EXHIBIT 36

To

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In

Western Watersheds Project, et al. v. U.S. Dept. of the Interior, et al.

Case No.: 3:21-cv-0103-MMD-CLB

Western Watersheds Project DEIS Supplemental Comments

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Working to protect and restore Western Watersheds and Wildlife

September 14, 2020 *Via Web Portal*

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U.S. Bureau of Land Management
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Subject: Supplemental Comments on the Thacker Pass Lithium Mine DEIS (DOI-BLM-NV-W010-2020-0012-EIS)

Dear Mr. Loda:

Western Watersheds Project (WWP) is writing again to submit supplemental comments on the Draft Environmental Impact Statement (DEIS) for the Thacker Pass Lithium Mine (DOI-BLM-NV-W010-2020-0012-EIS). We submitted another comment letter and 25 attachments earlier today. Due to the DEIS's short public comment period and the disruptions we have experienced because of the ongoing wildfire emergency, we have not been able to fully participate in the NEPA process for this Project. Even with this supplemental comment letter, there are additional comments that we have been prevented from making during the public comment period (e.g., golden eagles, greater sage-grouse, migratory birds, and BLM sensitive species). We ask again that BLM re-open the public comment period for this DEIS for a 30-to-45-day period, so that the public can fully participate and provide information for BLM's consideration. This would be in keeping with BLM's prior practice of 90-day DEIS comment periods for large, complex projects. Fast-tracking that hinders the public's ability to fully participate in NEPA review is unlawful.

A. Pole Creek

We are concerned about the Project's potential impacts on Pole Creek and the potential to harm wildlife that rely upon it, through reductions in water quantity and flow caused by the Project. Attachment 25 in our previously submitted DEIS comment letter contains photos that show that even in September, there is still substantial water in it. In this part of the Great Basin, every drop of water is precious. What seems like a "small" reduction in water quantity to BLM or LNC can be a very big reduction to wildlife, affecting survival and reproductive success. We don't think these potential impacts and similar potential impacts to Thacker Creek and the wildlife reliant on it have been adequately analyzed in the DEIS, especially given the potential for drought and a drier climate due to climate change to also reduce water quantity and stream flow. These would be direct, indirect, and cumulative impacts. NEPA requires BLM to make a full analysis of the impacts of this Project.

B. Golden Eagles

The DEIS states:

> Under the Proposed Action, the Applicant is requesting authorization from the USFWS for disturbance to and loss of annual productivity from one Golden Eagle breeding pair for a period of up to five years from the date of the issuance of a take permit, under the Bald and Golden Eagle Protection Act. This Alternative would include monitoring of the nest site and mitigation to offset impacts to golden eagles. Under this Alternative, LNC would provide the compensatory mitigation at the required 1.2:1 ratio by retrofitting electric utility poles, as discussed in the Eagle Rule Revision 2016 PEIS (USFWS 2016).

DEIS at ES-1.

What is the Project's plan for after the five years/breeding seasons elapse? Does LNC plan to re-apply for additional golden eagle take permits over the life of the Project? If the Project continues to disturb golden eagles after the expiration of its take permit, it will violate the Bald and Golden Eagle Protection Act (BGEP)A.

Why has LNC applied for a take permit authorizing disturbance and loss of annual productivity from only golden eagle breeding pair when there are so many active golden eagle nests within two miles and 10 miles? It is reasonably foreseeable that there will be disturbance and loss of annual productivity for more than only one golden eagle breeding pair. Yet the DEIS contains no explanation of or evidence for why only one pair would experience take. If any additional golden eagles experience any form of take prohibited by BGEPA without a take permit, it will be unlawful. What measures will the Project take to prevent unauthorized take of other golden eagles? How will the Project be monitored to ensure that unauthorized take of other golden eagles has not occurred? Who will review the results of this monitoring and how often will those reviews take place?

Eagle take permits under BGEPA can only be issued if the permit applicant has avoided and minimized impacts to the extent practicable. What avoidance and minimization measures has the Project taken? Has USFWS, NDOW or another government agency suggested other avoidance and minimization measures to prevent take of golden eagles that LNC or BLM is unwilling to implement? If so, what were they?

Some of this information is in the draft Eagle Conservation Plan but it should be repeated in the EIS where the full public can see it. The Eagle Conservation Plan is not actually part of the Project's NEPA documents (not an Appendix or posted on ePlanning) and was not available to the public for review during the DEIS public comment period unless members of the public had previous experience reviewing eagle conservation plans and knew to ask for it.

The Project's draft Eagle Conservation Plan (Attachment A) incorrectly asserts that incidental take of birds protected under the Migratory Bird Treaty Act (MBTA), which includes bald and golden eagles, is not unlawful. ECP at 4. This is based on a faulty Department of the Interior M-Opinion that was recently vacated by a federal court. *See* Attachment B. The Eagle Conservation Plan must be revised to correct this and reviewed to ensure that its avoidance, minimization, and mitigation measures are sufficient to prevent incidental take of migratory birds.

The Eagle Conservation Plan does not take into account that golden eagles can have alternate nests and that all of those nests need to be protected, not just the nests that happened to be active the year that a survey was conducted. *See* Attachment C (B. A. Millsap, *et. al.* Conservation Significance of Alternative Nests of Golden Eagles). "Based on our review, were commend alternative golden eagle nests be treated with the same deference as used nests in land use plans. We justify this recommendation on the basis of existing scientific information reviewed here, which suggests take, as defined by the [Bald and Golden Eagle Protection] Act and implementing regulations, is as likely to occur at alternative golden eagle nests as at used nests." Attachment C at 240. The Eagle Conservation Plan states that there are 59 golden eagle nests in the project area, which the Plan describes as including "9 active and used by golden eagles." Attachment A at 11. According to the Eagle Conservation Plan, in 2019's survey, there were 76 golden eagle nests and six characterized as active and used by golden eagles in the survey area. Attachment A at 12. This suggests that the number of golden eagle nests in the survey area is increasing. Many of these nests may be alternate nests, suggesting that there is a greater likelihood of golden eagle disturbance and loss of annual productivity than just one breeding pair per year/breeding season. Given this, it seems highly likely that the Project would result in illegal, unauthorized golden eagle take (e.g., disturbance, productivity loss, nest loss).

The Eagle Conservation Plan's assessment of the risk of Active Nest Destruction is based on a single year (2019), which had fewer active nests than the survey located the previous year. *See* Attachment A at 17. Basing this assessment on a single year's data is unwise given the use of alternative nests by golden eagles and underestimates the risk, thus increasing the likelihood of unauthorized nest destruction take.

Proposed new power lines at the Project should be undergrounded to reduce risk of eagle collision or electrocution. By undergrounding power lines, the Project would demonstrate that it had taken all practicable steps to avoid and minimize eagle loss, which is a requirement of getting an eagle take permit. Undergrounding power lines would also protect greater sage-grouse by eliminating a new source of perches for raptors that prey on them. Curiously, the Eagle Conservation Plan's perch risk assessment only mentions an existing powerline, not any that would be new, thus underestimating risk.

Because of the DEIS's short public comment period and the repeated disruptions caused by the recent wildfires, WWP has been unable to review the Eagle Conservation Plan and the DEIS's sections on golden eagles in full. We have more to say about this, but have prevented from saying it during the public comment period by ridiculously short public comment period associated with the Project's fast tracking.

C. Illegal Restriction on Review and Approval Authority

BLM bases its entire review of the Project on the assumption that LNC has a statutory right to conduct all of its proposed operations under the 1872 Mining Law and BLM's associated 43 CFR Part 3809 regulations.

Especially regarding all of the mining claims to be used for waste dumping and other non-extractive operations, BLM assumed that LNC has statutory rights to use these claims without meeting the Mining Law's prerequisite that each of its mining claims contain the discovery of a "valuable mineral deposit" of a locatable mineral.

To satisfy the discovery requirement necessary for a valid mining claim, "the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." U.S. v. Coleman, 390 U.S. 599, 602 (1968). This economic test for claim validity necessarily includes the consideration of all costs necessary to develop, process, transport, and market the mineral, including costs to protect public land and the environment. "[I]t must be shown that the mineral can be extracted, removed and marketed at a profit." Id. Here, there is no evidence in the record that the mining claims covering the public lands are valid under the Mining Law.

The mere fact that the company submitted a mining plan (MPO/POO) does not mean that all, indeed any, aspects of the Project are regulated only under Part 3809 or that approving the MPO is the BLM's only choice. Indeed, because the record lacks evidence that the company has statutory rights under federal mining laws, including the 1872 Mining Law, to the federal lands/minerals, review and regulation of the project is not solely under Part 3809, but rather the agency's special use and multiple use authorities (43 CFR Part 2900/2920) under FLPMA, and/or the statutes and regulations governing common variety minerals.

The BLM's overly-restricted interpretation of its authority was squarely and recently rejected by the federal courts. In 2019, the federal district court for the District of Arizona issued its decision in Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F.Supp.3d 738 (D. Ariz. 2019), in which the court vacated and remanded the federal government's approval of a large copper mine (the Rosemont Mine) due to the agency's erroneous interpretation and application of the 1872 Mining Law, federal public land law, and NEPA.[1]

The federal court squarely rejected the same federal government position taken by the BLM here – that mining claimants are entitled to use and occupy mining claims absent any evidence that the claims are valid under the Mining Law, and that the agency's mining regulations are the only proper regulatory vehicle for operations – and ruled that the government's statutory interpretation was contrary to the plain language and controlling caselaw under the Mining Law, NEPA, and other laws. The Rosemont decision rejected the government's position that it has no authority to apply its broader public land regulations to mining operations proposed on lands that fail to meet the Mining Law's statutory prerequisites for rights against the United States.

The only way to ascertain the proper regulatory scheme for the Project is for BLM to obtain the necessary information on the mineralization of the pit and other areas to be used by the Project in order to determine whether the minerals are locatable, and if so, whether the claims satisfy the Mining Law's claim validity prerequisites. The court in the Rosemont case held that unless sufficient evidence exists in the agency record that mining claims proposed for use and occupancy met the requirements of the Mining Law and were valid (i.e., each mining claim contained the requisite "valuable minerals"), the Mining Law does not govern the agency's review of the proposed use/occupancy of those lands. The agency could not simply assume

[1] Although that case involved the Forest Service, not BLM, the court's interpretation of the claimant's purported "rights" under the Mining Law applies equally to BLM.

rights under the Mining Law that limit the federal land agency's full and broad authority to protect public land and resources.

> [H]aving a piece of paper reflecting that one has unpatented mining claims does not show that one actually has *valid* unpatented mining claims. If there is no valuable mineral deposit beneath the purported unpatented mining claims, the unpatented mining claims are completely *invalid* under the Mining Law of 1872, and no property rights attach to those invalid unpatented mining claims.
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> Center for Biological Diversity, 409 F.Supp.3d at 747-48 (emphasis in original).

The federal court detailed how the agency never inquired into whether the mining claims met the Mining Law's prerequisite for use/occupancy rights (discovery of valuable minerals), yet the agency "accepted, without question, that those unpatented mining claims were valid" and "assumed that Rosemont had the right to use those 2,447 acres to support its mining operation (i.e., by dumping 1.9 billion tons of waste on that land)." Center for Biological Diversity, at 748. "This was a crucial error as it tainted the Forest Service's evaluation of the Rosemont Mine from the start." Id. at 747. The court held that such use/occupancy, without verification that such rights under the Mining Law actually exist on those lands/claims, was ***not*** authorized by the Mining Law, and thus was not governed by the agency's mining regulations.

The court also noted that its ruling does not require that the federal agency conduct a full-scale mineral validity review for every proposed use:

> The Forest Service argues that it is not required to conduct a validity determination before approving a mining plan of operations. **However, a validity determination differs significantly from establishing a factual basis upon which the Forest Service can determine rights**. A validity determination invokes a separate administrative procedure carried out by the BLM (which is within the Department of the Interior). **In contrast, the Forest Service** (which is within the Department of Agriculture) **merely needed a factual basis to support Rosemont's assertion of rights.** Such a finding would not preclude another individual from bringing an adverse proceeding to determine mineral rights, or the Government from initiating a validity determination. As referenced above, the fact that Rosemont proposed to dump 1.9 billion tons of waste on its unpatented claims on 2,447 acres of the Coronado National Forest was a potent indication that Rosemont's unpatented claims on the land in question were invalid (i.e., if Rosemont was voluntarily proposing to bury its unpatented claims under 1.9 billion tons of its own waste, there is a strong inference that there is no valuable mineral deposit lying below the waste site).

Center for Biological Diversity, at 761-62 (emphasis added).

The situation is the same here, as there is nothing in the record that provides "a factual basis to support [the claimant's] assertion of rights." Under basic principles of administrative law, "Any decision made without first establishing the factual basis upon which the Forest Service could form an opinion on surface rights would entirely ignore an important aspect of the

problem. *See State Farm*, 463 U.S. at 43. [Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983)]." Center for Biological Diversity, at 757-58.

The court also relied upon over a century of Mining Law court precedent which holds that the presence of valuable minerals on one claim (or on private land) cannot support claim validity on adjacent or nearby claims or other federal lands. "A claimant may not use the deposit present in one location to lend validity to an adjacent location. *See Waskey v. Hammer*, 223 U.S. 85, 91 (1912) ('A discovery without the limits of the claim, no matter what its proximity, does not suffice.'); *Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429, 443 (D. Nev. 1977)." Center for Biological Diversity, at 754.

In the Rosemont decision, the federal court rejected the agency's view that only its mining regulations, and not its Special Use Regulations, applied to mining-related operations on public land. The Forest Service mining regulations at 36 CFR Part 228, mirror the BLM's Part 3809 regulations in that they only apply to "operations authorized by the mining laws." *Compare* 43 CFR §3809.1(a) with 36 CFR §228.1.

> [I]t does not follow that the Forest Service must use these Part 228 regulations merely because an action falls within the regulation's definition of operations. The Forest Service's reliance on its definition of operations ignores the purpose of its own regulations. Part 228 regulates "use of the surface of National Forest System lands in connection with operations *authorized* by the United States mining laws (30 U.S.C. 21-54 [Mining Law of 1872])." 36 C.F.R. § 228.1. Therefore, authorization under the Mining Law of 1872 acts as a precursor to any regulation through Part 228.

Center for Biological Diversity, at 764 (emphasis in original). Thus, BLM/DOI regulations for special uses under other sections of FLPMA (e.g. Title V), 43 CFR Part 2900/2920, rather than the 3809 regulations, apply to all operations not specifically "authorized by the United States mining laws." For common variety minerals, the 1947 and 1955 Acts and their implementing regulations apply, rather than the Mining Law. Based on the DEIS, the lands slated for the waste dumps and other non-extraction facilities are comprised of common variety minerals, to which no "rights" under the Mining Law apply.

It should also be noted that BLM relies on LNC's "valid existing rights" to avoid compliance with the RMPs under FLPMA, but nowhere does BLM verify these "valid existing rights" under the Mining Law.

D. FLPMA

The proposed approval of the Project would violate FLPMA which requires that the BLM "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). This is known as the "prevent UUD" standard. This duty to "prevent undue degradation" is "the heart of FLPMA [that] amends and supercedes the Mining Law." Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003). "FLPMA, by its plain terms, vests the Secretary of the Interior [and the BLM] with the authority – indeed the obligation – to disapprove of an otherwise permissible mining operation because the operation, though

necessary for mining, would unduly harm or degrade the public land." Id. BLM cannot approve a mining project that would cause UUD. 43 C.F.R. § 3809.411(d)(3) (iii).

"FLPMA's requirement that the Secretary prevent UUD supplements requirements imposed by other federal laws and by state law." Center for Biological Diversity v. Dept. of Interior, 623 F.3d 633, 644 (9th Cir. 2010). BLM complies with this mandate "by exercising case-by-case discretion to protect the environment through the process of: (1) approving or rejecting individual mining plans of operation." Id. at 645, *quoting* Mineral Policy Center, 292 F.Supp.2d at 44. *See also* Kendall's Concerned Area Residents, 129 IBLA 130, 138 (1994) ("If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan.").

One of the required Performance Standards in Part 3809 mandates that all operations "must take mitigation measures specified by BLM to protect public lands." 43 CFR § 3809.420(a)(4). According to the national policy of the Interior Department/BLM, failure to look at a range of alternatives to avoid significant impacts and failure to require mitigation that would reduce adverse Project impacts constitutes UUD. "Mitigation measures fall squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. **An impact that can be mitigated, but is not, is clearly unnecessary**." 65 Fed. Reg. 69998, 70052 (Nov. 21, 2000) (preamble to BLM's 43 C.F.R. Part 3809 mining regulations) (emphasis added).

E. BLM Failed to Require Right-of-Ways (ROWs) Under FLPMA

BLM based its review of the Project on the belief that, once a POO/MPO is submitted, all operations, including electrical transmission lines, water pipelines, and access routes and uses outside of the mining claims, are covered by the Part 3809 regulations. Yet the only way that BLM could legally approve LNC's electrical transmission lines, water pipelines and access roads is to grant the applicant a Right-of-Way ("ROW") across these lands under FLPMA Title V.

For mining operations on public lands, these uses and other conveyances are not authorized by the Part 3809 plan of operations approval process. Instead, BLM must require the company to submit right-of-way or other special use permit authorizations and require that all mandates of FLPMA Title V and its implementing regulations are adhered to (e.g., no permit can be issued unless it can be shown that the issuance of the permits is in the best interests of the public, payment of fair market value, etc.). This is required because these uses are not covered by the 1872 Mining Law and the 3809 regulations.

Further, even if the BLM could ignore its duties under its multiple use and other mandates and assume that the company had a right under the Mining Law (which as noted herein it does not), such rights do not attach to the SUP/ROWs and other FLPMA approvals needed for the transmission line, pipeline, roads, etc..

The Interior Department has ruled that roads and pipelines, including those across public land related to a mining operation, are not covered by statutory rights under the Mining Law. *See* Alanco Environmental Resources Corp., 145 IBLA 289, 297 (1998) ("construction of a road, was subject not only to authorization under 43 C.F.R. Subpart 3809, but also to issuance of a right-of-way under 43 C.F.R. Part 2800."). "[A] right-of-way must be obtained prior to

transportation of water across Federal lands for mining." Far West Exploration, Inc., 100 IBLA 306, 308 n. 4 (1988) *citing* Desert Survivors, 96 IBLA 193 (1987). *See also*; Wayne D. Klump, 130 IBLA 98, 100 (1995) ("Regardless of his right of access across the public lands to his mining claims and of his prior water rights, use of the public lands must be in compliance with the requirements of the relevant statutes and regulations [FLPMA Title V and ROW regulations]."). As noted in Alanco, ROWs for access roads (as opposed to internal mine roads) are subject to FLPMA's Title V requirements.

The Interior Board of Land Appeals has expressly rejected the argument that rights under the Mining Law apply to pipelines and access roads:

> Clearly, FLPMA repealed or amended previous acts and Title V now requires that BLM approve a right-of-way application prior to the transportation of water across public land for mining purposes. See 43 U.S.C. § 1761 (1982). As was the case prior to passage of Title V of FLPMA, however, approval of such an application remains a discretionary matter and the Secretary has broad discretion regarding the amount of information he may require from an applicant for a right-of-way grant prior to accepting the application for consideration. Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982). A decision approving a right-of-way application must be made upon a reasoned analysis of the factors involved in the right-of-way, with due regard for the public interest. See East Canyon Irrigation Co., 47 IBLA 155 (1980).
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> **BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possesses under the mining laws. Such an assertion cannot be credited**.
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> The implied right of access to mining claims never embraced the right to convey water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. See 30 U.S.C. § 51 (1970) and 43 U.S.C. § 661 (1970). In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see § 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)(1), 43 U.S.C. § 1761(a)(1), for the grant of a right-of-way for the conveyance of water under new procedures. In effect, Congress substituted one statutory procedure for another. There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

Desert Survivors, 96 IBLA 193, 196 (1987)(underline emphasis in original, bold emphasis added). *See also* Far West Exploration, 100 IBLA 306, 309, n. 4 (1988)("a right-of-way must be obtained prior to transportation of water across Federal lands for mining."). The leading treatise on federal natural resources law confirms this rule: "Rights-of-way must be explicitly applied for and granted; **approvals of mining plans or other operational plans do not implicitly confer a right-of-way**." Coggins and Glicksman, PUBLIC NATURAL RESOURCES LAW, §15.21

(emphasis added). Thus, the BLM wrongly considered the transmission lines, pipelines, and access road associated with the Project part of mineral "operations" under Part 3809.

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

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

FLPMA, § 1765(b).

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

Second, the requirements in Section 505(b) mandate a BLM determination as to what conditions are "necessary" to protect federal property and economic interests, as well as "otherwise **protect[ing] the public interest in the lands traversed by the right-of-way or adjacent thereto**." (emphasis added). This means that the agency can only approve the SUP/ROW if it "protects the public interest in lands" not only upon which the road would traverse, but also lands and resources adjacent to and associated with the SUP/ROW. As noted herein, BLM would be unable to make a finding that industrial use of the lands within Red Rock Canyon State Park, such as the use/route approved in the DR, would "protect the public interest."

Third, is the requirement that the right-of-way grant "do no unnecessary damage to the environment" and be "consistent with … any other applicable laws," *id*. §§ 1764(a)-(c). This

means that a grant of a SUP/ROW leading to the mine (and the mine itself) must satisfy all applicable laws, regulations and policies, including the Endangered Species Act, Clean Water Act, all state and local laws, etc.

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

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

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

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

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

1994 WL 481924 at *3. That was also the case in Clifford Bryden discussed above, as the adverse impacts from the removal of the water was considered just as important as the adverse

impacts from the pipeline that would deliver the water. 139 IBLA at 388-89. *See also* C.B. Slabaugh, 116 IBLA 63 (1990) 1990 WL 308006 (affirming denial of right-of-way for water pipeline, where BLM sought to prevent applicant from establishing a water right in a wilderness study area).

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

As noted herein, BLM failed to use the proper legal regime governing the Project in proposing to approve the MPO/POO and issuing the DEIS.

In addition, the 2015 Grouse ARMPA contains greater sage-grouse protections including, but not limited to, management direction measures and Required Design Features that apply to Rights of Way grants. All wildlife protection and resource conservation measures in the 2015 Grouse ARMPA and the Winnemucca District RMP that apply to Rights of Way must be added as requirements for this Project.

F. Sensitive Species

BLM's mitigation plan fails to include the required analysis of the effectiveness of each measure, thus failing to meet BLM's duties under NEPA as well as FLPMA. Here, the DEIS does not impose mitigation measures that will eliminate or substantially reduce all of the potential impacts from the Project. As one example, the DEIS admits the presence of sensitive species such as bighorn sheep, yet little if any mitigation to prevent impacts is required. In order to protect this species and meet its FLPMA requirements, the BLM should have precluded any activity at and access near this area.

> As part of its duties to prevent UUD and irreparable harm to public land resources under FLPMA, BLM has established a national policy to protect designated Sensitive Species.
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> The objectives of the BLM special status species policy are:
>
> A. To conserve and/or recover ESA-listed species and the ecosystems on which they depend so that ESA protections are no longer needed for these species.
> B. To initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.

U.S. Dep't of the Interior BLM, Special Status Species Mgmt. Manual 6840 at 3 (2008) ("Special Status Species Manual"). BLM has specifically acknowledged its duty to safeguard the public's interest in protecting Sensitive Species:

> It is in the interest of the BLM to undertake conservation actions for such species before listing is warranted. It is also in the interest of the public for the BLM to undertake

> conservation actions to improve status of Sensitive Species so sensitive recognition is no longer warranted. By doing so, BLM will have greater flexibility in managing public lands to accomplish native species conservation objectives and other legal mandates.
>
> In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA.

Special Status Species Manual at 36.

In the DEIS, BLM failed to meet these requirements and as such, failed to meet the protective requirements of FLPMA. Merely naming sensitive species and providing little to no NEPA analysis of impacts to them in the DEIS is not enough. BLM must actively implement conservation measures protecting them at the Project area, as part of this Project.

G. Failure to Take the Required "Hard Look" at the Project under NEPA and FLPMA

The DEIS fails to comply with the "hard look" requirement under NEPA, as well as BLM's duties to protect public land and the public interest under FLPMA and other laws noted herein.

Failure to conduct a proper NEPA analysis, including reviewing off-site impacts, violates not only NEPA, but the FLPMA UUD standard:

> **Like NEPA, the [UUD] definition requires BLM to consider the nature and extent of surface disturbances resulting from a proposed operation and environmental impacts on resources and lands outside the area of operations**. Kendall's Concerned Area Residents, 129 IBLA 130, 140-41 (1994); Nez Perce Tribal Executive Committee, 120 IBLA 34, 36 (1991); see Sierra Club v. Hodel, 848 F.2d 1068, 1078, 1091 (10th Cir.1988) (nondegradation duty is mandatory). … [M]ost disturbed land at the mine sites is public land and other public land is adjacent to them. **To the extent BLM failed to meet its obligations under NEPA, it also failed to protect public lands from unnecessary or undue degradation**.

Island Mountain Protectors, 144 IBLA 168, 202, 1998 WL 344223, * 28 (internal citations omitted, emphasis added).

Failure to Obtain and Analyze Baseline Data and Information.

BLM violated NEPA by failing to provide sufficient analysis and data for the baseline conditions of resources that might be affected by the Project. Here, this is especially true for ground and surface waters, air quality, wildlife, recreation, cultural resources, and other resources where the DEIS fails to contain any detailed baseline information or analysis, and in many cases no baseline information/data at all.

The establishment of the baseline conditions of the affected environment is a fundamental

requirement of the NEPA process, because an inadequate environmental baseline precludes an accurate assessment of project impacts. Oregon Nat. Desert Ass'n v. Jewell 823 F.3d 1258 (9th Cir. 2016) (without accurate baseline information the agency cannot accurately assess project impacts); N. Plains Resource Council v. Surface Transp. Board, 668 F.3d 1067 (9th Cir. 2011) (reversing decision due to inadequate baseline information).

As the federal courts have held, rejecting BLM's post-NEPA analysis of baseline conditions:

> Without establishing baseline conditions for the Obscure Routes, the Bureau could not have analyzed the environmental impacts of the Recreation Plan properly. *Great Basin [Resource Watch v. BLM]*, 844 F.3d at 1101.
>
> At some point *after* the public comment period closed, the Bureau attached ground photographs for a few Obscure Routes to the forms; the photographs show details about vegetation and the condition of the routes themselves. Such late analysis, "conducted without any input from the public," impedes NEPA's goal of giving the public a role to play in the decisionmaking process and so "cannot cure deficiencies" in an EA. *Id.* at 1104.

Oregon Natural Desert Association v. Rose, 921 F.3d 1185, 1192 (9th Cir. 2019)(BLM EA violated NEPA for failure to adequately analyze baseline conditions).

For example, the DEIS has only cursory analysis of potentially affected water resources. Courts have held this baseline requirement applies equally to groundwater resources. In Gifford Pinchot, the Court held that the BLM EA's failure to include a comprehensive baseline analysis representative of the entire Project area violated NEPA:

> While Alternative 3 requires sampling and monitoring before drilling, the failure to obtain onsite data before analyzing the environmental effects means that such analysis cannot possibly be based on all of the relevant information.
>
> …
>
> Furthermore, the 2012 EA does not explain why sampling at two discrete holes not newly drilled as part of the Project will provide accurate information about contamination to groundwater at the drill sites. The monitoring required as part of Alternative 3 fails to address the Project's impact to groundwater.

Gifford Pinchot Task Force v. Perez, 2014 WL3019165, at *31 (D. Or. 2014). "Ninth Circuit cases acknowledge the importance of obtaining baseline condition information before assessing the environmental impacts of a proposed project." Id. at 28. This is required because:

> Without the baseline data, the agency cannot carefully consider information about significant environmental impacts and thus, the agency fails to consider an important aspect of the problem, resulting in an arbitrary and capricious decision. *Id.* Additionally, even if the mitigation measures may guarantee that the data will be collected in the future, the data is not available during the EIS process and is

> not available to the public for comment. *Id.* Thus, the process does not serve its larger information role and the public is deprived of the opportunity to play a role in the decision-making process. *Id.* Baseline information before approval is required so that the agency "can understand the adverse environment effects *ab initio*." *Id.*

Gifford Pinchot at *29, *quoting* N. Plains Resource Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1083-85 (9th Cir.2011).

> "Without establishing the baseline conditions ... there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." *Half Moon Bay Fisherman's Mktg. Ass'n. v. Carlucci*, 857 F.2d 505, 510 (9th Cir.1988); *see also N. Plains*, 668 F.3d at 1085 ("without [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fails to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.").

Gifford Pinchot at *27. "NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward." Northern Plains, 668 F.3d at 1083 (an agency's "plans to conduct surveys and studies as part of its post-approval mitigation measures," in the absence of baseline data, indicate failure to take the requisite "hard look" at environmental impacts).

Similarly, in Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161 (D. Idaho 2012), conservation groups challenged the Forest Service's approval of a hardrock mining exploration project, arguing the agency's environmental review failed to provide any baseline information on groundwater. In response, the Forest Service argued detailed information on groundwater resources was unnecessary because, in its judgment, the mine exploration would have "no impact" on groundwater resources. The court disagreed, and held that NEPA requires more than "conclusory assertions that an activity will have only an insignificant impact on the environment." Id. at *14 (*quoting* Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005). Instead, the court required detailed baseline data, including "a baseline hydrogeologic study to examine the existing density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and [measures of] the local groundwater levels to estimate groundwater flow directions." Id. at *16. *See also* Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior, 2011 WL 1743656, at *10 (D. Idaho 2011) (rejecting agency analysis of impacts of mine on groundwater).

The DEIS's groundwater analysis (or lack thereof) here similarly fails to comply with NEPA. Like in Gifford Pinchot and Idaho Conservation League, BLM here failed to conduct, collect, or examine any baseline studies on groundwater or other potentially affected resources, and as such the DEIS fails to take the required hard look at the potential impacts of operations on water and other resources.

Further, BLM cannot rely on mitigation measures to avoid collecting and analyzing the required baseline information/data. "[B]ecause NEPA aims "(1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant

information is available to the public[,]" the **"use of mitigation measures as a proxy for baseline data does not further either purpose."** Gifford Pinchot at *29 (emphasis added), quoting Northern Plains. "I reject Defendants' and Ascot's arguments that a baseline groundwater analysis is not required before the issuance of the EA because the sampling and monitoring are being used to confirm that no significant impacts are occurring rather than addressing an issue of insufficient data." Gifford Pinchot, at *31.

BLM cannot meet its NEPA obligations by foregoing collection of baseline data, and, instead, "anticipat[ing]" that the impacts of a proposed decision will be insignificant. Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). Indeed, in Half Moon Bay, the federal appeals court noted that the starting point of any NEPA analysis is the collection and description of baseline data, because, "without establishing … baseline conditions … there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA." 857 F.2d at 510.

The DEIS suffers from the same problem regarding air quality, where there is only partial data or analysis of baseline/background air quality. The federal courts have squarely held that BLM must obtain and analyze representative baseline data/information on all potentially affected resources. BLM's "assessment of baseline conditions must be based on accurate information and defensible reasoning." Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1101 (9th Cir. 2016) (BLM review and approval of mining operation violated NEPA requirement for analysis of baseline/background air quality).

BLM admits that the Project will produce air pollution, but the DEIS contains little baseline data/information, and certainly not for all of the Criteria Pollutants under the Clean Air Act. Under FLPMA and the 3809 regulations, BLM cannot authorize any activity without full assurance that the Project will comply with all environmental, wildlife, public lands, and other standards. BLM cannot rely on the fact that the operator will purportedly obtain an air quality or other permits from a state agency. Yet, as the courts have held, BLM cannot rely on current or future state permitting to avoid collection of baseline/background data/information.

> Eureka Moly [mining company applicant] argues that the FEIS' air impacts analysis is nonetheless adequate because it relies in part on the fact that the NDEP's Bureau of Air Pollution Control issued a Clean Air Act permit for the Project. This argument evinces a misunderstanding of the nature of NEPA and its relationship to "substantive" environmental laws such as the Clean Air Act. *See S. sFork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (per curiam) (holding that a **failure to discuss mercury emissions from a nearby mining facility in an EIS was not excused by the fact that the facility "operate[d] pursuant to a state permit under the Clean Air Act," because "[a] non-NEPA document ... cannot satisfy a federal agency's obligations under NEPA"). The failure to explain the zero baseline assumption frustrated the BLM's ability to take a "hard look" at air impacts, and the reference to the Project's Clean Air Act permit did nothing to fix that error.**

Great Basin Resource Watch, 844 F.3d at 1103-04 (emphasis added).

Thus, in order to comply with NEPA and FLPMA, BLM must obtain and analyze the required baseline/background data/information – and subject it to full public review under NEPA – for all potentially affected resources including water, air, wildlife, night skies, economic, hunting, recreation, public safety, traffic, noise, cultural, etc.

Failure to Adequately Review All Direct, Indirect, and Cumulative Impacts.

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

The DEIS fails to adequately review the direct and indirect impacts associated with the Project. Regarding cumulative impacts, although the DEIS contains a brief mention of a few other past, present, and reasonably foreseeable future activities within the area, little details are provided. Under NEPA, BLM must fully review the impacts from all "past, present, and reasonably foreseeable future actions." 40 CFR § 1508.7. These are the "cumulative effect/impacts" under NEPA. Cumulative effects/impacts are defined as:

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

40 CFR § 1508.7. In a cumulative impact analysis, an agency must take a "hard look" at all actions.

> An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. … Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe of Western Shoshone v. U.S. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting BLM-issued EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

A cumulative impact analysis must provide a "useful analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 1118 (9th Cir. 2004). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a

piecemeal review of environmental impacts. Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1306-07 (9th Cir. 2003). The NEPA obligation to consider cumulative impacts extends to all "past," "present," and "reasonably foreseeable" future projects. Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006) (requiring "mine-specific … cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region). As the courts have further held:

> Our cases firmly establish that a cumulative effects analysis "must be more than perfunctory; it must provide a *useful analysis* of the cumulative impacts of past, present, and future projects." Klamath–Siskiyou, 387 F.3d at 994 (emphasis added) (quoting Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir.2004)). To this end, we have recently noted two critical features of a cumulative effects analysis. First, it must not only describe related projects but also enumerate the environmental effects of those projects. *See* Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir.2005) (holding a cumulative effects analysis violated NEPA because it failed to provide "adequate data of the time, place, and scale" and did not explain in detail "how different project plans and harvest methods affected the environment"). Second, it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project. *See* Klamath–Siskiyou, 387 F.3d at 996 (finding a cumulative effects analysis inadequate when "it only considers the effects of the very project at issue" and does not "take into account the combined effects that can be expected as a result of undertaking" multiple projects).

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1133 (9th Cir. 2007), *quoting* Klamath–Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 994, 996 (9th Cir. 2004).

A full review of direct, indirect and cumulative impacts is also required by FLPMA's mandate that BLM take all measures to "prevent unnecessary or undue degradation" of public resources. "Like NEPA, the [UUD] definition requires BLM to consider the nature and extent of surface disturbances resulting from a proposed operation and environmental impacts on resources and lands outside the area of operations." Island Mountain Protectors, 144 IBLA 168, 202, 1998 WL 344223, *28 (citations omitted).

In this case, BLM failed to fully consider the cumulative impacts from all past, present, and reasonably foreseeable future activities in the region on water quality and quantity, air quality, recreation, cultural/religious, hunting opportunities, public safety, night skies, wildlife, economic, scenic and visual resources, etc. At a minimum, this requires the agency to fully review, and subject such review to public comment in a revised DEIS, the cumulative impacts from all other residential and commercial development, mining, grazing, recreation, energy development, roads, ORV use, etc., in the region. The DEIS's failure to include this analysis violates NEPA and FLPMA.

The federal courts have rejected an argument that the agency can avoid reviewing impacts simply because the mining company did not provide the necessary information. "[I]nsofar as

[the agency] has determined that it lacks adequate information on *any* relevant aspect of a plan of operations, [the agency] not only has the authority to require the filing of supplemental information, it has the obligation to do so." Center for Biological Diversity v. U.S. Dept. of the Interior, 623 F.3d 633, 644 (9th Cir. 2010) (emphasis in original).

Cumulative impacts must be reviewed "regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR § 1508.7. For example, in considering a challenge to federal approval of mineral leasing and mining, a court required the agency to look at the impacts from the proposed mill that would process ore from mines/leases, despite the fact that the proposed mill would be on private lands and despite the fact that the mill was not directly associated with the mines/leases being proposed and was not included in the lease/mining proposals. The court held:

> [The agency's] other two arguments—that the effects of the mill need not be evaluated because (1) it is being built by a company on private land, and (2) approval of the mill is controlled by other governmental entities—lack merit. Regardless of whether an EA or EIS is being prepared, the agency conducting the analysis must consider the "cumulative impacts" of the proposed action. …
>
> Nothing in this regulation suggests that ''cumulative impacts'' are limited to those occurring on [public] land, or that [the agency] need not consider the impacts from related activities that another federal agency is in charge of approving or disapproving.

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

Failure to Consider All Reasonable Alternatives.

The DEIS improperly fails to consider all reasonable alternatives as required by NEPA, which requires federal agencies to "rigorously explore and objectively evaluate all reasonable alternatives" to a proposed action that has significant environmental impacts. 40 C.F.R. §1502.14(a); *accord* 42 U.S.C. § 4332(2)(C)(iii). Informed and meaningful consideration of alternatives is critical to the NEPA statutory scheme, ensuring that agency decision-makers assess a project's costs, benefits, and environmental impacts in the correct context. *See* Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 729-30 (9th Cir. 1995). This requirement also ensures that decisionmakers "have before them and take into proper account all possible approaches to a particular project (*including total abandonment of the project*) which would alter the environmental impact and the cost-benefit balance." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988)(emphasis in original).

BLM violated NEPA's alternatives-review requirement by arbitrarily dismissing the No-Action Alternative and failing to consider reasonable alternatives that would minimize impacts to

public land and wildlife. Due to its locatable mineral and claim validity assumptions, BLM improperly restricted its NEPA/FLPMA review and regulatory authority based on its unsupported position that AM had a statutory right to conduct the Project (as discussed above). Because BLM "misconstrue[d]" its statutory authority, it arbitrarily dismissed the No-Action alternative, and thereby failed to take "a hard look at all reasonable options before it." New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 710-711 (10th Cir. 2009).

As result of its assumption that all aspects of the Project have "valid existing rights" under the 1872 Mining Law, BLM arbitrarily dismissed the No-Action Alternative and other alternatives that would better meet its FLPMA and other responsibilities based on its fundamental misconception of its regulatory authority. That was the holding in the Rosemont Mine decision, where the court rejected the same legal position taken by BLM here, where it asserts that it cannot choose the No-Action Alternative for the Project. In the Rosemont Mine decision, after discussing the agency's erroneous assumption of "rights" under the Mining Law (detailed above), the court discussed how this erroneous legal position also violated the agency's duties under NEPA:

> Based on the administrative record, the Forest Service improperly applied its Part 228 regulations to actions not authorized under the Mining Law of 1872. This mistake infected the FEIS and led to the Forest Service misinforming the public and failing to consider reasonable alternatives within the scope of its duties under the Organic Act.
>
> For example, in response to a public comment requesting the Forest Service "give true consideration to selection of the No Action Alternative", the Forest Service responded: "The Forest Service may reject an unreasonable Mine Plan of Operation but cannot categorically prohibit mining or deny reasonable and legal mineral operations under the mining laws." *Id.* at G-10 [Final Rosemont EIS]. In response to a comment requesting the Forest Service "consider other locations for copper mining", the Forest Service responded: "The Forest Service lacks the authority to deny Rosemont Copper's proposal if it can be legally permitted." *Id.* at G-12. And in response to a comment that the Forest Service "should scale down the size of the project or limit it to private lands only", the Forest Service repeated: "The Forest Service may reject an unreasonable Mine Plan of Operation but cannot categorically prohibit mining or deny reasonable and legal mineral operations under the mining laws." *Id.* These examples did not occur in isolation. Rather, they illustrate how heavily the Forest Service relied upon this rationale in its decision-making process.
>
> Under the Part 251 regulations, the Forest Service could limit the mine to any of the above options if it found they ran afoul of the public interest. The Forest Service failed to take the requisite hard look at these alternatives by informing the public that it could not truly consider any alternative that rejected the MPO or substantially modified it as to make the mine economically unfeasible. *See Nat. Res. Def. Council*, 421 F.3d at 813-14. A "thorough discussion of the significant aspects of the probable environmental consequences" will include the regulatory framework in which the Forest Service analyzes those consequences. *See California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). No amount of alternatives

> or depth of discussion could "foster[ ] informed decision-making and informed public participation" when the Forest Service bases its choice of alternatives on an erroneous view of the law. *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004).

Center for Biological Diversity, at 764-66 (internal footnotes omitted).

H. Migratory Birds

The Project's Bat and Bird Conservation Strategy (Attachment D) contains the same incorrect information about incidental take under the Migratory Bird Treaty Act based on the vacated M-Opinion as the draft Eagle Conservation Plan does. *See* Attachment D at 2-1. That section should be revised. In addition, the Bat and Bird Conservation Strategy and DEIS should be revised as necessary so that any assumptions or analysis based on the M-Opinion's faulty interpretation of MBTA is corrected.

Conclusion

Thank you again for this opportunity to assist BLM during the NEPA process. We respectfully request to be notified of all future public comment opportunities related to the Thacker Pass Lithium Mine Project, the availability of any NEPA analysis BLM undertakes in relationship to it, and BLM's decisions related to it, per 40 CFR § 1506.6.

Sincerely yours,

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