Adam Paul Laxalt
*Nevada Attorney General*
Lawrence VanDyke (NSB 13643C)
*Solicitor General*
C. Wayne Howle (NSB 3443)
*Chief Deputy Attorney General*
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1100/1108 (Tel./Fax)
LVanDyke@ag.nv.gov
WHowle@ag.nv.gov
***Attorneys for State of Nevada***

Christopher Hicks, Esq. (NSB 7747)
District Attorney
Michael W. Large, Esq. (NSB 10119)
Deputy District Attorney
WASHOE COUNTY DISTRICT ATTORNEYS' OFFICE
1 South Sierra Street, South Tower, 4th Floor
Reno, Nevada 89501
775-328-3200 (Telephone)
***Attorneys for Washoe County, Nevada***

Laura K. Granier, Esq. (NSB 7357)
*laura.granier@dgslaw.com*
DAVIS GRAHAM & STUBBS LLP
50 W. Liberty Street, Suite 950
Reno, Nevada 89501
(775) 229-4219/ (775) 403-2187 (Tel./Fax)
***Attorneys for Counties and Private Plaintiffs***

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

| | |
|---|---|
| **WESTERN EXPLORATION LLC, ET AL.**<br><br>**Plaintiffs,**<br>**v.**<br><br>**U.S. DEPARTMENT OF THE INTERIOR, ET AL.** | Case No. 3:15-cv-00491-MMD-VPC<br><br>**PLAINTIFFS' (1) OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. (2) OPPOSITION TO INTERVENORS' CROSS MOTION FOR SUMMARY JUDGMENT, AND (3) REPLY IN SUPPORT OF MOTION FOR SUMMARY** |

| | |
|---|---|
| **Defendants, and**<br><br>**THE WILDERNESS SOCIETY, et al.**<br><br>**Intervenor-Defendants.** | **JUDGMENT** |



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

## INTRODUCTION

NEPA's zone of interests includes protecting the environment from harm consisting of added risk from agencies making decisions without having an analysis with public comment of the likely effects of their decision on the environment. "NEPA's object is to minimize that risk, the risk of uninformed choice." The uninformed choice that resulted from the policy driven directives imposed in the NVLMP requires vacatur. Defendants cannot question the finality of the closure of tens of millions of acres to wind and solar energy and mineral development such as the prohibition of the China Mountain Wind Energy project that cost Elko County more than $500 million in estimated tax revenue. The BLM cannot ignore its recent restrictions on Eureka County's 45-year old gravel pit based on erroneous mapping of the area as PHMA. The BLM cannot hide that it erroneously mapped lands identified for disposal, to be used as a Washoe County school site and potential veterans cemetery and the Humboldt County landfill as PHMA. The Agencies argue these harms are "speculative." But BLM admitted the harms in the FEIS – including that the millions of additional acres of PHMA would add more areas for fire suppression, fuels management and increase firefighter exposure and overall risk. Despite acknowledging these significant harms, and agency personnel raising the inadequacies of the socioeconomic analysis and lack of consideration of mineral potential, the Agencies rammed the FEIS through and finalized the NVLMP in a mad rush to beat the arbitrary GSG listing deadline for the FWS. The Agencies' complete disregard for their statutory obligations resulted in a fatally flawed process and requires vacatur of the ROD and remand for an SEIS and an appropriate FLPMA review.

## ARGUMENT

### I. Plaintiffs have Standing to Challenge the NVLMP.

In the Ninth Circuit, plaintiffs demonstrate Article III standing in cases alleging procedural harm under NEPA by adducing sufficient facts to show that (1) the defendant violated certain procedural rules; (2) these rules protect plaintiff's concrete interests; and (3) it is reasonably probable that the challenged action will threaten those interests. *Citizens for Better*

*Forestry v. USDA*, 341 F.3d 961, 969–70 (9th Cir. 2003). A plaintiff shows injury to a "concrete interest" where the plaintiff "will suffer harm by virtue of [its] geographic proximity to and use of areas that will be affected" by the challenged action. *Id.* at 971. That interest must be within the zone of interests NEPA was designed to protect. *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995). NEPA is a procedural statute dictating a process. The Agencies' failure to follow NEPA's mandates strike at the heart of interests NEPA is intended to protect. The Agencies did not follow the mandated process or take the requisite hard look. Plaintiffs are harmed by the consequences that the procedurally flawed NVLMP has on the spread of invasive species which increases wildfire risks on the affected lands and the failure to focus on conserving the "best of the best" habitat as NDOW noted in its concerns with the SFA boundary.

NEPA's zone of interests includes protecting the environment from harm consisting of added risk from agencies making decisions without having an analysis with public comment of the likely effects of their decision on the environment. "NEPA's object is to minimize that risk, the risk of uninformed choice." *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 930 n. 14 (9th Cir. 2000). NEPA's process protects the environment and persons affected by that environment from ill-informed decision making – such as the NVLMP. "The 'asserted injury is that environmental consequences might be overlooked' as a result of deficiencies in the government's analysis under environmental statutes" which is what occurred here. *Id.* at 971-972.

Defendants violated NEPA's procedural safeguards by inadequately analyzing socioeconomic and cumulative impacts arising from the NVLMP, failing to disclose and analyze the best available science and science conflicting with that relied upon, and including substantive, new information in the FEIS without analyzing that information in a supplemental EIS ("SEIS"). These statutorily mandated procedures were intended to ensure a comprehensive analysis of impacts, thereby protecting Plaintiffs' interests in a fully-informed decision. Because of the NEPA violations, the NVLMP is rife with overlooked environmental consequences, including, an increased risk of wildfire in many counties; misidentification of lands as "priority" habitat and a resulting failure to focus on conservation of the best habitat (as NDOW pointed out,



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

NV 14990); and overgrowth of invasive annual grasses caused by restrictions on managed grazing and access. Such harms are "reasonably probable" and, sufficiently concrete under *Citizens*. "The person who has been accorded a procedural right to protect his concrete interests can assert the right without meeting all the normal standards for redressibility and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 at n 7 (1992).

Plaintiffs' interests also fall within the zone of interests FLPMA is intended to protect. *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1179 (9th Cir. 2000). One of FLPMA's stated policy goals is to manage the public lands "in a manner which recognizes the Nation's need for domestic sources of minerals." 43 U.S.C. § 1701(a)(12). Companies engaged in supplying the nation with domestic resources fall within the zone of interests protected under FLPMA. *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 256 (D.D.C. 2011). Western Exploration, Quantum and Paragon are harmed by the Agencies' violations of FLPMA and the NFMA and disregard for the Nation's need for domestic minerals (providing no geology or adequate mineral potential analysis). The State and Counties are harmed by interference with their sovereign authorities caused by BLM's failure to complete consistency reviews.

**A. The Counties Show Concrete and Particularlized Harm.**

***1. Plaintiff Counties do not assert injury as Parens Patriae***

The Counties do not assert injury as *parens patriae* to its citizens; rather, they are suing "to protect [their] own 'proprietary interests' that might be 'congruent' with those of its citizens.'" *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). The Ninth Circuit has recognized a broad range of proprietary interests, including the ability to **enforce land-use regulations**, *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990); enforce powers of revenue collection and taxation, *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848-49 (9th Cir. 1985); **protect natural resources from harm**, *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002); contest "harm caused by the **disruption of local comprehensive planning**" *American Motorcyclist Association v. Watt*, 534 F. Supp. 923 (C.D. Cal. 1981); and assert injury to its



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

proprietary interests where, as here, "land management practices of federal land could affect adjacent" land, *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995). Such injuries from federal land management practices include economic injury from an erosion of tax revenue, and injury to management and public safety interests from interference with County land use plans; management of roads; and provision of emergency and non-emergency public services. *Sausalito*, 386 F.3d at 1198-99.

Here, the NVLMP imposes restrictions on land use, including access, travel, and other management restrictions, as well as loss of tax revenue for counties. This injury, in the form of loss of tax revenue which is integral to providing county services and protecting the Counties' own natural resources, is "certainly impending," *Clapper v. Amnesty Intern. USA*, 133 S.Ct. 1138, 1148 (2013), and the FEIS specifically acknowledges such losses: "[l]ocal government tax revenues may however, be **substantially** affected in specific areas that would experience dramatic reductions in economic activity." NV 80759. Although the FEIS recognizes this impact, there was no socioeconomic analysis that quantified these impacts and, worse, the Agencies ignored information the Counties provided of the significant impacts and the inconsistencies with County Plans. NV 86212, NV 56463, NV 56516, NV 56533, FS 131422, NV 51388, NV 56416, NV 56929, NV 13794, NV 57017, NV 57105, NV 59104, NV 56031, NV 54445, NV 59190, NV 62951. The Counties are severely affected by the land closures which are final actions: reduction in wind energy development (such as Elko and White Pine County); a reduction in solar development (Eureka County); and a reduction in geothermal exploration and development (Churchill, Humboldt, Lander, and Washoe Counties). The China Wind project is prohibited under the NVLMP because it is located within the SFA, where wind energy projects are categorically excluded. NV 90666, NV 90760; ECF 67-2 ¶ 26. Humboldt County's ability to implement its land use plan including economic development is severely impaired by the NVLMP restrictions. ECF 67-5 ¶ 12-14, 18. Eureka County has identified a significant loss of revenue based on grazing restrictions and will suffer significant costs from the NVLMP's



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

restrictions on its gravel pit which will interfere with necessary road repairs.[1] **Ex. 1.** SFA-designated lands within Elko and Humboldt Counties have already been segregated – closed to new mining claims and exploration -- for up to two years immediately prohibiting the location of new mining claims which means a loss to the State and Counties of mining claim fees. No future decision-making process is needed to determine this outcome; the closures are final.

Unlike the state in *Pennsylvania v. Kleppe* which did not assert harms that go "beyond the individualized harms to her citizens" 533 F.2d 668 (D.C. Cir. 1976), here, the Counties will lose revenue necessary for the provision of County duties, incur additional costs to perform, and in some instances suffer interference with their ability to perform those functions. These injuries are concrete and harm the County itself, not just its citizens. In contrast to the D.C. Circuit's holding in *Kleppe*, a more recent Ninth Circuit decision has found that "injury to [a county's] proprietary interest in revenues earned from [a] two percent sales tax" is sufficient to confer standing. *Colorado River Indian Tribes*, 776 F.2d at 848. The Counties provided evidence of the lost revenue they will suffer as a result of the NVLMP closures and restrictions effective upon issuance of the ROD but the BLM summarily denied their protests and referred them to the inadequate protest resolution report. NV 56443, NV 89015; ECF 67-3 ¶ 8, ECF 67-2 ¶¶ 20, 26. Defendants also misconstrue *Rohnert Park* as finding that loss of tax revenue and profits to business in a City are only *parens patriae* interests. The municipality in *Rohnert Park* only asserted injuries from loss of tax revenue and profits <u>on behalf of its taxpayers and citizens</u>, and not on its own behalf. *City of Rohnert Park*, 601 F.2d 1040, 1044-45 (9th Cir. 1979). Rohnert Park's asserted interest was purely speculative and, thus, insufficient to show a cognizable interest. In contrast, the Counties have demonstrated interference with their sovereign authority, land use planning, and County plans– the very issues FLPMA mandates be considered in

[1] The agencies are implementing the NVLMP as demonstrated by BLM's March 7, 2016 decision to impose the ROD seasonal restrictions on Eureka County's gravel pit needed as a year-round source for road maintenance. The gravel pit is the only one in that part of Eureka County. There is no substitute source of gravel. (*See* **Ex. 2** and Ex. 1 ¶ 4). These restrictions prohibit use of the gravel pit for six months per year due to its location in winter habitat (ROD Management Decision ("MD") SSS 2E3, NV 90681) and its location in breeding habitat (ROD MD SSS 2E1A, NV 90680). There are no provisions for emergency access or the ability to get material needed to repair unsafe roads, or fix washouts for half of the year.



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

consistency reviews. NV 56871. The land closures preclude Plaintiffs from being able to develop affected lands and directly harm the Counties' proprietary interests -- there can never be future proposals or permit applications for the Prohibited Uses on the Closed Lands. The closure of millions of acres deprives the Counties of future revenue from these lands for the Prohibited Uses. Elko County's loss of tax revenues from the BLM's prohibition of the China Wind Energy Project is just one example of a loss of over $500 million that Phase 1 of the project would have generated. NV 13784. Now that the NVLMP has permanently closed the China Mountain project area to wind energy development, Elko County will never realize tax benefits from this project – or other wind energy projects on lands closed to wind energy development under the NVLMP. NV 87336; 14780.

***2. The Counties demonstrate environmental and natural resource harm.***

Federal land management practices can affect threats to adjacent lands which are "concrete, plausible interests within NEPA's zone of concern for the environment." *Douglas County*, 48 F.3d at 1501. "By failing to properly manage for insect and disease control and fire, the federal land management practices threaten the productivity and environment of the adjoining lands . . . It is logical for the County to assert that its lands could be threatened by how the adjoining federal lands are managed." *Id.* Here, BLM's misidentification of areas of abundant pinion juniper ("PJ") as PHMA require BLM to extinguish fires in the area which would allow improvement of the habitat and also mitigate the County's and ranchers' loss of water to the PJ. The meadows that are losing such water to the PJ are some of the best GSG habitat. Hendrix Decl., **Ex. 10**. Here, Counties expressed their concerns to the BLM of its failure to manage the Wild Horse and Burro ("WHB") issue or to evaluate the significance of their impact on GSG habitat and realistic cost and availability of government funds to reasonably control the problem. NV 88995-996 (noting the Herd Management Areas in Eureka County are currently an average of 250% of AML while statewide the population numbers are 150% of AML). The BLM (NV 88997) provided no analysis of the impact that would result from its failure to manage the problem and increasing restrictions on ranchers that have resulted. NV 88995-996. The BLM's



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

failure to manage the WHB population combined with the NVLMP's onerous grazing restrictions have resulted in limits on grazing permitees – another impact the Agencies failed to adequately analyze given the known problem with WHB and the need for $1 billion to manage the problem.[2]

The NVLMP grazing restrictions will result in decreased grazing (NV 80562), which will interfere with the Counties' Plans to utilize managed grazing as a tool to manage fire fuels. The Agencies now argue this harm is "speculative" when they admitted the impact in the FEIS. NV 80525 (additional acres of PHMA would impact fire management adding more areas for fire suppression, which would increase firefighter exposure and overall risk). Increased risk of fire on public lands puts adjacent lands at risk as fire does not respect property lines. The Agencies admitted in the FEIS that the "Proposed Plan would limit grazing treatments in PHMA" which, in turn may increase "the probability and severity of fire." NV 80526. The Agencies admit the impact but failed to properly analyze what that meant to the Counties. Eureka County raised the conflict with its land use planning and the BLM's erroneous identification of lands as PHMA which the BLM closed under its Right-of-Way ("ROW") exclusions for solar energy in Diamond Valley, expressing concerns that such closure would interfere with Eureka's ability to find a water balance and halt the County's advanced discussions with industries to target alternative, less water intensive uses in Diamond Valley. ECF 67-3 ¶ 16, NV 56416. The BLM ignored the County's concern for protection of its natural resources. NV 13804. Eureka County expressed concerns that removal of lands designated as suitable for disposal after these lands went through prior land use planning conflicted with Eureka County's plans for economic development and community expansion. NV 56416, NV 56434, NV 56447, ECF 67-3 ¶ 16. The BLM ignored these concerns, failing to consider possible resolution of these inconsistencies and violating

[2] *See* **Ex. 3**, found at http://www.seattletimes.com/business/blm-boss-wild-horse-program-facing-future-1b-budget-crisis/. Plaintiffs request that the Court take judicial notice of this document pursuant to FRE 201(b)(2).



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

NEPA by failing to evaluate impacts of the change in designation of such lands from "disposal" to "retention." NV 12547.

***3. The Counties suffer injury to access and ability to provide emergency services.***

The FEIS and the RODs describe emergency access from the perspective of providing BLM and USFS access. There is no provision to allow continued access by the Counties or the State that have public health and safety responsibilities. Even in their briefing, the Agencies assert "**to the extent** such services can be provided using existing routes, the Agencies' regulations" do not limit existing routes to emergency public-safety uses. What the Agencies omit is that many County "routes" likely do not satisfy the NVLMP's definition of "existing road." NV 81180, 86253. The Counties must keep roads in a safe condition at all times so they can: 1) be used in an emergency; and 2) don't have hazardous conditions that could create an emergency. Because the timing and location of emergencies are unpredictable, this necessitates year-round road maintenance to provide for both access and public safety – but the NVLMP prohibits or substantially restricts such access. For example, a recent public safety issue in White Pine County required replacement of a cattle guard on a road with a 50 mph speed limit. When the County notified the BLM it did not immediately allow the repair but instead delayed it for several weeks to determine whether the NVLMP seasonal restrictions prohibited repair. Dec. of B. Miller, **Ex. 4.** Similarly, the NVLMP seasonal restrictions placed on Eureka County's 45-year old gravel pit and Elko County's plans to pave a portion of the South Fork Reservoir road to save $112,000 in annual road maintenance costs (Decl. of S. Brown, **Ex. 11)** illustrates the NVLMP's interference with the Counties' obligations to maintain their roads year round to protect the public and properly maintain the roads.

The Agencies argue that the NVLMP does not compel adjudication of 2477 roads in an attempt to refute the Counties' harms suffered as a result of existing access restrictions under the NVLMP; however, it does because in order for the County to continue using its unadjudicated 2477 roads under the NVLMP restrictions the Counties must undergo costly adjudication – an impact the Counties raised and the BLM ignored. The Agencies inserted a phrase "subject to



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

valid existing rights" in an attempt to address the issue which does nothing to evaluate the widespread impacts or to resolve the interference with the Counties' sovereign obligations. NV 86253-4; 12547. If the BLM had adequately considered these concerns under its FLPMA consistency review or NEPA, the issue could have been resolved through appropriate discretion of the Agencies to accommodate such needs. The geographic scope of the travel restrictions is enormous, affecting roughly 13.9 million acres in northern Nevada as shown in Map 1, **Exhibit 5**, affecting all nine Plaintiff Counties and covering more than 26% of six counties[3]. BLM's argument that the specific locations of these restrictions remain to be determined by future travel management plans is incorrect. The locations where travel is restricted are determined and shown on the ROD map for Comprehensive Travel and Transportation Management Proposed Plan (Figure 2-13, NV 90766), which is a marked departure from the FEIS No Action travel restrictions (Figure 2-11, NV 81336), which shows vast areas open to travel whereas the NVLMP map shows no areas open to travel and vast areas with restricted travel. Plaintiffs' are harmed due to these restrictions to a significant portion of County lands.

The travel restrictions shown in ROD Figure 2-13 (NV 90766) are just one layer in a system of multiple, layered, and overlapping restrictions that the NVLMP currently imposes. In addition to the travel restrictions, the other layers that also currently regulate travel by limiting road access, maintenance, and construction include: 1) the 3.1 mile lek buffer distance for "linear features (roads)" (NV 90769), which is a year-round restriction; 2) the four-mile seasonal restrictions which apply in both PHMA and GHMA during every month of the year except for October (NV 90680-81); and 3) the three-percent disturbance cap within the Biologically Significant Units (NV 90666). Because the lek buffers, seasonal restrictions and disturbance caps are in effect now under the NVLMP, the future travel management plans will merely memorialize these restrictions. As a matter of law, the agencies cannot adopt anything in future plans inconsistent with the NVLMP. The ROD Figure 2-13 (NV 90766) shows where the travel

[3] Approximately 41% of Elko County, 44% of Eureka County, 27% of Humboldt County, 39% of Lander County, 39% of Washoe County, and 36% of White Pine County are blanketed by the travel restrictions. *See* Maps 2 – 7 in Exhibit 5 which illustrate the counties' road networks affected by the travel management restrictions; *see also* **Ex. 6**.



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

management restrictions apply today. The year-round 3.1 mile lek-buffers for roads, the seasonal restrictions, and the disturbance caps describe how the travel management restrictions must be applied under the NVLMP. There are no remaining land use management decisions to be made.

***4. The Counties demonstrate interference with their planning and management***

The Counties are harmed by the BLM's refusal to complete its FLPMA consistency review to resolve inconsistencies between the NVLMP and the local plans to the extent possible. The Agencies caused the Counties unnecessary harm by providing the Counties only generic form responses. Inconsistencies could have been resolved if BLM had completed the FLPMA mandated process. For example, Eureka County, as the FEIS reflects at Table 2-14 (NV 79703), had lands identified for disposal in the No Action Alternative that totaled 766,300 acres -- all of which were removed from disposal in the NVLMP apparently based on erroneous mapping that identified certain of those areas as PHMA. ECF 67-3 ¶ 15, NV 86256, 56416. This is not a speculative injury but a completed change from the BLM identifying these lands for disposal before the NVLMP and then for retention after. What is speculative is the Agencies' suggestion that disposal could take place under other authorities. If that is true then what is the purpose of the NVLMP changing the designation? This change in status makes it more difficult for the Counties to attempt to obtain these lands which interferes with their sovereign land use planning.

Humboldt County's Master Plan provides for the health and safety of its residents, to preserve its agricultural and mining-based economy, and to increase its commercial and industrial land base using developed site criteria for future land designations. NV 163168. The BLM failed to address inconsistencies between Humboldt County's Master Plan and the LUPA and instead misidentified as PHMA lands most appropriate for expansion of basic health and safety services -- interfering with the County's expansion of the Winnemucca landfill, use of gravel pits for road maintenance, access to Mountain Top Public Safety Radio sites, pursuit of suitable development options, and fire response and suppression. NV 163173-77.

Under the Lincoln County Land Act of 2000 ("LCLA") and Lincoln County Conservation, Recreation and Development Act of 2004 ("LCCRDA") (P.L. 106-298; PL 108-



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

424), the Secretary of Interior is directed to, jointly with the County, select and dispose of 90,000 acres and upon such sale pay five percent of proceeds to the State for general education and ten percent to the County for fire protection, law enforcement, public safety, housing, social service and transportation. *Id.* Similarly, the White Pine County Conservation, Recreation and Development Act of 2006 (P.L. 109-432) provides for the disposal of up to 45,000 acres of public lands with a similar distribution of funds to the State and County. The BLM, in coordination with the Counties prior to the NVLMP, identified these lands for disposal. Lincoln County raised concerns that the proposed LUPA restrictions would interfere with this Congressionally directed sale. NV 57064-65, NV 57090. Yet the record is devoid of evidence of any attempt to evaluate the impacts of the NVLMP's restrictions on such land disposal or to resolve the conflicts. Simply mentioning the Acts exist and stating the Agencies will not violate them fails to provide the FLPMA mandated consistency review or the "hard look" NEPA requires, NV 91843, which would have meant the BLM completed mapping overlays to show the proposed restrictions and what lands would remain usable and marketable for sale. The BLM undertook no such effort and unlawfully ignored the Counties.

***5. Ninety-Six Ranch Has Concrete and Particularized Harm.***

The Ninety-Six Ranch's (the Ranch) grazing permits are now subject to limited grazing during Spring and Summer in accordance with NVLMP standards. These are the most critical times of year for grazing, and the Ranch relies on the availability of such grazing to care for its livestock. The Defendants argue that the NVLMP does not alter existing grazing permits, nor dictate reduced grazing in the future. Yet the FEIS acknowledges that reduction in grazing will occur and will impact communities in California and Nevada. NV 80759. The NVLMP's inflexible standards the Agencies **must** now apply will permit invasive annual grasses that increase rangeland fuel loads to grow unchecked (as managed grazing has been limited), resulting in increased risk to the environment from wildfire and invasive species. The fear of increased fire damage from increased fuel loads is not speculative, as the incidence of wildfire has increased sixfold over the past 50 years due to suspended grazing rates rates. NV 56262;



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

ECF 67-7 ¶ 5c. In addition, the increased lek buffers in the NVLMP, which apply now will interfere with access to private lands causes the Ranch immediate harm. The Ranch relies on the availability of and access to rangeland and pasture land to manage its business. Lack of access is already working harm to the land, as the health of the Ranch's currently accessible pasture land is declining due to a higher frequency of use by livestock. ECF 67-7 ¶ 5c. The NVLMP also prescribed stubble height that cannot be obtained given the different plant species, yet the Ranch will be subject to implementation of "changes in livestock grazing management" when those heights are not obtained, with the FEIS noting that "management requirements would result in economic impacts on individuals . . . directly and indirectly." NV 80537. Although Defendants acknowledged there would be such impacts, they did nothing to disclose the magnitude or analyze the same. Even if the Ranch attempts to obtain such heights, external factors, such as drought, will hinder its efforts— yet the NVLMP does not recognize drought as a mitigating factor if heights are not obtained.

***6. Western Exploration & Quantum Have Concrete and Particularized Harm.***

Western Exploration and Quantum have established standing. WEX's Gravel Creek project is one of the top gold discoveries in the United States which is entirely within the SFA and proposed withdrawal area. Dec. of M. Schlumberger, Ex. 7 (to be filed upon receipt of order on Plaintiffs' motion to file under seal, ECF 81). WEX has evidenced through the Schlumberger Declaration the harm it has suffered as a result of the inclusion of Gravel Creek in the SFA, including a significant decrease in WEX's value, substantial difficulty raising capital to continue its development of the Gravel Creek Project, and that in order to stay in business, it has been required to agree to onerous financing terms that have devalued existing shares in order to find investors willing to take the risk created by the NVLMP's improper placement of the project within the SFA. Because the new SFA boundary was provided for the first time in the FEIS, WEX's first opportunity to raise its concerns given the significant mineral potential in these lands was in its protest letter. NV 86218-33. The BLM provided WEX the same generic form response it sent every other protestor reciting that it was not required to consider site-specific



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

information in its programmatic planning. NV 89011-12. As discussed in Plaintiffs' MSJ, the BLM's regulations and NEPA required a socioeconomic analysis and consideration of geology and mineral potential that were omitted despite their own internal staff noting: "If…we make recommendations for withdrawals without a MP, this will be an immediate protest point from industry in that they will aver BLM did not follow our process and BLM cannot make those recommendations absent an MP." GBR 14774, WO 29783. WEX also has suffered a procedural injury described below as a result of the BLM violating its regulations, 43 C.F.R. 2310.1-2(c)(12), requiring that the Notice of Proposed Withdrawal, which immediately segregated these lands and burdened them with a cloud of uncertainty and risk, must include a report evaluating the cost to displaced users such as WEX and any reasonable alternatives. No such report was ever completed.

The Court's decision vacating the ROD and requiring an SEIS would give WEX relief from the harm by requiring a proper socioeconomic analysis and consideration of the Nation's needs for minerals as NEPA, FLPMA and the NFMA require. This, in turn, would require a redrawing of the boundary of the proposed withdrawal to exclude the Gravel Creek property or, alternatively, even if after a proper and lawful analysis the lands remained in the SFA a new notice of withdrawal would change the date of the segregation and, therefore, the price of gold on that date to be considered relative to any validity exam. Such analysis would necessarily consider the mitigation WEX would be required to implement to protect GSG habitat to continue exploration and development of its underground mine, and evaluate whether mitigation would adequately provide for conservation while balancing the need for minerals. While the Agencies get deference after a proper evaluation, they get no deference where, as here, there was no balancing because the mineral potential was ignored. WEX's harm suffered from the NVLMP is unquestionable. Before the NVLMP improperly placed Gravel Creek within the SFA subjecting it to segregation and the withdrawal, WEX had a valuable discovery and the ability to apply to expand the exploration permits and submit permit applications for development of the mine without the requirement to undergo a validity exam. The placement of the lands within the SFA



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

has subjected those lands to the possible requirement for a validity exam which, as the USFS's lead mineral examiner testified took 2 years to complete for 5 claims. Hearing Test. 367. Gravel Creek covers more than 300 claims which, according to the evidence could take decades for a validity exam necessitated by an unlawful NVLMP.

Quantum Minerals has suffered severe harm and lost its interest in the Jarbidge property as a result of the improper inclusion of the lands within the SFA notwithstanding the USFS' recent biological evaluation noting there is no GSG habitat in the area. Gustin Dec., **Ex. 8.** Just as Gustin testified at the Injunction hearing, he was unable to raise the necessary funds to maintain his interest in the property because of the jeopardy and cloud of uncertainty the wrongful inclusion of the property within the SFA imposed on the project, destroying the business. This is a concrete harm and, given that Quantum still holds the valuable permits allowing exploration on these lands, this harm can be redressed by this Court's decision which would allow Quantum to realize the value of those permits and raise necessary funds to re-acquire or revive and assign its interest in the project. *Id.*

***7. The State of Nevada Has Concrete and Particularized Harm.***

Nevada has established harm by the Director of the Nevada Division of Minerals ("NDOM"), Rich Perry, whose declaration shows that the withdrawal of lands from mineral entry would seriously impinge on funding for his agency. ECF 70-9. Nevada also established that BLM did not adequately perform the consistency review required by FLPMA, a *procedural* harm. The BLM's decision to segregate 2.8 million acres of lands, immediately closing them from location of new mining claims and proposing to withdraw them from mineral entry that has jeopardized funding for NDOM – putting the claimholders within the withdrawal area in a position of either paying for claims they cannot explore if they do not currently have a permit, or lose their claims for failure to pay the annual claims maintenance fee. 30 U.S.C. 28f, 43 C.F.R. § 3834.11. These injuries would be prevented if the Court grants the relief that the State requests.

Nevada's claim of procedural harm is entitled to more lenient treatment. The procedural harm alleged -- BLM's failure to satisfactorily perform the Governor's Consistency Review



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

("GCR") -- is an adequate basis to establish the State's standing. *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 Tex. L. Rev. 1061 (2015). "The Supreme Court apparently never intended that the injury in fact, causation, and redressability requirements would apply to the federal and state governments in the same way as to private litigants." *Id.* at 1080. Consistency review includes the Governor's right to comment upon the proposed LUPA, and appeal the BLM's response. 43 C.F.R. § 1610.3–2(e). For the U.S. to now assert lack of standing contradicts Congress' manifest intent to afford the State a right to participate throughout the process. The Director's denial of the Governor's appeal of the BLM's decision on the GCR is a final agency action subject to review under the APA. NV 13669-74. *Cf. New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009), where, on challenge to BLM land use plan amendment, the court recognized that "states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders," and holding that the state's allegations of "harm to its lands as well as a financial burden through the costs of lost resources" were sufficient for standing purposes. *Id.* at 697 n.13 (citing *Massachusetts*, 549 U.S. at 519–20); *see also U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1815 (2016), where the Court applied "the 'pragmatic' approach we have long taken to finality" in order to determine whether there had been final agency action.

States as parties are entitled to an even greater leniency in standing determinations. In *Massachusetts* [*v. EPA*, 549 U.S. 497 (2007)], the Supreme Court gave greater standing rights to states than ordinary citizens. States receive 'special solicitude' in the standing analysis, particularly as compared to private parties. T. Grove, *When Can a State Sue the United States?*, 101 Cornell L. Rev. 851, 862 (2016). Nevada's statutes express mining's importance to the State: "The Legislature hereby finds that: (a) The *extraction of minerals by mining is a basic and essential activity making an important contribution to the economy of the State of Nevada*...." NRS 519A.010. Demonstrating further the legislature's recognition of mining's importance to Nevada, a division within State government is dedicated to promotion of the mining industry. *See* Nev. Rev. Stat. 513.073. The NVLMP causes loss to this agency's and the



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

State's revenue as articulated in the Perry Declaration. ECF 70-9. Similar to the NVLMP's interference with the Counties' sovereign powers, the State has suffered increased risk of fire, interference with its revenue collection, and NDOW's ability to effectively manage wildlife, the GSG itself, within the boundaries of the State as the Agencies ignored its concerns with the SFA. NV 90308-641, 90252-67, 17531-38, 13669-74.

**B. Plaintiffs' Challenges to the Plan Amendments are Ripe.**

If agency action only could be challenged at the site-specific development stage, the "underlying programmatic authorization would forever escape review." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992). Where, as here, the NVLMP "pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never." *Id.* Plaintiffs' procedural injuries under NEPA, FLPMA, and NFMA must be addressed now. Restrictions such as the lek buffers and land closures prohibiting solar, wind energy, fluid minerals, and saleable minerals development and locatable mineral exploration are final. MSJ at 4. The Agency's own recent draft IM confirms this:

> Implementation Decisions & Using Categorical Exclusions within the Greater Sage-Grouse Decision Area: By regulation and policy (43 CFR § 1610.5-3(a), H-1601), all implementation-level activities for which BLM has decision-making authority within the Greater Sage-Grouse PIA decision areas, must conform to the goals, objectives, allocations, and management actions contained in the Greater Sage-Grouse [Plan Amendments] and RODs. **Ex. 9**, Draft WO IM-2016 - dated March 25, 2016.

Moreover, FWS' Policy for Evaluation of Conservation Efforts analysis of the Federal Plans including the NVLMP determined that "The Federal Plans establish **mandatory constraints** and were established after notice and comment and review under [NEPA]. **All future management authorizations and actions undertaken within the planning area must conform to the Federal Plans**, thereby providing reasonable certainty that the plans will be implemented." 80 Fed. Reg. 59,858, 59874-5 (Oct. 2, 2015). The Agencies are legally precluded from making site-specific decisions contrary to the challenged plans' mandates. 36 C.F.R. 219.15(d)(3) (mandating that proposed activities comply with the standards in the Plan); FS 116569-621 & 155505



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

(recognizing "standards" are mandatory constraints on projects and activity decision-making).

***1. Ohio Forestry Demonstrates Plaintiffs' Claims are Ripe.***

The Government admitted in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998) that a plan incorporating a final decision to close lands to a particular use could result in concrete injury. 523 U.S. 738-39. Plaintiffs need not wait to challenge site-specific decisions where, as here, an Agency decision negatively immediately impacts them. The *Ohio Forestry* holding relies on the language of a specific USFS Resource Management Plan that, unlike the NVLMP, did not command inactivity; withhold or modify any legal authority; or restrict legal rights. *Id.* at 733. The *Ohio Forestry* Court held that the challenge was not ripe because the Sierra Club had not been "forc[ed] to modify its behavior in order to avoid future adverse consequences" – contrary to Plaintiffs here who are immediately affected by massive land closures in the NVLMP that are not subject to any further Agency action. *Id.* at 734. If the Sierra Club had raised specific harm—as have Plaintiffs "those provisions of the Plan that produce the harm" would have been immediately justiciable – similar to the land closures and immediately effective restrictions such as the lek buffer distance in the NVLMP. *Id.* at 738-39. *Ohio Forestry* is also distinguishable because the Ohio Plan did not permit regulatory action, restrictions, or prohibitions until a site was identified, reviewed, and presented to the public. Here, there is no future identification of sites for application of the NVLMP because it expressly applies to the millions of acres in the planning areas (NV 79551) covered by faulty habitat maps, including the arbitrarily defined SFAs where certain uses are prohibited. Plaintiffs' lands have been segregated by the Withdrawal Notice and those lands will be subject to that segregation and its attendant restrictions until determined otherwise -- the segregation prohibits location of new mining claims and significantly clouds existing claims with uncertainty, causing immediate harm to WEX.

At least 23 actions (NV 79632-37) are being applied immediately to selected livestock grazing permits.[4] These new restrictions constrain operations and create hardships to and harm

[4] BLM is limiting grazing location, duration and intensity to allow plant growth to meet the FEIS Table 2-2 (NV 79612) habitat objectives and seasonal use constraints (March 1 to June 30); restricting livestock turn-out locations within four miles from an active or pending lek from March 1 to 30; prohibiting domestic sheep use, bedding areas,



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

grazing permittees and Counties which rely on grazing for generation of revenue, in the course of their sovereign land use planning and for management of fire fuels.

***2. Future Decisions Must Comply With the Plan Amendments' Restrictions.***

BLM has long expressed the importance of the LUPA providing "regulatory certainty" to protect the GSG from being listed under the ESA. NV 91802. "Project-level decisions must be consistent with the applicable land use plan and comply with NEPA and other applicable laws," Defendants confirm that future agency actions must adhere to the NVLMP. (Def Mot. at 5.) There can be no future project development or land use applications for the Prohibited Uses on the Closed Lands. Former Nevada BLM Director Lueders testified that BLM would not process an application for an activity that was prohibited by the NVLMP. (Lueders testimony at 262-3). No intervening period of time or project proposal will change the Agencies' position on the challenged restrictions. The promise of site-specific EISs in the future is meaningless where development under the challenged plans is outright prohibited, such as within the SFAs for mineral development (NV 81359) and wind energy projects (NV 81365) in the SFA and PHMA. *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (site-specific impacts of decisive allocative decisions to use land in specific ways must be scrutinized before, and not when, specific development proposals are made). Where, as here, future decisions will be constrained by the challenged plans, site-specific analyses are not necessary to show harm because the challenged plans are at an administrative "resting place" where all that is left to do is apply the requirements. BLM cannot dispute that its future site-specific decisions must comply with the restrictions in the LUPA. Nor does BLM dispute that there will be no "decision" to challenge for any proposed activity that is prohibited under the NVLMP – such as solar, wind, or claim locations within the SFA. Challenges to the NVLMP are ripe and appropriately before this Court.[5]

---

and herder camps within two miles of active and pending leks from March 1 to 30; and requiring the removal of livestock for portions of the traditional grazing year. The FEIS concedes the immediacy of its impact: requirements "may impose direct short-term impacts on operator costs and/or jobs . . . required rest periods following treatments may impact the ability of livestock operators to fully use permitted AUMs in the short term" (NV 80739-40).

[5] In such cases, programmatic challenges may be heard. Similar to *Neighbors of Cuddy Mountain*, 137 F.3d 1372 (9th Cir. 1998) where plaintiffs sustained a claim that a failure to monitor species viability as required by NFMA



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

Defendants argue that hearing a challenge to the NVLMP will "hinder agency efforts to refine its policies" and perceive the Court's review as "deny[ing] the agency an opportunity to correct its own mistakes and to apply its expertise." *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232. Mistakes cannot be corrected, however, when Agencies refuse to examine the evidence before them (as was done with the SFA boundary designations which NDOW raised significant concerns over, the mineral potential at Gravel Creek raised by WEX, the erroneous mapping raised by Quantum. Application of a site-specific project will not cause the Agencies to refine their policies because certain NVLMP restrictions prohibit even the acceptance of a permit, precluding any ability of the Agencies to revisit the NVLMP restrictions (for example, should additional permits or plans be submitted for the China Mountain Facility in the SFA or for the staking of any claims within the SFA given the segregation of these lands). For the millions of acres closed to the Prohibited Uses, there can be no "richer factual context" as there is no speculation about the outcome of the Agencies' decisions. BLM would reject any application to use the closed lands for a Prohibited Use.

## II. Plaintiffs' Withdrawal Notice Challenges are Appropriately Before this Court.

### A. Segregation of Land As Proposed in the NVLMP and Implemented by the Withdrawal Notice is a Consummated, Final Agency Action.

The NVLMP's standards and the Withdrawal Notice are so intertwined that they cannot be considered independent from one another. Both serve as the consummation of the Agencies' decision-making process, and, the Withdrawal Notice and resulting segregation has already impacted the rights and obligations of affected parties. "Courts traditionally take a pragmatic and flexible view of finality." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Here, the NVLMP's recommendations related to SFA withdrawal are manifested in the Withdrawal

---

rendered a final action unlawful, Plaintiffs here can sustain a claim that, due to violations of the NFMA, final agency action in the NVLMP's withdrawal of lands is unlawful. Plaintiffs' claims can withstand ripeness challenges because there is a sufficient connection between the NVLMP and Plaintiffs' challenge of the SFA withdrawal contained in the NVLMP; there is a causal connection between the NVLMP's failings (scientifically unsupported land withdrawal in the SFA) and the agencies' unlawful approval of SFA boundaries. Compliance with the NFMA and FLPMA multiple use mandates is relevant to the lawfulness of the SFA withdrawal, Plan Amendments' travel and access restrictions, etc. *Id.* at 1069.



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

Notice, which is a final action. The impacts stemming from that Notice are immediately felt: "Upon publication of the [proposed withdrawal], the lands are immediately segregated from location and entry under the Mining Law" for two years and "segregation temporarily has essentially the same effect as a withdrawal; that is, it closes the lands to location and entry under the Mining Law, subject to valid existing rights." 80 *Fed. Reg.* 59858, 59878 (Oct. 2, 2015). Withdrawal of the SFAs is not speculative; it is being applied for two years through the segregation, and there is no lawful basis to require plaintiffs to wait two years for a site-specific decision when property values, development potential, and livelihoods are compromised. The Withdrawal Notice has "mark[ed] the consummation of the agency's decision-making process" as required by the first test in *Bennett v. Spear* (502 U.S. 154 (1997)) because the lands have already been segregated and the rights of claim owners have already been circumscribed and impacted. Claim owners within the segregation cannot locate new claims and face the threat of validity exams if they submit permit applications or attempt to modify an existing permit. Additionally, the segregation has created severe financial hardships for WEX and Quantum. (*See* Exs. 7 and 8). Whether or not the Secretary determines, in two years, to rubber stamp or modify the boundaries as laid out in the Notice is not the issue. Segregation has occurred, which was the intent of the NVLMP and the Withdrawal Notice. No additional decision must be made to implement restrictions on those segregated lands. Consummation occurred the moment the lands were segregated subject to the Notice. The Withdrawal Notice and the NVLMP are not "legally distinct and independent." This argument is an attempt to mask the Defendants' impermissible segmentation of NEPA review with respect to the withdrawal. *See* Pls' MSJ at 8. The NVLMP committed BLM to "recommend withdrawal" of SFAs. NV 90707. Yet Defendants now argue that decision did not obligate BLM to petition the Secretary for withdrawal. Def. MSJ at 17. FLPMA's plain language and the BLM's regulations belie this argument. FLPMA and BLM's implementing regulations require that BLM manage the public lands "in accordance with" its land use plans and consequently required BLM to implement the NVLMP with a petition that culminated in the Withdrawal Notice. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3; *Norton v. S.*



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

*Utah Wilderness Alliance*, 542 U.S. 55, 71-72 (2004). Unlike in *Norton*, in which plaintiffs attempted to compel certain monitoring actions to which a land use plan vaguely referred, in this case BLM has in fact taken specific action—a petition followed by the Withdrawal Notice and resulting segregation—required by the NVLMP. Defendants may not avoid judicial review of the NVLMP or Withdrawal Notice by arguing the two actions were separate and distinct.

Finally, BLM issued the withdrawal notice in violation of its own regulations. A notice of proposed withdrawal must contain, *inter alia*: a preliminary identification of the mineral resources in the area. 43 C.F.R. §§ 2310.1-3(b)(5), 2310.3-1(a), (b)(1). The Withdrawal Notice included no identification of mineral resources whatsoever. In addition, 43 C.F.R. §§ 2310.3-1(b)(2), 2310.1-2(c)(12) require that withdrawal notices contain a "statement as to whether any suitable alternative sites are available for the proposed use or for uses which the requested withdrawal action would displace." That statement "*shall include* a study comparing the projected costs of obtaining each alternative site in suitable condition for the intended use, as well as the projected costs of obtaining and developing each alternative site for uses that the requested withdrawal action would displace." 43 C.F.R. § § 2310.1-2(c)(12). Defendants argue that the obligation to prepare this study does not apply here because BLM determined no alternatives existed. Defendants' reasoning is flawed. While GSG habitat may not be relocatable, the SFAs proposed for withdrawal do not encompass all GSG habitat—BLM could have analyzed withdrawing other GSG habitat outside SFA boundaries. Further, roughly 26 percent of the SFA acreage does not constitute GSG habitat at all (NV 5523) and BLM could have identified alternative sites that include actual GSG habitat. *See* Pls' MSJ at 7. Finally, that individual mineral deposits within the SFA are not relocatable does not preclude the identification of other GSG habitat areas that are located in areas of limited or no mineral potential that would be preferable alternatives, and eliminate the conflicts with the known mineral deposits in the SFA, and achieve the resource balance FLPMA required[6]. BLM was

[6] Maps submitted with Governor Sandoval's January 2015 mineral withdrawal scoping comments identify high-priority GSG areas with no known mineral conflicts.



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

required to identify and analyze the cost of obtaining and developing alternative sites for displaced uses, including locatable mineral development – yet there is no such "report" and no mention of one of the largest recent gold discoveries in the U.S. at Gravel Creek. BLM's issuance of the Withdrawal Notice violated its regulations and is properly before this Court.

**B. The Withdrawal Notice and Plan Amendments are so Interrelated that the Notice has been Fatally Tainted by the Flawed Plan Amendments.**

The Withdrawal Notice has been tainted by the NVLMP's fatally defective process. The NVLMP withdrawal recommendations, which directly resulted in the Withdrawal Notice two days later, misidentified geographic areas as GSG habitat when site-specific evidence, including a USFS biological opinion, proved the identifications to be inaccurate. The NVLMP withdrawal recommendations included low-priority and non-habitat areas simply because the Agencies refused to acknowledge evidence that undermined their agenda-driven boundary conclusions. NV 05523. These unsupportable boundary lines were carried forward into the Withdrawal Proposal and, thus, the Withdrawal Notice suffers from the same defects as the NVLMP. The Agencies are presumed to have conducted sufficient due diligence to be confident of those boundaries. However, they have not done so and instead knowingly included low-priority and non-habitat lands in the SFA.

The Ninth Circuit has previously heard challenges to programmatic management directions, especially where such direction unlawfully taints future projects or decisions. *Citizens for Better Forestry*, 341 F.3d 961. The Ninth Circuit has also required that an environmental review be conducted again where an EA was considered "fatally defective [because] the Federal Defendants were predisposed to finding that the Makah whaling proposal would not significantly affect the environment." *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000) (concluding that a new EA must be prepared because "Federal Defendants should not have fully committed to support the Makah whaling proposal before preparing the EA because doing so probably influenced their evaluation of the environmental impact of the proposal"). The Withdrawal Notice has been tainted by the flawed NVLMP recommendations insofar as the



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

recommended boundaries and support for the withdrawal in the Notice are the same as those in the NVLMP. A prior written commitment of the type made in *Metcalf* is not required where the NVLMP withdrawal boundaries have simply been repeated verbatim, without question, in the Withdrawal Notice. Thus, just as the *Metcalf* court required a new EA "under circumstances that ensure an objective evaluation free of the previous taint," *id,* so, too, should this Court require the preparation of an SEIS on which a supportable withdrawal proposal can later be made.

## III. Plaintiffs' Claims are Likely to Succeed on the Merits.

### A. The NEPA Violations Require an SEIS.

The EIS for the NVLMP was insufficient because the Agencies failed to present a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *California v. Block*, 690 F.2d at 761. The FEIS' inadequacies include failure to conduct a meaningful socioeconomic impacts analysis, reliance on three post-DEIS and one post-FEIS documents, failure to disclose available information on where the lek buffers will require road closures, failure to conduct a meaningful analysis of the SFA's impacts on minerals, and the selection of a Proposed Plan that deviated substantially from the DEIS Preferred Alternative and is not qualitatively within the spectrum of alternatives analyzed in the DEIS.

#### *1. The unlawful segmentation of the mineral withdrawal requires vacatur*

Land withdrawal from mineral entry is the centerpiece of the Agencies' actions. The FWS and BLM described it as fundamental to the federal plan to protect GSG, which in turn is the driving motivation for the NVLMP. Yet the Agencies deny that the proposed withdrawal deserved consideration in the EIS. The BLM's argument is implausible. In the GCR, BLM made clear to the Governor it considered the land withdrawals essential. Most relevantly, the BLM rejected the State's Plan because it proposed significant mitigation requirements instead of withdrawals. BLM's argument that its proposed land withdrawals do not need to be considered in the NEPA analysis, and that they will be dealt with separately in a future EIS on the withdrawal decision are the acme of improper segmentation of connected actions. The administrative record makes clear that the BLM considered withdrawal an essential part of its



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

GSG conservation efforts and effectively committed to the withdrawal. The BLM's Great Basin GSG Project Manager, admitted it: "[f]or the most part, the State Plans differ from the Proposed Plans in that they do not endorse any resource use exclusions . . . they do not want to see exclusion of wind and solar developments, or tight restrictions tied to oil and gas developments or rights-of-way . . . . ." NV 007965. The BLM's acting Nevada State Director followed the FWS' directive.[7]

In his September 16, 2105, letter denying the GCR, BLM Director Kornze confessed that "by recognizing these [SFA] areas and applying consistent management [read: withdrawal] within them across the Great Basin, the BLM believes it is providing regulatory certainty to the FWS that these areas will be protected." NV 13671. It is clear from the BLM's own record that the decision to withdraw 2.8 million acres from mineral entry had been made. Even if the BLM has not made a "final agency action" in regards to withdrawal of lands from mineral entry, it still plainly must evaluate the impacts of withdrawal because NEPA requires it. NEPA's implementing regulations require that when agencies prepare an EIS, that document must consider cumulative impacts of the action, and defines cumulative impacts as "the incremental impact[s] of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. A reasonably foreseeable future action ("RFFA") is defined as an "[i]dentified proposal[ ]," 36 C.F.R. § 220.3, and an identified proposal exists where the agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 36 C.F.R. § 220.4(a)(1). "Projects need not be finalized before they are reasonably foreseeable," *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078–79 (9th Cir.2011). Looking at whether a potential future action is an identified proposal, courts must "focus upon a proposal's parameters

[7] In response to the Governor's recommendation not to close lands, he wrote: "FWS Director Dan Ashe stated that, 'Strong, durable, and meaningful protection of federally-administered lands in these areas will provide additional certainty and help obtain additional confidence for long term sage grouse persistence.'" NV 13661. Continuing: . . . consistent with the statement of the Director of the FWS and direction provided by the FWS in their October memorandum, the recommendations by the National Technical Team and Conservation Objectives Team, the PRMP identifies a subset of the Priority Habitat Management Areas as "Sagebrush Focal Areas" (SFAs), which are a portion of the FWS identified "strongholds" administered by the BLM. *Id.*



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

as the agency defines them." *Block*, 690 F.2d at 761. Here the BLM made clear how critical the withdrawals were in the NVLMP.

***2. The inadequate disclosure and analysis of science requires vacatur***

The Agencies assert that the FEIS disclosed where scientific information was lacking but provide no AR citations. The FEIS fails to disclose differing technical opinions amongst BLM staff and peer reviewers of the scientific adequacy of the NTT Report which is the underlying basis for many of the NVLMP's restrictions. NEPA requires disclosing that differing scientific viewpoints exist: "The EIS must disclose if there is incomplete, conflicting, or unavailable relevant data." 40 C.F.R. § 1502.22. BLM argues that Plaintiffs "selectively" cite an e-mail discussion from April 2015. Pl. Mem. at 24 (GBR 21278). Defendants then selectively use the responsive e-mail which reveals uncertainties about how to incorporate the SFA into the economic analysis. The main example pertains to grazing but the e-mails reflect a lack of meaningful analysis of the economic impact of the withdrawal of millions of acres of lands from mineral entry and closures to solar and wind energy. GBR 21277-78. Defendants assert that the e-mails of agency personnel should not be considered but what they ignore are comments from the Solid Mineral staff about the need to evaluate mineral potential and Adam Merrill's comment about the availability of technical data on mineral potential. This is one of BLM's internal experts whose input was ignored because it did not support the NVLMP policy objectives. A thorough and technically supportable evaluation of the mineral potential in the SFA and impacts of withdrawing these lands would have revealed significant impacts associated with the LUPA that would have made selecting this alternative difficult in light of the number of active mining claims and known mineral deposits within the SFA and FLPMA's balancing of resources requirement and mandate to provide for domestic sources of minerals. Plaintiffs' MSJ at 28-29: "I have had no input on these maps nor was I asked to do so. Asking around it does not appear that anyone else in WO-320 [BLM's solid minerals group] has had an opportunity either. The data for the mining claim maps is now 2 years old…since 2012, 90,000 data points have changed." WO 67489. Merrill informed BLM management about the shortcomings of the USGS



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

Mineral Resources Database ("MRDS") that BLM used for the maps – that they included information that is highly variable in quality and out of date. WO 67490. Defendants mischaracterize Plaintiffs' arguments as flawed and relying on agency e-mails instead of scientific data the Agencies failed to consider but Adam Merrill's comments point to specific scientific studies that the FEIS ignored or improperly used.

Defendants argue that an internal memo, WO 01457, indicated the Agencies sought out the latest scientific research. But, Defendants omit two key sentences in this document:

> USGS is conducting this review and then will panel the results to get scientific experts to offer their opinion on what constitutes "best available science" for the buffer distances used in the plans. **I expect a great deal of push back when this review is completed** . . . I believe there would be value in doing a science consistency check of the final plans to ensure that they are consistent with current science on GSG conservation.

The recommended review was not done and the anticipation that it would not be well received suggests disagreement regarding its findings. NEPA requires disclosure of such disagreement.

BLM argues that it revised the areas identified as "strongholds" in the Ashe Memo based on the Coates Map. But the record shows differently: the Agencies acknowledge in their e-mails that the Coates map was changed to fit the SFA boundaries. In a January 18, 2015 e-mail to Neil Kornze regarding "stronghold mapping," Dan Ashe asserts that "Non-habitat that is contained within the stronghold boundary remain[s] stronghold . . .." NV 05702. In January 2015, BLM changed some of the Coates habitat classifications outlining areas of GHMA, OHMA, and non-habitat reclassified as PHMA for the purpose of including the lands in the SFA. NV 05523. The BLM changed the habitat classifications on the Coates map to fit the "stronghold" boundaries, not the other way around. NV 13006. The pre- and post- SFA acres of modified habitat classifications correspond to the acres of GHMA, OHMA and non-habitat "that the SFA turned into PHMA". NV 05523. Defendants allege that because the Coates map was "considered" by the Agencies, the scientific basis for the SFAs is "sound" and was disclosed in the FEIS. Defendants' characterization of the October 2014 Coates map as the "Best Available Science" ignores the arbitrary modifications that the BLM made to this map in January 2015 to "adjust" the habitat classifications from GHMA, OHMA, and non-habitat on 722,800 acres to



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

PHMA in order to justify managing these lands as SFA. NV 05523. It also ignores BLM's acknowledgement of errors. On December 11, 2015 the Nevada Sagebrush Ecosystem Council ("SEC") unanimously adopted the 2015 USGS map spearheaded by Dr. Peter Coates as representing "the best science and the best information on sage-grouse habitat." The SEC asked Nevada BLM State Director John Ruhs about the process BLM would follow to use the 2015 map rather than the 2014 map upon which the NVLMP habitat classifications are based, noting that it is important for BLM to start using the updated map. Director Ruhs admitted that "BLM does not have everything worked out as of yet, but the Secretary and the Governor have agreed the BLM will utilize the best available science. So that means the BLM will have to find a mechanism to adjust the maps, taking this new information and including it." He indicated that BLM would be using the 2015 map on a project-by-project basis but that BLM is concerned about the significant changes and whether that will require the BLM to do a Plan Amendment. Similarly, Mr. Dunkleberger, Supervisor USFS Humboldt Toiyabe National Forest noted the USFS is still using the 2014 Coates Map because that was adopted in the NVLMP. He does have some concerns about what kind of NEPA will need to be done to adopt the new map. (**Ex. 12**, SEC Minutes at 17-19). Defendants do not deny that the revised SFA and "science" to support it were not released until the FEIS which gave the public no meaningful opportunity for public comment. Nor do the Agencies dispute that regardless of the scientific merits of the Crist study, it is a post-FEIS study that includes new information upon which the agencies relied. As such, NEPA required that the public be given an opportunity to consider this new information in an SEIS. Finally, Defendants mischaracterize Plaintiffs' support for *managed* grazing as a proven method for improving habitat conditions with the objectives of reducing the flammable fuel load of annual, non-native grasses and equating this with a position for supporting *increased* grazing. Plaintiffs advocate for managed grazing as documented in the numerous published technical references Plaintiffs provided but Defendants ignored.

***3. The substantial changes between the DEIS & FEIS requires an SEIS***

Defendants argue that substantial changes in the FEIS such as the SFA and the lek buffer



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

distances that were purportedly justified based on a study not available until post-DEIS were "qualitatively" within the scope of the alternatives analyzed in the DEIS. Simply having alternatives in the DEIS that considered ***some*** withdrawal of lands from mineral entry and spoke of possible lek buffers, does not satisfy NEPA or give the public the requisite notice and opportunity to comment on what impacts might result or analysis from actual mapped areas of the SFAs and a significantly modified lek buffer requirement. BLM acknowledges that it was important enough of a change that they notified the states of the strongholds that became the SFA as early as November 2014. NV 13661. Notifying State personnel does **not** satisfy NEPA's requirements for notice and public comment. An SEIS is required to evaluate the impact of the proposed withdrawal in the specific areas of the SFA – the boundary of which was revealed for the first time in the FEIS after the public comment process under NEPA had closed -- to examine the lost mineral resources and impacts on the 3,762 active mining claims in the SFA. Defendants attempt to excuse their lack of analysis and failure to use their own data in the LR 2000 database by citing a single reference in Table 5-39 (NV 80947) in the FEIS which cites LR 2000 as the source of the data for RFFA, including the number of pending Plans of Operation. This single reference does not reflect a meaningful or effective use of information especially given that BLM did not use LR 2000 to consider how many claims were affected by the NVLMP within the SFA. NDOM took this same information from LR 2000 and evaluated the devastating effect on claim holders and the State of Nevada – something the Agencies were required to do under NEPA and FLPMA but did not. ECF 70-9. NEPA requires that the agencies evaluate the impacts on minerals which they did not. Merely including pending Plans of Operation as a RFFA does not fulfill the Agencies' obligations under NEPA to evaluate impacts to minerals. The DEIS impact analysis for the withdrawals proposed in the different locations in Alternatives B, C, and F were inadequate and cannot satisfy the requirement to do a thorough impacts analysis pertaining to the specific locations for the SFA withdrawal. This analysis must examine the socioeconomic impact of the SFA to claimholders such as WEX, Quantum, and Paragon and the three affected counties: Elko, Humboldt, and Washoe. No such analysis was



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

conducted in either the DEIS or the FEIS.

Similarly, the FEIS lek buffers are substantially different than the DEIS lek buffers and are not qualitatively within the range of alternatives analyzed in the DEIS. First, the FEIS lek buffers apply to all habitat classifications on a continual basis, without any consideration of seasonal habitat use. In contrast, the DEIS lek buffers were seasonal. The Wildlife/GSG Required Design Features (RDFs) for the DEIS Preferred Alternative included a four-mile seasonal (from March 1 – June 15) lek buffer and seasonal restrictions applicable to brood-rearing and winter habitat areas. NV 45960. The FEIS contains the following lek buffers: 3.1 miles for roads, 3.1 miles for energy development infrastructure, 2 miles for tall structures (communication towers and transmissions lines), 1.2 miles for fences and other rangeland structures, 3.1 miles for surface disturbance, and .25 miles for noise. NV 90769. The 3.1-mile FEIS lek buffer zone for roads applies year round on all of the roads located in the **16.2 million acres** affected by the NVLMP travel restrictions. NV 79700. This year-round restriction is very different and a far more onerous than the DEIS seasonal four-mile buffer zone from leks.

BLM staff noted that the lek buffers were "RDFs" [Required Design Features] ...and "management actions not analyzed in the drafts." WO 48001. The Agencies have not conducted a proper NEPA analysis to evaluate the significant impacts resulting from the year-round prohibition against building new roads within 3.1 miles of a lek, or even using existing roads within 3.1 miles of a lek in an area covering more than **16.2 million acres**. Defendants admit (Def. MSJ at 50) that there was not a lek buffer for fences in the DEIS preferred alternative. The FEIS RDFs mandate a 1.2-mile buffer for all types of fences located anywhere in GSG habitat. The agencies must prepare an SEIS to evaluate the impacts of this universal, year-round lek buffer. Because the NVLMP mandates multiple, layered, and overlapping land use restrictions, the SEIS must also include a thorough cumulative impacts analysis that evaluates the impacts in the 16.2 million acre area in which other restrictions that affect road use and travel apply. This evaluation must examine the impacts on existing uses and the RFFA in this vast area and analyze the cumulative impacts that will result from the simultaneous imposition of the layered



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

restrictions. Similarly, the agencies must prepare an SEIS to evaluate the impacts of the universal 1.2-mile buffer zone for fences, which were not analyzed in the DEIS. The agencies assert that the FEIS lek buffers were based on a 2014 USGS study. The record shows that this is not entirely accurate. The addition of the new and universally applicable 1.2-mile buffer zone for fences in the FEIS is particularly problematic as revealed in an April 2015 e-mail between Michael Bean, Sarah Greenberger, and Jim Lyons (the Grouseketeers):

> …the USGS report identifies only certain types of fences in certain types of terrain as a collision risk. By imposing a buffer requirement for all types of fences in all types of terrain, **the BLM will impose a restriction for which the report offers no basis**…If we want to anchor our plans in the USGS report, then the way to do that is to require that new fences (of the types described in the report) be placed at least 1.2 miles from leks in flat or rolling terrain . . . that is probably better than the alternative of lumping all fences together, regardless of type and location. WO 29247, WO 29250 (emphasis added).

Despite the Grousketeer's acknowledgement that the universal 1.2-mile buffer requirement for all fences does not adhere to the recommendations of the 2014 USGS study, it is an NVLMP requirement that has no scientific basis and is thus arbitrary and capricious. Appendix B of the ROD reiterates the finding that one-size-fits all lek buffers are inappropriate: The USGS report recognized "that because of variation in populations, habitats, development patterns, social context, and other factors, for a particular disturbance type, **there is no single distance that is an appropriate buffer for all populations and habitats across the sage-grouse range.**" NV 90769-70. The USGS Report provides a more nuanced discussion than is reflected in the NVLMP. In discussing roads, the USGS Report includes the following observations:

> …it is important to recognize that . . . not all roads have the same effect…the influence of individual roads or networks of roads on sage-grouse habitat use and demographic parameters remains a research need. <u>This is a good example of the challenge associated with making clear interpretations of the effect area (and therefore, a definitive buffer distance) for these types of infrastructure</u>. WO 65647 – 649.

The USGS Report does not recommend uniform or prescriptive lek buffer distances and instead presents a range of lek-buffers. WO 65656. The inappropriate one-size-fits all buffers and acknowledgement from top DOI personnel that the USGS Buffer Report does not support the categorical 1.2-mile buffer requirement for fences validates Plaintiffs' position that the NVLMP



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

lek buffers are not based on the best available science. The Agencies have misrepresented the USGS Report and selectively used it to support the imposition of one-size-fits all buffer zones. This misuse of the USGS Report, prepared after the close of the DEIS comment period, underscores the need for an SEIS to give the public an opportunity to comment on the FEIS lek buffers in conjunction with their review of the USGS Report and evaluate whether this report adequately supports the addition of the FEIS lek buffers.

***4. An SEIS must evaluate the socioeconomic and cumulative impacts***

Defendants' erroneously argue that the Protest Report demonstrates that the FEIS satisfied NEPA requirements. The Protest Report (NV 88912-914) is unresponsive to Plaintiffs' protest letters, which document that the FEIS socioeconomic analysis omits essential information and uses incorrect data. The Protest Report erroneously asserts that NEPA supports the Agencies' dismissal of the missing information described in Plaintiffs' DEIS comments and in their protest letters. The Protest Report unlawfully mischaracterizes Plaintiffs' letters as presenting "needless detail" that is not "truly significant to the action in question". NV 88912. Asserting that the NVLMP is a broad land use planning-level decision, the agencies ignore the NEPA requirement to take a hard look at the socioeconomic impacts that are likely to result from adopting the NVLMP. Plaintiffs submitted protest letters describing the inadequacies of the FEIS socioeconomic impacts analysis. In their capacity as cooperating agencies, Elko and Eureka Counties provided county-specific economic data that NEPA required the agencies to consider and which the Agencies unlawfully ignored. NV 86212, NV 56516, NV 56463, NV 56533. Pershing County outlined several conflicts with its land use plan that the BLM ignored. NV 58757, 58760, 58762, 63937, 63959.

WEX's protest letter explained that it purchases goods and services to support its exploration activities at the Gravel Creek Project, which creates an economic engine for Mountain City, as well as contributing to other local economies. NV 86219. The FEIS does not evaluate the lost revenue to these communities as a result of the SFA segregation and proposed withdrawal, which includes WEX's Gravel Creek Project. As WEX's protest letter notes, NV



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

86221, the socioeconomic analysis is legally deficient because it omits any analysis of employment related to locatable minerals, but nonetheless reaches the unsupported conclusion that impacts to mining employment would be minimal. NV 81023-024. Nor did the Protest Report reflect that the BLM gave any consideration to the significant mineral potential at Gravel Creek to evaluate whether the lands for that project should be within the SFA. The same is true of Quantum which filed a Protest Letter which similarly was summarily denied.

Elko County's protest letter and comments on the DEIS included professionally prepared documents describing federal land management policy changes and their impacts to the local, state and regional economies[8]. The Agencies did not adequately consider these documents in violation of their NEPA obligations to carefully consider this type of information from a Cooperating Agency and to adequately respond to comments.[9] Elko County's DEIS comments and its protest letter substantiate that the NVLMP will create severe economic impacts to Elko County and the entire planning area. NV 86212. Eureka County provided extensive comments on the DEIS that outlined specific inaccuracies in the socioeconomic baseline assumptions, and expressed numerous concerns about shortcomings of the environmental consequences analysis. NV 56516. Eureka County described the concerns of the inadequate socioeconomic impacts done at too broad of a scale to be of any worth to local economies and interests. "During scoping and our participation as a cooperating agency, we continually noted this shortfall and even provided very specific Eureka County data and analysis that was not included." NV 56533. This clearly violated NEPA.

The State of Nevada's protest letter similarly asserted "…the FEIS fails to adequately analyze the socio-economic impacts from the proposed action…this analysis was not conducted

---

[8] The Impact of Federal Land Policies on the Economy of Elko County, Nevada, George Leaming Report 12/2010) (Harris Technical Report UCED 2006/07-11).

[9] 43 C.F.R. 1503.4 (a) "An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below. . ." The BLM did not consider Eureka County's comments. ("Declaring they had run out of time, BLM ignored the counties' comments: 'I think you sent it [Eureka County's ADPP comments] directly to the solicitor and the decision was made to only go through comment by comment on the state of NV and SETT comments (due to time constraints))." NV 51396.



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

in collaboration with the SETT as a cooperating agency (43 CPR Part 4100 §1610.4-6) and does not give adequate consideration to economic factors in compliance with NEPA 40 CPR 1508.14 (BLM NEPA Handbook BLM Handbook of SocioEconomic Mitigation, IV-2). Socio-economic impacts to counties and local communities, where impacts will be most relevant, have not been disclosed." NV 90337. Defendants' assertion that the FEIS "contains a thorough discussion of socioeconomic impacts" does not withstand scrutiny given the fact that the counties' comments informed the agencies that Chapters 3 and 4 were missing key data, using incorrect information, and relying on faulty assumptions. Defendants cannot justify their failure to use accurate and complete data with the claim that such data are not appropriate or necessary for a "plan-level" document. NEPA requires agencies to use best available data "sufficient to support reasoned conclusions" for all NEPA documents, including programmatic or plan-level documents, (BLM NEPA Handbook *id.*) The Agencies erroneously argue that they did not need to consider the Plaintiffs' facts because this is merely a plan-level document. The fact that the FEIS cumulative effects analysis "spans three WAFWA management zones" (Def. MSJ at 37) is irrelevant to Plaintiffs' claims regarding the inadequacy of the socioeconomic analysis. The WAFWA management zone cumulative effects analysis is GSG-centric; it only evaluates impacts to GSG habitat – and not to the human environment. The titles of the three tables[10] Defendants cite (NV 80924-43) make it clear that these long RFFA lists are proposed projects in the three WAFWA management zones that may impact GSG habitat. The FEIS does not look the other way to examine the impacts that GSG management will have on these projects – or to any other aspect of the human environment.

Defendants gloss over the omission of a reasonably foreseeable development scenario for locatable minerals (NV 80749) and instead cite tables pertaining to livestock grazing (NV 80738) and oil and gas output, employment and earnings (NV 80748) and geothermal and wind energy (NV 80751, -752), but does not present similar information for locatable minerals, stating

[10] Table 5-36: RFFAs in Mgmt Zone III Likely to Impact GSG Habitat; Table 5-37: RFFAs in Mgmt Zone IV



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

only that "in the absence of a reasonably foreseeable development scenario for minerals, it is not possible to quantify potential economic impacts across alternatives over the planning horizon." NV 80749. The omission of this analysis for locatable minerals is a fatal flaw requiring an SEIS that examines the full range of impacts to locatable minerals and the communities where they contribute significantly to the local economy.

**B. FLPMA & NFMA Violations Require Vacatur and Remand**

***1. FLPMA's consistency mandate requires more than form letter responses***

Defendants erroneously claim to have satisfied FLPMA's consistency review by allowing the counties, as cooperating agencies, to comment on the proposed plan. BLM is required to "keep apprised of state and local plans, to assure that consideration is given to them and to assist in resolving inconsistencies between BLM plans and such plans to the extent practical." *Am. Motorcyclist Ass'n v. Watt, 534 F.Supp.* 923, 935-36 (C.D. Cal. 1981), aff'd, 714 F.2d 962 (9th Cir. 1983). One of FLPMA's guiding land use planning principles is that BLM must coordinate with state and local governments and seriously consider state and county interests in the land use planning process. 43 U.S.C. § 1712(c)(9). BLM's regulations require that federal land use plans "shall, to the maximum extent practical," be consistent with state and local land use plans and policies. 43 C.F.R. § 1610.3-2. "BLM's plans shall be consistent with other Federal agency, state, and local plans to the maximum extent consistent with Federal law." BLM Manual H-1601-1 –Land Use Planning Handbook, I.E.1 (03/01/05). These provisions were "designed to protect the interests of local governments whenever federal agencies develop or implement federal land use plans." *Yount v. Salazar*, 2013 WL 93372, at *14 (D.Ariz.Jan. 8, 2013). BLM is required under FLPMA and its own regulations and policies to reconcile inconsistencies between federal and state land use programs "to the maximum extent practical." BLM did not resolve inconsistencies or even adequately consider inconsistencies. Pls' MSJ at 37 ("Declaring they had run out of time, 'the decision was made to only go through comment by comment on the

Likely to Impact GSG Habitat; Table 5-38: RFFAs in Mgmt Zone III Likely to Impact GSG Habitat.



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

state of NV and SETT comments (due to time constraints))." NV 51396. Notably, this acknowledged FLPMA violation was not addressed in the Defendants' MSJ. BLM must provide "meaningful public involvement" in the planning process. See 43 U.S.C.A. § 1712(c)(9). The two-page form letter that the counties received to their protests, which contained extensive and substantive comments addressing the many inconsistences in the NVLMP and the counties' Plans, is not responsive to the counties' protests and does not constitute meaningful involvement. As noted in Plaintiffs' MSJ, all protestors received the same form response letter.

Lastly, the government did not consider nor reconcile the counties' land use plans or balance the FLPMA requirement for the nation's need for domestic sources of minerals. *See* 43 U.S.C. § 1701(a)(12); *see also* Pl. MSJ at 38 (regarding the loss of agricultural productivity and wind energy development). Defendants do not dispute that the substance of the consistency review responses to the State and the Counties were formulaic and generic but instead simply assert that the timing of the chart listing inconsistencies with the State Plan was "obviously not a complete consistency analysis." NV 5704-06. While Plaintiffs agree this chart was not an adequate consistency review, the Defendants do not dispute the primary point – the nearly blank "Potential Resolution" column did not change following the expiration of the GCR. This table, which was prepared on May 19th, reflected the states' input on the Proposed Plan. BLM was in a position at that time to identify numerous inconsistencies with the State Plan. The inconsistencies are the same as those outlined in BLM's response to the GCR letter – they did not change. Governor Sandoval's July 29, 2015 twelve page GCR letter to the BLM (NV 17539) reiterated the State's commitment to conserve and protect GSG, and identified numerous conflicts the NVLMP created with State and local plans and policies. NV 17546. In both its responding correspondence and Defendants' motion, the Agencies argue that "certain aspects of the Nevada Plan would not be consistent with BLM's goal of conserving, enhancing, and restoring sage grouse habitat, as set forth in BLM's National Greater Sage Grouse Land Use Planning Strategy and other policies." However, neither the motion nor the BLM's correspondence identify specific federal policy that supports BLM's dismissive, out-of-hand rejection of the Governor's



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

points. The legal standard requires that the "[t]he Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest." 43 C.F.R. 1610.3-2 (e). The BLM did not even attempt to achieve, consistency "to the maximum extent practical . . . with resource related policies and programs of . . . State and local governments." 43 C.F.R. 1610.3-2 (b). Defendants disregarded their responsibilities in the Consistency Review process. *See* August 6, 2015 Letter, from Acting State Director, to Governor Sandoval: "Since [your consistency review letter] does not itself identify a particular inconsistency for BLM to resolve, it is not the proper subject of consistency review." NV 13660. Thus BLM shifted responsibility from itself to the State in violation of regulation:

> Prior to the approval of a proposed resource management plan, or amendment to a management framework plan or resource management plan, the State Director shall submit to the Governor of the State(s) involved, the proposed plan or amendment and shall identify any known inconsistencies with State or local plans, policies or programs.

GBR 10359. Identification of inconsistencies does not depend on the Governor's initiative; it is the BLM's responsibility to identify inconsistencies. BLM ignored this obligation too.

***2. Defendants Violated Statutory Multiple-Use Mandates***

Defendants cite several cases to argue that they may foreclose certain uses of the public lands to protect their preferred values. None of these cases bind this court and all of them are distinguishable and do not excuse Defendants' failure to balance multiple-use of the public lands. In *Wyoming v. U.S. Dep't of Ag.*, 661 F.3d 1209, 1267-68 (10th Cir. 2011), plaintiffs argued that the Roadless Rule's prohibition of certain uses of nearly 60 million acres of roadless areas unlawfully violated the Multiple Use and Sustained Yield Act (MUSYA). *Id.* at 1224, 1266—69. The court disagreed, noting that the roadless rule allowed numerous exceptions to its prohibitions and permitted road construction and timber cutting in a variety of contexts. *Id.* at 1267. Similarly, in *Wyoming Audubon v. Lyons*, 871 F. Supp. 1291, 1300-11 (W.D. Wash. 1994), the NFRC contended that an ecosystem approach violated MUSYA. Again, the court disagreed, noting that "the plan designates millions of acres for programmed logging." 871



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

F.Supp at 1311. By contrast, the NVLMP has no provisions for allowing development of locatable minerals within SFAs, but rather recommends withdrawal of all 2.8 million acres of land within the SFAs. NV 91811. Further, the court found in *Wyoming* that the Forest Service took a "hard look" and adequately considered the impacts of the Roadless Rule. Here, as discussed in Plaintiffs' Motion, the Agencies did not adequately consider the withdrawal's impacts, in particular the socioeconomic impacts or effect on the Nation's need for minerals. Finally, in *Wind River Multiple-Use Advocates v. Espy*, 835 F. Supp. 1362, 1372-73 (D. Wyo. 1993), the plaintiffs argued that the USFS' adoption of interagency bear management guidelines in a forest plan violated MUSYA. As the court noted, however, the particular guidelines the USFS adopted in that case did not preclude the plaintiffs' preferred uses of the public lands. In fact, the particular designations at issue required in certain areas that when a proposed use and grizzly bear conservation were inconsistent, the proposed use may prevail; and that in other areas, maintenance and improvement of grizzly bear habitat was not to be considered and the USFS should focus on discouraging the presence of bears. *Id.* at 1366. As the court noted, all the areas to which the grizzly bear restrictions at issue applied remained open for multiple use. *Id.* at 1372. Here, by contrast, withdrawal of SFAs from mineral entry and closure of those lands to other major uses such as solar, wind energy and oil and gas development will preclude all such use on millions of acres of land. *Wind River* does not stand for the proposition that foreclosing one of the primary uses of the public lands satisfies multiple use obligations. None of the cases allow the Agencies to ignore multiple use mandates. As discussed in Plaintiffs' MSJ, the Agencies enjoy no deference here because they never conducted any balancing but instead closed millions of acres to development without properly considering the impacts of doing so.

The agencies switched from no unmitigated loss to a new standard, net conservation gain, well after the close of the DEIS public comment period to unlawfully implement the findings in the FWS' September 2014 policy-driven document "Greater Sage-Grouse Range-wide Mitigation Framework Version 1.0." As acknowledged by Agency personnel, this was a radically new standard that "appears to conflict with our striving for no net loss…" WO 00602.



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

This new standard is inconsistent with FLPMA's Unnecessary and Undue Degradation ("UUD") directive (Pls' MSJ at 43). Defendants' attempted defense of this eleventh-hour addition disregards a key factor – the geography or scale at which it would be applied. BLM staff wrestled with this new standard noting that the Agency had only "…limited authority to require compensation for impacts beyond the impact on a project level." WO 34987. The net conservation standard applied on a project-level basis violates FLPMA and in many cases is simply impossible for projects, like mining, that involve significant landscape changes which FLPMA deems as "necessary and due" in order for the project to happen. Moreover, in the case of mining, FLPMA's requirement to balance resources must be interpreted to authorize the necessary surface disturbance associated with mineral projects that meet the UUD requirement. Application of a net conservation standard at the project level is the functional equivalent of a zero impacts standard that violates FLPMA and represents an unlawful use of an administrative policy to effect statutory changes. Viewed in a broader context, a net conservation policy that allows off-site mitigation, like the policy included in the Nevada State Plan is very different than the NVLMP net conservation gain standard. The State's Plan calls for a net conservation - objective applicable on a landscape level and not an inflexible net conservation standard applicable to all projects at a project-level scale like the NVLMP net conservation requirement.

Defendants' reliance on BLM Manual 6840 to justify the net conservation standard is circular and without merit because Manual 6840 specifically lists FLPMA as one of the authorities for the manual. Therefore Manual 6840 must comply with FLPMA – including the UUD standard. It cannot be used to justify the net conservation standard. Finally, the post-DEIS addition of the FWS Mitigation Framework and the net conservation standard violates NEPA. The Agencies should be required to prepare an SEIS to provide public review of the FWS Mitigation Framework/net conservation standard and the three other post-DEIS and post-FEIS publications. (Pls' MSJ at 16)

**IV. Plaintiffs Requested Remedy is Reasonable and Appropriate.**



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

Where an agency's finding "is not sustainable on the administrative record made, then the [agency's] decision must be vacated" and the matter remanded for further consideration. *Camp v. Pitts*, 411 U.S. 138, 143 (1973). The usual remedy for a procedural violation of the APA is to vacate the rule or regulation.[11] *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). Only in unusual circumstances is "an unlawfully promulgated regulation . . . left in place while the agency provides the proper procedural remedy." *Fertilizer Institute v. EPA*, 935 F.2d 1301, 1312 (D.C. Cir. 1991); *Western Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). When determining whether vacatur is appropriate pending rectification of a procedural flaw, the Court must consider (1) the purposes of the substantive statute under which the agency was acting; (2) the consequences of invalidating or enjoining the agency action; and (3) and potential prejudice to those who will be affected by maintaining the status quo. *Endangered Species Committee v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994). Courts also consider the magnitude of the administrative error and how extensive and substantive it was. *Id.* In light of those criteria, vacatur is appropriate.[12] First, remanding but not vacating, leaves in place a decision that violates NEPA and FLPMA—thereby allowing the agency to continue to implement an illegal decision before it has corrected statutory violations, undermining NEPA's purpose. Such violations taint the process and prohibit the fulfilment of NEPA's and FLPMA's mandates. The purpose of the ESA is to protect threatened and endangered species from extinction. Where, as here, the culmination of the ESA process was a decision not to list the species, there is no need to question whether the Act's purposes were fulfilled. Defendants have not and cannot claim that proper compliance with NEPA and FLPMA would have resulted in a listing and even if they did, that would not excuse their flagrant statutory violations. Second, the consequences of vacatur will not promise the destruction of key, important habitat. Rather, the State Plan, implementation of the Conservation

[11] Vacatur applies to NEPA violations. *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000); *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) ("[V]acating a rule or action in violation of NEPA is the standard remedy"); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002).

[12] In the Ninth Circuit, remand without vacatur is extremely rare. *Humane Soc'y of the United States v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) ("[T]he Ninth Circuit has only found remand without vacatur warranted by equity concerns in limited circumstances, namely [when] serious irreparable environmental injury" will occur if the decision is vacated").



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

Credit System, the Counties' plans and existing federal requirements and voluntary measures by private parties will continue to conserve and enhance GSG habitat while the procedural and substantive issues associated with the NVLMP are resolved. In fact, the increase in GSG seen over the past few years has occurred without implementation of the NVLMP and vacatur will not cause the reversal of that trend. Lastly, the request for preliminary injunction demonstrates the severity of the NVLMP impact to Plaintiffs if vacatur is not granted.

*Idaho Farm Bureau Federation v. Babbitt* ("*IFB*") does not stand for the proposition that a species at risk of extinction is to be given "special weight." Instead, the focus of the analysis is on "equitable concerns"— that the species at issue was originally listed as endangered; and undisputed evidence confirmed that the only two known habitats for the species had been greatly reduced. *IFB* is distinguishable because the GSG has not been listed and the equitable considerations in *IFB* are not applicable because GSG's habitat is in more than two discrete geographic locations and, in fact, spans eleven Western states. Similarly, in *Endangered Species Committee v. Babbitt*, ("*ESC*") the Court again focused on the equities of the situation, noting that vacatur was not appropriate because a lapse in listing following vacatur could irreparably harm scrub habitat communities by spurring landowner landscaping that would otherwise be prohibited by the presence of a listed species. 852 F. Supp. at 41. There is no evidence of irreparable harm to the GSG here and no "putatively threatened bird" here as there was in *ESC*. *Western Oil & Gas v. EPA*, also does not counsel against vacatur -- the Court's decision to leave EPA designations in effect stemmed from more than just "the possibility of undesirable consequences which we cannot now predict." 633 F.2d at 813. The Court's reason for not vacating the designations was to avoid thwarting the operation of the Clean Air Act in California while the designations were re-deliberated. Here, the ESA will not be thwarted because the Act's procedures have been used to determine that the GSG does not require listing. The assertion that the NVLMP is the only thing keeping the GSG from becoming endangered is misleading. FWS indicated that its decision not to list the GSG was due, in part to "unprecedented conservation planning efforts by Federal, State, local, and private partners . . ." 80 *Fed. Reg.* 59858, 59935



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

(Oct. 2, 2015). FWS' decision was not based on the LUPAs alone. Rather, FWS indicated that regulatory mechanisms and conservation efforts including State adopted plans with regulatory mechanisms effectively reduce the loss and fragmentation of GSG habitats and the GSG Initiative, working with private landowners across the GSG range – "[t]he initiative targets land within priority sage-grouse habitat and is improving rangeland health on more than 2.4 million acres." *Id.* at 59936. The NVLMP is not solely responsible for preservation of the GSG, the increase in their numbers, or the protection of the birds' habitat all of which was occurring prior to the NVLMP.

## CONCLUSION

For the foregoing reasons Plaintiffs respectfully request the ROD be vacated and remanded.

Respectfully submitted this 13th day of June, 2016.

**OFFICE OF THE ATTORNEY GENERAL**

Adam Paul Laxalt
*Attorney General of Nevada*

By: /s/ Lawrence VanDyke
Lawrence VanDyke (NSB 13643C)
*Solicitor General*
C. Wayne Howle (NSB 3443)
*Chief Deputy Attorney General*

***Attorneys for State of Nevada***

**WASHOE COUNTY DISTRICT ATTORNEY**

Christopher Hicks
*District Attorney*

By: /s/ Michael W. Large
Michael W. Large (NSB 10119)
*Deputy District Attorney*

***Attorneys for Washoe County, Nevada***



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

**DAVIS GRAHAM & STUBBS LLP**

By: /s/ Laura K. Granier
Laura K. Granier (NSB 7357)

***Attorneys for Plaintiffs Churchill County, Elko County, Eureka County, Humboldt County, Lander County, Lincoln County, Pershing County, and White Pine County, and Plaintiffs Western Exploration LLC, Quantum Minerals LLC, Paragon Precious Metals, LLC, and Ninety-Six Ranch, LLC***



DAVIS GRAHAM &
STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

**CERTIFICATE OF SERVICE**

Pursuant to F.R.C.P. 5(b), I certify that I am an employee of Davis Graham & Stubbs LLP and not a party to, nor interested in, the within action; that on the 13th day of June, 2016, a true and correct copy of the foregoing document was transmitted electronically to the following via the Court's e-filing electronic notice system:

| | |
|---|---|
| Holly Vance, Esq.<br>Assistant United States Attorney<br>100 West Liberty Street, Suite 600<br>Reno, NV 89501 | Holly.A.Vance@usdoj.gov |
| Luther L. Hajek, Esq.<br>Barclay T. Samford, Esq.<br>Trial Attorney, Natural Resources Section<br>United States Department of Justice<br>Environment and Natural Resources Division<br>999 18th St., South Terrace, Suite 370<br>Denver, CO 80202 | Luke.Hajek@usdoj.gov<br>Clay.Samford@usdoj.gov |
| Tanya Nesbitt, Esq.<br>Trial Attorney<br>U.S. Department of Justice<br>Environment and Natural Resources Division<br>Natural Resources Section<br>P.O. Box 7611<br>Washington, D.C. 20044 | Tanya.Nesbitt2@usdoj.gov |
| Julie Cavanaugh-Bill<br>Cavanaugh-Bill Law Offices, LLC<br>401 Railroad St., Ste. 307<br>Elko, Nevada 89801 | julie@cblawoffices.org |
| Roger Flynn, Esq.<br>Western Mining Action Project<br>440 Main St., #2<br>P.O. Box 349<br>Lyons, CO 80540 | wmap@igc.org |
| Matt Kenna, Esq.<br>Public Interest Environmental Law<br>1045 E. 5th Ave., Suite 11B<br>Durango, CO 81301 | matt@kenna.net |



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219

| | |
|---|---|
| Adam Paul Laxalt<br>*Nevada Attorney General*<br>Lawrence VanDyke<br>*Solicitor General*<br>C. Wayne Howle<br>*Chief Deputy Attorney General*<br>OFFICE OF THE ATTORNEY GENERAL<br>100 North Carson Street<br>Carson City, Nevada 89701 | LVanDyke@ag.nv.gov<br>WHowle@ag.nv.gov |
| Christopher Hicks, Esq.<br>District Attorney<br>Michael W. Large, Esq. Deputy District Attorney<br>Washoe County District Attorneys' Office<br>1 South Sierra Street, South Tower, 4th Floor<br>Reno, Nevada 89501 | MLarge@da.washoecounty.us |

/s/ Jeanette Sparks
Jeanette Sparks



DAVIS GRAHAM & STUBBS LLP
ATTORNEYS AT LAW
50 W. LIBERTY ST., STE. 950
RENO, NEVADA 89501
(775) 229-4219