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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WESTERN WATERSHEDS PROJECT; et al. Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; et al. Defendants, LITHIUM NEVADA CORP., Defendant-Intervenor.	Case No.: 3:21-cv-0103-MMD-CLB PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (ECF #23)

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I. An Injunction Is Warranted To Prevent Imminent Irreparable Harm.

BLM/LNC focus almost exclusively on Plaintiffs' harm from the initial Project work slated to begin on July 29. Yet they ignore BLM's own statement that LNC will "likely" have received all necessary state permits to begin full construction "sometime in July or August of 2021." Decl. of Kathleen Rehberg ¶5 (ECF #30-2). The CEO of LNC stated that it plans to "commence construction of the Thacker Pass Project in early 2022." LNC Ex. 12 ¶25 (ECF #31-12). Construction is thus imminent because it would occur before this Court can rule on the merits. League of Wilderness Defs. v. Connaughton, 752 F.3d 755, 765 (9th Cir. 2014)(court must consider "the portion of the harm that would occur while the preliminary injunction is in place"). Plaintiffs also will suffer immediate and irreparable harm from the ground disturbance associated with the initial Project activities, which will harm their use and enjoyment of the area and destroy fragile and irreplaceable sagebrush habitats. The Court can and should enjoin Defendants from Project-related ground disturbance to maintain the status quo until it can rule on the merits. W. Watersheds Project v. Zinke, 336 F. Supp. 3d 1204, 1218 (D. Idaho 2018) ("Ordinarily, a preliminary injunction maintains the status quo pending a final decision on the merits.").

A. Project Construction Is Imminent And Will Cause Plaintiffs Irreparable Harm.

Construction is planned to begin in "early 2022," and would likely occur while the preliminary injunction is in place. LNC Ex. 12 ¶25. Construction, which involves blasting, removal of all vegetation, and excavation and dumping of millions of tons of rock, is likely to commence before the Court can rule on the merits, given the timeline of this case. Pls.' Ex. 3 at ii (ECF #23-3). Even if the Administrative Record is adequate and no record motions are filed, merits briefing will not conclude until December 13, 2021. (ECF #28). If a party files a record motion, this schedule will be further delayed, and the case will not be fully briefed until well into 2022. *See* id.

Defendants do not dispute that construction will cause irreparable harm to Plaintiffs' interests. Instead, they contend that the harms are not "imminent" because LNC cannot begin construction until it has received required authorizations and permits for the Project, and LNC

committed to provide 60 days' notice before commencing "major ground-disturbing activities authorized under the challenged ROD" to a plaintiff in Bartell Ranch. BLM at 12-14 (ECF #30). But LNC is likely to receive the required state permits "sometime in July or August of 2021," and believes it will have cleared the remaining hurdles in time to begin construction in "early 2022." Rehberg Decl. ¶ 5; LNC Ex. 12 ¶ 25. Further, BLM believes that neither ground disturbing actions by BLM, nor the actions associated with the HPTP (Historic Properties Treatment Plan), are "authorized under the challenged ROD" and therefore could be carried out without notice. BLM at 11, 14. Plaintiffs do not know which other Project-associated actions Defendants may believe they can carry out without notice. Since the 60 days' notice or other actions could occur at any time, construction could begin before the court's merits ruling, and Plaintiffs would be forced to file a second motion for preliminary relief.

B. Pre-Construction Ground Disturbance Will Cause Plaintiffs Irreparable Harm.

Plaintiffs show irreparable harm by showing harm to their interests in viewing, utilizing and experiencing the site in its undisturbed state. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011)(irreparable harm where plaintiff asserted "that the Project will harm its members' ability to 'view, experience, and utilize' the areas in their undisturbed state"). Harm to sagebrush ecosystems, which may take 50 to 100 years to restore, is irreparable. W. Watersheds Project v. Bernhardt, 392 F. Supp. 3d 1225, 1254 (D. Or. 2019).

Plaintiffs have shown that Project-related ground disturbance—including the HPTP excavations—will cause irreparable harm to their interests. *See, e.g.,* Pls.' Ex. 25 ¶4 (ECF #23-25). The HPTP activities include removing fragile sagebrush habitats by digging up to 25 holes as deep as four and a half feet at each of 21 undisclosed locations, for a total of as many as 525 holes. BLM at 8-9. They also involve using a backhoe to dig trenches 65-130 feet long and nine feet deep, or more, at seven locations. Id. at 9. Neither the HPTP nor Defendants' Declarations state how many of these trenches would be dug. Presumably, road access will be required to place backhoes on site. LNC also plans to construct a fence and place a trailer on site. LNC Ex. 12 ¶ 27. This is not *de minimis* disturbance; the excavations will be scattered throughout the entire Project

area, harming Plaintiffs' enjoyment of the whole area. *See* Cottrell, 632 F.3d at 1135.

These actions will irreparably harm Plaintiffs' interests in enjoying the area in its present, relatively undisturbed state. For instance, Katie Fite has been visiting the Project area for 20 years and enjoys the lands for "hiking, camping, sightseeing, birdwatching, nature study, photography and other wild land pursuits, and for relaxation and respite in a natural wild land setting." Pls.' Ex. 29 ¶7; *See also* id. ¶9 (ECF #23-29). She attests:

> The initial ground disturbing activities and operations…would significantly, immediately, and irreparably impair my uses of the site and the values in these public lands that I so greatly value. For example, any ground disturbance, including any excavation or digging on public lands at the site, including that associated with historical/cultural information gathering or mitigation related to the Project, immediately and adversely affects my uses of the site and the environmental resources at the site. It is impossible to enjoy the natural plants, wildlife, scenery and solitude of the site when excavations and digging are occurring at the site.

Id. ¶25. *See also* Pls.' Ex. 27 ¶¶23, 33 (ECF #23-27)(detailing Kelly Fuller's interests and harms).

This initial ground disturbance will also irreparably harm Plaintiffs' interests in sagebrush habitats and sage-grouse and other species that depend upon them. Both Kelly Fuller and Katie Fite's Declarations demonstrate their extensive interests in wildlife and sagebrush habitats in the Project area. *See, e.g.,* Pls.' Ex. 27 ¶¶ 24-25; Pls.' Ex. 29 ¶¶10, 13, 14, 18-19. Excavations will remove and disturb mature sagebrush habitat in the last south-facing winter habitat in the Montana Mountains just as winter begins. Decl. of Terry Crawforth ¶¶29-33 (Ex. 32). The habitat provides an important food source and thermal cover for sage-grouse and other wildlife. Id. ¶¶18, 28-29. Without food or cover, sage-grouse and other wildlife will be less likely to survive the winter. Id. ¶¶ 26, 31. The disturbance will occur squarely within habitat likely used by birds that breed on the important Montana-10 lek. Braun Decl. ¶38 (ECF #23-30). Even if wildlife could rebound from these losses, the habitat will not. Sagebrush, once destroyed, can take decades to re-establish, if it can be restored at all. Id. ¶¶28, 30, 42. The holes and trenches throughout the Project site will create a network of weed vectors for cheatgrass invasion, even if surface vegetation is not stripped away following the HPTP activities—further degrading the habitat there. Crawforth Decl. ¶33.

These adverse effects to the environment from the initial HPTP work were never disclosed and evaluated in the FEIS. *See* Pls.' PI Br. at 5, 27-28 (discussing omissions); *see also* Compl. ¶¶

213-16. Where a court finds likelihood of success on the merits of a NEPA claim coupled with likely environmental harm, a NEPA violation constitutes irreparable harm warranting injunctive relief. Bernhardt, 392 F. Supp. 3d at 1258. The "likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high." S. Fork Band Council v. U.S. Dept. of Interior, 588 F.3d 718, 728 (9th Cir. 2009).

C. The HPTP Activities Are Part Of The Thacker Pass Project.

BLM also argues that this Court has no authority to enjoin the initial HPTP Project activities because "no final administrative action challenged by Plaintiffs in this case authorizes the proposed data collection, data recovery, or mitigation under the HPTP." BLM at 11. BLM primarily relies on Pacific Radiation Oncology v. Queen's Medical Center, in which the Ninth Circuit held that "there must be a relationship between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint." 810 F.3d 631, 636 (9th Cir. 2015). Plaintiffs' claims challenging the FEIS and ROD meet this standard.

Plaintiffs' Complaint challenged "the decisions of the [BLM]…to approve the Thacker Pass Lithium Mine Project…and Plans of Operations," specifically the ROD and FEIS, alleged injury from those actions, and sought relief including that the Court "[e]njoin Defendants, their agents, servants, employees, and all others acting in concert with them, or subject to their authority or control, from proceeding with any aspect of the Thacker Pass Project…." Compl. ¶¶1, 4, 46-50, Request for Relief (ECF #1). The ROD adopted "Alternative A," including "Applicant's Committed Environmental Design Features described in Appendix D of the EIS." Pls.' Ex. 1 at 7 of 33 (ECF #23-1). Among those is CR-01: "Should avoidance to a known [cultural] site not be feasible…or if adverse effects cannot be prevented, LNC would implement mitigation measures such as data recovery, documentation and reporting at the affected cultural sites." Pls.' Ex. 33. That is precisely what the HPTP is intended to accomplish. *See* BLM Ex. A at 18 of 172 (ECF #30-1)(Describing "data recovery approach…for data collection, analysis, and recording" which will also "provide mitigation efforts"). Actions under the HPTP are thus part of the ROD and FEIS challenged in Plaintiffs' Complaint. This case is utterly unlike Pacific Radiation Oncology.

Moreover, in challenging the FEIS and the ROD, Plaintiffs challenged BLM's violations of NEPA by failing to fully analyze mitigation measures and their effectiveness and impacts. *See* Compl. ¶¶213-16. The HPTP is a mitigation measure. BLM's Draft EIS for the Project states: "The mitigation for effects from the Proposed Action is the implementation of an approved [HPTP], currently in development." BLM Ex. B at 4-78 (ECF #30-3). BLM's surface management handbook requires that "[t]he EA or EIS must also disclose any impacts of implementing the mitigation measures, the effectiveness of the mitigation measures proposed, and residual effects of adverse impacts that would remain after mitigation measures are taken." BLM Ex. C at 4-40 (ECF #30-4). BLM's claim that the HPTP, which has never undergone NEPA review or public comment, is a separate federal action effectively concedes that the agency has violated NEPA, its implementing regulations, and the agency's own handbook.[1] While BLM contends, citing Apache Survival Coal. v. U. S., 21 F.3d 895, 906 (9th Cir. 1994), that the NHPA provides the exclusive mechanism to challenge its actions under the HPTP, Apache Survival contains no such holding. Plaintiffs' claims challenging the ROD and FEIS under NEPA, FLPMA, and the APA thus provide an adequate basis for the injunctive relief sought here.

D. The Balance Of Hardships And Public Interest Favor An Injunction.

Where environmental Plaintiffs face permanent irreparable harm while intervenors face only temporary delay, courts have found the balance of equities favors injunctive relief. Connaughton, 752 F.3d at 765. Just as it does in judging Plaintiffs' irreparable harm, the Court looks at the portion of the harm to LNC that would occur while the relief is in place. Id. LNC makes no showing that a temporary delay of ground-disturbing activities while the Court determines whether BLM lawfully approved the Project would seriously burden any interest. Since irreparable harm is likely and the public interest favors a stay, "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." Cottrell, 632 F.3d at 1134-35.

[1] If the Court considers this a separate action, Plaintiffs respectfully request leave to amend the Complaint to challenge the final agency action following the required public review.

III. Plaintiffs Have Raised "Serious Questions" On Their FLPMA Claims.

BLM/LNC assert that BLM complied with FLPMA when it approved the Project because RMP requirements to protect the environment and greater sage-grouse do not apply to locatable minerals projects, citing "rights" under the 1872 Mining Law. This new interpretation is contrary to the plain language of the Mining Law, a century of legal precedent interpreting the Law, and the language and structure of the greater sage-grouse ARMPA. A mining claimant can only hold rights against the United States on lands containing "valuable mineral deposits" and here there is no evidence that lands in the Project area to be used for tailings and waste rock dumps contain anything other than common variety minerals, to which the Mining Law does not apply. There is no blanket exclusion from RMP compliance for locatable minerals projects. Because LNC does not hold "rights" to those lands, BLM's determination that the Project is exempt from otherwise-applicable requirements of FLPMA and the RMP is arbitrary and capricious and violates FLPMA.

A. The Plain Language of the 1872 Mining Law Bases Mining Claim Occupancy Rights on "Valuable Mineral Deposits."

BLM/LNC incorrectly read the Mining Law's opening section, §22, as saying that since the waste dump lands were "open" for the filing of claims under the Mining Law, LNC has an automatic right to occupy and use them for permanent waste dumps, regardless of the mineral content of these lands and, indeed, regardless of whether LNC filed mining claims on these lands at all. That is wrong, as it disregards the plain language of §22, especially when read with other parts of the Law, as required by canons of statutory construction.

Section 22 provides that "All **valuable mineral deposits** in lands belonging to the United States … shall be free and open to exploration and purchase, **and the lands in which *they* are found to occupation** and purchase." 30 U.S.C. §22 (emphasis added). Section 22 contains two distinct clauses, neither of which can be plausibly read to grant a "right" to occupancy of federal lands that lack valuable mineral deposits. The first grants miners a revocable license to engage in exploration for "valuable mineral deposits" on open public lands. *See* Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959)("One who has located a claim upon the public domain has, prior to discovery of valuable minerals, only 'taken the initial steps in seeking a gratuity from the

Government.'"). This provision is not applicable here, as Plaintiffs challenge BLM's failure to apply the RMP requirements to occupancy/use of the waste dump lands, not to the mineral exploration or to LNC's mining claims covering the lands where the mine pit would be excavated.

The second clause in §22 involves a very different scenario, granting occupancy rights on lands actually found to contain "valuable mineral deposits." The Mining Law draws a direct link between occupancy rights and valid mining claims by limiting the "right of possession and enjoyment of all the surface" to only "the locators of all mining locations made on any mineral vein, lode or ledge." 30 U.S.C. §26. *See also* id. §23 ("mining claims" can only be located upon "the discovery of the vein or lode within the limits of the claim located."). "'Discovery' of a mineral deposit, followed by the minimal procedures to formally 'locate' the deposit, gives an individual the right of exclusive possession of the land for mining purposes." U.S. v. Locke, 471 U.S. 84, 86 (1985)(citing 30 U.S.C. § 26).[2] Interpreting these provisions, the Supreme Court has explained that a "right" is only conferred for a valuable mineral deposit:

> Under the Mining Act of 1872, 17 Stat. 91, as amended, 30 U.S.C. §22 *et seq.,* a private citizen may enter federal lands to explore for mineral deposits. **If a person locates a valuable mineral deposit on federal land**, and perfects the claim by properly staking it and complying with other statutory requirements, **the claimant "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations**," 30 U.S.C. §26.

Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 575 (1987)(emphasis added). But BLM/LNC read §22 out of context to grant an occupancy "right" to lands where no valuable minerals exist. This view of the Mining Law violates "one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Corley v. U.S., 556 U.S. 303, 314 (2009).

BLM/LNC next try to circumvent the requirements of the Law by claiming that the waste dumping on almost 1,500 acres is not "occupation" under §22 or "possession and enjoyment"

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[2] To prove that it has made the "discovery of a valuable mineral deposit" on each claim, LNC must show that the lands contain minerals that can be "extracted, removed and marketed at a profit." United States v. Coleman, 390 U.S. 599, 600 (1968). "Each lode claim must be independently supported by the discovery of a valuable mineral within the location as it is marked on the ground." Lombardo Turquoise Mining & Milling v. Hemanes, 430 F.Supp. 429, 443 (D. Nev. 1977) *aff'd* 605 F.2d 562 (9th Cir. 1979).

under §26. It cannot plausibly be maintained that the dumping of over 500 million cubic yards of waste would not be occupancy or exclusive use of these claims, as LNC never intends to remove the waste, nor does BLM require it to. BLM is wrong to say that a "miner's occupation under the Mining Law can only be characterized as 'permanent' if a patent is issued." BLM at 22. BLM relies on another provision allowing a claimant to apply for a patent, §29, but ignores the key provisions, §§ 22, 23, and 26, which base any rights to "occupation" and "possession and enjoyment" on the finding of valuable minerals on that claim. *See* Granite Rock, 480 U.S. at 575.

B. Federal Courts Base Rights To Permanently Occupy Mining Claims On The Presence Of A Valuable Mineral Deposit On Those Claims.

"The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant." Belk v. Meagher, 104 U.S. 279, 284 (1881). The Mining Law draws a sharp distinction between initial, temporary exploration and full occupancy rights that are dependent on the discovery of valuable minerals:

> [I]t is clear that **in order to create valid rights** or initiate a title as **against the United States a discovery of mineral is essential**. Section 2320, Rev. Stat.; *Waskey v. Hammer*, 223 U.S. 85, 90, 32 Sup. Ct. 187, 56 L. Ed. 359. Nevertheless, section 2319 [30 U.S.C. §22] extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and **this and the following sections hold out to one who succeeds in making discovery the promise of a full reward**.

Union Oil v. Smith, 249 U.S. 337, 346 (1919)(emphasis added). "[L]ocation is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim." Cole v. Ralph, 252 U.S. 286, 296 (1920).

BLM/LNC attempt to create a distinction between the "statutory right" to occupy public lands containing valuable minerals in §22 and the "property right" obtained from a valid mining claim in §§23 and 26. Yet, Union Oil directly linked §22's valuable mineral deposit requirement with "the following sections" of the Mining Law, *e.g.*, §26's valid claim requirements, which "hold out to one who succeeds in making discovery the promise of a full reward." 249 U.S. at 346.

The Supreme Court did not draw a material distinction between a "statutory" right and a "property" right when it held that to establish "valid rights" against the United States (i.e., the "right" of occupancy and use that LNC asserts) "**a discovery of mineral is essential**." Union Oil,

249 U.S. at 346 (emphasis added). The fact that a mining claimant who has discovered valuable minerals may later apply for a patent (fee title) to the claimed land under §29 does not mean that the requirements in §§22, 23, and 26 to establish occupation and use rights do not apply.[3]

BLM/LNC ignore the Supreme Court's longstanding holding linking possessory rights of mining claims to valuable minerals, regardless of whether a claimant may later apply for a patent. "Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States." Belk, 104 U.S. at 283. *See also* Teller v. U.S., 113 F. 273, 280-81 (8th Cir. 1901)(quoting Belk and finding that "rights" to possession of mining claims are based on valuable minerals).

> The statute grants two rights, (1) the right to explore and purchase all valuable mineral deposits in lands belonging to the United States; and (2) **the right to occupation and purchase of the lands *in which valuable mineral deposits are found*. The right to explore, that is, prospect for valuable minerals on public lands, cannot be telescoped with the right to locate the mining claim and occupy and exploit it for its valuable mineral content *after such minerals have been found*.**

Davis v. Nelson, 329 F.2d 840, 844-45 (9th Cir. 1964)(emphasis added). "[I]t is clear under both the mining law and the regulations that a discovery of valuable mineral is the *sine qua non* of an entry to initiate vested rights against the United States." Id. at 845. *See* R.T. Vanderbilt v. Babbitt, 113 F.3d 1061, 1063 (9th Cir. 1997)("Possessory interest in a claim can be held indefinitely upon discovery of valuable mineral deposits…."); Lara v. Sect. of Interior, 820 F.2d 1535, 1537 (9th Cir. 1987)("A mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim."). Thus, the "exclusive right of possession" only extends to "the holder of a valid, located claim" and only for "the surface included within the ... location." McMaster v. U.S., 731 F.3d 881, 885 (9th Cir. 2013).

> While location of a valuable mineral establishes a right to the possession of the deposit, and a surface use superior to any subsequent claimant, **mere exploration, without discovery, does not confer a privilege to obstruct surface use**. *Converse v. Udall*, 399 F.2d at 619-21….**[I]t is clear that the … admittedly invalid mining claims cannot be used to assert**

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[3] "Patenting, however, is not required" and claims containing the "discovery of a mineral deposit" give the claimant "the right of exclusive possession of the land for mining purposes." Locke, 471 U.S. at 86.

> **rights contrary to those of the general public**. See *Mulkern v. Hammitt*, 326 F.2d 896 (9th Cir. 1964).

U.S. v. Allen, 578 F.2d 236, 238 (9th Cir. 1978)(emphasis added). Here, LNC's presumed "right" to dump waste is being "used to assert rights contrary to those of the general public." Id.

District courts in the Ninth Circuit hold the same. "Without the discovery of a valuable mineral deposit, no rights arise under the mining laws." U.S. v. Biggs, 2007 WL 3313022, *5 (E.D. Cal. 2007). "Where a valuable deposit has been found, a claimant has the right to possession and enjoyment of the surface, while the United States retains title to the land." Chuck v. U.S., 2005 WL 8176560, *6 (E.D. Cal. 2005)(citing Granite Rock Co., 480 U.S. at 575). The same is true for other jurisdictions, which hold that possessory and occupancy rights on mining claims are dependent upon evidence of valuable minerals on the claims.

> [T]he Mining Law gives citizens three primary rights: (1) the right to explore for valuable mineral deposits, 30 U.S.C. §22; (2) **the right to possess, occupy, and extract minerals from the lands in which valuable mineral deposits are found**, 30 U.S.C. §26; and (3) the right to patent lands in which valuable mineral deposits are found, 30 U.S.C. §29.

Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 47 (D.D.C. 2003)(emphasis added).[4] *See also* Freeman v. Dep't of the Interior, 37 F. Supp. 3d 313, 319 (D.D.C. 2014)(same).

BLM's overly-restrictive interpretation of its authority was squarely and recently rejected in Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F. Supp. 3d 738 (D. Ariz. 2019), where the court vacated the federal government's approval of a large copper mine due to the agency's erroneous interpretation and application of the 1872 Mining Law, federal public land law, and NEPA. Although BLM/LNC try to distinguish that decision because it involved a mine on Forest Service, not BLM land, the case is directly on point here, as BLM's and the Department of Justice's legal position regarding LNC's "rights" to dump waste on its claims is the exact same taken by the Forest Service and DOJ in that case.

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[4] Mineral Policy Ctr. highlights the error of BLM/LNC's attempt to manufacture a meaningful distinction between "statutory" rights and "property" rights against the United States. As that court correctly held, the "right to possess [and] occupy" public lands and the "right to patent lands" are **both** dependent on the discovery of "valuable mineral deposits" on those lands. 292 F. Supp. 2d at 47. *See also* Union Oil, 249 U.S. at 346 ("a discovery of a mineral is essential" to both).

The court squarely rejected the position taken by BLM/LNC here, that claimants are entitled to use and occupy mining claims for waste dumps absent any evidence that the claims meet the requirements for occupancy and use rights under the Law, and that the agency has little discretion over such operations: "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." Ctr. for Biological Diversity, 409 F. Supp. 3d at 747-48 (emphasis in original).

Like this case, the agency never inquired into whether the mining claims met the Law's prerequisite for use/occupancy rights (discovery of valuable minerals), yet the agency "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)." Id. at 748. The court held "[t]his was a crucial error as it tainted the Forest Service's evaluation of the Rosemont Mine from the start." Id. at 747.

BLM/LNC argue that BLM does not have to inquire into whether the waste dump lands meet the requirements for rights under the Law because BLM does not normally inquire into claim validity before approving a mine plan. BLM at 22-24, LNC at 8-11. ***But Plaintiffs here do not argue that BLM must conduct a full claim validity review prior to approving every mining plan of operations.*** Rather, the issue is whether, based on BLM's actions **in this case**, and the facts on the ground **in this case**, BLM's position that LNC has an automatic "right" to use its mining claims for permanent waste dumps complies with the statute, based on a consideration of all "relevant factors" under the APA. It does not.

That BLM may not have to review claim validity in every case does not mean that it can blindly assume that LNC has an automatic right to dump its waste on its mining claims. Agencies and courts can, at any time, review mining claim validity, and the assertion of rights against the United States, like the use/occupancy rights LNC asserts here. Such inquiry ensures that "no right arises from an invalid [mining] claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public." Cameron v. U.S., 252 U.S. 450, 460 (1920). The valid claim requirement ensures that

"the rights of the public [are] preserved." Id. "A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation that [sic] [than] are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights…." Locke, 471 U.S. at 104-05. BLM may suspend review of a mining plan while it examines a claimant's asserted rights "in order to protect the claim and surrounding federal lands from damage." Clouser v. Espy, 42 F.3d 1522, 1535 n. 15 (9th Cir. 1994).

The fact that agencies usually do not review claim validity outside of "withdrawn" lands is not an excuse for ignoring the "valuable mineral deposit" requirement for claimed rights under the Law. As the Supreme Court recently warned, government practices cannot be upheld if they do not comport with the statute. "Nor may a court favor contemporaneous or later practices *instead* of the laws Congress passed." McGirt v. Okla., 140 S.Ct. 2452, 2468 (2020)(emphasis in original).

While compliance with the APA's "relevant factors" mandate does not always require a validity review, based on the individual facts of each mine case, the agency needs to ascertain the true scope of a claimant's asserted "rights" before the agency can assume those rights limit its authority over the project. As the court in Center for Biological Diversity recognized: "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. … **the [agency] merely needed a factual basis to support Rosemont's assertion of rights**." 409 F. Supp. 3d at 761-62 (emphasis added). Under basic principles of administrative law, "[a]ny 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 this problem." Id. at 757-58 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co, 463 U.S. 29, 43 (1983)). That same rule applies here.

C. LNC's Waste Dumps Are Not "Authorized by the Mining Laws" When They Are Proposed on Lands Containing Mere Common Rock.

BLM/LNC argue that BLM has little discretion over the waste dumps under its 43 C.F.R. Part 3809 regulations because they constitute "operations authorized by the mining

laws." BLM at 16-17. But only upon the satisfaction of the Mining Law's prerequisite requirements for statutory rights against the United States are "operations authorized by the mining laws":

> [T]he regulations state that mining activities on Forest Service land are permitted only as specifically authorized by the Mining Law of 1872. As Rosemont has no rights under the Mining Law as to the land at issue, it follows that the regulations certainly do not create independent rights that do not exist under the Mining Law.

Center for Biological Diversity, 409 F. Supp. 3d at 749. Both the 36 C.F.R. Part 228 Forest Service regulations in that case and BLM's Part 3809 regulations here are based on "operations authorized by the mining laws." 43 C.F.R. §3809.1(a).

For BLM lands, Mineral Policy Center held the same: "While a claimant can explore for valuable mineral deposits before perfecting a valid mining claim, without such a claim, she has no property rights against the United States, … and her use of the land may be circumscribed beyond the UUD standard because it is not explicitly protected by the Mining Law. *See Cameron v. United States*, 252 U.S. 450, 460 (1920)." 292 F. Supp. 2d at 47-48. "Before an operator perfects her claim, because there are no rights under the Mining Law that must be respected, BLM has wide discretion in deciding whether to approve or disapprove of a miner's proposed plan of operations." Id. at 48.

LNC could not hold any rights under the Mining Law for lands not containing valuable minerals because Congress has withdrawn such lands from coverage under the Mining Law. The Common Varieties Act of 1955 prohibited the filing of legitimate mining claims that contain only common minerals: "No deposit of common varieties of sand, stone, gravel … shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws." 30 U.S.C. §611. "[T]his Act … was intended to remove common types of sand, gravel, and stone from the coverage of the mining law." Coleman, 390 U.S. at 604.

That withdrawal of lands containing common minerals, coupled with the lack of any evidence that the waste dump lands contain the requisite valuable minerals (as the valuable lithium is in the pit), fatally undermines BLM's presumption that LNC had a "right" under the Mining

Law to dump its waste on these lands. But instead of inquiring whether the lands contained any valuable minerals, BLM simply presumed that LNC had a statutory right to use its claims for a dumping ground. Federal courts have "reject[ed] [the claimant's] argument that in the absence of a challenge to validity, the court must take at face value their assertion that claims are supported by an adequate mineral discovery." Freeman, 37 F. Supp. 3d at 319 (quoting Payne v. United States, 31 Fed. Cl. 709, 711 (1994)). Since the lands contain only common variety rock, LNC's mining claims as to those lands are invalid, and it has no right to those lands, as "no right arises from an invalid [mining] claim of any kind." Cameron, 252 U.S. at 460.

Indeed, the Interior Department policy that BLM relies on to avoid any inquiry into the minerals at the site expressly acknowledges that no rights under the Mining Law apply to lands containing only common variety rock and that BLM cannot authorize such operations.

> The Department's regulations also disallow mining claimants from beginning mining operations for minerals that may be "common variety" minerals until after BLM has determined that the minerals are an uncommon variety. 43 C.F.R. § 3809.101 (2004). The inquiry involved in a common variety determination, like the surface rights determination under the Surface Resources Act, is not a validity determination. Common variety determinations consider only the nature of the mineral deposit, including whether the mineral has some property giving it distinct and special value, to determine whether the mineral at issue is locatable. *United States v. McClarty,* 17 IBLA 20 (1974).

BLM Ex. D at 3, n. 2 (2005 Opinion). Although LNC would not be mining the common rock on its claims, this prohibition of "operations" applies here, as BLM defines mining "operations" to include all operations connected with the Project, including the waste dumps. 43 C.F.R. §3809.5.

BLM common variety regulations, 43 C.F.R. Part 3600, are very different than those for locatable minerals, Part 3809. At a minimum, BLM has complete discretion to disallow activities proposed on lands containing only common variety minerals. Thus, even if true, BLM/LNC's assertion that the RMPs do not apply to "locatable minerals" (since its lacks full discretion under Part 3809), does not apply to operations proposed on lands containing common variety minerals.

Rights obtained by the discovery of valuable minerals on one claim (such as in the mine pit) cannot establish any rights on the waste dump claims. "A discovery without the limits of the claim, no matter what its proximity, does not suffice." Waskey v. Hammer, 223 U.S. 85, 91 (1912). *See* Henault Min. Co. v. Tysk, 419 F.2d 766, 768 (9th Cir. 1969)(valuable mineral

deposit requirement cannot be met on one claim by a showing of minerals on other claims); Lombardo Turquoise Milling & Mining Co. v. Hemanes, 430 F. Supp. 429, 443 (D. Nev. 1977)(same). The Arizona court acknowledged this longstanding rule, as the agency's position, like BLM's here, would essentially nullify critical provisions of the Mining Law:

> No limiting principle would constrict surface use under the [agency's] interpretation of the Mining Law. This interpretation would render the act of [claim] location moot – an individual would need only discover a deposit before gaining a right to all the surface of public lands not withdrawn. This simply does not comport with the plain language of the Mining Law.

Center for Biological Diversity, 409 F. Supp. 3d at 762-63.

Lastly, BLM/LNC assert that BLM can ignore any aspect of the minerals and lands to be buried under the waste dumps because the dumps are "reasonably incident" to mining in the pit. LNC at 10, *quoting* 30 U.S.C. §612. This "reasonably incident" language comes from the Surface Resources Act, 30 U.S.C. §612(a), which limits activities on "mining claims" to such uses.

But that Act was not intended to and did not create a new statutory "right" to use other claims for any purposes related to mining, regardless of whether the claims supported rights under the Mining Law. Rather, it was intended to be restrictive, to eliminate "abuses under the general mining laws by those persons who located mining claims on public lands for purposes other than legitimate mining activity." Bohmker v. Oregon, 903 F.3d 1029, 1035 (9th Cir. 2018). In that Act "Congress did not intend to change the basic principles of the mining laws." Converse v. Udall, 399 F.2d 616, 617 (9th Cir. 1968).

Thus, the fundamental prerequisite for possessory/occupancy rights on mining claims (valuable mineral deposits) remained untouched by §612. The fact that the waste dumps may be "reasonably incident" to mining lithium in the pit does not create statutory rights where none exist.

D. BLM Cannot Avoid Complying with the RMP and FLPMA Simply Because LNC Is Proposing a Mining Operation for Locatable Minerals.

BLM and LNC assert that BLM's RMP does not apply, including the sage-grouse amendments, because LNC holds a "statutory right" under the Mining Law. *See* BLM at 16-19 (referring to "statutory rights" under the Mining Law); *see also* LNC at 5 (arguing RMP provisions "cannot be imposed when they interfere with rights under the Mining Law."). But in the same breath, BLM/LNC assert that the nature and extent of such "rights" is irrelevant and

BLM has no obligation to determine whether LNC's claims comply with the express requirements in the mining laws for such "rights." In addition to being contrary to the Mining Law and FLPMA, this interpretation is contrary to the RMP, as amended by the sage-grouse ARMPA.

As noted, except for initial exploration, a miner holds no "right" against the United States to a claim that does not contain a "valuable mineral deposit." FLPMA only requires that land use plan (RMP) provisions do not "impair the **rights** of any locators under that [1872] Act." 43 U.S.C. §1732(b)(emphasis added). Thus, if there is no "right" to be impaired, the RMP requirements apply. Even if there is a right, to the extent RMP requirements do not impair it, they still apply.

Yet here, BLM categorically asserts that the ARMPA provisions are not consistent with the Mining Law and "'locatable minerals resource projects are not subject to such requirements." BLM at 21 (quoting FEIS Appx. N at N-6). This is highly misleading, as the statement that "locatable mineral resource projects are not subject" to the ARMPA is **not** found in the ARMPA, in FLPMA, or the authority LNC cites.[5] The 3% disturbance cap for PHMA provides it is "subject to applicable laws and regulations, such as the 1872 Mining Law, as amended, and valid existing rights." LNC at 4 (discussing 3 percent disturbance cap Standard MD SSS 2A); Pls.' Ex. 9 at 2-30 (ARMPA). Similarly, the "'Required Design Features' and other 'management or litigation actions' based on sage-grouse habitat and population triggers may apply to approvals 'consistent with valid and existing rights and applicable law in authorizing third-party actions'." BLM at 21(quoting ARMPA). Notably, neither provision creates the blanket exemption for all locatable minerals projects that BLM claims. This purported categorical exemption from all ARMPA requirements for locatable minerals projects is simply BLM's staff's new interpretation of the ARMPA regarding "valid existing rights" and "applicable law." FEIS at N-6, and N-9.

That interpretation cannot be squared with the plain language of the ARMPA and is therefore not entitled to deference. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019)(Court should

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[5] Western Watersheds Project v. Bernhardt stated in dicta quoting the administrative record, "federal agencies have less discretion with respect to when and where mineral exploration and mining under the Mining Law is conducted, as compared to other agency authorizations." 2021 WL 517035, *26 (D. Idaho Feb. 11, 2021). This does not mean that BLM has no discretion over locatable minerals development.

only grant *Auer* deference after exhausting tools of statutory construction). The 3% disturbance cap provision, for instance, provides: "Although locatable mine sites are included in the degradation calculation, mining activities under the 1872 mining law **may** not be subject to the 3% disturbance cap." ARMPA App'x E at 4 (ECF #23-14) (emphasis added). "May" means that, depending on the specific facts of each mine, the cap may apply – facts ignored by BLM here.

If all locatable mineral operations were exempt from the ARMPA, then the ARMPA would state as much. Instead, the ARMPA contains specific direction and design features for locatable mineral operations, albeit subject to certain limits to protect "valid existing rights." Indeed, it requires BLM to "avoid, minimize, and mitigate" any effects to sage-grouse by avoiding new disturbance or else minimizing or mitigating any disturbance "whether in accordance with a valid existing right or not." Pls.' Ex. 9 at 2-6 (MD SSS-1). By claiming a blanket exemption from all ARMPA standards for the Project, BLM unlawfully dodged this duty as well.

E. BLM's Duty to "Prevent Unnecessary or Undue Degradation" Under FLPMA Requires Compliance with the Environmental Protection Provisions of the RMP.

BLM/LNC agree that BLM cannot approve a mine plan that may cause "unnecessary or undue degradation" (UUD) under FLPMA, 43 U.S.C. §1732(b). This includes the "performance standards" under 43 C.F.R. §3809.420. One of those performance standards is that mining "must comply with the applicable BLM land-use plans." 43 C.F.R. §3809.420(a)(3). BLM/LNC again argue that this cannot apply because compliance must be "consistent with the mining laws." Id.

First, LNC mistakenly asserts that BLM's duty under FLPMA to impose mitigation measures to ensure RMP compliance was removed when BLM revised its Part 3809 regulations in 2001. LNC at 12, n. 8. Yet those rules specifically:

> retain[ed] the general performance standards (paragraphs (a)(1) through (a)(5) from the 2000 rule because they provide an overview of how an operator should conduct operations under an approved plan of operations and clarify certain basic responsibilities, including the operator's responsibility to comply with applicable land use plans and BLM's responsibility to specific necessary mitigation measures.

66 Fed. Reg. 54835, 54840 (Oct. 30, 2001). One of these critical performance standards is BLM's duty to impose "mitigation measures to protect public lands." 43 C.F.R. §3809.420(a)(4). While BLM does not have to impose every conceivable mitigation measure, "Mitigation measures fall

squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. An impact that can be mitigated, but is not, is clearly unnecessary." 65 Fed. Reg. 69998, 70052 (Nov. 21, 2000)(preamble to rules that, as noted above, remain in place).

Here, BLM failed to require the sage grouse mitigation measures in the ARMPA, even if mitigation would not interfere with LNC's alleged "mining rights." The ARMPA requires that BLM "ensure mitigation that provides a net conservation gain to the species." Pls.' Ex. 9 at 2-7, 2-8 (ARMPA). This can be done without restricting any approved mining activity. As this Court remarked in Western Exploration v. U.S. Dept. of the Interior, "if actions by third parties result in habitat loss and degradation, even after applying avoidance and minimization measures, then compensatory mitigation projects will be used to provide a net conservation gain to the sage-grouse." 250 F. Supp. 3d 718, 747 (D. Nev. 2017). The ARMPA's "goals to enhance, conserve, and restore sage-grouse habitat and to increase the abundance and distribution of the species, … is best met by the net conservation gain strategy because it permits disturbances so long as habitat loss is both mitigated and counteracted through restorative projects." Id. But BLM approved the ROD with no sage-grouse mitigation plan in place and no plan has been provided for public review. Pls.' PI Mot. at 15-16.

Also, related to BLM's reliance of LNC's "rights" discussed above, BLM states that "while the performance standards with which operators must comply require consistency with land-use plans, such compliance is not required where a planning provision would prohibit exercise of statutory rights under the Mining Law." BLM at 17. BLM quotes its Minerals Handbook to say that BLM "must recognize the rights granted by the Mining Law." Id. at n. 45.

Thus, according to BLM, if LNC has demonstrated it has "statutory rights under the Mining Law," the RMP is inapplicable. But as detailed above, BLM disavows any duty to actually inquire into the nature of the rights, based on the facts on the ground, under its erroneous assumption that LNC has full statutory rights simply because the waste dumps are part of mining operation. Since there are no automatic "rights" to dump waste on these lands, LNC is not immune from the RMP and ARMPA protective standards which apply to the lands at the dump sites.

III. Plaintiffs Have Raised "Serious Questions" On Their NEPA Claims.

A. The FEIS Failed To Take A "Hard Look" At Wildlife Impacts.

The FEIS fails to take the required "hard look" at baseline conditions and wildlife impacts. The establishment of a baseline is "a practical requirement in environmental analysis often employed to identify the environmental consequences of a proposed agency action." Or. Nat. Desert Ass'n v. Jewell, 840 F.3d 562, 568 (9th Cir. 2016). Defendants claim that BLM adequately considered impacts to sage-grouse, but they cannot identify a detailed discussion of baseline sage-grouse populations in the area or how they use seasonal habitats there, because there is none. Nor can they point to a thorough analysis of how impacts to the Montana-10 and Pole Creek leks will affect sage-grouse populations in the Project area or within the Lone Willow PMU. LNC cites a paragraph in the FEIS that says "decreased quality of habitat and increased fragmentation" are likely, without projecting effects on sage-grouse from those effects. LNC at 21 (citing FEIS at 4-42-43). Vague statements like these, saying that some sage-grouse habitat exists and will be affected and some sage-grouse use the site and will be affected, does not explain what those impacts mean to sage-grouse populations at any scale and therefore fails to take the required "hard look." *See* Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 993 (9th Cir. 2004)("general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided."). According to NDOW, "anticipated project related noise increases at Montana-10 and Pole Creek 01 could have significant negative effects on these leks and the Lone Willow PMU." Pls.' Ex. 5 at R-184 (ECF #23-5).

The FEIS' analysis of impacts to pronghorn is similarly infirm. Sweeping assertions about effects to big game from habitat disturbance do not consider or disclose the actual effects from disturbance at the site to the local pronghorn population from destroying 5,000+ acres of winter range and cutting off two migration corridors in the Project area. *See* LNC at 21-22 (citing Pls.' Ex. 2 at 4-38-4-39). The FEIS does not provide baseline population information other than that the population is purportedly "stable." Nor does the FEIS disclose whether impacts to the "stable"

pronghorn population in the Project area are more significant given the species' decline statewide. *See* BLM at 28-29. BLM's brief contains more analysis of pronghorn than the entire FEIS.

Defendants are also wrong that the FEIS adequately considered impacts to the rare Kings River pyrg. Their argument that springsnails will not be affected within the direct impact of the Project footprint simply parrots the FEIS, which dismisses impacts to springsnails in a paragraph. Pls.' Ex. 2 at 4-48. However, Kings River pyrg are known to exist in only 13 springs. Pls.' Ex. 34 at 7. LNC admits that some of these springs will experience drawdown at the end of the recovery period. BLM Ex. F at 81 of 189 (ECF #30-7). Some of the springs known to support Kings River pyrg have depths of as little as 0.1 cm—so any reduction to water quantity would be significant. Pls.' Ex. 34 at 9 (*see* BLM-03). Groundwater drawdown may affect 5 of 13 **total** springs known to support Kings River pyrg and effects to the species should have been carefully analyzed.

B. The FEIS Failed to Provide the Detailed "Quantified Assessment" of the Cumulative Impacts from Other Activities in the Area.

BLM/LNC assert that the FEIS fully complied with BLM's duty to include "mine-specific or cumulative data," a detailed "quantified assessment" of other projects' combined environmental impacts, and "identify and discuss the impacts that will be caused by each successive project, including how the combination of those various impacts is expected to affect the environment" within the area. Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1104-06 (9th Cir. 2016) (quoting Great Basin Mine Watch v. Hankins, 456 F.3d 955, 973-74 (9th Cir. 2006)).

The FEIS lacks any mention of the nearby McDermitt Lithium Project. Pls.' Mot. at 32. To defend this glaring omission, BLM argues that Plaintiffs "waived" its ability to raise the issue. BLM at 31. Yet a plaintiff is not required to list every single project in the area that has cumulative impacts to assert that a cumulative impacts analysis is inadequate. That argument was rejected by the Ninth Circuit in another BLM mine case when it held that "plaintiffs met their burden in raising a cumulative impacts claim under NEPA, despite failing to specify a particular project that would cumulatively impact the environment along with the proposed project." Te-Moak Tribe v. U.S. Dept. of the Interior, 608 F.3d 592, 605 (9th Cir. 2010). "We conclude that Plaintiffs must show only the potential for cumulative impacts." Id. at 605. Plaintiffs more than carried this minimal

burden when they criticized BLM's failure to consider "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." Pls.' Exh. 36 (Plaintiff WWP's supplemental DEIS comments).

Regarding the other activities in the area, BLM/LNC maintain that the FEIS met the strict Ninth Circuit requirement for detailed and quantified data analysis under Great Basin Resource Watch and Great Basin Mine Watch. Yet they merely cite back to the FEIS which contains vague discussions of potential impacts, with no quantified analysis, except for listing acreages of other projects, which fails the Ninth Circuit test. Pls.' Mot. at 31-32.

BLM excuses these omissions, saying it "quantified" the impacts (again only listing the acreages) "where possible." BLM at 32. No details are provided, or any justification for why it could not have conducted the required "quantified" analysis. This violates the NEPA regulations, which require BLM to provide all needed information: "If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement." 40 C.F.R. §1502.22(a). "If there is 'essential' information at the plan- or site-specific development and production stage, [the agency] will be required to perform the analysis under § 1502.22(b)." Native Village of Point Hope v. Jewell, 740 F.3d 489, 499 (9th Cir. 2014). Here, the adverse impacts from the mine when added to other actions in the region are clearly essential to BLM's analysis (under NEPA) and duty to ensure that the mine mitigates adverse environmental impacts (under FLPMA), especially to regional wildlife.

For example, the FEIS provides no quantified, detailed information about the status of sage-grouse populations or habitats within the Lone Willow PMU or the Western Great Basin PAC, or the anticipated effects to sage-grouse from the Project in combination with other actions at either scale. BLM/LNC argue it was acceptable to cut-off its impacts review at the nearby Oregon border. But the ARMPA specifically relies upon the broader analysis the FEIS failed to do:

> When a hard trigger is hit in a PAC that has multiple BSUs, including those that cross state lines, the WAFWA Management Zone GRSG Conservation Team will convene to determine

> the cause, will put project level responses in place, as appropriate, and will discuss further appropriate actions to be applied.

Pls.'Ex. 9 at 2-13 (MD SSS 21). Nothing in the ARMPA suggests that the BSU is intended to encompass the full scope of cumulative impact analysis. Nor are Plaintiffs suggesting that BLM analyze impacts in context of the entire species' 11-state range; they are simply requesting a cumulative impacts analysis adequate to place the impacts of habitat destruction at Thacker Pass, likely to cause abandonment of one of the three largest leks in the Lone Willow PMU, in context. This is required to take the "hard look" at impacts to sage-grouse; as the U.S. Fish and Wildlife Service recognized: "[m]aintenance of the integrity of the PACs" is the "essential foundation for sage-grouse conservation." Pls.' Ex. 10 at 23-10.

C. BLM/LNC's Assurances of Compliance with Air and Water Quality Standards Have Been Rejected by the State of Nevada and Are Based on Either Non-Existent Mitigation Plans, or Plans That Never Underwent Public Review.

Regarding BLM's duties under FLPMA to ensure that the Project comply with all air and water quality standards at all times, Pls.'Mot. at 22-26, BLM/LNC rely on purported mitigation measures that have "not been determined," in the case of toxic air emissions, or were submitted without any public review (for water quality violations from the mine pit lake). They argue all such "technical" issues deserve essentially blind deference from this Court.

Under NEPA, BLM cannot rely on critical reports and mitigation measures that have not been subject to full public review. Great Basin Resource Watch, 844 F.3d at 1104. "Such late analysis, 'conducted without any input from the public,' impedes NEPA's goal of giving the public a role to play in the decisionmaking process and so 'cannot cure deficiencies' in a [NEPA document]." Or. Natural Desert Ass'n v. Rose, 921 F.3d 1185, 1192 (9th Cir. 2019)(*quoting* Great Basin). *See also* Western Exploration, 250 F. Supp. 3d at 748.

For the predicted violation of water quality standards, BLM argues, "Plaintiffs identify no provision of Nevada law to the effect that a potential future exceedance of a water-quality standard is a per se violation of state law. And, in any event, BLM reasonably concluded that proposed operations would not violate applicable water-quality standards." BLM at 25. This ignores Nevada

groundwater protection laws, as well as the finding by the Nevada Department of Environmental Protection (NDEP) that the project **would** violate state drinking water standards.

Under Nevada law: "A facility, may not degrade the waters of the State [which includes groundwater] to the extent that: … (b) For groundwater: (1) The quality is lowered below a state or federal regulation prescribing standards for drinking water." NAC 445A.424(1)(b)(1). NDEP informed LNC and BLM that, due to the predicted violation of the drinking water standards for antimony and other pollutants, the mine's excavation below the water table was illegal.

> Modeling results predict that the proposed full backfill of the open pits with waste rock and coarse gangue material will result in groundwater exceedances of several Profile I constituents up to 300 years post closure. …[T]he Division cannot authorize a facility to degrade waters of the State and subsequently mitigate the impacts. Pursuant to NAC445A.424, a facility, regardless of size or type, may not degrade waters of the State.
>
> Therefore, the Division will implement a Permit limitation to restrict mining below the water table (regional aquifer) until additional studies can be completed and a mine plan is proposed which does not result in the degradation of waters of the State. Please provide the water elevation of the regional aquifer, as well as data regarding variation and fluctuation in the water table.

May 5, 2021 letter from NDEP to LNC (Ex. 35). Despite this, BLM approved the **entire** project, including the excavation of the mine pit into the aquifer, whereas the NDEP said such operations violate state law. Also, as NDEP required, LNC must propose a new mine plan and submit additional information necessary to show that the project complies with state law. None of this new information will be subject to NEPA, since BLM has already approved the full project.

BLM/LNC also argue that the plan to monitor for the predicted violations satisfies NEPA. Yet, as EPA stressed to BLM, this plan was submitted after the public comment period was over. Pls.' Mot. at 23-24. Great Basin Resource Watch held that "putting off an analysis of possible mitigation measures until after a project has been approved, and after adverse environmental impacts have started to occur, runs counter to NEPA's goal of ensuring informed agency decisionmaking." 844 F.3d at 1107. While the court approved BLM's plan for the pit lake in Great Basin Resource Watch, the facts were very different, as the mine pit lake was not predicted to release its pollutants into groundwater (i.e., it was "ground water sink"). Id. at 1106.

Here, in contrast, the pit lake will flow into groundwater, which will be available for future users in the region. FEIS at 4-14 ("pit backfill outflow with concentrations on antimony that exceed the 0.006 regulatory threshold would migrate up to approximately one mile east-southeast of the pit."). Pls.' Ex. 2. The fact that there are no **current** groundwater users in the immediate vicinity ignores the very likelihood that as surface water supplies continue to dry up due to climate change, water users in the area will be forced to rely more and more on groundwater.

For air quality, BLM/LNC rely on LNC's "tail gas scrubber" technology to meet strict toxic air emission standards. LNC at 17. Yet, they never respond to Plaintiffs' quote from the FEIS admitting that this "scrubbing system has not yet been determined." FEIS Appx. K (Pltf. Exh. 18). Although BLM is afforded some deference on this technical issue, the court cannot defer to a void, as neither the public nor this Court has any idea if this "undetermined" technology will work. BLM/LNC never explain why this air emissions "scrubber" technology could not have been developed and submitted for public review as required by NEPA.

BLM/LNC also rely heavily on the fact that NDEP, which is not subject to NEPA, may issue an air quality permit. LNC at 16, 19. Yet BLM cannot rely on Nevada state air permitting as a substitute for full public review of mining projects under NEPA: "'[a] non-NEPA document ... cannot satisfy a federal agency' obligations under NEPA'. … and the reference to the Project's Clean Air Act permit did nothing to fix that error." Great Basin Resource Watch, 844 F.3d at 1104, (quoting S. Fork Band Council, 588 F.3d at 726). BLM's failure to fully ensure compliance with state environmental law is a violation of the UUD standard under FLPMA and its failure to subject its plans to public review violates NEPA.

Respectfully submitted this 1st day of July, 2021.

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CERTIFICATE OF SERVICE

I, Talasi Brooks, hereby attest that I served the foregoing and all attachments on all parties via this Court's ECF system, this 1st day of July, 2021.

/s/ Talasi B. Brooks