The following links and/or pages are support for agenda Item 8

NEVADA RURAL HOUSING AUTHORITY

19 January 2016

Nevada Association of Counties
304 S. Minnesota St.
Carson City, NV 89703

Re: Request for recognition as a Government Partner

Nevada Rural Housing Authority (NRHA) is requesting an official relationship with NACO as a Government Partner. NRHA works in cooperation with rural counties and communities to help them meet the housing needs for their citizens through a variety of solutions. NRHA was created by an act of the Nevada Legislature in 1973 as a Public Housing Authority to administer HUD's Section 8 rental voucher program in rural Nevada. Of the five board members for NRHA, two are appointed by NACO.

Currently, NRHA administers the following housing support throughout Nevada's 15 rural counties and in the rural areas of Clark and Washoe Counties:

- 1645 rental vouchers, serving nearly 2,000 households each year.
- HUD's 1393 rental vouchers have been supplemented with 81 Veterans Administration Supportive Housing (VASH) vouchers and 15 families are assisted with Tenant Based Rental Assistance (TBRA) provided through the Nevada Housing Division. An additional 156 households are assisted with project-based housing vouchers. 150 Mainstream Vouchers are administered each month for households with special needs.
- NRHA administers the Supportive Living Assistance (SLA) and Shelter Plus Care (SPC) programs for the Nevada Community Health Services in rural Nevada for approximately 69 families each month.
- These combined programs provide an economic impact to rural Nevada of over $9.5 million/year.

In 2005, NRHA initiated its homebuyer services program with a small bond program. Today, our homebuyer services have helped nearly 4,000 rural Nevadans purchase a home with over $655 million in mortgages, and another $21.3 million in down-payment assistance. In 2009, NRHA initiated a Mortgage Tax Credit program which provides new homeowners with increased disposable income through a tax credit on their mortgage interest. To date, NRHA has assisted over 775 families with approximately $12.4 million in tax savings through this program.

NEVADA RURAL HOUSING AUTHORITY

NRHA's real estate development department was created in 2002. It completed a statewide housing study in 2005, a first for rural Nevada. Another in-depth housing study was published in 2014 for 10 counties in Nevada's mining belt. A comprehensive study has been issued in 2015 for the economic area including Carson City, Carson Valley and the Dayton Valley areas and plans are underway for a study in southern Nevada. Over the past five years, NRHA has invested over $19 million in developing five multi-family housing projects in rural Nevada, including projects in Winnemucca, Eureka, and Carson City. A new special-needs project is in the development stage for Carson City, and an acquisition/rehabilitation project is in development for Yerington. Additional projects are in the planning stages for Tonopah and Ely.

Finally, our weatherization program assists four rural counties with weatherization and modernization services. Since its inception, our Weatherization department has assisted 928 households with approximately $2.4 million in repairs and improvements.

Rural Nevada is where we work; Housing is what we do. Our commitment and investment in rural Nevada is a reflection of that. We look forward to a long and productive relationship with NACO as a Government Partner.

Sincerely,

D. Gary Longaker
Executive Director

William L. Brewer
Deputy Director

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The following links and/or pages are support for agenda Item 11

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LYON COUNTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD MATHIS, Individually and as Special Administrator of the Estate of JOE ROBINSON MATHIS aka JOE R. MATHIS; and as Trustee of the JOE ROBINSON MATHIS AND ELEANOR MARGHERITE MATHIS TRUST; JAMES MATHIS and ANTHONY MATHIS,

Plaintiffs,

vs.

COUNTY OF LYON, a political subdivision of the State of Nevada; RICHARD GLOVER, an individual; DOES 1 through 20; and ROES 1 through 20,

Defendants.
_____/

CASE NO. 2:07-CV-00628-APG-GWF

MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE MOTION TO ALTER OR AMEND JUDGMENT AND REMITTITUR

COMES NOW Defendant, LYON COUNTY, by and through its attorneys, Thorndal Armstrong Delk Balkenbush & Eisinger, and hereby respectfully moves this Court, pursuant to Rule 59(a) and Rule 59(e) of the Federal Rules of Civil Procedure, for a new trial or, in the alternative, to alter or amend the judgment and for remittitur.

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Said Motion is made and based upon the points and authorities set forth below, all exhibits attached hereto and all pleadings and papers on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The facts of this case, as established at trial, are summarized as follows: the Plaintiffs' elderly father, Joe Mathis, died unattended in his rural, Smith Valley residence and was discovered on a welfare check conducted by the Lyon County Sheriff. After contacting Joe Mathis's sons, the Lyon County Sheriff's office contacted the elected Lyon County Public Administrator, Richard Glover, to take temporary control over the unattended residence. Glover entered the Mathis residence and removed various items of personal property, which he deposited at his office and in the public administrator storage locker. The Mathis sons arrived several days later and accused Glover of stealing various items. Ultimately, the Mathis sons, the Mathis Trust and the Mathis Estate brought suit against Lyon County and Glover, in both his official and individual capacities, under both 42 U.S.C. §1983 and various supplemental state torts.

This case has been ongoing for a number of years, due in large part to Glover exercising his interlocutory appellate rights and the fact that the Mathis Trust and Estate were unrepresented for a lengthy period of time. This case has seen several rounds of dispositive motions, which in turn have resulted in a series of dispositive ruling by this Court. In short, the remaining claims for relief at trial, with respect to Lyon County, were two municipality liability claims premised upon Glover's underlying constitutional violations: (1) Glover's failure to provide pre-deprivation notice; and (2) Glover's failure to obtain a search warrant. *See* Docket No. 205, at 15, 16; *see also* Docket No. 253, at 3.

Apart from these remaining avenues of liability, all other causes of action against Lyon County were previously dismissed, including the Plaintiffs' state law claim for Negligent Training and Supervision. *Id*. at 26. The Plaintiffs previously attempted to argue that their claim for Negligent Training and Supervision was actually a municipal liability claim asserted under 42 U.S.C. §1983; however, the Court rejected this notion:

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> "The County moved for summary judgment on the Fifteenth Claim for Relief (negligent supervision and training). (Dkt. No. 189 at 26.) Plaintiffs assert that this is not a state law claim but rather a Monell claim asserting municipal liability for failure to train. As the Complaint clusters this claim with various state law claims and fails to even mention *Monell* or Section 1983 in relation to this claim, **the Court agrees with the County that this claim should be treated as a claim under state law**."

Id. at 17. (Emphasis added).

Upon properly construing Plaintiffs' Fifteenth Claim for Relief as a supplemental state tort claim, the Court granted summary judgment in favor of Lyon County and ruled as a matter of law that the County did not have a legal duty to train and supervise its elected officials. The Court specifically found as follows:

> "It is a basic tenet that for an employer to be liable for negligent hiring, training, or supervision of an employee, the person involved must actually be an employee." *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1181 (Nev. 1996). **Because Glover was an elected official rather than an employee, the County cannot be liable under this tort**. The Nevada Supreme Court has not extended the tort of negligent supervision to elected officials, and this Court is not inclined to extend it absent clear direction from the Nevada Supreme Court. Therefore, Plaintiffs' motion for summary judgment on this claim is denied.

See Docket No. 205, at 26. (Emphasis added).

With the Court having winnowed down the remaining legal issues, a jury trial in this matter began on November 2, 2015. On November 10, 2015, a verdict was rendered in favor of the Plaintiffs. However, over the course of the trial, the Court made numerous rulings which were erroneous as a matter of law. These rulings directly prejudiced the Defendants and resulted in a grossly excessive and unsupported award of damages, which was nothing short of an outright miscarriage of justice.

As will be discussed below, this Court erred as a matter of law when it permitted the Plaintiffs to repeatedly argue that Lyon County failed to adequately train and supervise Defendant Glover - even though no such claim existed; even though the Plaintiffs agreed they would not offer such evidence [1] ; and even though the Court had already granted summary judgment on this exact issue. The Court also erred as a matter of law when it rejected a proposed

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[1] *See* Exhibit No. 1 (Trial Transcript, 8:2-3, Afternoon, 11/2/15)("We are not getting into, I think, any of the topics that Mr. Brown just raised.")

jury instruction offer by the County, which tracked the Court's own language and would have instructed the jury that an award of damages against the County could not be based on inadequate training and supervision. The language of the proposed instruction is as follows:

> "I instruct you that because Richard Glover was an elected official rather than an employee of Lyon County, Defendant Lyon County cannot be liable for any negligent hiring, training, or supervision of Richard Glover."

See Docket No. 333, at 2. Lastly, the Court passed on its final opportunity to un-ring the proverbial bell, when it told defense counsel that he was free to instruct the jury on the law of the case and argue in closing statements that there was no training and supervision claim at issue. The Court's instruction to defense counsel conflicted with the Court's sole authority to instruct the jury, it conflicted with the Court's other instructions, and it was a day late and a dollar short in attempting to rehabilitate a jury that had already been exposed to days of inadmissible and prejudicial evidence.

The Court's legal errors directly prejudiced the County and, as seen in the post-trial comments made by a juror in the Las Vegas Review-Journal, this previously-dismissed training and supervision claim formed the basis for the jury's award of damages with respect to Lyon County. Moreover, based on these juror statements, it is clear that the jury's grossly excessive award against Lyon County was intended to be improperly punitive in nature. As such, the County respectfully submits that, interest of justice, these erroneous rulings must be rectified and a new trial must be ordered in accordance with FRCP 59(a).

In the alternative, if the Court is not inclined to order a new trial to correct these injustices, then the County hereby moves the Court, pursuant to FRCP 59(e), to issue an order to remit damages based on the jury's award of excessive damages that were against the clear weight of evidence. Furthermore, based on the post-trial comments made by the jury, the damages awarded in the verdict were clearly issued under the influence of passion and prejudice and in manifest disregard of the Court's instructions. Moreover, not only was the jury's award against the County flagrantly excessive and punitive, but the jury clearly awarded duplicative damages and an improper double-recovery. Therefore, if the Court is not inclined to order a new trial, then the jury's award on damages must be subject to remittitur under Rule 59(e).

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II.

LEGAL ARGUMENT

A. A New Trial is warranted under Federal Rule of Civil Procedure 59(a).

Rule 59(a)(1)(A) of the Federal Rules of Civil Procedure provides that after a jury trial, the court may, on motion, grant a new trial on all or some of the issues, and to any party, "for any reason for which a new trial has heretofore been granted in an action at law in federal court." While at first blush the application of this rule may appear decidedly vague, the Ninth Circuit has explained the correct application of FRCP 59(a) and in the case of *Molski v. M.J. Cable Inc.*, the Ninth Circuit held as follows:

> "Rule 59 does not specify the grounds on which a motion for new trial may be granted." *Zang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003). Rather, the court is "bound by those grounds that have been historically recognized." *Id.* Historically recognized grounds include, but are not limited to, claims "that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons, the trial was not fair to the party moving." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S.Ct. 189, 85 L.Ed. 147 (1940). We have held that "[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based on false or perjurious evidence, or to prevent a miscarriage of justice." *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n. 15 (9th Cir. 2000).

Molski v. M.J. Cable Inc., 481 F.3d 724, 729 (9th Cir. 2007).

In considering a motion for new trial, the court has " 'the duty . . . to weigh the evidence as [the court] saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in [the court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence.' " *Molski*, 481 F.3d at 729, quoting *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990) (quoting *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir. 1957). Put another way, a new trial should be granted "if, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371-72 (9th Cir. 1987). The Ninth Circuit has cautioned that "the trial judge does not sit to approve miscarriages of justice," and that "[h]is power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has

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long been regarded as an integral part of trial by jury as we know it." *Landes*, 833 F.2d at 1371-72. Moreover, when weighing the evidence submitted to the jury, a judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party. *Id*.

Under Rule 59(a), a new trial is justified: "(1) to incorporate an intervening change in the law; (2) to reflect on new evidence not available at the time of trial; and (3) to correct a clear legal error or prevent manifest injustice." *Lewis v. Festo Corp*., 98-15204, 1999 U.S. App. LEXIS 8324, at *10-11 (9th Cir. Apr. 28, 1999) (citing *EEOC v. Lockheed Martin Corp*., 116 F.3d 110, 112 (4th Cir. 1997)).With respect to evidentiary rulings, "[a] new trial is only warranted when an erroneous evidentiary ruling substantially prejudiced a party." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1030 (9th Cir.2008). "A reviewing court should find prejudice only if it concludes that, more probably than not, the lower court's error tainted the verdict." *Tennison v. Circus Circus Enters., Inc*., 244 F.3d 684, 688 (9th Cir. 2001).

As to the matter at bar, a new trial in this case must be granted under FRCP 59(a), as the jury's award of damages was contrary to the clear weight of the evidence, was an unmistakable miscarriage of justice and the rulings made by this Court were clearly erroneous and directly (and demonstrably) resulted in substantial and undue prejudice to Lyon County. As such, this Court has no choice but to set aside the jury verdict and to order a new trial.

1. Irrelevant and prejudicial evidence was admitted at trial .

On day-one of the trial in this matter, counsel for Lyon County brought to the Court's attention that the Plaintiffs intended to offer argument and testimony before the jury that Lyon County had failed to adequately train and supervise Defendant Glover. *See* Exhibit No. 2 (Trial Transcript, 10:15-12:5, Morning, 11/2/15). Indeed, the Plaintiffs planned to offer witness testimony, deposition testimony and PowerPoint slides on this precise issue. *Id*. Defense counsel pointed out that Plaintiffs' PowerPoint slides for opening statements actually asserted the following: "**No direction from the Lyon County District Attorney. No direction from the Lyon County Sheriff. No direction from the Lyon County Board of County Commissions**." *See* Exhibit No. 2 (Trial Tr., 17:14-16) (Emphasis added). Clearly, all of the foregoing advise

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that Glover's challenged conduct was the result of Lyon County's failure to train and supervise Defendant Glover.

Defense counsel reminded the Court that Lyon County had submitted a motion in limine on this exact issue (*see* Docket No. 271, at 5-6 [2]) and the Court had taken the matter under submission without a decision. *Id*. Additionally, Defense counsel also reminded the Court that Plaintiffs' claim for Negligent Training, Hiring and Supervision (Plaintiffs' Fifteenth Claim for Relief) had been dismissed on summary judgment. *Id*. In fact, this Court had previously ruled that the Plaintiffs failed to assert a *Monell* claim for the failure to train and supervise Defendant Glover and that, as a matter of law, Lyon County had no duty to train and supervise elected officials. *See* Docket No. 205, at 17, 26.

As such, counsel for Lyon County again emphasized that such arguments as to Glover's training and supervision were irrelevant to the remaining claims (i.e. that Lyon County had a custom and policy with respect to Glover's 4th and 14th Amendment violations) and would only be used by the Plaintiffs to inflame the passions of the jury and unduly prejudice Lyon County. *See* Exhibit No. 2 (Trial Tr., 10:15-12:5). Counsel for Lyon County also cautioned that the Plaintiffs were attempting to reopen their case by asserting an un-pled claim for relief and/or were attempting to bootstrap a previously-dismissed claim into the remaining claims for trial. *Id*. Accordingly, counsel urged the Court to grant Lyon County's motion in limine and preclude the admission of this irrelevant and highly prejudicial evidence. *Id*.

In response to the foregoing arguments, counsel for the Plaintiffs affirmatively stated that "[w]e are not attempting to revive our claim for failure to train as Mr. Brown is correct, that the

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[2] Among other legal arguments, the County's motion in limine argued that any alleged failure by Lyon County to train or supervise Defendant Glover was totally and completely irrelevant to Plaintiffs' remaining constitutional claims and was, therefore, inadmissible under FRE 401, 402 and 403. *See* Docket No. 271, at 6.Simply put, the Plaintiffs never asserted a *Monell* claim with respect to the County's training and supervision of Glover and this Court already ruled as a matter of law that the County had no duty under Nevada law to train or supervise an elected official. As such, these training and supervision issues could not, in any imaginable way, make any fact at issue more or less probable; further, these allegations with respect to training and supervision were severely and unduly prejudicial to the County.

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Court ruled on that in summary judgment." *See* Exhibit No. 2 (Trial Tr., 12:9-22). Nevertheless, the Plaintiffs admitted that they were planning to offer evidence that the County failed to "direct," *i.e. supervise*, Defendant Glover. *Id*. Likewise, the Plaintiffs also admitted that they intended to offer argument and evidence that the County failed to "educate the public administrator as to what the law means, what they have to do to comply with the Constitution," *i.e. that the County failed to train Glover*. *See* Exhibit No. 2 (Trial Tr., 13:21-14:1).

In ruling on the issue, the Court again agreed that "there is no negligent training or supervision claim pending out there." *See* Exhibit No. 2 (Trial Tr., 14:5-7). Nevertheless, the Court ruled that "I'm going to -- I'm going to -- I'm not going to step in on that issue at this stage." *See* Exhibit No. 2 (Trial Tr., 17:25-18:1). The Court then granted a standing objection on the issue during opening statements. *See* Exhibit No. 2 (Trial Tr., 18:25-19:5). However, before opening statements commenced, the Court re-raised the issue and, with respect to the Plaintiffs' objectionable Power Point slides, the Court found that while "[i]t's walking on the edge . . . litigators walk on the edge all the time." *See* Exhibit No. 2 (Trial Tr., 127:16-17). The Court ultimately permitted the Plaintiffs to offer the objectionable PowerPoint slide and neglected to issue a specific ruling with respect to this inadequate training and supervision issue. Specifically, the Court simply wrote-off the County's foregoing argument as "anticipating an issue that may not arise." *See* Exhibit No. 3 (Trial Transcript, 8:4-9:8, Afternoon, 11/2/15).

However, as expected, this issue did arise and during opening statements the Plaintiffs offered several arguments that Lyon County negligently failed to train and supervise Defendant Glover:

> "You will learn that Mr. Glover also asked the Lyon County Board of County Commissioners for information regarding how the public administrator set up his files. You will learn that the Board of County Commissioners simply suggested that he contact other public administrators from other counties to see how they set up their files. The evidence will show that Public Administrator Glover also sought advice from the Lyon County District Attorney and the Lyon County Sheriff about how to perform his functions as the public administrator. However, the only direction that he was provided is that he should respond to scenes within four hours."
>
> * * *
>
> "Other than being told to remove weapons, **Public Administrator Glover did not receive direction from anyone else at Lyon County regarding**

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> **the procedures he should use as the Lyon County Public Administrator**. And Mr. Glover never even discussed his policies with the Lyon County District Attorney."

See Exhibit No. 3 (Trial Tr., 28:3-15, 29:5-9) (Emphasis added).

Again, it is important to note that the Court granted the County a standing objection on these inadmissible and prejudicial arguments during opening statements. *See* Exhibit No. 2 (Trial Tr., 18:25-19:5). However, the Plaintiffs' use of these irrelevant arguments did not end at opening statements; in fact, the record in this case is replete with numerous instances of the Plaintiffs offering evidence and testimony of inadequate training and supervision - some of which were deemed inadmissible and some of which were unexplainedly admitted over the objection of counsel. *See* Exhibit No. 4 (Trial Transcript, 259:11-260:3, 284:20-25, 286:3-11, 11/3/15).

During the direct examination of Defendant Glover, counsel for the County objected to the relevancy of the following question, which specifically asks about the County's lack of "supervision," "guidance," and "oversight" over the Public Administrator:

> "All right. And so other than telling you, 'Go talk to other public administrators,' and other than set your fee schedule, **the Lyon County Board of County Commissioners didn't give you any other guidance or supervision or oversight at all**; correct?"

See Exhibit No. 4 (Trial Tr.,177:17-23) (Emphasis added). The Court overruled the County's relevancy objection and this exact question was later cited by defense counsel as the need for an actual ruling on these training and supervision arguments. The Court instructed the Plaintiffs not to make these types of negligent training/supervision argument; however, the Court nonetheless found that the above-quoted question was somehow relevant. *See* Exhibit No. 4 (Trial Tr., 288:17-21).

Likewise, on day three, the Court overruled another relevancy objection by defense counsel during the direct examination of Lyon District Attorney Stephen Rye. Specifically, Plaintiffs counsel asked Mr. Rye whether the Lyon District Attorney ever issued any "written legal opinions or oral legal opinions about the duties and obligations of the Lyon County Administrator." *See* Exhibit No. 5 (Trial Transcript, 147:6-8, 11/4/15). Again, this question

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clearly went to issues of adequate training and supervision, which the Court had instructed the Plaintiffs not to ask. Still, the Court somehow found that the DA's issuance of advisory legal opinions to train the Public Administrator was relevant to "did the County ask or give advice on how to carry out his [Glover's] job or duties . . ." *See* Exhibit No. 5 (Trial Tr., 149:14-19). The Court then permitted the Plaintiffs to ask Mr. Rye whether he ever drafted legal opinions with respect to the duties and obligations of the Lyon County Public Administrator, to which Mr. Rye responded "not that I recall." *See* Exhibit No. 5 (Trial Tr., 149:14-19). These inquiries again asserted that the County failed to train and supervise Defendant Glover - even though no such claim was pled.

The repetitive chorus from the Plaintiffs that the County failed to adequately train and supervise Defendant Glover ultimately caused the County to offer a jury instruction on this exact issue. *See* Docket No. 333, at 2. The County's proffered jury instruction was taken directly from the Court's Order on Summary Judgment (*see* Docket No. 205, at 26) and simply reflected that the County had no legal duty to train and supervise elected officials. *Id.* Nevertheless, despite the fact that the record was inundated with testimony that the County had failed to "train," "direct," "supervise," "oversee" and "educate" Defendant Glover, the Court rejected the County's proposed jury instruction "because there is no claim for -- by the defendants against Lyon County for failure to train or supervise." *See* Exhibit No. 6 (Trial Transcript, 10:5-21, 11/6/15). Instead of affirmatively addressing the bevy of irrelevant and prejudicial testimony and arguments that had already been presented to the jury on this issue, the Court skirted the issue altogether and told defense counsel that he was free to argue during closing statements that "there is no claim for failure to train or supervise." *See* Exhibit No. 5 (Trial Tr., 147:6-8). This matter was ultimately submitted to the jury without an instruction and the jury rendered a grossly excessive verdict in favor of the Plaintiffs.

The County now submits that the jury's verdict was irreversibly tainted by a litany of inadmissible and prejudicial testimony regarding the County's failure to train/supervise Defendant Glover and that a new trial is necessary, in accordance with Rule 59(a), to prevent a clear miscarriage of justice. *See Molski*, 481 F.3d at 729. Under Ninth Circuit precedent, a new

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trial is warranted when an erroneous ruling by the court substantially prejudiced a party. *See Harper*, 533 F.3d at1030; *see also Tennison*, 244 F.3d at 688. Here, the County submits that the Court committed numerous legal errors during the course of the trial and that these legal errors directly resulted in substantial prejudiced to the County. As such, a new trial must be granted in accordance with Rule 59(a).

2. The Court Committed Numerous Legal Errors.

Respectfully, the County submits that the Court committed the following prejudicial legal errors at trial: (1) the Court erroneously overruled the County's many objections as to the litany of evidence and argument offered by the Plaintiffs with respect to inadequate training and supervision of Glover; (2) the Court erroneously rejected the County's jury instruction on this inadequate training and supervision issue; and (3) the Court erroneously ceding to defense counsel the Court's exclusive responsibility to instruct the jury on issues of law.

First, the Court erred as a matter of law when it overruled the County's numerous relevancy objections, with respect to the Plaintiffs repeated efforts to introduce evidence of inadequate training and supervision of Defendant Glover. *See* Exhibit No. 2 (Trial Tr., 127:16-17); *see also* Exhibit No. 3 (Trial Tr., 8:4-9:8); Exhibit No. 4 (Trial Tr.,177:17-23)*;* Exhibit No. 5 (Trial Tr., 147:6-8). This Court's April 11, 2014, Order not only specifically found that the Plaintiff never asserted a *Monell* claim for the failure to train/supervise Glover, but also found that Lyon County had no legal duty to train and supervise elected officials. *See* Docket No. 205, at 17, 26. Indeed, the Court echoed this same finding on multiple occasions throughout the trial. *See* Exhibit No. 2 (Trial Tr., 14:5-7); *see also* Exhibit No. 6 (Trial Tr., 10:5-21).

This evidence of inadequate training and supervision was patently irrelevant and inadmissible, as it had absolutely no tendency to make any fact of consequence more or less probable than it would otherwise be without the evidence. *See* Fed. R. Evid. 401(a); *see also* Fed. R. Evid. 402. Glover's training and supervision has no conceivable impact on the Plaintiffs' underlying Fourth and Fourteenth Amendment claims, nor does Glover's training and supervision have any relevance to whether Lyon County had a policy and custom of failing to provide pre-deprivation notice and failing to obtain warrants. *See* Docket No. 205, at 15, 16; *see*

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also Docket No. 253, at 3. What is more, to the extent evidence of Glover's training and supervision was even theoretically relevant under FRE 401, the probative value of such evidence/argument was *de minimis* and was substantially outweighed by the danger of unfair prejudice to the Defendants and the risk of juror confusion. *See* Fed. R. Evid. 403; *see also United States v. Hitt*, 981 F2.d 422 (9th Cir. 1992) (stating that a "district judge has wide latitude in making Rule 403 decisions. But this latitude isn't unlimited. Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury.") In fact, it is telling that on several occasions throughout the trial, the Court sustained the County's relevancy objections on this same issue and determined that such evidence lacked probative value, would confuse the issues before the jury, and would waste time. *See* Exhibit No. 4 (Trial Tr., 259:11-260:3, 284:20-25, 286:3-11).

Still, even if Glover's training and supervision was somehow relevant to whether a policy or custom existed on behalf of Lyon County, this Court had already ruled that Glover was a final policymaker. Therefore, even for the limited purpose of demonstrating a policy or custom, this evidence of training and supervision has zero probative value. Moreover, by permitted the Plaintiffs to champion this inadequate training and supervision issue, the jury was confronted with evidence as to a claim for relief that was never pled and/or was previously dismissed. As seen at trial, the Plaintiffs used this irrelevant issue to paint the County as a bad-actor and thereby urged the jury to punish the County with a punitive award of damages. Accordingly, at the very least, this evidence should have been excluded under FRE 403 and the Court erred as a matter of law when it permitted the Plaintiffs repeatedly argue that Lyon County inadequately trained and supervised Defendant Glover.

Second, as noted above, the Court compounded the aforementioned legal errors by rejecting the County's proffered jury instruction on the issue of inadequate training and supervision. The County's proposed jury instruction reads as follow:

> "I instruct you that because Richard Glover was an elected official rather than an employee of Lyon County, Defendant Lyon County cannot be liable for any negligent hiring, training, or supervision of Richard Glover."

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See Docket No. 333, at 2. Despite the fact that the foregoing language was taken directly from the Court's own Order (Docket No. 205, at 26), the Court refused to instruct the jury on this issue. The rationale for the Court's decision was that no such claim existed; however, that was exactly the need for an instruction. The record in this case was polluted with countless irrelevant allegations that Lyon County failed to adequately train and supervise Defendant Glover. *See* Exhibit No. 2 (Trial Tr., 127:16-17); *see also* Exhibit No. 3 (Trial Tr., 8:4-9:8); Exhibit No. 4 (Trial Tr.,177:17-23)*;* Exhibit No. 5 (Trial Tr., 147:6-8).

As such, the Court should have instructed jury to disregard evidence of inadequate training and supervision, in order to avoid severe prejudice to County. This did not occur and, predictably, severe prejudice resulted. This inadequate training and supervision issue was clearly not substantially covered by other delivered jury instructions and the Court's refusal to offer any jury instruction on this issue exposed the County to liability for a claim that was never even pled and/or had already been dismissed on summary judgment. The Court's refusal to instruct the jury on this issue clearly resulted in prejudicial harm to the County. *See Maiz v. Virani*, 253 F.3d 641, 658 (11th Cir. 2001) (A new trial is warranted for failure to give a proposed jury instruction if such refusal resulted in prejudicial harm to the requesting party).

Lastly, the Court erred as a matter of law when it rejected the above-mentioned jury instruction and, instead, urged defense counsel to cleanup this issue by arguing during closing statements that "there is no claim for failure to train or supervise." *See* Exhibit No. 5 (Trial Tr., 147:6-8). Instructing the jury as to the applicable law "is the distinct and exclusive province" of the court, not that of defense counsel at closing argument. *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993) (citations and quotation marks omitted). Therefore, defense counsel was simply not in a position, without a corresponding jury instruction, to rehabilitate a jury that had already been repeatedly exposed to a litany of inadmissible and prejudicial evidence. Furthermore, such an admonition by defense counsel at closing argument would have conflicted with Jury Instruction No. 1, which provided that "[y]ou must follow the law as I give it to you whether you agree with it or not . . ." *See* Docket No. 343, at 1. Moreover, Jury Instruction No. 8 clearly provided that "[a]rguments and statements by lawyers are not evidence." *Id.* at 8.

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As such, the Court erred as a matter of law when it held that an instruction on this training and supervision issue was not necessary because defense counsel could argue this issue during closing statements. Frankly, by closing statements the damage had already been done and the jury was already tainted. The Court's reliance on defense counsel to rehabilitate the jury was an abdication of judicial responsibility and directly prejudiced the County by permitting the above-mentions errors to remain unresolved.

3. These Legal Errors Tainted the Verdict and Prejudiced the Defendants.

Under Rule 59(a), legal error alone is not enough, a party requesting a new trial must also demonstrate that legal error resulted in substantial prejudice. *See Harper*, 533 F.3d at1030; *see also Tennison*, 244 F.3d at 688. The jury verdict in this matter issued an award against the Defendants in the sum total of $2,117,140.00 ($217.140.00 in property damage, $100,000.00 in putative damages and $1,800,000.00 in emotional distress damages). *See* Docket No. 342, at 7-9. However, the jury's award was irreparably intertwined with the legal errors discussed above.

Initially, the prejudicial effect of the Court's legal errors and the bias of the jury against Lyon County can be clearly and unequivocally seen within the four corners of the jury verdict. With respect to Glover's Fourteenth Amendment violation, the jury awarded Richard, James and Anthony Mathis $60,000.00 each in emotional distress damages; however, on the exact same constitutional violation asserted against the County, which was brought with respect to Glover acting in capacity as a final policymaker, the jury awarded Richard, James and Anthony Mathis $270,000.00 each in emotional distress damages. *See* Docket No. 342, at 2, 7. Based on the disparity between these two awards, it is clear that the jury held Lyon County responsible for something in addition to the claims at issue or, in the alternative, the jury intended to punish Lyon County for failing to adequately train and supervise Glover. Moreover, it is noteworthy that the jury issued an award against Lyon County that was **4 ½ times** greater than the award issued against Glover - even though both claims involved the same constitutional injury and the same unconstitutional acts. Indeed, the jury's intent to issue a punitive award against Lyon County is breathtakingly clear when considering that the Plaintiffs only asked for $250,000.00 each in emotional distress damages, yet the jury awarded Richard, James and Anthony Mathis

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$600,000.00 each. *See* Exhibit No. 8 (Trial Transcript, 73:4-7, 11/9/15).

Also, while it is clear from the face of the verdict that the jury intended to punish Lyon County for failing to adequately train and supervise Glover, this juror bias and total disregard for the Court's instructions were later confirmed by the jury itself. On November 11, 2015, Carri Geer Thevenot, a reporter with the Las Vegas Review-Journal, published a news article about the case, in which a juror named Kristine Anderson was quoted as telling the Review-Journal that the "jurors wanted to hold Lyon County accountable for failing to have written policies to guide its public administrator, and for failing to protect its citizens." *See* Exhibit No. 7 (11/11/15, Las Vegas Review-Journal Article). These comments by Kristine Anderson confirmed the fears of defense counsel and undeniably demonstrate that the jury intended to punish Lyon County (to "hold Lyon County accountable") for failing to adequately train and supervise Defendant Glover.

As such, the jury clearly ignored the actual claims at issue and rendered a punitive verdict on a claim that was not at issue and which had already been dismissed as a matter of law. Again, Lyon County was *actually* being tried for: (1) Glover's failure to provide predeprivation notice; and (2) Glover's failure to obtain a warrant before searching/seizing property. *See* Docket No. 205, at 15, 16; *see also* Docket No. 253, at 9-12. Lyon County was not being tried for having inadequate "written policies to guide" the decisions of Defendant Glover, which is indistinguishable from a *Monell* claim for failure to train and supervise - a claim that was never pled and was not before the jury. *See* Docket No. 205, at 17.

As demonstrated by the verdict and as later confirmed by Juror Anderson, the jury not only issued an award based on an un-pled claim for relief, but also completely and utterly disregarded the Court's instructions. The jury was clearly tasked with determining, for each of the constitutional claims against Lyon County, whether Glover's acts, done in his capacity as a final policymaker, resulted in Fourth and Fourteenth Amendment violations and whether those violations proximately caused damages. *Id*. at 19. None of the instructions discharged by the Court told the jury to render a verdict based on whether Lyon County had adequately enacted policies to "guide" (i.e. train and supervise) Defendant Glover. *See* Docket No. 343, at 17-19. In fact, the Court had already ruled in favor of the County on this exact issue and found no legal

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duty existed under the circumstances. *See* Docket No. 205, at 26. Nevertheless, by all accounts, this jury "went rogue" and rendered a verdict intended to punish Lyon County based on an un-pled and/or previously-dismissed claim for relief.

What is more, this effort to punish the County was clearly punitive in nature; however, a "municipality is immune from punitive damages under 42 U.S.C. § 1983." *See Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981).

Accordingly, the jury's flawed verdict is clearly prejudicial to the Defendants. Furthermore, such prejudice could have been averted if the Court: (1) had sustained the County's many objections with respect to this inadequate training and supervision issue; (2) had adopted the County's jury instruction on this exact issue; or (3) had actually addressed this issue before the jury, instead of telling defense counsel he was free to argue this legal issue during closing statements. As such, it is more probably than not that the Court's aforementioned legal errors tainted the verdict and have substantially and unduly prejudiced the Defendants. *Tennison*, 244 F.3d at 688. Therefore, a new trial must be granted under FRCP 59(a), as the jury's award of damages against Lyon County was (1) contrary to the clear weight of the evidence, (2) was an unmistakable miscarriage of justice, (3) was a result of the jury's complete disregard for the Court's instructions, and (4) was a direct result of the numerous legal errors made by this Court. *See Harper*, 533 F.3d at 1030. At the very least, there must be a new trial on damages, since the jury award in this matter was undeniably compromised.

B. IN THE ALTERNATIVE, THE JUDGMENT MUST BE ALTERED AND/OR AMENDED UNDER FRCP 59(E) AND REMITTITUR GRANTED.

Rule 59(e) provides a mechanism by which a trial judge may alter, amend, or vacate a judgment. A court has "considerable discretion" when considering a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003).The simple purpose of Rule 59(e) is to provide the district court with the means for correcting errors that may have "crept into the proceeding," while that court still holds jurisdiction over the case. *See Sosebee v. Astrue*, 494 F.3d 583, 589 (7th Cir. 2007). As noted by the Ninth Circuit in *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir.

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1979): "Errors in the trial court may be most speedily corrected by the trial judge. Frequently a trial judge has had to rule on difficult questions under time pressures and without thorough briefing by the parties."

Generally, there are four grounds upon which a Rule 59(e) motion may be granted: (1) the motion is "necessary to correct manifest errors of law or fact upon which the judgment is based"; (2) the moving party presents "newly discovered or previously unavailable evidence"; (3) the motion is necessary to "prevent manifest injustice"; or (4) there is an "intervening change in controlling law." *Turner*, 338 F.3d at1063 (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1254 n.1 (9th Cir. 1999)). As will be discussed below, the motion at bar has been brought to correct the manifest errors of law upon which the jury award was based and to prevent the manifest injustice that will result if the jury award is let stand. [3]

1. The Jury's award of emotional distress damages is excessive on its face and against the clear weight of evidence.

By way of brief review, each of the Plaintiffs were awarded the following amounts for property damage: Richard Mathis: $1,112.50; James Mathis: $265.00; Anthony Mathis: $145.50; and the Mathis Trust: $107,047.00. *See* Docket No. 342, at 2-9. The jury then unexplainedly multiplied these figures by two, thus amounting to a combined total of $217,140.00, of which only $3,046.00 was awarded to Richard, James and Anthony Mathis. *Id*. While the Mathis Trust was not permitted emotional distress damages, the jury awarded the remaining Plaintiffs the following amounts for emotional distress: Richard Mathis: $600,000.00; James Mathis: $600,000.00; and Anthony Mathis: $600,000.00. *Id*. Accordingly, the jury awarded Richard, James and Anthony Mathis a combined total of $1,800,000.00 in emotional distress damages. *Id*.

In reviewing a jury award, the jury's "finding of the amount of damages must be upheld unless the amount is 'grossly excessive or monstrous,' clearly not supported by the evidence, or 'only based on speculation or guesswork.'" *Handgards, Inc. v. Ethicon, Inc*., 743 F.2d 1282, 1297

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[3] Defendant Glover has also submitted a Motion to Alter or Amend and for Remittitur and the County hereby joins in Glover's Motion, to the extent it applies to Lyon County and does not conflict with the legal arguments contained herein.

(9th Cir. 1984) (quoting *Blanton v. Mobil Oil Corp*., 721 F.2d 1207, 1216 (9th Cir. 1983), cert. denied, 471 U.S. 1007 (1985)), cert. denied, 469 U.S. 1190 (1985). Here, on its face, the County submits that the jury's award of emotional distress damages was grossly excessive; furthermore, this award for emotion distress damages was clearly not supported by the evidence adduced at trial and, therefore, must have necessarily been the product of speculation and guesswork.

Again, Richard, James and Anthony were awarded a combined total of **$3,046.00** in property damages for Glover's unconstitutional deprivation, but were somehow awarded **$1,800,000.00** in emotional distress damages. When broken down, the jury's award for emotional distress damages is more than ***590 times*** the amount of property damage awarded to James, Richard and Anthony Mathis. What is more, this $1,800,000.00 award bears no relation to the evidence adduced at trial. In fact, it is telling that James, Richard and Anthony Mathis only asked the jury to award $250,000.00 each in emotional distress damages. *See* Exhibit No. 8 (Trial Tr., 73:4-7). As such, on its face, this award of emotional distress damages is improperly punitive in nature [4], is "grossly excessive or monstrous," and is wildly disproportionate to the Plaintiffs' economic losses and the evidence at trial. Furthermore, this award of emotional distress damages is so excessive to the point this Court can infer that passion or prejudice were at work against the Defendants.

The record in this case speaks for itself and the Plaintiffs simply did not produce sufficient evidence with respect to their individual emotional states to justify the jury's exorbitant award of $1,800,000.00 for emotion distress damages.

Anthony Mathis merely offered the following cursory testimony with respect to how "Mr. Glover's actions" affected him emotionally:

> "It makes it very painful to even think about anything with my parents. It's caused me I don't know how many sleepless nights. There's times when I have been irritable with it. It's -- it is not a pleasant thing to have to deal with for almost 10 years."

See Exhibit No. 4 (Trial Tr., 101:25-102:3-11, 11/3/15). This ambiguous testimony from

[4] *See Newport*, 453 U.S. at 271 (a "municipality is immune from punitive damages under 42 U.S.C. § 1983.")

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Anthony Mathis was certainly not specific to the constitutional violations at issue. Furthermore, apart from merely citing sleepless nights and being irritable, Anthony Mathis actually admitted that his emotional distress was derived from "anything with my parents" and not specifically Glover's challenged acts. *Id*. Based solely on the above-quoted testimony, the jury awarded Anthony Mathis $600,000.00 in emotional distress damages. This award was grossly excessive and not supported by the evidence.

Similarly, Richard Mathis offered the following vague testimony as to his emotional state:

> "Well, it caused me to lose a lot of sleep for various reasons. One is to how to be able to pay to prosecute this case. Other things that you probably would class as part of this, you know, diarrhea, upset stomach, things of that nature that never used to occur with me, but it -- it does now. And it's just something that weighs on you all the time."

See Exhibit No. 9 (Trial Transcript, 156:21-157:3, 11/5/15). Again, the above testimony is not specific to the constitutional violations at issue, nor did Richard directly attribute his sleeplessness, diarrhea and upset stomach to Glover's failure to obtain a warrant or provide pre-deprivation notice. In fact, Richard Mathis admitted that his sleeplessness was due to "various reasons," among which he included the stress of the litigation. Based solely on the above-quoted testimony, the jury awarded Richard Mathis $600,000.00 in emotional distress damages. Again, this award was grossly excessive and simply not supported by the evidence.

Similarly, James Mathis testified over several rambling minutes about how he was angry with Glover, that he worried about passing property to his own children, that he was more protective of his property and that he was distressed by the missing opals. *See* Exhibit No. 6 (Trial Tr., 80:9-86:15). However, again, none of James Mathis' testimony directly linked his emotion distress to the Fourth and Fourteenth Amendment violations at issue. James also mentioned having high blood pressure, but presented no evidence corroborating the existence of this unobservable ailment, nor did James produce any evidence establishing a causal link between his hypertension and Glover's challenged acts. Furthermore, the opals mentioned by James Mathis were property of the Mathis Trust and there is no bystander recovery for mental anguish under 42 U.S.C. §1983. *See Archuleta v. McShan,* 897 F.2d 495, 498 (10th Cir. 1990)

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("a section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else.") Therefore, as with Anthony and Richard, the jury's award of $600,000.00 to James Mathis for emotional distress was grossly excessive and not supported by evidence in the record.

Based on the testimony identified above, which was the only evidence before the jury regarding emotional distress, it is frankly indisputable that the jury's $1,800,000.00 award for emotional distress damages was patently excessive and not supported by the evidence. It is notable that none of the Plaintiffs presented any observable injuries or physical ailments causally related to this emotional distress, nor did the Plaintiffs offer any evidence that they even once saw a doctor, therapist, or other professional, or even sought the counsel of a friend, to help deal with this emotional distress. Apart from the foregoing testimony from James, Richard and Anthony Mathis, the information presented at trial concerning emotional distress came directly from argument by Plaintiffs' counsel - which is not evidence. *See* Docket No. 343, at 8.

Simply put, "an award of substantial compensatory damages . . . must be proportional to the actual injury incurred. . . . The award must focus on the real injury sustained . . . ." *Piver v. Pender County Bd. of Educ*., 835 F.2d 1076, 1082 (4th Cir. 1987), cert. denied, 487 U.S. 1206 (1988). Here, the jury was presented with insufficient evidence to place such a high dollar value on Plaintiffs emotional harm and, as such, the jury award was necessarily the product of rank speculation and guesswork. As such, the County urges the Court to reject the jury's grossly excessive award for emotional distress and, in accordance with Rule 59(e), to remit the verdict to reflect an amount sustainable by the proof. *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982). There is ample federal precedent to support remittitur in this case. [5]

[5] *See, e.g. Wulf v. City of Wichita*, 883 F.2d 842, 874-75 (10th Cir. 1989) (court held that a $250,000.00 award for emotional distress was grossly excessive, where the award was merely supported by the testimony of the plaintiff that he was stressed, angry, depressed and frustrated); *see also Spence v. Board of Educ*., 806 F.2d 1198, 1200-01 (3d Cir. 1986) (affirming district court's remittitur of jury award of $ 22,060.00 for emotional distress where plaintiff testified that she was "depressed and humiliated" by a retaliatory transfer); *Delph v. Dr. Pepper Bottling Co. of Paragould*,

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2. The jury's award against Lyon County was based on an outright disregard for the Court's instructions.

As discussed above, the jury's award against Lyon County was based on an outright disregard for the Court's instructions and, as such, the Court must alter or amend the judgment in order to prevent manifest injustice. *Turner*, 338 F.3d at1063. The post-trial comments of Juror Anderson confirm that the jury issued their award against Lyon County for failing to "have written policies to guide its public administrator, and for failing to protect its citizens." *See* Exhibit No. 7 (11/11/15, Las Vegas Review-Journal Article). However, these were not the claims the jury was instructed to entertain. None of the jury instructions utilized by the Court instructed the jury to render a verdict based on whether the County had properly enacted policies to "guide" Defendant Glover, nor was the jury tasked with determining whether the County protected its citizens. *See* Docket No. 343, at 17-19. The jury was tasked with determining whether Glover's acts, done in his capacity as a final policymaker, resulted in Fourth and Fourteenth Amendment violations and whether those violations proximately caused damages. *See* Docket No. 343, at 19.

The statements of Juror Anderson confirm that the jury patently disregarding the instructions of the Court and rendered a verdict based on passion and prejudice. As such, the jury's verdict with respect to the County must be set aside and the Court must render a new judgment in keeping with the evidence in the record. *See* FRCP 59(e).

3. The jury awarded an improper double-recovery and duplicative damages.

A Rule 59(e) motion may be brought by a party seeking to alter or amend the damages awarded in the judgment if the damages were clearly erroneous. *See Duran v. Town of Cicero*, 653 F.3d 632, 642-43 (7th Cir. 2011) (the specter of duplicative damage awards is properly raised in a Rule 59(e)). The United States Supreme Court in *Carey v. Piphus* held that for a §1983 action "the elements and prerequisites for recovery of damages . . . should parallel those for recovery of damages under the law of torts." *Carey v. Piphus*, 435 U.S. 247, 253 (1978). In

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Inc., 130 F.3d 349, 358 (8th Cir. 1997) (reducing compensatory damage award for emotional distress from $150,000.00 to $50,000.00 where plaintiff merely testified he had headaches, symptoms of headaches, and his stomach hurt).

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Nevada, with respect to the recovery of tort damages, the Nevada Supreme Court has expressly adopted the Double Recovery Doctrine and held that "a plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories." *Elyousef v. O'Reilly & Ferrario*, LLC, 126 Nev. ___ , 245 P.3d 547, 549 (2010); *see also Gentile v. Cty. of Suffolk*, 926 F.2d 142, 153 (2d Cir. 1991) ("when a plaintiff seeks compensation for the same damages under different legal theories of wrongdoing, the plaintiff should receive compensation for an item of damages only once.") Here, both the jury's award of property damages and the jury's award of emotional distress damages include an award of improper, duplicate damages.

As noted above, the jury awarded the Plaintiffs $108,570.00 in property damage against Glover, which the jury unexplainedly doubled for a total award of $217,140.00 against the Defendants. *See* Docket No. 342, at 2-9. However, the Plaintiffs only sustained one injury with respect to property damage; therefore, the Plaintiffs can only recover once for property damage - even if the Plaintiffs asserted different legal theories of wrongdoing. At present, the jury has award the Plaintiffs an improper double-recovery and if the verdict is let stand, the Plaintiffs will reap an improper windfall at the Defendants' expense. Accordingly, remittitur is necessary to reduce these duplicative property damages. *See Carey*, 435 U.S. at 253; *see also Elyousef*, 245 P.3d at 549.

Likewise, the jury also awarded the Plaintiffs $180,000.00 in emotional distress damages against Defendant Glover in his official capacity, with respect to his Fourteenth Amendment violation. *See* Docket No. 342, at 1-2. However, the jury then also awarded $810,000.00 against the County for the same Fourteenth Amendment violation, based on Glover's status as a final policymaker. *Id*. at 7. Simply put, the injury was the same and the conduct was the same, yet the Plaintiffs received a double-recovery by merely asserting different legal theories. *See Carey*, 435 U.S. at 253; *see also Elyousef*, 245 P.3d at 549. Accordingly, remittitur is again appropriate to prevent the Plaintiffs' recovery of duplicative emotional distress damages.

III.

CONCLUSION

Based on the foregoing, the County respectfully request that this honorable Court grant this

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Motion for New Trial or, in the alternative, to grant the County's Motion to Alter or Amend Judgment and remit the jury's award of damages.

DATED this 23rd day of December, 2015.

THORNDAL ARMSTRONG
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I electronically filed and caused the foregoing, **MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE MOTION TO ALTER OR AMEND JUDGMENT AND REMITTITUR**, to be served on all parties to this action via the United States District Court CM/ECF Electronic Filing system, fully addressed as follows:

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The following links and/or pages are support for agenda Item 16

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Nevada Association of Counties (NACO) Federal Priorities

Health & Human Services

- ***Medicaid:*** NACO supports measures that enhance flexibility in the Medicaid program to support local systems of care, and urges Congress to protect the Federal-State-Local Partnership Structure for Financing and Delivering Medicaid Services. County long-term care facilities, public health departments and hospital systems play a critical role in the Medicaid delivery system. Therefore, counties' ability to put up local matching funds and to receive targeted supplemental payments should be preserved. NACO opposes efforts to block grant, cap or otherwise cut Medicaid, as this would further shift costs to counties and reduce their ability to provide for the health of their residents.

- ***Improve Health Services for Justice-Involved Individuals:*** NACO supports collaborative programs between the health, human services and justice sectors—such as those made possible by the Mentally Ill Offender Treatment and Recovery Act (MIOTCRA)—that can help reduce the percentage of individuals in jails whom have a mental illness. NACO also supports the extension of Medicaid to individuals detained in county jails pending disposition of charges and the suspension, instead of termination, of benefits during the incarceration period. States refuse to assume the federal share of providing Medicaid services to eligible persons in county custody, terminating benefits and even eligibility. As a consequence, the entire cost of medical care for all arrested and detained individuals falls to the counties (note: this policy is regarding individuals that have *not* been convicted and are presumed innocent).

- ***Reauthorize and Fund the Older Americans Act (OAA):*** Nevada's demographics are such that we have one of the fastest growing senior populations in the U.S., and many of the services that seniors use are provided by counties. NACO supports reauthorizing the OAA with expanded program flexibility to distribute among nutrition programs; and supports increasing authorization and appropriations levels for all programs funded by the Act. Under the U.S. Department of Health and Human Services, many OAA programs, especially nutrition services, are cost effective investments to communities, but have remained at the same funding level for years despite increased demand.

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Mental Health and Jails

NACO supports measures that maintain funding for the Substance Abuse and Mental Health Services Administration (SAMHSA) block grants, fully implement and expand mental health parity, ease the Institute of Mental Disease (IMD) exclusion, expand access to health information technology (HIT), and develop and expand the behavioral health workforce. NACO also supports programs and legislation to support local efforts to reduce mental illness in jails and provide appropriate treatment to those in custody. County jails are not the appropriate place to treat individuals with mental illness, and such individuals should be diverted from county jails whenever possible. NACO also supports the reauthorization of the Mentally Ill Offender Treatment and Crime Reduction Act (MIOTCRA) as well as new federal legislation to support local efforts to reduce mental illness in jails and to treat those with mental health issues while incarcerated.

Environment

- ***Waters of the U.S. Rulemaking:*** NACO believes that local streets, gutters and human made ditches should be excluded from the definition of "Waters of the U.S." (WOTUS) under the federal Clean Water Act and calls on Congress to require the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers to withdraw the new WOTUS rule and rewrite it in consultation and collaboration with state and local governments.

- ***County Water/Wastewater Infrastructure Needs:*** NACO supports funding and regulatory relief for clean water and drinking water systems. This could include support for the Clean Water and Drinking Water State Revolving Fund Programs and/or other types of funding programs in the water/wastewater realm and/or regulatory programs such as those for stormwater management. This includes commonsense approaches that balance environmental protection and cost-benefit considerations, while promoting water affordability.

Transportation

As the Surface Transportation Legislation is implemented NACO supports continuing to advocate for counties' interests through subsequent rulings.

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Public Lands

- ***Public Land Management:*** As Nevada's Congressional Delegation is aware, Nevada has the largest percentage of federal lands (87%) of any state, and some of our counties (Nye, Esmeralda, Lander, Lincoln and White Pine) have over 90 percent of their total county acreage administered by the federal government. As a result, Nevada's counties find their local economies, fiscal condition, and quality of life influenced considerably by federal land management decisions. Counties are concerned that federal policies and lack of resources have rendered the agencies unable to properly maintain and administer the health of public lands. It is for these reasons that NACO supports efforts to increase active resource management with maximum engagement of the affected county governments; appropriate revenue sharing; and the transfer of some federal land to states, at the state's request in consultation with the counties.

- ***Continued full funding of PILT (Payment in Lieu of Taxes):*** PILT is also key to ensuring counties can fund the services they provide on Nevada's public lands. PILT compensates counties for tax-exempt federal land within their boundaries and, thanks to the work of Nevada's federal delegation, was fully funded for FY16.

- ***Fire Borrowing - Funding Wildfire Response:*** NACO supports federal reforms to end the practice of "fire borrowing" and improve forest management and hazardous fuels management on federal lands. Currently federal land managers are forced to use their general budgets for fire suppression of the most severe fires; fires in urban areas; and fires that require emergency response. As wildfires increase this means that agencies are using up funds intended for management and administration, as opposed to emergency funds similar to what the Federal Emergency management Agency is allowed to use for natural disasters that exceed their annual budget. NACO would support legislation providing emergency funding to fight wildfires on public land.

- ***The Public Lands Renewable Energy Development Act:*** Currently states and counties do not receive a share of the rental fees charged for solar and wind development on public lands. Passage of the Public Lands Renewable Energy Development Act (introduced as S. 1407 / H.R. 2663 in the 114th Congress) would change the incentives for renewable energy projects by sharing revenues and fees with counties and states. NACO supports the Act, which would replace the current rental fee system for renewable energy projects on public lands with a new royalty-based fee system that allocates 25% of the revenues generated by wind and solar energy projects to the counties where projects are sited. The additional revenue that this Act would generate for counties would help support county operations impacted

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by energy development including capital improvement projects (including road maintenance); public safety and law enforcement; and conservation easements.

County Financing and Funding

- ***IFTA & Marketplace Fairness:*** NACO opposes efforts by any industry seeking to create its own special immunity from state and local taxation. Industry examples of recent legislative initiatives seeking to preempt state and local taxing authority include wireless, rental car and online travel companies. In addition, NACO supports efforts that preserve and enable state and local governments to exercise their tax authority. NACO is concerned about extending IFTA, the Internet Tax Freedom Act, in its current form - IFTA exempts internet services from local taxation. NACO is also concerned with the lack of momentum on Marketplace Fairness Act legislation that would allow the collection of existing sales taxes on out-of-state catalog and online sales. NACO supports legislation to permit the collection of existing sales and use taxes from remote sellers. The issue of taxing remote sales has compounded in recent years due to the extraordinary development of the Internet as a retail marketplace. As a result, state and local governments have lost billions in uncollected sales taxes and Main Street business find themselves at a significant competitive disadvantage to various online sellers.

- ***Municipal Financing & the Tax Exempt Status of Municipal Bonds*:** NACO supports the preservation of the federal deductibility of local property and income taxes and the tax-exempt status of municipal bonds. Municipal bonds provide critical funding for public facilities, infrastructure and development. Provisions like the tax exemption for municipal bond interest have been part of the federal tax code for over 100 years, helping finance more than $3.7 trillion in public works projects. Furthermore, NACO urges the federal government to fulfill its obligations, such as providing previously guaranteed subsidy payments for Build America Bonds, and avoid any actions that would negatively impact county financing.

- ***Unfunded Mandates and Preservation of County Revenues:*** NACO opposes any new unfunded mandates and federal initiatives that fail to protect county revenues. In addition, NACO supports efforts to reform the lands in trust process to include the protection of county interests, such as jurisdiction and property tax revenues.

- ***Maintain Funding for the Community Development Block Grant (CDBG) Program:*** The U.S. Department of Housing and Urban Development CDBG program has been cut by $1 billion since FY 2010. NACO supports increased CDBG formula funding levels in FY 2017.

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Telecommunications

- ***Reauthorization of the Telecommunications Act:*** As the Telecommunications Act of 1996 is updated, NACO supports protecting local authority, including the right to manage the public rights-of-way, authority over the placement, construction and modification of personal wireless services facilities and the ability to require fair and reasonable compensation from telecommunications providers for use of the public rights-of-way.

- ***Broadband Deployment and Adoption:*** NACO supports legislation and administrative policies that help counties attract broadband services regardless of population or technology used. This includes legislation that provides tax credits to telecommunications providers that develop broadband in rural and under-served communities, and provides for broadened eligibility and additional federal agency loan authority or extension of credit to telecommunications providers that deploy broadband in rural communities

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February 22, 2016

Address

Dear Senator Heller:

The Nevada Association of Counties (NACO) would like to thank you for your help and advocacy thus far during the 114th Congress. There are a number of policy and budget issues that you and your staff have worked diligently on this past year that will have a positive impact on counties in Nevada. We wanted to recognize and thank you for that work:

- Payment in Lieu of Taxes (PILT): PILT is a critical source of revenue for Nevada's counties. Though Nevada's counties will continue to advocate for permanent full funding of PILT, achieving full funding for FY 2016 in the budget passed late last year was very important to counties and could not have been done without your help.
- FAST Act: The transportation bill helped counties by creating a stable funding source for transportation dollars for the next five years and included other very helpful provisions such as the extension of I-11. Passage of long-term surface transportation bill was also a priority for the National Association of Counties. Thank you for your efforts on this important issue.
- Sage-Grouse: Thank you for the work that you and your staff have done on the sage-grouse issue, as well as for working closely with Nevada's counties and supporting our efforts. As you know, Nevada's counties are seriously concerned about the implementation of the BLM's sage-grouse land use plans.
- Delay of the Cadillac Tax: Finally, Nevada's counties also appreciate the two-year delay of the Cadillac tax and your leadership and perseverance on this issue. Many county health plans fall under this categorization and implementation will reduce the value of benefits received by county employees.

We know that each level of government must partner with the others in order to deliver the services and protect the natural and economic resources upon which our shared constituents depend. Our members thank you for your service and for your work on behalf of issues that are important to county governments in Nevada.

We look forward to a continued partnership and thank you again for your efforts,

Respectfully,

Laurie Carson, President

The following links and/or pages are support for agenda Item 20

Elko County Board of Commissioners

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Commissioners
Delmo Andreozzi
Demar Dahl
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Elko County Manager
Robert K. Stokes

Executive Assistant
Michele Petty

January 15, 2016

Mr. Neil Kornze
Director, Bureau of Land Management
1849 C Street NW., (WO-200)
Washington, C.C. 20240
Sagebrush_withdrawals@blm.gov

Mr. John Ruhs,
Nevada State Director, Bureau of Land Management
Nevada State Office
1340 Financial Boulevard
Reno, NV 89502

Mr. William Dunkelberger, Forest Supervisor
Humboldt-Toiyabe National Forest
1200 Franklin Way
Sparks, NV 89431

RE: Comments Pursuant to the September 24, 2015 Notice in the Federal Register at 80 FR 57635 on the Proposed Withdrawal of Sagebrush Focal Areas in Nevada and an Associated Application and Environmental Impact Statement

Dear Director Kornze, State Director Ruhs, and Forest Supervisor Dunkleberger:

At a regularly scheduled meeting held December 2, 2015 the Elko County Board of Commissioners unanimously voted to become a cooperating/coordinating agency concerning the Notice of Proposed withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and the Notice of Intent to Prepare an Environmental Impact Statement. Elko County has since properly and officially requested that the BLM engage and recognize Elko County, Nevada as a cooperating/coordinating agency in the NEPA process and offers the following comments, statements recommendations and alternatives.

As Elko County currently maintains an energetic economic and cultural interest in mining/exploration, agriculture, oil/gas, renewable energy and recreation, the proposed application of withdrawal of public lands from mineral entry and associated land management restrictions will prove impactful, forever changing Elko County's cultural and economic sustainability. It is imperative that the Bureau of Land Management ("BLM") and United States Forest Service ("USFS") work closely with the State of Nevada and Elko County to ensure the proposed protection of the Greater Sage-Grouse is equalized with the priority to protect regional and Elko County culture, economics and citizens.

The proposed withdrawals of the Sagebrush Focal Areas (SFAs) are a direct result of the Nevada and Northeastern California Greater Sage-Grouse Approved Resources Management Plan Amendment signed September 21, 2015 ("ARMPA"). Pursuant to Section 102(2) (C) of NEPA, the BLM will prepare an EIS for this proposed withdrawal upon finalization of the scoping period. Most importantly, FLPMA section 204 identifies specific analyses that the Agencies must undertake prior to the withdrawal of public lands from operation of the Mining Law of 1872. A proper determination is one which fairly considers all 12 factors listed in 43 USCS § 1714 and the BLM's Regulations at 43 CFR 2310.3-1 explaining in detail the proposed withdrawal's effects on current natural resource uses, current land users, incompatibility with current land uses, and effects on ***state and local government interests and the regional economy***.

Our justifiable concerns are based on the fact that our county is subjected to 2,129,200 acres or approximately 75% of the 2,797,399 acres of Sage Brush Focal Area (SFA) in the State of Nevada is located in the northern ¼ of Elko County, this does not include the existing USFS Jarbidge Wilderness area of 113,000 acres. The total six state SFA acreage proposed for withdrawal is 10,047,727 acres, more than 20% of the total withdrawal is located in Elko County, more than any other single county of the twenty or more counties in the six Western States Greater Sage-Grouse Conservation planning area. Consequently, with extreme concern of the potential damaging impacts, Elko County offers the following comments related to the proposed Sagebrush Focal Areas mineral entry withdrawals and scoping for the Environmental Impact Statement.

Withdrawal:

The Mining/Exploration, Agriculture/Ranching, Oil/Gas, Renewable Energy and Recreation industries has committed significant resources to maintain Elko County's economic sustainability. As proposed the SFA restrictions will impose significant unjustified obstructions to mining, grazing, recreation and all other uses on federally managed public lands. The USFWS, BLM and USFS significantly changed the rules to employ the SFAs without notice, warning or any opportunity for stakeholder comment. Elko County maintains that this action violates the Federal Land Policy and Management Act (FLPMA) of 1976, the National Environment Policy Act (NEPA) of 1969, the General Mining Act of 1872 and the Multiple Use Sustained Yield Act of 1960 and will cause literal devastation to the Mining/Exploration, Agriculture/ Ranching, Energy and Recreation industries. The public was not provided a notice and comment period to provide input on the boundaries and potential effectiveness of the SFAs, as they were first presented in the FEIS for the ARMPA. Second, the science the Agencies rely on does not support the SFA boundaries. Third, there are known alternatives to the proposed withdrawals.

The use of the Nevada and Northeastern California Amended Resource Management Plan to segregate the 2.8 million acres designated as Sagebrush Focal Areas for withdrawal presupposes that the public was provided an opportunity for public hearing and meaningful comment. The public did not have a hearing prior to the application regarding the segregation and withdrawal boundaries, as the withdrawals first appeared in the administrative review of the FEIS.

Elko County was not provided adequate time to study a large document that had significantly changed since its draft form. The DEIS was issued on November 22, 2013, and the FEIS on May 28, 2015. Thus, while the BLM took more than one and one-half years to revise the EIS, the public was only allowed 30 days to analyze and prepare protest of the FEIS, which exceeds 2,000 pages in length. This despite the fact that there were major departures from and additions to the DEIS, and lack of response to or incorporation of many comments that were well grounded in science [For example, Elko, Humboldt and Eureka County's each submitted written critiques and comments of the DEIS with many scientific citations. All were virtually ignored in the FEIS]. Some revisions included important changes in methodologies, with insufficient justification or explanation for the public, making it difficult if not impossible even for scientific experts to make an informed response. Lack of transparency regarding criteria used to determine landscapes essential to conservation of the species undermines public confidence.

The withdrawal as proposed within the SFAs constitutes an irretrievable commitment of resources for an action that may not benefit Greater Sage-Grouse. Despite this irretrievable commitment, the public has no indication from where the science was identified to derive the SFAs. This withdrawal process adopts the wholesale assumption that the SFAs constitute the best habitat for Greater Sage-Grouse and that it can only be protected by withdrawal. Yet mineral withdrawal from the areas designated as SFA's is not scientifically supported. There are no habitat maps or scientific studies that support the conclusion that the SFAs are more important than other areas designated as "core" or "priority" across the scientific community; whether in the ARMPA, Nevada State Plan or other local plans. If there exists sufficient regulatory certainty to protect against non-SFA PHMAs without withdrawals, then it follows that a withdrawal is not necessary at all.

Elko County has many times in the past expressed concerns with the ARMPA's reliance on the NTT and COT Reports as conflicting with the Sagebrush Ecosystem Council and Sagebrush Ecosystem Technical Team findings supporting the State of Nevada's Action Plan. Nonetheless, the ARMPA cites to those reports, and therefore they should be used to determine whether the SFAs were supported by the science cited.

The NTT Report does propose a "withdrawal from mineral entry based on risk to the Greater Sage-Grouse and its habitat from conflicting locatable mineral potential and development," however, the NTT report does not discuss where a withdrawal might be most appropriate. Rather, the FEIS and ARMPA rely upon the COT Report to determine the NTT's request to evaluate risk from conflicting locatable mineral potential and development.

The Conservation Objectives Team (COT) Report does not support the SFA boundaries.

- The habitat map adopted by the BLM does not distinguish SFAs from other priority habitat.

- The identified risk of mining/exploration does not support the action. Mining not identified as a widespread risk in SFAs- only in Section 14 outside of SFAs (Northwest Interior).

    - Apparently as part of a wilderness bill that passed in the mid-nineties, the USGS was required to conduct an assessment of undiscovered mineral resources in the Pacific Northwest (though Nevada and other western states were included).

- Even though SFA areas may have a localized risk from mining/exploration, the decision asserts there are additional recommendations for widespread withdrawal from mineral location and entry for SFAs.

    - The management of these areas as SFAs would be consistent with the management direction for PHMAs, with the additional recommendations for withdrawal from mineral location and entry, NSO without exception for fluid mineral leasing, and prioritization for conservation actions, including processing of grazing permits.

        - In the Draft LUPA/EIS, Alternative C proposed a recommended withdrawal for all GRSG habitat and
        - Alternative D proposed NSO for fluid mineral leasing in all habitat. In the Proposed LUPA/DEIS,
        - Alternative F proposed prioritization for livestock grazing. Chapter 4 analyzed the impacts of those decisions. See DEIS Chapters 2 and 4.

    - As such, the management of these areas as SFAs and the impacts of the associated management decisions was addressed in the DEIS and is qualitatively within the spectrum of alternatives analyzed. SFAs. 2-2, FEIS.

- The BLM has not collectively reviewed each parcel of land within the SFA to determine its habitat characteristics.

If a withdrawal is a preferred method of protection, the very reports that the BLM relied upon in the ARMPA do not support the withdrawal boundaries as proposed. The withdrawals that appeared first in the FEIS then the ARMPA rely on the recommendations from *A Report on National Greater Sage-Grouse Conservation Measures,* Sage-grouse National Technical Team (December 21, 2011) (NTT Report) and *Greater Sage-grouse (Centrocercus urophasianus) Conservation Objectives: Final Report,* U.S. Fish and Wildlife Service (February 2013) (COT Report).

Elko County and the State of Nevada has committed resources and is dedicated to preserving Greater Sage-Grouse and its habitat. Nevada completed its State Plan to conserve Greater Sage-Grouse in 2014, and has directed significant funding at conservation of $5.7 million for Fiscal Years 2015-2017. Special Report by Western Governors, Greater Sage-Grouse Inventory: 2014 Conservation Initiatives, Western Governors' Association, page 5 (March 2015). Nevada has spent over $7.4 million since 2012 in support of Greater Sage-Grouse conservation efforts using pooled state, federal and local funds. Elko County's Greater Sage-Grouse Management and Conservation Plan and Elko County Public Land Use & Natural Resource Management Plan are designed to provide Greater Sage-Grouse management, conservation, preservation and re-habilitation measures, strategies and funding sources to benefit Greater Sage-Grouse without the loss of the county's heritage, culture and

economy. Expenditures for development and implementation of the plans exceed $200,000 and no federal funding was used.

The Elko County nor the State of Nevada Plan supports the SFA Boundaries or withdrawals. Implementation of withdrawals and will significantly undermine the potential effectiveness of the State Plan. Implementation will preclude the State from implementing its plan for a minimum of 20 years- before the state plan is even given an opportunity to be effective. A withdrawal, once completed, cannot be found as legitimacy and is very difficult to reverse. Essentially an irretrievable commitment of resources for an action that may not ultimately benefit Greater Sage-Grouse. Additionally Nevada and local specific data was not included in the delineation of SFAs, and no experts in the State were consulted. Overall, these are in conflict with federal policy, and design principles for CPR management.

The Dr. Peter Coates Map do not support SFAs and is being misapplied;

- Pages 2-2 and 2-3 describe the general characteristics for delineating focal areas, but there is no information on methodology used in their development. Nevada Management Categories (Coates et al. 2014) and NDOW Habitat Categorization methods are referenced, but prioritization using these tools does not align with SFAs. A USFWS letter is referenced, but no methodology is given in it. Delineation of the SFAs does not appear to incorporate modern scientific concepts of resistance and resilience; the level of science is therefore questionable

- Adoption of the state's map for this purpose is a misapplication of science created for an alternative purpose. Thus, one alternative is to adopt the entire State Plan- not just a misapplication of the State's Habitat Map.

    - "As noted in the DEIS, one of the goals/objectives of this planning effort is to protect both the habitat and the species. (see, for example, the LUPA/DEIS Goal B-SSS 1, Goal D-SSS 1, Goal E-SSS 1, Goal F-SSS 1, and Objective D-SSS 4. Further, as noted by the USGS Report/Coates which supports the delineation of habitat mapping for this planning effort, the potential presence of bird in these areas of the SFAs is acknowledged (see USGS Open File Report 2014-1163; page 28, habitat definitions).

    - The DEIS and the NDOW map it referenced defined the qualitative characteristics of habitat in terms of its importance to the species and as the intersection of the suitability of habitat for the species and the level of use by the bird (see NDOW document entitled Greater Sage-Grouse Habitat Categorization White Paper, December 2012 and Appendix A, Greater Sage-Grouse Habitat Map for Nevada and Northeastern California Land Use Plan Amendment). The habitat in the SFAs exhibits these characteristics – i.e., areas of high-quality sagebrush habitat, areas with highest breeding densities, and areas identified as essential to conservation and persistence of the species. In addition, the DEIS noted that among the issues brought forward for analysis was the use of "sound science to determine habitat requirements and restrictions needed to protect GRSG habitat." NV/CA DEIS,

Chapter 1 at p.16. The DEIS also stated that mapped habitat would be adjusted and refined based upon the best scientific tools available. NV/CA DEIS, Chapter 2, Table 2-4 at p. 61 (Goal D-SSS-AM) Table 2-5 at pages 93 (Action D-SSS-AM1), 100 (Action D-SSS-AM 9) and 119 (Action D-SSS-OPM 3). 2-2, FEIS

The publicly managed lands within the SFAs are to be immediately segregated from location and entry under the proposed action for a minimum of two years. Temporary segregation has essentially the same effect as a withdrawal. It closes the lands to location and entry under the proposed action subject to valid existing rights. Withdrawal of mineral entry in the SFAs with no legitimate basis to require location or action to delay two years for a site-specific decision will affect adjacent property values, development and investment potential.

The simple threat of withdrawal and restrictions has and will cause a chilling effect concerning potential and future investment for prospects to seek financing and investment for mining/exploration, agriculture/ranching and recreation activities in the region. Elko County believes that the SFA as represented in the FEIS, ROD and ARMPA does not comply with the 1872 National Mining Act, Multiple Use – Sustained Yield Act of 1960, FLPMA and NEPA. Elko County believes that mineral entries cannot be legally withdrawn by the BLM/USFS for an arbitrary and capricious act of the creation of the SFAs within the FEIS/ARMPA that causes detriment and impairment to the mining/exploration industries and economic future of Elko County and the region.

Several of the goals, objectives, management actions, standards, and guidelines contained in the FEIS/ARMPA/SFA are not consistent with rights under the General Mining Law which allows citizens of the United States the opportunity to enter, use, and occupy public lands open to location to explore for, discover, and develop certain valuable mineral deposits (30 U.S.C. § 22), subject to the FLPMA mandate to prevent unnecessary and undue degradation of public lands. 30 U.S.C. § 22 ensures pre-discovery access, use, and occupancy rights to enter lands open to location for mineral exploration and development. Prohibiting or restricting mineral exploration and development on lands co-located with Greater Sage-Grouse habitat, by way of limits placed upon surface disturbance, travel and transportation management (roads), ROW avoidance and exclusion areas and mineral withdrawals is contrary to the rights granted by § 22 of the General Mining Law.

Elko County believes that the BLM has a legal obligation to comply with the General Mining Law, Mining and Minerals Policy Act, and the FLPMA to recognize the Nation's need for domestic sources of minerals and the right to explore and maintain multiple uses. Despite, and in direct conflict with this legal obligation, the proposed SFA recommends severe restrictions, prohibitions, withdrawals, and de facto withdrawals. Withdrawals of the magnitude proposed under the SFAs conflict with § 22 of the General Mining Law, and the Mining and Minerals Policy Act and cannot be implemented through the land use planning process. Withdrawal of this magnitude should only be made by an Act of Congress or by the Secretary pursuant to the requirements and procedures of the FLPMA § 204(c) for a period not to exceed 20 years. The BLM has not documented the rationale for its decisions regarding the management of minerals. Specifically those decisions associated with how the withdrawals, and de facto withdrawals recommended in the SFAs comply with § 22 of the General Mining Law.

Further, if public lands needed for ROWs for roads, power lines, pipelines, etc. are no longer available for development, as described throughout the FEIS/ARMPA/SFA, including "restricted" areas, or avoidance/exclusion areas in SFAs, Priority Habitat Management Areas (PHMA) and General Habitat Management Areas (GHMA), the unpatented mining claims, patented claims, fee lands, and associated private property rights could be rendered worthless and could subject the federal government to a Fifth Amendment takings claim. To that end, the BLM's numerous references to VER has the potential to interfere with the access, use, and occupancy of lands open to location for mineral purposes, which are rights granted under the General Mining Law and Surface Use Act (30 U.S.C. § 612(b). These rights apply both to unpatented mining claims prior to discovery and to unclaimed lands open to mineral entry, independent of the discovery status of these lands. The numerous references to VER to these management actions is in fact a restriction, not an expansion of rights to use land for mineral purposes under the General Mining Law and Surface Use Act, and as such does not comply with the FLPMA, the General Mining Law, or the Surface Use Act.

The BLM asserts that mining is exempt from the 3-percent cap, the proposed action is conditioned with the constraints to "applicable laws and regulations, such as the 1872 Mining Law, as amended and valid existing rights"(VER). In the discussion of hard and soft trigger, "Limit ROW authorizations, leases, and permits to those needed for public safety and valid existing rights." The requirement for there to be VER puts an overly restrictive and unrealistic burden on mining operators exercising their rights under the General Mining Law, and creates a de facto withdrawal which is outside the BLM's authority and contrary to law. For locatable minerals the term "valid existing right," is a specific term that is reserved for those claims after a "discovery" of a valuable mineral deposit has been made. Therefore, the proposal to honor VER, fails to protect the rights associated with claims prior to a discovery of a valuable mineral deposit. Very few mining claims can withstand the rigorous economic evaluation, required by a claim validity examination to which they would be subjected as a result of this constraint.

Validity examinations are used to determine whether a claim has a discovery of a valuable mineral deposit that qualifies as VER that the federal government must exclude from the various restrictions, prohibitions and withdrawals. Thus, the many references to VER in the LUPA/FEIS are misleading because they create the false impression that the rights of mining claimants with claims in areas subject to restrictions, prohibitions, withdrawals and de facto withdrawals from future mineral entry would be respected and that claimants could continue to explore and develop their claims. Only after a claim is found to be valid as a result of a validity examination is it considered VER. However, mineral validity examinations create such a high threshold of proof that a claim can be mined at a profit that very few claims can demonstrate sufficient profitability to satisfy the criteria for a valid claim and VER. Generally speaking, some (but not all) claims at operating mines may meet the claim validity examination test and be treated as having VER. However, claims that are being actively explored almost never qualify as valid claims with VER. Even claims at advanced exploration projects that are being proposed for mine development may not qualify as VER.

The repeated and incorrect use of the term "Valid Existing Rights" when discussing the applicability of the conservation measures that restricts and prohibits land uses actually has the exact opposite effect on mining claims. It can be read to mean that the proposed land use restrictions apply to all mining claims in the SFA except those few claims that have a valuable discovery that can meet the economic tests to create VER. Thus, rather than limiting or exempting mining claims from the

draconian land use restrictions, the references to VER throughout the LUPA/FEIS broaden the impact of these restrictions to nearly all mining claims in the State of Nevada.

The maximum number of acres authorized for disturbance within Notices and Plan of Operations boundaries in the entire state of Nevada is only 191,374 acres, some of which are not co-located within Greater Sage-Grouse habitat. By contrast the proposed withdrawals within SFAs are almost 2.8 million acres; 15 times larger than the total footprint of existing mining activities in the State of Nevada. Therefore, the proposal to withdraw almost 2.8 million acres of land in Nevada from mineral entry is grossly out of proportion with the maximum potential impact that mineral activities might have on Greater Sage-Grouse and its habitat. Consequently, the proposed withdrawal within SFAs is not justified, is unreasonable and unnecessary, and is therefore, arbitrary and capricious. Additionally the proposal to withdraw almost 2.8 million acres from mineral entry demonstrates a general lack of understanding of geology and mineral occurrence by the BLM. Mineral deposits do not occur everywhere; they are located in small areas where geologic conditions are favorable. Mineral deposits are difficult and expensive to find. Therefore maintaining access for future mineral exploration and development is a planning issue that cannot be ignored.

The BLM's proposed prohibition against mineral development in SFAs and Greater Sage-Grouse habitat areas is disproportional to the amount of land used for mineral development and the impacts associated with mineral exploration and development, especially considering that the projected long term, unclaimed surface disturbances (i.e., open pit mines that are stabilized at closure but remain as features on the landscape) are small in the context of the habitat area.

Furthermore the withdrawal application states "No water rights would be needed to fulfill the purpose of the requested withdrawal." 80 CFR 57637. However, segregation and withdrawal will result in the expiration of private water rights, and will also implicate the water rights associated with grazing permits. The application only requires a "statement as to whether water will or will not be needed to fulfill the purpose of the requested withdrawal action." 43 CFR 2310.3-1 (c) (13) that water rights will be evaluated as a preliminary issue for the EIS is telling that this issue is inaccurately represented in the application. Thus, water rights would be needed to fulfill the purpose of the requested withdrawal.

Environmental Impact Statement Scoping Comments:

Elko County contends that the potential and real constraints created by the SFAs are detrimental to all multiple uses, including but not limited to, livestock grazing, roads, mineral extraction and exploration, oil and gas development, renewable energy, water rights and recreation. Elko County asserts that the proposed SFAs conservation measures can and must be resolved by logical unbiased methods that will not destroy local and regional economies and the general public utilizing public/private resources in areas arbitrarily designated by the BLM, USFS and other federal agencies. Elko County stresses that the BLM, USFS and the Federal Government in general must moreover endeavor to protect and enhance regional and local economic sustainability in conjunction with (but not subordinate to) Greater Sage-Grouse habitat conservation.

The BLM and USFS significantly changed the conventions in the FEIS with the inclusion of the SFA without communication, forewarning or opportunity for public comment or appeal, this contributes to a venue of distrust and negative confidence by the public in the process established by NEPA.

Elko County maintains this directly violates the provisions of NEPA, FLPMA, and will permit the BLM/USFS to unlawfully restrict publicly managed and privately owned lands for the multiple uses as provided for in the Elko County Land Use Master Plans and Chapter Four of the Elko County, Nevada County Code. Additionally many adjacent private property owners, investors and potential investors will and have lost cultural and monetary value, security, confidence and the ability to effectively and equitably manage their properties and interests by:

- Placing existing and future range improvements at risk when prioritized review of grazing permits will erode grazing rights and devalue adjacent private lands;

- Restrict or inhibit lawful ingress/egress to private properties adjacent to federally managed public lands, effectively restricting infrastructure development while devaluing and restricting county approved permitted land uses.

- Encumber ability to acquire fair market value when potential investors/buyers must be disclosed to that the land cannot be used to its full potential due to adjacent federally managed public lands restrictions;

- Inhibit ability to accurately value federal grazing permits that are essential ranching/agriculture assets knowing that their permits could be severely restricted or eliminated, when the prioritized review in SFAs and Priority Habitat Management Areas is completed;

- Effectively prohibits and restricts multiple uses on the federally managed lands as provided by the Multiple Use – Sustained Yield Act of 1960;

- Fails to provide common sense conservation measures to protect the Greater Sage-Grouse and habitat through the continued loss of habitat caused by wildfire and invasive species proliferation.

The SFA obscures over 2.1 million acres of northern Elko County, approximately 75 percent of the 2.8 million acres of Nevada's SFA land use prohibitions and restrictions. The numerous private land parcels adjacent to or within the Elko County SFAs are lands currently used for ranching, residential and recreation purposes that are comprised of lands cultivated for alfalfa hay or small grains, stream-irrigated meadows used to grow native wild hay, and pastures with sufficient carrying capacity to support cattle and wildlife. The future viable uses including commercial or industrial of these private land parcels depends in large part on the landowner's ability to use the adjacent public lands for livestock grazing, access, infrastructure and recreation.

Additionally because streams and wet meadows are high-quality, seasonal habitat for Greater Sage-Grouse, interfering with the continued use of private land parcels with streams and meadows will cause loss of brood-rearing and summer habitat. (See COT Report, Table 4-1 and Final EIS, Table 2.2 and Pages 2-39 and 2-57 and the 2014 Nevada Greater Sage-Grouse Conservation Plan Section 7.5 ("Nevada Conservation Plan"), which all emphasize the importance of riparian and wet meadow habitats). The management directives for the SFA threaten to eliminate or reduce the authorized use of the adjacent public lands for livestock grazing by imposing unworkable and authoritarian habitat

management objectives. Elko County estimates from GIS mapping that roughly 236,000 acres of Elko County private lands are adjacent to or engulfed by the SFA. The current use of these private land parcels for agriculture, ranching and other approved uses will be adversely affected by restrictions on grazing or access on adjacent public lands. Thus the SFA will diminish or even eliminate future economic agriculture, ranching and other uses on private property causing substantial economic harm to individual landowners and Elko County in general and potentially subject the federal government to regulatory takings claims. Additionally the SFAs will create stranded inholdings of private land parcels surrounded by public land managed for the sole purpose of Greater Sage-Grouse conservation including cultivated fields, meadows, and pastures that provide critically important brood-rearing habitat for the Greater Sage-Grouse and other wildlife species. Consequently, landowners within and adjacent to the SFAs, will experience restrictions to adjacent public lands that will have a significant adverse impacts including private property devaluation and depreciation.

Furthermore, Elko County maintains that the National Environmental Policy Act (NEPA) at 40 C.F.R. § 1502.9(b) requires agencies to disclose responsible scientific opposition, and therefore, the BLM should have disclosed that both the NTT and COT Reports, were being challenged under the DQA when the final environmental impact statement (FEIS) was released. The DQA challenges raise specific concerns related to several management actions found in the NTT and COT Reports which were carried forward in the LUPAs without disclosing that there is reasonable scientific opposition. The BLM failed to disclose the concerns raised under the DQA challenge, as well as identify the same scientific concerns raised during the call for comment on the various draft NEPA documents. Therefore, the NEPA documents associated with each of the LUPA/SFA are flawed and incomplete.

NEPA also requires that agencies use available and relevant data, which they did not in the preparation of the LUPA and SFAs. Neither the Draft EIS nor the FEIS documents include sections on geology, which is required as a baseline for evaluating mineral potential, or use BLM's LR-2000 online database to quantify the number of mining claims affected by the SFA proposed mineral withdrawal zones. Additionally, the NV – CA Final EIS erroneously states that there is no scientific data documenting the synergies between managed livestock grazing and suppressing rangeland fuel loads despite the fact that the State of Nevada and at least four Nevada counties provided detailed bibliographies pointing out these references that needed to be considered in the NEPA analysis.

Alternatives

The SFAs and associated "withdrawal" did not appear until the FEIS, and are not supported by the science relied upon by any of the agencies. The proposed withdrawals are not supported by the scientific reports that discuss the threat of mining and/or mineral exploration or any other multiple use to the Greater Sage-Grouse or its habitat. The threat is not widespread or immediate, while the threat to mining and other multiple uses is immediate, as there is a significant amount of mineral, natural resource and multiple use potential in SFAs.

Elko County is extremely concerned about the underlying information, or lack thereof, used to support the conclusion that this withdrawal should occur. Elko County understands that because the withdrawal process has been initiated it is important to provide comments and offers the following Position Statements and Recommendations:

- Elko County Position / Recommendation No. 1: It is in Elko County's and Nevada's interest that the State of Nevada Plan developed by the Sagebrush Ecosystem Program be implemented without interference.

- Elko County Position / Recommendation No. 2: Rescind the Sagebrush Focal Area order and application for mineral entry withdrawal.

- Elko County Position / Recommendation No. 3: Integrate the State of Nevada Plan as a Cooperative Agreement, over entering into Cooperative Agreements with individual private entities on a piecemeal basis. This would enhance the mitigation bank and credit program developed by the State and Local Plan.

- Elko County Position / Recommendation No. 4: That the BLM/USFS acknowledge and observe State of Nevada Revised Statutes concerning water rights and identify; how valid existing water rights "will" be impacted; how federal land management use and potential ownership will be needed to fulfill the purpose of the requested withdrawal action; concede to full due process as per NRS and afford the public to accurately comment, appeal and/or protest the water and water rights related consequences of the proposed withdrawal.

Thank you for this opportunity to provide comment, our position statements and recommendations. Please feel free to contact me if you should have any questions.

Respectfully,

Glen Guttry, Chairman
Elko County Board of Commissioners

cc: Representative Mark Amodei
Senator Dean Heller
Governor Brian Sandoval
Senator Pete Goicoechea
Assemblyman John Ellison

Scoping Comments to the Federal Register Notice of September 24, 2015: Bureau of Land Management and the U.S. Forest Service Proposed Withdrawal and Segregation of 2.7 Million Acres within Sagebrush Focal Areas in Nevada from Location and Entry Under the 1872 General Mining Law Submitted by Governor Brian Sandoval on Behalf of the State of Nevada

Governor Brian Sandoval, on behalf of the State of Nevada is responding to the public scoping process by providing specific information on six key elements that must be analyzed in detail and disclosed in the Environmental Impact Statement to meet compliance with the National Environmental Policy Act (NEPA) and assure that a thorough evaluation is conducted of the relevant issues and impacts associated with the proposed mineral withdrawal from the General Mining Act of 1872.

1. No Action Alternative

Nevada believes that areas with high mineral potential should absolutely not be withdrawn from mining and mineral exploration. In that regard, the No Action Alternative is the preferred alternative for the State of Nevada. The No Action Alternative is consistent with the Nevada Sage-Grouse Conservation Plan (the Nevada Plan) which incentivizes avoidance of habitat disturbance in priority sage-grouse management areas, minimizes direct impacts of habitat disturbance based on applied Required Design Features (RDFs), and requires mitigation for direct and indirect impacts through the Conservation Credit System (CCS) that assures and quantifies net benefits to greater sage-grouse (GRSG).

- The No Action Alternative must include an accurate description of the existing sage-grouse populations, habitat conditions, and threats and must quantify these existing baseline conditions for comparison with the proposed action alternative(s) and their resulting net benefit for GRSG.

The Bureau of Land Management/U.S. Forest Service (BLM/FS) Land Use Planning Amendment (LUPA) Final Environmental Impact Statement (FEIS) provided no science or analysis at any level to support the rationale that exclusion of mining and mineral exploration will maintain the key attributes of GRSG habitat that are needed to realize a net benefit for GRSG.

- The Mineral Withdrawal Environmental Impact Statement (EIS) must *include quantitative analysis and comparisons* of key habitat attributes (sagebrush cover, sagebrush height, and perennial grass and forb cover and composition) between the No Action Alternative and the proposed action alternatives and disclose how mineral withdrawal will result in changes to these key attributes that are needed to realize a net benefit for the GRSG populations in the Sagebrush Focal Areas (SFA).

- The No Action Alternative must be analyzed for the positive impacts that the mineral industry provides such as participation in landscape scale efforts that require a broad range of partnerships and opportunities for reclamation and to further reclamation technology through restoration research.

2. Timeframe

The State of Nevada adamantly rejects the premise that mineral withdrawal should be the initial conservation action implemented under the Approved Resource Management Plan Amendment (ARMPA) when other existing threats to habitat have a far greater urgency and detrimental impact on GRSG in terms of habitat loss. The need for wild horses to be managed at appropriate management levels and the occurrence of thousands of acres in need of wildfire rehabilitation have resulted in thousands of acres of habitat loss that could be restored through proper management and treatment if resources and time were directed to these objectives as opposed to preparing an EIS for the mining and exploration withdrawal action.

The mining withdrawal on more than 2.7 million acres in Nevada is grossly disproportionate to the mining risks in Nevada identified in the *Greater Sage-Grouse Conservation Objectives Final Report* (2013) (COT Report):

> **Northern Great Basin.** Threats to this population were identified as wildfire and invasive species. At least part of this large population was described as stable to increasing from 2007-2010 and was predicted to have virtually no chance of declining below 50 birds in 30-100 years. Portions of this population are well connected with Idaho, Oregon, and Utah.
>
> **Western Great Basin.** The threats to these population management units are variable and site-specific, however, continuous, year-round use by wild horses, wildfires, and invasive species are prevalent. Resiliency needs to be improved with increased habitat suitability in terms of shrub densities and native grasses and forbs.

- The EIS must analyze the anticipated results from mineral withdrawal in terms of ameliorating the specific and most pervasive threats to GRSG in the SFA -- wildfire, invasive species, and wild horses -- and demonstrate how mineral withdrawal improves landscape resiliency.

- The ARMPA requires that conservation actions be implemented in accordance with the principles of adaptive management. The EIS must analyze a shorter withdrawal interval to allow for adaptive management processes to occur. If the BLM is compelled to follow through with mineral withdrawal at any level, Nevada recommends a five-year withdrawal period, during which time the GRSG populations are intensively monitored, at the expense of the Department of Interior, to evaluate the efficacy of the withdrawal treatment in terms of ameliorating population and habitat threats. Management actions can subsequently be modified if needed to achieve desired results, and the adaptive management process continued.

3. Withdrawal Area Boundary

Neither the BLM, the U.S. Fish and Wildlife Service, the U.S. Forest Service, nor any of our State agencies can provide a description or definition of the process used to delineate the SFA. There is no information regarding the data or analyses that justifies promoting these particular designated acres of priority habitat to a higher level of management infringement than the remainder of the priority habitat throughout the State.

The direct, indirect, economic, and cumulative impacts of SFA designation and the associated management actions were inadequately analyzed in the LUPA NEPA process and ROD. What we do know about the genesis of the SFA is that the State was not consulted for its expertise and input prior to the area delineation.

At Governor Sandoval's direction, the Nevada Department of Wildlife (NDOW), Nevada Department of Conservation and Natural Resources (DCNR), and the Nevada Division of Minerals (NDOM) worked cooperatively to analyze the SFA region with regard to existing, active exploration claims/mineral potential and priority GRSG habitat to evaluate an Alternative Mineral Withdrawal Area that achieves greater benefits for GRSG by exchanging high value habitat for areas with high mineral potential and existing claims.

Areas with high mineral potential were assessed and mapped by the Nevada Bureau of Mines and Geology (NBMG). Assessments were based on the evaluation of existing data sources including known mining districts, Plans of Operation, Notices of Intent, information from the BLM LR2000, and permitting data from NBMG Annual Nevada Mineral Industry reports. Areas with high mineral potential were further evaluated for proximity to active GRSG leks and habitat and fitted to avoid and minimize impacts to GRSG and avoid or minimize potential for habitat fragmentation. Areas within the SFA characterized as high mineral potential are shown in Attachment A.

Existing GRSG populations and habitat quality within and adjacent to the SFA were reviewed by NDOW to identify areas of lower quality habitat and importance to GRSG where mineral withdrawal would not significantly benefit existing populations. NDOW also identified GRSG populations adjacent to the SFA that would greatly benefit multiple populations of GRSG if they were exchanged for areas that had existing mining claims in the SFA. . Areas proposed to be exchanged from the SFA because of lack of habitat and areas proposed to be included in the mineral withdrawal area based on the benefit to GRSG are shown in Attachment B

Collaborative analysis of these two assessments results in an Alternative Mineral Withdrawal Area that must be analyzed as an EIS alternative. The alternative area does not change the SFA boundaries, only the mineral withdrawal area for purposes of minimizing conflict, protecting mineral exploration of known mineral importance, and providing enhanced benefits to GRSG by protecting more leks. Some of the effects the Alternative Mineral Withdrawal Area are described in Table 1.

Table 1. A comparison of the effects of the BLM Mineral Withdrawal Area and the Alternative Withdrawal Area in Nevada.

Area proposed for exclusion from the BLM Mineral Withdrawal Area based on limited quality habitat for GRSG	245,389 acres (approximately 9% of 2,730,045 acre BLM Withdrawal Area)
Area proposed for exclusion from the BLM Mineral Withdrawal Area based on conflicts with existing mining claims	310,003 acres (approximately 10% of 2,730,045 acre BLM Withdrawal Area)
Area proposed in exchange for mineral potential exclusion to the BLM Mineral Withdrawal Area based on high quality habitat, high population importance, and avoidance of conflict with mineral claims	394,082 acres (393,812 acres of which is priority habitat)
Net change in area between the BLM Mineral Withdrawal Area and the Alternative Mineral Withdrawal Area	-161,310 acres
Number of claims in the BLM Mineral Withdrawal Area excluded from conflict with GRSG	3,726 claims (99 percent of the 3,778 total claims in the BLM Mineral Withdrawal Area)
Number of leks excluded in the Alternative Mineral Withdrawal Area for habitat quality and mining claim criteria	5 active leks
Number of leks added in the Alternative Mineral Withdrawal Area	49 active leks
Net change in number of leks included in the Alternative Mineral Withdrawal Area	44 active leks

- The Mineral Withdrawal EIS must analyze the Alternative Mineral Withdrawal Area prepared jointly by NDOW and NDOM that minimizes conflicts with existing claims and results in measurable net benefit to GRSG by protecting more important habitat, leks, and populations.

4. Valid Existing Rights

The purpose of the proposed mineral withdrawal is protection of GRSG and its habitat from adverse effects of locatable mineral exploration and mining "subject to valid existing rights" (VER).

The BLM's Federal Register Notices do not define VER which has led to much confusion, particularly for exploration projects. The BLM and USFS ARMPA are the basis for the proposed withdrawal broadly defined VER as follows:

> Documented legal rights or interests in the land that allow a person or entity to use said land for a specific purpose and that are still in effect. Such rights include fee title ownership, mineral rights, rights-of-way, easements, permits, and licenses.[1]

While unpatented mining claims, mill sites and tunnel sites that are properly maintained by annual maintenance fee payments or annual assessment work under the U.S. mining laws would fall within this definition, BLM and USFS state and district offices are in need of additional guidance on the scope of VER to ensure a uniform application of this definition that preserves the substantial capital investments that have been made in reliance on the rights granted by the U.S. mining laws, and protects local economies that are dependent on a sound mineral exploration and mining economy.

Since 1992, pursuant to the General Mining Law, a claimant may hold and maintain an unpatented mining claim, mill site or tunnel site by paying the appropriate annual maintenance fee to the United States, or by conducting the requisite annual assessment work and making an appropriate annual filing with BLM. The holder of a properly maintained mining claim has the exclusive right to use lands within the claim for mineral exploration and mining . In enacting the requirement for annual claim maintenance fees, Congress sought to eliminate uncertainties associated with the historic annual assessment work requirements, and establish a clear line by which claimants can be assured that they have a valid right without the need for lengthy or complex administrative determinations.

Several thousand unpatented mining claims and mill sites have been located by numerous individuals and entities within the proposed Mineral Withdrawal Area. In Nevada alone, more than 3,700 claims exist in the proposed withdrawal area for which significantly more than a half million dollars are paid to the United States yearly in annual maintenance fees. See Attachment A. Many of these areas are highly prospective for economic mineralization and tens of millions of dollars have been expended by the claim owners in conducting exploration activities related to those claims in reliance on the rights granted by the U.S. mining laws. While only a small fraction of those claims might ultimately be mined resulting in limited and localized disturbance, preserving the current rights of those claimants, including reasonable access rights, will promote several sound national policies, including:

- Promoting Congress' intent to establish a clear line by which mining claims can be maintained through payment of annual maintenance fees.
- Recognizing the substantial investment of resources that have been made in reliance on the current claim maintenance requirements.

[1] *See, e.g.,* USFS, Greater Sage-grouse Record of Decision, Idaho and Southwestern Montana, Nevada, Utah, p. 137 (Sept. 2015); BLM, Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment, p. 5-24 (Sept. 2015).

- Avoiding the high costs, administrative burdens and permitting delays that would be associated with a requirement to conduct claim-by-claim validity determinations.

- Supporting local communities and regional economies that rely substantially on a sound mineral exploration and mining economy.

An unpatented mining claim, mill site or tunnel site that has been maintained in accordance with the annual filing and fee requirements of the General Mining Law and Federal Land Policy and Management Act meets the definition of VER as set forth in the BLM and USFS sage-grouse plan amendment documents. The following language is a suggestion for clarifying the definition of VER for mineral exploration projects to provide clear national guidance to agency field personnel that maintains consistency with existing laws and policies:

> Documented legal rights or interests in the land that allow a person or entity to use said land for a specific purpose and that are still in effect. Such rights include fee title ownership, mineral rights and associated access rights, rights-of-way, easements, permits, and licenses. For mineral exploration projects, valid existing rights include unpatented mining claims, mill sites and tunnel sites that were located prior to the effective date of the final withdrawal notice and that have been maintained by the timely payment of an annual maintenance fee or the satisfaction of applicable annual assessment work and annual filing requirements pursuant to the U.S. mining laws and the Federal Land Policy and Management Act.

5. Pilot project to Demonstrate Alternative Management Approach to Constrain Mineral Exploration and Avoid Loss of Critical Sage-Grouse Habitat

The SFA area in Humboldt County known as the Lone Willow Population Management Unit (PMU) and also known as the Opalite District-McDermitt and Kings Valley Lithium claim blocks has well documented, vital importance to both the mineral and wildlife resources in Nevada. The Geological Society of America has identified lithium as a critical mineral resource (GSA 2013). Lithium has also been acknowledged by the Department of Interior as a mineral of national importance. The economic importance of the lithium deposits in Humboldt County was analyzed by Applied Analysis (2016) who wrote the following:

> The [Western Lithium] project is expected to have a material economic impact on the state of Nevada and the communities in which it operates. Economic impacts sourced directly to the Company's investment are estimated to reach approximately $2.5 billion over the life of the project. When secondary impacts (indirect and induced) are considered, total economic output is estimated to reach nearly $3.4 billion. In addition to substantial economic output, the project is estimated to support nearly 9,000 person-years of employment and $0.5 billion in salaries in wages over the life of the project. Fiscal impacts (public revenues) to state and local governments during the same timeframe are estimated to exceed $100 million over the life of the project, or approximately $4.3 million annually over the course of the 24-year life cycle.

The Lone Willow GRSG PMU is among highest priority PMUs within the State of Nevada and harbors one of the most dense sage-grouse populations in Nevada. Lone Willow PMU includes the Bilk Creek, Montana, and Double H Mountain ranges. The bulk of the sage-grouse population resides in the Montana Mountains. Mark-recapture efforts conducted from 2001 through 2005, mainly within the Montana Mountains, calculated population estimates for each of these years using a Lincoln Index model. The population estimates ranged from a low of 7,264 grouse in 2001 to a high of 13,625 grouse in 2004 (NDOW 2006, unpublished report). There are 65 active and pending active leks located within this PMU ranging in size from 2 to 46 males in attendance in 2015. Approximately 50 of these leks are within the Montana Mountains portion of the PMU. This PMU is not only important within the State of Nevada, but is also important to a larger population of sage-grouse that extends into Oregon and occupies the Trout Creek and Oregon Canyon Mountain ranges.

The Holloway Fire, which occurred in 2012, burned 460,842 acres, much of which was in priority habitat in both Nevada and Oregon. The fire burned significant portions of the Bilk Creek Mountains in Nevada and the Trout Creek Mountains in Oregon. Much of the more highly suitable sage-grouse habitat in the Montana Mountains was spared from the fire. In turn, the Montana Mountains likely now serves as a source population that will help repatriate the Trout Creek and Bilk Creek Mountain ranges as they recover from the Holloway Fire.

The dual importance of these resources to the State of Nevada and to the nation has led to consensus opinion that the area should be carefully managed in a collaborative manner between the Federal and State governments. Nevada strongly recommends that approximately 82,250 acres be designated as the Lone Willow Pilot Project which will be excluded from the BLM Mineral Withdrawal Area and managed as a special experimental stewardship project as allowed under the Public Rangelands Improvement Act or similar existing authority. The purpose of the pilot project is to cooperatively manage the mineral and wildlife resources on a case-by-case, site-scale basis that will incorporate valuable mitigation strategies and requirements using the State Conservation Credit System and incorporating a strong local rehabilitation/reclamation component with research opportunities. The Lone Willow Pilot Project will be managed by a collaborative management group of professional geologists, wildlife biologists, range ecologists, and reclamation specialists based on local scientific findings. The Management Group will define and operate under a suite of guidelines which will be approved by the BLM, NDOW, and NDOM, such as:

- Advanced planning, data collection and analyses, and mitigation will occur prior to ground disturbance in the pilot project area to fully incorporate the principles of avoid, minimize, and mitigate the direct and indirect impacts of the proposed exploration and mine projects.

- Mitigation alternatives will prioritize on-the-ground habitat restoration in the Lone Willow PMU.

- Mineral exploration activity within the pilot project area will be limited to existing active claims at the time of the final federal register notice of proposed withdrawal.

- All exploration projects will be permitted in accordance with existing BLM Plan of Operation procedures, including projects less than 5-acres in size.

6. Socio-Economic Analysis

The direct, indirect, and cumulative impacts to geology, mining, and exploration from mineral withdrawal in the SFA were not analyzed in the LUPA FEIS or ROD. These impacts are complex and far reaching to the local and state economies.

- Socio-economic impact analyses are critical for compliance with NEPA and must be thoroughly analyzed and disclosed in the Mineral Withdrawal EIS following academically approved methods and scope recommended by Dr. Thomas R. Harris, UNR College of Business Center for Economic Development (2015) (detailed in Attachment B) that at a minimum includes the following:

    1. A study area should be developed that is agreed upon by the BLM and the State.
    2. The IMPLAN model data should be validated and verified.
    3. The production function for different mining sectors should be developed to be sure they reflect the mining industry.
    4. A Social Accounting Matrix should be developed and verified and validated.
    5. A computable General Equilibrium model should be developed and scenarios as to land withdrawal for GRSG should be developed and applied.

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Office of the Governor

January 15, 2016

Neil Kornze, Director
Bureau of Land Management
U.S. Department of Interior
1849 C Street NW (WO-200)
Washington, D.C. 20240

Submitted electronically to:
sagebrush_withdrawals@blm.gov

Re: Federal Register Notice September 24, 2015: BLM and U.S. Forest Service Proposed Withdrawal and Segregation of 2.7 million acres within Sagebrush Focal Areas acres in Nevada from location and entry under the 1872 Mining Law

Dear Director Kornze:

This letter formally transmits the State of Nevada's scoping comments for the proposed mineral withdrawal Environmental Impact Statement (EIS) published in the Federal Register on September 24, 2015.

Let me start by saying excluding any lands from mining and exploration, or from any other authorized multiple use, is inconsistent with the Nevada Greater Sage-Grouse Conservation Plan (Plan) and the Conservation Credit System (CCS), which I believe is the best conservation plan for Nevada. Nevada's Plan and CCS create meaningful disincentives for mining and exploration in priority sage-grouse management areas through compensatory mitigation requirements that achieve and quantify a *net conservation gain* for greater sage-grouse. The CCS is also consistent with President Obama's recent Mitigation Policy. I believe the proposed land withdrawal will not be able to show any measurable results except for the demise of the mineral exploration industry in Nevada. The urgency to implement the withdrawal proposal prior to conducting the proper analysis needed to evaluate the efficacy of the action and the socio-economic impact of the action is unclear.

The attachments to this transmittal letter provide details of Nevada's comments on the proposed withdrawal application as well as our scoping comments on the Environmental Impact Statement. A summary of our comments follow.

1. As I stated before, Nevada proposes a No Action Alternative and prefers our state Plan and CCS as the proper management and conservation plan for Nevada.

2. We disagree with the urgency of the mineral withdrawal when there are other threats to greater sage-grouse and habitat that have not been adequately addressed. For instance, the out-of-control wild horse population in Nevada has resulted in significant loss of habitat and will continue until the horses are managed at the appropriate management levels. The loss of habitat in Nevada from wildfire is staggering and there are thousands of acres in need of rehabilitation, which directly affects greater sage-grouse habitat. Devoting time and resources to these two management issues would be of greater benefit to the habitat than mineral withdrawal when it is known that disturbance from mining operations and exploration has a minimal effect on habitat. I also propose that if there is a withdrawal, it should only be for a five year period during which time the greater sage-grouse populations are intensively monitored to evaluate the efficacy of the withdrawal treatment on habitat and population threats.

3. If the withdrawal application is approved, Nevada has developed maps that propose better boundaries that take into account existing mining operations and exploration activities that are crucial to the economy of Nevada and the nation. I directed the Department of Wildlife, Department of Conservation and Natural Resources and the Nevada Division of Minerals to work cooperatively to analyze the Sagebrush Focal Area (SFA) for its mineral potential and activity and to identify high value, priority greater sage-grouse habitat to better inform the BLM as decisions are made. As a result of this exercise by my state agencies, attached are maps whose boundaries achieve the stated goal of protecting priority habitat for the greater sage-grouse.

4. There is much confusion and there has been considerable discussion about protecting existing rights in the SFA. It is essential that all valid existing rights, plans of operation, notices of intent, and all claims where claim maintenance fees have been paid pursuant to the General Mining Law and the Federal Land Policy and Management Act be considered valid existing rights and excluded from mineral withdrawal. My staff and state resource departments stand ready to work with the BLM to properly define and identify these rights and claims.

5. There is an area in the SFA identified for withdrawal that has outstanding greater sage-grouse habitat and is also a world class lithium deposit, where there are hundreds of claims and a robust exploration operation underway. This area needs to be able to provide the lithium needed to continue our goal of clean energy as well as protect some of the best sagebrush habitat for the greater sage-grouse. It is also an area that was badly burned by the Holloway Fire and is in desperate need of rehabilitation. We propose using this area as a pilot project in order to demonstrate an alternative, adaptive management approach that constrains mineral exploration while avoiding the loss of critical sage-grouse habitat and rehabilitating a wildfire burn area. We believe this can be done with cooperation between agencies, state and federal, and the private company working to develop a management plan that achieves all the stated goals.

6. We propose a thorough, comprehensive socio-economic analysis of the direct, indirect and cumulative impacts to geology, mining and exploration from mineral withdrawal in the SFA. We do not believe these complex impacts were adequately analyzed in the Land Use Planning

Amendment, the Final Environmental Impact Statement or the Record of Decision and that they will have far reaching consequences to the local and state economies. In consultation with Dr. Thomas R. Harris, University of Nevada, Reno, College of Business, Center for Economic Development, several components were developed that must be included in such an analysis.

Again, I believe the final decision of the proposed withdrawal should be a **No Action Alternative** and that the Nevada Plan and CCS be fully implemented. If you choose not to accept the recommendations proposed by the State of Nevada, which are the best for managing and enhancing habitat, I ask that serious consideration be given to the attached scoping comments, maps and details attached to this letter.

Sincere regards,

BRIAN SANDOVAL
Governor

Humboldt County
Board of Commissioners

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January 1, 2016

Mr. Neil Kornze
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Mr. John Ruhs,
Nevada State Director, Bureau of Land Management
Nevada State Office
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Re: Scoping comments relative to Federal Register 80FR 57635 (September 24, 2015), 80 FR 63583 concerning mineral withdrawal proposals in Humboldt County Nevada.

These comments and scoping letter are in response to the Federal Register notices of September 24, and October 20. The noticed action involves an application filed by the BLM and Forest Service requesting the Secretary of the Interior to withdraw lands (subject to valid existing rights,) of approximately 10 million acres of Federal lands located in Idaho, Montana, Nevada, Oregon, Utah and Wyoming. Specifically, the lands proposed for withdrawal in Nevada contain approximately 2,797,399 acres in Elko, Humboldt and Washoe Counties. The proposed withdrawals are a direct result of identified actions outlined within "Sage Brush Focal Areas" described in the Greater Sage Grouse Resource Management Plan Amendment.

The underlying need as identified in the ARMP is to provide additional protection to areas the BLM has identified as "Sage Brush Focal Areas". This request implies that the withdrawals provide additional protection above and beyond what the ARMP provides for priority habitat. Therefore, EIS alternatives must identify what management opportunities exist that will provide additional protection. In addition, the "eminent Threat" to sage grouse habitats must be specifically identified as to location and pending threats present. If the proposal cannot identify additional protection specific to proposed claim activity and if there is no additional protection suggested, the withdrawal is simply duplicative.

Under the BLM's "purpose and need statement", "The purpose of the proposed withdrawal of the Sagebrush Focal Areas in priority Habitat Management Areas is to protect the greater Sage Grouse and its

habitat from adverse effects of locatable mineral exploration and mining subject to valid existing rights." 80CFR 57637. The purpose and need statement is a key element in the development of alternatives in the EIS. The purpose and need statement is at best a broad brush approach to a very large landscape using a statistical model as a basis for alternatives and the assessment that additional protections are warranted. The model also sets the boundaries of the SFA; USGS researchers admitted to the Sage Brush Eco-System Council that the boundaries are estimated based on computer generated probabilities with rough data collected from "coarse" resolution land-sat satellite imagery. Without accurate, statistically defensible data, the boundaries of the SFA are a best guess and cannot represent "best science" without extensive ground truthing efforts. Until the model is validated in this way, SFA boundaries, management assessments and proposals will remain arbitrary and capricious. Focused managed alternatives outlined within the EIS will dramatically limit exploration of mineral resources during the life of the withdrawal. The proposal to limit economic activity within Humboldt County must be based on data and boundaries which are in agreement as critical to sage grouse habitat. At this date, there is not agreement among management professionals that additional restrictions are warranted.

Without an accurate assessment of mineral resources found within the boundary of the SFA, the government will be unable to evaluate the economic impacts to each region affected by the mineral withdrawal. Ninety-seven present of the non-PHMA land contains hard rock mining locations. Within the government documents those areas are not fully defined or differentiated. Mining activity is not defined as to type or extent. Interestingly, "hard rock mining locations" are not broken down into types of mining. Further, the BLM does not say what percentage of valid, existing mining rights fall within PHMA's, effectively rendering those lands unavailable for development. This specific and crucial data is omitted from the proposal and will effectively skew analysis and minimize, on paper, the effects of the withdrawal to industry and the county.

Accurate economic impact analysis is of critical importance to state and local governments in assessing the impacts of this type of proposal. Information obtained from Dr. Harris from the University of Nevada, Department of Economics directs agencies and governments in the structure and development of detailed economic analysis. The site specific details in developing models for the assessment of the long and short term impacts of proposed alternatives will require considerable economic commitment by state and local governments. Once the proposed alternatives are developed and a preferred alternative is identified, economic analysis of those actions will begin. Dr. Harris estimates that the analysis of "input-output" models will require upwards of 12 months to complete. Only after those studies are completed will the government be able to evaluate the proposed actions required by law. This analysis should evaluate the socio-economic impacts of both the reduced mineral exploration activities that will result from the withdrawal, which will immediately and adversely affect local economies, as well as the longer–term adverse socio-economic impacts due to the development of fewer mining projects.

State and local economic and operational interests will require extensive evaluation of the existing Geology and Mineral potential of the proposed withdrawal area. Under FLPMA 204C(2)(12), a full and complete report from mining engineers and engineering geologists should include information on general geology, known mineral deposits, historical mine production, proposed production, mining claims, mineral leases, and a listing of all valid claims contained within the withdrawal boundary. In addition, a complete evaluation of future mineral potential combined with a comprehensive market review of potential market demand is necessary.

Based on the USFWS "not warranted listing", and an agency determination that within the SFA boundary for GSG, "mining does not pose a significant effect on habitat," and that further USFWS analysis

determined that "total historical mining in the SFA "affects less than 0.1% of the sage grouse occupied range" (FR59859, October 2, 2015, pg. 59915) the proposed designation of 2.8 million acres for withdrawal is a grossly disproportionate proposal given the intended purpose of the withdrawal.

The EIS must coordinate SFA boundaries and mineral withdrawals recognizing the ongoing needs of state and local governments for continued use and expanded needs for aggregates suitable for roads construction and maintenance.

Humboldt County supports an EIS preferred alternative whereby withdrawals occur only upon adaptive management protocols following ground truthing on an individual project basis. The SFA boundaries could be used a basis for further review for withdrawal. This alternative might also incorporate the state conservation credit system within SFA's. In the cases where a comprehensive review has suggested habitat conflict exists, the credit system could be used as mitigation. In those cases where conservation credit or mitigation is not offered and credits do not exist, withdrawal would be warranted.

In addition, all alternatives analysis within the EIS shall fully recognize the Humboldt County Master Plan and the management provisions identified within recommendations offered by the Nevada Sage Brush Ecosystem Council

Humboldt County wished to retain standing in this matter and looks forward to a collaborative solution to this issue in the months to come.

Respectfully,

Marlene Brissenden

Marlene Brissenden
Chairman,
Humboldt County Board of Commissioners.

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January 15, 2016

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Mr. John Ruhs,
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Sagebrush Withdrawal EIS Comments
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RE: Comments for the September 24, 2015 Notice in the Federal Register at 80 FR 57635 on the Proposed Withdrawal of Sagebrush Focal Areas in Nevada and an Associated Application and Environmental Impact Statement

Dear Director Kornze, State Director Ruhs, and Forest Supervisor Dunkleberger:

As an inter-governmental association for Nevada's county governments, the Nevada Association of Counties ("NACO") greatly appreciates the opportunity to provide comments for the Proposed Withdrawal Application and scoping comments on the Environmental Impact Statement ("EIS")

for Proposed Withdrawals within Sagebrush Focal Areas ("SFAs").[1] NACO works with county government to adopt and maintain local, regional, state and national cooperation which will result in a positive influence on public policy and optimize the management of county resources. As the state association for all 17 of Nevada's counties, it is our belief that county government, being closest to the people, is best positioned to understand and provide for fundamental needs.

This comment and scoping letter is in response to the Bureau of Land Management ("BLM") Notice published in the Federal Register at 80 FR 57635 on September 24, 2015, 80 FR 63583 on October 20, 2015, and 80 FR 57635 on November 13, 2015.[2] This Notice constitutes an application filed by BLM requesting the Assistant Secretary of the Interior for Land and Minerals Management to withdraw, subject to valid existing rights, approximately 10 million acres of BLM-managed public and National Forest System lands located in the States of Idaho, Montana, Nevada, Oregon, Utah and Wyoming from location and entry under the United States mining law, but not from leasing under the mineral or geothermal leasing or mineral materials laws. The areas described in Nevada contain approximately 2,797,399 acres across Elko, Humboldt, and Washoe Counties. This Notice also requests scoping comments for the Environmental Impact Statement prepared pursuant to the National Environmental Protection Act ("NEPA"), 43 U.S.C. § 4331 *et seq.*

For a State like Nevada with a vibrant economic and cultural interest in mining and agriculture, the withdrawal of public lands from mineral entry and associated land management restrictions will prove impactful, perhaps changing forever Nevadans ways of life. It is important now, more than ever, that the BLM and United States Forest Service ("USFS") (together, "Agencies") work closely with local government to ensure the protection of the Greater Sage Grouse is balanced with the need to protect Nevada's citizens; and perhaps discover that the two are not mutually exclusive.

This withdrawal process is governed by Sections 202 and 204 of the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1712, 1714 and with NEPA, 43 U.S.C. § 4331 *et seq.* Once the application for withdrawal is submitted to the Secretary, the Secretary must determine whether to reject the application or withdraw the lands from mineral entry.[3]

The proposed withdrawals of these SFAs are a direct result of the Nevada and Northeastern California Greater Sage-Grouse Approved Resources Management Plan Amendment signed September 21, 2015 ("ARMPA") and the recommendations provided by the FWS to the BLM in the Fish and Wildlife Service ("FWS") Memo from Director Dan Ashe ("FWS Memo") to provide

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[1] These comments are made in good faith with the aim to provide collaborative, thoughtful and substantive information to help inform decision-making on this important issue. NACO remains concerned about the underlying information, or lack thereof, used to support the conclusion that this withdrawal should occur. Instead, NACO understands that because the withdrawal process has begun it is important to provide input and ensure that the withdrawal process proceed properly. These comments may not be used to the extent that they conflict within the context of the lawsuit regarding the underlying ARMPA. It is in NACO, and Nevada's Counties' interest that the State Plan developed by the Sagebrush Ecosystem Program be implemented without interference.

[2] All materials cited herein, the majority of which are readily available online, are incorporated in full by reference. NACO has included a Memo that is not available online as Attachment A to this comment letter.

[3] FLPMA § 204(b); 43 U.S.C.A. § 1714(b).

regulatory assurances to help avoid a listing under the Endangered Species Act ("ESA").[4]

NACO recognizes that the Agencies are, and should be, encouraged to rely on one another to draw upon collective resources. While the work that the FWS does is extremely important, it is also important to consider that the FWS does not have jurisdiction over any non-migratory species not on the endangered species list, which includes the Greater Sage Grouse. Because the FWS Settlements resulted in an accelerated listing schedule, a listing under the ESA has become a threat resulting in what can only be described as a FWS veto power over the land management planning process. This veto power has resulted in an equally accelerated decision-making process that overrides the State Plan and lacks the use of credible science regarding extremely sensitive socioeconomic and environmental issues. It is important that the BLM think through this Withdrawal process before making a determination that will commit irretrievable resources for twenty plus years.

Pursuant to NEPA § 102(2)(C), the BLM will prepare an EIS for this proposed withdrawal upon finalization of the scoping period.[5] Most importantly, FLPMA § 204 identifies specific analyses that the Agencies must undertake prior to the Withdrawal of public lands from operation of the Mining Law of 1872.[6] A proper determination is one which fairly considers all 12 factors listed in 43 USCS § 1714 and the BLM's Regulations at 43 CFR 2310.3-1 explaining in detail the proposed withdrawal's effects on current natural resource uses, current land users, incompatibility with current land uses, and **effect on state and local government interests and regional economy**.

The first portion of this letter will focus on the Withdrawal Petition and underlying assumptions as published.[7] The remainder of this letter will describe the remaining Application and NEPA requirements and suggest ways the Agencies can work to fulfill them in concert with local government.

I. Comments on the Proposed Withdrawal Publication/Petition

Please accept this section as NACO's response to provide comments on the proposed withdrawal petition as described in 80 FR 57635. Publication of a withdrawal proposal in the Federal Register initiates a segregation period lasting up to two years during which period the activities specified in the notice are restricted.[8] This application segregates and seeks "to withdraw approximately 2,797,399 million acres of public and National Forest System lands located in Elko, Humboldt, and Washoe Counties in Nevada from location and entry under the United States mining laws, but not

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[4] *Record of Decision and Approved Resource Management Plan Amendments for the Great Basin Region, Including the Greater Sage-Grouse Sub-Region of Idaho and Southwestern Montana, Nevada and Northeastern California, Oregon, and Utah*, US Department of the Interior Bureau of Land Management (September 2015) ("ARMPA"); *Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes*, Memorandum from Director Dan Ashe of the Fish and Wildlife Service to Bureau of Land Management Director Neil Kornze and US Forest Service Chief Tidwell, (October 27, 2014). ("FWS Memo").

[5] 43 U.S.C. § 4332

[6] 43 U.S.C. § 1714

[7] Notices published in the Federal Register can be found at 80 FR 57635 on September 24, 2015, 80 FR 63583 on October 20, 2015, and 80 FR 57635 on November 13, 2015.

[8] 43 C.F.R. § 2310.2(a).

from leasing under the mineral or geothermal leasing or mineral materials laws."[9]

The BLM has chosen to submit the application for withdrawal separately from the proposal or petition.[10] Submission of withdrawal petitions must contain:

> (1) The office originating the petition (State Director's Office); (2) The type and purpose of the proposed withdrawal action (See § 2300.0-5(h) of this title) and that the petition pertains to the making of a withdrawal; (3) A legal description of the entire land area that falls within the exterior boundaries affected by the petition, together with the total acreage of such lands, and a map of the area; (4) The extent to which and the time during which any public lands that may be involved in the petition would be temporarily segregated and the temporary land uses that may be permitted during the segregation period, in accordance with § 2310.2 of this title; and (5) **A preliminary identification of the mineral resources in the area**. (e) Upon the approval by the Secretary of a petition for withdrawal, the petition shall be considered as a Secretarial proposal for withdrawal, and notice of the withdrawal proposal shall be published immediately in the Federal Register in accordance with § 2310.3-1(a) of this title.[11]

The following information must also be provided for the withdrawal petition to be sufficient under FLPMA. 43 CFR 2310.3-1. A withdrawal application must provide the following information as part of the public notice:

> (4) The type of withdrawal action that is being requested (See § 2300.0-5(h) of this title) and whether the application pertains to the making, extension or modification of a withdrawal; (5) A description of the lands involved in the application; (7) The public purpose or statutory program for which the lands would be withdrawn. If the purpose or program for which the lands would be withdrawn is classified for national security reasons, a statement to that effect shall be included; but, if at all possible, a general description of the use to which the lands would be devoted, if the requested withdrawal is allowed, should be included. In the case of applications that are not classified for national security reasons, an analysis of the manner in which the lands as well as their natural resources and resource values would be used to implement the purpose or program shall be provided; (8) The extent to which the lands embraced in the application are requested to be withheld from settlement, sale, location or entry under the public land laws, including the mining laws, together with the extent to which, and the time during which, the lands involved in the application would be temporarily segregated in accordance with § 2310.2 of this subpart; (9) The type of temporary land use that, at the discretion of the authorized officer, may be permitted or allowed during the segregation period, in accordance with § 2310.2 of this subpart; (10) **An analysis and explanation of why neither a right-of-way under section 507 of the Act (43 U.S.C. 1767), nor a cooperative agreement under sections 302(b) (43 U.S.C. 1732(b)) and 307(b) (43 U.S.C. 1737(b)) of the act would adequately provide for the proposed use**; (11) The duration of the withdrawal, with a statement in justification thereof (see § 2310.3-4 of this title). Where an extension of an existing withdrawal is requested, its duration may not exceed the duration of the existing withdrawal; (12) **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. The statement shall include a study comparing the projected costs of obtaining each alternative**

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[9] 80 FR 57635.
[10] 43 C.F.R. §§ 2310.3-1, 2310.1-3(c), 2310.1-2.
[11] 43 CFR 2310.1-3

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; (13) **A statement as to whether water will or will not be needed to fulfill the purpose of the requested withdrawal action**; and (14) The place where records relating to the application can be examined by interested persons.[12]

(A) Failure to Preliminarily Identify the Mineral Resources in the Area

The notice does not provide the requisite "preliminary identification of the mineral resources in the area."[13] This information is extremely important because it is the reason this action is occurring. The FWS's initial findings on March 23, 2010 for petitions to list the Greater Sage-Grouse as Threatened or Endangered at 75 FR 13910 highlight that the FWS does not "have comprehensive information on the number or surface extent of mines across the range," but that "Nevada (Management Zones III, IV, and V) is ranked second in the United States in terms of value of overall nonfuel mineral production in 2006 (USGS 2006, p. 10)."
The FWS listing determination states that the Agencies do not know how much mining impacts Greater Sage Grouse. On October 2, 2015, the FWS issued another finding stating that "Consistent with our 2010 finding, we do not have a comprehensive dataset about existing and proposed mining activity to do a quantitative analysis of potential impacts to sage-grouse."[14]

> "...Overall, the extent of [mining] projects ***directly affects less than 0.1 percent of the sage-grouse occupied range***. Although direct and indirect effects may disturb local populations, ***ongoing mining operations do not affect the sage-grouse range wide***."[15]

Also, FWS quantifies the huge area of the western U.S. that contains GSG habitat:

> "The sagebrush ecosystem upon which the sage-grouse depends **remains one of the largest, most widespread ecosystems in the United States, spanning approximately 70 million ha (173 million ac)**".[16]

These findings are problematic, as the State of Nevada, Commission on Mineral Resources Nevada Division of Minerals ("Division of Minerals") does have a comprehensive dataset about existing and proposed mining activity.[17] It is possible to perform a quantitative analysis of potential impacts to sage-grouse.

Request I-A: That the BLM submit a notice that describes the mineral resources in the area. TheBLM should consult with the State of Nevada, Commission on Mineral Resources Nevada Division of Minerals and the US Geological Survey. It would be helpful to preliminarily review and

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[12] 43 CFR 2310.1-2
[13] 43 CFR 2310.1-3(5).
[14] 80 F.R. 59858, 59915 (October 2, 2015).
[15] *Id.*
[16] *Id.* at 59933.
[17] *Information Related to Sage Grouse Management Plan and Proposed Mineral Withdrawal*, State of Nevada Commission on Mineral Resources Division of Minerals (Aug. 24, 2015)("Division of Minerals Site"), *retrieved at http://minerals.nv.gov/home/features/Mineral,_Geothermal_and_Oil___Gas_Potential_Maps_of_Sagebrush_Focal_Areas_-_6/24/2015/*

reference the materials provided on the Division of Minerals website to provide this information, at http://minerals.nv.gov/home/features/Mineral, Geothermal and Oil Gas Potential Maps of Sagebrush Focal Areas - 6/24/2015/.

(B) Alternatives Are Available, and Agencies Lack Scientific and Procedural Support for the Segregation Boundaries and Resulting Withdrawal

The BLM has, pursuant to FLPMA § 204(a), segregated 2,797,399 million acres within the SFA from Mineral Entry.[18] The segregation precludes adverse parties from establishing new rights in the SFA area prior to actual withdrawal. The notice does establish the segregative effect for up to 2 years while the application is processed.[19]

The issue with the conclusion that alternatives are not available is four-fold: **First, the public was not provided a notice and comment period to provide input on the boundaries and potential effectiveness of the SFAs, as they were first presented in the FEIS for the ARMPA. Second, New Science and Mapping Require that the BLM Re-Initiate the Segregation and Notices, and Submit an SEIS. Third, the science the Agencies purport to rely on does not support the SFA boundaries. Fourth, there are available alternatives to the withdrawal.**

1. The Public Has Not Had A Meaningful Opportunity To Comment On The Segregation Boundaries

The use of the ARMPA to segregate the 2.8 million acres designated as SFAs for withdrawal presupposes that the public was provided an opportunity for public hearing and meaningful comment. It also presupposes that reasonable alternatives to the SFAs were presented, which they were not. The public did not have a hearing or comment period prior to the application regarding the segregation and withdrawal boundaries because withdrawals first appeared in the FEIS.

The University of Nevada, Reno College of Agriculture, Biotechnology, and Natural Resources ("UNR CABNRs") Dean William A. Payne summarized these concerns in a supporting memorandum to a Protest of the 2015 Land Use Plan Amendment Final Environmental Impact Statement ("LUPA FEIS"), highlighting a "Lack of transparency regarding criteria used to determine landscapes essential to conservation of the species undermines public confidence":[20]

> "One of the most troubling aspects regarding process is inadequate time given to study a large document that had significantly changed since its draft form. The DEIS was issued on November 22, 2013, and the FEIS on May 28, 2015. Thus, while the BLM took more than one and one-half years to revise the EIS, the public was only allowed 30 days to protest the FEIS, which exceeds 2,000

[18] 43 USCA § 1714(a)
[19] 80 F.R. 57635; 43 C.F.R. 2300.0-5(m).
[20] William A. Payne, Memorandum to JJ Goicoechea, Sagebrush Ecosystem Council Chairman, Dean's Office for the College of Agriculture, Biotechnology and Natural Resources, University of Nevada, Reno, Table 1 (July 12, 2015)(CABNR Memo)

pages in length, and 60 days for consistency review. This despite the fact that there were major departures from and additions to the DEIS, and lack of response to or incorporation of many comments that were well grounded in science [For example, Humboldt County (2014) submitted a 40 page critique of the DEIS written largely by a University of Nevada Cooperative Extension expert, replete with a great many scientific citations. It was virtually ignored in the FEIS]. Some revisions included important changes in methodologies, with insufficient justification or explanation for the public, making it difficult if not impossible even for scientific experts to make an informed response."[21]

Request I-B-1: That the BLM thoroughly explain and cite to scientific information describing how the SFAs were designated.

2. New Science and Mapping Require that the BLM Re-Initiate the Segregation and Notices, and Submit an SEIS

Secretary of the Interior Sally Jewell has committed to adopt the Sagebrush Ecosystem Council's ("Council's") new map immediately for project-level decisions.[22] This new map reflects new science that impacts the SFAs. It is NACO's position that the map should be adopted only in context of the State Plan, which permits ground-truthing and does not support wholesale programmatic exclusions or withdrawals.

The new map referenced is the "Management Category Map (Draft December 2015) released by the Sagebrush Ecosystem Council ("Council") on December 11, 2015 at the Nevada Department of Wildlife ("NDOW"). At that meeting, Dr. Pete Coates presented these new maps (Coates et al. 2014, 2015)("Coates Map"). This commitment raises additional concerns. First, this map is specifically designed for program-level decisions, not project-level decisions. Management areas within the Coates Map simply triggers the need to ground-truth at the project level to help identify the habitat needed to implement the State Plan's Conservation Credit System. This is why the Council categorized management areas rather than designate SFAs or Withdrawal areas and that is what the State Plan supports. This was discussed in detail at the public meeting. The Coates Maps are based on modeling and do not provide confidence intervals or provide information about sample sizes. These maps contain disclaimers that say it is only meant as a model, for further ground-truthing. To adopt this map for project-level decisions is inappropriate and not supported by the best available science.

Second, this map is significantly different than what is provided in the ARMPA, especially in the Northern areas of Nevada. If there is a commitment to adopt this map, then the BLM must also reconsider the strongholds in light of this new scientific information. The BLM adopted the initial map presented by Dr. Pete Coates. Prior to the date the Record of Decision ("ROD") was signed, the BLM was aware that Dr. Pete Coates had this information but that the new map was not ready. Instead of waiting or preparing an SEIS,

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[21] CABNR Memo at 1.

[22] Sandoval Meets with Secretary of the Interior, Delivers Update on Greater Sage-Grouse Negotiations, Nevada Governor Brian Sandoval (Dec. 4, 2015), *retrieved at*: http://gov.nv.gov/News-and-Media/Press/2015/Sandoval-Meets-With-Secretary-of-The-Interior,-Delivers-Update-on-Greater-Sage-Grouse-Negotiations/

the Agencies failed to disclose that this information was being gathered and that the goal was to adopt that map in the future.

It is therefore curious that the SFAs would not change even as new information becomes available for that very area. This new information requires a Supplemental Environmental Impact Statement ("SEIS") under NEPA. Because the new information is related to the habitat mapping, this directly impacts the SFAs and withdrawals, especially in northen Elko County where a lot of the segregation is located. Therefore, the withdrawals should be delayed until at a minimum the SEIS is provided.

A Supplemental EIS must be prepared by an agency where "(1) changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or (2) new information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS."[23] To determine whether these two factors are present, the Agency must apply "a 'rule of reason,' if there remains major federal action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered."[24] This "rule of reason" is applied the same way the decision whether to create an EIS is applied.[25] That the SFAs only appeared in the FEIS yet resulted in this entire Withdrawal and additional EIS process legally requires an SEIS. Further, the new maps if adopted by the Agency will also require an SEIS or a new EIS altogether.

Request I-B-2: That the BLM publish a Supplemental Environmental Impact Statement ("SEIS") for public notice and comment regarding the SFAs and new mapping information. This information and public discussion at the Sagebrush Ecosystem Council meeting on December 11, 2015 makes clear that the purpose and use of the maps require further analysis, discussion, and reconciliation to ensure accurate and implementable Sage-Grouse protection measures. This also shows the need to provide an SEIS and to halt the segregation and Withdrawal period until that analysis is completed.

3. The Science Cited Does Not Support SFA Boundaries

A withdrawal of the SFAs constitutes an irretrievable commitment of resources for an action that may not even benefit Sage-Grouse, and that would undermine the State Plan. Despite this irretrievable commitment, the public does not know how the SFAs were developed: "The methods provided for delineation of the SFAs are not explicit or transparent, and therefore of poor scientific quality."[26]

This withdrawal process adopts wholesale the assumption that the SFAs constitute the best habitat for Sage Grouse; and that it can only be protected by withdrawal. While it is important to work closely with the FWS to implement regulatory assurances like the State Plan to continue to conserve

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[23] 23 C.F.R. § 771.130(a)
[24] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 363 (1989).
[25] *Id.* At 373-74.
[26] CABNR Memo at Table 1.

Greater Sage Grouse habitat and to avoid a future listing, the BLM *must* make explicit reference to the scientific and other sources relied upon for conclusions in the statement.[27]

Mineral withdrawal from the areas designated as SFAs is not scientifically supported. There are no habitat maps or scientific studies cited that support the conclusion that the SFAs are more important than other areas designated as "core" or "priority" management areas; whether in the ARMPA, COT Report, NTT Report, FWS Memo, or Nevada State Plan.[28]

If sufficient regulatory certainty protects against non-SFA PHMAs without withdrawals, then it follows that a withdrawal is not necessary at all.

> "Sagebrush Focal Areas (SFAs)—BLM and Forest Service will manage these areas, totaling approximately 2,797,400 acres within the NV/CA sub-region, as SFAs because of the importance of these areas to the conservation of the species range-wide. Specifically, SFAs include characteristics such as existing high-quality sagebrush habitat; highest breeding densities; have been identified as essential to conservation and persistence of the species; represent a preponderance of current federal ownership and in some cases are adjacent to protected areas that serve to anchor the conservation importance of the landscape. In light of the landscape level approach to GRSG conservation provided through this planning effort and as defined by the characteristics set forth above, as well as additional considerations, including potential for impacts from climate change, fire and invasives, these areas have been identified."[29]

The FWS Memo Cites Only to Unpublished "Strongholds"

According to the BLM, the SFAs were designated as requested by the FWS to provide the needed regulatory certainty to avoid a listing under the ESA. Supposedly, the FWS asked for this withdrawal because of the "strongholds" identified in the October 27, 2014 memo that identified "a subset of priority habitat most vital to the species persistence within which we recommend the strongest levels of protection."[30] This is according to maps the FWS acknowledged were prepared by the conservation community.

The BLM cites only to the FWS memo, yet the FWS in that memo does not cite to any scientific literature to support the SFAs, or, what the FWS refers to as "strongholds." Nor does the FWS cite to any scientific literature to support the SFAs in its listing decision.[31] The SFAs *only* appear in the maps attached to the memo, which are cited as "Pre-Decisional; For Internal Review Purposes Only.

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[27] 40 C.F.R. § 1502.24.

[28] *A Report on National Greater Sage-Grouse Conservation Measures*, Sage-grouse National Technical Team (December 21, 2011) (NTT Report); *Greater Sage-grouse (Centrocercus urophasianus) Conservation Objectives: Final Report*, U.S. Fish and Wildlife Service (February 2013) (COT Report); ARMPA at Appendix A; Coates et al. 2015.

[29] ARMPA at 2-2.

[30] FWS Memo.

[31] *Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (Centrocercus urophasianus) as an Endangered or Threatened Species, Proposed Rule*, 80 F.R. 59875 (October 2, 2015).

Do Not Distribute. PHMA current as of October, 2014."[32] Figure 13.1 identifies strongholds for breeding populations, and does not identify any SFA. Therefore, the SFAs as proposed are not supported by *any* science, let alone the best available science.

The COT Report Supports Only Localized, Not Widespread Risk of Mining in SFAs

Even if a withdrawal is a preferred method of protection, the reports that the BLM relies on do not support the withdrawal boundaries as proposed. The withdrawals that appeared first in the FEIS then the ARMPA rely on the recommendations from *A Report on National Greater Sage-Grouse Conservation Measures*, Sage-grouse National Technical Team (December 21, 2011) (NTT Report) and *Greater Sage-grouse (Centrocercus urophasianus) Conservation Objectives: Final Report*, U.S. Fish and Wildlife Service (February 2013) (COT Report). NACO and Nevada's Counties have in the past expressed many concerns with the ARMPA's reliance on the NTT and COT Reports as conflicting with the Council and Sagebrush Ecosystem Technical Team ("SETT") findings supporting the State of Nevada's Action Plan. Nevertheless, the ARMPA cites to those reports, and therefore they should be used to determine whether the scale of the SFAs and the widespread proposed withdrawal were supported by the science cited.

The NTT Report does propose a "withdrawal from mineral entry *based on risk to the sage-grouse and its habitat from conflicting locatable mineral potential and development.*"[33] However, the NTT report does not discuss where a withdrawal might be most appropriate or imply that it should cover 10 million acres of habitat nationwide. Rather, the ARMPA relies upon the COT Report to determine the NTT's request to evaluate risk from conflicting locatable mineral potential and development.

The COT Report does not contain SFAs or suggest withdrawals. It only provides management zones and Priority Areas for Conservation ("PACs").[34] The terms PHMA, GHMA, and OHMA are adopted from the State Plan. Looking to the COT report map, the areas that would fall within SFAs do not represent the areas at greatest risk from mining.

The COT Report shows that threats from mining within the ARMPA's SFA areas are only localized and not widespread. Figure 3 is a map that designates Sage-grouse Management Zones ("MZs"), populations, and PACs. These MZs correlate to the threats listed in Table 2, as defined by Garton *et al.* 2011.[35] Threats are characterized as (Y = threat is present and widespread), (L = threat present but localized), (N = threat is not known to be present), and (U = unknown).[36] If the SFAs are overlayed onto the COT Map, the areas that encompass the SFAs are numbered 26a ("Northern Great Basin")("L") and 31 ("Western Great Basin")("L"). The threat of mining is designated "L," or "threat present but localized" in every management zone within Nevada, except for area 14 ("Northwest Interior")("Y") where the threat of mining is elevated to "present and widespread". The only area that is designated (Y) is not within the SFA.[37]

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[32] FWS Memo.
[33] NTT Report at 24.
[34] COT Report at 14.
[35] COT Report at 16, 30.
[36] *Id.*
[37] COT Report at 24, 26, 30

This means the SFA Withdrawal does not include the ***only*** (Y) area in the COT Report with a widespread threat of mining in Nevada. This area, the Northwest Interior, is home to mining operations run by Newmont Mining Corporation, a company engaged in an Enabling Agreement that allows for mitigation and net conservation gains from mining threats to Greater Sage Grouse (See Section C on Cooperating Agreements).[38] Another Enabling Agreement between the BLM and Barrick Gold Corporation ("Barrick Enabling Agreement") covers Sage-Grouse habitat in an area with the exact same characteristics as those subject to the SFAs.[39]

Newmont even highlights both of these agreements, and boasts that mitigation and conservation efforts will help improve the Greater sage-grouse population:

> "As far as country that **Newmont has influence over**, either direct management or operational management, in the case of the allotments, is **about *1.8 million acres***," White said. "So that's **a significant chunk of country from a sage grouse conservation standpoint.** Especially if you look at the land position that Newmont has and the land position that Barrick has, and our combined conservation efforts, we're able to do significant good on the landscape for greater sage grouse."[40]

What this highlights is that these millions of acres are high priority habitat, that the BLM entered into private agreements after the LUPA FEIS was published, and that this acreage is not subject to withdrawals even though the habitat characteristics would suggest that they should be compared to the SFAs.

Most importantly, however, is that these agreements tout the benefit of project owners funding mitigation and conservation while greatly reducing the ability of the State Conservation Credit program to be implemented in the most important areas using the most important potential funders.

If the *only* area in the COT Report with a widespread threat of mining in Nevada is outside of the SFA, then it is insufficient to conclude that that some areas labeled as having a "localized" threat of mining should be subject to a widespread withdrawal lasting twenty plus years. Therefore, the COT Report does not support a need for widespread withdrawal above and beyond the many measures being implemented in the Northern or Western Great Basin Priority Areas.

<u>The FWS Listing Decision Does Not Support the SFA Boundaries</u>

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[38] *Partnering with The Nature Conservancy to Protect the Greater Sage-Grouse*, Newmont Mining Corporation (2015)("Newmont *retrieved at* http://www.newmont.com/resources/Case-Study-Library/Case-Study-Library/2015/Partnering-with-The-Nature-Conservancy-to-Protect-the-Greater-Sage-Grouse/default.aspx#sthash.TnkdA7NV.dpuf; see also *Mining, wildlife coexist in Nevada: Newmont has conservation program to benefit sage grouse habitat, Elko Daily Free Press* (Dec. 2, 2015 6:00 pm) ("Newmont Agreement"), *retrieved at*: http://elkodaily.com/mining/mining-wildlife-coexist-in-nevada-newmont-has-conservation-program-to/article_fa4e915c-40a2-5af5-96c4-7347292fe210.html (Together, "Newmont Mining Agreement")

[39] *Barrick Nevada Sage-Grouse Bank Enabling Agreement*, Department of the Interior, Bureau of Land Management, U.S. Fish and Wildlife Service, and Barrick Gold of North America (Mar. 25, 2015)

[40] *Id.*

The FWS published on October 2, 2015 its "12-Month Finding on a Petition To List Greater Sage-Grouse as an Endangered or Threatened Species."[41] It found that listing the Greater-Sage Grouse is *not warranted* because existing regulatory mechanisms are sufficient to ensure the species' protection. It cites to all of the protections afforded to the primary and general habitat as sufficient before discussing the threat of mining and withdrawals. With respect to mining, this notice cites only to its 2010 Findings, the COT Report, and the FWS Memo. Again, the 2010 Findings and the COT Report do not discuss a threat that warrants a withdrawal.

Thus the FWS listing decision only provides support for the "strongholds" with reference to the FWS Memo. An Agency may not adopt wholesale another Agency's conclusions unless those conclusions are supported by the best available science. 40 C.F.R. § 1502.24. The FWS listing decision at 80 FR 59872 discusses the COT Report and new scientific information. Even here the findings reference the FWS Memo to support the strongholds.[42] At a recent federal court hearing the USFS Supervisor testified that they did not independent due diligence of their own relative to the request for withdrawal but instead relied entirely on the USFWS determination and request for the "strongholds."[43]

This Memo, as discussed above, does not support the strongholds with any citation to science or supporting analysis. Because the FWS has not supported its request to add the strongholds with scientific citation or analysis, the BLM may not rely on the FWS's conclusion or request to support the strongholds. This is particularly true given the 3809 regulations the BLM can use to prevent undue and unnecessary degradation.

There is no science-based concern that supports a withdrawal. The science only supports localized withdrawal of 63,000 total acres in comparison with the 10 million being withdrawn. In 2010 the FWS was aware only "of approximately *63,000 acres* of existing mining related disturbance within the range of sage-grouse."[44] The notice indicates that mining related disturbance has not changed. Yet the FWS supports its own "recommendations for mineral withdrawal in SFAs that would remove potential impacts on approximately *10 million acres* of sage-grouse habitat."[45] This is woefully inconsistent with the finding that "...Overall, the extent of [mining] projects ***directly affects less than 0.1 percent of the sage-grouse occupied range***. Although direct and indirect effects may disturb local populations, ***ongoing mining operations do not affect the sage-grouse range wide***."[46]

The FWS only concludes with reference to the FWS Memo that "The Federal Plans designate the most important sagebrush habitat as SFAs where locatable mineral withdrawal is recommended... Within the areas of greatest conservation importance (SFAs), DOI will recommend withdrawal from

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[41] 80 FR 59858 (Oct. 2, 2015).
[42] *Id.*
[43] *Western Exploration, LLC et al. v. U.S. Dept. of the Interior, et al.*, Transcript of Plaintiff's Motion for Preliminary Injunction (#4), pgs. 353-356 (Nov. 18, 2015).
[44] *Id.*
[45] *Id.* at 59916.
[46] *Id.* at 59915.

locatable mineral entry."[47] The findings again state that the threat of mining is localized rather than widespread. The FWS notes its findings are consistent with the recommendations in the COT Report, that "Minerals are not distributed evenly across the sage-grouse landscape, and as a result, mining activities tend to be localized or regional."[48]

The FWS reasons only that the threat of widespread mining across those 10 million acres is that there *might* be a threat in the future: "Based on what we know today, no mining activities are likely to result in loss of these important areas for conservation, but we recognize that economic changes or technological advances may increase the risk of development in the future. Therefore, the long-term protection of the sage-grouse habitat in the SFAs from locatable mineral development will ensure that these important populations are conserved into the future." [49] The long-term protection of the sage-grouse habitat across management zones are numerous. Regulatory tools currently mitigate impacts to the sage-grouse. These protections include those provided by the Nevada State Plan, Council, and SETT, or by the ARMPA. These include, but are not limited to: permit and license restrictions, exclusion areas, habitat designations, seasonal travel restrictions, lek buffers, mitigation requirements, and the Conservation Credit System. Thus, the risk of development remains curbed by other means whether or not the Mining Act remains in effect.

The State Plan Does Not Support the SFAs or Withdrawals

The State Plan does not support the SFA Boundaries or withdrawals, and implementation of withdrawals will significantly undermine the potential effectiveness of the State Plan's Conservation Credit System.[50] In 2014, Nevada's Sagebrush Ecosystem council adopted the Nevada Conservation Credit System.[51] The credit system is designed to offset impacts from human-caused disturbances through enhancements and protections that result in a net benefit for greater sage-grouse habitat in Nevada. The State has invested $650,000 so far to create this system.[52]

The State system presumes that mining and other industry will occur, but only with mitigation that results in net conservation gain for equivalent habitat. The SFAs still fall largely within the PHMAs according to Coates et al. 2014, 2015. These maps are used to trigger project-level land evaluations whereby the State calculates the debits owed by the project owner depending on the quality of habitat used. The State Conservation Credit System creates a market to purchase credits which provides substantial mitigation for projects in this area:

> "The Nevada Conservation Credit System (CCS)4 is a pro-active solution that provides net conservation benefits for sage-grouse, while balancing the need for continued human activities vital to the Nevada economy and way of life. The CCS creates new incentives for private landowners and public land managers to preserve, enhance, restore, and reduce impacts to important habitat for the species.

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[47] FWS Memo.
[48] *Id.*
[49] *Id.* at 59916.
[50] *2014 Greater Sage-Grouse Conservation Plan*, Nevada Sagebrush Ecosystem Program (Oct. 1, 2014)("State Plan")
[51] *Id.* at 68.
[52] Inventory at 21.

> The CCS is a market-based mechanism that quantifies conservation outcomes (credits) and impacts from new anthropogenic disturbances (debits), defines standards for market transactions, and reports the overall progress from implementation of conservation actions throughout the sage-grouse range within Nevada. The CCS establishes the policy, operations, and tools necessary to facilitate effective and efficient conservation investments. The CCS is intended to provide regulatory certainty for industries by addressing compensatory mitigation needs whether or not the species is listed under the ESA."[53]

Further, Dean Payne addressed the fact that "Nevada-specific data was not included in the delineation of SFAs, and no experts in the State were consulted. Overall, these are in conflict with federal policy, and design principles for CPR management (Ostrom, 1990; NAS, 2013)."[54] He continues, "Criteria used to delineate SFAs do not match the State's assessment of breeding densities or its mapping using resistance and resilience concepts. The poorly justified SFAs constitute a major change from the DEIS, and insufficient time and information were given for review. They also ignore inter-national norms regarding use of local knowledge in sustainable CPR management (UNCCD, 2015)."[55]

In fact, the Withdrawals will greatly impact the effectiveness and ability to implement the State Plan, which comes with significant funding to implement the State's Conservation and mapping efforts:

> "Nevada Gov. Brian Sandoval has requested legislative approval in his FY 15-17 Biennial Budget for over $5.1 million for Sagebrush Ecosystem Program efforts, including a commitment of $1 million each year for critical habitat protection and restoration projects in sage-grouse management areas. The state has requested an additional $8.6 million to support statewide programs like its Wildland Fire Protection Program (WFPP) that address the threats to greater sage-grouse. Since 2012, Nevada's resource agencies have spent over $7.4 million (a compilation of state, federal and local funds) in support of greater sage-grouse conservation efforts to treat 28,000 acres of state, private and federal lands. Nevada is also working on a new mapping layer due out in May 2015 to identify locations of core habitat being threatened by pinyon-juniper encroachment; the map will be used to guide future decisions regarding removal projects."[56]

Biological Opinions within the SFAs Do Not Support SFA Boundaries

Finally, the FWS's own Biological Evaluations for projects within SFA boundaries are incompatible with the SFAs. For example, the "Jarbidge Minerals Exploration Biological Evaluation and Specialist Report," Jarbidge Ranger District, Humboldt-Toiyabe National Forest, Elko County, Nevada (August 2015)("Jarbidge Report") states that this project, which sits squarely within the SFA boundary, covers only GHMA, OHMA and non-habitat. The FWS determined that the effects of the project were "No Impact" because:

> **"Surveys have not found any sign of greater sage-grouse in the project area and there is no habitat available. Recent mapping by USGS and BLM shows a mixture of non-habitat and general habitat in the project area. Maps are being further refined and it will be**

[53] *State Plan* at 68.
[54] CABNR Memo at Table 1.
[55] CABNR Memo at Table 1.
[56] Inventory at 24.

recommended that the area be classified as entirely non-habitat."[57]

The FWS in these findings proves the BLM and FWS knew that maps were being refined at the time the ROD was signed, and therefore knew there was new information available that would warrant a revisiting of the rough habitat maps. This highlights the need to adopt the "further refined maps" within an SEIS due to information-based differences in the PHMA footprint. Yet even without the adoption of the new map, new information continuously becomes available. The comparison of the Coates Map with the Jarbidge Report illustrates that these program-level maps were created for a program-level purpose. These maps were created in the context of a planning exercise that considers all areas within the United States that could possibly support Greater Sage-grouse in the future. That information can only be appropriately used to inform where the Greater Sage-grouse actually live compared to where they could live to drive policy decisions aimed at manipulating the population's behavior and potential growth. Again, the State's policy decision was to manipulate the population using the Conservation Credit System to encourage breeding and movement.

Therefore, the SFA boundaries wholly lack scientific support or explanation. Further, while the State maps are more accurate and should be adopted, these maps as generated are only appropriate to use at a planning level to gauge important habitat areas before then then reviewing specific project boundaries to determine what mitigation measures, if any, need to be implemented.

Request I-B-3-(1): That the BLM work with the State Plan developers to adopt the Coates 2015 map as it was intended— to then ground-truth project areas and use the Conservation Credit System for mitigation.

Request I-B-3-(2): That the BLM cite to the science and provide an explanation that supports the SFA strongholds (other than the un-citable maps in the FWS Memo), and that the BLM and FWS point to each contradiction highlighted above and explain how the decision to adopt the FWS Memo strongholds is not arbitrary and capricious.

4. <u>There Are Available Alternatives to a Withdrawal</u>

The notice summarily states "there are no suitable alternative sites for the withdrawal."[58] NACO urges the Agencies to reconsider this conclusion and to ensure that an active analysis of potential alternatives to a withdrawal occurs during the preparation of this application. The application requires "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. The 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."[59]

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[57] Jarbidge Report at 8, 27.
[58] 80 F.R. 57637
[59] 43 CFR 2310.3-1 (12).

The alternatives analysis is the heart of the environmental impact statement, and in this case is required under both NEPA and FLPMA. These alternatives should sharply define the issues and provide a clear basis for choice among options by the decision-maker and public.[60] Besides the adoption of Nevada's State Plan as a viable alternative, an SEIS would have provided withdrawal alternatives. The SFAs and associated "withdrawal" did not appear until the FEIS, and the Withdrawals as proposed were not truly analyzed. The withdrawal notice lacks projected costs for both an alternative for either the conservation or the displaced use. This analysis requires the mineral information that has not been analyzed. The conclusion in the notice suggests the Secretary is relying on the ARMPA and LUPA FEIS for mineral information that was not analyzed in either document.

Population increases of nearly two-thirds from 2013 to 2015 *cannot* be attributed to land management plans finalized in October of 2015.[61] Rather, these increases are, and *must* be, attributable to local and State efforts. These efforts are sufficient alternatives. The Nevada Division of Minerals also provided potential alternatives to a withdrawal.[62]

What the ARMPA and notice also lack is any analysis of the added benefit of having a withdrawal, especially considering the key identified threats to Greater Sage-Grouse Habitat in ARMPA and COT Reports are wildfire and invasive species. For example, that a withdrawal might be appropriate appeared only in one alternative in the DEIS and FEIS. There was no analysis of alternative options looking to the Withdrawal specifically and no final cumulative impacts analysis using the options chosen.

The BLM should wait to withdraw this land to give the State Plan time to be implemented. In the meantime, the ARMPA already imposes exclusion zones, restoration goals, grazing standards, and project guidelines that greatly limit what industry can do within prime habitat.

Request I-B-4: To look to alternative options to a withdrawal, specifically to provide at least enough time to ensure the complete implementation of the State Plan. This might mean entering into a Coordinated Agreement and MOU to work with the State to implement the Conservation Credit Program. The Bi-State Action Plan is a prime example for how local, State, and federal Agencies can work together. If mining and industry were to continue with mitigation measures, the money could be used to fund habitat restoration resulting in a net conservation gain. This is not possible if potential funders like mineral exploration and mining companies are no longer in business.

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[60] 40 CFR 1502.14

[61] *Greater Sage-Grouse Population Trends: An Analysis of Lek Count Databases 1965-2015*, Western Association of Fish and Wildlife Agencies (August 2015) (WAWFA Trend Analysis); *see also* Lori Valadez, *Greater Sage-Grouse Population on the Rise*, Natural Resources Conservation Service, (August 17, 2015), *retrieved at http://blogs.usda.gov/2015/08/17/greater-sage-grouse-population-on-the-rise/*.

[62] Division of Minerals Site, *infra* at n. 18.

If the Agencies still feel the State cannot adequately protect against the threat of mining, then we would ask that the BLM work with the State to identify alternative areas that might be better suited for withdrawals that do not include areas of great mineral potential.

(C) Existing Cooperative Agreements to Protect Greater Sage-Grouse in Equally Valuable Habitat Proves a Cooperative Agreement Can Adequately Constrain Nondiscretionary Uses Within SFAs.

A cooperative agreement and right-of-way *would* adequately constrain nondiscretionary uses for the area encompassed by the Nevada SFA. As discussed above, the quality of habitat is equal or better and the threat of mining is higher (Y) in areas outside of the SFA boundaries. This statement is not meant to imply the SFA boundaries should change. Rather, that SFAs and withdrawals are *not needed* as shown by recent cooperative agreements. This is further supported by the mining threat assessments in the COT Report and FWS Greater sage-grouse Findings coupled with the Barrick Enabling Agreement and the Newmont Agreement, and potentially others.[63]

FLPMA requires "An analysis and explanation of why neither a right-of-way under section 507 of the Act (43 U.S.C. 1767), nor a cooperative agreement under sections 302(b) (43 U.S.C. 1732(b)) and 307(b) (43 U.S.C. 1737(b)) of the act would adequately provide for the proposed use." 43 CFR 2310.3-1 (c)(10). In response, the BLM claims "The use of a right-of-way, interagency or cooperative agreement, or surface management by the BLM under 43 CFR part 3715 or 43 CFR part 3809 regulations or by the Forest Service under 36 CFR part 228 would not adequately constrain nondiscretionary uses, which could result in loss of critical sage-grouse habitat."[64]

On March 25, 2015, the FWS and BLM entered into the "Barrick Nevada Sage-Grouse Enabling Agreement" across 250,000 acres of private lands within the Southern Great Basin management area. This Agreement cites to 43 CFR part 3809 regulations for authority. Therefore it would qualify as a cooperative agreement under 43 CFR 2310.3-1(c)(10).

With language nearly mirroring that found within the Barrick Enabling Agreement, the Newmont Mining Corporation:

> "'In partnership with The Nature Conservancy and others, Newmont is developing a multi-species, landscape-level Sagebrush Ecosystem Conservation Plan and Conservation Bank Program, including **approximately 400,000 acres of private lands and large aspects of about 1.4 million acres of federal grazing allotments**,' Newmont stated in its Nevada Sagebrush Ecosystem Conservation Program."[65]

According to the COT Report, the land covered by the Newmont Agreement is *superior,* and the land covered by the Barrick Enabling Agreement is *equal* in biological significance to the Greater sage-grouse compared to the land within the SFAs. The threat of mining to both areas is *exactly the same or greater.* Management zone 14 (Northwest Interior)(Y) is more important, and 15c (Southern Great

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[63] Barrick Enabling Agreement; COT Report at 30; Newmont Mining Agreement, *infra.* at n. 44.;
[64] 80 F.R. 57635,57637 (Sept. 24, 2015).
[65] Newmont Mining Agreement, *infra.* at n. 44.;

Basin) (L) could be considered even more important than the zones covered by the SFAs as it contains most of the Priority Area for Conservation (PAC) in Nevada.

If according to the COT Report the threat of mining is exactly the same within the SFAs as it is for the area covered by the Barrick Enabling Agreement, and higher for areas covered by the Newmont or other Agreements, then it logically follows that cooperative agreements *would* adequately provide for the proposed use to protect the Greater Sage-Grouse.

The adoption of the Barrick Enabling Agreement and Newmont Agreement only proves that the BLM could enter into a Cooperating Agreement to implement the State Plan and Conservation Credit System. The Agreement also shows that a credit system is a *preferred* approach with supporting funding and conservation efforts. This is especially true if it is adequate for the surface area covered by the existing agreements, at about 2 million acres. The Enabling Agreement contains mitigation standards, a credit banking system, more widespread goals for a broader area, encourages co-location, permits regulation of federal and state land, and satisfies multiple use standards. This addresses the fact that Current mining activity within the SFA renders some pieces of land better suited for co-location. Further, the important measures in these Agreements are only achievable because the Barrick and Newmont mining companies are *exempt* from ARMPA Regulations.

Entering into a Cooperating Agreement to implement the State Plan is preferred over entering into Cooperative Agreements with individual private entities on a piecemeal basis. These entities provide substantial funding and partnerships across the most important habitat that would support the success of the State Plan. Instead, they now potentially reduce the effectiveness of the Conservation Credit System and further stratify what should be a collaborative conservation effort. Such an Agreement would greatly enhance the mitigation bank and credit program developed by the State.

Request I-A-C: To enter into a Cooperating Agreement with the State of Nevada to implement the State Conservation Credit System similar to what was provided for the Barrick Gold and Newmont Mining Corporations.

(D) Water Rights Would Be Needed to Fulfill the Purpose of the Requested Withdrawal

The application states "No water rights would be needed to fulfill the purpose of the requested withdrawal." 80 CFR 57637. Water availability is the most powerful predictor of brood rearing. Segregation and withdrawal will result in the expiration of private water rights, and will also implicate the water rights associated with grazing permits. Thus, the water the Sage-grouse currently uses is a result of those water rights.

Without access to water supplies, the BLM may need to obtain water rights for the Greater Sage-Grouse, whether state or federal. The application only requires a "statement as to whether water will or will not be needed to fulfill the purpose of the requested withdrawal action." 43 CFR 2310.3-1 (c) (13) That water rights will be evaluated as a preliminary issue for the EIS is telling that this issue is inaccurately represented in the application. Thus, water rights *would* be needed to fulfill the purpose of the requested withdrawal.

Request I-D: That the notice be revised to restate that water will be needed to fulfill the purpose of the requested withdrawal action, as required by 43 CFR 2310.3-1 (c) (13). This remedy will allow the public to more accurately comment on the water-related consequences of the withdrawal.

II. Scoping Comments

Please accept this section as NACO's response to provide scoping comments for an Environmental Impact Statement (EIS) to analyze and disclose impacts of the proposed withdrawal.[66] The purpose of the public scoping process is to determine the relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the process for developing the EIS. Withdrawal Mandates under FLPMA § 204(c) Control the Withdrawal Process, which must also remain consistent with Multiple Use Principles under FLPMA as well as with NEPA. Acceptance of the withdrawals by the Secretary are predicated upon compliance with FLPMA § 202 and NEPA.

To show that the BLM is not basing its decision on a predetermined "anti-mining agenda," the Department of Interior (DOI) in its required "notification of withdrawal" sent to Congress, must fairly consider all 12 factors listed in 43 USCS § 1714(c)(2), explaining in detail proposed withdrawal's effects on current natural resource uses, current land users, incompatibility with current land uses, and effect on state and local government interests and regional economy.

The BLM's guiding principle in this action is multiple use as defined by the Federal Land Policy and Management Act (1976) (FLPMA), or the:

> "...management of public lands and their various resource values so that they are utilized in combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output."[67]

A. Legal Requirements

Draft environmental impact statements ("DEISs") are prepared according to the scope determined in the scoping process. For FLPMA Withdrawal purposes, it is important that the analysis provide a thorough estimate of the costs and benefits of the proposed withdrawal. An application may be cancelled or denied if the withdrawal is not needed or the costs are excessive.[68] The costs are defined

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[66] 50 CFR 57635; 80 FR 57635.
[67] FLPMA, 43 U.S.C. 1701 et al.; 43 U.S.C. 1702(c).
[68] 43 C.F.R. § 2310.1-4 (a), (b).

by 43 U.S.C. 1734(b) and are analyzed compared to available funds appropriated for processing applications.[69]

Before an authorized officer can take action on a withdrawal proposal, a supporting withdrawal application shall be submitted along with the documents as needed to meet NEPA Requirements.[70] This process also requires the BLM to develop and process the FLPMA Withdrawal case file for submission. The information, studies, analyses and reports must include:

> "(1) A report identifying the present users of the lands involved, explaining how the users will be affected by the proposed use and analyzing the manner in which existing and potential resource uses are incompatible with or conflict with the proposed use of the lands and resources that would be affected by the requested action. The report shall also specify the provisions that are to be made for, and an economic analysis of, the continuation, alteration or termination of existing uses. If the provisions of § 2310.3-5 of this title are applicable to the proposed withdrawal, the applicant shall also furnish a certification that the requirements of that section shall be satisfied promptly if the withdrawal is allowed or authorized.
>
> (2) If the application states that the use of water in any State will be necessary to fulfill the purposes of the requested withdrawal, extension or modification, a report specifying that the applicant or using agency has acquired, or proposes to acquire, rights to the use of the water in conformity with applicable State laws and procedures relating to the control, appropriation, use and distribution of water, or whether the withdrawal is intended to reserve, pursuant to Federal law, sufficient unappropriated water to fulfill the purposes of the withdrawal. Water shall be reserved pursuant to Federal law for use in carrying out the purposes of the withdrawal only if specifically so stated in the relevant withdrawal order, as provided in § 2310.3-3(b) of this title and only to the extent needed for the purpose or purposes of the withdrawal as expressed in the withdrawal order. The applicant shall also provide proof of notification of the involved State's department of water resources when a land use needed to carry out the purposes of the requested withdrawal will involve utilization of the water resources in a State. As a condition to the allowance of an order reserving water, the applicant shall certify to the Secretary that it shall quantify the amount of water to be reserved by the order.
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> (3) (See NEPA Analysis) An environmental assessment, an environmental impact statement or any other documents as are needed to meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), and the regulations applicable thereto. The authorized officer shall participate in the development of environmental assessments or impact statements. The applicant shall designate the Bureau of Land Management as a cooperating agency and shall comply with the requirements of the regulations of the Council on Environmental Quality. The Bureau of Land Management shall, at a minimum, independently evaluate and review the final product. The following items shall either be included in the assessment or impact statement, or they may be submitted separately, with appropriate cross references.
>
> (i) A report on the identification of cultural resources prepared in accordance with the requirements of 36 CFR part 800, and other applicable regulations.
>
> (ii) An identification of the roadless areas or roadless islands having wilderness characteristics, as described in the Wilderness Act of 1964 (16 U.S.C. 1131, et seq.), which exist within the area covered by the requested withdrawal action.
>
> (iii) A mineral resource analysis prepared by a qualified mining engineer, engineering geologist or geologist which shall include, but shall not be limited to, information on: General geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential and present and potential market demands.
>
> (iv) A biological assessment of any listed or proposed endangered or threatened species, and their critical habitat, which may occur on or in the vicinity of the involved lands, prepared in accordance with the provisions of section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1536), and regulations applicable thereto, if the Secretary determines that assessment is required by law.

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[69] 43 C.F.R. § 2310.1-4 (b).

[70] 43 C.F.R. § 2310.1-2(b). 43 U.S.C.S. § 1714(b)(1); 43 U.S.C.S. §§ 1701-1782; 43 C.F.R. § 2300.0-5(q); 43 C.F.R. § 2300.0-5(p); 43 CFR 2310.3-2; The National Environmental Protection Act, 42 USCS §§ 4341 et seq. (NEPA)

(v) An analysis of the economic impact of the proposed uses and changes in use associated with the requested action on individuals, local communities, State and local government interests, the regional economy and the Nation as a whole.

(vi) A statement as to the extent and manner in which the public participated in the environmental review process.

(4) A statement with specific supporting data, as to:

(i) Whether the lands involved are floodplains or are considered wetlands; and

(ii) Whether the existing and proposed uses would affect or be affected by such floodplains or wetlands and, if so, to what degree and in what manner. The statement shall indicate whether, if the requested action is allowed, it will comply with the provisions of Executive Orders 11988 and 11990 of May 24, 1977 (42 FR 26951; 26961).

(5) A statement of the consultation which has been or will be conducted with other Federal departments or agencies; with regional, State and local Government bodies; and with individuals and nongovernmental groups regarding the requested action.[71]

B. Applying the Legal Standards

1. Purpose and Need

The BLM should adopt a different purpose and need from what is written in the withdrawal notice at 80 CFR 57637. The withdrawal notice states: "The purpose of the proposed withdrawal of the Sagebrush Focal Areas in Priority Habitat Management Areas is to protect the Greater Sage-Grouse and its habitat from adverse effects of locatable mineral exploration and mining subject to valid existing rights." 80 CFR 57637.

Instead, the purpose and need should read, "The purpose of the proposed withdrawal of the Sagebrush Focal Areas in Priority Habitat Management Areas is to protect the Greater Sage-Grouse and its habitat from adverse effects of locatable mineral exploration and mining subject to valid existing rights above and beyond the protections outlined in the 2015 Amended Resource Management Plan to achieve the greatest level of conservation in a manner that leaves as many lands with mineral potential open for mineral entry pursuant to FLPMA multiple use and sustained yield mandates."

The purpose and need statement is key to developing the alternatives "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[72] Further, "Project alternatives derive from an Environmental Impact Statement's "Purpose and Need" section, which briefly defines the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.[73]

The underlying need as identified in the ARMPA is to provide *additional protection* to areas the BLM has identified as "Sagebrush Focal Areas," or deserving of the highest level of protection. What sets SFAs apart from other priority habitat areas within the ARMPA is the withdrawals. This implies that the withdrawals provide additional protection above and beyond what the ARMPA provides for all

[71] 43 C.F.R. 2310.3-2(b),
[72] 40 C.F.R. 1502.13.
[73] 40 C.F.R. 1502.13

priority habitat. Therefore, the alternatives must be crafted based on this statement of purpose and need. If there is no additional protection, then the withdrawal provides no benefit at a great cost. Therefore, the statement of purpose and need should be framed to highlight the additional protection that will be provided within the SFA.

Request II-B-1: That the Agencies adopt the Purpose and Need as expressed in this section.

2. Reasonable Range of Alternatives

Again, the alternatives analysis is at the heart of NEPA. NEPA was enacted to ensure that Agencies provide to the public enough information to show a fully informed decision-making process. The reasonable range of alternatives should allow the BLM to analyze in detail the environmental impacts of the proposal and provide a clear basis for choice among options.[74] The Alternatives are supposed to reflect a balance between multiple uses and needs. To the extent that these needs conflict, the Agency must choose one over the other.

It is NACO's position that many of the needs and requests expressed throughout this process do not conflict *so long as* the alternatives provide options that honestly compare and contrast these needs. Each alternative should present a realistic choice, otherwise the analysis is wasteful and simply "going through the motions" required by law. See I-B-C "There Are Available Alternatives to a Withdrawal," which urges the incorporation of the State Plan's Conservation Credit System and considers alternatives to the entire concept of the SFAs and the resulting Withdrawal. Alternatives to the decision to withdraw the SFA is distinguishable from the alternatives below, which presuppose that the SFA boundaries will be used to support the Withdrawal.

Please accept the following as NACO's suggested range of alternatives for the Withdrawal process:

<u>No Action Alternative</u>
The BLM must include an alternative of "no action."[75] In the context of land management planning, no action means no change from the current management direction.[76] Because the 2015 ARMPA and the State Plan are in effect, this alternative should contain the protections outlined in the 2015 Amended Resource Management Plan and the State Plan.

<u>Proposed Action</u>
The BLM's Proposed Action is to withdraw the SFAs as outlined in the 2015 ARMPA. The BLM should reconsider this, as discussed in Section I.

<u>Suggested Alternative</u>
NACO suggests that the BLM evaluate an alternative to the Proposed Action that adopts a Modified Proposed Action whereby withdrawals would occur only upon adaptive management and ground-truthing on a project by project basis. The SFA boundaries could be used as trigger for consultation

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[74] 40 C.F.R. 1502.14
[75] 40 C.F.R. 1502.14(d)
[76] *Am. Rivers v. Fed. Energy Regulatory* Comm'n, 201 F.3d 1186, 1200-01 (9th Cir. 200)

for an on the ground proposal which would warrant review for withdrawal. This Alternative might also incorporate the State Conservation Credit system within the SFAs. This way, the Conservation Credit system is an option for project proponents and funding will become available to support on-the-ground conservation projects as defined by the Sagebrush Ecosystem Council and associated Nevada State Planners. If no credits exist, then a withdrawal would be warranted for that area.

As defined by the ARMPA at 5-1, "Adaptive management" is "A type of natural resource management in which decisions are made as part of an ongoing science-based process. Adaptive management involves testing, monitoring, and evaluating applied strategies and incorporating new knowledge into management approaches that are based on scientific findings and the needs of society. Results are used to modify management policy, strategies, and practices."

Request II-B-2: That the Agencies adopt at a minimum NACO's Modified Alternative and reconsider as the agency's Preferred Alternative.

3. Economic Impacts Analysis

The County economies within the SFA are driven by mining, farming, and ranching, all of which will be impacted by the SFA Withdrawals. FLPMA Requires "An analysis of the economic impact of the proposed uses and changes in use associated with the requested action on individuals, local communities, State and local government interests, the regional economy and the Nation as a whole."[77]

In anticipation of the requisite economic impacts analysis, NACO requested from the University of Nevada, Reno's Center for Economic Development a process for regional economic impact modeling for sage grouse habitat studies. This request was made specifically for the withdrawals, and contains "suggestions for what a regional impact modeling and mining study should have and address."

The December 15, 2015 Memorandum from Thomas R. Harris, Director of the Center for Economic Development at the University of Nevada, Reno titled "Regional Economic Impact Modeling for Sage Grouse Studies" is attached as "Appendix A" for your reference and use throughout this process.

NACO also recommends that this analysis consider, at a minimum: (1) Industry responses to a withdrawal (2) Lack of certain minerals and their national and international use (3) Increased fires due to less people in the area (4) The cost to initiate and conduct all at once Priority Grazing Permit reviews for the Segregation (5) The cost to counties' key industries (6) Tax base impacts to Counties and the State (7) The cost to the State for loss of valuable Conservation Credit Program habitat and potential debtor projects (8) The cost to the State for mineral companies moving to other states or countries, and (9) The loss of employment opportunities locally and Statewide.

Request II-B-3: That the Agencies refer to the December 15, 2015 Memorandum from Thomas R.

[77] 43 CFR 2310.3-2(b).

Harris, Director of the Center for Economic Development at the University of Nevada, Reno titled "Regional Economic Impact Modeling for Sage Grouse Studies" attached as "Appendix A" during the Economic Impacts Analysis to analyze the short- and long-term impacts, as well as the direct and indirect impacts of each alternative. The final costs should be factored into the Secretary's ultimate decision whether or not to accept the Application as proposed.

4. Valid Existing Rights and Claims Validity Tests

The SFA Withdrawals are subject to Valid Existing Rights ("VERs"). Yet it is difficult to understand what that means in this context. As part of the segregation, the BLM has begun to initiate a claim validity analysis to determine what are VERs. This is a legal term of art, yet it is defined in the ARMPA as "Documented legal rights or interests in the land that allow a person or entity to use said land for a specific purpose and that are still in effect. Such rights include fee title ownership, mineral rights, rights of way, easements, permits, and licenses. Such rights may have been reserved, acquired, leased, granted, permitted, or otherwise authorized over time."[78]

Specifically, NACO wonders whether any documented legal rights or interests, according to the ARPMA definition of VERs, will be extinguished when the land is withdrawn. NACO recommends that the BLM develop Claims Validity Analysis procedures for the other VER elements that need clarification. This should include a public review and comment for each claim subject to claims validity proceedings.

Request II-B-4: That the BLM clarify Valid Existing Rights and develop procedures for VER elements that need clarification. This should include a public review and comment for each claim subject to extinction.

5. Coordination with State and Local Governments

Counties have land use planning and police powers, including an obligation to maintain transportation system and provide emergency services. It is this fact that drives the FLPMA directive that the BLM work closely with local and State governments to ensure consistency and implementation of planning efforts. Thus, it is very important that land management decisions be integrated with County planning efforts.

Importantly, the FLPMA Section 204(c)(2) analysis requirements and associated regulations include several criteria that require BLM to evaluate the effect of the withdrawal on local communities and local governments. The BLM must furnish:

> (2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also **the economic impact of the change in use on individuals, local communities, and the Nation**; (7) **a statement of the consultation which has been or will be had** with other Federal U.S. and

[78] ARMPA Glossary at 5-24.

agencies, with regional, **State, and local government bodies, and with other appropriate individuals and groups; (8) a statement indicating the effect of the proposed uses, if any, on State and local government interests and the regional economy."**

During land use planning, the BLM must also "coordinate … with the land use planning and management programs of the States and local governments within which lands are located." These plans include, "the statewide outdoor recreation plans … considering the policies of approved State and tribal land resource management programs….the Secretary shall… keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non- Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands."[79]

If the BLM determines that provisions of land use plans are not "consistent with the laws governing the administration of public lands," then NACO asks for a description of the differences and an explanation for why these differences or inconsistencies should not be resolved for the land use plans in the three counties where the SFA are located (e.g., Elko, Humboldt, and Washoe Counties).

Elko County Land Use Plans

Elko County General Open Space Plan, Nevada (Elko County 2003); Elko County Public Lands Policy Plan, Nevada (Elko County 2008); Elko County Water Resource Management Plan, Nevada (Elko County 2007)

Humboldt County Land Use Plans

Please consult with Humboldt County's Land Use Planning Department and with the County Ordinances to determine inconsistencies.

Washoe County Land Use Plans

Truckee Meadows Regional Plan (Washoe County Only), Nevada (TMRPA 2007), Washoe County Comprehensive Plan, Nevada (Washoe County 2005a); Washoe County Open Space & Natural Resource Management Plan, Nevada (Washoe County 2008); Washoe County Water Resources Management Plan, Nevada (Washoe County 2005b)

Request II-B-5: NACO requests that the BLM pay special attention to local and State conservation and land us plans and laws, and to highlight and explain inconsistencies with those plans. It will be important to analyze the economic impacts to counties as a result of these inconsistencies.

6. Environmental Consequences Under Each Alternative

[79] 43 U.S.C. 1712(a)(9).

The Environmental Consequences analyzed under each alternative, coupled with the economic impacts analysis, drives the result of the decision-making process. It is important to fully consider and analyze those consequences which naturally result from any given action. At present, the BLM has identified the following preliminary issues: Air quality/climate, American Indian resources, cultural resources, wilderness, mineral resources, public health and safety, recreation, socioeconomic conditions, soil resources, soundscapes, special status species, vegetation resources, visual resources, water resources, and fish and wildlife resources.[80]

Agencies must follow the National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., which "requires that an environmental impact statement itself shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix." This is the standard even when those conclusions come from another Agency's analysis or Protest Letters.

a. Preliminary Issue Analysis

NACO preliminarily requests that specific analyses be conducted for the following issues:

Air Quality/Climate

It is important to analyze the impacts to Air Quality and the Climate and GSG Emissions and impacts from (i) Increased driving distances (ii) Energy consumption from re-routing infrastructure (iii) Increase in fire impacts from additional fuel (iv) Impacts to the viability of renewable energy across Nevada and California.

Cultural Resources

Cultural resources should be defined pursuant to 43 CFR 2300.0-5(e).

Mineral Resources

FLPMA requires for a Withdrawal that the BLM conduct "A mineral resource analysis prepared by a qualified mining engineer, engineering geologist or geologist which shall include, but shall not be limited to, information on: General geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential and present and potential market demands."[81]

NACO recommends that the BLM ensure that the NDOM become a Cooperating Agency, and that both NDOM and the Nevada Bureau of Mines and Geology assist with this analysis. For Valid

[80] 80 F.R. 57637.
[81] 43 CFR 2310.3-2(b),

Existing Rights, NDOM counts a total of 3,762 claims in the mineral withdrawal area.[82] The BLM should list what it believes are the existing, valid, pre-existing claims. This includes locatable minerals, leasable minerals, and salable minerals. should be respected and listed to assist with public notice and understanding of the impacts.

NDOM also developed a "Distribution and Density of Unpatented Claims in Nevada 2016 Assessment Year as of 10/16/2015". This assessment and the supporting data should be used to analyze existing and potential mineral deposits found within the SFA boundaries. To begin, please also refer to the "Mineral, Geothermal and Oil & Gas Potential Maps of Sagebrush Focal Areas, 6/24/2015.

These studies should only be used as a starting point for working with the Nevada Bureau of Minerals. Any conclusions must be supported by studies and data.

Public Health and Safety

This analysis should include the following preliminary issues: (1) Fires and fuels (cost, increased fire incidents), (2) Food supply and domestic food security (3) Mineral supply and national security (4) National security impacts from reduced agriculture and mining.

Socioeconomic Conditions

When an EIS is prepared, and social or economic impacts are "interrelated" with physical impacts, the EIS must include a discussion of the social and/or economic impacts of the proposed action.[83] The impacts of a withdrawal from mining are certainly interrelated with the physical sociological impacts on the local communities.

Mining drives the economy for both Elko and Humboldt Counties. To the people who live in these counties, mining is not just a job. Rather, it is a way of life that has existed for multiple generations. The culture and daily lives of the people who live in this region revolves around the mining industry. The impacts to the mining industry could potentially devastate the community not only economically, but also psychologically.

Humboldt County's economy "is derived in large part from its main industries: Mining, Agriculture and Agricultural Services, Tourism and Construction. The County is located in the rich gold mining center of the Western U.S. and is the leading agricultural county in the State of Nevada with over 100,000 acres under cultivation. Tourism is also a large part of the County's economic base due to the large numbers of visitors the gaming industry brings to the area and the draw of the beautiful wide open spaces, historical sites, and great hunting and fishing."[84]

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[82] *Assessment Year 2016 Active Mining Claims as of 10/16/2015*, Nevada Division of Minerals, Lucia M. Patterson (11/10/2015).
[83] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).
[84] Humboldt County, Nevada Website, *retrieved at* http://www.hcnv.us

For Elko County, the economy is nearly identical: "Nearly 45,000 people live in its 17,181 square miles… The county enjoys a diversified economy built on mining, ranching, and tourism. One of Nevada's most scenic areas, it offers outdoor enthusiasts opportunities to camp, hike, fish and hunt… In addition, it has much to offer businesses seeking a central location among the Western states with ample natural resources."[85]

In fact, Elko County is so propelled by mining that it was designated a "Micropolitan Statistical Area ("S.A") because it is the primary area of the state's mining industry. During First Quarter 2007, the Elko Micropolitan S.A. employed 5,202 mining employees, which consists of 44.07% of the total state of Nevada mining employment. Also for the Elko Micropolitan S.A., the mineral industry accounted for 20.42 percent of total area employment… Using the IMPLAN input-output model database, sectoral location quotient values show which sectors are importers, self-sufficient, and exporters…"[86]

Because of the way of life that will be impacted by a mineral withdrawal from this mineral-rich area, it is of the utmost importance that the BLM take a hard look at the sociological, psychological, and socioeconomic impacts that are likely to result from these mineral withdrawals. NACO urges the BLM to work very closely with Counties to gather this important information.

Water Resources

The application should state that water is required, as stated above, because the best indicator of Sage Grouse presence is water. There is a huge benefit to the Sage Grouse from ranching and agricultural uses that promote riparian areas used for watering. If there is a co-benefit of stock watering in a particular area, then the impact of reducing the associated use may be detrimental to Sage Grouse. Another consideration is the indirect impact on fire occurrences if stock watering and other water uses are reduced as a result of the Withdrawal.

The BLM should also be aware that FLPMA requires "a report specifying that the applicant or using agency has acquired, or proposes to acquire, rights to the use of the water in conformity with applicable State laws and procedures relating to the control, appropriation, use and distribution of water, or whether the withdrawal is intended to reserve, pursuant to Federal law, sufficient unappropriated water to fulfill the purposes of the withdrawal. Water shall be reserved pursuant to Federal law for use in carrying out the purposes of the withdrawal only if specifically so stated in the relevant withdrawal order, as provided in § 2310.3-3(b) of this title and only to the extent needed for the purpose or purposes of the withdrawal as expressed in the withdrawal order. The applicant shall also provide proof of notification of the involved State's department of water resources when a land use needed to carry out the purposes of the requested withdrawal will involve utilization of the water resources in a State. As a condition to the allowance of an order reserving water, the applicant shall certify to the Secretary that it shall quantify the amount of water to be reserved by the order."[87]

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[85] *Id.*
[86] *Id.*
[87] 43 CFR 2310.3-2(b).

Finally, a withdrawal requires a statement with specific supporting data as to: (i) Whether the lands involved are floodplains or are considered wetlands; and (ii) Whether the existing and proposed uses would affect or be affected by such floodplains or wetlands and, if so, to what degree and in what manner. The statement shall indicate whether, if the requested action is allowed, it will comply with the provisions of Executive Orders 11988 and 11990 of May 24, 1977 (42 FR 26951; 26961).[88] Because the new rules are under federal litigation, this analysis must be performed using the definition of floodplains under the newer and older CWA rules and regulations.

The Priority Grazing Permits are up for review as a result of the SFA and part of this process. As part of the impacts analysis to wetlands, it is important that the BLM acknowledge the importance of grazing to vernal pools. In fact, one of the active management techniques used for maintaining vernal pools is grazing. The BLM should strongly consider studies that analyze this key symbiotic relationship.

Special Status Species and Fish and Wildlife Resources

Like the mineral resource analysis, the Sagebrush Ecosystem Council and Technical Team should be invited to be a Cooperating Agency. The analysis of impacts to fish and wildlife resources should be performed with the State program. NACO supports any analysis provided by the Nevada Sagebrush Ecosystem Programs.

Mitigation of the Effects of a Withdrawal from Public Lands

Consistent with 40 CFR 1502.14, the BLM must consider whether and what kind of mitigation measures may be appropriate to address the reasonably foreseeable impacts to resources from the approval of this proposed withdrawal. The BLM states "Because of the nature of a withdrawal of public lands from operation of the mining law, mitigation of its effects is not likely to be an issue requiring detailed analysis. However, consistent with Council on Environmental Quality regulations implementing NEPA (40 CFR 1502.14), the BLM must consider whether and what kind of mitigation measures may be appropriate to address the reasonably foreseeable impacts to resources from the approval of this proposed withdrawal."[89]

This statement is inconsistent with NEPA and with FLPMA, which both require a detailed impacts analysis of the proposed activity. If anything, the nature of a withdrawal of public lands from operation of the mining law *does* require a detailed analysis regarding the mitigation of its effects, even more than other actions. The purpose of NEPA is to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;"[90] and FLPMA is to balance the protection of "the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" with a recognition of "the Nation's need for domestic sources of minerals… from the public lands including

[88] 43 CFR 2310.3-2(b),
[89] 80 CFR 57637.
[90] 43 U.S.C.A. § 4321.

implementation of the Mining and Minerals Policy Act of 1970 (84 Sts. 1876, 30 U.S.C. 21a) as it pertains to the public lands."[91] That the purpose of FLPMA expressly mentions mining and minerals elevates the importance of mitigation.

A mineral withdrawal is a policy decision made at the explicit expense of the humans living in that environment. This is an extreme policy decision, and one which requires a complete and informed analysis of the potential impacts and possible mitigation strategies. It is such an impactful action that NEPA and FLPMA Sections 202 and 204 exist exclusively to ensure that agencies fully analyze and attempt to mitigate potential effects of mineral withdrawal. Therefore, NACO insists that the BLM provide a full analysis with a plan for the mitigation of the effects of a withdrawal from public lands.

b. Additional Issues Should Be Analyzed

Takings Analysis

The BLM must engage in a takings analysis as part of a Withdrawal pursuant to Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988). Although this withdrawal is subject to "Valid Existing Rights," ("VER") this does not take into account potential regulatory takings. Given that the definition of VER is a legal term of art, it is important to distinguish that definition from the one defined in the ARMPA at 5-24. Still, the definition provided in the ARMPA should be used to clarify what permit, license, lease, or claims holders possess and what they should expect through this process. NACO requests that the BLM pay special attention to Valid Existing Rights with no access or that become prohibitively expensive as a result of the SFA and Withdrawals.

Also, the BLM must compensate "the holder of record of each permit, license or lease lawfully terminated or revoked after the allowance of an application, for all authorized improvements placed on the lands under the terms and conditions of the permit, license or lease, before the lands were segregated or withdrawn." Further, "The amount of such compensation shall be determined by an appraisal as of the date of revocation or termination of the permit, license or lease, but shall not exceed fair market value. To the extent such improvements were constructed with Federal funds, they shall not be compensable unless the United States has been reimbursed for such funds prior to the allowance of the application and then only to the extent of the sum that the United States has received. (b) When an application is allowed that affects public lands which are subject to permits or leases for the grazing of domestic livestock and that is required to be terminated, the applicant shall comply with the cancellation notice and compensation requirements of section 402(g) of the Act (43 U.S.C. 1752(g)), to the extent applicable."[92]

Agricultural Resources

Because the SFA triggers evaluations for "Priority Grazing Permits," the BLM should also include impacts to agricultural resources. This should include the economic cost of uncertainty, and consider the extent to which these actions discourage agriculture.

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[91] 43 U.S.C.A. § 1701.
[92] 43 CFR 2310.3-4 § 2310.3-5.

The BLM should provide the process for determining the economic impacts for priority grazing permits. Within the SFAs, grazing permits are required to be reevaluated whether or not they are up for renewal. They will be evaluated using Table 2-2 and for consistency with the RMPs (and with the withdrawals).

Request II-B-6: That the BLM conduct the requested analyses, and include the additional issues listed.

III. Conclusion

NACO respectfully requests that the BLM call upon its local and State partners for meaningful participation and staff support to assist with the above outlined analyses. As the BLM is aware, agency cooperation is key to a successful NEPA process, especially as it relates to State and local governments.[93] Federal agencies are required to invite the participation of impacted states and governmental entities and provide them with an opportunity for participation in preparing an environmental impact statement.[94]

The BLM, as the lead agency, must request the participation of each cooperating agency at the earliest possible time, use the proposals of cooperating agencies, and meet with cooperating agencies by request.[95] When a federal agency is required to invite the participation of other governmental entities and allocate responsibilities to those governmental entities, that participation and delegation of duty must be meaningful.[96]

All three of the impacted counties, as well as surrounding counties and State Departments have staff and invaluable local information that will help to ensure a thoroughly deliberated planning document. The BLM may request that an agency provide staff support to enhance the BLM's interdisciplinary capability, and to request information and portions of the environmental impact statement for development.[97] NACO urges the BLM to do so, and if would be happy to assist with obtaining county-specific information upon request.

Sincerely,

Jeffrey Fontaine
Executive Director

JF/ts
CC: file

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[93] 40 CFR 1501.6; 40 CFR 1501.6.
[94] 40 CFR 1501.7 (2004).
[95] 40 CFR 1501.6(a).
[96] Int'l Snowmobile Mfrs. Ass'n v. Norton, 304 F. Supp. 2d 1278, 2004 U.S. Dist. Lexis 1796 (D Wyo Feb. 10, 2004).
[97] 40 CFR 1501.6.

College of Business
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December 15, 2015

To: Tori Sundheim
Public Lands and Natural Resources Coordinator
Nevada Association of Counties

From: Thomas R. Harris
Thomas R. Harris, Professor and Director
Department of Economics
University Center for Economic Development

Re: Regional Economic Impact Modeling for Sage Grouse Studies

Below are my bullet points concerning regional economic impact modeling for sage grouse habitat studies. My comments are separated into short-run and long-run suggestions. The section of bullet points are for short-run suggestions for what a regional economic impact modeling and mining study should have and address for sage grouse habitat designation studies:

- When developing a regional study, one of the most important decisions is the designation of a study area. A study area can be one county or an aggregation of numerous counties. When doing a regional impact analysis, the extent of the impacts of a study will be dependent on the size or aggregation of counties for a study area. If a study area is too small then all aspects of the impacts from sage grouse designation may not be covered. Alternatively if the study area is too large, the impacts of sage grouse designation will be masked by extraneous economic activity of a large study area. Additional when doing a multi-county study area, a multi-regional interindustry model may be appropriate to derive impact linkages between counties or areas.

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- Counties aggregated into a study area can follow the following aggregation techniques which are by functional economic area, forward and backward economic linkages, predefined study areas, standard county classification, or mathematical aggregation. Functional Economic Areas are defined as a semi-sufficient economic unit. Functional Economic Areas includes where people live, work, and shop and can sometimes be identified by physical or other characteristics. The U.S. Bureau of Economic Analysis has derived functional areas in the U.S. Forward and backward economic linkage procedures aggregated counties by expenditures and purchases by economic sectors in a study area. Backward linkages are purchases of goods and services to produce a product while forward linkages are purchases between economic sectors that are later purchased by consumers. A cluster of these counties would include a majority of backward and forward linkages. Predetermined clusters are counties aggregated by the private or public entities. A private entity may aggregate counties by market trade area. Examples of public sector clusters are those developed by U.S. Bureau of Census, Department of Commerce, Department of Labor and/or Bureau of Economic Analysis. U.S. Bureau of Census and Department of Commerce predefine areas such as Census Commuting Areas or Metropolitan Statistical Areas. Tolbert and Sizer (1990) defined 382 labor markets for the U.S. based on county level journey-to-work data based on 1990 Census. The Bureau of Economic Analysis also defines Functional Areas using similar procedures. Mathematical clustering employs mathematical procedures to cluster counties based on socio-economic data. Given the type of socio-economic data that is used and the objective of the cluster, the mathematical programs will cluster counties that have similar socio-economic characteristics. Whatever technique is used, the aggregation procedure should be outlined and detailed for assisting in interpreting the results.

- A popular model to derive economic impacts for a study area is input-output models. These models show the economic linkages between all sectors in an economy and can be used to estimate county-wide or study

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area wide impacts. One popular input-output modeling framework is the IMPLAN modeling system. This out-of-the-box model derives economic, employment, and labor income impacts for various economic studies. However before using these microcomputer models, the data should be verified and validated. After addressing the study area, the validation and verification of a microcomputer generated interindustry model should be the next step in the analysis. Procedures to verify and validate a national and regional IMPLAN model are detailed in a study by Holland et al. (1997) and Lahr (1993).

- For estimation of impacts, the IMPLAN microcomputer input-output model has developed sectors to derive the differential impacts of different types of mining. The mining sectors for IMPLAN are the Coal Mining Sector, the Iron Ore Mining Sector, the Gold Ore Mining Sector, the Silver Ore Mining Sector, the Lead and Zinc Mining Sector, the Copper Ore Mining Sector, the Uranium-Radium-Vanadium Ore Mining Sector and the Other Mining Ore Mining Sector. In using the Gold Ore Sector, the IMPLAN model derives a national average production function. However for Nevada, the Gold Ore Mining Sector may not reflect the national average production. It is a combination of open pit and underground mining which together yield a production function that could differ from the national average. Therefore before estimating impacts for the mining sectors, researchers need to verify and validate the Nevada mining sectors production function.
- Also for the analysis of impacts of withdrawals of land for sage grouse habitat, input-output models are often employed. These models are excellent in estimating impacts to the different economic sectors in an economy but do not yield information as to the differential impacts of changes in the economy. Differential impacts would be changes to employee compensation, proprietor income, other property income, indirect business taxes, household incomes and state and local government revenue. To complete the differential impacts a Social Accounting Matrix can be used. IMPLAN yields information to develop a Social Accounting Matrix but like input-output models the data needs to be verified and

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validated before it can be used. Therefore a Social Accounting Matrix should be employed for estimating impacts of sage grouse habitat designation.

- Often demand-driven input-output analysis is employed to estimate impacts to a study area economy from changes in final demand. However with sage grouse habitat withdrawals, output levels are determined and associated changes in final demand are not usually known. For the supply-determined analysis, procedures outlined by Seung and Waters (2013) should be employed with to derive impacts of land removal from sage grouse habitat designation. These procedures would yield a supply determined-Social Accounting Matrix analysis.

- However a criticism of the above models is that they are fixed priced models. Fixed price models have the inability to calculate welfare impacts, substitutability of inputs, and difficulty in addressing supply-constrained effects. Therefore a Computable General equilibrium model should be employed. These models are complex but base data can be derived from IMPLAN to estimate the impacts. Papers by Seung and Waters (2010) and Seung et al. (1997) show differences in impact results from fixed priced and Computable General equilibrium models.

The next set of bullet points address long-run objectives:

- A detailed analysis employing Computable General Equilibrium models should be employed to derive the differential impacts of land withdrawal from sage grouse habitat designation.
- First a study area should be developed that is agreed upon by a study group.
- Second, the IMPLAN model data should be validated and verified.
- Third, the production function for different mining sectors should be developed to be sure they reflect the areas mining industry.
- Fourth, a Social Accounting Matrix should be developed and verified and validated.

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- Fifth, a Computable General Equilibrium model should be developed and scenarios as to land withdrawals for sage grouse habitat should be developed and applied.
- This would take approximately a year to develop and would cost approximately $80,000.

If you have questions about this memorandum please call me at 775-784-1681.

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Summary of Requests from the Nevada Association of Counties

Comments for the September 24, 2015 Notice in the Federal Register at 80 FR 57635 on the Proposed Withdrawal of Sagebrush Focal Areas in Nevada and an Associated Application and Environmental Impact Statement

Request I-A: That the BLM submit a notice that describes the mineral resources in the area. The BLM should consult with the State of Nevada, Commission on Mineral Resources Nevada Division of Minerals and the US Geological Survey. It would be helpful to preliminarily review and reference the materials provided on the Division of Minerals website to provide this information, at: http://minerals.nv.gov/home/features/Mineral,_Geothermal_and_Oil___Gas_Potential_Maps_of_Sagebrush_Focal_Areas_-_6/24/2015/.

Request I-B-1: That the BLM thoroughly explain and cite to scientific information describing how the SFAs were designated.

Request I-B-2: That the BLM publish a Supplemental Environmental Impact Statement ("SEIS") for public notice and comment regarding the SFAs and new mapping information. This information and public discussion at the Sagebrush Ecosystem Council meeting on December 11, 2015 makes clear that the purpose and use of the maps require further analysis, discussion, and reconciliation to ensure accurate and implementable Sage-Grouse protection measures. This also shows the need to provide an SEIS and to halt the segregation and Withdrawal period until that analysis is completed.

Request I-B-3-(1): That the BLM work with the State Plan developers adopt the Coates 2015 map as it was intended— to then ground-truth project areas and use the Conservation Credit System for mitigation.

Request I-B-3-(2): That the BLM cite to the science and provide an explanation that supports the SFA strongholds (other than the un-citable maps in the FWS Memo), and that the BLM and FWS point to each contradiction highlighted above and explain how the decision to adopt the FWS Memo strongholds is not arbitrary and capricious.

Request I-B-4: To look to alternative options to a withdrawal, specifically to provide at least enough time to ensure the complete implementation of the State Plan. This might mean entering into a Coordinated Agreement and MOU to work with the State to implement the Conservation Credit Program. The Bi-State Action Plan is a prime example for how local, State, and federal Agencies can work together. If mining and industry were to continue with mitigation measures, the money could be used to fund habitat restoration resulting in a net conservation gain. This is not possible if potential funders like mineral exploration and mining companies are no longer in business.

Request I-A-C: To enter into a Cooperating Agreement with the State of Nevada to implement the State Conservation Credit System similar to what was provided for the Barrick Gold and Newmont Mining Corporations.

Request I-D: That the notice be revised to restate that water will be needed to fulfill the purpose of the requested withdrawal action, as required by 43 CFR 2310.3-1 (c) (13). This remedy will allow the

public to more accurately comment on the water-related consequences of the withdrawal.

Request II-B-1: That the Agencies adopt the Purpose and Need as expressed in this section.

Request II-B-2: That the Agencies adopt at a minimum NACO's Modified Alternative and reconsider as the agency's Preferred Alternative.

Request II-B-3: That the Agencies refer to the December 15, 2015 Memorandum from Thomas R. Harris, Director of the Center for Economic Development at the University of Nevada, Reno titled "Regional Economic Impact Modeling for Sage Grouse Studies" attached as "Appendix A" during the Economic Impacts Analysis to analyze the short- and long-term impacts, as well as the direct and indirect impacts of each alternative. The final costs should be factored into the Secretary's ultimate decision whether or not to accept the Application as proposed.

Request II-B-4: That the BLM clarify Valid Existing Rights and develop procedures for VER elements that need clarification. This should include a public review and comment for each claim subject to extinction.

Request II-B-5: NACO requests that the BLM pay special attention to local and State conservation and land us plans and laws, and to highlight and explain inconsistencies with those plans. It will be important to analyze the economic impacts to counties as a result of these inconsistencies.

Request II-B-6: That the BLM conduct the requested analyses, and include the additional issues listed.

Summary of SFA Comments from the Nevada Association of Counties

Comments for the September 24, 2015 Notice in the Federal Register at 80 FR 57635 on the Proposed Withdrawal of Sagebrush Focal Areas in Nevada and an Associated Application and Environmental Impact Statement

I. Comments On The Proposed Withdrawal Publication/Petition Notice
   A. Failure To Preliminarily Identify The Mineral Resources In The Area
   B. Alternatives Are Available, And Agencies Lack Scientific And Procedural Support For The Segregation Boundaries And Resulting Withdrawal
      1. The Public Has Not Had A Meaningful Opportunity To Comment On The Segregation Boundaries
      2. New Science And Mapping Require That The BLM Re-Initiate The Segregation And Notices, And Submit A Supplemental Environmental Impact Statement
      3. The Science Cited Does Not Support SFA Boundaries
         i. The FWS Memo Cites Only To Unpublished "Strongholds"
         ii. The COT Report Supports Only Localized, Not Widespread Risk Of Mining In Sfas
         iii. The FWS Listing Decision Does Not Support SFA Boundaries
         iv. The State Plan Does Not Support The Sfas Or Withdrawals
         v. Biological Evaluations Within The Sfas Do Not Support SFA Boundaries
      4. There Are Available Alternatives To A Withdrawal
      5. Existing Cooperative Agreements To Protect Greater Sage-Grouse In Equally Valuable Habitat Proves A Cooperative Agreement Can Adequately Constrain Nondiscretionary Uses Within Sfas
      6. Water Rights Would Be Needed To Fulfill The Purpose Of The Requested Withdrawal

II. Scoping Comments
   A. Legal Requirements
   B. Applying the Legal Standards
      1. Purpose and Need
         i. The purpose of the proposed withdrawal of the Sagebrush Focal Areas in Priority Habitat Management Areas is to protect the Greater Sage-Grouse and its habitat from adverse effects of locatable mineral exploration and mining subject to valid existing rights above and beyond the protections outlined in the 2015 Amended Resource Management Plan to achieve the greatest level of conservation in a manner that leaves as many lands with mineral potential open for mineral entry pursuant to FLPMA multiple use and sustained yield mandates.
      2. Reasonable Range of Alternatives
         i. <u>No Action Alternative:</u> The BLM must include an alternative of "no action."75 In the context of land management planning, no action

means no change from the current management direction.76 Because the 2015 ARMPA and the State Plan are in effect, this alternative should contain the protections outlined in the 2015 Amended Resource Management Plan and the State Plan.

ii. Proposed Action: The BLM's Proposed Action is to withdraw the SF As as outlined in the 2015 ARMPA. The BLM should reconsider this, as discussed in Section I.

iii. Suggested Alternative: NACO suggests that the BLM evaluate an alternative to the Proposed Action that adopts a Modified Proposed Action whereby withdrawals would occur only upon adaptive management and ground-truthing on a project by project basis. The SF A boundaries could be used as trigger for consultation for an on the ground proposal which would warrant review for withdrawal. This Alternative might also incorporate the State Conservation Credit system within the SF As. This way, the Conservation Credit system is an option for project proponents and funding will become available to support on-the-ground conservation projects as defined by the Sagebrush Ecosystem Council and associated Nevada State Planners. If no credits exist, then a withdrawal would be warranted for that area.

3. Economic Impacts Analysis
   i. December 15, 2015 Memorandum from Thomas R. Harris, Director of the Center for Economic Development at the University of Nevada, Reno titled "Regional Economic Impact Modeling for Sage Grouse Studies"
4. Valid Existing Rights And Claims Validity Tests
5. Coordination With State And Local Governments
6. Environmental Consequences Under Each Alternative
   i. Air Quality/Climate
   ii. Cultural Resources
   iii. Mineral Resources
   iv. Public Health And Safety
   v. Socioeconomic Conditions
   vi. Water Resources
   vii. Special Status Species And Fish And Wildlife Resources
   viii. Mitigation Of The Effects Of A Withdrawal From Public Lands
   ix. The BLM Should Also Add:
      a. Takings Analysis
      b. Agricultural Resources

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January 15, 2016

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Re: Protest of the Significant Changes to the Proposed Plan as set forth in the Nevada and California Greater Sage-Grouse Bi-State Distinct Population Segment (BSSG) Forest Plan Amendment and Final Environmental Impact Statement (FEIS) for the Carson City Field Office Consolidated Resource Management Plan and the Tonopah Field Office Resource Management Plan Amendment, Nevada

Director Kornze, State Director Ruhs, and Forest Supervisor Dunkelberger:

https://www.federalregister.gov/articles/2015/11/13/2015-28876/opportunity-to-comment-on-changes-to-the-nevada-and-california-greater-sage-grouse-bi-state-distinct

As an inter-governmental organization, the Nevada Association of Counties ("NACO") hereby submits this Protest letter on the significant changes to the Greater Sage-grouse Bi-state Distinct Population Segment Forest Plan Amendment ("Bi-State Land Management Plan Amendments," or "LUPA") Final Environmental Impact Statement ("FEIS") in accordance with 43 C.F.R. § 4160.3(a).[1] NACO represents all 17 of Nevada's counties, several statewide county associations called Affiliate Members, private industry representatives called Associate Members and Government Partners, and statewide associations related to county government. Generally, NACO supports the Protests and concerns expressed by our affected member counties, including Lyon County, Esmeralda County, Douglas County, and Mineral County, as well as the Protests written on behalf of the State of Nevada and individuals who support full implementation of the Bi-State Action Plan.

This Protest is a response to the Bureau of Land Management (BLM) Notice published in the Federal Register at 80 FR 70253 on Friday, November 13, 2015. According to this Notice, the clarification and changes include: (1) Identifying disturbance levels within BSSG

[1] All materials cited herein, the majority of which are readily available online, are incorporated in full by reference.

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habitat; (2) Adjusting buffers for tall structures near active or pending leks; (3) Adding a restriction for new high-power transmission lines; and (4) Changing on-the-ground management for habitat connectivity.

These additions are so similar to the additions placed in the Greater Sage Grouse Land Management Plan Amendments that this seems an attempt to streamline two separate plans with distinctive challenges and actors. The problem is twofold: First, that these new changes only apply to land on the Nevada side of the PMU, and Second that the Bi-State Action Plan functions under an MOU that grants the Bi-State Team cooperating authority to manage private and federal land to address the unique challenges associated with the Bi-State population. This level of coordinated authority was what elevated the Bi-State Team's decisions and precipitated the FWS decision that the Bi-State Plan was sufficient to protect against the need for a listing for the Bi-State Sage Grouse.

I. Overview and the Purpose and Need

"Without **trust** we don't truly collaborate; we merely coordinate or, at best, cooperate. It Is trust that transforms a group of people into a team." Stephen M.R. Covey

We understand that these four significant changes originate from the public comments provided to the USFS and from the FWS. NACO recognizes that the Agencies are, and should be, encouraged to incorporate public comments and reduce duplicative studies already performed by other Agencies. However, Agency actions *must* relate back to the purpose and need for the Plan Amendments.[2] These Plan Amendments are unique in that the stated purpose and need of the project preordains that the Plans are being amended specifically "To address the USFWS finding… the now 'proposed threatened' Endangered Species Act listing, and to support bi-state DPS population management objectives within the states of Nevada and California."[3]

It is problematic that these changes were not presented through the Bi-State Action Plan process. All jurisdictional agencies and several interest groups signed the "landmark agreement" for commitments to locally implement the *Bi-State Action Plan: Past, Present, and Future Actions for Conservation of the Greater Sage-Grouse Bi-State Distinct Population Segment*, Prepared for the Bi-State Executive Oversight Committee for Conservation of Greater Sage-Grouse by the Bi-State Technical Advisory Committee Nevada and California (March 15, 2012) (Bi-State Action Plan or BSAP). Signatories to the Bi-State Action Plan include the U.S. Department of Agriculture, Bureau of Land Management, Fish and Wildlife Service, Natural Resources Conservation Service, Nevada Department of Wildlife, California Department of Fish and Wildlife, and the US Geological Survey.

The landmark agreement signified an unprecedented level of commitment and funding from

[2] 40 C.F.R. § 1502.13; *City of Carmel-by-the-Sea v. United States DOT*, 123 F.3d 1142, 1155 (9th Cir. 1997)
[3] FEIS at 7-8.

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local, state, and federal stakeholders. The process to protect the BSS GDPS for the first time represented a true joint local and federal effort to ensure implementation of the on-the-ground science and the measures necessary to preserve such a sensitive population. This Plan "Recommended revisions and additions to federal agency regulatory mechanisms are provided to promote consistency in evaluating and permitting discretionary actions in sage-grouse habitat in the Bi-State area."[4]

These changes are not needed on a program-level because they reduce the flexibility required by the Bi-State Team to implement conservation measures; especially where these changes were already available to use as tools on a project-by-project basis. This reduction in flexibility greatly impacts the ability for the Team and for counties to develop critical projects related to the important fundamental services they provide. Disturbance caps, tall structure restrictions, high-voltage transmission lines exclusions, and new boundaries create de facto conflicts with the Bi-State Action Plan and county planning where the Amendments as previously written do not. These conflicts cannot be resolved once the Record of Decision (ROD) is signed because future projects and activities must be consistent with the forest plan or RMP. [5]

Finally, these changes only apply to lands within Nevada even where the State border straddles population units. It is unclear why the exact same population in California does not need these new regulations where those in Nevada do. The following summarizes NACO's big-picture concerns and asks:

I. That these changes are outside the scope of the purpose of the document, which is to provide regulatory assurances to prevent a listing under the Endangered Species Act. The FWS in its final rule for Bi-State in April 2015 said the Bi-State Action Plan provided those assurances.

II. That the changes circumvent the established methodology and instead remove the flexibility and limit the tools needed by the Bi-State Team to make local, on-the-ground decisions about projects, which also interferes with county land use planning.

III. That the changes remove the flexibility and limit the tools needed by the Bi-State Team to make on-the-ground decisions about projects. This also impacts counties because

The authority to impose disturbance caps, change height requirements, and prevent high power transmission lines already exists. It is not needed at the program-level when it can be implemented on a project by project basis.

IV. That there is not enough scientific support for the four changes or an explanation

[4] Bi-State Action Plan at 2.
[5] FEIS at 8.

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describing why they were needed, local input, how those changes will be implemented, or an analysis for how those changes will impact Nevadans.

V. The BLM Failed to Conduct a Cumulative Impacts Analysis.

What we are asking for:

1. To present these changes to the LAWG for collaborative reconsideration.
2. To create an exclusion for Counties where County-based functions are concerned.
3. To pay special attention to local and State conservation and land use plans and laws, and to highlight and explain inconsistencies with each.
4. To provide enough information so that we know how these changes are supported and how they will impact us.
5. To permit the Local Area Working Group to override regulatory requirements for Bi-State projects, or to allow them to be arbitrators for projects that might conflict with the plan but are important (in addition to the exclusions for Counties).

II. That these changes are outside the scope of the purpose of the document, which is to provide regulatory assurances to prevent a listing under the Endangered Species Act. The FWS in its final rule for Bi-State in April 2015 states the Bi-State Action Plan provides those assurances.

These changes fall outside the scope of the adopted purpose and need, and substantially undermine the effectiveness of the locally-driven Bi-State Plan. The Plan Amendments should reflect FWSs published listing findings and incorporate and fortify the Bi-State Action Plan as imagined by the FWS. It is problematic for NACO that instead these changes were introduced without Bi-State Team review, and that the sources and reasoning for these changes remains a mystery. This is especially true where the Counties, State, and even the FWS envisioned that the Bi-State Action Plan should set the methodologies for scientific and technical information with respect to the Bi-State DPS planning area. This leads to the conclusion that there exists a failure to support and explain changes that fundamentally alter the nature of the plans as previously anticipated.

In *City of Carmel-by-the*-Sea, the court explains that "Project alternatives derive from an Environmental Impact Statement's '*Purpose and Need*' section, which briefly defines 'the underlying *purpose* and need to which the agency is responding in proposing the alternatives including the proposed action.' 40 C.F.R. § 1502.13."[6] Thus, "The stated goal of a project necessarily dictates the range of "reasonable" alternatives" and the conclusions that stem from those alternatives.[7]

[6] *City of Carmel-by-the-Sea v. United States DOT*, 123 F.3d 1142, 1155 (9th Cir. 1997)
[7] *City of Carmel-by-the-Sea v. United States DOT*, 123 F.3d 1142, 1155 (9th Cir. 1997)

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While the purpose and need was to work closely with the FWS to develop regulatory assurances to avoid a listing, that decision was already made prior to this latest FEIS. It is important to remember that FWS does not have jurisdiction over any non-migratory species not on the endangered species list. This means the FWS April 23, 2015 finding ends the FWS jurisdiction and involvement in this process.

On April 23, 2015 the FWS withdrew the Bi-State DPS as a proposed threatened species under the Endangered Species Act (ESA).[8] The FWS cites directly to the Bi-State Action Plan to support the decision:

> "Based on our analyses of the potential threats to the species, and our consideration of partially completed, ongoing, and future conservation efforts (as outlined in the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) section of this document), we have determined that **the bi-State DPS should not be listed as a threatened species**. Specifically, we have determined that **conservation efforts** (**as outlined in the BSAP, Agency commitment letters, and our detailed PECE analysis…, as well as the TAC comprehensive project database**) **will continue to be implemented** because (to date) we have a documented track record of active participation and implementation by the signatory agencies, and commitments to continue implementation into the future."[9]

The FWS goes even further, citing to the Bi-State Action Plan methods as exemplary to determine what is most beneficial to the species on a project-by-project basis:

> "Agencies have committed to remain participants in the BSAP and continue conservation of the DPS and its habitat. Additionally, **the BSAP has sufficient methods for determining the type and location of the most beneficial conservation actions to be implemented**, including continued development of new population and threats information in the future that will guide conservation efforts."[10]

The FWS therefore concludes, "**As a result of these actions**, this document **withdraws the proposed rule** as published on October 28, 2013 (78 FR 64358)."[11]

<u>The Bi-State Action Plan</u>

The agreement comes with commitment and funding from local, state, federal, and interested stakeholders. The use of the Executive Oversight Committee ("EOC")[12], the Technical Advisory Committee ("TAC")[13], and Local Area Working Group ("LAWG")[14]

[8] This is different from the the Greater Sage-Grouse findings which do rely on the Land Management Plans and does not withdraw the proposed rule as published for both species on October 28, 2013 (78 FR 64358). *12-Month Finding on a Petition to List Greater Sage-Grouse (Centrocercus urophasianus) as an Endangered or Threatened Species*; *Proposed Rule*, 80 FR 59858 (October 2, 2015).
[9] 80 FR 22829, April 23, 2015.
[10] 80 FR 22829, April 23, 2015.
[11] 80 FR 22829, April 23, 2015.
[12] Members
[13]

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(together, "Bi-State Team") are key to long-term success, as the Plan Amendments only work as developed with LAWG and TAC input.[15] The commitment by USFS, BLM, USFWS, the State of Nevada and California was cemented with signatures confirming that "We, the undersigned, members of the Executive Oversight committee for Conservation of the Bi-State sage-grouse DPS, ***have reviewed and concur with this Action Plan for conservation*** of the Bi-State sage-grouse Distinct Population Segment:"

> Ren Lohoefeher, R8 Regional Director, US Fish and Wildlife Service Pacific Southwest Region
> Ted Koch, Nevada State Director, US Fish and Wildlife Service
> Ed Armenta, Forest supervisor Inyo National Forest, US Forest Service
> Bill Dunkelberger, Forest Supervisor Humboldt-Toiyabe National Forest, US Forest Service
> Amy L. Lueders, Nevada State Director, Bureau of Land Management
> James G. Kenna, California State Director, Bureau of Land Management
> Bruce Peterson, Nevada State Conservationist, Natural Resources Conservation Service
> Tony Wasley, Director, Nevada Department of Wildlife
> Charles H. Bonham, Director, California Department of Fish and Game
> Keith Miles, Western Ecological Research Center Acting Director, US Geological Survey[16]

The EOC consists of the Directors of State and Federal land resource agencies in Nevada and California with regulatory in the Bi-State DPS area. The purpose of the EOC according to the signed MOU (2012) is to "provide a framework to facilitate interagency cooperation among the parties that will ensure a consistent and coordinated multi-jurisdictional effort to conserve greater sage-grouse populations and habitats based on population and habitat conservation goals rather than land ownership or jurisdictional boundaries." The ultimate commitment by USFS, BLM, USFWS, the State of Nevada and California was cemented with signatures confirming that "We, the undersigned, members of the Executive Oversight committee for Conservation of the Bi-State sage-grouse DPS, ***have reviewed and concur with this Action Plan for conservation*** of the Bi-State sage-grouse Distinct Population Segment."[17]

Next, the TAC is responsible for providing technical expertise and guidance, and identifying and prioritizing actions necessary for conservation of the Bi-State DPS sage-grouse. The TAC conservation recommendations are presented in the Bi-State Plan. The Technical Team is best positioned to help determine where and how to implement conservation measures.

The final component, the LAWG "was formed under the guidance of the Governor's Team and includes "biologists from the BLM, USFS, Natural Resources Conservation Service, NDOW, CDFW, Department Of Defense, private property owners, and other key stakeholders such as Nevada Division of Forestry, California State Parks, University of Nevada Cooperative Extension, Nevada Wildlife Federation, USGS, Washoe Tribe of

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[14]

[15] Bi-State Action Plan at 2.

[16] *Bi-State Action Plan* at iv (March 15, 2012)

[17] *Bi-State Action Plan* at iv (March 15, 2012)

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California and Nevada, and the LADWP."[18]

III. That the changes circumvent the established methodology and instead remove the flexibility and limit the tools needed by the Bi-State Team to make local, on-the-ground decisions about projects, which also interferes with county land use planning.

Categorical exclusions, disturbance caps, buffers, and expanded habitat boundaries are tools already available at the Bi-State Team's disposal. Deciding at the program level to exclude or cap activity conflicts with the flexible Bi-State Plan as it was meant to be applied: on a localized or project-level basis using adaptive management and monitoring. The Bi-State Action Plan "Recommended revisions and additions to federal agency regulatory mechanisms… provided to promote consistency in evaluating and permitting discretionary actions in sage-grouse habitat in the Bi-State area."[19]
The counties are part of the Bi-State Action Team and help drive needed conservation efforts. As part of this effort, the counties believed their interests were appropriately addressed. These new changes create conflicts with fundamental county needs and land use authority.

While these severely restrictive measures might for some seem to better protect the Bi-state species and its habitat, they instead greatly reduce the Bi-State Team's discretionary authority and therefore the ability to implement measures using adaptive management, monitoring, and mitigation across Bi-State Habitat. These changes also reduce the ability for counties to provide fundamental infrastructure, even in locations that would better serve the Bi-State Sage Grouse working closely with the Bi-State Team. For example, disturbance caps, height requirements, and high voltage restrictions might mean that a much needed project best suited for co-location is no longer allowed because it creates a regulatory trap for decision-makers working to benefit the sage grouse and the people who live in the area.

A. The Changes Are Inconsistent with Chosen Scientific Methodology

The BLM upon signature agreed to the methods of the Bi-State Action Plan, and the FWS determined these methods provide adequate regulatory certainty to protect the Bi-State Sage Grouse. Yet the BLM has failed to follow the chosen methods and technology, which undermines public understanding. According to the National Environmental Protection Act (NEPA), "an agency must be permitted discretion in relying on the reasonable opinion of its own qualified experts," and must also ensure that the levels of accuracy and precision are consistent with the methods and technology used.[20] These changes circumvented the collaborative process and undermine what we believed was a commitment to the Bi-State

[18] Bi-State Action Plan at 1.
[19] Bi-State Action Plan at 2.
[20] 40 CFR 1502.16 and 40 CFR 1502.24.

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Action Plan, including the methods and technologies as described by the Bi-State Plan and the PECE Report. The Local Area Working Group never saw these proposed changes, and therefore never had a chance to determine to what extent they might conflict with Bi-State Action Team efforts. Even if there is no legal violation, the violation is trust-based and far more damaging.

These changes are inconsistent with the scientific methodology as defined by agreement in the adopted Bi-State Plan. In its findings the FWS cited to the Bi-State Action Plan methods as exemplary to determine what is most beneficial to the species on a project-by-project basis, that "**the BSAP has sufficient methods for determining the type and location of the most beneficial conservation actions to be implemented**, including continued development of new population and threats information in the future that will guide conservation efforts."[21] Because the purpose and need is to work with partners to avoid a listing, the listing decision guides the methodology. This methodology says specifically that the Bi-State Team should choose the location of the most beneficial conservation actions. This could conflict, for example, with disturbance cap requirements if the conservation action causes short-term disturbance. Alternatively, the Bi-State Team might decide that a project is better suited for an area with more disturbance, rather than placing that project in another area with less disturbance.

The Bi-State Action Plan was conceived as a "living document" that will be updated at a minimum of every three years with monitoring, inventory, and research results. Together, the Bi-State Team and Plan "lays out a comprehensive framework of administrative actions, regulatory mechanisms, habitat improvement treatments, monitoring, and research actions in a science-based adaptive management approach."[22] Annual work plans for resource agencies will be prepared separately and coordinated through the EOC based on recommendations from the Bi-State TAC and LAWG, consistent with the Bi-State Action Plan. [23]

The Action Plan incorporates a strategic, science-based adaptive management approach for future project planning based on development of a Conservation Planning Tool (CPT) for evaluation of the effectiveness of completed actions and updated analyses of specific risks to each life stage of the population. The tool is essentially a cost-benefit analysis for treatments for habitat improvement projects:

> The overarching principle of the Bi-State Action Plan depends on development of the Conservation Planning Tool (CPT) for science-based evaluation of the effectiveness of completed actions, quantifying population vital rates, confirming population risk assumptions, **validating seasonal use areas and habitat maps**, and **identifying priority locations for improving habitat connectivity** and **expanding available use areas to reduce habitat-based risks.** (Details of the CPT are included in Section 6.5). Recommended revisions and additions to federal agency regulatory mechanisms are provided to promote consistency in evaluating and permitting discretionary actions in

[21] 80 FR 22829, April 23, 2015.
[22] Bi-State Action Plan at 2.
[23] Bi-State Action Plan at 2.

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sage-grouse habitat in the Bi-State area."[24]

Shortly following the announcement that conservation efforts would be carried out through the Bi-State Action Plan, which "mark[ed] the single largest sage grouse restoration commitment in history and provides for full implementation of the plan,"[25] Secretary of the Interior Sally Jewell

> "applaud[ed] the NRCS, USFS and the BLM for their very significant commitments, which will help provide ***certainty*** that important conservation actions in key areas of the bird's habitat will ***continue to be implemented***. ***Together, we can make our landscapes work for both agriculture and the bi-state sage-grouse***," and that the Department of the Interior "made it a ***high priority to engage in voluntary partnership with ranchers, farmers and other landowners to conserve the wildlife and habitat that are so important to our heritage and way of life***." Tom Vilsack continues, "Through action such as this, along ***with the support of our partners***, we can help secure this species' future and maintain our vibrant western economies."[26]

Despite the BLM's signed commitments to the Bi-State Action Plan, these changes have not been reviewed by the TAC or the LAWG, and are therefore not scientifically supported as envisioned by the Bi-State Plan or FWS and do not fulfill the purpose and need of the EIS. Thus, each deviation constitutes a violation of the Agreement, fails to use the Best Available Science as defined by the Bi-State Plan, and falls outside of the scope of the EIS, which is predicated upon the Bi-State Action Plan's implementation.

Request II: That the BLM follow the methodology as defined by the Bi-State Plan, and the LAWG and TAC be given a review timeline for these changes to decide whether and to what extent they should be adopted as part of the Bi-State Action Plan.

Request III-3: To permit the Local Area Working Group to override regulatory requirements for Bi-State Team approved projects, or to allow them to be arbitrators for projects that might conflict with the plan but are important.

B. The Changes Conflict with County Planning Efforts

This reduction in flexibility also creates a conflict with county land use planning decisions. Where these tools also provided flexibility for counties to construct projects for land use planning efforts, now exclusions will make it difficult or impossible to construct needed infrastructure. Because this conflict did not exist prior to these changes, there was no need to discuss the issue.

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[24] Bi-State Action Plan at 2.
[25] *Sage Grouse Champions: Bi-State Local Area Working* Group, Sage Grouse Initiative (July 21, 2014).
[26] USDA Announces Landmark Commitment to Improve Sage-Grouse Habitat: *Nevada-California Ranchers to Benefit*, USDA Release No. 0129.14 (June 20, 2014).

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During land use planning, the BLM must "coordinate … with the land use planning and management programs of the States and local governments within which lands are located." These plans include, "the statewide outdoor recreation plans … considering the policies of approved State and tribal land resource management programs….the Secretary shall… keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non- Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands."[27]

If the BLM determines that provisions of land use plans or ordinances are not "consistent with the laws governing the administration of public lands," then NACO asks for a description of the differences and an explanation for why these differences or inconsistencies should not be resolved.

County Plans include, but may not be limited to the following:

Esmeralda County Master Plan, 12-7-2011
Esmeralda County Water Resource Plan 6-5-12
Esmeralda County Public Lands Policy Plan 2013
Lyon County Comprehensive Master Plan 12-23-2010
Lyon County Public Lands Policy
Carson City Master Plan, April 6, 2006
Douglas County, Nevada Master Plan 2011 Update Adopted March 1, 2012

Request III-1: To create an exclusion for counties to construct important county projects.

Request III-2: To pay special attention to local and State conservation and land use plans and laws, and to highlight and explain inconsistencies with each.

IV. That there is not enough scientific support for the four changes or an explanation describing why they were needed, local input, how those changes will be implemented, or an analysis for how those changes will impact Nevadans.

The Bi-State Action Plan adequately addresses all verified threats and connectivity habitat as evidenced by the "not warranted" finding. These changes are not supported by local science or planning, and were made on top of and outside of the local planning process. The Notice reasons that these changes "were made in response to issues raised during the protest period

[27] 43 U.S.C. 1712(a)(9) (FLPMA § 202(a)(9))

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and based on additional policy discussions.[28]

Even if it is legally permissible to deviate so greatly from the Bi-State Action Plan as adopted, the conclusions that precipitated these changes are not supported by analysis or data as required by NEPA.[29] Agencies must follow the National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., which was created to ensure that federal agencies take a "hard look" at the environmental consequences of their decisions.[30] This is to ensure that the agencies effectuate the need for the action using informed judgment.[31] NEPA does not permit an agency to rely on the conclusions and opinions without providing both supporting analysis and data. The EIS "shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix."[32] An agency must also evaluate and disclose credible scientific evidence that contra-indicates a proposed action.[33] This is the standard even when those conclusions come from another Agency's analysis or from Protest Letters.[34]

There are four broad underlying concerns associated with each significant change. First, it is unclear how and why the disturbance caps will be implemented yet it is clear that they conflict with measures in the FEIS and will reduce needed flexibility for the Bi-State Team to determine on a project-by-project basis whether a proposed project should be (1) co-located where already disturbed land may be double-purposed, and to avoid (2) encouraging disturbance where there is and should remain none. Second, the need to adjust buffers for tall structures lacks any support, as excluding tall structures is the most restrictive alternative used to reduce predation, a threat which is not analyzed or raised as an issue in the Bi-State Action Plan or FEIS. Third, creating an exclusion for high-power transmission lines is an unnecessary limitation as the Bi-State Team has standing authority to reject a project, or to design common-sense actions crafted to conserve the species or to accommodate public safety needs that might otherwise be excluded. Finally, it is a violation of local trust and NEPA that there is no definition, study, or other support to assert that additional connective habitat was necessary or that these new "connective habitat" boundaries are scientifically supported. As the Bi-State Plan already incorporated and labeled connective habitat as Priority Habitat, the lack of scientific information or support for new connective habitat boundaries makes it very difficult to provide meaningful comment on this issue.

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28 80 FR Page 70254

29 40 C.F.R. § 1502.9(b).

30 *City of Carmel-By-The Sea v. United States DOT*, Civ. No. 92-20002 SW, 1998 U.S. Dist. LEXIS 21441, at *17-18 (N.D. Cal. July 22, 1998)

31 *City of Carmel-By-The Sea v. United States DOT*, Civ. No. 92-20002 SW, 1998 U.S. Dist. LEXIS 21441, at *17-18 (N.D. Cal. July 22, 1998)

32 40 C.F.R. § 1502.24. Ohio Valley Trail Riders v. Worthington, 111 F. Supp. 2d 878, 2000 U.S. Dist. LEXIS 13394 (ED Ky July 10, 2000).

33 40 C.F.R. § 1502.9(b).

34 40 C.F.R. § 1502.24.

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(1) Identifying disturbance levels within BSSG habitat

According to the Notice, "The proposed change with respect to habitat disturbance sets a "total anthropogenic disturbance of no more than 3 percent of the total BSSG habitat on Federal lands within the Bodie Mountain/Grant, Desert Creek/Fales, and White Mountains population management unit boundaries (C-Wild-S-04)," and a "total anthropogenic disturbance of no more than 1.5 percent of the total BSSG habitat on Federal lands within the Pine Nut Mountains population management unit (PMU) boundaries (C-Wild-S-05), due to higher presence of risk factors in the PMU as analyzed under Final EIS Alternative C."[35]

Habitat availability can be assessed at the landscape scale without imposing disturbance caps that would interfere with the Bi-State Action Plan process. The Notice states "Concerns were raised by the public that the BLM action was not adequate to protect BSSG and its habitat. Disturbance levels identified in the Final EIS will require site-specific project mitigation to insure no unmitigated net loss of habitat. This requires assessing habitat availability at the landscape scale."[36]

Though well-meaning, disturbance caps provide the perverse incentive to disturb areas that have not been disturbed. For example, an area with existing disturbance is better suited for co-location, but the disturbance cap would prohibit a project where the preferred location would exceed the percentage of disturbance. Instead, the project would only be approved in an area with no disturbance. The resulting project would be placed in an area less well suited for both the builder and the Bi-State Sage Grouse.

The FEIS does not provide enough information to inform the public how disturbance is defined and will be implemented. The FEIS does not cite to science or explain the activities that would trigger the disturbance caps. Realistically, depending on the time of year and habitat, a herd of cows walking across a field could invoke the disturbance cap. The BLM must define what does and does not constitute a disturbance and how that disturbance will be calculated: treatments to improve habitat, recreation facilities (e.g., campgrounds, day use areas, scenic pullouts, trailheads, etc.), fire, activity on private land, wild horse and burros, and travel are all important factors that should be further analyzed.

If activity on private land triggers a disturbance, then this might confine grazing to private land which would concentrate the impacts to private land. This is a backdoor regulation of private property because it changes how private landowners are allowed to act. If activity on private property is used to measure disturbance levels, then this will create an increased impact.

[35] 80 CFR 70253

[36] [80 CFR Page 70254]

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It is critical how the BLM defines ecological site goals. This goes back to the baseline conditions of the habitat area used for defining disturbance levels. There is not enough information in the FEIS to determine where the calculation begins: Is the disturbance cap calculated by the desired habitat conditions, or by the actual condition of the land? Knowing that the habitat value varies, who will measure the ecological value of each site? How will the BLM ensure that the desired objectives for each ecological site are achievable? Can local partners help meet these objectives? Again, the Bi-State Team already measures the ecological value of the sites to choose the best areas for conservation. This Team consists of wildlife biologists and rangeland scientists who are qualified to make these determinations free from program level disturbance cap requirements.

Ground-truthing must be a tool that remains available for attainment levels on a given site. While the Coates map relied upon in the Bi-State LMP is a model-level map, on a project level the baseline sets a level of feasibility. To truly understand BSSG habitat and the relative impacts on a parcel-to-parcel basis, BSSG habitat must be ground-truthed prior to determining disturbance levels. To do this, ecological sites must be assessed through NRCS, and range land scientists must be used to interpret biological information.

While biologists can identify habitat, the ecological site analysis is a range specialist's job. For example, as NRCS performs soil surveys, they map soils in the field to develop a plant community appropriate for those soils. It is only once the soil survey and ecological site is established using local scientists and information that the management objectives of the site can be determined. If there is a potential for 40% sage brush, and we want more grass, then a range scientist might say to do some treatments, which are land disturbing.

The disturbance cap requirements create extreme uncertainty for ranchers. The only guarantee a rancher has is an allotment management plan. A rancher with priority habitat on an allotment must ask the agency if they have habitat, where it is, and compare that with the grazing plan to determine early on where they might encounter conflicts.

If grazing is greatly reduced because of these disturbance caps, then the BLM must also analyze impacts to vernal pools. Ranching and Sage-grouse habitat are known to have a symbiotic relationship, especially with respect to vernal pools

Looking at Table 2-2, it seems that the BLM has adopted what WAWFA provided plus more. To effectively restore Bi-State Sage Grouse habitat, the BLM must use local science and State of Nevada Monitoring Guidelines that they helped to develop. This Table 2-2 should be used as a guideline, but should not be used as objectives, which change depending upon the ecological site. In an arid state like Nevada, Table 2-2 may never be achieved on many sites.

The BLM must also analyze the effects of wild horses, must assess the economic impact to counties from the implementation of the proposed action, and must also analyze regulatory

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takings as a result of the disturbance caps.

(2) Adjusting buffers for tall structures near active or pending leks; and (3) Adding a restriction for new high-power transmission lines

As part of the protest process, the BLM is making changes in response to issues raised during the protest period and based on additional policy discussions and was analyzed under Alternative C in the EIS. "found that it should have identified the buffer distance for tall structures as 4 miles from active or pending leks. This is consistent with management prescriptions proposed by the USFS. Specifically, the BLM proposes to adopt the action from Alternative C which states that tall structures, which could serve as predator perches, will not be authorized within 4 miles of an active or pending lek (C-LUSU-S-04). The 4-mile lek buffer accords with other prescriptions of surface disturbance in sage-grouse habitat and is consistent with best science available." The BLM is also "designating exclusion areas for new high-power (>=120kV) transmission lines in BSSG habitat. Specifically, new high-power (>=120kV) transmission line corridors, rights-of-way, facilities, or construction areas in habitat (outside of existing corridors) will not be authorized (C-Min-S-09)."

These changes, again, are not needed. The FWS did not find predation to be a driving factor for Bi-State DPS populations, but instead found that the "the impact is thought to be relatively low and localized at this time compared to other threats" with respect to factor § 424.11(c)(C) "Disease and Predation," or "disease (West Nile virus) and predation facilitated by fences, powerlines, and roads, are threats in the Bi-State area." Thus, the action of excluding any structure above 8 feet to address the sole localized threat of predation seems disproportionate to what's stated in the agency's planning documents.

Further, under ESA § 424.11(c)(A) "Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range," urbanization, infrastructure (fences, powerlines, and roads), mining, energy development, grazing, invasive and exotic species, pinyon-juniper encroachment, recreation, wildfire, and the likely effects of climate change were the major threats to current and future destruction, modification, or curtailment of habitat in the Bi-State area. FWS acknowledged that individually, any one of these threats appears unlikely to severely affect persistence across the entire Bi-State DPS. Cumulatively, however, these threats interact in such a way as to fragment and isolate populations.

The main concern for FWS prior to the release of the Bi-State Plan was that existing regulatory mechanisms, § 424.11(c)(C), are "ineffective at ameliorating habitat-based threats and may not be able to address certain threats such as disease, drought, and fire." As of 2010, the finding stated that "existing regulatory mechanisms appear to be implemented in a manner that is inconsistent with life history requirements, reaction to disturbances, and currently understood conservation needs."

Even though the threat was low, the Bi-State Action Plan still addressed predation on sage-

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grouse, stating "it has not been quantified in the Bi-State area but ravens have been found to contribute to nest destruction. Pinyon and juniper removal and transmission line removal in sage-grouse habitat reduces predation risks by removing avian predator perches in sagebrush habitat." The Bi-State Action Plan has focused on conservation easements, fence removal and modification, seasonal and permanent road closures during the sage-grouse breeding and nesting seasons, managed livestock grazing permits, wild horse gathers, weed treatment, rangeland treatment to remove pinyon juniper trees and reestablish sagebrush habitat, fuel reduction progress, and meadow habitat condition improvements. This addresses threats cumulatively so that they do not fragment and isolate populations.

Raven control could be managed by permit in the Nevada portion of the Bi-State area if it is determined to be warranted by FWS. The Nevada Department of Wildlife (NDOW) currently holds a Federal Migratory Bird Depredation Permit that allows take of up to 2,000 common ravens for the protection of sage-grouse and other game bird species. Under the conditions of the permit, lethal take is not to be the primary means of control. Active hazing, harassment or other non-lethal techniques such as natural habitat improvement and modifications of anthropogenic artificial habitat provisions (such as transmission lines and landfills) must continue in conjunction with any lethal take of migratory birds. Other administrative stipulations in the permit include an annual report to the FWS Migratory Bird Permit Office identifying the county in which birds were taken, and a specific description of the damage or other interests harmed over the past year, and an estimate of economic loss suffered.

The BLM has not consulted with impacted counties to review land use plans and work with the counties to develop alternative locations for projects that are no longer permitted pursuant to these new changes. The BLM has additionally failed to provide an economics impacts analysis with respect to: renewable impact energy corridors, and impacts to ravens and other protected predators, GHG emissions impacts for re-routing a project around a lek through undisturbed habitat, and access to power for low income communities. The BLM should also address alternatives that do not create these high-cost restrictions. For example, anti-perch devices. The BLM must also conduct a takings analysis for rendering potential development economically prohibitive. See Exhibit 2.

These restrictions are likely to prevent common sense actions already authorized by the Bi-State Team. It does not make sense that the BLM would limit its own discretion for an issue that requires a permit anyway. These measures come at a high cost for little conservation gain where the Bi-State Action Plan already imposes restrictions per project.

(4) Changing on-the-ground management for habitat connectivity

Finally, "The BLM is clarifying language from Alternative C to provide for management of connectivity habitat. The BSSG landscape is fragmented by areas of agriculture and urbanization, as well as areas of naturally occurring and encroaching pinyon-juniper

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vegetation. Sage-grouse habitats within and between PMU are often separated by stretches of unsuitable areas that may inhibit sage-grouse movements across the landscape. Alternative C provides a limited amount of management direction to maintain or enhance suitability of connective area. Alternative C includes a goal about habitat and movement and an objective of improving degraded habitat, including areas with conifer encroachment (i.e., pinyon-juniper). Actions and Best Management Practices relating to connectivity apply primarily to mineral uses. Alternative C states that where valid existing rights exist, in connective habitat areas, vegetation characteristics suitable to sage-grouse should be maintained to the extent technically feasible (C-Min-S-01). In addition, Alternative C provides additional direction not specific to connectivity which states, ``Vegetation treatments and post-disturbance restoration should seed and/or transplant sagebrush to restore large patches of sagebrush cover and connect existing patches" (C-Wild-S-02). Given the fragmented nature of the bi-state landscape and the level of apparent isolation of subpopulations, additional management direction for connective habitat area is necessary to facilitate sage-grouse movement, reduce isolation, and increase genetic interchange between subpopulations. This change is being made in response to policy discussions."

This "connective habitat" is not needed because the Bi-State Plan maps already include connective habitat. When considering connective habitat, the Bi-State Plan worked with Pete Coates's methods and the CPT to develop a map that included connective habitat which was labeled as priority habitat.

In fact, "The overarching principle of the Bi-State Action Plan depends on development of the Conservation Planning Tool (CPT) for science-based evaluation of the effectiveness of completed actions, quantifying population vital rates, confirming population risk assumptions, validating seasonal use areas and habitat maps, and **identifying priority locations for improving habitat connectivity** and expanding available use areas to reduce habitat-based risks."[37] Further, the Bi-State Plan focuses "on protecting continuous blocks of unfragmented habitat, restoring historic habitat that has been impacted by pinyon-juniper encroachment and wildfire, reestablishing habitat connectivity, and securing permanent habitat conservation of important private lands."[38]

Between the DEIS and FEIS, somebody mapped connective habitat which added hundreds of acres of habitat to the map. Nobody knows how that happened, how it was added, or who added it. It appears as if it were drawn in at random. These changes should go through the Bi-State Team. Until we have access to scientific reports and an explanation for why these changes were needed, our comment is there is no such thing as connective habitat.

The BLM must define "habitat connectivity." If the land is not priority habitat, then making the connection will not be helpful. This regulation will impact the economy and recreation

[37] Bi-State Action Plan at 2.
[38] Bi-State Action Plan at ii.

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access. The BLM must provide an economic impacts analysis for how this change will impact counties, and recreation access.

Request IV-1: To provide enough information so that the public understands how these changes are supported and how they will impact us.

Request IV-2: These four significant changes should be fully evaluated by the Technical Advisory Committee and the Local Area Working Group for recommendation to the Executive Oversight Committee. This way, the LAWG and TAC can decide collaboratively whether these are in fact measures that can be implemented consistently and effectively given local information.

IV. Failure to Conduct a Cumulative Impacts Analysis

The FEIS also fails to perform a cost-benefit or cumulative impacts analysis for these new changes. All that is changed is the conclusions, but no additional support or analysis for their cost or alternatives. NEPA also requires that an EIS consider the "cumulative impact" of an action, which is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.[39] Even though the adopted components were analyzed as part of their respective alternatives in the earlier draft EISs, the chosen components have not been analyzed together, along with their cumulative impacts, as one final chosen project.

Request V: That the BLM perform a Cumulative Impacts Analysis using the final chosen actions.

V. Conclusion

Thank you for your time and consideration of this Protest letter. Nevada's counties are crucial stakeholders that will be significantly affected by this change in policy. We remain committed continuing to assist with the implementation of conservation measures, and understand the importance of working to preserve Bi-State Sage-Grouse habitat and populations.

Respectfully,

Jeff Fontaine
Executive Director, Nevada Association of Counties

[39] *City of Carmel-By-The Sea v. United States DOT*, Civ. No. 92-20002 SW, 1998 U.S. Dist. LEXIS 21441, at *17-18 (N.D. Cal. July 22, 1998)