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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
SOUTHERN DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, vs. UNITED STATES BUREAU OF LAND MANAGEMENT, *et al*., Defendants, and SOUTHERN NEVADA WATER AUTHORITY, Defendant-Intervenor.	Case No. 2:14-cv-00226-APG-VCF **PLAINTIFF CENTER FOR BIOLOGICAL DIVERSITY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; AND IN OPPOSITION TO DEFENDANTS' AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT** ORAL ARGUMENT REQUESTED
WHITE PINE COUNTY, *et al*., Plaintiffs, vs. UNITED STATES BUREAU OF LAND MANAGEMENT, *et al*., Defendants, and SOUTHERN NEVADA WATER AUTHORITY, Defendant-Intervenor.	Case No. 2:14-cv-00228-APG-VCF (Consolidated)

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INTRODUCTION

The Groundwater Project's purpose is to facilitate "the largest water appropriations in Nevada history" and "likely the largest interbasin transfer of water in U.S. history," impacting four basins that "encompass 20,688 square miles of Nevada." Fink Dec., Exh A at 3-4. According to the Nevada Department of Wildlife, "the Project could result in potential widespread and wholesale extirpations of populations of fisheries resources," and "significant disruptions to or disturbance of terrestrial wildlife species." AR Doc. 9230 at 34965. BLM violated the National Environmental Policy Act ("NEPA") and the Federal Land Policy and Management Act ("FLPMA") in developing and authorizing the Groundwater Project, and the Project should be held unlawful and set aside. 5 U.S.C. § 706.

BLM's response brief runs afoul of two long-standing principles of administrative law and NEPA. First, counsel for BLM routinely makes statements or presents opinions without providing any support in the administrative record. The Court, however, "may not accept appellate counsel's post hoc rationalizations for agency action." *Northwest Envtl. Defense Ctr. ("NEDC") v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007), *quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). The Court "may only sustain an agency's action on the grounds actually considered by the agency." *NEDC*, 477 F.3d at 686.

Second, BLM argues throughout in its response that it only needed to consider the environmental impacts and legal compliance for one of the three components of the Groundwater Project, which is construction of the initial right-of-way. NEPA, however, requires agencies to analyze both the direct and indirect environmental impacts of proposed actions, with "indirect effects" defined as effects that are "caused by the action and later in time or farther removed in

distance," but still "reasonably foreseeable." 40 C.F.R. §§ 1502.16, 1508.8(b). The groundwater pumping is clearly "reasonably foreseeable," as that is the very purpose of the Project.

The Groundwater Project EIS is in fact the only time that BLM will analyze the overall environmental consequences of the entirety of the Groundwater Project, and similarly the only time that BLM can assess whether the Project as a whole is able to comply with mandatory environmental protections. Contrary to BLM's arguments, this is not a case where the Center's claims must await later site-specific NEPA analyses, where the locations of future development are identified in greater detail. The Center's claims and the primary concerns of the Project identified by state and federal agencies relate to the severe environmental impacts resulting from the massive amounts of groundwater that will be withdrawn from Spring, Delamar, Dry Lake, and Cave Valleys, regardless of the precise locations of groundwater wells or facilities.

Furthermore, NEPA requires BLM to integrate the NEPA process "at the earliest possible time" to "head off potential conflicts." 40 C.F.R. § 1501.2; *see also Marsh v. ONRC*, 490 U.S. 360, 391 (1989) ("NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct"). Here, there are major potential conflicts between the severe impacts that would be caused by the groundwater pumping and BLM's ability to comply with mandatory requirements for wetlands, wildlife, and other resources. And once such a major proposal receives initial approval, "[t]he agency as well as private parties may well have become committed to the previously chosen course of action." *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983). It will thus become far more difficult for plaintiffs and others to influence future "stages" of the Project, as it is "far easier to influence an initial choice than to change a mind already made up." *Id.* Now is the appropriate time for the Court to address and resolve the serious questions raised by this unprecedented groundwater development proposal.

I. BLM Violated NEPA by Failing and Refusing to Prepare a Supplemental EIS

NEPA requires BLM to prepare a Supplemental EIS ("SEIS") if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). As set forth in the Center's opening brief, there has been significant new information concerning the Groundwater Project subsequent to the Final EIS, including: (1) SNWA's water rights were overturned because the appropriation was found unfair to future generations and not in the public interest, with an inadequate mitigation plan; (2) SNWA's 2015 Water Resources Plan discloses that the Project may not be needed; and (3) new science finds more severe and more certain impacts from climate change on the region. Center's Br. at 10-17. BLM's refusal to supplement the EIS violates NEPA. *Id*.

A. There Remains Major Federal Action to Occur for the Groundwater Project

In its response, BLM argues it was not required to prepare an SEIS for the Groundwater Project "because there is no major federal action left to occur." BLM's Br. at 56; *see also* SNWA's Br. at 48. Notably, this argument has no support in the record, as BLM's response to the Center's request for an SEIS did not assert there was no remaining major federal action. AR Doc. 47371. To the contrary, BLM highlighted the multiple steps that still must occur, and confirmed that "[c]onstruction would not occur for at least 5 years." *Id*. The Court should not accept the newly created rationale of BLM's counsel. *Burlington Truck Lines*, 371 U.S. at 168.

Moreover, BLM and SNWA are wrong that there is no remaining major federal action concerning the Groundwater Project. BLM's Br. at 56-57; SNWA's Br. at 48-49. First, as explained, BLM did not issue the May 23, 2013 right-of-way for the Project (AR Doc. 47363) until *after* the Center's May 6, 2013 request for an SEIS. AR Doc. 47359. Thus, as in *Bundorf v Jewell*, BLM retained ample discretion in issuing the right-of-way to constitute ongoing agency

action under NEPA. 2015 U.S. Dist. LEXIS 13928, *27-29 (D. Nev. Feb. 3, 2015). BLM's attempt to distinguish *Bundorf* fails, as in both instances BLM had not yet issued the right-of-way at the time the plaintiff requested an SEIS. BLM's Br. at 57 n. 24.[1]

Second, even after issuance of the right-of-way, BLM continues to retain considerable discretion over the Groundwater Project and major federal action still remains to occur. As BLM admits, the Project "will take nearly forty years to complete," and it "will take decades to go through necessary federal and state approval processes." BLM's Br. at 1, 9. "There are several steps that must occur before even the main conveyance pipeline may be constructed." *Id*. at 4. These steps include SNWA's "Notices to Proceed" with preconstruction activities, which BLM must approve; SNWA's preparation of a "Plan of Development" ("POD"), which BLM must approve; and BLM's development of a "Construction, Operation, Maintenance, Monitoring, Management, and Mitigation Plan" ("COM Plan"), which "must be approved before construction can move forward." *Id*. at 4-5. "The COM Plan would be fully developed after SNWA's completion and BLM's approval of the POD," and "in coordination with other federal, state, local and tribal entities." *Id*. at 35. "After the COM Plan is completed, SNWA would then be able to submit right-of-way requests for future stages of the Project." *Id*. Thus, as recognized by BLM, the preparation and approval of a Plan of Development and COM Plan is an "ongoing process for implementation" of the Project, and NEPA "will be ongoing for many years." AR Doc. 47416 at 193032. Indeed, construction is not expected to even begin for at least five years. AR Doc. 47418 at 193057. In short, implementation of the Project has yet to begin, numerous plans and approvals are still required, and NEPA's SEIS requirement still applies. AR Doc. 47483 at 197533 (the SEIS requirement applies after Final EIS, "but prior to implementation").

[1] SNWA simply ignores the *Bundorf* decision entirely. SNWA's Br. at 48-49.

Contrary to the assertions of BLM and SNWA, there is no support in the record that BLM's continued involvement, authority, and discretion over the Plan of Development, COM Plan, and other plans and approvals for the Groundwater Project, is "ministerial" or "limited." BLM's Br. at 56; SNWA's Br. at 48. BLM in fact explained in the record that the "monitoring, management, and mitigation program" for the Project is "complex and extensive." AR Doc. 12417 at 132723. In the EIS, BLM identified nearly twenty goals and objectives for just the COM Plan, such as ensuring the Project complies with resource protection requirements, protecting federal water rights, avoiding impacts that could cause jeopardy to listed species, and identifying triggers for early warning of adverse impacts. AR Doc. 12415 at 131194.

This case is far different from *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1088 (9th Cir. 2013), where a mine plan of operations was approved by BLM in the 1980s, and the mine had been "actively developed" for a number of years. BLM's Br. at 56. Here, BLM had not yet issued the right-of-way when the Center initially requested an SEIS, the Plan of Development and COM Plan for the Project have still not been completed or approved, and no construction has commenced or is even anticipated to begin for at least a number of years.

This case is also distinguishable from *Cold Mountain v. Garber*, 375 F.3d 884, 894 (9th Cir. 2004), where the Forest Service had issued a special use permit that was being implemented, and plaintiffs had identified no further actions that would be taken by the Forest Service concerning the permit. For the Groundwater Project, by contrast, the right-of-way permit had not been issued, and BLM must still undertake multiple steps and approvals as part of its ongoing implementation and oversight of the Project before any construction can begin.[2]

[2] This case is similarly distinguishable from the cases relied on by SNWA. SNWA's Br. at 48-49. In *W. Org. of Resource Councils v. Jewell*, the agency action at issue was implemented 35 years earlier, in 1979. 2015 U.S. Dist. LEXIS 113683, *13 (D.D.C. Aug. 27, 2015). Here, by contrast, multiple steps and BLM approvals remain to occur before implementation of the Project

This case instead shares more in common with *Sierra Club v. Bosworth*, 465 F.Supp. 2d 931 (N.D. Cal. 2006), where the court held that major federal action remained to occur after timber sale contracts had been approved by the Forest Service and awarded to a private party. The court took into consideration that "the timber sale contracts required the Forest Service's written approval of the operating plan prior to the commencement of logging." *Sierra Club*, 465 F.Supp. 2d at 939. Similarly, the right-of-way at issue here still requires multiple steps and approvals by BLM before any implementation of the project is allowed. AR Doc. 47363 at 192249-50 (requiring, in part, a "Notice to Proceed" from BLM and the approval of a "COM Plan" by BLM). The court also considered that the timber sale contracts could still be revisited by the Forest Service. *Bosworth*, 465 F.Supp. 2d at 939. Here, SNWA's right-of-way permit may also "be reviewed at any time deemed necessary." AR Doc. 47363 at 192250.[3]

In sum, preparation of a "postdecision" SEIS "is at times necessary to satisfy [NEPA's] 'action-forcing' purpose." *Marsh*, 490 U.S. at 370-71. It would be incongruous with NEPA's purposes "for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Id*. at 371. NEPA therefore requires an SEIS "when the remaining governmental action would be environmentally 'significant.'" *Id*. at 372. BLM still must take

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can commence. And in *Envtl. Prot. Info. Ctr. v. U.S. Fish and Wildlife Serv.*, the agency had issued a permit years earlier for logging on private lands, which had commenced and was ongoing, and the agency retained monitoring and oversight over compliance with the permit. 2005 U.S. Dist. LEXIS 30843, *13-14 (N.D. Cal., Nov. 10, 2005). For the Groundwater Project, BLM did not issue the right-of-way permit until *after* the Center's first request for an SEIS, and multiple steps remain before any on-the-ground implementation of the Project.

[3] *See also Klamath-Siskiyou Wildlands Center v. U.S. Forest Serv*., 2007 U.S. Dist. LEXIS 51974, *3-5 (D. Or., July 16, 2007) (court found major federal action remained to occur where timber sale contract had been issued, but commencement of the project had not yet begun).

multiple actions and approvals concerning the Groundwater Project, and the resulting environmental impacts would be significant, and thus major federal action remains to occur.

B. There are Significant New Circumstances and Information Relevant to the Environmental Concerns and Bearing on the Impacts of the Project

1) SNWA's water rights determination has been overturned

As explained, the primary concern expressed by plaintiffs and other agencies with the Groundwater Project is the severe impacts that would result from the massive amount of groundwater withdrawn, and thus it is relevant that SNWA's water rights were overturned, with the court directing the State Engineer to recalculate the appropriations. Center's Br. at 11; Fink Dec., Exh. A. The court noted that "groundwater mining" is defined as "pumping exceeding the perennial yield over time such that the system never reaches equilibrium," and found that under SNWA's appropriation, equilibrium "will never be reached." Fink Dec., Exh. A at 10, 12.

Remarkably, BLM does not contest that equilibrium would never be reached if the Groundwater Project proceeds. BLM's Br. at 59. The court further found, however, that groundwater mining at such a massive scale would be "unfair to following generations of Nevadans," and "not in the public interest." Fink Dec., Exh. A at 12-13. As explained, these findings are directly relevant because BLM is required to "manage the public lands under the principles of multiple use and sustained yield." 43 U.S.C. §1732(a); *see also id*. § 1701(a)(7). This mandate requires BLM to take into account "the long-term needs of future generations," and to maintain "in perpetuity" a high-level annual or periodic output of renewable resources on public lands. 43 U.S.C. § 1702(c), (h); *see also* 43 U.S.C. § 1765(b) (requiring protection of the public interest). Moreover, NEPA required BLM to explain in the Groundwater Project EIS whether the proposal would comply with environmental laws. 40 C.F.R. § 1502.2(d). In light of the court's findings that the groundwater pumping in Spring Valley would exceed the perennial

yield and never reach equilibrium, which is unfair to future generations and not in the public interest, BLM must prepare an SEIS to revisit whether this Project could satisfy the multiple use and sustained yield principles that must guide its management of public lands and resources.

As explained, the court also found several flaws in the "monitoring, management, and mitigation" stipulation between SNWA and the federal agencies, including the failure to set forth objective standards for when environmental impacts are unreasonable and additional mitigation required, and the failure to include a plan to monitor such a large area. Fink Dec., Exh. A, pp. 15-18, 20-23. In response, BLM states that "[t]he fact that more analysis of mitigation may be necessary for purposes of securing water rights does not mean that more analysis is required under NEPA." BLM's Br. at 59. The court, however, did not just identify a need for "more analysis" concerning mitigation. The court instead identified substantive, fundamental problems with the stipulated mitigation plan, which is a key component of the mitigation plan that BLM relied on for the Groundwater Project. *See* AR Doc. 12417 at 132723 (identifying the stipulated agreement as one of the two monitoring and mitigation processes for the Groundwater Project). The court therefore did not direct the Engineer to just further "analyze" mitigation, but rather to "[d]efine standards, thresholds, or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary or capricious." Fink Dec., Exh. A, p. 23.

Importantly, BLM provided no response to the Center's second request for an SEIS, which was sent shortly after the decision overturning SNWA's water rights. Thus there is no evidence before the Court whether BLM considered the directly relevant findings and conclusion of the state court concerning the same water rights that underlie the very purpose and need for the Groundwater Project, and whether this new information triggered the need for an SEIS. "When confronted with [the Center's] request to prepare a SEIS, [BLM] was required to evaluate

the new information and determine whether or not it was of sufficient significance to require a SEIS." *Sierra Club v. U.S. Dept. of Transp*., 310 F.Supp. 2d 1168, 1197 (D. Nev. 2004), *citing Friends of the Clearwater v Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000). BLM was required "to make a timely review" of whether the court's findings and decision required an SEIS for the Groundwater Project, and its "failure to evaluate in a timely manner the need to supplement the original EIS in light of that new information violated NEPA." *Friends*, 222 F.3d at 559.[4]

Rather than explaining where in the record BLM considered the relevance and significance of the new information, BLM's response relies solely on the thoughts and opinions of BLM's counsel. BLM's Br. at 57-59. The court, however, "may not accept [BLM] counsel's post hoc rationalizations for agency action," as BLM's decision must "be upheld, if at all, on the same basis articulated . . . by the agency itself." *Burlington Truck Lines*, 371 U.S. at 168-69.

2) SNWA's 2015 Water Resource Plan

SNWA's 2015 Water Resource Plan discloses for the first time that even under the worst case scenario, the Groundwater Project is now not needed until at least 2035, and that under other scenarios, the Project would not be needed until much later, if at all. Center's Br. at 14, *citing* Fink Dec., Exh. D, pp. 39-40. BLM responds that the Project "has always been long term in nature." BLM's Br. at 59. But this ignores the administrative record, as explained in the Center's opening brief. The purpose and need for the Groundwater Project stems from SNWA's 2004 application for a right-of-way, which anticipated that construction would begin in 2006. AR Doc. 46. The 2011 Draft EIS stated that construction would start in 2013, with the pipeline

[4] *See also Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013) ("An agency must document its decision that no SEIS is required"); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980) (the court should consider "the degree of care with which the agency considered the [new] information," and "the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data").

completed by 2019. AR Doc. 8161 at 29129. And the 2012 Final EIS assumed that SNWA needed to complete the pipeline by at least 2020. AR Doc. 12413 at 129683.

SNWA states in response that "under one scenario" in the 2015 Plan, the Groundwater Project would not be needed until 2035. SNWA's Br. at 56. But again, this is the Plan's worst case scenario. Fink Dec., Exh. D., p 40. Under the "normal supply scenario," the Project is not needed at all. *Id*., p. 39. And under the "shortage scenario (lower demand)," the Project is not needed until at least 2058. *Id*. While SNWA argues that approval was needed now even though the Project is not needed for decades, it cites to no supporting evidence. SNWA's Br. at 57.[5]

The new information from SNWA indicating that the Groundwater Project may no longer be needed is both relevant and significant. Moreover, this information demonstrates that SNWA has no intention of using the right-of-way for at least the initial five-year period, as required. 43 U.S.C. § 1766; 43 C.F.R. § 2807.17(c). While SNWA claims that this is outside the scope of the litigation (SNWA's Br. at 57), it is still a relevant factor for determining whether or not the new information contained in the 2015 Plan is significant under NEPA. Indeed, part of BLM's responsibility under NEPA is to evaluate whether the Groundwater Project will comply with other laws and policies. 40 C.F.R. § 1502.2(d). And the fact that "five years have not yet passed" is not the issue (SNWA's Br. at 57), as SNWA's 2015 Plan plainly admits that the Groundwater Project will not be needed until at least 2035, and may not be needed at all.

As with the state court water rights decision, BLM has failed to even consider whether the new information contained in SNWA's 2015 Water Resources Plan necessitates an SEIS, in violation of NEPA. *Friends*, 222 F.3d at 558 (agencies must evaluate new information "and

[5] Additionally, SNWA's emphasis on the multiple steps, planning, and permitting that still must occur "to bring the Project online" contradicts its previous argument that there is no major federal action concerning the Groundwater Project that is left to occur. *Id*.

make a reasoned determination whether it is of such significance as to require an SEIS"); *Great Old Broads*, 709 F.3d at 855 ("An agency must document its decision that no SEIS is required").

3) New science on the impacts of climate change to the region

On May 6, 2013, the Center submitted to BLM new scientific studies on the impacts of climate change on the Southwest Region and requested an SEIS, which was followed later by another critically important report for the region. AR Doc. 47359; AR Doc. 47360; Fink Dec., Exh. E. BLM refused to consider these reports (AR Doc. 47371), and BLM's response confirms that the reports were not considered. BLM's Br. at 60, n. 26. BLM instead unlawfully determined that under NEPA it never needs to consider new science. AR Doc. 47371 at 192635-36 (refusing to review new science that was issued after completion of the Final EIS).

The new studies show that the impacts of climate change on the Southwest Region are likely to be more severe than previously thought, and that the predicted impacts of climate change on the region are more certain than presented in the Final EIS. Center's Br. at 15-16. In response, BLM and SNWA do not dispute that these new reports were prepared by respected scientists, or that the reports are relevant to the region and the Groundwater Project, or that BLM has never considered these reports in the context of the Groundwater Project. BLM's Br. at 60-61; SNWA Br. at 52-53. Instead, counsel for BLM and SNWA argue that because the topics of the reports were discussed generally in the Final EIS, BLM did not need to even consider whether or not the reports' findings were significant and triggered the need for an SEIS. *Id.*

First, counsel for BLM and SNWA are wrong that the specific findings of the new reports were already addressed in the Final EIS. In terms of the severity and intensity of climate change on the Southwest region, the EIS states generally that "[p]rojections suggest continued strong

warming" and "decreases in precipitation," which "could affect water resources." AR Doc. 12414 at 130209. The new science, by contrast, predicts far more severe impacts:

> [T]he mean state of drought in the late 21st century over the Central Plains and Southwest will likely exceed even the most severe megadrought periods of the Medieval era in both high and moderate future emission scenarios, *representing an unprecedented fundamental climate shift with respect to the last millennium*.

Fink Dec., Exh. E at 7 (emphasis added).

> *Our results point to a remarkably drier future that falls far outside the contemporary experience* of natural and human systems in Western North America, conditions that may present a substantial challenge to adaptation.

Id. (emphasis added).

> Drought, as defined by Colorado River flow amount, is projected to become more frequent, more intense, and more prolonged, *resulting in water deficits in excess of those during the last 110 years (high confidence).*

AR Doc. 47360 at 191606 (emphasis added).

And in terms of the certainty of climate change science, BLM stated in the record that: "It is important to recognize that the current state-of-the-art climate change science reflects considerable uncertainties associated with future trends and potential effects to specific regions or species. This uncertainty is qualified in the Final EIS text." AR Doc. 12417 at 132704. Moreover, because of the uncertainties, BLM stated in the EIS that "it was not possible to provide a reasonable or meaningful simulation of the combined effects of pumping and climate change on water resources." AR Doc. 12414 at 130088. The new science, by contrast, finds:

> Notably, the drying in our assessment is robust across models and moisture balance metrics. *Our analysis thus contrasts sharply with the recent emphasis on uncertainty about drought projections for these regions.*

Fink Dec., Exh. E at 7 (emphasis added); *see also* AR Doc. 47360 at 192036 ("There is now more evidence and more agreement among climate scientists about the physical climate and related impacts in the Southwest").

Second, BLM is wrong that BLM's experts did not need to consider the new climate change reports, and that the agency could instead simply rely on its counsel's litigation position that the new science "does not provide significant new information." BLM's Br. at 61. The Ninth Circuit is clear that NEPA required BLM "to make a timely review" of whether the new climate change science required an SEIS, and BLM's "failure to evaluate in a timely manner the need to supplement the original EIS in light of that new information violated NEPA." *Friends*, 222 F.3d at 559; *Sierra Club*, 310 F.Supp. 2d at 1197 (BLM "was required to evaluate the new information and determine whether or not it was of sufficient significance to require a SEIS").

For the same reason, BLM and SNWA are wrong to criticize the Center for failing to explain whether the new climate science would allow BLM to now quantify the combined impacts of climate change and the Groundwater Project on groundwater flow or other resources. BLM's Br. at 60; SNWA's Br. at 54. As the Ninth Circuit has explained, "[i]t is the agency, not an environmental plaintiff, that has a 'continuing duty to gather and evaluate new information relevant to the environmental impact of its actions,' even after the release of an EIS." *Friends of the Clearwater*, 552 F.3d at 559, *quoting Warm Springs Dam Task Force*, 621 F.2d at 1023.[6]

Last, BLM and SNWA both ignore in their responses that BLM's only response to the new climate change science that is within the record before the Court concluded as follows:

> The Final EIS relied on the best information available to BLM *at the time it was issued*; therefore, a need to supplement the EIS has not been identified at this time . . . The [identified] documents were issued *after* the Final EIS was prepared.

[6] Similarly, SNWA cites to *Tri-Valley CARES v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012), to argue that the Center has not demonstrated that the new science shows a "seriously different picture" than the EIS. SNWA's Br. at 54. In *Tri-Valley*, however, the court deferred to the agency's determination in a "supplemental report," which it had prepared to consider the new information. *Tri-Valley*, 671 F.3d at 1130. Here, by contrast, BLM entirely failed to address the new climate science, and thus has not even considered whether it triggered the need for an SEIS.

AR Doc. 47371 at 192635-36 (emphasis added). As explained, BLM's response demonstrates a fundamental misunderstanding of its continued obligation to consider new information following completion of an EIS. The fact that BLM relied on the best available information *at the time it prepared* the EIS is irrelevant to the SEIS requirement. Similarly, rejecting new information solely because it was issued "after the Final EIS," completely undermines NEPA's requirement for agencies to supplement EISs to address new information. As explained by the Ninth Circuit, "an agency that has prepared an EIS cannot simply rest on the original document." *Friends*, 222 F.3d at 557. BLM's arbitrary response to the Center's request, and its refusal to even consider whether the new science triggered the need for an SEIS, violated NEPA. *Id*. at 559.

II. BLM Violated NEPA by Failing to Consider and Disclose the Combined Environmental Impacts of Climate Change and the Groundwater Project

As set forth in the Center's opening brief, NEPA requires agencies to consider both (1) the effects of a proposed action on climate change, and (2) the implications of climate change for the environmental effects of a proposed action. Center's Br. at 17, *citing* 79 Fed. Reg. 77802, 77824 (Dec. 24, 2014). This case concerns the second of these two issues, and more specifically, BLM's failure to consider the combined impacts of climate change and the Groundwater Project.[7] In its response, BLM does not contest that it is obligated to consider these impacts under NEPA. BLM's Br. at 50-55. BLM instead argues that it did in fact analyze in the Final EIS "the cumulative impacts of climate change when combined with the impacts of the Project." *Id*. at 51. BLM is wrong, as the EIS includes no such analysis for any of the affected resources.

In its response, BLM cites to the first page of the cumulative impacts analysis for each of the affected resources, where it claims the Final EIS discusses the combined impacts of both

[7] BLM's reliance on *WildEarth Guadians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013) is misplaced, (BLM's Br. at 50), as it concerns the first of these two issues - a project's effects on global climate change through contributing to greenhouse gas emissions - and is thus inapplicable.

climate change and the Groundwater Project. BLM's Br. at 51. For each of the affected resources, however, BLM first recites in the EIS the same paragraph of general "climate change effects."[8] BLM then discusses in the EIS the effects of climate change *by itself* on the affected resource, or for some resources states that such effects were not evaluated. *Id*. What is missing in the EIS's cumulative effects analysis for each affected resource is any analysis or discussion of the combined, cumulative effects of *both* the impacts of climate change on the region *and* the predicted environmental effects of the Groundwater Project. *Id*.

As explained in the Center's opening brief, providing a general discussion of climate change effects within the cumulative effects section for each affected resource does not satisfy NEPA's cumulative impacts requirement. Center's Br. at 18-19.[9] "Cumulative impact" means the incremental impact of the proposed action "when added to" other actions (40 C.F.R. § 1508.7), and thus considering the effects of climate change and the Groundwater Project in isolation from each other does not meet this requirement. *Muckleshoot Indian Tribe*, 177 F.3d at 810 (an EIS "must analyze the combined effects" of past, present and future actions).

Moreover, simply stating in a litigation brief that the EIS addressed the cumulative impacts of climate change when combined with the impacts of the Groundwater Project, and including a long list of citations, is plainly insufficient if none of those cited pages actually include such an analysis. BLM's Br. at 51.[10] BLM's response quotes from the water resources

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[8] *See* AR Doc. 12413 at 129910-12, 129985; AR Doc. 12414 at 130209, 130260, 130356-57, 130520, 130632-33, 130684, 130724, 130753, 130769, 130819; AR Doc. 12415 at 130856, 130896, 130957, 130985, 131032, 131151, 131174.

[9] *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 811 (9th Cir. 1999) (finding that although there were twelve sections in the EIS entitled "cumulative effects," those sections merely provided "very broad and general statements" that failed to meet NEPA's requirements).

[10] SNWA cites to these same pages for the missing cumulative impacts analysis (SNWA's Br. at 37 n. 192), as well as to a Table that similarly considers only the climate change effects in

section of the EIS to supposedly demonstrate that the combined impacts were considered. *Id*., *citing* AR 130209. As with all resources in the EIS, however, the quotes pertain only to the climate change effects in the region on the resource, without factoring in or considering the combined, cumulative effects of both climate change and the environmental effects of the Project. *Id*. Thus, BLM's response just restates generally that climate change will warm the atmosphere, increase drought, increase extreme weather events, and reduce snowpack and spring runoff. *Id*. While accurate, this is all true with or without the Groundwater Project, which was not factored into the analysis. Repeatedly stating that this is a "discussion of the cumulative impacts of climate change when combined with the impacts of the Project" does not make it so. *Id*. at 52; *Rhodes v. MacDonald*, 2009 U.S. Dist. LEXIS 84743, *13 (M.D. Ga., Sept. 16, 2009) ("Unlike in *Alice in Wonderland*, simply saying something is so does not make it so").[11]

BLM misconstrues the Center's argument by claiming the Center seeks "a more specific" analysis of the combined, cumulative impacts of the Groundwater Project and climate change. BLM's Br. at 52. The Court, however, does not need to consider whether the specificity of BLM's analysis on this issue in the Final EIS is sufficient, as there is no such analysis at all. Thus, this case is not like *Friends of the Wild Swan v. Jewell*, where the EIS did assess the combined effects of climate change and the proposed action for each alternative. 2014 U.S. Dist. LEXIS 116788, *31-32 (D. Mont., Aug. 21, 2014) (noting that a cumulative impacts analysis

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isolation, and not in combination with the environmental effects of the Groundwater Project. SNWA's Br. at 39 n. 201 (citing EIS Table 3.1-38); *id*. at 40 n. 207 (same).

[11] SNWA also tries to patch together a cumulative impacts analysis for wildlife from the EIS (SNWA's Br. at 40), but neglects to include BLM's conclusion that it was "not possible to relate potential effects with specific pumping alternatives." AR Doc. 12414 at 130474-75. SNWA also quotes a statement from the EIS (SNWA's Br. at 40), without noting that this statement was relying on a 2010 report which did not at all consider the Groundwater Project. AR Doc. 12414 at 130520, *citing* BLM 2010 (AR Doc. 47689). The 2010 report instead highlighted that climate change is expected to exacerbate other impacts on wildlife. AR Doc. 47689 at 220236.

must consider "the combined effects of actions," and that the Final EIS included "a comparison of the effects of climate change across the alternatives"). Similarly, in *Southern Utah Wilderness Alliance v. Burke*, the challenged EIS included a cumulative impacts analysis of the proposed action "combined with past, present, and reasonably foreseeable future actions," including climate change effects. 981 F.Supp. 2d 1099, 1110-11 (D. Utah 2013).

BLM and SNWA also argue that BLM was not required to "quantify" the cumulative impacts of climate change through "modeling." BLM's Br. at 54; SNWA's Br. at 39. This argument is also a red herring, as the Center has never argued that a quantitative analysis or modeling was required. Rather, the EIS is deficient under NEPA because it fails to provide *any* analysis – qualitative or quantitative – of the combined, cumulative impacts of climate change effects and the anticipated environmental consequences of the Groundwater Project.

As explained in the Center's opening brief, other agencies notified BLM that the EIS failed to consider the combined effects of climate change and the Groundwater Project, as required by NEPA. Center's Br. at 19-20. The U.S. Fish and Wildlife Service explained,

> The analysis of climate change effects is not very useful in that there [are] no substantive conclusions that reflect best professional judgment of *the additive effect of climate change* to project specific effects, or cumulative level project effects. It is highly likely that for some wildlife species for example, climate change will increase the vulnerability of a species to other stressors.

AR Doc. 9262 at 35066 (emphasis added). And the Nevada Department of Wildlife stated,

> *The additional cumulative effect* from climate change to any of the described Action Alternatives on aquatic and terrestrial ecosystems, surface and groundwater resources, and associated wildlife species is potentially very significant under even conservative climate change scenarios; *how this is evaluated in the draft EIS is woefully inadequate*.

AR Doc. 9230 at 34963 (emphasis added). As in the record, BLM states that in response to these agency comments, it "reorganized the discussion in the FEIS." BLM's Br. at 53. However, "reorganizing" an EIS by moving the generic discussion of climate change to the cumulative

effects section does not automatically turn that discussion into a cumulative effects analysis. Regardless as to where the discussion is found in the EIS, it still only considers the impacts of climate change on the affected resources in isolation, as opposed to in combination with the direct and indirect environmental impacts of the Groundwater Project, as required by NEPA.

BLM further asserts that the Center misinterprets the EIS in stating that BLM relied on uncertainty to avoid considering the combined impacts of climate change and the Groundwater Project. BLM's Br. at 53. In its response to comments on this same issue of climate change and uncertainty, however, BLM confirmed that "the current state-of-the-art climate change science reflects considerable uncertainties associated with future trends and potential effects to specific regions or species," and that "[t]his uncertainty is qualified in the Final EIS text." AR Doc. 12417 at 132704. Despite the uncertainties as to how climate change will continue to impact the region, agencies are to "use current scientific information and methodologies for assessing . . . climate effects" in EISs. 79 Fed. Reg. at 77817; *see also id.* at 77828 (agencies should assess the environmental effects "based on available climate change information"); *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (NEPA requires agencies to engage in reasonable forecasting when preparing EISs, as speculation is implicit in NEPA).

Last, BLM argues that the analysis of climate change in the Final EIS is consistent with CEQ's guidance on considering climate change under NEPA. BLM's Br. at 54. The CEQ guidance makes clear, however, that agencies must consider the implications of climate change for a proposed action by assessing the combined impacts of both climate change and the agency's proposal. 79 Fed. Reg. at 77813 ("Agencies should consider the specific effects of the proposed action [and] the nexus of those effects with projected climate change effects"); *id.* at 77825 ("Federal agencies, to remain consistent with NEPA, should . . . take into account the

ways in which a changing climate over the life of the proposed project may alter the overall environmental implications of such actions"). This analysis is especially important for actions such as the Groundwater Project, which are "designed for long-term utility and involve resources considered vulnerable to specific effects of climate change within the timeframe of the proposed project's anticipated useful life." *Id*. at 77813. By contrast, in the cumulative impacts sections of the Groundwater Project EIS, BLM considers the effects of climate change on the various resources in isolation and apart from the severe, long-term environmental consequences that are predicted to result from implementation of the Groundwater Project.

In sum, BLM's failure to assess and disclose the combined environmental consequences of both climate change and the Groundwater Project on affected resources violates NEPA.

III. BLM Failed to Consider Significant, Relevant Factors Concerning Mitigation in the EIS and Record of Decision, in Violation of NEPA and the APA

A. BLM Failed to Address Thresholds for When Additional Mitigation is Necessary to Prevent Irreversible Impacts to Springs, Streams, and Other Resources

There is no dispute that the Groundwater Project will result in widespread and severe impacts to springs, streams, and other resources; and that thresholds should be identified for when additional mitigation measures must be implemented to protect resources from undue degradation. As explained in the Center's opening brief, BLM failed to address fundamental factors concerning these triggers or thresholds in the EIS, including (1) BLM failed to determine what the thresholds would be prior to signing the Record of Decision and issuing the right-of-way; (2) BLM failed to assess the effectiveness of its yet-undisclosed thresholds or its overall mitigation plan; (3) BLM failed to consider and take into account the extremely long delay that would occur between when any established thresholds are exceeded, and when the impaired

spring or streams would eventually return to equilibrium; and (4) BLM failed to support its unidentified thresholds with any analytical data or scientific evidence. Center's Br. at 24-26.

As explained, EPA repeatedly brought these concerns to BLM's attention during the NEPA process. Center's Br. at 23-24. BLM argues in its response that "EPA did not go so far as CBD." BLM's Br. at 39. EPA's comments, however, closely track the Center's arguments concerning the deficiencies in the Groundwater Project EIS. EPA requested that BLM identify in the EIS the specific thresholds that would trigger additional mitigation measures if exceeded (AR Doc. 9469 at 38117); criticized BLM for failing to address in the EIS the "effectiveness of the mitigation strategy, as a whole, in preserving regional ecosystem functions" (*id*.); and commented that due to the "long time frames," the EIS "should address the time lag between cessation of pumping and recovery of groundwater levels." AR Doc. 12115 at 95996.[12]

BLM's acknowledges in its response that it "must seriously consider EPA's comments." BLM's Br. at 39, n. 14, *citing Citizens Against Burlington v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991); *see also Sierra Club*, 310 F.Supp. 2d at 1196 (finding that an agency's response to EPA's comments was inadequate); 40 C.F.R. § 1503.4 (agencies required by NEPA consider and respond to comments). Here, however, BLM merely informed EPA that its concerns with the project's mitigation plan will be addressed later, *outside* of the NEPA process. *See* AR Doc. 12417 at 133065 (stating that "impact thresholds" and "mitigation effectiveness" will be included "in the development of a comprehensive project-wide monitoring and mitigation plan").

The fact that BLM did not take EPA's concerns seriously is plainly evident in EPA's comments that are *subsequent to* BLM's response to comments on the Draft EIS. In its later

[12] *See also* AR Doc. 9262 at 35070 (U.S. Fish and Wildlife Service, commenting that the effectiveness of monitoring "in providing 'early warning' of undesirable impacts is unknown" and that "[t]ime lags in biological response to hydrologic changes could be problematic and need to be taken into account when planning and implementing . . . mitigation measures").

comments on the "Administrative Final EIS" ("AFEIS"), EPA continued to maintain that "the mitigation and adaptive management strategy outlined in the AFEIS does not appear viable." AR Doc. 12155 at 95991. EPA also continued to criticize BLM's decision to defer until later key questions concerning the mitigation strategy for the Groundwater Project:

> BLM defers an important part of the impact assessment – the discussion of probable effectiveness of the mitigation strategy as a whole – to the future COM plan, which will be developed after BLM's Record of Decision. It is important to include this information in the Tier 1 analysis to evaluate, at a programmatic level, the general mitigation approach that will be relied upon in the subsequent tiered NEPA documents.

Id. at 95992. EPA thus again requested that the EIS provide greater detail regarding the mitigation plan, including "an evaluation of the effectiveness of the adaptive management strategy, considering the long recovery times for groundwater levels to rebound after the cessation of pumping." *Id*.; *see also id*. at 95994 (stating that BLM's plan "does not appear to be an effective mitigation proposal" due to "the very long timeframes for effects of adaptive management actions (e.g. stopping groundwater pumping) to be seen in the landscape").[13]

In responding to its failure to identify the thresholds that will trigger when additional mitigation measures are necessary, BLM does not dispute that this will occur later, outside of the NEPA process, by "SNWA and other parties." BLM's Br. at 34 (explaining that "SNWA and other parties" will "establish environmental indicators," and that "SNWA and other parties" will "develop specific early warning thresholds"). NEPA requires, however, that "environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) ("NEPA emphasizes the importance of . . . comprehensive up-

[13] EPA again later restated its position within its comments on the Final EIS: "We have concerns regarding the effectiveness of the adaptive management proposal because . . . objectives have not been identified, and the time lags associated with monitoring impacts to groundwater present substantial challenges to the effectiveness of adaptive actions." AR Doc. 13399 at 148677.

front environmental analysis" to ensure that the agency will not regret its decision "after it is too late to correct"); *see also* 40 C.F.R. § 1502.16(h) (an EIS must address mitigation); *id.* § 1508.20 (mitigation includes avoiding the impact altogether, minimizing impacts by limiting the degree or magnitude of the action and its implementation, rectifying the impact by restoring the affected environment, reducing or eliminating the impact over time, and compensating for the impact).

In response to its failure to address the effectiveness of the mitigation plan for the Groundwater Project, BLM continues to rely on its consideration of individual component parts of its mitigation strategy. BLM's Br. at 40. EPA has explained why this is insufficient:

> We acknowledge that the DEIS attempts to convey effectiveness of each proposed mitigation measure and the residual impacts that would occur after mitigation. However, the DEIS does not evaluate the probable effectiveness of the mitigation strategy, as a whole, in preserving regional ecosystem functions. *Because of the large magnitude and scale of potential impacts, it is critical that an evaluation of regional mitigation effectiveness be included in the programmatic-level impact assessment and not deferred to future tiered NEPA analysis.*

AR Doc. 9469 at 38117 (emphasis added). Moreover, as further explained by EPA, BLM also cannot defer its assessment of the mitigation effectiveness for the Project to the future "COM Plan," as the "courts have ruled that agencies should discuss mitigation measures, along with an assessment of whether they can be effective, in the EIS." AR Doc. 12115 at 95993-94.

BLM states that it "respectfully disagrees" with EPA that it was required to assess the overall effectiveness of the mitigation plan in the EIS. BLM's Br. at 41, n. 15. Congress, however, has recognized the expertise of EPA by directing the agency to review and comment on all EISs. 42 U.S.C. § 7609(a). Moreover, EPA relied on guidance from CEQ, which is the agency charged with overseeing NEPA. AR Doc. 9469 at 38117 (noting that CEQ guidance states that "the probability of the mitigation measures being implemented must also be discussed"). BLM, on the other hand, is to receive no deference regarding its opinion that the

Groundwater Project EIS complies with NEPA. *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002) ("the court owes no deference to [BLM's] interpretation of NEPA or the CEQ regulations because NEPA is addressed to all federal agencies").

Indeed, EPA is correct that agencies must address in the EIS "mitigation measures, along with an assessment of whether they can be effective." AR Doc. 12115 at 95994, *citing Neighbors of Cuddy Mt. v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) (finding that agency failed to provide "an estimate of how effective the mitigation measures would be if adopted"). As explained by EPA, the "omission of a reasonably complete discussion of possible mitigation measures would undermine the action-forcing function of NEPA and prevent the agency and interested parties from properly evaluating the severity of the adverse affects." *Id.*, *citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

BLM also argues that it appropriately considered the long delay between when any established thresholds are exceeded, and when water levels would return to equilibrium. BLM's Br. at 41. The pages cited by BLM, however, only highlight the problem. In the context of discussing the impacts of groundwater drawdown on "federal resources and federal water rights," BLM stated that if it determines through monitoring that impacts are occurring, it would then determine "if emergency action and/or a mitigation plan is required." AR Doc. 12414 at 130127. According to the EIS, "[t]he early warning monitoring system coupled with BLM authority to require that specific measures be implemented in a timely manner to avoid, minimize or offset the impacts is expected to be effective at minimizing residual adverse effects to federal resources and federal water rights." *Id.* at 130128. As explained by EPA, however, the very long response time is a key reason why BLM's entire mitigation plan may in fact be ineffective. More specifically, BLM's "adaptive management" approach "does not appear to be

an effective mitigation proposal for this project" in part because "the very long timeframes for effects of adaptive management actions (e.g. stopping groundwater pumping) to be seen in the landscape could result in irreversible loss of resources." AR Doc. 12115 at 95994.

In contrast to EPA's identification of this issue as a fundamental problem affecting the entire mitigation and "adaptive management" strategy, BLM merely stated in the EIS, under its discussion of "potential residual impacts," that the recovery of water levels in some areas "could take several years or decades." AR Doc. 12414 at 130128. "Therefore, a long-term reduction in surface discharge at perennial surface water source areas is likely to occur in some areas." *Id.* The "potential residual impacts" on "federal resources" in "some areas," lasting "several years to decades," however, is far different from EPA's concern that "the mitigation and adaptive management strategy outlined in the [EIS] does not appear viable." AR Doc. 12115 at 95991.

Last, BLM argues that the Ninth Circuit upheld a similar mitigation plan in *Northern Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006). BLM's Br. at 37. In *Northern Alaska*, BLM was analyzing a plan for oil and gas leases across "vast reaches" of northern Alaska. *N. Alaska Envtl. Ctr.*, 457 F.3d at 973. Significantly, BLM did not know at this leasing stage which specific areas, if any, "subsequent exploration would find most suitable for drilling." *Id*. at 974. The court therefore held that "[b]cause it is impossible to know which, if any, areas . . . are most likely to be developed, BLM development of more specific mitigating measures cannot be required at this stage." *Id*. at 979.[14] In this case, by contrast, BLM analyzed the impacts of specific levels of groundwater production from each of the four basins, and found severe impacts to water, vegetation, and other resources. *See e.g.*, AR Doc. 47277 at 188142; AR Doc. 12414 at 130183; *id*. at 130350. What distinguishes this case from *Northern Alaska* is

[14] Similarly, in *San Juan Citizens*, the agency did not yet know the location or extent of future gas development. *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1054-55 (10th Cir. 2011).

that the Center's claims, as well as the concerns of state and federal agencies, are focused on the severe impacts of the proposed groundwater withdrawal on the affected region, regardless as to the precise site-specific locations of future groundwater facilities or wells. BLM has not explained, however, why a comprehensive mitigation strategy for these impacts could not be fully addressed now, in the EIS. Finally, there is no indication in *Northern Alaska* that EPA had repeatedly expressed concerns that the proposed mitigation plan was likely to be ineffective.

B. BLM Failed to Consider Compensatory Mitigation for Wetland Losses

BLM does not dispute in its response that the Groundwater Project will adversely affect thousands of acres of wetlands. Center's Br. at 27; *see* AR Doc. 13399 at 148674 (the Project would result in the "likely loss" of "3,096 acres of wetlands"); *id*. at 148678 ("The FEIS predicts moderate to high risk for thousands of acres of wetlands"). BLM also did not respond to EPA's concern that this irreversible loss of wetlands may be "unmitigable, given the potential need for thousands of acres of created waters of the U.S. and compensatory wetlands." AR 9469 at 38113, 38120. BLM's response instead focuses solely on the "first phase of construction" of the Groundwater Project, and argues that it can defer until later how it will compensate for the thousands of acres of wetlands impacts. BLM's Br. at 43-44. BLM's approach violates NEPA.

BLM is correct that the Center did not bring this claim under the Clean Water Act, or against the U.S. Army Corps of Engineers. BLM's Br. at 43. The Center instead argues that BLM violated NEPA by refusing to address compensatory mitigation for wetlands in the EIS. First, NEPA specifically required BLM to address mitigation in the Groundwater Project EIS, including "[c]ompensating for the impact by replacing or providing substitute resources or environments." 40 C.F.R. § 1508.20(e). This NEPA requirement is especially important where, as here, there will be severe impacts "that can only be modestly ameliorated through the

commitment of vast public and private resources." *Robertson*, 490 U.S. at 352. Second, NEPA required to address in the EIS how the Project will comply with other environmental laws and policies, which includes the compensatory mitigation for impacts to wetlands mandated by Section 404 of the Clean Water Act. 40 C.F.R. § 1502.2(d). And third, NEPA requires early, upfront environmental analysis "to head off potential conflicts." *Id*. § 1501.2; *Blue Mts.*, 161 F.3d at 1216. BLM failed to address in the EIS the "potential conflict" between the thousands of acres of wetlands that will be lost as a result of the Project and the need to compensate for these widespread losses, which EPA has warned "may be unmitigable." AR Doc. 12115 at 96999. [15]

Indeed, EPA notified BLM of its duty to address this issue in the EIS throughout the NEPA process. In its initial comments, EPA stated that the EIS should identify impacts to wetlands, "including identification of Section 404 Clean Water Act (CWA) requirements, and management and mitigation proposals to ensure compliance with these requirements." AR Doc. 2363 at 5281. EPA noted that these requirements include "all appropriate and practicable compensation measures for unavoidable losses to waters of the United States, including wetlands." *Id*. When BLM failed to address this issue, EPA again commented that the "EIS should evaluate the ability to meet the requirements of the CWA Section 404's compensatory mitigation rule, and discuss the opportunities that may exist for compensatory mitigation in the project area." AR Doc. 9468 at 38110. As recognized by EPA, the severe losses of wetlands resulting from the Project "may, in fact, be unmitigable, given the potential need for thousands of acres of created waters of the U.S. and compensatory wetlands." AR 9469 at 38120. And after BLM's response to comments on the Draft EIS, EPA continued to raise this same concern:

[15] While SNWA discusses mitigation measures that are included in the EIS, these measures do not include compensatory mitigation for the thousands of acres of wetlands that will be adversely impacted by the Groundwater Project, as predicted by BLM in the EIS. SNWA's Br. at 46.

> Opportunities for compensatory mitigation should be discussed in the FEIS because, as we previously commented, *lost acreage may be unmitigable* given the potential need for large amounts of acreage of created waters of the U.S. and compensatory wetlands. . . The FEIS should discuss possible options for compliance with the Compensatory Mitigation Rule and the practicability of this mitigation.

AR Doc. 12115 at 95999 (emphasis added); *see also* AR Doc. 9467 at 38107 (U.S. Army Corps of Engineers commenting that "mitigation plans should be developed to compensate for the unavoidable losses resulting from project implementation").[16]

Despite the clear comments from EPA and others on this issue during the NEPA process, there was still no discussion in the EIS addressing how BLM or SNWA could compensate for the thousands of acres of impacts to wetlands that BLM predicts in the EIS will result from the Groundwater Project. This is precisely the type of conflict that NEPA is intended to avoid. 40 C.F.R. § 1501.2. BLM violated NEPA by deciding to defer consideration of such an important issue, and to instead consider the required mitigation piecemeal as it approves future segments of the Project. *Robertson*, 490 U.S. at 349 ("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"); W. Rodgers, *Environmental Law* § 7.7 at 767 (1977) (NEPA's purpose "is to require consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete"). BLM's refusal to consider such an important aspect of the Groundwater Project renders the EIS insufficient. *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 493 (9th Cir. 2014) (NEPA requires agencies to consider every significant aspect of the environmental impact of a proposed action).

[16] SNWA claims in its response that EPA's comments on the Groundwater Project are based on an "exaggerated calculation." SNWA's Br. at 47. SNWA, however, fails to cite to anywhere in the record where BLM contested EPA's comments or calculation. Thus, there is no evidence to support the argument that the reason BLM failed to address this issue in the EIS, as requested by EPA, is because it disagreed with the substance of EPA's comments.

IV. BLM Failed to Demonstrate that the Groundwater Project Will Comply with the Ely RMP's Mandatory Protections for Wildlife and Aquatic Species

BLM does not dispute that the Groundwater Project must comply with the mandatory standards and guidelines in the Ely Resource Management Plan ("RMP"), including those designed to protect wildlife and aquatic species. In defending BLM's failure to demonstrate compliance with RMP standards for the Project, counsel for BLM provides explanations that have no support in the record, and highlights deficiencies in the EIS where BLM only arguably considered the impacts of one component of the Project on a small subset of the affected species.

A. Compensatory Mitigation Requirements for "Special Status Species"

Ely RMP standard SS-10 requires BLM to mitigate for all activities "that result in the loss of special status species habitats on a ratio of 2 acres of comparable habitat for every 1 acre of lost habitat." AR Doc. 47482 at 197079. As explained, the Groundwater Project would impact numerous special status species habitats, including desert bighorn sheep, sage grouse, a large number of species of bats, bald eagle, ferruginous hawk, golden eagle, northern goshawk, western burrowing owl, dark kangaroo mouse, pygmy rabbit, northern leopard frog, Bonneville cutthroat trout, Pahrump poolfish, White River spinedace, relict dace, Meadow Valley Wash desert sucker and speckled dace, and several species of springsnails. Center's Br. at 30-31, *citing* AR Doc. 12416 at 132198-132205, 132318-24, 130419-20. BLM failed to demonstrate in the record that the Groundwater Project will comply with RMP standard SS-10 for these species.

In the Groundwater Project EIS, BLM divides the environmental consequences of the Project into three components: (1) construction of the initial right-of-way and ancillary facilities; (2) the groundwater development areas (including wells, access roads, and gathering pipelines); and (3) the impacts resulting from groundwater pumping. AR Doc. 12413 at 129838. Counsel for BLM first errs by claiming that BLM only needed to demonstrate compliance with the RMP

standard for one of these three components: the impacts caused directly by construction of the initial right-of-way. BLM's Br. at 63-66. There is no support for this position in the Ely RMP or elsewhere in the record. The entire purpose of the right-of-way is to access the groundwater development areas and pump and transport groundwater, and indeed BLM recognized the need to assess the impacts of all three components in the EIS, and found widespread, severe impacts to wildlife and aquatic habitats. *See* AR Doc. 12414 at 130465-68 (impacts from right-of-way construction); AR Doc. 12414 at 130349-50, 130623-24 (impacts from groundwater development and groundwater pumping). If BLM cannot demonstrate compliance with the RMP standards for all components of the Project, then it was arbitrary and in violation of FLPMA for BLM to authorize the Project to proceed. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a).

Counsel for BLM also argues, again without any citation to the record, that the Ely RMP standard only applies to the "permanent loss" of habitat, and not the "long term disturbance" of habitat. BLM's Br. at 63-64; *id*. at 64 (table). This argument, however, is directly contradicted by the record, where BLM looks to "disturbed habitat" in discussing this standard. AR Doc. 12415 at 131186-87 (stating would improve 2 acres of habitat for every 1 acre of "disturbed habitat"); AR Doc. 47277 at 188423-25 (same). Moreover, the habitat disturbed by construction of the right-of-way would require "20 to *more than 200 years*" to recover, with close to 1000 acres "permanently converted" to industrial uses. AR Doc. 12414 at 130310 (emphasis added).

BLM's counsel further argues that for avian and bat species, the RMP standard only applies to "nesting habitat," and not "foraging habitat." BLM's Br. at 64. Once again, BLM provides no citations from the record. *Id*. This is because there is no evidence in the record that the RMP standard was intended to only protect some, but not all, of a species' habitat needs.

As set forth in the Center's opening brief, for a very small subset of the special status species that will suffer habitat loss as result of the Groundwater Project, BLM provided in the EIS a summary conclusion that the Project will comply with the RMP requirement. Center's Br. at 33, *citing* AR Doc. 12415 at 131186-87 (desert bighorn sheep, sage grouse, pygmy rabbit). BLM claims that for these species, the Center is "incorrect that BLM has not required 2:1 compensatory mitigation." BLM's Br. at 65. As the Center explained, however, FLPMA does not allow BLM to include only a conclusory statement proclaiming that it will comply with the standard. Center' Br. at 33, *citing Or. Natural Res. Council Fund ("ONRC") v. Brong*, 492 F.3d 1120, 1131-32 (9th Cir. 2007) (finding violation of FLPMA where BLM made "little more than a conclusory statement" that the research logging was appropriate and failed to explain how project would comply with the requirement).[17] While BLM attempts to distinguish *ONRC* on the facts, the basic principle remains that the agency must explain how the project will comply with the applicable standard, and not make "little more than [a] conclusory statement." *ONRC*, 492 F.3d at 1132. For the Groundwater Project, there is no indication in the record that BLM ever considered whether or not thousands of acres of comparable habitat on BLM lands are even available to mitigate for the widespread habitat destruction for these affected sensitive species.[18]

[17] *See also Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 963 (9th Cir. 2005) (stating that the reviewing court must be able "reasonably to ascertain from the record" whether the agency was in compliance with the RMP standard).

[18] SNWA goes a step further and argues that BLM was only required to assert in a monitoring and mitigation plan, which is still being developed and not yet approved, that all actions will conform to the Ely RMP. SNWA's Br. at 61. The Ninth Circuit, however, requires agencies to demonstrate how a proposed action will comply with the applicable RMP standards, and not just state that it will comply. *ONRC*, 492 F.3d at 1131-32. This is especially important for a proposed action such as the Groundwater Project, where BLM admits there will be a long-term loss of many thousands of acres of sensitive species' habitat, and yet provides no indication as to where it will find double this amount of habitat to be restored, as required by the RMP.

For the dozens of additional special status species, for which BLM does not even provide the conclusory sentence that the Groundwater Project will comply with the required 2:1 standard, BLM claims that it "appropriately explained" why such mitigation was not necessary. BLM's Br. at 65. Notably, BLM provides no supporting citation to the record because it does not exist.

First, for the golden eagle and ferruginous hawk, BLM admits that it only considered the direct impacts from construction of the right-of-way, and therefore did not consider the impacts from the Project's other two components. BLM's Br. at 65-66. And even for just the impacts caused by construction of the right-of-way, the EIS disclosed that impacts would include the "long-term reduction of approximately 10,460 acres of golden eagle foraging habitat, [and] 4,340 acres of ferruginous hawk nesting and foraging habitat." AR Doc. 12414 at 130467. Moreover, "[f]acility maintenance would result in the permanent conversion of 835 acres of golden eagle foraging habitat, [and] 306 acres of ferruginous hawk nesting and foraging habitat." *Id.*[19] Contrary to the assertion of its counsel, BLM never determined in the record that the chosen mitigation measures would prevent all loss of habitat for these sensitive species. BLM's Br. at 66. Similarly, there is no record evidence to support BLM's counsel's assertion that "BLM reasonably determined that requiring 2:1 compensatory mitigation was not necessary." *Id.*

Second, for the fourteen special status bat species, BLM again focuses only on the direct impacts caused by pipeline construction. BLM's Br. at 66. Even for just these impacts, however, the EIS found that the Project would result in the "long-term reduction" of up to 10,420 acres of foraging habitat, and that "facility maintenance would result in the permanent conversion of 101 to 955 acres of habitat to industrial uses." AR Doc. 12414 at 130468. The plain language of the

[19] While BLM claims in its response that surveys have not located any nests within the path of the right-of-way (BLM's Br. at 66), the EIS states that the golden eagle and ferruginous hawk "have been observed within or near the [right-of-ways]," and that two active ferruginous hawk nests are found within the 0.5 mile buffer of the right-of-way. AR Doc. 12414 at 130425.

RMP standard therefore required thousands of acres of compensatory mitigation. AR Doc. 47482 at 197079. Counsel for BLM concludes, however, that because "only bat foraging habitat would be affected" and because bat colonies have not been found within the right-of-way itself, "BLM's decision not to require 2:1 compensatory mitigation was reasonable." BLM's Br. at 66. But again, BLM cites to no support in the record. This is because there is no support for BLM's litigation position that the RMP standard does not apply to foraging habitat. And more fundamentally, there is no evidence that BLM ever made the determination, within the record, not to require the RMP standard's 2:1 compensatory mitigation for the affected bat species.

Similarly, for the dark kangaroo mouse, BLM states in the EIS that direct impacts from just construction of the right-of-way would include the "long-term reduction of approximately 6,583 acres" of habitat, and that "facility maintenance would result in the permanent conversion of 521 acres." AR Doc. 12414 at 130468. Counsel for BLM claims that BLM "reasonably chose to defer" to the Nevada Department of Wildlife to develop mitigation for the kangaroo mouse "rather than require 2:1 compensatory mitigation for lost habitat." BLM's Br. at 67. Once again, however, BLM provides no citation to the record to support this conclusion. *Id*. This is because there is again no record evidence that BLM ever considered whether the Project could comply with the RMP's 2:1 compensatory mitigation requirement for the kangaroo mouse.

For the additional special status species that would be impacted by the Groundwater Project, counsel for BLM provides no argument as to how the Project will comply with the RMP's compensatory mitigation requirement. BLM's Br. at 63-67. Moreover, there is nowhere in the record where BLM has "reasonably explained" or "appropriately considered" why the RMP's compensatory mitigation does not apply to these species. *Id*. at 65. Thus, for species such as the northern goshawk, the EIS acknowledged the Project will result in the "long-term

reduction" of thousands of acres of "foraging and nesting habitat," but there is no discussion of compliance with the RMP standard. AR Doc. 12414 at 130482, 130515. Similarly, construction of the right-of-way would cause the long-term loss of 4,900 acres of bald eagle foraging habitat, but there is no mention of the RMP standard in the EIS. *Id*. at 130467. The same is true for the loss of habitat for the northern leopard frog and the many aquatic special status species.

Last, SNWA cites to *League of Wilderness Defenders ("LOWD") v. Allen*, 615 F.3d 1122 (9th Cir. 2010), to argue that the court should defer to BLM's determination that the Project would comply with the RMP standard. SNWA's Br. at 62. In *LOWD*, however, the Forest Service had carefully explained how the proposal was consistent with the Forest Plan, which was reviewed and confirmed by the agency's regional office and the U.S. Fish and Wildlife Service "out of an abundance of caution." *LOWD*, 615 F.3d at 1128-29, 1132. For the Groundwater Project, by contrast, BLM merely asserted in the EIS that it would comply with the 2:1 standard for some species; and for most species the EIS does not even mention the standard. Thus, unlike *LOWD*, the court cannot defer to the BLM's analysis because there is no analysis.

In sum, for the dozens of special status species that BLM admits will lose thousands of acres of habitat as result of the Groundwater Project, the EIS provided only an unsupported conclusion for a few species, claiming that BLM will comply with the RMP standard; and for the remaining species, the EIS provided no explanation at all as to whether BLM will comply with the standard. Based on the record before the court, BLM failed to demonstrate compliance with RMP standard SS-10, in violation of FLPMA. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a).

B. Compensatory Mitigation Requirements for Impacts to Aquatic Species

The proposed action for the Groundwater Project is the right-of-way request by SNWA, which it seeks in order to "construct, operate, and maintain the main conveyance pipeline and

related facilities to support the future pumping and transport of groundwater from Spring, Delamar, Dry Lake, and Cave Valleys." AR Doc. 47277 at 188126. The EIS thus assessed the impacts resulting from construction of the pipeline, and "future groundwater development facilities and related groundwater pumping," as required by NEPA. *Id*. at 188153; *see* 40 C.F.R. § 1502.16 (requiring agencies to analyze the direct and indirect effects of proposed actions).

The EIS found that the Groundwater Project would cause severe impacts to streams, springs, and other aquatic resources, including the reduction in flow in 24 streams and 18 springs. AR Doc. 12414 at 130620-24. These flow reductions "could affect all types of aquatic communities including fish, amphibians, macroinvertebrates, macrophytes, and algae." *Id*. at 130623. Despite the disclosure of these severe aquatic impacts, however, BLM failed to address the Project's compliance with the following mandatory standard from the Ely RMP:

> WL-4: Mitigate all discretionary permitted activities that result in the loss of aquatic and priority wildlife habitats by improving 2 acres of comparable habitat for every 1 acre of lost habitat as determined on a project-by-project basis.

AR Doc. 47482 at 197074.

In response, BLM claims that it did not need to demonstrate that the Groundwater Project will comply with this RMP standard "because BLM has not approved any facilities for groundwater pumping." BLM's Br. at 68.[20] Agencies, however, are required to integrate NEPA "at the earliest possible time" in order to "head off potential conflicts" (40 C.F.R. § 1501.2), including "[p]ossible conflicts between the proposed action and objectives of . . . land use plans." 40 C.F.R. § 1502.16(c); *see also id*. § 1502.2(d) (agencies must evaluate in an EIS how proposal will achieve compliance with other environmental laws). This is precisely the type of conflict that early NEPA is intended to "head off," as there is no evidence in the record that BLM will be

[20] SNWA makes the same argument, as it focuses only on the impacts from construction of the right-of-way, and ignores the groundwater facilities and withdrawals. SNWA's Br. at 63-64.

able to compensate for the widespread, severe impacts to aquatic habitat caused by the Groundwater Project, as disclosed in the EIS. Moreover, waiting for future NEPA processes, years down the road, that only consider smaller component parts of the Project, will be too little, too late, as considerable time and expense will have already been expended in analyzing and approving the overall Project and in constructing the main pipeline. *See Marsh*, 490 U.S. at 371 ("NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct"); *Watt*, 716 F.2d at 952 (explaining that once agencies and private parties have become committed to a particular choice of action, it becomes far more difficult to influence later decisionmaking concerning that project).

BLM also argues that the EIS "discusses mitigation that will be employed to protect aquatic species during later phases of the Project." BLM's Br. at 68, *citing* AR 130119-29, 131179-84, 131189-90. But this argument further highlights the problem, as the mitigation for aquatic species discussed in the EIS fails to even consider the compensatory mitigation for aquatic species that is required by the Ely RMP. *Id*. As it stands, there is no evidence in the EIS or elsewhere as to how BLM will be able to comply with this mandatory standard in light of the severe, widespread, and unprecedented impacts to aquatic habitat, as acknowledged by BLM in the EIS. As result, the BLM has not demonstrated that the Groundwater Project can comply with this RMP standard, as required by FLPMA. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a).

C. Additional Standards for Sagebrush Habitat and Natural Water Sources

As set forth in the Center's opening brief, the Groundwater Project would also result in widespread, severe impacts to sagebrush habitat and natural water sources. Center's Br. at 36. For the three components of the Groundwater Project, (1) construction of the right-of-way would "remove or disturb" 10,681 acres of native shrublands and woodlands; (2) construction of

groundwater development areas would impact an additional 2,698 to 6,629 acres; and (3) groundwater pumping would adversely impact a staggering 130,000 acres of basin shrubland. AR Doc. 12414 at 130310, 130349-50. The groundwater pumping would also decrease natural water sources and put at risk over 200 springs and 33 miles of perennial streams. *Id*. at 130350. Despite these impacts, BLM failed to discuss or demonstrate in the EIS how the Project would comply with mandatory standards in the Ely RMP that are designed to protect sagebrush habitat and water sources. Center's Br. at 36, *quoting* VEG-18 (requiring BLM to "focus on maintaining . . . diversity, mosaics, and connectivity of sagebrush"); SS-6 (requiring BLM to stop the "conversion of native sagebrush"); SS-38 (requiring BLM to "[m]aintain intact and quality sagebrush habitat"); and WL-18 (requiring BLM to "[r]estore natural water sources").

For the 10,681 acres directly destroyed by construction of the right-of-way, BLM suggests that compliance with the RMP standards is not required because "9,641 acres will be reclaimed." BLM's Br. at 69. BLM acknowledged in the EIS, however, that it will take "20 *to more than 200 years* for recovery of similar species composition." AR Doc. 12414 at 130310 (emphasis added). Moreover, 945 acres would be "permanently converted to aboveground industrial uses." *Id*. BLM provided no explanation in the record as to how degrading 10,000 acres of habitat for as long as 200 years, with close to 1000 acres permanently converted to industrial use, meets the agency's mandatory obligation to maintain intact and quality sagebrush habitat. AR Doc. 47482 at 197070 (VEG-18), 197075 (SS-6), 197079 (SS-38).

For the thousands of additional acres of sagebrush habitat impacted by the groundwater development facilities, and the 130,000 acres impacted by groundwater pumping, BLM claims that this will be evaluated "in later phases of the Project." BLM's Br. at 69-70. But again, NEPA requires the assessment of environmental consequences "at the earliest possible time" in

order to "head off potential conflicts." 40 C.F.R. § 1501.2. Here, there is a clear conflict between the acknowledged widespread impacts to basin shrubland habitat, and the Ely RMP requirements to maintain intact and quality sagebrush habitat, including the connectivity of sagebrush between geographic areas, and to stop the conversion of native sagebrush to grasslands. AR Doc. 47482 at 197070 (VEG-18); *Id*. at 197079 (SS-6); *Id*. at 197084 (SS-38).

BLM further contends that the agency met its mandatory requirements for RMP standards VEG-18, SS-6, and SS-18, by complying with RMP standard SS-10 for sage-grouse. BLM's Br. at 70. There is no evidence in the record, however, that BLM ever determined that by complying with SS-10, it was thereby also complying with these three other mandatory and applicable RMP standards. Moreover, as stated above, even BLM's asserted compliance with SS-10 for sage grouse is supported by only a conclusory statement in the EIS that it would comply, and is again limited to only one of the three components of the Project. *See* Section IV.A., *supra*.

Counsel for BLM and SNWA also highlight mitigation measures that will be implemented to protect sage grouse, such as burying power lines, monitoring, surveys, fence marking, and pressure washing vehicles. BLM's Br. at 69-70; SNWA's Br. at 65-66. What is again missing, however, is any indication in the record that BLM in fact determined that these mitigation measures, if implemented, would satisfy the agency's specific RMP requirements to maintain and protect sagebrush habitat. The fact remains that despite the Groundwater Project's severe and widespread impacts on sagebrush habitat, the Project's compliance with RMP standards VEG-18, SS-6, and SS-38 is not mentioned anywhere in the EIS, and thus there is no way to determine that compliance with these standards was appropriately considered by BLM.

Concerning WL-18, and BLM's requirement to "[r]estore natural water sources (i.e., springs and seeps)," counsel for BLM again tries to punt this issue down the road to future stages

of the Project. BLM's Br. at 70. The Groundwater Project EIS, however, did assess the impacts of groundwater pumping, as it is an indirect effect of the proposed right-of-way, and BLM found that this pumping would severely decrease natural water sources in as many as 200 springs and 33 miles of streams. AR Doc. 12414 at 130350. BLM, however, provided no explanation in the record as to how it could comply with the RMP standard for restoring natural water sources despite this long-term and unprecedented degradation of springs and streams. This once again is precisely the type of "potential conflict" that a NEPA is intended to avoid. 40 C.F.R. § 1501.2.

V. BLM Violated FLPMA by Authorizing A Permanent Right-of-Way In White Pine County

As explained in the Center's opening brief, BLM had authority under the Lincoln County Conservation, Recreation, and Development Act ("LCCRD Act"), and the Southern Nevada Public Land Management Act ("SNPLM Act"), to issue SNWA a permanent right-of-way in Clark and Lincoln Counties. Center's Br. at 37-39. BLM, however, lacked the authority under FLPMA to issue SNWA a permanent right-of-way in White Pine County. *Id.*

Under FLMPA, each right-of-way "shall be limited to a reasonable term," in light of all circumstances concerning the project. 43 U.S.C. § 1764(b). Each right of way must also specify "whether it is or is not renewable," and the terms and conditions applicable to the renewal. *Id.* FLPMA provides an exception that allows permanent easements for water systems, but only in limited circumstances that are not present in this case. 43 U.S.C. § 1761(c).

In its response, BLM argues that its interpretation of ambiguous statutory language is entitled to deference under *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). BLM's Br. at 77; *see also* SNWA's Br. at 73. BLM, however, skipped step one of the *Chevron* test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is

> the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, 467 U.S. at 842-43. The court is only to consider whether the agency's interpretation is permissible if the statute is "silent or ambiguous with respect to the specific issue." *Id*. at 843; *see also Putnam Family P'ship v. City of Yucaipa*, 673 F.3d 920, 928 (9th Cir. 2012) (the court is to defer to an agency's interpretation of a statute only "if the statute is ambiguous").

Here, Congress spoke on the specific issue by requiring that right-of-ways be "limited to a reasonable term." 43 U.S.C. § 1764(b). As explained, "term" is commonly defined as "a period of time to which limits have been set," or "a limited or definite extent of time." Center's Br. at 39, *citing* http://dictionary.reference.com/browse/term; and http://www.merriam-webster.com/dictionary/term; *see also Putnam Family P'ship*, 673 F.3d at 928 ("[i]n determining whether a statute is ambiguous, we apply the traditional tools of statutory construction, including looking to the plain meaning of the text").[21] BLM fails to explain why limiting a right-of-way to a reasonable term, which may or may not be renewable, is ambiguous. BLM's Br. at 77.[22]

BLM also argues that FLPMA's exception, which allows permanent easements for water systems in limited circumstances, "is irrelevant." BLM's Br. 76. Statutory language, however, "cannot be construed in a vacuum." *Sturgeon v. Frost*, _ U.S. _; 194 L. Ed. 2d 108, 121 (2016). "It is a fundamental canon of statutory construction that the words of a statute must be read in

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[21] SNWA takes a segment of the definition of "term" out of context to argue that a "term" may be infinite. SNWA's Br. at 77. The definition as a whole, however, states: "a limited or definite extent of time; *especially* **:** the time for which something lasts." http://www.merriam-webster.com/dictionary/term. BLM, by contrast, does not contest in its response that the definition of term is commonly recognized as a limited period of time.

[22] BLM and SNWA also argue that legislative history supports BLM's interpretation. BLM's Br. at 77 n. 31; SNWA's Br. at 75. When a statute is clear, however, "there is no reason to resort to legislative history." *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997). Where the words of a statute are unambiguous, "the judicial inquiry is complete." *Desert Palace v. Costa*, 539 U.S. 90, 98 (2003).

their context and with a view to their place in the overall statutory scheme." *Id.* Here, by providing the limited exception for permanent easements, Congress demonstrated that it intended the general rule under FLMPA to limit right-of-ways to reasonable terms. Similarly, by later including specific language in the LCCRD Act and the SNPLM Act that the right-of-ways for Clark and Lincoln Counties were to be issued in perpetuity, Congress again demonstrated that it can be clear and explicit when it wishes to authorize permanent right-of-ways.[23]

As explained in the Center's opening brief, the BLM's regulations similarly state that when granting a right-of-way, BLM must "impose a specific term." 43 C.F.R. § 2805.10(a)(3). As the Center recognized, while BLM's regulations suggest that some grants may be "issued in perpetuity," this exception must be limited to the express exception in the statute. *Id.* § 2805.11(b)(2). Any broader interpretation of this regulation would contradict the plain language of the statute and be invalid. *Los Angeles Haven Hospice v. Sebelius*, 638 F.3d 644, 660-61 (9th Cir. 2011) (regulation is invalid when it "is at odds with the plain language of the statute").

CONCLUSION

For the above stated reasons, and for the reasons set forth in the Center's opening brief, the court should grant the Center's motion for summary judgment, and deny the cross-motions for summary judgment filed by BLM and SNWA.

Dated this 18th day of May, 2016.

Respectfully submitted,
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[23] Congress was explicit in authorizing permanent right-of-ways in the LCCRD Act and SNPLM Act, and as a limited exception in FLPMA section 1761(c), as perpetual property agreements are generally disfavored unless clear and unambiguous. *See e.g., Bancard Services v. E*Trade Access*, 292 F.Supp. 2d 1235, 1247-48 (D. Or. 2002), *citing McCreight v. Girardo*, 287 P.2d 414 (1955). In FLPMA section 1764(b), by contrast, Congress did not use the words "permanent" or "perpetuity," but rather stated that each right-of-way "shall be limited to a reasonable term" and "specify whether it is or is not renewable." 43 U.S.C. § 1764(b).

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CERTIFICATE OF SERVICE

I, Marc D. Fink, certify that on May 18, 2016, I filed a true and exact copy of PLAINTIFF CENTER FOR BIOLOGICAL DIVERSITY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; AND IN OPPOSITION TO DEFENDANTS' AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT with the Court's CM/ECF system, which will generate a Notice of Filing and Service on the following:

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