.2d 1063, 1071 (9th Cir.1988) (emphasis in original). Once a project begins, the "pre-project environment" becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible. Id. Without establishing the baseline conditions which exist in the vicinity … before [the project] begins, there is simply no way to determine what effect the proposed [project] will have on the environment and, consequently, no way to comply with NEPA. Half Moon Bay Fisherman's Mark't Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). "In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions." Western Watersheds Project v. BLM, 552 F.Supp.2d 1113, 1126 (D. Nev. 2008). "The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process." Council of Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act (May 11, 1999). Such baseline information and analysis must be part of the EA/EIS and be subject to public review and comment under NEPA.

BLM must first obtain this required baseline information and subject the information and analysis to public review and comment in the DEIS. "NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward." Northern Plains v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir 2011) (concluding that an agency's "plans to conduct surveys and studies as part of its post-approval mitigation measures," in the absence of baseline data, indicate failure to take the requisite "hard look" at environmental impacts). This requirement applies not only to ground and surface waters, but also to any other potentially affected resource such as air quality, recreation, cultural/religious/historical, soils, and wildlife and wildlife habitat, etc..

The DEIS lacks critical baseline information for all potentially affected wildlife species, including the numbers and movement of such species such as sage-grouse and other birds (including special status

and protected species such as Golden Eagles), pronghorn, mule deer, aquatic-dependent species such as springsnails and fish, etc.. Simply listing the acreages of species' habitat, as the DEIS Wildlife Report marginally does, is insufficient. Baseline data on all potentially affected water resources and species, including for springs, streams, seeps, and associated riparian areas is also not in the DEIS and the associated appendices. For air quality, BLM failed to obtain baseline data from at and around the site – which is especially suspect due to the adjacent ongoing mining operations.

Also, the Water Resources Report depicts numerous springs and streams that have yet to be surveyed and reviewed, as required by NEPA and FLPMA. Report Figure 2-3. This undermines BLM's assertion that there are not any Public Water Reserves (PWR 107) that may be affected by the Project (as a PWR 107 federal reserved water right does not have to be formally adjudicated, or even applied for, to exist). Under PWR 107 and FLPMA, the lands around the springs are withdrawn from entry and the agency cannot approve any activities that would adversely impact these lands and waters. BLM gives no reason why these important waters have yet to be surveyed/analyzed, not why they have not been protected under FLPMA and PWR 107.

D. BLM must include an adequate mitigation plan under NEPA and Interior Department requirements.

Under NEPA, the agency must have an adequate mitigation plan to minimize or eliminate all potential project impacts. NEPA requires the agency to: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 CFR § 1502.14(e); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(e))." 40 CFR § 1502.16(a)(9). NEPA regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. §§1508.1(s). "[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 v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989). NEPA requires that the agency discuss mitigation measures, with "sufficient detail to ensure that environmental consequences have been fairly evaluated." Methow Valley, 490 U.S. at 352, 109 S.Ct. 1835.

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare* Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) with Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. Methow Valley, 490 U.S. at 351–52 (citing 42 U.S.C. § 4332(C)(ii)).

A mitigation discussion without an adequate evaluation of effectiveness is useless in making that determination. South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009) (rejecting EIS for failure to conduct adequate review of mitigation and mitigation effectiveness in mine EIS). "The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court

to see how the [agency's] reliance on mitigation is supported by substantial evidence in the record." Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1251 n. 8 (D. Wyo. 2005). *See also* Dine Citizens v. Klein, 747 F.Supp.2d 1234, 1258-59 (D. Colo. 2010) (finding "lack of detail as the nature of the mitigation measures" precluded "meaningful judicial review").

"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 Part 3809 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).

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.

Here, much of the purported mitigation relies on future pledges by NGM to remediate Project impacts. But such future submittals do not satisfy NEPA's requirement that mitigation measures be subject to public review in the DEIS. Also, as detailed herein, the purported mitigation measures do not satisfy NEPA's and FLPMA's procedural and substantive requirements, including for water quality and quantity, aquatic life, wildlife, and other affected resources.

Lastly, much of the purported future mitigation requires extensive activities that will require decades or more of continued monitoring and direct mitigation work. These will require significant financial commitments by NGM. The future mitigation to replace lost stream and spring flows, such as in Horse Canyon discussed above, are particularly of concern. Yet outside of vague references to financial assurances, no details are provided, including no details about any future long-term funding mechanisms, and no opportunity for comment as required by NEPA and FLPMA. "[L]ong-term mitigation and reclamation funding issues must be 'discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.' *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 352 (1989)." Great Basin Resource Watch v. BLM, 844 F.3d at 1109. Although the court in that case eventually held that the reclamation and mitigation measures were sufficient, that is not the case here, as detailed herein.

E. BLM failed to fully review all reasonable alternatives.

NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E); 40 CFR § 1502.14. It must "rigorously explore and

objectively evaluate all reasonable alternatives" to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990).

The alternatives analysis should present the environmental impacts in comparative form, thus sharply defining important issues and providing the public and the decisionmaker with a clear basis for choice. Id. The lead agency must "rigorously explore and objectively evaluate all reasonable alternatives" including alternatives that are "not within the [lead agency's] jurisdiction." Id. "While a federal agency need not consider all possible alternatives for a given action in preparing an EA, it must consider a range of alternatives that covers the full spectrum of possibilities." Ayers v. Espy, 873 F.Supp. 455, 473 (D. Colo. 1994).

Much of the DEIS's discussion of alternatives is perfunctory and limited. As just one example, regarding placing the RIBs in an alternative location to avoid impacts to sage-grouse leks, BLM merely states that:

> Due to concerns about the proximity of mine features to the GRSG leks, an alternative to move the mine features closest to the GRSG leks was considered. This would include relocating the RIBs for the Goldrush Mine in West Pine Valley to reduce impacts to GRSG. Suggestions included moving all RIBs further away from the GRSG leks, moving the RIBs to an area closer to an existing road or existing disturbance, and moving the RIBs closer to the JD Ranch Road (M-111) or Buckhorn Road.
>
> NGM reviewed the potential feasibility of eliminating or moving RIB Gallery 3 (the RIB Gallery closest to the GRSG lek). It was determined RIB Gallery 3 could not be eliminated without causing mounding concerns at the remaining two RIB galleries. In addition, NGM reviewed the existing data to determine if RIB Gallery 3 could be re-located further from the GRSG leks. Based on the available information, an adequate alternative site was not located (NGM 2021). Since this alternative was determined not technically feasible, it was eliminated from detailed analysis.

DEIS at 2-35/36.

This is an insufficient justification for rejecting RIB relocation to reduce and potentially avoid impacts to the critical sage-grouse lek(s) in the area. The DEIS does not justify why "mounding concerns" take precedence over BLM's duties to comply with the ARMPA and FLPMA (see ARMPA/FLPMA discussions herein).

Neither BLM nor NGM address any potential alternatives and mitigation for this purported "mounding" that that could alleviate these "concerns," such that the Project could avoid locating facilities so close to such critical leks. Nor does the DEIS consider other locations for RIB(s) that, while potentially resulting in some additional costs, would eliminate these "mounding concerns" as well as impacts to important sage-grouse habitat.

Similarly, the DEIS rejects the alternative of reinjecting the pumped dewatering groundwater, which could avoid the need for the RIBs in sage-grouse PHMA, on mostly generalized technical concerns. Yet the arguable fact that NGM would have to conduct additional dewatering to account for the

reinjected waters is not justification for violating the ARMPA and FLPMA requirements to protect sage-grouse and its habitat.

Notably, BLM argues that all of NGM's dewatering and discharges comply with federal and state law (refuted herein), but the DEIS provides no analysis as to why additional dewatering that might result from the reinjecting would violate federal or state law.

F. The DEIS unreasonably considers only the ten-foot drawdown

The DEIS provided no adequate justification for the use of 10 foot drawdown plus an arbitrary one mile buffer to determine potentially affected surface waters. The effects of drawdown on surface water resources is a severe risk to resources within that drawdown. But in the DEIS, BLM only focuses on the ten-foot drawdown. But once the water table is drawn beneath a surface water resource dependent on the water table, it does not affect the surface resource any more to draw the water table down further. Therefore, it is reasonable to consider that a small drawdown can affect surface resources. A spring or seep that depends on the water table will go dry if the water table drops below that intersection of the water table with the surface. Therefore, it is unreasonable for the DEIS to only consider the ten-foot drawdown for its consideration of effects. A spring is just as dry for a one-foot drawdown as for a ten-foot drawdown. Additionally, the discharge from a spring would be reduced if the gradient controlling the discharge reduces without regard to there being any actual drawdown at the spring. This would occur at Horse Creek.

The one-mile buffer zone around the 10-foot drawdown is meaningless without knowing what drawdown occurs in that area. There is no discussion of how the threshold changes in groundwater elevation. BLM has not supported this approach nor the effectiveness of relying on the one-mile buffer zone in the NEPA analysis.

BLM previously claimed that "[c]hanges in groundwater levels of less than 10 feet often are difficult to distinguish from natural seasonal and annual fluctuations in groundwater levels" (Deep South, DEIS 3.2-50). While it is correct that there are natural fluctuations, drawdown caused by dewatering is simply imposed on top of the natural water table and its fluctuations. In areas with significant natural fluctuation, drawdown may simply increase the time that the stream or spring is dry, which is just as important as causing a perennial source to go dry.

Other federal EISs for mining projects have used a much lower drawdown for the consideration of impacts. The following is a small sample of those documents drawn from different states:

> Copper Flat Copper Mine: Draft Environmental Impact Statement, Sierra County, New Mexico, BLM/NM/ES-16-02-1793 – 2015. The DEIS considers drawdown to 1 foot. https://eplanning.blm.gov/eplanning-ui/project/75353/570
>
> Donlin Gold Project, Final Environmental Impact Statement, Alaska, 2015. This EIS considers drawdown to 0.1 feet due to the nearby wetlands that could be dried. https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/details?eisId=247774

Haile Gold Mine Project, Final Environmental Impact Statement, 2014, SAC 1992-24122-41A
The FEIS considers drawdown to 1 foot.
http://www.hailegoldmineseis.com/feis.html

The DEIS therefore errs in not considering drawdown less than ten feet. Consideration of drawdown to one-foot would account for some variability in the estimate intended to be accommodated by the one-mile buffer zone. The DEIS clearly underestimates the potential effects of drawdown on surface water resources and thus fails to protect those waters under FLPMA.

G. The DEIS Incorrectly Ignores Environmental Justice Aspects

In Section 4.3.1 the DEIS states that, "The Proposed Action would not be expected to disproportionately affect any particular population." (DEIS, p 4-5) This statement is a blatant insult to the Western Shoshone who have repeatedly testified as to the special significance of the Horse Canyon area and their ability to conduct cultural activities in the area. BLM has recognized the cultural significance of the area, "The Mount Tenabo/White Cliffs Property of Cultural and Religious Importance (PCRI) and the Horse Canyon PCRI are both important cultural sites…" (DEIS, "Native American Traditional Values Supplemental Environmental Report Goldrush Mine Project," p ES-4)

It is clear in the DEIS that BLM made no effort to directly interview Shoshone people on how existing mining operations have affected their cultural and spiritual practice in the region of Mt Tenabo, including Horse Canyon. BLM needed to meet in person with all of the tribes for a meaningful consultation that does not "compromise the rights of Indian Tribes." Sending merely a letter to the tribes generally disrespects the tribes and their desire for in person meetings, especially regarding a project such as Goldrush involving very significant changes to their lands as outlined in the Treaty of Ruby Valley.Western Shoshone have clearly been disproportionately affected.

For example, the following was stated by Western Shoshone during the Goldrush site visit on August 17, 2022 provided for Great Basin Resource Watch by Nevada Gold Mines (see attached transcript from on-site recording by GBRW):

> "This was a good pine nutting area, it is what sustained our people, it was a major source of food for our ancestors and we still come and get pine nuts here. Well now we have to go as far away from where you guys have mined cause your kicking up dust and your putting all the mercury into the air, and how good is that for our pine nut trees and so yea this is pretty destructive your industry and its pretty damaging to native people who, who care and who have that feeling in our soul."
>
> "There's the water and there's our medicines that are in the water. How do you recover that? When it's covered with acid, because I remember way back when my aunt used to tell me they would come out here and soak themselves in spring water for healing and your using these healing waters. There's no coming back from that, no recovery, you're not even recovering anything to tell you the truth. Your just putting plain simple water back in there."
>
> "But at Horse Canyon, we've had people in this valley and pine valley and some of these ranches like the bowmen ranch here, we have had our native people, they use the area, this land

was used, see the pine nuts, the juniper trees, were used for medicine. All of its medicine, all of its good medicine here and its being destroyed."

Clearly, Western Shoshone have been and continue to be disproportionately affected.

H. BLM did not Address how the Existing Mining in and around Mt Tenabo has Affected Western Shoshone Culture

The Cortez Hills mining operations (CHM), Deep South expansions, and Horse Canyon explorations is located entirely within the territory of the Western Shoshone Nation, recognized in the 1863 Treaty of Ruby Valley. These mining operations include the slopes of Mt. Tenabo, a mountain that is sacred to the Western Shoshone people and maybe currently used (as it has been for centuries) for religious and cultural purposes by Western Shoshone people. Specifically, for Horse Canyon:

> The Horse Canyon area is and has been a special place for the Shoshone people dating back thousands of years. The laws on mining seem to forget the land and the people who live on it, that also predate Nevada statehood and intruders looking for gold who have been taking all the resources of the Shoshone people. The expanding of Barrick's exploration activities into the Horse Canyon area tells the Shoshone people that the laws that protect tribes has no merit in legal terms. Barrick has known about this area before they purchased it from Placer Dome. I believe they were also doing exploration in Horse Canyon during court case for Cortez. Barrick also is aware that the Horse Canyon area is under the protection of "TCP" (Traditional Cultural Protection). There are things that cannot be bought that are priceless. These things are only to be recognized and talked about on both sides to come to a resolution. The 1872 Mining Law is a violation under International Human Rights Forum on Indigenous Peoples and their lands.
>
> - Larson Bill, Western Shoshone, South Fork Reservation

According to the DEIS, "The presented existing conditions tiers to and summarizes analyses that was set forth in prior NEPA documents including the Deep South Final EIS and the Cortez Hills Expansion Project Final EIS (BLM 2008, 2019a)." (DEIS, "Native American Traditional Values Supplemental Environmental Report Goldrush Mine Project," ES-1) The analysis from those previous EIS documents is also inadequate and we incorporate the following from Deep South FEIS comments as part of the current DEIS comments:

> We strongly object to the Native American cultural analysis.
> The FEIS response to our comments on tribal consultation continues to ignore its own directive for person to person meetings to be initiated by BLM. Only the Duckwater Tribe received in person consultation, which is inadequate. See our discussion below on the consultation process.
>
> The FEIS repeats the same ineffective and inadequate approach to delineating how Western Shoshone communities have been affected by the active mining operations in and around Mt. Tenabo. We emphasize that it is the modern culture that needs to be addressed in the FEIS. How has the mining operations affected the ability of the people to practice cultural/spiritual activities in the region. We have talked to a number of Western Shoshone who had a cultural

tradition in the Mt Tenabo Region, who now say that it is "too painful" to go to Mt Tenabo. Therefore, the Cortez mining complex in Crescent Valley including the Cortez Hills mine appears to have severely negatively affected Western Shoshone culture. BLM failed to capture this in the FEIS and needs to change and update its analysis of culture impacts.

We stand by our previous comments on the DEIS regarding using ethnography from decades past as an inadequate form of cultural consultation. In response to our comments, the BLM simply stated that this use of ethnography is "industry standard". Although this practice may be industry standard it is contrary to certain expert opinions as evident by the comment submitted by Dr. Ferguson and of UNR.

The industry standard use in the DEIS and FEIS does not adequately serve the intended purpose of determining cultural attributes to the land. It is built on a lack of understanding regarding the ethical utility of ethnography. That all cultures are changing and contested is foundational to an anthropological definition of culture. The use of dated ethnography arbitrarily ties a culture to one snapshot in time, and thus denies that cultures are changing. This lack of understanding of culture as dynamic results in an inaccurate cultural assessment. Since this use of outsider representation is only applied to a specific racial demographic based on legal pluralism, it is oppressive through an inequitable denial of self-representation.

For these reasons we have grave concerns regarding this current industry standards. We maintain our recommendation that referring to the ethnographic record is not sufficient, and on-going government-to-government consultation with tribal and traditional leadership needs to be the standard.

Deep South FEIS Comment Letter, December 5, 2018, Great Basin Resource Watch, Western Shoshone Defense Project, Progressive Leadership Alliance of Nevada, and the Center for Biological Diversity (attached)

And, we further incorporate the following comments on the Deep South DEIS:

<u>BLM Did Not Address How the Cortez Hills Expansion Affected Western Shoshone Culture</u>

The Cortez Hills mining operations (CHM) is located entirely within the territory of the Western Shoshone Nation, recognized in the 1863 Treaty of Ruby Valley. The Cortez Hills mining operations includes the slopes of Mt. Tenabo, a mountain that is sacred to the Western Shoshone people and maybe currently used (as it has been for centuries) for religious and cultural purposes by Western Shoshone people, including members of the South Fork Band, Timbisha Tribe, WSDP, and GBMW.

Members of the South Fork Band, Timbisha Tribe, Western Shoshone Defense Project (WSDP) had used the area of the CHM and adjacent lands for hunting, gathering, religious, cultural, and other traditional uses as well as for recreational, conservational, and aesthetic enjoyment. Western Shoshone religious and cultural uses of the CHM have most likely been permanently eliminated due to mining operations in and around Mt Tenabo. Religious, cultural, and other uses on lands inside and outside the permit boundary of the CHM may have been severely and

adversely affected, if not outright eliminated, by the CHM. The DEIS did not determine whether these activities have been eliminated.

There is mention of oral interviews with Western Shoshone in the DEIS,

> "Oral interviews with tribal members resulted in the identification of the following concerns regarding new mining and other developments: threats to power spots or sources, including the sacred and extremely rare white Tosawihi chert; access limitations to traditional resource areas; cumulative degradation of the cultural and biotic landscape of public lands within Western Shoshone traditional territory; possible direct effects to individual cultural properties from construction and data recovery; increased visibility and accessibility; inadvertent discovery of human remains; and impacts to eagles and sage grouse." (DEIS 3.9-25)

However, the date of these oral interviews is not indicated, and since this appears in the Ethnographic Studies section Commenters assume that these oral interviews were conducted many years ago and not in regards to the current expansion proposal or in relation to impacts from the CHM operations.

The DEIS contains many general statements on affects of mining on Western Shoshone cultural practice such as, "Use of these areas for individual Western Shoshone spiritual or religious renewal has decreased over time as mining and other activities have increased in the regional CESA." (DEIS 3.9-33), which appears to have come from information gained prior to 2004, and not from any current interviews

Under the cumulative effects section the DEIS concludes,

> "Cumulative effects to Western Shoshone places of cultural importance have occurred throughout Western Shoshone history and most likely would continue with modern human development activities, including mining, in the regional CESA. The addition of more development would affect the nature of Western Shoshone spiritual and religious use areas not only through visual intrusions, but through their presence within the landscape. Modern facilities could affect the function of these areas by interrupting the continuity of the ebb and flow of Western Shoshone power, renewal, and spirituality. Changes in the landscape could cumulatively affect the role of the landscape within tribal sacred and historical traditions, and potentially change how the tribes use the landscape." (DEIS 3.9-34)

This general assessment provides no specifics that could have been obtained from personal interviews on whether Western Shoshone can no longer practice their culture and religion in and around Mt Tenabo. BLM maintains that the affect of mining on the Native American Traditional Values is "unquantifiable," and therefore impacts cannot be determined. The tribes provided numerous declarations during the legal challenge on the CHM. BLM could have interviewed those people and other Western Shoshone to accumulate a record to evaluate how the Mt Tenabo cultural region has been affected by existing mining operations and potential effect of future developments. BLM needs to gather specific information from individual

Western Shoshone to completely assess the affect of mining on the culture and religious practices by the mining operations.

If the Deep South Expansion is approved then BLM will have failed to adequately protect public and public land resources, including the religious, cultural, and environmental resources and uses at and around the Project site as required by FLPMA, the RFRA, the Trust Responsibility owed to Native Americans, and the implementing regulations of these statutes. BLM also failed to fully evaluate the Project's impacts as required by NEPA and FLPMA.

The DEIS Provides No Mitigation or Alternatives to Elevate Negative Effects to Western Shoshone Culture and Practice in the Area Around Mt Tenabo

DEIS does indicate very severe impacts to Western Shoshone culture, "Use of these areas for individual Western Shoshone spiritual or religious renewal has decreased over time as mining and other activities have increased in the regional CESA." (DEIS 3.9-33); "Changes in the landscape could cumulatively affect the role of the landscape within tribal sacred and historical traditions, and potentially change how the tribes use the landscape." (DEIS 3.9-34) While not as specific as could be obtained, as discussed above, these kinds of effects represent a destruction of culture.

Despite the severity of how Western Shoshone culture is being eroded by the mining operations in and around Mt Tenabo, the DEIS offers no substantive approach to preventing this impact. The DEIS only states, "No mitigation measures have been identified for Native American Traditional Values based on implementation of BCI's applicant-committed environmental protection measures identified in Section 2.4.13." (DEIS 3.9-52) Section 2.4.13 only provides for Western Shoshone "observers," and "harvest affected wood products in proposed disturbance areas for firewood and posts and distribute the wood products to local Western Shoshone communities." (DEIS 2-62)

There is no attempt in the DEIS to prevent the cultural erosion by limiting the extent of mining and dewatering or develop other alternatives in and around Mt Tenabo. BLM needs to provide a Native American Traditional Values protection alternative. To do so BLM should meet with Western Shoshone to determine at this point in time what mining expansion if any could be allowed that would not further erode Western Shoshone culture.

BLM Failed to Analyze and Account for the Need to Mitigate the Impacts to Western Shoshone Uses and Interests in the Ground and Surface Waters

The DEIS does acknowledge the existence and importance of the spiritual, religious, and cultural values and uses of the waters in the CESA, for example, "According to Western Shoshone beliefs, all living things depend on water, and without it, life would cease. Therefore, the drying up of springs or reduction of flow, due to exploration drilling, mine dewatering, and other mining activities, is of great concern to the Western Shoshone, who view water sources as being sacred." (DEIS 3.9-34) And, "Water is the keystone of Western Shoshone religion because power (Puha), with its affinity for life, is strongly attracted to water (Rusco 2000)." (DEIS 3.9-44)

In fact, the depth of importance in protecting the sources of springs/surface waters, which includes the loss of the religious and cultural values in the ground water on Mt. Tenabo, is clear from the following declarations of former Chairman of the Timbisha Tribe, Joe Kennedy:

> "The water flowing underneath the Mt. Tenabo area is especially important to maintaining the balance and power of life I value as a central tenet of my religious beliefs as a Western Shoshone. Under our religious beliefs, the water in Mt. Tenabo is unique and is connected to specific spirits that reside in the Mountain and in the water. These spirits will suffer greatly, and indeed will likely be eliminated altogether, when this water is lost through the Project's dewatering operations." (Declaration of Joe Kennedy, ER 132-34, at 133.)

and, Carrie Dann,

> "The loss of these irreplaceable waters, and the spirits and religious values of these waters, constitutes irreparable damage to them, as to the fundamental religious practices and beliefs of myself and other traditional Western Shoshone." (Declaration of Carrie Dann, ER 129-31, at 130.)

BLM also recognizes that these values and uses by Western Shoshone of the waters in and around Mt Tenabo will be affected by stating, "… is assumed that Western Shoshone traditional lifeways as they relate to perennial waters have been, and would continue to be, cumulatively affected by mine-related activity that has occurred, and would occur, in the regional CESA." (DEIS 3.9-44)

Yet, BLM failed to fully review, analyze, and protect the spiritual, religious, and cultural uses and values in Mt. Tenabo's waters (in-situ) and in the general CESA. BLM's claim that, "The degree to which mine-related impacts to perennial waters in the regional CESA have affected, or would affect, Native American traditional values is not quantifiable" (DEIS 3.9-44) does not relieve BLM of its obligation to strive to determine how the Proposed action and alternatives will erode Western Shoshone cultural, spritial, and religious values and uses. Furthermore, BLM does not propose any way to reduce or eliminate the recognized impact to Western Shoshone culture caused by the massive dewatering of the Mt Tenabo and the regional aquifers.

Western Shoshone tribes submitted extensive comments to the BLM, requesting that the agency consider and adopt mitigation measures to protect ground (in-situ) and surface waters in and around Mt Tenabo in 2011 for the upcoming ROD. But, BLM continues to refused to act, issuing that ROD and the Deep South Expansion DEIS without any additional mitigation measures beyond the ones contained in the inadequate original Cortez Hills EIS and ROD to protect the groundwater sources (in-situ).

Deep South DEIS Comment Letter, December 5, 2018, Great Basin Resource Watch, Western Shoshone Defense Project, Progressive Leadership Alliance of Nevada, and the Center for Biological Diversity. (attached)

Below are the GBRW transcribed on-site voice recorded comments of indigenous attendees who participated during the August 17, 2022 Goldrush site visit:

> "It's upsetting to see all of this happening. It's really hurtful for me because this is where my family would come. We used this land all the time and then this happened. We fought like crazy to not let this happen, but we can't fight power, we can fight the big money and yet we suffer culturally and it's really difficult to stand here and see what became of this, of this mountain that was so and still is important. Our people still use the area and that's the reason I hear there's no Indians in the area but there is and it's just a sad thing. It's just so frustrating and so hurtful because, for myself, I suffer from the historical trauma of what's happened to the whole America's because for indigenous peoples it's not good. I hear this young lady tell me, it's ok it solves everybody's interest, but not the indigenous people. So, ya I had to express that and hurtful it is to see this, and when the plan was happening you guys said it was only going to be at the flank of the mountain, and I'm seeing it go up even further, and what's all this about, the instability here, what happened with the cave in here …. These rock cliffs represented writing on the wall is how it was interpreted and so they've taken off, once again there erasing us from the landscape, and there taking off the writing on that mountain and ugh yea, simply for a mineral that they say is in demand. I don't know how much demand there is, I still think that most of the gold produced is mainly for gold jewelry, correct me if i'm wrong miners, is that the demand?"

> "So how does this benefit the shoshone people? How does it benefit us? That's what I would like to know. We get a measly $1000 from you and you think that is good enough to pay our power bill? Come on, my power bill runs 400-600 dollars a month in the winter. Cause my house and ventilation system are not up to standards. Who's gonna rebuild my house when it falls down, is NGM gonna give me 15000 to get a new house, I mean come on. Indians are on the losing end here and you're making billions, for yourself, for your pocket… not my pocket. Like I said, my power bill is 600 dollars. It takes half of the money that you "give freely" to every tribal member. It pays like two months of power then we have to suffer through March. We are human just like you all are, we are not little bugs, and even we know how to take care of these bugs. When Mormon crickets used to come to town we taught our kids don't harm these creatures because there is a purpose for why they are here, there's a purpose for everything. A reason why everyone is here so I appreciate the 1000 to get through 2 months but Indians deserve a lot more than that."

> "It don't matter where you are in Nevada all of it is important to native people, because as you might know all of this is indigenous land so wherever you're mining, it doesn't matter where on this north american continent, it is indigenous land so every bit of it matters to all of us. But at Horse Canyon, we've had people in this valley and pine valley and some of these ranches like the bowmen ranch here, we have had our native people, they use the area, this land was used, see the pine nuts, the juniper trees, were used for medicine. All of its medicine, all of its good medicine here and its being destroyed. We've had our ancestors camp along these ranching area because that's what happened we had to learn to live in two worlds so our people have been brought and lived among the peripheral of these ranches and mining included but anywhere you are on Newe Sogobia it all matters because you are mining underground, I heard someone say but its going to be underground. But all these things matter to us in a spiritual way there our

relatives, so anything you do in the mining industry it's not working for people, for native people simply because everything means life. What you call resources are our life sources and it starts at the top of the mountain. It begins with the weather, anything that affects the weather, we get rain we get snow, that comes to water, you've heard the saying water is life and I hear everything about water being wasted in the mining industry, wasted or polluted and it's just really difficult to deal with any of those things. But our people have used all this area! No matter what valley you are in its been occupied by native people. It doesn't matter where you going Nevada there has been Paiute and Shoshone people for millennium and it's like none of this matters to the mining industry, no matter where you go globally it's the same thing, any time you have indigenous people who believe in a world you guys simple don't understand. All of this matters to us even though its out in the middle of nowhere you think theres nothing there but its all life until you touch it, until you do this to it, your killing the earth, your industry is.. And it doesn't matter where you are in the world it affects everything and our worldview and our connection to these areas. Again no matter what valley your in, no matter what water source your near it does truly have a tremendous effect and again I'm gonna bring up climate change. What is the mining industry doing to alleviate or do their part in trying to slow down the situation of climate change. We live in the most arid state in the nation. How are you guys able to rectify that your not damaging our access to water and to clean water. How is the mining industry able to do that. When all I can see is destruction and poison; in the air, and in the water, and the soil, what good is that going to do to our plants that we depend on for medicine and food. I don't know, that's the backstory I can give you. All of it matters, all of it is connected and that's just the view of our connection to the land. This whole valley you can find different area's if you read in the history books, which you don't read very much about native or indigenous people, where pretty much erased from what happened in this nation. This was a good pine nutting area, it is what sustained our people, it was a major source of food for our ancestors and we still come and get pine nuts here. Well now we have to go as far away from where you guys have mined cause your kicking up dust and your putting all the mercury into the air, and how good is that for our pine nut trees and so yea this is pretty destructive your industry and its pretty damaging to native people who, who care and who have that feeling in our soul. Its in our DNA. Its pretty sad."

"They came and showed us plants up here we were able to us for different medicinal purposes. I don't know what the scientific names are but there have been places for avy. The white chalk that we use for medicine and also the dosa, I can't tell you the scientific names but they are important and still are. I don't know if there was Yomba on the flanks of the mountain here but including all the plants we use is the wildlife. What's going on with the wildlife are we able to use them for a source of meat without contamination. What contamination are they taking in through the water and through the air. What's in place for the wildlife you are displacing them as well, is there any consideration for them."

"There's the water and there's our medicines that are in the water. How do you recover that? When it's covered with acid, because I remember way back when my aunt used to tell me they would come out here and soak themselves in spring water for healing and your using these healing waters. There's no coming back from that, no recovery, you're not even recovering anything to tell you the truth. Your just putting plain simple water back in there."

> "Always remember whatever mine you go to it all on indigenous land. There's no way around that and you are going to have to face other indigenous people as well because there's probably so much relationship to this. It don't matter to you guys as long as you make what you can make, and again Gary mentioned: capitalism, colonialism, and extractivism all goes hand in hand and thats whats so sad. You guys are even so colonized you don't even know how bad that is. Thanks for hearing me sorry. I'm taking my anger and frustration and historical trauma that we have to be displaced by this, by what you guys do to our lands and you can all walk away. We're attached we're related to the land and I don't think any of you guys can understand that. But so mine away I think karma will happen."
>
> "I can only speak to you about my experiences and that it all comes down to water, we are too disconnected and the world is focusing on the wrong things. You can not eat gold and you can not drink oil."

Great Basin resource Watch transcript of voice recorded comments take during the Goldrush site visit on August 127, 2022 provided by Nevada Gold Mines for Great Basin Resource Watch. (attached)

IV. BLM Failed to Require the Necessary Right-of-Way(s).

BLM erroneously proposes to approve all of the Project activities under a Plan of Operations under the Part 3809 regulations. Yet for all the pipelines, transmission lines, roads and uses that are not necessary for access to NGM's mining claims, BLM can only authorize such activities through a long-term Right-of-Way (ROW) under FLPMA for the Project. There is no discussion of the required FLPMA ROW. This includes the lack of any ROW for the purported long-term "mitigation" measures noted above, such as for the Horse Canyon replacement water and other water and power delivery facilities/lines.

Under FLPMA Title V, Section 504, BLM may grant a Right-of-Way (ROW) only if it "(4) will do no unnecessary damage to the environment." 43 U.S.C. § 1764(a). Rights of way "shall be granted, issued or renewed … consistent with … any other applicable laws." Id. § 1764(c). A right-of-way that "may have significant impact on the environment" requires submission of a plan of construction, operation, and rehabilitation of the right-of-way. Id. § 1764(d). A Title V SUP/ROW "shall contain terms and conditions which will … (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." Id. § 1765(a). In addition, the ROW can only be issued if activities resulting from the ROW:

> (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

FLPMA, § 1765(b).

At least three important potential substantive requirements flow from the FLPMA's ROW provisions. First, BLM has a mandatory duty under Section 505(a) to impose conditions that "will minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." Id. §1765(a). The terms of this section do not limit "damage" specifically to the land within the ROW corridor. Rather, the repeated use of the expansive term "the environment" indicates that the overall effects of the ROW on wildlife, environmental, scenic and aesthetic values must be evaluated and these resources protected. In addition, the obligation to impose terms and conditions that "protect Federal property and economic interests" in Section 505(b) requires that the BLM must impose conditions that protect not only the land crossed by the right-of-way, but all federal land affected by the approval of the ROW.

Second, the requirements in Section 505(b) mandate a BLM determination as to what conditions are "necessary" to protect federal property and economic interests, as well as "otherwise protect[ing] the public interest in the lands traversed by the right-of-way or adjacent thereto." This means that the agency can only approve the ROW if it "protects the public interest in lands" not only upon which the road would traverse, but also lands and resources adjacent to and associated with the ROW.

Third, is the requirement that the right-of-way grant "do no unnecessary damage to the environment" and be "consistent with … any other applicable laws," FLPMA §§ 1764(a)-(c). This means that a grant of a ROW leading to the exploration and mining must satisfy all applicable laws, regulations and policies, including the Endangered Species Act, Clean Air and Water Acts, all state and local laws, etc.

The federal courts have repeatedly held that the federal land agency not only has the authority to consider the adverse impacts on lands and waters outside the immediate ROW corridor, it has an obligation to protect these resources under FLPMA. In County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003), the court affirmed the Forest Service's imposition of mandatory minimum stream flows as a condition of granting a ROW for a water pipeline across USFS land. This was true even when the condition/requirement restricted or denied vested property rights (in that case, water rights). Id. at 1085-86.

The BLM thus cannot issue a ROW that fails to "protect the environment" as required by FLPMA, including the environmental resource values in and not within the ROW corridor. "FLPMA itself does not authorize the Supervisor's consideration of the interests of private facility owners as weighed against environmental interests such as protection of fish and wildlife habitat. FLPMA requires all land-use authorizations to contain terms and conditions which will protect resources and the environment." Colorado Trout Unlimited v. U.S. Dept. of Agriculture, 320 F.Supp.2d 1090, 1108 (D. Colo. 2004) appeal dismissed as moot, 441 F.3d 1214 (10th Cir. 2006).

The Interior Department, interpreting FLPMA V and its right-of-way regulations, has held that: "A right-of-way application may be denied, however, if the authorized officer determines that the grant of the proposed right-of-way would be inconsistent with the purpose for which the public lands are managed or if the grant of the proposed right-of-way would not be in the public interest or would be inconsistent with applicable laws." Clifford Bryden, 139 IBLA 387, 389-90 (1997) 1997 WL 558400 at *3 (affirming denial of right-of-way for water pipeline, where diversion from spring would be inconsistent with BLM wetland protection standards).

Similar to the County of Okanogan and Colorado Trout Unlimited federal court decisions noted above, the Interior Department has held that the fact that a ROW applicant has a property right that may be adversely affected by the denial of the ROW does not override the agency's duties to protect the "public interest." In Kenneth Knight, 129 IBLA 182, 185 (1994), the BLM's denial of the ROW was affirmed due not only to the direct impact of the water pipeline, but on the adverse effects of the removal of the water in the first place:

> [T]he granting of the right-of-way and concomitant reduction of that resource, would, in all likelihood, adversely affect public land values, including grazing, wildlife, and riparian vegetation and wildlife habitat. The record is clear that, while construction of the improvements associated with the proposed right-of-way would have minimal immediate physical impact on the public lands, the effect of removal of water from those lands would be environmental degradation. Prevention of that degradation, by itself, justified BLM's rejection of the application.

1994 WL 481924 at *3. That was also the case in Clifford Bryden, as the adverse impacts from the removal of the water was considered just as important as the adverse impacts from the pipeline that would deliver the water. 139 IBLA at 388-89. *See also* C.B. Slabaugh, 116 IBLA 63 (1990) 1990 WL 308006 (affirming denial of right-of-way for water pipeline, where BLM sought to prevent applicant from establishing a water right in a wilderness study area).

In King's Meadow Ranches, 126 IBLA 339 (1993), 1993 WL 417949, the IBLA affirmed the denial of right-of-way for a water pipeline, where the pipeline would degrade riparian vegetation and reduce bald eagle habitat. The Department specifically noted that under FLPMA Title V: "[A]s BLM has held, it is not private interests but the public interest that must be served by the issuance of a right-of-way." 126 IBLA at 342, 1993 WL 417949 at *3 (emphasis added).

As the IBLA recently held:

> The public interest determination is more than a finding that no laws will be violated by granting the ROW. Even if UUD [Unnecessary or Undue Degradation] can be avoided, degradation to public resources posed by a requested ROW may factor into BLM's determination of whether that ROW would be in the public interest. For example, in Sun Studs, we upheld BLM's rejection of a logging road ROW permit based on environmental considerations without any suggestion that the environmental harm rose to the level of unlawful degradation.

Klamath-Siskiyou Wildlands Center, IBLA 2019-75, at 9 (2019), citing Sun Studs, 27 IBLA at 282-83.

Lastly, BLM must comply with the financial requirements of the FLPMA regarding ROW applications and approvals. At a minimum, BLM must obtain "Fair Market Value" (FMV) for the use of federal land and resources. FLPMA requires that "the United States receive fair market value of the use of the public lands and their resources." 43 U.S.C. §1701(a)(9). "The holder of a right-of-way shall pay in advance the fair market value thereof, as determined by the Secretary granting, issuing, or renewing such right-of-way." 43 U.S.C. §1764(g). In addition, the company must fully "reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such

right-of-way and in inspection and monitoring of such construction, operation, and termination of the facility pursuant to such right-of-way." Id.

In addition, BLM must charge full costs for a reclamation and performance bond to cover the ROW. 43 CFR §2805.20. These substantial financial considerations are in addition to the rents and other fees required by FLPMA and the ROW regulations. *See* 43 CFR Part 2800.

In addition to all of the above FLPMA requirements, because all of these financial considerations are necessarily part of BLM's review and approval of the ROW, they are subject to full public review under NEPA and FLPMA.

V. The Removal of Common Variety Minerals From the Gravel Pit Areas Can Only Be Considered Under a Mineral Material Sales Contract Regime.

In addition to fundamentally misconstruing its authority to approve the Project's ancillary facilities under its self-imposed restriction on its discretion under assumed rights under the 1872 Mining Law which have not been shown to exist, BLM proposes to erroneously approve the extraction and removal of common variety rock from the gravel pit on public land under the Part 3809 locatable mineral regulations, rather than the 43 Part 3600 mineral material regulations.

"Because certain very common minerals, such as common earth and common clay, were never disposable under either the mining law or the mineral leasing acts, Congress enacted the Materials Act of 1947, 61 Stat. 681 (1947) (codified as amended at 30 U.S.C. § 601 et seq.), to provide a method for their disposal." Copar Pumice Co. v. Tidwell, 603 F.3d 780, 785 (10th Cir. 2010)(citations omitted). "Congress later amended the Materials Act when it enacted the Surface Resources Act of 1955 (also known as the Common Varieties Act), 69 Stat. 367 (1955) (codified at 30 U.S.C. § 601 et seq.)." Id.

"Disposal of these 'common varieties' was now 'permissible only under the Materials Act of 1947.' Watt v. W. Nuclear, 462 U.S. 36, 57 (1983)." Copar Pumice, 603 F.3d at 786. "Together, these Acts provide that the Secretary of the Interior and the Secretary of Agriculture, 'under such rules and regulations as [they] may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) … on public lands of the United States.' 30 U.S.C. § 601 (emphasis added)." Id. at 785-86. (citations omitted). "Generally, the disposal of these mineral materials occurs 'by contract let through competitive bidding.'" Id., at 86.

Here, BLM proposes to authorize the disposal of the common variety minerals from the gravel pit without compliance with, or consideration of, the 1947 Materials Act or the 1955 Common Varieties Act.

In addition to the statutory distinctions between "valuable minerals" and "common varieties," the disposition and use of the two different types of mineral deposits are subject to very different regulatory structures. The Interior Department regulates the exploration, mining, and removal of "valuable mineral deposits" on valid claims pursuant to 43 C.F.R. Part 3809. Those regulations govern

only "locatable" minerals (i.e., those types of minerals that can be claimed under the 1872 Mining Law), and not common variety minerals such as rock and stone:

> This subpart applies to operations that involve locatable minerals, including metallic minerals; some industrial minerals, such as gypsum; and a number of other non-metallic minerals that have a unique property which gives the deposit a distinct and special value. **This subpart does not apply to leasable and salable minerals. Leasable minerals, such as coal, phosphate, sodium, and potassium; and salable minerals, such as common varieties of sand, gravel, stone, and pumice, are not subject to location under the mining laws**. Parts 3400, 3500 and 3600 of this title govern mining operations for leasable and salable minerals.

43 C.F.R. § 3809(2)(e)(emphasis added).

Interior Department/BLM regulations governing the actual exploration, mining, processing, removal and transport of the two different types of mineral deposits are also very different. *Compare* 43 C.F.R. Part 3600 (common varieties such as the gravel here) with Part 3809 (locatable minerals).

BLM's review and approval of non-locatable common variety mineral operations is entirely discretionary, meaning that BLM is free to limit or deny any proposal to mine and remove common variety minerals as a matter of complete discretion. The "location of a mining claim encompassing a deposit of a common variety [mineral] establishes no right to develop the common variety [mineral] on the claim." John Steen, 166 IBLA 187, 190 (2005), 2005 WL 3072880, **WL2. "We have frequently recognized that BLM has considerable discretionary authority under the Materials Act and the implementing regulations regarding mineral materials at 43 CFR Part 3600, whether to approve an application to purchase mineral materials from the public lands." Id., 166 IBLA at 190, **WL3.

In addition, as stated in the Part 3600 regulations, FLPMA requires "BLM to manage the use, occupancy, and development of the public lands under the principles of multiple use and sustained yield in accordance with the land use plans that BLM develops under FLPMA." 43 C.F.R. § 3601.3. FLPMA further requires that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use." 43 U.S. C. § 1701(a)(8).

FLPMA also mandates that "the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute." 43 U.S. C. § 1701(a)(9). BLM's duty to protect "the public interest," to "protect public land resources and the environment and minimize damage to public health and safety during the exploration for and the removal of such minerals," to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," and ensure "the public benefits" from mining/removal of common variety minerals is not found in BLM's Part 3809 regulations governing locatable minerals.

In addition, while the federal government receives no payment or royalty when a mining claimant removes "valuable minerals" under the Mining Law and Part 3809 regulations (i.e., it is "free," 30

U.S.C. § 22), BLM can only "sell mineral material [common variety] resources at not less than fair market value." 43 C.F.R. § 3601.6(b).

The sale of common variety minerals, if approved by BLM at its discretion, can only be done pursuant to a "Mineral Materials Sales Contract," under detailed regulations ensuring that the federal government receives fair market value for the removed minerals. "BLM will not sell mineral materials at less than fair market value. BLM determines fair market value by appraisal." 43 C.F.R. § 3602.13(a).

BLM never applied its duties under the 1947 Act, the 1955 Act, and FLPMA to protect "the public interest," to "protect public land resources and the environment and minimize damage to public health and safety during the exploration for and the removal of such minerals," to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," and ensure "the public benefits" from mining/removal of common variety minerals in its consideration of operations at the gravel pit.

BLM apparently believes that simply because the gravel pit materials will be used in the overall gold mining project automatically means that excavation is authorized by the Mining Laws and regulated under Part 3809. Yet the fact that NGM would use the excavated mineral materials to support mining-related activities on **other** mining claims or on private lands does not transform the removal of mineral materials (Part 3600) into a locatable minerals mining operation (Part 3809).[6]

If that were the case, mining claimants could excavate common variety minerals from public lands for free simply because they might be used to support mining operations elsewhere, completely avoiding the requirements of Part 3600 and the Common Varieties Act.

Although a claimant may use common variety minerals found on a mining claim *that contains locatable minerals* for reasonable uses **on that claim** (which NGM will not do here), the claimant is not free to remove and transport the common variety rock off of that claim for uses elsewhere unless its subject to the required sales contract and Part 3600 review and approvals. And, as there is no evidence in the record that the mining claim(s) covering the gravel contain locatable minerals, these claim(s) are invalid and thus not covered by any rights under the Mining Law as discussed above.

VI. <u>The Agency Must Comply with the National Historic Preservation Act (NHPA) and Other Requirements to Protect Native American Interests and Resources</u>.

BLM must comply with the NHPA and requirements regarding Native American interests and resources. Due to the potential that cultural and religious sites and resources will be adversely affected, it would be a violation of the NHPA and other laws (and NEPA and FLPMA as noted above) to approve the Project without the required review of, and protection of, cultural/historical resources.

> [T]he fundamental purpose of the NHPA is to ensure the preservation of historical resources. See 16 U.S.C. § 470a(d)(1)(A) (requiring the Secretary to "promulgate regulations to assist

[6] There is no evidence in the record that the gravel materials have the required "distinct and special value" which might qualify the materials as "uncommon varieties" that would potentially be regulated under Part 3809.

> Indian tribes in preserving their particular historic properties" and "to encourage coordination ... in historic preservation planning and in the identification, evaluation, protection, and interpretation of historic properties"); *see also Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 226 (10th Cir.1981) ("The purpose of the National Historic Preservation Act (NHPA), is the preservation of historic resources."). Early consultation with tribes is encouraged by the regulations "to ensure that all types of historic properties and all public interests in such properties are given due consideration...." 16 U.S.C. § 470a(d)(1)(A).

Te-Moak Tribe of Western Shoshone v. U.S. Department of the Interior, 608 F.3d 592, 609 (9th Cir. 2010).

Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c],800.9(c). The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council"). *See* Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). *See also* 36 CFR § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.")

The Advisory Council on Historic Preservation ("ACHP"), the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA's requirements. *See* National Center for Preservation Law v. Landrieu, 496 F. Supp. 716, 742 (D.S.C.), aff'd per curiam, 635 F.2d 324 (4th Cir. 1980). The ACHP's regulations "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. Id. *See* National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as approval of the Projects, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. *See* Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. See 36 CFR § 800.4(d)(2). *See also* Pueblo of Sandia, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties). Consultation "must be 'initiated early in the undertaking's planning', so

that a broad range of alternatives may be considered during the planning process for the undertaking." Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 CFR § 800.2(c)(2)(ii). "The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c) (emphasis added).

The NHPA requires that consultation with Indian tribes "recognize the government-to- government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C). See also Presidential Executive Memorandum entitled "Government-to- Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771.

BLM must also protect archeological and grave resources, Sacred Sites and Native American religious and cultural uses pursuant to the above laws and requirements as well as: (1) the American Indian Religious Freedom Act (AIFRA), 42 U.S.C. 1996 et seq.; (2) the Archaeological Resources Protection Act (ARPA), 16 U.S.C. 470aa-mm ; and (3) the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 et seq.

Under NEPA, the NHPA, and the other laws, policies and requirements noted herein, BLM cannot approve the Project until full government-to-government consultation with all potentially affected Tribes has been completed, as well as full involvement with the public, which has not yet occurred.

In addition, due to BLM's failure to comply with FLPMA and NEPA as detailed above, BLM cannot fulfill its obligations to fully review, and protect, the cultural/historical/religious resources and uses affected by the Project.

VII. The Project does not Comply with Executive Order 13007 and Other Policies Requiring Protection of Indigenous Sacred Sites

The Project also fails to prevent UUD because it does not comply with Executive Order 13007, protecting "Indian Sacred Sites," and other, directly applicable management direction. Executive Order 13007 requires BLM to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." Exec. Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771 (attached). The Proposed Action will impact many areas on and around Mt. Tenabo that are considered sacred by various Western Shoshone tribes.

As defined by the Executive Order, "sacred site" means "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an

appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion." 61 Fed. Reg. 26771.

The Project threatens to severely reduce or eliminate religious uses of public land by the Western Shoshone. Mt. Tenabo and its surrounding landscape hold unique and significant religious importance to many Western Shoshone Tribes and people. The area is currently being used, as it has for centuries, by Western Shoshone people for prayer, fasting, purification ceremonies, and other religious practices. The spiritual significance of Mt. Tenabo is not limited to the top of the mountain, as BLM has argued in the past. Rather, the mountain is part of a sacred landscape that serves as a locus for various Western Shoshone religious beliefs, creation stories, and ceremonies. For instance, the waters within and around the mountain hold particular spiritual significance for the Western Shoshone, and the loss of sacred springs, seeps and streams caused by dewatering from the Project would severely degrade, inhibit, and prevent the exercise of traditional Western Shoshone religious practices.

Native American sacred sites such as Mt. Tenabo are recognized as critical public land resources protected by FLPMA. Although the Presidential Executive Order on Sacred Sites is not an independently-enforceable law, it clearly recognizes the federal government's priority to protect sacred sites on public land. "Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally important sites has historical value for the nation as a whole." Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 976 (9th Cir. 2004).

Federal courts have expressly recognized the need to protect sacred sites under the Executive Order ("E.O.") as a component of the government's public land management responsibilities: "Executive Order no. 13007 signed by President Clinton, May 24, 1996, orders Federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites." Wyoming Sawmills, Inc. v. U.S. Forest Service, 383 F.3d 1241, 1245 (10th Cir. 2004).

The preamble to BLM's mining regulations (43 C.F.R. subpart 3809) specifically recognizes the binding nature of E.O. 13007 as applied to BLM under FLMPA's UUD standard: "In these regulations, BLM has decided that it will approve plans of operations … if the requirements of subpart 3809 are satisfied and other considerations that attach to a Federal decision, such as Executive Order 13007 on Indian Sacred Sites, are also met." 65 Fed. Reg. 69998, 70032 (Nov. 21, 2000).

FLPMA protects all critical cultural resources, not just those covered by the procedural mechanism of the NHPA. "Those [sites/properties] that do not meet the eligibility standard are not subject to compliance with Section 106 of the National Historic Preservation Act. This does not mean that they are without protection, only that the NHPA is not the correct legal tool for protecting them." BLM Handbook H-8120-1, "Guidelines for Conducting Tribal Consultation" at II-2 (replaced by H-1780-1 in 2016).

More recently, the Department of Interior issued additional directives on protecting Tribal sacred sites. In addition to E.O. 13007, this new policy is directly applicable to the Project and must be considered by BLM in its NEPA process. Violation of binding direction renders an agency decision arbitrary and capricious. See Ecology Ctr., Inc. v. Austin, 430 F.3d 1057, 1069-70 (9th Cir. 2005) (arbitrary and capricious to ignore a standard when final EIS discusses it as if it is binding), *overruled on other*

grounds by Lands Council v. McNair, 537 F.3d 981, 990 (9th Cir. 2008). Where internal direction is non-binding, the agency may deviate under appropriate circumstances so long as it provides an adequate explanation for doing so. However, deviation from applicable guidance "without a reasoned explanation" constitutes arbitrary and capricious action. W. Watersheds Project v. Kraayenbrink, 620 F.3d 1187, 1208 (9th Cir. 2010); *see also* Davis v. Mineta, 302 F.3d 1104, 1117 (10th Cir. 2002) ("If [the agency] arbitrarily and capriciously failed to follow its own [non-mandatory] regulation, its decision must be reversed.").

The two new directives at issue here are the most recent and applicable internal agency direction on how to evaluate the Project's impacts on Tribal values under NEPA and other applicable statutes. The first is a November 9, 2021, memorandum of understanding ("MOU") concerning the protection of indigenous sacred sites among the Department of the Interior and several other federal agencies. MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIGENOUS SACRED SITES. The MOU recognizes that "[t]he connection to place is essential to the spiritual practice and existence of Indian Tribes" and notes that indigenous peoples "share an essential truth of the interconnectedness to nature and all life." MOU at 1. One consequence of this "essential truth" is that "[d]esecration of sacred places" has had "enduring" and "traumatic" impacts on the "social, cultural, spiritual, mental, and physical wellbeing of Indian Tribes." Id.

The MOU further acknowledges that "sites sacred to Indian tribes . . . often occur within a larger landform or are connected through physical features or ceremonies to other sites or a larger sacred landscape." MOU at 2. It directs the signatory federal agencies to "consider these broader areas and connections to better understand the context and significance of sacred sites." Id. A copy of the MOU is attached for consideration and inclusion in the administrative record.

The second new directive is a November 15, 2021, Joint Secretarial Order from Interior Secretary Debra Haaland and Agriculture Secretary Tom Vilsack ("Order"), which seeks to "ensure that the Department of Agriculture and the Department of the Interior . . . and their component Bureaus and Offices are managing Federal lands and waters in a manner" that protects "the treaty, religious, subsistence, and cultural interest of federally recognized Indian Tribes." Joint Secretarial Order ("JSO") 3403 (attached for inclusion in the administrative record).

The Order directs each Department to "[e]nsure that all decisions . . . relating to Federal stewardship of Federal lands, waters, and wildlife under their jurisdiction include consideration of how to safeguard the interests of any Indian Tribes such decisions may affect." Id. § 2. Through the Order, the Agriculture and Interior Departments commit to consultation and collaboration with Indian Tribes "to ensure that Tribal governments play an integral role in decision making related to the management of federal lands and waters," and to give "due consideration" to "Tribal recommendations on public lands management." Id. § 3.

The Order sets forth principles of implementation which apply "[w]hen making management decisions for Federal lands and waters, or for wildlife and their habitat that impacts the treaty or religious rights of Indian Tribes." See id. § 4. These include:

b. The Departments will collaborate with Indian Tribes to ensure that Tribal governments play an integral role in decision making related to the management of Federal lands and waters through consultation, capacity building, and other means consistent with applicable authority.

c. The Departments will engage affected Indian Tribes in meaningful consultation at the earliest phases of planning and decision-making relating to the management of Federal lands to ensure that Tribes can shape the direction of management. This will include agencies giving due consideration to Tribal recommendations on public lands management.

…

f. The Departments will consider Tribal expertise and/or Indigenous knowledge as part of Federal decision making relating to Federal lands, particularly concerning management of resources subject to reserved Tribal treaty rights and subsistence uses.

Order § 3. As with the MOU, a copy of the Order is attached for consideration and inclusion in the Administrative Record.

Together, and in combination with E.O. 13007, the Order and MOU provide for robust and enhanced consideration and protection of sacred sites. The Order, MOU, and E.O. 13007 directly address the specific issue repeatedly raised by area Tribes in connection with NGM's mining activities on and around Mt. Tenabo—the scope of sacred sites based on the Tribe's religious and cultural beliefs, and how BLM must engage with the Tribes to protect the sacred site and fulfill its statutory duties. BLM has not complied with these policies and has thus failed to prevent UUD.

The DEIS acknowledges that the Proposed Action will have significant impacts on Native American religious practices:

> If places of spiritual and religious use are present in the proposed disturbance, they would be impacted. If these places are outside the proposed disturbance, they may be impacted if physical disturbance to the landscape is within the viewshed. Impacts to spiritual and religious use sites would occur if such sites are identified within the physical disturbance footprint. Impacts would be major, long-term, and localized.

DEIS at 4-14. In addition, and as explained above, the Project will have severe and potentially irreversible impacts on culturally important landscape features such as springs, seeps, and streams.

Despite these impacts, the DEIS never addresses BLM's responsibility under FLPMA and its own policies to incorporate Tribal perspectives and protect indigenous sacred sites. Apart from a few general, conclusory statements about access (which also disclose that access to the sacred area in Horse Canyon will be limited by the Project) the DEIS never explains how BLM intends to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners," or how it will "avoid adversely affecting the physical integrity of such sacred sites," as required under E.O 13007. 61 Fed. Reg. 26771 (emphasis added). Nor does the DEIS indicate that BLM has considered Tribal perspectives regarding the delineation and protection of sacred areas, ensured the protection of the

"treaty, religious, subsistence, and cultural interests" of area Tribes, given "due consideration" to Tribal recommendations, or incorporated Tribal knowledge and expertise into its decisionmaking.

Consequently, BLM has failed to prevent UUD under FLPMA, *see* 65 Fed. Reg. 70032, and the DEIS violates NEPA because it does not explain BLM's deviation from directly applicable policies.

Conclusion

Thank you for the opportunity to comment on this important project. Please include all of the undersigned groups and representatives in all correspondences and public notices, etc.

Sincerely,

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Documents Included in These Comments and Attached for BLM Review, Consideration, and Inclusion in the Administrative Record

SAGEBRUSH ECOSYSTEM COUNCIL, MINUTES, Thursday, February 24th, 2022

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIGENOUS SACRED SITES, 11/12/21

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