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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

WESTERN WATERSHEDS PROJECT)
Plaintiff,)
)
v.)
)
AMY LUEDERS, BLM Nevada State)
Director, BUREAU OF LAND)
MANAGEMENT, an agency of the United)
States, and U.S. DEPARTMENT OF)
INTERIOR, an agency of the United States)
Defendants,)

No. 14-cv-00134-HDM-VPC

**OPENING BRIEF IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY
JUDGEMENT**

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INTRODUCTION

This case challenges the Bureau of Land Management's plans to mow, chop, burn and poison over 146,000 acres of sagebrush habitat; and construct or reconstruct dozens of range developments (including over 400 miles of fences, pipelines, reservoirs, and wells) within "essential, irreplaceable" habitat for the imperiled Greater sage-grouse across vast swaths of public lands in Nevada. Plaintiff Western Watersheds Project now seeks summary judgment reversing and vacating BLM's Cave Valley and Lake Valley Watershed Restoration Plan Environmental Assessment (Cave Lake EA) and Finding of No Significant Impact (Cave Lake FONSI) because the decisions violate the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA).

The Bureau of Land Management (BLM) violated NEPA, first, by failing to adequately examine the cumulative impacts of its vegetation projects on Greater sage-grouse (sage-grouse) populations and habitat, together with other past, present and future decisions in the immediate area. In its four-paragraph cumulative impacts analysis, BLM listed some of its past and future actions in and around the Cave Valley and Lake Valley watersheds, but BLM eschewed any quantitative analysis of likely cumulative impacts on sage-grouse. Courts have routinely reversed as arbitrary and capricious similar cumulative impact analysis. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) (*KS Wild I*) (rejecting general statements about possible effects).

BLM violated NEPA by also refusing to prepare an Environmental Impact Statement (EIS), and instead relying on a so-called "mitigated FONSI" – i.e., a FONSI in which BLM committed to lessen the ecological impacts of its vegetation projects through mitigation and project design components. BLM erred in relying on a mitigated FONSI

here because BLM failed to provide any analysis or review of the efficacy of its mitigation measures, and BLM vegetation projects fail to adhere to many of its own promised mitigation measures and design components. The Cave Lake EA and FONSI are also arbitrary and capricious because BLM never examined the ecological impacts of its planned range developments.

FACTUAL BACKGROUND

Greater Sage-Grouse

The Greater sage-grouse (*Centrocercus urophasianus*) – first described by Meriwether Lewis near the confluence of the Marias and Missouri rivers in Montana in 1805 – is a unique species of grouse found only in sagebrush-dominated habitats of western North America. Separate Statement of Uncontested Material Facts (SOF), ¶ 1 (filed herewith). Sage-grouse typically inhabit large, interconnected expanses of sagebrush habitat, and thus are characterized as a landscape-scale species. SOF at ¶ 2. Sage-grouse use different features of the landscape to meet its seasonal habitat needs, and are known to migrate over 75 miles between seasonal habitats. *Id.* at ¶¶ 3-10.

Historically, the distribution of sage-grouse was closely tied to the distribution of the sagebrush biome, and sage-grouse once occupied parts of 13 U.S. states and three Canadian provinces. SOF at ¶ 2. The abundance and distribution of sage-grouse have declined dramatically in North America, however, and the destruction, fragmentation, and degradation of sagebrush habitats over past decades have caused substantial declines in sage-grouse populations and a range reduction of about 44% from their historic range. *Id.* at ¶¶ 11-20. These same population and range declines are seen regionally and locally, too, with estimates identifying significant declines in sage-grouse populations throughout central Nevada and Utah between 1965-2007. *Id.* at ¶ 11.

Sagebrush is one of the most imperiled ecosystems in North America, and sagebrush and sage-grouse habitat is becoming increasingly degraded and fragmented due to the impacts of multiple threats, including fire, vegetation projects, livestock grazing and grazing-related infrastructure, nonrenewable and renewable energy development, as well as incursion of invasive plants and other factors. SOF at ¶¶ 13-20. Habitat fragmentation is a “primary cause” of the decline in sage-grouse populations, because, as noted, sage-grouse require large expanses of contiguous sagebrush. *Id.* at ¶ 14.

Fire is also a “primary factor” associated with sage-grouse population declines, especially within the Great Basin. SOF at ¶¶ 14-16. Fire results in direct, long-term habitat loss, and even small increases in the amount of burned habitat surrounding a traditional mating area – or lek - have a large influence on the probability of lek abandonment. *Id.*

The explosion of non-native, invasive weeds across the sagebrush-steppe ecosystem is a “serious rangewide threat” to sage-grouse populations and habitat, too. SOF at ¶¶ 19-20. Cheatgrass and other non-native annual grasses have caused “extensive sagebrush loss” in the Great Basin and elsewhere, and approximately 80 percent of the land in the Great Basin is susceptible to displacement by cheatgrass within 30 years. *Id.* Invasions of cheatgrass are associated with ground disturbances, including fire, grazing, infrastructure and other activities. *Id.*

Fences and other rangeland developments are also a leading cause of habitat fragmentation, and pose a threat to sage-grouse because fences provide perches for raptors, and modify access and movements by humans and livestock, “thus exerting a new mosaic of disturbance and use on the landscape.” SOF at ¶ 14. The increased

fragmentation by fences and other linear features promote the spread of exotic invasive species (like cheatgrass), facilitates predator movements, and isolates wildlife populations. *Id.* Of course, fences can also increase mortality directly, too, when sage-grouse fly into fences. *Id.*

Cave Valley and Lake Valley, Nevada

Cave Valley and Lake Valley are adjacent watersheds located south-southeast of Ely, Nevada. SOF ¶¶ 46-48. The watersheds consist of nearly 600,000 acres of mostly (96%) public lands – managed by BLM’s Ely Field Office – and are characterized by north to south trending mountains, gently to steeply sloping benches and alluvial fans, and valley bottoms characterized by alluvial flats. *Id.* Elevations range from between 5,900 feet in the valley bottoms to 11,735 feet on the South Schell Peak in the southern end of the Schell Creek Range, and annual precipitation ranges from 6-12 inches in the valley bottoms up to 14-20 inches on the top of the mountains. *Id.* at ¶ 49. This area is experiencing a recurrent drought. *Id.*

The primary vegetation within these watersheds consists of sagebrush communities, established stands of singleleaf pinyon pine and Utah juniper, with small areas of aspen forests, mixed conifer forests, ponderosa and limber pine forests, and mountain mahogany woodlands. SOF at ¶ 50. These watersheds also contain over 100 riparian resources (including seeps, springs and wet meadows). *Id.* at ¶ 51.

Cave Valley and Lake Valley provide important habitat for Rocky Mountain elk, mule deer, pronghorn antelope, desert bighorn sheep, and 31 BLM sensitive species, including bald eagle, ferruginous hawk, northern goshawk, golden eagle, pygmy rabbit, a series of bats, and many others. SOF at ¶¶ 52-53. These watersheds also provide nesting and foraging habitat for migratory birds, including habitat for Brewer’s sparrow,

sage thrasher, sage sparrow, loggerhead shrike, gray flycatcher, and green-tailed towhee. *Id.*

Cave Valley and Lake Valley also provide habitat for the sage-grouse, including breeding, late-brood rearing, and winter habitat. SOF at ¶¶ 3-10 (discussing seasonal habitat requirements), 54-57. *See also* AR 333-352 (Sage Grouse Guidelines). More specifically, Cave Valley includes 94,174 acres of sage-grouse nesting habitat; 195,615 acres of late brood-rearing habitat; 84,100 acres of winter habitat; and 109,989 acres of key yearlong habitat. *Id.* at ¶ 56. Similarly, Lake Valley includes 156,819 acres of nesting habitat; 201,850 acres of late brood-rearing habitat; 2,215 acres of identified winter habitat; and 206,352 acres of key yearlong habitat. *Id.* There are 22 known leks within the watersheds. *Id.* at ¶ 54. *See also* Declaration of Kenneth Cole (Cole Decl.), Exhs. 3, 4 (map of watersheds, sage-grouse habitat and leks) (filed herewith).

BLM considers much of the Cave Valley watershed and portions of the Lake Valley watershed as “preliminary priority habitat” and “preliminary general habitat”; and the central portion of Cave Valley is sage-grouse winter habitat. *Id.* The Nevada Department of Wildlife similarly considers the sage-grouse habitat in these watersheds as “essential, irreplaceable” habitat. SOF at ¶ 55.

Fires are prevalent across these watersheds, and the lands within and around Cave Valley and Lake Valley have experienced 1,114 fires between 1980-2003, and 627 between 1994-2003. SOF at ¶ 67. Within Cave Valley and Lake Valley alone, BLM has recorded 352 fires since 1980. *Id.* at ¶ 68. In total, these fires have burned almost 20,000 acres. *Id.*

BLM has carved up these watersheds into 12 separate allotments to facilitate livestock grazing, and BLM has constructed an extensive array of infrastructure,

including over 400 miles of fences, and approximately 37 troughs, 40 wells, 10 spring developments, eight reservoirs, and dozens of miles of pipelines. SOF at ¶ 58.

In recent years, BLM has documented the degraded ecological conditions across these watersheds. For example, in 2008, BLM concluded that the public lands within Cave Valley and Lake Valley were failing to meet the minimum rangeland health requirements for soils, watersheds and wildlife habitat. SOF at ¶ 60-68. BLM concluded that a lack of grasses, forbs, and biological soil crusts, and the “very high percentage” of cheatgrass across Cave Valley were causing uplands to fall below rangeland health standards. *Id.* at ¶ 60.

BLM similarly concluded that upland seeps, springs, and wet meadows were degraded, with only 32% functioning properly, and BLM noted that “[m]ost of the springs have been nearly or completely denuded from overgrazing as they are probably being targeted by livestock and wildlife in landscapes largely devoid of upland forage.” *Id.* at ¶ 61.

This lack of native vegetation also adversely impacts wildlife habitat across the Cave Valley, of course, and BLM concluded that the standard for wildlife habitat was not met because “[m]any sagebrush habitats exhibit minimal herbaceous understory,” and due to the prevalence of cheatgrass and other weeds throughout the watershed. SOF at ¶¶ 62-63.

BLM observed similar conditions within the Lake Valley watershed, finding that the standards for soils, uplands and riparian areas, and wildlife habitat were not met. SOF at ¶¶ 64-66. BLM again pointed to the lack of diverse, native herbaceous grasses and forbs, and the prevalence of cheatgrass, among other conclusions. *Id.* Like in Cave Valley, BLM’s assessment of the condition of upland seeps, springs and wet meadows in

Lake Valley – which provide critical late brood-rearing habitat for sage-grouse – demonstrated that only 18% of these areas were functioning properly. SOF at ¶ 65.

Cave Valley and Lake Valley Vegetation and Range Projects

In November 5, 2012, BLM issued its Cave Lake EA, which outlines BLM’s plan for a landscape-scale vegetation manipulation project within Cave Valley and Lake Valley. SOF at ¶¶ 69-98. More specifically, in the EA, BLM proposed to mow, chop, burn, and poison sagebrush expanses and juniper woodlands in 21 treatment units covering 199,000 of public lands, including within sage-grouse preliminary priority habitat, “essential, irreplaceable habitat,” and winter habitat. *Id.* at ¶¶ 71, 87. *See also* Cole Decl., Exhs. 5, 6, 7 (map overlaying watersheds, sage-grouse habitat and vegetation projects). The Cave Lake EA also identified an aggressive range development plan, calling for building new spring developments, pipelines, and water developments (well and reservoir), and authorizing the maintenance and reconstruction of 400 miles of fences within Cave Valley and Lake Valley. *Id.*

In the Cave Lake EA, BLM proposed to “treat” sagebrush and woodland communities with Tebuthiuron, a non-selective herbicide absorbed by plant roots through the soil, which disrupts and blocks photosynthesis. SOF at ¶¶ 72-85. BLM also plans to ignite prescribed fires across sagebrush and woodland communities, as well as employ other means of mechanical methods (e.g., Dixie harrow, roller chopper, mowing, etc.). *Id.*

The Cave Lake EA identified a series of standard operating procedures, mitigation measures and other project-specific limitations, designed to reduce the adverse impacts of its vegetation projects. SOF at ¶¶ 78-80. For example, BLM’s mitigation measures prohibit the use of Tebuthiuron in areas with surface water,

elevated groundwater level, and in areas lacking a healthy understory of native vegetation; and further require BLM avoid stands of mountain mahogany. *Id.* at ¶ 78.

BLM adopted similar protective measures for its prescribed fire projects, including burning only where there is a healthy and diverse understory of native perennial species and a lack of non-native invasive plants, and prohibiting fire in areas receiving less than 12-inches of annual precipitation. SOF at ¶ 80. These mitigation measures were intended to inhibit the spread of cheatgrass and other non-native, invasive species. *Id.*

In its Cave Lake EA, BLM identified a Cumulative Effects Study Area that included the Cave Valley and Lake Valley watersheds, together with several surrounding watersheds. SOF at ¶ 94-95. In the Cave Lake EA, however, BLM never examined the synergistic impacts of its planned projects and other recent vegetation projects in the same area on sage-grouse populations and habitat. *Id.* at ¶¶ 99-102.

The Cave Lake EA also included no detailed information on the conditions of the public lands in and around its proposed range developments, and failed to provide any examination or analysis of the possible impacts of the construction and reconstruction of these range developments on sage grouse populations and habitat, even though some of these projects will be constructed within essential, irreplaceable habitat – including immediately adjacent to an occupied sage-grouse lek. SOF at ¶ 93.

On the very same day BLM issued its Cave Lake EA, BLM also issued its Cave Lake FONSI and Decision Record, formally approving the vegetation and range projects identified in the Cave Lake EA, and foregoing the preparation of a comprehensive Environmental Impact Statement. SOF at ¶¶ 96-97. In its Cave Lake FONSI, BLM concluded that the mitigation measures, standard operating procedures and other

project design features included in the Cave Lake EA would ensure the projects would have no significant ecological impact. *Id.*

BLM's vegetation projects fail to adhere to these mitigation measures and other protections, however. SOF at ¶¶ 88-91. For example, BLM's plans call for directly applying Tebuthiuron over dozens of uplands riparian areas, even though applying Tebuthiuron over water violates BLM's own mitigation measures. *Id.* BLM's similarly plans on applying Tebuthiuron across mountain mahogany, pinyon juniper woodlands, black sagebrush, low sagebrush, and mountain big sagebrush vegetation communities even though BLM's own data shows that these communities lack a healthy understory of native grasses, again in disregard to BLM's own mitigation measures. *Id.* at ¶ 88. BLM's plans similarly disregard the mitigation measures for prescribed fire, including by permitting planned fire in xeric areas lacking a healthy native vegetation understory. SOF at ¶¶ 90-91.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Under the Administrative Procedures Act (APA), this Court shall hold unlawful agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, the Court must determine whether the decision was based on a consideration of the relevant factors and

whether there has been a clear error of judgment. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989). While the scope of review under APA § 706(2)(A) is narrow, an agency must articulate a rational connection between the facts found and the conclusions made. *Id.*

II. BLM'S VEGETATION PROJECTS VIOLATE NEPA.

BLM's Cave Lake EA and FONSI failed to adequately examine the cumulative impacts on Greater sage-grouse of its proposed vegetation projects together with other past, present, and reasonably foreseeable actions; and BLM erred in relying on a mitigated FONSI.

A. NEPA Requirements

NEPA is our basic national charter for protection of the environment, and it requires federal agencies to "take seriously the potential environmental consequences of a proposed action" by taking a "hard look" at the direct, indirect and cumulative impacts of their proposed actions. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005). *See also* 40 C.F.R. § 1500.1(a), § 1508.7, § 1508.8.

NEPA requires agencies to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Whether there may be a significant impact on the environment requires consideration of two factors: "context" and "intensity." 40 C.F.R. § 1508.27; 42 U.S.C. § 4332(2)(C). Context means the "significance of an action must be analyzed in several contexts such as society as a whole . . . , the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). Intensity concerns the "severity of impact," which includes consideration of, *inter alia*, the unique characteristics of the geographic area and the degree to which the possible effects

on the environment are highly uncertain or involve unique or unknown risks. *Id.* at § 1508.27(b).

In its NEPA analysis, an agency must “fully address cumulative environmental effects or cumulative impacts.” *Te-Moak Tribe of Western Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 602 (9th Cir.2010). A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . [and] can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*, quoting 40 C.F.R. § 1508.7. Put another way, “[s]ometimes the total impact from a set of actions may be greater than the sum of the parts . . . the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact.” *KS Wild I*, 387 F.3d at 994.

An EA must include “a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects” might impact the environment. *Te-Moak Tribe*, 608 F.3d at 603. “A proper consideration of the cumulative impacts of a project requires some quantified or detailed information; . . . [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *KS Wild I*, 387 F.3d at 993 (quotations omitted). The analysis must be “more than perfunctory” and “provide a useful analysis.” *Id.* “[V]ague and conclusory statements,” without supporting data, are not adequate. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 972–73 (9th Cir. 2006).

Lists or tables of other projects are not sufficient, even if they include a tally of affected areas. For example, “[a] calculation of the total number of acres to be harvested

in the watershed is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the *actual environmental effects* that can be expected from logging those acres.” *KS Wild I*, 387 F.3d at 995 (emphasis added). The same is true for a tally of miles of road construction, *id.*, or in the mining context, a tally of acreage of surface disturbance. *Great Basin Mine Watch*, 456 F.3d at 973. Rather, the analysis must explain “how individual impacts might combine or synergistically interact with each other to affect the environment.” *KS Wild I*, 387 F.3d at 994. This requirement extends with equal force to both EAs and EISs. *Te-Moak Tribe*, 608 F.3d at 603.

In limited circumstances, an agency may rely on mitigation measures to obviate preparation of an EIS, but these mitigation measures must be identified and their effectiveness analyzed in the environmental assessment. *Nat’l Parks and Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733-36 (9th Cir. 2001) (“*NPCA*”). The agency must provide analytic data on the efficacy of the proposed mitigation measures. *Id.* at 734. In evaluating the sufficiency of mitigation measures, courts consider whether the measures constitute an “adequate buffer” against the negative impacts that may result from the authorized activity. *Id.* at 734. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1992) (mitigation measures must render impacts “minor”).

B. BLM’s Cumulative Impacts Analysis is Inadequate.

This Court should reverse and vacate BLM’s EA and FONSI because BLM failed to adequately consider the cumulative impacts of its vegetation projects on sage-grouse populations and habitat. There is no dispute that the same population of sage-grouse occurs across Cave and Lake valleys, as well as the neighboring watersheds to the east – including South Spring Valley and Hamlin Valley. Complaint, ¶ 77 (DN 1); Answer, ¶ 77 (DN 26). *See also* Cole Decl., Exhs. 3, 4 (map of watersheds and sage-grouse habitat).

Sage-grouse within this population migrate between these watersheds depending on the physiological and habitat needs of the sage-grouse. Complaint, ¶ 77; Answer, ¶ 77.

Based on these ecological connections across watersheds, BLM identified a Cumulative Effects Study Area that included the entire Cave Valley and Lake Valley watersheds, together with South Spring Valley, Hamblin Valley, and other surrounding watersheds. AR 7620. Despite identifying an appropriately broad cumulative effects study area, however, BLM never examined the cumulative impacts of its vegetation projects authorized under the Cave Valley EA, together with other past, present and reasonably foreseeable vegetation projects on these surrounding public lands, as NEPA requires. AR 7620-23.

For example, in 2008 BLM approved the Lincoln County Sage-Grouse Habitat Restoration Plan (Lincoln County Plan), which permitted mechanical and chemical projects – including chaining, chopping, mowing and poisoning (using Tebuthiuron) – on 9,500 acres of sage-grouse habitat in the Cave, Lake, South Spring, and Hamlin valleys. AR 10118-10122 (EA), 10158-165 (maps of projects). *See also* AR 10168-172 (FONSI and Decision Record). Importantly, the record shows that many of the areas subjected to the Lincoln County Plan are within or immediately adjacent to areas subject to treatment in Cave Lake EA. AR 6470 (map of “Treatments pre-2010” and proposed treatments). *See also* Cole Decl., Exhs. 1, 2 (maps of current and prior projects).

In 2009 – i.e., fully three years before BLM issued the Cave Lake EA – BLM completed this project, which included mowing sagebrush down to ground level and literally reducing this habitat to dust. Cole Decl., ¶¶ 21-28; *id.* at Photographs 1-5. In fact, BLM led a site visit to these same location in August 2011, AR 6717-26 (notification and information on site visit), and the visit revealed that two years after the implementing the

Lincoln County Plan, this area remained unsuitable sage-grouse habitat, lacking the native grasses, forbs, and sagebrush necessary to meet the seasonal needs of sage grouse. *Id.* See also AR 970-72 (Sage Grouse guidelines) (discussing seasonal habitat needs).

Later in 2009, BLM authorized a separate plan to poison (using pelletized Tebuthiuron) an additional 4,000 acres of pinyon-juniper woodlands and sagebrush habitat in the neighboring South Spring Valley watershed. AR 10173-10227 (South Spring Valley Sagebrush Habitat Restoration Project EA and FONSI). See also Complaint, ¶ 115; Answer, ¶ 115; Cole Decl., Exhs. 1, 2 (map of watersheds). BLM completed this project, too, before issuing the Cave Lake EA and FONSI, although the Cave Lake EA fails to provide any information on the results of this project. AR 7621 (Cave Lake EA) (noting that BLM completed “[s]everal fuels treatments . . . in the cumulative effects study area,” with no description of projects or results); AR 7511 (noting the “results of [past] treatments have been monitored and a range of potential outcomes is understood”).

Finally, at the same time BLM was preparing its Cave Lake EA and FONSI, BLM was also planning a more aggressive vegetation treatment plan on sage-grouse habitat in the neighboring South Spring Valley and Hamlin Valley watersheds. Complaint, ¶ 116-17; Answer, ¶ 116-17. See also Cole Decl., Exhs. 1, 2 (maps of proposed projects). Through that project, BLM proposed to chain, masticate, cut, mow, chop, poison or burn hundreds of thousands of additional acres of sagebrush. Complaint, ¶ 116-17; Answer, ¶ 116-17.

Thus, BLM recently completed two vegetation projects within its own designated Cumulative Effects Study Area, and has concrete plans for a third, larger project. However, BLM’s Cave Lake EA barely mentions these projects, much less examine the synergistic impacts of the projects. AR 7620-23. The Ninth Circuit has repeatedly held unlawful agency cumulative impacts analysis that simply lists a series of projects, with no

corresponding analysis. *KS Wild I*, 387 F.3d. at 993 (reversing agency decisions for failure to adequately consider cumulative impacts); *Great Basin Mine Watch*, 456 F.3d at 972–73 (same).

Surprisingly, BLM never assessed the impacts of its prior projects on sage-grouse populations in and around the project area, even though this information was readily available. *Id.* For example, BLM is aware of the presence of sage-grouse leks around areas targeted by the Lincoln County Plan. AR 10158-164. The Cave Lake EA is devoid of any discussion or analysis of sage-grouse attendance at these leks before and after BLM implemented the Lincoln County projects, or any discussion of sage-grouse population trends in this area. AR 7120-22. *See* 75 Fed. Reg. 13910-14014, 13921 (March 23, 2010) (12-Month Finding for Petitions to List the Greater Sage-Grouse as Threatened or Endangered) (noting that the annual counting of male sage-grouse on leks remains the primary approach to monitor long-term trends in population). In fact, BLM does not present any information on sage-grouse populations – including numbers, leks visits, or trends – for this area. *Id.*

The Cave Lake EA also fails to analyze and discuss the efficacy of these past projects in improving sage-grouse habitat. For example, BLM claims these projects were intended to improve sage-grouse habitat, but then BLM never discussed whether these prior projects improved native herbaceous grasses and forbs, improved sagebrush cover and density to meet the habitat needs for sage-grouse, or otherwise reduced cheatgrass and other invasive species on the sites. AR 7620-23. *See also* AR 10113 (claiming purpose of Lincoln County Plan was to restore marginal sage-grouse habitat by reducing sagebrush, increase native grasses and forbs, and reduce invasive weeds on the sites); AR 10187

(claiming South Spring Valley project was designed to restore approximately 4,000 acres of marginal sage grouse habitat).

Instead of looking at the synergistic impact of BLM's past, present, and future projects on sage-grouse populations and habitat, BLM provided a perfunctory analysis at best. AR 7620-23. Indeed, in its cumulative impacts analysis, BLM never even mentions sage-grouse, and BLM claims only that "the results of these treatments have been monitored and a range of potential outcomes is understood." AR 7511. But BLM fails to identify or discuss these "results," and certainly never examines the "results" of this analysis as it applies to sage-grouse populations and habitat.

BLM is not permitted to rely on conclusory opinions in the absence of hard data, however, because "allowing [an agency] to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which the [agency] derived [its] opinion." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998).

Moreover, BLM's cumulative impact analysis in the Cave Lake FONSI – which is supposed to include a "convincing statement of reasons" explaining why BLM's vegetation projects will cause no significant cumulative impact on the environment, *see Ctr. for Biol. Diversity v. NHTSA*, 538 F.3d 1172, 1220 (9th Cir. 2008) – is similarly lacking. AR 7765-69. In total, the Cave Lake FONSI notes:

All resources have been considered for cumulative effects and any potential impacts have been documented in the EA. No significant impacts were identified. Other fuels reduction projects, habitat improvement projects, or range improvement projects may be proposed in the future in the Cave Valley and Lake Valley Watersheds based upon monitoring and

future assessments. As standard procedure, future projects will be subject to their own cumulative impact analysis and reviewed on a site-specific case-by-case basis.

AR 7768.

The FONSI – like the EA – provides no analysis at all, and instead relies on BLM’s conclusory assertions that no significant cumulative impacts will occur. BLM cannot meet its NEPA obligations in this way, and the Ninth Circuit has routinely rejected similarly vacant cumulative impact analyses. *See Te-Moak Tribe*, 608 F.3d 592 (reversing EA for inadequate cumulative impact analysis); *KS Wild I*, 387 F.3d. at 993.

BLM also failed to consider the overlapping impacts on sage-grouse populations and habitat of BLM’s projects together with recent wildfires and other fires in and around the Cave and Lake Valley watersheds. BLM’s failure to undertake this analysis is particularly problematic here, because wildfires and prescribed fires are “primary factor[s]” associated with sage-grouse population declines, especially within the Great Basin. 75 Fed. Reg. at 13931-35 (review of fire threats); *id.* at 13934 (“[F]ire is the primary cause of recent large-scale losses of [sage-grouse] habitat within the Great Basin”). Fires results in “direct, long-term habitat loss,” and even small increases in the amount of burned habitat surrounding a lek have a large influence on the probability of lek abandonment. *Id.* at 13931.

An analysis of the overlapping impacts of BLM’s past, present and foreseeable vegetation projects together with recent trends in wildfire and expected future prescribed fires would quantify the breadth of future threats to sage-grouse populations and habitat. *Great Basin Mine Watch*, 456 F.3d at 973 (“A calculation of the total number of acres to be [impacted by other projects] in the watersheds is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the actual environmental effects that

can be expected”). For example, the Ely Fire Management Plan notes that the areas within and around the Cave and Lake Valley watersheds have experienced 1,114 fires between 1980-2003, and 627 between 1994-2003. *See* SOF ¶ 67. Within the Cave Valley and Lake Valley watersheds alone, BLM has recorded at least 352 fires since 1980, totaling nearly 20,000 acres. AR at 7587, Table 3.6. *See also* AR 1040, 1056, 1080, 1096, 1108 (maps of recent fires in FMUs in Cave and Lake Valley watersheds).

In addition to wildfires, BLM plans to ignite fires through the five Fire Management Units (FMUs) within the Cave and Lake valleys over the coming decade. In fact, under BLM’s Ely Fire Management Plan, BLM has adopted a target of burning 55,000 acres annually within these five FMUs, and up to 335,000 acres over the coming decade. *See* SOF ¶ 24.

Like BLM’s truncated analysis of its vegetation projects, BLM similarly sidestepped its obligation to consider the impacts of these fires – together with its planned projects on sage grouse populations and habitat. In fact, in its EA, BLM concludes only that the combination of past, present and reasonably foreseeable future fuels and fire management actions “are minimal and not measurable.” AR 7623. But, again, these conclusory statements do not meet BLM’s NEPA obligations, which instead require a more robust analysis. *Thomas*, 137 F.3d at 1150; *KS Wild I*, 387 F.3d. at 933.

Nor is BLM’s claim true, as BLM could have easily measured the impacts of past fires and future prescribed fires on “essential, irreplaceable” sage-grouse habitat within the surrounding landscape, and BLM could have similarly compared sage-grouse lek counts in these areas against lek counts outside of the fire areas. This information would have provided BLM – and the public – with accurate, on-the-ground data on the overlapping

impacts of wildfires and BLM's past, present and future projects on sage-grouse populations and habitat.

Instead of undertaking this required analysis, in its EA BLM relies on little more than conclusory statements. District courts have routinely rejected similarly "truncated" cumulative impacts analyses. *W. Watersheds Project v. Salazar*, 843 F.Supp.2d 1105, 1126 (D. Id. 2012). *See also W. Watersheds Project v. Bennett*, 392 F.Supp.2d 1217 (D. Id. 2005). In each of these cases, the court held that an agency must provide "some quantified or detailed information" because "[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Bennett*, 392 F.Supp.2d at 1223, *citing Ocean Advocates*, 402 F.3d at 868.

The Cave Lake EA and FONSI fail to adhere to this standard. When BLM has systematically ignored past, present and reasonably foreseeable vegetation projects and fires on immediately adjacent watersheds and surrounding areas, there is a significant potential for cumulative impacts. *See Te-Moak Tribe*, 608 F.3d at 605 (requiring plaintiff to show "only the potential for cumulative impacts"). This is especially true here where the scientific evidence demonstrates that habitat fragmentation caused by vegetation projects – including prescribed fire, chemical and mechanical removal of sagebrush - negatively impacts sage-grouse populations and habitat. AR 339-41 (Sage-grouse Guidelines); 75 Fed. Reg. 13910-14014, 13924-58 (Sage-grouse listing decision). Thus, BLM's perfunctory cumulative impact analysis violated NEPA.

C. BLM Improperly Relied on a Mitigated FONSI.

BLM erred in relying on a "mitigated FONSI" because it failed to provide any analysis or review of the effectiveness of its mitigation measures, and because BLM's

proposed actions did not even comply with many of these measures. Instead, BLM was required to prepare an Environmental Impact Statement examining the ecological impacts of its vegetation projects and rangeland developments on sage-grouse populations and habitat.

1. Requirements of a Mitigated FONSI.

The Ninth Circuit has outlined the proper use of a mitigated FONSI. In *Idaho Sporting Congress v. Thomas*, the court rejected a mitigated FONSI that only listed a series of mitigation measures, holding that a “mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by the NEPA.” 137 F.3d at 1151. *See also Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1988) (holding agency’s “perfunctory description of mitigating measures” did not provide “sufficient detail to ensure that environmental consequences have been fairly evaluated”).

The Ninth Circuit again rejected a mitigated FONSI in *NPCA*, because it provided no data or analysis explaining the efficacy of its mitigation measures, holding that “speculative and conclusory statements were insufficient to demonstrate that the mitigation measures would render the environmental impacts so minor as to not warrant an EIS.” *NPCA*, 241 F.3d at 735. *See also Klamath-Siskiyou Wildlands Center v. U.S. Forest Serv.*, 373 F.Supp.2d 1069, 1082 (*KS Wild II*) (E.D. Cal. 2004) (reversing mitigated FONSI because it “dramatically overstates the effectiveness” of its mitigation measures).

Accordingly, an agency may rely on a mitigated FONSI only when the mitigation measures are clearly identified, their efficacy is supported by analytical data and

analysis, and the implementation of the mitigation measures will render the ecological impacts of the proposed action minor.

2. BLM's Mitigation Measures Are Not Supported By Any Data or Analysis.

This Court should reverse and vacate the Cave Lake EA and FONSI because BLM fails to adequately support its mitigation measures with data and analysis. As noted above, BLM adopted a series of mitigation measures in the Cave Lake EA, including timing restrictions, project design restrictions, and other project-specific mitigation measures. AR 7512, 7522. For example, BLM adopted restrictions for its use and application of Tebuthiuron, including limiting Tebuthiuron projects to areas “with a desirable understory,” only using Tebuthiuron where “pinyon pine and juniper have established on sagebrush ecological sites,” and avoiding areas that “have surface water or an elevated groundwater level” and “stands of mountain mahogany.” AR 7522. *See also* AR 6482 (Ely Weeds EA, identifying mitigation measures and standard operating procedures relating to Tebuthiuron application). BLM claims that applying these restrictions will avoid harming soils, native vegetation communities, restrict the future explosion of cheatgrass across the treated areas, and avoid Tebuthiuron leaching into groundwater. *Id.*

Similarly, BLM adopted mitigation measures for prescribed fires, and limited planned fires to areas receiving more than 12 inches of annual precipitation with “a healthy and diverse understory or native perennial species and a lack of non-native invasive plants.” AR 7512, 7522. *See also* AR 7743, Response to Comment No. 49 (noting that fire “would be allowed in areas that could recover (e.g., areas with sufficient understory”)). Of course, these mitigation measures were designed to reduce the threats

of increased soil and water erosion due to a lack of understory immediately post-fire, and reduce the risk of cheatgrass and other non-native grasses proliferating in the burned areas. AR 7592. *See also* AR 7522 (“Given the presence of a healthy and diverse understory of native perennial species and a lack of non-native invasive plant species, it is less likely that invasive plants would establish in these areas.”); 7598 (noting that “Cheatgrass is the most likely weed species to infest treatment units”).

BLM specifically relied on the application of these mitigation measures in concluding there would be no significant impacts from the vegetation projects. Indeed, in the Cave Lake FONSI, BLM found that “the Proposed Action . . . with the project design features, will not significantly affect [sic] the quality of the human environment and that an Environmental Impact Statement is not required.” AR 7766. *See also id.* (“Design features of the proposed action ensure that no threshold of significance is approached”); *id.* at 7767 (“Herbicide treatments have also been somewhat controversial in other states, but treatments will be designed using criteria that will minimize any potential impacts”); *id.* (“Design features of the proposed action have been developed to address known risks and uncertainties”).

After listing these mitigation measures, however, the Cave Lake EA provides no analysis or discussion examining the effectiveness of these mitigation measures – and the FONSI is similarly devoid of any examination whatsoever. AR 7477-7759, 7765-69. Instead, BLM simply concludes that the mitigation measures will effectively reduce the adverse impacts to sage-grouse habitat, soils, waters and the public lands. AR 7766. As discussed above, the Ninth Circuit and other courts have made clear, repeatedly, that simply listing mitigation measures does not comport with NEPA. *Idaho Sporting Congress*, 137 F.3d at 1151; *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d

at 1380; *NPCA*, 241 F.3d at 735; *KS Wild II*, 373 F.Supp.2d at 1085 (holding that paucity of analytic data support mitigation measures renders mitigated FONSI “speculative and conclusory”).

Yet, here, BLM simply identifies its mitigation measures, and fails to include any reasoned analysis demonstrating that these measures will reduce the adverse ecological impacts below the threshold for preparing an EIS. AR 7477-7759, 7765-69. Like in *Idaho Sporting Congress*, the Cave Lake EA and FONSI simply lists a series of mitigation measures; and BLM’s NEPA analysis lacks any examination of the efficacy of these mitigation measures as required in *NPCA*. BLM’s EA and FONSI also lacks the rigor and analysis required in *Neighbors of Cuddy Mountain* and *KS Wild II*, and similar to that case, the Cave Lake EA and FONSI do not establish that the impacts of the vegetation projects and range developments will be “minor.”

This Court should follow *Idaho Sporting Congress*, *Neighbor of Cuddy Mountain*, *NPCA*, and *KS Wild II* and reject BLM’s efforts to sidestep preparing an EIS. Because BLM failed to undertake this required analysis, it erred in relying on a mitigated FONSI, and the Cave Lake EA and FONSI should be reversed and vacated.

3. BLM’s Failure to Adhere to Its Own Mitigation Provisions Requires an EIS.

BLM’s failure to adhere to its own mitigation measures relied upon to ameliorate the ecological impacts of the Cave Lake project – especially regarding the limitations and application of Tebuthiuron and prescribed fire – further demonstrates the need to prepare an EIS, and BLM’s failure to do so requires this Court to reverse and vacate the EA and FONSI.

a. Tebuthiuron Projects

As noted above, BLM adopted mitigation measures prohibiting the use of Tebuthiuron in areas with surface water or an elevated groundwater level, in stands of mountain mahogany, and in areas lacking a healthy understory of native vegetation. AR 7522. But BLM's vegetation projects violate each of these mitigation measures.

First, BLM's own data shows extensive riparian areas – including dozens of springs – in the northwest portion of Cave Valley. *See* AR 6492 (map of riparian areas and springs).¹ Yet, the Cave Lake EA calls for the application of Tebuthiuron directly over many of these riparian areas – without any buffer surrounding these springs – in direct violation of BLM's mitigation measures. *Compare* AR 7637-38 (information and map on Treatment Unit S-1), *with* AR 6492 (map of springs), *and* Cole Decl., Exhs. 8, 9 (maps overlaying Tebuthiuron projects and riparian areas in Cave Valley and Lake Valley).

BLM's failure to adopt any buffer around riparian areas – and direct application of Tebuthiuron over riparian areas – is also contrary to the EPA's pesticide label for Spike 20, the only Tebuthiuron product BLM is authorized to use here. *See* SOF at ¶ 33 (*citing* to EPA Label for Tebuthiuron); *id.* at ¶ 35 (*quoting* EPA Label) (under “**Environmental Hazards**,” “[d]o not apply directly to water, to areas where surface water is present, or to intertidal areas below the mean high water mark”); *id.* at ¶ 37 (*quoting* EPA Label) (“Do not apply Spike 20P in areas where the water table is predominantly shallow (5 feet or less), such as marshy or sub irrigated areas”). *See also*

¹ By definition, a spring is an area with flowing water originating from an underground source, with the top surface of the groundwater being the so-called water table. AR 4170 (definition of spring), 4169 (definition of groundwater) (Ely Resource Management Plan).

AR 6363-6452, Appendix G at p. 63 (Ely District Integrated Weeds Management Plan) (listing three Tebuthiuron products, only one of which is the pelletized form of Tebuthiuron BLM intends to use on these projects).

BLM's direct application of Tebuthiuron over riparian areas across Cave Valley similarly runs afoul of BLM's own Ely District Integrated Weed Management Plan and Environmental Assessment, which also adopted mitigation measures and Standard Operating Procedures. AR 6363-6452, 6442 (identifying a "Mitigation Measure" requiring that BLM "[e]stablish appropriate (herbicide specific) buffer zones to downstream water bodies, habitat, and species/populations of interest"); AR 6443 (adopting Standard Operating Procedure requiring BLM "[u]se appropriate herbicide-free buffer zones for herbicides not labeled for aquatic use based on risk assessment guidance, with minimum widths of 100 feet for aerial . . . applications).

BLM's violations of its own mitigation measures for Tebuthiuron are not limited to riparian areas, unfortunately. As noted, BLM adopted a mitigation measure requiring that Tebuthiuron projects "avoid stands of mountain mahogany." AR 7522. But a careful review of the Administrative Record reveals that in Treatment Unit S-1, BLM authorized application of Tebuthiuron directly over one of the largest stands of Curl-leaf mountain mahogany in the entire Cave Valley watershed. *Compare* AR 5776 (map of major vegetation community types) (showing stand of mountain mahogany in the northwest corner); *with* AR 7541, Map 2.7 (overview of all treatment units); *and* AR 7638, Map A.1 (map of Treatment Unit S-1). *See also* Cole Decl., Exh. 12 (map overlaying major vegetation types with Tebuthiuron projects).

BLM is similarly violating the mitigation measure requiring BLM to apply Tebuthiuron only in areas with a healthy understory of native vegetation, as BLM's own

data shows that it is planning on applying Tebuthiuron in areas with a depauperate understory and vast expanses of cheatgrass. AR 7522. For example, BLM is planning on applying Tebuthiuron across the northwestern portion of Cave Valley, which is made up almost entirely of curl-leaf mountain mahogany and pinyon-juniper woodlands. Compare AR 5776 (map of vegetation communities); and AR 7638, Map A.1 (map of Treatment Unit S-1), with Cole Decl., Exh. 12.

In its Cave Valley Watershed Evaluation Report, BLM concluded that these areas have depressed native understory vegetation and exploding cheatgrass populations. See AR 5735, Table 1.2. According to BLM own data, the composition of the understory within pinyon juniper woodlands should be 35-60% grasses and 10-20% forbs, but BLM's own data shows that composition of grasses and forbs fall far below expected levels (at 32% and 7%, respectively). *Id.* This same analysis holds true on the Curl-leaf mahogany communities, too, where both the grasses and forbs fall below expected levels. *Id.*

According to BLM, cheatgrass now accounts for over 1/3 of all grass understory found in the Curl-leaf mountain mahogany vegetation type (18.5% cheatgrass cover versus 33.5% grass cover), and nearly 40% of total cover in the pinyon-juniper vegetation type (20% cheatgrass cover and 32% native grass cover). *Id.* BLM admitted that this level of cheatgrass caused violation of the Fundamentals of Rangeland Health in both vegetation communities. AR 5734. See also AR 5736 (noting that herbaceous understory was "much lower than the standards . . . due to the prevalence of cheatgrass").

This same analysis applies equally to the black sage vegetation communities targeted by BLM's Tebuthiuron projects, including, for example, Treatment Unit S-2.

See AR 7541, Map 2.7 (map of all treatment units); AR 7641, Map A.3 (map of Treatment Unit S-2); AR 5776 (map of major vegetation communities in Cave Valley). See also Cole Decl., Exh. 12. BLM's own data shows that these vegetation communities have a depauperate understory, too, where grasses are only one-half of what is expected (23.3% composition of grasses versus an expected composition of 50%), and forbs are similarly lacking. AR 5738, Tables 1.5, 1.6.

Because BLM failed to adhere to the mitigation measures undergirding its FONSI – and, thus, failed to reduce the ecological impacts of its Tebuthiuron projects - BLM erred in relying on a mitigated FONSI. See *NPCA*, 241 F.3d at 734; *Thomas*, 137 F.3d at 1151; *KS Wild II*, 373 F.Supp.2d at 1087 (reversing reliance on mitigated FONSI).

In *NPCA*, *Thomas*, and *KS Wild II*, the Ninth Circuit held that reliance on mitigation measures was proper only when the measures effectively reduced the ecological threats below the threshold requiring preparation of an EIS. *Id.* Like in those cases, here BLM's mitigation measures here do not reduce the threats of BLM's project projects on critical environmental resources, because, as shown above, BLM is failing to adhere to its own mitigation measures. It is of no consequence that the cause of BLM's mitigation failure in this case (i.e., failure to implement mitigation measures) differs from the cause of mitigation failure in *NPCA*, *Thomas*, and *KW Wild II* (i.e., mitigation measures ineffective), because as the Council for Environmental Quality recently explained, mitigation failure can derive from either a failure to implement mitigation measures or a failure in the effectiveness of the mitigation. See 76 Fed. Reg. 3843-53, 3845 (January 21, 2011) (Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact).

Because BLM failed to adhere to its Tebuthiuron mitigation measures, it cannot now rely on these measures to ameliorate the significance of the ecological impacts flowing from its Tebuthiuron projects. In relying on these measures to support its mitigated FONSI, BLM violated NEPA.

b. Prescribed Fire Projects

BLM is similarly failing to adhere to its mitigation measures in areas subject to prescribed fire, again necessitating preparation of an EIS. As noted above, BLM identified two mitigation measures designed to reduce the ecological impact of its prescribed fires, including limiting BLM's planned fires to areas receiving over 12 inches of precipitation annually and prohibiting planned fires in areas lacking a healthy understory of native vegetation. AR 7512, 7522. According to BLM, these mitigation measures were designed to reduce the impacts of its planned burns, including increased wind and water erosion, and increased risk of post-fire colonization of invasive, non-native plants. AR 7592, 7522, 7598.

The Administrative Record reveals that BLM is failing to adhere to the first mitigation measure by permitting prescribed fires in areas that receive as little as 5-8 inches of rain annually. Indeed, BLM's own data shows that it has approved prescribed burns on eight separate areas in the Cave Valley watershed that receive less than 12 inches of annual precipitation. *See* AR 8810-11 (Ecological Site Description (ESD) for Site Number 028BY074NV) (average annual precipitation of 5-8 inches); 8814-15 (ESD for Site Number 028BY077NV) (5-8 inches); 8796-97 (ESD for Site Number 028BY065NV) (8-10 inches); 8708-09 (ESD for Site Number 028BY013NV) (8-10 inches); 8704-05 (ESD for Site Number 028BY011NV) (8-10 inches); 8678-79 (ESD for Site Number 028BY007NV) (10-12 inches); 8794-95 (ESD for Site Number

028BY059NV) (10-14 inches); and 8676-77 (ESD for Site Number 028BY006NV) (10-14 inches). *See also* Cole Decl., ¶¶ 29-30 (identifying each of these areas as subject to prescribed fire).

BLM's data also shows that it is failing to adhere to its second mitigation measure, too, especially because BLM has permitted planned fires in areas suffering from a depauperate understory and increased presence of cheatgrass. AR 7522. For example, much of Treatment Units C-1 and C-2 and a large portion of Treatment Unit W-2 consist of pinyon-juniper woodland. *Compare* AR 5776 and AR 5855 (maps of major vegetation communities in Cave Valley and Lake Valley watersheds), *with* AR 7541, Map 2.7 (map of all treatments unit). *See also* Cole Decl., Exhs. 10, 11 (map overlaying major vegetation communities and Treatment Units C-1, C-2, A-1 and W-2). As discussed above, BLM's own data shows that these pinyon-juniper woodlands are lacking healthy understories of native grasses and forbs, and, instead, contain increasing concentrations of cheatgrass. *See* AR 5735, Table 1.2.

Here again, the Cave Lake EA and FONSI failed to fully examine the ecological impacts of igniting prescribed fire in areas with depauperate understories and increasing concentrations of cheatgrass, but the scientific information in the Administrative Record suggests increasing cheatgrass monocultures and associated impacts are likely results from BLM's projects.

The record shows that cheatgrass is a "highly invasive non-native annual grass that out-competes native vegetation for resources by sprouting earlier." AR 5828 (Lake Valley watershed assessment). Cheatgrass readily displaces native vegetation and alters the fire regimes of entire plant communities, which causes loss of native vegetation and reduced food and cover availability for wildlife. *Id.* AR 5757 (Cave Valley watershed

assessment); AR 5836. Indeed, the Nevada Department of Wildlife acknowledged that “[e]xotic Grasslands and Forblands are inferior substitutes for native ecosystems, and they are widely acknowledged to create more problems for wildlife than they offer sustenance.” AR 1656 (Nevada’s Wildlife Action Plan). Increases in cheatgrass are also tied to increasing erosion. AR 5812, 5737.

It is undisputed that if cheatgrass is present before a fire, it is known to rapidly revegetate after a fire, again outcompeting native vegetation. AR 340 (Sage Grouse Guidelines), 5859 (noting that prior burns in Lake Valley have been revegetated by cheatgrass). In its 2010 sage-grouse rule, the U.S. Fish and Wildlife Service concluded that the “extensive distribution and highly invasive nature of [cheatgrass] poses substantial increased risk of fire and permanent loss of sagebrush habitat, as areas disturbed by fire are highly susceptible to further invasion and ultimately habitat conversion to an altered community state.” 75 Fed. Reg. at 13932.

Indeed, BLM has previously acknowledged the susceptibility of burned areas to conversion to cheatgrass monocultures, and Ely BLM’s own fire plan prohibits the use of fire in areas “prone to invasion by cheatgrass,” unless BLM adopts aggressive mitigation measures to replace the cheatgrass understory with native species. AR 651, 844 (Ely Fire Management Plan). BLM’s Cave Lake Project lacks these post-fire mitigation measures. AR 7542-7548 (describing projects).

Of course, BLM’s recognition of the threats of a post-burn cheatgrass invasion informed BLM’s mitigation measure in the first place. AR 651 (Ely Fire Management Plan) (noting that “[a]ggressive actions will be taken in burned areas susceptible to conversion to cheatgrass, or other invasive species”). But BLM’s own data shows that it is failing to adhere to its own project restrictions designed to protect against the further

expansion of cheatgrass, and reduce the risk of water and wind erosion on recently-burned slopes.

BLM's failure to adhere to its own mitigation measures designed to reduce the environmental impacts of its Tebuthiuron poisoning and prescribed fires undermines the basis for its Finding of No Significant Impact, and further demonstrates the need to prepare an EIS. BLM's failure to do so requires this Court to reverse and vacate the EA and FONSI. *See NPCA*, 241 F.3d at 734.

III. BLM'S RANGE PROJECTS ARE UNLAWFUL.

BLM additionally violated NEPA in approving a series of range projects, as BLM failed to take any look – never mind a “hard look” – at the ecological consequences of building the projects. *Ocean Advocates*, 402 F.3d at 864 (NEPA requires federal agencies to “take seriously the potential environmental consequences of a proposed action” by taking a “hard look” at the ecological impacts of their proposed actions”). Pursuant to NEPA's “hard look” requirement, an agency must prepare an up-front, coherent, comprehensive environmental review. *Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003).

In the Cave Lake EA, BLM describes its proposed action as constructing new spring developments, pipelines, and water developments (well and reservoir), and authorizing the maintenance and reconstruction of 400 miles of fences within Cave Valley and Lake Valley. AR 7531-38 (describing projects), 7549-7552, 7549, Map 2.8 (map of pipeline extensions).

While the Cave Lake EA provides some data on the location of the new developments, BLM included no information on the condition of the areas in and around the projects, including the presence/absence of invasive and noxious weeds;

whether these areas contains sage-grouse leks, breeding habitat or other high value wildlife habitat; or any other features of these areas. *See id.* BLM also failed to prepare any analysis on the potential environmental effects of constructing these range projects, such as the potential for invasive and/or noxious weed establishment or increase following construction. *Id.* BLM similarly ignored the impacts of these projects on sage-grouse preliminary priority habitat, even though some of the new projects are planned within important sage grouse habitat. *Id.*

Instead of preparing a “coherent comprehensive environmental review” of the impacts of its planned range developments, as NEPA requires, the Cave Lake EA substitutes conclusory assertions and *ipse dixit*. *Ctr. for Biol. Diversity*, 349 F.3d at 1166. For example, BLM admits that the “projects could disturb existing vegetation and weeds could spread into the newly disturbed areas,” but then BLM concludes, “[t]his increase in weeds is expected to be minimal.” AR 7598. BLM provides no explanation or analysis supporting this conclusion, however, and BLM never discusses whether cheatgrass infestations have been located in and around the project areas, or how its construction will effect the infestations of noxious already located throughout Cave and Lake valleys. *Id.*

This last oversight is particularly problematic because BLM’s own data shows that it has discovered 152 incidences of noxious weed infestations in Lake Valley, and 21 incidences in Cave Valley, including in areas subject to disturbance from development of the range projects. AR 5751-52, 5727-29.² Compare AR 5732, Map 2.3 (map of existing

² A “noxious weed” refers to those plant species which have been legally designated as unwanted and undesirable.” AR 5827.

fences to be rebuilt); AR 7549, Map 2.8 (map of new pipelines); *and* AR 5777, 5856 (maps of weeds located within Cave and Lake Valleys).

BLM relies on similarly unmoored conclusions regarding the direct impacts of its construction and reconstruction of these range projects on sage-grouse habitat and populations. In the Cave Lake EA, BLM claims only that “[t]here would be loss of some habitat due to well development and pipeline construction; however this will not affect special status species’ population” – like the sage-grouse. AR 7603.

Here again, BLM provides no explanation or justification for its conclusions, and the evidence in the record shows that several of BLM’s new pipelines will be within “essential, irreplaceable” sage-grouse habitat, and immediately adjacent to sage-grouse leks. *Compare* AR 7549, Map 2.8 (map of new pipelines), *and* AR 7573, Map 3.1 (map of sage-grouse leks and priority habitat).

BLM cannot meet its NEPA obligations in this manner, and courts have routinely reversed similarly vacant environmental reviews. In *Great Basin Mine Watch v. Hankins*, the Ninth Circuit reversed a BLM environmental review that similarly offered conclusions instead of analysis, holding that “vague and conclusory statements, without any supporting data, do not constitute a “hard look” at the environmental consequences of the action as required by NEPA.” 456 F.3d 955, 973 (9th Cir. 2004) (“The [Bureau] cannot simply offer conclusions. Rather, it must identify and discuss the impacts that will be caused” by the project), *quoting* *KS Wild I*, 387 F.3d at 1001.

Like in *Great Basin Mine Watch*, BLM here has refused to undertake any review of the likely impacts of its range developments on weeds and sage-grouse. Instead, BLM offers conclusions but no analysis. This Court should follow *Great Basin Mine Watch*,

and hold that BLM violated NEPA by failing to adequately examines the ecological impacts of its range developments.

CONCLUSION

For the foregoing reasons, this Court should grant Western Watersheds' motion for summary judgment, and vacate and remand BLM's Cave Lake Environmental Assessment and Finding of No Significant Impact.

Dated this 17th day of September, 2014.

Respectfully submitted,

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