Appeal No. 22-8022

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WESTERN WATERSHEDS PROJECT, et al., Plaintiffs-Appellants,
v.
U.S. BUREAU OF LAND MANAGEMENT, et al., Defendants-Appellees,
and
JONAH ENERGY, LLC and STATE OF WYOMING, Defendants-Intervenors-Appellees

On Appeal from the United States District Court for the District of Wyoming
The Honorable Scott W. Skavdahl, Civil Action No. 2:19-cv-146-SWS

ORAL ARGUMENT IS REQUESTED

OPENING BRIEF OF APPELLANTS WESTERN WATERSHEDS PROJECT, et al.

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Western Watersheds Project, Upper Green River Alliance, and Center for Biological Diversity certify that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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RELATED PRIOR OR PENDING APPEALS

Pursuant to Tenth Circuit Rule 28.2(C)(3), there are no prior or related appeals.

GLOSSARY OF TERMS

APA	Administrative Procedure Act
Area 1	Development Area 1
Area 2	Development Area 2
Area 3	Development Area 3
Conservation Groups	Appellants Western Watersheds Project, Upper Green River Alliance, and Center for Biological Diversity
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLPMA	Federal Land Policy and Management Act
Grand Teton	Grand Teton National Park
Land Use Plans	BLM Pinedale and Rock Springs Field Offices' Resource Management Plans
Jonah Infill	Jonah Infill Drilling Project
NEPA	National Environmental Policy Act
NPL	Normally Pressured Lance
PAPA	Pinedale Anticline Project Area
Park	Grand Teton National Park
Park Service	National Park Service
ROD	Record of Decision

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331 because this case challenges final agency action by federal agencies. This Court has jurisdiction under 28 U.S.C. § 1291.

The district court entered final judgment disposing of all claims on April 13, 2022. Addendum at 66–67.[1] This appeal was timely filed May 10, 2022, pursuant to Fed. R. App. P. 4.

CONSERVATION GROUPS' STANDING

Appellants Western Watersheds Project, Upper Green River Alliance, and Center for Biological Diversity ("Conservation Groups") have Article III standing because they show: (1) injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision is likely to redress the injury. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000); *see also Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 451–52 (10th Cir. 1996) (stating standard for establishing injury-in-fact from inadequate environmental review). Conservation Groups submitted standing declarations from members explaining their concrete interests in the project area at issue ("Project

[1] Citations to this brief's Addendum and Appendices are cited as "Addendum at X" and "App.-volume no.-X," respectively. All "ECF" citations are to the district court docket.

Area") and its wildlife, and how the Bureau of Land Management's (BLM) failure to comply with the Federal Land Policy and Management Act (FLPMA) and National Environmental Policy Act (NEPA) resulted in inadequate and uniformed decision-making that threatens those interests. *See* App.-I-172–200 (ECF Nos. 52-1, 52-2, 52-3, 52-4). A favorable judicial decision vacating the Record of Decision and Environmental Impact Statement will redress these harms by requiring further environmental study and potential modifications to the Project.

ISSUES PRESENTED

1. Whether the U.S. Bureau of Land Management violated the Federal Land Policy and Management Act when it failed to require the Normally Pressured Lance Project ("Project" or "NPL Project") to phase development across Greater sage-grouse ("sage-grouse") priority habitat or explain why the Project should not have to comply with this "Required Design Feature" of the governing land use plans.

2. Whether BLM violated the National Environmental Policy Act when it acted on incomplete information about the baseline conditions of and NPL Project's impacts on sage-grouse Winter Concentration Areas, deciding instead to use the Project itself to test the effects of Winter Concentration Area development; and

3. Whether BLM violated NEPA when it failed to take a "hard look" at the Project's environmental impacts on the renowned long-distance pronghorn migration between Grand Teton National Park ("Grand Teton" or "Park") and the Upper Green River Valley, also known as the "Path of the Pronghorn"; the continued existence of pronghorn in Grand Teton; and resulting harms to the Park's ecological and recreational values.

STATEMENT OF THE CASE

I. Legal Background

A. The National Environmental Policy Act

The National Environmental Policy Act is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's "twin aims" are to promote "informed agency decisionmaking and public access to information." *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009). "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Accordingly, agencies must prepare a "detailed statement" for all "major federal actions significantly affecting the quality of the human environment" or an

environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. § 1502.4[2] An EIS must describe, among other things, "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided," and any reasonable alternatives. 42 U.S.C. § 4332(2)(C)(i)–(iii) . "[A]ssessment of a given environmental impact must occur as soon as that impact is 'reasonably foreseeable.'" *Richardson*, 565 F.3d at 716 (citing 40 C.F.R. § 1502.22); *see also Kern v. BLM*, 284 F.3d 1062, 1072 (9th Cir. 2002). The information presented "must be of high quality" as "[a]ccurate scientific analysis . . . and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). "At all stages throughout the process, the public must be informed and its comments considered." *Richardson*, 565 F.3d at 704 (citing 40 C.F.R. § 1503.1(a)(4)).

Conclusory statements regarding impacts without adequate discussion do not meet the required "hard look" under NEPA. *Davis v. Mineta*, 302 F.3d 1104,

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[2] Revised NEPA regulations took effect on September 14, 2020, two years after the Project was approved in August 2018. *See* Council on Environmental Quality (CEQ), Update to the Regulations Implementing the Procedural Provisions of NEPA, 85 Fed. Reg. 43304 (July 16, 2020). These regulations were subsequently amended in April 2022. CEQ, NEPA Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (April 20, 2022). All citations in this brief are to the NEPA regulations in effect at the time BLM approved the Project as those still govern the Court's review. *See NRDC v. McCarthy*, 993 F.3d 1243, 1246 n.1 (10th Cir. 2021) (CEQ regulations, "which took effect September 14, 2020, do[] not operate retroactively.").

1122–23 (10th Cir. 2002). The agency's "hard look" analysis must utilize "public comment and the best available scientific information." *Colo. Env't Coal. v. Dombeck,* 185 F.3d 1162, 1171 (10th Cir. 1999) (citations omitted). The agency must carefully gather and consider "detailed information concerning significant environmental impacts." *See Robertson,* 490 U.S. at 349.

B. The Federal Land Policy and Management Act

BLM's organic act, the Federal Land Policy and Management Act, requires that the public lands be managed for "multiple use," including "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment." 43 U.S.C. §§ 1701(a)(7), 1702(c). FLPMA directs BLM to develop and adhere to land use plans, 43 U.S.C. §§ 1701(a)(2), 1701(a)(7), 1712(a), which "describe[], for a particular area, allowable uses, goals for future condition of the land, and specific next steps." *Pennaco Energy, Inc. v. U.S. DOI*, 377 F.3d 1147, 1151 (10th Cir. 2004) (citation omitted). Once a land use plan is adopted, "[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a). This is known as the FLPMA "conformity requirement." *See id*. Accordingly, oil and gas development on BLM lands must conform to the governing plan's requirements. *See Richardson*, 565 F.3d at 689 n.1.

II. Factual Background

A. Upper Green River Wildlife Habitat

The Upper Green River Valley in western Wyoming is one of the most biologically significant areas in North America. Large areas of undisturbed sagebrush and sagebrush grassland communities, the vast majority of which are federal public lands, make these areas prime habitat for native wildlife. *See* App.-II-481–82. More than 100,000 ungulates spend each winter here, including pronghorn, elk, mule deer, and moose, in Serengeti-like congregations. App.-II-378, App.-II-485 (photos). The region also contains the densest and largest remaining populations of the highly imperiled Greater sage-grouse, App.-II-378, along with the most intact habitat for this species. App.-III-763. Particularly relevant here are two of the Upper Green River Valley's unique features: the state's only designated sage-grouse Winter Concentration Areas, where large numbers of birds gather to survive Wyoming's cold and snowy winters, and the renowned "Path of the Pronghorn"—a 170-mile migration corridor between pronghorn summer range in Grand Teton National Park and wintering grounds in the Upper Green River Valley.

1. Sage-Grouse Habitat

The Greater sage-grouse (*Centrocercus urophasianus*) is North America's largest grouse and is uniquely adapted to and dependent on sagebrush for survival.

App.-II-513. Male sage-grouse engage in spectacular mating dances at sites known as "leks," where they return to attract mates every spring. *Id.*; App.-III-663. These birds once were abundant across the western U.S. and Canada, but loss and fragmentation of their native sagebrush-steppe habitats have caused populations to decline precipitously over the last century. App.-II-515–17.

The Upper Green River Valley provides habitat for sage-grouse year-round. *See* App.-III-685. Due to the increasing rarity of large flocks of sage-grouse, one of the most unique areas in Wyoming is the Upper Green River Valley's Alkali Creek Basin and Alkali Draw, where 1,500 to 2,000 sage-grouse congregate largely on BLM lands every winter. App.-II-519; App.-II-466. This area comprises the largest winter concentration flock in the state. *Id.*, App.-III-655; App.-II-316–17. These hardy birds miraculously survive Wyoming's harsh winters on a diet consisting solely of dirt and sagebrush. App.-III-759; App.-III-776. Researchers estimate that eight hundred birds—or roughly half of the wintering population—migrate from up to dozens of miles away each winter. App.-II-519; App.-II-321.

Scientists do not yet fully understand why so many sage-grouse migrate here, App.-II-467, but the lands provide good wintering habitat. The area's sagebrush stands are tall enough that they are above snow during winter and thus provide food and shelter to sage-grouse. *See* App.-III-776; App.-II-346; App.-II-342–43.

Recognizing the area's uniqueness, BLM and the state of Wyoming ("Wyoming") formally designated large swaths of it "Winter Concentration Areas." App.-I-123; App.-I-279. These lands are the state's only designated Winter Concentration Areas. App.-III-662–63; App.-III-760 (statewide map).

2. Threats to Sage-Grouse Habitat

Sage-grouse are highly sensitive to human development, including oil and gas activities. For example, studies show they avoid suitable winter habitat within 1.2 miles of development. App.-II-427–29. Such high degree of avoidance causes substantial losses of high-quality habitat surrounding drilling pads and wells and deprives sage-grouse of adequate forage and cover. App.-II-428; *see also* App.-II-431–32 (study finding sage-grouse avoided well sites and human activity); App.-II-338–39. In addition, increasing well-pad density reduces sage-grouse winter habitat use, regardless of whether pipelines are used to reduce truck traffic and other human activity. App.-II-345.

Indirect habitat loss induced by oil and gas development could have population-level consequences for sage-grouse. Displacement from suitable habitat forces animals to use lower quality habitat or "relocate to unaffected habitats where the population density and competition increase." App.-II-406. Displacement and increased competition in turn result in "lower survival, lower reproductive success, lower recruitment [from juveniles to adults], and lower

carrying capacity leading ultimately to population-level impacts." *Id.*; *see also* App.-II-404 ("Behavioral avoidance of energy development reduces the distribution of sage-grouse and may result in population declines if density-dependence or habitat suitability lowers survival or reproduction in displaced birds.").

Winter conditions restrict sage-grouse to a fraction of the sagebrush steppe that they inhabit the rest of the year. App.-II-342. Thus, winter habitat loss could have the greatest potential to reduce the land's capacity to support sage-grouse populations. *See* App.-II-344; App.-II-429 (study noting that loss of sage-grouse crucial winter habitats "could be detrimental to population persistence").

3. Current Sage-Grouse Management

Due to dramatic declines in sage-grouse populations over the last century, in 2010, the U.S. Fish and Wildlife Service found that Endangered Species Act (ESA) listing for the sage-grouse was "warranted, but precluded" by higher priority species. *See* 75 Fed. Reg. 13,910 (March 23, 2010). The Service identified the primary threats to the species as habitat loss and fragmentation, coupled with a lack of adequate regulatory mechanisms to protect habitat across the bird's range. *Id.* at 13,962, 14,004. In response to the Service's "warranted, but precluded" finding and to avoid an ESA listing, Wyoming established a "Greater sage-grouse Core Area Protection Strategy" to conserve sage-grouse and avoid its listing under

the ESA. App.-III-777–78. Under the strategy, it designated "core areas" (also known as "core habitat"), which are "identified as the most important for [sage-grouse] and include breeding, late brood-rearing, [and] winter concentration areas." App.-III-745. Core areas enjoy heightened protections under Wyoming's management regime. *See generally* App.-III-777 (State of Wyoming, Executive Order 2015-4).

In addition, BLM undertook a multi-state planning effort to review and amend their land management plans to increase sage-grouse protections. In September 2015, BLM finalized amendments to its land use plans across the bird's range, including amendments for its Pinedale and Rock Springs field offices' plans in Wyoming (together, "Land Use Plans"). *See generally* App.-III-766 *et seq*.

Among other things, the 2015 amendments to BLM's Land Use Plans created new designations of "priority" and "general" habitat management areas for sage-grouse and corresponding protections. App.-III-767. Priority habitat has "the highest conservation value to maintaining or increasing Sage-grouse populations" and encompasses state-designated core areas. App.-III-746.

Further, the Land Use Plans adopted a number of development restrictions in general and priority habitat, including the following "Required Design Feature" for oil and gas projects in priority habitat: "Apply a phased development approach with concurrent reclamation." App.-II-383. This measure ensures that development

in priority habitat does not all occur at the same time. Each area that is developed is reclaimed before the next development phase begins to maintain swaths of functional habitat. App.-III-631.

The Land Use Plans, however, do not address protection of Wyoming's only designated Winter Concentration Areas except to prohibit "[s]urface disturbing and/or disruptive activities" during winter. App.-II-380. Instead, BLM left it to later site-specific planning to address protections for this area. App.-II-353 (BLM staff: "Sage-Grouse [Land Use Plan] Amendments deferred management of the [Winter Concentration Areas] in the NPL Project Area to the NPL EIS."); App.-II-380 (Land Use Plans: "Appropriate seasonal timing restrictions and habitat protection measures would be considered and evaluated in consultation with the [Wyoming Game and Fish Department] in all identified winter concentration areas.").

4. Path of the Pronghorn and Pronghorn Wintering Grounds

The pronghorn (*Antilocapra americana*) is North America's sole surviving endemic ungulate. App.-II-435. These highly curious and charismatic animals have large dark eyes and branched horns, and are icons of the interior West.

One of the most remarkable phenomena about the species is the "Path of the Pronghorn"—a 6,000-year-old migration corridor extending over 170 miles from Grand Teton National Park, through Bridger-Teton National Forest and the Upper

Green River Valley. *See* App.-II-436 (mapped route); App.-II-397; *see also* App.-II-483. The Path of the Pronghorn migration is one of the two longest known in the Western Hemisphere for a land mammal species outside the Arctic, and one of North America's last remaining long-distance migrations over land. App.-II-378; App.-II-465; App.-II-437. This migration extends as far south as along the Green River near Seedskadee National Wildlife Refuge and the Little Colorado Desert in BLM's Rock Springs Field Office. App.-III-764; App.-III-765.

The Grand Teton herd's roughly 300 pronghorn make up a fraction of Wyoming's larger Sublette Herd Unit 401 ("Sublette herd")—whose range also spans the Upper Green River Valley, including the Project Area. App.-II-437; App.-III-656–57. They are the elite endurance runners of the larger herd, and, indeed, of the entire species. In the fall, over the course of about three days, pronghorn migrate up to 170 miles from Grand Teton to the Upper Green River Valley, at an average pace of about 50 miles per day. App.-II-437. They traverse steep mountain passes, narrow stream valleys, and even a highway overpass at Trapper's Point on U.S. 191. App.-II-436–37; App.-II-443–44; App.-II-393–94. In total, the pronghorn gain an elevation of 1,000 feet to reach the less snowy winter habitat in the Upper Green River Valley. App.-II-437. In spring, they return to their summering grounds in Grand Teton traveling the same route. *Id*.

Studies show that the Path of the Pronghorn is the only remaining route for

pronghorn summering in Grand Teton to reach the Upper Green River Valley—six of eight routes between the broader Greater Yellowstone ecosystem and the Upper Green River Valley have been eliminated. App.-II-437. Further, the route is "invariant," meaning that no alternate migratory routes are available. *Id.* Accordingly, scientists predict that any complete obstruction of the route would likely extirpate the park's entire population of pronghorn, *id.*, because pronghorn could no longer access seasonal ranges to avoid resource shortages. *See* App.-II-487. Even if these routes were later made accessible, they would still be lost, because "migration memory" passed between parents and young would be lost. *See id.*; App.-III-674; App.-II-407.

That this long-distance migration has survived for thousands of years is remarkable, in light of significant geographic "bottlenecks" and human-caused threats, such as fences, highways, housing subdivisions, and proliferating oil and gas development in winter habitats. App.-II-443. The route constricts in several locations, App.-II-393; App.-II-396, and across its entire length, it averages only 2 km (1.2 miles) wide, App.-II-435. In the Upper Green River Valley, the migration route to wintering grounds further south has been reduced to a narrow band due to two large neighboring gas fields—the Pinedale Anticline Project Area and the Jonah Infill Drilling Project ("PAPA" and "Jonah Infill" projects, respectively), *see* App.-I-268; App.-II-397—two of the largest natural gas development fields in the

contiguous U.S. App.-II-394.[3] Migrating pronghorn now avoid these two gas fields but still traverse the undeveloped lands located south of the Jonah Infill Project, which lie within the NPL Project Area. App.-II-397.

Recognizing the scientific and ecological significance of the Grand Teton herd's migration, in 2008 the U.S. Forest Service protected the Path of the Pronghorn from development from the southern edge of Grand Teton National Park through Bridger-Teton National Forest, making it the first federally protected migration corridor. App.-II-389; App.-II-456. The federal protection, however, does not extend past the national forest or to BLM lands in the Upper Green River Valley.

Millions of dollars in private and public investments have been made in studying and protecting the internationally recognized Path of the Pronghorn, and the migratory route has been widely commemorated in national publications. *See* App.-I-264; App.-I-254.

5. Threats to Pronghorn Migration and Winter Habitat

Pronghorn are highly sensitive to oil and gas development. Roads, wells, pipelines, compressor stations and other infrastructure fragment habitat, effectively impeding or blocking pronghorn movement. App.-III-765. Pronghorn avoid these

[3] The PAPA and Jonah Infill projects cover 309 square miles and 47 square miles, respectively, or over 350 square miles. App.-II-394; App.-III-751 (map).

disturbances by up to 0.6 miles. App.-II-408. Studies in the Upper Green River Basin show that they avoid habitat patches smaller than 1,000 acres and abandon patches smaller than 600 acres (about one square mile). App.-II-409–10; App.-II-479. When encountering natural gas fields along their traditional migration routes, pronghorn tend to avoid gas fields entirely or move through them more rapidly with fewer stopovers, losing out on high-quality foraging opportunities. App.-II-397–98; App.-II-525. Accordingly, gas development could reduce pronghorn fitness and survival by preventing access to high-quality forage along migratory routes or by impeding access to traditional wintering grounds with less snow cover and more abundant forage. *Id.*; App.-II-511.

Such indirect habitat loss could result in population declines: the pronghorn's winter diet consists largely of sagebrush, and sagebrush availability in winter limits wintering pronghorn population numbers. *See* App.-III-764; *see also* App.-II-405 ("availability and quality of crucial winter ranges at lower elevations generally limit productivity, recruitment and abundance of migratory big game populations in mountainous environments"); App.-II-511 (study finding oil and gas development causes pronghorn population declines).

The Sublette herd has steadily declined over the last two decades. Between 2006 and 2014, the Sublette herd, declined from 60,100 to 31,300. *Compare* App.-III-764 *with* App.-III-656–57. The 2014 population figures are 34.8 percent below

Wyoming's management objective of 48,000 individuals. *Id*.

B. The NPL Project

In August 2018, BLM approved Jonah Energy's proposed Normally Pressured Lance Project, App.-III-545, a 3,500 gas-well project spanning over 220 square miles in the Upper Green River Valley, 35 miles south of Pinedale. App.-III-618. Some 96.3 percent of the Project Area is federal land straddling BLM's Pinedale and Rock Springs field offices. *Id*. BLM authorized the development of up to 11 regional gas gathering facilities or compressor stations, 205 miles of gas pipelines and roads along 100-foot-wide corridors, 38.6 miles of power lines, and 15 miles of condensate and wastewater pipelines. App.-III-564. Total disturbance from this development could exceed 5,800 acres, *id*., entailing significant direct and indirect habitat loss.

The entire Project Area is occupied habitat for sage-grouse, which use the Project Area year-round. App.-III-662; App.-III-756 (BLM map). Its entire southeastern corner—over one-third of the Project Area, or 75 square miles—is priority habitat, including mating and brood-rearing grounds. *Id*.; App.-III-662. The Project Area encompasses 42 square miles of Winter Concentration Areas, App.-III-685, including those areas around Alkali Creek and Alkali Draw. App.-III-662. Ten occupied leks—where males gather every spring to attract mates—occur throughout the Project Area, including its Winter Concentration Areas. App.-

III-663.

The Project Area encompasses several pronghorn migratory routes and "areas of active migration." *See* App.-III-711; App.-III-657; App.-III-755 (BLM map). North of the Project Area, the Path of the Pronghorn branches into several routes, some of which traverse the Project Area. *See* App.-II-464; App.-II-478; App.-II-477. These migratory routes provide pronghorn access to over 32 square miles of crucial winter/yearlong habitat, essential for the long-term viability of the Sublette herd, in the north-central portion of the Project Area and along its southwestern edge. App.-III-656; App.-III-755; App.-II-464 (BLM and Wildlife Conservation Society maps, respectively).[4] They also allow pronghorn to reach winter habitat further south of the Project Area. *Id.*; App.-I-261.

BLM's environmental review and approval of the Project followed a several-year-long process, detailed below.

1. Scoping and EIS Preparation

In April 2011, BLM initiated a 30-day "scoping" period, soliciting public comments on the NPL Project and issues the agency should address and analyze in the EIS. App.-III-619–20. Both the public and National Park Service ("Park Service") raised concerns about the Project's impacts on the Path of the Pronghorn

[4] These maps differ because BLM did not map all migratory routes that researchers have documented.

and viability of the Grand Teton herd. The Park Service specifically highlighted that the Project Area provided both wintering and migration habitat for the Grand Teton herd:

> Radio collared pronghorn from the park have moved through the NPL project area en route to wintering grounds near Fontanelle Reservoir and areas further south towards Rock Springs. Several radio collared animals have also spent time in the project area during the winter months.

App.-I-261.

Accordingly, the Park Service observed that "[c]onservation of the[se] [wintering] habitats . . . and their movement corridors are essential to the persistence of the park's pronghorn population." App.-I-261. It further noted the threat posed by oil and gas development within the Project Area: "Although pronghorn are currently successful in returning to the park each year, there may be a threshold of oil and gas development and activity at which they no longer do so because of impaired habitat connectivity or population level demographic impacts related to habitat loss, fragmentation, and/or disturbance." *Id*. Accordingly, "[i]n the interest of ensuring the persistence of the pronghorn . . . that summer in [Grand Teton]," the Park Service urged that the EIS "identify[] thresholds at which impacts to ungulate populations are significant," including "threshold levels for well pad densities and roads." App.-I-262.

The public raised similar concerns that, if left unprotected, both the Grand

Teton herd and Path of the Pronghorn could be irretrievably lost. App.-II-423–25; App.-II-526–27; App.-I-264–68. For example, in one study raised by public commenters, Joel Berger, a leading pronghorn expert, cautioned: "If [the migration is] obstructed, whether by petroleum development, housing or other factors, an entire population from a national park will be eliminated. . . ." App.-II-437. Berger also noted that "petroleum development in winter habitats," both within and outside migratory routes, posed a threat to long-distance migration. App.-II-443. Specifically, the potential for planned gas fields in southwestern Wyoming "to seriously alter winter habitats and *subsequently sever migration* is genuine" (emphasis added). *Id.*; *see also* App.-II-389–90 (loss of winter range threatens Grand Teton herd).

Public comments also expressed concern about the Project's impacts on sage-grouse. App.-I-257; App.-I-259. During BLM's review of the Project, it conducted sage-grouse winter habitat surveys and identified the locations of wintering grounds in the Project Area. App.-I-271. The surveys formed the basis of Wyoming's designation of the Project Area Winter Concentration Areas in 2014. *See supra* at 28–29. However, BLM later acknowledged that these aerial surveys, which had been completed during a narrow time frame in late January and February, did not account for sage-grouse movements and habitat use throughout the entire winter season and thus provided an incomplete picture of wintering areas

used by sage-grouse. App.-II-468; *see also* App.-II-348 (criticizing reliance on "once-per-year flights"); App.-I-271 (BLM identifying need for aerial surveys "throughout the winter"); App.-II-354 (BLM biologist warning that "just because sage-grouse have not been inventoried during the narrow periods where inventories occurred doesn't mean that sage-grouse aren't using the areas for wintering").

In March 2015, BLM and the Wyoming Game and Fish Department recommended that the State protect the identified Winter Concentration Areas as core areas, App.-II-518–21; App.-II-313, which would have limited surface disturbance of a single development site to 32 acres per 640 acres or one square mile (5% disturbance), App.-III-789. The agencies highlighted that these areas' "biological importance to core area birds" from outside the Project Area and the birds' fidelity to them justified their protection. App.-II-519; App.-II-316–17. Against BLM and its own wildlife agency's recommendation, however, Wyoming declined to protect the Winter Concentration Areas as core areas, finding that any necessary protections should be determined in BLM's then-ongoing NEPA review for the NPL Project. *See* App.-II-318–19; App.-II-523.

Accordingly, BLM endeavored to consider appropriate protections for Winter Concentration Areas in the NPL Project NEPA process. In 2015, BLM drafted a proposal to study and gather additional data on sage-grouse use of the NPL Project Area's winter habitat. App.-II-466–74. Specifically, the study was

designed to:

(1) Fully identify winter concentration sites because "key areas [of winter habitat use] during November, December, and March" were still "unknown," App.-II-468;

(2) Determine the extent to which core-area birds from outside the Project Area used the NPL's winter habitat, and their "travel corridors" and other "unique and important habitats" that should be conserved, App.-II-467; and

(3) Study whether and where sage-grouse consume soil in the NPL's wintering areas. App.-II-467. Such "geophagy" sites could be important for winter nutrition, and thus require protection from development, but had not previously been considered in delineating Winter Concentration Areas. *Id.*; App.-I-277.

The proposal noted that the "unique habitat" that BLM proposed to study "ma[de] the site an anomaly requiring detailed, on-site research." App.-II-467. However, nothing in the record indicates that BLM ever performed the study.

Given the importance and uniqueness of the NPL's wintering sites, the Wyoming Governor's Office convened a meeting in April 2016 with BLM, Jonah Energy, and other parties to discuss how these areas should be protected. App.-II-360. At the meeting, the State and BLM agreed that no development should be allowed in Winter Concentration Areas until the agencies better understood the

impacts of gas field development on sage-grouse using these areas and appropriate mitigation measures. App.-II-362–63.

2. The Draft EIS

In July 2017, BLM released the draft EIS for public review and comment. App.-II-367–68; App.-II-376. The draft EIS considered the "no action" alternative and three action alternatives, all with the same number of wells but different drilling restrictions—the "Proposed Action" or Jonah's original proposal, which would have required the least restrictions on development; "Alternative A," which would have required phased development in three geographically defined phases to protect sensitive wildlife resources; and "Alternative B," BLM's preferred alternative, which divided the Project Area into three "Development Areas" ("Area 1," "Area 2," and "Area 3") with varying densities of development based on each locale's resources. App.-II-370–71; App.-III-752 (map of Alternative B Development Areas). Area 1 contains most but not all of the Project's Winter Concentration Areas in the Project Area's western side. App.-III-757. Pronghorn migratory routes or "areas of active migration" traverse all three Development Areas, with the majority of routes and wintering grounds in Area 2. App.-III-755; App.-III-653. Area 3 contains all of the Project Area's sage-grouse priority habitat. App.-III-757. BLM, however, failed to include a phased development approach as part of the preferred alternative despite the Land Use Plan requirement to "[a]pply

a phased development approach with concurrent reclamation" for oil and gas projects in priority habitat. App.-II-383.

The draft EIS acknowledged the Project's potential to harm the Sublette herd from disruption of migration under Jonah's "Proposed Action" Alternative, but without addressing how the Project would affect pronghorns' ability to continue returning to Grand Teton. App.-II-372–73. Further, for Alternative B it found that similar impacts would result to an unspecified lesser degree in a portion of the Project Area. App.-II-375.

In addition, for all three alternatives, in accord with the consensus at the Governor's meeting, the draft EIS proposed to "defer authorizing development in [sage-grouse] Winter Concentration Areas until additional research is completed to better inform the appropriate level of development, potential impacts, and appropriate mitigation in these areas." App.-II-369. It noted ongoing efforts by the Wyoming Game and Fish Department and BLM to "identify[] additional research and studies that should be conducted to better understand the use and role of Winter Concentration Areas." App.-II-374.

Public comments on the draft EIS urged BLM to include phased drilling in the preferred alternative. App.-II-420; App.-I-258–59. Public comments also criticized the draft EIS's failure to analyze impacts on the Grand Teton pronghorn herd's migration. *See, e.g.,* App.-II-423; App.-II-412; App.-II-462; App.-II-419.

3. The Final EIS and Project Approval

In June 2018, BLM published the final EIS. App.-III-617. Without explanation, the final EIS reversed BLM's proposed commitment to deferring development in Winter Concentration Areas, App.-III-748, even though it also acknowledged that "[t]here is limited research on Sage-Grouse use of the Winter Concentration Areas . . . and the potential impacts that could occur to Sage-Grouse. . . . As a result, the potential impacts . . . [are] not well understood." App.-III-688. The final EIS proposed a modified preferred alternative that authorized development in Winter Concentration Areas and used the *Project* to test the effects of development on sage-grouse in a "concurrent[]" study. App.-III-641–42. Based on the observed impacts of Winter Concentration Area development, BLM would consider, but not necessarily require, additional mitigation measures on any "subsequent development" in Winter Concentration Areas. *Id.*

Specifically, the final EIS described two alternative "Winter Concentration Area Development Scenarios." App.-III-642. Under the less restrictive Scenario 1, BLM would place no limit on the rate, scale, or density of Winter Concentration Area development, aside from generally applicable disturbance caps for Area 1 and Area 2 (an average of 1 and 4 "disturbance sites" per 640 acres, respectively). *See id*. The only special protection for Winter Concentration Areas would be a prohibition on surface disturbing and/or disrupting activities from December 1 –

March 14, as already required by the Land Use Plans. *Id*. BLM acknowledged that this timing limitation would not prevent loss and avoidance of Winter Concentration Area habitat from facilities constructed during non-winter months or prevent disruptions to wintering grouse from production activities. App.-III-687–88. Under Scenario 2, BLM would apply additional measures, including a five-percent disturbance cap, centralized placement of surface infrastructure, burial of pipelines, and phasing of development proceeding from east to west. App.-III-642.

The final EIS made no changes to BLM's analysis of the Project's impacts on the Grand Teton herd or its migration. *See, e.g.*, App.-II-497–506.

On August 27, 2018, BLM issued the Record of Decision (ROD), which approved the final EIS and the modified preferred alternative identified therein (Alternative B). App.-III-554–56. The selected alternative did not incorporate phased drilling. *See* App.-III-548. The ROD authorized Winter Concentration Area development to proceed indefinitely according to the minimally protective Scenario 1, but BLM retained discretion to adopt measures listed under Scenario 2 after seeing the results of the concurrent study. App.-III-555.

On February 19, 2021, Conservation Groups filed a Petition for Review of Agency Action in the District of Wyoming, challenging BLM's ROD based on

violations of FLPMA and NEPA. *See* App.-I-011 (ECF No. 15).[5] The district court's Order Upholding Agency Action was issued on April 5, 2022, and judgement was issued on April 13, 2022. Addendum at 19, 66 (ECF Nos. 63, 64). The Conservation Groups timely filed this appeal on May 10, 2022.

SUMMARY OF THE ARGUMENT

BLM authorized the 3,500-well NPL gas field in some of the most significant habitat for local and regional Greater sage-grouse and pronghorn in Wyoming's Upper Green River Basin, but disregarded important legal requirements and environmental considerations, in violation of the Administrative Procedure Act (APA), FLPMA, and NEPA.

First, BLM authorized development of wells, pipelines, gas compressor stations, and powerlines in sage-grouse "priority habitat" spanning 75 square miles, without requiring "a phased development approach with concurrent reclamation" in these critical mating and brood-rearing grounds, as required by the governing Land Use Plans, violating FLPMA. BLM also failed to apply or justify an exemption, apparently on the erroneous grounds that this Required Design Feature was discretionary. In any case, an exemption is unsupportable on the

[5] The case was originally filed in the District of Idaho, but the District of Idaho severed and transferred the NPL Project claims to the District of Wyoming. App.-I-015 (ECF No. 1).

record: BLM considered a phased approach alternative in the EIS, and consistently maintained that it was both feasible and more environmentally beneficial than alternatives without phasing.

Second, BLM authorized gas well development across 28 square miles of prime sage-grouse "Winter Concentration Areas" and potentially other important winter habitat, without first considering the harm to local and regional sage-grouse populations, including core-area populations important to the maintenance of Wyoming sage-grouse populations. Instead of gathering the necessary baseline winter habitat use information to determine the Project's reasonably foreseeable effects on sage-grouse populations *before* approving the Project, BLM got the process exactly backwards: it authorized development in Winter Concentration Areas to inform itself of the Project's effects. NEPA's regulation governing "incomplete or unavailable information" required BLM to gather the missing baseline information, or explain why it could not do so. 40 C.F.R. § 1502.22. BLM did neither. Further, even if this information was not obtainable, it was required to use "theoretical approaches or research methods generally accepted in the scientific community," *id*. § 1502.22(b)(4), to forecast the Project's effects on wintering sage-grouse and disclose them in the EIS. BLM's failure to follow these procedures and instead use the Project to test the Project's effects undermined NEPA's mandate that agencies look before they leap.

Third, the EIS failed to consider and analyze the Project's impacts on Grand Teton National Park's pronghorns' ability to continue their annual extraordinary long-distance migration between the Park and the Upper Green River Valley, disregarding the Park Service's, public's, and scientific interests in protecting the Path of the Pronghorn. The EIS's broad-brushed discussion of the Project's impacts on the larger Sublette herd's important wintering areas and migration routes in the Project Area did not address the unique ecological and national-park interests at stake, nor meaningfully inform the public which of the proposed alternatives would cause or avoid the loss of the Grand Teton herd and its migration. Because the EIS failed to consider whether the Project would result in the species' decline or loss in the Park, it also failed to consider the potential indirect harms to Grand Teton National Park's ecology, wildlife, and recreation.

STANDARD OF REVIEW

Because FLPMA and NEPA do not provide for private causes of action, courts review BLM's compliance with these statutes under the APA. 5 U.S.C. § 706; *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006), *cert. denied,* 550 U.S. 904 (2007). This Court's "review of the lower court's decision in an APA case is de novo," and "owe[s] no deference to the district court's decision." *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.,* 248 F.3d 1277, 1281 (10th Cir. 2001) (quotations omitted).

Under the APA, courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). An action is arbitrary and capricious,

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). It is the duty of the reviewing court to "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (citing *State Farm*, 463 U.S. at 43). This includes a "thorough, probing, [and] in-depth review" of the administrative record. *Wyoming v. United States*, 279 F.3d 1214, 1238 (10th Cir. 2002). Courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *See Olenhouse*, 42 F.3d at 1574–75 (quotation omitted).

"In the NEPA context, an agency's EIS is arbitrary and capricious if it fails to take a 'hard look' at the environmental effects of the alternatives before it."

WildEarth Guardians v. U.S. BLM, 870 F.3d 1222, 1233 (10th Cir. 2017) (citation omitted). This requires courts to examine "whether there is a reasonable, good faith, objective presentation of the topics NEPA requires an EIS to cover." *Id.* (quotations omitted).

ARGUMENT

I. BLM Violated FLPMA by Exempting the Project from Phased Development without Demonstrating that an Exemption Applied.[6]

A. BLM Provided No Valid Rationale for Exempting the NPL Project from Phased Development.

FLPMA requires BLM to manage public lands "in accordance with" the land use plans it develops. 43 U.S.C. § 1732(a); *see also* 43 C.F.R. § 1610.5-3(a) (BLM authorizations "shall conform to the approved [land-use] plan."). The NPL Project Area is governed by BLM's Pinedale and Rock Springs land use plans, which specify various "Required Design Features" for projects approved in sage-grouse priority habitat. App.-II-381–87. Among these is a requirement that projects "[a]pply a phased development approach with concurrent reclamation." App.-II-383. Phasing reduces pressure on wildlife by localizing and minimizing the amount of habitat disturbed at any given time. *See* App.-III-631; App.-III-695–96, App.-III-704.

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[6] *See* App.-I-163–167 (Conservation Groups' merits briefing below raising these issues); Addendum at 61–64 (district court addressing them).

Required Design Features must be applied unless BLM "demonstrate[s] in the [NEPA] analysis associated with the project/activity" that at least one of three exemptions is met:

> [1] A specific [Required Design Feature] is documented to not be applicable to the site-specific conditions of the project/activity (e.g. due to site limitations or engineering considerations). Economic considerations, such as increased costs, do not necessarily require that [a Required Design Feature] be varied or rendered inapplicable.
>
> [2] An alternative [Required Design Feature], a state-implemented conservation measure, or plan-level protection is determined to provide equal or better protection for GRSG [Greater sage-grouse] or its habitat. A specific [Required Design Feature] will provide no additional protection to GRSG or its habitat.

App.-II-381. A third exemption, dealing solely with coal mines, is not applicable here. *Id.* BLM explained in an internal document that the first exception applies where an issue is directed at a different BLM program (e.g., grazing measures would not apply to a mining project), "simply does not apply" to a project, or "if incorporation of it would be technically infeasible or somehow create unintended consequences." App.-I-282. This "final case will require substantial evidence as to why, in this instance, it is impractical to comply." *Id.* App.-I-505; App.-II-899

More than one-third of the NPL Project Area spans sage-grouse priority habitat. App.-III-662. Accordingly, under the governing Land Use Plans, these areas require a "phased development approach with concurrent reclamation," unless BLM demonstrates in the NEPA process that an exemption applies. *See*

App.-II-381. BLM violated this requirement here by exempting the NPL Project from phasing without claiming, much less demonstrating, that an exemption applied. Instead of phasing the Project's progression in sage-grouse habitat, BLM authorized Jonah to develop all priority sage-grouse habitat "simultaneously," App.-III-548—allowing new well pads, pipelines, roads, and powerlines to fragment the entire Project area concurrently, without preserving contiguous blocks of intact mating, nesting, and brood-rearing habitat.

Early on, in its environmental review, BLM properly identified the need to apply a phased-development approach to the NPL Project's priority habitat and concluded that "[e]ssentially, it appears that phasing can be accomplished." App.-I-287; *see also* App.-II-357 (concluding "some sort of phased development approach" would be required). BLM then incorporated a phased-development approach into Alternative A to "meet[] the intent" of the Required Design Feature. App.-II-365. Alternative A divided the NPL Project Area into seven "Development Areas" that would be developed in three sequential phases with concurrent reclamation. App.-III-631–36; App.-III-639. BLM solicited input from Jonah on this phasing approach and "made several updates/revisions . . . based on input from Jonah." App.-II-352; *see also* App.-II-361; App.-II-326–333; App.-II-351 (all describing adjustments BLM made in response to input from Jonah). Throughout this process, BLM steadfastly maintained "that the phased-development approach

included in Alternative A is feasible." App.-II-361; *see also* App.-II-310 (BLM letter to Jonah explaining that it "reviewed this matter and found that phasing would be possible . . . and technically feasible" notwithstanding Jonah's concerns); App.-II-335 (meeting minutes explaining "that there would be no waste or inefficiencies associated with a phased approach as Jonah would still be allowed the opportunity to fully develop their leases").

Nonetheless, BLM ultimately declined to require the Project to use a phased development approach. The ROD selected Alternative B, which excluded phasing, App.-III-576, and clarified that the Project "is not required to be sequential or phased over time" and that "BLM authorizes development to occur in all [Development Areas] simultaneously." App.-III-548.

The ROD and EIS do not explain BLM's decision to waive the phasing requirement. They also do not claim, much less "demonstrate[]," that one of the Required Design Feature exemption criteria applied, as required under the Land Use Plans. *See* App.-II-381. Indeed, the record lacks evidence that BLM even *considered* the exemption criteria when deciding not to require phasing. BLM stated only that "Alternative B will best avoid or reduce impacts to sensitive resources while still allowing for recovery of natural gas and condensate resources . . . and will best meet the purpose and need of the project." App.-III-576. However, this explanation says nothing of the phasing requirement specifically,

and a desire to promote energy extraction is not among the permissible grounds for exempting a Required Design Feature.

"One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). "[T]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record," and an agency must "make plain its course of inquiry, its analysis and its reasoning." *See Olenhouse*, 42 F.3d at 1575. An agency must also consider every "important aspect of the problem" and may not "rel[y] on factors which Congress has not intended it to consider." *See State Farm*, 463 U.S. at 43.

BLM fell short of these standards here. The ROD and EIS do not articulate any explanation for BLM's decision not to require a phased development approach for the Project. The public was left to guess whether BLM believed one of the exemptions applied and why, and whether BLM even considered the exemptions in making its decision. Although the EIS defines Required Design Features and their exemption criteria, App.-III-747, merely listing a factor "is not a substitute for considering it." *Getty v. Federal Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). Because BLM failed to articulate a rational explanation for its decision not to require phasing, or "demonstrate[]" in the NEPA process that an

exemption applied, App.-II-381, its ROD is arbitrary, capricious, and contrary to the governing Land Use Plans, violating the APA and FLPMA.

B. BLM Relied on an Improper Factor.

The only possible explanation for BLM's decision not to require phased development is an impermissible one. Phillip Blundell, BLM's Planning and Environmental Coordinator, wrote to his team in August 2015 explaining that "we no longer feel we need to update both alternatives to accommodate a phased development approach" because the "state office has recently stated that the Required Design Features (RDFs) of the [Land Use Plans], for which the phased development requirement is based on, are discretionary." App.-II-322–23. To the contrary, Required Design Features are obligatory, and BLM cannot depart from those requirements without meeting the narrow criteria for variance written into the governing Land Use Plans. App.-II-381. Thus, in addition to ignoring an important factor—the exemption criteria—the record suggests that BLM based its decision on an impermissible one.

C. The Record Would Not Have Supported a Finding that an Exemption Applied.

In addition to being unexplained, BLM's decision not to require phased development is unsupportable on the record. The first exemption is inapplicable because the EIS does not demonstrate that phased development is "[in]applicable to the site-specific conditions" of the Project, as evidenced by BLM's ability to

develop a phasing plan for Alternative A which it deemed "feasible." App.-II-361. The second exemption is inapplicable because the EIS found that phasing would have materially benefitted sage-grouse and Alternative B did not include "equal or better" protections. *See* App.-III-703–04 (concluding that phasing would benefit sage-grouse by confining habitat disturbance to "localize[d]" areas and that Alternative A would impact sage-grouse "to a substantially lesser degree" than Alternative B).

D. The District Court's Post-Hoc Rationales Fail as a Matter of Law and Fact.

The district court tried to supply various explanations for BLM's actions, but an agency decision cannot be upheld on a rationale "that the agency itself has not given." *See Olenhouse*, 42 F.3d at 1574–75 (quoting *State Farm*, 463 U.S. at 43). The available record also contradicts these post-hoc rationales.

First, straying from the arguments Federal Defendants themselves made, the district court suggested that BLM rejected phased development under the first exception, because variables beyond BLM's control rendered the measure not "applicable." Addendum at 63. BLM itself never came to this conclusion, and the cited records do not support it either. As support, the district court quoted a passage from the EIS that is unrelated to phasing and merely explains that development may occur more slowly than anticipated, based on factors such as production success, commodity markets, and workforce availability. *Id*. (citing

App.-III-630). There is no evidence that these variables render BLM powerless to sequence development geographically or that these variables were the reason BLM rejected phasing. *See High Country Conserv'n Advocs. v. U.S. Forest Serv.,* 951 F.3d 1217, 1225 (10th Cir. 2020) (refusing to uphold agency decision based on statements in the record that the agency did not offer as a justification for its decision).

Second, seeming to contradict itself, the district court suggested that BLM had not actually *rejected* phasing but rather *deferred* the question to later site-specific permitting. This argument fails because the ROD directs that the Project "is not required to be sequential or phased over time" and "authorizes development to occur in all [Development Areas] simultaneously." App.-III-548. BLM also explicitly noted which Required Design Features would be evaluated at the site-specific stage, and phased development was not among them. *See* App.-I-297–99 (memo noting that BLM staff identified which Required Design Features "will be addressed at the site-specific stage"); App.-I-282–96 (table identifying which Required Design Features would be addressed at the site-specific stage); App.-III-572 (same for other mitigation). The district court did not grapple with these facts.

In sum, the district court improperly upheld BLM's decision based on post hoc justifications that are insufficient as a matter of law and fact.

II. BLM Violated NEPA by Acting on Incomplete Information About Sage-Grouse Winter Concentration Areas.

NEPA requires agencies to take a "hard look" at the environmental effects of their proposed actions, which must entail "a careful job at fact gathering and otherwise supporting its position." *Richardson*, 565 F.3d at 704 (citation omitted). NEPA regulations also require agencies to obtain "incomplete information relevant to reasonably foreseeable significant adverse impacts" if it "is essential to a reasoned choice among alternatives." 40 C.F.R. § 1502.22(a). Specifically, if "the overall costs of obtaining [the incomplete or unavailable information] are not exorbitant, the agency shall include the information in the [EIS]." *Id*. But if the information "cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known," the regulations direct that the agency "shall include within the [EIS] . . . the agency's evaluation of such impacts [that the missing information is relevant to] based upon theoretical approaches or research methods generally accepted in the scientific community." *Id.* § 1502.22(b)(4).

BLM violated these standards here by approving development in Winter Concentration Areas before collecting and evaluating baseline data on sage-grouse use of these habitats. *Supra* at 29–31, 33–34. BLM acknowledged key gaps in its understanding of Winter Concentration Areas, including: (1) the full extent of Winter Concentration Areas, because prior aerial surveys were incomplete, App.-II-468; App.-II-354; App.-I-271; (2) the extent to which core-area birds from

outside the Project Area use these sites, App.-II-467; (3) the timing of movements and the "travel corridors" birds use to reach Winter Concentration Areas, App.-II-467–68; and (4) the location of sage-grouse "geophagy" sites important for sage-grouse winter nutrition, App.-II-467; App.-I-277. As explained below, this information was relevant to the Project's impacts on sage-grouse; "essential to a reasoned choice" regarding the appropriate levels of development and mitigation in Winter Concentration Areas; and obtainable through a field study without exorbitant costs. Further, even if it could not feasibly obtain this information, BLM violated its obligation to use theoretical approaches or research methods to make an informed assessment of the Project's effects, as the record shows was possible. The approach BLM took instead—a post-hoc evaluation of the effects of Winter Concentration Area development *after* they have occurred—is fundamentally at odds with NEPA.[7]

A. The Missing Information Was "Relevant to Reasonably Foreseeable Adverse Impacts."

The missing information on sage-grouse use of the Project Area's winter habitat was "relevant to reasonably foreseeable adverse impacts," 40 C.F.R. § 1502.22(a), which no party contested before the district court. Without accurately

[7] *See* App.-I-154–162 (Conservation Groups' merits briefing below raising these issues); Addendum at 56–61 (district court addressing them).

understanding where and how wintering sage-grouse use the Project Area, BLM was in the dark as to the full extent of wintering habitat that could be lost or degraded, the possibility of Project development blocking migration to and movement within this vital winter habitat, and how severely local and regional core-area populations could be harmed.

B. The Missing Information Was Essential to a Reasoned Choice among Alternatives.

The missing information regarding baseline winter habitat use was "essential to a reasoned choice among alternatives," both as a legal matter and as the record demonstrates. 40 C.F.R. § 1502.22(a).

First, as a matter of law, courts hold that "without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci,* 857 F.2d 505, 510 (9th Cir. 1988). Here, collection of the missing baseline information was "essential" because without it, BLM could not understand the impacts of the NPL Project on local and regional core-area populations, and the specific areas that should be protected and how. *See Or. Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 571 (9th Cir. 2016) (holding that because BLM failed to accurately define sage-grouse winter use of project site, it "could not assess the Project's impacts to [sage-grouse], qualitatively or quantitatively," and "did not know what impacts to

mitigate, or whether the mitigation proposed would be adequate to offset damage to wintering sage grouse"); *see also N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) ("without [baseline] data, an agency cannot carefully consider information about significant environment impacts"); *Nat'l Audubon Soc'y v. Dept. of the Navy*, 422 F.3d 174, 187–89 (4th Cir. 2005) (finding agency failed to take "hard look" at a proposed airfield's impacts on a national waterfowl refuge, where a month-long study it had conducted to measure bird movement patterns was "insufficient in duration" to represent the full winter migratory season). Just as in these cases, BLM's efforts to delineate winter habitat were incomplete, as prior surveys did not represent the full wintering season and failed to identify geophagy and other sites thought to be particularly vital for sage-grouse survival in winter months.

BLM itself acknowledged that additional baseline information regarding "Sage-Grouse use of the Winter Concentration Areas" was necessary to inform the "appropriate level of development, potential impacts, and appropriate mitigation." BLM128994. BLM further explained:

> [T]here is limited research on Sage-Grouse use of the Winter Concentration Areas in the NPL Project Area . . . and the potential impacts that could occur to Sage-Grouse from development in and around these areas. *As a result, the potential impacts on local and regional Sage-Grouse populations resulting from development in the NPL Project Area Winter Concentration Areas is [sic] not well understood*. The [Wyoming Game and Fish Department], BLM, and other appropriate entities are identifying additional research and

> studies that should be conducted to better understand the use and role of Winter Concentration Areas on Sage-Grouse that use or could potentially use these areas.

App.-II-374 (emphasis added).[8]

Apparently because of these knowledge gaps, the draft EIS also proposed that BLM "defer authorizing development in Winter Concentration Areas until additional research is completed to better inform the appropriate level of development, potential impacts, and appropriate mitigation in these areas," App.-II-369, as BLM, Wyoming Game and Fish Department, U.S. Fish and Wildlife Service, and the Governor's Office had agreed in April 2016, App.-II-363.[9] *Supra* at 33–34. By its own admission, then, BLM could not properly weigh the Project's impacts and choose between alternative development scenarios or mitigation options until gathering better information about winter habitat use.

The final EIS, however, inexplicably "remove[d] requirements for deferring development in Sage-Grouse Winter Concentration Areas until further research has been conducted." App.-III-748. Instead, BLM chose to allow an undefined amount

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[8] This quotation is from the draft EIS. In the final EIS, BLM substituted the reference to "local and regional Sage-Grouse populations" with "Sage-Grouse," even though it still could not address the Project's impact on local and regional populations and did not do so in the final EIS. *See* App.-III-688.

[9] *See also* App.-II-415 (noting Wyoming Game and Fish Department's support for "BLM deferring authorization for development in delineated WCAs until additional research is completed to better inform what the appropriate levels of development might be"); App.-II-364 (Fish & Wildlife Service expressing same).

of "limited scale" development in Winter Concentration Areas while conducting a "concurrent[]" study of the resulting impacts. App.-III-641. BLM did not explain why it no longer believed the missing information on Winter Concentration Areas was necessary to evaluate the impacts of this Winter Concentration Area development or terms under which it should proceed.

Moreover, the declaration of sage-grouse expert Clait Braun, App.-I-032 (ECF No. 40-1, "Braun Decl."), illustrates that this information was "essential to a reasoned choice" before the Project's authorization and could not wait to be gathered through trial-by-error, due to its risk of irreversible population declines—a relevant factor BLM should have considered but ignored.[10] Dr. Braun predicts that "given the number of resident and seasonal sage-grouse populations that utilize the Winter Concentration Areas . . . and the limiting nature of winter habitat," any development in these areas would cause "marked declines in local and regional sage-grouse populations." Braun Decl. ¶ 34 (App.-I-044).[11]

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[10] Dr. Braun is one of the nation's leading sage-grouse experts, and the Magistrate Judge found that his declaration is admissible extra-record evidence for purposes of showing that BLM ignored "relevant factors" in its decision-making. *See* Addendum at 6–8 (ECF No. 45). The district court affirmed that order. Addendum at 9 (ECF No. 49).

[11] BLM's biologist also believed that "winter concentration areas could conceivably be abandoned and population level declines could be incurred throughout the Upper Green River Basin." App.-II-489; *see also* App.-II-359; App.-II-336; App.-II-339; App.-III-761.

Restrictions on development—including a winter prohibition on development activities, and restriction on density of disturbance locations allowed in Area 2 (4 per 640 acres) or in Area 1 (1 per 640 acres)—will not be "sufficient to maintain viable populations of sage-grouse." *Id*. ¶ 32 (App.-I-041). The harms to wintering sage-grouse "will likely be long-lived and permanent," and effective restoration of disturbed sage-grouse habitat "takes decades." *Id*. ¶ 33 (App.-I-042).

Further, "[b]y the time BLM has obtained reliable results of this promised study, it will likely be too late to make necessary corrections." *Id*. ¶ 37 (App.-I-043). This is because:

> Sage-grouse density data are difficult to obtain as lek counts are imprecise and populations naturally fluctuate over time. Data collection (counts of males on leks) thus has to markedly improve over a span of multiple years to properly test the hypothesis that the population changes are attributable to human activity. The lag time between the onset of energy development and measurable population declines will further complicate data collection efforts. It may take 10 years of data collection to even come close to understanding the response of sage-grouse to the NPL project.

Id. In short, development in Winter Concentration Areas could irreversibly harm sage-grouse populations before BLM could understand the Project's effects and correct course. This approach is contrary to NEPA's purpose to "ensure[] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349.

The district court erred in finding that the missing baseline information on Winter Concentration Areas was not "essential." First, this conclusion was based on the court's factually incorrect view that no development will be allowed in Winter Concentration Areas until after the promised study is completed, Addendum at 59, which contradicts the ROD, App.-III-555. Second, the district court's holding that BLM adequately considered the Project's impacts on wintering sage-grouse is unsupported. Addendum at 59–60. While the EIS acknowledged various "adverse" effects, including the potential for development to displace sage-grouse from winter habitat, App.-III-687–88, the EIS did not even fully identify sage-grouse Winter Concentration Areas for the entire winter season, precluding BLM's understanding of the Project's full risks to wintering populations. BLM also failed to identify the location of geophagy sites or travel corridors birds use to access Winter Concentration Areas, leaving it uninformed as to the unique impacts of development in these sites. Without information on why and to what extent core-area populations use Winter Concentration Areas, BLM was also unable to evaluate their biological importance to core-area birds and the maintenance of Wyoming sage-grouse populations. *See* App.-III-688; App.-II-467; App.-II-361–63.

C. BLM Failed to Establish that It Could Not Collect the Missing Information.

The EIS does not explain why BLM chose not to collect the missing

information regarding sage-grouse winter habitat use, nor does it establish that "the overall costs of obtaining it are exorbitant or the means to obtain it are not known." 40 C.F.R. § 1502.22(b). No party contested before the district court that BLM could have collected the missing information before authorizing the Project, and that it could have done so without exorbitant costs. *Id*. According to the declaration of Clait Braun, a field study tracking birds between fall, winter, and spring sites "could have revealed where sage-grouse are migrating from to use the NPL Winter Concentration Areas and the potential severity of impacts to specific migratory populations." Braun Decl. ¶ 40 (App.-I-044). Further, BLM's detailed 2015 Winter Concentration Area study proposal not only identified research needs but also proposed study methods to identify all areas where birds congregated throughout the winter, areas used by core-area birds, and geophagy sites. App.-II-468–74. This proposal, too, establishes that a field study was technically and economically feasible.

D. BLM Failed to Apply Theoretical Approaches or Research Methods Generally Accepted in the Scientific Community.

Even if a field study would have been costly or could not fully resolve questions about the Project's impacts on sage-grouse, BLM could not throw its hands up in the air and use the Project to determine the Project's effects. Instead, it was required to evaluate the impacts of Winter Concentration Area development on sage-grouse populations "based upon theoretical approaches or research

methods generally accepted in the scientific community" *before* authorizing the Project. 40 C.F.R. § 1502.22(b)(4). This BLM failed to do. As Dr. Braun explains, BLM could have "used existing data and hired persons with modeling experience to build models that would predict possible outcomes," or even predicted outcomes based on a review of published studies. Braun Decl., ¶¶ 30–36, 41 (App.-I-040–043, App.-I-045); *see also* App.-II-417. The EIS failed to address why BLM could not take either of these approaches (and no party disputed in the district court that these methods were available). Instead, BLM irrationally committed to an experimental test of virtually limitless scope on wintering sage-grouse without disclosing the potential risks to sage-grouse populations, in violation of NEPA.

III. BLM Failed to Take a Hard Look at the Project's Impacts on the Path of the Pronghorn, Grand Teton Herd, and Grand Teton National Park.

BLM further violated NEPA because the EIS failed to analyze the Project's impacts on the "Path of the Pronghorn" and Grand Teton National Park pronghorn that use it. Thus, BLM disregarded the potential irreplaceable loss of "a phenomenon which is of regional and national significance," in the Park Service's words, App.-I-261, and cascading consequences for Grand Teton National Park, where pronghorn are among the "most sought-after animals" for wildlife viewing, App.-II-504.

NEPA requires every EIS to contain a "detailed statement" of the direct, indirect, and cumulative impacts of their proposed actions and alternatives "and

their significance." 42 U.S.C. § 4332(2)(C); 43 C.F.R. §§ 1502.16(a)–(b), 1508.7, 1508.8. An EIS must "reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006) (quoting *Comm. to Pres. Boomer Lake Park v. U.S. Dep't of Transp*., 4 F.3d 1543, 1553 (10th Cir. 1993)). In evaluating the significance of a project's impacts, an agency must consider both the "intensity" of impacts and their "context." 40 C.F.R. § 1508.27(a)–(b) ; *see also id*. § 1508.27(a) ("Significance varies with the setting of the proposed action."). An agency must also consider the "[u]nique characteristics of the geographic area such as proximity to . . . park lands . . . or ecologically critical areas," and "[t]he degree to which the action . . . may cause loss or destruction of significant scientific, cultural, or historical resources." *Id*. § 1508.27(b)(3), (8).

BLM failed to meet these standards here. NEPA mandates particular care when evaluating "[u]nique" or "significant" ecological features, yet BLM failed to disclose the Project's impacts on the nationally-renowned Path of the Pronghorn—one of the few remaining long-distance land migrations in the world, App.-II-439, the longest-known terrestrial migration in the lower 48, and a 6,000-year-old phenomenon of significant scientific interest, App.-I-261; App.-II-435; *see also* App.-II-437 (noting "rarity of relict migrations among terrestrial mammals in the Western Hemisphere in excess of even 100 km"). BLM also failed to study the

Project's impacts on the unique context and setting to which they may reach—Grand Teton National Park.[12]

A. BLM Failed to Take a Hard Look at the Project's Impacts on the Persistence of the Path of the Pronghorn and Grand Teton Herd.

The EIS failed to take a hard look at whether the Project would allow the Grand Teton herd to continue its Path of the Pronghorn migration, or whether it would diminish pronghorn numbers in Grand Teton. Its analysis of pronghorn impacts focused on the larger Sublette herd, which also uses the NPL Project Area, but this approach ignored unique concerns particular to the Grand Teton herd, and raised by the Park Service and the public.

The Grand Teton herd's migration sets the herd apart from thousands of other pronghorn that winter with it in the Upper Green River Valley. App.-II-465. But this extraordinary quality also leaves it vulnerable to extirpation. Scientists have found this migration to be "invariant" such that "[t]he possibility of adoption of alternate routes is low." App.-II-437. Indeed, Dr. Berger has observed that "[a]ny obstruction is likely to extirpate pronghorn from [Grand Teton]." *Id*. The Park Service was particularly concerned with the Project's potential to eliminate the Path of the Pronghorn and extirpate the Grand Teton herd. *Supra* at 26–27. It

[12] *See* App.-I-139–145 (Conservation Groups' merits briefing below raising these issues); Addendum at 45–49 (district court addressing them).

urged that to "ensur[e] the persistence of the pronghorn . . . that summer in [Grand Teton]," the EIS should "identify[] thresholds at which impacts to ungulate populations are significant," including "threshold levels for well pad densities and roads." App.-I-262.

Despite the national significance of, and comments concerning, the Path of the Pronghorn, BLM failed to evaluate how the Project would impact the Grand Teton herd or its unique migration, or identify the thresholds at which they could be extirpated, as the Park Service recommended. *Utahns for Better Transp. v. U.S. DOT*, 305 F.3d 1152, 1179–80 (10th Cir. 2002) (agency's failure to analyze highway project's impacts on migratory birds violated NEPA because it ignored a "primary concern" of many commenters: "impacts to the [Great Salt Lake] ecosystem and its ability to continue as a nationally and internationally significant wildlife use area").

Although the EIS acknowledged the Grand Teton pronghorn herd's use of the Project Area, App.-III-657, it did not consider potential effects *particular to this herd* that would result from reducing its winter habitat or disrupting its migration. NEPA required BLM to consider these effects on a unique national-park population and its "highly fragile" and unique migration route, App.-II-443, App.-II-435, but BLM failed to do so. *See* 40 C.F.R. § 1508.27(b)(3); *see also, e.g.*, *Anderson v. Evans*, 350 F.3d 815, 833–34 (9th Cir. 2002) (potential loss of grey

whale population in marine sanctuary required further environmental review, even if larger coastal population would be unaffected); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 233 (D.D.C. 2003) (agency's failure to consider statewide swan-population reduction program's effects in specific locales ran afoul of NEPA's directive to study environmental impacts "at the level of 'society as a whole (human, national), the affected region, *the affected interests*, and *the locality*'" (citing 40 C.F.R. § 1508.27(a), first emphasis added, second in original)).

Specifically, the EIS's discussion of the Project's impacts on the larger Sublette herd—of which the Grand Teton herd is a unique subset—does not mention the Grand Teton herd, its unique vulnerability to extirpation, or the specific migration pathways it uses. *See* App.-III-674. This omission was significant as the record suggests Grand Teton pronghorn are particularly susceptible to impacts given the extreme length, several bottlenecks, and invariant nature of their migration. App.-II-437; App.-II-443 (describing migration as "highly fragile"). BLM also failed to identify the threshold of development at which pronghorn would be unlikely to return to Grand Teton, as the Park Service suggested and noted was "feasible" in light of prior and ongoing research. App.-I-262; *see also supra* at 23–24 (describing research). Accordingly, the reader is left to wonder whether, under any of the alternatives, the Grand Teton herd's migration pathways would be disrupted, whether physiological stresses would prevent the

herd's return to its summering grounds or survival therein, or whether population declines would be steep enough to eliminate the herd. In sum, the "general statements" BLM offered about generic pronghorn impacts "do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (citation omitted); *see also* 40 C.F.R. § 1508.27(b) (analysis of proposed action's "significant" effects entails analysis of their "intensity" or "severity").

Likewise, the EIS's discussion of the comparative effects of the various alternatives on pronghorn speaks only in abstract generalities. In comparing the Proposed Action to more restrictive alternatives, the EIS states that the alternatives would have "similar impacts" but "to a lesser degree" than the Proposed Action and merely identifies sections of the Project Area where those impacts would be "reduce[d]." App.-III-628–29; App.-III-696; App.-III-710–11. This simplistic comparison is insufficient to understand how Grand Teton pronghorn would fare under the various alternatives and the effectiveness of mitigation options before BLM. *See Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) ("perfunctory references do not constitute analysis useful to a decisionmaker in deciding whether, or how, to alter the program to lessen [the] environmental impact"). Indeed, because BLM never defined a threshold of development at which

pronghorn are unlikely to return to the Park, as the Park Service suggested, it could not meaningfully compare alternatives.

The record does not rationally explain these omissions. Responding to comments raising the potential loss of the Path of the Pronghorn, BLM evaded the issue, stating "there are no [Wyoming Game and Fish Department]-designated pronghorn migration corridors in the NPL Project Area." App.-III-749. Yet multiple studies have documented this migration pathway, App.-II-397, App.-II-483, App.-II-436, and the EIS acknowledges that "[p]ronghorn radiomarked in the Grand Teton National Park do use the winter ranges present within the Project Area." App.-III-657. NEPA does not exempt federal agencies from studying impacts to known wildlife use areas simply because they lack a special state designation.

BLM's cursory response also improperly brushed aside the Park Service's comments confirming the existence of this "national[ly] significan[t]" pronghorn migration route and risks the Project posed to the "persistence of pronghorn in [Grand Teton]." App.-I-261–62. BLM was required to address these "undeniably relevant" concerns from a sister agency with pertinent expertise. *Davis*, 302 F.3d at 1123 (invalidating NEPA review where agency failed to consider sister agency's comments); *Utahns*, 305 F.3d at 1179–80 (invalidating NEPA review's wildlife analysis where agency disregarded wildlife agency comments).

BLM's failure to study the Project's impacts on the Grand Teton herd also apparently stemmed from the EIS narrowly limiting the analysis area to "the Project Area and a one-mile buffer around the Project Area," App.-III-664, although pronghorn population declines in their summering grounds could be felt across their entire home range. The EIS's arbitrary geographic scope was never explained and obscured important impacts well beyond this boundary, in violation of NEPA. *See Utahns*, 305 F.3d at 1179–80 (EIS's limiting wildlife-impacts study area to within 1,000 feet of a proposed highway improperly ignored public's concerns about migratory birds occurring outside this zone, and its interest in maintaining the Great Salt Lake as a migratory bird refuge); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021) ("an agency's delineation of the area potentially affected by the project must be reasonable and adequately explained" (citation omitted)).

In the district court, counsel for BLM advanced a post-hoc rationalization for its omissions, which the district court improperly accepted: that the EIS's discussion of the Project's environmental consequences on the larger Sublette herd properly subsumed the Project's impacts on the Grand Teton herd. Addendum at 49 n.19. However, BLM itself never claimed this to be true, and courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Olenhouse*, 42 F.3d at 1575 (citation omitted). Because the EIS is silent on

this issue, the Court cannot assume that its analysis of Sublette herd effects was also a proxy analysis for the Grand Teton herd and Path of the Pronghorn. *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 926 (9th Cir. 2015) (rejecting similar post hoc proxy rationale). Finally, as explained above, this post-hoc rationale further fails because the EIS's generic discussion of the Sublette herd *did not* consider the unique migration of the Grand Teton herd, or unique National Park context in which impacts to that herd will be felt.

B. The EIS Fails to Disclose the Project's Indirect Effects on Grand Teton National Park.

Even if the EIS could somehow be read as having considered the Project's harms on the Path of the Pronghorn migration and the Grand Teton herd's persistence, the EIS is silent on the "downstream" consequences for Grand Teton National Park. NEPA required the analysis of indirect recreational and ecological effects on Grand Teton, even if those effects would occur "later in time" or are "farther removed in distance." *See* 40 C.F.R. § 1508.8; *see also id.* § 1508.27(b)(3), (8) (requiring consideration of "[u]nique characteristics of the geographic area such as proximity to . . . park lands . . . or ecologically critical areas").

According to specialist Dr. Joel Berger, the elimination of the Grand Teton herd would "leav[e] a conspicuous gap in the function of native predator–prey interactions" in Grand Teton, App.-II-437, harming the Park's ecological integrity

and biodiversity. As Dr. Berger observed, "migration is an ecological process central to maintaining biological diversity." App.-II-452. Thus, the Project puts at risk not just the health of the Park's pronghorn population, but a host of other wildlife inhabiting the Park, including native predators.

Further, mere population decline would reduce opportunities for Grand Teton visitors to view and enjoy one of the Park's "most sought-after animals," App.-II-504, in one of the nation's most popular national parks for wildlife observation, undermining a primary purpose for which the national parks system was created—"to conserve . . . the wild life therein and to . . . leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a); *see also* App.-II-389; (Grand Teton "is renowned for its complete suite of native large mammals"). The decline or loss of this charismatic species would diminish the richness of the Park's wildlife diversity and scenic landscape. These localized effects to a unique park landscape demanded consideration, even if Wyoming's larger pronghorn population would persist. *See Anderson*, 350 F.3d at 833–34; *Fund for Animals*, 281 F. Supp. 2d at 233.

The district court's Order, however, did not even address this issue, apparently due to its factually incorrect view that "Grand Teton National Park pronghorn [do] not use winter ranges in the Project Area," Addendum at 48, which contradicts the EIS and Park Service's comments. *Supra* at 65. The district court

further reasoned that the record does not adequately establish that the entire Grand Teton herd "will certainly be eliminated if migration is obstructed." Addendum at 48. However, NEPA requires consideration of all "reasonably foreseeable" effects, 40 C.F.R. § 1508.8(b), not merely certain ones. The record confirms that effects to the Grand Teton herd are reasonably foreseeable, *see* App.-I-261, App.-II-437, and BLM itself never determined to the contrary.

In sum, BLM failed to take a hard look at the Project's consequences of disrupting the Path of the Pronghorn, in disregard of the Project's national, regional, and ecologically and scientifically unique context. *See Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (loss of farmland was significant in light of its "aesthetic, economic, ecological, and cultural value" to the local region, warranting further study in EIS).

CONCLUSION AND RELIEF REQUESTED

Based on the errors above, Conservation Groups request that the Court reverse the judgment of the district court and remand with instructions to vacate the NPL ROD and EIS. Under the APA, courts "*shall* . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added).

This Court has taken several different steps when reversing a district court

decision in an APA case: "(1) reversed and remanded without instructions, (2) reversed and remanded with instructions to vacate, and (3) vacated agency decisions." *High Country*, 951 F.3d at 1228 (quoting *WildEarth Guardians*, 870 F.3d at 1239). However, remand with instructions to vacate is the "typical" remedy. *Id.*; *see also, e.g.*, *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) (remanding with instructions to vacate due to NEPA violation); *Utah Env't Cong. v. Richmond*, 483 F.3d 1127, 1140 (10th Cir. 2007) (remanding with instructions to vacate Forest Service approval of project that was inconsistent with land management plan, in violation of the National Forest Management Act); *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1195 (10th Cir. 2006) (same); *Utah Env't Cong. v. Bosworth*, 439 F.3d 1184, 1195 (10th Cir. 2006) (same). Other circuits likewise recognize that "vacatur is the default response" to unlawful agency action, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021), and that it is a defendant's burden to show that compelling equities "overcome the presumption of vacatur." *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1122 (9th Cir. 2018).

There is no reason here for the Court to depart from the "typical remedy." Vacatur will support NEPA's goal of ensuring that BLM acts only after it fully studies the Project and possible alternatives. It will also allow BLM to conform its

decision to the governing Land Use Plans.

STATEMENT REGARDING ORAL ARGUMENT

Conservation Groups believe that oral argument would be beneficial because this case involves significant issues regarding FLPMA and NEPA.

Respectfully submitted, October 28, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 point font size and Times New Roman.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Emsisoft Business Security, version 2022.10.0.11669, last updated October 28, 2022, and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I certify that on October 28, 2022, I electronically filed the foregoing OPENING BRIEF OF APPELLANTS WESTERN WATERSHEDS PROJECT, et al., with attached Addendum, using the court's CM/ECF system, which will send notification of this filing to:

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ADDENDUM

ADDENDUM INDEX

United States District Court

For The District of Wyoming

UPPER GREEN RIVER ALLIANCE, WESTER WATERSHEDS PROJECT, and CENTER FOR BIOLOGICAL DIVERSITY, Petitioners, vs. UNITED STATES BUREAU OF LAND MANAGEMENT and WILLIAM PERRY PENDLEY, in his official capacity as Deputy Director of the U.S. Bureau of Land Management, Respondents, and JONAH ENERGY, LLC, and STATE OF WYOMING, Respondent-Intervenor.	Civil No. 19-CV-146-S

ORDER GRANTING, IN PART, PETITIONERS' MOTIONS TO SUPPLEMENT THE ADMINISTRATIVE RECORD [39]

This matter is before the Court on Petitioners' Motion to Supplement the Administrative Record [Doc. 39]. The Court, having carefully considered the briefing on the matter, finds Petitioners have sufficiently shown the Declaration of Dr. Clait E. Braun is admissible for the limited purpose of addressing the alleged procedural deficiency in the Bureau of Land Management's decision allowing development of natural gas wells in Sublette County, Wyoming.

BACKGROUND

This action is originally before the Court on Petitioners' review of agency action. Petitioners seek judicial review of the Bureau of Land Management's ("BLM") approval of Jonah Energy LLC's Normally Pressured Lance Project ("NPL Project") for the development of natural gas wells across a large area in Sublette County, Wyoming. Petitioners argue the BLM failed to consider and disclose significant environmental impacts of the NPL Project before it was authorized. The NPL Project area encompasses habitat for Greater sage-grouse. Petitioners allege the BLM authorized development without first assessing the impacts to the Greater sage-grouse and this prime winter habitat referred to as "winter concentration areas." Petitioners assert that in June of 2018, the BLM abandoned is previous commitment to defer development in winter concentration areas for the Greater sage-grouse, of which a large portion of the NPL Project is located, until the impact of the development was studied. Petitioners claim the BLM created a new alternative that would authorize development in winter concentration areas but require a concurrent study on the effects to the Greater sage-grouse. One of the challenges Petitioners raise in this action is claiming the BLM failed to adequately analyze the impacts of the NPL Project on the Greater sage-grouse in this winter concentration area in violation of the National Environmental Policy Act ("NEPA").

In the instant Motion, Petitioners move to supplement the administrative record by adding the Declaration of Dr. Clait E. Braun, which identifies relevant factors the BLM should have considered but ignored before issuing a decision. Petitioners argue that in the NEPA context, which we have here, supplementation is appropriate to fill gaps and address inadequacies in the BLM's Environmental Impact Statement ("EIS") analysis. Petitioners claim the briefing in this matter will identify large gaps in the BLM's EIS, and also argue that

the BLM failed to take the requisite hard look at the effects of drilling in winter concentration areas on sage-grouse populations. Petitioners claim NEPA regulations establish procedures for how an agency is to proceed with incomplete information and argue the BLM did not follow the established procedures. Specifically, Petitioners argue the BLM did not obtain the information it deemed missing regarding the impacts of drilling on the Sage-grouse winter concentration area. Petitioners further assert the Declaration is necessary to fill in the gaps and address the inadequacies in the BLM's decision by:

> attesting (1) that this missing information on baseline habitat use and the impacts of gas field development in Winter Concentration Areas is "relevant to reasonably foreseeable significant adverse impacts" to greater sage-grouse, 40 C.F.R. § 1502.22(a); Exhibit A at ¶¶ 17-18, 29-37, 40; (2) that several methods existed for BLM to obtain this missing information at a non-exorbitant cost, 40 C.F.R. § 1502.22(b); Exhibit A at ¶ ¶ 31-32, 38-41; and (3) that an evaluation of such impacts was also possible based on "theoretical approaches or research methods generally accepted in the scientific community," 40 C.F.R. § 1502.22(b)(4)

Petitioners' Memorandum in Support of Motion to Supplement the Administrative Record, ECF No. 40, Sept. 23, 2020 at 8.

Respondent BLM opposes Petitioner's Motion to Supplement the Record. The BLM argues Petitioners cannot show the extraordinary circumstances necessary for supplementing the administrative record because the BLM considered the available research on sage-grouse, including their winter range. The BLM noted there was limited research on sage-grouse use of winter concentration areas within the NPL Project and decided to allow development with in these areas only on a limited scale and while conducting concurrent studies to better understand the impacts on sage-grouse in the winter concentration areas. The BLM claims this was done after analyzing impacts utilizing existing studies on the impacts of development in winter ranges. The BLM claims the Certified Administrative Record already includes, in

one form or another, eleven of the fifteen articles cited in the Declaration. Therefore, the BLM argues the Declaration is a post hoc opinion of a researcher who disagrees with the decision. The BLM goes on to argue the Motion is untimely because Petitioners could have submitted the Declaration with their comments.

Respondent-Intervenor Jonah Energy, LLC ("Jonah Energy") also opposes the Motion to Supplement the Record. Jonah Energy argues the Court should not consider the Declaration because it was prepared two years after the NPL Project was approved, so there is no way it could have been considered when approving the project. Next, Jonah Energy argues the Declaration is not offered to "fill in the gaps or address inadequacies" but rather to dispute the BLM's decision. Jonah Energy goes on to argue that supplementing the administrative record with the Declaration would circumvent the principles of administrative exhaustion, and claims that the information and studies relied upon in the Declaration were available well before the decision was issued and Petitioners' failure to raise these concerns before the decision was issued should not be rewarded.

Respondent-Intervenor the State of Wyoming ("Wyoming") also opposes the Motion to Supplement the Record. Wyoming argues Petitioner's request to supplement the administrative record is not permissible because the BLM did not fail to mention or address serious environmental impacts. Rather, Wyoming claims the Declaration only provides a list of literature and alternative studies the BLM could have relied upon. Wyoming argues the Declaration is merely a competing expert opinion challenging the BLM's use of scientific literature in imposing surface use restrictions and continuing its own studies to monitor the effects on development in winter concentration areas on the NPL project. As such, Wyoming claims the Declaration is an impermissible competing expert opinion. Wyoming goes on to

argue the Motion is untimely because all the scientific literature identified in the Declaration, with the exception of one article, was available before the BLM issued its decision and Petitioner offers no explanation why the opinions were not offered during the public comment period.

Standard of Review

"The APA governs judicial review of agency action, requiring a reviewing court to 'hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Biodiversity Conservation All. v. U.S. Forest Serv.*, No. 11-CV-226-S, 2012 WL 3265865, at *1 (D. Wyo. Jan. 4, 2012) (quoting 5 U.S.C. § 706(2)(A)). A district court's review of an agency decision is limited to whether the challenged action or inaction meets the requisite standard based on the administrative record before the agency at the time the decision was made. 5 U.S.C. § 706. The Supreme Court has stated the review of an agency decision is limited to "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, (1971). A court may not rely on evidence outside the administrative record absent extraordinary circumstances. *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985); U.S.D.C.L.R Rule 83.6(b)(3) for District of Wyoming. The 10th Circuit has recognized five possible exceptions wherein a party is allowed to introduce evidence outside the record:

> (1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) the agency considered factors that were left out of the formal record; (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) evidence coming into existence after the agency acted demonstrates the actions were right or wrong.

Id. (citing *Custer County Action Assn v. Garvey,* 256 F.3d 1024, 1028 n. 1 (2001)). "Generally, however, documentation and evidence suitable for annexing to an agency's designated record takes two distinct, yet often confused, forms: (1) materials which were actually considered by the agency, yet omitted from the administrative record ('completing the record'); and (2) materials which were not considered by the agency, but which are necessary for the court to conduct a substantial inquiry ('supplementing the record')." *Water Supply & Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1265 (D. Colo. 2012).

RULING OF THE COURT

The Tenth Circuit has made clear the "designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." *Citizens For Alternatives To Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007) (citations omitted). However, courts have considered extra-record materials in "extremely limited" circumstances, such as where the agency ignored relevant factors it should have considered or considered factors left out of the formal record." *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (internal quotations and citations omitted). In NEPA cases courts have conducted an initial review of extra-record evidence to determine if any of the limited circumstances are present. "[S]uch an initial review may illuminate whether an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug." *Id*. (internal quotations and citations omitted). "[I]n NEPA cases . . . a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and

alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored." *Colorado Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1241 (D. Colo. 2010) (internal quotations and citations omitted). "This exception is based on a crucial distinction between judicial review of substantive agency decisions and judicial review of an agency's compliance with the procedural requirements of NEPA." *Id*. (internal quotations and citations omitted).

In sum, Respondents argue the Declaration is inadmissible because: Petitioners have failed to establish any of the circumstances necessary for supplementation of the administrative record; Petitioners should have offered the Declaration during the comments period; all available research was considered; the record already includes eleven of the fifteen articles cited in the Declaration; and Petitioners are not offering the Declaration to fill in gaps or address inadequacies, but to dispute the decision.

The Court finds these arguments, while colorable, are not sufficient to deny Petitioners' request to supplement the administrative record in this action. "[B]y its very nature Petitioners' NEPA challenge is based not on the substantive accuracy of the [BLM's] environmental assessment, but on a procedural failure—the failure to consider the impacts [to sage-grouse]." *Colorado Wild*, 713 F. Supp. 2d at 1241. The extra-record Declaration at issue here is important in the "NEPA context where a party challenges not the merits of the agency's decision, but the sufficiency of the process followed in reaching it." *Id*. Petitioners claim the Declaration seeks to fill in the gaps or inadequacies by identifying factors the BLM should have considered but that Petitioner alleges it purposefully ignored. Respondents are correct in the assertion that much of the Declaration amounts to Dr. Braun offering his expert opinion disagreeing with the BLM's decision. However, Petitioners have presented sufficient

information showing that at least some of the Declaration attempts to addresses the alleged procedural failures by the BLM when considering the impact of the decision on the sage-grouse and the winter range. Further, allowing the Declaration will cause minimal prejudice given the fact the record already includes eleven of the fifteen articles cited in the Declaration. Therefore, the Declaration is admissible for the limited purpose of showing "either that the [BLM's] analysis was clearly inadequate or that the [BLM] improperly failed to set forth opposing views widely shared in the relevant scientific community." *Id*. The Declaration is not "admitted for purposes of providing an opposing expert opinion in opposition to the substantive result of the [BLM's] NEPA process." *Id*. ("Extra-record evidence which is actually a competing expert opinion, however, may not be admitted under the guise of the NEPA exception.").

THERFORE IT IS ORDERED Petitioner's Motion to Supplement the Administrative Record [Doc. 39] is GRANTED in PART.

IT IS FURTHER ORDERED the Declaration of Dr. Braun is admitted for the limited purposed of addressing the alleged procedural deficiency of the BLM's NEPA compliance.

Dated this 6th day of November, 2020.

Kelly H. Rankin
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UPPER GREEN RIVER ALLIANCE, WESTER WATERSHEDS PROJECT, and CENTER FOR BIOLOGICAL DIVERSITY, Petitioners, v. UNITED STATES BUREAU OF LAND MANAGEMENT and WILLIAM PERRY PENDLEY, in his official capacity as Deputy Director of the U.S. Bureau of Land Management, Respondents, and JONAH ENERGY, LLC, STATE OF WYOMING, Intervenor-Defendant.	Case No. 19-CV-146-SWS

ORDER DENYING RESPONDENTS' JOINT REQUEST FOR RECONSIDERATION OF ORDER GRANTING, IN PART, PETITIONERS' MOTIONS TO SUPPLEMENT THE ADMINISTRATIVE RECORD

This matter comes before the Court on the Respondents' Joint Request for Reconsideration (ECF No. 46) of Magistrate Judge Rankin's *Order Granting, in part, Petitioners' Motions to Supplement the Administrative Record.* (ECF No. 45.) The Petitioners filed oppositions to the request (ECF No. 47) and the Respondents have replied. (ECF No. 48.) Having considered the parties' arguments, reviewed the record herein, and being otherwise fully advised, the Court finds the motion for reconsideration should be DENIED.

BACKGROUND

Since the relevant facts of this case were recently set forth by Magistrate Judge Rankin in his order, (*see* ECF No. 45), they will only briefly be reiterated here. This action is before the Court on Petitioners' review of the Bureau of Land Management's ("BLM") decision to approve development of natural gas wells across an area of Sublette County, Wyoming. The Normally Pressured Lance Project ("NPL Project") was proposed by Jonah Energy LLC and its project area encompasses habitat for Greater sage-grouse. Petitioners argue the BLM did not consider or disclose significant environmental impacts of the project before authorizing the project, specifically, failing to consider the impacts to the sage-grouse in "winter concentration areas." The Petitioner's ultimately allege this failure to adequately analyze such impacts are in violation of the National Environmental Policy Act ("NEPA").

Petitioners moved to supplement the administrative record with a declaration by Dr. Clait E. Braun, which identifies relevant factors the BLM should have—but did not—consider before issuing a decision. Specifically, Petitioners argued the BLM violated NEPA regulations which establish procedures for how an agency is to proceed with incomplete information. Petitioners alleged their proposed supplementation would address the inadequacies in the BLM's decision by

> attesting (1) that this missing information on baseline habitat use and the impacts of gas field development in Winter Concentration Areas is "relevant to reasonably foreseeable significant adverse impacts" to greater sage-grouse, 40 C.F.R. § 1502.22(a); Exhibit A at ¶¶ 17-18, 29-37, 40; (2) that several methods existed for BLM to obtain this missing information at a non-exorbitant cost, 40 C.F.R. § 1502.22(b); Exhibit A at ¶ ¶ 31-32, 38-41; and (3) that an evaluation of such impacts was also possible based on "theoretical approaches or research methods generally accepted in the scientific community," 40 C.F.R. § 1502.22(b)(4).

(ECF No. 40, *Petitioners' Memorandum in Support of Motion to Supplement the Administrative Record.*)

Respondents BLM, Intervenor Jonah Energy LLC ("Jonah Energy"), and Intervenor State of Wyoming ("Wyoming") all opposed the Petitioner's motion to supplement the record for various reasons, many of which were overlapping. The BLM argued their decision relied on necessary research relating to the sage-grouse in the winter concentration areas, citing to eleven of the fifteen articles cited in the proposed supplemental declaration. The BLM acknowledged there was limited research on sage-grouse use of winter concentration areas within the NPL Project, but all necessary research was considered in their final decision to allow limited-scale development in those areas. Jonah Energy opposed the motion, arguing the Court should not consider the Declaration because it was not prepared until two years after the BLM's authorization of the project, and it only serves to dispute the BLM's decision. Wyoming opposed the motion on the basis that the supplementation is simply a competing expert opinion which challenges the BLM's use of scientific literature in making its decision on the NPL project. Finally, all Respondents joined in arguing the motion was untimely because Petitioners could have submitted the Declaration during the public comment yet failed to do so.

Taking all parties' positions into consideration, Magistrate Judge Rankin issued his order, granting in part Petitioner's request to supplement the record. (ECF No. 45.) Magistrate Judge Rankin found the Respondents' arguments colorable, but not sufficient to deny the request to supplement the administrative record with the Declaration. (*Id.* at 7.) Magistrate Judge Rankin came to this holding upon a finding that the "NEPA challenge is

based not on the substantive accuracy of the BLM's environmental assessment, but on a procedural failure—the failure to consider the impacts to sage-grouse." (*Id.* (citing *Colorado Wild v. Vilsak*, 713 F. Supp. 2d 1235, 1241 (D. Colo. 2010)). While agreeing with Respondents that much of the Declaration amounted to Dr. Braun's opinion disagreeing with the BLM's decision, Magistrate Judge Rankin found Petitioners "presented sufficient information showing that at least some of the Declaration attempts to address the alleged procedural failures by the BLM when considering the impact of the decision on the sage-grouse and the winter range." (*Id.* at 7.) Magistrate Judge Rankin then found the Declaration admissible only for the limited purpose of showing "either that the BLM's analysis was clearly inadequate or that the BLM improperly failed to set forth opposing views widely shared in the relevant scientific community," and not to provide an opposing expert opinion in opposition to the result of the BLM's NEPA process. (*Id.* at 8 (citing *Colorado Wild*, 713 F. Supp. 2d at 1241)).

Following Magistrate Judge Rankin's order, the Respondents BLM, Jonah Energy and Wyoming jointly requested a reconsideration of the order pursuant to 28 U.S.C. § 636(b)(1)(a) and U.S.D.C.L.R. 74.1(a). The Respondents argue Magistrate Judge Rankin's order adopts a NEPA exception permitting supplementation which the Tenth Circuit and the District of Wyoming have not yet adopted. (*See* ECF No. 46 at 2, 6, 7.) The Respondents further argue the order applies the NEPA exception inappropriately by allowing the Declaration which was prepared two years after the BLM issued its decision. (*Id.* at 7.) Respondents also reiterate the Declaration is an untimely expert opinion and, as it is written, the opinions cannot be segregated from the Declaration's allegations of the BLM's

procedural failures, as ordered by Magistrate Judge Rankin. (*Id.* at 10.) Finally, Respondents state the record relied on by the BLM already contains the studies on which the Declaration relies on, undercutting the notion that the supplementation contains "relevant factors" the BLM ignored in their decision. (*Id.*)

Petitioners oppose the request for reconsideration lodged by Respondents, arguing Respondents have not met the high burden to show Magistrate Judge Rankin's order is clearly erroneous or contrary to law. (ECF No. 47 at 2.) The Petitioners argue the Respondents mischaracterize the "NEPA exception" relied upon by Magistrate Judge Rankin, stating the NEPA exception is simply a restatement of the Tenth Circuit's "relevant factors" exception applied in a NEPA context. (*Id.* at 8.) The Petitioners highlight how the Tenth Circuit routinely applies the relevant factors exception in NEPA cases in the same manner Magistrate Judge Rankin applied it in this case. (*Id.* at 9.) Petitioners highlight how the BLM failed to analyze how the project would impact sage-grouse populations, arguing against Respondents' contention that the BLM adequately addressed the impacts of development in winter concentration areas. (*Id.*) Petitioner's further argue the Court is capable of limiting its review of the Declaration to determine whether the BLM ignored relevant factors in its decision. (*Id.*) Finally, Petitioners rebut the Respondents' claims of untimeliness, arguing until the decision was final, there was no reason for Petitioners to present the Declaration during the public comment period because the BLM indicated they were going to defer development approvals until further studies were conducted. (*Id.* at 11.) Petitioners also emphasize there is no rule against supplementation with post-decisional declarations prepared in anticipation of litigation. (*Id.*)

STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1)(A), a district "judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court," with limited exception. A judge of the court may "reconsider any pretrial matter under [Section A] where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." *Id.*; *see also* U.S.D.C.L.R. 74.1(a). A party has fourteen days after service of the magistrate judge's order to seek reconsideration on a non-dispositive matter. U.S.D.C.L.R. 74.1(a). Under the clearly erroneous standard, "the reviewing court must affirm unless it 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Allen v. Sybase, Inc.*, 468 F.3d 642, 658 (10th Cir. 2006) (quoting *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) (internal citations omitted). "Because a magistrate is afforded broad discretion in the resolution of non-dispositive discovery disputes, the court will overrule the magistrate's determination only if this discretion is abused." *Comeau v. Rupp*, 142 F.R.D. 683, 684-85 (D. Kan. 1992). It is with this standard in mind the Court considers Respondent's request.

DISCUSSION

"The Administrative Procedures Act governs judicial review of agency action, requiring a reviewing court to 'hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Biodiversity Conservation All. v. U.S. Forest Serv.*, No. 11-CV-226-SWS, 2012 WL 3265865, at *1 (D. Wyo. Jan. 4, 2012) (quoting 5 U.S.C. § 706(2)(A)). A district court's review of an agency decision is limited to determining whether the challenged

action or inaction meets the requisite standard based on the information and materials available to the agency at the time the decision was made. 5 U.S.C. § 706. An agency's action "must be reviewed on the basis articulated by the agency and on the evidence and proceedings before the agency at the time it acted." *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985). Consideration of extra-record materials is appropriate only in "extremely limited" circumstances. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (citing *Am. Mining Cong.*, 772 F.2d at 626). The Tenth Circuit has recognized five possible exceptions where a party may be allowed to introduce evidence from outside the agency's record:

> (1) that the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) that the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) that the agency considered factors that were left out of the formal record; (4) that the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) that evidence coming into existence after the agency acted demonstrates that the actions were right or wrong[.]

Am. Mining Cong., 772 F.2d at 626 (internal citations omitted).

The parties' fundamental disagreement condenses down to whether there is a distinction between the "NEPA exception" articulated by the District of Colorado in *Colorado Wild* and the "relevant factors" exception enumerated and adopted by the Tenth Circuit. *See id; see also Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004). Beyond that, the parties also disagree as to whether any "relevant factors" exception should be applied to this case, and what effect it might have. Respondents argue the "NEPA exception" has not been adopted by the District of Wyoming and is different from the Tenth Circuit's "relevant factors" standard articulated in *Lee*. (ECF No. 48 at 2.) Respondents contend Magistrate

Judge Rankin applied the "NEPA exception" and not the exception from *Lee*, and further, even *Lee's* standard does not support supplementing the record with such a Declaration. (*Id.* at 2-3.) Accordingly, Respondents ultimately argue Magistrate Judge Rankin's order is contrary to law. This Court disagrees.

The Court recognizes the Tenth Circuit and other circuits have a myriad of diverse opinions concerning whether and when supplementation of the administrative record is appropriate. Some circuits treat the "NEPA exception" the Respondents refer to, as its own exception separate and apart from the "relevant factors" exception articulated by the Tenth Circuit in *Lee*. *See e.g., Esch v. Yuetter*, 976 F.2d 976, 991 (2nd Cir.). However, the Tenth Circuit has not made such a distinction. And ultimately the characterization of the exception Magistrate Judge Rankin applied is not determinative on this Court's analysis of whether he committed clear error or his decision was contrary to law.

In *Lee*, the Tenth Circuit states,

> While judicial review of agency action is normally restricted to the administrative record, we have recognized that consideration of extra-record materials is appropriate in "extremely limited" circumstances, *such as where the agency ignored relevant factors it should have considered* or considered factors left out of the formal record. To be sure, where, as is often the case *in the NEPA context*, we are faced with an agency's technical or scientific analysis, an initial examination of the extra-record evidence in question may aid us in determining whether these circumstances are present. As a number of other circuits have explained, such an initial review may illuminate whether "an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug."

Lee, 354 F.3d at 1241 (internal citations omitted) (emphasis added). In applying the exception articulated in *Lee* to this case, Magistrate Judge Rankin held "at least some of the Declaration attempts to address the alleged procedural failures by the BLM when considering

the impact of the decision on the sage-grouse and the winter range." (ECF No. 45 at 8.) The Court finds this holding is not clearly erroneous or contrary to law.

Petitioners allege the BLM only cursorily acknowledged sage-grouse avoid oil and gas development in winter habitat, but it failed to address how exactly the project would impact the sage-grouse population specifically. (ECF No. 47 at 9.) This purported procedural failure highlights the possibility that the BLM could have ignored relevant factors it should have considered in rendering its decision. A supplementation highlighting these inconsistencies is consistent with *Lee's* reasoning which allows for an inquiry into factors the agency might not have considered. *See Lee*, 354 F. 3d at 1241. Whether Magistrate Judge Rankin relied on *Lee* or on *Colorado Wild*, which cites to and relies on Lee, is immaterial. Furthermore, whether the District of Wyoming should adopt or has adopted the particular application of the exception articulated in *Colorado Wild* is not for this Court's determination. The *Lee* case by itself supports Magistrate Judge Rankin's decision to permit the supplemental Declaration, especially considering the additional limitations he imposed. (*See* ECF No. 45 at 8.) Because *Lee* has not been overruled and is still precedential in the Tenth Circuit, the Magistrate court's reliance on it and its progeny from other district courts is not contrary to law.

Turning next to Respondents' concerns regarding the untimeliness of the post-decisional Declaration, the Court finds there is legal authority which supports such a supplementation. Respondents do not cite to any authority which prohibits supplementation with a Declaration simply because it was prepared after the agency decision. On the contrary, Petitioners cite to several district court cases within the Tenth Circuit which have allowed

such a supplementation. *See e.g. Colo. Wild*, 713 F. Supp at 1241-42, *Hayes v. Chaparral Energy, LLC*, No. 14-CV-495-GKF-PJC, 2015 WL 13627878 at *2 (N.D. Okla. 2015). This premise is consistent with the justification for the exception against supplementation articulated in *Lee*, as it would be impossible to articulate deficiencies in an agency's decision-making process until the decision was rendered. Therefore, the decision to admit a post-decisional expert declaration in this instance is not clearly erroneous or contrary to law.

CONCLUSION

In accordance with the foregoing discussion, the Court finds Respondents have failed to establish Magistrate Judge Rankin's *Order Granting, in part, Petitioners' Motions to Supplement the Administrative Record* (ECF No. 45) was clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A). Furthermore, Magistrate Judge Rankin did not abuse his discretion in permitting such a supplementation. Accordingly, it is hereby

ORDERED that Respondents' *Joint Request for Reconsideration* (ECF No. 46) is DENIED.

Dated this 6th day of January, 2021.

Scott W. Skavdahl
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UPPER GREEN RIVER ALLIANCE, WESTERN WATERSHEDS PROJECT, and CENTER FOR BIOLOGICAL DIVERSITY, Petitioners, vs. UNITED STATES BUREAU OF LAND MANAGEMENT and WILLIAM PERRY PENDLEY, in his official capacity as Deputy Director of the U.S. Bureau of Land Management, Respondents, and JONAH ENERGY, LLC and STATE OF WYOMING Respondent-Intervenors.	Case No. 2:19-CV-146-SWS

ORDER UPHOLDING AGENCY ACTION

This matter is before the Court under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, to review the Bureau of Land Management's approval of the Normally Pressured Lance Project ("NPL Project"). Respondent Jonah Energy proposed the NPL Project to extract natural gas resources on the sage-brush scrublands in northwest Wyoming. Petitioners contend the BLM acted arbitrarily and capriciously in approving the

project because the agency did not take a "hard look" at impacts to wildlife, particularly greater sage grouse and pronghorns. All parties have fully briefed the matter.[1] (ECF Nos. 52, 57, 58, 59, 62.)

On review, this Court determines the BLM complied with NEPA and the agency took a "hard look" at all potential environmental impacts. The agency properly considered several alternatives and responded to public comments throughout the administrative process. Accordingly, the Court affirms the BLM's decision approving the NPL Project.

FACTUAL BACKGROUND

a. Greater Sage Grouse Habitat

The greater sage grouse is a bird native to the western United States, including northwest Wyoming. (BLM126800.) The bird's survival is largely dependent on sagebrush, which is found throughout Sublette County, Wyoming, including the NPL Project Area.[2] (BLM126798.) Loss of sagebrush across the country has contributed to sage grouse population decline over the past century. (BLM126802.) However, the Upper Green River Valley in Wyoming attracts thousands of sage grouse every winter. (BLM127089.)

Sage grouse Winter Concentration Areas[3] ("WCAs") are places where groups of sage grouse congregate and live during the winter, primarily between early December and mid-March. (BLM128627.) Sage grouse prefer locations in the winter where sage brush

[1] The Court concludes oral argument would not materially assist in the consideration of this review. *See* Local Civil Rule 83.6(c). The Court carefully considered the parties' briefing and reviewed the thousands of documents comprising the administrative record. Consequently, the Court has all the information necessary to render its decision.

[2] The Project Area is an eleven-mile area considered the "analysis area" for the sage grouse population which may be affected by the NPL Project. (*See* BLM128401; BLM128627.)

[3] Governor Mead defined this term to recognize the unique nature of these wintering grounds to sage grouse. (Wyoming Executive Order 2015-4 at 5.)

grows higher than the snow and even though the WCAs are outside of primary sage grouse habitat, these areas are "important to maintaining sustainable Sage-Grouse populations." (BLM128628.) Any type of surface disturbance in WCAs is prohibited during the winter to protect the habitat for the sage grouse. (Wyoming Executive Order 2015-4 at 6–7.)

Sage grouse are sensitive to human activities, including oil and gas development. Sage grouse avoid wintering anywhere within 1.18 miles (1900 meters) of such activities. (BLM077925.) The greater the well pad density in an area, the less likely sage grouse will use that habitat during winter. (*See generally* BLM017143.) This avoidance could further decrease the Wyoming sage grouse population. (BLM 072677; *see also* BLM017105.)

Decline in the sage grouse population over the past century has sparked national conversations about protecting the species. In 2010, the U.S. Fish and Wildlife Service listed the greater sage grouse as "warranted, but precluded" in favor of higher priority species. 75 F. Reg. 13,910 (March 23, 2010). The primary threats to sage grouse were habitat loss and fragmentation, which were exacerbated by the lack of regulation to protect sage grouse. *Id.* In response to the "warranted, but precluded" designation, the BLM released a finalized list of amendments (2015 Wyoming Sage-Grouse Resource Management Plan Amendments) to protect sage grouse habitat. (BLM139375; BLM139384.)

The 2015 Wyoming Sage-Grouse Resource Management Plan Amendments ("RMP") designated "priority" and "general" habitat management plans for sage grouse, including additional protective measures. (BLM139457; BLM139469.) A priority habitat management area ("PHMA") is one with the "highest conservation value to maintaining or

increasing sage grouse populations." (BLM139469.) These PHMAs do not include WCAs. The only protection required by the RMP in WCAs is a prohibition on surface disruption during the winter, when sage grouse use the habitat. (BLM139410.) Any additional protection measures for WCAs are determined as needed in consultation with the Wyoming Game and Fish Department ("WGFD"). (BLM139410.)

The RMP also requires phased development for any oil and gas exploration within sage grouse habitat. (BLM139502–04; BLM053287.) This is a protective measure known as a required design feature ("RDF") enumerated in the RMP. (BLM053287–88.) However, an RDF is not required if either: (1) it is not applicable to the site-specific conditions of the project or (2) an alternative protective measure is determined to provide equal or better protection to sage grouse or its habitat. (BLM053287.)

b. Pronghorn Migration

The pronghorn is an ungulate native to North America, found throughout the western United States. (BLM078857.) This case specifically analyzes the impacts to the Sublette Pronghorn Herd Unit (Herd Unit 401) which includes most pronghorn in Western Wyoming. (BLM128610.) Herd Unit 401 is found in and around the Project Area.[4] (*Id.*) Pronghorn located in Grand Teton National Park make a yearly migration through the Upper Green River Valley and Bridger-Teton National Forest. (BLM078859; BLM061274; BLM081323; BLM082388; BLM128610–11.) This migration, known as "Path of the Pronghorn," follows a 6,000-year-old migration corridor extending between

[4] Herd Unit 401 is a WGFD-designated population. (BLM128610.) The NPL Project Area falls entirely within Herd Unit 401 management area. (*Id.*)

100 and 150 miles through north-west Wyoming. (BLM078857; BLM078859; BLM133184; BLM133184.) During this migration, pronghorn traverse the route over the course of three days. (BLM078859.) In the spring, the pronghorn travel the same route at a slower pace to return to Grand Teton National Park. (*Id.*) The Path of the Pronghorn is designated as a protected national migration corridor[5] by the U.S. Forest Service, although the protection does not extend to the Upper Green River Valley, where the NPL Project would be located.[6] (BLM081401; BLM078890.)

The Path of the Pronghorn is the only remaining route for pronghorn in Grand Teton National Park to reach the Upper Green River Valley. (BLM078859.) There are no alternate migratory routes available for these pronghorns. (*Id.*) "Development in crucial winter range and migration routes could . . . eliminate the herd's migration memory and break the tradition of migration to the most suitable winter habitats, thus reducing the viability of pronghorn Herd Unit 401 in perpetuity." (BLM128980.) The Path of the Pronghorn runs through part of the NPL Project Area. (BLM130957.)

Although studies on this topic are limited, research indicates pronghorn are sensitive to oil and gas development and this development can hinder pronghorn movement and

[5] WGFD does not use the term "migration routes" and the BLM properly included suggestions from state agencies like WGFD when adopting these same designations. (BLM128611; BLM076835–36); 40 C.F.R. § 1501.8. "Migration corridors are areas of the landscape that a substantial portion of the herd or herd segment uses consistently to move between seasonal habitats." (BLM128611 at n. 35.) Migration routes are a term used by the BLM to "identify migration pathways consistently used by wildlife to make seasonal movements between winter and summer ranges." (*Id.*) Migration corridors are an official WGFD designation, while migration routes are not. (*Id.*) The WGFD submitted a comment after the draft EIS was released, clearing up this confusion and specifying the difference between routes and corridors. (BLM076836.)

[6] The federal protection does extend to one specific area in the Upper Green River Valley: 9,500 acres at Trapper's Point are designated as an Area of Critical Environmental Concern. (BLM134805.) To protect this area, two highway overpasses and six underpasses are located in this area to eliminate threats to Pronghorn passing through the Highway 191 corridor. (BLM007286.)

migration. (*See* BLM133428; *see* also BLM133462; BLM133503.) Pronghorn tend to avoid areas of oil and gas development by approximately 0.25 to 0.6 miles and avoid well pads within 100 meters. (BLM072696.) When pronghorn encounter development along migration routes, they may avoid these areas entirely, which can negatively impact foraging opportunities. (BLM127302; *see* BLM061274–75.) Oil and gas development along pronghorn migratory routes has the potential to significantly diminish the health of a herd. (BLM126616; *see* BLM 061274–75.)

c. Normally Pressured Lance Project

Respondent-Intervenor Jonah Energy ("Jonah") submitted a proposal to extract natural gas resources from certain areas of its federal leases in Wyoming. (BLM128268–69.) The NPL Project Area, spans approximately 140,859 acres in Sublette County, Wyoming. (BLM128193) Currently, there are about 116 total wells already drilled within the Project Area, including fifty-five natural gas wells. (BLM128268.) The NPL Project would be located near two existing development projects: the Jonah Infill Development Project and the Pinedale Anticline Project. (BLM 127835.) The proposal requests permission to begin the project using delineation wells to determine the extent of the natural gas resources in the NPL project area, because no similar exploration has been done.[7] (BLM128301) Ultimately, Jonah plans to drill up to 3,500 directionally drilled natural gas wells using multi-well pads in the NPL Project Area. (BLM128193.) The proposal includes plans to develop up to 350 new wells per year, including the necessary

[7] Jonah plans to use the information from the delineation wells as a basis for potential future development. (BLM128301.)

facilities, such as well pads, access roads, and pipelines. (*Id.*) The NPL Project development phase would span ten years, but the overall production phase would be thirty years. (BLM043705.) Jonah estimates the total lifespan of the NPL Project to be forty years. (BLM127835.)

The NPL Project Area is primarily sagebrush scrubland. (ECF No. 15 at 2; BLM128627; BLM128564.) The State of Wyoming effectively owns the pronghorn and sage grouse species (as it does all wildlife) within the NPL Project Area. Wyo. Stat. Ann. § 23-1-103 (2021). The State's goal is providing "an adequate and flexible system" to manage wildlife. *Id.* Wyoming prioritizes wildlife protection by maintaining habitat functionality through avoidance and minimization. (BLM000712). WGFD places special emphasis on big game crucial winter ranges and sage grouse nesting and brood-rearing habitats. (*Id.*)

The NPL Project Area includes three non-WGFD pronghorn migratory routes and "areas of active migration," including the Path of the Pronghorn, used by the Grand Teton Herd. (BLM129017–18; BLM128610–11; BLM130957; BLM130969.) Importantly, there are no WGFD-designated pronghorn migration corridors in the NPL Project Area. (BLM128611.) Two herds of pronghorn were recorded using the NPL Project Area in 2010. (BLM128610.) The BLM acknowledged the project area contains approximately 20,800 acres of pronghorn crucial winter range.[8] (BLM129017.) However, the Project Area includes areas that are important to pronghorn year-round. (BLM128972.)

[8] Pronghorn crucial winter range are areas designated by the WGFD as areas that are a determining factor to the pronghorn population's long-term survival. Julie Young, et al., *Wildlife and Energy Development Pronghorn of the Upper Green River Basin – Year 3 Summary*, WILDLIFE CONSERVATION SOCIETY (July 2008).

Sage grouse also have substantial habitat in the Project Area, including nesting ground, leks,[9] and WCAs. (BLM 128481; BLM128501.) The Project Area includes Wyoming's largest concentration of wintering sage grouse. (*Id.*)

d. Public Input on the NPL Project

On February 27, 2008, the BLM began scoping[10] for the NPL Project proposal. (*See* BLM000472). On March 28, 2008, the BLM received a comment from the WGFD, asking the BLM to analyze WGFD recommendations. (BLM000701.) The WGFD included a copy of "Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats" in their comment. (BLM000701; BLM000705.) These recommendations were compiled by senior wildlife biologists, utilizing available scientific data, and are intended to "avoid, minimize, and mitigate actual and anticipated impacts to habitat functions resulting from large-scale oil and gas development." (BLM000706–07.)

In April 2011, the BLM opened up a public comment period to gain a better understanding of the issues the environmental impact statement ("EIS") should address. (BLM043669.) This scoping period included three scoping meetings in Wyoming for the

[9] Male sage grouse are best known for mating display dances performed every spring in various "leks." A lek is a "bare area where male Sage-Grouse perform courtship displays to attract females." (BLM128628.) A lek is considered active if it is used by a male sage grouse during mating season. (*Id.*) There are fifty-six leks within eleven miles of the Project Area, forty-four of which are considered occupied. An occupied lek is one where a male has been active during at least one mating season in the past ten years. (BLM128628.) Within the NPL Project Area, there are ten occupied leks. (*Id.*)

[10] Scoping is the process by which the BLM identifies "planning issues that should be considered in the land management plan" and then "analyzes these issues and uses them to develop a range of alternative management strategies." *Public Involvement*, BUREAU OF LAND MANAGEMENT, https://www.blm.gov/programs/planning-and-nepa/public-participation (last visited Jan. 19, 2022).

public to come and voice concerns. (*Id.*) In response, the BLM received several comments expressing concern[11] about the project, including:

a. A comment from the National Park Service, noting the oil and gas development may prevent pronghorn from following the migration route and returning to Grand Teton National Park. (BLM004546.) This comment requested the EIS analyze how the NPL Project would affect the Grand Teton Pronghorn herd. (BLM004547.)

b. Comments requesting phased development and drilling (BLM004887; BLM079468.)

c. A general comment expressing concern for the NPL Project's impacts on pronghorn migration. (BLM003888–89.)

d. Comments requesting directional drilling to protect migratory routes, including Path of the Pronghorn (BLM007149; BLM007289; BLM079468.)

e. Comments expressing concern about the impact to sage grouse habitats and requesting buffers between well sites and leks. (BLM004887; BLM007149; BLM079468; BLM003888.)

As a part of the review, BLM conducted surveys to determine sage grouse wintering grounds within the NPL Project Area, but those surveys did not provide a complete picture of sage grouse wintering habits because they were only conducted during a short time frame. (BLM 008132; BLM 017185.) This short time frame was a "flight day."

[11] From the 1,238 comments and concerns received during the scoping period, the BLM identified 29 issue statements, which it used to develop the scope of the EIS. (BLM043669.) The relevant issue statements to this case include: (1) "Will the NPL Project affect special status species and their habitat?"; (2) "To what extent should the BLM limit surface disturbance within the project area"; and (3) "How will the NPL Project affect wildlife and habitat?" (BLM043670; BLM043778.)

(BLM008132.) "Flights represent a 'one shot in time' assessment of where wintering birds are located on the flight day and do not encompass where [sage grouse] are located throughout the winter." (*Id.*)

In March 2015, the BLM and the WGFD recommended the state protect certain "core areas" of designated sage grouse habitat by limiting surface disturbance to 5%.[12] (Wyoming Executive Order 2015-4 at 5.) The State found the necessary protections could be adequately determined through the NPL Project environmental review. (*See id* at 6–7, 14.)

e. Draft Environmental Impact Statement

In July 2017, the BLM released the Draft EIS for further public review and comment. (BLM043666). The Draft EIS introduced four possible alternatives for the project: (1) a "no action" alternative; (2) "proposed action" alternative, i.e., the NPL Project submitted by Jonah; (3) Alternative A, which addressed sensitive wildlife resources, and (4) Alternative B, which addressed concerns to conserve a broad range of resource values and constrain development to the least environmentally sensitive areas. (BLM043672–73.) Alternative B was the BLM's preferred alternative. (*Id.*)

The BLM also considered nine additional alternatives that were ultimately eliminated before the BLM conducted a detailed analysis. (BLM 043676.) One of these alternatives focused on additional protection measures for sage grouse WCAs. (*Id.*) The

[12] Despite requests to recognize the importance of "core areas" of sage grouse habitat, the State of Wyoming declined to issue a blanket protection over these areas. (*See* BLM127089; *see also* BLM015584.)

BLM eliminated this alternative because it "would not be technically or economically feasible." (*Id.*)

The BLM determined the proposed action would potentially directly impact wildlife because of short-term and long-term surface disturbance. (BLM043697.) Alternative A slightly decreased these impacts by reducing surface disturbance by 4.2% and reducing access roads by approximately twelve miles. (*Id.*) Alternative B resulted in even greater reduction of surface disturbance (7.9%) and reduced "density of development" in the first development area. (*Id.*) Alternative B also included twenty-two fewer miles of access roads. (*Id.*)

The BLM found these same impacts on Big Game, including pronghorn. (BLM043698.) The proposed action would result in several indirect impacts on the pronghorn population, "including habitat loss, fragmentation, increased avoidance by and displacement of individuals and groups, decreased habitat quality, and migration disruptions[.]" (*Id.*) In addition to the impacts discussed for wildlife generally, Alternative A would limit the "density of development and reduced surface disturbance in pronghorn crucial winter range in [specified development areas within NPL Project Area.]" (*Id.*) Alternative B also included the same reductions in surface disturbance and access roads noted above, but also decreased development in a "more clustered pattern[.]" (*Id.*)

The Draft EIS also acknowledged the Grand Teton Pronghorn Herd (Herd 401) and its reliance on the NPL Project Area. (BLM044132.) The EIS noted Herd 401's unique migration route and recognized that three pronghorn migration routes cross the analysis

area. (BLM044133.)[13] "Habitats associated with the [NPL Project Area] are important to pronghorn year-round, including during migration, when large herds of species are moving long distances between seasonal ranges." (*Id.*) The Draft EIS identified Highway 191 as a current barrier to pronghorn migration—pronghorn may use the NPL Project Area to migrate to seasonal ranges to avoid crossing Highway 191. (*Id.*)

Turning to greater sage grouse specifically, the Draft EIS noted the species could be impacted by the proposed action, including by habitat loss and degradation, although this impact would be least severe within the Sage-Grouse PHMA. (BLM043700–01.) The proposed action could increase sage grouse mortality because of "decreased quantity and quality of suitable habitat, increased avoidance and displacement, [and] increased habitat fragmentation[.]" (BLM043701.) Even following the BLM Wyoming Sage-Grouse RMP Amendments, development and surface disturbance could still adversely affect the sage grouse population within the Sage-Grouse PHMA. (*Id.*)

Under Alternative A, short term surface disturbance affecting sage grouse would increase because of the buried pipelines and overall, the effects on sage grouse under Alternative A would be similar to the Proposed Action. (BLM043702.) Under Alternative B, surface disturbance would be reduced, and a clustered pattern of development areas would result in fewer disturbance locations overall. (*Id.*) Short term adverse impacts to the sage grouse population may increase under Alternative B, but ultimately result in reduced long term adverse effects. (BLM 043703.)

[13] The Final EIS confirmed this statement. (BLM130957; BLM130969.)

The Draft EIS stated the NPL Project "could result in decreased quantity and quality of suitable breeding, wintering, and foraging habitat for Sage-Grouse, resulting from surface disturbance, vegetation clearing, and other project related activity[.]" (BLM043705.) The EIS noted the adverse impacts "could persist for up to 40 years[.]" (*Id.*) The degradation of sage grouse habitats, including sage grouse winter habitats within the NPL Project Area, could impact sage grouse life cycles and populations in Wyoming. (BLM043706.)

After the BLM released the Draft EIS, it opened up the public comment period again for another forty-five days. (BLM043667) The public response focused on the Draft's lack of analysis on any effects to the Grant Teton pronghorn herd's migration routes. (BLM 077006; 077012–13; BLM076754; BLM080028; BLM076986). Comments also recognized the Project's potential to disturb wintering sage grouse. (BLM077009–12; 076758–59.) Other comments requested the BLM to consider a phased drilling alternative. (BLM076987; BLM 079467–68.)

The BLM received a comment from the WGFD asking for a more careful delineation between pronghorn migration corridors and routes. (BLM076836.)

> While we appreciate the effort to protect migrating pronghorn, placing excessive protections on individual pronghorn migration routes [such as those non-WGFD migration routes in the Project Area[14]] may hamper our efforts to designate corridors elsewhere in the state that may be more important to pronghorn populations overall. The Department would prefer that the project be designed so that pronghorn movement patterns are not constricted in the project area, rather than trying to compensate for impacts to routes of individual animals.

[14] WGFD uses the term "migration route" to identify specific paths used consistently by individual animals making seasonal movements, while migration corridors are used by a "substantial portion of the herd[.]" (BLM076835–86.)

(*Id.*)

f. Final Environmental Impact Statement

After considering the second round of comments, in June 2018, the BLM published the Final EIS. (BLM128191.) Similar to the Draft EIS, the Final EIS included four potential alternatives: (1) No Action; (2) Proposed Action; (3) Alternative A; and (4) Alternative B. (BLM128197–98.) However, in contrast to the Draft EIS, the Final EIS included two potential scenarios under Alternative B. (BLM129198.) Alternative A was still listed as an alternative developed to address sensitive wildlife resources. (BLM129197.) This alternative ended with the same number of wells but changed the location, timing, and pattern of development and drilling. (*Id.*) The Project Area would be divided into several development areas ("DA"), and the development in each DA would be driven by the "presence or absence of delineated wildlife habitats[.]" These adjustments would lengthen the development time period for the NPL Project, because less wells would be drilled each year. (*Id.*) Development would be completed sequentially in three phases overall, with development in the sage grouse PHMA divided into further phases. (*Id.* at BLM128197–98.)

Alternative B was still listed as the BLM preferred alternative and attempted to conserve a broad range of resources and restrict development to the least environmentally sensitive locations within the Project Area. (BLM128198.) Alternative B focused on conservation overall, rather than on the wildlife specifically. (*Id.*) The project under Alternative B would include the same number of wells, but certain DAs would have reduced density of development to "reduce impacts to a range of sensitive resources in this

area." (*Id.*) In addition, the BLM considered two potential development scenarios within this alternative: Scenario 1, which would utilize a seasonal timing limitation on development during the sage grouse wintering period, and Scenario 2, which would utilize the same seasonal timing limitation but also add a disturbance threshold "and other measures" to reduce environmental impacts. (*Id.*)

The Final EIS noted pronghorn were present in the NPL Project Area year-round but some "20,688 acres of crucial winter/year-long habitat, essential for the long-term viability of the population, are located throughout the north-central portion of the Project Area, with additional smaller areas along the southwestern Project Area boundary[.]" (BLM128610.) Pronghorn in the Project Area make a uniquely long migration through the Upper Green River Basin, traveling between seventy-two and one-hundred sixty miles. (BLM128611.) And while there are three total pronghorn migration routes that pass through the Project Area, none of these are WGFD-designated pronghorn migration corridors. (*Id.*) The Grand Teton Herd does utilize winter ranges within the Project Area. (*Id.*) The Final EIS did acknowledge "[d]egradation of seasonal habitat and disruptions in migratory routes . . . are of particular concern for pronghorn due to the presence of crucial winter range . . . and the presence of migration routes that connect pronghorn crucial winter range and other pronghorn habitats in the analysis area and the region." (BLM128980.)

The EIS also noted that, while drilling would be prohibited in the crucial winter ranges from November 15 through April 30, surface disturbance could still affect migration routes. (*Id.*) Because of these possible adverse effects "Jonah Energy has committed to work with the BLM, the WGFD, and other stakeholders to better understand and, if

possible, preserve migration routes in the Project Area, and would avoid activities and facilities that create barriers to the seasonal movements of all big game, including pronghorn[.]" (*Id.*) However, the NPL Project could reduce "the viability of the pronghorn Herd Unit 401 in perpetuity." (*Id.*)

The Final EIS included a phased development pattern in Alternative A, which would reduce potential impacts to pronghorn. (BLM129003.) Overall, Alternative A would reduce impacts to pronghorn migration and crucial winter range, as compared to moving forward with the NPL Project as proposed. (*Id.*) Under Alternative B, the impacts to pronghorn migration would be the same as moving forward with the NPL project as proposed. (BLM129018.) The proposed action (and alternatives) would be unlikely to result in direct adverse impacts to migration corridors and migration bottlenecks[15] because there are no bottlenecks within 6.2 miles of the Project Area. (BLM128878.)

Turning to the sage grouse, the EIS noted the grouse can be found in the NPL Project Area at all times of the year and that 34% of the Project Area includes PHMA. (BLM128627.) Overall sage grouse populations in Wyoming have declined since 1960, but peak male lek attendance has risen each year since 2013. (BLM128624.) Sage grouse populations are in decline across the country largely due to human activities including "disturbance due to oil and gas development." (BLM128626.) "Research has shown that functional habitat loss occurs due to human activities, including noise, which cause Sage-Grouse to avoid areas even when sagebrush remains intact[.]" (*Id.*) The Final EIS used a

[15] A bottleneck is "any portion of a . . . migration corridor where animals are significantly physically or behaviorally restricted." Wyoming Executive Order 2020-1 (Feb. 13, 2020) (defining bottlenecks in the context of mule deer and antelope).

density disturbance calculation tool to calculate approximately .55% of PMA in the NPL Project Area already has existing surface disturbance. (BLM128629.)

A two-mile radius buffer from any noise or drilling activities around known leks is necessary to ensure sage grouse attendance. (BLM128500.) When there is noise from drilling or road activity within two to three miles of a lek site, male sage grouse avoid the leks. (*Id.*) Because there were ten known leks within the NPL Project Area, noise must stay below 10dBA about the existing baseline noise level to conform with the Wyoming Sage-Grouse RMP Amendments. (BLM128501.)

Next the Final EIS recognizes, while there is potential for impacts on wintering sage grouse, those impacts "are not well understood" due to "limited research[.]" (BLM128302.) To attempt to mitigate this limited knowledge, the BLM would conduct a study "concurrently with development activities to better understand the impacts of developing in Winter Concentration Areas." (*Id.*) This study "would inform analysis during site-specific NEPA reviews." (*Id.*) Additionally, for all alternatives considered, "the BLM would defer authorizing development in Winter Concentration Areas until additional research is conducted to better inform the appropriate level of development, potential impacts, and appropriate mitigation[.]" (BLM128994.)

Moving on to discuss the impact of the NPL project on sensitive species, the Final EIS points out male lek attendance declines "up to four miles from oil and gas well surface locations" and in some cases may be even greater than four miles. (BLM128975.) The document also notes the highest concern for pronghorn is degradation of seasonal habitat and the potential for disruption to the migratory route. (BLM128980.) The NPL Project

would likely cause "displacement and disrupt [pronghorn] migration patterns" within the Project Area. (*Id.*) "Although the BLM prohibits the development of new wells in pronghorn crucial winter range from November 15 to April 30, drilling and other surface-disturbing activities could occur in areas outside of designated range, including migration routes." (*Id.*) However, the Wyoming RMP Amendments would prohibit any drilling from December 1 through March 15, which would "minimize potential impacts to overlapping pronghorn migration routes from the [NPL Project] during the wintering period." (*Id.*)

After the Final EIS was released, the BLM opened it to public comment for thirty days. (BLM127870.) The BLM received nine comment letters during the thirty-day period and one additional comment letter shortly after the comment period closed. (*Id.*) These comments included input on development in Winter Concentration Areas and concerns about how the NPL Project would affect pronghorn and sage grouse. (*Id.*)

g. Record of Decision

The BLM ultimately adopted Alternative B in the Record of Decision ("ROD"), released in August 2018. The process from proposal to decision took ten years. Overall, this alternative was the best choice to avoid and reduce impacts to the environment and sensitive wildlife while still allowing for recovery of natural gas resources. (BLM127865.) The decision required the project area be divided into three development areas ("DAs"), requiring different development density in each DA. (BLM127836.) DA 1, which includes WCAs and pronghorn habitat, is limited to an average of one disturbance location per 640 acres. (BLM127837.) DA 3, which includes sage grouse PHMA, has the same density

disturbance limit as DA 1. DA 3 also restricts total disturbances to 5% surface disturbance per 640 acres, including existing disturbances. (BLM127838.)

Specifically, the BLM authorized Scenario 1 of Alternative B, outlined in the Final EIS. (BLM127844.) Scenario 1 allows for a concurrent study with limited development in WCAs, in order to improve limited research in the area. (BLM127843.) Scenario 1 also applies seasonal timing limitations on development in the winter, to conform to the RMP amendments. (BLM127844.) However, the decision may be adapted for Scenario 2, based on the results of the study. (*Id.*)

Jonah Energy is allowed to move forward on NPL Project only by complying with a long list of resource protection measures, listed in Appendix A of the Record of Decision. (BLM127854.) Besides the measures already discussed specific to Alternative B, Scenario 1, the additional resource protection measures include: (1) limiting drilling activities and surface use during winter migratory periods and big game birthing areas and (2) requiring Jonah to avoid activities and facilities that prevent seasonal big game migration. (BLM127897.)

The decision also incorporated several restrictions to protect sage grouse leks, sage grouse habitat, and WCAs. (BLM127841.) As a baseline requirement, "development will be consistent with the BLM Wyoming Sage-Grouse RMP Amendments[.]" (BLM127897.) This includes noise level constraints, limits on road construction, buffer perimeters to development around leks, and limits on development during winter months. (BLM127841–42.) The final decision incorporated "goals, objectives, management decisions, and

required design features from the BLM Wyoming Sage-Grouse RMP Amendments." (BLM127866.)

PROCEDURAL BACKGROUND

Petitioners originally filed a complaint in the United States District Court for the District of Idaho on April 30, 2018. (ECF No. 1.) The complaint included several contentions with BLM action and the effect on sage grouse habitat, including those before this Court. (*See* ECF No. 2.) The District of Idaho severed all claims related to the NPL project, pursuant to F.R.C.P. 21. (*Id.* at 6.) The court transferred all NPL claims to the District of Wyoming because the project was more closely connected to Wyoming and "Wyoming's interests predominate over Idaho's." (*Id.* at 17–18.)

On July 15, 2019, all NPL claims were transferred to this Court. (ECF No. 1.) On February 19, 2020, Petitioners filed an *Amended Petition for Review*. (ECF No. 15.) After several months of supplementing the administrative record, Petitioners filed their *Opening Merits Brief* (ECF No. 52) on April 8, 2021. Respondent filed its brief in opposition on June 23, 2021 (ECF No. 57) and Respondent-Intervenors each filed respective response briefs as well (ECF No. 58; ECF No. 59). Petitioners filed a reply brief on August 20, 2021. (ECF No. 62.) The matter is now ripe for consideration.

PETITIONER'S ARGUMENTS

Petitioners make two main arguments against the BLM's ROD. First, they argue the BLM violated the National Environmental Protection Act by failing to take a "hard look" at the consequences of the project. (ECF No. 52 at 33.) This includes the BLM's alleged failure to consider reasonable alternatives to the project. (*Id.*) Within this argument,

petitioners assert three sub-arguments: (1) BLM failed to consider the NPL Project's impact on the Path of the Pronghorn and the pronghorn herd in Grand Teton National Park; (2) BLM failed to consider reasonable proposed alternatives to protect the Path of the Pronghorn and other similar migratory routes through the NPL Project Area; and (3) BLM failed to take a "hard look" at the NPL Project's potential negative impacts to the Wyoming sage grouse population. (*Id.* at 34, 30, 49.) Second, the BLM violated FLPMA by disregarding the 2015 Sage Grouse RMPs.

Petitioners assert the final EIS did not analyze how the NPL Project could potentially eliminate the pronghorn from Grand Teton National Park. (*Id.* at 32.) While the EIS did acknowledge the NPL Project could impact pronghorn winter ranges and "migratory routes generally," it failed to analyze the significance of the Path of the Pronghorn as one of the "few remaining long-distance migrations in the world[.]" (*Id.* at 35–36.) The impacts on this migratory route could have "'indirect recreational and ecological effects on Grand Teton National Park, which the EIS also fails to acknowledge." (*Id.* at 38.) The EIS should have specifically analyzed the Path of the Pronghorn and the impacts on Grand Teton National Park separately, rather than focusing on the Sublette pronghorn herd generally. (*Id.* at 39–40.)

Petitioners also take issue with BLM's failure to consider proposed alternatives to protect the Path of the Pronghorn and other migratory routes. (*Id.* at 40.) Comments suggested buffer zones to development along migratory routes. (*Id.* at 40 (citing BLM080028; BLM079469)). None of the alternatives identified in the EIS absolutely prevented development along migratory routes, "much less a buffer zone around them."

(*Id.* at 42.) The two alternatives either prevented any action altogether or only gave the "mere possibility of voluntary protection of migratory routes" which was unreasonably narrow. (*Id.* at 43.) This narrow analysis and failure to address why other alternatives were not included in the EIS was a violation of NEPA's "hard look" standard. (*Id.* at 44.) Ultimately, the EIS limited the range of alternatives and failed to give adequate explanation for this unreasonable limit. (*Id.* at 48.)

The third sub-argument focuses on the BLM's failure to consider all reasonably foreseeable impacts to the sage grouse WCAs. (*Id.* at 49.) Petitioners argue the BLM lacked sufficient baseline data to even analyze the impacts to these areas, and failure to collect this data violated the BLM's obligations under NEPA. (*Id.*) Even after acknowledging the lack of data in this area, the best the EIS did was promise a concurrent study on the effects of sage grouse in conjunction with approval of the NPL Project. (*Id.* at 50–51.) The BLM could not adequately assess the effects on sage grouse WCAs in the EIS because it did not have the data to do so. (*Id.*) The limits to disturbance location density adopted by the ROD could still allow for significant impacts to WCAs. (*Id.* at 52.) The BLM ignored the incomplete information on sage grouse, even though it was relevant to reasonably foreseeable effects of the NPL Project. (*Id.* at 55.)

Second, Petitioners argue BLM violated the Federal Land Policy and Management Act ("FLPMA") by failing to comply with the 2015 RMP Amendments. (*Id.* at 58.) FLPMA requires the BLM to implement all activities in accordance with governing RMPs, including the 2015 Sage Grouse RMP. (*Id.* at 58.) The 2015 RMP requires the NPL Project to implement a phased development approach but the BLM rejected this alternative. (*Id.* at

59–60.) The NPL Project ROD gives a blanket statement that it is in conformity with the 2015 RMP but never discusses the phased development requirement. (*Id.* at 60.) This was a clear violation of FLPMA's requirements and failure to conform renders the NPL ROD void. (*Id.* at 62.) Respondents assert various counter-arguments in three separate briefs. (ECF No. 57; ECF No. 58; ECF No. 59.) These counter-arguments will be addressed as relevant.

LEGAL STANDARD

1. The Administrative Procedure Act

The Administrative Procedure Act (APA) governs this review. *See* 5 U.S.C. § 702; *see also Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 882–83 (1990) (reiterating that NEPA does not provide a private right of action). The review in this case is sought under the general review provisions of the APA, and so the agency action at issue must be a final action. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Section 706 of the APA guides this Court's analysis of the issue. 5 U.S.C. § 706. The reviewing court must set aside the agency action if it was arbitrary, capricious, an abuse of discretion, or disregarded the law. *Id.*

An agency action is arbitrary and capricious if: (1) the agency relied on factors not enumerated by Congress; (2) did not consider an important aspect of the problem; (3) offered justifications for the action that were contrary to the evidence; or (4) is so implausible that it cannot be attributed to differing opinions or levels of expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court uses the administrative record for a factually exhaustive but legally narrow

review. *Biodiversity Conservation Alliance v. Bureau of Land Management*, No. 09-CV-08, 2010 WL 3209444, at *5 (D. Wyo. June 10, 2010).

The reviewing court determines whether the agency considered all relevant factors and made a clear error of judgment. *Biodiversity Conservation Alliance*, No. 09-CV-08, 2010 WL at *4. The agency's determination must be supported by facts on the record—there must be a rational connection between the facts and the agency's decision. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (1994). Using a substantial evidence standard of review, the court determines whether there is enough evidence that a reasonable mind might find support the agency's decision. *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003). Evidence may be considered substantially in support of the agency's decision, even if there is also evidence to support a contrary decision. *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1241 (10th Cir. 2000) ("the mere presence of contradictory evidence does not invalidate the Agencies' actions or decisions"). However, the court is not permitted to use post hoc justifications for the agency's decision or substitute its judgment for that of the agency. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *see Schneider v. Nat'l, Inc. v. Interstate Commerce Comm'n*, 948 F.2d 338, 343 (7th Cir. 1991).

2. National Environmental Protection Agency

The National Environmental Protection Agency ("NEPA") exists "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). NEPA's purpose is twofold. "First, it places upon an

agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

To ensure compliance with NEPA, all agencies of the federal government are required to provide a detailed environmental impact statement on any major federal action which significantly affects the quality of the human environment. 42 U.S.C. § 4332(C). "The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s). 40 C.F.R. § 1502.15. The agency should focus on important issues rather than "useless bulk in statements." *Id.* An environmental impact statement should be followed by a record of decision, stating the decision and all considered alternatives. 40 C.F.R. § 1505.2. The record of decision must also state "whether the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not." *Id.*

Under NEPA, the record of decision will be arbitrary and capricious if the agency did not take a "hard look" at all relevant information when making the decision. *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 704 (10th Cir. 2009). Importantly, NEPA does not require certain outcomes or any specific substantive action by the agency. *Id.* The agency only requires procedural steps and "merely prohibits uninformed—rather than unwise—agency action." *Id.* (quoting *Robertson v. Methow*

Valley Citizens Council, 490 U.S. 332, 351 (1989). The agency's decision is presumptively valid and the party challenging the decision has the burden of proof. *Citizens' Committee to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008). The reviewing court must differentiate between actual deficiencies in the agency's analysis which affected the informed decision-making process and "mere flyspecks[.]" *Utahns for Better Transp. V. U.S. Dept. of Transp.*, 305 F.3d 1152 (10th Cir. 2002). "Agencies are not required to elevate environmental concerns over other valid concerns." *Cure Land, LLC v. United States Dep't of Agriculture*, 833 F.3d 1223, 1235 (10th Cir. 2016) (internal citations and quotations omitted).

STANDING

Petitioners assert they have standing (ECF No. 52 at 32), and Respondents do not contest this issue. To show they have standing, petitioners must have suffered a concrete and particularized injury that is actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Petitioners also must show the injury is "fairly traceable" to the respondent's action and this injury can be addressed through a favorable judicial decision. *Id.* Petitioners allege and establish such injuries which are fairly traceable to the BLM's ROD for the NPL Project and would be redressable by this Court. (*See* ECF No. 52 at 32; *see also* ECF No. 52-1; ECF No. 52-2; ECF No. 52-3; ECF No. 52-4.) Accordingly, the Court concludes Petitioners have standing to challenge this action.

ANALYSIS

1. Pronghorn

a. BLM Did Not Fail to Consider the Project's Impacts on the Path of the Pronghorn and Grand Teton National Park.

Petitioners argue the Final EIS only included three sentences acknowledging the pronghorn "make some of the longest seasonal migration movements documented for the species." (ECF No. 52 at 36 (quoting BLM128611)). The EIS did not identify specific migratory routes, map out the winter ranges used by Herd 401, or analyze adverse effects of the project to Herd 401 and its migration routes. (ECF No. 52 at 36.) The BLM also failed to discuss the downstream, indirect effects of the loss of Herd 401. (*Id.* at 38.) The BLM was required to consider such effects under 40 C.F.R. § 1508.8.[16] Respondents argue the Path of the Pronghorn does not run through the NPL Project Area. (ECF No. 57 at 14 (citing BLM128611)). Furthermore, Petitioners cannot point to any ways a mandatory buffer zone alternative would have better protected migratory routes. (*Id.*) The BLM did briefly consider a wildlife and resource protection alternative but eliminated it from more detailed analysis. (*Id.*) The BLM also considered mitigation measures that were similar to Petitioners' proposed alternatives and considering these mitigation measures was sufficient. (*Id.* at 18.)

For the BLM's consideration of the significance of the Path of the Pronghorn to survive under the arbitrary and capricious standard, the BLM must have examined the relevant data and shown a rational connection between the facts, data, and the ultimate decision. *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683,

[16] 40 C.F.R. § 1508.8 is currently listed as "[reserved]" and has been listed as such since February 25, 2022, after the parties had submitted their briefs to the Court.

713 (10th Cir. 2009). "Under the arbitrary and capricious standard of review, this Court must give the Agencies' decision substantial deference." *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152, 1173 (10th Cir. 2002).

An agency is required to consider the future indirect impacts of a project in addition to direct impacts. *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001) (citing 40 C.F.R. § 1508.7).[17] NEPA only requires the agency put forth a reasonable, good faith, objective presentation of topics. *Utahns for Better Transp.*, 305 F.3d at 1174.

The EIS did consider the potential adverse impacts to pronghorn. The EIS considered the reduced viability of the pronghorn herd should pronghorn lose migratory routes or crucial winter range. (BLM128980.) The EIS acknowledged that pronghorn avoid highly developed areas but frequently utilize the Project Area, which is largely undeveloped at this time. (*Id.*) "Disrupted migration could prevent herds from reaching high quality forage . . . . [and] development in . . . migration routes could also eliminate the herd's migration memory[.]" (*Id.*) The EIS acknowledged the Proposed Action would likely displace or disrupt pronghorn populations. (*Id.*)

Petitioners argue the BLM did not analyze specific migratory routes used by Pronghorn throughout the Project Area. (ECF No. 52 at 36.) The BLM specifically differentiated between migration corridors and migration routes. (BLM129233.) The Final EIS points out there are no WGFD-designated pronghorn migration corridors in the NPL Project Area. (BLM128611.) This statement did not come from a lack of analysis, but

[17] 40 § C.F.R. § 1508.7 is also currently listed as "[reserved]" and the language quoted in Custer no longer explicitly exists.

rather from a recommendation submitted by the WGFD. (BLM076836.) As the State of Wyoming points out in its response brief, the WGFD requested the BLM not conflate routes and corridors. (ECF No. 58 at 30.) "While we appreciate the effort to protect migrating pronghorn, placing excessive protections on individual pronghorn migration routes may hamper our efforts to designate corridors elsewhere in the state that may be more important to pronghorn populations overall." (*Id.*)

The Final EIS followed the guidance of the WGFD—it did not fail to analyze specific migratory routes. NEPA requires the BLM to respond to comments made by other agencies. 40 C.F.R. § 1503.4. A response can include improving or modifying its original analysis. 40 C.F.R. § 1503.4(a)(3). The Final EIS responded to the WGFD by modifying its analysis to reflect the changes requested. This change does not indicate the BLM failed to consider the Path of the Pronghorn. The BLM simply took the recommendations of the WGFD. The BLM also acknowledged in the Final EIS that there were three pronghorn migration routes in the Project Area. This does not meet the standard for completely failing to consider an alternative under the arbitrary and capricious standard.

The Final EIS also considered indirect impacts on pronghorn, including "decreased or degraded seasonal habitats (including migration routes) that are important in supporting local and regional wildlife populations." (BLM128979.) It noted the degradation and disruption of migratory routes was of "particular concern" for pronghorn. (BLM129020.) The Final EIS was not required to use the specific term "Path of the Pronghorn" to demonstrate it adequately considered important migratory routes. *See Citizens for a Healthy Cmty v. United States Bureau of Land Management*, 377 F.Supp.3d 1223, 1235

(D. Colo. 2019). The BLM discussed the recorded pronghorn movement between Grand Teton National Park and the Upper Green River Basin in the Final EIS, but also found Grand Teton National Park pronghorn did not use winter ranges in the Project area. (BLM128611.) Additionally, the Final EIS acknowledged Highway 191, already located east of the Project Area, may be a complete barrier to migration on its own. (*Id.*) The Final EIS did not completely fail to consider the potential indirect impacts of the NPL project or loss of pronghorn migration.

The Final EIS mentioned several times that migration routes could face degradation or decreased use. (BLM128979.) This does not align with Tenth Circuit precedent in *Richardson*, where the public was not given any information on major impacts of an alternative. *See Richardson*, 565 F.3d at 708. The Final EIS informed the public that pronghorn migration could be drastically affected. The public had an opportunity to comment on this after the Final EIS was released. (BLM127870.) Petitioners' citation to expert research stating the Grand Teton pronghorn herd will certainly be eliminated if migration is obstructed (BLM078859) does not imply the BLM's analysis failed to completely consider an important aspect of the problem. *See Theodore Roosevelt Conservation Partnership v. Salazar*, 605 F.Supp.2d 263, 274 (D.C. Cir. 2009) (reminding counsel that the Court does not attempt to resolve conflicting scientific opinions).[18]

NEPA does not require the BLM to discuss all potential environmental impacts at length or in specific detail—it only requires the BLM consider all relevant factors and

[18] Petitioner cites other studies to show the potential negative impact of the NPL project on pronghorn migration, but no other study comes to such a drastic conclusion that the entire pronghorn herd could disappear. *See* BLM126616.

articulate a legitimate connection between the facts and the ultimate decision. *Diné Citizens Against Ruining Our Environment v. Bernhardt*, No. 1:19-CV-703, 2021 WL 3370899, at *5 (D.N.M. Aug. 3, 2021) (internal citations and quotations omitted). This Court's responsibility is to ensure the BLM took a "hard look" at the pronghorn migratory routes and any potential consequences to these routes as a result of the agency action. *Kleppe v. Sierra Club*, 427 U.S. 390, n. 21 (1976). The Final EIS discussed the potential loss of migratory routes in several places, not merely three sentences as Petitioners suggest.[19] The BLM sufficiently took a hard look and considered the impacts of potential migratory route degradation, including the Path of the Pronghorn.

b. BLM Did Not Fail to Consider Reasonable Proposed Alternatives for Protection of Pronghorn Migratory Routes.

An environmental impact statement must provide a "full and fair discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives[.]" 40 C.F.R. § 1502.1. As part of this analysis, agencies must balance between evaluating alternatives in detail while still limiting their consideration to a reasonable number of alternatives. 40 C.F.R. § 1502.14.

When a court reviews the adequacy of alternatives given in an EIS, the court uses a "rule of reason." *High Country Conservation Advocates v. United States Forest Service*, 951 F.3d 1217, 1223 (10th Cir. 2020). This reasonableness standard examines both (1) the

[19] Petitioners argue the BLM cannot subsume the analysis of the Grand Teton Herd and the Path of the Pronghorn within the analysis of the Sublette Herd, and, at the very least, the EIS should have explained this approach. This is not the legal standard. The BLM is not required to individually analyze every possibly sub-herd—the BLM only needs to analyze the relevant data and analyzing the three migration corridors and the pronghorn population utilizing the Project Area is sufficient to show the BLM considered the relevant data. *Richardson*, 565 F.3d at 713.

alternatives the agency discusses and (2) the extent to which the agency discusses them. *Id.* An agency is not required to provide a detailed study of alternatives that are not reasonable. *Id.* Neither is an agency required to analyze alternatives if the alternative has been rejected in good faith as remote, speculative, impractical, or ineffective. *Id.* An agency is only required to consider multiple similar alternatives if they are significantly distinguishable from one another. *Id.*

This standard does not mandate the court come to a particular conclusion. *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004). The court only considers whether an agency's decisions were arbitrary. *Id.* The agency's decision is bound by reason and practicality. *Id.* (internal citations and quotations omitted). The court should only be concerned with whether the agency gathered sufficient information to decide on a reasoned choice of alternatives discussing environmental impacts. *Id.*

Petitioners assert the BLM should have evaluated an alternative with a "buffer zone" around pronghorn migratory routes. The BLM should have at least considered measures that "required avoidance of development within pronghorn migratory routes." (ECF No. 52 at 42.) Instead, the BLM authorized the project with only the mere possibility of voluntary migratory route protection. (*Id.* at 43.) The buffer zone alternative was a reasonable alternative, and the BLM should have included at least some analysis to comply with NEPA. Respondents disagree, stating "the range of alternatives was not unreasonably narrow because it considered alternatives that balanced the competing goals of governing RMPs." (ECF No. 58 at 43.) Respondent Jonah Energy referenced the "lengthy list" of studies the BLM considered to evaluate the effect on the pronghorn. (*Id.* at 31.) This

included consulting with WGFD and considering the potential impacts on Herd 401. (*Id.* at 31–33.) Even if Petitioners do not approve of the result, it doesn't negate the BLM's "hard look" at these issues. (*Id.* at 37.) NEPA does not mandate certain results, yet Petitioners only challenge the substance of the decision. (*Id.*)

The Biodiversity Conservation Alliance submitted a public comment, asking the BLM to consider a two-mile buffer around pronghorn migration corridors in the Project Area. (BLM079469.) The BLM did not directly address a buffer zone alternative in the Final EIS. (*See* BLM128201.) However, the BLM did address this comment on the record. (BLM127599.)[20] The Western Watersheds Project also submitted a comment requesting a one-mile buffer around the narrower pronghorn migration pathway. (BLM127535.) The BLM eliminated this alternative because it was substantially similar to Alternative A, considered in detail to address sensitive wildlife concerns. Additionally, the BLM considered but eliminated a wildlife resource and protection alternative, discussed in both the Draft and Final EIS. (BLM127525; BLM128201.) The BLM noted the comments raising concern over migratory routes in the ROD. (BLM127870.) The BLM did not completely fail to address this "proposed 'middle ground' alternative[.]" (ECF No. 52 at 44.)

When a considered alternative includes aspects of a suggested action, the BLM does not need to consider the suggestions as distinct alternative approaches. *Citizens for a*

[20] Petitioners argue Respondents attempt to use post-hoc rationalization for rejecting a buffer zone by citing to Alternative A and the Wildlife Resource and Protection Alternative, because neither of these alternatives explicitly mention a buffer zone. (ECF No. 62 at 15.) The BLM's response to the buffer zone comment on the record upends this argument—BLM gave the same rationalization before issuing the ROD.

Healthy Cmty., 377 F.Supp.3d at 1235. Petitioners here have not shown explicitly incorporating a buffer zone was significantly different from Alternative A or the wildlife resource and protection alternative. Pronghorn were designated as a "focus species" in Alternative A, meaning the BLM would implement more resource protection measures for pronghorn in that scenario. (BLM128340–41.) Under this alternative, density of development would be reduced overall to protect big game. (BLM128343.) The BLM also acknowledged the pronghorn migration corridor as a "sensitive biological resource" in the ROD Appendices and stated the corridors will be avoided to minimize disturbance. (BLM128045.)

Petitioners contend the BLM was required by the Pinedale and Green River RMP's to include buffer zones, but the RMP's are not so specific. (ECF No. 52 at 46.) Both RMPs merely require any projects to protect big game migration. (BLM133285; BLM132624.) The Pinedale RMP explicitly states the magnitude of impacts required to protect migratory routes could differ based on the project. (BLM133285.) The protection measures could range from project relocation to seasonal timing limitations. (*Id.*) Nowhere in the Pinedale RMP are buffer zones around migratory routes mandatory. At most, the Pinedale RMP prohibits surface occupancy along big game migration routes and bottlenecks "unless other restrictions were applied[.]" (BLM132818.) Likewise, the Green River RMP only mandates reducing habitat loss by applying appropriate restrictions. (BLM132624.) The Green River RMP does not mandate any specific restrictions to preserve big game migratory routes, including buffer zones. (BLM132657.) (BLM127835–36.) There is no

indication the BLM failed to comply with the Pinedale or Green River RMP. In fact, the ROD explicitly states the NPL Project must comply with both RMPs. (BLM127836.)

The ROD also stated Jonah Energy would work with BLM and WGFD to understand and potentially preserve migration routes in the Project Area. (BLM127897.) Petitioners argue these resource protection measures are "illusory" but the Court disagrees. (ECF No. 52 at 43.) The Record of Decision sets forth restrictions to protect big game, including limiting development density in different DAs within the Project Area and requiring site-specific BLM approval before any project-related operations. Petitioners assert the ROD only prevents Jonah Energy from physically blocking migration routes, but not necessarily narrowing or impeding the same. (ECF No. 62 at 18.) Petitioners dissect the wording of the ROD, arguing preventing barriers is not the same as preserving migration routes to prevent displacement. (*Id.*) This argument is unconvincing. Parsing words and sentences does not create a problem with the BLM's chosen alternatives. The BLM properly considered several alternatives and mitigation measure to preserve migratory routes.

Based on the wildlife prevention measures considered in Alternative A and the protection measures implemented in the ROD, there is no indication BLM acted arbitrarily or capriciously when it did not consider a buffer zone alternative. The BLM specifically addressed this public comment, finding it was similar to other analyzed alternatives. The only evidence petitioners offer to support their contentions is that the Final EIS never explicitly discussed buffer zones around migratory routes. The omission of one very specific protective measure from the EIS does not show the BLM wholly failed to consider

a reasonable alternative. *See* 40 C.F.R. § 1502.14(f). "An agency need not include an infinite range of alternatives, but is required to cover those which are feasible and briefly explain why other alternatives, not discussed, have been eliminated. *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F.Supp.2d 1156, 1175 (D.N.M. 2000) (citing 40 C.F.R. § 1502.14). The agency's failure to specifically discuss buffer zones around migratory routes was a reasonable decision considering the detailed analysis of Alternative A. The BLM's lack of discussion of buffer zones does not render its decision arbitrary or capricious.

2. Greater Sage Grouse

a. Petitioners Properly Raised Their Concerns About the Sage Grouse in the Public Comment Period.

The BLM argues Petitioners did not make a specific public comment about conducting additional studies in the WCAs. (ECF No. 57 at 22–23.) Since the BLM did not have an opportunity to review and respond to a comment during the administrative process, Petitioners are barred from asserting this claim to the Court. (*Id.*) The BLM also argues Petitioners' comments never raised the issue of phased development in order to comply with FLPMA, so Petitioners should also be prohibited from raising the issue now. (ECF No. 57 at 25.)

Jonah echoes this argument, stating Petitioners did not advance either of the greater sage grouse arguments now before the Court and Petitioners should not now be allowed to assert technical issues such as violations of NEPA and FLPMA. (ECF No. 59 at 25.) No organization raised concerns during the public comment period that 40 C.F.R. § 1502.22

required BLM to acquire additional data before issuing the ROD. (*Id.*) Likewise, Petitioners did not assert the ROD would violate the 2015 Sage Grouse RMP. (*Id.*)

Petitioners' challenge the BLM's compliance with NEPA, but in order to bring this claim in federal court, Petitioners must have exhausted available administrative remedies. *Ark Initiative v. United States Forest Service*, 660 F.3d 1256, 1261 (10th Cir. 2011). Any relevant objections must usually be raised during the public comment period. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1048 (10th Cir. 2015). However, there are two exceptions: (1) where commenters need not point out an environmental assessment's "obvious" flaw; and (2) a commenter does not waive an issue if it is otherwise brought to the agency's attention. *Id.*

The comment must have been presented in sufficient detail so the agency can take steps to address the complaint. *Ark Initiative*, 660 F.3d at 1261. However, claimants are not required to use precise legal formulations or magic words when raising claims. *Jarita Mesa Livestock Grazing Ass'n v. United States Forest Service*, 140 F.Supp.3d 1123, 1185 (D.N.M. 2015).

The National Audubon Society submitted a comment explicitly asking the BLM to follow 40 C.F.R. § 1502.22. (BLM076911.) This comment also stated a failure to evaluate complete data on WCAs would violate NEPA. (*Id.*) The National Wildlife Federation submitted a comment requesting the BLM conduct additional research on WCAs before issuing drilling permits and expressing concern over the lack of research available, despite development being allowed under Alternative B. (BLM076985.) This comment echoed the requirement that the agency follow 40 C.F.R. § 1502.22. (*Id.*) These comments are

sufficient to raise the issue of conducting additional research in WCAs before permitting development. Petitioners have exhausted their administrative remedies on this issue.

Turning to whether Petitioners sufficiently raised the FLPMA violation claims during the administrative process, Petitioners claim they are not required to raise this issue because it falls under the "obvious" exception to exhaustion of administrative remedies. (ECF No. 62 at 26.) When an EIS's flaws are so obvious, there is no need for a commentator to point them out. *Dep't of Trans. V. Public Citizen*, 541 U.S. 752, 765 (2004). The BLM was aware it needed to comply with the resource design features of the 2015 Sage Grouse RMP. (BLM015436; BLM015450.) Jonah Energy and the BLM worked together to discuss phased development, to ensure compliance with the RMPs. (BLM015450.) The BLM later discussed removing the phased development plan as "discretionary" in an email. (BLM015699.) The BLM was already aware of the need to comply with FLPMA and contemplated this independently. There was no need for Petitioners to specifically raise the issue of FLPMA compliance. Petitioners' comment on this issue would not have served any purpose—the BLM was already aware the project needed to comply with the RMP and was working towards that goal. The Court finds Petitioners meet the exception to administrative exhaustion and the FLPMA compliance issues are properly before this Court.

b. BLM Did Take a Hard Look at the NPL Project's Impacts on Sage Grouse Populations.

NEPA requires federal agencies to "take a hard look" at the environmental consequences of the proposed actions. *Pennaco Energy, Inc. v. United States Dep't of*

Interior, 377 F.3d 1147, 1150 (10th Cir. 2004). The standard only requires the agency to adequately identify and evaluate environmental concerns—beyond this, agencies are not required to take any further action. *Id.* To meet this standard, the agency must prepare an EIS, comparing the environmental impact of the proposed action to impacts of alternatives. 42 U.S.C § 4332(C).

Petitioners contend the BLM failed to obtain baseline data on WCAs. (ECF No. 52 at 49.) The BLM recognized significant gaps in available research on sage-grouse use of WCAs in the Project Area but declined to gather this data before issuing the ROD. (*Id.* at 50.) The BLM plans to conduct these studies concurrently with NPL project development, rather than assessing impacts to sage grouse beforehand. (*Id.*) Instead, the Project itself will be used to test the effects of development on sage grouse. (*Id.* at 52 (citing BLM128346)). Respondents contest this rendition of the facts, stating Petitioners ignore that, under any proposed alternative, the BLM would not authorize development in WCAs until additional research has been conducted to better understand potential effects on sage grouse. (ECF No. 57 at 19 (citing BLM128994). The Final EIS summarizes available research on WCAs but restricts any further development until more studies are conducted. (*Id.* at 20.) This site-specific authorization requirement satisfies NEPA and further analysis before issuing a decision is not required by the law. (*Id.* at 21 (citing *Sierra Club v. Robertson*, 810 F. Supp. 1021, 1030 (W.D. Ark. 1992)).

Federal regulations specify how an agency should proceed when faced with incomplete or unavailable information. 40 C.F.R. § 1502.21. The agency must make it clear that the information is lacking. § 1502.21(a). If the incomplete information is essential to

a reasoned choice among alternatives, and the overall costs to obtain the information is not unreasonable, the agency should collect the data and include it in the EIS. § 1502.21(b). If the information is not obtainable because of exorbitant cost or the agency is not able to collect the data, the agency must include in the EIS: (1) a statement that the information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information; (3) a summary of existing credible scientific evidence that is relevant to evaluating the reasonable foreseeable impacts of the project; and (4) the agency's evaluation of such impacts based on the available data. § 1502.21(c).

To demonstrate a violation of NEPA, based on failure to include data, Petitioners must show (1) the missing information is essential to a reasoned decision between the alternatives; and (2) that the public was unaware of the limitations of the data the agency did rely on. *Trout Unlimited v. United States Dep't of Agriculture*, 320 F.Supp.2d 1090, 1111 (D. Colo. 2004) (citing *Colo. Env't Coalition v. Dombeck*, 185 F.3d 1162, 1172–73 (10th Cir. 1999)). Petitioners argue the missing data was essential to a reasoned decision, because WCAs are important to maintaining sustainable sage grouse populations and have a high conservation value. (ECF No. 52 at 55.) Other studies indicate development in WCAs has a high risk of sage grouse population decline (*Id.* at 56.) Without the baseline data on WCAs, the BLM could not comprehend the potential for sage grouse population loss. (*Id.*)

The Court disagrees that this information was essential to reasoned decision making. The BLM acknowledged in the Final EIS "the potential impacts on sage-grouse resulting from development in the NPL Project Area Winter Concentration Areas are not well

understood." (BLM128302.) However, the BLM did have the benefit of reviewing the 2015 RMP, which discussed WCAs as a PHMA. (BLM053417.) The 2015 RMP imposes seasonal timing restrictions on development in WCAs (BLM053195) and allows the BLM to grant exceptions to the restrictions if the BLM and WGFD determine the exception would not adversely impact the population being protected (BLM053286). The BLM did not allow development in WCAs without baseline data, but instead relied upon the 2015 RMP. The ROD authorizes limited development in WCAs with seasonal timing limitations, in accordance with the 2015 RMP. (BLM 127844; BLM053441); *see Trout Unlimited*, 320 F.Supp.2d at 1111 (using other analyses to inform decision when data was limited was sufficient to satisfy NEPA requirements).

Additionally, the BLM explicitly states, under any alternative, no development will be authorized in WCAs "until additional research is conducted to better inform the appropriate level of development, potential impacts, and appropriate mitigation in sage-grouse winter concentration areas." (BLM128994.) The BLM reiterates in the ROD that the study will inform which WCA development scenario proceeds. (BLM127843.) The BLM initially authorized Scenario 1, but the results of the study may affect this, and the BLM reserves the right to switch to Scenario 2. (BLM127844.) BLM also had some baseline data, although minimal, from the "flight day" studies. (BLM128627.)

Furthermore, it does not appear the baseline data is necessary for the BLM to make an informed decision. While Petitioners contend it was necessary to determine the effects of development on WCAs, it appears the BLM is already aware of the effects. The Final EIS notes sage grouse are susceptible to loss of winter habitat from the NPL Project as

proposed. (BLM128991.) It also notes the sage-grouse are likely to suffer decreased quality of habitat following surface disturbance. (*Id.*) The Final EIS recognizes "recent studies shows oil and gas development can affect sage grouse during their entire life cycle and can contribute to displacement of sage-grouse from [these areas]." (BLM128992.) The Final EIS notes any increased development could negatively affect the sage grouse population. (BLM128993.)

Looking at WCAs specifically, the Final EIS acknowledged the Proposed Action would have short-term and long-term effects on WCAs, partially because WCAs are authorized at a higher development density than PHMAs. (BBLM128993.) The Final EIS reiterates sage grouse populations could face similar displacement under Alternative B, Scenario 1, although the effects may be slightly less drastic because this Alternative would be a 7.9% decrease in surface disturbance compared to the proposed action. (BLM129033.) It does not appear more baseline data is necessary for the BLM to evaluate the impacts of the project on sage grouse. The Final EIS indicates the BLM was aware of the impacts to sage grouse, including loss of winter habitat, avoidance of the area, and adverse impacts to the overall population. (BLM128995.) NEPA only prohibits uniformed, rather than unwise decision making. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). The BLM made an informed decision based on the available data.

Petitioners do not show how baseline data was essential to a reasoned decision.[21] Accordingly, Petitioners' arguments on this claim fail. *Dombeck*, 185 F.3d at 1173 (holding the plaintiffs failed to show how additional, site specific data was essential to a reasoned decision, where the agency was aware of the scarcity of data and used relevant, available information to come to its final decision); *Trout Unlimited*, 320 F.Supp.2d. at 1111 (holding the agency complied with NEPA when plaintiffs could not show the missing information was necessary to a reasoned decision); *High Country Conservation Advocates v. United States Forest Service*, 52 F.Supp.3d 1174, 1194 (D. Colo. 2014); *Rags Over the Arkansas River, Inc. v. Bureau of Land Management*, 77 F.Supp.3d 1038, 1049 (D. Colo. 2015).

c. BLM Did Not Violate FLPMA by Failing to Comply with the 2015 Sage Grouse RMP.

Finally, Petitioners argue the BLM failed to comply with FLPMA because the ROD did not follow the 2015 Sage Grouse RMP. (ECF No. 52 at 58.) The Federal Land Policy and Management Act requires BLM actions to conform with Resource Management Plans. 43 C.F.R. § 1610.5-3(a). The 2015 RMP requires any development within PHMAs to implement a phased approach to development—this is a required design feature ("RDF") for any oil and gas projects in the habitat. (ECF No. 52 at 58 (citing BLM139504)). RDFs

[21] Petitioners cite to a case from the Ninth Circuit where the court held baseline data on sage grouse was necessary for a complete EIS. *Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–86 (9th Cir. 2011). The case is not binding precedent on this Court. Regardless, the case is further distinguishable because the only data collected on sage grouse was the total acreage of sage grouse habitat within the project area. *Id.* at 1084. Here, the BLM had much more data to rely on when making a decision, including maps of sage-grouse PMHA, WCAs, and other sage grouse habitat not specifically designated by WGFD but known to be used by sage grouse. (*See e.g.*, BLM128994.) The BLM here relied on substantially more data than the Board in *Plains Resource Council*.

are required for activities within sage grouse habitat, unless the NEPA analysis shows a specific RDF is not applicable to site-specific conditions of the project or an alternative RDF or other conservation measure will provide equal or better protection to sage grouse and sage grouse habitat. (BLM139502.)

Respondents counter this, arguing despite Petitioners' contentions, the BLM did consider a phased development approach but properly rejected the alternative. (ECF No. 58 at 59.) Under the 2015 RMP, the BLM did not need to implement phased development if analysis showed there were better site-specific conditions. (*Id* at 60. (citing BLM139502)). This action is also consistent with FLPMA. (*Id.*) The BLM considered phased development in Alternative A but ultimately chose Alternative B because it more closely aligned with the purpose and needs of the project. (*Id.* at 58.) Besides the options discussed in Alternative A and B, the BLM also considered a paced development option, but eliminated this from consideration early because it was not technically or economically feasible. (*Id.* at 62.)

The ROD is very clear that site-specific permitting will begin once Jonah Energy identifies the precise locations of the proposed wells. (BLM127835; BLM127860.) Once Jonah requests the site-specific permits, the BLM will conduct a site-specific environmental review. (BLM127836.) "Some resource protection measures will be included as COAs during permitting for site-specific development of the NPL Project, as applicable[.]" (BLM127854.) Discussing sage grouse habitat specifically, the ROD notes the BLM will make site-specific determinations to appropriately mitigate impacts to sage

grouse. (BLM127859.) The BLM committed to apply RDFs from the 2015 RMP as applicable. (BLM127899.)

The BLM also recognized several variables affect the project beyond the BLM's control, namely: "production success, appropriate engineering technology, economic factors, commodity processes, availability of commodity markets, the availability of appropriate equipment, and a trained workforce, and regulatory constraints[.]" (BLM128308.) This falls under the first exception to implementing RDFs—when "a specific RDF is documented not to be applicable to the site-specific conditions of the project/activity (e.g., due to site limitations or engineering considerations)." (BLM053287.) Phased development was considered as a part of Alternative A (BLM128655) but rejected because of these constraints (*See* BLM127865) ("[Alternative B] will allow development on valid existing leases throughout the NPL Project Area and will best meet *the purpose and needs of the project*") (emphasis added).

The BLM considered phased development but the decision to reject Alternative A in favor of Alternative B was not contrary to the RMP or FLPMA.[22] The RMP acknowledges this type of situation where RDFs may not be applicable until site specific determinations. (BLM053287.) After site specific analysis, some RDFs may not even be applicable. The BLM has not analyzed site-specific constraints on this project yet and will

[22] The District of Idaho considered the sister case to this action in *Western Watersheds Project v. Bernhardt*, 543 F.Supp.3d 958 (D. Idaho 2021) *appeal docketed*, No. 21-35673 (9th Cir. Aug. 17, 2021). There, the magistrate judge held the BLM did act arbitrarily and capriciously by rejecting plaintiff's proposed alternatives requesting deferral of parcels designated as PHMA for sage grouse. *Id.* at 983. The BLM only considered two alternatives: the no action alternative and the proposed action. *Id.* at 982. The magistrate judge further found BLM failed to provide adequate explanation for the rejection of the proposed alternative. *Id.* at 984. This is distinguishable from the case here, where the BLM considered four potential alternatives and gave sufficient detail in the Final EIS and ROD detailing why phased development was ultimately rejected.

not do so until Jonah submits permit applications for precise drill site locations. (BLM127836.) The RMP contemplates such a situation where site-specific decisions may affect certain RDF applicability. (BLM053287.) The BLM complied with FLPMA and the RMP in deciding on Alternative B. *See Oregon Natural Desert Ass'n v. Shuford*, No. 06-242, 2007 WL 1695162, at *13 (D. Oregon June 8, 2007) (holding the BLM was not required to analyze alternatives under the RMP when such alternatives would not be feasible or consistent with the BLM's management duties); *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 510 (D.C. Cir. 2010) (holding there was no FLPMA violation where the BLM reasonably decided the proposed development encompassed the RMP requirements); *Cascadia Wildlands v. Bureau of Land Management*, 4410 F.Supp.3d 1146, 1155 (D. Oregon) (upholding BLM action where it was not "plainly inconsistent" with governing RMPs).

CONCLUSION

Based upon a complete review of the administrative record in this matter, there is substantial evidence to support the reasoned basis for BLM's decisions in this matter. The BLM took a "hard look" at the environmental consequence and considered all relevant information when making its ROD and deciding the best alternative to balance the goals of the NPL Project and the potential environmental impacts. Petitioners have not demonstrated the BLM's decision to approve Alternative B for the NPL Project violated NEPA, was arbitrary or capricious, or was otherwise contrary to law.

IT IS THEREFORE ORDERED that the BLM's Record of Decision on the Normally Pressured Lance Project is **AFFIRMED**.

Dated this 5th day of April, 2022.

Scott W. Skavdahl
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UPPER GREEN RIVER ALLIANCE, WESTERN WATERSHEDS PROJECT, and CENTER FOR BIOLOGICAL DIVERSITY,

Petitioners,

vs.

UNITED STATES BUREAU OF LAND MANAGEMENT and WILLIAM PERRY PENDLEY, in his official capacity as Deputy Director of the U.S. Bureau of Land Management,

Respondents,

and

JONAH ENERGY, LLC and STATE OF WYOMING,

Respondent-Intervenors.

Case No. 2:19-CV-146-SWS

JUDGMENT

This case came before the Court under the Administrative Procedure Act (APA), 5 U.S.C. § 706, for judicial review of the Bureau of Land Management's decision to authorize the Normally Pressured Lance Project in Sublette County, Wyoming. The Court entered an Order Upholding Agency Action on April 5, 2022 (ECF No. 63), which

is fully incorporated herein by this reference. In accordance with the findings of fact and conclusions of law set forth in that Order,

IT IS HEREBY ORDERED AND ADJUDGED that the Bureau of Land Management's Record of Decision in the Normally Pressured Lance Project is UPHELD AND AFFIRMED.

FINAL JUDGMENT is entered accordingly.

Dated this 13th day of April, 2022.

Scott W. Skavdahl
United States District Judge

5 USCS § 706, Part 1 of 4

Current through Public Law 117-200, approved October 11, 2022.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 7. Judicial Review (§§ 701 — 706)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [*5 USCS §§ 556* and *557*] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

History

HISTORY:

Sept. 6, 1966, *P. L. 89-554*, § 1, *80 Stat. 393*.

End of Document

42 USCS § 4332, Part 1 of 2

Current through Public Law 117-200, approved October 11, 2022.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 163) > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY (§§ 4321 — 4370m-12) > POLICIES AND GOALS (§§ 4331 — 4335)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [*42 USCS §§ 4321* et seq.], and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [*42 USCS §§ 4341* et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by *section 552 of title 5, United States Code*, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [*42 USCS §§ 4321* et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [;]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act [*42 USCS §§ 4341* et seq.].

History

HISTORY:

Jan. 1, 1970, *P. L. 91-190*, Title I, § 102, *83 Stat. 853*; Aug. 9, 1975, *P. L. 94-83*, *89 Stat. 424*.

End of Document

43 USCS § 1712

Current through Public Law 117-200, approved October 11, 2022.

United States Code Service > TITLE 43. PUBLIC LANDS (Chs. 1 — 50) > CHAPTER 35. FEDERAL LAND POLICY AND MANAGEMENT (§§ 1701 — 1787) > LAND USE PLANNING AND LAND ACQUISITION AND DISPOSITION (§§ 1711 — 1723)

§ 1712. Land use plans

(a) Development, maintenance, and revision by Secretary. The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

(b) Coordination of plans for National Forest System lands with Indian land use planning and management programs for purposes of development and revision. In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.

(c) Criteria for development and revision. In the development and revision of land use plans, the Secretary shall—

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under chapter 2003 of title 54, United States Code [*54 USCS §§ 200301* et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between

Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

(d) Review and inclusion of classified public lands; review of existing land use plans; modification and termination of classifications. Any classification of public lands or any land use plan in effect on the date of enactment of this Act [enacted Oct. 21, 1976] is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

(e) Management decisions for implementation of developed or revised plans. The Secretary may issue management decisions to implement land use plans developed or revised under this section in accordance with the following:

(1) Such decisions, including but not limited to exclusions (that is, total elimination) of one or more of the principal or major uses made by a management decision shall remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate, under the provisions of this section, of the land use plan involved.

(2) Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate. If within ninety days from the giving of such notice (exclusive of days on which either House has adjourned for more than three consecutive days), the Congress adopts a concurrent resolution of nonapproval of the management decision or action, then the management decision or action shall be promptly terminated by the Secretary. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the management decision or action. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same management decision or action. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(3) Withdrawals made pursuant to section 204 of this Act [*43 USCS § 1714*] may be used in carrying out management decisions, but public lands shall be removed from or restored to the operation of the Mining Law of 1872, as amended (R.S. 2318–2352; *30 U.S.C. 21* et seq.) or transferred to another department, bureau, or agency only by withdrawal action pursuant to section 204 [*43 USCS § 1714*] or other action pursuant to applicable law: *Provided,* That nothing in this section shall prevent a wholly

owned Government corporation from acquiring and holding rights as a citizen under the Mining Law of 1872.

(f) Procedures applicable to formulation of plans and programs for public land management. The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

History

HISTORY:

Oct. 21, 1976, *P. L. 94-579*, Title II, § 202, *90 Stat. 2747*; Dec. 19, 2014, *P. L. 113-287*, § 5(l)(6), *128 Stat. 3271*.

End of Document

43 USCS § 1732

Current through Public Law 117-200, approved October 11, 2022.

United States Code Service > TITLE 43. PUBLIC LANDS (Chs. 1 — 50) > CHAPTER 35. FEDERAL LAND POLICY AND MANAGEMENT (§§ 1701 — 1787) > ADMINISTRATION (§§ 1731 — 1748d)

§ 1732. Management of use, occupancy, and development of public lands

(a) Multiple use and sustained yield requirements applicable; exception. The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 202 of this Act [43 USCS § 1712] when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements. In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: *Provided,* That unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way under section 507 of this Act [43 USCS § 1767], withdrawals under section 204 of this Act [43 USCS § 1714], and, where the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under subsection (b) of section 307 of this Act [43 USCS § 1737(b)]: *Provided further,* That nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 314, section 603, and subsection (f) of section 601 of this Act [43 USCS § 1744, 1782, and 1781(f)] and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

(c) Revocation or suspension provision in instrument authorizing use, occupancy or development; violation of provision; procedure applicable. The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan: *Provided,* That such violation occurred on public lands

covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: *Provided further,* That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: *Provided further,* That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: *Provided further,* That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail.

(d) Authorization to utilize certain public lands in Alaska for military purposes.

(1) The Secretary of the Interior, after consultation with the Governor of Alaska, may issue to the Secretary of Defense or to the Secretary of a military department within the Department of Defense or to the Commandant of the Coast Guard a nonrenewable general authorization to utilize public lands in Alaska (other than within a conservation system unit or the Steese National Conservation Area or the White Mountains National Recreation Area) for purposes of military maneuvering, military training, or equipment testing not involving artillery firing, aerial or other gunnery, or other use of live ammunition or ordnance.

(2) Use of public lands pursuant to a general authorization under this subsection shall be limited to areas where such use would not be inconsistent with the plans prepared pursuant to section 202 [*43 USCS § 1712*]. Each such use shall be subject to a requirement that the using department shall be responsible for any necessary cleanup and decontamination of the lands used, and to such other terms and conditions (including but not limited to restrictions on use of off-road or all-terrain vehicles) as the Secretary of the Interior may require to—

(A) minimize adverse impacts on the natural, environmental, scientific, cultural, and other resources and values (including fish and wildlife habitat) of the public lands involved; and

(B) minimize the period and method of such use and the interference with or restrictions on other uses of the public lands involved.

(3)

(A) A general authorization issued pursuant to this subsection shall not be for a term of more than three years and shall be revoked in whole or in part, as the Secretary of the Interior finds necessary, prior to the end of such term upon a determination by the Secretary of the Interior that there has been a failure to comply with its terms and conditions or that activities pursuant to such an authorization have had or might have a significant adverse impact on the resources or values of the affected lands.

(B) Each specific use of a particular area of public lands pursuant to a general authorization under this subsection shall be subject to specific authorization by the Secretary and to appropriate terms and conditions, including such as are described in paragraph (2) of this subsection.

(4) Issuance of a general authorization pursuant to this subsection shall be subject to the provisions of section 202(f) of this Act [*43 USCS § 1712(f)*], section 810 of the Alaska National Interest Lands Conservation Act [*16 USCS § 3120*], and all other applicable provisions of law. The Secretary of a military department (or the Commandant of the Coast Guard) requesting such authorization shall reimburse the Secretary of the Interior for the costs of implementing this paragraph. An authorization pursuant to this subsection shall not authorize the construction of permanent structures or facilities on the public lands.

(5) To the extent that public safety may require closure to public use of any portion of the public lands covered by an authorization issued pursuant to this subsection, the Secretary of the military department concerned or the Commandant of the Coast Guard shall take appropriate steps to notify the public concerning such closure and to provide appropriate warnings of risks to public safety.

(6) For purposes of this subsection, the term "conservation system unit" has the same meaning as specified in section 102 of the Alaska National Interest Lands Conservation Act [*16 USCS § 3102*].

History

HISTORY:

Oct. 21, 1976, *P. L. 94-579*, Title III, § 302, *90 Stat. 2762*; Nov. 3, 1988, *P. L. 100-586*, *102 Stat. 2980*.

End of Document

54 USCS § 100101

Current through Public Law 117-200, approved October 11, 2022.

United States Code Service > TITLE 54. NATIONAL PARK SERVICE AND RELATED PROGRAMS (§§ 100101 — 320303) > Subtitle I. National Park System (Divs. A — B) > Division A. Establishment and General Administration (Chs. 1001 — 1049) > CHAPTER 1001. General Provisions (§§ 100101 — 100102)

§ 100101. Promotion and regulation

(a) In general. The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

(b) Declarations.

(1) 1970 declarations. Congress declares that—

(A) the National Park System, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States and its territories and possessions;

(B) these areas, though distinct in character, are united through their interrelated purposes and resources into one National Park System as cumulative expressions of a single national heritage;

(C) individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one System preserved and managed for the benefit and inspiration of all the people of the United States; and

(D) it is the purpose of this division to include all these areas in the System and to clarify the authorities applicable to the System.

(2) 1978 reaffirmation. Congress reaffirms, declares, and directs that the promotion and regulation of the various System units shall be consistent with and founded in the purpose established by subsection (a), to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.

History

HISTORY:

Dec. 19, 2014, *P. L. 113-287*, § 3, *128 Stat. 3096*.

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

43 CFR 1610.5-3

This document is current through the Oct. 12, 2022 issue of the Federal Register, with the exception of the amendments appearing at 87 FR 61152, 87 FR 61465, and 87 FR 61660.

Code of Federal Regulations > Title 43 Public Lands: Interior > Subtitle B — Regulations Relating to Public Lands > Chapter II — Bureau of Land Management, Department of the Interior > Subchapter A — General Management (1000) > Part 1600 — Planning, Programming, Budgeting > Subpart 1610 — Resource Management Planning > § 1610.5 — Resource Management Plan Approval, Use and Modification.

§ 1610.5-3 Conformity and implementation.

(a) All future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department, and subsequent more detailed or specific planning, shall conform to the approved plan.

(b) After a plan is approved or amended, and if otherwise authorized by law, regulation, contract, permit, cooperative agreement or other instrument of occupancy and use, the Field Manager shall take appropriate measures, subject to valid existing rights, to make operations and activities under existing permits, contracts, cooperative agreements or other instruments for occupancy and use, conform to the approved plan or amendment within a reasonable period of time. Any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to *43 CFR 4.400* at the time the action is proposed for implementation.

(c) If a proposed action is not in conformance, and warrants further consideration before a plan revision is scheduled, such consideration shall be through a plan amendment in accordance with the provisions of § 1610.5-5 of this title.

(d) More detailed and site specific plans for coal, oil shale and tar sand resources shall be prepared in accordance with specific regulations for those resources: Group 3400 of this title for coal; Group 3900 of this title for oil shale; and part 3140 of this title for tar sand. These activity plans shall be in conformance with land use plans prepared and approved under the provisions of this part.

Statutory Authority

43 U.S.C. 1711-1712.

Authority Note Applicable to 43 CFR Subtit. B, Ch. II, Subch. A, Pt. 1600

History

[48 FR 20368, May 5, 1983; *70 FR 14561*, 14567, Mar. 23, 2005; *81 FR 89580*, 89661, Dec. 12, 2016; *82 FR 60554*, 60555, Dec. 21, 2017]