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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WESTERN EXPLORATION LLC, ELKO COUNTY, NEVADA, EUREKA COUNTY, NEVADA, QUANTUM MINERALS LLC,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, SALLY JEWELL, in her official capacity as Secretary, BUREAU OF LAND MANAGEMENT, a part of the U.S. Department of the Interior, NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management, U.S. Department of the Interior, AMY LUEDERS, in her official capacity as Nevada State Director of the Bureau of Land Management, U.S. DEPARTMENT OF AGRICULTURE, TOM VILSACK, in his official capacity as Secretary, U.S. FOREST SERVICE, a part of the U.S. Department of Agriculture, THOMAS L. TIDWELL, in his official capacity as Chief, U.S. Forest Service, BILL DUNKLEBERGER, in his official capacity as Humboldt-Toiyabe National Forest Supervisor,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

1. Elko County, Nevada, Eureka County, Nevada, Western Exploration LLC, and Quantum Minerals LLC (collectively the "Plaintiffs") bring this action against the U.S. Department of the Interior ("DOI") and Sally Jewell, in her official capacity as Secretary; Neil Kornze, in his official capacity as Director of the Bureau of Land Management ("BLM"); Amy Lueders, in her official capacity as Nevada State Director of the BLM; the Department of Agriculture ("USDA") and Tom Vilsack, in his official capacity as Secretary; Thomas L. Tidwell, in his official capacity as Chief, U.S. Forest Service ("USFS"); Bill Dunkleberger, in his official capacity as Humboldt-Toiyabe National Forest Supervisor; BLM, and USFS (together, "the agencies"). Plaintiffs seek declaratory and injunctive relief for violations of federal laws including, but not limited to: the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*; the National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. §§ 1601 *et seq.*; the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4231 *et seq.*; the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), 5 U.S.C § 601 *et seq.*; the Administrative Procedure Act ("APA"); the 1872 Mining Law (the "General Mining Law"), 20 U.S.C. §§ 21a *et seq.*, as amended; and the United States Constitution.

2. Plaintiffs request the Court enjoin DOI and BLM from implementing the September 21, 2015 Record of Decision and Approved Resource Management Plan Amendments for the Great Basin Region, Including the Greater Sage-Grouse Sub-Regions of Idaho and Southwestern Montana, Nevada and Northeastern California, Oregon, and Utah ("BLM ROD"), and USDA and USFS from implementing the September 16, 2015 Record of Decision Idaho and Southwest Montana, Nevada, and Utah ("USFS ROD") (collectively with the BLM ROD, (the "RODs")). Plaintiffs request the Court enjoin Defendants from taking any action to interfere with continued access to all lands that were open for mineral entry prior to any

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segregation proposed in the RODs, including segregating lands from operation of the General Mining Law, or otherwise prohibiting multiple-use of such lands.

JURISDICTION & VENUE

3. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction) and the APA, 5 U.S.C. § 702 (judicial review of final agency action). This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA.

4. Venue is proper in the U.S. District Court for the District of Nevada under 28 U.S.C. §§ 1391(c)(2) and (e) in that: (i) Defendants reside in the District of Nevada, with BLM maintaining an office at 1340 Financial Blvd., Reno, Nevada 89502, from which BLM implements its policies within the State, and with USFS maintaining an office at 1200 Franklin Way, Sparks, Nevada 89431, from which USFS implements its policies within the State; (ii) the events giving rise to the claims occurred in Nevada, and the ARMP's (defined below) regulatory impacts will be felt within this district where it will be implemented; and (iii) each of the Plaintiffs reside, and/or operate businesses, or are governmental entities in Nevada.

THE PARTIES

5. Elko and Eureka Counties are political subdivisions of the State and were cooperating agencies for the Nevada and Northeastern California Environmental Impact Statement ("EIS"/LUPA") upon which the RODs are based. Their County Commissioners and staff devoted countless hours and resources to reviewing the November 2013 Draft EIS, the May 2015 Administrative Draft of the Nevada and Northeastern California Final Environmental Impact Statement ("FEIS"), and the June 2015 FEIS/Proposed LUPA. The Counties submitted comments on each of these documents, including Elko County's June 26, 2015 Protest Letter and Eureka County's June 29, 2015 Protest Letter on the FEIS/Proposed LUPA. The agencies'

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September 15, 2015 Protest Resolution Report Nevada and Northeastern California Sub-Regional Greater Sage-Grouse Land Use Plan Amendment/Final Environmental Impact Statement ("Protest Report") does not adequately address the Counties' comments or inconsistencies between local and State conservation and land use plans and laws and the LUPA.

6. Elko County's Protest Letter, submitted under 43 C.F.R. § 1601.5-2, identified inconsistencies between the LUPA and Elko County conservation plans. BLM and USFS did not make any meaningful changes to the Approved Resource Management Plan ("ARMP") to address these inconsistencies, offering instead a vague statement that there may be differences between local, state, and federal laws and plans, but does not describe the differences or explain why the differences and inconsistencies could not be resolved. (BLM ROD at 2-15).

7. Elko County covers 10,995,840 acres and has a population of 52,760 people. The county's economic drivers are ranching, mining, recreation, and tourism. Over 72 percent of the county is federal land managed by BLM and USFS. The FEIS habitat maps show 75 percent of Elko County as Priority Habitat Management Areas ("PHMA") and General Habitat Management Areas ("GHMA"). The ARMP restrictions on these lands will interfere with Elko County's land use planning and police powers including its obligation to maintain its transportation system and provide emergency services; the ARMP travel restrictions affect more than 1,500 miles of roads in Elko County. The ARMP will cause environmental harm because its grazing restrictions will result in a build-up of fuel load on the range and increase wildfire frequency and intensity, which will destroy Greater Sage-grouse ("GSG") habitat. The travel restrictions will impede emergency vehicles including fire-fighting equipment.

8. Elko County estimates the ARMP will result in an annual loss of $31 million in agricultural productivity and substantial losses from severely restricted mineral exploration and development, oil and gas exploration and development, wind energy, and other natural resource

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development, as discussed in Elko County's June 26, 2015 Protest Letter. The ARMP will result in the total destruction of certain businesses and interference with the Counties' police powers to implement land use plans including the Elko County, Nevada Greater Sage Grouse Management and Conservation Strategy Plan ("Elko County Plan") adopted in September 2012.

9. Western Exploration ("Western") is a small company incorporated in Nevada. Western owns two projects in Elko County, 112 unpatented mining claims at Doby George and 331 unpatented mining claims at Wood Gulch – Gravel Creek. The USFS approved a Plan of Operations governing Western's exploration drilling that includes provisions to protect GSG and its habitat. For example, the environmental protection measures preclude Western from drilling until mid-July each year to protect GSG and other species. Western has worked cooperatively with the USFS since 1997 to obtain its Plan of Operations, investing millions of dollars on its continued exploration. At no time prior to June 1, 2015, did the agency ever indicate any of the proposed project area might be considered for withdrawal from mineral entry. The November 2013 DEIS preferred alternative did not propose withdrawing millions of acres of land, recognizing the inconsistency of doing so with the agencies' statutory multiple-use mandates.

10. Gravel Creek has significant potential to become a sizeable economic gold and silver mine. The ARMP restrictions obstruct Western's development of Gravel Creek by identifying a Sagebrush Focal Area ("SFA") that proposes the withdrawal of over 2 million acres of land in Elko County from mineral entry, including the 6,950 acres on which Western's mining claims are located. Western had no notice of the agencies' plans to designate the Gravel Creek project area as an SFA to be withdrawn from mineral entry until the May 29, 2015 publication of the EIS/Proposed LUPA. Western was deprived of proper notice of the SFA withdrawal and the opportunity to comment on the DEIS and the adverse impact the SFA will have on Western's

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business and the development of a significant mineral deposit. Western filed a protest letter on the EIS/Proposed LUPA, which the Protest Report does not adequately address.

11. The ARMP jeopardizes Western's investment of over $32 million which it made with reasonable expectations its rights under the General Mining Law would be respected. Gold deposits like Gravel Creek are extremely rare, costly and difficult to find; the odds of finding another similarly promising deposit elsewhere are extremely remote. The invalidation of this discovery through the claim contest and segregation processes the agencies have threatened in conjunction with the SFA will render Western's investment worthless. Other ARMP restrictions inconsistent with the State and local plans also interfere with Western's rights.

12. Eureka County is made up of eighty-one percent federally administered land, primarily managed by BLM and USFS. The County's economy is driven by mining, farming and ranching, all of which will be harmed by the ARMP's land use restrictions. Approximately 2,000 people live in Eureka County and are mainly employed in the natural resources or ranching sectors. The community's welfare and viability depend on business and recreational activities conducted on or in connection with use of and access to federal lands.

13. Like Elko County, Eureka County was a cooperating agency for the EIS/LUPA and submitted comments on each of the BLM/USFS documents developed. The County's March 2012 scoping comments emphasized the need for the LUPA to be consistent with the Eureka Master Plan and Eureka County Code Title 9. Throughout the EIS process, Eureka County commented on the many ways the agencies' proposed land use restrictions are inconsistent with Eureka County's policies and code. For example, Eureka County submitted comments on the DEIS that included 39 pages of inconsistencies with Eureka County's Master Plan and Eureka County Code. Eureka County's protest letter on the FEIS/Proposed LUPA describes the agencies' utter lack of effort to coordinate with Eureka County.

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14. Eureka County repeatedly asserted that its local plans, policies, and proposals for GSG conservation were superior to the Proposed LUPA and would result in protecting GSG and conserving and enhancing habitat while maintaining a strong and vibrant economic base. The ROD and ARMP ignore these comments and the detailed economic data the County provided. The Protest Report does not adequately address Eureka County's comments, stating that because the ARMP is a regional programmatic planning document, the agencies were not obligated to examine impacts to local communities with this level of detail or specificity. The agencies failed to demonstrate the Eureka County Master Plan and Title 9 of the County Code would not benefit and conserve GSG. The ARMP's livestock grazing restrictions will interfere with Section 6.21 of the Eureka Master Plan's provision for managed grazing in a beneficial manner that prevents fuel buildup and excessive wildfire damage. The ARMP's livestock grazing restrictions will create increased fuel loads that will burden Eureka's fire district and result in destruction of GSG habitat. The ARMP will interfere with Eureka's land use planning and sovereign police powers.

15. Quantum Minerals LLC ("Quantum") is a small private Nevada company formed to acquire property interests in and near the Jarbidge Mining District in Elko County. Quantum's business plan focuses on exploring this highly prospective gold district to potentially redevelop the property into a modern gold mine. Quantum's only property is at Jarbidge and comprised of approximately 110 unpatented mining claims and nine patented mining claims.

16. On August 20, 2015, the Deputy District Ranger of the Humboldt-Toiyable National Forest approved Quantum's Plan of Operations (the "Decision Memo"). During the 14-month period USFS evaluated Quantum's Plan of Operations, consultants performed environmental baseline studies including a vegetation study to identify wildlife habitat present in the project area. Neither these studies nor USFS personnel ever identified GSG habitat in the Jarbidge project which ranges in elevation between 6,000 and 9,000 ft above sea level and has

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numerous trees, which makes it obviously unsuitable habitat for GSG which typically avoid wooded areas because trees serve as perching sites for ravens and other avian predators.

17. Quantum relied on the expertise of local USFS personnel from the Jarbidge Ranger District to provide accurate information about environmental conditions on the Jarbidge property, including the presence of federally threatened or endangered species or critical habitat, based on their personal knowledge and on-the-ground experience with the Jarbidge area. Prior to acquiring the Jarbidge claims, Quantum reviewed the maps in the DEIS which did not show any GSG habitat in the immediate Jarbidge claim area, with the closest habitat located at least one-third of a mile to the northwest of Quantum's claim block. The addition of the SFA to the ARMP contradicts the facts on the ground, as determined by USFS personnel, who studied the area. Thus, in less than two years, the known habitat characteristics of the Jarbidge project area mysteriously transformed – without any changes in actual on-the-ground habitat conditions – from non-habitat to the highest priority habitat and an SFA proposed for withdrawl. This sudden termination of Quantum's rights under the General Mining Law to explore its only project creates such substantial, imminent, and irreparable harm that it will destroy Quantum's business.

18. The SFA segregation and withdrawal deprives Quantum of its rights under the General Mining Law to use and occupy its unpatented mining claims and will severely devalue adjacent patented mining claims and potentially render these private lands worthless. Because the boundaries of mineral deposits rarely conform to land ownership borders, invalidation of the unpatented claims and the prohibition against using these lands for mineral development may create spatial, physical, and technical constraints that make economic development of the private lands infeasible and even impossible.

19. The Decision Memo considered the baseline studies, which did not identify any suitable habitat for GSG because of the high elevation and numerous trees, consistent with the

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professional knowledge and experience of USFS personnel for the environmental and habitat conditions in the project area. Without explanation, the FEIS included these lands within the SFA, catapulting them to the "best of the best" of GSG habitat without science or commercial information to support such an arbitrary change which will put Quantum out of business.

20. U.S. DEPARTMENT OF THE INTERIOR ("Interior" or "DOI") is charged with protecting and managing the Nation's natural resources and, under FLPMA, developing, maintaining and revising land use plans with public involvement and employing the principals of multiple-use and sustained yield.

21. BUREAU OF LAND MANAGEMENT ("BLM") is responsible for managing and conserving resources for multiple-use and sustained yield on public lands. In doing so, BLM must prepare NEPA analyses to evaluate the direct, indirect, and cumulative impacts from amending land use plans pursuant to FLPMA.

22. U.S. FOREST SERVICE ("USFS") is part of the U.S. Department of Agriculture and is charged with implementing the NFMA and to prepare NEPA analyses to evaluate the direct, indirect, and cumulative impacts from amending land and resource management plans. NFMA requires the USFS manage the nation's Forest System Lands to provide for a broad range of resource issues consistent with principles established under the Multiple Use & Sustained Yield Act of 1960 ("MUSYA"), 16 U.S.C. § 528.

23. SALLY JEWELL is the Secretary of Interior, and is sued in her official capacity. Secretary Jewell, in her capacity as Secretary of Interior, has ultimate responsibility for BLM actions pursuant to FLPMA and the General Mining Law.

24. NEIL KORNZE is the Director of BLM and is sued in his official capacity and oversees BLM, the agency that implements FLPMA and administers the General Mining Law.

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25. AMY LUEDERS is the Nevada BLM State Director, is sued in her official capacity and supervises BLM's implementation of FLPMA within the State of Nevada.

26. TOM VILSACK is the Secretary of the Department of Agriculture, and is sued in his official capacity in which he has ultimate responsibility for USFS' actions under the NFMA.

27. THOMAS L. TIDWELL is the Chief of the USFS, and is sued in his official capacity. Chief Tidwell has responsibility for the USFS' actions under the NFMA.

28. BILL DUNKLEBERGER is the Forest Supervisor for the Humboldt-Toiyabe National Forest and is sued in his official capacity. Forest Supervisor Dunkleberger supervises USFS' implementation of the NFMA within the State of Nevada.

LEGAL BACKGROUND

A. Federal Land and Policy Management Act

29. FLPMA requires that public lands be managed under principles of multiple-use in a manner that recognizes the nation's need for domestic sources of minerals, including implementation of the Mining and Minerals Policy Act of 1970. 43 U.S.C. § 1701(a)(12). FLPMA defines "multiple use" as the "management of the public lands and their various resource values so that they are utilized in the combination that will *best meet the present and future needs of the American people*" providing a "combination of ***balanced and diverse resource uses*** . . . without permanent impairment of the productivity of the land and the quality of the environment" and with consideration "to the relative values of the resources." 43 U.S.C. § 1702(c). The ARMP violates multiple-use, ignoring the "present and future needs of the American people" and making GSG habitat conservation the primary land management objective to the exclusion of other uses without adequate consideration of science and commercial information to evaluate viable alternatives that would allow balanced and diverse resource uses.

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30. FLPMA preserves rights of claim locators under the General Mining Law, including access rights. 43 U.S.C. § 1732(b). The SFA withdrawals from mineral entry and travel restrictions violate § 1732(b) of FLPMA, the requirement to recognize the Nation's needs for domestic sources of minerals, 43 U.S.C. § 1701(a)(12), and the General Mining Law.

31. FLPMA recognizes state and local governments have expertise in and sovereign local police powers over land use planning, and *requires* the Secretary to develop land use plans that "are consistent with State and local plans to the maximum extent" such plans are "consistent with Federal law and the purposes of [the] Act." *See* 43 U.S.C. § 1712(c)(9). This honors fundamental principles of federalism allowing states to develop unique solutions and engage in cooperative efforts with local governments to solve state-specific problems. *See* Executive Order 13232, Aug. 4, 1999, 64 Fed. Reg. 43255. The ARMP is inconsistent with the 2014 Nevada Sage-Grouse Conservation Plan ("Nevada Plan"), the Elko County Plan and the Eureka Master Plan in violation of FLPMA § 202(c)(9). The Protest Report summarily dismisses the consistency requirement with circular logic that state and local plans and laws may be different than federal laws, in which case the ARMP can be inconsistent with state and local plans, but does not discuss the differences or why they cannot be reconciled. (Protest Report at 42). While FLPMA permits an agency's final decision to, in certain cases, be inconsistent with state or local plans, FLPMA does not allow BLM to ignore critical comments from state and local governments and refuse to engage in a meaningful involvement with them.

32. The ARMP is irreconcilably different from the state and local plans which are consistent with the multiple use and sustained yield mandates in FLPMA and NFMA, whereas the ARMP is not. BLM obscures this difference stating its objective is to implement a "GSG conservation strategy rangeland [that] provide[s] for the conservation of the GRSG and its habitat and to provide FWS with regulatory certainty that in turn will potentially preclude a

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determination that the species is warranted for listing." (BLM Response to Sandoval Consistency Review at 3). BLM admits that it has chosen to subordinate its multiple use and sustained yield mandate in order to influence FWS' listing determination, which is unlawful; FLPMA requires BLM to take a balanced approach that achieves multiple- use while also conserving GSG habitat.

33. The Nevada, Eureka and Elko County plans focus on reducing key threats to GSG habitat (as identified in the U.S. Fish & Wildlife Service ("FWS") 2013 Greater Sage-grouse Conservation Objectives: Final Report ("COT Report")) – wildfires and invasive species infestations. The ARMP does not focus on reducing these primary threats but instead imposes onerous restrictions on public land use, despite the COT Report's conclusion that use of public lands is not the primary habitat threat. The ARMP's failure to focus on the primary threats to GSG habitat will result in environmental harm by interfering with the State's and Counties' Plans. The BLM ROD emphasizes the COT Report finding that fire and weeds/annual grasses are a ubiquitous threat throughout the ROD planning area, and shows threats ascribed to mining and "*improper* grazing" as being much less widespread. (BLM ROD at 1-10, -11).

34. The agencies have violated their Congressional grant of authority in developing the ARMP by substituting their statutorily mandated objective to manage federal lands for multiple-use and sustained yield with GSG conservation measures that will "…provide the FWS with regulatory certainty that in turn will potentially preclude a determination that the species is warranted for listing." BLM Response to State's Consistency Review at 3. Neither FLPMA nor NFMA provide the agencies with the statutory authority to ignore or subordinate their multiple-use and sustained yield statutory mandates in preference for influencing FWS' decisions. FWS does not have statutory authority over an unlisted species or land use planning. The agencies unlawfully delegated their land use planning authority to FWS by adopting the "Stronghold Areas" (called SFA in the ARMP and RODs) that FWS asserted were necessary in an October

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2014 memorandum from Director Ashe to Director Kornze and Chief Tidwell. **Exhibit 1**. This action was arbitrary, capricious and unlawful because FWS and the agencies failed to identify any science or commercial information to support that such withdrawals are necessary.

35. The 2014 FWS memorandum includes habitat maps that show areas along the northern border of Nevada as PHMA where FWS asserts "the strongest levels of protection are recommended" based on areas "noted and referenced by the conservation community." The agencies have improperly added the third-party "conservation community" stronghold maps to the FEIS, labeling the stronghold areas as SFA withdrawal zones, and included them as a new concept (FEIS at 1-1) without giving the public an opportunity to review a Supplemental EIS that included the FWS October 2014 maps or disclosing science or commercial information underlying the identification of the SFA boundaries and conclusion these areas should be withdrawn. The Protest Report similarly characterizes the October 2014 memorandum and maps as providing new information: "This memorandum provides information *in addition* to that which was already considered in the Draft LUPA/FEIS . . . ." (Protest Report at 172).

36. The agencies' use of the FWS October 2014 memorandum to delineate the SFA is questionable especially in light of FWS' September 22, 2015 announcement that GSG is not warranted for listing as a protected or endangered species under the Endangered Species Act. The Nevada Division of Wildlife – not FWS—has primary authority over unlisted species like GSG; FWS has no statutory authority or jurisdiction. Therefore, it is unlawful for FWS to play this role in influencing land management decisions pertaining to GSG. In addition to improperly delegating land use planning authority for the ARMP, the agencies unlawfully provided FWS "veto" authority in project-level decisions including relative to disturbance cap determinations.

37. An agency may not sub-delegate authority to another agency under the guise of taking advice. BLM improperly delegated its authority to propose, and include the SFA in the

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ARMP. FWS advocated for the SFA and engaged in the land use planning process in a manner outside of its authority. The BLM acquiesced to the FWS' SFA under the guise of taking advice. This violates the land use planning authority Congress delegated to BLM/USFS and exceeds FWS' authority which is limited to federally listed threatened and endangered species.

38. FLPMA also permits BLM to "make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section." *See* 43 U.S.C. § 1714(a) (emphasis added). The BLM may choose to propose a withdrawal, or it may consider withdrawal upon application from an entity or person outside the BLM. *Id*. § 1714(b)(1). USFS has acknowledged it must propose a withdrawal to BLM through the application process. *See U.S. v. Smith Christian Min. Enterprises, Inc*., 537 F. Supp. 57, 60-61 (D. Ore. 1981). USFS's own manual on withdrawal applications indicates: "[USFS] must apply to the Secretary of Interior for withdrawal actions on USFS lands." Manual 2760.01, *Special Uses Management: Withdrawals*. In evaluating the appropriateness of a withdrawal, this manual directs USFS to "encourage mineral activity where mineral extraction is the best use of the site." Moreover, USFS notes requests for withdrawal of minerals "should be made rarely."

39. The DEIS did not select a preferred alternative involving widespread withdrawals. Then, after publication of the DEIS, FWS and, effectively USFS (given USFS has jurisdiction over the Forest System Lands at issue), proposed the SFA, which requires implementation of widespread withdrawal zones including approximately 395,000 acres of USFS-administered lands in Elko County – in conflict with the DEIS analysis. USFS did not conduct a FLPMA or NEPA analysis of the SFA withdrawals as required by the evaluation criteria in its own manual for proposing withdrawal of lands. This proposed land withdrawal was not made in accordance with the provisions and limitations of 43 U.S.C. § 1714.

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40. To initiate a new withdrawal, BLM, or another applicant must follow § 1714 and its implementing regulations. FLPMA's implementing regulations on withdrawal direct potential applicants to pre-application consultation with BLM. 43 C.F.R. § 2310.1-1 ("A potential applicant should contact the appropriate State" BLM office "well in advance of the anticipated submission date of an application . . . Early consultation also will assist in determining the need for a withdrawal, taking possible alternatives into account.") After consultation, "before the authorized officer can take action on a withdrawal proposal, a withdrawal application in support thereof ***shall be*** submitted." *Id*. § 2310.1-2 (emphasis added). The application shall contain, *inter alia*,

> A legal description of the entire land area that falls within the exterior boundaries of the affected area and the total acreage of such lands . . . The extent to which the lands embraced in the application are requested to be withheld from entry under the public land laws, including the mining laws . . . The type of temporary land use that, at the discretion of the authorized officer, may be permitted or allowed during the segregation period . . . An analysis and explanation of why neither a right-of-way under section 507 of the Act . . . nor a cooperative agreement . . . would adequately provide for the proposed use . . . The place where records relating to the application can be examined by interested persons.

Id. §§ 2310.1-2(c)(5), (8), (9), (10), (12), (14). Based on information and belief, neither USFS nor FWS engaged in pre-application consulting with BLM, or filed a withdrawal application with BLM as FLPMA requires.

41. In addition, USFS failed to comply with its own procedures when it accepted, wholesale, the FWS' proposed "strongholds" which led to the SFA. According to FSM 2760, before requesting BLM to withdraw lands, USFS should "[n]otify permittees holding permits on lands open to mineral development of their risks and liabilities," and "document new withdrawal of lands from…entry under the mining law by: (a) An assessment of the mineral potential. (b)

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An evaluation of alternatives. (c) An analysis showing that the use or special features of the area cannot be adequately preserved or protected through other means." Manual 2761.03, *Special Uses Management: Withdrawals.* Moreover, USFS directs forest officers to "[i]nclude in the withdrawal the minimum area needed for the intended use." *Id.* The USFS did not perform any of the required functions in proposing the land withdrawal to BLM. There has been no analysis to determine whether the proposed withdrawal was the minimum area "needed for the intended use" and, as demonstrated herein, it is not. The public has been deprived of any meaningful opportunity to evaluate the SFA.

42. A "withdrawal petition" is a request to file an application for withdrawal that is originated within the DOI. *Id.* § 2300.5(p). The withdrawal petition must be submitted to the BLM for transmittal to the Secretary. *Id.* § 2310.1-3. A withdrawal petition must contain, *inter alia*: the office originating the petition; the type and purpose of the proposed withdrawal action; whether the petition pertains to the making, extension or modification of a withdrawal; and a preliminary identification of the mineral resources in the area. *Id.* §§ 2310.1-3(b)(1), (2), (5). Upon information and belief, neither USFS nor FWS submitted a withdrawal petition to BLM in violation of these requirements.

43. FWS is an agency within DOI without specific land use planning authority, and it is thereby required to submit a withdrawal petition to BLM if it seeks land withdrawals. Based on information and belief, FWS did not engage in the requisite application process to request withdrawal of land (i.e., the "highest level of protection") within the Strongholds identified in the October 2014 memorandum that became the SFA in the ARMP. Moreover, FWS' role in identifying and requesting the SFA withdrawal must be examined now that FWS determined not to list GSG and the limited jurisdiction the agency has over an unlisted species.

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44. BLM and USFS should be enjoined from implementing the SFA in the ARMP because such adoption did not occur in conformance with the requirements to request land withdrawal, and thereby violated the requirements of FLPMA.

B. The National Forest Management Act

45. NFMA requires the Secretary of Agriculture and its agency the USFS to manage the Nation's National Forest System lands consistent with the principles established under the Multiple Use and Sustained Yield Act of 1960 ("MUSYA"), 16 U.S.C. § 528. NFMA directs USFS to manage federal lands for multiple uses, and requires USFS to use "a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences" (16 U.S.C. § 1604(b)), to consider both environmental and economic goals (16 U.S.C. § 1604(g); 36 C.F.R. § 219.1(a)), while taking into account the Nation's needs for minerals (*see* 16 U.S.C. § 528). The SFA withdrawal zones and travel restrictions in the ARMP that affect USFS-administered lands violate the NFMA multiple-use mandate. The USFS ROD mischaracterizes the changes that the ARMP makes to the Humboldt-Toiyabe Land Management Plans as "non-significant," despite the fact that it asserts GSG habitat covers 44 percent of the Humboldt National Forest and 15 percent of the Toiyabe National Forest. (USFS ROD at 67). Impacting 44 percent of a national forest is significant – especially when 566,600 acres are SFA to be withdrawn from operation of the General Mining Law (USFS ROD at 21). The SFA withdrawal in the Humboldt National Forest represents roughly 50 percent of the GSG habitat in the forest and 22 percent of the entire forest area and is significant.

C. The General Mining Law

46. Section 22 of the General Mining Law requires that public lands be open for mineral exploration and development. This right of access, use, and occupancy applies to all unpatented mining claims before and after discovery of a valuable mineral deposit pursuant to

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Section 22 and 30 U.S.C. § 612(b), the Surface Use Act (herein referred to as "the General Mining Laws") guaranteeing the right to use and occupy federal lands open to mineral entry, for prospecting, mining and processing and all uses reasonably incident thereto, including ancillary use rights, and rights of and associated with ingress and egress. These rights also extend to public lands being used and occupied for mill site purposes and ancillary uses for facilities necessary to support mining operations. Numerous land use restrictions in the ARMP including the SFA withdrawals and the access (travel) restrictions violate the General Mining Laws.

47. The proposed travel restrictions in Nevada's "checkerboard lands" where the odd-numbered sections are private lands interspersed between public lands, have significant potential to expose the federal government to property takings claims. Restrictions on road uses on public lands may render the contiguous road segment on adjacent private land sections inaccessible and therefore without economic value. Nevada courts have held that the government's substantial impairment of a property owner's right of access constitutes a compensable taking. BLM did not analyze the financial impact to the federal government of such takings claims, in violation of Executive Order 12360 or viable alternatives such as the conservation measures in the Eureka, Elko and Nevada Plans to achieve the same objectives. In addition, the primary jurisdiction over use of roads resides with local governments; BLM cannot lawfully restrict such use or the right of local governments to maintain or improve such roads.

48. The 2.8 million acres proposed for withdrawal is grossly out of proportion with the footprint of mineral activities in Nevada. For example, Western Exploration's claims at issue cover only 6,950 acres. BLM's LR 2000 database shows the statewide authorized surface disturbance of mineral exploration and development as of January 2014 was 191,374 acres – a mere 6.8 percent of the 2.8 million acre SFA areas. The proposed withdrawal of 2.8 million

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acres is fifteen times the size of the entire footprint of authorized mineral projects in Nevada and includes significant acreage in southern Nevada *outside of GSG habitat*.

49. It is arbitrary, capricious and unlawful for BLM and USFS to propose withdrawing the SFA and extinguishing claimants' rights under the Mining Laws given the agencies' acknowledgment in the FEIS that some of the areas proposed for withdrawal do not have important habitat – or habitat at all. This raises the question of what, if any, science exists to support identification of these areas. As explained in the State of Nevada's Sagebrush Ecosystem Council's June 29, 2015 Protest Letter, "[t]he methods provided for delineation of the SFAs are not explicit and therefore are not transparent nor scientifically defensible…Overall, the criteria described for producing the SFA does not match the State's assessment of breeding bird densities…or resistance and resilience mapping statewide …, and it is unclear what criteria were applied to determine which landscapes qualify as being 'essential to conservation and persistence of the species.'" (SEC pages 5 – 6). Instead, the agencies blindly adopted the stronghold area/SFA from the October 2014 Ashe memo with no supporting information or even disclosure to the public of what science or data supported identification of the SFA boundaries.

50. This is particularly concerning in light of numerous examples in Nevada counties identifying errors in the ARMP's identification of areas mischaracterized as GSG habitat, such as the PHMA in Eureka County that covers the Town of Eureka, US Highway 50, State Route 278, the Eureka County landfill, the Falcon-to-Gondor major distribution line, multiple ancillary power lines, multiple subdivisions with homes, paved and gravel roads, farms with alfalfa fields and irrigation systems, hay barns and other infrastructure. The Protest Report glosses over problems with the habitat maps stating that they need not be resolved because the ARMP is a regional, programmatic plan and the agencies should wait to resolve such problems on a project-by-project basis if and when a project proponent raises inconsistencies between the ARMP maps

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and the on-the-ground habitat conditions. (Protest Report at 172). This response is inadequate for the SFA where the agencies admit the actual presence of GSG populations is speculative, (Protest Letter at 82) and where there will never be any project proponents to raise this issue due to the mineral withdrawal and other onerous prohibitions and restrictions that apply to the SFA. The answer is also unsatisfactory because the PHMA shown in the ARMP habitat maps will create widespread areas where project development of any kind is strongly discouraged based on little or no reliable information about actual habitat condition, which will substantially interfere with the local and state land use plans and economic development objectives. Finally, the identification of these areas, among other characteristics, renders the document a site-specific EIS in addition to a programmatic EIS.

51. The agencies' broad assertion in the ARMP that the restrictions will be applied "to the extent" permissible by law does not provide analysis or disclosure of impacts to rights under the General Mining Laws, the necessity or alternatives to impairment of such rights, or provide adequate public notice of how restrictions will be applied. Although many stakeholders (including plaintiffs) raised concerns about valid existing rights, the RODs remain ambiguous about this important issue. Many voiced concerns that rights for unpatented mining claims located under the General Mining Law would be restricted to claims with a proven discovery of a valuable mineral deposit. The glossary in the BLM ROD at 2-4 is unresponsive to this concern and offers a valid existing right definition that may interfere with claimants' rights under § 22 of the General Mining Law prior to discovery of a valuable mineral deposit. The USFS ROD at 64 is similarly vague stating that valid existing rights would be preserved and uses a nearly identical definition of valid existing right as used in the BLM ROD. (USFS ROD at 100). Despite the numerous comments pertaining to valid existing rights and the discovery status of mining claims that are included in the Protest Report (*See* Protest Report at 13 - 26), the report fails to address

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the concerns raised about the discovery status of a claim and simply asserts that the "FEIS/PLUPA does not violate valid existing rights." (Protest Report at 26). Clarification of this issue is critical to Plaintiffs because the ARMP and RODs are replete with vague references that the widespread land use prohibitions and restrictions in the SFA, PHMA, and GHMA do not interfere with valid existing rights. The references to valid existing rights in the RODS obscure the real impact of the ARMP on mineral exploration and mine development, which will be to impose such rigid land use restrictions including but not limited to lek buffer zones, travel restrictions, and seasonal constraints that the ARMP extinguishes rights under § 22 of the General Mining Law for claims without a discovery of a valuable mineral deposit (which is the bulk of the mining claims in Nevada), resulting in the *de facto* withdrawal of millions of acres of PHMA and GHMA habitat areas shown on the faulty ARMP maps from operation of the General Mining Law *See* BLM ROD at 1-17 and USFS ROD at 127. The impacts of this were not adequately disclosed or analyzed in the NEPA or FLPMA process completed for the ARMP.

D. The National Environmental Policy Act

52. NEPA requires that an EIS contain "high-quality information and accurate scientific analysis." 40 C.F.R. § 1500.1(b). If there is incomplete or unavailable relevant data, the EIS must disclose this fact. 40 C.F.R. § 1502.22. Internal email correspondence reveals that the agencies knew the information they relied upon to create requirements in the ARMP had shortcomings and yet did not disclose these shortcomings. This withholding of information violated NEPA, which requires up-front disclosures of relevant shortcomings in the data or models. *Id.*; *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005). DOI officials recognized the unlawful nature of the some of the land use restrictions and prohibitions in the ARMP, which originated in the December 2011 National Technical Team Report ("NTT Report"). E-mail correspondence between DOI personnel who prepared the NTT Report reveals that some NTT

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members voiced concerns about the illegality of the recommended conservation measures in the NTT Report yet these same measures survived DOI's internal review and are now incorporated into the ARMP. *See* **Exhibit 2**. The resulting policy that is being advanced in the ARMP violates FLPMA and NFMA. The BLM ROD confirms the purpose of the ARMP is to implement the NTT Report, describing the ARMP as a radical change in BLM's management of the public lands: "This change represents a new paradigm in managing the sagebrush landscape for the BLM … to conserve the GRSG, consistent with direction articulated in the NTT report. (BLM ROD at 1-40, citing the NTT Report at 6-7)

53. NEPA requires a supplemental EIS when the agency makes substantial changes in the proposed action that are relevant to environmental concerns or significant new circumstances or information are included relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c). Here, the Proposed LUPA in the FEIS differed so dramatically from the Preferred Alternative in the DEIS because it introduced for the first time the SFA, which the FEIS described as a "new concept" (FEIS at 1-1 and Protest Report at 172), it precluded "meaningful consideration" by the public and required circulation of a Supplemental EIS. *State of Cal. v. Block*, 690 F.2d 753 (9th Cir. 1982). The public comment procedures are "at the heart of the NEPA review process" and require responsible opposing viewpoints be included in the FEIS reflecting the "paramount Congressional desire to internalize opposing viewpoints into the decision-making process." NEPA requires not merely public notice, but meaningful public participation in the evaluation process. Failure to include significant elements of the ARMP, such as the SFA, disturbance caps and lek buffers in the DEIS defeats this aim and has resulted in ARMP restrictions radically different from the preferred alternative in the DEIS. By failing to disclose such substantial requirements until the FEIS when opportunity for comment pursuant to NEPA passed, the agencies insulated their decision-making process from

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public scrutiny rendering NEPA's procedures meaningless. *Id.* In addition, supplementation is required where, as here, modifications to a proposed action "alter the overall cost-benefit analysis of the proposed action." *Russell County Sportsmen v. USFS*, 668 F.3d 1037, 1048 (9th Cir. 2011).

54. The agencies' Preferred Alternative (Alternative D) in the November 2013 DEIS did not include the SFA withdrawal zones because such withdrawals would be inconsistent with the multiple-use and sustained yield mandates in FLPMA and NFMA and would not meet the agencies' planning regulations or NEPA requirements. "Alternative D . . . emphasizes ***balancing resources and resource use among competing human interests, land uses, and the conservation of natural and cultural resource values*** . . . ." The agencies explained in the DEIS that Alternative D "seeks to provide a balanced level of protection, restoration, enhancement, and use of resources and services to meet ongoing programs and land uses." (DEIS, 2-13).

The agencies selected Alternative D to comply with NEPA and the agencies' multiple use mandates: "Formulated by the planning team, the preferred alternative represents those goals, objectives, and actions determined to be most effective at resolving planning issues and balancing resource use . . . ." The agencies selected this as the Preferred Alternative based on it meeting the purpose and need, the agencies' multiple-use mission, interdisciplinary team recommendations, environmental consequences analysis of the alternative, and Cooperating Agency comments provided on the Administrative Draft EIS. (DEIS, 2-24). Adding the SFA is a substantial change between the DEIS and the FEIS that is arbitrary and capricious and cannot be explained or justified by any change in law or regulations. The Protest Report mischaracterizes the discussion in the DEIS explaining why Alternative D was the Agency Preferred Alternative stating that "Alternative D resulted from customizing Alternative B to balance among competing interests" (Protest Report at 59). The DEIS discusses ***balancing resources*** in the

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context of complying with the agencies' multiple use and sustained yield mandates – not to address competing interests – such as those of the conservation groups that advocated alternatives that included more widespread land use prohibitions and more stringent land use restrictions. The Protest Report also rationalizes adding the SFA to the FEIS despite the DEIS Preferred Alternative by characterizing this change as ***minor*** and within the scope of the alternatives analyzed in the DEIS: "the management of these areas as SFAs and the impacts of the associated management decisions was addressed in the DEIS and is qualitatively within the spectrum of alternatives analyzed." (Protest Report at 83). NEPA demands more to determining a Proposed Action, which must be a "logical outgrowth" stemming from the DEIS. The addition of the SFA withdrawal zones to the ARMP is not a logical outgrowth of the DEIS Preferred Alternative which was selected on the basis of satisfying the agencies' multiple use and sustained yield mandates, which the ARMP does not.

55. In the FEIS, the agencies acknowledge the SFA are a new policy recommendation that is based on an October 27, 2014 memorandum from the FWS Director entitled "Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes." *See* Exhibit 1. The USFS ROD at 20 and the Protest Report at 172 reiterate that the SFA concept originated with FWS and was new information added to the FEIS. There was ample time between October 2014 and publication of the FEIS to give public notice and opportunity to comment on the new maps. Yet, BLM waited until May 29, 2015 to publish the FEIS and deprived the public meaningful opportunity to comment on the new SFA. BLM's failure to publish a Supplemental EIS, disclose any science or data relied upon to prepare the new maps and seek public comments on those maps violates NEPA. Moreover the agencies' eleventh-hour addition of the SFA contradicts their stated justification for the DEIS Preferred

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Alternative that balanced "resources and resource use" by avoiding withdrawal zones – with no explanation for this reversal.

56. The Protest Report states that the SFA boundaries were determined using maps prepared by the USGS, but that the presence of GSG populations in the SFA has not been verified: "…the ***potential*** presence of birds in these areas of the SFAs is acknowledged." (Protest Report at 82"). The agencies admit they propose draconian withdrawal of these lands which puts some of the most valued potential mineral resource lands in the world off limits without even confirming that the SFA contain important GSG populations. The agencies further admit that the proposal to withdraw these lands from mineral entry and processing of grazing permits is a new "additional recommendation" presented for the first time in the FEIS. (Protest Response at 82). In addition, the agencies failed to provide the public an opportunity to review and comment on the data first identified in the FWS Memo and used to draw the SFAs.[1] Worse still, the BLM discloses for the first time in the Protest Report that USGS mapping was considered to draw the SFA boundaries. NEPA requires the disclosure of this in the DEIS and opportunity for public comment. The SFA boundaries are not drawn using best available science, were not provided in time for public comment as NEPA requires and are therefore arbitrary, capricious, and unlawful.

57. NEPA requires an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). The DEIS and FEIS do not present a complete or accurate discussion of the regulatory tools already in place to protect GSG habitat, including BLM Manual 6840, *Special Status Species Management* and the surface management regulations pertaining to locatable minerals at 43 C.F.R. § 3809 and 36 C.F.R. § 228 Subpart A, and the local and State plans. All of these existing regulations and conservation plans should have been

[1] The maps are marked: "Pre-Decisional. For Internal Review Purposes Only. Do Not Distribute."

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considered in the context of the No Action Alternative as they all are in place and will continue to be implemented even absent federal action through revision of the LUPA.

58. Although Manual 6840 is not included in Chapter 7, References, of the FEIS, nor were any alleged inconsistencies with it ever raised by Director Lueders who actively participated in the development of the Nevada Plan, the BLM relies on it extensively in its August 6, 2015 response to Governor Sandoval's FLPMA § 202(c)(9) consistency review letter. The absence of any meaningful discussion of Manual 6840 anywhere in the DEIS or FEIS is a flaw that requires BLM and USFS to prepare a Supplemental EIS for public comment – especially in light of BLM's reliance on Manual 6840 in replying to Governor Sandoval's consistency review letter. The DEIS and FEIS did not include any explanation that the Nevada Plan was inconsistent with Manual 6840 – an issue BLM first raised in its response to the Governor's Consistency Review notwithstanding Director Lueder's active participation in development of the Nevada Plan. The No Action Alternative should have considered the effectiveness of implementing the State and Local Plans. Although the FEIS considered the Nevada Plan as Alternative E, it did not give this alternative meaningful consideration, dismissed the Elko Conservation Plan as an alternative that did not require detailed consideration, and did not give much consideration at all to the Eureka Plan. The Protest Report at 175, 180, and 197 correctly states that the objective of Manual 6840 is to reduce threats to BLM sensitive species with the objective of minimizing the likelihood for listing. However, in establishing its objectives for the ARMP, BLM is using Manual 6840 in a vacuum as if the species protection objectives of the mandate eclipse or even nullify BLM's statutory multiple use and sustained yield mandates. BLM must implement the species protection measures in Manual 6840 in a manner consistent with FLPMA multiple use and sustained yield directives.

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59. The agencies must consider reasonable alternatives to ensure they have before them and take into account all possible approaches to, and potential environmental impacts associated with a proposed action. BLM and USFS should **not** have considered the Proposed Plan (as well as Alternatives B, C, D, and F in the FEIS) given that they are "infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." An alternative that maximized multiple-use of lands, such as the Elko County Plan, should have been fully analyzed. Although the Nevada Plan also provides for such multiple-use, the BLM did not select it or propose it as the Preferred Alternative apparently because the agency now says the plan is inconsistent with Manual 6840 though Director Lueders never raised this through the numerous meetings she participated in over several years to develop the Nevada Plan.

60. The agencies inappropriately eliminated two reasonable alternatives, the Elko County Plan and an Increased Grazing Alternative, from detailed analysis (FEIS, Section 2.11). The agencies' rejection of both alternatives reflects an unwillingness to take a "hard look" at the synergies between properly managed grazing and GSG habitat conservation that is embraced in Nevada Plan and the Elko County and Eureka County Master plans. The agencies' erroneous statement: "[t]here are currently no science-based studies that demonstrate that increased livestock grazing on public lands would enhance or restore GRSG habitat or maintain or increase GRSG abundance and distribution" (FEIS at 2-460) flies in the face of the detailed list of scientific, published references included in the Elko County and State Plans. The agencies provide no justification for why they have chosen to ignore the published scientific literature on managed grazing and habitat conservation. The Nevada Plan cites numerous technical studies that discuss livestock grazing and GSG habitat conservation and the important role that managed livestock grazing plays in maintaining riparian areas and wet meadows – two important seasonal GSG habitats. Elko County provided the agencies with information about how livestock grazing

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can reduce wildfire risks, including the following citation from federal expert, Dr. Lynn James, Director of USDA, ARS plant research laboratory at Logan Utah:

> Fires depend on adequate fuels-grasses and certain shrubs. The larger the fuel load, the hotter the fire will burn and the more damaging it will be…An economical and efficient way to remove excess grass is with an on-off grazing system. Fuel loads are reduced while producers benefit from forage consumed by their livestock. Other grazing strategies can aid in preventing or managing wildfires and controlled burns. Fires that do occur burn with reduced intensity and a general upward trend in rangeland condition is sustained. (Elko County Protest Letter at 9).

61. Because the sweeping land use restrictions in the ARMP are inconsistent with FLPMA and NFMA multiple-use and sustained yield mandates and the General Mining Law, they do not meet NEPA criteria for a reasonable alternative, which must be practical or feasible from legal, technical, and economic standpoints. This, combined with the existence of viable and preferable but unexamined alternatives renders the FEIS legally inadequate.

E. The Small Business Regulatory Enforcement and Fairness Act

62. The Regulatory Flexibility Act ("RFA") was enacted with the purpose of requiring agencies "to fit regulatory and informational requirements to the scale of businesses, organizations, and governmental jurisdictions subject to regulation." Pub. L. No. 96-354, § 2(b), 94 Stat. 1164 (1980). In order to achieve this purpose, "agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." *Id.*

63. The Small Business Regulatory Enforcement and Fairness Act ("SBREFA") amended the RFA noting the need for fundamental changes in the regulatory and enforcement culture of Federal agencies to be more responsive to small business without compromising the statutory missions of the agencies. Pub. L. No. 104-121, § 202(3), 110 Stat. 864. Congress additionally noted "the requirements of [the RFA] have too often been ignored by government

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agencies, resulting in greater regulatory burdens on small entities than necessitated by statute." *Id*. § 202(5). As a result, Congress determined "[s]mall entities should be given the opportunity to seek judicial review of agency actions required by [the RFA]." *Id*. § 202(6).

64. The RFA defines "small entities as including small organizations, small businesses, and small governmental jurisdictions that have populations under 50,000 people." 5 U.S.C. § 601(5). Small businesses are determined by industry classification according to the current Small Business Administration's ("SBA") Table of Small Business Size Standards. *Id*. § 601(3). A small business for the mining industry is 500 people or less. Plaintiffs Western and Quantum qualify as small businesses. Eureka County has a population of 2,018 people according to the U.S. Census Bureau, and therefore qualifies as a small entity under the RFA.

65. The RFA requires "an agency [that] is required by [5 U.S.C. § 553], or any other law, to publish general notice of proposed rulemaking for any proposed rule . . . [to] prepare and make available for public comment an initial regulatory flexibility analysis." *Id*. § 603(a). An initial regulatory flexibility analysis must "contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." *Id*. § 603(c).

66. The RFA requires the agency prepare a final regulatory flexibility analysis. *Id.* § 604. This analysis must include, among other things, a description of the steps the agency took to minimize the significant economic impact on small entities, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives considered was rejected. *Id.* § 604(a).

67. The agencies failed to make available for public comment an initial or final regulatory flexibility analysis in violation of SBREFA. Given the significant economic impacts

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on small businesses and entities such as Western Exploration, Quantum, and Eureka County, the ARMP should be stayed and any enforcement against small entities deferred.

PROCEDURAL & FACTUAL BACKGROUND

A. Elko County Plan

68. Elko County's strong commitment to land stewardship and conservation is reflected in the Elko County Plan. The Elko County Board of Commissioners approved the Elko County Plan and endorsed its purpose of ensuring that GSG populations and their habitat "are maintained, enhanced, or restored on public lands," and also promoted on private lands. (Elko County Plan at 13). In preparing the plan, the Elko County Division of Natural Resources Management developed a carefully researched and referenced study based on best available science that focuses on the site-specific environmental and socioeconomic conditions in the county. The Elko County Plan is the principal resource for GSG habitat management in the county, protects GSG populations and achieves significant sage-grouse habitat conservation.

69. The Elko County Plan reflects the multiple-use land management principles in the December 2010 Elko County Public Land Use and Management Plan (together with the Elko County Plan the "Elko Conservation Plans") which was developed under the direction of the Elko County Board of Commissioners and the Elko County Natural Resources Advisory Commission to promote traditional multiple-uses in unison with conservation measures for federal lands. The foundation of the Elko Conservation Plans is FLPMA's mandate that the public lands be managed to achieve multiple-use and sustained yield. (43 U.S.C. § 1701). Elko's Conservation Plans promote GSG habitat conservation while maintaining a sustainable local economy and will provide superior GSG conservation than the ARMP.

70. Elko County is a cooperating agency for the EIS/LUPA process and submitted comments on the DEIS and FEIS/Proposed LUPA that document the numerous inconsistencies

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between the Elko Conservation Plans and the LUPA and explain that the LUPA provides inferior GSG conservation compared to the Elko Conservation Plans, and consequently harms the environment and threatens Elko County's economy. The agencies ignored these comments and failed to demonstrate the Elko Conservation Plans would not benefit and conserve GSG habitat.

71. The Elko County Plan focuses on reducing threats to GSG and its habitat (mainly wildfire, invasive grass species, and predation) while maintaining multiple-uses of the land whereas the ARMP focuses on prohibiting and restricting regulated multiple-uses (e.g., livestock grazing, mining, recreation, access, etc.) in the SFA, PHMA, and GHMA. These conflicting land management objectives between the ARMP and the Elko County Plan will substantially interfere with Elko County's GSG habitat conservation policies.

72. The threat reduction objectives in the Elko County Plan are consistent with the COT Report recommendations – that regulated public land uses are not the main threats to GSG habitat and that wildfire and the invasion of non-native grass species like cheat grass are the main threats to GSG and its habitat in Nevada. The Elko County Plan focuses on reducing these threats while adhering to FLPMA multiple-use principles. It is thus consistent with federal law and will achieve far superior GSG habitat conservation compared to the ARMP.

73. The Elko County Plan emphasizes that properly managed livestock grazing can play a significant role in creating and enhancing GSG habitat and reduce habitat destruction due to wildfire by strategically using livestock grazing to reduce the fuel load associated with cheat grass and other non-native grasses. Because livestock grazing activities occur on most of the land in Elko County, capitalizing upon the synergies between livestock grazing and GSG habitat conservation can be of tremendous benefit to GSG and its habitat. The ARMP ignores these synergies and imposes rigid, one-size-fits-all livestock grazing restrictions (such as unreasonable stubble height requirements, restrictions on grazing seasons and allowable numbers of cattle, and

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prescriptive limits on maximum structure heights) that create conflicts with the Elko Conservation Plans. Many of the ARMP grazing restrictions will increase the buildup of highly flammable, non-native grass species and lead to more frequent and intense wildfires and destruction of GSG habitat. The Elko County Plan, like the COT Report, explicitly rejects uniform, range-wide prescriptions for managing the land: "Due to the variability in ecological conditions, species' and threat status, and differing cultural perspectives across the Sage Grouse range, developing detailed, prescriptive species or habitat actions is biologically untenable and inappropriate at the range-wide scale." (Elko County Plan at 112).

74. The ARMP's SFA withdrawals are inconsistent with the Elko County Plan which emphasizes multiple-use. The SFA prohibits mineral exploration and development, and solar and wind energy, and place unworkable restrictions on other land uses including oil and gas development, geothermal energy, and livestock grazing. The SFA in Elko County covers over 2 million acres (*nearly 20 percent of the county*) and is comprised of roughly 1.65 million acres of BLM-administered land and 395,000 acres of USFS-administered lands.

75. The Elko County Plan consists of various strategies developed to address several general conservation categories:

- Population and habitat management measures that focus on maintaining existing healthy populations and habitat conditions;
- Habitat enhancement and rehabilitation actions where on-the-ground projects have been identified and developed to mitigate verified risks;
- Education and outreach to promote long-term conservation through widespread stewardship and proper land use ethics;
- Regulations and policies to facilitate implementation of management actions.
- Guidelines that will permit for the development of GSG Conservation Programs that will not cause detriment to local, state and regional economies; and

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- Incentive-based directives for private property owners to develop management methods to protect GSG populations and to preserve and restore GSG habitat.

76. From 2010-2012 Elko County devoted at least 1,400 hours of staff time and spent more than $189,000 to develop the Elko County Plan which is jeopardized by the ARMP.

77. The ARMP is inconsistent with the Elko County Plan and violates the FLPMA consistency mandate at 43 U.S.C. § 1712(c)(9), the FLPMA and NFMA multiple-use and sustained yield provisions, and interferes with Elko's planning efforts and local police powers, including measures to reduce wildfire dangers through the planned use of livestock grazing.

78. The Elko County Plan contains numerous recommended actions to reduce fuel loads comprised of highly flammable non-native annual grasses with strategies to restore a more fire resistant, resilient and diverse vegetation community that provides GSG habitat. The ARMP restrictions on grazing will interfere with this critical component of the Elko County Plan. The agencies adopted the "strongholds" proposed by the conservation community through FWS to draw the SFA boundaries, yet they ignored the FWS COT Report that provides for deference to local management plans that already provide an effective strategy for fire, and recognizes the importance of local ecological conditions for grazing management strategies and of using local data on threats and ecological conditions, and that "specific strategies or actions necessary to achieve . . . conservation objectives ***must be developed and implemented at the state or local level, with the involvement of all stakeholders.***" COT Report at 52, 38, 41. This is precisely what Elko has done yet the agencies' SFA and other proposals for disturbance caps, travel restrictions, and lek buffers disregard and interfere with these local efforts.

79. The ARMP includes widespread travel restrictions that affect roughly 40 percent of all of the roads in the county and segments of nearly all of the 1,500 miles of roads that Elko County maintains. The Elko Conservation Plans rely on maintaining access throughout Elko to

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achieve the county's conservation goals for access to ranches throughout the county, as routes to adjacent counties, and to provide emergency services for ambulances and fire-fighting equipment. The ARMP prohibits cross-country travel in the SFA, PHMA, and GHMA; imposes restrictions on road use and maintenance of existing roads including prohibiting the use of certain roads during specific seasons and times of day and limiting noise; and recommends road closures. All of these travel restrictions are inconsistent with the access requirements of FLPMA and interfere with Elko's Conservation Plans and its obligations to maintain its transportation systems, one of its core police power functions for public health and safety.

B. The Eureka Master Plan and County Code

80. Eureka County has a long history of developing land stewardship policies pertaining to wildlife habitat conservation. In 2006, the County updated the Land Use Element of the Eureka County Master Plan with provisions for wildlife and wildlife habitat, including sage grouse. The County updated this plan again in 2010 ("Eureka Master Plan"). The Eureka Master Plan was adopted pursuant to NRS Chapter 278. The ARMP is inconsistent with the Eureka County Master Plan and will interfere with Eureka County's road access and maintenance obligations, zoning laws, and economic development.

81. Title 9 of the Eureka County Code also governs natural resources, wildlife management and conservation, and public lands. The ARMP is inconsistent with key elements of Title 9, including: Chapter 30, for land-use planning on federal lands; Chapter 40, procedures to ensure full disclosure and cooperation regarding decisions affecting federal lands located within the County; and Chapter 50, declaring that the County holds title in trust for the public to all public roads and public travel corridors in the County except for State and federal highways.

82. Only 13 percent of Eureka County's total land area consists of private land, creating a dependency on federal land that is often detrimental to the socioeconomic conditions

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in the County. The ARMP's land use restrictions will exacerbate this problem by substantially reducing use of the federally administered lands that cover most of Eureka County. The ARMP will adversely affect the ranching, farming and mining businesses that form the County's economic base, resulting in a loss of employment and economic outputs that will be devastating to Eureka County, which is already facing serious economic challenges.

83. Eureka County's policies place a similar emphasis as Elko County on the important and cost-effective role that properly managed livestock grazing plays in reducing wildfire risk and enhancing GSG habitat. The livestock grazing restrictions in the ARMP conflict with Section 6.21 of the Eureka Master Plan which states that: 1) wildfires are causing unreasonable economic hardship to Eureka County livestock producers; 2) properly managed grazing provides a substantial advantage for native plant recovery following fire; and 3) managed grazing is beneficial in preventing excessive damage to plants by wildfire and prohibiting grazing prior to a fire results in unnecessary damage to the plants.

84. The economically burdensome and technically ill-advised livestock grazing restrictions in the ARMP will result in increased fuels and burden the county's fire district, harm ranchers and the economy, and result in destruction of GSG habitat. The ARMP livestock grazing restrictions will also cause economic harm to Eureka County's ranching industry, with an estimated cost of $7 to $15 million per year. The inevitable decline in the ranching industry that will result from the ARMP will cause further harm to GSG. The constant presence of ranchers on the rangeland benefits GSG by developing water sources and being first responders to fire. Fewer ranchers forced to operate on less land means fewer benefits to GSG.

85. The habitat maps covering Eureka County in the FEIS/Proposed ARMP are not based on quality data or sound science and dramatically conflict with on-the-ground conditions. For example, there is a large area in southern Eureka County designated as PHMA that

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incorrectly includes the Town of Eureka, US Highway 50, State Route 278, the Eureka County landfill, the Falcon-to-Gondor major distribution power line, multiple ancillary power lines, multiple subdivisions with homes, paved roads and gravel roads, farms with alfalfa fields and irrigation systems, and hay barns, among other infrastructure. The ARMP includes many land use restrictions for PHMA such as disturbance caps that are nonsensical for the Town of Eureka and the surrounding developed area. Obviously, the infrastructure associated with an established community is not habitat. The serious flaws in the habitat map in the FEIS/ARMP create many inconsistencies with the Eureka Master Plan and Title 9. These map errors have significant implications for Eureka County's land use planning because BLM has revised its maps designating which lands are suitable for disposal on the basis of the faulty habitat map. Lands that Eureka County needs for community expansion, economic development, and infrastructure that were formerly designated as suitable for disposal are no longer considered suitable for disposal because of the erroneous classification of these lands as GSG habitat.

86. The Eureka County Department of Natural Resources (ECDNR), the Eureka County Wildlife Advisory Board to Manage Wildlife and the Eureka Conservation District initiated efforts to address pinyon-juniper (P-J) encroachment into high-value GSG habitat areas and movement corridors, which is a key threat to GSG. In 2011, these local agencies proposed to BLM a plan to hand-thin P-J around selected springs on public lands. Unfortunately, Eureka County is still waiting for BLM to approve this habitat improvement project. In the meantime, Eureka County is proactively addressing thousands of acres of P-J that exist on private lands with habitat characteristics that would benefit from P-J removal. Eureka County has successfully worked with private landowners and identified funding, including grants, to hire hand-crews to reduce the density of P-J. Since 2013, this effort has improved over 4,000 acres of GSG habitat on private land on Roberts Mountain and in the Diamond, Monitor, and the Sulphur Springs

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ranges in southern Eureka County at a cost of $262,658. The County has additional funds committed to continue the P-J removal projects. The ARMP restrictions, including but not limited to the lek buffer zones, disturbance caps, seasonal travel restrictions, road closures, and noise limits, will interfere with these types of conservation projects, because private landowners will be less able and willing to work cooperatively on conservation efforts, which will ultimately frustrate the goal of conserving and enhancing sage-grouse habitat.

87. Because invasive weeds increase wildfire risks, Eureka County treats an average of over 1,000 acres of noxious and invasive weeds per year at a cost of $60,000 to $100,000 per year. The ARMP threatens the viability of this habitat conservation program, which is funded with taxpayer monies collected mainly from ranchers and farmers. Tax revenues from ranching and farming are expected to decline as a result of the ARMP land use restrictions.

88. Additionally, since 2010, ECDNR has received three separate Clean Water Act 319(h) sub-grants through the Nevada Division of Environmental Protection that have directly benefitted GSG. These sub-grants provide 50 percent of the project costs and have reduced livestock use of riparian areas that are important GSG habitat. To date, the total grant monies awarded for these efforts exceeds $252,000. These coordinated efforts rely upon the continued use of public lands in combination with private lands. The ARMP will interfere with the effective conservation strategies implemented by Eureka County through the course of its land use planning and general exercise of police powers to protect the public health and safety.

89. Eureka County recently obtained GSG population data from the Nevada Department of Wildlife (NDOW) for areas where the County conducted its habitat conservation projects to determine their impact. The June 2015 NDOW population data shows high counts of males using leks in the Diamond Population Management Unit (PMU) and the 3 Bars PMU, which cover over half of Eureka County and have the bulk of the priority and general habitat in

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the County. The Diamond PMU had a record high count of 159 males. The 3 Bar PMU had a high count of 348 males, the third highest count since a record count in 2006 of 460. The 3 Bar #1 lek has been monitored since 1971 and had a high count of 41 males, the highest since 1987. This lek had no birds from 1995 to 1997. The NDOW data clearly document the importance and success of the County's conservation efforts and show that Eureka County's efforts have resulted in stabilizing and increasing GSG numbers *without the land use restrictions in the ARMP*.

90. The ARMP will interfere with Eureka County's ability to create incentives for landowners, ranchers with BLM or USFS grazing permits, and other agencies to participate in the County's conservation efforts. These incentives will vanish as a result of the ARMP, which will discourage these same partners from collaborating on important on-the-ground projects because of the ARMP's restrictive provisions. Rather than facilitating conservation work and partnerships at the local level with a proven track record of success, the ARMP will discourage this work and ultimately harm GSG and its habitat. A recent BLM grazing decision in the Little Smoky Valley Use Area of the Duckwater Allotment proposed to severely reduce and restrict cattle grazing because, although there are no active GSG leks currently identified in the Little Smoky Valley Use Area "or within three miles of the boundary, both preliminary priority (PPH) and preliminary general (PGH) Sage-grouse habitat occur in the use area." This type of arbitrary grazing restrictions in the ARMP will force many Eureka County ranchers out of business because the forage utilization thresholds in the ARMP are unrealistic.

91. The ARMP includes widespread travel restrictions inconsistent with the Eureka Master Plan and that interfere with the County's obligation to maintain its transportation system to achieve the county's conservation goals, for access to ranches throughout the county, as routes to adjacent counties, and to provide emergency services for ambulances and fire-fighting equipment. BLM has already imposed travel restrictions that severely restricted travel based on

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proximity of roads to GSG leks. Approximately 1,958 miles of roads in Eureka County, are located within areas where the ARMP travel restrictions apply. The ARMP prohibits cross-country travel in PHMA, and GHMA, which is another source of inconsistency between the ARMP and the Eureka Master Plan, and imposes restrictions on road use and maintenance of existing roads including prohibiting the use of certain roads during specific seasons and times of day and limiting noise. The ARMP also recommends road closures that are inconsistent with the access requirements of FLPMA and interfere with Eureka County's fire-fighting capabilities and obligation to maintain its transportation systems.

92. The ARMP's interference with private property rights is inconsistent with the Eureka Master Plan. Despite the vague statements that the ARMP will recognize and maintain valid existing rights, the ARMP land use restrictions could impair use of water rights, rights-of-way, and mineral rights in Eureka County. The ARMP requires removal of certain range improvements and water conveyances like dams, water tanks, ditches, and pipelines that may qualify as RS 2339 rights and that constitute private property rights. The ARMP provides no meaningful discussion of how the agencies intend to address valid existing rights, including those rights that have not been adjudicated in federal court but are nonetheless valid existing rights (e.g., roads that have not yet been adjudicated as RS 2477 roads) or rights under § 22 of the General Mining Law on mining claims. This leaves in limbo the status of water rights, grazing permits, water conveyances (RS 2339), mining claims, and unadjudicated RS 2477 roads and places a significant financial burden on the Counties to pay for the protracted and costly legal process of seeking adjudication. For the duration of that process, which can take years and cost millions, the roads in question remain subject to the ARMP travel restrictions which interfere with the County's policy powers and obligations to provide emergency services. Interference with the ongoing use of rights pursuant to grazing permits, water conveyances and

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mining claims will substantially harm both the owners and Eureka County's economy and potentially subject the federal government to takings claims. The ARMP does not evaluate the potential takings claims that could arise from this interference with private property rights.

93. The ARMP substantially interferes with implementation of Eureka County's Master Plan and Code, local conservation efforts that have documented success, and Eureka County's land use planning and police powers and will harm GSG habitat in Eureka County.

C. The Nevada State Plan

94. Nevada has led GSG conservation since 2000, when it established a task force to develop a plan that would conserve and protect Nevada's GSG populations and habitat. The October 2001 Nevada GSG Conservation Strategy laid the groundwork for the formation of local area working groups (LAWG) and Population Management Units (PMUs). From 2001 to 2004 the Governor's GSG Conservation Team, under leadership of the Nevada Department of Wildlife (NDOW), completed an intensive planning effort for the State in which LAWGs developed plans for their respective areas and PMUs. In June 2004, the 1st Edition of the Greater Sage-grouse Conservation Plan for Nevada and Eastern California (2004 State Plan) was completed. Between 2004 and 2014, resource management agencies implemented conservation projects and instituted policies to support the conservation goals in the 2004 State Plan.

95. In March 2012, Governor Sandoval established the Governor's Greater Sage-grouse Advisory Committee (Advisory Committee) to provide a State Plan Alternative to be evaluated in the EIS that BLM and USFS were preparing in conjunction with developing the Nevada and Northeastern Nevada GSG conservation LUPA. The Advisory Committee published the 2012 Strategic Plan for Conservation of Greater Sage-Grouse in Nevada (2012 State Plan) which presented a list of primary threats and strategies to conserve GSG and its habitat in Nevada and recommended that the Governor establish the Sagebrush Ecosystem

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Program (SEP), comprised of the Sagebrush Ecosystem Council (SEC) and the Sagebrush Ecosystem Technical Team (SETT). The SEC was established on November 19, 2012.

96. In April 2013, the SEC directed the SETT to further develop a comprehensive and detailed conservation plan. The SEC worked through a series of meetings starting in July 2013 including multiple opportunities for public comment and in October 2014 adopted the 2014 Nevada Greater Sage-grouse Conservation Plan ("Nevada Plan"). The FEIS evaluated the Nevada Plan as Alternative E but did not select it as the Proposed Plan despite its superiority in that it covers all lands in the state compared to the LUPA, and complies with FLPMA and NFMA multiple-use and sustained yield mandates. The Nevada Plan is based on the best available science, and stakeholder input, producing a GSG conservation plan that addresses the habitat threats and other factors specific to Nevada, consistent with the COT Report. The Nevada Plan provides effective and comprehensive conservation measures that include substantial financial mitigation requirements for both direct and indirect impacts to GSG habitat on both public and private lands that cannot be avoided or minimized. In contrast, the ARMP only focuses on direct impacts; it does not require mitigation of indirect impacts.

97. The Nevada Plan's foundation is the habitat conservation hierarchy of "avoid, minimize, and mitigate," which implements a multiple-use land management objective consistent with FLPMA and the FWS COT Report that strives to balance multiple land uses including protecting GSG habitat. This hierarchy requires avoidance of impacts to habitat to the maximum extent possible, minimized habitat impacts that cannot be avoided, and mitigated impacts that are unavoidable and cannot be minimized. Nevada has developed a state-of-the art Conservation Credit System requiring financial mitigation based on site-specific metrics to determine a valuation for the impacted habitat and the mitigation required to offset the impacts by investing in mitigation that will achieve a net habitat gain.

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98. The FEIS describes the Nevada Plan as a comprehensive and scientifically sound plan that carefully considers site-specific habitat conditions and land uses. The Nevada Plan is the only alternative in the FEIS that is described as being based on data and as using methods that have been scrutinized and accepted in peer-reviewed scientific sources.

> The State of Nevada SGMA map is based on a data-driven approach that uses existing GRSG telemetry locations and mapping products as multiple environmental factors to model the probability of GRSG occurrence throughout Nevada. This process resulted in resource selection functions that were used to create a habitat suitability index and predict the relative importance of all areas, even those where data are lacking. These methods have been accepted in peer-reviewed scientific literature and have been shown to be valuable for identifying areas meaningful to GRSG populations. (FEIS, Page 2-100)

99. The data and science-based foundations for the Nevada Plan/Alternative E comply with the information and data quality standards BLM must use in developing a NEPA document and a LUPA. The agencies must describe how the Proposed Plan is based on data and use methods that have been accepted by peer-reviewed scientific literature and disclose that information for public comment. The FEIS/Proposed LUPA did not adequately explain why the agencies did not select Alternative E, the Nevada Plan, as the Proposed Plan; discuss why the Proposed Plan must differ from the Nevada Plan; evaluate how the Nevada Plan is inconsistent with federal law; or demonstrate that the Proposed Plan will result in superior GSG habitat conservation compared to the Nevada Plan. Without this discussion, the agencies' selection of the Proposed Plan violates FLPMA's consistency mandate. Moreover, the Proposed Plan is based on questionable science and the agencies failed to fully disclose that.

100. Early in the LUPA process, BLM asked scientists to peer-review the NTT Report.[2] The peer-reviewers' comments reveal questionable science behind the conservation measures recommended in the NTT report, which are the foundation for the Proposed Plan. The

[2] The peer reviewers' comments are attached to the December 18, 2012 letter from Secretary of the Interior to the Honorable Doc Hastings, US House of Representatives. (*See* **Exhibit 3**).

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peer reviewers were highly critical of the science used to develop the report, finding it grossly oversimplified because it ignores the seasonal aspects of how GSG use the landscape. The peer reviewers objected to the one-size-fits-all approach to habitat conservation and the absence of state-level data in the report, and suggested that the recommended conservation measures are inconsistent with FLPMA and, therefore, unlawful:

- "…There is no discussion of the seasonal requirements of sage-grouse to provide managers with a context for their actions. There are limited references to the state-level sage-grouse plans. A good deal of effort went into these plans and they contain valuable information that should be incorporated into the planning process."

- "…I expected a science document that reviewed the literature, laid out what is known about program area impacts to sage-grouse, and where the uncertainties lie. This seems a strange blend of policy loosely backed by citations, ***with no analysis of the science***."

- "…Lack of consideration of space, and particularly (in this document) time is a critical mistake that, to me, renders this document problematic, if not dangerous. As written, there is essentially no consideration of the temporal dynamics of plant communities that provide sage-grouse habitat."

- "The document suffers from a 1-size fits all approach that lacks context. Lumping all sage grouse seasonal habitats in all locations across the range regardless of population size or relative importance of the population to either "priority sage grouse habitats" or "general sage grouse habitats" strikes me as tremendously over simplistic."

- "It … assumes that grouse are the highest and best use of the land…this HAS to be addressed before these guidelines become policy or serious problems will arise. What about FLPMA… where does it fit into the picture?"

See Exhibit 3. Accurate scientific evidence remains essential to an EIS. *Seattle Audubon Soc. v. ESPY*, 998 F.2d 699 (9th Cir. 1993). An agency cannot "ignore reputable scientific criticism" in its EIS. *See City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1151 (9th Cir. 1997). BLM has failed to address in a "meaningful way the various uncertainties surrounding the scientific evidence." *Seattle Audubon*, 998 F.2d at 704. BLM has not disclosed the scientific criticism over some of the NTT recommendations that it has adopted.

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101. Conversely, the Nevada Plan emphasizes the scientifically sound importance of properly managed livestock grazing as an effective GSG habitat conservation measure and that farming and ranching on private lands in unison with authorized livestock grazing on adjacent public lands has been a long standing practice in Nevada.

> Historically, many homesteaders began to farm and ranch much of Nevada's riparian and mesic landscapes due to the availability of surface water or springs. Once developed, many of these mesic areas were expanded by the artificial spreading of water or irrigation. These larger, irrigation induced, privately and publicly owned meadows served to support many species of wildlife in addition to livestock. This expansion of late brood rearing habitat and an increase in sagebrush acreage due to an absence of fire after consumption of fine fuels, (Burkhardt and Tisdale 1976) may be the cause of sage-grouse population expansion in the late 1800s and early 1900s (Gruel and Swanson 2012). ***Today, by allowing for the authorized use of proper and targeted livestock grazing on public lands, private landowners and wildlife habitat managers can serve to protect or even benefit each other if managed properly (by reductions in fuels, targeted grazing of specific habitats and cheatgrass, etc.).*** The State of Nevada recognizes and supports this long standing beneficial relationship and the property interests associated with grazing permits (Figure 10, Nevada Plan at 84)(emphasis added).
>
> Section 7.5, Management Action 1.1.5 of the Nevada Plan: "At a minimum, use grazing management strategies for riparian areas and wet meadows to maintain or achieve riparian Proper Functioning Condition (PFC) and promote brood rearing/summer habitat objectives, as described in Table 4.1, within sage-grouse habitat. Within sage-grouse habitat, manage wet meadows to maintain a component of available perennial forbs with diverse species richness to facilitate brood rearing and stabilizing riparian species (Burton et al. 2011) near where water flows to achieve or maintain PFC. Use Ecological Site Descriptions (ESDs) or locally relevant information about soils, hydrology, soil moisture, and site potential to set realistic objectives and evaluate assessments and monitoring data (Swanson et al. 2006). Also conserve or enhance wet meadow complexes to maintain or increase amount of edge and cover near that edge to minimize elevated mortality during the late brood rearing period (Hagen et al. 2007; Kolada et al. 2009a; Atamian et al. 2010) as observed throughout the stream/watershed and not limited to only easily accessible sites. Some defined areas of concentrated livestock use may be necessary to protect and enhance the overall riparian area. (Nevada Plan at 88).

102. Because grazing allotments on public lands cover almost the entire State of Nevada (Nevada Plan at 213), the ARMP's livestock grazing restrictions and shortcomings in addressing wildfire have an enormous detrimental impact on GSG habitat and interfere substantially with the conservation efforts of the State, Elko and Eureka Plans.

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103. The State of Nevada provided the agencies with detailed comments on the many ways the LUPA's new provisions are inconsistent with the Nevada Plan and will harm the State. First, the SEP's June 29, 2015 Protest Letter states:

> We remain troubled…[that] significant new federal agency actions were added that replaced important components of the State Plan. FLPMA and its implementing regulations require that BLM's land use plans be consistent with officially approved state and local plans. The State Plan *is* consistent with the purposes, policies, and programs of federal laws and regulations applicable to the public lands, is based on best available data and science, addresses each of the threats identified by the Conservation Objectives Team (COT) report, was developed entirely in a public and transparent process, and is supported by a wide array of stakeholders across the State of Nevada. Therefore, the State Plan should be fully implemented as the preferred alternative in the FEIS. The full implementation of the FEIS, as currently written, will adversely impact the State due to, among other things, unnecessary land use allocations, an unnecessary disturbance cap, and unrealistic expectations to achieve certain habitat objectives solely through management actions." (SEP Protest Letter at 1.)

The Protest Letter details the inconsistent provisions in the LUPA including adaptive management triggers; allowance of other unspecified mitigation measures; SFA; three percent disturbance cap; no mitigation requirement in OHMA or for indirect impacts to PHMA and GHMA as a result of indirect impacts in OHMA; and travel and transportation management.

104. Second, Governor Sandoval's July 29, 2015 consistency review letter to BLM reiterates the inconsistencies outlined in the SEP's Protest Letter and adds that the LUPA is inconsistent with local plans. The state expended "millions of dollars and thousands of hours to present a scientific, innovative and effective conservation plan." The State's comments on the DEIS "identified hundreds of inconsistencies with state and local plans, and best available science that were largely ignored in the FEIS/Proposed LUPA." Governor Sandoval expressed concerns about the SFA, which are a new concept "with significant environmental and societal implications" introduced "without adequate public notice or opportunity for comment in the LUPA/FEIS." His letter criticizes the significant methodologies changed with little scientific justification or explanation provided to the public. (Consistency Review Letter at 2).

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105. Governor Sandoval objected to a "heavy-handed, federal approach that uses status-quo approaches and relies primarily on information from federal officials in Washington D.C., rather than expertise from state conservation and wildlife agencies, and local input." The LUPA/FEIS replaces Nevada's state and local planning efforts with national level policy resulting in a "document that is insufficient and flawed; not based on the best available science, or state and local plans, and not well rooted in federal law." (*Id.* at 2, 5). The BLM summarily dismissed the inconsistencies asserting that the State's recommendations would not be consistent with "the goal of the BLM's GRSG conservation strategy" to provide for GSG conservation and regulatory certainty that in turn will preclude an FWS determination that the species is warranted for listing. (BLM Response Letter at 3). FLPMA does not authorize BLM to manage the public lands to influence the FWS' listing determination – especially at the expense of multiple-use. The FLPMA multiple use and consistency mandates *required* BLM to accept all elements of the Nevada Plan (as well as local plans) that are consistent with federal law. Throughout the LUPA process, BLM has not provided any specific examples of how the Nevada Plan is inconsistent with the multiple use principles in FLPMA.

106. On September 4, 2015, Governor Sandoval filed an appeal with BLM Director Kornze pursuant to § 1610.3-2(e) that decries "BLM['s] decision to summarily reject Nevada's recommendations" regarding significant inconsistencies between the LUPA/FEIS, and Nevada's state and local plans. Governor Sandoval asserts that the LUPA/FEIS is incompatible with the Nevada Plan and provides less protection to GRSG and, therefore, should not be implemented without adopting the Nevada Plan which provides for increased conservation for GRSG, complies with federal law and policies, and is supported by a vast majority of Nevadans. The appeal letter outlines how the LUPA will interfere with GSG conservation and harm the State and emphatically rejects the SFA as "scientifically, functionally and administratively flawed"

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noting that the two-year segregation period to evaluate the mineral withdrawals in the SFA is "ill-advised" and would immediately and irreparably harm Nevada, as the segregation would create a *de facto* withdrawal and have a chilling effect in the region to the detriment of local, state, and national interests. (Appeal Letter at 4, 5).

CLAIMS FOR RELIEF

107. On December 27, 2011, the BLM issued Instruction Memoranda No. 2012-043 and 2012-044 directing preparation of LUPAs and EIS documents that included the NTT Report conservation measures as one of the alternatives to be evaluated. The ARMP is based largely on the NTT Report's recommended restrictions and prohibitions.

108. Plaintiffs have participated in the EIS/LUPA process and objected to the land use restrictions and prohibitions in the EIS alternatives and the Proposed LUPA.

Count I
Violation of the APA and FLPMA by Ignoring Consistency Requirements

109. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 108 of this Complaint, as though fully set forth below.

110. FLPMA requires the Secretary's land use plans "shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act." 43 USC § 1712(c)(9). The FEIS identifies the Elko Plan as an alternative eliminated from detailed consideration because it purportedly was inconsistent with the agencies' GSG objectives and federal law. Yet, the agencies fail to identify any inconsistencies of the Elko Plan with federal law. The Elko Plan is more consistent with FLPMA's multiple-use mandate and the recommendations of the COT Report than the ARMP and presents conservation strategies based on the best available science superior to those presented in the ARMP.

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111. Similarly, the BLM's response to the State's consistency review did not identify inconsistencies between the Nevada Plan and federal law, but instead cited to "policies, strategies and goals" none of which are a basis under FLPMA for refusing to resolve inconsistencies between the state and local plans and the LUPA. The BLM denied several local and state recommendations simply as "not consistent with the purposes, policies and programs of federal laws and regulations applicable to public lands, in particular BLM's Sage-Grouse Strategy, its Special Status Species Policy, and its goal to provide regulatory certainty for the conservation of Greater Sage-Grouse and its habitat," that unlawfully ignores the fact that the state and local plans *are* consistent with FLPMA, which should have been the focus of BLM's response. BLM Response Letter at 3. Neither the DEIS nor FEIS disclosed that the Nevada Plan/Alternative E was inconsistent with BLM's Special Status Species Policy.

112. The ARMP grazing restrictions will interfere with the implementation of the Elko and Eureka County Plans' use of livestock grazing to improve GSG habitat and adversely affect ranchers and the counties' economies. The livestock grazing restrictions in the ARMP are counterproductive because they create substantial environmental harm to GSG and its habitat in Elko and Eureka Counties and throughout Nevada. The Elko and Eureka County Plans and Nevada Plan accomplish the same goals BLM identifies, using practice and cost effective grazing measures that have a track record of successfully conserving and restoring GSG habitat. Broadly asserting generalizations that the state and local plans do not accomplish these goals based on the FWS memoranda is contrary to the facts, arbitrary, capricious and unlawful.

113. The Elko County, Eureka County and Nevada Plans are based on science and local site-specific data which in many instances reveals facial data errors in the ARMP's habitat mapping and will produce more effective GSG habitat conservation efforts than the ARMP. The state and local plans apply to all GSG habitat categories, including the 7.6 million acres of

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OHMA that is not the primary focus of the ARMP, and require mitigation of direct and indirect impacts to all habitat management categories, which the ARMP does not. Similarly, the Elko and Eureka Plans apply to all lands (public and private) in the respective counties. Because the ARMP only applies to federal lands GSG conservation measures may differ where the land ownership pattern consists of adjacent sections of public and private lands and is likely to result in less effective and inconsistent conservation efforts.

114. Numerous entities, including each of the Plaintiffs, advised BLM of these inconsistencies through comments and protest letters to BLM which ignored these inconsistencies in violation of FLPMA and instead displaced comprehensive, collaborative science-based state and local conservation plans with the ARMP.

115. Irreparable environmental harm to GSG habitat and Plaintiffs' interests in achieving effective habitat conservation will result from BLM's interference with implementation of the Nevada, Eureka and Elko County Plans and disruption of local planning activities resulting from the ARMP's inconsistencies.

116. The agencies' failure to comply with FLPMA's consistency requirements will result in imminent substantial harm to Plaintiffs who will suffer loss of use of public lands and property rights due to the ARMP's restrictions. In addition, the ARMP's inconsistencies with State and local land use and conservation plans will interfere with the local police powers, implementation of those plans and other functions to protect the public health and safety such as obligations to maintain transportation systems and management of fire protection services. The agencies' actions are contrary to law and must be set aside under 5 U.S.C. § 706(2).

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Count II
Violation of the APA, FLPMA & NFMA: Failure to Manage Federal Lands for Multiple-Use and Sustained Yield & In A Manner that Recognizes the Nation's Need for Minerals

117. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 116 of this Complaint, as though fully set forth below.

118. The ARMP ignores FLPMA's and NFMA's multiple-use mandate and substitutes a prioritization of GSG habitat conservation to the exclusion of other uses on over 20 million acres of Nevada's public and National Forest System lands without adequate consideration of science, viable alternatives to the severe restrictions proposed, or due process in accordance with USFS procedures to propose withdrawals to BLM. Defendants have failed to undertake the appropriate review, consideration, and analysis of relevant local data, conservation efforts and other authorized uses of the public and National Forest System lands at issue.

119. Defendants' proposal to withdraw 2.8 million acres of lands in Nevada will put some of the best mineral exploration in the world off-limits to exploration and development and ignores the Nation's need for minerals. The agencies have not demonstrated such measures are necessary or that these lands all include critical GSG habitat or, in some instances, habitat at all. The agencies' action is arbitrary, capricious and in violation of law particularly given the erroneous habitat maps the agencies used to identify conservation areas.

120. Defendants' actions will put Western and Quantum out of business and put lands with some of the greatest mineral potential off limits to exploration and development without adequate impact analysis of the loss of such resource potential, the need or effectiveness for the conservation or the reasonable consideration of viable alternatives such as the local and state plans. The agencies' actions are contrary to law and must be set aside under 5 U.S.C. § 706(2).

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Count III
Violation of the APA and the General Mining Law

121. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 120 of this Complaint, as though fully set forth below.

122. In violation of Section 22 of the Mining Law, the ARMP restrictions impose severe harm on Plaintiffs by constraining exploration and development on a significant portion of the lands where many of Nevada's most important mineral deposits and gold trends are located. Elko and Eureka Counties will be harmed by the ARMP's interference with mineral exploration and development and creation of such severe burdens that some of the best mineral exploration terrain **in the world** will be off-limits to exploration and development. This will dramatically reduce future discoveries of valuable mineral deposits that can ultimately become mines, stifle job creation, and impede these Counties' (and the State's) economic recoveries. The ARMP restrictions will chill investment in Plaintiffs' and other mineral projects in Nevada.

123. The proposed withdrawal of 2.8 million acres from mineral entry in Nevada and other onerous travel and land use restrictions in the ARMP will interfere with and, in some instances, entirely deprive Plaintiffs Western and Quantum of their rights under the Mining Law and put these small companies out of business. Further, it is not in accordance with law.

124. The SFA withdrawal will cause substantial irreparable harm to Plaintiffs Western Exploration and Quantum Minerals whose mining claims on USFS-administered lands have already been threatened with imminent claims contests. The ARMP restrictions that affect USFS- and BLM-administered lands outside of the SFA interfere with rights under the General Mining Law, including rights of ingress and egress, and will substantially harm Plaintiffs including Elko and Eureka county residents and should be set aside as unlawful.

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Count IV
Violation of the APA, NEPA & FLPMA: Substantial Changes between the DEIS and the FEIS With No Opportunity for Public Notice or Comment

125. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 124 of this Complaint, as though fully set forth below.

126. The agencies rely on the FWS memorandum in adopting the SFA but did not provide the public the information in the DEIS about how the FWS determined the SFA boundaries were appropriate to identify the "best of the best" GSG habitat and justify setting aside these lands solely for GSG habitat. No science, data or commercial information was disclosed in the DEIS to explain the basis for the proposed boundaries which conflict with local data and as the agencies acknowledge were new information in the FEIS. As discussed in the SEP's Protest Letter, State experts disagree with the SFA boundaries and strenuously object to the omission of Nevada-specific data and the fact that FWS and the agencies did not consult with any Nevada experts in delineating the SFA boundaries. Consequently, the FWS conclusions that such boundaries are appropriate for land withdrawals to conserve GSG habitat conflict with local expertise, and the result of a process that is inexplicable, arbitrary, and devoid of reason.

127. As described in the FEIS, the inclusion of the SFA in the Proposed Plan is introduced as a new concept that is based on the October 2014 memorandum. Consequently, the addition of the SFA in the ARMP is not a logical outgrowth of the Preferred Alternative in the DEIS – but instead contradicts the FLMPA and NFMA multiple-use approach which the agencies identified as a primary premise for avoiding widespread withdrawals. As such it is arbitrary and capricious and violates the APA and NEPA. Title 5 of USC 553(b) requires that agencies publish proposed rules to provide interested persons an opportunity to participate through submission of written data, views, or arguments. Although the publication of notice of a proposed rule need not contain every precise proposal which may ultimately be adopted as a rule,

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the final rule must be a "logical outgrowth" of the proposed rule. In determining whether a final rule is a "logical outgrowth," the court should determine whether the interested parties "should have anticipated that such a requirement might be imposed." Plaintiffs could not have anticipated the addition of the SFA withdrawal zones because the DEIS states that the agencies were bound by their statutory multiple-use mission and selected Alternative D as their preferred alternative rather than alternatives that included large-scale land withdrawals.

128. The public must be provided 90 days for review of a DEIS. 43 C.F.R. § 1601.3(i). Given the new elements in the FEIS including the SFA map which is an integral part of the Plan and was not available to the public until the May 29th publication of the FEIS, (but had been provided to the agencies in October 2014), the agencies deprived Plaintiffs and all interested stakeholders a meaningful opportunity to review and comment upon the significant changes and the data upon which they were based. The agencies' failure to follow the planning criteria established for the EIS documents by creating a new alternative so materially different from the Preferred Alternative in the DEIS prejudiced the Plaintiffs' and the public's ability to comment upon and participate in the formulation of the LUPA as required by FLPMA, 43 U.S.C. § 1712(f), as well as violating NEPA public review requirements. The agencies' actions are unlawful and should be set aside under the APA.

129. An injunction would benefit the public far more than the ARMP's implementation because it will ensure the agencies do not extend their power beyond Congress' delegation or make decisions based on unverifiable conclusions and avoid the environmental harm implementation of the ARMP will cause. An injunction would avoid the environmental harm associated with the ARMP's interference with the Nevada and Elko and Eureka County Plans.

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Count V
Violation of the APA and NEPA: Failure to take a Hard Look at the Impacts of the Proposed Plan & Analyze Viable Alternatives

130. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 129 of this Complaint, as though fully set forth below.

131. The ARMP includes land use restrictions and prohibitions that ignore multiple-use and sustained yield and threaten key economic drivers in northern Nevada including but not limited to ranching, mining, hunting, and recreation because so much of this area is comprised of BLM-administered public land. The FEIS fails to provide a thorough cumulative socioeconomic impacts analysis of the simultaneous, layered, and overlapping restrictions and prohibitions in the ARMP that would be placed on uses of public lands and instead relies on a piecemeal analysis of separate alternatives without looking at the cumulative effects of the numerous land use prohibitions and restrictions in the ARMP.

132. The ARMP should be remanded with direction to the agencies to analyze how the ARMP restrictions will severely reduce economic activity throughout northern Nevada, and evaluate alternatives that will reduce the widespread loss of tax revenues and jobs and the substantial economic and socioeconomic harm to Plaintiffs and minimize or avoid interfering with local police powers and land use planning (such as the 1,500 miles of roads in Elko County and the 1,958 miles of roads in Eureka County impacted by the ARMP's travel restrictions).

133. The addition of the SFA withdrawal zones to the agencies' ARMP grievously harms Plaintiff Elko County where the agencies have designated a broad expanse of land along Elko County's northern border with Idaho as SFA. Elko County estimates that the ARMP removes roughly 2,000 square miles (1.6 million acres of BLM-administered lands and 395,000 acres of USFS-administered lands) from multiple uses that include ranching, agricultural

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production, mineral exploration and development, oil and natural gas exploration and development, wind energy, and other natural resource development.

134. In addition, the ARMP interferes with Elko's economy, local land use planning and other police powers. Using the USDA's agricultural census, Elko County calculates that the ARMP will cause an annual loss of approximately $31 million of agricultural productivity. Elko County has identified over 236,000 acres of agricultural land affected within or adjacent to the SFA. Additional losses are anticipated as a result of withdrawing the SFA lands from mineral exploration and development, oil and gas exploration and development, and wind energy. The EIS failed to disclose or analyze these impacts in violation of NEPA.

135. Elko County has suffered significant harm from BLM's deferral of the China Mountain Wind Energy Project because of GSG habitat. As discussed in Elko County's June 2015 Protest Letter, this project would have provided Elko County $500 million to the local economy in phase one construction, 750 construction jobs and up to 50 permanent jobs. The full project would provide $18.8 million in property taxes with $7.6 million going to the state and the remainder to Elko County. The China Mountain Wind Energy Project in Elko County is located in an area the ARMP designates as SFA and places off-limits to wind energy development. This prohibition is inconsistent with the Elko County Conservation Plans that embrace multiple-use. As the Elko County Plan notes, this type of prioritization of lands to be set aside for GSG habitat to the exclusion of all other uses raises significant concerns about the United States being self-sustainable. The significant loss of lands for use to develop wind energy projects in Elko County in addition to agricultural and mining development will exacerbate not only our Country's reliance on foreign oil and energy but could lead us to become import dependent for food.

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136. The addition of the SFA to the ARMP causes substantial and irreparable harm to Plaintiffs Western and Quantum. Withdrawing these lands from mineral entry will interfere with exploration and development of these projects and destroy the future of Western and Quantum.

137. In addition, the FEIS' range of alternatives analyzed is inconsistent with NEPA. 42 U.S.C. § 4331. The Proposed Plan and listed alternatives do not attain "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences" in violation of a core principle of NEPA.

138. The FEIS also fails to satisfy NEPA's requirement that agencies take a "hard look" at how the choices before them affect the environment, and then place their data and conclusions before the public. The FEIS is riddled with general statements about possible effects, which do not satisfy the hard look requirement absent a justification regarding why more definitive information could not be provided. *Northwest Environmental Advocates v. National Marine Fisheries Service*, 460 F.3d 1125, 1141 (9th Cir. 2006). The FEIS is full of material errors, omissions, and internal inconsistencies as detailed in Plaintiffs' protest letters and herein.

139. The FEIS maps are internally inconsistent, rendering them legally insufficient. Chapter 3, Affected Environment, in the FEIS is incomplete because it does not include a section on geology and minerals. The absence of such an analysis in the FEIS Affected Environment section violates NEPA because without this discussion, there is no baseline against which to measure the impacts that the ARMP will have on locatable minerals or to conduct a proper balancing analysis to comply with the multiple-use mandate. The land use restrictions – especially the over 16 million acres targeted for travel limitations – and the 2.8 million acres of mineral withdrawals proposed in the SFA will substantially irreparably harm Plaintiffs. Plaintiffs have been deprived of adequate notice and opportunity to comment on the adverse impact the ARMP will have on their mineral exploration and development; impacts to minerals

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and geology were neither disclosed nor analyzed. The omission of this discussion is inexcusable because there are numerous published sources of information on the geology and mineral potential of the ARMP planning area available from the USGS and the Nevada Bureau of Mines. The Protest Report ignores the grievous omission of a section dealing with geology and mineral resources saying it is unnecessary for a regional, planning-level analysis, which is incorrect.

140. The FEIS contains perfunctory, vague, and un-quantified assessments that do not constitute a "hard look." Statements like: "Any alternative that limits locatable mineral development (i.e., reduces the area available for development) subject to valid existing rights and applicable law will have some adverse impact on locatable minerals by reducing availability of these resources" (FEIS 4-306) do not satisfy standards for an adequate NEPA impact analysis.

141. BLM's hard look requirement is explained in BLM's 2008 NEPA Handbook (H 1790-1), as "a reasoned analysis containing quantitative or detailed qualitative information." Section 6.8.1.2 "Analyzing Effects" in the NEPA Handbook requires that the effects analysis provide a level of detail sufficient to support reasoned conclusions by comparing the amount and degree of impact the proposed action alternative will cause. General qualitative statements about possible effects and risk like "some adverse impact on locatable minerals" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided for public comment. This is especially true where, as here, this information was readily available to the agencies in BLM's Land and Mineral Rehost 2000 System ("LR 2000") online database, which provides reports on BLM land and mineral use authorizations for mining claims, oil, gas, geothermal leasing and other land uses. Without such an overlay to demonstrate impacts, BLM deprived the public of meaningful opportunity to comment, in violation of NEPA and FLPMA. Proposing withdrawal of millions of acres of lands putting significant resources off limits, the agencies "may not rely upon forecasting difficulties or the task's magnitude to

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excuse the absence of a reasonably thorough site-specific analysis" of the decision's consequences. *State of Cal. v. Block*, 690 F.2d 753 (9th Cir. 1982).

142. When preparing an EIS, agencies must look hard at the factors relevant to the definition of purpose and consider the views of Congress in the agency's statutory authorization to act. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. 1991) When Congress expresses its intent by statute, as it has through FLPMA, NFMA, MUSYA, and the General Mining Laws, the agencies must take it seriously. *Id.* at 198. This evaluation must go into selecting reasonable alternatives for detailed analysis. BLM and USFS analyzed alternatives that improperly make GSG habitat conservation the primary use of the relevant federal lands without adequately analyzing or disclosing the science or necessity for the scope of restricting 20 million acres including 2.8 million acres withdrawn from operation of the Mining Law. Nor have the agencies demonstrated that less restrictive alternatives would not achieve GSG conservation, in violation of FLPMA, NFMA, MUSYA and the General Mining Laws.

143. The agencies have not provided analysis to support that they cannot achieve GSG conservation in a manner compliant with FLPMA, NFMA, MUYSA, and the General Mining Laws. The August 2015 Western Association of Fish and Wildlife Agencies ("WAFWA") report entitled "Greater Sage-Grouse Populations Trend: An Analysis of Lek Count Databases 1965 – 2015," documents that GSG population numbers show large variability with recent lek counts revealing that the number of male birds counted in 2015 on leks range-wide has increased 63 percent compared to the 2013 lek count data. The encouraging improvement in recent population trends has occurred with the State and local plans in place and without the ARMP's severe restrictions. WAFWA's findings, along with the 2015 lek county data reported in Eureka County, are compelling evidence that current federal, state, local, and private conservation

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efforts are achieving significant conservation in compliance with the multiple-use mandates in FLPMA and NFMA, calling into question the need for the ARMP's land use restrictions.

144. The absence of a thorough analysis of the direct, indirect, and cumulative socioeconomic impacts of implementing the ARMP also violates NEPA. For example, Section 5.14.2 of the FEIS makes virtually no attempt to evaluate the socioeconomic impacts to local governments and states: "Because specific impacts on local government tax revenues could not be quantified, the nature of the potential cumulative effect is not possible to characterize beyond the analysis in Section 4.20, Socioeconomics and Environmental Justice." (FEIS 5-241). The CEQ regulations require the agencies deal with uncertainties by including a "summary of existing credible scientific evidence which is relevant to evaluating the reasonable foreseeable significant adverse impacts" and the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. 40 C.F.R. §§ 1502.22(b)(3)-(4); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1033 (9th Cir. 2006). This requires the use of information reasonably available to the BLM and an analysis of whether there is reasonably reliable scientific information available to support that such onerous restrictions which will cause significant economic impact are necessary and will effectively achieve conservation. The FEIS is fatally deficient on both points.

145. That it is "not possible to determine ***specific*** economic impacts" does not excuse the agencies from providing any analysis of economic impacts, which clearly is possible based on available information. As the agency charged with managing the federal mineral estate BLM maintains the LR 2000 online database and is thus in possession of the necessary data to at least provide an estimate of claims currently located that would be affected by the ARMP. BLM has also failed to consider relative scarcity of values, integrated principles of economic sciences, and long-term benefits as required under Section 202(c) of FLPMA. The FEIS fails to meet the

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agencies' obligation to "guarantee that relevant information is available to the public," *Save the Peaks Coalition v. U.S. Forest Service*, 669 F.3d 1025, 1035 (9th Cir. 2012), or to provide content to foster "informed decision-making and informed public participation." *Id.* The agencies' actions are contrary to law and must be set aside under 5 U.S.C. §706(2), the ROD should be stayed and the documents remanded to the agencies for further analysis.

Count VI
Violation of the APA and SBREFA:
Failure to Evaluate the Impact of the Proposed Plan on Small Entities

146. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 145 of this Complaint, as though fully set forth below.

147. Eureka County has a population of approximately 2,000 people, and therefore qualifies as a small entity under the RFA. Quantum and Western are small businesses with fewer than 500 employees, and therefore qualify as small entities under the RFA.

148. Eureka County, Quantum Minerals, and Western Exploration all entities that will be directly regulated by the ARMP, and the ARMP causes a distinct risk to all Plaintiffs listed.

149. The final publication of the LUPAARMP/FEIS is a "final agency action for which there is no other adequate remedy in court."

150. The LUPA/FEIS ignores the economic impacts on Plaintiffs Western and Quantum, which will effectively terminate their existing operations, resulting in significant financial harm as well as the significant economic impacts on Plaintiff Eureka County which could put it on the brink of or within the throws of economic devastation.

151. Defendants failed to consider or certify whether the ARMP would have a significant economic impact on a substantial number of small entities, in violation of the RFA.

152. The RFA provides courts jurisdiction to review any claims of noncompliance with section 601, 604, 605(b), 608(b), and 610 in accordance with the judicial review provisions of

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the APA, 5 U.S.C. §§ 701–706. *Id.* § 611(a)(1). Under the RFA, if the court grants relief, "the court shall order the agency to take corrective action including but not limited to: (A) remanding the rule to the agency, and (B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest." *Id.* § 611(a)(4); *see Northwest Mining Ass'n v. Babbitt*, 5 F.Supp.2d 9, 16 (1998) (remanding and deferring the effective date of a final rule for violation of the RFA/SBREFA). The court may also stay the effective date of any rule. *See* 5 U.S.C. § 611(a)(5).

153. Enforcement of the ARMP is not in the public interest, and the effective date of the rule should be deferred. Small mining, ranching and farming businesses are an integral source of economic stability and employment in Nevada, and the ARMP will detrimentally impact them by terminating operations. The State and local plans are proving effective at GSG conservation and the ARMP's interference with those efforts will cause environmental harm. The agencies' actions are unlawful and should be set aside under the APA.

Count VII
Violation of the Due Process Clause of the United States Constitution

154. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 153 of this Complaint, as though fully set forth below.

155. The Due Process Clause of the Fifth Amendment forbids government practices and policies that violate precepts of fundamental fairness. Here, FWS' and USFS' failure to comply with the withdrawal process requirements under FLPMA and the USFS Manual and notice and other substantive requirements under NEPA denied Plaintiffs due process and is fundamentally unfair to them, abrogates their rights and due process.

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156. Defendants have violated their statutory obligations for land use planning, multiple-use and sustained yield as described above and in violation of their constitutional obligation to execute laws enacted by Congress, violating precepts of fundamental fairness.

157. The ARMP should be declared null and void and any regulatory action proposed or completed as a result of the ARMP including the ROD and any proposed land withdrawal should be vacated and remanded to the agencies for further consideration.

Count VIII
Unlawful Delegation from BLM to FWS to Identify SFA Withdrawal Areas

158. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 157 of this Complaint, as though fully set forth below.

159. An agency cannot delegate its authority without express authorization of Congress. FWS directed the agencies to delineate stronghold areas that became the SFA in the Proposed LUPA and ARMP. BLM unlawfully sub-delegated its authority to identify the SFA when it acquiesced to FWS' directive in the October 2014 memorandum and delineated the ARMP SFA on the basis of the stronghold areas shown on the maps in the FWS memorandum.

160. Plaintiffs are seeking to enjoin BLM from adopting the SFA in its ARMP because such adoption is an unlawful delegation of decision-making authority from BLM to FWS.

161. The addition of the SFA to the ARMP is causing real, imminent and irreparable harm based on the enforcement of a withdrawal zone identified by an agency without the authority to make such an identification. In light of the FWS' September 22, 2015 determination that GSG is not warranted for listing as threatened or endangered, FWS has no jurisdiction over GSG populations further highlighting the unlawfulness of the FWS' role in identifying the SFA.

162. Western's and Quantum's due process rights were violated when they were deprived of opportunity to comment on the SFA. Adopting the SFA and withdrawing the land

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from mineral entry will make future exploration and development of these projects impossible, and put the future of the Western and Quantum at substantial risk of destruction.

163. The ARMP should be declared null and void and any regulatory action proposed or completed as a result of the ARMP, the ROD and any proposed land withdrawal should be vacated and remanded to the agencies for further consideration.

Count IX
Violation of FLPMA & Due Process: Violation of Withdrawal Procedures

164. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 163 of this Complaint, as though fully set forth below.

165. New land withdrawals must be proposed in accordance with FLPMA § 1714. BLM may propose land for withdrawal and publish the proposal in the Federal Register, or an applicant may apply to BLM to initiate a withdrawal pursuant to FLPMA. USFS did not do pre-application consulting or file an application for withdrawal with BLM for the lands in the SFA. FWS did not submit a valid withdrawal petition with BLM for SFA lands under FLPMA.

166. The BLM's failure to require FWS and USFS to follow required application procedures causes substantial irreparable harm to Western Exploration and Quantum. The applications would have included studies and analyses required by FLPMA. Withdrawing these lands from mineral entry will make exploration and development of these projects impossible, and put the future of the Western Exploration and Quantum at substantial risk of destruction.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment in their favor, and:

1. Declare the Defendants have violated FLPMA, its implementing regulations, and the APA by failing to ensure the ARMP is consistent with State and local land use and conservation plans to the extent they are consistent with federal law;

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2. Declare the Defendants have violated FLPMA and NFMA multiple-use and sustained yield mandates for land use planning and failed to manage public lands in a manner that provides for the Nation's needs for mineral resources;

3. Declare and adjudge that Defendants have violated the General Mining Laws;

4. Declare and adjudge that Defendants violated the APA and NEPA by failing to take a hard look at impacts resulting from the ARMP, to evaluate viable alternatives, and making substantial significant changes in the FEIS without meaningful opportunity for public review and comment on such changes, and stay the effectiveness of the ROD, remand the ROD to Defendants for further analysis consistent with NEPA, defer enforcement of any rules under the ARMP and enjoin any action taken to interfere with use of lands segregated or proposed for withdrawal from mineral entry;

5. Declare and adjudge that Defendants violated the RFA in promulgating the ARMP, remand the ARMP to Defendants for additional rulemaking, and defer enforcement of the rule until the RFA requirements are satisfied;

6. Declare and adjudge that Defendants unlawfully delegated their authority to FWS and violated Plaintiffs' constitutional right to due process of law; and

7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted this 23rd day of September, 2015.

DAVIS GRAHAM & STUBBS LLP

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

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